

Gear Up Found., Inc. v Riordan
2024 NY Slip Op 35206(U)
July 3, 2024
Supreme Court, Westchester County
Docket Number: Index No. 61675/2018
Judge: Charles D. Wood
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order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
GEAR UP FOUNDATION, INC., VINCENT FORRAS,
CARMEN MONICA CARRERA,

Plaintiffs,

DECISION and ORDER

- against -

Index No.: 61675/2018
Sequence No. 5

CHRISTOPHER RIORDAN, PADDY NEVILLE,
and THOMAS WHYTE,¹

Defendants.

-----X
WOOD, J.

New York State Courts Electronic Filing ("NYSCEF") Document Numbers 148-181 were read in connection with defendant Thomas Whyte's ("defendant") motion to disqualify plaintiffs' counsel, Michael Sussman, Esq. ("Sussman"), of the Law Firm of Sussman & Goldman, from representing plaintiffs in this action, pursuant to Rules 1.6, 1.7, 3.7 and 8.4(c) of the New York State Rules of Professional Conduct.²

In this action for defamation, plaintiffs allege that in August and October of 2017, defendants defamed and libeled plaintiffs by falsely representing that they were, *inter alia*, a fraud. Plaintiffs allege that as a result, their reputations have been damaged and that they lost funding that they would have otherwise received.

Based upon the foregoing, the motion is decided as follows:

¹ By Decision and Order dated July 23, 2019, this Court granted defendant Patrick Ianzizotto's motion to dismiss the complaint as against him.

² By letter dated April 11, 2024, defendant Paddy Neville joined the instant motion.

“A party’s entitlement to be represented in ongoing litigation by counsel of his or her own choosing is a valued right which should not be abridged absent a clear showing that disqualification is warranted. While the right to choose one’s counsel is not absolute, disqualification of legal counsel during litigation implicates not only the ethics of the profession but also the parties’ substantive rights, thus requiring any restrictions to be carefully scrutinized. The party seeking to disqualify a law firm or an attorney bears the burden to show sufficient proof to warrant such a determination. Whether to disqualify an attorney is a matter which lies within the sound discretion of the court” (*Marotta v Marotta*, 218 AD3d 468, 471 [2d Dept 2023]; *Gamez v Lopez*, 220 AD3d 844, 846 [2d Dept 2023]; *Falk v Gallo*, 73 AD3d 685, 685-686 [2d Dept 2010]).

As a preliminary matter, the Court notes that defendant did not make any arguments based on Rules 1.6 or 8.4(c). As such, the motion has only been considered pursuant to Rules 1.7 and 3.7.

Rule 3.7

Rule 3.7 of the New York State Rules of Professional Conduct provides that:

- (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 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.*
- (b) *A lawyer may not act as advocate before a tribunal in a matter if: (1) another lawyer in the lawyer’s firm is likely to be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony may be prejudicial to the client; or (2) the lawyer is precluded from doing so by Rule 1.7 or Rule 1.9 (emphasis added).*

“The advocate-witness rules contained in the Code of Professional Responsibility, which has been superseded by the Rules of Professional Conduct, provide guidance for the courts, but are not binding authority, in determining whether a party’s attorney should be disqualified during litigation” (*Fuller v Collins*, 114 AD3d 827, 829 [2d Dept 2014]).

“A party moving to disqualify counsel on the ground that he or she may be called as a witness must demonstrate that (1) the testimony of the opposing party’s counsel is necessary to his or her case, and (2) such testimony would be prejudicial to the opposing party” (*Gamez* at 846; *Kingston Check Cashing Corp. v Nussbaum Yates Berg Klein & Wolpow, LLP*, 218 AD3d 760, 761 [2d Dept 2023]). “Disqualification may be required only when it is likely that the testimony to be given by the witness is necessary. Testimony may be relevant and even highly useful but still not strictly necessary. A finding of necessity takes into account such factors as the significance of the matters, weight of the testimony, and availability of other evidence” (*S&S Hotel Ventures Ltd. Partnership v 777 S.H. Corp.*, 69 NY2d 437, 445-446 [1987]).

Defendant moves to disqualify Sussman pursuant to Rule 3.7, arguing that he is a necessary witness whose testimony bears on significant issues of fact. Specifically, defendant argues that plaintiffs’ allegations of defamation place plaintiff Gear Up Foundation, Inc.’s (“Gear Up”) finances and corporate governance and policies at issue in determining the truth or falsity of defendants’ alleged defamatory statements. Defendant argues that Gear Up’s website and e-mails to and from Sussman indicate that Sussman is a member of Gear Up’s Board of Directors (the “Board”). As such, defendant argues that it is likely that Sussman has personal knowledge of, *inter alia*, Gear Up’s financial practices and corporate governance, as well as of the financial harm caused to Gear Up by plaintiffs Vincent Forras (“Forras”) and Monica Carrera’s (“Carrera”) (collectively, the “individual plaintiffs”) improper use of the funds donated to Gear Up. Defendant

argues that he should be permitted to question Sussman at a deposition or trial about these issues.

Defendant argues that permitting Sussman to continue as counsel will be potentially severely prejudicial to defendants at trial, because the jury may be confused or misled by a lawyer's serving as both advocate and witness.

In opposition, Sussman argues that he is not a witness to anything relevant to this action. He argues that he only served as a member of the Board from September 2008 through late 2009, and has not served since. He also argues that he has never been uniquely knowledgeable about any aspect of Gear Up's operation. He argues that any information defendant seeks is available through those who have served on the Board during the relevant time period, including the individual plaintiffs and others they identified at their deposition. He argues that defendant has not explained why he cannot obtain this information from other people. He affirms that he has no knowledge regarding any of the issues that defendant desires to question him about.

Sussman argues that defendants will not be prejudiced if he is not called as a witness at trial. He argues that defendant should not call him as a witness, because he has no unique knowledge regarding these issues.

Forras submits an affidavit, in which he states that Sussman has not been on the Board since late 2009, nor involved in the management or operation of Gear Up in any way. He asserts that the website which lists Sussman as a Board member is "an abandoned website which others hijacked years ago" (Affidavit of Vincent Forras, ¶ 9). He asserts that they do not control that website and that their actual website does not list Sussman as a Board member.

In reply, defendant argues that Gear Up's Form 990s indicate that Sussman also served on the Board in 2005, 2006 and 2007.³ Defendant also argues that since Sussman admits to having

³ The Court notes that Gear Up's Form 990s for the years 2005 and 2006 list Sussman as "Board/atty" (Exhibit B). In plaintiffs' response to the April 12, 2023, notice to admit, plaintiffs denied that Sussman was a member of the

served on the Board in 2008 and 2009, it is highly unlikely that he does not have any knowledge regarding Gear Up's practices and lack of corporate governance that led to the misuse of the donated funds.

Defendant argues that he is unable to call other witnesses related to the plaintiffs' improprieties, because plaintiffs have refused to disclose the Board minutes which will identify the Board members. Defendant also argues that there is no other witness who can testify that Forras made a material misrepresentation on the Form 990s and on their website by identifying Sussman as a Board member without his knowledge and permission. Defendant argues that this goes to plaintiffs' veracity.

Here, defendant has not demonstrated that Sussman should be disqualified pursuant to Rule 3.7, because he has not established that Sussman's testimony is necessary. Specifically, defendant has not demonstrated that Sussman has unique knowledge regarding the issues about which he desires to question him, and that this information is not available from other sources (*See, i.e., Hudson Valley Marine, Inc. v Town of Cortlandt*, 54 AD3d 999, 1000-1001 [2d Dept 2008] [holding that defendant had not demonstrated that the plaintiff's attorney's testimony was necessary, because other people could testify about relevant matters]). Moreover, defendant's own motion papers indicate that the information he seeks may be available from other sources. For example, the printout of the website defendant submitted with his motion as Exhibit E lists not only Sussman, but Alan Wilzig, Dr. Stephen Levin, and Michael Weaver as Board members. The Form 990s defendant submitted with his motion as Exhibit S list officers. The emails that defendant submitted with his motion as Exhibits J, K, and R also refer to several members of the Board.

Board from 2005 through 2007. Plaintiffs stated that Sussman was the corporation's counsel for limited purposes (Exhibit B, D).

Accordingly, defendant's motion to disqualify Sussman pursuant to Rule 3.7 is denied.

Rule 1.7

Rule 1.7 of the New York State Rules of Professional Conduct provides that:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either: (1) the representation will involve the lawyer in representing differing interests; or (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a 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.

"[D]oubts as to the existence of a conflict of interest must be resolved in favor of disqualification so as to avoid even the appearance of impropriety. Moreover, even when an actual conflict of interest may not exist, disqualification may be warranted based on a mere appearance of impropriety so long as there is actual prejudice or a substantial risk thereof" (*Marotta* at 471; *Wiederman v Halpert*, 172 AD3d 1442, 1443 [2d Dept 2019]; *Lovitch v Lovitch*, 64 AD3d 710, 711 [2d Dept 2009]).

Defendant moves to disqualify Sussman pursuant to Rule 1.7 to avoid the appearance of impropriety, arguing that there is a potential conflict of interest between Sussman and the individual plaintiffs. Specifically, defendant argues that as a member of the Board and a fiduciary of Gear Up, Sussman has an obligation to act in Gear Up's best interests and has a duty to see that funds improperly taken by the individual plaintiffs are returned to Gear Up.

In opposition, Sussman argues that there is no appearance of impropriety, because he has not been a member of the Board since 2009.

Here, defendant has not demonstrated that Sussman should be disqualified pursuant to Rule 1.7, because he has not established that there is any conflict of interest or appearance of impropriety created by Sussman serving as plaintiffs' counsel. Contrary to defendant's arguments, the record indicates that Sussman is not currently a member of the Board and has not been for over a decade. As such, he does not have a duty to Gear Up that conflicts with the individual plaintiffs' interests.

Accordingly, defendant's motion to disqualify Sussman pursuant to Rule 1.7 is denied.

Any other relief requested and not decided herein is denied. The foregoing shall constitute the Decision and Order of this Court.

Based upon the foregoing, it is hereby

ORDERED, that defendant Thomas Whyte's motion to disqualify plaintiffs' counsel, Michael Sussman, Esq., of the Law Firm of Sussman & Goldman, from representing plaintiffs in the instant action, and all other relief requested, is denied; and it is further

ORDERED, that within twenty days after this decision and order is uploaded to NYSCEF, counsel for plaintiffs shall serve a copy of this decision and order electronically with notice of entry, upon all parties, and file proof of service on NYSCEF within five days of service.

Dated: White Plains, New York
July 3, 2024



HON. CHARLES D. WOOD, J.S.C.

To: All Parties by NYSCEF