

SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

STEVEN R. LEVENTHAL, as representative of a class consisting
of himself and all others similarly situated,
Plaintiff,

Index No.: 100530/2011

Motion Date: 03/15/2016

- v -

Motion Seq. No.: 003

BAYSIDE CEMETERY, CONGREGATION SHAARE ZEDEK AND
COMMUNITY ASSOCIATION FOR JEWISH AT-RISK CEMETERIES,
INC.,

Motion Cal. No.: _____

Defendants.

The following papers, numbered 1 to 3 were read on this motion to disqualify defendants' counsel.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____
Notice of Cross Motion/Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

PAPERS NUMBERED	
_____	1
_____	2
_____	3

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that the motion is denied.

The Code of Professional Responsibility 5-102 [22 NYCRR § 1200.21c] provides that "If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that the lawyer ought to be called as a witness on a significant issue on behalf of the client, the lawyer shall not serve as an advocate on issue of fact before the tribunal."

This court disagrees with plaintiff that the firm of Axinn, Veltrop & Harrier should be disqualified as counsel for defendants because Russell Steintal, a member of that law firm ought to be called as a witness. As stated by the Court of Appeals in the seminal case of S&S Hotel Ventures Limited Partnership v 777 S.H. Corp., 69 NY2d 437, 445 (1987) (citations omitted):

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

Disqualification may be required only when it is likely that the testimony to be given by the witness is necessary. Testimony may be relevant and even highly useful but still not strictly necessary. A finding of necessity takes into account such factors as the significance of the matters, weight of the testimony, and availability of other evidence.

This court finds to be neither significant nor even material to the claim of breach of the trust claims at bar, Steinthal's testimony of what Ethan Klingsberg communicated to him as to the "real reason" for defendants having disclosed two, rather than the 700, perpetual care contracts, in response to the Attorney General's investigation. Even assuming its materiality, such testimony would merely be cumulative of the testimony of the witness with the given name of Lolita, who was the office manager, who gathered together the records, and the witnesses Joel Shaiman, president, and Mark D. Ankorn, rabbi of defendant synagogue, who signed the correspondence that contained the gross undercount that was sent to the Attorney General. Each such witness would have first hand personal knowledge of the undercounting of the number of perpetual care contracts and the circumstances under which such inaccurate account was conveyed by written communication to the Attorney General.

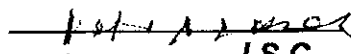
In addition, unlike in Hitzig v Borough-Tel Service, Inc., 108 AD2d 677 (1st Dept 1985), Steinthal was not named by plaintiff as a party defendant. Nor does plaintiff claim that Steinthal participated in any decision of the board with respect to any transaction concerning the trusts at issue.

This is the decision and order of the court.

Dated: March 15, 2016

MAR 15 2016

ENTER:


J.S.C.
HON. DEBRA A. JAMES

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