SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3761-20

NOEMI ESCOBAR, individually and as Guardian for J.V., an infant,

Plaintiff-Appellant,

v.

DAVID A. MAZIE and MAZIE SLATER KATZ & FREEMAN, LLC,

Defendants-Respondents.

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Argued January 11, 2022 – Decided April 25, 2022

Before Judges Messano, Accurso, and Enright.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-8329-17.

Robert H. Solomon argued the cause for appellant (Nagel Rice, LLP, attorneys; Bruce H. Nagel and Robert H. Solomon, of counsel and on the brief).

Brian J. Molloy argued the cause for respondents (Wilentz, Goldman & Spitzer, PA, attorneys; Brian J.

Molloy, of counsel and on the brief; Samantha J. Stillo, on the brief).

PER CURIAM

Plaintiff Noemi Escobar appeals, on leave granted, from a July 14, 2021 Law Division order denying her second attempt to disqualify defendant David A. Mazie's and his firm's, Mazie Slater Katz & Freeman, LLC, choice of counsel in this matter. We affirm, essentially for the reasons expressed in Judge Keith E. Lynott's thorough and thoughtful written opinion of the same date.

We sketched the essential facts in our prior opinion in this matter, Escobar v. Mazie, 460 N.J. Super. 520, 523-24 (App. Div. 2019). Defendants represented plaintiff, the legal guardian of her grandson, in a civil suit against the State of New Jersey and others for catastrophic injuries to the four-month-old infant caused by the criminal acts of his father, the boyfriend of plaintiff's eighteen-year-old daughter. Ibid.; N.E. for J.V. v. State Dep't of Children & Families, Div. of Youth & Family Servs., 449 N.J. Super. 379, 383-84, 388 (App. Div. 2017). Defendants recovered a verdict against the State on plaintiff's behalf for $165,972,503, which the judge reduced to $102,630,435.25 on a motion for remittitur. Escobar, 460 N.J. Super. at 524, 524 n.2. The jury assigned one hundred percent of the liability to the State,

finding no liability even as to the baby's father, who had shook and dropped the infant resulting in the child's injuries. Id. at 524-25; N.E. for J.V., 449 N.J. Super. at 383-84, 384 n.2. The State's motion for judgment notwithstanding the verdict based on qualified immunity was denied, and it appealed. Escobar, 460 N.J. Super. at 524.

While the appeal was pending, the State attempted to settle the case. Ibid. Although the parties worked through a mediator, and the State made several offers, including one for $10,000,000 cash after argument, plaintiff rejected them all. Ibid. We subsequently reversed the judgment, agreeing with the State that its employees were shielded from liability by qualified immunity, N.J.S.A. 59:3-3. Ibid.

Plaintiff filed her malpractice claim against defendants in late 2017, alleging, among other things, they failed to properly "inform and educate" her of the risks of the judgment being reversed on appeal, rendering her unable to make an informed decision about settlement. Following the filing of an amended complaint, defendants made a motion to remove plaintiff as the guardian ad litem on the basis of an alleged inherent conflict between her and her grandson, which was denied. In support of their motion for

reconsideration, defendants submitted the certification of the mediator, a retired Superior Court judge.[1]

The mediator described the two mediation sessions he conducted, the various settlement offers tendered by the State as well as his understanding of the issues undergirding the State's approach to settlement, most notably its belief that the State was immune from liability. The mediator averred he was present for "an open discussion" between plaintiff and defendant Mazie concerning immunity, the "uncertainty of the result in the context of current case law, and the effect of losing on that issue." The mediator also offered his impression of the factors motivating plaintiff in those discussions. Although finding no bar to the mediator testifying as a fact witness in view of plaintiff's claims against her former counsel, the judge denied the motion.

[1] Although the mediator opined as to his belief that plaintiff's allegations of malpractice against defendants vitiated the privilege accorded to communications between the parties and the mediator under the Uniform Mediation Act, N.J.S.A. 2A:23C-1 to -13, under which the mediation was conducted, his certification was nevertheless submitted under seal to permit the court to rule on the issue. The judge subsequently denied plaintiff's motion to bar use of the certification, finding, under the circumstances, no confidentiality bar "to any otherwise relevant and admissible testimony of [the mediator] in this case . . . concerning his interactions with the plaintiff and/or her then counsel during the mediation."

Defendants were represented by Margolis Edelstein when those motions were decided in 2018. In January 2021, defendants retained new counsel, Wilentz, Goldman & Spitzer. In February the mediator, along with several other lawyers in his firm, joined the Wilentz firm, prompting plaintiff's motion to disqualify Wilentz pursuant to New Jersey Rule of Professional Conduct 1.12.

After hearing argument, Judge Lynott denied the motion. In addition to the facts we've stated, the judge added that although there was a public announcement of the merger, neither new counsel of record at Wilentz nor anyone else at the firm, "affirmatively notified the court or the plaintiff and her counsel of the merger and [the mediator's] new affiliation with the firm that had recently become counsel to the defendants in this case."

The judge also related the exchange between counsel after the announcement, namely, that plaintiff's counsel contacted new counsel of record objecting to his and his firm's representation of defendants under RPC 1.12, "in light of [the mediator's] continuing role as a material witness in the case," and the Wilentz firm's prompt advice of the steps it had taken to screen the mediator "from any participation as an attorney to the defendants (a role that it asserts was never contemplated in any event)." Those steps included

ensuring the mediator would not have access to electronic or paper files maintained by the firm and would not benefit from fees paid to the Wilentz firm for its service as counsel to defendants.

The judge rejected plaintiff's arguments that Wilentz's representation of defendants violates RPC 1.12 because the Rule prevents "any participation" by the mediator in this case, including his testifying as a fact witness at deposition or trial, and that defense counsel's failure to notify plaintiff the mediator had joined his firm, as expressly required by the Rule, itself warranted disqualification.

The judge began his analysis with the text of the Rule which provides:

> (a) Except as stated in paragraph (c),[2] a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, arbitrator, mediator or other third-party neutral, or law clerk to such a person, unless all parties to the proceeding have given consent, confirmed in writing.
>
> (b) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

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[2] Michels, Current N.J. Attorney Ethics § 22:5 (2022) notes "[t]he reference . . . to 'paragraph (c)' is an error resulting from the addition of a new paragraph (b) in 2004; the reference should be to paragraph (d)."

> (1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
>
> (2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this Rule.
>
> (c) A lawyer shall not negotiate for employment with any person who is involved as a party or as an attorney for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer, arbitrator, mediator, or other third-party neutral. A lawyer serving as law clerk to such a person may negotiate for employment with a party or attorney involved in a matter in which the law clerk is participating personally and substantially, but only after the lawyer has notified the person to whom the lawyer is serving as law clerk.
>
> (d) An arbitrator selected by a party in a multi-member arbitration panel is not prohibited from subsequently representing that party.
>
> [RPC 1.12.]

Reading the text, the judge had no hesitation in concluding paragraph (a) of the Rule prohibited the mediator from serving as counsel to defendants here. Although accepting defendants' representation that such was never the intent, the judge nevertheless found the mediator's move to Wilentz "triggered" the Rule's disqualification provisions. The judge also agreed with plaintiff that this case is sufficiently related to the underlying case in which the mediator

participated "to implicate the essential purpose of the Rule," that is, preventing "the compromising of the mediator's former neutrality by participating as an advocate in the related matter."

Ruling the present case a "matter" for purposes of the Rule, the judge found the Wilentz firm disqualified unless the firm "reliably undertake[s] to screen [the mediator] from 'any participation' in the case" as "an attorney acting in such capacity." Judge Lynott rejected plaintiff's expansive interpretation of the phrase "any participation" as preventing the mediator's participation in any and every capacity, and specifically here, that of a fact witness. The judge reasoned

> the Rules of Professional Conduct in general and Rule 1.12 in particular govern the conduct of lawyers in their capacity as such advising and representing clients and appearing as advocates before courts and other tribunals. That a lawyer may be a fact witness in a case — whether by virtue of personal observation of an accident, drafting and negotiation of a contract, or by prior service as a mediator — does not give rise to the concerns that underpin the Rule's prohibition on "any participation."

Accordingly, the judge concluded the only sensible construction of the phrase "any participation," in light of the "background and purpose of the Rule," was that the disqualified lawyer be timely screened from any participation as a lawyer in the matter and apportioned no part of the fee therefrom.

The judge was satisfied the procedures the Wilentz firm had "put in place adequately assure that [the mediator] will not and cannot participate in the case in a capacity as a lawyer and will not share or participate in fees earned by the firm from its continuing service as counsel to the defendants, as RPC 1.12 requires." He further noted plaintiff could practically verify compliance with those procedures by questioning the mediator about them at deposition or trial.[3]

Although finding Wilentz should have notified plaintiff's counsel the mediator had joined the firm and the procedures it had put in place to screen him from the case, the judge found it's failure to do so did not disqualify Wilentz from representing defendants. The judge noted there was no dispute that plaintiff's counsel became aware of the merger shortly after it occurred through the public announcement and immediately brought it to the firm's attention, thus achieving "the essential purpose of the notice requirement — to apprise interested parties of the circumstances and ensure the procedures

[3] To assuage plaintiff's concern that Wilentz cannot appropriately screen the mediator if the firm is preparing him to testify, defendants have offered, "[i]n the event that [the mediator] is deposed or testifies at trial, co-counsel Mazie Slater will handle [those] aspects of the defense."

required by the Rule are established contemporaneously with the individual's arrival at a law firm."

Mindful a party is ordinarily entitled to defend a case with counsel of its choosing, the judge concluded plaintiff had not established "a basis on which to interfere with the defendants' choice" here. While finding RPC 1.12 plainly applicable, the judge was satisfied the procedures Wilentz put in place to screen the mediator satisfied its obligations under the Rule.

Plaintiff appeals, reprising the arguments she made to the trial court and emphasizing there is "no adequate screening procedure that can be put in place to preclude [the mediator] 'from [having] any participation in th[is] matter,' as [the mediator] is already an active participant in this case," having submitted a certification adverse to plaintiff at defendant Mazie's request and on whose testimony defendants intend to rely at trial.

Our review of a decision granting or denying a motion to disqualify counsel is de novo. City of Atl. City v. Trupos, 201 N.J. 447, 463 (2010). Our courts have long recognized the paramount importance of "a client's right freely to choose his counsel." Dewey v. R.J. Reynolds Tobacco Co., 109 N.J. 201, 205, (1988) (quoting Gov't of India v. Cook Indus., Inc. 569 F.2d 737, 739 (2d Cir. 1978)). The right is not unlimited, of course, as "there is no right

to demand to be represented by an attorney disqualified because of an ethical requirement." Id. at 218 (quoting Reardon v. Marlayne, Inc., 83 N.J. 460, 477 (1980)). As we observed the last time we considered a disqualification motion in this case, such "motions are, nevertheless, viewed skeptically in light of their potential abuse to secure tactical advantage." Escobar, 460 N.J. Super. at 526.

Having reviewed this record, we agree with Judge Lynott that plaintiff failed to carry her burden to prove that disqualification of the Wilentz firm is justified. See Trupos, 201 N.J. at 462-63. We have little to add to his straightforward analysis of RPC 1.12.

There can be no doubt RPC 1.12 is intended to prohibit former judges, arbitrators, mediators or law clerks from representing anyone connected with a matter in which the lawyer formerly participated "personally and substantially" in one of those roles, without written consent. See RPC 1.12; Comparato v. Schait, 180 N.J. 90, 96 (2004). Paragraph (a) of the Rule says so directly. Paragraph (b) imputes that disqualification "to a law firm that employs the former judge, arbitrator, mediator or law clerk unless the disqualified lawyer is properly screened from the matter." Michels, Current N.J. Attorney Ethics § 22:5 (2022). Plaintiff argues Wilentz can't effectively screen the mediator

"from any participation in the matter " because the mediator has already participated by providing a certification and will continue to do so by providing testimony at deposition and trial.

But as RPC 1.12 does not bar a lawyer from testifying as a fact witness in a matter in which the lawyer formerly participated as a mediator, we see no justification to disqualify his firm for failing to screen the mediator from such participation. Cf. State v. Dayton, 292 N.J. Super. 76, 83 (App. Div. 1996) (noting the prohibition in RPC 3.7 against a lawyer acting as advocate at a trial in which the lawyer is likely to be a necessary witness, "is not against being a witness, but against acting as trial attorney in a case where it is likely that the attorney's testimony will be necessary" (quoting State v. Tanksley, 245 N.J. Super. 390, 393 (App. Div. 1991))).

To construe the Rule as plaintiff suggests would plainly expand the disqualification in paragraph (a) beyond the boundaries of representation for those former judges, arbitrators, mediators or law clerks associated with a firm. She has provided us no basis to do so or to second-guess the judge's ruling that the procedures the firm has put in place are sufficient to ensure the mediator will not participate in defendants' representation or share in any fees earned by the firm for its services to defendants.

In short, we affirm the order denying the disqualification of the Wilentz firm, substantially for the reasons expressed in Judge Lynott's well-reasoned opinion.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION