STATE OF RHODE ISLAND

KENT, SC. SUPERIOR COURT

(FILED: April 8, 2024)

JOHN C. PONTE; and GREENWICH BUSINESS CAPITAL, LLC, formerly known as PONTE INVESTMENTS, LLC	:	
v.	:	**C.A. No. KC-2023-0536**
INDEPENDENCE BANK; ROBERT S. CATANZARO, individually and in his official capacity; ROBERT A. CATANZARO, individually and in his official capacity; HEATHER MARSHALL, individually and in her official capacity; BENJAMIN ANDREW, individually and in his official capacity; JENNIFER L. HOFFMAN-BRION, individually and in her official capacity; KAREN H. BASSETTE, individually and in her official capacity; JESSICA MELENDEZ, individually and in her official capacity; AMERICO PINHEIRO, individually and in his official capacity; THOMAS M. BAIN, individually and in his official capacity; and ROBERT FARIS, individually and in his official capacity	:	

DECISION

LICHT, J. Pursuant to Rule 1.9 of the Rhode Island Rules of Professional Conduct, Defendant Independence Bank (Independence) has moved to disqualify attorney Christopher Mulhearn (Attorney Mulhearn) from representing Plaintiffs John C. Ponte (Ponte) and Greenwich Business Capital, LLC (GBC), formerly known as Ponte Investments, LLC (collectively, Plaintiffs). Plaintiffs object to Independence's motion. For the reasons stated herein, this Court denies Independence's Motion to Disqualify.

I

Facts and Travel

Beginning in 2009, Attorney Mulhearn represented Independence in connection with "certain collections efforts, workouts, and receiverships." Catanzaro Aff. ¶ 4. During this time, specifically in late 2013, Independence developed a unique business, financial, and operating model in which it would originate, process, underwrite, close, fund, and service Small Business Administration (SBA) loans under a streamlined SBA loan program (the SBA Loan Program). *Id.* ¶ 3. Independence would also sell portions of those loans on the secondary market. *Id.* To increase its lending volume under this model, Independence sought relationships with third-party loan referral sources. *Id.*

On or about December 28, 2014, Attorney Mulhearn connected Independence with Ponte and his company, GBC.[1] Mulhearn Aff. ¶ 2. Following Independence and Plaintiffs' conversations about the SBA Loan Program, Independence engaged Attorney Mulhearn to discuss how the terms of such referral relationships would be set out. Catanzaro Aff. ¶ 7. Further, Independence claims that it confidentially disclosed to Attorney Mulhearn the specifics of the SBA Loan Program, including details of its operational model and the risks of working with third parties. *Id.* ¶¶ 7, 10.

Thereafter, in March 2015, Independence and/or Ponte instructed Attorney Mulhearn to memorialize the terms of the referral relationship between Independence and Plaintiffs in a contract entitled the "Non-Exclusive Independent Selling Agreement" (the

[1] Independence claims that this occurred in late 2013, *see* Catanzaro Aff. ¶ 5, but Attorney Mulhearn provides this specific date in his affidavit. *See* Mulhearn Aff. ¶ 2.

2015 Contract).[2] Catanzaro Aff. ¶¶ 5, 7; Mulhearn Aff. ¶ 5. The parties formally entered into the 2015 Contract on or about April 3, 2015. Catanzaro Aff. ¶ 6; Mulhearn Aff. ¶ 5. The 2015 Contract specifically addressed and reflected Independence's SBA Loan Program, Catanzaro Aff. ¶ 5, the parties' respective rights and obligations, and the compensation structure for Plaintiffs. Mulhearn Aff. ¶ 7.

