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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

TRANSNATIONAL
MANAGEMENT SYSTEMS, LLC
et al.,

Plaintiffs and Respondents,

v.

PEGASUS ELITE AVIATION,
INC.,

Defendant and Appellant.

B277517

(Los Angeles County
Super. Ct. No. LC100724

APPEAL from an order of the Superior Court of Los Angeles County, Lawrence Riff, Judge. Dismissed in part and affirmed in part.

Clark Hill, Richard H. Nakamura Jr.; David Olson Law Group, David S. Olson; Clark & Trevithick, Jonathan L. Smoller, for Defendant and Appellant.

Jeffrey Scott Shapiro; Jordan & Leverrier and Conrad Jordan; Steven L. Graff, Inc. and Steven L. Graff, for Plaintiffs and Respondents.

INTRODUCTION

Pegasus Elite Aviation, Inc. appeals from an order denying in part its motion to disqualify counsel for Transnational Management Systems, LLC and Transnational Management Systems II, LLC (collectively, Transnational) or, in the alternative, to order Transnational and its attorneys to return certain allegedly confidential information they had obtained and to impose evidentiary sanctions. Since appealing from the trial court's order, Baird Williams & Greer, the target of Pegasus's disqualification motion, withdrew from representing Transnational in this action, thus mooted the disqualification issue. We affirm the trial court's ruling denying Pegasus's request to order Transnational and its attorneys to return or destroy all copies of the information and for evidentiary sanctions, without prejudice to Pegasus's right to renew its request for appropriate injunctive relief or sanctions should Pegasus discover additional facts supporting its request.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Alleged Misdeeds of Counsel for Transnational*

Pegasus is a private charter aircraft company whose fleet consists of jets leased from others. Transnational leased two jets to Pegasus from 2009 to 2012. A dispute arose over Pegasus's maintenance and billing practices, and in August 2013 Transnational sued Pegasus for breaches of the contracts governing the leased planes. Pegasus filed a cross-complaint for, among other things, breach of contract.

The law firm of Bailey & Partners originally represented Transnational in this action. In November 2014 Transnational

associated attorneys Joshua Krakowsky and Larry K. Hatcher of Davidoff Hatcher & Citron (DH&C) as co-counsel. In March 2015 Transnational substituted Daniel Mestaz of Baird Williams & Greer (BW&G) for Bailey & Partners. Pegasus alleges attorneys from DH&C and BW&G improperly facilitated or acquiesced in agreements with prospective witnesses to make payments to those witnesses in exchange for testimony and evidence damaging to Pegasus.

1. *The Alleged Agreement with Tony Carcione*

Pegasus alleged DH&C attorney Krakowsky facilitated an agreement with Tony Carcione, the principal of a company from which Transnational bought the two planes it leased to Pegasus. In a lawsuit filed in New York, Transnational (or its president Adam Victor) sued Carcione for breach of fiduciary duty.¹ Pegasus claimed Krakowsky offered to “let Carcione off” in the New York lawsuit in exchange for favorable testimony against Pegasus in this action and another action filed in New York. An email from Krakowsky to counsel for Carcione in fact offered Carcione a “provisional” payment of \$250,000 to settle the lawsuit against him and proposed adjustments to that amount based on the amount of the judgment, if any, Transnational recovered from Pegasus in this action. Krakowsky stated in the email, “[W]e want a way to let Carcione off, but make sure he cooperates against [Pegasus].”

¹ The record on appeal in this case does not include a copy of the complaint filed against Carcione in New York.

2. *The Alleged Agreement with Chip Paige*

Pegasus claimed BW&G attorney William Sawkiw “acquiesced” to a similar “sliding scale contingency agreement” with Chip Paige, a former pilot and information technology consultant for Pegasus. BW&G represented Paige’s company in a lawsuit the company filed in July 2014 against Pegasus and its president, Timothy Prero, in Arizona. Nine months later, in March 2015, BW&G became counsel for Transnational in this action. Meanwhile, according to Pegasus, Paige improperly gave BW&G proprietary information belonging to Pegasus, to which Paige had access as Pegasus’s former IT consultant.

Several weeks after BW&G began representing Transnational in this case, Paige, Prero, and their respective companies settled the Arizona action. The settlement agreement provided that neither Paige nor his company would “consult with or provide any assistance or documents to [Victor], [Transnational], or any other third party adverse to Pegasus and/or its agents, including Prero, in litigation or any other dispute.”

In June 2016 Pegasus took Paige’s deposition in this action. Paige testified he entered into an agreement with Victor by email in early to mid-2015 to provide Transnational assistance in this case in exchange for a percentage of Transnational’s recovery. The precise percentage varied with the amount of Transnational’s ultimate recovery. Paige also testified that he drafted the email containing the terms of this agreement following a conversation with Victor and that he “thought” he copied the BW&G attorney Sawkiw on the email. Paige said he and Victor did not sign a formal agreement memorializing the agreement, and Paige did not remember whether he received a response from Victor or Sawkiw to his email. After sending the

email, however, Paige spent 90 to 100 hours consulting with Transnational on this case until he settled his action against Prero and Pegasus and agreed not to provide further assistance to Transnational. While he consulted for Transnational, Paige said BW&G told him the firm intended to use the Pegasus data Paige provided to BW&G in connection with this action.

B. Paige's Access to Pegasus's Data

Prero was a self-described mentor to Paige in the late 1990's. Prero helped Paige obtain a pilot's rating, retained Paige and his company as information technology consultants, and allowed Paige and his company to sublease space from Pegasus on "favorable" terms. As an IT consultant for Pegasus, Paige had access to and helped maintain certain data belonging to Pegasus, such as (1) QuickBooks accounting data, including profit and loss statements; (2) federal excise tax data, including a response to a 2013 audit; and (3) FlightPak scheduling software data, including customer lists, pricing data, and passenger information. Pegasus stored the QuickBooks and excise tax data on servers owned by Paige, and the FlightPak data resided on a personal computer owned by Paige. As Pegasus's IT consultant and the owner of this hardware, Paige knew the administrator password to access Pegasus's data.

There was no written agreement acknowledging the proprietary or confidential nature of the data Pegasus stored on servers and devices owned by Paige. Prero stated in a declaration, however, he "made clear to Paige, and [was] quite sure he understood, that any Pegasus information and computer files to which he was given access to perform [IT] duties were to be maintained as strictly confidential." Paige testified in his deposition that he never discussed the confidentiality of the data

with Prero but that “there was probably an assumption of privacy” in the QuickBooks data. He said he put the FlightPak data on his personal computer as a backup in case the servers belonging to the company that provided the FlightPak software and related services went down.

The friendship and business association between Prero and Paige ended in late 2013. Before Paige left Pegasus, Pegasus hired another IT consultant who migrated data from Paige’s servers to new servers owned by Pegasus. The consultant completed the migration after Paige had left, and someone called Paige to ask him to pick up his servers. Some time after Paige retrieved the servers he realized they still contained Pegasus’s QuickBooks data and excise tax data. Paige, however, never told Pegasus he still had this information, and no one at Pegasus ever asked Paige or anyone else to return or delete the data. Paige took his personal computer containing the FlightPak data when he left Pegasus.

In September 2014 Paige shared with Victor and Bailey & Partners some of the Pegasus data on his servers and personal computer. Paige testified he shared the information to try to “kick-start” a financial arrangement between himself and Victor. After BW&G substituted into this action as counsel for Transnational, Paige made copies of the Pegasus data files and loaded them on computers at BW&G. Pegasus claims BW&G shared the Pegasus data with its expert, who used the data in his damages report.

