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SCANNED ON 2/15/2011

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

PRESENT: JOAN A. MADDEN PART 11
Justice

~~William Whitney~~ Brasier and Holladay as co-guardians for William D Whitney,

Plaintiff,

-v-

Cortland Community Reentry Program.

Defendant.

INDEX NO. 104246/09

MOTION DATE 10/7/10

MOTION SEQ. NO. 003

MOTION CAL. NO. ____

The following papers, numbered 1 to ____ were read on this motion to/for ____

	PAPERS NUMBERED
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 is decided in accordance with the annexed Memorandum Decision + Order.

FILED

FEB 15 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: February 9, 2011

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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 11

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ROBERTA BRASIER and C. RANDOLPH HOLLADAY, as Co-Guardians of the person and property of WILLIAM D. WHINERY,

Plaintiffs

-against-

CORTLAND COMMUNITY REENTRY PROGRAM, INC.,

Defendant.

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Index No. 104246/09

JOAN A. MADDEN, J.:

Defendant Cortland Community Reentry Program, Inc. ("CCRP") moves for an order (i) dismissing the complaint on the ground that the plaintiffs, as co-guardians for William D. Whinery ("Whinery"), lack the capacity to sue, and (ii) disqualifying David Scott, Esq. as counsel for plaintiffs. Plaintiffs Roberta Brasier and C. Randolph Holladay (together "the plaintiffs" or "co-guardians") oppose the motion.

Background

By order dated November 6, 1998, plaintiffs were named co-guardians of the person and property of Whinery, who had suffered serious head injuries in a hit-and-run incident in July 1998. In December 1998, Whinery was admitted to CCRP, which operates a post-acute rehabilitation program to address the needs of individuals recovering from head injuries. At that time, Whinery's primary source of funding was the New York State Crime Victim's Fund ("the Crime Victim's Fund").

In 2007, based on neuropsychological examination of Whinery, the Crime Victim's Fund notified CCRP that it was going to decrease funding to Whinery and that it was ending funding in November 2007. The co-guardians appealed this determination, and their appeal was denied in May 2008. The co-guardians subsequently brought an Article 78 proceeding challenging the

denial.[1]

In June 2008, CCRP requested reimbursement for Whinery's care from the Crime Victim's Fund. In September 2008, the request was denied, and CCRP was informed by the Crime Victim's Fund that no further funding was available. In October 2008, CCRP requested reimbursement funding from the co-guardians, and certain amounts were paid. In or about March 2009, CCRP commenced an action in the Supreme Court, Cortland County, against the co-guardians and Whinery seeking payment for outstanding balances allegedly due and owing it.[2]

On March 27, 2009, the co-guardians commenced this action against CCRP by summons with notice. A complaint was subsequently filed in May 2009. The complaint alleges that CCRP misrepresented that it would accept as its fees the level of payment awarded by the Crime Victim's Board on behalf of Whinery, that the CCRP breached its agreement with the co-guardians to accept the payments or reimbursements through various sources, including the Crime Victim's Board, that CCRP was unjustly enriched at the co-guardians' expense, that the CCRP and its employees were negligent in their care of Whinery, and that CCRP violated the Public Health Law by discriminating against Whinery based on his inability to pay and discharging him without a written discharge plan. CCRP filed an answer denying the allegations in the complaint, and asserting various defenses.

Before discovery began, CCRP made this motion seeking to dismiss the complaint based on the co-guardians purported lack of standing and to disqualify plaintiffs' counsel David Scott, Esq. The motion to dismiss is denied as moot as after the motion was made the plaintiffs were granted the specific authority to prosecute this action.

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[1]The status of this proceeding and/or its outcome is not set forth in the record.

[2]By decision and order dated September 23, 2009, Justice Alice Schlesinger denied CCRP's motion to change venue of this action to the Supreme Court, Cortland County.

With respect to the disqualification aspect of the motion, CCRP argues that Mr. Scott should be disqualified under the advocate-witness rule contained in Rule 3.7 of the Rules of Professional Conduct, asserting that as Mr. Scott represented the co-guardians in the appeal of the determination of Crime Victim's Board, he is likely to be called to testify as a witness in this action. CCRP also argues that Mr. Scott should be disqualified as he received confidential information from CCRP's Director of Program Development, George J. Griffith, in connection with the appeal of the Crime Victim's Board's determination, including confidential medical, mental and health care information regarding Whinery, and that Mr. Scott would not otherwise have access to this information.

The co-guardians oppose the motion, arguing that while Mr. Scott worked with CCRP in connection with the appeal of the Crime Victim's Board determination, he did not represent it as counsel, that the proceedings before the Crime Victim's Board are matters of public record, and that the information provided by CCRP to Mr. Scott was not confidential or privileged. Furthermore, the co-guardians assert that CCRP has failed to show that Mr. Scott has personal knowledge of the matters in issue, or that Mr. Scott's will be called as a witness on a significant issue.

In reply, CCRP argues that Mr. Scott will be required to testify as to the efforts to recover from the Crime Victim's Board which is necessary to CCRP's defense of the claims asserted in this action and that, at this early stage of the litigation, the co-guardians will not be prejudiced by the change in counsel.

Discussion

It is well-settled that "the disqualification of an attorney is a matter that rests within the sound discretion of the court." Flores v. Willard J. Price Associates, LLC, 20 A.D.3d 343, 344 [1st Dept. 2005). The Rules of Professional Conduct (formerly the New York Code of

Professional Responsibility) serve as a general guide in considering disqualification motions. S & S Hotel Ventures Limited Partnership v 777 S. H. Corp., 69 NY2d 437 (1st Dept 1987). Under the advocate witness rule contained in the Rule 3.7 of The Rules of Professional Conduct,[3] an attorney is prohibited from acting as an advocate before a tribunal where he or another attorney from his firm is likely to be called as a witness on a significant issue other than on behalf of its client, where it is apparent that the testimony may be prejudicial to the client.

"Disqualification...during litigation implicates not only the ethics of the profession but also the substantive rights of the litigants [and] denies a party's right to representation by the attorney of its choice." S & S Hotel Ventures Limited Partnership v 777 S. H. Corp., 69 NY2d at 443 (citations omitted)." The right to counsel is "a valued right [and] any restrictions must be carefully scrutinized. Id. Furthermore, where the rules relating to professional conduct are invoked not at a disciplinary proceeding but "in the context of an ongoing lawsuit, disqualification...can create a strategic advantage of one party over another" Id. ; see also, Broadwhite Associates v. Truong, 237 AD2d 162, 163 (1st Dept 1997)(noting that unless movant meets heavy burden of showing disqualification is warranted, such a motion should be

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[3]Rule 3.7 of the Rules of Professional Conduct (22 NYCRR 1200.29) provides that:

(a) a lawyer shall not act as an advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact unless: (1) that testimony relates solely to an uncontested issue; (2) the testimony relates solely to the nature and value of legal services rendered in the matter; (3) disqualification of the lawyer would work substantial hardship on the client; (4) the testimony will relate solely to a formality, and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; or (5) the testimony is authorized by the tribunal.

(b) a lawyer shall not act as advocate before a tribunal in a matter if: (1) another lawyer in the lawyer's firm is likely to be called as a witness on a significant issue other than on behalf of the client and it is apparent that the testimony may be prejudicial to the client; or (2) the lawyer is precluded from doing so by Rule 1.7 or Rule 1.9.

considered as an effort to obtain strategic advantage).

Thus, the party seeking disqualification "carries a heavy burden of identifying projected testimony of the advocate-witness and demonstrating how it would be 'so adverse to the factual assertions or account of the events offered on behalf of the client as to warrant his disqualification.'" Broadwhite Associates v. Truong, 237 AD2d 162, 163 (1st Dept 1997), quoting, Martinez v. Suozzi, 186 AD2d 378, 379 (1st Dept 1992). In addition, "[u]nder New York law, the mere fact that an attorney was involved in the transaction at issue, or that his proposed testimony would be relevant or highly useful is insufficient to warrant disqualification; rather, the crucial inquiry is whether the subject testimony is necessary, taking into account such factors as the significance of the matter, the availability of other evidence and the weight of the testimony." Brooks v. Lewin, 48 AD3d 289 (1st Dept), lv dismissed in part and denied in part, 11 NY3d 826 (2008).

Under this standard, CCRP has not met its burden of showing that Mr. Scott should be disqualified as counsel for plaintiffs under the advocate-witness rule. First, CCRP has not established that Mr. Scott's testimony regarding the proceedings before the Crime Victim's Board would be necessary to its defense of the action or relevant to any significant issue in the litigation or prejudicial to plaintiffs and CCRP has not identified any projected testimony warranting Mr. Scott's disqualification. Notably, as the proceedings before the Crime Victim's Board are matters of public record, they are not within Mr. Scott's exclusive knowledge. Furthermore, it appears that the issue in this action is not the denial of the funding by the Crime Victim's Board but, rather, CCRP's obligation to Whinery in light of this denial.

Next, the assistance given by the CCRP to Mr. Scott in the proceedings before the Crime Victim's Board does not give rise to any conflict that would require Mr. Scott's disqualification since there is no allegation or evidence that there was ever an attorney-client relationship

between CCRP and Mr. Scott. See e.g., Whitman Breed Abbott & Morgan v. Oram, 300 AD2d 135 (1st Dept 2002)(court properly denied motion to disqualify respondent's counsel based an alleged conflict of interest when petitioner failed to adduce evidence to establish an attorney-client relationship between counsel and petitioner). Thus, any confidences exchanged between Mr. Scott and CCRP are not entitled to protection. Compare Greene v. Greene, 47 NY2d 447, 453 (1979)(noting that "an attorney owes a continuing duty to a former client...not to reveal confidences learned in the course of the professional relationship"). Finally, as the confidential information provided by CCRP to Mr. Scott concerns Whinery, Mr. Scott, as counsel for Whinery's co-guardians, is presumably entitled to such information.[4]

Conclusion

In view of the above, it is

ORDERED that the motion to dismiss is denied as moot; and it is further

ORDERED that the motion to disqualify plaintiffs' counsel is denied; and it is further

ORDERED that the parties by their counsel shall appear on March 3, 2011 at 9:30 am, in Part 11, room 351, for a preliminary conference.

A copy of this decision and order is being mailed by my chambers to counsel for the parties.

Dated: February 9, 2011

J.S.C.

[4]To the extent that this information consists of Whinery's medical records and other information regarding Whinery's treatment or assessments, the co-guardians would be entitled to such records under Public Health Law §§ 17, 18.