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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Madden PART 11
Justice

Hemmings, Paul

- v -

IVY League Apt. Corp.

INDEX NO. 100357/12

MOTION DATE

MOTION SEQ. NO. 02

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for Disqualify Counsel

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision/Order.

FILED
OCT 25 2012
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: October 20, 2012

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 11

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PAUL HEMMINGS, VIVIAN LLORDA, ROGER MURPHY, RONALD SMITH AND MAYADA EL-ZOGHBI, EACH ON THEIR OWN BEHALF AS SHAREHOLDERS OF IVY LEAGUE APT CORP. AND DERIVATIVELY ON BEHALF OF THE IVY LEAGUE APT CORP.,

Plaintiffs,

Index no. 100357/12

-against-

DECISION AND ORDER

IVY LEAGUE APT CORP., 675 REALTY LLC, EDEL FAMILY MANAGEMENT CORP., MICHAEL EDELSTEIN, FLORENCE EDELSTEIN, RONALD EDELSTEIN, DANIEL EDELSTEIN, SHANEE RUBIN, ERIN MESSNER, AND LUZ FELICIANO,

Defendants.

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JOAN A. MADDEN, J.:

Plaintiffs move for an order disqualifying Charles Chehebar, Esq. (Chehebar) and his law firm Chehebar Deveney & Phillips (the Law Firm) from representing defendants 675 Realty LLC (the Sponsor), Edel Family Management Corp. (the Managing Agent), Michael Edelstein, and Florence Edelstein on the ground that Chehebar and members of the Law Firm will be required to testify regarding disputed issues in this lawsuit. The Sponsor, the Managing Agent and Michael Edelstein and Florence Edelstein oppose the motion, which is denied for the reasons below.

BACKGROUND

Plaintiffs allege that in 1986, the Sponsor converted a 60-unit apartment building located at 675 Academy Ave. in New York City to ownership as a cooperative. The Coop contains one professional apartment and, according to the Offering Plan, the

professional apartment was to be leased by the Coop to the sponsor for a term of 25 years. Although no shares were immediately allocated to the professional apartment, 176 shares were designated for it. The Offering Plan further provides:

> That in the event that the professional unit is altered for residential use and the Certificate of Occupancy amended to reflect such residential use, or in the event a ruling shall be made by the Internal Revenue Service or by a court of competent jurisdiction that the existence of the professional unit in the building will not result in a disqualification of the Apartment Corporation as a "cooperative" under § 216 (1) (B) of the Internal Revenue Code, the lessee (i.e. the Sponsor) may surrender the lease for the professional apartment, at which time the Apartment Corporation shall issue to the lessee the 176 shares of the Apartment Corporation allocated to Apartment AA together with the appropriate proprietary lease

(Llodra Aff., Ex. G [Offering Plan], at 39-40).

At a board meeting on August 29, 2011, the Coop's board of directors approved four resolutions related to the professional apartment: 1) approval of the installation of new windows; 2) approval of the dimensions of the apartment for conversion to residential use which plans had been approved by the Buildings Department; 3) a mandate that all work for conversion of the professional unit to residential use would be substantially completed by the later of 180 days from August 29, 2011 or the date provided for, if any, in the offering plan and; 4) an agreement that, upon completion of all work and the amendment of the certificate of occupancy in accordance with the time provisions in Resolution 3, the board would issue the 176 shares and the proprietary lease to the Sponsor (Chehebar Aff, Ex. 1).

In January 2012, plaintiffs commenced this lawsuit alleging, *inter alia*, that defendants breached their obligations in the Offering Plan, that the Sponsor and Michael Edelstein, Florence Edelstein, Ronald Edelstein, Daniel Edelstein (collectively the Edelstein Family) breached their fiduciary duties, and seeking injunctive relief prohibiting the Coop from transferring the shares allocated for the professional apartment to the Sponsor.[1]

Specifically, plaintiffs contend that, on August 29, 2011, the date of the board meeting where the board prospectively and conditionally approved the issuance of the shares, the defendants had not met the threshold requirements delineated in the bylaws for issuance of the shares because the professional apartment had not been converted to residential use, the certificate of occupancy had not been amended to reflect such residential use and/or there had not been an affirmative ruling from the IRS or a court regarding the status of a Coop qua Coop upon conversion. They claim that when the 25-year lease expired in September 2011, the Sponsor's option to acquire the shares also expired as it had not met the threshold requirements articulated in the bylaws. They also contend that the resolution must be set aside as the Sponsor controlled the board and as the resolution violates the Assurance of Discontinuance (AOD) between the Sponsor and New York's Attorney General prohibiting the Sponsor from purchasing any additional shares in the Coop (Llorda Aff, Ex. H, at 7, ¶ 13).

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[1] Plaintiffs moved for a preliminary injunction to prevent the defendants from allocating or assigning the 176 shares that have been designated for the professional apartment and to prevent the defendants from issuing a proprietary lease for the apartment (motion seq. no. 001), but subsequently withdrew the motion.

In support of the motion to disqualify Charles Chehebar, Esq. and the Law Firm from representing the Sponsor, the Managing Agent or Florence and Michael Edelstein in this action, plaintiffs argue that Chehebar is a necessary witness, or it is likely that his testimony will be necessary, since he was present at the August 29, 2011 board meeting and took the minutes of the meeting; he was the principal drafter of the four resolutions that were accepted at that meeting; he played a pivotal role in negotiating and drafting the AOD and he played an active role in the September 2011 elections, including his supervision of the vote count.

In addition, they argue that even if Chehebar is not a necessary witness, he may be called as a witness and it is likely that his testimony will be prejudicial to his clients.

In opposition to disqualification, the Sponsor, Managing Agent and Florence and Michael Edelstein argue that Chehebar is not serving as their advocate in this lawsuit. In addition, they contend that, even if he were their advocate, Chehebar is not a necessary witness to the events that occurred at the August 29, 2011 board meeting as there were many other individuals present at that meeting; that no one has contested the accuracy of the minutes that Chehebar took at the August 29, 2011 meeting; Chehebar's testimony will not be necessary regarding the terms of the AOD because the document speaks for itself; and, if testimony is necessary to establish whether exercising the option violated paragraph 13 of the AOD, the proper party to testify is the Attorney General, not Mr. Chehebar. Finally, the Sponsor, Managing Agent and Florence and Michael Edelstein deny that Chehebar had anything to do with the election process or the tallying of the votes.

DISCUSSION

Rule 3.7 of the New York Rules of Professional Conduct (22 NYCRR 1200.00) set forth circumstances where a lawyer or a law firm, in the court's discretion, may be disqualified from acting as an advocate before a tribunal.

Rule 3.7 (a), which relates to the disqualification of an individual attorney states:

> A lawyer shall not act as an 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 the legal services rendered in the matter; (3) disqualification of the lawyer would work substantial hardship on the client; or (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.

Rule 3.7 (b), which sets forth the circumstances for disqualification of a law firm, states:

> A lawyer may not act as an 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.

As an initial matter, for disqualification to be available under Rule 3.7 (a), the lawyer-witness must be serving as an "advocate before the tribunal" (*Murray v Metropolitan Life Ins. Co.*, 583 F3d 173, 179 [2d Cir 2009]). In *Murray*, four of defendants' lawyers were likely to be called to testify at trial. Three of them were transactional attorneys and would not be trial advocates. The fourth, a trial attorney, was a member of the litigation team, but he would not act as an advocate before the jury. In

that case, the court held that none of the attorney witnesses was properly considered as trial counsel for the purposes of Rule 3.7 (a).

Here, Chehebar will not be serving as the "advocate before the tribunal" for the Sponsor, the Managing Agent and/or Florence and Michael Edelstein. Rather, Cornelius P. McCarthy, Esq., of counsel to Chehebar, Devaney and Phillips, will represent those clients before the court. Therefore, disqualification on advocate-witness grounds is not warranted.

However, even if Chehebar were serving as advocate, plaintiffs have not demonstrated that Chehebar would be a necessary witness. Under Rule 3.7 (a), the movant must meet the "heavy burden of establishing that [the lawyer's] testimony [is] necessary" (*Campbell v McKeon*, 75 AD3d 479, 481 [1st Dept 2010]; *see also S & S Hotel Ventures, Ltd. Partnership v 777 S. H. Corp.*, 69 NY2d 437, 445-446 [1987]). "Merely because an attorney has relevant knowledge or was involved in the transaction at issue does not make that attorney's testimony necessary" (*Talvy v American Red Cross in Greater N.Y.*, 205 AD2d 143, 152 [1st Dept 1994], *affd* 87 NY2d 826 [1995][internal quotation marks and citation omitted]). Indeed, where other witnesses are available or the attorney's testimony would be cumulative, the movant's burden cannot be met (*see 1010 Data, Inc. v Firestone Enters., Inc.*, 88 AD3d 627, 628 [1st Dept 2011][attorney's testimony regarding modifications to agreement not necessary where agreement based on announcement at board meeting where others were present and there was no ambiguity in the agreement]).

In this case, there were nine other individuals, including two nonparties, who attended the August 29, 2011 board meeting and no one has questioned the accuracy of

the minutes of that meeting. In addition, the Attorney General as well as other nonparty witnesses are available to testify regarding the AOD. Chehebar's testimony regarding these issues would be cumulative and is, therefore, unnecessary (*see Plotkin v Interco Dev. Corp.*, 137 Ad2d 671, 674 [2d Dept 1988][motion to disqualify should be denied where there is other evidence available from another source, including a party to the litigation]). Accordingly, the branch of the motion that seeks to disqualify Chehebar is denied.

Moreover, the branch of the motion that seeks disqualification of the Law Firm pursuant to Rule 3.7 (b) is also denied.

Under Rule 3.7 [b], a law firm can be disqualified by imputation under the witness-advocated rule only when the movant proves, "by clear and convincing evidence, that [A] the witness will provide testimony prejudicial to the client, and [B] the integrity of the judicial system will suffer as a result" (*Murray v Metropolitan Life Ins. Co.*, 583 F.3d at 178-179).

In this case, plaintiffs have failed to demonstrate that, if Chehebar is called as a witness, he will provide testimony that will be prejudicial to his clients. Plaintiffs vague and conclusory statements that Chehebar's testimony will prejudice his clients are insufficient to warrant imputed disqualification and thus deprive the defendants of their choice of counsel (*see S&S Hotel Ventures Ltd. Partnership v 777 S.H. Corp.*, 69 NY2d at 446; *Nowak v Pillich*, 186 AD2d 1018 [4th Dept 1992]; *Ocean-Clear, Inc. v Continental Cas. Co.*, 94 AD2d 717, 719 [2d Dept 1983]).

Accordingly, it is

ORDERED that plaintiffs' motion to disqualify Charles Chehebar, Esq., and the members of his law firm, Chehebar, Deveney and Phillips from representing defendants 675 Realty, LLC, Edel Family Management Corp., Florence Edelstein and Michael Edelstein is denied; and it is further

ORDERED that a preliminary conference shall be held on December 13, 2012 at 9:30 am in Part 11, room 351, 60 Centre Street, New York, NY.

DATED: October 20, 2012

ENTER:

J.S.C.

FILED

OCT 25 2012

COUNTY CLERK'S OFFICE
NEW YORK