UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON DIVISION

CODY J. WILLIAMS,

PLAINTIFF

v.

UNITED STATES EQUESTRIAN FEDERATION, INC.

DEFENDANT AND COUNTERCLAIM PLAINTIFF,

and

USA EQUESTRIAN, INC.,

DEFENDANT.

CIVIL ACTION NO. 04-161-JMH

DEFENDANT UNITED STATES EQUESTRIAN FEDERATION, INC.'S RESPONSE TO PLAINTIFF'S MOTION TO DISQUALIFY COUNSEL

Comes the Defendant, United States Equestrian Federation, Inc. (hereinafter "Federation"), by counsel, and for its response to Plaintiff's Motion to Disqualify Ira A. Finkelstein, Esq. as counsel for the Defendant herein, hereby states as follows:

Plaintiff filed the motion to disqualify late in the afternoon of Friday, April 23, 2004, before the Motion for Preliminary Injunction which was set to be heard on Monday, May 26, 2004 which hearing had been continued at the request of Defendant's counsel because of scheduling conflicts. The Plaintiff's effort to disqualify Ira Finkelstein is simply a smoke screen to detract the Court's attention away from the fact the Federation is entitled to an injunction prohibiting the Plaintiff from attending any horse shows sponsored by the Federation and should be summarily rejected and denied by this Court.

When the Court thoroughly analyzes Kentucky Supreme Court Rule 3.130(3.7) and applies it to the statements made by Ira Finkelstein in his affidavit submitted with the Defendant's Motion for Preliminary Injunction, it is clear, as a matter of law, that Mr. Finkelstein is not a necessary witness, nor is he a lawyer who is an advocate "at a trial" since this case is not at the trial stage. Finally, the statements contained in his affidavit do not relate to a contested issue. Instead, Mr. Finkelstein was simply placing written evidence before the Court to consider for purposes of establishing the Defendant's need for entry of an injunction against the Plaintiff, which the Court granted on April 26, 2004.

Kentucky Supreme Court Rule 3.130(3.7) does not require the disqualification of Attorney Finkelstein.

S.C.R. 3.130(3.7) provides as follows:

(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 the legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

There are several reasons why this rule does not apply to Mr. Finkelstein's affidavit submitted in support of the Defendant's Motion for Injunction. First, Mr. Finkelstein is not acting as an "advocate at trial." This is not a trial of the case, but instead is a motion, submitted on papers with exhibits and a substantial affidavit from John Long, to prove that the Federation is entitled to an injunction prohibiting Mr. Williams from attending horse shows that are governed by the Federation. In fact, injunctions are routinely granted on the papers that are submitted to the Court without cross examination and without oral testimony. Because this rule relates to "advocates at trial," we are not at the trial stage, so the rule simply does not apply.

At any hearing on a motion for permanent injunction, if the Court requires any testimony, it can be provided by witnesses who will appear at the hearing or provide testimony by way of deposition. Thus, Mr. Finkelstein will not be a witness at the permanent injunction hearing.

Secondly, the rule provides a lawyer shall not act as an advocate at trial in which the lawyer is likely to be a "necessary" witness. There is no proof that Mr. Finkelstein will be a necessary witness. When one looks at the affidavit submitted by Mr. Finkelstein, it basically breaks out into three general topics. First, he provided testimony that Mr. Williams had attended approximately seven recognized competitions since he became suspended by the Federation in December 2003. That fact is not in dispute. In fact, Mr. Williams has admitted he has attended those competitions since his suspension.

Instead, the dispute before the Court is a legal dispute as to whether the Federation has the ability to utilize its regulations to prohibit non-members from attending Federation-recognized events. Thus, that factual statement by Mr. Finkelstein is not disputed.

On page 2, Mr. Finkelstein then lists a number of Federation recognized competitions to be held in April and May, including the Rolex Three Day Event. Once again, it is not disputed that those events actually exist and that they are recognized by the Federation.

The next several paragraphs in Mr. Finkelstein's affidavit simply provides references to other cases including the United States Court of Appeals for the Ninth Circuit case involving Gene Scott wherein the Court held that the American Horse Shows Association was entitled to prohibit Dr. Scott from entry onto the grounds of events recognized by the AHSA. In that regard, Mr. Finkelstein was simply providing legal authority to the Court and certainly could have provided that case cite in a pleading versus an affidavit.

In paragraph 5 of Mr. Finkelstein's affidavit, he provided the Court with a copy of the New York state case of American Horse Show Association v. Barney Ward. Once again, no one disputes that the American Horse Show Association v. Barney Ward case exists. While the Plaintiff may contest that case's application, that is an issue of law for the Court to decide and is not a factual dispute.

The third category in Mr. Finkelstein's affidavit involved him providing additional proof to the Court of the fact that Mr. Williams has been seen at horse shows since the entry of the fines and suspensions against him. In that regard, Mr. Finkelstein attached written communications from witnesses Michael Morrissey, John Rush and Rodney Harkey. Once again, the Plaintiff does not dispute he attended those horse shows.

In paragraph 6 of Mr. Finkelstein's affidavit, he then advised the Court that the Federation has instituted charges against other persons who are not registered for competitions and other suspended trainers. That fact is not being disputed by the Plaintiff. In fact, the Plaintiff may not even have any knowledge as to those facts concerning other persons.

