Vanderbilt Brookland LLC v Vanderbilt Myrtle Inc.
2016 NY Slip Op 32500(U)
December 23, 2016
Supreme Court, Kings County
Docket Number: 500522/14
Judge: Lawrence S. Knipel
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At an IAS Term, Part Comm-4 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 23rd day of December, 2016

PRESENT:

HON. LAWRENCE KNIPEL,
Justice.

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VANDERBILT BROOKLAND LLC,

Plaintiff,

- against -

Index No. 500522/14

VANDERBILT MYRTLE INC., CUMBERLAND FARMS, INC. and ALL YEAR MANAGEMENT LLC.,

Defendants.

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The following papers numbered 316 - 344 and read herein:	NYSCEF Documents
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	316 - 342
Opposing Affidavits (Affirmations)	343 - 344
Reply Affidavits (Affirmations)	
Sur- Reply Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, in motion sequence number 13, plaintiff Vanderbilt Brookland LLC (Brookland) moves for an order: (1) pursuant to CPLR 2308(b), compelling non-party Regina Felton, Esq., counsel for defendant Vanderbilt Myrtle Inc. (Vanderbilt Myrtle), to comply with the subpoena dated August 26, 2015, commanding her to produce documents and to appear for examination regarding the transactions and events underlying this action (the Subpoena); and (2) pursuant to Rule 3.7 of 22 NYCRR § 1200.0,

disqualifying Ms. Felton from representing Vanderbilt Myrtle in this action.

Facts and Procedural Background

Plaintiff commenced this action against Vanderbilt Myrtle seeking a judgment declaring the parties' rights with respect to a Property Sale Contract to purchase property owned by Cumberland Farms, Inc. (Cumberland), located at 140 Vanderbilt Avenue in Brooklyn (the Property). Vanderbilt Myrtle is the tenant of the Property, which is used as a gas station. On September 24, 2013, Cumberland offered Vanderbilt Myrtle the right of first refusal to purchase the Property. On November 6, 2013, Vanderbilt Myrtle elected to exercise that right.

By written agreement executed in October or November 2013, Brookland agreed to be bound by the terms and conditions set forth in the Property Sale Contract; that Vanderbilt Myrtle would sell 5% of its stock to Brookland for $500,000, with $50,000 payable upon the signing of the contract; to pay the $1,000,000 non-refundable deposit due to Cumberland under the Property Sale Contract; and not to record the agreement or any memorandum thereof (the Vanderbilt Contract). The Property Sale Contract was executed between Cumberland and Vanderbilt Myrtle on December 4, 2013. Pursuant thereto, Cumberland agreed to sell the Property to Vanderbilt Myrtle for $10,000,000; Vanderbilt Myrtle was obligated to deposit $1,000,000 with First American Title Company (First American) upon execution of the agreement and to close no later than July 30, 2014.

Thereafter, Vanderbilt Myrtle assigned the Property Sale Contract to a second party,

All Year Management LLC (All Year).

Brookland then commenced the instant action against Vanderbilt Myrtle on January 23, 2014 and moved to enjoin Vanderbilt Myrtle from selling, assigning or transferring the Property. By decision and order dated March 17, 2014, a preliminary injunction was granted (the March 2014 Decision).

On April 2, 2014, Cumberland and All Year executed a Memorandum of Contract in which Cumberland agreed to sell the Property to All Year pursuant to the terms and conditions set forth in the Property Sale Contract (the Memorandum of Contract).

On May 14, 2014, Brookland filed an Amended Complaint adding Cumberland and All Year as defendants. The Amended Complaint asserts a claim for a mandatory injunction compelling performance of the Property Sale Contract and the Vanderbilt Contract to enable Brookland to purchase the Property. In a later motion, Brookland sought to extend the preliminary injunction granted against Vanderbilt Myrtle in the March 2014 Decision to Cumberland and All Year. By decision and order dated October 6, 2014, this court denied Brookland's motion for injunctive relief, holding that because "All Year was the first and only party to record its conveyance, it is likely to succeed in proving that its rights are superior to those of Brookland."

Thereafter, Brookland moved for reargument and/or renewal of its motion. By decision and order dated April 10, 2015, this court granted leave to reargue and, upon reargument, granted Brookland a preliminary injunction against Cumberland and All Year.

