

Kaye v Chowdhury

2025 NY Slip Op 31411(U)

April 2, 2025

Supreme Court, New York County

Docket Number: Index No. 805087/2019

Judge: John J. Kelley

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

PRESENT: HON. JOHN J. KELLEY **PART** **56M**

Justice

-----X

ARNOLD KAYE,

Plaintiff,

- v -

NASIM CHOWDHURY, M.D., ERIC ELOWITZ, M.D., and
NEW YORK-PRESBYTERIAN/WEILL CORNELL MEDICAL
CENTER,

Defendants.

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INDEX NO. 805087/2019

MOTION DATE 01/17/2025

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76

were read on this motion to/for DISQUALIFY COUNSEL.

This is an action to recover damages for medical malpractice. In an order dated October 17, 2024, this court had denied the defendants' initial motion to disqualify the plaintiff's attorneys from representing him in this action, based on the failure of the defendants' attorney to appear for oral argument. The denial expressly was made without prejudice to renewal. The defendants now move pursuant to CPLR 5015(a)(1) to vacate their default in failing to appear for oral argument, and pursuant to CPLR 2221(d) and (e) to reargue and renew their motion to disqualify the plaintiff's attorneys from representing him in this action on the ground of conflict of interest. The plaintiff opposes the motion. The defendants' motion is granted to the extent that leave to renew is granted, and, upon renewal, their default in appearing for oral argument is vacated, the order dated October 17, 2024 is vacated, and their motion to disqualify Koss & Schonfeld, LLP, and Moshe Hoffman, Esq., from representing the plaintiff in this action is thereupon granted. The instant motion is otherwise denied.

In the first instance, that branch of the defendants' motion seeking leave to reargue its prior motion is denied, since the court did not overlook or misapprehend any facts or law

submitted to it in connection with that motion (see *Matter of Setters v AI Props. & Devs. (USA) Corp.*, 139 AD3d 492, 4492 [1st Dept 2016]; *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992]; *Schneider v Solowey*, 141 AD2d 813, 813 [2d Dept 1988]), but simply denied the motion based on the defendants' default in appearing for oral argument.

“A party seeking to vacate a default in appearing on the return date of a motion must demonstrate both a reasonable excuse for the default and a potentially meritorious motion or opposition to the motion” (*New Hope Missionary Baptist Church, Inc. v 466 Lafayette, Ltd.*, 230 AD3d 510, 511 [2d Dept 2024], quoting *Santiago v City of New York*, 206 AD3d 948, 949 [2d Dept 2022]; see CPLR 5015[a][1]; *Mortgage Elec. Registration Sys., Inc. v Dort-Relus*, 166 AD3d 961, 961 [2d Dept 2018]; *Maurice v Maurice*, 183 AD3d 455, 455 [1st Dept 2020]; *Toos v Leggiadro Intl., Inc.*, 114 AD3d 559, 561 [1st Dept 2014]; *Goldman v Cotter*, 10 AD3d 289, 291 [1st Dept 2004]). “The determination of what constitutes a reasonable excuse is within the sound discretion of the Supreme Court” (*Nico v Olajitan*, 229 AD3d 561, 562 [2d Dept 2024], quoting *Wachovia Mtge., FSB v Coleman*, 170 AD3d 1244, 1245 [2d Dept 2019]). “The court has discretion to accept law office failure as a reasonable excuse where that claim is supported by a detailed and credible explanation of the default” (*Federal Natl. Mtge. Assn. v Bandhu*, 214 AD3d 705, 707 [2d Dept 2023] [internal quotation marks omitted]; see *New Hope Missionary Baptist Church, Inc. v 466 Lafayette, Ltd.*, 230 AD3d at 511; *Guilfoyl v Watts*, 212 AD3d 785, 786 [2023]; *Aegis SMB Fund II, L.P. v Rosenfeld*, 189 AD3d 472, 473 [1st Dept 2020]).

It has long been the rule that an attorney's illness, coupled with law office failure, may be sufficient to establish a reasonable excuse for defaulting (see *Imperato v Mount Sinai Med. Ctr.*, 82 AD3d 414, 415 [1st Dept 2011], *affd* 18 NY3d 871 [2012]; *Frenchy's Bar & Grill v United Intl. Ins. Co.*, 251 AD2d 177, 177-178 [1st Dept 1998]). Here, Patrick P. Mevs, the attorney assigned by the defendants' law firm to appear at the oral argument of their initial motion, adequately explained, in his affirmation, the details of his illness on the scheduled date, and why he thus was unable to appear. He further stated, that, although the appearance was entered in

his firm's calendar, his paralegal was herself on pre-pregnancy leave and, hence, no one in his office could inform another attorney to cover for him. The court also notes that, several hours after the scheduled time for oral argument, Mevs contacted the court via email to explain why he had failed to appear thereat. The court thus concludes that the defendants have established a reasonable excuse for their failure to appear at the oral argument of their initial motion.

