

Security Pac. Natl. Bank v Evans
2013 NY Slip Op 31676(U)
July 19, 2013
Supreme Court, New York County
Docket Number: 22899/1992
Judge: Shlomo S. Hagler
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Shlomo S. Hagler
Justice

PART: 17

SECURITY PACIFIC NATIONAL BANK,

INDEX NO.: 022899/1992

Plaintiff,

FILED

MOTION SEQ. NO.: 015

- against -

TRACIE EVANS, et al,

JUL 26 2013

DECISION and ORDER

Defendants. NEW YORK

COUNTY CLERK'S OFFICE

Motion by Defendant Tracie Evans for a protective order, pursuant to CPLR § 3103(a), striking, modifying or limiting plaintiff's document request dated August 1, 2011.

	Papers Numbered
Defendant Evans' Notice of Motion with Affirmation of Defendant's Counsel David Worth, Esq., in Support of the Motion, Exhibits "1" & "2" and Affirmation of Good Faith with 3 Exhibits	<u>1</u>
Plaintiff's Notice of Cross-Motion for Preclusion and Disqualification of Defendant's Attorney with Affirmation of Plaintiff's Counsel William M. Rifkin, Esq., & Exhibits "1" through "14"	<u>2</u>
Defendant's Reply Affirmation of David Worth, Esq., in Further Support of Defendant's Motion for a Protective Order and in Opposition to Plaintiff's Cross-Motion with Exhibits "1" through "3"	<u>3</u>
Plaintiff's Reply Affirmation of William M. Rifkin, Esq., in Further Support of Plaintiff's Cross-Motion and in Opposition to Defendant's Motion for a Protective Order	<u>4</u>
Defendant's Sur-Reply with Affirmation of David Worth, Esq., and Affidavit of Tracie Evans	<u>5</u>
Transcript of Oral Argument of February 25, 2013	<u>6</u>

Cross-Motion: ☐ No ☒ Yes **Number of Cross-Motions: 1**

Cross-Motion by Plaintiff for Preclusion and Disqualification of Defendant's Attorney .

Upon the foregoing papers, it is hereby ordered that Defendant's Motion and Plaintiff's Cross-Motion are is both granted to the extent set forth in the attached separate written Decision and Order, and the branch of Plaintiff's Cross-Motion seeking disqualification of Defendant's attorney is denied.

Dated: July 19, 2013
New York, New York


Hon. Shlomo S. Hagler, J.S.C.

Check one: ☐ **Final Disposition** ☒ **Non-Final Disposition**
Motion is: ☐ Granted ☐ Denied ☒ Granted in Part ☐ Other
Cross -Motion is: ☐ Granted ☐ Denied ☒ Granted in Part ☐ Other
Check if Appropriate: ☐ SETTLE ORDER ☐ SUBMIT ORDER
 ☐ DO NOT POST ☐ REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17**

-----X
SECURITY PACIFIC NATIONAL BANK,

Plaintiff,

Index No. 22899/92

-against-

TRACIE EVANS, et al,

DECISION and ORDER

Defendants.

Motion Sequence No.: 015

Hon. Shlomo S. Hagler, J.S.C.:

FILED

JUL 26 2013

NEW YORK

COUNTY CLERKS OFFICE

In this protracted foreclosure action, defendant Tracie Evans (“Evans” or “defendant”) moves, under motion sequence number 015, for a protective order striking and/or modifying/limiting the document request of plaintiff Security National Bank (“SPN Bank” or “plaintiff”), dated August 1, 2011, pursuant to CPLR § 3103(a). Plaintiff cross-moves, under the same motion sequence number, (1) pursuant to CPLR § 3126 to preclude or limit defendant’s evidence or in the alternative, to dismiss defendant’s claims with prejudice for failure to comply with discovery, and (2) to disqualify David Worth, Esq. (“Worth”) from continuing in his role as counsel for defendant Evans, in accordance with Rule 3.7 of the New York Rules of Professional Conduct (“the advocate-witness rule”) on the grounds that Worth will be required to testify about substantive issues in the upcoming litigation.

