

Gerzog v Goldfarb

2020 NY Slip Op 30348(U)

February 6, 2020

Supreme Court, New York County

Docket Number: 653432/2018

Judge: Joel M. Cohen

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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. JOEL M. COHEN PART IAS MOTION 3EFM

Justice

-----X

IRA GERZOG,

Plaintiff,

- v -

STEVEN GOLDFARB, SONIA HERNIA, HARVEY MIGDEN,

Defendants.

-----X

INDEX NO. 653432/2018

MOTION DATE N/A

MOTION SEQ. NO. 012

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 012) 298, 299, 300, 301, 305, 313, 314, 315, 316, 313-1, 315-1, 322

were read on this motion to

DISQUALIFY COUNSEL.

Defendant Steven Goldfarb seeks an order disqualifying Plaintiff Ira Gerzog's lawyer, Mr. Joshua Wurtzel, and his firm Schlam Stone & Dolan LLP, based on Goldfarb's allegations that Wurtzel proposed a secret settlement agreement between co-Defendant Harvey Migden and Gerzog. Specifically, Goldfarb alleges that Wurtzel effectively suggested to Migden that in return for false testimony favorable to Gerzog, Gerzog would not continue to pursue his claims against Migden. The motion is based on the affirmation of Joseph Johnson, Goldfarb's lawyer, who describes a December 12 conversation with Christopher Skoczen, Migden's lawyer. According to Johnson, Skoczen shared with him the details of an August 8 conversation with Wurtzel. The relevant portion of Johnson's affirmation is provided below:

During the course of their discussion, Mr. Wurtzel stated words to the effect that so long as Mr. Migden's testimony supported Mr. Wurtzel's theory of the case, he would have no reason to keep Mr. Migden in the suit as a party. To me, it sounded like he was suggesting that this should be some sort of motivation for Mr. Migden with respect to how he testified in this matter. Mr. Skoczen then noted to Mr. Wurtzel that Mr. Migden's testimony would essentially clear him of the claims

asserted against him, such that Mr. Wurtzel would have no basis to proceed any further against him in any event.

(NYSCEF Doc. No. 299, ¶7).

Skoczen has not offered any affidavit regarding Johnson's testimony. Wurtzel, in his affirmation, denies Johnson's characterization of the conversation:

I stated that Mr. Gerzog had a strong case against Migden, but would be interested in discussing a settlement that would involve Migden providing relevant documents and truthful and complete testimony... [and that] we would have "no reason" to pursue Migden if we were able to recover against Goldfarb, since our theory was that Goldfarb and Migden were joint tortfeasors and thus liable to Mr. Gerzog for the same damages.

(NYSCEF Doc. No. 315, ¶¶ 10, 17).

Goldfarb argues that Johnson's affirmation shows that Wurtzel attempted to either suborn perjury from Migden or enter some form of "Mary Carter" agreement with Migden. Goldfarb requests Wurtzel and his firm be disqualified from further representing Gerzog in this case since (1) the unethical behavior alleged inherently warrants disqualification and (2) Wurtzel would now need to testify about his actions in this case, but would be currently unable to do so due to attorney-client privilege. Gerzog denies both the accuracy and admissibility of Johnson's affirmation, and further rejects Goldfarb's conclusions even based on Johnson's affirmation.

Goldfarb offers two principal arguments in favor of disqualifying Wurtzel and his firm from representing Plaintiffs in this action. First, Goldfarb argues that Wurtzel must be disqualified, under Rule 3.7 of New York's Rules of Professional Conduct, as a necessary witness to the conversation with Skoczen. Second, Goldfarb argues that Wurtzel's alleged conduct was prejudicial to the administration of justice and therefore Goldfarb should be disqualified under Rule 8.4.

DISCUSSION

The analysis of a motion to disqualify counsel must be undertaken with caution. “[B]ecause disqualification of a law firm during litigation may have significant adverse consequences to the client and others, it is particularly important that the [Rules of Professional Conduct] not be mechanically applied when disqualification is raised in litigation.” *Kassis v. Teacher's Ins. & Annuity Ass'n*, 93 N.Y.2d 611, 617 (1999). “Disqualification denies a party’s right to representation by the attorney of its choice” – a right that, while “not absolute,” remains “a valued right and any restrictions must be carefully scrutinized.” *S & S Hotel Ventures Ltd. P'ship v. 777 S.H. Corp.*, 69 N.Y.2d 437, 443 (1987). And of course, courts must always guard against the use of disqualification motions “as an offensive tactic, inflicting hardship on the current client and delay upon the courts” without good reason. *Solow v. W.R. Grace & Co.*, 83 N.Y.2d 303, 310 (1994).

Here, Goldfarb relies mainly on hearsay – that is, Johnson’s recitation of what Skoczen told him “the effect of” what Wuertzel said. This attenuated – and inadmissible – evidence does not provide a persuasive basis to disqualify counsel.

Even accepting Johnson’s version of events, Plaintiff’s attempt to analogize the conversation to an impermissible “Mary Carter” agreement is unavailing. “A ‘Mary Carter’ agreement is a contract by which one or more of the defendants in a multiparty case secretly conspires with the plaintiff to feign an active role in the litigation in exchange for assurances that its own liability will be diminished proportionately by increasing the liability of the nonagreeing defendant(s).” *Reutzel v. Hunter Yes, Inc.*, 135 A.D.3d 1123, 1124–25 (1st Dep’t 2016) (internal citations omitted). As the court in *Reutzel* highlights, “secrecy is the essence of what generally is regarded as an essentially collusive agreement.” *Id.* Therefore, disclosure by the parties upon

reaching an agreement would remove any legal or ethical concerns. *See Leon v. J & M Peppe Realty Corp.*, 190 A.D.2d 400, 414 (1993) (citing *Ward v. Ochoa*, 284 So.2d 385 [Fla. Sup. Ct. 1973] (requiring a new trial since the trial court refused to admit the agreement in evidence)). Here, there was no such agreement, secret or otherwise.

Finally, the vague suggestion that counsel was seeking to suborn perjury is not supported by the “evidence” presented. Wuertzel vehemently denies seeking to obtain false testimony and Johnson’s affirmation does not show otherwise. Encouraging Migden to provide information that counsel believes will be helpful to his client’s case is not the same as encouraging Migden to testify falsely, and the Court is not willing to infer such an intent based on the flimsy record offered by Plaintiff. Nor does the record support the argument that disqualification is required under the advocate-witness rule.

Accordingly, the motion to disqualify is denied.

To the extent Plaintiff’s request for sanctions can be deemed a cross-motion, it is denied. The Court suggests that the parties focus more on litigating the merits of the case and less on flogging each other with tangential issues and *ad hominem* attacks.¹

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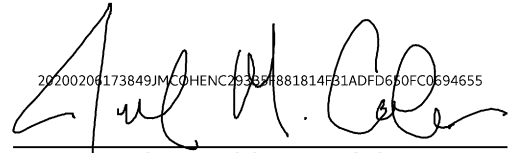
¹ The argument in Plaintiff’s opposition brief with respect to scheduling depositions of Migden, Goldfarb, and himself is not properly before the Court as a cross-motion. If the parties are not able to work out something as straightforward as scheduling depositions of central witnesses, which would be extremely disappointing, they should follow the Commercial Division’s rules with respect to raising discovery disputes.

Accordingly, it is:

ORDERED that Defendant's motion to disqualify Plaintiff's counsel, Joshua Wuertzel and Schlam Stone & Dolan, is **Denied**.

This constitutes the decision and order of the Court.

2/6/2020
DATE


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JOEL M. COHEN, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
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CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN			<input type="checkbox"/>
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