



IT IS ORDERED as set forth below:

Date: May 6, 2016

James R. Sacca
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

| | | |
|--|---|------------------------|
| In re: |) | |
| |) | Case No.: 11-51759-JRS |
| Brian Lee Willis, |) | |
| Debtor. |) | Chapter 7 |
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| Elite Investors, LLC (Series E), |) | |
| as assignee of John L. Rocker, |) | Case No.: 15-5433-JRS |
| Plaintiff, |) | Adversary Proceeding |
| |) | |
| v. |) | |
| |) | |
| Partnership Liquidity |) | |
| Investors IV, LLC, Keith H. Brookings, |) | |
| and Brian Lee Willis, |) | |
| Defendants. |) | |
| <hr/> | | |
| Partnership Liquidity Investors IV, LLC, |) | |
| Counter-Claimant, Cross-Claimant, |) | |
| and Third-Party Claimant |) | |
| |) | |
| v. |) | |
| |) | |
| Elite Investors, LLC (Series E), as |) | |
| assignee of John L. Rocker, |) | |
| Counter-Defendant, |) | |

Brian Lee Willis,)
Cross-Defendant,)
John Rocker,)
3rd party Defendant.)

ORDER

This case is presently before the Court on Partnership Liquidity Investors IV, LLC's ("Partnership Liquidity") Motion to Disqualify Elite Investors, LLC's ("Elite Investors") and John Rocker's ("Rocker") counsel (the "Motion") (Doc. 38) and response in opposition thereto (Doc. 44).

Factual and Procedural History

Elite Investors filed this adversary proceeding on November 12, 2015 in response to a dispute in the bankruptcy case regarding the chapter 7 trustee's motion to sell the estate's economic interest in Spring Creek Apartments, LLC ("Spring Creek") to Partnership Liquidity for, initially, \$450,000 (the "Motion to Sell"). The dispute involves, among other things, whether the Debtor held a 40% interest in Spring Creek, a 19.5% interest, or an interest somewhere in between by way of an alleged trust agreement in which the Debtor allegedly held Rocker's interest in trust in order for Spring Creek to obtain a loan. In the trustee's Motion to Sell she acknowledged the conflicting allegations regarding whether the Debtor owned a 40% interest or some lesser amount, did not seek to sell any more than the actual economic interest owned by the estate, and made no warranties as to the actual interest being sold. Spring Creek and Rocker made written and oral objections to the Motion to Sell through counsel from the firm Stone & Baxter, LLP ("Stone & Baxter"). The objections, among other things, related to the dispute regarding the size of the interest in Spring Creek the Debtor, and therefore the estate, owned.

The Court held a hearing on October 6, 2015 at which it ruled that it would allow the trustee to sell whatever economic interest in Spring Creek that the Debtor owned.¹ It also gave the members of Spring Creek time to match the offer made by Partnership Liquidity. The Court indicated that if any member did match the offer, it would determine at a later hearing whether it would allow the trustee to conduct an auction. Douglas D. Johnson, Jr. (“Johnson”), a member of Spring Creek, matched the offer. Another hearing was held on October 27, 2015, and the Court concluded that the trustee would be allowed to conduct an auction to sell the estate’s economic interest in Spring Creek. On November 18, 2015, the trustee conducted an auction at which both Partnership Liquidity and Johnson made multiple bids (the “Auction”). Partnership Liquidity made the final high bid for \$605,000.

In the meantime, on November 12, 2015, Elite Investors, as assignee of Rocker’s alleged interest in Spring Creek, filed the present adversary proceeding seeking a declaratory judgment regarding its ownership interest in Spring Creek, abandonment of that interest by the trustee, and a preliminary injunction. Soon after, on November 17, 2015, Elite Investors filed a motion for preliminary injunction in this case (the “Motion for Preliminary Injunction”) asking the Court to enjoin the trustee from closing on any sale of the disputed portion of the estate’s interest in Spring Creek pending the resolution of this adversary proceeding, and requested that it be heard on an expedited basis. Elite Investors and Rocker are represented by Stone & Baxter in this adversary proceeding.

