[Cite as *Stanley v. Bobeck*, 2009-Ohio-5696.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92630

THOMAS STANLEY

PLAINTIFF-APPELLEE

vs.

JOSEPH A. BOBECK, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-632974

BEFORE: Blackmon, J., McMonagle, P.J., and Jones, J.

RELEASED: October 29, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellants Joseph A. Bobeck ("Bobeck"), Bobeck Funding, LLC ("Bobeck Funding"), Sunshine Builders and Developers, LLC ("Sunshine I"), Sunshine Builders and Developers II, LLC ("Sunshine II") [collectively referred to as Bobeck] appeal the trial court's decision disqualifying their attorneys, Meyers, Roman, Friedberg, & Lewis ("MRFL"). Bobeck assigns the following errors for our review:

> **"I. The trial court abused its discretion in ruling that MRFL has a conflict of interest pursuant to Rule 1.7 of the Ohio Rules of Professional Conduct."**
>
> **"II. To the extent that the trial court's journal entry was based upon the possibility of attorneys from MRFL being potential witnesses at trial, the trial court abused its discretion in disqualifying MRFL."**
>
> **"III. The trial court abused its discretion when it ruled that Stanley did not waive his right to object to MRFL's representation of appellants by failing to move to disqualify MRFL within a reasonable time of discovering the potential conflict."**

{¶ 2} Having reviewed the record and pertinent law, we reverse the trial court's decision and remand for proceedings consistent with this opinion. The apposite facts follow.

Background

{¶ 3} Thomas Stanley and Joseph Bobeck formed the corporation Sunshine I for the purpose of acquiring property to develop. Stanley and Bobeck were the only two shareholders; each owned a 50% share in the corporation. Sunshine I engaged in a project to build a community of custom homes known as The Chateaux at Emery Woods ("The Chateaux"). Pursuant to the Sunshine I's operating agreement, Tom Stanley Builders ("TSB") would serve as the builder of the Chateaux project, and Stanley would be the construction manager. Bobeck was designated the manager of Sunshine I and was responsible for handling Sunshine I's financial matters, record keeping, and tax-related activities. In March 2007, Bobeck terminated TSB and Stanley's employment with the Chateaux project.

{¶ 4} On August 16, 2007, Stanley filed an action against Bobeck, Bobeck Funding, Sunshine I, and Sunshine II. Stanley alleged that Bobeck violated his fiduciary duty by terminating his employment in order to prevent Stanley from participating in the operation of Sunshine I. According to

Stanley, Bobeck formed Sunshine II in order to transfer the property and assets of Sunshine I to Sunshine II, thereby depriving Sunshine I and Stanley of profits that would have been earned upon the successful completion of The Chateaux development.[1]

{¶ 5} Bobeck counterclaimed and also filed a third-party claim against TSB alleging that Stanley breached his obligations to Sunshine I by fraudulently misrepresenting his experience in building, causing Sunshine I to incur expenses and debts for which Stanley received the sole benefit, and Stanley misappropriated money rightfully belonging to Sunshine I. According to Bobeck, the homes built by Stanley were substantially defective, and Stanley failed to pay vendors, using money for the development to work on unrelated projects.[2]

{¶ 6} On September 19, 2008, Stanley filed a motion to disqualify MRFL, the firm representing Bobeck, arguing that MRFL's previous and present representation of Sunshine I and its representation of Bobeck, Bobeck

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[1]Stanley asserted the following six claims: (1) breach of fiduciary duty; (2) discharge without just cause; (3) R.C. Chapter 1705 demand for inspection against Sunshine I; (4) unjust enrichment; (5) defamation; (6) co-mingling of assets of Sunshine I with Sunshine II.

[2]Appellants asserted the following claims: (1) breach of fiduciary duty; (2) fraud and fraudulent inducement; (3) breach of contract; (4) unjust enrichment; (5) demand for accounting; (6) defamation.

Funding, Sunshine I and Sunshine II created a conflict of interest. Stanley also argued that one of the MRFL attorneys might be a "critical witness" in the case because he helped draft the documents that created Sunshine II. Bobeck opposed the motion arguing no conflict existed and that even if a conflict existed, Stanley waived the right to assert it.

{¶ 7} The trial court conducted a hearing on the matter. After hearing the parties' arguments and reviewing the briefs and documents submitted, the trial court concluded Stanley did not waive the issue and found there was a conflict of interest pursuant to Rule 1.7. The trial court stated that because MRFL represented Sunshine I in the past, MRFL owed a duty of loyalty to Stanley.

Waiver

{¶ 8} We first address Bobeck's third assigned error regarding whether Stanley waived the issue of disqualification of counsel by failing to raise the issue earlier. We conclude Stanley did not waive the issue of disqualification.

{¶ 9} "[The] timeliness [of a motion to disqualify counsel] is not a fixed concept, but generally courts have held that the proper time within which to raise an objection is soon after the onset of litigation, * * * or at least within a

reasonable time once the facts are known."[3] In the instant case, counsel for Stanley advised MRFL in a letter, dated December 4, 2007, that there was a conflict of interest that required MRFL to withdraw as counsel. It was not until September 19, 2008, nine months later, that Stanley filed his motion to disqualify MRFL. We conclude that the nine month delay did not result in a waiver of the disqualification of MRFL. The motion was filed soon after the exchange of documents, which documents affirmed Stanley's belief that MRFL should be disqualified.

{¶ 10} Moreover, a motion to disqualify counsel for conflict of interest should be denied based on "waiver only where there is substantial proof that the movant's delay has resulted in serious prejudice to the opposing party, or where litigation has proceeded to the point where disqualification would create substantial hardship to the opposing party, or where it is clear that the moving party knowingly delayed the filing of the motion in order to cause such hardship or prejudice."[4] We find none of the these factors to be evident here. The trial date was approximately six months away when Stanley filed

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[3] *Sarbey v. Natl. City Bank, Akron* (1990), 66 Ohio App.3d 18, 28 (granting a motion to disqualify approximately seven months after the complaint was filed); see, also, *Karaman v. Pickrel, Schaeffer & Ebeling Co.*, 2nd Dist. No. CA21813, 2008-Ohio-4139 (granting disqualification of counsel nearly two years after complaint was filed).

[4] *Sarbey* at 29-30.

its motion, and no substantial discovery in the form of depositions or expert reports had been completed at that point. There is also no indication that Stanley filed the motion to cause Bobeck any prejudice or hardship. Accordingly, Bobeck's third assigned error is overruled.

***Dana* Test**

{¶ 11} In his first assigned error, Bobeck contends the trial court failed to apply the appropriate analysis in determining whether a conflict existed.

{¶ 12} In reviewing a trial court's decision to disqualify a party's counsel, we apply an abuse of discretion standard.[5] An abuse of discretion implies that the trial court's attitude in reaching its decision is unreasonable, arbitrary, or unconscionable.[6] We are mindful that "disqualification constitutes a 'drastic measure which courts should hesitate to impose except when absolutely necessary'" in large part because it deprives a client of the counsel of his choosing.[7]

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[5] *155 N. High, Ltd. v. Cincinnati Ins. Co.*, 72 Ohio St.3d 423, 426, 1995-Ohio-85; *Carr v. Acacia Country Club*, Cuyahoga App. No. 91292, 2009-Ohio-628; *Spivey v. Bender* (1991), 77 Ohio App.3d 17.

[6] *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

[7] *Kala v. Aluminum Smelting & Refining Co., Inc.,* 81 Ohio St.3d 1, 6, 1998-Ohio-439, citing *Freeman v. Chicago Musical Instrument Co.* (C.A.7, 1982), 689 F.2d 715, 721.

{¶ 13} Ohio has adopted the three-part test for disqualification of counsel due to a conflict of interest set forth in *Dana Corp. v. Blue Cross & Blue Shield Mut. Of N. Ohio.*[8] The test is as follows: (1) a past attorney-client relationship must have existed between the party seeking disqualification and the attorney he or she wishes to disqualify; (2) the subject matter of the past relationship must have been substantially related to the present case; and (3) the attorney must have acquired confidential information from the party seeking disqualification.[9] If a party moving to disqualify an attorney cannot meet the first prong of the *Dana* test, that party lacks standing to seek the disqualification.[10]

{¶ 14} A review of the trial court's judgment entry shows that the court failed to apply the *Dana* test in determining whether to disqualify MRFL. Instead, the court based the disqualification solely on the fact that MRFL had previously represented Sunshine I, a closely held corporation. The court concluded that because Stanley and Bobeck were each 50 percent

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[8](C.A.6, 1990), 900 F.2d 882. See *Morgan v. N. Coast Cable Co.* (1992), 63 Ohio St.3d 156; *Hollis v. Hollis* (1997), 124 Ohio App.3d 481, 485; *Kitts v. U.S. Health Corp. of S. Ohio* (1994), 97 Ohio App.3d 271, 275.

[9]*Dana* at 889; *Morgan* supra, at 159, fn. 1.

[10]*Morgan* at syllabus.

shareholders of Sunshine I, MRFL owed its allegiance to Sunshine I and its shareholders. We disagree with the trial court's conclusion.

{¶ 15} In determining whether corporate counsel should be disqualified from representing any of the corporation's officers in a later suit, the trial court is required to find all three factors enumerated in the *Dana* test before ordering disqualification.[11] Even though an attorney has served as counsel for a corporation, Ohio does not require the immediate disqualification of the attorney from serving as personal counsel for a shareholder or officer in a suit involving the corporation.[12] In Ohio, pursuant to Rule 1.13(a) of the Ohio Rules of Professional Conduct, corporate counsel represents the interests of the corporation and not those of individual officers.

> **"(a) A lawyer employed or retained by an organization represents the organization acting through its constituents. A lawyer employed or retained by an organization owes allegiance to the organization and not to any constituent or other person connected with the**

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[11] *Legal Aid Soc. of Cleveland v. W & D Partners I, L.L.C.,* 162 Ohio App.3d 682, 2005-Ohio-4130.

[12] *Phillips v. Haidet* (1997), 119 Ohio App.3d 322, 325; *A.G. Financial, Inc. v. LaSalla*, Cuyahoga App. No. 84880, 2005-Ohio-1504; *Maloof v. Benesch, Friedlander, Coplan & Aronoff*, Cuyahoga App. No. 84006, 2004-Ohio-6285.

> **organization. The constituents of an organization include its owners and its duly authorized officers, directors, trustees, and employees."**[13]

{¶ 16} The trial court made an exception to this rule by concluding a closely held corporation is different from a large corporation because it is more like a partnership. No exception, however, was made regarding close corporations in the Rules of Professional Conduct. There is also no case law indicating that a different standard applies when the corporation is a closely held corporation. Moreover, there is no evidence that Stanley believed that MRFL was acting as his personal attorneys when representing Sunshine I as Stanley never conferred with MRFL on legal matters. Therefore, because there was no prior attorney-client relationship between Stanley and MRFL, the first prong of the *Dana* test was not met.

{¶ 17} Stanley relies upon this court's decision in *Abadir v. Fanous*[14] and the federal case of *Rosman v. Shapiro*[15] to support his contention that an attorney of a closely held corporation should be disqualified when

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[13]Rule 1.13(a) of the Ohio Rules of Professional Conduct.

[14](Sept. 19, 1997), Cuyahoga App. No. 71871.

[15](S.D. N.Y 1987), 633 F.Supp. 1441.

representing one shareholder against the other. However, these cases are distinguishable.

{¶ 18} In *Abadir*, the attorney had direct contact with all three shareholders and participated in the meeting that was the subject of the lawsuit. He then chose to side with two of the shareholders against the remaining shareholder regarding a dispute about the agreement. In that case, this court concluded that because the attorney had contact with all three shareholders, it was reasonable for the shareholders to believe the attorney represented them individually in the matter.

{¶ 19} In *Rosman*, both shareholders had contact with the attorney. The court held that the firm's direct contact with both shareholders from the beginning of the representation created an appearance of impropriety. Both of these cases emphasized the contact between the attorney and each shareholder. In the instant case, Stanley did not have direct contact with MRFL, as discussed further below.

{¶ 20} However, even if there was a prior relationship, the two other prongs of the *Dana* test have not been met. The past representation of a party does not in and of itself establish a conflict of interest.[16] **The key question when there was a prior relationship is whether the attorney**

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[16] *Hollis* at 484-485.

acquired confidential information from the party seeking disqualification so as to be prejudicial in the present representation.[17] This consideration is actually the third prong of the *Dana* test, but since it is relevant to resolving the first prong, we will address the third prong now.

{¶ 21} When an attorney brings an action against a former client on a matter substantially related to his prior representation of that client, the attorney is irrebutably presumed to have benefitted from confidential information relevant to the subsequent case.[18] However, when the attorney in the subsequent litigation is not the original attorney, but, instead, another attorney in the same law firm, the presumption of received confidences becomes rebuttable.[19] In the instant case, the presumption is rebuttable because the original attorney is not the attorney in the instant case. Instead, another attorney from the firm represented Bobeck.

{¶ 22} Stanley has failed to establish that defense counsel possessed confidential information that would be prejudicial to him in the current case. In fact, it is undisputed that counsel never met with Stanley or spoke with him. Instead, all conversations regarding Sunshine I were conducted with

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[17]Id., citing *Dana Corp.* at 829. See, also, *Morgan* at 160.

[18]*Luce v. Alcox*, 165 Ohio App.3d 742, 2006-Ohio-1209.

[19]Id.

Bobeck. Therefore, it is difficult to imagine what confidential information MRFL could have obtained from Stanley given it had never communicated with him. Therefore, MRFL rebutted the presumption that confidential information was received. As a result, the third prong of the *Dana* test has not been met.

{¶ 23} The second prong of the *Dana* test concerns whether the subject matter of the prior representation is substantially related to the present case.

{¶ 24} Rule 1.0(n) of the Ohio Rules of Professional Conduct defines "substantially related" as follows:

> **"'Substantially related matter' denotes one that involves the same transaction or legal dispute or one in which there is a substantial risk that confidential factual information that would normally have been obtained in the prior representation of a client would materially advance the position of another client in a subsequent matter."**

{¶ 25} In the instant case, the basis for Stanley's claims against Bobeck is that Bobeck established Sunshine II in order to deprive Stanley and Sunshine I of Sunshine I's assets. MRFL drafted the documents that created

Sunshine II. Under this scenario, the only possible conflict would be between Sunshine I and Sunshine II, because as we stated before, MRFL never personally represented Stanley. However, Sunshine I and Sunshine II are not adversaries in this case. Therefore, there is no conflict. Because Stanley failed to satisfy the three prongs of the *Dana* test, we conclude the trial court erred in granting the motion to disqualify. Accordingly, Bobeck's first assigned error is sustained.

Necessary Witness

{¶ 26} In his second assigned error, Bobeck contends the trial court abused its discretion in disqualifying counsel because one of the MRFL attorneys, attorney Brosse, was a necessary witness.[20] We disagree.

{¶ 27} The MRFL attorney that is acting as trial counsel in the instant case, is not the same attorney that previously represented Sunshine I. However, Stanley claims it would be "unseemly" for the trial attorney to conduct cross- examination of a colleague. The mere fact the counsel from the same firm representing a party may testify does not result in an immediate disqualification. Rule 3.7 of the Ohio Rules of Professional Conduct states in pertinent part:

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[20]The trial court did not grant the disqualification based on the possibility one of the MRFL attorneys would be a witness. However, because Stanley raised this as an argument in the court below, we will address the issue.

"(b) A lawyer may act as an advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or 1.9 [conflict of interest]."

{¶ 28} Moreover, where an attorney's testimony is unnecessary to prove his client's claim or the testimony is available through other witnesses, it is an abuse of discretion to disqualify the attorney.[21] Stanley contends it is necessary to call the previous attorney from MRFL to testify regarding the attorney fees paid by Sunshine I to MRFL. However, certainly someone else besides the previous attorney, i.e., a bookkeeper or other employee of Sunshine I, could testify what the payments represented.

{¶ 29} Stanley also contended that attorney Brosse may have had contact with a deceased witness. However, there is no evidence that he actually had contact with the witness, only speculation. "A mere allegation that allowing representation presents the possibility of a breach of confidence or appearance of impropriety is not enough."[22] Under these circumstances, we conclude Brosse is not a necessary witness. Accordingly, Bobeck's second assigned error is sustained.

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[21]*Environmental Network Corp. v. TNT Rubbish Disposal, Inc.* (2001), 141 Ohio App.3d 377, 379.

[22]*Phillips* at 327.

{¶ 30} Judgment reversed and remanded for proceedings consistent with this opinion.

It is, therefore, considered that said appellants recover of said appellee their costs herein.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

PATRICIA ANN BLACKMON, JUDGE

CHRISTINE T. McMONAGLE, P.J., CONCURS;
LARRY A. JONES, J., DISSENTS
(SEE ATTACHED DISSENTING OPINION.)

LARRY JONES, J., DISSENTING:

{¶ 31} I respectfully dissent from my learned colleagues in the majority. I believe there is substantial evidence in the record to support the trial court's decision. I believe the trial court's actions were proper and should be affirmed.

{¶ 32} Here, a past attorney-client relationship existed between the party seeking disqualification and the attorney he seeks to disqualify. Moreover, the subject matter of the relationships between the parties is substantially related and

the attorney acquired confidential information from the party seeking the disqualification in this case.

{¶ 33} There is a conflict here; MRFL attorneys will most likely have to testify regarding issues concerning confidential information involving this closely held corporation. I believe Rule 1.7 of the Ohio Rules of Professional Conduct prohibits MRFL's representation of appellants jointly in this case. MRFL owes a duty to Sunshine I, and its representation of any of the other appellants is a violation of this duty.

{¶ 34} MRFL had substantial involvement in the activities of Sunshine I, of which Stanley and Bobeck are each 50% owners. Documents and records produced in discovery on this matter have shown thousands of dollars paid by Sunshine I to MRFL. Appellant Bobeck is also in charge of Sunshine II and Bobeck Funding, which are both currently represented by MRFL in this lawsuit against Stanley as well as other matters.

{¶ 35} The monies paid from Sunshine I to MRFL are an integral part of Stanley's claims in this matter. Stanley should be given a fair opportunity to ascertain what services were actually provided to Sunshine I and what services were paid for by Sunshine I.

{¶ 36} I believe that the evidence in this case demonstrates that the three factors in *Dana Corp. v. Blue Cross & Blue Shield Mut. of Northern Ohio,* (C.A.6,

1990), 900 F.2d 882, 889, were satisfied. Accordingly, I believe the disqualification of MRFL was proper and the trial court's ruling should be upheld.

{¶ 37} Accordingly, I would affirm the lower court.