

Ast v Cohen
2015 NY Slip Op 30611(U)
April 15, 2015
Supreme Court, New York County
Docket Number: 652277/14
Judge: Donna M. Mills
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SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT : DONNA M. MILLS
Justice

PART 58

MARK AST,

Plaintiff,

-v-

NANCY COHEN, et al.,

Defendants.

INDEX No. 652277/14

MOTION DATE _____

MOTION SEQ. No. 003

MOTION CAL No. _____

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

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits... 1

Answering Affidavits- Exhibits _____ 2, 3

Replying Affidavits _____

CROSS-MOTION: YES NO

Upon the foregoing papers, it is ordered that this motion to disqualify defendant Roger Fidler, Esq. as attorney for other defendants in this action is decided as follows:

Plaintiff Mark Ast brings this motion to disqualify Mr. Fidler as counsel for several defendants, based on the Code of Professional Responsibility DR § 5-101(A) and § 5-102(B), 22 NYCRR §§ 1200.20 and 1200.21.

In the instant action, plaintiff has alleged that defendant Fidler has committed and conspired to commit fraud and other acts, which include but are not limited to various acts considered to be securities crimes by the Securities and Exchange

Commission. It is alleged by plaintiff that defendant Fidler as company treasurer, corporate counsel, officer, independent consultant, and director of defendant Proteonomix, played a unique and critical role in perpetuating the alleged fraud. Plaintiff now seeks the disqualification of defendant Fidler, by virtue of his various roles in Proteonomix.

Mr. Fidler opposes the motion disqualifying him from representing other named defendants. He has submitted waivers of conflicts from several defendants. While Mr. Fidler acknowledges that because of his knowledge of Proteonomix, he is in a unique position. He however states in his opposition to the motion that he has limited his representation of the other defendants to moving to dismiss the action for failure to acquire jurisdiction. It is noted that said motion has already been filed.

The standard on a motion to disqualify is whether the movant has met its burden to show that the testimony to be given by the witness is necessary and that if called by the opposing side, the testimony would be prejudicial to the witness-advocate's client (*S & S Hotel Ventures L.P.*, 69 N.Y.2d at 446, *see also Talvy*, 205 A.D.2d at 152). "Any doubt concerning the necessity for the attorney's testimony should be resolved in favor of disqualification" (*Zagari v. Zagari*, 295 A.D.2d 891, 891 [4th Dept 2002], *citing Matter of Stober v. Gaba & Stober, P.C.*, 259 A.D.2d 554, 555 [2d Dept 1999]; *108th Street Owners Corp. v. Overseas Commodities, Ltd.*, 238 A.D.2d 324 [2d Dept 1997]). For testimony to be "necessary" the Court must consider the "significance of the matters, weight of the testimony, and availability of other evidence" (*S & S Hotel Ventures L.P.*, 69 N.Y.2d at 446). A motion to disqualify should be denied where the testimony sought is cumulative as there is other evidence available either from a third party or from the

parties themselves (*Plotkin v. Interco Dev. Corp.*, 137 A.D.2d 671 [2d Dept 1988]). “A witness whose testimony is, at best, cumulative is not a necessary witness” (*Talvy*, 205 A.D.2d at 143, 152; see also *Sokolow, Dunaud, Mercadier & Carreras LLP v. Lacher*, 299 A.D.2d 64 [1st Dept 2002] [disqualification required where advocate was the only one who could provide testimony on a critical issue in case]; *Matter of Cowen & Co. v. Tecnoconsult Holdings, Ltd.*, 234 A.D.2d 86 [1st Dept 1996] [holding that attorney’s testimony is unnecessary when four other witnesses are available to testify on the same issue]).

Even if the testimony is relevant and highly useful, it may not be strictly necessary (*Plotkin, supra*). If an attorney will not testify on behalf of the client, the Court must still consider the effects of the attorney being called to testify by opposing counsel. Then, disqualification will be required only if it is apparent that the attorney’s testimony will be prejudicial to the testifying attorney’s client. (*id.*). By requiring that the moving party provide proof as “to the content or subject matter of the testimony that might be elicited from the ... attorney” and “how such testimony would be so adverse to the factual assertions or account of events offered on behalf of the [party] as to warrant disqualification,” the law is protecting, to the extent possible, the party’s right to be represented by an attorney of the client’s choosing (*Goldstein, supra*, 52 AD3d at 472).

Under the circumstances, movant has not met his burden of showing the existence of a conflict of interest so as to require Mr. Fidler to disqualify himself from representing some of his co-defendants. The potential for conflict raised by plaintiff is purely speculative and academic. Provided that Mr. Fidler has made, or makes, full disclosure to each client, no ethical provision or policy considerations require

disqualification of Mr. Fidler at this time. Moreover, the plaintiff has not offered any decisional authority to support the proposition that an attorney-witness is precluded from representing a party during pre-trial matters.

Accordingly, it is

ORDERED that the plaintiff's motion to disqualify defendant Roger Fidler as attorney for several defendants is denied with leave to renew before the trial commences.

Dated: 4/15/15

Donna M. Mills
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION
DONNA M. MILLS, J.S.C.