

Blanche, Verte & Blanche, Ltd. v Joseph Mauro & Son, Inc.

2010 NY Slip Op 32402(U)

September 1, 2010

Supreme Court, Suffolk County

Docket Number: 04-18062

Judge: John J.J. Jones

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

DO NOT

PRESENT:

Hon. JOHN J.J. JONES, JR.
Justice of the Supreme Court

MOTION DATE 5-11-10
ADJ. DATE 7-14-10
Mot. Seq. # 003 - MD
004 - XMD

-----X			
BLANCHE, VERTE & BLANCHE, LTD.,	:	NEIL H. GREENBERG & ASSOCIATES P.C.	
	:	Attorneys for Plaintiff	
	:	900 Merchants Concourse, Suite 214	
Plaintiff,	:	Westbury, New York 11590	
	:		
	:	GUARARRA & ZAITZ	
- against -	:	Attorneys for Defendant Joseph Mauro & Son, Inc.	
	:	100 Park Avenue, 20 th Floor	
	:	New York, New York 10017	
JOSEPH MAURO & SON, INC., and SHORE	:		
DRUGS, INC.,	:	WHITE, QUINLAN & STALEY	
	:	Attorneys for Defendant Shore Drugs, Inc.	
Defendants.	:	377 Oak Street, P.O. Box 9304	
-----X		Garden City, New York 11530	

Upon the following papers numbered 1 to 64 read on this motion for summary and judgment and cross motion to disqualify attorney; Notice of Motion/ Order to Show Cause and supporting papers 1 - 24; Notice of Cross Motion and supporting papers 25 - 47; Answering Affidavits and supporting papers 48 - 52; 57 - 64; Replying Affidavits and supporting papers 65 - 69; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Joseph Mauro & Son, Inc. is denied; and it is further

ORDERED that the cross motion by defendant Shore Drugs, Inc. is granted in part and denied in part.

Defendant Joseph Mauro & Son, Inc. ("Mauro") moves for an order granting it summary judgment dismissing plaintiff Blanche, Verte & Blanche, Inc.'s ("plaintiff") complaint and all cross-claims against it and provides copies of the pleadings, the various parties' pretrial deposition transcripts and a document titled "Release and Subrogation Receipt." Mauro has also submitted a memorandum of law. Plaintiff opposes and provides various decisions by this court concerning related matters under index number 04-11240 and an affidavit by John Battista ("Battista"). Defendant Shore Drugs, Inc. ("Shore") cross-moves for an order disqualifying plaintiff's counsel, compelling plaintiff's counsel to

appear for an examination before trial and denying Mauro's summary judgment motion and provides copies of the pleadings, excerpts from various parties' pretrial deposition transcripts, a copy of this court's prior decision dated January 10, 2010 and a copy of "Plaintiff's Notice of Expert Witness Exchange." Mauro has submitted an affirmation in opposition to the cross motion. Shore has replied.

Mauro is an electrical contracting business. Shore was a commercial tenant on the first floor of a building owned by plaintiff located at 2 East Main Street, Bay Shore, New York. The underlying complaint alleges, among other things, that Mauro's failure to properly correct a problem with the existing electrical system caused a fire which occurred at the premises on October 24, 2002. The electrical work performed by Mauro was done approximately one week before the fire. As noted by Mauro, a summary judgment motion "based upon [Shore's] full compensation for its loss by the proper measure of damages under New York law, and the terms of the insurance contract between [Shore] and its insurer, the St. Paul Traveler's Companies, Inc." was denied by this court by its decision dated January 13, 2010. By its instant motion, Mauro contends that it performed work for Shore only on an as needed basis; that it did not perform electrical work during a renovation which took place at the Shore establishment approximately six years prior to the fire; that plaintiff did not claim that the fire was caused by its replacement of a circuit breaker but by its failure to diagnose an alleged defect in the circuit breaker panel; that the reason it was called to the Shore establishment - to address a "sizzling sound"- was accomplished by its contractor; and that counsel for Shore signed and executed a "Release and Subrogation Receipt" for St. Paul/Travelers. Mauro contends, as a threshold matter, that "plaintiff cannot prove that [] Mauro committed an act from which a jury could rationally infer that it negligently caused the fire." It argues that the complaint does not allege that Mauro's work caused the fire but that its contractor failed to correct a dangerous condition, and that it was not Mauro's duty to "troubleshoot other problems or be a guarantor of the entire electrical system." It is also contended that plaintiff has failed to proffer "definitive proof that the area of the origin is the electrical panel that [] Mauro had worked on some days before the fire." It is further argued that in the event the proof offered by plaintiff is "deemed to be adequate," it is nonetheless "woefully weak and cannot, and should not, be sustained as a matter of law." Mauro also moves for dismissal of cross-claims asserted by Shore against it. It is claimed that because Mauro does not owe a duty of care to plaintiff, the cross-claims for contribution by Shore must fail.

