

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

LELAND H. MENKE

C.A. No. 27330

Appellant

v.

MARY JEAN MENKE, et al.

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV 2013-11-5249

Appellees

DECISION AND JOURNAL ENTRY

Dated: June 24, 2015

CARR, Presiding Judge.

{¶1} Appellant, Leland Menke, appeals the judgment of the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} This matter stems out of a dispute between Leland (“Lee”) and Mary Jean (“Jeanie”) Menke. After marrying in 1964, Lee and Jeanie operated a business known as R&R Engine and Machine (“R&R Engine”). Together they owned a machine shop, fuel shop, and truck repair business. In 1988, the couple sold their shares of R&R Engine to Richard Yates. Though Lee and Jeanie divorced in 1990, they remained involved both personally and professionally. As Lee and Jeanie pursued their business interests, Attorney Brent English served as legal counsel and advisor to the couple in a variety of other legal matters from 1990 to 2001. In 1991, with the assistance of Attorney English, an agreement was reached where Jeanie would reacquire 76 percent of the shares of R&R Engine that were previously sold to Yates.

Yates eventually sold back the remaining 24 percent of the shares as well. Attorney English also represented Lee and Jeanie in a separate lawsuit stemming from a dispute with Yates over the control of the business.

{¶3} Though Lee and Jeanie never remarried, they reconnected romantically and worked together at R&R Engine up until the events which gave rise to this lawsuit. In 2009, the couple acquired Perry Diesel Service, Inc., a fuel business similar to that operated by R&R Engine. The couple also began the process of building an addition to R&R Engine's headquarters and planning a transition whereby their son would take a more prominent role in running their businesses. During the course of these events, Lee and Jeanie had a falling out, and a controversy ensued regarding the control of their business entities.

{¶4} On November 6, 2013, Lee filed a complaint in the Summit County Court of Common Pleas asking the trial court for a declaratory judgment regarding who owns the shares of R&R Engine and Perry Diesel. Lee's complaint also contained multiple counts of breach of contract and unjust enrichment, as well as counts of promissory estoppel and fraud. In addition to asking the court for a declaration that he owns 50 percent of the shares of R&R Engine and Perry Diesel, he asked for \$500,000 in compensatory damages, \$500,000 in punitive damages, as well as reasonable attorney fees and the imposition of a constructive trust. On December 5, 2013, Jeanie filed an answer to the complaint in which she asserted numerous affirmative defenses.

{¶5} Jeanie subsequently filed a motion to disqualify Attorney Brent English as counsel for Lee. In support of her motion, Jeanie filed a memorandum alleging that Attorney English had represented Lee and Jeanie in a multitude of legal disputes over the years and that Attorney English had obtained confidential information which was pertinent to the instant

lawsuit. Jeanie further asserted that it was possible Attorney English would have to serve as a fact witness in the matter. Lee filed a brief in opposition to the motion to disqualify, and Jeanie filed a timely reply brief. After holding a hearing on the disqualification issue, the trial court issued an order granting the motion on March 14, 2014.

{¶6} Lee filed a timely notice of appeal.¹ Now before this Court, Lee raises four assignments of error.

II.

ASSIGNMENT OF ERROR I

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY DISQUALIFYING APPELLANT'S COUNSEL WHERE THE MOVING PARTIES (A) DID NOT DEMONSTRATE HE HAD A CONFLICT OF INTEREST; (B) THAT DISQUALIFIED COUNSEL HAD CONFIDENTIAL INFORMATION ABOUT THEM; AND (C) DISQUALIFIED COUNSEL WAS NOT NECESSARY WITNESS ON ANY ISSUE IN THE CASE.

ASSIGNMENT OF ERROR II

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY DISQUALIFYING APPELLANT'S COUNSEL WHERE THE MOVING PARTIES FAILED TO DEMONSTRATE HE HAD A CONFLICT OF INTEREST AND WHERE THE MOVING PARTIES FAILED TO DEMONSTRATE THAT HE HAD PREVIOUSLY REPRESENTED THEM IN ONE OR MORE MATTERS THAT WERE "SUBSTANTIALLY RELATED" TO THE CLAIMS AGAINST THEM IN THIS CASE.

ASSIGNMENT OF ERROR III

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY DISQUALIFYING APPELLANT'S COUNSEL WHERE THE MOVING PARTIES FAILED TO DEMONSTRATE HE HAD A CONFLICT OF INTEREST AND WHERE THE MOVING PARTIES FAILED TO DEMONSTRATE THAT HE POSSESSED CONFIDENTIAL INFORMATION ABOUT THEM.

¹ A trial court order disqualifying an attorney from continuing representation as civil trial counsel is a final, appealable order pursuant to R.C. 2505.02. *Kala v. Aluminum Smelting & Refining Co, Inc.*, 81 Ohio St.3d 1, 3 (1998).

{¶7} In his first, second, and third assignments of error, Lee argues the trial court erred and abused its discretion in granting Jeanie’s motion to disqualify Attorney English. This Court disagrees.

{¶8} At the outset of our discussion, we note that this Court reviews a trial court’s ruling on a motion to disqualify counsel for an abuse of discretion. *Popa Land Co., Ltd. v. Fragnoli*, 9th Dist. Medina No. 08CA0062-M, 2009-Ohio-1299, ¶ 9, citing *Avon Lake Mun. Utils. Dept. v. Pfizenmayer*, 9th Dist. Lorain No. 07CA009174, 2008-Ohio-344, ¶ 13. Under this standard, “[a] trial court will be found to have abused its discretion when its decision is contrary to law, unreasonable, not supported by evidence, or grossly unsound.” *Tretola v. Tretola*, 3d Dist. Logan No. 8-14-24, 2015-Ohio-1999, ¶ 25, citing *State v. Boles*, 187 Ohio App.3d 345, 2010-Ohio-278, ¶ 16-18 (2d Dist.).

{¶9} “An attorney may not represent an interest which is adverse to that of a former client when a substantial relationship exists between the subject matter of the former representation and the matter encompassed by the present representation.” *Skycasters L.L.C. v. J.W. Didado Elec. Inc.*, 9th Dist. Summit No. 23901, 2008-Ohio-4849, ¶ 18, quoting *Friedman v. Kalail*, 9th Dist. Summit No. 20657, 2002 WL 498172, *1 (Apr. 3, 2002). “The 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.” *Skycasters* at ¶ 18, quoting *Witschey v. Medina Cty. Bd. of Commrs.*, 169 Ohio App.3d 214, 2006-Ohio-5135, ¶ 32 (9th Dist.). “[T]he moving party must provide some evidence that a need for the disqualification exists. A mere allegation that allowing the representation presents the possibility of a breach of confidence or the appearance of impropriety is not enough.” *Skycasters* at ¶ 21, quoting *Friedman* at *1.

{¶10} When determining whether the disqualification of an attorney is proper, the initial step involves evaluating the nature and scope of a past attorney-client relationship between the party seeking disqualification and the attorney it seeks to disqualify. *Kala v. Aluminum Smelting & Refining Co., Inc.*, 81 Ohio St.3d 1, 8 (1998); *Dana Corp v. Blue Cross & Blue Shield Mut. of N. Ohio*, 900 F.2d 882 (6th Cir.1990). The Supreme Court of Ohio has held that if a prior attorney-client relationship exists, “a court must determine whether a substantial relationship exists between prior and present representations.” *Kala* at 8. “Second, if a substantial relationship is found between the current matter and the prior matter, the court must examine whether the attorney shared in the confidences and representation of the prior matter.” *Id.* “A fundamental principle in the attorney-client relationship is that the attorney shall maintain the confidentiality of any information learned during the attorney-client relationship.” *Disciplinary Counsel v. Ward*, Slip Opinion No. 2015-Ohio-237, ¶ 21, quoting *Kala*, 81 Ohio St.3d at 4. Thus, there is a rebuttable presumption of shared confidences arising from prior representation. *Kala*, 81 Ohio St.3d at 8. Finally, the presumption of shared confidences may be rebutted by evidence demonstrating that (1) there was no substantial relationship between the subject of the prior matter and the matter at issue, (2) the side-switching attorney had no personal contact with or knowledge of the prior matter, or (3) the side-switching attorney has joined a new law firm that erected adequate and timely screens that prevented the flow of information from the quarantined attorney to other members of the law firm. *State v. Wiles*, 126 Ohio App.3d 71, 82 (11th Dist.1998).

{¶11} In support of his assignments of error, Lee contends that Jeanie failed to demonstrate that Attorney English had a conflict of interest. Lee maintains that Jeanie never established that Attorney English had access to confidential information. Lee further asserts that

Jeanie failed to demonstrate that Attorney English was a necessary witness that she intended to call in the instant matter.

{¶12} A critical issue in the current lawsuit is a dispute over the ownership and control of the shares of R&R Engine. After working together in the business for years, Lee and Jeanie sold their shares of R&R Engine to Richard Yates in 1988. Given the nature of the claims in Lee's complaint, some of the most significant testimony at the disqualification hearing centered on Attorney English's representation of Lee and Jeanie when they began the process of buying back the shares of R&R Engine in 1991. Attorney English represented Lee, Jeanie, and R&R Engine in a multitude of legal proceedings between 1990 and 2001, including the reacquisition of the shares from Yates, as well as subsequent litigation with Yates where the ownership of the shares was in dispute. The parties' testimony varied regarding the nature and scope of Attorney English's representation. With respect to the shares reacquired from Yates, Jeanie testified that she became the owner of all the shares of R&R Engine, and that Attorney English engaged in confidential communications with Jeanie and Lee regarding the ownership of the shares. Lee claimed Jeanie was holding one half of the shares on his behalf, but that Attorney English had no knowledge of the couple's private agreement. Attorney English claimed that while he had an attorney-client relationship with Jeanie and Lee, his job was to negotiate with Yates' attorney. Though Attorney English was responsible for drawing up the necessary legal documents, he maintained that he had no knowledge of a private arrangement between Jeanie and Lee.

