Judge Eaton

STATE OF VERMONT
WINDSOR COUNTY

KAVEH SHAHI and LESLIE SHAHI	)	
	)	**Windsor Superior Court**
v.	)	**Docket No. 496-9-06 Wrcv**
	)	
DEIRDRE DONNELLY	)	

DECISION ON PENDING MOTIONS

The present matters before the court are a number of motions, filed by both parties, seeking rulings on procedural, discovery-related, and "potentially dispositive" issues. All of the motions were filed after the expiration of a joint stay of all proceedings in this matter so that the parties might explore an amicable resolution.

There are a number of issues that are common to many of the motions presently before the court. It makes sense to address these common issues first, in order to avoid unnecessary duplication of explanation.

The first issue is whether it is proper for the court to take judicial notice of the contents of two other superior court files involving the same or similar parties and controversies as the present case: *Shahi v. Madden & Donnelly*, No. 360-7-03 Wrcv ("*Shahi I*") and *Shahi v. Madden*, No. 591-11-04 Wrcv ("*Shahi II*"). Both parties have assumed, in some form or another, that the court may reference the documents that are contained within those two court files in order to find a fact necessary to the resolution of issues in the present case.

Prior to the adoption of the Vermont Rules of Evidence, it was generally considered "improper for a court to take judicial notice of the files, records and judgment in a case other than that on trial." *In re Estate of Leno*, 139 Vt. 554, 557 (1981). This meant that it was improper for the court to make its own review of prior files, pleadings and judgments that had not been offered into evidence by the parties according to the normal evidentiary rules. This protected against the possibility that "matters might be considered that a party has no opportunity to meet and explain." *Condosta v. Condosta*, 139 Vt. 545, 547 (1981).

Vermont Rule of Evidence 201 permits a somewhat more relaxed approach to judicial notice than either *Leno* or *Condosta*, but it still does not permit courts to take judicial notice of the *content* of other case files to use as evidence in the present proceeding—in other words, for the truth of the matter contained therein. *Jakab v. Jakab*, 163 Vt. 575, 578–79 (1995) (mem.). Instead, Rule 201 permits the court to take judicial notice of the *existence* or *fact* of a prior case or judgment for non-hearsay purposes, but not the *content* of any testimony or findings of fact contained therein for the truth of the

matter asserted. V.R.E. 201; 21B Wright & Graham, Federal Practice and Procedure: Evidence 2d § 5106.4.

It makes sense that the court should not take judicial notice of the *content* of prior findings of fact for the truth of the matter asserted, because doing so would make the important and well-established doctrines of issue preclusion and claim preclusion "virtually superfluous." 21B Federal Practice and Procedure, *supra*, at § 5106.4. In other words, if the court were to take judicial notice of the content of prior findings, and to consider those findings as true, the result would be that any facts found in a prior case would be forever binding in future litigation, regardless of whether use of that fact in another proceeding satisfied the carefully-delineated elements of issue preclusion or claim preclusion. *Id.*

One of the central issues in the present case is whether the prior findings and judgments contained in the *Shahi I* and *Shahi II* files should preclude re-litigation of issues or claims in the present docket. The parties have taken adversarial positions on the applicability of the preclusion doctrines to the circumstances of this case, and on the scope and accuracy of the facts determined by the prior proceedings. For the foregoing reasons, the court concludes that it would not be appropriate to take judicial notice of the content of any pleadings, findings, or judgments in either *Shahi I* or *Shahi II* for the truth of the matter asserted. The principles of issue preclusion and claim preclusion shall determine whether any prior judgments or findings preclude re-litigation of any components of the present case.

For the same general reasons, the court will also not take judicial notice of the "facts" set forth in the reported appellate decision of *Shahi v. Madden*, 2008 VT 25, 183 Vt. 320, for the truth of the matter asserted therein. Judicial notice of the facts reported in that decision would not be consistent with the application of the doctrines of issue preclusion and claim preclusion.

In particular, the "facts" that are set forth in the text of appellate decisions do not necessarily represent the facts that have been actually litigated and necessarily decided by the finder of fact. *Berlin Convalescent Ctr., Inc. v. Stoneman*, 159 Vt. 53, 56 (1992); see also *Trepanier v. Getting Organized, Inc.*, 155 Vt. 259, 265 (1990) (explaining elements of issue preclusion). In many appellate decisions, the factual recitation does not represent findings made by the trier of fact, but rather represents a summary of the evidence viewed in the light most favorable to one party or another for purposes of applying an appellate standard of review. This occurs, for example, when an appellate court evaluates whether a jury verdict and damages award is supported by the evidence: the appellate court views and recites the evidence in the light most favorable to the prevailing party, without regard to modifying evidence. *Follo v. Florindo*, 2009 VT 11, ¶ 31; *Record v. Kempe*, 2007 VT 39, ¶ 19, 182 Vt. 17; *Needham v. Coordinated Apparel Group, Inc.*, 174 Vt. 263, 265 (2002); *Haynes v. Golub Corp.*, 166 Vt. 228, 233 (1997); *McGee Constr. Co. v. Neshobe Dev., Inc.*, 156 Vt. 550, 556 (1991).

In this case, it appears that the aforementioned appellate standard of review was used when the Vermont Supreme Court reviewed the jury verdict and punitive damages award from the trial in *Shahi II*. The "facts" described in the appellate decision constituted a recitation of the evidence presented during the trial for the purpose of determining whether the verdict and award were supported by the evidence. The discussion of the evidence does not constitute findings or holdings of the court, but rather represents the court's non-binding interpretation or illustration of the evidence. *Brueckner v. Norwich Univ.*, 169 Vt. 118, 127 (1999); *State v. Lund*, 144 Vt. 171, 195 (1984) (Peck, J., dissenting). For these reasons, the court will not take judicial notice of the "facts" described in that opinion for the truth of the matter asserted.

It does not matter for the purposes of judicial notice whether the liability evidence presented during the *Shahi II* trial was "uncontested." 2008 VT 25, ¶ 2. Allowing judicial notice of the content of "uncontested" evidence presented during a prior trial for the truth of the matter asserted would transform the evidence into a binding fact forever, even if the evidence was completely irrelevant to the issues actually litigated and decided by the finder of fact. See *Trepanier*, 155 Vt. at 265 (explaining that issue preclusion requires the issue to have been actually litigated and decided in the prior litigation). It is for this reason that the doctrines of issue preclusion and claim preclusion, with their limiting principles and elements, are better tools than judicial notice for determining the preclusive effect to be given any prior finding or judgment.

For the foregoing reasons, the parties should hereafter assume that the court will not take judicial notice of the content of any prior case files or reported opinions, and further that no facts in this case are subject to judicial notice unless and until the court rules otherwise. The evidence in this case will be submitted and evaluated within the normal crucible established by the adversarial system, the Rules of Civil Procedure, and the Rules of Evidence.

The second preliminary issue arises from the assumption that the court will make its own review of the prior dockets to determine whether or not the elements of issue preclusion or claim preclusion have been met. It will not, because it is the burden of the party asserting preclusion to show that each of the essential elements of the doctrine have been met, and that the use of issue preclusion or claim preclusion is appropriate under the circumstances. 18 Wright, Miller & Cooper, Federal Practice and Procedure: Juris.2d § 4405. The parties must show the factual predicates necessary to their assertion of preclusion.

The final preliminary issue involves this court's prior ruling on the motion to dismiss filed by Dr. Donnelly. In that decision, filed in May 2007, the court held that the remaining claims asserted by the Shahis were cognizable under the standard of review applicable to motions to dismiss filed under Rule 12(b)(6). *Assoc. of Haystack Property Owners, Inc. v. Sprague*, 145 Vt. 443, 446 (1985). For the reasons suggested above, the court also held that it was not appropriate to address the "potentially dispositive" issues relating to claim preclusion in the absence of a developed factual record. The court therefore instructed the parties to proceed with discovery on the preclusion issue, and to

file any motions for summary judgment on that issue alone before proceeding with discovery on the other claims in the case.

