

**Nina Penina, Inc. v Njoku**

2005 NY Slip Op 30063(U)

March 18, 2005

Supreme Court, New York County

Docket Number: 0106051/0512

Judge: Emily Jane Goodman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

**EMILY JANE GOODMAN**

PRESENT: \_\_\_\_\_

PART 17

Justice

0106051/2004

NINA PENINA, INC.

vs

NJOKU, I.O.

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

SEQ 2

MOTION SEQ. NO. \_\_\_\_\_

DISQUALIFY COUNSEL

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion *is decided in accordance with the attached decision and order*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**FILED**

MAR 23 2005

NEW YORK COUNTY CLERK'S OFFICE

Dated: 3/18/05

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

**EMILY JANE GOODMAN**  
J.S.C.

Check if appropriate:  DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 17

-----X

NINA PENINA, INC.,

Plaintiff,

Index No. 106051/04

-against-

CHIEF I.O. NJOKU,

Defendant.

-----X

**EMILY JANE GOODMAN, J.:**

Defendant Chief I.O. Njoku (Njoku) moves to disqualify Robert Teitelbaum (Teitelbaum) and his firm from representing plaintiff Nina Penina, Inc. (Nina Penina) in this action.

Plaintiff commenced this action, seeking specific performance and/or damages resulting from defendant's refusal to convey a piece of property known as 655 St. Nicholas Avenue, New York, New York (the property). Defendant contends that Teitelbaum should be disqualified because Teitelbaum is a witness to factual issues that are at the heart of this case.

On March 3, 2004, Dr. Philip Thomas (Thomas), attorney in fact for Njoku, signed a contract of sale whereby Njoku agreed to sell the property to plaintiff for \$1.9 million. On March 17, 2004, Thomas and Marc Chemtob (Chemtob), president of Nina Penina, signed a rider to the contract of sale of the property, at the office of Ronald E. Stoute, Njoku's attorney. Prior to

signing the rider, Chemtob informed Thomas that Teitelbaum had prepared the rider. Thomas claims that he specifically disclosed the existence of restrictive covenants in the deed, and a "Community Facility" use restriction that they imposed on the property. Thomas went through the rider with Chemtob, and compared it to the deed restrictions and regulations. Thomas discussed the deed restrictions with Chemtob and explained the portions of the regulations applicable to the property, and their impact on the future use of the property, as they had been explained to him by an official from the New York City Buildings Department. After the discussion, Chemtob called Teitelbaum from Stoute's office and discussed the details of the conversation. Teitelbaum made changes to the rider, and faxed a revised version of the rider to Stoute's office. Thomas read the rider, including paragraph six, and understood it to be in conformity with his discussion with Chemtob. Thomas then signed the rider. Thomas Affid., ¶¶ 3-5. Plaintiff does not dispute Thomas's recitation of the facts surrounding the signing of the rider.

The parties do not include any affidavits regarding the failure to consummate the sale of the property, but apparently defendant did not convey the property to plaintiff, after which plaintiff commenced this action.

Plaintiff makes allegations regarding discovery in its opposition papers. However, this motion for disqualification of

Teitelbaum does not address any discovery issues, so those assertions are irrelevant to this motion.

Defendant contends that Teitelbaum should be disqualified from representing plaintiff because he was a witness to the matters involved in drafting the rider that is currently the subject of the dispute. Defendant asserts that, if the court does not interpret the language of the rider as a matter of law, parol evidence will be relevant to the inquiry about what the parties contemplated that language to mean. In its reply papers, plaintiff further asserts that plaintiff's counsel had agreed to withdraw, but then reneged on that agreement. However, that issue has no bearing on whether or not Teitelbaum should be disqualified. Plaintiff further states in its reply papers that "we believe the contract is unambiguous ... ." Reply Affirm., ¶ 5.

An attorney can be disqualified only when it is clear that the attorney will be called as a witness, and that his or her testimony is necessary. *Daniel Gale Assoc., Inc. v George*, 8 AD3d 608, 609 (2d Dept 2004). Here, defendant itself acknowledges that Teitelbaum's testimony may be entirely unnecessary, because the court may construe the rider as a matter of law. Under such circumstances, a motion to disqualify is, at best, premature. Further, defendant has failed to demonstrate that the information would not be available from another source,

e.g., Chemtob and Thomas. *Id.*; *Broadwhite Assoc. v Truong*, 237 AD2d 162, 163 (1<sup>st</sup> Dept 1997). Under these circumstances, there is no basis to disqualify Teitelbaum at this time.

Accordingly, it is hereby

ORDERED that the motion is denied.

**This Constitutes the Decision and Order of the Court.**

Dated: March 18, 2005

ENTER:



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J.C.S.  
**EMILY JANE GOODMAN**

**FILED**  
MAR 23 2005  
NEW YORK  
COUNTY CLERK'S OFFICE