VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 21-CV-00156

Eve Taylor v. Paul Hawkins

ENTRY REGARDING MOTION

Title: Motion Disqualify; Motion for Finding of Judicial Admission (Motion: 2; 3)
Filer: Benjamin L. Luna; Benjamin L. Luna
Filed Date: April 30, 2021; April 30, 2021

The motions are DENIED.

DECISION ON MOTIONS FOR FINDING JUDICIAL ADMISSION AND TO DISQUALIFY OPPOSING COUNSEL

Eve Taylor (Plaintiff) alleges that her father, Peter Hawkins (Defendant) owes her $33,788.07. Following a hearing, this court granted Plaintiff's motion to attach Defendant's property. Order of Approval of Writ of Attachment, *Taylor v. Hawkins*, No. 21-CV-00156, slip op. at 1 (Vt. Super. Ct. Feb. 26, 2021). At the hearing, Defendant made a statement about his intention to "settle up" with Plaintiff, and another statement that "When we get squared away with the other stuff—I'll be glad to pay her." Hr'g Tr. at 5:15–18; 6:1–3 (Ex. 2 to Pl.'s Mot. for Finding Judicial Admission) (filed April 30, 2021). Plaintiff now moves for a finding that Defendant's statements at the attachment hearing constitute binding judicial admissions about his obligation to repay Plaintiff. Plaintiff also moves to disqualify Defendant's counsel, John M. Mazzuchi, arguing that Attorney Mazzuchi is likely to be a necessary witness at trial and thus must be disqualified under Rule 3.7 of the Vermont Rules of Professional Conduct. Defendant opposes both motions.

Plaintiff's Motion for Finding Judicial Admission

"A judicial admission is a statement made by a party or its counsel which has the effect of withdrawing a fact from contention and which binds the party making it throughout the course of the proceeding." *In re Motors Liquidation Co.*, 957 F.3d 357, 360 (2d Cir. 2020) (quotations and citations omitted). Such a statement must be "a formal statement of fact," not merely a legal conclusion, and must also be "intentional, clear, and unambiguous." *Id.* at 361 (citing *Oscanyan v. Arms Co.*, 103 U.S. 261, 263 (1880)); see also *Buxton v. Springfield Lodge No. 679*, 2014 VT 52, ¶ 19, 196 Vt. 486 ("A concession made absolutely without qualification is a 'a judicial

admission and a binding waiver of the issue.'") (citation omitted). Absent formal or "explicit" language that would "clearly demonstrate … a binding waiver of the issue," the court will not find that a party's statement was a judicial admission. *Lebel v. Lebel*, No. 488-12-18 Frcv, slip op. at 3 (Vt. Super. Ct. Jun. 1, 2020) (finding no judicial admission when defense counsel made a statement at trial that was seemingly at odds with defendant's sworn affidavit, because counsel's statement, taken in context, was made "only to clarify that [a third party] did not commit any wrongdoing," and was not sufficiently formal to constitute a binding waiver).

Plaintiff moves the court to find the following six judicial admissions:

1. Plaintiff loaned Defendant money;
2. Defendant owes the Plaintiff money;
3. Plaintiff loaned Defendant at least $20,000;
4. Defendant has not paid Plaintiff any of the money she loaned him;
5. Defendant did not deny he owed the $34,000 pled in Plaintiff's Complaint and writ of attachment; and,
6. Defendant owes Plaintiff $33,788.07.

Pl.'s Mot. for Finding Judicial Admission (filed April 30, 2021). Each of the six proposed findings of judicial admission suggested by Plaintiff hinge on the idea that Defendant admitted that the money was a "loan," and that Defendant acknowledged an obligation to pay back money he "owes" to Plaintiff.

Plaintiff overstates what Defendant actually said. At the attachment hearing, Defendant stated unequivocally that Plaintiff "offered me—she put money—20,000 in a bank account and … offered to help me out." Hr'g Tr. at 5:10–12. Defendant also stated, "I never signed an agreement that I would pay her back." Hr'g Tr. at 5:24–25. Defendant argues that the money Plaintiff transferred to him was a gift, not a loan, and he never backed down from this position at the hearing. Defendant's further statements, "When we get squared away with the other stuff—I'll be glad to pay her," and "I told her when I got all through my other stuff, I would settle up with her," both demonstrate Defendant's alleged intention to one day repay the money. Hr'g Tr. at 5:15–18; 6:1–3. But neither statement is an admission that the money Plaintiff transferred to Defendant was a loan, and neither statement is a formal, conclusive acknowledgment of an obligation to pay Plaintiff back. In context, none of Defendant's statements are sufficiently "intentional, clear, and unambiguous" for the court to find they constitute a judicial admission.

Thus, the motion is DENIED.

Plaintiff's Motion to Disqualify Opposing Counsel

Plaintiff argues that the court should disqualify Attorney Mazzuchi because he is likely to be a necessary witness at trial. In January 2020, Plaintiff exchanged emails with Attorney Mazzuchi because he was representing her father about an unrelated legal matter. In her email to Attorney Mazzuchi, Plaintiff mentioned her father's "dire financial circumstances," and made

statements that she had "put $20000 [sic] in a bank account I opened for him" and "I have now given them over $33,000." See Pl.'s Email to John Mazzuchi (Ex. 1 to Pl.'s Mot. to Disqualify Counsel) (filed April 30, 2021). Plaintiff also asserts that she spoke to Attorney Mazzuchi "at least once" on the phone. Pl.'s Mot. to Disqualify Counsel. Plaintiff argues that because she communicated with Attorney Mazzuchi one or two times about the money she transferred to her father, she will need to call him as a necessary witness if this case goes to trial.

Under the Vermont Rules of Professional Conduct:

> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
>
> (1) the testimony relates to an uncontested issue;
>
> (2) the testimony relates to the nature and value of legal services rendered in the case; or
>
> (3) disqualification of the lawyer would work substantial hardship on the client.

V.R.Prof.C. 3.7(a). However, the court's inquiry does not end there. "There is not necessarily any direct connection between violations of the Code of Professional Conduct and litigation of the case." *Lawson v. Brown's Home Day Care*, No. 195-9-97 Cacv, 2003 WL 27377643 at *6 (Vt. Super. Ct. Jan. 29, 2003). Although the court may look to the Rules of Professional Conduct for guidance, "[a] violation of professional ethics does not … automatically result in disqualification of counsel. Such relief should ordinarily be granted only when a violation … poses a significant risk of trial taint." *Metcalfe v. Yale Univ.*, No. 15-CV-1696 (VAB), 2018 WL 6258607, at *4 (D. Conn. Nov. 30, 2018) (citing *W.T. Grant Co. v. Haines*, 531 F.2d 671, 676–77 (2d Cir. 1976)).

"[D]isqualification of counsel ... is a drastic measure which courts should hesitate to impose except when absolutely necessary." *Lasek v. Vermont Vapor, Inc.*, 2014 VT 33, ¶ 37, 196 Vt. 243. When ruling on a disqualification motion, the court must be "solicitous of a client's right freely to choose his counsel and mindful of the fact that a client whose attorney is disqualified may suffer the loss of time and money in finding new counsel, and lose the benefit of counsel's familiarity with the case." *Cody v. Cody*, 2005 VT 116, ¶ 16, 179 Vt. 90 (quotations omitted). Finally, the court should also "remain wary of the potential for abuse of the ethics rules for dilatory or tactical purposes." *Shahi v. Donnelly*, No. 496-9-06 Wrcv, 2009 WL 6557345 (Vt. Super. Ct. May 7, 2009).

In motions to disqualify an attorney under the "so-called 'advocate-witness rule,'" the "threshold issue" is whether the movant has met her burden of showing that the attorney is likely to be a necessary witness. *Id.* "A 'necessary witness' … is one whose proposed testimony is relevant and material to the determination of the issues being litigated, and whose testimony is not cumulative." *Id.* (citing *Fognani v. Young*, 115 P.3d 1268, 1273 (Colo. 2005). Put another way, the court may consider "such factors as the significance of the matters, the weight of the

testimony, and the availability of other evidence. Testimony may be relevant and even highly useful but still not strictly necessary." *Paramount Communications, Inc. v. Donaghy*, 858 F. Supp. 391, 394 (S.D.N.Y. 1994). Finally, "[w]here … an alternative witness, such as the client, can testify to the information that the movant seeks to elicit from the attorney, a motion for disqualification should be denied." *Acker v. Wilger*, No. 12 Civ. 3620 (JMF), 2013 WL 1285435, at *3 (S.D.N.Y. Mar. 29, 2013).

Here, Plaintiff has not met her burden to show that Attorney Mazzuchi is likely to be a necessary witness. Attorney Mazzuchi's proposed testimony would apparently consist purely of the information imparted to him by Plaintiff via email and phone. Plaintiff has not explained why the financial details contained in her email to Attorney Mazzuchi could not be elicited in another way from a different witness. Because Attorney Mazzuchi's proposed testimony would almost certainly be cumulative and could be provided by a different witness, he is not a "necessary witness" for purposes of Rule 3.7, and this court finds other no basis to disqualify him.

Thus, the motion is DENIED.

Electronically signed pursuant to V.R.E.F. 9(d) on July 8, 2021 at 10:40 AM.

Mary Miles Teachout

Mary Miles Teachout
Superior Court Judge