SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

789

CA 22-01969

PRESENT: SMITH, J.P., LINDLEY, MONTOUR, GREENWOOD, AND DELCONTE, JJ.

BRANDICE M.C., INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF JAC, A MINOR, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JOYCE M. WILDER, C.N.M., DEFENDANT-APPELLANT, ET AL., DEFENDANTS.

MARTIN, GANOTIS, BROWN, MOULD & CURRIE, P.C., DEWITT (CHARLES E. PATTON OF COUNSEL), FOR DEFENDANT-APPELLANT.

PORTER LAW GROUP, SYRACUSE (MARY E. LANGAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Jefferson County (James P. McClusky, J.), entered October 24, 2022. The judgment granted the motion of plaintiff for a declaration that Porter Nordby Howe LLP, should not be disqualified from representing plaintiff, and denied the cross-motion of defendant Joyce M. Wilder, C.N.M., to disqualify that law firm.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the motion is denied, and the cross-motion is granted.

Memorandum: Plaintiff commenced this medical malpractice action alleging that Joyce M. Wilder, C.N.M. (defendant) was negligent and deviated from the applicable standards of care in, inter alia, failing to manage plaintiff's labor and delivery in a proper and adequate manner. The signatory on the complaint and the CPLR 3012-a certificate of merit was Daniel P. Laraby, Esq., of the law firm Porter Nordby Howe LLP (Porter firm). Shortly after commencement of the action, counsel for defendant, Charles E. Patton, Esq. of the law firm Martin, Ganotis, Brown, Mould & Currie, P.C. (Martin firm), asked Laraby to disqualify himself and the Porter firm from representing plaintiff based on the fact that Laraby had previously represented defendant in another case involving substantially similar allegations during his prior employment with the Martin firm. Another attorney at the Porter firm responded that the firm would not disqualify itself from the case and noted that he took Laraby "off th[e] case." Plaintiff then moved for a judgment declaring that the Porter firm should not be disqualified as counsel for plaintiff, and defendant cross-moved to disqualify the Porter firm from representing plaintiff.

Supreme Court granted the motion and denied the cross-motion, and we now reverse.

"Although [a] party's entitlement to be represented by counsel of [their] choice is a valued right which should not be abridged absent a clear showing that disqualification is warranted . . . , [t]he right to counsel of choice is not absolute and may be overridden where necessary" (*Jozefik v Jozefik*, 89 AD3d 1489, 1490 [4th Dept 2011] [internal quotation marks omitted]). Rule 1.9 of the Rules of Professional Conduct (22 NYCRR 1200.0) provides that "[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]). It further provides as relevant here that 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]).

As the above rule reflects, "[a]ttorneys owe fiduciary duties of both confidentiality and loyalty to their clients" (*Tekni-Plex, Inc. v Meyner & Landis*, 89 NY2d 123, 130 [1996], *rearg denied* 89 NY2d 917 [1996]; *see Kassis v Teacher's Ins. & Annuity Assn.*, 93 NY2d 611, 615-616 [1999]). 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.*, 89 NY2d at 131; *see Kassis*, 93 NY2d at 615-616; *Solow v Grace & Co.*, 83 NY2d 303, 308 [1994]). "[S]uch 'side switching' clearly implicates the policies both of maintaining loyalty to the first client and of protecting that client's confidences" (*Kassis*, 93 NY2d at 616).

"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. This prophylactic measure thus frees clients from apprehension that information imparted in confidence might later be used to their detriment, which, in turn, 'fosters the open dialogue between lawyer and client that is deemed essential to effective representation' " (*Tekni-Plex, Inc.*, 89 NY2d at 131). "[A]ny doubts about the existence of a conflict should be resolved in favor of disqualification so as to avoid the appearance of impropriety" (*Severino v DiIorio*, 186 AD2d 178, 180 [2d Dept 1992]; *see McCutchen v 3 Princesses & AP Trust Dated Feb. 3, 2004*, 138 AD3d 1223, 1226 [3d Dept 2016]).

"The party seeking disqualification of a law firm or an attorney bears the burden of making a clear showing that disqualification is warranted" (*HoganWillig, PLLC v Swormville Fire Co., Inc.*, 210 AD3d 1369, 1372-1373 [4th Dept 2022] [internal quotation marks omitted];

see Kelleher v Adams, 148 AD3d 692, 692-693 [2d Dept 2017]; *Lake v Kaleida Health*, 60 AD3d 1469, 1470 [4th Dept 2009]), and "a trial court's decision to disqualify a law firm or an attorney shall be reviewed on appeal for abuse of discretion" (*HoganWillig, PLLC*, 210 AD3d at 1373; *see Goldberg & Connolly v Upgrade Contr. Co., Inc.*, 135 AD3d 703, 704 [2d Dept 2016]; *Jozefik*, 89 AD3d at 1490).

We agree with defendant that she met her initial burden on her cross-motion of establishing all three criteria, thus giving rise to an irrebuttable presumption that Laraby is disqualified from representing plaintiff in this matter (*see generally Tekni-Plex, Inc.*, 89 NY2d at 131; *Solow*, 83 NY2d at 313; *Moray v UFS Indus., Inc.*, 156 AD3d 781, 782 [2d Dept 2017]). There is no dispute that there was a prior attorney-client relationship between Laraby and defendant and that the interests of plaintiff and defendant are materially adverse. The only dispute is whether the matters involved in both representations are substantially related. To meet that requirement, the moving party has " 'to establish that the issues in the present litigation are identical to or essentially the same as those in the prior representation or that [counsel] received specific, confidential information substantially related to the present litigation' " (*Benevolent & Protective Order of Elks of United States of Am. v Creative Comfort Sys., Inc.*, 175 AD3d 887, 888 [4th Dept 2019]; *see NYAHSA Servs., Inc., Self-Ins. Trust v People Care Inc.*, 156 AD3d 1205, 1206 [3d Dept 2017]; *Gustafson v Dippert*, 68 AD3d 1678, 1679 [4th Dept 2009]; *see also Anonymous v Anonymous*, 262 AD2d 216, 216 [1st Dept 1999]).

We conclude that defendant established that the issues in the present and prior litigation are identical or essentially the same (*see generally Solow*, 83 NY2d at 305, 313). The plaintiff in the prior representation, whose baby had suffered from essentially the same injuries as plaintiff's son here, made many of the same allegations of negligence and malpractice against defendant as plaintiff does in this case. Both cases involved whether defendant properly monitored the patients and the babies and made proper decisions regarding oxytocin administration, and whether defendant made the proper decision to continue with vaginal delivery instead of proceeding with a cesarean section. Alternatively, defendant established that Laraby received specific, confidential information in the prior litigation that is substantially related to the present litigation (*see Clairmont v Kessler*, 269 AD2d 168, 169 [1st Dept 2000]; *Severino*, 186 AD2d at 179-180). In particular, Laraby had access to the litigation strategy to defend defendant against the allegations of malpractice, including speaking with and receiving reports of expert witnesses.

We further agree with defendant that inasmuch as Laraby is disqualified, the Porter firm is also disqualified. Under the general rule, "where an attorney working in a law firm is disqualified from undertaking a subsequent representation opposing a former client, all the attorneys in that firm are likewise precluded from such representation" (*Kassis*, 93 NY2d at 616). "[T]he rule of imputed disqualification [of the law firm] reinforces an attorney's ethical

obligation to avoid the appearance of impropriety" (*id.*; *see also Tekni-Plex, Inc.*, 89 NY2d at 131). Although there is a presumption that the entire law firm is disqualified, the presumption may be rebutted (*see Kassis*, 93 NY2d at 616-618; *Solow*, 83 NY2d at 313; *Moray*, 156 AD3d at 783). The party seeking to avoid disqualification must prove that any information acquired by the disqualified lawyer is unlikely to be significant or material to the litigation and that the law firm erected an ethical wall around the disqualified attorney (*see Kassis*, 93 NY2d at 617; *Matter of Yeomans v Gaska*, 152 AD3d 1040, 1041 [3d Dept 2017]). Here, plaintiff failed to rebut that presumption of disqualification. Moreover, the Porter firm cannot now erect an ethical wall to separate Laraby from the case (*see generally Moray*, 156 AD3d at 783-784). He has already been involved in the present matter inasmuch as he was the signatory to the complaint and signed the certificate of merit. In addition, the Porter firm is a small law firm, and it did not set forth what measures it was taking in regards to an ethical wall (*see Yeomans*, 152 AD3d at 1042). The attorney now handling the case simply stated that Laraby was "taken . . . off this case."

We therefore conclude that the court abused its discretion in granting the motion and denying the cross-motion for disqualification.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court