

Buhl v Kesner

2023 NY Slip Op 30708(U)

March 9, 2023

Supreme Court, New York County

Docket Number: Index No. 152548/2022

Judge: Mary V. Rosado

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

Second Circuit. However, the Second Circuit has not yet issued a decision overruling the SDNY decision, and therefore it remains good law for purposes of this motion.

After dismissal of Kesner's defamation claims against Buhl, she initiated this action to recover damages, including costs and attorneys' fees, pursuant to N.Y. Civ. Rights Law § 70-a (NYSCEF Doc. 1). Kesner now seeks to disqualify Buhl's attorney, who also represented her in the underlying SDNY action (NYSCEF Doc. 10).

Kesner seeks to disqualify Buhl's attorney pursuant to the witness-advocate rule (NYSCEF Doc. 11). Kesner argues that Buhl's intent behind her publications, intent that her attorney may have personal knowledge of, will play a part in his defense in this action. In essence, Kesner argues that Buhl's attorney may have personal knowledge of whether Buhl acted with actual malice in publishing the information which Kesner argues is defamatory.

Buhl opposes Kesner's motion and argues that Kesner is seeking to relitigate whether Buhl acted with actual malice, an issue decided on a motion for summary judgment in the underlying action (NYSCEF Doc. 16). Buhl argues that relitigating the actual malice issue is barred by *res judicata* and collateral estoppel. Further, Buhl argues that Kesner has failed to show by clear and convincing evidence that Buhl's attorney should be disqualified, and, in any event, the rule Kesner relies upon deals with trial testimony, and therefore the motion is premature as this case is at a pre-trial stage.

Kesner argues in reply that Buhl's Anti-SLAPP claims were dismissed on procedural grounds and therefore Kesner's argument is not barred by *res judicata* or collateral estoppel. Kesner also reiterates that Buhl's counsel is "an essential witness on a significant issue of fact, *i.e.*, whether or not Plaintiff had *actual malice* and acted with wanton disregard for the truth in her reporting".

II. Discussion

Rule 3.7 of the Rules of Professional Conduct provides that “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.”

The advocate-witness disqualification rules provide guidance, but not binding authority, for courts in determining whether a law firm should be disqualified during litigation (*S&S Hotel Ventures, Ltd. Partnership v 777 S.H. Corp.*, 69 NY2d 437 [1987]). Whether a witness “ought” to testify is not solely determined by the fact that a witness has relevant knowledge or was involved in the claim at issue; rather, disqualification is only required when it has been shown it is likely the testimony given by a witness is necessary (*Matter of de Menil*, 195 AD3d 410, 411 [1st Dept 2021]). “The challenging party carries a heavy burden of identifying the projected testimony of the advocate-witness and demonstrating how it would be so adverse to the factual assertions or account of events offered on behalf of the client as to warrant his disqualification” (*Dishi v Federal Ins. Co.*, 112 AD3d 484 [1st Dept 2013] quoting *Broadwhite Assoc. v Truong*, 237 AD2d 162, 163 [1st Dept 1997]). Moreover, although it may be determined at the close of discovery that disqualification is warranted, this alone may not disqualify counsel from pursuing pretrial representation (*id*; see also *Twin Securities, Inc. v Advocate & Lichtenstein, LLP*, 97 AD3d 500 [1st Dept 2012]). Because of potential abuse, “courts must guard against the tactical use of motions to disqualify counsel.” (*Lamborn v Dittmer*, 873 F2d 522, 531 [2d Cir 1989]).

Collateral estoppel applies when “(1) the issues in both proceedings are identical, (2) the issue in the prior proceeding was actually litigated and decided, (3) there was a full and fair opportunity to litigate in the prior proceeding, and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits” (*Conason v Megan Holding, LLC*, 25 NY3d [2015] [internal quotation marks and citation omitted], *rearg denied* 25 NY3d 1193 [2015]; *Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1985]). “The fundamental inquiry is whether re-litigation should be permitted in a particular case in light of fairness to the parties, conservation of the resources of the courts and the litigants, and the societal interests in consistent and accurate results.” *Buechel v Bain*, 97 NY2d 295, 303, 304 [2001]). The litigant seeking the benefit of collateral estoppel must show that the decisive issue was necessarily decided in the prior action against a party, or one in privity with a party, while the party to be precluded bears the burden of demonstrating the absence of a full and fair opportunity to contest the prior determination (*id.*).

While Defendant asserts testimony from Plaintiff’s counsel is necessary to establish a defense related to Plaintiff’s actual malice, the Court finds that Defendant is collaterally estopped from litigating whether or not Plaintiff acted with actual malice. On a summary judgment motion, the Court in the underlying action explicitly found that “[i]n sum, there is literally no evidence on which a rational juror could conclude that Buhl published the statements at issue with actual malice.” (*see Kesner v Buhl*, 590 F.Supp.3d 680, 698 [SDNY 2022]). Defendant’s claims against Plaintiff in the underlying action were then dismissed. Collateral estoppel therefore bars Defendant from attempting to relitigate the issue of actual malice. Since Defendant is barred from relitigating the issue of actual malice, it is an uncontested issue, and therefore Rule 3.7 of the Rules of Professional Conduct does not apply. Indeed, the decision in the underlying action regarding an

absence of actual malice means Buhl’s counsel’s testimony regarding his knowledge of actual malice is not necessary.

In any event, given the supporting papers and arguments proffered on the instant motion, Defendant has not met its heavy burden of showing the necessity of Buhl’s counsel’s testimony to warrant pre-trial disqualification. If the Court in the underlying action’s determination that actual malice did not exist is overruled on appeal, this Court may entertain another motion by Defendant. Further, at this pre-trial stage, where it cannot be determined whether testimony from Plaintiff’s counsel will be necessary at trial or whether his testimony will relate solely to an uncontested issue, Defendant’s motion to disqualify is premature (*Twin Securities, Inc. v Advocate & Lichtenstein, LLP* [1st Dept 2012]). Therefore, Defendant’s motion is denied, without prejudice.

Accordingly, it is hereby,

ORDERED that Defendant Harvey J. Kesner’s motion seeking disqualification of counsel for Plaintiff Teri Buhl is denied without prejudice; and it is further

ORDERED that within ten days of entry, counsel for Plaintiff Teri Buhl shall serve a copy of this Decision and Order, with notice of entry, on all parties to this action; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

3/9/2023
DATE

Mary V Rosado JSC
HON. MARY V. ROSADO, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: