

**Lawrence v Chedward Realty Corp.**

2008 NY Slip Op 33435(U)

December 19, 2008

Supreme Court, New York County

Docket Number: 104343/06

Judge: Shirley Werner Kornreich

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

PRESENT: Kornreich  
Justice

PART 54

Index Number : 104343/2006

LAWRENCE, BARBARA

VS

CHEDWARD REALTY CORP.

Sequence Number : 002

OTHER

INDEX NO. \_\_\_\_\_  
MOTION DATE 11/6/08  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

motion to/for \_\_\_\_\_

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1, 2  
3

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**NOTICE OF DECISION AND ORDER  
WITH ACCOMPANYING MEMORANDUM  
DECISION AND ORDER.**

**FILED**  
DEC 24 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: \_\_\_\_\_

12/19/08  
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  
BARBARA LAWRENCE & ALLEN LASKIN, :

Plaintiffs, :

-against- : DECISION & ORDER  
INDEX NO.: 104343/06

CHEDWARD REALTY CORP., 1375-1383 BROAD- :  
WAY CORP., WILLIAMS REAL ESTATE INC., :  
STATECOURT ENTERPRISES, INC., 26-1375 :  
ASSOCS. INC. & SWISS GOLD, INC. :

Defendants.

-----X  
1375-1383 BROADWAY CORP. & WILLIAMS REAL :  
ESTATE, INC., :

Third-Party Plaintiffs, :

-against- : INDEX NO. 59071/07

26-1375 ASSOCS., INC. & SWISS GOLD, INC., :

Third-Party Defendants.

-----X  
HON. SHIRLEY WERNER KORNREICH:

**FILED**

DEC 24 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

In this personal injury action, defendants 1375-1383 Broadway Corporation (Broadway Corp.) and Williams Real Estate, Inc. (Williams) moves and defendant Swiss Gold, Inc. (Swiss) cross-moves to disqualify plaintiffs' counsel on the basis of the advocate-witness rule. Plaintiffs oppose the motions.

In the late afternoon of September 15, 2005, plaintiff Barbara Lawrence, a self-employed consultant and photographer, tripped and fell on a sidewalk in front of property allegedly owned, leased or managed by the various defendants. After her fall, she telephoned her friend Stephanie Brand, who went to the accident site, helped her up and took her, in a taxi cab, to meet both of

their husbands for dinner and the theatre. Ms. Lawrence testified that she recounted the accident to Ms. Brand, and at the restaurant, described the accident to her husband, Allen Laskin, and Ms. Brand's husband, Mark J. Elder. Ms. Lawrence, who had allegedly torn her rotator cuff in the fall, further testified that she was in pain during the dinner, complained of pain and ate little. She left the theatre during intermission due to the pain. During her recuperation and thereafter, Mr. Laskin testified that he and his wife continued to socialize with Ms. Brand and Mr. Elder and discussed Ms. Lawrence's medical progress and condition. Mark J. Elder represents Ms. Lawrence in this matter.

Code of Professional Responsibility DR 5-102 (a) provides that a "lawyer shall not act,...., as an advocate on issues of fact before any tribunal if the lawyer knows or it is obvious that the lawyer ought to be called as a witness on a significant issue on behalf of the client,.... 22 NYCRR 1200.21 (a). See *Advent Assocs., LLC v. Vogt Family Investment Partners, L. P.*, 208 NY Slip Op 9150 (3d Dept. 2008)(lawyer may not continue to represent a party where he is necessary witness). An attorney is considered a necessary witness implicating the advocate-witness rule, when the evidence to be offered is relevant, material and non-cumulative. *S & S Hotel Ventures Ltd Partnership v. 777 S. H. Corp.*, 69 N.Y.2d 437, 445-6 (1987). As noted by the Court of Appeals in *People v. Berroa*, 99 N.Y.2d 134, 140 n.1 (2002), the advocate-witness rule is not new and has its genesis in ancient Roman Law. "When lawyers have become intertwined with the merits [of a case]...they begin to look more like a traditional fact witness. In these circumstances, any factual statements that a lawyer makes should be subject to the same vetting that all witnesses receive, including the requirement that the witness be sworn and subject to cross-examination." *Id.* at 143, n.4. The advocate-witness rule not only protects the rights of

the client and adversary, but also the integrity of the legal profession. *S & S Hotel Ventures Ltd Partnership v. 777 S. H. Corp.*, *supra* at 444 (1987).

Disqualification of a lawyer, however, impacts on a litigant's right to representation by counsel of his choice, delays the case and may well redound to the moving party's advantage. *S & S Hotel Ventures Ltd Partnership v. 777 S. H. Corp.*, *id.* at 443; *Strongback Corp. V. N.E.D. Cambridge Ave. Dev. Corp.*, 32 A.D.3d 793, 794 (1st Dept. 2006); *Talvey v. Amer. Red Cross*, 205 A.D.2d 143, 149 (1st Dept. 1994). Consequently, a request to disqualify opposing counsel must be carefully scrutinized, and the movant bears the burden of demonstrating that the lawyer's testimony is material and necessary for trial. *Id.*

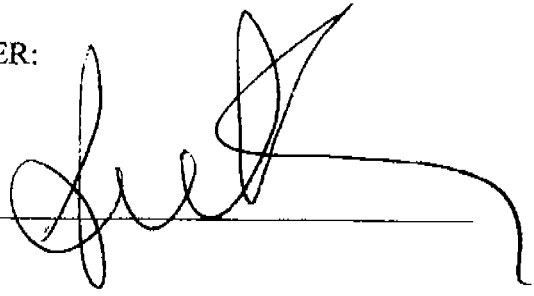
Here, Mr. Elder is a witness to the injury and damages suffered by Ms. Lawrence. His testimony is relevant and material. Nonetheless, he is not necessary, since Ms. Lawrence's husband and Mr. Elder's wife can testify to the same facts. Indeed, Mr. Elder's wife is the best witness, because, it was she who Ms. Lawrence called immediately after she fell, apparently helped Ms. Lawrence up, can testify to the location of the fall, and took Ms. Lawrence from the accident site. Counsel's wife, therefore, is a necessary witness in the case.

On these facts, Mr. Elder is clearly intertwined with the merits of the case. *See People v. Berroa, supra*. Mr. Elder will have to cross-examine his own wife and both open and close on her testimony. His role in the matter will come before the jury. It is inevitable that anything he says, although not under oath and subject to cross-examination, will have the appearance of testimony. *Id.* His representation of Ms. Lawrence at trial, therefore, would undercut the integrity of the trial and give him an advantage over his adversaries. Consequently, Mr. Elder should be disqualified from representing plaintiffs at trial. However, Mr. Elder may continue to

represent plaintiffs for discovery purposes and his firm may continue to represent them at trial.  
*See S & S Hotel Ventures Ltd Parnership v. 777 S. H. Corp., supra; Hillcrest Owners, Inc. v. Preferred Mutual Insur. Co., 234 A.D.2d 269, , 270 (2d Dept. 1996).* Accordingly, it is

ORDERED that defendants' motion and cross-motion to disqualify plaintiffs' counsel is granted only to the extent of disqualifying Mr. Elders from representing plaintiffs at the trial.

ENTER:



J.S.C.

DATED: December 19, 2008

**FILED**  
DEC 24 2008  
COUNTY CLERK'S OFFICE  
NEW YORK