STATE OF NORTH CAROLINA

COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
09 CVS 3031

LANNESS K. McKEE and LANNESS K. McKEE, JR.,

Plaintiffs,

v.

HUNTINGTON JAMES, JOHNNIE MARSHBURN, and COCONUT HOLDINGS, LLC

Defendants,

v.

LANNESS K. McKEE & COMPANY, INC.,

Nominal Defendant.

ORDER

THIS MATTER is before the Court on Defendant Huntington James' Motion to Disqualify Plaintiffs' Counsel. At a May 23, 2012, hearing on the Motion, Lanness K. McKee ("McKee") and Lanness K. McKee Jr. ("Key") (collectively "Plaintiffs") were represented by Chad W. Dunn ("Dunn") of Brazil & Dunn and Jeffrey B. Foster ("Foster") of The Foster Law Firm, P.A.; Dunn and Foster were represented by Mr. Charles Ellis of Ward & Smith, P.A.; Defendant Huntington James ("James") was represented by Jason B. James, Joshua B. Durham, and E. Fitzgerald Parnell of Poyner Spruill, LLP; and Defendant Coconut Holdings, Inc. ("Coconut") was represented by Edward B. Davis of Bell, Davis & Pitt, P.A. Having considered the matters of record, the parties' briefs and supporting documents, and the arguments and contentions of counsel during the hearing, the Court **DENIES** Defendant James' Motion to Disqualify.

INTRODUCTION

1. Plaintiffs filed this action against Defendant James on August 27, 2007. Plaintiffs filed a Second Amended Complaint on October 13, 2010, alleging direct actions of breach of contract, breach of fiduciary duty, fraud, unfair and deceptive trade practices, conspiracy, intentional infliction of emotional distress, libel and slander, and punitive damages; and derivative actions of unjust enrichment, corporate waste, gross mismanagement, punitive damages, breach of fiduciary duty, conspiracy, conversion, fraudulent transfer of assets to avoid creditors, misappropriation of trade secrets, and unfair and deceptive trade practices in connection with James' acquisition of a majority stake in Lanness K. McKee & Company, Inc. ("McKee Craft").

2. On October 21, 2011, Defendant James filed his Motion to Disqualify Plaintiffs' Counsel pursuant to Rule 3.7 of the North Carolina Rules of Professional Conduct ("Lawyer as Witness") contending that Dunn and Foster are necessary witnesses to an allegedly false affidavit signed by James Hunt ("Hunt"), a McKee Craft employee from 1978 to 2008. (Def. James' Reply Br. Supp. Mot. Disqualify 4.)

3. Plaintiffs filed their Response to the Motion on November 8, 2011, Defendant James filed a Reply Brief on November 14, 2011, and the Court heard oral arguments on May 23, 2012.

FACTS[1]

4. Forty years ago, McKee formed McKee Craft for the purpose of building and selling boats. (Pls.' 2d Am. Compl. ¶ 8.) Later, McKee involved his son, Key, in the business. (Pls.' 2d Am. Compl. ¶ 11.) In 2006, James discussed with Plaintiffs an "investment opportunity" in McKee Craft. (Def. Coconut's Answer Pls.' 2d Am. Compl. ¶ 29-30.)

5. On August 6, 2007, Plaintiffs individually, and on behalf of McKee Craft, entered into a Common Stock Purchase Agreement ("Original Purchase Agreement") with James, which

[1] The Court makes findings of fact solely for the purpose of resolving the Motion to Disqualify.

became effective on May 30, 2007. (Def. James' Resp. Pls.' Mot. Quash and Objections to Subpoena Ex. G.) On February 6, 2008, McKee, on behalf of McKee Craft, entered into a second Common Stock Purchase Agreement ("Second Purchase Agreement") with James for the purchase and sale of additional shares, which gave James an 88.65 percent ownership interest in McKee Craft. (Def. James' Resp. Pls.' Mot. Quash and Objections to Subpoena Ex. H.)

6. Plaintiffs allege James "engaged in conduct evidencing his intention to breach both the Original Purchase Agreement and the Second Purchase Agreement," (Pls.' 2d Am. Compl. ¶ 62), by "failing to provide promised capital," "purposely slowing the investment," "removing Plaintiffs as employees and officers," "directing staff to stop honoring customer warranty claims," "failing to pay legal obligations promised," and "maliciously suppressing McKee Craft's income." (Pls.' 2d Am. Compl. ¶¶ 39-40, 65-66, 117(i).)

7. In or around April 2011, Key, Dunn, and Foster met with Hunt, Roland Turner, and Bobbie Lewis, all former employees of McKee Craft. (Def. James' Mot. Disqualify Ex. 3-52.) Dunn and Foster participated in an interview of Hunt. (Def. James' Mot. Disqualify Ex. 3-52.) On or around April 15, 2011, and after the meeting at which Dunn and Foster were present, Key read a prepared affidavit to Hunt outside the presence of counsel. (Def. James' Mot. Disqualify Ex. 2.)[2] Hunt and Key then traveled separately to Branch Bank & Trust for Hunt to sign the affidavit before a notary public. (Def. James' Mot. Disqualify Ex. 3-53-54.)

8. On August 25, 2011, Defendant James' attorneys deposed Hunt on video-tape and determined he was illiterate. (Def. James' Am. Reply Br. Supp. Mot. Disqualify 1, 4.)

9. During the deposition, Hunt denied ever being read the following portions of his affidavit:

[2] At the Court hearing, May 23, 2012, Dunn and Foster stipulated that the affidavit submitted by Defendant James is identical to the affidavit Dunn and Foster delivered to Key.

> After Hunt James took control of McKee Craft, construction of boats was sporadic. Often, we would not have the materials to construct new boats. Other times, we would have materials to product boats, but were ordered not to. The construction and manufacturing capabilities of our plant were significantly underutilized. We were capable of building many more boats a week, but were not permitted to do so by Hunt James.
>
> * * *
>
> I came to the conclusion that Johnnie Marshburn and Hunt James did not want to build government or recreational boats. There was no reasoning for what boats we would build and when. Our factory was capable of building many more boats than was requested in 2008.
>
> * * *
>
> From what I could see, Hunt James and Johnnie Marshburn did not try to build boats, make a profit, and ensure the company's survival.

(Def. James' Mot. Disqualify Ex. 3.)

CONCLUSIONS OF LAW

10. Disqualification is a serious matter which cannot be based on "imagined scenarios of conflict." *Plant Genetic Sys. v. Ciba Seeds*, 933 F. Supp. 514, 517 (M.D.N.C. 1996). Because disqualification motions have a potential for abuse as litigation tactics, disqualification is viewed by courts as a "drastic measure" to be imposed only when "absolutely necessary." *Capacchione v. Charlotte-Mecklenburg Bd. Of Educ.,* 9 F. Supp. 2d 572, 579 (W.D.N.C. 1998); *see also Weeks v. Samsung Heavy Indus. Co.,* 909 F. Supp. 582 (N.D. Ill. 1996); *Zurich v. Knotts*, 52 S.W.3d 555 (Ky. 2001). Such motions, therefore, are "carefully scrutinized." *S. & S. Hotel Ventures v. 777 S.H. Corp.*, 508 N.E.2d 647, 650 (N.Y. 1987).

11. Courts should not mechanically apply ethical canons, but should decide disqualification issues on a case-by-case basis. *Shaffer v. Farm Fresh*, 966 F.2d 142 (4th Cir. 1992). The burden placed on the moving party to show grounds for disqualification is high. *State v. Simpson*, 315

N.C. 359, 373, 334 S.E.2d 53, 62 (1985) (holding that for disqualification, "compelling reasons for such action must exist"). A court must remain mindful of overly-mechanical application of a bright line rule at the expense of a litigant's right to freely choose counsel. *Shaffer*, 966 F.2d at 142; *see also United States v. Smith*, 653 F.2d 126 (4th Cir. 1981) (holding that a party's right to counsel of its choosing is a fundamental tenet of American jurisprudence, and that, therefore, a court may not lightly deprive a party of its chosen counsel).

12. The North Carolina Rules of Professional Conduct, Rule 3.7, provides that:

> A lawyer shall not act as an 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 services rendered in the case, or (3) disqualification of the lawyer would work a substantial hardship on the client. . . . [Moreover, 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.

N. C. R. Prof'l Conduct 3.7 (emphasis added).

13. Rule 3.7 works to eliminate confusion regarding the attorney's role. Because a witness normally presents facts based on personal knowledge, while an attorney tests those facts by putting forth arguments, blending these two roles tends to confuse jurors as to whether a statement by an attorney as a witness should be understood as proof or as legal analysis of proof. N. C. R. Prof'l Conduct 3.7 cmt. n. 2.

14. Allowing a lawyer to testify on behalf of his client, or when called by his adversary, runs the risk of prejudicing a party while also risking the appearance of judicial impropriety that "diminishes the effectiveness of the entire system" and "disrupts the normal balance of judicial machinery." *Cottonwood Estates Inc. v. Paradise Builders, Inc.*, 624 P.2d 296, 300 (Ariz. 1981) (citing *Alexander v. Watson*, 128 F.2d 627 (4th Cir. 1942)); *see also Chemcraft Holdings Co. v. Shayban*, 2006 NCBC 13, (N.C. Super. Ct. October 5, 2006), http://www.ncbusinesscourt.net/

opinions/2006%20NCBC%2013.htm (granting motion to disqualify based on a concurrent conflict of interest that reflected the appearance of impropriety). Courts have also warned of the possibility or perception that the lawyer may distort the truth for the sake of the client. *United States v. Morris*, 714 F.2d 669 (7th Cir. 1983); *Bottaro v. Hatton Assocs.*, 680 F.2d 895 (2d Cir. 1982).

15. However, a lawyer is not disqualified merely because an opponent announced an intention to call him as an adverse witness. *Devins v. Peitzer*, 622 So. 2d 558 (Fla. Dist. Ct. App. 1993). The "likely to be necessary" standard of Rule 3.7 broadly protects the client's right to choose his own representation. *See Brown v. Daniel*, 180 F.R.D. 298 (D.S.C. 1998); *Jones v. City of Chicago*, 610 F. Supp. 350 (N.D. Ill. 1984).[3]

16. A necessary witness is not the *best* witness, but the *only* witness that can testify to information that is relevant and material to the dispute. *State v. Daniels*, 337 N.C. 243, 446 S.E.2d 298 (1994)*; State v. Simpson*, 314 N.C. 359, 334 S.E.2d 53 (1985); *Chappell v. Cosgrove*, 916 P.2d 836 (N.M. 1996); *United Food & Comm'l Workers v. Darwin Lynch Adm'rs.*, 781 F. Supp. 1067 (M.D. Pa. 1991). Where other witnesses are available to testify as to the information sought, the Court does not abuse its discretion in refusing to allow an adverse party to call his opponent. *Id.*

17. A lawyer's testimony is "necessary" when it is relevant, material, and unobtainable by other means. *State v. Rogers*, No. COA11-482, 2012 WL 695988 (N.C. Ct. App. March 6, 2012) (citing *North Carolina State Bar*, Formal Eth. Op. 1 (2011)). Deciding disqualification issues requires a fact intensive inquiry. *See, e.g., Schaffer v. State*, 697 S.E.2d 305 (Ga. Ct. App. 2010); *see also United Food & Comm'l Workers*, 781 F. Supp. at 1067.

[3] The previous "ought to be called" advocate-as-witness standard implies a higher bar for counsel to avoid disqualification while the "likely to be necessary" language gives greater weight to the client's choice of counsel. *See Brown*, 180 F.R.D. at 298; *Jones*, 610 F. Supp. at 350.

18. In *Schaff v. State*, counsel was not disqualified for conducting a video-taped interview of the victim, who later recanted, where the victim's mother and counsel's legal assistant were present. 697 S.E.2d at 305. In *United Food & Comm'l Workers*, a lawyer was not disqualified when he negotiated agreements and drafted documents under dispute because the same information was obtainable through other sources. 781 F. Supp. at 1067; *but see Chappell v. Cosgrove*, 916 P.2d 836 (N.M. 1996). In *Chappell v. Cosgrove*, where an attorney had the sole knowledge of discussions leading up to a disputed contractual agreement, the attorney was "necessary" because similar testimony was unobtainable. 916 P.2d at 836.

19. Here, the Court concludes that James has failed to demonstrate that Dunn and Foster are necessary witnesses pursuant to Rule 3.7. As in *Schaff*, at least two former employees of McKee Craft were present at Hunt's initial interview in or around April 2011. Moreover, Key, who allegedly read the affidavit to Hunt and was present when the document was notarized, has yet to be deposed. Unlike *Chappell*, where an attorney was disqualified because he was the only individual with knowledge of the discussions leading up to the contract in dispute, here, information regarding the taking, creation, and signing of Hunt's affidavit are obtainable through other means.

20. Testimony of Dunn and Foster as to the creation and preparation of Hunt's affidavit is not essential to the foundation of James' case. The preparation and creation of Hunt's affidavit bears only on Hunt's credibility, and possibly on the collateral question of whether Hunt was manipulated. Dunn and Foster are not necessary witnesses to resolve the central dispute in this case.

21. **IT IS THEREFORE ORDERED** that Defendant's Motion to Disqualify is **DENIED**.

SO ORDERED, this is the 10th day of July, 2012.

/s/ Calvin E. Murphy
Calvin E. Murphy
Special Superior Court Judge