Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

ORIGINAL

Present: HONORABLE ALLAN B. WEISS IA Part 2
Justice

PAMELA BRANDES, etc.

- against -

NORTH SHORE UNIVERSITY HOSPITAL, et al.

Index Number 5965 1997

Motion Date December 17, 2003

Motion Cal. Number 7, 11

Motions bearing calendar numbers 7 and 11 are consolidated for disposition. The following papers numbered 1 to 37 were read on this: (1) motion by the plaintiff, pursuant to 22 NYCRR § 1200 et seq., to require the defendants I. Michael Leitman, M.D., Dan Seth Reiner, M.D. and Robert Cherry, M.D. to retain counsel separate from that representing North Shore University Hospital, to be paid for by Medical Liability Mutual Insurance Company; and, (2) order to show cause by the defendants North Shore University Hospital, I. Michael Leitman, M.D., Sharon McLaughlin, M.D., Dan Seth Reiner, M.D., Larry Frankini, M.D. and Robert Allen Cherry, M.D., pursuant to 22 NYCRR § 1200 et seq., to disqualify the plaintiff's attorney, Norman Leonard Cousins, Esq., from further representation of the plaintiff in this action.

	Papers Numbered
Cal #7	
Notice of Motion - Affidavits - Exhibits	1 - 4
Cal #11	
Order to Show Cause - Affidavits - Exhibits	5 - 7
Answering Affidavits - Exhibits	8 - 29
Reply Affidavits	30 - 37

Upon the foregoing papers it is ordered that the motion and the order to show cause are determined as follows:

I. The Relevant Facts

A. Background and Retainer Agreement

The plaintiff Pamela Brandes ("Brandes"), as Personal Representative of the Estate of Robert Brandes, commenced this action on or about March 12, 1997, seeking damages for medical malpractice and the wrongful death of her husband. According to Brandes, her husband died allegedly as a result of complications that arose as a result of a laparoscopic cholecystectomy to remove his gall bladder, which procedure was converted to an open cholecystectomy.

The procedure was performed at the defendant North Shore University Hospital ("the hospital"). Brandes alleges that the various individual defendants participated in some aspect of her husband's care and treatment (collectively, "the doctors").

By retainer agreement dated November 23, 1996, Brandes and her husband retained Norman Leonard Cousins ("Cousins") and Fred Rosenberg to prosecute this action on a contingency fee basis ("the Brandes action").[1] According to Cousins, Brandes also executed a Litigation Financing Agreement which obligates her to pay interest of 15% per annum on all disbursements that Cousins advances on her behalf; however, that agreement is not part of the record.

The hospital and the doctors are represented by the law firm of Fumuso, Kelly, DeVerna, Snyder, Swart & Farrell, LLP ("the Fumuso firm").

B. Involvement of Legal Asset Funding LLC

During the pendency of the Brandes action, on October 7, 2002, the Fumuso firm received a letter from Thomas A. DeClemente, Esq., of the law firm DeClemente & Associates (collectively, "DeClemente").

DeClemente enclosed a Notice of Assignment he alleged was executed by Cousins in favor of Legal Asset Funding, LLC ("Legal Asset"), assigning all legal fees that Cousins might recover in the Brandes action. DeClemente informed the Fumuso firm that when and if the Brandes action was resolved, whether by settlement, judgment or other means, all legal fees due to Cousins should be forwarded to Legal Asset, care of him.

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[1] Robert Brandes died shortly after the institution of the action.

The Notice of Assignment recites, inter alia, that on August 16, 2001, pursuant to a separate agreement of the same date, Cousins transferred and assigned to Legal Asset, a portion of his right, title and interest in and to his share of the law firm fee recovery, judgment or settlement in the Brandes action, in the amount of $1 million or any statutorily-permitted recovery.

Approximately seven months later, on May 15, 2003, the Fumuso firm advised DeClemente that, inter alia, it would require the legal documents connected to the assignment, including the underlying contract, the accompanying note and security agreement, the offer to lend/loan, the Uniform Commercial Code ("UCC") Financing Statement, and proof of the filing of such documents in the State of New York.

By letter dated May 19, 2003, DeClemente responded, in pertinent part:

> "You may have misunderstood. We **bought** the legal fee of Mr. Cousins in the Bradeis [sic] matter therefore some of the documents you requested, to wit: the note, security agreement, offer to lend/loan contract do not exist as this transaction is NOT a loan. The Notice of Assignment for my clients purchase, which we sent you is an instrument which is binding on the obligor. However, I am sending you the UCC Financing Statement and proof that it was filed with the State of New York. I am also sending you the first and last page of the contract between Norman Cousins and Legal Asset Funding, LLC.
>
> As you well know, the law in New York is quite clear, in that an assignment of any attorney's legal fees is not only permissible, but is absolutely enforceable against the Obligor...."

[emphasis in original].

Annexed to DeClemente's letter was, inter alia, a UCC Financing Statement filed on or about January 22, 2002, which indicated that Legal Asset had a secured interest in "Anticipated attorney's Fees ($666,666.66) pursuant to the settlement in [the Brandes action]."

Ultimately, DeClemente also sent the Fumuso firm the first and last page of the Legal Asset/Cousins contract, entitled "Assignment of Settlements and Limited Irrevocable Power of Attorney" ("assignment agreement"). The assignment agreement, dated November 10, 2001 recites, in pertinent part:

WHEREAS I had an interest in a medical malpractice verdict in the amount of **$4,215,300**, in which the legal fee was equal to at least **$1,200,000.00** plus **$95,000.00** in expenses and Kevin and Juanita Veneski were to receive the remainder as their share of the verdict, which verdict was overturned on appeal by the New York Supreme Court, Appellate Division, First Department on July 5, 2001.

WHEREAS, a Judgment in the sum of at least **$3,200,000** is expected to be obtained in the matter of **Veneski v. Queens - Long Island Medical Group, P.C.,** Supreme Court of the State of New York, New York County, under Index No. 100011-1998.

* * *

WHEREAS I wish to receive an additional sum of money to successfully prosecute the Veneski litigation and am pledging as additional collateral the below entitled matters.

WHEREAS I have an interest in the following legal matters in which I expect legal fees to be paid to me on a contingency fee basis on each and every one of them pursuant to the case reports I have sent you, attached hereto as Exhibits 1-11 to this contract: **... Brandes v. North Shore University Hospital, Supreme Court of New York, County of Queens, Index No. 13581/01; ..., hereinafter, "the Property".**

* * *

[emphasis in original].

In addition to reciting that Cousins assigned his interest in legal fees in the Brandes action and in the action entitled Veneski v Queens - Long Island Medical Group, P.C. ("the Veneski action"), the assignment agreement recited that Cousins also assigned his interest in legal fees for 10 other pending litigations in federal and New York State courts. The assignment agreement was to be governed by and construed in accordance with the laws of the State of New Jersey.

Apparently, the Veneski action was settled in November, 2002, for $3,369,427.00.

C. Involvement of Core Funding Group, L.P.

In January and February, 2003, Core Funding Group, L.P. ("Core Funding") informed the Fumuso firm that it had a loan and security agreement with Cousins, granting it a security interest in Cousins' prospective attorney's fees in the Brandes action.

Annexed to one letter from Core Funding was an "Offer to Lend/Loan Contract", dated May 25, 1999, which pre-dated the Legal Asset documents, supra. Pursuant to that document, Cousins personally guaranteed to repay Core Funding the sum of $140,667.81 on or before November 26, 1999, and to deposit into escrow as security for the loan all attorney's fees earned by his firm from specified actions. On or about the same date, Cousins executed a confession of judgment in favor of Core Funding, both individually and as sole proprietor for the Law Offices of Leonard Norman Cousins.

Core Funding's security agreement recites that in exchange for the sum of $140,667.81, Cousins pledged the attorney fees arising from the Veneski action, the Brandes action and a third action which was not listed in the Legal Asset assignment agreement. Pursuant to section three of that security agreement, Cousins warranted that he would not, prior to or after the execution of the agreement, cause or permit any act which would result in the waste, impairment or diminution in the value of the collateral, or permit any other liens or encumbrances to be placed on or against the collateral.[2]

On or about June 6, 1999, Core Funding filed a UCC Financing Statement executed by Cousins, individually and as sole proprietor for the Law Offices of Norman Leonard Cousins. Those financing statements were continually renewed by Core Funding.

