

Cino v Creighton

2013 NY Slip Op 30968(U)

April 30, 2013

Sup Ct, New York County

Docket Number: 111503/11

Judge: Donna M. Mills

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

PRESENT : DONNA M. MILLS
Justice

PART 58

VICTOR J. CINO,

Plaintiff,

INDEX No. 111503/11

-against-

MOTION DATE _____

JAN J. CREIGHTON,

FILED

MAY 06 2013

MOTION SEQ. No. 05

NEW YORK
COUNTY CLERK'S OFFICE

MOTION CAL No. _____

The following papers, numbered 1 to _____ were read on this motion for _____.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits... 1-4

Answering Affidavits- Exhibits 5-7

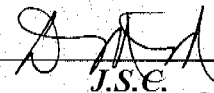
Replying Affidavits 8

CROSS-MOTION: YES NO

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH ATTACHED ORDER.

Dated: 4/30/13


J.S.C.

DONNA M. MILLS, J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

VICTOR J. CINO,

INDEX NO.
111503/11

Plaintiff,

- against -

JAN J. CREIGHTON,

DECISION/ORDER

Defendant.

FILED

DONNA M MILLS, J:

MAY 06 2013

NEW YORK
COUNTY CLERK'S OFFICE

Defendant Jan J. Creighton ("Defendant or Creighton") brings this motion to disqualify plaintiff, Victor J. Cino's counsel, Nicholas R. Perrella, Esq. ("Perrella").

Plaintiff opposes the motion and cross moves for sanctions, and an award of costs and attorney's fees against Defendant.

Creighton in his affidavit in support of the motion, claims that Perrella was his attorney on various matters commencing in 1989 including an environmental legal dispute involving a gas station that he operated in Hamilton, NJ called Tri-Star Amoco. Defendant also claims that Perrella represented him in landlord-tenancy matters on properties that he controlled. Defendant maintains that he and Perrella also had a personal relationship as friends outside of the lawyer client relationship.

Perrella in his affirmation, while admitting that his law firm represented Defendant in the dispute involving defendant's gas station in the aforementioned environmental matter, vehemently denies working on the case himself, and maintains that he has no knowledge of the aforementioned litigation which occurred in the 1990's. Additionally, Perrella states that he did not represent defendant in any other matter and did not have a relationship with defendant outside of the professional relationship.

Perrella now represents plaintiff Victor Cino in the underlying action which involves fraud allegedly perpetrated by Defendant, in June 1997, on plaintiff, Cino, when the defendant allegedly fraudulently transferred title to property in Ocean County, New Jersey, to Trenton Petroleum Company, an entity owned and controlled by Defendant.

The Code of Professional Responsibility does not in all circumstances bar attorneys from representing parties in litigation against former clients. Rather, DR 5–108 sets out two prohibitions on attorney conduct relating to former clients. First, an attorney may not represent “another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client” (Code of Professional Responsibility DR 5–108[A][1] [22 NYCRR 1200.27(a)(1)]). Second, an attorney may not use “any confidences or secrets of the former client except as permitted by DR 4–101(c) or when the confidence or secret has become generally known” (Code of Professional Responsibility DR 5–108[A][2] [22 NYCRR 1200.27(a)(2)]).

A party seeking disqualification of its adversary's lawyer pursuant to DR 5–108(A)(1) must prove that there was an attorney-client relationship between the moving party and opposing counsel, that the matters involved in both representations are substantially related, and that the interests of the present client and former client are materially adverse. Only “where the movant satisfies all three inquiries does the irrebuttable presumption of disqualification arise” (Tekni–Plex, Inc. v. Meyner & Landis, 89 N.Y.2d 123, 132, 651 N.Y.S.2d 954, 674 N.E.2d 663, rearg. denied 89 N.Y.2d 917, 653 N.Y.S.2d 921, 676 N.E.2d 503).

Here, it is not disputed that the interests of Cino and Creighton are materially adverse and that Perrella represented both of them; thus, the issue before me is whether defendant demonstrated that the issues in the former and current matters are substantially related. In that regard, when “an examination of the nature of the two disputes and the scope and duties of the representation readily reveals the lack of any nexus between the subject matters or the issues, the movant cannot prevail on this ground” (Hunkins v. Lake Placid Vacation Corp., 120 A.D.2d 199, 202, 508 N.Y.S.2d 335 [1986]; see Jamaica Pub. Serv. Co. v. AIU Ins. Co., 92 N.Y.2d 631, 636–637, 684 N.Y.S.2d 459, 707 N.E.2d 414 [1998]).