These instructions have not been followed in the motions that have been filed since the expiration of the stay. In particular, even though the parties have conducted very little or no discovery, Dr. Donnelly seeks rulings on the merits on all of the claims presented in the complaint by way of a motion for summary judgment filed three days after she filed her answer. Summary judgment rulings at this juncture would be inconsistent not only with this court's express prior instructions, but also with the principle that rulings on the merits as a matter of law are appropriate when, "*after an adequate time for discovery*, a party fails to make a showing sufficient to establish the existence of an element essential to his case and on which he has the burden of proof at trial." *Poplaski v. Lamphere*, 152 Vt. 251, 254–55 (1989) (emphasis added); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Although summary judgment need not await completion of discovery, it does require that the parties be provided with adequate time for discovery prior to the filing of a summary judgment motion. *Doe v. Doe*, 172 Vt. 533, 534 (2002) (mem.); *Bushey v. Allstate Ins. Co.*, 165 Vt. 399, 405 (1995); *Al Baraka (Bancorp) v. Hilweh*, 163 Vt. 148, 156 (1994). For these reasons, the court has interpreted the motion filed by Dr. Donnelly on October 27, 2008, as a motion seeking judgment on the pleadings under Rule 12(c).

The court now turns to the motions presently under advisement. Plaintiff Kaveh Shahi, Esq. represents himself pro se, and has also entered an appearance to represent his wife, plaintiff Leslie Shahi. Defendant Deidre Donnelly is represented by Steve Ellis, Esq.

Defendant's Motion for Judgment on the Pleadings

The first motion is Dr. Donnelly's motion for judgment on the pleadings. When reviewing motions filed under Rule 12(c), the issue before the court is whether the movant is entitled to judgment as a matter of law on the basis of the complaint and answer. *Fercenia v. Guiduli*, 2003 VT 50, ¶ 6, 175 Vt. 541 (mem.); *Sorge v. State*, 171 Vt. 171, 174 (2000). The court considers as true all of the factual allegations of the non-moving party, and also draws all reasonable inferences in favor of the non-moving party. *Id.*

The first question is whether either party is entitled to judgment on the pleadings on the issues relating to claim preclusion and/or issue preclusion. Since review under Rule 12(c) does not contemplate the factual record, a ruling at this time would not satisfy the instructions set forth by this court's prior decision: that the preclusion issues should be decided under the standard of review set forth by Rule 56, with the benefit of a factual record. In addition, review of the present motion is complicated by the parties' assumptions that the court would take judicial notice of the content of other case files and court opinions, and make its own review of the record. For these reasons, the motion is denied with respect to the preclusion issues. A motion on for partial summary judgment

on the preclusion issues (and only the preclusion issues) may be filed after the parties have conducted adequate discovery. *Doe*, 172 Vt. at 534.

The second question is whether the agency, conspiracy, and vicarious liability claims are appropriate for judgment on the pleadings. The complaint and answer show that the facts pertaining to these claims are disputed, and therefore not appropriate for rulings at this time. The development of the factual record through discovery will be necessary for the trial court to assess these claims. The motion is denied with respect to the agency, conspiracy, and vicarious liability claims.

The third question is whether the request for declaratory judgment was adequately stated in the complaint, or otherwise subject to judgment on the pleadings. In the court's view, the complaint provides Dr. Donnelly with fair notice of the claim and states upon information and belief an apparently disputed fact regarding the number of times that Mr. Madden was previously married; it is therefore inappropriate for ruling under Rule 12(c).

The final question is whether the allegations of fraudulent transfer are sufficient to support the claim under the heightened Rule 9 standards for pleading fraud. Rule 9(b) requires that "the circumstances constituting fraud . . . shall be stated with particularity," for the purpose of providing the defendant "with sufficient information to enable him or her to effectively prepare a response." *Silva v. Stevens*, 156 Vt. 94, 106 (1991). In this case, the allegations in the complaint are not so lacking in detail that they do not provide the defendant with fair notice of the claim. In addition, the pleadings do not show that it is "undisputed" that Dr. Donnelly and Mr. Madden had no fraudulent intent within the meaning of 9 V.S.A. § 2288 when they purchased the property. The question of whether the claim has factual support is better evaluated in light of a developed factual record, on motion for summary judgment.

For the foregoing reasons, Dr. Donnelly's motion for judgment on the pleadings is *denied*.

Plaintiff's Motion to Dismiss and/or to Strike Counterclaim

The next motion is the Shahis' motion to dismiss and/or strike the counterclaims, filed on November 7, 2008. The motion generally contends that the counterclaim allegations fail to state claims upon which relief can be granted, and that the allegations should be stricken because they contain immaterial content.

Review of the motion is complicated by two issues. The first is the Shahis' assumption that the court would take judicial notice of the contents of the prior dockets between the parties, and consider those facts when evaluating the motion. The court will not do so for the reasons discussed in more detail above, and because consideration of materials beyond the pleadings (such as evidence offered in other cases) would not be consistent with the standard of review required for motions filed pursuant to Rule 12(b)(6). Cf. *Condosta v. Grussing*, 144 Vt. 454, 459 (1984).

The second complication is that the counterclaims are not separated into separate counts, but instead are stated as a narrative of facts in which the specific causes of action asserted are mostly implied, rather than stated explicitly. This is normally permitted under the relaxed standards applicable to notice pleading. 5A Wright & Miller, Federal Practice and Procedure: Civil 3d § 1324. In this case, however, the court is concerned that the presentation of the counterclaims (in particular, the sheer number of separate causes of action potentially asserted within the counterclaim when the allegations stated therein are viewed as broadly as possible) have not put the plaintiffs on fair notice of the claims that are actually being asserted.

Put another way, after making its own review of the pleadings, the court itself is not sure what causes of action have been asserted in the counterclaim. The narrative can be construed as stating causes of action that are not referenced in Dr. Donnelly's memorandum filed on November 26, 2008 in opposition to the motion to dismiss. This creates at least the potential for argument down the road about what claims have been fairly raised. Rather than argue later, the court believes that it would be more appropriate and efficient to identify now the specific causes of action that have been asserted by way of counterclaim. Separate statements of each count will significantly improve the fairness of the notice offered by the pleading, will facilitate the clear presentation of the issues, and will not impose an undue burden on Dr. Donnelly. V.R.C.P. 10(b). The court will therefore require Dr. Donnelly to file an amended counterclaim that states each cause of action or claim in a separate count.

In the interest of economy, there is one counterclaim for malicious prosecution that has been stated clearly enough for the court to rule upon at this time under the Rule 12(b)(6) standard of review. See *Siliski v. Allstate Ins. Co.*, 174 Vt. 200, 203 (2002) (explaining that the elements of malicious prosecution require proof that a party instituted a proceeding against the individual without probable cause, that the party did so with malice, that the proceeding terminated in that individual's favor, and that the individual suffered damages as a result of that proceeding).

As recent appellate decisions have made clear, motions to dismiss are disfavored and rarely granted. *Bock v. Gold*, 2008 VT 81, ¶ 4; *Colby v. Umbrella, Inc.*, 2008 VT 20, ¶ 5; *Endres v. Endres*, 2006 VT 108, ¶ 4, 180 Vt. 640 (mem.). "A court should not dismiss a cause of action for failure to state a claim upon which relief may be granted 'unless it appears beyond doubt that there exist no circumstances or facts which the plaintiff could prove about the claim made in his complaint which would entitle him to relief.'" *Assoc. of Haystack Property Owners, Inc. v. Sprague*, 145 Vt. 443, 446 (1985) (quoting *Levinsky v. Diamond*, 140 Vt. 595, 600–01 (1982).

In this case, however, Dr. Donnelly contends in ¶ 48 of the counterclaims that the elements of malicious prosecution were met when the Shahis claimed in their original complaint, in this action, that Dr. Donnelly conspired to deprive them of access to the courts. The civil rights claim was later dismissed by order of the court in May 2007. It is clear as a matter of law that any claim for malicious prosecution based on this dismissal is not yet ripe, since causes of action for malicious prosecution "do not arise until the

termination of the original proceeding upon which it is based." *Anello v. Vinci*, 142 Vt. 583, 587 (1983). Thus, "[a] counterclaim cannot be maintained to recover damages for the malicious prosecution of the action in which the counterclaim is asserted." *Id.* For this reason, the motion to dismiss must be *granted* with respect to the counterclaim for malicious prosecution asserted in ¶ 48 of the counterclaims.

