2019 IL App (1st) 181287-U

No. 1-18-1287

Order filed July 26, 2019

Fifth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

PNC BANK, N.A.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 16 L 5712
	)	
EP CURRAGH, LLC,	)	Honorable
	)	Alexander P. White,
Defendant-Appellee.	)	Judge, presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Justices Hoffman and Hall concurred in the judgment.

ORDER

¶ 1 *Held*: We reverse the circuit court's order disqualifying plaintiff's attorneys because the record does not support a finding that an associate at the attorneys' law firm previously represented defendant in a substantially related matter or otherwise gained confidential information related to defendant while at her former firm.

¶ 2 PNC Bank appeals from the circuit court's order disqualifying its attorneys due to an imputed conflict of interest under Rules 1.9 and 1.10 of the Illinois Rules of Professional Conduct. PNC argues that there is no evidence in the record establishing that an associate at its

attorneys' law firm previously represented EP Curragh in a substantially related matter while at her former firm, and that, in any event, its attorneys' law firm effectively screened the associate from involvement in the present matter shortly after learning of the alleged conflict. For the reasons that follow, we reverse the circuit court's order and remand for further proceedings.[1]

¶ 3 I. BACKGROUND

¶ 4 EP Curragh, LLC, is owned by Sophia Leongas. The company operated a restaurant on premises that it leased from PLL, LLC, a company owned by Sophia's brother, Paul Leongas. In 2009, PNC's predecessor-in-interest (which we will refer to as PNC) sued PLL to foreclose on its mortgage on the property. PNC was represented in those proceedings by the law firm of Crowley & Lamb. PLL was represented by the law firm of Brown, Udell, Pomerantz & Delrahim (BUPD).

¶ 5 In August 2012, while the foreclosure action was pending, the court-appointed receiver sued EP Curragh for breaching its lease by failing to pay rent. EP Curragh was represented in those proceedings by BUPD. After the foreclosure action concluded, the receiver's interest in recovering unpaid rent was assigned to PNC, and the breach-of-lease action continued with PNC (again represented by Crowley & Lamb) as the plaintiff. On January 31, 2014, the circuit court entered judgment against EP Curragh for $1,044,866.35.

¶ 6 In April 2014, in an effort to collect the judgment, PNC commenced the present supplementary proceedings, see 735 ILCS 5/2-1402 (West 2014), by issuing citations to discover assets to EP Curragh and numerous third parties, including Sophia and Paul personally; Holland

[1] In adherence with the requirements of Illinois Supreme Court Rule 352(a) (eff. July 1, 2018), this appeal has been resolved without oral argument upon the entry of a separate written order.

Pub, LLC, which is jointly owned by Sophia and Paul; and EPC Properties, LLC, which is owned by Sophia. The supplementary proceedings were stayed from April 2015 to April 2016, while EP Curragh unsuccessfully sought bankruptcy protection in federal court. On December 29, 2017, PNC filed a petition for recovery of assets and for judgments against Sophia, Holland Pub, and EPC Properties, alleging that EP Curragh fraudulently transferred all of its assets to Holland Pub a month before judgment was entered on the breach-of-lease claim, and that Holland Pub later transferred a portion of the revenues generated from those assets to EPC Properties, all with the intent to prevent PNC from collecting its judgment. The petition seeks to set aside the allegedly fraudulent transfers or hold Sophia, Holland Pub, and EPC Properties directly liable for the judgment.

¶ 7 On November 1, 2017, before PNC filed the petition to recover assets, Crowley & Lamb was absorbed by the law firm of Plunkett Cooney. On December 8, 2017, EP Curragh filed a motion to disqualify Plunkett Cooney from representing PNC. The motion alleged that a Plunkett Cooney associate, Leslie Rojas, previously worked for BUPD and represented EP Curragh in matters that were substantially related to the present matter. The motion argued that Rojas was therefore prohibited from representing PNC in the current proceedings under Rule 1.9 of the Illinois Rules of Professional Conduct, and that her conflict was imputed to all other Plunkett Cooney attorneys under Rule 1.10.

