

**Gentile v 2400 Johnson Ave Owners, Inc.**

2023 NY Slip Op 34639(U)

February 21, 2023

Supreme Court, Bronx County

Docket Number: Index No. 807753/2022E

Judge: Naita A. Semaj

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NEW YORK SUPREME COURT – COUNTY OF BRONX

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 27

PAUL T. GENTILE et al

Index No. 807753/2022E

Plaintiff,
- against -

Hon. Naita A. Semaj,
Justice of the Supreme Court

2400 JOHNSON AVE OWNERS, INC. et al
Respondent.

The following papers numbered NYSCEF Doc. #25 to NYSCEF Doc. #45 were read on the Plaintiff's motions (Seq. No. 1) to disqualify Respondent's counsel, were noticed, and duly submitted on July 13, 2023.

Table with 2 columns: Sequence No. 1, NYSCEF Doc. Nos.
Rows include: Notice of Motion – Exhibits and Affidavits Annexed, Cross Motion – Exhibits and Affidavits Annexed, Answering Affidavit and Exhibits, Memorandum of Law, Reply Affidavit

See attached decision and order dated July 21, 2023.

Dated: 7/21/23

Hon. Naita A. Semaj, J.S.C. (with signature)

- 1. CHECK ONE... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
2. MOTION IS... GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE... SETTLE ORDER SUBMIT ORDER

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX

-----X  
PAUL T. GENTILE et al

Plaintiff,

DECISION and ORDER

Index No. 807753/2022E

- against -

2400 JOHNSON AVE OWNERS, INC. et al

Respondent.

-----X  
**HON. NAITA A. SEMAJ**

Upon the foregoing papers, the motion (Seq. No. #1) by the Plaintiff, for an order disqualifying the firm Kagan Lubric Lepper Finkelstein & Gold LLP as counsel for Respondents, 2400 Johnson Avenue Owners, Inc., the Board of Directors of 2400 Johnson Avenue Owners, Inc., Laura Fieber, James F. McShane, David Kahn, Jim Corollo and Biswa Bhowmick, based upon a purported conflict of interest is decided as follows.

**Plaintiff’s motion to disqualify**

Motion for disqualification of the Firm is based upon Rule 1.7 of the Rules of Professional Conduct, which provides: (a) (1) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that the representation will involve the lawyer in representing differing interests. (b) Notwithstanding the existence of a concurrent conflict of interest a lawyer may represent a client if the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client, the representation is not prohibited by law 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; and each affected client gives informed consent, confirmed in writing. (Rules of Professional Conduct Rule 1.7 [22 NYCRR § 1200]).

Disqualification of counsel 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 matter” (*Tekni-Plex, Inc. v Meyner & Landis*, 89 NY2d 123, 131 [1996] [internal citations omitted]). A party's entitlement to be represented in ongoing litigation by counsel of his or her own choosing is a valued right which should not be abridged absent a clear showing that disqualification is warranted (see *S & S Hotel Ventures LP v. 777 S.H. Corp.*, 69 NY2d 437 [1987; *Dietrich v Dietrich*, 136 AD3d 461 [1st Dept 2016])). “The party seeking to disqualify a law firm or an attorney bear [a heavy] burden to show sufficient proof to warrant such a determination” (*Gulino v Gulino*, 35 AD3d 81, 812 [2d Dept 2006] [internal citations omitted]; see also *Ullmann -Schneider v. Lacher & Lovell-Taylor PC*, 110 AD3d 469 [1st Dept 2013]). Furthermore, “whether or not to disqualify an attorney or law firm is a matter which rests in the sound discretion of the court” (*Id.* [internal citations omitted]).

In the instant action, the Plaintiff alleges that the law firm should be disqualified based solely on purported differing interests arising from the Board and the Board Respondents breaching their fiduciary duty and engaging in conduct not in the best interest of the shareholders or the Co-op. The Plaintiff alleges that: 1) The board members treated Plaintiffs unequally and unfairly in connection with the handling of their drinking water complaint; 2) Respondents failed to act in the best interest of the Co-op’s shareholders in failing to disclose the Plaintiff’s water testing results with shareholders; 3) Respondent board members failed to act with the utmost loyalty and care in connection with the

drinking water complaint by not sufficiently investigating Plaintiff's claims; and 4) Respondent Board members improperly took steps to prevent the Plaintiff from obtaining a seat on the Board.