Mauro also asserts that in the event plaintiff's claims survive this motion, counsel for plaintiff should be disqualified "due to his intimate involvement with the conception, negotiation and execution of the insurance contract central to a key dispute in this case." As noted by Mauro, Travelers Insurance Company, as insurer and subrogee of plaintiff, seeks damages from Mauro. The previous summary judgment motion by Mauro seeking dismissal "based partly on the fact that as per the terms of the insurance contract between [plaintiff] and Travelers, [plaintiff] was adequately compensated" was denied. It is now argued that inasmuch as the "party substantially responsible for negotiating the terms of the insurance contract on behalf of [plaintiff] was [plaintiff's counsel], who appears in the instant action (and in six sister actions)" and "[b]ecause [his] intimate involvement with the contract is at the heart of Mauro's summary judgment motion and appeal, it is inappropriate" for plaintiff's counsel to continue his representation. Mauro cites, in support, Disciplinary Rule 5-102[a] which prohibits an attorney from testifying as a witness before a tribunal. Mauro also cites *Caravousanos v Kings County Hosp.*, 27 Misc3d 237 [2007], "a case with circumstances substantially similar to the set of facts presented here."

Caravousanos involved a application to disqualify an attorney who represented both an obligee and a surety in a construction contract in which the principal defaulted. The court found that the parties interests were “irrefutably adverse” and granted disqualification.

Shore, by its cross motion, contends that Mauro’s motion should be denied as a successive summary judgment motion and that, in any event, questions of fact exist which preclude summary judgment with respect to its cross-claims for indemnification and contribution against Mauro. Specifically, Shore contends that there is no evidence of wrongdoing on its part which would have caused the fire, and notes that plaintiff has served a notice of expert disclosure which informs that its expert will testify as to acts or omissions by Mauro which caused or contributed to the damages claimed by plaintiff. Shore also contends that plaintiff’s counsel should be disqualified, because he is “a proper witness to be called on behalf of [plaintiff] as he is the only individual from [plaintiff] who can testify as to how [plaintiff] calculated its damages.” Shore further asserts that plaintiff’s counsel has a financial stake in the outcome of the litigation which is violative of the disciplinary rules. Shore also asks that “given [plaintiff’s counsel] has been improperly representing [plaintiff] since the inception of this litigation, defendant should be permitted to depose [plaintiff’s counsel].”

By its opposition, plaintiff notes that Mauro previously moved for summary judgment and, at that time, had all the facts and circumstances relevant to the matter including the opinion of plaintiff’s expert witness. It is noted that Mauro has also previously moved for summary judgment in the “numerous companion actions” to this action. Both the prior application under captioned index number and those brought under the companion actions have been denied. As to the latter, the court noted that the motions were unsupported by an affidavit by Mauro’s expert regarding the cause of the fire and its point of origin. It is contended that the instant motion is similarly lacking thus it is contended it should not be considered. It is also argued that it should not be considered given the proscription against successive summary judgment motions. As to the motion to disqualify counsel, plaintiff’s attorney affirms that he will not be a witness at a trial of the action, and that he did not negotiate with or participate in the actual purchase of the insurance policy on property owned by plaintiff. Counsel also affirms that he did not negotiate with any insurance company with respect to payment to plaintiff for damages sustained by the fire. Such damages, according to counsel, were determined by a public adjuster. Counsel also states that he never acquired an interest in the outcome of this litigation and that he was not a shareholder in plaintiff at the time of the fire. Counsel also notes that discovery ended in this matter over a year ago and that any belated effort to secure his testimony in a pretrial deposition is without basis. Finally, counsel notes that defendants have failed to support the respective motions for his disqualification with admissible evidence.

