At an I.A.S. Part 64 of the Supreme Court of the State of New York, held in the County of Kings at the Courthouse, 360 Adams Street, Brooklyn, New York, on the 3rd day of April, 2017.

PRESENT: HON. KATHY J. KING,
Justice.

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MALKIE WIEDERMAN,

DECISION/ORDER

Plaintiff(s),

Index No. 4057/2016

-against-

ISSAC HALPERT AND MARSHA HALPERT,

Defendant(s).

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The following papers numbered 1-5 read herein:	Papers Numbered:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1 - 4
Opposing Affidavits (Affirmations)	5 - 6
Reply Affidavits (Affirmations)	7 - 8
Affidavit (Affirmation)	
Memorandum of Law	9 - 10

In this debt collection action, Defendants, Issac Halpert and Marsha Halpert, ("Defendants") move by order to show cause for a temporary restraining order (i) enjoining Plaintiff and Plaintiff's attorney from taking any further actions to satisfy Plaintiff's judgment against Defendants out of the personal bank account of the Defendants' daughter, Batsheva Halpert ("Batsheva"), and/or taking any additional actions on behalf of Plaintiff to satisfy Plaintiff's judgment, and (ii) preventing Plaintiff's attorney from taking any additional actions on behalf of Plaintiff in furtherance of, assisting with, or in any attempt to satisfy or obtaining satisfaction of Plaintiff's judgment against the Defendants while the instant motion is pending. Upon the signing of the order to show cause, the Court granted the temporary restraining order

pending the hearing on the return date. The Court notes that the prayer for relief contained in Defendants order to show cause does not request vacatur of the restraining notice issued against the personal bank account of Batsheva Halpert, nor does it request disqualification of Plaintiff's prior attorney, Jacob Zelmonovitz, Esq. Notwithstanding this omission, the Court shall consider Defendants' application for vacatur and disqualification, since the relief sought is contained in the attorney affirmation and supporting affidavits in support of the order to show cause. Significantly, Plaintiff's attorney, in opposition, did not cite said omission.

FACTS

In 2016, Plaintiff filed a foreign judgment against Defendants in the amount of $600,892.49 based on a judgment obtained on default in Connecticut Superior Court. That action is presently on appeal. Plaintiff is presently represented by Jacob Zelmonovitz, Esq. in the instant proceeding to collect the judgment. In 2009, Mr. Zelmonovitz had previously represented the Defendants in one action, and their son and daughter in law in a separate lawsuit, prior to the Connecticut action. According to Defendants, as a result of their attorney/client relationship, Mr. Zelmonovitz learned confidential and secret information about Defendants' finances, businesses, rental properties, and other financial assets, as well as information about Defendants' other children, including their daughter, Batsheva. Defendants state in their respective affidavits that their daughter received a letter from New York Community Bank advising that her personal bank account was being restrained and that said letter was the first and only letter received from Plaintiff. Defendants now seek to vacate said notice and disqualify Mr. Zelmonovitz from representing Plaintiff. Pending the determination of the motion, the Court extended the temporary restraining order.

DISCUSSION

CPLR §5222(d) requires that a judgment creditor who serves a restraining notice on a third-party must serve a copy of the restraining notice together with a "Notice to Judgment Debtor or Obligor" by first class mail or personally deliver, to the judgment debtor or obligor. In the instant case, a review of the moving papers indicate that Plaintiff has failed to provide proof that he served *both* the restraining notice together with the Notice to Judgment Debtor or Obligor pursuant to CPLR §5222(d) on Defendants. Accordingly, the Court finds that Plaintiff did not provide proper notice of the restraining notice pursuant to CPLR §5222(d).

Additionally, contrary to Plaintiff's contentions, the documentary evidence provided by Defendants sufficiently rebuts the presumption of joint tenancy, since it establishes that defendant Marsha Halpert, is a co-signer, and that Batsheva is the only individual who deposits and withdraws money in the account. Under New York Law, "the deposit of funds into a joint account constitutes prima facie evidence of intent to create a joint tenancy." *Fragetti v. Fragetti*, 262 A.D.2d 527, 527, 692 N.Y.S.2d 442, 443 (2nd Dept 1999). However, the presumption "can be rebutted by providing direct proof that no joint tenancy was intended or substantial circumstantial proof that the joint account had been opened for convenience only." *Id; see also In re Richichi* (2 Dept. 2007) 38 A.D.3d 558, 832 N.Y.S.2d 57. Accordingly, the Court finds that that Defendant, Marsha Halpert, does not have a beneficial interest in the subject bank account.

Since service of the restraining notice is defective and Defendant Halpert does not have a beneficial interest in Batsheva's bank account at New York Community Bank, the restraining notice must be vacated as a matter of law.

DISQUALIFICATION OF ATTORNEY JACOB ZELMANOVITZ

Defendants also move for disqualification of Plaintiff's counsel, Jacob Zelmanovitz.

Disqualification of counsel conflicts with the general policy favoring a party's right to representation by counsel of choice, and it deprives current clients of an attorney familiar with the particular matter" (*Tekni-Plex, Inc. v Meyner & Landis*, 89 NY2d 123, 131 [1996]). Thus, a party seeking to disqualify an attorney for an opposing party on the ground of a conflict of interest has the burden of demonstrating three elements: (1) the existence of a prior attorney-client relationship between the moving party and opposing counsel, (2) that the matters involved in both representations are substantially related, and (3) that the interests of the present client and former client are materially adverse (*see id.* at 131; *Mediaceja v Davidov*, 119 AD3d 911 [2014]; *Campbell v McKeon*, 75 AD3d 479 [2010]; **592* Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.9). Since the "substantially related" standard is now the norm (*see Sessa v Parrotta*, 116 AD3d 1029 [2014]; *Reem Contr. Corp. v Resnick Murray St. Assoc.*, 43 AD3d 369 [2007]; *Medical Capital Corp. v MRI Global Imaging, Inc.*, 27 AD3d 427 [2006]), the fact that an attorney has learned of some of a former client's financial information and corporate structure in prior litigation is not in and of itself a basis for disqualification (*see* NY St Bar Assn Comm on Prof Ethics Op 628 [1992]; *see also Abselet v Satra Realty, LLC*, 85 AD3d 1406, 1407 [2011]).

Absent a substantial relationship between the prior litigation and the present case, disqualification would be warranted only upon a showing that in the prior action, prior counsel had received specific confidential information substantially related to the present litigation *Lightning Park, Inc. v. Wise Lerman & Katz, P.C.*, 197 A.D.2d 52, 609 N.Y.S.2d 904 (1st Dept 1994). To obtain disqualification, the former client need not show that confidential information necessarily will be disclosed in the course of the litigation; rather, a reasonable probability of disclosure should suffice. *Greene v. Greene*, 47 N.Y.2d 447, 418 N.Y.S.2d 379 (1979).

In the instant matter, it is undisputed that Defendants had a prior attorney-client relationship with Mr. Zelmonovitz.

Mr. Zelamanovitz previously represented the Halperts in a 2009 action based on identity theft. Additionally, Mr. Zelamanovitz represented the Defendants children in a second action based on fraud, where he was privy to confidential information about the finances, various business entities, rental properties, property ownership and other financial assets of both the Halperts and their children. Defendants argue that Mr. Zelamanovitz will utilize the confidential financial information he obtained as prior counsel to both the Defendants and the children of Defendants to collect on a money judgment on behalf of Plaintiff Malkie Weiderman.

In opposition, Mr. Zelamanovitz contends that (i) the matters involved in both the prior proceedings and the case at bar are not substantially-related; and (ii) no confidential information was obtained during his representation that can be used to the Defendants disadvantage, and (iii) he is only using information available through public resources to conduct judgment enforcement proceedings.

The Court does not find that the prior representation of the Defendants is substantially-related to the instant matter. However, the Court finds that a prior attorney-client relationship existed between the Defendants and Mr. Zelmanovitz, and the confidential information that he had knowledge of during his prior representation can be used adversely against the Defendants in this action.

Contrary to Mr. Zelamanovitz's contentions, it is well settled that doubts as to the existence of conflict of interest must be resolved in favor of disqualification so as to avoid even the appearance of impropriety. *See Cohen v. Cohen*, 125 AD3d 589, 2 NYS3d 605 (2nd Dept 2015); *Galanos v. Galanos*, 20 AD3d 450, 797 NYS2d 774 (2nd Dept 2005).

In *Sirianni v. Tomlinson, et. al,* a shareholder derivation action, disqualification of counsel was warranted where the Defendant's counsel had previously represented Plaintiff's wife. The Court found that the record supports the contention that there existed a reasonable possibility that confidences were exchanged during Plaintiff's counsel's prior representation of Defendant's wife which related to Defendant's financial position and economic affairs and which information could be utilized in this action by counsel for benefit of his client. The Court, in disqualifying counsel, found that the interests of Defendant's wife and defendant are one and the same, since there exists, if not actual conflict of interest, at least appearance of impropriety. *See Sirianni v. Tomlinson, et al*, 133 AD2d 391, 519 NYS2d 385.

Accordingly, the Court finds that it is proper under these facts to disqualify Attorney Zelamanovitz to prevent undue prejudice to the Defendants.

Based on the foregoing, the Defendant's motion is granted, and it is hereby,

ORDERED, all stays issued in the within action are vacated; and it is further,

ORDERED, that the restraining notice issued against the personal bank account of Batsheva Halpert is vacated, and it is further,

ORDERED that Attorney Jacob Zelmonovitz is hereby disqualified from representing Plaintiff in the within action, and the within motion is stayed for 60 days from the date of entry of this order for Plaintiff to retain new counsel.

This constitutes the decision and order of the Court.

ENTER,

HON. KATHY J. KING
J.S.C

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