

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present : HONORABLE Luther V. Dye
Justice

IA Part 7

JULES HOFFMAN x

Index
Number 27408/99

-against-

Motion
Date 12/18, 2001

CHERYL UNTERBERG, DAVID UNTERBERG,
and ALAYNE REAL ESTATE, INC.,

Motion
Cal. Number 26

X

The following papers numbered 1 to 18 read on this motion by defendants to disqualify attorney Alan Lasher as co-counsel for the plaintiff in the instant action.

Papers
Numbered

Notice of Motion - Affidavits - Exhibits	1-8
Answering Affidavits - Exhibits	9-13
Reply Affidavits	14-18
Other	

Upon the foregoing papers it is ordered that the motion is granted.

Facts

Defendant Alayne Real Estate, Inc. ("Alayne Inc.") is a residential property management company. Setam Condominiums, owned by Setam Realty, is managed by Alayne Inc. Setam Realty was at first owned entirely by Seva Hoffman, however, in 1995, Seva transferred a forty-nine (49%) percent ownership interest to defendant Cheryl Unterberg, and thereafter granted defendant Cheryl Unterberg two options to purchase her fifty (50%) percent ownership interest. The one (1%)percent balance was taken by defendant Cheryl Unterberg under Seva Hoffman's will.

Defendant David Unterberg is the President of Alayne Inc.

Defendant Cheryl Unterberg is married to defendant David Unterberg. The plaintiff, Jules Hoffman, is the father of Cheryl Unterberg, and allegedly also has an ownership interest in Setam Realty. In 1991, Alayne Inc. hired Angela Millwater ("Millwater") to assist with the management of its client properties. Alayne Inc. also hired Gary and Sheldon Hoffman, the plaintiff's sons, to assist in managing the buildings. In 1995, the plaintiff moved to Israel and thereafter, Gary, Sheldon and Millwater shared in the management of Alayne Inc.'s client residential properties. In so doing, Gary Hoffman, Sheldon Hoffman and Angela Millwater collected rent and security deposits from tenants; maintained Alayne Inc.'s records of the same; and hired contractors to perform maintenance and repairs on the said property. At some point in 1999, Alan Lasher, Esq., was hired by Setam Realty to handle a matter involving the unlawful use of property by a tenant of the Setam Condominiums. It is also alleged that, subsequently, Alayne Inc. retained Alan Lasher to investigate a complaint of missing funds belonging to clients of Alayne Inc. In conducting the investigation, it is alleged that, Mr. Lasher had access to confidential books and records. Plaintiff in this action seeks, *inter alia*, an accounting of monies collected by Alayne Inc. on behalf of Setam Realty.

As it pertains to the instant motion, defendant contends that Mr. Lasher's prior personal and professional involvement in matters substantially related to the issues in the pending lawsuit disqualify him from acting as co-counsel in the instant action. Plaintiff objects to the disqualification of Mr. Lasher and contends that there is no conflict of interest which disqualifies Mr. Lasher from acting as co-counsel in this action, and that he would be substantially prejudiced by a removal of Mr. Lasher at this stage of the lawsuit. Alternatively, the plaintiff waives the assertion of any claims against Mr. Lasher's wife for any prior wrongdoing thus, as plaintiff believes, removing Mr. Lasher's conflict of interest.

Discussion

Attorneys have fiduciary duties of both confidentiality and loyalty to their clients (see, Solow v Grace & Co., 83 NY2d 303, 306). The Code of Professional Responsibility thus imposes a continuing obligation on attorneys to protect their clients' confidences and secrets. Thus, even after an attorney's representation has concluded, a lawyer may not reveal information confided by a former client, or use such information to the disadvantage of the former client or the advantage of a third party (Code of Professional Responsibility DR 4-101 [B] [22 NYCRR 1200.19(b); see also, Code of Professional Responsibility DR 5-

108 [A] [2] [22 NYCRR 1200.27 (a)(2)]). Moreover, an attorney must avoid not only the fact, but even the appearance of representing conflicting interests" (Tekni-Plex, Inc. v Tang, 89 NY2d 123, 127, quoting Cardinale v Golinello, 43 NY2d 288, 296; see also, Code of Professional Responsibility Canon 9).

