NDNY FEDERAL COURT BAR ASSOCIATION, INC.
www.ndnyfcba.org

NOTICE OF CLE PROGRAM

The NDNY-FCBA's CLE Committee

Presents

"The Ethical Representation of Clients and What Happens When the Relationship Must End**"**

Friday, February 11, 2022
10:00 a.m. – 11:15 a.m.

(R.S.V.P. by February 4, 2022)

Because of COVID-19 related restrictions, this CLE will be offered in a virtual setting, via Zoom. A link for the Zoom CLE will be provided to registered attendees.

This program will discuss the ethical rules that govern conflicts that often arise during the representation of clients in New York. The presenters will inform on the obligations of lawyers to examine conflicts when entering into a client relationship, what to do if a conflict arises during the relationship, when it is necessary to terminate a relationship and how to appropriately do so.

Presenters:

Hon. Thérèse Wiley Dancks
United States Magistrate Judge, Northern District of New York

Suzanne O. Galbato, Esq.
General Counsel
Bond, Schoeneck & King, PLLC

Kristin M. Nicoll, Esq.
Director of Conflicts and Legal Ethics
Simpson Thacher & Bartlett LLP

Moderator:

Suzanne Messer, Esq.
Bond, Schoeneck & King, PLLC

Agenda

10:00-10:05	Introduction and Overview of Program
10:05-10:45	Discussion of Conflicts Principles (Kristin Nicoll)
10:45-11:15	Discussion of the Termination of a Client Relationship (Judge Dancks and Suzanne Galbato)

The Northern District of New York Federal Court Bar Association
has been certified by the New York State Continuing Legal Education Board
as an Accredited Provider of continuing legal education in the State of New York.
"The Ethical Representation of Clients and What Happens When the Relationship Must End"
has been approved in accordance with the requirements of
the New York State Continuing Legal Education Board for
1.5 credit towards the **Ethics** requirement.*

This program is appropriate for newly admitted and experienced attorneys.

This is a single program. No partial credit will be awarded.

This program is complimentary to all Northern District of New York
Federal Court Bar Association Members.

1987 WL 28707
Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

Arthur BOYLE, as Administrator of the Estate of Cecelia Zyjewski, Deceased, Plaintiff,
v.
Emanual REVICI, M.D. and Institute of Applied Biology, Inc., Defendants.

No. 83 Civ. 8997 (MJL).
|
Dec. 16, 1987.

Attorneys and Law Firms

Abady & Jaffe, New York City by Richard A. Jaffe, for defendants.

OPINION AND ORDER

LOWE, District Judge.

***1** Abady & Jaffe, attorneys for the defendants, moves for leave to withdraw as counsel. The plaintiff does not oppose the motion. The defendants sought an adjournment of the motion, returnable October 2, 1987, pending an agreement that would make the motion unnecessary. By letter dated December 4, 1987, Matthew G. Dineen, an attorney associated with Abady & Jaffe, informed this Court that no agreement had been arranged or was likely to be arranged. The motion is therefore ripe for decision at this time.

Rule 3(c) of the General Rules of this Court provides that an attorney may be permitted to withdraw from a case "upon a showing by affidavit of satisfactory reasons." Abady & Jaffe, in its affidavit, states that it requests to withdraw because the defendants have owed them $25,000 for several months. They also state that, even after repeated requests, the defendants have not been able to assure them that the $25,000 or amounts due for future work will be paid at any time. Affidavit of Richard A. Jaffe, ¶¶ 3 and 4.

Disciplinary Rule 2–110(C)(1)(f) of the Code of Professional Responsibility provides that an attorney may seek leave to withdraw when a client "deliberately disregards an agreement or obligation to the lawyer as to expenses or fees." We agree with Abady & Jaffe that the defendants have deliberately disregarded their obligation to pay Abady & Jaffe's fees. We, therefore, grant Abady & Jaffe's motion to withdraw as counsel.

We place this case on the suspense calendar for thirty days, so that the defendants may obtain substitute counsel. [1]

It Is So Ordered.

All Citations

Not Reported in F.Supp., 1987 WL 28707

Footnotes

1 The corporate defendant, Institute of Applied Biology, Inc. must obtain substitute counsel. Corporations may not appear *pro se* in federal court. *Jones v. Niagra Frontier Transp. Authority,* 722 F.2d 20, 22 (2d Cir.1983).

528 F.2d 1384
United States Court of Appeals,
Second Circuit.

CINEMA 5 LTD., Plaintiff-Appellant,
v.
CINERAMA, INC., et al., Defendants-Appellees.

No. 105, Docket 75—7185.
|
Argued Oct. 23, 1975.
|
Decided Jan. 27, 1976.

Synopsis

New York theater operators brought antitrust action against motion picture distributor and others. The United States District Court for the Southern District of New York, Charles L. Brieant, Jr., J., disqualified plaintiff's counsel from further representation of plaintiff in the action, and plaintiff appealed. The Court of Appeals, Van Graafeiland, Circuit Judge, held that although the 'substantial relationship test' is applied in determining whether a lawyer may accept employment against a former client, such test is not sufficient for determining propriety of employment against an existing client, that in the latter case, adverse representation is prima facie improper, that where upstate law firm of which plaintiff's counsel was also a member was representing the present defendant in an antitrust suit brought against it by upstate theater operators, counsel was required to be disqualified and that because of peculiarly close relationship existing among legal partners, his partners in New York City firm were disqualified as well.

Affirmed.

Procedural Posture(s): On Appeal.

West Headnotes (9)

[1] **Attorneys and Legal Services** Current and Former Clients

The "substantial relationship" test is customarily applied in determining whether a lawyer may accept employment against a former client.

14 Cases that cite this headnote

[2] **Attorneys and Legal Services** Current and Former Clients

Where a lawyer accepts employment against an existing client, propriety of his conduct must be measured not so much against similarities in litigation as against the duty of undivided loyalty which an attorney owes to each of his clients.

77 Cases that cite this headnote

[3] **Attorneys and Legal Services** Fiduciary Duties

A lawyer's duty to his client is that of a fiduciary or trustee.

10 Cases that cite this headnote

[4] **Attorneys and Legal Services** Standards of professional conduct; enforcement; discipline

Canons of the American Bar Association's Code of Professional Responsibility constitute appropriate guidelines for the professional conduct of New York lawyers with regard to proceedings both in state courts and federal court sitting in New York.

26 Cases that cite this headnote

[5] **Attorneys and Legal Services** Disclosure, Waiver, or Consent

It is questionable conduct for an attorney to participate in any lawsuit against his own client without the knowledge and consent of all concerned.

11 Cases that cite this headnote

[6] **Attorneys and Legal Services** Conflicts as grounds for disqualification

Attorneys and Legal Services Standard of proof; heavy burden

The "substantial relationship" test does not set a sufficiently high standard by which disqualification is to be determined where a lawyer undertakes employment against an existing client since such test may properly be applied only where the representation of a former client has been terminated and the parameters of such relationship have been fixed; where the relationship is a continuing one, adverse representation is prima facie improper and the attorney must be prepared to show, at the very least, that there will be no actual or apparent conflict in loyalties or diminution in vigor of his representation.

198 Cases that cite this headnote

[7] **Attorneys and Legal Services** Partners and associates; law firms

Counsel, who was member of law firm which represented motion picture distributor in antitrust suit brought against distributor by upstate New York theater operators and who was also member of law firm which was representing New York City theater operators in their antitrust action against the distributor and whose offer to withdraw his representation in the former action was not accepted, was required to be disqualified from further representing the New York theater operators in their action; because of peculiarly close relationship among the partners in the New York City firm, such partners were disqualified as well.

64 Cases that cite this headnote

[8] **Attorneys and Legal Services** Conflicts as grounds for disqualification

Attorney was disqualified from undertaking litigation against existing client, notwithstanding that such participation was minimal or that the dual representation came about inadvertently and unknowingly.

25 Cases that cite this headnote

[9] **Attorneys and Legal Services** Conflicts of Interest

An attorney must avoid not only the fact, but even the appearance, of representing conflicting interest.

9 Cases that cite this headnote

Attorneys and Law Firms

***1385** Donald J. Cohn, New York City (Webster, Sheffield, Fleischmann, Hitchcock & Brookfield, New York City, James V. Kearney, New York City, on the brief), for plaintiff-appellant.

Janet P. Kane, New York City (Phillips, Nizer, Benjamin, Krim & Ballon, New York City, Simon Rose, David G. Richenthal, New York City, on the brief), for defendants-appellees.

Before MOORE, FEINBERG and VAN GRAAFEILAND, Circuit Judges.

Opinion

VAN GRAAFEILAND, Circuit Judge:

This appeal from an order granting defendants' motion to disqualify plaintiff's counsel presents a somewhat unusual set of facts. Counsel has been disqualified from further representation of plaintiff because a partner in this New York City law firm is also a partner in a Buffalo firm which is presently representing the defendant Cinerama, Inc. in other litigation of a somewhat similar nature. Although we agree with the district court that there was no actual wrongdoing and intend no criticism of the lawyers involved, we find no abuse of the district court's discretion, Hull v. Celanese Corp., 513 F.2d 568, 571 (2d Cir. 1975), and so affirm.

There is little or no dispute as to the facts, most of them having been stipulated. Attorney Manly Fleischmann is a partner in Jaeckle, Fleischmann and Mugel of Buffalo and in Webster, Sheffield, Fleischmann, Hitchcock and Brookfield of New York City. He divides his time between the two offices. Cinerama is a distributor of motion pictures and the operator of several large theater chains. In January 1972 the Jaeckle firm was retained to represent Cinerama and several other defendants in an action brought in the United States District

Court for the Western District of New York. Plaintiffs in that suit are local upstate theater operators who allege anti-trust violations resulting from discriminatory and monopolistic licensing and distribution of motion pictures in the Rochester area. A similar action involving allegedly illegal distribution in the Buffalo area was commenced in March 1974, and the Jaeckle office represents the interests of Cinerama in this action also. Both suits are presently pending in the Western District.

The instant action, brought in the Southern District of New York in August 1974, alleges a conspiracy among the defendants to acquire control of plaintiff corporation through stock acquisitions, with the intention of creating a monopoly and restraining competition in New York City's first-run motion picture theater market. Judge Brieant found that there was sufficient relationship between the two law firms and the two controversies to inhibit future confidential communications between Cinerama and its attorneys and that disqualification was required to avoid even the appearance of professional impropriety, citing as authority our decision in General Motors Corp. v. City of New York, 501 F.2d 639 (2d Cir. 1974).

Appellant's counsel strongly dispute these findings. They say that they should not be disqualified unless the relationship between the controversies is substantial, and they contend there is nothing substantial in the relationship between an upstate New York conspiracy to deprive local theater operators of access to films and an attempted corporate take-over in New York City.

***1386** **[1]** **[2]** The 'substantial relationship' test is indeed the one that we have customarily applied in determining whether a lawyer may accept employment against a former client. International Electronics Corp. v. Flanzer, 527 F.2d 1288, 1291 (2d Cir. 1975); Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751 (2d Cir. 1975); Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562 (2d Cir. 1973). However, in this case, suit is not against a former client, but an existing one. One firm in which attorney Fleischmann is a partner is suing an actively represented client of another firm in which attorney Fleischmann is a partner. The propriety of this conduct must be measured not so much against the similarities in litigation, as against the duty of undivided loyalty which an attorney owes to each of his clients.

[3] A lawyer's duty to his client is that of a fiduciary or trustee. Hafter v. Farkas, 498 F.2d 587, 589 (2d Cir. 1974); Spector v. Mermelstein,361 F.Supp. 30, 38 (S.D.N.Y.1972), modified on other grnds., 485 F.2d 474 (2d Cir. 1973); Wise, Legal Ethics 256 (2d ed.). When Cinerama retained Mr. Fleischmann as its attorney in the Western District litigation, it was entitled to feel that at least until that litigation was at an end, it had his undivided loyalty as its advocate and champion, Grievance Committee v. Rottner, 152 Conn. 59, 65, 203 A.2d 82 (1964), and could rely upon his 'undivided allegiance and faithful, devoted service.' Von Moltke v. Gillies, 332 U.S. 708, 725, 68 S.Ct. 316, 324, 92 L.Ed. 309 (1948). Because 'no man can serve two masters', Matthew 6:24; In re W. T. Byrns, Inc., 260 F.Supp. 442, 445 (E.D.Va.1966); Woods v. City Nat'l Bank and Trust Co., 312 U.S. 262, 268, 61 S.Ct. 493, 85 L.Ed. 820 (1941), it had the right to expect also that he would 'accept no retainer to do anything that might be adverse to his client's interests.' Loew v. Gillespie, 90 Misc. 616, 619, 153 N.Y.S. 830, 832 (1915), aff'd, 173 App.Div. 889, 157 N.Y.S. 1133 (1st Dep't 1916). Needless to say, when Mr. Fleischmann and his New York City partners undertook to represent Cinema 5, Ltd., they owed it the same fiduciary duty of undivided loyalty and allegiance.

[4] Ethical Considerations 5—1 and 5—14 of the American Bar Association's Code of Professional Responsibility provide that the professional judgment of a lawyer must be exercised solely for the benefit of his client, free of compromising influences and loyalties, and this precludes his acceptance of employment that will adversely affect his judgment or dilute his loyalty. The Code has been adopted by the New York State Bar Association, and its canons are recognized by both Federal and State Courts as appropriate guidelines for the professional conduct of New York lawyers. Hull v. Celanese Corp., supra, 513 F.2d at 571 n. 12.

[5] Under the Code, the lawyer who would sue his own client, asserting in justification the lack of 'substantial relationship' between the litigation and the work he has undertaken to perform for that client, is leaning on a slender reed indeed. Putting it as mildly as we can, we think it would be questionable conduct for an attorney to participate in any lawsuit against his own client without the knowledge and consent of all concerned. This appears to be the opinion of the foremost writers in the field, see Wise, supra, at 272; Drinker, Legal Ethics 112, 116, and it is the holding

of the New York courts. In Matter of Kelly, 23 N.Y.2d 368, 376, 296 N.Y.S.2d 937, 244 N.E.2d 456 (1968), New York's highest court said that 'with rare and conditional exceptions, the lawyer may not place himself in a position where a conflicting interest may, even inadvertently, affect, or give the appearance of affecting, the obligations of the professional relationship.' Nor is New York alone in this view. In Grievance Committee v. Rottner, supra, 152 Conn. at 65, 203 A.2d 82, Connecticut's highest court held that the maintenance of public confidence in the bar requires an attorney to decline employment adverse to his client, even though the nature of such employment is ***1387** wholly unrelated to that of his existing representation.

[6] [7] [8] [9] Whether such adverse representation, without more, requires disqualification in every case, is a matter we need not now decide. We do hold, however, that the 'substantial relationship' test does not set a sufficiently high standard by which the necessity for disqualification should be determined. That test may properly be applied only where the representation of a former client has been terminated and the parameters of such relationship have been fixed. Where the relationship is a continuing one, adverse representation is prima facie improper, Matter of Kelly, supra, 23 N.Y.2d at 376, and the attorney must be prepared to show, at the very least, that there will be no actual or apparent conflict in loyalties or diminution in the vigor of his representation. We think that appellants have failed to meet this heavy burden and that, so long as Mr. Fleischmann and his Buffalo partners continue to represent Cinerama, he and his New York City partners should not represent Cinema 5, Ltd. in this litigation.

