

Cardali v Slater

2013 NY Slip Op 32825(U)

October 31, 2013

Supreme Court, New York County

Docket Number: 111546/2011

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: RAKOWER

PART 15

FILED
Justice

NOV 06 2013

COUNTY CLERK'S OFFICE
NEW YORK

Index Number : 111546/2011
CARDALI, ROBERT A.
vs.
SLATER, RICHARD N.
SEQUENCE NUMBER : 003
DISQUALIFY COUNSEL

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____


| | |
|--|--------------------|
| Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). <u>4, 2</u> |
| Answering Affidavits — Exhibits _____ | No(s). <u>3</u> |
| Replying Affidavits _____ | No(s). _____ |

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

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

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

Dated: 10/31/13



_____, J.S.C.

HON. EILEEN A. RAKOWER

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 — NEW YORK COUNTY

PRESENT: Hon. EILEEN A. RAKOWER

PART 15

Justice

ROBERT A. CARDALI AND ROBERT A. CARDALI
AND ASSOCIATES LLP.,

Plaintiffs,

- v -

RICHARD N. SLATER AND WINSBERT SPENCE,

Defendants.

FILED

NOV 06 2013

COUNTY CLERK'S OFFICE
NEW YORK

INDEX NO. 111546/2011

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. 003

The following papers, numbered 1 to _____ were read on this motion for/to

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answer — Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1

2

3

Plaintiffs Robert A. Cardali and Robert A. Cardili and Associates LLP (collectively, "Plaintiffs") bring the instant action to recover for alleged libel and slander by Defendants. The complaint alleges that defendant Richard M. Slater ("Slater") falsely accused Plaintiffs of improperly and fraudulently billing some of their clients, including defendant Winsbert Spence ("Spence"). As a defense, Defendants assert that the statements/writings complained of were true. The case was discontinued as to Spence on May 24, 2013.

Defendant Slater now moves: (1) to dismiss this case based on Plaintiffs' failure to respond to outstanding discovery demands; and (2) to disqualify Arnold DiJoseph, Plaintiffs' counsel, from representing Plaintiff on the basis that he is a fact witness whose testimony is necessary to Plaintiff's case. Plaintiffs oppose.

Outstanding Demands

Slater claims Plaintiffs failed to comply with the Preliminary Conference

Order dated June 25, 2013 in that Plaintiffs failed to provide a bill of particulars and a response to discovery demands.

However, rather than serving its own discovery demands on Plaintiffs, Slater merely requested to join in co-defendant Spence's demands. Slater may prepare and serve its own demand for bill of particulars and notice to produce, or Slater may formally adopt those served by November 12, 2013. Plaintiffs must reply to Slater's new demands or those originally served by Spence and adopted by Slater by November 29, 2013.

Disqualify Counsel

Slater contends that DiJoseph, Plaintiffs' counsel, should be disqualified from representing Plaintiff pursuant to the witness-advocate rule, because Slater contends DiJoseph was a key participant in the communications central to the dispute between the parties and which is the basis of the within lawsuit.

New York Rules of Professional Conduct 3.7, known as the advocate-witness rule, states in relevant part:

- (a) A lawyer shall not act as 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.

This rule applies "first and foremost, where the attorney representing the client before a jury seeks to serve as a fact witness in that very proceeding." (*Ramey v. District 141, Intern. Ass'n of Machinists and Aerospace Workers*, 378 F.3d 269 [2nd Cir. 2004]). The justifications underlying this rule are that "(1) the lawyer will appear to vouch for his own credibility, (2) the lawyer's testimony will put opposing counsel in a difficult position when he has to vigorously cross-

examine his lawyer-adversary and seek to impeach his credibility, and (3) there may be an implication that the testifying attorney may be distorting the truth as a result of bias in favor of his client.” (*Id.*) Overall, if an attorney acts as both advocate and witness it can “blur[] the line between argument and evidence” thereby confusing the fact finder. (*Id.*)

Since disqualification denies litigants the right to representation by an attorney of their choosing, attorneys should only be disqualified if their testimony is necessary. (*See, S&S Hotel Ventures Limited Partnership v. 777 S.H. Corp.*, 69 N.Y.2d 437, 508 [1987]). Testimony that might be relevant or useful is not strictly necessary. (*Id.*) Rather, such factors to consider are “the significance of the matters, weight of the testimony, and availability of other evidence.” (*Id.*) Whether an attorney is “an active participant in a disputed transaction” or has specific and personal knowledge of the underlying circumstances are also factors considered. (*See e.g. Hempstead Bank v. Reliance Mortg. Corp.*, 81 A.D.2d 906 [2nd Dept. 1981]; *Zagari v. Zagari*, 295 A.D.2d 891 [4th Dept. 2002]).

Here, Slater asserts that DiJoseph’s testimony is material and necessary to Slater’s defense. Specifically, Slater claims that Plaintiffs improperly and fraudulently billed their clients for expenses that had not been authorized under their respective retainer agreements. Slater argues that as a result of such alleged conduct, when the cases settled, clients received less than their proper amount of their settlement share. Slater alleges that DiJoseph has intimate knowledge of the facts which include the motion work he did on certain files, and DiJoseph is knowledgeable of Plaintiffs’ practice of passing improper charges for DiJoseph’s own bills onto the client.

However, Slater has failed to demonstrate that Mr. Cardali or other members of his office cannot testify as to Cardali’s billing procedures and practices. Accordingly, since it is not evident that DiJoseph is the only source of such testimony, and not merely cumulative, the motion to disqualify counsel is denied at this time.

Wherefore, it is hereby

ORDERED that Defendant’s motion is denied; and it is further,

ORDERED that Defendant Richard M. Slater serve his demands for bill of particulars and notice to produce or formally adopt Spence's demands by November 12, 2013 and Plaintiffs reply to such demands by November 29, 2013; and it is further

ORDERED that all parties are reminded that they must appear for their scheduled conference at 80 Centre Street, Room 327, on December 3, 2013 at 9:30 a.m.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: October 31, 2013


HON. EILEEN A. RAROWER

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

FILED
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