2013 IL App (2d) 120910-U
No. 2-12-0910
Order filed August 23, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

LOOP LEGAL COPIES, INC.,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff,	)	
	)	
v.	)	No. 12-SC-1366
	)	
SPOMENKA LUEDI and	)	
HANS LUEDI,	)	
	)	
Defendants and Third-Party	)	
Petitioners/Appellants	)	
	)	
(Donald L. Johnson, Donald L. Johnson, P.C.,	)	Honorable
Benjamim P. Hyink and The Hyink Law Firm,	)	Patrick J. Leston,
Third-Party Respondents/Appellees).	)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Hudson and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in granting Hyink's and Johnson's motion to disqualify the Luedis' attorney.

¶ 2 In this discretionary interlocutory appeal, the third-party petitioners, Spomenka Luedi and Hans Luedi (collectively, the Luedis), appeal from the July 19, 2012, order of the circuit court of Du Page County granting the motion of the third-party respondents, Donald L. Johnson, Donald L.

Johnson P.C. (collectively, Johnson), Benjamin P. Hyink, and The Hyink Law Firm (collectively, Hyink), to disqualify the Luedis' counsel, attorney David Novoselsky. We reverse.

¶ 3 BACKGROUND

¶ 4 On December 18, 2009, Novoselsky filed a legal malpractice claim in Cook County against Johnson and Hyink (collectively, respondents) on behalf of the Luedis. The trial court granted Johnson's motion to transfer venue to Du Page County. The Luedis appealed from the order transferring venue pursuant to Illinois Supreme Court Rule 306(a)(2) (eff. Feb. 16, 2011). The First District Appellate Court denied the request for interlocutory appeal. On January 26, 2011, our supreme court denied a petition for leave to appeal. The Luedis subsequently filed their complaint in Du Page County. On May 23, 2011, the Luedis voluntarily dismissed the complaint.

¶ 5 On December 8, 2010, the plaintiff, Loop Legal Copies, Inc. (Loop Legal), had filed a small claims complaint, in Du Page County, against the Luedis for unpaid services (copying fees). On August 4, 2011, the Luedis filed, in Cook County, an answer to that complaint and a three-count third-party complaint against the respondents, for contribution (count I) and alleging legal malpractice (count II) and breach of fiduciary duty (count III). The latter claims related to the respondents's representation of the Luedis in an underlying legal malpractice action against a different attorney. In the underlying action, Novoselsky allegedly provided expert testimony on behalf of the Luedis as to the standard of care and proximate cause.

¶ 6 On October 12, 2011, Johnson moved to transfer the third-party complaint to Du Page County based on *forum non conveniens*. Johnson argued that the complaint was actually a refiling of the previously-dismissed complaint. On October 17, 2011, Hyink moved to dismiss the complaint pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2010)). Hyink argued that count I should be dismissed because it was actually a claim for breach of contract

and failed to state a claim for contribution. Hyink further argued that counts II and III were not proper third-party claims because they had nothing to do with Loop Legal and that the Luedis were merely trying to circumvent the previous order requiring the claims to be brought in Du Page County.

¶ 7 On December 6, 2011, the circuit court of Cook County entered an order dismissing count I, with leave to replead, and severing counts II and III. The latter counts were transferred to Du Page County. On December 27, 2011, the Luedis filed a motion, in Du Page County, for extension of time to file an amended third-party complaint. On April 6, 2012, the Luedis filed a motion to transfer the case out of small claims court. They also moved to file an amended complaint pursuant to section 2-616 of the Code (735 ILCS 5/2-616 (West 2010)).

¶ 8 On April 12, 2012, Hyink filed a motion to disqualify Novolselsky pursuant to Rule 3.7 of the Illinois Rules of Professional Conduct of 2010 (eff. Jan. 1, 2010), which provides that an attorney shall not act as an advocate at trial in which the attorney is likely to be a necessary witness unless certain conditions are met. Hyink argued that Novoselsky was a necessary witness because he had provided expert testimony in the underlying legal malpractice action. On May 24, 2012, the trial court granted the Luedis' motion to file an amended complaint, and granted Johnson leave to join Hyink's motion to disqualify Novoselsky. Subsequently, on May 31, 2012, Johnson filed its motion to disqualify Novoselsky, adopting and incorporating the arguments contained in Hyink's motion.

¶ 9 On July 19, 2012, a hearing was held on the motion to disqualify. At the hearing, the respondents argued that Novoselsky was going to be a necessary witness in the case since Novoselsky had offered expert testimony on the issue of proximate cause in the Luedis' underlying legal malpractice case. The Luedis did not prevail in the underlying case because the trial court determined that they had failed to establish proximate cause. The respondents argued that they would need to depose Novoselsky and have him testify about what could have or should have been

brought forth in the underlying case on the issue of proximate cause. They also argued that Novoselsky could be a fact witness because he was familiar with what happened in the underlying case. The respondents believed that disqualifying Novoselsky would not create a substantial hardship on the Luedis since the case was in its infancy. The respondents insisted that they had not waived the right to seek disqualification as the motion to disqualify was filed as soon as the case was pending in the correct forum.

¶ 10 The Luedis argued that Novoselsky's testimony would not be required. They noted that there were four other litigants who could testify as fact witnesses as to what happened in the underlying case. The Luedis suggested that the attempt to have Novoselsky and his entire law firm excluded, three years after the case was first filed, was a tactical weapon misused for purposes of harassment. They noted that venue was not improper in Cook County, only that Du Page County was more convenient. As such, there was no reason to wait three years to file the motion to disqualify and the motion was waived. The Luedis further argued that even if Novoselsky were a necessary witness, it would be a substantial hardship to secure alternate counsel at this stage of the litigation.

¶ 11 Following the hearing, the trial court granted the motion to disqualify. The trial court disqualified Novoselsky individually, but not his firm. The trial court further ordered that the Luedis could not call Novoselsky as either an expert or a fact witness if his firm was representing them at the time of trial. The trial court noted that the order did not preclude Novoselsky's deposition from being taken as part of discovery. Additionally, the trial court stated that it did not consider Novoselsky as a necessary witness, only a probable witness, because Novoselsky's testimony from the first trial was a matter of record and someone else would have to opine on that testimony. The trial court acknowledged that its opinion could change in the future. The trial court warned the Luedis that if Novoselsky was found to be a necessary witness in the future, it would exclude his

firm from representing them. Finally, the trial court noted that the motion to disqualify was not waived because it agreed that the matter of forum should have been resolved prior to the filing of the motion.

¶ 12 The trial court's written order stated that the motion was granted for the reasons set forth in the record. The written order further provided that Novoselsky, individually, was disqualified but that his law firm could continue to represent the Luedis up until such time that it was determined that Novoselsky would be a necessary witness, in which case Novoselsky's law firm would also be excluded. The order granted the respondents permission to depose Novoselsky. The order provided that if it was later determined that Novoselsky would not be a necessary witness, the Luedis could move to reinstate him. Following the denial of their motion to reconsider, the Luedis filed a petition for leave to file an interlocutory appeal pursuant to Illinois Supreme Court Rule 306(a)(7) (eff. Feb. 16, 2011). On October 9, 2012, this court granted the motion and allowed this appeal.

¶ 13 ANALYSIS

¶ 14 On appeal, the Luedis raise two arguments. First, they argue that the respondents waived their right to seek the disqualification of Novoselsky by failing to raise the issue earlier in the proceedings. Second, they argue that the trial court abused its discretion in granting the respondents' motion to disqualify. We will address these arguments in turn.

¶ 15 Motions to disqualify an attorney should be made with reasonable promptness after a party discovers the basis for the filing of the motion. *In re Estate of Klehm*, 363 Ill. App. 3d 373, 377 (2006). Accordingly, motions to disqualify are subject to waiver if not promptly asserted. *Id.* In the present case, we cannot say the motion was not promptly asserted. The motion was filed about four months after the case was transferred to Du Page County. Although the case had been pending in Cook County for four months, the only issue addressed there was the issue of venue. The Luedis

argue that Hyink had filed a "substantive" motion to dismiss in Cook County. However, the primary issue raised by Hyink in that motion was that dismissal was proper because the claims should have been filed as a separate action in Du Page County. Once venue was transferred to Du Page County and the matter was moved out of small claims court, the respondents moved to disqualify Novoselsky. At that point, the case was still early in its proceedings. Although the Luedis had filed the same claim a couple of years earlier, the Luedis voluntarily dismissed the action after venue was transferred from Cook to Du Page County. As such, the earlier case also had not proceeded to more advanced stages of litigation. Accordingly, the trial court did not err in finding that the respondents had not waived their right to move to disqualify Novoselsky.

¶ 16 In so ruling, we note that the cases relied on by the Luedis in support of finding waiver are unpersuasive, as the motions to disqualify in these cases were based on conflicts of interest and were not filed in the preliminary stages of litigation. See *In re Estate of Kirk*, 292 Ill. App. 3d 914, (1997) (motion to disqualify attorney waived because probate case proceeded for three-and-a-half years before motion was filed); *First National Bank of Elgin v. St. Charles National Bank*, 152 Ill. App. 3d 923, 932-33 (1987) (motion to disqualify waived where case had proceeded for four years and motion was not filed until 15 months after party discovered the alleged conflict of interest); *Tanner v. Board of Trustees of University of Illinois*, 121 Ill. App. 3d 139, 146-47 (1984) (motion to disqualify waived where case had proceeded for eight years and motion was not filed until nine months after the discovery of the alleged conflict of interest); *Roth v. Roth*, 84 Ill. App. 3d 240, 245 (1980) (motion to disqualify waived where plaintiffs knew of possible conflict of interest for two years but did not file motion until shortly before trial).

¶ 17 The Luedis next argue that the trial court abused its discretion because Novoselsky's disqualification at this point in the proceedings was premature. Rule 3.7 of the Illinois Rules of Professional Conduct provides:

> "(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
>
> (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." Ill. R. Prof. Conduct R. 3.7 (eff. Jan. 1, 2010).

The Luedis argue that this rule only precludes an attorney from acting as an advocate and a necessary witness at trial and that it does not apply to an attorney acting in his pretrial capacity. They argue, therefore, that even if Novoselsky were a necessary witness, he could still act without limitation at this point in the proceedings.

At the outset, we note that the respondents contend that this issue is forfeited because the Luedis did not argue before the trial court that disqualification was premature. Rather, the Luedis argued only that the motion to disqualify should be denied because Novoselsky was not a necessary witness. Forfeiture is a limitation on the parties and not on this court, which has a responsibility to achieve a just result and maintain a sound and uniform body of precedent. *O'Casek v. Children's Home & Aid Society of Illinois*, 229 Ill. 2d 421, 438 (2008). Accordingly, regardless of any waiver, we will address the merits of this argument.

¶ 18 Disqualification of an attorney is a drastic measure that should only be imposed when absolutely necessary. *Owen v. Wangerin*, 985 F. 2d 312, 317 (7th Cir. 1993). Motions to disqualify are viewed with caution since they can be used as a means to harass opposing counsel. *In re Estate of Klehm*, 363 Ill. App. 3d 373, 377 (2006). A trial court's decision to grant a motion to disqualify an attorney will not be disturbed absent an abuse of discretion. *Schwartz v. Cortelloni*, 177 Ill. 2d 166, 176 (1997). A trial court abuses its discretion only when its ruling is arbitrary, fanciful or unreasonable or where no reasonable person would take the view adopted by the trial court, (*People v. Anderson*, 367 Ill. App. 3d 653, 664 (2006)), or where its ruling rests on an error of law (*Cable America, Inc. v. Pace Electronics, Inc.*, 396 Ill. App. 3d 15, 24 (2009)).

¶ 19 Rule 3.7 of the Illinois Rules of Professional Conduct mirrors Rule 3.7 of the American Bar Association (ABA) Model Rules of Professional Conduct. When disqualification is sought under the ABA Model Rule 3.7, the court must engage in a two-part inquiry. *In re Leventhal*, Bankruptcy No. 10 B 12257, 2012 WL 1067568 at *2 (Bkrtcy. N.D. Ill 2012). First, the court must determine whether the attorney is likely to be a necessary witness. If so, the court must then decide whether the attorney's disqualification would work a substantial hardship on the client. *Id.* Courts have found that an attorney is likely to be a necessary witness when it is foreseeable that he will testify, when it is obligatory for him to testify, when he has crucial information that must be divulged, or if his testimony is crucial to the case. See *id.* (citing cases).

¶ 20 In *Walton v. Diamond*, No. 12 C 4493, 2012 WL 6587723 (N.D. Ill. 2012), the plaintiff argued that the defendants' attorney should be disqualified because he would be a necessary witness at trial. The Northern District of Illinois adopted the ABA Model Rules as its rules of professional conduct. (As noted, Rule 3.7 of the Illinois Rules of Professional Conduct mirrors ABA Model Rule 3.7.) The *Walton* court concluded that, based on Rule 3.7, disqualification of the defendants'

attorney was premature because the case was still in its early stages. *Id.* at *3. The *Walton* court acknowledged that the defendant's attorney would become a necessary witness if the case proceeded to trial but noted that it was unclear whether the case would proceed that far. The court further noted that the Illinois Supreme Court had held that an attorney need not withdraw at the early stages of a proceeding "based on the possibility that he might have to become a witness" at trial. *Id.* (quoting *In re Heilgeist*, 103 Ill. 2d 453, 462 (1984)). The *Walton* court explained that disqualifying the defendants' attorney early in the case would avoid unnecessary delay closer to trial but would deprive the defendants of their chosen counsel. *Walton*, 2012 WL 6587723 at *3.

¶ 21 In the present case, the trial court abused its discretion in granting the motion to disqualify. The trial court found that, at this stage in the proceedings, Novoselsky was not a necessary witness, only a "probable witness," because someone else could opine on Novoselsky's expert testimony given at the underlying trial. Because the trial court determined that Novoselsky was not a necessary witness, the trial court should have denied the motion to disqualify without prejudice to the respondents' right to renew the motion in the future should the record affirmatively establish that Novoselsky was likely to become a necessary witness. *Id.*; see also *United States v. Hollnagel*, No. 10 CR 195, 2011 WL 3898033, at *4 (N.D. Ill. 2011) (motion to disqualify denied because government described attorney only as a potential witness and failed to establish that the attorney was likely to be a necessary witness); *Horizon Federal Savings Bank v. Selden Fox & Associates*, No. 85 C 9506, 1987 WL 13569, at *6 (N.D. Ill. 1987) (because court could not conclude that attorney would be necessary witness, motion to disqualify was denied without prejudice to the right to renew the motion after discovery had been taken).

¶ 22 In addition, the trial court abused its discretion in finding that, should Novoselsky become a necessary witness, his law firm would also be excluded from representing the Luedis. If it is

established at a later date that Novoselsky is likely to be a necessary witness, Rule 3.7 does not necessarily compel disqualification of his entire firm. Rather, Novoselsky's firm could still represent the Luedis unless precluded from doing so by Rule 1.7 or 1.9. See Ill. R. Prof. Conduct R. 3.7(b) (eff. Jan 1, 2010).

¶ 23 CONCLUSION

¶ 24 For the foregoing reasons, the judgment of the circuit court of Du Page County granting the respondents' motion to disqualify is reversed.

¶ 25 Reversed.