Filed 8/7/17 Faulkner v. Klein CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

SAMANTHA FAULKNER, Appellant, v. CONRAD LEE KLEIN et al., Respondents.	2d Civil No. B265893 (Super. Ct. No. BP063500) (Los Angeles County)

Samantha Faulkner is a named successor trustee for the Mark Hughes Family Trust, dated September 3, 1987, as amended (the trust). She appeals an order disqualifying Miller Barondess, LLP (Miller Barondess) from representing her in this matter because three of its attorneys previously represented former trustees Conrad Lee Klein, Jack Reynolds, and Christopher Pair.

Faulkner contends (1) Klein and Reynolds do not have standing to seek disqualification because the office of the trustee holds the attorney-client privilege; (2) the probate court applied the wrong legal standard to determine that one of the

attorneys is disqualified; and (3) the other two attorneys were effectively screened from Miller Barondess's representation of Faulkner. We agree that Klein and Reynolds lack standing to seek disqualification and we reverse.

BACKGROUND

Mark Hughes died in May 2000, leaving more than $300 million in assets in the trust. Klein, Reynolds, and Pair succeeded him as co-trustees of the trust. The probate court removed them in 2013 for wrongdoing. Litigation about their accountings and possible surcharge liability continues.

While they were trustees, Klein and Reynolds retained a series of law firms whose bills were paid by the trust. Three attorneys who represented Klein and Reynolds as trustees at various firms and times joined Miller Barondess: Louis R. Miller (formerly of Christensen Miller LLP (Christensen Miller)), Gene Williams (formerly of Browne Woods George LLP (Browne Woods)), and Scott Street (formerly of Akin Gump Strauss Hauer & Feld LLP (Akin Gump)).

In 2015, Faulkner retained Miller Barondess to help her petition for appointment as a successor trustee. Klein and Reynolds moved to disqualify Miller Barondess on the ground that Miller, Williams, and Street have conflicts of interest arising from their prior representation of Klein and Reynolds while they were trustees and the conflicts extend vicariously to the entire Miller Barondess firm.

In support of the disqualification motion, Klein and Reynolds offered evidence that Williams and Street performed extensive legal work for them while they were trustees and had access to their confidential client files. They also offered evidence

that Miller negotiated a fee dispute with them after that representation ended.

Klein and Reynolds offered the declaration of their current counsel, Edward A. Woods of Akin Gump and formerly of Browne Woods. Woods declares Christensen Miller billed more than $1 million in fees as "the Former Trustees' principal counsel" from 2000 to 2001 while Miller was a partner. Woods declares "it is [his] understanding that [Louis] Miller had direct contact with the Former Trustees . . . and was personally involved in negotiating a dispute between [Christensen Miller] and the Former Trustees regarding Christensen Miller's fees."

Woods declares Williams billed for more than 2,300 hours on trust matters as an associate under Woods's supervision at Browne Woods. He declares Browne Woods served as "the Former Trustees' principal counsel of record" from 2005 to 2011. Woods declares Williams had access to the former trustees' confidential files and worked on pending objections to their accountings. He offers a copy of Williams's 2009 declaration in support of the former trustees' accountings, and billing records that show Williams worked 135.5 hours on "trustee removal" in 2007.

Woods declares Street billed for over 450 hours on trust matters as an associate under his supervision from 2011 to 2013 at Akin Gump when that firm, "represent[ed] [Klein and Reynolds'] interests in various ongoing proceedings relating to the Trust." He declares Street had access to confidential trustee files and his work included review of the Tower Grove transaction that is now the subject of a surcharge claim against Klein and Reynolds for tens of millions of dollars.

In opposition to the motion, Faulkner offered declarations from Williams and Street that they never represented the trustees in their personal capacities and only represented the office of the trust. Williams declares he "never represented [any trustee] in his personal or individual capacity. All of the work [he] did for them was on behalf of the office of the [trust]." Street declares, "[t]he work [he] did for the trustees was on behalf of the office of the [trust]. [He] never represented [any trustee] in his personal or individual capacity." Copies of fee petitions and court orders show the trust paid Klein, Reynolds, and Pair's pre-removal legal bills at Christensen Miller, Browne Woods, and Akin Gump.

Faulkner also offered Miller's declaration that he did not work on trust matters at Christensen Miller, and did not receive any confidential information related to the trust or trustees. He declares Williams and Street were completely screened from Faulkner's representation at Miller Barondess, and provides documentation of that screening. Miller also declares he "learned" his former firm represented the trustees when he received the motion to disqualify and that he "never met or dealt with . . . any of the trustees."

In reply to Faulkner's opposition, Klein and Reynolds submitted a letter Miller wrote five months after Christensen Miller stopped representing them, in which he refers to his "conversations with Conrad Klein and Bob Shapiro" about their unpaid bill, confirms that his firm will accept an agreed reduction if it is paid upon a timetable, and writes that his firm "will proceed against the Estate" if the compromised bill is not paid.

