

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

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|---|---|--------------------------------|
| LEONARD F. CARR |) | CASE NO: CV-09-682363 |
| |) | |
| Plaintiff |) | JUDGE JOHN P. O'DONNELL |
| |) | |
| vs |) | |
| |) | |
| ACCACIA COUNTRY CLUB COMPANY, et al. |) | <u>JOURNAL ENTRY</u> |
| |) | |
| Defendants |) | |

John P. O'Donnell, J.:

Having considered the defendants' motion to disqualify as counsel Leonard F. Carr, Esq., L. Bryan Carr, Esq., and the Carr Law Firm¹, the plaintiff's brief in opposition², the evidence produced at hearing³, and the parties' written closing arguments⁴, the court finds as follows:

THE LAWSUIT

On January 21, 2009, plaintiff Leonard F. Carr filed the complaint in this case. The complaint is captioned as being one for the appointment of a receiver and for breach of fiduciary duty. Named as defendants are the Acacia Country Club Company, its board of directors, and the individual directors.

The gist of the complaint is the plaintiff's allegation that the Acacia Country Club, of which he is a shareholder, and its board of directors have breached their fiduciary duty to the plaintiff by seeking approval of a loan for \$2,500,000.00 to cover some of the expenses of operating the club over the next three years, while the board looks for a buyer of Acacia's assets.

¹ Filed March 2, 2009.

² Filed March 30, 2009.

³ The hearing took place on July 1, 8 and 21, 2009.

⁴ The defendants' closing argument was filed August 3 and the plaintiff's closing argument was filed August 10, 2009.

The plaintiff objects to this loan and alleges that Acacia is already \$4,000,000.00 in debt. He claims that if the company obtains the loan, he will incur damages.

The complaint also describes the plaintiff's objection to a resolution proposed by the board to have the shareholders ratify a change to a 2003 resolution that authorized the sale of 16 acres of Acacia's land. The contract entered into after the 2003 resolution actually conveyed 17.9 acres of Acacia property with an additional scenic easement over 6.4 acres of Acacia's property. Because the proposed sale as authorized by the 2003 resolution and the actual sale differed – Acacia sold almost two more acres than the resolution authorized, and encumbered the other 6.4 acres – the board in late 2008 proposed a resolution that would ratify the land deal, *i.e.* remove any doubt that the sale as it was actually made was within the board's authority.

Plaintiff Leonard F. Carr is a lawyer who signed the complaint in a *pro se* capacity. L. Bryan Carr, the plaintiff's son, is also a lawyer who entered his appearance as counsel for the plaintiff by signing the complaint. The plaintiff is also represented by attorney Robert DeMarco.

THE MOTION TO DISQUALIFY

The defendants' motion to disqualify Leonard F. Carr, L. Bryan Carr, and the Carr Law Firm as counsel for the plaintiff in this case is premised upon the defendants' allegation that Leonard F. Carr previously represented defendant Acacia Country Club in a substantially related matter.

In April, 2007, the Acacia Country Club Company retained Leonard F. Carr and his law firm as counsel. The plaintiff performed legal research and rendered a legal opinion to Acacia about the City of Lyndhurst's denial of permits to allow Acacia to install utility poles and golf ball netting at its driving range. The netting was needed because Acacia's sale of some of its

land to a developer – the real estate transaction that is the subject of the resolution objected to by the plaintiff – resulted in the truncation of the existing driving range.

During the representation, the plaintiff, as counsel, had various communications with Acacia board members and attended a board meeting on May 16, 2007, although he was not on the board at the time.⁵ L. Bryan Carr also did some legal research and edited and proofread the written opinion ultimately sent by the plaintiff to Acacia. L. Bryan Carr has been “of counsel” for the Carr Law Firm⁶ for about 12 years. He and Leonard Carr have the same address and telephone number, share some office staff, and work together on “some”⁷ cases.

THE OHIO RULES OF PROFESSIONAL CONDUCT

The defendants allege that Leonard F. Carr, L. Bryan Carr, and the Carr Law Firm should be disqualified from representing the plaintiff in this case under Rule 1.9 of the Ohio Rules of Professional Conduct. That rule reads as follows:

Rule 1.9: Duties to Former Clients

- (a) Unless the former client gives *informed consent, confirmed in writing*, 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.
- (b) ***
- (c) A lawyer who has formerly represented a client in a matter or whose present or former *firm* has formerly represented a client in a matter shall not thereafter do either of the following:
 - (1) use information relating to the representation to the disadvantage of the former client except as these rules would permit or require with respect to a client or when the information has become generally known;

⁵ See defendants’ hearing Exhibit 6. The plaintiff is listed on the meeting agenda as an attendee pursuant to agenda Item No. 10.

⁶ Leonard F. Carr Co., LPA.

⁷ Hearing testimony of Leonard F. Carr.

- (2) reveal information relating to the representation except as these rules would permit or require with respect to a client.

The defendants also believe that L. Bryan Carr, an Acacia shareholder, and the Carr Law Firm should be disqualified under Ohio Rule of Professional Conduct Rule 1.8(i) prohibiting the acquisition of a proprietary interest in litigation the lawyer is conducting for a client. As further support for the disqualification of L. Bryan Carr and the Carr Law Firm, the defendants cite to Rule 1.10 barring lawyers associated in a firm from representing a client where another of the firm's lawyers is prohibited from the representation under Rule 1.9.

PRIOR DISQUALIFICATION IN *LEONARD F. CARR v. ACACIA COUNTRY CLUB COMPANY, et al.*, CASE NO. CV-07-635329

The court's decision on disqualification in this case is made easier because the same lawyers and firm sought to be disqualified here have already been disqualified as counsel for the same plaintiff, and for the same reasons, in the case captioned *Leonard F. Carr v. Acacia Country Club Company, et al.*, still pending before this court as case number CV-07-635329.

The motion to disqualify was granted in that case after the trial court found that the subject matter of Carr's 2007 representation of Acacia and case number 635329 were substantially related. Carr appealed that decision to the Cuyahoga County Court of Appeals. The appellate court affirmed the disqualification of both Carrs and the firm in its case number 91292.⁸

In considering a motion for disqualification based upon a prior attorney-client relationship, Ohio courts have endorsed the three-part test enunciated in *Dana Corp. v. Blue Cross and Blue Shield Mut. Of Northern Ohio* (C.A. 6, 1990), 900 F. 2d 882.⁹ That test requires that: (1) a past attorney-client relationship must have existed between the party seeking

⁸ See defendants' hearing Exhibit 10, trial court's entry granting disqualification in 635329; and Exhibit 13, the journal entry and opinion in the court of appeals case number 91292.

⁹ See, e.g. *Morgan v. Northcoast Cable Co.* (1992) 63 Ohio St. 3d 156, 159.

disqualification and the attorney he or she wishes to disqualify; (2) the subject matter of the past relationship must have been substantially related to the present case; and (3) the attorney must have acquired confidential information from the party seeking disqualification.¹⁰

As noted above, the existence of a past attorney-client relationship between Acacia and Carr, and the acquisition by Carr during that relationship of confidential information, were found to exist by the trial court in 635329, and those findings were not disturbed by the court of appeals. The principle of *res judicata* therefore applies to prevent this court from concluding to the contrary. *Res judicata* is an issue that has been definitively settled by judicial decision.¹¹ For that same reason, this court is bound to conclude that Carr's 2007 representation of Acacia and case number 635329 are substantially related. What remains to be decided is whether this case and the 2007 representation are substantially related.

The defendants argue that an abundance of evidence exists to show that 635329 and this case are substantially related and that, therefore, this case is also substantially related to Carr's earlier representation of Acacia. As to the first part of that argument – that 635329 and this case are substantially related – there can be very little dispute. It should suffice to note that the plaintiff himself filed a motion to consolidate this case and 635329 on the basis that both cases involve common questions of law and fact.¹² The court also believes that the evidence supports the second prong of the defendants' argument: that this case is substantially related to 635329, which is substantially related to Carr's 2007 representation, therefore this case is substantially related to the representation.

Although it is not possible to enumerate all of the facts and circumstances that make case number 635329 “substantially related” to the earlier legal representation, and then to list all of

¹⁰ *Dana*, 900 F. 2d at 889.

¹¹ *Koly v. Nassif*, 2007-Ohio-2505, Cuyahoga Co. App. No. 8399, ¶ 6.

¹² Defendants' hearing Exhibit 19, plaintiff's motion to consolidate, 1st page.

the facts and circumstances that make this case substantially related to 635329, and thereafter compare those commonalities in Venn diagram fashion to conclude with mathematical precision whether this case is substantially related to Carr's 2007 representation, it is also not necessary since a "substantial" relation is not dependent on a specified quantum of common facts and circumstances. As Carr himself put it, the "genesis" of all of these disputes is the 2005 sale of land from Acacia to the developer.¹³ Carr's former client, Acacia, is therefore entitled to protect the confidences it shared with Carr from possibly being used against it in this lawsuit.

For the reasons given, the defendants' motion to disqualify Leonard F. Carr, Esq., is granted. Consistent with the earlier decisions of the trial court in 635329 and the court of appeals in 91292, L. Bryan Carr, Esq., and Leonard F. Carr Co., L.P.A., are also disqualified.

IT IS SO ORDERED:

Date: _____

Judge John P. O'Donnell

¹³ See defendants' hearing Exhibit 4, Carr's May 1, 2007, letter to Acacia.

SERVICE

A copy of this Journal Entry was sent by regular U.S. mail, this 27th day of August, 2009, to the following:

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Judge John P. O'Donnell