

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL**

MINUTE ORDER

DATE: 08/31/2020

TIME: 11:35:00 AM

DEPT: C-74

JUDICIAL OFFICER PRESIDING: Ronald L. Styn

CLERK: Kim Mulligan

REPORTER/ERM: Not Reported

BAILIFF/COURT ATTENDANT:

CASE NO: **37-2019-00066633-CU-FR-CTL** CASE INIT.DATE: 12/13/2019

CASE TITLE: **Kim Funding LLC vs Chicago Title Company [E-FILE]**

CASE CATEGORY: Civil - Unlimited CASE TYPE: Fraud

EVENT TYPE: Motion Hearing (Civil)

APPEARANCES

The Court, having taken the above-entitled matter under submission on 08/28/2020 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

After taking this matter under submission, the court confirms and modifies its tentative ruling as follows.

Defendants Chicago Title Company and Chicago Title Insurance Company's motion to disqualify Latham & Watkins, LLP, counsel for Plaintiffs Kim Funding, LLC, Kim H. Peterson, Joseph J. Cohen, ABC Funding Strategies, LLC, Payson R. Stevens, Kamaljit K. Kapur and the Payson R. Stevens and Kamaljit Kaur Kapur Trust is GRANTED.

Relying on the rules of disqualification applicable to successive representations set forth in cases including *Flatt v. Superior Court* (1994) 9 Cal.4th 275 and *Jessen v. Hartford Casualty Ins. Co.* (2003) 111 Cal.App.4th 698, both sides spend a considerable amount of time on the issue of whether there is a "substantial relationship" between this matter and the "Norton Scheme" cases in which Latham represented Chicago Title. However, Chicago Title also relies on authorities recognizing that

"[a] former client may seek to disqualify a former attorney from representing an adverse party by showing the former attorney actually possesses confidential information adverse to the former client." (*H.F. Ahmanson & Co. v. Salomon Bros.* (1991) 229 Cal.App.3d 1445, 1452, 280 Cal.Rptr. 614 (*Ahmanson*)). There is no strict requirement of precise relationship between the factual and legal issues of the two cases. "[T]he attorney may acquire confidential information about the client or the client's affairs which may not be directly related to the transaction or lawsuit at hand but which the attorney comes to know in providing representation to the former client with respect to the previous lawsuit or transaction." (*Jessen, supra*, 111 Cal.App.4th at p. 712, 3 Cal.Rptr.3d 877.)

Costello v. Buckley (2016) 245 Cal.App.4th 748, 754. *Costello* specifically confirms that "the substantial relationship presumption is only required when the former client cannot independently establish that the attorney acquired confidential information in the first case that could be used in the successive case." *Costello*, 245 Cal.App.4th at 755.

Chicago Title submits evidence that Latham's representation of Chicago Title in the Norton Scheme cases spanned a period of approximately 4-years, during which time over 41,670 hours were incurred by over 80 different timekeepers, and included: extensive discovery, deposition preparation of Chicago Title employees; a four-month jury trial; advice on related insurance coverage litigation; discussions with Chicago Title personnel about Chicago Title policies, procedures, memoranda and training materials relating to escrow accounts, employee training, duties and oversight, fraud identification and prevention, audits and investigations; business operations; business practices; Chicago Title's financial condition; Chicago Title's litigation and settlement strategies; Latham's direction of two separate mock jury exercises involving feedback from mock jurors about Chicago Title's roles and liability and whether Chicago Title followed its own procedures, and evaluation of which types of jurors are most likely to side with Chicago Title or plaintiffs; a focus group analysis; evaluation of the strength and weaknesses of Chicago Title employee witnesses; debriefing of jurors in the Norton Scheme cases; and knowledge of Chicago Title's negotiations with its insurers to obtain coverage for certain claims.

In opposition John T. Ryan, one of the attorneys at Latham who represented Chicago Title in the Norton Scheme cases, addresses the issue of Latham's possession of confidential information from Chicago Title. Attorney Ryan states:

5. At the time of the Norton trial that is the subject of Chicago Title's motion, I was an associate attorney at Latham. I am unaware of any confidential information from my prior representation of Chicago Title in the Norton case that was tried in 2010 that is "directly at issue" or of "critical importance" in the current litigation.

