

**Li-Hui Chen v Jafri**

2013 NY Slip Op 30852(U)

March 5, 2013

Supreme Court, Queens County

Docket Number: 17193/12

Judge: Timothy J. Dufficy

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**Short Form Order**

**NEW YORK SUPREME COURT - QUEENS COUNTY**

**PRESENT: HON. TIMOTHY J. DUFFICY**  
**Justice**

**PART 35**

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**LI-HUI CHEN,**

**Plaintiff,**

**-against-**

**ZAHRA B. JAFRI and FUSION AUTO FINANCE**  
**LLC,**

**Defendants,**

**Index No. 17193/12**  
**Mot. Date: 11/30/12**  
**Mot. Cal. No. 20**  
**Mot. Seq. 1**

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The following papers numbered 1 to 14 read on this motion by FUSION AUTO FINANCE LLC for an order summary judgment dismissing plaintiff's complaint in its favor and dismissing the complaint as against it.

**PAPERS**  
**NUMBERED**

Notice of Motion-Affirmation-Exhibits.....	1 - 4
Notice of Cross-Motion-Affirmation-Exhibits.....	5 - 8
Affirmation in Support of Plaintiff's Cross-Motion- and In Opposition-Exhibits.....	9 - 11
Affirmation in Opposition to Plaintiff's Cross-Motion- and In Further Support-Exhibits.....	12 - 14

Upon the foregoing papers, it is ordered that the motion is denied and the cross-motion granted.

In this action, the plaintiff seeks damages for personal injuries sustained during an automobile accident. The defendants are the driver of the vehicle, ZAHRA B. JAFRI, and the company that leased the subject vehicle to the defendant driver, FUSION AUTO FINANCE LLC. Both defendants are currently represented by the firm of Mendolia & Stenz. Defendant FUSION AUTO FINANCE LLC. moves for summary judgment dismissing the plaintiff's complaint based upon the "Graves Amendment" (49 USC §30106).

The Graves Amendment "bars vicarious liability actions against professional lessors and renters of vehicles", as would otherwise be permitted by Vehicle and Traffic Law § 388. (See Graham v Dunkley, 50 AD3d 55, 58 [2d Dept 2008].) The Graves Amendment provides, in pertinent part, that "[a]n owner of a motor vehicle that rents or leases the vehicle to a person . . . shall not be liable under the law of any State . . . by reason of being the owner of the vehicle . . . , for harm to persons or property that results or arises out of the use, operation, or possession of the vehicle during the period of the rental or lease, if . . . the owner . . . is engaged in the trade or business of renting or leasing motor vehicles; and . . . there is no negligence or criminal wrongdoing on the part of the owner." (49 USC § 30106[a][emphasis added].) The Graves amendment, by its express terms, is inapplicable to claims of independent negligence asserted against the leasing company, and cannot be asserted as a defense to such claims (Park v Edge Auto Inc., 2009 N.Y. Misc. LEXIS 2427; 241 NYLJ. 85 [Sup. Ct. Nassau Co. ]; Cole v Ramp Motors, Inc., 2012 NY. Misc. LEXIS 5575; 2012 NY Slip Op 32934u [Sup. Ct. Suffolk Co.].)

Plaintiff cross-moves for the disqualification of the firm of Mendolia & Stenz on the ground that it has a conflict in representing a defendant whose liability is barred by the Graves Amendment at the same time as the driver of the vehicle.

Disqualification of an attorney is a matter which rests within the sound discretion of the court (Nationscredit Financial Services Corp. v Turcios, 41 AD3d 802 [2d Dept. 2007].) A party's entitlement to be represented in ongoing litigation by counsel of his own choosing, however, is a valued right which should not be abridged absent a clear showing that disqualification is warranted. (Bentz v Bentz, 37 AD3d 386 [2d Dept. 2007].)

The Rules of Professional Conduct, which were promulgated as joint rules of the Appellate Divisions of the Supreme Court, effective April 1, 2009, and which supersede the former Part 1200 (Disciplinary Rules of the Code of Professional Responsibility), specifically, Rule 1.7(a) provides that, "Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that . . . the representation will involve the lawyer in representing differing interests." (Rules of

Professional Conduct [22 NYCRR 1200.0] Rule 1.7 [a].) Paragraph (b) sets forth necessary conditions that allow an attorney to represent parties with differing interests<sup>1</sup>.

The issue of the simultaneous representation by one law firm of both the leasing car company seeking an absolute defense under the Graves Amendment, and the individual driver that would remain as the sole defendant, is one that is fraught with ethical perils. The language of Rule 1.7(a) requires that the determination be made as of the time it becomes apparent to a reasonable lawyer that the dual representation "will involve the lawyer in representing differing interests."

Courts that have considered this issue can be divided into two schools of thought. Most reported state court decisions have held that there is an irreparable conflict by virtue of invocation of the Graves Amendment as an absolute defense on behalf of the leasing company to the impairment of representation of the driver as an individual defendant (Vinokur v Raghunandan, 27 Misc3d 1239 [A], 2010 N.Y. Misc. LEXIS 2644 , 2010 NY Slip Op 51108(U) [Sup. Ct. Kings Co. Battaglia, J.]; Graca v Krasnik, 20 Misc3d 1127[A], 2008 NY Slip Op 51640[U] [Sup. Ct. Kings Co. Saitta, J.]; Meigel v Schulman (24 Misc3d 1242[A], 2009 NY Slip Op 51853[U] [Sup Ct., Kings County, Saitta, J.]), . These cases focus on the fact that when counsel representing both the driver and rental car agency asserts a Graves defense on behalf of the leasing company, the driver lacks independent counsel to challenge the viability of that defense. In addition, a Graves dismissal leaves the remaining defendant bearing full responsibility for the occurrence.

Federal courts have held that there is no inherent conflict, where liability in such cases is solely vicarious in nature, and no independent liability is ascribed to the leasing company. (See Drake v Karahuta, 2010 U.S. Dist. LEXIS 5703, 2010 WL 376388 [USDC

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<sup>1</sup> The ABA's Model Rules of Professional Conduct prohibits lawyers from representing multiple clients where the client's interests are directly adverse or there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client unless the lawyer reasonably believes that he will be able to provide competent and diligent representation to each affected client; the representation is not prohibited by law; the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation; and each affected client gives informed consent, confirmed in writing. Model Rules of Prof'l Conduct R. 1.7(a) (2010).

WDNY, 2010]; Cf. Stratton v Wallace, 2012 U.S. Dist. LEXIS 108444 [USDC WDNY 2012] [*“Drake is inapplicable inasmuch as plaintiff’s complaint does allege independent liability against Great River Leasing, LLC.”*]). These courts theorize that, after discovery is complete, if the essence of the claim is one of vicarious responsibility, this negates any ethical dilemma. One federal court determined that even if concurrent representation of the defendants poses a conflict, that conflict is waivable (Govias v Tejada, 2010 U.S. Dist. LEXIS 91576, 10 Civ. 3397 [JSR] [USDC SDNY, 2010]).

One state court has agreed with the Federal bench that the issue turns on whether there is independent liability asserted against the leasing company, and has declined to disqualify counsel representing both parties pending the outcome of discovery. (See Zoller v Nagy, 2010 N.Y. Misc. LEXIS 5767; 2010 NY Slip Op 33296(U) [Sup. Ct. Nassau Co. Murphy, J].; Anderson v Keon, 2011 NY Misc LEXIS 3652, 2011 NY Slip Op 32043(U) [Sup. Ct. Nassau Co. 2011]).

It is the opinion of this Court that the Federal cases ignore one fundamental reality of client representation; that is, that competent, conflict-free representation should commence at the answering (pleading) stage on behalf of the defendant-client. Each potential client is entitled to independent representation which competently and completely vindicates their interests at every stage of the litigation. If an objective attorney, free of any potential conflict, would believe that competent representation would require that a cross-claim be interposed in good faith against the rental car agency, for negligent maintenance or repair of the vehicle, for example, that cross-claim should be interposed. The stage of discovery is irrelevant, since conflict analysis under Rule 1.7 requires that the determination be made as of the time it becomes apparent to a reasonable lawyer that the dual representation "will involve the lawyer in representing differing interests." Of course, the necessary interposition of a cross-claim on behalf of the driver creates a fundamental conflict for counsel seeking to simultaneously represent both parties.

In the case at bar, this Court finds that a reasonable lawyer should have been aware of the conflict of interest upon review and analysis of the plaintiff’s complaint. As Justice Saitta observed in Meigel v Schulman, *supra*, “[t]he conflict exists at the point the attorney recognizes that one of their two clients may have a Graves Amendment defense.”

The complaint in this case has but a single cause of action containing allegations against both defendants. Paragraphs 7 and 10 of the Complaint alleges that “at all times herein mentioned, Defendants maintained the aforementioned motor vehicle.” and that defendants “repaired the aforementioned motor vehicle.” These allegations of negligent maintenance and repair raise a distinct source of prospective liability separate from vicarious liability as to the leasing company. By its very definition, the Graves Amendment does not apply to non-vicarious liability. The Court believes that a competent attorney representing the defendant driver would be constrained to interpose a cross-claim against the leasing company for negligent maintenance and repair of the vehicle. These would normally be the responsibility of the leasing company. However, in the instant case, counsel for the combined defendants has not done so, and indeed, is conflicted from doing so.

Moreover, as aptly explained by Justice Battaglia in Vinokur, supra, the mere assertion, in a summary judgment motion, of a Graves defense by counsel for the leasing company, should not eviscerate the driver's right to oppose the motion by independent counsel on the basis that the moving defendant has failed to establish its prima facie entitlement to that defense. The use of concurrent counsel impugns the defendant driver's ability to interpose opposition, thereby compromising the driver's representation .

The Court further opines that it is improper to ignore a conflict until discovery is completed, and then declare that the lack of evidence of independent allegations of negligence then negates any conflict. That approach requires the court to blind itself to the ethical problem and hope that, after disclosure is complete, the need for disqualification no longer exists. This Court declines to adopt that approach.

The fact that there is a conflict in the instant case does not end the inquiry by any means. Even where the Court finds that "a reasonable lawyer would conclude that . . . the representation will involve the lawyer in representing differing interests" ( Rules of Professional Conduct [22 NYCRR 1200.0] Rule 1.7 [a]), concurrent representation may still occur, 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." (Rules of Professional Conduct [22 NYCRR 1200.0] Rule 1.7 [b].)

In its papers, defense counsel fails to even address the criteria set forth Rule 1.7(b), thus the criteria delineated by the Rule has not been met in this case. Moreover, the abrogation of a party's entitlement to be represented in ongoing litigation by counsel of his/her own choosing is not in issue in this case, since the issue of conflict has apparently not been raised with either of the defendants, as demonstrated by the fact that there are no affidavits from either of them submitted on this motion.

However, even assuming, arguendo, that there was an attempted waiver in this instance, this Court questions whether waiver is even an appropriate prophylactic measure in these situations (Cf. Govias v Tejada, supra) for the reasons which follow.

Under Rule 1.7(b), counsel considering representation of multiple clients must first determine whether they can reasonably provide competent and diligent representation to each affected client and whether their combined representation will require them to assert a claim by one client against the other client. These are conjunctive requirements. If and only if these requirements are met, counsel may then obtain informed, written consent from the client to the simultaneous representation. The Court opines that, in the case at bar, as explained in the foregoing, counsel would likely have to interpose a cross-claim for negligent maintenance and repair on behalf of the driver against the leasing company. Additionally, there is the issue of the need to oppose the leasing company's motion under the Graves Amendment on behalf of the driver. It is unlikely that independent counsel would believe that it would be in the interest of the client-driver to waive both the cross-claim and opposition to the motion. Simply put, there is a non-waivable conflict present, since a disinterested lawyer would not advise the clients in this matter to consent to joint representation under the circumstances.

An attorney who undertakes the joint representation of two parties in a lawsuit should not continue as counsel for either one after an actual conflict of interest has arisen" because continued representation of either or both parties would result in a violation of the ethical rule requiring an attorney to preserve a client's confidences or the rule requiring an attorney to represent a client zealously (Alcantara v. Mendez, 303 AD2d 337

[2d Dept. 2003]; Sidor v. Zuhoski, 261 AD2d 529 [2d Dept. 1999]; Quinn v Walsh, 18 AD3d 638m [2d Dept. 2005].).

Accordingly, the cross-motion is granted, and defendants' counsel, Mendolia & Stenz, is disqualified from representing either of the defendants in this action. The motion on behalf of the defendants is denied, with leave to renew, following the appointment of new counsel. The action is stayed pursuant to CPLR 2201 for sixty (60) days after service of the within Order upon the defendants in order to permit them to obtain new counsel.

Plaintiff's counsel is hereby directed to serve a copy of this Order with Notice of Entry upon Mendolia & Stenz and the plaintiffs individually.

This constitutes the decision and order and judgment of this Court.

**Dated: March 5, 2013**

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**TIMOTHY J. DUFFICY, J.S.C.**