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UAS Investments LLC Order on Motion by UAS, Frisbee and Daryl Moody Regarding Disqualification of Prior Counsel and Access to Documents

Elizabeth E. Long
Fulton County Superior Court Judge

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**IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA**

UAS INVESTMENTS, LLC,)	
)	
Plaintiff,)	
)	
v.)	CAFN 2015CV256036
)	
ROBERT MILLER,)	
)	
Defendant.)	
_____)	
)	
ROBERT MILLER,)	
)	
Plaintiff,)	
)	
v.)	CAFN 2015CV267515
)	
SEAN FRISBEE, DARYL MOODY, and)	
DAN MOODY,)	
)	
Defendants.)	

**ORDER ON MOTION BY UAS, FRISBEE, AND DARYL MOODY REGARDING
DISQUALIFICATION OF PRIOR COUNSEL AND ACCESS TO DOCUMENTS**

Before this Court is a Motion by UAS, Frisbee, and Daryl Moody Regarding Disqualification of Prior Counsel and Access to Documents. Having considered the briefs and oral arguments of all parties, the Court finds as follows:

In the summer of 2014, Daryl Moody suggested that UAS Investments, LLC (“UAS”), Robert Miller (“Miller”), and Leucadia Group, LLC (“Leucadia”) retain the law firm of Hill, Kertscher and Wharton, LLC (“HKW”) to advise and draft documents with respect to a potential transaction that would supply needed capital to Leucadia (hereinafter, the “Uhl Transaction”). The Uhl Transaction did not come to fruition. In January, 2015, UAS and Sean Frisbee (“Frisbee”) hired HKW to sue Miller and Leucadia. Frisbee has dismissed his claims in this action without prejudice and all claims against Leucadia have been dismissed with prejudice.

A second suit was filed in California and a third suit in Fulton Superior Court. Miller sought successfully to have UAS's counsel HKW disqualified because it had previously represented Miller and Leucadia. After a hearing, the Court found on September 25, 2015, that HKW represented Miller and Leucadia in the Uhl Transaction and found "that this prior representation directly relate[d] to the claims HKW now seeks to prosecute on behalf of UAS."

HKW has withdrawn from the first Fulton County case, and Frisbee, Daryl Moody, and Dan Moody are now also parties by virtue of the second Fulton County case brought by Miller. New counsel represents Frisbee, UAS, Daryl Moody, and Dan Moody, and the two Fulton County cases have been consolidated for discovery purposes only.

Miller has threatened to seek to disqualify Movants' current counsel if they come in contact with material that Miller provided to HKW during the course of that prior representation. On December 23, 2015, Movants were directed by the Court to file this current Motion to resolve the issue of access by Movants' counsel to documents in Movants' files. Under Georgia Law, it is Miller's burden to demonstrate that his communications to HKW are privileged. *See Peterson v. Baumwell*, 202 Ga. App. 283, 285 (1991).

Movants argue that in the prior representation Miller, UAS, Daryl Moody, and Frisbee were jointly represented by HKW because they all sought representation by HKW in the Uhl Transaction. Therefore any communication made to HKW is not privileged in any subsequent litigation between the parties. *See Both v. Frantz*, 278 Ga. App. 556, 563 (2006) ("[T]here is a well-recognized exception to the exclusion of evidence based on the attorney-client privilege when an attorney jointly represents two or more clients whose interests subsequently become adverse.").

Miller argues that Frisbee and Moody both denied in affidavits that they were represented by HKW for purposes of the disqualification motion. HKW submitted an affidavit in opposition


to the disqualification motion stating that Miller was warned of potential conflicts of interest in a phone call, but Miller denies this. Miller contends that HKW should have received informed written consent from the parties under Rule 1.7 of the Georgia Rules of Professional Conduct before undertaking the role of joint counsel for adverse parties.

The Court agrees with Movants. Although the evidence is somewhat conflicting, the most credible evidence is that Miller, all of the Movants, and Leucadia were jointly represented by HKW in the prior representation. HKW's statement that Miller was warned of a potential conflict in connection with the disqualification hearing is self-serving on behalf of HKW. Turning to the issue of the need for informed written consent, although the best path for a prudent lawyer would be to obtain prior written consent, there is no requirement under Georgia law when at the time of the prior representation there was no actual conflict.

While the prior representation was joint, the parties to the joint representation became adverse over the course of the Uhl Transaction culminating in the suit filed in January 2015.

The Court has considered the various methods suggested by the parties for screening for the potentially problematic materials. The Court will ask HKW to review its file of the prior representation and send to the Court for *in camera* inspection all documents, communications, or materials that were sent by Miller between August 13, 2014, and the filing of the initial Complaint (a) to any attorney at HKW, (b) that did not copy a third party or Movants, and (c) that were subsequently sent by HKW to Movants.

SO ORDERED this 10th day of February, 2016.



Senior Judge Elizabeth E. Long
Superior Court of Fulton County
Atlanta Judicial Circuit

Copies to: All registered users of eFileGA associated with this case.

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