

IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

PAUL PETER,

Plaintiff,

vs.

HESS OIL VIRGIN ISLANDS CORP.,
Defendant.

CIVIL NO. 408/1994

ACTION FOR DAMAGES

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court on Defendant's Motion to Disqualify. For the reasons appearing herein, the attorney is ordered disqualified.

FACTS

On May 5, 1994, Plaintiff filed a complaint against the Defendant, Hess Oil Virgin Islands Corporation (hereinafter HOVIC), alleging that while employed by various contractors to perform work at the HOVIC refinery, he was directed by defendant at various times, to hydroblast, paint and do other labor which exposed him to toxic vapors, substances and particulates. He alleges that he has suffered physical injuries, toxic related diseases, etc. and that his ailments were caused by the toxic exposure caused by Defendant. ¹

¹ Complaint, pp. 1 - 2.

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Defendant subsequently filed a motion to disqualify plaintiff's counsel, Lee J. Rohn, Esq. The basis for the motion is that Attorney Rohn "[f]rom 1985 to 1987 . . . worked at the Law Offices of Bryant, White & Associates and defended HOVIC in substantially related cases. (cite omitted) In particular, the case Patrick Belin v. HOVIC, (Civil No. 1986/71, District Court of the Virgin Islands, Division of St. Croix) involved a claim for damages for alleged injury and illness arising out of Belin's alleged inhalation of toxic paint vapors." ² Defendant also points to Attorney Rohn's admission in Erick Brice v. HOVIC, (Civil No. 1989/214, District Court of the Virgin Islands, Division of St. Croix), Opposition to Motion For Disqualification of Plaintiff's Counsel that "[a]fter leaving the Law Offices of Britain H. Bryant, P.C., Lee J. Rohn refrained from taking any cases against HOVIC for a period of approximately two (2) years. To date Lee J. Rohn has refused cases such as paint inhalation and asbestos cases because they are substantially related to cases in which she participated in the defense of HOVIC." ³ Defendant lists a variety of similarities between this case and other cases in which Attorney Rohn represented HOVIC, particularly the Belin case, and asserts that the similarities are "such that confidences disclosed to Attorney Rohn might be used against HOVIC in the Peter lawsuit." ⁴ Defendant further objects to Attorney Rohn's representation of the plaintiff in this matter on the basis that "in defending HOVIC against prior punitive damage claims, Attorney Rohn had access to information concerning the financial worth

² Motion and Memorandum of Law to Disqualify Plaintiff's Counsel, pp 1 - 2.

³ Motion and Memorandum of Law to Disqualify Plaintiff's Counsel, Exhibit D p. 2.

⁴ Motion and Memorandum of Law to Disqualify Plaintiff's Counsel, p. 2.

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of HOVIC and was privy to confidential strategy sessions regarding the defense of such claims. Such confidential information could now be used against HOVIC in pursuit of her present client's punitive damage claim." ⁵

In the opposition to the motion to disqualify Plaintiff relies on Brice v. HOVIC, 769 F.Supp. 193 (D.V.I. 1990) where the Court denied a motion to disqualify Attorney Rohn. In that case the Court determined that the crucial issue was "whether or not Ms. Rohn may have been privy to confidences or secrets of HOVIC in the course of her prior employment which will compromise HOVIC's defense in the action." Id. at 196. Counsel for Plaintiff thus argues that the motion to disqualify should be denied because HOVIC has not shown "any confidences or secrets which would give the plaintiff a special advantage." ⁶ Attorney Rohn further states that "in light of the balancing of interests test noted in Brice, . . . HOVIC would have to make a strong showing, and it has failed to make any showing here." ⁷ She dismisses her admission in Brice, with regard to paint inhalation and asbestos cases as merely a "gratuitous comment." ⁸ In support of the opposition to the motion to disqualify counsel, Attorney Rohn further argues that due to the lengthy passage of time the value of any information gained by her in 1985 -1987 has correspondingly decreased and the prior attorney - client relationship with HOVIC has completely expired.

⁵ Id., p. 8.

⁶ Plaintiff's Opposition to Motion to Disqualify Counsel, p. 7.

⁷ Id., p. 6.

⁸ Id., p. 1.

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In its Reply to Plaintiff's Opposition, Defendant points out that in Brice, the District Court did not have before it Plaintiff's counsel's admission that that case was substantially related to . . . prior litigation in which she had represented HOVIC. Defendant asserts that this is borne out in a later order denying a motion to disqualify plaintiff's attorney, Lee Rohn, issued by Magistrate Resnick in Thompson. et. al. v. HOVIC and Amerada Hess. In that case Magistrate Resnick noted that "[t]his matter would clearly be foreclosed by the November 30, 1990 opinion of Acting Chief Judge Brotman in Erick Brice v. Hess Oil Virgin Islands Corp., D.Ct. Civ 1989/214, but for Attorney Rohn's statement on page two of her opposition to disqualification dated December 6, 1989 filed in Brice.

. . . To date, Lee J. Rohn has refused cases such as paint inhalation and asbestos cases because they are substantially related to cases in which she participated in the defense of HOVIC . . .

That statement raises the possibility that Attorney Rohn may have been privy to confidences or secrets of HOVIC in the course of her prior employment which will compromise HOVIC's defense." ⁹ It is HOVIC's contention that they have presented sufficient evidence that the present factual pattern is substantially related to a previous representation and thus disqualification of Attorney Lee J. Rohn is warranted pursuant to the American Bar Association Model Rules of Professional Responsibility, Model Rule 1.9(a).

⁹ The Motion to Disqualify was granted in that case, however the case was distinguished on issues not applicable in the instant case.

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DISCUSSION

The American Bar Association Model Rule of Professional Responsibility have been judicially adopted in this jurisdiction. V.I. Bar Association v. Boyd-Richards, 26 V.I. 299 (D.V.I. 1991). Under Model Rule 1.9(a) a lawyer may not "represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of [a] former client unless the former client consents after consultation." The concerns underlying the rule are the risk that confidential information gained in a prior representation will be used to the disadvantage of the former client, and the potential for the violation of the lawyer's duty of loyalty.

As recently as 1992, this Court has applied the "substantial relationship" test in considering whether to disqualify an attorney for prior representation.¹⁰ In McNamara v. Boehm, Civ. No. 141/92 (July 8, 1992) Judge Finch wrote that "[w]here a substantial relationship or a reasonable perception of a substantial relationship between the subject matter of the present suit and that of the former representation exists, the court will assume that confidential information has passed between the attorney and the former client, notwithstanding the attorney's declaration to the contrary." (Citations omitted.) See also, Lynch v. Lampkin, 27 V.I. 152, 155 (Terr. Ct., STX 1992). "The substantial relationship test does not require that the moving party be able to show that confidences actually were

¹⁰ This Court finds that the balancing test espoused in Brice v. HOVIC 769 F. Supp. 193 (D.V.I. 1990), is against the weight of authority requiring the application of the "substantial relationship" test in instances of successive representation, as such this Court declines to follow Brice.

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passed or to detail their contents.¹¹ Rather, a court must consider the subject matter and scope of the former and present representations and decide whether the substance of the new relationship causes it to conflict with the earlier one."

Id.

It is clear to the Court that the subject matter of the present suit is 'substantially related' to work Attorney Rohn performed for HOVIC in previous litigation, particularly the Brice v. HOVIC matter. HOVIC has shown that there is a meaningful connection between matters involved in the previous representation and matter involved in the present case. Both Brice and the instant case involve allegations of exposure to toxic substances while performing painting, sandblasting and other related duties at the HOVIC refinery. It is reasonable to infer that confidential information was provided by HOVIC to Attorney Rohn during her representation of HOVIC in Brice v. HOVIC. It is well established that "disqualification of an attorney is appropriate if she might have acquired substantially related material during the former representation." Lynch, 27 V.I. at 156. See also, American Roller Co. v. Budinger, 513 F.2d 982 (3d Cir. 1975); Richardson v. Hamilton International Corp., 469 F.2d 1382 (3d Cir. 1972) cert denied 411 U.S. 986 (1973).

A lawyer's duty to a client continues even after the termination of the lawyer - client relationship. Attorney Rohn was well aware of her continuing duty to HOVIC as evidenced by her admission in Brice. This Court is not

¹¹ The Court presumes that an attorney receives confidences as part of the attorney-client relationship. Examination of the attorney-client relationship would necessarily compromise confidentiality and therefore should not be required to prove a conflict of interest. See, e.g. Analytica, Inc. v. NPD Research, Inc., 708 F.2d 1263, 1267 (7th Cir. 1983); Cheng v. GAF Corp., 631 F.2d 1052, 1052 (2d Cir. 1980), vacated on other grounds, 450 U.S. 903 (1981).

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swayed by Attorney Rohn's characterization of her admission as merely a "gratuitous comment." HOVIC has shown that the matters involved in the pending suit are substantially related to the matters or cause of action in which they were represented by Attorney Rohn. Attorney Rohn's position in this matter is clearly adverse to the interests of HOVIC and thus disqualification is appropriate.

For the foregoing reasons, Defendant's motion to disqualify will be granted.

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ORDER

In accordance with the memorandum opinion entered herein, it is hereby
ORDERED that the motion to disqualify Lee J. Rohn, Esq., as counsel
for the plaintiff is granted; and it is further

ORDERED that this action is stayed for 30 days from the date of this
order so that the plaintiff may retain substitute counsel.

Dated: March 21, 1996


ALPHONSO G. ANDREWS, JR.
Territorial Court Judge

ATTEST:
YVONNE V. WESSELHOFT
Clerk of the Court

BY: 
Deputy Clerk
3/22/96

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