SUPREME COURT OF THE STATE OF NEW YORK
KINGS COUNTY

PRESENT: HON. PAUL WOOTEN PART 97
Justice

JONATHAN BREMNER, LUCID STUDIOS, LLC, and ROBIN SKY,

Plaintiffs,

INDEX NO. 521618/2018

MOT. SEQ. NO. 3

- against -

CHARLOTTE BUSH,

Defendant.

In accordance with CPLR 2219(a), the following papers were read on plaintiffs' motion to disqualify defendant's counsel.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	1, 2
Answering Affidavits — Exhibits (Memo)	3
Replying Affidavits (Reply Memo)	4

This is an commenced by plaintiffs Jonathan Bremner (Bremner), Lucid Studios, LLC and Robyn Sky (collectively, plaintiffs),[1] against defendant Charlotte Bush (Bush or defendant) via Summons and Verified Complaint alleging causes of action for defamation, slander per se and abuse of process.

Before the Court is a motion by plaintiffs for an Order disqualifying counsel for Bush from representing her in this matter.

[1] Bremner entirely owns Lucid Studios, LLC and Robyn Sky, an unincorporated business entity.

BACKGROUND

The complaint claims that Bremner and Bush were involved in producing a play, but their professional relationship ended, and Bush allegedly engaged in making serious allegations on social media against Bremner including sexual assault allegations. Bush also sought and received an Order of Protection against Bremner in Family Court.

According to Bremner, he approached the Diana Adams Law Firm for consultation about his Family Court matters and met with Andy Izenson (Izenson), one of the firm's attorneys at the Brooklyn Bar Association. Bremner states that he brought a significant amount of material to the meeting and discussed his case at length with Izenson, who explained that he did not practice in Family Court, that his services were best utilized as a mediator and that he "knew someone close to these girls that might be willing to talk" (aff of plaintiff at 4). Thereafter, Bremner and Izenson exchanged several emails. Bremner also states that he sent Izenson a digital copy of a 250-page evidence binder that he had compiled. However, Bremner, soon afterwards, began to suspect that Izenson was acting against his interests. Following a few more email exchanges, Bremner sought other counsel for his Family Court proceedings and was allegedly told, by such counsel, that Izenson had compromised his case.

Plaintiffs, in October 2018, commenced this action sounding in defamation, slander per se and abuse of process against Bush, as mentioned above. Bush has moved, pursuant to CPLR 3211, to dismiss the action, and her attorney, J. Remy Green (Green) affirms that:

> "My involvement in this matter predates the Complaint. I initially met Defendant through a mutual friend (she had a "legal question"). Around that time, I was introduced to a larger group of women (inclusive of those who have not become my clients), who had asked for some background information on a restorative justice mediator named Andy Izenson (whom I have worked with before) who asked if someone could speak to them informally on behalf of the larger Group, to help coordinate a restorative justice process" (affirmation of defendant's counsel, dated January 11, 2019 at 1-2, annexed as exh. A to plaintiffs' moving papers).

* * *

> "Attorney Izenson mediator conveyed (without any specificity) that as a part of that process, Plaintiff was willing to take responsibility for his wrongful actions as to many of the women in the Group. However, this never came about because once Plaintiff was asked to make gestures of good faith like accepting service of process that he apparently had been dodging on an order of protection or stipulating to protective orders, the process fell apart" (*id.* at 2).

Plaintiffs move for an order disqualifying Green from representing Bush due to the improper communications that Green allegedly had with Izenson in violation of the attorney-client privilege that existed between Bremner and Bush.

DISCUSSION

"It is well settled that the disqualification of an attorney is a matter which rests within the sound discretion of the court" (*Campolongo v Campolongo*, 2 AD3d 476, 476 [2d Dept 2003]; *see Ike & Sam's Group, LLC v Brach*, 138 AD3d 690 [2d Dept 2016]; *Hele Asset, LLC v S.E.E. Realty Assoc.*, 106 AD3d 692 [2d Dept 2013]). "A party's entitlement to be represented in ongoing litigation by counsel of his or her own choosing is a valued right which should not be abridged absent a clear showing that disqualification is warranted" (*Nenninger v Kelly*, 140 AD3d 961, 961 [2d Dept 2016], quoting *Campolongo*, 2 AD3d at 476; *see also Gjoni v Swan Club, Inc.*, 134 AD3d 896, 897 [2d Dept 2015], quoting *Matter of Marvin Q.*, 45 AD3d 852, 853 [2d Dept 2007]).

> "While the right to choose one's counsel is not absolute, disqualification of legal counsel during litigation implicates not only the ethics of the profession but also the parties' substantive rights, thus requiring any restrictions to be carefully scrutinized. The party seeking to disqualify a law firm or an attorney bears the burden to show sufficient proof to warrant such a determination" (*Hele Asset, LLC*, 106 AD3d at 693).

"Absent actual prejudice or a substantial risk thereof, the appearance of impropriety alone is not sufficient to require disqualification of an attorney" (*Nenninger*, 140 AD3d at 963).

Here, plaintiffs allege that Green, Bush's attorney received privileged information regarding Bremner from his former attorney, Izenson, thereby warranting the disqualification. Plaintiffs argue

that an attorney-client relationship and privilege existed between Bremner and Izanson. It is axiomatic that the alleged binder of documents and any conversations regarding those documents would be subject to attorney-client privilege. Therefore, it is reasonable, for purposes of this motion, to accept that an attorney-client relationship existed between Bremner and Izenson.

However, plaintiffs' legal basis for arguing that Green, allegedly having received confidential information from Izenson, must be disqualified is misplaced. All the cases cited by plaintiff establish the standard by which a former representative of one party may be disqualified for representing that same party's adversary in a subsequent litigation (*see Greene v Greene,* 47 NY2d 447 [1979]; *Petrossian v Grossman,* 219 AD2d 587 [2d Dept 1995]; *Macro Cash & Carry Corp. v Berkman*, 81 AD2d 783 [1st Dept 1981]; *Neighborhood Supermarket Chain v Epic Sec. Corp.,* 162 Misc 2d 218 [Civ Ct, New York County 1994]). Here, Izenson is not representing Bush, Green never represented Bremner and there is no longer a professional relationship between Izenson and Bremner. The facts, set forth by plaintiffs describe an attorney who has received privileged information that could affect the integrity of the case, but none of the above-cited cases reflect this fact pattern and are irrelevant herein.

Further, plaintiffs bear the burden of proof to merit disqualification relief. Plaintiffs have not met this burden. It is uncontroverted that Izenson and Green have spoken. A conversation between two attorneys, though, does not create the presumption that confidences have been revealed. Green's affirmation does reference a statement by Izenson, as a mediator, that Bremner was willing to take some responsibility for his wrongful actions. Plaintiffs proffer no argument that this statement, in and of itself, was privileged, and plaintiffs have made no application to remove this statement from the pleadings.

However, based on Green's use of this statement, plaintiffs argue that "it is not unreasonable that Green also has, in his possession, the 250-page notebook that Mr. Bremner provided to the Adams Law Firm and Izenson, besides the notes that Izenson may have made in his interviews with

Bremner" (aff of plaintiffs' counsel at 14). This argument is both speculative on plaintiffs' part and insufficient to meet plaintiffs' burden of proof. "Mere conclusions based upon surmise, conjecture, speculation or assertions are without probative value" (*Maiorano v Price Chopper Operating Co.,* 221 AD2d 698, 699 [3d Dept 1995]). Analogously, mere conclusory statements, expressions of hope, or unsubstantiated allegations are insufficient to defeat a motion for summary judgment (*see Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]; *Spodek v Park Prop. Dev. Assoc.*, 263 AD2d 478, 478 [2d Dept 1999]). Further, plaintiffs have offered no proof that Bremner actually provided Izensen with the documents other then his statement in his affidavit the he "sent him a digital copy of the 250 page binder of evidence that [he] had compiled on this case" (affidavit of plaintiff at 7). While plaintiffs provide, as exhibits, a number of email exchanges between Bremner and Izenson, there is no copy of an email about or containing the alleged digital transfer of the 250-page binder.

Finally, even if it were established that Green received confidential materials and communications from Izenson, disqualification would not necessarily be warranted (*see Parnes v Parnes,* 80 AD3d 948, 953 [3d Dept 2011]). Specifically, in *Parnes*, plaintiff obtained confidential e-mails and used them, without apprising the other side of their existence at a deposition. While the Appellate Decision expressed displeasure at both the retention of the documents and the surprise use of them at deposition, it reversed disqualification of plaintiff's counsel and explained that "[a]lthough a substantial right of defendant was prejudiced by plaintiff's uncovering of and her counsel's use of the privileged documents, the less severe sanction of suppression of the e-mails is a sufficient remedy for the problem, and also protects plaintiff's valuable right to counsel of her choosing" [internal citations omitted]). Similarly, in *Surgical Design Corp. v Correa* (21 AD3d 409, 410 [2d Dept 2005]), defendants improperly retained privileged documents and attempted to use them in the litigation. The Second Department concluded that "the appropriate remedy was suppression of the information contained in those documents . . . [t]he harsh sanction of

disqualification, however, was not warranted here, especially since the practical effect . . . would be to deny . . . defendants the counsel of their own choice and further delay the action to the detriment of all concerned" (*id.* [internal citations omitted]).

CONCLUSION

Accordingly, it is hereby,

ORDERED that the motion by plaintiffs to disqualify defendant's counsel from representing her in this matter is denied; and, it is further,

ORDERED that counsel for defendant shall serve a copy of this Order with Notice of Entry upon the plaintiffs.

This constitutes the Decision and Order of the Court.

Dated: 10/10/19

PAUL WOOTEN J.S.C.

KINGS COUNTY CLERK
FILED
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