

AIG Prop. Cas. Co. v Harleysville Worcester Ins. Co.
2021 NY Slip Op 31200(U)
April 7, 2021
Supreme Court, New York County
Docket Number: 651603/2019
Judge: Shawn T. Kelly
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SHAWN TIMOTHY KELLY PART IAS MOTION 57

Justice

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AIG PROPERTY CASUALTY COMPANY F/K/A CHARTIS
PROPERTY CASUALTY COMPANY

Plaintiff,

INDEX NO. 651603/2019

MOTION DATE 01/04/2021

MOTION SEQ. NO. 001

- v -

HARLEYSVILLE WORCESTER INSURANCE COMPANY,

Defendant.

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44

were read on this motion to/for DISQUALIFY COUNSEL

Upon the foregoing documents, it is

Plaintiff, AIG Property Casualty Company f/k/a Chartis Property Casualty Company ("AIG") commenced this declaratory judgment action pursuant to Insurance Law §3420(a)(2) seeking a declaration that Harleysville was obligated to indemnify its insured, Martack Corp. ("Martack"), for an unsatisfied judgment in the subrogation action entitled AIG Property Casualty Company f/k/a Chartis Property Casualty Company a/s/o Joseph Edelman, et ano. v. Property Markets Group, Inc., et al. bearing New York County Index No. 157701/2015 (the "Underlying Action") under a Commercial General Liability Policy issued by Harleysville to Martack Corp. bearing Policy No. MPA00000065958H for the Policy Period February 1, 2012 to February 1, 2013.

Defendant Harleysville Worcester Insurance Company ("Harleysville") moves for an Order pursuant to the Rules of Professional Conduct 22 NYCRR 1200.0, Rule 3.7 to disqualify

the law firm of Frenkel Lambert Weiss Weisman & Gordon, LLP and attorney, Richard A. Lambert Esq., from representing the Plaintiff in this action.

Background

On or about October 1, 2015, AIG commenced the Underlying Action against Martack for property damage that was discovered on September 9, 2013. In the Underlying Action, AIG was represented by the Frenkel Firm and attorney Richard A. Lambert Esq. On December 6, 2016, AIG made a motion for a Default Judgment against Martack which resulted in a Judgment against Martack, Ameribuild Construction Management, Inc., William J. Kennedy Plumbing, Inc., and Big Apple Sheetmetal Co., jointly and severally in the amount of \$1,300,000, plus interest in the amount of \$416,391.78, for a total of \$1,717,161.78 (the "Judgment").

The present action was commenced by AIG against Harleysville by the filing of the Summons and Complaint on March 19, 2019. AIG is again represented by the Frenkel Firm and attorney Richard A. Lambert Esq.

Defendant contends that Richard A. Lambert, Esq. is a necessary witness to material and significant facts involved in this litigation, disqualifying him and the Frenkel Firm from representing the Plaintiff in this action. Specifically, Defendant alleges that Mr. Lambert was the only person who communicated, verbally and in writing, with Harleysville on Plaintiff's behalf during the course of Harleysville's coverage investigation as it relates to the claim of property damage.

Analysis

The Rules of Professional Conduct, 22 N.Y.C.R.R. §1200.0 prohibit an attorney who expects to be a witness on a significant factual issue in the case, or that attorney's firm, from acting as counsel for a party to the action. Rule 3.7 of the New York

Rules of Professional Conduct states as follows:

Rule 3.7: Lawyer as witness.

(a) 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 unless:

- (1) the testimony relates solely to an uncontested issue;
 - (2) the testimony relates solely to the nature and value of legal services rendered in the matter;
 - (3) disqualification of the lawyer would work substantial hardship on the client;
 - (4) the testimony will relate solely to a matter of formality, and there is no reason to believe that substantial evidence will be offered in opposition to the testimony;
- or
- (5) the testimony is authorized by the tribunal.

(b) A lawyer may not act as advocate before a tribunal in a matter if:

- (1) 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; or
- (2) the lawyer is precluded from doing so by Rule 1.7 or Rule 1.9.

Movant must meet a heavy burden of establishing that testimony of the subject attorney would be both necessary and prejudicial to defendants (*see Ullmann-Schneider v Lacher & Lovell-Taylor PC*, 110 AD3d 469, 470 [1st Dept 2013]; *Dishi v Federal Ins. Co.*, 112 AD3d 484 [1st Dept 2013]; *Orbco Advisors LLC v 400 Fifth Realty LLC*, 134 AD3d 448, 19 NYS3d 745 [2015]). Testimony may be relevant and even highly useful, but that alone does not raise to the level of strictly necessary (*see Kim v New York Group For Plastic Surgery, LLP*, No. 158068/2014, 2015 WL 400188 [2015]). Further, disqualification of an attorney based upon Rule

3.7 rests within the sound discretion of the trial court (see *Gould v Decolator*, 131 AD3d 448, 15 NYS3d 145 [2nd Dept 2015]).

Defendant has failed to identify specific issues requiring Mr. Lambert’s testimony or to demonstrate the significance of the matters Mr. Lambert would testify to, the weight of such testimony, and the unavailability of other sources of such evidence (see *S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp.*, 69 NY2d 437, 445-446 [1987]; *Campbell v McKeon*, 75 AD3d 479, 481, 905 NYS2d 589 [2010]). Accordingly, Defendant’s motion is denied.

It is hereby,

ORDERED that Defendant’s motion to disqualify is denied.

4/7/2021

DATE

SHAWN TIMOTHY KELLY, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: