2021-07-21

Torres v. Sedgwick Ave. Dignity Dev. LLC

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX: HOUSING PART H

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JASON TORRES, Index No. 307644/20

Petitioner, **DECISION/ORDER**

-against-

SEDGWICK AVENUE DIGNITY DEVELOPERS LLC,
JOHN WARREN & MHR MANAGEMENT INC.,

Respondents-Owners,

and

DEPARTMENT OF HOUSING PRESERVATION
AND DEVELOPMENT OF THE CITY OF NEW YORK,

Co-Respondent.

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Recitation, as required by C.P.L.R. § 2219(a), of the papers considered in r of this motion.

Papers Numbered

Notice of Motion with Affirmation & Affidavit Annexed
[With Exhibits A-D, NYSCEF Doc. No. 12] ……..... 1
Affirmation in Opposition with Affirmations, Affidavit and Memorandum
of Law Annexed [With Exhibits A-B, NYSCEF Doc. Nos. 13-19] ……..…... 2
Affirmation in Opposition [NYSCEF Doc. No. 20] ……..…….. 3

After oral argument held on July 9, 2021 and upon the foregoing cited papers, the decision and order on these motions is as follows:

BACKGROUND & PROCEDURAL HISTORY

Petitioner commenced the instant proceeding by Order to Show Cause dated December 9, 2020 seeking correction of violations and a finding of harassment.[1]

After several adjournments wherein access was provided for respondents to make repairs, on April 22, 2021, the court issued an Order to Correct and Notice of Violations Pursuant to CPLR §409(b). Respondents were directed to correct open violations in petitioner's apartment at the subject building within prescribed time frames [30 days for "immediately hazardous" class

[1] See Order to Show Cause and Petition [NYSCEF Doc. Nos. 1-5].

"C" violations and "hazardous" class "B" violations, and 90 days for "non-hazardous" class "A" violations]. [2] Petitioner's remaining claims, including his harassment claim, were adjourned to June 7, 2021 for trial. [3]

On or about June 4, 2021, respondents' counsel emailed the court and the other parties regarding what respondents perceived as a conflict of interest between petitioner's counsel, TakeRoot Justice ("TakeRoot"), and respondents. As a result, after conferencing the case at the June 7, 2021 court date, the court set a motion practice schedule and adjourned the proceeding to July 9, 2021 for oral argument.

The court now is presented with respondents' motion to disqualify petitioner's counsel, TakeRoot, due to the alleged conflict between TakeRoot and respondents. Respondents claim the alleged conflict will prevent them from being afforded a fair trial.

Respondents state that the subject premises are owned by respondent Sedgwick Avenue Dignity Developers LLC ("respondent Sedgwick"), as nominee for UHAB Housing Development Fund Corporation ("UHAB HDFC"). In turn, UHAB HDFC is a subsidiary of UHAB, Inc. and the two entities are, for all intents and purposes, indistinct. Furthermore, respondent John Warren ("respondent Warren") is a principal of both corporate respondents named herein and president of the board of UHAB, Inc.

Because UHAB HDFC and UHAB Inc. (collectively "UHAB") are "inextricably intermingled" with the subject premises and the subject of this proceeding, respondents claim the alleged contractual relationship between TakeRoot and UHAB creates a conflict of interest.

Respondents further allege that TakeRoot has admitted to a business and financial interest and relationship between itself and UHAB, lists UHAB as a "company partner" on TakeRoot's website, and that there is a written contract memorializing the relationship between TakeRoot and UHAB. As such, while respondents and their counsel cannot explain the nature off this relationship, they allege that its mere existence is sufficient to show a potential for conflict, which in turn requires the disqualification of TakeRoot as attorneys for petitioner.