The court further concludes, as explained in more detail below, that the defendants' motion for disqualification is meritorious and that, consequently, leave to renew should be granted. A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination" (*McLaughlin v Snowlift, Inc.*, 214 AD3d 720, 721 [2d Dept 2023], quoting CPLR 2221[e][2]; see *Melcher v Apollo Med. Fund Mgt., LLC*, 105 AD3d 15, 23 [1st Dept 2013]; *Dinallo v DAL Elec.*, 60 AD3d 620, 621 [2d Dept 2009]; *American Audio Serv. Bur. Inc. v. AT & T Corp.*, 33 AD3d 473, 476 [1st Dept 2006]). Here, the new facts presented to the court consisted of additional information as to why Mevs was unable to appear at oral argument, and as to why no one else at his firm learned of the appearance. These facts change the court's prior determination, inasmuch as the court now has a basis to reach the merits of the defendants' disqualification motion, and thereupon to grant it.

The court concludes that the plaintiff's attorneys are collaterally estopped from arguing that they should not be disqualified from representing him. This doctrine precludes a person involved in litigation "from relitigating in a subsequent action an issue clearly raised and decided against that party in a prior action" (*Ji Sun Jennifer Kim v Goldberg, Weprin, Finkel, Goldstein, LLP*, 120 AD3d 18, 23 [1st Dept 2014]; see *Hudson v Merrill Lynch & Co., Inc.*, 138 AD3d 511, 515 [1st Dept 2016]). To successfully invoke the doctrine, "the issue in the second action must be identical to an issue which was raised, necessarily decided and material in the first action," and "the party to be precluded must have had a full and fair opportunity to litigate the issue in the earlier action" (*Ji Sun Jennifer Kim v Goldberg, Weprin, Finkel, Goldstein, LLP*, 120 AD3d at

23). Attorneys representing a party in an action may be subject to collateral estoppel to the same extent as a party (*see Hyman & Gilbert v Withers*, 47 Misc 3d 219 [Sup Ct, Westchester County 2014] [where law firm previously had been awarded attorneys' fees in a Family Court proceeding and a Supreme Court action, it was collaterally estopped from seeking additional fees in a plenary action that it had commenced against its client]).

The defendants in this action alleged that Moshe Hoffman, who previously had been an associate at Aaronson Rappaport Feinstein & Deutsch, LLP (ARFD), the firm which currently represents them in this action, had, in the course of that employment, accessed privileged information concerning this very action, and then left the employ of ARFD to work at Koss & Schonfeld, LLP (K&S), the law firm now representing the plaintiff herein. The defendants asserted that this information was contained in documents known as "Litigation Plan Reports" or "Case Plan Reports" that ARFD maintained on its ProLaw electronic case management system. They thus alleged that Hoffman and K&S had violated the Rules of Professional Conduct, and thus should be disqualified from further representing the plaintiff. In opposition to that showing, the plaintiff argued that, to the extent that Hoffman had seen those documents, he did not read or review any documents, or obtain any information, that constituted attorney work-product or that was protected by the attorney-client privilege, that, although Hoffman already had been interviewed for a position at K&S when he accessed those documents, he had yet to accept an offer of employment from K&S, and that he did not share that information with anyone.

The defendants established that, in an action entitled *Waldman v Foote*, pending in the Supreme Court, Bronx County, under Index No. 260568/2019E, the court (Gerez, J.) granted an identical motion, made by ARFD, to disqualify Hoffman and K&S as the plaintiff's attorneys therein, based on facts identical to the instant dispute (*see Waldman v Foote*, 2024 NY Misc LEXIS 15802 [Sup Ct, Bronx County, Sep. 30, 2024]). In *Waldman*, as here, the defendants demonstrated that Hoffman, when he was an associate attorney at ARFD, accessed "Case Plan Reports" referable to that action. K&S made the identical arguments that they made herein, and

Hoffman and K&S had a full and fair opportunity to be heard on the issue of whether they committed any violations of the Rules of Professional Conduct and whether they should be disqualified from representing the plaintiff.

As Justice Gerez explained it,

“Hoffman applied for the open position [with Koss & Schonfeld], and his first interview with [the] Koss & Schonfeld firm was held remotely on April 4, 2023, with a second interview on April 23, 2024. On May 12, 2023, Mr. Hoffman left his employment at Aaronson Rappaport and joined Koss & Schonfeld beginning on May 15, 2023. Subsequently, Mr. Hoffman was assigned to prosecute this matter on behalf of the plaintiff.”

(*id.*, 2024 NY Misc LEXIS 15802, *2). She further found that, as is the case here,

“in opposition to the motion, Mr. Hoffman avers in a sworn affirmation that he has no recollection of the documents he reviewed; that he is not in any possession of confidential information regarding the defendant . . . ; any documents he opened were merely for cursory review of the kinds of cases Koss & Schonfeld handle; and he has not shared any confidential information with any of the attorneys at Koss & Schonfeld.”

(*id.*, 2024 NY Misc LEXIS 15802, *4). Justice Gerez credited “Hoffman’s sworn testimony and d[id] not find any sanctionable conduct. There is no cause to believe Mr. Hoffman acted deliberately with nefarious intentions to gain some tactical advantage over defendant that he would later exploit when stepping into the shoes of a plaintiff’s attorney” (*id.*). She nonetheless concluded that, even if Hoffman’s review of the defendant’s case file might have been “completely inadvertent,” he nonetheless

“acquired client confidences in his prior employment—whatever may have been contained in the document he opened—and the overarching public policy calls for ensuring the integrity of the attorney-client relationship by protecting client secrets and preventing even the appearance of impropriety. As such, his immediate disqualification is required.”

(*id.*).

In explaining her determination, Justice Gerez wrote that

“‘[t]he right to counsel of choice is not absolute and may be overridden where necessary’ (*S&S Hotel Ventures Ltd. Partnership v 777 S.H. Corp.*, 69 NY2d 437, 443 [1987]). Rule 1.9 of the Rules of Professional Conduct (22 NYCRR 1200.0) 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 unless the former client gives informed consent, confirmed in writing’ (Rule 1.9 [a]). Further, a lawyer ‘who has formerly represented a client in a matter. . . shall not thereafter . . . use confidential information of the former client . . . to the disadvantage of the former client . . . ; or . . . reveal confidential information of the former client’

“(Rule 1.9[c][1], [2]).

“A party seeking to disqualify an attorney or a law firm for a conflict of interest must establish ‘(1) the existence of a prior attorney-client relationship between the moving party and opposing counsel, (2) that the matters involved in both representations are substantially related, and (3) that the interests of the present client and former client are materially adverse’ (*Tekni-Plex, Inc. v Meyner and Landis*, 89 NY2d 123, 131 [1996]). ‘Satisfaction of these three criteria by the moving party gives rise to an irrebuttable presumption of disqualification. This rule of disqualification fully protects a client’s secrets and confidences by preventing even the possibility that they will subsequently be used against the client in related litigation’ (*id.*)”

(*id.*, 2024 NY Misc LEXIS 15802, *2-3).

With respect to K&S, Justice Gerez ruled that, inasmuch as Hoffman must be disqualified, K&S was “presumptively disqualified” (*id.*, 2024 NY Misc LEXIS 15802, *5). As she explained it, “[d]isqualification of a law firm during litigation implicates not only the ethics of the profession but also the substantive rights of the litigants. Disqualification denies a party’s right to representation by the attorney of its choice’ (*S & S Hotel Ventures*, 69 NY2d at 443)” (*id.*).

Justice Gerez nonetheless further analyzed the issue as follows:

“Thus, where one attorney is disqualified as a result of having acquired confidential client information at a former law firm, the presumption that the entirety of the attorney’s current firm must be disqualified may be rebutted” (*Kassis v Teacher’s Ins. & Annuity Assn.*, 93 NY2d 611, 617 [1999]). ‘The party seeking to avoid disqualification must prove that any information acquired by the disqualified lawyer is unlikely to be significant or material in the litigation’ (*id.*). Here, whether he recalls the substance of the documents he accessed or not, even if only for a fleeting glance, Mr. Hoffman lifted a veil and was made privy to private client information about defendant . . . during his employment at Aaronson Rappaport. Under the particular circumstances of this case, it cannot be said that the information is ‘unlikely to be significant or material’ as it was contained in the defense file for this very litigation. Further, there was no ethical wall erected around Mr. Hoffman at Koss & Schonfeld with respect to this matter.

Indeed, he was immediately assigned to handle it. As such, Koss & Schonfeld simply cannot rebut the presumption and are also disqualified”

(*id.*, 2024 NY Misc LEXIS 15802, *5-6).


This court concludes that, inasmuch as the very issue presented on this motion had been determined against Hoffman and K&S in the *Waldman* case, based on virtually identical facts, Hoffman and K&S are estopped from arguing that they may continue to represent the plaintiff in this action. Even if this court did not invoke the doctrine of collateral estoppel, it completely agrees with Justice Gerez’s analysis and determination, and would have granted the motion in any event.

Accordingly, it is,

ORDERED that the defendants’ motion is granted to the extent that they are granted leave to renew their prior motion to disqualify Moshe Hoffman, Esq., and Koss & Schonfeld, LLP, and, upon renewal, their default in appearing for oral argument in connection with that prior motion is vacated, the order dated October 17, 2024 is vacated, their motion to disqualify Moshe Hoffman, Esq., and Koss & Schonfeld, LLP, from representing the plaintiff in this action is thereupon granted, Moshe Hoffman, Esq., and Koss & Schonfeld, LLP, be, and hereby are, disqualified from further representing the plaintiff in this action, and the instant motion is otherwise denied.

This constitutes the Decision and Order of the court.

4/2/2025
DATE



JOHN J. KELLEY, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER		

APPLICATION:

CHECK IF APPROPRIATE: