

Avezzano v Anker Mgt., Inc.

2019 NY Slip Op 34086(U)

September 27, 2019

Supreme Court, Westchester County

Docket Number: 66244/2017

Judge: Terry Jane Ruderman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF WESTCHESTER

-----X
 THOMAS AVEZZANO,

Plaintiff,

DECISION and ORDER

-against-

Index No. 66244/2017
 Motion Sequence No. 7

ANKER MANAGEMENT, INC., 901 PROPERTIES,
 L.L.C. and NORTH WHITE PROPERTIES, L.L.C.,

Defendant.

-----X
 RUDERMAN, J.:

The following papers were considered on plaintiff's motion for an order disqualifying counsel for defendants 901 Properties, L.L.C. and North White Properties, L.L.C. from continuing to represent those parties in this action:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Affirmation, Exhibits A - J	1
Anker Management's Affirmation in Support	2
Affidavit in Opposition	3
Reply Affirmation	4

Plaintiff Thomas Avezzano claims that he provided handyman and building superintendent services for properties managed by defendant Anker Management, located at 901 North Broadway and 690 and 700 North Broadway in North White Plains, which properties are owned by defendants 901 Properties, L.L.C. and North White Properties, L.L.C., respectively. This action arises out of the alleged failure by Anker Management, Inc. to pay plaintiff the wages owed for those services rendered at those properties.

The Dweck Law Firm initially appeared on behalf of Anker Management, and now represents defendants 901 Properties and North White Properties. Jack Dweck has previously

submitted an affirmation acknowledging that he is a member of both 901 Properties, LLC and North White Properties, LLC. In now moving for that firm's disqualification, plaintiff relies on the fact that it was Jack Dweck, the principal attorney of the Dweck Law Firm, who appeared as the representative witness for the depositions of defendants 901 Properties and North White Properties. Plaintiff also observes that Avezzano, in his deposition, stated that he performed his working for Jack Dweck as well as for Anker, and added that Jack Dweck personally paid his checks a couple of times. The latter fact was confirmed by Jack Dweck during his deposition testimony.

In opposition, Jack Dweck submits an affidavit in which he tentatively acknowledges that he "may have" paid Avezzano one or twice as an accommodation to the managing agent, but asserts that he neither hired plaintiff nor managed his services; he states that it was exclusively the buildings' managing agents that hired plaintiff and paid for his services over the years. Dweck argues that his testimony is not relevant or necessary for plaintiff's case, since testimony regarding plaintiff's hiring and the services he provided, and who paid him, can only come from plaintiff or from Mark Anker.

Discussion

"Disqualification of a law firm during litigation implicates not only the ethics of the profession but also the substantive rights of the litigants" (*S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp.*, 69 NY2d 437, 443 [1987]). "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 – on which the party seeking disqualification carries the burden – that counsel's removal is warranted" (*Goldstein v Held*, 52 AD3d 471, 472 [2d Dept 2008]).

Plaintiff quotes from former Code of Professional Responsibility DR 5-102, a rule which has been superseded and replaced by Rule 3.7 (a) of the Rules of Professional Conduct (22 NYCRR 1200.0). Rule 3.7 (a) provides that,

“(a) A lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact unless:

- (1) the testimony relates solely to an uncontested issue;
- (2) the testimony relates solely to the nature and value of legal services rendered in the matter;
- (3) disqualification of the lawyer would work substantial hardship on the client;
- (4) the testimony will relate solely to a matter of formality, and there is no reason to believe that substantial evidence will be offered in opposition to the testimony;

or

- (5) the testimony is authorized by the tribunal.”

There is an overwhelming likelihood that Jack Dweck will be called as a witness. It was he who appeared as the deposition witness on behalf of defendants 901 Properties and North White Properties. Moreover although he may have no significant information to proffer regarding plaintiff's hiring, he appears likely to possess significant knowledge regarding how decisions are made when a hiree's claim for payment is declined or rejected.

None of the exceptions to Rule 3.7 apply.

While Jack Dweck must be disqualified from appearing on behalf of defendants 901 Properties and North White Properties pursuant to Rule 3.7 (a), a question arises as to whether the disqualification of The Dweck Law Firm is required as well. In *Hillcrest Owners v Preferred Mut. Ins. Co.* (234 AD2d 269, 269-270 [2d Dept 1996]), the Court held that “[t]he Supreme Court properly disqualified Vincent A. DiBlasi from representing the plaintiff, since it is likely his testimony would be necessary to establish the existence of that alleged oral agreement,” but that “the Supreme Court erred in disqualifying the firm of Pizzitola & DiBlasi, P. C., [since] [a] law firm may continue representing a client even if one of its attorneys ought to be called as a

witness, and there is nothing in the record to support a conclusion that any attorney from Pizzitola & DiBlasi, P. C., other than Vincent A. DiBlasi, ought to be called as a witness” (*id.* at 269-270, citing *Talvy v American Red Cross in Greater N.Y.*, 205 AD2d 143 [1st Dept 1994], *affd* 87 NY2d 826 [1995]).

Rule 3.7 (b) (1) includes a provision for circumstances when other lawyers in the firm of the likely attorney-witness must also be precluded from serving as the client’s advocate before the tribunal. It provides that “[a] lawyer may not act as [an] advocate before a tribunal in a matter if . . . another lawyer in the lawyer’s firm is likely to be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony may be prejudicial to the client” (Rules of Professional Conduct [22 NYCRR 1200.0] rule 3.7 [b] [1]). Where there is no showing that the attorney-witness’s testimony may be prejudicial to the client’s case, it is an improvident exercise of discretion to disqualify the entire firm (*Advanced Chimney, Inc. v Graziano*, 153 AD3d 478, 481 [2d Dept 2017]). Since there is no showing here that Jack Dweck’s anticipated testimony may be prejudicial to the clients’ case, the disqualification motion must be denied at this time to the extent it seeks the disqualification of the entire Dweck Law Firm.

Accordingly, it is hereby

ORDERED that defendant’s motion for an order disqualifying The Dweck Law Firm is denied, except to the extent that Jack S. Dweck is disqualified from further representation of defendants 901 Properties and North White Properties in this matter, since he is likely to be called as a witness on a significant issue of fact; and it is further

ORDERED that the parties shall appear, *as previously directed*, in the Compliance Part

on October 31, 2019.

This Constitutes the Decision and Order of the Court.

Dated: White Plains, New York
September 27, 2019


HON. TERRY JANE RUDERMAN, J.S.C.