SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : COMMERCIAL PART 8

----------x

LOUANN LARSEN, as Trustee of the LARSEN 2021 FAMILY TRUST, SUBTRUST A, and the LARSEN 2021 FAMILY TRUST, SUBTRUST C; KATERINA VOUMVOURAKIS, as Trustee of the LARSEN 2021 FAMILY TRUST, SUBTRUST A, and the LARSEN 2021 FAMILY TRUST, SUBTRUST B; and LYDIA LARSEN, as Trustee of the LARSEN 2021 FAMILY TRUST, SUBTRUST B, and the LARSEN 2021 FAMILY TRUST, SUBTRUST C, as trustees and derivatively on behalf of POWER COOLING, INC. and RELIANCE MACHINING, INC.,

Plaintiffs, Index # 512169/2022

- against - September 14, 2023

LAUREN LARSEN,

Defendant,

and Motion Seq. Nos. 6 and 8

POWER COOLING, INC., and RELIANCE MACHINING, INC.,

Nominal Defendants,

----------x

PRESENT: HON. LEON RUCHELSMAN

The defendant Lauren Larsen has moved seeking to disqualify counsel for the plaintiffs Power Cooling Inc., and Reliance Machining Inc. The plaintiffs have cross-moved seeking to disqualify defendant's counsel. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

As recorded in prior orders the nominal defendant corporations, which are engaged in cooling and heating services, were owned by Lloyd Larsen. On December 1, 2002 Lloyd placed 51% of the shares of common stock of the corporations into a trust

and his daughter Lauren, the defendant herein, was named as trustee along with a non-party. Further, Lloyd and his wife and Lauren executed an agreement wherein they were the only shareholders with voting rights. Lloyd passed away in 2011 and Lauren was gifted 29% of the company and purchased another 20% from her mother, leaving her with 49% of the company. In 2021 the 2002 Trust was reformed into a new trust with three subdivisions, two (Subtrusts A and B) maintaining 19.40% each and Subtrust C maintaining 9.4%). The 2002 trust still maintained 2.75%. The trustees of Subtrusts A, B and C are Lloyd's other three children, the plaintiffs herein, Louann, Lydia and non-party Linnea and other non-parties.

The Complaint alleges that since Lloyd's death Lauren has mismanaged the corporations, failing to provide distributions and paying her children salaries and benefits for providing no work. Further, the Complaint alleges the defendant has diverted income from the corporation for her own personal gain.

In support of the motion to disqualify the defendant asserts that in 2019 an attorney from Windels Marx Lane & Mittendorf, LLP was hired to engage in decanting the trusts to afford greater percentages of ownership to Louann Larsen, Lydia Larsen and Linnea Larsen. The plaintiff's have cross-moved seeking to disqualify Lauren's counsel based upon the same facts surrounding the decanting of the trusts. Essentially, each party argues the

respective counsel that was involved in decanting the trusts will now be called as witnesses in this action and another action commenced by Lauren and that therefore all counsel representing the parties in this action must be disqualified.

Presently, the plaintiffs have sought new counsel and consequently, the motion seeking to disqualify plaintiff's counsel is now rendered moot. The motion seeking to disqualify defendant's counsel will now be considered.

Conclusions of Law

It is well settled that a party in a civil action maintains an important right to select counsel of its choosing and that such right may not be abridged without some overriding concern (Matter of Abrams, 62 NY2d 183, 476 NYS2d 494 [1984]). Therefore, the party seeking disqualification of an opposing party's counsel must present sufficient proof supporting that determination (Schmidt v. Magnetic Head Corp., 101 AD2d 268, 476 NYS2d 151 [2d Dept., 1984]).

Rule 3.7 of the New York Rules of Professional Conduct prohibits an attorney from representing a party where it is likely the attorney will be called as a witness on behalf of the client regarding a "significant issue" (id). Thus, to disqualify counsel the party seeking such disqualification must demonstrate that the testimony of the counsel will be necessary to pursue its

own claims (Arons v. Charpentier, 8 AD3d 595, 779 NYS2d 242 [2d Dept., 2004]). Alternatively, even if not strictly necessary, disqualification would be proper where the testimony of counsel would be prejudicial to his or her own client (Daniel Gale Associates, Inc., v. George, 8 AD3d 608, 779 NYS2d 573 [2d Dept., 2004]).

Thus, the crucial questions which must be addressed is whether the testimony of plaintiff's counsel is 'necessary' and even if not necessary whether such testimony will prejudice any of the defendants.

For testimony to be deemed necessary thereby requiring disqualification of counsel, it must be demonstrated that counsel is 'likely to be a witness' (Rule 3.7) and the testimony cannot be garnered from other sources, is not cumulative and is vital to prove the allegations of the case (Sokolow, Dunaud, Mercadier & Carreras LLP v. Lacher, 299 AD2d 64, 747 NYS2d 441 [1st Dept., 2002]).

The defendant's counsel has presented sufficient evidence that she did not represent the defendant regarding the decanting of the trusts at all and is not likely to therefore be called as a witness. First, Mr. Norman Seidenfeld Esq. has submitted an affidavit wherein he asserts that he was counsel for the defendant in the decanting of the trusts and that Ms. Hauser was not involved in that at all. Mr. Seidenfeld states that "I

personally negotiated the terms with Alan Winters over a period of approximately 10 months. These negotiations took place through email and telephone calls. I do not recall any occasion on which I copied Michele Hauser on emails between Winters and me; on no occasion was she on any call with us" (see, Affirmation of Norman Seidenfeld, ¶4 [NYSCEF Doc. No. 192]). Moreover, Ms. Hauser states that "Mr. Winters never called or emailed or reached out to me through any mechanism for any reason at all during approximately 10 months of negotiations and I neither called nor emailed nor otherwise reached out to him" (see, Affirmation of Michelle Hauser, ¶5 [NYSCEF Doc. No. 189]). It is true that Ms. Hauser wrote a very long email to Lauren on March 25 2021 and there are emails between Lauren and Mr. Seidenfeld which reference Ms. Hauser's input, however, there is no question that the main counsel negotiating any changes to the trusts was Mr. Seidenfeld. Thus, to the extent Ms. Hauser had any input in the actual negotiations her involvement was not significant and her testimony will not be necessary. Indeed, she will likely not be called as a witness. The testimony of Mr. Seidenfeld will prove critical in this regard rendering Ms. Hauser's role, if any, merely secondary. Moreover, any further basis to assert Ms. Hauser represented Lauren in the decanting process because Mr. Winters, counsel for plaintiff believed that to be the case, is insufficient grounds for disqualification.

Therefore, since Ms. Hauser's role did not form the basis of any agreements that were ultimately agreed upon and any information she may contain can be obtained from other sources the motion seeking disqualification is denied. Further, the court does not consider alternative grounds seeking disqualification that were raised for the first time in reply.

So ordered.

ENTER:

Dated: September 14, 2023
Brooklyn, N.Y.

Hon. Leon Ruchelsman
JSC