In all other respects, the motion is treated as seeking a more definite statement of the claims under Rules 12(e) and 10(b), and Dr. Donnelly is required to file an amended counterclaim within 10 days.

Defendant's Motion to Disqualify

The next motion is Dr. Donnelly's motion to disqualify plaintiff Kaveh Shahi, Esq., from representing himself in this matter while also appearing as counsel for his wife, plaintiff Leslie Shahi. Dr. Donnelly contends that Vermont Professional Conduct Rule 3.7 prohibits Attorney Shahi from representing another person in a case where he will be a necessary factual witness.

Rule 3.7 provides as follows:

> Rule 3.7. LAWYER AS WITNESS
>
> (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 or value of legal services rendered in the case; or
>
> (3) disqualification of the lawyer would work substantial hardship on the client.

Rule 3.7 represents a codification of the so-called "advocate-witness" rule, which provides generally that "counsel cannot maintain dual roles as advocate and witness in the same matter before the same tribunal." *Fognani v. Young*, 115 P.3d 1268, 1272 (Colo. 2005). The primary motivation underlying the rule is that the combination of the roles of witness and advocate may prejudice the opposing party, since the evidence in a case is normally presented by witnesses, and advocates are normally limited to explaining and commenting upon the evidence given by others. Rule 3.7, Reporter's Notes. "It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof." *Id.*

Motions to disqualify an opposing attorney present a "delicate balance" that "must be struck between two competing considerations: the prerogative of a party to proceed with counsel of its choice and the need to uphold ethical conduct in courts of

law." *Horen v. Toledo Pub. Sch. Dist. Bd. of Educ.*, 882 N.E.2d 14, 18 (Ohio Ct. App. 2007) (citation omitted). On one hand, courts must consider the effects of disqualification on the lawyer's client, and remain wary of the potential for abuse of the ethics rules for dilatory or tactical purposes. *Fognani*, 115 P.3d at 1272; see also Vermont Rules of Professional Conduct Notes on Scope (explaining that the purposes of the ethics rules can be subverted when the rules are "invoked by opposing parties as procedural weapons"). On the other hand, the court must ensure that the commingling of the roles of witness and advocate do not prejudice the opposing party, taking into consideration the "nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses." Vermont Professional Conduct Rule 3.7—Comment. In addition, it goes without saying that the court takes seriously its role in upholding the professional conduct rules in all of the proceedings that take place before it.

The threshold issue is determining whether Dr. Donnelly has met her burden of showing that Attorney Shahi is likely to be a necessary witness in the case. A "necessary witness" for purposes of the advocate-witness rule is one whose proposed testimony is relevant and material to the determination of the issues being litigated, and whose testimony is not cumulative. *Fognani*, 115 P.3d at 1273; *Beller v. Crow*, 742 N.W.2d 230, 234 (Neb. 2007). "Thus, determining whether the moving party has properly demonstrated that opposing counsel is 'likely to be a necessary witness' involves a consideration of the nature of the case, with emphasis on the subject of the lawyer's testimony, the weight the testimony might have in resolving disputed issues, and the availability of other witnesses or documentary evidence which might independently establish the relevant issues." *Fognani*, 115 P.3d at 1274 (citations omitted).

The central thrust of the allegations in the amended complaint is that Dr. Donnelly is liable for the judgment awarded in *Shahi II* under a variety of theories. The most important of these theories to the present decision is negligent entrustment, since the complaint alleges that Dr. Donnelly negligently financed, supported, and otherwise allowed Mr. Madden to develop the Densmore Hill property (in close proximity to the Shahis) even though she knew or should have known that Mr. Madden posed a continuing threat to the Shahis' safety and peaceful enjoyment of their property. Similarly, the agency theory alleges in part that Dr. Donnelly ratified Mr. Madden's past torts by placing him in charge of the construction project even though this caused Mr. Madden to be present on the Densmore Hill property and thereby pose additional threats to the Shahis' safety and peaceful enjoyment of the property. It is highly likely (though not certain) that testimony from Attorney Shahi would shed material and relevant light on the allegations that Mr. Madden's presence on the neighboring property represents a continuing threat to the safety and security of the Shahis. See *Freeman v. Vicchiarelli*, 827 F. Supp. 300, 302–03 (D.N.H. 1993) (explaining that Rule 3.7 does not require certainty as to an attorney's testimony, but rather requires only a likelihood that the attorney will testify regarding a specific matter).

