THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTOR 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 RESPONDENT

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FACTS

Robin Robinson owned a house at 2470 Sol Legare Road in Charleston, South Carolina. (Complaint ¶6) (R. p. 16, lines 1-7). RRJR, LLC owned a gentlemen's club, Thee Southern Belle, located at 2028 Pittsburg Avenue in North Charleston, South Carolina. (Id.) RRJR and its owner, Robin Robinson, were represented by attorney William Swope, who assisted RRJR in finding financing to pay various debts. (Destaso Dep. Vol. I, pp. 16-18) (R. pp. 51-52). Among other obligations, there was a judgment creditor seeking to foreclose on its judgment and both Robinson and RRJR owed various local, state, and federal tax liens. (Destaso Dep. Vol. I, p. 20, 109, 139) (R. pp. 54, 69, 71).

In the summer of 2013, Swope contacted Respondent William H. Sloan, Jr., a real estate attorney, and indicated that he was planning to refer a refinance matter to him. (Sloan Dep. pp. 18, 20) (R. p. 95, line 13 - p. 96, line 19). Sloan believed that he would be representing Robinson and RRJR since it was a refinance matter. (Sloan Dep. pp. 20, 21) (R. p. 96, line 24 - p. 97, line 6). That summer, Swope also spoke with Vincent Destaso of Fine Housing about a potential loan and advised Destaso that RRJR/Robinson needed to borrow between $800,000 and $900,000 to cover existing debts. (Destaso Dep. Vol. I, p. 17) (R. p. 52, lines 6-11). Destaso was not interested in making a loan, but indicated that he might be interested in purchasing the properties offered as collateral. (Destaso Dep. Vol. I, pp. 29, 40) (R. p. 55, lines 23 - p. 56, lines 16).

On November 19, 2013, Destaso was again approached by a broker about a potential transaction with RRJR/Robinson. Some time prior to November 25, 2013, Destaso traveled from his home in New York to Charleston, South Carolina and visited Thee Southern Belle and met Robinson. (Destaso Dep. Vol. I, pp. 41, 55) (R. p. 57, line 18 - p. 58, line 25). On November 25 or 26, 2013, Fine Housing made an $800,000 proposal to purchase the properties, lease the

properties for two years, and allow repurchase at an established repurchase price. (Destaso Dep. Vol. I, p. 68, 73) (R. p. 59, line 18 - p. 60, line 25).

Swope had prepared preliminary title opinions for both parcels that he provided to both Destaso and Sloan. (Sloan Dep. p. 25, Destaso Dep. Vol. I, p. 29) (R. p. 100, lines 8-11; R. p. 55, lines 6-13). Notably, Swope intentionally failed to identify a lease between Barry Clarke and RRJR relating to the 2028 Pittsburg Avenue property in his title search. (Sloan Dep. p. 54-56) (R. p. 116, line 8 - p. 118, line 25).

In addition, Robinson was a named defendant in two lawsuits, one filed by Chandler Ryan Crabtree and one by William Foster. (Complaint ¶29) (R. p. 19 at ¶29). Swope likewise represented Robinson in those two actions. (Sloan Dep. p. 44) (R. p. 107, lines 2-8). Neither claim had been reduced to a judgment against Robinson or RRJR at the time of closing on the two parcels. (Sloan Dep. p. 45) (R. p. 108, lines 3-9).

Instead of a refinance as originally contemplated by Swope, on Saturday, November 30, 2018, RRJR and Robinson reached agreement with Fine Housing pursuant to which Fine Housing agreed to purchase the two properties for $850,000 and would lease them to Robinson and RRJR with a right to repurchase the properties. (Destaso Dep. Vol. I, pp. 89, 103, 104, 125) (R. pp. 62, 68-70). The closing had to occur on Monday, December 2, 2013, because a foreclosure proceeding was scheduled on the outstanding judgment on the morning of Tuesday, December 3, 2013. (Sloan Dep. p., 24; Destaso Dep. Vol. I, pp. 94-96, 178-179) (R. p. 24, lines 4-9; R. p. 63, line 10-p. 65, line 10; R. p. 72-73). Although a request to postpone the foreclosure hearing was made by Fine Housing, Charles Altman, who represented the judgment creditor, was insistent that the foreclosure sale proceed on December 3, 2013. (Destaso Dep. Vol. I, pp. 95 -97) (R. pp. 64-66). In fact, following at 4:00 p.m. closing, Sloan had to obtain and hand-deliver a certified check to

pay the judgment to Altman by 10:00 a.m. on December 3, 2013. (Destaso Dep. Vol. I, p. 192) (R. p. 74, lines 16-20). As a result, the closing was unduly rushed. (Destaso Dep. Vol. I, p. 84) (R. p. 61, lines 3-10).

Because he was concerned that Swope had not identified all tax liens on the properties, on the morning of December 2, 2013, Sloan asked Charles Feeley to conduct a title examination that day. (Sloan Dep. p. 46) (R. p. 109, lines 8-25). Given the time constraints, Sloan did not review Feeley's work until after the closing that evening. (Sloan Dep. p. 53) (R. p. 115, lines 7-25). Feeley had identified an $81,953.76 tax lien on the Sol Legare property in the name of John Robinson (Robin Robinson's deceased spouse) and the lease involving Barry Clarke on the Pittsburgh property, neither of which were included in the Swope title search. (Sloan Dep. p. 34, 46 - 47) (R. p. 102, lines 15-25; R. p. 109, lines 8 - p. 110, line 25). When Sloan contacted Swope that night, Swope contended that the tax lien was not against Robin Robinson, but only her deceased husband, John Robinson. (Sloan Dep. p. 48) (R. p. 48, lines 4-10). Sloan did not know whether that lien applied to the property owned by Robin Robinson. (Sloan Dep. pp. 49-51) (R. pp. 112-114).

Sloan did not have payoff information for many of the other known tax liens on the properties and Swope agreed to obtain and provide that information. As a result, Sloan did not issue a title commitment at the time of the closing and Destaso knew this. (Sloan Dep. pp. 38-39) (R. pp. 104-105). Accordingly, Sloan withheld a sum from the closing to cover potential tax liens that needed to be paid. (Sloan Dep. p. 64) (R. p. 119). Despite many requests by both Sloan and Altman, Swope did not provide all of the tax lien payoffs, presumably so that one or more liens would expire after closing so that the proceeds could then be paid to RRJR or Robinson. (Sloan Dep. p. 65, 88-89) (R. p. 65; R. p. 128, line 1 - p. 129, line 15). Altman contended to Sloan that

even if a tax lien had expired by its terms, the lien amount was required to be paid to the taxing authority. (Sloan Dep. pp. 85-87, 89) (R. pp. 125-126, 129).

Fine Housing also contends that Sloan erroneously issued title commitments for the properties after closing and that the title policies issued by Sloan included after-acquired knowledge concerning the Clarke Lease and tax liens. (Complaint) (R. pp. 15-20). When questions arose regarding title, Sloan sent the title commitments to Altman, then counsel for Fine Housing. (Sloan Dep. pp. 32) (R. p. 101, line 15-25).

Robinson and RRJR's Lawsuit against Fine Housing

Following the closing, RRJR and Robinson immediately defaulted on the lease and filed suit against Fine Housing contending that they had been misled regarding the nature of the transaction and thought that it was a loan. (Destaso Dep. Vol. I, pp. 228-229) (R. pp. 76-77). Altman was retained by Fine Housing to handle that litigation. As part of the settlement of that matter, in September 2014, Robinson granted Altman authorization to contact the taxing authorities and obtain the tax lien payoff information that Swope had never provided. (Destaso Dep. Vol. I, pp. 265-269) (R. pp. 85-89). Fine Housing claims damages relating to the payment of tax liens negotiated by Altman following the settlement with Robinson and RRJR, including the disputed tax lien in the name of John Robinson. Fine Housing, however, has no personal knowledge of the tax liens paid, the amounts paid, or whether the amounts were actually payable since Altman handled those matters. In fact, Altman directed Sloan to make certain payments from the amounts held in Trust to pay lax liens:

Q: And didn't I (Altman) obtain a compromised settlement with the South Carolina Department of Revenue?

A: Yes.

(Sloan Dep. p. 83) (R. p. 123, lines 16-19).

