

M E M O R A N D U M

SUPREME COURT: QUEENS COUNTY
IA PART: 17

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Application of JEAN-PIERRE ABLA,
etc.

INDEX NO. 4945/06

BY: KITZES, J.

-against-

DATED: SEPTEMBER 6, 2006

A.W.M. CORP., etc.
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This is a proceeding by petitioner Jean-Pierre Abla for the dissolution of A.W.M. Corp. d/b/a Future Dent Creation (A.W.M.) pursuant to Business Corporation Law § 1104-a. Respondent A.W.M. cross-moves for disqualification of the firm Meister, Seelig & Fein, LLP (MSF) from representing the petitioner in this action.

This court will initially address the cross motion which seeks disqualification of counsel. Under DR 5-108 of the Code of Professional Responsibility [22 NYCRR § 1200.27] the moving party has the burden of establishing 1) the existence of a prior attorney-client relationship, 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. (Tekni-Plex, Inc. v Meyner and Landis, 89 NY2d 123 [1996]; Columbus Constr. Co. v Petrillo Builders Supply Corp., 20 AD3d 383 [2005].) Upon satisfaction of all three criteria, an irrebuttable presumption of disqualification arises. (Solow v W.R. Grace & Co., 83 NY2d 303 [1994].)

A.W.M. is a closely held corporation in the business of manufacturing dental appliances. Petitioner Abla and Shoichi Matsumoto are each owners of 32.5% shares of stock, and Perlita Walsh owns the remaining 35% of outstanding shares. In 1997 a lawsuit was instituted against A.W.M., Abla and Matsumoto to enforce a covenant not to compete by Matsumoto's former employer. Benjamin Fein, Esq., then a member of the firm of Rosenberg & Fein, represented the defendants. Thereafter in 1998, Mr. Fein now a member of MSF states that he prepared a shareholders' agreement for A.W.M. in draft form at the request of Abla.

It is the contention of Walsh and Matsumoto that it was their belief Mr. Fein drafted the document on behalf of the corporation and its shareholders and did not solely represent Abla's interest. A controversy currently exists as to the execution of this instrument and enforcement of its terms. It is clear that the 1997 litigation has no substantive relationship to this dissolution proceeding. There is also no indication in the papers that Mr. Fein had any contact with Matsumoto and Walsh concerning the agreement. Thus, the mere belief that Fein drafted the agreement on behalf of all the shareholders is insufficient to establish the existence of an attorney-client relationship. (See, Jamaica Public Serv. Co. Ltd. v AIU Ins. Co., 92 NY2d 631 [1998]; cf., Morris v Morris, 306 AD2d 449 [2003]; Matter of Greenberg v Greenberg, 206 AD2d 963 [1994].) In addition, the showing

necessary for disqualification is not demonstrated by A.W.M.'s payment of Mr. Fein's fees for drafting the instrument. (See, Matter of Ventura, 26 AD3d 334 [2006]; Mancheski v Gabelli Group Capital Partners, 22 AD3d 532 [2005].)

With respect to Mr. Fein being called as a witness to the facts underlying the preparation of the shareholder's agreement, even if he "ought to be called," the disqualification of the entire firm would not be warranted. (Code of Professional Responsibility DR 5-102[A] [22 NYCRR 1200.21(A)]; Talvy v American Red Cross, 205 AD2d 143 [1994], affd 87 NY2d 826 [1995]; Hillcrest Owners v Preferred Mut. Ins. Co., 234 AD2d 269 [1996].) Moreover, respondent has not established that if Fein was called as a witness that his testimony would be prejudicial to the petitioner. (Code of Professional Responsibility DR-5-102[B] [22 NYCRR § 1200-21[B]; Kaplan v Maytex Mills, 187 AD2d 565 [1992]; Furgang v Berrebbi, 184 AD2d 613 [1992].) It is noted that other actions are pending and this determination as to disqualification is limited to the dissolution action before this court.

In accordance with Business Corporation Law § 1109, the parties are directed to appear for a hearing in IA Part 17, at a date and time to be fixed in the order to be entered hereon. At the hearing, the parties shall present specific allegations and proof including a schedule of the corporate assets, liabilities, names of creditors and claims to permit an appropriate remedy to be

fashioned by the court. The parties shall provide each other with full access to all books and records of the corporation in their possession within 10 days after service of a copy of this order.

Settle order.

J.S.C.
