

Russell v Adams

2011 NY Slip Op 30018(U)

January 7, 2011

Supreme Court, Greene County

Docket Number: 10-1707

Judge: Joseph C. Teresi

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF GREENE

STACEY RUSSELL and SUSAN RUSSELL,

Plaintiffs,

-against-

DECISION and ORDER
INDEX NO. 10-1707
RJI NO. 19-10-5395

MARK R. ADAMS; RAYMOND E. ADAMS;
VINCENT MELAPIONI; ANNA MELAPIONI;
SANTO ASSOCIATES LAND SURVEYING AND
ENGINEERING, P.C.; ALTON P. MACDONALD, JR.;

Defendants.

Supreme Court Greene County All Purpose Term, December 21, 2010
Assigned to Justice Joseph C. Teresi

APPEARANCES:

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TERESI, J.:

Plaintiffs commenced this action, in part, challenging Defendants Mark and Raymond Adams' (hereinafter collectively "the Adams Defendants") claim to an easement over their property located at 102 High Ridge Villa Road, Cairo, New York (hereinafter "the premises"). Plaintiffs now move to disqualify the Adams Defendants' attorney, James Keefe (hereinafter "Keefe"), pursuant to the Rules of Professional Conduct rules 1.9 and 3.7 (22 NYCRR 1200.0).

The Adams Defendants oppose the motion.¹ Because Plaintiffs failed to demonstrated their entitlement to disqualify Keefe, their motion is denied.

“Disqualification of a [lawyer] 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, 444 [1987]). “The right to choose one's own counsel is a valued right” (Advent Associates, LLC v. Vogt Family Inv. Partners, L.P., 56 AD3d 1023, 1024 [3d Dept. 2008]), “which should not be abridged absent a clear showing that disqualification is warranted.” (Falk v. Gallo, 73 AD3d 685, 686 [2d Dept. 2010]).

Considering first Plaintiffs’ Rule 1.9 disqualification argument, “a party seeking disqualification of its adversary's lawyer [on this ground] must prove: (1) the existence of a prior attorney-client relationship between the moving party and opposing counsel, (2) that the matters involved in both representations are substantially related, and (3) that the interests of the present client and former client are materially adverse.” (Tekni-Plex, Inc. v. Meyner and Landis, 89 NY2d 123, 131 [1996][citing DR 5-108 [22 NYCRR 1200.27[a][1], former Rule 1.9).

Here, Plaintiffs failed to demonstrate the first element of Rule 1.9. Plaintiffs allege that in 1971 Keefe represented William J. Schneider, Jr. (hereinafter “Mr. Schneider”) in purchasing the premises. Thereafter, Keefe represented Mr. Schneider and his wife, Sarah Schneider (hereinafter “Mrs. Schneider”), in transferring the premises to Mrs. Schneider. Then, in 2005, Mrs. Schneider transferred the premises to Plaintiffs. Plaintiffs do not allege Keefe represented

¹ The Adams Defendants’ opposition, dated December 14, 2010, was timely served (because Plaintiffs failed to serve their motion and CPLR §2214[b] demand 16 days before their motion was noticed to be heard) and is considered herein. The Adams Defendants’ opposition, dated December 20, 2010, was not timely served and is not being considered herein.

either themselves or Mrs. Schneider for the 2005 transfer. Rather, they rely upon Keefe's representation of their predecessors in interest. As this showing does not demonstrate "the existence of a prior attorney-client relationship between the moving party [Plaintiffs] and opposing counsel [Keefe]... [Plaintiffs have no] standing to challenge [Keefe's] continued representation." (Cunningham ex rel. Rogers v. Anderson, 66 AD3d 1207 [3d Dept. 2009] quoting Tekni-Plex, Inc. v Meyner & Landis, supra [internal quotation marks omitted]). Nor have Plaintiffs made any showing that the fiduciary duty Keefe owed to Mr. and Mrs. Schneider, has been transferred to their daughter Plaintiff Susan Russell. (Id.)

Turning next to Plaintiffs' Rule 3.7 challenge, the rule 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," and then provides exceptions to the general rule. (22 NYCRR 1200.0, rule 3.7, former DR 5-102[A][22 NYCRR 1200.21]). In order to warrant disqualification under this rule, Plaintiffs' must "meet the heavy burden of establishing that [Keefe's] testimony [is] necessary." (Campbell v. McKeon, 75 AD3d 479 [1st Dept. 2010]). "A finding of necessity takes into account such factors as the significance of the matters, weight of the testimony, and availability of other evidence." (Advent Associates, LLC v. Vogt Family Inv. Partners, L.P., supra at 1024, quoting S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp., supra).

On this record, Plaintiffs failed to demonstrate the necessity of Keefe's testimony. Contrary to Plaintiffs' contention that Keefe's easement advice to Mr. Schneider in 1971 is necessary, such potential testimony is nearly irrelevant. Neither Keefe's beliefs nor his advice are material elements of the easement claims being made herein. Moreover, Plaintiffs proffer

only Mrs. Schneider's affidavit to establish Keefe's 1971 advice.² However, her affidavit is wholly speculative on this point. To the extent that Mrs. Schneider indicates that Keefe did not inform her of the claimed easement, when representing both her and Mr. Schneider, conspicuously absent from such allegation is any indication that the instant easement claim was discussed at all. Because "plaintiff[s] ha[ve] not demonstrated that [Keefe's] testimony was unique to him, and, therefore, necessary, rather than merely relevant and potentially useful or valuable," they failed to demonstrate their entitlement to disqualification pursuant to Rule 3.7. (Advent Associates, LLC v. Vogt Family Inv. Partners, L.P., supra at 1024).

Accordingly, Plaintiffs' motion is denied in its entirety.

This Decision and Order is being returned to the attorneys for the Adams Defendants. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Greene County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: Albany, New York
January 7, 2011


Joseph C. Teresi, J.S.C.

² Plaintiffs' attorney's affirmation "lacked any evidentiary value." (Groboski v. Godfroy, 74 AD3d 1524 [3d Dept. 2010], citing Ahlers v. Wildermuth, 70 AD3d 1154, 1155 [3d Dept. 2010]; 2 North St. Corp. v. Getty Saugerties Corp., 68 AD3d 1392, 1395 [2009], lv denied 14 NY3d 706 [2010]).

PAPERS CONSIDERED:

1. Notice of Motion, dated December 13, 2010; Affirmation of Sarah Schneider, dated December 13, 2010; Affidavit of Sally Schneider, dated December 1, 2010; with attached Exhibits A-D.
2. Affidavit of James Keefe, dated December 14, 2010, with attached unnumbered exhibit.
3. Affidavit of James Keefe, dated December 20, 2010 (not considered).