UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PAUL D. CEGLIA, Plaintiff, v. MARK ELLIOT ZUCKERBERG and FACEBOOK, INC., Defendants.	:	Civil Action No. 1:10-cv-00569-RJA

DEFENDANTS' OPPOSITION TO CEGLIA'S MOTION TO DISQUALIFY DEFENDANTS' COUNSEL

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PRELIMINARY STATEMENT

Ceglia's Motion to Disqualify Defendants' Counsel is a thinly-veiled effort to blow up the schedule for expedited discovery established in this Court's April 4, 2012 Order (Doc. No. 348). The motion is frivolous on its face, but the punch line is in the relief that Ceglia requests—a stay of all discovery until the Court has ruled on Ceglia's motion. Doc. No. 438 at 16-17. This Court has already rejected a stay, concluding that Ceglia's Motion to Disqualify "appears without sufficient potential merit" to warrant it. Doc. No. 451 at 7. But the fact that Ceglia made a stay of discovery the centerpiece of his requested relief demonstrates that his Motion to Disqualify was intended solely to achieve obstruction, delay, and harassment. Indeed, Ceglia expressly acknowledged that he was seeking an excuse not to attend "Defendants' currently noticed depositions." Doc. No. 438 at 17. Having correctly denied Ceglia's attempt to disrupt the expert discovery process and delay the inevitable dismissal of his fraudulent suit, the Court should also deny the Motion to Disqualify.

The utterly baseless nature of the claims in Ceglia's motion confirms that it could not conceivably have been filed in good faith. The Court need not even reach the merits because Ceglia lacks standing to move to disqualify Defendants' counsel. As the Court has already recognized, Ceglia has not "shown he is presently a Facebook shareholder with standing to raise the disqualification question on behalf of the corporation." Doc. No. 451 at 7. Moreover, Ceglia has waived the arguments that he raises in his motion by failing to assert them at any previous time within the nearly two years that this suit has been pending.

Even if the Court were to reach the merits, Ceglia's motion should be denied for the simple reason that he relies on the wrong rules: Ceglia's motion is based entirely on the New York Disciplinary Rules, but those rules were replaced on April 1, 2009 by the New York Rules of Professional Conduct. *See* 22 N.Y.C.R.R. § 1200.0; *see also* Local Rule 83.3(a) ("Attorneys

practicing in this Court shall faithfully adhere to the New York Rules of Professional Conduct."). Ceglia does not even mention the governing Rules of Professional Conduct. Under those rules, counsel's representation of both Mark Zuckerberg and Facebook, Inc. in this case is unquestionably appropriate because there is no actual conflict of interest between Defendants, and even if such a conflict existed, Defendants have given their informed consent to the dual representation. Indeed, as this Court has already found, it is "implausible . . . that the interests of Defendant Zuckerberg, an acknowledged lead founder and majority shareholder of Defendant Facebook, Inc. could conceivably be divergent so as to require the court to find such waiver and consent to be ineffective." Doc. No. 451 at 7.

Accordingly, Ceglia's frivolous and abusive motion should be rejected. Moreover, because this motion is the latest in a long series of filings that have "multiplie[d] the proceedings . . . unreasonably and vexatiously," the Court should order Ceglia's counsel, Mr. Boland and Mr. Argentieri, to show cause why they should not be sanctioned under 28 U.S.C. § 1927. Courts often impose sanctions under § 1927 when a party uses a disqualification motion "as a pretext to harass an opponent and delay litigation." *Vegetable Kingdom, Inc. v. Katzen*, 653 F. Supp. 917, 926 (N.D.N.Y. 1987).

ARGUMENT

Ceglia claims that Defendants' counsel should be disqualified from representing Defendants in this case because their "dual representation" of both Defendants purportedly gives rise to a conflict of interest that violates the New York Disciplinary Rules. Doc. No. 438 at 4-6. The Court need not even reach the merits of that claim because—as this Court has already recognized, Doc. No. 451 at 7—Ceglia lacks standing to bring it. New York courts have repeatedly and unambiguously held that a "party seeking disqualification of [his or her] adversary's lawyer must prove," among other things, "the existence of a prior attorney-client

