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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

JAMES A. KAY, JR.,

Plaintiff and Appellant,

v.

ROBERT MILLS,

Defendant and Respondent.

B278656

(Los Angeles County
Super. Ct. No. BC620344)

APPEAL from an order of the Superior Court of
Los Angeles County. Teresa A. Beaudet, Judge. Affirmed.

Timothy D. McGonigle Prof. Corp. and Timothy D.
McGonigle for Plaintiff and Appellant.

Robert Mills, in pro.per., for Defendant and Respondent.

Appellant James A. Kay, Jr., (Kay) appeals from the trial court's denial of his motion for preliminary injunction against his former attorney, respondent Robert Mills (Mills). We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

From February 2008 through May 2009, Mills was an associate attorney at Bradley & Gmelich, working as a part of team of attorneys representing Kay in a multi-party legal and accounting malpractice action known as *Kay v. Silver & Freedman* (the *Silver & Freedman* action). The *Silver & Freedman* action involved Kay's personal financial records and tax returns for the prior seven years. During the 15-month period that Mills worked on the *Silver & Freedman* action, he billed a total of 130.1 hours performing legal services on behalf of Kay, which averaged 8.7 hours per month. Mills left Bradley & Gmelich in September 2009, and was unsure of the status of the *Silver & Freedman* action when he left.

Five years later in 2014, Motorola Solutions, Inc. filed a fraudulent transfer action against Ann Pick (Pick) and others (the *Motorola* action). Pick retained Mills to represent her. In December 2015, Mills filed a cross-complaint on Pick's behalf against multiple cross-defendants, including Kay. In April 2016, Kay brought a motion in the *Motorola* action to disqualify Mills from representing Pick based on Mills's prior representation of Kay.

The following month in May 2016, Kay initiated the instant action by filing a complaint against Mills asserting claims for breach of fiduciary duty and injunctive relief, and seeking punitive damages.

Meanwhile, on June 1, 2016, the trial court in the *Motorola* action sustained without leave to amend Kay's demurrer to Pick's

cross-complaint, and determined that Kay's motion to disqualify Mills in that case was therefore moot.

Despite the fact that Kay was no longer a party in the *Motorola* action after his successful demurrer, Kay filed in the instant case a motion for preliminary injunction on July 29, 2016, seeking "an order preliminarily enjoining defendant Robert Mills ('Mills') from representing Ann Pick (or her son Harold Pick), in any legal action involving Kay, including but not limited to the [*Motorola* action], and/or any appeals arising out of that case; and also from sharing any confidential information that Mills obtained from his former client Kay with the Picks or anyone else."

Mills opposed the motion for preliminary injunction, and stated in his supporting declaration that there was "no appeal planned or considered by Pick in connection with the court's ruling on KAY's demurrer in the *Motorola* action."

The trial court here denied Kay's motion for preliminary injunction, finding that Kay had failed to demonstrate both (1) the existence of irreparable and imminent harm if the injunction was not issued, and (2) a likelihood of success on the merits because there was no showing of a substantial relationship between the *Silver & Freedman* action and the *Motorola* action.¹

Kay filed a petition for writ of mandate in this court, which we denied, and this appeal followed.

¹ The trial court rejected Mills's argument that it lacked jurisdiction to rule on the motion, relying on *Machado v. Superior Court* (2007) 148 Cal.App.4th 875, 880–881 for the proposition that an aggrieved person not a party to an action may file a collateral injunctive suit to end a conflicted representation.

DISCUSSION

I. Relevant Law and Standard of Review

“In determining whether to issue a preliminary injunction, the trial court considers: (1) the likelihood that the moving party will prevail on the merits and (2) the interim harm to the respective parties if an injunction is granted or denied. The moving party must prevail on both factors to obtain an injunction. Thus, where the trial court denies an injunction, its ruling should be affirmed if it correctly found the moving party failed to satisfy either of the factors. [Citation.]” (*Pittsburg Unified School Dist. v. S.J. Amoroso Construction Co., Inc.* (2014) 232 Cal.App.4th 808, 813–814.)

“[T]he proper scope of review is the abuse of discretion standard ordinarily applied to rulings on disqualification motions.” (*Morrison Knudsen Corp. v. Hancock, Rothert & Bunshoft* (1999) 69 Cal.App.4th 223, 229 (*Morrison*).)

II. There Was No Abuse of Discretion

The procedural posture of this case is unusual. Despite the facts that Kay is no longer a party to the *Silver & Freedman* action and that Mills has declared under oath that his client Pick has no plans to appeal in that case, Kay has nevertheless persisted in pursuing Mills’s disqualification. Kay’s motion for preliminary injunction, which is essentially a motion to disqualify, seeks to bar Mills from ever representing Pick or her son *in any legal action* involving Kay, no matter the issue, because nearly 10 years ago now Mills acquired Kay’s confidential personal financial information. The law is otherwise.

A. Likelihood of Prevailing

Where, as here, the issue at hand is an attorney’s successive representation, the party seeking an injunction or

disqualification can show a likelihood of prevailing on the merits by demonstrating that the two legal matters involved are substantially related. “The test for a ‘substantial relationship’ between cases entails an inquiry into “the similarities between the two factual situations, the legal questions posed, and the nature and extent of the attorney's involvement with the cases.” [Citation.] It must be shown that the information from the prior representation is ‘material’ to the current employment. [Citation.]” (*Morrison, supra*, 69 Cal.App.4th at p. 234.)

As the moving party, Kay failed to demonstrate any similarities between the *Silver & Freedman* action and the *Motorola* action. In his motion for preliminary injunction, he simply asserted in a single sentence, “It is likely that Kay will prevail on the merits of his claim.” He presented no evidence, authority or argument. Indeed, as the trial court noted, he did not even submit copies of any pleadings from the *Silver & Freedman* action so that a comparison of the two lawsuits could be made. Based on its taking of judicial notice of the operative complaint in the *Silver & Freedman* action as requested by Mills, the trial court properly concluded that there was no substantial relationship between the *Silver & Freedman* action and the *Motorola* action. The evidence showed that the *Silver & Freedman* action was an attorney and accountant malpractice action based on the alleged negligence of defendants in the advice, preparation and submission of Kay’s tax returns, while Pick’s cross-complaint in the *Motorola* action alleged that Kay conspired with the other cross-defendants to bring down a competitor in the radio frequency industry.

Kay’s position that Mills’s mere knowledge of Kay’s confidential financial information creates a substantial

relationship because such knowledge could be used to adverse effect in the subsequent representation (e.g., in deciding whether to file a complaint or cross-complaint or to seek punitive damages) is without merit. While Kay cites to *Farris v. Fireman's Fund Ins. Co.* (2004) 119 Cal.App.4th 671, 681, he ignores that *Farris* also stated, “whether [Mills] actually possesses confidential information that would work to his advantage in his current representation is not the test. Rather, the test is whether a substantial relationship exists between the subjects of the two compared representations. [Citations.]” (*Id.* at p. 683, fn. omitted; see also *Jessen v. Hartford Casualty Ins. Co.* (2003) 111 Cal.App.4th 698, 709 [disqualification is based on “the similarities between the legal problem involved in the former representation and the legal problem involved in the current representation”]; *Fremont Indemnity Co. v. Fremont General Corp.* (2006) 143 Cal.App.4th 50, 63 [the subject of a current representation is substantially related to the subject of a prior representation when the issues are sufficiently similar].)

Thus, even if Kay was still a party in the *Motorola* action, he has not shown that the *Motorola* action is substantially similar to the *Silver & Freedman* action. Accordingly, the trial court correctly concluded that Kay failed to meet his burden of showing a likelihood of prevailing on the merits.

B. Interim Harm

“To obtain a preliminary injunction, a plaintiff ordinarily is required to present evidence of the irreparable injury or interim harm that it will suffer if an injunction is not issued pending an adjudication of the merits.” (*White v. Davis* (2003) 30 Cal.4th 528, 554.)

In his motion for preliminary injunction, Kay asserted: “Here, while the threat posed by Mills’s use of Kay’s confidential information in the Motorola action—though perhaps temporarily derailed by the granting of the demurrer to all causes of action in Pick’s cross-complaint in the *Motorola* action—there is still a clear and present danger to Kay, so long as there is any possibility of an appeal, or any possibility that Mills will continue to provide assistance to the Picks in their litigation by using Kay’s confidential information against him. Preventing the further dissemination/use of Kay’s confidential information will preclude further prospective damage and will curtail the possibility that people who intend harm to Kay’s interests will have access to this information.”

Kay, however, presented no evidence that Mills had in fact already used Kay’s confidential financial information to assist Pick or anyone else or that Mills intended to disclose such information. Any threats of harm are purely speculative (i.e., “any possibility”). “An injunction cannot issue in a vacuum based on the proponents’ fears about something that may happen in the future.” (*Korean Philadelphia Presbyterian Church v. California Presbytery* (2000) 77 Cal.App.4th 1069, 1084.) Accordingly, the trial court correctly concluded that Kay failed to demonstrate the existence of irreparable and imminent harm if an injunction was not issued.

DISPOSITION

The order denying Kay's motion for preliminary injunction is affirmed. Mills is entitled to recover his costs on appeal.

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_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
HOFFSTADT

_____, J.*
GOODMAN

* Retired Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.