

Schwartz v Miltz

2007 NY Slip Op 32755(U)

August 29, 2007

Supreme Court, Nassau County

Docket Number: 1127-04/

Judge: Antonio I. Brandveen

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

WALTER SCHWARTZ,

Plaintiff,

- against -

MICHELE FARKAS MILTZ,

Defendant.

TRIAL / IAS PART 36
NASSAU COUNTY

Index No. 11127/04

Motion Sequence No. 003 & 004

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1, 2</u>
Answering Affidavits	<u>3</u>
Replying Affidavits	<u> </u>
Briefs: Plaintiff's / Petitioner's	<u> </u>
Defendant's / Respondent's	<u>4</u>

The plaintiff moves for an order for summary judgment in favor of the plaintiff.

The defendant cross moves for an order to denying the plaintiff's motion for summary judgment, and granting defendant's motion to disqualify Anthony Mascolo, Esq. as attorney for the plaintiff on the grounds he previously represented the defendant in a

divorce action, including on the day the deed, which is the subject of this action, was signed, by his affirmation in support of the present summary judgment motion, he makes himself a fact witness, and through his representation of the defendant in the divorce action, he obtained confidential, privileged information which he is now using to help the plaintiff, and an order awarding the defendant attorneys' fees. The plaintiff opposes the cross motion. The Court has carefully reviewed and considered all of the parties' papers on the motion and cross motion.

The underlying partition action commenced on August 13, 2004. The plaintiff claims the defendant added his name to the deed on her house awarded to her in a matrimonial action. The plaintiff alleges the defendant recorded the deed on the Long Beach property with the Nassau County Clerk. The plaintiff asserts the defendant took that step as a gift in contemplation of marriage, which was consummated on June 29, 2003, and in payment of \$250,000.00 in debts owed the plaintiff. The plaintiff contends differences subsequent to the marriage ceremony arose between the parties, and led to separation and divorce, including the instant action. The plaintiff alleges he spent the money on the defendant, her family, and the Long Beach property. The plaintiff claims he took those actions because the defendant and her former spouse spent trust funds for their four children living above their means during the latter part of their marriage. The plaintiff contends the defendant told him he would be repaid for his assistance to her. The plaintiff asserts the defendant added his name to the deed on the Long Beach

property to repay him for those debts. The plaintiff alleges he relied on the defendant's promises, and made substantial contributions of money and labor for the upkeep and improvement of the Long Beach property.

The defendant claims the Long Beach property was awarded to the defendant in settlement of the matrimonial action before another Justice of this Court on May 9, 2003. The defendant alleges the parties executed a deed during the Court's morning session, and their signatures were notarized by the Court Part Clerk. The defendant contends the parties appeared later that same day before the Court, and they acknowledged the deed signing. The defendant maintains the parties, in a subsequent private conversation outside the courtroom that day, discussed refinancing on the Long Beach property. The defendant alleges the plaintiff represented he would assist the defendant in the refinancing. The defendant admits credit problems, but the parties planned to get married. The defendant contends belief in the plaintiff's good faith actions, and the plaintiff's lack of interest in the house, but a desire to help the defendant put her name on his house. The defendant claims that as a result of that understanding the defendant added the plaintiff's name to the grantee portion of the deed, changed the equalization forms, and recorded the deed in the Nassau County Clerk's office on May 9, 2003.

Under CPLR 3212(b), a motion for summary judgment "shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or

defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” “The motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact.” Summary judgment is a drastic remedy that is awarded only when it is clear that no triable issue of fact exists (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 325; *Andre v. Pomeroy*, 35 N.Y.2d 361). Summary judgment is the procedural equivalent of a trial (*Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 A.D. 2d 572). Thus the burden falls upon the moving party to demonstrate that, on the facts, it is entitled to judgment as a matter of law (*see, Whelen v. G.T.E. Sylvania Inc.*, 182 A.D. 2d 446). The court’s role is issue finding rather than issue determination (*see, e.g., Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395; *Gervasio v. Di Napoli*, 134 A.D.2d 235, 236; *Assing v. United Rubber Supply Co.*, 126 A.D.2d 590). Nevertheless, “the court must evaluate whether the alleged factual issues presented are genuine or unsubstantiated” (*Gervasio v. Di Napoli, supra*, 134 A.D.2d at 236, quoting from *Assing v. United Rubber Supply Co., supra; see, Columbus Trust Co. v. Campolo*, 110 A.D.2d 616, *aff’d* 66 N.Y.2d 701). If the issue claimed to exist is not genuine, and, therefore, there is nothing to be resolved at the trial, the case should be summarily decided (*see, Andre v. Pomeroy*, 35 N.Y.2d at 364; *Assing v. United Rubber Supply Co., supra*). The Court finds there is a triable issue of fact which must be presented to and considered by a trier of the facts.

22 NYCRR § 1200.27 (A) (1) provides:

Except as provided in DR 9-101 [1200.45] (B) with respect to current or former government lawyers, a lawyer who has represented a client in a matter shall not, without the consent of the former client after full disclosure: Thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client.

So, an attorney may be disqualified from representing a client if (1) the moving party is a former client of the adverse party's counsel; (2) there is a substantial relationship between the subject matter of the counsel's prior representation of the moving party and the issues in the present lawsuit; and (3) the attorney whose disqualification is sought had access to, or is likely to have had access to, relevant privileged information in the course of his prior representation of the client.

The federal Courts have observed:

Disqualifying a party's counsel is a "drastic measure" that requires the balancing of two important considerations. *A.V. by Versace, Inc. v. Gianni Versace, S.p.A.*, 160 F.Supp.2d 657, 662-63 (S.D.N.Y.2001). On the one side is the deference the system gives a party in selecting counsel of their choice, and on the other side is the need for the profession to maintain the highest degree of fiduciary and professional standards. *Hempstead Video, Inc. v. Inc. Vill. of Valley Stream*, 409 F.3d 127, 132 (2d Cir.2005) (Leval, J.); *Evans v. Artek Sys. Corp.*, 715 F.2d 788, 791 (2d Cir.1983) (Mansfield, J.). Disqualification of an attorney imposes a substantial transaction cost on a party. The affected party incurs the costs associated with finding a new attorney who must then become familiar with the matter. *Gov't of India v. Cook Indus.*, 569 F.2d 737, 739 (2d Cir.1978); *Siemens Energy & Automation, Inc. v. Coleman Elec. Supply Co., Inc.*, No. 98 Civ. 3416, 1999 WL 551223 at (E.D.N.Y. June 23, 1999) (Trager, J.). In addition, the party also loses the benefit of a chosen counsel's expertise in a field and specialized knowledge of the party's affairs. *Gov't of India*, 569 F.2d at 739.

In preserving professional standards the district court is not strictly interested in policing the ethics rules. *Universal City Studios v. Reimerdes*, 98 F.Supp.2d 449, 455 (S.D.N.Y.2000) (Kaplan, J.); *see also Hempstead Video, Inc.*, 409 F.3d at 132 (“[N]ot every violation of a disciplinary rule will necessarily lead to disqualification.”); *Board of Educ. of the City of New York v. Nyquist*, 590 F.2d 1241, 1246 (2d Cir.1979) (Feinberg, J.) (“[W]e have shown considerable reluctance to disqualify attorneys despite misgivings about the attorney’s conduct.”). That is a job better left to specialized professional disciplinary bodies, including the Grievance Committee of this Court. *Nyquist*, 590 F.2d at 1246; *Etna Prods. Co. Inc. v. Tactica Int’l*, 234 F.Supp.2d 442, 445 (S.D.N.Y.2002) (Kaplan, J.). Rather, “[t]he objective of the disqualification rule is to ‘preserve the integrity of the adversary process,’ ” *Evans*, 715 F.2d at 791 (*quoting Nyquist*, 590 F.2d at 1246). As a result, disqualification is only appropriate where allowing the representation to continue would pose “a significant risk of trial taint.” *Glueck v. Jonathan Logan, Inc.*, 653 F.2d 746, 748 (2d Cir.1981) (Newman, J.). A court should disqualify an attorney for a conflict of interest only where the conflict raises a significant risk that the attorney will be unable to represent his client with zeal and vigor or where the attorney possesses privileged information, obtained through prior representation of an adverse party, that might benefit his or her current client. *Id.*; *Commercial Union Ins. Co. v. Marco Int’l Corp.*, 75 F.Supp.2d 108, 110 (S.D.N.Y.1999) (Kaplan, J.).

These considerations have led the Second Circuit to disfavor disqualification and to require the party seeking disqualification to satisfy a “high standard of proof” in order to succeed. *Evans*, 715 F.2d at 791 (*quoting Gov’t of India*, 569 F.2d at 739). “Mere speculation will not suffice.” *Paretti v. Cavalier Label Co., Inc.*, 722 F.Supp. 985, 987 (S.D.N.Y.1989). This is especially important because motions to disqualify are “often interposed for tactical reasons,” and in the best of situations “inevitably cause delay.” *Nyquist*, 590 F.2d at 1246

Reilly v. Computer Associates Long-Term Disability, 423 F. Supp.2d 5, 9 [EDNY,2006].

Here, the plaintiff’s attorney represented the defendant in a divorce action against Mendel Milt, and it would seem privileged information relates to that matter. The issue here

involves a partition and sale action, and whether there was a valid real property transfer where the plaintiff allegedly obtained a half interest in the subject property. The Court finds the defendant has not met the burden required by law under 22 NYCRR § 1200.27.

Accordingly, the motion for summary judgment is denied, and those branches of the cross motion are denied seeking to disqualify Anthony Mascolo, Esq. as attorney for the plaintiff and awarding the defendant attorneys' fees.

So ordered.

Dated: August 29, 2007

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J. S. C.
HON. ANTONIO I. BRANDVEEN