

Bedessee v Bedessee

2024 NY Slip Op 32796(U)

August 8, 2024

Supreme Court, Kings County

Docket Number: Index No. 507184/2022

Judge: Leon Ruchelsman

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

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NAWSHAD BEDESSEE,

Plaintiffs, Decision and order

- against -

Index No. 507184/2022

VERMAN BEDESSEE, RAYMAN BEDESSEE,
INVOR BEDESSEE, BEDESSEE IMPORTS INC.,
ANDREW BEDESSEE CORP., BEDESSEE HOLDINGS
INC., BEDESSEE EAST-WEST INDIAN FOOD, INC.
D/B/A BEDESSEE SPORTING GOODS, and
OTHER XYZ CORPORATIONS 1-10,
the true names of which are unknown
to the Plaintiff,

August 8, 2024

Defendant,

-----X
PRESENT: HON. LEON RUCHELSMAN

Motion Seq. #8, #9, #10, #12

The plaintiff has moved seeking to compel the attorney for the defendants Samuel Friedman Esq. to comply with a subpoena served upon him. Mr. Friedman has cross-moved seeking a protective order. Further, the plaintiff has moved seeking to disqualify Mr. Friedman from continuing to represent the defendants. The defendants have cross-moved seeking to disqualify plaintiff's counsel. All the motions have been opposed respectively. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

As recorded in prior decision, the plaintiff and the defendants are all brothers and all assumed control of their father's businesses upon his death in 2017. The complaint alleges, among other improprieties, that defendant, Verman Bedessee the managing member of the business diverted business

assets to his other wholly owned businesses and used the defendant entities pay personal expenses. The complaint further alleges the defendant utilizes employees of the entities to work for his own wholly owned companies thereby ruining the financial stability of the defendant entities. The complaint alleges causes of action for a declaratory judgement, an accounting, breach of fiduciary duty, constructive trust, conversion, corporate waste, unjust enrichment and other claims. The defendants assert the plaintiff has engaged in improper conduct and maintains unclean hands and should not be permitted to assert such claims.

The plaintiff served a subpoena upon defendant's counsel, Samuel Friedman Esq., seeking information. According to the plaintiff, "Friedman acted as outside counsel for the Defendant companies and as such should have testimony and documents, including but not limited, the meeting minutes, shareholders register, filing corporate documents, and all email correspondence exchange with the parties and non parties surrounding, inter alia, ownership, appraisals, and loans taken out by Defendants. At a minimum, he conferred with all the parties together and separately on issues of family ownership in the New York Bedessee companies" (see, Memorandum of Law, page 4 [NYSCEF Doc. No. 202]). The plaintiff argues that discovery thus far has failed to resolve any of the ownership disputes in this litigation and thus the testimony and documents possessed by

Friedman is essential.

Concerning subpoenas served upon opposing counsel, such subpoenas are proper, and the attorney cannot assert any privilege, only if the attorney was not acting as counsel in the transaction but was acting as the role of negotiator or some other corporate capacity (Vanderbilt Brookland LLC v. Vanderbilt Myrtle Inc., 2016 WL 7423819 [Supreme Court Kings County 2016]). In Vanderbilt (supra) counsel for the defendant could not shield herself from depositions relying on the attorney client privilege. The court explained counsel's dealings were "conducted in her capacity as the authorized corporate representative of Vanderbilt Myrtle" and not as counsel providing any legal advice (*id.*).

In this case there is no dispute that Mr. Friedman acted as counsel regarding all the materials sought within the subpoena. The plaintiff's assertion that Mr. Friedman is a fact witness is a truism that without a demonstration the attorney-client privilege is not applicable cannot require such deposition. Of course, almost every attorney may be a fact witness in these types of situations and the dearth of cases permitting such disclosure highlights the infrequency of this request. Thus, the plaintiff has failed to present any basis to conclude Mr. Friedman was not acting as counsel for the defendant.

The plaintiff further seeks to depose Mr. Friedman on the grounds the information is vital and the attorney-client

privilege should yield to the necessity of the information required. That request is not governed by Vanderbilt (supra) wherein the individual is not counsel at all. This "appropriately rare" expedient, deposing an attorney to ask factual questions, is governed by Liberty Petroleum Realty LLC v. Gulf Oil L.P., 164 AD3d 401, 84 NYS3d 82 [1st Dept., 2018]). The court first noted that deposing opposing counsel is disfavored because such depositions are hardly calculated to "assist preparation for trial by sharpening the issues and reducing delay and prolixity'" and because "the practice of calling opposing counsel as a witness at trial is [] offensive to our conception of the adversarial process" and because such depositions "raises at least the possibility of attorney disqualification" (id). The court did permit such depositions but only where the information sought is material and necessary and where there is good cause for such deposition and where the material cannot be obtained from other sources. In Liberty (supra) the plaintiffs, distributors of motor fuel to gas stations sued various gas stations on the grounds the gas stations ceased purchasing gas from plaintiffs and began purchasing from others and that such conduct amounted to tortious interference with franchise agreements. The plaintiff served a subpoena on defendant's counsel seeking his deposition regarding the tortious interference claims. The court noted there was a likelihood the testimony was sought merely to disqualify counsel; the testimony

was not relevant in any event and such testimony could involve privileged communications. The court remanded to a lower court to correct an erroneous burden shift which could have impacted the lower court's decision.

Considering that guidance, the plaintiff has failed to present any evidence why the testimony is material and relevant and in any event cannot be obtained from other sources. Mr. Friedman bears the initial burden demonstrating the information sought from him is not unique. Thus, the plaintiff requests the deposition of Mr. Friedman to inquire about the corporate composition of various entities. However, Mr. Friedman has adequately asserted that he does not possess any unique information that cannot be discovered from other sources, especially the parties themselves. In opposition, the plaintiff merely states that "Defendants' personal communications, factual admissions, and factual misrepresentations to Friedman [sic] and his firm are highly relevant to establishing the nature of the relationship between the Bedessee brothers with regard to ownership, shareholders, and financial status" (see, Memorandum in Reply, page 7 [NYSCEF Doc. No. 253]). The need and importance of the information sought does not establish any basis to seek such testimony from Mr. Friedman. Further, there is insufficient evidence that Mr. Friedman was acting as a fiduciary to the extent that any of his communications are discoverable pursuant to the fiduciary exception to the attorney-client privilege

(Eraiture v. Board of Directors of 44 King Street Inc., 216 AD3d 530, 189 NYS2d 480 [1st Dept., 2023]).

Therefore, based on the foregoing the motion seeking to compel Mr. Friedman to comply with any subpoena is denied and the cross-motion seeking a protective order is granted.

Turning to the motion to disqualify Mr. Friedman on the grounds he will be called as a witness, Rule 3.7 of the New York Rules of Professional Conduct prohibits an attorney from representing a party where it is likely the attorney will be called as a witness on behalf of the client regarding a "significant issue" (*id.*). Thus, to disqualify counsel the party seeking such disqualification must demonstrate that the testimony of the counsel will be necessary to pursue its own claims (Arons v. Charpentier, 8 AD3d 595, 779 NYS2d 242 [2d Dept., 2004]). Alternatively, even if not strictly necessary, disqualification would be proper where the testimony of counsel would be prejudicial to his or her own client (Daniel Gale Associates, Inc., v. George, 8 AD3d 608, 779 NYS2d 573 [2d Dept., 2004]).

Thus, the crucial questions which must be addressed is whether the testimony of Mr. Friedman is 'necessary' and even if not necessary whether such testimony will prejudice any of the defendants. For testimony to be deemed necessary thereby requiring disqualification of counsel, it must be demonstrated that counsel is 'likely to be a witness' (Rule 3.7) and the

testimony cannot be garnered from other sources, is not cumulative and is vital to prove the allegations of the case (Sokolow, Dunaud, Mercadier & Carreras LLP v. Lacher, 299 AD2d 64, 747 NYS2d 441 [1st Dept., 2002]). In this case there has been absolutely no evidence presented at all that the plaintiff by necessity should call Mr. Friedman to pursue any of its claims (see, S&S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp., 69 NY2d 437, 515 NYS2d 735 [1987]). First, there has been no demonstration that evidence or testimony in the possession of Mr. Friedman cannot be obtained from other sources or is not duplicative or that it would be harmful to the defendants. This is particularly true in this case where none of the parties have been deposed. Indeed, the plaintiff does not dispute these realities. Plaintiff concedes that "Friedman is the only person, other than the parties, who has first-hand knowledge of the particular facts surrounding the ownership of the Bedessee Companies, a most central issue of fact in the instant litigation, as Defendants Verman and Rayman contend that Defendant Verman is the sole owner of BINY without reputable evidence reflecting the same. Friedman's knowledge of all the parties herein is central to this lawsuit and he should be required to testify" (see, Memorandum in Support, page 8 [NYSCEF Doc. No. 244]). While it is true an attorney can be called as a witness to corroborate disputed facts (Falk v. Gallo, 73 AD3d

685, 901 NYS2d 99 [2d Dept., 2010]) there must be a demonstration such facts indeed are in dispute. Moreover, proof of ownership of corporations, a disputed matter in this case, cannot be decided based upon Mr. Friedman's thoughts about percentages of ownership or even communications between the parties that the parties already possess. Nor can ownership be based upon Mr. Friedman's relationship with the parties following the death of their father. Ownership is not established in so tenuous a fashion. Therefore, Mr. Friedman's testimony is not "necessary" and he should not be disqualified on this basis.

The former client conflict of interest rule is codified in the New York Rules of Professional Conduct, Rule 1.9 (22 NYCRR §1200.0 et. seq.). Specifically, Rule 1.9(a) provides: "a lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client..." (id).

