

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D30298
O/ct

_____AD3d_____

Submitted - February 10, 2011

MARK C. DILLON, J.P.
ANITA R. FLORIO
THOMAS A. DICKERSON
JEFFREY A. COHEN, JJ.

2010-02180
2010-08072

DECISION & ORDER

Wells Fargo Bank, N.A., as Trustee, respondent,
v Chase Caro, appellant, et al., defendants.

(Index No. 15509/07)

Chase Caro, White Plains, N.Y., appellant pro se.

DelBello Donnellan Weingarten Wise & Wiederkehr, LLP, White Plains, N.Y. (Frank J. Haupel and Michael J. Schwarz of counsel), for respondent.

In an action to foreclose a mortgage, the defendant Chase Caro appeals, as limited by his brief, from so much of (1) an order of the Supreme Court, Westchester County (Liebowitz, J.), entered January 4, 2010, as denied those branches of his motion which were to disqualify the plaintiff's counsel and to strike the amended complaint, and (2) an order of the same court entered July 1, 2010, as denied that branch of his motion which was for leave to renew and, as, upon reargument, adhered to the original determination in the order dated January 4, 2010, denying that branch of his motion which was to disqualify the plaintiff's counsel.

ORDERED that the appeal from so much of the order entered January 4, 2010, as denied that branch of the motion of the defendant Chase Caro which was to disqualify the plaintiff's counsel is dismissed, as that portion of the order was superseded by the order entered July 1, 2010, made upon reargument; and it is further,

ORDERED that the order entered January 4, 2010, is affirmed insofar as reviewed; and it is further,

March 8, 2011

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ORDERED that the order entered July 1, 2010, is affirmed insofar as appealed from; and it is further,

ORDERED that one bill of costs is awarded to the plaintiff.

In this action to foreclose a mortgage, the defendant Chase Caro (hereinafter the defendant) moved to disqualify the plaintiff's substituted law firm, DelBello Donnellan Weingarten Wise & Wiederkehr, LLP (hereinafter the firm) on the ground that he previously disclosed information pertaining to this action to attorney Brandon R. Sall, his long-term acquaintance, in an effort to solicit legal advice on the matter. Sall is "of counsel" to the firm. After the firm was substituted as the plaintiff's counsel, the defendant moved, inter alia, to disqualify the firm based on his alleged prior disclosures to Sall, and to strike the amended answer, asserting that it was tainted by an alleged conflict.

"The 'disqualification of an attorney is a matter which rests within the sound discretion of the court and will not be overturned absent a showing of abuse'" (*Mondello v Mondello*, 118 AD2d 549, 550, quoting *Schmidt v Magnetic Head Corp.*, 101 AD2d 268, 277; see *A.F.C. Enters., Inc. v New York City School Constr. Auth.*, 33 AD3d 736, 736; *Calandriello v Calandriello*, 32 AD3d 450, 451). "A party seeking to disqualify an adversary's lawyer under Code of Professional Responsibility DR 5-108(a)(1) (22 NYCRR 1200.27[a][1]) must prove (1) the existence of a prior attorney-client relationship between the moving party and opposing counsel, (2) that the matters involved in both representations are substantially related, and (3) that the interests of the present client and [the] former client are materially adverse" (*Calandriello v Calandriello*, 32 AD3d at 451 [internal quotation marks omitted]; see *Tekni-Plex, Inc. v Meyner & Landis*, 89 NY2d 123, 131; *M.A.C. Duff, Inc. v ASMAC, LLC*, 61 AD3d 828, 829-830; *Columbus Constr. Co., Inc. v Petrillo Bldrs. Supply Corp.*, 20 AD3d 383, 383; *Matter of Epstein*, 255 AD2d 582, 583).

Here, even assuming that the defendant established the existence of a prior attorney-client relationship with Sall, the record establishes that Sall performed no work for the firm in connection with this action, and that he merely sublet office space from the firm for his separate and distinct law firm. The defendant failed to demonstrate that there "was a prior attorney-client relationship between himself and the law firm representing the [plaintiff] which would subject him to the risk 'of being opposed by an attorney who might have had access to his confidences'" (*Calandriello v Calandriello*, 32 AD3d at 452, quoting *Nemet v Nemet*, 112 AD2d 359, 360). Accordingly, under the circumstances presented here, the Supreme Court properly denied that branch of the defendant's motion which was to strike the amended complaint based on the alleged conflict and, upon reargument, adhered to its original determination denying that branch of the defendant's motion which was to disqualify the firm based on Sall's "of counsel" status (see *Calandriello v Calandriello*, 32 AD3d 450; *Shelton v Shelton*, 151 AD2d 659; compare *Cardinale v Golinello*, 43 NY2d 288; *Nemet v Nemet*, 112 AD2d 359).

"A motion for leave to renew shall be based upon new facts not offered on the prior motion that would change the prior determination, and shall contain reasonable justification for the failure to present such facts on the prior motion" (*Marrero v Crystal Nails*, 77 AD3d 798, 799; see *Countrywide Home Loans Serv., LP v Albert*, 78 AD3d 985, 986; CPLR 2221[e]). Here, the

Supreme Court properly denied that branch of the defendant's motion which was for leave to renew, as the allegedly "new facts" offered would not have changed the prior determination (CPLR 2221[e][2]).

DILLON, J.P., FLORIO, DICKERSON and COHEN, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court