

Sheen v Mainstay Coop.

2007 NY Slip Op 31001(U)

April 19, 2007

Supreme Court, Queens County

Docket Number: 0002010/2005

Judge: Lawrence Vincent Cullen

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE LAWRENCE V. CULLEN IA Part 6
Justice

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LISA SHEEN,			Number	<u>2010</u>	2005
Plaintiff,			Motion		
- against -			Date	<u>January 30,</u>	2007
MAINSTAY COOPERATIVE, et al.,			Motion		
Defendants.			Cal. Number	<u>34</u>	
	x		Motion Seq. No.:	<u>3</u>	

The following papers numbered 1 to 8 read on this motion by plaintiff to disqualify Eric B. Schultz, from acting as defendants' attorney, pursuant to rule 5-102 of the Disciplinary Rules of the Code of Professional Responsibility (22 NYCRR 1200.21).

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1-4
Answering Affidavits - Exhibits	5-6
Reply Affidavits	7-8

Upon the foregoing papers it is ordered that the motion is denied.

Plaintiff in this action alleges that defendants discriminated against her on the basis of race. Plaintiff is a tenant-shareholder of defendant Mainstay Cooperative, Section One, Inc., and the proprietary lessee of Unit 6D (the "unit"), of the building located at 144-55 Melbourne Avenue, Flushing, New York. Plaintiff is an American citizen of Chinese descent and Taiwanese birth. Herman Saltzman, is Jewish and the president of the Board of Directors of Mainstay. Bonnie Phillips, the secretary of the Board at the time of the subject transactions, is also Jewish. The complaint alleges that the discrimination began upon submission of her application to purchase the cooperative unit, continued through the course of her renovations of the unit, and culminated with service upon plaintiff of a 10-day Notice to Cure with respect to renovations made to her unit.

In the amended verified complaint, plaintiff seeks a declaratory judgment that the Notice to Cure is null, void, and of no force and effect; that plaintiff was not in default of her proprietary lease as claimed in the Notice to Cure; that plaintiff has not made any structural alterations to the unit; and that any alterations to the unit made by plaintiff were undertaken with defendants' prior approval and consent.

By this motion, plaintiff seeks to disqualify Eric V. Schultz as attorney for defendants on the ground that Schultz should be called as a witness. The primary issue on which plaintiff alleges that Schultz is expected to be questioned relates to who authorized service of the Notice to Cure; to what address was it sent and when was it served. Plaintiff asserts that since Schultz represents Mainstay and participated in the drafting and service of the disputed Notice to Cure, he has personal knowledge of the underlying circumstances and ought to be called as a witness and thus it is improper for him to continue to represent defendants.

The New York Code of Professional Responsibility, 22 NYCRR § 1200.21, contains the "advocate-witness" rule, which prohibits a lawyer from representing a client if the lawyer "knows or it is obvious that the lawyer ought to be called as a witness on a significant issue on behalf of the client." DR 5-102(A). The narrow exceptions to the rule concern testimony regarding an uncontested issue; relating to a matter of formality where there should not be opposition; or regarding the nature and value of legal services. There exists a further exception where disqualification would work a "substantial hardship on the client because of the distinctive value of the lawyer as counsel in the particular case."

A party's entitlement to be represented in ongoing litigation by counsel of his or her own choosing is a valued right which should not be abridged absent a clear showing that disqualification is warranted (see Aryeh v Aryeh, 14 AD3d 634 [2005]; Dominquez v Community Health Plan of Suffolk, 284 AD2d 294 [2001]; Olmoz v Town of Fishkill, 258 AD2d 447 [1999]). While the right to choose one's counsel is not absolute, disqualification of legal counsel during litigation implicates not only the ethics of the profession but also the parties' substantive rights, thus requiring any restrictions to be carefully scrutinized (see S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp., 69 NY2d 437 [1987]). Whether or not to disqualify an attorney or law firm is a matter which rests in the sound discretion of the court (see Gulino v Gulino, 35 AD3d 812 [2006]; Olmoz v Town of Fishkill, supra). The party seeking to disqualify a law firm or an attorney bears the burden to show sufficient proof to warrant such a determination (see Aryeh v Aryeh, supra; Petrossian v Grossman, 219 AD2d 587, 588 [1995]). Specifically, the movant must show that the attorney will be called as a witness at trial and that the attorney's testimony is

