

Marion Scott Real Estate, Inc. v Riverbay Corp.

2020 NY Slip Op 30312(U)

February 4, 2020

Supreme Court, New York County

Docket Number: 653953/2014

Judge: Gerald Lebovits

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. GERALD LBOVITS PART IAS MOTION 7EFM

Justice

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INDEX NO. 653953/2014

MARION SCOTT REAL ESTATE, INC.,

MOTION DATE 01/29/2020

Plaintiff,

MOTION SEQ. NO. 006

- v -

RIVERBAY CORPORATION,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 006) 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149

were read on this motion to

DISQUALIFY COUNSEL

Redmond Law PLLC, New York, NY (Steven E. Spada of counsel), for plaintiff.
Khader Law, P.C., Yonkers, NY (Michael J. Khader of counsel), and *Smith, Buss & Jacobs, LLP*, Yonkers, NY (Jeffrey D. Buss of counsel), for defendant.

Gerald Lebovits, J.:

Plaintiff, Marion Scott Real Estate, Inc., was the managing agent for the housing development in Bronx County known as Co-Op City. Marion Scott was retained by, and acted on behalf of, defendant, Riverbay Corporation, the cooperative housing corporation of Co-Op City. In 2014 Riverbay suspended Marion Scott from serving as managing agent for Co-Op City. Marion Scott hotly disputed Riverbay's claimed justifications for that suspension (and the validity of the suspension itself), and brought the present action challenging the suspension (and seeking damages that Marion Scott allegedly suffered as a result).

Riverbay's general counsel when it suspended Marion Scott as managing agent (and when it undertook to justify that suspension) was Jeffrey D. Buss, Esq. Buss is also a partner at the law firm of Smith, Buss & Jacobs LLP. Riverbay's present counsel of record in this case is Michael J. Khader, Esq., of Khader Law, P.C. Yet in addition to Khader, Jeffrey Buss has argued several prior motions and a prior appeal in this action on behalf of Riverbay; and over the past 18 months Buss has also e-filed a number of documents in this case on Riverbay's behalf.

Marion Scott now moves to disqualify Jeffrey Buss, his law firm, and Khader Law as counsel for Riverbay. Marion Scott argues, in essence, that their disqualifications each are required under the advocate-witness rules set forth in Rules of Professional Conduct 3.7 (a) and 3.7 (b) (codified at 22 NYCRR § 1200.0). Marion Scott's motion is granted as to Buss but denied as to Smith, Buss & Jacobs and as to Khader Law.

DISCUSSION

A motion to disqualify based on one of the Rules of Professional Conduct “implicates not only the ethics of the profession but also the substantive rights of the litigants”; it must therefore be resolved equitably, rather than mechanically, “in the interests of justice to all concerned.” (*S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp.*, 68 NY2d 437, 443 [1987] [internal quotation marks omitted].) Although a litigant’s “right to counsel of choice is not absolute and may be overridden where necessary—for example, to protect a compelling public interest—” it is “a valued right and any restrictions must be carefully scrutinized.” (*Id.*) This is particularly true because invocation of the Rules of Professional Conduct to disqualify a party’s counsel “in the context of an ongoing lawsuit” can “stall and derail the proceedings, redounding to the strategic advantage of one party over another.” (*Id.*; *accord Solow v W.R. Grace & Co.*, 83 NY2d 303, 309-310 [1994].)

I. Whether Jeffrey Buss Should be Disqualified as Counsel for Riverbay under Rule 3.7 of the Rules of Professional Conduct

Marion Scott relies on Rule 3.7 of the Rules of Professional Conduct, the so-called “advocate witness” rule. That rule provides, as relevant here, that an attorney “shall not act as an advocate for a tribunal in a matter” under two principal circumstances: (i) the attorney “is likely to be a witness on a significant issue of fact” (Rule 3.7 [a]); or (ii) 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” (Rule 3.7 [b]). Rule 3.7 recognizes “that the roles of an advocate and of a witness are inconsistent” and might place an improper thumb on the scales of the credibility of a testifying lawyer-witness; and also that a conflict of interest between counsel and client may result should an attorney from a law firm be called upon to give testimony that will prejudice the interests of the firm’s client. (*S & S Hotel Ventures*, 69 NY2d at 444, 446.)

Marion Scott’s argument to disqualify Jeffrey Buss under Rule 3.7 is straightforward: Marion Scott is likely to call Buss as a witness in this proceeding because, as Riverbay’s general counsel, Buss was heavily involved in the actions and events that are the subject of Marion Scott’s claims against Riverbay. (*See* NYSCEF No. 130, at 4-7.) Indeed, Marion Scott has for that reason already subpoenaed Buss’s testimony and intends to pursue his deposition. (*See id.* at 7; *see also* NYSCEF No. 134 [subpoena].)

Buss does not seriously dispute that Marion Scott likely will call him as a witness in the case. To the contrary, he represents in an affirmation that he has not objected to his deposition subpoena, that he “remain[s] prepared to appear for a deposition,” and that “[d]ue to [his] potential status as a witness, Riverbay elected to retain separate trial counsel.” (NYSCEF No. 146, at 3.)

