

Joseph v Rassi

2022 NY Slip Op 34129(U)

December 7, 2022

Supreme Court, Kings County

Docket Number: Index No. 510914/2016

Judge: Leon Ruchelsman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

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ADAM JOSEPH, individually and as Member of
Legs Media, LLC and Milk Agency, LLC,
Plaintiff,

Decision and order

- against -

Index No. 510914/~~216~~ 2016

MAZDACK RASSI, individually and as
Member of Legs Media, LLC and
Milk Agency, LLC; MOISHE MANA, individually
and as Member of Legs Media, LLC and
Milk Agency, LLC, EREZ SHTERNLICHT,
individually and as Member of Legs Media, LLC
and Milk Agency, LLC; MILK STUDIOS, LLC;
LEGS MEDIA, LLC; MILK AGENCY, LLC;
MILK MAKEUP, LLC; MILK MAKEUP HOLDINGS,
LLC; MILK MAKEUP MANAGEMENT, LLC; and
SCOTT SASSA,

Defendants,

December 7, 2022

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved seeking to disqualify counsel representing defendants Milk Studio LLC and Milk Makeup LLC. Further, the plaintiff seeks a document-by-document privilege log pursuant to CPLR §3122. The plaintiff has opposed the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

According to the complaint, Legs Media, an entity created to provide creative content for various Milk companies, originally a photography studio, was formed in 2008. Thus, after 2010 Legs became a media agency developing projects for advertising agencies. In 2012 the plaintiff was given a twenty five percent share of Legs Media. Over time many existing and new Milk

entities were formed and some of them competed for space with Legs Media and the attention of the individual defendants. The relationship between the plaintiff and the defendants worsened as the defendants were engaged in other Milk ventures. In 2016 the parties discussed a possible buyout wherein Legs would be separated from any Milk entities. Dan Schulman Esq. "in-house counsel for all Milk branded entities" (see, Complaint, §206 [NYSCEF Doc. No. 18]) facilitated the negotiations. An agreement could not be reached and the plaintiff's employment was terminated. The plaintiff then commenced this action alleging breach of fiduciary duty, corporate waste, misappropriation of corporate opportunity and other causes of action.

The plaintiff has now moved seeking to disqualify Mr. Schulman on the grounds a conflict of interest exists because as counsel to all of the Milk entities his representation also included Legs Media and the plaintiff who clearly do not maintain the same interests as the defendants. The defendants oppose the motion arguing it has no merit.

Conclusions of Law

It is well settled that a party in a civil action maintains an important right to select counsel of its choosing and that such right may not be abridged without some overriding concern (Matter of Abrams, 62 NY2d 183, 476 NYS2d 494 [1984]). Therefore, the party seeking disqualification of an opposing

party's counsel must present sufficient proof supporting that determination (Schmidt v. Magnetic Head Corp., 101 AD2d 268, 476 NYS2d 151 [2d Dept., 1984]).

There is no question that Mr. Schulman represented the various entities in the past and that such representation cannot be undone. However, Mr. Schulman does not currently represent any party in this litigation. The plaintiff argues that "now, Schulman, the entities' In-House Counsel is favoring both the Controlling Members and those entities - all at Joseph's expense" (see, Affirmation in Support, page 7 [NYSCEF Doc. No. 353]). However, Mr. Schulman is not trial counsel defending this action. There is no legal support for the proposition that Mr. Schulman cannot consult with the actual trial counsel because of his past representation of the entities. Indeed, as all parties concede, Mr. Schulman may be called as a witness and can be required to provide testimony in this matter. Therefore, none of the rules concerning conflicts of interest are implicated by the scenario here. For example, Rule 1.7(b) of the New York State Rules of Professional Responsibility states that when a lawyer is faced with representing clients with different interests a lawyer may represent such client "if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve

the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing" (id). However, that only applies if the lawyer is actively and currently engaged in representation. As noted, Mr. Schulman is not actively engaged in any such present representation and is not counsel pursuing this litigation. The mere fact that he can provide information to the entities he represented concerning the facts of this litigation does not demand disqualification. To be sure, the fact that Mr. Schulman may be a witness in this action further supports the conclusion that he is not actively representing any party (see, BT Holdings LLC v. Village of Chester, 2015 WL 8968360 [S.D.N.Y. 2015] holding that an attorney does not violate the advocate-witness rule if the attorney will not be advocating at trial).

Moreover, there is no evidence that Mr. Schulman ever represented the plaintiff. As noted, the complaint does not allege that relationship. Therefore, based on the foregoing, the motion seeking disqualification is denied.

Turning to the motion seeking to require a document-by-document privilege log, Commercial Division Rule 11(b)(1) [22 NYCRR 202.70(g)] specifically states that "the preference in the Commercial Division is for the parties to use categorical

designations, where appropriate, to reduce the time and costs associated with preparing privilege logs" (id). However, Rule 11(b)(3) states that "to the extent that a party insists upon a document-by-document privilege log as contemplated by CPLR 3122, and absent an order to the contrary, each uninterrupted e-mail chain shall constitute a single entry, and the description accompanying the entry shall include the following: (i) an indication that the e-mails represent an uninterrupted dialogue; (ii) the beginning and ending dates and times (as noted on the e-mails) of the dialogue; (iii) the number of e-mails within the dialogue; and (iv) the names of all authors and recipients - together with sufficient identifying information about each person (e.g., name of employer, job title, role in the case) to allow for a considered assessment of privilege issues" (id). Thus, the rule itself contemplates a court order mandating production by categorical designation and not document-by-document production. Further, Rule 11(b)(2) states that "in the event the requesting party refuses to permit a categorical approach, and instead insists on a document-by-document listing on the privilege log, then unless the Court deems it appropriate to issue a protective order pursuant to CPLR 3103 based upon the facts and circumstances before it, the requirements set forth in CPLR 3122 shall be followed" (id).

The plaintiff provides a few reasons a categorical log is

insufficient. First, plaintiff asserts that "the fiduciary-duty exception applies to the attorney-client privilege and communications between Schulman and Joseph's partners regarding this dispute, and thus are not subject to attorney-client privilege from Joseph" (see, Affirmation in Support, page 16). Next, plaintiff argues that "Schulman's representation of the Controlling Members in this action against Joseph could not support a claim of privilege" (see, Affirmation in Support, page 17). Lastly, plaintiff argues that "a document-by-document privilege reasonable [sic] here because there is a relatively small number of documents being withheld for privilege (less than 700) and there is a high amount of money in controversy" (see, Affirmation in Support, page 18).

However those arguments do not explain why a document-by-document production will ameliorate plaintiff's concerns. The mere fact the number of documents are relatively small considering the amount in controversy is not a basis to alter the preferred method of categorical designations. Likewise, seeking a document-by-document production cannot be demanded to buttress arguments that a conflict of interest exists. Thus, the plaintiff has not presented any basis to require the defendants to expend time and expense to provide a document-by-document production.


Therefore, the motion seeking production pursuant to CPLR

\$3122 is denied.

So ordered.

ENTER:

DATED: December 7, 2022
Brooklyn NY



Hon. Leon Ruchelsman
JSC