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materially adverse to the interests of the former client..."

(Id). Although a hearing may be necessary where a substantial issue of fact exists as to whether there is a conflict of interest (Olmoz v. Town of Fishkill, 258 AD2d 447, 684 NYS2d 611 [2d Dept., 1999]) mere conclusory assertions are insufficient to warrant a hearing (Legacy Builders/Developers Corp., v. Hollis Care Group, Inc., 162 AD3d 649, 80 NYS3d 59 [2d Dept., 2018]).

Thus, a party seeking disqualification of counsel must demonstrate that: (1) there was a prior attorney client relationship; (2) the matters involved in both representations are substantially related; and (3) the present interests of the attorney's past and present clients are materially adverse (Moray v. UFS Industries Inc., 156 AD3d 781, 67 NYS3d 256 [2d Dept., 2017]; see, also, Falk v. Chittenden, 11 NY3d 73, 862 NYS2d 869 [2008]; Jamaica Pub. Serv. Co. v. AIU Ins. Co., 92 NY2d 631, 684 NYS2d 459 [1998]). Once the moving party demonstrates that these three elements are satisfied "an "irrebuttable presumption of disqualification follows" (McCutchen v. 3 Princesses and A P Trust Dated February 3, 2004, 138 AD3d 1223, 29 NYS3d 611 [2d Dept., 2016]).

Thus, in interpreting the prior rule DR 5-108(A) (1) which is substantially the same in import, disqualification would be proper where it is established that there is a substantial relationship between the current litigation and the prior one

(Kuberzig v. Advanced Dermatology, P.C., 260 AD2d 548, 688 NYS2d 596 [2d Dept., 1999]).

Thus, concerning this substantial relationship prong, in Spano v. Tawfik, 271 AD2d 522, 705 NYS2d 659 [2d Dept., 2000], the court held disqualification improper where the plaintiff's attorney suing defendant for breach of contract once represented the defendant in a trademark infringement action when plaintiff and defendant were the sole shareholders of the corporation that settled that trademark action. The court noted there was insufficient evidence the matters were substantially related. Indeed, for the two matters to be viewed as substantially related they must be 'identical to' each other or 'essentially the same' (Lightning Park, Inc., v. Wise Lerman Katz, P.C., 197 AD2d 52, 609 NYS2d 904 [1st Dept., 1994]).

Moreover, in Campbell v. McKeon, 75 AD3d 79, 905 NYS2d 589 [1st Dept., 2010] the court explained that a "lawyer's representation of a business entity does not render the law firm counsel to an individual partner, officer, director or shareholder unless the law firm assumed an affirmative duty to represent that individual" (id). Thus, a corporation's counsel represents the corporation and not its individual shareholders or its employees (Eurycleia Partners LP v. Seward & Kissel LLP, 12 NY3d 553, 883 NYS2d 147 [2009]).

Consequently, even if Mr. Friedman represented the

corporate entities it does not mean he must be disqualified from representing any individuals.

Therefore, the motion seeking to disqualify Mr. Friedman is denied.

The cross-motion seeking to disqualify plaintiff's counsel is denied at this time. There is insufficient evidence that any prior representations were related to this action. The case of Sessa v. Parrotta, 116 AD3d 1029, 985 NYS2d 128 [2d Dept., 2014] is instructive. In that divorce case the court denied the wife's motion to disqualify the husband's attorney on the grounds that attorney had prepared the wife's will. The court held the subject matter of both cases were not related thus there was no substantial relationship between the two representations. Again, in Altungevik v. Aykmat, 49 Misc3d 1209(A), 26 NYS3d 212 [Supreme Court Suffolk County 2015] the court denied plaintiff's motion to disqualify the defendant's counsel. In that derivative shareholder action the defendant's counsel had previously represented the plaintiff in preparing a pre-nuptial agreement, an immigration application and the shareholder agreement of defendant Euro Planet Inc. The court held the current lawsuit concerned the value of the defendant Euro Planet Inc. The court noted the formation of the corporation years before was not substantially similar to its value in the current action and thus denied the motion for disqualification.

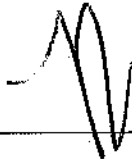
These cases demonstrate that a party seeking disqualification of opponent's counsel "bears a heavy burden" (Mayers v. Stone Castle Partners, LLC, 126 AD3d 1, 1 NYS3d 58 [ast Dept., 2015]) and the court must examine the evidence presented and determine whether in its discretion such disqualification is proper (id). The prior action involved a Department of Labor audit and concerned payroll records and the employment status of its employees. That matter is not related at all to this action, that is a dispute between brothers about ownership of their father's entities.

Therefore, the motion seeking to disqualify plaintiff's counsel is denied.

So ordered.

ENTER:

DATED: August 8, 2024
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC