

Jong Keon Lim v Purisic

2013 NY Slip Op 30395(U)

January 24, 2013

Supreme Court, Queens County

Docket Number: 22253/2011

Judge: Timothy J. Dufficy

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY
Justice

PART 35

-----X
JONG KEON LIM and YOUNG SOOK LEE,

Plaintiff(s),

Index No. : 22253/2011

Mot. Date: 11/29/12

-against-

Mot. Cal. No. 39

Mot. Seq. 1

BECIR PURISIC,

Defendant(s).

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The following papers numbered 1 to 9 read on this motion by defendants for an order disqualifying plaintiffs' counsel, Sim & Park, LLP, from representing either of the plaintiffs in this action.

	<u>PAPERS NUMBERED</u>
Notice of Motion-Affidavits-Exhibits.....	1- 4
Affirmation in Opposition-Exhibits.....	5- 7
Reply Affirmation.....	8 - 9

Upon the foregoing papers, it is ordered that the motion is granted, as follows:

Disqualification of an attorney is a matter which rests within the sound discretion of the court. (Nationscredit Financial Services Corp. v Turcios, 41 AD3d 802 [2nd Dept. 2007]). A party's entitlement to be represented in ongoing litigation by counsel of his own choosing, however, is a valued right which should not be abridged absent a clear showing that disqualification is warranted. (Bentz v Bentz, 37 AD3d 386 [2nd Dept. 2007]).

Because the counterclaim asserted against plaintiff driver, **JONG KEON LIM**, by the driver of the opposing vehicle places plaintiff-driver's pecuniary interests in conflict with those of his passenger, defendant's counsel urges that plaintiffs' counsel be

disqualified. In response, plaintiffs' counsel argues that because his clients consented after disclosure, his conflicted representation may continue.

Pursuant to The Code of Professional Responsibility DR 5-105(A) (22 NYCRR 1200.24) "[a] lawyer shall decline proffered employment if the exercise of professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under DR5-105(C)". The Ethical Considerations (EC), while not mandatory, represent additions to the rules governing the conduct of lawyers. EC 5-17 addresses the issue of representation of multiple co-defendants in a simultaneous action. As stated therein, "[t]ypically recurring situations involving potentially differing interests are those in which a lawyer is asked to represent . . . co-plaintiffs or co-defendants in a personal injury case Whether a lawyer can fairly and adequately protect the interests of multiple clients in these and similar situations depends upon an analysis of each case."

Even the "possibility" or "appearance" of conflict is prohibited. The Code's disciplinary rules state that "[a] lawyer shall decline proffered employment if the exercise of professional judgment on behalf of a client will be or is likely . . . to involve the lawyer in representing differing interests." (Code of Professional Responsibility DR 5-105 [a] [22 NYCRR 1200.24 (a)] [emphasis added].) It has been noted that "The standards of the profession exist for the protection and assurance of the clients and are demanding; an attorney must avoid not only the fact, but even the appearance, of representing conflicting interests." (Graca v Krasnik, 20 Misc 3d 1127[A], 2008 NY Slip Op 51640[U], *3 [Sup Ct, Kings County 2008]; Aversa v. Taubes, 194 AD2d 579 [2d Dept. 1993]; Rotante v Lawrence Hosp., 46 AD2d 199 [1st Dept 1974]; Edelman v Levy, 42 AD2d 758 [2d Dept 1973]; Sidor v Zuhoski, 261 AD2d 529, 530, [1st Dept. 1999].)

Generally, an attorney who represents both the driver and passengers involved in a motor vehicle accident creates a conflict of interest violative of DR 5-105(A). In those instances where clients have differing interests, an attorney, however, may withstand disqualification from dual representation where "a disinterested lawyer would believe that the lawyer can competently represent the interest of each and * * * each consents to the representation after full disclosure of the implications of simultaneous representation and the advantages and risks involved". DR5-105(C), (22 NYCRR 1200.24). If a disinterested attorney would advise the clients to refuse to consent to dual representation, the attorney with the conflict is not permitted to seek client consent. EC 5-16.

The inherent ethical conflict of joint representation that exists between a driver and injured passenger has been discussed in numerous cases (see Quinn v Walsh, 18 AD3d 638 [2nd Dept 2005]; Alcantara v Mendez, 303 AD2d 337 [2d Dept. 2003]; Pessoni v Rabkin, 220 AD2d 732 [2nd Dept 1995]; Shaikh v Waiters, 185 Misc 2d 52 [Sup Ct. Nassau County 2000]; Ganiev v Nazi, 189 Misc 2d 83 [App Term, 2nd Dept 2001]).

Counsel considering representation of multiple clients must first determine whether a disinterested lawyer could competently represent the respective interests of all potential clients. If the answer is yes, then, after full disclosure of the implications of simultaneous representation, and the advantages and risks involved, the parties may give consent. If the answer is no, then the conflict may not be waived and joint representation would be unethical. Even in instances where full disclosure and consent are given, the interests of the various parties could be so adverse that dual representation is improper. Boyd v Trent, 287 AD2d 475 [2d Dept. 2002] lv to app disp. 98 N.Y.2d 671 [2002]; Franklin High Income Trust v App Global, Ltd., 5 Misc3d 1032A [Sup Ct. NY Co. 2004]).

