

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
FIRST DEPARTMENT

Applehole v Wyeth Ayerst Labs.

Applehole v. Wyeth Ayerst Labs., 2023 NY Slip Op 01059 (App. Div. 2023) · No. Appeal No. 17418; Case No. 2022-00788; Index No. 105122/09 · Decided February 28, 2023

SUMMARY

The Appellate Division, First Department dismissed an appeal challenging the disqualification of Parker Waichman LLP from representing intervenor plaintiffs. The court held that the prior disqualification ruling was law of the case and that Parker Waichman lacked standing to appeal because it had already been disqualified from representing the plaintiffs.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, First Department
WRITING FOR THE COURT	Kern, J.P.; Oing, J.; Kennedy, J.; Mendez, J.; Pitt-Burke, J.
JURISDICTION	New York
DECIDED	February 28, 2023
DOCKET	Appeal No. 17418; Case No. 2022-00788; Index No. 105122/09
DISPOSITION	dismissed
PROCEDURAL POSTURE	Appeal from an order granting defendants' motion to disqualify Parker Waichman LLP and related entities from representing intervenor plaintiffs.
PRECEDENTIAL VALUE	published
PARTIES	Clara Applehole et al., Intervenor plaintiffs v. Wyeth Ayerst Laboratories et al., Paul J. Napoli, Gerald Kaiser, Marc J. Bern, Napoli, Kaiser & Associates LLP, Napoli, Kaiser, Bern LLP, Napoli, Kaiser, Bern & Associates LLP, Law Offices of Marc Jay Bern, P.C., Napoli, Kaiser, Bern & Associates P.C., Napoli, Kaiser & Bern, P.C.

TOPICS

- standing
- appellate procedure
- civil procedure

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether the prior determination disqualifying Parker Waichman from representing the plaintiffs was binding under the law-of-the-case doctrine absent newly discovered evidence or a change in the law.
2. Whether Parker Waichman had standing to appeal an order disqualifying it from representing the plaintiffs.

HOLDINGS

1. The prior appellate resolution of Parker Waichman's disqualification was the law of the case and foreclosed reexamination because there was no newly discovered evidence or change in the applicable law.
2. Parker Waichman lacked standing to bring the appeal because it had been disqualified from representing the plaintiffs in any capacity.

KEY QUOTATIONS

“As Parker Waichman was disqualified from representing plaintiffs in any capacity, it does not have standing to bring the appeal and therefore, the appeal must be dismissed.”

FACTUAL BACKGROUND

Parker Waichman LLP represented or sought to represent intervenor plaintiffs in the action. A partner of the firm was expected to be called as a material witness, resulting in a prior order disqualifying the firm under Rule 3.7(b). After that order was affirmed and appellate leave was denied, defendants obtained the order challenged in this appeal, again disqualifying Parker Waichman and related entities from representing the intervenor plaintiffs.

PROCEDURAL HISTORY

Supreme Court, New York County, granted defendants' motion to disqualify Parker Waichman from representing intervenor plaintiffs. Plaintiffs had previously appealed an order disqualifying Parker Waichman under Rule 3.7(b) because a partner of the firm was expected to be called as a material witness. The Appellate Division affirmed that prior order, and both the Appellate Division and Court of Appeals denied leave to appeal. The present appeal was dismissed because the prior determination was the law of the case and Parker Waichman lacked standing to pursue the appeal.

DISPOSITION

dismissed

CASES CITED

- Matter of Diet Drug Litig., 180 AD3d 483, 483 [1st Dept 2020], lv denied 36 NY3d 942 [2020]
- Kenney v City of New York, 74 AD3d 630, 630-631 [1st Dept 2010]

OPINION

PER CURIAM.

Applehole v Wyeth Ayerst Labs. (2023 NY Slip Op 01059) Applehole v Wyeth Ayerst Labs. 2023 NY Slip Op 01059 Decided on February 28, 2023 Appellate Division, First Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the Official Reports. Decided and Entered: February 28, 2023 Before: Kern, J.P., Oing, Kennedy, Mendez, Pitt-Burke, JJ. Index No. 105122/09 Appeal No. 17418 Case No. 2022-00788 [*1]Clara Applehole et al., Plaintiff-Appellants, vWyeth Ayerst Laboratories et al, Defendants, Paul Napoli et al., Defendants-Respondents.

[And Another Action] Parker Waichman LLP, Port Washington (Jay L. T. Breakstone of counsel), for appellants. L'Abbate, Balkan, Colavita & Contini, LLP, Melville (Marian C. Rice of counsel), for Paul J. Napoli, Napoli, Kaiser & Associates LLP, Napoli Kaiser, Bern LLP, Napoli, Kaiser, Bern & Associates, LLP and Napoli, Kaiser & Bern, P.C., Groombridge, Wu, Baughman and Stone, LLP, New York (Eric Alan Stone of counsel), for Paul J. Napoli, Napoli, Kaiser & Associates LLP, Napoli Kaiser, Bern LLP, Napoli, Kaiser, Bern & Associates, LLP and Napoli, Kaiser & Bern, P.C.

Ropers Majeski, P.C., New York (John W. Hanson of counsel), for Marc J. Bern and Law Office of Marc J Bern, and Godosky & Gentile, P.C., New York (Anthony Gentile of counsel), for Gerald Kaiser, respondents. Appeal from order, Supreme Court, New York County (Andrew Borrok, J.), entered January 31, 2022, which granted the motion of defendants Paul J. Napoli, Gerald Kaiser, Marc J. Bern, Napoli, Kaiser & Associates LLP, Napoli, Kaiser, Bern LLP, Napoli, Kaiser, Bern & Associates LLP, Law Offices of Marc Jay Bern, P.C., Napoli, Kaiser, Bern & Associates P.C., and Napoli, Kaiser & Bern, P.C. to disqualify Parker Waichman LLP or any of its related entities from representing intervenor plaintiffs in this action, unanimously dismissed, without costs.

Plaintiffs have already appealed a prior order determining that Parker Waichman was disqualified under Rules of Professional Conduct (22 NYCRR 1200.0) rule 3.7(b) from representing intervenor plaintiffs in this action, as a partner of that firm was to be called as a material witness. This Court affirmed the order, and both this Court and the Court of Appeals denied leave to appeal (see Matter of Diet Drug Litig., 180 AD3d 483, 483 [1st Dept 2020], lv denied 36 NY3d 942 [2020]).

As a result, since there has been no new evidence discovered after the prior order or any change in the applicable law, resolution of the issue on the prior appeal constitutes the law of the case and forecloses reexamination of the issue (see Kenney v City of New York, 74 AD3d 630, 630-631 [1st Dept 2010]).

As Parker Waichman was disqualified from representing plaintiffs in any capacity, it does not have standing to bring the appeal and therefore, the appeal must be dismissed. THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT. ENTERED: February 28, 2023

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