

Falk v Gallo
2009 NY Slip Op 33399(U)
June 30, 2009
Supreme Court, Nassau County
Docket Number: 019472-06
Judge: Timothy S. Driscoll
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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----x
**JEFFREY FALK, M.D. and ANESTHISYSTEMS,
INC.,**

Plaintiff,

-against-

**VICTOR A. GALLO, M.D., VICTOR A.
GALLO, M.D., P.C., and GARDEN CITY
MEDICAL PLAZA CORP.,**

Defendants.
-----x

**TRIAL/IAS PART: 25
NASSAU COUNTY**

Index No: 019472-06

Motion Seq. No: 4

Submission Date: 5/8/09

The following papers having been read on this motion:

- Notice of Motion, Affidavit, Affirmation and Exhibits.....x**
- Defendants' Memorandum of Law.....x**
- Affirmation in Opposition and Exhibits.....x**
- Reply Affirmation and Exhibit.....x**

This matter is before the Court for decision on the motion filed by Defendants Victor A. Gallo, M.D. ("Dr. Gallo"), Victor A. Gallo, M.D., P.C. ("Gallo PC") and Garden City Medical Plaza Corp. ("GC Medical") (collectively "Defendants") on January 12, 2009, which was submitted on May 8, 2009. ¹ The Court grants Defendants' motion to disqualify Plaintiffs' counsel. The Court directs counsel for Defendants and substitute counsel for Plaintiffs to appear before the Court for a conference on August 13, 2009 at 9:30 a.m. If Plaintiffs have not retained substitute counsel by that date, the Court directs Plaintiffs to appear before the Court for the

¹ This Court assumed responsibility for this motion on May 8, 2009.

conference on August 13, 2009 at 9:30 a.m., with the understanding that the Court will conclude that Plaintiffs are proceeding *pro se*.

BACKGROUND

A. Relief Sought

Defendants move for an Order disqualifying Plaintiffs' counsel, Allen H. Weiss, Esq. ("Weiss"), on the grounds that 1) Weiss is a necessary trial witness; and 2) Weiss' prior representation of Defendants on substantially similar matters creates a conflict of interest that necessitates his disqualification as counsel for Plaintiffs in the instant litigation.

Plaintiffs oppose Defendants' application, submitting that it is without merit and, further, that it is a tactical move by Defendants designed solely to gain a strategic advantage in this litigation.

B. The Parties' History

Dr. Gallo is a physician licensed to practice medicine in New York, and the sole shareholder of Gallo PC. Gallo PC is a New York professional corporation organized for the practice of medicine and specializing in the treatment of diseases affecting both the colon and rectum. GC Medical owns the office space in which Gallo PC is located ("Premises"), and from which it operates its medical practice.

Dr. Gallo provides an affidavit, dated December 30, 2008, in which he affirms that 1) in October 2000, Plaintiff, Jeffrey Falk, M.D. ("Dr. Falk"), began an affiliation with Gallo PC, pursuant to which Dr. Falk would anesthetize patients who were undergoing an invasive procedure at Gallo PC; 2) this agreement continued for two years without a written agreement; 3) in or about October 2002, Dr. Falk and Dr. Gallo discussed a lease arrangement between Gallo PC and GC Medical, and Plaintiff Anesthisystems, Inc. ("AI"), Dr. Falk's corporation, whereby AI would rent office space from GC Medical for \$5,500 per month; 4) at Dr. Falk's suggestion, the parties engaged the services of Weiss to draft the formal lease agreement; 5) Weiss drafted a three year lease ("Original Lease"), which was executed on or about November 1, 2002 and terminated on October 31, 2005; and 6) Gallo PC did not retain independent counsel to review the Original Lease.

Dr. Gallo avers, further, that he retained Weiss' services in drafting an employment agreement for a physician, Dr. Jules Garbus ("Garbus"), whom Dr. Gallo hired in June 2003. In

preparation for the execution of that employment agreement, Dr. Gallo met with Weiss several times. During those meetings, Dr. Gallo discussed with Weiss details of the daily operations of Gallo PC, including its income, patient volume and general business practices. Gallo PC paid Weiss' legal fees related to the preparation of the Garbus agreement, which was executed in October 2003.

Upon the expiration of the Original Lease, the parties negotiated a new lease ("Oral Agreement") which was to include, *inter alia*, a) an increase in Dr. Falk's rent, 2) Plaintiffs' retroactive payment to Defendants of back rent, reflecting the rent increase, for the months of November 2005 through March 2006, and 3) Plaintiffs' agreement to use, and pay the salaries and benefits of, a registered nurse and medical assistant then employed by Gallo PC. Mr. Weiss met with both parties in or about April of 2006², to discuss the terms of the new lease and the reduction of the oral agreement to writing.

With respect to the April 2006 meeting, Dr. Gallo affirms that he and Dr. Falk met with Weiss for approximately two (2) hours, during which time they discussed the terms of the agreement in detail, and Weiss took extensive notes regarding the proposed rental increase, salary payments, payment of back rent and the parties' financial obligations towards patients insured by a particular company. Dr. Gallo avers, further, that they did not discuss the length of the new lease agreement. Although Weiss advised Drs. Falk and Gallo that he would reduce the oral agreement to writing, Weiss did not prepare that document.

Dr. Gallo avers that, based on his understanding that Weiss represented Plaintiffs and Defendants with respect to the new lease agreement, he did not retain independent counsel to represent him in that context. Dr. Gallo subsequently retained new counsel, who represents him in the instant litigation.

Plaintiffs commenced this action to recover money damages, including lost profits, resulting from the Defendants' alleged breach of the Oral Agreement. In the amended complaint ("Complaint"), Plaintiffs allege that, in or about April 2006, the parties orally agreed that 1) Plaintiffs would pay \$15,500 monthly rent for continued use of the Premises; and 2) Plaintiffs would employ and compensate specified employees that Dr. Gallo designated, including his

² Dr. Gallo affirms that this meeting took place in April of 2005, but the Court concludes that he meant April of 2006.

son's fiancée, at a salary of \$85,000 annually. The Complaint alleges, further, that in or about August 2006, Defendants insisted on changing the terms of the parties' Oral Agreement by 1) requiring Dr. Falk to enter into an employment agreement with Defendants whereby he would receive a salary; and 2) providing that checks from patients or medical plans, payable to Dr. Falk, would be assigned to Defendants and become the property of Gallo PC, and Dr. Falk would assign to Gallo PC the right to bill patients for his reimbursable medical services. The Complaint alleges, further, that Dr. Falk advised Defendants that this proposed agreement, which Plaintiffs characterize in the Complaint as "improper fee splitting," was illegal. Plaintiffs allege that Dr. Gallo then informed Dr. Falk that he would be denied further access to the Premises, and that Defendants have barred him from the Medical Plaza since September 12, 2006, thereby preventing him from performing medical services for patients. Plaintiffs seek damages for Defendants' alleged breach of the parties' Oral Agreement.

Defendants have interposed four counterclaims based on their allegations that Plaintiffs breached the parties' Oral Agreement. They seek damages resulting from Plaintiffs' alleged failure to pay back rent and a portion of the salary owing to a medical assistant. Plaintiffs have retained Weiss to represent them in this action, and Defendants now seek an Order directing the disqualification of Mr. Weiss.

C. The Parties' Positions

Defendants move to disqualify Weiss as Plaintiffs' counsel 1) in light of his prior representation of Defendants on matters related to the parties' claims in this action, and 2) because Weiss is a necessary witness regarding the terms of the oral agreement upon which the Complaint is based.

Defendants rely, in part, on The Code of Professional Responsibility³ §§ DR 5-102(C), 5-102(D) and 5-108(A).

DR § 5-102(C) provides, in pertinent part:

If, after undertaking employment in contemplated or pending litigation, a

³ The Court notes that as of April 1, 2009, the New York Code of Professional Responsibility has been replaced by the Rules of Professional Conduct. However, in the matter *sub judice*, the relevant events transpired prior to the effective date of the Rules of Professional Conduct, and accordingly it is the New York Code of Professional Responsibility which governs the matters herein raised (*see Estate of Naomi Goodman*, NYLJ May 29, 2009, at 29, col 2).

lawyer learns that or it is obvious that the lawyer ought to be called as a witness on a significant issue on behalf of the client, the lawyer shall not serve as an advocate on issues of fact before the tribunal * * *

DR § 5-102(D) provides, in pertinent part:

If after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that the lawyer or a lawyer in his or her firm may be called as a witness on a significant issue other than on behalf of the client, the lawyer may continue the representation until it is apparent that the testimony is or may be prejudicial to the client at which point the lawyer and the firm must withdraw acting as an advocate before the tribunal.

DR § 5-108(A) provides, in pertinent part:

* * * a lawyer who has represented a client in a matter shall not, without the consent of the former client after full disclosure: (1) Thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client; 2) Use any confidences or secrets of the former client * * *

Defendants argue that the crux of the underlying action is a dispute with respect to the terms of the Oral Agreement. Among the issues is the length of the Oral Agreement, which Defendants submit was terminable at will, and Plaintiffs contend was for a term of one year. Defendants affirm that, given that Mr. Weiss is the only nonparty witness to the negotiations surrounding the Oral Agreement, they will call him as a trial witness. Defendants submit that Weiss' testimony is necessary, both with regard to Defendants' assertion that the Oral Agreement was terminable at will, and to support Defendants' counterclaims based on Plaintiffs' alleged breach of the Oral Agreement. Moreover, after Weiss testifies on behalf of Defendants, it is expected that Plaintiffs will then cross-examine Weiss, which would place Weiss in the position of potentially testifying in a manner that may be prejudicial to Plaintiffs. Thus, Defendants submit, Weiss' representation of Plaintiffs is prohibited by §§ DR 5-102(C) and (D).

Defendants submit, further, that Weiss' representation of Plaintiffs and Defendants during the negotiations regarding the Oral Agreement constitutes a conflict of interest that precludes his continued representation of Plaintiffs, pursuant to DR § 5-108(A)(1) and (2). Defendants submit that, in light of Weiss' prior dual representation of the parties, the material interest of the

Defendants, as his former clients, are materially adverse to those of the Plaintiffs, his current clients and, therefore, Weiss may not continue to represent Plaintiffs.

Plaintiffs oppose Defendants' application, submitting that Defendants' motion is frivolous, and was filed in an effort to deny Dr. Falk the services of Weiss, the attorney of his choice, who has represented him in this litigation for more than two (2) years. Plaintiffs dispute many of Defendants' factual allegations with respect to Weiss' involvement in the Original Lease and Oral Agreement. In his Affirmation dated January 22, 2009, Weiss affirms, *inter alia*, that 1) Weiss has represented Dr. Falk for approximately 20 years in numerous matters; 2) Weiss represented Dr. Falk in 2000 when Falk began his professional relationship with Dr. Gallo; 3) in 2000, Dr. Gallo retained an attorney named Ira Levine to represent him with respect to an agreement that Dr. Gallo proposed entering into with Dr. Falk; 4) Weiss discussed this proposed agreement with Mr. Levine, and advised Mr. Levine that Dr. Gallo's proposed agreement was illegal; 4) in 2002, Dr. Falk asked Weiss to prepare an agreement whereby Dr. Falk would pay Dr. Gallo sums characterized as rent, which were really monthly fees "under the guise of a rent payment;" 5) Weiss prepared that agreement (the Original Lease) in 2002, which the parties labeled a "sublease," and delivered it to Dr. Falk, who gave it to Dr. Gallo to review; 6) Weiss prepared the Original Lease himself, and never consulted with Dr. Gallo or Dr. Falk about its terms; 7) Weiss did not prepare the Original Lease at the request of Dr. Gallo; and 8) Dr. Gallo never paid Weiss for any services related to the Original Lease, contrary to Dr. Gallo's allegations. In light of the foregoing, Plaintiffs submit that Weiss is not a necessary witness, and there is no conflict requiring Weiss' disqualification as counsel for Plaintiffs.

RULING OF THE COURT

A party's right to be represented in ongoing litigation by counsel of his choosing is a valued right which should not be abridged absent a clear showing that disqualification is warranted. *Campolongo v. Campolongo*, 2 A.D.3d 476 (2d Dept. 2003). The disqualification of an attorney is within the sound discretion of the trial court. *Nationscredit Financial Services Corp. v. Turcios*, 41 A.D.3d 802 (2d Dept. 2007); *Bentvena v. Edelman*, 47 A.D.3d 651 (2d Dept. 2008).