Factual Background

At oral argument, this Court resolved the issues regarding discovery by granting both motions “to the extent of requiring the defendants to produce the documents as set forth within 30 days” and, if they fail to do so, allowing the parties to move for appropriate relief (Transcript of Oral Argument, dated February 25, 2013, at p. 15, lines 5-9). The sole

remaining issue on this motion and cross-motion is the disqualification of Worth as attorney for Evans. At issue in the underlying action is whether or not plaintiff breached an implied warranty to negotiate in good faith. Plaintiff claims that Worth, who negotiated all the agreements between CitiMortgage Inc. (“CMI”) and defendant Evans, will be required to testify as to those negotiations. (Affirmation of Plaintiff’s Counsel William M. Rifkin, Esq. in Support of Plaintiff’s Cross-Motion [“Rifkin Aff. In Support”], at ¶ 27.) Specifically, plaintiff alleges that Worth has knowledge of three particular areas of importance: (1) that Worth negotiated the Settlement Agreement with Andrew M. Roth, Esq. [“Roth”], the attorney for CMI at the time, (2) that Worth drafted a letter for CMI to sign that would resolve Evans’ credit issues, and (3) that Worth informed Roth on March 30, 2007 that all the credit issues were resolved and the closing would occur on or about April 13, 2007. (*Id.* at ¶ 28.) If Worth is required to testify, he will be unable to continue in his capacity as counsel for the defense under the advocate-witness rule. Worth avers that his testimony is unnecessary and, therefore, he should not be disqualified. (Affirmation of David Worth in Support of Defendant’s Sur-Reply, at ¶ 10.)¹

Discussion

“Disqualification [of counsel] is a matter which rests within the sound discretion of the trial court.” (*Ferolito v Vultaggio*, 99 AD3d 19, 27 [1st Dept 2012] citing *Harris v Sculco*, 86 AD3d 481 [1st Dept 2011].) Motions to disqualify opposing counsel are generally disfavored since such motions are often made for tactical reasons, may result in unnecessary delay, and interfere with a party’s right to choose his or her own counsel and,

1. The sur-reply by Worth and Evans was authorized by the court.

therefore, require a high standard of proof for those seeking disqualification. (*Cohen v Acorn Intl. Ltd.*, 921 F Supp 1062, 1063-64 [SDNY 1995] [citations omitted].) More importantly, to trigger the “advocate-witness” rule the movant must show that the attorney’s testimony is necessary and that the same information cannot be gleaned from another source. (See *S & S Hotel Ventures Ltd. Partnership v 777 S.H. Corp.*, 69 NY2d 437 [1987].) In *S & S Hotel Ventures*, the Court of Appeals unanimously reversed the Supreme Court’s decision and the subsequent Appellate Division, First Department’s affirmance, which disqualified plaintiff’s attorney who participated in negotiations and communications with defendant’s counsel regarding a loan agreement and the resulting default. The Court of Appeals found that the attorney should not be disqualified because his testimony was not *necessary* [emphasis in original] (*id.* at 445-446.) The Court of Appeals also noted that, while the New York Code of Professional Responsibility’s Disciplinary Rules (the predecessor to the current New York Rules of Professional Conduct) are to be considered, they are not to be applied mechanically when disqualification is raised in litigation; instead the court should take into consideration all relevant circumstances and has discretion in applying these disciplinary rules or codes (*id.* at 443-445).

In this case, Evans has submitted an affidavit stating explicitly that not only does she have personal knowledge of all the areas that the plaintiff claims Worth needs to testify about, but that all actions Worth performed were done at her request or in her presence. (Affidavit of Defendant Tracie Evans in Support of Defendant’s Sur-Reply, ¶ 3-7.) Since Evans is clearly able to provide all the information the plaintiff claims they will require, Worth’s testimony is not necessary.

Plaintiff has failed to meet the burden of proof required to authorize disqualification under the advocate-witness rule and plaintiff's motion to disqualify Worth as counsel for defendant Evans is, therefore, denied.

Conclusion

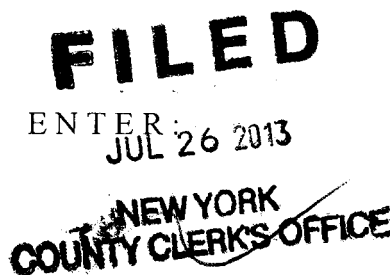
Accordingly, it is hereby

ORDERED that defendant Tracie Evans' motion and Plaintiff's cross-motion are both granted to the extent of requiring the defendants to produce the documents as set forth within 30 days and allowing the parties to move for appropriate relief if defendants fail to do so; and it is further

ORDERED, that this Court denies that branch of the motion of plaintiff Security Pacific National Bank to disqualify David Worth, Esq., from continuing as counsel for defendant Tracie Evans.

The foregoing constitutes the decision and order of this Court. The clerk of the court is hereby directed to enter this decision and order.

Dated: July 19, 2013
New York, New York



Hon. Shlomo S. Hagler, J.S.C.