

Goldberger & Dubin, P.C. v Hochfelder

2011 NY Slip Op 32030(U)

July 14, 2011

Supreme Court, New York County

Docket Number: 105962/10

Judge: Joan A. Madden

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

PRESENT: HON. JOAN A. MADDEN
Justice

PART 11

GOLDBERGER & DUBIN, P.C.

INDEX NO.: 105-962/10

Plaintiff,

MOTION DATE: 8

- v -

MOTION SEQ. NO.: 001

JAMES L. HOCHFELDER

MOTION CAL. NO.:

Defendant.

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 unopposed memorandum decision and order.*

Dated:

July 14, 2011

J.S.C.

FILED

JUL 21 2011

NEW YORK COUNTY CLERK'S OFFICE

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
GOLDBERGER & DUBIN, P.C.,

Plaintiff

-against-

JAMES L HOCHFELDER,

Defendant.

-----X
JOAN A. MADDEN, J.:

Index No. 105962/10

FILED

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NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff Goldberger & Dubin, P.C. ("G&D") moves to disqualify Schwartz & Ponterio, PLLC ("S&P") from representing defendant James L. Hochfelder ("J Hochfelder"). Plaintiff alleges disqualification is required as there exists a non-waivable conflict of interest. Defendant opposes the motion, which is denied for the reasons below.

In this action, G&D sues J Hochfelder for legal services G&D provided on behalf of his son Adam Hochfelder (A Hochfelder"). G&D alleges J. Hochfelder agreed to guarantee payment for G&D's services to his son. A dispute arose between A. Hochfelder and G&D with respect to the amount of legal fees. In connection with that dispute, Matthew Schwartz ("Schwartz") of S&P was retained by A. Hochfelder. Schwartz sent a letter to G&D dated April 29, 2010, requesting an accounting of legal fees paid to G&D on behalf A. Hochfelder. In May 2010, G&D commenced this action against J. Hochfelder seeking \$100,000 in attorneys fees for services provided to A. Hochfelder. J. Hochfelder then retained S&P to represent him in this action.

In this motion to disqualify, G&D claims that during the course of representing A. Hochfelder in connection with a number of criminal and civil matters, G&D learned of unlawful

or illegal acts of both Hockfelders. G&D further argues that under Rule 1.6 of the Rules of Professional Conduct,¹ an attorney is permitted to reveal confidences and otherwise privileged information to defend against accusations of wrongful conduct or to collect a fee. Since J. Hochfelder asserts defenses of unjust enrichment and unreasonable attorneys' fees, in addressing these defenses, G&D asserts it will need to reveal work performed on behalf of A. Hochfelder which will include confidences relating to their allegedly unlawful or illegal conduct. G&D argues that since S&P represents both Hochfelders, this creates a non-waivable conflict of interest. Specifically, G&D argues to properly represent the father, S&P must put the son's interests at risk, and to properly represent the son, S&P must put the father's interest at risk.

In opposition, S&P asserts that G&D lacks standing to seek its disqualification as G&D is neither a present nor former client of S&P. S&P also argues that any potential conflict has been waived, and in support of this argument, it submits the affidavits from J. Hochfelder and A. Hochfelder. J. Hochfelder states that before he retained S&P he was aware that it represents his son in connection with the fee dispute with G&D, and that he is aware of potential conflicts from S&P representing him and his son simultaneously, and that all risks were disclosed in writing in the retainer agreement he signed. Nonetheless, J. Hochfelder states he decided to retain S&P to defend him in this action and consented to S&P's continuing representation of his son. A. Hochfelder likewise states in his affidavit that he is aware of the potential conflicts, has consented to S&P's simultaneous representation, and has agreed to waive any conflict.

By stipulation, A. Hochfelder was permitted to intervene in this action. In the intervention order, G&D was directed to submit for in-camera inspection its assertions regarding

¹G&D refers to this provision as "Ethics Rule 1.6."

the alleged illegal activities. A. Hochfelder agreed to consult with an independent attorney regarding the alleged conflict arising out S&P's joint representation. Accepting the assertions in G&D statement as true, an in-camera review suggests that during its representation of A. Hochfelder, G&D obtained information from him that may be harmful to him and J. Hochfelder. However, in a supplemental affidavit, A. Hochfelder states that after reviewing these assertions in G&D's statement, and, after consulting with another attorney, he does not perceive a conflict.

