

1186 Broadway Tenant LLC v Friedman
2019 NY Slip Op 33463(U)
November 21, 2019
Supreme Court, New York County
Docket Number: 655038/2018
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 39EFM

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1186 BROADWAY TENANT LLC, 1186 BROADWAY
RESTAURANT LLC,

Plaintiff,

- v -

KENNETH FRIEDMAN, BIERGARTEN, LLC,

Defendant.

INDEX NO. 655038/2018

MOTION DATE 08/06/2019

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

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KENNETH FRIEDMAN, BIERGARTEN, LLC

Plaintiff,

-against-

FRIEDFIELD BRESLIN, LLC

Defendant.

Third-Party
Index No. 595995/2018

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HON. SALIANN SCARPULLA:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 24, 25, 26, 27, 28, 29, 30, 37, 40, 41, 42, 43, 44, 45, 47, 48, 49, 56

were read on this motion to/for DISQUALIFY COUNSEL.

Upon the foregoing documents, it is

Defendants/third-party plaintiffs Kenneth Friedman (“Friedman”) and Biergarten, LLC (“Biergarten”) (collectively, “defendants”) move to disqualify the law firm of Kasowitz Benson Torres LLP (the “Firm”) from representing plaintiffs 1186 Broadway Tenant LLC (“Broadway Tenant”), 1186 Broadway Restaurant LLC (“Broadway Restaurant”) (collectively, “plaintiffs”), and third-party defendant Friedfield Breslin, LLC (“Friedfield”) or any other party in this action.

Background

This action arises out of the operation and management of two restaurants, the Breslin Restaurant and the John Dory Restaurant (collectively, “Restaurants”), and the food and beverage services (collectively, “Services”) at the Ace Hotel (“Hotel”) in New York City. Broadway Tenant operates the Hotel, and it is alleged that Broadway Restaurant is Broadway Tenant’s subsidiary. Friedman owns Biergarten, a restaurant management company.

On April 29, 2009, Biergarten and Broadway Restaurant executed an Amended and Restated Limited Liability Company Agreement (the “LLC Agreement”), under which the parties agreed to form Friedfield, a joint venture to operate and manage the Hotel’s Restaurants and Services. The LLC Agreement designated Biergarten as the managing member charged with the management and control of Friedfield. Plaintiffs furnished the initial capital for the operation. Friedfield and Broadway Tenant simultaneously executed a Restaurant Management Agreement (the “RMA”) for Biergarten to provide the Services.

Under the RMA, Broadway Tenant would receive an annual “Return on Investment” equal to 9.5% of net sales depending upon “Available Cash Flow.” Under the LLC Agreement, Biergarten would receive an annual operator management fee of either \$250,000 or 4.5% of Friedfield’s gross sales revenues, plus 2.25% of the gross sales revenues Friedfield generated from the Ace Hotel’s event space. In the event the

Return on Investment paid to Broadway Tenant was less than \$500,000 in any year after the third full year of operations, then Broadway Tenant could terminate the RMA.

Plaintiffs allege that the Restaurants generated significant revenues until an annual decline in cash flow began in 2015. Plaintiffs claim that annual audits in 2016 and 2017, followed by a forensic accounting of Friedfield's records, revealed, amongst other issues, poor financial management and recordkeeping pertaining to journal entries and cash receipts and disbursements. Also, the forensic audit allegedly revealed that defendants improperly calculated the Return on Investment paid to Tenant. Plaintiffs complain that defendants effectively hid Friedfield's true financial state, which would have triggered Broadway Tenant's right to terminate the RMA.

Plaintiffs commenced this action asserting causes of action for fraud, breach of contract, breach of fiduciary duty, and aiding and abetting a breach of fiduciary duty, unjust enrichment, and conversion related to defendants' management of Friedfield. After interposing separate answers, defendants brought a third-party complaint against Friedfield seeking contractual indemnification, defense and an advance of their attorneys' fees under the terms of the LLC Agreement and for a declaratory judgment.

Shortly thereafter, Friedman amended his answer to assert counterclaims for tortious interference with contract against Broadway Restaurant and for breach of contract against Broadway Tenant. Biergarten also amended its answer to assert counterclaims for breach of contract against plaintiffs and tortious interference with contract against Broadway Restaurant, as well as derivative counterclaims on behalf of

Friedfield, as a nominal defendant, for breach of fiduciary duty and breach of contract against Broadway Restaurant, and for aiding and abetting a breach of fiduciary duty against Broadway Tenant. The Firm presently represents plaintiffs in the primary action and Friedfield in the third-party action.

