

Vinar v Khan

2021 NY Slip Op 34278(U)

June 3, 2021

Supreme Court, Queens County

Docket Number: Index No. 718903/2019

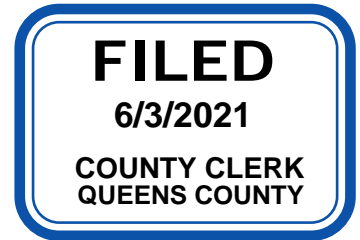
Judge: Maurice E. Muir

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This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT – QUEENS COUNTY



Present: HONORABLE MAURICE E. MUIR
Justice

ALEKSANDER VINAR and ZHANNA
KRUGLAK,

Plaintiff,

-against-

ABDEL KHAN,

Defendant.

IAS Part - 42

Index No.: 718903/2019

Motion Date: 6/3/21

Motion Cal. No. 27

Motion Seq. No. 1

The following electronically filed (“EF”) documents read on this motion by Abdel Khan (“Mr. Khan” or “defendant”) for an order: (1) disqualifying the Law Firm of Berke & Associates PLLC from representing either plaintiff due to a conflict of interest; (2) dismissing the plaintiffs’ complaint for failing to comply with discovery pursuant to CPLR § 3126(3); (3) precluding the plaintiffs from testifying at the time of trial in support of their claims or in opposition to the Defendant’s affirmative defenses pursuant to CPLR § 3126(2), or, in the alternative; (4) resolving the issues to which the information sought is relevant in favor of the Defendant pursuant to CPLR § 3126(1) or CPLR § 3124.

	<u>Papers</u> <u>Numbered</u>
Notice of Motion-Affirmation- Exhibits-Service.....	EF 05 - 12
Affirmation in Opposition- Exhibits-Service.....	EF 16 - 23
Reply-Affirmation- Exhibits-Service.....	EF 24

Upon the foregoing papers, it is ordered that this motion is determined as follows:

This is an action to recover damages for personal injuries Aleksander Vinar (“Mr. Vinar”) and Zhanna Kruglyak (“Ms. Kruglyak”) (collectively, the “plaintiffs”) allegedly sustained in a motor vehicle collision with Abdel Khan (“Mr. Khan” or “defendant”). The plaintiff alleges that on August 1, 2017, Mr. Khan’s 2003 Utility Tractor Truck was in contact

with the motor vehicle operated by Mr. Vinar wherein, Ms. Kruglyak was a passenger. On November 6, 2019, the plaintiffs commenced the instant action; and on May 12, 2020, issue was joined, wherein the defendant interposed an answer. On December 2, 2020, the court issued a preliminary conference order (“PCO”), which directed the parties to conduct examinations before trial (“EBT”) on or before March 2, 2021; and independent medical examinations (“IME”) sixty (60) days thereafter. Now, the defendants seek the above-described relief.

It is well settled law that “[t]he disqualification of an attorney is a matter that rests within the sound discretion of the court” (*Halberstam v. Halberstam*, 122 AD3d 670 [2d Dept 2014]; see also *Ike & Sam's Group, LLC v. Brach*, 138 AD3d 690 [2d Dept 2016]; *Matter of Madris v. Oliviera*, 97 AD3d 823 [2d Dept 2012]). “A party's entitlement to be represented by counsel of his or her choice is a valued right which should not be abridged absent a clear showing that disqualification is warranted” (*Scialdone v. Stepping Stones Assoc., L.P.*, 148 AD3d 950, 952 [2d Dept 2017], quoting *Homar v. American Home Mtge. Acceptance, Inc.*, 119 AD3d 901 [2d Dept 2014]). “Disqualification of legal counsel during litigation implicates not only the ethics of the profession but also the parties' substantive rights, thus requiring any restrictions to be carefully scrutinized. The party seeking to disqualify a law firm or an attorney bears the burden to show sufficient proof to warrant such a determination” (*Kelleher v. Adams*, 148 AD3d 692, 692-693 [2d Dept 2017], quoting *Hele Asset, LLC v. S.EE. Realty Assoc.*, 106 AD3d 692, 693 [2d Dept 2013], quoting *Gulino v. Gulino*, 35 AD3d 812 [2d Dept 2006]). “Absent actual prejudice or a substantial risk thereof, the appearance of impropriety alone is not sufficient to require disqualification of an attorney” (*Nenninger v. Kelly*, 140 AD3d 961, 963 [2d Dept 2016]).

Furthermore, Rule 1.7(a) of the Rules of Professional Conduct (22 NYCRR 1200.0) provides, in pertinent part, with respect to conflicts of interests involving current clients, that a lawyer shall not represent a client if a reasonable lawyer would conclude that “the representation will involve the lawyer in representing differing interests” (Rules of Professional Conduct [22 NYCRR 1200.0] Rule 1.7[a][1]). Pursuant to Rule 1.7(b) of the Rules of Professional Conduct (22 NYCRR 1200.0), the potential conflict may be waived if the lawyer reasonably believes that he or she will be able to provide competent and diligent representation to each affected client, the representation is not prohibited by law, the representation does not involve the assertion of a claim by one client against the other in the same litigation, and each affected client gives informed consent, confirmed in writing.

More importantly, “the dual representation by one firm of a driver and passenger in an automobile involved in a collision constitutes a conflict of interest in violation of the disciplinary rules” (*Quin v. Walsh*, 18 AD3d 638 [2d Dept 2005]; *Shelby v. Blakes*, 129 AD3d 823, 825 [2d Dept 2015]; *Pessoni, v. Rabkin*, 220 AD2d 732 [2d Dept 1995]; *Sacco and Fillas, LLP v. Broderick*, 133 AD3d 862 [2d Dept 2015]). Here, the Court finds that plaintiffs' counsel representation of Mr. Vinar and Ms. Kruglak creates an obvious conflict which warrants that plaintiffs' counsel be disqualified from representing either plaintiff. Firstly, the Court notes that the Ms. Kruglak's right as a potential “innocent passenger to summary judgment on the issue of liability is not barred or restricted by any potential issue of comparative fault as between the owners and operators of the two vehicles involved in the accident” (*Phillip v. D & D Carting Co., Inc.*, 136 AD3d 18, 24-25 [2d Dept 2015]; *Romain v. City of New York*, 177 AD3d 590 [2d Dept 2019], citing CPLR § 3212(g); *Jung v. Glover*, 169 AD3d 782 [2d Dept 2019]; *Phillips v. D&D Carting Co., Inc.*, 136 AD3d 18 [2d Dept 2015]; *Anzel v. Pistorinoi*, 105 AD3d 784 [2d Dept 2013]; *Medina v. Rodriguez*, 92 AD3d 850 [2d Dept 2012]; *Silberman v. Surrey Cadillac Limousine Serv.*, 109 AD2d 833 [2d Dept 1985]).

Now the court turns to that branch of the defendants' motion, which seeks to dismiss the plaintiffs' complaint, pursuant to CPLR § 3126(3). Here the court finds that the affirmation of good faith submitted by the defendants is insufficient to show that counsel conferred with the plaintiffs' counsel in a good faith effort to resolve those issues raised by the motion. The affirmation of good faith required by the court rule must indicate the “time, place and nature of the consultation and the issues discussed and any resolution, or shall indicate good cause why no such conferral with counsel for opposing parties was held.” (*see* 22 NYCRR § 202.7[c].) Upon the failure to satisfy this requirement, denial of the motion is warranted. (*Bronstein v. Charm City Housing, LLC*, 175 AD3d 454 [2d Dept 2019]; *Roye v. Gelberg*, 172 AD3d 1260 [2d Dept 2019]; *Cashbamba v. 1056 Bedford LLC*, 172 AD3d 415 [1st Dept 2019]; *Murphy v. County of Suffolk*, 115 AD3d 820 [2d Dept 2014]; *Deutsch v. Grunwald*, 110 AD3d 949 [2d Dept 2013]; *Ponce v. Miao Ling Liu*, 123 AD3d 787 [2d Dept 2014]).

Accordingly, it is hereby

ORDERED that the motion to disqualify the Law Firm of Berke & Associates, PLLC from representing either of the plaintiffs in this herein action is granted; and it is further,

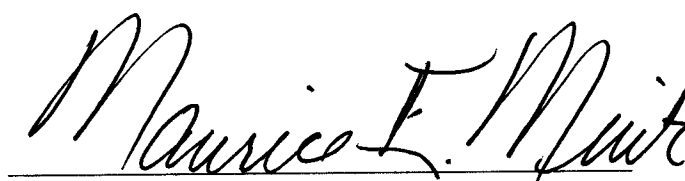
ORDERED that this action is stayed for 90 days after service of a copy of this order with notice of entry to afford plaintiffs an opportunity to engage new counsel to be substituted for Berke & Associates, PLLC; and it is further,

ORDERED that branch of the defendant's motion, pursuant to CPLR §§ 3124 and 3126, is denied; and it is further,

ORDERED that defendant shall serve a copy of this decision and order with notice of entry upon plaintiffs and the clerk of this court on or before June 30, 2021.

The foregoing constitutes the decision and order of the court.

Dated: June 3, 2021



MAURICE E. MUIR
J.S.C.

