

**Clark v A.O. Smith Water Prods.**

2010 NY Slip Op 33135(U)

November 1, 2010

Supreme Court, New York County

Docket Number: 190165/10

Judge: Louis B. York

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

PRESENT: LOUIS B. YORK  
J.S.C.  
Justice

PART 2

Clerk

INDEX NO. 190165/10

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

- v -  
A.O. Smith Water Products

The following papers, numbered 1 to \_\_\_\_\_ were read on 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

PAPERS NUMBERED

**FILED**

NOV 08 2010

NEW YORK  
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM DECISION.**

*This action is stayed for 45 days from  
the service of this ~~order~~ decision ~~to~~ with  
Notice of Entry.*

Dated: 11/1/10

Ley

**LOUIS B. YORK** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 2**

-----X  
**KEITH CLARK,**

**Plaintiff,**

**-against-**

**A.O. SMITH WATER PRODUCTS, et al.,**

**Defendants.**  
-----X

**Index No. 190165/10**

**DECISION/ORDER**

**FILED**  
**NOV 08 2010**  
**NEW YORK**  
**COUNTY CLERK'S OFFICE**

**Louis B. York, J.S.C.:**

In this personal injury action resulting from asbestos exposure Movants ~~Garter~~ & Co., Inc. ("Courter"), DAP, Inc. ("DAP"), The Fairbanks Company ("Fairbanks") and Kentile Floors, Inc. ("Kentile") move to disqualify Joan M. Gasior, Esq. ("Gasior") and the law firm of Napoli, Bern, Ripka LLP ("Napoli Bern") from representing Non-movant in this action. Movants also seek Napoli Bern's disqualification from representing the plaintiffs in Pastore v. A.O. Smith Water Products Co., Index No. 190194/2010 and Powell v. A.O. Smith Water Products Co., Index No. 190198/2010.

Gasior worked at McGivney & Kluger, P.C. for 7 years as counsel for the moving defendants, eventually heading the firm's New York asbestos team, and afterwards becoming an assistant managing partner. Gasior had a wide range of duties, including discovery and pretrial strategy, settlement planning and negotiations, meeting with clients and their respective insurance carriers, evaluating cases and attending trials.

In 2009 Gasior billed Kentile for approximately 1300 hours. She also attended a Kentile training seminar, and sat in on a deposition involving the company's former president. During that same year, Gasior billed Fairbanks for about 40 hours of work. In

the period she represented Fairbanks, Gasior attended four settlement conferences on their behalf. In 2005, Gasior began working on the Courter account. She was also DAP's leading counsel for over four years. Gasior's involvement with DAP included periodic communication with their in-house counsel, national coordinating counsel and their insurance carrier.

Gasior ended her employment with McGivney & Kluger towards the end of February 2010. She began working at Napoli Bern's Manhattan office in March 2010. As a result, Napoli Bern transferred all asbestos litigation matters to their Long Island office. Gasior alleges that she is not involved with the underlying asbestos action and has no access to any of Napoli Bern's asbestos case files. At the time of this motion, she was working on a whistleblower case, and another matter regarding a pharmaceutical drug.

Movants filed the underlying asbestos claim on April 24, 2010. McGivney & Kluger immediately wrote Gasior, citing the ethical obligations owed to Movants. After highlighting the potential conflict issues, McGivney & Kluger requested Gasior, along with Napoli Bern, to cease their representation of Non-movants. Apparently, Non-movants refused. Because of this refusal, Movants requests this court to disqualify Gasior and Napoli Bern.

Movants insist that Gasior's prior involvement with their asbestos defense was very significant. They fear that all the information and defense strategies revealed to her in confidence will likely to be used against them in this present litigation. Moreover, Movants argue that the appearance of impropriety dictates the disqualification of Gasior and Napoli Bern. However, Gasior contends that her role at McGivney & Kluger was

merely ministerial and administrative, thus, no confidential information was acquired. Additionally, Napoli Bern asserts that it should remain as counsel, because the firm enacted adequate measures to shield Gasior from the present asbestos suit.

In the motion papers, both parties cite numerous cases to support their respective positions. However, for the reasons stated below, the court grants Movants' motion to disqualify Gasior and Napoli Bern from representing Non-movants.