Because he is a partner in the Jaeckle firm, Mr. Fleischmann owes the duty of undivided loyalty to that firm's client, Cinerama. Because he is a partner in the Webster firm, he owes the same duty to Cinema 5, Ltd. It can hardly be disputed that there is at least the appearance of impropriety where half his time is spent with partners who are defending Cinerama in multi-million dollar litigation, while the other half is spent with partners who are suing Cinerama in a lawsuit of equal substance. [1]

Because 'an attorney must avoid not only the fact, but even the appearance, of representing conflicting interests,' Edelman v. Levy, 42 App.Div.2d 758, 346 N.Y.S.2d 347 (2d Dept. 1973)(mem.), this requires his disqualification. Hull v. Celanese Corp., supra, 513 F.2d at 571; General Motors v. City of New York, supra, 501 F.2d at 649; W. E. Bassett Co. v. H. C. Cook Co., 201 F.Supp. 821, 825 (D.Conn.), aff'd, 302 F.2d 268 (2d Cir. 1962) (per curiam). Moreover, because of the peculiarly close relationship existing among legal partners, if Mr. Fleischmann is disqualified, his partners at the Webster firm are disqualified as well. Laskey Bros., Inc. v. Warner Bros. Pictures, Inc., 224 F.2d 824, 826 (2d Cir. 1955), cert. denied, 350 U.S. 932, 76 S.Ct. 300, 100 L.Ed. 819 (1956); American Can Co. v. Citrus Feed Co., 436 F.2d 1125, 1128 (5th Cir. 1971); Estep v. Johnson, 383 F.Supp. 1323, 1325 (D.Conn.1974).

Nothing that we have heretofore said is intended as criticism of the character and professional integrity of Mr. Fleischmann and his partners. We are convinced that the dual representation came about inadvertently and unknowingly, and we are in complete accord with Judge Brieant's finding that there has been no actual wrongdoing. Furthermore, the record shows that after learning of the conflict which had developed, the Jaeckle firm, through Mr. Fleischmann, offered to withdraw its representation of Cinerama in the Western District actions. However, that offer was not accepted, and Mr. Fleishmann continued, albeit reluctantly, to have one foot in each camp.

Under the circumstances, Judge Brieant's order of disqualification cannot be construed as an abuse of his discretion. We therefore affirm.

All Citations

528 F.2d 1384, 1976-1 Trade Cases P 60,698

Footnotes

1 Mr. Fleischmann's personal participation in the Buffalo litigation was minimal, and we are confident that he would make every effort to disassociate himself from both lawsuits and would not divulge any information that came to him concerning either. However, we cannot impart this same confidence to the public by court order.

End of Document

459 F.Supp.2d 159
United States District Court,
E.D. New York.

Victor J. DeFAZIO, Jack Finkelstein, James Collins, and Henry Gebhard, Plaintiffs,
v.
Kevin WALLIS; Robert Aquino; Ryan P. Greenberg; Thomas Ryan; Bryan Zwolack; Capital Health Management, Inc.; Meridian Ambulance Group, LLC; Meridian Behavioral Sciences, LLP; Meridian Group Holdings, LLC; Meridian Behavioral Health Sciences, LLP; Meridian MSO, Inc.; Meridian MSO, LLC; National Health Car Corp; Phoenix Transport Corp. d/b/a Emergency Ambulance Service; University Care Network, LLC; Defendants "John Does" and "Jane Roes" "1" Through "15", The Manes "John Doe" and "Jane Roe" Being Fictitious, the Identity of Said Defendants Not Being Presently Known to the Plaintiffs; and/or Others Presently Unknown to the Plaintiff, Jointly or Severally, Doing Business Under the Trade Styles Affordable Ambulance, Capital Management, Med Transit, Meridian, Meridian Behavioral Health Services, Meridian Health Services, National Ems, National Management Group, Phoenix Ambulance, Physicians Health Services, Presidential Emergency Medical Service and University Health Plans, Defendants.

No. 05–CV–5712(ADS)(ARL).
|
Oct. 17, 2006.

Synopsis

Background: Investors brought action against numerous companies and officers, stemming from alleged illegal investment scheme. Officer appealed order of magistrate judge denying motion to disqualify investors' counsel.

[Holding:] The District Court, Spatt, J., held that counsel had access to officer's confidential information through prior representation.

Reversed; motion granted.

West Headnotes (11)

[1] **United States Magistrate Judges** Clear error, manifest error, or contrary to law in general

Magistrate judge's finding is "clearly erroneous" if reviewing court on entire evidence is left with definite and firm conviction that mistake has been committed. Fed.Rules Civ.Proc.Rule 72(a), 28 U.S.C.A.

53 Cases that cite this headnote

[2] **United States Magistrate Judges** Clear error, manifest error, or contrary to law in general

Magistrate judge's order is "contrary to law" when it fails to apply or misapplies relevant statutes, case law, or rules of procedure. Fed.Rules Civ.Proc.Rule 72(a), 28 U.S.C.A.

92 Cases that cite this headnote

[3] **Attorneys and Legal Services** Relation of remedy to client's right to counsel of choice

In exercising its power to disqualify counsel, court must attempt to balance client's right freely to choose his counsel against need to maintain highest standard of profession.

[4] **Attorneys and Legal Services** Discretion of court

Whether or not disqualification of counsel is warranted is subject to court's discretion.

1 Cases that cite this headnote

[5] **Attorneys and Legal Services** Tactical use of remedy; harassment

Attorneys and Legal Services Relation of remedy to client's right to counsel of choice

Given immediate adverse effect on client by separating him from counsel of his choice, and that disqualification motions are often interposed for tactical reasons and inevitably cause delay, court must demonstrate reluctance in granting motions to disqualify counsel.

2 Cases that cite this headnote

[6] **Attorneys and Legal Services** Confidentiality

Attorneys and Legal Services Multiple clients; dual representation

As matter of professional responsibility, attorney owes duty of loyalty to his client not to divulge confidential communications and not to accept representation of person whose interests are opposed to client.

[7] **Attorneys and Legal Services** Standards of professional conduct in general

Not every violation of disciplinary rule will necessarily lead to attorney disqualification; rather, disqualification is warranted only where attorney's conduct tends to taint underlying trial.

[8] **Attorneys and Legal Services** Current and Former Clients

Attorneys and Legal Services Conflicts as grounds for disqualification

Risk of taint, as may warrant disqualification, is encountered when attorney might benefit client in lawsuit by using confidential information about adverse party obtained through prior representation of that party.

2 Cases that cite this headnote

[9] **Attorneys and Legal Services** Current and Former Clients

Attorneys and Legal Services Conflicts as grounds for disqualification

To determine that disqualification is warranted in cases of alleged successive representation, court must be satisfied that: (1) moving party is former client of adverse party's counsel; (2) there is substantial relationship between subject matter of counsel's prior representation of moving party and issues in present lawsuit; and (3) attorney whose disqualification is sought had access to, or was likely to have had access to, relevant privileged information in course of his prior representation of client.

5 Cases that cite this headnote

[10] **Attorneys and Legal Services** Presumptions, inferences, and burden of proof in general

In cases where same individual lawyer participated in prior and current representation, movant for disqualification is not required to make specific showing that confidences were passed to counsel; instead, movant is entitled to benefit of irrebuttable presumption that confidences were shared.

5 Cases that cite this headnote

[11] **Attorneys and Legal Services** Particular Cases and Contexts

Attorneys and Legal Services Presumptions, inferences, and burden of proof in general

Counsel had access to corporate officer's confidential information through his prior representation, for purposes of disqualifying counsel from representing investors in current action against officer and related entities, stemming from alleged illegal investment scheme; although officer purportedly intended for counsel to communicate information at issue to third parties, officer was entitled to irrebuttable presumption of confidentiality.

4 Cases that cite this headnote

Attorneys and Law Firms

***161** Dinerstein & Lesser, P.C., by Robert J. Dinerstein, Esq., of Counsel, Commack, NY, for the Plaintiffs.

Law Offices of Edward Weissman, by Edward Weissman, Esq., of Counsel, New York, NY, for the Defendants Kevin Wallis and Ryan P. Greenberg.

Law Offices of Thomas F. Liotti, by Thomas F. Liotti, Esq., of Counsel, Garden City, NY, for the Defendants Robert J. Aquino and Capital Health Management, Inc.

Law Offices of Anthony A. Capetola, by Donald T. Rollock, Esq., of Counsel, Willston Park, NY, Co–Counsel for the Defendant Thomas Ryan.

Pezold, Smith, Hirschmann & Selvaggio, LLC, by George C. Pezold, Esq., of Counsel, Huntington, NY, for the Defendant Bryan Zwolack.

The Law Office of Bennett D. Krasner, by Bennett D. Krasner, Esq., of Counsel, Atlantic Beach, NY, for the Defendant Phoenix Transport Corp.

No Appearance: The Defendants Meridian Ambulance Group, LLC, Meridian Behavioral Sciences, LLP, Meridian Group Holdings, LLC, Meridian Behavioral Health Sciences, LLP, Meridian MSO, Inc., Meridian MSO, LLC, National Health Care Corp., and University Care Network, LLC.

MEMORANDUM OF DECISION AND ORDER

SPATT, District Judge.

On December 8, 2005, Victor DeFazio, Jack Finkelstein, James Collins, and Henry Gebhard (collectively, the "plaintiffs") commenced this action against the numerous defendants alleging, among other things, violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* ("RICO"). Presently before the Court is an appeal by the defendant Kevin Wallis ("Wallis") of an ***162** order of United States Magistrate Judge Arlene R. Lindsay that denied Wallis' motion to disqualify the plaintiffs' counsel.

I. BACKGROUND

It is difficult to discern from the complaint specifically what conduct the defendants allegedly engaged in that gave rise to this lawsuit. Although the complaint contains 238 paragraphs and is 32 pages long, it contains few factual allegations of misconduct. The plaintiffs assert causes of action for violations of Sections 1962(a), (b), and (c) of the RICO statute, and state law causes of action for breach of fiduciary obligation, common law tort, "conversion/theft/embezzlement" and unjust enrichment.

The complaint does contain allegations that the defendants made unspecified misrepresentations to the plaintiffs with the purpose of inducing them to invest in certain business entities, some of whom are named as defendants in this case. Also, at some point some of the defendants allegedly forged the signatures of the plaintiffs DeFazio, Finkelstein, and Collins on an application for a line of credit from the North Fork Bank, and misrepresented on that application that these plaintiffs were, among other things, officers and directors of the company applying for the loan. Finally, it is alleged that the defendants leased certain business equipment from third parties that they did not return when they terminated their operations. When the defendants did not return the leased equipment, the plaintiffs became liable as guarantors on the leases.

On January 6, 2006, the defendant Kevin Wallis ("Wallis") made a motion to disqualify the plaintiffs' counsel, Dinerstein & Lesser, P.C. and Robert J. Dinerstein, Esq. ("Dinerstein"), from representing the plaintiffs in this action based on allegations that Dinerstein previously represented Wallis and a small business with which Wallis was affiliated as an officer, and that during the course of that representation Wallis shared confidences with Dinerstein that can be used to Wallis' detriment in this lawsuit.

The submissions of the parties with respect to the motion to disqualify revealed that a hearing was necessary to resolve certain factual disputes related to Dinerstein's alleged representation of the Wallis. Accordingly, on March 13, 2006, the Court referred Wallis' motion to Judge Lindsay for the purpose of resolving all questions of fact and law relating to the motion to disqualify, and to issue an order determining the motion pursuant to Rule 72(a) of the Federal Rules of Civil Procedure.

On May 18, 2006, Judge Lindsay conducted a hearing at which Wallis, Dinerstein, and a third witness testified. On August 11, 2006, Judge Lindsay issued a written Order denying Wallis' motion. *See* Order, Docket Entry 91 (Aug. 14, 2006) (the "Order"). On August 20, 2006, Wallis timely filed an appeal of the Order to this Court.

II. DISCUSSION

A. The Legal Standards

1. Standard of Review

[1] **[2]** When considering an appeal of magistrate judge's ruling on a non-dispositive matter, a district judge "shall modify or set aside any portion of the magistrate's order found to be clearly erroneous or contrary to law." Fed.R.Civ.P. Rule 72(a); *see also* 28 U.S.C. § 636(b)(1)(A) ("A judge of the court may reconsider any [nondispositive] pretrial matter ... where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law."). A finding is clearly erroneous if "the reviewing court on the entire evidence is left with the definite and firm conviction ***163** that a mistake has been committed." *United States v. U.S. Gypsum Co.,* 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.Ed. 746 (1948); *United States v. Isiofia,* 370 F.3d 226, 232 (2d Cir.2004). An order is contrary to law "when it fails to apply or misapplies relevant statutes, case law, or rules of procedure." *Catskill Dev., L.L.C. v. Park Place Entm't Corp.,* 206 F.R.D. 78, 86 (S.D.N.Y.2002) (citation omitted).

2. The Standard for Disqualification

[3] "The authority of federal courts to disqualify attorneys derives from their inherent power to 'preserve the integrity of the adversary process.' " *Hempstead Video, Inc. v. Inc. Village of Valley Stream,* 409 F.3d 127, 132 (2d Cir.2005) (citing *Bd. of Educ. v. Nyquist,* 590 F.2d 1241, 1246 (2d Cir.1979)). In exercising this power, the Court must "attempt[ ] to balance a client's right freely to choose his counsel against the need to maintain the highest standard of the profession." *Hempstead Video, Inc.,* 409 F.3d at 132 (internal quotations and citations omitted).

[4] **[5]** Whether or not disqualification is warranted is subject to the Court's discretion. *Cresswell v. Sullivan & Cromwell,* 922 F.2d 60, 72 (2d Cir.1990). In this regard, given the "immediate adverse effect on the client by separating him from counsel of his choice, and that disqualification motions are often interposed for tactical reasons ... and inevitably cause delay," *Nyquist,* 590 F.2d at 1246, the Court must demonstrate reluctance in granting motions to disqualify counsel. *See, e.g., W.T. Grant Co. v. Haines,* 531 F.2d 671 (2d Cir.1976); *see also Blue Planet Software, Inc. v. Games Int'l., LLC,* 331 F.Supp.2d 273 (S.D.N.Y.2004). As the Second Circuit has advised:

> when dealing with ethical principles, ... we cannot paint with broad strokes. The lines are fine and must be so marked. Guideposts can be established when virgin ground is being explored, and the conclusion in a particular case can be reached only after painstaking analysis of the facts and precise application of precedent.

Fund of Funds, Ltd. v. Arthur Andersen & Co., 567 F.2d 225, 227 (2d Cir.1977) (quoting *United States v. Standard Oil Co.,* 136 F.Supp. 345, 367 (S.D.N.Y.1955)).

[6] **[7]** **[8]** " 'As a matter of professional responsibility, an attorney owes a duty of loyalty to his client ... not to divulge confidential communications ... and not to accept representation of a person whose interests are opposed to the client.' " *Ehrich v. Binghamton City Sch. Dist.,* 210 F.R.D. 17, 23 (N.D.N.Y.2002) (emphasis added) (quoting *In re Agent Orange Prod. Liab. Litig.,* 800 F.2d 14, 17 (2d Cir.1986)). However, "not every violation of a disciplinary rule will necessarily lead to disqualification." *Hempstead Video, Inc.,* 409 F.3d at 132. Disqualification is warranted only where "an attorney's conduct tends to taint the underlying trial." *Nyquist,* 590 F.2d at 1246 (internal quotations and citations omitted); *see also Ehrich,* 210 F.R.D. at 25. This "risk [of taint] is encountered when an attorney ... might benefit a client in a lawsuit by using confidential information about an adverse party obtained through prior representation of that party." *Glueck v. Jonathan Logan, Inc.,* 653 F.2d 746, 748 (2d Cir.1981).

[9] To determine if disqualification is warranted in cases of alleged successive representation, the Court must employ the three-prong "substantial relationship" test. *See, e.g., Hempstead Video, Inc.,* 409 F.3d at 133. Under this test, the Court must be satisfied that:

(1) the moving party is a former client of the adverse party's counsel;

***164** (2) there is a substantial relationship between the subject matter of the counsel's prior representation of the moving party and the issues in the present lawsuit; and

(3) the attorney whose disqualification is sought had access to, or was likely to have had access to, relevant privileged information in the course of his prior representation of the client.

Evans v. Artek Sys. Corp., 715 F.2d 788, 791 (2d Cir.1983); *see also* *Hempstead Video, Inc.,* 409 F.3d at 133; *Cheng v. GAF Corp.,* 631 F.2d 1052, 1056 (2d Cir.1980), *vacated on other grounds,* 450 U.S. 903, 101 S.Ct. 1338, 67 L.Ed.2d 327 (1981); *Gov't of India v. Cook Indus., Inc.,* 569 F.2d 737, 739–40 (2d Cir.1978); *NCK Org. Ltd. v. Bregman,* 542 F.2d 128, 131–35 (2d Cir.1976); *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.,* 518 F.2d 751, 754 (2d Cir.1975); *Hull v. Celanese Corp.,* 513 F.2d 568, 572 (2d Cir.1975); *Emle Indus., Inc. v. Patentex, Inc.,* 478 F.2d 562, 570–74 (2d Cir.1973); *Battagliola v. Nat'l Life Ins. Co.,* No. 03 Civ. 8558(GBD)(AJP), 2005 WL 101353, at *6 (S.D.N.Y. Jan. 19, 2005); *United States Football League v. Nat'l Football League,* 605 F.Supp. 1448, 1457–66 (S.D.N.Y.1985); *T.C. Theatre Corp. v. Warner Bros. Pictures,* 113 F.Supp. 265, 268–69 (S.D.N.Y.1953).

Here, Wallis seeks to have Dinerstein disqualified from representing the plaintiffs in this matter because Wallis claims that in 1999 he retained Dinerstein to represent a company called Regional Medical Transport ("RMT"). At that time in 1999, Wallis served as the Chief Executive Officer of RMT. The purpose of the prior representation was to assist RMT in connection with an administrative proceeding before the Regional Emergency Medical Services Council of the City of New York.

B. Judge Lindsay's Order

Based on the submissions of the parties and the testimony at the May 18, 2006 hearing, Judge Lindsay determined that Wallis satisfied the first two elements of the "substantial relationship" test, but failed to meet the third element. With respect to the first element, Judge Lindsay determined that an attorney-client relationship existed between Wallis and Dinerstein, even though Dinerstein was retained to represent RMT and not Wallis individually. *See* Order at 7–8. Although Dinerstein objects to Judge Lindsay's finding that there was a prior attorney-client relationship, the Court finds no reason to disturb Judge Lindsay's conclusion. *See* *Rosman v. Shapiro,* 653 F.Supp. 1441, 1445 (S.D.N.Y.1987).

As to the second element, Judge Lindsay determined that there is a substantial relationship between the issues in the present lawsuit and the subject matter of Dinerstein's representation of RMT. *See* Order at 6. An issue underlying this case is whether Wallis induced investors to invest in certain entities by lying to them about his educational and employment background. The prior representation relating to RMT also involved an issue of Wallis' alleged misrepresentation of his educational and employment background. Neither party objects to Judge Lindsay's conclusion regarding the similarity of issues presented in the former and present representation.

C. As to the Likelihood that Confidences were Passed

[10] The final element of the substantial relationship test requires the Court to consider whether Dinerstein had access to, or was likely to have had access to, relevant privileged information in the course of his prior representation of Wallis. In cases such as this, where the same individual ***165** lawyer participated in the prior and current representation, the movant is not required to make a specific showing that confidences were passed to counsel. Instead, the movant is entitled to the benefit of an irrebuttable presumption that confidences were shared. *See, e.g., Gov't of India v. Cook Indus., Inc.,* 422 F.Supp. 1057, 1060 (S.D.N.Y.1976), aff'd, 569 F.2d 737 (2d Cir.1978) ("The law is clear that if the former action and the present action are 'substantially related' and the attorney's involvement in the former case was more than peripheral, then there is an irrebuttable presumption that the attorney had access to confidential information.") (footnote and citations omitted); *Tiuman v. Canant,* No. 92 Civ. 5813, 1994 WL 198690 at *3–4 (S.D.N.Y. May 19, 1994) ("When an attorney was personally in control of a prior representation, there is an irrebuttable presumption that the attorney had access to confidential information."); *Yaretsky v. Blum,* 525 F.Supp. 24, 29 (S.D.N.Y.1981) (recognizing that the presumption is irrebuttable).

"The presumption arises in order to forestall a direct inquiry into whether confidential information was in fact transmitted by the client." *United States Football League,* 605 F.Supp. at 1461. "Such an inquiry would be improper; it would put the movant to the choice of either revealing its confidences in order to prevail on the motion or else refraining from moving to disqualify, thereby running the risk that its adversary will use its confidences against it in the litigation." *Id.*

The application of this irrebuttable presumption can be traced to the case of *T.C. Theatre Corp. v. Warner Bros. Pictures, Inc.* 113 F.Supp. at 269. In *T.C. Theatre Corp.,* the Court stated:

> To compel the client to show, in addition to establishing that the subject of the present adverse representation is related to the former, the actual confidential matters previously entrusted to the attorney and their possible value to the present client would tear aside the protective cloak drawn about the lawyer-client relationship. For the Court to probe further and sift the confidences in fact revealed would require the disclosure of the very matters intended to be protected by the rule. It would defeat an important purpose of the rule of secrecy—to encourage clients fully and freely to make known to their attorneys all facts pertinent to their cause.
>
> Considerations of public policy, no less than the client's private interest, require rigid enforcement of the rule against disclosure. No client should ever be concerned with the possible use against him in future litigation of what he may have revealed to his attorney.... The rule prevents a lawyer from placing himself in an anomalous position. Were he permitted to represent a client whose cause is related and adverse to that of his former client he would be called upon to decide what is confidential and what is not, and, perhaps, unintentionally to make use of confidential information received from the former client while espousing his cause. Lawyers should not put themselves in the position "where, even unconsciously, they might take, in the interests of a new client, an advantage derived or traceable to, confidences reposed under the cloak of a prior, privileged relationship."

Id. at 269 (paragraph break added). Building on this premise, the Second Circuit has stated:

> The dynamics of litigation are far too subtle, the attorney's role in that process is far too critical, and the public's interest in the outcome is far too great to leave room for even the slightest doubt concerning the ethical propriety of ***166** a lawyer's representation in a given case. These considerations require application of a strict prophylactic rule to prevent any possibility, however slight, that confidential information acquired from a client during a previous relationship may subsequently be used to the client's disadvantage.
>
> Moreover, the court need not, indeed cannot, inquire whether the lawyer did, *in fact,* receive confidential information during his previous employment which might be used to the client's disadvantage. Such an inquiry would prove destructive of the weighty policy considerations [underlying the rule because] the client's ultimate and compelled response to an attorney's claim of non-access would necessarily be to describe in detail the confidential information previously disclosed and now sought to be preserved.

Emle Indus., 478 F.2d at 571.

This situation is different from a case involving an attorney who is associated with a larger firm, and a party seeks to the disqualify the attorney and the firm based on the attorney's prior representation. *See* *United States Football League,* 605 F.Supp. at 1462 n. 28. Under those circumstances, the presumption that the client shared confidences with the individual lawyer is not rebuttable, but the firm itself will be permitted to defend against disqualification by showing that the conflicted attorney was subject to appropriate "screening" measures. *See* *id.;* *Hempstead Video, Inc.,* 409 F.3d at 137. "Screening" is not possible in a case where the same attorney or attorneys associated with the same small firm participate in both the prior and subsequent representations. *See* *Cheng,* 631 F.2d at 1058.

[11] In this case, after determining that Wallis and Dinerstein had a prior attorney-client relationship based on a matter sufficiently related to this one, Judge Lindsay considered the testimony of the parties to determine if confidences were actually passed. Judge Lindsay credited Dinerstein's testimony over that of Wallis, and concluded that Wallis did not disclose to Dinerstein the information he claimed to have disclosed and, even if Wallis did disclose that information, it was not confidential because Wallis intended the information to be passed on to a third party.

Having determined that the same lawyer, Dinerstein, previously represented the defendant Wallis in a related matter, the sharing of confidences should have been presumed, and Wallis' motion should have been granted. The fact that Wallis intended for Dinerstein to communicate some or all of that information to third-parties does not change the result of disqualification. *Gov't of India,* 422 F.Supp. at 1060 ("[I]f a substantial relationship is established, the presumption of access to confidences prevails even though the 'confidential' information may be publicly available."); *NCK Org., Ltd.,* 542 F.2d at 133 (stating that "the attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge.") (citation omitted); *Tiuman,* 1994 WL 198690 at *3 ("Even if all confidential information to which [counsel] had access was independently known by the [adversary], [the client's] privilege in this information as disclosed to his attorney ... is not thereby nullified."). Accordingly, Wallis' motion to disqualify Dinerstein as counsel for the plaintiffs in this action should be granted.

Finally, the fact that Wallis appeared before Judge Lindsay and testified, without ***167** objection, concerning the nature and substance of his prior relationship with Dinerstein does not change the analysis. *Cf. United States Football League,* 605 F.Supp. at 1448. In the Court's opinion, the integrity of attorney-client relationships will be better served by a strict, bright-line rule of disqualification based on an irrebuttable presumption of shared confidences. *See Emle Indus., Inc.,* 478 F.2d at 571 ("These [ethical] considerations require application of a strict prophylactic rule to prevent any possibility, however slight, that confidential information acquired from a client during a previous relationship may subsequently be used to the client's disadvantage.").

III. CONCLUSION

Based on the foregoing, it is hereby

ORDERED, that the Order of United States Magistrate Judge Arlene R. Lindsay, dated August 14, 2006, is reversed; and it is further

ORDERED, that Wallis' motion to disqualify Dinerstein & Lesser, P.C. and Robert J. Dinerstein, Esq. as counsel for the plaintiffs is granted; and it is further

ORDERED, that the plaintiffs retain new counsel, who is to file a notice of appearance within thirty days of the date of this order.

SO ORDERED.

All Citations

459 F.Supp.2d 159, RICO Bus.Disp.Guide 11,182

82 F.3d 55
United States Court of Appeals,
Second Circuit.

JOSEPH BRENNER ASSOCIATES, INC., Plaintiff–Appellant,
v.
STARMAKER ENTERTAINMENT, INC., Defendant,
Christina Burks Lee, Esq., Appellee.

No. 995, Docket 95–7721.
|
Argued Jan. 18, 1996.
|
Decided April 22, 1996.

Synopsis

In copyright infringement suit, the United States District Court for the Southern District of New York, Richard Owen, J., 1995 WL 271741, permitted plaintiff's counsel to withdraw from representing plaintiff, ordered plaintiff to pay outstanding balance due counsel, and granted counsel a retaining lien over litigation files. Plaintiff appealed. The Court of Appeals, Heaney, Senior Circuit Judge, sitting by designation, held that: (1) counsel was entitled to withdraw, and (2) plaintiff was required to pay counsel the outstanding balance due.

Affirmed.

Procedural Posture(s): On Appeal.

West Headnotes (8)

[1] Attorneys and Legal Services Termination by Attorney; Withdrawal

Attorney's withdrawal from representation of client was justified on the basis that attorney was no longer able to represent client effectively; client insisted on having his son participate in case, despite hostility that had developed between attorney and son in a previous matter, son hired his own attorney, whom attorney perceived to be a "back-seat driver," and client began complaining about attorney's representation and stopped making his previously regular, monthly installment payments. N.Y.Ct.Rules, § 1200.15(c)(1)(iv) [DR 2-110, subd. C, par. 1 d].

11 Cases that cite this headnote

[2] Attorneys and Legal Services Making, requisites, and validity

Increase in attorney's hourly rate was enforceable; district court credited attorney's testimony that she had informed client of increase and that he had agreed to it, and client testified that his memory was failing and that he did not remember a conversation about hourly rate increase.

[3] Federal Courts "Clearly erroneous" standard of review in general

Court of Appeals defers to district court's factual findings, particularly those based on credibility determinations, unless they are clearly erroneous.

1 Cases that cite this headnote

[4] Attorneys and Legal Services Performance or breach

Attorney's failure to bill client for over two years did not constitute a serious breach of retainer agreement that warranted recision; arrangement under which client made monthly installment payments regardless of amount billed was unusual, but client did not object to billing practice until after relationship came to an end.

[5] Attorneys and Legal Services Quantum meruit in general

Even if attorney's failure to bill client for over two years constituted a substantial breach of retainer agreement that warranted recision, attorney was entitled to recover for her services performed on quantum meruit theory.

2 Cases that cite this headnote

[6] **Attorneys and Legal Services** Admissibility

In dispute over legal fees between attorney and client, trial court acted within its discretion in limiting testimony of client's expert witness regarding veracity of attorney's bills; client failed to demonstrate that expert would testify to anything other than that another lawyer could have performed work more quickly, and client failed to bring any particular instances of waste to court's attention.

[7] **Attorneys and Legal Services** Making, requisites, and validity

Trial court acted within its discretion in determining that attorney's request for fees from former client was reasonable and in ordering former client to pay full amount requested; court noted substantial amount of work performed by attorney, complexity of case, and attorney's status as a sole practitioner with little or no support staff.

2 Cases that cite this headnote

[8] **Federal Courts** Costs and fees

Trial court acted within its discretion in copyright infringement suit in exercising ancillary jurisdiction with respect to claim for attorney fees made by plaintiff's counsel against plaintiff; fee dispute was related to main action, and district court was familiar with amount and quality of work performed by plaintiff's counsel.

