

Tanner v DKC Trading LLC

2017 NY Slip Op 30624(U)

March 23, 2017

Supreme Court, New York County

Docket Number: 653595/2015

Judge: Charles E. Ramos

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

-----X
KEN TANNER, WENDI TANNER and JJAMZ, INC.,

Plaintiffs,

Index No. 653595/2015

- against -

DKC TRADING LLC, NEW AXIOM PARTNERS, INC.
and PUNCH FASHION, LLC,

Defendants,

DKC TRADING LLC and PUNCH FASHION, LLC,

Counterclaim Plaintiffs,

- against -

KEN TANNER, WENDI TANNER and JJAMZ, INC.

Counterclaim Defendants.

-----X

Hon. C. E. Ramos, J.S.C.:

In motion 003, defendants/counterclaim plaintiffs DKC Trading LLC ("DKC") and Punch Fashion, LLC ("Punch LLC") move to disqualify Richard Roth, Esq. and the Roth Law Firm, PLLC (the "Roth Firm") from representing plaintiffs/counterclaim defendants Ken Tanner¹, Wendi Kenner (collectively, the "Tanners"), and Jjamz, Inc. ("Jjamz"), pursuant to section 3.7(a) of the Rules of Professional Conduct ("RPC 3.7[a]"), and for the imposition of sanctions against plaintiffs and their counsel, pursuant to section 130-1.1 of the Rules of Chief Administrator of the Courts

¹ The record refers to plaintiff Ken Tanner and Kenneth Tanner interchangeable.

("RCAC 130-1.1").

For the reasons set forth below, the Court denies the motions in their entirety.

Background

According to the unverified second amended complaint, the Tanners are owners of Jjamz, a costume jewelry business. David Cleary is the owner of DKC, and owner and CEO of Punch LLC (Affidavit of Cleary ["Cleary Aff."], ¶ 1). Roth is Mr. Tanner's step brother-in-law, and has been Mr. Tanner's attorney for many years (Affidavit of Kenneth Tanner ["Ken Aff."], ¶¶ 3, 4).

In 2011, Mr. Tanner met Cleary when Jjamz was experiencing financial issues (Complaint, ¶¶ 10, 12). Cleary claimed that he had strong relationships with large retailers, and that his connections could help Jjamz's business (*id.* at ¶¶ 15, 16). Cleary also represented to the Tanners that Jjamz could be the exclusive manufacture and wholesaler for DSW Inc. ("DSW") (*id.* at ¶ 18). Based on Cleary's assurances, the Tanners devoted significant amounts of time and capital to Jjamz to design, produce, and build a 400-store rollout (*id.* at ¶ 20). However, DSW later introduced additional jewelry lines from other vendors (*id.* at ¶ 22).

After Jjamz completed DSW's rollout, Cleary demanded a large royalty percentage for introducing the DSW business, and threatened to disclose Jjamz's financial condition to DSW

(Complaint, ¶ 26). As the relationship between the Tanners and Cleary began to deteriorate, Cleary recommended the Tanners to meet with a consultant (the "Consultant") to examine Jjamz's business (*id.* at ¶ 27). The Tanners allege that the Consultant acted primarily in Cleary's interests instead of providing a neutral evaluation (*id.* at ¶ 28).

On September 22, 2014, the Tanners entered an agreement with New Axiom Partners, Inc. ("New Axiom") to assess Jjamz's operations and capital requirements (Complaint, ¶ 32). New Axiom did not provide the assessment in the given time frame, but designed an operating model to provide Jjamz an influx of capital (*id.* at ¶¶ 33, 35, 36). Meanwhile, the Tanners were heavily relying upon the Consultant's due diligence and oversight in running Jjamz's operations (*id.* at ¶ 37).

On December 2, 2014, the Tanners had a telephonic meeting with key managers of Jjamz and the Consultant, who informed them that the Tanners would no longer be involved with day-to-day operations of Jjamz (Complaint, ¶ 39). Subsequently, the Consultant and DKC sought to control Jjamz's payments and expenses (*id.* at ¶ 39). Thereafter, the assets of Jjamz were sold to Punch LLC, and DKC purchased ninety percent of Punch LLC (Transcript, 2016/12/12, 3:4-5). The record is unclear as to how sale of the assets was effectuated. The transaction was closed on January 2, 2015 (Complaint, ¶ 52). Thereafter, DKC and Punch LLC

failed to timely pay the Tanners pursuant to the terms of the operative agreements (*id.* at ¶¶ 54, 55).

In October 2015, the Tanners commenced this action against DKC, New Axiom, and Punch LLC, for breach of contract, breach of the covenant of good faith and fair dealing, and fraud. DKC and Punch LLC interposed counterclaims for breach of contract, unjust enrichment, and fraud.

Discussion

DKC and Punch LLC move pursuant to RPC 3.7(a) to disqualify Roth and the Roth Firm on the ground that Roth is likely to be called as a witness. They base their allegations on an email from Ms. Tanner to Roth (the "Email") and a comment posted on the Roth Firm's yelp.com page (the "Review"). DKC and Punch LLC also move pursuant to RCAC 130-1.1 to impose sanctions on the Tanners and Jjamz and their counsel, on the ground that the Tanners and Jjamz's reply to their counterclaims constitutes frivolous conduct. The Tanners and Jjamz cross-move to amend the complaint, which is granted without oppositions.

According to DKC and Punch LLC, Ms. Tanner wrote an Email to Roth on July 29, 2015, which was carbon copied to Mr. Tanner (Cleary Aff., Ex. A). The Email contained a comment related to Roth and the Roth Firm's service, and stated that "[w]e had a very complicated case dealing with volatile, unscrupulous people" (*id.*). On July 7, 2015, a user named "Ken T." posted the Review the Roth Firm's yelp.com page, which stated that "[m]y partner

and I had a very complicated dispute that resulted from the sale of our business to volatile, unscrupulous businessmen" (*id.* at Ex. B).

It is unclear who informed Cleary of the Review (Cleary Aff., ¶ 2). Apparently Cleary believes that "Ken T." on yelp.com website is Mr. Tanner, and asserts that he (Mr. Clearly) has been identified as one of the "unscrupulous businessmen" to whom the Review referred, which is damaging to his reputation (*id.* at ¶ 4). On March 10, 2016, Cleary's attorney contacted Roth to request removal of the Review from yelp.com (*id.* at ¶ 5). The Review was subsequently removed (*id.*). Cleary represents that he intends to call Roth to testify as a fact witness about the Review in the trial of this action (*id.* at ¶ 6). Mr. Tanner disputes that Cleary is "unscrupulous businessmen" and contends that the Review refers to Jeffery Saull and Karen Saull from another Jjamz's business transaction (Ken Aff., ¶¶ 6-9).

On August 25, 2016, a copy of the Tanners' reply to counterclaims was served by email from Roth to DKC and Punch LLC's counsel (Affirmation of Corcoran, ¶¶ 4, 6). In the reply, the Tanners and Jjamz denied most of the allegations asserted in the answer of DKC and Punch LLC (*id.* at Ex. C)².

It is undisputed that "[t]he disqualification of an attorney

² Plaintiffs did not e-file the Reply dated August 25, 2016. Therefore, the only copy of the Reply is provided as an exhibit of Affirmation of Corcoran.

is a matter that rests within the sound discretion of the court" (*Flores v Willard J. Price Assoc., LLC*, 20 AD3d 343, 344 [1st Dept 2005]). RPC 3.7(a) prohibits a lawyer representing a client "in a matter in which the lawyer is likely to be a witness on a significant issue of fact" with limited exemptions.

Here, Roth is unlikely to be a witness on a significant issue of fact, and therefore, should not be disqualified. First, the Review is not related to significant issues of fact in this action. Neither the Email nor the Review refers to Cleary or any parties in this action. It is unclear from the record how Cleary is identified in the Review and how Punch LLC is related to the Review.

Second, Roth is unlikely to have any personal knowledge of whom the Review referred to. Roth is only the recipient of the Email from Ms. Tanner. The Review is posted on yelp.com for the Roth Firm by Mr. Tanner, Roth's step brother-in-law, to compliment Roth and the Roth Firm's service (Ken Aff., ¶ 3; Cleary Aff., Ex. B). Therefore, DKC and Punch LLC fail to persuade this Court that RPC 3.7(a) prohibits Roth from representing the Tanners and Jjamz in this action.

Furthermore, DKC and Punch LLC seek to impose sanctions against the Tanners and Roth because they denied most of the allegations in DKC and Punch LLC's answer. RCAC 130-1.1 allows the court to impose sanctions on frivolous conducts when

"(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false."

CPLR 3018 provides that "[a] party shall deny those statements known or believed by him to be untrue." In addition, denials made in good faith in an answer are not frivolous (*Lazarus v Wiernicki*, 195 AD 830, 832 [1st Dept 1921]).

Here, no sanctions against the Tanners and their counsel is warranted because the denials in the reply appear to be made in good faith. Therefore, the motion for sanctions is denied. DKC and Punch LLC are cautioned that further baseless motion practice, without merit and undertaken to harass the plaintiffs, may result in sanctions against them and/or their counsel.

Accordingly, it is


ORDERED that defendants' motion to disqualify the Roth Firm as plaintiff's counsel is denied; and it is further

ORDERED that defendants' motion for sanction is denied; and it is further

ORDERED that the plaintiff's cross motion for leave to amend the complaint herein is granted without opposition.

Dated: March 23, 2017

ENTER:


CHARLES E. RAMOS
J.S.C.