The Clarke Lawsuit

On March 21, 2014, Barry Clarke contacted Sloan and advised him that he had a lease that applied to the Pittsburgh Avenue property. (Sloan Dep. pp. 56, 78) (R. p. 118, lines 2-17). Sloan notified both Altman and Fine Housing of the call that day. (Sloan Dep. p. 78) (R. p. 121, lines 2-13). Clarke subsequently filed a lawsuit against Fine Housing contending that he had a right of first refusal that applied to some or all of the 2028 Pittsburgh property. (Destaso Dep. Vol. I, pp. 243-246) (R. pp. 78-81). Altman, along with counsel retained by Stewart Title, represented Fine Housing in that case. The trial court found in favor of Clarke in that case and awarded him $350,000. That decision is also on appeal to this Court. Fine Housing seeks damages against Sloan in this case relating to the Clarke matter.

Crabtree and Foster Settlements

In addition to damages relating to the Clarke matter, Fine Housing claims damages relating to the settlement of claims by Crabtree and Foster, although Fine Housing has no personal knowledge or understanding of the settlement negotiated by Altman. (Destaso Dep. Vol. I, p. 280) (R. p. 91).

Attorney's Fees

Fine Housing claims damages for attorney's fees, yet Destaso cannot identify all of the matters for which Fine Housing incurred fees or the amounts paid for each matter. (Destaso Dep. Vol. I, pp. 279-282) (R. pp. 90-93). It is apparent that Altman represented Fine Housing on a wide variety of matters, including those not involved in this litigation.

The depositions of Appellant and of Sloan have made clear that Altman is a necessary fact witness concerning the following issues:

a. The urgency of the payoff of the Sherman mortgage and Sherman's refusal to postpone the foreclosure sale, leading to a rushed closing;

b. Obtaining payoffs for tax liens associated with both parcels of property, including attempts to deal with the seller's counsel regarding payoffs;

c. Disputed assertions by Altman concerning which liens had to be paid and a subsequent negotiation of a payoff of a state tax lien;

d. Discussions and negotiations relating to the title insurance commitments and title policy;

e. The settlement of the action brought by Robin Robinson and RRJR, since Mr. DeStaso, the 30(b)(6) representative of his client, Fine Housing, Inc., testified at his deposition that he did not read the settlement agreement and was not familiar with its terms, but claims amounts paid in settlement as damages in this case;

f. The settlements Fine Housing has entered into with the current tenant of the Pittsburg Avenue property;

g. The settlement of the prior *Foster* and *Crabtree* actions; and

h. The nature of legal services provided to Fine Housing, Inc. for which Fine Housing is seeking damages.

ARGUMENT

A. Charles Altman is a Necessary Witness in this Case and was Properly Disqualified

The trial court correctly concluded that Charles Altman is a necessary witness in this case and should be disqualified from participating as trial counsel for Fine Housing. Rule 3.7 of the Rules of Professional Conduct 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 3.7, SCRPC.

A necessary witness is someone who has material information that no one else can provide. *Mettler v. Mettler*, 928 A.2d 631, 633 (Conn. Sup. Ct. 2007). As the trial court appropriately noted, "an attorney may be a necessary witness even when there other witnesses to an event if 'no other witness would be able to provide evidence regarding the full extent of [witness's] involvement'" with the relevant issues. *Brooks v. S.C. Comm'n on Indigent Def.*, 419 S.C. 319, 327, 797 S.E.2d 402, 406 (Ct. App. 2017) (Order at 5) (R. p. 7). Additionally, "in the disqualification situation, any doubt is to be resolved in favor of disqualification." *Hull v. Celanese,* 513 F.2d 568, 571 (2d Cir. 1975).

Charles Altman's testimony would necessarily provide material information that other witnesses or documents cannot provide. Furthermore, as the trial court judge appropriately noted, Mr. Altman is the only individual who can offer *complete* testimony relating to several issues. (Order at 5) (R. p. 7). First, Charles Altman is a necessary witness with respect to the reasonableness of and necessity for the settlement of the lawsuits filed by Crabtree and Foster in 2013. As the trial court appropriately noted, Charles Altman would be testifying as to the *necessity* of the settlement. (Id.) Destaso, Appellant's 30(b)(6) representative, did not even have knowledge about the details of those lawsuits or terms of the settlement, and certainly did not, and could not, testify as to the necessity of the settlements. (Destaso Dep. pp. 260-262) (R. pp. 82-84). Accordingly, Charles Altman is a necessary witness with respect to the *Crabtree* and *Foster* settlements.

Second, as the trial court properly noted, Charles Altman is a necessary witness with respect to the title insurance policies issued for the Sole Legare and Pittsburg Avenue properties, as Altman himself corresponded with Sloan regarding the content of the policies at the time they were issued. (Order p. 6) (R. p. 8). Testimony regarding the title insurance policies would necessarily extend beyond the communications themselves. Accordingly, Charles Altman is a necessary witness with respect to the insurance policies for the Sol Legare and Pittsburg Avenue properties.

Third, as the trial court appropriately found, Charles Altman is a necessary witness regarding the tax liens on the Sol Legare and Pittsburgh Avenue parcels. More specifically, as the trial court noted, Charles Altman is a necessary witness with respect to: (1) disputes concerning which tax liens actually applied to the parcels – i.e. did the John Robinson lien apply to either parcel; (2) disputes concerning why Fine Housing paid that tax lien; (3) a settlement which allowed Charles Altman to talk to the South Carolina Department of Revenue about Robinson's tax liabilities; and (4) Charles Altman's negotiations with the South Carolina Department of Revenue concerning the satisfaction of liens. (Order p. 6) (R. p. 8). There is no other witness who could testify with any context about how Altman acquired Robinson's power to attorney and the reasons for and negotiation of the tax liens.

The testimony concerning the tax liens affecting both the Sol Legare Parcel and the Pittsburgh Avenue parcels extends beyond the mere existence or payment of the tax liens. More specifically, Charles Altman's testimony would necessarily include reasons *why* he advised the Fine Housing to pay the tax lien, not merely the fact that the tax lien was paid. Of course, only Charles Altman himself can provide insight as to how he concluded that he should advise the Fine Housing to pay off the tax lien. No expert witness, fact witness, or document can provide such

information. Accordingly, Charles Altman is a necessary witness with respect to the tax liens encumbering both parcels.

Furthermore, with respect to the negotiations with the South Carolina Department of Revenue, any testimony would necessarily include Charles Altman's perspective of the negotiations, as opposed to the mere fact that negotiations occurred. Even if a representative from the South Carolina Department of Revenue were to testify, such a representative would not be able to provide a complete perspective of the negotiations. Furthermore, no evidentiary documents or public records concerning the lien can provide a complete perspective of the negotiations.

Additionally, Charles Altman is a necessary witness with respect to the necessity of paying the tax liens on the Pittsburgh Avenue and Sol Legare parcels. As the trial court properly noted, on November 10, 2014, Sloan wrote to Vincent Destaso that he disagreed with Charles Altman. Altman's opinion regarding the state tax liens. (Order p. 7) (R. p. 9). Accordingly, the testimony regarding the tax liens would necessarily require Charles Altman to testify about his *opinion* regarding the necessity of paying such tax liens. (Id.) Accordingly, Charles Altman is a necessary witness with respect to the necessity of paying the tax liens on both parcels.

Next, as the trial court properly determined, Charles Altman is a necessary witness with respect to (1) the diminution of Plaintiff's title insurance coverage; (2) Plaintiff's settlement with Robinson; (3) Plaintiff's mitigation of its damages through rents received for the Pittsburg Avenue parcel subsequent to closing; and (4) Plaintiff's failure to mitigate damages by refusing an offer by Barry Clarke to purchase the Pittsburg Avenue parcel. First, with respect to the diminution of insurance coverage, Destaso testified that he did not understand the lost title coverage, but he was advised by counsel that he had suffered the insurance loss. (Destaso Dep. Vol. I, p. 280) (R. p. 91, lines 1-7). Next, with respect to the settlement of the Robinson lawsuit, Destaso only could testify

to the fact that the matter settled. (Destaso Dep. Vol. I, p. 200) (R. p. 73, lines 13-23). Destaso was not able to provide any meaningful information regarding the settlement.

As evidenced by his questioning of Sloan during Sloan's deposition, Fine Housing must rely on Altman to pit his own testimony against that of Sloan with respect to certain communications between them relating to the title commitments and policies, what amounts had to be paid from escrowed funds, why certain lien should have been paid, in what amount, and to whom. (See e.g. Sloan Dep. pp. 65, 80, 83, 84, 86) (R. pp. 120, 122-124, 126). As such, the trial court properly determined that juror confusion would result if Charles Altman were to testify or essentially do so on cross-examination. For these reasons, the trial court's determination that Charles Altman is a necessary witness was not an abuse of discretion and should be affirmed.

B. The Trial Court Did Not Fail to Apply the Exceptions in Rule 3.7.

Under Rule 3.7, an attorney who is likely to be a necessary witness may continue to represent a client if the: "(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 3.7 SCRPC. Appellant's argument that Altman's testimony lies within the first exception of Rule 3.7 is misplaced. Altman's testimony concerns more than the existence or terms of settlements and "other litigated claims." As discussed in detail above, Fine Housing lacks any information about many of its claims in this case and about why it suffered damages and how they are calculated. Beyond this, while Fine Housing has little idea what attorney's fees it has incurred and why Sloan is liable for all or any of them, Altman's knowledge far exceeds the value of legal services provided and his testimony is hardly limited to such issues as Appellant suggests.

Additionally, the Trial Court appropriately determined that Appellants would not face substantial hardship by the disqualification of Charles Altman. Respondent identified Charles Altman as a witness concerning the facts of the case in his Answers and Objections to Plaintiff's First Set of Interrogatories. Therefore, as the trial court appropriately determined, Appellant and Charles Altman were both on notice that Altman is a witness in this case. (Order, p. 9) (R. p. 11). Appellant has not identified any authority that suggests that the trial court abused its discretion by finding that it was relevant that Respondent identified Charles Altman in its discovery responses. Accordingly, the trial court did not err in finding that disqualification would not work a substantial hardship on Appellant.

C. The Trial Court Did Not Err in Disqualifying Altman From Further Representation of Appellant.

First, on December 20, 2016, the Trial Court issued a scheduling order in the case establishing deadlines to discovery and dispositive motions, all of which have now passed. (December 20, 2016 Scheduling Order). Thus, there are few pretrial matters remaining. Although Rule 3.7 states that "[a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness," courts which have addressed identical language have held that an attorney may not conduct pretrial activity in a case in which the attorney is disqualified. *See Addock v. Ewing*, 57 So. 3d 434, 441 (La. Ct. App. 2011)("Rule 3.7 can apply to a summary judgment proceeding. We do not read the word "trial" in the rule to be so restrictive as to refer only to that court proceeding which reaches a final determination in a lawsuit."); *Daniels v. City of Wyoming*, CA No: 1:15-cv-507, at *2 (S.D. Ohio April 7, 2016)("The purpose of Rule 3.7 is to prevent the trial jury from learning about an attorney's dual role as an advocate and a witness."). *Freeman v. Vicchiarelli*, 827 F. Supp. 300, 303 (D.N.J. 1993)("The case law and policies regarding the

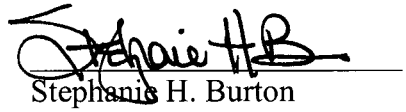
attorney-witness rule begins to operate as soon as either attorney realizes that a possible conflict may arise.").

These courts recognize that pretrial activities, such as taking or defending depositions, risk revealing an attorney's dual role to the jury at trial. *Daniels* at *3. By continuing to participate in pretrial activities, Altman's dual role would inevitably be revealed to the jury. Furthermore, as the United States District Court of South Carolina has recognized, "a motion to disqualify counsel is subject to the Court's supervisory authority to ensure fairness in *all* judicial proceedings." *Marshall Tucker Band v. MT Indus., Inc.,* 209 F. Supp. 3d 854, 858 (D.S.C. 2016). The trial court did not err in disqualifying Charles Altman from all further representation of Appellant and its decision should be affirmed.

CONCLUSION

Based upon the foregoing arguments and authorities, Respondent William H. Sloan, Jr. respectfully submits that the trial court did not abuse its discretion in granting Respondent's Motion to Disqualify Charles Altman as Attorney for Plaintiff and its decision should be affirmed.

Respectfully Submitted,



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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rules 211(b), SCACR.

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