In paragraphs 10 and 11, Mr. Finkelstein then advised the Court of Mr. Williams' appearance on the grounds in the company of Robert Cheska, who is also a suspended person. Once again, Mr. Finkelstein simply provided written information from Steward Dale Lawler about seeing Mr. Williams and Mr. Cheska at the grounds of a competition on March 7, 2004.

In fact, attached to the affidavit is correspondence between counsel Ira Finkelstein and Plaintiff's counsel Pierce Cunningham about the fact that Cody Williams and Mr. Cheska attended an event on March 7. Counsel for Mr. Williams, Pierce Cunningham, in his March 15th letter did not deny the fact that his client was at that horse show with Mr. Cheska, but instead

began to argue the legal issues as to whether the Federation could enjoin those persons from coming to horse shows.

Thus, the so-called "contested" facts in Mr. Finkelstein's affidavit is not information solely within Mr. Finkelstein's knowledge, but instead is information other people possess about having seen the Plaintiff at horse shows and legal precedent that Mr. Finkelstein wanted to place before the Court. Thus, he is not going to be a "necessary witness" for this trial. Instead, the very persons who observed the Plaintiff at those horse shows could give testimony for the Court either in person or by deposition, if that issue is even disputed by the Plaintiff.

Again, the Plaintiff's contesting the legal issue of whether the Federation has the ability to prohibit a non-member from coming to its events, not the particular facts that Mr. Finkelstein places in his affidavit. Thus, the Plaintiff glosses over the fact that Mr. Finkelstein will not be a necessary witness.

Finally, even if it was determined that Mr. Finkelstein was a necessary witness under the Rule, he does not have to be disqualified if his testimony relates to an uncontested issue. See S.C.R. 3.130(3.7)(a)(1). As discussed above, the "facts" provided in Mr. Finkelstein's affidavit are not contested. No one disputes that the Plaintiff has been at a number of horse shows since his suspension took effect and no one disputes that there will be more Federation recognized horse shows in the future. What the Plaintiff disputes is the legal authority of the Federation to prohibit him from appearing at shows, and the legal precedent of the Scott and Ward case to the facts at hand. Accordingly, S.C.R. 3.130(3.7) does not require this Court to disqualify Mr. Finkelstein as co-counsel for the Federation.

The case law interpreting Kentucky Supreme Court Rule 3.130(3.7) also supports the Federation's position that Mr. Finkelstein should not be disqualified. In Carlson v. Thomas, 159

F.R.D. 661 (E.D. Ky. 1994), Magistrate Peggy Patterson, in denying a party's motion to disqualify the opposing party's counsel, correctly held that the ability to deny one's opponent the services of his chosen counsel is a potent weapon, so that motions for attorney disqualification should be viewed with extreme caution for they can be misused as a technique for harassment. Magistrate Patterson found that the moving party seeking disqualification of counsel bears the initial burden of persuasion and proof. Magistrate Patterson correctly found that disqualification is a drastic measure which Courts should hesitate to impose except when absolutely necessary. It is clear that under the facts of this case, it is not absolutely necessary to disqualify Ira Finkelstein for the grounds previously discussed.

In Moss v. Commonwealth of Kentucky, Ky., 949 S.W.2d 579 (1997), the Kentucky Supreme Court affirmed the lower court's decision not to disqualify a prosecutor who, during his own inspection of the defendant's clothing, came upon incriminating evidence and disclosed that to defendant's counsel. At the trial, the Commonwealth's attorney actually testified about what he found when he inspected the defendant's clothing. The defendant argued that the prosecutor's discovery of this incriminating evidence created a break in the chain of custody so that the evidence should not be introduced and the prosecutor should not be allowed to testify.

In affirming the denial of the motion to disqualify, the Kentucky Supreme Court held, "It is a general rule that a prosecuting attorney should not testify as a witness in a trial. Brown v. Commonwealth, 512 S.W.2d 509 (1974). However, SCR 3.130 and Rule 3.7(a)(1) of the Rules of Professional Conduct permits such testimony when the testimony relates to an uncontested issue." Although there was a legal dispute as to the sufficiency of the chain of custody, the testimony of the Commonwealth attorney revealed the circumstances in which the items were

discovered, so that those facts were uncontested. As such, the trial court did not err in allowing the prosecuting attorney to testify.

The same circumstance exists herein because the facts to which Ira Finkelstein allegedly has testified are not contested. Instead, what is contested is the legal effect of those undisputed facts, for which there will be legal argument made and for which this Court has already concluded in its April 26, 2004 order granting the motion for preliminary injunction and denying the plaintiff's motion for preliminary injunction. Accordingly, what is in dispute is the law and not the facts, and, therefore, Mr. Finkelstein should not be disqualified.

Finally, as a throw-away argument, the Plaintiff relies upon Supreme Court Rule 3.130(3.6)(a), dealing with extrajudicial statements made by attorneys that would have a substantial likelihood of materially prejudicing an adjudicative proceeding. This argument hardly warrants a response, other than to say that Mr. Finkelstein made factual statements to the press. The one statement made reference to by Plaintiff on page 5 of his motion that Mr. Finkelstein's statements have likened the Plaintiff to convicted felons, drug dealers and bad check artists, was, in fact, a statement made by the author of the article herself and was not anything identified as a direct quote from Mr. Finkelstein or a statement made by Mr. Finkelstein. Clearly, the statements made by Mr. Finkelstein to the press do not violate this rule.

Accordingly, this Court should deny the Plaintiff's motion to disqualify Mr. Finkelstein in serving as co-counsel for the Federation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by United States mail, postage pre-paid, on this 7th day of May, 2004 upon:

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