

**Empire Purveyors, Inc. v Brief Justice Carmen &
Kleiman, LLP**

2009 NY Slip Op 32752(U)

November 17, 2009

Supreme Court, New York County

Docket Number: 110909/08

Judge: Jane S. Solomon

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

PRESENT: SOLOMON

Justice

PART 55

EMPIRE PURveyORS, INC.,
ETAL.

INDEX NO.

110909/08

MOTION DATE

11/2/09

MOTION SEQ. NO.

02

MOTION CAL. NO.

- v -

BRIEF JUSTICE CARRERA
KREIMAN, LLP, ETAL.

The following papers, numbered 1 to 8 were read on this motion to/for disqualify attorney

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-3

4-6

7-8

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the entered memorandum decision and order.

FILED

NOV 23 2009

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 11/17/09



J.S.C.

JANE S. SOLOMON

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

-----X
EMPIRE PURVEYORS, INC., THE ESTATE OF
ANTONIO PINTO, TONI PINTO, and
RICHARD PINTO,

Plaintiffs,

Index No. 110909/08

-against-

DECISION and ORDER

BRIEF JUSTICE CARMEN & KLEIMAN, LLP,
ROY JUSTICE, ESQ., WAYNE S. COOK, JR.,
ESQ., and WINDELS MARX LANE &
MITTENDORF LLP,

Defendants.

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

INTRODUCTION

In this legal malpractice action, defendant Wayne S. Cook, Jr. (Cook) moves to disqualify plaintiffs' attorney, David Fischman, Esq. (Fischman). Defendants Brief Justice Carmen & Kleiman, LLP (Brief Justice) and Roy Justice, Esq. join in the motion, which is denied for the reasons below.

FACTS

Plaintiff Empire Purveyors, Inc. was a meat and poultry business run by the late Antonio Pinto (Antonio). Antonio made a personal loan in 1987 of \$40,000 to Eileen Diane Weinberg (Weinberg), a restaurateur and customer of Empire Purveyors. The loan was due and payable on May 31, 1988. Another loan, in the amount of \$80,000, was made by Empire Purveyors to My Jet, Inc., a corporation by which Weinberg operated her restaurant. Payment on this loan was due October 23, 1990. The debt was not

[*3]

timely paid, and plaintiffs claim that in 1992 Weinberg and My Jet agreed to make partial payments of \$200 per week, which amount was tacked onto Empire Purveyor's invoices for meat. My Jet ceased operations, but Weinberg opened a new restaurant, and Plaintiffs allege that Weinberg and the new restaurant continued to make payments on the loans through September 2003.

Antonio died in 1999. Plaintiff Toni Pinto (Toni) is a representative of Antonio's estate, and an officer and shareholder of Empire Purveyors. In September 2002, Weinberg's restaurant went out of business and she stopped making payments. In October 2003, Toni consulted with defendant Roy Justice, a partner of Brief Justice, regarding the loans. Brief Justice assigned the matter to its associate, Cook. Plaintiffs contend that Cook misled them about work done on the matter by falsely representing that a lawsuit was commenced against Weinberg, a judgment obtained and that collection efforts were underway. In late 2005, Cook left Brief Justice and began working for defendant Windels Marx Lane & Mittendorf LLP (Windels Marx), and brought plaintiffs' case file with him. Only in December 2005 did Plaintiffs learn that no lawsuit was begun. They subsequently engaged Fischman. Fischman brought a lawsuit in September 2006 (*Empire v Weinberg*, New York County Index number 603282/2006, referred to as the Underlying Action), in which Weinberg prevailed after trial. Plaintiffs, represented by

Fischman, then brought this action against Cook, Justice, Brief Justice and Windels Marx.

THE UNDERLYING LAWSUIT

Plaintiffs alleged in the Underlying Action that Weinberg made payments over time long after the notes matured, and accordingly the statute of limitations was tolled by partial payments through September 2003. At their depositions, both Toni and Weinberg denied the existence of written documents indicating that payments Weinberg made were payments for the loans, rather than for a restaurant's meat bill.

In denying summary judgment to the plaintiffs before her in the Underlying Action, Justice Helen Freedman of this court, in her decision dated May 12, 2008, explained the dispute and governing law in detail and with great clarity. After trial, she dismissed the complaint on the ground that plaintiffs had not established that their claim was timely. Plaintiffs failed to support their claim that the statute of limitations was tolled or revived by payments made by Weinberg for the loan. Weinberg admitted she made payments to Empire Purveyors, but argued that those payments were for meat, not for the loan.

