

**Strasser v Strasser**

2019 NY Slip Op 30351(U)

February 5, 2019

Supreme Court, Kings County

Docket Number: 524192/18

Judge: Leon Ruchelsman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

-----x  
FRAIDA STRASSER,

Plaintiff,

Decision and order

- against -

Index No. 524192/18

MS # 2

JONATHAN STRASSER,

Defendant,

February 5, 2019

-----x  
PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved seeking to disqualify the attorney of defendant Robert H. Groman Esq. and the Law Firm of Forchelli, Deegan Terrana LLP on the grounds these attorneys represented the plaintiff in the past and thus a conflict of interest has developed. The defendant opposes the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

On August 8, 2018 the plaintiff and defendant, husband and wife, entered into an agreement. The agreement, signed by both spouses as well as two witnesses was designed to foster marital problems that had arisen between the couple. In addition, the agreement provided specific sums which the defendant was required to pay the plaintiff as well as her children from a previous marriage. The plaintiff has alleged the defendant has breached the agreement and has failed to make any payments pursuant to the agreement. The plaintiff instituted this lawsuit alleging six causes of action. Five causes of action relate to various breaches allegedly committed by the defendant. The sixth cause of action

seeks an accounting. The plaintiff filed the instant order to show cause seeking to disqualify defendant's counsel on the grounds they have represented the plaintiff in the past. Specifically, in 2009 and again in 2012 Mr. Groman drafted wills for the Strassers as well as a life insurance trust. The plaintiff asserts that representation requires disqualification since "Groman had represented both Jonathan and Fraida Strasser and in particular in a matter which is directly involved in the present lawsuit" (see, Affidavit of Fraida Strasser, ¶ 4). It is further argued that such disqualification is required since, according to Mrs. Strasser, Groman and the Forcelli law firm "continue to retain my last will and testament is [sic] their safe deposit box thus continuing in effect the attorney-client relationship with me" (id at ¶ 3). The defendant has opposed the motion arguing essentially that it has no merit.

#### Conclusions of Law

It is well settled that a party in a civil action maintains an important right to select counsel of its choosing and that such right may not be abridged without some overriding concern (Matter of Abrams, 62 NY2d 183, 476 NYS2d 494 [1984]). Therefore, the party seeking disqualification of an opposing party's counsel must present sufficient proof supporting that determination (Rovner v. Rantzer, 145 AD3d 1016, 44 NYS3d 172 [2d Dept., 2016]).

The former client conflict of interest rule is codified in the

New York Rules of Professional Conduct, Rule 1.9 (22 NYCRR §1200.0 et. seq.). Specifically, Rule 1.9(a) provides: "a lawyer who has formerly represented a client in a matter shall not thereafter 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..." (Id). Although a hearing may be necessary where a substantial issue of fact exists as to whether there is a conflict of interest (Olmoz v. Town of Fishkill, 258 AD2d 447, 684 NYS2d 611 [2d Dept., 1999]) mere conclusory assertions are insufficient to warrant a hearing (Legacy Builders/Developers Corp., v. Hollis Care Group, Inc., 162 AD3d 649, 80 NYS3d 59 [2d Dept., 2018]).

Thus, a party seeking disqualification of counsel must demonstrate that: (1) there was a prior attorney client relationship; (2) the matters involved in both representations are substantially related; and (3) the present interests of the attorney's past and present clients are materially adverse (Moray v. UFS Industries Inc., 156 AD3d 781, 67 NYS3d 256 [2d Dept., 2017]; see, also, Falk v. Chittenden, 11 NY3d 73, 862 NYS2d 869 [2008]; Jamaica Pub. Serv. Co. v. AIU Ins. Co., 92 NY2d 631, 684 NYS2d 459 [1998]). Once the moving party demonstrates that these three elements are satisfied "an "irrebuttable presumption of disqualification follows" (McCutchen v. 3 Princesses and A P Trust Dated February 3, 2004, 138 AD3d 1223, 29 NYS3d 611 [2d Dept.,

2016])).

Thus, in interpreting the prior rule DR 5-108(A)(1) which is substantially the same in import, disqualification would be proper where it is established that there is a substantial relationship between the current litigation and the prior one (Kuberzig v. Advanced Dermatology, P.C., 260 AD2d 548, 688 NYS2d 596 [2d Dept., 1999])).

