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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

SHERRIE BROWN, et al., Plaintiffs and Respondents, v. BASROCK RENAISSANCE CALIFORNIA, et al., Defendants and Appellants.	B240161 (Los Angeles County Super. Ct. No. LC090846)

APPEAL from an order of the Superior Court of Los Angeles County. Bert Glennon, Judge. Affirmed.

Kimball, Tirey & St. John, Abel Ortiz and Eli Gordon for Defendants and Appellants.

Campbell & Farahani, Frances M. Campbell and Nima Farahani for Plaintiffs and Respondents.

INTRODUCTION

This is an appeal from an order denying a motion to disqualify counsel. We affirm.

FACTUAL AND PROCEDURAL SUMMARY

According to the operative (fourth amended) complaint, Sherrie Brown, Joselyn Thomas, Octavia Lindlahr, Cari Hicks, Faraniz Behdin, Nendee W. Thomson, Rajeev Rawat, Alla Zelinsky, Mathew John, Jennifer R. Schiffbauer, Irina Kenig, Sebrina Brooks, Lani N. Cooley, Michael Cooley, Greg Rom, Patti Ehart, Shane Cornejo, Marilyn Goldsmith and Emily Palumbo are residents of the Mercer Apartments in Woodland Hills; the Mercer Apartments are owned by Basrock Renaissance California, LLC (Basrock) and managed by Sequoia Equities, Inc. (Sequoia). (We include all 19 plaintiffs in our further references to Brown unless otherwise indicated.) Brown alleges claims for (1) private nuisance, (2) breach of the implied warranty of habitability, (3) negligence, (4) violation of Los Angeles rent stabilization ordinance (L.A.M.C., § 151.00 et seq.), (5) violation of the Los Angeles rent stabilization ordinance (L.A.M.C., § 151.06.02 (failure to pay interest on security deposits)) and (6) unfair business practices (Bus. & Prof. Code, § 17200 et seq.) against Basrock and Sequoia, primarily related to these entities' failures to repair air conditioning (a service promised in advertising) and elevators. (We include Basrock in our further references to Sequoia unless otherwise indicated.)

The original complaint was filed in August 2010. Trial was originally set for November 14, 2011. On November 6, 2011, plaintiffs' counsel informed defense counsel three of the plaintiffs had recently informed her of recently discovered medical issues. Trial on the (third amended) complaint was continued to March 19, 2012 to allow for further discovery, including independent medical examinations.

On December 19, 2011, plaintiffs' counsel sent defense counsel an email requesting a stipulation to add Emily Palumbo as a plaintiff. That same day, defense counsel responded that, with the case "fully prepped for trial" and discovery completed except for "11th hour medical damages claims" by three of the plaintiffs, it was "far too late in the proceedings to be adding plaintiffs."

On January 11, 2012, Brown filed a motion for leave to file a fourth amended complaint to add Palumbo as a plaintiff. The following day, defense counsel (Abel Ortiz) sent plaintiffs' counsel a letter indicating he would assume plaintiffs' counsel were unaware of the facts that Palumbo was an employee of Sequoia and a leasing agent at the Mercer Apartments involved in the lawsuit. He said that continued communication with Palumbo would constitute a violation of rule 2-100 of the Rules of Professional Conduct (communications with a represented party), urged her to take the motion to amend off calendar unless she had information or authority to the contrary and said defendants reserved the right to disqualify plaintiffs' counsel. (All further rule references are to the Rules of Professional Conduct.) That same day, plaintiffs' counsel (Frances Campbell) responded that Palumbo was not a represented party and was a "very low-level employee of Sequoia" who "in essence shows apartments and does clerical work" such that no violation of rule 2-100 had occurred.

