

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION**

IN RE:)	
)	
CHARLOTTE COMMERCIAL)	
GROUP, INC.,)	Case Number: 01-52684
)	
Debtor.)	
_____)	
)	
CHARLOTTE COMMERCIAL)	
GROUP, INC.,)	Adversary Proceeding No.: 01-6044W
)	
Plaintiff,)	
)	
vs.)	
)	
FLEET NATIONAL BANK)	
)	
Defendant.)	
_____)	

MEMORANDUM OPINION

THIS MATTER came on before the Court for hearing upon Plaintiff's Motion to Disqualify Kenneth M. Greene as Counsel for Defendant. This adversary proceeding arises out of a Chapter 11 proceeding initiated by the Plaintiff, Charlotte Commercial Group, Inc. (hereinafter "Plaintiff" or "CCG") on November 13, 2001. David Meschan and the law firm of Tuggle Duggins & Meschan were retained to represent CCG in the Chapter 11 proceeding. CCG operated as the Debtor-in-Possession until March 14, 2002, at which time the Court appointed William P. Miller, Trustee. On April 26, 2002, the Court entered an order granting the Bankruptcy Administrator's motion to convert the case from Chapter 11 to Chapter 7.

While operating as a Debtor-in-Possession, CCG moved for authorization to retain

special counsel to represent the Plaintiff in an action against Fleet National Bank (hereinafter "Defendant" or "Fleet"). The Court entered an order appointing Herman L. Stephens as Special Counsel on December 6, 2001 and entered an order appointing additional special counsel David Niblock on February 20, 2002. The Plaintiff commenced this adversary proceeding on December 17, 2001 and filed the motion to disqualify counsel for Fleet on March 6, 2002. The Plaintiff contends that Fleet's counsel, Mr. Kenneth M. Greene, should be disqualified from further representation of Fleet inasmuch as continued participation would put counsel in a position where he would be, and would give the appearance of, violating Rules 1.9, 1.6 (c)(1), 1.6(c)(2) and 1.6(c)(3) of the Rules of Professional Conduct.

The Court, after considering the pleadings, the evidence presented, and the arguments of counsel, makes the following Findings of Fact and Conclusions of Law pursuant to Federal Rules of Civil Procedure 52, made applicable in bankruptcy proceedings by Federal Rules of Bankruptcy Procedure 7052.

STATEMENT OF FACTS

CCG is a North Carolina corporation in the business of purchasing at a discount and servicing customer loans from automobile dealers. On September 24, 1998, CCG entered into a loan and security agreement with Fremont Financial Corporation pursuant to which Fremont agreed to provide a revolving loan to CCG up to a maximum of \$3,000,000.00, in amounts based upon formulas relating to the amount of eligible receivables which CCG had purchased from dealers. After September 24, 1998, the Fremont loan was assigned to Summit Bank. In October 2000, CCG and Summit entered into an amended agreement and a revolving credit note. Among other things, the loan documents increased the maximum amount of the loan to \$7,500,000.00 upon satisfaction of certain conditions. Subsequently, Fleet became a successor-in-interest by a

merger with Summit.

Mr. Robert M. Sauls is the Chairman of the Board and the Chief Executive Officer of CCG. There are two other members of the Board of Directors, Mr. Brodie B. Baker and Mr. H. Gordon Niblock. In addition to Mr. Sauls, other officers of the Debtor are Mr. Roy Tipton, President; Jeff McBay, Vice President; and Sam Stark, Chief Financial Officer. Mr. Sauls owns 69% of the stock of the company with the remaining 31% split among various other entities.

For several years prior to September 1991, Mr. Sauls served as the Chairman of the Board and Chief Executive Officer of Manufactured Homes, Inc. and MANH Financial Services. These companies filed for Chapter 11 in the Middle District of North Carolina in a case known as the "Manufactured Homes, bankruptcy case #91-13018." Mr. Sauls was replaced as the Chairman of the Board and CEO prior to the filing of the bankruptcy petition.

At the time of the filing of the Manufactured Homes bankruptcy proceeding, there was a civil action that had commenced in the Superior Court of Forsyth County by an insurance company (National Fire Insurance) against Manufactured Homes. Manufactured Homes had asserted several counterclaims in this action. Herman Stephens was engaged to represent Manufactured Homes in the civil litigation.

Mr. Sauls was a creditor in the Manufactured Homes bankruptcy proceeding and wanted to ensure that the Debtor (Manufactured Homes) could continue to finance the civil litigation. In September 1991, Mr. Sauls retained Mr. Kenneth M. Greene to represent him in the Manufactured Homes bankruptcy proceeding. This representation extended through October, 1993. All parties agree that Mr. Sauls is a former client and not a current client of Mr. Greene or his law firm. In representing Mr. Sauls, Mr. Greene filed a proof of claim on behalf of Mr. Sauls and negotiated an agreement with the bankruptcy trustee (the case converted to a Chapter 7

proceeding) that would allow the civil litigation to go forward if Mr. Sauls financed the continuation of the lawsuit in exchange for a percentage interest in any recovery by Manufactured Homes. Ultimately, the bankruptcy trustee filed a motion with the bankruptcy court to approve a proposed settlement in the civil litigation. Mr. Sauls, through his counsel, Mr. Greene, opposed the settlement and presented testimony at the hearing as to why he did not believe the settlement was appropriate. Mr. Greene also represented Mr. Sauls in connection with a stand still agreement with NCNB National Bank in regards to a million dollar loan.

Mr. Sauls contends that during the course of this representation, Mr. Greene obtained background information and came to know “his decision making process, strategies and predilections in regard to the litigation of the claims and the civil action and other matters which could be used to the disadvantage of CCG and thereby adversely affect Mr. Sauls.” See Plaintiff’s Motion to Disqualify ¶ 10. The Court has also reviewed Mr. Sauls’ supplemental affidavit *in camera*. Nothing contained in the supplemental affidavit leads the Court to believe that Mr. Greene acquired any information that could be embarrassing to Mr. Sauls nor likely to be detrimental to CCG.

CONCLUSIONS OF LAW

In the Fourth Circuit, a motion to disqualify counsel requires the court to apply a two-part test. The movant must establish: (1) that an attorney-client relationship existed with the alleged former client; and (2) that the former representation is substantially related to the current controversy. See Plant Genetic Sys., N.V. v. Ciba Seeds, 933 F. Supp. 514 (M.D.N.C. 1996); SuperGuide Corp. V. DirectTV Inc., 141 F. Supp. 2d 616 (W.D.N.C. 2001) “Disqualification issues must be decided on a case-by-case basis.” Plant Genetic Sys., N.V. v. Ciba Seeds, 933 F. Supp. at 516. When considering a motion to disqualify, the court must balance a party’s right to

retain the counsel of his choice with the substantial hardship resulting from disqualification and the “public perception of and the public trust in the judicial system.” Id. at 517.

Additionally, Rule 1.9 of the Revised Rules of Professional Conduct provides in part:

(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 consents after consultation.

...

(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:

(1) use confidential information protected from disclosure by Rule 1.6 to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client or when the information has become generally known; or

(2) reveal confidential information protected from disclosure by Rule 1.6 except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

Since the parties do not dispute that Mr. Greene formerly represented Mr. Sauls, the relevant issue is whether Mr. Greene's former representation of Mr. Sauls is substantially related to the current controversy. If the matters are related, then it is likely that confidences were disclosed which could be used against the movant. First, the parties involved in this proceeding (CCG and Fleet) are entirely different from those in the former proceeding (Manufactured Homes, MANH and National Fire Insurance Company). Further, the subject matter of the present litigation is related to Fleet's alleged breach of a finance agreement with CCG. This dispute is centered upon the specific terms of an agreement between CCG and Fleet. Mr. Greene's prior representation of Mr. Sauls was limited to his interests as a creditor of Manufactured Homes. The Manufactured Homes litigation and the present CCG litigation involve different facts and issues, and different debtors, creditors and contracts. These matters are not substantially related.

