

**Baker, Sanders, Barshay, Grossman, Fass,
Muhlstock & Neuwirth, LLC v Comprehensive
Mental Assessment & Med. Care, P.C.**

2012 NY Slip Op 31228(U)

April 24, 2012

Supreme Court, Nassau County

Docket Number: 16008-07

Judge: Vito M. DeStefano

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SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,
Justice

TRIAL/IAS, PART 15
NASSAU COUNTY

**BAKER, SANDERS, BARSHAY, GROSSMAN,,
FASS, MUHLSTOCK & NEUWIRTH, LLC,**

Decision and Order

Plaintiffs,

**MOTION SUBMITTED:
February 22, 2012
MOTION SEQUENCE:21
INDEX NO. 16008-07**

-against-

**COMPREHENSIVE MENTAL ASSESSMENT
& MEDICAL CARE, P.C., ALL MENTAL CARE
MEDICINE, P.C., POINTS OF HEALTH
ACUPUNCTURE, P.C., HORIZON PSYCHOLOGICAL
SERVICES, P.C., ART OF HEALING MEDICINE,
P.C., LUBARSKY & TARNOVSKY, P.C.,**

Defendants,

-and-

**ROBERT BAKER, DOUGLAS SANDERS, DAVID
BARSHAY, MARC GROSSMAN and TODD FASS,**

**Additional Defendants
On the counterclaims.**

**BAKER, SANDERS, BARSHAY, GROSSMAN, FASS,
MUHLSTOCK & NEUWIRTH, LLC,**

Third-Party Plaintiff

-against-

NICHOLAI MINKIN, a/k/a NICHOLAS MINKIN,

a/k/a NICK MINKIN, a/k/a NICK MILANI,

Third-Party Defendant

The following papers and the attachments and exhibits thereto have been read on this motion:

Notice of Motion	1
Affirmation in Opposition	2
Affidavit in Reply	3

David Barshay (“Barshay”) moves for an order pursuant to CPLR 321(c) disqualifying the law firm of Gusrae Kaplan Nusbaum, PLLC (the “Firm”) upon the ground that the Firm’s representation of Defendants Comprehensive Mental Assessment & Medical Care, P.C., All Medical Care Medicine, P.C., Points of Health Acupuncture, P.C., Horizon Psychological Services, P.C., and Art of Healing Medicine, P.C. (collectively referred to as “Medical Providers”) and Third-party Defendant Nicholai Minkin, a/k/a Nicholas Minkin, a/k/a Nick Minkin, a/k/a Nick Milani (“Minkin”) is in violation of Rule 1.7(a) of the Rules of Professional Conduct.

For the reasons that follow, Barshay’s motion is granted.

In the instant action to recover damages for breach of contract and quantum meruit, the Medical Providers asserted counterclaims against additional defendants Robert Baker, Douglas Sanders, David Barshay, Marc Grossman and Todd Fass. The counterclaims seek damages for, *inter alia*, legal malpractice, gross negligence, negligent misrepresentation, fraud and breach of fiduciary duty.

Barshay, a defendant on the counterclaims, thereafter commenced a third-party action (the third-party action) against Minkin asserting claims for fraud and indemnification (Ex. “A” to Motion).¹ According to Barshay, “if the Medical Provider Defendants/Counterclaim Plaintiffs have been caused damages as set forth in their Counterclaims, such damages were sustained by reason of the acts and/or omissions of Mr. Minkin in acting beyond the alleged agency authority granted to him by the Medical Provider Defendants/Counterclaim Plaintiffs, rather than by any acts of [Barshay]. As such, [Barshay] seeks indemnification from Mr. Minkin” (Affirmation in Support at ¶ 5).

¹ Each of the defendants on the counterclaims commenced a third-party action against Minkin.

Barshay thereafter served the instant motion seeking to disqualify the Firm based upon its simultaneous representation of Minkin and the Medical Providers.² The crux of the adversarial interests concern Minkin's purported authority to approve settlements on behalf of the Medical Providers. The Medical Providers assert that Minkin was not authorized to approve settlements (Ex. "F" at pp 172-73), while the Third-party Plaintiffs claim that Minkin was the person with whom they spoke and that he had "authority to make decisions" (Ex. "G" to Motion at p 53).³

In opposition to the motion, the Firm argues that the premise of the third-party action, namely, that Minkin authorized the Third-party Plaintiffs to enter into the "illicit settlements", has no basis in fact and is without merit and, thus, there is no conflict of interest. Specifically, the Firm argues that Minkin was never authorized to enter into any settlement nor was any such representation made. The Firm further argues that the purported illegal settlements at issue occurred after the Third-party Plaintiffs were terminated in October 2005 and that there is no evidence that any of the Medical Provider Defendants approved the "illegal settlements at issue here" or even communicated with the Third-party Plaintiffs after their termination (Minkin Affidavit in Opposition at ¶10).⁴

The Court's Determination

Barshay's motion for disqualification of the Firm is based upon Rule 1.7 of the Rules of Professional Conduct, which provides:

Rule 1.7 Conflict of Interest; Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:

(1) the representation will involve the lawyer in representing differing

² David Barshay had served a prior motion to disqualify The Law Office of Roman Popik ("Popik") but that motion was subsequently withdrawn when Popik's legal representation was terminated (Affirmation in Support at ¶¶ 10-11). Popik was also counsel to the Medical Providers as well as Third-party Defendant Minkin.

³ Third-party Plaintiff Fass testified at his deposition that he always spoke with Minkin and that Minkin "had made all prior decisions" and had "authority to make decisions" (Ex. "G" to Motion at p 53).

⁴ Allegations in the complaint are to the contrary, however. The complaint states that "[a]fter the alleged termination in 2005, Defendants continued to authorize Plaintiffs to settle outstanding claims and cases on their behalf" (Second Amended Verified Complaint at ¶ 16).

interests; or

(2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

(Rules of Professional Conduct Rule 1.7 [22 NYCRR § 1200]).

The disqualification of an attorney is in the sound discretion of the court (*Nationwide Assoc., Inc. v Targee Street Internal Medicine Group, O.C.*, 303 AD2d 728 [2d Dept 2003]). Consideration is given to competing concerns, namely, avoiding the appearance of impropriety against the right of a party to choose his own attorney, and to the possibility that the motion may be used for some strategic advantage (*S&S Hotel Ventures Ltd Partnership v 777 S.H. Corp.*, 69 NY2d 437 [1987]). In *Greene v Greene* (47 NY2d 447, 451-52 [1979]), the Court of Appeals stated:

It is a long-standing precept of the legal profession that an attorney is duty bound to pursue his client's interests diligently and vigorously within the limits of the law For this reason, a lawyer may not undertake representation where his independent professional judgment is likely to be impaired by extraneous considerations. Thus, attorneys historically have been strictly forbidden from placing themselves in a position where they must advance, or even appear to advance, conflicting interests. This prohibition was designed to safeguard against not only violation of the duty of loyalty owed the client, but also against abuse of the adversary system and resulting harm to the public at large. Perhaps the clearest instance of impermissible conflict occurs when a lawyer represents two adverse parties in a legal proceeding. In such a case, the lawyer owes a duty to each client to advocate the client's interests zealously. Yet to properly represent either one of the parties, he must forsake his obligation to the other. *Because dual representation is fraught with the potential for irreconcilable conflict, it will rarely be sanctioned even after full disclosure has been made and the consent of the clients obtained. Particularly is this so when the public*

interest is implicated or where *the conflict extends to the very subject matter of the litigation* (emphasis added).

