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United States District Court,
S.D. New York.

Kadian MCBEAN, et al. Plaintiffs,
v.
THE CITY OF NEW YORK, et al. Defendants.

No. 02 Civ. 5426(GEL). | June 3, 2003.

City moved to disqualify attorney representing claimants challenging alleged policy of strip searching misdemeanor arrestees without reasonable suspicion of weapons or contraband concealment. The District Court, Lynch, J., held that: (1) counsel would not be disqualified for representing city in case in which he lacked substantial involvement, and (2) counsel would not be disqualified due to involvement in case differing from present case.

Motion denied.

Attorneys and Law Firms

Michael A. Cardozo, Corporation Counsel of the City of New York (Deborah I. Meyer), New York, NY, for defendant City of New York, of counsel.

Richard J. Cardinale, Cardinale Hueston & Marinelli, Brooklyn, NY, and Robert N. Isseks, Middletown, NY, for plaintiffs Kadian McBean, et al.

Opinion

OPINION AND ORDER

LYNCH, J.

***1** In this putative class action for federal civil rights violations arising from two alleged policies or practices of the New York City Deparment of Corrections ("DOC") applied at New York City jails, defendant New York City has moved to disqualify plaintiffs' counsel on the ground that one of them previously represented the City in similar litigation and had access to confidential materials. The motion will be denied.

BACKGROUND

The complaint in this action alleges principally (1) that, in violation of the First, Fourth, and Fourteenth Amendments and the clear mandate of the Second Circuit in *Shain v. Ellison,* 273 F.3d 56 (2d Cir.2001), misdemeanor arrestees brought to New York City jails have been subject to strip searches in the absence of any "reasonable suspicion that the detainees [were] concealing weapons or contraband," (Second Am. Compl. ¶¶ 1(i), 12), and (2) that, in violation of the right of detainees "to refuse medical care" under the First, Fourth, and Fourteenth Amendments, female misdemeanor detainees at New York City jails are subject to "nonconsensual gynecological examinations." (*Id.* ¶ ¶ 1(ii), 21.)

The City has moved to disqualify plaintiffs' counsel Michael Hueston based upon Hueston's work for the City as an Assistant Corporation Counsel ("ACC") on two earlier actions filed in this District on behalf of detainees who had been strip-searched while in DOC custody: *Tyson v. City of New York,* Dkt. No. 97 Civ. 3762(KMW), and *Kellner v. City of New York,* Dkt. No. 99 Civ. 4082(JSM). *Tyson,* brought in 1997 and settled on July 5, 2001, was a class action on behalf of "all persons who have been or will be arrested for misdemeanor or noncriminal offenses in New York and Queens Counties and then were or will be strip searched pursuant to City, DOC, and NYPD policy, practice and custom." (Meyer Decl. Ex. E ¶ 27.) *Kellner* was an individual action by a felony arrestee who was stripped searched while in DOC custody on January 3, 1997; it was brought in 1999 and settled on February 9, 2001. The City also moves to disqualify Hueston's co-counsel Richard J. Cardinale and Robert N. Isseks -Cardinale because he is Hueston's law partner, and Isseks because of his "close working relationship[ ]" with Hueston in this and other civil rights class actions. (D. Mem. at 3.)

The City made a similar motion to disqualify these attorneys in a pending Eastern District of New York class action, *Spinner v. City of New York,* Dkt. No. 01 Civ. 2715(CPS), in which plaintiffs allege similarly illegal strip searches by the New York Police Department and DOC in Brooklyn precincts and jails. That motion was referred to Magistrate Judge Cheryl L. Pollack, who denied it on May 20, 2000. *Spinner v. City of New York,* slip op. at 44 (E.D.N.Y. May 20, 2002) (*"Spinner I"*). Judge Pollak later denied the City's motion for reconsideration based on "newly-discovered evidence." *Spinner v. City of New York,,* slip. op. at 2 (E.D.N.Y. Jan. 28, 2003) (*"Spinner II"*).[1]

[1] Those rulings are now on appeal before Judge Sifton.

***2** The parties have stipulated that this Court may consider the factual record presented before Judge Pollak in *Spinner.* Having reviewed that record and Judge

Pollak's thorough and well-reasoned opinions, the Court agrees with her findings of fact (*Spinner I,* slip op. at 32-41; *Spinner II,* slip op. at 19-22), which, to the extent relevant to the instant motion, will be adopted here. Similarly, Judge Pollak extensively and accurately states the relevant case law on the issues raised in this motion (*Spinner I,* slip op. at 14-27), so there is no need to repeat her scholarly recitation of the underlying law of disqualification. Rather, it will be sufficient to state and apply the appropriate tests for disqualification under these circumstances.

