

Pallazzo v Thomas

2007 NY Slip Op 31669(U)

June 13, 2007

Supreme Court, Orange County

Docket Number: 0004457/2006

Judge: Lawrence I. Horowitz

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

-----X

ANDREW PALLAZZO and MARZENA
WEGLOWSKI-PALLAZZO,

Plaintiffs,

-against-

GEORGE THOMAS,

Defendant.

-----X

HOROWITZ, LAWRENCE I., J.S.C.

DECISION AND ORDER

Index No. 4457/06

Defendant moves for the disqualification of plaintiffs’ attorneys because they represented him in a prior action. Plaintiffs oppose defendant’s motion. For the reasons stated in this opinion, the Court denies defendant’s motion and, therefore, holds that plaintiffs’ attorneys may continue to represent their current clients¹.

It is well settled that a party seeking disqualification of opposing counsel must prove that (a) an attorney-client relationship existed between the moving party and opposing counsel, that (b) the matters involved in both actions are “substantially related,” and that (c) the interests between instant and former clients are materially adverse.² To succeed on its motion, the moving party can also show that opposing counsel will *probably* reveal the former client’s confidential or secret information. DR 5-108(a)(2). The Court shall now address these criteria.

¹The Court wishes to thank its 2007 summer intern Gianfranco Cuadra of Hofstra Law School, who worked on this decision.

² See Code of Professional Responsibility DR 5-108(a)(1) (22 N.Y.C.R.R. 1200.27(a)(1)). See also *Jamaica Pub. Serv. Co. v. AIU Ins. Co.*, 92 N.Y.2d 631, 636 (1998) (stating that the moving party must prove *all three* prongs mentioned above to disqualify opposing counsel); *Tekni-Plex, Inc. v. Meyner & Landis*, 89 N.Y.2d 123, 131-32 (1996); *Solow v. W.R. Grace & Co.*, 83 N.Y.2d 303, 308 (1994); *Greene v. Greene*, 47 N.Y.2d 447, 451 (1979); *Med. Capital Corp. v. MRI Global Imaging Inc.*, 27 A.D.3d 427, 428 (2d Dep’t 2006); *Mancheski v. Gabelli Group Capital Partners, Inc.*, 22 A.D.3d 532, 534 (2d Dep’t 2005).

An Attorney-Client Relationship Existed Between Defendant And Opposing Counsels

It is black letter law that an attorney-client relationship exists when a person or entity retains an attorney or a firm. It is undisputed that an attorney-client relationship existed between defendant George Thomas and the law firm Finkelstein & Partners, L.L.P. (“Finkelstein”), the attorneys for plaintiff in the instant case. In 2004, Finkelstein successfully represented Mr. Thomas as plaintiff in a personal injury suit arising out of a motor vehicle accident (the “previous action”). Clearly, there was an attorney-client relationship between them.

The Matters Involved In Both Actions Are Not “Substantially Related”

The matters involved in both actions are not substantially related because no information from the previous action is relevant to the instant case. In *Tekni-Plex, Inc.*, the Court of Appeals provided guidance for determining this issue: Cases are substantially related if they share material issues and facts.³ 89 N.Y.2d at 134; see also *Cardinale v. Golinello*, 43 N.Y.2d 288 (1977) (using the same rule to conclude that two cases were substantially related).⁴ The instant case shares no material information or issues with the previous action.

In the previous action, Mr. Thomas’s *motorcycle* was struck from behind while he was stopped at an intersection. The driver who struck Mr. Thomas’s vehicle was *not* Andrew Pallazzo, the instant plaintiff. Mr. Thomas then retained Finkelstein to

³ Tekni-Plex, Inc., merged with another company, creating a new corporation. Before the merger, law firm Meyner & Landis had represented old Tekni-Plex in several actions. Issues relevant in the previous cases were also relevant in the subsequent action. The suits also shared several key facts. Thus, the Court of Appeals held that the cases were substantially related. 89 N.Y.2d at 134-35.

⁴ All disputes in *Cardinale* arose from that defendant’s purchase of a company while under the representation of a law firm. *Id.* at 292-95. Later, a member of that firm joined plaintiff’s attorneys in an action against defendant. The Court disqualified plaintiff’s attorneys “simply from the fact that the lawyer, or the firm with which he was then associated, represented the former client *in matters related to the subject matter of the second representation.*” *Id.* at 295 (emphasis added).

represent him as plaintiff in an action against the other driver. In that case, Finkelstein obtained a concession of liability from the opposing party, and the case settled a year after it began.

However, in the instant action, plaintiff alleges that he was stopped at an intersection when his vehicle was struck from behind by *Mr. Thomas's car*. Mr. Thomas was not riding his motorcycle from the previous action. Furthermore, Mr. Thomas's insurance policy for his motorcycle does *not* cover cars. That is, the motorcycle's insurance coverage does not apply to the car that Mr. Thomas operated on the date of the accident at issue (February, 2006). Hence, the information that Finkelstein received in the course of the previous action is irrelevant to the case at bar. In any event, the insurance policy for the motorcycle is now expired.

Defendant states that the two cases must be substantially related simply because both deal with motor vehicle accidents. Yet defendant refers to no relevant authorities or facts that advance his position. For this reason, the Court denies defendant's motion and follows the Second Department's rulings: Defendant's "conclusory assertions" that issues from the previous action are connected to the instant case are "insufficient to justify depriving" plaintiffs "of the counsel of their choice" in this action. *Med. Capital Corp.*, 27 A.D.3d at 428.⁵

⁵ See also *Mancheski*, 22 A.D.3d at 534 (holding that disqualification of opposing counsel is a "severe remedy" to be used only if information counsel received in a previous suit will likely "taint" the present litigation). No information from the previous action appears to "taint" the instant case. See also *Olmoz v. Town of Fishkill*, 258 A.D.2d 447, 447 (2d Dep't 1999) (holding client's right to choose attorney of his choice should not be abridged "absent a clear showing that disqualification is warranted"). Defendant has failed to make a convincing argument as to why Finkelstein should be disqualified from representing plaintiffs.

The Interests Between The Instant And Former Clients Are *Not* Materially Adverse

The interests between the instant plaintiff and Mr. Thomas—as Finkelstein’s former client—are not materially adverse. For interests to be materially adverse, the instant suit must in some way adversely affect an issue or fact relevant to the previous litigation. See *Tekni-Plex, Inc.*, 89 N.Y.2d at 135-36. Hence, whether the two actions are substantially related serves as evidence for this issue.

Without citing to any supporting authorities, defendant claims that the clients’ interests must be materially adverse because he was sued by plaintiff. This claim is without merit because, as already discussed, the current case has no impact on any issues or facts from the previous action.

Rather, Mr. Thomas’s interest in the former action was to win a personal injury suit arising out of motor vehicle accident. Although the current plaintiff seeks to recover damages for a motor vehicle accident, the vehicles involved in both actions, the parties litigating, and the types of insurance policies at issue are different. Thus, the clients’ interests are not adverse.⁶

Opposing Counsel Lacks Confidential Or Secret Information About Defendant And Has Committed No Act Evidencing Impropriety

Finkelstein lacks relevant confidential information about defendant and does not advance conflicting interests by representing plaintiffs. It may therefore continue to represent plaintiffs in this matter. The Court of Appeals has held repeatedly that counsels are “strictly forbidden from placing themselves in a position where they must advance, or even appear to advance, conflicting interests.” *Greene v. Greene*, 47

⁶ The parties never mentioned whether Mr. Thomas’s personal injuries from the previous suit in any way affected his ability to operate a motor vehicle. That is, neither party called into question Mr. Thomas’s skill in operating a motor vehicle as a possible connection between the suits. The Court does not address the issue.

N.Y.2d 447, 451 (1979); see, e.g., DR 5-108(a)(2); *Cardinale*, 43 N.Y.2d at 296; accord, *in re Henry Hof, Jr.*, 102 A.D.2d 591, 593-95 (2d Dep't 1984).

Defendant relies on *in re Henry Hof, Jr.*, to argue that he does not have to state any specific details of the alleged confidential information at issue. See 102 A.D.2d at 594. Yet defendant fails to mention that in that case, the Second Department expressly stated that a “reasonable probability” of disclosure was “apparent *from the situation itself.*” *Id. citing Colonie Hill, Ltd. v. Duffy*, 86 A.D.2d 645, 646 (2d Dep't 1982) (emphasis added).⁷ The facts of *that case* were sufficient for the Second Department to conclude that a conflict of interests existed.

But in the case at bar, it is not “apparent” that there are any confidences that could be disclosed. As previously stated, the prior action and the current case have no material connections. In *Jamaica*, the Court of Appeals stated that the moving party must present *some* evidence that at a minimum allows the Court to determine whether the alleged confidential information falls within the scope of DR 5-108(a)(2). 92 N.Y.2d at 638. In the case at bar, defendant’s sole mention of confidences is that they do not need to be stated. Thus, to grant defendant’s disqualification motion would “encourage the strategic use of such motions.” *Id.*

The Court also denies defendant a hearing for determining the disqualification issue. The Second Department has held that a hearing for determining disqualification should normally be held. *Olmoz*, 258 A.D.2d at 448. But because defendant has

⁷ *In re Henry Hof, Jr.*, dealt with probate issues, an accounting, and an attorney’s breach of a fiduciary duty. Under those circumstances, the Second Department clearly and expressly stated that confidences were most likely disclosed to the attorney, which is why he was properly disqualified: “We think that different considerations pertain in *accounting proceedings* where, as a result of prior dual representation, confidences have developed leading inevitably to the possibility of conflict.” 102 A.D.2d at 594 (emphasis added). No facts in the instant case lead “inevitably” to a possible conflict of interests.

presented nothing but “mere conclusory assertions that there is a conflict of interests,” the hearing is denied. *Id.*

Based on the facts of the present case, it is clear that there are no relevant confidences that Finkelstein could disclose. For this same reason, the Court finds that Finkelstein does not appear to advance any conflicting interests.

On account of the foregoing, the motion is DENIED.

The foregoing constitutes the Decision and Order of this Court.

Dated: Goshen, New York
June 13, 2007

ENTER:

HON. LAWRENCE I. HOROWITZ
Justice of the Supreme Court