

**Siller Wilk LLP v Red Riv. Delta LLC**

2012 NY Slip Op 33506(U)

July 19, 2012

Supreme Court, New York County

Docket Number: 103879/10

Judge: Richard F. Braun

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This opinion is uncorrected and not selected for official publication.

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

**HON. RICHARD F. BRAUN**

**PRESENT:** \_\_\_\_\_ **J.S.C.**  
Justice

**PART** 23

Index Number : 103879/2010  
SILLER WILK  
vs.  
RED RIVER DELTA, et al  
SEQUENCE NUMBER : 001  
COMPEL DISCLOSURE

**FILED**  
**JUL 25 2012**

INDEX NO. \_\_\_\_\_  
MOTION DATE 2/16/12  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to 4, were read on this motion before the **NEW YORK COUNTY CLERK'S OFFICE** respect/disqualify/substitute

Notice of Motion/~~Order to Show Cause~~ -- Affidavits -- Exhibits \_\_\_\_\_ | No(s). 12

Answering Affidavits -- Exhibits \_\_\_\_\_ | No(s). 3

Replying Affidavits \_\_\_\_\_ | No(s). 4

Upon the foregoing papers, it is ordered that this motion is granted to the extent of compelling defendants to produce documents in response to Request no. 5 of Plaintiff's first notice for discovery & inspection, within 20 days of service of a copy hereof, with notice of entry; compelling Anthony Z. Fletcher to testify and produce documents at a deposition in this action in compliance with the subpoena ad testificandum, within said 20 days; disqualifying him from representing defendants in the action; he constitutes the decision and order of this Court. See separate Opinion

and substituting "With a slander L.P. as plaintiff and amend the caption accordingly and further amending the caption to add Siller Wilk L.P. as counterclaim defendant, and it is further

ORDERED that plaintiff shall serve a copy hereof on the County Clerk and Social Support Office, who shall amend their records accordingly;

Dated: New York, New York July 19, 2012

ENTER: RP, J.S.C.

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

1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 23**

----- X  
SILLER WILK LLP,

Index No. 103879/10

Plaintiff,

**OPINION**

-against-

RED RIVER DELTA LLC, MICHAEL  
CALLAHAN, HUY CHI LE, and  
JEAN MARC HOUMARD,

Defendants.  
----- X

**FILED**

**JUL 25 2012**

**RICHARD F. BRAUN, J.:**

**NEW YORK  
COUNTY CLERK'S OFFICE**

This is an action to recover legal fees and for an account stated. Plaintiff Siller Wilk LLP moves (1) pursuant to CPLR 3124, to compel defendants to produce certain documents in response to request no. 5 of plaintiff's first notice for discovery & inspection, dated August 5, 2010; (2) pursuant to CPLR 2302 and 3124, to compel Anthony Q. Fletcher, Esq., counsel for defendants, to comply with a subpoena ad testificandum, dated December 29, 2012; (3) pursuant to rule 3.7 of the Rules of Professional Conduct, to disqualify Mr. Fletcher as counsel for defendants; and (4) to amend the caption to substitute plaintiff's current name, "Wilk Auslander LLP", in place of plaintiff's former name.

In the complaint in this action, plaintiff claims that it performed legal services for defendant Red River Delta LLC from February 2007 to September 2009 in connection with the underlying action, that defendant agreed to pay plaintiff's hourly billing rates and disbursements for the legal services, and that defendant failed to make any payments after March 2009, owing plaintiff a balance of \$175,000.

By written settlement agreement, the parties agreed to permit defendants to pay the outstanding balance for legal services in three installments: an initial installment of \$100,000, and two subsequent installments of \$37,500. Defendants also agreed that the entire outstanding balance, plus any additional legal fees, expenses, and interest, would become immediately due upon defendants' default in payments under the settlement agreement. Defendants paid the initial \$100,000 installment. However, plaintiff contends that defendants failed to pay the remaining installments under the settlement agreement. Plaintiff also alleges that it sent written statements to defendants requesting payment of the outstanding balance, plus additional fees and expenses, but that defendants failed to pay the amount demanded.

