

Hiller v Lo

2009 NY Slip Op 33116(U)

December 23, 2009

Supreme Court, New York County

Docket Number: 603200/07

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD

PART 35

Index Number : 603200/2007
HILLER, ROY S.
 vs.
LO, JAMES P.
 SEQUENCE NUMBER : 001
 DISQUALITY COUNSEL

INDEX NO. _____
 MOTION DATE 10/19/09
 MOTION SEQ. NO. _____
 MOTION CAL. NO. _____

n this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby
 ORDERED that the motion of defendant James P. Lo for an order disqualifying Richard
 Godosky, Esq. from representing plaintiff Roy S. Hiller is granted; and it is further
 ORDERED that defendant serve a copy of this order with notice of entry upon all parties
 within 20 days of entry; and it is further
 This constitutes the decision and order of the Court.

Dated: 12/23/09



HON. CAROL EDMEAD J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

PAPERS NUMBERED

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MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
ROY S. HILLER,

Plaintiff,

Index No. 603200/07

-against-

DECISION/ORDER

JAMES P. LO,

Defendant.

-----X
HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action, plaintiff Roy S. Hiller (“plaintiff”) seeks to recover legal fees against defendant James P. Lo (“defendant”).

Defendant now moves for an order to disqualify Richard Godosky, Esq. (“Mr. Godosky”) from representing plaintiff on the ground that Mr. Godosky is engaging in an impermissible conflict of interest, in violation of Disciplinary Rule 5-108(A) (22 NYCRR §1200.27[A]) of the Code of Professional Responsibility.

Background¹

In approximately December 1997, defendant and Wade T. Morris, Esq. (“Mr. Morris”) formed a partnership, Lo and Morris, Esqs. (“L&M”), a law firm. In 1998, plaintiff became a subtenant of L&M’s office, and L&M referred personal injury cases to plaintiff for trial. The dispute herein arises from plaintiff’s work on *Wun Lee v Ranger Transport et. al.* (the “*Wun Lee* case”).

Initially, the plaintiff in the *Wun Lee* case was represented by the law firm of Schaerf &

¹Information is taken from defendant’s motion, which comprises an affidavit from defendant (“Lo Affd.”) and a memorandum of law (“MOL”), and plaintiff’s Complaint.

Sealove ("S&S"). Later, L&M was substituted as counsel. After doing substantial legal work, L&M referred the *Wun Lee* case to plaintiff, who settled it. Subsequently, S&S and plaintiff placed liens on L&M for a share of the attorneys' fees in the *Wun Lee* case.

In or around October 2001, L&M dissolved. Mr. Morris retained Mr. Godosky to represent him in the dissolution. Pursuant to the dissolution agreement, defendant and Mr. Morris retained Mr. Godosky to represent them in negotiations with S&S in the fee dispute arising from the *Wun Lee* case (the "*Lee* fee dispute"). Defendant and Mr. Morris negotiated directly and settled with plaintiff.

Mr. Godosky now represents plaintiff in the instant action, wherein plaintiff claims that defendant breached his agreement with plaintiff to compensate plaintiff for plaintiff's work as trial and litigation counsel on nine other personal injury cases.

Defendant argues that Mr. Godosky's prior representation of defendant in the *Lee* fee dispute violates the Disciplinary Rules and precludes his current representation of plaintiff. Defendant contends that he and Mr. Morris discussed with Mr. Godosky plaintiff's claim against the firm and his request for fees. In so doing, defendant and Mr. Morris disclosed, and Mr. Godosky learned, confidences and secrets pursuant to DR 4-101(A), relating to, *inter alia*, defendant's billing and referral fee practices, plaintiff's representation in the *Lee* fee dispute, defendant's opinions and evaluations of plaintiff's legal work, and plaintiff's relationship with L&M and defendant in the *Lee* fee dispute as well as in all other referral matters. Mr. Godosky gave defendant legal advice with respect to plaintiff's claim, and requested that he be permitted to negotiate directly with plaintiff on behalf of defendant and Morris. Defendant and Morris declined this request.

Defendant contends that any information concerning defendant's billing practices, dealings and relationships with plaintiff was imparted to Mr. Godosky for the purpose of negotiating fee-dispute settlements and constitutes confidences and secrets, as defined by DR 4-101(A). Defendant further contends that, pursuant to DR 5-108, confidences and secrets can only be waived upon the consent of the client after full disclosure by the lawyer who represented the client, and in some instances, such confidences and secrets may not be waived. As the information Mr. Godosky received from defendant is substantially related to the prior matter in which plaintiff's interests were adverse to defendant's interests and may be used in the current matter in which plaintiff's interests are adverse to defendant's interests, disclosure is prohibited by DR 4-101(B) and DR 5-108(A). Moreover, the confidential and secret information Mr. Godosky learned in the *Lee* fee dispute is material to the instant action. Defendant further argues that Mr. Godosky's representation of plaintiff creates an appearance of impropriety sufficient to warrant disqualification.

In opposition, plaintiff argues that with regard to the *Lee* fee dispute, any information Mr. Godosky obtained with respect to plaintiff's billing and referral-fee practices does not constitute "confidences and secrets" pursuant to DR 4-101(A). Relying on an affirmation from Mr. Godosky (the "Godosky Affm.") and an affidavit from Mr. Morris (the "Morris Affd."), plaintiff further contends that no confidences or secrets were disclosed to Mr. Godosky during that relationship. Plaintiff argues that defendant has "merely averred, without specifics or substantiation," that the information Mr. Godosky obtained was confidential and secret. Such conclusory allegations are not sufficient to disqualify Mr. Godosky from representing plaintiff in this action.

Further, plaintiff argues that defendant has not established that Mr. Godosky's current and former legal representations are adverse or substantially related. Instead, defendant concedes that the *Lee* fee dispute has been resolved, defendant and Mr. Morris "negotiated directly and settled with [plaintiff]." Defendant fails to explain how plaintiff's claim for fees in the nine matters in question herein has anything to do with the negotiations of the *Lee* fee dispute.

Plaintiff further argues that defendant has failed to demonstrate any probability that any confidential information allegedly obtained during the former representation would be disclosed during the course of the current litigation. Defendant has not identified any specific confidential information to which Mr. Godosky was privy, and there is no possibility that any information Mr. Godosky obtained would be disclosed in this action. Therefore, as defendant has failed to make a clear showing that disqualification is warranted, defendant's motion should be denied.

In reply, defendant maintains that the information Mr. Godosky received while representing defendant in the *Lee* fee dispute constitutes confidences and secrets. Citing his reply affidavit (the "Lo Reply Affd."), defendant argues that in addition to learning defendant's billing and referral-fee practices, Mr. Godosky also learned defendant's opinions and evaluations of plaintiff's legal work, which definitely constitutes a confidence.

Defendant further argues that he has not made a mere "generalized assertion" that Mr. Godosky has acquired confidential information. Defendant's affidavits provide sufficient facts to determine whether there is a reasonable probability that confidences would be disclosed. Defendant stated exactly what kind of confidences were conveyed to Mr. Godosky, and cannot provide more detailed content without disclosing the very confidences he wishes to protect.

In addition, defendant disputes Mr. Morris' statement that only he, and not defendant,

communicated with Mr. Godosky. Defendant points out that Mr. Godosky's affirmation neither corroborates Mr. Morris' statement nor affirms that he did not have any personal contact with defendant – nor could he. Mr. Godosky represented defendant and Mr. Morris as individuals, defendant argues, citing the retainer agreement between defendant and Mr. Godosky (the "Retainer Agreement").² Defendant attests that he indeed spoke with Mr. Godosky several times about the *Lee* fee dispute, at least once face to face in Mr. Godosky's office. Also, at Mr. Godosky's request, defendant drafted an affirmation detailing defendant's and Mr. Morris' work in the *Lee* fee dispute.

Defendant also argues that Mr. Godosky would disclose such confidences to plaintiff. Defendant's opinion of plaintiff's legal work and defendant's referral-fee practices with plaintiff are at the heart of the dispute in the instant lawsuit, where plaintiff is claiming legal referral fees pursuant to an alleged agreement between defendant and plaintiff. Effective representation of plaintiff by Mr. Godosky creates enormous pressure on him to reveal to plaintiff defendant's confidences regarding plaintiff. Even if Mr. Godosky could withstand this pressure, the appearance of impropriety requires his disqualification, defendant argues.

With respect to Mr. Godosky's claim that the former representation of defendant and the current representation of plaintiff are not substantially related, defendant argues that it does not matter that the *Lee* fee dispute settled, or that Mr. Godosky did not negotiate with plaintiff. Defendant contends that the test for a substantial relationship is whether information acquired in

²The Court notes that the Retainer Agreement for the *Lee* fee dispute, dated April 4, 2002, consists only of the following statement in the form of a "Stipulation": "It is hereby stipulated, consented to and agreed, by and among the undersigned, that James Lo and Wade Morris retain Richard Godosky, Esq., to negotiate a settlement of the fee disputed in this matter and that Richard Godosky will handle the motion with reference to same, presently returnable April 8, 2002, for a fee of \$15,000.00."

the course of the former representation relates to the current representation, and whether it can be used to the disadvantage of the former client. Mr. Godosky learned information from defendant concerning plaintiff that is directly relevant to the issue here, where defendant's and plaintiff's interests are directly adverse. Thus, defendant's confidences are in peril.

Discussion

Disqualification of Attorney

Under DR 5-108, an attorney who has formerly represented a party shall not then represent another person in the same or substantially related matter in which the person's interests are materially adverse to the interests of the former client (Code of Professional Responsibility DR 5-108 [A] [1]; [22 NYCRR 1200.27]). A party seeking disqualification must show that (1) there was a prior attorney-client relationship in the former matter, (2) the matters involved in both representations are substantially related, and (3) the interests of the current client and the client in the former matter are materially adverse (*Falk v Chittenden*, 11 NY3d 73, 78 [2008]; *Jamaica Pub. Serv. Co. Ltd. v AIU Ins. Co.*, 92 NY2d 631, 636 [1998], quoting *Tekni-Plex, Inc. v Meyner and Landis*, 89 NY2d 123, 132 [1996], *rearg denied* 89 NY2d 917 ["Only 'where the movant satisfies all three inquiries does the irrebuttable presumption of disqualification arise'"]). Where there is a conflict of representation, doubts as to the existence of a conflict of interest are to be resolved in favor of the disqualification [*Lammers v Lammers*, 205 AD2d 432 [1st Dept 1994]]. Generally, an attorney must avoid not only the fact but even the mere appearance of impropriety (*Tekni-Plex* at 130-131).

It is also well settled that on a motion to disqualify opposing counsel, "the burden is upon the one seeking disqualification of the adversary attorney because of the strong public policy to

allow persons to retain counsel of their choice and because in many cases . . . disqualification of counsel would cause severe prejudice to the client, who would have to secure new counsel to deal with somewhat complex litigation with the accompanying increased expense and loss of time” (*Macro Cash and Carry Corp. v Berkman*, 81 AD2d 783 [1st Dept 1991]). The disqualification rules, codified from the Rules of Professional Responsibility in the NYCRR, provide guidance rather than binding authority for courts in determining whether disqualification is required (*S&S Hotel Ventures Ltd. Partnership v S.H. Corp.*, 69 NY2d 437 [1987]).

It is undisputed that two elements of the three-prong test for disqualification are met: (1) Mr. Godosky, who previously represented defendant in a fee dispute with plaintiff, is now representing plaintiff in a separate fee dispute with defendant, and (2) plaintiff’s and defendant’s interests in the instant action are materially adverse. The parties dispute whether any information defendant disclosed to Mr. Godosky qualifies as secrets or confidences, pursuant to DR 4-101[A], whether the *Lee* fee dispute is substantially related to the nine cases herein from which plaintiff seeks to recover attorneys’ fees, and whether the appearance of representing conflicting interests warrants Mr. Godosky’s disqualification.

First, defendant demonstrates that the information Mr. Godosky learned from defendant qualifies as a “confidence” or “secret,” pursuant to DR 4-101[A], which states:

“Confidence” refers to information protected by the attorney-client privilege under applicable law, and “secret” refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

“[N]ot all communications to an attorney are privileged. In order to make a valid claim of privilege, it must be shown that the information sought to be protected from disclosure was a

'confidential communication' made to the attorney for the purpose of obtaining legal advice or services" (*Matter of Grand Jury Subpoenas Served Upon Doe*, 142 Misc 2d 229, 230-231 [Sup Ct New York County 1988], quoting *Matter of Priest v Hennessy*, 51 NY2d 62, 69 [1980]).

Here, defendant attests that as part of Mr. Godosky's representation of defendant in the negotiations to settle the *Lee* fee dispute with S&S, Mr. Godosky learned "confidences and secrets" relating to, *inter alia*, defendant's "individual billing and referral fee practices" (Lo Affd., ¶ 8). In his reply, defendant further attests: "I also discussed with Godosky *the legal fee* [plaintiff] was requesting on the Wun Lee case, as well as [plaintiff's] attitude towards the client and competence in handling the Wun Lee matter as well as other cases" (Lo Reply Affd., ¶ 8) (emphasis added).³ After "negotiating directly with [plaintiff], and *based in part upon Godosky's advice*," defendant and Mr. Morris settled its fee dispute with plaintiff in the *Lee* fee dispute (*id.* at 10) (emphasis added). In addition, defendant contends that plaintiff "specifically knew of my retention of Godosky in the fee dispute matters and therefore would have a reasonable expectation that my secrets/confidences would be disclosed to him to my disadvantage in this current litigation" (*id.* at ¶ 14).

In his opposition, plaintiff offers no more than the conclusory assertion by Mr. Godosky that "there were no confidences or secrets disclosed to me during" his prior attorney-client relationship with defendant (Godosky Affm., ¶ 10). Further, Mr. Godosky concedes that he

³ Defendant goes on to dispute Mr. Morris' contention that Mr. Morris was "the only one who communicated with Mr. Godosky" and that defendant "had no direct contact with" Mr. Godosky (Morris Aff., ¶ 6). Defendant contends that the statement is "suspect," as he and Mr. Morris "still have a contentious relationship," plaintiff is a "personal friend" of Mr. Morris and shares an office with Mr. Morris, and "I did not trust Morris and did not want Morris to control the fee negotiations on each fee dispute and thereby create a situation where I could not talk with Godosky or could not have a voice or say about the attorney fees we were entitled to" (Lo Reply Affd., ¶¶ 10, 11). Defendant further attests: "I personally visited the offices of Godosky where I discussed with him secrets and confidences concerning the plaintiff Hiller who had acted as trial counsel on the Wun Lee matter" (*id.* ¶ 6).

“obtained” information from defendant “with respect to defendant’s bill and referral fee practices” (*id.* at ¶ 7). Further, plaintiff does not deny that Mr. Godosky provided defendant with legal advice on settling the *Lee* fee dispute with plaintiff, based on the information Mr. Godosky obtained from defendant.

The First Department has held that a “party seeking disqualification must identify the “specific confidential information imparted to the attorney. General allegations of confidential information . . . will not do” (*Bank of Tokyo Trust Co. v Urban Food Malls Ltd.*, 229 AD2d 14, 31 [1st Dept 1996]) (citations omitted). The Court of Appeals explained in *Jamaica*:

As we have previously recognized, disqualification motions present competing concerns. Balanced against the vital interest in avoiding even the appearance of impropriety is concern for a party’s right to representation by counsel of choice and danger that such motions can become tactical “derailment” weapons for strategic advantage in litigation (*S&S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp.*, 69 N.Y.2d 437, 443, 515 N.Y.S.2d 735, 508 N.E.2d 647). With these considerations in mind, it is clear that *a movant must offer more to justify disqualification*. Allowing a party seeking disqualification to meet its burden by generalized assertions of “access to confidences and secrets” would both make it difficult, if not impossible, to test those assertions and encourage the strategic use of such motions. (*Id.* at 638) (emphasis added):

Here, defendant has offered the Court more than “generalized assertions.” Defendant asserts that “billing and referral fee practices” were disclosed to Mr. Godosky. He further states that he discussed with Mr. Godosky plaintiff’s representation in the *Lee* fee dispute, defendant’s opinions and evaluations of plaintiff’s legal work, and plaintiff’s relationship with L&M and defendant in the *Lee* fee dispute as well as in all other referral matters (Lo Affd., ¶ 8). Defendant further points out that he cannot elaborate further on the ground that he cannot not do so without “disclosing the very confidences” that he wishes to protect (reply, ¶4).

Accordingly, as defendant has provided sufficient specific detail, the Court finds that the

information disclosed to Mr. Godosky constitutes confidences or secrets as defined by DR 4-101[A].

Second, defendant demonstrates that the *Lee* fee dispute is substantially related to the fee dispute herein. “In order to meet the “substantial relationship” test, the issues in the present litigation must be “identical to” or “ ‘essentially the same’ as” those in the prior case before disqualification will be granted. . . . Absent a substantial relationship between the [prior] litigation and the present case, disqualification would be warranted only upon a showing that in the prior action [the attorney] had received specific confidential information substantially related to the present litigation” (*Lightning Park, Inc. v Wise Lerman & Katz, P.C.*, 197 AD2d 52, 55 [1st Dept 1994], citing *Saftler* at 57). The party seeking disqualification “need not show that confidential information necessarily will be disclosed in the course of the litigation; rather, a *reasonable probability of disclosure* should suffice” (*Greene v Greene*, 47 NY2d 447, 453 [1979] (emphasis added); *Clairmont v Kessler*, 269 AD2d 168, 169 [1st Dept 2000] [granting defendant physician’s motion to disqualify his former attorney where “circumstances show a reasonable probability that the attorney acquired confidential information in the prior action of matters likely to be in issue in this case”]; *see also Will of Mann*, 111 AD2d 652, 653 [1st Dept 1985] [“The very nature of the prior proceedings was such that it involved matters, such as [the respondent’s] financial condition and her relationship with her mother, which may be relevant in these proceedings. [The respondent] should not be burdened with the concern that the confidences which she imparted to her former attorney will be the subject of inquiry in this litigation”]).

Here, defendant demonstrates that the issues in the present litigation are “essentially the

same as” those in the *Lee* fee dispute, and that Mr. Godosky “received specific confidential information substantially related to the present litigation” (*Lightning Park* at 55). All of the relevant cases herein – the *Lee* fee dispute and the nine cases cited in plaintiff’s Complaint – involve fee disputes. Thus, it is clear that defendant’s billing and referral fee practices and any opinions disclosed to Mr. Godosky regarding plaintiff’s legal work are substantially related to the instant case. The fact that defendant did not specifically retain Mr. Godosky to settle the *Lee* fee dispute with plaintiff is of no moment. Defendant attests that he personally discussed his billing and referral fee practices with Mr. Godosky (Lo Reply Affd., ¶¶ 6-8). Defendant further attests, and plaintiff does not deny, that after meeting with defendant, Mr. Godosky’s offered to “negotiate directly with [plaintiff] on behalf of [defendant and Mr. Morris]” in the *Lee* fee dispute (Lo Affd., ¶ 9). Although defendant declined Mr. Godosky’s offer, Mr. Godosky obtained enough information from defendant to be able to represent defendant’s interests against plaintiff. As defendant’s and plaintiff’s interests remain materially adverse herein on the same subject of the payment attorneys’ fees, defendant has demonstrated that there is a reasonable probability that confidential information will be disclosed in the course of Mr. Godosky’s current representation of plaintiff (*see Greene* at 453).

As defendant has demonstrated a reasonable probability of the disclosure of confidences obtained by Mr. Godosky, the Court finds that Mr. Godosky’s representation of plaintiff herein would pose an impermissible conflict of interest, in violation of DR 5-108(A).

Finally, the appearance of impropriety warrants disqualification. It is well settled that an attorney “must avoid not only the fact, but even the appearance, of representing conflicting interests” (*Thomson U.S. Inc. v Gosnell*, 181 AD2d 558, 559-560 [1st Dept 1992] quoting

Cardinale v Golinello, 43 NY2d 288, 296 [1977]). However, "the appearance of impropriety, standing alone, might not be grounds for disqualification" (*In re Liquidation of Midland Ins. Co.*, 16 Misc 3d 1125, 847 NYS2d 903 [Sup Ct New York County 2007], quoting *People v Herr*, 86 NY2d 638, 641 [1995]).

Here, as defendant has demonstrated that DR 5-108(A) was violated and that the appearance of impropriety warrants Mr. Godosky's disqualification.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion of defendant James P. Lo for an order disqualifying Richard Godosky, Esq. from representing plaintiff Roy S. Hiller is granted, and Richard Godosky, Esq. is hereby disqualified from representing plaintiff in this matter; and it is further

ORDERED that no further proceedings may be taken against said plaintiff without leave of this court for a period of 45 days after service of this order; and it is further

ORDERED that defendant serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: December 23, 2009

FILED
JAN 05 2010
NEW YORK
COUNTY CLERKS OFFICE



Hon. Carol R. Edmead, J.S.C.

HON. CAROL EDMEAD