

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
FIRST DEPARTMENT

Ullmann-Schneider v. Lacher & Lovell-Taylor PC

110 A.D.3d 469 (N.Y. App. Div. 1st Dep't 2013) · Decided October 8, 2013

SUMMARY

The Appellate Division, First Department affirmed the denial of defendants’ motion to disqualify plaintiffs’ attorneys. The court held that defendants failed to meet the heavy burden of showing that counsel’s testimony was necessary and prejudicial, noting that other evidence could establish the basis for the fees charged in estate accounting proceedings.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, First Department
WRITING FOR THE COURT	Gonzalez, P.J.; Mazzairelli, J.; Andrias, J.; DeGrasse, J.
JURISDICTION	New York
DECIDED	October 8, 2013
DISPOSITION	affirmed
PROCEDURAL POSTURE	Defendants appealed from an order denying their motion to disqualify plaintiffs' attorneys.
STANDARD OF REVIEW	The court applied the heavy-burden standard governing motions to disqualify counsel and required a showing that attorney testimony was necessary and prejudicial to the client's interests.
PRECEDENTIAL VALUE	Published appellate decision; binding within the First Department subject to higher-court authority.
PARTIES	Defendants v. Ullmann-Schneider and plaintiffs

TOPICS

- civil procedure
- probate procedure
- estate litigation

PRACTICE AREAS

- civil procedure
- attorney disqualification
- legal ethics
- probate and estate litigation

QUESTIONS PRESENTED

1. Whether defendants met the required burden to disqualify plaintiffs' attorneys based on the possibility that counsel might be called as a witness.
2. Whether testimony from plaintiffs' counsel or other attorneys at the firm was necessary and prejudicial to plaintiffs' interests.

HOLDINGS

1. Defendants failed to meet the heavy burden required to disqualify plaintiffs' attorneys because the anticipated attorney testimony was not shown to be necessary and prejudicial to plaintiffs' interests.

KEY QUOTATIONS

“Disqualification . . . during litigation implicates not only the ethics of the profession but also the substantive rights of the litigants [and] denies a party’s right to representation by the attorney of its choice” (469)

“a valued right and any restrictions must be carefully scrutinized” (469)

“in the context of an ongoing lawsuit, disqualification . . . can [create a] strategic advantage of one party over another” (469)

FACTUAL BACKGROUND

The dispute concerned the extent and reasonableness of fees charged to Leonard Ullmann, who was deceased, during accounting proceedings involving his mother's estate. Defendants sought to disqualify plaintiffs' attorneys because Donald Hamburg, plaintiffs' counsel and a former co-executor of the estate, might be called as a witness. The court concluded that defendants could rely on Ullmann's deposition to establish the client directives underlying the fees, and that any testimony from Hamburg or other firm attorneys was either unnecessary, nonprejudicial, or cumulative.

PROCEDURAL HISTORY

Supreme Court, New York County, denied defendants' motion to disqualify plaintiffs' attorneys. The Appellate Division, First Department, unanimously affirmed the order without costs.

DISPOSITION

affirmed

CASES CITED

- S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp., 69 N.Y.2d 437, 443 (1987)
- Broadwhite Assoc. v. Truong, 237 A.D.2d 162, 163 (1st Dep't 1997)
- Talvy v. American Red Cross in Greater N.Y., 205 A.D.2d 143, 153 (1st Dep't 1994), aff'd, 87 N.Y.2d 826 (1995)

OPINION

PER CURIAM.

Order, Supreme Court, New York County (Lawrence K. Marks, J.), entered December 11, 2012, which denied defendants' motion to disqualify plaintiffs' attorneys, unanimously affirmed, without costs. "Disqualification . . . during litigation implicates not only the ethics of the profession but also the substantive rights of the litigants [and] denies a party's right to representation by the attorney of its choice" (*S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp.*, 69 NY2d 437, 443 [1987]). The right to counsel is "a valued right and any restrictions must be carefully *470scrutinized" (*id.*). Furthermore, where the rules relating to professional conduct are invoked not at a disciplinary proceeding but "in the context of an ongoing lawsuit, disqualification . . . can [create a] strategic advantage of one party over another" (*id.*). Thus, the movant must meet a heavy burden of showing that disqualification is warranted (see *Broadwhite Assoc. v Truong*, 237 AD2d 162, 163 [1st Dept 1997]). Disqualification is required only where the testimony by the attorney is considered necessary and prejudicial to plaintiffs' interests (see *id.*). Defendants have not met their burden. The dispute in this case involves the extent and reasonableness of the fees that defendants charged to Leonard Ullmann, now deceased, during accounting proceedings related to his mother's estate. To justify their fees based on the directives given by their client, defendants can use his deposition taken during the accounting proceedings, and thus, would not need to call to the stand Donald Hamburg, plaintiffs' counsel, who also served, for a time, as Leonard Ullmann's co-executor of his mother's estate. Even if Hamburg's testimony is needed, there is no evidence that it would be prejudicial to his client. Neither are any other partners at counsel's law firm necessary witnesses. The lead trial litigator for plaintiffs affirmed that his involvement with the subject estate and the account proceedings was minimal, and any testimony that could be provided by counsel's copartner in the firm's trust and estates department, who did not have first hand experience with the plaintiffs, would be cumulative (see *Talvy v American Red Cross in Greater N.Y.*, 205 AD2d 143, 153 [1st Dept 1994], *affd* 87 NY2d 826 [1995]). Concur — Gonzalez, P.J., Mazzairelli, Andrias and DeGrasse, JJ.