

Swetnick v Bell

2008 NY Slip Op 30822(U)

March 12, 2008

Supreme Court, New York County

Docket Number: 0116886/2006

Judge: Judith J. Gische

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

PRESENT: GISCHE
Justice

PART 10

SWETHICK, ROBERT N.,
ET AL.

INDEX NO. 116886/06

- v -

EVAN BELL,
ET AL.

MOTION DATE _____

MOTION SEQ. NO. 04

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
THE ACCOMPANYING MEMORANDUM DECISION.**

FILED
MAR 24 2008
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/12/08

J. GISCHE
HON. JUDITH J. GISCHF 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: PART 10**

-----X
Robert N. Swetnick, James Ryan,
John Doe et al, individually and as
partners in 7th Street Redevelopment
Associates, L.P., and Gramercy
Flower Associates, L.P.

Plaintiffs

-against-

Evan Bell, individually and
Bell & Company a/k/a
Bell & Company, Certified Public
Accountants,

Defendants.

-----X

DECISION/ORDER

Index No.: 116886/06

Seq. No.: 004

Present:

Hon. Judith J. Gische

J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of
this/these motion(s):

Papers

Defs n/m 3212 w/ EB affid, SS affirm, exhs

Pltff opp w/RNW affid, exhs

Def reply w/ SS affirm

FILED

MAR 24 2008

NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers the court's decision is as follows:

GISCHE, J.;

Plaintiffs have commenced this action against the defendants to compel financial disclosure and for a formal accounting, the underlying bases of which are allegations that the defendants have engaged in self dealing, etc. Plaintiffs also seek an award of punitive damages. The court previously denied a motion by defendants for summary judgment on the basis that it was premature because discovery was incomplete. Order,

Gische J., 10/1/07 ("prior order"). In that prior order, which is incorporated herein by reference, the court permitted plaintiff to serve an amended complaint to assert claims against defendant Evan Bell, in his capacity as General Partner of 7th Street Redevelopment Associates, L.P. ("7th Street") and Gramercy Flower Associates, L.P. ("Gramercy") (collectively "the partnerships").

The court now has before it plaintiffs' motion for an order disqualifying Steven B. Sperber and his firm ("Sperber") from representing the defendants in this action. Other relief sought by the plaintiffs include an order: 1) directing repayment to the partnerships of the legal fees that defendants paid to Sperber in connection with this action, 2) enjoining the defendants from paying any more legal fees to Sperber from partnership assets, 3) enjoining defendants from using partnership funds to pay for an auditor; and 4) directing inspection of certain documents previously demanded by plaintiffs.

Defendants have cross moved to have plaintiffs post a \$1,000,000 bond and for an order enjoining plaintiffs from disseminating personal information about them to investors.

Pending the hearing on plaintiffs' motion, the court ordered that defendant not use partnership assets to pay any further legal fees to Sperber ("TRO"). That TRO, issued on January 2, 2008 remains in effect, pending the court's decision on these motions.

Background of the disputes

Plaintiffs Robert N. Swetnick ("Swetnick") and James Ryan are limited partners

in the partnerships. They have brought this action individually and as limited partners in the partnerships. Defendant Evan Bell ("Bell"), is the general partner of both limited partnerships. He is also an accountant by profession and the principal of Bell & Company a/k/a Bell & Company, CPA ("Bell & Co." or "the accounting firm"), an accounting firm used by partnerships.

Plaintiffs have served an amended complaint to assert claims against Bell in his capacity as General Partner of the partnerships. Plaintiffs claim he has engaged in self-dealing and other acts that are for his sole personal benefit, and therefore, constitute a breach of his fiduciary duty to them. Among the acts alleged are his obtaining a mortgage secured by real property owned by one of the partnerships and charging management fees and commissions in connection with apartment sales at another property.

Plaintiffs move to disqualify Sperber and his law firm on two bases. First, they contend that they want to depose Sperber to determine why Bell has two law firms representing him. According to plaintiffs, the other firm specializes in criminal defense. Though not expressly stated, plaintiffs apparently believe Bell will not be truthful about why he needs criminal defense, but Sperber may know why and may have to disclose the reason.

Plaintiffs contend that Bell has no right to use partnership assets to hire an independent auditor. They contend the auditor is entirely partisan and therefore Bell should finance this expense, or they should have a say in who is hired to do the audit. Thus, plaintiffs seeks an order from the court enjoining Bell from paying the auditor's

fees using partnerships' assets.

Plaintiffs also contend that defendants are stonewalling their discovery demands and they have not provided "any" of the documents demanded. In reply, however, they retreat from this argument, focusing instead on defendants' alleged failure to provide annual financial statements for each limited partner. Defendants deny they have ignored plaintiffs' demands, but argue that not only have they provided everything demanded, they welcome plaintiffs to Bell's office to examine whatever documents they have. They have provided copies of the documents produced to date. The documents provided include tax returns, with schedules, balance sheets and income statements. The defendants have also provided bank statements, a property appraisal and rent rolls, and other documents.

Defendants also oppose plaintiffs' motion to disqualify Sperber arguing that even if Bell has retained a criminal defense lawyer, this has no bearing on whether Sperber and his firm can continue to represent the defendants in this action. Sperber denies he has any information that would aid plaintiffs in connection with their claims against his client, and he only knows the allegations they have made against in their complaint. He contends that if they want to know about his fees, he is willing to testify, but that this is not a basis for disqualification.

Defendants argue that under the partnership agreement, Bell, as General Partner, has the right to hire an auditor and also to be indemnified for his legal fees which can be paid out of partnership assets. Defendants rely upon the indemnification provisions contained in the 7th Street partnership agreement. The Gramercy agreement

contains similar language, although defendants concede there appear to be some typographical errors which make the provision incomplete. The sample provisions provide as follows:

"5.5 Indemnification. The partnership shall indemnify and hold harmless the General Partner and each Partnership employee or agent, against any and all claims, actions, demands, losses, costs, expenses (including attorneys' fees) [. . .] as a result of any claim, legal proceeding [. . .] related to any action taken or omitted to be taken in good faith in connection with the business and affairs of the Partnership . . ."

* * *

"7.3 Actions brought by Limited Partners. In the event that a Limited Partner brings a lawsuit against the Partnership, the General Partners [etc] and judgment is not rendered in favor of such Limited Partner as to all of them, then such Limited Partner shall reimburse each of the aforementioned parties against whom judgment is not rendered in favor of the Limited Partner for all expenses, including but not limited to attorneys' fees, incurred in opposing or defending such lawsuit, regardless of whether such lawsuit is dismissed or otherwise terminated other than by a judgment in favor of such Limited Partner. Nothing contained herein shall entitle Limited Partner to reimbursement for its expenses in connection with a lawsuit brought against the General Partner, the Partnership [etc.] regardless of the outcome of such lawsuit."

Defendants argue that were the court inclined to grant plaintiffs' motion for a preliminary injunction against the payment of legal fees by the partnerships to Bell's lawyers, then plaintiff must post a bond as CPLR § 6312 (b) provides. They seek a bond of \$1,000,000.

With respect to the audit, defendants rely upon the powers of the General

Partner contained in Article V of the partnership agreements. Insofar as relevant to this dispute, the General Power has the power to "employ on behalf of the Partnership . . ." an array of persons to perform services

Discussion

I. Disqualification

The "advocate witness rule" (DR 5-102 et seq) requires that a lawyer's professional judgment be exercised for his client's benefit, free from "compromising influences and loyalties . . ." S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp., 69 N.Y.2d 437, 444 (1987). Disqualification of an attorney or a law firm "may be required only when it is likely that the testimony to be given by the witness is necessary. . ." S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp., *supra* at 445-446.

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 v. 777 S.H. Corp., *supra* at 446.

If there is the possibility an attorney may be called to testify by the other side on a significant issue, disqualification of that attorney is required only if it is apparent that his testimony will be so adverse to the factual assertions or account of events offered on behalf of his own client. Sokolow, Dunaud, Mercadier & Carreras LLP v. Lacher, 299 A.D.2d 64, 75 [1st Dept 2002] (*citing* Broadwhite Assocs. v. Truong, 237 A.D.2d 162, 162-163 [1st Dept 1997]; S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp., 69 N.Y.2d 437, 446 [1987]).

In deciding whether testimony is "necessary" the court has to take into account

such factors as the significance of the matters the lawyer is expected to testify about, the weight of such testimony, and the availability of other evidence. S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp., *supra* at 446. Merely because an attorney has relevant knowledge or was involved in the transaction at issue does not make that attorney's testimony "necessary," thereby requiring his disqualification. Talvy v. American Red Cross in Greater New York, 205 A.D.2d 143, 152 (1st Dept 1994) *affirmed*¹ 87 N.Y.2d 826 (1995) (*citing S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp.*, *supra* at 445).

This analytical approach is wholly consistent with the general legal principle that a party has the right to be represented by an attorney of his or her own choosing and the disciplinary rules requiring that a lawyer's professional judgment be exercised for his client's benefit, free from "compromising influences and loyalties . . ." DR 5-102 *et seq*; S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp., *supra* at 444.. Consequently, the moving party seeking disqualification of the other party's attorney not only has the heavy burden of establishing that the attorney is a necessary witness, or that the moving party intends to call the attorney as a witness, but also that the testimony the attorney is expected to give will be adverse to his own client's interests.

Transcontinental Const. Services, Ltd. v. McDonough, Marcus, Cohn & Tretter, P.C., 216 A.D.2d 19 (1st Dept. 1995); *Also: Hakimian Management Corp v. Fiore*, 16 Misc3d 1108 (A) (Sup Ct N.Y. Co 7/9/07).

¹There is no written decision by the Court of Appeals, other than that the decision of the appellate court is affirmed "for the reasons stated in the opinion by Justice Joseph P. Sullivan at the Appellate Division." All references are, therefore, to the appellate court's decision.

In support of plaintiffs' motion to disqualify Sperber and his firm, plaintiffs only surmise that "maybe" Sperber knows why Bell has a retainer agreement with a criminal defense firm. Plaintiffs acknowledge they do not want to ask Sperber about his own legal fees, or the nature of his representation of the defendants in this action. DR 5-102 [A][3]; Henry v. Advance Process Supply Co., 11 A.D.3d 430 (2nd Dept 2004). Plaintiffs' assumption that Sperber knows "something" that maybe they cannot learn from Bell himself is insufficient to support their motion to disqualify Sperber and his firm. Therefore, their motion for disqualification of defendants' counsel must be denied.

II. Preliminary Injunction and Indemnification

Plaintiffs seek a preliminary injunction against Bell continuing to use partnership assets to pay his legal fees. Plaintiff also seek an order directing Sperber to repay the fees he has been paid using partnership monies thus far. In order to obtain a preliminary injunction, plaintiffs would have to show: [1] a likelihood of success on the merits; [2] irreparable injury, and [3] a balancing of the equities in its favor. CPLR § 6301, Aetna Insurance Co., Inc. v. Capasso, 75 NY2d 860 (1990). For the reasons that follow, plaintiff fails its burden with respect to each prong.

The partnership agreements each contain indemnification provisions. Of the two, the 7th Street agreement is more complete. It expressly provides for General Partner to be indemnified in the event he is sued by the Limited Partners, for any action "taken or omitted in good faith . . ." The agreement provides further that General Partner is also entitled to indemnification by a Limited Partner, unless there is a judgment "rendered in favor of" the Limited Partners. It well established law that an agreement to indemnify must be "strictly construed" and "should not be found unless it

can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances . . ." Goldwasser v. Geller, 279 A.D.2d 297, 297 (1st Dept 2001). Consequently, as per the express terms of these partnership agreements, Bell is entitled to indemnification, unless or until the allegations against him of misappropriation, self-dealing, etc., are proved. At this point, however, they are simply unproved allegations, and there is no basis to enjoin payments by him to his attorney in connection with his legal defense against the limited partners claims. See: Levine v. Levine, 184 A.D.2d 53 (1st Dep't 1992); Meyerson v. Tullman, 281 AD2d 170 (1st Dep't 2001). Nor is there any basis to order him to repay these monies at this point in the litigation. Therefore, plaintiffs' have failed to meet their burden in connection with their motion for a preliminary injunction, and it is denied. The TRO against payment of legal fees to Sperber using partnership assets is hereby vacated forthwith.

III. Audit

Bell has hired an independent auditor to perform an audit of the partnerships' books and records. Although the limited partners contend this individual is not "independent," because he was selected and hired by Bell, without any input on their part, the General Partner has the right, as per the express provisions of Article V, section 5.1 of the partnership agreements, to hire any professional he sees necessary to render services to the partnership. Such professional includes an accountant. While the limited partners have had no input in the selection process, as per the partnership agreements, this is a power reserved to the general partner.

The court also evaluates plaintiffs' motion from the standpoint of the broad indemnification provisions in the partnership agreements (see Article V, section 5.5,

supra). These provisions allow the General Partner to be indemnified for his "costs and expenses" in defending this action. Thus, whether under his broad powers, or his right to indemnification, (sections 5.1 or 5.3), Bell can hire the auditor, without consulting the limited partners, and there is basis to enjoin him from paying the auditor's fees with partnership assets. This is, however, subject to plaintiffs' overarching claims of self dealing, etc., for which they seek damages. Those claim remain to be decided at a later date. Therefore, plaintiffs' motion for an order preventing the defendants from paying for an auditor using partnerships' assets is also denied.

IV. Discovery

Although plaintiffs have retreated from their initial contentions that defendants have not provided them "any of the requested," they still maintain that they have not been provided with annual financial statements for each limited partner. The court has examined the documents that defendants have turned over thus far in discovery. They include Schedule K-1 statements setting forth each limited partner's share of income, deductions and credits. Plaintiffs have not further clarified what they have demanded, that the defendants have not provided. Consequently, plaintiffs' motion, to enforce discovery is denied at this time.

V. Defendants' cross motion

Having denied plaintiffs' motion for injunctive relief for the reasons stated earlier in this decision, defendants' cross motion for a \$1,000,000 bond is rendered academic and it is denied. To the extent that defendants' contend a bond is called for under the partnership agreement, the motion is also denied because the section they rely upon (Article VII, section 7.3) does not expressly provide for a bond, but only provides for

contractual indemnification.

The remaining branch of defendants' cross motion is for an order enjoining the plaintiffs from disseminating information about them to non-parties. This is based upon a single letter from one of the limited partners who has not provided an affidavit. In any event, defendants have not demonstrate they are entitled to such an order, based upon the record developed on these motions. According, this branch of defendants' cross motion is denied.


Conclusion

Plaintiffs' motion is denied in its entirety. Defendants' cross motion is also denied.

Any relief requested, not expressly addressed, is hereby denied.

This shall constitute the decision and order of the court.

Dated: New York, New York
March 12, 2008

So Ordered:


Hon. Judith J. Gische, JSC

FILED
MAR 24 2008
NEW YORK
COUNTY CLERK'S OFFICE