DISCUSSION

The City bases its motion for disqualification on Canons 4 and 9 of the Code of Professional Responsibility. Canon 4 provides that "A lawyer should preserve the confidences and secrets of a client." In reviewing disqualification motions under Canon 4, the Second Circuit has held that counsel should be disqualified if:

> (1) the moving party is a former client of the adverse party's counsel;
>
> (2) there is a substantial relationship between the subject matter of the counsel's prior representation of the moving party and the issues in the present lawsuit; and
>
> (3) the attorney whose disqualification is sought had access to, or was likely to have had access to, relevant privileged information in the course of his prior representation of the client.

Evans v. Artek Systems Corp., 715 F.2d 788, 791 (2d Cir.1983). Canon 9 provides that lawyers "should avoid even the appearance of impropriety," and, in furtherance of that goal, Disciplinary Rule ("DR") 9-101(B) prohibits a lawyer from "accept[ing] employment in a matter in which he had substantial responsibility while he was a public employee." A "matter," for the purposes of this Rule, is "a discrete and isolatable transaction or set of transactions between identifiable parties." *Int'l Union. United Auto. Aerospace and Agric. Implement Workers of Am. v. Nat'l Caucus of Labor Committees,* 466 F.Supp. 564, 568 (S.D.N.Y.1979) (quoting ABA Formal Op. No. 342 (Nov. 24, 1975), *in* 62 A.B.A.J. 517 (1975)). Thus, a lawyer should be disqualified only if (1) the pending matter involves the same transaction or set of transactions between identifiable parties and (2) he previously had substantial responsibility for the same matter as a public employee. *Laker Airways Ltd. v. Pan Am. World Airways,* 103 F.R.D. 22, 29 (D.D.C.1984).

I. *Tyson*

[1] The City does not argue that Hueston's involvement with *Tyson* should disqualify him under DR 9-101(B); the parties apparently agree that he did not participate substantially in that case within the meaning of the rule. (D. Mem. at 20; P. Mem. at 23.)

With respect to Canon 4, the first element of the *Evans* test is satisfied; the City was indisputably a "former client of the adverse party's counsel," Hueston. The parties dispute whether *Tyson* and the instant case bear a "substantial relationship" to each other, and whether Hueston "had access to, or was likely to have had access to, relevant privileged information."

***3** There is some basis for the City's claim that the *Tyson* litigation is substantially related to the instant litigation, since it too was a class action aimed at the same defendant's alleged blanket policy or practice of strip-searching misdemeanor arrestees.[2] But this Court need not address the relationship between the instant matter and the *Tyson* case because it agrees with Judge Pollak's key findings on the remaining element of the Canon 4 inquiry: access or likely access to relevant privileged information. First, there is no presumption that Hueston "had access" to confidential materials, since he did not have "substantial responsibility" for *Tyson. Spinner I,* slip op. at 41. Second, Hueston did not *actually* obtain confidential information relevant to *Tyson. Spinner I,* slip op. at 36; *Spinner II,* slip op. at 19. Therefore, Hueston's role in the *Tyson* litigation does not call for disqualification here.

[2] Judge Pollak, of course, did not address any similarity between the instant case and *Tyson.* Her conclusion that *Spinner* and *Tyson* were not "substantially identical or ... clearly connected" is of limited relevance here, since it was based primarily on her findings that "separate and independent agencies [were] involved" in the two cases, and that *Tyson,* in contrast to *Spinner,* involved a written directive. *Spinner I,* slip. op. at 34. Here, in contrast, the challenged policy was adopted by the same agency (DOC) as in *Tyson,* and the policy arguably is derived from some of the same written pronouncements as those challenged in that case. (*See* D. Reply Mem. at 6-7.)

II. *Kellner*

[2] In contrast to *Tyson,* the parties do not dispute that Hueston, while an ACC, "had substantial responsibility" for the *Kellner* case. This Court finds, however, that the *Kellner* action was sufficiently distinct from the instant action that it is neither "substantially related" to it, nor "the same matter," such that disqualification is called for. True, both *Kellner* and the complaint here involve the

same agency, DOC, operating, arguably, under the same underlying policy. But the very fact that multiple individual and class action lawsuits have been filed and litigated, all attacking that "policy" in different circumstances or as applied to different types of arrestees and detainees, indicates that not all injuries traceable to that policy are the same "matter"; certainly they are not all the result of a single transaction or set of transactions. The various documents relating to DOC's policies are no longer confidential, if they ever were, and their application to different groups of arrestees at different institutions at different times has resulted in multiple litigations raising different factual and legal issues. *Kellner,* in particular, involved a felony arrestee, and this case expressly involves only misdemeanor arrestees, since *Shain* applies only to them. *See Shain,* 273 F.3d at 59. *Kellner* was an individual action that dealt only with the legality of the strip search of one particular plaintiff in 1997; this case, in contrast, involves a class of arrestees who have been detained "since 1999" (Compl.¶ 5), and challenges policies relating both to strip searches and to gynecological examinations. The strip search alleged in *Kellner* was conducted by a DOC officer at Manhattan Central Booking (Meyer Decl. Ex. F ¶ 13), whereas the complaint here alleges strip searches at six New York City jails (Compl.¶ 5). Thus, the cases are clearly not the "same matter," and DR 9-101 does not prohibit Hueston from handling this case after having represented the City in *Kellner.*

***4** In arguing that DR 9-101 applies here, the City's relies heavily on *General Motors v. City of New York,* 501 F.2d 639 (2d Cir.1974), in which the Court of Appeals disqualified a former Justice Department lawyer who had handled government antitrust litigation against General Motors from later representing New York City in its own antitrust suit against that company. That reliance is misplaced. While the City accurately cites broad dicta in *General Motors* that "there lurks great potential for lucrative returns in following into private practice the course already charted with government resources" (D. Mem. at 20, quoting *General Motors,* 501 F.2d at 650), courts considering disqualification motions under DR 9-101 have been primarily concerned with the confidential information an attorney obtains through government employment. *See, e.g., Twin Laboratories, Inc. v. Weider Health & Fitness,* Dkt. No. 89 Civ. 949(MBM), 1989 WL 49368, at *3 (S.D.N.Y. May 4, 1989) (citing potential for "exploitation of secrets" gained from the "broad power of the government to obtain discovery"). The *General Motors* court itself placed great emphasis on the information the attorney obtained during his government service. In distinguishing that case from *United States v. Standard Oil Co.,* 136 F.Supp. 345 (S.D.N.Y.1955), the court emphasized the "likelihood that information pertaining to the pending matter reached the attorney" during his government employment, *General Motors,* 501 F.2d at 651 (quoting Kaufman, *The Former Government Attorney and the Canons of Professional Ethics,* 70 Harv. L.Rev. 657, 665 (1957)), and found the two cases at issue to be the same "matter" largely because "virtually every overt act of attempted monopolization in the City's complaint is lifted in haec verba from the Justice Department complaint." *Id.* at 650. It deemed relevant the past history of alleged "predatory practices," which the attorney had been familiar with from his work at the Justice Department, only because that pattern was central to an "essential element in proving ... intent to monopolize or an abuse of monopoly power," as well as to the possible defense that "GM is a passive recipient of monopoly power." *Id.* Here, DOC's practices at the time of *Kellner* in 1997 are irrelevant to the principal issue here: whether or not the members of this plaintiff class, which consists only of persons detained "since 1999," were in fact strip searched in violation of *Shain.* If *General Motors* required disqualification here, then any ACC who personally handled any of the large variety of civil rights issues that come up in the City's Law Department would effectively be "sterilize[d] ... in too large an area of law for too long a time," and "prevent[ed] ... from engaging in practice of the very specialty for which the government sought his service." *Standard Oil,* 136 F.Supp. at 363.

Nor are the instant case and *Kellner* "substantially related" under the *Evans* Canon 4 test. "The fact that both matters share a common area of law" - the constitutionality of strip searching arrestees - "or that the cases involve ... the same agency are not a sufficient basis upon which to find substantial relationship." *Spinner I,* at 23 (citing *Laker,* 103 F.R.D. at 40.) To the extent that a "substantial relationship" exists here, it is among the legal issues, not the defendants or the facts. *See Twin Laboratories, Inc. v. Weider Health & Fitness,* Dkt. No. 89 Civ. 949(MBM), 1989 WL 49368, at *5 (S.D.N.Y. May 4, 1989) (citing absence of overlap of "factual matters"). *Kellner* was settled after minimal discovery, and what facts there were (most notably, the fact that plaintiff in *Kellner* was a felony arrestee) distinguish, rather than replicate, the facts alleged here.

***5** The City argues that *Kellner* nevertheless became, from June 1999 through January or February 2000, substantially related to the instant case because Hueston, unaware at first that the plaintiff had been charged with a felony when he was searched, treated the case as an opt-out from the *Tyson* class action. (D. Mem. at 7.) However, Hueston's subjective belief that his plaintiff was a misdemeanor arrestee is not relevant to the objective reality of whether the two actions are substantially related. Hueston's understanding of the nature of the *Kellner* case *is* relevant only to the extent that it affected his actions, and specifically, to whether he, as a result of this (mis)understanding, actually obtained confidential information about misdemeanor arrestee cases such as *Tyson* and the instant case. But this Court

and Judge Pollak have both found that he did not receive any such information. Since *Kellner* is not itself substantially related to this litigation, whatever confidential information he acquired about the factual particulars of that case is of no consequence under the *Evans* standard.

CONCLUSION

For the reasons stated above, defendant's motion to disqualify Michael Hueston is denied. Since the motion to disqualify Richard Cardinale and Robert N. Isseks is based on imputing Hueston's alleged conflict to his associates, that motion is also denied.

SO ORDERED.