STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY	)	
Ronald E. Price And Diana R. B. Price,	)	
Plaintiffs	)	CASE NO. 04-CP-08-1855
vs.	)	**AMENDED ORDER OF DISQUALIFICATION**
Belinda Fox, Danny L. Gilbert and Eagle Harbor, Inc.,	)	
Defendants,	)	

This matter came before me pursuant to a Motion to Reconsider, Alter or Amend filed by Jeffrey T. Spell, Esquire ("Spell") on February 4, 2013 to amend this court's November 1, 2012 Order of Disqualification to allow Spell to represent Defendant Danny Gilbert, Eagle Harbor, Inc. and Heritage Classic Homes in all pretrial matters in certain litigation filed by Ronald and Diana Price ("Prices"). In this court's November 1, 2012 order, Spell was disqualified under Rule 3.7[1] because Spell was a likely witness. In response to Spell's motion, the Prices filed a Return on February 22, 2013, in which they renewed their argument from their brief[2] before the prior Order on Disqualification that Spell should also be disqualified under Rule 1.9(a) since the Prices were Spell's former clients in a substantially related matter. This court elected to treat that argument as a motion to reconsider the court's ruling on that issue. After carefully considering Spell's Motion to Reconsider the Order of Disqualification dated November 1, 2012 as well as Price's Return to the Motion, this court now concludes that Spell is also disqualified under Rule 1.9(a) and hereby amends its order accordingly.

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[1] All references to "Rules" are to the South Carolina Rules of Professional Conduct unless otherwise stated.

[2] The court allowed parties to submit briefs, affidavits and exhibits prior to the original Order of Disqualification dated November 1, 2012.

STATEMENT OF THE CASE

After a status conference and motion hearing on February 28, 2012, this court granted Jay Masty, Esquire's motion to be relieved[3] as counsel for Danny Gilbert ("Gilbert"), Eagle Harbor, Inc. ("Eagle Harbor" or "EHI") and Heritage Classic Homes, Inc. ("Heritage Classic Homes" or "HCH") (collectively "Gilbert entities"). The court gave Gilbert and his entities 20 days to secure other counsel and notify the court and opposing counsel that he had done so. On March 22, 2012, Jeffrey T. Spell ("Spell") called J. Derrick Jackson ("Plaintiffs' counsel") notifying him that Gilbert wanted Spell to represent him and the Gilbert entities. Plaintiffs' counsel then contacted his clients to see if they had any objections and if they would waive the conflict acknowledged by Spell. On March 28, 2012, Plaintiffs' counsel notified Spell by e-mail that his clients were not willing to waive the conflict and that Gilbert would need to find other counsel as soon as possible. Spell responded "Thank You" Thereafter, there was no record of any communication until May 4, 2012, when Plaintiffs' counsel e-mailed Spell about scheduling his deposition On or about May 18, 2012, Plaintiffs' counsel spoke with Spell confirming his deposition date and time and following up on a subpoena for his records that was issued on May 4, 2012. On May 23, 2012, Plaintiffs' counsel notified Spell that he may want to reschedule his deposition which was scheduled for May 25, 2012, and on May 24, 2012, Plaintiffs' counsel confirmed with Spell that his deposition would be rescheduled to a mutually agreeable time and date.

On June 5, 2012, at the previously rescheduled status conference, Spell appeared and stated that he intended to represent Gilbert and the Gilbert entities despite the Prices objections. This issue surprised Prices' counsel who thought the issue had been settled by the March 28, 2012 e-mail noting the Prices objections and that they were not willing to waive any conflicts. This court held a conference with the attorneys and

[3] This was filed by Masty in September 2011.

allowed counsel 20 days[4] to submit a brief on the issue. Thereafter, the court issued its order dated November 1, 2012 disqualifying Spell under Rule 3.7 because Spell was a likely witness. As previously discussed, Spell filed a Motion to Reconsider, Alter or Amend and the Prices filed a Return asking the court to amend its order to include disqualification under Rule 1.9(a). This Amended Order follows:

FACTUAL BACKGROUND[5]

Spell is a licensed South Carolina attorney and is the owner of Low Country Title Services, LLC. Both Troy Winn (Winn) and Gerry Fox (Fox) have testified that Spell was Danny Gilbert's attorney throughout the development process and that he closed most of the real estate closing for lots in Eagle Harbor Subdivision. (Exhibits[6] 9, 10, 11, 12, 15) Fox also testified that Spell could have provided the real estate contracts which were used to sell lots in Eagle Harbor Subdivision. (Exhibit 11) Gilbert handled the sale of the lots as an agent of both Winn and Fox. (Exhibits 8, 13) Spell also represented Eagle Harbor, Inc. in closing construction loans. (Exhibits 20, 27) Spell is listed as a contributor of Services to Eagle Harbor (Exhibit 19) Spell may also have prepared the covenants and restrictions which were recorded for Eagle Harbor Subdivision. (Exhibit 10) Spell may also have prepared the incorporation documents for Eagle Harbor Homeowners Association, Inc. for which Danny Gilbert is the organizer. Spell did prepare and record the documents conveying the roads in the subdivision from the Winns and Foxes to Eagle Harbor Home Owners' Association, Inc. (Exhibit 16)

On or about September 13, 2003, the Prices signed an Agreement to Buy and Sell (which may have been prepared by Spell) to purchase Lot #20 in Eagle Harbor. Subdivision Phase II from Belinda Fox. This Agreement had "Jeff Spell" preprinted as the closing attorney. (Exhibit 21)

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[4] This was extended an additional five days upon request by Plaintiffs' counsel.

[5] This shall be the court's findings of fact, unless otherwise qualified.

[6] References to "Exhibits" herein are to Plaintiff's Response to Spell's Notice of Appearance.

On November 06, 2003, Spell submitted a title research request for Lot #20 and in the blank for "My Client" listed "Ronald Price" and "Dana [sic] RB Price." (Exhibit 22) On or about November 25, 2003, Ronald Price individually and as attorney in fact for Diana Price executed an Attorney Preference form designating Jeffrey T. Spell as attorney. (Exhibit 23)

The closing took place on November 25, 2003 at the law office of Spell. He did not attend the closing, but had an associate, Brian Badger witness the closing. Spell's agency, Low Country Title, LLC is listed as the Settlement Agent. On the HUD-1 Settlement Statement, the Prices were charged several fees by Low Country Title Services, LLC including a "closing fee", "an Abstract or Title Search", and "Document Preparation." The HUD-1 also shows the Prices were charged for and issued an owners title policy. (Exhibit 24, 25) The HUD-1 was signed "Jeffrey T. Spell by Brian W. Badger." The HUD-1 reflects payments to Heritage Classic Homes, Inc. of $41,020 and Dee Dee Cox another $3,000 which was a debt of Gilbert. (Exhibit 24) Fox testified that this was Gilbert's share of the profits. (Exhibit 14) According to the Prices, Spell never disclosed to the Prices his prior representation or relationship with Gilbert, Fox, Eagle Harbor or the Winns. (Price Affidavits Exhibits 1, 3)

The closing was for buying the property and constructing a home and the Prices had contracted with Gilbert/Heritage Classic Homes to construct their home. After building started, the Prices discovered several issues which they allege were contrary to what Gilbert had represented to them when he sold the lot. The Prices contacted Spell by e-mail as their closing attorney for advice about these problems. (Exhibit 2) In this e-mail, Price states in Item 4, "Since you were our closing agent, we assume you are the #1 person to ask about the following ...issues as well." Price then proceeds to list items like the delay in getting a septic tank permit, the inability to subdivide, the legality of the restrictive covenants (all of which are part of the present lawsuit.) Price concludes, "you as our closing agent, should be able to help us."

The Prices were named as Defendants in a lawsuit filed by Gilbert's subcontractor (Case #1150) and subsequently the Prices filed the present suit for the alleged misrepresentations related to the property issues (Case#1855).

LAW/ANALYSIS

STANDARD

It should be noted that doubts as to the existence of an asserted conflict of interest should be resolved in favor of disqualification. *See, International Business Machines Corporation v. Levin*, 579 F. 2d 271 (3rd Cir. 1978) and *Chugach Electric Association v. United States District Court*, 370 F. 2d 441 (9th Cir. 1966), cert. denied, 389 U.S. 820, 88 S. Ct. 40 (1967). However, the burden of proving a conflict of interest is on the party seeking the disqualification. *Duncan V. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 646 F. 2d 1020 (5th Cir. 1981)(quoted in S.C. Bar Ethics Advisory Opinion No. 90-34[7]).

RULE 1.9 DUTIES TO FORMER CLIENTS

Rule 1.9(a) provides as follows:

> (a) 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.

The Prices were Spell's Clients

In this case, Spell cannot seriously dispute that he "formerly represented" the Prices. He was selected as attorney on the attorney preference form, his company Lowcountry Title Services, LLC was listed as "Settlement Agent" for the closing. He is responsible for the title search which lists the Prices as "My Client", the title commitments and the title policy that were issued. Lowcountry Title was paid fees by the Prices at closing. The closing documents are signed Jeffrey Spell by various persons in his office. Subsequent to the closing, the Prices contacted Spell by e-mail for his help

[7] All future references to the SC Bar Ethics Advisory Opinions will only be to the Opinion No.

as "closing attorney." The Prices state they believed he was their attorney and relied upon him to protect their interests. (Price Affidavits, Exhibits 1 and 3)

The matters are substantially related.

The present litigation is substantially related to the Spell's former representation of the Prices. Many of the issues raised in the complaint are issues which the Prices asked for Spell's help. Looking at the Prices, Amended Complaint (1855)(Exhibit 29), paragraph 8 refers to the Agreement to Buy and Sell. This Agreement may have been drafted and provided by Spell and is the Agreement closed for the sale of the property. Paragraph 10 alleges the condition in the Agreement about being able to subdivide the property into two separate lots, paragraphs 11 alleges that this representation was made by Defendants during negotiations and "up through the closing." Paragraph 12 includes allegations that the property could not be subdivided because of DHEC requirements for a septic tank system. Advising the Prices about their Agreement and whether or not the subdivide condition could be satisfied due to DHEC regulations were all part of Spells former representation. Indeed, in Diana Prices' March 11, 2004 e-mail to Spell (Exhibit 2), she specifically asks Spell about the DHEC permits and the notification that she could not subdivide the property. She asks Spell, "This was a main factor in us purchasing the lot . . .does this constitute a breach of contract?"

Another example of how Spells' former representation is substantially related to this case is the lack of binding restrictive covenants. In paragraph 13 (as well as other paragraphs) of the Amended Complaint, the Prices allege, "all Defendants led your Plaintiffs to believe that they were purchasing property in a gated, restricted community with a valid homeowner's association, and associated covenants, restrictions, architectural guidelines and other benefits confirmed by the same, which would enhance the value of the subject property being purchased by them, and otherwise provide for amenities and services not otherwise available in a neighborhood without the same benefits." Winn testified that he thought Spell prepared the

covenants (Exhibit 10) which the Prices allege are not valid since they were executed by a Declarant (Eagle Harbor) that never owned the property. (See paragraph 14 of the Amended Complaint.)

Regardless of whether or not Spell prepared and recorded the restrictive covenants, as closing attorney he had a duty to advise the Prices as to what restrictions were binding (or not binding) on the property they were purchasing. This is another issue Ms. Price asked Spell about in her March 11, 2004 e-mail to Spell. (Exhibit 2)

The same point can be made about the Eagle Harbor Homeowners Association, Inc. ("EHHOA") which is the recipient of the roads in the subdivision conveyed through deeds prepared and recorded by Spell. EHHOA's registered agent is Gilbert and the Prices contend membership is not required because of the invalid covenants. Therefore, according to the Prices, the roads have no source of continued maintenance. These allegations are the subject of a proposed amendment to the complaint which the court has under consideration.

Yet another example is the allegation that property purchased by the Prices was not ready for construction because Gilbert had not applied for the proper DOT permit to install a septic line across a state road. (Exhibit 2 (A)). According to the Prices, this delayed construction on the Prices house and was another matter upon which Spell should have advised the Prices. In her e-mail she asks Spell to explain her options.

Another example is the presence of wetlands encumbering about 2.0 acres of the Prices property. (Exhibit 26) This is part of the Prices alleged damages. As part of his title search, and as closing attorney, Spell should have advised the Prices as to possible wetlands encumbering their property and cannot now represent the same Defendants who should have obtained the required wetland studies.

Indeed, Spell's former representation is so substantially related that a previous attorney of the Prices included him as a Defendant in a proposed Second Amended

Complaint (Exhibit 30)(Fifth Cause of Action) which was never served and later withdrawn for reasons unknown to the Prices or their current counsel.

The final elements of Rule 1.9(a) are easily satisfied. Obviously, Gilbert and his entities interests are materially adverse to the Prices being on opposite sides in contested litigation. Finally, the Prices did not consent to the conflicted representation which was communicated to Spell by e-mail from the Price's counsel.

Opinion 10-3 is distinguishable

The primary Ethics Opinion recited and relied upon by Spell is distinguishable. Spell principally relies on Opinion 10-3. (Exhibit 35) The facts of that opinion are as follows:

> "Several years ago, an attorney conducted a transaction which pertained to a bond for title/contract for sale for two parties. ...Another attorney with the same law firm, who practices at another location than the previous attorney, may be retained by the Homeowners Association to address a violation of the recorded covenants and restrictions on the subject real property. This would include sending letters to the prospective purchasers on behalf of the Homeowners Association regarding such violations, and potentially filing a lawsuit on behalf of Homeowners Association against both prospective purchaser and title owner."

In Opinion 10-3, the committee begins it opinion by stating, "The South Carolina Supreme Court has held that representing a borrower in a residential transaction and later representing the lender in foreclosure does not create an appearance of impropriety. *In re Anonymous*, 298 S.C. 163, 378 S.E.2d 821 (1989). Ironically, this statement comes from a footnote in the opinion. The actual *holding* of the opinion was that a lawyer who represented both the buyer and seller in a residential real estate transaction should not subsequently represent the purchaser against the seller in litigation regarding the condition of the property sold so as to avoid the appearance of impropriety. The "appearance of impropriety" was the test under the old rules and has been replaced by Rule 1.9(a) and the substantial relationship analysis.

Under the specific facts of 10-3, the committee concluded as follows:

When the closing involves an installment land sale contract, rather than a sale by deed, whether a substantial relationship exists between the closing and a later action against the buyer would depend on 1) whether the lawyer advised the buyer about the specific contract involved or merely advised the buyer about land contracts generally and 2) whether the subsequent adverse representation involved the same legal issues about which the lawyer gave the buyer advice. Ordinarily, neither would occur. Therefore, without more, enforcement of HOA covenants or restrictions based solely on post-closing acts or omissions of the buyer would not ordinarily be substantially related to the prior closing.

This conclusion shows several distinguishing factors from this case. First, Gilbert and his entities are not mere lenders or an HOA, they are the developers of a project for which Spell provided substantial services before providing closing services for the Prices. Second, as pointed out in detail above, there are common legal issues about which the Prices sought Spells advice as closing attorney and which are part of the present litigation. Third, the committee emphasized that the litigation was based solely on post-closing action or omissions. As noted above, in this case, many of the allegations relate to pre-closing conduct, actions or omissions. Fourth, the sale in this case was by deed, and not an installment land sale contract.

Finally, this court notes that the committee itself noted that its opinion conflicted with many previous opinions on the subject: 84-24 (closing attorney cannot represent lender in subsequent foreclosure on same property;) 90-22 (closing attorney may update title but cannot file lis pendens or represent lender in foreclosure;) 05-05 (closing attorney cannot represent HOA in collecting dues for property purchased.)

While the committee continued in its opinion to try an explain this conflict, some of the quotes from those opinions are worth noting. From 90-22, "Rule 1.9 concerns loyalty to the client in cases of serial representation; its protections are for the benefit of the former clients." G. Hazard and W. Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* (1986) at 174." "The concerns underlying this proscription are the potential for violation of the lawyers duty of loyalty, as well as the risks that confidential information gained in a prior representation will be used to the

disadvantage of the former client." ABA/BNA *Lawyers Manual on Professional Conduct,* 51:202.

From 05-05, "One of the signal events in a client's life is the purchase of a home. A lawyer representing a client purchasing a home finds herself in the role of helping a client acquire a valuable and enduring possession. The expected duty of loyalty is profound. For a lawyer to ultimately take a position endangering home ownership when that lawyer had previously used his or her best efforts to help the client obtain a home would be an expression of hostility to a former client in violation of Rule 1.9 and a breach of the corresponding duty of loyalty owed to that former client.

This court concludes that Spell is disqualified from representing Gilbert and his entities under Rule 1.9(a) because of this previous representation of the Prices. The present litigation is substantially related to his previous representation and Spells representation would be materially adverse and breach his duty of loyalty to the Prices.

RULE 3.7 LAWYER AS WITNESS

Rule 3.7(a) provides that "A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness." Spell is likely to be a necessary witness in this case. Indeed, the best evidence of this is that the same parties Spell wants to represent listed him as a witness in their answer to the Prices interrogatories in this case. (Exhibit 31) Likewise, the Prices also listed him as a witness in their answers to interrogatories. (Exhibit 32) Therefore, it defies logic to suggest he is not likely to be a necessary witness. Moreover, since the interrogatories listing Spell date back to 2006 and 2007, it demonstrates that the Prices are not naming him as a witness to disqualify him.

Spell's deposition was originally scheduled before the June 5, 2012 hearing at the same time as Troy Winn, but postponed because of the possibility that Winns' attorney would also take Spell's deposition if Winn was added as a party.

Spell obviously has substantial information about the facts in this case since he represented Gilbert and Eagle Harbor. As noted in the factual background, he closed most of the loans in the subdivision, possibly prepared the covenants and restrictions, possibly prepared the contract which were used in the sale of the lots, and prepared and recorded the deeds concerning the roads to the EHHOA. He also may have organized and prepared the Bylaws for EHHOA. It not clear at this point how much a role Spell played in advising Gilbert and the other developers, but Winn testified when asked about Spell's role, "It was Danny's attorney. That's all I Know. And that he used him for everything that needed to be done." (Exhibit 10) And as alleged in the pleadings, Danny Gilbert played a role in everything.

Spell argues that it's premature to disqualify him as attorney and that can be done later at trial as needed; however this argument ignores the language of the Rule and the cases that have considered the issue. First, the rule uses the phrase "is likely" which looks to a present calculation of a possible future event. Second, the cases suggest the withdrawal should take place when the potential to be a witness is recognized. *See In re Westmoreland,* 353 S.C. 44 ,577 S.E.2d 209(2003)(public reprimand for lawyer who refused to withdraw from representing one of the partners in a partnership dispute when it became apparent he would be required to testify in the trial of the matter both as a witness to some events and as a party-defendant to others.) *See also In re Hawkins,* 320 S.C. 57, 463 S.E.2d 92 (1995) (under Code of Professional Responsibility lawyer failed to withdraw as counsel even though lawyer should have known he might be called as a significant and probably adverse fact witness.)

Finally, contrary to Spell's representations at the rescheduled Status Conference, this rule is not solely for the benefit of his potential clients. Comment 1 to Rule 3.7 provides, "Combining the roles of advocate and witness can prejudice *the tribunal* and the *opposing party* and can also involve a conflict of interest between the lawyer and client." *Emphasis added.*

Comment 2 to Rule 3.7, "The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate witness should be taken as proof or as an analysis of the proof." Comment 3, "To protect the tribunal, paragraph (a) prohibits a lawyer from simultaneously serving as advocate and necessary witness except in those circumstances specified in paragraphs (a)(1) through (a)(3)." So it is apparent the rule is also intended to protect the tribunal and opposing party.

There are three limited exceptions to the rule, none of which apply to this case. First, the rule does not apply to uncontested matters. Until Spell's deposition is taken, its unknown which matters will be uncontested, but it's likely many of the matters will be. For example, in the Defendants Answers to Prices' Interrogatories Spell is expected to testify that there was no representation that the property could be subdivided, a statement with which the Prices strongly disagree. Second, there is no issue about the value of legal services, and finally, Gilbert and his entities will suffer no hardship from disqualification. Spell filed his notice of appearance in June 2012, and Gilbert has had since September 2011 to secure other counsel, and can still do so. Furthermore, as part of this court's previous order, Gilbert and his entities were afforded an additional 30 days to secure counsel because of the disqualification.

This court finds that Spell is disqualified under Rule 3.7 (a) because it is apparent he is likely to be a fact witness at the trial of this civil action.

MOTION TO RECONSIDER DENIED

As this court has found that Spell is also disqualified under Rule 1.9(a), the court finds it unnecessary to decide if Spell could have represented the Gilbert Defendants in pretrial matters only.

CONCLUSION

Under Rule 1.9(a), Spell cannot now represent Gilbert and his entities in a matter which is substantially related to Spell's former representation of the Prices and in which Gilbert and his entities interests are materially adverse to the Prices. Also, it appears likely that Spell will be a necessary witness at the trial of this matter; accordingly, he is disqualified under Rule 3.7. For all these reasons, and because any doubts about a conflict of interest should be resolved in favor of disqualification, this court hereby disqualifies Spell from representing Gilbert and his entities.

Danny Gilbert, Eagle Harbor, Inc. and Heritage Classic Homes, Inc. have had ample time before to secure other counsel. Accordingly, they shall only have 15 days to secure other counsel.

IT IS SO ORDERED.

Robert E. Watson, Master-in-Equity
Berkeley County

Moncks Corner, South Carolina
~~May~~ 6/12, 2013