

**Rosenbaum v Schlossman**

2007 NY Slip Op 32599(U)

August 17, 2007

Supreme Court, New York County

Docket Number: 0601766/2006

Judge: Milton A. Tingling

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

PRESENT: Hon. Milton A. Tingling  
Justice

PART 44

Rosenbaum, Cory Esq.

INDEX NO. 1017666/2006  
MOTION DATE 3/28/06.  
MOTION SEQ. NO. 002  
MOTION CAL. NO. 17

Schlossman, Beth Esq.,  
Feinsilver, David Esq., &  
The Feinsilver Law Group, P.C.

The following papers, numbered 1 to 3 were read on this motion to/for Summary Judgment/Disqualify

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

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

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

PAPERS NUMBERED

**FILED**

AUG 21 2007

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

COUNTY CLERK'S OFFICE  
NEW YORK

Plaintiff, Corey Rosenbaum ("Rosenbaum/plaintiff") moves to disqualify co-defendant, David Feinsilver ("Feinsilver), from representing himself or the co-defendants, Beth Schlossman ("Schlossman") his wife and the law firm The Feinsilver Law Group, P.C. ("FLG") in the case at bar. Defendants oppose Plaintiff's motion to disqualify and cross-moves for summary judgment dismissing Plaintiff's complaint. Plaintiff's motion to disqualify Feinsilver is hereby granted in part to the extent Feinsilver can only represent himself. Defendant's cross-motion for summary judgment is denied.

The facts of the case are as follows. Schlossman had been the attorney of record for the plaintiffs in the matter of Yissel Flores Castro and Alex Flores Castro et al. v. Alfred S. Friedman Management Corp., et al. ("Castro matter"). Said case was scheduled

Dated: 8/17/07

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

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

for trial on January 5, 2006 but settled on January 2, 2006 for \$1,050,000.00. Feinsilver is Schlossman's husband and has appeared on her behalf in the Castro matter and in other instances. On May 19, 2005, Feinsilver filed a Notice of Appearance as Trial Counsel in the underlying action. Feinsilver never requested or expected to receive a portion of Schlossman's fee for the services that he rendered as trial counsel in the Castro matter because of his mutual relationship with Schlossman.

Plaintiff first approached Feinsilver offering his participation in the litigation of the Castro matter. E-mail from Corey Rosenbaum to David Feinsilver (Dec. 14, 2005, 10:46pm). Feinsilver inquired as to plaintiff's availability the week of December 26, 2005 – January 1, 2005 to assist him at trial and perform pre-trial work of the Castro matter. Id. That was the time period when Feinsilver would be on vacation. Plaintiff then made Feinsilver aware that he was available to assist him at trial and perform pre-trial work during the given time period. Through a series of e-mail correspondence and telephone calls, plaintiff was retained by Feinsilver as trial counsel. Soon thereafter, the terms of the agreement to work together in the Castro case were negotiated. At the time of the various email correspondence and telephone calls, the case had not yet gone to trial but was in anticipation of going to trial. Therefore, any work that plaintiff alleges he did and any work Feinsilver alleges was not done is deemed to be in the stage of pre-trial work.

On December 23, 2005, Feinsilver met with Brenda Castro and an associate in preparation for the trial. Feinsilver invited Plaintiff to meet with him at that time in anticipation of discussing Plaintiff's potential retention to assist Feinsilver with the Castro matter. Plaintiff alleges that issues relative to the Castro matter were discussed at

the meeting and later that evening he started reviewing the entire Castro file. Feinsilver alleges the meeting with Plaintiff was for the limited purpose of discussing Plaintiff's potential hiring as an independent contractor. While waiting for his flight to take off on December 24, 2005, Feinsilver spoke with Plaintiff and they reached an agreement for Rosenbaum to be hired and compensated. The compensation agreement, hereinafter the fee share agreement, was for Plaintiff to receive 20% of all attorneys' fees earned at any time prior to plaintiff Yissel's second witness taking the stand or if the case settles on Tuesday January 2, 2006; thereafter plaintiff was to receive 25% of all attorneys' fees earned. E-mail from David Feinsilver to Corey Rosenbaum (Dec. 25, 2005, 9:48- 0500 EST).

