

Miller v FJF Elec. Co., Inc.

2008 NY Slip Op 31585(U)

June 2, 2008

Supreme Court, New York County

Docket Number: 0602344/2007

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHÉ
J.S.C.

PART 10

Index Number : 602344/2007

MILLER, LESLIE

VS.

F.J.F.ELECTRICAL CO.INC

SEQUENCE NUMBER : 003

COMPEL DISCLOSURE

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

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

FILED
JUN 10 2008
COUNTY CLERK'S OFFICE
NEW YORK

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

Dated: June 7, 2008

HON. JUDITH J. GISCHÉ 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

Leslie Miller,
Plaintiff,

-against-

FJF Electrical Co., Inc.,
W. Joseph Salerno a/k/Joe Salerno and
Frank Salerno a/k/a Frank Foronity a/k/a
Frank "Farongi",
Defendants.

Decision/Order
Index# 602344/2007
Mot. Seq. #003

Present:
Hon. Judith J. Gische
J.S.C.

Pursuant to CPLR 2219(a) the court considered the following numbered papers on this motion:

PAPERS

Notice of Motion, LM affd., LM affd. of good faith, exhibits.....	1
RES affirm. in opp, FF affd., exhibits.....	2
LM Supplemental affd., exhibits.....	3

FILED NUMBERED
JUN 10 2008
COUNTY CLERK'S OFFICE
NEW YORK

Gische, J.:

Upon the foregoing papers the decision and order of the court is as follows:

Plaintiff, Leslie Miller, appearing pro se, brings this motion for: [1] entry of judgment on the first cause of action for failure to verify the answer; [2] preclusion for failure to furnish a Bill of Particulars and provide other discovery, [3] sanctions and [4] disqualification of defendants' counsel. Defendants oppose the motion in all respects.

The underlying complaint seeks damages for breach of contract; fraud; account stated and an accounting. The claims all relate to the installation of a security system for Reckson Construction and Development, LLC at a property located at 68 Executive Park 111 in Melville, New York. Plaintiff claims that he and the defendants were each

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responsible for certain aspects of the installation and that they agreed to share in the profits received. Plaintiff claims that not only did defendants fail to share according to the agreement, but that they rendered fraudulent statements of job related expenses.

1. The Verification of the Answer

The underlying complaint is verified by Leslie Miller. The law firm of Schrier, Fiscella & Sussman, LLC interposed one answer on behalf of all of the named defendants. It denies the material allegations of the complaint and asserts various affirmative defenses. The answer is verified by Richard E. Schrier, Esq. It is denoted as an "Attorney's Corporate Verification." It states that the contents of the answer is: "true to deponent's own knowledge, except as to matters stated to be alleged on information and belief, and as to those matters deponent believes it to be true." It further provides: " The grounds for deponent's belief as to all the matters stated upon deponent's knowledge are as follows: correspondence, information and documents in deponent's file and deponent's personal knowledge."

Plaintiff rejected the answer on basis that it was not properly and/or improperly verified. He now seeks entry of a default judgment as if no answer had been interposed at all.

CPLR 3020 (a) requires that where a pleading is verified, each subsequent pleading shall also be verified. The answer in this action was certainly verified. Plaintiff claims, however, that each named defendant should have separately verified the answer. In addition he claims that the attorney, who does not claim to be a corporate officer, cannot verify on behalf of the corporate defendant.

CPLR 3020 (d) specifies by whom the verification shall be made. It provides in

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pertinent part:

"The verification of a pleading shall be made by the affidavit of a party, or if two or more parties are united in interest are pleading together, by at least one of them who is acquainted with the facts, except: 1. If the party is a domestic corporation, the verification shall be made by an officer thereof and shall be deemed a verification made by the party....3. if the party is foreign corporation or is not in the county whether the attorney has his office of if there are two or more parties united in interest and pleading together and none of them acquainted with the facts is within the county...of if all the material allegations are within the personal knowledge of an agent or the attorney, the verification may be made by such agent or attorney."

Defendants claim that W. Joseph Salerno and Frank Salerno do not exist. They acknowledge that a Frank Foronjy exists and they he is the principle of FJF Electric. They also acknowledged at oral argument that a "William" Salerno exists. Whether these parties were simply incorrectly identified in the caption awaits further litigation. In any event, they claim that the defendants are united in interest and that, therefore, only one verification need be made. Here all parties are sued based upon the same alleged facts and causes of action. They have interposed a joint answer. They are united in interest as that term is used in the verification statute. Lansner v. Board of Elections of the City of New York, 72 NY2d 929 (1988). Consequently the verification is not infirm simply because it is not separately verified by each of the defendants.

The further issue is whether an attorney verification will suffice. Attorney Scarier claims that he comes within that provision of CPLR 3020 allowing an attorney's verification where the material allegations being verified are within the attorney's personal knowledge. The statute does in fact allow for such an attorney verification. This claim by Attorney Schreir, however, impacts on the request that he be disqualified

as counsel (see decision, *infra*).

The court finds that the verification of the answer comports with CPLR 3020 and that it is deemed interposed at or about the time of its service upon plaintiff.

2. Discovery

Plaintiff seeks discovery sanctions based upon defendants failure to provide a Bill of Particulars and to exchange the names and addresses of all eye witnesses, etc. On February 7, 2008 defendants were served with plaintiff's Demand for a Bill of Particulars. Defendants rejected the Demand. Plaintiff claims that this was in violation of the court's preliminary conference order.

Defendants' rejection of the Demand for a Bill of Particulars was based upon the fact that the answer contains no counterclaims. Further there are no issues identified in this case on which defendants have the burden of proof. It is well established in New York that a Bill of Particulars is intended to be an amplification of the pleadings and is permitted with respect to claims on which the pleader has the burden of proof. New England Seafood of Amherst v. Travelers, 84 AD2d 676 (4th dept 1981); State of New York v. Horsemen's Benevolent & Protective Association, 34 AD2d 769 (1st dept. 1970). Since plaintiff has not identified any issues on which defendant has the burden of proof, a demand for a Bill of Particulars was not available to plaintiff. The fact that the court set deadlines for the service of such demand was certainly not a substantive ruling that such a demand was in fact proper in this case.

To the extent plaintiff claims that he was not provided a list of eye witnesses, that has since been provided, rendering that aspect of the motion moot.

3. Sanctions

Although plaintiff asks in most general way for sanctions, he has not provided any basis for the court to grant sanctions against "defendants and their attorneys" as requested. Plaintiff has not shown in any manner that defendants conduct was frivolous within the meaning of the applicable court rule. Matter of Minister, Elders & Deacons of Refm. Prot. Dutch Church of City of N.Y. v. 198 Broadway, 76 N.Y.2d 411 (1990).

4. Disqualification of Defendants Counsel

Plaintiff claims that counsel is a potential witness in this action. He also claims that he suffers from a conflict of interest.

Plaintiff has failed to identify any conflict of interest.

With respect to potential testimony, it is clear from the parties' defense of the attorney verification in this matter that Attorney Schrier has personal knowledge of the underlying facts.

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., 69 N.Y.2d 437, 445-446 (1987). "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.

Even if there is the possibility that 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

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apparent that his or her testimony will be so adverse to the factual assertions or account of events offered on behalf of the client so as to warrant his or her disqualification.

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]).

Therefore, the testimony that the attorney is expected to offer must be adverse to his own client.

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 or 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 is consistent with the general legal principle that a party has the right to be represented by an attorney of his or choosing. Therefore, the moving party seeking disqualification 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 he is expected to give will be adverse to his client's

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 division decision.

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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). This approach is also consistent with the so-called "advocate witness rule" (DR 5-102 et seq) because a lawyer's professional judgment should be exercised for his client's benefit, free from "compromising influences and loyalties . . ." S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp., *supra* at 444.

The record on this motion is not developed enough for the court to evaluate whether Attorney Schrier's testimony is or will be necessary at trial. The court therefore denies this branch of the motion without prejudice to renew at the conclusion of discovery. As part of discovery plaintiff may notice for and take the deposition of Attorney Schrier.

CONCLUSION

In accordance herewith it is hereby

ORDERED that plaintiff's motion to disqualify defendants' counsel is denied without prejudice to renew , and it is further

ORDERED that plaintiff's motion is in all other respects denied, and it is further

ORDERED that any requested relief not expressly discussed herein is denied and that this shall constitute the decision and order of the court.

Dated: New York, New York
June 2, 2008

FILED
JUN 10 2008
COUNTY CLERK'S OFFICE
NEW YORK

SO ORDERED:

J. J. J.S.C.