

Van Acker Constr. Corp. v Hance

2011 NY Slip Op 30092(U)

January 11, 2011

Sup Ct, Wayne County

Docket Number: 71321/2010

Judge: Dennis M. Kehoe

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STATE OF NEW YORK
SUPREME COURT COUNTY OF WAYNE

VAN ACKER CONSTRUCTION CORPORATION
Plaintiff,

-vs-
NANETTE HANCE,
Defendant

DECISION

Index No. 71321

2010

Goldberg Segalla, LLP
Christopher J. Belter, Esq., of Counsel
Daniel B. Moar, Esq., of Counsel
Attorneys for Plaintiff

Lacy Katzen, LLP
John T. Refermat, Esq., of Counsel
Attorney for Defendant

The Plaintiff has moved for an Order pursuant to the New York Rules of Professional Conduct (22NYCRR 1200.0) disqualifying the firm of Lacy Katzen, LLP from serving as the Defendant's legal counsel in the instant action. The Defendant has opposed the motion, maintaining that there is no need for the disqualification.

The Plaintiff's claim arises from a verbal agreement between the Plaintiff and the Defendant, pursuant to which the Defendant engaged the Plaintiff in February 2009 to perform improvements to her residence located at 7710 Hamilton Street, Williamson (Pultneyville), New York. In the

Complaint, the Plaintiff alleges that it furnished materials and services related to the project totaling \$137,040.79. The Plaintiff further maintains that, in response to a series of invoices presented to Defendant, the Defendant paid only the sum of \$66,454.73, leaving an alleged balance due of \$70,586.06. The Plaintiff filed a Mechanics Lien against the property on March 26, 2010. Subsequently, the Plaintiff commenced this action to foreclose the lien by filing a Summons and Complaint on July 22, 2010, which also sets forth cause of action based on breach of contract, account stated and unjust enrichment. The Defendant served an Answer and Counterclaim, setting forth numerous affirmative defenses, as well as nine Counterclaims.

This motion arises from the Plaintiff's claim that Susan VanAcker, as President of the Plaintiff Corporation, spoke with a member of the Lacy Katzen firm on the telephone in late April or early May 2010, regarding possible representation by the firm in connection with the Plaintiff's claim against the Defendant. Specifically, Ms. VanAcker spoke to Peter Rodgers, Esq., in a telephone conversation, during which she alleges that they discussed possible causes of action, as well as potential settlement figures. Ultimately, the Plaintiff chose not to hire Lacy Katzen and retained Goldberg

Segulla, LLP, which commenced this lawsuit on the Plaintiff's behalf.

However, prior to the commencement of the action, the Defendant received correspondence dated May 19, 2010 from Christopher J. Belter, Esq., of the Goldberg firm, demanding payment by the Defendant of the balance allegedly due to the Plaintiff. In response to the letter, Mr. Belter received a telephone call in June 2010 from John T. Refermat, Esq., of Lacy Katzen, to discuss possible resolution of the matter. Upon relaying the substance of the conversation to Mrs. VanAcker, she expressed surprise to Mr. Refermat as to Lacy Katzen's involvement in the matter, due to her prior discussion regarding the case with Mr. Rodgers. An exchange of emails subsequently took place regarding representation of the Defendant, but Lacy Katzen determined that no conflict existed and declined to withdraw. Pleadings were exchanged, and this motion ensued.

The Plaintiff relies on Rule 1.18 of the Rules of Professional Conduct, which states in part as follows:

- (a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a "prospective client".
- (b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use

or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

Pursuant to this Rule, the fact that the Plaintiff did not formally retain Lacy Katzen to represent her is clearly not determinative of the issue. (See, e.g. Burton v Burton, 139 AD2d 554 (2nd Dept, 1988)). The rule extends to “a preliminary consultation by a prospective client with a view toward retention of the lawyer, even where actual employment does not arise.” (The Rose Ocko Foundation, Inc. v Liebovitz, 155 AD2d 426 (2nd Dept, 1989)).

There are a number of inconsistencies in the respective accounts of the telephone conversation which admittedly took place between Mrs. VanAcker and Mr. Rodgers, including issues as to length and contents. In

his affidavit, Mr. Rodgers maintains that the conversation was brief, and that there was little discussion regarding the details of the case. However, Mrs. VanAcker alleges that the call lasted 18 minutes, that they outlined potential claims against the Defendant and that they discussed specifics as to the amount of money needed to settle the case. Counsel for the Defendant denies that anyone possesses any knowledge regarding potential settlement figures, and that Lacy Katzen has received no information from Mrs. VanAcker which could prove "significantly harmful" to her, as required by RPC §1.18(c).

The courts have recognized that "a party's entitlement to be represented in ongoing litigation by counsel of his own choosing is a valued right which should not be abridged absent a clear showing that disqualification is warranted." (*Heim v Merritt-Meridian Corp.*, 236 AD2d 367, 2nd Dept, 1997) (citations omitted)). However, this entitlement must be balanced against a party's right to be free from apprehension that his or her interests will be prejudiced as a consequence of any prior conversations between counsel and the opposing party (See, e.g. *Deshiens v Ford Motor Co.*, 81 AD2d 707 (3rd Dept, 1981)).

The Court has no doubt that Lacy Katzen undertook the

representation of the Defendant in good faith and that considerable time and effort has already been expended by them in this matter. However, "It is axiomatic that an attorney must avoid even the appearance of a conflict of interest." (*Bridges v Alcan Constr. Corp*, 134 AD2d 316 (2nd Dept, 1987)). As the Court of Appeals has observed," with rare and conditional exceptions, the lawyer may not place himself in a position where a conflicting interest may, even inadvertently, affect, or give the appearance of affecting, the obligations of the professional" (*Matter of Kelly* 23 NY2d 368). It is a settled principle that "doubts as to the existence of a conflict of interest must be resolved in favor of disqualification so as to avoid even the appearance of impropriety". (*Seely v Seely*, 129 AD2d 625 (2nd Dept, 1987)).

Therefore, the Court finds that disqualification is appropriate, given the totality of circumstances, and the Plaintiff's motion is granted.

Counsel for the Plaintiff is directed to submit an Order in accordance with this Decision.

Dated: January 11, 2011
Lyons, New York



Honorable Dennis M. Kehoe
Acting Supreme Court Justice

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SUPREME AND COUNTY COURT