

Fawcett v Fox News Network, LLC
2022 NY Slip Op 30062(U)
January 11, 2022
Supreme Court, New York County
Docket Number: 157135/2021
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE PART 12

Justice

-----X

JOHN FAWCETT,

Plaintiff,

- v -

INDEX NO. 157135/2021

MOTION DATE

MOTION SEQ. NO. 001 007

FOX NEWS NETWORK, LLC, FOX CORPORATION, ANDREW NAPOLITANO, LARRY KUDLOW, LACHLAN MURDOCH, VIET DINH, GARY SCHREIER, SUZANNE SCOTT, JAY WALLACE, KEVIN LORD, DENISE COLLINS, STEPHANIE FREEMAN, JENNA STREM,

Defendants.

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 6-26, 36-88, 113-120 were read on this motion to preclude.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 108-112, 138 were read on this motion to extend time.

In this action, plaintiff, a former employee of defendant Fox News Network, LLC, seeks damages from defendants for his alleged sexual harassment by defendant Napolitano. Fox News and defendant Fox Corporation (collectively, movants) seek an order precluding plaintiff from seeking the pro hac vice admission of attorney Ty Clevenger and barring Clevenger's participation in this action (mot. seq. 1). Plaintiff opposes and by notice of cross motion, seeks Clevenger's admission pro hac vice. (Id.; NYSCEF 36, 80). Given plaintiff's cross motion, there is no need to address movants' motion to preclude.

Plaintiff also seeks an order extending his time to file a reply to movants' opposition to his cross motion (mot. seq. 7; NYSCEF 108). Absent any authority offered for the submission of

reply papers on a cross motion, as the parties did not provide for a reply to plaintiff's cross motion in their stipulation adjusting the briefing deadlines for this motion practice (NYSCEF 84), given plaintiff's delay in seeking an extension for this relief, and in light his failure to comply with this part's page limitations for reply memoranda, plaintiff's motion for an extension of time to file a reply is denied, and the reply memorandum is not considered.

It is well settled that admission *pro hac vice* is a privilege, not a right. (*Leis v Flynt*, 439 US 438 [1979]). Thus, a court has discretion in deciding such an application. As pertinent here, an attorney who is a member in good standing of the bar of another state may be admitted *pro hac vice* and, in the court's discretion, may participate in any matter in which the attorney is employed. (22 NYCRR § 520.11[a] ["General"]).

Pursuant to subsection (e) ("Professional Responsibility Requirements") of the rule:

An attorney admitted *pro hac vice* pursuant to this section:

- (1) shall be familiar with and shall comply with the standards of professional conduct imposed upon members of the New York bar, including the rules of court governing the conduct of attorneys and the Rules of Professional Conduct; and
- (2) shall be subject to the jurisdiction of the courts of this State with respect to any acts occurring during the course of the attorney's participation in the matter.

Subdivision (e) is construed as requiring that the applicant's familiarity and compliance with the standards of professional conduct be demonstrated in the application for admission *pro hac vice*, even though the rule plainly places such an obligation on attorneys who have already been so admitted. (*See* 64 NY Jur 2d § 38 [attorney so admitted *pro hac vice* "must be familiar with, and must comply with, the standards of professional conduct imposed on members of the New York bar, including the rules of court governing the conduct of attorneys and the Rules of Professional Conduct . . ."]; "out-of-state attorney who, *inter alia*, does not indicate in an affidavit familiarity with the Disciplinary Rules or willingness to abide by them, is not entitled to admission *pro hac vice*"]; *see eg Foccaci v One East River Place Realty Co., LLC*, 2019 NY Slip Op 30856[U]

[Sup Ct, New York County 2019] [applicant failed to declare under oath that, if admitted *pro hac vice*, he “shall be subject to the jurisdiction of the courts of [New York State] with respect to any acts occurring during the course of [his] participation in the matter.”)]. Even if such a demonstration is not required to obtain admission, the reviewing court’s exercise of discretion would likely be best informed if based on supporting documentation that warrants an inference that the applying attorney is familiar and in compliance with the pertinent standards.

While a party’s choice of counsel constitutes an important factor in determining whether *pro hac vice* status should be granted, the reviewing court must also consider whether the admission would pose a risk to the efficient conduct of the case or to the court’s control of its courtroom and calendar. (*Perkins v Elbilila*, 90 AD3d 543, 544 [1st Dept 2011]; *Neal v Ecolab, Inc.*, 252 AD2d 716, 716 [3d Dept 1998]; *Giannotti v Mercedes Benz U.S.A., LLC*, 20 AD3d 389 [2d Dept 2005]; *Adkins v Lipper, Gordon & Co.*, 10 Misc 3d 1062[A] [Sup Ct, Nassau County 2005]). In most of the decisions in which the interest in efficient litigation is addressed, it is the timing of the application that is in issue. (*Eg Perkins*, 90 AD3d at 544; *Giannotti*, 20 AD3d 389). In other cases, courts consider an applicant’s disciplinary records in determining whether admission would pose a risk to orderly proceedings and court decorum. (*Eg Adkins*, 10 Misc 3d 1062[A]).

Here, Clevenger is a member in good standing in the state of Texas (NYSCEF 83) and, on February 12, 2020 and August 12, 2020 he was admitted *pro hac vice* in actions brought in respectively, Texas and Tennessee (NYSCEF 38, 40) notwithstanding the prior determination of the Eastern District of New York denying him such status (NYSCEF 9). And, although plaintiff has retained local counsel, there is no indication in her affirmation or in the affirmation submitted by her successor (NYSCEF 106, 107) as to the need for Clevenger’s services.

Clevenger's explanations of his disciplinary record and his conduct to date in this instant action reflect an inclination to litigate on the fringes of propriety and/or throw shade at opposing parties and judges who have sanctioned him or have sustained disciplinary charges against him. His rationalizations do nothing to dispel the impression that Clevenger is lax in complying with the standards of professional practice, notwithstanding his presumed sincerity and belief in the righteousness of his causes and motives. In any event, it is not the function of the court reviewing an application for admission *pro hac vice* to sit as an appellate court with respect to the courts and disciplinary bodies which have imposed or sustained the imposition of sanctions and have decided charges against the applicant.

Moreover, although Clevenger points to the absence of sanctions imposed on him or disciplinary action taken against him since his 2020 admissions in Texas and Tennessee, he does not address the likely impact of the COVID-19 pandemic and its sequelae on the litigation conducted in either action. Consequently, the absence of sanctions or disciplinary complaints during that period is not sufficiently probative to alter the negative impression left by Clevenger's disciplinary record.

Additionally, the supporting affirmations of four of the five attorneys are defective. The notarized affirmations of the attorneys from Texas and Tennessee are unaccompanied by certificates of conformity (NYSCEF 45, 47), and the affirmations of two of the New York attorneys are not notarized. And, while the affidavit of the third New York attorney is properly sworn and executed, his familiarity with Clevenger as a litigation opponent is limited to the period since February 2020. Thus, it lacks probative value absent any contention that the case was significantly litigated notwithstanding the pandemic. The application also lacks a basis for finding that Clevenger is familiar with the standards and rules governing the practice of law in

New York, an omission that renders more significant local counsels' failures to explain the need for his services.

Consequently, for all of the foregoing reasons and in the exercise of my discretion, I find that the submissions here demonstrate that the interests in respecting plaintiff's right to counsel of his choice are outweighed by the interest in ensuring that the instant litigation not be sidetracked by the risk to orderly proceedings and court decorum posed by Clevenger.

Accordingly, it is hereby

ORDERED, that the motion of defendants Fox News Network, LLC and Fox Corporation for an order precluding plaintiff from moving for the admission *pro hac vice* of attorney Ty Clevenger is denied as academic; it is hereby

ORDERED, that plaintiff's cross motion for an order granting the admission *pro hac vice* of attorney Ty Clevenger is denied; and it is further

ORDERED, that plaintiff's motion for an extension of time to file a reply to the opposition to his cross motion is denied.

1/11/2022

DATE

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

202201111221135JAFFEA16D00273A1F4BE6830E5602EEFAF5A2

BARBARA JAFFE, J.S.C.