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Court of Appeal, First District, Division 5, California.

Garritt BLANZ et al., as Trustees, etc., Plaintiffs and Respondents,
v.
Robert C. HINCKLEY et al., Defendants;
Kevin Born, Appellant.

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(San Francisco County Super. Ct. No. CGC-16-553800)

Attorneys and Law Firms

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Opinion

Jones, P. J.*

***1** Kevin Born (Born) appeals an order denying his motion for disqualification. Garritt Blanz and David Blanz, as Trustees of the David and Karen Blanz Family Trust (the Blanzes) filed a complaint against Robert C. Hinckley and Christine H. Bartlett Hinckley (the Hinckleys) asserting causes of action relating to construction and remodeling work at adjoining properties in San Francisco, California. Andrew Zacks and James Kraus, attorneys at Zacks, Freedman & Patterson, PC (ZFP), represent the Blanzes.

Almost a year after this complaint was filed, Born met with Andrew Zacks for a one-hour consultation. Born is the president and chief executive officer (CEO) of Ashbury General Contracting & Engineering (Ashbury), the general contractor for the Hinckleys' remodeling project. Based on this consultation, Born contends the trial court should have disqualified ZFP from representing the Blanzes in their lawsuit against the Hinckleys. We disagree and affirm.

FACTUAL AND PROCEDURAL HISTORY

Over a month before the Blanzes sued the Hinckleys, the Hinckleys filed a demand for arbitration against the Blanzes based on an arbitration clause in an easement document central to the parties' dispute.

I. *The Arbitration*

As explained in the final arbitration award, the Hinckleys and the Blanzes own adjoining properties, and there was "substantial evidence of animosity between [them], almost from the outset of their adjoining ownerships and remodeling projects." The prior owner of both properties created a five-foot easement over the Blanzes' property as a means of access from the street to the rear yard of the Hinckleys' property. The Hinckleys claimed the Blanzes interfered with their use of the easement. The Blanzes claimed the Hinckleys trespassed on their property and overburdened the easement.

The arbitration hearing occurred in late November 2016. Born testified as a witness and he was cross-examined by Kraus from ZFP. In the final arbitration award, dated February 23, 2017, the arbitrator denied two of the Hinckleys' claims but

ordered the Blanzes to remove curbing that obstructed the easement.

II. *The Legal Action*

On August 19, 2016, three days after the Blanzes—represented by ZFP—filed their response to the Hinckleys' arbitration demand, the Blanzes filed their complaint naming the Hinckleys as defendants. The Blanzes allege the Hinckleys' agents "caused material and detritus ... to cross the property line resulting in litter and damage" to the Blanzes' property, and they sprayed concrete on the Blanzes' windows. The Blanzes claim the "Hinckleys' contractor" erected scaffolding over the property line, disconnected and never reassembled downspouts, and damaged "a below-ground water barrier that protects the structure" on the Blanzes' property.

On February 14, 2017, the Hinckleys filed an answer and cross-complaint against the Blanzes. While ZFP represents the Blanzes as plaintiffs, Bledsoe, Diestel, Treppa & Crane LLP (the Bledsoe Firm) associated into the case as co-counsel for the Blanzes to defend against the Hinckleys' cross-claims.

***2** On July 31, 2017, almost one year after the Blanzes sued the Hinckleys, and eight months after he testified at the arbitration hearing, Born had a one-time consultation with Andrew Zacks from ZFP. In his declaration, Born states he "sought out" attorney Zacks based on his reputation, and Born sought "legal advice concerning construction, contract, easement, encroachment and land use issues." In July 2018, the Bledsoe Firm issued a subpoena for the deposition of Born, but Born was never deposed. The trial in the litigation between the Blanzes and the Hinckleys was scheduled to begin in late January 2019.

III. *Discovery of the Potential Conflict of Interest, Born's Disqualification Motion, and the Trial Court's Ruling*

On January 25, 2019, the Bledsoe Firm contacted counsel for Born to determine if the attorney would accept a trial subpoena on behalf of Born. Born's counsel indicated he recently learned that Born met with Zacks in July 2017. Zacks responded that the matters were unrelated and he asked an attorney from the Bledsoe Firm to examine Born at trial. When ZFP and the Bledsoe Firm refused to voluntarily recuse themselves, Born moved to disqualify them. The Hinckleys filed a notice of joinder in the motion.

In March 2019, after a hearing on the motion, the trial court denied it. In May 2019, both the Hinckleys and Born appealed. In November 2019, we granted the Blanzes' motion to dismiss the Hinckleys' appeal, but we denied their motion to dismiss Born's appeal. On the merits, we now affirm the order denying Born's motion for disqualification.

DISCUSSION

On appeal, Born argues ZFP "is subject to automatic disqualification for concurrent representation of adverse clients." ZFP responds by arguing, among other things, that Born lacked standing to bring his disqualification motion, and that the trial court did not abuse its discretion in denying the motion because Born was not directly adverse to the Blanzes. We begin by addressing the standard of review and relevant disqualification principles.

I. *Standard of Review and Disqualification Principles*

"Generally, a trial court's decision on a disqualification motion is reviewed for abuse of discretion. [Citations.] If the trial court resolved disputed factual issues, the reviewing court should not substitute its judgment for the trial court's express or implied findings supported by substantial evidence.... However, the trial court's discretion is limited by the applicable legal principles." (*People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1143–1144 (*SpeeDee Oil*).)

A motion to disqualify a party's counsel raises important policy considerations. (*SpeeDee Oil*, *supra*, 20 Cal.4th at p. 1144.) Depending on the circumstances, "a disqualification motion may involve such considerations as a client's right to chosen counsel, an attorney's interest in representing a client, the financial burden on a client to replace disqualified counsel, and the possibility that tactical abuse underlies the disqualification motion." (*Id.* at p. 1145.) However, "determining whether a conflict of interest requires disqualification involves more than just the interests of the parties." (*Ibid*.) "The paramount concern must be to preserve public trust in the scrupulous administration of justice and the integrity of the bar." (*Ibid*.)

"Where an attorney successively represents clients with adverse interests, and where the subjects of the two representations are substantially related, the need to protect the first client's confidential information requires

that the attorney be disqualified from the second representation." (*SpeeDee Oil*, *supra*, 20 Cal.4th at p. 1146, citing *Flatt v. Superior Court* (1994) 9 Cal.4th 275, 283 (*Flatt*).) "A related but distinct fundamental value of our legal system is the attorney's obligation of loyalty. Attorneys have a duty to maintain undivided loyalty to their clients .... Therefore, if an attorney—or more likely a law firm—simultaneously represents clients who have conflicting interests, a more stringent per se rule of disqualification applies. With few exceptions, disqualification follows automatically, regardless of whether the simultaneous representations have anything in common or present any risk that confidences obtained in one matter would be used in the other." (*SpeeDee Oil*, at pp. 1146–1147.)

II. *Born Has Standing to Seek ZFP's Disqualification*

***3** First, we address ZFP's argument that Born lacked standing to seek its disqualification because "he was not a party when he filed his disqualification motion." Instead, according to ZFP, Born should have moved to intervene in the action or he should have filed a collateral injunctive suit against ZFP. Having done neither, ZFP contends the trial court "lacked jurisdiction" to address Born's motion.

ZFP is wrong. ZFP acknowledges that "Born was ZFP's client for one hour" in July 2017. Eighteen months later, in January 2019, Born was subpoenaed to testify in the lawsuit filed by the Blanzes against the Hinckleys, which raises the question as to whether ZFP, or any attorneys associated with ZFP, may examine or cross-examine its former client during the trial. Born argues that by simultaneously representing him (for one hour in July 2017) and the Blanzes (since August 2016), ZFP violated its duty of loyalty to him. Based on this alleged violation of "a legally protected interest," Born has standing to seek ZFP's disqualification. (*Great Lakes Construction, Inc. v. Burman* (2010) 186 Cal.App.4th 1347, 1356.)

In *Machado v. Superior Court* (2007) 148 Cal.App.4th 875, the court stated "an aggrieved nonparty who asserts that an attorney has undertaken adverse representation should file a collateral injunctive suit to end the conflicted representation." (*Id.* at p. 881.) But *Machado* does not stand for the proposition that a nonparty cannot file a disqualification motion. Indeed, in *Machado*, the court held a nonparty had standing to file a disqualification motion in part because the nonparty was identified in the complaint as a coconspirator of the defendant. (*Id.* at pp. 879, 881–882.)

Similarly here, the close connections between Born and the parties to this litigation support our conclusion that Born—who had a consultation with ZFP—can seek the law firm's disqualification. Born is the president and CEO of Ashbury, the Hinckleys' general contractor. The complaint and first amended complaint assert claims against the Hinckleys based on construction work performed by Ashbury. The Hinckleys' second amended cross-complaint (SACC) adds a cause of action against Ashbury for equitable indemnity, claiming that if the Hinckleys are liable to the Blanzes, then the Hinckleys are entitled to indemnity from Ashbury.[1] Although Born is not a party, the Blanzes seek to examine him at trial. Born's relationship to the parties and his consultation with ZFP are sufficient to give Born standing to seek ZFP's disqualification.

III. *No Abuse of Discretion in the Trial Court's Determination that Born's July 2017 Meeting with ZFP Does Not Require ZFP's Disqualification*

In ruling on Born's motion for disqualification, the trial court focused on two timeframes: (1) July 31, 2017; and (2) August 1, 2017 to the present, the time period after Born's one-time consultation. During the first time period, ZFP simultaneously represented the Blanzes and Born, and during the second, Born was a former client of ZFP. We begin with the second timeframe because it provides insight into how the trial court addressed disputed factual questions.

A. *ZFP's Former Representation of Born*

***4** In its order denying the motion for disqualification, the trial court found that "under the former client standard, applicable to the time after July 31, 2017, there is no substantial relationship between the representation of [the Blanzes] and Mr. Born. (See Andrew Zacks declaration and e-mails requesting a consultation.)" Mindful of our standard of review, we assess whether substantial evidence supports the trial court's conclusion. (*SpeeDee Oil*, *supra*, 20 Cal.4th at p. 1143.)

We agree with the trial court. The record indicates that in the November 2016 arbitration between the Hinckleys and the Blanzes, the Hinckleys called Born, their general contractor, as a witness, and he was cross-examined by Kraus from ZFP. According to Born, he was "not represented by counsel at this arbitration," and he "was questioned extensively about the facts and circumstances concerning the renovation work performed at" the Hinckleys' property. Eight months later, on

July 31, 2017, Born met with attorney Zacks of ZFP for a one-time consultation.

The record contains conflicting accounts of the subject matter of this consultation. Contemporaneous emails, notes, and a declaration from a ZFP administrative assistant indicate that a colleague or acquaintance of Born reached out to Zacks to schedule the consultation on a matter unrelated to the lawsuit between the Blanzes and the Hinckleys.[2] ZFP checked for conflicts using a database "comprised of [information regarding] all past and current clients, consults, adverse parties, all the properties we have worked on." ZFP's intake process did not identify the consultation with Born as creating a potential conflict because Born and Ashbury were not parties to the Blanzes' lawsuit against the Hinckleys in July 2017, and because Born did not indicate the consultation concerned their properties.

In his declaration in opposition to the motion for disqualification, Zacks averred the subject matter of the consultation was not related to the litigation. The contemporaneous emails and notes support Zacks's account of the consultation. Importantly, at the hearing on the motion to disqualify, counsel for Born acknowledged that Born did not consult with Zacks about the property at issue in the lawsuit between the Blanzes and the Hinckleys.

Born's recollection of the consultation differs. Born claims he consulted with Zacks "on the precise legal issues raised in the subject matter including the tort of trespass in the context of contractors working on properties with 'zero-lot-lines,' " and Born claims he shared with Zacks his "litigation attitudes, practices, ... [and] philosophy." But the trial court, citing Zacks's declaration and the emails requesting a consultation, found there was no substantial relationship. We defer, as we must, to the trial court's resolution of this disputed factual matter, which is supported by substantial evidence. (*SpeeDee Oil*, *supra*, 20 Cal.4th at p. 1143.) Based on this evidence supporting the trial court's finding of no substantial relationship between the former client's consultation with ZFP and this lawsuit between the Blanzes and the Hinckleys, the court did not abuse its discretion in denying Born's motion to disqualify ZFP from representing the Blanzes.

B. *ZFP's Concurrent Representation of the Blanzes and Born*

***5** Next, considering ZFP's simultaneous representation of the Blanzes and Born on July 31, 2017, it does not require ZFP's disqualification because there was no direct adversity or evidence of divided loyalty.

Rule 1.7(a) of the California Rules of Professional Conduct[3] provides that "[a] lawyer shall not, without informed written consent from each client ... represent a client if the representation is directly adverse to another client in the same or a separate matter." (fn. omitted.) Born argues ZFP is subject to automatic disqualification because ZFP simultaneously represented the Blanzes and Born during his consultation "notwithstanding that these parties are directly adverse to each other." Born contends, for example, that to prove the Blanzes' case against the Hinckleys, ZFP "would necessarily have to impugn the work of Mr. Born and Ashbury Construction to demonstrate trespass and/or nuisance."

In ruling on Born's motion, the trial court found that on July 31, 2017, the interests of the Blanzes and Born were not directly adverse because they were not "parties to concurrently pending actions," and although the trial court did not "suggest that being a party is a necessary requirement, ... in the absence of such fact, something more than what is being presented is required."

We agree with the trial court. "The paradigmatic instance of ... prohibited dual representation ... occurs where the attorney represents clients whose interests are *directly* adverse *in the same litigation*." (*Flatt*, *supra*, 9 Cal.4th at p. 284, fn. 3.) But here, when Born consulted with Zacks on July 31, 2017, neither Born nor Ashbury were parties in the lawsuit between the Blanzes and the Hinckleys. At the hearing on the motion, Born conceded there was no discussion of the Blanzes' property during the consultation. Based on the record before the trial court, including the conflicting accounts of what was discussed during the one-time consultation, we find no abuse of discretion in the conclusion that Born failed to establish direct adversity. (*SpeeDee Oil*, *supra*, 20 Cal.4th at p. 1144 ["When substantial evidence supports the trial court's factual findings, the appellate court reviews the conclusions based on those findings for abuse of discretion."].)

In arguing otherwise, Born relies on the comment to rule 1.7 of the California Rules of Professional Conduct, which provides that "direct adversity can arise when a lawyer cross-examines a non-party witness who is the lawyer's client in another matter, if the examination is likely to harm or embarrass the witness." But here, Born is no longer ZFP's client and has not been since July 2017. At the conclusion of the consultation, Born paid ZFP, which suggests there was

no expectation ZFP would continue representing Born. After this one-day, one-time consultation, Zacks had no further discussions or communication with Born. This part of the comment to rule 1.7, which addresses a situation in which a lawyer seeks to cross-examine a current client, does not apply.

***6** Furthermore, "[t]he primary value at stake in cases of simultaneous or dual representation is the attorney's duty—and the client's legitimate expectation—of *loyalty*." (*Flatt*, *supra,* 9 Cal.4th at p. 284.) "Attorneys who concurrently represent more than one client should not have to choose which client's interest are paramount or make a choice between conflicting duties. [¶] ... [¶] Thus, an attorney cannot represent a client in one matter and simultaneously sue that client in an unrelated matter. [Citation.] However, in other scenarios, ... automatic disqualification is not required." (*Sharp v. Next Entertainment Inc.* (2008) 163 Cal.App.4th 410, 428.)

Here, ZFP's concurrent representation of the Blanzes and Born does not require its automatic disqualification because there is no indication that ZFP's representation of the Blanzes compromised Zacks's duty of loyalty to Born, or prevented Zacks " 'from devoting his entire energies to [Born's] interests' " during the consultation. (*Flatt*, *supra*, 9 Cal.4th at p. 289, italics omitted.) Born does not argue, for example, that Zacks was required to qualify or limit the advice he provided as a result of his firm's simultaneous representation of the Blanzes. (*Blue Water Sunset, LLC v. Markowitz* (2011) 192 Cal.App.4th 477, 488–489 ["An actual '[c]onflict of interest between jointly represented clients occurs whenever their common lawyer's representation of the one is rendered less effective by reason of his representation of the other.' "].)

Relying on *Truck Ins. Exchange v. Fireman's Fund Ins. Co.* (1992) 6 Cal.App.4th 1050, Born argues the "automatic disqualification standard continues even though the representation ceases prior to filing of the motion to disqualify." But this case is not like *Truck Ins. Exchange*, in which a law firm, knowing that it represented an entity in pending wrongful termination cases, nevertheless agreed to begin representing an insurance company in its lawsuit against the entity. (*Id.* at pp. 1055–1056.) The law firm attempted to avoid the consequences of its simultaneous representation of adverse clients by withdrawing from the wrongful termination cases before a motion for disqualification could be heard, but the court held that "a law firm that *knowingly* undertakes adverse concurrent representation may not avoid disqualification by withdrawing from the representation of the less favored client before hearing." (*Id.* at p. 1057, italics added.) Here, Born does not claim that Zacks was aware of Born's role in the dispute between the Blanzes and the Hinckleys when he agreed to the consultation. When Zacks's recollection of the 2017 consultation was refreshed by his review of ZFP files in January 2019, Born was long since a former client of ZFP, not a concurrent client.

In arguing for automatic disqualification, Born relies on *M'Guinness v. Johnson* (2015) 243 Cal.App.4th 602, in which the court concluded a law firm concurrently represented litigation adversaries based on a range of factors, including the nature of the client agreement, the law firm's retention of client funds, and the law firm's invoicing practices. (*Id.* at pp. 617–620.) Here, there is no dispute that ZFP concurrently represented the Blanzes and Born on July 31, 2017. Even so, we must examine the motion "carefully to ensure that literalism does not deny the parties substantial justice." (*SpeeDee Oil*, *supra*, 20 Cal.4th at p. 1144.) Given Born's failure to convince the trial court that his consultation was substantially related to the Blanzes' lawsuit, and his failure to explain how ZFP's duty of loyalty to him was compromised by its simultaneous representation of the Blanzes, permitting ZFP to continue representing the Blanzes cannot undermine the public's trust in the administration of justice or the integrity of the bar. (*Id.* at p. 1145.) Under these circumstances, we will not deny the Blanzes their right to chosen counsel. (*Ibid.*; *In re Marriage of Zimmerman* (1993) 16 Cal.App.4th 556, 565 ["To deprive respondent of the counsel of his choice at this late stage in the proceedings, where no unfair disadvantage to appellant is indicated, would, we believe, cause undue hardship to respondent without serving the purpose of the disqualification remedy."].)[4]

IV. *Vicarious Disqualification*

***7** Generally, an attorney's conflict of interest will be imputed to the attorney's law firm resulting in its vicarious disqualification. (*City and County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 847–848.) In addition, a law firm is subject to vicarious disqualification when it associates as counsel an attorney who obtained confidential information from the opposing party. (*Pound v. DeMera DeMera Cameron* (2005) 135 Cal.App.4th 70, 73.)

Here, Born argues the Bledsoe Firm is subject to vicarious disqualification because of its association with ZFP. But, as explained *ante*, there was no abuse of discretion in the trial

court's denial of Born's motion to disqualify ZFP. As a result, the Bledsoe Firm is not subject to vicarious disqualification.

DISPOSITION

We affirm the order denying Born's motion for disqualification. ZFP and the Bledsoe Firm are entitled to costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

WE CONCUR:

Simons, J.

Burns, J.

All Citations

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Footnotes

* Retired Presiding Justice of the Court of Appeal, First Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

1 Born moves for judicial notice of the SACC. ZFP, on behalf of the Blanzes, opposes the motion. We may take judicial notice of court records and official acts. (Evid. Code, § 452, subds. (c), (d).) Accordingly, we grant the motion. We take judicial notice of the fact that the Hinckleys filed a cross-complaint naming Ashbury as a cross-defendant, but not of the truth of the allegations in the SACC. (*Guarantee Forklift, Inc. v. Capacity of Texas, Inc.* (2017) 11 Cal.App.5th 1066, 1075.)

2 We cannot describe these emails or notes in detail because they were filed under seal and may contain information protected by the attorney-client privilege. However, we—like the trial court—have reviewed them, and they indicate the consultation was not related to this lawsuit.

3 Rule 1.7, effective November 1, 2018, governs "conflicts of interest involving current clients." (*Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Co.* (2018) 6 Cal.5th 59, 85, fn. 7.)

4 ZFP and the Bledsoe Firm argue that Born's motion was filed for improper tactical reasons. Based on our prior analysis, we need not address this argument.