The probate court granted the motion to disqualify, finding Klein and Reynolds have standing to bring the motion

because they formed a personal attorney-client relationship with their former counsel in addition to their attorney-client relationship as trustees. It found the representations are substantially related because the "same accountings are still being litigated . . . Faulkner may now be obligated to seek a surcharge against Klein and Reynolds for deficiencies with the accountings . . . [and] Miller formerly aided in the negotiated resolution of a fee dispute relating to . . . the same fees for which Klein and Reynolds may now face a surcharge." It found disqualification minimally prejudices Faulkner because she has other counsel and Miller Barondess had no previous involvement in the case. It found the entire firm is vicariously disqualified because Miller was not ethically screened and the screening of Williams and Street was ineffective because they switched sides.

DISCUSSION

We review for abuse of discretion a trial court's decision on a disqualification motion. (*People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1143.) A trial court abuses its discretion if it misapplies the law. (*Id.* at p. 1144.) Where, as here, the trial court resolved disputed factual issues, we do not substitute our judgment for its express or implied findings if they are supported by substantial evidence. (*Id.* at p. 1143.)

Attorneys owe undivided loyalty and confidentiality to their clients. (Bus. & Prof. Code, § 6068, subd. (e); Rules of Prof. Conduct, rule 3-310(C) & (E).) An attorney may not, without the informed written consent of the former client, accept employment adverse to the former client where, by reason of the representation of the former client, the member "obtained confidential information material to the employment." (Rules of

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 former client may disqualify the attorney from successive representation by showing the attorney had access to the former client's confidential information and there is a substantial relationship between the subject of the current and prior representations. (*Cobra*, *supra*, 38 Cal.4th at p. 847.) If the attorney personally provided legal services to the former client, it is presumed the attorney possesses confidential information. (*Ibid.*) But if the attorney did not personally provide legal services, the former client must establish that the nature of the relationship and the subject of the prior representation make it likely the attorney acquired material confidential information. (*Ibid.*; *Adams v. Aerojet-General Corp.* (2001) 86 Cal.App.4th 1324, 1337.)

Normally, a disqualified attorney's firm is vicariously disqualified. (*Cobra*, *supra*, 38 Cal.4th at p. 847; *Flatt v. Superior Court* (1994) 9 Cal.4th 275, 283.) Whether and how ethical screening may protect against vicarious disqualification is the subject of an unresolved split in authority. (See, e.g., *Kirk v. First American Title Ins. Co.* (2010) 183 Cal.App.4th 776, 791, 814 ["vicarious disqualification . . . may be rebutted by a proper ethical wall" unless an involved attorney switched sides in the same case]; *Meza v. H. Muehlstein & Co., Inc.* (2009) 176 Cal.App.4th 969, 979 [ethical screening "will generally not preclude the disqualification of the firm"].)

A person seeking disqualification must demonstrate they had an attorney-client relationship with the targeted

attorney (*Koo v. Rubio's Restaurants, Inc.* (2003) 109 Cal.App.4th 719, 729), or some other relationship imposing a duty of confidentiality (*DCH Health Services Corp. v. Waite* (2002) 95 Cal.App.4th 829, 833). Klein and Reynolds rely on attorney-client privilege for standing. When a trustee seeks advice on trust administration, the client is the office of the trustee, not the individual trustee. (*Moeller v. Superior Court* (1997) 16 Cal.4th 1124, 1131, 1135 (*Moeller*) ["administrative" communications].) And when there is a change in trustees, the power to assert the attorney-client privilege passes with the office from the predecessor to the successor trustee. (*Id.* at p. 1133.) In such circumstances, the predecessor may not withhold from the successor privileged communications between the office of the trust and its counsel. This rule enables the successor trustee to fulfill their duty to inquire into the predecessor's administration of the trust and remedy any breaches. (*Id.* at pp. 1137-1138.) The current trustee is thus the present holder of the privilege with respect to any confidential communications between the former trustees and Miller, Williams, or Street that arose from their representation of the office of the trust. (*Id.* at p. 1131.)

On the other hand, a trustee may individually seek legal advice in their personal capacity to protect against personal liability. (*Moeller*, *supra*, 16 Cal.4th at pp. 1134-1135 ["defensive" communications].) If the trustee takes affirmative steps to segregate that personal representation from trust administration, they may withhold those communications arising from personal representation from the successor trustee. (*Fiduciary Trust Internat. of California v. Klein* (2017) 9 Cal.App.5th 1184, 1199 (*Fiduciary Trust*).) For example, a trustee who seeks legal advice from personal counsel for their

own protection "may be able to avoid disclosing the advice to a successor trustee by hiring a separate lawyer and paying for the advice out of [his] personal funds." (*Moeller*, at p. 1134.)

But some steps must be taken by a trustee seeking to protect their communications with personal counsel. "*Moeller requires* a trustee to take certain affirmative steps to preserve its right to rely upon the attorney-client privilege as the basis for withholding from the successor trustee confidential documents maintained in the trust's legal files." (*Fiduciary Trust*, *supra*, 9 Cal.App.5th at p. 1199, italics in original [reversing an order that allowed Klein and Reynolds to withhold documents from the successor trustee based on attorney-client privilege].) "[T]o require a trustee to distinguish, scrupulously and painstakingly, his or her own interests from those of the beneficiaries is entirely consistent with the purpose of a trust." (*Moeller*, *supra*, 16 Cal.4th at p. 1135.)

There is no evidence in the record to support a finding that Klein and Reynolds sought legal advice in their personal capacity from Miller, Williams, or Street or that they took any steps to separate their requests for advice related to personal representation from that related to administrative representation prior to their removal. They described all the legal services as administrative in verified contemporaneous court filings. In a 2002 verified petition for approval and settlement of Christensen Miller's fee claim, Klein and Reynolds represented they "retained the law firm of [Christensen Miller] to represent them in connection with administration of the Trust and related entities." In a 2013 verified petition for fees, they represented they "employed counsel to advise them in the performance of their administrative duties, and to defend and

prosecute various legal actions for the protection of Trust property and of the Trustees in the performance of their duties." In a 2013 declaration in support of that fee claim, their current attorney (Woods) declared that Akin Gump's "services in the Removal Matter . . . were performed, [inter alia], for the purpose of assisting the [trustees] in completing their duties of Trust administration."

The probate court found the former trustees "formed a personal attorney-client relationship with their former counsel in addition to the relationship they formed in their capacities as trustees of the Trust." But it acted before law of the case clarified the proper approach. (*Fiduciary Trust*, *supra*, 9 Cal.App.5th at p. 1199.) In *Fiduciary Trust*, our colleagues in the First Appellate District held Klein and Reynolds could not meet their burden to show the preliminary fact of personal representation by "describ[ing documents] as relating to a petition for removal or surcharge." (*Id.* at p. 1201.) "[T]he mere fact that a communication relates, however broadly, to a petition for surcharge or removal does not prove the legal advice contained within the communication was *sought or obtained* by the predecessor trustee out of concern for personal liability as opposed to concern for the general health of the trust." (*Id.* at p. 1202.)

Here, too, Klein and Reynolds show counsel performed some work that related to removal, accounting objections, and matters for which they may be subject to surcharges, but they offer no evidence they retained Miller, Williams, or Street in their personal capacities for the purpose of protecting against personal liability. No lawyer declares they represented Klein or Reynolds in their personal capacities, and

there are no retainer agreements or billing records to support such an inference. Williams and Street each declare they worked for the office of the trust and did not represent Klein or Reynolds in their personal capacities. Miller declares he never worked for the trustees directly in any capacity. His collection letter proves he had contact with the former trustees because he refers to a "conversation" with Klein. But it does not support an inference that the firm represented Klein and Reynolds in their personal capacities. It is adversarial, and he wrote it five months after the firm's representation ended.

Woods has direct knowledge of the work Williams and Street performed at their former firms, but only declares that Browne Woods was "the Former Trustees' principal counsel of record from 2005 through 2011" and that after 2011 Akin Gump "represent[ed] their interests in various ongoing proceedings relating to the Trust." Woods does not declare that Brown Woods or Akin Gump represented Klein, Reynolds, or Pair in their personal capacity.

The first record we find of any effort by the former trustees to segregate personal attorney-client communications from administrative attorney-client communications is in 2013, post-removal, when Akin Gump redacted its invoices related to the removal matter and segregated documents to withhold from the successor trustee. Akin Gump billed over $100,000 to segregate and withhold those documents, and then sought payment from the trust on the grounds it did so, "for the purpose of assisting the [former trustees] in completing their duties of Trust administration, by allowing them to preserve the attorney-client privilege necessary for the defense of their Accountings and pending removal petition . . . ."

Retrospective segregation is insufficient to preserve the former trustees' right to withhold attorney-client communications from their successor. "[I]t is not the content or nature of the communication, or the fact that the communication later becomes relevant to the issue of the trustee's personal liability, that is dispositive . . . it is the fact that, at the time the legal advice was sought, the purpose of obtaining the advice was protection against personal liability." (*Fiduciary Trust*, *supra*, 9 Cal.App.5th at p. 1202.) There is no evidence of any other relationship imposing a duty of confidentiality owed to Klein and Reynolds personally. Klein and Reynolds did not meet their burden of demonstrating standing to seek disqualification of Miller Barondess.

DISPOSITION

The order is reversed. The probate court shall enter a new order denying the motion to disqualify Miller Barondess. Appellant shall recover her costs on appeal.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

YEGAN, Acting P. J.

PERREN, J.

Lesley C. Green, Judge

Superior Court County of Los Angeles

Miller Barondess, Louis R. Miller, Mira Hashmall and Christopher D. Beatty, for Appellant.

Akin Gump Strauss Hauer & Feld, Rex S. Heinke, Edward A. Woods and Oleg Stolyar, for Respondents Conrad Lee Klein and Jack Reynolds.

Greenberg Traurig, Eric V. Rowen, Scott D. Bertzyk, Lisa A. McCurdy and Matthew R. Gershman, for Respondent Alexander Hughes.