

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 1
NASSAU COUNTY

INDEX No. 13050/10

MOTION DATE: Oct. 12, 2011
Motion Sequence # 004

In the Matter of the Application of
SHMOUEL TOLEDANO, individually, and as
50% shareholder of Home Tower Group, Inc.,
Prestige Equities, Inc., First Stage, Inc.,
Second Stage, Inc., Third Stage, Inc., Gross
Group Inc., Strong Equities, Inc., Singer
Equities, Inc., Rose Equities, Inc. and Sterling
State, Inc.,

Petitioner-Plaintiff,

For the Judicial Dissolution of
HOME TOWER GROUP, INC.; PRESTIGE
EQUITIES, INC., FIRST STAGE, INC.,
GROSS GROUP, INC., STRONG EQUITIES,
INC., SINGER EQUITIES, INC., ROSE
EQUITIES, INC. and STERLING STATE, INC.,

-against-

YORAM ELIYAHU, STRAIGHT GROUP, INC.,
SUPER POWER HOMES, INC. and
JOHN DOE CORP./ENTITIES "1" through "25",
the names of which are unknown to Petitioner-Plaintiff
but are intended to be entities that are owned by
YORAM ELIYAHU,

Respondents-Defendants,

-and-

DREW R. LONTOS, ESQ. as Escrow Agent,

Nominal Defendant.

The following papers read on this motion:

- Notice of Motion..... X
- Affirmation in Opposition..... X
- Reply Affirmation..... X

Motion by petitioner to disqualify respondents' counsel is denied.

This is an action for judicial dissolution of a group of jointly held corporations. Petitioner Shmouel Toledano and respondent Yoram Eliyahu each own 50 % of Home Tower Group, Inc, Prestige Equities, Inc., First Stage, Inc., Second Stage, Inc., Third Stage, Inc., Gross Group, Inc., Strong Equities, Inc., Singer Equities, Inc., Rose Equities, Inc., and Sterling State, Inc. The corporations are engaged in real estate development and own 41 commercial properties located in New York City and Westbury, Connecticut.

On November 3, 2006, Toledano and Eliyahu entered into a "dissolution agreement," whereby the parties would attempt to liquidate their holdings for 18 months and then distribute most of the remaining properties to the shareholders. The method of distribution was that Eliyahu would divide the properties into two lists, or "pools," and that Toledano would chose one of the lists, and they would become his properties. Additionally, Eliyahu was to buy out Toledano's interest in the corporate offices located at 138-15 Jamaica Avenue in Queens for \$600,000.

This action was commenced on July 8, 2010. Toledano alleges that Eliyahu refused to divide the properties into two lists as he was required to do pursuant to the terms of the dissolution agreement. Toldedano further alleges that Eliyahu refused to buy out his interest in the corporate offices as required by the agreement. Finally, Toledano alleges that Eliyahu misappropriated funds of the jointly held companies to pay expenses of his own companies, as well as his personal expenses.

In his first cause of action, Toledano seeks specific performance of the dissolution agreement, including an order directing Eliyahu to divide the properties into two lists and to purchase Toledano's interest in the Jamaica property. In the second cause of action, petitioner seeks judicial dissolution of the jointly held corporations on the ground of deadlock pursuant to Business Corporation Law § 1104. Toledano also asserts causes of action for an accounting, breach of contract, breach of fiduciary duty, diversion of assets, missappropriation of assets, and unjust enrichment.

In their answer, respondents assert counterclaims for breach of contract, breach of the duty of good faith and fair dealing, and an accounting. In their sixth counterclaim, respondents seek rescission of the dissolution agreement on the ground of mutual mistake as to prices in the real estate market.

Plaintiff moves to disqualify defendants' counsel, Naidich Wurnman Birnbaum & Maday, on the ground of conflict of interest. Plaintiff alleges that Richard Naidich, one of the partners in the firm, represented plaintiff both individually and in connection with the real estate business. In opposition, Naidich Wurnman argues that it represented only the real estate corporations and the dissolution proceedings are not substantially related to the prior representation.

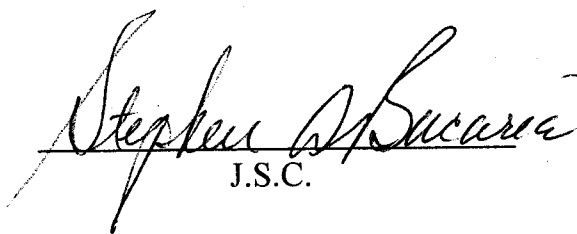
Rule 1.9 of the Rules of Professional Conduct provide that a lawyer who formerly represented a client in a matter shall not represent another person in the same or a substantially related matter in which the person's interests are materially adverse to those of the former client, unless the former client gives informed consent in writing. If the party seeking disqualification establishes 1) a prior attorney-client relationship between the moving party and opposing counsel, 2) the matters involved in the representations are substantially related, and 3) the interests of the present and former client are materially adverse, there will arise an irrefutable presumption of disqualification (*Tekni-Plex, Inc. v Meyner & Landis*, 89 NY2d 123, 131 [1996]). However, disqualification conflicts with the general policy favoring a party's right to representation by counsel of choice and deprives current clients of an attorney familiar with the matter (Id). Such motions are also sometimes used as a litigation tactic to gain a strategic advantage over an adversary (Id at 131-32). Thus, the court must avoid mechanical application of blanket rules and undertake a careful appraisal of the interests involved (Id at 132). The burden of establishing the three criteria is on the party seeking disqualification.

Since Toledano and Eliyahu were each 50 % stockholders, and Naidich Wurnman was

counsel to the real estate corporations, Toledano has established an attorney client relationship with Naidich Wurnman. Since Toledano seeks dissolution of the corporations on the ground of deadlock, it appears that the interests of the parties are materially adverse. However, Toledano has not established that legal matters concerning the operation of the real estate companies are substantially related to their dissolution. Accordingly, plaintiff's motion to disqualify Naidich Wurnman from serving as defendants' counsel is denied.

So ordered.

Dated DEC 07 2011


J.S.C.

ENTERED
DEC 09 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE