

Bosquez v RXR Realty LLC

2020 NY Slip Op 32331(U)

July 15, 2020

Supreme Court, New York County

Docket Number: 450464/2020

Judge: Paul A. Goetz

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

PRESENT: HON. PAUL A. GOETZ

PART IAS MOTION 47EFM

Justice

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JOSE RODOLFO RODRIGUEZ BOSQUEZ,
 Plaintiff,
 - v -
 RXR REALTY LLC, ET AL,
 Defendants.

-----X

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 553-589, 591-610, 617

were read on this motion to/for DISMISS/DISQUALIFY.

Plaintiff Jose Rodolfo Rodriguez Bosquez commenced this Labor Law action on June 30, 2017, to recover for severe personal injuries he suffered on June 6, 2017, while working for third-party defendant Global Iron Works Inc. at a construction site. Third-party defendant Global Iron Works now moves pursuant to CPLR 3103 seeking dismissal of the third-party complaint or alternatively, disqualifying counsel for defendants/third-party plaintiffs Hunter Roberts Construction Group LLC, RXR Pier 57 MT LLC and Super P57 LLC.

It is well-established that “[a] party has a right to be represented by counsel of [his] choice, and any restrictions on that right must be carefully scrutinized.” *Skanska USA Bldg v. Atlantic Yards B2 Owner, LLC*, 146 A.D.3d 1, 13 (1st Dep’t 2016) (internal quotation marks and citations omitted). Thus, a movant seeking disqualification of an opponent’s counsel faces a heavy burden. *Id.* Further, where a motion to disqualify is made in ongoing litigation, courts should examine whether the motion is made for tactical purposes, so as to delay litigation and deprive an opponent of quality representation. *Id.*

Global argues that Cullen & Dykman, the attorneys retained by third-party plaintiffs, should be disqualified from representing the third-party plaintiffs in this matter because they previously represented Global regarding this incident. Although Global does not cite a specific rule in its motion seeking disqualification, pursuant to Rule 1.9(a) of the New York Rules of Professional Conduct, a lawyer who formerly represented a party in a matter is prohibited from subsequently representing another party in the same matter whose interests are adverse to the interests of the former client. In order to disqualify counsel based on an alleged violation of this rule, the moving party must show, among other things, the existence of a prior attorney-client relationship between itself and opposing counsel. *Campbell v. McKeon*, 75 A.D.3d 479, 480 (1st Dep't 2010). To determine whether an attorney-client relationship exists, a court must consider the parties' actions and while the existence of a relationship is not dependent on the payment of a fee or an explicit agreement, a party cannot create the relationship based on his or her subjective or unilateral beliefs or actions. *Pelligrino v. Oppenheimer & Co.*, 49 A.D.3d 94, 99 (1st Dep't 2008).

Here, Global does not submit a formal retainer, letter of representation or any other document to show that Cullen & Dykman undertook to represent Global in this matter. Instead, Global's argument is based entirely on the recollection of two of its employees who cooperated and communicated with Cullen & Dykman's investigation of the incident on behalf of Hunter Roberts. Global submits affidavits from Marissa Pawell, Global's controller, and Todd Pawell, Global's foreman for the project, who both aver that they understood that Cullen & Dykman was acting as their attorney during the two year investigation it conducted regarding the incident, from approximately June 2017, when the incident occurred, to May 2019, just a few weeks prior to the filing of the third-party complaint against Global. Affidavit of Marissa Pawell sworn to on

May 5, 2020; Affidavit of Todd Pawell sworn to on May 5, 2020. Mr. and Ms. Pawell's understanding of this alleged representation was based on Cullen & Dykman's repeated requests for information from Global regarding the incident, the alleged instructions by Hunter Roberts that they should only cooperate with Cullen & Dykman regarding any investigation of the incident, and the alleged promises by Scott Shapiro of Cullen & Dykman that Cullen & Dykman would help Global with the ongoing OSHA and Department of Buildings investigations regarding the incident. Further, Mr. and Ms. Pawell aver that given their understanding that Cullen & Dykman was acting as their attorney in this matter, they cooperated fully with the investigation and shared information and documents that they would not have otherwise had they known their interests were adverse.

