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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JOHN A. MILANO
Justice

IA Part 3

STUART GLASHOW, et al. x

Index
Number 12804 1999

- against -

Motion
Date October 31, 2000

LINDEN TOWERS COOPERATIVE #4, et al.

x

Motion
Cal. Number 30

The following papers numbered 1 to 13 read on this motion by defendants for an order disqualifying plaintiffs' Gallet, Dreyer & Berkey LLP.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits(A-N)	1 - 7
Answering Affidavits-Exhibits(A-K)	8 - 11
Reply Affidavits	12 - 13
Defendants' Memorandum of Law	
Plaintiffs' Memorandum of Law	

Upon the foregoing papers it is ordered that the motion to disqualify plaintiffs' counsel is denied.

Attorneys owe fiduciary duties of both confidentiality and loyalty to their clients (see, Tekni-Plex Inc. v Meyner and Landis, 89 NY2d 123; 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. Even after 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 5-08 [A] [2] [22 NYCRR 1200.27 (a) (2)]). An attorney, moreover, "must avoid not only the fact, but even the appearance, of representing conflicting interests" (Cardinale v Golinello, 43 NY2d 288, 296; see also, Code of Professional Responsibility Canon 9).

In accordance with these duties, the Code precludes attorneys from representing interests adverse to a former client on matters substantially related to the prior representation. This ethical

proscription is set forth in DR 5-108 as follows:

"A Except with the consent of a former client after full disclosure a lawyer who has represented the former client in a matter shall not:

"1. 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" (22 NYCRR 1200.27 [a] [1]).

Under DR 5-108 (A) (1), a party seeking disqualification of its adversary's lawyer 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 (see, Solow v Grace & Co., 83 NY2d at 308). Satisfaction of these three criteria by the moving party gives rise to an irrebuttable presumption of disqualification (id., at 309).

Disqualification of counsel, however, 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 (see, id., at 309-310; Tekni-Plex Inc. v Meyner and Landis, supra; S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp., 69 NY2d 437, 443). Disqualification motions, unfortunately, have also been used as a litigation tactic to gain strategic advantage over an adversary (see, S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp., 69 NY2d at 443, supra). The court notes that in the case at bar, issue has been joined for over a year, that the parties have engaged in some discovery, and that the within motion was made on the eve of the depositions, which had been adjourned at the defendants' request.

In assessing whether the moving party has met its burden of satisfying each of the three requirements for disqualification under DR 5-108, courts should avoid mechanical application of blanket rules. Rather, the three pivotal inquiries--whether there exists a prior attorney-client relationship, a substantial relationship between the representations and adversity of interests--require careful appraisal of the interests involved. Only where the movant satisfies all three inquiries does the irrebuttable presumption of disqualification arise (see, Tekni-Plex Inc. v Meyner and Landis, supra; Solow v Grace & Co., 83 NY2d at 313).

It is undisputed that Gallet Dreyer & Berkey, LLP, or its predecessor law firm, served as general counsel to Linden Towers Cooperative #4, Inc. from some time prior to 1978 until May 1992, at which time the relationship was terminated by Linden Towers. Gallet, Dreyer & Berkey performed a variety of legal services on

behalf of Linden Towers during this period. In May 1992, Linden Towers decided to change law firms, and all of the files retained by Gallet, Dreyer & Berkey were turned over to new counsel. Gallet, Dreyer & Berkey retained a copy of its original retainer agreement and a receipt from the successor law firm for the transfer of files. Since May 1992 there has been a complete change in the make up of the board of directors of Linden Towers. There has been no communication between the cooperative, the members of the board of directors and Gallet, Dreyer & Berkey since May 1992. In addition none of the board of directors or officers are known personally to Stanley Dreyer, plaintiffs' counsel.

The Glashows, plaintiff's herein, have been shareholders and tenants in Linden Towers for over 30 years, and raised two children in their apartment. It is asserted that since 1996, the cooperative has engaged in an effort to evict the Glashows from their apartment because their adult son, who is gay, now resides with his parents, and lives there alone during the months his parents reside in Florida. The within action seeks to recover damages for malicious prosecution and the intentional infliction of emotional distress arising out of a 1997 holdover proceeding against the Glashows and a 1999 summary proceeding to evict them from their parking space. Both of these proceedings were dismissed on the merits in favor of the Glashows.

Defendants have failed to establish that any confidential information obtained by Gallet, Dreyer & Berkey during the period it represented Linden Towers has any relationship to the proceedings against the Glashows which form the basis of the current litigation. The fact that the predecessor law firm commenced a proceeding against the Glashows in 1978, and that that action was still pending when Mr. Dreyer joined the firm in 1978, is irrelevant. The 1978 action involved the cooperative's right to collect late fees, and therefore has no bearing on the present litigation. In addition the fact that an attorney at the law firm's predecessor wrote a letter in 1988 challenging the occupancy of an apartment by the adult brother of the apartment's shareholder of record, who had never previously lived in the apartment, is equally irrelevant. The advice given by the law firm in 1988 was based on the facts presented and bears no relationship to the current litigation. During the time that Dreyer, Gallet & Berkey represented Linden Towers it was never asked to give legal advice on the right of an adult child of a shareholder to return to live with his parents in the apartment in which he grew up. Finally, the court finds that the fact that the parking lot lease was drafted by the law firm's predecessor eighteen years ago does not create a conflict of interest. The import of the lease is not at issue, as the rights and responsibilities of the parties under that lease have already been determined in the 1999 summary proceeding. In the instant action the only issue pertaining to the lease is whether the attempt to terminate the Glashow's parking space lease was maliciously motivated.

In view of the foregoing the court finds that the defendants have failed to establish their burden of proof and therefore the motion to disqualify plaintiffs' counsel is denied.

Dated: January 17, 2001

J.S.C.