

STATE OF NORTH CAROLINA
COUNTY OF DAVIDSON

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
09-CVS-1400

FERGUSON FIBERS, INC.,

Plaintiff,

v.

TONY CRAIG FOSTER,

Defendant.

**ORDER ON DEFENDANT'S MOTION
TO DISQUALIFY COUNSEL**

THIS MATTER is before the Court on Defendant's Motion to Disqualify Counsel, filed September 14, 2009, pursuant to Rule 1.9 of the North Carolina Rules of Professional Conduct. After reviewing the submissions by counsel, the Court hereby GRANTS Defendant's Motion.

Rule 1.9(a) of the North Carolina Rules of Professional Conduct provides that 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 the former client gives informed consent, confirmed in writing." N.C. Rules of Prof'l Conduct R. 1.9 (2006). To prevail on his motion, Defendant Tony Craig Foster ("Foster") must show: (1) an attorney-client relationship existed between J. Calvin Cunningham ("Cunningham") and Foster in a prior lawsuit; (2) the current lawsuit is the same as or a substantially related matter to the prior lawsuit; and (3) the position of Plaintiff Ferguson Fibers, Inc. ("Ferguson") is materially adverse to Foster's interest in this case. See Ferguson v. DDP Pharmacy, Inc., 174 N.C. App. 532, 536, 621 S.E.2d 323, 327 (2005). Ferguson does not dispute that Cunningham represented Foster in a prior lawsuit or that its interests are materially adverse to Foster's interests in this case.¹ At issue is whether this case is substantially related to any of the prior representation.

For purposes of Rule 1.9, matters are "substantially related . . . if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that information as would normally have been obtained in the prior representation would materially advance the client's

¹ Ferguson acknowledges that Cunningham represented Foster in a child support action against Foster's former spouse and in a second action involving the sale of his current spouse's business. (Resp. Def.'s Motion Disqualify at 2.) Foster, however, also contends that Cunningham represented him in a later action against his former spouse. (Foster Aff. ¶ 4.)

position in the subsequent matter.” N.C. Rules of Prof’l Conduct R. 1.9 cmt. 3. The Court recognizes that Cunningham’s representation in the prior lawsuits involved different legal issues than the current controversy and was not centered on facts concerning Foster’s employment at Ferguson. However, in the case of an organizational client, “knowledge of specific facts gained in prior representation that are relevant to the matter in question ordinarily will preclude such representation.” N.C. Rules of Prof’l Conduct R. 1.9 cmt. 3.

Foster maintains that Cunningham obtained information during his prior representation that is relevant to this case. Specifically, he contends that they discussed his employment and business dealings with Ferguson on numerous occasions, including his “role in helping Ferguson move a portion of its business to Mexico,” his “strained relationship” with Ferguson’s President, and the terms of his employment. (Foster Aff. ¶¶ 7, 9–11.) Cunningham, in contrast, maintains that he never discussed facts concerning Foster’s employment. (Cunningham Aff. ¶ 18.) The Court need not resolve this factual dispute. Its existence is sufficient to require disqualification.

Attorneys who represent various constituents of an organization, be they investors, employees, suppliers, or customers, are in a better position than lay persons to protect against potential conflicts of interest. Where counsel represents both a company and its employees, it is the duty of the lawyer to inform the client about the implications of the dual relationship. See N.C. Rules of Prof’l Conduct R. 1.13(f)–(g) & cmts. 10–12. That lawyer always runs the risk that he or she will receive information that might subsequently place them in a conflict situation. Under the circumstances of this case and in light of the pending litigation between the lawyer and his former client, it is not unreasonable for Foster to be concerned about a potential conflict of interest.

Disqualification decisions are within the discretion of the trial judge. Travco Hotels, Inc. v. Piedmont Natural Gas Co., 332 N.C. 288, 295, 420 S.E.2d 426, 430 (1992). In addressing the issue of disqualification, “the goal of maintaining public confidence in our system of justice demands that courts prevent even the appearance of impropriety and thus resolve any and all doubts in favor of disqualification.” Chemcraft Holdings Corp. v. Shayban, 2006 NCBC ¶ 34 (N.C. Super. Ct. Oct. 5, 2006), <http://www.ncbusinesscourt.net/opinions/2006%20NCBC%2013.htm> (citations omitted). Foster’s perception of events, as the client, is of “paramount importance” in preventing the appearance of impropriety. See id. His concerns are not unreasonable.

Based on the foregoing, the Court hereby ORDERS the following:

1. Defendant’s Motion to Disqualify Plaintiff’s Counsel in this action is GRANTED.

2. The Law Offices of J. Calvin Cunningham, and any attorney currently a member or employee of that law firm, is prohibited from any further representation of the Plaintiff in this action.
3. Further proceedings in this matter shall be held in abeyance for a period of thirty (30) days, during which time Plaintiff may seek new counsel of record.

This the 8th day of December, 2009.

/s/ Ben F. Tennille
The Honorable Ben F. Tennille
Chief Special Superior Court Judge
for Complex Business Cases