Riconda v Liberty Ins. Underwriters, Inc.
2017 NY Slip Op 32876(U)
June 13, 2017
Supreme Court, Suffolk County
Docket Number: 12/3655
Judge: Jerry Garguilo
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SHORT FORM ORDER E-FILE **INDEX NO. 12/3655**

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION IAS PART 48 - SUFFOLK COUNTY

PRESENT:
HON. JERRY GARGUILO
SUPREME COURT JUSTICE

ORIG. RETURN DATE: 4/21/17, 5/2/17
FINAL SUBMISSION DATE: 5/24/17
MOTION SEQ#001, 002
MOTION: 001-MD; 002-MD

JOHN R. RICONDA
Plaintiff,

-against-

LIBERTY INSURANCE UNDERWRITERS, INC.,

Defendant.

PLAINTIFF'S ATTORNEY
WHITE & CASE
1221 AVENUE OF THE AMERICAS
NEW YORK, NY 10020

DEFENDANT'S ATTORNEY
D'AMATO & LYNCH
TWO WORLD FINANCIAL CENTER
225 LIBERTY STREET
NEW YORK, NY 10281

Upon the following e-filed papers numbered 26 to 53 read on this motion to preclude testimony, or to disqualify as attorney and to preclude testimony of a new witness; Notice of Motion/Order to Show Cause and supporting papers 26 - 33, 34 - 38 ; Notice of Cross Motion and supporting papers_____; Answering Affidavits and supporting papers 42 - 51 ; Replying Affidavits and supporting papers 52 - 53 _; Other _______; and upon due deliberation; it is,

In this action, plaintiff seeks to obtain insurance proceeds from an "Executive Advantage Policy" issued by defendant Liberty Insurance Underwriters, Inc. to QSGI, Inc., the corporation that purchased plaintiff's company, Contemporary Computer Services, Inc. The Liberty policy provides coverage for "Loss" with regard to a claim against the Officers and Directors of QSGI or its Subsidiaries, subject to various terms, conditions and exclusions. The parties have completed discovery and a note of issue was filed on May 9, 2017. At a court conference on April 3, 2017, defendant's counsel informed plaintiff's counsel that he would call John FitzSimons, a partner at defendant's counsel's law firm, as a fact witness at trial.

Plaintiff now moves to preclude the testimony of Mr. FitzSimons, or, in the alternative, to disqualify the law firm D'Amato & Lynch LLP. Plaintiff also moves to preclude defendant from introducing the testimony of a new CPLR 3106 (d) witness. Defendant opposes both motions.

In support of his motion to preclude Mr. FitzSimons' testimony at trial, plaintiff relies upon 22 NYCRR 1200.29, Rule 3.7, Lawyer as Witness, and contends that Mr. FitzSimons' testimony would be prejudicial to plaintiff and would present multiple problems ultimately requiring the disqualification of D'Amato & Lynch. Plaintiff also submits three letters were written on behalf of defendant by its attorneys, Linda Lin and Mr. FitzSimons. The first two letters, dated February 16, 2011, and March 24, 2011, were authored by Linda Lin, an attorney who is no longer employed by defendant. In a letter dated July 11, 2011, Mr. FitzSimon informed plaintiff once more that there was no coverage in the policy, which, in effect, repeated the rationale given by Linda Lin. Plaintiff contends that Mr. FitzSimon has no personal knowledge of the facts underlying the coverage dispute, and disputes defendant's counsel's position that FitzSimons is a proper fact witness based on the coverage letter he wrote. Plaintiff further claims that FitzSimons' testimony would violate New York's advocate-witness rule, in that he would be divulging communications between and among himself and others at D'Amato & Lynch, on the one hand, and Liberty and Ms. Lin, on the other. The testimony would function as a complete waiver of the attorney-client privilege between Liberty and D'Amato & Lynch. In addition, such testimony would require the disqualification of the law firm.

In opposition, defendant submits, *inter alia*, the affirmation of William P. Larsen, III, retired partner of D'Amato & Lynch. Mr. Larsen avers that prior to his retirement, he handled the defense of defendant since the commencement of this civil action brought by plaintiff in 2012. Larsen states that FitzSimons' testimony was discussed as early as 2012 and Liberty has never agreed to forego his testimony as a fact witness at trial. Plaintiff's counsel elected not to depose FitzSimons, who is a partner at D'Amato & Lynch. The issue was raised again in 2015 when Larsen stated that he would seek the deposition of plaintiff's counsel if plaintiff wished to depose FitzSimons. Ultimately, only the depositions of the plaintiff, Ms. Lin and a non-party, Edward Cummings were mentioned. Larsen further disputes plaintiff's contention that a conflict of interest exists or that FitzSimons' testimony would disqualify D'Amato & Lynch as counsel of record. Furthermore, FitzSimons' testimony would support the coverage position of the defendant and is not in any way prejudicial to the client. FitzSimons' testimony is necessary inasmuch as Linda Lin is no longer an employee of defendant so that defendant cannot guarantee her appearance at trial, and her superiors at the time of her employment are likewise no longer employed by defendant,.

The decision whether or not to disqualify an attorney is within the discretion of the trial court (***Bentvena v Edelman***, 47 AD3d 651, 849 NYS2d 626 [2d Dept 2008]). "In determining whether to grant a motion to disqualify, the court's function is to ensure that the parties are properly represented and that litigation is conducted fairly" (***Solomon v N.Y. Prop. Ins. Underwriting Ass'n***, 118 AD2d 695, 500 NYS2d 41 [2d Dept 1986]). The court must take into account not only a party's

significant right to be represented by counsel of its own choosing, but also the fairness and effect of granting disqualification (***S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp.***, 69 NY2d 437, 440 - 441, 515 NYS2d 735 [1987]). The advocate-witness disqualification rules do not mandate the disqualification but provide guidance for courts to use in determining a disqualification motion made by an adversary (***Id.***).

As this motion for disqualification is based on the "Lawyer as Witness" rule, the moving party must demonstrate that defendant's counsel is likely to testify on a significant issue of fact and that none of the exceptions apply. The party bringing a motion to disqualify an attorney must make a clear showing that disqualification is warranted (***Unger v Unger***, 15 AD3d 389, 390, 790 NYS2d 176 [2d Dept 2005]). "Whether an opposing party intends to call the attorney as a witness is not dispositive of whether the attorney ought to be called" (***Burdett Radiology Consultants, P.C. v Samaritan Hosp.***, 158 AD2d 132, 134, 557 NYS2d 988 [3d Dept 1990]). Rule 3.7 of Part 1200 of the Rules of Professional Conduct provides:

> Lawyer as Witness
> (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.
>
> (b) A lawyer may not act as advocate before a tribunal in a matter if:
> (1) another lawyer in the lawyer's firm is likely to be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony may be prejudicial to the client; or
> (2) the lawyer is precluded from doing so by Rule 1.7 or Rule 1.9.

Here, plaintiff does not state that he will call FitzSimons as a witness at trial, or that FitzSimons' testimony is necessary to plaintiff's case. Plaintiff asserts that it's defendant's intention to call FitzSimons as a witness and that such ' testimony at trial is prejudicial to plaintiff's case but concedes that such testimony would essentially repeat Ms. Lin's denial of coverage in her letter dated March 24, 2011. Inasmuch as it is clear that FitzSimons' opinion regarding no coverage in the

subject insurance policy is consistent with Liberty's initial determination by Ms. Lin, there is no prejudice to plaintiff inasmuch as plaintiff received a letter on the subject from FitzSimons in 2011. In addition, such communication is not privileged since it was shared with plaintiff and would not violate the attorney-client privilege between D'Amato & Lynch, FitzSimons and Liberty. Moreover, the court finds that plaintiff's delay of five years in moving to disqualify FitzSimons to be a dilatory tactic. The court further finds that FitzSimons' testimony may be necessary as an adjunct to Ms. Lin's deposition since Lin is no longer employed at Liberty. The court is mindful that other possible witnesses for defendant have also left the employ of Liberty and are now unavailable to testify. In addition, to require defendant to change attorneys in this pretrial phase of the litigation should this motion be granted would cause substantial hardship to defendant. Thus, the court, in its discretion, declines to grant that branch of plaintiff's motion to disqualify FitzSimons as a witness.

The court, in its discretion, also denies the second branch of plaintiff's motion, which seeks to disqualify the law firm of D'Amato & Lynch. Or, even assuming, arguendo, that FitzSimons is called as a witness at trial, the disqualification of the entire firm would still not be warranted. The law firm may still continue to represent its client when one of its attorneys may be called as a witness (see ***Talvy v. American Red Cross***, 205 AD2d 143, 618 NYS2d 25 [1st Dept 1994]). Pursuant to the Rules of Professional Conduct, Rule 3.7, only the attorney-witness who will testify on behalf of the client is disqualified from representing the client (see ***Kaplan v Maytex Mills, Inc.***, 187 AD2d 565, 590 N.Y.S.2d 136 [2d Dept 1992]). Accordingly, plaintiff's first motion is denied in its entirety.

The plaintiff's second motion to preclude defendant from calling a new and still unidentified witness at trial is denied as speculative.

Accordingly, it is

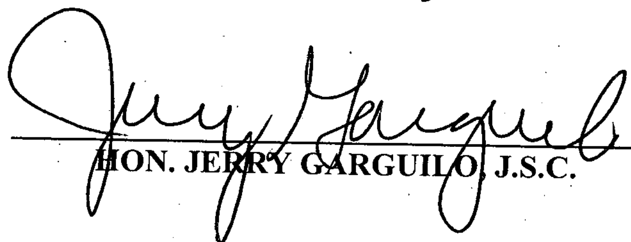
ORDERED that plaintiff's motions (001, 002) are consolidated for the purpose of this determination; and it is further

ORDERED that plaintiff's motion (001) is denied in its entirety; and it is further

ORDERED that plaintiff's motion (002) is denied; and it is further

ORDERED that Counsel is directed to appear at a ~~compliance~~ pre-trial conference on July 12, 2017 at 9:30 a.m. in Part 48.

DATED: June 13, 2017



HON. JERRY GARGUILO, J.S.C.