Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable **DICCIA T. PINEDA-KIRWAN** IA PART 36
Justice

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J&S SUPPLY CORP.,

Plaintiff(s)

-against-

MCGIVNEY & KLUGER, P.C., ET AL,

Defendant(s).

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AND A THIRD-PARTY ACTION.

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Index No.: 702425/16
Motion Date *CMP*: 1/29/18
(Rcv'd Pt. 36 2/2/18)
Motion Cal. No. *CMP*: 71
Motion Seq. No.: 5

The following numbered papers read on this motion by defendants to disqualify Lisa M. Solomon, Esq., as counsel for plaintiff J&S Supply Corp. (J&S), and third-party defendant, Robert B. Goebel.

PAPERS	NUMBERED
Notice of Motion-Affidavits-Exhibits	1 - 3
Answering-Affidavits-Exhibits	4 - 11
Replying	12 - 14

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

Plaintiff in this legal malpractice action seeks damages arising out of the defendants' representation of J&S in an underlying asbestos-related action filed in Supreme Court of the State of New York in New York County, entitled *Kestenbaum v Durez Corporation, et al*, under Index No. 190436/2011 ("the Kestenbaum Action"). The Kestenbaum action was ultimately settled for $1.1 million, allegedly a fraction of the potential liability.

During the pendency of the Kestenbaum Action, a dispute arose between J&S and its insurer, Liberty Mutual, regarding coverage ("the Coverage Dispute"). On July 10, 2013, Liberty Mutual filed a lawsuit against J&S in the United States District Court for the Southern District of New York, entitled *Liberty Mutual Fire Ins. Co., et al v J&S Supply Corp.*, Case No. 130cv004784 ("the Coverage Action"). The Coverage Action seeks to recover approximately $880,000 from J&S, representing the uninsured portion of the settlement.

In this action, J&S seeks to recover the uninsured portion of the settlement from defendants, as well as the costs of defending the Coverage Action, based on defendants' alleged malpractice as defense counsel for J&S in the Kestenbaum Action. It is submitted that discovery in this action revealed that J&S' alleged losses were the direct and proximate result of actions of Robert B. Goebel, who alone represented J&S in the Coverage Dispute. Goebel erroneously believed that J&S could not be held liable for any portion of the settlement and, therefore, refused to negotiate with Liberty Mutual for a lower contribution and never advised defendants not to pursue settlement.

On July 5, 2017, defendants commenced a third-party action against Goebel seeking contribution to and/or indemnification for any recovery by J&S. Lisa M. Solomon, Esq., who represented J&S in the Coverage Action, also represents plaintiff in this action; and has now appeared as counsel for Goebel, her husband. Thus, Solomon presently represents both the plaintiff in this action and the third-party defendant, who is potentially liable to plaintiff in the event defendants' claims are successful.

By Order dated December 20, 2017, the Court denied Goebel's motion to dismiss the third-party complaint filed against him by defendants, holding that defendants have sufficiently stated causes of action for indemnification and contribution. As a result, J&S is potentially liable for the $880,000 uninsured portion of the settlement ultimately reached in the underlying action.

Defendants contend that Solomon's representation of both J&S and Goebel constitutes an unwaivable conflict, and now move for Solomon's disqualification as counsel to either party. The motion is opposed by plaintiff and Goebel.

Rule 1.7 [a] of the Rules of Professional Conduct, which governs conflicts of interests, provides that "[e]xcept 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; 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." 22 NYCRR 1200.0.

Rule 1.7[b] provides that, "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" *Id.*

The purpose of the Rules of Professional Conduct regarding conflicts of interest "is to protect clients, ignorant and sophisticated, maintain the integrity of the legal system and prevent even host attorneys from serving mutually antagonistic interests" *(see Dorsainvil v Parker*, 14 Misc3d 397 [Sup Ct, Kings County 2006]). "[A]n attorney must avoid not only the fact, but even the appearance of representing conflicting interests" *(Aversa v Taubes*, 194 AD2d 579, 580 [2d Dept 1993]). "[W]ith rare and conditional exceptions, the lawyer may not place himself in a position where a conflicting interest may, even inadvertently, affect or give the appearance of affecting, the obligations of the professional relationship" (*Id., quoting Kelly v Greason*, 23 NY2d 368 [1968]).

The party seeking to disqualify a law firm or an attorney bears the burden to show sufficient proof to warrant such a determination' " (*Hele Asset, LLC v S.E.E. Realty Associates*, 106 AD3d 692, 693 [2d Dept 2013], *quoting Gulino v Gulino*, 35 AD3d 812, 812, [2d Dept 2006] [internal citations omitted]; *see S & S Hotel Ventures Ltd. Partnership v 777 S.H. Corp.*, 69 NY2d 437, 443–445 [1987]).

