

SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,
Justice

TRIAL/JAS, PART 11
NASSAU COUNTY

ZEEV ZUCKERMAN,

Decision and Order

Plaintiff,

MOTION SEQUENCE: 01
INDEX NO.:604957/15

-against-

ALEXANDER SHAKNOVICH, and
1725-89 REALTY LLC,

Defendants.

The following papers and the attachments and exhibits thereto have been read on this motion:

Notice of Motion	1
Affirmation in Support	2
Affirmation in Opposition	3
Memorandum of Law in Opposition	4
Reply Affidavit	5
Reply Memorandum of Law	6

The plaintiff's motion, pursuant to 22 NYCRR §1200.0 (Rule 37), to disqualify David Schwartz, Esq. and the firm of Morea Schwartz Bradham Friedman & Brown LLP, from appearing as counsel for the defendants is determined as hereinafter provided.

"A party's entitlement to be represented in ongoing litigation by counsel of his or her own choosing is a valued right which should not be abridged absent a clear showing that disqualification is warranted. While the right to choose one's counsel is not absolute, disqualification of legal counsel during litigation implicates not only the ethics of the profession

but also the parties' substantive rights, thus requiring any restrictions to be carefully scrutinized. The party seeking to disqualify a law firm or an attorney bears the burden to show sufficient proof to warrant such a determination" (*IKE and Sam's Group, LLC v Brach*, __ AD3d __ [2d Dept, April 6, 2016] quoting *Hele Asset, LLC v S.E.E. Realty Associates*, 106 AD3d 692, 693; see *S&A Hotel Venture Ltd. Partnership v 777 S.H. Corp.*, 16 NY2d 437, 443-445).

"The advocate-witness rules contained in the Rules of Professional Conduct (22 NYCRR §1200.0) Rule 3.7 provide guidance, but are not binding authority, for courts in determining whether to disqualify an attorney' (*Gould v Decolator*, 131 AD3d 448, 449, 16 NYS 3d 146 [2015]). '[P]ursuant to Rule 3.7 of the Rules of Professional Conduct (22 NYCRR §1200.0), unless certain exceptions apply, [a] lawyer shall not act or advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact' (*Friia v Palumbo*, 89 AD3d 896)" (*Speilberg v Twin Oaks Construction Company, LLC*, 134 AD3d 1015, 1015-1016).

In this action for, *inter alia*, the judicial dissolution of a limited liability company (see Limited Liability Law §§ 702 and 703), the plaintiff was represented by separate counsel at the formation of the entity and when it acquired its principle asset, i.e., apartment 2E at 1725 York Avenue in Manhattan. However, Mr. Schwartz drafted and is likely to be witness with respect to a significant factual issue in the litigation – the validity of the June 23, 2010 disputed Acknowledgment of Redemption (see Exh. C to Plaintiff's July 31, 2015 complaint) as well as to its alleged inconsistency with the subsequent October 11, 2010 spreadsheet (*id.*, Exh. B) which he also drafted (see *Gould, supra* at 449; *Spielberg, supra* at 1016). Accordingly, it is ordered that the plaintiff's motion pursuant to 22 NYCRR § 1200.0 (Rule 3.7), to disqualify David Schwartz, Esq. and the firm of Morea Schwartz Bradham Friedman & Brown LLP from appearing as counsel for the defendants is granted.

It is hereby ordered that the action is stayed for thirty days to allow time for the defendants to obtain counsel. The parties or their attorneys, if represented, shall appear in court on Wednesday, July 27, 2016 for a conference. Failure to appear may result in a calendar default (22 NYCRR 202.27). Business entities must appear by counsel.

The court declines to reach the movant's remaining contentions.

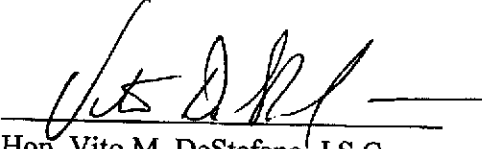
This constitutes the decision and order of the court.

Dated: June 27, 2016

ENTERED

JUL 01 2016

NASSAU COUNTY
COUNTY CLERK'S OFFICE 2


Hon. Vito M. DeStefano, J.S.C.