Zito v Harding
2005 NY Slip Op 30523(U)
November 15, 2005
Supreme Court, New York County
Docket Number: 602308/04
Judge: cahn

[* 1]

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

PART 49

Index Number : 602308/2004
ZITO, ROBERT J.A.
VS
FISHBEIN, BADILLO, WAGNER
Sequence Number : 007
AMEND

INDEX NO. _____
MOTION DATE 7/25/05
MOTION SEQ. NO. _____
MOTION CAL. NO. 19

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

	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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE .....

Dated: 11/15/05

J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 49
----------X

ROBERT J.A. ZITO, Index No. 602308/04

Plaintiff,

- against -

FISCHBEIN BADILLO WAGNER HARDING,

Defendant.
----------X

CAHN, J.:

Plaintiff moves (1) to serve another amended complaint to add (a) the law firm Cozen O'Connor and (b) the partners of defendant law firm Fischbein Badillo Wagner Harding (FBWH) as party defendants, and (2) disqualifying Cozen O'Connor as counsel to FBWH, pursuant to Disciplinary Rule 5-102 [A] ("Lawyers as Witnesses") (22 NYCRR 1200.21).

The facts underlying this action were set forth in prior decisions. Briefly summarized, from August 1998 through March 2003, plaintiff was an attorney at the FBWH law firm. He alleges that he performed legal services at FBWH pursuant to an agreement that provided that FBWH would compensate him in an amount that includes (1) the sums that FBWH collects from clients that plaintiff introduced to the firm, and (2) the sums for services that plaintiff performed on matters for clients whom he did not introduce to the firm, less his proportionate share of the firm's overhead expenses. Plaintiff claims that FBWH failed to compensate him in the agreed-upon manner.

FBWH contends that plaintiff was always an at-will, salaried employee, and not a partner of the firm, although he was allowed to use the title "contract partner." FBWH asserts that plaintiff was never a party to any firm partnership agreement, never guaranteed nor agreed to be

responsible for any of its debts, did not share in its losses, never received an IRS Form K-1 (partnership form) from it, and never had an equity interest in it.

The original complaint contained two causes of action for (1) breach of contract and (2) unjust enrichment. The amended complaint included a third cause of action seeking damages pursuant to Labor Law § 198. In prior decisions, I dismissed the unjust enrichment and Labor Law causes of action, but denied the motion to dismiss the breach of contract cause of action.

I previously determined that plaintiff could amend the complaint to add only those individuals who were equity partners of FBWH during the relevant time period.

In now seeking leave to also add Cozen O'Connor as a party defendant, plaintiff contends that, during the pendency of this action, there has been either a merger or a de facto merger between FBWH and Cozen O'Connor. Plaintiff argues that Cozen O'Connor is a successor firm to FBWH, and as such, is liable for FBWH's obligations, debts, and liabilities, and that FBWH will be insolvent or otherwise unable to pay any judgment that plaintiff may obtain. FBWH argues that Cozen O'Connor is not a successor firm, and that there was no merger or de facto merger of the two law firms.

The de facto merger doctrine creates an exception to the general principal that an acquiring corporation does not become responsible for the pre-existing liabilities of the acquired corporation (*see Schumacher v Richards Shear Co.*, 59 NY2d 239 [1983] [in the context of tort liability]). The hallmarks of a de facto merger are: (1) continuity of ownership, (2) cessation of ordinary business and dissolution of the acquired corporation as soon as possible, (3) assumption by the successor of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the acquired corproation, and (4) continuity of management, personnel, physical

location, assets, and general business operation (*Fitzgerald v Fahnestock & Co.*, 286 AD2d 573 [1st Dept 2001]). The de facto merger doctrine is not limited to tort actions, but is also applicable to breach of contracts actions (*id.*).

Plaintiff argues that there has been a defacto merger of the two law firms, because 39 of the 45 former FBWH lawyers are now associated with Cozen O'Connor, and, of these, at least 18 former FBWH attorneys have become members of Cozen O'Connor. Moreover, Cozen O'Connor occupies the same space as that used by FBWH, located at 909 Third Avenue, New York, New York.

According to Richard S. Fischbein, Esq., formerly a senior partner and equity member of FBWH, FBWH continues to exist. It continues to own and collect its receivables, and that none were assigned to Cozen O'Connor, nor has Cozen O'Connor purchased any of FBWH's assets. In addition, FBWH remains liable for its debts; Cozen O'Connor has not assumed any liabilities, nor has it agreed to pay any of FBWH's debts or obligations. Although Cozen has taken over part of the former FBWH space at 909 Third Avenue, it has entered into its own lease with the landlord of the premises for its use of that space. FBWH also contends that there is no common ownership of the two firms, nor is there common management.

The issue of whether or not there has been a merger or de facto merger of the two firms cannot be resolved on papers alone, especially considering that a de facto merger finding does not require the presence of all of the above-stated factors (*Matter of New York City Asbestos Litig. v A.W. Chesterton Co.*, 15 AD3d 254 [1st Dept 2005]). There are numerous issues of fact, including, but not limited to, the continuity of ownership and management, the transfer of assets, if any, and the continued existence of FBWH as a going concern.

