

**Melcher v Apollo Med. Fund Mgt. L.L.C.**

2007 NY Slip Op 33802(U)

November 14, 2007

Supreme Court, New York County

Docket Number: 0604047/2003

Judge: Herman Cahn

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

PRESENT: Cahn  
Justice

PART 49M

James L. Melcher

INDEX NO. 604047/03

MOTION DATE 10/15/07

Apallo Medical Fund Management  
L.L.C. and Brandon Fradd

MOTION SEQ. NO. 016

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

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

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

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

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

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM  
DECISION IN MOTION SEQUENCE**

**FILED**

NOV 19 2007

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 11/14/07

[Signature]

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):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 49

-----X  
JAMES L. MELCHER,

Plaintiff,

-against-

Index No. 604047/03

APOLLO MEDICAL FUND MANAGEMENT L.L.C.  
and BRANDON FRADD,

Defendants  
-----X

**FILED**  
NOV 19 2007  
COUNTY CLERK'S OFFICE  
NEW YORK

Cahn, J.:

Plaintiff James L. Melcher moves pursuant to DR 5-102<sup>1</sup> of the Code of Professional Responsibility, to disqualify the law firm of Greenberg Traurig, LLP, and two of its attorneys, Leslie D. Corwin, Esq. and Caroline J. Heller, Esq., from representing defendants in this action.<sup>1</sup>

Defendants cross-move for expenses and attorneys' fees, and for the imposition of sanctions on Melcher and his attorney, pursuant to 22 NYCRR 130-1.1, for engaging in frivolous conduct by making a motion that is without merit and that was undertaken to delay the resolution of this action.

Melcher claims that, on August 7, 2007, Corwin admitted to facts that demonstrate that he and his client, defendant Brandon Fradd, swore falsely on repeated occasions when they stated under oath that a witness in Vermont, James Beckwith, could not be contacted despite their best efforts and that Beckwith had resisted their attempts to contact him.

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<sup>1</sup> Melcher also sought a stay of the trial in this action, which was then scheduled for October 10, 2007, pending determination of the instant motion. The parties have since agreed to adjourn the trial to November 26, 2007. Thus, that part of the instant motion seeking a stay is not addressed.

[\* 3 ]

Melcher asserts that in Corwin's August 7, 2007 affidavit, he admitted to two facts that contradicted his and Fradd's prior sworn statements. Melcher states that Corwin admitted that he and Heller had a conference call with Beckwith on February 5, 2004 and that Heller made a few follow-up calls during the week of February 9, 2004, but that no further efforts were made to contact Beckwith thereafter.

Melcher maintains that, as a result of these admissions, Corwin and Heller will be adverse witnesses to Fradd at the trial. According to Melcher, Fradd repeatedly swore in affidavits that Beckwith was a critical witness, but that they were unable to contact him. Fradd testified in his deposition that he personally tried to reach Beckwith, but that Beckwith never returned his call.

Melcher asserts that, within a few weeks of the 2004 conference call among Corwin, Heller and Beckwith, Greenberg Traurig and Fradd began a campaign of false swearing that Beckwith could not be contacted at all. Melcher explains that these false statements were proffered to explain why defendants could not provide evidence that the "amendment" that Fradd burned on January 28, 2004 was a genuine document, drafted by Beckwith in May 1998.

Melcher contends that the testimony of Corwin and Heller, as well as documents in Greenberg Traurig's files, will show that Fradd swore falsely under oath. Melcher asserts that, because their testimony and files are necessary to the trial on the issue of Fradd's credibility, and are adverse to Fradd, disqualification is mandatory under DR 5-102 (B) and (D). Melcher argues that the standard for disqualification is that the lawyers' testimony might or may be prejudicial to the client. See Wensley & Partners v Polimeni, 262 AD2d 311 (2d Dept 1999); DR 5-102 (B) & (D).

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Melcher argues that, if there is a trial, he will call Corwin, Heller and Greenberg to testify and to produce documents adverse to Fradd. He further argues that it is a violation of legal ethics for a lawyer to knowingly make a false statement of fact or use perjured testimony, and a lawyer who receives information that a client has perpetrated a fraud on the tribunal must promptly call upon the client to rectify it or reveal the fraud to the tribunal. DR 7-102.

According to Melcher, Corwin's August 7, 2007 affidavit shows that he has known for three and a half years that his and Fradd's repeated sworn statements, that Beckwith could not be contacted and that he had resisted all prior attempts to talk to him, were false statements of fact.

Melcher contends that Corwin finally admitted to his contact with Beckwith only after: Beckwith's deposition; the commencement by Melcher of a separate lawsuit against Greenberg Traurig; and the retention of independent counsel to represent Greenberg Traurig therein. Melcher states that Corwin's disclosure of the contact coincided with Greenberg Traurig's answer to the complaint in the lawsuit he commenced against Greenberg Traurig, which admitted that the February 2004 phone call had occurred. Melcher maintains that the fact that Corwin now asserts that the conference call he previously concealed was "brief" or "non-substantive" is irrelevant, given that Corwin had previously sworn that Beckwith could not be contacted at all and had resisted all attempts to talk to him. Melcher argues that Corwin must be disqualified for lying before this court and, because he is a partner/shareholder in Greenberg Traurig, the disqualification extends to the firm.

In their cross motion, defendants seek sanctions, arguing that in recent months, Melcher and his counsel have waged a campaign to publicly malign Fradd, Corwin and Greenberg Traurig in motion papers. Defendants state that, prior to the instant baseless motion, Melcher filed

[\* 5 ]  
several others, including a motion for recusal, a motion to strike pleadings for destruction of evidence and deceit, and a motion to vacate the note of issue.

Defendants argue that most of these motions were frivolous because they were either without merit in the law, undertaken primarily to delay the action and to harass and injure Fradd and his attorneys, and/or assert material false factual statements. Defendants maintain that this pattern of uncivil and malicious behavior on the part of Melcher and his counsel should not be allowed to continue, and is deserving of sanctions.

Defendants assert that neither Fradd nor Corwin lied under oath and that testimony concerning defendants' attempts to contact Beckwith is not necessary. Defendants further argue that testimony concerning communications between Greenberg Traurig and defendants, as well as its work on this action, are protected from disclosure at trial by the attorney-client privilege and the attorney work product doctrine. Defendants also contend that Melcher's delay in filing the instant motion until the eve of trial, when the facts underlying the motion were known to him and his counsel for two months, demonstrates that the motion is being used to delay resolution of this action.

Corwin asserts that neither he nor Fradd claimed that Beckwith could not be contacted at all or had never been contacted. Thus, Corwin argues that they never misled the court or lied in an affirmation or affidavit. Corwin maintains that the affirmations and affidavits stated that Beckwith was unavailable and that he had resisted prior attempts to talk. According to Corwin, these statements were true when made and are consistent with the fact that Corwin had one brief conversation with Beckwith and thereafter Beckwith would not return telephone calls.

The party seeking disqualification "bears the burden of establishing that such a drastic

remedy is warranted.” O’Donnell, Fox & Gartner v R-2000 Corp., 198 AD2d 154, 155 (1<sup>st</sup> Dept 1993). “Disqualification of a law firm during litigation implicates not only the ethics of the profession but also the substantive rights of the litigants. Disqualification denies a party’s right to representation by the attorney of its choice.” S & S Hotel Ventures Ltd. Partnership v 777 S.H. Corp., 69 NY2d 437, 443 (1987). The right to choose one’s counsel, while not absolute, “is a valued right and any restrictions must be carefully scrutinized.” Id. Furthermore, disqualification of a party’s chosen counsel “can stall and derail the proceedings, redounding to the strategic advantage of one party over another.” Id.

Additionally, “[d]isqualification may be required only when it is likely that the testimony to be given by the witness is necessary.” Id. at 445-46. “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.” Id.

Melcher’s motion is denied. Any testimony Fradd’s counsel might provide concerning their contact with Beckwith would not address the main issues in this action, but rather would be an attempt to bolster or diminish Fradd’s credibility. While the credibility of the parties involved is clearly an important factor in any case, there are already several issues upon which Melcher seeks to call into question Fradd’s credibility. This court finds that the testimony of Melcher’s attorneys on this matter is not necessary to justify the “drastic remedy” of disqualifying Fradd’s counsel a few weeks before the trial is scheduled to begin. See e.g. Pearl v 305 E. 92<sup>nd</sup> St. Corp., 156 AD2d 122 (1<sup>st</sup> Dept 1989). The matters about which Melcher seeks to have his adversary testify, are collateral, if that, and would probably not be allowed in.

[\* 7 ]

Defendants ask the court to grant their cross motion for sanctions because Melcher and his attorney have demonstrated a pattern of frivolous motion practice since the filing of the note of issue. They maintain that Melcher's motion to disqualify is without merit in the law, and that he hardly makes a pretense of setting forth the proper standards under which the court may grant a motion to disqualify.

Defendants' cross motion is also denied.

However, the court again notes that this action seems to have deteriorated into an attack on counsel, and attempts to have the court recuse itself. The court expects a quick return to civility.

Accordingly, it is

ORDERED that the motion to disqualify is denied; and it is further

ORDERED that defendants' cross motion for sanctions is denied.

Dated: November 14, 2007

ENTER:

  
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J.S.C.

**FILED**  
NOV 19 2007  
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