

Roth Law Firm, PLLC v Sands
2008 NY Slip Op 31182(U)
April 15, 2008
Supreme Court, New York County
Docket Number: 0602323/2007
Judge: Joan Madden
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PRESENT: Hon. Joan A. Melillo
Justice

PART 11

Index Number : 602323/2007

ROTH LAW FIRM, PLLC

vs

SANDS, STEVEN BRETT

Sequence Number : 003

DISQUALIFY COUNSEL

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

motion to/for disqualify

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision and Order.

FILED
 APR 23 2008
 COUNTY CLERK'S OFFICE
 NEW YORK

Dated: April 15, 2008

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

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ORIGINAL IS ELECTRONICALLY RETURNED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X INDEX NO. 602323/07
THE ROTH LAW FIRM, PLLC, pro se,

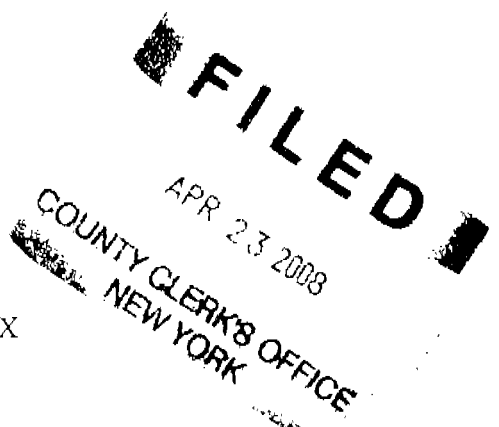
Plaintiff,

--against--

STEVEN BRETT SANDS and MARTIN SCOTT SANDS,

Defendants.

-----X
JOAN A. MADDEN, J.:



In this action arising out of defendants' alleged refusal to pay for legal services rendered on their behalf and for their benefit by the plaintiff law firm, plaintiff, who is appearing pro se, moves for an order disqualifying Gusrae, Kaplan, Bruno & Nusbaum, P.L.L.C ("the Gusrac firm") as counsel for defendants in this action pursuant to New York State disciplinary rule DR 5-102. Defendants oppose the motion, which is denied for the reasons below.

Background

Plaintiff is a small law firm that represented defendants, who are two brothers, in numerous litigations and arbitrations involving various business entities owned and/or controlled by defendants, including a brokerage firm known as Sands Brothers, Ltd., Inc. Plaintiff's representation of defendants began in March 2003 and ended in early 2006, when plaintiff notified defendants that it could not longer represent them since defendants owed plaintiff approximately \$1.5 million for legal services. The amended complaint asserts causes of action for: (1) breach of contract, (2) services rendered, (3) account stated, (4) quantum meruit, (5) tortious interference with Legal Fees Agreement against Steven Sands, (6) fraudulent misrepresentation, (7) fraud in

the inducement, (8) unjust enrichment, (9) common law fraud, (10) to pierce the corporate veil, and (11) intentional tort. In addition to \$1.5 million in outstanding attorneys' fees, the amended complaint seeks \$100,000 in compensatory damages, punitive damages, and attorneys' fees.

By decision and order dated April 11, 2008, this court granted defendants' motion to dismiss the amended complaint to the extent of dismissing the fraud claims, the intentional tort claim, and the requests for punitive damages and attorneys' fees. Defendants have not yet answered the complaint.

While the motion to dismiss was pending, plaintiff made this motion to disqualify the Gusrac firm under the advocate-witness rule of the Code of Professional Responsibility, DR-5-102(B)(22 NYCRR 1200.2[b]). Plaintiff argues that since attorneys from the Gusrac firm acted as additional or subsequent counsel to plaintiff on the matters that are now the subject of this fee dispute, that it will be necessary for plaintiff to call them as witnesses, and that their testimony will be prejudicial to defendants.

In support of the motion, plaintiff submits the affirmation of Richard Roth, Esq. ("Roth") who is the principal of the plaintiff law firm. Roth states that "I had conversations with David Gehn, Marty Kaplan, Sirino Bruno and Brian Graifman, all litigation partners at the Gusrac firm, about many of the matters upon which this suit is based. Those conversations related to the work [plaintiff] was performing on those matters, strategies in connection with the matters, billing the client, disbursements and the fact that money was due and owing." (Roth Affirmation, ¶ 4). Roth further states that "the Gusrae firm worked very closely with [plaintiff] and has first hand knowledge of conversations relating to the issues in this action, the work [plaintiff] performed and many other items in which no one else has knowledge. Each of these partners will therefore be

called to testify for [plaintiff] at trial and all the testimony will be adverse to defendants.” (Id., ¶ 7).

Roth also points to specific matters identified in the Amended Complaint in which both plaintiff and the Gusrac firm represented defendants. In particular, Roth states that in the *Rogério-Forsatti* litigation (Amended Complaint, ¶ 25 (i)), the Gusrac firm settled the matter behind plaintiff’s back on the eve of trial while Roth was preparing examinations for a hearing in the case. Roth further states that in the *Huang* and *Beus* litigations (Id., ¶ 25 (c) & ¶ 25 (n), 33-40 respectively), plaintiff and the Gusrac firm worked as co-counsel and appeared together in court and at arbitration hearings, and that in the *Keilly* matter (Id., ¶ 25 (j)) plaintiff and the Gusrac firm also worked together as co-counsel. In the *Cuddy* matter (Id., ¶ 25 (g)), Roth states that he had conversations with Mr. Bruno of the Gusrac firm about settling the matter together on behalf of the defendants. According to Roth in the *Jasmine* and *Hodge* matters (Id., ¶ 25 (m)), the Gusrac firm took over the plaintiff’s representation of defendants.

Roth also asserts that David Gehn, Esq., who is a litigation partner at the Gusrac firm, represented Steven Sands during the period that Sands is alleged to have tortiously interfered with an agreement between Daniel Klibanoff (“Klibanoff”), an unsuccessful claimant in an arbitration, who agreed to pay plaintiff \$100,000 in legal fees in exchange for withdrawing an attorney’s fees claim before the arbitration panel (Amended Complaint, ¶ 25 (k), 41-68).

In opposition to the motion, defendants argue that the motion to disqualify the Gusrac firm is premature as no discovery has been conducted. In addition, defendants argue that the unsworn statements in Roth’s affirmation must be rejected as Roth is an interested party, and that in any event, Roth’s position that he intends to call certain members of the Gusrac firm as witnesses is

self-serving and speculative and insufficient to establish that such testimony would be necessary or prejudicial to defendants.

In reply, to correct any procedural error, Roth submits an affidavit containing the same statements as the affirmation submitted in support of the disqualification motion. Roth also points out that his statements as to Mr. Gchn's knowledge regarding the facts underlying the tortious interference claim against Steven Sands are supported by the printed copies of email communications annexed as exhibits to the Amended Complaint (exhibits 12, 14, 17, 18, 19, 20, 21, and 22).

Discussion

The Code of Professional Responsibility states that an attorney involved in litigation must withdraw when it becomes obvious that the attorney ought to be called as a witness. (Code of Professional Responsibility, DR 5-102; S & S Hotel Ventures Limited Partnership v 777 S. H. Corp., 69 NY2d 437 (1st Dept 1987). While the importance of the Code of Professional Responsibility must not be ignored, "it is particularly important that [it] not be mechanically applied when disqualification is raised in litigation." Id., at 444). "Disqualification...during litigation implicates not only the ethics of the profession but also the substantive rights of the litigants [and] denies a party's right to representation by the attorney of its choice." (Id. at 443 [citations omitted])."

Thus, "[u]nder New York law, the mere fact that an attorney was involved in the transaction at issue, or that his proposed testimony would be relevant or highly useful is insufficient to warrant disqualification; rather, the crucial inquiry is whether the subject testimony is necessary, taking into account such factors as the significance of the matter, the availability of

other evidence and the weight of the testimony.” Brooks v. Lewin, 48 AD3d 289 (1st Dept 2008); see also, Whitman Breed Abbott & Morgan v Oram, 300 AD2d 135, 136 [1st Dept 2002).

(disqualification under the advocate-witness rule requires a showing of “personal knowledge of the matters at issue...so highly and indispensably probative that the attorney’s testimony ... is necessary”); S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp., 69 NY2d at 446 (“A finding of necessity takes into account such factors as the significance of the matters, weight of the testimony, and availability of other evidence.”).

The party seeking disqualification, “carries a heavy burden of identifying projected testimony of the advocate-witness and demonstrating how it would be ‘so adverse to the factual assertions or account of the events offered on behalf of the client as to warrant his disqualification.’” Broadwhite Associates v. Truong, 237 AD2d 162, 163 (1st Dept 1997), quoting, Martinez v. Suozzi, 186 AD2d 378, 379 (1st Dept 1992). The courts have found that this burden is not met when early in a proceeding, the party seeking disqualification states that it intends to call the adverse party’s lawyer as a witness, but does not “adequately show what the testimony of the advocate witness is expected to be, how it will be adverse to the client... or how the client will be prejudiced.” Phoenix Assurance Co. of New York v. C.A. Shea & Co., Inc., 237 AD2d 157 (1st Dept 1997)(citations omitted); see also, Kirshon, Shron, Cornell & Teitelbaum, P.C. v. Savarese, 182 AD2d 911 (3d Dept 1992)(holding that disqualification motion was premature when made before discovery and in the absence of evidence showing that the testimony of the advocate witness would be necessary to establish the moving parties’ case or prejudicial to the adverse party’s clients); Code of Professional Responsibility, DR 5-102 [D](permitting an attorney who may be called as a witness and who has already retained by a client to continue representation

