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Attorney Conflicts in New York Relating to Construction

Introduction

A homeowner (“Owner”) who is building a new home hired a Construction Manager (“CM”) to manage the various trades for him including electrical work. Pursuant to contract, the CM was required to obtain three bids from each trade, and make a recommendation to the Owner as to which one to use. The contract permitted the Owner to reject all the contractors from any trade suggested by the CM and obtain his own contractor. However, CM had to notify the owner in writing that the CM consents to the Owner's use of another contractor. During the course of construction, CM offered three electricians to the Owner who rejected all of them and instead selected another electrician. Although CM noted this in its meeting minutes, CM failed to provide separate written consent to the Owner.

The project proceeded without the CM's supervision of the Electrical contractor's work and without the CM's review or approval of the Electrical Contractors bills. Rather, all of this was done directly by the Owner. The project was eventually substantially completed. The Owner then refused to pay the contract balances to about 6 to 10 of the trade contractors as well as the CM and the electrician.

Subsequently, the Owner sent a Notice of Default letter, making demands against the CM and the electrician for monetary damages. The CM and electrician ignored the demand and two months later hired a single attorney to represent them in order to recover the contract balances from Owner. Both the CM and electrician filed a Notice of Mechanic's Lien. CM and the Electrician do not have any obligation to each other and each has their own individual

contracts breached by the Owner's non-payment. The Attorney filed liens for each of the contractors, and subsequently commenced an action against the Owner for the contract balances.

The Owner is now alleging that the Attorney's representation of both the CM and Electrician is improper and a conflict of interest. The Owner also alleges that the CM had an obligation to the Owner under the contract to "bond off" the Electrician's Mechanic lien. The Owner has made a motion seeking disqualification of the Attorney and imposition of sanctions. The Owner has on several occasions advised the attorney that he intends to commence litigation directly against the Attorney and file a grievance with the disciplinary committee unless the electrician and CM agree to settle the matter on his terms.

Questions Presented

1. Is the CM's confirmation of the Owner's assumption of responsibility for the Electrician, by a notation in the meeting minutes that was distributed to all the parties, sufficient to satisfy "written notice" under the contract?
2. Is the parties' actual knowledge of the Owner's assumption of the Electrician, as well as the actions of the parties based upon the Owner assumption of the Electrician, adequate to waive the written notice requirement in the contract?
3. Did the attorney act improperly in representing both the CM and the Electrician if:
 - a. The CM did have an obligation (assuming the contract was in good standing) to "bond off" the Electrician's lien, or
 - b. The CM had no obligations to the Owner regarding the electrician.
4. Does the Owner have a direct cause of action against the attorney?
5. Has the Owner acted improperly by using the threats to pursue litigation and/or grievance proceedings against the attorney as an incentive to settlement?

Short Answers

1. Yes. Notation in the meeting minutes that was distributed to all parties is sufficient to satisfy “written notice” under the contract because the owner had actual notice, it substantially complies with the provision in the contract and that deviation does not prejudice the Owner.
2. Yes. The parties’ actual knowledge or their actions are adequate to waive the written notice requirement in the contract because parties to a contract may waive the contractual provisions orally or by conduct, including partial performance.
3. If the CM had an obligation to “bond off” the Electrician’s lien, then there will be a conflict of interest. However if there is no such obligation, then the attorney can represent both the CM and the electrician in the present action.
4. No. At most the Owner can bring a motion to disqualify based on a conflict of interest
5. Yes. The owner acted improperly by using the threats to pursue litigation and/or grievance proceedings against the attorney as an incentive to settlement.

Discussion

I. STRICT COMPLIANCE WITH THE NOTICE PROVISION OF THE CONTRACT IS NOT REQUIRED IF THE OTHER PARTY IS NOT PREJUDICED BY THE DEVIATION.

Strict compliance with the notice provision of a contract is not required where the party seeking enforcement of the notice provision does not claim that it did not receive actual notice, or was prejudiced by the deviation. *Suarez v Ingalls*, 282 AD2d 599 (2d Dept. 2001). See also, *Fortune Limousine Serv., Inc. v. Nextel Communications*, 35 A.D.3d 350, 353 (2d Dept. 2006). In *Fortune*, the plaintiff Fortune Limousine (“Fortune”) entered into a contract with the defendant Unistar under which Fortune agreed to advance to Unistar the sum of \$ 911.99 per month for an 11-month initial contract term in exchange for the possession and use of the Nextel communications equipment. *Id.* at 351. Fortune had the option to either

return the communications equipment or to purchase it for one dollar upon at least 30 days' written notice prior to the expiration of the initial contractual term. *Id.* The contract required all the necessary notices to be delivered personally or by certified or registered mail, postage prepaid. *Id.* Thereafter, Unistar provided Fortune with 90 days advance notice that the contract was scheduled to expire. *Id.* Unistar claimed that Fortune never exercised its options prior to expiration of the contract. *Id.* According to Fortune, however, at some point prior to expiration it notified Unistar of its intent to exercise the one-dollar purchase option. *Id.*

Fortune sued for breach of contract and Nexel moved for summary judgment dismissing that claim, which the trial court denied. *Fortune Limousine Serv., Inc.*, 35 A.D.3d at 352. On appeal, Unistar argued that Fortune did not transmit a written exercise of the purchase option and a one-dollar check to Unistar. *Id.* In response, Fortune stated that it exercised the purchase option by a notification to Unistar "at some point prior to October 12, 1996." *Id.* at 353. However, Fortune failed to state whether the alleged notification was in writing as required by the contract and whether any such written notice was delivered to Unistar personally or by certified or registered mail as required by the contract. *Id.* In reversing the trial court and granting Unistar's motion for summary judgment, the Second Department held that "[w]hile strict compliance with contractual notice provisions need not be enforced where the adversary party does not claim the absence of actual notice or prejudice by the deviation," Unistar never received any notice at all and the breach of contract claim should have been dismissed. *Id.*

In the instant case, CM distributed the written minutes of the meeting to all the parties in which it was noted that the Owner was taking care of the electrical work himself. Moreover, the Owner cannot seriously claim that he did not get notice of the CM's consent based upon the fact that the project proceeded without CM's supervision of the Electrical contractors work and without review or approval of the Electrical Contractor's bills. Indeed,

all this was done directly by the Owner, clearly evidencing the Owner's notice as well as the lack of any identifiable prejudice to the Owner.

Similarly, in *Gorey v. Allion Healthcare, Inc.*, 18 Misc. 3d 1118A, 2008 NY Slip Op 50125U, 9 (N.Y. Sup. Ct. 2008), the plaintiff, Gorey, a former CFO of the defendant, alleged breach of an employment agreement. In his complaint he alleged, *inter alia*, that the defendant violated the employment agreement by failing to award him a severance package in accordance with the terms of his employment agreement, following his resignation for "good reason." *Id.* at 3. Thereafter, defendant filed a motion for summary judgment to dismiss plaintiff's complaint including the claim for the severance package. *Id.* at 4. In this regard, defendant argued that Gorey cannot bring a breach of contract claim for severance pay because he failed to give notice with an opportunity to cure which was a condition precedent under the terms of the employment agreement. *Id.* at 8. According to the agreement, a resignation by the employee for "good reason" requires the employee to give written notice of "certain defined occurrences, such as a material breach by employer, and that such breach continued for thirty days accompanied by a continuing failure to cure the occurrence." *Id.* at 8-9. The agreement also requires all written notices to be sent to Michael Moran at Allion's headquarters, with a copy to the corporation's counsel. *Id.* at 9. The defendant also alleged that the termination of the agreement would only be effective if the notice of termination was received by the non-terminating party. *Id.* at 3. According to defendant, plaintiff had not complied with that provision. *Id.* at 9.

