

Matter of McCarthy
2018 NY Slip Op 31117(U)
February 26, 2018
Surrogate's Court, Nassau County
Docket Number: 275904/l
Judge: Margaret C. Reilly
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**SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

**In the Matter of the Settlement of the First Intermediate
Account of Proceedings of Brian J. McCarthy as
Co-Executor of the Estate of**

DECISION & ORDER

**File No. 275904/I
Dec. Nos. 33777
33778**

DANIEL P. McCARTHY,

Deceased.

PRESENT: HON. MARGARET C. REILLY

The following papers were considered in the preparation of this decision:

Notice of Motion to Disqualify Ralph Berman, Esq. and Seyfarth Shaw LLP
as Counsel and for Sanctions 1

Affidavit of David A. Smith, Esq. in Support of Motion with Exhibits 2

Affirmation of Mary E. Mongioi, Esq. of Forchelli, Curto, et. al. in
Support of Motion to Disqualify Counsel and for Sanctions with Exhibits. 3

Notice of Cross Motion to Disqualify Forchelli, Curto, et. al. as Counsel 4

Affirmation of Eddy Salcedo, Esq. of Seyfarth Shaw LLP in Opposition
to Motion to Disqualify Counsel and for Sanctions and in Support of
Cross Motion to Disqualify Forchelli, Curto, et. al. with Exhibits 5

Memorandum of Law of Seyfarth Shaw LLP 6

Notice of Cross Motion for Sanctions 7

Affirmation of Mary E. Mongioi, Esq. in Opposition to Cross Motion to
Disqualify Forchelli, Curto, et. al. and in Support of Cross Motion for
Sanctions 8

Memorandum of Law of Forchelli, Curto, et. al. 9

Reply Affirmation of David S. Smith in Opposition to Seyfarth Shaw’s
Cross Motion and in Further Support of the Motion to Disqualify
Seyfarth Shaw LLP and for Sanctions 10

Memorandum of Law and Affirmation of David A. Smith, Esq.
with Exhibits. 11

This is the accounting proceeding in the Estate of Daniel P. McCarthy by Brian J. McCarthy, a former executor of the Estate of Daniel P. McCarthy, whose letters were revoked by decree of this court, dated April 21, 2015. There are related proceedings pending

in which Brian J. McCarthy is accounting as trustee of three lifetime trusts established by Daniel P. McCarthy's wife, Genevieve McCarthy, now deceased (File No. 335348/E, File No. 335349/E, and File No. 335350/E). Brian J. McCarthy was removed as trustee of those trusts by separate decrees dated April 21, 2015.

The objectants, Patricia Warmington, Denis McCarthy and Maureen McKeown, now move the court for an order disqualifying Ralph Berman, Esq. and the firm of Seyfarth Shaw LLP from representing the accounting party, Brian J. McCarthy, and for the imposition of sanctions for refusing to voluntarily withdraw as counsel and requiring objectants to make the instant motion. The movants and Brian J. McCarthy are siblings, four of the five children of the decedents, Daniel P. McCarthy and Genevieve J. McCarthy. Kathleen Bedard is the decedents' fifth child and is the surviving executor of the Estate of Daniel P. McCarthy and the remaining trustee of the three trusts established by Genevieve McCarthy. Kathleen's attorney has filed an affirmation in support of the motion to disqualify counsel. Brian J. McCarthy and Seyfarth Shaw LLP have filed a cross motion to disqualify Kathleen Bedard's attorneys. Kathleen Bedard's attorneys, in turn, have filed a cross motion seeking sanctions against Brian J. McCarthy and Seyfarth Shaw LLP for bringing the motion to disqualify them as Kathleen's attorneys.

In a decision and order dated June 29, 2017 (Decision Nos. 32821, 32822 and 32823), this court set the matter down for oral argument. However, by stipulation dated August 16, 2017, counsel for all parties agreed to submit the motion and cross motions for decision without oral argument.

The objectants' motion to disqualify Ralph Berman, Esq. and Seyfarth Shaw LLP as counsel for Brian J. McCarthy and the cross motion made by Seyfarth Shaw LLP on behalf of Brian J. McCarthy to disqualify Kathleen Bedard's counsel, Forchelli, Curto, et. al., are both being made pursuant to rule 3.7 of the Rules of Professional Conduct (22 NYCRR 1200.0), which provides that:

“(a) A lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact unless:

- (1) the testimony relates solely to an uncontested issue;
- (2) the testimony relates solely to the nature and value of legal services rendered in the matter;
- (3) disqualification of the lawyer would work substantial hardship on the client;
- (4) 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; or
- (5) the testimony is authorized by the tribunal.

(b) A lawyer may not act as advocate before a tribunal in a matter if:

- (1) another lawyer in the lawyer's firm is likely to be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony may be prejudicial to the client; or
- (2) the lawyer is precluded from doing so by Rule 1.7 or Rule 1.9.”

Rule 1.7 (a) (2) of the Rules of Professional Conduct (22 NYCRR 1200.0) provides, in relevant part, that “a lawyer shall not represent a client if a reasonable lawyer would conclude that...there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.”

While the Rules of Professional Conduct are not binding authority, they do provide guidance to this court in determining whether to disqualify counsel (*Gould v Decolator*, 131 AD3d 448 [2d Dept 2015]). In order to disqualify an attorney under rule 3.7 of the Rules of Professional Conduct (22 NYCRR 1200.0), known as the advocate-witness rule, the moving party must demonstrate that the testimony of the opposing parties' counsel is necessary to the moving party's case (*S&S Hotel Ventures Ltd. Partnership v 777 S. H. Corp*, 69 NY2d 437 [1987]).

The objectants have established that the testimony of Brian J. McCarthy's counsel will be necessary in this proceeding to establish whether Brian J. McCarthy may be subject to surcharge for his performance as an executor of his father's estate and as a trustee in the related proceedings. Even if such testimony should prove to be unnecessary, there is still an inherent conflict of interest between Brian J. McCarthy and his counsel which should preclude their representation of him pursuant to rule 1.7 (a) (2) of the Rules of Professional Conduct (22 NYCRR 1200.0). The submissions made by Brian J. McCarthy's counsel in the Reply to Objections of Patricia Warmington in File No. 2014-381268/A and the Affirmation of Ralph Berman in Support of Order to Show Cause with Temporary Stay of Prior Order made in File No. 275904/F, et. al., as well as the deposition testimony of Brian J. McCarthy's counsel, indicate that the delay in filing Brian J. McCarthy's accounting in this proceeding and the related trust proceedings was at least partially the result of law office failure on the part of his counsel.

While this court has been advised that Ralph Berman, Esq., the attorney deposed by the objectants and the remaining executor, has departed from the firm of Seyfarth Shaw, LLP, this does not render the issue of that firm's disqualification moot. The deposition testimony of Brian J. McCarthy is replete with references to other attorneys at Seyfarth Shaw LLP who provided legal services to him throughout this and the related proceedings and with regard to his accountings therein. The firm itself still has a potential conflict with Mr. McCarthy which necessitates its removal as his counsel in this and the related proceedings.

With regard to the cross motion made by Seyfarth Shaw LLP seeking to disqualify Forchelli, Curto, et. al. as counsel for Kathleen Bedard, such relief is unwarranted. That cross motion is premised upon the argument that the testimony of Forchelli, Curto, et. al. is necessary to ascertain the accuracy of Kathleen Bedard's accounting in this and the related trust proceedings. However, in opposition to the cross motion, Forchelli, Curto, et. al. has demonstrated that the firm was not representing Kathleen Bedard as her counsel at the time any of the subject accountings were prepared and the testimony of the firm cannot be deemed necessary in regard to those accountings.

Accordingly, so much of the objectants' motion as seeks to disqualify Brian J. McCarthy's counsel, Seyfarth Shaw LLP, in this proceeding is **GRANTED**. The cross motion made by Seyfarth Shaw LLP on behalf of Brian J. McCarthy to disqualify Kathleen Bedard's counsel Forchelli, Curto, et. al., is **DENIED**.

In addition to seeking the disqualification of Brian J. McCarthy's counsel, the objectants' motion also seeks to impose sanctions upon his counsel pursuant to 22 NYCRR part 130-1.1. Similarly, Kathleen Bedard's attorneys' cross motion seeks sanctions against Brian J. McCarthy and Seyfarth Shaw LLP for bringing the motion to disqualify them as Kathleen's attorneys.

Part 130 of the Rules of the Chief Administrator of the Courts (22 NYCRR part 130) provides for the award of costs and imposition of financial sanctions for frivolous conduct in civil litigation. Conduct is frivolous and subject to the award of costs and/or the imposition of sanctions when it is completely without merit in law or fact and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or it asserts material factual statements that are false (22 NYCRR 130-1.1 [c]; *Weissman v Weissman*, 116 AD3d 848 [2d Dept 2014]; *Muro-Light v Farley*, 95 AD3d 846 [2d Dept 2012]; *Mascia v Maresco*, 39 AD3d 504 [2d Dept 2007]).

In determining whether a party's conduct is frivolous, the court must consider, among other factors, the circumstances under which the conduct took place, including the time available to investigate the legal or factual basis of the conduct, and whether the conduct was discontinued when its lack of legal or factual basis should have been apparent or was brought to the attention of counsel or the party (22 NYCRR 130-1.1 [c]; *Finkelman v SBRE, LLC*, 71 AD3d 1081 [2d Dept 2010]; *Matter of Ernestine R.*, 61 AD3d 874 [2d Dept 2009]; *Glenn v Annunziata*, 53 AD3d 565 [2d Dept 2008]).

The court determines that neither the conduct of Brian J. McCarthy nor his counsel is frivolous, as defined by the applicable rule and thus the court declines to impose costs or sanctions at this time.

This constitutes the decision and order of the court.

Dated: February 26, 2018
Mineola, New York

E N T E R:

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Judge of the Surrogate's Court

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