Morever, the circumstances here present the unusual situation of Cozen O'Connor's representing FBWH, which argues that Cozen O'Connor should not be made a party defendant, rather than Cozen O'Connor making this assertion on its own behalf. It is for these reasons that I grant the motion for leave to serve an additional amended complaint adding Cozen O'Connor as a party defendant. This is necessary to afford it the opportunity to argue on its own behalf that it does not belong in this action as a party. In the interests of justice and judicial economy, and for purposes of case management, after Cozen O'Connor serves its answer to the amended complaint, I am inclined to bifurcate the action to the extent of severing the framed issue of merger/de facto merger, so that discovery and resolution of that issue can proceed expeditiously.

As for disqualification, plaintiff argues Cozen O'Connor should be disqualified from representing FBWH, because a number of former FBWH attorneys, who now practice at Cozen O'Connor, ought to be called to testify as witnesses concerning significant issues in this action, including attorneys who were part of the "Firm Governance Committee, and the "Partner Compensation Committee" of FBWH.

The advocate-witness rule requires an attorney to withdraw from a case "'if the lawyer knows or it is obvious that the lawyer ought to be called as a witness on a significant issue on behalf of the client'" (*Sokolow, Dunaud, Mercadier & Carreras LLP v Lachner*, 299 AD2d 64, 74 [1st Dept 2002], quoting Code of Professional Responsibility DR 5-102 [22 NYCRR 1200.21]). However, as stated by the Court of Appeals:

> "Disqualification of a law firm during litigation implicates not only the ethics of the profession but also the substantive rights of the litigants. Disqualification denies a party's right to representation by the attorney of its choice."

(*S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp.*, 69 NY2d 437, 443 [1987]).

Under the 1990 amendments to the Code of Professional Responsibility, a law firm is permitted to continue representation of a client even though one of the firm's attorneys will be called as a witness on behalf of the client before a tribunal (*Matter of Owen & Mandolfo v Davidoff of Geneva*, 197 AD2d 370 [1st Dept 1993], *lv denied* 83 NY2d 751 [1994]). A firm is not to be disqualified merely because one or more of its attorneys might be called as witnesses (*ICS Yarn Corp. v Incomex, Inc.*, 298 AD2d 232 [1st Dept 2002]; *Talvy v American Red Cross in Greater New York*, 205 AD2d 143 [1st Dept 1994], *affd* 87 NY2d 826 [1995]).

Because the record indicates that only a small number of Cozen O'Connor attorneys are necessary witnesses, the motion to disqualify the entire firm is denied. However, any attorneys at Cozen O'Connor who are necessary witnesses in this action, such as former members of the various FBWH governance committees, are disqualified from representing FBWH.

Parenthetically, the court notes that if Cozen O'Connor continues its representation of FBWH and partners, there may be a conflict of interest between FBWH and its attorneys -- since FBWH may be better served by a finding that there was a de facto merger and Cozen O'Connor may be better served by a finding of no de facto merger. However, since all of the parties are attorneys, they should be able to resolve the issue.

Fischbein and Bruce Lederman are both necessary witnesses. On a prior motion, Fischbein stated that, as a senior partner and equity member of FBWH, he is the person who originally hired plaintiff. The record indicates that, on behalf of FBWH, he is the person having the greatest knowledge of the alleged terms of compensation between plaintiff and the firm. As for Lederman (whose name appears on the memorandum of law submitted in opposition to plaintiff's motion), he states that he was involved in the hiring of plaintiff, and to the best of his

knowledge, plaintiff remained an employee of FBWH at all times until he voluntarily left FBWH's employ and at no time did plaintiff have an equity interest in FBWH. In that affidavit, Lederman details his understanding of plaintiff's compensation arrangement with the firm (*see* Exhibit C to plaintiff's affidavit, sworn to May 26, 2005). In view thereof, it is probably necessary for Lederman to testify in the action. Therefore, both Lederman and Fischbein must be disqualified under DR 5-102 (A) (*Sokolow, Dunaud, Mercadier & Carreras LLP v Lachner*, 299 AD2d 64, *supra*). This would also appear to apply to Mark Intriligator, Menachem Kastner, and Marvin Mitzner, former partners of FBWH on its "Case Intake Committee," whose testimony may be relevant to the issue of damages, if any. Other attorneys may later be disqualified under the same reasoning.

The basic reasoning behind disqualification under the "advocate-witness" rule, is to prevent the unseemly spectacle of the attorney who is representing a party on trial, leave counsel table and testify as a witness. Further, the attorney should not vouch for his own testimony on opening or summation. Finally, it avoids conflicts between the testifying attorney and his client.

However, all of those reasons should not prevent the attorney from working on the matter in a "behind the scenes" capacity. For example, the disqualified attorney herein, could assist the trial attorney to prepare for the questioning of witnesses, preparing motion papers, etc. To the extent that the court has disqualified attorneys herein, the disqualification is limited to appearances at trial, on depositions or at court appearances.

Finally, to the extent that any individual attorneys are added as defendants, they may, of course, represent themselves (*In re Hunter Studios*, 164 BR 431 [Bankr ED NY 1994]), if they be so advised.

Accordingly, it is

ORDERED that the motion is granted and plaintiff is granted leave to serve a supplemental summons and further amended complaint. Defendants shall answer the amended complaint within 20 days from the date of service of the amended complaint upon them; and it is further

ORDERED that plaintiff's motion is denied to the extent that it seeks to disqualify Cozen O'Connor from representing defendant Fischbein Badillo Wagner Harding; and it is further

ORDERED that Richard S. Fischbein, Esq. and Bruce Lederman, Esq. are disqualified from representing defendants in the trial of the lawsuit.

Dated: November 15, 2005

ENTER:

J.S.C.