Wilson Evans 50th LLC v 936 Second Ave. L.P.
2019 NY Slip Op 32237(U)
July 29, 2019
Supreme Court, New York County
Docket Number: 156514/2018
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. BARBARA JAFFE**, *Justice* **PART** **IAS MOTION 12EFM**

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WILSON EVANS 50TH LLC,

Plaintiff,

- v -

936 SECOND AVENUE L.P., JONIS REALTY MANAGEMENT CORP., JONIS MANAGEMENT CORP., and CITI-URBAN MANAGEMENT CORP.,

Defendants.

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INDEX NO. 156514/2018

MOTION DATE

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 50-63, 90-119, 127, 128, 183, 186-195, 243

were read on this motion to disqualify counsel.

Defendants move to dismiss the verified complaint, pursuant to CPLR 3211(a)(1) and (7), and to disqualify Jason Davidson and his law firm from representing plaintiff. Plaintiff opposes.

I. RELEVANT BACKGROUND

In its amended verified complaint, plaintiff alleges that it is the owner of the premises located at 300, 302, and 304 East 50th Street in Manhattan and that defendant 936 Second Avenue L.P. (936) is the current lessee. Pursuant to their lease, 936 is obligated to repair and maintain the premises at its own cost, and to pay fees incurred in enforcing its obligations under the lease. Plaintiff alleges that 936 has failed to keep the premises in safe and good condition, resulting in over 200 violations. (NYSCEF 188).

On March 12, 2018, plaintiff delivered a notice of default to 936 stating that it was in default and demanded that 936 cure its default by April 16, 2018. (NYSCEF 56). On June 26,

2018, plaintiff delivered to 936 a notice of termination stating that it was terminating the lease because 936 had failed to cure. (NYSCEF 57).

By summons and complaint dated July 12, 2018, plaintiff initiated this action, advancing causes of action for ejectment, use and occupancy, breach of lease, waste, and attorney fees and expenses. (NYSCEF 54). By notice of motion dated August 29, 2018, defendants moved for an order partially dismissing the complaint and disqualifying "plaintiff's counsel." (NYSCEF 50). By notice of cross-motion, plaintiff moved for an order imposing costs and sanctions on defendants for filing their motion to dismiss. (NYSCEF 95). On January 15, 2019, plaintiff filed an amended verified complaint asserting causes of action only for breach of lease and for attorney fees and expenses. (NYSCEF 188). On January 28, 2019, defendants withdrew their motion to dismiss, but retained the motion to disqualify "plaintiff's counsel" (NYSCEF 183), and filed their verified answer in which they asserts counterclaims against plaintiff and counterclaim-defendant, plaintiff's manager and "counsel" (NYSCEF 189). Plaintiff withdrew its cross-motion for sanctions. (NYSCEF 186).

By notice of motion dated March 4, 2019, plaintiff and its manager moved to dismiss the counterclaims. (NYSCEF 199).

II. CONTENTIONS

A. Defendants (NYSCEF 63)

Defendants contend that plaintiff's manager must be disqualified from representing plaintiff in this action because both parties will call him as a witness with respect to plaintiff's claims and defendants' counterclaims. They observe that he verified the factual allegations in the complaint, submitted an affidavit in support of plaintiff's order to show cause for use and occupancy, and, as plaintiff's manager, issued both the notice of default and notice of

termination. They argue that the manager's role as partner of his law firm conflicts with his role as plaintiff's manager, as he must both maximize business for the firm and minimize plaintiff's costs. They additionally maintain that they will call him as a witness to elicit testimony that is prejudicial to plaintiff.

In support, defendants submit the affidavit of 936's vice president, who therein states that defendants' representatives had met with plaintiff's manager about the property on several occasions. He alleges that the manager raised no issue as to the conditions of the property and was present during an inspection of the premises in 2017. In 2016, the parties had a rent dispute and entered into an agreement, signed by the manager as "Attorney for Owner," by which 936 agreed to pay plaintiff temporarily a disputed higher rent amount, and plaintiff agreed to negotiate in good faith about lowering the rent and possibly selling the property to 936. The vice president maintains that plaintiff failed to negotiate in good faith, and that its manager failed to transmit certain settlement offers to plaintiff's principals. On March 12, 2018, 936 received the notice of default from plaintiff which was signed by the manager in that capacity (NYSCEF 56). The vice president denies having known that plaintiff's attorney and its manager were one and the same before his receipt of the notice; rather, that individual had previously warranted in an email that someone else was the property's manager (NYSCEF 62). On June 26, 2018, 936 received the notice of termination, also signed by the manager (NYSCEF 57).

B. Plaintiff (NYSCEF 114)

Plaintiff contends that defendants' motion is premature, and even if not, defendants fail to demonstrate that plaintiff's manager/attorney is a necessary witness. Not only can it call other witnesses with knowledge about the case that is superior to his, but it alleges that he does not personally manage the premises. It also argues that a lawyer may serve in both corporate

capacities without creating a conflict, and observes that plaintiff's members chose that individual to serve in that dual capacity. Moreover, even if the manager/attorney must be disqualified, plaintiff maintains, his law firm need not.

By affidavit, plaintiff's manager/attorney acknowledges that he became plaintiff's manager on September 5, 2017, and states that plaintiff's members have not voted to replace him. On November 8, 2017, plaintiff sent 936 a notice informing it that he had become its manager (NYSCEF 103), and on November 16, he emailed its principals that he had not received the rent owed (NYSCEF 104). He observes that plaintiff has a manager for the daily operations of the premises, which differs from his role as manager of the corporate entity. According to him, after the value of the premises had been determined by arbitration (NYSCEF 105), 936 failed to pay the full amount of rent and real estate taxes due, in addition to allowing 232 violations to be issued against the premises. After he had sent the notice of default, 936 failed to cure any of the defaults or pay any rent due. Thereafter, plaintiff terminated the lease by sending a ten-day notice of termination. Currently, there are 260 open violations against the premises, including a failure to correct leaks, repair cracks in the walls and ceilings, fix defective electrical outlets and inoperable gas lines, replace missing fire proofing, supply hot water, repair broken and defective stair treads, replace broken windows, fix loose flooring, cover exposed electrical wiring, properly exterminate for vermin and roaches, provide fire stopping, replace rotting wooden beams in the ceiling, and loose and sagging stairs, provide proper grounding for electrical lines, cover an exposed electrical panel, and supply support for gas lines. Violations for illegal transient use have also been issued. Plaintiff's manager/attorney also states that as recently as January 23, 2018, he had repeatedly notified defendants of the violations of the premises. (NYSCEF 112). He asserts that as he does not manage the premises for plaintiff, but is

only plaintiff's manager, there are persons with knowledge of the issues surrounding the premises superior to his. He denies any conflict resulting from his dual role as plaintiff's manager and attorney, because he has determined that there is no such conflict, and warrants that plaintiff's members do not view him as having conflicts, as they have not voted to elect a new manager or retain new counsel. (NYSCEF 96).

C. Reply (NYSCEF 127)

Defendants observe that plaintiff identifies no other witnesses with knowledge superior to its manager/attorney and deny that their motion is premature as it is clear that his testimony will be necessary. They maintain that he has exclusive authority over plaintiff's operations, including the power to retain legal counsel, incur and pay legal fees, terminate the lease, and settle litigation, without the approval of plaintiff's members, and observe that plaintiff does not submit an affidavit from one of plaintiff's members refuting the alleged conflicts.

D. Sur-reply (NYSCEF 195)

Plaintiff observes that its manager/attorney has not appeared in this matter, that defendants have not filed an affidavit of service demonstrating that he was served with their counterclaims, and that the manager/attorney has not filed an answer to the counterclaims. It reiterates that disqualification is premature as no discovery has been exchanged, and therefore, it is not yet known whether the testimony is necessary or adverse to plaintiff, and asserts that defendants' counterclaims are meritless, and do not support disqualification.

E. Oral argument (NYSCEF 243)

At oral argument, the parties confirmed that the motion concerns only disqualification.

Defendants argued that plaintiff's operating agreement gives its manager sole authority to select counsel and negotiate and pay counsel's fees. They also asserted that when plaintiff's

manager/attorney decided to become plaintiff's attorney, he should have recused himself, but could not, as plaintiff does not have a board. Defendants observed that plaintiff offers no evidence that plaintiff's members consented to the dual role and argued that the manager/attorney's affidavit attesting to such is conclusory and insufficient. Defendants also asserted that as he is now a counterclaim defendant, he and plaintiff are "certain" to have claims against one another in light of an indemnification provision in the operating agreement.

Disqualification is mandatory, defendants maintained, because the manager/attorney will be called as a witness on plaintiff's claims and defendants' counterclaims. They allege that another attorney at the manager/attorney's firm told defendants' counsel that plaintiff would no longer negotiate a settlement if defendants did not withdraw their claims against the manager/attorney, thereby revealing a conflict of interest. They deny that their motion is premature, as a potential conflict is clear at this juncture.

According to plaintiff, it has been represented by its manager/attorney's firm since 2006, that the firm was representing it when the operating agreement was executed, and that the members wanted the attorney to also be its manager. Plaintiff's counsel denied that she had spoken with defendants' counsel about not settling. To the extent defendants argue that a conflict between plaintiff and its manager/attorney will arise, she claimed it is speculative and constitutes an insufficient basis for disqualification. Plaintiff denied that the manager/attorney has unchecked authority to manage, and to the extent that defendants claim that he is a necessary witness, plaintiff argued that there is a registered agent for the premises who can testify to the violations, and that the violations will be proven by documentary evidence. Plaintiff also asserted that defendants' counterclaims are meritless and are advanced solely as an attempt to disqualify plaintiff's counsel, and moreover, disqualification is premature as the counterclaims have not

been addressed by a motion to dismiss, and discovery remains outstanding. Plaintiff warranted that the manager/attorney has not appeared in this matter as counsel.

Defendants, in reply, argued that the manager/attorney has appeared in this matter, as his name is listed as counsel in two memoranda of law. Defendants assert that some of plaintiff's members are alive and could have submitted affidavits.

III. ANALYSIS

A. Necessary witness

Pursuant to 3.7 of the Rules of Professional Conduct, an attorney may not act as an advocate in a matter "where it is likely that [he or she] will 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 where the attorney knows he or she is likely to be a witness on a significant issue of fact on the client's behalf." (*Harris v Sculco*, 86 AD3d 481 [1st Dept 2011]). As disqualification impacts a party's right to be represented by counsel of its choice, the movant bears the "heavy burden" of demonstrating that counsel will be called as a witness and how such testimony would be adverse to plaintiff. (*Skanska USA Bldg. Inc. v Atl. Yards B2 Owner, LLC*, 146 AD3d 1, 13 [1st Dept 2016], *affd* 31 NY3d 1002 [2018]; *Broadwhite Assocs. v Truong*, 237 AD2d 162, 163 [1st Dept 1997]).

As it is undisputed that plaintiff's manager is listed as of counsel on two filings, he is deemed plaintiff's attorney.

Plaintiff's amended complaint is limited to defendant's alleged failure to maintain the premises in safe and good condition, facts about which its manager/attorney may be able to address. While defendants express an intent to call him as their witness, absent discovery, it is unknown whether his testimony is necessary to defend against the alleged breach. (*See Harris*,

86 AD3d 481 [denying motion to disqualify as premature where necessity of attorney's testimony unclear]; *Twin Sec., Inc. v Advocate & Lichtenstein, LLP*, 97 AD3d 500, 500 [1st Dept 2012] [denying pre-discovery disqualification motion as premature because unknown whether attorney's testimony related solely to uncontested issue]; *see also S & S Hotel Ventures Ltd. P'ship v 777 S.H. Corp.*, 69 NY2d 437, 446 [1987] ["Testimony may be relevant and even highly useful but still not strictly necessary."]).

Disqualification based on defendants' counterclaims is equally premature, as the manager/attorney has not filed an answer, and the joint motion to dismiss defendants' counterclaims pends. As it is unknown whether defendants' counterclaims will be sustained, let alone whether the testimony will be necessary to establish those causes of action, defendants' motion is premature.

B. Conflicts of interest

Pursuant to 1.7 of the Rules of Professional Conduct, an attorney may not act as an advocate in a matter where he or she has a conflict of interest with his or her current client. However, as defendants are neither a former or current client of the manager/attorney, they lack standing to disqualify him for alleged conflicts of interest between him and plaintiff. (*See Shah v Ortiz*, 112 AD3d 543 [1st Dept 2013] [lack of prior attorney-client relationship fatal to motion to disqualify under rule 1.7]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion to disqualify is denied without prejudice, with leave to renew following the completion of discovery.

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7/29/2019			BARBARA JAFFE, J.S.C.
DATE			

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
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