

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY**

SHARON LEE GRAMMER	:	
BARK,	:	C.A. No: K14C-11-019 RBY
	:	
_____ Plaintiff/Counterclaim	:	
Defendant,	:	
	:	
v.	:	
	:	
TIMOTHY C. MAY, JR.,	:	
	:	
Defendant/Counterclaim	:	
and Third-Party Plaintiff,	:	
	:	
v.	:	
	:	
GERRY GRAY,	:	
	:	
Third-Party Defendant,	:	

*Submitted: September 4, 2015
Decided: September 28, 2015*

*Upon Consideration of Defendant /Third Party Plaintiff's Motion for Judgment
on the Pleadings*
DENIED

*Upon Consideration of Defendant /Third Party Plaintiff's Motion to Disqualify
Shane Heberling, Esq.*
DENIED

ORDER

Shane C. Heberling, Esquire, Law Office of Gerry Gray, Georgetown, Delaware for Plaintiff/Counterclaim Defendant.

Stephen E. Smith, Esquire, Baird Mandalas Brockstedt, LLC, Dover, Delaware for Defendant/Third-Party Plaintiff.

Gerry Gray, Esquire, Law Office of Gerry Gray, Georgetown, Delaware for Third-Party Defendant.

Young, J.

SUMMARY

This dispute between Sharon Lee Grammer Bark (“Plaintiff”) and Timothy C. May, Jr. (“Defendant”) revolves around a 2011 Court Order (“the Order”) requiring Defendant to make retroactive and ongoing support payments to Plaintiff. Plaintiff and Defendant made an agreement during the pendency of their dating relationship that Defendant would pay support to Plaintiff in the event of a breakup. After their relationship ended, Plaintiff sought enforcement of the agreement. Plaintiff’s efforts to enforce the support agreement have led to the current litigation.

The ongoing litigation between the parties has both financial and personal dimensions. Plaintiff disputes that Defendant has honored his payment obligations pursuant to the Order. Defendant disputes the viability and propriety of Plaintiff’s claim for attorney’s fees, which Defendant claims to have paid. Defendant has counterclaimed for fraud against Plaintiff and her new boyfriend and attorney Gerard Gray (“Gray” or “Third-Party Defendant”). Defendant has filed a motion for judgment on the pleadings with respect to Plaintiff’s claims.

Material questions of fact remain regarding the existence and amount of debt owed, as well as the availability and propriety of attorney’s fees. Therefore, Defendant’s motion for judgment on the pleadings is **DENIED**.

Defendant has also filed a motion to disqualify Plaintiff’s counsel based on conflict of interest. Plaintiff’s boyfriend and attorney Gray previously withdrew as counsel of record, but a new member of Gray’s firm, Shane Heberling, Esq. (“Heberling”) was substituted with the Court’s permission. Defendant asserts that

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the likely prior conflict between Plaintiff's representation by her boyfriend Gray can be imputed to Heberling based on his employment at Gray's firm. Defendant also maintains that Heberling should be disqualified because he cannot represent Plaintiff adequately against the counterclaims of fraud, since they relate to both Plaintiff and Third-Party Defendant, who is Heberling's employer.

Heberling was not a member of Gray's firm at the time of the alleged fraud. Heberling's representation of Plaintiff is not prohibited, because the asserted conflict is based on Gray's personal interest and does not present a significant risk of materially limiting the representation. Therefore, Defendant's motion to disqualify counsel is **DENIED**.

FACTS AND PROCEDURES

The dispute between Plaintiff and Defendant concerns the November 8, 2011 Court Order requiring Defendant to make retroactive and ongoing support payments to Plaintiff. Plaintiff and Defendant made an agreement during the pendency of their dating relationship that, in the event of a break-up, Defendant would assume the \$333.00 monthly support payments otherwise owed to Plaintiff by her ex-husband. Following their break-up, Plaintiff obtained the Order declaring Defendant owed her \$7,992.00 in principal and interest to compensate retroactively for the period during which she and Defendant dated. The Order also required Defendant to pay Plaintiff \$333.00 monthly until her cohabitation or remarriage.

On or about October 21, 2014, Plaintiff's attorney signed the Order affirming that the judgment debt interest and costs were satisfied. In her November 18, 2014 Complaint, Plaintiff alleges that Defendant has not met his ongoing obligation to pay

\$333.00 per month pursuant to the Order and is in arrears in the amount of \$14,162.65. To clarify the discrepancy between these two positions, during presentation of the instant motions Plaintiff asserted that the underlying principal and interest were paid, but that the ongoing obligations were separate and continuing costs. Plaintiff now seeks continued or renewed enforcement of the Order against Defendant to obtain support payments. Plaintiff also seeks an award of attorney's fees.

Defendant filed a counterclaim against Plaintiff and Third-Party Defendant, alleging that the claims for attorney's fees in this case amount to conspiracy and fraud. Defendant disputes that Plaintiff paid or was billed for attorney's fees. Defendant asserts that Plaintiff has incurred no costs for legal services, based on her relationship with Third-Party Defendant, her counsel of record in this case when the request for fees was filed.

DISCUSSION

I. Defendant's Motion for Judgment on the Pleadings

Pursuant to Superior Court Civil Rule 12(c), a moving party is entitled to judgment on the pleadings when, considering only that which is presented by the pleadings, no material fact exists and the party is entitled to judgment as a matter of law.¹ All inferences should be drawn in favor of the non-moving party.²

In his answer, Defendant denies multiple allegations in the Complaint,

¹ *Gonzalez v. Apartment Cmtys. Corp.*, 2006 WL 2905724 (Del. Super. Oct. 4, 2006).

² *Id.*

including his failure to pay ongoing support and the existence of any outstanding debt to Plaintiff. As such, genuine issues of material fact remain. Therefore, Defendant's motion for judgment on the pleadings is **DENIED**._____

II. Defendant's Motion to Disqualify Counsel

Defendant has failed to specify the rule or rules supporting the requested disqualification under Delaware's Rules of Professional Conduct (hereinafter, "DRPC, Rule __"). In order to resolve this motion the Court will assess disqualification of Plaintiff's counsel according to the rules of conflict which Defendant's motion and pleadings fairly implicate.

First, Defendant asserts that Plaintiff's counsel is likely to be a necessary witness in this case to clarify his current fee agreement with Plaintiff. Thus, Plaintiff's counsel could be disqualified under DRPC, Rule 3.7, which generally prohibits lawyers from acting as witnesses at a client's trial.³ The Court has recognized the potential for abuse in this disqualification rule. The Delaware Supreme Court has established a high burden of proof on the non-client litigant to support disqualification, requiring clear and convincing evidence of the existence of a conflict

³ DRPC, Rule 3.7(a) states:

- (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.

and of resulting prejudice to the proceedings.⁴ To meet this standard, the testimony of the attorney must be “necessary to the resolution of the suit.”⁵ Moreover, disqualification is not required when any of the three exceptions in Rule 3.7 applies.⁶ Here, Plaintiff’s counsel’s testimony regarding the fee agreement is not necessary to resolve Plaintiff’s case. Furthermore, even if Plaintiff’s counsel were likely to be a necessary witness, his testimony about attorney’s fees relates to the value of legal services. Thus, it falls under an exception to the prohibition.⁷ Defendant has failed to meet the standard for disqualification under Rule 3.7.

Second, Defendant asserts that, as a member of Third-Party Defendant’s firm, Plaintiff’s counsel faces a substantial conflict of interest arising from Defendant’s conspiracy and fraud counterclaims. According to Defendant, Plaintiff’s counsel will be constrained in representing Plaintiff against Defendant’s counterclaims because he may be unwilling to cast blame on Third-Party Defendant as his employer. Thus, Plaintiff’s counsel could be disqualified under DRPC, Rule 1.7, which generally prohibits lawyers from representing clients where such representation may be substantially impacted by other responsibilities or personal interests.⁸ That

⁴ *McLeod v. McLeod*, 2014 WL 7474337 (Del. Super. Dec. 20, 2014) (citing *In Re Bailey*, 821 A.2d 851, 863 (Del. 2003)).

⁵ *Id.*

⁶ See, e.g., *Matter of Estate of Waters*, 647 A.2d 1091 (Del. 1994).

⁷ DRPC, Rule 3.7(a)(2).

⁸ DRPC, Rule 1.7 states in relevant part:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of

disqualification is not warranted under Rule 1.7. Plaintiff's counsel may adequately represent Plaintiff's interests in the case while managing his role as employee of Third-Party Defendant. Plaintiff's counsel's responsibilities to a third-party and his personal interest in current employment do not warrant disqualification given the absence of a significant risk of material limitation to Plaintiff's representation. Defendant has failed to meet the standard for disqualification under Rule 1.7.

Finally, Defendant asserts that Third-Party Defendant had a conflict of interest when previously representing Plaintiff, and this conflict can be imputed to Plaintiff's counsel now as a member of Third-Party Defendant's firm. Thus, Plaintiff's counsel could be disqualified under DRPC, Rule 1.10, which generally prohibits any lawyer in a firm from representing a client when another firm member would be prohibited from doing so by the conflicts rules.⁹ As explained above, in this case Plaintiff's

interest exists if:

- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.
- (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
 - (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
 - (2) the representation is not prohibited by law;
 - (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
 - (4) each affected client gives informed consent, confirmed in writing.

⁹ DRPC, Rule 1.10(a) states:

- (a) Except as otherwise provided in this rule, while lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the

