

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA Part 2
Justice

	<u>x</u>	
PAMELA BRANDES, etc.,		Index Number <u>5965</u> 1997
Plaintiff,		Motion Date <u>November 7,</u> 2007
- against -		
NORTH SHORE UNIVERSITY HOSPITAL, et al.,		Motion Cal. Numbers <u>2 & 3</u>
Defendants.		Motion Seq. Nos. <u>57 & 58</u>
	<u>x</u>	

Motions bearing calendar numbers 2 and 3 are consolidated for disposition. The following papers numbered 1 to 5 were read on this: (1) motion by defendant Dan Seth Reiner for an order permitting him to renew a previous motion which sought to disqualify the plaintiff's attorney, Norman Leonard Cousins, Esq., from further representation of the plaintiff in this action; (2) motion by defendants North Shore University Hospital, I. Michael Leitman, M.D., Larry Frankini, M.D., and Robert Allen Cherry, M.D. for an order permitting them to renew their previous motion to disqualify the plaintiff's attorney, Norman Leonard Cousins, Esq., from further representation of the plaintiff in this action; and (3) on this cross motion by defendant Guy L. Mintz M.D. for an order permitting him to renew a previous motion to disqualify the plaintiff's attorney, Norman Leonard Cousins, Esq., from further representation of the plaintiff in this action.

	Papers Numbered
Order to Show Cause - Affidavits - Exhibits	1
Notice of Motion - Affidavits - Exhibits	2
Notice of Cross Motion - Affidavits- Exhibits....	3
Answering Affidavits - Exhibits	4
Reply Affidavits	5

Upon the foregoing papers it is ordered that the motions and the cross motion are disposed of as follows:

The plaintiff Pamela Brandes ("Brandes"), as Personal Representative of the Estate of Robert Brandes, commenced this action on or about March 12, 1997, seeking damages for medical malpractice and the wrongful death of her husband. According to Brandes, her husband died as a result of complications that arose as a result of a laparoscopic cholecystectomy to remove his gall bladder, which procedure was converted to an open cholecystectomy. The procedure was performed at defendant North Shore University Hospital ("the hospital"). Brandes alleges that the various individual defendants participated in some aspect of her husband's care and treatment (collectively, "the doctors").

By retainer agreement dated November 23, 1996, Brandes and her husband retained Norman Leonard Cousins, Esq. ("Cousins") and Fred Rosenberg to prosecute this action on a contingency fee basis ("the Brandes action"). (Robert Brandes died shortly after the institution of the action.) According to Cousins, Brandes also executed a Litigation Financing Agreement which obligates her to pay interest at 15% per annum on all disbursements that Cousins advances on her behalf.

The hospital and some of the doctors are represented by the law firm of Fumuso, Kelly, DeVerna, Snyder, Swart & Farrell, LLP ("the Fumuso firm").

During the pendency of the Brandes action, on October 7, 2002, the Fumuso firm received a letter from Thomas A. DeClemente, Esq., of the law firm DeClemente & Associates (collectively, "DeClemente").

DeClemente enclosed a Notice of Assignment that he alleged was executed by Cousins in favor of Legal Asset Funding, LLC ("Legal Asset"), assigning all legal fees that Cousins might recover in the Brandes action. DeClemente informed the Fumuso firm that when and if the Brandes action was resolved, whether by settlement, judgment or other means, all legal fees due to Cousins should be forwarded to Legal Asset, care of him.

The Notice of Assignment recites, inter alia, that on August 16, 2001, pursuant to a separate agreement of the same date, Cousins transferred and assigned to Legal Asset, a portion of his right, title and interest in and to his share of the law firm fee recovery, judgment or settlement in the Brandes action, in the amount of \$1 million or any statutorily-permitted recovery.

On or about May 19, 2003, DeClemente sent to the Fumso firm a second letter and a UCC Financing Statement filed on or about January 22, 2002, which indicated that Legal Asset had a secured

interest in "Anticipated attorney's Fees (\$666,666.66) pursuant to the settlement in [the Brandes action]." DeClemente eventually also sent the Fumuso firm the first and last page of the alleged Legal Asset/Cousins contract, entitled "Assignment of Settlements and Limited Irrevocable Power of Attorney" ("assignment agreement") which indicated that Cousins assigned his interest in legal fees in the Brandes action, in the action entitled Veneski v Queens - Long Island Medical Group, P.C. ("the Veneski action"), and his interest in legal fees for 10 other pending litigations in federal and New York State courts.

In January and February, 2003, Core Funding Group, L.P. ("Core Funding") informed the Fumuso firm that it had a loan and security agreement with Cousins, granting it a security interest in Cousins' prospective attorney's fees in the Brandes action. Core Funding's security agreement recites that in exchange for the sum of \$140,667.81, Cousins pledged the attorney fees arising from the Veneski action, the Brandes action and a third action which was not listed in the Legal Asset assignment agreement.

On or about July 28, 2003, Core Funding commenced an action by order to show cause in the United States District Court, Southern District of New York ("SDNY"), naming Cousins, DeClemente, Legal Asset, the hospital and others as defendants (see, Core Funding Group, LLC v Norman Leonard Cousins, et al., 03 Civ. 5575 (SDNY) ("the federal action")). In the order to show cause, Core Funding sought to, inter alia, (1) restrain certain defendants from paying to Cousins or other parties any portion of Cousins' attorney's fee arising from the settlement in the Veneski action; (2) enjoin Cousins and others from transferring certain collateral to DeClemente or Legal Assets; and (3) require the defendants in the Brandes action to deposit with the court any legal fees arising from a future settlement or judgment.

In a supporting declaration, Core Funding's President indicated that after Core Funding's loans to Cousins went into default, he learned from the defendants in the Brandes action and other actions that DeClemente was claiming the same collateral. When confronted with documents, Cousins admitted that he had used the same collateral pledged to Core Funding to borrow money from DeClemente.

When Core Funding learned that Cousins had executed an assignment directing that his entire fee in the Veneski action be paid to Legal Asset, Core Funding commenced the federal action to protect its collateral. On or about September 4, 2003, Core Funding discontinued and dismissed the federal action against the hospital. By letter dated December 8, 2003, the attorneys for Core

Funding informed the federal court that the federal action had been settled pursuant to a stipulation and order of dismissal.

On December 17, 2003, defendant North Shore Hospital and several of the defendant doctors submitted a motion for an order disqualifying attorney Cousins from representing plaintiff Brandes. They argued that (1) although a cause of action belongs exclusively to the client, the nature of Cousins' financial dealings gave him an interest in the Brandes action; (2) Cousins sold his interest in the Brandes action twice, thereby breaching his pledge to Core Funding and, as Cousins is personally liable on the debt to Core Funding he is no longer a disinterested lawyer; (3) although an attorney is permitted to obtain a loan to finance anticipated disbursements, more than disbursements are being funded in the Brandes action; (4) in pledging potential settlement or judgment funds, Cousins is sharing legal fees with Legal Asset, a non-lawyer; (5) by commingling numerous cases as security for various loans, Cousins made each client a surety for the others; (6) Cousins cannot exercise his best professional judgment solely on behalf of his clients, and free from all competing interests, as a client might wish to pursue litigation, while Cousins might wish to take an attractive settlement offer to satisfy his debts; (7) because the hospital and Cousins were named as defendants in the federal action, they incurred additional legal fees unrelated to the Brandes action and solely as the result of Cousins' personal financial dealings; (8) notwithstanding Brandes' alleged agreement to pay 15% interest on amounts expended for disbursements, the interest rates on the loans from Core Funding and Legal Asset to Cousins are exorbitant, if not usurious, as they contemplate a 60-70% interest rate; (9) there is no legal authority for Cousins' practice of assigning or pledging potential legal fees in contingency matters; and, (10) even though the federal action was dismissed, the counterclaims, cross claims and third-party action interposed by Legal Asset against Cousins remain viable.

Cousins opposed the motion, asserting, inter alia, that: (1) there is no ethical or legal conflict created by an attorney who assigns post-judgment or post-settlement attorney's fees to a third-party lender to finance litigation expenses and assist with cash flow, and courts of other states permit such assignments; (2) there was no conflict of interest as Brandes is not a party to any of the contracts, and Cousins does not have an interest in her causes of action; (3) litigation financing "levels the playing field" and enables plaintiffs to go head-to-head with major insurance companies; and (4) DeClemente had forged the Notice of Assignment in an attempt to divert the funds from the Veneski settlement to himself, and his activities had resulted in the federal action which was voluntarily dismissed and discontinued

when Core Funding was satisfied that DeClemente had committed that forgery.

In a fifteen page decision and short form order (one paper) dated January 5, 2004, this court denied the disqualification motion. The court noted that "[w]here a lawyer possesses a personal, business or financial interest at odds with that of his client, the lawyer may not act on behalf of the client as the conflict is too substantial, and the possibility of adverse impact upon the client and the adversary system too great, to allow the representation (see, Greene v Greene, [47 NY2d 447, 452], citing, DR 5-101[A])." After discussing the nature and purpose of a contingency fee and the right of a litigant to assign the proceeds of personal injury claims prior to judgment or settlement, the court stated that an attorney may "assign the future right to receive legal fees upon settlement or judgment, even though the fee may be uncertain, doubtful or contingent (see, Williams v Ingersoll, 89 NY 508; Pomona Enters., Ltd. v Mellen, 30 AD2d 704; GOL § 13-101). Such an assignment is treated as an executory contract for the transfer of a future fund upon which specific performance will be granted when the fund comes into existence (see, Williams v Ingersoll, supra; Aponte v Maritime Overseas Corp., [300 F Supp 1075].)" The court subsequently noted that in order to assist a client with the expenses of litigation, "an attorney may refer the client to a lending institution which would then assess the value of the client's claim and take a lien on the proceeds of the claim to secure a loan to the client (see, NY St Bar Assn Comm on Prof Ethics, Op 666 [73-93] [1994])" or, "[i]n the alternative, an attorney may charge the client interest on the unreimbursed expenses of litigation, to cover the interest paid to the bank from which the attorney borrows to pay those expenses (see, NY St Bar Assn Comm on Prof Ethics, Op 754 [2002]; Bar Assn of City of NY Comm on Prof & Jud Ethics, Op 2000-2 [undated]; Bar Assn of City of NY Comm on Prof & Jud Ethics, Op 1997-1 [1997])." The court concluded: "the contention by the hospital and the doctors that Cousins obtained an improper financial interest in the Brandes action solely as a result of the assignments of his right to future legal fees, or that an actual or potential conflict of interest was created thereby, is rejected (see, e.g., DR 5-103, 5-104; 22 NYCRR §§ 1200.22, 1200.23). Also rejected is the contention that the assignment of the right to attorney's fees constitutes "fee splitting" under the circumstances presented in this case. Similarly, there is no evidence that the financial dealings at issue affect Cousins' professional judgment on behalf of Brandes (see, DR 5-101)." The court found no merit in any of the arguments advanced by the proponents of the disqualification motion.

On appeal the, Appellate Division, Second Department, affirmed this court's order denying the disqualification motion, holding tersely : "Under the circumstances of this case, the Supreme Court providently exercised its discretion in denying the appellants' motion to disqualify the plaintiff's counsel (see Aryeh v Aryeh, 14 AD3d 634 [2005]; Olmoz v Town of Fishkill, 258 AD2d 447 [1999]; see also General Obligations Law § 13-101; Code of Professional Responsibility DR 5-101 [a]; 5-103 [b] [1] [22 NYCRR 1200.20 (a); 1200.22 (b) (1)]; NY St Bar Assn Comm on Prof Ethics Op 754 [2002]; Bar Assn of City of NY Comm on Prof & Jud Ethics, Formal Op 1997-1). We note that contrary to the plaintiff's contention, the appellants had standing to move to disqualify her attorney (see generally Code of Professional Responsibility DR 1-103 [22 NYCRR 1200.4]; Matter of Waldman v Waldman, 118 AD2d 577 [1986])." (Brandes v North Shore University Hosp., 22 AD3d 439, 439-440 [Oct. 03, 2005].)

On November 7, 2007, some of the defendants submitted the instant motions and cross motion for the purpose of renewing the application to disqualify the plaintiff's attorney. The court notes that the plaintiff began this action on March 12, 1997 and that the plaintiff filed a note of issue on July 9, 2003.

The defendants are given leave to renew. Renewal is warranted because the movants have attempted to place new facts before the court which were not known to them at a prior time. (See, CPLR 2221[e]; N.A.S. Partnership v Kligerman, 271 AD2d 922; Wagman v Village of Catskill, 213 AD2d 775.)

The movants allege that they now have learned that (1) Cousins induced Brandes to act as a surety for another client and (2) Brandes has guaranteed a loan to Cousins himself. Cousins represented Kevin Veneski and Juanita Veneski in a medical malpractice action pending in the New York State Supreme Court, New York County (Veneski v Queens-Long Island Medical Group, P.C.). Cousins borrowed funds to finance the litigation. In November 2002, during the second trial, the parties settled the case on the basis of a recovery of \$3,000,000 in cash and an annuity to be purchased at the cost of \$369,472. On January 30, 2007, The Honorable Sherry Klein Heitler rendered a decision on a motion for an order to increase counsel fees, pursuant to Judiciary Law § 474-a, by Cousins, then the former attorney for the Veneskis, and on a cross motion by the Veneskis for an order finding that Cousins owed them \$1,231,061.89 for moneys taken from them (Veneski v Queens-Long Island Medical Group, P.C., 2007 WL 852109 [n.o.r.] [NY Sup, (January 30, 2007)]). Describing financial dealings between Cousins and the Veneskis after the settlement, the court noted the following; "According to {Kevin} Veneski, Cousins then

'demanded' that Veneski lend him \$65,000 in cash; Veneski reluctantly agreed, and withdrew \$65,000, which he gave to Cousins. In return, Veneski received a promissory note for \$65,000, not from Cousins, but from Cousins's client in another medical malpractice case, Pamela Brandes." During the course of the decision, the judge stated: "With respect to Veneski's alleged loan to Cousins, although the alleged loan does not relate directly to the relief requested in the motion and cross motion before this court, if, as Veneski alleges, Cousins pressured Veneski to lend him money, and did not advise his client to seek the advice of independent counsel with respect to that loan, a serious question exists regarding whether Cousins's actions constituted professional misconduct. (See Matter of Gebo, 19 AD3d 932 (3d Dept 2005); Matter of Leff, 275 A.D.2d 135 (1st Dept 2000); Matter of Farrington, 270 A.D.2d 710 (3d Dept 2000); DR 1-102 (22 NYCRR 1200.3[a][5],[7]); DR 5-104 (22 NYCRR 1200.23[a]). The court will, therefore, refer that matter to the Disciplinary Committee of the Appellate Division, First Department, for further inquiry. In so doing, the court notes that on January 2, 2007, Harris D. Leinwand, the current attorney for the Veneskis, filed a complaint with the Disciplinary Committee regarding the alleged loan, as well as other actions by Cousins in connection with his representation of the Veneskis."

The note referenced in the Veneski decision, dated August 27, 2004, evidences a promise made by Pamela Brandes to pay Kevin Veneski \$65,000 in three years with interest calculated at 15% per annum.

The movants again argue that the financial transactions engaged in by Cousins create a conflict of interest with his client in violation of DR 5-101 (22 NYCRR 1200.20) which provides: "(a) A lawyer shall not accept or continue employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests ***." (See, In re DeSousa, 36 AD3d 121.) The movants rely on the same expert's affidavit submitted on the previous disqualification motion. The papers submitted by the movants largely rehash facts and arguments previously placed before this court and the Appellate Division. The papers submitted by the movants also recount alleged acts of misconduct by Cousins in other medical malpractice cases besides Veneski, and although the allegations are disturbing, they are not relevant enough here or different enough from activities previously brought to this court's attention to warrant a change in the earlier disposition. The court also notes that Cousins' activities in the Veneski action have already been referred by the judge in that case to the Disciplinary Committee of the Appellate Division, First Department. In regard to the relevant new matter, Cousins has offered evidence

that Mr. Veneski made his loan to Brandes, not to Cousins himself. The movants do not cite a specific Disciplinary Rule which clearly prohibits a lawyer's client in one case from making a loan to his client in another case. Moreover, Pamela Brandes has submitted an affidavit expressing disapproval of yet another attempt to disqualify her attorney in this case which has been pending for approximately ten years. She swears that she had become familiar with the Veneskis as their and her malpractice cases progressed and that after the Veneski case settled, Mr. Veneski "offered to assist me with defraying the expenses of my litigation. *** Mr. Veneski agreed to lend me \$65,000 at 15% interest per annum. The entire sum was deposited in my bank account. I personally wrote out a promissory note to Kevin Veneski dated August 27, 2004 and sent it to him. *** The note has been fully satisfied and my obligation to Kevin Veneski extinguished." Under all of these circumstances, the court finds no reason to alter the disposition of the prior motions to disqualify.

Accordingly, upon renewal, the motions and cross motion are denied.

Dated:1/8/08

J.S.C.