Chin v Chin
2017 NY Slip Op 31875(U)
September 6, 2017
Supreme Court, New York County
Docket Number: 156604/2012
Judge: James E. d'Auguste

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

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HARRY CHIN and 124-126 MOTT CORP.,

Plaintiffs,

-against-

JAMES CHIN, ED CHIN, JOHN CHIN, YING WEE CORP., KENT MEE MUI CHIN, LLC, CHAPPAQUA REALTY & MANAGEMENT CO., OPUS CONSTRUCTION INC., and CHIN & CHIN REALTY LLC,

Defendants.

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DECISION AND ORDER
Index No. 156604/2012
Mot. Seq. No. 010

Hon. James E. d'Auguste

That branch of defendants' motion seeking a protective order, pursuant to CPLR 3101 and 3103, is denied. The alleged basis of the protective order, as articulated in plaintiffs' memorandum of law, is that the causes of action are without merit and, as such, "further discovery or inquiry pertaining thereto must cease" (NYSCEF Doc. No. 253, at 3), with a further invitation to dismiss the claims. This Court declines, in the guise of resolving a protective order, to grant accelerated judgment. Accordingly, the application for a protective order is denied.

That branch of defendants' motion seeking to conduct a deposition of Benjamin Mellors, a non-party witness, pursuant to CPLR 3107 and 3108, is granted. This Court (Mendez, J.), in an order dated February 22, 2017, provided for Mr. Mellors to answer five specific questions. NYSCEF Doc. No. 273. Mr. Mellors' testimony was required because he should have highly relevant information involving the scope of the parties' settlement, but limitations on the deposition were imposed based upon his status as plaintiffs' former counsel. As Mr. Mellors' answers to the five written questions permitted by this Court are inadequate (*see* NYSCEF Doc. No. 274), the Court

finds that an oral deposition is appropriate under the circumstances. The Court cannot order Mr. Mellors to appear for a deposition in New York, as he is an out-of-state non-party witness. If Mr. Mellors, however, will appear for a deposition in New York, the deposition will be supervised by the Court. Otherwise, the defendants may submit a commission to obtain Mr. Mellors' testimony. The Court recognizes that the information Mr. Mellors possesses is sensitive in nature, but arguably any attorney-client privilege is going to have to be balanced with the truth finding process as related to the settlement negotiations at issue, referenced by Justice Mendez. NYSCEF Doc. No. 273, at 3. Justice Mendez, relying on *Veras Investment Partners, LLC v. Akin Gump Strauss Hauer & Feld, LLP*, 52 A.D.3d 370 (1st Dep't 2008), that "[p]laintiff placed the meaning of the term 'Operating Account' at issue in this action by alleging that defendants violated the July 6, 2011 Stipulation of Settlement and Release." NYSCEF Doc. No. 273, at 3. While Justice Mendez further held that "[d]efendants have shown that the discovery sought was part of a 'common interest' further resulting in waiver of attorney-client privilege" with respect to the term "operating account," he also determined that defendants were not seeking discovery of confidential communications between plaintiffs and Mr. Mellors during settlement negotiations. While the negotiations may be privileged in this instance, even so, the privilege may not be honored where "the application of the privilege would deprive the opposing party of vital information." 52 A.D.3d at 372; *see Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616, 624 (2016) ("Despite the social utility of the privilege, it is in [o]bvious tension with the policy of this State favoring liberal discovery. Because the privilege shields from disclosure pertinent information and therefore constitutes an obstacle to the truth-finding process, it must be narrowly construed." (alteration in original) (internal quotation marks and citations omitted) (quoting *In re Jacqueline F.*, 47 N.Y.2d 215, 219 (1979)));

Priest v. Hennessy, 51 N.Y.2d 62, 68 (1980) (holding that the privilege may give way to strong public policy considerations).

The cross-motion seeking to disqualify defendants' counsel, Mark A. Varrichio, Esq., pursuant to Rule 3.7(a) of the Rules of Professional Conduct, is granted. "The Code of Professional Responsibility requires that an attorney withdraw from a trial 'if it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client' (DR 5-102[A] of the Code of Professional Responsibility)." *H.H.B.K. 45th Street Corp v. Stern*, 158 A.D.2d 395, 369 (1st Dep't 1990). Further, "[w]hether an attorney 'ought' to testify and, therefore should withdraw from the ligigation, is determined by whether the testimony is necessary and not merely by whether the attorney 'has relevant knowledge or was involved in the transaction at issue.'" *Id.* (quoting *S & S Hotel Ventures Ltd. P'ship v. 777 S.H. Corp.*, 69 N.Y. 2d 437, 445 (1987)). It is evident from the granting of the above deposition of former counsel for plaintiffs, together with the multiple submissions wherein counsel attests to his personal knowledge of the specific facts that are material to the outcome of this litigation, that he will be a witness in this action. Contrary to *H.H.B.K.*, *supra*, Mr. Varrichio indicates that he has knowledge of the final settlement negotiations and would be a fact witness to those proceedings and would be necessary if the parties were unable to obtain Mr. Mellors' testimony. 158 A.D.2d at 396-97. In many ways, it is difficult to distinguish where Mr. Varrichio's knowledge ends and his advocacy begins. This creates a real danger that Mr. Varrichio's continued representation of parties in this proceeding could impact his likely factual testimony at trial. Having convinced the Court as to the essential nature of Mr. Varrichio's potential testimony related to the settlement in the prior case and having discussed these matters not based solely upon argument but upon his own purported personal knowledge, in the inverse of obtaining this

individual's testimony, it highlights the inappropriate nature of having a fact witness also serve as counsel. With respect to Anthony Rella, Esq., the Court reaches a different conclusion based upon plaintiffs' failure to demonstrate the necessity of a disqualification. Mr. Rella is not a signatory to the settlement agreement and it is questionable whether he would be a witness. To the extent Mr. Rella will be providing fact evidence, then he should commence the process of securing new counsel for his clients. Accordingly, the Court hereby grants the application for Mr. Varrichio's disqualification as counsel in this matter and denies without prejudice the application for Mr. Rella's disqualification as counsel in this matter.

This constitutes the decision and order of this Court.

Dated: September 6, 2017

Hon. James E. d'Auguste, J.S.C.