United States Bankruptcy Court
Northern District of Illinois
Eastern Division

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Bankruptcy Caption: In re Howard E. Leventhal and Malgorzata J. Kubiak-Leventhal

Bankruptcy No. 10 B 12257

Adversary Caption: Gene Schenberg v. Howard E. Leventhal

Adversary No. 11 A 1467

Date of Issuance: March 22, 2012

Judge: A. Benjamin Goldgar

Appearance of Counsel:

Attorneys for plaintiff Gene Schenberg: Michael J. McKitrick, Richard F. Huck, III, Danna McKitrick, PC, St. Louis, MO; Patrick G. Somers, Somers & Associates, Schaumburg, IL

Attorney for defendant Howard E. Leventhal: JoAnne M. Denison, Denison & Associates, P.C., Chicago, IL

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)	Chapter 7
	)	
HOWARD E. LEVENTHAL and MALGORZATA E. KUBIAK-LEVENTHAL,	)	No. 10 B 12257
	)	
Debtors.	)	
	)	
GENE SCHENBERG,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 11 A 1467
	)	
HOWARD E. LEVENTHAL,	)	
	)	
Defendant.	)	Judge Goldgar

MEMORANDUM OPINION

Before the court for ruling in this adversary proceeding is the motion of defendant Howard Leventhal to disqualify Richard F. Huck, III, as counsel for plaintiff Gene Schenberg. For the following reasons, the motion will be denied.

1. Background

The following facts are evident from the parties' papers and the court's docket and are not in dispute. Leventhal and Schenberg have been embroiled in civil litigation in state and federal courts, here and elsewhere, on and off for the past decade. Along the way, Schenberg obtained a judgment against Leventhal in Missouri state court for approximately $271,000. After Leventhal tried to remove the state court action to the district court in Chicago, Schenberg obtained a $5,000 sanctions award against Leventhal from the district court.

On March 22, 2010, Leventhal and his wife filed a joint *pro se* chapter 7 bankruptcy case. The list of creditors they submitted to the court with the petition named Schenberg as a creditor but failed to provide a street address. Schenberg's address was shown only as "Chesterfield, Missouri 63017." As a consequence, Schenberg asserts, he did not receive the notice of the bankruptcy case sent to other creditors (Official Form 9A) and did not learn of the case until after Leventhal received his discharge on June 30, 2010. By then, it was too late for Schenberg to object to the dischargeability of Leventhal's debt – at least on a ground specified in sections 523(a)(2), (4), or (6) of the Bankruptcy Code, 11 U.S.C. §§ 523(a)(2), (4), (6). *See* Fed. R. Bankr. P. 4007(c).

In July 2011, Schenberg filed an adversary proceeding against Leventhal alleging that Leventhal owed him a debt nondischargeable under section 523(a)(3)(B) of the Code. Section 523(a)(3)(B) excepts from discharge any debt nondischargeable under sections 523(a)(2), (4), or (6) in a specific circumstance. The debt must have been "neither listed nor scheduled . . . with the name . . . of the creditor to whom such debt is owed, in time to permit . . . timely filing of a proof of claim and timely request for a determination of dischargeability . . . unless such creditor had notice or actual knowledge of the case in time for such timely filing and request." 11 U.S.C. § 523(a(3)(B). Schenberg alleged that the debt owed him was not listed or scheduled in time for him to object to its dischargeability, and that he had no notice or actual knowledge of the bankruptcy case in time to file his objection.[1/]

On February 16, 2012 – seven months into the adversary proceeding and just two months

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[1/] As originally filed, the complaint contained two counts. Count I was a claim against both Leventhal and his wife under section 523(a)(3)(B). Count II was a claim under section 727(d) to revoke their discharge. Count I was later dismissed as to Leventhal's wife, and Count II was dismissed as untimely against both Leventhal and his wife.

before the scheduled April 12 trial – Leventhal moved to disqualify Schenberg's lawyer, Huck. In his motion, Leventhal contends that Huck cannot represent Schenberg at trial because Huck will be called as a witness and will testify that he had notice of the bankruptcy case, notice that Leventhal contends must be imputed to Schenberg as a matter of law. *See, e.g., In re Marino,* 195 B.R. 886, 895 (Bankr. N.D. Ill. 1996) (imputing notice to creditor where creditor's attorney had notice of bankruptcy case). Leventhal therefore maintains that Huck's disqualification is required under the "advocate-witness rule." *See* Model Rules of Prof'l Conduct R. 3.7 (2011).[2/]

The disqualification motion is briefed and ready for ruling.

