

<b>Casanas v Casanas</b>
2021 NY Slip Op 31211(U)
April 13, 2021
Supreme Court, New York County
Docket Number: 153156/2016
Judge: Carol R. Edmead
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. CAROL R. EDMEAD PART IAS MOTION 35EFM

*Justice*

-----X

ALEIDA CASANAS,

Plaintiff,

- v -

RICHARD CASANAS, THE CARLEI GROUP, LLC,

Defendant.

-----X

INDEX NO. 153156/2016

MOTION DATE 11/20/2020

MOTION SEQ. NO. 008

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 008) 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366

were read on this motion to/for DISQUALIFY COUNSEL.

Upon the foregoing documents, it is

ORDERED that the application of Plaintiff Aleida E. Casanas (Motion Seq. 008) to disqualify Mr. Stephen Finkelstein from acting as counsel for defendants The Carlie Group, LLC and Mr. Richard M. Casanas is denied; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that the counsel for Defendants shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry on all parties.

## MEMORANDUM DECISION

Plaintiff Aleida E. Casanas (“Aleida”) brings an application, pursuant to Rules 3.7, 1.7 and 1.9 of the Rules of Professional Conduct, to disqualify Mr. Stephen Finkelstein (“Mr. Finkelstein”) from acting as counsel for defendants The Carlie Group, LLC (“CARLEI”) and Mr. Richard M. Casanas (“Richard”). Mr. Finkelstein opposes. For the reasons below, this Court denies Aleida’s application.

### BACKGROUND FACTS

#### **This Proceeding**

Aleida commenced this action asserting three causes of action. Her first cause of action seeks a declaratory judgment declaring that certain leases (the “Leases”) for Apartments 2C and 2W in a building located at 462 Columbus Avenue and 73 West 82<sup>nd</sup> Street in Manhattan, New York (the “Building”) are valid and enforceable contracts. The Leases, which provide for a “rent waiver in exchange for 20 (twenty) hours a week”, was made between Aleida and the Building’s previous owner, Aleida Realty Corp (“ARC”). ARC was a corporation formed by the parents of Aleida and Richard: Carlos (the “Father”) and Aleida P. (the “Mother”). Ownership to the Building was later transferred to CARLEI but no payment was made for the transfer.

Aleida’s second cause of action alleges that the property of their Father was not distributed as provided by law. In the third cause of action, Aleida seeks an accounting of all rental proceeds from the Building, including Apartments 2C and 2W, and of any insurance reimbursement from a fire that damaged the Building in 2009.

Defendants filed their answer and raised counterclaims seeking judgment declaring the Leases to be fraudulent; that Aleida has no possessory rights in Apartments 2C and 2W; that to the extent that the Leases are genuine, they are unenforceable as a matter of law; that if the Leases are

genuine and enforceable, that CARLEI has a right to terminate them for Aleida's noncompliance therewith; and that Defendants are entitled to monetary damages for Aleida's breach of the Leases.

Defendants later moved for summary judgment dismissing Aleida's complaint and affirmative defenses to defendants' counterclaims, as well as granting Defendants' summary judgment on their counterclaims.

In a Decision dated January 12, 2018 (the "January 2018 Decision"), this Court granted Defendants' motion for summary judgment. On appeal, the First Department modified the January 2018 Decision to the extent that the first cause of action was remanded for further proceedings. The First Department held that issues of fact exist as to: (i) whether the parties' course of conduct demonstrates that the consideration for the waiver of rent in the Leases, *i.e.*, 20 hours of "work" per week, is sufficiently definite to satisfy the statute of frauds; and (ii) whether Richard lacked knowledge of the Leases and that therefore Aleida was a mere licensee and not a lessee.

### **Motion to Withdraw as Counsel**

On August 17, 2020, Defendants' counsel, Rosenberg & Estis ("R&E"), sought an order allowing it to withdraw as counsel. The motion was opposed by Defendants who were represented by Mr. Finkelstein only with respect to R&E's application for withdrawal.