Years later, on or about July 3, 2023, Plaintiffs filed the present action seeking damages arising out of the named Defendants', including Independence, alleged breach of contract, amongst other noncontract claims. *See generally* Compl. The 2015 Contract serves, in part, as the basis for the breach of contract claim in this suit. *Id.*

On or about August 29, 2023, Plaintiffs filed their First Amended Complaint. *See* Am. Compl. Thereafter, on or about October 23, 2023, Plaintiffs filed their Second Amended Complaint. *See* Second Am. Compl. In response to the Second Amended Complaint, on or about December 14, 2023, Independence and some of the other Defendants, including Robert S. Catanzaro, the Chief Executive Officer of Independence (Catanzaro), filed respective motions to dismiss the Second Amended Complaint. *See* Mot. to Dismiss Second Am. Compl. Due to now-Plaintiffs' counsel, Attorney Mulhearn, indicating to the Court at a chambers conference that he intended to file a Third Amended Complaint, the December motions to dismiss were deemed moot. On or about February 5, 2024, Plaintiffs filed their Third Amended Complaint. *See* Third Am. Compl.

---

[2] It is disputed as to who requested Attorney Mulhearn to draft the 2015 Contract. While Independence alleges that it requested Attorney Mulhearn to draft the 2015 Contract, Catanzaro Aff. ¶ 7, it is Attorney Mulhearn's position that both Catanzaro and Ponte tasked him with drafting the 2015 Contract. Mulhearn Aff. ¶ 5. However, even assuming Attorney Mulhearn drafted the 2015 Contract solely on behalf of Independence, the Court does not find that disqualification is warranted.

After more than seven months of litigation, Independence now alleges for the first time that it recently discovered that the 2015 Contract was in fact drafted and negotiated by Attorney Mulhearn in his prior role as counsel to Independence. For this reason, Independence filed the present motion to disqualify Plaintiffs' counsel with the Court.[3]

II

Standard of Review

"Though the Rhode Island Supreme Court has not expressly adopted a standard of review for a motion to disqualify an attorney from a case, it has expressed on numerous occasions that the proponent of a motion to disqualify has a high burden to meet." *Quinn v. Yip*, No. KC-2015-0272, 2018 WL 3613145, at *3 (R.I. Super. July 20, 2018); *see also Weetamoe Condominium Association v. Town of Bristol*, No. PB 02-2517, 2003 WL 21296848, at *2 (R.I. Super. May 7, 2003) ("In order to obtain disqualification of counsel, a moving party carries a heavy burden and must satisfy a high standard of proof."). "[T]o determine whether a situation requires attorney disqualification under Rule 1.9, a court needs to determine '(i) whether there is an attorney-client relationship and (ii) if so, whether there is a substantial relationship between the former representation and present relationship.'" *Ageloff v. Noranda, Inc.*, 936 F. Supp. 72, 75 (D.R.I. 1996) (quoting *Polyagro Plastics, Inc. v. Cincinnati Milacron, Inc.*, 903 F. Supp. 253, 236 (D.P.R. 1995)). "[M]otions to disqualify are generally disfavored because they separate a client from a chosen attorney, inevitably cause delay, and are often made only for tactical reasons." *Fregeau v. Deo*, No. PC 03-4179, 2005 WL 1837011, at *3 (R.I. Super. Aug. 2, 2005).

[3] The actual motion is entitled "Motion to Disqualify Defendants' Counsel" but it is obvious based on the arguments therein that Independence intended to disqualify Attorney Mulhearn, Plaintiffs' Counsel.

III

Analysis

Rule 1.9(a) of the Rhode Island Supreme Court Rules of Professional Conduct states 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." Sup. Ct. R. Prof. Conduct 1.9(a). Therefore, "[t]o establish a violation of Rule 1.9, Plaintiff must demonstrate that: (1) she was a former client; (2) the current action is substantially related to the prior representation; and (3) Defendant's interests in this matter are materially adverse to Plaintiff's interests." *Cronan v. Cronan*, No. PC-2022-01255, 2022 WL 17669064, at *3 (R.I. Super. Dec. 5, 2022); *see also Audette v. WD & Associates, Inc.*, No. PC-2021-03727, 2021 WL 5492866, at *3 (R.I. Super. Oct. 29, 2021).

It is undisputed that Independence was a former client of Attorney Mulhearn and that Independence's interests in this case are materially adverse to his current client. Therefore, what is left for this Court to determine is whether this case is the same or substantially related to Attorney Mulhearn's prior representation of Independence.

"[The Rhode Island Superior Court] recognizes that Rhode Island's Rule 1.9 carries with it an irrebuttable presumption that client confidences were obtained in a prior matter if that prior matter and the current matter are the same or substantially related." *Quinn*, 2018 WL 3613145, at *8. "According to our Supreme Court, the test for determining whether matters are substantially related has . . . honed in its practical application to grant disqualification only upon a showing that the relationship between the issues in the prior

and present cases is ‘patently clear’ or when the issues are ‘identical’ or ‘essentially the same.’” *Fregeau*, 2005 WL 1837011, at *2; (quoting *Brito v. Capone,* 819 A.2d 663, 665 (R.I. 2003)). “When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited.” Sup. Ct. R. Prof. Conduct 1.9 n.2.

“Matters are ‘substantially related’ for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client’s position in the subsequent matter.” *Id.* n.3. “In the case of an organizational client, general knowledge of the client’s policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation.” *Id*.

Several Rhode Island cases have contemplated what facts and circumstances satisfy the element of substantial relation to warrant disqualification of counsel. *See 6 Blackstone Valley Place, LLC v. Prime Healthcare Services Landmark, LLC*, No. PC-2019-4524, 2022 WL 2313764, at *14-16 (R.I. Super. June 3, 2022) (refusing to disqualify attorney where the attorney worked only 5.5 hours over the course of three years on a former client’s basic corporate maintenance filings that had no connection to lease in dispute); *see also Fregeau*, 2005 WL 1837011, at *4 (refusing to disqualify attorney where the new case involved distinct factual underpinnings, legal issues, and defenses that were disanalogous from the attorney’s representation of the former client in a prior case with an unrelated defendant); *see also Ogden Energy Resource Corp v. State of R.I.*, No. 92-0600T, 1993 WL 406375,

at *3 (D.R.I. June 23, 1993) (finding attorney's prior representation of a party was substantially related to the attorney's present representation of the opposing party where the factual bases, parties, and underlying goals were the same as the prior litigation and where attorney had full access to privileged communications and work-product concerning the former client's overall legal efforts, which were pertinent to the current dispute).

The most significant case on the substantial relation element is *Quinn v. Yip*. There, the Rhode Island Superior Court found that disqualification was warranted under Rule 1.9 where the law firm, amongst other things, incorporated the former client's entity, created the former client's entity's allocation of ownership interests, and represented the former client in the very same real estate in which the new client sought ownership interest. *Quinn*, 2018 WL 3613145, at *5. The fact that the new client was challenging the very documents that the attorney and the law firm drafted in their representation of the former client indicated to the court that the matters were the same or substantially related as the law firm was subsequently attacking that very same corporate form and structure they previously created. *Id.* at *6. The court also found that the attorney's prior representation could have, and arguably did, allow him to obtain confidential information relevant to plaintiff's representation. *Id.* at *7. On this point, the court partially relied on an Advisory Opinion, which found that an attorney could not represent a wife in the same domestic relations matter that the husband's attorney had consulted the attorney on because the attorney could have been privy to extremely pertinent information directly involved in the domestic relations matter. *Id.*; *see also* R.I. Supreme Court Ethics Advisory Panel Opinion No. 1989-07. The *Quinn* court held that since it found the prior representation and current representation to be the same or substantially related, an irrebuttable presumption existed

that the firm and attorney obtained client confidences in the prior representation even if no such information was actually obtained. *Id.* at *8.

Independence argues that Attorney Mulhearn's prior representation of Independence and his current representation of Plaintiffs are the same or substantially related because Plaintiffs' primary claim is for Independence's alleged breach of the very contract negotiated and drafted by Attorney Mulhearn in his prior representation of Independence. Independence's Mot. to Disqualify at 12. Independence argues that even if Attorney Mulhearn did not actually learn of any client confidences, *Quinn* creates an irrebuttable presumption that such confidences were obtained so long as the matters are the same or substantially related. *Id.* at 10-12. For their part, Plaintiffs argue that Attorney Mulhearn's current representation is not the same or substantially related to Attorney Mulhearn's prior representation of Independence because Attorney Mulhearn merely drafted the 2015 Contract, which was subsequently amended several times without his involvement. Pls.' Obj. to Mot. to Disqualify at 6. Since Attorney Mulhearn did not represent Independence vis-à-vis the SBA Loan Program, which is the real crux of the present suit, disqualification is not necessary. *Id.* at 7.

Plaintiffs' Third Amended Complaint indicates that Plaintiffs have advanced eleven causes of action. Third Am. Compl. ¶¶ 65-120. Of these eleven causes of action, Count I for Breach of Contract and Count II for Breach of the Duty of Good Faith and Fair Dealing[4] are predicated on a contractual relationship between Plaintiffs and Independence.

[4] "[T]he implied covenant of good faith and fair dealing does not create an independent cause of action[,] but must be connected to a breach-of-contract claim." *Premier Home Restoration, LLC v. Federal National Mortgage Association*, 245 A.3d 745, 750 (R.I. 2021) (internal quotations omitted).

Id. ¶¶ 65-75. Specifically, Count I defines this contractual relationship to be memorialized in the "Agreements" entered into by the parties. *Id.* ¶ 66. The term "Agreements" is defined as including the 2015 Contract, which was admittedly drafted by Attorney Mulhearn, as well as a separate agreement drafted in 2018. *Id.* ¶ 20. Accordingly, two of Plaintiffs' causes of action are based, in part, on breach of the 2015 Contract that Attorney Mulhearn drafted while representing Independence. However, as will be discussed, this is nothing more than a red herring as Plaintiffs are neither disputing the existence of the 2015 Contract nor claiming some ambiguity in the 2015 Contract which might cause an inquiry into the parties' intentions in drafting the contract. Rather, Plaintiffs' claims are predicated on Independence's conduct and communications during the SBA Loan Program, which is not the same or substantially related to Attorney Mulhearn's prior work in drafting the 2015 Contract for Independence.

Independence's biggest crutch for its argument that Attorney Mulhearn's current representation of Plaintiffs is the same or substantially related to Attorney Mulhearn's former representation of Independence is the trial judge's ruling in *Quinn v. Yip*. However, while Independence characterizes *Quinn* as containing "circumstances far less clear than those present in this case," Independence's Mot. to Disqualify at 7, the Court views *Quinn* to contain far more implicative facts than those contained here. *Quinn* involved a situation in which an attorney and his law firm performed extensive work for their former client, including documenting the structure, formation, and allocation of ownership interests of the former client's entity. Years later, that same law firm sought to represent a new client in a suit that directly attacked the same corporate structures and documents the firm drafted for the former client, including by asserting ownership interest when the drafted documents

did not specifically provide for it. In this way, the *Quinn* court found the substantial relation element to be satisfied due to the attorney and his firm's work for the former client being directly attacked and challenged by the new client in the subsequent suit. This is not the case here.

While Independence asserts two contractual claims, in part, under the 2015 Contract, there is no allegation anywhere in the Complaint or in any subsequent filing that Plaintiffs seek to attack or challenge the 2015 Contract's validity or substance as was done in *Quinn*. Rather, Plaintiffs take issue to the conduct of Independence during the lifetime of the SBA Loan Program and its subsequent communications with third parties in relation to the SBA Loan Program. Unlike in *Quinn*, these claims do not in any way contradict or alter any of the rights or obligations provided for in the 2015 Contract but rather examine whether Independence's subsequent conduct acted in conformity with the Agreements, which themselves are not in dispute. Thus, the present case does not contain analogous facts to *Quinn* because Attorney Mulhearn worked only on the 2015 Contract, provided no further advice or services relevant to Independence's relationship with Plaintiffs, and does not challenge the 2015 Contract's validity or terms in any way on behalf of Plaintiffs in the present suit. Therefore, *Quinn* does not assist Independence in showing that Attorney Mulhearn's prior representation of Independence is the same or substantially related to his current representation of Plaintiffs, and the irrebuttable presumption that confidential information was obtained does not arise.