The Code of Professional Responsibility, though not a binding authority, provides guidance to the Court. *S&S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp*, 69 N.Y.2d 437

(1987). Where, as here, Defendants move to disqualify Plaintiffs' counsel pursuant to the "lawyer as witness rule" as embodied in DR § 5-102, disqualification is required only upon a showing that the testimony to be provided is "necessary." *Nationscredit Financial Services Corp. v. Torches, supra*; *Goldberger v. Eisner*, 21 A.D.3d 401 (2d Dept. 2005); *Broadwhite Associates v. Truong*, 237 A.D.2d 162 (1st Dept. 1997). In determining whether a lawyer is a necessary witness, the court should consider 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., supra*. The moving party must also demonstrate that the testimony may be prejudicial to the client. *Daniel Gale Assoc. v George*, 8 A.D.3d 608, 609 (2d Dept 2004).

The Court concludes that the Defendants have met their burden and have demonstrated both that Weiss' testimony is necessary, and that Weiss' testimony could be prejudicial to the Plaintiffs. Although there are factual disputes regarding the extent of Weiss' involvement in the Oral Agreement, the evidence before the Court strongly suggest that Weiss was the only individual, other than the parties, present when the parties discussed the Oral Agreement. Indeed, in Paragraph 6 of their Responses to Interrogatories, Plaintiffs themselves admit that "[t]he parties discussed the renewal of the agreement in the presence of [Weiss], who played no role in reaching an agreement. [Weiss], who was then recuperating from bypass surgery and had yet [sic] returned to his office, had been invited to lunch with the parties to discuss a modification of their prior written agreement." While Plaintiffs dispute Defendants' assertions regarding the extent to which Weiss was involved in the negotiations of the Oral Agreement, Plaintiffs concede that Weiss was present during at least one potentially relevant conversation. His testimony about this conversation could obviously be prejudicial to the Plaintiffs.

It is crucial to the Court's analysis that the disputed agreement is not written. When parties set down their agreement in a clear, complete document, their writing should, as a rule, be enforced according to its terms. *W.W.W. Associates, Inc. v. Giancontieri*, 77 N.Y.2d 157 (1990). Were there a written contract, the fact finder could rely on that document in determining the terms of the parties' agreement(s), and Weiss' testimony might not be relevant or necessary. In the absence of a writing, however, the parties will necessarily have to elicit testimony at trial regarding the terms of the Oral Agreement. Given that the record before the Court suggests that Weiss has personal knowledge of at least some of the discussions that formed the basis of the

Oral Agreement, the Court concludes that Weiss is a necessary trial witness for the Defendants. Moreover, there exists the real possibility that Weiss' testimony may prejudice Plaintiffs. Accordingly, the Court concludes that disqualification of Weiss is appropriate.

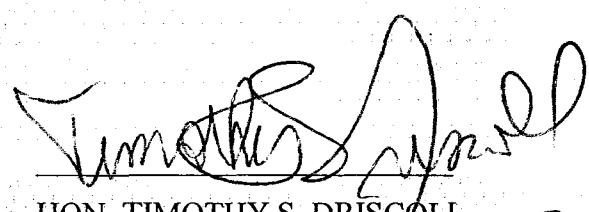
Based upon the foregoing, the Court grants Defendants' motion to disqualify Plaintiffs' counsel, Allen H. Weiss Esq. The Court directs counsel for Defendants and substitute counsel for Plaintiffs to appear before the Court for a conference on August 13, 2009 at 9:30 a.m. If Plaintiffs have not retained substitute counsel by that date, the Court directs Plaintiffs to appear before the Court on August 13, 2009 at 9:30 a.m. If Plaintiffs appear before the Court on August 13, 2009 at 9:30 a.m. without substitute counsel, the Court will conclude that they intend to proceed *pro se* in this litigation.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY
June 30, 2009



HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED

JUL 08 2009

NASSAU COUNTY
COUNTY CLERK'S OFFICE