Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, **ALLAN B. WEISS** IAS PART 2
Justice

SHEREEANN ALAYOFF,

Plaintiff,

-against-

ABRAHAM ALAYOFF,

Defendant.

Index No: 28546/10

Motion Date: 2/9/11

Motion Cal. No.: 2

Motion Seq. No.: 2

The following papers numbered 1 to 16read on this motion by plaintiff for an Order disqualifying defense counsel from representing the defendant in this action

	PAPERS NUMBERED
Order to Show Cause-Affidavits-Exhibits	1 - 6
Answering Affidavits-Exhibits.....	7 - 12
Replying Affidavits.....	13 - 16

Upon the foregoing papers it is ordered that this motion is denied.

The plaintiff commenced this action after the defendant obtained a warrant of eviction from the Housing Court to evict the plaintiff, his daughter, from apartment 34A at the cooperative located at 110-34 64th Avenue, Forest Hills, N.Y. which defendant owns. Simultaneously with commencing this action, the plaintiff moved, by a separate order to show cause for an injunction, enjoining the defendant from, inter alia, enforcing the warrant of eviction and/or transferring or selling the apartment and the shares.

In this action, plaintiff seeks a judgment compelling the defendant to transfer to plaintiff the shares of stock allocated to apartment 34A at the cooperative located at 110-34 64th Avenue, Forest Hills, N.Y. (hereinafter the apartment), directing the defendant to pay the maintenance charges for the apartment as long as both plaintiff and defendant are living and to transfer of ownership to plaintiff of a 1996 Toyota VIN JT3HP10V0T7014075 (hereinafter the car) and monetary damages based upon allegations

of breach of contract, revocation of a gift and negligent or intentional infliction of emotional distress.

The plaintiff now moves to disqualify the defendant's attorney, Glen Bank, Esq., pursuant to 22 NYCRR 1200.6 [Rule 1.6 Confidentiality of Information], 22 NYCRR 1200.9 [Rule 1.9 Duties to Former Clients] and 22 NYCRR 1200.29 [Rule 3.7 [a] Lawyer as Witness] of the Rules of Professional Conduct. The defendant opposes.

A party in a litigation has the valued right to counsel of his choice, and "any restriction imposed on that right will be carefully scrutinized .... and will not yield unless confronted with some overriding competing public interest...." (Matter of Abrams [John Anonymous], 62 NY2d 183 196, [1984]; see Kassis v. Teacher's Ins. & Annuity Assn., 93 NY2d 611, 617 [1999]; S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp., 69 NY2d 437, 443 [1987]; In Re Marvin Q, 45 AD3d 852 [2007]). In determining a motion to disqualify opposing counsel the court must weight the competing interests of avoiding the appearance of impropriety, the concern for a party's right to representation by counsel of its choice, clients' concerns and apprehensions that confidential information might be revealed or used to the party's detriment and the danger that disqualification may become a tactical maneuver to obtain a strategic advantage in litigation (see Jamaica Public Serv. Co. v. AIU Ins. Co., 92 NY2d 631, 638 [1998]; Tekni-Plex, Inc. v. Meyner & Landis, 89 NY2d 123, 132 [1996]; S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp.,supra; Midwood Chayim Aruchim Dialysis Associates, Inc. v. Brooklyn Dialysis, LLC, 82 AD3d 1177 [2011]). Accordingly, the movant bears the burden of establishing that the drastic remedy of disqualification is warranted (see Bentvena v. Edelman, 47 AD3d 651 [2008]).

The Rules of Professional Conduct prohibit a lawyer who has represented a client in a matter from representing another person in the same or a substantially related matter in which the person's interests are materially adverse to those of the former client unless the former client gives informed consent, confirmed in writing or, with certain exceptions not relevant here, from using or revealing confidential information protected by Rule 1.6 to the disadvantage of the former client (Rule 1.9 [a][c][1][2], 22 NYCRR 1200.9[c][1][2]; Rule 1.6, 22 NYCRR 1200.6). Pursuant to Rule 1.6 information is "confidential information" when it is gained during or related to the representation of a client, regardless of its source, that is protected by the attorney-client privilege, or likely to become embarrassing or detrimental to the client if disclosed or information that the client has

requested be kept confidential (Rule 1.6 "Confidential Information"; 22 NYCRR 1200.6).

To prevail, the plaintiff seeking disqualification of the adversary's lawyer pursuant to Rule 1.9 and Rule 1.6 must prove: (1) the existence of a prior attorney-client relationship between the movant and opposing counsel, (2) that the matters involved in both representations are substantially related, and (3) that the interests of the present client and former client are materially adverse (Scafuri v. DeMaso, 71 AD3d 755, 756 [2010], citing Tekni-Plex, Inc. v. Meyner & Landis, supra). Upon satisfaction of all three criteria, an irrebuttable presumption of disqualification arises (see Tekni-Plex, Inc. v. Meyner & Landis, supra at 131; Solow v. W.R. Grace & Co., 83 NY2d 303 [1994]).

The plaintiff submitted her affidavit asserting that Bank was the "family attorney" for her and defendant for several decades. Specifically, plaintiff claims that, in 1987, when she was a teenager, Beck represented her and the defendant in a Family Court proceedings regarding the custody of the plaintiff; in 2003-2004 Bank represented the defendant in the purchase of the apartment and represented the plaintiff before the co-op board; in 2007 Bank was involved in discussions to transfer ownership of the apartment; in 2009 she appeared in Bank's office, at his direction, to sign papers transferring the shares from defendant to the plaintiff. Plaintiff claims that it was her understanding that Beck was representing her interests and those of the defendant in this transaction.

In opposition, the defendant asserts that Bank has been his attorney for over 25 years handling numerous business and personal legal matters, and that his relationship with Bank developed from that of attorney-client into a close friendship. Defendant also asserts that as his attorney, Bank handled the custody proceeding in Family Court, the negotiation of the contract and the closing in the purchase of the apartment. With respect to obtaining board approval, however, he asserts that it was handled by a broker not Bank. In addition, he asserts that approval required preparing various documents, which included listing the plaintiff as the prospective occupant, and neither he, Bank nor plaintiff personally appeared before the board as no personal appearance was required for the approval.

The plaintiff has failed to sustain her burden of demonstrating that the existence of an attorney client relationship. Plaintiff's characterization of Bank as the "family attorney" is insufficient to demonstrate that she, individually had an attorney-client relationship with Bank. In determining

whether an attorney-client relationship exists, the court must consider the actions of the parties (see Pellegrino v. Oppenheimer & Co., 49 AD3d 94, 99 [2008]). An attorney-client relationship is established where there is an explicit undertaking to perform a specific task (see Terio v. Spodek, 63 AD3d 719 [2009]; Wei Cheng Chang v. Pi, 288 AD2d 378, 380[2001], lv. denied 99 NY2d 501[2002]; Pellegrino v. Oppenheimer & Co., Inc., supra; Sucese v. Kirsch, 199 AD2d 718, 719 [1993]). The plaintiff's subjective belief and actions cannot unilateral create the relationship (see e.g. Wei Cheng Chang v. Pi, supra; Volpe v. Canfield, 237 AD2d 282 [1997], lv denied 90 NY2d 802 [1997]; see also Jane St. Co. v. Rosenberg & Estis, 192 AD2d 451 [1993]). The plaintiff has submitted no evidence to demonstrate that Bank agreed to or acted as her attorney in any action or legal matter. Bank absolutely denies that he consented to or acted as plaintiff's attorney in any matter.

Nor is disqualification warranted to protect any alleged client confidences. Rule 1.9 and Rule 1.6 prohibits an attorney from using or disclosing "client confidences". Since the plaintiff has failed demonstrate the existence of an attorney-client relationship, any information she may have given Bank is not a "client confidence" (see Rowley v. Waterfront Airways, Inc. 113 AD2d 926 [1985]). The plaintiff seeking out and "consulting" with Bank about personal and professional matters over the years and allegedly imparting confidential information cannot create an attorney client relationship (see Pellegrino v. Oppenheimer & Co., Inc., supra). Although an attorney-client relationship may encompass a consultation even where the attorney is not retained, there must be some evidence that the consultation was had with the intention to retain the attorney (see Pellegrino v. Oppenheimer & Co., Inc., supra at 98-99). Other than plaintiff's vague and conclusory affidavit, there is no evidence as to the nature of the matters about which she allegedly consulted with Bank, or that such consultation was for the purpose of retaining him or another attorney in a specific matter nor has she identified any "confidential information" imparted which might be used against her and for the defendant's benefit (see Jamaica Public Service Co. Ltd. v. AIU Ins. Co., supra; Pellegrino v. Oppenheimer & Co., Inc., supra; Volo Logistics, LLC v. Varig Logistica, S.A., 51 AD3d 554, 555 [2008]; cf Campbell v. McKeon, 75 AD3d 479, 481 [2010]). Although the plaintiff need not state exactly the claimed secrets and confidences, she must provide information sufficient to determine whether there exists a reasonable probability that there would be a violation of the Rules (see Jamaica Public Service Co. Ltd. v. AIU Ins. Co., supra at 638; see also Petrossian v. Grossman, 219 AD2d 587 [1995]). Here, there is only plaintiff's generalized allegations.

Even if the court accepted plaintiff's claim that Bank represented both plaintiff and defendant in the acquisition of the apartment the plaintiff always knew that Bank was defendant's long time attorney so that she could not have reasonably expected that Bank would not reveal the information to defendant (see Volo Logistics, LLC v. Varig Logistica, S.A., supra; Meyers v. Lipman, 284 AD2d 207 [2001] citing Talvy v. American Red Cross, 205 AD2d 143, 150 [1994], aff'd 87 NY2d 826 [1995]).

Nor has plaintiff established that disqualification is warranted pursuant to 22 NYCRR 1200.29 (Rule 3.7 [a]) the "advocate witness rule". Rule 3.7(a) provides that unless certain exceptions apply, an attorney shall not act as an advocate on issues of fact before any tribunal if the lawyer knows or it is obvious that the lawyer ought to be called as a witness on a significant issue on behalf of his client. To warrant disqualification on this ground the plaintiff has the burden of establishing that the testimony is necessary (see S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp., supra at 445-446; Hudson Valley Marine, Inc. v. Town of Cortlandt, 54 AD3d 999, 1000 [2008]). The determination of whether testimony is necessary requires consideration of such factors as the significance of the matters, the weight of the testimony and the availability of other evidence (see S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp., supra).

The plaintiff claims that Bank is a witness to the events and circumstances surrounding the contract regarding the apartment and the car and she intends to call him as a witness. The plaintiff's vague and conclusory claim as to Bank's personal knowledge is insufficient. In any event, even if an attorney has relevant knowledge or may have been involved in the transaction at issue does not render his testimony necessary (see S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp., supra, at 445; see, e.g., Campbell v. McKeon, 75 AD3d 479 [2010]) especially since plaintiff failed to demonstrate, among other things, the unavailability of any other evidence (Zutler v. Drivershield Corp., 15 AD3d 397 [2005]; see also Campbell v. McKeon, supra at 481. Under the circumstances it appears that plaintiff is seeking a strategic advantage by the disqualification of the defendant's attorney of long standing, a result which would deny defendant the valued right to representation by counsel of his choice (S & S Hotel Ventures Limited Partnership v. 777 S.H. Corp., supra, 69 NY2d 437, 443).

Dated: April 27, 2011
D# 44

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J.S.C.