

**Galindo v State Farm Fire & Cas. Co.**

2014 NY Slip Op 31011(U)

April 15, 2014

Supreme Court, Suffolk County

Docket Number: 12-28852

Judge: Jr., Andrew G. Tarantino

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 50 - SUFFOLK COUNTY

**PRESENT:**

Hon. ANDREW G. TARANTINO, JR.,  
Acting Justice of the Supreme Court

MOTION DATE 11-19-13  
ADJ. DATE 12-17-13  
Mot. Seq.# 002 - MG

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EDIXON GALINDO,

Plaintiff,

- against -

STATE FARM FIRE AND CASUALTY  
COMPANY, and HICKORY HOMES AND  
PROPERTIES, INC.,

Defendants.

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ORR AND BROWN, P.C.  
Attorney for Plaintiff  
14 Mamaroneck Avenue  
White Plains, New York 10601

SARETSKY KATZ DRANOFF &  
GLASS, L.L.P.  
Attorney for Defendant State Farm  
475 Park Avenue South, 26<sup>th</sup> Floor  
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DANIEL GAMMERMAN, ESQ.  
Attorney for Defendant Hickory Homes  
6800 Jericho Turnpike, Suite 110W  
Syosset, New York 11791

Upon the following papers numbered 1 to 43 read on this motion to disqualify; Notice of Motion/ Order to Show Cause and supporting papers 1 - 21; Notice of Cross Motion and supporting papers    ; Answering Affidavits and supporting papers 22 - 31; Replying Affidavits and supporting papers 32 - 37; Other (Affidavit in Further Opposition 38 - 43; ~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that the motion by defendant State Farm Fire and Casualty Company for an order disqualifying Ian Douglass Orr and the firm of Orr and Brown, P.C. from representing plaintiff in this matter is granted; and, it is further

**ORDERED** that Ian Douglass Orr and the firm of Orr and Brown, P.C. is disqualified and the matter is stayed for thirty (30) days from the date of this order so that plaintiff may obtain new counsel, if he so chooses; and, it is further

**ORDERED** that defendant State Farm Fire and Casualty Company is required to serve a copy of this order upon plaintiff and plaintiff's counsel, with notice of entry, within ten (10) days of the date of

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this order.

Plaintiff commenced this action to recover damages he allegedly sustained as a result of a breach of contract and breach of duty of care by defendant State Farm Fire and Casualty Company (“defendant”) in connection with a homeowner’s insurance policy issued to him by defendant on December 20, 2009 for premises known as 169 Fairview Avenue, Port Chester, New York (“the premises”).<sup>1</sup> On March 13, 2010, while the policy was still in effect and premiums paid, the premises was damaged when a 40 foot tree fell on it during a rain and windstorm. Plaintiff and his family were directed by the police department to evacuate the home as a result of the extensive damage caused by the tree. Thereafter, for a period of approximately five months, plaintiff handled the claim with defendant on his own. He advised defendant that he retained an attorney, Ian Douglass Orr (“attorney Orr”), to represent him on or about August 5, 2010. From the date of the windstorm to the date plaintiff retained counsel, defendant paid for alternate living quarters for plaintiff and his family. Thereafter, and at least through June 30, 2011, defendant continued to pay rent for such alternate living quarters on behalf of plaintiff.