C. *The Motion To Disqualify Counsel for Transnational or for Evidentiary Sanctions*

In July 2016 Pegasus moved to disqualify all counsel of record for Transnational at the time, including DH&C and

BW&G. The motion did not identify individual lawyers within those firms. Pegasus asserted counsel for Transnational obtained and used privileged and confidential Pegasus computer files they knew Paige had obtained improperly and offered to pay Paige and Carcione for testimony in an amount contingent on the outcome of this case. Alternatively, Pegasus asked the court to order counsel for Transnational to return or destroy all copies of material obtained from Paige in their possession or the possession of their clients, consultants, and experts. Pegasus also asked the court to preclude Transnational from introducing such evidence at trial.

Krakowsky and Hatcher withdrew as counsel for Transnational the day before the hearing on Pegasus's motion. The trial court granted the motion in part by revoking Krakowsky's pro hac vice status and finding "he acted improperly with Mr. Carcione and violated ethical standards." The trial court otherwise denied Pegasus's motion to disqualify counsel for Transnational, order the return and destruction of the information obtained from Paige, or impose evidentiary sanctions. The court refused to disqualify attorneys from BW&G, finding Pegasus had failed to "trace" the alleged agreement between Victor and Paige to the law firm. The court also found Pegasus had voluntarily provided its data to Paige without "a degree of understanding of confidentiality and non-dissemination."

Pegasus timely appealed. In March 2017 Transnational substituted Jeffrey Scott Shapiro for BW&G, Mestaz, and Daryl Williams.²

DISCUSSION

A. *The Appeal from the Order Denying the Motion To Disqualify BW&G Is Moot*

Pegasus argues the trial court erred by denying its motion to disqualify BW&G. No attorneys affiliated with that firm, however, currently represent Transnational. Thus, we cannot grant Pegasus any effective relief, and its appeal is moot.

“It is well settled that an appellate court will decide only actual controversies and that a live appeal may be rendered moot by events occurring after the notice of appeal was filed. We will not render opinions on moot questions or abstract propositions, or declare principles of law which cannot affect the matter at issue on appeal.” (*Building a Better Redondo, Inc. v. City of Redondo Beach* (2012) 203 Cal.App.4th 852, 866; see *Daily Journal Corp. v. County of Los Angeles* (2009) 172 Cal.App.4th 1550, 1557.) As a general rule, an appeal is moot when any ruling by this court “can have no practical effect [nor can it] provide the parties with effective relief.” (*Lincoln Place Tenants Assn. v. City of Los Angeles* (2007) 155 Cal.App.4th 425, 454; see *Steiner v. Superior Court* (2013) 220 Cal.App.4th 1479, 1485.)

² William Sawkiw of BW&G was never counsel of record for Transnational, but the trial court admitted him *pro hac vice* to represent Transnational in this action. The substitution of attorney signed by Mestaz, who was counsel of record for Transnational, did not reference Sawkiw, and the record does not indicate whether Sawkiw is still affiliated with BW&G.

Disqualifying BW&G and its attorneys from this case at this time would have no practical effect because neither the firm nor any of its attorneys represent Transnational, either in the trial court or this court. (See *La Jolla Cove Motel & Hotel Apartments, Inc. v. Superior Court* (2004) 121 Cal.App.4th 773, 782 [“this case has been rendered technically moot because, as [the challenged attorneys] no longer represent [any party] in this action, we cannot order their disqualification”].)

Pegasus argues its appeal is not moot because “Pegasus is suffering continuing harm from Transnational’s attorneys’ possession and use of the stolen data.” Even if true, however, the remedy for any improper continuing use by Transnational of the data would be Pegasus’s alternative requests for an order requiring the return and destruction of the data or imposing evidentiary sanctions, not the disqualification of BW&G or its attorneys. (See *Neal v. Health Net, Inc.* (2002) 100 Cal.App.4th 831, 844 [“disqualification is . . . an ineffective remedy [where] it would not prevent the party from giving new counsel [privileged] information, which would leave the adversary in the same position as before”]; see also *ibid.* [rather than disqualifying counsel, client confidences allegedly obtained by opposing counsel can be protected by “less drastic measures such as: protective orders[;] limiting the admission of evidence; in camera proceedings; the use of sealed records; payment of attorney fees and costs; and disciplinary sanctions through the State Bar of California in appropriate circumstances”].)

Pegasus also argues the issue whether Sawkiw or other BW&G attorneys violated Rule 5-310 of the Rules of Professional Conduct (Rule 5-310) by “acquiescing” to an unethical contingency arrangement is an issue of continuing public interest that is likely to recur, and there is no reported case that

“construes the acquiescence clause of Rule 5-310” in these circumstances.³ Thus, Pegasus argues, this court should exercise its discretion to consider its appeal from the trial court’s order denying in part the motion to disqualify to address this issue. (See *Building a Better Redondo, Inc. v. City of Redondo Beach*, *supra*, 203 Cal.App.4th at p. 867 [“[w]hen an action involves a matter of continuing public interest that is likely to recur, a court may exercise an inherent discretion to resolve that issue, even if an event occurring during the pendency of the appeal normally would render the matter moot”]; *La Jolla Cove Motel & Hotel Apartments, Inc. v. Superior Court*, *supra*, 121 Cal.App.4th at p. 782 [“we will nevertheless exercise our discretion to resolve the matter on the merits because the appeal raises an issue of public interest that is likely to recur”].)

While there may be a dearth of case law on the meaning of “acquiesce” in Rule 5-310, the trial court’s ruling not to disqualify BW&G based on the purported “sliding scale” agreement with Paige rested on the lack of evidence BW&G had any knowledge of or involvement with that agreement, not on the definition of “acquiesce.” Pegasus contended Paige copied Sawkiw on the email Paige sent to Victor containing the terms of the purported agreement, but Paige testified he merely “thought” he copied Sawkiw on the email, and Pegasus did not produce the email or any other evidence to show Sawkiw knew about the agreement. Pegasus also suggested BW&G must have known about (or at least “acquiesced” in) the agreement between Paige and Victor

³ Rule 5-310(B) provides that a member shall not “[d]irectly or indirectly pay, offer to pay, *or acquiesce* in the payment of compensation to a witness contingent upon the content of the witness’s testimony or the outcome of the case.” (Italics added.)

because Paige worked 90 to 100 hours as a consultant for BW&G and received no compensation. The trial court, however, found there was insufficient evidence to infer from Paige's uncompensated work that BW&G had knowledge of Paige's agreement with Victor. To the extent "acquiesce" is undefined in the case law, it must require, at a minimum, some knowledge about the thing to which an attorney allegedly acquiesced. The trial court found no evidence of any such knowledge on the part of Sawkiw or BW&G.

Therefore, Pegasus's appeal from the order denying its motion for disqualification raises only fact-specific questions about whether BW&G had any knowledge of Paige's alleged agreement with Victor. Elucidating on the meaning of the term "acquiesce" in Rule 5-310 in this case would not shed light on an important issue of public interest that is likely to recur. (See *Building a Better Redondo, Inc. v. City of Redondo Beach*, *supra*, 203 Cal.App.4th at p. 867 ["the appeal of the judgment in this case presents fact-specific issues that are unlikely to recur and thus does not justify our exercise of discretion to resolve moot questions"].) Under these circumstances, we decline to exercise discretion to consider the merits of a moot issue.

B. *The Trial Court Did Not Abuse Its Discretion in Denying Pegasus's Request for an Order Requiring Transnational To Return or Destroy the Allegedly Confidential Information or Imposing Evidentiary Sanctions at This Stage of the Litigation*

1. *Standard of Review*

Pegasus's request for an order requiring Transnational and its attorneys to return or destroy documents and information

was, although not styled as such, a motion for a preliminary injunction. (See, e.g., *Millennium Corporate Solutions v. Peckinpough* (2005) 126 Cal.App.4th 352, 354 [affirming an order granting application for preliminary injunction ordering the return of confidential client files and information]; *Pillsbury, Madison & Sutro v. Schectman* (1997) 55 Cal.App.4th 1279, 1289 [affirming an order granting a preliminary injunction ordering the return of wrongfully obtained confidential documents].) We generally review an order denying such a motion for abuse of discretion. (*SB Liberty, LLC v. Isla Verde Association, Inc.* (2013) 217 Cal.App.4th 272, 281; *Yu v. University of La Verne* (2011) 196 Cal.App.4th 779, 787.) Similarly, we review for an abuse of discretion a trial court’s order granting or denying evidentiary sanctions in connection with a motion to disqualify counsel. (*Peat, Marwick, Mitchell & Co. v. Superior Court, supra*, 200 Cal.App.3d at p. 291; *Chronometrics, Inc. v. Sysgen, Inc.* (1980) 110 Cal.App.3d 597, 608.)

We will not disturb the trial court’s resolution of disputed factual issues, and we will uphold the trial court’s express and implied findings if supported by substantial evidence. (*People ex rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1143-1144; *People ex rel. Feuer v. FXS Management, Inc.* (2016) 2 Cal.App.5th 1154, 1159; *M’Guinness v. Johnson* (2015) 243 Cal.App.4th 602, 615.) In reviewing factual findings for substantial evidence, a reviewing court “look[s] only to the evidence supporting the prevailing party” and “discard[s] evidence unfavorable to the prevailing party as not having sufficient verity to be accepted by the trier of fact.” (*Clark v. Superior Court* (2011) 196 Cal.App.4th 37, 47; see *Koo v. Rubio’s Restaurants, Inc.* (2003) 109 Cal.App.4th 719, 728 [a trial court’s resolution of factual disputes is conclusive].) We

presume the trial court's order is correct, indulge all presumptions to support it, and resolve factual disputes arising from the evidence in favor of the prevailing party. (*Clark*, at pp. 46-47 [disqualification]; *Integrated Dynamic Solutions, Inc. v. VitaVet Labs, Inc.* (2016) 6 Cal.App.5th 1178, 1184 [preliminary injunction]; *Stephen Slesinger, Inc. v. Walt Disney Co.* (2007) 155 Cal.App.4th 736, 765 [sanctions for misconduct].)

2. *Substantial Evidence Supports the Trial Court's Finding That Pegasus Failed To Protect Its Data as Confidential or Proprietary*

Pegasus's motion for an order requiring Transnational and its attorneys to return the information they obtained from Paige and for evidentiary sanctions rested on Pegasus's contention that the data Paige gave BW&G was "privileged and confidential." The trial court disagreed and found that, because Prero and Paige did not have "a degree of understanding of confidentiality and non-dissemination," the evidence submitted in support of the motion did not support imposing the "drastic remedy of throwing counsel off the case or the evidentiary sanctions." Substantial evidence supports the trial court's finding.

Transnational argued Pegasus had no reasonable expectation of privacy or confidentiality in the data because Prero gave Paige "unfettered access" to the data without any agreement to maintain its confidentiality and because Pegasus failed to take reasonable measures to maintain its confidentiality. Transnational submitted deposition testimony by Paige stating that Pegasus stored the data on his servers and computer and never asked Paige to return or delete the data when his relationship with Pegasus and Prero ended. Transnational also cited evidence indicating Pegasus knew Paige still had the data

in November 2015, long after their relationship ended, when Paige produced the data in discovery responses in the action Paige brought against Prero and Pegasus in Arizona.⁴ And yet at that time Pegasus still did not ask Paige to return or delete the data, and the settlement agreement precluding Paige from assisting Transnational in this action did not require Paige to return or delete any Pegasus data to which he still had access. This evidence supports the trial court's finding.

Moreover, Pegasus conceded it did not wipe Paige's servers clean of its data before Pegasus or its consultant contacted Paige and asked him to retrieve the servers. Pegasus attempted to explain this oversight by arguing Prero did not know Pegasus's data remained on the servers, but this fact tends to support, rather than undermine, the trial court's finding that Pegasus did not take adequate measures to protect the confidentiality of its data.

Indeed, Pegasus introduced very little evidence of an agreement between Paige and Pegasus regarding confidentiality of the QuickBooks data, and no evidence of any such agreement regarding the FlightPak or excise tax data.⁵ Pegasus apparently

⁴ Pegasus contests Transnational's characterization of Paige's discovery responses in the Arizona action.

⁵ Paige testified only that there was an undefined "assumption of privacy" in the QuickBooks accounting data. Pegasus cited Prero's contrary declaration stating he "made clear to Paige . . . that any Pegasus information and computer files to which he was given access . . . were to be maintained as strictly confidential," but we defer to the trial court's credibility determinations. (See *Stephen Slesinger, Inc. v. Walt Disney Co.*, *supra*, 155 Cal.App.4th at p. 765.)

did not require Paige to sign a nondisclosure or confidentiality agreement when Pegasus retained Paige as an IT consultant, and Pegasus either failed to keep track of its data on Paige's personal computer and servers or failed to demand the return or destruction of its data when Paige left Pegasus. While Pegasus introduced some evidence to the contrary, and while, in general, the type of information at issue may be sensitive or confidential, we cannot substitute our judgment for the trial court's factual findings. (See *People ex rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc.*, *supra*, 20 Cal.4th at p. 1143; *Clark v. Superior Court*, *supra*, 196 Cal.App.4th at p. 47.)

Pegasus cites *In re Shell Oil Refinery* (1992) 143 F.R.D. 105 for the proposition that evidentiary sanctions are appropriate where a party "circumvented the discovery process" by obtaining proprietary documents of the opposing party from an employee of that party. (*Id.* at p. 108.) In that case, however, the court assumed the documents in question were proprietary and found the employee (who, unlike Paige, was bound by a confidentiality agreement) was not authorized to give the documents to counsel for the opposing party. (See *id.* at p. 108 & fn. 2.) The trial court in this action found Paige was not similarly restricted.

That is not to say, however, that Transnational will have unfettered freedom to use Pegasus's data in this (and perhaps other) litigation with impunity. This case is still in its early stages; a lot can happen between remittitur and trial. As discovery proceeds, Pegasus may uncover new facts showing Paige or BW&G knew Pegasus's data were confidential at the time Paige provided it to counsel for Transnational. Pegasus may learn, either from additional sessions of Paige's deposition or the depositions of Transnational's former attorneys on non-privileged topics, that Transnational's former attorneys improperly received

and used information from Paige. Pegasus may have grounds for asking the court to revise and strengthen the existing protective order. (See *Neal v. Health Net, Inc.*, *supra*, 100 Cal.App.4th at p. 850 [“litigants such as defendants, who are concerned that privileged or confidential information may be publicly disclosed by their former employee, should seek an appropriate protective order”].) And, to the extent Transnational attempts to use data Pegasus proves are not discoverable, Pegasus may have enough evidence to file a renewed motion for preliminary injunction, an appropriate motion in limine, or a motion for evidentiary or issue sanctions. (See *Cottle v. Superior Court* (1992) 3 Cal.App.4th 1367, 1381.) As Pegasus concedes, “The propriety of what data was discoverable was never in fact vetted via discovery.” On remand, the vetting may begin.⁶

⁶ Pegasus also concedes counsel for Transnational has returned “[s]ome of the Pegasus data,” but Pegasus does not identify what data counsel for Transnational has returned or whether the data counsel for Transnational still possesses are subject to discovery. Pegasus also concedes “some of the FlightPak data could have been acquired directly from FlightPak.” Under these circumstances, Pegasus’s motion was premature.

DISPOSITION

The appeal from the order denying Pegasus's motion to disqualify BW&G is dismissed as moot. The order denying Pegasus's request for an order requiring the return and destruction of information obtained from Paige and for evidentiary sanctions is affirmed. The parties are to bear their costs on appeal.

SEGAL, J.

We concur:

ZELON, Acting P. J.

J. WILEY, J.*

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