

STATE OF MICHIGAN



NINTH JUDICIAL CIRCUIT COURT
TRIAL DIVISION

RAGHURAM ELLURU, M.D.,

HON. PAMELA L. LIGHTVOET P47677

Plaintiff,

FILE NO. 2015-0575-CB

v

GREAT LAKES PLASTIC,
RECONSTRUCTIVE & HAND SURGERY,
P.C., a Michigan corporation, and
SCOTT D. HOLLEY, M.D., jointly and severally,

Defendants.

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**OPINION AND ORDER GRANTING PLAINTIFF'S MOTION TO QUASH DEPOSITION AND
FOR PROTECTIVE ORDER AND DENYING DEFENDANTS' MOTION TO DISQUALIFY
PLAINTIFF'S COUNSEL**

At a session of said Court held in the
City and County of Kalamazoo, Michigan
on this 6th day of September, 2016;

HON. PAMELA L. LIGHTVOET, CIRCUIT COURT JUDGE

Pending before the Court is Plaintiff's Motion to Quash Deposition and for Protective Order and Defendants' Motion to Disqualify. For the reasons outlined below, Plaintiff's Motion is Granted and Defendants' Motion is Denied.

The Court will not outline the facts as they have been briefed and addressed in various orders since the filing of this action. However, the Court took the instant Motions under advisement, is delayed in its rulings on these Motions, has addressed numerous other significant issues in this case, and opines as follows:

PLAINTIFF'S MOTION TO QUASH DEPOSITION AND FOR PROTECTIVE ORDER

On May 11, 2016, Defendants served on Plaintiff Elluru discovery requests including (1) Requests for Admissions, Interrogatories and Requests for Production; (2) a Notice to Produce Documents; and (3) a Notice of Taking Deposition of Plaintiff Elluru. At the time the discovery requests were made, Attorney Allen represented both the corporate and individual Defendants. Thus, the requests were sent to Plaintiff on behalf of both Defendants.

Plaintiff filed the instant Motion to Quash arguing that the Court's March 18, 2016 Opinion and Order substantively ended this case and the only remaining task was the dissolution of the corporation. Plaintiff argued that Defendants' discovery requests were sent almost two months after the Court's ruling allowing for dissolution, and are irrelevant and improper under MCR 2.302. Therefore, no discovery could elicit evidence that is of "consequence to the determination of this action" and Defendants' discovery should not be allowed.

Defendants argued that the discovery requests were appropriate as they sought information directly related to Plaintiff's Amended Motion to Enter Judgment of Dissolution and Appoint Receiver, Defendants' Motion to Disqualify Plaintiff's Counsel, and Defendants' Motion for Reconsideration. Defendants also argued that the information may show whether Plaintiff has unclean hands as recent bills from Plaintiff's attorneys firm indicate a concerted plan to establish a "deadlock" and/or contract

negotiations which may show a breach of fiduciary duty. (Aside from the present motions, the Court has since heard and ruled on the motions referenced above and appointed a Receiver.).

The discovery requests were sent almost two months after the Court granted Plaintiff's Motion for Summary Disposition and opined that the corporation should be dissolved. Thereafter, there were various arguments/motions/orders regarding finalizing the Judgment of Dissolution to effectuate the Court's ruling, but the heart of the lawsuit had been decided. As outlined below, there were conversations and negotiations with the attorneys for all parties about dissolution/dividing the practice within the year before the lawsuit was filed. Despite Defendants' argument that at some point the Court may have welcomed discovery after the March 18, 2016 Opinion, given the Court's ruling on other Motions to date (including Defendants' Motion(s) for Reconsideration) the discovery was untimely and irrelevant to the dissolution ordered by the Court. Defendants' concern/argument about unclean hands and the effect on Defendants' Motion to Disqualify is addressed below. Furthermore, at this time a Judgment of Dissolution has been entered, various appeals have been filed, and a Receiver has been appointed for the Corporate Defendant. Defendants' request for further discovery is, therefore, denied.

WHEREFORE, Plaintiff's Motion to Quash and for Protective Order is granted.¹

DEFENDANTS' MOTION TO DISQUALIFY PLAINTIFF'S COUNSEL

This case represents an interesting fact pattern on disqualification as the Plaintiff's attorneys firm and Defendant's attorney's firm have both represented Great Lakes Plastic, Reconstructive and Hand Surgery, P.C. (hereinafter GLPRHS) at various times in the past. This Court previously ruled that, given the clear conflicts, Mr. Allen is disqualified from representing both the corporation and Dr. Holley under MRPC 1.7 and 1.13(e). The instant Motion addresses whether Mr. Lubben should remain as the attorney

¹ It is noteworthy that Defendants requested discovery is mainly based on Miller Johnson's invoices for work done for the corporation. The bills were sent to Defendants' attorney per an e-mail from Plaintiff's attorney indicating "Dr. Holley has a right as an equal shareholder to review the invoices which Miller Johnson sent to the corporation." (See Exhibit 5 of Defendants' Brief in Support of Defendants' Motion to Disqualify Plaintiff's Counsel.) However, though Plaintiff is the Treasurer and is equal shareholder, the Varnum firm has opposed turning over its billings/invoices to Dr. Elluru, for the work done on behalf of the corporation. It has been argued/implied that the invoices contain privileged attorney client information. This is one of the various concerns the Court addressed when ruling that Defendants' counsel cannot represent both the corporation and Dr. Holley.

for Plaintiff, Dr. Elluru, or whether he should be disqualified given his firm's prior representation of the corporation.

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). MRPC 1.7 and 1.9 prohibit the representation of a client where that representation is directly or materially adverse to another client or former client.

Defendants' argue that Miller Johnson's representation of Dr. Elluru was forbidden from the start as Plaintiff's claims are the same or substantially related to the matter in which Miller Johnson represented GLPRHS and, therefore, the firm's representation of Dr. Elluru is adverse to GLPRHS' interests. Defendants further argue that Dr. Holley was unaware that Miller Johnson was performing personal legal services for Plaintiff in/around March of 2015; that the corporation was never consulted about its representation or continued representation; and that the firm engaged in adverse corporate discussions such as: (a) discussing how to deadlock/dissolve the corporation, (b) discussing terminating Dr. Holley, and (c) by improperly calling a special meeting, etc. Defendants request that the disqualification be effective from the beginning of the case - thereby eliminating the pleadings and all of this Court's rulings.²

ANALYSIS

As outlined by Defendants, the court must first look at the purpose of the representation and whether it is directly adverse to the interest of another client. In this case, the Miller Johnson invoices initially address pension plan funding issues for the corporation (i.e. Employee Benefits). There are separate billings in the Miller Johnson invoices which address Medical Practice Matters. The billings are clearly delineated and there are separate attorney entries showing Mr. Lubben's contact with Dr. Elluru under the Medical Practice Matter entries.

² Defendants also argue that Plaintiff had given his "notice of intention to terminate his employment" by late 2014 or early 2015 and there was an obvious conflict. However, the Court has already rejected the "notice" argument in a prior motion and will not address it again herein.

The exhibits relied on by the Defendants reference numerous contacts by way of phone contact, billing summaries and e-mails among the various attorneys involved with the parties during the year 2015.³ There is a phone call referenced on 3/27/15 to Attorney David Lewis regarding Dr. Holley's position on [the] dispute and a message to Attorney Jeff Smith requesting documents. On 4/2/15 there is reference to a discussion with Dr. Holley's legal counsel and a phone conference with Dr. Holley's attorney regarding dissolution of the corporation. The entries the following months show numerous contacts between Dr. Holley's counsel at the time (Attorney David Lewis) and Plaintiff's attorney (Mr. Lubben). There are also numerous entries referencing contact with the corporation's attorney, Jeff Smith. According to the invoices, all parties were engaged in the communications about the dissolution of the business and the conflict issue was apparently never raised. The discussions and e-mails referenced in the invoices simply confirm there was a major breakdown among the two shareholders as the Court previously determined.

Defendants reference a July 13, 2015 entry wherein "Plaintiff and his lawyers hatched a plan to artificially create a deadlock by calling an illegal meeting to dissolve the corporation, terminate Dr. Holley, and turn over corporate control and all assets to Dr. Elluru—knowing all the time that there would not be an "agreement" by Dr. Holley to his own termination, nor any agreement by GLPRHS to its legal destruction." (See pg. 5 of Defendants' Brief in Support of Defendants' Motion to Disqualify Plaintiff's Counsel.). The extent of the attorney/client discussions are unknown, but the attorneys agreed to cancel the special meeting apparently believing a resolution had been reached. Through the various motions/exhibits, the Court is aware that letters were sent to/from both doctors' attorneys before Mr. Allen's involvement in this case that appeared to delineate an agreement to the dissolution terms- or that the parties were very close. Unfortunately for the parties, for whatever reason things fell apart quickly and despite the references in the invoices, Dr. Holley was never "fired". To the contrary, it was Dr. Holley

³ From the entries, Attorney David Lewis was representing Dr. Holley and Attorney Jeff Smith was representing the corporation.

who fired Dr. Elluru and this lawsuit followed. Of course, the Court ruled that Dr. Holley's action was improper- and would have found it improper for Dr. Elluru to do so if the issue was raised under the facts as known.

As outlined above, according to the exhibits Miller Johnson represented the corporation for pension issues not initially materially adverse to the other parties. In March of 2015, all parties were aware of Mr. Lubben's representation of Dr. Elluru for dissolution purposes as all attorneys became involved in the dissolution discussions. At this point, whether GLPRHS is technically a present or former client of Miller Johnson's firm is moot as there is no proof of continued representation. Both MRPC 1.7 and 1.9 allow for continued representation under certain circumstances if the client properly consents. There could be no consent to dual representation by the corporation as the shareholders have been unable to hold meetings or communicate/agree in a very long time and a Receiver has now been appointed for the corporation, so further analysis is not needed.

Given the lawsuit and breakdown of communication between the shareholders, the Court agrees with Defendants that it is inappropriate for Miller Johnson to represent GLPRHS and Dr. Elluru at this point, just as the court has ruled it is not appropriate for Mr. Allen to do so. However, Mr. Lubben may remain as Dr. Elluru's attorney and Defendant's request to disqualify Mr. Lubben from the beginning of the lawsuit is denied. The parties were represented by attorneys and engaged in conversations to dissolve the corporation so the court finds no prejudice to any party during any point of any dual representation. Further, Miller Johnson's representation of the corporation for pension issues was not materially adverse to the other parties at the time. Therefore, Defendants' request to disqualify Mr. Lubben from the beginning of the lawsuit and effectively wipe out all pleadings and court orders is denied.

At this point, both individual Defendants have the attorney of their choosing and the corporation is being represented by the Receiver. Dual representation is not appropriate for either party and the case is moving forward.

WHEREFORE, Defendant's Motion to Disqualify Plaintiff's Counsel is denied.

OPINION

For the reasons outlined above, the Court holds that Plaintiff's Motion to Quash Deposition and for Protective Order is GRANTED and Defendants' Motion to Disqualify Plaintiff's Counsel is DENIED.

IT IS SO ORDERED.

Date: September 6, 2016



HON. PAMELA L. LIGHTVOET (P47677)
Circuit Court Judge