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

PRESENT: Hon. EILEEN A. RAKOWER PART 15

Justice

ESTATE OF DINA EHRLICH,

INDEX NO. 113993/2010

Petitioner,

-v-

DAVID WOLF AND MICHAEL C. WIMPFHEIMER, ESQ.,

Respondents.

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO. 003

The following papers, numbered 1 to ___ were read on this motion for/to

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	1, 2
Answer — Affidavits — Exhibits	3
Replying Affidavits	4

Petitioner, Estate of Dina Ehrlich ("Petitioner" or "the Estate"), brings this action to recover funds from defendants David Wolf ("Wolf"), the son-in-law of Dina Ehrlich's second husband Martin Bluenthal, and Michael Wimpfheimer Esq. ("Wimpfheimer"), Wolf's attorney. The complaint alleges that the subject funds belong to the Estate, and Wolf agreed to return them to the Estate pursuant to an agreement dated January 18, 2010. Petitioner asserts that it was Wimpfheimer, as attorney for Wolf, who drafted and executed the agreement on behalf of Wolf.

Petitioner now moves to disqualify Wimpfheimer from representing Wolf on the basis that he is a fact witness whose testimony is necessary to Plaintiff's case. Plaintiff contends that Wimpfheimer should be disqualified from representing Wolf pursuant to the witness-advocate rule, because Wimpfheimer was a key participant in the communications central to the dispute between the parties and which is the basis of the within lawsuit. Respondents oppose this motion.

New York Rules of Professional Conduct 3.7, known as the advocate-

witness rule, states in relevant part:

> (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.

This rule applies "first and foremost, where the attorney representing the client before a jury seeks to serve as a fact witness in that very proceeding." *Ramey v. District 141, Intern. Ass'n of Machinists and Aerospace Workers*, 378 F.3d 269 [2nd Cir. 2004]. The justifications underlying this rule are that "(1) the lawyer will appear to vouch for his own credibility, (2) the lawyer's testimony will put opposing counsel in a difficult position when he has to vigorously cross-examine his lawyer-adversary and seek to impeach his credibility, and (3) there may be an implication that the testifying attorney may be distorting the truth as a result of bias in favor of his client." (*Id.*) Overall, if an attorney acts as both advocate and witness it can "blur[ ] the line between argument and evidence" thereby confusing the fact finder. (*Id.*)

Since disqualification denies litigants the right to representation by an attorney of their choosing, attorneys should only be disqualified if their testimony is necessary. (*See S&S Hotel Ventures Limited Partnership v. 777 S.H. Corp.*, 69 N.Y.2d 437, 508 [1987]). Testimony that might be relevant or useful is not strictly necessary. (*Id.*) Rather, such factors to consider are "the significance of the matters, weight of the testimony, and availability of other evidence." (*Id.*) When an attorney is "an active participant in a disputed transaction" or has specific and personal knowledge of the underlying circumstances are also factors considered. (*See e.g. Hempstead Bank v. Reliance Mortg. Corp.*, 81 A.D.2d 906 [2nd Dept. 1981]; *Zagari v. Zagari*, 295 A.D.2d 891 [4th Dept. 2002]).

The Complaint alleges that on July 20, 2009, Ms. Ehrlich opened a Joint Account at Chase Bank with Wolf, her second husband Martin Bluenthal's son-in-law, to assist her in paying bills. It is alleged that the purpose of the Joint Account was solely for Wolf to assist Ms. Ehrlich with the payment of her bills. Ms. Ehrlich died on December 21, 2009. Pursuant to Ms. Ehrlich's last will and testament, each of Wolf's children and nephews were to receive $25,000 bequests, but Wolf himself was not a beneficiary of Ms. Ehrlich's estate.

The Complaint further asserts that pursuant to an agreement dated January 18, 2010, between Wimpfheimer, as attorney for Wolf, and Joel Krinitz, acting on behalf of Ms. Ehrlich's Estate, Wolf agreed to pay the bequests of $25,000 each to his children and nephews under Ms. Ehrlich's will out of the Joint Account. The agreement also provided that Wolf would not issue any other checks on the Koint Account without authorization by the executors of Ms. Ehrlich's Estate, and that Wolf would transmit the balance of the Joint Account to the estate of Dina Ehrlich.

The complaint alleges that Wolf paid the bequests as agreed to from the Joint Account; however, it is alleged the balance of the joint account, $191,574.70, has not been turned over to the Estate. Petitioner contends that Wolf has "raided the account for his own personal benefit."

Petitioner alleges that Wimpfheimer's testimony is material and necessary to demonstrate Wolf's agreement to the terms of the 2010 Agreement, which is the basis for the first cause of action for breach of contract. Petitioner specifically states that Wimpfheimer's testimony with respect to the 2010 Agreement will be critical at trial because Wolf himself testified at his deposition that: (i) he does not recall the January 18, 2010 Agreement at all; (ii) he does not recognize Wimpfheimer's signature on the letter agreement; and (iii) he disclaims any obligation to comply with the terms of the letter agreement. Thus, Petitioner asserts that Wimpfheimer, who drafted and executed the agreement on behalf of Wolf, must testify as to whether Wolf was aware of the agreement he drafted, whether Wolf intended to be bound by its terms, and whether Wimpfheimer was authorized to execute the agreement on Wolf's behalf.

In opposition, Respondents assert that the "existence" of the January 2010 Agreement is not contested and, therefore, there is no need for him to testify, and

further, he cannot be compelled to testify regarding his involvement with the Agreement on the basis of attorney client privilege.

Wolf's assertion at his deposition that he does not recall the 2010 Agreement, does not recognize Wimpfheimer's signature on the Agreement, and therefore is not bound by its terms makes Wimpfheimer's testimony necessary and disqualification of Wimpfheimer as trial counsel for Wolf is therefore warranted.

Wherefore, it is hereby

ORDERED that Petitioner's motion to disqualify is granted to the extent that Michael C. Wimpfheimer is disqualified from serving as trial counsel for respondent David Wolf in this action.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: DECEMBER 5, 2013

HON. EILEEN A. RAKOWER J.S.C.

Check one: FINAL DISPOSITION (X) NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE