SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. KENNETH A. DAVIS,

Justice

TRIAL/IAS, PART 3
NASSAU COUNTY

STEVEN KINZELBERG,

Plaintiff,

SUBMISSION DATE: 4/7/08
INDEX No.: 3783/07

-against-

DESIGN QUEST, LTD. and
RICHARD RUBENS, individually,

MOTION SEQUENCE # 3,4

Defendants.

The following papers read on this motion:

Notice of Motion/Cross-Motion.....	XX
Answering Papers.....	
Reply.....	XXX
Briefs: Plaintiff's/Petitioner's.....	
Defendant's/Respondent's.....	

Motion by defendants pursuant to CPLR 1003 to substitute Messardiere Design Quest, Inc. as party defendant in place and stead of the named defendant Design Quest, Ltd., and amend the caption, and to disqualify plaintiff's counsel pursuant to DR5-101(B) is granted in part and denied in part as hereinafter provided.

Cross motion by plaintiff for the imposition of sanctions pursuant to 22 NYCRR § 130-1.1 and an award of attorneys fees and costs is denied.

This action arises out of a written agreement dated May 11, 2006 and addendum thereto, between plaintiff and defendant Richard Rubens as president of Design Quest, Ltd. Pursuant to the agreement, Design Quest, Ltd. was hired to perform interior design services at plaintiff's residence in Palm Beach Gardens, Florida. According to the complaint, defendants, *inter alia*, inflated prices[1], billed for false storage charges and accepted payment for

[1]Plaintiff alleges that rather than charge a fee based on 25% of the stated price of services/products in accordance with

non-delivered goods.

Although the agreement herein was executed by defendant Richard Rubens as president of Design Quest, Ltd., of 575 Madison Avenue, New York City, it appears that, prior to the transactions at issue, defendant Richard Rubens, had failed to pay the franchise taxes for an entity which was known, in fact, as "The Design Quest, Ltd." as a result of which that entity became inactive.[2]

In a letter dated June 13, 2007, counsel for defendants advised plaintiff's counsel that plaintiff had named the wrong party and that Messardiere Design Quest, Inc. was the only entity that defendant Richard Rubens had operated through and the only entity involved in the transactions at issue. Counsel further noted that although he was authorized to accept service of an amended complaint naming the proper party defendant, plaintiff declined to voluntarily agree to serve a supplemental summons and amended complaint naming the correct corporate defendant, taking the position that defendants would have to make a motion to correct the error.

To correct the purported error, defendants have moved pursuant to CPLR 1003 to substitute the entity known as Messardiere Design Quest, Inc. as and for the named corporate defendant and to amend the caption of this action to reflect the addition of said defendant. The motion is predicated on the grounds that although defendant Richard Rubens apparently operated under the broad banner of Design Quest, Ltd., in actuality, Design Quest, Ltd. is an inactive corporation having no relation to plaintiff, the agreement, or the transaction at issue. In this regard, defendants point out that his business generally operated under the names "Design Quest, Ltd.," "Messardiere's Design Quest, Ltd.," or "Messardiere Design Quest Corp," all of which has led to substantial confusion. Invoices related to purchases made herein bear the legend "Messardiere's Design Quest, Ltd., 575 Madison Avenue, New York, New York" and checks issued by plaintiff to "Design Quest" were deposited into Messardiere Design Quest, Inc.'s bank account at Wachovia Bank, even though endorsed "for deposit only Design Quest, Ltd.".

Although the May 11, 2006 agreement clearly states that Design Quest, Ltd. was hired to perform the various design services specified therein, defendant Richard Rubens, the president of Messardiere Design Quest, Inc. maintains that the agreement was, in

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the agreement, defendants calculated their fee on the basis of inflated prices.

[2]See Order of this court dated October 31, 2007.

fact, between plaintiff and Messardiere Design Quest, Inc. and it was Messardiere Design Quest, Inc. which was hired to provide the contracted for design services. By way of explanation Mr. Rubens avers that he had been "sloppy" in his use of corporate names and has been advised that in all his future dealings he "must specifically, exactly and consistently refer" to Messardiere Design Quest exactly as it is named in the Certificate of Incorporation, a practice not previously followed.

With respect to joinder, CPLR 1003 provides, in pertinent part, that

> "[p]arties may be added at any stage of the action by leave of court or by stipulation of all parties who have appeared, or once without leave of court within twenty days after service of the original summons or at any time before the period of responding to that summons expires or within twenty days after service of a pleading responding to it."