In accordance with these rules, "a lawyer may not represent a client in a matter and thereafter represent another client with interests materially adverse to interests of the former client in the same or substantially related matter" (Kassis v Teacher's Ins. & Annuity Assoc., 93 NY2d 611; see, Horn v Municipal Information Services, Inc., 282 AD2d 706. Disqualification is necessary when an attorney's successive representation of adverse interests raise the possibility that in the present matter the attorney will improperly, albeit inadvertently, use confidences gained in the prior representation to the detriment of the former client (see, Matter of Strober v Gaber & Strober, 259 AD2d 554). The ethical proscription is set forth in Disciplinary Rule 5-108, which prohibits attorneys from representing another person in the same or substantially related matter to which the attorney formerly represented an adverse party (22 NYCRR §1200.27). Disciplinary Rule 5-101(B) of the Code of Professional Responsibility (22 NYCRR 1200.20[b]), prohibits a lawyer from representing a client where "the lawyer knows or it is obvious that the lawyer ought to be called as a witness on behalf of the client." Further, Disciplinary Rule 5-102(A) (22 NYCRR 1200.21[a]), requires that a lawyer withdraw if, after being retained, he or she learns or it is obvious that he ought to be called as a witness on behalf of the client (Matter of Benincasa v Garrubbo, 141 AD2d 636, 639; see also, Solomon v New York Prop. Ins. Underwriting Assn., 118 AD2d 695). Since the test under both DR 5-101(B) and 5-102 (A) (22 NYCRR 1200.20[b]; 1200.21[a]) is whether an attorney "ought to be called," the parties' intentions do not determine whether the rule is implicated (Zweig v Safeco Ins. Co., 125 AD2d 205). Disqualification may be required even if the party whom the attorney represents does not intend to call him as a witness and even if the opposing party's stated intention to do so does not come to pass (see, Mac Arthur v Bank of New York, 524 FSupp 1205; Hempstead Bank v Reliance Mtge Corp., 81 AD2d906; North Shore Neurosurgical Group v Leivy, 72 AD2d 598; Grossman v Commercial Capital Corp., 59 AD2d 850; Gasoline Expwy v Sun Oil Co., 64 AD2d 647). Nevertheless, disqualification may be required "only when it is likely that the testimony to be given by the witness is necessary" (S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp., 69 NY2d 437, 445 - 446). A "finding of necessity takes into account such factors as the significance of the matters, weight of the testimony, and availability of other evidence" (Eisenstadt v Eisenstadt, 282

AD2d 570; S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp., supra.) . Indeed the prohibition against an attorney representing a client in a matter in which it is obvious that the attorney ought to be called as a witness, is so strong as to bar the recovery of a legal fee for any services rendered under the prohibited circumstances (Brill v Friends World Coll., 133 AD2d 729). Any doubts should be resolved in favor of disqualifying the attorney (see, People v Paperno, 54 NY2d 294, on remand, 90 AD2d 168; Matter of Benincasa v Garrubbo, supra.).

The party moving for disqualification bears the burden of demonstrating (1) the existence of a prior attorney-client relationship between the moving party and opposing counsel, (2) that the matters involved in both representations are substantially related, and (3) that the interests of the present client and former clients are materially adverse (see, Tekni-Plex, Inc., v Meyner & Landis, 89 NY2d 123, 131; Solow v W.R. Grace Co., 83 NY2d 303, 308; Kuberzig v Advanced Dermatology, P. C., 260 AD2d 548, 548-549); see also, S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp., supra. at 445).

In the instant case, there are several reasons which warrant the disqualification of Mr. Lasher as co-counsel for the plaintiff upon the trial of the instant action. Previously Alayne Realty rented commercial space in Setam Condominiums to a tenant who used the premises to engage in criminal activity. A forfeiture proceeding was commenced by the City of New York, and Mr. Lasher defended the action. While technically only Setam Realty was named in the caption of that action, Alayne Realty had an interest in the outcome of the litigation because Alayne Realty had rented the space to the tenant and would have been financially liable if the proceeding had resulted in forfeiture of the property. Also, at some point previously, an internal investigation was had into missing funds belonging to Setam Realty. It was alleged that Angela Millwater, the property manager and Mr. Lasher's wife, was at least in part, responsible for collecting a portion of these missing funds, represented as tenant security deposits. Mr. Lasher participated in this internal investigation, and thereby became privy to confidential financial information concerning both Alayne and Setam Realities, respectively, which he may not divulge to his current client.

Moreover, the instant action seeks, *inter alia*, an accounting of the same monies allegedly missing from Setam, and which precipitated the prior internal investigation in which Mr. Lasher participated. Where, as here, an attorney representing a party was an active participant in a disputed transaction and has personal knowledge of the underlying circumstances, he ought to

be called as a witness on behalf of his client and it is improper for him to continue his representation (Chang v Chang, 190 AD2d 311; see, Hempstead Bank v Reliance Mortgage Corp., 81 AD2d 906).

Mr. Lasher contends that he only had access to limited information involving Setam Realty, and thus there is no substantive reason to disqualify him. Since it is well established that a court may not inquire into the nature of the confidences alleged to have been revealed to the tainted attorney, the movant need only show that the attorney had access to such substantially related material, and the inference that the attorney received these confidences will follow (LIU v Real Estate Investment Group, Inc., 771 FSupp 83; T. C. Theatre Corp. v Warner Bros. Pictures, 113 FSupp 265, 268). In the case at bar, the petitioner attached a copy of a letter allegedly written by Mr. Lasher indicating that Mr. Lasher represent[ed] "Alayne Realty," in the prior forfeiture matter. The petitioner has also attached a transcript of a deposition taken on July 11, 2000, in the lawsuit entitled "Alayne Real Estate, Inc. and David Unterberg v Sheldon Hoffman, Gary Hoffman, Jules Hoffman and Sibling Realty Co., LLC", (Index No. 123/2000), wherein Mr. Lasher admits that Alayne Realty paid his legal fees in the prior forfeiture action. Moreover, based upon the allegations in the verified complaint, it appears there are matters involved in Mr. Lasher's former association with Alayne Realty and Setam Realty which are substantially related to allegations made in the instant lawsuit.

While not acknowledging or disavowing the validity of the allegations made against Mr. Lasher and Ms. Millwater, the court finds that the continued participation of Mr. Lasher as attorney for the plaintiff may jeopardize the integrity of confidences and secrets which were imparted to him under the cloak of his prior attorney-client relationship with Setam and Alayne Realities, respectively. Indeed, it is likely that the petitioner will call Mr. Lasher and/or his wife, Angela Millwater, as witnesses in order to fully explore the above-stated matters (see, Benincasa v Garrubbo, 529 NYS2d 797; see generally, Matter of Bartoli, 143 AD2d 830), and there is a strong probability that their testimony, which is relevant and necessary (see generally, S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp., supra; Plotkin v Interco Dev Corp., 137 AD2d 671), would be detrimental to the defendants (see, Matter of Stober v Gaber & Stober, supra).

Although Mr. Lasher contends that there is no proof of a risk that a client confidence might be betrayed by him, under the circumstances the court is not persuaded thereby and does not regard this factor as decisive (see, Sperr v Seaman, 284 AD2d

449; cf., Kassis v Teacher's Ins. & Annuity Assn., *supra*; see also, 562 Eglinton v Merlo, 277 AD2d 1027; Press v Lozier, 239 AD2d 879). Indeed there exists a continuing danger that Mr. Lasher might unintentionally transmit information which he gained through this prior association with Alayne Inc. and Setam Realty, notwithstanding that precautions might be taken to prevent such disclosures. In such cases, the attorney must be disqualified (see, Cheng v GAF Corp., 631 F2d 1052).

A review of the above facts also suggests that there is a conflict of interest between Mr. Lasher and his representation of the plaintiff. Indeed, in a court proceeding before this court on October 24, 2000, a transcript of which was annexed to the instant motion, Mr. Lasher conceded that he has a conflict of interest by virtue of his prior representation in the forfeiture matter. Where a conflicting interest may, even inadvertently, affect, or give the appearance of affecting, the obligations of the professional relationship (Matter of Kelley, 23 NY2d 368, 376), the courts have been scrupulous in resolving all doubts in favor of disqualification (see, 108th St. Owners Corp. v Overseas Commodities, 238 AD2d 324; Bridges v Alcan Constr. Corp., *supra*; Burton v Burton, 139 AD2d 554; Seeley v Seeley, *supra*; Flushing Sav. Bank v FSB Props., 105 AD2d 829).

Mr. Lasher also states that since he did not formally or technically represent Alayne Realty in connection with the prior investigation into missing funds, he cannot be disqualified at this juncture. This argument lacks merit in that the law does not require a formal attorney-client relationship in order to trigger application of the rule (see, Liu v Real Estate Inv. Group, Inc., *supra*).

"It is an undeniable maxim of the legal profession that an attorney must avoid even the appearance of impropriety" (Greene v Greene, 47 NY2d 447, 451; Matter of Hof, 102 AD2d 591; see, Code of Professional Responsibility Canon 9; see also, Bridges v Alcan Constr. Corp., 134 AD2d 316; Sirianni v Tomlinson, 133 AD2d 391; Seeley v Seeley, 129 AD2d 625, 626; Solomon v New York Prop. Ins. Underwriting Assn., 118 AD2d 695). Although the court's ruling rests firmly on DR 5-101 (B); DR 5-102(A) and DR 5-108, the result is also compelled by the rule in Canon 9 of the Code of Professional Responsibility, that "a lawyer should avoid even the appearance of impropriety."

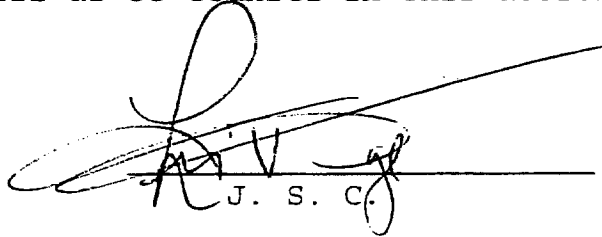
Finally, the waiver of rights and conflict executed by the plaintiff may constitute a clear and effective waiver of any right plaintiff might otherwise have to a claim of conflict of interest (see, Schneider v Saiber Schlesinger Satz & Goldstein,

260 AD2d 321). However, it does not waive rights which defendants may have against Mr. Lasher for breach of fiduciary duties (cf. Yasuda Trust & Banking Co., Ltd. (New York Branch) v 250 Church Associates, 206 AD2d 259). To effectuate a waiver by defendants, the waiver must come from the defendants (see, Rossworm v Pittsburgh Corning Corp., 468 FSupp 168). Further, plaintiff's assertion that he will suffer extreme hardship should Mr. Lasher be disqualified as co-counsel in the trial of the instant matter, is unavailing. The record indicates that co-counsel Gabor has been active in all of the critical stages of the proceeding.

Conclusion

A motion for disqualification of an attorney rests within the sound discretion of the court (see, Olmoz v Town of Fishkill, 258 AD2d 447; Fischer v Deitsch, 168 AD2d 599; Solomon v New York Prop. Ins. Underwriting Assn., 118 AD2d 695; Narel Apparel v American Utex Int., 92 AD2d 913, 914), and all doubts are resolved in favor of disqualification (see, 108th St. Owners Corp. v Overseas Commodities, 238 AD2d 324). For reasons stated above, it is ordered that the motion to disqualify Alan Lasher from representing the plaintiff as co-counsel in this action, is granted.

Dated: March 7, 2002



J. S. C.