

**Thacker v Constantine Cannon LLP**

2019 NY Slip Op 32980(U)

October 7, 2019

Supreme Court, New York County

Docket Number: 155930/18

Judge: Doris Ling-Cohan

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 36

-----X  
GAIL THACKER,

Plaintiff,

Index No.  
155930/18

- against -

CONSTANTINE CANNON LLP,

Motion Seq.  
001

Defendant.  
-----X

HON. DORIS LING-COHAN, J.S.C.

Before this Court is defendant Constantine Cannon LLP's (Constantine) motion pursuant to Rules 1.7 (Rule 1.7) and 3.7 (Rule 3.7) of the New York Rules of Professional Conduct, to disqualify the Law Offices of John T. Maher ("the Maher Firm"), John T. Maher Esq. ("Maher"), and Diana Jarvis, Esq. ("Jarvis", together with the Maher Firm and Maher, "the JTM Group"), as counsel for plaintiff Gail Thacker ("Thacker"). Plaintiff Thacker cross-moves pursuant to 3211(b) to dismiss Constantine's twenty-eight affirmative defenses.

**Background**

This is an action for legal malpractice and breach of contract commenced by Thacker against defendant law firm Constantine. As alleged in the complaint, in 2014, Thacker, an artist, was living in a rent-stabilized apartment in Williamsburg, Brooklyn. In May 2014, she was illegally evicted by her landlord, Thomas Malloy (Malloy). In December 2014, Thacker retained the Maher Firm to commence an action against Malloy for unlawful eviction (the "Wrongful Eviction Action"). However, shortly thereafter, in January 2015, Constantine offered to represent Thacker *pro bono*, under the Volunteer Lawyers for the Arts program, which provides free legal services to artists.

On February 6, 2015, Thacker accepted Constantine's *pro bono* representation and signed a retainer agreement with Constantine (the Retainer). Pursuant to the Retainer, Constantine agreed to retain Maher and Jarvis as legal consultants, and to split attorney's fees

with them (Complaint, Exhibit B, at 1). Thacker alleges that Maher and Jarvis were never actually retained as legal consultants by Constantine, and, on February 24, 2015, by email, Thacker formally terminated the Maher Firm's representation of her in the Wrongful Eviction Action (Complaint, Exhibit C).

On or about August 11, 2019, the Wrongful Eviction Action was dismissed, after a traverse hearing, for lack of personal jurisdiction/improper service. On May 3, 2017, such decision was affirmed, on appeal (Complaint, Exhibits F, G). After such dismissal, Thacker was unable to reassert some of her claims against Malloy, because the one-year statute of limitations had expired.

Thacker subsequently retained the Maher Firm and commenced this action against Constantine for legal malpractice and breach of the Retainer. Thacker alleges herein that, but for Constantine's failure to properly serve Malloy, she would have prevailed on her claims asserted in the Wrongful Eviction Action (Complaint, ¶ 62).

### Discussion

As stated, in the within motion, defendant law firm Constantine moves to disqualify the JTM Group, on the basis that Maher and Jarvis will have to testify in this action, as to allegedly significant facts relating to the Wrongful Eviction Action since Maher and Jarvis were co-counsel and legal advisors to Constantine during such action. According to Constantine, Maher and Jarvis advised Thacker on executing the Retainer, which Thacker alleges in her complaint was breached. Moreover, Constantine maintains that the Maher Firm's professional judgment is adversely affected by their own financial, business, and personal interests because it has been placed in the position of advising Thacker on claims that the Maher Firm may ultimately be liable for, as co-counsel to Constantine.

In opposition, Thacker argues that she had no attorney-client relationship with the Maher Firm, with respect to the Wrongful Eviction Action, after its formal termination on February 24, 2015, after Constantine was retained. Additionally, plaintiff argues that Maher and Jarvis are

not parties to the Retainer and Constantine never actually retained Maher and Jarvis, as legal consultants. Lastly, Thacker contends that the JTM Group was not involved in the Wrongful Eviction Action, in any way.

