

Shah v Ortiz

2013 NY Slip Op 31649(U)

July 22, 2013

Supreme Court, New York County

Docket Number: 651500/2011

Judge: Eileen Bransten

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. EILEEN BRANSTEN

J.S.C.

PRESENT: _____ Justice

PART 3

Index Number : 651500/2011
SHAH, SAMAR
vs.
ORTIZ, JUAN
SEQUENCE NUMBER : 004
DISQUALIFY COUNSEL

INDEX NO. 651500/2011
MOTION DATE 6/13/13
MOTION SEQ. NO. 004

The following papers, numbered 1 to 3, were read on this motion to/for disqualify counsel

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s) 1

Answering Affidavits — Exhibits No(s) 2

Replying Affidavits No(s) 3

Upon the foregoing papers, It is ordered that this motion is

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 7-22-13

[Signature] J.S.C.

- 1. CHECK ONE: ... CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ... MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: ... SETTLE ORDER SUBMIT ORDER
DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART THREE

-----X

SAMAR SHAH and INDIGO GLOBAL, INC.,

Plaintiffs,

-against-

Index No. 651500/2011
Motion Date: 6/13/2013
Motion Seq. No.: 004

JUAN ORTIZ, A-DATA TECHNOLOGY LATIN
AMERICA, LLC and FAR EAST INVESTMENTS,
LLC,

Defendants.

-----X

BRANSTEN, J.

This matter comes before the Court on Plaintiffs’ motion for disqualification. Defendants Juan Ortiz and Far East Investments, LLC’s (“Far East”) oppose. For the reasons that follow, Plaintiffs’ motion to disqualify Defendants’ counsel is denied.

I. Background

The facts of this matter were discussed extensively in the Court’s July 2012 decision denying Defendants’ summary judgment motion. Thus, only details necessary to this motion are referenced herein.

In 2005, Far East, a company owned equally by Ortiz, a Florida resident, and Shah, a New Jersey resident, entered into a joint venture with non-party A-Data Taiwan to form A-Data Technology Latin America, LLC (“ALA”). ALA distributed computer

components and peripherals in Florida and Latin America. Far East owned 50% of ALA. See Reply Affidavit of Samar Shah (“Shah Reply Aff.”) ¶ 4.)

In July 2006, A-Data Taiwan terminated its joint venture agreement with Far East and shut down ALA. Thereafter, ALA filed a Florida arbitration proceeding (the “Arbitration”) against A-Data Taiwan. During the Arbitration, ALA was represented by Jeffrey P. Shapiro, Esq. of the firm Shapiro Ramos. See Affidavit of Jeffrey P. Shapiro (“Shapiro Aff.”) Ex. B (February 19, 2006 retainer letter).

Through the Arbitration, ALA sought damages for breach of the joint venture agreement. In December 2008, Shah, Ortiz and ALA entered into a letter agreement (the “2008 Letter Agreement”) in furtherance of the Arbitration, that states in its entirety:

Samar Shah will travel to Miami, without counsel, on reasonable notice to testify in the case on the following conditions.

1. A-Data Technology Latin America, LLC (“ALA”) and Juan Ortiz will hold Mr. Shah, individually and Indigo Global, Inc. harmless from any and all claims related to his membership in or activity as it relates to his being an officer or member of A-Data Technology Latin America, LLC.
2. We understand that legal fees and expenses related to the . . . arbitration are to be paid by the losing party As such, in the event ALA is deemed to be the “prevailing party” . . . Mr. Shah will recover 50% of any recovery paid to [ALA] after Juan Ortiz is reimbursed fees and expenses incurred in connection with this matter.
3. Should there be any dispute between Mr. Ortiz and Mr. Shah or between Mr. Shah and ALA, it will be resolved in New York City and service of any

process involved will be deemed adequate if served by Federal Express on you for Mr. Ortiz or on this office for Mr. Shah.

(Shah Reply Aff. Ex. A.)

Shah asserts that the Arbitration resulted in a substantial award to ALA. *See* Affidavit of Samar Shah (“Shah Aff.”) ¶ 3. However, Shah claims that Defendant Ortiz failed to pay Shah the “50% of any recovery” to which he is entitled under the 2008 Letter Agreement. Accordingly, in July 2011, Shah and Indigo filed this action, alleging breach of the 2008 Letter Agreement, breach of the implied obligation of good faith and fair dealing, unjust enrichment, and breach of fiduciary duty.

On December 5, 2011, Defendants interposed an Answer and asserted counterclaims for breach of fiduciary duty, breach of the duty of good faith and fair dealing, tortious interference with contract and prospective economic advantage, and unjust enrichment.¹ Notably, Defendants’ Answer lists Jeffrey P. Shapiro, Esq. of Shapiro Ramos as “of counsel” for Defendants.²

¹ Defendants’ counterclaim for tortious interference was dismissed by the Court with leave to replead on July 26, 2012 (motion sequence 002).

² The Answer lists attorneys from Gibbons P.C. as counsel for Defendants and lists Jeffrey P. Shapiro’s name below as “of counsel.” On September 12, 2012, the Cohen Law Group, P.C. replaced Gibbons P.C. as counsel to Defendants; however, Shapiro has remained “of counsel.”

Plaintiffs now bring a motion for disqualification, asserting that Shapiro's participation in the instant litigation as counsel for Defendants is improper.

II. Motion to Disqualify Counsel

Plaintiffs assert two bases for Shapiro's disqualification in their motion. First, Plaintiffs contend that Shapiro cannot be adverse to them in the current proceeding, since he allegedly represented Shah in the Arbitration. Shah maintains that the instant litigation is substantially related to the Arbitration and that Shapiro's current representation of Defendants is materially adverse to Shah's interests. Next, Plaintiffs invoke the "advocate-witness" rule, stating that Shapiro cannot represent Defendants in this case, since Shapiro "may well be a material witness at trial." (Shah Aff. ¶ 7(b).) For the reasons the follow, both of Plaintiffs' arguments fail.

1. *Representation Adverse to Interests of Organizational Client*

Plaintiffs first invoke Rule 1.9 of the Rules of Professional Conduct to disqualify Shapiro. Rule 1.9(a) provides that:

A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

The pending motion turns on Rule 1.9(a)'s use of the term "client." "On a motion to disqualify counsel, the moving party must prove, among other things, the existence of a prior attorney-client relationship between itself and opposing counsel." *Campbell v. McKeon*, 75 A.D.3d 479, 480 (1st Dep't 2010). Here, Plaintiffs have failed to demonstrate such a relationship. Instead, the record shows that Shapiro was retained to represent ALA, not Shah himself, in the prior arbitration proceeding. *See* Shapiro Aff. Ex. B (February 19, 2006 retainer letter pertaining to Arbitration, executed by Shapiro and ALA, stating that "client" is ALA).

Shapiro's representation of ALA did not create an attorney-client relationship with Plaintiffs, notwithstanding that Far East was a shareholder of ALA and Plaintiff Shah was a shareholder of Far East. "A lawyer's representation of a business entity does not render the law firm counsel to an individual partner, officer, director or shareholder unless the law firm assumed an affirmative duty to represent that individual." *Id.* at 480-81. Plaintiffs have failed to demonstrate that counsel assumed such an affirmative duty here to represent Shah. In support of their motion, Plaintiffs cite to emails exchanged between Shah, Shapiro, and Shapiro's associates regarding the Arbitrations, alleging that these emails demonstrate that Shapiro represented his interests. *See* Shah Aff. Ex. B. These emails, however, do not establish that Shapiro assumed a duty to represent Shah individually. Instead, the emails demonstrate that, within the scope of Shapiro's

representation of the corporate entity, ALA, Shapiro corresponded with Shah to solicit information for his work on behalf of ALA. These communications do not demonstrate the existence of an attorney-client relationship between Shah and Shapiro. Accordingly, in the absence of such a relationship, Plaintiffs' motion for disqualification fails.

Likewise, Plaintiffs' motion to disqualify Brian Cohen, Esq. is denied. Plaintiffs contend that Shapiro improperly divulged client confidences – i.e. Shah's confidences – to Defendants. However, as discussed above, Shapiro never represented Shah and thus was not privy to his confidences in the context of an attorney-client relationship.

Therefore, Plaintiffs' motion as it pertains to Cohen fails.

2. *Laches*

Even if Shah demonstrated an attorney-client relationship with Shapiro, Plaintiffs motion for disqualification nevertheless would be denied on timeliness grounds. As Defendants correctly note, laches is a final consideration that weighs against granting disqualification. *See St. Barnabas Hosp. v. N.Y. City Health & Hosp. Corp.*, 7 A.D.3d 83, 94-95 (1st Dep't 2004).

Plaintiffs first should have been put on notice of Shapiro's representation of Defendants in this action on November 11, 2011, when he appeared "of counsel" on Defendants' Answer. *See* Docket No. 9. Nevertheless, Plaintiffs waited over eighteen

months to file their motion to disqualify. Such a delay, on its face, has been held by the First Department to demonstrate Plaintiffs' consent to counsel's role in the litigation. *See id.* at 94 ("Our conclusion that St. Barnabas has consented to the Rosenman firm's present role in this litigation is strengthened by the fact that St. Barnabas inexcusably waited about 14 months from the time this action was commenced – and about 12 months from the time the Rosenman firm served HHC's answer and counterclaims – before finally serving its disqualification motion."). Plaintiffs offer no excuse for the delay, aside from their attorney's assertion that he raised the issue informally to Defendants' counsel after the Answer was filed and never received a response. *See* 6/5/13 Oral Arg. Tr. 8: 16-22. Accordingly, even if Plaintiffs demonstrated a violation of Rule 1.9(a), the Court concludes that Plaintiffs' acquiescence in Shapiro's representation of Defendants during the first eighteen months of this action's pendency establishes Plaintiffs' consent to such representation.

3. *Advocate-Witness Rule*

Plaintiffs next cast Shapiro as a "likely" witness at trial and seek his disqualification under Rule 3.7 of the Rules of Professional Conduct. However, Rule 3.7 does not provide for the disqualification of attorneys who could be called to testify at trial. Instead, Rule 3.7, or the "advocate-witness" rule, provides for disqualification only

where a lawyer who *ought to be called* as a witness on behalf of his client. *See S&S Hotel Ventures Ltd. P'ship v. 777 S.H. Corp.*, 69 N.Y.2d 437, 444 (1987). Here, Plaintiffs have not met “the heavy burden” of demonstrating that Shapiro’s testimony is “necessary.” *Campbell v. McKeon*, 75 A.D.3d 479, 481 (1st Dep’t 2010). Specifically, Plaintiffs have not demonstrated “the significance of the matters [to which Shapiro] would testify, the weight of such testimony and the unavailability of other sources of such evidence.” *Id.*

Plaintiffs simply state that Shapiro is likely to be called as a witness to testify as to the amount of the fee he received in connection with his work on the Arbitration. The amount of Shapiro’s fee, however, is not at issue in this action. Moreover, to the extent that Plaintiffs contend that the monies due to them under the 2008 Letter Agreement were used by Defendant Ortiz to pay Shapiro, Plaintiffs fail to explain why such testimony can only come from Shapiro – and not instead from Ortiz. Therefore, Plaintiffs have failed to demonstrate that Shapiro ought to testify, and accordingly, their motion to disqualify Shapiro as an “advocate-witness” is denied.

The Court has considered the remainder of Plaintiffs’ arguments on this motion and finds them unavailing.

ORDER

Accordingly, it is hereby

ORDERED that Plaintiffs' motion for disqualification is denied.

This constitutes the decision and order of the court.

Dated: New York, New York
July 22, 2013

ENTER

A handwritten signature in black ink, appearing to read "Eileen Bransten", written over a horizontal line.

Hon. Eileen Bransten, J.S.C.