As an initial matter, Global submits no evidence that these employees had the authority to retain counsel for Global regarding this incident and there is no evidence that anyone with authority from Global ever formally retained Cullen & Dykman as Global's counsel. Further, as the third-party plaintiffs point out, Global was obligated to cooperate with the post-accident investigation under its contract with Hunter Roberts. Cullen & Dykman's investigation of the matter at the behest of Hunter Roberts to secure basic and relevant records is insufficient to create an attorney-client relationship between Cullen & Dykman and Global. Affirmation of John Sparling dated May 27, 2020, Exh. G, para. 3.5. Global's contention that it reasonably believed that Cullen & Dykman was representing them in connection with this accident is further undermined by numerous facts and documents. For instance, at the beginning of the investigation, Cullen & Dykman served Global with a subpoena in which they clearly identified themselves as counsel for the third-party plaintiffs, not Global. Subsequently during the investigation, Cullen & Dykman served Global with a second subpoena, in response to Ms.

Pawell's request that a subpoena was required in order for Global to produce additional information. Sparling Aff., Exh. F; Affirmation of Scott M. Shapiro dated May 27, 2020, para. 5; Affidavit of Samantha Clairemont sworn to on May 25, 2020, paras. 6-7. Moreover, Cullen & Dykman never represented or appeared on behalf of Global in either the OSHA or Department of Buildings investigations of the accident and Global never contacted them to seek their advice or representation in these proceedings. Sparling Aff., paras. 26-28 and Exh. I, pp. 38-39 (transcript of OATH hearing in which Mr. Pawell did not have counsel and was only aware of counsel for Hunter Roberts and RXR); Shapiro Aff., para. 8; Affidavit of Giuliana Benedicty sworn to on May 26, 2020, para. 8; These facts clearly undermine Global's claim that they believed that Cullen & Dykman was representing them in connection with this matter.

Both Ms. Pawell and Mr. Pawell claim that they were instructed by both Ms. Benedicty of Hunter Roberts and Mr. Shapiro of Cullen & Dykman not to speak to any other attorneys regarding this incident. While clearly such a statement would be inappropriate, it is insufficient to give rise to an attorney-client relationship between Cullen & Dykman and Global. Further, it appears that this is an incorrect and imprecise description of what occurred. Rather, after the incident in June 2017, Global was apparently contacted by an investigator hired by plaintiff who claimed that it was retained by Hunter Roberts and was seeking an investigation. In response to the confusion created by this communication, both Hunter Roberts and Cullen & Dykman advised Global that Cullen & Dykman was heading the investigation on behalf of Hunter Roberts and that Global should only speak to Cullen & Dykman regarding Hunter Roberts' investigation of the incident. Shapiro Aff., para. 7; Benedicty Aff., para. 6. Thus, there was nothing inappropriate about Cullen & Dykman's conduct during the investigation and there is no evidence that they were retained or acted as counsel for Global.

Finally, Global concedes that the only privilege it asserts over the documents it produced to Cullen & Dykman during the investigation is the attorney-client privilege. Affirmation of Jason L. Beckerman dated May 6, 2020, para. 23 (“The only basis we would have to assert a privilege over these materials is that they were shared by my client under the belief that they were protected by attorney-client privilege.”). Given that there was no attorney-client relationship between Global and Cullen & Dykman, there is no basis for Global to assert privilege over these documents and Cullen & Dykman’s production of these documents during the course of discovery was appropriate. Accordingly, it is

ORDERED that the motion is denied; and it is further

ORDERED that counsel shall contact the court within ten days of entry of this order to schedule a discovery conference.

7/15/20
DATE


PAUL A. GOETZ, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE