Transperfect Document Mgt., Inc. v Collard
2012 NY Slip Op 33805(U)
January 17, 2012
Supreme Court, New York County
Docket Number: 116290/10
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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TRANSPERFECT DOCUMENT MANAGEMENT, INC.,

Plaintiff,

INDEX NO. 116290/10

-against-

PETER M. COLLARD, JR.,

Defendant.

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JOAN A. MADDEN, J.:

Defendant Peter M. Collard, Jr. moves for an order disqualifying Daniel Turinsky, Esq. and Kasowitz, Benson, Torres & Friedman LLP ("Kasowitz, Benson" or the "Kasowitz firm") from representing plaintiff TransPerfect Document Management, Inc.("TransPerfect"), in this action. Plaintiff Transperfect opposes the motion.

The following facts, for the most part, are taken from defendant Collard's affidavit and the exhibits attached thereto, and are not disputed unless otherwise noted. From August 2002 to November 2007, defendant Collard was employed by ImageNet of Washington, D.C., Ltd, and in August 2006, he executed a non-disclosure, non-solicitation and non-compete agreement with ImageNet. In 2007, after terminating Collard's employment, ImageNet commenced an action against him in Texas, alleging, *inter alia*, that he misappropriated and misused confidential, proprietary and trade secret business information. On February 15, 2008, the Texas action was resolved pursuant to a Settlement Agreement, in which Collard agreed, *inter alia*, not to compete with ImageNet, not to solicit ImageNet's customers, and not to solicit or hire ImageNet's employees.

On or about July 9, 2008, Collard was hired by plaintiff TransPerfect. According to Collard, he advised TransPerfect of the non-compete provisions in his 2008 settlement agreement with ImageNet, and "expressed concern that the position violated" the agreement. By that time, ImageNet was "renamed" Inventus of Washington, D.C. Collard states that on July 11, 2008, Inventus' general counsel wrote to TransPerfect, claiming his employment violated the non-competition, non-solicitation and non-interference provisions of the ImageNet settlement agreement, and threatening legal action. On July 30, 2008, TransPerfect's President & CEO, Peter Shawe, wrote Collard a letter acknowledging that Collard had "completely and accurately disclosed to us any contractual obligations with your former employer, ImageNet WDC," and stating that "TransPerfect will indemnify you against all claims, liabilities, and expenses, including reasonable attorney's fees and expert's fees, that may be incurred arising from issues surrounding your employment with TransPerfect and your former employment." On December 17, 2008, Shaw wrote an addendum to the July 30, 2008 letter, stating: "TransPerfect is requesting Peter Collard aid Brooke Christian in his management [of] TransPerfect Document Management. . . . [and] believes this request is within applicable law and does not violate any lawful and enforceable terms of Peter Collard's contract with his previous employer ImageNet. Provided Peter Collard follows TransPerfect's directives, TransPerfect will indemnify Peter Collard as described in the letter of July 30, 2008."

In February 2009, Collard received an email from Darrin Campbell, President of The Elite Group, LLC a/k/a MM&C. MM&C apparently purchased Inventus and "assumed" Inventus' rights in Collard's 2008 settlement agreement with ImageNet. Campbell accused Collard of violating his non-compete obligations under the ImageNet settlement agreement, and

suggested that TransPerfect "buy out the agreement . . . or we will seriously contemplate filing a claim." Collard forward the email to TransPerfect's executives Phil Shawe and Brooke Christian, and Shawe responded by confirming that Collard was "indemnified in writing and verbally." Collard states that "[a]t some point, Mr. Christian told me that TransPerfect would attempt to negotiate an agreement with MM&C/The Elite Group" and that it was his "understanding that Mr. Christian contacted Daniel Turinsky, Esq. as attorney with the law firm of Kasowitz, Benson, Torres & Friedman LLP, to negotiate with MM&C/The Elite Group as my representative and on my behalf regarding the language of a written settlement and release." Collard also states that "[i]t was my clear understanding that Mr. Turinsky was, in fact, representing me in connection with those efforts, and that his services on my behalf were being paid for by TransPerfect in fulfillment of Mr. Christian's promise in early January 2009 that he would hire and pay for a lawyer for me if I desired." Collard states that he and attorney Turinsky "communicated directly with each other in February 2009 regarding those negotiations and the related drafting of a written settlement agreement and release, and we typically copied another Kasowitz, Benson attorney, Eric Wallach, and Mr. Christian on our e-mail correspondence."

Collard further states that he "had at least one telephone conference with Daniel Turinsky, Mr. Christian, and possibly others during which we discussed settlement strategy and related issues, and whether TransPerfect would be included as a party to the agreement," and during that telephone conference and in a February 19, 2009 email, Turinsky "advised that I alone, and not TransPerfect, should be signatory to the agreement" with MM&C/Elite. Collard explains that he "conferred via e-mail with Mr. Turinsky regarding the proposed language in the settlement and

release during the negotiations" with MM&C/Elite and "forwarded that language to Mr. Wallace, who agreed to provide his feedback as a matter of courtesy and friendship." Collard states that his references to Mr. Wallace as "my attorney" were meant "to be shorthand for conveying that Mr. Wallace had been my attorney in the Texas lawsuit filed by ImageNet" and that "Turinsky alone . . .was representing me in the negotiations with MM&C/Elite, and who had primary responsibility for reviewing, drafting, and approving a settlement agreement and release on my behalf." On February 20, 2009, Collard executed a Settlement Agreement and Release which provided for MM&C to release Collard from his non-competition and non-solicitation obligations, in return for the payment of $37,500. Collard states that it is his "understanding that TransPerfect paid Kasowitz, Benson for the time spent and expenses incurred by Mr. Turinsky . . .while working on my behalf in connection with the drafting of the Settlement Agreement and Release and the related negotiations."

TransPerfect alleges that on December 6, 2010, Collard advised his supervisor that he was resigning. Collard alleges that TransPerfect terminated his employment on December 7, 2010. It is not disputed that Collard subsequently began working for Modus, LLC, his current employer.

On December 16, 2010, TransPerfect commenced the instant action for injunctive relief and damages, asserting claims for breach of contract, misappropriate of confidential information, breach of fiduciary duty and duty of loyalty, and unfair competition. By a decision and order dated February 15, 2011, this court granted TransPerfect's motion for a preliminary injunction. On March 3, 2011, Collard filed his first motion for disqualification of TransPerfect's counsel, Daniel Turinsky and the Kasowitz firm.

On March 16, 2011, the parties executed a Stipulation and Order of Settlement, which this court so-ordered on March 29, 2011; the parties also executed a Stipulation of Discontinuance with Prejudice. In the meanwhile, during the settlement negotiations, the parties had been adjourning Collard's disqualification motion on consent, and after the settlement was finalized, the court issued a short form order dated March 29, 2011, permitting the motion to be withdrawn in view of the settlement. On or about June 20, 2011, plaintiff moved by order to show cause, pursuant to Judiciary Law § 753(A)(3) and CPLR 5104, to hold Collard and his current employer, Modus, in civil contempt for willful violation of the stipulation of settlement (motion sequence no. 003). Although Collard initially sought to "renew" his original motion for disqualification, on August 15, 2011, he made a second motion to disqualify plaintiff's counsel, which is now before this court.

Disqualification involves the denial of a party's right to counsel of its own choice, so protecting that right is valued and restricting it is disfavored. See S & S Hotel Ventures Ltd Partnership v. 777 S.H. Corp., 69 NY2d 437, 443 (1987). Consequently, the party seeking disqualification bears the burden of making a "clear showing that disqualification is warranted." Aryeh v. Aryeh, 14 AD3d 634 (2nd Dept 2005); see also Petrossian v. Grossman, 219 AD2d 587 (2nd Dept 1995).

The Code of Professional Responsibility prohibits an attorney from "represent[ing] 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." DR 5-108(a) (1); see Pelligrino v. Oppenheimer & Co, Inc, 49 AD3d 94, 97 (1st Dept 2008). A party seeking disqualification of an attorney or law firm on the ground of prior representation must establish that: 1) a prior attorney-

client relationship existed between the moving party and opposing counsel; 2) both representations involved matters that are substantially related; and 3) the interests of the present and former clients are materially adverse. See Tekni-Plex, Inc. v. Meyner & Landis, 89 NY2d 123, 131 (1996); Pelligrino v. Oppenheimer & Co, Inc, supra at 98.

"To determine whether an attorney client relationship exists, a court must consider the parties' actions." Id at 99. Ordinarily, such "relationship is established where there is an explicit undertaking to perform a specific task," and the "existence of the relationship is not dependent upon the payment of a fee or an explicit agreement." Id. The standard, however, for determining such relationship is modified where, as here, a corporation's counsel provides legal representation to an employee of the corporation. See Eurycleia Partners, LP v. Seward & Kissel, LLP, 12 NY3d 553, 562 (2009); Pelligrino v. Oppenheimer & Co, Inc, supra at 100; Talvy v. American Red Cross in Greater New York, 205 AD2d 143, 148 (1st Dept 1994), aff'd 87 NY2d 826 (1995). In such cases, "[u]nless the parties have expressly agreed otherwise in the circumstances of a particular matter, a lawyer for the corporation represents the corporation, not its employees." Talvy v. American Red Cross in Greater New York, supra at 148; accord Eurycleia Partners, LP v. Seward & Kissel, LLP, supra at 562; Pelligrino v. Oppenheimer & Co, Inc, supra at 100.

Applying the foregoing principles, the court concludes that defendant Collard has not made a sufficient showing that he had an attorney client relationship with attorney Turinsky or Turinsky's firm, Kasowitz, Benson, Torres & Friedman, LLP. Even though Collard alleges that attorney Turinsky was representing him, and submits a copy of an email written by Mr. Turinsky stating that Collard was "his client," Collard has neither alleged nor produced documentary proof

establishing the existence of an "express agreement" to vary from the general rule that a corporation's attorney represents the corporation, and not its employee. Talvy v. American Red Cross in Greater New York, supra at 148.

In February 2009, Turinsky represented Collard when Collard was employed by TransPerfect, in connection with the claims by MM&C/Elite that Collard was performing work for TransPerfect in violation of the restrictive covenants contained in Collard's February 2009 settlement agreement with ImageNet. As noted above, Collard acknowledges that he forwarded Elite's threatening email to TransPerfect's executives, Shawe and Christian, and Shawe responded that Collard was indemnified and Christian responded that TransPerfect would attempt to negotiate an agreement with MM&C/Elite. Collard also acknowledges that it was his "understanding" that Christian contacted Turinsky regarding the language of a written settlement and release.

It is clear that Turinsky and his firm had a longstanding and ongoing attorney client relationship with TransPerfect. Turinsky submits an affirmation (which is consistent with an affidavit from Brooke Christian, TransPerfect's Senior Vice President for Global Sales), that he and his firm have represented TransPerfect "in numerous matters since 2001," including "several litigations," and he has "regularly provided legal advice to TransPerfect with respect to a variety of issues for the past four years." Turinsky states that TransPerfect retained his firm after the settlement terms with MM&C/Elite had been worked out, and that he was "merely asked to coordinate with MM&C's counsel to memorialize the terms of the settlement in a written agreement." He specifically states that "I never advised Mr. Collard that I would be acting as his attorney in connection with the negotiations with MM&C, and believe that I copied Mr.

Christian, my client contact at TransPerfect for this matter, on all substantive communications with Mr. Collard."

Collard admits that TransPerfect paid the Kasowitz firm for Turinsky's legal representation in negotiating the settlement agreement with MM&C/Elite. Notably, TransPerfect had agreed to "indemnify" Collard "against all claims, liabilities, and expenses, including reasonable attorney's fees and expert's fees, that may be incurred arising from issues surrounding your employment with TransPerfect and your former employment." Pursuant to that agreement, Collard presumably could have hired his own attorney at his own expense, and then sought indemnification or reimbursement from TransPerfect. Collard, however, opted to use the services of his employer's attorney, at no expense of his own. The record also shows that both Collard and Turinsky consistently copied Brooke Christian, TransPerfect's Senior Vice President for Global Sales, on their e-mail correspondence regarding the settlement negotiations.

Even accepting Collard's assertion that he had no other attorney representing him, that fact alone would not alter the court's conclusion as to the absence of an attorney client relationship with Turinsky and the Kasowitz firm. Moreover, Collard admits that he sought and received at least some legal advice from attorney Richard Wallace, a personal friend. Wallace submits an affidavit explaining that in January and February 2009, Collard "called on me for some friendly advice regarding his employment" with TransPerfect, they spoke on the phone a "few times and he forwarded to me a series of emails and drafts of a settlement agreement given to him by Daniel Turinsky," and "I reviewed those documents and provided some advice to Mr. Collard." Also, Collard's February 19, 2009 e-mail to attorneys Turinsky and Wallach (both of the Kasowitz firm), and copied to Brooke Christian, stated: "Hi Dan [Daniel Turinsky], here is

some language on the release from *my attorney*, Rick Wallace of Wallace & King, that might help with MMC's draft" [emphasis added].

Under the circumstances presented, Collard has not established that the parties expressly agreed to depart from the general rule that a corporation's attorneys represent the corporation and not its employee, and for that reason the court concludes that Collard did not have a prior attorney client relationship with Turinsky or the Kasowitz firm. See Eurycleia Partners, LP v. Seward & Kissel, LLP, supra at 562; Campbell v. McKeon, 75 AD3d 479 (1st Dept 2010); Pelligrino v. Oppenheimer & Co, Inc, supra at 100; Talvy v. American Red Cross in Greater New York, supra at 148.

The court likewise concludes that Collard has not established that the matter currently before this court is substantially related to the representation previously provided by attorney Turinsky and the Kasowitz firm in connection with MM&C's allegations that Collard's employment with TransPerfect violated the restrictive covenants in Collard's agreement with ImageNet. See Jamaica Public Service, Co, Ltd v. AIU Insurance Co, 92 NY2d 631 (1998). In March 2011, Collard, TransPerfect and Modus settled the instant action by executing a so-ordered Stipulation and Order of Settlement, and a Stipulation of Discontinuance with Prejudice. Pursuant to Paragraphs 9 and 10 of the Stipulation of Settlement, "[t]he Parties [Transperfect and Collard] and Modus [Collard's current employer] agree that any violation of the terms of this Order shall be punishable by contempt, among other remedies available to the Court and the non-breaching party," and "[t]his Court shall retain jurisdiction over the Parties and Modus (which voluntarily consents to the Court's jurisdiction) for the purposes of enforcing this Order."

In June 2011, TransPerfect moved for an order holding Collard and Modus in civil contempt for willful violation of the stipulation of settlement. In accordance with the express terms of the stipulation, TransPerfect is now seeking to invoke the court's continuing jurisdiction over the enforcement of the settlement agreement which fully and finally disposed of the instant action on its merits. Since the underlying mater is finally disposed, the issues before this court are now limited to the enforcement of the parties' agreement settling this action, specifically whether Collard and his current employer, Modus, have violated the terms of the settlement. The instant matter, therefore, is completely unrelated to the matter in February 2009 where Turinsky represented Collard as an employee of TransPerfect, in connection with MM&C's allegations that Collard's work for TransPerfect violated the restrictive covenants in Collard's agreement with ImageNet. See Jamaica Public Service, Co, Ltd v. AIU Insurance Co, supra; Metro Cash & Carry Corp. v. Berkman, 87 AD2d 783, 784 (1st Dept 1981).

Collard's further reliance on the advocate as witness rule is misplaced. He has not identified and cannot identify any testimony by Turinsky or another member of the Kasowitz firm which is necessary and bears any relevance to the matter presently before this court, which as discussed above is limited to the enforcement of Collard's agreement with TransPerfect settling the instant action. See Brooks v. Lewin, 48 AD3d 289 (1st Dept), lv dism in part and denied in part, 11 NY3d 826 (2008); Broadwhite Associates v. Truong, 237 AD2d 162, 163 (1st Dept 1997).

Based on the foregoing, Collard has not met his burden of showing that disqualification of TransPerfect's counsel is warranted, and his motion is denied. See Tekni-Plex, Inc. v. Meyner & Landis, supra; Pelligrino v. Oppenheimer & Co, supra. In view of this determination,

the court need not consider the additional arguments raised by TransPerfect in opposition to the motion.

Accordingly, it is

ORDERED that defendant's motion is denied.

DATED: January 17, 2012

ENTER:

J.S.C.