Buss’s principal argument, therefore, is not that he is unlikely to be a *witness* in this case, but rather that he has not served as an *advocate* in the case. Buss asserts that “[s]ince I may be called as a witness I will not be serving as trial counsel,” and emphasizes that his firm “has not

entered an appearance as the attorneys of record in this case” and does not intend to do so. (NYSCEF No. 146, at 4.)

The record reflects, however, that whether or not Jeffrey Buss has served as counsel of record, he has appeared as an advocate in this case on Riverbay’s behalf. Buss has argued several motions in this court for Riverbay. (See NYSCEF No. 148, at ¶¶ 4-6.) Buss has also registered as an e-filing user in this case and repeatedly used his NYSCEF account to file papers electronically on Riverbay’s behalf, including notice of entry of a First Department decision in this case in an appeal that Buss himself had argued. (See NYSCEF No. 115 [notice of entry, signed by Buss, of the First Department decision and order in *Marion Scott Real Estate, Inc. v Riverbay Corp.*, 173 AD3d 588, 588 [1st Dept 2019]]; see also generally NYSCEF Nos. 106-109, 116, 119-121, 126 [papers e-filed by Buss]).

Since Buss has served as an advocate in a matter in which he likely will be called as a witness, Marion Scott has established that Buss should be disqualified from continuing to act as an attorney for Riverbay in this matter—whether to prepare or file papers, appear in court, or deliver oral argument.¹

II. Whether Smith, Buss & Jacobs and Khader Law, P.C., Should be Disqualified as Counsel for Riverbay under Rule 3.7 of the Rules of Professional Conduct

In addition to moving to disqualify Jeffrey Buss individually, Marion Scott also asks this court to disqualify Smith, Buss & Jacobs LLP as a whole. Marion Scott *also* seeks to disqualify Khader Law, P.C., (Riverbay’s current counsel of record) as, in essence, an affiliated entity of Smith, Buss & Jacobs. This court declines to disqualify either Smith, Buss & Jacobs or Khader Law.

A. Whether Smith, Buss & Jacobs Should be Disqualified

Marion Scott’s motion papers do not identify any lawyer from Smith, Buss & Jacobs, other than Jeffrey Buss himself, who is both involved as an advocate for Riverbay in this action

¹ Buss argues that Marion Scott improperly brought this motion to disqualify him after an extended period of inaction and delay. (See NYSCEF No. 146, at ¶¶ 14, 19.) Buss is correct that, notwithstanding Marion Scott’s protestations (see NYSCEF No. 148, at ¶ 10), it has been clear at least since the fall of 2018 that (i) this action was actively proceeding, (ii) Buss would likely be called as a witness (whether on Marion Scott’s claims or on Riverbay’s counterclaims), and (iii) that Buss was appearing in the case on Riverbay’s behalf. But the First Department has recently reaffirmed that given the important policy interests served by Rule 3.7 of the Rules of Professional Conduct, a motion to disqualify based upon this rule is not subject to laches. See *Anderson & Anderson LLP v North Am. Foreign Trading Corp.* (139 AD3d 464, 465 [1st Dept 2016]), citing *Grossman v Commercial Capital Corp.* (59 AD2d 850, 850 [1st Dept 1977]). That Marion Scott could—and likely should—have sought to disqualify Buss earlier under Rule 3.7 does not defeat its motion now.

and likely to be called as a witness.² And disqualifying one attorney from a law firm because that attorney is likely to be called as a witness does not, without more, warrant disqualifying the entire firm. (*See Talvy v. American Red Cross in Greater N.Y.*, 205 A.D.2d 143, 152 [1st Dept 1994]; *accord Hillcrest Owners, Inc. v Preferred Mut. Ins. Co.*, 234 AD2d 269, 270 [2d Dept 1996].)

A broader, firm-wide form of disqualification is required only where an attorney from the firm is likely to be called “on a significant issue other than on behalf of the client,” *and* the circumstances make it “apparent that the testimony may be prejudicial to the client.” (Rule of Professional Conduct 3.7 [b].) Here, Marion Scott has not shown that it is likely to call a witness from Smith, Buss & Jacobs who will provide testimony that prejudices Riverbay. At most, Marion Scott asserts in brief and conclusory terms that “it is apparent that the testimony of Mr. Buss will be prejudicial” to Riverbay by “undermining [its] defenses and the merit of [its] counterclaims.” (NYSCEF No. 130, at 2.) That is not enough.³ (*See, e.g., Anderson & Anderson LLP v North Am. Foreign Trading Corp.*, Index No. 651010/2011, 2014 NY Slip Op 51530 [U] [Sup Ct, NY County Oct. 20, 2014] [declining to disqualify a law firm absent a “concrete basis,” grounded in deposition testimony or other evidence, to conclude that an attorney from the firm will likely offer prejudicial testimony], *aff’d, Anderson & Anderson LLP*, 139 AD3d at 466.)

Marion Scott has thus failed to establish that this court should disqualify Smith, Buss & Jacobs, as a firm, from representing Riverbay in this action.

B. Whether Khader Law Should be Disqualified

The failure of Marion Scott’s argument for disqualifying Smith, Buss & Jacobs also dooms its request for this court to disqualify Khader Law. Marion Scott contends, in essence, that Khader Law is not *really* litigation counsel for Riverbay here, but is instead acting largely as a catspaw for Smith, Buss & Jacobs. (*See* NYSCEF No. 130, at 7-8.) That contention, though, regardless of its accuracy,⁴ is immaterial here.

² The only other Smith, Buss & Jacobs attorney identified by name in Marion Scott’s motion papers as having been involved in or had knowledge of the factual circumstances underlying this action, such that he or she could conceivably be called as a witness, is Kenneth R. Jacobs, Esq. (*See* NYSCEF No. 128, at ¶ 25.) But Marion Scott does not suggest that Jacobs has also acted (or is likely to act) as an advocate on Riverbay’s behalf in this action.

³ Marion Scott also asserts that Buss’s testimony on the various matters of which he has personal knowledge will “necessarily be adverse to his client.” (NYSCEF No. 130, at 7.) But Rule 3.7 (b) is based upon the potential conflict of interest that would arise between law firm and client when a firm attorney is called by an adversary to offer testimony that will *prejudice* the client. *See S & S Hotel Ventures* (69 NY2d at 446). Thus, the mere fact that Buss may be called as a witness by Riverbay’s adversary in litigation does not warrant disqualifying Buss’s law firm, unless Marion Scott can also show prejudice to Riverbay from his testimony. Marion Scott may well believe that Buss’s future testimony will favor its legal position (rather than that of Riverbay); but this court is not required to credit that belief absent any concrete basis to do so.

⁴ In support of this argument, Marion Scott asserts, among other things, that Smith, Buss & Jacobs and Khader Law operate out of the same address—773 Yonkers Avenue, Suite 200, in

The only reason that the asserted close connections between Smith, Buss & Jacobs and Khader Law might be relevant to disqualification would be if Smith, Buss & Jacobs were laboring under some sort of ethical conflict in representing Riverbay that might in turn be imputed to Khader Law—for example, if Smith, Buss & Jacobs were ethically required as a firm to take acts that might harm the interests of Riverbay, or if that firm had gained client confidences of Marion Scott in the course of a past representation that would be relevant to the issues in this case.

Marion Scott's motion to disqualify Smith, Buss & Jacobs is not, however, based on those types of ethical considerations. Rather, Marion Scott relies solely on Rule 3.7 of the Rules of Professional Conduct. And discussed above, this court has concluded that on this record, Rule 3.7's principles operate here only to bar *one particular attorney* (i.e., Jeffrey Buss) from acting both as witness and as advocate for Riverbay in this case, rather than also barring Buss's entire law firm from advocating for Riverbay. Absent any impairment to Smith, Buss & Jacobs's capacity as a firm to advocate for Riverbay, any relationship between that firm and Khader Law in litigating this case is irrelevant.⁵

Accordingly, it is hereby

ORDERED that Marion Scott's motion to disqualify is granted only to the extent that Jeffrey Buss, Esq. is hereby disqualified from acting on behalf of Riverbay in this action; and it is further

ORDERED that Jeffrey Buss Esq. may not prepare filings, file papers, or appear at argument as advocate for Riverbay; and it is further

Yonkers, New York. (See NYSCEF No. 130, at 8.) This court notes that although Jeffrey Buss and Michael Khader have each represented in sworn affirmations that the two firms have separate offices in different suites in the 773 Yonkers Avenue building with different addresses (see NYSCEF No. 142, at ¶¶ 6-7 [Khader affirmation]; NYSCEF No. 146, at ¶¶ 4-6 [Buss affirmation]), evidence in the record indicates that both firms in fact operate out of Suite 200 (see e.g. NYSCEF No. 126, at 1 [November 25, 2019, notice of entry signed by Michael Khader for the Law Offices of Michael J. Khader, listing an address of 773 Yonkers Avenue, Suite 200]; NYSCEF No. 148 at ¶ 11, and NYSCEF No. 149 [screenshots of webpages for Smith, Buss & Jacobs and Khader Law, P.C., that each give an address of 773 Yonkers Avenue, Suite 200].) This apparent inconsistency, although troubling, does not alter the key point on the present motion—the extent to which the two firms are organizationally unified, and the nature and degree of their cooperation in litigating this action, does not affect whether Khader Law should be disqualified under Rule 3.7.

⁵ Marion Scott also does not offer any basis for this court to conclude that disqualifying Buss individually from serving further as an advocate for Riverbay in this case is insufficient to vindicate the ethical and policy considerations underlying Rule 3.7.

ORDERED that Marion Scott's motion to disqualify is otherwise denied.

2/4/2020
DATE


GERALD LEBOVITS, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: