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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:
HON. DANIEL PALMIERI
Acting Justice Supreme Court

----------x **TRIAL TERM PART:47**

STEVEN DELORENZ and KIMBERLY DELORENZ,

INDEX NO.:20253/07

Plaintiffs,

MOTION DATE:5-19-09
SUBMIT DATE:6-30-09
SEQ.NUMBER- 004

-against-

JEFF MOSS, LISA C.J. KEYES, SJEF VANDENBERG and MARCIA SCHUCK,

Defendants

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The following papers have been read on this motion:

Order to Show Cause, dated 5-7-09..... 1
Affirmation in Opposition, dated 6-8-09.....2
Reply Affirmation, dated 6-26-09.....3

The motion by plaintiffs Steven DeLorenz and Kimberly DeLorenz to disqualify defense counsel Quirk and Bakalor, P.C. (hereafter "Quirk") from representing either defendant Jeff Moss or defendant Lisa C.J. Keyes pursuant to applicable ethical standards is denied.

This is one of three related cases resulting from a motor vehicle accident that occurred on May 12, 2007 near the intersection of Glen Cove Road and Glen Head Road in Old Brookville, Nassau County. At the time of the accident, defendant Jeff Moss was operating the vehicle owned by his then-wife, defendant Lisa C.J. Keyes. Moss struck the

rear of the vehicle operated by Sjef Van den Berg, which in turn struck the rear of the vehicle operated by Marcia Schuck, which then hit the rear of Steven DeLorenz's automobile. The accident caused the death of Van den Berg's wife, a passenger in his vehicle. In or about late May 2007, Keyes' insurance carrier Travelers Insurance Company (hereafter "Travelers") retained Quirk as counsel for both Moss and Keyes.

On July 11, 2008, the Court granted summary judgment motions pursuant to CPLR 3212 to (i) DeLorenz, (ii) Darwin Acosta and Walter Acosta (defendants in another action), (iii) Schuck, and (iv) Van den Berg on the issue of fault, but not as to serious injury. Insofar as is relevant here, there remain issues of damages between plaintiff DeLorenz against co-defendants Moss and Keyes.

On September 9, 2008 Moss pleaded guilty to a 14 count criminal indictment stemming from this occurrence, including manslaughter, and was sentenced to two to six years in prison, where he presently resides. Shortly after resolution of the criminal case, this Court permitted DeLorenz to amend the complaint to add a cause of action for punitive damages against Moss.

The defendants Keyes and Moss recently notified the Court that they had been divorced by a Judgment of Divorce on March 16, 2009, and agreed to disclose Moss's net worth for the purposes of the DeLorenz punitive damages claim brought against him.

On April 20, 2009, Quirk notified the Court by letter that it wished to relinquish representation of Moss because of a conflict of interests it perceived between the co-defendants. Quirk recognized a conflict after DeLorenz wished to depose Keyes for

evidence to be used against Moss on the punitive damages claim. The firm indicated its belief that this dual representation was not permitted pursuant to the Rules of Professional Conduct. Travelers Insurance Company, which was funding the defense under a policy issued on the Keyes/Moss vehicle, agreed that it would retain new counsel for Moss and that Quirk would continue its representation of Keyes. Moss is now represented by O'Connor, O'Connor, Hintz & Deveney, LLP.

Based upon the Quirk letter to the Court, plaintiff DeLorenz now moves to disqualify Quirk from representing either Keyes or Moss under applicable ethical standards. In opposition Quirk asserts, *inter alia,* that plaintiff lacks standing to disqualify it from representing Keyes in this matter, and contends that the interests of the co-defendants are not materially adverse. Quirk also states disqualification should be denied since it obtained Moss's consent, confirmed in writing, to its continued representation of Keyes in a May 28, 2009 letter. An unredacted version of that letter has been supplied to the Court on this motion. It should be noted that although there is no writing from Keyes herself submitted on this motion, the fact that her present attorneys have opposed the application indicates that she is agreeable to its continued representation of her interests in this litigation.

Effective April 1, 2009, the New York Rules of Professional Conduct (hereafter "New Rules") replaced the Code of Professional Responsibility (hereafter "Code") in an effort to enhance the consistency of ethical standards. The New Rules include approximately three-quarters of the former Code, with the remaining one-quarter coming from the ABA's Model Rules. Simon, *Comparing the New NY Rules of Professional*

Conduct To the NY Code of Professional Responsibility, New York State Bar Association Journal, May 2009, at 9. (Also available at www.nysba.org.) The New Rules align New York with the 47 other states that have adopted the ABA model. Siegler, Talel, *Impact of New Ethics and Conflicts of Interest Rules*, New York Law Journal, July 1, 2009, at 3, 10.

Initially, the Court finds that the New Rules apply to the instant motion in regulating the behavior of the attorneys involved, because the present disqualification issue arose after April 1, 2009. However, well-established case law mandates that this motion be denied, as there is no basis for concluding that the holdings of those cases have been eviscerated by the adoption of the New Rules.

A party is entitled to representation of his own choosing, which should not be abridged absent a clear showing that disqualification is warranted. *Feeley v Midas Props.*, 199 AD2d 238 (2d Dept. 1993). A court must "consider such factors as the party's valued right to choose its own counsel, and the fairness and effect in the particular factual setting of granting disqualification or continuing representation." *S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp.*, 69 NY2d 437, 440 (1987). The party seeking the disqualification of the attorney bears the burden of the motion. *Id.* at 445.

As this motion is for disqualification based upon a conflict of interests between a former and current client, the moving party must demonstrate (i) the existence of a prior attorney-client relationship between the moving party and opposing counsel (*i.e.*, standing); (ii) that the matters involved in both representations are substantially related ; and (iii) that the present interests of the attorney's past and present clients are materially

adverse. *Jamaica Pub. Serv. Co. v AIU Ins. Co.*, 92 NY2d 631 (1998); *Pelligrino v Oppenheimer & Co.*, 49 AD3d 94 (1st Dept. 2008); *Waehner v Northwest Partners, LTD.*, 30 AD3d 799 (3d Dept. 2006).

In the instant matter the DeLorenz plaintiffs have had no relationship with Quirk other than as adversaries, and this motion ultimately is the result of their desire to depose Keyes for information they might use against Moss. However, the DeLorenz plaintiffs do not suggest that their interests can be harmed by Quirk's continued representation of Keyes, or that any confidences of theirs are at stake. The movants therefore clearly cannot meet the initial test, the existence of a prior attorney-client relationship. Only Moss would be able to do so.

The DeLorenz's reliance on a prior decision of this Court, *Shaikh v Waiters,* 185 Misc 2d 52 (Sup. Ct. Nassau County 2000), is misplaced. That case involved an infant plaintiff who was a passenger in a car driven by her mother, also a plaintiff. The Court found that the infant's interests were inherently adverse from the driver/parent's. It also found that the infant had no ability to consent to a dual representation by the same lawyer, as this would have to come through the parent guardian, the very person with the adverse interest.

The infant was unable to protect her own interests because, unlike the circumstances in the present case, plaintiffs' attorney would not agree to relinquish any of its clients, and opposed the motion to disqualify made by the defendants. Standing was not an issue that was raised or addressed. Even if it had been, it would not have been a bar

under the case law noted above, because the party needing protection was an infant. Just as the infant could not consent to a dual representation except through the very party with the adverse interest, she could not make a motion for disqualification on her own either. The authority holding that there must be an attorney-client relationship to make a motion for disqualification was not dispositive in *Shaikh* because those cases presume that the adversely affected client – the one who ordinarily would have standing – is under no disability preventing him or her from making such a motion. The client here is an adult and is able to do so, if he were to so choose. Therefore, only Moss would have the standing to move for Quirk's disqualification from representing Keyes based upon a conflict of interests. Notably, Moss's new attorney has not submitted any papers on this motion, notwithstanding their substitution prior to the final return date.

Moreover, it is not clear that Moss's and Keyes's interests have become "materially adverse." While they are no longer married and Keyes' testimony may prove harmful to Moss on the punitive damages claim, that testimony is of no use to her because she is not the target of a punitive damages claim herself. The information adduced would be of use only to the plaintiff, and thus is not sought by Quirk, but by the DeLorenz's attorney. There is also no allegation or proof that her testimony is to be given in exchange for any forbearance on plaintiffs' part.

Further, there is no factual showing by any party as to what type of information Quirk might have obtained from Moss during the course of the joint representation that

might later be used against him to the benefit of Keyes, especially since liability issues have already been determined. This concern for maintaining client confidences is cited as a key reason for disqualification for adverse interests. *Pelligrino v Oppenheimer & Co., supra,* 49 AD3d at 98, citing *Solow v Grace & Co.,* 83 NY2d 303 (1994). A party seeking disqualification must be able to demonstrate the existence of a "reasonable probability" of disclosure or use of a former client's confidences and secrets by the attorney. *Jamaica Pub. Serv. Co. v AIU Ins. Co., supra,* 92 NY2d at 637. That has not been shown here.

Notwithstanding the foregoing, the Court does not conclude that Quirk acted improperly in advising Moss to seek other counsel. While Moss's interests and Keyes's interests do not appear to be "materially adverse", they were certainly "differing interests" as that term is defined by the New Rules. The latter "include every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest." Rule 1.0(f). Thus, as a "differing interest" is broader in scope and reach than a "conflicting interest," Quirk's attorneys could conclude that continuing to represent both might affect their judgment or loyalty, because the interests of the two could still be seen as "inconsistent" or "diverse." Its action in seeking to end representation of one of these clients was therefore justified. Rule 1.7(a)(1) ["Conflict of Interest: Current Clients" – lawyer shall not represent a client if reasonable lawyer would conclude that representation would involve representing "differing interests"].

Reading Rule 1.7(a)(1) and Rule 1.0(f) together, an attorney therefore is able to make his or her own determination that judgment or loyalty might be compromised even where, as here, the "differing" interests are "inconsistent" or "diverse" interests, and not actual "conflicting" interests, a distinction which courts in other jurisdictions have found to be important. *See, McCourt Company v FPC Properties,* 386 Mass 145, 146 (Sup Jud Ct, Suffolk 1982); *Deupree v Garnett,* 277 P2d 168, 173 (Ok 1954). Accordingly, when it became clear that Keyes was being asked to testify against Moss, Quirk had enough reason to end Quirk's dual representation on a voluntary basis. This was so even though Moss's interests and Keyes's interests were not actually in conflict, *i.e.,* were not "materially adverse," and thus did not require Quirk to end the representation of both under the New York case law cited above.

Finally, based upon the letter to Moss submitted to the Court, it appears that Moss consented to the continuing representation of Keyes by Quirk, his now-former attorneys, which was confirmed in writing. Rule 1.9(a). This Rule provides that a lawyer who has formerly represented a client in a matter may not represent another client whose interests are materially adverse unless the former client gives "informed consent," "confirmed in writing." *See,* Rules 1.0(e), (j). In this case, such consent was given and confirmed. Thus, even assuming that the interests of Keyes and Moss have become materially adverse, the representation of Keyes may continue.

In sum, while it remains within the sound discretion of the trial court to disqualify

an attorney (*Stober v. Gaba & Stober, P.C.*, 259 AD2d 554 [2d Dept. 1999]; *Mondello v. Mondello*, 118 AD2d 549, 550 [2d Dept. 1986]), there is no basis for doing so in this case.

The Court notes that Travelers already has agreed to pay for new counsel for Moss, as it should. *See, Public Service Mut. Inc. Co. v. Goldfarb,* 53 NY2d 392, 401 (1981); *Prashker v. United States Guar. Co.* , 1 NY2d 584, 593 (1956).

This shall constitute the Decision and Order of this Court.

ENTER

DATED: July 15, 2009

HON. DANIEL PALMIERI
Acting Supreme Court Justice

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