Therein, the court recognized that the denial of Brookland's prior motion was premised on the application of Real Property Law § 294(3), pursuant to which priority is given to the good faith purchaser whose contract is first duly recorded. On reargument, it was noted that the Property Sale Contract expressly provided that neither it, nor any memorandum thereof, was to be recorded. Cumberland and All Year nevertheless executed a new agreement, the Memorandum of Contract, in order to avoid the recording prohibition. Accordingly, the making and recording of the Memorandum of Contract, after receipt of notice of Brookland's claim to purchase the Property, may not satisfy the good faith requirement of the recording statute and hence may not serve to give All Year priority vis-a-vis Brookland's earlier claim.

On August 28, 2015, Brookland served the Subpoena on Ms. Felton; notice of the Subpoena was also served on the other parties in this action. The Subpoena requests the production of all correspondence and communications between Ms. Felton and Karen S. D'Antonio, Esq., of Hiscock &Barkley, the attorney for Cumberland; between Ms. Felton and Eial Girtz, Esq., the attorney for Brookland; between Ms. Felton and Stephen Friedman, Esq., of Reiss Sheppe, the attorney for All Year; and between Ms. Felton and First American relating to the sale of the Property and the various agreements entered into between the parties. Ms. Felton did not move to quash, modify or limit the Subpoena, nor did she object to it. On September 18, 2015, Ms. Felton did not appear for examination and a record of her default was made.

After several motions were made by Brookland, Vanderbilt Myrtle produced a total

of 574 pages of documents and the deposition of John Tsao, the president of Vanderbilt Myrtle, was conducted.

Plaintiff's Demand for Discovery from Ms. Felton

Plaintiff's Contentions

In support of its motion, plaintiff alleges that on November 25, 2013, it made the first payment of $50,000 required under the Vanderbilt Contract. By letter dated November 27, 2013 to Ms. D'Antonio, Ms. Felton sent the signature page of the Property Sale Contract and requested Cumberland's consent for this assignment, along with a request that the escrow deposit be held by First American in New York City instead of its office in Houston, Texas. By email sent on December 5, 2013, Ms. D'Antonio advised Ms. Felton that Cumberland did not object to the assignment. By email sent on December 5, 2013, Ms. Felton advised Brookland's attorney that Cumberland's consent had been obtained.

On December 10, 2013, Brookland wired $1 million from Capital One Bank to First American; the money was remitted by Gilad Enterprises LLC (Gilad). An email sent on the same day and produced from the file of Ms. Felton confirms that $1 million was wired. Plaintiff also relies upon an affidavit from James Thanasules, Vice President and Agency Counsel for First American, in which he alleges that on December 10, 2013, First American received a wire transfer in the amount of $1,000,000 from Gilad; the funds were still being held by First American.

By letter dated January 14, 2014 from Ms. Felton, Mr. Girtz was advised that

Vanderbilt Myrtle rescinded, terminated and cancelled all agreements with Brookland; a $50,000 bank check, representing a refund of plaintiff's initial payment under the Vanderbilt Contract, accompanied the letter. Plaintiff argues that Vanderbilt Myrtle has no right to terminate the Contract. Brookland also contends that although defendants claim that All Year is a good faith purchaser of the Property, without prior notice of Brookland's claim, Ms. Felton communicated with All Year about Brookland prior to the time that the Property Sale Contract was assigned to it.

On March 24, 2014, counsel for Brookland telephoned Ms. D'Antonio to inform her and Cumberland of the March 2014 Decision that granted a preliminary injunction and to request that Cumberland proceed with Brookland's purchase of the Property. Ms. D'Antonio responded by advising Brookland that on December 23, 2013, Vanderbilt Myrtle transferred its rights under the Property Sale Contract to an unidentified third party; the transferee presented an assignment instrument to Cumberland, which was countersigned on January 6, 2014 (the Assignment Agreement). On March 25, 2014, counsel for Brookland again spoke with Ms. D'Antonio and was told that while she could not disclose the name of the transferee, Mr. Friedman was the attorney. Mr. Friedman did not respond to communications from Brookland's counsel.

Brookland was able to independently determine the identity of the purported assignee by searching the ACRIS electronic database system of the New York City Department of Finance. Brookland discovered that on April 8, 2014, Cumberland and All Year recorded

the Memorandum of Contract.

Brookland thus contends that this case presents three issues of fact: whether consent was given by Cumberland to an assignment of Vanderbilt Myrtle's rights under the Property Sale Contract; whether Brookland properly paid the $1 million deposit called for by the Property Sale Contract and properly notified Vanderbilt Myrtle that the payment was made; and whether All Year was a good faith purchaser of the Property, without prior notice of Brookland's claim, when it entered into the Assignment Agreement with Vanderbilt Myrtle. Plaintiff asserts that Ms. Felton has critical knowledge and information relative to the factual issues and alleged defenses to Brookland's claim, since she participated in the negotiation of these transactions. According to plaintiff, her deposition and trial testimony are therefore material and necessary, and it is projected to be adverse to her client's contentions and interests. Moreover, the disclosure of Ms. Felton's knowledge and information relative to these issues is not protected by the attorney-client privilege because all of her dealings in respect to the subject transactions were purportedly of a business character and were conducted in her capacity as the authorized corporate representative of Vanderbilt Myrtle.

Brookland further asserts that the documents produced by Vanderbilt Myrtle and the deposition testimony of Mr. Tsao confirm that Ms. Felton is at the center of every issue raised in this action. More specifically, plaintiff contends that the documents produced by Vanderbilt Myrtle generally consist of the subject agreements and correspondence in the form of letters, facsimile transmissions and emails. It claims that although the subject

agreements were signed by Mr. Tsao, virtually none of the correspondence produced by Vanderbilt Myrtle was received or sent by Mr. Tsao. Rather, the correspondence is between the transactional attorneys for the parties, i.e., Ms. Felton for Vanderbilt Myrtle, Mr. Girtz for Brookland, Ms. D'Antonio for Cumberland and Mr. Friedman for All Year.

Brookland also asserts that at his deposition, conducted on March 28 and 29, 2016, Mr. Tsao testified "I don't remember" in response to more than 100 questions. For example, he did not remember the specifics of meetings attended by him and Ms. Felton with representatives of Brookland and All Year; whether he had specifically authorized Ms. Felton to send certain key correspondences to counsel; whether he had ever been shown key correspondences received by Ms. Felton from counsel; and whether he was ever informed by Ms. Felton of any oral communications between her and other counsel. Mr. Tsao only vaguely remembered meeting with some of the principal actors in relation to the subject transactions; Ms. Felton was present at and participated in most of these meetings. Brookland goes on to assert that its inability to discover any meaningful information from Vanderbilt Myrtle was further frustrated by Ms. Felton's conduct in invoking the attorney-client privilege and instructing Mr. Tsao not to answer many questions. Mr. Tsao did, however, remember that all of the subject transactions were negotiated and conducted by Ms. Felton, who was authorized to act on behalf of Vanderbilt Myrtle.

Thus, the correspondence produced during discovery corroborates the assertion that Ms. Felton met with the parties and their counsel and communicated with counsel both

before and after the subject agreements were executed. Ms. Felton was therefore intimately involved in the transactions between Vanderbilt Myrtle and Brookland, between Vanderbilt Myrtle and Cumberland, and between Vanderbilt Myrtle and All Year. Brookland thus concludes that because Ms. Felton is at the center of this controversy, her non-party documents are highly relevant and are therefore discoverable. Brookland also explains that it did not move to compel compliance with the Subpoena until after discovery between the parties was completed in accordance with the direction of this court.

Ms. Felton's Contentions

In opposition, Ms. Felton argues that the facts as alleged by plaintiff are not true, relying primarily on the language of the Property Sale Contract providing that "[u]pon the full execution and delivery of this Agreement, Purchaser shall deposit One Million Dollars ($1,000,000) in escrow (the 'Deposit') with First American at its office located at 633 Third Avenue, New York, New York 10017 (the 'Escrow Agent')" (Property Sale Contract, para 2[a], p 1) (emphasis in original). She then asserts that Brookland disclosed that a non-party paid the non-refundable deposit. She claims that since there was no assignment of the deposit, the Property Sale Contract did not bind the non-party. Therefore, any deposit purportedly tendered was not in compliance with the Property Sale Contract, so that enforcement of the contract was frustrated. Ms. Felton further contends that in the absence of the tender of the $1 million deposit, Vanderbilt Myrtle's sole obligation was to refund any remuneration received in connection with the void transaction. Ms. Felton goes on to argue

that since plaintiff acknowledges that it did not tender the payment of the deposit, it does not have the right to bring suit for breach of contract. She notes that these issues are pending before the Appellate Division.

