Small v Arch Capital Group, Ltd.

2009 NY Slip Op 32571(U)

October 28, 2009

Supreme Court, New York County

Docket Number: 600869/07

Judge: Richard B. Lowe

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SCANNED ON 11/4/2009

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

PRESENT: HON. RICHARD B. LOWE, III
Justice

PART 56

Small, Lewis

INDEX NO. 600869/07

MOTION DATE 4/24/09

- v -

MOTION SEQ. NO. 006

Arch Capital

MOTION CAL. NO. ______

The following papers, numbered 1 to ______ were read on 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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
NOV 04 2009
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: OCT 28 2009

HON. RICHARD B. LOWE, III
J.S.C.

Check one: FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

[* 2]

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

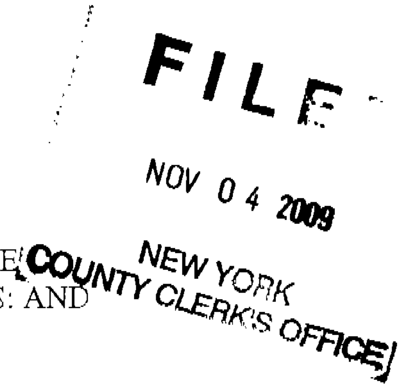
---X

LEWIS SMALL, Individually and as Trustee of the RICHARD SMALL VOTING TRUST and the AMERICAN INDEPENDENT COMPANY VOTING TRUST; RICHARD SMALL; DAVID WILSTEIN; LEONARD WILSTEIN; DENISE WILSTEIN; GARY WILSTEIN; RONALD WILSTEIN; and FREDERICK GITTERMAN;

Index No. 600869/07

Plaintiffs,

-against-



ARCH CAPITAL GROUP, LTD; AMERICAN INDEPENDENT COMPANIES, INC. as successor by merger to AMERICAN INDEPENDENT INSURANCE HOLDING COMPANY; TDH CAPITAL PARTNERS: AND TDH III, L.P.,

Defendants.

---X

Hon. Richard B. Lowe, III:

Defendants Arch Capital Group Ltd. and American Independent Companies, Inc. as successor by merger to American Independent Insurance Holding Company (American Independent) (collectively, the Arch defendants), and defendants TDH Capital Partners and TDH III, L.P. (the TDH defendants) move for an order terminating the engagement of plaintiff's expert on the ground that the defendants had previously engaged the same expert, with whom they had had a confidential relationship and had shared confidential information.

Background

Following the previous dismissal of several of plaintiffs' claims, by order of this court entered May 2[illegible], 2008, this is an action for breach of a corporate reorganization

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agreement, wherein plaintiffs allege that defendants failed to prosecute and otherwise support certain lawsuits in which both plaintiffs and defendants are alleged to have had a beneficial interest.

According to the complaint, plaintiffs sold their shares in American Independent to Arch Capital Group Ltd., but retained an interest in any potential damages to be awarded in two state and one federal lawsuit that had been commenced on behalf of American Independent. These lawsuits are referred to by the parties herein as the Lederman Lawsuits. The alleged breach of the reorganization agreement consists primarily of defendants' failure to invest more than $500,000 in furtherance of the Lederman Lawsuits, and in failing to give free rein to plaintiff Lewis Small (Small) to choose the witness list, and replace counsel, in the still-pending federal action. Plaintiffs demand damages which include the loss of value of their respective shares in any proceeds which may be awarded in the Lederman Lawsuits.

The moving defendants claim that plaintiffs have engaged William W. Fox, [illegible] (Fox), American Independent's expert in the Lederman Lawsuits, in connection with the plaintiffs' prosecution of their claims against defendants in this action, including defendant American Independent and the [illegible]DH defendants, who also claim a proprietary interest in the outcome of those lawsuits. Defendants claim that Fox is a continuing member of their federal action trial team.

Discussion

A two-step analysis has been created by the courts to determine whether a c[illegible]

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conflict of interest will require the disqualification of an expert witness (*Rou.apou. V.N.A., inc.*, 207 AD2d 123 [3rd Dept 1995]). First, the court must determine whether it was "objectively reasonable for the party claiming to have initially retained the expe . to conclude that a confidential *relationship* existed between them and then, secondly, to ascertain if any confidential or privileged *information* was disclosed by said party to the expert." *Id.* at 125 (emphases added). Where there are affirmative answers to both questions under consideration, disqualification will be required, "while negative responses to either inquiry will likely result in a finding that disqualification would not .. appropriate." *(Id.: see also Wang Labs. v Toshiba Corp.*, 762 F Supp 1246 [ED Va 1991]).

In the present case, defendants claim that, under the objectively reasonab.. standard, they had, and continue to have, a confidential relationship with Fox, and that they have disclosed confidential information to him. Defendants have offered a co... Fox's July 15, 1999 retainer letter, under seal, to support their claim of an objective reasonable expectation that they entered into a confidential relationship with Fo.. Without jeopardizing the confidentiality of the terms of this retainer agreement, suf.. e to say that Fox expressly ackno.. ledged, in his retainer statement, that he would "t.. appropriate steps to ensure the confidentiality of ... con.versations, other communica.. and any material [de.endants] send.." (Affida.. of Sua.. .. Schwartz, Esq., dated .. 2009, Exh E

Plaintiffs claim that they are not seeking ... Fox ... to have him "be

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his allegiance" to defendants, but seek, instead, to present the substance of the report created by Fox in connection with the Lederman Lawsuits in order to prove their claims against defendants in this lawsuit. If permitted to use Fox's report, such evidence will be offered to support the plaintiffs' claim that the federal Lederman Lawsuit would have succeeded if defendants had not breached the reorganization agreement by failing to fully fund that litigation, and had permitted Small to control that litigation. Further, argues Small, Fox's report has already been offered into evidence in the Lederman actions, and is part of the public record. Plaintiffs claim that Fox's August [illegible] 1999 report, attached as an exhibit to the Schwartz Affidavit, states the issues for which he was retained and the documents he used in forming his opinion. Citing *Tower Ins. Co. of New York v St[illegible] of New York* (20 Misc 3d 698 [Ct Cl 2008], Plaintiffs also argue that the Defendants have failed to allege that American International disclosed any confidential or privileged documents or information to Fox, and therefore failed failing to sustain their burden of proof on the issue of disqualification.

In response, the Defendants argue that plaintiffs bear the burden of proving t[illegible] right to retain Fox as their expert, and that they are bound by the previous rulings of court's Special Master in the course of the present litigation unless they are shown plaintiff to have been "clearly erroneous or contrary to law." However, the defend[illegible] themselves acknowledge that the Special Master indicated his rulings staying plain[illegible] retention of Fox were "preliminary" [illegible] the instant motion being brought and a decis[illegible] ultimately being made by this Court (Defendants R[illegible] Mem. p 2.) Further, [illegible]

law on the disqualification of expert witnesses, cited previously, makes clear that it is the burden of the party seeking disqualification to prove entitlement to that relief by meeting the two-part test set forth above

The terms of Fox's retainer letter make clear that Fox and the defendants contemplated entering into a confidential relationship. However, defendants have failed to meet the second prong of the burden of proof by failing to offer any examples of confidential information which was turned over to Fox in his role as their expert witness. In fact, they appear to be silent on the issue of whether confidential information was actually exchanged. The court acknowledges that the defendants submitted an excerpt from a January 8, 2002 memorandum from William Lockhorn of American Independent. They also submitted an excerpt from a March 11, 2002 e-mail from plaintiff Small. (Schwartz Affidavit, Exh D). However, it is unclear in the papers what these submissions have been offered to prove.

The court also notes that it is of little import that Small was still Chairman of the Board of AIICO when Fox was retained to consult, and/or to testify, on reinsurance industry issues in the Lederman Lawsuits. Upon defendants' proof that confidences were exchanged with Fox, any confidences Small may have gleaned while chairman at AIICO will not create a waiver of defendants' right to preserve the confidentiality of such information, or their relationship with Fox as an expert witness. Small has failed to any authority for the creation of a waiver by defendants as a result of his former position as chairman of AIICO.

"[A]n expert engaged by the opposing party should not be sought out and placed in the unethical position of accepting a retainer from both sides." *Gnoj v City of New York*, 29 AD2d 404, 407 (1st Dept 1968). While disqualification is not warranted because the defendants have failed to meet their burden of proof by establishing that actual confidential information was given to Fox, the Plaintiffs' retention of Fox as their own expert may well place Fox in the untenable, even unethical, position of accepting a retainer from both parties to this litigation.

Gilly v City of New York (69 NY2d 509 [1987]), cited by plaintiffs, is instructive in the present circumstances. *Gilly* was decided pursuant to Uniform Rules for the Supreme and the County Court § 202.17, Exchange of medical reports in personal injury and wrongful death actions. In *Gilly,* the Court held that a physician retained by defendant who had "examined the plaintiff, formulated his findings and had them conveyed to both parties in litigation, should not be barred from relating the substance of his report when called as a witness by plaintiff." *Id.* at 512. The physician would not be placed in a ethical dilemma under these circumstances, found the Court, since the physician's report had previously been reduced to writing and served on the adversary, whereupon it ceased to be for the exclusive use of the defendant.

In the present case, plaintiffs suggest that they only wish to use Fox's report in support of their direct case. Therefore, even if defendants had sustained their burden of proof on this motion and Fox was disqualified from being retained as plaintiffs' witness, there does not appear to be any obstacle, ethical or otherwise, to plaintiffs' right to c[illegible]

Fox as a witness, or to the admissibility of Fox's report into evidence in connection with plaintiffs' case in chief.

Conclusion

Accordingly, it is

ORDERED that defendants' motion to preclude plaintiffs from engaging William W. Fox, Jr. as an expert witness is denied.

Dated: October 28, 2009

ENTER:

J.S.C. HON. RICHARD B. LOWE

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