The “substantially related” element of conflict of interest analysis apparently finds its roots in Judge Weinfield's decision in T.C. Theatre Corp. v. Warner Bros. Pictures, 113 F.Supp. 265, 268 [S.D.N.Y. 1953]. (See Crawford v. Antonacci, 297 A.D.2d 419, 420, 746 N.Y.S.2d 94 [3d Dept. 2002] [Lahtinen, J., dissenting].) That decision was based upon former Canon 6 of the Canons of Professional Ethics, which proceeded from “ [t]he obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences.” (See T.C. Theatre Corp. v. Warner Bros. Pictures, 113 F.Supp. at 268.) As such, there was an articulated link between the “substantially related” concept and client confidences and secrets. “[T]he Court must ask whether it can reasonably be said that in the course of the former representation the attorney might have acquired information related to the subject of his subsequent representation. If so, then the relationship between the two matters is sufficiently close to bring the latter representation within the prohibition of Canon 6.” (*Id.* at 269.) On the other hand, “[t]he proscription against taking a case against a former client is

predicated ... on more than the possibility of use in the second representation of information confidentially obtained from the former client in the first representation ... Irrespective of any actual detriment, the first client is entitled to freedom from apprehension and to certainty that his interests will not be prejudiced in consequence of representation of the opposing litigant by the client's former attorney." (Cardinale v. Golinello, 43 N.Y.2d 288, 295–96, 401 N.Y.S.2d 191, 372 N.E.2d 26 [1977].)

The conflicts rule, therefore, is based on "policies both of maintaining loyalty to the first client and of protecting the client's confidences." (See Kassis v. Teacher's Insurance and Annuity Association, 93 N.Y.2d 611, 616, 695 N.Y.S.2d 515, 717 N.E.2d 674 [1999].) Disciplinary Rule 5–108 reflects these separate "fiduciary duties of loyalty and confidentiality" (see *id.*) in the structure of provisions (A)(1) and (A)(2). Thus, the potential conflict should be analyzed separately under each provision (see Jamaica Public Service Co. Ltd. v. AIU Ins. Co., 92 N.Y.2d at 636–38, 684 N.Y.S.2d 459, 707 N.E.2d 414), and disqualification may be required for a "substantially related" matter, even though confidential information is not a factor (see Nationwide Associates, Inc. v. Targee Street Internal Medicine Group, P.C., 303 A.D.2d 728, 729, 758 N.Y.S.2d 108 [2d Dept. 2003]; 562 Eglinton, Inc. v. Merlo, 277 A.D.2d 1027, 716 N.Y.S.2d 228 [4th Dept. 2000]; Press v. Lozier, Inc., 239 A.D.2d 879, 659 N.Y.S.2d 648 [4th Dept. 1997]; see also Sperr v. Gordon L. Seaman, Inc., 284 A.D.2d at 450, 727 N.Y.S.2d 456).

Nonetheless, where there is both a "substantial relationship" between the respective subject matters of the former and present engagements, and "it is reasonable to infer that [the attorney] gained some confidential information during [the] former representation which is of some value to [the attorney's] present client" (see Walden Federal Savings and Loan Association v. Village of Walden, 212 A.D.2d 718,

719, 622 N.Y.S.2d 796 [2d Dept. 1995]), the whole may prove greater than the sum of its parts.

In my view, after a “careful appraisal of the interests involved” (Tekni-Plex v. Meyner & Landis, supra at 132, 651 N.Y.S.2d 954, 674 N.E.2d 663), the Defendant failed to demonstrate a substantial relationship between the current and prior representation. I cannot say that this action is clearly a “substantially related matter” to the operation of the gas station proceeding in which Perrella previously represented Creighton. This action centers around a purported fraudulent transfer of property. As such, the within matter has no relationship whatsoever with the alleged prior matters referred to by Creighton. I also do not find any evidence of any privileged information that may have been imparted to Perrella in his previous representation of Creighton.

Plaintiff in his cross motion seeks sanctions against Defendant and his counsel, Robert Martini, and awarding costs and disbursements of this motion, including reasonable attorneys’ fees. “Pursuant to 22 NYCRR 130-1.1, an award of costs, including attorney’s fee, may be imposed against a party for frivolous conduct” (Finkelman v. SBRE, LLC, 71 AD3d 1081, 1081 [2010]). The Defendant and his attorney cannot be considered to have engaged in frivolous conduct as a result of this motion to disqualify Perrella from representing plaintiff in this action. Accordingly, since no frivolous conduct occurred, there is no basis for the imposition of a monetary sanction upon the Defendant and his counsel (see, 22 NYCRR 130–1.1; see generally, Fascaldi v. Fascaldi, 209 A.D.2d 576, 619 N.Y.S.2d 100; Dime Sav. Bank of N.Y. v. Zangiacomi, 225 A.D.2d 515, 638 N.Y.S.2d 773).

Accordingly, it is

ORDERED that defendant’s motion to disqualify plaintiff’s counsel is denied; and

it is further

ORDERED that plaintiff's cross motion for costs and sanctions is denied.

Dated: 4/30/13

ENTER:



J.S.C.

REGINA M. MILLS, J.S.C.

FILED

MAY 06 2013

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