

SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: HON. JACQUELINE W. SILBERMANN  
Administrative Judge Justice

PART \_\_\_\_\_

*Ambase Corporation*

INDEX NO. 107962/2004

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

- v -

*Doris Polk & Wardwell et al.*

*Interim Order  
Administrative Order*

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...	_____
Answering Affidavits – Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion:  Yes  No

~~Upon the foregoing papers, it is ordered that this motion~~

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Counsel for plaintiff in this matter has applied to me to direct a transfer of this case at random to a non-Commercial Justice. In connection with a motion made by defendants, they filed a Request for Judicial Intervention on which, it appears, they designated this case as a Commercial matter. The case was accordingly assigned at random to Judge Ira Gammernan. Judge Gammernan is a Judicial Hearing Officer and the consent of both sides is required for any case to proceed before him. The consent issue has not yet been finally resolved, at least as far as the court's computer system is concerned. Counsel for plaintiff advises that he has submitted to the Commercial Division Support Office a declination of consent to the assignment to Judge Gammernan.

Dated: \_\_\_\_\_ J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

Counsel for defendants asserts that the question of whether this case belongs in the Division or not should be left in the first instance to the Commercial Division Justice to whom the case is assigned. The *Guidelines for Assignment of Cases to the Commercial Division* indicate that when an RJI is submitted seeking assignment of a case to the Division, a preliminary review is conducted by a back office with respect to the sums at issue in the case. Par. C (i). If, as here, the complaint on its face demands in excess of \$ 125,000, the back office will assign the case to the Division as requested by the submitting party. The Division Justice to whom the matter is assigned may, however, direct that the matter be transferred out of the Division in light of the principles set forth in Paragraphs A and B of the *Guidelines*. Par. C (ii). In the normal course, then, the Division Justice will address the assignment question in the first instance in any matter in which more than \$ 125,000 is involved.

At this point, I could return this matter for an initial review by the Division Justice. However, in view of several considerations, I will not do so. First, the question of where a case ought properly to be assigned is ultimately a matter for the Administrative Judge. If the Division Justice were to direct that a matter designated Commercial should be transferred out of the Division, the party who filed the RJI would, if it wished, be entitled to appeal that directive to me as Administrative Judge. *Guidelines* Par. F. If the Division Justice, on the other hand, were to decide that the matter should be retained in the Division despite the objection of another party to the case, Par. F does not provide for an appeal to me, nor does any other provision of the *Guidelines*. This is a lacuna or imbalance in the *Guidelines*. It is my view that, in the interest of basic fairness, all parties in the case should have the same rights to complain to the Administrative Judge, if they wish, about the correctness of a determination by a Division Justice as to whether a case marked Commercial should, or should not, proceed as a Division matter. Thus, if a case is retained in the Division at the directive of the assigned Division Justice, I will entertain, by analogy to Par. F, an appeal from a party that objected to that assignment before the Division Justice. Although the applicant here could have proceeded in the normal manner and, if unsuccessful, could have appealed to me, it is not entirely unreasonable for it to have proceeded as it did since it did not discern in the *Guidelines* an opportunity to apply to me for a final determination on the question.

Furthermore, the parties have presented their views on the appropriateness of the assignment in correspondence to me and it would be most expeditious and efficient for me to address the question now rather than await an initial ruling by the Division Justice. This is particularly so since the

case remains assigned to Judge Gammerman in the court's computer. I could not refer this question in the first instance to him as the assigned Judge because of his status as a JHO. Judge Gammerman will not transfer any case out of the Division or retain it over the objection of a party; in view of his status as a JHO, all parties must consent to the assignment to him before he will take action in a case. Thus, in view of the objection of plaintiff to an assignment to Judge Gammerman in any event, if I were to follow the course of referring the matter to the assigned Justice in the first instance, this case would have to be reassigned to another Justice before I could make such a referral. A resolution by me at this time would be a more efficient way to proceed. Beyond that, I have no doubt how this application would be treated were it to be made to a Division Justice initially.

The gravamen of this case is alleged negligence and legal malpractice by attorneys. See, e.g., Amended Complaint ¶ 25. Plaintiff asserts a breach of fiduciary duty theory as well, but in good part the breach consists, it is claimed, of failure to "conduct an appropriate investigation and inquiry," to "provide competent representation" (Pars. 36, 38) and the like. The Third and Fourth causes of action are related to the claimed breach.

Defendants do not argue that this is not, at its heart, a legal malpractice case. It would be hard to so argue. Rather, defendants emphasize that the representation involved was in connection with a commercial transaction or dispute. Counsel for defendants says in his letter that the "background of the case presents a complex business-oriented situation ...."

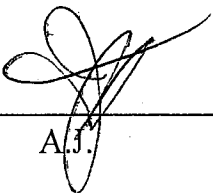
Probably the clearest of all the categories in the *Guidelines* is found in Par. A (6). This provides for the presumptive transfer out of the Division of attorney malpractice actions. This provision is not qualified depending upon the factual context out of which the action arose; that is, the *Guidelines* do not distinguish between actions that arise out of commercial transactions or litigation by commercial lawyers and those that arise in other contexts, authorizing acceptance of the former but providing for transfer of the latter. It is true that the *Guidelines* speak of presumptions. Nevertheless, they attempt to set out with as much clarity as practicalities permitted at the time of their drafting a division of labor between the Division and the rest of the court. In that Division, legal malpractice cases do not belong in the Division. This is how the *Guidelines* have been applied in practice.

Defendants contend that counsel for plaintiff did not raise immediately his complaint about the Commercial assignment. The period of time prior to the filing of the RJJ, which is referred to by defendants, could not properly be

counted against plaintiff since the case by definition had not been assigned then and there was therefore nothing for plaintiff to challenge. The only relevant event that occurred prior to filing of the RJI was the purchase of the index number; the plaintiff could have purchased a Commercial number (in the 600,000 series) and, had it done so, that would bear on the present application, but it did not. The clock therefore began to tick when the RJI was filed and served, which, defendants state, occurred on or about September 24, 2004. It appears that the parties adjourned the return date of the motion and that plaintiff cross-moved and then, a few weeks later, raised a complaint about the assignment. Although plaintiff could have written its letter to me a few weeks earlier than it did and should have done so, there has thus far been no expenditure of time by a Justice of this court addressing any substantive aspect of this case. The motion is returnable in the Motion Support Office Courtroom today. Since the plaintiff, as it is entitled to do, has objected to the assignment to Judge Gammerman in writing, the case, as stated above, would have to be assigned to another Division Justice before any Justice could begin to address the substance of the case. Under these circumstances, it does not appear to me that plaintiff waived its right to complain by proceeding when and as it did.

Accordingly, the application should be granted and the Motion Support Office is directed to reassign this case at random to a General Assignment Part.

Dated: December 8, 2004



A.J.