By its opposition to Shore’s cross motion, Mauro contends that the instant motion is dissimilar from that which was initially brought because the latter alleged that plaintiff had not sustained compensable damages against it as a matter of law and the former alleges that it was not negligent in performing the electrical work at the premises. It also argues that, should the court deem its motion to be successive, it should nonetheless entertain it because to do so would further the ends of justice and its assertion that it is free from negligence should provide the requisite sufficient cause to warrant consideration. It also contends as to its motion for plaintiff’s counsel’s disqualification, that current New York Rules for Discipline for Attorneys, specifically Rule 3.7(a) states that a lawyer should be

disqualified if “the lawyer is likely to be a witness.” It claims that counsel “as the main representative of [plaintiff] in the negotiation of the insurance contract, [counsel] is the only potential witness concerning questions involving [plaintiff’s] position with respect to the agreement.” It is also contended that counsel “gained personal knowledge of the parties’ intent during the contract formation, thereby prejudicing Mauro with respect to its contract-related claims.”

By its affirmation in reply to plaintiff’s opposition to its cross motion, Shore counters plaintiff’s counsel’s assertion that he will not be called as a witness at trial by noting that “such conclusion is not entirely in counsel’s discretion.” It is contended that it is unclear how the amount sought by plaintiff was determined and that plaintiff’s attorney, as “current counsel and member,” would have access to that information. It points to the pretrial deposition testimony of plaintiff’s president in which he stated that counsel would have known how the amount sought in the lawsuit was derived. It is also contended that counsel’s assertion that he was uninvolved in negotiating the settlement of plaintiff’s insurance claim is belied by his signature, on behalf of plaintiff, on a “Sworn Statement of Loss” dated August 16, 2004 and a document dated August 14, 2004 which appears to direct the recipient of monies from a claim settlement to choose the manner in which payment is to be made. It is contended that Shore never waived its right to depose counsel and that in its summary judgment motion Shore “specifically reserved its right to depose counsel in the event that the Court denied [its] summary judgment motion.” Shore also asks that in the event the court denies its request to depose counsel, that counsel should nonetheless be disqualified “because he may still be called as a witness at the time of trial.”

As noted by Mauro, multiple summary judgment motions by the same party are disfavored absent a showing of newly discovered evidence or sufficient cause (*see Lapadula v Kwok*, 304 AD2d 798 [2003]). Neither has been shown here. Mauro’s attempt to cast the instant motion in a light different than those previously brought does not bear close scrutiny particularly where the earlier motions sought dismissal of plaintiff’s complaint. Accordingly, the motion by Mauro is denied.

The disqualification of an attorney is a matter that rests solely in the discretion of the trial court (*see Boyd v Trent*, 287 AD2d 475 [2001]), and a client’s right to the counsel of its own choosing is an invaluable right that should not be tampered with unless a clear showing of disqualification has been made (*Zutler v Drivershield Corporation*, 15 AD3d 397 [2005]). Therefore, the withdrawal of an attorney will be required only where the attorney may be called as a witness, if it is apparent that the attorney’s testimony will prejudice the client (*see Martinez v Suozzi*, 186 AD2d 378 [1992]) and is necessary (*see Zutler v Drivershield Corporation supra*). Thus, the burden of disqualification is placed upon the party asserting the need for disqualification (*see Cowen & Company v Tecnoconsult Holdings Limited*, 234 AD2d 86 [1996]).

Under the instant circumstances, Shore failed to satisfy its burden of establishing the necessity for the disqualification of plaintiffs’ counsel to the extent that is required to warrant the court granting an order disqualifying plaintiffs’ counsel. Shore has not demonstrated that any testimony that may be proffered by the plaintiff’s counsel is so prejudicial to his client’s factual assertions or account of events so as to warrant counsel’s disqualification (*Martinez v Suozzi, supra*). Further it does not appear that counsel’s knowledge as to the issues raised by is exclusively within his purview. Nor has Shore overcome plaintiff’s valuable right of being entitled to counsel of its own choosing (*see, Zutler v*

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Drivershield Corporation, supra). With respect to the application for leave to depose plaintiff's counsel it is noted that the motion does not include an affirmation of good faith required for post-note of issue discovery. Inasmuch as the note of issue in this action was filed on December 17, 2009, and because the moving party has not demonstrated unusual or unanticipated circumstances which developed after the filing of note of issue the request to depose counsel must be denied (*see Recine v Grant*, 65 AD3d 535 [2009]). Accordingly, defendants' respective motion and cross motion are denied.

Dated: 1 Sept. 2010



J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION