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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2723-21

RAUL ALMENDARIZ, YADIRA
TERAN, and KRYSTLE CRUZ,

Plaintiffs,

v.

CUELLAR LLC d/b/a SHOPRITE
OF PASSAIC/CLIFTON,

Defendant,

and

FELIX MORALES,

Defendant-Respondent,

and

CUELLAR LLC d/b/a SHOPRITE
OF PASSAIC/CLIFTON,

Defendant/Third-Party
Plaintiff-Appellant,

v.

INSURE-RITE LTD., FEDERAL

INSURANCE COMPANY, IRON-
SHORE INDEMNITY, INC., and
SCOTTSDALE INDEMNITY
COMPANY,¹

Third-Party Defendants-
Respondents.

Submitted November 7, 2022 – Decided December 1, 2022

Before Judges Mayer and Enright.

On appeal from an interlocutory order of the Superior
Court of New Jersey, Law Division, Passaic County,
Docket No. L-3332-19.

Gold, Albanese, Barletti & Locascio, LLC, attorneys
for appellant Cuellar LLC (James N. Barletti, of
counsel and on the briefs).

McCarter & English, LLP, respondent Insure-Rite Ltd.
(Sherilyn Pastor, on the brief).

PER CURIAM

By way of a May 10, 2022 order granting leave to appeal, defendant/third-
party plaintiff Cuellar LLC d/b/a Shoprite of Passaic/Clifton (Cuellar) appeals
from a March 31, 2022 order disqualifying the law firm of Gold, Albanese,

¹ Federal Insurance Company and Scottsdale Indemnity Company improperly
pled as Chubb Insurance Company and Nationwide Insurance Company,
respectively.

Barletti & Locascio, LLC (Gold) from continued representation of Cuellar due to a conflict of interest.² We affirm.

The underlying litigation is an employment discrimination lawsuit brought by plaintiffs Raul Almendariz, Yadira Teran, and Krystle Cruz against Cuellar and others (the underlying litigation). Cuellar owns and operates a ShopRite grocery store in Passaic County and also owns and operates ShopRite Liquor of Clifton, LLC (ShopRite Liquor). Utica National Insurance Group insured ShopRite Liquor and retained Gold to defend Cuellar in the underlying litigation.

After nearly two years of litigation, Cuellar filed a third-party complaint against third-party defendant Insure-Rite Ltd. (I-R). Cuellar's third-party action sought insurance coverage from I-R for the claims against it in the underlying litigation. To give context to the issue on appeal, we provide some brief background regarding I-R, I-R's relationship with its insureds, and I-R's association with Gold.

² In a separate May 10, 2022 order, we granted a motion filed by third-party defendant Insure-Rite Ltd., allowing submission of documents for in camera consideration by this court. Consistent with that order, I-R filed a separate confidential appendix containing the documents reviewed in camera by the trial court.

I-R is an association wholly owned by Wakefern Food Corp. (Wakefern) and Wakefern's insured members. Wakefern's insured members consist of entities operating under the ShopRite name and other Wakefern subsidiaries. Cuellar is an insured member of Wakefern and conducts business under the ShopRite name. I-R is a captive insurer,³ formed for the purpose of providing insurance coverage solely to Wakefern and its insured members. Wakefern tenders claims for insurance coverage on behalf of its members to I-R. Upon receipt of a claim for insurance coverage, I-R assigns defense counsel to the insured member. I-R and Wakefern are symbiotic entities as their mutual interests are the protection of Wakefern and its subsidiaries as insured members under I-R's insurance policy.

Counsel assigned to defend claims brought against Wakefern's insured members are required to comply with I-R's Litigation Guidelines (Guidelines) and are paid by I-R for their legal services. The Guidelines contain practices and procedures to be employed by defense counsel selected by I-R. The Guidelines specify that communications with Wakefern's claims manager, Lynn

³ "A captive insurer is a corporation organized for the purpose of insuring the liability of its owner" and "generally the insured is both the sole shareholder and the only customer of the captive insurer." Owens-Illinois, Inc. v. United Ins. Co., 264 N.J. Super. 460, 469 (App. Div. 1993), rev'd on other grounds, 138 N.J. 437 (1994).

McKenna, are confidential. The documents in the confidential appendix submitted to this court included documents evidencing communications between McKenna, as Wakefern's claims manager, and Gold, as assigned counsel for Wakefern's insured members.

Additionally, a third-party administrator, Gallagher Bassett Services, Inc. (GB), assists with the administration of claims against Wakefern's insured members. GB sends communications to law firms handling claims against Wakefern's insured members, including Gold, reminding assigned counsel to comply with the Guidelines. Documents in the confidential appendix included letters from GB to Gold regarding other litigations in which I-R assigned Gold as defense counsel for a Wakefern-insured member. Over the course of a twenty-year relationship and numerous litigation matters, Gold worked with Wakefern's claims personnel to defend Wakefern's insured members under I-R's insurance policies.

As counsel for I-R's insureds, Gold had access to confidential and proprietary information regarding I-R's business operations. That information included the Guidelines, which detailed I-R's methods and procedures for handling claims and litigation strategy. The Guidelines governed topics related to discovery matters, settlement positions, and trial planning.

On June 1, 2021, the date Cuellar filed a third-party complaint against I-R, Gold represented several I-R insureds in pending matters. At that time, Gold defended a Wakefern subsidiary in a federal court litigation entitled Robertson v. PRRC Inc., No. 1784CV01077. The confidential appendix included privileged information between Wakefern and Gold discussing possible settlement as well as the defense of Wakefern's insured member in the Robertson matter. At the time I-R filed its motion to disqualify Gold, the Robertson matter remained pending and was listed for trial in the near future. Further, when Gold filed the third-party complaint against I-R, the law firm was in the process of settling, or had recently settled, several other litigations on behalf of Wakefern and its insured members – specifically, the Wakefern-insured members sued in Vasquez v. Inserra Supermarkets, Inc., Docket No. BER-L-8840-17, and Graham v. Glass Gardens, Inc., Docket No. BER-L-2977-17.

In the third-party complaint against I-R, Cuellar referred to emails between Gold and Wakefern's claim manager McKenna. According to the allegations in the third-party complaint, on April 17, 2020, Cuellar submitted a request for defense and indemnification to McKenna regarding the underlying litigation. McKenna denied coverage. Based on McKenna's denial of insurance

coverage for Cuellar in the underlying litigation, Cuellar claimed I-R violated the insurance contract.

According to I-R, McKenna and Gold exchanged hundreds of emails over the years as part of the relationship between Gold, Wakefern, and I-R. Those communications reflected typical confidential correspondence exchanged between an insured, an insurer, and assigned counsel.

Based on Gold's long-standing relationship as counsel for Wakefern and its insured members, I-R filed a motion to disqualify Gold as counsel for Cuellar. After oral argument on March 9, 2022, the judge granted the parties' request to submit additional exhibits to the trial court for in camera review. After hearing the arguments, considering the briefs, and reviewing the additional documents in camera, the judge granted I-R's motion.

Relying on Gray v. Commercial Union Insurance Company, 191 N.J. Super. 590 (App. Div. 1983), the judge found Gold had a "twenty-year relationship in which it ha[d] been retained as counsel by Wakefern to defend its member companies in accordance with its Insure-Rite policies." Additionally, the judge explained Gold was representing a Wakefern-insured member in Robertson at the time the judge decided I-R's disqualification motion. While recognizing "Gray did not create a universal prohibition where former

insurance assigned counsel may never represent clients with interests adverse to that carrier," the judge found the existence of a "substantial relationship . . . given the longstanding and current relationship between Gold [], Wakefern and Insure-Rite." Additionally, the judge explained Wakefern "is self-insured by its captive insurer" and, therefore, I-R is not a separate and distinct entity from Wakefern as asserted by Gold.

Based on the in camera review of documents submitted by the parties, the judge rejected Gold's assertion that it dealt solely with a third-party administrator and not I-R. The judge concluded the documents demonstrated communications between Gold, acting as counsel for a Wakefern-insured member, and Wakefern's claims supervisor in the Robertson litigation at the "same time as it was [c]ounsel for [Cuellar] in this matter." Additionally, the Robertson litigation had not been dismissed as of the date the judge decided the disqualification motion. Thus, the judge found "a concurrent conflict that warrant[ed] disqualification."

The judge further explained

even if there was not a concurrent conflict, Gold [] maintained a [twenty]-year relationship with Wakefern and was privy to confidential and proprietary information relevant to the case at bar, including Insure-Rite's [G]uidelines, including litigation strategy, methods and procedures in handling and defending

claims, and internal procedures and protocols. Accordingly, this [c]ourt finds that even if a concurrent conflict did not exist, these communications show that Insure-Rite would be prejudiced should Gold [] continue in its representation in the instant matter.

Based on these findings, in a March 31, 2022 order, the judge disqualified Gold as counsel for Cuellar.

On appeal, Cuellar argues that Gold should not have been disqualified as its counsel because the cases relied upon by the motion judge were modified by later decisions from this court and the New Jersey Supreme Court. Additionally, Cuellar contends even if there is a conflict, the ultimate sanction of disqualification was too drastic and the judge should have considered less onerous alternatives. We disagree.

"[A] determination of whether counsel should be disqualified is, as an issue of law, subject to de novo plenary appellate review." City of Atlantic City v. Trupos, 201 N.J. 447, 463 (2010); see also Greebel v. Lensak, 467 N.J. Super. 251, 257 (App. Div. 2021) ("We review a decision on a disqualification motion de novo.").

When deciding a motion to disqualify counsel, courts must "balance competing interests, weighing the need to maintain the highest standards of the profession against a client's right freely to choose his counsel." Twenty-First

Century Rail Corp. v. N.J. Transit Corp., 210 N.J. 264, 273-74 (2012) (citing Dewey v. R.J. Reynolds Tobacco Co., 109 N.J. 201, 218 (1988)). However, "to strike that balance fairly, courts are required to recognize and to consider that 'a person's right to retain counsel of his or her choice is limited in that there is no right to demand to be represented by an attorney disqualified because of an ethical requirement.'" Id. at 274 (citation and internal quotation marks omitted). Motions for disqualification "should ordinarily be decided on the affidavits and documentary evidence submitted, and an evidentiary hearing should be held only when the court cannot with confidence decide the issue on the basis of the information contained in those papers" Troupos, 201 N.J. at 463 (quoting Dewey, 109 N.J. at 222).

The party requesting disqualification bears the burden of demonstrating that the attorneys previously represented it "and that the present litigation is materially adverse to the former client" Id. at 462. If the moving party makes that showing, "the burden shifts to the attorney(s) sought to be disqualified to demonstrate that the matter or matters in which . . . they represented the former client are not the same or substantially related to the controversy in which the disqualification motion is brought." Id. at 463.

Under the New Jersey Rules of Professional Conduct (RPC), a lawyer is prohibited from representing a client if such representation is directly adverse to another client. Rule 1.7 of the RPC provides:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) [T]he representation of one client will be directly adverse to another client;

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) [E]ach affected client gives informed consent, confirmed in writing, after full disclosure and consultation

RPC 1.7 embodies "the fundamental understanding that an attorney will give 'complete and undivided loyalty to the client' [and] 'should be able to advise the client in such a way as to protect the client's interests'" State ex rel. S.G., 175 N.J. 132, 139 (2003) (quoting In re Dolan, 76 N.J. 1, 9 (1978)).

Here, because the disqualification was based on an alleged conflict with a concurrent client, the trial court first decided if an attorney-client relationship existed between Gold and I-R. Based on the documents reviewed in camera by the motion judge, he concluded there was an attorney-client relationship. The

judge determined Gold represented two clients, the insurer, I-R, and I-R's insured, Cuellar. Therefore, the judge found a conflict of interest existed when Gold filed the third-party complaint on behalf of Cuellar and against I-R.

Our Supreme Court has held clients of insurer-assigned defense counsel represent both the insurer and the insured. Lieberman v. Employers Ins. of Wausau, 84 N.J. 325, 338 (1980). Based on that relationship, the Court concluded that insurance carrier-assigned defense counsel "owes to both [the insurer and the insured] a duty of good faith and due diligence in the discharge of its duties[.]" Id. at 339. When assigned counsel has reason to believe that the duty to the insured would conflict with the duty to the insurer, the attorney "cannot continue to represent both." Ibid.

Following the Court's direction in Lieberman, we addressed an attorney's disqualification as a result of a conflict of interest arising from counsel's receipt of confidential information based on counsel's previous representation of the insurance carrier. Gray, 191 N.J. Super. at 598. We disqualified counsel in Gray because counsel had "access to secrets and confidential information" gleaned through the attorney's representation of the insurer. Ibid. We noted counsel's familiarity with the insurance carrier's "litigation philosoph[ies] and its methods and procedure in handling and defending claims and litigation" as

grounds for counsel's disqualification in a suit brought against the insurer. Id. at 593. "If there be any doubt as to the propriety of an attorney's representation of a client, such doubt must be resolved in favor of disqualification." Herbert v. Haytaian, 292 N.J. Super. 426, 438-39 (App. Div. 1996) (alterations in original) (citation omitted).

Here, Gold had frequent contacts with Wakefern's claims manager and represented Wakefern's insured members under I-R's insurance policies for twenty years. Gold received I-R's Guidelines, providing the law firm with insight into litigation strategies and other information relevant to representation of I-R's insureds. When Gold filed the third-party complaint against I-R in the underlying litigation, Gold was actively representing and defending an existing Wakefern-insured member under I-R's insurance policy in the Robertson case.⁴

Gold's attempts to avoid its disqualifying interest as required under Lieberman and Gray are unavailing. Gold cannot avoid the fact that I-R selected

⁴ On appeal, Gold argues the Robertson matter is now settled. However, at the time the judge decided the disqualification motion, Gold concedes that matter was not dismissed until the filing of a stipulation of dismissal nearly three months later on June 13, 2022. See Santacroe v. Neff, 134 F. Supp. 2d 366, 370 (D.N.J. 2001) (holding the court "looks to RPC 1.7 when the movant is an actual . . . client during the events pertinent to [the] motion."). Moreover, Gold filed the third-party complaint against I-R on June 1, 2021, one year prior to final disposition of the Robertson case.

and retained Gold to represent I-R's insureds in defending covered claims for twenty years and had confidential and propriety information related I-R's litigation strategies and philosophies. Moreover, contrary to the cases relied upon by Gold, Wakefern, its ShopRite stores, and its insured members are covered under an insurance policy issued by their captive insurer, I-R. As a captive insurer, I-R is not a separate and distinct entity. I-R only provides insurance to Wakefern and Wakefern's insured members. Additionally, I-R's funding for the payment of claims is derived from the premiums paid by Wakefern and its insured members.

Under these circumstances, we are satisfied the judge correctly disqualified Gold rather than imposing a lesser remedy. Cuellar elected to file a third-party claim against Gold's current client. Cuellar could have litigated the coverage dispute with I-R in a separate action but chose not to do so. More importantly, Cuellar has new counsel with ample experience who is defending Cuellar in the underlying litigation.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION