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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:
HON. DANIEL PALMIERI
Acting Justice Supreme Court

----------x **TRIAL TERM PART: 45**

FRANK PALADINO,

INDEX NO.: 3252/08

Plaintiff,

-against-

SKATE SAFE, INC., SKATE SAFE OF AMERICA, LLC d/b/a SKATE SAFE OF AMERICA and BRIAN RICHFORD,

Defendant.

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(Cross) MOTION: 6-3-10
SUBMIT DATE: 7-21-10
SEQ. NUMBER - 004

The following papers have been read on this cross motion:

Notice of Cross Motion, dated 5-21-10.....1
Affirmation in Opposition, dated 6-29-10.....2
Reply Affirmation, dated 7-2-10.....3

This cross motion by the plaintiff to disqualify Malapero & Prisco, LLP from continuing it representation of the defendants is granted. A stay of proceedings is granted for 60 days to allow defendants to obtain new, separate counsel, which may not in either case be present counsel, and for defendant Brian Richford to reargue or renew the motion to dismiss denied by order of this Court dated January 28, 2010.

The facts of this case have been set forth in the January 28 order, but for purposes of the instant cross motion will be restated briefly. On the evening of March 5, 2007, plaintiff,

a (roller) hockey team member was engaged in a game at defendant Skate Safe, Inc. and Skate Safe of America, LLC (jointly, "Skate Safe")'s facility. An altercation broke out between members of the teams and both plaintiff and defendant Brian Richford, a Skate Safe employee acting as a referee, headed in the direction of the fight. The versions of the events then differ. Plaintiff alleges that he was going to break it up when defendant blocked him and threw him down. Richford contends that plaintiff appeared to be intent on joining in the fight, and so he impeded and blocked him from doing so. As a result of this interaction, plaintiff alleges that he sustained bodily injury.

This cross motion is a direct result of the main motion by defendants to reargue the Court's January 28 decision. [1] That determination, made upon defendants' motion for summary judgment, effectively denied all relief to the defendants except for dismissal of the claim against Skate Safe of negligent hiring and retention. On reargument defendants' attorneys contend that the Court erred in not dismissing the negligent supervision, negligent training and vicarious liability claims as pled against Skate Safe. They argue, and in fact ask the Court to find, that Richford was acting outside the scope of his employment at the time of the incident that underlies this law suit, and for that reason Skate Safe should not be held liable.

Plaintiff argues that this places the interests of Richford in opposition to that of Skate Safe, his employer, yet both are represented by the same attorneys. Plaintiff points out that the motion to reargue does not seek to overturn the Court's denial of the motion insofar as

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[1] The decision on the motion to reargue is issued simultaneously herewith, by way of separate order.

it sought dismissal of the claims make against Brian Richford, and thus seeks relief only on behalf of Skate Safe. Plaintiff asserts that the position taken by Skate Safe creates a conflict for the attorneys, who represent both the business entities and the individual defendant. The Court agrees.

Plaintiff's counsel presents a letter written to defendants' attorney, dated March 23, 2010 in which he alludes to the conflict described above and notes that he, plaintiff's attorney, learned for the first time that the insurance carrier paying for the defense had sent Richford a letter reserving its right to discontinue paying for his defense.

Plaintiff also presents a copy of this reservation of rights letter, dated May 8, 2008, which plaintiff's counsel said was "recently" exchanged by defendants. After reproducing the relevant language of the policy, the insurer stated that "If, during the course of handling and investigation of this action we uncover that you purposely injured Mr. Paladino, or had a history of doing this, we reserve the right to withdraw your defense at any time. Intentional acts of 'insureds' are not covered..."

It remains within the sound discretion of the trial court to disqualify an attorney. *Stober v. Gaba & Stober, P.C.*, 259 AD2d 554 (2d Dept. 1999); *Mondello v. Mondello*, 118 AD2d 549, 550 (2d Dept. 1986). Under the circumstances present here, the Court find s that the firm of Malapero & Prisco, LLP cannot continue as counsel to the defendants pursuant

to 22 NYCRR § 1200.7(a)(1) (Rules of Professional Conduct, Rule 1.7(a)[1]). [2] ["a lawyer should not represent a client if a reasonable lawyer would conclude... the representation will involve the lawyer in representing differing interests"].

The party seeking the disqualification of the attorney has the burden on the motion. *S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp.*, 69 NY2d 437,445 (1987). However, the burden has been met here, because the cross moving plaintiff has demonstrated that the interests of Skate Safe and Richford are adverse; Skate Safe now has argued that if any party should be held liable is must be Richford, because his actions, if wrongful, were outside the scope of his employment – *i.e.,* were based upon personal motives not in furtherance of his employer's business. *See, Carnegie v J.P. Phillips, Inc.*, 28 AD3d 599, 600 (2d Dept. 2006); *Schuhmann v McBride*, 23 AD3d 542, 543 (2d Dept. 2005). This would free Skate Safe from responsibility and, quite possibly, leave Richford without insurance.

An attorney should not continue representing two co-parties after a conflict of interest arises between them, because this would result in a violation of the rule requiring attorneys to represent a client zealously, and to preserve client confidences. *Sidor v Zuhoski,* 261 AD2d 529 (2d Dept. 1999). Indeed, once this conflict becomes apparent, the Court should

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[2] Effective April 1, 2009, the New York Rules of Professional Conduct replaced the Code of Professional Responsibility in an effort to enhance the consistency of ethical standards. The new Rules include approximately three-quarters of the former Code, with the remaining one-quarter coming from the ABA's Model Rules. Simon, *Comparing the New NY Rules of Professional Conduct To the NY Code of Professional Responsibility*, New York State Bar Association Journal, May 2009, at 9. Thus, much of the existing case law on disqualification remains viable.

disqualify the attorney from representing either. *Id.*, at 530; *Shaikh v Waiters,* 185 Misc 2d 52 (Sup Ct Nassau County 2000). The reason is that the party who is no longer represented by the attorney may already have given confidences to the attorney, and may fear that this could be used against him in some fashion, to the advantage of the remaining client. The concern for maintaining client confidences is cited as a key reason for disqualification for adverse interests. *Pelligrino v Oppenheimer & Co., supra,* 49 AD3d 94, 98 (1st Dept. 2008), citing *Solow v Grace & Co.,* 83 NY2d 303 (1994).

Client consent may, under appropriate circumstances, provide a basis for permitting continued representation after a conflict arises. 22 NYCRR § 1200.7(b) (Rule 1.7(b)); *Shaikh v Waiters,* 185 Misc 2d 52, *supra.* In this case, both affected clients have provided affidavits stating that each has been "fully informed by counsel of the implications of the simultaneous representation," and each consents. However, the Rule also requires a belief under a "reasonable lawyer" standard that the attorney have a reasonable belief that the attorney "will be able to provide competent and diligent representation to each affected client." 22 NYCRR § 1200.7(b)(1) (Rule 1.7(b)(1)).

In this case, the Court concludes that such a belief would not be reasonable. The position taken by defendants that Skate Safe should be free from liability because Richford was acting outside the scope of his employment undoubtedly places the employer's interests ahead of the individual's who, as noted above, may be left without insurance coverage. Even if the attorney agreed to continue representation of Richford without charge (an offer not found in the opposition papers), that would not extend to paying for any judgment. It is

also worthy of note that the attorney has made no mention of being willing to challenge the insurance carrier on Richford's behalf in a declaratory judgment action should the carrier make good on its threat to withdraw its defense, nor of avoiding a discussion of Richford's role with the carrier. In view of the insurer's threat to discontinue the referee's defense if it uncovers evidence that he "purposely" injured the plaintiff, communications about Richford carry risk for this client. This is one of those cases in which the dual representation is "so fraught with the potential for irreconcilable conflict" that it cannot be allowed. *Greene v Greene,* 47 NY2d 447, 451-452 (1979).

Defendants' reliance on this Court's decision in *DeLorenz v Moss* (24 Misc 3d 1218(A) [Sup Ct Nassau County 2009]) is misplaced, because in that case the Court specifically found that the parties' positions could not be seen as "materially adverse" or "conflicting", in that nothing that the former wife knew could be used against the former husband to her advantage. Only the plaintiff might benefit with regard to damages he might seek against the former husband. As noted above, here the employer, Skate Safe, is attempting to separate itself from the employee's actions, which would be to its benefit (dismissal) and potentially harmful to the employee in the form of loss of insurance coverage. The conflict is not mitigated by the attorneys' assertion that they continue to claim that Richford did nothing wrong and did not intentionally harm the plaintiff. The argument that he was not engaged in the employer's business (but rather, by clear implication, only his own) is more consistent with a claim that Richford's conduct was intentional than not.

Finally, the Court rejects the argument by defendants' counsel that plaintiff does not

have the standing to bring on this motion. Principles of standing are matters of public policy (*Sun-Brite Car Wash v Board of Zoning Appeals of the Town of North Hempstead,* 68 NY2d 406, 413 [1987]), and in the area of regulating the practice of law those principles must be flexible enough to allow a court to insure that the integrity of proceedings before it is maintained, especially where a court recognizes the existence of a conflict. *See, Booth v Continental Ins. Co.,* 167 Misc 2d 429 (Sup Ct New York County 1995). Even in the *DeLorenz* case, in which disqualification was denied, this Court never questioned the plaintiff's standing to raise the issue.

Finally, the Court would remind defendants that the insurance carrier is still obligated to provide a defense to each of the now-separated defendants, even under a reservation of rights. *See, Public Service Mut. Inc. Co. v. Goldfarb,* 53 NY2d 392, 401 (1981); *Prashker v. United States Guar. Co.* , 1 NY2d 584, 593 (1956).

This shall constitute the Decision and Order of this Court.

ENTER

DATED: July 29, 2010

HON. DANIEL PALMIERI
Acting Supreme Court Justice

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