Independence's argument also lacks support when comparing the present case to the facts presented in the R.I. Supreme Court Ethics Advisory Panel Opinion No. 1989-07. The Advisory Opinion involves a relatively straightforward consent issue as the attorney's

prior attorney-client relationship with the husband's attorney on behalf of the husband concerned the same exact domestic relations matter the wife was seeking the attorney's services on. However, the present case is not so black and white. As aforementioned, Attorney Mulhearn only limitedly participated on matters involving Independence and Plaintiffs while serving as Independence's counsel i.e., through his drafting of the 2015 Contract. While the Advisory Opinion dealt with a scenario where the prior representation went directly to the crux of the subsequent matter, Attorney Mulhearn was not previously involved with the crux of the present case. Instead, the crux of the present case, which is Independence's conduct during the SBA Loan Program and its communications to third parties concerning the SBA Loan Program, is distinct from Attorney Mulhearn's work on the 2015 Contract. As such, Attorney Mulhearn's limited work on the 2015 Contract is not analogous to the facts presented in the Advisory Opinion as this prior work is not what was directly at issue in the subsequent representation. Therefore, the Advisory Opinion does not provide the requisite support to indicate that Attorney Mulhearn's prior representation of Independence is the same or substantially related to his current representation of Plaintiffs.

Because Independence's primary authorities are distinguishable from the present case, Independence has failed to show that the two representations are the same or substantially related as to impose *Quinn's* irrebuttable presumption that client confidences were obtained in Attorney Mulhearn's prior representation of Independence. Therefore, without the protection of *Quinn's* irrebuttable presumption, the Court must consider whether the matters could have been viewed as substantially related due to the possibility that confidential information would have been obtained by Attorney Mulhearn in the prior

representation. *See* Sup. Ct. R. Prof. Conduct 1.9 n.3. Independence itself acknowledged that Attorney Mulhearn's work for Independence, other than the 2015 Contract, was confined to "certain collections, workout, and receivership-related work." Independence's Mot. to Disqualify at 4. Independence makes no allegation that Attorney Mulhearn worked on any further matters related to Plaintiffs and/or the SBA Loan Program, nor that Attorney Mulhearn could have potentially gained access to information and/or personnel working with Plaintiffs and/or the SBA Loan Program. Accordingly, it seems unlikely to the Court that Attorney Mulhearn could have or actually did obtain any client confidences in his prior representation of Independence.

Since Independence has not affirmatively shown that Attorney Mulhearn's prior representation of Independence is the same or substantially related to his current representation of Plaintiffs, Independence has neither carried its heavy burden nor satisfied the high standard of proof needed to successfully prevail on a motion to disqualify. Again, the mere fact that Attorney Mulhearn drafted the 2015 Contract is not enough to render the two representations the same or substantially related, especially in light of the fact that the present suit centers around Independence's conduct and communications during the SBA Loan Program rather than attacking the particulars of the 2015 Contract. Therefore, Independence has failed to make out a claim for disqualification under Rule 1.9.

IV

Conclusion

Because Attorney Mulhearn's prior representation of Independence is not the same or substantially related to his current representation of Plaintiffs, this Court **DENIES** Defendant Independence Bank's Motion to Disqualify. Counsel shall submit an appropriate Order.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**John C. Ponte, et al. v. Independence Bank, et al.**
CASE NO:	**KC-2023-0536**
COURT:	**Kent County Superior Court**
DATE DECISION FILED:	**April 8, 2024**
JUSTICE/MAGISTRATE:	**Licht, J.**
ATTORNEYS:	
For Plaintiff:	**Christopher M. Mulhearn, Esq.**
For Defendant:	**Kevin Hagan, Esq.** **Charles A. Tamuleviz, Esq.** **William Wynne, IV, Esq.**