

STATE OF NEW YORK
SUPREME COURT

COUNTY OF MONROE

PORTFOLIO MANAGEMENT ASSOCIATES, LLC,

Plaintiffs,

DECISION & ORDER

v.

LONG CONSULTING and MANAGEMENT GROUP
INC. and ROBERT D. LONG and TRACEY LONG,
and JACOBS ENGINEERING NEW YORK, INC.,
and COUNTY OF MONROE and ETHRINE CLEVELAND
and REGENTS SYSTEMS, INC.,

Index No. 2004/8132

Defendants.

The motion to disqualify alleges that, at the time of commencement of this action on July 16, 2004, Plaintiff's counsel represented defendants Long Consulting and Management Group, Inc. and the Longs themselves, both in connection with their failed Consulting Management Agreement executed July 24, 2003, and in an action then pending between LCMG and a former employee of LCMG, Arthur Leitget. In late 2003, Leiget sued, naming both LCMG and plaintiff Portfolio Management Associates, LLC as defendants, for unpaid compensation by LCMG. According to plaintiff's counsel, in an affidavit filed only after repeated attempts by the court to obtain one on the issue, Portfolio Management Associates was named as a co-defendant in the Leitget suit because "it provided financing and consulting services for LCMG." In the Leitget suit, plaintiff's counsel filed a motion to dismiss on behalf of PMA and an answer on behalf of LCMG, on February 25, 2004.

Thereafter, the day after the 67-page complaint was filed in

this action by PMA against LCMG and the Longs personally, alleging breach of the aforementioned Consulting Management Agreement, a declaratory judgment that PMA is a majority shareholder of LCMG, and seeking a set-aside of Robert Long's transfer of his residence to Tracey Long, plaintiff's counsel moved to withdraw as counsel for LCMG in the Leitget suit while simultaneously moving to dismiss on behalf of PMA in the same lawsuit. Plaintiff's counsel states that he sought withdrawal "based on growing tensions between PMA and LCMG." Although the order was not included in the responding papers on the disqualification motion, plaintiff's counsel alleges that the court granted PMA's motion to dismiss and permitted him to withdraw as LCMG's counsel, leaving LCMG as the lone defendant in that lawsuit at some unspecified time in September, 2004. Plaintiff's counsel then sued LCMG in Rochester City Court for non-payment of fees. The fee collection action is still pending.

Although Plaintiff's counsel alleges that the Steinbrenner law firm has "long served" PMA, Steinbrenner affidavit, at ¶1, and that PMA is "its longstanding client," Coyne affidavit at ¶8, plaintiff's counsel, however, did not commence this action on behalf of PMA against LCMG and the Longs (on July 16, 2004). Instead, the law firm of Adair, Kaul, Murphy, Axelrod & Santoro, LLP (Brett E. Dawson, Esq, of counsel) filed the summons and complaint. Plaintiff's counsel does not, in their responding affidavits, specify when they were substituted for the Adair law

firm as PMA's counsel in this lawsuit, but court records reveal that it was on March 31, 2005.

Accordingly, plaintiff's counsel contends that he took over the file well after he was relieved of representation of LCMG back in September of 2004, and that the former client conflict rules of DR 5-108 apply, not the concurrent representation rules of DR 5-105 and the per se rule of Cinema 5, Ltd. v. Cinerama, 528 F.2d 1384, 1386 (2d Cir. 1976); Aerojet Properties, Inc. v. State of New York, 138 A.D.2d 39, 41 (3d Dept. 1988); N.Y. State 580 (1987). In this, plaintiff's counsel is correct only if the two litigations are taken in a vacuum. But here, defendants allege without contradiction that Steinbrenner represented PMA throughout its business relationship with LCMG and the Longs (despite not having been PMA's litigation counsel at the outset of this lawsuit), and plaintiff's counsel each have filed affidavits conceding that PMA is their longstanding client, ie., throughout the period the parties' business disputes developed, and deteriorated, and when they represented LCMG in the Leitgeb litigation. Caselaw holds that, "[f]or purposes of evaluating whether a conflict exists, all services rendered by an attorney for a client are characterized as legal services." Abbondanza v. Siegel, 209 A.D.2d 1023, 1024 (4th Dept. 1994). See also, Dembitzer v. Chera, 285 A.D.2d 525 (2d Dept. 2001) ("ongoing attorney-client relationship with a partnership in which Chera was a general partner"). "A law firm may not represent one

client in litigation against another client." Abbondanza v. Siegel, 209 A.D.2d at 1024. See A.L.I., Restatement (Third) of the Law Governing Lawyers §128(2) ("unless all affected clients consent . . . , a lawyer in civil litigation may not . . . represent one client to assert or defend a claim against or brought by another client currently represented by the lawyer, even if the matters are not related"). The burden of proof on the motion, therefore, is on plaintiff's counsel "and shifts the focus from the similarities in litigation to counsel's fundamental duty of undivided loyalty to his client." Aerojet Properties, Inc. v. State of New York, 138 A.D.2d at 41.

Plaintiff's counsel alleges that he "represented LCMG in the *Leitgeb* matter with full disclosure of the joint representation to PMA and LCMG and LCMG's consent having been received to proceed." Steinbrenner affidavit, at ¶12. On the other hand, PMA's complaint in this action seeks a declaration that it is 98% owner of LCMG by virtue of PMA's purported exercise of a stock warrant issued by LCMG on May 4, 2004, and LCMG's counterclaims seek damages for PMA's alleged lockout, and theft of, LCMG's business records. LCMG maintains in its affirmative defenses and counterclaims that PMA's conduct, during the period that Steinbrenner represented LCMG in the *Leitgeb* matter and while representing PMA in general concerning the parties' consulting management agreement, was characterized by fraud, duress, illegality, and malice. Long's affidavit alleges that the

offices of PMA and Steinbrenner were adjacent and on the same floor in the same building during the relevant time period, and that Steinbrenner will likely be called as a witness in this action.

Under these circumstances, the entanglements are just too great to permit plaintiff's counsel continuation of PMA's representation against LCMG and the Longs, even in the face of the claimed consents obtained from LCMG in the Leitgeb litigation. There is no claim of a tactical motion brought late in the proceedings; the motion was brought in response to a motion to compel made early in the discovery phase of the case. Defense counsel brought the potential conflict to a head in correspondence shortly after assuming defense of this action, and was denied any detailed explanation even in response to defendants' motion until the court succeeded in obtaining the Steinbrenner affidavit less than two weeks ago. I think that continuous representation of PMA, during a period in which it is alleged that PMA acquired a 98% interest in LCMG and thus was acting adversely to Long's claimed 100% interest in LCMG, and during a time when plaintiff's counsel, in fact, represented LCMG in another matter involving one of LCMG's employees, precludes counsel from undertaking the prosecution of this matter against LCMG on behalf of PMA. "The per se rule applies if an attorney simultaneously represents clients with differing interests even though the representation ceases prior to the filing of the

disqualification motion." Ehrich v. Binghamton City School District, 210 F.R.D. 17, 25 (N.D.N.Y. 2002). "While it may be true that . . . [Steinbrenner] last represented . . . [LCMG] in . . . [September of 2004], it is also true that the facts generating th[is] lawsuit [between PMA and LCMG] and the conflict arose during . . . [Steinbrenner's] employment . . . " by LCMG in the Leitgeb matter. Id. 210 F.R.D. at 25 (bracketed material supplied).

The motion to disqualify is granted. The motion to compel is denied without prejudice. The motion to consolidate is denied. The motion to enforce the prior order of this court directing return of LCMG's books and records is denied without prejudice to it being brought in the Gloeblinks litigation.

SO ORDERED.

KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: December 2, 2005
Rochester, New York