Unless certain exceptions apply, Rule 1.7 (a) of the Rules of Professional Conduct provides that:

a lawyer shall not represent a client if a reasonable lawyer would conclude that either: (1) the representation will involve the lawyer in representing differing interests; or (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests

(22 NYCRR 1200.0, Rule 1.7 [a]). Rule 3.7 of the Rules of Professional Conduct provides that “[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 certain exceptions apply (*id.* at Rule 3.7 [a]).

“Disqualification of counsel conflicts with the general policy favoring a party's right to representation by counsel of choice, and it deprives current clients of an attorney familiar with the particular matter” (*Tekni-Plex, Inc. v Meyner & Landis*, 89 NY2d 123, 131 [1996] [internal citations omitted]). 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 (see *S & S Hotel Ventures LP v. 777 S.H. Corp.*, 69 NY2d 437 [1987; *Dietrich v Dietrich*, 136 AD3d 461 [1<sup>st</sup> Dept 2016]]). “The party seeking to disqualify a law firm or an attorney bears [a heavy] burden to show sufficient proof to warrant such a determination” (*Gulino v Gulino*, 35 AD3d 81, 812 [2d Dept 2006] [internal citations omitted]; see also *Ullmann -Schneider v. Lacher & Lovell-Taylor PC*, 110 AD3d 469 [1<sup>st</sup> Dept 2013]). “Whether or not to disqualify an attorney or law firm is a matter which rests in the sound discretion of the court” (*id.* [internal citations omitted]).

Here, at this juncture, Constantine failed to meet its *heavy burden* in establishing that disqualification of the JTM Group under Rule 1.7 and 3.7 is warranted (see *Matter of Segal v*

*Five Star Elec. Corp.*, 165 AD3d 613, 613 [1st Dept 2018]). The Court notes that this motion is pre-discovery and grounds may indeed exist to disqualify plaintiff's counsel, upon discovery.

At this early stage, Constantine relies primarily upon several emails purportedly establishing Jarvis' active role in the Wrongful Eviction Action, after the Maher Firm's termination and, prior to the improper service of Malloy arguing that, thus, JTM Group will be necessary witnesses in this matter, this Court disagrees (Malone Affirmation, Exhibits E, F, G, H). The emails are described as follows: (1) on March 2, 2015, Jarvis responded to an inquiry about filing a notice of pendency stating that, "John recommended an Order to Show Cause seeking an immediate order" (*id.*, Exhibit E); (2) on March 4, 2015, Jarvis sent Constantine comments on a draft of the Order to Show cause seeking a notice of pendency and recommended using certain cases (*id.*, Exhibit F); (3) on March 27, 2015, Jarvis suggested speaking with the process server on how to serve Malloy, who was evading service (*id.*, Exhibit G); and (4) on March 30, 2015, Jarvis requested a copy of the process server's affidavit of service pertaining to his alleged service on Malloy (*id.*, Exhibit H). The emails alone are insufficient to satisfy defendant's heavy burden or on this motion to disqualify. However, there may be additional supportive evidence revealed during discovery. Further, it is unclear, however, if Jarvis performed these limited tasks as co-counsel, a legal consultant, or out of professional courtesy. Notably, it is undisputed that Maher and Jarvis were not parties to the Retainer and that no other contractual agreements exist to define any role JTM Group may have had in the Wrongful Eviction Action, or any relationship with Constantine (Complaint, Exhibit B).

Further, at this juncture, the record is devoid of any evidence to show that any member of the JTM Group was actually retained by Thacker, or hired by Constantine (as co-counsel), after the Maher Firm's termination (which occurred after Constantine was formally retained), or that Maher or Jarvis were actually ever retained, as legal consultants. Moreover, Constantine fails to identify any specific communications that would be the subject of the JTM Group's alleged testimony, articulate why any such testimony is necessary in this action, or provide any

basis for this Court to conclude that the JTM Group were co-counsel or legal advisors to Constantine, to warrant the disqualification of plaintiff's counsel herein (*Campbell v McKeon*, 75 AD3d 479, 481 [1st Dept 2010] [the trial court correctly determined that the plaintiff failed to meet heavy burden of establishing opposing counsel's testimony was necessary, since plaintiff did not identify specific issues requiring the attorney's testimony, nor demonstrate the significance or weight of such alleged testimony, nor the unavailability of other sources of such evidence).

Moreover, even if the Maher Firm may have had a limited role in negotiating the Retainer on behalf of Thacker, such fact fails to provide a basis for disqualification, as the submissions herein merely show that the Maher Firm was engaged as counsel for a very brief period of time (approximately one [1] month), prior to Constantine's retention as *pro bono* counsel and the signing of the Retainer. In addition, Constantine failed to establish in the within submissions, that any testimony relating to the negotiation of the Retainer is necessary in this action.

Finally, Thacker's alleged July 2015 statement that, "Jarvis is my attorney and, therefore, all my communications with her are privileged as they are with you" (Malone Affirmation, Exhibit I), is insufficient, as such a statement by Thacker, without more, does not necessarily create an attorney-client relationship (see *Pellegrino v Oppenheimer & Co.*, 49 AD3d 94, 99 [1st Dept 2008] [internal citations omitted][“while the existence of the [attorney-client] relationship is not dependent upon the payment of a fee or an explicit agreement, a party cannot create the relationship based on his or her own beliefs or actions”]). Upon further discovery, however, there may indeed be a basis to disqualify.

Given the lack of clarity surrounding any role in the Wrongful Eviction Action that the JTM Group may have had, Constantine failed to demonstrate that the JTM Group's judgment “on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests” (Rule 1.7) to warrant disqualification.

Nevertheless, in the event that discovery reveals facts that would render any member of the JTM Group's testimony necessary, Constantine may renew its motion to disqualify. At this time, however, Constantine failed to fulfill its heavy burden to warrant the granting of disqualification (see *Harris v Sculco*, 86 AD3d 481 [1st Dept 2011] [internal citations omitted]). Thus, Constantine's motion to disqualify is denied, without prejudice.

Thacker cross-moves to dismiss all of Constantine's twenty-eight affirmative defenses because they are pled in conclusory fashion. In response, Constantine agrees to voluntarily discontinue its second through eleventh, thirteenth to fifteenth, twenty-fourth, twenty-fifth, and twenty seventh affirmative defenses without prejudice. The motion to dismiss will therefore only address Constantine's first, twelfth, sixteenth through twenty-third, twenty-sixth, and twenty-eighth affirmative defenses.

"On a motion to dismiss affirmative defenses pursuant to CPLR 3211 (b), the plaintiff bears the burden of demonstrating that the defenses are without merit as a matter of law" (534 E. 11th St. Hous. Dev. Fund Corp. v Hendrick, 90 AD3d 541, 541 [1st Dept 2011]). Moreover, the answer is to be liberally construed, and the court must view the allegations in the light most favorable to the non-moving party and give such non-moving party the benefit of every reasonable inference (*Granite State Ins. Co. v Transatlantic Reinsurance Co.*, 132 AD3d 479, 481 [1st Dept 2015]). An affirmative defense should not be dismissed if a question of fact remains (534 E. 11th St., 90 AD3d at 541).

In support of the cross-motion to dismiss the remaining affirmative defenses, Thacker submits an attorney affirmation from Maher containing only a single sentence of conclusory statements that are insufficient to establish that Constantine's remaining affirmative defenses lack merit, as a matter of law (Maher Affirmation, ¶¶ 59-83; *Granite State Ins. Co.*, 132 AD3d at 483 ["[t]he conclusory affidavit and scant documentary proof presented do not establish, at this pre-discovery stage of the proceedings, that this affirmative defense fails as a matter of law"]).

Consequently, Thacker's cross-motion to dismiss Constantine's remaining affirmative defenses is denied.

Accordingly, it is

ORDERED that defendant Constantine's motion to disqualify is denied but may move, upon further discovery, for such relief; and it is further

ORDERED that plaintiff Thacker's cross-motion to dismiss the affirmative defenses is granted to the extent that Constantine's second through eleventh, thirteenth to fifteenth, and the twenty-fourth, twenty-fifth, and twenty seventh affirmative defenses are dismissed, without prejudice; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon defendants, with notice of entry.

The Court notes that this case was referred to the Court's Commercial Division ADR program, by order dated August 8, 2019.

Date: October 7, 2019



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Hon. Doris Ling-Cohan, J.S.C.