D. Involvement of Fred Rosenberg

By letter dated June 4, 2003, Fred Rosenberg notified Medical Liability Mutual Insurance Company, the insurer for the hospital and the doctors ("the insurer"), that he was co-counsel in the Brandes action, and he annexed a copy of Brandes' retainer agreement. Rosenberg requested that upon final resolution of the

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[2] Although the record is not entirely clear on the matter, it appears that Cousins previously executed two separate loan agreements with Core Funding pledging his fees from the Veneski action and another action as security and, when those loans were not timely repaid, he entered into the loan at issue.

Brandes action, his name appear as co-counsel with Cousins on any settlement drafts/checks.

By letter dated June 5, 2003, Cousins advised the insurer that Rosenberg was not co-counsel in the Brandes action and, instead, was "purely a referring attorney with whom I have a referral fee arrangement." Cousins asserted that Rosenberg's name should not be included on any checks issued in the Brandes action, and he asked the insurer to accept his letter "as an agreement by me to hold the defendants and their carriers harmless from any claims for attorney's fees which may be asserted by Mr. Rosenberg."

By letter dated June 9, 2003 the Fumuso firm, on behalf of the hospital, the doctors and the insurer, informed Cousins that his hold harmless offer was not accepted, and any settlement drafts or checks would not be issued absent a court order directing payment.

E. Federal Litigation

On or about July 28, 2003, Core Funding commenced an action by order to show cause in the United States District Court, Southern District of New York ("SDNY"), naming Cousins, DeClemente, Legal Asset, the hospital and others as defendants (see, Core Funding Group, LLC v Norman Leonard Cousins, et al., 03 Civ. 5575 (SDNY) ("the federal action").

In the order to show cause, Core Funding sought: (1) to restrain certain defendants from paying to Cousins or other parties any portion of Cousins' attorney's fee arising from the settlement in the Veneski action; (2) the appointment of a receiver to take charge of and turn over all legal fees that were the subject of the security agreement between Cousins and Core Funding; (3) to enjoin Cousins and others from transferring such collateral to DeClemente or Legal Assets; and, (4) to require the defendants in the Brandes action to deposit with the court any legal fees arising from a future settlement or judgment.

In a supporting declaration, Core Funding's President indicated that after Core Funding's loans to Cousins went into default, he learned from the defendants in the Brandes action and other actions that DeClemente was claiming the same collateral. When confronted with documents, Cousins admitted that he had used the same collateral pledged to Core Funding to borrow money from DeClemente, and that he had been paying DeClemente first, because DeClemente was "associated with dangerous people and could not be ignored." The Core Funding representative asserted that his own investigation revealed that DeClemente had been indicted for, but

not convicted of arson and forgery, and was charging annualized interest rates of 60-70% on loans.

Believing that payment would be imminent in the Veneski action, Core Funding decided not to commence any action against Cousins; however, when Core Funding learned that Cousins executed an assignment directing that his entire fee be paid to Legal Asset, Core Funding commenced the federal action to protect its collateral. Core Funding therefore sought, inter alia, injunctive relief, the imposition of a constructive trust, a declaratory judgment and damages based upon conversion and fraudulent conveyance.

On or about September 4, 2003, Core Funding discontinued and dismissed the federal action against the hospital.

On or about November 24, 2003, Legal Asset interposed an answer with cross claims and counterclaims in the federal action, and commenced a third-party action against Cousins, the Veneski plaintiffs and others, seeking to recover the amounts due to it from the settlement proceeds of the Veneski action. Neither Brandes nor any of the defendants in the Brandes action were named by Legal Asset as third-party defendants.

By letter dated December 8, 2003, the attorneys for Core Funding informed the SDNY that the federal action was settled pursuant to a stipulation and order of dismissal. That stipulation and order recites, inter alia, that: (1) the federal action was dismissed without prejudice provided that certain amounts stemming from an unrelated action were paid to the attorneys for Core Funding within fifteen (15) days of the entry of the stipulation and order; (2) Core Funding would cancel its UCC liens against Cousins; and, (3) DeClemente, Legal Asset and Cousins would release and discharge Core Funding.

II. Order To Show Cause

Relying on numerous Canons, Ethical Considerations and Disciplinary Rules, and the affidavit of an expert, the hospital and the doctors contend that Cousins should be disqualified as Brandes' attorney.

Essentially, they urge that: (1) although cause of action belongs exclusively to the client, the nature of Cousins' financial dealings give him an interest in the Brandes action; (2) Cousins sold his interest in the Brandes action twice, thereby breaching his pledge to Core Funding and, as Cousins is personally liable on the debt to Core Funding he is no longer a disinterested lawyer;

(3) although an attorney is permitted to obtain a loan to finance anticipated disbursements, more than disbursements are being funded in the Brandes action; (4) in pledging potential settlement or judgment funds, Cousins is sharing legal fees with Legal Asset, a non-lawyer; (5) by commingling numerous cases as security for various loans, Cousins made each client a surety for the others; (6) Cousins cannot exercise his best professional judgment solely on behalf of his clients, and free from all competing interests, as a client might wish to pursue litigation, while Cousins might wish to take an attractive settlement offer to satisfy his debts; (7) because the hospital and Cousins were named as defendants in the federal action, they incurred additional legal fees unrelated to the Brandes action and solely as the result of Cousins' personal financial dealings; (8) notwithstanding Brandes' alleged agreement to pay 15% interest on amounts expended for disbursements, the interest rates on the loans from Core Funding and Legal Asset to Cousins are exorbitant, if not usurious, as they contemplate a 60-70% interest rate; (9) there is no legal authority for Cousins' practice of assigning or pledging potential legal fees in contingency matters; and, (10) even though the federal action was dismissed, the counterclaims, cross claims and third-party action interposed by Legal Asset against Cousins remain viable.

Based upon affidavits by expert-attorneys who also utilize the services of Core Funding or Legal Asset, and an affidavit by Brandes, Cousins opposes the order to show cause, asserting, inter alia, that: (1) the hospital and doctors lack standing to seek disqualification; (2) there is no ethical or legal conflict posed by an attorney who assigns post-judgment or post-settlement attorney's fees to a third-party lender to finance litigation expenses and assist with cash flow, and courts of other states permit such assignments; (3) Brandes' litigation financing agreement charges an interest rate of 15% per annum, which is 1% less than that permitted by law; (4) there was no conflict of interest as Brandes is not a party to any of the contracts, and he does not have an interest in her causes of action; (5) litigation financing "levels the playing field" and enables plaintiffs to go head-to-head with major insurance companies; (6) the Internal Revenue Service permits the deduction of interest expenses arising from litigation financing; (7) Fred Rosenberg used to share space with Cousins, his sister was Brandes' friend, he was never affiliated with Cousins' practice or the action, and his name was placed on the retainer statement solely to protect him as the referring attorney; (8) DeClemente forged the Notice of Assignment in an attempt to divert the funds from the Veneski settlement to himself, which resulted in the federal action which was voluntarily dismissed and discontinued when Core Funding was satisfied that DeClemente had committed that forgery; and, (9) pursuant to the

settlement in the federal action, Core Funding cancelled its UCC liens and extinguished Cousins' debt, and it has no interest in the Brandes action.

III. Decision on Order To Show Cause

Contrary to Cousins' claim, the defendants have standing to move for his disqualification (see, e.g., Landsman v Moss, 180 AD2d 718; Waldman v Waldman, 118 AD2d 577).

The disqualification of counsel conflicts with the general policy favoring a party's right to representation by counsel of choice, and it deprives current clients of an attorney familiar with the particular matter (see, Tekni-Plex, Inc. v Meyner & Landis, 89 NY2d 123, 131, reh'g denied, 89 NY2d 917). Disqualification motions have been used as a litigation tactic to gain strategic advantage over an adversary (see, Tekni-Plex, Inc. v Meyner & Landis, supra at 131-132; see also, S&S Hotel Ventures Ltd. P'shp v 777 S.H. Corp., 69 NY2d 437, 443). Nonetheless, the general right of a party to litigation to select an attorney of his or her choosing is not limitless (see, Greene v Greene, 47 NY2d 447, 453).

"It is a long-standing precept of the legal profession that an attorney is duty bound to pursue his client's interests diligently and vigorously within the limits of the law (Code of Professional Responsibility, canon 7)" (Greene v Greene, supra at 451). For this reason, a lawyer may not undertake representation where his independent professional judgment is likely to be impaired by extraneous considerations (see, Greene v Greene, supra). Where a lawyer possesses a personal, business or financial interest at odds with that of his client, the lawyer may not act on behalf of the client as the conflict is too substantial, and the possibility of adverse impact upon the client and the adversary system too great, to allow the representation (see, Greene v Greene, supra at 452, citing, DR 5-101[A]).

A. The Nature of A Contingency Fee

Generally, a contingency fee relationship, by its nature, involves uncertainty and risk and requires the parties to make predictions as to: (1) the likelihood of recovery; (2) the length of time until recovery; and (3) the probable size of the recovery (see, Haines v Liggett Group, Inc., 814 F Supp 414, 427 [US Dist Ct., NJ 1993]). Such arrangements serve important public policy considerations as they are a necessary means of broadening access to justice and allowing those otherwise unable to afford counsel to

obtain representation in the courts (see, Haines v Liggett Group, Inc., supra at 427-428).[3]

It has long been recognized that a contingency fee arrangement constitutes an equitable assignment to the attorney of a percentage of the proceeds of a settlement or a trial of the action, and a lien upon the recovery (see, Matter of City of New York, 5 NY2d 300, 307, cert denied, 363 US 841; Industrial Comm'r v W.E. Hedger Transp. Corp., 1 NY2d 503; LaFetra v Hudson Trust Co., 203 App Div 729, 737-738, aff'd 236 NY 533; Judiciary Law §§ 475, 475-a).

An attorney with a contractual right to participate in the proceeds of a settlement or judgment is not, in any true sense of the word, a party in interest or an equitable owner of the client's cause of action:

> "The conclusion emerges that in litigation an attorney conducts for a client he acquires no more than a professional interest. To hold that a contingent fee contract or any 'assignment' or 'lien' created thereby gives the attorney the beneficial rights of a real party in interest, with the concomitant personal responsibility of financing the litigation, would be to demean his profession and distort the purpose of the various acceptable methods of securing his fee."

(Benci-Woodward v Commissioner, 219 F3d 941, 942-943 [9th Cir., 2000], cert denied 531 US 1112 [2001], citing and quoting Isrin v Superior Court, 63 Cal 2d 153, 403 P2d 728, 734; see also, DR 5-103; NY St Bar Assn Comm on Prof & Jud Ethics, Op 1987-4 [concurring opinion] [1987]).

B. Attorney's Right To Assign and To Fund Litigation Expenses

Pursuant to General Obligations Law ("GOL") § 13-101, any claim or demand can be transferred except, inter alia, a claim to recover damages for a personal injury, or where the transfer of the

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[3] The contingency fee rate in New York for personal injury, wrongful death or medical malpractice actions is set by statute and the Rules of the Appellate Divisions (see, Yalango by Goldberg v Popp, 84 NY2d 601; Judiciary Law 474-a; 22 NYCRR 691.20[e]). There is no claim that Brandes' retainer agreement violates the statutorily-permitted contingency fee rate.

claim would contravene a federal or state statute or public policy (see, GOL § 13-101[1], [3]). Nonetheless, a claimant can assign the proceeds of personal injury claims prior to judgment or settlement (see, Silinsky v State-Wide Ins. Co., 30 AD2d 1; Grossman v Schlosser, 19 AD2d 893; see also, Aponte v Maritime Overseas Corp., 300 F Supp 1075 [SDNY, 1969]).

Generally, an attorney has the same right to assign the future right to receive legal fees upon settlement or judgment, even though the fee may be uncertain, doubtful or contingent (see, Williams v Ingersoll, 89 NY 508; Pomona Enters., Ltd. v Mellen, 30 AD2d 704; GOL § 13-101). Such an assignment is treated as an executory contract for the transfer of a future fund upon which specific performance will be granted when the fund comes into existence (see, Williams v Ingersoll, supra; Aponte v Maritime Overseas Corp., supra).

