

Edwards v Sigma Transp., Inc.
2018 NY Slip Op 33226(U)
December 6, 2018
Supreme Court, Kings County
Docket Number: 500582/2017
Judge: Bernard J. Graham
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At IAS Part 36 of the Supreme Court of the State of New York, Kings County, on the 6th day of December, 2018.

PRESENT: Hon. Bernard J. Graham, JSC

ERLEEN J. EDWARDS,

Plaintiff,

Index No. 500582/2017

- against -

Motion Seq. 2

SIGMA TRANSPORTATION, INC. and TREY R. UTSEY,

Defendants.

LISA THORPE AS ADMINISTRATRIX OF THE ESTATE OF BEATRICE THORPE, DECEASED,

Plaintiff,

Index No. 500586/2017

- against -

Motion Seq. 3 & 4

SIGMA TRANSPORTATION, INC. and TREY R. UTSEY, BUENA VIDA CORP. D/B/A BUENA VIDA CONTINUING CARE & REHABILITATION CENTER,

Defendants.

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SIGMA TRANSPORTATION, INC. and TREY R. UTSEY,

Third Party Plaintiff,

-against-

ERLEEN J. EDWARDS,

Third Party Defendant.

Upon the foregoing papers defendants Sigma Transportation, Inc. and Trey R. Utsey (“Sigma defendants”) seek an order disqualifying the law firm of Stefano A. Filippazzo, P.C. (“Filippazzo firm”) from representing plaintiff Erleen Edwards in action

#1 (Index #500582/2017 [MS #2]) and a corresponding order disqualifying the law firm of Richard A. Klass (“Klass Firm”) from representing plaintiff Lisa A. Thorpe (“Thorpe”) in action #2 (Index #500586/2017 [MS#3]). Defendants Buena Vida and third-party defendant Edwards in action #2 (Index #500586/2017) also seek to disqualify the Klass firm from representing plaintiff Thorpe (MS#4). The instant motions were marked fully submitted on March 23, 2018 in Part 2 (Hon. Justice Gloria M. Dabiri). Following Justice Dabiri’s retirement, the present motions and underlying action were transferred to Part 36 (Hon. Justice Bernard J. Graham).

BACKGROUND

This action arises from a motor vehicle accident that occurred on November 9, 2015, allegedly resulting in injuries to plaintiff Erleen Edwards in action #1 and plaintiff-decedent Beatrice A. Thorpe in action #2. Plaintiff Edwards commenced action #1 on January 11, 2017. On the same day, the estate of Beatrice A. Thorpe, through its administrator Lisa Thorpe, and represented by the Klass firm commenced a separate action entitled *Lisa Thorpe, as Administrator of The Estate of Beatrice A. Thorpe, Deceased v. Sigma Transportation, Inc., Trey R Utsey, and Buena Vida Corp. d/b/a Buena Vida Continuing Care and Rehabilitation Center*, Index No. 500586/2017. A Joint Trial Order dated October 27, 2017 (Rivera, J.S.C.) joined the two cases for the purposes of trial.

PARTIES' CONTENTIONS

In support of their motions the Sigma defendants argue that the Filippazzo firm's representation of plaintiff Edwards presents a conflict of interest. Although plaintiff Thorpe in action #2 is nominally represented by the Klass firm, the Sigma defendants argue that Edwards and Thorpe are "ultimately represented by the same attorneys" because of the close association between the Filippazzo and Klass firms. They note that attorney Sandra Fusco, an associate at the Filippazzo firm, has made court appearances both on behalf of Edwards in action #1, and on behalf of Thorpe in action #2. Such joint representation of the two plaintiffs in these related personal injury actions presents a conflict, defendants argue, because Edwards and Thorpe have competing interests with regards to allocating liability for the motor vehicle accident that gave rise to the two cases.

DISCUSSION

"The basis of a disqualification motion is an allegation of a breach of a fiduciary duty owed by an attorney to a current or former client ... [so movants who] are neither present nor former clients of the subject attorneys ... have no standing to seek their disqualification" (*Ogilvie v McDonald's Corp.*, 294 AD2d 550, 552 [2d Dept 2002]; see also *Ellison v Chartis Claims, Inc.*, 142 AD3d 487, 488 [2d Dept 2016]; *Scafuri v DeMaso*, 71 AD3d 755, 756 [2d Dept 2010]; *Hall Dickler Kent Goldstein & Wood, LLP*

v McCormick, 36 AD3d 758, 759 [2d Dept 2007]; *A.F.C. Enterprises, Inc. v New York City School Const. Auth.*, 33 AD3d 736, 736 [2d Dept 2006]). Here, the Sigma defendants in both actions and defendant Buena Vida in action #2 do not claim to be current or former clients of the Filippazzo firm, and thus, they lack standing to seek the disqualification of plaintiff's chosen counsel (*see Ogilvie*, 294 AD2d at 552).

“A party's entitlement to be represented in ongoing litigation by counsel of his or her own choosing is a valued right which should not be abridged absent a clear showing that disqualification is warranted... Whether or not to disqualify an attorney or law firm is a matter which rests in the sound discretion of the court” (*Gulino v Gulino*, 35 AD3d 812, 812 [2d Dept 2006]). Assuming *in arguendo* that third-party defendant Edwards has standing to seek disqualification of the Klass firm in action #2, “the party seeking to disqualify a law firm or an attorney bears the burden of demonstrating the need for disqualification” (*Gulino v Gulino*, 35 AD3d 812, 812 [2d Dept 2006]). In this case third-party defendant Edwards, as the moving party, has the burden of showing that the Klass firm's continued representation of plaintiff Thorpe would violate Rule 1.7(a) of the Rules of Professional Conduct (22 NYCRR 1200.00)¹. Rule 1.7(a) of the Rules of Professional Conduct provides that, “Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that . . . the representation

¹ Rule 1.7(a) provides that: except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude either: (1) the representation will involve the lawyer in representing differing interests; or (2) there is a significant risk that the lawyer's professional judgement on behalf of a client will be adversely affected by the lawyer's own financial, business, property, or other personal interests.

will involve the lawyer in representing differing interests." (22 NYCRR 1200.0 Rule 1.7 [a]). Here, the movants argue that Thorpe's claims of negligence against Buena Vida, Edwards' employer, directly place her interests in conflict with those of Thorpe. However, the movants appear to be manufacturing a conflict where none exists as Thorpe does not claim that Edwards was negligent or in any way proximately caused the injuries sustained in the accident. Under the circumstances of this case, a reasonable lawyer would not conclude that its representation of Thorpe, despite its ties with the Filippazzio firm, would entail the Klass firm representing differing interests. However, assuming, *in arguendo*, that a potential conflict does exist, the Klass firm's continued representation of Thorpe satisfies the exception requirements set out in Rule 1.7 [b] of the Rules of Professional Conduct.

Pursuant to Rule 1.7(b) of the Rules of Professional Conduct (22 NYCRR 1200.0) a potential conflict of interest may be waived if the lawyer reasonably believes that he or she will be able to provide competent and diligent representation to each affected client, the representation is not prohibited by law, the representation does not involve the assertion of a claim by one client against the other in the same litigation, and each affected client gives informed consent, confirmed in writing. Here, the Klass firm's representation of Thorpe is not prohibited by law, Mr. Richard Klass, Esq. attests to continuous zealous representation of his client's interests, Thorpe does not assert a

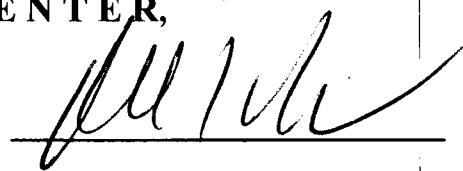
negligence claim against Edwards and in affidavits addressed to the court and annexed to plaintiff's opposition papers, Edwards and Thorpe aver that they were aware of the affiliation between the Filippazzo and Klass law firms and consent to such representation (see *Garcia v Krasnik*, 20 Misc. 3d 1127[a] [Sup Ct Kings County 2008]; *Shelby v Blakes*, 129 AD3d 823 [2d Dept 2015]. Accordingly, it is

ORDERED, that the motion of Sigma Transportation, Inc. and Trey R. Utsey in action #1 [Index #500582/17] is denied (MS#2); and it further

ORDERED, that the motion of Sigma Transportation, Inc. and Trey R. Utsey in action #2 [Index #500586/17] is denied (MS#3); and it is further

ORDERED, that the motion of Buena Vida Corp. and third-party defendant Erleen Edwards in action #2 [Index #500586/2017] is denied (MS#4).

ENTER,



**J.S.C.
HON. BERNARD J. GRAHAM**

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