Ryan does not address the issue of whether Latham is in possession of confidential information adverse to Chicago Title. Use of limiting words "directly at issue" and "critical importance" are relevant to an analysis of whether there is a "substantial relationship" between this matter and the Norton Scheme matter for purposes of applying the presumption that an attorney possesses confidential information, but is insufficient to rebut evidence that Latham acquired confidential information about Chicago Title during its representation of Chicago Title in the Norton Scheme cases that is adverse to Chicago Title in this case. Absent specifically addressing this issue, Latham fails to rebut Chicago Title's evidence that Latham is in possession of confidential information from the Norton Scheme cases that is adverse to Chicago Title in this case.

The court is not persuaded by Plaintiffs' efforts to distinguish *Costello*. The facts, while perhaps unique, are analogous to those in this case. While the attorney in *Costello* did not dispute his receipt of confidential information in the prior case, Latham has not denied that it received confidential information about Chicago Title in the Norton Scheme cases. As with the attorney's possession of confidential information about the plaintiff's romantic relationship with the defendant at issue in *Costello*, information the court found could be used by the defendant to defeat the plaintiff's claim, the evidence before the court is that Latham is in possession of confidential information about Chicago Title that Plaintiffs could use in this case in pursuit of their claims against Chicago Title. To the extent Latham applies a "material/critical importance" standard to an attorney's actual possession of confidential information, nothing in *Costello* or the other authorities set forth above contain such a requirement. Rather, as

Costello explains, the attorney's "disqualification is required if in the course of his previous representation of [the plaintiff], [the attorney] *may have acquired* information that *could be used* against [plaintiff] in his subsequent representation of another client." *Costello*, 245 Cal.App.4th at 756. *Costello* concludes "[t]he evidence in this case demonstrates that both requirements are met." *Costello* 245, Cal.App.4th at 756. Similarly, the evidence before the court establishes that Latham acquired information about Chicago Title in the Norton Scheme cases that could be used by Plaintiffs against Chicago Title in this case. The evidence shows that such information, including information derived from mock jury trials on issues specific to Chicago Title, and information as to Chicago Title's financial condition, goes beyond Chicago Title's "play-book." In this circumstance, the court exercises its discretion in favor of disqualification of Latham.

At oral argument Plaintiffs again relied on *City and County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839 and argued for application of the substantial relationship test. Following oral argument, the court re-read this case. The court finds *City and County of San Francisco* requires disqualification of Latham under the substantial relationship test as well.

To determine whether there is a substantial relationship between successive representations, a court must first determine whether the attorney had a direct professional relationship with the former client in which the attorney personally provided legal advice and services on a legal issue that is closely related to the legal issue in the present representation. (*Jessen v. Hartford Casualty Ins. Co.* (2003) 111 Cal.App.4th 698, 710–711, 3 Cal.Rptr.3d 877.) If the former representation involved such a direct relationship with the client, the former client need not prove that the attorney possesses actual confidential information. (*Id.* at p. 709, 3 Cal.Rptr.3d 877.) Instead, the attorney is presumed to possess confidential information if the subject of the prior representation put the attorney in a position in which confidences material to the current representation would normally have been imparted to counsel. (*Flatt, supra*, 9 Cal.4th at p. 283, 36 Cal.Rptr.2d 537, 885 P.2d 950; *Adams v. Aerojet–General Corp.* (2001) 86 Cal.App.4th 1324, 1332, 104 Cal.Rptr.2d 116; *H.F. Ahmanson & Co. v. Salomon Brothers, Inc.* (1991) 229 Cal.App.3d 1445, 1453–1454, 280 Cal.Rptr. 614.)

City and County of San Francisco, 38 Cal.4th at 847.

In this case it is undisputed that Latham attorneys, including attorney Ryan, had a direct professional relationship with various Chicago Title personnel including Senior Vice President and Deputy Chief Legal Officer, Mark E. Schiffman. Based on the evidence presented, including the evidence set forth above, the court finds Chicago Title establishes that the legal advice and services provided by Latham to Chicago Title in the Norton Scheme cases was on legal issues closely related to the legal issues in this case. The court also finds that the subject of Latham's representation of Chicago Title in the North Scheme cases put Latham in a position in which confidences material to Latham's current representation of Plaintiffs would normally have been imparted to Latham. Under *City and County of San Francisco* and the authorities cited therein, Latham is presumed to possess confidential information of Chicago Title. Therefore, the court exercises its discretion in favor of disqualification of Latham on this basis as well.

All matters set for hearing on September 18, 2020, in this and the related cases, are vacated. The court will hear from the parties regarding the rescheduling of these motions, (and any other motions the parties believe should be heard at the same time) at the Status Conference. Plaintiffs shall advise the court of the identify of their new counsel at or before the Status Conference.

IT IS SO ORDERED.



Judge Ronald L. Styn