

Mauriello v Battery Park City Auth.

2018 NY Slip Op 32696(U)

October 11, 2018

Supreme Court, New York County

Docket Number: 160687/14

Judge: Lynn R. Kotler

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

CARL T. MAURIELLO

INDEX NO. 160687/14

MOT. DATE

- v -

MOT. SEQ. NO. 006 and 007

BATTERY PARK CITY AUTHORITY et al.

-INTERIM ORDER (007)

The following papers were read on this motion to/for
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits
Notice of Cross-Motion/Answering Affidavits — Exhibits
Replying Affidavits
NYSCEF DOC No(s).
NYSCEF DOC No(s).
NYSCEF DOC No(s).

Previously, the court granted plaintiff's counsel's motion to be relieved (motion sequence number 008) and stayed this action for a period of 30 days. As a result, the court restored motion sequence number 006 and 007 to the active calendar to be submitted on September 18, 2018 as a control date.

In the interim, second third-party defendant Battery Park City Authority ("BPCA") voluntarily discontinued its third-party action. Meanwhile, to date, no attorney has been substituted in for plaintiff. Therefore, plaintiff is deemed to be proceeding pro se. The court has also received a letter from Jordan N. Pedersen, Jr., Esq., plaintiff's counsel in connection with plaintiff's workers' compensation claim dated October 3, 2018. That letter represents that plaintiff has been unable to obtain representation in this action, and therefore plaintiff "has decided to afford the State Insurance Fund, the carrier in the workers' compensation case, the opportunity to intervene in t[his action] to seek recover of its workers' compensation lien pursuant to the Longshore Act." Attorney Pedersen requests that the court "defer any action on this matter" until a motion to intervene has been filed.

In motion sequence number 006, defendants Pier A Battery Park Associates LLC, D'Onofrio General Contractors Corp. ("D'Onofrio") and D7 Construction Pier A, LLC (all collectively "Pier A") move to have counsel for co-defendant Battery Park City Authority ("BPCA") disqualified. BPCA, only, opposes that motion. In motion sequence number 007, plaintiff moved to strike defendant D'Onofrio's answer for failing to provide discovery and produce a witness for deposition. That motion has been submitted without written opposition.

In light of Attorney Pedersen's letter, the court will hold its decision on motion sequence number 007 in abeyance pending the motion to intervene. The court will, however, decide motion sequence number 006 herein, since the relief requested is not for or against plaintiff and plaintiff did not previously take any position with respect to the motion. Moreover, the motion has been pending for a considerable amount of time, and a further adjournment would substantially prejudice the defendants. The court's decision follows.

Dated: 10/11/18

[Signature]
HON. LYNN R. KOTLER, J.S.C.

- 1. Check one: [] CASE DISPOSED [X] NON-FINAL DISPOSITION
2. Check as appropriate: Motion is [] GRANTED [X] DENIED [] GRANTED IN PART [] OTHER
3. Check if appropriate: [] SETTLE ORDER [] SUBMIT ORDER [] DO NOT POST [] FIDUCIARY APPOINTMENT [] REFERENCE

A party has the right to be represented by counsel of his or her own choosing, and the movant on a motion to disqualify bears a heavy burden (*Ullmann-Schneider v. Lacher & Lovell-Taylor PC*, 110 AD3d 469 [1st Dept 2013]). Rule 1.9 of Part 1200 (22 NYCRR 1200-1.9), entitled Duties to former clients, provides as follows:

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) Unless the former client gives informed consent, confirmed in writing, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 or paragraph (c) of this Rule that is material to the matter.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client, except as these Rules would permit or require with respect to a current client or when the information has become generally known; or

(2) reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client.

A motion to disqualify should generally be denied if it was made for strategic purposes only, such as to delay the litigation or deprive a party of quality representation (*see e.g. Solow v. Grace & Co.*, 83 NY2d 303 [1994]). "The decision of whether to grant a motion to disqualify rests in the discretion of the motion court" (*Mayers v. Stone Castle Partners, LLC*, citing *Macy's Inc. v. J.C. Penny Corp., Inc.*, 107 AD3d 616 [1st Dept.2013]).

The motion is supported by the affirmation of Gail L. Ritzert, Esq., Pier A's counsel, who states that Christopher Gibbons, Esq. was employed by her firm, Havkins Rosenfeld Ritzert & Varriale, LLP ("HRRV") and actively represented Pier A in this action for approximately three years by, *inter alia*, filing pleadings and conducting all party depositions to date. On April 27, 2018, Gibbons left HRRV and joined Hannum Feretic, Pendergast & Merlino, LLC ("HFPM"), which is counsel for BPCA. Movants and BPCA each have cross-claims against each other. Attorney Ritzert maintains that during the course and scope of HRRV's representation of Pier A, Attorney Gibbons "was privy to extensive, confidential, privileged information and worked closely to develop the clients' to (sic) litigation strategy." Further, Attorney Ritzert states that during his tenure at HRRV, Attorney Gibbons represented D.'Onofrio in three other matters, two of which involved the same barge crew the plaintiff herein worked with.

In opposition, Jason A. Stewart, Esq., attorney for BPCA, acknowledges that Attorney Gibbons should not be involved in this action. However, BPCA maintains that the motion should be denied because movants have not met their heavy burden, Attorney Gibbons "gained no significant client confidences in the course of his representation" of Pier A, and even if he did, HFPM has instituted an ethical wall and screening program to prevent the exchange of any information from Attorney Gibbons and

HFPM's attorneys working on BPCA's case. HFPM has also provided an affirmation by Attorney Gibbons attesting to those facts.

The court finds that the motion must be denied for the reasons that follow. Contrary to HFPM's contention, movant has met its *prima facie* burden on this motion by showing that Attorney Gibbons played a significant, active role in movants' defense. The court rejects HFPM's unsubstantiated argument that Attorney Gibbons hasn't gained any confidential or privileged information or that such information is not material to the litigation. Indeed, Attorney Gibbons drafted pleadings and has personal knowledge of movants' claims, defenses and litigation strategy. Further, Attorney Gibbons played a significant role during discovery in this action, to wit, he conducted all party depositions to date.

HFPM has, however, rebutted the presumption that it should be disqualified as BPCA's counsel by coming forward with proof that the even the possibility that Attorney Gibbons could accidentally exchange information pertaining to this action with HFPM's handling attorneys. Attorney Stewart maintains that Attorney Gibbons "has no assignments or responsibilities that are in any way related to the instant litigation." Attorney Gibbons is assigned to HFPM's Long Island-based office, while BPCA's defense is handled by James Merlino, Esq. or other associates who work out of the New York City-based office. HFPM's physical file for this action is stored within a file cabinet in Attorney Merlino's private office in New York City.

Attorney Stewart further explains that upon hiring Attorney Gibbons, HFPM "applied an Ethical Wall within Abacus Law, which restricted [Attorney] Gibbon's privilege to access any file materials pertaining to the instant matter, thereby creating a further layer of insulation between [Attorney] Gibbons and the instant matter." Attorney Stewart explains that Abacus Law is case management software used by the firm to manage, store and maintain all digital files. Therefore, Attorney Gibbons "is blocked from accessing all of the notes, calendar entries, documents, emails and any other information maintained in Abacus Law" pertaining to this matter.

HRRV has provided a screen shot of Abacus Law which demonstrates the digital file restrictions placed with respect to Attorney Gibbons. In addition, HFPM has provided the affidavits of its managing attorney, Marla Miler Ostrover, Esq., and office manager, Julia Nezierovski, attesting to the efforts HFPM has undertaken to implement the ethical wall.

Based upon the foregoing, the court finds that HFPM has established that disqualification is not warranted under these circumstances. There is simply no indication on this record that Attorney Gibbons will in any adversely use or disclose to HFPM any information he obtained by virtue of his representation of movants prior to joining HFPM. Moreover, as Attorney Stewart points out, granting the motion "would set a dangerous precedent which would have a chilling effect on the ability of attorneys to move between firms."

Accordingly, the motion to disqualify is denied.

CONCLUSION

In accordance herewith, it is hereby

ORDERED that motion sequence number 006 is denied in its entirety; and it is further

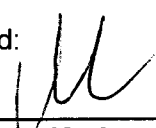
ORDERED that motion sequence number 007 is restored to the active calendar for a control date on December 4, 2018 to potentially join the proposed motion to intervene by the State Insurance Fund; and it is further

ORDERED that the parties are directed to appear on December 4, 2018 at 9:30am for a status conference in Part 8, 80 Centre Street, Room 278.

A copy of this decision has been mailed to plaintiff *pro se*.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: 10/11/18
New York, New York

So Ordered: 

Hon. Lynn R. Kotler, J.S.C.