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| <b>Martino v WP Owners Corp.</b>   |
| 2020 NY Slip Op 34536(U)   |
| November 20, 2020  |
| Supreme Court, Queens County   |
| Docket Number: 701059/2020   |
| Judge: Carmen R. Velasquez   |
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SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE CARMEN R. VELASQUEZ IAS PART 38  
Justice

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FLEUR MARTINO,

Index No.: 701059/2020

Plaintiff,

Motion Dated:  
August 31, 2020

**FILED**

-against-

Seq. No. 1

**11/20/2020**  
**2:35 PM**

WP OWNERS CORP.,

Defendant.

**COUNTY CLERK**  
**QUEENS COUNTY**

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The following papers numbered EF 10-38 read on this motion by the plaintiff for an order disqualifying the plaintiff's counsel; and cross motion by the defendant for an order dismissing the first cause of action and declaring that defendant offered plaintiff access to its books and records pursuant to BCL § 624 and for sanctions for frivolous conduct.

PAPERS  
NUMBERED

|   |          |
|---|----------|
| Notice of Motion - Affidavits - Exhibits.....   | EF 10-17 |
| Notice of Cross Motion - Affidavits - Exhibits. | EF 18-34 |
| Affirmation in Opposition - Exhibits.....       | EF 35-37 |
| Replying Affirmation.....                       | EF 38    |

Upon the foregoing papers it is ordered that this motion by the plaintiff for an order disqualifying the defendant's counsel and cross motion by the defendant for an order dismissing the first cause of action and declaring that defendant offered plaintiff access to its books and records pursuant to BCL § 624 and for sanctions are decided as follows:

The plaintiff commenced this declaratory judgment action, which seeks, *inter alia*, to compel the defendant to allow the plaintiff to inspect the books and records of defendant corporation. Plaintiff is the shareholder and signatory to a proprietary lease for an apartment at premises located at 75-35 210<sup>th</sup> Street in Oakland Gardens, Queens. Defendant is the owner of the cooperative apartment complex. Plaintiff seeks the names and addresses of all cooperative owners. Plaintiff also seeks, *inter alia*, a declaratory judgment that the imposition of late fees is usurious and a violation of the law and attorney fees.

Defendant commenced a landlord-tenant proceeding against the plaintiff herein in the Civil Court, Queens County, in 2004 as a result of outstanding maintenance payments. The same attorneys, Borah, Goldstein, Altschuler, Nahins & Goidel, P.C., represented the landlord in the Civil Court action as well as the instant action. On May 11, 2005, the parties reached a settlement in the Civil Court action. Under the terms of the settlement, the landlord's claim for legal fees would be severed. In addition, on February 14, 2005, plaintiff commenced a proceeding with the New York State Division of Human Rights. The New York State Division of Human Rights dismissed the plaintiff's complaint, finding that there was no probable cause to support her claims that she was not granted a reasonable accommodation. According to the plaintiff, she has been billed the sum of \$8,426.84 in legal fees. Late fees and administrative arrears were also assessed against the plaintiff.

In support of the instant motion, plaintiff asserts that Eric Goidel, a member of the law firm of Borah, Goldstein, Altschuler, Nahins & Goidel, P.C., who was an attorney for defendant since 2005, will be a key witness as to how the legal fees were determined, for what action and why the matter with regard to legal fees was never litigated. Plaintiff states that Eric Goidel will be required to testify as a witness with respect to legal fees. According to plaintiff, defendant is seeking legal fees not just in the landlord tenant proceeding but in a prior unrelated proceeding.

In support of the cross motion, defendant argues that it repeatedly offered the plaintiff the opportunity to inspect its shareholder list but the plaintiff failed to avail herself of such access. Defendant also opposes the motion to disqualify and contends that Mr. Goidel's testimony will not be necessary in any trial, and there is no basis for disqualification. Defendant asserts that the monies sought is the result of the defendant prosecuting a summary non-payment proceeding and defending against a discrimination claim by the plaintiff.

With respect to the first cause of action, defendant asserts that, by letter to plaintiff's counsel dated March 3, 2020, it allowed plaintiff to make an appointment, upon five days' written notice, to inspect the defendant's books and records. According to defendant, neither plaintiff nor her counsel ever arranged an on-site inspection with the defendant. Rather, plaintiff requested that defendant forward a list of all the shareholders to the plaintiff.

Business Corporation Law § 624(b) provides that "[a]ny

person who shall have been a shareholder of record of a corporation upon at least five days' written demand shall have the right to examine in person or by agent or attorney, during usual business hours, its minutes of the proceedings of its shareholders and record of shareholders and to make extracts therefrom for any purpose reasonably related to such person's interest as a shareholder."

In the case at bar, the contrary to the plaintiff's contention, defendant has not refused plaintiff access to its shareholder list. Defendant merely required that plaintiff make an appointment and come to the offices of the defendant. There is no requirement in the statute that defendant forward such information to the plaintiff.

In any event, to the extent that plaintiff argues that defendant has not complied with the statute, plaintiff has failed to properly assert her rights as required in BCL § 624(d). BCL § 624(d) provides that "[u]pon refusal by the corporation ... to permit an inspection of the minutes of the proceedings of its shareholders or of the record of shareholders as herein provided, the person making the demand for inspection may apply to the supreme court in the judicial district where the office of the corporation is located, upon such notice as the court may direct, for an order directing the corporation ... to show cause why an order should not be granted permitting such inspection by the applicant." Here, plaintiff did not bring an Order to Show Cause as required by BCL § 624 but rather commenced a declaratory judgment action.

The court will now address the motion by the plaintiff for disqualification. The determination whether or not disqualification of an attorney is warranted is a matter committed to the sound discretion of the trial court. (*Matter of Blackman*, 165 AD3d 654, 655 [2d Dept 2018]; *Columbus Constr. Co., Inc. v Petrillo Bldrs. Supply Corp.*, 20 AD3d 383, 383 [2d Dept 2005].) However, a party's right to be represented by counsel of his or her own choosing is a valued right that should not be abridged absent a clear showing that disqualification is warranted. (*Wiederman v Halpert*, 172 AD3d 1442, 1443 [2d Dept 2019]; *Mediaceja v Davidov*, 119 AD3d 911, 911 [2d Dept 2014].) The burden is on the proponent of disqualification to show sufficient proof to warrant such a determination. (*Petrossian v Grossman*, 219 AD2d 587, 588 [2d Dept 1995].)

Rule 3.7(a) of the Rules of Professional Conduct (22 NYCRR 1200.00), 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." (see *Greenberg v Grace Plaza Nursing & Rehabilitation Ctr.*, 174 AD3d 510, 511 [2d Dept 2019].) However, disqualification of an attorney is not necessary where it "would work substantial hardship on the client." (Rules of Professional Conduct 3.7[a][3].) Further, to disqualify an attorney on the ground that such attorney will be a witness in a proceeding, it must be shown that the testimony of such attorney - witness is necessary. (*Gulino v Gulino*, 35 AD3d 812, 812 [2d Dept 2006].) Speculative assertions that support a motion to disqualify are insufficient. (*Zutler v Drivershield Corp.*, 15 AD3d 397, 397 [2d Dept 2005].)

Here, plaintiff has failed to establish the necessity of Mr. Goidel's testimony. Under the settlement agreement in the Civil Court proceeding, the defendant "reserves all rights to its claims for legal fees, both in connection with those invoiced in this proceeding, as well as any legal fees incurred in any other proceeding or action..." Indeed, such testimony is not vital to the issue of whether the defendant can seek late fees and attorney fees relating to prior proceedings. This is especially so because of the provisions in both the proprietary lease and the stipulation of settlement in the Civil Court proceeding.

With respect to the branch of the cross motion for sanctions, pursuant to 22 NYCRR § 130-1.1, sanctions are intended to limit frivolous or harassing behavior. (*Doe v Karpf*, 58 AD3d 669, 670 [2d Dept 2009].) Section 130-1.1 permits the court to award reasonable attorney's fees resulting from frivolous conduct. Conduct is considered to be frivolous if "(1)it is completely without merit in law ... (2) it is undertaken primarily to delay or prolong the resolution, or to harass or maliciously injure another; or (3)it asserts material factual statements that are false." (22 NYCRR §130-1.1[c].) The section further provides that "[i]n determining whether conduct undertaken was frivolous, the court shall consider, ... (1) the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct; and (2) whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party."

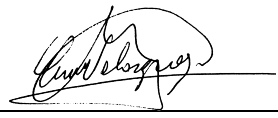
At bar, although the court is not granting plaintiff's motion to disqualify and finds that the first cause of action is improper, the court does not find that the plaintiff's conduct was undertaken to delay, harass or injure the defendant. Thus, sanctions are not warranted herein.

Accordingly, the motion by the plaintiff to disqualify the defendant's counsel is denied.

The branch of the cross motion to dismiss the first cause of action is granted, and the first cause of action is dismissed.

The branch of the cross motion by the defendant for sanctions is denied.

Dated: November 20, 2020



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CARMEN R. VELASQUEZ, J.S.C.

**FILED**

**11/20/2020**

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**COUNTY CLERK  
QUEENS COUNTY**