In addition, Ms. Felton alleges that plaintiff does not name or describe the substance of the non-party documents that it seeks to acquire and does not explain why the documents are sought. Instead, plaintiff offers unsupported representations without providing any factual basis for the statements. More specifically, she alleges that while plaintiff represents that Cumberland provided written consent to assign the right to purchase the subject property, it fails to attach a copy of that writing. Ms. Felton goes on to argue that plaintiff offers no explanation as to why it believes that it was entitled to issue the Subpoena to her, thereby circumventing the discovery tools set forth in CPLR Article 31. She also asserts that plaintiff fails to provide copies of the demands that it allegedly made on her to comply with the Subpoena.

Ms. Felton thus concludes that the narrow questions before the court are:

> "Did plaintiff tender a non-refundable deposit into the Escrow Agent?" Or, "Did a non-party, not bound by the terms of the Purchase and Sale Agreement purport to make a non-refundable deposit into the Escrow Agent as 'beneficiary' in order to give the appearance of compliance when in fact the third party together with Escrow Agent retained beneficial interest and control over the deposit."

Ms. Felton thus concludes that since plaintiff's arguments lack any merit, Brookland's request that she be compelled to comply with the Subpoena must be denied.

Discussion

Pursuant to CPLR 3101(a), "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." "The words 'material and necessary' as used in section 3101 must 'be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity'" (*Matter of Kapon v Koch*, 23 NY3d 32, 38 [2014], quoting *Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403, 406 [1968]). "The essential test is 'usefulness and reason'" (*Levine v City Med. Assoc., P.C.*, 108 AD3d 746, 747 [2d Dept 2013]), quoting *Andon v 302-304 Mott St. Assoc.*, 94 NY2d 740, 746 [2000] [internal quotation marks omitted]).

Pursuant to CPLR 3101(a)(4), discovery may be sought from "any other person, upon notice stating the circumstances or reasons such disclosure is sought or required." To obtain discovery from a nonparty, "'the subpoenaing party must first sufficiently state the "circumstances or reasons" underlying the subpoena (either on the face of the subpoena itself or in a notice accompanying it)'" (*Ferolito v Arizona Beverages USA, LLC*, 119 AD3d 642, 643 [2d Dept 2014], quoting *Matter of Kapon,* 23 NY3d at 34; *accord Reid v Soults*, 138 AD3d 1091, 1092 [2d Dept 2016]). More specifically, the subpoena must detail the relationship between the nonparty and the parties and provide the nonparty with ample information to challenge the subpoena (*Ferolito*, 119 AD3d at 643). It is also noted that in *Matter of Kapon* (23 NY3d 36), the Court of Appeals clarified thirty years of ambiguity and

conflict in the various Appellate Divisions regarding CPLR 3101(a)(4) and adopted the liberal discovery standard favored by the First and Fourth Departments, holding that the information sought in a subpoena served upon a nonparty need only be relevant, and that it is not necessary for the party seeking disclosure to demonstrate that the information sought is not available from another source.

As is also relevant herein, CPLR 2308(b) provides, in relevant part, that "if a person fails to comply with a [non-judicial] subpoena which is not returnable in a court, the issuer or the person on whose behalf the subpoena was issued may move in the supreme court to compel compliance. If the court finds that the subpoena was authorized, it shall order compliance . . .".[1] Finally, it must also be recognized that "an application to quash a subpoena should be granted '[only] where the futility of the process to uncover anything legitimate is inevitable or obvious' . . . or where the information sought is 'utterly irrelevant to any proper inquiry'" (*Anheuser-Busch v Abrams*, 71 NY2d 327, 331-332 [1988]; *accord Kapon*, 23 NY3d at 38).

Applying these provisions to the facts of this case, the court finds that the nonparty discovery sought by the Subpoena issued to Ms. Felton is relevant, material and necessary. In this regard, the facts as alleged by Brookland adequately detail the role that Ms. Felton played in the transactions at issue and explain why the production of the documents sought and her deposition are needed. The court further finds that since Ms. Felton was an active

[1] Although CPLR 2308(b) goes on to provide additional means by which compliance may be compelled, plaintiff does not seek the imposition of any of these provisions in its motion.

participant in the negotiations and transactions at issue, the Subpoena's statement that the discovery sought is necessary because she is "in possession and [has] knowledge of information and documents that are material, necessary and relevant to the claims asserted in this action" provides her with a sufficient basis to challenge the Subpoena.

In opposing this branch of plaintiff's motion, Ms. Felton fails to establish that the information sought by Brookland is utterly irrelevant to the action or that such discovery would be futile. Instead, she argues that her version of the facts should be accepted by the court, claiming that Brookland mischaracterizes the facts and improperly interprets the law and the Property Sale Contract. Resolution of the factual and legal issues raised in this action is not properly determined by the court on a motion seeking to compel discovery.

Finally, the disclosure sought from Ms. Felton is not protected by the attorney-client privilege. "'In order to make a valid claim of privilege, it must be shown that the information sought to be protected from disclosure was a confidential communication made to the attorney for the purpose of obtaining legal advice or services'" (*North State Autobahn v Progressive Ins. Group*, 84 AD3d 1329 [2d Dept 2011], quoting *Matter of Priest v Hennessy*, 51 NY2d 62, 69 [1980] [internal quotation marks omitted]). "Documents which are 'not primarily of a legal character, but [express] substantial nonlegal concerns' are not privileged" (*Bertalo's Restaurant v Exchange Ins. Co.*, 240 AD2d 452, 454 [2d Dept 1997], *appeal dismissed* 91 NY2d 848 [1997], quoting *Cooper-Rutter Assocs. v Anchor Natl. Life Ins. Co.*, 168 AD2d 663 [2d Dept 1990]).

In this case, the discovery sought concerns Ms. Felton's dealings in the business transactions that are in issue, conducted in her capacity as the authorized corporate representative of Vanderbilt Myrtle. The court therefore finds that Ms. Felton's communications with the other parties and/or their counsel are not protected, nor are her communications with Mr. Tsao relating to the pre-litigation transactions (*see Spectrum Sys. Int. v Chemical Bank*, 78 NY2d 371, 379 [1991] [a lawyer's communication is not cloaked with attorney-client privilege when the lawyer is hired for business or personal advice or to do the work of a non-lawyer]; *In re Grand Jury Subpoena Served upon Bekins Record Storage Co.*, 62 NY2d 324, 329 [1984] [consultation with an attorney for business advice does not invoke the privilege, nor would the privilege apply to communications with an attorney who was acting in a capacity as a commercial consultant]; *Cooper-Rutter Assoc.*, 168 AD2d 663 [documents concerning both the business and legal aspects of the defendants' ongoing negotiations with the plaintiff with respect to the business transaction out of which the underlying lawsuit ultimately arose were not protected by the attorney-client privilege and were discoverable]).

Accordingly, Brookland's motion to compel compliance by Ms. Felton with the Subpoena is granted.

Plaintiff's Request to Disqualify Ms. Felton from Representing Vanderbilt Myrtle

Plaintiff's Contentions

In support of this branch of its motion, Brookland argues that the discovery conducted

to date confirms that Ms. Felton will undoubtedly be a witness at trial on significant issues of fact and that her projected testimony will be adverse to her client. Thus, pursuant to the Advocate-Witness Rule, Ms. Felton cannot continue to represent Vanderbilt Myrtle in this action. More specifically, plaintiff argues that her testimony will be adverse and prejudicial to Vanderbilt Myrtle since she will testify that Cumberland granted written consent to an assignment of Vanderbilt Myrtle's rights under the Property Sale Contract to Brookland; Ms. Felton received confirmation that the $1 million contract deposit had been made by Brookland; and Ms. Felton, Vanderbilt Myrtle and All Year knew that the contract deposit had been made by Brookland when Vanderbilt Myrtle contracted to assign its rights under the Property Sale Contract to All Year for a price double that of the Vanderbilt Myrtle-Brookland Contract.

Plaintiff thus concludes that these facts establish that Ms. Felton is a necessary fact witness to the underlying transactions, events and communications at issue in this action, so that disqualification is necessary.

Ms. Felton's Contentions

In opposition, Ms. Felton alleges that plaintiff does not offer documentation or citations from documentary evidence to support its application for her disqualification. She also asserts that while plaintiff references her "projected testimony," Brookland does not explain the meaning of its assertion. Ms. Felton therefore concludes that plaintiff offers no legitimate reasons for her disqualification.