After attorney Orr was retained by plaintiff, with a letter dated January 6, 2011, he submitted an invoice dated June 2, 2010 in the amount of \$13,045.37 to defendant for payment to “Homeowners Claim Services” for emergency restoration and mitigation work it had allegedly completed at the premises in May of 2010. Defendant claims that after receipt of this invoice from attorney Orr, it questioned him with regard to the hours billed for managerial and supervisory work, as well as the manner in which Homeowners Claim Services obtained “power” to use its equipment, and requested “dry out” reports. During the next few weeks defendant maintains that it unsuccessfully attempted to gain this information from attorney Orr and to enter the premises for a home inspection. It contends that some of the damage sustained at the premises was as a result of a failure to mitigate damages by plaintiff. Additionally, defendant asserts that it did not receive proper proofs of loss for contents as it had requested from plaintiff and then attorney Orr. As a result thereof, defendant placed plaintiff’s claim under investigation by its special investigation unit. Thereafter, in a letter dated January 21, 2011 attorney Orr indicated to defendant that he had “obtained an agreement with the mitigation vendor [Homeowners Claim Services] for payment and satisfaction of the (June/2010) mitigation invoice submitted for [plaintiff’s] claim” and that plaintiff was withdrawing this claim. Defendant continued its investigation into the claim as well as negotiating with attorney Orr regarding the need for a complete demolition and rebuild of the premises (which defendant agreed was required after hiring an engineer to “re-inspect” the premises). On or about January 24 and 25, 2011 defendant’s agent went to the office of Homeowners Claim Services and found no one there and discovered that its telephone had been disconnected. Defendant requested an examination under oath of attorney Orr after it completed one of plaintiff where he testified that he did not hire Homeowners Claim Services, did not know it, never authorized it to work at the premises, and did not pay it for services. Attorney Orr refused to appear for an examination under oath and indicated that he would not forward information regarding records for

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<sup>1</sup>The court’s records reflect that the complaint was dismissed against defendant Hickory Homes and Properties, Inc. by order dated September 19, 2013 and that the cause of action alleging a violation of General Business Law § 349 was dismissed.

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Homeowners Claim Services to defendant. Finally, after granting authority to pay rent on behalf of plaintiff through June 30, 2011 and completing its investigation into plaintiff's claim, defendant denied any further coverage to plaintiff on the policy stating in its May 27, 2011 letter to plaintiff that

“[o]ur denial of your claim is based on the following reasons: State Farm Fire & Casualty Company has concluded that you have violated the policy provision relating to concealment or fraud during the presentation of your claim.

Additionally, you have failed to cooperate with State Farm's investigation by your failure to provide documents requested during the investigation and you failed to cooperate by failing to produce Mr. Orr [for] an examination under oath.

The investigation also concluded that that you provided false and misleading information during the claim investigation.

In reaching its determination, State Farm Fire & Casualty Company has relied upon the following terms and conditions of your insurance policy, which include the following:

Please refer to your policy:

Please review the SECTION I- CONDITIONS section of your policy, which states:

#### SECTION I - CONDITIONS

2. Your Duties After Loss. After a loss to which this insurance may apply, you shall see that the following duties are performed:

d. as often as we reasonably require:

(2) provide us with records and documents we request and permit us to make copies;

(4) produce employees, members of the insured's household or others for examination under oath to the extent it is within the insured's power to do so; and

Please also review the SECTION I AND SECTION II - CONDITIONS sections of your policy, which states:

2. Concealment of Fraud. We do not provide coverage for an insured who, whether before or after a loss, has:

a. intentionally concealed or misrepresented any material fact or circumstance; or

b. engaged in fraudulent conduct;

relating to this insurance.

Defendant now seeks an order disqualifying attorney Orr and his law firm, Orr & Brown, P.C., from representing plaintiff in this matter. It claims that because attorney Orr acted as plaintiff's claim representative throughout the claim's process and was the "alter ego" of Homeowners Claim Services, on whose behalf defendant claims he submitted a fraudulent invoice which resulted in a denial of plaintiff's insurance claim, he will be called as a witness. Defendant asserts that attorney Orr is the only person with knowledge of the invoice issued by Homeowners Claim Services and thus, is an indispensable witness. They claim that he must be disqualified because his representation violates the advocate-witness rule of the code of professional conduct and because there is a conflict of interest between attorney Orr and plaintiff. Defendant submits a copy of a Business Certificate dated May 27, 2005 filed in the office of the County Clerk for the County of Westchester on May 27, 2005 in which Ian D. Orr certified that he was "conducting or transacting business in the County of Westchester under the business name or designation of HOMEOWNERS CLAIM SERVICE." Additionally, defendant provides a copy of a Certificate of Discontinuance of Business filed January 28, 2011 in the County Clerk's Office for the County of Westchester and certified by Ian D. Orr on January 28, 2011, which indicates that Homeowners Claim Service was discontinued on December 31, 2010.

