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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

YIGAL LANGNAS, Plaintiff and Respondent, v. DAVID BROWN et al., Defendants and Appellants.	B275564 (Los Angeles County Super. Ct. No. BC561995)

APPEAL from an order of the Superior Court of Los Angeles County, Deirdre H. Hill, Judge. Affirmed.

Beitchman & Zekian, David Prisyon Beitchman for Defendants and Appellants.

No appearance for Plaintiff and Respondent.

Defendant David Brown enlisted his friend, plaintiff Yigal Langnas, to assist him in turning around his struggling company, defendant Universal Garment Wash & Dye, LLC (Universal). With the aid of defendants' attorney, David Beitchman, Brown and Langnas spent nineteen months preparing an agreement documenting the contours of their business arrangement. Later, Beitchman also prepared documents facilitating the transfer of real property owned by Brown to Langnas.

The parties' business and personal relationships deteriorated, and Langnas filed a breach of contract complaint against Brown and Universal. Defendants, represented by Beitchman, answered and filed a cross-complaint against Langnas. Sixteen months later, immediately after obtaining new counsel, Langnas filed a motion to disqualify Beitchman and his law firm from representing defendants. The trial court granted the motion after finding that Beitchman would be called as a witness and that he may have had an attorney-client relationship with Langnas.

Defendants appeal, and we affirm. The trial court did not abuse its discretion in granting the motion. Langnas stated in his declaration that Beitchman provided him legal advice throughout the lengthy business negotiations and in connection with the property transfer. The court properly presumed on those facts that Beitchman possessed confidential information relevant to the instant matter. The court also stated in its order that it considered the prejudice to defendants, and we conclude it did not abuse its discretion in finding that the prejudice to Langnas outweighed the prejudice to them.

BACKGROUND

In November 2012, longtime friends Langnas and Brown signed a "Development Agreement," effective June 1, 2012, pursuant to which Langnas agreed to act as a consultant to Brown's business, Universal. According to the declaration Langnas submitted in support of his motion to disqualify, Langnas and Brown spent 19 months negotiating the terms of the Development Agreement. During that time, Brown's attorney, Beitchman, prepared "at least" 11 draft agreements, "on the basis of numerous conversations with both Brown" and Langnas. Beitchman also "directly responded" to Langnas's "questions regarding the legal impact of various provisions and provided legal advice." In addition, Beitchman drafted a second agreement, the "Property Agreement," setting forth the terms of a real estate transfer from Brown to Langnas and back again. According to Langnas, Beitchman provided him with "legal advice . . . on the propriety of the transaction," as well as in connection with other unrelated matters including a potential products liability action and a personal injury claim. Indeed, Langnas asserted that he "turned exclusively to Beitchman for legal advice" during the three years he lived in Los Angeles. Langnas further claimed that Beitchman led him to believe that Beitchman "was handling a dog bite case" for him, as Beitchman "provided consultation on the case and told me that he would be handling the case on my behalf if the insurance company failed to pay it or if we were sued." Beitchman "never did follow up as promised and did not respond to the lawsuit" against Langnas.

Eventually the relationship between Langnas and Brown soured. According to Langnas's complaint, Langnas performed all of his obligations under the Development Agreement, but Brown

and Universal refused to pay him. According to defendants' cross-complaint, Langnas "performed virtually none of the promised services" under the Development Agreement and breached other oral and written agreements, including the Property Agreement. Langnas filed suit against defendants in October 2014; he was represented by attorney Marc Rohatiner at the time.

Brown and Universal responded with an answer and cross-complaint in December 2014. Attorney Beitchman filed both documents on defendants' behalf.

In September 2015, approximately nine months after defendants filed their pleadings, Rohatiner contacted Beitchman about the possibility of filing a disqualification motion. Rohatiner also provided Beitchman with a courtesy copy of the proposed motion and Langnas's declaration, discussed above, in support thereof. The proposed motion asserted that disqualification was warranted because Beitchman was a "material fact witness" in the case who also had a previous attorney-client relationship with Langnas. According to a declaration by Beitchman, he "reached out" to Rohatiner and "had multiple conversations with him regarding not only the alleged claims that I should be disqualified from this case, but about the facts and circumstances of this case as well." Rohatiner did not file the disqualification motion. According to Beitchman, Rohatiner also failed to conduct any discovery on Langnas's behalf.

Defendants took Langnas's deposition in November 2015. Defendants subsequently advised Rohatiner that they intended to seek sanctions under Code of Civil Procedure section 128.7, based on Langnas's deposition testimony regarding the real

estate transaction underlying the Property Agreement. Rohatiner replied that Langnas would sign a quit-claim deed restoring Brown's title to the disputed property. The parties stipulated to the filing of a first amended cross-complaint and the reopening of discovery to address the newly added claims. They also sought a continuance of the trial date. The court accepted the stipulation and granted the continuance, moving the trial date from February 2016 to July 2016.

On February 10, 2016, Rohatiner emailed Beitchman to inform him that Langnas "has not provided me the signed deed" as promised, and "I no longer have any understanding of what his plans are with respect to the property." Defendants responded by filing their proposed motion for sanctions against Langnas and Rohatiner. On February 19, 2016, Rohatiner filed a motion to be relieved as counsel. The trial court heard and granted the motion relieving Rohatiner in late March 2016.

Langnas promptly obtained new counsel, Elliot Blut, who substituted into the case on April 1, 2016. One week later, he filed a motion to disqualify Beitchman from representing defendants. The motion was virtually identical to the proposed disqualification motion Rohatiner sent to Beitchman in September 2015. The motion was supported by a declaration from Langnas that also was virtually identical to his proposed September 2015 declaration.

Defendants opposed the motion, which they characterized as "an appalling tactical maneuver to harass and annoy Defendants and their counsel" that would cause them substantial prejudice three months before trial. They argued that Beitchman did not have an attorney-client relationship with Langnas, emphasizing Langnas's concession that "he did not specifically

retain Beitchman to represent him" in the Development Agreement negotiations. Defendants conceded that Beitchman consulted with Langnas "on two separate potential new matters," but stated that Beitchman declined the representations and did not receive confidential information relevant to the instant case. They also asserted that neither Beitchman nor anyone at his firm led Langnas to believe that Beichtman was handling a dog bite case. In addition, defendants argued that, even if Beitchman had an attorney-client relationship with Langnas, the subject of that relationship was not substantially related to the current litigation. They also disputed that Beitchman was a key witness on any of the issues in the case.

The court heard the motion on May 4, 2016; no reporter was present. According to the minute order, both counsel were present and argued. The court took the matter under submission and later granted the motion. In its written order, the court concluded that conflicts of interest would arise if Beitchman continued to represent defendants. The court credited Langnas's assertions that Beitchman rendered legal services to Langnas by explaining to him "the legal significance of certain proposed terms in the agreements," and noted Beitchman's concession that he consulted with Langnas about unrelated matters on two separate occasions. The court explained, "[i]t is hornbook law that preliminary consultations and representations that lead a person to believe the attorney is representing him or her establishes [*sic*] a *prima facie* attorney-client relationship." The court further stated that it is generally "the attorney's duty to follow-up with the prospective client or third-party and notify them, in writing, that the attorney is not representing the party with whom they had a professional interaction. While Beitchman

alleges that he told Plaintiff that he declined to represent Plaintiff orally, at the minimum, there was confusion about the relationship between Beitchman and Plaintiff as evidenced by the declaration in support of the motion." In addition, the court found that "Beitchman will be called as a material witness to this case, both to testify as to the nature of the legal services and as to the specific intent of the parties when entering into the disputed agreements." Considering Langnas's decision to call Beitchman as a witness, "the substantial interactions Beitchman had with Plaintiff and the potential prejudice to Defendants," the court, "in its discretion," found that "Beitchman, and his firm, must be disqualified from presenting this case at trial." The court further stated that defendants would "be given an opportunity to obtain new counsel who is not expected to be called to testify or has conflicts with prior representations for Plaintiff."

Defendants obtained new counsel. Beitchman timely filed a notice of appeal challenging the disqualification order on defendants' behalf. (See Code of Civil Procedure, § 904.1, subd. (a)(6) [orders granting or denying injunctions immediately appealable]; *Machado v. Superior Court* (2007) 148 Cal.App.4th 875, 882-883 [order disqualifying an attorney is an injunctive order and a collateral order].)

STANDARD OF REVIEW

We review the trial court's ruling on a disqualification motion for abuse of discretion. (*People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1143.) "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." (*Ibid.*) "When substantial evidence

supports the trial court's factual findings, the appellate court reviews the conclusions based on those findings for abuse of discretion." (*Id.* at p. 1144.)

DISCUSSION

I. Governing Principles

Attorneys owe duties of undivided loyalty and confidentiality to both current and former clients. (Bus. & Prof. Code, § 6068, subd. (e); Rules of Prof. Conduct, rule 3-310(C) & (E).) Unless an attorney obtains the informed written consent of a former client, he or she may not accept employment adverse to that client if the attorney, by representing the former client, "obtained confidential information material to the employment." (Rules Prof. Conduct, rule 3-310(E).) A former client may seek to disqualify counsel from representing an adversary in violation of these rules. (*City and County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 847 (*Cobra*).) The trial court has the power to order disqualification under Code of Civil Procedure section 128, subdivision (a)(5). (*Gregori v. Bank of America* (1989) 207 Cal.App.3d 291, 299; *DCH Health Services Corp. v. Waite* (2002) 95 Cal.App.4th 829, 831; Code of Civ. Proc., § 128, subd. (a)(5).)

A former client may disqualify an attorney from successive representation of another client by showing a "'"substantial relationship"' between the subjects of the prior and the current representations." (*Cobra*, *supra*, 38 Cal.4th at p. 847.) "To determine whether there is a substantial relationship between successive representations, a court must first determine whether the attorney had a direct professional relationship with the former client in which the attorney personally provided legal advice and services on a legal issue that is closely related to the

legal issue in the present representation." (*Ibid.*, citing *Jessen v. Hartford Casualty Ins. Co.* (2003) 111 Cal.App.4th 698, 710-711.) If the former representation did involve a direct professional relationship, the attorney is presumed to possess confidential information if the subject of the prior representation put the attorney in a position in which confidences material to the current representation normally would have been imparted to counsel. (*Ibid.*) No such presumption arises if the attorney's relationship with the previous client was not direct. In that case, the former client must demonstrate a substantial relationship by showing that the subjects of the prior and current representations render it likely that the attorney acquired confidential information that is relevant and material to the current representation. (*Ibid.*) When a substantial relationship is established, by presumption or otherwise, the attorney generally will be disqualified from representing the second client. (*Ibid.*)

Even where a substantial relationship is established, the trial court retains discretion to deny a disqualification motion. In exercising that discretion, the court properly may consider the possibility that the moving party delayed bringing the motion as a strategic effort to prolong the litigation or cause prejudice to the opposing party. (*Western Continental Operating Co. v. Natural Gas Corp.* (1989) 212 Cal.App.3d 752, 763.) Factors bearing on this determination include how long the moving party has known of the potential conflict, whether the moving party has been represented by counsel since learning of the potential conflict, whether an earlier motion to disqualify would have been inappropriate or futile, and whether anyone prevented the moving party from making the motion earlier, and if so, under

what circumstances. (*River West, Inc. v. Nickel* (1987) 188 Cal.App.3d 1297, 1309.) Courts also have recognized that the delay itself may be significant and may be "an indication that the alleged breach of confidentiality was not seen as serious or substantial by the moving party." (*Liberty National Enterprises, L.P. v. Chicago Title Insurance Co.* (2011) 194 Cal.App.4th 839, 847.) Where the party opposing the motion can demonstrate prima facie evidence of unreasonable delay in bringing the motion causing prejudice to the present client, disqualification should not be ordered unless the moving party proffers adequate justification for the delay. (*Western Continental Operating Co. v. Natural Gas Corp.*, *supra*, 212 Cal.App.3d at p. 763.) The adequacy of the justification is a matter within the trial court's wide discretion. So too is whether the delay or ensuing prejudice to the current client of the potentially conflicted counsel is sufficiently "extreme or unreasonable" as to warrant denying the motion. (*Id.* at p. 764.)

The trial court also has the discretion to disqualify an attorney if the attorney will be called as a witness in an action in which he or she is acting as an advocate. The so-called "advocate-witness rule" "has long been a tenet of ethics in the American legal system" (*Kennedy v. Eldridge* (2011) 201 Cal.App.4th 1197, 1208), and the state bar has adopted a rule of professional conduct that generally prohibits an attorney from acting as a witness and advocate in the same proceeding. Rule of Professional Conduct 5-210 provides, "A member shall not act as an advocate before a jury which will hear testimony from the member unless: [¶] (A) The testimony relates to an uncontested matter; or [¶] (B) The testimony relates to the nature or value of legal services rendered in the case; or [¶] (C) The member has the

informed, written consent of the client. . . ." The trial court has the discretion to disqualify an attorney even if his or her client provided informed written consent "where it is confronted with manifest interests which it must protect from palpable prejudice." (*Lyle v. Superior Court* (1981) 122 Cal.App.3d 470, 482; see also *Smith, Smith & Kring v. Superior Court* (1997) 60 Cal.App.4th 573, 580 (*Smith*).)

II. Analysis

Defendants contend the court abused its discretion in disqualifying Beitchman. They do not dispute that Langnas was a former client of Beitchman, or that the two had a direct professional relationship. Instead, they argue that Langnas failed to demonstrate a substantial relationship between his previous representation and the present one. They claim that "any alleged legal advice was not on any legal issue that is closely related to the legal issue in the present representation." This claim is belied by Langnas's declaration, which the trial court was entitled to credit. Langnas stated that "[t]hroughout the negotiations [of the Development agreement], Beitchman directly responded to my questions regarding the legal impact of various provisions and provided legal advice." The Development Agreement is at the heart of both Langnas's and defendants' current claims. Langnas also stated that Beitchman "provided legal advice" regarding the Property Agreement and its propriety; the Property Agreement and the property to which it pertains are the subject of several of defendants' cross-claims. The court was well within its discretion to conclude that any legal advice Beitchman gave Langnas regarding these agreements was substantially related to the current litigation.

Where an attorney has a direct professional relationship with a former client and that relationship concerned a matter that is substantially related to the present litigation, the attorney is presumed to possess relevant confidential information such that disqualification is necessary. (*Cobra*, *supra*, 38 Cal.4th at p. 847.) Defendants contend the presumption is not operative here because "[n]othing in the subject of the prior representation can rightly be said to have put attorney Beitchman in a position in which confidences material to the current representation would normally have been imparted to him." This argument is predicated on their inference that, because Langnas's declaration does not state "or even imply" that "he and Mr. Beitchman were ever alone, outside the presence of Mr. Brown, when Mr. Brown (on behalf of Universal) negotiated the [Development] Agreement with Mr. Langnas," any information imparted to Beitchman would not have been confidential. They emphasize that any conversations between Langnas and Beitchman happened "during" the negotiations, which they suggest necessarily meant in the presence of Brown. Defendants further suggest that there would have been no need for Langnas to communicate with Beitchman about the "legal impact of various provisions" of the Development Agreement, because "the 'legal impact' of those provisions was *as written in the agreement*."

The court was not required to make the inferences urged by defendants. It is equally reasonable to infer from the record that Langnas, who "turned exclusively to Beitchman for legal advice," did so at least occasionally outside the presence of Brown and Universal. There is nothing in the record to suggest that the lengthy, 19-month negotiations process exclusively occurred when all three men were present together. To the contrary, the

record contains an email from Beitchman addressed solely to Langnas, in which Beitchman stated, "Nice speaking with you Yigal," from which it is reasonable to infer Beitchman and Langnas communicated without Brown. The record also contains an email from Beitchman to both Brown and Langnas, which notes that an attached draft Development Agreement "contains the last several requests made by Yigal," and asks them both to "read the agreement completely before signing and bring any questions or concerns to my attention." The second email also suggests that Langnas and Beitchman communicated with one another about the substance of the Development Agreement.

Nor are we persuaded by defendants' suggestion that individuals preparing a contract have no need to obtain legal advice regarding the "legal impact" of its provisions. The subject of the prior representation—the negotiation and preparation of the Development Agreement—would put Beitchman "in a position in which confidences material to the current representation normally would have been imparted to counsel." (*Cobra*, *supra*, 38 Cal.4th at p. 847.) The presumption accordingly applied, and the trial court did not err in concluding disqualification was appropriate due to Beitchman's former representation of Langnas.

The court likewise did not err in concluding that Beitchman's likely role as a witness warranted his disqualification. Defendants argue that "an attorney acting as both witness and advocate in a client's case is tolerable," and assert that "[n]othing in the present case even intimates that either Universal or Brown object to Mr. Beitchman serving as a witness." Defendants are correct that the advocate-witness rule is not absolute. As noted above, Rule of Professional Conduct 5-

210 has three exceptions, one of which provides that an attorney may act as a witness with the informed written consent of his or her client. The problem here, however, is that Langnas plans to call Beitchman as a witness *against* Brown and Universal. Even if Brown and Universal were to grant informed consent, such an arrangement would leave Beitchman in the ethical bind of testifying against the clients for whom he is duty-bound to zealously advocate. (See *Tucker Ellis LLP v. Superior Court* (2017) 12 Cal.App.5th 1233, 1247 [discussing the "sacrosanct duty of a law firm to zealously represent the interests of its clients with undivided loyalty"].) Moreover, it would also impugn the integrity of the judicial process, a consideration the trial court was entitled to weigh heavily. (See *Smith, supra*, 60 Cal.App.4th at p. 580.)

