

High Value Trading LLC v Shaoul
2016 NY Slip Op 32411(U)
December 8, 2016
Supreme Court, New York County
Docket Number: 651788/11
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK, PART 11

-----X
 HIGH VALUE TRADING LLC and
 ALSKOM REALTY, LLC,

Index No. 651788/11

Plaintiffs,

-against-

JACK SHAOUL and UNIVERSE ANTIQUES, INC.,
 Defendants.

-----X
 Joan A. Madden, J.:

Defendants move to disqualify plaintiffs' counsel, Philip C. Chronakis, Esq. (Chronakis).¹

Plaintiffs oppose the motion, which is denied for the reasons below.

Background

This action arises out of allegations that in March 2010, defendants sold plaintiffs a fake painting purportedly created by Renoir, for \$1,100,000. The court notes that the action is trial ready and this disqualification motion was made on October 25, 2016, less than six weeks before the December 8, 2016 trial date, and two years after the note of issue was filed.

The disqualification motion relates to issues surrounding the conflicting testimony and statements by Nicholas Milani ("Milani"), a former associate of Alexander Komolov, an art dealer, who owns plaintiffs, regarding whether Komolov signed a general release dated July 25, 2011 ("the Release"), which defendants maintain discharges them from liability with respect to the painting at issue in this action.

Milani was first questioned by counsel for defendants at defendants' counsel's office in February 2013, without notice to plaintiffs. The questioning was videotaped without a court

¹Defendants incorrectly label the motion as a motion *in limine*

reporter although a transcript was prepared from the videotape.² Plaintiffs objected to the deposition as improper, and defendants thereafter subpoenaed Milani's deposition in accordance with the CPLR. Milani appeared for the subpoenaed deposition on October 15, 2013. Milani responded to defendants' questions, but left the deposition shortly after counsel for plaintiffs' began to question him. At his deposition, Milani testified that Komolov signed the Release as he had when questioned in February 2013.

Following a motion for contempt by the plaintiffs, the court directed that Milani appear and testify at a further deposition. Before the deposition was taken, however, Milani provided the an affidavit dated March 4, 2015 to plaintiffs ("the Affidavit"),³ which he signed in the presence of his attorney, Jeffery Millman ("Millman"), in which he recants his prior testimony with respect to Komolov and his dealings with defendants, including regarding the Release.⁴ Defendants, maintain that the Affidavit is directly linked to the settlement of the Federal Action

²Defendants maintain that contrary to plaintiffs' characterization, Milani's February 2013 testimony was not a "secret deposition," but, rather, a "statement under oath" taken as part of defendants' pre-litigation investigation before they interposed their answer.

³Defendants referred to the Affidavit as a "knockout affidavit."

⁴Specifically, in the Affidavit, Milani states that "the statements made by me in regard to [Komolov] and his business dealings with [defendants], including but not limited to the execution of a General Release dated July 25, 2011, and possession, ownership and description of any and all paintings which were mentioned by me at the above mentioned occurrences were inaccurate and false" (Milani, Aff., ¶ 3). Milani avers that the Affidavit was made "without duress, undue influence and/or promise from anyone and in the presence of my attorney, Jeffrey Millman, Esq." (Id., ¶ 3). He further states that "[a]t the time I made these statements [at the deposition], I did not exercise fair and impartial judgment and accurate recollection of the facts as my perception of reality and sense of fairness were impeded and affected by the lawsuit filed by Mr. Komolov and subsequently the money judgment entered against me personally and my company, Milani Packing Inc." (Id., ¶ 4). Presumably, Milani's "perception of reality" was in response to Komolov's lawsuit and the judgment against him.

which was brought by Komolov and plaintiff Alskom Realty, LLC (“Alskom”), against Milani, and others for alleged violations of the Racketeer Influenced and Corrupt Organizations Act.⁵ Under the settlement agreement which was made on March 5, 2015, the day after Milani executed the Affidavit, and the parties agreed to seal certain records related to the settlement.

In response to the Affidavit, defendants moved, by order to show cause, for various relief, including for an order removing Roman Popik as counsel for plaintiff High Value based on his alleged role in drafting the Affidavit. However, while the motion was pending Chronakis, who was counsel for Alskom, was substituted as counsel for High Value thus rendering that aspect of the motion moot. Defendants also sought, *inter alia*, the deposition of Popik and the continued deposition of Milani, as well as an order that Milani and his counsel to produce settlement documents filed under seal in the Federal Action. In its decision and order dated October 21, 2015, the court granted the motion to the extent of ordering Milani and Popik to appear for depositions before a Special Referee but limited such depositions to questions related to the Affidavit.⁶ The court rejected defendants’ request to unseal the settlement documents in the Federal Action, finding that defendants had not made a sufficient showing as to their relevance and materiality. The court also noted that the documents attached to defendants’ July 20, 2015 letter to the court, demonstrated that the key terms of the settlement agreement were part of the

⁵Defendants failed to answer the complaint in the Federal Action and, in November 2013, a judgment was entered against them in the amount of \$1,288,265.39.

⁶Specifically, with respect to Milani, the court limited the questions to those related to the Affidavit, including the relationship, if any, between his statements in the Affidavit and the settlement of the Federal Action. With regard to Popik, the court limited the questions to those related to the Affidavit, including the circumstances surrounding, and the events leading up to, the drafting of the Affidavit.

public file in the Federal Action and were known to the defendants.

The court ordered depositions of Milani and Popik were held respectively on December 14, 2015, and November 30, 2015. At his deposition, Milani testified that the statements in the Affidavit were false and that he signed it because it was a condition of settling the Federal Action.

Following the conclusions of the Milani and Popik depositions, defendants sought no further relief until almost a year later, when they submitted a proposed order to show cause on October 5, 2016, less than 21 days before trial, for an order (i) directing a hearing involving Popik, Chronakis, Komolov, Milani and Millman or, alternatively, ordering their depositions before a Special Referee and precluding the assertion of the attorney-client privilege during such depositions; (ii) directing Milani and his counsel to produce all settlement documents which they have consented to seal in the Federal Action ; (iii) ordering that plaintiffs be precluded from relying on the Affidavit or evidence adduced from Milani relating to his position that he lied in giving prior depositions. By order dated October 7, 2016, the court declined to sign the order to show cause writing that:

[D]efendants have failed to demonstrate a legally sufficient basis for the proposed relief sought in the order to show cause. First, much of the relief sought by the order to show cause, including the request for the settlement documents in the Federal Action, has been previously addressed and resolved by the court. Furthermore, since the action is on the trial calendar for trial on October 26, 2016, this proposed application is made within weeks of trial. Thus, in order obtain further discovery, defendants are required to demonstrate the existence of “unusual or unanticipated circumstances” (Uniform Rules of Trial Courts, Section 202.21(d), and defendants have failed to meet this standard. In this connection, the court notes that defendants have already had the opportunity to depose Milani and Popik regarding issues surrounding the Affidavit. In addition, defendants provide no

explanation as to why they waited until almost a year after such depositions to seek more discovery, including the depositions of Millman, Chronakis, and Komolov. In any event, the additional discovery sought by defendants relates solely to issues of Milani's credibility, about which there is already ample evidence in the record, and which are for resolution at trial.

After the court denied the order to show cause, and the trial date was adjourned to December 8, 2016, defendants made this motion to disqualify Chronakis as counsel, arguing that "based on his leadership role" in obtaining the Affidavit, and on the ground that defendants intend to call him as a witness to testify as to his participation and creation of the Affidavit and therefore under Rule 3.7 of the Rules of Professional Conduct Chronakis should be disqualified as plaintiffs' attorney.

Plaintiffs oppose the motion, arguing that plaintiffs have not demonstrated that the facts surrounding the Affidavit consist of a "significant issue" or that the information sought from Chronakis is not available from other sources, such that plaintiffs should be deprived on their choice of counsel. Plaintiffs further argue that the motion should be denied as it was made on the eve of trial with the intent "to stall and derail the proceedings," citing Strongback Corp. v. N.E.D. Cambridge Ave. Dev. Corp., 32 AD3d 793, 794 (1st Dept 2006).

Discussion

"Disqualification of a law firm during litigation implicates not only the ethics of the profession but also the substantive rights of the litigants. Disqualification denies a party's right to representation by the attorney of its choice. . . ." S & S Hotel Ventures Ltd. Partnership v 777 S.H. Corp., 69 NY2d 437, 443 (1987)(citations omitted). Moreover, this court is mindful that disqualification motions "are often used as a litigation tactic 'inflicting hardship on the current client and delay upon the courts by forcing disqualification even though the client's attorney is ignorant of any confidences of the prior client.'" Talvy v American Red Cross in Greater New York, 205 AD2d 143, 148 (1st Dept 1994), aff'd 87 NY2d 826 (1995).

Under the advocate as witness, "[d]isqualification may be required only when it is likely that the testimony to be given by the witness is 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 & Hotel Ventures Ltd. Partnership v 777 S.H. Corp., 69 NY2d at 445-469 (citations omitted); Talvy v American Red Cross in Greater N.Y., 205 AD2d at 152; see Rules of Professional Conduct rule 3.7 [22 NYCRR 1200.29], former Code of Professional Responsibility DR 5-102(A)(22 NYCRR 1200.21).

In this case, defendants have not met their burden of demonstrating that Chronakis is a necessary witness such that he should be disqualified as plaintiffs' counsel. First, it cannot be said that any knowledge that Chronakis possesses as to the circumstances surrounding Milani's signing of the Affidavit are of such significance as to justify depriving plaintiffs of their choice of counsel particularly in light of Milani's testimony that the statements in the Affidavit are false. In any event, defendants have not shown that disqualification is warranted given the availability of other witnesses with personal knowledge of the circumstances surrounding the Affidavit including Milani, Popik and Millman. See e.g. Campbell v. McKeon, 75 AD3d 479 (1st Dept 2010)(motion court properly denied disqualification where movant did not establish the unavailability of other sources of evidence); OCS Optical Disc Service GmbH v. Toshiba Corp., 41 AD3d 166, 167 (1st Dept 2007)(disqualification not warranted where attorney's testimony was "merely cumulative"). Finally, the timing of this disqualification motion on the eve of trial suggests that it was made by defendants to gain strategic advantage and/or to delay these proceedings. See Strongback Corp. v. N.E.D. Cambridge Ave. Dev. Corp., 32 AD3d at 794.

Accordingly, it is

ORDERED that the motion is denied.

DATED: December 8, 2016



HON. JOAN A. MADDEN
 J.S.C.