relationship between the moving party and opposing counsel." *Scafuri v. DeMaso*, 71 A.D.3d 755, 756 (N.Y. App. Div. 2010) (internal quotation marks omitted); *see also* Local Rule 83.3(a) (this Court gives "due regard" to New York state court decisions in interpreting the New York Rules of Professional Conduct). Thus, parties lack standing to seek disqualification of an attorney that "never represented them in any matter." *Id.*; *see also, e.g.*, *Murchison v. Kirby*, 201 F. Supp. 122, 124 (S.D.N.Y. 1961) ("Absent a complaint by the former or present client the moving party has no status to object to the representation of the adverse party by an attorney of his choice."). Courts have specifically applied this rule to motions to disqualify based on "dual representation," holding that parties seeking disqualification on that ground do "not have standing to seek . . . disqualification" when they are "neither a former nor a present client of the law firm" engaging in the dual representation. *Hall Dickler Kent Goldstein & Wood, LLP v. McCormick*, 36 A.D.3d 758, 759 (N.Y. App. Div. 2007); *see also, e.g.*, *Singh v. Friedson*, 10 A.D.3d 721, 722 (N.Y. App. Div. 2004) (same). Under this settled precedent, Ceglia lacks standing to seek disqualification because he has never had an attorney-client relationship with Defendants' counsel. Indeed, as this Court found in denying Ceglia's request for a stay, Ceglia has not "shown he is presently a Facebook shareholder with standing to raise the disqualification question on behalf of the corporation." Doc. No. 451 at 7.

The Court also need not reach the merits of Ceglia's "recent discovery" of an alleged rules violation, Doc. No. 451 at 6, because his "unexplained delay" in moving for disqualification results in a waiver of his frivolous arguments. *St. Barnabas Hosp. v. N.Y. City Health & Hosps. Corp.*, 7 A.D.3d 83, 84 (N.Y. App. Div. 2004). The court in *St. Barnabas Hospital* explained that "inordinate delay in moving for [disqualification] is an indication that the motion has been made to gain a tactical advantage in the litigation, or for purposes of delay." *Id.*

at 95. Because the moving party in that case "inexcusably waited about 14 months from the time th[e] action was commenced . . . before finally serving its disqualification motion," and because the moving party was "fully aware" during that period "of all the facts on which it subsequently relied," the party's disqualification arguments were waived. *Id.* at 94-95; *see also, e.g.*, *Talvy v. Am. Red Cross in Greater N.Y.*, 205 A.D.2d 143, 153-54 (N.Y. App. Div. 1994) ("plaintiff's inexcusable delay of over three years in moving for disqualification" supported denial of disqualification motion); *Sauer v. Xerox Corp.*, 85 F. Supp. 2d 198, 201 (W.D.N.Y. 2000) (denying disqualification motion because litigation was "in its advanced stages, and forcing plaintiff to find new counsel at this point would further delay resolution of the remaining issues, as well as work some hardship upon plaintiff").

Under these decisions, Ceglia's Motion to Disqualify must be denied because he has inexcusably delayed in bringing his meritless disqualification arguments. This litigation has been pending for nearly two years, and counsel have engaged in dual representation of Defendants throughout that period. But Ceglia has only now moved for disqualification—just as the parties are poised to begin expert discovery and depositions. Ceglia does not and cannot offer any explanation for this delay. He cannot reasonably claim that he was not previously aware of the alleged conflict of interest that he raises in his motion—particularly because his arguments are based largely on Defendants' Answer, which was filed more than a year ago. Doc. No. 438 at 10-12. This "inordinate delay" clearly demonstrates that Ceglia's Motion to Disqualify "has been made to gain a tactical advantage in the litigation, or for purposes of delay," and Ceglia's arguments should therefore be deemed waived. *St. Barnabas Hosp.*, 7 A.D.3d at 95. Indeed, it would be perverse and highly prejudicial to permit a party like Ceglia to lie in wait for two years, only to spring forth with a disqualification motion after opposing

counsel have devoted massive amounts of time and resources to litigating the case and obtaining intimate knowledge of the facts and governing law.