On November 18, 2015, after the conclusion of the Auction, the Court held a hearing first on the Motion for Preliminary Injunction and then on the Motion to Sell. Stone & Baxter represented Spring Creek, Rocker, and Elite Investors. The Court denied Elite Investor’s Motion for Preliminary Injunction and granted the trustee’s Motion to Sell the estate’s economic interest,

¹ All parties agreed that the Debtor owned at least a 19.5% interest in Spring Creek.

whatever it may be, in Spring Creek to Partnership Liquidity for \$605,000. The Order granting the Motion to Sell specifically stated that it did not adjudicate the dispute regarding the estate's, and consequently Partnership Liquidity's, interest in Spring Creek.² The sale of the estate's economic interest in Spring Creek to Partnership Liquidity was closed on November 27, 2015 for \$605,000.

After various pleadings were filed, the trustee filed a Motion to Dismiss as to her only which, after hearing, the Court granted. Partnership Liquidity filed the present Motion to Disqualify Stone & Baxter which Elite Investors and Rocker oppose.

Discussion

“As a general rule, motions to disqualify counsel are viewed unfavorably.” *Reece v. United Home Care of N. Atl., Inc.*, No. 1:12-CV-2070-RWS, 2014 WL 1775499, at *2 (N.D. Ga. May 2, 2014). A litigant is “presumptively entitled to the counsel of his choice, that right may be overridden only if compelling reasons exist.” *Herrmann v. GutterGuard, Inc.*, 199 Fed. App'x 745, 752 (11th Cir. 2006) (internal quotation marks omitted) (citation omitted). “A disqualification order ‘is a harsh sanction, often working substantial hardship on the client’ and should therefore ‘be resorted to sparingly.’” *Id.* (quoting *Norton v. Tallahassee Mem'l Hosp.*, 689 F.2d 938, 941 n.4 (11th Cir. 1982)). “Generally, courts are reluctant to grant motions to disqualify opposing counsel because disqualification has an immediate adverse effect on the client by separating him from counsel of his choice, because parties often move for disqualification of opposing counsel for tactical reasons, and because, even when made in the best of faith, such motions inevitably cause delay.” *Adkins v. Hosp. Authority of Houston Cnty., Ga.*, 2009 WL 3428788, at *6 (M.D. Ga. Oct. 20, 2009). “To disqualify an attorney because of

² The Order stated: “This Order shall be WITHOUT PREJUDICE to the claims asserted by Elite [Investors] in the Adversary Proceeding as well as any and all defenses of the Defendants in the Adversary Proceeding. All claims and defenses as to the Disputed Spring Creek Economic Interest are hereby preserved for subsequent adjudication.”

a conflict of interest, the conflict must be palpable and have a substantial basis in fact and may not be theoretical or speculative.” *In re Odum*, No. 07-9048, 2008 WL 7874259, at *2 (Bankr. N.D. Ga. May 28, 2008).

Attorneys practicing before this Court must comply with the Georgia Rules of Professional Conduct. *See* BLR 9010-3; LR 83.1 C. “In Georgia, ‘in the absence of contrary evidence, it will be presumed that members of our State Bar have properly complied with the Bar’s ethical directory and disciplinary rules.’” *Reece v. United Home Care of N. Atl., Inc.*, No. 1:12-CV-2070-RWS, 2014 WL 1775499, at *2 (N.D. Ga. May, 2, 2014) (quoting *Gene Thompson Lumber Co. v. Davis Parmer Lumber Co.*, 377 S.E.2d 15, 17 (Ga. Ct. App. 1988)). The party bringing a motion to disqualify bears the burden of proof. *In re BellSouth Corp.*, 334 F.3d 941, 961 (11th Cir. 2003).

Pursuant to GRPC 1.7, a lawyer cannot represent a client if “there is a significant risk that . . . the lawyer’s duties to another client, a former client, or a third person will materially and adversely affect the representation of the client.” GRPC 1.7(a). Under some circumstances, a conflict may be waived if each affected client gives informed consent in writing after certain other conditions are met. GRPC 1.7(b). A conflict under GRPC 1.7 is not waivable if it: (a) is prohibited by law or other rules in GRPC; (b) “includes the assertion of a claim by one client against another client represented by the lawyer in the same or substantially related proceeding;” or (c) “involves circumstances rendering it reasonably unlikely that the lawyer will be able to provide adequate representation to one or more of the affected clients.” GRPC 1.7(c). “Comment 15 to Rule 1.7 places the primary responsibility for resolving questions of conflict of interest on the lawyer undertaking the representation.” *Bernocchi v. Forcucci*, 614 S.E.2d 775, 778 (Ga. 2005). “Where the conflict is such as clearly to call into question the fair or efficient

administration of justice, opposing counsel may properly raise the question.” GRPC 1.7 cmt [15]. “Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment.” *Id.* Rule 1.9 governs conflicts of interest with regard to former clients. Pursuant to GRPC 1.9, a lawyer who has formerly represented a client in a matter cannot represent another client in the same or substantially related matter if that client’s interests are materially adverse to the interests of the former client unless the former client provides informed consent, confirmed in writing. In addition, a lawyer who formerly represented a client in a matter cannot thereafter use information relating to that representation to disadvantage the former client³ or reveal information relating to the representation.

Stone & Baxter discontinued representing Spring Creek in late January 2016. Partnership Liquidity, pointing to case law, argues that the Court should consider this a current client conflict because a lawyer cannot convert a conflict into a former client conflict by choosing to end the representation of the disfavored client. However, regardless of whether the Court looks to the rule governing current client conflicts or former client conflicts it concludes that a conflict does not exist and Stone & Baxter should not be disqualified.

To support its position that Stone & Baxter should be disqualified, Partnership Liquidity mainly points to various New York cases for the proposition that a lawyer cannot represent a limited liability company and thereafter represent an individual member in a case in which the member’s interest are adverse to other members. Partnership Liquidity points to no Georgia case law for this proposition, and the Court finds the non-binding cases that it does point to unpersuasive as applied to the facts of this case. For example, in *Barmash v. Perlman*, 2013 N.Y. Misc. LEXIS 4626 (N.Y. Sup. Ct. 2013), a New York state trial court opinion,⁴ the court held

³ Except when allowed or required by GRPC 1.6 and 3.3, or when the information becomes generally known.

⁴ New York supreme courts are trial courts in New York State, not the highest court in the state as it is in Georgia.

that a conflict of interest existed when the company's attorney concurrently represented the company's majority shareholder for claims of breach of fiduciary duties owed to the company and minority shareholders. *Campbell v. McKeon*, 75 A.D.3d 479 (N.Y. App. Div. 2010), involved the same situation as *Barmash*, and the court relying on Rule 1.13 held that the attorney for the company could not represent both the company and the majority member when there were allegations of breaching fiduciary duties to the company.⁵ The remainder of the cases Partnership Liquidity points to were derivative suits in which counsel provided the company services in connection with the transactions underlying the derivative claims. *See Morris v. Morris*, 306 A.D.2d 449 (N.Y. App. Div. 2003); *Cannon v. U.S. Acoustics Corp.*, 398 F. Supp. 209 (N.D. Ill. 1975).

