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SHORT FORM ORDER

INDEX No. 11-32079
CAL. No. _____

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 45 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE June 29, 2012
ADJ. DATE July 27, 2012
Mot. Seq. # 001-MD

MEDFORD PETROLEUM LLC,

Plaintiff,

- against -

QUALITY QUICK MART, INC and STEPHEN J. McGIFF

Defendant.

Attorney for Plaintiff
Steven A. Sternlicht, Esq.
1000 Main Street
Port Jefferson, New York 11777

Attorney for Defendants
Stephen J. McGiff, PC
96 South Ocean Avenue
Patchogue, New York 11772

Upon the following papers numbered 1 to 14 read on this motion to disqualify as attorney; Notice of Motion/ Order to Show Cause and supporting papers 1 - 9; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 10 - 12; Replying Affidavits and supporting papers ____; Other Plaintiff's memo of law 13 - 14; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (001) by the plaintiff to disqualify defendant Stephen A. McGiff as attorney for defendant Quality Quick Mart, Inc. is denied.

In this breach of contract action, the plaintiff seeks to recover its down payment in the failed purchase of a gasoline station dealership and convenience store located at 2665 Route 112, Medford, New York. Subsequent to the execution of a sales contract, William C. Manus, Jr., the purchaser and principal of the plaintiff Medford Petroleum, LLC, withdrew from training classes offered by British Petroleum ("BP"). Defendant Stephen McGiff, the defendant Quality Quick Mart Inc.'s attorney, refused to return the down payment in the amount of $42,000.000 on the ground that Manus wilfully breached the contract by failing to complete the training.

A review of the complaint reveals that the plaintiff alleges in the first cause of action that it is entitled to the refund of its $42,000.00 down payment from the seller, defendant Quality Quick Mart, Inc. and compensatory damages of $500,000.00. In the second cause of action, the complaint

alleges that McGiff breached a fiduciary duty by his refusal to comply with the contractual terms in paragraphs 5 and 6 of the Sales Agreement ("the Agreement") regarding the prompt return of the down payment to the plaintiff, and seeks the $42,000.00 down payment and compensatory damages in the amount of $500,000.00. In the third cause of action, the complaint alleges that McGiff breached the contract by his failure to account and promptly refund the $42,000.00 down payment to the plaintiff and seeks the $42,000.00 down payment and compensatory damages in the amount of $500,000.00.

The plaintiff now moves to disqualify the defendant McGiff as attorney for the defendant Quality Quick Mart.. Plaintiff's counsel affirms that McGiff will be required to testify at a deposition and at trial regarding the two causes of action that have been interposed against him, and regarding the agreement that he drafted on behalf of Quality Quick Mart, Inc. As such, counsel maintains that McGiff's testimony will be prejudicial to his codefendant/client, and is a conflict of interest.

In support of the motion, the plaintiff submits, among other things, the personal affidavit of William C. Manus, Jr., a copy of the Agreement, a letter from Leon Petroleum LLC, a letter from the plaintiff's attorney to defendant McGiff, and a letter from defendant McGiff to the plaintiff's attorney.

William C. Manus, Jr. avers in his affidavit that he is the member manager of the plaintiff Medford Petroleum, LLC. Manus states that McGiff was the attorney who represented the defendant Quality Quick Mart, Inc. and drafted the agreement in the sale of a gasoline service station dealership and convenience store for $420,000.00. Defendant McGiff acted as escrowee of the $42,000.00 down payment for both his client and the plaintiff, Medford Petroleum LLC. McGiff signed the sales contract acknowledging both his contractual and fiduciary capacity as escrowee. Manus states that the contract provided certain conditions to be met in order for the plaintiff to be appointed as a gasoline station dealer which were set forth in paragraphs 5 and 6. Manus avers that if any of these specified conditions were not met, the plaintiff had the right to void the contract and McGiff was obligated to promptly return the $42,000.00 down payment to the plaintiff. Paragraph 5 provided that the purchaser procure franchise agreement approval from British Petroleum ("BP"), in addition to securing an agreement by BP or the landlord assume full responsibility for tanks, pumps and lines. Paragraph 6 provided that the plaintiff was required to obtain a satisfactory lease from Leon Petroleum. Manus states that in either paragraph the plaintiff had the right to terminate the contract if unable to fulfill the contingencies. Manus states that there was no condition precedent requiring him to successfully complete a training program with BP prior to obtaining a franchise, nor was he aware of such a requirement until two weeks after signing the contract. Once he attended the training classes, Manus realized that he was incapable of passing the tests conducted in the training program and withdrew.

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Leon Petroleum, in a letter dated August 31, 2011, informed Manus that he would not be approved for a lease with Leon Petroleum at the gasoline service station. By letter dated September 6, 2011, the plaintiff's attorney demanded that McGiff to return the down payment of $42,000.00 to the plaintiff. By letter dated September 13, 2011, McGiff declined to return the down payment on the ground that Manus voluntarily withdrew prior to completion of the BP training program

In addition to the terms of the Agreement, as stated above in Paragraphs 5 and 6, the Agreement provides in Paragraph 11 that "the Purchaser and Seller jointly and severally agree to indemnify and save harmless the Escrow Agent from and against any and all liability arising under the performance of their duties hereunder,...except with respect to any liability which may be incurred as a result of the Escrow Agent's bad faith or gross negligence".

In opposition, the defendants Quality Quick Mart, Inc. and McGiff submit the personal affidavit of David Warren, and counsel's affirmation. Warren avers that he is the president of the defendant Quality Quick Mart, Inc. He states that McGiff has represented him and his company for a number of years, and he sees no conflict or problem with him representing both Quality Quick Mart, Inc. and himself as escrow agent in this action. If McGiff is caused to testify, Warren sees no prejudice to Quality Quick Mart, Inc. Warren further states that Manus was made aware of the requirement of training classes and that the contract was signed late in July 2011 because the next BP class was not offered until August 2011. Warren believes that Manus' withdrawal from the classes and cancellation of the contract caused Warren to lose other bona fide purchasers. The defendant's counsel affirms that the plaintiff has failed to demonstrate that the knowledge possessed by McGiff regarding the defendant's refusal to refund the down payment is no greater than that possessed by the co-defendant Quality Quick Mart, Inc., its principal, Warren, and the plaintiff's attorney, therefore McGiff's testimony is not necessary.

A party's entitlement to be represented in ongoing litigtion by counsel of his or her own choosing is a valued right which should not be abridged absent a clear showing – on which the party seeking the disqualification carries the burden – that counsel's removal is warranted (*see* ***Goldman v Goldman***, 66 AD3d 641, 885 NYS2d 641 [2d Dept 2009]). Where the Rules of Professional Conduct (22 NYCRR 1200.0) are invoked in litigation, courts "are not constrained to read the rules literally or effectuate the intent of the drafters, but look to the rules as guidelines to be applied with due regard for the broad range of interests at stake" (***Niesig v Team I***, 76 NY2d 363, 369-370, 559 NYS2d 493 [1990]; *see* ***S&S Hotel Ventures Ltd. Partnership v 777 S. H. Corp.***, 69 NY2d 437, 515 NYS2d 735 [1987]). It is the Supreme Court's responsibility to balance the competing interests, and "[t]he disqualification of an attorney is a matter that rests within the sound discretion of the Supreme Court" (***Falk v Gallo***, 73 AD3d 685, 685, 901 NYS2d 99 [2d Dept 2010]; *see* ***Cardinale v Golinello***, 43 NY2d 288, 292, 401 NYS2d 191 [1977]; ***Erlanger v Erlanger***, 20 NY2d 778, 779, 284 NYS2d 84 [2007]; ***Nationscredit Fin. Servs. Corp. v Turcios***, 41 AD3d 802, 802, 839 NYS2d 523 [2d Dept 2007]; ***Flores v Willard J. Price Assocs., LLC***, 20 AD3d 343, 344, 799 NYS2d 43 [1st

Dept 2005]; ***Schmidt v Magnetic Head Corp.***, 101 AD2d 268, 277, 476 NYS2d 151 [2d Dept 1984]), and will not be overturned absent a showing of abuse (*see* ***W. T. Grant Co. v Haines***, 531 F2d 671, 677, [2d Cir. N.Y. 1976]). Disqualification is appropriate only if proven by clear and convincing evidence that (1) the witness will provide testimony prejudicial to the client and (2) the integrity of the judicial system will suffer as a result (*see* ***Ross v Blitzer***, 2009 WL 4907062 [SD NY 2009]).

Rule 1.7(a)(1) of the Rules of Professional Conduct prohibits an attorney from representing a client "if the representation will involve the lawyer in representing differing interests..." However, [notwithstanding] the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing.

Rule 3.7 (a) of the New York Rules of Professional Conduct provides:

> 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.
> (*see* 22 NYCRR § 1200.29 [2009]).

Here, the Court finds that Rule 1.7 is inapplicable to the case at bar inasmuch as McGiff is not faced with representing more than one client and Warren has consented to such an arrangement in writing. With regard to Rule 3.7, the plaintiff has failed to prove by clear and convincing evidence that disqualification would be appropriate under the circumstances presented. Disqualification may be required only when it is likely that the testimony to be given by the witness is necessary (*see* ***J.P. Foley & Co. v Vanderbilt***, 523 F2d 1357, 1359 [2d Cir. N.Y. 1975]). A finding of necessity takes into account such factors as the significance of the matters, weight of the testimony, and availability

of other evidence (*see* ***Comden v Superior Ct. of Los Angeles County***, 20 Cal 3d 906, 576 P2d 971, *cert denied* 439 U.S. 981 [1978]; *see also* ***Universal Athletic Sales Co. v American Gym, Recreational & Athletic Equip. Corp.***, 546 F2d 530, 538-539 (1976), *cert denied* 430 U.S. 984 [1977]; ***Foster Wheeler Corp. v Babcock & Wilcox Co.***, 440 F Supp 897, 903 [S.D.N.Y. 1977]).

Since the plaintiff "failed to offer any proof as to the content or subject matter of the testimony that might be elicited from the [defendant's] attorney," nor is it "apparent from the record as to why it is necessary to call him as a witness," the plaintiff "failed to demonstrate that the testimony of the [defendant's] attorney is necessary" (***Blanche, Verte & Blanche, Ltd. v Joseph Mauro & Sons***, 91 AD3d 693, 694, 936 NYS2d 571 [2d Dept 2012], quoting ***Bentvena v Edelman***, 47 AD3d 651, 651-652, 849 NYS2d 626 [2008]). Nor does the plaintiff demonstrate how such testimony would be so adverse to the factual assertions or account of events offered on behalf of the defendant Quality Quick Mart, Inc. as to warrant disqualification (*see* ***Goldstein v Held***, 52 AD3d 471, 859 NYS2d 707 [2d Dept 2008]; ***Broadwhite Associates v Troung***, 237 AD2d 162, 654 NYS2d 144 [1st Dept 1997]). The plaintiff has further failed to establish that McGiff and Quality QuickMart, Inc. have differing interests, and such an assertion has been rebutted by the sworn affidavit provided by Quality Quick Mart's principal, David Warren, who attests that he and McGiff are united on the claim against them by the plaintiff and that there is no conflict of interest. Accordingly, the motion to disqualify McGiff is denied.

Dated: 9/10/12

THOMAS F. WHELAN, J.S.C.