In response, plaintiff argued that he sent a letter to the defendant which stated that he was giving the defendant notice of his resignation for good reason. *Gorey*, 2008 NY Slip Op at 9. The letter listed his claims and stated that defendant failed to comply with the terms of the agreement. *Id.* The letter also stated that the resignation will not take effect until 30 days thereafter, to allow defendant to comply with the employment agreement. *Id.*

In denying defendant's motion for summary judgment, the court held strict compliance with contract notice provisions will not be enforced where the party against whom the claim is made both admits receipt of the notice and does not claim any prejudice as a result of the deviation. *Gorey*, 2008 NY Slip Op at 8-9. Although plaintiff did not strictly adhere to the notice requirements of the contract, the defendant's President had received a hand and e-mail delivered written notice from plaintiff, setting forth the reasons he believed the defendant had failed to comply with the terms of his employment agreement and a 30 day window prior to his resignation. *Id.* at 10. Under the circumstances, the court held that plaintiff substantially complied with the notification terms of the contract and plaintiff's failure to send a copy of the letter to counsel, when Moran testified that he was already in touch with counsel during the 3 day period between the letter and the Board's acceptance of the letter as a resignation, demonstrated that defendant was in no way prejudiced by the deviation. *Id.* at 10.

In the instant case also, although CM did not completely comply with the terms of the agreement by providing written consent to the Owner, the meeting minutes to all the parties did provide actual notice and was a minor deviation from the notice provision. Therefore, the notification provided by the meeting minutes is sufficient to satisfy the written notice requirement.

Conversely, in *Kalus v. Prime Care Physicians, P.C.*, 20 A.D.3d 452 (2d Dept. 2005), plaintiff, a doctor, had a contract with the defendant healthcare company to perform services as a cardiologist for a term of one year unless terminated earlier in accordance with the agreement. *Id.* The agreement provided that plaintiff's employment could be terminated, without cause, by giving written notice 120 days prior to the effective date of termination specified in the notice. *Id.* If the termination was "with cause" then the defendant was required to give the plaintiff written notice of failure or breach constituting cause and 30 days

to cure it. *Id.* at 453. Plaintiff was notified by letter that he was terminated with immediate effect because he failed to cure certain deficiencies complained of at a performance review. *Id.* Thereafter, plaintiff brought an action against the defendant for breach of employment agreement. The defendants moved for summary judgment asserting that the performance review given to the plaintiff satisfied the 30 days notice requirement. *Id.*

The Supreme Court denied the motion for summary judgment and defendants appealed. *Kalus*, 20 A.D.3d at 452. *Id.* In affirming the Supreme Court, the Second Department held that the performance review of the plaintiff did not satisfy the written notice requirement under the agreement. *Id.* at 453. The performance review only set forth some problems regarding the plaintiff but never identified his failures or breaches and did not state that the plaintiff had 30 days to cure them. *Id.* The Court noted that the fundamental objective when interpreting a written contract is to determine the intention of the parties as derived from the language employed in the contract. *Id.* According to the Court, the intention of the termination for cause provision in the agreement was to put the employee on written notice of the conduct considered by the employer to be in breach of the employment contract and to give him 30 days to cure that breach. *Id.* at 454. As such, the motion to dismiss was properly denied. *Id.*

The instant case is distinguishable. The intent of the parties in the present case by requiring written consent was to evidence the CM's acquiescence in the Owner's choice. As such, the notification in the meeting minutes distributed by CM was sufficient to satisfy that intent. Owner also acted in compliance with that meeting minutes by proceeding with the project and supervising the electrical contractor's work. As a result, the parties mutually departed from the "written" notification requirements of the contract and acted pursuant to the change in contractor requested by the Owner. See also, *Austin v. Barber*, 227 A.D.2d 826, 828 (3d Dept. 1996) (where the conduct of the parties demonstrates an indisputable

mutual departure from the written agreement and the changes were clearly requested by the owner and carried out by the contractor, written notice of the changes in work not required).

Furthermore, “once it becomes clear that one party will not live up to the contract, the aggrieved party is relieved from the performance of futile acts, such as conditions precedent.” See, *J. Petrocelli Constr., Inc. v. Realm Elec. Contrs., Inc.*, 15 A.D.3d 444, 446 (2d Dept. 2005). In *J. Petrocelli Constr.*, the general contractor entered into a contract with the city. *Id.* at 445. The general contractor then entered into a sub-contract with a subcontractor for the electrical work. *Id.* Despite frequent admonishments by the contractor, the subcontractor failed to achieve substantial completion of the work and the City held a termination conference. *Id.* After the conference, the general contractor terminated the subcontract and sued the sub-contractor for breach of contract. *Id.* The defendant subcontractor moved for partial summary judgment on its counter-claim alleging breach of contract against the general contractor on the ground that the general contractor failed to provide seven days written notice before terminating the subcontract. *Id.* The court denied the sub-contractor’s motion for partial summary judgment and held that neither party was entitled to judgment as a matter of law on their claims. *Id.* at 446.

On appeal to the Second Department, the contractor argued that the sub-contractor’s vice-president was present at the termination conference. *J. Petrocelli Constr., Inc.*, 15 A.D.3d at 446. The contractor further argued that at the conference, the sub-contractor’s vice president repudiated the sub-contract by stating that the sub-contractor could not get more personnel to work on the project and therefore had no way of addressing City’s complaints. *Id.* In affirming the decision of the Supreme Court, the Second Department held that once it becomes clear that one party will not live up to the contract, the aggrieved party is relieved from the performance of futile acts, such as conditions precedent. *Id.* at 446. As a result, issues of fact existed as to whether the contractor was relieved of its “condition precedent” of

providing seven days written notice as required in the agreement where the sub-contractor failed to achieve substantial compliance with the contract. *Id.*

In the instant case, although CM did not provide the written consent to the Owner regarding the electrical contractor, the Owner subsequently breached the contract by failing to pay the contractors. Therefore, the Owner has not lived up the contract terms and any requirement of written consent should be relieved.

II. PARTIES TO A CONTRACT MAY WAIVE THE CONTRACTUAL PROVISIONS ORALLY OR BY CONDUCT, INCLUDING PARTIAL PERFORMANCE.

A contracting party may orally waive enforcement of a contract term by words or conduct, including partial performance notwithstanding a provision to the contrary in the agreement. *Madison Ave. Leasehold, LLC v. Madison Bentley Assoc., LLC*, 30 A.D.3d 1 (1st Dept. 2006). In *Madison*, the plaintiff Madison entered into a lease with defendant Bentley which was for a term of 10 years. *Id.* at 2. Defendant, the Millers, entered into a separate agreement with the plaintiff in which they guaranteed various obligations of Bentley under the lease. *Id.* at 3. Bentley vacated the premises three years after the commencement of the lease with seven years remaining on its term. *Id.* Bentley had not paid any rent since vacating the premises and the Millers did not make any payments under the guaranty. *Id.* Madison sought to recover from Bentley under the lease and from the Millers under the guaranty. *Id.* Thereafter, the Millers moved for summary judgment with respect to their liability under the guaranty. *Id.* The Supreme Court granted the motion for summary judgment dismissing the complaint to the extent that it alleged individual liability for breach of a lease between plaintiff and defendant Bentley. *Id.* Plaintiff appealed. *Id.*

In affirming the Supreme Court, the First Department noted that the guaranty in question stated that the guarantor's obligations shall cease and terminate upon the third (3rd) anniversary of the commencement date of the lease if the tenant has not been in monetary

default during the first three (3) years of the term of the Lease. *Madison Ave. Leasehold, LLC*, 30 A.D.3d at 19. As a result, the only basis for enforcement of the guaranty was Bentley's monetary default during the first three years of the lease. *Id.* During that time, Bentley had made numerous late payments and plaintiff had accepted those payments without question. *Id.* In fact, plaintiff did not raise the timeliness of Bentley's rent payments until after the third anniversary of the lease, when in early 2004 it commenced the present suit to recover the rent due for the remainder of the lease term. *Id.* at 7.

Accordingly, the First Department held that the trial court properly determined that the guaranty clause had expired according to its terms. *Madison Ave. Leasehold, LLC*, 30 A.D.3d at 10-12. The court further held that, having failed, over the course of three years, to give the dealership any notice that timely payment of rent would be required, the landlord could not now insist that the failure to strictly comply with the timely payment condition of the lease constituted a default. *Id.* The course of conduct of the parties to the lease clearly establishes waiver of its timely payment provision as a matter of law. *Id.* at 7.

In the instant case, Owner was aware of the written consent provision, but never requested same and continued to perform the contract as if such notice of consent was sent. Therefore, the Owner waived the written notice requirement through both his knowledge and actions.

In addition, "[a] party for whose benefit a provision is inserted in a contract may waive that provision and accept performance of the contract as is." *De Freitas v. Holley*, 93 A.D.2d 852, 853 (2d Dept. 1983). In *De Freitas*, the defendant Raymond Holley entered into a contract to sell real property to the plaintiff buyer. *Id.* at 852-853. Paragraph four of the rider to the contract provided that the purchaser shall conduct a termite inspection at his own expense. *Id.* If the inspection discloses a termite condition which the seller is unwilling to adequately correct, then the purchaser or seller may cancel the contract after serving a notice

of such cancellation to the attorneys for either party in writing. *Id.* On inspection, substantial termite damage and infestation was disclosed. *Id.* Thereafter, the seller's attorney wrote to plaintiff advising her that his client did not intend to remedy the termite situation and had elected to cancel the contract, returning plaintiff's escrowed deposit. *Id.* Plaintiff responded to seller's attorney expressing her intention to proceed with the purchase since she was not concerned about the termite infestation. *Id.*

However, the defendant seller, acting for himself and/or through his attorney, conveyed the premises to a different buyer. *De Freitas*, 93 A.D. at 853. Plaintiff commenced an action for specific performance of the contract. *Id.* The trial court granted summary judgment in favor of the defendants and held that the language of the contract was unambiguous and defendant Holley validly canceled the contract pursuant to paragraph four of the contract rider, in strict compliance with the terms of the contract. *Id.*

In reversing the trial court's order granting summary judgment to the defendants, the Second Department held that the language of contractual provision was intended to protect plaintiff from having to purchase the property in the event that a termite condition was discovered and the seller refused to correct it. *De Freitas*, 93 A.D. at 853. The court further held that a party for whose gain a provision is included in a contract may waive that provision and admit the performance of that contract. *Id.* (internal citation omitted). Thus, when plaintiff learned that the termite inspector had discovered a termite condition, she had the right to waive that defect and require performance of the contract *Id.* (internal citation omitted). As the purchaser was apparently ready, willing and able to perform, and had elected to proceed to closing without demanding that the condition be corrected, the seller could not unilaterally cancel the contract of sale based upon a provision affording the seller the right to cancel if he is unwilling to adequately correct a particular condition and guarantee such correction. *Id.* (internal citation omitted).

In the instant case, the provision of written consent was presumably included in the contract for the benefit of CM, so that it could relinquish responsibility regarding contractors appointed directly by the Owner. As such, the written consent was designed to protect the CM. Therefore, CM had the right to waive that provision by failing to give written notice.

III. THERE IS IMPROPRIETY IN SIMULTANEOUS REPRESENTATION BY AN ATTORNEY IF IT CREATES A CONFLICT OF INTEREST AND AFFECTS THE OBLIGATIONS OF HIS PROFESSIONAL RELATIONSHIP.

The issue as to whether the attorney acted improperly in representing both the CM and the electrician is contingent upon whether the CM had an obligation to “bond off” the Electrician’s lien. Under such circumstances, there will be a conflict of interest. However, if there is no such duty on the CM’s part, then the attorney can represent both the CM and the electrician in the present action.

With rare and conditional exceptions, a lawyer may not place himself in a position where a conflicting interest may, even inadvertently, affect, or give the appearance of affecting, the obligations of his professional relationship. *Kelly v. Greason*, 23 N.Y.2d 368, 296 N.Y.S.2d 937, 943 (1968). This is owing to the fact that such an appearance of conflicting or adverse interests may constitute professional misconduct on the part of the lawyer, who is in a fiduciary relationship with his client. *Id.* at 375.

Under the N.Y. Code of Professional Responsibility Canon 5, an attorney should exercise independent professional judgment on behalf of the client he represents. *Vegetable Kingdom, Inc. v. Katzen*, 653 F. Supp. 917 (N.D.N.Y. 1987) (holding that parties being jointly represented had a “substantial identity of interest” the disqualification sought by the defendant was inappropriate). Pursuant to N.Y. Code of Professional Responsibility DR 5-105(A) and (B), an attorney must decline to accept and refuse to continue employment if it would be likely to involve him in representing differing interests. *Id.* Disqualification of counsel is appropriate in cases where an attorney’s conflict of interest undermines the court’s

confidence in his representation. *Id.* It is also appropriate when the attorney is potentially in a position to use privileged information concerning the adversary side, obtained through a prior representation. *Id.* However, absent any such showing of tainted conduct on the part of an attorney, mere appearance of impropriety is “too slender a reed on which to rest a disqualification.” *Id.* at 925.

In the exceptional situations where representation may be permissible, despite a potential and sometimes even an actual, clear conflict of interest, the lawyer must, at the very least, disclose to all affected parties the nature and extent of the conflict and obtain their consent to the continued representation. *Day v. Meyer*, 2000 U.S. Dist. LEXIS 13470, 18-19 (S.D.N.Y. Sept. 19, 2000). It may also be possible for an attorney to withstand disqualification for dual representation, when all concerned consent to the compromised representation. See *Hogan v. Higgins*, 2008 U.S. Dist. LEXIS 59889 (E.D.N.Y. Aug. 5, 2008.) In *Hogan*, defendants moved to disqualify the firm of Cobb and Cobb from representing the plaintiffs in their action against defendant police officers. *Id.* at 2-3. Defendants alleged that as a result of a letter sent by a paralegal with the firm of Cobb and Cobb to a witness in the case, the attorneys at Cobb and Cobb had become witnesses and had consequently developed a conflict of interest with the plaintiffs they represent. *Id.* at 4. However, taking into consideration the extensive and complex history of the litigation as well as the fact that the plaintiffs unequivocally expressed consent to continued representation by the Cobb and Cobb attorneys, the court denied the defendants' motion for disqualification of plaintiffs' counsel. *Id.* at 15.

Here, assuming the CM had a duty under the contract to “bond off” the electrician, a conflict of interest is created. Under such circumstances, it would be in the electrician’s best interests to have the CM “bond off” the lien, creating adverse positions between the two parties.

However, it is well settled that when the attorney sought to be disqualified had never represented the moving party that attorney owes no duty to the moving party and the moving party has no standing to raise a conflict of interest. See *Reichenbaum v. Reichenbaum & Silberstein, P. C.*, 162 A.D.2d 599 (2nd Dept. 1990); *In re Town & Country Constr. Co.*, 160 A.D.2d 1085 (3d Dep't 1990) (disqualification motion denied where firm sought to be disqualified owed respondents no fiduciary duty, had never represented respondents and never had a confidential relationship with respondents); *Booth v. Continental Ins. Co.*, 167 Misc. 2d 429 (Sup. Ct West.199).

In *Reichenbaum v. Reichenbaum & Silberstein, P. C.*, 162 A.D.2d 599 (2nd Dept. 1990), decedent's attorneys brought an action to obtain discovery from decedent's former company in order to determine the value of decedent's estate. The law firm for the company sought disqualification of the decedent's attorneys alleging that insofar as the decedent's attorneys represented certain defendants in 50 pending malpractice cases in which the company's law firm represents the plaintiffs, the decedent's attorney's representation of the decedent in the present action would necessarily lead to conflicts of interest and loyalty as well as to the appearance of impropriety. *Id.* at 600. The Second Department disagreed and held that the company's law firm had failed to establish that it was a party entitled to seek the disqualification of the petitioner's legal counsel. *Id.* Specifically, the Court noted that when the firm sought to be disqualified has never represented the moving party, that firm owed no duty to that party and it follows that if there is no duty owed there can be no duty breached. *Id.*

Here, the Owner has not standing to raise a conflict issue between the two contractors being represented by Attorney.

IV. A CAUSE OF ACTION EXISTS ONLY IN THE FORM OF A MOTION TO DISQUALIFY BASED ON A CONFLICT OF INTEREST.

Owner can show no damages as a result of Attorney's representation of both CM and Electrician. Regarding the conflict of interest, at most Owner may be able to bring a motion to disqualify because, as an attorney himself, he has the authority and obligation to bring a possible ethical violation to the attention of the court. Under such circumstance the adverse party may properly move to disqualify the attorney for an opposite party on the ground of conflict of interest. *SMI Industries Canada, Ltd. v. Caelter Industries, Inc.*, 586 F. Supp. 808 (ND NY 1984) (lack of standing argument "must give way to a maxim that adequately addresses the need to ensure both clients and the general public that lawyers will act within the bounds of ethical conduct"); *Vegetable Kingdom, Inc. v. Katzen*, 653 F. Supp. 917 (N.D.N.Y. 1987); Code of Professional Responsibility DR 1-103 [A].

However, the law in the Second Department appears settled that such a motion would not be successful based upon lack of standing. *Reichenbaum v. Reichenbaum & Silberstein*, P. C., 162 A.D.2d 599 (2nd Dept. 1990); *Rowley v. Waterfront Airways, Inc.*, 113 A.D.2d 926 (2nd Dept. 1985).

V. THE OWNERS CONDUCT OF SEEKING SETTLEMENT THROUGH COERCION IS FRIVOLOUS AND HAS VIOLATED THE CANONS OF PROFESSIONAL RESPONSIBILITY

A. An Attorney Who Fails To Abide By The Canons Of Professional Ethics Is Liable For Professional Misconduct

An attorney who institutes an action to merely harass or maliciously injure another is liable for professional misconduct. See 22 NYCRR 1200.33; *In re Guardino*, 188 A.D.2d 467 (N.Y. App. Div. 2d Dep't 1992). In *Guardino*, the attorney was charged with professional misconduct for instituting an action when it was obvious that such action would serve merely to harass or maliciously injure another. *Id.* at 353. The attorney also allegedly sent letters to an adversary attorney and forwarded an affidavit to the same attorney which reflected adversely on the attorney's fitness to practice law. *Id.* The Special Referee instituted disciplinary proceedings against the attorney, but the attorney refused to appear at the

proceedings. *Id.* The court concurred with the Special Referee's finding that the attorney had violated the Code of Professional Responsibility (22 NYCRR 1200.33 [a] [1]). *Id.* The court ordered that the attorney be disbarred from the practice of law upon his default. *Id.*

The Code prohibits an attorney from filing a suit, asserting a position or defense, delaying a trial, or taking other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another. 22 NYCRR 1200.33 [a] [1]). The Code also prohibits the attorney from counseling or assisting the client in conduct that the lawyer knows to be illegal or fraudulent. 22 NYCRR 1200.33 [a] [7]).

In the instant case, the Owner himself is an attorney and has resorted to actions amounting to professional misconduct by using threats to obtain settlement.

B. Court May Impose Sanctions On Attorneys For Engaging In Frivolous Conduct.

Courts may award costs or financial sanctions against either the attorney or the party for frivolous conduct. 22 NYCRR § 130-1.1. The conduct of an attorney is deemed frivolous if it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or asserts material factual statements that are false. See 22 NYCRR § 130-1.1. In determining whether the conduct undertaken was frivolous, the court shall consider, "the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, or should have been apparent, or was brought to the attention of counsel or the party." *Id.*

The court has discretionary power to award costs and financial sanctions against an attorney or party for actions resulting from frivolous conduct. *Flaherty v. Stavropoulos*, 199

A.D.2d 301, 302 (2d Dept. 1993) citing 22 NYCRR 130-1.1[a)]; see also *Kamen v. Diaz-Kamen*, 2007 NY Slip Op 4453, 2 (2d Dept. 2007).

In *Jalor Color Graphics v. Universal Adver. Sys.*, 2 A.D.3d 165 (1st Dept. 2003), an attorney threatened criminal prosecution during the course of a civil lawsuit, as part of a calculated, deliberate strategy designed to harass plaintiff into folding its litigation hand. The Court held that the attorney's baseless threats constituted frivolous conduct undertaken primarily to harass and intimidate an adversary, and to frustrate resolution of the litigation. *Id.* at 166. As such, costs and sanctions against the attorney were proper. *Id.* .

C. Settlements That Are Reached Through Coercion And Duress Are Void.

It should be noted that stipulations of settlement, which are favored by the courts, can be set aside for such reasons as duress and coercion. *Scheinberg v. Scheinberg*, 249 N.Y. 277 (1928); *Fourth Ocean Putnam Corp. v. Suburbia Federal Sav. & Loan Assn.*, 124 A.D.2d 550, 552 (2d Dept. 1986). A contract may be voided on the ground of economic duress where the complaining party was compelled to agree to its terms by means of a wrongful threat which precluded the exercise of its free will. *Austin Instrument, Inc. v. Loral Corp.*, 29 N.Y.2d 124, 130 (1971).