IN THE COURT OF COMMON PLEAS PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

BRIAN T. MALEWICZ, et al.,	:	
	:	
Plaintiffs,	:	December Term 2002
	:	
	:	
v.	:	No.: 1741
	:	
	:	
MICHAEL BAKER CORPORATION et al.,	:	Commerce Program
	:	
Defendants.	:	Control No.: 031219

C. Darnell Jones, II, J. .....

0 P I N I O N

Plaintiffs, Brian Malewicz, Michael D. Burns, David L. Jannetta, Mark J. De Nino and Mobility Technologies, Inc., have filed a motion to disqualify Robert A. Nicholas, Esquire, William J. McDonough, Esquire and the law firm of Reed Smith, LLP. as counsel for defendants, Michael Baker Corporation and Donald P. Fusilli, Jr. For the reasons discussed in this opinion, this court is issuing a contemporaneous Order granting plaintiffs Motion to Disqualify Counsel.

PARTIES

Due to the number of parties involved in this suit, the court finds it necessary to identify the parties and their relationship to the respective corporations. The plaintiffs in this action are Brian Malewicz, Michael B. Burns, David J. Jannetta, Mark J. DeNino and Mobility Technologies Inc.(Mobility) Malewicz, Burns, Jannetta, and De Nino are shareholders of Mobility. Mobility, a Delaware Corporation, was formerly known as Argus Network, Inc.

Defendants in this action are Michael Baker Corporation(MBC), Donald P. Fusilli, Fred Johnson, Dwight Sangrey and Howard Kraye. Fusilli is a shareholder and executive officer of MBC. Johnson, Sangrey and Kraye are shareholders and executive officers of Santa Fe Technologies(SFT).

BACKGROUND

The facts alleged in plaintiffs complaint are as follows:

Mobility designs, constructs and maintains electronic monitoring systems which monitor automobile traffic and report traffic conditions in real time. (¶ 14) During the first six months of 1998, Mobility explored the possibility of cooperating with other companies to prepare and submit a bid to the U.S. Department of Transportation for a contract to fund the installation of electronic traffic monitoring systems in a number of states. (¶ 15) Santa Fe Technologies ("SFT") was one of the companies Mobility considered as a potentially suitable participant. (¶ 17) In June 1998, Mobility and SFT began to discuss the possibility of cooperating with each other to prepare and submit a bid for the federal government contract. (¶ 18)

In connection with and as a result of preparing a bid, Mobility and SFT, on November 2, 1998, entered into an agreement providing for the merger of SFT into Mobility. A provision within the merger agreement specifically provided that Mobility had the unqualified right to terminate the Merger Agreement if the merger was not consummated by December 15, 1998. (¶ 19) The companies then proceeded to conduct due diligence reviews in advance of the consummation of the merger. (¶ 18) At the time the Merger Agreement was signed between Mobility and SFT, SFT was on the brink of financial collapse and desperately needed the influx of capital that the merger, if consummated, would provide. (¶ 25)

During the course of due diligence, Mobility learned and determined that (1)SFT had previously secured a loan of approximately $200,000.00 from MBC with pledges of SFT stock by certain of SFT's shareholders, including defendants Fred Johnson ("Johnson") and Howard Kraye ("Kraye"), who collectively owned and/or controlled millions of shares of SFT stock;[1] (2) SFT's earnings in 1998 were falling well below projections(¶ 22); and (3) SFT had questionable sensor-installation credentials which caused Mobility to determine that SFT's presence as part of the team preparing for the bid would jeopardize the contract award. (¶ 22) On February 24, 1999, Mobility exercised its unqualified right to terminate the merger agreement. (¶ 23)

Mobility subsequently entered into another arrangement with Sensor Management Systems ("SMS") to provide the services originally contemplated with SFT. (¶24) Mobility merged with SMS and was awarded the contract by the U.S. Department of Transportation. (¶24)

Upon termination of the SFT-Mobility merger agreement, defendants Sangrey, Kraye and Johnson allegedly devised a plan with the assistance of MBC to (1) extort money from Mobility and use that money to inject capital into SFT, (2) repay the indebtedness to MBC and (3) permit Sangrey, Kraye and Johnson to regain control of SFT's stock and resurrect a solvent SFT. (¶ 27)

Allegedly, in order to effectuate the plan, MBC informed Sangrey, Kraye, and Johnson that Internet Capital proposed to invest $19,000,000.00 in Mobility. (¶28) Sangrey, Kraye and Johnson knew that claims of liability asserted in the midst of the financing process would have to be reported to the prospective investors and would necessarily induce them not to invest in Mobility, or to significantly change the terms of the financing to make them less favorable to

[1]At the time the merger agreement was signed, SFT was seriously in arrears on its loan from MBC. (¶21)

Mobility and its shareholders. (¶ 28)

On August 3, 1999, Sangrey, Kraye and Johnson caused SFT's counsel to transmit a letter to plaintiffs DeNino, Jannetta and Burns announcing the filing of a lawsuit against them and Mobility. (¶ 32) Enclosed with the letter was a complaint filed by SFT in New Mexico state court. The lawsuit was filed against Mobility, Jannetta, Burns, DeNino and three former SFT employees who operated SMS, Nash, Musnitsky and Dollar. In the lawsuit, SFT claims that it is entitled to damages for the alleged tortious conduct of the defendants in connection with replacing SMS for SFT as a participant in the proposed federal contract bid and the failed merger of SFT into Mobility. (¶33) This lawsuit is currently pending in New Mexico.

As a result of the August 3, 1999 letter from SFT's counsel, Internet Capital declined to invest the planned $19,000,000.00 in Mobility under the terms that had originally been proposed. Instead Internet Capital demanded significant changes in the terms of the financing, which had the result of drastically diminishing the value of Mobility stock and of altering the control structure of the company. Mobility accepted Internet Capitals financing terms and suffered losses. (¶ 36)

As a result of the New Mexico lawsuit, Mobility and Jannetta retained Alan K. Cotler, Esquire to represent them. At the time that Mr. Cotler was retained he was a partner with the Philadelphia office of Klett, Rooney, Lieber and Schorling, LLP. Mr. Cotler was assisted by Andrew Hoppes, Esquire a senior litigation associate at that firm From August 1999 until May 2001, Messrs. Cotler and Hoppes remained at Klett Rooney.

During Mr. Cotler's representation of Jannetta and Mobility, he entered into a joint cooperative defense agreement with counsel for codefendant Michael Burns, Timothy Russell,

Esquire of Spector, Gaden and Rosen, P.C. since common interests existed with respect to all or most of the issues that arose in the defense of the case. Plaintiffs brief Exhibit D.

In May 2001, Mr. Cotler joined the firm of Reed Smith LLP as a partner and Mr. Hoppes joined the firm as counsel. When Messrs. Cotler and Hoppes joined Reed Smith they brought with them the representation of Jannetta and Mobility in the New Mexico lawsuit. Messrs. Cotler and Hoppes continued to represent Jannetta and Mobility until September 2002, when they were replaced by Spector, Gaden and Rosen, P.C. Spector, Gaden and Rosen P.C. represent Jannetta, Mobility and the other plaintiffs in this action.

The instant lawsuit was instituted in December 2002 by plaintiffs Brian T. Malewicz, Michael D. Burns, David L. Jannetta, Mark J. DeNino and Mobility Inc. against MBC, Donald P. Fusilli, Jr., Fred Johnson, Dwight Sangrey and Howard Kraye. In December 2002, MBC and Fusilli retained Robert A. Nicholas, Esquire and William J. McDonough, Esquire of Reed Smith to represent them in the present action. Messrs. Nicholas and McDonough filed preliminary objections on behalf of MBC and Fusilli to plaintiffs complaint which are currently pending before this court. Many of the facts remain in dispute. This court need not decide these facts in order to resolve the present motion to disqualify. Rather, this court's inquiry is limited to whether Messrs. Nicholas and McDonough and the firm of Reed Smith LLP should be disqualified from representing MBC and Fusilli in the instant matter.

DISCUSSION

Our Supreme Court has repeatedly stated that "the trial court in the first instance has the power to regulate the conduct of attorneys practicing before it, and has the duty to insure that those attorneys act in accordance with their Professional Responsibility." Albert M. Greenfield &

Co. v. Alderman, 52 Pa. D & C 4th 96, 105 (Pa. Com. Pl. 2001) quoting American Dredging Co. v. City of Philadelphia, 480 Pa. 177, 183, 389 A.2d 568, 571 (Pa. 1978). Currently, "an attorney's conduct concerning the representation of his client is governed by the Pennsylvania Rules of Professional Conduct." Id. quoting In re Birmingham Twp., Delaware County, 142 Pa. Cmwth. 317, 322, 597 A.2d 253, 255 (Pa. Cmwlth. 1991). "A court may restrain conduct which it feels may develop into a breach of ethics; it 'is not bound to sit back and wait for a probability to ripen into a certainty."' Id. at 106, quoting Maritrans G.P. Inc. v. Pepper, Hamilton & Scheetz, 529 Pa. 241, 255, 602 A.2d 1277, 1284 (Pa. 1992).

An attorney will not be permitted to represent conflicting interests unless those interests agree to be so represented. Id. "The test of whether an attorney has a conflicting interest so as to preclude his representation of a party is not the actuality of conflict, but the possibility that a conflict may arise." Greenfield, supra. at 107 quoting Middleberg v. Middleberg, 427 Pa. 114, 115, 233 A.2d 889, 890 (Pa. 1967).

Granting a motion to disqualify and removing the offending lawyer is the usual remedy employed when a breach of ethics is made to appear. Id. Disqualification is "a serious remedy which must be imposed with an awareness of the interests of a client in representation by counsel of the client's choice." Id. Further, violation of the ethical rules does not necessarily provide grounds for disqualification. Id. Rather, a court may disqualify counsel if it is necessary "to ensure the parties receive the fair trial which due process requires." Id. at 108 quoting McCarthy v. Southeastern Pennsylvania Transp. Authority, 2001 Pa. Super. 106, 772 A.2d 987 (Pa. Super. 2001). In addition, the court should prevent litigants from using motions to disqualify opposing counsel for tactical purposes. Id. citing Hamilton v. Merrill Lynch, 645 F. Supp. 60,61(E.D. Pa.

1986).

I. Waiver

Defendants maintain that counsel for plaintiffs waived his right to challenge MBC and Fusilli's choice of counsel since they granted defendants an extension of time to file preliminary objections and waited almost three months to file the instant motion. Defendants brief p. 5. In response, plaintiffs argue that defendants were timely informed that a conflict of interest existed. Plaintiffs reply brief pg. 2-3.

Waiver is a valid basis for the denial of a motion to disqualify. Commonwealth Ins.Co.y v. Graphix Hot Line Inc, 808 F. Supp. 1200, 1207 (E.D. Pa. 1992)

> Such a finding is justified when a former client expressly agrees to the attorney's representation of an adversary ....or when a former client was conceitedly aware of the former attorney's representation of an adversary but failed to raise an objection promptly when he had the opportunity. In the latter circumstance, the person whose confidences and secrets are at risk of disclosure or misuse is held to have waived his right to protection from that risk.

INA Underwriters Ins. Co. v. Nalibotsky, 594 F.Supp. 1199, 1204 (E.D. Pa. 1984)

In determining whether the moving party has waived its right to object to the opposing party's counsel, the court should consider the length of the delay in bringing a motion to disqualify, when the movant learned of the conflict, whether the movant was represented by counsel during the delay, why the delay occurred and whether disqualification would result in prejudice to the nonmoving party. Commonwealth Insurance Company v. Graphix Hot Line , supra. at 1208. In particular, courts should inquire whether the motion was delayed for tactical reasons. Id.

In applying the above referenced standard to the case at hand, it is evident from the record that the plaintiffs have not waived their right to object to defendants choice of counsel. The

instant matter was filed in December 2002. On or about December 30, 2002, Robert A. Nicholas, Esquire contacted Michael Wagner, Esquire, counsel for plaintiffs to request an extension of time for his clients to answer the complaint. Affidavit of Michael C. Wagner, Esquire ¶ 8. During this conversation, Mr.Wagner informed Mr.Nicholas that a conflict of interest existed with their representation of MBC and Fusilli. Mr. Wagner claims that he granted an extension of time to Mr. Nicholas with the hopes that MBC and Fusilli would retain other counsel. Id. ¶ 8.

