

Carlton on the Park, Ltd. v Weitzman

2010 NY Slip Op 33389(U)

November 29, 2010

Supreme Court, Nassau County

Docket Number: 008035/2010

Judge: Ira B. Warshawsky

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SHORT FORM ORDER

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

**HON. IRA B. WARSHAWSKY,
Justice.**

TRIAL/IAS PART 8

CARLTUN ON THE PARK, LTD.,

Plaintiff,

-against-

INDEX NO.: 008035/2010
MOTION DATE: 09/07/2010
MOTION SEQUENCE: 001 and 002

HOWARD S. WEITZMAN, Individually and as
Comptroller of the County of Nassau, THOMAS
SUOZZI, as County Executive of the County of
Nassau, ALINE KHATCHADOURIAN, Individually
and as Deputy Comptroller of the County of Nassau,
and LISA S. TSIKOURAS, Individually and as
Deputy Director of Field Audit for the County of
Nassau, and the COUNTY OF NASSAU,

Defendants.

The following papers read on these motions:

Notice of Motion, Affirmation & Exhibits Annexed	1
Memorandum of Law in Support of Motion to Disqualify	2
Notice of Cross-Motion & Affirmation of Anthony A. Capetola, Esq.	3
Affirmation in Support of Andrew R. Scott, Esq.	4
Plaintiff's Affirmation in Reply and in Further Support of Cross-Motion of Lance D. Simon, Esq.	5

PRELIMINARY STATEMENT

Defendants move to disqualify Anthony A. Capetola, Esq., or an attorney in his office from representing plaintiff. Defendants contend that counsel is very likely to testify at a trial of this matter and the continued representation of the corporate plaintiff would pose ethical concerns and violate Rule 3.7 of the Rules of Professional Conduct. 22 NYCRR § 1200.29.

Plaintiff responds that he and his law firm have provided representation to Carlton for 15 years, and his representation has never previously been challenged. He has nevertheless arranged for another law office to proceed with the matter commencing with the stage when testimony is required, including depositions and trial.

For the same reasons raised by defendants, plaintiff contends that present and former members of the County Attorney's office will be witnesses in this matter; and that representation of all defendants by the County of Attorney presents an inherent conflict of interest, since their interests may diverge, creating an appearance of impropriety on the part of counsel.

BACKGROUND

Plaintiff is a restaurant located at Eisenhower Park, which currently operates under a lease/licensing agreement dated on or about July 24, 2003 with Nassau County. An earlier lease agreement was executed in July, 1995. Rents include a base rental with percentage increases set forth in the lease. Carlton has undergone previous audits which resulted in no additional rent due. As a result of an audit released on December 8, 2009, County seeks to impose additional rent, allegedly based upon the receipt and distribution of tips. Also at issue in the litigation are set-offs taken by Carlton as a result of failure of County to provide services, and claimed negligence on their part affecting operation of Carlton. The County disallowed these set-offs, including an additional set-off which resulted from unpaid rent for a function hosted by Nassau County.

Judging from the tenor and allegations of the complaint, plaintiff implies that the effort to hold Carlton responsible for unpaid percentage rent, and improper withholding of claimed set-offs became a personal matter, with individuals allegedly politicizing and publicizing their claims that Carlton was not meeting its obligations under the agreement. It is in this climate that the parties move and cross-move to disqualify their respective counsel.

DISCUSSION

The provision of the Rules of Professional Conduct upon which both parties rely provides as follows:

Rule 3.7: Lawyer as witness.

- (a) A lawyer shall not act as advocate before a tribunal in a matter in which the

lawyer is likely to be a witness on a significant issue of fact unless:

- (1) the testimony relates solely to an uncontested issue;
 - (2) the testimony relates solely to the nature and value of legal services rendered in the matter;
 - (3) disqualification of the lawyer would work substantial hardship on the client;
 - (4) the testimony will relate solely to a matter of formality, and there is no reason to believe that substantial evidence will be offered in opposition to the testimony;
- or
- (5) the testimony is authorized by the tribunal.

(b) A lawyer may not act as advocate before a tribunal in a matter if:

- (1) another lawyer in the lawyer's firm is likely to be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony may be prejudicial to the client; or
- (2) the lawyer is precluded from doing so by Rule 1.7 or Rule 1.9.¹

The determination of whether to disqualify an attorney is a matter left to the sound discretion of the Court.² Selection of counsel of one's choosing is a valuable right, which ought not be abridged absent a clear showing that disqualification is warranted.³ In cases such as this, where counsel is the majority owner and principal of the litigant, it is obviously of significant financial benefit to make use of his knowledge of the issues and the history of the relationship between and among the parties.

It is not controverted that Anthony A. Capetola, Esq. is likely to be called as a witness in the event of a trial of this proceeding. His testimony would not appear to fall within any of the exceptions to Rule 3.7; relating to an uncontested issue; limited to the nature and value of legal

¹22 NYCRR 1200.29

²*Gulino v. Gulino*, 35 A.D.3d 812 (2d Dept. 2006)

³*Aryeh v. Aryeh*, 14 A.D.3d 634 (2d Dept. 2005)

services; relating solely to a matter of formality, and there is no reason to believe substantial evidence will be offered in opposition to the testimony; or that the testimony is authorized by the tribunal. There remains an issue as to whether disqualification would work a substantial hardship on the client.

Courts have recognized, and sought to limit, the tactical misuse of the witness-advocate rule, and the Court of Appeals has made it clear that the witness advocate rule is not to be applied as if it were “controlling statutory law”, and that, instead, the rule provides guidance for courts in determining whether a party’s law firm at his adversary’s instance, should be disqualified during a litigation.⁴ While *S & S Hotel Ventures* dealt with the prior Code of Professional Responsibility, it dealt squarely with the witness advocate rule. It made the point that even if an attorney has relevant knowledge or was involved in the transaction at issue, that alone is insufficient to make the attorney’s testimony “necessary”. The challenging party has the burden of establishing necessity.⁵

While Mr. Capetola is clearly in possession of relevant information, both as to the underlying transaction, and the operation of the restaurant, he is not the bookkeeper or accountant; neither is he the on-site manager who would have first encountered physical conditions, such as flooding, which impacted upon the ability of the restaurant to function. Under such circumstances, the testimony of counsel would be cumulative, and the motion to disqualify should be denied.⁶

In evaluating whether or not to disqualify an attorney under the witness-advocate provision of the Code, it is important to consider the sixfold purpose of the statute:

1. Avoid the unseemliness of an attorney arguing to the trier of fact as to his own credibility;
2. Avoid damage to the client if a jury discounts the testimony of the lawyer precisely

⁴*S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp.*, 69 N.Y.2d 443 (1987).

⁵*Id.* At 445; see also *Talvey v. American Red Cross in Greater NY*, 205 A.D.2d 143, 152 (1st Dept. 1004).

⁶*Plotkin v. Interco Dev. Corp.*, 137 A.D.2d 671 (2d Dept. 1988); see also *Talvey*, 205 A.D.2d 143, at 152.

because he is simultaneously serving as an advocate and witness;

3. Conversely, avoiding a jury giving undue credence to the lawyer's testimony because of his special knowledge of the law and facts;

4. Avoid temptation for lawyer to cover up parts of testimony which may be unflattering to him;

5. Avoid confusion to jury and unfairness where attorney may testify under the guise of legal argument, or make legal arguments under guise of testimony; and

6. Avoid practical problem of either bringing a new lawyer solely to question the advocate-witness, or, alternatively have the attorney question himself.⁷

Both the language of the Code, and the foregoing purposes for the existence of the witness-advocate restraints, make it clear that the disqualification relates to appearances before a tribunal. While the dangers sought to be avoided may arise in a pre-trial context, they are less likely to do so.⁸

At this preliminary stage of the proceedings, there is no basis to disqualify Anthony A. Capetola, Esq., or his law firm. The motion to disqualify is denied. If it becomes necessary for Mr. Capetola to give testimony because no other person is capable of putting forth the position of Carlton, the problems sought to be avoided by the existence of the witness-advocate rule would come to the fore, and the Court directs that, under such circumstances, a disinterested attorney-advocate should conduct the questioning of Mr. Capetola.

Plaintiff seeks the disqualification of the Nassau County Attorney's Office for the same reasons. But the position of the County Attorney is significantly different. Where the attorney who would be called to testify is a transactional real estate lawyer, and not a litigator who would present the case before a tribunal, there is no basis for the imposition of the witness-advocate rule.⁹

⁷Simon, New York Code of Professional Responsibility at 779 (8th ed.).

⁸*Cartier v. Bertone Group, Inc.*, 404 F.Supp.2d 573 (S.D.N.Y. 2005) (Rakoff, J.).

⁹*Smolenski v. T.G.I. Friday's, Inc.*, 15 Misc.3d 792 (Nass. Co. Sup. Ct. 2007) see also *Murray v. Metropolitan Life Insurance Company*, 583 F.3d 173, 179 (2d Cir. 2009).

The cross-motion to disqualify the Nassau County Attorney's Office from representing the defendants is denied.

This constitutes the Decision and Order of the Court.

Dated: November 29, 2010


J.S.C.

ENTERED

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COUNTY CLERK'S OFFICE