2. Discussion

Leventhal's motion to disqualify Huck must be denied. Although Huck is likely to be a necessary witness at trial, Huck's disqualification would work a substantial hardship on Schenberg.

a. The "Advocate-Witness" Rule

The roles of attorney and witness "usually are incompatible." *Gusman v. Unisys Corp.*, 986 F.2d 1146, 1148 (7th Cir. 1993). Under what is known as "the advocate-witness rule," an attorney is therefore barred from acting both as advocate and as witness in a single proceeding. *United States v. Jones*, 600 F.3d 847, 861-62 (7th Cir. 2010). The rule "has deep roots in

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[2/] The relevant rule here is American Bar Association Model Rule 3.7. The disciplinary rules that apply in bankruptcy cases are the disciplinary rules that apply in the district court. *See* Bankr. Ct. L.R. 9029-4A; *Levit v. Herbst (In re Thomas Consol. Indus., Inc.*), 289 B.R. 647, 652 (N.D. Ill. 2003). Local Rule 83.50 of the district court provides that the applicable disciplinary rules are the ABA Model Rules. *See* Dist. Ct. L.R. 83.50. (There are exceptions when the ABA Model Rules are inconsistent with the state disciplinary rules that apply to Illinois attorneys or to lawyers from other states, *see id.*, but Huck is admitted in Illinois, and Rule 3.7 of the Illinois Rules of Professional Conduct is identical to ABA Model Rule 3.7, *see* Ill. Rules of Prof'l Conduct R. 3.7 (2010).)

American law," *id.* at 862 (internal quotation omitted), and addresses three concerns: (1) the possibility that the attorney will not be a fully objective witness; (2) the risk that the trier of fact will confuse the roles of advocate and witness; and (3) the potential appearance of impropriety. *Mercury Vapor Processing Techs., Inc. v. Village of Riverdale*, 545 F. Supp. 2d 783, 787 (N.D. Ill. 2008); *see also United States v. Turner*, 651 F.3d 743, 749 (7th Cir. 2011) (noting that rules of professional conduct for attorneys "have long recognized that having an attorney testify either for or against his client can put great stress on our system of justice").

In this district, the advocate-witness rule is embodied in ABA Model Rule 3.7. Rule 3.7(a) declares that "[a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness." Model Rules of Prof'l Conduct R. 3.7(a) (2011). The rule then provides three exceptions, only the third of which is potentially relevant here. Under Rule 3.7(a)(3), an attorney may act as an advocate at trial, even though he is likely to be a necessary witness, if his disqualification "would work substantial hardship on the client." Model Rules of Prof'l Conduct R. 3.7(a)(3) (2011).

Disqualification of an attorney, moreover, is considered a "drastic measure which courts should hesitate to impose except when absolutely necessary." *Owen v. Wangerin*, 985 F.2d 312, 317 (7th Cir. 1993) (internal quotation omitted); *Mercury Vapor*, 545 F. Supp. 2d at 787; *Bogosian v. Board of Educ. of Community Unit. Sch. Dist. 200*, 95 F. Supp. 2d 874, 875 (N.D. Ill. 2000). Courts recognize that "the ability to deny one's opponent the services of capable counsel[ ] is a potent weapon." *Manning v. Waring, Cox, James, Sklar & Allen*, 849 F.2d 222, 224 (6th Cir. 1988). Because they are potential "techniques of harassment," motions for disqualification are "viewed with extreme caution." *Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715, 722 (7th Cir. 1982); *Mercury Vapor*, 545 F. Supp. 2d at 787; *Bogosian*, 95 F.

Supp. 2d at 875.

