

STATE OF MICHIGAN

SIXTEENTH JUDICIAL CIRCUIT COURT

AMERASORTING, LLC

Plaintiff,

vs.

Case No. 2016-2817-CB

MONTEREY SORTERS, LLC, 1ST
SORT, INC., 1ST QUALITY, LLC, PETER
LOPEZ, HENRY YACOUB, CARL GUETHING
and DAVE BRADLEY,

Defendants,

and

PETER LOPEZ, HENRY YACOUB and
DAVE BRDLEY,

Counter-Plaintiffs,

vs.

AMERASORTING, LLC,

Counter-Defendant.

OPINION AND ORDER

Plaintiff has filed a motion to disqualify Defendants/Counter-Plaintiffs Peter Lopez, Henry Yacoub and Dave Bradley's ("Counter-Plaintiffs") counsel, Joseph L. Hardig, III. Counter-Plaintiffs have filed a response and request that the motion be denied. Plaintiff has also filed a supplemental brief in support of its motion

I. Factual and Procedural History

Plaintiff has been a sorting business operator since May 2014. Counter-

Plaintiffs are three of Plaintiff's former employees, and are three of the co-owners of Defendant Monterey Sorters, LLC ("Defendant Monterey"). On August 9, 2016, Plaintiff filed its complaint in this matter ("Complaint"). In the Complaint, Plaintiff alleges that the Counter-Plaintiffs have taken its proprietary information and have tortuously interfered with its contractual and economic relations.

On February 28, 2017, Plaintiff filed its instant motion to disqualify Counter-Plaintiffs' counsel. On March 28, 2017, Counter-Plaintiffs filed their response. On April 3, 2017, the Court held a hearing and took the matter under advisement. Plaintiff has since filed a supplemental brief in support of its motion.

II. Arguments and Analysis

In its motion, Plaintiff alleges that a portion of its claims are based on the events taking place at meetings Attorney Hardig attended about the sorting business with several individuals including Defendant/Counter-Plaintiff Peter Lopez ("Defendant Lopez"). Plaintiff avers that Attorney Hardig is a necessary witness in this case because the meetings were held to discuss forming a sorting company to compete with Plaintiff, and that Attorney Hardig's notes are a central piece of evidence in this case that it will need to question him about at trial.

The party seeking disqualification bears the burden of demonstrating specifically how and as to what issues in the case the likelihood of prejudice will result.' *Rymal v Baergen*, 262 Mich App 274, 319, 686 NW2d 241 (2004). In her motion, Defendant relies on DR5-102 of the ABA Model Code, which governs situations in which a lawyer becomes, or is likely to become a witness. However, lawyers in Michigan are regulated by the Michigan Rules of Professional

Conduct, rather than the ABA Model Code. With respect to lawyers as witnesses, MRPC 3.7 is the governing rule. MRPC 3.7 provides:

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

(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.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

The party seeking disqualification under MRPC 3.7 has the burden of establishing that the attorney's testimony will be necessary, and that the testimony sought is not available from other sources. *In re Susser Estate*, 254 Mich App 232, 238; 657 NW2d 147 (2002). Further, "[t]he party seeking disqualification bears the burden of demonstrating specifically how and as to what issues in the case the likelihood of prejudice will result." *Kubiak v Hurr*, 143 Mich App 465, 471; 372 NW2d 341 (1985). In its supplemental brief, Plaintiff argues that it will be prejudiced by Attorney Hardig's representing the Counter-Plaintiffs because he will be able to explain the meeting he attended without having to undergo cross-examination. However, it is undisputed that there were several individuals at the meeting, any of which could potentially testify as to the events in question. Moreover, while Plaintiff argues that none of those individuals could explain Attorney Hardig's notes, Plaintiff has not deposed several of the people that attended the meeting, and has therefore failed to show

that it could not obtain the testimony sought from other sources. In addition, while Plaintiff argues that the meetings in question led to Defendant Monterey's formation, that fact has not been established. Disqualification of counsel "is a drastic measure which courts should hesitate to impose except when absolutely necessary." *Debiasi v Charter County of Wayne*, 284 F Supp 2d 760, 770-771 (ED Mich 2003). In this case, Plaintiff has failed to establish that disqualifying Attorney Hardig is necessary to avoid prejudice. Consequently, the Court is convinced that Plaintiff's motion must be denied at this time.

III. Conclusion

Based upon the reasons set forth above, Plaintiff's motion to disqualify Counter-Plaintiffs' counsel is DENIED. In compliance with MCR 2.602(A)(3), the Court states this Opinion and Order does not resolve the last claim and does not close the case.

IT IS SO ORDERED.

Date: MAY 01 2017

Kathryn A. Viviano
Hon. Kathryn A. Viviano, Circuit Court Judge