

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

PLUS CONCRETE, INC.,

Plaintiff,

vs.

Case No. 2015-1621-CB

RMD HOLDINGS, LTD (a/k/a
NATIONWIDE CONSTRUCTION
GROUP) and ROBERT DEMIL,

Defendants.

OPINION AND ORDER

Plaintiff has filed a motion to disqualify Defendants' counsel Lawrence M. Scott ("Mr. Scott") and O'Reilly Rancilio, P.C ("O'Reilly"). Defendants have filed a response and requests that the motion be denied.

I. Arguments and Analysis

Plaintiff seeks to have Mr. Scott and the O'Reilly firm disqualified under MRPC 1.7 and 1.9. MRPC 1.7(a) and MRPC 1.9(a) prohibit the representation of a client where that representation is directly or materially adverse to another client (MRPC 1.7) or former client (MRPC 1.9). The party seeking disqualification bears the burden of demonstrating specifically how and as to what issues in the case the likelihood of prejudice will result.' *Rymal v Baergen*, 262 Mich App 274, 319, 686 NW2d 241 (2004).

Plaintiff's complaint includes a claim for breach of fiduciary duty against Defendant Robert Demil ("Defendant Demil"). Specifically, Plaintiff alleges that Defendant Demil breached his fiduciary duty as a shareholder and treasurer of

Plaintiff by, *inter alia*, retaining Mr. Scott and O'Reilly without obtaining the requisite approval of Plaintiff's remaining shareholders.

In its motion, Plaintiff asserts that Mr. Scott and the O'Reilly have essential information that is material to their breach of fiduciary duty claim against Defendant Demil. Specifically, Plaintiff asserts that the following information is material to its breach of fiduciary duty claim:

1. The nature and scope of O'Reilly's representation of Plaintiff;
2. Who advised O'Reilly that Placido Corral, a shareholder and the President of Plaintiff, authorized O'Reilly to be retained;
3. Who hired O'Reilly on Plaintiff's behalf;
4. The nature and scope of O'Reilly representation of Plaintiff;
5. The identity of the person who requested O'Reilly to complete certain tasks; and
6. The nature and scope of the information O'Reilly obtained with respect to Plaintiff.

In its motion, Plaintiff contends that Mr. Scott and O'Reilly must be disqualified under MRPC 3.7, 1.7(a) and 1.9(a).

A. MRPC 1.7(a)

MRPC 1.7 governs conflicts of interests of current clients. *People v Waterstone*, 287 Mich App 368; 789 NW2d 669 (2010), rev'd on other grounds 486. In this case, Defendants contend that Rule 1.7 does not apply in this case because their counsel ceased representing Plaintiff in May 2015. However, they do not present any evidence in support of their position. In its motion, Plaintiff does not address whether the attorney-client relationship has been terminated between itself and Mr. Scott/O'Reilly. Nevertheless, this question is not material

because, for the reasons discussed below Mr. Scott and the O'Reilly should be disqualified under MRPC 1.9 and 3.7.

B. MRPC 1.9(a)

MRPC 1.9(a) governs conflicts of interests involving a former client.

Specifically, MRPC 1.9(a) provides:

- (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 consents after consultation.

In this case, Plaintiff's relationship with Mr. Scott and O'Reilly, and the facts surrounding the retention of Mr. Scott/O'Reilly, are at the center of Plaintiff's breach of fiduciary duty claim against Defendant Demil. Specifically, Plaintiff alleges that Mr. Scott and O'Reilly were improperly retained without the requisite approval from the other shareholders, and that the scope of Mr. Scott/O'Reilly's representation is unknown because it refuses to turn its files related to the representation over to Plaintiff. Given the intertwined nature between Mr. Scott/O'Reilly's representation of Plaintiff and Plaintiff's current breach of fiduciary duty claim, the Court is convinced that the two matters are substantially related within the meaning of MRPC 1.9, and on that basis Mr. Scott and O'Reilly must be disqualified.

C. MRPC 3.7

MRPC 3.7 provides:

- (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

- (1) The testimony relates to an uncontested issue;

(2) The testimony relates to the nature and value of legal services rendered in the case; or

(3) Disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as 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 Rule 1.9.

In this case, Plaintiff's breach of fiduciary duty claim against Defendant Demil directly relates to his interaction with Mr. Scott and O'Reilly. Consequently, Plaintiff would likely seek to depose Mr. Scott and/or call him to testify at trial. Further, the issues Mr. Scott would be called to testify regarding, i.e. the scope and nature of his representation of Plaintiff, are not uncontested. Defendants contend that Mr. Scott was merely retained to assist with dissolving Plaintiff. Plaintiffs assert that Mr. Scott was retained to assist Defendant Demil in using Plaintiff for his own benefit. Moreover, the scope of Mr. Scott's potential testimony would go beyond the value and scope of his services. Plaintiff will likely seek to elicit testimony regarding Defendant Demil's involvement in retaining Mr. Scott and O'Reilly and the scope of his instructions to Mr. Scott. Finally, disqualifying Mr. Scott will not impose a substantial hardship on Defendants given the early stage of this matter. For these reasons, the Court is satisfied that Mr. Scott must be disqualified pursuant to MRPC 3.7.

II. Conclusion

Based upon the reasons set forth above, Plaintiff's motion to disqualify Defendants' counsel Lawrence Scott and O'Reilly Rancilio, P.C. is GRANTED. In

compliance with MCR 2.602(A)(3), the Court states this Opinion and Order does not resolve the last claim and does not close either of the cases.

IT IS SO ORDERED.

Date: 08/28/2015

Kathryn A. Viviano
Hon. Kathryn A. Viviano, Circuit Court Judge