SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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In the Matter of the Probate of the Last Will and Testament of

MURIEL M. WENZEL,

Deceased.

File No. 345250

Dec. No. 763

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In this probate proceeding, objectant, Patricia Semon, moves for an order disqualifying counsel for Gail M. Fanny, the petitioner and nominated executor under the will of Muriel M. Wenzel. Gail cross-moves for sanctions on Patricia for making a frivolous motion.

BACKGROUND

The motion was brought in connection with the contested probate of an instrument dated November 16, 2006. Muriel M. Wenzel died on January 15, 2007, survived by three children: Gail, Patricia, and William J. Wenzel. A petition for probate was filed on July 29, 2007, and an SCPA 1404 examination was conducted on October 7, 2008. Objections were subsequently filed by Patricia. In connection with the depositions and objections, Gail, the nominated executor, is represented by Ken Sutak, who is of counsel to Franklin, Gringer and Cohen, P.C. ("FG&C"). Depositions were concluded on April 7, 2009.

The motion for disqualification arises out of FG&C's legal representation of the Acme Cake Company ("Acme"), which has four shareholders who each own 25% of the corporation. The shareholders are (1) Patricia, (2) Patricia's husband, Thomas, (3) Patricia's brother, William, and (4) William's wife, Debra. In 2000, FG&C commenced two actions on behalf of Acme in Supreme Court, Nassau County, one of which, against Thomas, remains open. Acme is now in bankruptcy proceedings. Patricia seeks disqualification of FG&C as counsel to Gail in the

probate proceeding on the grounds that FG&C cannot represent Gail, whose interests are adverse to the interests of its former client, Patricia. In the alternative, Patricia avers that FG&C is concurrently representing two clients, Patricia and Gail, with adverse interests.

In response, Sutak notes that his representation of Gail is limited to (1) the depositions of her prior counsel and his associate, who may be material witnesses in the probate matter, and (2) the objections to probate filed by Patricia. More significantly, Sutak points out, FG&C represented Acme, and not Patricia, in the proceedings in Supreme Court. Accordingly, Sutak argues, Patricia was never a client of FG&C and therefore lacks standing to seek disqualification of FG&C in the probate matter. Counsel further argues that even if the court determines that Patricia is a former client of FG&C, disqualification of the firm would not be appropriate in the probate matter, as no substantial relationship exists between the Supreme Court action filed on behalf of Acme and this probate proceeding, which would be a prerequisite for disqualification. Simultaneously, Sutak brought a cross-motion for monetary sanctions, arguing that the motion for disqualification is frivolous, dilatory and not in good faith.

ISSUES PRESENTED

Central to the motion for disqualification are the following issues:

1. The applicable standard for a determination of disqualification.

2. Whether Patricia is a former client of FG&C by virtue of her status as a shareholder of Acme, on behalf of whom FG&C brought two actions in Supreme Court in 2000.

3. If the court determines that FG&C's representation of Acme was tantamount to a representation of Patricia individually, the court must then examine whether that relationship

continued through Acme's bankruptcy so as to determine whether Patricia is presently a client of FG&C.

DISCUSSION

1. The applicable standard for a determination of disqualification

A. Attorney representation of a client with interests adverse to those of a former client.

The ethical obligation of an attorney who wishes to represent a client with interests adverse to those of a former client is set out in Rule 1.9 of the Rules of Professional Conduct,[1] which provides, in part: "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing" (Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.9 [a]).

Applying this standard, the Court of Appeals developed a tripartite test to determine whether an attorney should be disqualified on the basis of adverse client interests. The first part requires the individual who seeks disqualification of an opponent's attorney to prove that he or she has a prior attorney/client relationship with said attorney. The second part of the test requires a showing that the matters in the two proceedings are substantially related. Lastly, the movant must show that the interests of the two clients are materially adverse. If a party seeking to disqualify an adversary's attorney is able to prove all three parts of this test, such proof "gives rise to an irrebuttable presumption of disqualification" (*Tekni-Plex, Inc. v Meyner and Landis* (89 NY2d 123, 131 [1996] [internal citations omitted]).

B. Concurrent representation of clients with adverse interests.

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[1] 22 NYCRR part 1200 replaced the Code of Professional Responsibility as the governing rules for attorney conduct in New York effective April 1, 2009.

Where an attorney has an ongoing relationship with one client, and concurrently represents a second party whose interests are adverse to those of the first client, whether or not in the same proceeding, the courts apply a much stricter standard to determine whether the attorney's representation of the second party is improper (*Aerojet Props. v State of New York*, 138 AD2d 39, 40-41 [3d Dept 1988]). It is virtually axiomatic that it would be ethically inappropriate for an attorney to bring a lawsuit against his or her current client, barring the most extraordinary circumstances (*Pfizer v Stryker Corp*., 256 F Supp 2d 224, 226 [SD NY 2003]). It is, perhaps, not quite as clear when the representation of two clients with adverse interests involves two completely separate matters. Even so, the "simultaneous representation of [opposing parties], even though on unrelated matters, is at best unseemly" (*Rubenstein v Foster Bros. Mfg. Co.*, 52 AD2d 597, 597 [2d Dept 1976]). What is frequently referred to as the "prima facie" or "per se" rule was first delineated in *Cinema 5, Ltd. v Cinerama, Inc.* (528 F2d 1384 [2d Cir 1976]) as follows: "Where the relationship is a continuing one, adverse representation is prima facie improper ... and the attorney must be prepared to show, at the very least, that there will be no actual or apparent conflict in loyalties or diminution in the vigor of his representation" (*id.* at 1387). This standard shifts the inquiry away from the substantiality of the relationship between the two matters being handled by the attorney, and instead focuses on the attorney's responsibility to provide his or her client with absolute loyalty (*Aerojet Props. v State of New York*, 138 AD2d 39, 41 [3d Dept 1988]). The attorney opposing disqualification bears a heavy burden of proof to show the court that his or her concurrent representation of the second client will not create a conflict in loyalties or diminish the vigor of the attorney's representation of the first client (*JP Morgan Chase Bank v Liberty Mutual In. Co.*, 189 F Supp 2d 20, 23 [SD NY 2002]; *British Airways, PLC v The Port Authority of New York and New Jersey*, 862 F Supp 889,

894 [ED NY 1994]).

2. Whether Patricia is a former client of FG&C by virtue of her status as a shareholder of Acme

"It is well settled that a corporation's attorney represents the corporate entity, not its shareholders or employees ... " *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 562 [2009]). As a general rule, "[a]n attorney does not represent a co-shareholder simply by reason of his or her representation of the corporation, unless he or she affirmatively assumes that duty" (*Kalish v Lindsay*, 47 AD3d 889, 891 [2d Dept 2008], citing *Walker v Saftler, Saftler & Kirschner*, 239 AD2d 252 [1st Dept 1997] and *Kushner v Herman*, 215 AD2d 633 [2d Dept 1995]). However, a court may find the existence of an attorney/client relationship where a shareholder "reasonably believed [that the corporate attorney] was acting as his counsel" *(Rosman v Shapiro*, 653 F Supp 1441, 1445 [SD NY 1987]). In *Rosman*, cited by Gail's attorney in his reply affirmation, corporate counsel undertook the representation of one 50% shareholder suing the other 50% shareholder, who then moved to disqualify plaintiff's counsel. "Although, in the ordinary corporate situation, corporate counsel does not necessarily become counsel for the corporation's shareholders and directors ... where, as here, the corporation is a close corporation consisting of only two shareholders with equal interests in the corporation, it is indeed reasonable for each shareholder to believe that the corporate counsel is in effect his own individual attorney" (*id.*). The court then notes "the general proposition that in a close corporation, the issue of corporate versus individual representation must be decided on a case by case basis" (*id.*).[2] A

[2]In view of the fact that Sutak is of counsel to FG&C, and not a member of the firm, it is worth noting that while the court in *Rosman* granted the motion for disqualification of the law firm, "the Court can see no reason to disqualify the of-counsel attorneys ... Having had no prior attorney-client relationship with Rosman, the of-counsel attorneys owe no duty to remain loyal to Rosman's interests" *(Rosman v Shapiro*, 653 F Supp 1441, 1447 [SD NY 1987]). The decision is not on point with the present facts, in that the non-disqualified attorneys in *Rosman* were of-counsel to the firm for the two matters before the court, while Sutak is of counsel on an ongoing basis but has no connection to the Acme lawsuits.

determination as to whether a fiduciary relationship exists between a client and an attorney must be very fact-specific (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 561 [2009]).

In the proceeding before this court, Patricia claims to be a client of FG&C by virtue of her status as a 25% shareholder in Acme. At first glance, this fact might appear to align this case with *Rosman*, discussed above. However, *Rosman* involved two active shareholders, both of whom treated the company as though it were a partnership, and both of whom attended meetings with the corporate attorney together and separately seeking legal advice on behalf of the corporation. In contrast, an affidavit filed by William affirms that Patricia is a non-participatory non-voting shareholder in Acme who plays no role in its management. Patricia does not dispute William's statement or assert that she ever met with any member of FG&C, nor does she claim that she has any basis to believe that FG&C represented her individually.

CONCLUSION

Patricia has not established that she is or ever was a client of FG&C. "[A] party who is neither a present or former client of an attorney has no standing to complain about the attorney's representation ... " (*Kalish v Lindsay*, 47 AD3d 889, 891 [2d Dept 2008]). The court therefore denies Patricia's motion for disqualification. The cross-motion for sanctions is also denied.

This is the decision and order of the court.

Dated: December 24, 2009

JOHN B. RIORDAN
Judge of the
Surrogate's Court