In any event, even if this Court were to reach the merits, Ceglia's Motion to Disqualify should still be denied. "[M]otions to disqualify are generally disfavored." *Sauer*, 85 F. Supp. 2d at 199. That is because, as this Court and the Second Circuit have explained, "'disqualification has an immediate adverse effect on the client by separating him from counsel of his choice, and . . . disqualification motions are often interposed for tactical reasons.'" *Id.* (quoting *Bd. of Educ. of City of N.Y. v. Nyquist*, 590 F.2d 1241, 1246 (2d Cir.1979)). Thus, "[t]he burden is on the movant to demonstrate that an attorney should be disqualified, . . . [and] that burden is a heavy one," requiring the "party moving for disqualification [to] satisfy 'a high standard of proof.'" *Id.* (quoting *Evans v. Artek Sys. Corp.*, 715 F.2d 788, 791 (2d Cir.1983)).

Ceglia does not come close to satisfying this heavy burden for a simple reason: His Motion to Disqualify relies entirely on rules that are no longer applicable. The only ground on which Ceglia seeks disqualification is that counsel's dual representation of Defendants allegedly violates New York Disciplinary Rule 5-105. But the New York Disciplinary Rules were replaced on April 1, 2009 by the New York Rules of Professional Conduct. *See* 22 N.Y.C.R.R. § 1200.0. Indeed, this Court's Local Rules expressly recognize this change, providing that "[a]ttorneys practicing in this Court shall faithfully adhere to the *New York Rules of Professional Conduct*," not the now-defunct Disciplinary Rules. Local Rule 83.3(a) (emphasis added). Ceglia's entire motion is therefore baseless.

In any event, whether evaluated under the defunct rule on which Ceglia relies or the operative rule in effect during this litigation, counsel's joint representation of Zuckerberg and Facebook is fully consistent with the rules of professional responsibility. In fact, the rules

expressly allow for the dual representation at issue here. Rule 1.13(d) of the Rules of Professional Conduct provides that "[a] lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7." Rule 1.13(d) (emphasis added). The comments to the rules confirm that dual (or "common") representation is entirely proper—and, indeed, is often preferable to requiring parties to retain separate counsel—if it complies with the requirements of Rule 1.7, which governs concurrent conflicts of interest. The comments explain that "[i]n civil matters, two or more clients may wish to be represented by a single lawyer." Rule 1.7 cmt. 29. "The alternative to common representation," the comments explain, "can be that each party may have to obtain separate representation, with the possibility of incurring additional cost [or] complication." *Id.* Thus, "clients may prefer common representation to separate representation" (*id.*), and "multiple representation of persons having similar interests in civil litigation is proper if the requirements of [Rule 1.7(b)] are met. *Id.* cmt. 23 (emphasis added); *see also Kittay v. Kornstein*, 230 F.3d 531, 538 (2d Cir. 2000) (recognizing that, even under the New York Disciplinary Rules on which Ceglia relies, counsel were permitted to engage in dual representation of clients with informed consent).

In this case, counsel's representation of both Zuckerberg and Facebook is fully consistent with Rule 1.7 of the Rules of Professional Conduct, which provides:

> (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 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.

Rule 1.7.

As a threshold matter, Ceglia has utterly failed to carry his heavy burden of demonstrating that there is any actual conflict of interest in this case under Rule 1.7(a) that would even implicate Rule 1.7(b)'s informed consent requirement. As the rule makes clear, informed consent is required only when the representation "*will* involve the lawyer in representing differing interests"—not when there is a *mere potential* that a conflict of interest might arise. Rule 1.7(a) (emphasis added). Ceglia's Motion to Disqualify, however, consists entirely of baseless allegations and conspiracy theories regarding hypothetical conflicts of interest between Zuckerberg and Facebook—for example, that Facebook would want to analyze the handwriting on Ceglia's fraudulent Work for Hire Document, but Zuckerberg would not. Doc. No. 438 at 8-9. These allegations are preposterous, and they constitute precisely the sort of "conclusory and speculative assertions regarding a conflict of interest" that have been deemed "insufficient to warrant the disqualification of [a] law firm" in countless cases. *Scafuri*, 71 A.D.3d at 756.

In reality, there is no actual conflict between the interests of Zuckerberg and the interests of Facebook in this case that would even require informed consent. As Defendants have detailed in their Motion to Dismiss, indisputable evidence establishes that Ceglia's suit is a fraud, and

Defendants therefore have a complete unity of interest—to ensure that Ceglia's fraudulent claims are dismissed as quickly as possible. Ceglia cites "differing answers to the allegations in the complaint" from Zuckerberg and Facebook, Doc. No. 438 at 10, but those "differing answers" simply reflect the state of each Defendant's knowledge at the time their Answer was filed, not an actual conflict of interest. Indeed, because the evidence obtained in expedited discovery after the Answer was filed has made it abundantly clear that Ceglia's claims are fraudulent, Ceglia cannot legitimately allege any actual conflict of interest between Zuckerberg and Facebook based on the Answer. To the contrary, Facebook and its shareholders have a potent common interest with Zuckerberg in defending against Ceglia's fraudulent claims of ownership against the company's founder and CEO.

In any event, to the extent that any actual conflict of interest could be considered to exist under Rule 1.7(a), counsel's dual representation of Zuckerberg and Facebook is plainly permitted under Rule 1.7(b). Counsel have reasonably determined that they can competently and diligently represent both Defendants. Rule 1.7(b)(1). This representation also is not prohibited by law, and this case does not involve the assertion of a claim by one of the Defendants against the other. Rule 1.7(b)(2)-(3). And each of the Defendants has given informed consent, confirmed in writing, to dual representation by all counsel for Defendants in this case. Rule 1.7(b)(4). This Court has already explained that it "appears implausible to the court that the interests of Defendant Zuckerberg, an acknowledged lead founder and majority shareholder of Defendant Facebook, Inc. could conceivably be divergent so as to require the court to find such waiver and consent to be ineffective." Doc. No. 451 at 7. Thus, counsel's dual representation of Zuckerberg and Facebook is fully consistent with the rules of professional responsibility.

Ultimately, it is clear that Ceglia's Motion to Disqualify has been "interposed for tactical reasons" (*Sauer*, 85 F. Supp. 2d at 199 (internal quotation marks omitted))—namely, to further Ceglia's bad-faith litigation strategy of obstruction, harassment, and delay. It is no coincidence that Ceglia filed this motion after the case has been pending for nearly two years, just as the expert discovery process is beginning. Indeed, Ceglia's request that expert discovery be stayed pending resolution of his motion (Doc. No. 438 at 16-17) lays bare his true motivation—he was seeking an excuse not to appear at the depositions of his experts that Defendants have noticed to begin days from now. Ceglia was attempting to delay the inevitable—that his experts will be deposed, that he will be forced to file his response to Defendants' Motion to Dismiss, and that this Court will dismiss his case based on the overwhelming evidence that Ceglia is committing a fraud on the Court. This Court has correctly rejected those delay tactics by denying Ceglia's request for a stay. Doc. No. 451. Because his Motion to Disqualify was filed for no other reason than to disrupt the expert discovery process established by this Court, the motion should be denied.

The Court should also order Ceglia's counsel, Mr. Boland and Mr. Argentieri, to show cause why they should not be sanctioned under 28 U.S.C. § 1927 for "multipl[ying] the proceedings in [this] case unreasonably and vexatiously" by filing this Motion to Disqualify. Given the timing of the motion and its utter lack of merit—as well as the recent deluge of similarly frivolous motions filed by Ceglia's counsel—it is readily apparent that Mr. Boland and Mr. Argentieri filed this motion in bad faith. "[T]he use of disqualification motions as a pretext to harass an opponent and delay litigation has been deemed grounds for sanctions under § 1927." *Vegetable Kingdom*, 653 F. Supp. at 926 (imposing § 1927 sanctions for bad-faith motion to disqualify); *see also, e.g.*, *Optyl Eyewear Fashion Int'l Corp. v. Style Cos., Ltd.*, 760 F.2d 1045,

1050-51 (9th Cir. 1985) (same); *Wold v. Minerals Eng'g Co.*, 575 F. Supp. 166, 167-68 (D. Colo. 1983) (same); *Greater Buffalo Press, Inc. v. Fed. Res. Bank of N.Y.*, 129 F.R.D. 462, 467 (W.D.N.Y. 1990) (imposing sanctions under Rule 11 for frivolous disqualification motion). To prevent further harassment, delay, and obstruction, Ceglia's counsel should be held accountable.

CONCLUSION

For the foregoing reasons, the Court should deny Ceglia's motion to disqualify Defendants' counsel and order all other relief it deems just and proper, including directing Ceglia's counsel to show cause why they should not be sanctioned under 28 U.S.C. § 1927.

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Respectfully submitted,

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