

**Riverdale Nursing Home v Correa**

2011 NY Slip Op 34344(U)

October 14, 2011

Supreme Court, Bronx County

Docket Number: Index No. 21087/1011E

Judge: Alexander W. Hunter, Jr.

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: PART IA23A**

-----X  
Riverdale Nursing Home,

Index No.: 21087/1011E

Plaintiff,

Decision/Order

-against-

Santiago O. Correa a/k/a Santiago Rios, Miriam M.  
Gonzalez and Chris J. Johnson, Esq. a/k/a Christopher  
Jack Johnson, Esq.

Defendant.

-----X  
**HON. ALEXANDER W. HUNTER, JR.**

Plaintiff's motion for an order pursuant to C.P.L.R. §306-b extending the time to serve the summons and complaint in this action is granted. Plaintiff's further motion for an order pursuant to C.P.L.R. §315, permitting plaintiff to serve defendant Santiago O. Correa by publication if other service cannot be effectuated, is granted. Plaintiff's motion for an order disqualifying defendant Chris J. Johnson, Esq., from acting as counsel for his co-defendant Maria M. Gonzalez, is denied without prejudice.

Plaintiff avers that it operates a nursing home on West 230<sup>th</sup> Street in the Riverdale section of Bronx County. From June 1, 2006 through December 28, 2009, defendant Santiago O. Correa was a resident. Plaintiff contends that although some of the nursing home bills were paid, when defendant Correa left, she still owed the nursing home \$87,479.70. Plaintiff filed the instant action seeking recovery of that amount.

With respect to the motion for an order extending the time to serve defendant Correa, plaintiff contends that it sought the address of defendant Correa in a national database. Two addresses were identified; one on Amsterdam Avenue in New York County and another in Manalapan or Englishtown, New Jersey. Plaintiff alleges that process servers attempted to serve defendant Correa at both addresses unsuccessfully. At the New York County address, defendant Correa was not listed on the building directory and at the New Jersey address, the process server was told by "Tina" the Administrative Director of the facility that defendant Correa was never a resident there. (Exhibits E and F).

Plaintiff's counsel claims that despite making diligent efforts to serve defendant Correa with the summons and complaint, service has not been made within the 120 days required under C.P.L.R. §306-b. Plaintiff's counsel asserts that good cause has been shown for an extension of time to serve the summons and complaint upon defendant Correa. Therefore, the motion should be granted.

Plaintiff further requests that this court direct the manner of service of the summons and complaint upon defendant Correa pursuant to C.P.L.R. §308(5) since none of the other methods set forth in that provision can be effectuated under these circumstances. Thus, C.P.L.R. §315 authorizes the court to order service of a summons by publication in an action described in C.P.L.R. §314 if service cannot be made by another prescribed method with due diligence.

Plaintiff finally requests that this court order the disqualification of Chris J. Johnson, Esq., as counsel for his co-defendant Maria M. Gonzalez. Plaintiff argues that defendant Johnson was defendant Correa's attorney for several years including the time period when Mr. Correa resided at plaintiff's nursing home. In his answer, defendant Johnson contends that he was defendant Correa's attorney only between December 2007 and October 2008. Co-defendant Maria M. Gonzalez admits that she became defendant Correa's attorney-in-fact in December 2007 and that she personally signed checks written on defendant Correa's bank account. Plaintiff alleges in the complaint that defendant Correa had a significant amount of money in his bank account over which defendant Gonzalez had a power of attorney. Defendant Correa was denied Medicaid coverage because of the amount of money defendant Correa had. However, plaintiff's counsel alleges that "...much of that money disappeared, to parts unknown." (Korsinsky Aff., para. 8).

Plaintiff alleges that as the person in control over defendant Correa's account, defendant Gonzalez controlled the disposition of the money and alleges that some of it went to her. Plaintiff contends that there was a fraudulent conveyance under New York Debtor-Creditor Law and the claim against defendant Gonzalez is asserted pursuant to that statute. Moreover, defendant Johnson was defendant Correa's attorney. Plaintiff's counsel contends that it is believed that he, too, was the recipient of some of defendant Correa's money and participated in wrongdoing. Plaintiff asserts that defendant Johnson also violated the Debtor-Creditor Law. Defendant Johnson is representing himself in the instant action, *pro se*, and he also represents defendant Gonzalez. Plaintiff alleges that same is improper and that defendant Johnson should be disqualified as defendant Gonzalez's attorney.

Plaintiff argues that the Rules of Professional Conduct provide 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. There are exceptions to the ban but plaintiff argues that the only one applicable herein is that the disqualification of the lawyer would work substantial hardship on the client. The instant matter is still in the earliest stages of litigation. Therefore, plaintiff contends that there is no hardship to defendant Gonzalez if defendant Johnson is disqualified as her attorney and the motion should be granted.

Plaintiff further argues that essential to the case at bar and to the defenses, are what defendants Gonzalez and Johnson will testify to. Plaintiff contends that a conflict will occur as defendant Johnson will be a witness to several significant issues including how defendant Correa handled his money, how defendant Gonzalez handled defendant Correa's money, where the money went and whether there was an effort to engage in a fraudulent conveyance. In sum, defendant Johnson is one of three key witnesses who can testify as to what happened to defendant Correa's money. Additionally, it can be anticipated that if the money is gone, defendant Johnson will take the position that he did not take it and that it may have gone to defendant Gonzalez who is his own client. Therefore, an apparent conflict exists and defendant Johnson should be disqualified from representing defendant Gonzalez in this action.

Defendant Johnson opposes the motion by plaintiff seeking to disqualify him from acting as counsel for defendant Gonzalez. Defendant asserts that plaintiff's lawsuit is frivolous and rife with material factual statements that are false. Defendant makes reference to the first cause of action in the complaint and contends that both he and defendant Gonzalez, in their respective answers, have denied plaintiff's allegations regarding any "agreement" entered into to arrange for payment to plaintiff for services rendered to defendant Correa. Defendant Johnson contends that

neither he nor defendant Gonzalez had any involvement with defendant Correa's admission to plaintiff's nursing home and neither of them entered into an agreement with the plaintiff either at the time of defendant Correa's admission or at any other time. Defendant Johnson claims that because of his personal involvement in the matter, he knows that plaintiff's first cause of action is false.

Defendant Johnson further contends that he has served a demand for discovery and inspection upon plaintiff requesting, among other items, the alleged "agreement" between plaintiff and defendants but same has not been produced. Defendant Johnson claims that since plaintiff knows that he is aware that no such agreement was made, rather than complying with discovery demands, plaintiff has filed the instant motion in an effort to obtain a "strategic advantage." (Johnson Aff., para. 8). Defendant Johnson argues that the Appellate Division, First Department has stated that a motion for disqualification should be considered an effort to obtain a "strategic advantage" unless the movant meets the heavy burden of showing that disqualification is warranted. **Broadwhite Associates v. Truong**, 237 A.D.2d 162 (1<sup>st</sup> Dept. 1997).

Defendant Johnson further argues that plaintiff's counsel attempts to show a contradiction between his answer and defendant Gonzalez's but there is no contradiction. Plaintiff has not met the heavy burden of showing that disqualification is warranted. In addition, courts have held that the right to counsel is a valued right and any disqualification must be carefully scrutinized. Therefore, the motion should be denied.

Defendant Gonzalez submits an affidavit in opposition to plaintiff's motion wherein she alleges that she does not wish to retain any attorney other than defendant Johnson to represent her in this action and that the allegation by plaintiff that she took possession of defendant Correa's assets and transferred them to herself and others, is false.

In reply, plaintiff's counsel contends that defendant Johnson cannot file an affirmation because he is a party to the proceeding. He can only file an affidavit and, thus, his affirmation is improper and should be disregarded by this court. Moreover, it is apparent from defendants' answers that defendant Johnson supervised the transactions at issue and will likely be a witness in this case. Moreover, since it is "virtually certain" that since defendant Johnson is a party to this action, he will testify at trial, his disqualification is necessary pursuant to Rule 3.7 of the Rules of Professional Conduct.

The motion by plaintiff for an order to extend the time to serve the summons and complaint upon defendant Correa and for service pursuant to publication pursuant to C.P.L.R. §315 is granted as the motion was unopposed and plaintiff has shown good cause for this court to extend the time for service pursuant to C.P.L.R. §306-b.

With respect to the motion for disqualification, **22 NYCRR 1200.0 Rule 3.7**, provides that, "(a) 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 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.”

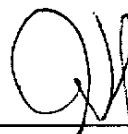
In S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp., 69 N.Y.2d 437 (1987), the Court of Appeals stated, “The advocate-witness disqualification rules contained in the Code of Professional Responsibility provide guidance, not binding authority for courts in determining whether a party’s law firm, at its adversary’s instance, should be disqualified during litigation. Courts must, in addition, consider such factors as the party’s valued right to choose its own counsel, and the fairness and effect in the particular factual setting of granting disqualification or continuing representation.” Id. at 440.

This court finds that plaintiff, at this time, has failed to meet its burden that defendant Johnson should be disqualified from serving as counsel for defendant Gonzalez. Plaintiff has not established thus far that any testimony he may have to give at trial, will in any way conflict with that of defendant Gonzalez. Plaintiff merely speculates that defendants Johnson and Gonzalez will likely blame each other for money that may or may not be “missing” from defendant Correa’s account. At present, it appears that the responsible party for the bill owed to plaintiff’s facility and the person who signed any purported agreement with plaintiff to assume responsibility for the cost of his care, is defendant Correa. Plaintiff has not demonstrated at this stage of the proceedings that defendant Johnson’s testimony would be, “...so adverse to the factual assertions or account of events offered on behalf of the client as to warrant his disqualification” (citations omitted). Martinez v. Suozzi, 186 A.D.2d 378 (1<sup>st</sup> Dept. 1992).

Accordingly, the motion for disqualification is denied without prejudice to renewal at a later stage in the litigation, if it becomes apparent through proof in admissible form that defendant Johnson’s potential testimony will contradict that of defendant Gonzalez to such an extent that they will essentially be pointing the finger of blame at one another.

This constitutes the decision and order of this court.

Dated: October 14, 2011



J.S.C.  
ALEXANDER W. HUNTER, JR.  
J.S.C.