Discussion

As is relevant herein, NYCRR § 1200.0, Rule 3.7, 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 . . .
>
> (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.

"The disqualification of an attorney is a matter that rests within the sound discretion of the trial court" (*Bajohr v Berg*, 143 AD3d 849, 849 [2d Dept 2016], citing *Ike & Sam's Group, LLC v Brach*, 138 AD3d 690, 692 [2d Dept 2016]; *Goldberg & Connolly v Upgrade Contr. Co.*, 135 AD3d 703, 704 [2d Dept 2016]; *Spielberg v Twin Oaks Constr. Co., LLC*, 134 AD3d 1015 [2d Dept 2015]). Further, it is well settled that:

> "'Disqualification . . . during litigation implicates not only the ethics of the profession but also the substantive rights of the litigants [and] 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]). The right to counsel is 'a valued right and any restrictions must be carefully scrutinized' (*id.*). Furthermore, where the rules relating to professional conduct are invoked not at a disciplinary proceeding but 'in the context of an ongoing lawsuit, disqualification . . . can [create a] strategic advantage of one party over another' (*id.*). Thus, the movant must meet a heavy

> burden of showing that disqualification is warranted (*see Broadwhite Assoc. v Truong*, 237 AD2d 162, 163 [1st Dept 1997]). Disqualification is required only where the testimony by the attorney is considered necessary and prejudicial to plaintiffs' interests (*see id.*)."

(*Ullmann-Schneider v Lacher & Lovell-Taylor PC*, 110 AD3d 469, 469-470 [1st Dept 2013]). "A party seeking to disqualify an attorney or a law firm, must establish (l) the existence of a prior attorney-relationship and (2) that the former and current representation are both adverse and substantially related" (*Solow v W. R. Grace & Co.*, 83 NY2d 303, 308 [1994]).

Applying the above quoted Rule and case law precedent, the court finds that Ms. Felton is disqualified from representing Vanderbilt Myrtle in this action. As discussed above, the facts offered by Brookland, as supported by the documentation annexed to the papers, establish that Ms. Felton participated in negotiating the subject transactions and is likely to be a witness with respect to significant factual issues in this litigation (*see Spielberg*, 134 AD3d at 1016). In this regard, since Ms. Felton negotiated and drafted many of the documents in issue, it is clear that she has personal knowledge of that material facts (*see Gould v Decolator*, 131 AD3d 448, 449 [2d Dept 2015]). In addition, in light of Mr. Tsao's deposition testimony indicating that he had little, if any, memory of the transactions at issue, along with the fact that he authorized Ms. Felton to act on behalf of Vanderbilt Myrtle, which she indisputably did, Ms. Felton will be a necessary witness to testify as to Vanderbilt Myrtle's version of the transactions, events and communications surrounding the parties' negotiation of and compliance with the agreements that form the basis of the claims and

defenses asserted in this action. Finally, it is noted that these issues are hotly contested, inasmuch as plaintiff and defendants offer significantly different versions of the facts.

Accordingly, Brookland's motion to disqualify Ms. Felton from representing Vanderbilt Myrtle in this action is granted (*see generally Lauder v Goldhamer*, 122 AD3d 908, 910-911 [2d Dept 2014] [the allegations in the amended complaint and plaintiff's affidavit established that his testimony, as the only attorney involved in the plaintiff's execution of the retainer agreement and who plaintiff alleged made certain misrepresentations that induced her to execute the agreement would be necessary to resolve issues pertinent to the cause of action to set aside the retainer agreement so that he was properly disqualified]; *see also Fuller v Collins*, 114 AD3d 827, 830 [2d Dept 2014], *lv dismissed* 24 NY2d 935 [2014]; *Falk v Gallo*. 73 AD3d 685, 686 [2d Dept 2010]).

Conclusion

Brookland's motion is granted in its entirety. Ms. Felton is ordered to comply with the Subpoena served upon her, i.e., she is ordered to produce the documents demanded and to appear for deposition at a time and place agreed to between the parties within 30 days of service of copy of this order with notice of entry. Ms. Felton is disqualified from continuing to represent Vanderbilt Myrtle in this action.

The foregoing constitutes that order and decision of this court.

ENTER:

J. S. C.

HON. LAWRENCE KNIPEL