

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present: HON. EMILY PINES
J. S. C.

Original Motion Date: **04-28-2009**
Motion Submit Date: **07-29-2009**
Motion Sequence No's.: **002 MOTD**
003 MG

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**SHERBROOKE SMITHTOWN OWNERS
CORP.,**

Plaintiff,

-against-

**JOHANNA MERSON, VERONICA DOWNES,
ELLIOTT UTRECHT, RUMAPLE, LLC., PAUL
J. HESSEL, JOHN FERRANTE, J. MERSON
MANAGEMENT CORP. a/k/a MERSON
PROPERTIES; MERSON PROPERTIES and
"JOHN DOE #1" through " JOHN DOE #5", the
last five (5) names being fictitious and unknown to
the Plaintiff,**

Defendants.

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ORDERED, that the motion (motion sequence number 002) by defendants to disqualify the firm of Schneider Mitola LLP from representing plaintiff Sherbrooke Smithtown Owners Corp. in this action is granted; and it is further

ORDERED, that the cross-motion (motion sequence number 003) by plaintiff for leave to amend its pleadings is granted to the extent set forth herein and plaintiff is further granted an extension of time to serve defendant Veronica Downes; and it is further

ORDERED, that upon proof of such service, the motion to dismiss the complaint as against Downes will be deemed denied; and it is further

ORDERED, that a compliance conference is scheduled for November 18, 2009 at 9:30 a.m. before the undersigned.

BACKGROUND

Plaintiff commenced this action against defendants by the filing of a Summons and Verified Complaint on or about September 12, 2008. The action arises out of the cooperative conversion of a 48 unit apartment complex located at 355 Route 111, Smithtown, New York (the “subject premises”). Plaintiff, Sherbrooke Smithtown Owners Corp. (“plaintiff” or “Sherbrooke”) was formed by defendant sponsor, Johanna Merson (“sponsor” or “Merson”), on or about June 11, 2003 and Merson and Sherbrooke entered into a contract of exchange to sell, transfer or cause to be conveyed the subject premises pursuant to an offering plan dated February 26, 2004.¹ The record reflects that defendants Merson, Veronica Downes (“Downes”) and Elliott Utrecht were the original members of the Board of Directors of Sherbrooke. Downes and Utrecht were sponsor appointed members who were subsequently replaced by elected members upon the sale of units to individual owners.²

The gravamen of the Complaint is that defendants breached the offering plan, and subscription agreement and committed fraud and misrepresentation regarding the condition of the subject premises. Specifically, plaintiff alleges that the Engineering Report and Supplemental Engineering Report contained in the offering plan represented that the subject premises were in good condition, when in fact, numerous defects and poor building conditions existed.³ As a result, plaintiff alleges that it had to expend significant sums of money to repair the conditions (which are detailed at length in the Complaint). The Complaint also asserts causes of action against the property manager, J. Merson

¹ According to the Complaint, defendant Rumaple, LLC (“Rumaple”) is an entity solely owned and controlled by Merson and was the initial holding company of the subject premises which entered into the contract of exchange with plaintiff.

² Pursuant to the offering plan, the sponsor is entitled to appoint three (3) of the five (5) members of the Board until over 50% of the shares of stock are sold or until the second anniversary of the date upon which the subject premises was transferred pursuant to the contract of exchange, whichever occurs first.

³ Defendant Paul J. Hessel was the engineer who prepared the reports.

Management Corp., a/k/a Merson Properties and Merson Properties for breach of contract for failing to properly maintain the subject premises; against Hessel for failing to submit an accurate Engineering Report and Supplemental Engineering Report and for misrepresentation; against John Ferrante (“Ferrante”) for breach of contract for allegedly certifying an unreasonable budget and for breach of the duty of good faith and fair dealing; against Merson for fraud and misrepresentation regarding concealment of the actual conditions of the subject premises; against Merson, Downes and Utrecht for breach of fiduciary duty.

DEFENDANTS’MOTION

Defendants now move for an Order disqualifying the law firm of Schneider Mitola LLP (the “law firm”) from representing plaintiff in this action. Defendants also move to dismiss the Complaint as against defendant Downes on the ground that she was not properly served.

Motion to Disqualify

Defendants move to disqualify the law firm on the ground that a former associate of the law firm, Richard Johnson (“Johnson”), was an elected member of the Board, retained the law firm as counsel for the Board and began “holding private, unauthorized and improper Executive Board meetings, excluding Board member Merson. Palladino Affirmation at ¶5. In support of the motion, defendants submit an affidavit of Merson, an affidavit of Chicco, a copy of the offering plan, and a copy of the pleadings. Defendants allege that at the direction of the law firm, specifically, Marc H. Schneider, Esq. (“Schneider”), the Board took certain actions regarding its budget, refinancing a loan, improvements/repairs to the subject premises and the retention of experts.⁴ Palladino Affirmation at ¶18. Defendants state that the law firm and Schneider are necessary parties to the action and must be implead as third-party defendants. Additionally, defendants urge the Court to recognize that at a minimum, the law firm, and Schneider will be fact witnesses who must testify in this action, and therefore have a conflict of interest which mandates disqualification.

Moreover, defendants argue that since the law firm represented plaintiff while Merson was a member of the Board of Directors, it cannot now represent plaintiff in an action *against* Merson as a prior attorney client relationship existed between Schneider and Merson. Furthermore, defendants claim

⁴ Defendants also claim that the law firm also improperly advised the Board that Robert Chicco, Esq. (“Chicco”), a member of CKC Equities, LLC (“CKC”) which acquired cooperative apartment shares, should be excluded from the Board of Directors. CKC purchased shares which it claims were “unsold shares” of three units, which, pursuant to the offering plan and by-laws, entitled it to a seat on the Board. CKC designated Chicco as its representative.

that Schneider and the law firm obtained privileged information while representing Merson and they cannot now use that information in their representation against Merson. Therefore, they seek disqualification of the law firm from its representation of plaintiff in this action.

Dismissal against Downes

Defendants argue the Complaint must be dismissed against Downes because plaintiff failed to serve the same within 120 days of its filing with the Court pursuant to CPLR §306-b. Here, defendants claim that although plaintiff's affidavit of service state that Downes was served on October 4, 2008 at 21 Potter Lane, Levittown New York, Downes was not a resident of New York as she had moved out of the state and relocated to Florida on or about December 31, 2005.⁵ Downes submits an affidavit stating that she moved out of state and permanently relocated and never received a copy of the Summons and Complaint. Thus, defendants assert that plaintiff failed to comply with the service requirements of CPLR §308 and the Complaint must be dismissed against Downes.

PLAINTIFF'S OPPOSITION AND CROSS-MOTION

Plaintiff opposes the motion and cross moves for an Order, *inter alia*, pursuant to CPLR §3025, granting leave to amend the Complaint as follows: (1) modifying the background portions of the Complaint and the 6th and 11th causes of action based upon common law fraud and breach of fiduciary duty by adding and/or supplementing same with additional facts and permitting plaintiff to allege same against all defendants named in such causes of action and defendant sought to be added, Robert Chicco, Esq.; and (2) adding a 15th cause of action seeking declaratory relief against Merson, Chicco and CKC Equities, LLC. Plaintiff also seeks leave pursuant to CPLR §1024, to replace John Doe #1 with Robert Chicco, Esq., and John Doe #2 with CKC Equities, LLC or in the alternative, granting leave to add such parties pursuant to CPLR §305 and §1003. Finally, in the event the Court determines that Downes was not properly served within the time limits of the CPLR, plaintiff seeks an extension of time to serve Downes at her address in Palm Beach, Florida, pursuant to CPLR §306-b.

Opposition to Motion to Disqualify

Plaintiff argues that the law firm should not be disqualified because it does not need to be called as a witness since others can testify regarding the issues in this case. First, plaintiff notes that the issue of the refinancing of the loan is not the subject of the Complaint and has nothing to do with the issues of the construction defects at the subject premises. Additionally, plaintiff argues that the law firm's testimony is not "necessary" as the other Board members can testify as to what transpired. With regard

⁵ The affidavit of service, annexed to the motion papers, indicates that Downes was served pursuant to CPLR §308(4), or "nail and mail" service.

to the claim that the firm, and Schneider specifically, advised the Board to exclude Chicco, plaintiff asserts that Chicco's firm, CKC, was not entitled to a seat on the Board because it was not a holder of unsold shares as defined in the offering plan.

Turning to the conflict of interest claim arising out of the prior representation, plaintiff asserts that Johnson was on the Board only from 2005 to 2006 and was not on the Board when the instant action was commenced in 2008. Moreover, plaintiff notes that Merson was not on the Board when the law firm was hired by plaintiff in 2006, nor was she on the Board when the action was commenced. Additionally, plaintiff argues that there is no conflict of interest because the law firm never represented either Merson or Chicco individually.