Courts generally are not pleased with motions to disqualify, especially if they are done strategically to add expense or cause undue delay. Matter of Essex Equity Holdings USA LLC v Lehman Bros. Inc., 2010 NY Slip Op 20225 [U] (2010) (quoting Felix v. Balkin, 49 F. Supp. 2d 260 (S.D.N.Y. 1999)). The overall principle is to allow clients to freely choose their lawyers, and by protecting the clients' confidences, foster open communication. Id. So as a rule, a lawyer may not represent a client if his or her "independent professional judgment is likely to be impaired by extraneous considerations." Greene v. Greene, 47 N.Y.2d 447, 451 (1979). In addition, an attorney is prohibited from representing a new client whose interest are adverse to a former client, if the representation is regarding the same or substantially related matter. Kassis v. Teacher's Ins. & Annuity Ass'n, 93 N.Y.2d 611, 615 – 616 (1999); see NYRPC 1.9; see also Pellegrino v. Oppenheimer & Co., Inc., 851 N.Y.S.2d 19, 49 A.D.3d 94 (1st Dep't 2008). If the attorney works at a law firm, then the firm is also disqualified. Id. However, deciding whether a previous engagement is substantially related to a current one, is not always apparent.

Generally, matters are substantially related if "the issues in the present litigation '[are identically] or essentially the same' as those in the prior case." Lightning Park v.

Wise Lerman & Katz, P.C., 609 N.Y.S.2d 904, 906, 197 A.D.2d 52, 56 (1st Dep't 1994) (citations omitted); Acme Am. Repairs, Inc. v. Katzenberg, 2007 U.S. Dist. LEXIS 23097 (E.D.N.Y. 2007) ("a substantial relationship exists when the material facts of the prior representation are 'necessary to the present litigation'") (quoting United States Football League v. Nat'l Football League, 605 F.Supp. 1448, 1459 [S.D.N.Y. 1985]). A substantial relationship may exist between a previous case and one currently being litigated, if the two cases share the same subject matter. Anonymous v. Anonymous, 691 N.Y.S.2d 769, 262 A.D.2d 216 (1st Dep't 1999).

Movants assert that the "nature of asbestos litigation is such that each defense is substantially related to every asbestos case." McGivney Aff., at ¶ 14. Additionally, they allege asbestos related conditions have significantly developed over the years, leading to reoccurrences of "the same or similar medical issues...across thousands of cases." Id. at ¶ 18. Law firms acting as national coordinating counsels to the various companies can ensure a nationwide uniform defense of their clients, by strategizing around facts and circumstances that show up repeatedly in asbestos litigation. Movants allege that this coordinated centralized defense is also used at the local level. However, Napoli Bern argues that all asbestos litigation is not substantially related to each other, because every plaintiff introduces unique circumstances, such as, type of asbestos exposure, length of exposure, and the illness being alleged.

Mitchell v. Metro. Life Ins. Co., (2002 U.S. Dist. LEXIS 4675, 16-19 (S.D.N.Y. Mar. 20, 2002)), provides sufficient guidance in the determination regarding substantial relatedness. The case involved facts similar to those presently before the court. In Mitchell, an attorney who worked at the plaintiff's law firm in a discrimination suit,

previously worked at another firm representing the defendant against sales practice claims. During that period, the law firm was defendant's national coordinating counsel, and the attorney was involved at the senior level. Furthermore, the attorney billed defendant for over 1300 hours in her last two years at the firm.

The Mitchell court held that that the matters were substantially related. They noted that the attorney "was privy to privileged communications concerning [defendant's] settlement strategy[, in addition to the] company's approach to structuring and valuing proposed settlements." Id. at \*7 – \*8. Furthermore, the attorney was "privy to confidential information[,] that could...pose a significant risk of trial taint to the disadvantage of [the defendant in the current proceeding]." Id. at \*18.

In this action, Gasior represented Movants at the senior level. In 2008, McGivney & Kluger became Kentile's national coordinating counsel for asbestos litigation. The following year, Gasior billed Kentile for over 1300 hours. She also reviewed case files in preparation for pre trial reports, various meetings, and participation in phone conferences with Kentile's in-house counsel regarding depositions and experts. The circumstances of Gasior's association with Kentile, closely resemble those that disqualified the attorney in Mitchell. In contrast to Mitchell, and to the support of Movants, the subject matters are exactly the same in both cases. This advances the notion that the prior cases, in which Gasior represented Movants, are substantially related to the matters currently being brought by Non-movants.

Alternatively, the court has another ground to grant Movant's motion. Lawyers "owe a continuing duty to former clients not to reveal confidences learned in the course of their professional relationship." Kassis, at 614. This rule protects the confidences of

the former client, whose interest is adverse to the attorney's new client. Furthermore, there is a rebuttal presumption that the attorney's law firm is also disqualified from representing the new client. Id. at 617.

However, merely alleging that the attorney learned confidential information is not an adequate basis to disqualify said attorney. Bank of Tokyo Trust Co. v. Urban Food Malls, 229 A.D.2d 14, 31, 650 N.Y.S.2d 654, 666 (1st Dep't 1996). The movant must prove that the side-switching attorney obtained the client's confidential information, unless the non-movant can show that no confidential information was obtained. Kassis, at 615; Green, at 453 (an attorney has a continuing obligation "not to reveal confidences learned in the course of the professional relationship"). The moving party simply needs to demonstrate a reasonable probability that the attorney may disclose confidential information. Green, at 453; Jamaica Pub. Serv. Co. v. AIU Ins. Co., 92 N.Y.2d 631, 637 (1998) ("movant need not actually spell out the claimed secrets and confidences in order to prevail, [but]...at a minimum[, must] provide the motion court with [sufficient information to determine] whether there exists a reasonable probability that [NYRPC 1.9] would be violated").

The court's analysis above exhibits a strong presumption that Gasior acquired confidences from Movants during her tenure at McGivney & Kluger. She repeatedly communicated with Movants and their respective insurance carriers on a normal basis to discuss case statuses, settlements, and upcoming depositions. See Order to Show Cause, Exhibit F. Non-movants' attempts to downplay Gasior's timesheet entries are not effective, especially when the lengths of these communications regularly surpassed sixty minutes. Additionally, the probability that Gasior obtained confidential information is

high since, a) she was an assistant managing partner at McGivney & Kluger, b) she was not physically isolated from McGivney & Kluger's asbestos litigation office and c) she had open accessibility to the firm's asbestos litigation files. Kassis, 93 N.Y.2d 611, 618 (citing Cardinale v Golinello, 43 NY2d 288, 292 (1977)).

Without revealing privileged communications, Movants' papers sufficiently detail Gasior's access to confidential information. The court may reasonably infer that, not only were the discussions substantial in nature, but they also contained confidences. Further, Gasior normally relayed this information to the rest of McGivney & Kluger's New York Asbestos Litigation team. Movants' settlement figures, along with their particular set of strategies for conducting discovery and negotiations, are not public information.

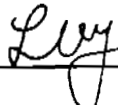
Non-movants fail to make a prima facie showing that no reasonable probability exists, in which Gasior obtained Movants' confidences. Solow v. W. R. Grace & Co., 83 N.Y.2d 303, 313 (1994). The court also notes, that although the moving party has a heavy burden to supply to a high level of proof, "if there are doubts ... doubts should be resolved in favor of disqualification." Matter of Essex Equity Holdings USA LLC, (quoting Felix v. Balkin, 49 F. Supp. 2d 260 (S.D.N.Y. 1999)). The record is full of seeds planting doubt in the mind of the court. Granting Movants' motion seeking to disqualify Gasior and Napoli Bern is appropriate.

For the reasons given above, it is therefore

ORDERED that Napoli, Bern, Ripka LLP and Joan M. Gasior are disqualified from representing plaintiffs in Clark & A.O. Smith Water Products Co., Index No. 190165/2010, Pastore v. A.O. Smith Water Products Co., Index No. 190194/2010 and Powell v. A.O. Smith Water Products Co., Index No. 190198/2010.

Dated: 11/1/10

ENTER:

  
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Louis B. York, J.S.C.

**LOUIS B. YORK**  
J.S.C.

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