UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

J. SAUVE, INC. CASE NO. 90-00536

Debtor

IN RE:

JACK R. SAUVE, JR. CASE NO. 90-00572

Debtor

APPEARANCES:

SWARTZ, EVANS, DICKINSON, TINKER & TIMMERMAN, P.C.
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STEPHEN D. GERLING, U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The Court considers herein the motions by the Debtors, J. Sauve, Inc. and Jack R. Sauve, Jr. seeking to disqualify the law firm of Swartz, Evans, Dickinson, Tinker and Timmerman, P.C.

("Swartz, Evans") from representing the Jefferson National Bank ("Bank") "in these proceedings"

due to a conflict of interest.

The motions were heard at a Motion Term of this Court held at Watertown, New York on March 28, l99l and the Court reserved decision on both motions at that time.

JURISDICTIONAL STATEMENT

The Court has jurisdiction of these contested matters pursuant to 28 U.S.C. §1334(b), §l57(a), (b)(l) and (b)(2)(A) & (O).

FACTS

Debtors J. Sauve, Inc. and Jack R. Sauve, Jr. filed separate voluntary petitions pursuant to Chapter 7 of the Bankruptcy Code (11 U.S.C. §§101-1330) ("Code") on March 7, l990 and March 9, l990, respectively.

In both cases, Debtors listed the Bank as a creditor.[1] In the Chapter 7 case of Jack R. Sauve, Jr., the Bank represented by Swartz, Evans commenced an adversary proceeding seeking a denial of the individual Debtor's discharge pursuant to Code §727 and a determination of nondischargeability of the debt due the Bank pursuant to Code §523(a)(2)(A) ("AP 90-60l20A").

AP 90-60l20A was commenced by the filing of a complaint on October 4, l990 and the individual Debtor filed an Answer on November 5, l990. A pre-trial conference was held on December l9, l990 and a Scheduling Order was issued by the Court on January 4, l99l scheduling

[1] The corporate Debtor listed the Bank in Schedule A-2 as holding a secured claim in the sum of $ll7,728 with the debt arising out of a Small Business Administration Corporate Loan on February l, l989; the individual Debtor listed the Bank in Schedule A-2 as holding a secured claim in the sum of $l5,200 arising out of a Retail Installment Contract in February l989.

trial of AP 90-60120A on March 21, 1991. The instant motions were filed initially as a single motion on March 12, 1991 and, thereafter filed as separate amended motions on March 18, 1991.

DISCUSSION

The motions have been made in each Debtor's case rather than in AP 90-60120A though the individual Debtor indicated through counsel at the March 28, 1991 hearing that he actually seeks disqualification of the Swartz, Evans firm as the Bank's counsel in connection with the pending AP 90-60120A.

Debtor Jack R. Sauve, Jr. alleges that he previously retained one Daniel S. Pease, Esq. ("Pease") to represent him in incorporating J. Sauve, Inc. and in obtaining a Small Business Administration ("SBA") loan from the Bank. The individual Debtor contends further that Pease "had and may still have" his personal confidential records, as well as those of the corporate Debtor. (Affidavit of Lawrence X. Dalton sworn to March 14, 1991, para. 8). The individual Debtor argues that while Pease maintains a law office in Massena, New York, he is listed as being presently "of counsel" to Swartz, Evans and in fact, that Pease recently related to the individual Debtor much of what occurred at an "examination before trial" of a representative of the Bank conducted in AP 90-60120A at the individual Debtor's attorney's office, even though Pease was not present at the examination.

The individual Debtor maintains that both he and the corporate Debtor established an attorney-client relationship with Pease in connection with the loan transaction with the Bank, and that as a result of Pease's present relationship with Swartz, Evans, that firm has a conflict of interest in representing the Bank "herein". (Affidavit of Lawrence X. Dalton sworn to March 14, 1991, para.

9).

Swartz, Evans has filed a copy of an affidavit of Pease sworn to on March 20, l99l in which Pease contends that he is currently a member of the law firm of Pease & Willer located in Massena, New York and that he is also "of counsel" to Swartz, Evans and as such he performs work on behalf of the Bank's branch office in Massena, New York.

Pease asserts that his first contact with the individual Debtor occurred in November l987 while Pease was associated with the Kirsch Law Firm in Massena, New York and at that time the individual Debtor requested representation in both "corporate matters and the closing on a $2l7,00 loan package." (Copy of Affidavit of Daniel S. Pease sworn to March 20, l99l, para. 2). Pease maintains that he had no part in processing the loan application through SBA, but that in November, l988 he attended a loan closing presumably on the Debtors' behalf pursuant to an "arrangement" with the Kirsch firm even though at the time of the closing, he was no longer employed by that firm. (Id. para. 5).

Pease acknowledged that in the Spring of l989 he entered into his "of counsel" relationship with Swartz, Evans pursuant to which he represents the Massena branch of the Bank "with local closings", and that he disclosed to Swartz, Evans two of his clients with open loans at the Bank. One of the two clients Pease identified was the individual Debtor and the corporate Debtor. (Id. para. 7).

Finally, Pease asserts that he advised Swartz, Evans that he could not represent the Bank with respect to the Debtors' outstanding loans and has not done so. (Id. para. 9).

The New York Court of Appeals in Greene v. Greene, 47 N.Y.2d 447 (l979), citing to the Code of Professional Responsibility, DR. 5-l0l, observed that,

> An attorney traditionally has been prohibited from representing a party in a lawsuit

> where the opposing party is the lawyer's former client (e.g. Hatch v. Fogerty, 40 How.Pr. 492, 503). Underlying this rule is the notion that an attorney, as part of his fiduciary obligation, owes a continuing duty to a former client - broader in scope than the attorney client evidentiary privilege - not to reveal confidences learned in the course of the professional relationship (See Watson v. Watson, l7l Misc. l75, l76). To obtain disqualification of the attorney, the former client need not show that confidential information necessarily will be disclosed in the course of the litigation; rather a reasonable probability of disclosure should suffice. (See Sheffield v. State Bar of California, 22 Cal.2d 627; Gailbraith v. State Bar of California, 28l Cal. 329).

Id. at 453. (See also Flaum v. Birnbaum, l07 A.D. l087 (l985)).

It should also be noted that the New York Code of Professional Responsibility, DR 5-l05(B), which prohibits an attorney from representing one client where that representation is adversely affected by his representation of another client or is likely to involve him in representing different interests, extends to all of the members of the attorney's firm by virtue of DR 5-l05(D).

There is no dispute here that both Debtors are former clients of Pease, as he acknowledges that he made that fact clear to Swartz, Evans when he entered into the "of counsel" relationship with the firm in the Spring of l989.

Pease contends that his "of counsel" relationship is limited to representing the Massena branch of the Bank in local closings, however, at the argument of the motion on March 28, l99l, the Bank's counsel, Daniel Dickinson, Esq., acknowledged that he conferred with Pease following the examination before trial of a Bank official at the Debtors' counsel's office in Massena on February 8, l99l. Presumably, it was through that conference that Pease gained the information regarding the examination that he discussed with the individual Debtor the following evening.

Black's Law Dictionary, Fifth Edition at page 975, defines "of counsel" as "[a] phrase commonly applied in practice to the counsel employed by a party in a cause and particularly to one employed to assist in the preparation or management of an action or its presentation on appeal, but who is not the principal attorney of record for the party."

It appears to this Court that Pease's present relationship with Swartz, Evans is sufficient to invoke the provisions of DR 5-l05(D) and that the Debtors have established "a reasonable probability" that confidential information will be disclosed. Greene v. Greene, supra 47 N.Y.2d at 453.[2]

Pease acknowledges that the Debtors were former clients and that he perceived his representation of them sufficient to prohibit him taking a position adverse to them when he entered into his of counsel relation with Swartz, Evans.

The Court further concludes that Pease's former representation of the Debtors apparently involves the very matters that form the basis of the Bank's present claims against the corporate Debtor and that the potential for a conflict of interest exists in spite of Pease's contention that he has maintained the confidentiality of his former clients information and that he continues to do so.

Based on the foregoing, it is

ORDERED that Swartz, Evans, Dickinson, Tinker & Timmerman, P.C. is disqualified from representing the Jefferson National Bank in either of these Chapter 7 proceedings to include further representation of the Bank in AP 90-60l20A and it is further,

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[2] The Court notes in correspondence to this Court from Swartz, Evans dated April 8, l99l regarding this motion, Pease is currently listed among the named partners of Swartz, Evans on their letterhead. Pease does not appear with the group designated below the partners' names as being "of counsel".

ORDERED that the Jefferson National Bank shall be given a period of thirty (30) days from the date of entry of this Order to retain other counsel.

Dated at Utica, New York

this day of April l99l

STEPHEN D. GERLING
U.S. Bankruptcy Judge