Service on Downes

Plaintiff opposes dismissal of the Complaint against Downes and argues that her conclusory allegations that she did not receive a copy of the pleading are insufficient to warrant dismissal. Plaintiff argues that the process server's affidavit of service pursuant to CPLR §308(4) demonstrates that she was properly served at her last known address and that he spoke to a neighbor who stated she resided at the Levittown address. However, plaintiff argues that in the event the Court finds that Downes was not properly served, that it should be granted an extension of time to serve her in Florida as the time to bring a claim against her has not expired. Finally, plaintiff states that since Downes clearly has notice of the proceedings (as evidenced by her submission of an affidavit) and since discovery has not commenced, there would be no prejudice in granting an extension of time to serve to Downes.

Motion to Amend and Add Parties

Plaintiff argues that it is entitled to amend and supplement its pleadings pursuant to CPLR §§3025(b), 305 and 1003. Specifically, plaintiff argues, as set forth in the affidavit of its Vice President, Jayne Glynn, that it only recently discovered that Chicco was also one of Merson's appointees on the Board and further that only recently Chicco has been "improperly asserting a right to a seat on the Board" and further that Chicco was the sponsor's attorney when the offering plan was filed. Plaintiff argues that there is no prejudice by the amendment which seeks declaratory relief regarding Chicco's entitlement to a seat on the Board and the right to rely on the engineering reports contained within the offering plan. Under the circumstances, plaintiff asserts that it should be entitled to amend and supplement its pleadings to detail the particular affirmative misrepresentations of the offering plan, the actions by the sponsor to discourage investigation into the conditions of the subject premises, Chicco's role in attempting to obtain a Board seat. Based on the foregoing, plaintiff urges the Court to grant the cross-motion in its entirety.

OPPOSITION TO THE CROSS MOTION

Defendants oppose the cross motion and argue that (1) plaintiff has failed to plead the elements of fraud with specificity as required by CPLR §3016(b); (2) there is no justiciable controversy regarding the alleged “unsold shares”; and (3) plaintiff should not be granted an extension of time to serve Downes because it was aware of her address in Florida ten (10) days after service of the Complaint. Specifically, defendants argue that the proposed amended complaint fails to properly plead a cause of action for fraud in that it does not set forth with the requisite specificity the material elements of a material misrepresentation of facts, made with knowledge of its falsity, with intent to receive, justifiable reliance and damages. Here, defendants argue that the proposed amended complaint fails to set forth any specific factual allegations, but rather only conclusory allegations. Additionally, defendants argue that the fraud claim is really a disguised breach of contract claim and such is impermissibly duplicative and should not be permitted.

Regarding the addition of the fifteenth cause of action seeking a declaratory judgment that CKC is not a holder of unsold shares, defendants argue that plaintiff is not seeking any relief against the sponsor and moreover, even if there is a controversy, monetary relief is the appropriate remedy.

Finally, defendants assert that plaintiff has failed to show good cause for failing to serve Downes within 120 days of filing of the Summons and Complaint. Instead, defendants reiterate that Downes relocated on or about December 31, 2005 and that on or about September 22, 2008, plaintiff’s counsel notified its process server that if Downes could not be served at the Levittown address she could be served at the Florida residence. Since plaintiff’s counsel was aware of another residence for Downes, they instead elected to “nail and mail” at the Levittown address. Since that was not Downes’ actual place of residence (since 2005), the service was improper and the complaint must be dismissed against her.

DISQUALIFICATION

The Law

Rule 3.7 of Part 1200, the Rules of Professional Conduct (effective April 1, 2009) states:

Lawyer as Witness

- (a) A lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact unless:
 - (1) The testimony relates solely to an uncontested issue;
 - (2) The testimony relates solely to the nature and value of legal services rendered in the matter;

- (3) Disqualification of the lawyer would work substantial hardship on the client;
 - (4) The testimony will relate solely to a matter of formality, and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; or
 - (5) The testimony is authorized by the tribunal.
- (f) A lawyer may not act as an advocate before a tribunal in a matter if:
- (1) Another lawyer in the lawyer's firm is likely to be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony may be prejudicial to the client; or
 - (2) The lawyer is precluded from doing so by Rule 1.7 or Rule 1.9.

Rule 1.9, Duties to Former Clients states:

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.
- (b) Unless the former client gives informed consent, confirmed in writing, a lawyer shall not knowingly represent a person in the same or substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:
 - (1) Whose interests are materially adverse to that person; and
 - (2) About whom the lawyer had acquired information protected by Rules 1.6 and paragraph (c) that is material to the matter.
- (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
 - (1) Use confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client, except as these Rules would permit or require with respect to a current client or when the information has become generally known; or
 - (2) Reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client.

The Court of Appeals has explained that the “advocate-witness disqualification rules contained in the Code of Professional Responsibility provide guidance, not binding authority, for courts in determining whether a party’s law firm, at its adversary’s instance, should be disqualified during litigation. Courts must, in addition, consider such factors as the party’s valued right to choose its own counsel, and the fairness and effect in the particular factual setting of granting disqualification or continuing representation.” ***S & S Hotel Ventures Limited Partnership v. 777 S.H. Corp.***, 69 N.Y.2d 437, 515 N.Y.S.2d 735, 508 N.E.2d 647 (1987). The Second Department has recently reaffirmed that a party’s right to be represented in ongoing litigation by counsel of its own choosing is a valued right which should “not be abridged absent a clear showing - -on which the party seeking disqualification carries the burden – that counsel’s removal is warranted.” ***Goldstein v. Held***, 52 A.D.3d 471, 859 N.Y.S.2d 707 (2d Dept. 2008). ***See also, Bentvena v. Edelman,***

47 A.D.3d 651, 849 N.Y.S.2d 626 (2d Dept. 2008)(burden of demonstrating necessity falls upon the party seeking disqualification); **Heim v. Merritt-Meridian Corp.**, 236 A.D.2d 367, 654 N.Y.S.2d 570 (2d Dept. 1997). However, where counsel’s testimony is “central to the plaintiff’s theory of recovery” set forth in the complaint, to wit, counsel’s actions may have given rise to the cause of action, the attorney should be disqualified. **See, Bridges v. Alcan Construction Corp.**, 134 A.D.2d 316, 520 N.Y.S.2d 793 (2d Dept. 1987). **See also, Wensley and Partners v. Polimeni**, 262 A.D.2d 311, 692 N.Y.S.2d 85 (2d Dept. 1999)(where it is apparent that the attorney’s testimony may be prejudicial to the former client, disqualification is warranted); **Fairview at Old Westfield v. European American Bank**, 186 A.D.2d 238, 588 N.Y.S.2d 339 (2d Dept. 1992); **North Shore Neurosurgical Group v. Leivy**, 72 A.D.2d 598, 421 N.Y.S.2d 100 (2d Dept. 1979). When counsel was “an active participant in a disputed transaction and has personal knowledge of the underlying circumstances, he ought to be called on behalf of his client and it is improper for him to continue his representation.” **Zagari v. Zagari**, 295 A.D.2d 891, 744 N.Y.S.2d 104 (2d Dept. 2002)(internal quotation omitted). If a disqualification question is presented, any doubt is to be resolved in favor of disqualification. **Solomon v. New York Property Insurance**, 118 A.D.2d 695, 500 N.Y.S.2d 41 (2d Dept. 1986).

Turning to the conflict of interest issue presented by the law firm’s prior representation of the Board, the Court of Appeals has recognized that attorneys owe a continuing duty to former clients not to reveal confidences learned in the course of their professional relationship. **Kassis v. Teacher’s Insurance and Annuity Assoc.**, 93 N.Y.2d 611, 695 N.Y.S.2d 515, 717 N.E.2d 674 (1999). Moreover, where an attorney has a prior attorney-client relationship with a party and the current matter is substantially related to the issues in the instant action, disqualification is appropriate, regardless of whether confidential information was obtained so that the client may be free from apprehension and certain that their interests will not be prejudiced by the prior representation. **Nationwide Assoc. v. Targee Street Internal Medicine Group**, 303 A.D.2d 728, 758 N.Y.S.2d 108 (2d Dept. 2003).

Applying the foregoing rules to the case at bar demonstrates why the law firm must be disqualified from its representation of plaintiff. Here, the submissions reflect that an associate of the law firm was a member of the Board and the law firm, specifically, Schneider, took allegedly wrongful actions in excluding members, holding private meetings and refusing to allow access to the minutes of the meetings. Furthermore, the law firm represented the Board while Merson was a member of the Board and thus should not be permitted to represent the plaintiff against Merson. Thus, in the exercise

of this Court's discretion, the law firm is disqualified on the ground that it is likely to be a witness in this case and also has a conflict of interest based on its prior representation of the Board.