Respondents also speciously allege that TakeRoot has strategically chosen to represent petitioner in this proceeding due to the relationship between UHAB and TakeRoot for its own

[2] See Order to Correct dated April 21, 2021.
[3] See Id.

nefarious purposes. [4] Finally, respondents state in conclusory fashion that petitioner will not be harmed or prejudiced if TakeRoot is disqualified at this stage of the proceeding, days before the July 27, 2021 scheduled trial date, as his harassment claim is not an emergency, respondents have been "attentive" to his repair issues, petitioner is "more than willing to come before the court pro se" and that, in any case, petitioner has his pick of the "host of legal services providers" that can represent him free of charge. [5]

Petitioner's opposition contains several affirmations from individual attorneys in the TakeRoot organization, describing how TakeRoot and UHAB are connected. According to petitioner's counsel, TakeRoot and UHAB Inc. are members of Stabilizing NYC, along with 18 other organizations. Each organization has a separate contract with HPD and receives its funding directly from HPD; no funding passes through or between TakeRoot or UHAB. TakeRoot is also not part of the steering committee of Stabilizing NYC ("the coalition"), does not govern the coalition, does not select its members, and does not determine the funding members received from HPD. [6]

Petitioner's counsel states that the coalition coordinates tenant organizing and legal support for tenants who live in buildings on the "Predatory Equity Watch List," that neither respondents not UHAB ever appeared on that list or been the subject of any coalition activity, that by definition UHAB HDFC, as an HDFC, cannot be considered a predatory equity building, and that the coalition is not involved in financing, rehabilitating, managing or purchasing buildings. [7]

Petitioner's counsel also discusses the electronic case management system TakeRoot uses to maintain its client base and perform conflict checks. Counsel for petitioner states that TakeRoot enters new client information into this system contemporaneously with the opening of a new case, and a conflict check is performed. Upon learning of respondents' claim of conflict of interest, counsel performed a conflict check which determined that neither UHAB entity (UHAB HDFC or UHAB Inc.) has ever been a client of TakeRoot in any matter, in or out of court,

[4] See Affirmation in support of motion at Par. 20.
[5] See Affirmation in support of motion at Par. 26-27.
[6] See Grinthal Affirmation in opposition at Par. 9-10; Rahman Affirmation in opposition at Par. 5.
[7] See Grinthal Affirmation in opposition at Par. 12-16; Rahman Affirmation in opposition at Par. 6-9. See https://hcr ny.gov/housing-development-fund-corporation-hdfc for a brief description of "HDFC."

TakeRoot has never had any attorney-client relationship with UHAB nor owed UHAB any duty of confidentiality. [8]

As to why TakeRoot has taken up representation of petitioner in this matter, petitioner's counsel states TakeRoot was assigned to the case by the NYC Office of Civil Justice ("OCJ") which assigned legal service providers to represent pro se petitioners on HP proceedings on a rotating basis. Petitioner and nine other pro se tenants with HP cases returnable on the same date were assigned to TakeRoot; TakeRoot did not seek out petitioner. [9]

Petitioner, for his part, has made it clear that he wants TakeRoot to continue representing him and that he waives any potential conflict. Petitioner also states he had no knowledge of any relationship UHAB has with his building because in any prior cases between him and respondents, UHAB never came up.

Summarily, petitioner and his counsel argues that because there is no attorney-client relationship between TakeRoot and UHAB, because UHAB has no meaningful involvement in this proceeding, and because petitioner would be prejudiced if he had to seek new counsel on the eve of trial or proceed pro se, respondents' motion must be denied.

In reply, respondents and their counsel argue that TakeRoot's explanation of its relationship with UHAB and the coalition reveals even more conflicts, as TakeRoot admits to being funded by HPD, who would benefit from any civil penalties imposed on respondents.

Respondents argue that petitioner's opposition papers serve to show that TakeRoot is "inextricably intermingled" with all parties in this proceeding, both respondents and HPD. Respondents argue that petitioner might be better served with representation from another legal service provider and that respondents' waiver is required so that TakeRoot can remain petitioner's counsel.