When disqualification is sought under Rule 3.7, the court must engage in "a two-part inquiry." *United States v. Hollnagel*, No. 10 CR 195, 2011 WL 3898033, at *4 (N.D. Ill. Sept. 6, 2011). First, the court must determine whether the attorney is "'likely to be a necessary witness.'" *Id.* (quoting Model Rules of Prof'l Conduct R. 3.7(a) (2011)); *see also Robin v. Katten, Muchin, Zavis, Pearl & Galler*, No. 85 C 8913, 1986 WL 7079, at *7 (N.D. Ill. June 13, 1986) (calling this "[t]he essential inquiry"). Second, if the attorney is likely to be a necessary witness, the court must decide whether the attorney's "disqualification [would] 'work substantial hardship' on" the client. *Hollnagel*, 2011 WL 3898033, at *4 (quoting Model Rules of Prof'l Conduct R. 3.7(a)(3) (2011)). The disqualification decision rests with the court's "broad discretion." *Id.* at *3; *see also Doe v. Catholic Archdiocese of Chicago*, No. 09 C 7656, 2010 WL 2293460, at *2 (N.D. Ill. June 8, 2010).

b. "Likely to be a Necessary Witness"

In this case, Huck is likely to be a necessary witness. Courts have "variously described" the circumstances under which an attorney ought to be a witness. *Robin*, 1986 WL 7079, at *7; *see also Jones v. City of Chicago*, 610 F. Supp. 350, 356-57 (N.D. Ill. 1984). The Seventh Circuit has suggested that an attorney's testimony is likely to be necessary when it is "foreseeable" he will testify. *Bank of Am. v. Saville*, 416 F.2d 265, 272 (7th Cir. 1969). Other courts have found the standard met when the attorney is aware of facts making it "obligatory" for him to testify in order to represent his client "completely and zealously." *Cossette v. Country Style Donuts, Inc.*, 647 F.2d 526, 530-31 (5th Cir. June 1981). Still others have said that an attorney ought to testify if he "has crucial information in his possession which must be divulged," *Universal Athletic Sales Co. v. American Gym, Recreational & Athletic Equip. Corp.*,

546 F.2d 530, 538-39 n.21 (3d Cir. 1976), or if his testimony is "essential to the case," *General Mill Supply Co. v. SCA Servs., Inc.*, 697 F.2d 704, 708 (6th Cir. 1982).

Huck is likely to be a necessary witness at trial here because it appears Leventhal intends to defend Schenberg's section 523(a)(3)(B) claim partly, if not primarily, on the ground that Schenberg had notice of the bankruptcy case in time to object to the dischargeability of Leventhal's debt. Leventhal expects to demonstrate that Schenberg had notice because his attorney and agent, Huck, had notice, and notice must be imputed to Schenberg. Leventhal has two theories about how Huck had notice – and although one of the theories is not viable, the other one is.[3/]

i. The Continuances of the Creditors Meeting

First, Leventhal contends Huck had notice because he appeared on the court's creditor list, and the court sent creditors at least six notices in the case, five of them notices that the creditors meeting had been continued.[4/]

This theory is a non-starter. Although the creditors meeting was indeed continued several times (*see* Btcy. Dkt. Nos. 21, 22, 27, 29, 31), Huck was never given notice that the

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[3/] Leventhal failed to offer these theories in his *pro se* disqualification motion. They appear for the first time in Leventhal's reply, filed by his newly retained counsel. New arguments in a reply are dirty pool: they sandbag the opponent, depriving him of a chance to respond. Arguments offered for the first time in a reply are therefore ordinarily deemed waived. *Gonzales v. Mize*, 565 F.3d 373, 382 (7th Cir. 2009). Nevertheless, courts have the discretion to overlook a waiver. *See, e.g., United States v. Wilson*, 962 F.2d 621, 627 (7th Cir. 1992). Since Leventhal could raise his waived arguments in a renewed disqualification motion, and since the disqualification motion would have to be denied in any event, the court will exercise its discretion and address the arguments despite the waiver.

[4/] The sixth notice Leventhal cites, notice of the entry of discharge, is irrelevant. By the time Leventhal received his discharge, it was obviously too late for Schenberg to object to dischargeability under section 523(c).

creditors meeting in Leventhal's case had been continued. No creditor was. In contending otherwise, Leventhal assumes that creditors on the creditor list are given notice of every event in a bankruptcy case. Not so. The list is one the court maintains. The national Bankruptcy Noticing Center ("BNC") uses the list (in the form of the creditor mailing matrix) to give creditors notice of certain events in a case, such as the filing of the case and entry of discharge. When the BNC gives notice, the docket in the case will contain a copy of the notice as well as a BNC certificate of service. (*See, e.g.*, Btcy. Dkt. Nos. 7, 17, 24, 33).

But the BNC does not give notice of every event in a case. Among others, the BNC does not give notice of continued creditors meetings, and the docket in Leventhal's case consequently contains no BNC certificate of service for those events. (*See* Btcy. Dkt. Nos. 21, 22, 27, 29, 31).[5/] Just four BNC certificates of service appear on the docket here. (*See* Btcy. Dkt. Nos. 7, 17, 24, 33). Of those, only two reflect service on creditors (*see* Btcy. Dkt. Nos. 7, 33); the others show service on Leventhal and his wife (*see* Btcy. Dkt. Nos. 17, 24). The two showing service on creditors accompany Official Form 9A giving notice of the initial filing of the case (which the certificate shows was not sent to Huck) and the entry of discharge (which the certificate shows was). (*See id.*). The first time Huck could have known about the case from the bankruptcy court, in other words, was after the discharge had been entered. By that time, it was too late to object to dischargeability under section 523(c).

Leventhal's notice theory based on the continuances of the creditors meeting, then, would

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[5/] Not only were notices of the continuances not mailed to creditors, but the court's electronic receipts for the continuances – which can be viewed by clicking on the grey sphere next to the docket entry – show that electronic notice of the continuances was given only to the chapter 7 trustee and the U.S. Trustee. (*See* electronic receipts for Btcy. Dkt. Nos. 21, 22, 27, 29, 31).

not make Huck's testimony necessary, either to support the theory or to rebut it.[6/]

ii. The E-Mail

Leventhal's second notice theory, however, has more promise. Leventhal contends that Huck had notice because Leventhal sent him an e-mail notifying him of the case. If so, Huck's testimony is likely to be necessary to respond to Leventhal's testimony.

According to Leventhal, he sent Huck an e-mail about the case shortly after the petition date. Documents Leventhal has submitted with his reply suggest that he sent Huck an e-mail at Huck's work address on April 5, 2010, roughly two weeks post-petition. In the e-mail, Leventhal said he had "had to go personal BK." (*See* Def. Reply Ex. B). A properly addressed item mailed to someone is presumed to have been received, *Laouini v. CLM Freight Lines, Inc.*, 586 F.3d 473, 476-77 (7th Cir. 2009); *Boomer v. AT&T Corp.*, 309 F.3d 404, 415 n.5 (7th Cir. 2002), and courts have recently applied this presumption to e-mail, *see American Boat Co. v. Unknown Sunken Barge*, 418 F.3d 910, 914 (8th Cir. 2005); *Dempster, v. Dempster*, 404 F. Supp. 2d 445, 449 (E.D.N.Y. 2005); *see, e.g.*, *Ball v. Kotter*, 746 F. Supp. 2d 940, 952 n.10 (N.D. Ill. 2010) (applying presumption). If Leventhal testifies in his own case (as he apparently intends) that he sent the e-mail to Huck, a presumption will arise that Huck received it. That will permit Leventhal to argue that Schenberg had notice of the bankruptcy case because notice to

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[6/] The parties are understandably confused about why the court's list of creditors has two listings for Schenberg – "Gene B. Schenberg c/o Richard Huck, 7701 Forsyth Blvd, Ste 800, St. Louis MO 63105-1861" and "Gene B. Schenberg, Chesterfield, Missouri 63017" – when the list Leventhal filed on the petition date had only the latter. The reason is that Leventhal did not list Schenberg as "Gene B. Schenberg c/o Richard Huck" until Leventhal filed his Schedule F, and the clerk's office updated its own creditor list based on Leventhal's schedules, something it customarily does when a *pro se* debtor files schedules that differ from the creditor list. Huck received notice from the court that the discharge had been entered but not that the case had been filed, because he appeared on the creditor list when the discharge was entered but not when Official Form 9A was sent out.

Huck must be imputed to Schenberg.

Once Leventhal testifies that he sent the e-mail, Huck's testimony will be necessary, and he will likely be called as part of Schenberg's rebuttal case. Schenberg will probably need to call Huck either to rebut the presumption of delivery by having Huck testify that he did not, in fact, receive the e-mail, or to rebut the notice point some other way: for example, that Huck was no longer acting as Schenberg's lawyer and agent at the time, or perhaps that Huck did not understand the e-mail message because he did not know what "BK" meant.

Regardless, Huck is likely to testify. Otherwise, the presumption that the e-mail gave him notice of the case, notice that might arguably be imputed to Schenberg, *see Marino*, 195 B.R. at 895, will stand unrebutted.

c. "Substantial Hardship"

Although Huck is likely to be a necessary witness, the court in its discretion will deny the motion to disqualify him as trial counsel. The motion will be denied because disqualifying Huck will constitute a "substantial hardship" to Schenberg.

Disqualification motions generally require a court to balance the client's interest in retaining the attorney of his choice against the court's interest in upholding the ethical standards in the rules. *Doe*, 2010 WL 2293460, at *2. In determining whether disqualification under Rule 3.7 will work a substantial hardship, the court must consider whether disqualification will promote the policies underlying the advocate-witness rule, *Robin*, 1986 WL 7079, at *8 (citing *United States v. Morris*, 714 F.2d 669, 671-72 (7th cir. 1983), and measure the circumstances of the case against those policies, *Jones v. City of Chicago*, 610 F. Supp. 350, 357 (N.D. Ill. 1984).

Granting Leventhal's motion and disqualifying Huck would not promote the policies underlying the advocate-witness rule. *See Mercury Vapor*, 545 F. Supp. 2d at 787 (listing

policies). There is no particular reason to believe Huck will be less than a fully objective witness if he testifies and also represents Schenberg at trial. Because the trial will be a bench trial, not a jury trial, there is no risk whatever that the trier of fact will confuse the roles of advocate and witness. *See United States v. Johnston*, 690 F.2d 638, 644 (7th Cir. 1982) (noting that the advocate-witness rule is applied more flexibly when a bench trial is involved). And there is no reason to believe Huck's testimony will give rise to any real appearance of impropriety. Huck's testimony, limited to the single issue of whether he received the e-mail, will probably be quite brief.

Disqualification of Huck, meanwhile, would deprive Schenberg of "a lawyer with substantial knowledge of and involvement in the background of this case" and will "impose a significant financial burden" on Schenberg. *See Rudzinski v. Metropolitan Life Ins. Co.*, No. 05 C 474, 2007 WL 3171338, at *6 (N.D. Ill. Oct. 25, 2007) (denying disqualification motion). To prevail on his section 523(a)(3)(B) action, Schenberg will have to prove the underlying debt is nondischargeable under section 523(a)(6). *See TD BankNorth, N.A. v. Ewing (In re Ewing)*, 365 B.R. 347, 351 (Bankr. D. Mass. 2007). Huck represented Schenberg both in the underlying Missouri state court action and in the district court removal, the two matters giving rise to the debt Schenberg contends is nondischargeable. Disqualification would remove an experienced attorney familiar with the underlying debt (to say nothing of the long and hostile relationship between Schenberg and Leventhal) and would force Schenberg to retain new counsel, unfamiliar with the dispute or the relationship, just weeks before trial. *See Knowledgeaz, Inc. v. Jim Walter Res., Inc.*, 1:05-cv-1019-RLY-WTL, 2007 WL 2258731, at *5 (S.D. Ind. Aug. 3, 2007) (noting that a party's delay in seeking to disqualify an attorney weighs against disqualification). The harsh consequences to Schenberg from disqualifying Huck shortly before trial outweigh the

negligible benefits from enforcing the goals of the advocate-witness rule in the context of this case.

Because Huck's disqualification would constitute a substantial hardship to Schenberg, Leventhal's motion to disqualify Huck will be denied.

3. Conclusion

For these reasons, the motion of defendant Howard Leventhal to disqualify Richard F. Huck, III, as counsel for plaintiff Gene Schenberg is denied.[7/]

Dated: March 22, 2012

A. Benjamin Goldgar
United States Bankruptcy Judge

[7/] Schenberg and Huck should be aware that if Huck does end up testifying at trial, another of Schenberg's attorneys will have examine him. Huck will not be permitted to testify in a narrative form as if he himself were a party appearing *pro se*.