Third District Court of Appeal

State of Florida

Opinion filed November 6, 2019.

No. 3D19-849
Lower Tribunal No. 19-298

Francisco Aracena Blamey, et al.,
Petitioners,

vs.

Juan Menadier, et al.,
Respondents.

A Writ of Certiorari to the Circuit Court for Miami-Dade County, Peter R. Lopez, Judge.

Law Offices of Jonathan A. Heller, P.A., and Jonathan A. Heller; Jay M. Levy, P.A, and Jay M. Levy, for petitioners.

Law Offices of Charles M-P George, and Charles M-P George, for respondents.

Before LOGUE, LINDSEY, and LOBREE, JJ.

ON MOTION FOR REHEARING

LOGUE, J.

This case comes before us on rehearing. We withdraw our previous opinion, and issue this opinion in its stead.

Petitioners, Francisco Aracena Blamey ("Aracena") and Above Ground Level Aerospace Corp. ("AGL"), seek a writ of certiorari quashing the trial court's order denying their motion to disqualify the attorney representing the respondents, Juan Menadier ("Menadier") and A Professional Aviation Services Corp ("Menadier's Corporation"). Before filing this lawsuit against AGL, the respondents' attorney, Stephen J. Kolski, performed legal work for AGL. The issue presented is whether the underlying lawsuit is substantially related to Kolski's prior legal work for AGL. For the reasons below, we hold it is. Accordingly, we grant the petition and quash the trial court's order.

FACTS

AGL repairs and sells various aircraft parts. At all relevant times, it was owned by Aracena. Aracena hired Menadier to manage AGL. While working for AGL, Menadier formed his own corporation, which we refer to as Menadier's Corporation. Menadier claims Aracena orally agreed to give Menadier 50% of the stock of AGL. Menadier and Aracena's discussions in this regard came to a head at a meeting in October 2018. In anticipation of the meeting, Menadier asked Kolski to draft a term sheet. The term sheet that Kolski prepared set forth the current

ownership interest of the corporate entities and individuals involved in the deal, but left items to be resolved at the meeting.

When AGL was formed, Menadier brought Kolski on board to serve as its lawyer. Kolski had previously performed legal work for Menadier. Kolski's sole contact at AGL was Menadier. Kolski did various legal tasks for AGL. Kolski did not sign a formal retainer agreement. When Menadier's employment with AGL ended, Kolski also stopped doing legal work for AGL. While Kolski represented AGL, he never represented Aracena personally.

When Kolski prepared the term sheet, Menadier was the General Manager of AGL and Kolski was AGL's only lawyer. Kolski billed Menadier's Corporation for the term sheet. When Menadier received the invoice, however, he forwarded the bill to AGL's accounting department for payment. Menadier indicated that this was a mistake. But he also testified that his practice during this time was to send all Kolski's legal bills to AGL's accounting department for payment. In fact, he did not even open the bills. "I was AGL," he explained, "I was the company." The AGL employee who ran its day to day operations testified that she understood Kolski prepared the term sheet for AGL, which is why AGL paid the invoice.

When the meeting took place, however, Aracena and Menadier failed to agree and AGL fired Menadier. Menadier and Menadier's Corporation then filed the instant lawsuit, represented by Kolski.

The current, operative complaint contains nine individual counts. We focus on three. In count I, Menadier sued Aracena for breach of the oral agreement to give Menadier 50% of the stock of AGL. In count II, Menadier sued AGL for unjust enrichment claiming Menadier had transferred $54,670 to AGL and had paid a third party $83,948.90 to pay a debt of AGL as part of "Menadier's required equity contribution." In count VIII, Menadier's Corporation sued AGL for unjust enrichment over $252,325.39 for airplane parts which were sold to third parties with the proceeds going to AGL, as Menadier and Menadier's Corporation admit in their Response, "in anticipation of becoming a 50% owner of AGL."

Aracena and AGL moved to disqualify Kolski from representing Menadier and Menadier's Corporation. The trial court held an evidentiary hearing and denied the motion to disqualify. Aracena and AGL now seek a writ of certiorari quashing the order denying the motion to disqualify.

STANDARD OF REVIEW

To grant certiorari relief, there must be: "(1) a material injury in the proceedings that cannot be corrected on appeal (sometimes referred to as irreparable harm); and (2) a departure from the essential requirements of the law." Nader v. Fla. Dep't of Highway Safety & Motor Vehicles, 87 So. 3d 712, 721 (Fla. 2012) (quotation omitted).

Moreover, in a certiorari proceeding, "[t]he required 'departure from the essential requirements of law' means something far beyond legal error. It means an inherent illegality or irregularity, an abuse of judicial power, an act of judicial tyranny perpetrated with disregard of procedural requirements, resulting in a gross miscarriage of justice." Chessler v. All Am. Semiconductor, 225 So. 3d 849, 852 (Fla. 3d DCA 2016).

ANALYSIS

Under Florida law, "[t]he disqualification of a party's attorney is 'an extreme remedy and should be employed sparingly.'" Scott v. Higginbotham, 834 So. 2d 221, 223 (Fla. 2d DCA 2002) (citation omitted). Thus, "[t]o disqualify opposing counsel the movant must demonstrate that (1) 'an attorney-client relationship existed,' which 'giv[es] rise to an irrefutable presumption' that confidential information was 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.'" Chessler, 225 So. 3d at 852 (quoting State Farm Mut. Auto. Ins. Co. v. K.A.W., 575 So. 2d 630, 633 (Fla. 1991)) (emphasis added); see also Junger Utility & Paving Co. v. Myers, 578 So. 2d 1117, 1119 (Fla. 1st DCA 1989).

Aracena and AGL sought to disqualify Kolski under Rule Regulating the Florida Bar 4-1.9, which provides that a lawyer cannot represent a person against a

former client where that person's interests are materially adverse to those of the former client. Rule 4-1.9(a) reads:

> A lawyer who has formerly represented a client in a matter must not afterwards:
>
> 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.

(Emphasis added). The comments to Rule 4-1.9 define what constitutes a "substantially related" matter:

> Matters are "substantially related" for purposes of this rule if they involve the same transaction or legal dispute, or if the current matter would involve the lawyer attacking work the lawyer performed for the former client.

Here, the trial court concluded there was "no substantial similarity between the representation sought at this moment" and the prior work performed by Kolski. We respectfully disagree.

The lawsuit stems from the fact that Aracena failed to honor his alleged oral promise to give Menadier 50% of AGL's stock. Kolski acted as AGL's attorney in drawing up the term sheet. Admittedly, only Aracena, and not AGL, is a defendant in count I of the complaint. But AGL is the named defendant in other counts including count II, where Menadier sued AGL for unjust enrichment for cash and other consideration provided to AGL as part of "Menadier's required equity contribution" relating to the oral promise. Similarly, count VIII against AGL is also

based on actions taken in anticipation of Menadier becoming a 50% owner of AGL. The unconsummated transfer on which Kolski worked for AGL is at the heart of the lawsuit.

In fact, both sides essentially admitted the lawsuit stems from Aracena's failure to honor the alleged oral promise. In their brief, Petitioners Aracena and AGL state:

> Respondents' claims predominantly arise from Respondent Menadier's allegations that [Aracena and AGL] orally agreed to give Menadier 50% of the stock of AGL, and alleged actions that Menadier claims he took in reliance upon that oral agreement for stock ownership (such as allegedly lending monies to AGL).

Similarly, in their brief, Respondents Menadier and Menadier's Corporation concede that the acts or omissions giving rise to the claims in the lawsuit are related to the failed transfer of AGL's stock:

> in anticipation of becoming a 50% owner of AGL, Mr. Menadier had [Menadier's Corporation] turn over its aircraft parts inventory to AGL. AGL sold those parts and did not compensate [Menadier's Corporation]. After it became clear that Mr. [Aracena] would not sell 50% of AGL to Mr. Menadier as promised, [Menadier's Corporation] sued in unjust enrichment to recover the value of those parts.

(Emphasis added.).

Because Kolski's prior work for AGL in drawing up the term sheet for the transfer is substantially related to the current lawsuit over the failure to consummate the transfer, Kolski is disqualified from suing his past client, AGL. See K.A.W., 575 So. 2d at 633; Chessler, 225 So. 3d at 852; Junger, 578 So. 2d at 1119.

Petition granted, order quashed.