17 Cases that cite this headnote

***56** Appeal from a judgment entered June 26, 1995, in the United States District Court for the Southern District of New York, Richard Owen, *Judge,* granting Christina Burks Lee leave to withdraw for cause as counsel for Joseph Brenner Associates, Inc., awarding unpaid counsel fees, together with prejudgment interest, and granting a retaining lien on legal files in her possession.

Attorneys and Law Firms

Reuben Blum, New York City, for Appellant.

Kleon C. Andreadis, Andreadis & Natsios, Brooklyn, New York (C.B. Lee, New York City, of counsel), for Appellee.

Before: KEARSE, WALKER, and HEANEY,[*] Circuit Judges.

Opinion

HEANEY, Senior Circuit Judge:

This case involves a dispute between an attorney, Christina Burks Lee, and her client, Joseph Brenner, the sole shareholder of Joseph Brenner Associates, Inc. ("Brenner, Inc."). Brenner appeals from a judgment entered in the United States District Court for the Southern District of New York (Richard Owen, *District Judge*), granting Lee leave to withdraw for cause as counsel for Brenner, Inc., awarding unpaid counsel fees together with prejudgment interest, and granting a retaining lien on the legal files in her possession. We affirm.

I. BACKGROUND

Beginning in 1990, Lee represented Brenner in two copyright infringement cases involving twenty-nine allegedly "pirated" videotapes of motion pictures for which he claimed Brenner, Inc. owned the copyrights. Over a four-year period, Lee invested significant time and effort on her client's behalf. By mid–1994, however, the attorney-client relationship deteriorated.

On November 4, 1994, Lee moved the court for permission to withdraw from representation, for a judgment on the balance due, and for a lien on the files in her possession until Brenner made full payment. Brenner opposed Lee's motion and cross-moved the court to relieve Lee as attorney but to require her to turn over the files, to find the legal fees excessive, to relieve Brenner from any obligation to pay the fees, and to assess punitive damages against Lee. After a two-day hearing, the district court permitted Lee to withdraw from representation, ordered Brenner to pay the outstanding balance of ***57** $49,284.26, and granted Lee a retaining lien over the litigation files. The court denied Brenner's cross-claims in all respects.

On appeal, Brenner argues that Lee was not justified in requesting leave to withdraw and challenges the district court's determination that Lee's legal fees were reasonable.

II. DISCUSSION

A. Withdrawal from Representation

[1] Before the district court, Brenner agreed that Lee should withdraw as counsel, though he contended that she had deliberately precipitated the crisis and thus was not entitled to the requested compensation. We are confident that the record provides ample justification for Lee's withdrawal.

During the course of representation, Brenner insisted, over Lee's objections, on having his son participate in the case. Lee had represented Brenner's son in a prior, unrelated matter and found it difficult to work with him based on hostility that had developed between them. In addition, Brenner's son hired an attorney, Lawrence Stanley, to represent his interests in the litigation. Stanley contacted Lee and sought to participate in the representation. Lee perceived Stanley's position to be that of a "back-seat driver" and she refused to work with him as co-counsel. Moreover, Brenner began complaining about Lee's representation, and as of March 1994, he stopped making his previously regular, monthly installment payments.

Given these circumstances, Lee was no longer able to represent Brenner effectively and her request to withdraw was appropriate. *See* N.Y. Comp.Codes R. & Regs. tit. 22, § 1200.15(c)(1)(iv) (withdrawal permissible if client renders it unreasonably difficult for the lawyer to carry out employment effectively). Accordingly, we affirm the district court's decision to permit Lee to withdraw from representation.

B. Attorneys Fees

[2] **[3]** Brenner also challenges the court's determinations with respect to his outstanding legal fees. First, he argues that Lee's increase of her hourly rate, from $150 to $180, was unenforceable because it lacked consideration. Brenner did not specifically raise this argument before the district court, but the court adequately addressed the fee increase in its opinion so that we may address, and reject, Brenner's claim. *See, Thomas E. Hoar, Inc. v. Sara Lee Corp.,* 900 F.2d 522, 527 (2d Cir.), *cert. denied,* 498 U.S. 846, 111 S.Ct. 132, 112 L.Ed.2d 100 (1990) (federal appellate courts generally will not consider claims not presented in the lower courts). The court credited Lee's testimony that in January 1993 she informed Brenner of the increase and that he had agreed to it. Brenner testified that his memory was failing and that he did not remember a conversation about the hourly rate increase. We defer to the district court's factual findings, particularly those based on credibility determinations, unless they are clearly erroneous. *See Anderson v. City of Bessemer,* 470 U.S. 564, 575, 105 S.Ct. 1504, 1512, 84 L.Ed.2d 518 (1985). We see no reason to upset the court's finding on this issue. Moreover, Brenner's consideration theory falters because Lee continued to provide services to him after the fee increase.

[4] **[5]** Second, Brenner argues that Lee's failure to bill Brenner for over two years constituted a substantial breach of their retainer agreement, thus warranting recision of their contract. Although the court indicated in its opinion that Brenner did not argue breach of contract, it examined the parties' payment arrangement, noting that it was "somewhat unusual." Lee initially informed Brenner of her hourly rate and that she billed regularly. For the first two years, regardless of the amount billed, Brenner made monthly installment payments of $2,000 to $2,500, and later $1,000. Lee admits that from October 1992 until September 1994, she did not submit a bill to Brenner, but claims that she did not do so because of Brenner's depression at the time. Lee testified that she received payments from Brenner through March or April 1994 and that he did not complain about the bill. Brenner offered no evidence that he objected to this unusual billing practice until after their relationship came to an end. We do not condone Lee's conduct. We agree with the district court, however, that she did not materially ***58** breach her contract with Brenner. Moreover, were we to find a breach based on failure to bill, Lee would still be entitled to recover for her services based on a quantum meruit theory. *See In re Rosenman & Colin,* 850 F.2d 57, 63 & n. 3 (2d Cir.1988).

[6] Third, Brenner contends that the court did not properly review the requested fees. The court held a two-day evidentiary hearing and reviewed the documents submitted by both parties. Contrary to Brenner's allegations, the court did not prevent him from presenting expert testimony to challenge Lee's legal fees. On the first day of the hearing, the following transpired:

> Mr. Stanley [Brenner's attorney]: So, Judge, you are saying that if I brought an expert ... you wouldn't credit his testimony as being an indication of the veracity of these bills?

> The Court: I don't suppose—
>
> Mr. Stanley: Or the reasonableness of these bills?
>
> The Court: Let's put it this way. I am not going to foreclose anything, but I would have a hard time saying that because you found somebody who is a speedy Gonzalez, ... that somebody who takes a lot more time to do the same task is lying because that person can do it faster.
>
> Mr. Stanley: Could I have leave to bring such an expert tomorrow morning?
>
> The Court: You could bring him. That is your prerogative. But let's see where it falls.

Tr. 140–141. On the second day of the hearing, Mr. Stanley declined to present his expert witness to the court:

> Mr. Stanley: I didn't bring an expert witness today, because I happen to agree with your Honor that if the Court isn't willing to consider reasonableness on billing, then and expert witness is really not going to add anything. I don't think that an expert witness is really more of an expert than the Court is on these matters.

Tr. 189. Because Brenner failed to demonstrate that the witness would testify to anything other than that another lawyer could have performed the work more quickly and failed to bring any particular instances of waste to the court's attention, his proffer was inadequate. Thus, the district judge did not abuse its discretion in limiting the testimony at the hearing.

[7] In reviewing Lee's fee request, the court noted the substantial amount of work Lee performed over the four years of representation. Her work included extensive initial investigation to determine what claims Brenner had, preparation of two lengthy complaints, opposition to a motion to transfer the case from New York to California, motions to disqualify counsel, settlement negotiation, a motion to compel discovery, discovery conferences, and several depositions—or parts thereof—in California. The court considered the complexity of the case and Lee's status as a sole practitioner with little or no support staff. In light of the evidence before it, the court did not abuse its discretion in determining that Lee's request was reasonable and in ordering Brenner to pay the full amount.

[8] Finally, Brenner argues for the first time in his reply brief that the trial court did not have the authority to enter a money judgment. This court has previously held that a district court, in its discretion, may exercise ancillary jurisdiction to hear a fee dispute when the dispute relates to the main action. *Cluett, Peabody & Co. v. CPC Acquisition Co.*, 863 F.2d 251 (2d Cir.1988); *see also National Equipment Rental Ltd. v. Mercury Typesetting Co.*, 323 F.2d 784 (2d Cir.1963) (federal district court may condition substitution of attorneys upon client's payment of substituted attorney's reasonable fees and disbursements). Here, the fee dispute was related to the main action. Because the district court was familiar with the amount and quality of the work performed by Lee, the district court did not abuse its discretion in exercising ancillary jurisdiction with respect to Lee's claim for attorney's fees.

III. CONCLUSION

Based on the foregoing, we affirm the district court's decision permitting Lee to withdraw from representation, awarding unpaid counsel fees, together with prejudgment interest, ***59** and granting a retaining lien on the legal files in her possession.

All Citations

82 F.3d 55, 38 U.S.P.Q.2d 1600

Footnotes

* The Honorable Gerald W. Heaney, United States Senior Circuit Judge for the Eighth Circuit, sitting by designation.

End of Document

KeyCite Yellow Flag - Negative Treatment
Distinguished by Stinson v. City of New York, S.D.N.Y., November 26, 2018

575 F.Supp. 837
United States District Court,
S.D. New York.

Genaro MARRERO, Plaintiff,
v.
Police Officer CHRISTIANO, the City of New York, and Two Police Officers Sued Herein as "John Doe" Since Names Are Unknown, Defendants.

No. 82 Civ. 6852 (CBM).
|
June 7, 1983.

Synopsis
Attorneys who had withdrawn sought order fixing lien in its favor on any eventual recovery by client in the law suit. The District Court, Motley, Chief Judge, held that: (1) court had ancillary jurisdiction to hear fee dispute; (2) under New York law, law firm which withdraws without good and sufficient cause automatically forfeits its lien; and (3) withdrawal because of client's refusal to accept settlement offer was not based on good and sufficient cause.

Order accordingly.

West Headnotes (4)

[1] **Federal Courts** Costs and fees

Federal court may, in its discretion, exercise ancillary jurisdiction to hear fee disputes and lien claims between litigants and their attorneys when the dispute relates to the main action, regardless of the jurisdictional basis of the main action.

21 Cases that cite this headnote

[2] **Federal Courts** Mortgages, liens, bills, notes, security interests, and debt collection

Attorney's claim for lien is governed by state law.

2 Cases that cite this headnote

[3] **Attorneys and Legal Services** Waiver, loss, or discharge

Under New York law, when attorney withdraws without good and sufficient cause, his lien is automatically forfeited.

17 Cases that cite this headnote

[4] **Attorneys and Legal Services** Waiver, loss, or discharge

Law firm's withdrawal because of client's refusal to accept settlement offer was not based on good and sufficient cause and law firm forfeited its right, under New York law, to a lien on any eventual recovery by client in the law suit.

12 Cases that cite this headnote

Attorneys and Law Firms

***838** Piken & Piken, P.C. by Claudia J. Stern, Robert W. Piken, Rego Park, N.Y., for movant.

Genaro Marrero, pro se.

Frederick A.O. Schwarz, Jr., Corp. Counsel by Kenneth A. Sommer, New York City, for defendants Christiano and the City of New York.

MEMORANDUM OPINION AND ORDER

MOTLEY, Chief Judge.

This is an action for damages brought pursuant to 42 U.S.C. §§ 1981–1988. Plaintiff Genaro Marrero (Marrero) alleges that he was falsely arrested and beaten. He claims to have sustained physical and other injuries, and seeks $500,000.00 in compensatory, as well as $150,000.00 in punitive, damages. [1] The case came before the court on April 15, 1983 on the motion of Piken & Piken, P.C. (the Law Firm), attorneys for Marrero, for an order relieving it as counsel for Marrero and for an order fixing a lien in its favor on Marrero's eventual recovery, if any, in this action.

The court granted the Law Firm's motion to withdraw, and reserved decision on the motion for a lien. For the reasons set forth below, the motion for an order fixing a lien in favor of the Law Firm is denied.

BACKGROUND:

The Law Firm asserts that, after it had obtained all of plaintiff's medical records and had responded to interrogatories propounded by defendants, it commenced settlement negotiations with defendants.[2] According to the Law Firm, defendants made an offer of settlement in the amount of $3,000.00, including attorneys' fees. The Law Firm states that it communicated the $3,000.00 settlement offer to Marrero, recommending that Marrero accept the settlement.[3] The Law Firm characterizes the alleged $3,000.00 offer as "the best possible settlement offer ...."[4] Marrero asserts that, at the time that the settlement offer was communicated to him, the Law Firm informed him that, if he "did not accep[t] the offer, [the Law Firm was] ready to be relieve[d] as [his] attorney."[5] Marrero refused to accept the offer.

The Law Firm then brought on the instant motion, stating that "[Marrero] is being uncooperative and ... it would be in everyone's best interest if we did not continue to represent him in this action."[6] The Law Firm contends, nonetheless, that it is entitled to a lien on any eventual recovery in this action. It seeks a lien in ***839** the minimum amount of $1,336.00, calculated on the basis of an alleged contingent fee arrangement with Marrero[7] and the $3,000.00 settlement offer.

DISCUSSION:

[1] A federal court may, in its discretion, exercise ancillary jurisdiction to hear fee disputes and lien claims between litigants and their attorneys when the dispute relates to the main action, regardless of the jurisdictional basis of the main action.

> This power resides in the federal court as ancillary to its conduct of the litigation.

National Equipment Rental, Ltd. v. Mercury Typesetting Co., 323 F.2d 784, 786 (2d Cir.1963).

> The termination of relations between a party in litigation in a federal court and his attorney is a matter relating to the protection of the court's own officers ....

Id. at 786 n. 1. *See also* *Jenkins v. Weinshienk,* 670 F.2d 915, 918 (10th Cir.1982); *In re Coordinated Pretrial Proceedings,* 520 F.Supp. 635, 649 (D.Minn.1981); and *Moore v. Telfon Communications Corp.*, 589 F.2d 959, 967 (9th Cir.1978).

[2] The court has decided to exercise its ancillary jurisdiction to determine the Law Firm's claim for a lien. The instant claim is governed by New York law. *See Cook v. Moran Atlantic Towing Corp.*, 79 F.R.D. 392, 394 (S.D.N.Y.1978); and *Application of Kamerman,* 278 F.2d 411, 412–13 (2d Cir.1960).

The attorney's lien for compensation, or "charging lien," is codified at section 475 of the New York Judiciary Law. The statute provides in pertinent part that:

> From the commencement of an action ... in any court, ... the attorney who appears for a party has a lien upon his client's cause of action ... which attaches to a verdict, report, determination, decision, judgment or final order in his client's favor .... The court upon the petition of the client or attorney may determine and enforce the lien.

