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Robert D. Scarborough Jr. et al., Order on Plaintiffs' Motion to Disqualify Banker Donelson, LLP as Counsel for the Defendants

Elizabeth E. Long
Fulton County Superior Court Judge

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IN THE SUPERIOR COURT OF FULTON COUNTY
BUSINESS CASE DIVISION
STATE OF GEORGIA

ROBERT D. SCARBOROUGH, JR. and)	
JOHN R. HAMPARIAN,)	
Plaintiffs,)	Civil Action File No: 2017CV290622
v.)	
ANTHONY LAIR and AARON)	Bus. Case Div. 2
INGRAM,)	
Defendants.)	
)	
)	
)	

ORDER ON PLAINTIFFS’ MOTION TO DISQUALIFY BAKER DONELSON, LLP AS COUNSEL FOR THE DEFENDANTS

This above styled case is before the Court on Plaintiffs’ Motion to Disqualify Baker Donelson, LLP as Counsel for Defendants. Having considered the record and arguments of counsel at a February 7, 2018 hearing on the motion, the Court finds as follows:

1. Background

This case is a direct action by Robert D. Scarborough, Jr. and John R. Hamparian (collectively “Plaintiffs”) against Defendants Anthony Lair and Robert Ingram (collectively, “Defendants”) for alleged breaches of fiduciary duty and fraud. Plaintiffs are minority shareholders and Defendant Lair is the majority shareholder of NeoMed, Inc. (“NeoMed”). The claims asserted in this action arise from a 2016 purchase of a separate entity, NM Fulfillment. Baker Donelson has been NeoMed’s counsel since its formation in 2007. NeoMed is not a party to this action nor is Baker Donelson.

In 2016, according to Plaintiffs' allegations, Defendants informed Plaintiff Scarborough that NeoMed needed to acquire NM Fulfillment. At the shareholders meeting authorizing the purchase, Defendants and Joe Delgado, a Baker Donelson attorney, misrepresented certain information. Plaintiffs seek to disqualify Baker Donelson from representing Defendants in this action citing Georgia's Rules of Professional Conduct, specifically Rules 1.7, 1.9, and 3.7.

2. Standard of Review

Disqualification of counsel is an extreme remedy. As summarized by the Supreme Court of Georgia:

[T]he right to counsel is an important interest which requires that any curtailment of the client's right to counsel of choice be approached with great caution." Blumenfeld v. Borenstein, 247 Ga. 406, 408, 276 S.E.2d 607 (1981). "[D]isqualification has an immediate adverse effect on the client by separating him from counsel of his choice, and ... inevitably cause[s] delay." Reese v. Ga. Power Co., 191 Ga. App. 125(2), 381 S.E.2d 110 (1989). "[A] client whose attorney is disqualified may suffer the loss of time and money in finding new counsel and 'may lose the benefit of its longtime counsel's specialized knowledge of its operations.' " Bergeron v. Mackler, 225 Conn. 391, 398, 623 A.2d 489 (Conn.1993). Because of the right involved and the hardships brought about, disqualification of chosen counsel should be seen as an extraordinary remedy and should be granted sparingly. Anderson Trucking Service v. Gibson, 884 So.2d 1046, 1049 (Fla.App.2004). See also Meehan v. Antonino, 2002 WL 31559712 (Conn.Super.2002) (unpub. op.).

Bernocchi v. Forcucci, 279 Ga. 460, 462, 614 S.E.2d 775, 778 (2005).

3. Analysis

Plaintiffs argue that Baker Donelson should be disqualified because of an "inherent conflict of interest in Baker Donelson representing the Defendants given Baker Donelson's past and continued representation of NeoMed." Regarding conflicts of interest, the Georgia Rules of Professional Conduct specifically mandate:

A lawyer shall not represent or continue to 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 material and adversely affect the representation of the client, except as permitted in (b).

Ga. R. Prof. Cond. 1.7(a).

Plaintiffs rely on cases in which an attorney was representing both a plaintiff and the corporation in a derivative action. Here, the corporation is not a party to the action. The action is a direct action and not a derivative action. Plaintiffs cite no cases which are not derivative actions.

Additionally, Rule 1.9 of the GA Rules of Professional Conduct does not prohibit Baker Donelson's representation.

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 gives informed consent, confirmed in writing.

Ga. R. Prof. Cond. 1.9.

Plaintiffs are not current or former Baker Donelson clients. Baker Donelson represented the corporation not the plaintiffs in all previous representation. Baker Donelson never represented plaintiffs in their personal capacities, only as representatives of NeoMed.


Finally, Plaintiffs contend Baker Donelson must be disqualified because "some of its attorneys" will be key witnesses in this case. Under Georgia's Rules of Professional Conduct:

- (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.**

Ga. R. Prof. Cond. 3.7 (emphasis added).

Baker Donelson is not disqualified because its attorneys may be witnesses in this action. As noted above, Attorney Delgado has not represented any of the parties in this action. Even if he, or other Baker Donelson attorneys, are witnesses and would therefore be precluded from serving as an advocate at trial, this would not disqualify Baker Donelson's remaining attorneys from representing Defendants. Under Georgia's rules, "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." Ga. R. Prof. Cond. 3.7(b). Although Plaintiffs speculate as to the potential perception of a conflict, the Court finds Plaintiffs have not met their burden of proving that the extraordinary remedy of disqualification is warranted. The Court hereby DENIES Plaintiffs' Motion to Disqualify.

SO ORDERED this 13th day of February, 2018.


ELIZABETH E. LONG, SENIOR JUDGE
Metro Atlanta Business Case Division
Fulton County Superior Court
Atlanta Judicial Circuit

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