Marine Midland Bank, N.A. v Koch
2009 NY Slip Op 33449(U)
August 23, 2009
Supreme Court, New York County
Docket Number: 100613/09
Judge: Eileen Bransten

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART THREE

MARINE MIDLAND BANK, N.A.,

Petitioner,

Index No.: 100613/09
Motion Date: 4/14/09
Motion Seq. No.: 002

- against -

RICHARD F. KOCH, RICHARD F. KOCH d/b/a KOCH REALTY CO., LEONARD MAGGIO, WHALENECK ENTERPRISES, INC., and 3010 WHALENECK REALTY CORP.,

Respondents.

BRANSTEN, EILEEN, J.:

In this proceeding to enforce a judgment, brought pursuant to CPLR 5225 (b) and 5227, petitioner Marine Midland Bank, N.A. ("Marine Midland") seeks an order directing respondents to turn over to petitioner any shares owned by judgment-debtor Richard F. Koch ("Koch") in respondent companies Whaleneck Enterprises, Inc. and 3010 Whaleneck Realty Corp. (collectively the "Whaleneck Companies"). Marine Midland has an outstanding judgment against Koch individually and Richard F. Koch d/b/a Koch Realty Co. in the amount of more than $7 million.

Respondents Leonard Maggio ("Maggio") and the Whaleneck Companies move to disqualify Marine Midland's attorney, Martin Mushkin ("Mushkin"), from representing Marine Midland in this proceeding, pursuant to former Code of Professional Responsibility

Disciplinary Rules 5-103 (22 NYCRR 1200.22[a]) and 5-102 (22 NYCRR 1200.21).[1] The branch of the motion seeking dismissal based on former DR 5-103, which prohibits an attorney from acquiring a proprietary interest in the subject matter of litigation he or she is conducting for a client, has been withdrawn (*see* Xanthos Reply Aff., ¶ 4). Respondents maintain, however, that Mushkin should be disqualified, pursuant to DR 5-102, because he is or may be a material witness.[2]

Analysis

Disqualification of an attorney during litigation "implicates not only the ethics of the profession but also the substantive rights of the litigants" (*S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp.*, 69 NY2d 437, 443 [1987]). As disqualification denies a party's valued right to representation by the attorney of its choice, any restrictions on that right must be carefully scrutinized (*id.*; *see Cerqueira v Clivilles*, 213 AD2d 202, 202 [1st

[1]Effective April 1, 2009, the New York Rules of Professional Conduct replaced the Code of Professional Responsibility Disciplinary Rules, which retains much of the former Code while generally adopting the format of the American Bar Association's Model Rules of Professional Conduct (*see* 22 NYCRR Part 1200). For a comparison of the old and new rules, *see* Simon, *Comparing the New NY Rules of Professional Conduct to the New York Code of Professional Responsibility*, New York State Bar Association Journal, May 2009, at 9 (also available at www.nysba.org).

[2]Rule 3.7 (22 NYCRR 1200.29) of the Rules of Professional Conduct has replaced the Code of Professional Responsibility DR 5-102 as the "lawyer as witness" rule. The former and current rules are substantively similar, but Rule 3.7 adopts the language of the American Bar Association's Model Rules of Professional Conduct.

Dept 1995]). The lawyer as witness disqualification rules "provide guidance, not binding authority, for courts in determining whether a party's [attorney or] law firm, at its adversary's instance, should be disqualified during litigation" (*S & S Hotel Ventures*, 69 NY2d at 440; *Strongback Corp. v N.E.D. Cambridge Ave. Dev. Corp.*, 32 AD3d 793, 794 [1st Dept 2006]). The rules should not be "mechanically applied when disqualification is raised in litigation" (*S & S Hotel Ventures*, 69 NY2d at 444), and "cannot be applied as if they were controlling statutory or decisional law" (*id.* at 443). Further, "[c]ourts adjudicating disqualification motions must be mindful of the possibility that the motion is made for improper reasons, to 'stall and derail the proceedings, rebounding to the strategic advantage of one party over another'"(*Strongback Corp.*, 32 AD3d at 794, quoting *S & S Hotel Ventures,* 69 NY2d at 443).

Disqualification of an attorney under the lawyer as witness rule is required only when it is likely that the testimony to be given by the attorney as witness is necessary[3] (*S & S Hotel Ventures,* 69 NY2d at 445-446; *see Talvy v American Red Cross in Greater N. Y.*, 205 AD2d 143, 152 [1st Dept 1994], *affd* 87 NY2d 826 1995). "Testimony may be relevant and even highly useful but still not strictly necessary. A finding of necessity takes into account such

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[3]Former DR 5-102 prohibited a lawyer from serving as an advocate if the lawyer "ought to be called as a witness on a significant issue on behalf of the client." Rule 3.7 (a) prohibits a lawyer acting as an advocate if "the lawyer is likely to be a witness on a significant issue of fact." Under both the Code and the Rules, courts consider whether the attorney's testimony is necessary.

factors as the significance of the matters, weight of the testimony, and availability of other evidence" (*S & S Hotel Ventures*, 69 NY2d at 446; *see also Advent Assocs., LLC v Vogt Family Investment Partners, L.P.*, 56 AD3d 1023, 1024 [3d Dept 2008][testimony must be unique to attorney-witness]).

On a motion to disqualify, the burden is on the moving party to demonstrate that the attorney's testimony is necessary (*Hudson Valley Marine, Inc. v Town of Cortlandt*, 54 AD3d 999, 1000 [2d Dept 2008]; *see Lefkowitz v Mr. Man, Ltd.*, 111 AD2d 119, 121 [1st Dept 1985]; *S & S Hotel Ventures*, 69 NY2d at 445). Testimony is not necessary if "offered for the collateral purpose of impeachment" (*Melcher v Apollo Med. Fund Mgt. L.L.C.*, 52 AD3d 244, 245 [1st Dept 2008]; *see Talvy*, 205 AD2d at 152). Nor does testimony that is cumulative or merely corroborative of the testimony of other witnesses warrant disqualification (*see Kubin v Miller*, 801 F Supp 1101, 1113 [SD NY 1992]; *cf. MacArthur v Bank of N.Y.*, 524 F Supp 1205, 1208-1209 [SD NY 1981]; *see also S & S Hotel Ventures*, 69 NY2d at 446; *Hudson Valley Marine, Inc.*, 54 AD3d at 1000-1001). Conclusory allegations and speculation that testimony is necessary are also insufficient to meet the burden of showing that an attorney should be disqualified (*see Lefkowitz*, 111 AD2d at 121-122; *Goldberger v Eisner*, 21 AD3d 401, 401 [2d Dept 2005]; *Cerqueira*, 213 AD2d at 202).

Here, respondents have not met their burden of showing that Mushkin must be disqualified. At issue in this turnover proceeding is what ownership interest Koch has in the

Whaleneck Companies that could be used to satisfy Marine Midland's judgment against Koch. Maggio asserts that he owns 75% of each of the Whaleneck Companies, and that Koch owns 25% of each company (*see* Maggio Aff. in Support, ¶ 2), pursuant to a letter agreement dated March 28, 1990. Certain income tax records indicate that Maggio and Koch each own 50% of each of the Whaleneck Companies. Maggio contends that Mushkin's testimony will be necessary at trial because he interviewed Whaleback's accountant, Richard Zerah ("Zerah"), about the preparation of the tax returns for the Whaleback companies.

Mushkin acknowledges that he spoke to Maggio and Zerah prior to commencement of this proceeding, in or around October 2008, and reviewed tax returns of each of the Whaleback companies dating back five years. Maggio was subsequently deposed, and while the moving respondents contend that Mushkin's testimony is necessary because the authenticity of tax filings, and other corporate documents, can only be established by Mushkin, Maggio has already identified, at his deposition, the tax returns as copies of the returns filed for the Whaleback companies. Respondents also argue that the basis for disqualification is that Mushkin interviewed accountant Zerah about issues of "corporate capitalization, tax return accuracy, and the protocol of respondents' tax return preparation," and that Mushkin will be required to testify as to those matters, and to testify in the event that "respondents' accountant-witness offers a response or document inconsistent with petitioner's counsel's investigation" (Xanthos Reply Aff. in Support, ¶¶ 8-11).

Respondents, however, do not demonstrate that Mushkin's testimony is necessary to establish either the structure or functioning of the corporations, or the accuracy of or protocol for preparing tax returns. Both Zerah and Maggio can testify as to the same matters based on their personal knowledge and participation in corporate activities. Even if Mushkin has any personal knowledge of those matters, such knowledge is not unique to him, and respondents do not show that his testimony would not simply be cumulative. To the extent that respondents contend that Mushkin may seek to impeach respondents' testimony based on his interview notes, evidence shows that a contradiction between Maggio's testimony and the tax returns already exists (*see Talvy*, 205 AD2d at 152), and, in any event, such testimony would be no more than collateral (*see Melcher*, 52 AD3d at 245).

Accordingly, it is

ORDERED that the motion to disqualify Mushkin as counsel for Marine Midland is denied.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
August 23, 2009

FILED
Aug 28 2009
NEW YORK
COUNTY CLERK'S OFFICE

ENTER:

Hon. Eileen Bransten