(McKinney 1983).

[3] "[W]here [, however,] an attorney withdraws without good and sufficient cause, his lien is *automatically* forfeited." *Suffolk Roadways, Inc. v. Minuse,* 56 Misc.2d 6, 7, 287

N.Y.S.2d 965, 967 (1968) (citation omitted) (emphasis added). *See also* *People v. Keeffe,* 50 N.Y.2d 149, 156, 428 N.Y.S.2d 446, 449, 405 N.E.2d 1012 (1980) ("An attorney's charging lien may be lost if he voluntarily withdraws or is discharged for misconduct ....").

[4] Here, the Law Firm sought to withdraw because Marrero refused to accept a settlement offer.[8] Under New York law, the refusal of a client to accept a settlement offer is not good and sufficient cause for the withdrawal of the attorney.

> It is the client who controls the decision as to whether a settlement offer is to be accepted.... This decision is binding upon the attorney even though not in accordance with his advice. Certainly, *a refusal to accept a settlement,* even though favored by an attorney, *is not just cause for withdrawal by the attorney.*
>
> ***840** *Suffolk Roadways,* 56 Misc.2d at 9, 287 N.Y.S.2d at 969 (emphasis added).

Notwithstanding the lack of good cause for the withdrawal of the Law Firm as plaintiff's counsel at this juncture, the court permitted the Law Firm to withdraw because of its demonstrated disinclination to further prosecution of plaintiff's case.[9] It was the court's opinion that continued representation by the Law Firm would not be in Marrero's best interests. Nevertheless, having withdrawn because of Marrero's refusal to accept a settlement offer, the Law Firm has forfeited its right under New York law to a lien on any eventual recovery in this action.

Although no issue has been raised with respect to the attorney's possessory lien upon the client's funds and papers, it is important to note that, under New York law, it would seem that the mere threat of withdrawal works a forfeiture of the possessory lien. *See Kaplan v. Kaplan,* 65 N.Y.S.2d 677, 678 (N.Y.Sup.1946) ("If plaintiff's ... attorneys [told her that they would withdraw from the case and] refuse[d] to further represent her without justification, they would clearly possess no lien upon her papers or funds."). Here, Marrero has alleged that the Law Firm, when it communicated the settlement offer, informed him that it would seek to withdraw if he refused to accept the offer.[10] The Law Firm has not denied the allegation, and did in fact seek to withdraw after Marrero refused to accept the settlement offer.

CONCLUSION:

Since the Law Firm withdrew from representation of Marrero without adequate justification, it is not entitled to a lien for compensation on Marrero's eventual recovery, if any. The motion for an order fixing a lien is therefore denied in all respects.

The next pre-trial conference in this case will be held on June 17, 1983 at 10:00 a.m. in courtroom 906.

SO ORDERED.

All Citations

575 F.Supp. 837

Footnotes

1 *See* Complaint at ¶¶ 16 and 17.

2 Affidavit of Claudia J. Stern, dated March 16, 1983, at second unnumbered page.
According to Marrero, the Law Firm did not obtain the medical records of Marrero's current treating physician, despite the Law Firm's representations that it had obtained all of Marrero's medical records. *Compare* Affidavit of Genaro Marrero in Opposition at third unnumbered page *with* Affidavit of Claudia J. Stern, dated March 16, 1983, at second unnumbered page.

3 Affidavit of Claudia J. Stern, dated March 16, 1983, at second unnumbered page.
Marrero contends that the Law Firm informed him that the settlement offer was for $1,000.00, rather than $3,000.00. Affidavit of Genaro Marrero in Opposition, at ¶ 3.

4 Affidavit of Claudia J. Stern, dated March 16, 1983, at second unnumbered page.
Marrero expresses disbelief that an offer of $1,000.00 in settlement of a $500,000.00 claim can be considered reasonable, and further states that:

> I think that what is happening here is that this law firm has decided it does not want to do the work [wh]ich it undertook to do and is trying to pressure me to settle not because the firm believe[s] that [it] is a fair settlement but simply because they are trying to break their contract with me.

Affidavit of Genaro Marrero in Opposition at sixth unnumbered page.

5 Affidavit of Genaro Marrero in Opposition at third unnumbered page.

6 Affidavit of Claudia J. Stern, dated March 16, 1983, at second unnumbered page.

7 The Law Firm contends that it had a contingent fee agreement with Marrero. A copy of a document purported to be the retainer agreement providing for a contingent fee is annexed as an exhibit to the affidavit of Claudia J. Stern, dated March 16, 1983.

Marrero appears to have signed the document, but the space provided on the form for identification of the counsel retained is blank. Marrero asserts that he concluded the retainer agreement with the firm of Krause & Krause, P.C., rather than with the Law Firm. *See* Affidavit of Genaro Marrero in Opposition, at sixth unnumbered page. In view of the court's decision on the instant motion it is, however, unnecessary to pass upon the validity of the contingent fee arrangement that the Law Firm contends it made with Marrero. It should be noted, however, that the Law Firm filed the complaint in this action and is the only firm that has appeared on behalf of Marrero in this Court.

8 *See* Affidavit of Claudia J. Stern, dated March 16, 1983, at second unnumbered page; Memorandum of Law in support of claim for lien at 3 (“Had the [plaintiff] saw [sic] fit to follow the advice of counsel [,] counsel's work, labor and services would have been complete ....”).

9 The Law Firm has characterized Marrero as “totally uncooperative” in refusing to accept the settlement offer. Affidavit of Claudia J. Stern, dated March 16, 1983, at second unnumbered page. The Law Firm has, in addition, submitted an affidavit outlining its views on the weaknesses of Marrero's claim for damages in this action. The gratuitous factual allegations contained therein, which will not be repeated here, unequivocally indicate that the Law Firm has forsaken its responsibility to protect the interests of its client and may, in addition, constitute breaches of the attorney-client privilege. *See* Reply Affidavit of Claudia J. Stern, dated April 8, 1983, at ¶ 2.

10 See n. 5, *supra,* and accompanying text.

NEW YORK STATE BAR ASSOCIATION
One Elk Street, Albany, New York 12207 • PH 518.463.3200 • www.nysba.org

New York State Bar Association
Committee on Professional Ethics

Opinion 1229 (09/21/2021)

Topic: Lawyer's Rights and Duties after Death of a Client

Digest: A lawyer may not settle a claim for a client after the client has died absent authorization from a duly qualified representative of the decedent.

Rules: 1.2(a), 1.16(d)

FACTS

1. The inquirer is a New York lawyer who practices personal injury law in New York. Some years ago, a client retained the inquirer on a contingency-fee basis to pursue a claim arising out of a vehicular accident. With the client's approval, the inquirer opted not to commence an action but instead to engage in negotiations directly with the alleged tortfeasor's insurer to achieve an out-of-court resolution of the dispute. The inquirer characterizes the client's claim as weak, an assessment apparently shared by the insurer, whose initial very modest settlement offers the client rejected.

2. More recently, the inquirer negotiated a somewhat higher albeit still modest settlement sum from the insurer, which the inquirer considers both fair and the maximum the insurer is likely to tender. In seeking to obtain the client's approval of the deal, the inquirer learned, for the first time, that the client had passed away from causes unrelated to the accident animating the claim, and that the client had died before the lawyer received the most recent settlement offer. The inquirer notified the insurer of the client's demise. At the time of this notice, the insurer had already forwarded a release to the inquirer for the client's signature with the amount of consideration set forth in the release. Upon learning of the client's death, the insurer did not rescind the offer; according to the inquirer, the insurer said that the coronavirus pandemic has occasioned other similar circumstances. Nevertheless, no binding commitment exists that the insurer will pay the offered amount, and no money has yet been exchanged.

3. As far as the inquirer has been able to ascertain, the client died intestate and with little if any assets. The inquirer retained an investigator in an effort to locate the client. This effort resulted in the discovery of a companion who confirmed both the client's death and the client's lack of meaningful assets. Neither the late client's companion nor the lawyer's investigator have been able to produce a death certificate, which the inquirer sought as a prerequisite for a possible petition to the Surrogate's Court. To the best of the inquirer's knowledge, no probate or like proceedings have been started to dispose of the deceased client's assets.

4. The inquirer holds a power of attorney authorizing the lawyer "to execute documents necessary for the prosecution of the [client's] legal affairs," including such documents as "pleadings," "releases," and "settlement drafts," but this authorization requires that the client be notified "in advance of each such document that is being executed on [the client's] behalf and

consent orally to the execution of said documents."

5. The inquirer's contingency-fee agreement with the client entitles the inquirer to a third of the client's recovery after deduction of expenses. Had the client survived and accepted the offer, this agreement would entitle the client to at least half the tendered settlement amount. The inquirer wishes to abandon the matter based on the client's death.

QUESTION:

5. May a lawyer cease to pursue a client's matter, which was never the subject of a judicial proceeding, when the client dies before conclusion of the matter?

OPINION:

6. Our answer is yes. The N.Y. Rules of Professional Conduct ("Rules") say that whether an attorney-client relationship exists is a question of law not ethics. Rules, Preamble ¶ [9]. Nevertheless, we have said that "the death of the client terminates the attorney-client relationship." N.Y. State 1211 ¶ 4 (2020) (citing cases). "As a consequence, '[t]he lawyer . . . may not take any further steps in connection with the matter unless and until [the lawyer] is authorized to do so by the deceased's duly qualified personal representative.'" *Id.* (quoting ABA 95-397). "A client's death terminates a lawyer's actual authority," and any "rights of the deceased client pass to other persons – executors, for example, who can, if they wish, revive the representation." Restatement (Third) of the Law Governing Lawyers § 31 cmt. e (2000).

7. Rule 1.2(a) allocates to the client the sole decision on whether to settle a matter. Without a client, the inquiring lawyer has no right to accept the proposed settlement offer, no matter whether the counterparty is prepared to proceed. Here, the inquirer's power of attorney only reinforces this conclusion, because, while interpretation of such documents are issues of law not ethics, the document unambiguously invests the client with the power to decide whether to settle. Accordingly, in our judgment, the lawyer has no right to effect the settlement, and as a result is not only free but also ethically obligated to forbear from further steps to obtain the settlement proceeds in the absence of a duly qualified personal representative of the client to instruct the lawyer otherwise.

8. A lawyer in the inquirer's position may, but need not, attempt, as the inquirer did, to identify a personal representative to act on the deceased client's behalf in furtherance of judicial proceedings in an appropriate court to effect the proposed settlement. We note the absence of any pending court proceedings – that the personal injury matter never matured into an action – only to make clear that the lawyer here required no judicial permission to terminate the attorney-client relationship because there was no tribunal involved. Rule 1.16(d) prohibits a lawyer from withdrawing without tribunal permission where required by a tribunal's rules.

CONCLUSION:

9. When a client dies before conclusion of the matter, the lawyer has no right to proceed with the matter and may not accept a settlement offer, made after the client died and without the deceased client's approval, absent the separate endorsement of the decedent's duly qualified personal representative.

(22-21)

484 F.Supp. 950
United States District Court, S. D. New York.

R-T LEASING CORPORATION, Plaintiff,
v.
ETHYL CORPORATION, Defendant.

No. 79 Civ. 1720.
|
Nov. 30, 1979.

Synopsis
Plaintiff lessor in action for breach of lease for railroad transport cars moved to disqualify law firm representing defendant in action currently pending. The District Court, Motley, J., held that representation by defendant's law firm of minority shareholder of plaintiff's parent corporation in acquisition of two subsidiaries of plaintiff's parent in relationship entirely adverse to plaintiff and its parent did not establish an attorney-client relationship between plaintiff and law firm representing defendant in court action and, thus, law firm would not be disqualified.

Motion denied.

West Headnotes (5)

[1] **Attorneys and Legal Services** Corporations and business organizations

Where law firm's representation of minority shareholder in parent corporation of plaintiff lessor resulted in scattered arm's length transactions with parent corporation, and where no substantial relationship existed between subject matter of prior representation and present proceedings, no attorney-client relationship existed between plaintiff lessor and law firm to permit plaintiff lessor to assume position of aggrieved former client in its present action against defendant, now represented by law firm, for breach of lease for railroad transport cars and, thus, motion to disqualify on basis of violation of canon mandating preservation of secrets and confidences of present and former client and canon which forbids even appearances of impropriety would be denied. ABA Code of Professional Responsibility, Canons 4, 9.

10 Cases that cite this headnote

[2] **Attorneys and Legal Services** Current and Former Clients

Attorneys and Legal Services Conflicts as grounds for disqualification

An attorney may be disqualified from appearing on behalf of an adversary to a former client in subsequent legal proceedings. ABA Code of Professional Responsibility, Canon 4.

[3] **Attorneys and Legal Services** Current and Former Clients

Attorneys and Legal Services Conflicts as grounds for disqualification

Test for disqualification of attorney under canon providing that lawyer should preserve confidences and secrets of client is that attorney-client relationship must have existed between attorney and the adverse party in present suit and, second, and most important, a substantial relationship must exist between issues involved in prior representation and those of action in which disqualification is sought. ABA Code of Professional Responsibility, Canon 4.

4 Cases that cite this headnote

[4] **Attorneys and Legal Services** Confidentiality

Canon providing that lawyer should preserve confidences and secrets of client protects only clients against disclosure of confidential information. ABA Code of Professional Responsibility, Canon 4.

[5] **Attorneys and Legal Services** Potential or prospective clients; consultations

Where law firm never entered into attorney relationship with plaintiff in present action in which law firm represented defendant, canon prohibiting even appearance of impropriety

was inapplicable. ABA Code of Professional Responsibility, Canon 9.

Attorneys and Law Firms

***950** Easton & Echtman, P. C. by Irwin Echtman, New York City, for plaintiff.

Cahill, Gordon & Reindel by Denis McInerney, R. Kevin Castel, New York City, for defendant.

MEMORANDUM OPINION

MOTLEY, District Judge.

R-T Leasing Corp., (R-T Leasing) has moved pursuant to Canons 4 and 9 of the ABA Code of Professional Responsibility to ***951** disqualify the law firm of Cahill, Gordon & Reindel (Cahill) as counsel for Ethyl Corporation (Ethyl) in an action currently pending before this court. In the alternative, R-T Leasing has requested additional discovery, to culminate in a hearing, on the issue of disqualification. This motion stems from R-T Leasing's pending suit against Ethyl for alleged breaches of leases for railroad transport cars.

The grounds for Cahill's disqualification as advanced by R-T Leasing are that Cahill's previous legal representation of The Overmeyer Co., Inc., (TOC), a minority shareholder in R-T Systems, Inc., (R-T Systems) (the parent corporation of R-T Leasing) in a series of transactions from 1970 to 1973 was tantamount to legal representation of R-T Systems and R-T Leasing, its subsidiary. As a result of Cahill's alleged role as counsel to R-T Systems, R-T Leasing contends that Cahill's representation of Ethyl in the present action, in opposition to the interests of its purported former client, violates Canon 4, which mandates preservation of the secrets and confidences of present and former clients, or, at minimum, contravenes Canon 9, which forbids even the appearance of impropriety. Pointing to the standard remedy of disqualification of attorneys whose conduct falls below those strictures set forth in Canons 4 and 9, R-T Leasing has demanded disqualification of Cahill to obviate the possibility, no matter how remote, of disclosure of or unconscious reliance upon (to R-T Leasing's ultimate detriment) confidences imparted to Cahill during the course of the alleged prior representation of R-T Systems.

In opposition to the motion, Cahill unequivocally disclaims any prior legal representation of R-T Systems and stresses with some vehemence that its representation of TOC in scattered arms-length transactions with R-T Systems may not by any stretch of the imagination be construed as actual or even a de facto representation of R-T Systems. Since proof of a prior attorney-client relationship is necessary for a party to invoke the directives of Canon 4, Cahill contends, a relationship that Cahill claims does not exist on the facts of the instant case, Canon 4 cannot be used as a basis for Cahill's disqualification. Furthermore, Cahill argues that not a scintilla of evidence exists to support a finding that Cahill's relationship with Ethyl exhibits a miasma of impropriety even assuming the absence of a bona fide attorney-client relationship. As a coup de grace to R-T Leasing's insinuations of the existence of a web of impropriety associated with Cahill's present representation of Ethyl in the action before this court, Cahill argues that even if it is assumed arguendo that an attorney-client relationship existed between Cahill and R-T Systems, R-T Leasing has neglected to establish the necessary element in all disqualification motions that a substantial relationship existed between the subject matter of the prior representation and the present proceedings.

[1] For the reasons stated below, this court is persuaded by the evidence presented in the briefs, affidavits and also by the argument at the hearing on this motion that the directives of Canons 4 and 9 are inapplicable to the facts of the case at hand, thus furnishing no basis for Cahill's disqualification as counsel for Ethyl. Once the smoke has cleared, it is patently obvious to the court that no attorney-client relationship existed between R-T Leasing and Cahill to permit R-T Leasing to assume the position of an aggrieved former client in the present action, gravely concerned with the possibility of Cahill's reliance on or disclosure of confidential communications shared in the course of the prior attorney-client relationship, a possibility to be foreclosed only by Cahill's disqualification. The motion to disqualify is hereby denied.

Canon 4

[2] Canon 4 of the ABA Code of Professional Responsibility provides that "(A) lawyer should preserve the confidences and secrets of a client." Canon 4, applying, of course, to the relationship between an attorney and a present client, has been construed by the courts to prevent disclosures of confidential communications of former ***952** clients, particularly if the attorney is so inclined to undertake representation of a party

in an action adverse to the interests of a former client, who is also a party in the same action. Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562 (2d Cir. 1973), following T. C. Theatre Corp. v. Warner Bros. Pictures, Inc., 113 F.Supp. 265 (S.D.N.Y.1953). In other words, an attorney may be disqualified from appearing on behalf of an adversary to a former client in subsequent legal proceedings.

[3] Respectful of the sanctity of an attorney's duty of loyalty to a client for all matters and confidences disclosed during the course of their professional relationship, a relationship that carries with it a presumption of confidentiality, the T. C. Theatre court first formulated a test for disqualification of attorneys who violate the directives of Canon 4 (formerly Canon 6).

> He (the attorney) is enjoined for all time, except as he may be released by law, from disclosing matters revealed to him by reason of the confidential relationship. Related to this principle is the rule that where any substantial relationship can be shown between the subject matter of former representation and that of subsequent adverse representation, the latter will be prohibited. 113 F.Supp. at 268.

Thus, the test for disqualification of an attorney is two-fold: first, an attorney-client relationship must have existed between the attorney and the adverse party in the present suit and, second, and most important, a substantial relationship must exist between the issues involved in the prior representation and those of the action in which disqualification is sought. See NCK Organization Ltd. v. Bregman, 542 F.2d 128 (2d Cir. 1976).

The Emle court, elucidating the two-pronged test of T. C. Theatre, supra, dispensed with any notion that a court, in disqualification actions, must affirmatively inquire as to whether the attorney had actual access to any confidential matters during the prior representation. The court observed that a presumption of the existence of confidential communications arises from the very fact of the attorney-client relationship.

> (T)he court need not, indeed cannot, inquire whether the lawyer did, in fact, receive confidential information during his previous employment which might be used to the client's disadvantage . . . . Thus, where "it can reasonably be said that in the course of the former representation the attorney might have acquired information related to the subject matter of his subsequent representation," (citation omitted) it is the court's duty to order the attorney disqualified. 478 F.2d at 571.

Accord, Fund of Funds, Ltd. v. Arthur Andersen & Co., 567 F.2d 225 (2d Cir. 1977).

Applying the standard for disqualification articulated in the Second Circuit, the court is persuaded that R-T Leasing has failed to sustain its burden of proof as to the first prong of the test, that of the existence of a prior attorney-client relationship among R-T Systems, R-T Leasing and Cahill. As R-T Leasing has not satisfied this threshold requirement, the court need not consider whether a substantial relationship existed between the issues present in both the prior transactions between Cahill and R-T Systems and the pending action before this court.

The court concludes that the affidavits submitted by R-T Leasing in support of its motion establish only that Cahill, in a relationship entirely adverse to R-T Systems and R-T Leasing, assisted its client, TOC, in the acquisition of two subsidiaries of R-T Systems and also in the ultimately aborted merger plan with R-T Systems. No legal authority has reached the attention of this court that premises disqualification of an attorney's previous representation of a client in a relationship adverse to the party moving for disqualification. The simple reason for the absence of such authority is that an attorney-client relationship necessarily demands consent and cooperation of both parties, precluding an adversary relationship such as that which existed among Cahill, R-T Systems and R-T Leasing.

***953** The key facts offered by R-T Leasing in support of its motion are that Cahill performed services as counsel for R-T Systems during negotiations for TOC's acquisition of the two subsidiaries to the extent that Cahill allegedly consulted with R-T Systems regarding its internal problems, including advice on fending off potential takeovers and the proper disclosures to the SEC. According to R-T Leasing, these

alleged consultations permitted Cahill's access to confidential records of R-T Systems and R-T Leasing.

[4] What R-T Leasing appears to overlook is that Canon 4 protects only clients against disclosure of confidential information. Thus, it is immaterial that Cahill may have had access to the "confidential" matters of R-T Systems because Canon 4 does not protect such confidences from scrutiny of opposing counsel. See Emle Industries v. Patentex, Inc., supra. Affidavits submitted by Cahill have persuaded the court that in all transactions of 1970 to 1973, Cahill was indeed counsel solely for TOC and its subsidiary, parties with potential if not actual adverse interests to R-T Systems and R-T Leasing. First and foremost, R-T Systems was represented by independent counsel, McDermott, Will and Emery, in all negotiations concerning TOC's purchase of R-T Systems stock, the two acquisitions and the possible merger. Equally probative of the arms-length and entirely adverse relationship between Cahill and R-T Systems is the 1979 10-K form submitted as evidence by Cahill, stating that no material relationship existed between R-T Systems and TOC, the client of Cahill. Furthermore, TOC's position as a stockholder of ten percent of the stock of R-T Systems does not lead to the imputation of Cahill's acting as counsel to R-T Systems. The facts of the instant case are analogous to those appearing in International Electronics Corp. v. Flanzer, 527 F.2d 1288 (2d Cir. 1975). Reversing the lower court's grant of plaintiffs' disqualification motion of an attorney who had acted on behalf of the defendant selling shareholders, the court reasoned that

> The law firm and the plaintiffs (the merged corporation) were on opposite sides of the negotiations which were conducted at arms length. The plaintiffs' attack is now on the bona fides of the selling stockholders. These defendants the selling stockholders not the buyer, were the clients of the law firm. 527 F.2d at 1292.

As in Flanzer, TOC, as purchaser of R-T Systems stock and subsidiaries and also as a potential merger candidate, was on the opposite end of the bargaining table with R-T Systems in the negotiations of 1970 to 1973; Cahill, as attorney for TOC occupied a position adverse, albeit friendly, to R-T Systems. Furthermore, R-T Systems offers no evidence that Cahill accepted fees for legal services from R-T Systems or in any way comported itself in a manner inconsistent with its role as counsel for TOC.

The cases relied upon by R-T Leasing for the proposition that de facto legal representation is sufficient to activate the sanction of disqualification pursuant to Canon 4, first, establish no such principle and, second, are inapposite to the facts of the instant case. Emle Industries, supra, and Hull v. Celanese Corp., 513 F.2d 568 (2d Cir. 1975) each involved disqualification of an attorney from representation adverse to a former client, a situation that does not exist here. In Emle, supra, the court disqualified the attorney from bringing a suit against Burlington, a subsidiary of Patentex and a former client. In Hull, supra, a former attorney for a corporation, a Ms. Donata Delulio, who assisted in the prosecution of a sex-discrimination suit on behalf of her former client, was disqualified from switching sides in the same action to act as a plaintiff-witness for the opposing counsel in the identical suit. Although the facts of Hull do not squarely conform to the strictures of Canon 4 since the attorney did not act as counsel for the opposing party, the very existence of a prior representation of the now adverse former client, exposing the client to a serious risk of disclosure of confidences, was the decisive factor in the court's decision to grant the disqualification motion. These cases do not support R-T ***954** Leasing's suggestion that a de facto attorney-client relationship may be used as a ground for disqualification under Canon 4.

For the reasons stated above, this court concludes that R-T Leasing has failed to sustain its burden of demonstrating the existence of an attorney-client relationship among Cahill and R-T Systems and R-T Leasing. Therefore, the motion to disqualify Cahill as counsel for Ethyl is denied.

Canon 9

R-T Leasing's argument that Cahill should be disqualified under Canon 9 similarly fails.

Canon 9 provides that "(a) lawyer should avoid even the appearance of professional impropriety." Canon 9, not unlike the ancient adage that Caesar's wife shall be above suspicion, has been cautiously applied by the courts in light of its potential abuse as a dilatory tactic in litigation. As the court observed in International Electronics, supra,

> We caution . . . that Canon 9, though there are occasions when it should be applied, should not be used promiscuously as a convenient tool for disqualification when the facts simply do not fit within the rubric of other specific ethical and disciplinary rules.
>
> 527 F.2d at 1295.

[5] The court fails to detect any "appearance of impropriety" in Cahill's present representation of Ethyl. The court reiterates its finding that Cahill never entered into an attorney-client relationship with R-T Systems or R-T Leasing in the transactions of 1970 to 1973, leading to an appearance of impropriety in its subsequent representation of Ethyl in the present action. As a result, Canon 9 is inapplicable.

So Ordered.

All Citations

484 F.Supp. 950

End of Document

1994 WL 411528
Only the Westlaw citation is currently available.
United States District Court, N.D. New York.

TOWER FACTORY OUTLET and
Seaton Textile Corporation, Plaintiffs,
v.
TEXTILIMPEX–TRICOT, Linen Trading,
Inc., Warta Insurance Company, Tricot,
Ltd. and Textilimpex, Ltd., Defendants.

No. 84–CV–320.
|
Aug. 2, 1994.

Attorneys and Law Firms

Davoli McMahon Law Firm, Syracuse, NY (Jennifer Gale–Smith, of counsel), for plaintiff.

Standard Weisberg, P.C., New York City (Artuhur Liederman and Suzanne Perla, of counsel), Saperston Day Law Firm, Buffalo, NY (Samuel Goldblatt, of counsel), for defendant Tricot Ltd.

Samuel Goldblatt, Esq., Saperston Day Law Firm, Buffalo, NY, for defendant.

MEMORANDUM–DECISION AND ORDER

NEAL P. McCURN, Senior District Judge.

BACKGROUND

***1** This litigation arises out of a state court action wherein the plaintiff minor sustained severe and permanent injuries when the garment he was wearing ignited. The plaintiffs in the present action, Tower Factory Outlet ("Tower") and Seaton Textile Corporation ("Textile"), were the defendants in the underlying action. Plaintiff Tower is the retail entity which offered the garment for sale, and plaintiff Textile imported the garment from a Polish entity. Eventually, the underlying state court action was settled and on March 7, 1984, Tower and Textile commenced this indemnification action. Named as defendants in the Second Amended Complaint in this action are Textilimpex–Tricot, a centralized export agency owned by the Polish government; Linen Trading, Inc., Tricot's general agent in the United States; Tricot, Ltd. and Textilimpex, Ltd., both allegedly successors to Textilimpex, and Warta Insurance Company, purportedly insured Textilimpex–Tricot for, among other things, personal injuries such as those sustained by the plaintiff minor in the underlying action.

Almost four years after the commencement of this action, on February 9, 1988, plaintiffs obtained a default judgment against defendant Textilimpex–Tricot in the amount of $900,000.00. Order (Feb. 9, 1988). Nearly one year after that, on February 15, 1989, the court signed a stipulation executed by plaintiffs' counsel and Arthur J. Liederman, counsel for defendant Tricot, ordering that the default judgment against Textilimpex–Tricot be vacated. That default judgment was vacated based upon Attorney Liederman's representation that Textilimpex–Tricot is no longer in existence. Stipulation (Feb. 15, 1989) at 1, ¶ 1, Docket Entry # 16. In that stipulation Tricot expressly admits that "it will be legally responsible for Textilimpex–Tricot, Ltd.'s obligations or liabilities with respect to knitwear products...." *Id.* at 1, ¶ 4. On December 31, 1992, Textilimpex–Tricot was liquidated, and defendant Tricot is the successor to the former. Affidavit of Arthur J. Liederman (June 29, 1994) at ¶ 3.

Arthur Liederman is now moving for withdrawal as counsel for defendant Tricot. [1] This motion is based primarily upon the inability of Mr. Liederman and his firm to communicate with Tricot. For nine and a half months, from December 1, 1992 through September 20, 1993, defense counsel's attempts to communicate with defendant Tricot went completely unanswered. During that time, defense counsel sent three separate letters via Federal Express, which Federal Express verified were delivered, but to which Tricot never responded. *Id.* at ¶ 5. In addition, defense counsel attempted to communicate with defendant Tricot through facsimile and telex, but to no avail as those numbers are no longer in use by Tricot. *Id.*

Trying to find some means of locating and communicating with Tricot, defense counsel contacted the Polish consulate to determine whether Tricot was, in fact, still in business. *Id.* at ¶ 6. Defense counsel was eventually referred to the Polish Commercial Counselor's office, but it could be of no service and suggested contacting a credit agency such as Dun & Bradstreet. *Id.* Although defense counsel claims that the cost of a service such as that would be "prohibitive," no dollar amount or further explanation is provided in that regard. *Id.*

***2** Prior to a September 29, 1993 pretrial conference scheduled before Magistrate Judge Scanlon, defense counsel

again attempted to communicate with his client one last time; this time defense counsel did receive a response, which is part of the record on this motion. *See id.,* exh. C thereto. Specifically, by letter dated September 30, 1993, defense counsel was advised that Tricot is in bankruptcy in Poland and has been liquidated. *Id.,* at ¶ 8 and exh. C thereto. That letter further advises that no one associated with Tricot's liquidation has any knowledge of the facts and circumstances surrounding this litigation. *Id.* After receiving this letter, on October 25, 1993, defense counsel once again wrote Tricot, this time requesting that it contact defense counsel by telephone. *Id.* at ¶ 9. [2]

In light of these difficulties in locating and communicating with defendant Tricot, defense counsel now seeks withdrawal. In further support of this motion to withdraw, defense counsel also points to the fact that currently Tricot has outstanding unpaid bills for legal services rendered, totalling "several thousand dollars which we have no hope of recovering." *Id.* at ¶ 10. No documentation or further details of the relevant circumstances surrounding Tricot's alleged failure to pay have been provided to the court on this motion however. Defense counsel has served Tricot with a copy of these motion papers, but to date Tricot has not responded in any form. Plaintiffs do not opposes this motion. *See* Letter of Jennifer Gale Smith to Court (July 22, 1994), Docket Entry # 29.

DISCUSSION

Nowhere in his moving papers did defense counsel specify any particular provision of the Code of Professional Responsibility upon which he is basing this withdrawal motion. [3] Presumably he is relying upon Disciplinary Rule ("DR") 2–110(C)(1)(d), which permits withdrawal if the client "[b]y other conduct renders it unreasonably difficult for the lawyer to carry out employment effectively." DR 2–110(C)(1)(d) (McKinney 1992); *see also* ABA Model Code of Professional Responsibility DR 2–110(C)(1)(d) (same). Or perhaps defense counsel is relying upon DR 2–110(C)(6) [check cite], the catch-all provision, which allows an attorney to move for withdrawal if the attorney "believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal." DR 2–110(C)(6) (McKinney 1992). Because the circumstances described in attorney Liederman's affidavit, for the most part, appear to fall neatly under the former provision, the court will assume that DR 2–110(C)(1)(d) is the basis for this motion.

When an attorney seeks to withdraw from a case, however, it is incumbent upon the court to assure that the prosecution of the lawsuit is not disrupted by the withdrawal, and that the withdrawal is for good cause. *See Goldsmith v. Pyramid Communications, Inc.,* 362 F.Supp. 694, 696; and *El Morro Food Distributors, Inc. v. W.M. Tannin Co.,* 223 F.Supp. 717, 718 (S.D.N.Y.1963). To illustrate, in *Statute of Liberty v. Intern. United Industries,* 110 F.R.D. 395 (S.D.N.Y.1986), the court granted an attorney's motion to be relieved as counsel where, among other things, the client failed to answer the firm's telephone calls and letters regarding the course of the litigation and the scheduling of depositions in particular. *Id.* at 397.

***3** Likewise, in the present case, because Tricot has failed to respond to nearly all of defense counsel's inquiries, and because there is now no one associated with Tricot who has any knowledge about this litigation, clearly these factors make it "unreasonably difficult for attorney Liederman to effectively represent Tricot in this action. Thus, the court grants Arthur Liederman's motion to withdraw, on behalf of himself and Standard, Weisberg P.C., as counsel for defendant Tricot.

At this point it should be emphasized that the Code does permit an attorney to request permission to withdraw if the client has "deliberately disregard[ed] an agreement or obligation ... as to expenses or fees." DR 2–110(C)(1)(f) (McKinney 1992). "However, it is not enough to justify withdrawal under this provision to state generally that some fees are owing, the attorney must set forth details of the client's failure." *Standard Dyeing and Finishing Co. v. Alma Textile Printers Corp.* No. 84–Civ.–2928–CSH, Slip Op. at 11 (S.D.N.Y. Aug. 4, 1986) (citations omitted). "Indeed, in some circumstances, failure to pay will not justify withdrawal." *Id.* (citation omitted) (emphasis added).

In the present case, because attorney Liederman has not offered any details as to Tricot's alleged non-payment, insofar as this motion to withdraw is based upon Tricot's supposed failure to pay for legal services rendered, it must be denied. Failure to pay is not a ground for granting the present motion because given the scant state of the record on this issue, the court is unable to determine whether Tricot's failure to pay is "deliberate" within the meaning of D.R. 2–110(c)(1)(f).

See id. Thus, although the court does grant this withdrawal motion, it does so because defendant Tricot has made it "unreasonably difficult" for attorney Liederman and his firm to continue representing Tricot in this action, and not because Tricot has allegedly failed to pay attorney Liederman and his firm.

Because the court hereby grants the motion by Arthur J. Liederman of Standard Weisberg, P.C. to withdraw as counsel for defendant Tricot, Ltd., said defendant now has thirty (30) days to advise the court as to its new attorney.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp., 1994 WL 411528

Footnotes

1 In the answer submitted by Mr. Liederman he identifies his client as follows: "Defendant Foreign Trade Enterprise Tricot, Ltd., sued herein as Tricot, Ltd...." Answer at 1. In that answer Tricot admits assuming the obligations and liabilities with respect to knitwear of defendant Textilimpex–Tricot or Textilimpex. *Id.* at 2, ¶ 6. In the Notice of Motion filed in connection with his withdrawal motion, however, Mr. Liederman identifies his client as Textilimpex–Tricot, and he does the same in his supporting affidavit. Liederman Affidavit at ¶ 1. Given the fact that only defendant Tricot filed an answer in this action, and that that was done by Mr. Liederman, the court assumes that the use of Textilimpex–Tricot,'s name in these motion papers is simply a confusing oversight.

2 Although the court has absolutely no reason to doubt Mr. Liederman's veracity, it would have been preferable if a copy of this letter had also been made a part of the record on this motion, as were counsel's previous letters.

3 In this regard, counsel is advised that the court has been extremely lenient in its consideration of this motion in its present form. As counsel is aware, this motion was not timely filed, as required under Local Rule 7. The court was willing to give counsel some latitude in this regard, however, because these newly adopted Local Rules, including this change from a twenty-one to a twenty-eight day advance filing period, just became effective July 1, 1994. Further, because counsel probably does not routinely practice in the Northern District of New York, he was not aware of this change. The requirement of a memorandum of law is not new to this District however, and thus there is no reason for counsel's failure to file the same.

187 F.3d 317
United States Court of Appeals,
Second Circuit.

Joseph M. WHITING, Plaintiff–Appellee,
v.
Garrett R. LACARA, Appellant,
The Incorporated Village of Old Brookville;
Chief Charles K. Smith, Ltn.; John Post;
Ltn. Maurice Sullivan, individually and
as Members of The Old Brookville Board
of Police Commissioners, Defendants.

Docket Nos. 98–9081(L), 98–9429(CON).
|
Argued July 12, 1999.
|
Decided Aug. 23, 1999.

Synopsis

Former police officer filed a civil rights action against county, village, village police department, other villages, and various individual defendants regarding the termination of his employment. The United States District Court for the Eastern District of New York, Arthur D. Spatt, J., 20 F.Supp.2d 438, denied attorney's motions to withdraw as counsel for officer, and attorney appealed. The Court of Appeals held that officer's desire both to dictate legal strategies to his attorney and to sue his attorney if those strategies were not followed placed attorney in so impossible a situation that he had to be permitted to withdraw.

Reversed.

Procedural Posture(s): On Appeal.

West Headnotes (9)

[1] **Federal Courts** Counsel

Denial of attorney's motion to withdraw as counsel for plaintiff was appealable under the collateral order doctrine; the denial conclusively determined the disputed question, the issue was completely separate from the merits of the underlying action, and once a final judgment was entered, the harm to attorney would be complete, and no relief could be obtained on appeal.

39 Cases that cite this headnote

[2] **Federal Courts** Interlocutory and Collateral Orders

Collateral order doctrine is limited to trial court orders affecting rights that will be irretrievably lost in the absence of an immediate appeal.

7 Cases that cite this headnote

[3] **Federal Courts** Interlocutory and Collateral Orders

To be appealable under the collateral order doctrine, interlocutory order must: [i] conclusively determine the disputed question, [ii] resolve an important issue completely separate from the merits of the action, and [iii] be effectively unreviewable on appeal from a final judgment.

25 Cases that cite this headnote

[4] **Federal Courts** Counsel

Court of Appeals reviews a district court's denial of a motion to withdraw only for abuse of discretion.

38 Cases that cite this headnote

[5] **Federal Courts** Counsel

District courts are due considerable deference in decisions not to grant a motion for an attorney's withdrawal; trial judge is closest to the parties and the facts, and Court of Appeals is very reluctant to interfere with district judges' management of their very busy dockets.

18 Cases that cite this headnote

[6] **Attorneys and Legal Services** Permission of court; proceedings

Plaintiff's desire both to dictate legal strategies to his counsel and to sue counsel if those strategies were not followed placed counsel in so impossible a situation that he had to be permitted to withdraw; if required to continue to represent plaintiff, counsel would have had to choose between exposure to a malpractice action or to potential Rule 11 or other sanctions. Fed.Rules Civ.Proc.Rule 11(b)(2), 28 U.S.C.A.; ABA Code of Prof.Resp., DR 2–110(C)(1)(a).

11 Cases that cite this headnote

[7] **Attorneys and Legal Services** Permission of court; proceedings

Considerations of judicial economy weigh heavily in favor of giving district judges wide latitude in ruling on attorney's motion to withdraw as counsel, but there are some instances in which an attorney representing a plaintiff in a civil case might have to withdraw even at the cost of significant interference with the trial court's management of its calendar.

42 Cases that cite this headnote

[8] **Attorneys and Legal Services** Termination by Attorney; Withdrawal

Although the Model Code of Professional Responsibility was drafted solely for its use in disciplinary proceedings and cannot by itself serve as a basis for granting a motion to withdraw as counsel, the Model Code provides guidance for the court as to what constitutes "good cause" to grant leave to withdraw as counsel.

85 Cases that cite this headnote

[9] **Attorneys and Legal Services** Permission of court; proceedings

District court has wide latitude to deny a counsel's motion to withdraw on the eve of trial where the Model Code of Professional Responsibility merely permits withdrawal.

63 Cases that cite this headnote

Attorneys and Law Firms

***318** Robert E. Sokolski, New York, New York, for Appellant.

Joseph M. Whiting, pro se, South Huntington, New York, for Plaintiff–Appellee.

Before: WINTER, Chief Judge, WALKER, and CABRANES, Circuit Judges.

Opinion

PER CURIAM:

Garrett R. Lacara appeals from two orders of Judge Spatt denying Lacara's motions to withdraw as counsel for plaintiff-appellee Joseph M. Whiting. Although the record before Judge Spatt justified denial of the motions, amplification of Whiting's position at oral argument persuades us to reverse. [1]

BACKGROUND

In July 1996, appellee, a former police officer, filed a civil rights action against Nassau County, the Incorporated Village of Old Brooksville, the Old Brooksville Police Department, other villages, and various individual defendants. The action was based on the termination of his employment as an officer. He sought $9,999,000 in damages.

***319** Appellee's initial counsel was Jeffrey T. Schwartz. In October 1996, Robert P. Biancavilla replaced Schwartz. A jury was selected in October 1997 but was discharged when Biancavilla withdrew from the case with appellee's consent.

Whiting retained Lacara in December 1997. In June 1998, the district court partially granted defendants' summary judgment motion and dismissed plaintiff's due process claims. *See Whiting v. Incorporated Village of Old Brookville,* 8 F.Supp.2d 202 (E.D.N.Y.1998). The court scheduled the remaining claims, one free speech claim and two equal protection claims, for a jury trial on August 18, 1998. On July 20, 1998, the district court denied appellee's motion to amend his complaint to add a breach of contract claim and another

due process claim. *See Whiting v. Incorporated Village of Old Brookville,* 182 F.R.D. 14 (E.D.N.Y.1998).

On August 6, 1998, Lacara moved to be relieved as counsel. In support, he offered an affidavit asserting that appellee "[had] failed to follow legal advice," that appellee "[wa]s not focused on his legal rights," and that appellee "demand[ed] publicity against legal advice." Lacara also asserted that appellee had failed to keep adequate contact with his office, was "not sufficiently thinking clearly to be of assistance at the time of trial," and would "be of little or no help during trial." Furthermore, Lacara stated that appellee had "demand[ed] that [Lacara] argue collateral issues which would not be allowed in evidence," demanded that Lacara continue to argue a due process claim already dismissed by the court, and drafted a Rule 68 Offer without Lacara's consent and demanded that he serve it on defendants. Finally, Lacara asserted that on July 30, 1998, Whiting had entered his office and, without permission, had "commenced to riffle [Lacara's] 'in box.' " Lacara stated that he had to call 911 when Whiting had refused to leave the office. Lacara offered to provide further information to the court in camera. Whiting's responsive affidavit essentially denied Lacara's allegations. Whiting stated that he would not be opposed to an order relieving counsel upon the condition that Lacara's firm refund the legal fees paid by Whiting.

On August 13, Judge Spatt denied Lacara's motion to withdraw as counsel. Judge Spatt subsequently issued a written order giving the reasons for denying appellant's motion. *See Whiting v. Incorporated Village of Old Brookville,* 20 F.Supp.2d 438 (E.D.N.Y.1998).

On August 13, 1998, Lacara filed a notice of appeal and moved for an emergency stay of the district court's order and to be relieved as appellee's attorney. We granted Lacara's motion for an emergency stay pending appeal but denied his request for relief on the merits at that time. *See Whiting v. Lacara,* No. 98–9081 (2d Cir. Sept. 10, 1998). At a status conference on September 23, 1998, the district court entertained another motion from Lacara to withdraw as counsel, which Judge Spatt again denied. Lacara filed a timely appeal, which was consolidated with the earlier appeal.

DISCUSSION

a) *Appellate Jurisdiction*

[1] We first discuss whether we have jurisdiction over this appeal. The district court's order denying Lacara's motion to withdraw is neither a final judgment under 28 U.S.C. § 1291 nor an interlocutory order certified under 28 U.S.C. § 1292(b). Thus, we have jurisdiction, if at all, only under the collateral order doctrine, "a narrow exception to the general rule that interlocutory orders are not appealable as a matter of right." *Schwartz v. City of New York,* 57 F.3d 236, 237 (2d Cir.1995).

[2] **[3]** The collateral order doctrine "is limited to trial court orders affecting rights that will be irretrievably lost in the absence of an immediate appeal." ***320** *Richardson–Merrell, Inc. v. Koller,* 472 U.S. 424, 430–31, 105 S.Ct. 2757, 86 L.Ed.2d 340 (1985). To fit within the collateral order exception, the interlocutory order must: "[i] conclusively determine the disputed question, [ii] resolve an important issue completely separate from the merits of the action, and [iii] be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 468, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978).

The denial of Lacara's motion to withdraw as counsel satisfies each of the three requirements. An order denying counsel's motion to withdraw " 'conclusively determine(s) the disputed question,' because the only issue is whether ... counsel will ... continue his representation." *Firestone Tire & Rubber Co. v. Risjord,* 449 U.S. 368, 375–76, 101 S.Ct. 669, 66 L.Ed.2d 571 (1981) (quoting *Coopers & Lybrand,* 437 U.S. at 468, 98 S.Ct. 2454). Moreover, whether Lacara must continue to serve as appellee's counsel is in the present circumstances an issue completely separate from the merits of the underlying action.

Finally, once a final judgment has been entered, the harm to Lacara will be complete, and no relief can be obtained on appeal. Unlike an order granting or denying a motion to disqualify an attorney, which primarily affects the interests of the underlying litigants, *see Risjord,* 449 U.S. at 376–78, 101 S.Ct. 669 (holding no collateral order jurisdiction over district court's denial of motion for disqualification of counsel because order would be effectively reviewable upon final judgment), an order denying counsel's motion to withdraw primarily affects the counsel forced to continue representing a client against his or her wishes. *See Malarkey v. Texaco, Inc.,* No. 81 Civ. 5224, 1989 WL 88709, at *2 (S.D.N.Y. July 31, 1989) (noting that denying counsel's motion to withdraw "amounts to" requiring "specific performance"). Denial of

a motion to withdraw is directly analogous to a denial of immunity or of a double jeopardy claim, which are reviewable under the collateral order doctrine on the ground that having to go through a trial is itself a loss of the right involved. *See* *Mitchell v. Forsyth,* 472 U.S. 511, 524–30, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) (immunity); *Abney v. United States,* 431 U.S. 651, 659–62, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977) (double jeopardy). The injury to a counsel forced to represent a client against his will is similarly irreparable, and the district court's decision would be effectively unreviewable upon final judgment. We therefore have appellate jurisdiction.

b) *The Merits*

[4] **[5]** We review a district court's denial of a motion to withdraw only for abuse of discretion. *See, e.g., Fleming v. Harris,* 39 F.3d 905, 908 (8th Cir.1994); *Washington v. Sherwin Real Estate, Inc.,* 694 F.2d 1081, 1087 (7th Cir.1982). District courts are due considerable deference in decisions not to grant a motion for an attorney's withdrawal. *See, e.g.,* *Washington,* 694 F.2d at 1087. The trial judge is closest to the parties and the facts, and we are very reluctant to interfere with district judges' management of their very busy dockets.

[6] Judge Spatt denied Lacara's motion pursuant to Rule 1.4 of the Civil Rules of the United States District Court for the Southern and Eastern Districts of New York, which provides that

> [a]n attorney who has appeared as attorney of record for a party may be relieved or displaced only by order of the court and may not withdraw from a case without leave of the court granted by order. Such an order may be granted only upon a showing by affidavit or otherwise of satisfactory reasons for withdrawal or displacement and the posture of the case, including its position, if any, on the calendar.

In addressing motions to withdraw as counsel, district courts have typically considered whether "the prosecution of the suit is [likely to be] disrupted by the withdrawal of counsel." ***321** *Brown v. National Survival Games, Inc.,* No. 91–CV–221, 1994 WL 660533, at *3 (N.D.N.Y. Nov.18, 1994) (finding that because "[discovery] is not complete and the case is not presently scheduled for trial .... granting the instant motion will not likely cause undue delay"); *see also* *Malarkey,* 1989 WL 88709, at *2 (denying counsel's motion to withdraw when case is "on the verge of trial readiness"); *Rophaiel v. Alken Murray Corp.,* No. 94 Civ. 9064, 1996 WL 306457, at *2 (S.D.N.Y. June 7, 1996) (denying motion to withdraw and noting concern with litigation delay because it would be "too easy for a defendant to stall proceedings by inducing the withdrawal of its attorney by non-payment of fees").

[7] Considerations of judicial economy weigh heavily in favor of our giving district judges wide latitude in these situations, but there are some instances in which an attorney representing a plaintiff in a civil case might have to withdraw even at the cost of significant interference with the trial court's management of its calendar. For example, the Code of Professional Responsibility might mandate withdrawal where "the client is bringing the legal action ... merely for the purpose of harassing or maliciously injuring" the defendant. Model Code of Professional Responsibility ("Model Code") DR 2–110(B)(1); N.Y. Comp.Codes R. & Regs. tit. 22, § 1200.15(b)(1). In such a situation, by denying a counsel's motion to withdraw, even on the eve of trial, a court would be forcing an attorney to violate ethical duties and possibly to be subject to sanctions.

[8] **[9]** Lacara does not claim that he faces mandatory withdrawal. Rather, he asserts three bases for "[p]ermissive withdrawal" under the Model Code: (i) Whiting "[i]nsists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law," Model Code DR 2–110(C)(1)(a); (ii) Whiting's "conduct [has] render[ed] it unreasonably difficult for [Lacara] to carry out employment effectively," DR 2–110(C)(1)(d); and (iii) Whiting has "[d]eliberately disregard[ed] an agreement or obligation to [Lacara] as to expenses or fees," DR 2–110(C)(1)(f). Although the Model Code "was drafted solely for its use in disciplinary proceedings and cannot by itself serve as a basis for granting a[m]otion to withdraw as counsel," we continue to believe that "the Model Code provides guidance for the court as to what constitutes 'good cause' to grant leave to withdraw as counsel." *Brown,* 1994

WL 660533, at *4 n. 1 (citing *Armstrong v. McAlpin,* 625 F.2d 433, 446 n. 26 (2d Cir.1980), *vacated on other grounds,* 449 U.S. 1106, 101 S.Ct. 911, 66 L.Ed.2d 835 (1981)); *see also* *Joseph Brenner Assocs. v. Starmaker Entertainment, Inc.,* 82 F.3d 55, 57 (2d Cir.1996) (citing New York implementation of Model Code in affirming district court's decision granting counsel's withdrawal motion). However, a district court has wide latitude to deny a counsel's motion to withdraw, as here, on the eve of trial, where the Model Code merely permits withdrawal.

In the instant matter, we would be prepared to affirm if the papers alone were our only guide. Although Lacara has alleged a nonpayment of certain disputed fees, he has not done so with sufficient particularity to satisfy us that withdrawal was justified on the eve of trial. *See Rophaiel,* 1996 WL 306457, at *1–2 (denying counsel's motion to withdraw based solely on the nonpayment of fees when allegation was not made with sufficient particularity). Moreover, there is nothing in the district court record to suggest error in that court's finding that "Whiting has been very cooperative and desirous of assisting his attorney in this litigation." *Whiting,* 20 F.Supp.2d at 439. To be sure, we are concerned by Lacara's allegation that appellee trespassed in his office and that appellant had to call 911 to get Whiting to leave. However, Whiting disputes Lacara's description of these events. Moreover, we strongly agree with the district court that, as the third attorney in this case, Lacara had ample notice that appellee was a difficult client. *Id.*

***322** Nevertheless, we reverse the denial of appellant's motion for withdrawal under Model Code DR 2–110(C)(1)(a). Among Lacara's allegations are that Whiting insisted upon pressing claims already dismissed by the district court and calling witnesses Lacara deemed detrimental to his case. At oral argument, Whiting confirmed Lacara's contention that Whiting intends to dictate how his action is to be pursued. Whiting was asked by a member of the panel:

> Are you under the impression that if we affirm Judge Spatt's ruling, you will be able to tell Mr. Lacara to make the arguments you want made in this case? ... [T]hat, if Mr. Lacara says, "That witness doesn't support your case," and you don't agree with that, are you under the impression that if we affirm Judge Spatt's ruling you'll be able to force him to call that witness?

To which Whiting replied, "Yes I am."

Moreover, in his statements at oral argument, Whiting made it clear that he was as interested in using the litigation to make public his allegations of corruption within the Brookville police department as in advancing his specific legal claims. For example, Whiting thought it relevant to inform us at oral argument that police officers in the department were guilty of "illegal drug use, acceptance of gratuities, [and] ongoing extramarital affairs while they were on duty." Appellee stated that he wanted to call an officer to testify that the officer could not "bring up anything criminal about the lieutenant, the two lieutenants, or the chief, which could get them in trouble or make the department look bad." Finally, Whiting made clear that he disagreed with Lacara about the handling of his case partly because Whiting suspects that Lacara wants to cover up corruption. Appellee stated: "For some strange reason, Mr. Lacara states that he doesn't want to put certain witnesses on the stand.... The bottom line is he does not want to make waves and expose all of the corruption that's going on within this community."

Also, at oral argument, appellee continued to bring up the already-dismissed due process claims. He asserted: "They found me guilty of something which was investigated by their department on two separate occasions and closed as unfounded on two separate occasions." We thus have good reason to conclude that Whiting will insist that Lacara pursue the already dismissed claims at trial.

Finally, appellee indicated that he might sue Lacara if not satisfied that Lacara provided representation as Whiting dictated. After admitting that he did not consider Lacara to be the "right attorney" for him in this case, Whiting asserted that he deemed Lacara "ineffective." The following exchange also occurred:

> *Question from Panel:*
>
> If you think that Mr. Lacara is ineffective in representing you as you stand here now, doesn't Mr. Lacara face the prospect of a ... malpractice suit, by you, against him, if he continues in the case?
>
> *Appellee's Reply:*
>
> Yes, I believe he absolutely does.
>
> *Question from Panel:*

> Then, isn't that all the more reason to relieve him? So that what you say is ineffective and is in effect a distortion of the attorney-client relationship, doesn't continue?
>
> *Appellee's Reply:*
>
> I believe I do have grounds to sue Mr. Lacara for misrepresentation....

We believe that appellee's desire both to dictate legal strategies to his counsel and to sue counsel if those strategies are not followed places Lacara in so impossible a situation that he must be permitted to withdraw.

Model Code DR 2–110(C)(1)(a) limits the obligations of attorneys to follow their clients' dictates in how to conduct litigation. Attorneys have a duty to the court ***323** not to make "legal contentions ... [un]warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law...." Fed.R.Civ.P. 11(b)(2). We have determined that "an attorney who continues to represent a client despite the inherent conflict of interest in his so doing [due to possible Rule 11 sanctions] risks an ethical violation." *Healey v. Chelsea Resources, Ltd.,* 947 F.2d 611, 623 (2d Cir.1991) (citing *Calloway v. Marvel Entertainment Group,* 854 F.2d 1452, 1471 (2d Cir.1988), *rev'd on other grounds,* 493 U.S. 120, 110 S.Ct. 456, 107 L.Ed.2d 438 (1989)). In this case, appellee's belief that he can dictate to Lacara how to handle his case and sue him if Lacara declines to follow those dictates leaves Lacara in a position amounting to a functional conflict of interest. If required to continue to represent Whiting, Lacara will have to choose between exposure to a malpractice action or to potential Rule 11 or other sanctions. To be sure, such a malpractice action would have no merit. However, we have no doubt it would be actively pursued, and even frivolous malpractice claims can have substantial collateral consequences.

As previously noted, the interest of the district court in preventing counsel from withdrawing on the eve of trial is substantial. Moreover, we would normally be loath to allow an attorney to withdraw on the eve of trial when the attorney had as much notice as did Lacara that he was taking on a difficult client. However, the functional conflict of interest developed at oral argument causes us to conclude that the motion to withdraw should be granted.

We therefore reverse and order the district court to grant appellant's motion to withdraw as counsel. We note that Lacara agreed in this court to waive all outstanding fees and to turn over all pertinent files to Whiting.

All Citations

187 F.3d 317

Footnotes

1 Defendants take no position on this appeal.

Presenters

Hon. Therese Wiley Dancks
United States Magistrate Judge, Northern District of New York

Thérèse Wiley Dancks is a United States Magistrate Judge for the Northern District of New York. At the time of her appointment in February of 2012, she was a founding partner in the law firm of Gale & Dancks, LLC, where her practice centered on civil litigation and trial work. She was associated with the law firm of Mackenzie Hughes, LLP from 1991 to 1997. Judge Dancks graduated magna cum laude from LeMoyne College in 1985 and earned her J.D. degree cum laude from Syracuse University College of Law in 1991.

Judge Dancks is a past president of the Central New York Women's Bar Association and established the organization's award winning Domestic Violence Legal Assistance Clinic during her term. She is a past director of the Onondaga County Bar Association and has been a board member of several charitable and community organizations. She served as Chairwoman of the Board of Directors of the Hiscock Legal Aid Society and the Secretary of the Board of Directors of St. Elizabeth College of Nursing. She has co-authored articles for the Syracuse Law Review and she frequently lectures for educational institutions, professional organizations and bar association.

Suzanne Galbato, Esq.
General Counsel, Bond Schoeneck & King PLLC

Suzanne is a litigation attorney who handles litigation throughout New York state courts and in federal courts across the country, including multidistrict and class action litigation.

She counsels and represents a wide variety of clients, including individuals, manufacturers, media companies, pharmaceutical companies, insurance companies, financial institutions, municipalities, not-for-profit organizations, small business owners, school districts and universities.

Suzanne's practice also includes representing clients in administrative hearings and resolving disputes through mediation. She has extensive experience arguing appeals in both state and federal court. Suzanne represents a variety of public and private companies as well as non-profit organizations in complex civil litigation. She handles commercial disputes, breach of contract, product liability, employment discrimination, unfair competition, trade secret and antitrust matters. Her practice also includes complex environmental litigation, encompassing defense of personal injury and property damage claims in multi-plaintiff cases arising from the contamination of soil and groundwater. Suzanne has experience defending personal injury claims based on exposure to hazardous substances in consumer products. She also represents clients in False Claims Act litigation and white collar criminal matters.

Prior to joining the firm, Suzanne clerked for the Honorable Rosemary S. Pooler, of the U.S. Court of Appeals for the Second Circuit.

Kristin Nicoll, Esq.
Simpson Thacher & Bartlett LLP

Kristin Nicoll is Director of Conflicts and Legal Ethics at Simpson Thacher & Bartlett LLP (the "Firm"). Kristin has been with the Firm since 2007. Prior to joining the Firm, Kristin was a corporate associate and worked on a variety of M&A, financing and general corporate matters. Kristin received her J.D. from Syracuse University and her B.Sc. from Cornell University, School of Industrial and Labor Relations, and is admitted to practice in New York.

Moderator

Suzanne M. Messer, Esq.
Bond Schoeneck & King PLLC

Suzanne represents clients in commercial, higher education, employment and civil rights disputes and litigation. She has counseled and litigated in these subject areas for more than 15 years and regularly appears in federal and state courts. Suzanne has tried both jury and non-jury trials, argued before appellate-level courts and assisted clients in resolving disputes through mediations and arbitration proceedings.

Suzanne's experience in complex litigation matters involves the extensive use of a variety of e-discovery platforms and technology. She is proficient in the management, collection and production of electronically stored information (ESI), uses technology to facilitate discovery in litigation and regularly assists clients with the preparation and implementation of record preservation policies.

Suzanne is an active participant in the Northern District of New York Federal Court Bar Association (NDNY FCBA) and has served as a Co-Chair of the Continuing Legal Education Committee of the NDNY FCBA for two years. In that role, she not only organizes continuing legal education programs but is a frequent presenter and panelist. Suzanne also serves on the Executive Committee and as a District Leader of the New York State Bar Association's Commercial and Federal Litigation Section.