

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D20-1423

FIRST FIDELITY TRUST SERVICES,
INC.,

Appellant,

v.

SHELTER COVE CONDOMINIUM
ASSOCIATION, INC., EMILE
PETRO, JR., ZOE PETRO, BRYAN
SALIBA, and JULIAN BEALL,

Appellees.

No. 1D20-1425

FIRST FIDELITY TRUST SERVICES,
INC.,

Appellant,

v.

SHELTER COVE CONDOMINIUM
ASSOCIATION, INC. and ARMINTA
TRUST,

Appellees.

No. 1D20-1426

FIRST FIDELITY TRUST SERVICES,
INC.,

Appellant,

v.

SHELTER COVE CONDOMINIUM
ASSOCIATION, INC., et al.,

Appellees.

On appeal from the Circuit Court for Escambia County.
Gary L. Bergosh, Judge.

November 3, 2021

LONG, J.

Appellant, First Fidelity, seeks review of three nonfinal orders granting Appellee, Shelter Cove's, motions to disqualify the law firm Carver Darden as its counsel.¹ First Fidelity raises four issues on appeal contesting the trial court's application of the

¹ The parties and the trial court refer to the firm as representing the client, having an attorney-client relationship, and as being disqualified by conflicts. But lawyers, not law firms, represent clients, have attorney-client relationships, and can be disqualified by conflicts. It is true that lawyers in firms share their conflicts, *see* R. Regulating Fla. Bar 4-1.10, but it is the individual lawyer that carries the ethical obligations associated with the practice of law. That said, we adopt the parties' use of the firm name in this opinion for ease of reference to represent the relationships, conflicts, and disqualifications of the firm's lawyers.

Florida Rules of Professional Conduct, the court's decision to hold a non-evidentiary hearing, Shelter Cove's standing to seek disqualification, and whether Shelter Cove waived its right to seek disqualification. We affirm the trial court's disqualification of Carver Darden on all grounds and write to address only the first two issues raised by First Fidelity.

I. Facts

A. The Petro Case

In 2007, Emile Petro, Jr., filed a complaint against Shelter Cove seeking relief related to actions taken by Shelter Cove to reconstruct and repair Shelter Cove's condominium units. The parties entered into a settlement agreement and stipulated to entry of a final judgment, in which the plaintiffs were awarded a monetary judgment against Shelter Cove. The final judgment was entered in May 2012. Shelter Cove subsequently failed to satisfy the judgment.

Following motions by the plaintiffs, the trial court granted their request to appoint a receiver to enforce the final judgment. The trial court entered an order appointing a receiver in October 2014. The order named Robert Bell as the initial Receiver and empowered the Receiver to exercise all powers of Shelter Cove "through or in place of its board of directors or officers." The order mandated that the Receiver "shall take action to timely satisfy the Final Judgment and the Settlement Agreement, including the imposition of assessments or special assessments upon Shelter Cove unit owners." And it explained that the Receiver's overarching duty was to "aid in execution upon the Final Judgment and to ensure Shelter Cove's satisfaction of its obligations under the Settlement Agreement."

In November 2014, Robert Rushing of the law firm Carver Darden entered an appearance in the Petro Case as counsel for the Receiver. During the approximately two months Carver Darden represented the Receiver, it assisted the Receiver in executing his duties ordered by the court. This included aiding the Receiver in conducting Shelter Cove's annual meeting where a special assessment to pay the final judgment was initiated, instituting the

special assessment against unit owners, and enforcing past due payments on the assessments.

In December 2014, attorneys for the Receiver and plaintiffs filed a joint motion to substitute the Receiver, seeking to replace Robert Bell. The new Receiver chose to retain different counsel and discharged Carver Darden.

Several years later, Mr. Rushing and Carver Darden began representing First Fidelity, the purported owner of a unit formerly owned by Ed Cheshire. Carver Darden again entered an appearance in the Petro Case, but this time on behalf of First Fidelity. First Fidelity made numerous filings in the case including requesting affirmative relief against the Receiver to prevent its unit from being rented to recoup past due assessment payments, seeking to stay the proceedings pending a related federal case—which has since been involuntarily dismissed—and seeking disqualification of the Receiver’s counsel.