Vehicle and Traffic Law § 388(1) provides in pertinent part that: [e]very owner of a vehicle used or operated in this state shall be liable and responsible for death or injuries to person or property resulting from negligence in the use or operation of such vehicle, in

the business of such owner or otherwise, by any person using or operating the same with the permission express or implied of such owner. The inherent ethical conflict of joint representation of a driver and an injured passenger in an automobile involved in a collision has been held to constitute a conflict of interest in violation of the disciplinary rules warranting removal of counsel from further representation of the clients in Quinn v Walsh, supra; Ferrara v Jordache Enterprises, Inc., 12 Misc3d 769 [Sup Ct. Kings Co. 2006]; Shaikh ex rel. Shaikh v Waiters, supra; Pessoni v Rabkin, supra; Alcantara v Mendez, supra; and Sidor v Zuhoski, supra.

The Code and existing precedent, with rare exception, require that an attorney who undertakes joint representation of two (2) parties in a lawsuit not continue as counsel for either party after an actual conflict of interest is found to exist. DR 5-105 (22 NYCRR 1200.24); EC 5-15. This is mandated because continued representation for either or both parties would necessarily result in violation of the requirement that client confidences be preserved (DR 4-101 [22 NYCRR 1200.19]; EC 4-1), and that a client be zealously represented (DR 7-101 [22 NYCRR 1200.32]; EC 7-1). (see Kyung Seong Kim v Metropolitan Suburban Bus Authority, 2008 NY Slip Op 30858U, 3-8 [Sup. Ct. NY Co. 2008]).

Reliance solely upon client consent and waiver as described in DR 5-105 (c) as justification for representation of a passenger and driver involved in a motor vehicle accident is precipitous. Subdivision (c) of DR 5-105 provides a two-prong test. It states that a lawyer may represent multiple clients (1) if any disinterested lawyer would believe that the lawyer can competently represent the interest of each; and (2) after full disclosure of the implications of the simultaneous representation and the advantages and risks involved, each consents to the joint representation. Consent after full disclosure is only effective after "the first prong (the objective/disinterested lawyer requirement) is satisfied. The phrase "disinterested lawyer," as used in DR 5-101 (c) has been interpreted to mean "that a lawyer is not permitted to seek client consent to a conflict if a disinterested lawyer

would advise the client to refuse consent, and that a client consent that is given is not valid if the objective test of a disinterested lawyer is not met." (Shaikh, 185 Misc 2d at 56; see also Code of Professional Responsibility EC 5-16) . In Greene v. Greene, 47 NY2d 447 (1979), the Court of Appeals held that disclosure alone does not resolve the conflict issues created by dual representation. "Because dual representation is fraught with the potential for irreconcilable conflict, it will rarely be sanctioned even after full disclosure has been made and the consent of the clients obtained" (Greene, 47 NY2d at 451-452; see also Tavarez v. Hill, 23 Misc. 3d 377 [Sup Ct. Bx Co. 2009]).

In the case before the Court, despite plaintiff's counsel's averments, and those of his clients, that the risks of joint representation were disclosed and consent obtained to his continued representation, there is little, if any, specificity in the affidavits of the plaintiffs which details the extent and content of counsel's admonitions to them. Absent full disclosure, there can be no meaningful consent.

Of greater import, the Court is disinclined to find that a "disinterested lawyer" would believe that consent could sanitize the current conflict situation. This is particularly the case given the fact that the driver of the other vehicle stated that plaintiff-driver went through the light, and that the police report adopts this version of the accident. Using the objective test as defined in DR 5-101(c), a disinterested lawyer should know or have reason to recognize under those circumstances that a counterclaim would almost certainly be interposed on behalf of the driver of the opposing vehicle. An attorney could not zealously represent two clients whose interests are so directly adverse, a passenger, who is presumably free from negligence, and a driver, whose negligence is hotly contested by differing accounts of the accident. The negligence of either or both drivers affords redress to the plaintiff-passenger, while only the negligence of the opposing driver affords redress to the plaintiff-driver. Simply put, the Court finds that a "disinterested lawyer" would not advise the clients in this matter to consent to joint representation, hence the consent obtained by plaintiffs' counsel, even after full disclosure, is inefficacious to cure the

conflict in representation.

Since the objective standard precludes the use of consent and waiver here, a hearing to determine the extent of disclosure and waiver is unnecessary. The Court finds as a matter of law that there is a non-waivable conflict present. Thus plaintiffs' counsel may not continue to represent either of the plaintiffs in this matter, or collect any legal fees for doing so (see Ulico Casualty Co. v Wilson, Elser, Moskowitz, Edelman & Dicker, 16 Misc3d 1051 [Sup Ct. NY Co. 2007]). .

On June 29, 2012, my colleague, Justice Bernice D. Siegal, in a case captioned Dan Luo and Wu Jia Yin v Mark Lindenbaum, Index No. 22244/2011, disqualified plaintiffs' counsel under precisely the same circumstances, to wit, simultaneous representation of a driver and passenger in a motor vehicle in the same action. Conduct previously found ethically objectionable ought not be repeated in future (see Matter of Ravitch, 82 AD3d 126, 128 [1st Dept. 2011] [*Aggravating factor against attorney in disciplinary proceeding was fact that on a number of occasions she simultaneously represented the driver and passenger of automobiles in personal injury matters*].)

Accordingly, plaintiffs' counsel, Sim & Park, LLP, are disqualified from representing either of the plaintiffs in this action. The plaintiffs are granted sixty (60) days after service of the within order upon them in order to obtain new counsel, during which time all proceedings are hereby stayed pursuant to CPLR § 2201. Defendant is hereby directed to serve a copy of this order with notice of entry upon Sim & Park, LLP and the plaintiffs individually.

This constitutes the opinion, decision and order of the Court.

Dated: January 24, 2013

TIMOTHY J. DUFFICY, J.S.C.