

Abney v SmartStop

2023 NY Slip Op 31186(U)

April 5, 2023

Supreme Court, New York County

Docket Number: Index No. 651177/2021

Judge: Verna L. Saunders

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and that he and plaintiff vacated the other three units and placed some of plaintiff's items in the unit Attorney Hershman is leasing. Defendants argue that since Attorney Hershman is leasing a unit previously leased to plaintiff, has taken possession of some of plaintiff's property, and is a witness to the events giving rise to this suit, he must be disqualified from representing plaintiff.

Plaintiff opposes the motion arguing that defendants failed to submit an affidavit from an individual with personal knowledge of the facts asserted; failed to provide an explanation as to who the parties named in the assignment agreement are; failed to provide evidence of the welcome letter's validity, relevance or receipt by plaintiff; and failed to provide a contract executed by plaintiff in place of the blank contract with a "VOID" watermark provided which fails to establish any connection to plaintiff. Plaintiff asserts that Attorney Hershman should not be disqualified as he rented the storage unit for the sole purpose of preventing spoilation when defendants refused to re-rent the unit to plaintiff. Moreover in the sworn affidavit, authored by plaintiff, she states, in pertinent part, that her initial rental agreements with FlatRate did not include an arbitration clause; that she provided a new e-mail address to defendants and therefore, any welcome letter or new contract sent to her old e-mail address was not received; and that she requested that her attorney rent the unit so that the condition she found her belongings in would be "unchanged".

In reply, defendants maintain that Attorney Hershman should be disqualified because the conduct described in his affirmation, wherein he states that he rented plaintiff's unit to prevent spoilation, raises questions as to what he knew or may have witnessed with respect to plaintiff's claims of property damage when he rented the unit and whether he has been properly safeguarding her property.

As relevant here, CPLR 7503 provides that "[a] party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration." On an application to compel arbitration pursuant to CPLR 7503(a), the court's function is to determine whether an agreement to arbitrate and an issue referable to arbitration exists (Advisory Committee Notes; see also *Edgewater Growth Capital Partners, L.P. v Greenstar N. Am. Holdings, Inc.*, 69 AD3d 439 [1st Dept 2010]).

Thus, on a motion to compel arbitration, a court must first "determine whether parties have agreed to submit their disputes to arbitration and, if so, whether the disputes generally come within the scope of their arbitration agreement" (*Sisters of St. John the Baptist, Providence Rest Convent v Geraghty Constructor*, 67 NY2d 997, 999, [1986]). "Once the courts have performed the initial screening process, determining that the parties have agreed to arbitrate the subject matter in dispute, their role has ended and they may not proceed to decide whether particular claims are tenable" (*Praetorian Realty Corp. v Presidential Towers Residence, Inc.*, 40 NY2d 897,898 [1976]).

Upon consideration of the arguments advanced and the relevant legal principles, defendants' application to compel arbitration and dismiss this action is denied. There appears to be no dispute that plaintiff rented four storage units from a FlatRate storage entity and that the business was purchased by an entity doing business as SmartStop Storage, however, the Assignment of Purchase and Sale Agreement annexed to the papers names SST IV Acquisitions LLC and SST IV 865-882 Frelinghuysen Ave LLC as assignor and assignee, but the moving papers fail to explain how these entities are related to the defendants named and appearing herein. Furthermore, the welcome letter attached in support of defendant's application is not addressed to anyone and the record attached to the welcome letter indicates that no DocuSign was captured, meaning that plaintiff had not signed the new lease with the new terms. Also, plaintiff avows that she provided an updated e-mail address to

defendants and based upon the documents submitted, it appears that defendants sent the welcome letter with the new lease to the former -email address. Defendants, on the other hand, fail to annex an affidavit from a person with personal knowledge, employed by defendants, attesting to the facts asserted namely, that plaintiff was informed of the changes to the lease and the thirty-day period to accept the terms or vacate. Insofar as plaintiff did not receive the welcome letter and new lease agreement terms, she was not afforded the opportunity to exercise the thirty-day period to review the papers and decide whether to accept the terms or vacate the units. Thus, the court finds that the parties did not agree to arbitrate the disputes herein.

With respect to defendant's application to disqualify, it is well-settled that "[d]isqualification of [counsel] during litigation implicates not only the ethics of the profession but also the substantive rights of the litigants" because it "denies a party's right to representation by the attorney of its choice" (*S & S Hotel Ventures LP v 777 S. H. Corp.*, 69 NY2d 437, 443 [1987]), which should not be abridged absent a clear showing that disqualification is warranted (*see Matter of Abrams*[*John Anonymous*], 62 NY2d 183, 196 [1984]; *State v Philip Morris, Inc.*, 308 AD2d 57 [1st Dept 2003]). Notwithstanding this principle, an attorney "must avoid not only the fact, but even the appearance, of representing conflicting interests" (*Matter of Strasser*, 129 AD3d 457, 458 [1st Dept 2015], quoting *Cardinale v Golinello*, 43 NY2d 288, 296 [1977]). And, it is well-established that "[t]he decision of whether to grant a motion to disqualify rests in the discretion of the motion court" (*Mayers v Stone Castle Partners, LLC*, 126 AD3d 1, 6 [1st Dept 2015], citing *Macy's Inc. v J.C. Penny Corp., Inc.*, 107 AD3d 616 [1st Dept 2013]).

