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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

SERGIO MIRALDA,

Plaintiff and Respondent,

v.

HENG SHENG, INC.,

Defendant and Appellant.

B282158

(Los Angeles County
Super. Ct. No. BC640698)

APPEAL from an order of the Superior Court of
Los Angeles County, Holly E. Kendig, Judge. Reversed.

Law Offices of Shun C. Chen and Shun C. Chen for
Defendant and Appellant.

Chami Law, PC and Pouya B. Chami for Plaintiff and
Respondent.

Appellant Heng Sheng Inc. challenges the trial court's order granting respondent Sergio Miralda's motion to disqualify appellant's trial counsel based on his conduct related to respondent's Code of Civil Procedure section 998¹ offer and his other communications with respondent's counsel. Because appellant's counsel's conduct did not harm respondent or present a substantial continuing injury to the judicial proceedings, we conclude that the trial court erred in disqualifying appellant's counsel, and accordingly, we reverse.

FACTUAL AND PROCEDURAL SUMMARY

Respondent worked in appellant's restaurant as a dishwasher and cook from 2007 until July 2016, when he was terminated. On November 16, 2016, respondent filed a complaint against appellant for, among other claims, wage and hour law violations and unfair business practices.

On December 8, 2016, several weeks after the lawsuit was filed, the parties' lawyers exchanged emails regarding the case. Respondent's counsel sent appellant's counsel a document which purported to summarize the respondent's factual and legal theories, and appellant's counsel responded: "[P]lease admit [that] your client has no social security number and did not provide it to my client, which will streamline our investigation." Respondent's counsel refused, reminding appellant's attorney that respondent's immigration status was non-discoverable in a wage/hour case and that his social security information was irrelevant. Appellant's counsel responded that "[w]e are not

¹ All statutory references are to the Code of Civil Procedure.

attacking his illegal alien status. We need to confirm he does not have [a] social security number so an employer will not [*sic*] be able to provide [a] wage statement to show withholding,” and counsel added: “Under our new president’s guideline, your client will be deported before the case is over.”

The same day as this email exchange, respondent served a section 998 offer to resolve respondent’s claims against appellant for \$45,000.00. Respondent’s section 998 offer indicated that appellant could accept by signing the offer or by filing the original offer with proof of acceptance within 30 days.

On the copy of the section 998 offer that was subsequently returned to respondent in late December 2016, appellant’s counsel had crossed out the amount of \$45,000.00 that originally appeared, and had handwritten “\$4,500” in its place and signed the section 998 offer on behalf of appellant. Appellant’s counsel attached the executed section 998 offer to an email that stated: “[O]ur client [appellant] accepts your client’s corrected offer in the sum of \$4,500.00. The acceptance is attached. Please confirm the acceptance, and our client will send you the check immediately. All discovery requests are now moot. Please rest assured this is the best ‘recovery’ your client will ever have.”

Respondent’s counsel immediately responded: “Counsel—the offer was for \$45,000 (not \$4,500). Your handwritten edit to the offer is absurd and constitutes fraud.”

In early January 2017, respondent filed a motion to disqualify appellant’s counsel. Specifically, respondent argued that disqualification was required because appellant’s counsel fraudulently altered the original section 998 offer and then purported to accept it to end the litigation. Respondent also asserted that appellant’s counsel’s request for his social security

information and his prediction that respondent would be deported supported counsel's disqualification. Respondent pointed out that appellant's counsel's conduct made him a witness in the case. Appellant opposed the motion, arguing among other things, that the altered section 998 offer was a counteroffer presented in the context of the parties' private and privileged settlement discussions.

On January 30, 2017, after a hearing, the trial court granted the motion to disqualify appellant's counsel. The minutes of the hearing reflect the court's conclusion that appellant's counsel's action of altering and then accepting the altered section 998 offer was an attempt to end the action by "fraudulent" means. The trial court found that appellant's counsel's conduct warranted disqualification in the "interests of justice and in order to preserve the integrity of the judicial process." The court further concluded that appellant's counsel's conduct "was deceitful and his other communications in this action demonstrate that [p]laintiff will be unable to achieve a fair resolution of this dispute if [appellant's counsel] is allowed to remain," [and that] "the ethical violation outweighs any right [d]efendant may have to retain [its counsel]."

On February 2, 2017, respondent's served a "notice of ruling" of the disqualification motion. On April 19, 2017, appellant filed this appeal.

DISCUSSION

Appellant argues before this court that the trial court erred in granting the motion to disqualify its counsel. Appellant complains that the trial court failed to cite any ethical rule or any other legal authority to support the trial court's conclusion

that counsel's conduct warranted disqualification and thus the ruling lacks a rational basis. Respondent counters that this court should dismiss the appeal as untimely, and he also defends the trial court's decision on the merits, asserting that appellant's counsel's dishonest and deceitful conduct with respect to the section 998 offer and his statements regarding respondent's immigration status required disqualification to avoid injury to respondent and protect the integrity of the judicial process.

A. Timeliness of the Appeal.

California Rules of Court, rule 8.104 sets forth the normal time to file an appeal. As is relevant here, rule 8.104(a) provides that “a notice of appeal must be filed on or before . . . [¶] . . . [¶] (B) 60 days after the party filing the notice of appeal serves or is served by a party with a document entitled ‘Notice of Entry’ of judgment or a filed-endorsed copy of the judgment, accompanied by proof of service.” (Cal. Rules of Court, rule 8.104(a)(1)(B).) The trial court granted the motion to disqualify appellant's counsel on January 30, 2017, and respondent served a “notice of ruling” of the motion on February 2, 2017.² According to respondent, the “notice of ruling” constitutes “notice of entry” under California Rules of Court, rule 8.104. Thus, respondent maintains, appellant only had 60 days to file and serve its notice of appeal, namely, until April 3, 2017, and because appellant did not serve the notice of appeal until April 19, 2017, the appeal is untimely and we lack jurisdiction to consider it.

² The trial court did not issue a written order on the motion and the minutes of the proceeding were not served with respondent's notice of ruling.

We disagree. Respondent’s “notice of ruling” does not equate with “notice of entry of [an order]” under California Rules of Court, rule 8.104. (*Alan v. American Honda Motor Co., Inc.* (2007) 40 Cal.4th 894, 905.) “It might seem that the difference between a ‘notice of ruling’ and a ‘notice of entry’ is hypertechnical. In another context it might be.” (*20th Century Ins. Co. v. Superior Court* (1994) 28 Cal.App.4th 666, 672.) But, because the time limits for filing a notice of appeal are jurisdictional, “we must apply [California Rules of Court, rule 8.104] . . . strictly and literally according to its terms; the rules ‘must stand by themselves without embroidery.’ ” (*In re Marriage of Taschen* (2005) 134 Cal.App.4th 681, 686, quoting *20th Century Ins. Co. v. Superior Court, supra*, 28 Cal.App.4th at p. 672.) Thus, courts have consistently held that the required document entitled “notice of entry” (Cal. Rules of Court, rule 8.104(a)) must bear precisely that title. (*Sunset Millennium Associates, LLC v. Le Songe, LLC* (2006) 138 Cal.App.4th 256, 260.) Accordingly, here, because respondent did not serve a “notice of entry” of the trial court’s order granting the disqualification motion, the 60-day period in California Rules of Court, rule 8.104(a)(2) is inapplicable, and the appeal is timely.

B. The Disqualification Motion

A trial court’s discretionary authority to disqualify an attorney derives from the power inherent in every court, “[t]o control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto.” (§ 128, subd. (a)(5); *In re Complex Asbestos Litigation* (1991) 232 Cal.App.3d 572, 585.) The trial court’s exercise of

this discretion is limited by the applicable legal principles and is subject to reversal when there is no reasonable basis for the action. (*Bell v. 20th Century Ins. Co.* (1989) 212 Cal.App.3d 194, 198.)

Disqualification motions involve a conflict between the client's right to counsel of his or her choice and the need to maintain ethical standards of professional responsibility, and, thus, judges must scrutinize these motions to ensure that literalism does not deny the parties substantial justice. (*Comden v. Superior Court* (1978) 20 Cal.3d 906, 915.) The trial court must weigh the competing interests of the parties against potential adverse effects on the integrity of the proceeding before it and should resolve the close case in favor of the client's right to representation because "[t]he right of a party to be represented in litigation by the attorney of his or her choice is a significant right [citation] and ought not to be abrogated in the absence of some indication the integrity of the judicial process will otherwise be injured." (*Smith, Smith & Kring v. Superior Court* (1997) 60 Cal.App.4th 573, 580, quoting *Johnson v. Superior Court* (1984) 159 Cal.App.3d 573, 580.)

Even if we assume that appellant's counsel had, as the trial court found, engaged in misconduct when he altered the section 998 offer and attempted to end the action "via fraudulent means;" and even assuming that appellant's counsel made statements which respondent interpreted as threatening appellant's immigration status, such conduct would not automatically warrant disqualification. Not every instance of an attorney's misconduct or an ethical violation warrants disqualification (see *Hetos Investments, Ltd. v. Kurtin* (2003) 110 Cal.App.4th 36, 47-48). Rather, disqualification is

appropriate when the lawyer engages in conduct which causes actual harm to the adverse party, counsel's client or the judicial proceedings. As explained in *Gregori v. Bank of America* (1989) 207 Cal.App.3d 291, 308-309, "[s]ince the purpose of a disqualification order must be prophylactic, not punitive, the significant question is whether there exists a genuine likelihood that the status or misconduct of the attorney in question will affect the outcome of the proceedings before the court." Thus, disqualification is proper, for example, where it results from a conflict of interest involving the disclosure of confidential information (see *Kennedy v. Eldridge* (2011) 201 Cal.App.4th 1197, 1205-1206); counsel has had improper ex parte contacts with a party (see *Chronometrics, Inc. v. Sysgen, Inc.* (1980) 110 Cal.App.3d 597, 607-608); or counsel's personal interests are directly adverse to his client (see *Cal Pak Delivery, Inc. v. United Parcel Service, Inc.* (1997) 52 Cal.App.4th 1, 10). Disqualification cannot, however, be based on speculative harms or those that have no substantial continuing effect on the judicial proceedings. (*Smith, Smith & Kring v. Superior Court, supra*, 60 Cal.App.4th at p. 581.)

Here, disqualification was not grounded on a convincing demonstration of detriment to respondent or injury to the integrity of the judicial process. There is no evidence that respondent suffered actual injury or that he will suffer any future harm as a result of appellant's counsel's actions. Appellant's effort to accept the altered section 998 offer was unsuccessful and, in any event, did not result in a legally enforceable agreement. Indeed, section 998 requires acceptance of a section 998 offer to be absolute and unqualified. (See *Bias v. Wright* (2002) 103 Cal.App.4th 811, 820). And where, as here,

the response to a section 998 offer adds or changes the terms from those offered, the “acceptance” becomes a “counteroffer.” (*Guzman v. Visalia Community Bank* (1999) 71 Cal.App.4th 1370, 1376-1377.) Respondent’s counsel immediately rejected appellant’s “counteroffer” and respondent’s original section 998 offer expired by its terms 30 days after it was presented. Thus, respondent suffered no cognizable harm based on appellant’s counsel’s conduct.

Also, there is no evidence in the record that the integrity of the judicial process had been compromised. Appellant’s counsel did not attempt to enforce the altered version of the section 998 offer, and there is no evidence that appellant’s counsel engaged in litigation processes or used judicial resources for improper purposes. Likewise, there is no showing that this conduct will have any continuing impact on the litigation.

On the other hand, the trial court’s ruling denied appellant its choice of counsel with little consideration of the combined effects of the strong interest parties have in representation by counsel of their choice, and in avoiding the duplicate expense and time-consuming effort involved in replacing counsel already familiar with the case. (*Lyle v. Superior Court* (1981) 122 Cal.App.3d 470, 481.) “[I]t must be kept in mind that disqualification usually imposes a substantial hardship on the disqualified attorney’s innocent client, who must bear the monetary and other costs of finding a replacement.” (*Gregori v. Bank of America, supra*, 207 Cal.App.3d at p. 300.) Indeed, in this case it appears that the client did not replace the attorney.³

³ After appellant filed this appeal, the trial court on its own motion entered default because appellant had not yet retained new counsel.

Appellant's counsel's conduct in this case, if proven, might warrant punishment by the state bar, but the fact that counsel may have violated ethical and professional norms does not justify disqualification of counsel, absent a showing of detriment to the represented parties or the judicial proceedings. Such harm does not appear here. If the trial 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 . . . section 128 can be stretched to support the disqualification." (*Chronometrics, Inc. v. Sysgen, Inc.*, *supra*, 110 Cal.App.3d at p. 607.) Accordingly, the trial court erred in disqualifying appellant's counsel.

DISPOSITION

The order is reversed. Appellant Heng Sheng, Inc. is awarded its costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

I concur:

LUI, J.

CHANEY, J., Dissenting.

“The authority to disqualify an attorney stems from the trial court’s inherent power “[t]o control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto.” ’ ’ (*Cal Pak Delivery, Inc. v. United Parcel Service, Inc.* (1997) 52 Cal.App.4th 1, 8, quoting Code Civ. Proc., § 128, subd. (a)(5).) The decision whether to do so rests firmly within the trial court’s discretion. (*Cal Pak Delivery, Inc.*, *supra*, at p. 9.)

“The paramount concern [in determining whether to disqualify counsel] must be the preservation of public trust in the scrupulous administration of justice and the integrity of the bar.” (*In re Complex Asbestos Litigation* (1991) 232 Cal.App.3d 572, 586.) “The important right to counsel of one’s choice must yield to ethical considerations that affect the fundamental principles of our judicial process.” (*People v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1145.)

The opinion emphasizes the punitive nature of the order disqualifying appellant’s counsel. But it is not the case here that the entire universe of consequences of counsel’s ethical breaches below existed by the time the trial court heard the disqualification motion. Rather, the trial court determined that counsel’s behavior and the risk of continued misbehavior have undermined and will continue to undermine the judicial process.¹ The record contains no evidence—and the opinion cites none—that would contradict that conclusion.

¹ The trial court found that disqualification was “necessary in the interests of justice and in order to preserve the integrity of the judicial process.” The order noted that counsel’s conduct related to the Code of Civil Procedure section 998 offer was “deceitful and his other communications in this action

“When a matter is left to the discretion of the trial court, on appeal we apply the abuse of discretion standard of review. [Citation.] Under that standard, *there is no abuse of discretion requiring reversal if there exists a reasonable or fairly debatable justification under the law for the trial court’s decision or, alternatively stated, if that decision falls within the permissible range of options set by the applicable legal criteria.*” (*Cahill v. San Diego Gas & Elec. Co.* (2011) 194 Cal.App.4th 939, 957 [emphasis added].)

“It is the appellant’s burden on appeal to show the trial court abused its discretion.” (*Cahill, supra*, 194 Cal.App.4th at p. 957.) The appellant here has not done so; on the record before us, the trial court’s decision falls within the court’s permissible range of options.

I would affirm the trial court’s disqualification order. Therefore, I respectfully dissent.

CHANEY, J.

demonstrate that Plaintiff will be unable to achieve a fair resolution of this dispute if [counsel] is” not disqualified. Part of those “other communications” involve conduct that blatantly violates public policy codified in Labor Code section 1171.5 by both inquiring into Miralda’s immigration status and threatening him that he “will be deported before the case is over.”