Subsequent to Mr. Wagner's initial conversation with Mr.Nicholas, Mr. Nicholas and Mr. McDonough filed preliminary objections on behalf of Michael Baker Corp. Upon receipt of the preliminary objections, Mr. Wagner contacted William McDonough, Esquire, the attorney listed on the preliminary objections and explained the nature and extent of the conflict of interest. Id. at ¶ 9 Mr. Wagner's affidavit states that Mr. McDonough responded that he would inquire into the matter. Thereafter, Mr. McDonough contacted Mr. Wagner and stated that Reed Smith had determined to represent Fusilli and MBC. Id. ¶ 10 This conversation was followed by a letter to Mr. Nicholas by Mr. Russell, lead counsel from Spector, Gadded and Rosen, P.C., dated February 21, 2003 identifying in writing the conflict of interest. Plaintiffs brief Exhibit E. Mr. Nicholas responded that Reed Smith would not withdraw as counsel for Fusilli and MBC. Plaintiffs brief Exhibit F. On March 13, 2003, plaintiffs filed the subject motion.

This court finds that a delay of less than three months does not constitute a significant passage of time to waive a party's right to object to counsel. See Imbesi v. Imbesi, 2001 WL

1352318 (E.D. Pa. 2001). [2] The fact that plaintiffs counsel granted defendants an extension to file a responsive pleading is not evidence that plaintiffs waived their right to object to opposing counsel in this case. Moreover, this court is not persuaded that MBC and Fusilli will be prejudiced by this court's decision to grant disqualification, especially in light of the fact that plaintiffs are not moving to strike the preliminary objections filed by Messr. Nicholas and McDonough.

Thus, this court finds that the plaintiffs did not waive their right to object to defendants choice of counsel.

II. Conflict of Interest-Former Client

Plaintiffs maintain that Messrs. Nicholas and McDonough and the law firm of Reed Smith should be disqualified from representing MBC and Fusilli in this case. Plaintiffs brief pg 8. Plaintiffs argue that the Reed Smith attorneys, Messrs. Cotler and Hoppes, obtained confidential information during their representation of Mobility and Jannetta which by operation of law is presumed to be shared with Messrs. Nicholas and McDonough. Plaintiffs brief pg. 8. Defendants, on the other hand, maintain that the New Mexico case is not substantially related to the subject matter in this lawsuit. Defendants also argue in the alternative that even if the cases were substantially related Messrs. Cotler and Hoppes were with the firm of Klett Rooney during the heavy stages of the litigation and that while at Reed Smith there was little activity with the file. Messrs. Cotler and Hoppes argue in further support that they have no involvement in any

[2]The United States District Court for the Eastern District of Pennsylvania has adopted the rules of professional conduct, as adopted by the Supreme Court of Pennsylvania. U.S.D.C., E.D. Pa.; Local R. Civ. P. p14 (IV) (B). Currently this rule is cited as U.S.D.C. E.D. Pa. local R.C.P. 83.6 (IV). Therefore, district court case opinions dealing with motions to disqualify opposing counsel are valid as persuasive authority.

aspect of this litigation.

The Pennsylvania Rules of Professional Conduct address an attorney's conflict of interest with a former client as follows:

> "A lawyer who has formerly represented a client in a matter shall not thereafter:
> (a) 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 consents after a full disclosure of the circumstances and consultation: or
> (b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information had become generally known." Rule 1.9.

The fact that two representations involve similar or related facts is not of itself sufficient to warrant a finding of a substantial relationship. Commonwealth Ins. Co. v. Graphix Hotline, Inc., 808 F. Supp. 1200, 1204, (E.D.Pa. 1992). Rather, the test is whether the information acquired by the attorney in his former representation is substantially related to the subject matter of the subsequent representation. If the attorney might have acquired confidential information related to the subject matter of the subsequent representation, then Rule 1.9 would prevent the attorney from representing the second client. Id. The court's primary concern is whether "confidential information that might have been gained in the first representation may be used to the detriment of the former client in the subsequent action." Id. quoting Realco Services, Inc. v. Holt, 479 F.Supp. 867, 871 (E.D. Pa. 1979).

To perform the substantial relationship analysis under Rule 1.9, a court must answer the following three questions: 1) What is the nature and scope of the prior representation at issue?, 2) What is the nature of the present lawsuit against the former client?, 3) In the course of the prior representation, might the client have disclosed to his attorney confidences which could be

relevant to the present action? In particular, could any such confidences be detrimental to the former client in the current litigation? Id. quoting INA Underwriters Insurance Co. v. Nalibotsky, 594 F. Supp. 1199, 1206 (E.D. Pa. 1984).

In answering the first question, the court should focus upon the reasons for the retention of counsel and the tasks which the attorney was employed to perform. Id With respect to the second question, the court should evaluate the issues raised in the present litigation and the underlying facts. Finally, in answering the third question, the court should be guided by the interpretation of the word "might" set forth in Realco. Id. The burden of establishing a substantial relationship falls upon the moving party. Id.

After applying these principles of law to the facts of this case, the court finds that the requirements of the substantial relationship test have been met. With regard to the nature and scope of Messrs. Cotler and Hoppes prior representation and tasks performed, the evidence produced by the parties demonstrates that depositions were taken and motions were filed addressing issues such as forum non conveniens, personal jurisdiction and arbitration by Messrs. Cotler and Hoppes. Messrs. Cotler and Hoppes also entered into a joint defense agreement with counsel for Michael Burns due to the commonality of issues and participated in meetings to discuss litigation strategy, settlement and the possibility of instituting a lawsuit against MBC and Fusilli.

This court finds that the issues raised in the present litigation are directly related to Messrs. Cotler and Hoppes prior representation of Jannetta and Mobility. Review of the complaints in the respective actions evidence that the central issue in both matters is the failed merger between SFT and Mobility and the conduct of the shareholders/executives of SFT, the

shareholders/executives of MBC and the shareholders/executives of Mobility pre and post merger. Indeed, the present lawsuit arises directly from the New Mexico lawsuit. Thus, the court finds that the present action is substantially related to the action pending in New Mexico.

Defendants' statements that little activity occurred in the New Mexico lawsuit from May 2001 to September 2002 and that there have been no discussions with Mr. Nicholas regarding the New Mexico action have no bearing once the court finds that a substantial relationship exists. Once a substantial relationship between past and present representations has been established, an irrebuttable presumption arises that confidential information relevant to the present dispute might have been obtained through the prior representation. Reading Anthracite Co. v. Lehigh Coal & Navigation Co. Inc., 771 F.Supp. 113, 117 (E.D. Pa. 1991).

Mr. Cotler's involvement with Mobility and Jannetta in the pending New Mexico action was extensive as was his knowledge of sensitive information provided to him by Jannetta as well as the other defendants. Moreover, it is undisputed that while Messrs. Cotler and Hoppes were at Reed Smith, the possibility of instituting this lawsuit was discussed. Thus, a substantial risk exists that representation of the present client will involve the use of information acquired in the course of representing the former client.

In light of the fact that a substantial relationship exists between the New Mexico lawsuit and the instant lawsuit and that Messrs. Cotler and Hoppes are disqualified from representing Michael Baker Corp. and Fusilli in the present action, Messrs. Nicholas and McDonough are also disqualified from representing MBC and Fusilli. Rule 1.10 of the Rules of Professional Conduct governs the imputed disqualification of an entire law firm. Rule 1.10 (a) provides that "while lawyers are associated in a firm, none of them shall knowingly represent a client when any one of

them practicing alone would be prohibited from doing so by Rules ...1.9." Rule of professional conduct 1.10(a). Under this rule, confidential information which may have been "gained by one member of a law firm is imputable to other members of the same law firm." Estate of Pew, 440 Pa. Super. 195, 655 A.2d 521, 545(Pa. Super. 1994). Paragraph (a) operates only among the lawyers currently associated in a firm. Comment to Professional Rule of Conduct 1.10. Inasmuch as Messrs. Cotler and Hoppes are disqualified from acting as counsel for Michael Baker Corp. and Fusilli in this matter, Rule 1.10(a) likewise prohibits Messrs. Nicholas and McDonough and the firm of Reed Smith from representing those same parties in this litigation.

CONCLUSION

For these reasons, this court finds that Plaintiffs Motion for Disqualification is Granted.

BY THE COURT,

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C. DARNELL JONES II, J.

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MICHAEL BAKER CORPORATION et al.,	:	Commerce Program
	:	
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O R D E R

AND NOW, this day of , 2003, upon consideration of Plaintiffs Brian T. Malewicz, Michael D. Burns, David L. Jannetta, Mark J. DeNino, and Mobility Technologies, Inc.'s Motion to Disqualify Robert A. Nicholas, Esquire, William J. McDonough, Esquire and the law firm of Reed Smith, LLP from representing Michael Baker Corporation and Donald P. Fusilli, Jr. in this action, and the response in opposition, the respective memoranda, all matters of record, oral argument, and in accordance with the contemporaneous opinion being filed of record, it is **ORDERED** that Plaintiffs motion to disqualify is **GRANTED.**

BY THE COURT,

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C. DARNELL JONES, II, J.

Dated: August 6, 2003