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Avigdor v Rosenstock
2015 NY Slip Op 50721(U)
Decided on May 12, 2015
Supreme Court, Kings County
Demarest, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on May 12, 2015

Supreme Court, Kings County

Morton Avigdor, Plaintiff,

against

Paul Rosenstock, Doctors on Call, Dr. Management Service, Inc., Dr. Management Service of New York, LLC, Comprehensive Geriatric Medicine, P.C., 1651 Coney Island Associates, LLC, 1651 Coney Island Associates, L.P., Medical Network Services, P.C., ABC Corps 1-10, John Doe 1-10, Defendants.

505789/2014

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Carolyn E. Demarest, J.

The following e-filed papers read herein:

*Papers [*2]Numbered*

Notice of Motion/Order to Show Cause/

Petition/Cross Motion and

Affidavits (Affirmations) Annexed*22-30*

Opposing Affidavits (Affirmations)*54-75*

Reply Affidavits (Affirmations)*76-77*

Affidavit (Affirmation)

Other Papers

In this action by plaintiff Morton Avigdor (plaintiff) against defendants Paul Rosenstock (Rosenstock), Doctors on Call, Dr. Management Service, Inc., Dr. Management Service of New York, LLC, Comprehensive Geriatric Medicine, P.C., 1651 Coney Island Associates, LLC, 1651 Coney Island Avenue Associates, L.P., Medical Network Services, P.C., ABC Corps. 1-10, and John Doe 1-10 (collectively, defendants), plaintiff cross-moves,[FN1] under motion sequence number three, for an order: (1) disqualifying Jacob S. Feinzeig, Esq. (Mr. Feinzeig) from acting as attorney for defendants in this action because he previously represented him in a related matter and obtained his confidential information at that time, and (2) pursuant to CPLR 3025, granting him leave to amend his complaint.[FN2]

BACKGROUND

In 1968, Doctors on Call was established by parties unrelated to this litigation. According to plaintiff, who is an attorney, in 2005, he and Rosenstock, who is a physician,

purchased Doctors on Call together for about $50,000; plaintiff paid $35,000 towards this purchase and Rosenstock paid the other $15,000, but each of them acquired a 50% interest [FN3] The entity information of the NYS Department of State Division of [*3]Corporations reflects that Dr. Management Service, Inc. was incorporated on August 1, 2005 as a domestic business corporation with a principal executive office address at 7104 Fort Hamilton Parkway in Brooklyn, New York (the 7104 Fort Hamilton Parkway building), and that Rosenstock was its chief executive officer. Plaintiff alleges that Dr. Management Service, Inc. was incorporated at that time as a vehicle to operate Doctors on Call. Plaintiff claims that since he was not a physician and not familiar with the business of medicine, he agreed to let Rosenstock handle the day-to-day operations of Doctors on Call.

Subsequently, a written agreement between plaintiff and Rosenstock, dated September 11, 2008 (the 2008 agreement), was executed, effective September 1, 2008. According to plaintiff, the 2008 agreement reduced his share in Doctors on Call to 20%. The 2008 agreement provided that a side letter would be drawn indicating a 20% ownership share for plaintiff and an 80% ownership share for Rosenstock in Doctors on Call.

Plaintiff and Rosenstock further agreed, in the 2008 agreement, that Doctors on Call, as the tenant, would sign a confession of judgment for eviction from the second floor of its then current premises, the 7104 Fort Hamilton Parkway building, upon which plaintiff, as the landlord, would be able to execute with one week's prior notice in the event that rent was in arrears for more than 30 days, with the exception that Doctors on Call would have the right to cure its outstanding three months rent arrears by paying two months of rent for each of the next three months. The 2008 agreement also provided that the payment of business expenses would require prior authorization of both plaintiff and Rosenstock with the following exceptions: (1) expenses under $2,000, but all expense payments to employees required approval, (2) payroll, and (3) payment to approved vendors, with a list of vendors to be reviewed by both plaintiff and Rosenstock. The 2008 agreement set forth that plaintiff would attend all meetings with strategic partners and/or customers, such as Elderplan, Metropolitan Geriatric, HMO's, etc., but that plaintiff would not be introduced at these meetings as a partner or equity holder in Doctors on Call.

Pursuant to the terms of the 2008 agreement, plaintiff was not to be called on to make any additional contributions of capital, either debt or equity, to maintain his ownership interest in Doctors on Call, and that dilution in the event of "outside" equity contributions was to be pro rata (i.e., on an 80/20% basis). The 2008 agreement also provided that Rosenstock was to "accrue salary of $3,000 per week based on his devoting a minimum of 20 hours per week exclusively to Doctors on Call", but that this salary would no longer accrue after 150 days beginning September 1, 2008, and that this payout would not be made until Doctors on Call was deemed to be "cash flow positive" by the company's certified public accountant but that Rosenstock would be entitled to be paid this salary as long as the company remained cash flow positive. Under the 2008 agreement, plaintiff was to be paid $130 per hour on a pre-specified ad hoc basis for any [*4]consulting or legal work performed for the benefit of Doctors on Call, but not beyond 150 days beginning September 1, 2008, and also only when Doctors on Call was deemed cash flow positive.

In addition, the 2008 agreement stated that plaintiff would lend Rosenstock $30,000, secured by Rosenstock's partnership with him in an adjacent building, and would also lend him an additional $15,000 within two weeks subject to this same lien and a favorable status with regard to a pending Elderplan deal. The 2008 agreement further set forth that $10,500 of Rosenstock's personal funds contributed to the company on or around September 1, 2008 was to be carried on its books as a non-interest bearing loan. Pursuant to the 2008 agreement, plaintiff was given the absolute right to audit the books and monitor the activities of Doctors on Call at his discretion and in a time and manner of his choosing, and Rosenstock was to do everything in his power to facilitate the exercise of that right.

Plaintiff claims that after the execution of the 2008 agreement, Rosenstock continued to operate Doctors on Call for years and regularly told him that it was not making any money and that it was not profitable. Plaintiff also claims to have repeatedly demanded to review the financial records of Doctors on Call, but was denied access. Plaintiff further claims that Rosenstock has now denied that he has any ownership interest in Doctors on Call.

Plaintiff asserts that Doctors on Call has become a profitable company and is now worth millions of dollars, that Rosenstock has been paying himself a significant salary for

work that he performed for Doctors on Call from 2008 to the present, and that Rosenstock has also given himself other compensation, such as health and retirement benefits. Doctors on Call has moved from the 7104 Fort Hamilton Parkway building into new and larger office space and has hired additional employees, and plaintiff believes that it now has approximately 40 employees.

Plaintiff alleges that over the years, Rosenstock and/or unknown persons (which he has designated as John Doe 1-10) associated with Rosenstock have created other legal entities, which Rosenstock has been using to improperly conceal Doctors on Call's true finances. Plaintiff states that these entities are Dr. Management Service of New York, LLC, Comprehensive Geriatric Medicine, P.C., 1651 Coney Island Associates, LLC, 1651 Coney Island Avenue Associates, L.P., Medical Network Services, P.C., and ABC Corps. 1-10. Plaintiff alleges that Doctors on Call's income has been and is being improperly attributed to these entities, that Doctors on Call's funds have been, and are being, improperly used to pay for the expenses of these entities, and that these entities are improperly utilizing Doctors on Call's resources, without due compensation. Plaintiff claims that these entities are the alter egos of Doctors on Call, Dr. Management Service, Inc., and/or Rosenstock.

On June 24, 2014, plaintiff filed this action against defendants. Plaintiff's complaint alleges that "Doctors on Call, through the medical professionals it employs and [*5] contracts with, provides in-home medical care in the New York City area". Plaintiff further alleges, in his complaint, that he is a 20% owner of Doctors on Call, and that Rosenstock is Doctors on Call's chief operating officer and an 80% owner. He asserts that Rosenstock refuses to acknowledge plaintiff's ownership interest in Doctors on Call, and that, despite repeated demands, Rosenstock also refuses to provide him with an accounting of Doctors on Call's income, expenses, profits, and losses. He claims that Rosenstock is trying to conceal Doctors on Call's finances from him and to improperly impede him from taking the profit draws from Doctors on Call to which he is entitled pursuant to the 2008 agreement.

Plaintiff's complaint sets forth five causes of action. Plaintiff's first cause of action seeks a declaratory judgment that he is an owner of Doctors on Call. Plaintiff's second cause of action seeks injunctive relief permitting him to examine all the records pertaining to Doctors on Call's business. Plaintiff's third cause of action, which seeks damages in the

amount of at least $100,000 against defendants, jointly and severally, alleges that defendants have conspired to conceal Doctors on Call's true financial position and have prevented him from taking profit draws from Doctors on Call. Plaintiff's fourth cause of action, which seeks damages in the amount of at least $1,000,000, alleges that defendants owe money to him for funds that originally belonged to Doctors on Call or should have been due to Doctors on Call, or should have been profits available to him, but which were improperly withheld from Doctors on Call and him. Plaintiff's fifth cause of action alleges that Rosenstock's salary from Doctors on Call is improper and seeks injunctive relief ordering that Rosenstock may no longer take any salary or compensation from Doctors on Call for work done for Doctors on Call, but, rather, may only take profit draws, along with plaintiff.

On August 8, 2014, plaintiff brought an order to show cause seeking a default judgment against defendants, an order permitting him to correct the late filing of proof of service, and a temporary restraining order: (1) enjoining Rosenstock from violating the terms of the 2008 agreement, (2) permitting him to have an absolute and unlimited right to review and audit all books and activities related to Doctors On Call, (3) prohibiting Rosenstock from taking or being given any salary or other remuneration for work with Doctors on Call, and (4) prohibiting defendants from: (a) making any payments to any vendors not approved by plaintiff, (b) moving any assets from Doctors on Call to any other business entities, (c) moving, concealing, disbursing, discarding, or divesting any assets of any of the corporate defendants, and (d) destroying any business records of Doctors on Call or any of the other corporate defendants. By an order dated September 19, 2014, Justice David I. Schmidt denied plaintiff's motion for a default judgment, granted plaintiff the right to correct the irregularity of late filing of proof of service, and vacated the temporary restraining order in all respects except to the extent that Rosenstock had agreed to not: (1) "make any payments to any vendors not made before without court approval", (2) move any assets from Doctors on Call to any other business [*6]entities without court approval, (3) move, conceal, disburse, discard, or divest any assets of any of the corporate defendants without court approval, and (4) destroy any business records of Doctors on Call or any other corporate defendants without court approval. In addition, this September 19, 2014 order prohibited plaintiff from contacting any defendant or employee of defendants.

