

COPY

Index No.: 36859-08

SUPREME COURT - STATE OF NEW YORK
I.A.S. Part 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA,
Justice

DARIA CAMPISI,

Plaintiff,

- against -

SLOMIN'S INC.,

Defendant.

CASE DISPOSED: NO
MOTION R/D: 9/30/11
SUBMISSION DATE: 1/6/12
MOTION SEQUENCE NO.: 004 MOT D

ATTORNEY FOR PLAINTIFF

Roth & Roth, LLP
192 Lexington Avenue, Suite 802
New York, New York 10016

ATTORNEYS FOR DEFENDANT

Kirschenbaum & Kirschenbaum, PC
200 Garden City Plaza, Suite 500
Garden City, New York 11530

Upon the following papers filed and considered relative to this matter:

Notice of Motion dated August 18, 2011; Affirmation in Support dated August 18, 2011; Exhibits A and B annexed thereto; Affirmation in Opposition dated September 7, 2011; Reply Affirmation dated October 13, 2011; and upon due deliberation; it is

ORDERED, that the motion by plaintiff, pursuant to 22 NYCRR 1200.21, et seq., for an Order disqualifying defendant's counsel Kenneth Kirschenbaum from continuing to represent the defendant in this matter, is denied.

In the underlying action, the plaintiff asserts claims against the defendant for negligence, breach of contract, and fraud in the inducement in the signing of a contract by which the defendant was to provide security services to the plaintiff. Specifically, the plaintiff alleges that Slomin's sold a security system to the plaintiff which Slomin's knew would not be compatible with plaintiff's communication system, which was equipped with Voice Over Internet Protocol ("VoIP"). The plaintiff alleges that the subject contract, which was drafted by Kenneth Kirschenbaum, the defendant's attorney. The plaintiff further alleges that since Kirschenbaum drafted the subject contract, his testimony was relevant and necessary to the prosecution of the action.

On that basis, the plaintiff seeks to disqualify Kirschenbaum under the "Advocate-Witness Rule" of the New York Code of Professional Responsibility Disciplinary Rule 5-101 as codified in 22 NYCRR 1200.21 and which states in pertinent part:

"(a) A lawyer shall not act, or accept employment that contemplates

the lawyer's acting, as an advocate on issues of fact before any tribunal if the lawyer knows or it is obvious that the lawyer ought to be called as a witness on a significant issue on behalf of the client."

Here, the plaintiff maintains that Kirschenbaum drafted the contract at issue and would be a material witness because the contract was drafted in such a way as to defraud the buyer/plaintiff. Accordingly, the plaintiff seeks to depose Kirschenbaum as to why he believed the documents and information relied upon by him in drafting the contract was "common knowledge in the industry". The plaintiff also seeks to uncover what information Kirschenbaum relied on in drafting paragraph 11 of the Monitoring Agreement. This paragraph, which is a disputed provision in this matter, provides as follows:

[Plaintiff] acknowledges that SLOMIN'S explained the difference between VOIP (Voice Over Internet Protocol) and standard telephone line service and that SLOMIN'S recommends use of standard telephone line service and communication since VOIP may be less reliable and not compatible with the alarm system. [Plaintiff] acknowledges that if VOIP is used, it is at [Plaintiff's] sole risk.

Plaintiff alleges that based upon his drafting of the form contract, Kirschenbaum has effectively made himself into an expert on alarm systems, thereby rendering his testimony as necessary to the prosecution of the plaintiff's case.

In his opposition to the motion, Kirshenbaum disputes that he is a necessary witness in this matter. He maintains that the subject form contract speaks for itself and does not require his expert testimony. He further states that he had no personal involvement with the plaintiff, her negotiations with defendant, or the circumstances surrounding her execution of the agreement with defendant. There has been no evidence adduced to dispute Kirschenbaum's claim that he had no personal involvement with the plaintiff or her execution of the contract.

Kirschenbaum, in his affirmation in opposition, notes that for the past thirty five years his law practice has specialized in alarm contract law, representing the alarm industry nationwide. He has provided standardized alarm contracts to a multitude of alarm companies throughout the United States, which contracts may be ordered from a website, and altered by the purchaser. Counsel further states that he is not an expert in alarm security systems, alarm monitoring, or alarm installation, and has no technical expertise in alarm systems or their communication devices. Kirschenbaum notes that the plaintiff does not alleged that Slomin's acted in any way to prevent her from reading the full contract or obtaining advice before execution, or that plaintiff was told anything about the alarm system or its functionality other than what is written in the contract.

Under the circumstances presented, the plaintiff's assertions for disqualification do not meet the heavy burden placed on the plaintiff of "identifying the projected testimony" and "demonstrating how it would be so adverse to the factual assertions or account of events offered" on behalf of the defendant so as to warrant disqualification at this time. See, Broadwhite Assocs. v. Truong, 237 A.D.2d 162, 163, 654 N.Y.S.2d 144.

The foregoing constitutes the Order of this Court.

Dated: March 28, 2012

Hon. Denise F. Molia

HON. DENISE F. MOLIA J.S.C.