Aleida opposed Mr. Finkelstein's limited representation of Defendants on the ground that "[Mr.] Finkelstein [] is on the short list of witnesses to be subpoenaed by [Aleida] [] with regard to questions of fact in this action..." (NYSCEF doc No. 298). In support, Aleida set forth instances in the past when Mr. Finkelstein acted as witness, notary or attorney in the execution of various documents involving Richard, their Mother and ARC. Mr. Finkelstein disputed Aleida's allegations, maintaining that these transactions have nothing to do with this case and that he has no intention of representing Defendants beyond R&E's application for withdrawal.

In an Order dated September 29, 2020, this Court granted R&E's application and accordingly stayed this proceeding for a period of forty-five (45) days to provide Defendants sufficient time to engage new counsel.

### **Motion to Disqualify Mr. Finkelstein as Counsel**

In a letter dated November 2, 2020, Mr. Finkelstein advised this Court that, after reflection and given his long attorney-client relationship with Richard, he accepted Richard's request to represent Defendants in this case (NYSCEF doc No. 315). In a letter dated November 3, 2020, Aledia expressed her intention to file a formal objection.

In an Interim Order dated November 5, 2020, this Court directed Aledia to move to disqualify Mr. Finkelstein and that her failure to do so shall constitute a waiver of the issue.

On November 20, 2020, Aledia moved, by Order to Show Cause, to disqualify Mr. Finkelstein as counsel on the basis of Rules 3.7, 1.7 and 1.9 of the Rules of Professional Conduct. In support, Aleida sets forth - as she also did in her opposition to Mr. Finkelstein's representation of Defendants in R&E's application to withdraw counsel - instances in the past when Mr. Finkelstein acted as witness, notary or attorney in the execution of various documents involving Richard, their Mother, ARC and other entities related to their family (NYSCEF doc Nos. 320 and 337).

Mr. Finkelstein opposes. He contends that Aleida failed to meet her burden of showing that Finkelstein's prior representation of members of Aleida's family is substantially related to the current action in such manner as would prejudice her in the prosecution of this action (NYSCEF doc No. 335).

## DISCUSSION

### Rule 3.7 of the Rules of Professional Conduct

Rule 3.7 (a) of the Rules of Professional Conduct provides that, unless certain exceptions apply, "[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."

The rule "generally prohibits an attorney from acting as an advocate before a tribunal where it is likely that the attorney will 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 where the attorney knows he or she is likely to be a witness on a significant issue of fact on the client's behalf" (*Harris v Sculco*, 86 AD3d 481 [1st Dept 2009], citing *Goldberger v Eisner*, 21 AD3d 401 [2005] and *Broadwhite Assoc. v Truong*, 237 AD2d 162 [1997]).

In the case of *Ullman-Schneider v Lacher & Lovell-Taylor PC* (110 AD3d 469 [1st Dept 2013]), the First Department explained that a moving party bears a heavy burden of demonstrating that disqualification of counsel is warranted, thus:

"Disqualification . . . during litigation implicates not only the ethics of the profession but also the substantive rights of the litigants [and] denies a party's right to representation by the attorney of its choice" []. The right to counsel is "a valued right and any restrictions must be carefully scrutinized" []. Furthermore, where the rules relating to professional conduct are invoked not at a disciplinary proceeding but "in the context of an ongoing lawsuit, disqualification . . . can [create a] strategic advantage of one party over another" []. **Thus, the movant must meet a heavy burden of showing that disqualification is warranted. Disqualification is required only where the testimony by the attorney is considered necessary and prejudicial to plaintiffs' interests** []." (citations omitted; emphasis added)

In *S&S Hotel Ventures Ltd. Partnership v 777 S. H. Corp.* (69 NY2d 437 [1987]), the Court of Appeals elucidated on the factors to consider in determining whether an attorney's testimony is necessary, to wit:

"But whether a witness "ought" to testify is not alone determined by the fact that he has relevant knowledge or was involved in the transaction at

issue. Disqualification may be required only when it is likely that the testimony to be given by the witness is necessary []. Testimony may be relevant and even highly useful but still not strictly necessary. A finding of necessity takes into account such factors as the significance of the matters, weight of the testimony, and availability of other evidence [].”

This Court finds that Aleida failed to meet her burden of proof. She failed to identify the specific issues requiring Mr. Finkelstein’s testimony and to demonstrate the significance of the matters Mr. Finkelstein would testify to, the weight of such testimony and the unavailability of other sources of such evidence. In support of this conclusion, this Court tackles below each transaction that Aleida alleges Mr. Finkelstein had involvement as witness, notary or counsel.

*The Brownstone Insurance Documents*

Aleida first presents to this Court what she calls “Brownstone Insurance Documents”, including a sworn statement of proof of loss (the “Statement of Loss”) executed by Richard concerning the 2009 fire that damaged the Building. The Statement of Loss was notarized by Mr. Finkelstein.

In claiming that the Brownstone Insurance Documents support her application to disqualify Mr. Finkelstein as counsel, Aleida alleges that the documents “mis[led] ALL FAMILY MEMBERS” and, thus, “[t]he crime-fraud exception to attorney client privileged [may not be invoked].” (NYSCEF doc No. 320, p. 5). Moreover, she alleges that the documents “support a pattern of unjust enrichment by defendant and plaintiff’s claim.” (NYSCEF doc No. 337, p. 11; emphasis in original)

This Court finds that Aleida failed to clearly demonstrate how the Brownstone Insurance Documents support her application to disqualify Mr. Finkelstein as counsel for being a potential necessary witness. As Mr. Finkelstein pointed out, he merely notarized Richard’s signature on the Statement of Loss; there is no evidence that he had a hand in completing said statement. More

importantly, the contents of the Statement of Loss - attesting to the fact of fire and the damages suffered as a result - are not at issue here. Aleida herself alleges that in “2009, there was a certain fire incident in the Building” and that “[f]rom 2012 through in or about January 2016, Defendant turned over to Plaintiff a portion of the rent proceeds subtracting [an amount] to repay what [ ] Richard claimed to be [the] cost to renovate Unit 2C and Unit 2W after the Fire Incident.” (NYSCEF doc No. 123, ¶¶ 21-25).

While Aleida alludes to “fraud” and “unjust enrichment” in relation to the Brownstone Insurance Documents, she does not clearly set forth the facts upon which such conclusory statements were based and how they are material to her remaining cause of action. Assuming the alleged fraud was based on Richard signing the Statement of Loss as “insured”, Richard did so in his capacity as the “managing member” of CARLEI, as the document reflects. If the basis for Aleida’s allegation of “fraud” relates to the contested ownership of the Building, this Court already dismissed without prejudice Aleida’s cause of action seeking a declaration of the parties’ rights and obligations with respect to the Building.

*Real Property Transfer Report RP-5217NYC*

Aleida next presents a Real Property Transfer Report (RP-5217NYC; the “Tax Form”) and alleges that Mr. Finkelstein deliberately did not check the box on Tax Form indicating that the “sale is between relatives or former relatives” or “sale between related companies or partners in business” is material to her remaining cause of action.

Mr. Finkelstein admits he prepared the Tax Form in his capacity as counsel for CARLEI when “the Deed conveying title to the Building from ARC to CARLEI was recorded in early 2008.” (NYSCEF doc No. 335)

This Court finds that Aleida again failed to establish how Mr. Finkelstein's preparation of the Tax Form makes him a necessary witness here. Assuming that in the process of transferring the title to the Building, Mr. Finkelstein obtained information about the Leases, Aleida failed to show that Mr. Finkelstein is the only person who can testify about them. In fact, based on the record, Aleida claims that one Susan Frank ("Ms. Frank"), a real estate broker, has knowledge about the existence and enforcement in the past of the purported Leases. Thus, Aleida submitted as evidence Ms. Frank's letter which stated that: (i) she "marketed APT #2C and APT #2W to prospective subtenants; scheduled and conducted showing of apartments; prepared sublease agreements and collected rent and security deposits on behalf of [Aleida];" and (ii) that Richard lived in the Building and that she "had direct contact with [him] in discussion with the preparation of current leases and that the leases should ensure [Aleida] is listed as OverTenant." On the basis of this, the First Department held that "[t]here is evidence that [Aledia] had sublet the two units for several years under written subleases naming her "Overtenant" and [Richard] did not deny that plaintiff had sublet one of the apartments to him for several years." Therefore, this Court finds that, at best, Mr. Finkelstein's testimony would only be corroborative to Ms. Frank's. It is not necessary as Aleida claims.

As to the allegation that Mr. Finkelstein deliberately did not check the box on the Tax Form indicating that the "sale is between relatives or former relatives" or "sale between related companies or partners in business", suffice it to say that Aleida failed to show how this is relevant to her remaining cause of action. Guided by the First Department's ruling, further proceeding is limited to issues of fact relating to the definiteness of the consideration for the waiver of rent and to Richard's knowledge (or lack of knowledge) of the Leases. Aleida does not explain how the Tax Form's alleged inaccuracy can help thresh out said issues of fact.

*Litigation Involving the Current Residence of the Mother*

Aleida then draws the attention of this Court to a proceeding where Mr. Finkelstein is acting as counsel for the Mother regarding her ownership of the cooperative apartment where the Mother lives (the “Coop Litigation”). The details of the Coop Litigation are unclear.

In her affirmation, she describes the Coop Litigation as “an estate proceeding for Carlos Casanas, the tenant in common on the shares for Coop 41 West 82<sup>nd</sup> Street, NYC 10024 [which] is the current residence of [the Mother], disabled stroke victim, whom Defendant is trying to change ownership currently as of 11/2020.” In her memorandum of law, Aleida describes the same Coop Litigation as follows: “[Mr.] Finkelstein is currently (2020) filing/has filed a proceeding to remove Carlos Casanas, [Aleida] and [the deceased Father], the tenant in common on the shares of [the Mother’s] current residence, 41 West 82<sup>nd</sup> Street.”

Aleida again failed to demonstrate how Mr. Finkelstein’s involvement in the Coop Litigation makes him a necessary witness here. Aleida does not explain how the Coop Litigation is at all connected to this case. According to Mr. Finkelstein, at issue in the Coop Litigation is the ownership of the apartment at Coop 41 West 82<sup>nd</sup> Street, NYC 10024, which is different from the Building subject of this action.

*Entity Information Sheets of ARC, CARLEI, Laguna Bahia LLC and RMC Realty Group Inc*

Aleida then proceeds to present various documents retrieved from the NYS Department of State (“DOS”) Division of Corporations. The documents are entity information sheets of ARC, CARLEI, Laguna Bahia LLC (“Laguna”) and RMC Realty Group (“RMC”). In these documents, Mr. Finkelstein’s name appears either as DOS Process C/O Addressee or Registered Agent. Aleida also presents Laguna’s articles of organization which was signed by Mr. Finkelstein as attorney-in-fact of their Mother

Laguna and RMC are entities not involved in this litigation so Mr. Finkelstein's connection to these entities is irrelevant here. On the other hand, there is no sufficient evidence showing that Mr. Finkelstein's connection to ARC and CARLEI makes him a necessary witness for Aleida.

*The Mother's Last Will and Testament*

Aleida mentions in passing that Mr. Finkelstein witnessed the last will and testament of the Mother. She alleges that as a result, Mr. Finkelstein "highly likely [] have obtained, privileged and confidential information with potential to prejudice Plaintiff's action before this court..." This Court rejects this argument for being unsubstantiated. Aleida's assumption that Mr. Finkelstein "highly likely" obtained information she needs in this action is not sufficient to discharge her heavy burden of showing that Mr. Finkelstein is necessary witness.

**Rules 1.7 and 1.9 of the Rules of Professional Conduct**

To further support her motion to disqualify Mr. Finkelstein as counsel, Aleida also invokes Rules 1.7 and 19 of the Rules of Professional Conduct. This Court, however, finds both rules inapplicable here.