A motion to disqualify is addressed to the sound discretion of the court (*Hele Asset, LLC v S.E.E. Realty Assoc.*, 106 AD3d at 693, *quoting Matter of Madris v Oliviera*, 97 AD3d 823, 825 [2d Dept 2012]; *see Matter of Marvin Q.*, 45 AD3d 852, 853 [2d Dept 2007]; *Olmoz v Town of Fishkill*, 258 AD2d 447 [2d Dept 1999], and "any doubts are to be resolved in favor of disqualification." (*Matter of Stober v Gaba & Stober, P.C.*, 259 AD2d 554, 555 [2d Dept 1999].) The Court may raise the issue of disqualification *sua sponte*, and should do so under certain circumstances (*see People v Swanson*, 43 AD3d 1331, 1332 [4th Dept 2007] [violation of witness-advocate rule]; *see also Boyd v Trent*, 287 AD2d 475, 475-76 [2d Dept 2002] [conflict of interest]).

"It is a long-standing precept of the legal profession that an attorney is duty bound to pursue his client's interests diligently and vigorously within the limits of the law (Code of Professional Responsibility, canon 7). For this reason, a lawyer may not undertake representation where his independent professional judgment is likely to be impaired by extraneous considerations (*Greene v Greene*, *supra* at 451 [1979]). Thus, attorneys historically have been strictly forbidden from placing themselves in a position where they must advance, or even appear to advance, conflicting interests (*see e.g., Cardinale v Golinello*, 43 NY2d 288, 296 [1977]; Code of Professional Responsibility, DR 5-105). This prohibition was designed to safeguard against not only violation of the duty of loyalty owed the client, but also against abuse of the adversary system and resulting harm to the public at large (*Greene v Greene*, *supra* at 451).

"Perhaps the clearest instance of impermissible conflict occurs when a lawyer represents two adverse parties in a legal proceeding. In such a case, the lawyer owes a duty to each client to advocate the client's interests zealously. Yet, to properly represent either one of the parties, he or she must forsake his or her obligation to the other. 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" (*Matter of Kelly*, 23 NY2d 368, 376, 378 [1968]; *Eisemann v Hazard*, 218 NY 155, 159, *supra*.; *Matter of Gilchrist*, 208 App Div 497). Thus where, as here, it has been determined that counsel has a concurrent conflict of interest, it has been held that the lawyer should be disqualified from representing both clients (*see Alcantara v Mendez*, 303 AD2d 337, 338 [2d Dept 2003]; *Sidor v Zuhoski*, 261 AD2d 529, 530 [2d Dept 1999] ["An attorney who undertakes the joint representation of two parties in a lawsuit should not continue as counsel for either one after an actual conflict of interest has arisen because continued representation for either or both parties would result in a violation of the ethical rules requiring an attorney to preserve a client's confidences or the rule requiring an attorney to represent a client zealously" (citations, internal quotation marks, and brackets omitted)].) This is particularly so where the conflict extends to the very subject matter of the litigation (*Matter of Kelly, supra*, at p 378; *see Matter of Gilchrist, supra*, at pp 497-498).

By the same token, where it is the lawyer who possesses a personal, business, or financial interest at odds with that of his client, these prohibitions apply with equal force (Code of Professional Responsibility, DR 5-101, subd [A]). Viewed from the standpoint of a client, as well as that of society, it would be egregious to permit an attorney to act on behalf of the client in an action where the attorney has a direct interest in the subject matter of the suit. As in the dual representation situation, the conflict is too substantial, and the possibility of adverse impact upon the client and the adversary system too great, to allow the representation. In short, a lawyer who possesses a financial interest in a lawsuit akin to that of a defendant may not, as a general rule, represent the plaintiff in the same action.

Aptly illustrating these problems are the circumstances of the present case. Plaintiff's counsel has strong interests on both sides of the litigation. She has undertaken to represent plaintiff, owing it the highest duty of loyalty and professional skill in carrying on the legal action. At the same time, Goebel may be liable for conduct which might have occurred during his tenure as prior counsel for J&S. That a possibility of Goebel being cast in damages exists is demonstrated by his status as third-party defendant in this lawsuit.

In opposition to the motion, Solomon contends that "there is no conflict arising from her continued concurrent representation of plaintiff and Goebel, whose interests are fully aligned." The Court of Appeals in *Greene v Greene*, 47 NY2d 447, 451 [1979]), stated that "[p]erhaps the clearest instance of impermissible conflict occurs when a lawyer represents two adverse parties in a legal proceeding." Solomon asserts that the interest of J&S and Goebel are not adverse because they do not intend to assert claims against one another but instead, "their common adversary is the defendants." In this regard, Solomon argues that "the common objective. . . for both plaintiff and Goebel is, first to prove that defendants were negligent and engaged in misdeeds and caused damage to plaintiff . . . and second . . . to defeat defendants' defenses and claims by showing that Goebel was not negligent in his handling of discussions with Liberty Mutual concerning the coverage dispute between Liberty Mutual and J&S." This line of reasoning ignores the fact that, as a result of defendants' third-party claims for contribution and indemnification, Goebel is potentially liable for all or a portion of J&S' alleged damages. Goebel, therefore, has an obvious incentive to defeat defendants' claims against him. However, that is not his only means of limiting his liability in this action. Goebel's potential liability for defendants' contribution claim, for example, is proportionate to his equitable share of any judgment obtained by J&S (*see* CPLR 1402). Anything which reduces the value of J&S'claims against defendants therefore, reduces Goebel's liability. Indeed, Goebel would escape liability for either contribution or indemnification if J&S' claims against defendants are unsuccessful. Therefore, defendants' claims against Goebel render his claims adverse to J&S, and *vice versa*.

Any doubts as to the existence of a conflict of interest must be resolved in favor of disqualification (*see Moray v UFS Indus., Inc.*, 156 AD3d 781, 784 [2d Dept 2017]; *Gjoni v Swan Club, Inc.*, 134 AD3d 896, 897 [2d Dept 2015]; *Halberstam v Halberstam*, 122 AD3d 679 [2d Dept 2014]; *Sperr v Gordon L. Seaman, Inc.*, 284 AD2d 449, 450 [2d Dept 2001]). Even when an actual conflict of interest may not exist, disqualification may be warranted based on a mere appearance of impropriety (*see Halberstam v Halberstam*, 122 AD3d 679 [2d Dept 2014]). An attorney must avoid not only the fact, but even the appearance, of representing conflicting interests. An attorney may not place himself or herself in a position where a conflicting interest may, even inadvertently, affect, or give the appearance of affecting, the obligations of the professional relationship *(see Tekni-Plex, Inc. v Meyner & Landis*, 89 NY2d 123, 130 [1996]; *Cardinale v Golinello*, 43 NY2d 288, 296 [1977]; *Matter of Strasser*, 129 AD3d 457, 458 [1st Dept 2015]).

Solomon also argues that there is no conflict merely because Goebel is the spouse of Solomon because Solomon does not have a personal, property or financial interest that is at odds with the interests of either Goebel or plaintiff, and that the parties have agreed to waive the conflict. Notwithstanding the fact that both J&S and Goebel have each expressly waived any conflict in writing, the court recognizes an inherent conflict between Goebel's desire to minimize his obligations and J&S' desire to maximize their

recovery and, as such, disqualification is warranted under the circumstances (*see Alcantara v Mendez*, 303AD2d 337 [2d Dept 2003] [pecuniary interests in conflict by virtue of counterclaim asserted against one of the plaintiffs and, thus, continued representation of all plaintiffs violated Code of Professional Responsibility]; *Big Brows LLC v Devitt*, 32 Misc3d 1231 [A] [Sup Ct, Kings County 2011] ["plaintiffs, whose pecuniary interests are in conflict with one other, can not be represented by the same attorney as such irreconcilable conflict in the professional allegiance of counsel cannot be waived"]; *Zwiebel v Guttman*, 4 Misc3d 10 [A] [Sup Ct, Kings County 2004], *affd* 26 AD3d 429 [2d Dept 2006]; *Booth v Continental Insurance Co.*, 167 Misc2d 429, 438-39 [Sup Ct, Westchester County 1995] ["sometimes even with full disclosure and consent, the interests represented are so adverse that dual representation is improper. Because an attorney's joint representation of two adverse parties in a legal proceeding is fraught with potential for irreconcilable conflict, it will rarely be sanctioned even after full disclosure has been made and consent of clients obtained"] [citations omitted]. This Court finds that this type of conflict is so fraught with problems that even consent is not sufficient to permit continued representation.

Finally, Solomon argues that the motion should be denied because to disqualify Solomon would prejudice plaintiff and Goebel by denying them their litigation counsel of choice. "Although it is usually recognized that a party to litigation may select an attorney of his or her choosing, this general right is not limitless. The attorney may not accept employment in violation of a fiduciary relationship and may not allow his own interests to conflict with those of his client. To hold otherwise would be to ignore the overriding public interest in the integrity of our adversary system" (*Greene v Greene*, 47 NY2d 447 [1979]).

Accordingly, the motion to disqualify Solomon as counsel for J&S and for Goebel, is granted. Counsel for plaintiff is directed to serve a copy of this order upon the plaintiff, defendant's counsel, and third-party defendant, within thirty (30) days of service of this order with Notice of Entry, and file an Affidavit of Service with the court. All proceedings are stayed for 30 days after the filing of an affidavit of service with the court, during which time plaintiff and third-party defendant may retain new counsel.

This constitutes the decision and order of this Court.

Dated: March 30, 2018

DICCIA T. PINEDA-KIRWAN, J.S.C.

FILED
APR 10 2018
COUNTY CLERK
QUEENS COUNTY