

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

FILED

MARATHON HOTELS, INC.

Plaintiff,

v.

MILLER GOLER FAEGES LAPINE, LLP, et al.

Defendants

CASE NO.: CV 14 836757

2016 MAR 10 A 10:57

JUDGE PAMELA A. BARKER

CLERK OF COURTS
CUYAHOGA COUNTY

OPINION AND JOURNAL ENTRY ON
PLAINTIFF'S MOTION TO DISQUALIFY
VORYS, SATER, SEYMOUR AND
PEASE LLP

This matter is before the Court on Plaintiff, Marathon Hotels, Inc.'s Motion To Disqualify Vorys Sater Seymour and Pease LLP ("Vorys") As Counsel For Defendant Lapine ("Plaintiff's Motion"), Defendant Lapine's Brief In Opposition thereto ("Defendant's Brief"), and Plaintiff's Reply To Defendant's Brief ("Defendant's Reply"). A hearing on Plaintiff's Motion was commenced on January 22, 2016 and concluded on February 19, 2016. Subsequently, Plaintiff submitted its Closing Memorandum In Support Of Plaintiff's Motion To Disqualify Vorys and Defendant Lapine submitted his Post-Hearing Submission In Opposition To Marathon Hotels, Inc.'s Motion To Disqualify.

Findings of Fact relevant to issue of Standing

Plaintiff, Marathon Hotels, Inc. ("Marathon") is an Ohio corporation, owned by shareholders Vern Fuller ("Fuller") and Carla Gold ("Gold")¹, which managed and operated the hotel owned by Landerhaven Hotel Venture, LLC ("LHV").² LHV is a limited liability company,

¹ Transcript of January 22, 2016 Hearing ("1/22/16 Tr."), p. 93, lines 17-25.

² 1/22/16 Tr., p. 144, lines 3- 25; p. 145, lines 1-2.

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formed for the purpose of constructing, owning and operating the hotel,³ with two classes of members, Class A member Amicus Marathon, LLC, and Class B members.⁴ Amicus Holdings, owned by Defendant Kenneth Lapine ("Lapine") and Mike Sekerak ("Sekerak"), and Marathon Associates, Inc. owned by Fuller and Gold, are members of Amicus Marathon, LLC, which manages Landerhaven Hotel.⁵ Lapine, Sekerak, Fuller and Gold make decisions on behalf of Amicus Marathon, LLC, by a majority vote of 3 of the 4.⁶ Pursuant to paragraph 6.11 of the LHV Operating Agreement, Lapine and his law firm, Defendant Miller Goler Faeges Lapine LLP (Miller Goler), are designated as counsel to LHV.⁷

Lapine retained Vorys to represent him in the instant matter regarding claims asserted against him by Plaintiff, and subsequently, in his capacity as general counsel for LHV, he retained Vorys to respond to a subpoena issued to LHV by Plaintiff in this matter. Plaintiff has never been, and is not, a client of Vorys.⁸

Arguments of Plaintiff and Lapine and Conclusion of Law relating to issue of Standing

Plaintiff argues that Vorys should be disqualified from representing Lapine because Vorys possesses conflicts of interest precluded by the Ohio Professional Rules of Conduct 1.7 and 1.13.⁹ Lapine argues that Plaintiff, a corporate entity, which has never been a client of Vorys, does not have standing to seek Vorys' disqualification, citing the Ohio Supreme Court's

³ 1/22/16 Tr., p. 122, lines 4-13; Lapine's Ex. L, ¶¶ 1.2, and 1.3.

⁴ 1/22/16 Tr., p. 120, lines 3-10; p. 121, lines 3-7.

⁵ 1/22/16 Tr., p. 124, lines 9-25; p. 125, lines 1-3; p. 128, lines 1-25; p. 129, lines 1-15; Lapine's Ex. M.

⁶ 1/22/16 Tr., p. 121, lines 18-25; p. 122, lines 1-3; p. 129, lines 1-15; Lapine's Ex. M.

⁷ 1/22/16 Tr., p. 127, lines 1-10; Lapine's Ex. L.

⁸ At page 4 of Plaintiff's Reply, Plaintiff acknowledges that it "has not been a 'former client' of Vorys"; and in its Response to Request for Admission No. 9, Plaintiff admitted that Vorys does not represent it in the instant matter. It is undisputed that Vorys has never represented the Plaintiff, Marathon Hotels, Inc. 1/22/16 Tr., p. 224, lines 14-16.

⁹ Plaintiff's Motion, at page 5.

decision in *Morgan v. North Coast Cable Co.*, 63 Ohio St.3d 156, 159, 586 N.E.2d 88, 90. Specifically, Lapine asserts that in *Morgan*, the Ohio Supreme Court cited *Dana Corp. v. Blue Cross & Blue Shield Mut. Of Northern Ohio*, 900 F.2d 882 (6th Cir. 1990)¹⁰, "when it explained that to determine if the party bringing a disqualification motion has standing, the court looks to see whether 'there is (or was) an attorney-client relationship between the party seeking disqualification and the attorney the party seeks to disqualify.'" In further support of his argument, Lapine correctly cites two cases from the Ninth District Court of Appeals, specifically *Witschey v. Medina County Bd. Of Comm'rs*, 169 Ohio App.3d 214, 223, 2006-Ohio-5135, ¶131, and *Skycasters LLC v. J.W. Didado Elec., Inc.* (9th Dist. No. 23901), 2008-Ohio-4849, ¶18 wherein the Court cited and relied upon *Morgan* for the propositions or conclusions that "[t]he prerequisite to disqualifying an attorney due to a conflict of interest is the existence of a prior or current attorney-client relationship between the party moving for disqualification and the attorney being sought for disqualification"; and "[s]trangers to the attorney-client relationship[] lack standing to assert that a conflict of interest exists." Lapine does acknowledge that "*Dana* involved an alleged conflict stemming from a past attorney-client relationship under Rule 1.9."¹¹

Plaintiff argues that since *Dana* and *Morgan* involved a past attorney-client relationship involving Rule 1.9, and it is seeking disqualification of Vorys pursuant to Rule 1.7 applicable to dual representation of current clients with adverse or conflicting interests, the standing requirement of *Dana* and *Morgan* does not apply to this matter. In support of this argument,

¹⁰ In *Dana*, the Sixth Circuit Court of Appeals set forth a three-part test for disqualification of counsel, the first part of which is that "the past attorney-client relationship existed between the party seeking disqualification and the attorney it seeks to disqualify." (Emphasis added.)

¹¹ Lapine's Post-Hearing Submission, at p. 16.

Plaintiff cites two Ohio federal district court cases and two Ohio cases, involving either Rule 1.7 or former Disciplinary Rule 5-105 relating to concurrent representation.¹²

In each of the four cases cited and relied upon by Plaintiff, the party who sought disqualification of the lawyer or firm was a client of the lawyer(s) or firm sought to be disqualified, thereby meeting the first prong of the test, or standing requirement, set forth in *Dana*.¹³ Indeed, in none of the four cases cited by Plaintiff did the court specifically find or conclude that the standing requirement set forth in *Dana* and relied upon by the Ohio Supreme Court and Ohio appellate courts did not apply in the context of concurrent representation. In *Pioneer-Standard, supra*, and *SST Castings, supra*, the federal district courts concluded that the *Dana* "substantially-related test" or the second part of the *Dana* three-part test is not applicable to a case where an attorney undertakes employment against a current client. And, in *Henry Filters, Inc., supra*, at *4, involving former Disciplinary Rule 5.105, the Court explained:

We note at the outset that a motion to disqualify an attorney gives rise to two areas of examination: (1) the nature of the relationship between the litigants; and, (2) the nature of the relationship between the attorney's past and present duties, as those duties relate to the litigants. **The court must first scrutinize**

¹² *SST Castings, Inc. v. Amana Appliances, Inc.*, 250 F. Supp.2d 863 (S.D. Ohio 2002); *Pioneer-Standard Elecs. Inc. v. Cap Gemini America Inc.*, No. 1:01CV2185, 2002 U.S. Dist. LEXIS 7120, 2002 WL 553460 at *8 (N.D. Ohio Mar. 11, 2002); *Henry Filters, Inc. v. Peabody Barnes, Inc.*, 82 Ohio App.3d 255, 611 N.E.2d 873, 875 (Ohio App. 6th Dist. 1992); and *Carnegie Cos. v. Summit Props.* (9th Dist. No. 24553), 183 Ohio App.3d 770, 2009-Ohio-4655, 918 N.E.2d 1052.

¹³ In *SST Castings, supra*, the plaintiff sought disqualification of defense counsel because defense counsel's Cincinnati office had represented the plaintiff in the past and defense counsel's Washington DC counsel was representing the plaintiff in a matter that had recently been held in abeyance before the U.S. Court of International Trade. In *Pioneer-Standard, supra*, the plaintiff sought disqualification of one of the law firms representing the defendant based upon its assertion that the firm was representing the plaintiff in a separate matter. In *Henry Filters, supra*, the defendant/appellee sought disqualification of the plaintiff/appellant's counsel, based upon its assertion – and the court's agreement – that to the extent that the firm had represented it and defendant/appellee for purposes of a patent application, an attorney-client relationship had been formed or established. In *Carnegie Cos., supra*, the plaintiff sought disqualification of defense counsel by arguing that it was a client of defense counsel when the litigation began, and the appellate court agreed with the trial court's decision so finding.

the relationship that existed between the moving party and the attorney that the moving party seeks to disqualify. If there is no current or past attorney-client relationship, then the motion should be denied. On the other hand, if the court determines that there is, or has been, an attorney-client relationship, then the court must inquire into the relationship between the current representation and the representation giving rise to the attorney-client relationship between the lawyer and the litigant. [Citation omitted.] (Emphasis added.)

Since there is no current or past attorney-client relationship between Plaintiff, Marathon Hotels, Inc. and Vorys, so as to confer standing upon Plaintiff to seek Vorys' disqualification as counsel for Lapine, Plaintiff's Motion must be and is **DENIED**.

IT IS SO ORDERED.

Pamela A. Barker 3-9-16

JUDGE PAMELA A. BARKER Dated