SERVICE ON DOWNES

CPLR §306-b states:

Service of the summons and complaint, summons with notice, or of the third-party summons and complaint shall be made within one hundred twenty days after their filing, provided that in an action or proceeding where the applicable statute of limitations is four months or less, service shall be made not later than fifteen days after the date on which the applicable statute of limitations expires. If service is not made upon a defendant within the time provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service.

CPLR §308(4) authorizes "nail and mail" service upon a defendant at his/her "last known residence" where service pursuant to §§308(1) and 308(2) cannot be made with due diligence. In the case at bar, the submissions reflect that Downes was not properly served pursuant to CPLR §308(4) as Downes permanently relocated to the state of Florida several years prior to the commencement of this action and did not reside at the Levittown address where service was effectuated. Therefore, plaintiff failed to comply with the time requirements contained within CPLR §306-b.

In determining whether to grant an extension in the interest of justice pursuant to CPLR §306-b, the Court should consider whether the statute of limitations has expired on the claim, the length of the delay, the promptness of the request for an extension, the meritorious nature of the cause of action and the prejudice to defendant. ***Bumpus v. New York City Transit Auth.***, __A.D.3d __, 883 N.Y.S.2d 99 (2d Dept. 2009). Although the interest of justice standard does not require reasonably diligent efforts at service, the court may consider this factor along with other enumerated factors. ***Id.***

In this case, the submissions reflect that the statute of limitations has not expired on the claim against Downes and thus plaintiff could commence a separate action against her. Additionally, plaintiff attempted service at what it believed to be her last known residence several times prior to the "nail and mail" service at the Levittown address. Additionally, the process server indicated that he spoke to a neighbor who stated that Downes lived at that address. Therefore, even though a significant period of time elapsed prior to plaintiff's request for an extension of time, since discovery has not commenced and there would be no prejudice to Downes, in the interest of justice, the Court is granting plaintiff an extension of time for a period of forty-five (45) days to effectuate service of defendant Veronica Downes.

AMENDMENT OF PLEADINGS

It is well settled that leave to amend a pleading pursuant to CPLR §3025(b) should be freely given absent prejudice or surprise resulting from the delay. *Northbay Construction Co., Inc. v. Bauco Construction Corp.*, 275 A.D.2d 310, 711 N.Y.S.2d 510 (2d Dept. 2000). In determining whether to grant leave to amend, the Court should consider “how long the amending party was aware of the facts upon which the motion was predicated, whether the amendment is meritorious, and whether a reasonable excuse for the delay was offered.” *Romeo v. Arrigo*, 254 A.D.2d 270, 678 N.Y.S.2d 115 (2d Dept. 1998). *See also, Haller v. Lopane*, 305 A.D.2d 370, 759 N.Y.S.2d 504 (2d Dept. 2003); *Sidor v. Zuhoski*, 257 A.D.2d 564, 683 N.Y.S.2d 590 (2d Dept. 1999).

Here, plaintiff seeks leave to modify the background portions of the Complaint and the 6th and 11th causes of action based upon common law fraud and breach of fiduciary duty by adding and/or supplementing with additional facts. Plaintiff further seeks to add a 15th cause of action against proposed additional defendants Chicco and CKC seeking a declaratory judgment that they are not entitled to a seat on the Board and that the tenants were entitled to rely on provisions of the offering plan.

Upon a review of the proposed amended pleadings, the Court cannot say that such amendments are “palpably insufficient or patently devoid of merit” such as to warrant denial of the motion. *State Insurance Fund v. Service Unlimited*, 50 A.D.3d 1085, 857 N.Y.S.2d 231 (2d Dept. 2008). Additionally, defendants have failed to demonstrate surprise or prejudice resulting from the amendment. *Maloney Carpentry, Inc., v. Budnik*, 37 A.D.3d 558, 830 N.Y.S.2d 262 (2d Dept. 2007). Therefore, the cross-motion to amend the pleadings is granted in its entirety, and such pleadings shall be deemed served as of the date of this Order with the exception of Downes, who shall be reserved in accordance with this Decision.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: September 30, 2009
Riverhead, New York

EMILY PINES
J. S. C.