Thus, concerning this substantial relationship prong, in Spano v. Tawfik, 271 AD2d 522, 705 NYS2d 659 [2d Dept., 2000], the court held disqualification improper where the plaintiff's attorney suing defendant for breach of contract once represented the defendant in a trademark infringement action when plaintiff and defendant were the sole shareholders of the corporation that settled that trademark action. The court noted there was insufficient evidence the matters were substantially related. Indeed, for the two matters to be viewed as substantially related they must be 'identical to' each other or 'essentially the same' (Lightning Park, Inc., v. Wise Lerman Katz, P.C., 197 AD2d 52, 609 NYS2d 904 [1<sup>st</sup> Dept., 1994])).

In this case there has been no evidence presented the matters are the same in any significant way. It is true the agreement that is at the heart of this lawsuit requires the defendant to "make the necessary changes in the Trust so that the wife shall be secure that at the end of the day she will receive the share that is due

her" (see, Agreement § 6). However, the agreement does not specify which trust is contemplated, nor does it delineate the changes the defendant must make. Notwithstanding the ambiguous nature of the duties imposed upon the defendant in the agreement they cannot possibly have any prior representations.

Indeed, the plaintiff does not explain how the prior representation has any bearing upon this case. The plaintiff's only assertion regarding the actual prior representation is that "Groman represented both Jonathan and me in connection with the preparation of our last wills and testaments and a life insurance trust of which I was appointed and continue to serve as a trustee" (see, Affidavit of Fraida Strasser, ¶ 2). However, this lawsuit is not about the formation or creation of any wills or trusts, it is about whether the defendant breached an agreement between the parties. To be sure, a trust is mentioned in the agreement and as noted, some vague duties are imposed upon the defendant, however, the plaintiff has failed to explain how the creation of those documents over six years ago is substantially related to the breach of contract claims sought here. The legal arguments presented in support of the motion likewise do not support any conclusion the two matters are substantially related. The plaintiff argues in conclusory fashion that "the documents previously prepared by Groman are directly pertinent to the issues presently being presented to this Court for determination" (see, Attorney's

Affirmation in Support, ¶ 7). The affirmation further argues that the agreement that is the subject of this lawsuit requires the defendant to make payments to a trust and to change the trust, however, the affirmation does not demonstrate how the creation of that trust conflicts with representation of the defendant here defending breach of contract claims. The tangential connection to an unspecific trust demanding unspecified changes is too attenuated to create any conflict. The case of Sessa v. Parrotta, 116 AD3d 1029, 985 NYS2d 128 [2d Dept., 2014] is instructive. In that divorce case the court denied the wife's motion to disqualify the husband's attorney on the grounds that attorney had prepared the wife's will. The court held the subject matter of both cases were not related thus there was no substantial relationship between the two representations. Again, in Altungeyik v. Ayknat, 49 Misc3d 1209(A), 26 NYS3d 212 [Supreme Court Suffolk County 2015] the court denied plaintiff's motion to disqualify the defendant's counsel. In that derivative shareholder action the defendant's counsel had previously represented the plaintiff in preparing a pre-nuptial agreement, an immigration application and the shareholder agreement of defendant Euro Planet Inc. The court held the current lawsuit concerned the value of the defendant Euro Planet Inc. The court noted the formation of the corporation years before was not substantially similar to its value in the current action and thus denied the motion for disqualification.

These cases demonstrate that a party seeking disqualification of opponent's counsel "bears a heavy burden" (Mayers v. Stone Castle Partners, LLC, 126 AD3d 1, 1 NYS3d 58 [ast Dept., 2015]) and the court must examine the evidence presented and determine whether in its discretion such disqualification is proper (id).

As noted, the plaintiff has failed to present any specific basis to conclude there is a substantial relationship between this litigation and the preparation of any trust documents years ago. The validity or the legality of the trust documents are not in dispute nor is their formation. The only relationship between this litigation and any trust documents is the fact the agreement in this case requires the defendant to take certain actions with respect to a trust document. Therefore, the two matters are not substantially related.

Further, there is no evidence that Mr. Groman is the current attorney of the plaintiff. It may be true the law firm still maintains the plaintiff's will in its safe deposit box. First, that convenience does not establish an attorney client relationship. Moreover, the mere retention of any will is surely not substantially related to this breach of contract lawsuit. Consequently, the motion seeking to disqualify defendant's counsel is denied.

So ordered.

ENTER:

DATED: February 5, 2019  
Brooklyn N.Y.

Hon. Leon Ruchelsman



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KINGS COUNTY CLERK  
FILED

