

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA  
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO  
FILE MOTION FOR REHEARING AND  
DISPOSITION THEREOF IF FILED

KEMP INVESTMENTS NORTH,  
LLC, A FLORIDA LIMITED LIABILITY COMPANY,

Appellant,

v.

Case No. 5D20-1553

KURTIS ENGLERT AND CAROL S. GEISLER,

Appellees.

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Opinion filed March 26, 2021

Nonfinal Appeal from  
the Circuit Court  
for Seminole County,  
Susan Stacy, Judge.

Berry J. Walker, Jr., of Walker &  
Tudhope, P.A., Altamonte Springs,  
for Appellant.

Quoc Van, Sanford, for Appellees.

EDWARDS, J.

Appellant, Kemp Investments North, LLC (“Kemp”), appeals the trial court’s order granting Appellee Carol S. Geisler’s (“Geisler”) motion to disqualify Berry Walker (“Walker”) as counsel for Kemp. Based upon one of the grounds relied upon by the trial court, we affirm.

Walker and his law firm, Walker & Tudhope, P.A., acted as closing agents and issued title insurance when Geisler sold the property in question to Kemp. She conveyed title to Kemp via a warranty deed and also signed an affidavit in connection with closing in which she swore she was the sole owner of the property. Geisler also signed a written acknowledgement that while Walker & Tudhope handled the closing, they were not her lawyers and did not represent her in that closing. That closing took place in May 2019 and all relevant documents were duly recorded by June 5, 2019.

Another deed (“Englert Deed”) dated April 2018 regarding the same property was recorded April 22, 2019, prior to the Geisler-Kemp closing. This quitclaim deed purported to be signed by Geisler and appeared to transfer the property to Geisler and Kurtis Englert (“Englert”) as joint tenants with right of survivorship. It turns out that Englert rendered aid and assistance to Geisler, his neighbor, following Hurricane Irma. Geisler claims the Englert Deed is a fraud and that her signature was forged. Englert maintains that it is legitimate, she signed the deed, and he received an interest in the property

for rendering the assistance referred to above, paying some of Geisler's bills, and repairing the house located on the property so that Geisler could put the property up for sale.

Walker & Tudhope only learned of the Englert Deed after the Geisler-Kemp closing. Walker contacted Geisler to find out what she could tell him about the Englert Deed. After Walker cautioned her that she would be in trouble if she had secretly transferred an interest in the property to Englert, Geisler executed a forgery affidavit that Walker prepared in which she swore that the Englert Deed did not bear her signature.

Walker filed suit against Englert on behalf of Kemp to quiet title and claiming slander of Kemp's title. Walker then filed an amended complaint against Englert that added Geisler as a defendant, claiming she had breached her contract with Kemp and committed fraud in the closing affidavit she executed.

Geisler answered the amended complaint and filed a series of motions seeking to disqualify Walker from representing Kemp in the underlying lawsuit. The trial court granted Geisler's motion and entered a written order disqualifying Walker from further representing Kemp in the underlying case.

"The standard of review for orders entered on motions to disqualify counsel is that of an abuse of discretion." *Applied Digit. Sols., Inc. v. Vasa,*

941 So. 2d 404, 408 (Fla. 4th DCA 2006) (citing *Stewart v. Bee–Dee Neon & Signs, Inc.*, 751 So. 2d 196, 205 (Fla. 1st DCA 2000)). “Disqualification of a party’s chosen counsel is an extraordinary remedy and should be granted sparingly.” *Whitener v. First Union Nat’l Bank of Fla.*, 901 So. 2d 366, 370 (Fla. 5th DCA 2005) (citing *Cunningham v. Appel*, 831 So. 2d 214, 215 (Fla. 5th DCA 2002)). An order disqualifying counsel must be tested against the standards imposed by the Rules Regulating Florida Bar. See *Cazares v. Church of Scientology of Ca., Inc.*, 429 So. 2d 348, 349 (Fla. 5th DCA 1983).

The first basis for the trial court’s order was that Walker would likely be a material witness if the case proceeded to trial, which the trial court determined would violate rule 4-3.7, Rules Regulating Florida Bar. That rule provides in pertinent part:

**(a) When Lawyer May Testify.** A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness on behalf of the client unless:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony;
- (3) the testimony relates to the nature and value of legal services rendered in the case; or
- (4) disqualification of the lawyer would work substantial hardship on the client.

