SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU
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DONNA SAMUELS,

Plaintiff,

INDEX NO: 11505/12

-against-

AFFIRMATION IN SUPPORT OF MOTION

OCWEN LOAN SERVICING, L.L.C., LITTON LOAN SERVICING, L.P., I.M. BEST d/b/a REMAX BEST,

Defendants.
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NICHOLAS J. MASSIMO, an attorney admitted to practice in the State of New York, affirms the following under penalty of perjury:

1. That I am a member of the law firm who is the attorney of record for Plaintiff DONNA SAMUELS (hereinafter referred to as "SAMUELS") and as such am familiar with the facts and circumstances herein and I make this affirmation requesting that this Court (I) pursuant to CLPR § 321(c) and Rule 1.7(a) of the Rules of Professional Conduct to Disqualify the law firm of Conway, Goren & Brandman from representing Defendants OCWEN LOAN SERVICING, LLC. (hereinafter referred to as "OCWEN"), LITTON LOAN SERVICING LP (hereinafter referred to as "LITTON")[1] and I.M. BEST, INC. d/b/a RE/MAX BEST (hereinafter referred to as "RE/MAX") due to a conflict of interest between the Defendants OCWEN/LITTON and RE/MAX and/or (II) for an Order pursuant to CPLR § 3101(a) directing that Defendant OCWEN/LITTON produce their corporate officers, employees and/or agents Randall Stone, Raquel Steinmeyer and R. Furtado for party depositions.

[1] As the Court will see further herein, as the individual designated for deposition by Defendant's OCWEN and LITTON testified that in 2011 OCWEN effectively acquired Defendant LITTON in 2011, these two Defendants will be referred to as OCWEN/LITTON. *See, Exhibit D at pg. 36.*

2. The within action was brought on behalf of Plaintiff DONNA SAMUELS, for negligence for failing to maintain a premises which caused Plaintiff to trip and fall causing Ms. SAMUELS serious physical injury at 964 Washington Street, Franklin Square, New York 11010 on January 2, 2012. *See, Summons & Complaint annexed hereto at Exhibit A.* On January 2, 2012, after numerous times where Defendants failed to provide Plaintiff with the basic need of hot water and heat, on a cold January night, Plaintiff went to the basement of the premises that she was renting from Defendants OCWEN/LITTON which failed to have working lighting to attempt to light the hot water heater and boiler to provide hot water and heat to her home when she tripped and fell due to sewage, sludge, mold and water buildup in the basement which the Defendants failed to clean or control and sustained serious physical injuries. *See, Exhibit E at pp. 189-215; see Photos of Area of Fall annexed hereto at Exhibit J.*

3. As will be demonstrated herein, Plaintiff now moves to Disqualify the Attorneys for both Defendants OCWEN/LITTON and REMAX due to a conflict of interest between the parties as to who was responsible for the management, operations, custody, care and/or maintenance of the subject premises as Defendant OCWEN/LITTON has provided discovery suggesting that Defendant RE/MAX was the property manager of the premises or an agent of Defendant OCWEN/LITTON in the management of the property, however, Defendant RE/MAX claims they were merely the Listing Agent for the property and had no obligation to manage or maintain the property. Plaintiff further moves for an Order directing Defendants OCWEN/LITTON to produce their officers, employees or agents Randall Stone, Raquel Steinmeyer and R. Furtado who were intimately involved in the communications regarding the status of the premises after the individual that the corporate Defendants OCWEN/LITTON chose to produce for deposition, Howard Handville proved to have no knowledge of or involvement in the facts and circumstances which led up to Plaintiff's accident and injuries.

PRIOR HISTORY OF THE CASE

4. Plaintiff commenced the instant case by filing and serving a Summons and Verified Complaint on September 11, 2012.[2] *See, Exhibit A.* On or about February 19, 2013, Defendants OCWEN, LITTON and RE/MAX served a Verified Answer with Demands. *See, Verified Answer annexed hereto at Exhibit B. [Demands are omitted]*.

5. On July 24, 2013, Plaintiff DONNA SAMUELS was deposed by Defendants. On August 20, 2014, Defendant RE/MAX designated and produced Michael Carroll for deposition on behalf of that corporate Defendant. *See, Deposition of Michael Carroll annexed hereto at Exhibit C.* On January 23, 2015, Defendants OCWEN and LITTON designated and produced Howard Handville for deposition. *See, Deposition of Howard Handville annexed hereto at Exhibit D.* At the end of the Handville Deposition an attorney for Plaintiff Frank C. Panetta, Esq. placed Defendants OCWEN/LITTON on notice that Plaintiffs intended to call further witnesses from that Corporate Defendant as Mr. Handville had little to no personal knowledge of the facts and circumstances of the case. Christopher Lochner, Esq. indicated that the OCWEN/LITTON Defendants would not consent to the production of further witnesses from those corporate Defendants and that if Plaintiff wanted further depositions they would have to make a motion to the Court. *See, Exhibit D at pp. 53-54.*

6. On April 8, 2015, the parties appeared before the Honorable Margaret Reilly for a Compliance Conference at which time the Plaintiff requested further depositions of the corporate

[2] The original action was entitled *Donna Samuels v. Ocwen Loan Servicing, LLC., Litton Loan Servicing, LP, RE/MAX of New York and RE/MAX Best Franchisee (wherein the franchisee's corporate name is fictitious). On or about February 5, 2014, a stipulation signed and agreed to by all parties removed Defendant RE/MAX of New York from the action and substituted Defendant RE/MAX Best Franchisee (wherein the corporate name is fictitious) with Defendant I.M. Best Franchise d/b/a RE/MAX Best and the caption was amended to the current caption. Defendant RE/MAX of New York's answer has been omitted from this motion as they are no longer a Defendant in the action as all claims and cross claims have been dismissed against them.*

defendant OCWEN/LITTON. At that time, counsel for OCWEN/LITTON explicably stated that they would not provide another deposition without a Court Order. Therefore, Plaintiff is left with no choice but to proceed by motion to obtain further depositions.

I. DEFENDANT'S COUNSEL MUST BE DISQUALLIFIED FROM REPRESENTING ANY DEFENDANTS DUE TO A CONFLICT OF INTEREST

7. Plaintiff submits to this Court that there exists a conflict of interest in the law firm representing all Defendants, Conway, Goren and Brandman, representing both OCWEN/LITTON and RE/MAX as discovery has failed to yield a definitive answer as to which of these Defendants was responsible for the management and maintenance of the property where Plaintiff was injured.

8. Plaintiff testified that she was told by both Randall Stone of Defendant OCWEN/LITTON and OCWEN/LITTON's attorneys Knuckles, Komosinski & Elliot, L.L.P. (hereinafter referred to as "Knuckles"), that Defendant RE/MAX was responsible for managing the property prior to the incident with Mike Carroll as the person to contact. *See, Deposition of Donna Samuels annexed hereto at Exhibit E at pp. 272-273.* On July 23, 2009, Knuckles sent Plaintiff a letter which stated that "Please contact Mike Carroll, Re Max Best, (631) 321-9203 if there is any trouble with the utilities." *See, July 23, 2009 Knuckles Letter annexed hereto at Exhibit F.* On September 19, 2011, Defendants OCWEN/LITTON sent Plaintiff a letter which stated "Please include the property address and lease number 7091162508 on your payment and send it to the local real estate broker/property manager listed below. West Babylon – Remax Best, Attn: Mike Carroll, 575 Sunrise Highway, West Babylon, NY 11704, Business Ph: (631) 321-9203." *See, September 19, 2011 Ocwen Letter annexed hereto at Exhibit G.* These letters

demonstrate Plaintiff's belief that Mike Carroll of Defendant RE/MAX was responsible for the management and maintenance of the property in question.

9. However, when Mike Carroll of RE/MAX was deposed in this action, he denied he was responsible for the management and maintenance of the property claiming he was hired by OCWEN/LITTON only as a listing agent for the property. *See, Exhibit C at pp. 11, 19-20, 142-144.* In fact, Carroll claimed that there was no property manager and that he did not know who was responsible for the maintenance of the property. *See, Exhibit C at pp. 19-20.* When asked why the September 19, 2011 letter from OCWEN/LITTON referred to Mr. Carroll at RE/MAX as the property manager, Mr. Carroll stated that it looked like a standard letter they put local real estate broker and that he was not the property manager. *See, Exhibit C at pp. 141-142.*

10. As demonstrated above, OCWEN/LITTON can claim that they were an out of possession landlord as RE/MAX was responsible for the management and maintenance of the property. However, clearly Defendant RE/MAX claims that they were not responsible for the management and maintenance of the property in an attempt to absolve that entity from liability. This creates a clear conflict of interest for the same attorneys to represent both OCWEN/LITTON and RE/MAX.

11. "Where it has been determined that counsel has a concurrent conflict of interest, it has been held that a lawyer should be disqualified from representing both clients. *See, Alcantara v. Mendez*, 303 A.D.2d 327, 338 (2d Dept. 2003); *Sidor v. Zuhoski*, 261 A.D.2d 529, 530 (2d Dept. 1999) ['An attorney who undertakes joint representation of two parties in a lawsuit should not continue to act as counsel for either one after an actual conflict of interest has arisen because continued representation for either or both parties would result in a violation of the ethical rules requiring an attorney to preserve a client's confidences or the rule requiring an attorney to represent a client zealously' (citations, internal quotation marks, and brackets omitted)]. A

motion to disqualify is addressed to the sound discretion of the court, and 'any doubts are to be resolved in favor of disqualification.' *Matter of Stober v. Gaba & Stober, P.C.*, 259 A.D.2d 554, 555 (2d Dept. 1999)." *Vinokur v. Raghunandan*, 27 Misc. 3d 1239(A) at *1. (Sup. Ct. Kings County, 2010). A "court may disqualify an attorney not only for acting improperly, but also to avoid the appearance of impropriety." *Solomon v. New York Prop. Ins. Underwriting Assn.*, 118 A.D.2d 695, 695 (2d Dept. 1986).

12. "Rule 1.7(a) of the Rules of Professional Conduct provides that, 'Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that . . . the representation will involve the lawyer in representing differing interests' (Rules of Professional Conduct [22 N.Y.C.R.R. § 1200.0] Rule 1.7(a)." *Vinokur v. Raghunandan*, 27 Misc. 3d 1239(A) at *2. (Sup. Ct. Kings County, 2010).

13. As demonstrated above, there appears to be a clear conflict of interest with regard to the firm of Conway, Goren and Brandman representing both the OCWEN/LITTON Defendants and the RE/MAX Defendant as it is unclear as to which entity was responsible for the management and maintenance of the property where Plaintiff was injured or whether the OCWEN/LITTON Defendants had legally placed themselves as out of possession landlords on the property by hiring RE/MAX to manage and maintain the property or whether RE/MAX never agreed to manage and maintain the property leaving the legal responsibility to the land owners, OCWEN/LITTON. At the very least it cannot be denied that there is an appearance of a conflict of interest in Conway, Goren and Brandman representing both the OCWEN/LITTON Defendants and the RE/MAX Defendant. Therefore, the proper remedy is for the Court to disqualify Conway, Goren and Brandman from representing both the OCWEN/LITTON Defendants and the RE/MAX Defendant and direct each of these Defendants to retain their own attorneys.

II. PLAINTIFF IS ENTITLED TO FURTHER PARTY DEPOSITIONS FROM OCWEN/LITTON DEFENDANTS

14. Defendant OCWEN/LITTON in the present matter designated an individual named Howard Handville as the person to deposed in this action, as is their right to designate an individual. However, as Handville proved that he has no personal knowledge of the facts and circumstances of the case and was unable to provide even basic answers with regard to who was responsible to manage and maintain the property in question, who addressed Plaintiff's complaints with regard to the failure to manage and maintain the property, in particular the boiler which had been malfunctioning, the condition of the basement where the boiler was located, the lighting in the basement area, whether repairs had been scheduled to be made, whether repairs had been made and if they were, who made the repairs, what repairs were made and what dates said repairs had been made.

15. "Although ordinary procedure permits a corporation to designate which of its representatives will be available for examination, the adverse party is not barred from seeking further discovery where the testimony of the witness produced is inadequate. *S.S. Silberblatt, Inc. v. American Pecco Corp.*, 52 A.D.2d 824 (1st Dept. 1976). The CPLR provides that there shall be full disclosure by a corporate party and its employees of all evidence which is material and necessary to prosecute the cause of action. (CPLR § 3101(a), *Allen v. Crowell-Collier Pub. Co.*, 21 N.Y.2d 403 (discussed in 43 St. John's L. Rev. 324). . . . [W]here the probing party specifically alleges the nature of the inadequacy of the witness first produced by a corporate party and demonstrates the relationship of that inadequacy to the probing party's causes of action, further discovery should be permitted. *See, Besen v. C.P.L. Yacht Sales*, 34 A.D.2d 789

(2d Dept. 1970)." *Lounsbury v. New York State Electric and Gas*, 62 A.D.2d 1033, 1033 (2d Dept. 1978).

16. In basic terms, Handville knew virtually nothing about this case. Handville is employed as a Senior Loan Analyst for OCWEN in title only whose main job is to testify for the company when they need testimony, appear for mediations, conferences or Court appearances and to execute responses to affidavits and interrogatories. *See, Exhibit D at pp. 8-9, 15, 24.* Handville estimates he has testified somewhere between 400 and 600 times for OCWEN since he was employed by them in August 2010. *See, Exhibit D at pp. 10-14.* Handville admits that he had no personal knowledge of the communications and events involved in Ms. Samuel's matter and first became aware of the matter in December 2014 when he was assigned by OCWEN's legal department to be designated for the deposition in this matter. *See, Exhibit D at pp. 22-23, 25*. Handville's only familiarity with the property was that he reviewed some of the legal documents and the servicing logs kept by OCWEN and LITTON prior to OCWEN buying LITTON. *See, Exhibit D at pp. 36, 40.* Handville admitted that he was never involved in arranging for repairs on the subject property in this matter or anything to remediate any of the problems or complaints made by Plaintiff with regard to the property. *See, Exhibit D at pp. 39-40.*

17. Handville was unaware of the basic complaints that Plaintiff contends gave Defendants actual notice of the defective conditions which led to her fall and injuries such as the chronic problems with the boiler, hot water heater and that there was no lighting in the basement. *See, Exhibit D at pp. 38-39.* Handville was not aware that there was a sewage issue in the basement, not aware that there was a mold issue in the basement of the home, or that there was a water leak in the basement of the home which caused a muck which contributed to Plaintiff's fall. *See, Exhibit D at pg. 47.* Handville was unaware that Plaintiff was wrongfully threatened

with eviction by OCWEN and didn't know anything about a person named Mary Wohlrab who left notes for Plaintiff threatening her with eviction despite there being no cause for the same. *See, Exhibit D at pp. 48-49.*

18. Handville was unable to state who at OCWEN was responsible for the maintenance of the property, though he believed in 2009 when Litton owned the property it was Mike Carroll. *See, Exhibit D at pp. 46.* Handville believed that the property manager for Litton was a person named R. Furtado, but he didn't know that person's first name, didn't know which of OCWEN's office's Furtado worked out of, was not familiar with Mr. Furtado and never spoke to Mr. Furtado prior to the deposition. *See, Exhibit D at pp. 51-52.* Handville did not know what Mike Carroll of RE/MAX's relationship with OCWEN was, whether Mr. Carroll was an agent of OCWEN, didn't know if OCWEN had direct contact with Mr. Carroll, didn't know how Mr. Carroll became involved with the subject property and believed that Mr. Carroll was a real estate agent that Litton worked with once they acquired the property through foreclosure in 2009. *See, Exhibit D at pp. 31-35, 41-43, 46.* Mr. Handville doesn't know any of the people in the subject property and was not aware how many apartments the property had other than knowing that it was listed as a two family residence. *See, Exhibit D at pp. 30, 37.*

19. Mr. Handville believed that Randall Stone worked for LITTON but was not aware of Mr. Stone's title prior to the deposition. *See, Exhibit D at pp. 49-50.* The name was vaguely familiar to him as someone employed by LITTON. *See, Exhibit D at pg. 35.* In sum, Handville appears to be employed by OCWEN to be a witness in Court when needed, reviewed paperwork on the case in question, but clearly had no involvement in or personal knowledge of the underlying facts of this matter whatsoever. Plaintiff has clearly demonstrated the inadequacy of Mr. Handville as a witness as he lacked personal knowledge of the events preventing Plaintiff from being able to acquire discovery as to who was responsible to manage and maintain the

property in question, who addressed Plaintiff's complaints with regard to the failure to manage and maintain the property, in particular the boiler which had been malfunctioning, the condition of the basement where the boiler was located, the lighting in the basement area, whether repairs had been scheduled to be made, whether repairs had been made and if they were, who made the repairs, what repairs were made and what dates said repairs had been made.

20. Plaintiff at this time seeks to take depositions of OCWEN/LITTON employees, officers or agents with knowledge of these transactions, Randall Stone, Raquel Steinmeyer, and R. Furtado. As the Court will see herein, both Randall Stone and Raquel Steinmeyer were intimately involved with the complaints that Plaintiff made and must have knowledge of what complaints Plaintiff made regarding the maintenance of the property, what actions were contemplated to remedy the situation and what actions, if any, were actually taken to remedy any defects on the property.

21. As stated in paragraph 8 above, Plaintiff had reason to believe that both Randall Stone and Mike Carroll were responsible for the property management and maintenance of the premises. *See, ¶ 8 above.* Indeed, prior to the incident Plaintiff made numerous written complaints to both Randall Stone at OCWEN and Mike Carroll at RE/MAX with regard to the fact that the heat and hot water consistently would not work in her apartment as well as regarding the sewage in the basement of the building where the hot water tank and boiler was located. *See, Complaints by Donna Samuels annexed hereto at Exhibit H.* Email communications between Michael Carroll and representatives of OCWEN/LITTON demonstrate that Randall Stone was very involved with discussing, though not necessarily dealing with, the complaints that Ms. Samuels made with regard to the consistent lack of heat, hot water and the sewage in the basement of the building. *See, Emails annexed hereto at Exhibit I.* However, as the Court can see, approximately two months before Ms. Samuels was injured, an individual whose name is

Raquel Steinmeyer appears to have taken the role that Randall Stone previously filled with regard to discussions between OCWEN/LITTON and RE/MAX. Ms. Steinmeyer became involved in discussions regarding the condition of the property and her email identifies her as being in the REO Department, and Property Management, Tenant Specialist.[3] *See, Exhibit I at November 1, 2011 Email between Michael Carroll and Raquel Steinmeyer.*

22. Plaintiff has clearly demonstrated the inadequacy of Howard Handville who clearly had no information regarding the complaints made by Ms. Samuels and how they were addressed by OCWEN/LITTON. Plaintiff has further demonstrated that both Randall Stone and Raquel Steinmeyer have sufficient knowledge regarding the complaints that Plaintiff made with regard to the consistent failure of being provided heat and hot water and the condition of the basement where the hot water heater and boiler were located that serviced her apartment. With regard to R. Furtado, Mr. Handville's testimony that he was the property manager demonstrates that he/she is a person that would have specific knowledge with regards to the complaints made by Plaintiff to Defendant OCWEN/LITTON and how, or even if, they were addressed. As the Court is aware, Plaintiff has alleged that she sustained her injuries due to having been forced to go to the basement on January 2, 2012 to attempt to light the boiler and hot water tank to provide heat and hot water and tripped and fell due to the leaks, sewage, sludge and mold in the basement which caused her to sustain her injuries, demonstrating the relationship between Plaintiff's claim and the testimony sought.

23. As Plaintiff has clearly demonstrated that the individual produced by OCWEN/LITTON, Howard Handville had inadequate knowledge regarding the complaints made by Plaintiff with regard to the condition of the property and how or if that Defendant addressed

[3] The Court should note that although Ms. Steinmeyer identifies herself as an employee of Altisource, Altisource is clearly an entity of OCWEN/LITTON as demonstrated by a letter sent to Ms. Samuels on September 7, 2011. *See, September 7, 2011 LITTON letter annexed hereto at Exhibit K.*

those complaints and has further demonstrated that Randall Stone, Raquel Steinmeyer and R. Furtado are all individuals with sufficient knowledge to address those issues for discovery, and are all officers, employees or agents of Defendant OCWEN/LITTON, Plaintiff is clearly entitled to an Order from this Court mandating that Defendants OCWEN/LITTON produce Randall Stone, Raquel Steinmeyer and R. Furtado for party depositions. *See, Besen v. C.P.L. Yacht Sales*, 34 A.D.2d 789 (2d Dept. 1970); *Lounsbury v. New York State Electric and Gas*, 62 A.D.2d 1033, 1033 (2d Dept. 1978).

24. No prior application has been made by Plaintiff for the relief requested herein.

WHEREFORE, Plaintiffs DONNA SAMUELS requests that this Court (I) pursuant to CLPR § 321(c) and Rule 1.7(a) of the Rules of Professional Conduct that this Court Disqualify the law firm of Conway, Goren & Brandman from representing Defendants OCWEN/LITTON and RE/MAX due to a conflict of interest between the Defendants and/or (II) issue an Order pursuant to CPLR § 3101(a) directing that Defendant OCWEN and/or LITTON produce their corporate officers, employees and/or agents Randall Stone, Raquel Steinmeyer and R. Furtado for party depositions.

Dated: April 28, 2015
Mineola, New York

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