THIS ACTION

Plaintiffs claim that, on Cook's advice, they took payments from Weinberg in 2003 without obtaining written acknowledgment from her that they were for the loans; that in

April 2004, Cook advised plaintiffs to deposit checks received from Weinberg marked "paid in full" without any notation or reservation of rights indicating that more money was due; that Cook lost important original documents, including original handwritten notes signed by Weinberg, which supported their position in the dispute; that Cook's false reports regarding his prosecution of the claim against Weinberg lulled plaintiffs into non-action to their detriment; and that, in late 2005, while working for Windels, Cook directly provided confidential information to Weinberg, which weakened their case.

The complaint has two causes of action. The first is for legal malpractice, and the second is for breach of fiduciary duty based on Cook's alleged disclosure of confidential information to Weinberg.

DISCUSSION

Cook asserts that he will call Fischman as a trial witness on the issue of proximate cause based on his subsequent representation of plaintiffs. In other words, even conceding Cook's misconduct, Cook maintains that plaintiffs' case against Weinberg would not have succeeded in any event, or, that there were steps Fischman might have taken to ameliorate the consequences of the alleged misconduct. Defendants contend that they would question Fischman on: (1) his efforts to locate original documents in the underlying action, which plaintiffs

claims were lost by Cook; (2) Fischman's efforts to obtain a written acknowledgment of the loans from Weinberg in the underlying action; and (3) his litigation strategy and how this impacted decisions he made at trial. No defendant has actually sought to obtain Fischman's testimony on these matters.

In their legal arguments, both parties cite DR 5-102 of the Code of Professional Responsibility (the "Code"), with no mention of the Rules of Professional Conduct (the "Rules"), which became effective on April 1, 2009, before this motion was made. Section 1200.9 of the Rules addresses the same subject matter as DR 5-102 of the Code. Section 1200.29(a) states that "a lawyer shall not act as an advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact."

The case law dealing with DR 5-102 remains applicable to the extent that it is consistent with the language of Rules Section 1200.29 (see *DeLorenz v. Moss*, 24 Misc3d 1218A [Sup. Ct., Nassau Co. 2009]). In *S & S Hotel Venures Ltd. Partnership v 777 S.H. Corp*, the Court of Appeals addressed the application of DR 5-102 in a motion to disqualify an attorney from further representation of a client in litigation because the attorney may be called as a witness (69 NY2d 437 [1987]). The Court held that: "Disqualification of a law firm during litigation implicates not only the ethics of the profession but also the

substantive rights of the litigants. Disqualification denies a party's right to representation by the attorney of its choice." (69 NY2d at 443, citation omitted). The Court warned against a mechanical application of DR 5-102 in disqualifying counsel in litigation, stating that the Code provides "guidance for the courts in determining whether a case would be tainted by the participation of an attorney of a firm" (69 NY2d at 444-445). The party seeking disqualification bears the burden of showing the taint or unfairness arising from the lawyer's testimony in the case (*id.*). Moreover, the moving party must show not only that the lawyer ought to or is likely to be called as a witness, but that the likely testimony is necessary (*id.*, and see, *Rivas v Raymond Schwartzberg & Assoc., PLLC*, 52 AD3d 401 [1st Dept June 24, 2008]).

Here, defendants have not shown how Fischman's testimony is necessary to address a significant issue of fact. Cook contends that Fischman did not serve him with a subpoena for the missing documents, but he hardly need Fischman's testimony to establish this. Cook also fails to explain how testimony from Fischman regarding his efforts to obtain written acknowledgments from Weinberg, in addition to the production of documentary evidence from the underlying action, is relevant or necessary to his defense. Cook and Brief Justice contend that although Toni and Weinberg testified in the underlying action regarding the

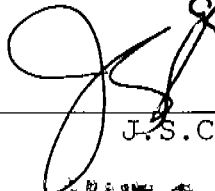
documents in question, only Fischman can testify as to when he was informed that such documents did or did not exist, and the steps he took to obtain them. Defendants have not shown how or why plaintiffs' testimony regarding these documents would be inadequate, making Fischman's testimony necessary.

Finally, the facts of what occurred in the Underlying Action are ascertainable from the transcripts and documents generated therein, and defendants fail to explain how Fischman's testimony on his litigation strategy in the that action is in any fashion relevant to this lawsuit¹ (see *Jakobleff v Cerrato, Sweeney and Cohn*, 97 Ad2d 834 [2d Dept 1983] [defendants in malpractice action not entitled to depose subsequent lawyer regarding remedial steps he could have taken, but didn't]). Accordingly, it hereby is

ORDERED that Cook's motion to disqualify David J. Fischman, Esq. as plaintiffs' attorney is denied.

Dated: November 17, 2009

ENTER:



J.S.C.
JANE S. SOLOMON

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¹ Even if relevant, Fischman's litigation strategy is attorney work product, which is not obtainable pursuant to CPLR 3101 (c).