The attorney's assignment of the right to receive legal fees does not, however, cause the attorney to become an equitable owner of a share in the client's cause of action, as the only thing being assigned is the interest in the relevant portion of the future proceeds, rather than an interest in the litigation (see, Williams v Ingersoll, supra; Aponte v Maritime Overseas Corp., supra; Isrin v Superior Court, supra).

With respect to an attorney's ability to "finance litigation", an attorney representing a client in litigation shall not advance or guarantee financial assistance to the client, but may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination and the costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses (see, DR 5-103[B][1]; 22 NYCRR § 1200.22; see also, Holmes v Y.J.A. Realty Corp., 128 AD2d 482, 483; Cullen v Olins Leasing, Inc., 91 AD2d 537, appeal dismissed, 61 NY2d 867; NY St Bar Assn Comm on Prof Ethics, Op 600 [24-88][1989]; NY St Bar Assn Comm on Prof Ethics, Op 598 [4-88][1989]).

To aid the client with the expenses of litigation, an attorney may refer the client to a lending institution which would then assess the value of the client's claim and take a lien on the proceeds of the claim to secure a loan to the client (see, NY St Bar Assn Comm on Prof Ethics, Op 666 [73-93] [1994]). In the alternative, an attorney may charge the client interest on the unreimbursed expenses of litigation, to cover the interest paid to the bank from which the attorney borrows to pay those expenses (see, NY St Bar Assn Comm on Prof Ethics, Op 754 [2002]; Bar Assn

of City of NY Comm on Prof & Jud Ethics, Op 2000-2 [undated]; Bar Assn of City of NY Comm on Prof & Jud Ethics, Op 1997-1 [1997]).

C. Transactions At Issue

Here, the assignment of future legal fees to Legal Asset appears to be in connection with an immediate advancement of funds, while the Core Funding transaction was clearly a loan, and both were collateralized by future legal fees.

None of Cousins' clients are parties to these transactions, and none of the clients' interests were assigned or used as collateral. Instead, the only assignment or security interest given was in Cousins' prospective right to legal fees upon settlement of, or judgment in, the actions. As a result, Cousins' clients were not, in effect, sureties for one another. Moreover, as Core Funding's loan was made personally to Cousins, Cousins could personally guarantee it, without affecting his clients' interests.

Given the riskier nature of the collateral used as a source for the advancement of funds by Legal Asset, the alleged (but not proven) usurious interest rates charged by that entity may, instead, be the "discounted present value" of Cousins' future interest in such legal fees (see, e.g., GOL § 5-1701[c] [defining "discounted present value" within the meaning of the Structured Settlement Protection Act]). To the extent that Cousins utilized the sums loaned or advanced for disbursements made on behalf of Brandes, the interest rate he charged Brandes is less than the alleged rate charged to him, is not usurious, and was fully disclosed to Brandes.

Finally, and to the extent relevant, although Cousins twice collateralized his interest in future legal fees from the Brandes action and the Veneski action, apparently in breach of his agreement with Core Funding, there has been no demonstration that his actual or future legal fees from those actions will be less than the amount loaned or advanced, and the federal action commenced by Core Funding is now resolved.

Accordingly, the contention by the hospital and the doctors that Cousins obtained an improper financial interest in the Brandes action solely as a result of the assignments of his right to future legal fees, or that an actual or potential conflict of interest was created thereby, is rejected (see, e.g., DR 5-103, 5-104; 22 NYCRR §§ 1200.22, 1200.23). Also rejected is the contention that the assignment of the right to attorney's fees constitutes "fee splitting" under the circumstances presented in this case.

Similarly, there is no evidence that the financial dealings at issue affect Cousins' professional judgment on behalf of Brandes (see, DR 5-101).

Disqualification is not warranted based upon the fact that Fred Rosenberg, undisputedly an attorney, is named in Brandes' retainer agreement solely for the purpose of securing his permitted referral fee (see, Rodriguez v City of NY, 66 NY2d 825; DR 2-107). In addition, as no defendant in the Brandes action is a party with respect to the remaining counterclaims, cross claims or third-party action brought by Legal Asset, there is no basis presented for the disqualification of Cousins as a result of the federal action.

Accordingly, the order to show cause is denied.

IV. Motion To Require Separate Attorney and Decision

According to the doctors and the hospital, I. Michael Leitman ("Leitman") was the surgeon selected by Robert Brandes to perform the surgery, and discussed the procedure with Robert Brandes pre-operatively. During the laparoscopic surgery, Leitman encountered trouble, requested assistance and, due to excessive bleeding, converted the procedure into an open cholecystectomy. The defendants Dan Seth Reiner, M.D. ("Reiner") and Robert Allen Cherry, M.D. ("Cherry") responded to Leitman's request for assistance.

According to Brandes, her husband authorized Leitman to perform the laparoscopic cholecystectomy, but the procedure was performed instead by Reiner, Cherry and Dr. Frankini, without her husband's knowledge or consent. Brandes also asserts that Reiner, Cherry and Frankini lacked the requisite knowledge, skill and experience to perform the procedure and, inter alia, the hospital and the doctors fabricated records in an attempt to cover up what actually happened in the operating room.

By prior decision and order of this court (Weiss, J.), dated June 25, 2003, a motion by Reiner and Cherry for summary judgment dismissing the complaint against them was denied. In that order, this court found that there were numerous issues of fact as to, inter alia, which doctors performed the laparoscopic cholecystectomy.

Brandes now moves to require Leitman and Cherry to retain counsel separate from the Fumuso firm which also represents the

hospital, to be paid for by the insurer.[4] In support, she notes that there is an inherent conflict among the doctors and the hospital as to who performed the procedure, and whether the hospital is, ultimately, vicariously liable. In addition, Brandes notes that Leitman and Cherry may, ultimately, cross claim against one another and the hospital.

The hospital, Leitman and Cherry oppose the motion, asserting that: (1) they do not dispute their involvement in the case and there is no inherent conflict between them and the hospital; (2) they did not cross claim against one another as they do not believe that they injured Robert Brandes; and, (3) Leitman and Cherry desire the continued representation of the Fumuso firm.

As Leitman and Cherry submitted affidavits stating that they were fully informed of the potential conflict, and they consent to the continued representation, disqualification of the Fumuso firm is unwarranted (see, Dominguez v Community Health Plan, 284 AD2d 294; DR 5-105[C]; 22 NYCRR § 1200.24[c]).

Brandes' related contentions concerning an alleged conflict of interest arising from the possibility that an associate attorney with the Fumuso firm might be called as a witness at trial are conclusory in nature and, similarly, do not warrant disqualification (see, Haberman v City of Long Beach, 298 AD2d 497; Olmoz v Town of Fishkill, 258 AD2d 447; Broadwhite Assocs. v Truong, 237 AD2d 162).

As a result, Brandes' motion is also denied.

Conclusion

Accordingly, based upon the papers submitted to this court and the determinations set forth above, it is

ORDERED that the branch of the motion by the plaintiff to require the defendant Dan Seth Reiner, M.D. to retain counsel separate from that representing the defendant North Shore University Hospital, to be paid for by Medical Liability Mutual Insurance Company is denied as moot; and it is further

ORDERED that the branch of the motion by the plaintiff to require the defendants I. Michael Leitman, M.D. and Robert Cherry,

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[4] Since the date of Brandes' motion, the defendant Dan Seth Reiner, M.D. has obtained separate counsel, so Brandes' motion is moot with respect to him.

M.D. to retain counsel separate from that representing North Shore University Hospital, to be paid for by Medical Liability Mutual Insurance Company, is denied; and it is further

ORDERED that the order to show cause by the defendants North Shore University Hospital, I. Michael Leitman, M.D., Sharon McLaughlin, M.D., Dan Seth Reiner, M.D., Larry Frankini, M.D. and Robert Allen Cherry, M.D., to disqualify the plaintiff's attorney, Norman Leonard Cousins, Esq., from further representation of the plaintiff in this action, is denied.

Dated: Jan 5, 2004

J.S.C.

QUEENS COUNTY CLERK
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