

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. STEPHEN A. BUCARIA**

Justice

TRIAL/IAS, PART 1  
NASSAU COUNTY

\_\_\_\_\_  
PHILIP J. O'REILLY, as Executor of the  
Estate of MICHAEL VECCHIO also known  
as MICHAEL S. VECCHIO,

INDEX No. 187/08

MOTION DATE: June 15, 2011  
Motion Sequence # 001, 002

Plaintiff,

-against-

POST ROAD ENTERTAINMENT, LLC,  
DONALD G. KELLY, TODD KOSAKOWSKI,  
ALBERT SILVERMAN, TRI-KELLY'S, INC.,  
WPENT, INC., SONOTURTLE, LLC,  
TURTLECOVE OF STANDFORD, LLC,  
CLUB, LLC, GREENWICH BEAR, LLC and  
HULA'S NEW HAVEN, LLC,

Defendants.

\_\_\_\_\_  
The following papers read on this motion:

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

Motion by plaintiff to substitute Philip J. O'Reilly as Executor of the Estate of Michael Vecchio as plaintiff in this action is **granted**. Cross-motion by defendants to disqualify the law firm of O'Reilly, Marsh & Corteselli, PC from representing plaintiff is **denied**.

**O'REILLY v POST ROAD ENTERTAINMENT, LLC, et al Index no. 187/08**

This is an action for breach of contract. Plaintiff Michael Vecchio and defendants Donald Kelly, Todd Kosakowski, and Albert Silverman formed defendant Post Road Entertainment, LLC. The purpose of the company was to operate bars and restaurants. Vecchio alleges that he provided \$850,000 of financing, and Kelly and Kosakowski operated the business.

On October 29, 2004, the four members of Post Road entered into a "buy-sell" agreement whereby the other members had a right of first refusal, if a member wished to sell his interest. If any member died, his interest would be purchased by Post Road for \$1.5 million. The purchase price was to be paid from the proceeds of a life insurance policy held by the company on the life of each member.

This action was commenced on January 4, 2008. In the first cause of action, plaintiff seeks an accounting with respect to the affairs of Post Road and the return of his investment. In the second cause of action, plaintiff alleges that defendants breached Post Road's operating agreement, as well as the buy-sell agreement. Plaintiff asserts various other claims, including fraud, unjust enrichment, and breach of fiduciary duty.

Michael Vecchio died on February 19, 2010. Letters testamentary were issued to Philip J. O'Reilly on April 13, 2010. O'Reilly is a partner in the law firm representing plaintiff in the action. O'Reilly moves pursuant to CPLR § 1015 for an order substituting him as executor as the plaintiff in the action.

Defendants cross-move for an order disqualifying O'Reilly, Marsh & Corteselli from representing plaintiff. Defendants argue that O'Reilly is under a conflict of interest by having his law firm represent the estate. Alternatively, defendants argue that O'Reilly should be disqualified under the advocate-witness rule because his testimony may be necessary to establish the breach of contract claim.

Where a party dies, substitution of the personal representative is mandatory pursuant to CPLR § 1015 (*Wisdom v Wisdom*, 111 AD2d 13 [1<sup>st</sup> Dept 1985]). Accordingly, Philip J. O'Reilly's motion to be substituted as plaintiff is **granted**. All further papers in this action shall bear the caption set forth in ¶ 9 of plaintiff's affirmation in support of motion.

Surrogate's Court Procedure Act § 2110 provides that at any time during the administration of an estate, the Surrogate's Court is authorized to fix and determine the

**O'REILLY v POST ROAD ENTERTAINMENT, LLC, et al Index no. 187/08**

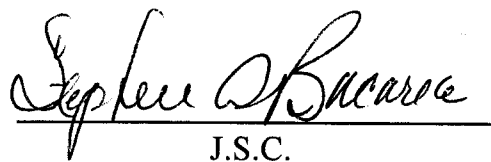
compensation of an attorney for services rendered to a fiduciary or of an attorney who has rendered legal services in connection with the performance of his duties as a fiduciary (See Matter of Trust Created by Hyde, 15 NY3d 179 [2010]).

Thus, SCPA § 2110 suggests that it is perfectly proper for an attorney who is serving as executor to retain his own firm as counsel. In any event, O'Reilly, Marsh's fees will be subject to review by the Surrogate's Court. Accordingly, defendants have not established that O'Reilly is subject to a conflict of interest between his roles as executor and member of the law firm serving as plaintiff's counsel.

Nor have defendants shown that O'Reilly is likely to be called as a witness concerning Post Entertainment's operating agreement, the buy-sell agreement, or any other significant issue in the case. Defendants' cross-motion to disqualify the law firm of O'Reilly, Marsh & Corteselli, PC from representing plaintiff is **denied**.

So ordered.

Dated AUG 11 2011

  
J.S.C.

**ENTERED**  
AUG 15 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE