UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

JANET JENKINS, Plaintiff, v. KENNETH L. MILLER, et al., Defendants.	No. 2:12-cv-184-WKS

PLAINTIFF'S MOTION FOR LEAVE TO FILE SUR-REPLY TO DEFENDANT TIMOTHY D. MILLER'S MOTION TO DISQUALIFY PLAINTIFF'S COUNSEL

Plaintiff Janet Jenkins moves for leave to file a sur-reply to Defendant Timothy Miller's motion to disqualify Plaintiff's counsel because Defendant's reply relies on a brand-new argument in support of disqualification and merely tacks on part of his original argument in three sentences at the end. ECF 636. In support, Plaintiff states the following:

1. Defendant filed a motion to disqualify Plaintiff's counsel on February 1, 2021. In just eleven paragraphs, barely spanning three pages, Defendant argued only that Rule 1.9(a) of the Vermont Rules of Professional Conduct, which governs duties to former clients, prevents counsel from continuing to represent Plaintiff because, he says, Plaintiff's and Isabella's interests are adverse and Isabella has affirmatively objected to that continued representation. *See* Mot. ¶¶ 7–10. Defendant's motion made no reference to or argument under Rule 1.7 of the Vermont Rules of Professional Conduct, which governs concurrent conflicts of interest.

2. On February 16, 2021, Plaintiff filed a response in opposition to Defendant's motion. ECF 645. In summary, she argued that Rule 1.9 does not prevent counsel from continuing to represent Plaintiff because Plaintiff's and Isabella's interests are not materially adverse and because counsel represented them jointly and have not switched sides in this case.

She further argued that, even if they have materially adverse interests and the Court applies the Second Circuit's successive-representation test to determine whether that conflict of interest warrants disqualification, Defendant fails on the test's first prong because he is not a former client of Plaintiff's counsel.

3. On February 25, 2021, Defendant filed a reply. ECF 653. In that reply, Defendant rejects his original argument that counsel have a conflict of interest between a current client (Plaintiff) and a former client (Isabella). *See, e.g.*, Reply 4 ("Timothy does not cite the successive relationship test because that test does not apply to the facts of this case."); *id.* ("[T]here is not a 'successive representation' and the 'successive representation test' does not apply in this case."); *id.* at 8 ("Janet and Isabella's conflict of interest does not arise from separate successive cases …."). Instead, he now argues that counsel had a conflict of interest between *concurrent* clients that continues to exist despite Isabella's firing of counsel upon her dismissal. *See, e.g.*, *id.* at 2 ("This express conflict occurred while counsel was still concurrently representing both Janet and Isabella as parties in this case and continues even after Isabella has had her claims dismissed."); *id.* at 4 ("In this case, counsel has represented both Isabella and Janet concurrently ***in the same case***. … In this case, counsel has concurrently represented both Janet and Isabella in the same case and desires to continue to represent just Janet ***in this same case***." (emphasis in original)); *id.* at 8 ("It is prima facie improper for counsel, having concurrently represented Isabella and Janet and receiving contrary instruction, to continue to represent just Janet."); *id.* ("Janet and Isabella's conflict of interest … arise[s] … from their previous concurrent representation in this same case."); *id.* ("Janet has the burden of proof of showing that counsel that concurrently represented both her and Isabella in this case should not be disqualified."). Defendant still somewhat argues

that Rule 1.9 applies, but he tacks that argument on at the very end in three sentences addressing only the requirement of written informed consent. *See* Reply 9.

4. Defendant clearly forfeited all his new arguments by failing to make them in his opening brief. *See, e.g.*, *Hirschmann v. Green Mountain Glass, LLC*, No. 5:15-cv-34, 2018 WL 4896015, at *1 n.2 (D. Vt. Oct. 9, 2018) (Crawford, C.J.) ("It is well settled that courts should not consider arguments first raised in a party's reply brief which afford no opportunity for response from the opposing party." (quoting *Haywin Textile Prods., Inc. v. Int'l Fin. Inv.*, 137 F. Supp. 2d 431, 434 (S.D.N.Y. 2001))); *accord Klinker v. Furdiga*, 22 F. Supp. 3d 366, 367 n.1 (D. Vt. 2014) (Reiss, C.J.); *Snider v. Colvin*, No. 2:14-cv-99, 2015 WL 4897871, at *7 n.3 (D. Vt. Aug. 17, 2015) (Conroy, J.). Therefore, the Court should consider, at most, only the argument he made in his motion that Rule 1.9(a) supposedly prohibits counsel from continuing to represent Plaintiff.

5. Plaintiff requests leave to file a sur-reply addressing Defendant's new arguments in case the Court decides in its discretion to consider those new arguments.

6. Pursuant to Local Rule 7(a)(7), Plaintiff certifies that she made a good-faith attempt to obtain Defendant's agreement to the requested relief. On March 4, 2021, Plaintiff's counsel asked Defendant's counsel whether he would oppose this motion. Defendant's counsel responded that he did not believe Defendant's argument had changed and asked Plaintiff's counsel to point out where in Defendant's motion he had argued that counsel's "conflict in successive cases is what requires …disqualification." Plaintiff's counsel responded explaining that Defendant's motion cited and applied only Rule 1.9(a) of the Vermont Rules of Professional Conduct, which by its very terms governs successive representations and is not affected by whether the case is the same or different. Defendant did not respond.

CONCLUSION

Plaintiff's motion for leave to file a sur-reply to Defendant's motion to disqualify Plaintiff's counsel should be granted.

Respectfully submitted.

March 4, 2021

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CERTIFICATE OF SERVICE

I hereby certify that, on this date, the foregoing document was served on the following counsel of record through the Court's CM/ECF system:

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March 4, 2021

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