

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

RUSSELL G. BUTTERWORTH, ET AL., :
Plaintiffs, :
 :
v. : Civil Action No. 3:00CV413(CFD)
 :
CITICORP MORTGAGE, INC.; OCWEN :
FEDERAL BANK, FSB; ABC BANKS; :
WITHERSPOON LAW OFFICES; :
THOMAS W. WITHERSPOON, JR.; :
JOHN P. FAHEY; MICHELLE D. :
SENSALE; and XYZ LAW FIRMS, :
Defendants. :

RULING ON MOTIONS TO DISQUALIFY COUNSEL

I. Introduction

In March 1989, Attorney Robert A. Heghmann and his wife agreed to two mortgages on property located in Avon, Connecticut, in connection with their purchase of that property. First, the Heghmanns borrowed \$278,000 from Citicorp Mortgage, Inc. (“CMI”), evidenced by a promissory note in that amount and secured by a first mortgage from the Heghmanns to CMI (“the first mortgage”). Second, the Heghmanns borrowed \$30,000 from Russell G. and M. Diane Butterworth (“the Butterworths”), the plaintiffs in this case. That loan was evidenced by a promissory note in that amount and secured by a second mortgage from the Heghmanns to the Butterworths (“the second mortgage”). The Butterworths were also the sellers to the Heghmanns of the property subject to the two notes and mortgages.

On November 28, 1994, CMI began an action in the Connecticut Superior Court to foreclose its first mortgage against the Heghmanns. The Butterworths were also named as defendants in the foreclosure action because of the second mortgage. They did not, however, file

an appearance in that case and a default was entered against them. CMI,¹ which was represented by the Witherspoon Law Offices and the attorneys named as defendants in this action, ultimately was successful in foreclosing on the first mortgage and taking the property clear of the second mortgage.

In the instant action, which was brought pursuant to 42 U.S.C. §1983 and related statutes, the Butterworths claim that they were not served with a summons or complaint in the state foreclosure case, and thus were denied due process and equal protection under the law. They allege that these constitutional violations were a result of a conspiracy by the named defendants, and that the state constructive service statute, Conn. Gen. Stat. § 52-59b, is constitutionally deficient. Mr. Heghmann represents the Butterworths in this action.

Pending before the Court, among other motions, are defendants' motions to disqualify Mr. Heghmann [Documents # 6 and # 18], and plaintiffs' motion to disqualify Michele D. Sensale [Document # 26]. For the following reasons, defendants' motions are GRANTED. Plaintiffs' motion is DENIED, without prejudice.

II. Discussion

The defendants claim that Mr. Heghmann should be disqualified because (1) he will be called as a witness in this case, and (2) his representation of the Butterworths presents a conflict of interest because his own interests are, or are likely to be, adverse to those of his clients.²

¹Ocwen Federal Bank, FSB, ("Ocwen") is the successor in interest to CMI based upon an assignment of the mortgage from CMI to Ocwen, and thus holds title to the property as a result of the foreclosure action.

²The defendants also claimed that Mr. Heghmann should be disqualified based on Local Rule of Civil Procedure 2(c)(1), which requires attorneys of record who do not have an office in Connecticut to designate an office in the state where service of papers can be made. Mr.

Heghmann argues that he should not be disqualified because if called as a witness, he will testify only as to uncontested matters, and that his interests do not conflict with those of his clients. In addition, he claims that he should not be disqualified because this case, like the foreclosure action from which it arises, is complex, and it is unlikely that the Butterworths will find another attorney willing to represent them.

Under the Local Rules of Civil Procedure for the U.S. District Court, “[a] lawyer shall not accept employment in contemplated or pending litigation if he or she knows or it is obvious that he or she . . . ought to be called as a witness.” D. Conn. L. Civ. R. 33(a). There are three exceptions to this rule. A lawyer may accept such employment when the lawyer’s testimony will relate solely to (1) an uncontested matter; (2) a matter of formality when there is no reason to believe that substantial evidence will be offered in opposition to the testimony; or (3) the nature and value of legal services rendered in the case by the lawyer to the client. See id.

In this case, Mr. Heghmann is likely to testify as to at least three issues. First, he states that he is the person who first informed the Butterworths of the foreclosure action against them and him. As a result, he is likely to testify as to when the plaintiffs received actual notice of the foreclosure action. Second, the defendants indicated that they intend to examine the Butterworths’ contractual rights under the second mortgage, and Mr. Heghmann’s testimony would be relevant to the validity of that mortgage. Finally, Mr. Heghmann may also be called to testify as to the amount outstanding on the second mortgage, including reductions on the balance due to his own payments. None of these issues is likely to be uncontested and none is a matter of

Heghmann subsequently has indicated in his memorandum in opposition to the first motion to disqualify and in the hearing held before this Court that he has designated such an office. The defendants withdrew that basis for the motions based on that representation.

mere formality. Thus, pursuant to Local Rule 33(a), Mr. Heghmann is disqualified from representing the Butterworths.

In addition, under Rule 1.7(b) of the Rules of Professional Conduct of the Connecticut Superior Court³, “[a] lawyer shall not represent a client if the representation of that client may be materially limited . . . by the lawyer’s own interests, unless (1) [t]he lawyer reasonably believes the representation will not be adversely affected; and (2) [t]he client consents after consultation.” However, “when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer cannot properly ask for such agreement or provide representation on the basis of the client’s consent.” Rules Prof’l. Conduct R. 1.7(b) cmt. Here, Mr. Heghmann’s interests are in likely conflict with those of his clients, the Butterworths. For example, any settlement discussions may very well result in actual conflicts between the positions of the Heghmanns and the Butterworths: any amounts recovered by the Butterworths in this action may very well directly offset Mr. Heghmann’s own outstanding financial obligation to them under the note. As a result, Attorney Heghmann’s own personal interests could be different from those of the Butterworths in that setting. Moreover, there is an insufficient basis to conclude that the plaintiffs consented to Mr. Heghmann’s representation after being consulted about this potential conflict.⁴ Nevertheless, even if they had consented, their waiver would be unacceptable because it is reasonable to assume that no disinterested lawyer would accept

³Rule 3 of the Local Rules of Civil Procedure for the U.S. District Court, District of Connecticut, adopts most of the Rules of Professional Conduct of the Connecticut Superior Court, including Rule 1.7(b).

⁴Attorney Heghmann has submitted an affidavit from Mr. Butterworth, but it does not discuss the potential conflict.

