

Orr v Yun

2013 NY Slip Op 33412(U)

December 5, 2013

Supreme Court, New York County

Docket Number: 603423/2006

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: SALIANN SCARPULLA Justice

PART 19

KENNETH ORR

INDEX NO. 603423/2006

MOTION DATE

- V -

DANIEL YUN and BELSTAR GROUP, LLC

MOTION SEQ. NO. 017

The following papers, numbered 1 to ... were read on this motion to/for strike / disqualify
Notice of Motion/Order to Show Cause - Affidavits - Exhibits No(s)
Answering Affidavits - Exhibits No(s)
Replying Affidavits No(s)

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

ORDERED that plaintiff's motion to strike the defendants' answer and to strike the note of issue is decided per attached decision and order placed on the record on September 11, 2013; and it is further

ORDERED that plaintiff's motion to disqualify defendants' counsel Martin Stein is decided per the memorandum decision dated 12/5/13

This constitutes the Decision and Order of the Court.

FILED DEC 06 2013 NEW YORK COUNTY CLERK'S OFFICE

RECEIVED DEC 05 2013 JWS MOTION SUPPORT OFFICE NYS SUPREME COURT-CIVIL

Handwritten signature of Saliann Scarpulla

DATED: 12/5/13

SALIANN SCARPULLA, J.S.C.

- 1. CHECK ONE : [] CASE DISPOSED [X] NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE : MOTION IS : [] GRANTED [] DENIED [X] 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: CIVIL TERM: PART 19

-----X

KENNETH ORR,

Plaintiff,

Index No.: 603423/06

Submission Date: 9/25/13

- against-

DECISION AND ORDER

DANIEL YUN AND BELSTAR GROUP, LLC,

Defendants.

-----X

For Plaintiff:
Richard Paul Stone, Esq.
14 Penn Plaza, Suite 2220
New York, NY 10122

For Defendants:
Heller, Horowitz & Feitz, P.C.
292 Madison Avenue
New York, NY 10017

Papers considered in review of this motion to disqualify counsel (motion seq. no. 017):

Notice of Motion/Affirm. of Counsel in Supp./Exhibits.....	1
Affirm in Opp.....	2
Reply Affirm.....	3
Supplemental Affirm. in Supp/Exhibits.....	4

FILED

DEC 06 2013

HON. SALIANN SCARPULLA, J. COUNTY CLERK'S OFFICE
NEW YORK

In this breach of contract action, plaintiff Kenneth Orr ("Orr") moves to disqualify defendants' counsel Martin Stein ("Stein") on the grounds that he is a necessary witness to Orr's case.¹

¹ In addition, Orr moves to strike the defendants' answer and to strike the note of issue. On September 11, 2013, I issued a decision and order on the record addressing that branch of Orr's motion.

On September 28, 2006, Orr commenced this action seeking damages and injunctive relief based on defendants Daniel Yun (“Yun”) and Belstar Group LLC’s (“Belstar Group”) alleged breach of an employment contract. In the complaint, Orr alleges that he and Yun entered into a contract on February 28, 2006, in which Yun agreed to give Orr: (i) an annual salary of \$300,000; (ii) a 25% ownership interest in Belstar Group; and (iii) a \$50,000 signing bonus (“the contract”).

Orr alleges that he performed under the contract, and that the defendants breached the contract on or about June 25, 2006. Specifically, Orr alleges that the defendants failed to compensate him under the contract, and they failed to give him 25% ownership interest in Belstar Group. Orr also alleges that Yun breached the duty of good faith and fair dealing by failing to attend meetings and by acting in bad faith to deprive Orr from receiving the benefits of the contract.²

In the answer, the defendants admitted that Orr and Belstar Group entered into an agreement on February 28, 2006. However, the defendants assert several affirmative defenses, including the defenses that: (1) defendants terminated the contract; (2) the parties mutually terminated the contract; (3) Orr materially breached the contract; and (4) Orr fraudulently induced defendants to enter into the contract.

² Orr’s second cause of action for fraudulent misrepresentation was dismissed on summary judgment. *Orr v. Yun*, 95 A.D.3d 661, 661-62 (1st Dep’t 2012).

In the current motion, Orr argues that Stein should be disqualified because he is a necessary witness who can testify about the contract. Orr claims that Stein is a key witness because he was involved with the formation of Belstar Group and every aspect of the underlying transactions. Orr further contends that Stein's testimony is necessary to explain the relationships between Belstar Group and other Belstar entities.

In support of his motion to disqualify, Orr submits a list of questions that he intends to ask Stein at trial. Orr argues that he only seeks testimony from Stein regarding information that is not protected by attorney-client privilege. He further argues that the defendants waived any attorney-client privilege by asserting their affirmative defenses.

In opposition, defendants argue that Stein should not be disqualified because his testimony is not necessary to Orr's case, and there is no evidence that Stein's testimony would be prejudicial to defendants. The defendants also argue that any of their communications with Stein regarding the contract is protected by attorney-client privilege. The defendants further contend that Stein's disqualification would severely prejudice them because he is their only attorney and this case is close to trial. The defendants state that they do not intend to call Stein as a witness.

Stein submits an affirmation stating that he "never met or spoke to Orr prior to this litigation." At oral argument on September 25, 2013, Stein stated, on the record, that he was not aware of the contract until June 2006 "when I rendered legal advice to Mr. Yun"

and that he was “not aware of the agreement except for my rendering of legal advice four months after.”

Discussion

The advocate-witness rule requires an attorney to withdraw from a case where it is likely that he will be called as a witness. N.Y. Rules of Prof. Conduct, Rule 3.7(a) (22 N.Y.C.R.R. § 1200.0). Disqualification is only required where the attorney’s testimony is considered necessary. *Sokolow v. Lacher*, 299 A.D.2d 64, 74 (1st Dep’t 2002).

Here, I deny Orr’s motion to disqualify defendants’ counsel Martin Stein because he failed to show that Stein’s testimony is necessary. Stein stated that he did not have knowledge of the contract between Orr and the defendants until June 2006 – four months after the contract was executed. While Stein may have useful knowledge about the events surrounding the contract beginning in June 2006, Orr failed to demonstrate that Stein’s testimony regarding the contract is necessary to prove his case. *S & S Hotel Ventures Ltd. Partnership v. 777 S. H. Corp.*, 69 N.Y.2d 437, 446 (1987) (“Testimony may be relevant and even highly useful but still not strictly necessary”); *Phoenix Assurance Co. of New York v. C.A. Shea & Company*, 237 A.D.2d 157, 157 (1st Dep’t 1997). Both Orr and Yun have knowledge about the contract from which the fact finder can determine whether a valid contract exists, and whether defendants breached the contract.

Orr also failed to show that Stein’s testimony is necessary to explain the relationships between Belstar Group and the other Belstar entities. Yun has been deposed

multiple times in this action, and he has testified to the relationships between Belstar Group and the other Belstar entities.

In addition, Orr did not identify any non-privileged factual information that he seeks to elicit from Stein's testimony. Any communications between Stein and the defendants concerning the contract, which were made for the purpose of rendering or obtaining legal advice are protected by attorney-client privilege. CPLR § 4503; *Spectrum Sys. Int'l Corp. v. Chem. Bank*, 78 N.Y.2d 371, 377-78 (1991). Contrary to Orr's claim, the defendants did not waive attorney-client privilege as they did not place their privileged communications at issue by asserting their affirmative defenses. An "at issue" waiver occurs where "a party affirmatively places the subject matter of its own privileged communication at issue in litigation." *Deutsche Bank Trust Co. of Ams. v. Tri-Links Inv. Trust*, 43 A.D.3d 56, 63 (1st Dep't 1997).

Lastly, Orr made no showing that Stein would testify adversely to his clients' interests. Disqualification of an attorney is only required where the attorney's continued representation would be prejudicial to his or her client's interests. *Broadwhite Associates v. Truong*, 237 A.D.2d 162, 163 (1st Dep't 1997).

For the above stated reasons, I deny Orr's motion to disqualify defendants' counsel Martin Stein.

In accordance with the foregoing, it is hereby

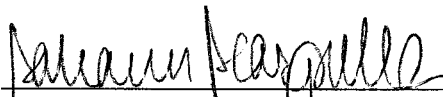
ORDERED that plaintiff Kenneth Orr's motion to disqualify defendants' counsel Martin Stein is denied; and it is further

ORDERED that the parties shall appear for trial on March 10, 2014 at 9:30 a.m., 60 Centre Street, Room 335.

This constitutes the decision and order of the Court.

Dated: New York, New York
December 5, 2013

ENTER:


Saliann Scarpulla, J.S.C.

FILED

DEC 06 2013

**NEW YORK
COUNTY CLERK'S OFFICE**