

Lyoussi v Etufugh

2018 NY Slip Op 30846(U)

May 4, 2018

Supreme Court, New York County

Docket Number: 805102/2016

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

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Jacqueline Lyoussi,

Plaintiff,

- v -

Ngozi Etufugh, D.D.S., and Nassau Oral &
Maxillofacial Surgery, PLLC,

Defendants.
-----X

Index No.
805102/2016

**DECISION
and ORDER**
Mot. Seq. 2

HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff Jacqueline Lyoussi (“Lyoussi” or “Plaintiff”) commenced this dental malpractice action by filing a summons and complaint on March 4, 2016. Lyoussi seeks to recover damages allegedly sustained following a third molar extraction that Lyoussi received from Ngozi Etufugh, D.D.S. (“Etufugh”) on October 16, 2013. Lyoussi alleges that as a result of Etufugh’s negligence, Lyoussi “has suffered and continues to suffer from injury/damage to nerves/ nerve structures; injury/damage to the gums and tissue surrounding the extraction; loss of feeling on the right side of Plaintiff’s mouth; loss of taste; chronic mouth and jaw pain; discomfort; debilitating headaches; malalignment of teeth and/or bite malocclusion; anxiety; stress; emotional distress; mental and emotional anguish; diminished quality of life; and loss of enjoyment of life.” (Lyoussi’s Verified Bill of Particulars, page 6).

Lyoussi is represented by Paul T. Davis, Esq. (“Davis”). Davis is Lyoussi’s husband. Davis and Lyoussi were married on October 17, 2016.

Presently before the Court is defendants Etufugh and Nassau Oral & Maxillofacial Surgery, PLLC (collectively, “Defendants”) motion seeking an Order to disqualify Davis from acting as Lyoussi’s attorney because “he is almost certainly a witness herein and cannot function both as an advocate and as a witness

to essential facts.” (Affirmation of Kenneth J. Burford, Esq. (“Burford Aff.”)), at ¶ 2. Lyoussi opposes Defendants’ motion to disqualify Etufugh.

Factual Allegations

Defendants state that the records of Etufugh show that Davis was Lyoussi’s emergency contact person in October 2013. (Burford Aff. at ¶ 7). Defendants state that following Etufugh’s care of Lyoussi in October 2013, when Lyoussi was treated by Riverdale Oral Surgery on December 13, 2013 for her alleged nerve damage, Davis “was not only her emergency contact person and ‘partner’ but was also present and driving her home.” (*Id.* at ¶ 8). Defendants allege that Davis should be disqualified from representing Lyoussi because he would be a witness to Lyoussi’s alleged permanent injuries following the October 23, 2013 surgery in light of his relationship with her. (*Id.* at ¶ 10). Defendants allege, “As plaintiff and Paul Davis were ‘partners’ (see Exhibit ‘E’) at least as of December 13, 2013, Mr. Davis would be a witness at a minimum to those ‘permanent injuries’ following the October 23, 2013 surgery.” (*Id.*)

Defendants also allege that “there is conflict in the likely testimony to be given by plaintiff and that of her attorney and husband.” (*Id.* at ¶ 19). Defendants claim, “Merely by way of example, in her verified complaint, plaintiff alleges that as a result of the tooth extraction, she has been rendered ‘lame’. It is unlikely, based upon the absence of any such reference in the medical/dental records received thus far, that Mr. Davis will testify that his wife cannot walk as a result of the extraction.” (*Id.*)

In opposition, Davis avers in his affidavit that he was Lyoussi’s emergency contact person for the third molar extraction that she received from Etufugh in October 2013, but “was not present for the procedure and at no time did [he] speak with Defendant Etufugh about the procedure.” (Davis Aff. at ¶ 11). Davis avers that he picked up Lyoussi from Riverdale Oral Surgery after her December 2013 appointment, but “was not present for the appointment and did not discuss the procedure with the provider.” (*Id.* at ¶ 12). Davis further avers:

To be clear, I have never accompanied Plaintiff to any dental appointment or treatment related to the injuries claimed in this action, or ever been present for any dental

appointment, consultation, treatment or procedure, or ever spoken to any provider regarding any dental appointment, consultation, treatment or procedure, related to the injuries claimed in this action, which Plaintiff sustained from the third molar extraction that Plaintiff received from Defendant Etufugh in October 2013.

(*Id.* at ¶13).

Davis further avers that “Plaintiff does not intend to call me as a witness at trial.” (Davis Aff. at ¶22). Davis further avers, “Any non-cumulative testimony that I might offer would concern issues that are not significant issues of fact in this matter.” (*Id.*) Davis further argues, “Defendants have failed to show that my testimony is necessary, considering the availability of other evidence” such as the medical records from Etufugh and Riverdale Oral Surgery which show the immediate onset of Lyoussi’s injuries. (*Id.* at ¶ 23). Davis further argues, “Dendants offer only speculation and conjecture that my testimony could conflict with that of Plaintiff.” (*Id.* at ¶ 25).

Legal Standard

“A movant seeking disqualification of an opponent’s counsel bears a heavy burden.” (*Mayers v. Stone Castle Partners, LLC*, 126 A.D. 3d 1, 6 [1st Dept 2015]) The burden is heavy because “[a] party has a right to be represented by counsel of its choice, and any restrictions on that right ‘must be carefully scrutinized.’” (*Mayers*, 126 A.D. 3d at 6). Under the advocate-witness rule (Rules of Professional Conduct rule 3.7[a] [22 NYCRR 1200.29], former Code of Professional Responsibility DR 5-102[a]), “[a] lawyer shall not act as advocate before a tribunal in a manner in which the lawyer is likely to be a witness on a significant issue of fact.” Rule 3.7[a]. The advocate-witness rule “is not to be mechanically applied, as disqualification of an attorney is a matter which rests within the sound discretion of the trial court.” (*Advanced Visual Concepts, Ltd. v. Saffron Props., LLC*, 51 Misc 3d 50, 51 [App Term 2016] [citations omitted]).

Disqualification under this rule “may be required only when it is likely that the testimony to be given by the witness is necessary.” (*S & S Hotel Ventures Ltd. Partnership v. 777 S. H. Corp.*, 69 N.Y.2d 437, 445-46 [1987]). For purposes of

this rule, “[t]estimony 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, 69 N.Y.2d at 446). “Whether an opposing party intends to call the attorney as a witness is not dispositive of whether the attorney ought to be called.” (*Burdett Radiology Consultants v. Samaritan Hosp.*, 158 A.D.2d 132, 134 [3rd Dept. 1990]). Moreover, “Although it may be determined at the close of discovery that disqualification is warranted, this should not prevent counsel from pursuing pretrial activities.” (*Dishi v. Fed. Ins. Co.*, 976 N.Y.S.2d 379, 380 [1st Dept 2013]).

Discussion

Defendants have a “heavy burden” of showing that Davis should be disqualified from representing Lyoussi. (*Mayers v Stone Castle Partners, LLC*, 126 A.D. 3d 1, 6 [1st Dept 2015]). Because Lyoussi “has a right to be represented by counsel of [her] choice, . . . any restrictions on that right ‘must be carefully scrutinized’” by this Court. (*Mayers*, 126 A.D.3d at 6). Here, Defendants’ conclusory claims that Davis would have witnessed Lyoussi’s alleged injuries sustained from the October 2013 surgery because of the nature of their relationship is insufficient, without more, to meet their heavy burden of establishing that Davis’ testimony is “necessary” for purposes of a motion to disqualify counsel based on the advocate-witness rule.

Wherefore, it is hereby,

ORDERED that the motion to disqualify Paul T. Davis, Esq., from acting as Plaintiff’s attorney is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: MAY 4, 2018



EILEEN A. RAKOWER, J.S.C.