South Shore D'Lites, LLC v First Class Prods. Group, LLC
2019 NY Slip Op 33722(U)
December 20, 2019
Supreme Court, New York County
Docket Number: 650827/2012
Judge: Tanya R. Kennedy
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 63

SOUTH SHORE D'LITES, LLC, D'LITES OF WEST CALDWELL, LLC, and HGB D'LITES OF SMITHTOWN, LLC, Plaintiffs, - v - FIRST CLASS PRODUCTS GROUP, LLC, TODD COVEN, and MAGDA ABT, Defendants.	**INDEX NO.** 650827/2012 **MOTION SEQ. NO.** 007 **DECISION**

HON. TANYA R. KENNEDY, J.S.C.:

Plaintiff, D'Lites of West Caldwell ("West Caldwell"), moves for an order pursuant to the New York Rules of Professional Conduct, 22 NYCRR 1200.0, to disqualify the law firm of Fox Rothschild LLP ("Fox Rothschild") from representing Defendants, First Class Products Group, LLC ("First Class"), Todd Coven ("Coven"), and Magda Abt ("Abt"), (collectively, "Defendants"), in this action. This Court held oral argument on the motion, which is denied in its entirety in light of the following discussion.

BACKGROUND AND PROCEDURAL HISTORY

South Shore D'Lites, LLC ("Southshore"), D'Lites of West Caldwell ("West Caldwell"), and HGB D'Lites of Smithtown, LLC ("Smithtown"), (collectively, "Plaintiffs"), commenced this action in March 2012 alleging, *inter alia*, that certain sub-license agreements for the sale of the D'Lites brand of frozen dietary desserts were franchise agreements, and that Defendants, a corporate entity and its principals, failed to provide Plaintiffs with disclosures required for prospective franchisees.

The instant complaint asserts causes of action for (1) breach of duty of good faith and fair dealing; (2) breach of fiduciary duty; (3) violation of General Business Law §349; (4) fraud in the inducement, and (5) violation of General Business Law §§683, 687, and 692.

In November 2018, Defendants filed a substitution of counsel to substitute Fox Rothschild in place of The Law Offices of Brian K. Bernstein, P.C. (*see* Exhibit 4 of Morris Supporting

Affirmation). West Caldwell now seeks to disqualify Fox Rothschild from representing Defendants herein, maintaining that its Partner, Marc J. Gross, Esq. ("Gross"), who joined the firm in 2017, was a partner at Greenbaum, Rowe, Smith & Davis LLP ("Greenbaum"), which previously represented West Caldwell, First Class, Abt, and nonparty D'Lites of Woodbury, LLC in a 2011 defamation action against News Corp., Fox 5 News, and its reporter, Arnold Diaz, in New Jersey Superior Court (the "Fox News Action"), which was discontinued in 2012 (*see* Exhibit 8 of Morris Supporting Affirmation; Coven Opposing Affidavit, ¶6).

The Complaint in the Fox News Action alleged, *inter alia*, that Diaz made defamatory and slanderous statements about the Plaintiffs, including that the plaintiffs were "selling a lie;" "lying to customers;" "advertising something that's not true;" that Abt's and/or D'Lites products were not low carb;" "not low sugar;" and that Diaz had "lab reports" to prove it and by publishing knowingly false lab reports (*see* Exhibit 8 of Morris Supporting Affirmation).

DISCUSSION

"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 Meyer & Landis*, 89 NY2d 123, 131 [1996]; *see S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp.*, 69 NY2d 437, 443 [1987]). The ability to select one's counsel is a "valued right" and any restrictions must be "carefully scrutinized" (*S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp.*, *supra* at 443; *see Mayers v Stone Castle Partners, LLC,* 126 AD 3d 1, 5 [1st Dept 2015]). Further, such right "should not be abridged absent a clear showing that disqualification is warranted" (*Trimarco v Data Treasury Corp.*, 91 AD3d 756, 756-757 [2d Dept. 2012]).

A court has discretion to determine whether to grant a motion for disqualification and should consider whether such motion, when made during pending litigation, is merely a tactic to secure a strategic advantage over its adversary (*see Tekni-Plex, Inc. v Landis*, *supra* at 132; *Mayers v Stone*

Castle Partners, LLC, supra at 6; *Ullmann-Schneider v Lacher & Lovell-Taylor PC*, 110 AD3d 469, 470 [1st Dept 2013]. Therefore, a moving party bears a "heavy burden" of establishing that disqualification is warranted (*S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp.*, *supra* at 445; *Ullmann-Schneider v Lacher & Lovell-Taylor, PC*, *supra* at 470).

