

STATE OF MICHIGAN  
MACOMB COUNTY CIRCUIT COURT

NORTH ROSE TOWNE HOUSES  
IMPROVEMENT ASSOCIATION, INC.

Plaintiff,

vs.

Case No. 2015-2117-CB

DEBORAH WIZA,

Defendant.

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OPINION AND ORDER

Defendant has filed a motion to disqualify Plaintiff's counsel. Plaintiff has filed a response and requests that the motion be denied.

I. Factual and Procedural History

Plaintiff is the homeowner's association for the North Rose Townhouses. Defendant is one of Plaintiff's former board members. Plaintiff's complaint in this matter is based on its allegation that Defendant made statements and engaged in activities while serving as a board member that were not authorized and that created liability and additional expenses for Plaintiff.

On June 17, 2015, Plaintiff filed its complaint in this matter ("Complaint"). The Complaint includes claims for breach of fiduciary duty (Count I), embezzlement/conversion (Count II), misrepresentation (Count III), and injunctive relief (Count IV). On December 30, 2015, Defendant filed her instant motion to disqualify Plaintiff's counsel. On January 11, 2016, Plaintiff filed a response in which it requests that Defendant's motion be denied. On February 23, 2016, the

Court held a hearing in connection with the motion and took the matter under advisement.

## II. Arguments and Analysis

In this case, one of the bases for Plaintiff's claims is Defendant's alleged sending of a defamatory letter to the IRS regarding a landscaping company Plaintiff had terminated. Due to the termination and the letter, the landscaping company filed a lawsuit against Plaintiff and Defendant ("Landscaping Case"). While Plaintiff's counsel filed an answer on behalf of Plaintiff, it is undisputed that Plaintiff's insurance carrier represented Plaintiff's interests during the remainder of the case. The case was ultimately settled out of court. However, due to the filing a claim, Plaintiff's insurance rate has allegedly increased.

In her motion, Defendant contends that Plaintiff's counsel must be removed from this case because he will be a necessary witness. Specifically, Defendant asserts that Plaintiff's counsel will be questioned regarding his involvement in the Landscaping Case. 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.

In her brief, Defendant contends that Plaintiff's counsel will be a necessary witness because he advised Plaintiff that it could terminate its contract with the landscaping company at the center of the Landscaping Case and Defendant's allegedly defamatory letter. However, Plaintiff's claims in this case relate solely to Defendant's allegedly wrongful conduct while a member of Plaintiff's board. While one of the allegedly wrongful actions was writing a letter regarding the landscaping company to the IRS, Defendant has failed to provide any evidence that Plaintiff's counsel needs to be questioned as a witness about any matter relevant to Plaintiff's claims in this matter. 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). In this case, Defendant has failed to establish that Plaintiff's counsel's testimony is necessary and not available from other sources. Consequently, Defendant has failed to satisfy her burden. As a result, Defendant's motion must be denied.

III. Conclusion

Based upon the reasons set forth above, Defendant's motion to disqualify Plaintiff's 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: FEB 29 2016

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