until “it is apparent that the testimony is or may be prejudicial to the client”); compare Sokolow, Dunaud, Mercadier & Carreras LLP v. Lacher, 299 AD2d 64 (1st Dept 2002)(holding that disqualification of attorney before discovery was warranted in action by one law firm against another firm arising from the breach of a merger agreement where discovery in related case showed that attorney was the only witness who could testify on behalf of his clients to explain why certain fees his firm received were not payable to the other firm under the merger agreement).

Under this standard, plaintiff has not met its burden of showing that Gusrae firm should be disqualified under the advocate-witness rule. While plaintiff and Gusrac firm represented defendants in the matters for which plaintiff is seeking fees, plaintiff does not adequately specify what testimony will be required of defendants. Presumably, billing records will substantiate the amount of fees due and owing to plaintiff so that partners from the Gusrac firm will not be required to testify that plaintiff performed certain services. Furthermore, as the fraud claims, intentional tort claim and request for punitive damages have been dismissed, it appears that allegations that the Gusrac firm aided defendants in settling cases without plaintiff’s knowledge, and that defendants engage in a pattern of conduct of failing to pay their attorneys, including the Gusrac firm, are no longer relevant.

Moreover, with the exception of David Gehn, plaintiff does not explain how his conversations with the various litigation partners at the firm will be required to prove its claims or will be prejudicial to defendants. In fact, at this early stage of the litigation, when defendants have not even answered the amended complaint, the nature of defendants’ defenses are unknown and no discovery has been conducted, it cannot be said what issues will be relevant at trial.

As for Mr. Gehn, who represented Steven Sands during the period of his alleged

interference with an agreement for the payment of legal fees to plaintiff, it cannot be said on this record that his testimony, even if necessary, will be prejudicial to defendants. In any event, even if Mr. Gehn is called at his witness at trial, it is well established that “a law firm is permitted to continue representation of a client even though one of the firm’s attorneys will be called as a witness on behalf of the client before the tribunal.” Owen & Mandolfo, Inc. v Davidoff of Geneva, Inc., 197 AD2d 370 (1st Dept 1993) lv denied, 83 NY2d 751 (1994); Sokolow, Dunaud, Mercadier & Carreras LLP v. Lacher, 299 AD2d at 76 (holding that trial court’s decision should be modified to the extent that it disqualified entire law firm upon a finding the testimony of a partner in that firm was necessary to the clients’ case); Kaplan v Maytex Mills, Inc., 187 AD2d 565 (2d Dept 1992)(the 1990 revision of the Code of Professional Responsibility DR 5-102(A) “now permits a law firm to continue representation of a client even if one attorney in the firm is required to testify”); But see, Price v Price, 289 AD2d 11 (1st Dept 2001).

Furthermore, while plaintiff relies heavily on Moses & Singer, LLP v. S&S Machinery Corp., 251 AD2d 271 (1st Dept), lv dismissed, 92 NY2d 1024 (1998), to argue that the Gusrae firm should be disqualified, that case is not controlling here. In Moses & Singer, LLP, which, like the instant case, involved an action for the recovery of legal fees, the Appellate Division, First Department affirmed the trial court’s grant of plaintiff’s motion to disqualify defendants’ attorney writing that he was “engaged as co-counsel in the litigation that gave rise to the bills at issue [and therefore] his testimony would likely be necessary.” Id., at 271. However, the procedural posture in Moses & Singer, LLP was significantly different than in the instant case. There, the disqualification motion was not made at the beginning of action but at the time that the court granted plaintiff’s motion for summary judgment on its account stated claim and to dismiss

defendants' counterclaims. Thus, although Moses & Singer, LLP does not delineate the underlying facts, it can be presumed that the issues relevant to the trial were known to the court, and provided the basis for finding that the testimony of defendants' counsel was necessary. In contrast, as indicated above, at this early stage, the issues that will be relevant to the trial in this action are unknown, so that it would premature to grant plaintiff's disqualification motion.

Finally, while denying the motion at this time, the court recognizes that as this action proceeds it may become apparent that disqualification of the Gusrac firm is warranted. Accordingly, the motion is denied without prejudice to renewal.

Conclusion

In view of the above, it is

ORDERED that plaintiff's motion to disqualify Gusrac, Kaplan, Bruno & Nusbaum, PLLC as counsel for defendants in this action is denied without prejudice to its renewal.

DATED: April 15 2008


J.S.C.

FILED
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