The circumstances of this case are similar to those of Travco Hotels, Inc. v. Piedmont

Natural Gas Company, Inc., 332 N.C. 288, 420 S.E.2d 426 (1992). In that case, the attorneys for Piedmont moved to disqualify Travco's counsel, Womble Carlyle Sandridge & Rice, based upon its prior representation of Piedmont in which Piedmont had sought damages when one of its gas lines was broken during construction work. In Travco, Piedmont was being sued by a restaurant owner to recover for an explosion; therefore, the issue presented was what caused the gas line to rupture. The court found that the trial judge was within his discretionary authority in finding that the matter Womble Carlyle previously handled for Piedmont was not substantially related to the facts and issues in Travco. Id. at 299.

The Plaintiff argues that Mr. Greene's representation of Fleet will put Mr. Greene in the position where he would have the opportunity to reveal confidential information or use that information to the detriment of the Plaintiff and to the benefit of Fleet, despite the fact that the matters are not substantially related. Rule 1.6 of the Revised Rules of Professional Conduct provides:

(a) "Confidential information" refers to information protected by the attorney-client privilege under applicable law, and other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client. For the purposes of this rule, "client" refers to present and former clients.

...

(c) Except when permitted under paragraph (d), a lawyer shall not knowingly:

- (1) reveal confidential information of a client;
- (2) use confidential information of a client to the disadvantage of the client; or
- (3) use confidential information of a client for the advantage of the lawyer or a third person, unless the client consents after consultation.

Mr. Sauls contends that Mr. Greene obtained confidential information regarding Mr. Sauls decision making process and strategies. The Court has reviewed the affidavit submitted by

Mr. Sauls *in camera*. There is no indication that Mr. Greene was privy to any practices or strategies which were unique, unexpected or irregular. While there may be some similarities between the business operations of Manufactured Homes and those of CCG, these similarities appear to be of the type that would be anticipated within an industry. No confidential information regarding the operations of CCG was disclosed. No information regarding CCG's relationship with Fleet was disclosed. Mr. Greene obtained no confidential, personal information regarding Mr. Sauls which would be embarrassing or harmful to him, or relevant to the present dispute. There is nothing in the evidence to indicate that Mr. Greene has any confidential information that pertains to any issue presented in this matter.

When considering a motion to disqualify, a court may also balance the circumstances of the case with any practical considerations. Capacchione v. Charlotte-Mecklenburg Board of Ed., 9 F. Supp. 2d 572, 582 (W.D.N.C. 1998). Disqualification of Mr. Greene in this case would prejudice Fleet. Mr. Greene has represented Fleet throughout CCG's Chapter 11 and Chapter 7 proceeding. He has participated in numerous hearings and listened to hours of testimony. Mr. Greene's knowledge of the facts and circumstances of this case will facilitate the efficient resolution of this matter. Disqualification of Mr. Greene at this point in the proceedings would cause delay and expense. Mr. Greene is bound by the ethical obligations imposed by the Revised Rules of Professional Conduct. In addition, Mr. Greene is not aware of any confidential information related to the present matter. See Affidavit of Kenneth M. Greene ¶ 11. The file from the proceeding ten years ago is either in storage or has been destroyed. See Affidavit of Kenneth M. Greene ¶ 12. CCG will not be prejudiced by the information Mr. Greene received in connection with a matter that is not substantially related to the present facts and issues.

"Disqualification is a serious matter which cannot be based on imagined scenarios of

conflict, and the moving party has a high standard of proof to meet in order to prove that counsel should be disqualified.” Plant Genetic Sys., N.V. v. Ciba Seeds, 933 F. Supp. at 517. CCG is asking the Court to hypothesize a scenario of conflict based upon Mr. Saul’s assertion that Mr. Greene knows how he thinks as a result of their relationship nine years earlier in a different matter. CCG has presented no evidence that there was any confidential communication between Mr. Greene and Mr. Sauls which bears any relationship to the lawsuit between CCG and Fleet, or which would engender any prejudice to CCG even if it were disclosed. Allowing Mr. Greene to continue as counsel for Fleet will not compromise the integrity of this proceeding.

For the reasons stated herein, the Plaintiff’s Motion to Disqualify Kenneth M. Greene as Counsel for Defendant is denied.

This the 23 day of May 2002.

CATHARINE R. CARRUTHERS

Catharine R. Carruthers
United States Bankruptcy Judge