Also on August 8, 2014, defendants moved, under motion sequence number two, to dismiss plaintiff's complaint upon the ground that the 2008 Agreement was illegal and unenforceable pursuant to Education Law § 6509-a and 8 NYCRR 29.1 (b) (4), which prohibit a medical provider from splitting fees with a non-professional. Education Law § 6509-a defines unprofessional conduct to include an arrangement whereby a licensed medical provider "has directly or indirectly requested, received or participated in the division, transference, assignment, rebate, splitting or refunding of a fee for, or has directly requested, received or profited by means of a credit or other valuable consideration as a commission, discount or gratuity in connection with the furnishing of professional care, or service." Furthermore, "it is the established public policy of this State that medical providers may not engage in voluntary prospective fee-splitting arrangements" (*Sheldon Rabin, M.D., P.C. v Hirshfield*, 223 AD2d 535, 536 [2d Dept 1996]; *see also* Education Law § 6509-a; 8 NYCRR 29.1 [b]). "This proscription against fee-splitting does not extend to a licensed professional associated with or employed by a professional corporation formed to provide medical services" (*Sheldon Rabin, M.D., P.C.*, 223 AD2d at 536). Thus, a physician can provide services through a corporation, but that corporation must be a professional corporation owned by licensed physicians (*see id*.), but plaintiff is not a physician.

Education Law § 6530 (19) defines unprofessional conduct to include "[p]ermitting any person to share in the fees for professional services, other than: a partner, employee, associate in a professional firm or corporation, professional subcontractor or consultant authorized to practice medicine, or a legally authorized trainee practicing under the supervision of a licensee." This prohibition includes "any arrangement or agreement whereby the amount received in payment for furnishing space, facilities, equipment or personnel services used by a licensee constitutes a percentage of, or is otherwise dependent upon, the income or receipts of the licensee from such practice, except as otherwise provided by law with respect to a facility licensed pursuant to article twenty-eight of the public health law or article thirteen of the mental hygiene law." 8 NYCRR 29.1 (b) (4) sets forth the identical provision contained in Education Law § 6530 (19).

It is well settled that where a commercial relationship among parties constitutes an unlawful fee-splitting arrangement in violation of Education Law § 6530 (19) and 8 NYCRR 29.1 (b) (4), it will not be enforced by the court (*see South Shore Neurologic*

Assoc., P.C. v Mobile Health Mgt. Servs., Inc., 121 AD3d 881, 881-882 [2d Dept 2014]; *LoMagno v Koh*, 246 AD2d 579, 579 [2d Dept 1998]; *Hartman v Bell*, 137 AD2d 585, [*7]586 [2d Dept 1998]; *United Calendar Mfg. Corp. v Huang*, 94 AD2d 176, 180 [2d Dept 1983]). Since plaintiff originally alleged that the primary business of Doctors on Call is to provide in-home medical care in the New York City area, defendants contend that plaintiff has alleged that, by the 2008 agreement, he entered into a contract with a physician, i.e., Rosenstock, to share in the profits of a business which provides medical services to patients in their homes. Defendants argue that since plaintiff is claiming a portion of the fees generated by Doctors on Call, he is seeking to enforce an illegal fee-splitting arrangement in violation of Education Law § 6530 (19) and 8 NYCRR 29.1 (b) (4)

Plaintiff, in opposition to defendants' motion, contends that Doctors on Call is a business that provides administrative and management support services for doctors who provide in-home medical care in the New York City area, and that it is not a medical practice. He thus argues that Doctors on Call did not provide medical services, and that the 2008 agreement does not constitute an illegal fee-splitting arrangement. Defendants denied this and submitted affidavits by Rosenstock and physicians associated with Doctors on Call and others, who assert that Doctors on Call is the name of a group of physicians who rendered medical services to homebound patients, and that no member of Doctors on Call provided any management services. The court, however, at the December 17, 2014 oral argument, denied defendants' motion to dismiss since it found that factual questions were raised which warrant discovery and are beyond the scope of a motion to dismiss.[FN4]

At the December 17, 2014 oral argument, plaintiff's cross-motion with respect to his request to expand the scope of the preliminary injunction to include the very same relief that had been sought and previously denied in his order to show cause on August 8, 2014 was also denied.

As to plaintiff's cross-motion insofar as it seeks to disqualify defendants' counsel, Mr. Feinzeig, the court notes that defendants represented to the court at the December 17, 2014 oral argument that they had already engaged new counsel, which would render the disqualification issue moot. However, pursuant to CPLR 321 (b) (1), "[u]nless the party is

a person specified in section 1201 [i.e., an infant, incompetent person, or conservatee], an attorney of record may [only] be changed by filing with the clerk a consent to the change signed by the retiring attorney and signed and acknowledged by the party," and "[n]otice of such change of attorney [is required to] be given to the attorneys for all parties in the action or, if a party appears without an attorney, to the party." Here, no notice of substitution of counsel or consent to change attorneys has been filed by [*8]defendants. [FN5] Thus, since there has been no consent to change attorneys filed, and no showing that defendants have actually retained and substituted new counsel for Mr. Feinzeig, the court must address plaintiff's cross motion insofar as it seeks to disqualify Mr. Feinzeig as defendants' counsel. Also remaining outstanding is plaintiff's cross-motion insofar as it seeks leave to amend his complaint.

DISCUSSION

Amendment of the Complaint

Plaintiff seeks to amend his complaint to delete paragraph 8 of the complaint which alleged that "[t]he primary business of Doctors on Call is to provide in-home medical care in the New York City area," and to substitute a new paragraph 8 of the complaint which alleges that "[w]hen Defendant Rosenstock and Plaintiff purchased DOC its primary business was to provide administrative, management and other support services for doctors who provide in-home medical ca[r]e in the New York City area," and that "[b]ecause Dr. Rosenstock has completely prevented Plaintiff from asserting any ownership role in DOC (which is the basis of the instant litigation) Plaintiff can only presume the primary business of DOC remains such."

