Cicala v Jacobs
2017 NY Slip Op 31873(U)
August 30, 2017
Supreme Court, New York County
Docket Number: 805059/2015
Judge: Eileen A. Rakower

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

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JESSICA CICALA,

Index No.
805059/2015

Plaintiffs,

- v -

DECISION and ORDER

Mot. Seq. 001

BRAD JACOBS, M.D., NICHOLAS SEWELL, M.D., and ALLURE PLASTIC SURGERY, P.C.,

Defendants.

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AMENDED DECISION

HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff Jessica Cicala ("Cicala") commenced this medical malpractice action by filing a summons and complaint on February 12, 2015. Cicala claims *inter alia*, that Defendant Brad Jacobs, M.D. ("Dr. Jacobs") performed a reduction mammoplasty on her but departed from accepted standards of medical care. When Cicala commenced this action, her counsel of record was Krentsel & Guzman, LLP. However on July 21, 2016, Cicala substituted Krentsel & Guzman, LLP with the law firm of Joseph Tacopina, P.C., d/b/a Tacopina & Seigel ("T&S").

On April 13, 2017, Dr. Jacobs filed this instant motion pursuant to 22 NYCRR § 1200.0 for an order disqualifying T&S as Cicala's counsel. Dr. Jacobs asserts that "[a]round 2006 and 2007" he "consulted with [T&S], and . . . divulged private, personal, confidential and sensitive information." (affirmation of Markowitz at 2). Dr. Jacobs consulted T&S because he "was dealing with complicated issues related to licensing and regulation of his medical license . . . [B]oth present and former patients as well as regulatory authorities had raised various concerns . . ." (affirmation of Markowitz at 2) Dr. Jacobs avers, "To my best recollection, I subsequently retained [T&S] for issues related to licensing and regulation of medical license." (aff of Jacobs at 1) Because Cicala's complaint

alleges "licensing and regulatory matters," Dr. Jacobs argues that T&S should be disqualified. He specifically draws the Court's attention to paragraphs 6, 7, 8, and 9 of the complaint. These paragraphs provide the following,

> "Defendant, JACOBS, was, on or about November 1, 2012 and continuing through to and including March 21, 2014, a licensed practicing Plastic Surgeon located at 150 East 61st Street, New York, NY 10065 . . . Defendant, JACOBS, did and at all times hereinafter mentioned does maintain his practice at 150 East 61st Street, New York, NY 10065, amongst other locations . . . Defendant, JACOBS, held himself out to be a physician duly qualified and competent to render requisite medical, surgical care and treatment and/or internal care to the public at large and, more particularly, to the Plaintiffs and Plaintiff named here . . . Defendant, JACOBS, undertook and agreed to render medical, surgical care and treatment and/or internal care to the Plaintiff . . ." (Cicala complaint ¶ 6-9)

Additionally, Dr. Jacobs argues that even if he didn't formerly retain T&S, T&S still owes him a fiduciary duty that requires preserving the secrets of prospective clients. (affirmation of Markowitz at 6)

T&S opposes and claims that Dr. Jacobs consulted T&S "'in connection with evaluating and pursuing potential civil claims for defamation against [Jacobs],' not medical licensing issues." (affirmation of Tacopina at 1) In support, T&S appends as Exhibit 1, an unexecuted draft retainer agreement that Dr. Jacobs allegedly never signed. (Tacopina's exhibit 1) T&S asserts that it has no record of Dr. Jacobs paying T&S, no "written communication from [Dr.] Jacobs, and no "handwritten notes of any conversation with [Dr.] Jacobs." (affirmation of Tacopina at 2) According to T&S, Dr. Jacob "never retained T&S" (affirmation of Tacopina at 2). Additionally, T&S argues that Dr. Jacobs consulted the firm "almost six years prior to the malpractice alleged in this action." (affirmation of DeOreo at 3) The firm contends that Dr. Jacobs filed this instant motion for tactical reasons and not because an actual conflict exists.

Standards

Rule 1.9 of 22 NYCRR § 1200.0 provides in relevant part,

(a) A lawyer who has formerly represented a client in a matter shall not thereafter 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, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) Use confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client, except as these Rules would permit or require with respect to a current client.

Rule 1.6 of 22 NYCRR § 1200.0 provides in relevant part,

(a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:

(1) the client gives informed consent, as defined in Rule 1.0 (j);

(2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or

(3) the disclosure is permitted by paragraph (b).

"Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by

> the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested to be kept confidential. "Confidential information" does not ordinarily include (1) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates."

"A movant seeking disqualification of an opponent's counsel bears a heavy burden." (*Mayers v Stone Castle Partners, LLC*, 126 AD3d 1, 6 [1st Dept 2015]) The burden is heavy because "[a] party has a right to be represented by counsel of its choice, and any restrictions on that right 'must be carefully scrutinized.'" (*id.*) To disqualify opposing counsel, the movant "must show: (1) the existence of a prior attorney-client relationship between the movant and opposing counsel; (2) that the matters involved in the prior and the present representations are 'substantially related': and (3) that the interests of the present client and former client are materially adverse." (*Reem Contracting Corp. v Resnick Murray St. Associates*, 43 AD3d 369, 371 [1st Dept 2007]) "[T]o show that matters are 'substantially related,' defendants must show that the issues in the matters are identical or essentially the same." (*Becker v Perla*, 125 AD3d 575, 575 [1st Dept 2015]) In *Becker v Perla*, the First Department of the Appellate Division stated that the defendants failed to show that the matters were substantially related because "the prior matter involved the enforcement of a loan against a third party, and the present matter involve[d] defendants' alleged diversion of monies intended for and earned by a project in the Dominican Republic." (*id.*) Lastly, "[c]ourts should also examine whether a motion to disqualify, made during ongoing litigation, is made for tactical purposes, such as to delay litigation and deprive an opponent of quality representation." (*Mayers* at 6)

Discussion

Dr. Jacobs has the "heavy burden" of showing that T&S should be disqualified. (*Mayers v Stone Castle Partners, LLC*, 126 AD3d 1, 6 [1st Dept 2015]) Because Cicala "has a right to be represented by counsel of [her] choice, . . . any restrictions on that right 'must be carefully scrutinized'" by this Court. (*id.*)

Here, Dr. Jacobs fails to show that the "matters involved in the prior and the present representations are 'substantially related.'" (*Reem Contracting Corp. v Resnick Murray St. Associates*, 43 AD3d 369, 371 [1st Dept 2007]) The issues in the

matters are not "identical or essentially the same" because the issue in the present matter is whether Dr. Jacobs committed malpractice when he performed a reduction mammoplasty. (*Becker v Perla*, 125 AD3d 575, 575 [1st Dept 2015]) Regardless of whether the prior issues involved defamation or regulation of Dr. Jacob's medical license, they are not identical or essentially the same as negligently performing a reduction mammoplasty.

Significantly and perhaps most telling however is that Dr. Jacobs waited 9 months after T&S's substitution to bring this motion. Although T&S became Cicala's counsel of record on July 21, 2016, Dr. Jacobs did not move to disqualify T&S until April 13, 2017. Such a motion has the appearance of being "made for tactical purposes, such as to delay litigation and deprive [Cicala] of quality representation." (*Mayers v Stone Castle Partners, LLC*, 126 AD3d 1, 6 [1st Dept 2015])

Wherefore, it is hereby,

ORDERED that Brad Jacobs, M.D.'s motion to disqualify Joseph Tacopina, P.C., as counsel of record for Jessica Cicala pursuant to 22 NYCRR § 1200.0 is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: August 30 2017

EILEEN A. RAKOWER, J.S.C.