


ORDERED.

Dated: November 16, 2017



Jerry A. Funk
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

IN RE:

CLIMATE CONTROL MECHANICAL SERVICES, INC.,
BASE 3, LLC,
THE ALEXANDER GROUP, LLC
FACILITY PERFORMANCE, LLC

Debtors.

Chapter 11

Case No.: 3:15-bk-2248-JAF

Case No.: 3:15-bk-2249-JAF

Case No.: 3:15-bk-2250-JAF

Case No.: 3:15-bk-5021-JAF

JOINTLY ADMINISTERED

ORDER DENYING MOTION TO DISQUALIFY OPPOSING COUNSEL

This case is before the Court on the motion to disqualify opposing counsel brought by Debtors CLIMATE CONTROL MECHANICAL SERVICES, INC. (“Climate Control”); BASE 3, LLC; THE ALEXANDER GROUP, LLC (“Alexander Group”); and FACILITY PERFORMANCE, LLC (collectively, the “Debtors”). (Doc. 515). On November 9, 2017, a preliminary hearing was held on this motion at which time the Court heard argument from the Debtors, the UNITED STATES TRUSTEE (the “U.S. Trustee”), Creditor CIRACO ELECTRIC INC. (“Ciraco”), Creditor NELSON & COMPANY, LLC, Creditor COMMUNITY BANK & TRUST OF FLORIDA, Creditor FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

Creditor CONTINENTAL CASUALTY COMPANY; and Interested Party SKANSKA USA BUILDING, INC. (“Skanska”). For the reasons stated herein, the Motion is denied without prejudice to re-raising the issue if relevant facts are further developed.

Background

The Debtors seek to disqualify the law firm representing Skanska and Ciraco—Winderweede, Haines, Ward & Woodman, P.A. (the “Law Firm”). Ciraco is a creditor of only Alexander Group and is not a creditor in Climate Control’s bankruptcy case despite all the cases being jointly administered for procedural purposes. Skanska, on the other hand, is a plaintiff and counter-defendant in a related adversary proceeding, Adv. No. 3:16-ap-100-JAF (the “Breach of Contract Action”), but is not a named creditor in any of the bankruptcy cases. Climate Control is the defendant and counter-plaintiff in the Breach of Contract Action. The action involves competing counterclaims for breach of a construction subcontract, along with a claim by Climate Control for a right to payment from various sureties under Skanska’s payment bond for the subject construction project.

The preliminary hearing on Debtors’ motion to disqualify the Law Firm was held in conjunction with two motions brought by Ciraco, the Emergency Motion to Appoint a Chapter 11 Trustee and the Emergency Motion to Freeze Unauthorized Bank Accounts and Other Assets (the “Emergency Motions”). (Docs. 507 & 508). The Emergency Motions contend that recent third-party discovery has evidenced the Debtors’ concealment of “[estate] funds through unauthorized and undisclosed bank accounts, to the tune of more than \$700,000.” (Doc. 507 at 2). The Emergency Motions seek, among other things, to have a trustee appointed in all of the related bankruptcy cases. (Doc. 507 at 13). The motion to disqualify was filed four days after Ciraco’s Emergency Motions. (Doc. 515). The Emergency Motions are currently set for trial on February

1, 2018. (Doc. 524). The U.S. Trustee indicated it may file a similar motion seeking similar relief after further investigation.

The instant motion to disqualify contends that the Law Firm is precluded from representing both Skanska and Ciraco, pursuant to Florida Rule of Professional Conduct 4-1.7, because the dual representation involves asserting a position on behalf of Skanska that is adverse to Ciraco. Specifically, the Debtors argue that, in the Breach of Contract Action, Skanska asserts that no monetary damages are owed to Climate Control. They contend this assertion by Skanska is adverse to Ciraco because, under the proposed Chapter 11 plan, Ciraco would receive a portion of any money paid into the estate—which includes any damages awarded to Climate Control from Skanska in the Breach of Contract Action. Skanska and Ciraco have given written informed consent to the dual representation and have waived any purported conflict. The Debtors, however, contend the alleged conflict is not waivable because the dual representation fails to meet Rule 4-1.7(b)(3). At the preliminary hearing, the evidence proffered in support of the motion to disqualify was essentially undisputed evidence based simply on the face of the record in the related bankruptcy cases and adversary proceeding.

Analysis

“The party bringing the motion to disqualify bears the burden of proving the grounds for disqualification.” Herrmann v. GutterGuard, Inc., 199 F. App’x 745, 752 (11th Cir. 2006). “Motions to disqualify are governed by two sources of authority. First, attorneys are bound by the local rules of the court in which they appear,” which will typically include that State’s rules of professional conduct. Id. “Second, federal common law also governs attorneys’ professional conduct because motions to disqualify are substantive motions affecting the rights of the parties.” Id. Further, as applied here, “[t]he court must clearly identify a specific Rule of Professional

Conduct which is applicable to the relevant jurisdiction and must conclude that the attorney violated that rule.” Id. (citing Schlumberger Techs., Inc. v. Wiley, 113 F.3d 1553, 1561 (11th Cir. 1997)). In this district, the Law Firm is governed by Chapter 4 of the Rules Regulating the Florida Bar. See District Court Local Rule 2.04(d); Bankruptcy Court Local Rule 2090-1(a).

Rule 4-1.7 of the Rules Regulating the Florida Bar provides in pertinent part:

(a) Representing Adverse Interests. Except as provided in subdivision (b), a lawyer must not represent a client if:

- (1) the representation of 1 client will be directly adverse to another client; or
- (2) there is a substantial risk that the representation of 1 or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Informed Consent. Notwithstanding the existence of a conflict of interest under subdivision (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a position adverse to another client when the lawyer represents both clients in the same proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing or clearly stated on the record at a hearing.

R. Regulating Fla. Bar 4-1.7 (2017). “[N]otwithstanding a conflict under rule 4-1.7(a), a lawyer might still be able to represent the clients provided that the representation is not prohibited by law,” and the representation complies with Rule 4-1.7(b). Young v. Achenbauch, 136 So. 3d 575, 581 (Fla. 2014). Additionally, the comments to Rule 4-1.7 provide in part:

Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment.

Comment to R. Regulating Fla. Bar 4-1.7 (“Conflict charged by an opposing party”); see also Am. Marine Corp. v. Canaveral Port Auth., 2015 WL 12915705, at *2 (M.D. Fla. June 25, 2015) (“Disqualification of counsel is an extraordinary remedy, and such motions are generally viewed with skepticism because they are often made for tactical purposes.”).

Here, the Court will assume a conflict exists under Rule 4-1.7(a) only for purposes of this Order, given the preliminary posture in which the motion was heard. Nevertheless, the prima facie evidence proffered at the preliminary hearing does not rise to the level necessary to grant Debtors the extraordinary remedy they desire.

First, the Court must view the motion with skepticism in light of the fact that it was filed by opposing counsel soon after Ciraco’s Emergency Motions alleging concealment of estate assets.¹ It is not clear what injury Debtors would suffer as a result of the dual representation. However, Debtors may stand to benefit tactically if the Law Firm was disqualified and unable to prosecute the Emergency Motions after having completed discovery, document review, and financial accounting related to those issues.

Second, and more importantly, the presumed conflict appears to be waivable in light of the fact that Ciraco and Skanska are not involved in the “same proceeding before a tribunal.” R. Regulating Fla. Bar 4-1.7(b)(3). Ciraco is not involved in Skanska’s adversary proceeding, and Skanska is not involved in any of the bankruptcy cases. Further, as the U.S. Trustee stated at the hearing, the Debtors’ bankruptcy cases are not substantively consolidated but are jointly administered for procedural purposes. In other words, even assuming that Skanska makes an assertion that is in some way adverse to Ciraco in the Breach of Contract Action, Rule 4-1.7(b)(3)

¹ The Court must also question whether Ciraco has standing to raise the issues brought in the Emergency Motions as a jurisdictional matter. See the decretal clause, below.

is nevertheless satisfied and the purported conflict is waivable under Rule 4-1.7(b). That is, Skanska's and Ciraco's informed consent controls disposition of the motion.

Accordingly, it is hereby ORDERED that Debtors' motion to disqualify counsel is DENIED, however this denial is WITHOUT PREJUDICE to re-raising the issue if facts supporting such a motion are further developed. The legal argument and evidence proffered at the preliminary hearing does not present a prima facie case for disqualification.

Additionally, as referenced in footnote 1 above, the Court has concerns with Ciraco's standing to bring the Emergency Motions, which are brought against several of the Debtors in related bankruptcy cases in which Ciraco is not an interested party. Standing to bring the contested matter is a jurisdictional question which the Court has a duty to raise so that the parties may properly address the issue early and economically in the process. The Court invites Debtors to submit briefs on the question of Ciraco's standing to bring the Emergency Motions within ten (10) days following the entry of this Order. Ciraco and any other interested party may file a response within ten (10) days of service of Debtors' briefs on standing, if Debtors file and serve such a brief.