“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. II. 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. Thus, the movant must meet a heavy burden of showing that disqualification is warranted. See 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 considered as an effort to obtain strategic advantage).

Under this standard the motion to disqualify must be denied. As a preliminary matter, S&P is correct that, in general, as D&G is neither a former client nor present client of S&P, it lacks standing to seek S&P's disqualification. See Develop Don't Destroy Brooklyn v. Empire State Development Corp., 31 AD3d 144, 150 (1st Dept 2006), lv denied, 8 NY3d 802 (2007)(holding that “petitioners had no standing to seek disqualification since they did not claim,

nor had there ever been, an attorney-client relationship between the attorney/law firm and petitioners”); AFC Enterprises, Inc. v. New York City School Construction Authority, 33 AD3d 736 (2d Dept 2006)(finding that “[s]ince the defendant is neither a present nor a former client of the subject attorneys, it has no standing to seek disqualification based on a conflict of interest”); Application of the Metropolitan Transportation Authority, 222 AD2d 340, 341 (1st Dept 1995)(noting that “claimant’s standing to make this [disqualification] motion is dubious since he was not a present or former client” of the law firm sought to be disqualified). Thus, the motion to disqualify can be denied on this ground alone.

G&D argues that this rule does not apply as the circumstances of this case are more akin to those in which a prosecutor asserts a conflict of interest that must be investigated by the court. See e.g., People v. Gomberg, 38 NY2d 307 (1975).

However, even assuming that this argument has any merit, the court notes that under such circumstances a conflict of interest may be waived. See People v. Glinton, 72 AD3d 618 (1st Dept), lv denied, 75 NY3d 920 (2010)(holding that the defendant made a valid waiver of his right to a conflict-free counsel). Here, the court finds that both J. Hochfelder and A. Hochfelder are aware of alleged conflicts arising out of S&P’s representation and have knowingly and voluntarily waived such conflicts, and therefore as explained below, disqualification is not warranted.

Rule 1.7 of New York Rules of Professional Conduct (Part 1200.7), which governs disqualification based on conflicts arising out of simultaneous representation, provides that:

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:
 - (1) the representation will involve the lawyer in representing

differing interests;² or

(2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property, or personal interests.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a) a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Under this rule there is no basis for disqualification of S&P even if it could be argued that A. Hochfelder and J. Hochfelder having potentially differing interests as defined under 1.7(a)(1), S&P is not disqualified from representing them simultaneously since each has consented in writing to the representation. See 1.7(b)(4); see also, Dominguez v. Community Health Plan of Suffolk, Inc., 284 AD2d 294 (2d Dept 2001)(disqualification denied where clients submitted affidavits indicating that they were fully informed of potential conflict of interest arising out of law firm's multiple representation, and consented to it).

In reaching this conclusion, the court makes no determination as to whether G&D may divulge in this action against J. Hochfelder confidential information obtained from and during its representation of A. Hochfelder.

Finally, contrary to G&D's position, the New York courts have not adopted the rule in

²Rule 1.0 (f) (Part 1200.0) defines "Differing interests" as including "every interest that will adversely affect either the judgment or loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest."

Cinema 5 v. Cinerama, Inc., 528 F.2d 1384, 1387 (2d Cir 1975), which utilizes a per se rule of disqualification where there is an existing attorney-client relationship on behalf of a client whose interests are potentially adverse to the interests of another current client. See Kassis v. Teachers's Ins. and Annuity Ass'n, 93 NY2d 611, 616 (1999)(declining to adopt a per se rule of disqualification noting that it may have "a significantly adverse impact on the clients and others")(internal citation and quotation omitted); see also, Ciao-Restaurant Corp. v. Paxton 350 LLC, 22 Misc3d 1117(A)(Sup Ct NY Co. 2008)(denying motion to disqualify based on simultaneous representation and noting that New York courts have not adopted the per se rule in Cinema 5 v. Cinerama, Inc.).

Conclusion

In view of the above, it is

ORDERED that the motion to disqualify S&P as counsel for the defendant is denied; and it is further

ORDERED that the parties by their counsel shall appear for a preliminary conference on August 4, 2011 at 9:30 am, in Part 11, room 351.

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

Dated: July 4, 2011

J.S.E.

FILED

JUL 21 2011