That respondent Warren previously worked for HPD creates even more potential conflict, according to respondents, as HPD and TakeRoot could be working in concert to "satisfy old workplace grudges."

Finally, respondents argue that it is irrelevant that TakeRoot and UHAB have never had an attorney-client relationship, and that is not the basis of their motion to disqualify. Respondents argue, without any legal support whatsoever, that attorney-client relationship is not the sole

[8] See Grinthal Affirmation in opposition at Par. 3-7; Rahman Affirmation in opposition at Par. 3.
[9] See Grinthal Affirmation in opposition at Par. 11.

rationale for disqualification and that disqualification is appropriate merely where "the lawyer's other interests may impact a party."

DISCUSSION

As a threshold matter, it is important for this court to note the time-honored principle that "[a] party's entitlement to be represented in ongoing litigation by counsel of his or her own choosing is a valued right which should not be abridged absent a clear showing that disqualification is warranted... Whether or not to disqualify an attorney or law firm is a matter which rests in the sound discretion of the court." (*Edwards v Sigma Transp., Inc.*, 2018 NY Misc. LEXIS 6171, *3, 2018 NY Slip Op 33226(U) [Sup Ct, Kings County 2018], *quoting Gulino v Gulino*, 35 AD3d 812, 812, 826 NYS2d 903 [2d Dept 2006]; *Hirshfeld v Stahl*, 194 AD2d 388, 599 NYS2d 951 [1st Dept 1993]).

Indeed, "[d]isqualification of counsel conflicts with the general policy favoring a party's right to representation by counsel of choice, and it deprives current clients of an attorney familiar with the particular matter." (*Matter of Max v ALP, Inc.*, 2018 N.Y. Misc. LEXIS 2919, *3, 2018 NY Slip Op 31551(U) [Sup Ct, NY County 2018], *quoting Tekni-Plex, Inc. v Meyner & Landis*, 89 NY2d 123, 131, 651 NYS2d 954 [1996]).

Given the serious nature of disqualifying a party's chosen representative, especially in the circumstances here, on the eve of trial, the law is clear that the movant seeking disqualification must clearly show three specific factors. If the movant cannot prove all three, disqualification is not warranted and cannot be granted. "A movant seeking disqualification of an opponent's counsel bears a heavy burden … The right to counsel is a valued right [and] any restrictions must be carefully scrutinized." (*Paul v Davidson*, 2021 NY Misc. LEXIS 795, *8-9 2021 NY Slip Op 30576(U) [Sup Ct, NY County 2021], *quoting Mayers v Stone Castle Partners, LLC*, 126 AD3d 1, 5, 1 NYS3d 58 [1st Dept 2015] and *Ullmann-Schneider v Lacher & Lovell-Taylor PC*, 110 AD3d 469, 469-70, 973 NYS.2d 57 [1st Dept 2013]).

The law is clear that "[w]hen seeking to disqualify an opposing party's attorney or law firm, … [t]he movant 'must prove: (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 client are materially adverse." (*Paul v Davidson*, 2021 NY Misc. LEXIS at *9, *quoting Tekni-Plex, Inc. v Meyner & Landis*, 89 NY2d at 131-132 ["Only where the movant satisfies all three

inquiries does the irrebuttable presumption of disqualification arise"]; *see also Campbell v McKeon*, 75 AD3d 479, 480, 905 NYS2d 589 [1st Dept 2010] ["On such motion to disqualify counsel, the moving party must prove, among other things, the existence of a prior attorney-client relationship between itself and opposing counsel"] [internal citations omitted]; *Pellegrino v Oppenheimer & Co., Inc.*, 49 AD3d 94, 98, 851 NYS.2d 19 [1st Dept 2008]).

It is undisputed that TakeRoot has never represented any of the named respondents here and there has never been an attorney-client relationship with respondents and TakeRoot, either currently or in the past. Respondents do not claim this type of relationship exists or ever existed.

As to UHAB (either the HDFC or the Inc.), it also cannot be disputed that no such attorney-client relationship exists or has ever existed with TakeRoot. Respondents' motion never once alleged such a relationship and, in fact, the affirmation in reply of respondents' counsel affirmatively states that "the motion in chief does not make that argument." [10] Moreover, petitioner's attorneys have explicitly denied any existence of an attorney-client relationship between UHAB and TakeRoot, stating that "TakeRoot has never provided legal services to UHAB or UHAB HDFC as a client. TakeRoot has never had an attorney client relationship with or owed a duty of confidentiality to either UHAB or UHAB HDFC," and that "[N]either UHAB nor UHAB HDFC have ever been a client of TakeROOT in any matter, whether in or out of court." [11]

As such, in the circumstances here it is unnecessary to reach the last two prongs of the disqualification analysis, as respondent cannot, and indeed have not even attempted to, prove the first prong – the existence of a current or prior attorney-client relationship – whether between TakeRoot and respondents or TakeRoot and the UHAB entities.

Respondents claim TakeRoot must be disqualified due to an alleged conflict of interest pursuant to Rule 1.7 of the New York Rules of Processional Conduct. Where the motion for disqualification is made upon this ground, courts have held that "[t]he basis for a disqualification motion is the alleged breach of the fiduciary duty owed by an attorney to a current or former client," and that "[w]hen the law firm targeted by the disqualification motion has never represented the moving party, that firm owes no duty to that party." (*HSBC Bank USA, N.A. v Santos*, 185 AD3d 475, 477, 128 NY S.3d 2 [1st Dept 2020] [internal citations omitted]. "[I]t

[10] See Affirmation in reply at Par. 16-17.
[11] See Rahman Affirmation in opposition at Par. 3; Grinthal Affirmation in opposition at Par. 6-7.

follows that if there is no duty owed there can be no duty breached." *Id., quoting Rowley v Waterfront Airways, Inc.*, 113 AD2d 926, 927, 493 NYS2d 828 [2d Dept 1985]).

"A party seeking to disqualify another party's attorney on conflict of interest grounds must have standing to do so based on either being a present or former client of the subject attorney … If the attorney never represented the moving party, it cannot have breached a fiduciary duty to that party." (*426 Realty Assoc., LLC v Lynch*, 2019 N.Y. Misc. LEXIS 5304, *11-12, 2019 NY Slip Op 32936(U) [Sup Ct, NY County 2019] [internal citations omitted]).

Where, as here, the moving party never had an attorney-client relationship with the law firm or attorney it seeks to disqualify, the moving party "had no standing to bring a motion to disqualify." (*HSBC Bank USA, N.A. v Santos*, 185 AD3d at 477 [internal citations omitted]; *see also Scafuri v DeMaso*, 71 AD3d 755, 756, 896 NYS2d 421 [2d Dept 2010] ["The plaintiffs failed to satisfy the first of the foregoing criteria, since the law firm never represented them in any matter and, therefore, they lacked standing to seek the law firm's disqualification."] [internal citations omitted]; *Edwards v Sigma Transp., Inc.*, 2018 NY Misc. LEXIS 6171, *3, 2018 NY Slip Op 33226(U), [Sup Ct, Kings County 2018] ["The basis of a disqualification motion is an allegation of a breach of a fiduciary duty owed by an attorney to a current or former client ... [so movants who] are neither present nor former clients of the subject attorneys ... have no standing to seek their disqualification."], *quoting Ogilvie v McDonald's Corp.*, 294 A.D.2d 550, 552, 742 N.Y.S.2d 897 [2d Dept 2002]).

Given that both sides admit that there is no attorney-client relationship, nor has there ever been, between either TakeRoot and respondents or TakeRoot and the UHAB entities, respondents lack standing to make the instant motion.

As such, respondents' motion is denied in its entirety because respondents lack standing to bring the motion in the first place *and* because they cannot prove the existence of a prior or current attorney-client relationship between the moving party and opposing counsel.