Moreover, the complaint contains a number of allegations regarding Mr. Madden's character for which Attorney Shahi's personal knowledge appears to be

necessary. The court is aware that interrogatories and requests for production have been directed to Attorney Shahi concerning these allegations. In this context, it is important to emphasize (for the reasons discussed in more detail above) that Mr. Madden's character is not a subject that is susceptible to judicial notice.[1]

Furthermore, although the court has requested clarification of the specific counterclaims asserted in the action, it is apparent that their gravamen is the allegation that, ever since Dr. Donnelly and her husband began construction of a home on the Densmore Hill property, the Shahis have undertaken actions (particularly legal actions) designed to interfere with construction and "drive them away" from the property. In particular, Dr. Donnelly alleges that the Shahis have abused court processes for the ulterior purpose of driving her away from her property, slandered her title to the property, and intentionally inflicted emotional distress. Since many of the allegations involve statements that were specifically made by Attorney Shahi in various court documents and in court proceedings, it appears inescapable to the court that his testimony will be necessary to shed light on the circumstances surrounding the representations and court processes at issue.

In the larger picture, this case presents an ongoing dispute between two couples who are neighbors, and who have been feuding with each other for years about a variety of deeply personal issues. At this point, it simply does not appear that there is a reasonable way of extracting and separating Attorney Shahi's personal involvement in the underlying disputes from his role as an advocate. He actively participated in many of the events at the heart of this case. For this reason, it appears to the court that Attorney Shahi "will be providing substantial factual testimony that is central to claims in this proceeding." *Horen*, 882 N.E.2d at 19; see also *Beller*, 742 N.W.2d at 235 (holding that attorney was necessary witness where he actively participated in many of the relevant altercations between the parties). It also appears to the court that, given Attorney Shahi's personal involvement in the case, there is a significant possibility that his continued dual representation of himself and his wife will cause juror confusion, and therefore prejudice to the opposing party. See *Record v. Kempe*, 2007 VT 39, ¶¶ 23–25, 182 Vt. 17 (focusing on the prejudice caused to opposing party by failure to disqualify counsel). For these reasons, the court concludes that Attorney Shahi is a necessary witness in this case, and that his disqualification is required unless one of the exceptions in Rule 3.7(a)(1)–(3) applies.

First, the court is not persuaded that Attorney Shahi's testimony will relate only to uncontested matters. Rule 3.7(a)(1). As explained in more detail above, the mere fact that "uncontested" evidence was presented during the *Shahi II* trial does not mean that those facts are incontrovertibly established for purposes of the present litigation.

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[1] In addition, the question of whether or not Mr. Madden's presence on the neighboring property represents a continuing threat to the Shahis' safety and security cannot be judicially noticed, regardless of how the reported appellate decision in *Shahi v. Madden* characterized the evidence offered during the *Shahi II* trial. Even if liability or character evidence was "uncontested" during that trial, the question of a continuing threat is highly contested in the current proceeding, thus making judicial notice inappropriate. V.R.E. 201.

Moreover, the allegations in the counterclaims (especially those relating to the Shahis' motivations in initiating particular court processes, or in making particular representations) appear to be highly contested. The exception in Rule 3.7(a)(1) for testimony related to uncontested matters does not apply in this case.

Second, there is no suggestion that Attorney Shahi's testimony relates only "to the nature or value of legal services rendered in the case." Rule 3.7(a)(2).

Third, the court is not persuaded that the disqualification of Attorney Shahi from representing his spouse in this litigation will work a substantial hardship on the client. Rule 3.7(a)(3). Disqualification will have little practical effect in the course of the litigation (other than clarifying the roles of the trial participants for the jury) because Attorney Shahi will continue representing himself as a litigant in this matter, and will probably continue to take a lead role in discovery matters, pre-trial motions, and trial practice. *Horen*, 882 N.E.2d at 20. In addition, given the early stage of the litigation, there will be plenty of time for a new attorney (perhaps another counsel within Attorney Shahi's firm) to become familiar with the facts of the case. *Id.* Moreover, given Attorney Shahi's central participation in many of the events at issue in this case, it should have been reasonably foreseeable prior to the filing of the complaint that his participation as an advocate would be barred by the attorney-witness rule. *Beller*, 742 N.W.2d at 236.

The court is also not persuaded that decision on the disqualification motion should await trial, or that disqualification during pre-trial discovery proceedings is not appropriate under the rule. To the extent that *Record v. Kempe* sheds any light on the issue of disqualification as a matter of Vermont law, it suggests that the issue should not wait until the eve of trial, but rather should be addressed as early as possible.[2] 2007 VT 39, ¶ 24. A decision at this juncture additionally reduces the hardships associated with new counsel becoming familiar with the case shortly before trial.

The court is aware of the language in *Cooke v. AT&T Corp.*, 2006 WL 1447415 (S.D. Ohio May 23, 2006), suggesting that disqualification of an attorney from representing both himself and his spouse in litigation represents a "wooden and unquestioning" application of the former (and similar) disciplinary rules applicable to attorneys, and further suggesting that it would be "shocking" for the disciplinary rules to be interpreted as prohibiting an attorney from representing his spouse. However, the facts in *Cooke* were that the attorney and his spouse brought claims against a telephone company for invasion of privacy based on telephone solicitations they received from the company during the evening. In other words, the circumstances in *Cooke* did not involve the attorney's personal involvement and active participation in the feud that forms the heart of the case. Cf. *Horen*, 882 N.E.2d at 19–20 (disqualifying attorney from representing family where she was involved in disputes at issue). In addition, there is nothing in the text of Rule 3.7 or its accompanying notes that suggest that the professional conduct rule does not apply when family relationships are at issue. For these

[2] In a related note, the court is not persuaded that the issue was "waived" by the fact that Dr. Donnelly did not move for pre-trial disqualification in *Shahi II*.

reasons, the court concludes that disqualification will not cause Ms. Shahi substantial hardship.

The court has considered the whole circumstances presented by this case. In the end, it concludes that Attorney Shahi's representation of his wife in this litigation is not consistent with Rule 3.7. Having reached this conclusion, the court feels that it is important to uphold the professional conduct rules in this proceeding by requiring Attorney Shahi to withdraw as counsel for Ms. Shahi.

Accordingly, Attorney Shahi shall file a notice of withdrawal as counsel of record for Leslie Shahi within 30 days. Ms. Shahi shall, within the same 30 days, either appear pro se or arrange for other counsel to appear on her behalf.

Rule 3.7 does not prevent Attorney Shahi from representing himself. See *Horen*, 882 N.E.2d at 19 (explaining that "an attorney may always represent himself in his own litigation even if he must testify as to the substantive facts of the case"). Attorney Shahi may continue to represent himself, and to participate in all of the proceedings in this case in that capacity.

Plaintiff's Motion for a Protective Order

The next motion under advisement is the Shahis' Motion for a Protective Order, filed December 8th, 2008. The motion seeks protection from answering written discovery requests directed to the Shahis for the reason that the discovery is prohibited by earlier orders of the court, and/or is in bad faith. In particular, the Shahis allege that Dr. Donnelly's filing of the motion for summary judgment (which this court treated as a motion for judgment on the pleadings) is inconsistent with filing discovery against the opposing party.

The motion is mostly moot at this point, but the court addresses the underlying issue because it is likely to recur again. It is true that the May 2007 court order contemplated that discovery would occur first on the preclusion issues, followed by partial summary judgment rulings. However, there is nothing in that ruling that requires further discovery on the merits of the claims in the complaint and counterclaim to await the court's ruling on partial summary judgment.

The court therefore encourages the parties to contemplate in their discovery schedule that additional discovery on the underlying issues (especially issues not affected by the partial summary judgment rulings) will continue while the motions for partial summary judgment are under advisement. The motion for a protective order is *denied*.

Defendant's Motion for Sanctions

Dr. Donnelly seeks sanctions against the Shahis based upon their failure to respond to written discovery. The court has determined that sanctions are not appropriate at this time, since the Shahis sought court protection from the discovery requests, and

since the court entered a stay of all proceedings in this matter until it could resolve the numerous pending motions addressed in this opinion. Many of the motions decided in this opinion could have affected the scope of discovery and/or the party or attorney responsible for responding to the requests. The motion for sanctions is *denied.*

Plaintiff's Motion to Strike Defendants' Memorandum or Leave to Respond Further

Plaintiffs object to the court's consideration of the memorandum filed by Dr. Donnelly on December 26th, 2008, in further opposition to the motion seeking dismissal of the counterclaims. Since the court's decision on the motion (discussed in more detail above) was not influenced whatsoever by which party happened to have the "last word" on the matters involved in the decision, the present motion is *denied as moot.*

Defendant's Motion to Amend Counterclaims

Dr. Donnelly seeks to amend the counterclaims to add a claim for abuse of process against the Shahis based on post-judgment discovery proceedings in *Shahi II* that have taken place since the filing of the answer to the amended complaint on October 24, 2008. Since leave to amend a pleading "shall be freely given when justice so requires," V.R.C.P. 15(a), and since the court discerns no prejudice in light of the court's foregoing ruling that another amended counterclaim must be filed, the motion is *granted.*

Conclusion and Housekeeping Matters

On March 5th, 2009, the court enjoined both parties from filing further pleadings relating to the motions that have been ruled upon in this decision, from conducting discovery, and from filing new motions relating to discovery issues. The stay is now lifted in all respects.

The court anticipates that Dr. Donnelly will file an amended counterclaim within 10 days from the issuance of this order. The court then expects the parties to file an ADR/discovery stipulation within 30 days from the issuance of this order. The discovery order should very clearly set forth the time for (1) discovery on the preclusion issues, (2) the filing of a motion for partial summary judgment on the preclusion issues, (3) additional discovery, and (4) the filing of summary judgment motions on any other issues in the case.

ORDER

For the foregoing reasons, the court makes the following rulings:

(1) Defendant's Motion for Judgment on the Pleadings (MPRs ## 6 & 14), filed October 27, 2008, is ***denied***;

(2) Plaintiffs' Motion to Dismiss and/or Strike Counterclaims (MPR #16), filed November 7, 2008, is ***granted*** as to the counterclaim for malicious prosecution stated in ¶ 48 of the amended counterclaim. In all other respects, the motion is treated as seeking a more definite statement of the counterclaims under Rules 12(e) and 10(b), and Ms. Donnelly is required to file an amended counterclaim within 10 days of the date of issuance of this order.

(3) Defendant's Motion to Disqualify Kaveh Shahi from Acting as Counsel in this Matter (MPR #10), filed November 18, 2008, is ***granted***. Attorney Shahi shall file a notice of withdrawal as counsel of record for plaintiff Leslie Shahi within 30 days. Ms. Shahi shall, within the same 30 days, either appear pro se or arrange for other counsel to appear on her behalf.

(4) Plaintiffs' Motion for a Protective Order (MPR #11), filed December 8, 2008, is ***denied***.

(5) Defendant's Cross-Motion for Sanctions (MPR #12), filed December 15, 2008, is ***denied***.

(6) Plaintiff's Motion to Strike Defendant's Memorandum (MPR #13), and Motion for Leave to Respond Further (MPR #17), both filed on January 6, 2009, are ***denied as moot***;

(7) Defendant's Motion to Amend Counterclaims (MPR #15), filed on January 13, 2009, is ***granted***.

(8) The parties shall file an ADR/discovery stipulation within 30 days from the issuance of this order.

(9) The March 5, 2009 stay on discovery, and the filing of any additional motions, is now lifted.

Dated at Woodstock, Vermont this 7 day of May, 2009.

Hon. Harold E. Eaton, Jr.
Superior Court Judge

FILED

MAY - 7 2009

WINDSOR COUNTY CLERK