

Korsinsky & Klein, LLP v FHS Consultants, LLC

2018 NY Slip Op 32345(U)

September 17, 2018

Supreme Court, Kings County

Docket Number: 513969/2016

Judge: Paul Wooten

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 97

KORSINSKY & KLEIN, LLP,

Plaintiff,

- against -

FHS CONSULTANTS, LLC,

Defendant.

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KINGS COUNTY CLERK
FILED

The following papers were read on defendants' cross-motion to disqualify counsel.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits

Answering Affidavits — Exhibits (Memo) _____

Replying Affidavits (Reply Memo) _____

PAPERS NUMBER
1
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This is a breach of contract action commenced by plaintiff Korsinsky & Klein, LLP, to recover monetary damages against defendant FHS Consultants, LLC for a breach of a retainer agreement. Plaintiff alleges that on August 30, 2007, plaintiff's predecessor, the Law Offices of Michael Korsinsky, entered into a Retainer Agreement (the Agreement) with defendant. Pursuant to the Agreement, defendant agreed to refer collection matters of healthcare facilities to the Law offices of Michael Korsinsky, and in return, the Law Offices of Michael Korsinsky would receive 22% of any recovery. Thereafter, in 2009, the Law Offices of Michael Korsinsky consolidated its operations with another firm resulting in the formation of plaintiff, Korsinsky & Klein, LLP. Plaintiff continued to perform its obligations as set forth in the Agreement, except in limited instances, where defendant would retain plaintiff on an hourly basis to handle certain matters concerning defendant's own debt.

Plaintiff commenced this action on August 10, 2016, via Summons and Complaint, seeking past due payments totaling at least \$98,112.85. Defendant filed an Amended Answer

with counterclaims for, *inter alia*, legal malpractice, conversion, collusion, and intentional interference with contract. Now, before the Court is a motion by plaintiff, brought by an Order to Show Cause (OSC), for an Order, pursuant to Rules 1.7(a), 1.10 and 3.7 of the New York Rules of Professional Conduct (22 NYCRR 1200.0), disqualifying the Law firm of Ellenoff, Grossman & Schole, LLP (Ellenoff Grossman & Schole), as counsel for defendant. Counsel for defendant opposes the OSC.

In support of its motion, plaintiff argues that Ellenoff Grossman & Schole must be disqualified from representing defendant because continued representation would create a conflict of interest under the Rules of Professional Responsibility. Specifically, plaintiff avers that defendant's counterclaim for legal malpractice stems from plaintiff's representation of defendant in an action captioned *FHS Consultant, LLC v Eger Lutheran Home and Services, Inc.*, Kings County Index No. 500474/2013 (the *Eger Action*). At some point, Ellenoff Grossman & Schole replaced plaintiff as counsel for defendant in the *Eger Action*. Plaintiff maintains that attorneys from Ellenoff Grossman & Schole will likely be called as witnesses in the legal malpractice portion of the counterclaim. Thus, plaintiff maintains that under rule 3.7 of the New York Rules of Professional Responsibility, Ellenoff Grossman & Schole LLP cannot both represent defendant and be a witness in the case.

In opposition to the OSC, defendant argues that plaintiff's OSC must be denied as plaintiff failed to demonstrate that the testimony of attorneys from Ellenoff Grossman & Schole is necessary on the legal malpractice counterclaim. Defendant argues, *inter alia*, that plaintiff merely makes conclusory assertions that Ellenoff Grossman & Schole will have to be called as witnesses to testify on significant issues of fact regarding the malpractice claim. Moreover, defendants contend that the malpractice alleged in the counterclaim occurred prior to Ellenoff Grossman & Schole's representation of defendant in the *Eger Action*; thus, no work performed by Ellenoff Grossman & Schole impacted plaintiff's prior work for defendant that may have

constituted legal malpractice. Additionally, defendant argues that plaintiff has not alleged any prejudice it would sustain if an Ellenoff Grossman & Schole attorney were to testify on the counterclaim.

LEGAL STANDARD

"It is well settled that the disqualification of an attorney is a matter which rests within the sound discretion of the court" (*Campolongo v Campolongo*, 2 AD3d 476, 476 [2d Dept 2003]; *see Ike & Sam's Group, LLC v Brach*, 138 AD3d 690 [2d Dept 2016]; *Hele Asset, LLC v S.E.E. Realty Assoc.*, 106 AD3d 692 [2d Dept 2013]). "A party's entitlement to be represented in ongoing litigation by counsel of his or her own choosing is a valued right which should not be abridged absent a clear showing that disqualification is warranted, and the movant bears the burden on the motion" (*Nenninger v Kelly*, 140 AD3d 961, 961 [2d Dept 2016], quoting *Campolongo*, 2 AD3d at 476; *see also Gjoni v Swan Club, Inc.*, 134 AD3d 896, 897 [2d Dept 2015], quoting *Matter of Marvin Q.*, 45 AD3d 852, 853 [2d Dept 2007]). "While the right to choose one's counsel is not absolute, disqualification of legal counsel during litigation implicates not only the ethics of the profession but also the parties' substantive rights, thus requiring any restrictions to be carefully scrutinized. The party seeking to disqualify a law firm or an attorney bears the burden to show sufficient proof to warrant such a determination" (*Ike & Sam's Group, LLC*, 138 AD3d at 691, quoting *Hele Asset, LLC*, 106 AD3d at 693). "Absent actual prejudice or a substantial risk thereof, the appearance of impropriety alone is not sufficient to require disqualification of an attorney" (*Nenninger*, 140 AD3d at 963).

Moreover, under Rule 3.7 of the Rules of Professional Conduct, unless certain exceptions apply, "[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" (Rules of Professional Conduct [22 NYCRR 1200.0] rule 3.7[a]; *see also Lombardi v Lombardi*, __ NY3d __ [2d Dept 2018]). To disqualify counsel on the grounds that he or she may be called to testify as a witness, the party

moving to disqualify must show (1) the testimony of the opposing party's counsel is necessary to his or her case, and (2) such testimony would be prejudicial to the opposing party (*id.* at *2, citing *S & S Hotel Ventures Ltd. Partnership v 777 S.H. Corp.*, 69 NY2d 437, 466 [1987]). "A finding of necessity takes into account such factors as the significance of the matters, weight of the testimony, and availability of other evidence" (*S & S Hotel Ventures Ltd. Partnership*, 69 NY2d at 446).

DISCUSSION

Here, upon reviewing the papers, the Court finds that plaintiff's OSC to disqualify Ellenoff Grossman & Schole as counsel for defendant must be denied as plaintiff failed to meet its burden of proving that disqualification is warranted. Specifically, the Court finds that since the parties have yet to engage in any discovery, it is unclear, at this juncture, whether testimony of attorneys from Ellenoff Grossman & Schole who handled the *Eger* Action is at all necessary on a significant issue of fact, and whether such testimony would be prejudicial to plaintiff (see e.g. *Spinner v County of Nassau*, 82 AD3d 870, 871 [2d Dept 2011], citing *Kirshon, Shron, Cornell & Teitelbaum v Savarese*, 182 AD2d 911, 912 [3d Dept 1993]). Thus, the Court finds that plaintiff's motion to disqualify defendant's counsel is merely pre-emptive and premature, and is therefore denied without prejudice (see *Spinner*, 82 AD3d at 871).

CONCLUSION

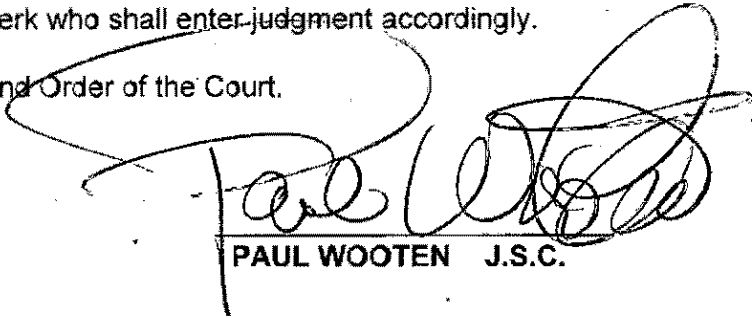
Accordingly, it is hereby,

ORDERED that the OSC by plaintiff, Korsinsky & Klein LLP, to disqualify the Law offices of Ellenoff Grossman & Schole LLP as counsel for defendant is denied without prejudice; and, it is further,

ORDERED that counsel for defendant, FHS Consultants, LLC, shall serve a copy of this Order upon plaintiff and the County Clerk who shall enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 9/19/18


PAUL WOOTEN J.S.C.

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