The Court is not persuaded that Stone & Baxter owes a fiduciary duty to Partnership Liquidity by way of its representation of Spring Creek. Partnership Liquidity has not pointed to any Georgia case law and the cases that it does cite are distinguishable from the facts at hand. Even if the law were as Partnership Liquidity suggests, the Court still would not disqualify Stone & Baxter in this case because Partnership Liquidity purchased only an economic interest in Spring Creek; Partnership Liquidity is not a full, voting member of Spring Creek. Under the circumstances in this case, to disqualify Stone & Baxter would be expanding its duties as a result

⁵ Partnership Liquidity also points to *Tzolis v. Wolf*, 2006 WL 1310621 (N.Y. Sup. Ct. Mar. 20, 2006), which is an unreported decision from a New York state trial court ruling on a motion to dismiss for failure to state a claim and concluding the plaintiffs did state a claim for breach of fiduciary duty against the company's counsel, citing to case law stating that a company's attorney has a duty to protect minority shareholders' interests. The court relied on *Collins v. Telcoa Int'l Corp.*, 283 A.D.2d 128 (N.Y. App. 2001), a case in which the court was also ruling on a motion to dismiss for failure to state a claim and the complaint alleged that the company's attorney also represented the plaintiff individually. In addition it relied on *Franco v. English*, for the proposition that a lawyer's fiduciary duty extends to limited partners, something that the Court of Appeals of New York, the highest court in the state, overruled in *Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 N.Y.3d 553 (N.Y. 2009) ("We therefore hold that S & K's representation of this limited partnership, without more, did not give rise to a fiduciary duty to the limited partners."). Therefore, the Court does not find this case compelling. In *Woods v. Superior Court*, 149 Cal. App. 3d 931 (Cal. Ct. App. 1983), the court concluded counsel who had represented a company owned by a husband and wife for many years could not then represent the husband in divorce proceedings because the attorney continued to represent the wife's interest in business which would be the focus of the divorce proceedings.

of being counsel for Spring Creek much too far. There is also no evidence that an attorney client relationship existed between Stone & Baxter and Partnership Liquidity such that it would be representing one client against another.

In addition, the Court does not see conflicting positions between Spring Creek and Elite Investors or Rocker that would require disqualification of Stone & Baxter. There are no claims in this case that Elite Investors or Rocker are officers or directors breaching fiduciary duties they owed to Spring Creek or other members of Spring Creek such that Stone & Baxter would have conflicting interests representing Spring Creek and Elite Investors or Rocker. The dispute in this case revolves around whether the alleged trust agreement between the Debtor and Rocker is valid. Spring Creek is not a party in this litigation and the result of a resolution of this case is essentially an issue of whom it pays.⁶ Partnership Liquidity argues Spring Creek and Rocker have conflicting interests in this matter because the firm “could not, in good conscience, advise [Spring Creek], which owns and operates a large apartment complex, that it is better off with Rocker as a member as opposed to [Partnership Liquidity] considering that Rocker has bad credit and [Partnership Liquidity] is an investment entity managed by a real estate investment trust professional.” The Court disagrees. It appears that both Rocker and Elite Investors argue that Elite Investors is now the member of Spring Creek, not Rocker. Regardless, there are many factors that will be taken into consideration regarding membership interests, aside from what Partnership Liquidity suggests. Stone & Baxter is in the best position to determine what is in the best interests of its clients for purposes of advising them.⁷

⁶ While it may also impact whether Elite Investors has a voting member interest in Spring Creek the Court does not believe that results in a conflict in this case.

⁷ If the Court were to apply GRPC 1.9, for the reasons stated herein, it does not appear to the Court that the interests of Elite Investors or Rocker are materially adverse to Spring Creek.

Motions to disqualify are not looked upon favorably and should be used sparingly. The Court concludes that Partnership Liquidity has not shown that Stone & Baxter owes any duties to it as an interest holder in Spring Creek. In addition, the Court is not concerned that any duties Stone & Baxter may owe to Spring Creek will materially and adversely affect the representation of Elite Investors or Rocker. The Court is satisfied that the attorneys from Stone & Baxter understand their responsibility to clients regarding conflicts of interest, and will not disqualify the firm in this adversary proceeding.

Conclusion

Accordingly, for the reasons stated herein, it is hereby

ORDERED that Partnership Liquidity's Motion to Disqualify is DENIED.

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