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

PRESENT: DEBRA A. JAMES **PART 59**
Justice

MAGEN DAVID of UNION SQUARE, THE SIXTEENTH STREET SYNAGOGUE, and 3 WEST DEVELOPMENT, LLC,

Plaintiffs,

- v -

3 WEST 16TH STREET, LLC,

Defendants.

Index No.: 600573/2008
Motion Date: 07/15/08
Motion Seq. No.: 001
Motion Cal. No.: _____

3 WEST 16TH STREET, LLC,

Third Party Plaintiff,

- v -

STEVEN J. ANCONA,

Third Party Defendant.

Index No. 590326/2008

FILED
FEB 25 2009
COUNTY CLERK'S OFFICE
NEW YORK

The following papers, numbered 1 to 4 were read on this order to show to disqualify counsel.

	PAPERS NUMBERED
Order to Show Cause -Affidavits -Exhibits	1
Answering Affidavits - Exhibits	2- 3
Replying Affidavits - Exhibits	4

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, the motion of plaintiffs to disqualify counsel for defendant on the basis of the witness advocate rule must be DENIED.

In this action, plaintiffs Magen David of Union Square, the Sixteenth Street Synagogue and 3 West Development, LLC seek to quiet title to a certain building located at 3 West 16th Street, New York, New York (the "Premises"). They also seek a declaratory judgment with respect to their rights under an

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check One: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

Agreement pertaining to such Premises, as well as the enforcement of a charitable gift, specific performance and partition, as remedies for a claimed breach of that Agreement.

Plaintiffs move to disqualify defendant's counsel Hartman & Craven, LLC pursuant to CPLR 321 and DR 5-102 (A) and (B) (22 NYCRR 1200.21 [a] and [b]). DR 5-102 (A) provides that

> A lawyer shall not act, or accept employment that contemplates the lawyer's acting, 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.

DR 5-102 provides that

> Neither a lawyer nor the lawyer's firm shall accept employment in contemplated or pending litigation if the lawyer knows or it is obvious that the lawyer or another lawyer in the lawyer's firm may be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony would or might be prejudicial to the client.

It is conceded by all parties that William Kaplan, Esq., a partner of H&C and other H&C attorneys represented the principal of defendant corporation in the negotiation, drafting and execution of the Agreement. Plaintiffs seek disqualification on the grounds that at the time the parties entered into the Agreement "Kaplan expressly took the position that the agreement was a joint venture/construction loan agreement" rather than a lease, which position is adverse to his client's position in this action. Plaintiffs argue that since they intend to call Kaplan as a witness to testify at a deposition and at trial on a

significant issue and his expected testimony will be prejudicial to his client's/defendant's position, the representation of defendant by Kaplan and his firm is in violation of the disciplinary rules.

The Court of Appeals has held that "[d]isqualification may be required only when it is likely that the testimony to be given by the witness is necessary. 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 Ltd. Partnership v 777 S.H. Corp., 69 NY2d 437, 445-446 (1987) (citation omitted). "An attorney witness 'ought' to be called only when it is likely that the testimony to be given by the witness is necessary. Merely because an attorney 'has relevant knowledge or was involved in the transaction at issue' does not make that attorney's testimony necessary." Talvy v American Red Cross in Greater New York, 205 A.D.2d 143, 152 (1st Dept 1994) (citations omitted). The court agrees with defendant that the plaintiffs have not met their burden of demonstrating facts sufficient to support their motion for disqualification.

Defendant contends that the Agreement is clear on its face and that therefore, any testimony of Kaplan would not be necessary, since it would be, in fact, irrelevant as inadmissible

parol evidence. Nor does defendant agree that its attorney's communications are inconsistent, in any event, with its position that the Agreement constitutes a lease.

Assuming arguendo, that the court ultimately determines that the terms and conditions of the Agreement are ambiguous, parol or extrinsic evidence would be admissible for the purpose of determining the intent of the parties in order to interpret the Agreement. Such evidence would, however, involve the intent of the parties, not their counsel. Thus, there is evidence on the question of the intent of the parties available other than that of defense counsel, in the form of the testimony of the principal of defendant itself, which would be sufficient to prosecute plaintiffs' claims. See Galluccio v Fochios, 303 AD2d 190 (1st Dept 2003) ("petitioner has not established that counsel's testimony is necessary, since the same testimony that petitioner cites as necessary can be obtained from other witnesses, such as respondent himself"). Moreover, any of the e-mails or other correspondence sent by defense counsel Kaplan contemporaneously with the negotiations, which are contrary to the defendant's position, would be admissible at trial as admissions made by defendant's agent, which would obviate any necessity for the testimony of Kaplan. Murray v Sweasy, 69 AD 45 (1st Dept 1902).

Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher, 299 AD2d 64 (1st Dept 2002) is distinguishable on its facts since Lacher,

the attorney, was himself one of the parties to the law firm merger agreement in question, and his testimony possibly prejudicial and absolutely necessary, to his former clients who he sought to defend in the action by the merged firm for attorneys fees.

The court must therefore deny the motion "since defendants failed to establish that the testimony of the attorney who purportedly ought to be called as a witness would be non cumulative of other witnesses' testimony, and thus necessary, or that such testimony, if the attorney were called to testify by defendants, would be prejudicial to plaintiff." Metropolitan Transp. Authority v 2 Broadway LLC, 279 AD2d 315, 316 (1st Dept 2001). Nor has defendant indicated any intention of calling its counsel as a witness. See Ansonia Associates Ltd. Partnership v Public Service Mut. Ins. Co., 277 AD2d 98, 99 (1st Dept 2000).

Accordingly, it is

ORDERED that the motion is DENIED.

This is the decision and order of the cou

Dated: February 19, 2009 ENTER:

HON. DEBRA A. JAMES J.S.C.