In any case, if there was a basis to entertain the instant motion to disqualify TakeRoot based on conflict of interest, such belated motion, made on the eve of trial, seven months since this proceeding was commenced and six months after the first court date, such motion would still have to be denied.

"[I]n the absence of a violation of an ethical or disciplinary rule, the mere appearance of impropriety alone is insufficient to warrant disqualification, and, in any event, any appearance of

impropriety must be balanced against a party's right to the counsel of his or her choice as well as the possibility that the motion for disqualification may be motivated purely by tactical considerations." (*Matter of Max v ALP, Inc.*, 2018 N.Y. Misc. LEXIS at *5 [internal citations omitted]; *Mayers v Stone Castle Partners, LLC*, 126 AD3d 1, 6, 1 NYS3d 58 [1st Dept 2015]).

To that end, "Courts should also examine whether a motion to disqualify, made during ongoing litigation, is made for tactical purposes, such as to delay litigation and deprive an opponent of quality representation … Where the *movant knew or ought to have known* of the alleged conflict of interest for an extended period of time and moves for disqualification during the midst of litigation, the Court can infer that 'the motion was made merely to secure a tactical advantage,' and the movant 'may be found to have waived any objection to the other party's representation'." (*Paul v Davidson*, 2021 N.Y. Misc. LEXIS at *9-10 [emphasis added] [internal citations and quotations omitted]; *Hele Asset, LLC v S.E.E. Realty Associates*, 106 AD3d 692, 694, 964 NYS2d 570 [2nd Dept 2013]).

Here, respondents do not attempt to explain why they waited to bring the instant motion, or the issue of disqualification to the court's attention, until six months after this case commenced, five months after it was first heard in court, and only on the sixth court appearance. Indeed, that sixth appearance was the initial trial date scheduled in this proceeding and the trial failed to move forward because of the respondents' belated claim of conflict.

Respondents were or should have been more than well-aware of their "inextricably linked" relationship to UHAB and, if such relationship is as inextricable as alleged, respondents were or should have similarly been well aware of the coalition that UHAB and TakeRoot are both a part of. Given the circumstances, respondents should have recognized the potential conflict and made the instant motion months ago, when this proceeding was first commenced. The court notes that respondent John Warren as the President of the Board of Directors of UHAB[12] is in the position to know of the alleged conflicts and, critically, is in the position to clearly explain the alleged conflict, rather than "unknown unknowns."[13] His affidavit, however, only musters "I am aware that TakeRoot and UHAB have a business relationship; I am unaware of the extent of that relationship."

[12] John Warrant affidavit at par. 5.
[13] Tracy Boshart affirmation par. 19 and 21.

As such, the court can infer that the instant motion was made purely for tactical purposes, either to delay trial (which respondents have now successfully accomplished) or to deprive petitioner of counsel in general, or at least counsel who is familiar with this proceeding. (*see Matter of Voss v 87-10 51st Ave Owners Corp*, 292 AD2d 622, 624m 740 NYS2d 371 [2nd Dept 2002]). Therefore, even *if* there was a potential conflict of interest present herein and *if* respondents had standing to assert same, the court would find that respondents waived any objection to petitioner's choice of representation.

CONCLUSION

Based on the foregoing, respondents' motion to disqualify TakeRoot as counsel for petitioner is denied in its entirety.

The trial date of July 27, 2021 at 10 A.M. remains. The parties are directed to appear promptly and be ready to proceed with trial on that date. The parties are further directed to email each other and the court any documents and other evidence they wish to introduce into evidence, that has not already been submitted, no later than July 23, 2021. Any objections to any new proposed evidence shall be noted via email to each other and the court by July 26, 2021.

This constitutes the Order of the court. Copies will be emailed to the parties' counsels.

Dated: July 21, 2021
Bronx, New York

SO ORDERED,

/S/

SHORAB IBRAHIM, JHC

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