SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **IAS MOTION 56EFM**

Justice

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CLEONE PERRY,

Plaintiff,

- v -

THE LIGHTING GROUP, LLC, JACK TRENTACOSTA, DAVID BRUMM, PHOTONICS LABORATORIES, and AL HEYER,

Defendant.

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INDEX NO. 154923/2018

MOTION DATE 12/23/2020

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, and 80 (Motion 004)

were read on this motion to/for DISQUALIFY ATTORNEY.

In this action to recover damages for discrimination in employment on the basis of sex, the defendants move to disqualify both of the attorneys for the plaintiff under the "advocate/witness" rule, inasmuch as they would be required to appear as witnesses in the action. The plaintiff opposes the motion. The motion is denied.

In the present dispute, the plaintiff testified at her deposition that one of her attorneys recommended to her that she file criminal charges against the defendant David Brumm in connection with an alleged sexual assault that underlies a portion of the instant action. She further testified that her other attorneys drafted pleadings and other documents in this action that, although based on statements that she made to them, were not 100% accurate.

In the first instance, where a party asserts that he or she relied on advice of counsel, or asserts that he or she acted good faith in asserting either a claim or a defense in connection with that advice, then the basis for that reliance, and the state of that party's knowledge, including legal advice from counsel, will be subject to disclosure (*see United States v Bilzerian*,

926 F2d 1285, 1292 [2d Cir 1991]). This rule is commonly known as an "at issue" waiver of privilege. "'At issue' waiver of privilege occurs [only] where a party affirmatively places the subject matter of his or her own privileged communication at issue in litigation, so that invasion of the privilege is required to determine the validity of a claim or defense of the party asserting the privilege, and application of the privilege would deprive the adversary of vital information" (*Deutsche Bank Trust Co. of Ams. v Tri-Links Inv. Trust*, 43 AD3d 56, 63 [1st Dept 2007]; *Credit Suisse First Boston v Utrecht-America Fin. Co*., 27 AD3d 253, 254 [1st Dept 2006]).

Conversely, where a party does not herself place in issue the matter as to which the privileged communications are relevant, the privilege is not waived. "Of course, that a privileged communication contains information relevant to issues the parties are litigating does not, without more, place the contents of the privileged communication itself 'at issue' in the lawsuit; if that were the case, a privilege would have little effect" (*Deutsche Bank Trust Co. of Ams. v Tri-Links Inv. Trust,* 43 AD3d at 64). "Rather, 'at issue' waiver occurs 'when the party has asserted a claim or defense that he *intends to prove by use of the privileged materials*'" (*id.*, quoting *North Riv. Ins. Co. v Columbia Cas. Co*., 1995 WL 5792, *6, 1995 US Dist LEXIS 53, *17 [SD NY 1995] [emphasis added] [citations omitted]).

The defendants have not established that the source of the plaintiff's motivation for filing criminal charges, in and of itself, is actually "at issue" in this civil sex discrimination and harassment action. In other words, there is no likely possibility that the plaintiff will attempt to satisfy her burden of proof in this action by establishing that her attorney gave her advice as to whether to pursue criminal charges. Moreover, while an attorney shall not "present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter" (Rules of Professional Conduct [22 NYCRR 1200.0] Rule 3.4[e]; *see Matter of Bailey*, 171 AD3d 184, 187 [1st Dept 2019]), that did not occur here; rather, based on advice of counsel, the plaintiff herself elected to pursue criminal charges against Brunn.

Regardless of the fact that the defendants now know that the plaintiff's attorneys gave her certain limited advice, and that the pleadings and other documents that they prepared may not have been perfectly accurate, there is no basis for disqualification here even had the plaintiff waived her attorney-client privilege.

"Disqualification of counsel conflicts with the general policy favoring a party's right to representation by counsel of choice, and it deprives current clients of an attorney familiar with the particular matter" (*Tekni-Plex, Inc. v Meyner & Landis*, 89 NY2d 123, 131 [1996]). Hence, the party seeking disqualification must make a clear showing that disqualification is warranted (*see Matter of Dream Weaver Realty, Inc*. 70 AD3d 941 [2d Dept 2010]). To satisfy that burden, the defendants, who invoke the "advocate/witness" rule, must show that any relevant information independently known to the plaintiff's attorneys is absolutely necessary to her case (*see S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp.*, 69 NY2d 437 [1987]). "Merely because an attorney 'has relevant knowledge or was involved in the transaction at issue' does not make that attorney's testimony necessary" (*Talvy v American Red Cross*, 205 AD2d 143, 152 [1st Dept 1994], quoting *Lipin v Bender*, 193 AD2d 424, 445 [1st Dept 1993]; *see Hemmings v Ivy League Apt Corp.*, 2012 NY Slip Op 32666[U] [Sup Ct, N.Y. County, Oct. 25, 2012]).

The defendants have made no showing here that the plaintiff's attorneys obtained relevant information above and beyond that which the plaintiff provided to them, let alone that their testimony would be necessary. In addition, the defendants' reliance upon the discrepancy between the pleadings and papers that the plaintiff's attorneys drafted on her behalf, and her deposition testimony, are only relevant to impeaching the plaintiff as a witness at trial. Where an attorney's proposed testimony is solely offered "for the collateral purpose of impeachment," disqualification is not warranted (*Melcher v Apollo Med. Fund Mgmt. LLC*, 52 AD3d 244, 245 [1st Dept 2008]).

Moreover, the defendants have waived any objection to the plaintiff's representation by waiting for almost 2½ years before seeking to disqualify her attorneys (*see Matter of Valencia v Ripley*, 128 AD3d 711, 712-713 [2d Dept 2015]; *Abselet v Satra Realty, LLC,* 85 AD3d 1406, 1407 [3d Dept 2011]).

It appears that the defendants seek disqualification of the plaintiff's attorneys solely for tactical purposes, to delay litigation, and to deprive the plaintiff of representation by counsel of her choosing (*see Solow v Grace & Co.*, 83 NY2d 303, 310 [1994]; *Skanska USA Bldg. Inc. v Atlantic Yards B2 Owner, LLC,* 146 AD3d 1 [1st Dept 2016]; *Stilwell Value Partners IV, L.P. v Cavanaugh,* 123 AD3d 641 [1st Dept 2014]; *H.H.B.K. 45th St. Corp. v Stern*, 158 AD2d 395, 396 [1st Dept 1990]).

For the foregoing reasons, it is

ORDERED that the defendants' motion to disqualify the plaintiff's attorneys is denied.

2/16/2021
DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:	☐	**CASE DISPOSED**		☒	**NON-FINAL DISPOSITION**		
	☐	**GRANTED**	☒ **DENIED**	☐	**GRANTED IN PART**	☐	**OTHER**
APPLICATION:	☐	**SETTLE ORDER**		☐	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	☐	**INCLUDES TRANSFER/REASSIGN**		☐	**FIDUCIARY APPOINTMENT**	☐	**REFERENCE**