In support of his proposed amendment, plaintiff has submitted his affirmation, in which he attests that the business that he purchased with Rosenstock is not a medical practice. He asserts that Doctors on Call is a business that provides administrative and management support services for doctors, such as making appointments, billing, scheduling, receptionist services, and providing space for doctors to operate. He states that the doctors that contract with Doctors on Call are expected to pay Doctors on Call for these services, and that this is Doctors on Call's business model. He claims that this model allows the doctors to do what they do best, which is to provide medical care for the patients. He asserts that Doctors on Call frees up the doctors to spend their time practicing

medicine while it provides administrative, managerial, and support services, for which the doctors pay.

Plaintiff states that the allegation in paragraph 8 of the complaint that the primary business of Doctors on Call is to provide in-home medical care in the New York City area is inaccurate, and that it "was an overly simplified statement that perhaps did not capture the full nuances of the business model." He explains that, in actuality, as set forth in the proposed amended complaint, when he and Rosenstock purchased Doctors on Call, its primary business was to provide administrative, management, and other support services for doctors who provide in-home medical care in the New York City area, and that he presumes that the primary business of Doctors on Call remains the same.

Plaintiff points out that there are multiple corporate defendants, and that two of [*9] them, Comprehensive Geriatric Medicine, P.C. and Medical Network Services, P.C., are New York State professional corporations pursuant to Business Corporation Law § 1503 (a). He states that he believes that it is through these corporations that Rosenstock provides the medical care, and that it is through Doctors on Call, as well as Dr. Management Service, Inc. and Dr. Management Service of New York, LLC, that the support services are provided. He notes that Dr. Management Service, Inc., which was incorporated by plaintiff and defendant in 2005, at which time, plaintiff alleges that he and Rosenstock purchased Doctors on Call, is a business corporation pursuant to the Business Corporation Law (*see* Business Corporation Law § 201), and is not a professional corporation. He asserts that this reflects that Doctors on Call was intended to be a support service for doctors business and not a medical practice. He points to the fact that Rosenstock had Comprehensive Geriatric Medicine, P.C. incorporated in 1997 as a professional service corporation and had Medical Network Services, P.C. incorporated in 1998 as a professional service corporation, and argues that this indicates that Rosenstock knew well the difference between a professional corporation and a business corporation at the time that he and plaintiff incorporated Dr. Management Service, Inc. as a business corporation.

Plaintiff seeks to amend his complaint in order to establish that the 2008 agreement regarding Doctors on Call is not prohibited as an illegal fee splitting agreement under Education Law § 6530 (19) or § 6509-a and 8 NYCRR 29.1 (b) (4). He requests leave to

do so in order to correct the prior allegations made in paragraph 8 of the complaint regarding Doctors on Call's primary business.

Pursuant to CPLR 3025 (a), "[a] party may amend his [or her] pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it." Here, no answer has yet been served, and plaintiff has submitted his proposed amended complaint seeking leave to amend as part of his cross-motion in response to and during the pendency of defendants' motion to dismiss his original complaint. Thus, plaintiff is entitled to amend his complaint as a matter of right (*see* CPLR 3025 [a]; *D'Amico v Correctional Med. Care, Inc.*, 120 AD3d 956, 957 [4th Dept 2014]; Matter of *Gansburg v Blachman*, 111 AD3d 935, 936 [2d Dept 2013]; *Johnson v Spence*, 286 AD2d 481, 483 [2d Dept 2001]*; STS Mgt. Dev. v New York State Dept. of Taxation & Fin.*, 254 AD2d 409, 410 [2d Dept 1998]; *Miller v General Motors Corp.*, 99 AD2d 454, 454 [1st Dept 1984], *affd* 64 NY2d 1081 [1985]).

In any event, while plaintiff may amend his complaint as of right, insofar as he seeks leave of the court for his proposed amendment, he would be entitled to the granting of such leave (*see* CPLR 3025 [b]; *Matter of Gansberg*, 111 AD3d at 936). A motion for leave to amend a complaint should be freely granted, absent prejudice or surprise directly resulting from the delay in seeking leave, unless the proposed amendment is palpably insufficient or patently devoid of merit (*see* CPLR 3025 [b]; *Clarke v Laidlaw Tr., Inc.*, [*10]125 AD3d 920, 922 [2d Dept 2015]; *Aurora Loan Servs., LLC v Thomas*, 70 AD3d 986, 987 [2d Dept 2010]; *Lucido v Mancuso*, 49 AD3d 220, 222 [2d Dept 2008], *appeal withdrawn* 12 NY3d 813 [2009]). "Inherent in this rule is that [n]o evidentiary showing of merit is required under CPLR 3025 (b)'" (*Clarke*, 125 AD3d at 922, quoting *Lucido*, 49 AD3d at 229).

Here, the proposed amendment is not palpably insufficient or patently devoid of merit (*see Vidal v Claremont 99 Wall, LLC*, 124 AD3d 767, 767-768 [2d Dept 2015]; *Post v County of Suffolk*, 80 AD3d 682, 685 [2d Dept 2011]). There is also no showing of prejudice or surprise resulting directly from any delay by plaintiff in seeking leave to amend his complaint since he seeks such amendment only four months after he filed his complaint and before defendants served their answer, and there has been no discovery.

In opposition to plaintiff's cross motion, defendants assert that plaintiff has already admitted in his original complaint, and in an affidavit previously submitted to the court in support of his August 8, 2014 order to show cause, that the primary business of Doctors on Call is to provide in-home medical care in the New York City area. They contend that after realizing that the contract to share profits with doctors is unenforceable, plaintiff has now fabricated the contradicting allegation that Doctors on Call is only a management company. They argue that the court should not allow plaintiff to amend his complaint because the proposed amendment contradicts his prior sworn assertions.

The court notes that the purpose of an amendment of pleadings pursuant to CPLR 3025 "is to permit the plaintiff to amend his [or her] theory of recovery to comply with the facts as they unfold, not to permit the plaintiff to alter his representation of material facts to best suit his [or her] theory of recovery and thereby overcome defenses raised in opposition" (*Bogoni v Friedlander*, 197 AD2d 281, 292 [1st Dept 1994], *lv denied* 84 NY2d 803 [1994]). The "amendment of pleadings is not a vehicle that can be utilized to relieve a party from the consequences of prevarication" (*id.*).

However, here, plaintiff is entitled to amend his complaint as of right, and, as discussed above, there is also no prejudice resulting to defendants from such amendment. While allegations in a complaint constitute a formal judicial admission (*see Penna, Inc. v Ruben*, 72 AD3d 523, 523-524 [1st Dept 2010]), once a complaint is amended, "any formal judicial admission deleted by the amendment is relegated to the status of an informal judicial admission which, although not conclusive, constitutes evidence of the proposition alleged" (*Stauber v Brookhaven Natl. Lab.*, 256 AD2d 570, 570-571 [2d Dept 1998]; *see also Imprimis Invs. v Insight Venture Mgt.*, 300 AD2d 109, 110 [1st Dept 2002]). Thus, " [a]n admission of fact in an original pleading does not lose its effect as an admission of fact because the pleading has been superceded as such by an amended pleading'" (*Kwiecinski v Chung Hwang*, 65 AD3d 1443, 1443 [3d Dept 2009], quoting *Ranken v Probey*, 136 App Div 134, 135 [3d Dept 1909]; *see also Resseguie v Adams*, 55 AD2d 698, 699 [1976], *affd sub nom. Locator-Map v Adams*, 42 NY2d 1022 [1977]; *Ogilvie v City of New York*, 44 AD2d 586, 586 [2d Dept 1974]). "As a result, admissions [*11]in an original pleading superceded by an amended pleading are still evidence of the facts admitted'" (*Kwiecinski*, 65 AD3d at 1444, quoting *Resseguie*, 55 AD2d at 699). "The circumstances surrounding the original admissions and the amendment may be explained

at trial, however, and the weight afforded the original admissions is to be determined by the factfinder" (*Kwiecinski*, 65 AD3d at 1444; *see also Bogoni*, 197 AD2d at 292-293; *Arinsky v Arsinskiy*, 280 App Div 820, 820 [2d Dept 1952]). Thus, plaintiff's prior complaint remains admissible as an informal judicial admission, the circumstances of which may be explained at trial and defendants have suffered no prejudice by the amendment. Consequently, plaintiff's motion, insofar as it seeks leave to amend his complaint (although not required since he was entitled to amend his complaint as of right pursuant to CPLR 3025 [a]), is granted.

Disqualification of Defendants' Counsel

Plaintiff, in support of his cross motion insofar as it seeks to disqualify defendants' attorney, Mr. Feinzeig, from representing them in this action, asserts that in or about 2005, at about the same time that he purchased the Doctors on Call business with Rosenstock, he also purchased the 7104 Fort Hamilton Parkway building, a portion of which was leased to Doctors on Call and in which it had been operating, on his own without Rosenstock as a partner. He states that in connection with the purchase of the 7104 Fort Hamilton Parkway building and the Doctors on Call business, he consulted with Mr. Feinzeig, and that Mr. Feinzeig counseled him during the time that he purchased both the 7104 Fort Hamilton Parkway building and the Doctors on Call business together. He further states that Rosenstock was not involved in these discussions, and that these consultations were between himself and Mr. Feinzeig in which he provided Mr. Feinzeig with confidential information regarding both of these matters and Mr. Feinzeig counseled him in order to facilitate his purchase of both the 7104 Fort Hamilton Parkway building and the Doctors on Call business. He contends that since Mr. Feinzeig has obtained confidential information in the course of this prior attorney-client relationship with him, which is substantially related to this action, he should be disqualified as defendants' counsel.

Mr. Feinzeig, in an affirmation in opposition to plaintiff's cross-motion, asserts that plaintiff "is no stranger to wrongdoing," and states that plaintiff had used a portion of "embezzled funds" while serving as executor of the estate of Elias Gelbwachs (Gelbwachs) to purchase two buildings, i.e., the 7104 Fort Hamilton Parkway building and a building located at 884 71st Street in Brooklyn, New York (the 884 71st Street building), to take title to these two buildings in his own name. Mr. Feinzeig further asserts that plaintiff also used these "stolen funds" from Gelbwachs' estate to purchase his share

of Doctors on Call. He states that "[a]s an embezzler, [plaintiff] has no standing to pursue th[is] action against defendants." He specifically states that the since the money plaintiff used to buy the 7104 Fort Hamilton Parkway building and his share of Doctors on Call came from the estate of Gelbwachs, they were both purchased with funds from an [*12] improper source, and that plaintiff, therefore, under the doctrine of constructive trust, does not beneficially own either Doctors on Call or the 7104 Fort Hamilton Parkway building. He maintains that any and all profits from Doctors on Call and the ownership of the 7104 Fort Hamilton Parkway building, that were obtained through these "stolen" funds from Gelbwachs' estate, cannot go to him.

Mr. Feinzeig admits that he has "a lot of information about [plaintiff's] embezzlement of funds from [Gelbwachs' e]state," but states that the source of his information is the public record. Mr. Feinzeig, however, admits that he represented plaintiff in 2009 in connection with his failed attempt to sell the 884 71st Street building, which, as noted, was one of the two buildings that he claims that plaintiff used embezzled funds to purchase.

Mr. Feinzeig denies representing plaintiff as an attorney in connection with the 7104 Fort Hamilton Parkway building or in connection with Doctors on Call or any company owned by Rosenstock. He states that in 2005, plaintiff came to his storefront law firm's office which he shares with his wife, Sima, who runs Sima Funding, Ltd., a mortgage brokerage firm, and that plaintiff retained her to obtain a mortgage for the 7104 Fort Hamilton Parkway building. He claims that plaintiff met with Sima regarding a fully executed contract that he "had nothing to do with." He further claims that at no time during 2005 did he advise plaintiff regarding any legal matters in connection with the purchase of the 7104 Fort Hamilton Parkway building or the purchase of Doctors on Call. He states that on May 5, 2005, plaintiff executed a mortgage broker agreement with Sima Funding, Ltd. for help in procuring mortgage financing and then completed a mortgage application, which was forwarded to the Bank of New York, and that additional documents requested by the bank were obtained by Sima through communication with plaintiff, who provided her with the requisite documents. He further states that the mortgage loan was approved by the bank, and that a closing on the loan for the 7104 Fort Hamilton Parkway building took place on June 16, 2005, but that neither he, nor his wife,

attended the closing. Mr. Feinzeig claims that plaintiff did not provide him with confidential information during his meeting with Sima.

In reply, plaintiff notes that Mr. Feinzeig admits that he represented him in the attempted sale of the 884 71st Street building, and that Mr. Feinzeig acknowledges that this was related to the instant action by alleging improper conduct relating to Surrogate's Court matters concerning that property. He further notes that, while Mr. Feinzeig claims that his law practice and the mortgage brokerage business of his wife, Sima, are completely separate entities, Sima works for Feinzeig at his law office and has sent him e-mails in connection with the present action.

Plaintiff further asserts that Mr. Feinzeig's references to his purchase of the 7104 Fort Hamilton Parkway building, and allegations regarding the source of funds for this purchase, indicate that he intends to utilize confidential information that he obtained while representing plaintiff and that he will be prejudiced if Mr. Feinzeig is permitted to [*13] continue as counsel to defendants. Plaintiff contends that since Mr. Feinzeig is taking an adverse position to him by representing defendants in this action, he has a conflict of interest which mandates his disqualification as defendants' counsel.

Rule 1.9 (a) of the Rules of Professional Conduct (22 NYCRR 1200.0), entitled "Duties to Former Clients," provides as follows:

"(a) A lawyer who has formerly represented a client in a matter shall not 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 unless the former client gives informed consent, confirmed in writing."

In addressing a disqualification motion, courts consider this Rule of Professional Conduct as guidance in rendering their determination (*see Tekni-Plex, Inc. v Meyner & Landis*, 89 NY2d 123, 130-131 [1996], *rearg denied* 89 NY2d 917 [1996]). "The disqualification of an attorney is a matter that rests within the sound discretion of the court" (*Columbus Constr. Co., Inc. v Petrillo Bldrs. Supply Corp.*, 20 AD3d 383, 383 [2d Dept 2005]; *see also Albert Jacobs, LLP v Parker*, 94 AD3d 919, 919 [2d Dept 2012]; *Mondello v Mondello*, 118 AD2d 549, 550 [2d Dept 1986]).

A party seeking disqualification of its adversary's counsel based on such counsel's purported prior representation of that party must establish: "(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" (*Tekni-Plex, Inc.*, 89 NY2d at 131; *see also* Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.9 [a]; *Falk v Chittenden*, 11 NY3d 73, 78 [2008]; *Jamaica Pub. Serv. Co. v AIU Ins. Co.*, 92 NY2d 631, 636 [1998]; *Matter of Town of Oyster Bay v 55 Motor Ave. Co., LLC*, 109 AD3d 549, 550 [2d Dept 2013]; *Gabel v Gabel*, 101 AD3d 676, 676 [2d Dept 2012]; *Scopin v Goolsby*, 88 AD3d 782, 784 [2d Dept 2011]; *Calandriello v Calandriello*, 32 AD3d 450, 451 [2d Dept 2006]; *Columbus Constr. Co., Inc.*, 20 AD3d at 383). A moving party who establishes these three elements creates an irrebuttable presumption of disqualification (*see Falk*, 11 NY3d at 78; *Tekni-Plex, Inc.*, 89 NY2d at 132).

The movant has the burden of establishing these elements in order for an irrebuttable presumption of disqualification to arise (*see Jamaica Pub. Serv. Co.*, 92 NY2d at 636). If established, the irrebuttable presumption is imposed in order to "free the former client from any apprehension that matters disclosed to an attorney will subsequently be used against it in related litigation" and to avoid "the appearance of impropriety' on the part of the attorney or the law firm" (*Solow v Grace & Co.*, 83 NY2d 303, 309 [1994]).

While it is true that " [a] party's entitlement to be represented in ongoing litigation [*14]by counsel of [its] own choosing is a valued right which should not be abridged absent a clear showing that disqualification is warranted'" (*Matter of Dream Weaver Realty, Inc. [Poritzky—DeName]*, 70 AD3d 941, 943 [2d Dept 2010], quoting *Aryeh v Aryeh*, 14 AD3d 634, 634 [2d Dept 2005]; *see also S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp.*, 69 NY2d 437, 443 [1987]; *Gabel*, 101 AD3d at 677), "[i]t is an undeniable maxim of the legal profession that an attorney must avoid even the appearance of impropriety" (*Heelan v Lockwood*, 143 AD2d 881, 883 [2d Dept 1988] [internal quotation marks omitted]). It is an attorney's duty to preserve a client's secrets and confidences and avoid the appearance of impropriety (*see Nesenoff v Dinerstein & Lesser, P.C.*, 12 AD3d 427, 428 [2d Dept 2004]). In some circumstances "the very appearance of a conflict of interest" is sufficient to warrant disqualification (*Galanos v Galanos*, 20 AD3d 450, 452 [2d Dept 2005]).

In deciding whether a conflict of interest requiring disqualification exists, the court must consider whether the lawyer or law firm that previously represented the party or entity which is seeking to disqualify that attorney, obtained, in the course of that representation, confidential information which would be disclosed or could be used against the former client in the current litigation (*see Cardinale v Golinello*, 43 NY2d 288, 296 [1977]; *Columbus Constr. Co., Inc.*, 20 AD3d at 384; *Sirianni v Tomlinson*, 133 AD2d 391, 392 [2d Dept 1987], *appeal dismissed* 74 NY2d 792 [1989]).It is not essential, however, that the prior client establish that confidential information will necessarily be disclosed in the course of the litigation (*see Narel Apparel v American Utex Intl.*, 92 AD2d 913, 914 [2d Dept 1983]). "A reasonable probability of disclosure [is] sufficient" (*id*. [internal quotation marks omitted]). Courts will infer the "reasonable probability of disclosure of confidences" from the particular nature of the past and present representations at issue (*Forbush v Forbush*, 107 AD2d 375, 379-380 [4th Dept 1985]).

Disqualification of the attorney will be granted where the party seeking disqualification establishes either a substantial relationship between the issues in the litigation and the subject matter of the prior representation, or where the party's former counsel had access to confidential material substantially related to the litigation (*see Credit Index v RiskWise Intl.*, 296 AD2d 318, 318 [1st Dept 2002]; *Forest Park Assoc. Ltd. Partnership v Kraus*, 175 AD2d 60, 61-62 [1st Dept 1991]; *Saftler v Government Empls. Ins. Co.*, 95 AD2d 54, 57 [1st Dept 1983]). " [D]oubts as to the existence of a conflict of interest must be resolved in favor of disqualification'" (*Justinian Capital SPC v WestLB AG, NY Branch*, 90 AD3d 585, 585 [1st Dept 2011], quoting *Rose Ocko Found. v Liebovitz*, 155 AD2d 426, 428 [2d Dept 1989]; *see also Sperr v Gordon L. Seaman, Inc.*, 284 AD2d 449, 450 [2d Dept 2001]; *Heelan*, 143 AD2d at 883).

With respect to the first element of the existence of an attorney-client relationship, it is noted that an attorney-client relationship arises "when one contacts an attorney in his [or her] capacity as such for the purpose of obtaining legal advice or services" (*Matter of Priest v Hennessy*, 51 NY2d 62, 68-69 [1980]). "Formality is not essential to create a [*15]legal services contract" (*Talansky v Schulman*, 2 AD3d 355, 358 [1st Dept 2003]). " Therefore, it is necessary to look to the words and actions of the parties to ascertain if an attorney-client relationship was formed'" (*id*., quoting *C.K. Indus. Corp. v C.M. Indus. Corp.*, 213 AD2d 846, 848 [3d Dept 1995]).

Mr. Feinzeig denies that he represented plaintiff in connection with his purchase of the 7104 Fort Hamilton Parkway building and the Doctors on Call business while plaintiff specifically attests that Mr. Feinzeig did provide him with legal advice with respect to these purchases. As noted, however, Mr. Feinzeig concedes that he previously represented plaintiff in connection with his attempted sale of the 884 71st Street building, and that plaintiff, in 2005 (at the time of that plaintiff claims to have originally purchased his interest in Doctors on Call), came to his office, which he shares with his wife, and met with her in connection with obtaining a mortgage for the purchase of the 7104 Fort Hamilton Parkway building. The court finds that plaintiff's contacts with Mr. Feinzeig give rise to a reasonable inference that, at the very least, confidences of plaintiff were revealed to Mr. Feinzeig, sufficient to establish a fiduciary relationship of loyalty with respect to those communications (*see Bank Hapoalim B.M. v WestLB AG*, 82 AD3d 422, 422 [1st Dept 2011]; *Rose Ocko Found.*, 155 AD2d at 427). Thus, the court finds that an attorney-client relationship existed between plaintiff and Mr. Feinzeig.

As to the second element, that the former and current representations must be substantially related, the court notes that Mr. Feinzeig's claims relating to funding of the purchases of the 7104 Fort Hamilton Parkway building and the Doctors on Call business, which appear to have been obtained during his representation of plaintiff regarding the sale of the 884 71st Street building, are substantially related to the claims now being asserted by plaintiff (*see Tekni-Plex, Inc.*, 89 NY2d at 134-135*; Anonymous v Anonymous*, 262 AD2d 216, 216 [1st Dept 1999]). Where, in the prior representation, the attorney received specific confidential information that is substantially relevant to issues in the present litigation, or if there is even a reasonable probability that the attorney received such information, Rule 1.9 is implicated because the duty of loyalty to former clients mandates the continued protection of former clients' confidences (*see Bank Hapoalim B.M.*, 82 AD3d at 433; *Rose Ocko Found.*, 155 AD2d at 427; *Narel Apparel*, 92 AD2d at 914).

It appears, from his own admissions, that Mr. Feinzeig was privy to protected confidences of plaintiff during the course of a prior representation, and a reasonable probability of disclosure of confidences exists if Mr. Feinzeig continues to represent defendants (*see Albert Jacobs, LLP*, 94 AD3d at 919; *Wall St. Assoc. v Brodsky*, 227 AD2d 301, 302 [1st Dept 1996]). Indeed, Mr. Feinzeig points to allegations of

embezzlement by plaintiff, which, he contends, deprive plaintiff of an interest in Doctors on Call, claims directly related to funds involving both the 7104 Fort Hamilton Parkway building and the 884 71st Street building, in connection with which Mr. Feinzeig admits he represented plaintiff. This presents a conflict of interest and, at the very least, raises an [*16]appearance of impropriety which warrants Mr. Feinzeig's disqualification in this action.

Significantly, there is a continuing duty of confidentiality that an attorney owes to a former client (*see* Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.6; *Kassis v Teacher's Ins. & Annuity Assn.*, 93 NY2d 611, 615-616 [1999]; *Cardinale*, 43 NY2d at 295-296). A former client may be justifiably concerned about the continuing sanctity of his or her confidences if his or her former attorney subsequently represents another party opposed to the former client's interests (*see Solow*, 83 NY2d at 309). Thus, plaintiff is "entitled to freedom from apprehension and to certainty that his interests will not be prejudiced" by Mr. Feinzeig's prior representation of him (*Cardinale*, 43 NY2d at 296; *see also Columbus Constr. Co., Inc.*, 20 AD3d at 384; *Nationwide Assoc. v Targee St. Internal Medicine Group*, 303 AD2d 728, 729 [2d Dept 2003]). The court finds that the matters involved in Mr. Feinzeig's prior representations of plaintiff and the present action are substantially related within the meaning of rule 1.9 of the Rules of Professional Conduct (22 NYCRR 1200.0).

As to the third element, it is undisputed that the interests of the former and current clients are adverse since plaintiff is seeking to establish that he has a 20% interest in Doctors on Call, whereas defendants are contending that plaintiff has no interest in it (*see Tekni-Plex, Inc.*, 89 NY2d at 131).

Thus, plaintiff has established requisite elements that he had a prior attorney-client relationship with Mr. Feinzeig, that the matters involved in Mr. Feinzeig's prior representation of him are substantially related to the matters involved in Mr. Feinzeig's representation of defendants in this action, and that the interests of plaintiff and defendants are materially adverse. Consequently, an irrebutable presumption has been established by plaintiff (*see Falk*, 11 NY3d at 78; *Tekni-Plex, Inc.*, 89 NY2d at 132).

No issue is raised which would require an evidentiary hearing. Indeed, the very appearance of a conflict of interest in this action is sufficient to warrant disqualification of

Mr. Feinzeig as a matter of law without the necessity for such a hearing (*see Matter of Isaiah Dejohn S.*, 37 AD3d 725, 726 [2d Dept 2007]; *Galanos*, 20 AD3d at 452; *Burton v Burton*, 139 AD2d 554, 554 [2d Dept 1998]). Thus, plaintiff's cross-motion for an order disqualifying Mr. Feinzeig from acting as the attorney for defendants in this action is granted.

CONCLUSION

Plaintiff's cross-motion, insofar as it seeks leave to amend his complaint and to disqualify Mr. Feinzeig from representing defendants in this matter, is granted. In light of Mr. Feinzeig's disqualification, the amended complaint in the proposed form annexed to plaintiff's cross-moving papers (e-filed Document No.29, Exhibit 5) shall be served upon the defendants by certified mail together with a copy of this decision and order, with notice of entry thereof, within three days of entry, and defendants shall serve an answer to [*17]the amended complaint within 30 days from the date of such service. In accordance with CPLR 321 (c), this action is stayed for a period of 30 days from the date of service upon the defendants of a copy of this order with notice of entry in order to afford them an opportunity to retain new counsel. The matter is calendared for June 24, 2015 at 9:45 AM for appearance of new counsel for defendants.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

Footnotes

Footnote 1: Defendants' motion, under motion sequence number two, which sought to dismiss plaintiff's complaint, was denied at oral argument on December 17, 2014.

Footnote 2: Plaintiff's motion, to the extent that it also sought an order expanding the preliminary injunction to include the additional relief that had been sought and denied in his order to show cause on August 8, 2014, was denied at the December 17, 2014 oral argument.

Footnote 3: Rosenstock denies the existence of any agreement with plaintiff in 2005 as to Doctors on Call, and it appears that there was no written agreement at that time.

Footnote 4: The court also denied defendants' motion in view of plaintiff's then pending cross motion (which it now addresses) insofar as it seeks to amend the complaint to assert factual allegations that Doctors on Call's primary business was to provide administrative, management, and other support services for doctors who provide in-home medical care in the New York City area.

Footnote 5: No consent to change attorneys has been e-filed and there has been no such filing in the Kings County Clerk's office. There is also no evidence of any notice of a change of attorneys given to plaintiff or any correspondence to the court regarding any such change.

Return to Decision List