

Thomas v Curreri

2018 NY Slip Op 31642(U)

March 7, 2018

Supreme Court, Kings County

Docket Number: 505880/14

Judge: Debra Silber

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9

x

CHARLES J. THOMAS, as guardian of the property of
MAGOMED ABDUSALAMOV, an incapacitated person,
BAKANAY ABDUSALAMOVA, individually, PATIMAT
ABDUSALAMOVA, SHAKRIZAT ABDUSALAMOVA and
SAYGIBAT ABDUSALAMOVA as infants by their
mother and natural guardian BAKANAY
ABDUSALAMOVA,

Plaintiffs,

-against-

ANTHONY G. CURRERI, M.D., OSRIC S. KING, M.D.,
GERARD P. VARLOTTA, D.O., BENJAMIN ESTEVES,
JR.,

Defendants.

x

DECISION / ORDER

Index No. 505880/14
Motion Seq. No. 40
Date Submitted: 3/1/18
Cal. No. 63

Recitation, as required by CPLR 2219(a), of the papers considered in the review of plaintiffs' motion to disqualify defendant Gerard P. Varlotta's expert.

Papers	NYSCEF Doc.
Order to Show Cause, Affirmation and Exhibits Annexed.....	<u>796, 825-827</u>
Answering Affirmation and Exhibits Annexed.....	<u>830-839</u>
Reply and Exhibit Annexed.....	<u>840-841</u>

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

This is a medical malpractice and negligence action arising from a boxer's injuries during and following a professional boxing match. Plaintiffs move to disqualify Michael Schwartz, D.O. from serving as an expert for defendant Gerard P. Varlotta, D.O., based upon the fact that plaintiffs' counsel consulted with Dr. Schwartz for the purpose of possibly retaining him as plaintiffs' expert witness.

As the Third Department explained in *Roundpoint v V.N.A. Inc.* (207 AD2d 123, 125 [3d Dept 1995] [internal citations omitted]):

To resolve the issue of whether a claimed conflict of interest disqualifies an expert, courts have used a two-step analysis, first seeking to determine if it was objectively reasonable for the party claiming to have initially retained the expert to conclude that a confidential relationship existed between them and then, secondly, to ascertain if any confidential or privileged information was disclosed by said party to the expert. Affirmative answers to both inquiries requires disqualification while negative responses to either inquiry will likely result in a finding that disqualification would not be appropriate.

Here, although plaintiffs' counsel consulted with the defendant's expert, he did not retain him, and under the circumstances, it is not objectively reasonable to conclude that a confidential relationship existed (*see Winzelberg v 1319 50th St. Realty Corp.*, 114 AD3d 673 [2d Dept 2014]). Even if a consultation with an expert, without retention, could create a confidential relationship in some circumstances, there is no indication that the one15 to 20 minute telephone conversation between Dr. Schwartz and plaintiffs' counsel herein involved the disclosure of privileged or confidential information. Schwartz asserts that no privileged information or confidences were imparted to him by plaintiffs' counsel which he did not already know about from the publicity following the bout.

Plaintiffs' counsel offers only conclusory claims that confidential and privileged information had to have been provided to the expert, thereby failing to satisfy plaintiffs' burden on the motion (*see Winzelberg v 1319 50th St. Realty Corp.*, 35 Misc 3d 715, 718 [Sup. Ct., Kings County 2012] ["neither the movant nor the Synagogue have alleged that confidential information was actually disclosed to" the expert], *affd.* 114 AD3d 673 [2nd Dept 2014]; *Tower Ins. Co. of New York v State*, 20 Misc 3d 698, 702 [Ct. Cl. 2008] [expert denied having obtained confidential information which was not

controverted]; *Rodriguez v Pataki*, 293 F Supp 2d 305, 312 [SDNY] [“conclusory claims that expert received ‘confidential’ information ‘regarding [their] analyses, thought processes, and deliberations’ insufficient to meet burden on motion to disqualify“], *affd.* 293 FSupp. 2d 315 [SDNY 2003]; *cf. Pazooki v. Richard Obreza Trucking, Inc.*, 2005 N.Y. Misc. LEXIS 8434, *1 [Sup Ct., NY County 2005] [evidence that privileged information was disclosed to expert that was not controverted by expert].

Indeed, as with motions for attorney disqualification, the court must be mindful of the use of motions to disqualify experts for tactical advantage where no confidences have been revealed (*see Solow v W.R. Grace & Co.*, 83 NY2d 303, 310 [1994] [“such disqualification motions may be used frivolously as a litigation tactic when there is no real concern that a confidence has been abused”]). Moreover, it would be unfair to allow one party to limit the available pool of experts in a specialty by briefly consulting with each of them, particularly where the expert expressed an adverse opinion (*cf. Carrasquillo v Rothschild*, 110 Misc 2d 758, 760 [Sup. Ct., Bronx County 1981] [“the opinion of an expert . . . should be equally available to all parties willing to pay an appropriate fee for time consumed by travel and testimony, and for whom the expert is willing to testify as to that opinion. To conclude [otherwise] would enable one party to the litigation to deny access to outstanding experts in a particular field to its adversary by consulting and ‘retaining’ those experts first”]; *United States v International Business Machines Corp.*, 406 F Supp 175, 178 [SDNY 1975] [“a party to a lawsuit involving highly specialized technology could, by the employment of experts, effectively insulate itself from the highly probative testimony that those experts might provide”]).

Accordingly, it is

ORDERED that the motion is denied.

This shall constitute the decision and order of the court.

Dated: March 7, 2018

ENTER:



Hon. Debra Silber, J.S.C.

Hon. Debra Silber
Justice Supreme Court