Rule 1.7 prohibits a lawyer from undertaking a representation of a client whose interests conflict with those of another current client or with the lawyer's own interests, absent each affected client's informed consent given in writing. The rule is inapplicable as Aleida does not allege to be a current client of Mr. Finkelstein. Neither did Aleida allege that Mr. Finkelstein has any interest in this action that conflict with the Defendants.

Rule 1.9, on the other hand, provides that "[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing." In *Reem Contr. Corp. v Resnick*

*Murray St. Assoc* (43 AD3d 369 [1st Dept]), the First Department explained that “[a] party seeking disqualification of an adversary’s lawyer must show: (1) the existence of a prior attorney-client relationship between the movant and opposing counsel; (2) that the matters involved in the prior and the present representations are “substantially related”; and (3) that the interests of the present client and former client are materially adverse.”

Here, Aleida failed to establish the existence of an attorney-client relationship between herself and Mr. Finkelstein. While Aleida alleges that Mr. Finkelstein engaged in “joint representations” of three members of her family and companies previously owned by her parents (NYSCEF doc No. 320, p. 4), these representations did not involve Aleida herself.

As to Mr. Finkelstein’s representation of the Mother in the Coop Litigation, Mr. Finkelstein alleges, and Aleida failed to refute, that such representation is “through Richard, who has the [M]other’s unlimited Power of Attorney.”

With respect to Mr. Finkelstein’s past representation of and/or connection to the companies previously owned by Aleida’s parents (*i.e.*, ARC, Laguna and RMC), it is settled that a lawyer’s representation of a business entity does not render him counsel to an individual partner, officer, director or shareholder unless he assumed an affirmative duty to represent that individual (*Campbell v McKeon*, 75 AD3d 479 [1st Dept 2010], citing *Polovy v Duncan*, 269 AD2d 111 [1st Dept 2000]; *Omansky v 64 N. Moore Assocs.*, 269 AD2d 336 [1st Dept 2000]; *Talvy v American Red Cross in Greater N.Y.*, 205 AD2d 143 [1st Dept 1994], *affd* 87 NY2d 826 [1995]).

Here, Aleida does not even allege that she was a member, shareholder or officer of her parents’ companies. Even if she was, Aleida failed to present cogent evidence establishing that Mr. Finkelstein had agreed to or acted as her personal attorney. In fact, Mr. Finkelstein alleges that

“to the best of [his] memory, [he had] never actually met or spoken with [Aledia] (NYSCEF doc No. 335, ¶ 18).

Aside from failing to meeting her burden to show existence of a prior attorney-client relationship, Aleida also failed to demonstrate how the legal matters for which Mr. Finkelstein represented Aledia’s family members and/or companies owned by her parents involve issues that are substantially related to the issue in this action. Aleida’s conclusory assertions in this regard fall far short of meeting her burden.

**Mr. Finkelstein’s Previous Representations**

This Court notes that, as Aleida alleges, Mr. Finkelstein had previously represented to this Court that he had no interest in representing Defendants beyond R&E’s application to withdraw as counsel. This Court, however cannot prevent Mr. Finkelstein from taking this case upon further reflection as there is no rule that prohibits him from doing so. Thus, Mr. Finkelstein’s previous representations cannot be used by Aleida to seek his disqualification.

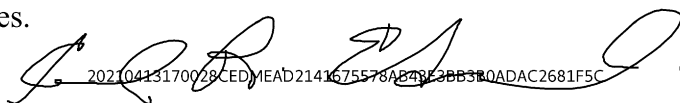
**CONCLUSION**

Based on the foregoing, it is hereby

ORDERED that the application of Plaintiff Aleida E. Casanas (Motion Seq. 008) to disqualify Mr. Stephen Finkelstein from acting as counsel for defendants The Carlie Group, LLC and Mr. Richard M. Casanas is denied; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that the counsel for Defendants shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry on all parties.

  
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CAROL R. EDMEAD, J.S.C.

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