

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

XIN GAO,

Plaintiff and Appellant,

v.

TONY M. LU,

Defendant and Respondent.

B242785

(Los Angeles County
Super. Ct. No. GC047450)

APPEAL from an order of the Superior Court of Los Angeles County.

Jan A. Pluim, Judge. Affirmed.

Xin Gao, in pro. per., for Plaintiff and Appellant.

Tony M. Lu, in pro. per., for Defendant and Respondent.

INTRODUCTION

Plaintiff Xin Gao appeals from the denial of his motion to disqualify Tony M. Lu as counsel for the remaining defendants in this action. Finding no abuse of discretion by the trial court, we affirm.

PROCEDURAL AND FACTUAL SUMMARY

This case comes before this Court a second time, after Xin Gao dba Deal To China's ("Gao") appeal of the trial court's grant of Tony M. Lu's ("Lu") special motion to strike in this case alleging malicious prosecution, conspiracy, and abuse of process. We affirmed that ruling on December 17, 2012.¹ As the complete factual background is not necessary to our determination here, we adopt the statement of facts from our prior ruling.

Prior to the last appeal, Lu, as counsel, filed a motion to set aside the default that Gao had obtained against all other defendants. Over Gao's opposition, the court granted the motion on January 4, 2012, deeming filed defendant's demurrer to the complaint. The court overruled that demurrer on February 10, 2012.

On May 17, 2012, Gao filed his motion to disqualify Lu as counsel. After receiving written opposition and conducting a hearing, the court denied the motion on July 3, 2012, without prejudice to its renewal if Gao's appeal of the special motion to strike were successful. Gao timely appealed.²

¹ Xin Gao v. Lu, B238394 [non-pub.].

² Lu moved to dismiss the appeal, asserting the action has been dismissed, but has failed to file a copy of the order or judgment. Accordingly, we deny his motion. Gao has requested that Judge John Segal be recused; as Judge Segal is not involved in the hearing or determination of this case, that request is moot.

DISCUSSION

The denial of a motion to disqualify counsel is an appealable order. (*Machado v. Superior Court* (2007) 148 Cal.App.4th 875, 882-883; *Derivi Const. & Architecture, Inc. v. Wong* (2004) 118 Cal.App.4th 1268, 1272.) We review such orders for abuse of discretion. (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711-712 [“We have uniformly held that a motion to recuse is directed to the sound discretion of the trial court, and its decision to grant or deny the motion is reviewed only for an abuse of discretion”]; *Clark v. Superior Court* (2011) 196 Cal.App.4th 37, 46-47 [ruling on disqualification reversed only where there is no reasonable basis for the decision].)

Gao’s claims against Lu stemmed from Lu’s representation of the other defendants in the initial litigation against Gao. Gao’s motion to disqualify, filed more than five months after Lu’s first appearance as counsel for those defendants, and after substantial proceedings had taken place, asserted that Lu was therefore a material witness, and that his prior representation gave rise to personal conflicts of interest in this litigation. Gao also asserted that Lu, both as a named defendant, and as counsel for the other defendants, had and would continue to cause injury to Gao, including, among other things, by obstructing Gao’s discovery.

Gao relied on *Comden v. Superior Court* (1978) 20 Cal.3d 906, and various professional guidelines for professional conduct. He asserted that the appearance of impropriety constituted further grounds for granting the motion.

Comden rested on Rule of Professional Conduct 2-111, a rule which required withdrawal by counsel when counsel, or a member of his or her firm, should be called as a witness in the matter. Rule 2-111 was repealed in 1989, and replaced with a rule that allows continued employment with the client’s informed consent.³

³ Rule 5-210 states: “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 and value of legal services rendered in the case; or (C); The member has the informed, written consent of the client. If the member represents the People or a governmental entity, the consent shall be obtained

Even under the prior rule, however, courts recognized the competing interests at stake, requiring the court to balance between the appearance of impropriety on the one hand, and the right of a client to representation by counsel of his choosing, including the expense and detriment of replacing counsel familiar with the case, on the other. (*Comden v. Superior Court*, *supra*, 20 Cal.3d at p. 915.) The amendments to the Rules of Professional Conduct changed the emphasis in that balance, giving more weight to a party's choice of counsel absent a showing of detriment to the moving party or the judicial process. (*Lyle v. Superior Court* (1981) 122 Cal.App.3d 470, 482 [while trial court has discretion to order withdrawal of a lawyer/witness, the resolution should favor the right to counsel of one's choice]; see also *Liberty National Enterprises v. Chicago Title Insurance Company* (2011) 194 Cal.App.4th 839, 848 [interest of nonmoving client to counsel of its choice must be taken into account, especially in absence of actual conflict or breach of confidentiality].)

In this case, the trial court performed the necessary balance, considering “the principal of professional integrity” as balanced against the defendants’ interest in counsel of their choice.⁴ In fact, by expressly allowing the motion to be renewed if this Court overturned the trial court’s dismissal of Lu as a party, the court demonstrated that its balance reflected the fact that Lu was no longer a party, but instead the lawyer who had

from the head of the office or a designee of the head of the office by which the member is employed and shall be consistent with principles of recusal.”

4 “1) Motion to Disqualify Counsel is denied without prejudice to its renewal, but only if the Order Granting Attorney Lu’s Special Motion to Strike is reversed on appeal. [¶] The legal basis cited for the current motion is Rule of Professional Conduct 2-111, which was repealed in 1989. Moreover, even before its repeal, courts were required to balance the principal of professional integrity against a client’s interest in having counsel of his or her choice, even if such counsel may be less effective because of testifying as a witness. [sic] *Lyle v. Superior Court* (1981) 122 Cal.App.3d 470. [¶] Plaintiff’s objections to the Lu Declaration are sustained . . .”

represented the other defendants in all related matters. In light of our affirmance of Lu's dismissal, the balance struck remains appropriate.⁵ We find no abuse of discretion.

DISPOSITION

The order is affirmed. Respondent is to recover his costs on appeal.

ZELON, J.

We concur:

PERLUSS, P. J.

WOODS, J.

⁵ Gao's primary assertion of detriment rested on his assertion that Lu had blocked necessary discovery. To the contrary, the court found that Gao had failed to respond to discovery, ordering sanctions.