Feinsilver alleges he required plaintiff to review the subpoenaed evidence in court; meet with and prepare Brenda Castro, her husband, and her adult daughter for testimony; meet with and prepare all of the plaintiffs' experts for trial (whose availability had already been confirmed by Feinsilver's office); and contact and speak with the minor plaintiff's teachers. He alleges Plaintiff did none of the aforementioned and after agreeing to contact adversary counsel about stipulating certain documents into evidence plaintiff did not.

Plaintiff claims he served three pre-trial motions specific to lead paint cases: a Juarez motion shifting the burdens of proof on certain issues; a motion *in limine*; and a motion for a unified trial. Plaintiff also noted his appearance on those motions. Plaintiff further alleges he reviewed the records to be subpoenaed, reviewed the file to prepare a witness list, contacted the infant's mother, began preparing motions, reviewed approximately seventy-five pages of the infant's school records, discussed with

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Feinsilver the treatment of such evidence at trial, spent time trying to locate additional teachers to testify at trial, contacted the City Department of Health to obtain a witness for trial and prepared several hours for *voir dire*. Plaintiff further asserts he provided Feinsilver with substantial lead paint trial advice, including scientific information pertaining to causation and the injuries unique to lead exposure, defenses likely to be raised at trial, a survey of the Juarez and other lead-specific case-law, and a proven trial strategy.

On January 2, 2006, plaintiff was directed to cease performing work on the Castro matter. E-mail from Beth Schlossman to Corey Rosenbaum (Jan. 2, 2006, 12:54:51PM EST.). Although Schlossman was aware of the hiring of Plaintiff to assist in the Castro matter, the only correspondence between Plaintiff and Schlossman is the aforementioned email. On that same day, the Castro matter settled for \$1,050,000.00. Of that amount, Schlossman, Feinsilver and Rosenbaum are due \$364,898.25. As per the fee share agreement, plaintiff alleges he is entitled to 20% or \$72,979.65.

The first issue before the court is whether or not David Feinsilver can be disqualified from representing himself, Beth Schlossman, and The Feinsilver Law Group in the case at bar. The court holds that David Feinsilver is disqualified from representing Schlossman and FLG because his testimony is necessary but may represent himself. The second issue before the court is whether defendants are entitled to summary judgment and dismissal of Plaintiffs claim. The court holds that defendants are not entitled to summary judgment or dismissal of Plaintiff's complaint because genuine issues of material facts are in dispute, such as what work was actually done in preparation for the Castro matter.

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The “advocate-witness” rule requires an attorney to withdraw from a case where it is likely that he will be called as a witness (Code of Professional Responsibility DR 5-102). But such disqualification is required only where the testimony by the attorney is considered *necessary*. See *Broadwhite Associates v. Truong*, 237 A.D.2d 162. A finding of necessity takes into account such factors as the significance of the matters, weight of the testimony, and availability of other evidence. *Id.* It is clear by the various correspondences between Feinsilver and Plaintiff that Feinsilver’s testimony is necessary. Plaintiff demonstrates that Feinsilver’s testimony is necessary by showing that the fee share agreement was negotiated between himself and Feinsilver, the various emails exchanged were between Plaintiff and Feinsilver and telephone conversations were solely between Plaintiff and Feinsilver. Although Schlossman was aware of the retention and work of plaintiff, she did not have first hand knowledge of required pre-trial work that was or was not supposed to be done. The significance of the matter to which Feinsilver must testify to is the basis for which there exist issues of material fact in dispute requiring a trial. Moreover, the availability of other evidence extends only to the e-mails exchanged between Feinsilver and plaintiff. No other evidence exists as to conversation held between Feinsilver and plaintiff, i.e. recorded phone conversations or letters- with the exception of a note Plaintiff furnished to Feinsilver on December 24, 2005.

Feinsilver further claims that Plaintiff unduly delayed bringing his motion by waiting six months. In *Talvy v. American Red Cross in Greater New York*, Plaintiff’s inexcusable delay of over three years in moving for disqualification of defendant’s counsel provided an additional reason for denying the motion. *Talvy v. American Red*

Cross in Greater New York, *Supra*. Clearly six months is not three years and therefore does not prompt the court to deny the motion.

It is well established law that a party has the right to represent themselves. Therefore, Feinsilver is not prohibited from representing himself. However, to represent Schlossman and FLG is a different issue. As Feinsilver correctly cites, a law firm is permitted to continue to represent a client even if one of its attorneys will be called as a witness. American Red Cross in Greater New York, 205 A.D.2d at 145. However, it cannot be interpreted to mean the *subject attorney*, as part of the firm, is permitted to continue to represent a client, even if *he* is one of the attorneys that will be called as a witness. Thus, Feinsilver does not fall within the scope of the Talvy court. Accordingly, Feinsilver is disqualified from representing Schlossman or FLG.

The second issue before the court is Defendant's motion for summary judgment and dismissal of Plaintiff's complaint. In order to grant partial summary judgment, there must not exist a material issue of fact in dispute. Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). Defendant has not established he is entitled to summary judgment as questions of material fact exist as to what work was performed, what work was required to be performed, and position of Plaintiff during the preparation of the Castro matter for trial. Furthermore, prior to Defendant moving for summary judgment, Plaintiff moved for summary judgment. The Honorable Karen Smith denied Plaintiff's motion because "questions of fact exist by reason of the parties disparate versions of the circumstances surrounding their relationship which are supported only by their own statements." Plaintiff contends he was hired as co-counsel to assist in pretrial work and potentially trial work had the case gone to trial. Feinsilver contends Plaintiff was hired as an

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independent contractor with specific work to be performed. Feinsilver and Plaintiff continue to present their differing versions of the circumstances surrounding their relationship and thus summary judgment denied.

Feinsilver further seeks to dismiss Plaintiff's complaint based upon three grounds: Plaintiff's failure to file a retainer statement, breach of the material terms of the independent contractor agreement and his termination for cause. Based on the facts, all three grounds are genuine issues of material fact in dispute which require trial. Plaintiff's failure to file the retainer at the time he was retained does not preclude him from seeking recovery of legal fees. Where outgoing attorneys failed to timely file an OCA retainer statement, their filing of a retainer statement nunc pro tunc, was sufficient to preserve their right to recover legal fees otherwise earned. Garrett v. New York City Health & Hospitals Corp., 25 A.D.3d 424. Furthermore, Plaintiff filed his retainer in February 12, 2006 and he was retained by Feinsilver on December 24, 2005. The attorneys in Garrett waited seven to eight years until the retainer was filed. Id. Where a seven to eight year delay of the filing of a retainer preserves an attorney's right to recover legal fees so may a one to two month delay. Thus, plaintiff is not precluded from seeking recovery of legal fees.

Whether or not a material breach of the agreement occurred is an issue for the trier of fact. The material terms of the agreement were never explicitly stated rather, through various phone calls and e-mails, the parties continued to conjure requirements until January 2, 2006 when Plaintiff was told to refrain from working on the Castro matter. Thus, a trial is necessary to extract the actual material terms both parties claim were compulsory or optional. Furthermore, whether or not Plaintiff was terminated for

cause and whether the cause, if any, is proper grounds prompting termination for cause, is an issue to be decided by the trier of fact.

Accordingly, Plaintiff's motion to disqualify Feinsilver as counsel for himself, Schlossman and FLG is granted in part to the extent that Feinsilver may only represent himself. Defendant's motion for summary judgment is denied.

8/17/07

MAF  
JSC  
JUDGE MILTON A. TRINGLING

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