Notwithstanding the fact that both Minkin and the Medical Providers have each expressly waived any conflict in writing,⁵ the court recognizes an inherent conflict between Minkin's desire to minimize his indemnity obligations and the Medical Providers' desire to maximize their recovery and, as such, disqualification is warranted under the circumstances (*see Alcantara v Mendez*, 303AD2d 337 [2d Dept 2003] [pecuniary interests in conflict by virtue of counterclaim asserted against one of the plaintiffs and, thus, continued representation of all plaintiffs violated Code of Professional Responsibility]; *Big Brows LLC v Devitt*, 32 Misc3d 1231[A] [Supreme Court Kings County 2011] ["plaintiffs, whose pecuniary interests are in conflict with one other, can not be represented by the same attorney as such irreconcilable conflict in the professional allegiance of counsel cannot be waived"]; *Zwiebel v Guttman*, 4 Misc3d 1010[A] [Kings County Supreme Court 2004], *aff'd* 26 AD3d 429 [2d Dept 2006];⁶ *Booth v Continental Insurance Co.*, 167 Misc2d 429, 438-39 [Supreme Court Westchester County 1995] ["sometimes even with full

⁵ With respect to their waivers, the affidavits of Minkin and the Medical Providers were identical. The affidavits stated, in relevant part: "to the extent there is a potential conflict (and there is none), I have expressly waived such conflict, in writing". The affidavits further provide as follows:

When I decided to retain my current counsel, the law firm of Gusrae Kaplan Nusbaum PLLC ("Gusrae Kaplan"), I personally met with one of Gusrae Kaplan's senior lawyers, Mikhail Ratner. After reviewing the case file, Mr. Ratner advised me that, as part of retaining Gusrae Kaplan, I needed to waive possible conflict of interest associated with the third-party action against [Minkin], in this case. Mr. Ratner provided me with a retainer, which contained extensive provisions regarding such waiver of conflict By executing the retainer . . . I knowingly waived any potential conflict of interest (Minkin and Pinkusovich Affidavits in Opposition to Motion).

⁶ In *Zwiebel v Guttman*, *supra*, defendants Williamsburg and Chase cross-moved to amend their answer and assert a counterclaim for indemnification against plaintiff Zwiebel. One attorney represented all of the plaintiffs. In ordering disqualification, the court stated:

Both Chase and plaintiffs' counsel recognize that an inherent conflict exists between Solomon Zwiebel's understandable desire to minimize his indemnity obligations and his co-plaintiffs' equally understandable desire to maximize their recovery. The Kulefsky law office's concurrent representation of all plaintiffs therefore contravenes the New York Code of Professional Responsibility's disciplinary rules and ethical considerations. The representation arrangement itself creates the problem even if Chase's belated indemnity counterclaim amendment [against plaintiff Zwiebel] now brings the conflict into sharp focus and would necessitate delay for successor counsel. . . . Consequently, the Kulesky law office's disqualification must presently occur for all plaintiff's including Solomon Zwiebel to avoid even the possibility of compromising fiduciary confidences in this already on-going litigation.

disclosure and consent, the interests represented are so adverse that dual representation is improper. Because an attorney's joint representation of two adverse parties in a legal proceeding is fraught with potential for irreconcilable conflict, it will rarely be sanctioned even after full disclosure has been made and consent of clients obtained" [citations omitted]; *see also* Formal Opinion 2001-2, Conflicts in Corporate and Transactional Matters, The Association of the Bar of the City of New York [in litigation, the burden of the lawyer to justify simultaneous representation may be higher than in a transactional context]).

Contrary to the Firm's contention that there is no conflict of interest because the parties have not asserted claims against each other, the rule is triggered when a lawyer simultaneously represents two clients in matters involving "differing interests." Differing interests is not limited to adverse interests, as the Firm suggests, but, rather, is defined broadly to "include every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be conflicting, inconsistent, diverse, or other interest" (Rules of Professional Conduct Rule 1.0[f] [22 NYCRR § 1200]).

Based on the foregoing, it is hereby ordered that the motion to disqualify the Firm is granted. Because the Firm has been privy to confidential information of the Medical Providers and Minkin, it will not be able to continue representing any party to this litigation. Accordingly, the action, including discovery, is stayed for 45 days from the date hereof to enable Minkin and the Medical Providers to retain new counsel. The matter is adjourned to June 20, 2012 for a compliance conference.

This constitutes the decision and order of the court.

Dated: April 24, 2012



Hon. Vito M. DeStefano, J.S.C.

ENTERED

APR 26 2012

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**