

**Gershman v Greene**

2007 NY Slip Op 34321(U)

December 31, 2007

Supreme Court, Nassau County

Docket Number: 0871-06/

Judge: Karen Veronica Murphy

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK  
TRIAL TERM, PART 25 NASSAU COUNTY**

**PRESENT:**

**Honorable Karen V. Murphy**  
**Justice of the Supreme Court**

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**LAURENCE GERSHMAN,**

**Index No. 20871/06**

**Plaintiff(s),**

**-against-**

**Motion Submitted: 10/19/07  
Motion Sequence: 002**

**JEFFREY GREENE,**

**Defendant(s).**

\_\_\_\_\_ x

The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....X
- Answering Papers.....X
- Reply.....
- Briefs: Plaintiff's/Petitioner's.....
- Defendant's/Respondent's.....

Motion by the attorneys for the defendant for an Order disqualifying Plaintiff's counsel is denied.

This action arises out of a series of transactions in which the Plaintiff and Defendant sought to acquire several separate companies and then "roll-up" these companies into a single, larger enterprise. On or about May 22, 2006, Plaintiff tendered \$30,000 to Defendant. Defendant alleges that this payment was non-refundable, non-repayable partial compensation towards the amounts that Plaintiff promised to pay Defendant for services that Defendant had and would render in connection with the "roll-ups." Plaintiff claims that this payment was a loan with interest that must be repaid by Defendant. Plaintiff seeks repayment of the \$30,000 with interest paid by Plaintiff to Defendant, while Defendant's counterclaims seek to recover the remainder of the promised payments together with damages arising from

Plaintiff's alleged misrepresentations and breach of contract. Richard S. Gershman, Esq. is the brother of the Plaintiff and the Attorney representing the Plaintiff in the within collection matter.

In support of the within disqualification motion the Plaintiff alleges that Attorney Gershman acted as counsel for both the Plaintiff and the Defendant, as well as seeking and receiving "legal advice and input" from him. Defendant states "[s]pecifically, Attorney Gershman advised both Plaintiff and me as to, *inter alia*: (i) the proposed structure of the transactions; (ii) the potential vehicle that was to be utilized to complete the "roll-up" transaction (e.g., whether to incorporate an S or C corporation); (iii) the preferred state of incorporation; and (iv) the logistics of the Underlying Transactions (whether to perform concurrent or consecutive "roll-ups" of the target companies). (Greene affidavit, September 19, 2007, paragraph 10). Moreover, it is claimed that the Defendant and Attorney Gershman had one private meeting together. Attorney Gershman acknowledges one meeting with the Defendant. Attorney Gershman states he does not know what a "roll-up" is nor would he be able to handle such a matter since he is not a corporate attorney. Defendant does not refute Attorney Gershman's claim that he never drafted any documents nor was he privy to any correspondence between the Plaintiff and Defendant. Further, Attorney Gershman claims that when he met with the Defendant he had no knowledge of the disputed \$30,000 payment from the Plaintiff to the Defendant that is the subject matter of the within action and for which he has been engaged to represent the Defendant in the collection of same. Moreover, Attorney Gershman asserts he has no knowledge of any putative or actual transactions between Plaintiff and Defendant regarding the "roll-up" of various companies.

It is settled that, "[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." (*Gulino v Gulino*, 35 A.D.3d 812, 826 N.Y.S.2d 903 (2d Dept., 2006); see *S & S Hotel Ventures Ltd. Partnership v 777 S.H. Corp.*, 69 N.Y.2d 437, 508 N.E.2d 647, 515 N.Y.S.2d 735, (1987); *Bentz v Bentz*, 37 A.D.3d 386, 831 N.Y.S.2d 423 (2d Dept., 2007); *Aryeh v Aryeh*, 14 A.D.3d 634, 788 N.Y.S.2d 622 (2d Dept., 2005); *Haberman v City of Long Beach*, 298 A.D.2d 497, 748 N.Y.S.2d 397 (2d Dept., 2002); see also *Kassis v Teacher's Ins. and Annuity Ass'n.*, 93 N.Y.2d 611, 717 N.E.2d 674, 695 N.Y.S.2d 515 (1999); *Tekni-Plex, Inc. v Meyner & Landis*, 89 N.Y.2d 123, 674 N.E.2d 663, 651 N.Y.S.2d 954 (1996); *Unger v Unger*, 15 A.D.3d 389, 790 N.Y.S.2d 176 [2d Dept., 2005]).

"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." (*Gulino v Gulino, supra*).

To disqualify an attorney for violation of the advocate-witness rule, “[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 Associates v Truong*, 237 A.D.2d 162, 654 N.Y.S.2d 144 (1<sup>st</sup> Dept., 1997); quoting from *Martinez v Suozzi*, 186 A.D.2d 378, 588 N.Y.S.2d 175 (1<sup>st</sup> Dept., 1992); see also *Gulino v Gulino*, *supra*; *Calandriello v Calandriello*, 32 A.D.3d 450, 819 N.Y.S.2d 569 (2d Dept., 2006); *Swersky v Swersky*, 262 A.D.2d 397, 690 N.Y.S.2d 751 (2d Dept., 1999); *Plotkin v Interco Development Corp.*, 137 A.D.2d 671, 524 N.Y.S.2d 763 [2d Dept., 1988]).

Specifically, it must be established that the testimony of the attorney would be necessary. See Code of Professional Responsibility DR 5-101[B][C] [22 NYCRR 1200.20; (*S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp.*, *supra* at 445; *In re Porter*, 35 A.D.3d 477, 826 N.Y.S.2d 377 (2d Dept., 2006); *Zutler v Drivershield Corp.*, 15 A.D.3d 397, 790 N.Y.S.2d 485 [2d Dept., 2005]).

Notably, “[t]estimony may be relevant and even highly useful but still not strictly necessary” and 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.*, *supra* at 446; *Davin v JMAM, LLC*, 27 A.D.3d 371, 812 N.Y.S.2d 494 (1<sup>st</sup> Dept., 2006); *Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher*, 299 A.D.2d 64, 747 N.Y.S.2d 441 (1<sup>st</sup> Dept., 2002); *Eisenstadt v Eisenstadt*, 282 A.D.2d 570, 723 N.Y.S.2d 395 [2d Dept., 2001]).

Moreover, disqualification is unwarranted merely because that attorney “has relevant knowledge or was involved in the transaction at issue \* \* \*.” (*S & S Hotel Ventures Ltd. Partnership v 777 S.H. Corp.*, *supra* at 446; see *Talvy v American Red Cross in Greater New York*, 205 A.D.2d 143, 618 N.Y.S.2d 25 (1<sup>st</sup> Dept., 1994); *aff’d*, 87 N.Y.2d 826, 661 N.E.2d 159, 637 N.Y.S.2d 687 [1995]).

Lastly, it is settled that “[c]ourts adjudicating disqualification motions must be mindful of the possibility that the motion is made for improper reasons to stall and derail the proceedings, rebounding to the strategic advantage of one party over another.” (*Strongback Corp. v N.E.D. Cambridge Ave. Development Corp.*, 32 A.D.3d 793, 823 N.Y.S.2d 357 (1<sup>st</sup> Dept., 2006) quoting from *S & S Hotel Ventures Ltd. Partnership v 777 S.H. Corp.*, *supra* at 443).

The Defendant has not established that Plaintiff’s counsel played a crucial role in the alleged negotiations underlying this dispute. The fact that the Defendant intends to call Attorney Gershman as a witness is not sufficient in and of itself to override the Plaintiff’s right to choose his own counsel. (See *L & W Supply Corp. v Ruthman*, 135 A.D.2d 877, 521

N.Y.S.2d 877 [3d Dept., 1987]). At this stage of the proceedings, where discovery has not yet been had, disqualification of Attorney Gershman from representing Plaintiff is premature. See Code of Professional Responsibility, DR 5-102[B]; (see *Kirshon, Shron, Cornell & Teitelbaum, P.C. v Savarese*, 182 A.D.2d 911, 581 N.Y.S.2d 487 [3d Dept., 1992]).

A Preliminary Conference (see 22 NYCRR 202.12) shall be held at the Preliminary Conference part, located at the Nassau County Supreme Court on the 7<sup>th</sup> day of February, 2008, at 9:30 AM. This directive, with respect to the date of the Conference, is subject to the right of the Clerk to fix an alternate date should scheduling require. The attorneys for the Plaintiff shall serve a copy of this order on the Preliminary Conference Clerk and the attorneys for the plaintiffs.

The foregoing constitutes the Order of this Court.

Dated: December 31, 2007  
Mineola, N.Y.

  
J. S. C.

**ENTERED**

JAN 14 2008  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE