

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Case No. 2017-002517

Fine Housing, Inc.,

Appellant,

v.

William H. Sloan, Jr.,

Respondent.

BRIEF OF APPELLANT

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Patrick J. Norton #102554
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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in finding Charles S. Altman to be a “necessary witness?”
2. Did the trial court err in failing to apply the exceptions explicit in Rule 3.7 in its analysis?
3. Did the trial court err in disqualifying Charles S. Altman from all representation of Appellant?

STANDARD OF REVIEW

“[A]n order granting a motion to disqualify a party’s attorney in a civil case affects a substantial right and may be immediately appealed under [S.C. Code] Section 14–3–330(2).”

Hagood v. Sommerville, 362 S.C. 191, 197, 607 S.E.2d 707, 710 (2005).

A circuit court’s ruling on a motion to disqualify a party’s attorney is reviewed for an abuse of discretion. See Orangeburg Sausage Co. v. Cincinnati Ins. Co., 316 S.C. 331, 347–48, 450 S.E.2d 66, 75 (Ct. App. 1994) (finding no abuse of discretion in the circuit court’s ruling disqualifying an attorney from acting as an advocate but allowing the attorney to act as a witness). “An abuse of discretion occurs when the [circuit] court’s ruling is based on an error of law or is not supported by the evidence.” Lawing v. Univar, USA, Inc., 415 S.C. 209, 225, 781 S.E.2d 548, 556–57 (2015).

Brooks v. S.C. Comm’n on Indigent Def., 419 S.C. 319, 324, 797 S.E.2d 402, 404 (Ct. App. 2017).

STATEMENT OF THE CASE

On February 16, 2016, Appellant Fine Housing, Inc., brought suit against Respondent William H. Sloan, Jr., alleging professional negligence arising from a real estate closing in which Appellant purchased two parcels of real property located in Charleston County. (R. pp. 14-29). Respondent represented Appellant in the closing. On January 7, 2017, Respondent moved to stay the matter pending resolution of a related case (Clarke v. Fine Housing, Inc., CA No. 2015-CP-10-03038) the final outcome of which was required for the parties to determine amount of damages in

the instant matter.¹

While discovery was ongoing, Respondent filed a Motion to Disqualify Charles S. Altman as Attorney for Plaintiff. (R. pp. 36-39). Upon consideration of the relevant pleadings and argument proffered at hearing held June 1, 2017, the trial court granted Respondent's Motion. (R. pp. 1-11). On July 7, 2017, Appellant filed the Motion for Reconsideration, which was denied by Order entered November 20, 2017. (R. pp. 12-13). Appellant filed and served the Notice of Appeal on December 6, 2017.

FACTS

Respondent represented Appellant in the purchase of two parcels of property on December 2, 2013. At the time of closing, one of the parcels was scheduled to be sold at foreclosure sale on December 3, 2013. Charles S. Altman represented the mortgagee in the foreclosure matter. Subsequent to the December 2, 2013 closing, Appellant became aware of myriad issues effecting clarity of title. These issues were not addressed by Respondent prior to or at closing. Due to the litigious nature of several of these matters, Appellant retained Altman to represent it with regard to the litigations and to confirm that legal title to the parcels was clear.

Respondent sets forth eight areas of potential testimony for which he asserts Altman is a necessary witness. (R. pp. 37-38 at ¶ 6). To summarize, these areas include: (a) issues relating to the impending foreclosure sale against the prior owner by a former mortgagee, represented in the foreclosure matter by Altman; (b) and (c) tax liens filed against the former owner attaching to the

¹ In Clarke v. Fine Housing, Inc., Clarke alleged a right to purchase one of the parcels by virtue of certain terms contained in a Lease of a portion of the parcel; that has been adjudicated at the trial court and is now pending before the Court of Appeals pursuant to cross-appeals by each party thereto. The instant case has been stayed pursuant to an Order of the Trial Court entered June 26, 2017.

parcels and the need for the removal of those liens to clear title; (d) the terms, conditions, and exceptions set forth in (various) iterations of the title commitment and policy issued by Respondent for the benefit of Appellant; (e) settlement of a related matter brought against Appellant by the former owners of the parcels; (f) matters relating to the obligations of the current commercial tenant; (g) settlement of a ongoing litigation matter creating a cloud on title; and (h) the nature and value of legal services rendered to Appellant by Altman. (R. pp. 37-38 at ¶ 6).

ARGUMENT

Rule 3.7 states, in relevant part:

(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.

Rule 407, SCACR (RPC 3.7). The Rule seeks to avoid juror confusion by eliminating a situation wherein an attorney is acting in a dual role as both advocate and factual witness.

1. THE TRIAL COURT ERRED IN FINDING THAT CHARLES S. ALTMAN IS A "NECESSARY WITNESS."

The trial court abused its discretion in relying upon the Respondent's assertion that Altman is a "necessary witness" in a future trial. An attorney is determined to be a necessary witness "when the 'attorney's testimony is relevant to disputed, material questions of fact' and 'there is no other evidence available to prove those facts.'" Brooks v. S.C. Commission on Indigent Defense, 419 S.C. 319, 326, 797 S.E.2d 402, 405 (Ct. App. 2017) (internal citations omitted). "A necessary witness is not just someone with relevant information, however, but someone who has material information that no one else can provide." Mettler v. Mettler, 50 Conn. Supp. 357, 360, 928 A.2d 631, 633

(2007). See also Cottonwood Estates, Inc. v. Paradise Builders, Inc., , 128 Ariz. 99, 105, 624 P.2d 296, 302 (1981) (“When an attorney is to be called other than on behalf of his client, a motion for disqualification must be supported by a showing that the attorney will give evidence material to the determination of the issues being litigated, that the evidence is unobtainable elsewhere, and that the testimony is or may be prejudicial to the testifying attorney's client.”).

Appellant has not named Altman, in discovery or anywhere else, as a necessary fact witness. Instead, in a clearly tactical move, Respondent has asserted that Altman is a necessary witness primarily to contradict or impeach Respondent’s own potential testimony. Other jurisdictions have explicitly recognized that naming opposing counsel as a necessary witness to trigger disqualification is a tactic not to be tolerated. See Brooks, 419 S.C. 319, 326, 797 S.E.2d 402, 405 (Ct. App. 2017) (“However, we also recognize the countervailing rationale that a party could call opposing counsel as a necessary witness, requiring his or her disqualification, purely for tactical or strategic reasons.” Beller v. Crow, 274 Neb. 603, 742 N.W.2d 230, 234 (2007); Smithson v. U.S. Fid. & Guar. Co., 186 W.Va. 195, 411 S.E.2d 850, 855 (1991)).

The burden of proving the necessity of counsel as a witness is on the moving party. The trial court erred in reviewing the matter in the light most favorable to Respondent, and in failing to consider the identification of other witnesses who could readily provide information relating to each of the areas of testimony identified by Respondent, to include Respondent, Will Swope, Howard Sherman, and representatives of the South Carolina Department of Revenue, the Internal Revenue Service, and Appellant, among others. (R. pp. 47-48).² Pursuant to S.C. Code § 15-36-100, Appellant has also provided the Affidavit of C. Joseph Roof, who is expected to testify as an expert

²Evidence proffered with regard to prior or pending litigated matters can likewise

witness relating to the Respondent's actions as they relate to the standards of due care involved in a real estate closing. (R. pp. 24-29). Moreover, several of the items purportedly in dispute are matters of public record and are fully documented, such as the tax liens, the other litigation matters, the prior foreclosure matter, and any settlements. (R. pp. 41, 42).

Furthermore, several of the identified issues, such as the attachment of the liens to the parcels and the determination of other actions relating to potential clouds of title, are matters not only of record but also solely within the purview of the trial judge as matters of law. The documents evidencing these matters are evidence in the case and address many of the issues for which the trial court determined in error Altman would be a necessary witness.³

In finding Altman to be a necessary witness, the trial court improperly accepted the Respondent's characterization of Appellant's trial strategy and introduction of evidence supporting its case in chief. Moreover, the trial court improperly commingled questions of fact and law without consideration of the "juror confusion" rationale of Rule 3.7. Without setting forth that strategy explicitly, the Appellant's assertions that there are other witnesses and evidence to meet its *prima facie* burdens should be sufficient and dispositive. The trial court's determination of Altman as a necessary witness is thus an abuse of discretion and should be reversed.

2. THE TRIAL COURT ERRED IN FAILING TO APPLY THE EXCEPTIONS EXPLICIT IN RULE 3.7 IN ITS FINDING.

Notwithstanding the trial court's finding of Altman as a "necessary witness," the trial court committed error in failing to consider and apply properly the exceptions explicitly delineated in Rule

³As such, the risk of juror confusion and the underlying rationale of Rule 3.7 is *de minimis* if at all existent and should be properly balanced against the rights of Appellant.

3.7, specifically, that “(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.” Rule 407, SCACR.

Altman’s testimony as to the nature and value of legal services rendered is an explicit exception to Rule 3.7. Respondent relied upon his potential testimony as to legal services rendered and the costs incurred by Appellant on the face of his Motion to Disqualify (R. p. 38 at ¶ 6(h)). The trial court clearly abused its discretion in its reliance on this type of evidence to disqualify Altman, in direct contravention of Rule 3.7. Moreover, the Order disqualifying Altman improperly and overtly combines evidence relating to the nature and value of legal services rendered in prior matters with the Respondent’s blanket assertions relating to substantive matters of law and fact for which there is ample evidence exclusive of any need for Altman to testify. This blurred characterization effectively causes a extinguishment of the exception of Rule 3.7(b) in direct contravention of the Rule.

Moreover, any testimony that could be proffered by Altman as to the amounts and terms of the settlement and other litigated claims lies firmly within the first exception, that of testimony relating to an uncontested issue. There is no actual dispute as to the existence of certain litigated matters, their resolution through settlement or adjudication, settlement agreements, and the amounts paid to resolve certain matters.

Finally, Appellant provided an Affidavit setting forth the basis for its assertion that disqualification of Altman would create a substantial hardship for Appellant. (R. p. 45). Respondent addressed the existence of the Affidavit merely by alleging that there was sufficient time to obtain new counsel, and that Respondent’s answers to Standard Interrogatory No. 1 to include Altman as

a witness concerning the facts of the case should have put Altman and Appellant on notice that Respondent would seek disqualification of Altman as a “necessary witness.” Neither of these allegations meet Respondent’s burden of showing the absence of a substantial hardship. As is clear from the record in the case at bar, there have been multiple litigations, negotiations, claims, liens, and lease disputes that have afflicted and clouded Appellant’s ownership of the parcels purchased in December 2013. For Appellant to retain new counsel to review countless documents, deposition transcripts, and pleadings in this matter and all of the related litigation, as well as to conduct any independent investigation and discovery necessary would require extensive duplicated efforts and incur substantial additional attorneys fees and costs. For the reasons set forth herein, the trial court’s failure to properly apply the Rule 3.7 exceptions and deny Respondent’s Motion to Disqualify was an abuse of discretion and clear error. The Order of disqualification should be reversed.

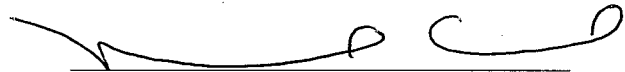
3. THE TRIAL COURT ERRED IN DISQUALIFYING CHARLES S. ALTMAN FROM ALL FURTHER REPRESENTATION OF APPELLANT.

Rule 3.7 explicitly states that “[a] lawyer shall not act as advocate *at a trial* in which the lawyer is likely to be a necessary witness.” *Id.* (emphasis added). This Rule must be read literally by the Court and construed according to its clear and unambiguous meaning. The trial court disqualified Altman as legal counsel for Appellant. The Order makes no limitation as to trial advocacy and as such is wholly overreaching. (R. p.11). Prior to trial, the rationale of Rule 3.7 as to juror confusion is non-existent. Assuming *arguendo* that this Court finds that Altman is a likely necessary witness at trial and that the exceptions of Rule 3.7 do not apply, the Order of the trial court disqualifying Altman as counsel must still be reversed or remanded to limit disqualification solely to any acts as trial counsel in the event that he is in fact a necessary witness.

CONCLUSION

For the reasons set forth above, Appellant respectfully requests that this Court find that the trial court's findings were an abuse of discretion, that the Order Granting Defendant's Motion to Disqualify Charles S. Altman as Attorney for Plaintiff and the subsequent Order Denying Plaintiff's Motion to Reconsider be reversed and this matter be remanded to the circuit court for further proceedings as appropriate.

Respectfully submitted,



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Certificate of Counsel

The undersigned hereby certifies that the Final Brief complies with Rule 211(b),
SCRPC.

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