Defendants answered the complaint, generally denying the allegations in the complaint and asserting numerous affirmative defenses, including that the settlement agreement was void as against public policy because the agreement preconditioned the substitution of defendants' counsel on defendants' consenting to plaintiff's financial demands. Defendants allege counterclaims for conversion, breach of fiduciary duty, breach of contract, negligence, and legal malpractice.

The only grounds under which defendants object to the request in plaintiff's notice to produce are attorney client privilege and attorney work product. Generally, attorney client communications and attorney work product are not discoverable under CPLR 3101 (b) and (c). The party asserting such privileges has the burden thereon and of proving non-waiver thereof (*Matter of Priest v Hennessy*, 51 NY2d 62, 69 [1980]; *New York Times Newspaper Div. of N.Y. Times Co. v Lehrer McGovern Bovis*, 300 AD2d 169, 172 [1<sup>st</sup> Dept 2002]; *John Blair Communications v Reliance Capital Group*, 182 AD2d 578, 579 [1<sup>st</sup> Dept 1992]). The attorney client privilege is deemed waived when a party puts at issue in the litigation the subject matter of the communication and where

upholding the privilege would prevent the opposing party from receiving important information in discovery (*Veras Inv. Partners, LLC v Akin Gump Strauss Hauer & Feld LLP*, 52 AD3d 370, 373 [1<sup>st</sup> Dept 2008]). Defendants have waived the privileges by in essence asserting a duress defense in their seventh affirmative defense that the settlement agreement's conditioning the change of defendants' counsel on defendants' conceding to plaintiff's financial demands regarding its outstanding bills for attorney's fees voided the agreement, and by asserting their counterclaims. Thus, the discovery and inspection request should be complied with.

In deposition discovery of defendants, the finger was pointed at Mr. Fletcher as the person who would have certain relevant information sought by plaintiff. Given that, and his involvement with the settlement negotiations and the escrow account, his deposition should occur, with production of documents.

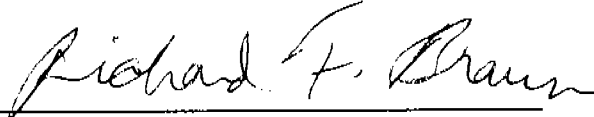
Rule 3.7 (a) of the Rules of Professional Conduct provides that a lawyer shall not be an advocate before any tribunal in which he or she is likely to be a witness on a significant factual issue, with certain exceptions not shown to be applicable here. The Court of Appeals held in interpreting the predecessor rule that, where an attorney who will be a witness at trial has already appeared for his or her client, the lawyer must withdraw from the representation (*S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp.*, 69 NY2d 437, 444 [1987]). Disqualification of a lawyer causing a client pecuniary hardship is alone an insufficient reason to not disqualify the attorney (*cf. Grossman v Commercial Capital Corp.*, 59 AD2d 850 [1<sup>st</sup> Dept 1977] [under the predecessor rule to rule 3.7 (a) (3)]). Mr. Fletcher should be disqualified under the circumstances here.

Normally changing a party's name in the caption to the party's new name should be allowed. Defendants have argued that this should not be permitted here in light of defendants' counterclaims.

The caption has been amended to the new name of plaintiff, and the caption should include the current plaintiff's name as a counterclaim defendant in light of the arguable merit to defendants' arguments as to the need to maintain plaintiff's name in the caption.

Therefore, by this court's separate July 19, 2012 decision and order, the motion was granted to the extent of compelling defendants to produce documents in response to request no. 5 of plaintiff's first notice for discovery & inspection, dated August 5, 2012, within 20 days of service of a copy of the July 19, 2012 decision and order, with notice of entry; compelling Anthony Q. Fletcher, Esq. to testify and produce documents at a deposition in this action in compliance with the subpoena ad testificandum, within said 20 day period; disqualifying him from representing defendants in this action; and substituting Wilk Auslander LLP as plaintiff in this action, and amending the caption accordingly. The caption has been further amended to include the name of Siller Wilk LLP as counterclaim defendant.

Dated: New York, New York  
July 19, 2012

  
RICHARD F. BRAUN, J.S.C.

**FILED**

**JUL 25 2012**

**NEW YORK  
COUNTY CLERK'S OFFICE**