

Firm Disqualified For Conflict between Clients

BY LAZAR EMANUEL

In *R.M. Buck Construction Corporation v. Village of Sherbourne*, #90788 (April 4, 2002), the Appellate Division, Third Department, ordered the disqualification of Melvin & Melvin LLP, a Syracuse law firm, as counsel for plaintiff ("Buck").

Buck is a construction contractor. It was the lowest bidder in a public bid for the construction of a wastewater treatment plant by defendant ("the Village"). A dispute developed between Buck and the Village about the scope of the work and Buck attempted to withdraw its bid. When Buck claimed that it had made a mathematical error in calculating its bid, the Village retained Bradley, a Melvin & Melvin partner. At a hearing before the Village Board of Trustees, Bradley questioned Buck and obtained an admission from Buck that it had lied at a previous meeting with the Village. After a private meeting between Bradley and the Village Board, the Board adopted a resolution denying Buck's application to withdraw its bid. Bradley rendered no further services to the Village or the Village Board after the hearing.

Buck then commenced the work required by its bid but soon advised the Village that the work site was substantially more difficult than anticipated. Buck served the Village with a series of claims asking additional compensation for the work. Buck's notices of claim were prepared by Sheats, another Melvin & Melvin attorney. Unable to resolve its claims, Buck retained Melvin & Melvin in an action against the Village for breach of contract and unjust enrichment. The Village immediately moved to disqualify Melvin & Melvin on the basis of Bradley's representation of the Village during the hearing on Buck's request to withdraw its bid.

The Supreme Court denied the motion to disqualify but the Appellate Division reversed. The Court discussed the line of cases which lead to the decision by the Court of Appeals in *Kassis v. Teacher's Ins. and Annuity Assn.* 93 NY2d 611 (1999). The Appellate Division said:

Disqualification cases involve consideration of several established principles including an attorney's ongoing duty to protect the confidence of former clients and the "rule that a lawyer may not represent a client in a matter and thereafter represent another client with interests materially adverse to interests of the former client in the same or a substantially related matter" (quoting *Kassis*, at 615-16).

Imputing disqualification to other lawyers

The issue was whether Bradley himself was disqualified and whether his disqualification would be imputed to the entire firm.

"...where an attorney working in a law firm is disqualified from undertaking a subsequent

representation opposing a former client, all the attorneys in that firm are likewise precluded from such representation" (quoting *Kassis*, at 616).

The Court found that Bradley himself was clearly disqualified. His relationship with the Village was that of lawyer and client, the interests of Buck and the Village were materially adverse, and the Village had not consented to Bradley's representation of Buck in the breach of contract claim. Further, Bradley's participation in the Village Board hearing and resolution raised issues of propriety and loyalty which could be dispelled only by disqualification. The Court referred to DR 5-108(A)(1), which provides:

....a lawyer who has represented a client in a matter shall not, without the consent of the former client after full disclosure: 1. 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.

After finding Bradley disqualified, the Court inquired whether the other lawyers at Melvin & Melvin were also disqualified. The law firm would be given the opportunity to "rebut the presumption of disqualification" by... "proving that any information acquired by the disqualified lawyer is unlikely to be significant or material in the litigation" (citing *Kassis*, at 617). The firm could also present facts "establishing the firm's remaining attorneys possess no confidences or secrets of the former client" (citing *Solow v. W. R. Grace and Co.*, 83 NY2d 303 (1994) at 313).

The Court would also consider other factors, including the size of the firm, the amount of office space occupied by the firm, the accessibility of files and "the relative informality of office interaction" (citing *Kassis* at 618)

The Court concluded that, although the parties had submitted competing affidavits, Melvin and Melvin had not met its burden of presenting sufficient evidence to rebut the presumption of disqualification.

In addition, the Court said:

Furthermore...we note that there was also insufficient proof that the law firm erected adequate screening measures (citing *Kassis* at 618).

Lazar Emanuel is the publisher of NYPRR.