Under Rule of Professional Conduct 3.7(a): "[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" (22 NYCRR 200.29). Here, insofar as Attorney Hershman confirms the veracity of the rental agreement annexed to the moving papers signed by Attorney Hershman, when he conceded that he is safeguarding plaintiff's property and has therefore, leased her storage unit to prevent "spoilation" of evidence, to wit: the condition of her property, this court foresees that a potential conflict may arise between the plaintiff and her counsel Attorney Hershman or that Attorney Hershman may be required to testify as to the condition of his client's property. If plaintiff discovers another piece of her property is damaged or missing, Attorney Hershman may be required to testify as to which of plaintiff's belongings he observed when he purchased the unit, what condition her belongings were in, how many times he observed the belongings, and who has access to the unit. He may also have to testify as to how he came to be in custody of her belongings as a means to lay a foundation for submission of evidence in support of her claims. Furthermore, if Attorney Hershman fails to pay the monthly storage fees or breaches the rental agreement in any way, placing plaintiff's belongings at risk for auction, plaintiff may have a claim against Attorney Hershman. The advocate-witness rule supports disqualification of Attorney Richard K. Hershman under these circumstances (*see Tenesaca Delgado v Bretz & Coven, LLP*, 109 AD3d 38, 47 [1st Dept 2013]).

Since "any doubts as to the existence of a conflict should be resolved in favor of disqualification" (*Justinian Capital SPC v WestLB AG, NY Branch*, 90 AD3d 585, 585 [1st Dept 2011] [internal quotation marks and citation omitted]; accord *Chang v Chang*, 190 AD2d 311 [1st Dept 1993]), this Court finds, in its discretion, that disqualification of Attorney Richard K. Hershman is warranted (*see Zedeck v Derfner Mgt. Inc.*, 98 AD3d 925, 925-926 [1st Dept 2012]) and that, given the potential prejudice, any waivers from plaintiff are insufficient to cure the conflict (*see Matter of Strasser*, 129 AD3d at 458-459; *Graca v Krasnik*, 20 Misc 3d 1127[A] [Sup Ct, Kings County 2008]; *Franklin High Income Trust v APP Global, Ltd.*, 5 Misc 3d 1032[A] [Sup Ct, NY County 2004]; *see*

generally Matter of Grand Jury Investigation, 191 Misc 2d 800, 806 [Sup Ct, NY County 2002]).
Based on the foregoing, it is hereby

ORDERED that defendants' application for an order pursuant to CPLR 7503(a) directing plaintiff to arbitrate the dispute between the parties is denied; and it is further

ORDERED that defendants' application for disqualification of Attorney Richard K. Hershman, Esq. is granted to the extent that the Attorney Richard K. Hershman, Esq. is disqualified as counsel, and may not represent plaintiff in this matter; and it is further

ORDERED that counsel for defendants, within twenty-one (21) days after the entry of this order, shall serve a copy of this order with notice of entry upon counsel for all other parties and upon plaintiff; and it is further

ORDERED that the action is stayed from this date until forty-five (45) days after service of a copy of this order with notice of entry upon counsel for all parties and upon plaintiff, who shall, within said period, retain another attorney in place of the attorney named above; and it is further

ORDERED that the new attorney retained by plaintiff shall serve upon all parties a notice of appearance and file same with the Clerk of the General Clerk's office (60 Centre Street, Room 119) and the Clerk of the Part within said forty-five (45) day period; and it is further

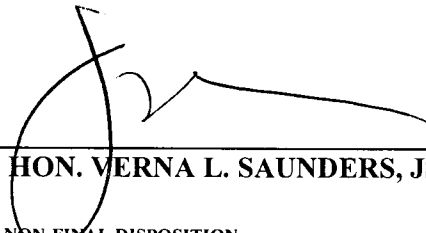
ORDERED that in the event that plaintiff no notice of appearance is filed within said forty-five (45) day period, plaintiff is deemed to proceed *Pro se* (as her own attorney); and it is further

ORDERED that the parties are directed to appear for a conference on June 14, 2023; and it is further

ORDERED that defendant shall serve a copy of this order with notice of entry upon plaintiff within twenty (20) days of entry.

This constitutes the decision and order of this Court.

April 5, 2023



HON. VERNA L. SAUNDERS, JSC

CHECK ONE:

CASE DISPOSED
 GRANTED

DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART

OTHER