TekSHORT FORM ORDER INDEX NO. 02362-16

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 25 - SUFFOLK COUNTY

PRESENT:

HON. GLENN A. MURPHY
Acting Justice of the Supreme Court

MOTION DATE: 01-08-18 and 01-08-18
SUBMIT DATE: 02-2-18
MOTION: 009 MOT D
MOTION: 010 MOT D

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LORI A. JANCZEWSKI,

Plaintiff,

-against-

ADAM J. JANCZEWSKI,,

Defendant.

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PLTF'S/PET'S ATTY:
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Selden, New York 11784

DEFT'S/RESP'S ATTY:
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ATTY FOR CHILD:
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The Court in its deliberations has considered:

1. Plaintiff's Order to Show Cause (MOT 009).

2. Defendant's Cross-Motion (MOT 010).

3. Plaintiff's Affidavit in Reply.

4. Defendant's Reply.

The plaintiff filed a pro se Order to Show Cause seeking disqualification of defendant's attorney. The facts with regard to the possible conflict of interest are undisputed.

The plaintiff retained the firm Robert G. Venturo as counsel in this matter in July of 2016. The plaintiff worked closely with an associate at the time, namely, Nicole Berkman, Esq. The plaintiff indicated that she spoke frequently with Ms. Berkman both personally, telephonically and via e-mail. The plaintiff indicated that she had shared personal, intimate information and confidences with Ms. Berkman during those points of contact regarding this matter.

On or shortly after February 10, 2017 Ms. Berkman was hired by the defendant's firm, Ray, Mitev and Associates. Although the Court was made aware of the possible conflict in the spring of 2017, the plaintiff did not file an application seeking disqualification until December 15, 2017. The Court notes that the firm of Robert G. Venturo was relieved on November 15, 2017, before the plaintiff filed her Motion for disqualification.

The plaintiff believes that the facts presented establish a conflict of interest that requires the defendant's attorneys to be disqualified with regard to this matter.

The Court of Appeals in ***Tekni-Plex, Inc. v. Meyner & Landis***, 89 NY2d 123 (1996) applied Professional Responsibility code DR5-108 (A) (1), The Court noted "a party seeking disqualification of its adversary's lawyer must prove: (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". (See, ***Solow v. W.R.Grace & Co.,*** 83 NY2d 303 at 308 (1994). Satisfaction of these three criteria by the moving party gives rise to an "irrebuttable presumption of disqualification". id. at 309.

Tekni-Plex Court noted that the code of professionally responsibility posed a "continuing obligation of attorneys to protect their clients confidences and secrets."... (***Tekni-Plex*** at 130). The Court went on to note that an attorney "must avoid not only the fact, but even the appearance, of representing conflicting interests citing ***Cardinale v Golinello***, 43 NY2d 288 at 296 (1997). The Court further stated the... "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". ***Tekni-Plex*** at 131 *emphasis added.*

The ***Tekni -Plex*** decision remains the law of this Department see, e.g.: ***Gabel v. Gabel***, 101 AD3d 676 (2nd Dept 2012); ***Matter of Town of Oyster Bay v. 55 Motor Avenue Co., LLC***, 109 AD3d 549 (2nd Dept. 2013); ***Mediaceja v. Davidov***, 119 AD3d 911 (2nd Dept. 2014); ***Sharifi-Nistanak v. Coccia***, 119 AD2d 765 (2nd Dept. 2014).

The case law proffered by the plaintiff is inapplicable to the facts presented herein. Specifically, the defendant utilizes, ***Unger v Unger,*** 15 AD2d 389 (2nd Dept. 2015) as authority for his position. However ***Unger*** dealt with an "innocuous exchange of pleasantries at a restaurant that Court found did not rise to the level of a representation required under DR5-108 id. Here during the course of the litigation, the associate who worked on the matter with the plaintiff, was hired by the defendant's firm.

The defendant's reliance on ***Messina v. Messina,*** 85 AD2d 688 (2nd Dept. 1991) is also misplaced. In ***Messina***, the parties were jointly represented by an attorney at a closing that became the husband's matrimonial attorney some 6 years prior to the commencement of the action of divorce. The Court held that a routine purchase of a marital residence " 6 years prior to the present action is an insufficient grounds are which to rest the disqualification of the husband's counsel".id.

Citing ***Lucci v. Lucci,*** 150 AD2d 650 (2nd Dept. 1989). Finally the defendant's reliance on Justice Mackenzie's decision, ***D'Lauro v D'Lauro*** is also misplaced as factually distinguishable

The plaintiff also argues that the doctrine of collateral estoppel is applicable to this matter with regard to the defendant's application to have counsel removed. Plaintiff's main site for three cases as authority in support of it's position is found in the decision of ***Valenti v. Clocktower Plaza Props., Ltd.***, 118 AD3d 766 (2nd Dept 2014). As authority relating to the rejection of the defendant's application to have counsel removed. ***Valenti*** states in part

> "Under the doctrine of res judicata, a disposition on the merits bars litigation between the same parties, or those in privity with them, of a cause of action arising out of the same transaction or series of transactions as a cause of action that either was raised or could have been raised in the prior proceeding..." *citations omitted.* "The doctrine of res judicata operates to preclude the renewal of issues actually litigated and resolved in a prior proceeding as well as claims for different relief which arise out of the same factual grouping or transaction and which should have or could have been resolved in the prior proceeding" *citations omitted.* "To determine what factual grouping constitutes a transaction, the Court must consider how the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations, business understanding, or usage". *citations omitted* id at 778.

This Court finds a deficiency in the plaintiffs suggestion that the doctrine of res judicata is applicable to this matter. Here, the Family Court determination was based upon the defendant's application to have counsel removed on an O Docket for an incident which occurred in June of 2016. The incident occurred approximately four (4) months after Ms. Berkman left the defendant's Counsel employ and was hired by plaintiff's attorney's firm. Further complicating the defendant's Family Court application was that she made her Motion immediately prior to the commencement of trial some eighteen (18) months after the defendant filed her complaint in Family Court. (A total of 22 months after Ms. Berkman left Mr. Venturo's firm and became an associate of plainitff's counsels firm). That is, the "conflicted" attorney was employed by the defendants' firm some four (4) months prior to the date of the alleged incident to be litigated in the Family Court. Further, the issues litigated in the Family Court relate to an incident that occurred after the plaintiff filed his summons and notice with regard to the instant matrimonial action.

It cannot be said that the doctrine of res judicata is applicable as the "actual grouping" of the incidents are infact unrelated in time and space to the instant matrimonial matter. As the incident litigated in the Family Court post dates the pendency of the matrimonial matter, res judicata does not apply. The Family Court Magistrate was faced with a factual allegation regarding representation of a client that pre dated the Family Court matter. The defendant was estopped from claiming a conflict as the counsels' representation of the plaintiff occurred some four (4) months prior to the defendant filing the action and moments before trial, some twenty two (22) months after the incident occurred.

In the case at bar, as the conflict occurred during the course of litigation, this Court must rely on ***Tekni -Plex,*** *supra* and it's progeny. Here, the defendant has established that there is a prior attorney/client relationship between the defendant and opposing counsel's new assistant. The defendant

also established that the matters involved in both representations are substantially related, infact they are exactly the same matter. Thirdly, the defendant established that her interests and that of her former counsel are materially adverse. Therefore as held in ***Solow v. W.R.Grace & Co.***, *supra* an irrebuttable presumption of disqualification has resulted. *See* ***Solow,*** 83 NY2d at 309.

The defendant's counsel correctly notes that the only conflict between the parties in this matter is equitable distribution. The defendant further notes that issues resolved are not complex as the defendant is a W-2 employee and the plaintiff's income is derived from social security disability. Although the instant matter does not appear to involve complex equitable distribution issues, the plaintiff is entitled to the protections afforded her in DR5-108 (A) (1). It is therefore

ORDERED, the defendant's application to have the plaintiff's firm disqualified from this matter is granted. The defendant shall have 30 days from the date of service of this Order to retain new counsel. Until such time, the matter is held in abeyance and the matter is placed on the conference calendar for March 15, 2018 at 9:30 a.m.

All other arguments raised by the defendant in his Cross-Motion (MOT 010) seeking sanctions and raising claims of res judicata and estoppel are denied

The foregoing constitutes the Order of this Court.

Dated: February 13, 2018

Hon. Glenn A. Murphy, A.J.S.C.