Friia v Palumbo
2011 NY Slip Op 30258(U)
January 19, 2011
Sup Ct, Suffolk County
Docket Number: 6747/2007
Judge: Ralph T. Gazzillo
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Index No: 6747/2007

SHORT FORM ORDER

Supreme Court - State of New York
IAS PART 6 - SUFFOLK COUNTY

MOT. SEQ: 005 Mot. D
006 Mot. D
007 Mot. D

PRESENT:

Hon. RALPH T. GAZZILLO
A.J.S.C.

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L. VICTORIA FRIIA,

Plaintiff(s),

- against -

STEVEN PALUMBO,

Defendant(s).

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Upon the following papers numbered 1 to 32 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 5 ; Notice of Cross Motion and supporting papers 6 - 10, 11- 14 ; Answering Affidavits and supporting papers 15 - 18, 19 - 22, 23 - 26 ; Replying Affidavits and supporting papers 27 - 28, 29 - 30, 31 - 32 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motions (seq. 005, 006, 007) are hereby consolidated for the purpose of this determination; and it is further

ORDERED that the motion (seq. 005) by nonparty Thomas LaRussa for an order quashing the judicial subpoena seeking his deposition is denied; and it is further

ORDERED that the cross motion (seq. 006) by the plaintiff for an order precluding inquiry of nonparty LaRussa by reason of the marital privilege is denied; and it is further

ORDERED that the motion (seq. 007) by the defendant to disqualify Jeffrey Horn, Esq and the law firm of Horn & Horn Esqs. as counsel is denied; and it is further

ORDERED that Mr. LaRussa is directed to appear at a deposition within 45 days of the date of service of this order's notice of entry; and it is further

ORDERED that the defendant serve a copy of this order with notice of entry upon the

plaintiff and Mr. LaRusso within thirty days of its entry and file an affidavit of service with the Clerk of the Court.

The plaintiff commenced this action to impose a constructive trust on a residence owned by defendant in Syosset, New York. The plaintiff asserts that the defendant promised to convey a one-half interest in the property in return for contributions to a loan on the house. In a prior order, dated September 19, 2008 (Weber, J.), the Court noted that the plaintiff's claim that the parties maintained joint bank accounts and that she contributed "substantially all" the money in these accounts.

The defendant served upon the plaintiff's husband, nonparty Thomas LaRussa, a judicial subpoena to testify at a deposition. LaRussa moves to quash the subpoena on the ground that no special circumstances exist. The plaintiff cross-moves to preclude defendant from obtaining information from LaRussa on the ground that she is entitled to assert the marital privilege. The defendant moves to disqualify the plaintiff's attorney on the ground that conflicts of interest exist.

Disclosure by a nonparty witness should be as broad under State practice as in the Federal courts and that the showing needed under CPLR 3101 (a) (4) "is truly a nominal one" (***Kooper v Kooper***, 74 AD3d 6, 901 NYS2d 312 [2d Dept 2010]; ***Slabakis v Drizin***, 107 AD2d 45, 485 NYS2d 270 [1st Dept 1985]). A mere showing by the lawyer that he needs such witness's pretrial deposition in order to prepare fully for the trial should suffice as a special circumstance (***Villano v Conde Nast Publications, Inc.***, 46 AD2d 118, 361 NYS2d 351 [1st Dept 1974]; ***Kelly v Shafiroff***, 80 AD2d 601, 436 NYS2d 44 [2d Dept 1981]; ***Catskill Center for Conservation & Development, Inc. v Voss***, 70 AD2d 753, 416 NYS2d 881 [3d Dept 1979).

In support of his motion to quash, Mr. LaRussa avers in his personal affidavit that he and plaintiff are now married. He denied having any communications with the plaintiff regarding the bank accounts between the parties. He also denied any personal knowledge or involvement in the business or personal financial dealings between the two parties during their marriage.

Turning to the cross motion by the plaintiff to preclude defendant from seeking any information from September 6, 2008 and thereafter between the plaintiff and Mr. LaRussa by reason of marital privilege pursuant to CPLR 4502(b), the plaintiff submits, *inter alia*, her personal affidavit. She avers that she and Mr. LaRussa were married on September 6, 2008, and denies that there were any conversations with Mr. LaRussa concerning joint bank accounts with the defendant, except for informing Mr. LaRussa that the defendant had withdrawn all of the money from the joint accounts. Therefore, she does not consent to a deposition of Mr. LaRussa.

Pursuant to CPLR 4502(b), the marital privilege provides that a husband or wife may not be required, or, without the consent of the other if living, allowed, to disclose a confidential communication made by one to the other during marriage is inapplicable except to those statements that would not have been made but for the absolute confidence in, and induced by, the marital relationship. The statutory privilege does not protect all the daily and ordinary exchanges between the spouses, but merely those that would not have been made but for the absolute confidence in, and

induced by, the marital relationship. Here, the Court finds that the statement allegedly made by the plaintiff to Mr. LaRussa is not a confidential communication and therefore the marital privilege does not apply. In any event, inasmuch as both plaintiff and LaRussa deny that any communication was made with regard to details of the bank accounts jointly held by plaintiff and defendant, there is no reason to invoke the privilege (*see*, ***Poppe v Poppe***, 3 NY2d 312, 165 NYS2d 99 [1957]). Accordingly, the motion by LaRussa and cross motion by plaintiff are denied.

Turning to the motion by defendant to disqualify the plaintiff's attorney of record, in support, the defendant submits, *inter alia*, his personal affidavit. The defendant avers that he met with Jeffrey S. Horn, Esq., the plaintiff's attorney, for legal representation related to his auto repossession business in 2002. The defendant states that he was advised to transfer money from his business accounts to an account in his wife's name alone to avoid personal liability in an action that was commenced against him, which he states he did. He states that the plaintiff was present at the meetings with Mr. Horn. Subsequently, he was represented by the New York State Insurance Fund Liquidation Bureau and the action against him was dismissed. He did not retain Mr. Horn and did not sign a retainer agreement. Thereafter, the plaintiff transferred the funds into a joint account from the account in her name only. Although he never retained Mr. Horn, the defendant avers that the advice given to him regarding one of the accounts which is at issue in the instant action causes a conflict of interest.

In opposition, the plaintiff avers in her personal affidavit that she was present at all meetings held between the defendant and Mr. Horn, and, as a result, no confidences were revealed. She also states that the defendant never requested that Mr. Horn represent him, nor was a retainer presented to the defendant. She disputes the defendant's version that Mr. Horn advised him to transfer monies in order to avoid a personal judgment against him. The plaintiff states that Mr. Horn advised the defendant to call the New York State Insurance Fund Liquidation Bureau for assistance.

The disqualification of an attorney is a matter that rests within the sound discretion of the court (***Calandriello v Calandriello***, 32 AD3d 450, 451, 819 NYS2d 569 [2nd Dept 2006]; ***Zutler v Drivershield Corp.***, 15 AD3d 397, 790 NYS2d 485 [2nd Dept 2005]). In considering a motion to disqualify, the court is mindful that a party's right to be represented by counsel of his own choosing is a valued substantive interest which should not be interfered with absent a clear showing that disqualification is warranted (***In re Epstein***, 255 AD2d 582, 583, 680 NYS2d 655 [2nd Dept 1998]). Disqualification of a law firm during litigation implicates not only the ethics of the profession but also the substantive rights of litigants by denying a party the right to be represented by the attorney of his choice (***S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp.***, 69 NY2d 437, 443, 515 NYS2d 735 [1987]). In considering a disqualification motion the court must closely examine the facts of the case and balance a party's right to counsel of choice against the need to maintain the highest standards of the legal profession.

The party seeking to disqualify an attorney bears the burden of establishing that the attorney will be called as a witness at trial and that the attorney's testimony is necessary (***Eisenstadt v Eisenstadt***, 282 AD2d 570, 723 NYS2d 395 [2nd Dept 2001]; ***Morgasen v Federated Consultant***

Service, Inc., 174 AD2d 656, 571 NYS2d 518 [2nd Dept 1991]). "Testimony may be relevant and even highly useful but still not strictly necessary. A finding of necessity takes into account such factors as the significance of matters, weight of the testimony, and availability of other evidence" (***S & S Hotel Ventures Ltd. Partnership v 777 S.H. Corp.***, *supra* at 446). Delay in making a motion to disqualify has been held to support a finding that it was brought in bad faith, to delay proceedings or to otherwise secure an advantage (***Eisenstadt v Eisenstad***, *supra*).

Rule 1.9(a) of the Rules of Professional Conduct; 22 NYCRR 1200.19 (2009), formerly Code of Professional Responsibility Disciplinary Rule 5-108, provides that attorneys owe a continuing duty to former clients not to reveal confidences learned in the course of their professional relationship. It is this duty that provides the foundation for the well established rule that a lawyer may not represent a client in a matter and thereafter represent another client with interests materially adverse to the interests of the former client, in the same or a substantially related matter (***Kassis v Teacher's Ins. and Annuity Ass'n***, 93 NY2d 611, 615-616, 695 NYS2d 515 [1999]).

Here, the Court finds that there was never an attorney-client relationship inasmuch as the defendant did not retain Mr. Horn and the litigation was resolved in his favor by the New York State Insurance Fund Liquidation Bureau. In addition, defendant conceded that the two meetings had with Mr. Horn were in the presence of the plaintiff. The Court further finds that Mr. Horn's testimony is not necessary to the proceeding inasmuch as the same information can be obtained from the plaintiff. Moreover, the Court finds that the fact that the defendant waited over two years before moving to disqualify the plaintiff's attorney belies any genuine claim that he was prejudiced or that the motion was anything but an afterthought or dilatory tactic (***Eisenstadt v Eisenstad***, *supra*). Accordingly, the motion to disqualify the plaintiff's attorney is denied.

Dated: 1/14/11

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J.S.C.

__FINAL DISPOSITION _X_NON-FINAL DISPOSITION

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