Defendants now move to disqualify the Firm on three grounds: (1) the Firm cannot represent one Friedfield member (Broadway Restaurant) against another Friedfield member (Biergarten) in a dispute regarding Friedfield; (2) the Firm cannot simultaneously represent Friedfield and Broadway Restaurant in the derivative action because Friedfield is effectively suing its own member, and should Friedfield prevail, plaintiffs would be liable to Friedfield; and (3) because an actual conflict exists between Friedfield and plaintiffs, the Firm cannot represent any party in this action..

In opposition, plaintiffs argue that there is no disqualifying conflict because the claims filed on behalf of Friedfield are derivative in nature; as such, Friedfield, as a nominal defendant, is a “passive” litigant. Additionally, plaintiffs contend that the alleged conflict is illusory because the derivative claims seek relief payable to defendants, not Friedfield.

Discussion

It is well settled that a party has the “right to representation by the attorney of its choice . . . and any restrictions [on that right] must be carefully scrutinized.” *Ullmann-Schneider v Lacher & Lovell-Taylor PC*, 110 AD3d 469, 469-70 (1st Dept 2013) (quotation marks and citations omitted). On a motion seeking to disqualify an

adversary's attorney, the court "must consider the totality of the circumstances and carefully balance the right of a party to be represented by counsel of his or her choosing against the other party's right to be free from possible prejudice due to the questioned representation." *Ferolito v Vultaggio*, 99 AD3d 19, 27 (1st Dept 2012) (quotation marks and citation omitted). As such, the use of a motion to disqualify as an offensive measure to gain a tactical advantage or to delay active litigation is discouraged. *See Solow v Grace & Co.*, 83 NY2d 303, 310 (1994).

At issue is a perceived conflict of interest between plaintiffs and Friedfield based upon Rules of Professional Conduct, 22 NYCRR 1200.0 Rules 1.7, "Conflict of interest: current clients," and 1.13, "Organization as client." Rule 1.7(a)(1) provides that, "[e]xcept as provided in paragraph (b), a lawyer shall not represent a client if a reasonably lawyer would conclude that . . . the representation will involve the lawyer in representing differing interests." The term "differing interests" is defined as "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest." Rule 1.0(f).

Pursuant to Rule 1.7(b)(3), "[n]otwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if . . . the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal" Comment 17 to Rule 1.7 (b) (3) reads, in pertinent part:

Paragraph (b) (3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or

other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding.

NY St Bar Assn rev June 2018.

Additionally, Rule 1.13(d) states that:

A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the concurrent representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

A corporation, or in this instance, a limited liability company, is customarily a passive litigant in a derivative action. *See Stilwell Value Partners IV., L.P. v Cavanaugh*, 123 AD3d 641, 642 (1st Dept 2014). A corporate defendant does not require separate, independent counsel because its appearance is "nominal," and the appearance of the same attorney for the nominal corporate defendant does not prejudice a shareholder from pursuing the derivative claims. *See 207 Second Ave. Realty Corp. v Salzman & Salzman*, 291 AD2d 243, 244 (1st Dept 2002).

Nevertheless, a corporate litigant should appear by independent counsel in certain instances. *See Russo v Zaharko*, 53 AD2d 663, 665 (2d Dept 1976). For instance, counsel may be disqualified from concurrently representing defendants sued in a derivative action where their interests conflict. *See Zedeck v Derfner Mgt. Inc.*, 98 AD3d 925, 925 (1st Dept 2012) (granting a motion to disqualify where the interests of one defendant, who held a 50% interest in the corporations, differed from those of the other defendants). Any "doubts as to the existence of a conflict of interest must be resolved in

favor of disqualification.” *Justinian Capital SPC v WestLB AG, N.Y. Branch*, 90 AD3d 585, 585 (1st Dept 2011) (internal quotation marks and citation omitted).

Here, defendants have met their burden on the disqualification motion with respect to representing third-party defendant Friedfield LLC. Despite plaintiffs’ characterization of Friedfield as a passive litigant, the fact that defendants have brought a third-party action against Friedfield for indemnification has required Friedfield to formally appear in this dispute. Indeed, as noted at oral argument, defendants have separately moved for an advancement of their fees, which is a motion that merits a response from Friedfield.

Moreover, the potential for conflict is apparent. Significantly, LLC Agreement LLC Agreement § 10.2 (a), reads in part:

To the fullest extent permitted by applicable law, each Member and each Covered Person of such Member shall be entitled to indemnification from the Company ... for any loss, damage or claim incurred by such Member and each Covered Person of such Member by reason of any act or omission performed or omitted by such Member or Covered person in good faith on behalf of the Company ... except that no Member or Covered Person shall be entitled to be indemnified in respect of any loss, damage or claim incurred by such Member or Covered Person by reason of gross negligence or willful misconduct with respect to such acts or omissions

Plaintiffs and defendants each allege that the other breached their fiduciary obligations owed to Friedfield, and a necessary element to prevail on that cause of action is misconduct. *See Pokoik v Pokoik*, 115 AD3d 428, 429 (1st Dept 2014). If it were ultimately established that defendants engaged in misconduct, sufficient to support the breach of fiduciary duty claim, then Friedfield would presumably object to defendants’ invocation of the contractual indemnification provision in the LLC Agreement because

Friedfield may not be obligated to indemnify them. In that regard, Friedfield's and plaintiffs' interests are aligned and do not conflict.¹

Nevertheless, the potential for conflict exists where, in view of the derivative claims, the Firm may be placed in a situation where it may protect plaintiffs' interests over those of Friedfield. *See Schmidt v Magnetic Head Corp.*, 101 AD2d 268, 279 (2d Dept 1984) (concluding that the corporation should appear by independent counsel because of a "clear potential conflict"). At a minimum, if Broadway Restaurant were to prevail, it would be entitled to contractual indemnification from Friedfield. But, if it is subsequently determined that Broadway Restaurant engaged in misconduct related to Friedfield, then the Firm may be placed in an untenable situation where its clients' interests would conflict, as discussed under Rule 1.7(b)(3).

Plaintiffs' contention that the present motion is a strategic delay tactic is unpersuasive. The motion was filed one month after the Firm's appearance for Friedfield at a preliminary conference. Thus, there was no unnecessary delay. *See generally Potters v 71st St. Lexington Corp.*, 8 AD3d 198, 199 (1st Dept 2004). Therefore, the portion of the motion seeking to disqualify the Firm from representing Friedfield is granted. *See Justinian Capital SPC*, 90 AD3d at 585.

¹ To the extent defendants assert that plaintiffs lacked the requisite authority to appoint the Firm to appear for Friedfield, this argument was not raised in the initial moving papers. In any event, it is not clear whether Broadway Restaurant and Biergarten could have jointly agreed on which law firm would represent Friedfield in this dispute in accordance with LLC Agreement § 5.2.

However, the facet of the motion that seeks to disqualify the Firm from representing any party in this action, is denied. *See Culligan Soft Water Co. v Clayton Dubilier & Rice LLC*, 139 AD3d 621, 621 (1st Dept 2016) (denying a motion seeking to disqualify counsel from representing any party and directing the corporate defendant to obtain separate counsel should the amended complaint survive the pleading stage).²

In accordance with the foregoing, it is hereby

ORDERED that the motion seeking to disqualify the law firm of Kasowitz Benson Torres LLP from representing plaintiffs 1186 Broadway Tenant LLC and 1186 Broadway Restaurant LLC and third-party defendant Friedfield LLC or any other party in this dispute is granted only to the extent that the law firm of Kasowitz Benson Torres LLP is disqualified from representing third-party defendant Friedfield LLC in this matter and is otherwise denied; and it is further

ORDERED that the action is stayed from this date until 30 days after service of a copy of this order with notice of entry upon counsel for all parties and upon third-party defendant Friedfield LLC who shall, within the 30 day period, retain another attorney in place of Kasowitz Benson Torres LLP; and it is further

² Several of the cases cited by defendants in support of its motion are inapposite because, in those actions, the law firms were disqualified based on their prior relationships representing one of the parties. There is no indication that the Firm enjoyed a prior attorney-client relationship with Friedfield before this dispute. *See, e.g., Deerin v Ocean Rich Foods, LLC*, 158 AD3d 603, 608 (2d Dept 2018); *Campbell v McKeon*, 75 AD3d 479, 480 (1st Dept 2010); *Riederman Assoc. LLC v Justin*, 2017 NY Slip Op 30812[U], *4-5 (Sup Ct, NY County 2017); *Barmasch v Perlman*, 2013 NY Slip Op 32460[U], *4-5 (Sup Ct, NY County 2013).

ORDERED that the new attorney retained by third-party defendant Friedfield LLC shall file a notice of appearance; and it is further

ORDERED that such filing with the Clerk of the General Clerk's Office and the Clerk of the Part shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supmanh); and it is further

ORDERED that counsel are directed to appear for a conference in Part 39, Room 208, 60 Centre Street on January 8, 2020 at 2:15p.m.

This constitutes the decision and order of the Court.

11/21/2019
DATE


SALIANN SCARPULLA, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE