

Gartenberg v Supreme Co. I LLC

2019 NY Slip Op 30083(U)

January 7, 2019

Supreme Court, New York County

Docket Number: 154159/2017

Judge: Robert D. Kalish

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: Hon. _____ Robert D. KALISH
Justice

PART 29

GARY GARTENBERG,

INDEX NO. 154159/2017

Plaintiff,

MOTION DATE 12/19/18

- v -

MOTION SEQ. NO. 002

SUPREME COMPANY I LLC et al.,

Defendants.

NYSCEF Doc Nos. 73-85 and 207-208 were read on this motion for admission pro hac vice.

Motion by defendants Driton LLC d/b/a Ninos Ristorante Italiano and Arbesa Rest. Corp. (collectively, "Driton") pursuant to 22 NYCRR § 520.11 and CPLR 2221 (e) for an order granting Mr. Peter B. Van Deventer, Esq. admission pro hac vice to appear as their defense counsel in this action is denied with prejudice.

BACKGROUND

On August 20, 2018, the Court denied Driton's first motion on procedural grounds and directed movants to resubmit their application with certain missing information. (NYSCEF Doc No. 70.) It is undisputed that Mr. Van Deventer is a member in good standing of the New Jersey Bar and is a partner at Lewis Brisbois, the current attorney of record for Driton.

In a supplemental affidavit submitted with the prior motion, Mr. Van Deventer had indicated that "approximately ten" pro hac vice motions had been filed on his behalf over the past 2.5 years. (NYSCEF Doc No. 69 ¶ 4.) Mr. Van Deventer had also indicated that he was "unable to determine the exact number of pro hac vice motions that have been filed on [his] behalf in the Supreme Court of New York due to an inability to secure that information from two prior firms." (*Id.*)

In this renewed application for admission pro hac vice, Mr. Van Deventer now informs the Court that he has applied for admission pro hac vice in New York 52 times in his 40 years of practice as an attorney and that those applications have been granted 51 times and denied one time (referring, as to the denial, to this Court's August 20, 2018 decision and order on motion seq. 001). (NYSCEF Doc No. 77 ¶¶ 4-5.)

On December 27, 2018, pursuant to a directive from this Court at the December 19, 2018 oral argument on this motion, counsel for movants e-filed an affidavit by Ms. Janice Knerr, a "Claims Resolution Manager at Gallagher Bassett, the Third Party Administrator of claims for Navigator's Insurance Company on behalf of [Driton]." (NYSCEF Doc No. 207 [Aff of Knerr])

¶ 1.) Ms. Knerr averred that the basis of the instant application is Gallagher Basset's thirty-year relationship with Mr. Van Deventer and his firms, which Ms. Knerr has retained "on behalf of insureds in hundreds of personal injury litigation matters in a number of States including New York State." (*Id.* ¶ 2.) Ms. Knerr indicated that she has always required that, if a matter is tried, Mr. Van Deventer serve as lead trial attorney, and that, in this case, she always expected that, if the matter were to be tried, Mr. Van Deventer would serve as lead trial counsel for Driton. (*Id.* ¶¶ 2-3.)

DISCUSSION

In the first instance, although the instant motion is made pursuant to CPLR 2221 (e), this Court permits renewed applications for admission pro hac vice without leave where a prior submitted application is incomplete or procedurally improper under the Court's local part rules. Here, the first application for the relief requested herein was denied upon the Court's receipt of an incomplete application. The instant application has cured this deficiency by supplying all the information required by the Court's rules regarding applications for admission pro hac vice. Moreover, Mr. Van Deventer has indicated that he was previously unable to determine the total number of pro hac vice applications made on his behalf at the time he supplemented the papers submitted with the first motion. As such, the Court will now consider the instant motion on its merits as leave to renew was not explicitly required here, and even if it was, the Court would have granted leave to renew based upon Mr. Van Deventer's representations regarding the availability of the missing information at the time the prior motion was made.

22 NYCRR § 520.11 (a) (1) provides that "[a]n attorney and counselor-at-law or the equivalent who is a member in good standing of the bar of another state, territory, district or foreign country may be admitted pro hac vice[] in the discretion of any court of record[] to participate in any matter in which the attorney is employed."

In 1998, the Appellate Division, Third Department held that the Supreme Court did not abuse its discretion when it denied a defendant's motion to admit pro hac vice two out-of-state attorneys. (*See Neal v Ecolab Inc.*, 252 AD2d 716 [3d Dept 1998].) The court stated that "[a]lthough Supreme Court did not set forth the reasons for its decision, we can assume from this record that the court exercised its discretion to deny the motion in the interest of retaining calendar and courtroom control." (*Id.*) The court stated further that "[w]hile pro hac vice admission furthers this State's policy favoring representation by counsel of one's own choosing, that policy must be balanced against the interest in promoting judicial efficiency and a trial court's considerable authority to control its courtroom and calendar." (*Id.* [citation omitted].) In *Neal*, the pro hac vice application was filed 2.5 years after the commencement of the action and only two weeks prior to trial, and there had been a failure to clarify the role that each of the total of four attorneys would play as trial counsel. The court found that these factors "support[ed] the conclusion that admitting the two additional attorneys would have a disruptive effect on the trial" and saw no reason to disturb the lower court's decision. (*Id.* at 716-717.)

In 2005, the Appellate Division, Second Department adopted and applied the *Neal* balancing test in reversing a lower court's denial of an application for admission pro hac vice. (*Giannotti v Mercedes Benz U.S.A., LLC*, 20 AD3d 389 [2d Dept 2005].) The court found that,

where the plaintiff/client had specifically moved to admit two California attorneys who were familiar with claims such as the plaintiff's, where the applicant attorneys had solicited the plaintiff directly after having learned of his identity through discovery in a California case, and where the application was made three months after the filing of an amended complaint, "there was no discernable adverse impact upon considerations of 'judicial efficiency' or the court's management of its 'courtroom and calendar'." (*Id.*, quoting *Neal*.)

In 2011, the Appellate Division, First Department also adopted and applied the *Neal* test and reversed a lower court's denial of a defendant's pro hac vice application where "[t]he motion was made within days after the commencement of the action[and] pro hac vice admission would not adversely affect judicial efficiency or the court's control of its courtroom and calendar." (*Perkins v Elbilialia*, 90 AD3d 543, 544 [1st Dept 2011], citing *Giannotti*.) The court noted that "[t]his State's policy favors 'representation by counsel of one[s] own[] choosing.'" (*Id.*, citing *Neal*.) The court further noted that the defendant's submissions had satisfied the statutory requirements for pro hac vice admission pursuant to 22 NYCRR § 520.11 (a), (c), and (e), and that the out-of-state attorney had relevant subject-matter expertise.

Here, the Court finds based upon the papers submitted and the oral argument that Mr. Van Deventer has, like the out-of-state attorney in *Perkins*, met all the relevant regulatory requirements pursuant to 22 NYCRR § 520.11. Meeting these requirements is necessary, but not sufficient, for the Court to grant the instant application. First, the Court must apply the *Neal* test and balance the State's policy favoring representation by counsel of one's own choosing with the adverse effect, if any, that granting the application would have on judicial efficiency or this Court's control of its courtroom and calendar.

This Court interprets this State's policy favoring representation by counsel of one's own choosing as accruing to the benefit of the direct client in a matter, i.e., the named plaintiff(s) or defendant(s), in a matter where an insurance company stands in their shoes. While Driton's counsel indicated at the December 19, 2018 oral argument that Driton specifically selected Mr. Van Deventer to represent it, the affidavit of Ms. Knerr contradicts this representation by counsel and clarifies that it is in fact Gallagher Basset, a third-party claims administrator, that is the true applicant. Gallagher Basset, being the administrator of claims for Navigator's Insurance Company, presumably the company which sold the insurance policy to Driton, is twice-removed from the named defendants in this matter. And, as the affirmation in opposition to Ms. Knerr's affidavit correctly points out, this Court granted movants leave to submit an affidavit from Driton indicating whether and why Driton chose Mr. Van Deventer to represent it, and this has not been done. (NYSCEF Doc No. 208.) As evidenced by Ms. Knerr's affidavit, it is Gallagher Basset which chose Mr. Van Deventer specifically, on behalf of Driton, while Driton has been twice-removed from any acts of Gallagher Basset. As such, the Court finds that the State's policy favoring representation by counsel of one's own choosing has very little applicability to the instant application.

As the Court stated on the record at the December 19, 2018 oral argument, the timing of the instant application is not of concern to the Court and would not result in the type of disruption or confusion that was apparently the case in *Neal* and that impacted that court's control of its courtroom and calendar. Nevertheless, in weighing the *Neal* factors, the Court

concludes that granting the instant application would have an impermissibly adverse effect on judicial efficiency. Mr. Van Deventer has applied for admission pro hac vice 52 times, 10 of which, by his own admission, were in the past 2.5 years. Driton's counsel indicated at the December 19, 2018 oral argument that it was unaware that new reciprocity rules for admission to the New York Bar on motion went into effect as of September 1, 2016, and that Mr. Van Deventer could potentially obtain admission on motion. Counsel further indicated that, had Mr. Van Deventer been aware of the availability of admission on motion, he would already have obtained it. As this procedure has been available to Mr. Van Deventer for over two years now, had he availed himself of it, perhaps all 10 of the applications for admission pro hac vice would have been unnecessary. It is more efficient for the judiciary not to have to entertain motions for admission pro hac vice of attorneys who perennially make such applications and who are otherwise eligible for admission to the New York Bar on motion based upon the reciprocity statute. (See 22 NYCRR § 520.10; <https://ww2.nycourts.gov/attorneys/admissions/admission.shtml>; <http://www.nybarexam.org/aom/admissiononmotion.htm>; <https://www.njbarexams.org/appinfo.action?id=12> [collectively, last accessed on January 7, 2019, at 11:56 a.m.])

This Court would distinguish the analyses in *Giannotti* and *Perkins*, which focused primarily on the timing of the filing of the pro hac vice applications and, to a lesser extent, on the expertise of the applicants. This Court has found no authority which has analyzed the question of whether a court should exercise its discretion in granting or denying a pro hac vice application based upon the finding that the sheer number of pro hac vice applications regarding a specific out-of-state attorney over a relevant time period has such an adverse effect on judicial efficiency as to warrant denial of the application when weighed against the state's policy favoring representation by counsel of one's own choosing.

There comes a time when inefficient practices that bog down motion courts must be discouraged or ended. In the instant case, the Court finds that, based upon the 52 times Mr. Van Deventer has sought admission in New York pro hac vice, that 10 such times were in the past 2.5 years, and that he is a member in good standing of the New Jersey Bar, which now has reciprocity with New York for the purposes of admission to the New York Bar on motion, it does adversely affect the judicial efficiency of the New York courts at large to grant this application. Although there is no bright line as to the number of times an out-of-state attorney may apply for admission pro hac vice, to this Court, 52 times over a 40-year period, and 10 times in the past 2.5 years, appears to be an extreme outlier. Particularly in light of the rule changes regarding admission on motion, the appropriate procedure for such a perennial applicant for admission pro hac vice from the State of New Jersey to follow is to seek admission to the New York Bar upon motion.

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CONCLUSION

Accordingly, it is

ORDERED that the motion by defendants Driton LLC d/b/a Ninos Ristorante Italiano and Arbesa Rest. Corp. pursuant to 22 NYCRR § 520.11 and CPLR 2221 (e) for an order granting Mr. Peter B. Van Deventer, Esq. admission pro hac vice to appear as their defense counsel in this action is denied with prejudice.

The foregoing constitutes the decision and order of the Court.

1/7/2019
DATE


HON. ROBERT D. KALISH
J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	<input type="checkbox"/> REFERENCE
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	