Defendants further contend that the trial court failed to properly analyze other relevant factors, such as the necessity of Beitchman's testimony to the case, their strong interest in keeping Beitchman as their counsel, and the possibility that Langnas sought to disqualify Beitchman for purely tactical reasons. (See *Smith, supra*, 60 Cal.App.4th at pp. 580-582.) They argue this violates *Smith*'s holding, that "trial judges must indicate on the record they have considered the appropriate factors and make specific findings of fact when weighing the conflicting interests involved in recusal motions." (*Id.* at p. 582.) We disagree.

The trial court's minute order granting the disqualification motion indicates that the trial court considered appropriate factors. It states: "Given that Beitchman will be called as a witness in this case by Plaintiff, the substantial interactions Beitchman had with Plaintiff, and the potential prejudice to

Defendants, the court in its discretion, finds that Attorney Beitchman, and his firm, must be disqualified from presenting this case at trial." Defendants may not agree with the trial court's balancing of the relevant considerations, but that is not a basis for reversing the trial court's discretionary determination, particularly where the record contains no transcript of the hearing at which the court may have made additional, more illuminating comments. As appellants, defendants bear the burden of affirmatively demonstrating error. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) They have not done so with respect to the court's discretionary conclusion that the concerns associated with Langnas calling Beitchman as a witness outweigh defendants' interest in retaining him as counsel.

Defendants likewise have not demonstrated that the court erred in rejecting their contention that the disqualification motion was so untimely as to cause them extreme prejudice. Defendants argue that once they presented prima facie evidence of unreasonable delay—presumably Rohatiner's proposed, unfiled disqualification motion from September 2015—Langnas failed to carry his burden of justifying the delay. They further claim that Langnas "sat on" the conflict for 16 months while knowing full well that Beitchman represented defendants, thereby indicating that he did not truly view the conflict as problematic, and that the court failed to consider their substantial interest in retaining Beitchman as their counsel. None of these arguments compels reversal.

"Delay will not necessarily result in the denial of a disqualification motion; the delay and ensuing prejudice must be extreme." (*Western Continental Operating Co. v. Natural Gas Corp.*, *supra*, 212 Cal.App.3d at p. 764.) The 16-month delay

between Beitchman appearing in the case and Langnas's filing of the motion was substantial. But the trial court was within its discretion to conclude the delay was not extreme. Langnas's new counsel filed the motion shortly after entering his appearance, and trial was still more than three months away. Langnas evidently advised his previous counsel of the conflict in a more timely fashion—counsel prepared but did not file the disqualification motion seven months earlier. Langnas's new counsel explained in his briefing that previous counsel "never followed through" with the motion, just as he failed to conduct any discovery. Langnas, who was represented by counsel for all but one week of the proceedings, could not reasonably have been expected to file the motion himself when prior counsel failed to do so. There is no evidence that Langnas "sat on" the conflict for tactical reasons; it appears that current counsel acted on the information as soon as practicable.

The trial court explicitly considered the prejudice to defendants, and did so in the context of other important considerations such as prejudice to Langnas. Given that defendants also knew of the potential motion some seven months prior to its filing, and still had three months before the trial date, it was not unreasonable for the court to conclude that the prejudice they would suffer in obtaining new counsel would not be "extreme." Defendants have not shown that they were blindsided by the motion, or that the issues in the case are so complex that it would be difficult to locate new counsel. In fact, defendants obtained new counsel within one month of the disqualification order, and the matter has not yet proceeded to trial. They are similarly situated to Langnas, who also had to obtain new counsel around the same time. In short, the court did

not abuse its discretion in granting the motion for disqualification.

DISPOSITION

The order of the trial court is affirmed. Because respondent did not appear on appeal, no party shall recover costs. (Cal. Rules of Court, rule 8.278(a)(5).)

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COLLINS, J.

We concur:

WILLHITE, Acting P. J.

MANELLA, J.