

**Brandland v Kunkis**

2005 NY Slip Op 30592(U)

July 5, 2005

Supreme Court, New York County

Docket Number: 103516/04

Judge: Shirley Werner Kornreich

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 54

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DR. CARYN BRANDLAND,

Plaintiff,

Index No.: 103516/04

-against-

**DECISION  
and  
ORDER**

MARTHA H. KUNKIS and  
BAUMAN & KUNKIS, P.C.,

Defendants.  
-----X

KORNREICH, SHIRLEY WERNER, J.:

This is an action to recover for alleged legal malpractice, breach of contract, breach of fiduciary duty and intentional infliction of emotional distress arising from defendants' representation of plaintiff in the purchase of an apartment and the execution of a partnership agreement.

***Motion***

Defendants now move, by Order to Show Cause, to disqualify both plaintiff's counsel and his firm under Disciplinary Rule 5-102, codified at 22 NYCRR 1200.21, on the ground that plaintiff's counsel is a necessary witness in the malpractice action and that his testimony will be prejudicial to plaintiff. In support of their motion, defendants submit the affirmation of counsel, a copy of the complaint, plaintiff's supplemental response to interrogatories, and portions of the transcript of the deposition of Pamela H. Eagle, plaintiff's former partner. Plaintiff has opposed, submitting the affirmation of counsel, plaintiff's affidavit, and the affidavit of Donna M. Langenbahn, Ph.D., plaintiff's former psychologist.

***Facts***

In 1998, plaintiff, Dr. Caryn Brandland, sustained a severe head injury after falling ice from the Empire State Building hit her on the head. Brownell Aff. at para. 6. Plaintiff

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proceeded to file a lawsuit to recover for the injuries she suffered in the accident. *Id.* She retained Clifford Stern, then of the firm of Schneider, Kleinick & Weitz, LLP, to represent her in that lawsuit. *Id.* In January 2001, plaintiff agreed to settle the lawsuit for \$3.25 million. Compl. at para. 12. As of the date of the settlement of her personal injury case, plaintiff had become involved in a romantic relationship with Pamela Eagle. *Id.* at para. 13.

Also in January 2001, plaintiff decided to use the settlement proceeds from her personal injury suit to purchase an apartment in which she and Eagle could live. *Id.* at para. 14. At the urging of Eagle, plaintiff and Eagle retained defendant Martha Kunkis, of defendant firm Bauman & Kunkis, P.C., to represent them in the real estate transaction. *Id.* at para. 16; Brownell Aff. at para. 7. At this time, Mr. Stern was no longer plaintiff's attorney. Stern Aff. at para. 14.

Plaintiff alleges that, at or before closing on the apartment, and without plaintiff's knowledge and informed consent, Kunkis added Eagle's name to the deed as a joint tenant. Compl. at para. 21. At the time of closing, however, plaintiff alleges that she believed, "as [she] had been consistently led to believe from the date she and Eagle had retained Defendant Kunkis, that she had sole and complete ownership of the [apartment]" since she had paid for the apartment in its entirety. *Id.* at para. 20. After closing on the apartment, Kunkis also represented both plaintiff and Eagle in the execution of a partnership agreement, which was completed on March 29, 2001. *Id.* at paras. 22, 26.

By March 2003, plaintiff determined that Eagle had misappropriated her funds and had obtained title to the apartment as a joint tenant. *Id.* at para. 42. The relationship between plaintiff and Eagle deteriorated, resulting in a civil lawsuit filed by plaintiff against Eagle. *Id.* at

para. 43-45. In July 2003, plaintiff and Eagle settled the lawsuit under a confidentiality agreement. *Id.* at para. 46.

Plaintiff subsequently initiated the present legal malpractice action against Kunkis and her firm Bauman & Kunkis, P.C. She has once again retained Clifford Stern, who had represented her in the personal injury action, now of the firm Silverstein, Hurwitz & Stern, LLP, to represent her in this matter. Brownell Aff. at para. 8; Stern Aff. at para. 1.

In her complaint, plaintiff alleges that Kunkis simultaneously represented her and Eagle in connection with the purchase of the apartment and the partnership agreement without disclosing that a conflict of interest existed between her and Eagle, namely that plaintiff desired to retain complete ownership of the apartment while Eagle wanted joint ownership. Compl. at para. 51; Interrogatory 24. Plaintiff further alleges, *inter alia*, that Kunkis acted against plaintiff's best interests and failed to: zealously represent her; research applicable law; draft proper documents pertaining to the purchase of the apartment and the partnership agreement; and advise her of the potential outcomes under these contracts. Compl. at paras. 51, 59. Finally, plaintiff claims that Kunkis, acting either alone or in concert with Eagle, coerced her into the contracts without her informed consent. *Id.* at paras. 29, 41.

In response to interrogatories 25, 26, 27, 31 and 32, asking plaintiff to set forth the basis for her claims that Kunkis coerced her into executing the contracts, represented her without adequate preparation, and acted disloyally, as well as her claim for punitive damages, plaintiff, objecting to each question, alleged, *inter alia*, that "Kunkis knew or should have known that Plaintiff suffered from cognitive deficits and other disorders as a result of having sustained a traumatic brain injury." Interrogatories 25, 26, 27, 31, 32.

Defendants now contend that plaintiff's attorney, Stern, will be called to testify regarding plaintiff's claim that she suffered from cognitive deficits during the time that she was represented by Kunkis. Brownell Aff. at para. 13. In his affirmation in opposition, Stern argues that plaintiff "understood the ramifications of the settlement of her case." Stern Aff. at para. 8. Moreover, in her own affidavit, plaintiff agrees that she "certainly" understood the settlement agreement." Brandland Aff. at para. 3. Plaintiff further contends that Stern was not the only attorney who explained the settlement agreement to her. *Id.* at para. 3. She alleges that Harvey Weitz, Stern's partner at the time, was also representing her and "actually settled the case and explained the settlement terms and ramifications to [her] on several occasions while Mr. Stern was present." *Id.* In the deposition of Eagle, submitted by the defendants, Eagle states that Stern "handled" the personal injury lawsuit for plaintiff but she is in accord with plaintiff in stating that plaintiff also met with Harvey Weitz with regard to the settlement, in addition to "a few other people." EBT of Pamela H. Eagle, p. 119. Eagle further states that she was with plaintiff each time plaintiff spoke with Stern regarding the personal injury lawsuit. *Id.*, p. 118.

Finally, plaintiff states in her affidavit that from September 8, 1999 through October 22, 2001, she was treated by Dr. Donna Langenbahn, an "expert in the field of neuropsychology," for brain injuries that were the subject of her personal injury case. Brandland Aff. at para. 2. Dr. Langenbahn, in her affidavit, contends that she is "probably most knowledgeable in assessing [plaintiff's] ability to concentrate and listen, her ability to process information, and how well she can track and understand conversations" and that she is available to testify as to whether plaintiff "was competent to understand and consent to the settlement of her personal injury lawsuit in January 2001 as well as to her ability to understand and process the information necessary to provide her informed consent." Langenbahn Aff. at paras. 3-4.

### ***Conclusions of Law***

The “advocate-witness rule” requires an attorney to withdraw from a case “if the lawyer knows or it is obvious that the lawyer or another lawyer in the lawyer’s firm may be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony would or might be prejudicial to the client.” Code of Professional Responsibility DR 5-102[B] [22 NYCRR 1200.21]. Disqualification of an attorney under the “advocate-witness rule” is only required, however, “where the testimony by the attorney is considered *necessary*.” *Broadwhite Assoc. V. Truong*, 237 A.D.2d 162, 162-63 (1st Dept. 1997) (emphasis in original). The burden is on the challenging party to establish that the attorney’s testimony is necessary. *Galluccio, M.D. v. Fochios, M.D.*, 303 A.D.2d 190, 190 (1st Dept. 2003); *Zutler v. Drivershield Corp.*, 15 A.D.3d 397, 397 (2d Dept. 2005).

In addition, when an attorney is called as a witness for the adverse party, “disqualification would be required only where continued representation would be prejudicial to [the client’s] interests.” *Broadwhite*, 237 A.D.2d at 163; *see Sokolow, Dunaud, Mercadier & Carreras LLP v. Lacher*, 299 A.D.2d 64, 76 (1st Dept. 2002) (holding that showing of prejudice is only required when attorney is called as witness for adverse party). To make a showing of prejudice, “[t]he challenging party carries a heavy burden of identifying the projected testimony of the advocate-witness and demonstrating how it would be ‘so adverse to the factual assertions or account of events offered on behalf of the client as to warrant his disqualification.’” *Broadwhite*, 237 A.D.2d at 163 quoting *Martinez v. Suozzi*, 186 A.D.2d 378, 379 (1st Dept. 1992).

Finally, the decision as to disqualification of an attorney-witness rests in the discretion of the Court. *Sokolow*, 299 A.D.2d 64, 74 (1st Dept. 2002); *Zutler*, 15 A.D.3d at 397. Because “a

party's entitlement to be represented in ongoing litigation by counsel of its choosing is a valued right," the court will not order disqualification "absent a clear showing that disqualification is warranted." *Id.* Here, the Court finds that disqualification is improper because defendants have failed to show that Stern's testimony is necessary or that it would be prejudicial to plaintiff.

In determining the necessity of an attorney's testimony, the Court considers such factors as "the significance of the matters, the weight of the testimony, and availability of other evidence." *S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp.*, 69 N.Y.2d 437, 446 (1987). Moreover, the Court recognizes that "[t]estimony may be relevant and even highly useful but still not strictly necessary." *Id.* For example, "a witness whose testimony is, at best, cumulative is not a necessary witness." *Talvy v. American Red Cross in Greater NY*, 205 A.D.2d 143, 153 (1st Dept. 1994). Defendants claim that Stern's testimony is necessary because Stern "was in the unique position to know Plaintiff's mental capacity and abilities following the accident." Brownell Aff. at para. 13. The Court finds this argument unpersuasive.

First, in assessing the significance of Stern's testimony, the Court disagrees with defendants that a "core issue" of plaintiff's malpractice action is "whether [p]laintiff was competent to enter into the real estate and domestic partner agreement." *Id.* While plaintiff does raise the issue of her cognitive deficiencies in response to defendants' interrogatories, it is significant to note that plaintiff makes no mention of this issue in her complaint. The heart of plaintiff's cause of action is that Kunkis simultaneously represented multiple parties with conflicting interests without obtaining plaintiff's informed consent, in addition to failing to explain to plaintiff the implications and outcomes of the contracts. *See* Compl. at para. 51; Interrogatory 25 ("Kunkis did not fully explain the legal effect and ramifications of the terms of the documents that Plaintiff was asked to execute"). Therefore, since plaintiff's claim is that

Kunkis made no explanation or attempt to obtain informed consent whatsoever, the issue of plaintiff's cognitive deficiencies is not central to a finding of defendants' malpractice. In turn, the proposed testimony of Stern regarding plaintiff's ability to understand the terms of her settlement in the personal injury action is of little relevance to the present matter.

However, even if plaintiff's cognitive abilities with regard to the settlement of her personal injury action were relevant to this case, Dr. Langenbahn, plaintiff's treating neuropsychologist during both the settlement of the personal injury action and the execution of the real estate and partnership transactions, is the appropriate witness to testify to her cognitive abilities. Moreover, should defendants insist upon lay testimony, Stern's *former* partner Weitz "actually settled the case and explained the settlement terms and ramifications" to plaintiff. Brandland Aff. at para. 3. Thus, the evidence suggests that Weitz is in a better position than Stern to testify as to plaintiff's understanding of the personal injury settlement. Therefore, the Court finds that Stern is not a necessary witness. *See e.g., Galluccio*, 303 A.D.2d at 190 ("petitioner has not established that counsel's testimony is necessary, since the same testimony that petitioner cites as necessary can be obtained from other witnesses"); *Cowen & Co. v. Tecnoconsult Holdings Ltd.*, 234 A.D.2d 86 (1st Dept. 1996) (attorney's testimony cumulative and not necessary where four other witnesses are available to testify as to same matter).

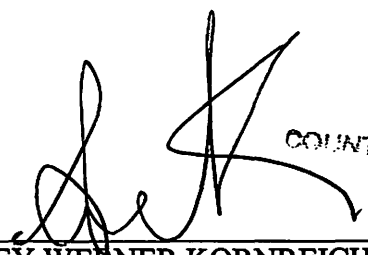
Disqualification is also improper because defendants have not submitted evidence that Stern's testimony would prejudice plaintiff. Defendants contend that Stern's testimony is prejudicial because, if he testifies that plaintiff was competent to understand and agree to the personal injury settlement, then he undercuts her position that she suffered from cognitive difficulties during the execution of the real estate and partnership transactions. Brownell Aff. at para. 5. Based on the evidence, however, Stern's projected testimony is not "adverse to the

factual assertions or account of events offered on behalf of plaintiff.” *Luk Lamellen u. Kupplungsbau GmbH v. Lerner.*, 167 A.D.2d 451, 452-53 (2d Dept. 1990). Plaintiff submits in her affidavit that she “certainly” understood the personal injury settlement. Brandland Aff. at para. 1. This coincides with Stern’s affirmation that she understood the settlement. Stern Aff. at para. 8. The evidence does not suggest, as defendants contend, that plaintiff will pursue the theory that she was incompetent to understand the terms of her personal injury settlement. As suggested above, it is not clear that the personal injury suit and Stern’s prior representation of plaintiff will be relevant to this case whatsoever. Therefore, defendants have failed to meet their burden. *See, e.g. Forrest v. Par Pharmaceutical, Inc.*, 46 F. Supp. 2d 244, 248 (S.D.N.Y. 1999) (“Because both attorney and client attest to essentially the same facts, [defendant] has failed to demonstrate that [attorney’s] testimony is adverse to his client”). Accordingly, it is

ORDERED that defendants’ motion, by Order to Show Cause, for disqualification of both plaintiff’s counsel and his firm is denied.

The foregoing shall constitute the Decision and Order of the Court.

**FILED**  
 JUL 29 2005  
 NEW YORK  
 COUNTY CLERK



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 SHIRLEY WERNER KORNREICH

Date: July 5, 2005  
 New York, New York