{¶13} The trial court ultimately determined that Attorney English should be disqualified. In reaching this conclusion, the trial court found:

Although the current action has been filed some 10 years after Attorney English has represented these Defendants in one fashion or another, there is no dispute that the shares of stock in R&R Engine, at dispute in the current litigation, were also a matter of dispute that Mr. English was involved in back in 1991/1992.

Although Mr. English states that no discussion was had back then with respect to the allocation of shares between [Lee] and [Jeanie], it is clear that he represented both [Lee] and [Jeanie] in that litigation; that he negotiated with Yates' counsel for [Jeanie's] repurchase of the 145 shares of R&R Engine (76% of the total shares) from Yates; and actually drafted the agreement for said transaction.

The trial court also emphasized the rebuttable presumption that confidential information was shared between Jeanie and Attorney English with respect to the R&R Engine shares, and further underscored Jeanie's testimony that she believed her discussions with Attorney English regarding the numerous civil actions were made in confidence, "especially with respect to the 1992 civil suit brought by Mr. Yates in Summit County over the disputed shared of R&R Engine."

{¶14} A review of the hearing transcript reveals additional testimony that supports the trial court's conclusion. Jeanie testified that she believed her discussions with Attorney English regarding the shares of R&R Engine were confidential communications made within the confines of an attorney-client relationship. When Attorney English questioned Jeanie as to whether there was a discussion about who owned the shares, Jeanie testified, "I was [the] hundred percent [owner]. * * * [Y]ou were in the office when we decided that." When Attorney English attempted to clarify that his job was simply to get the shares back, Jeanie disagreed, stating, "No, you asked me who was owning the company, and I remember specifically you asked, 'Whose name do you want the company in,' and it was my name." Moreover, though Attorney English strongly denied any knowledge of a share-holding agreement between Lee and Jeanie, he acknowledged drafting the restructuring agreement for R&R Engine, and he also admitted to having knowledge that the shares were put in Jeanie's name, at least in part, to shield the couple from possible liability stemming from other civil and criminal matters involving Lee that were unresolved at that time.

{¶15} Given the evidence presented by the parties, we cannot conclude that the trial court's decision to disqualify Attorney English was contrary to law, unreasonable, lacking evidentiary support, or grossly unsound. *Tretola* at ¶ 25. There is no dispute that Attorney English had previously represented Lee and Jeanie in several legal matters involving the shares of R&R Engine. It is further apparent that a substantial relationship existed between the prior representation and the current litigation in light of the fact that control of the shares of R&R Engine was central to the representation in both instances. Jeanie testified that she and Lee engaged in confidential communications regarding the shares of R&R Engine with Attorney English, and there is a rebuttable presumption of shared confidences arising from prior representation. *Kala*, 81 Ohio St.3d at 8. Though Jeanie and Attorney English offered conflicting testimony, we note that "[i]t is precisely the role of the trier of fact to weigh the testimony and credibility of witnesses, and resolve disputes of fact." *Wilhoite v. Kast*, 12th Dist. Warren No. CA2001-01-001, 2002 WL 4524, *6 (Dec. 31, 2001). Under these circumstances, where there was evidence that Attorney English had access to confidential information and permitting continued representation would result in counsel representing an interest adverse to that of a former client on a substantially related issue, the trial court did not abuse its discretion in granting Jeanie's motion for disqualification.

{¶16} Lee's first three assignments of error are overruled.

ASSIGNMENT OF ERROR IV

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY DISQUALIFYING APPELLANT'S COUNSEL WHERE THE MOVING PARTIES FAILED TO DEMONSTRATE HE WAS A NECESSARY WITNESS ON ANY ISSUE AND THAT THEY INTENDED TO CALL HIM AS A WITNESS.

{¶17} In his fourth assignment of error, Lee contends that the trial court abused its discretion by disqualifying Attorney English when Jeanie never demonstrated it was necessary to call him as a witness. While Jeanie noted in her motion that Attorney English might be a “possible * * * fact witness in this matter,” the trial court did not ultimately grant the motion on that basis. As noted above, the trial court granted Jeanie’s motion to disqualify on the basis that permitting continued representation would result in counsel representing an interest adverse to that of a former client on a substantially related issue. In light of this Court’s determination that the trial court did not abuse its discretion in granting the motion on that basis, we decline to address Lee’s fourth assignment of error as the matter is now moot. *See* App.R. 12(A)(1)(c).

III.

{¶18} Lee’s first, second, and third assignments of error are overruled. Based on our resolution of the first three assignments of error, the fourth assignment of error is moot. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is

instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

DONNA J. CARR
FOR THE COURT

MOORE, J.
CANNON, J.
CONCUR.

(Cannon, J., of the Eleventh District Court of Appeals, sitting by assignment.)

APPEARANCES:

BRENT L. ENGLISH, Attorney at Law, for Appellant.

THOMAS C. LOEPP, Attorney at Law, for Appellees.