Geisler argued and the trial court ruled that Walker would likely have to testify regarding the closing documents Walker's firm prepared and Geisler executed for the Geisler-Kemp closing, the fraud affidavit he prepared and Geisler signed, and the police report he filed making accusations of fraud relating to the property in question. However, there is no likelihood that any such testimony would be needed from Walker, as nobody contests the authenticity of any of those documents. The critical issue is whether Geisler signed and delivered the Englert Deed or whether her signature on that deed was forged. Nobody has suggested that Walker has any first-hand knowledge about the authenticity of the Englert Deed. Furthermore, Kemp has taken the position that it will not call Walker as a witness at trial.<sup>1</sup> Thus, the trial court abused its discretion in relying upon rule 4-3.7 to find Walker disqualified.

As the second basis for disqualifying Walker, Geisler argued and the trial court found that Walker had a potential conflict of interest when he was the attorney suing Geisler with regard to the subject matter of whether the

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<sup>1</sup> Geisler's claim that she may call Walker as a witness during trial is unavailing. "[T]he requirement that a lawyer withdraw when he expects to be a witness was not intended to permit an opposing party to call him as a witness and disqualify him from serving as counsel." *Alto Constr. Co. v. Flagler Constr. Equip., LLC*, 22 So. 3d 726, 727–28 (Fla. 2d DCA 2009) (citing *AlliedSignal Recovery Tr. v. AlliedSignal, Inc.*, 934 So. 2d 675, 680 (Fla. 2d DCA 2006)).

Englert Deed was legitimate or forged. Geisler claimed that she thought Walker was representing her after she was invited to come to his office, she consulted with him regarding the legal ramifications that might exist if the Englert Deed was legitimate, Walker prepared the forgery affidavit, and advised her that he was going to sue Englert. Geisler claims that Walker told her that he would take care of everything for her.

Rule 4-1.7, Rules Regulating The Florida Bar, provides in pertinent part that: “a lawyer must not represent a client if . . . the representation of 1 client will be directly adverse to another client. . . .” A party seeking to disqualify opposing counsel based on a conflict of interest must demonstrate that:

(1) an attorney-client relationship existed, thereby giving rise to an irrefutable presumption that confidences were disclosed during the relationship, and (2) the matter in which the law firm subsequently represented the interest adverse to the former client was the same or substantially related to the matter in which it represented the former client.

*Kaplan v. Divosta Homes, L.P.*, 20 So. 3d 459, 462 (Fla. 2d DCA 2009) (quoting *State Farm Mut. Auto. Ins. Co. v. K.A.W.*, 575 So. 2d 630, 633 (Fla. 1991)).<sup>2</sup>

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<sup>2</sup> Although *K.A.W.* specifically applied this test to rule 4-1.9, the Florida Supreme Court, in a footnote, stated that “Rule Regulating The Florida Bar 4-1.7 is also pertinent here.” 575 So. 2d at 632 n.1.

Geisler properly does not claim that an attorney-client relationship was created between Walker and her as a result of Walker & Tudhope handling the Geisler-Kemp closing. However, the trial court found that Geisler's subjective belief that Walker represented her with regard to the forgery issues surrounding the Englert Deed was reasonable, which defines whether such a relationship existed.<sup>3</sup> Walker's consultation with Geisler regarding the Englert Deed and his preparation of the forgery affidavit preceded Walker filing suit against Englert and Geisler.

Geisler did not spell out below or on appeal exactly how Walker's representation of Kemp against her is adverse. However, it does not require in-depth analysis to conclude that Walker's actions on behalf of Kemp in which he sues Geisler claiming breach of contract and fraud are adverse and are substantially related to their consultation regarding the Englert Deed.<sup>4</sup>

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<sup>3</sup> "The test for determining the existence of an attorney-client relationship 'is a subjective one and hinges upon the client's belief that he is consulting a lawyer in that capacity and his manifested intention is to seek professional legal advice.' This subjective belief must be reasonable." *JBK Inv. of S. Fla., Inc. v. S. Title Grp. Inc.*, 251 So. 3d 173, 177 (Fla. 4th DCA 2018) (quoting *Bartholomew v. Bartholomew*, 611 So. 2d 85, 86 (Fla. 2d DCA 1992)).

<sup>4</sup> "Matters are considered substantially related when the first matter 'could reasonably be understood as important to the issues involved in the present matter.'" *Garcia v. Bd. of Cnty. Comm'rs, Marion Cnty., Fla.*, No. 5:19-cv-458-Oc-30PRL, 2019 WL 5863896, at \*3 (M.D. Fla. Nov. 8, 2019)

Thus, the trial court did not abuse its discretion in disqualifying Walker on the basis of a conflict of interest which is prohibited by rule 4-1.7. Therefore, he will not be permitted to represent Kemp in the underlying matter.

AFFIRMED.

WALLIS and LAMBERT, JJ., concur.

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(quoting *Mitchell v. Hunt*, No. 8:15-cv-2603-t-23tgw, 2017 WL 1157897, at \*4 (M.D. Fla. Jan. 9, 2017)).