

**Kingston Check Cashing Corp. v Nussbaum Yates
Berg Klein & Wolpow, LLP**

2019 NY Slip Op 35011(U)

August 8, 2019

Supreme Court, Kings County

Docket Number: Index No. 502993/15

Judge: Lawrence Knipel

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Commercial Part 4 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 8th day of August, 2019.

P R E S E N T:

HON. LAWRENCE KNIPEL,
Justice.

-----X

KINGSTON CHECK CASHING CORP.,

Plaintiff,

- against -

NUSSBAUM YATES BERG KLEIN & WOLPOW, LLP,
and STEVEN CHAIM GOLDBERGER, a/k/a
CHAIM GOLDBERGER,

Defendants.

-----X

NUSSBAUM YATES BERG KLEIN & WOLPOW, LLP,

Third-Party Plaintiff,

- against -

REPUBLIC BANK OF CHICAGO,

Third-Party Defendant.

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NUSSBAUM YATES BERG KLEIN & WOLPOW, LLP,

Second Third-Party Plaintiff,

- against -

WINNE BANTA BASRALIAN & KAHN, P.C., and
WINNE BANTA HETHERINGTON BASRALIAN & KAHN, P.C.,

Second Third-Party Defendants.

-----X

The following e-filed papers read herein:

Notice of Motion/Cross Motion, Affirmation, and Exhibits Annexed _____
Affirmation (Affidavit) in Opposition and Exhibits Annexed _____
Reply Affirmation and Exhibits Annexed _____

NYSCEF#:

158-168; 190
170-189; 190, 191-200
203-208

Yes,

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KINGS COUNTY CLERK
FILED

In this action to recover damages for accounting malpractice, the defendant/third-party plaintiff/second-third party plaintiff Nussbaum Yates Berg Klein & Wolpow, LLP (Nussbaum) moves for an order: (1) disqualifying the second third-party defendants Winne Banta Basralian & Kahn, P.C., and Winne Banta Hetherington Basralian & Kahn, P.C. (collectively, Winne Banta), and all attorneys associated with Winne Banta from serving as counsel to the plaintiff Kingston Check Cashing Corp. (Kingston) and the first third-party defendant Republic Bank of Chicago (Republic); (2) determining that the subject matter of attorney-client communications between Kingston and Winne Banta has been placed “at issue” in this action; and (3) pursuant to CPLR 2221 (e), granting leave to renew its prior motion seeking to continue the pretrial deposition of Kingston’s sole shareholder, Yissachar D. Sugar. Winne Banta cross-moves for an order (1) compelling Nussbaum to produce witnesses for pretrial depositions, and (2) extending the current note of issue deadline.

This action arises out of a course of alleged embezzlement and outright fraud committed by the defendant-in-default Steven Chaim Goldberger, also known as Chaim Goldberger (Goldberger), during his employment at Kingston, a licensed check-cashing establishment governed by the Anti-Money Laundering (AML) statutes and regulations. During Goldberger’s tenure at Kingston: (1) Nussbaum acted as Kingston’s outside accountant; (2) Winne Banta acted as Kingston’s outside counsel and its Independent Examiner for purposes of its AML compliance program; and (3) Republic extended to Kingston a line of credit from which Goldberger stole a currency delivery in the amount of \$300,000. Kingston’s discovery of Goldberger’s defalcations, estimated to result in losses

to Kingston in excess of \$2-3 million, was the impetus for the underlying action against Nussbaum. In turn, Nussbaum impleaded Republic for contribution and indemnification, as well as Winne Banta for contribution. Issue has been joined in the underlying action and in each of the third-party actions. Winne Banta represents the plaintiff Kingston in the underlying action and the first-party defendant Republic in the first third-party action.¹ By order, dated Aug. 18, 2017 (NYSCEF #62), the Court denied Nussbaum's prior motion in Seq. No. 3 for an order disqualifying Winne Banta and all attorneys associated with it from continuing as counsel to both the plaintiff and Republic. On May 1, 2018, Mr. Sugar was deposed for seven consecutive hours at the offices of Nussbaum's counsel. By order, dated Oct. 26, 2018 (NYSCEF #145), the Court denied Nussbaum's prior motion in Seq. No. 12 for, among other things, an order, pursuant to CPLR 3124, compelling Mr. Sugar to appear for an additional day of deposition. By order, dated Feb. 1, 2019 (NYSCEF #149), the Court established Aug. 31, 2019 as the note of issue deadline. To date, the pretrial depositions of Nussbaum's witnesses and certain of Kingston's responses to Nussbaum's document demands remain outstanding.

Determination of Nussbaum's Motion

Request for Disqualification of Winne Banta

“[T]he 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]).

“A party's entitlement to be represented in ongoing litigation by counsel of his or her own

¹ Separate counsel represents Winne Banta as the defendant in the second third-party action.

choosing is a valued right which should not be abridged absent a clear showing that disqualification is warranted” (*id.*). On a motion to disqualify an attorney, the “heavy burden” of making such a showing is on the movant (*see Swersky v Swersky*, 262 AD2d 397, 398 [2d Dept 1999]). “The advocate-witness rules contained in the Rules of Professional Conduct (22 NYCRR 1200.0) provide guidance, but are not binding authority, for the courts in determining whether a party’s attorney should be disqualified during litigation” (*Greenberg v Grace Plaza Nursing & Rehabilitation Ctr.*, ___ AD3d ___, 2019 NY Slip Op 05390, *2 [2d Dept 2019]). Rule 3.7 (a) (“Lawyer as witness”) of the Rules of Professional Conduct generally provides that “[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.” To disqualify a lawyer under Rule 3.7 (a), the movant “must demonstrate that the testimony of the opposing party’s counsel is necessary to the [movant’s] case, and that such testimony would be prejudicial to the [opponent]” (*Cathedral Ct. Assoc., L.P. v Cathedral Props. Corp.*, 116 AD3d 649, 651 [2d Dept 2014], *lv dismissed in part, denied in part* 24 NY3d 941 [2014]).

Here, Nussbaum has failed to establish that the disqualification of Winne Banta is warranted. Nussbaum has failed to demonstrate that Winne Banta’s testimony is necessary to Nussbaum’s case, or that such testimony would be prejudicial either to Kingston or Republic (*see Levy v 42 Dune Road, LLC*, 162 AD3d 651, 653 [2d Dept 2018]; *Giammona v 72 Mark Lane, LLC*, 143 AD3d 941, 942 [2d Dept 2016]; *Cathedral Ct. Assoc., L.P.*, 116 AD3d at 651; *see also Campbell v McKeon*, 75 AD3d 479, 481 [1st Dept 2010]).

Request Concerning the Waiver of Attorney-Client Privilege

“A waiver of the attorney-client privilege may be found where the client places the subject matter of the privileged communication in issue or where invasion of the privilege is required to determine the validity of the client’s claim or defense and application of the privilege would deprive the adversary of vital information” (*Soussis v Lazer, Aptheke, Rosella & Yedid, P.C.*, 91 AD3d 753, 754 [2d Dept 2012]; *see also Deutsche Bank Trust Co. of Ams. v Tri-Links Inv. Trust*, 43 AD3d 56, 63 [1st Dept 2007]). By commencing suit against its former accountants, Kingston has not placed in issue privileged communications with its counsel. Nor are Kingston’s claims of the type that disclosure of the privileged communications is necessary to enable Nussbaum to assert its case (*see Raphael v Clune White & Nelson*, 146 AD2d 762, 763 [2d Dept 1989]; *see also IDT Corp. v Morgan Stanley Dean Witter & Co.*, 107 AD3d 451, 452 [1st Dept 2013]; *Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP*, 62 AD3d 581, 582 [1st Dept 2009]). Further, Nussbaum has long been aware of Winne Banta’s involvement with Kingston’s AML compliance before moving – not once but twice – to disqualify it. Nussbaum’s repeated attempts to disqualify Winne Banta – Kingston’s attorney of long standing – appear to have been made to secure a tactical advantage in litigation so as to deny Kingston (as well as Republic) of the valued right to representation by counsel of its choice (*see Homar v American Home Mtge. Acceptance, Inc.*, 119 AD3d 901, 901 [2d Dept 2014]; *Broadwhite Assoc. v Truong*, 237 AD2d 162, 163 [1st Dept 1997]).

Request for Leave to Continue Mr. Sugar's Deposition

As the Court ruled in its Oct. 26, 2018 order denying Nussbaum's original motion to compel Mr. Sugar to appear for an additional day of deposition, one day of "7 hours was enough." Nussbaum has offered no new facts that would change the Court's prior determination (*see Chernysheva v Pinchuck*, 57 AD3d 936, 937 [2d Dept 2008]).

Determination of Winne Banta's Cross Motion

Winne Banta has demonstrated, without opposition from Nussbaum, that in May 2015 – over four years ago – Kingston served on Nussbaum a notice to take the depositions of a corporate representative and of an accountant in charge of Kingston's files, and that, to date, Nussbaum has failed to produce either of those witnesses for a deposition. In opposition, Nussbaum contends that the depositions of its representatives must be further stalled while it is awaiting Kingston's full document production. Nussbaum's failure to sit for depositions for a period in excess of four years cannot be excused by Kingston's alleged incomplete document production. At the next appearance in this action, the Court will set the schedule for (1) the remaining depositions (that of Nussbaum and Republic); (2) the outstanding document production; and (3) the new note of issue deadline.

Conclusion

Accordingly, it is

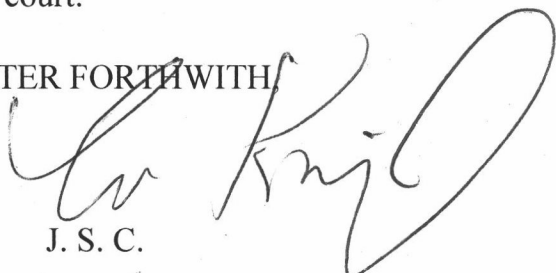
ORDERED that Nussbaum's motion in Seq. No. 14 is *denied in its entirety*; and it is further

ORDERED that Winne Banta's cross motion in Seq. No. 15 is *granted to the extent* that, at the next appearance in this action, the Court will set the schedule for (1) the remaining depositions (those of Nussbaum and Republic); (2) the outstanding document production; and (3) the new note of issue deadline.

The parties are reminded of their previously scheduled appearance in Commercial Part 4 on Sept. 20, 2019.

This constitutes the decision and order of the court.

ENTER FORTHWITH



J. S. C.

HON. LAWRENCE KNIPEL
Administrative Judge

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