

**Joa v Boulin**

2011 NY Slip Op 33303(U)

November 15, 2011

Supreme Court, Queens County

Docket Number: 26171/08

Judge: Howard G. Lane

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continued representation of defendant Julian Joa. Plaintiff's attorney now maintains that the Law Office of Cheven, Keely & Hatzis breached the fiduciary duty and confidentiality owed to their clients as well as the ethical obligation to avoid the appearance of impropriety maintaining that pursuant to Disciplinary Rule 5-108, an attorney is barred "from representing a client in a matter that is the same as or is substantially related to a matter in which the attorney represented a former client where the new client's interests are materially adverse to those of the former client, except upon consent of the former client after full disclosure" (*Gellman v. Hilal*, 607 NYS2d 853 [Sup Ct, NY County 1994]).

It is well-settled law that: "[a]ttorneys owe a continuing duty to former clients not to reveal confidences learned in the course of a professional relationship. It is this duty that provides the foundation for the well-established rule that a lawyer may not represent a client in a matter and thereafter represent another client with interests materially adverse to interests of the former client in the same or a substantially related matter. Indeed such "side-switching" clearly implicated the policies both of maintaining loyalties to the first client and of protecting the client's confidences. . . ." (*Kassis v. Teacher's Insurance and Annuity Association, et al.*, 93 NY2d 611 [1999]).

In the instant case, it is uncontroverted that the Law Office of Cheven, Keely & Hatzis previously represented defendants Andrew Boulin and Tashanah Boulin in the same matter and that the interests of the Law Office of Cheven, Keely & Hatzis's current client, Julian Joa are materially adverse to those of his former clients, defendants Andrew Boulin and Tashanah Boulin. As the Law Office of Cheven, Keely & Hatzis has failed to submit proof that it received consent upon full disclosure from the defendants Andrew Boulin and Tashanah Boulin to represent defendant Julian Joa, the Law Office of Cheven, Keely & Hatzis shall be disqualified from representing defendant Julian Joa in the instant action.

That branch of plaintiff's motion seeking an order pursuant to CPLR 3126 precluding defendants Andrew Boulin and Tashanah Boulin from testifying at the time of trial of this action as well as striking the answer of defendants Andrew Boulin and Tashanah Boulin is hereby granted solely to the following extent:

On May 20, 2009, a Preliminary Conference Order was entered into between the parties, whereby the defendants Andrew Boulin and Tashanah Boulin were to appear for an examination before

trial. It is undisputed that the defendants Andrew Boulin and Tashanah Boulin failed to comply with the terms of this order. Thereafter, on September 21, 2009, a Compliance Conference Order was entered into between the parties, whereby the defendants Andrew Boulin and Tashanah Boulin were to again appear for an examination before trial. It is undisputed that defendants Andrew Boulin and Tashanah Boulin have failed to comply with the terms of this order. The attorney for defendants Andrew Boulin and Tashanah Boulin asserts that the two have been experiencing familial difficulties and have become estranged. As defendants Andrew Boulin and Tashanah Boulin have failed to comply with two court orders and have failed to provide a reasonable excuse for such non-compliance, the Answer of defendants Andrew Boulin and Tashanah Boulin shall be stricken without further order of the Court unless defendants Andrew Boulin and Tashanah Boulin appear for outstanding EBT's on a date, time, and place mutually agreed upon by the parties, but no later than sixty (60) days from the date of service of a copy of this order with notice of entry.

Plaintiff is directed to serve a copy of this order upon all defendants.

That branch of plaintiff's motion seeking summary judgment on the issue of liability against the defendants Andrew Boulin and Tashanah Boulin is hereby granted.

This is an action to recover for personal injuries allegedly sustained by the plaintiff as the result of a motor vehicle accident occurring on February 1, 2008.

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue (*Andre v. Pomeroy*, 32 NY2d 361 [1974]; *Kwong On Bank, Ltd. v. Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980]; *Crowley Milk Co. v. Klein*, 24 AD2d 920 [3d Dept 1965]). Even the color of a triable issue forecloses the remedy (*Newin Corp. v. Hartford Acc & Indem. Co.*, 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against (*Bennicasa v. Garrubo*, 141 AD2d 636 [2d Dept 1988]; *Weiss v. Gaifield*, 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (see, *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's

function is issue finding, not issue determination (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Pizzi by Pizzi v. Bradlee's Div. of Stop & Shop, Inc.*, 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (*Gervasio v. DiNapoli*, 134 AD2d 235 [2d Dept 1987]). The role of the court on a motion for summary judgment is to determine if bona fide issues of fact exist, and not to resolve issues of credibility (*Knepka v. Tallman*, 278 AD2d 811 [4<sup>th</sup> Dept 2000]).

Plaintiff established a prima facie case that there are no triable issues of fact regarding defendants Andrew Boulin and Tashanah Boulin. In support of the motion, plaintiff presented, inter alia, the examination before trial transcript testimony of both defendant Julian Joa himself and of plaintiff, Jaimee Joa herself which testimony establishes that: at the time of the accident, the defendant Julian Joa was driving a car in which plaintiff Jaimee Joa was a passenger and as their vehicle was entering an intersection, the vehicle owned by defendant Tashanah Boulin and operated by defendant Andrew C. Boulin made a sharp left turn at the last minute in front of their vehicle without ever stopping before attempting to make the left turn, thus failing to yield the right of way as required by Vehicle and Traffic Law § 1141. Plaintiff was entitled to anticipate that defendant would yield the right of way (*Gabler v. Marly Building Supply Corp.*, 27 AD3d 519 [2d Dept 2006]).

In opposition, the defendants Andrew Boulin and Tashanah Boulin failed to raise a triable issue of fact. Defendants have failed to submit an affidavit from one with personal knowledge of the facts (see, CPLR 3212). While defendants Andrew Boulin and Tashanah Boulin submit an attorney's affirmation stating that summary judgment should be denied because discovery has not yet been completed and the case has not yet been restored, defendants fail to include an affidavit of one with personal knowledge of the facts of the underlying accident. It is well settled that an affirmation from a party's attorney who lacks personal knowledge of the facts, is of no probative value (see, *Zuckerman v. City of New York*, 49 NY2d 557 [1980]; *Wisnieski v. Kraft*, 242 AD2d 290 [2d Dept 1997]; *Lupinsky v. Windham Constr. Corp.*, 293 AD2d 317 [1st Dept 2002]). As such, no triable issue of fact has been created regarding defendants Andrew Boulin and Tashanah Boulin.

Accordingly, as there are no triable issues of fact regarding defendants Andrew Boulin and Tashanah Boulin, plaintiff's motion for summary judgment on liability against them is granted.

That branch of plaintiff's motion seeking summary judgment on the issue of threshold pursuant to CPLR 5102(d) against the defendants Andrew Boulin and Tashanah Boulin is hereby denied as premature since pursuant to the Stipulation of the parties entered into on the return date of the motion, October 11, 2011, an IME of the plaintiff is still outstanding. As such, a threshold motion is premature at this point. Plaintiff shall be granted leave to renew this branch of the motion upon completion of the scheduled IME of plaintiff.

This constitutes the decision and order of the Court.

Dated: November 15, 2011

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**Howard G. Lane, J.S.C.**