

<b>Chhabra v Couture Interior Design Intl. Inc.</b>
2019 NY Slip Op 32419(U)
August 13, 2019
Supreme Court, New York County
Docket Number: 653644/2018
Judge: Louis L. Nock
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART IAS MOTION 38EFM

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NEERU CHHABRA,  
  
Plaintiff,

INDEX NO. 653644/2018

MOTION DATE 03/14/2019,  
03/14/2019

- v -

COUTURE INTERIOR DESIGN INTERNATIONAL INC.,  
DURITE USA, LLC, BEN CHASIN, MAURICE SEDAKA,

MOTION SEQ. NO. 001 002

Defendants.

**DECISION + ORDER  
ON MOTION**

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HON. LOUIS L. NOCK:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 27, 28, 29, 39

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 002) 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 30, 31, 32, 33, 34, 35, 36, 37, 38

were read on this motion to/for DISQUALIFY COUNSEL

Upon the foregoing documents, plaintiff's motion to dismiss the second counterclaim of defendants Couture Interior Design International Inc. and Ben Chasin, a/k/a Bernard Chasin (seq. no. 001), and defendant Durite USA LLC's motion to disqualify plaintiff's counsel (seq. no. 002), are consolidated for disposition and decided in accordance with the following memorandum.

Background:

Plaintiff commenced this action, by and through her present counsel, the law firm of Cozen O'Connor, 45 Broadway, Suite 1600, New York, New York (the "Firm"), by the filing of

a summons and complaint on July 20, 2018 (NYSCEF Doc. No. 1).<sup>1</sup> The essential gravamen of the suit is capsulized in the complaint's introductory paragraphs, opening with the description that: "This action arises out of defendants' coordinated scheme to induce plaintiff to enter into a home improvement contract and pay deposits thereunder without providing any goods or services to plaintiff." (Complaint ¶ 1.)

Defendant Durite USA LLC ("Durite") is a former client of the Firm, which forms the gravamen of Durite's instant motion to disqualify that law firm as counsel for the plaintiff in this case (motion seq. no. 002). The motion to disqualify is predicated upon the fact that a partner of the Firm performed legal services for Durite in or around 2002 before the U.S. Patent and Trademark Office (the "PTO") in connection with securing a patent for Durite's "Durazzo" process, explained in its moving papers as a process that "enables many top designers and architectural firms to take advantage of design flexibility that was not possible with metal strips, incorporating terrazzo stone art on floor, elevator lobbies, terrazzo front desk furniture and walls" and "allows for a monolithic, seamless terrazzo finish which is very elegant and not able to be produced by others in the same manner." (Doc. No. 18.) Those patent-related services resulted in a U.S. patent for the Durazzo process in 2002 and a Canadian patent for the process in 2009. Once the patents were secured, the Firm's involvement was essentially limited to making sure that the Durazzo patent did not expire for the failure by Durite to periodically pay U.S. patent maintenance fees and similar Canadian patent fees.<sup>2</sup> The only other involvement was an unbilled telephone consultation in 2016 or 2017 responding to Durite's inquiry about a possible

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<sup>1</sup> References to "Doc. No." found henceforth in this decision and order are abbreviated forms of the more fully stated source identifier "NYSCEF Doc. No."

<sup>2</sup> The Firm was under a ministerial obligation to inform former patent clients of periodic notices issued by the PTO regarding the patentholder's need to make a maintenance fee payment (*see*, 37 CFR 10.23[c][8]).

infringement of its patent by some third party (completely unrelated to this action). The Firm's said partner opined to Durite that no infringement had occurred.

The instant action has nothing to do with the Durazzo patent whatsoever. Rather, it has to do with plaintiff's allegations that Durite, among the other defendants, accepted payment for home renovations and installations that never occurred.

Plaintiff has moved to dismiss defendants' second counterclaim for defamation/commercial disparagement (motion seq. no. 001) on the ground that "the particular words complained of" are never set forth in the counterclaim (CPLR 3016).

The Motion to Disqualify:

The right of any party to be represented by the counsel of her choice is a "valued right [and] restrictions must be carefully scrutinized" (*Ullman-Schneider v Lacher & Lovell-Taylor PC*, 110 AD3d 469, 469-70 [1<sup>st</sup> Dept 2013] [brackets in original; citation omitted]; *see also, Solow v W.R. Grace & Co.*, 83 NY2d 303, 310 [1994] ["A per se disqualification rule . . . conflicts with public policies favoring client choice and restricts an attorney's ability to practice"]). That is why a movant seeking disqualification of adversary counsel "must meet a heavy burden of showing that disqualification is warranted" (*Ullman-Schneider, supra*, at 470).

Rule 1.7 of the Rules of Professional Conduct (22 NYCRR 1200.0, rule 1.7) governs conflicts related to current clients. However, there is no competent evidence that there presently exists any current attorney-client relationship between the Firm and Durite, notwithstanding Durite's counsel's affirmation statement that "the Cozen O'Connor firm represents Durite" (Doc. No. 18 ¶ 4). "Disqualification of a party's chosen counsel . . . is a severe remedy which should only be done in cases where counsel's conduct will probably 'taint the underlying trial'" (*Mancheski v Gabelli Group Capital Partners, Inc.*, 22 AD3d 532, 534 [2d Dept 2005] [citation

omitted]). Nothing contained in Durite's principal's affidavit (Doc. No. 19) approaches such a showing, or any showing; as it merely points out the Firm's prior patent-related work, unrelated to the instant lawsuit alleging failure to deliver on payments made. No current retainer agreement is exhibited. Moreover, the assertion that the flooring contracted for was to be Durazzo flooring (*id.*, ¶ 31) is wholly beside the point of whether Durite failed or didn't fail to install it. Due to the lack of any sufficient showing that a current attorney-client relationship exists between the Firm and Durite, this court cannot conclude that Durite's heavy burden to clearly show a conflict with a current representational relationship, under Rule 1.7, has been sustained.

Rule 1.9 of the Rules of Professional Conduct (22 NYCRR 1200.0, rule 1.9) governs conflicts related to former clients. The factors required to be shown are: "(1) the existence of a prior attorney-client relationship and (2) that the former and current representations are both adverse and substantially related" (*Solow, supra*, at 308). Here, it cannot be said that the prior patent set-up and ministerial fee notices are, at all, related, let alone "substantially related" (*id.*), to the instant lawsuit for alleged failure to install the flooring.

The Official Comment to Rule 1.9 (Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.9 Comment [3]) addresses the meaning of "substantially related" as follows:

Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if, under the circumstances, a reasonable lawyer would conclude that there is otherwise a substantial risk that confidential factual information that would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter.

In the opinion of the court, no such reasonable conclusion could be reached under the circumstances of the instant litigation, which has nothing to do with the quality of Durazzo, or its status as a patented asset of Durite. Rather, the instant litigation alleges a failure by Durite to

install the flooring after allegedly being paid to do so. No reasonable suggestion has been proffered by Durite to the effect that any confidential factual information necessary to the Firm's prior task of securing the Durazzo patent years ago could possibly "materially advance" plaintiff's claims in this lawsuit alleging a failure to install in exchange for price paid, or that said securing of the patent can be said to "involve the same transaction or legal dispute" as this lawsuit alleging a failure to install in exchange for price paid.

Attempting to hint at some sort of nexus in support of its motion to disqualify, Durite's principal tells us that "[t]he only way to accomplish Plaintiff's desired finish was to utilize Durite's patented floating floor methodology which was patented by the Cozen O'Connor firm" (Doc. No. 19 ¶ 31).<sup>3</sup> However, this court cannot perceive how the mere fact of *utilization* of the patented flooring – allegedly contracted for but not installed – could possibly relate, substantially or not, to confidential factual information relating solely to the securing of the patent itself. In other words, this case is not about the floor's patent; it is about whether or not Durite installed, or didn't install, the floor, and if it was obligated to do so.

For the reasons set forth above, the motion to disqualify is denied.

*The Motion to Dismiss the Second Counterclaim:*

The second counterclaim of defendants Couture Interior Design International Inc. and Ben Chasin, a/k/a Bernard Chasin, sparsely alleges that plaintiff "began making false and improper statements regarding Couture and its principal Chasin falsely maligning Couture and Chasin's work, character, and integrity" (Doc. No. 8 ¶ 87). No detail whatsoever is alleged as to the content of said alleged statements. CPLR 3016 requires allegational specificity in any pleading purporting to sound in defamation, as follows: "In an action for libel or slander, the particular

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<sup>3</sup> The referenced affidavit (Doc. No. 19) contains a typographical error involving two separate paragraphs numbered 31 – one on page 6 and another on page 7. The textual reference herein to paragraph 31 is to the one on page 7.  
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words complained of shall be set forth in the complaint . . . .”<sup>4</sup> That requirement is mandatory in any pleading of a cause of action for defamation, and requires “the particular words” as well as an allegation of “the time, place and manner of the false statement and to specify to whom it was made” (*Dillon v City of N.Y.*, 261 AD2d 34, 38 [1<sup>st</sup> Dept 1999]). Dismissal of the defamation claim is warranted in the absence of specificity (*see, id.*). This result obtains whether the claim is asserted by a plaintiff in a complaint or by a defendant in a counterclaim (*see, BCRE 230 v Riverside LLC v Fuchs*, 59 AD3d 282 [1<sup>st</sup> Dept 2009]).

The second counterclaim lacks the statutorily require specificity. Therefore, it is dismissed. However, leave is granted to defendants Couture Interior Design International Inc. and Ben Chasin, a/k/a Bernard Chasin, to serve and file an amended second counterclaim which would furnish the necessary specificity in accordance with the holding of this court set forth hereinabove, within 20 days from the date of e-filing of this decision.

Accordingly, it is

ORDERED that the motion by defendant Durite USA, LLC, to disqualify plaintiff’s counsel herein is denied; and it is further

ORDERED that the motion by plaintiff to dismiss the second counterclaim of defendants Couture Interior Design International Inc. and Ben Chasin, a/k/a Bernard Chasin, is granted and, accordingly, said counterclaim is dismissed, but without prejudice to said defendants’ right to serve and file an amended second counterclaim which would furnish the necessary specificity in

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<sup>4</sup> That provision closes with the proviso: “but their application to the plaintiff may be stated generally.” That proviso will not avail defendants, as they have not satisfied the opening clauses of the provision, as to foundational specificity.

accordance with the holding of this court set forth hereinabove, within 20 days from the date of e-filing of this decision.

ENTER:

*Louis L. Nock*

<u>8/13/2019</u>			<u>LOUIS L. NOCK, J.S.C.</u>
DATE			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART	<input checked="" type="checkbox"/> OTHER
	<input type="checkbox"/> DENIED	<input type="checkbox"/> SUBMIT ORDER	
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		