¶ 8 In a supporting affidavit, Paul stated that billing records from BUPD indicate that Rojas "performed legal services" for him and several LLCs owned by him or Sophia, including EP Curragh, "from June of 2010 until March of 2012." According to Paul, "other records were not readily available" due to a change in BUPD's billing system, but he "believe[d]" that Rojas

"performed services" for these entities "after March of 2012." Paul's affidavit did not specify whether Rojas represented EP Curragh in the breach-of-lease action or the supplementary proceedings, but EP Curragh's motion suggested that Rojas worked on both. The motion further alleged that billing records and emails obtained from BUPD show that Rojas's legal work for EP Curragh included "legal research," attending "internal strategy conferences" and "litigation strategy meetings," "writing legal briefs and memoranda," and sending and receiving "emails relating to litigation." EP Curragh asserted that the billing records and emails were protected by attorney-client privilege, but it stated that it would submit them to the circuit court for *in camera* review if requested.

¶ 9 In response, PNC argued that EP Curragh had not established any prior representation by Rojas because it failed to attach the referenced billing records or emails to its motion but instead relied solely on assertions in Paul's affidavit that were not based on Paul's personal knowledge. Even accepting the affidavit's assertions as true, PNC argued, BUPD's billing records showed only that Rojas performed legal work for several Leongas-related entities between June 2010 and March 2012, a period that ended five months before the breach-of-lease action was filed. PNC further argued that the breach-of-lease action and the current supplementary proceedings are not substantially related because the issues involved in the two cases are distinct. Finally, PNC argued that any conflict affecting Rojas should not be imputed to the entire Plunkett Cooney firm because the firm screened Rojas from involvement in the case shortly after the alleged conflict was brought to its attention.

¶ 10 The circuit court heard oral argument on the motion but did not conduct an evidentiary hearing or review the billing records and emails referenced by EP Curragh.[2] The court later entered a written order disqualifying Plunkett Cooney from representing PNC. The court's order consists of a three-and-a-half page statement of facts that is copied nearly verbatim from EP Curragh's motion, followed by 29 pages in which the court copied (again nearly verbatim) the parties' arguments. In a concluding sentence, the court stated that it "agree[d] with" EP Curragh and granted its motion. We allowed PNC's petition for leave to appeal under Supreme Court Rule 306(a)(7).

¶ 11 II. ANALYSIS

¶ 12 An order disqualifying a party's attorney is reviewed on appeal for an abuse of discretion. *Schwartz v. Cortelloni*, 177 Ill. 2d 166, 176 (1997); *Gagliardo v. Caffrey*, 344 Ill. App. 3d 219, 225 (2003) (abuse of discretion standard applies even when trial court did not conduct evidentiary hearing). A trial court abuses its discretion where its decision "is arbitrary, fanciful or unreasonable." *People v. Becker*, 239 Ill. 2d 215, 234 (2010). Where the trial court's decision is based on factual findings, we will defer to those findings "unless they are unsupported by evidence in the record." *Schwartz*, 177 Ill. 2d at 176.

¶ 13 A lawyer's duties to a former client are governed by Rule 1.9 of the Illinois Rules of Professional Conduct. Under Rule 1.9(a), "[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

[2] PNC did not include a transcript or bystander's report of the oral argument in the record on appeal. Although we generally resolve doubts arising from an incomplete record against the appellant, see *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984), EP Curragh does not dispute that the circuit court did not review the billing records and emails or conduct an evidentiary hearing.

the former client gives informed consent." Ill. R. Prof. Conduct 1.9(a). "Matters are 'substantially related' for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." Ill. R. Prof. Conduct 1.9, cmt. 3. "A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter." *Id*. Rather, "[a] conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services." *Id*.

¶ 14 Under Rule 1.9(b), "[a] lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client * * * whose interests are materially adverse to that person[,] and * * * about whom the lawyer had acquired [confidential information] that is material to the matter[,] unless the former client gives informed consent." Ill. R. Prof. Conduct 1.9(b). Rule 1.9(b) "operates to disqualify the lawyer only when the lawyer involved has actual knowledge of [protected confidential] information." Ill. R. Prof. Conduct 1.9, cmt. 5. To determine whether a lawyer actually acquired confidential information about a client of her former firm whom she did not personally represent, a court should consider the "situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together." Ill. R. Prof. Conduct 1.9, cmt. 6. For instance, if a lawyer had "general access to files of all clients of a law firm and * * * regularly participate[d] in

discussions of their affairs," a court should "infer[ ] that [the] lawyer in fact [was] privy to all information about all the firm's clients." *Id*. On the other hand, if the lawyer had "access to the files of only a limited number of clients and participate[d] in discussions of the affairs of no other clients," it generally "should be inferred that [the] lawyer in fact [was] privy to information about the clients actually served but not those of other clients." *Id.*

¶ 15 Finally, if a lawyer is prohibited from representing a person under Rule 1.9, no other lawyer in the same firm may represent that person, see Ill. R. Prof. Conduct 1.10(a), "unless the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom," Ill. R. Prof. Conduct 1.10(e).

¶ 16 To determine whether two matters are substantially related, a trial court must conduct a three-step inquiry. See *Schwartz*, 177 Ill. 2d at 180 (adopting standard from *LaSalle National Bank v. County of Lake*, 703 F.2d 252, 255-56 (7th Cir. 1983)). The court first "must make a factual reconstruction of the scope of the prior legal representation." *LaSalle National Bank*, 703 F.2d at 255. The court then must "determine[ ] whether it is reasonable to infer that the confidential information allegedly given would have been given to a lawyer representing a client in those matters." *Id*. at 255-56. This aspect of the inquiry "avoids requiring disclosure of confidential information by focusing upon the general features of the matters involved and inferences as to the likelihood that confidences were imparted by the former client that could be used to adverse effect in the subsequent representation." Restatement (Third) of the Law Governing Lawyers § 132, cmt. d(iii) (2000). Finally, the court must "determine[ ] whether that information"—*i.e.*, the confidential information that ordinarily would have been disclosed to a lawyer in the course of the prior representation—"is relevant to the issues raised in the litigation

pending against the former client." *LaSalle National Bank*, 703 F.2d at 256. Under this test, "[t]he party seeking disqualification bears the burden of establishing that the present and former representations are substantially related." *Schwartz*, 177 Ill. 2d at 177-78.

¶ 17 PNC argues that EP Curragh did not carry its burden of establishing that Rojas previously represented EP Curragh in a substantially related matter, and that the circuit court therefore abused its discretion in disqualifying Plunkett Cooney based on an imputed conflict of interest. We agree. The record does not support a finding that Rojas is prohibited under Rule 1.9(a) from representing PNC in the current proceedings because no evidence establishes that she previously represented EP Curragh in a substantially related matter. In the circuit court, EP Curragh relied exclusively on Paul's affidavit attesting that Rojas represented a number of Leongas-related entities, including EP Curragh, between June 2010 and March 2012. But Paul's affidavit did not identify the specific matters in which Rojas represented EP Curragh. Notably, the breach-of-lease action was not filed until August 2012, and the supplementary proceedings did not commence until April 2014, both outside the time period in which (according to Paul's affidavit) Rojas represented EP Curragh. Paul noted his belief that Rojas's representation of EP Curragh extended past March 2012, but neither he nor EP Curragh provided any evidence to substantiate that assertion. And while EP Curragh alleged that BUPD's billing records and emails demonstrate Rojas's extensive involvement in Leongas-related matters, it does not dispute that it never submitted those documents to the circuit court for review. Accordingly, there was no evidence in the record from which the circuit court could make a factual reconstruction of the nature and scope of Rojas's prior representation of EP Curragh. And in the absence of such a factual reconstruction, there is no way to determine whether any matter in which Rojas

previously represented EP Curragh is substantially related to the present proceedings. See *Schwartz*, 177 Ill. 2d at 180 ("In deciding whether a substantial relationship exists between two representations, a careful examination of the factual context of the subject matters of both representations is necessary in order to determine whether disqualification is required.").

¶ 18 Nor does the record support Rojas's disqualification under Rule 1.9(b). Under that rule, EP Curragh need not show that Rojas personally represented EP Curragh, but it must establish that Rojas actually acquired confidential information about EP Curragh while working at BUPD that is relevant to the current proceedings. See Ill. R. Prof. Conduct 1.9(b); Ill. R. Prof. Conduct 1.9, cmt. 5. It is unclear whether EP Curragh sought to rely on Rule 1.9(b) below, but it presented no evidence about the particular facts of Rojas's association with BUPD, such as her general access to client information, that would allow the circuit court to infer whether she was privy to confidential information of clients that she did not personally represent. See Ill. R. Prof. Conduct 1.9, cmt. 6.

¶ 19 Because we hold that the record is insufficient to support a finding that Rojas is prohibited from representing PNC in the current proceedings, we need not address PNC's alternative argument that any conflict affecting Rojas should not be imputed to the entire Plunkett Cooney firm because the firm screened Rojas upon learning of the asserted conflict.

¶ 20 III. CONCLUSION

¶ 21 For the foregoing reasons, we reverse the circuit court's order disqualifying PNC's attorneys and remand for further proceedings.

¶ 22 Reversed and remanded.