Rule 1.9 of the New York Rules of Professional Conduct prohibits an attorney from representing a client on a matter which is "substantially related" to a matter in which the attorney has represented a former client, where the current client's interests are materially adverse to the interests of the former client. The prohibition under Rule 1.9 is imputed to the attorney's firm under Rule 1.10.

Rule 1.10(c) states that:

> [w]hen a lawyer becomes associated with a firm, the firm may not knowingly represent a client in a matter that is the same as or substantially related to a matter in which the newly associated lawyer, or a firm with which that lawyer was associated, formerly represented a client whose interests are materially adverse to the prospective client or current client unless the newly associated lawyer did not acquire any information protected by Rule 1.6 [Confidentiality of Information] or Rule 1.9(c) that is material to the current matter.

West Caldwell argues that Fox Rothschild should be disqualified from representing Defendants in this action since Gross represented West Caldwell, First Class and Abt in the Fox News Action on matters substantially related to the claims herein. West Caldwell further argues that Gross was copied on an email addressed to Coven that was referenced in Defendants' limited privilege log, which this Court previously directed Defendants to produce to Plaintiff pursuant to the crime-fraud exception to the attorney-client privilege (*see* NYSCEF Doc. No. 209, September 12, 2018 Order). As such, West Caldwell maintains that Gross is a potential adverse fact witness in this matter.

Defendants argue in opposition that the pleadings in this action and in the Fox News Action clearly indicate that there is no substantive nexus between the two actions. Defendants note this action concerns sub-license agreements between Plaintiffs and First Class to sell D'Lites products, whereas the Fox News Action sounded in defamation. Defendants also maintain that while the

Plaintiffs herein allege that Defendants misrepresented certain facts regarding the business, the complaint is devoid of any allegations that Defendants made any misrepresentations regarding the calorie, carbohydrate, fat or sugar content of Plaintiffs' products.

Defendants argue that Gross was copied on the email referenced in Defendants' limited privilege log because he was Defendants' initial contact at Greenbaum, which does not render him a potential adverse fact witness. Defendants maintain that Gross was not involved in drafting or negotiating the sub-license agreements between First Class and Plaintiffs, or their predecessors in interest, or in providing legal advice regarding the drafting and negotiation process. Lastly, Defendants maintain that Gross was ethically screened from this action before they substituted Fox Rothschild as counsel; that he is not the billing attorney on this matter; and that he has not participated in representing them since joining the firm.

Contrary to West Caldwell's contention, it has not met its "heavy burden" of establishing that disqualification is warranted. The claims in this action are based upon certain sub-license agreements between Plaintiffs and First Class, as well as Defendants' alleged failure to provide required disclosures to franchisees. The Fox News Action sought to recover damages for defamation based upon slanderous statements about the Plaintiffs and the nature and content of their products.

Unlike the complaint in the Fox News Action, the complaint is devoid of any allegations with respect to Defendants' misrepresentations regarding the content or nature of Plaintiffs' products. As such, there is no "substantive nexus" between the two actions necessitating disqualification. Moreover, West Caldwell has not alleged that Gross obtained any confidential information that would disadvantage West Caldwell in this action to impute Rule 1.9 to Fox Rothschild.

Rule 3.7(b)(1) of the Rules of Professional Conduct provides that "[a] lawyer may not act as advocate before a tribunal if 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."

The party moving for disqualification on the ground that the attorney is likely to be called as a witness must establish that "(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" (*Trimarco v Data Treasury Corp.*, *supra* at 757). "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 v 777 S. H. Corp.*, *supra* at 446). Here, there has been no showing that Gross had any involvement with drafting or negotiating the sub-license agreements, to render his testimony as necessary.

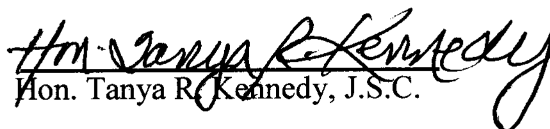
Accordingly, it is

ORDERED that the motion to disqualify counsel is denied; and it is further

ORDERED that the parties shall appear for a status conference on January 15, 2020 at 2:15 p.m.

Dated: New York, New York
December 20, 2019

ENTER:



Hon. Tanya R. Kennedy, J.S.C.

HON. TANYA R. KENNEDY