

Deriggi v Brady

2008 NY Slip Op 32789(U)

October 7, 2008

Supreme Court, New York County

Docket Number: 104300/2007

Judge: Shirley Werner Kornreich

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

PRESENT: HON. SHIRLEY WERNER KORNREICH

PART 54

Index Number : 104300/2007

DERIGGI, KENNETH

vs

BRADY, EDWARD

Sequence Number : 002

DISQUALIFY COUNSEL

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
<u>Notice of Motion/</u> Order to Show Cause — <u>Affidavits</u> — <u>Exhibits</u> ...	_____
<u>Answering Affidavits</u> — <u>Exhibits</u> _____	_____
<u>Replying Affidavits</u> _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

FILED

OCT 09 2008

COUNTY CLERK'S OFFICE
NEW YORK

10/7/08

Dated: _____

HON. SHIRLEY WERNER KORNREICH

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 54

-----X

KENNETH DERIGGI,

Plaintiff,

-against-

EDWARD BRADY, 199 BOWERY REST. GROUP,
LLC d/b/a "BLVD" and d/b/a "CRASH MANSION
@ BLVD," NANCY BRADY, MARK SAAD, JOHN
LUGANO, PASTA & POTATOES, INC. d/b/a
VILLAGE LANTERN, 52 RESTAURANT GROUP
CORP. d/b/a OPAL BAR AND RESTAURANT, and
CAPITAL DILIGENCE GROUP, INC.,

Defendants.

-----X

Index No.:104300/2007

**DECISION and
ORDER**

FILED
OCT 09 2008
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NEW YORK

KORNREICH, SHIRLEY WERNER, J.:

This is an action for fraud, breach of the duty of good faith and fair dealing, specific performance, a declaration of rights and an accounting. The action arises from then parties' disagreement over their various interests and investments in a new restaurant in the Bowery district of Manhattan, as well as the limited liability company formed to run it. By decision dated January 30, 2008, the court granted plaintiff leave to file his amended complaint, then deemed it as filed, and denied defendants' motion to dismiss the First, Second, Third and Fifth Causes of Action. Plaintiff now moves to disqualify Lawrence R. Lonergan, Esq. as counsel to defendants on the grounds that Lonergan (1) drafted the operating agreement ("Agreement") plaintiff argues is controlling, (2) represented defendant 199 Bowery Rest. Group, LLC in conjunction with the

drafting of the Agreement, and (3) is the creator and custodian of corporate records. Defendants oppose and cross-move for an order quashing a *subpoena duces tecum* served on Lonergan. Defendants claim grounds of relevance and attorney-client privilege. Both motions are denied for the reasons stated below. The court assumes the parties' familiarity with the facts summarized in the January 30, 2008 order.

Discussion and Rulings

Plaintiff's Motion to Disqualify

Initially, plaintiff's motion is timely. The case has not yet proceeded to preliminary conference and plaintiff requested that Lonergan recuse himself right after the court denied defendants' motion to dismiss. *Winston Affirm.*, ¶¶ 4-5. In any event, the motion does not meet the requirements for disqualification.

DR 5-101 (B) of the Code of Professional Responsibility (22 NYCRR 1200.20 [b]) prohibits a lawyer, except in circumstances not applicable here, from representing a client where "the lawyer knows or it is obvious that the lawyer ought to be called as a witness on behalf of the client." The right of a party to an action to select his or her own attorney is a valuable right, and an attorney should not be disqualified unless there is a clear showing that disqualification is warranted. *Unger v. Unger*, 15 AD3d 389 (2nd Dept. 2005); *see Chang v. Chang*, 190 A.D.2d 311, 318-319 (1st Dept. 1993). The party seeking to disqualify an attorney bears the heavy burden of establishing that the attorney will be called as a witness at trial and that the attorney's testimony is necessary. *Id.*; *Morgasen v. Federated Consultant Services, Inc.*, 174 AD2d 656 (2nd Dept. 1991). Disqualification is a drastic remedy that should not be ordered unless the party requesting it also identifies the lawyer's projected testimony and demonstrates "how ...[the

testimony] would be so adverse to the factual assertions or account of events offered on behalf of the client as to warrant his disqualification.' (Martinez v. Suozzi, 186 AD2d 378, 588 N.Y.S.2d 175)." *Broadwhite Assocs. v. Truong*, 237 AD2d 162, 163 (1st Dept. 1997) (reversing lower court's order disqualifying attorney); *ODS Opt. Disc Serv. GmbH v. Toshiba Corp.*, 41 A.D.3d 166, 167 (1st Dept. 2007) (reversing lower court's order disqualifying attorney and firm).

Plaintiff has not met his burden. He argues that Lonergan's testimony will be "necessary" because the latter (1) drafted the operating agreement, (2) acted as counsel for the LLC (and plaintiff by inclusion as a member), and (3) might have been privy to information and input relevant to the negotiation of, and the intent of the parties to, the LLC operating agreement and possibly the LLC § 1102 disclosure in which plaintiff's investment is discounted. Defendants admit that Lonergan drafted the operating agreement, but deny that he prepared the LLC disclosure and that he has any special knowledge regarding the parties' understanding and intentions. Plaintiff has not identified either the projected testimony Lonergan would provide, or that it would be prejudicial to *his* clients, the defendants. At most, plaintiff has shown that Lonergan has knowledge that would be relevant and "highly useful," but not that it would be "strictly necessary" to plaintiff's case or more than simply cumulative to other testimony. *Broadwhite Assocs. v. Truong*, *supra*, 237 AD2d at 162-163. This is not enough.

Motion to Quash

Plaintiff has served Lonergan with a *subpoena duces tecum* ("SDT") seeking two categories of documents: (1) Documents related to the LLC operating agreement and each member's investment; (2) documents relating to the incorporation and business of the LLC. Defendants seek to quash the SDT, arguing attorney-client privilege and work product, and that

the SDT is vague, burdensome, lacks particularity, and seeks unnecessary and immaterial documents. Specifically, defendants assert that the LLC and "its accountant" (unnamed), and not Lonergan, keeps and maintains "the business records, financial data, tax records or other documents related to 199 Bowery LLC." Brady Affid., ¶¶ 5-6.

Defendants' claim of attorney-client privilege and work product to resist the SDT is rejected for failure to comply with CPLR 3122(b) by providing a privilege log. CPLR 3122(b) requires a non-party asserting privilege to furnish a privilege log, specifying the nature of the documents, their general subject matter, their date, who prepared them and the basis for the privilege. Further, it is uncontroverted that plaintiff, as a member of the LLC, is entitled to review its records. Defendants' additional grounds are equally unfounded. The First Department, in *Velez v. Hunts Point Multi-Serv. Ctr., Inc.*, 29 A.D.3d 104, 112 (1st Dept. 2006), described the moving non-party's burden in seeking to quash an SDT:

It is well settled that the purpose of a subpoena duces tecum is to compel the production of specific documents that are relevant and material to facts at issue in a pending judicial proceeding (*see Matter of Terry D.*, 81 NY2d 1042, 1044 [1993]). It is equally well settled that a motion to quash a subpoena duces tecum should be granted only where the materials sought are utterly irrelevant to any proper inquiry (*see New Hampshire Ins. Co. v Varda, Inc.*, 261 AD2d 135, 687 NYS2d 261 [1999]; *Matter of Reuters Ltd. v Dow Jones Telerate*, 231 AD2d 337, 341, 662 NYS2d 450 [1997]). "Moreover, the burden of establishing that the requested documents and records are utterly irrelevant is on the person being subpoenaed" (*Gertz v Richards*, 233 AD2d 366, 366, 650 NYS2d 584 [1996]).

Id.

Defendants have not established that the documents sought are "utterly irrelevant" to any proper inquiry. *Id.* Plaintiff has charged that defendants defrauded him into making his investment in the LLC and that the LLC operating agreement is the controlling document

defining the parties' rights and responsibilities. Defendants deny these allegations. To the extent that Lonergan has any documents showing the parties' understanding of their commercial relationship and expectations, as well as defendants' financial dealings with each other and the LLC, these documents are relevant to the litigation and discoverable. Nor have defendants established that the SDT is burdensome. To the contrary, defendant Nancy Brady affirms that the LLC's business records, financial data, tax records and other documents related to the LLC are kept by the LLC and its accountant, and not Lonergan. Brady Affid., ¶ 6. Accordingly, it is

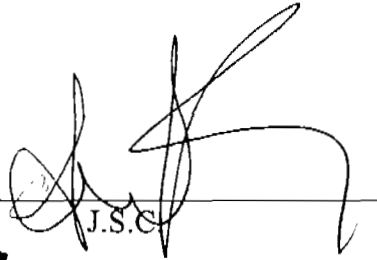
ORDERED that Plaintiff Kenneth Deriggi's motion to disqualify Lawrence R. Lonergan, Esq. from serving as defendants' counsel is denied; and it is further

ORDERED that defendants' cross-motion to quash the *subpoena duces tecum* served on Lawrence R. Lonergan, Esq. is denied; and it is further

ORDERED that the parties shall appear in Part 54 of this court on November 13, 2008 at 9:30 A.M. for a preliminary conference.

ENTER:

Date: October 7, 2008
New York, N. Y.


J.S.C.
FILED
OCT 09 2008
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