On January 27, defense counsel provided plaintiffs' counsel with notice that on February 1, he would apply ex parte for an order shortening time "or to rule immediately" on Sequoia's motion to disqualify counsel (and three motions to compel independent medical examinations). In its memorandum of points and authorities filed on January 31, Sequoia argued that, without disclosing Palumbo's employment with Sequoia, plaintiffs' counsel had improperly communicated with her for more than a month despite the fact their communication "was obviously nothing other than the facts and issues in this case." According to the declaration of Sequoia's Regional Portfolio Manager (Mark Teufel), Palumbo was a "leasing consultant" under the direction of the Leasing Manager at the

Mercer Apartments, and she was "accountable for the leasing and advertising efforts of the community as well as customer service to residents, including maintenance requests and tenant complaints. [¶] Her primary responsibilities include[] meeting weekly revenue/leasing goals, provide excellent **customer service to internal and external customers** through the facilitation and implementation of company wide customer[-]centric programs and initiatives." (Original emphasis.) He said Palumbo "**presents the community to prospective residents through tours of the community, its amenities, model units and/or other available floor plans, participates in the marketing of the community and ensures most current, relevant information about the community is provided to prospective customers through monitoring and updating online and print advertisements and postings daily.**" (Original emphasis.) A copy of the "career description" for a "leasing consultant" was attached as an exhibit to Teufel's declaration.

According to Teufel, Palumbo managed the "entire cycle of relationship of all tenants through the first contact, move-in and continuing through to the renewal process." She was required to have "continued and extensive contact with tenants" and "a cursory review" of Sequoia's activity logs "indicate over thirty (30) instances in which Palumbo had contact with and/or worked directly on issues regarding other Plaintiffs' tenancies" prior to and during the pending litigation, and the records indicated that "certain incidents directly relate to matters raised by the Plaintiffs in this action." Teufel said he had direct communications with Palumbo, and she would continue to have direct communications with the property manager at the Mercer Apartments.

On February 1, Brown filed substantive opposition, arguing defense counsel was misleading the court and relying on "bad" law. Under *Snider v. Superior Court* (2003) 113 Cal.App.4th 1187, Brown argued, Palumbo was a tenant of the building with the right to counsel of her choice, she was only a "very low level employee" and not a "party" within the meaning of rule 2-100 and, in any event, she initiated contact with plaintiffs' counsel such that all communication was proper.

According to Campbell's declaration, Palumbo retained Campbell & Farhani to represent her against Sequoia regarding claims arising out of her tenancy at the Mercer Apartments on December 16, 2011. When Campbell spoke with Palumbo, she determined that although Palumbo worked for Sequoia, she was not a member of Sequoia's "control grou[p]" and had never spoken to any attorney from Sequoia's defense counsel. According to Campbell, she opened her office in 2005, focusing on tenants' rights, housing law and civil rights and, after forming a partnership with Nima Farahani in 2011, she (and Farhani) continued to practice housing rights law almost exclusively. She said her firm was one of the "very few private firms" in Los Angeles County specializing in housing rights, and the firm had incurred over $160,000 in attorneys' fees in the case. Based on her experience with the tenants' rights bar, she opined that it would be "almost impossible" for the plaintiffs to find competent replacement counsel because of the lien amount at issue if plaintiffs were forced to retain new counsel.

Farahani also filed a declaration stating that Palumbo contacted her in December 2011 seeking representation in connection with the habitability violations at her apartment. Several minutes into the conversation, Farahani learned Palumbo resided at the Mercer Apartments involved in this litigation and then learned Palumbo worked in the leasing office answering phones and performing clerical tasks. She "immediately asked . . . Palumbo if she had ever discussed the present action with Defendants' attorneys." Palumbo "assured [Farahani] that she had not." Farahani agreed to meet with her later to discuss the case. Because Palumbo, along with the other plaintiffs, is a tenant of Building F and her grievances concern the same inoperable elevators and air conditioning systems of which the other plaintiffs complain, Farahani agreed to represent Palumbo. Farahani said she had never asked for nor obtained any confidential information from Palumbo as Palumbo had nothing new to add to the information already obtained. Farahani said she had never represented Sequoia, and if Palumbo had actually

been a high ranking employee in possession of important and/or confidential information, Sequoia should have taken steps to prevent such an employee from contacting opposing counsel—"unless, of course, this was a purposeful trap set in place by the defense intending to cause the communication so as to provide them a reason to later bring the present motion . . . ."

Palumbo submitted a declaration indicating that, as a leasing agent at the Mercer Apartments where she also lived (in Building F), she would "answer the phones in the office and show apartments at the Mercer." She was not an officer or executive with Sequoia, and she had "never spoken with any of the lawyers representing Sequoia regarding this litigation." The only conversations she had with anyone from the company were when Teufel told her "if [she] join[ed] the lawsuit against [Sequoia,] it would be grounds for termination. The next day he told [her] that information was incorrect and to disregard what he said."

In its reply (filed on February 17), Sequoia maintained that the litigation hinged on acts and omissions of its onsite employees, and the prejudice to the defendants and continuing impact on the proceedings outweighed any hardship to the plaintiffs.

After hearing argument at the February 21 hearing, the trial court denied Sequoia's motion to disqualify counsel. The trial court commented that Palumbo, not plaintiffs' counsel, had initiated the contact; she lived in the building as a tenant. The evidence she answered phones and "undoubtedly talks to other people who live there" was insufficient to warrant disqualification of counsel.

Sequoia appeals.

DISCUSSION

According to Sequoia, the trial court abused its discretion in denying the motion to disqualify plaintiffs' counsel because Palumbo is a "party" within the meaning of rule 2-100, her acts or failures may be imputed to Sequoia as she had a "possible role in the alleged negligence," and the ongoing violation of rule 2-100 will have a continuing effect on these proceedings. We disagree.

Applicable Law

Rule 2-100 of the Rules of Professional Conduct

"Rule 2-100 Communication With a Represented Party

"(A) While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.

"(B) For purposes of this rule, a 'party' includes:

"(1) An officer, director, or managing agent of a corporation or association, and a partner or managing agent of a partnership; or

"(2) An association member or an employee of an association, corporation, or partnership, if the subject of the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.

"(C) This rule shall not prohibit:

"(1) Communications with a public officer, board, committee, or body; or

"(2) Communications initiated by a party seeking advice or representation from an independent lawyer of the party's choice; or

"(3) Communications otherwise authorized by law."

As our Supreme Court explained in addressing the predecessor to rule 2-100 (and resulting *discipline by the State Bar*), "This rule is necessary to the preservation of the attorney-client relationship and the proper functioning of the administration of justice . . . . It shields the opposing party not only from an attorney's approaches which are intentionally improper, but, in addition, from approaches which are well intended but misguided." (*Mitton v. State Bar of California* (1969) 71 Cal.2d 525, 534.) "The rule was designed to permit an attorney to function adequately in his proper role and to prevent the opposing attorney from impeding his performance in such role. If a party's

counsel is present when an opposing attorney communicates with a party, counsel can easily correct any element of error in the communication or correct the effect of the communication by calling attention to counteracting elements which may exist. Consequently, before any direct communication is made with the opposing party, consent of the opposing attorney is required." (*Ibid.*)

Disqualification of Counsel for Violation of Rule 2-100

Violation of rule 2-100 may expose counsel to disciplinary charges. (Bus. & Prof. Code, §§ 6077 [State Bar has power to discipline members for willful breach of rules of professional conduct], 6078; *Crane v. State Bar of California* (1981) 30 Cal.3d 117). However, whether an attorney is to be disqualified from representing the client in a pending case rests within the trial court's discretion. (*Chronometrics, Inc. v. Sysgen, Inc.* (1980) 110 Cal.App.3d 597, 607-608 (*Chronometrics*).) As the *Chronometrics* court commented, "We detect a common theme in the cases relating to disqualification of attorneys by trial courts. If the status or misconduct which is urged as a ground for disqualification will have a *continuing effect* on the judicial proceedings which are before the court, it is justified in refusing to permit the lawyer to participate in such proceedings. . . . If, on the other hand, the court's purpose is to *punish* a transgression which has no substantial continuing effect on the judicial proceedings to occur in the future, neither the court's inherent power to control its proceedings nor Code of Civil Procedure section 128 can be stretched to support the disqualification." (*Id.* at p. 607, italics added.)

In the *Chronometrics* case, the trial court found the attorney had communicated with the opposing party regarding the subject matter of the controversy, knowing the party was represented by counsel but without the consent of that counsel, in violation of the predecessor to Rule 2-100, *and improperly obtained information from the opposing party as a result*. (*Chronometrics, supra,* 110 Cal.App.3d at pp. 603, 607-608.) Under such circumstances, the *Chronometrics* court found, "It was not an abuse of the court's discretion to refuse to permit the wrongfully obtained information to be used by [the

attorney] directly in the proceedings before the court. The extension of the disqualification beyond [the attorney] personally to his law firm has, however, no purpose but a punitive one. [ ] As we have indicated, such purposes should be accomplished through established disciplinary proceedings." (*Id*. at p. 608, fn. omitted.)

"Rule 2-100 is intended to preserve the attorney-client relationship." (*McMillan v. Shadow Ridge at Oak Park Homeowner's Association* (2008) 165 Cal.App.4th 960, 967 (*McMillan*).) "'"Trial courts in civil cases have the power to order disqualification of counsel when necessary for the furtherance of justice. [Citations.] *Exercise of that power requires a cautious balancing of competing interests*. The court must weigh the combined effect of a party's right to counsel of choice, an attorney's interest in representing a client, the financial burden on a client of replacing disqualified counsel and any tactical abuse underlying a disqualification proceeding against the fundamental principle that the fair resolution of disputes within our adversary system requires vigorous representation of parties by independent counsel . . . ."'" (*McMillan, supra,* 165 Cal.App.4th at p. 965, original italics, citation omitted.)

Therefore, the *McMillan* court observed, even *if a communication is deemed to be within the ambit of rule 2-100,* a trial court's denial of a motion to disqualify counsel is properly upheld where the trial court finds "nothing occurred in the conversations that would 'have any effect on either the outcome of the litigation or on the way in which the litigation is going to proceed.'" (*McMillan, supra,* 165 Cal.App.4th at p. 968.) "'The court's goal is not to impose a *penalty,* as the propriety of punishment for violation of the Rules of Professional Conduct is a matter within the purview of the State Bar, not of a court presiding over the affected case. (See Bus. & Prof. Code, § 6077; *Noble v. Sears, Roebuck & Co*. (1973) 33 Cal.App.3d 654, 658–659 [109 Cal. Rptr. 269].) Instead, what the court must do is focus on identifying an appropriate remedy for whatever *improper effect* the attorney's misconduct may have had in the case before it.'" (*McMillan, supra,* 165 Cal.App.4th at p. 968, original italics, further citation omitted.)

According to the record, although this litigation had been pending for well over a year with the continued trial date approaching, Palumbo stated in her declaration that she had never spoken with defense counsel, and she merely answered telephones and showed apartments. It did not appear that the communications involved "any act or omission of [Palumbo] in connection with the matter that may be binding upon or imputed to [Sequoia]" within the meaning of rule 2-100(B). To the contrary, notwithstanding Sequoia's assertion she had a "possible" role in any negligence, Palumbo stated her only contact with Teufel (Sequoia's Regional Portfolio Manager) had been his statement to her (revoked the following day) that involvement in the litigation was grounds for termination. Moreover, it was undisputed that Palumbo initiated contact with plaintiffs' counsel regarding her own claims as a tenant of the building (rule 2-100(C)(2)), and there was no indication plaintiffs' counsel had improperly obtained confidential information. However, there was evidence of the prejudice to the plaintiffs if the disqualification motion had been granted. We find no abuse of discretion.

DISPOSITION

The order is affirmed. Respondents are entitled to costs on appeal.

WOODS, J.

We concur:

PERLUSS, P. J. **JACKSON, J.**