

**Kyung Seong Kim v Metropolitan Suburban Bus  
Auth.**

2008 NY Slip Op 30858(U)

March 20, 2008

Supreme Court, Nassau County

Docket Number: 0139-07/

Judge: William R. LaMarca

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**SHORT FORM ORDER**

**SUPREME COURT STATE OF NEW YORK  
COUNTY OF NASSAU - PART 17**

**Present: HON. WILLIAM R. LaMARCA  
Justice**

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**KYUNG SEONG KIM, Individually and as  
father and Guardian, of JOSEPH KIM, an  
infant over the age of 14 years, and  
YOUNG KIM, Individually and as guardian  
of RAY KIM, an incompetent person,**

**Motion Sequence #1  
Submitted January 10, 2008**

**Plaintiffs,**

**-against-**

**INDEX NO: 139/07**

**METROPOLITAN SUBURBAN BUS  
AUTHORITY and ADOLFO MESSON-BEATO,**

**Defendants.**

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**The following papers were read on this motion:**

<b>Notice of Motion.....</b>	<b>1</b>
<b>Affirmation in Opposition.....</b>	<b>2</b>
<b>Reply Affirmation.....</b>	<b>3</b>

**Relief Requested**

Counsel for defendants, METROPOLITAN SUBURBAN BUS AUTHORITY and ADOLFO MESSON-BEATO (hereinafter collectively referred to as the "MSBA"), moves for an order dismissing the cause of action asserted by plaintiff, YOUNG KIM, "as guardian of RAY KIM, an incompetent person", for lack of standing, and for an order disqualifying plaintiffs' counsel, David N. Sloan, Esq., from representing any of the KIM plaintiffs on the

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ground that the representation of both a vehicle's driver and its three (3) passengers in this motor vehicle negligence action constitutes a violation of the Code of Professional Responsibility, DR 5-105(a), by plaintiffs' counsel. Counsel Sloan opposes the motion, which is determined as follows:

### **Background**

In this action, plaintiffs seek to recover damages for personal injuries arising from a motor vehicle accident, on September 20, 2006, in which the 1997 Cadillac operated by plaintiff husband, KYUNG SEONG KIM, and occupied by his wife and the couple's two sons, YOUNG KIM, JOSEPH KIM and RAY KIM, was allegedly stopped at a red light in the northbound lane of Route 107 when it was struck in the rear by a MSBA bus, operated by defendant, ADOLFO MESSON-BEATO. Plaintiff's wife, YOUNG KIM, was seated in the front passenger seat and the couple's two sons, JOSEPH KIM and RAY KIM, were seated in the rear. Although he is now over the age of eighteen, JOSEPH was a minor at the time of the accident. RAY, who suffers from Down's Syndrome and is mentally handicapped, was twenty-one at the time. The same attorney, David N. Sloan, Esq., represents all four (4) of the KIM plaintiffs. Defendants, the owner of the MSBA bus and the driver, have interposed two (2) counterclaims against plaintiff driver, KYUNG SEONG KIM, for contribution and/or indemnification, based on his alleged negligence in causing the accident and to recover for property damage to the subject bus.

In response to defendants' motion to disqualify Mr. Sloan from continuing to represent the passengers in the KIM vehicle (YOUNG, JOSEPH and RAY), as well as the driver, based on a conflict of interest, plaintiffs' attorney argues that, after a discussion and review of all documents in the case, plaintiff driver and his wife, on behalf of themselves

and their two (2) sons, decided to retain him to represent all the plaintiffs, since the bus operator was entirely at fault in this accident for hitting a stopped vehicle in the rear. Moreover, counsel maintains that there is no conflict of interest as the counterclaim asserted against plaintiff driver has been answered by staff counsel for GEICO Insurance Company, who is defending him on the counter-claim. The court disagrees.

### The Law

Disqualification of an attorney is a matter which rests within the sound discretion of the court. *Nationscredit Financial Services Corp. v Turcios*, 41 AD3d 802, 839 NYS2d 523 (2<sup>nd</sup> Dept. 2007). A party's entitlement to be represented in ongoing litigation by counsel of his own choosing, however, is a valued right which should not be abridged absent a clear showing that disqualification is warranted. *Bentz v Bentz*, 37 AD3d 386, 831 NYS2d 423 (2<sup>nd</sup> Dept. 2007). Because the counterclaim asserted against plaintiff driver, KYUNG SEONG KIM, places his pecuniary interests in conflict with those of his children, in the Court's view it is improper for him to commence this action as father and guardian for his minor child. As both the owner and driver of the vehicle, his pecuniary interest is potentially in conflict with, and adverse to, those of his wife, and both of his sons, who were passengers in the vehicle.

Pursuant to The Code of Professional Responsibility DR 5-105(a) (22 NYCRR 1200.24) "[a] lawyer shall decline proffered employment if the exercise of professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under DR-105(c)". The Ethical

Considerations (EC), while not mandatory, represent additions to the rules governing the conduct of lawyers. EC 5-17 addresses the issue of representation of multiple co-defendants in a simultaneous action. As stated therein, "[t]ypically recurring situations involving potentially differing interests are those in which a lawyer is asked to represent \* \* \* co-plaintiffs or co-defendants in a personal injury case \* \* \* . Whether a lawyer can fairly and adequately protect the interests of multiple clients in these and similar situations depends upon an analysis of each case".

Generally, an attorney who represents both the driver and passengers involved in a motor vehicle accident creates a conflict of interest violative of DR 5-105(a). In those instances where clients have differing interests, an attorney, however, may withstand disqualification from dual representation where "a disinterested lawyer would believe that the lawyer can competently represent the interest of each and \* \* \* each consents to the representation after full disclosure of the implications of simultaneous representation and the advantages and risks involved". DR5-105( c ), (22 NYCRR 1200.24). If a disinterested attorney would advise the clients to refuse to consent to dual representation, the attorney with the conflict is not permitted to seek client consent. EC 5-16.

Counsel considering representation of multiple clients must first determine whether a disinterested lawyer could competently represent the respective interests of all potential clients. If the answer is yes, then, after full disclosure of the implications of simultaneous representation, and the advantages and risks involved, the parties may give consent. If the answer is no, then the conflict may not be waived and joint representation would be unethical. Even in instances where full disclosure and consent are given, the interests of the various parties could be so adverse that dual representation is improper. *Boyd v Trent*,

287 AD2d 475, 731 NYS2d 209 (2<sup>nd</sup> Dept. 2002), *lv to app disp.* 98 NY2d 671 (C.A.2002).

Vehicle and Traffic Law § 388(1) provides in pertinent part that:

[e]very owner of a vehicle used or operated in this state shall be liable and responsible for death or injuries to person or property resulting from negligence in the use or operation of such vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission express or implied of such owner.

The inherent ethical conflict of joint representation of a driver and an injured passenger in an automobile involved in a collision has been held to constitute a conflict of interest in violation of the disciplinary rules warranting removal of counsel from further representation of these clients in numerous cases, e.g. *See, Quinn v Walsh*, 18 AD3d 638, 795 NYS2d 647(2<sup>nd</sup> Dept. 2005); *Ferrara v Jordache Enterprises, Inc.*, 12 Misc3d 769, 819 NYS2d 421 (Supreme Kings Co. 2006); *Shaikh ex rel. Shaikh v Waiters*, 185 Misc2d 52, 710 NYS2d 873 (Supreme Nassau Co. 2000); *Pessoni v Rabkin*, 220 AD2d 732, 633 NYS2d 338 (2<sup>nd</sup> Dept. 1995).

Here the Court is confronted with a situation in which neither the infant son, nor the adult incapacitated son, was capable of fully understanding the ramifications of the dual representation and, under the existing circumstances, the Court finds that their parents lacked the capacity to either commence the lawsuit or to waive the obvious conflict of interest on their behalf. Moreover, despite assertions to the contrary by plaintiffs' counsel, there is no basis to conclude that there is no possibility of a viable counterclaim against the plaintiff driver. Not every rear end collision is the exclusive fault of the rearmost driver. The parties' respective submissions demonstrate that a dispute exists as to the actual manner in which the accident occurred, whether it was, in fact, a rear-end collision and the extent

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to which, if any, plaintiff bears culpability. Because a child may properly bring an action against his or her parents, it is improper for an attorney to represent both the parents and the child in an automobile accident brought against the owner and driver of the other vehicle. *Alcantara v Mendez*, 303 AD2d 337, 756 NYS2d 90 (2<sup>nd</sup> Dept. 2005); *Sidor v Zuhoski*, 261 AD2d 529, 690 NYS2d 637 (2<sup>nd</sup> Dept. 1999).

The CPLR requires that infants must appear by a guardian *ad litem* in every civil case (CPLR §1203, §1207, §1208), and an infant has no capacity to waive the failure to appoint such a representative to protect his interests. *State ex rel. Byrnes v Goldman*, 59 Misc2d 570, 302 NYS2d 926 (Supreme NY Co. 1969). Pursuant to CPLR §1201, both parents presumably have custody of an infant child so either parent may appear on the infant's behalf. Here, however, there is a conflict of interest between plaintiff, KYUNG SEONG KIM, as the owner/operator of the vehicle, and his wife, YOUNG KIM, and his injured sons, JOSEPH, an infant at the time the action was commenced, and RAY, an adult who suffers from Down's Syndrome. The plaintiff father, therefore, lacked standing to commence this lawsuit on behalf of his then infant son, JOSEPH. *Boyd v Trent, supra*, at pp. 475-476. Similarly, YOUNG KIM, who was not properly appointed a guardian *ad litem* for RAY KIM, lacked standing to act on his behalf in commencing the action or in consenting to a waiver of the attorney David N. Sloan's apparent conflict of interest in representing the entire family.

Because there is a counterclaim asserted by defendants against plaintiff, KYUNG SEONG KIM, and since his pecuniary interests conflict with those of his wife and sons, continued representation of the plaintiffs in this matter by attorney David N. Sloan, Esq.

violates the Code of Professional Responsibility. The Code and existing precedent, with rare exception, require that an attorney who undertakes joint representation of two (2) parties in a lawsuit not continue as counsel for either party after an actual conflict of interest is found to exist. DR 5-105 (22 NYCRR 1200.24); EC 5-15. This is mandated because continued representation for either or both parties would necessarily result in violation of the requirement that client confidences be preserved (DR 4-101 [22 NYCRR 1200.19]; EC 4-1), and that a client be zealously represented (DR 7-101 [22 NYCRR 1200.32]; EC 7-1).

Plaintiffs do not refute the claim that defendant, RAY KIM, is an adult incapable of adequately protecting his rights by virtue of the fact that he suffers from Down's Syndrome. An infant or incompetent cannot bring an action in his own name but is required to do so by or through a representative. Where an action is commenced other than by or through such a representative, the defendant may raise the incapacity of the plaintiff by way of a motion. 67 NYJur2d § 577, p. 488.

A guardian *ad litem* may be appointed by the court at any stage of an action in which an adult is incapable of adequately prosecuting or defending his rights, even when no formal adjudication of incompetence has been made. *Bowen v Rubin*, 213 F.Supp.2d 220, 2001 US Dist. LEXIS 24684 ([E.D.N.Y. 2001]; *In re Doe*, 184 Misc2d 519, 709 NYS2d 372 (N.Y. Sup. 2000). Such appointment is justified when, based on a preponderance of the evidence, the court concludes that a party's condition impedes the individual's ability to protect his rights.

Based on the foregoing, it is hereby

**ORDERED**, that the present action is stayed, pursuant to CPLR §2201, for a period of sixty (60) days, to afford plaintiffs the opportunity to obtain new representation, as David N. Sloan, Esq. is hereby disqualified from further representation of any of the plaintiffs; and it is further


**ORDERED**, that new counsel shall apply to the court for the appointment of a guardian *ad litem* to represent plaintiff, RAY KIM. Inasmuch as plaintiff, JOSEPH KIM, is no longer a minor he may properly proceed on his own behalf; and it is further

**ORDERED**, that a Status Conference is directed in this matter, to be held on June 2, 2008 at 9:30 A.M. before the undersigned, at which time the parties, or new counsel on their behalf, shall appear to schedule the remaining discovery that must be completed in this matter prior to certification for trial.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: March 20, 2008

  
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WILLIAM R. LaMARCA, J.S.C.

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kim-msba,#1/counselissues

**ENTERED**

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**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**