The Respondents assert that Plaintiff's argument for disqualification is premised on his belief that the Respondent corporation should make a cross claim against the Respondent Board members for breach of their fiduciary duty. Respondent contends that there has been no breach of fiduciary duty. Moreover, counsel for the Respondent argued that "it has long been established that joint representation is appropriate for both the cooperative corporation and the Board Members in actions brought by tenant shareholders for production of records, breach of warranty of habitability, failure to provide services or effect a repair or decision to enforce or not to enforce House Rules etc." (*See Respondent's motion*, p. 11, #36)

Plaintiff claims he was threatened with eviction within weeks of filing this claim. In support of his position, Plaintiff attached a letter from the Board, dated December 15, 2021 and contained in Plaintiff's exhibit E, which asks Plaintiff to remedy a decade old violation in a specific time frame and sets forth possible action to be taken if the violation is not remedied. Respondent also communicated to the Petitioner, in an email dated January 21, 2022 and also contained in Exhibit E, that such notice was sent after so much time had passed due to a lender requesting all permits violations be closed to secure funding and that an identical notice was sent to at least one other tenant. It therefore cannot be said, based on these facts and evidence before the court, that any threats or retaliation occurred.

The Plaintiff further asserts that the conflicting interest between the Respondents flows from the board members failure to take appropriate actions to address the Plaintiff's water complaint and their failure to notify the other residents of the results of Plaintiff's water test and that such failure results in a breach of their fiduciary duty. The Plaintiff believes that the Respondent Board had a duty to share his water testing results with all of the residents and the failure to do so was a fatal breach of the Board's fiduciary duty to the Co-op which can give rise to the Co-op itself having a claim against the individual Board members. However, this argument is without merit as, following Plaintiff's complaints and testing of the water, the Respondent followed up by conducted their own testing. That testing revealed, in relevant part, that the water posed no immediate health risks.

Finally, the Plaintiff claims that the law firm should be disqualified because some of the Respondent's may wish to settle and, at that point, there would be a conflict of interest with the other Respondents who remain named. This argument is highly speculative and in no way lends itself to a requirement that, at this juncture, there is any basis to find that each and every respondent herein should have separate counsel. As such, the Plaintiff's motion to disqualify Respondent's counsel is denied.

### **Respondent's Cross Motion to dismiss**

Respondent seeks to dismiss the complaint against the Board of directors and Board members in that "the Board of Directors may not be separately named as a party to any court action proceeding, because it does not have a separate judicial existence from 2400 Johnson and, specifically here, is not a party to Plaintiffs' proprietary lease". The Respondent asserts that since the Plaintiff failed to prove that the Respondents breached a fiduciary duty the action should be dismissed as to these Respondents. (Respondent's motion, p. 14, NYSCEF #38). The Plaintiff claims that the Respondent's motion is untimely as dismissal under CPLR 3211 may only be made "[a]ny time before service of the responsive pleading is required. Plaintiffs further argues that the board member Respondents should remain named Respondents because "the Complaint contains

numerous pages of detailed factual allegations describing the Board Respondents' bad faith conduct undertaken in breach of their fiduciary obligations to the Plaintiffs." (See *Plaintiff's Reply*, NYSCEF # 45).

CPLR §3211(e) states that any objection or response based upon a ground set forth in paragraphs one, three, four, five and six of subdivision (a) is waived unless raised either by such motion or in the responsive pleading. It also states that a motion based upon a ground specified in paragraph two, *seven* or ten of subdivision (a) may be made at any subsequent time or in a later pleading. Accordingly, the Respondent's claim is not barred for untimeliness. Additionally, there is no evidence before this court that there was specific action taken by any individual board member, that would amount to a breach of a fiduciary duty. The Plaintiff has also failed to set forth any specific tortious actions taken by the board members that could be considered outside of legitimate condominium purposes. Individual Board members are protected by the business judgment rule absent allegations of tortious acts outside of legitimate condominium purposes (*Pelton v. 77 Park Ave. Condominium*, 38 A.D.3d 1, 825 N.Y.S.2d 28 [1st Dept. 2006], overruled on other grounds by *Fletcher v Dakota, Inc.*, 99 A.D.3d 43, 948 N.Y.S.2d 263 [1st Dept. 2012]). It has long been held by this Court that "a corporate officer who participates in the commission of a tort may be held individually liable, ... regardless of whether the corporate veil is pierced" (*Peguero v. 601 Realty Corp.*, 58 A.D.3d 556, 873 N.Y.S.2d 17 [2009] [internal quotation marks omitted], quoting *Espinosa v. Rand*, 24 A.D.3d 102, 102, 806 N.Y.S.2d 186 [2005], quoting *American Exp. Travel Related Services Co., Inc. v. North Atlantic Resources, Inc.*, 261 A.D.2d 310, 311, 691 N.Y.S.2d 403 [1999]).

Accordingly, it is hereby

**ORDERED** that Plaintiff's motion (Seq. 1) to disqualify Respondent's counsel is **DENIED**; and it is further


**ORDERED** that Respondent's motion to dismiss the Complaint against the Board of Directors and Board Members is **GRANTED** in its entirety; and it is further

**ORDERED** that the action will proceed only against Respondent 2400 Johnson Avenue Owners, Inc

This is the Decision and Order of the Court.

Dated: 7/21/2023

ENTER



Naita A. Semaj, J.S.C.