Charles M. Weiss, Inc. v Hosseini
2016 NY Slip Op 31131(U)
June 15, 2016
Supreme Court, New York County
Docket Number: 652700/15
Judge: Cynthia S. Kern

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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CHARLES M. WEISS, INC.,

Index No. 652700/15

Plaintiff,

-against-

DECISION/ORDER

SHADI HOSSEINI, DDS,

Defendant.

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HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Notice of Cross-Motion and Affidavits Annexed.....	2
Replying Affidavits.....	3
Exhibits.....	4

Plaintiff Charles M. Weiss, Inc. commenced the instant action alleging causes of action for breach of contract and economic tort arising out of License Agreements between the parties. Defendant Shadi Hosseini, DDS now moves for an Order pursuant to Rule 3.7(a) of the Rules of Professional Conduct ("RPC") disqualifying plaintiff's counsel. Plaintiff cross-moves for an Order withdrawing its demand for a jury trial on the ground that the terms of the License Agreements at issue expressly preclude a trial by jury. Plaintiff's cross-motion is unopposed. For the reasons set forth below, defendant's motion is granted and plaintiff's cross-motion is granted without opposition.

The relevant facts according to the complaint are as follows. Plaintiff is a New York corporation whose sole shareholder was Charles M. Weiss, D.D.S. until his death on December 30, 2012. Subsequently, Roya Moghadassi-Weiss, Esq., who is both plaintiff's counsel and Mr. Weiss' wife, became plaintiff's sole shareholder and remains plaintiff's sole shareholder to date.

Plaintiff leases two floors in the Chrysler Building from TST/TMW 405 Lexington, L.P., Tishman Speyer. The 69th Floor of the building is dedicated to leasing full or part-time, fully furnished dental operatories and offices to dental practitioners. Defendant, a dentist, has been a tenant of plaintiff's since March 2010 when she and Dr. Arshjot S. Ahuja, her ex-associate/partner, signed License Agreements for part-time use of operatories and office space on the 69th Floor of the building.

Subsequently, the partnership between defendant and Dr. Ahuja dissolved and defendant commenced a lawsuit against Dr. Ahuja seeking various relief, which was thereafter resolved pursuant to a so-ordered agreement. Subsequent to the dissolution of defendant's partnership with Dr. Ahuja, defendant complained to plaintiff, specifically Moghadassi-Weiss, about certain problems she had with the leased space, specifically, *inter alia*, that the sunlight in the space negatively affected her patients and prevented her from working; that her dental supplies were being stolen; that there were issues with the maintenance of her dental chairs; and that she wanted exclusive use of the space known as the east-side operatories to expand her practice and have full control over her work space. The complaint alleges that Moghadassi-Weiss attempted to remedy these issues in various ways and that she told defendant that defendant would not be able to rent the east-side operatories until the expected renewal of the lease with the landlord of the building in 2017 and provided defendant with a projected monthly rent for the requested space.

Shortly thereafter, defendant's attorney came to the leased premises to speak with Moghadassi-Weiss and informed her that defendant would not be coming back to the leased premises, that she was looking for other office space but that defendant would continue to pay

rent and attempt to assign her lease. After defendant allegedly removed her belongings from the leased space in a manner in violation of the License Agreements, defendant's attorney notified Moghadassi-Weiss that defendant refused to pay any more rent and that she was abandoning her lease.

Thereafter, plaintiff, represented by its sole shareholder Moghadassi-Weiss, commenced the instant action against defendant asserting causes of action for breach of contract and economic tort based on defendant's alleged default under the License Agreements in failing to pay rent, failing to provide a security deposit in the amount equal to one month's rent and abandoning the leased premises and defendant's alleged maligning, disparaging and defaming of plaintiff and Moghadassi-Weiss by publishing falsehoods about them which have allegedly harmed plaintiff's good will and business reputation.

The court now turns to defendant's motion for an Order disqualifying plaintiff's counsel. Rule 3.7(a) of the RPC provides, with certain exceptions, that "[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." "The advocate-witness rule requires an attorney to withdraw from a case 'if the lawyer knows or it is obvious that the lawyer ought to be called as a witness on a significant issue on behalf of the client.'" *Sokolow, Dunaud, Mercadier & Carreras LLP v. Lacher*, 299 A.D.2d 64, 74 (1st Dept 2002), quoting New York Code of Professional Responsibility DR 5-102 [A][22 NYCRR 1200.21(a)]. "Where an attorney representing a party was an active participant in a disputed transaction and has personal knowledge of the underlying circumstances, he ought to be called as a witness on behalf of his client and it is improper for him to continue his representation." *Chang v. Chang*, 190 A.D.2d 311, 318 (1st Dept 1993).

However, "Rule 3.7 lends itself to opportunistic abuse. 'Because courts must guard against the tactical use of motions to disqualify counsel, they are subject to fairly strict scrutiny, particularly motions' under the witness-advocate rule." *Murray v. Metropolitan Life Ins. Co.*, 583 F.3d 173, 178 (2d Cir. 2009), quoting *Lamborn v. Dittmer*, 873 F.2d 522, 531 (2d Cir. 1989). Thus, "such disqualification is required only where the testimony by the attorney is considered necessary." *Broadwhite Assocs. v. Truong*, 237 A.D.2d 162, 162 (1st Dept 2002). "Testimony may be relevant and even highly useful but still not strictly necessary. A finding of necessity takes into account such factors as the significance of the matters, weight of the testimony, and availability of other evidence." *S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp.*, 69 N.Y.2d 437, 446 (1987). However, "[a]ny doubts as to the existence of a conflict should be resolved in favor of disqualification." *Chang*, 190 A.D.2d at 319.

Here, defendant has established that plaintiff's counsel, Moghadassi-Weiss, must be disqualified from representing plaintiff in the instant action on the ground that she will need to be called as a witness at trial as her testimony is necessary. Moghadassi-Weiss is plaintiff's sole shareholder and is the only witness who can testify as to the License Agreements at issue in the instant litigation and as to plaintiff's damages based on the alleged breach of the License Agreements and the alleged defamation. Although it is undisputed that the License Agreements were signed by her deceased husband, Moghadassi-Weiss has affirmed that she was a witness to these agreements and has not offered any other witness who would be able to testify as to same. Further, Moghadassi-Weiss is the only witness who can testify as to the dealings plaintiff had with defendant prior to the commencement of the instant action which plaintiff alleges constitutes defendant's default under the License Agreements and defamatory conduct. Indeed,

the complaint is replete with allegations that defendant made all requests and complaints to Moghadassi-Weiss and that it was Moghadassi-Weiss alone who communicated with defendant about said issues. Although there may have been other witnesses to the alleged defamation, Moghadassi-Weiss is the only witness who can testify as to how such alleged defamatory conduct has damaged the plaintiff and plaintiff has failed to provide the court with names of any other witnesses who could be called to testify as to the information Moghadassi-Weiss has in her possession.

Plaintiff's assertion that defendant's disqualification motion should be denied as moot on the ground that disqualification under Rule 3.7(a) is triggered only when the attorney serves as an advocate before a jury and plaintiff has withdrawn its demand for a jury trial is without merit. The First Department has held that even in a case where "there will be a non-jury trial, that fact does not diminish the unseemly and ineffective position of an advocate who becomes a witness arguing his own credibility." *Grossman v. Commercial Capital Corp.*, 59 A.D.2d 850, 850 (1st Dept 1977). Moreover, nothing in the language of Rule 3.7(a) suggests that disqualification of an attorney under that provision only applies when the attorney tries a case before a jury.

Plaintiff's assertion that defendant's disqualification motion should be denied on the ground that it is premature and should only be considered after pre-trial proceedings are complete is without merit. "[C]ourts often permit attorneys who are potential witnesses to represent clients throughout pretrial proceedings including discovery and dispositive proceeding before considering disqualification." *Uribe Bros. Corp. v. 1840 Wash. Ave. Corp.*, 26 Misc.3d 1235 *4 (Sup. Ct. Bronx County 2010). However, a motion to disqualify counsel will only be viewed as premature if at the stage of the litigation at which such motion is brought, the court

cannot determine whether the lawyer at issue needs to be called as a witness. *See id* ("At this stage of the litigation,...doubt remains that [the attorney] in fact needs to be called as a witness. As a result, this motion can be viewed as premature.") *See also Salomone v. Abramson*, 48 Misc.3d 318, 329 (Sup. Ct. N.Y. County 2015)("where there is little doubt as to the substance of the lawyer's testimony or whether it is necessary to prove a party's claim, then disqualification need not await completion of discovery.") Here, at this stage of the litigation, the court has no doubt that Moghadassi-Weiss will need to be called as a witness. Further, plaintiff has failed to provide any evidence that further discovery in this case will lead to a finding that Moghadassi-Weiss will not be needed as a witness at trial and has failed to provide names of any other witnesses who may be called to testify as to the information Moghadassi-Weiss has in her possession.

To the extent plaintiff asserts that defendant's disqualification motion should be denied on the ground that Eric Nelson, Esq. will be assisting Moghadassi-Weiss during the litigation, such assertion is without merit. Plaintiff provides Nelson's one-sentence affirmation in which he affirms that he has "been engaged by attorney Roya Moghadassi-Weiss, of counsel, to assist her as necessary, or as we may otherwise agree, in the litigation of the above-captioned matter." However, such affirmation does not change this court's determination that Moghadassi-Weiss must be disqualified from representing plaintiff as the affirmation fails to explain the extent of Nelson's involvement in the litigation and it fails to state that Nelson will be the attorney that will be trying the case.

Finally, plaintiff's assertion that defendant's disqualification motion should be denied on the ground that disqualification of Moghadassi-Weiss would impose substantial hardship on

plaintiff is without merit. An exception to the advocate-witness rule is if "disqualification of the lawyer would work substantial hardship on the client." Rules of Professional Conduct, 3.7(a)(3). However, "no hardship exception is demonstrated beyond a conclusory statement." *Salomone*, 48 Misc.3d at 329. Further, it is well-settled that an "allegation of pecuniary hardship alone is insufficient to avoid disqualification, because financial hardship is not synonymous with substantial hardship within the meaning of the exception." *Grossman*, 59 A.D.2d at 850. Here, plaintiff asserts that disqualification of Moghadassi-Weiss would work substantial hardship on it because it is a small corporation and that its damages would be substantially minimized if plaintiff is compelled to retain counsel other than Moghadassi-Weiss as its litigation costs would be high. However, such allegations are merely conclusory as plaintiff has not provided any evidence that it cannot afford to pay other counsel. Moreover, such allegations are immaterial as financial hardship alone, without more, is insufficient to avoid disqualification under Rule 3.7(a)(3).

Accordingly, plaintiff's cross-motion to withdraw its demand for a jury trial is granted without opposition and defendant's motion to disqualify plaintiff's counsel is granted. It is hereby

ORDERED that plaintiff's counsel is disqualified from representing plaintiff in the instant action; and it is further

ORDERED that the case is stayed for thirty (30) days from the date of this decision to allow plaintiff the opportunity to obtain new counsel. The parties shall appear for a conference in Part 55 on July 26, 2016 at 11:00 a.m. This constitutes the decision and order of the court.

Dated: 6/15/16

Enter: _____
J.S.C.
HON. CYNTHIA S. KERN
J.S.C.