

Tatalovic v Nightlife Enters. L.P.

2009 NY Slip Op 31800(U)

August 11, 2009

Supreme Court, New York County

Docket Number: 102297/06

Judge: Jane S. Solomon

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

PRESENT: **SO ORDERED**
JANE S. SOLOMON Justice

PART 55

Jelica Tatalovic

INDEX NO. 102297/06

MOTION DATE 7/27/09

MOTION SEQ. NO. 04

MOTION CAL. NO. _____

- v -
NightLife Enterprises, LP

The following papers, numbered 1 to 14 were read on this motion to/for disqualify counsel

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...	<u>1-3</u>
Answering Affidavits – Exhibits _____	<u>4-9</u>
Replying Affidavits _____	<u>10-14</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided as per
attached decision & order

FILED
AUG 12 2009
NEW YORK COUNTY CLERK'S OFFICE
NEW YORK

NB. 10-19-09
Comp. Conf at 2PM
Part 55, rm 432
60 Centre St
New York 10007

Dated: 8/11/09 J.S.
JANE S. SOLOMON 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):

2]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
JELICA TATALOVIC,

Plaintiff,

-against-

NIGHTLIFE ENTERPRISES, L.P. and LATE
NIGHT MANAGEMENT, INC., and THE ESTATE
OF MICHAEL N. MATHIAS F/K/A NENAD
MATIJASEVIC,

Defendants.

-----X
JANE S. SOLOMON, J.:

INTRODUCTION

Plaintiff Jelica Tatalovic (Tatalovic) sues to recover money due under a promissory note. Nightlife Enterprises, L.P. ("Nightlife") was the maker of the note; defendant Late Night Management, Inc. ("Late Night") is Nightlife's sole general partner. Michael N. Mathias f/k/a Nenad Matijasevic ("Mathias"), who is now deceased and whose Estate is a defendant, was a principal in Nightlife and a former business associate of Tatalovic's husband.

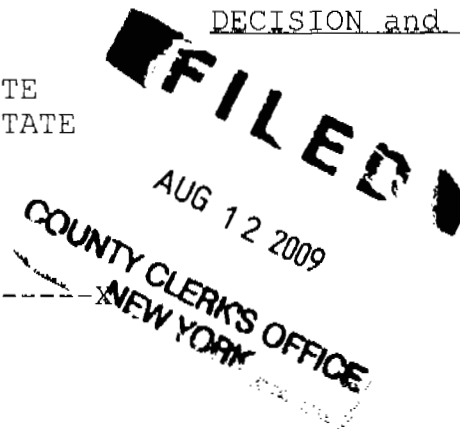
Tatalovic moves to disqualify the law firm representing Nightlife and Late Night, Biancone & Wilinsky, LLP. ("the Firm") Night Life and Late Night cross-move to compel Tatalovic to comply with certain discovery requests. The motions are decided as follows.

FACTS

The basis for Tatalovic's lawsuit is a promissory note

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DECISION and ORDER



for \$300,000, payable to her over time starting on July 1, 1998 ("Note"). The Note was purportedly given in connection with a subscription agreement in Tatalovic's name for the purchase of a limited partnership interest in Nightlife. Both the Note and the subscription agreement are dated September 5, 1997 and bear a signature of Daniel Fried, Late Night's president. Nightlife and Late Night claim that the Note was forged, that they did not deliver it to Tatalovic, and that as the source of the \$300,000, Mathias is entitled to payment. Tatalovic does not dispute that Mathias caused Nightlife to receive the funds for her interest; she asserts that they were delivered on her behalf in satisfaction of a debt owed to her husband by Mathias.

Defendants rely on a 2002 agreement made by Mathias and Nightlife and assert a cross-claim for indemnification against the Estate based on that agreement. As relevant, that document includes the following recitals: Mathias wired \$300,000 to Nightlife on July 21, 1997; that, although Tatalovic executed a subscription agreement, she never tendered payment; that Mathias tendered another \$300,000 by wire transfer on September 10, 1997 for the subscription unit claimed by plaintiff; and that, while Tatalovic demanded payment on January 8, 2002, she never received a note and Mathias was the source of the funds for the subscription agreement in which she is named. Accordingly, the agreement provides that, "as a material inducement to Nightlife

to reject the adverse claim asserted by [Tatalovic] . . . and to make all future payment" thereunder to him, Mathias agrees to indemnify Nightlife and Late Night and pledges his limited partnership interest in Nightlife as security for this obligation.

Louis Biancone, a partner in Biancone & Wilinsky, represented Nightlife and Late Night at the time that the Note was made. Tatalovic submits an August 15, 1997 letter from him to her husband transmitting a draft note and wire transfer instructions. At her deposition, Tatalovic testified that Biancone personally delivered the executed Note to her in 1997.

Biancone also negotiated the 2002 indemnification agreement with Mathias on behalf of Nightlife and Late Night. (Deposition of Allan Young, attached as Exh. F to Gleason Affidavit, 19-20.) His firm has represented Nightlife and Late Night in this action from its inception. This disqualification motion was made after summary judgment motions were made.

DISCUSSION

Although no discovery has been sought of him, Tatalovic represents that she intends to call Biancone as a witness at trial, and that his involvement in the execution and delivery of her Note make him a necessary witness on a crucial aspect of her case.

On behalf of Nightlife and Late Night, Thomas Wilinsky,

[* 5]

Biancone's law partner, contends that Biancone will not act as trial counsel, making it permissible for the Firm to represent Nightlife and Late Night, even if Biancone were called to testify. Moreover, Wilinsky argues that Biancone is not a necessary witness to the delivery of the Note because Tatalovic alleges that she was also present.

In reply, Tatalovic argues that Biancone's testimony would be unique because he is the only person who can testify about Fried's execution of the Note, an important issue in the case. Further, Tatalovic argues that Biancone's role at trial is irrelevant to the question of the Firm's disqualification.

New York's Rules of Professional Conduct (the "Rules", codified at 22 NYCRR § 1200.0 et seq.), became effective on April 1, 2009. While not cited by the parties, the Rules are applicable here because this motion was made after the effective date of the Rules. The advocate-witness rule is codified in Section 1200.29 of the Rules. That provision prohibits a lawyer from acting as an advocate before a tribunal if the lawyer is likely to be called as a witness on a significant issue of fact unless any of the five exceptions in subsection (a) are applicable (22 NYCRR § 1200.29[a]).

Subsection (b) of Section 1200.29 prevents a lawyer from acting "as advocate before a tribunal in a matter if: (1) another lawyer in the lawyer's firm is likely to be called as a

witness on a significant issue other than on behalf of the client, and it is apparent that the testimony may be prejudicial to the client" (22 NYCRR 1200.29[b]).

Subsection (a) is not at issue here because Biancone himself is not seeking to act as trial counsel. Subsection (b) is implicated because the Firm could be disqualified based on Biancone's status as a witness.

There are many cases applying the prior advocate-witness rule set forth in DR 5-102 of New York's Code of Professional Responsibility (the "Code"), which was repealed and replaced with the Rules. As recently noted by another Court, cases applying the Code were not completely "eviscerated" by the Rules (*DeLorenz v. Moss*, NYLJ, July 28, 2009, at 27, col. 3 [Sup. Ct., Nassau Co.]). They remain applicable to the extent that they are consistent with the language of the pertinent section of the Rules. DR 5-102 is similar to Section 1200.29, making cases dealing with the former useful in interpreting the latter.

Courts have held that a party seeking disqualification "carries a heavy burden" of "'identifying the projected testimony' and 'demonstrating how it would be so adverse to the factual assertions or accounts of events offered on behalf of the clients as to warrant his disqualification'" (*Veritas Capital Management L.L.C. v. Campbell*, 22 Misc. 3d 1107[a], 2008 WL 5491146, at *9 [Sup. Ct., N.Y. Co. 2008]). If the moving party

does not clearly show that disqualification is warranted, the motion should be denied (*Toren v Anderson, Kill & Olick, P.C.*, 185 Misc.2d 23, 29-30 [Sup. Ct. N.Y. Co. 2000]).

Here, there is no question that the execution and delivery of the Note are significant issues in this case. Moreover, Nightlife and Late Night contend that Tatalovic's credibility is in question. If Tatalovic's assertion that Biancone's testimony will corroborate her version of the events proves correct, it will be inconsistent with the defense the Firm is asserting for its present clients. Notably, Biancone is not heard from on this motion to deny that he personally delivered the Note to Tatalovic.

Under the circumstances, notwithstanding the delay, the motion must be taken seriously. Tatalovic has met her burden of clearly showing that Biancone's testimony may be prejudicial to Nightlife and Late Night. Any delay in seeking disqualification is excused because the need for Biancone's testimony would have been obviated had the court granted Tatalovic's motion for summary judgment.

With respect to the cross-motion to compel disclosure, Nightlife and Late Night seek: (1) to have the Note examined by their expert; (2) documents concerning plaintiff's alleged ownership of a limited partnership interest in Nightlife (Notice for Discovery and Inspection ("Notice") dated June 24, 2008,

No.7); (3) documents concerning business activities between Mathias and Tatalovic's husband that were allegedly connected to Tatalovic's purported investment in Nightlife (Notice, Nos. 3, 4, 8, 9, 12, 13, 14, 15, 16, 20, 21, 22, 23, and 24); and (4) information requested at plaintiff's deposition (Letter from Thomas B. Wilinsky to John P. Gleason, dated March 23, 2009, Nos. 1-6).

Nightlife and Late Night are entitled to a response by Tatalovic to the aforementioned demands because they seek information that is material and necessary to this action, except for request No. 3 in the March 23, 2009 letter. That request improperly demands a copy of an agreement that Tatalovic had with her former counsel. Additionally, the request for an examination of the Note has already been addressed by an Interim Decision and Order, dated July 27, 2009, which directed Tatalovic to turn over documents for expert examination. Accordingly, it hereby is

ORDERED that Tatalovic's motion to disqualify the law firm of Biancone & Wilinsky, LLP is granted; and it further is

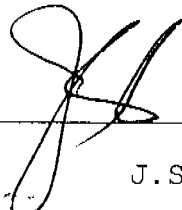
ORDERED that Tatalovic shall respond to the requests numbered 3, 4, 7, 8, 9, 12, 13, 14, 15, 16, 20, 21, 22, 23, and 24 in the Notice for Discovery and Inspection dated June 24, 2008, and the requests numbered 1, 2, 4, 5, and 6 in the letter dated March 23, 2009 from Thomas B. Wilinsky to John P. Gleason, within thirty days of entry hereof; and it further is

ORDERED that the action is stayed for forty-five days to provide Night Life and Late Night the opportunity to obtain new counsel, except that Tatalovic is obligated to timely comply with the foregoing decretal paragraph; and it further is

ORDERED that a compliance conference shall be held on October 19, 2009 at 2:00 p.m.

Dated: August //, 2009

ENTER:



J.S.C.
JANE S. SOLOMON
J.S.C.

FILED
 AUG 12 2009
 COUNTY CLERK'S OFFICE
 NEW YORK