necessary (Eisenstadt v Eisenstadt, 282 AD2d 570 [2001]; Morgasen v Federated Consultant Services, Inc., 174 AD2d 656 [1991]; see also Luk Lamellen U. Kupplungsbau GmbH v Lerner, 167 AD2d 451 [1990]). "Testimony may be relevant and even highly useful but still not strictly necessary. A finding of necessity takes into account such factors as the significance of the matters, weight of the testimony, and availability of other evidence" (S & S Hotel Ventures Ltd. Partnership v 777 S.H. Corp., 69 NY2d 437, 446 [1987]). Here, the plaintiff failed to sustain her burden of demonstrating that disqualification is warranted (id. at 448; see Petrossian v Grossman, 219 AD2d 587 [1995]; Matter of Reichenbaum v Reichenbaum & Silberstein, 162 AD2d 599 [1990]; Bison Plumbing City v Benderson, 281 AD2d 955 [2001]).

As stated in plaintiff's submissions, the primary issue on which Schultz is expected to be questioned relates to who authorized service of the Notice to Cure; to what address was it sent and when was it served. Plaintiff asserts that since Schultz represents Mainstay and participated in the drafting and service of the disputed Notice to Cure, he has personal knowledge of the underlying circumstances and ought to be called as a witness and thus it is improper for him to continue to represent defendants. Upon review of the record, however, it appears that these issues are neither disputed nor relevant to plaintiff's pleadings and causes of action; and indeed they are issues to which others may testify.

As to plaintiff's first cause of action, plaintiff seeks an order granting her declaratory judgment finding that the Notice to Cure which was sent to her by the cooperative is "null and void and of no force and effect." The Notice to Cure alleges, inter alia, that plaintiff is in default of the Occupancy Agreement between she and defendants in that plaintiff made unauthorized structural alterations to her apartment without the consent of the cooperative. The complaint, however, raises no questions as to whether the notice was served, whether the notice was received by plaintiff, whether the Board of Directors authorized the notice, the manner in which it was served nor were there issues regarding the address to which the Notice was sent. Significantly, plaintiff acknowledges receipt of the said Notice, and there is no issue as to the fact that defendants sought to proceed with an action to compel plaintiff to comply with the requirements of the occupancy agreement. Thus, any testimony by Schultz with regard to this matter would relate to uncontested issues.

Moreover, plaintiff has not submitted an affidavit in support of this application stating specifically what information she intends to elicit from Schultz that cannot be obtained from other sources.

The reasons for the prohibition against the "lawyer as witness" provision of the Code are described in Simons Code of Professional Responsibility Annotated (Professor Roy Simon, 2004 Edition at 579). As set forth, the rule avoids several potential effects on the trier of fact, which are inevitable when the advocate becomes a fact witness, including either discounting or bolstering the lawyer's testimony. The rule also avoids any potential conflict between the attorney and his client resulting from the lawyer's desire to place himself in the best light and the "unseemly sight of arguing to a judge or jury about his own credibility ...". The prohibition prevents any unfairness arising from the lawyer presenting his case twice to the trier of fact, through his client and later through his own testimony. Finally the regulation avoids the evident practical awkwardness of bringing in a new advocate to question the lawyer-witness (Id.). On the facts of this case, these concerns are not implicated.

Accordingly, the motion to disqualify Schultz as attorney for defendants is denied.

Dated: April 19, 2007

LAWRENCE V. CULLEN, J.S.C.