The Receiver notified Carver Darden that its representation of a unit owner constituted a conflict of interest and requested they withdraw. Carver Darden refused. The Receiver filed a motion on behalf of Shelter Cove to disqualify Carver Darden as First Fidelity’s counsel. The motion also alleged that First Fidelity’s purported acquisition of the unit was achieved through a series of fraudulent transfers designed to defeat the very assessment levied by the Receiver while represented by Carver Darden. The issue of ownership and fraudulent transfer was not resolved by the trial court before ruling on the motion to disqualify.

B. The Shelter Cove Foreclosure

Due to Cheshire’s failure to pay the special assessment, the Receiver initiated a foreclosure action against the unit on behalf of Shelter Cove. First Fidelity was named as a defendant in the foreclosure action due to its purported interest in the unit. This foreclosure action was consolidated by the trial court with the Petro Case. Carver Darden appeared on behalf of First Fidelity in the foreclosure action and sought to dismiss the Receiver’s suit. First Fidelity claimed that it was a senior and superior lienholder

because its mortgage on the unit was recorded prior to Shelter Cove's claim of lien.

The assessment forming the basis of Shelter Cove's claim of lien and foreclosure action is the same that Carver Darden originally helped the Receiver levy. The Receiver again notified Carver Darden of the conflict and asked Carver Darden to withdraw. After Carver Darden refused to withdraw, the Receiver filed a motion to disqualify Carver Darden from representing First Fidelity. In the motion, the Receiver recounted the conflict and again described the various grounds of fraudulent transfer alleged in the Petro Case.

C. The First Fidelity Foreclosure

While the Shelter Cove foreclosure was pending, First Fidelity filed a separate lawsuit concerning the same unit and sought to foreclose its purported mortgage lien interest. The foreclosure complaint asserted that First Fidelity holds a note secured by a duly recorded mortgage encumbering the unit. The complaint further asserted that Shelter Cove's claim of lien was junior and inferior to First Fidelity's mortgage.

In November 2019, the trial court transferred the First Fidelity Foreclosure to the same division as the consolidated actions in the Petro Case and Shelter Cove Foreclosure. Carver Darden subsequently filed a notice of appearance on behalf of First Fidelity. Shelter Cove again filed a motion to disqualify Carver Darden from representing First Fidelity based on the same conflict and fraud grounds alleged in the previous two cases.

D. Motions to Disqualify, Hearing, and Disposition

The three motions to disqualify were heard together at a non-evidentiary hearing on January 9, 2020. The motions, which are nearly identical in each case, assert that Carver Darden previously represented Robert Bell when he served as Shelter Cove's court-appointed receiver in the Petro Case. This representation, the motion asserts, involved assisting Mr. Bell in levying the special assessments against condominium units including the unit formerly owned by Cheshire and now purportedly owned by First

Fidelity. Since First Fidelity claims an interest in the unit at issue, Shelter Cove maintained that First Fidelity's interest is materially adverse to the Receiver's position.

At the conclusion of the hearing, the trial court indicated that it would grant Shelter Cove's motions. The court subsequently issued three nearly identical written disqualification orders in each case, finding that "[Carver Darden] previously represented Robert Bell, the initial receiver appointed for the Association . . ." and that "Carver Darden's current representation of First Fidelity . . . is substantially related to Carver Darden's prior representation of the initial receiver . . . due to involvement of substantially similar issues and parties." This appeal followed.

II. Analysis

We have jurisdiction. See Fla. R. App. P. 9.130(a)(3)(E) (permitting appeals of nonfinal orders that grant or deny a motion to disqualify counsel). "An order involving the disqualification of counsel must be tested against the standards imposed by the Florida Rules of Professional Conduct." *Young v. Achenbauch*, 136 So. 3d 575, 580 (Fla. 2014) (quoting *Estright v. Bay Point Improvement Ass'n, Inc.*, 921 So. 2d 810, 811 (Fla. 1st DCA 2006)). Appellate review of an order entered on a motion to disqualify counsel is limited to whether the trial court abused its discretion in granting the motion. *Id.* "While the trial court's discretion is limited by the applicable legal principles, the appellate court will not substitute its judgment for the trial court's express or implied findings of fact which are supported by competent substantial evidence." *Id.* at 581 (quoting *Applied Digital Solutions, Inc. v. Vasa*, 941 So. 2d 404, 408 (Fla. 4th DCA 2006)).

A. Florida Rules of Professional Conduct

The Florida Rules of Professional Conduct comprise Chapter 4 of the Rules Regulating the Florida Bar. Rule 4-1.9 governs conflicts of interest between a current and former client and formed the basis for the trial court's disqualification of Carver Darden. The rule prohibits a lawyer who has formerly represented a client from representing "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.” R. Regulating Fla. Bar 4-1.9. And a conflicted lawyer shares his conflict with the other lawyers in his firm. *See* R. Regulating Fla. Bar 4-1.10 (“While lawyers are associated in a firm, none of them may knowingly represent a client when any 1 of them practicing alone would be prohibited from doing so by rule 4-1.7 or 4-1.9”).

In applying rule 4-1.9, the Florida Supreme Court has explained:

[O]ne seeking to disqualify opposing counsel [is] required to show 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.

State Farm Mut. Auto. Ins. Co. v. K.A.W., 575 So. 2d 630, 633 (Fla. 1991).

As a threshold question, the party seeking to disqualify an opposing law firm must show that a previous attorney-client relationship existed between that party and the firm. *Id.* Only once an attorney-client relationship is shown does the irrefutable presumption attach. *Id.* First Fidelity argues for the first time on appeal that no attorney-client relationship existed between Carver Darden and Shelter Cove. This argument is unpreserved, unsupported by the record, and contradicted by First Fidelity’s explicit and repeated references to its representation of Shelter Cove’s court-appointed receiver.

Under the order appointing receiver, the Receiver was tasked with aiding the execution of the Petro Case’s final judgment and “ensur[ing] Shelter Cove’s satisfaction of its obligations under the Settlement Agreement.” In performing its duties under the order, the Receiver was empowered to “exercise all of the powers of Shelter Cove.” It is undisputed that during its representation of the Receiver, Carver Darden attended Shelter Cove’s annual meeting where the special assessment was formally adopted and

assisted the Receiver in following the mandate of the order to levy the special assessment on behalf of Shelter Cove against unit owners—including, specifically, Cheshire and the unit now purportedly owned by First Fidelity.

At the hearing below, Carver Darden never argued that an attorney client-relationship did not exist. Instead, Carver Darden’s argument focused on the scope of the prior representation with the Receiver. It argued that because the immediate dispute before the trial court was whether First Fidelity’s mortgage lien on the unit was senior, the issue of Carver Darden’s representation of the Receiver to implement the special assessment was not relevant, and therefore not substantially related.

Carver Darden repeatedly acknowledged that it previously represented the Receiver acting on behalf of Shelter Cove. It cannot now attack its prior concession of this material fact for the first time on appeal. Here, the trial court did not abuse its discretion in finding that, in the course of its representation of Shelter Cove’s court-appointed receiver, Carver Darden maintained an attorney-client relationship with Shelter Cove.

Once an attorney-client relationship is shown, the irrefutable presumption that confidences were disclosed attaches and cannot be overcome.² The analysis then turns to whether the interests of the current and former client are materially adverse and whether the matters are substantially related.

Rule 4-1.7 of the Florida Rules of Professional Conduct governs whether the interests of a present and former client are adverse. Under the rule, such representation is adverse if “there is a substantial risk that the representation of 1 or more clients

² First Fidelity argues that the presumption should not apply because no confidences were actually disclosed while Carver Darden represented the Receiver. But, the point of the *irrefutable* presumption is that it cannot be disputed once an attorney-client relationship is shown.

will be materially limited by the lawyer's responsibilities to . . . a former client." R. Regulating Fla. Bar 4-1.7.

At the hearing, Mr. Rushing acknowledged that Carver Darden's representation of First Fidelity would be materially limited—and he would be forced to withdraw due to conflict—if the dispute concerned the special assessment. Mr. Rushing only maintained that the issue of whether First Fidelity was a bona fide lender must be decided first. Carver Darden argues that its representation of First Fidelity was not substantially related to its prior representation of the Receiver because the dispute before the trial court over lien priority did not concern the special assessment.

The material facts underlying the trial court's ruling were not contested by Carver Darden or First Fidelity at the hearing. It was undisputed that (1) Carver Darden previously represented the Receiver, (2) Carver Darden's previous representation of the Receiver included assisting the imposition of the Petro Case's special assessment against the Cheshire unit, (3) failure to pay the special assessment resulted in Shelter Cove filing a claim of lien against the unit, (4) Carver Darden now represents First Fidelity, (5) First Fidelity claims to hold a mortgage interest in the same Cheshire unit, (6) First Fidelity claims its mortgage interest is senior to Shelter Cove's claim of lien.

The trial court did not abuse its discretion by relying on these undisputed facts when disqualifying Carver Darden and finding that its representation of First Fidelity violated rule 4-1.9. As explained by the commentary to the rule, "matters are 'substantially related' . . . if they involve the same transaction or legal dispute, or if the current matter would involve the lawyer attacking work that the lawyer performed for the former client." R. Regulating Fla. Bar 4-1.9 cmt. Here, Shelter Cove's claim of lien, which First Fidelity is seeking priority over, is the lien resulting from the same special assessment Carver Darden helped Shelter Cove levy. Carver Darden cannot now attack its prior work by helping an adverse party gain lien priority over the same special assessment it worked to impose for its prior client.

First Fidelity’s rationale that the parties should be required to litigate the issue of lien priority before a disqualification ruling is also unpersuasive. This Court has rejected similar arguments attacking the scope of the trial court’s ability to rule on disqualification. *Rombola v. Botchey*, 149 So. 3d 1138, 1142 (Fla. 1st DCA 2014) (holding that the scope of disqualification should not be limited to narrowly-defined disputed issues). We affirm the trial court’s ruling upholding this principle.

B. Non-evidentiary Hearing

First Fidelity also argues that the trial court’s failure to hold an evidentiary hearing on the issue of disqualification of Carver Darden is, by itself, reversible error. But First Fidelity cites no law or rule to support this assertion.

It is true that “where material facts are in dispute, an evidentiary hearing is required.” *Sch. Bd. of Broward Cty. v. Polera Bldg. Corp.*, 722 So. 2d 971, 974 (Fla. 4th DCA 1999). However, an evidentiary hearing is not required for a motion to disqualify counsel where the factual allegations warranting disqualification are not in dispute. *Estright*, 921 So. 2d at 811; see also *Allstate Ins. Co. v. Bowne*, 817 So. 2d 994, 998 (Fla. 4th DCA 2002) (“Because there is no conflict in this case as to the pertinent facts, we do not understand what an evidentiary hearing would accomplish, except to cause the parties unnecessary expense.”). In *Estright*, it was undisputed that a homeowner’s association member’s current attorney previously represented the association in drafting the association’s governing documents. *Estright*, 921 So. 2d at 811. It was also undisputed that the association member was disputing fines that emanated from the association’s governing documents and which resulted in a claim of lien. *Id.* We ruled that no evidentiary hearing was required because the attorney for whom disqualification was sought did not dispute the prior representation of the association or the drafting of the association’s governing documents. *Id.*

Similarly, in its motions to disqualify Carver Darden, Shelter Cove alleged the requisite factual elements to disqualify Carver Darden under rule 4-1.9. Specifically, Shelter Cove alleged that Carver Darden previously represented Bell during his role as

Shelter Cove's court-appointed receiver, and thereby assisted Shelter Cove in levying the special assessment that resulted in the claim of lien against the unit now purportedly owned by First Fidelity. At the hearing below, First Fidelity did not dispute either allegation. In applying rule 4-1.9, the trial court agreed with Shelter Cove that the undisputed facts were sufficient to establish that its previous representation of the Receiver was materially adverse and substantially related to its current representation of First Fidelity. Other than accepting the undisputed facts, it was not necessary for the trial court to make any additional factual findings of its own to reach its conclusion on the applicability of rule 4-1.9. Thus, as we held in *Estright*, an evidentiary hearing was not necessary when the elements alleged for disqualification were not contested.

III. Conclusion

The trial court did not abuse its discretion in disqualifying Carver Darden and finding its current representation of First Fidelity was materially adverse and substantially related to its prior representation of the Receiver. Nor did the trial court err in ruling on the motion to disqualify before allowing Carver Darden to fully litigate the merits of the lien priority and bona fide purchaser issues. And because the pertinent factual allegations relied upon by the trial court to disqualify Carver Darden were not in dispute, an evidentiary hearing was not necessary.

AFFIRMED.

B.L. THOMAS and ROBERTS, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Robert S. Rushing, Travis M. Morock, and Nathan R. Jurgensen of Carver, Darden, Koretzky, Tessier, Finn, Blossman and Areaux, LLC, Pensacola, for Appellant.

Justin I. Remol and John K. Reed of Remol Reed, P.A., Destin, for Appellee Shelter Cove Condominium Association, Inc.

Michael H. Crew of Crew and Crew, P.A., Fort Walton Beach, for Appellees Emile Petro, Jr., Zoe Petro, Bryan Saliba and Julian Beall.