Rule 3.7 of the Rules of Professional Conduct states in pertinent 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 to an uncontested issue;
  - (2) the testimony relates solely to the nature and value of legal services rendered in this matter;
  - (3) disqualification of the lawyer would work a 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.

"The disqualification of an attorney is a matter that rests with the sound discretion of the [trial court]. In order to disqualify counsel pursuant to the advocate-witness rule, the moving party must demonstrate that (1) the testimony of the opposing party's counsel is necessary to his or her case, and (2) such testimony would be prejudicial to the opposing party" (*McElduff v McElduff*, 101 AD3d 832, 833, 954 NYS2d 891 [2d Dept 2012] *internal quotations and citations omitted*).

It is clear that it is more than "likely" that plaintiff's attorney will be called as a witness to testify with regard to significant issues of fact concerning the very substance of this lawsuit, *i.e.* the submission of an invoice for payment by defendant for work allegedly performed by an entity under which he himself conducted business. Attorney Orr's testimony with regard to the invoice submitted on behalf of his business is necessary inasmuch as defendant relied on its evaluation of that claim in denying plaintiff coverage for having submitted a fraudulent claim, and, clearly, such testimony would be damaging to

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plaintiff. Attorney Orr appears to be the only person with knowledge of the work allegedly provided to plaintiff by his company, which is a significant factual issue in this matter, thus he is a necessary witness and must be disqualified (*see Fuller v Collins*, \_\_\_ AD3d \_\_\_, 2014 NY Slip Op 1149 [2d Dept 2014]; *Friia v Palumbo*, 89 AD3d 896, 932 NYS2d 542 [2d Dept 2011]).

“An attorney may not place himself in a position where a conflicting interest may, even inadvertently, affect, or give the appearance of affecting, the obligation of the professional relationship” (*Roddy v Nederlander Producing Co. of America, Inc.*, 96 AD3d 509, 509, 949 NYS2d 10 [1st Dept 2012] *internal citations and quotations omitted*). “Attorneys owe fiduciary duties of both confidentiality and loyalty to their clients. Thus, attorneys have continuing obligations to protect their clients' confidences (*see Code of Professional Responsibility DR 4-101 [b] [22 NYCRR 1200.19 (b)]*). Moreover, an attorney must avoid not only the fact, but even the appearance, of representing conflicting interests. [T]he greatest trust between [people] is the trust of giving counsel. This unique fiduciary reliance . . . is imbued with ultimate trust and confidence. Furthermore, [t]he duty to deal fairly, honestly and with undivided loyalty superimposes onto the attorney-client relationship a set of special and unique duties, including maintaining confidentiality, avoiding conflicts of interest, . . . and honoring the clients' interests over the lawyer's. Indeed, the lawyer may not place himself in a position where a conflicting interest may, even inadvertently, affect, or give the appearance of affecting, the obligations of the professional relationship” (*Flores v Willard J. Price Associates, LLC*, 20 AD3d 343, 344, 799 NYS2d 43 [1st Dept 2005], *internal citations omitted*). Rule 1.7 of the Rules of Professional Conduct states in pertinent part: (a) ... a lawyer shall not represent a client if a reasonable lawyer would conclude that either: (1) the representation will involve the lawyer in representing differing interests; or (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.”

Here, where at the very least, attorney Orr has an interest in protecting his license to practice law (in that it is alleged that his business submitted a fraudulent claim on behalf of a client), those interests may differ from those of plaintiff in securing homeowner's insurance for the rebuilding of his premises in this breach of contract claim. The loyalty which is required of attorney Orr cannot be provided to plaintiff under the circumstances of this case and, the appearance of impropriety abounds.

Accordingly, defendant's motion to disqualify attorney Orr and the law firm of Orr & Brown, P.C. from representing plaintiff in this matter is granted. The matter is stayed for thirty days in order for plaintiff to obtain new counsel, if he so chooses.

Dated: 4.15.2014

  
A.J.S.C.

\_\_\_\_ FINAL DISPOSITION     X  NON-FINAL DISPOSITION