The provision, which grants the court wide latitude in determining whether parties are to be added (*Gross v BFH Co., Inc.*, 151 AD2d 452 [2nd Dept. 1989]), is to be liberally construed. The motion to add a new party should be granted unless adding the new party would cause unnecessary delay or prejudice the rights of the original parties to the action. *Scory LLC v Maroney*, 15 Misc3d 1140(A), 2007 NY Slip Op. 51064 (U) [Sup. Ct. Nassau County, May 22, 2007]. Under the circumstances extant, where there is neither a stipulation signed by all parties nor the possibility of a timely amendment of the pleadings as of right, the joinder of Messardiere Design Quest, Inc. as defendant by the filing of a supplemental summons and amended complaint can be accomplished only with prior judicial permission. *Public Adm'r of Kings County v McBride*, 15 AD3d 558, 559 [2nd Dept. 2005]. While plaintiff argues that all of its dealings were with Design Quest, Ltd-and not Messardiere Design Quest, Inc., and that "[t]here is no justice in allowing this foreign unlicensed corporation to insert itself into this litigation for the purpose of shielding defendant Rubens from his own bad act," Messardiere Design Quest, Inc. must, in my view, be added as a defendant in order to insure that complete relief is accorded between the parties to the action. CPLR 1001(a). Moreover, plaintiff offers no credible argument of prejudice by reason of such addition which would mitigate against the relief.

With respect to the issue of disqualification of plaintiff's counsel, it is well established that the right of a party to an action to select his own attorney is a valuable right which should not be abridged absent a clear showing that disqualification is warranted. *Gulino v Gulino*, 35 AD3d 812 [2nd Dept. 2006]. While the

right to choose one's counsel is not absolute, disqualification of 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. *S & S Hotel Ventures Ltd. Partnership v 777 S.H. Corp.*, 69 NY2d 437, 443 [1987]. The determination whether or not disqualification of an attorney is warranted is a matter committed to the sound discretion of the trial court. *Bentvena v Edelman*, 47 AD3d 651 [2nd Dept. 2008].

Where, as here, a party moves to disqualify an opposing party's attorney on the ground that the attorney will be called as a witness at trial [DR 5-101(B)], the movant bears the heavy burden of establishing that the attorney testimony will be necessary. *Eisenstadt v Eisenstadt*, 282 AD2d 570 [2nd Dept. 2001]. In determining whether the attorney's testimony is necessary, the court will take into account such factors as the significance of the matters, weight of the testimony and the availability of other evidence. *S & S Hotel Ventures Ltd. Partnership v 777 S.H. Corp., supra* at p. 446. The mere possibility that an attorney may be called to testify, is an inadequate excuse to justify disqualification. *NYK Line (North America Inc. v Mitsubishi Bank, Ltd.,*, 171 AD2d 486, 488 [1st Dept. 1991]. Disqualification may be required only when it is likely that the testimony to be given by the witness will be adverse to the client. *ODS Optical Disc Service GmbH v Toshiba Corp.*, 41 AD3d 166 [1st Dept. 2007].

Taking the applicable factors into consideration here, defendant has failed to sustain the burden of demonstrating the necessity of plaintiff's attorney's testimony. While defendants contend that the attorney's knowledge *vis a vis, inter alia*, defendants' readiness to deliver furnishings/carpeting, changes to and cancellation of delivery and installation orders and rejection of mitigating offers made by defendants is central to plaintiff's breach of contract claim, the contention is mere supposition. Further, such issues could be raised by defendants in cross examining plaintiff. The fact that Directional, Inc., a wholesale furniture vendor in North Carolina received a call from an individual who identified herself as "Deborah" from Messardiere Design Quest, and requested a duplicate copy of a purportedly lost invoice which was, in turn, sent to facsimile number 516-741-4225 does not, without more, constitute a basis to disqualify plaintiff's attorney on the grounds that she is a necessary witness.

Accordingly, defendants' motion to add Messardiere Design Quest, Inc. as a party defendant in this action is granted pursuant to CPLR 1003. Plaintiff shall serve a supplemental summons and amended complaint on defendants' counsel within 25 days after service of a copy of the order hereon, with notice of entry, on plaintiff's counsel whereafter the caption of this action shall be

amended to reflect the addition. Given the confusion *vis a vis* the various corporate entities under which defendant Richard Rubens allegedly conducted business, and their legal status, the entity misidentified as Design Quest, Ltd. shall remain a defendant in this action until further order of this court. The supplemental summons, amended complaint, and the amended caption shall, however, reflect the correct name of the misidentified defendant to wit: The Design Quest Ltd., which misnomer is hereby corrected.

That branch of defendants' motion which seeks disqualification of plaintiff's counsel pursuant to DR 5-101(B) is denied.

Cross motion by plaintiff for the imposition of sanctions on defendants predicated on alleged frivolous conduct pursuant to 22 NYCRR 130-1.1 in moving to disqualify plaintiff's counsel is denied. The decision as to whether to award sanctions rests within the sound discretion of the court. *Wagner v Goldberg*, 293 AD2d 527 [2nd Dept. 2002].

22 NYCRR § 130-1.1(a) allows courts to sanction attorneys for engaging in frivolous conduct, including conduct: (1) "completely without merit in law;" (2) "undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injury another;" or (3) "assert[ing] material factual statements that are false." 22 NYCRR § 130-1.1 further provides that:

> "In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, or should have been apparent, or was brought to the attention of counsel or the party."

Contrary to plaintiff's argument, the theories advanced by defendants in support of disqualification were not so totally meritless as to warrant the imposition of sanctions.

This decision constitutes the order of the court.

Dated: MAY 09 2008

ENTERED
MAY 14 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE

KENNETH A. DAVIS

J.S.C.