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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

VIPULKUMAR PATEL,

Plaintiff and Respondent,

v.

GOVIND VAGHASHIA,

Defendant and Appellant;

PRASHANT VAGHASHIA,

Defendant and Respondent.

B292006

(Los Angeles County
Super. Ct. No. EC064357)

APPEAL from an order of the Superior Court of Los Angeles County, Alan S. Rosenfield, Judge. Affirmed.

Stone | Dean, Robyn M. McKibbin for Defendant and Appellant.

Law Offices of Alfred O. Anyia and Alfred O. Anyia for Defendant and Respondent.

No appearance for Plaintiff and Respondent.

Govind Vaghashia (Govind) and his brother Prashant Vaghashia (Prashant) were named as defendants in a wage and hour lawsuit. For a time, they were both represented by Robyn M. McKibbin (McKibbin) of Stone | Dean LLP (Stone | Dean). Prior to trial, Prashant retained separate counsel and then moved to disqualify McKibbin and her firm from representing Govind. We are asked to decide on the record presented—which does not include a reporter’s transcript from the hearing on the disqualification motion—whether the trial court abused its discretion in ordering McKibbin and Stone | Dean disqualified.

I. BACKGROUND

Prashant and Govind are brothers and partners in a business enterprise involving the ownership and management of several hotels in Southern California.

Prashant and Govind hired their brother-in-law, Bhikhabhai Patel (Bhikhabhai), to be the property manager at one of their hotels. In May 2015, Bhikhabhai sued Prashant, Govind, and their wives, alleging, among other things, that defendants failed to pay wages and overtime compensation (we refer to this case as Patel I). Prashant and Govind retained McKibbin and Stone | Dean as their defense counsel. After Bhikhabhai dismissed Govind and his wife, the case proceeded to a court trial against Prashant and his wife. The trial court returned a verdict in their favor on all claims. Bhikhabhai appealed and McKibbin and Stone | Dean continued to represent Prashant and his wife.

In the meantime, Bhikhabhai’s son, Vipulkumar Patel (Vipulkumar), who had also been hired by the brothers to work at their hotels, filed a lawsuit against Prashant and Govind and

their wives. Vipulkumar alleged defendants failed to pay wages and overtime compensation (we refer to this case as Patel II). As they had in Patel I, the brothers retained McKibbin and Stone | Dean as their defense counsel. Govind cross-complained against Vipulkumar and alleged he embezzled money from Govind and Prashant to purchase a motel in North Carolina. In connection with his cross-complaint, Govind retained McKibbin and Stone | Dean.

In December 2017, while Patel I was on appeal and Patel II was proceeding toward trial, a dispute between the brothers over their business partnership resulted in litigation between them. In April 2018, Prashant substituted attorneys in Patel II, replacing McKibbin with the attorney representing him in litigation against his brother. Two weeks later, Prashant moved to disqualify McKibbin and Stone | Dean as Govind's defense counsel in Patel II. Prashant maintained that disqualification was necessary because he and his brother's interests in Patel II were no longer aligned and, in fact, adverse.

In support of his disqualification motion, Prashant submitted a declaration describing a breach in the brothers' previously unified defense in Patel II. According to Prashant, in early December 2017, shortly before he sued Govind, he learned from an employee that Govind had forged Vipulkumar's signature on an employment agreement and then "tendered [it] as evidence" in Patel II. After learning of the forgery, Prashant confronted his brother, who purportedly responded by suggesting the brothers blame the forgery on one of their employees. Prashant declared he advised McKibbin of the forgery in his brother's presence and told them he would not go along with any plan to blame the forgery on someone other than Govind.

Prashant argued the court must disqualify McKibbin because, as counsel for both Prashant and Govind in the Patel II litigation, she and her firm had become “privy to PRASHANT’s litigation strategies, interests, [and] confidences with respect to his defenses,” especially with regard to the forged employment agreement. Prashant asserted disqualification was necessary “[f]rom the moment that [Prashant] informed attorney McKibbin of the fact that [Govind] admitted to forging the employment agreement.”

Govind opposed disqualification on several grounds. He conceded his and Prashant’s interests were at odds in the litigation between them, but he asserted there was no conflict in Patel II. Govind also maintained the allegedly forged employment agreement was irrelevant to the issues in Patel II because Vipulkumar had not alleged a breach of contract claim in his pleadings and Govind had not alleged a similar claim in his cross-complaint. In addition, Govind argued Prashant “[u]nreasonably [d]elayed” in bringing his motion by waiting four months after learning of the purported forgery. Govind, however, did not deny he had introduced the allegedly forged employment agreement into the Patel II litigation or that McKibbin was in possession of confidential information relating to both Govind and Prashant’s respective defenses in Patel II.

Govind did not submit a declaration with his disqualification opposition to dispute his brother’s statements about their discussions regarding the allegedly forged employment agreement. But McKibbin submitted a declaration in which she stated “Prashant never told [her] that Govind ‘forged’ any document, or words to that effect.” McKibbin also asserted that the disqualification motion had caused the trial

court to vacate the trial date, but she did not detail or generally discuss any resulting prejudice to Govind from that vacatur.

At an unreported hearing, the trial court granted Prashant's motion to disqualify McKibbin and Stone | Dean. In a minute order issued in connection with the hearing, the court found it was "without dispute that [Stone | Dean and McKibbin] previously represented both moving defendant [Prashant] and defendant [Govind] in this matter." Because the prior and current representations "occurred in the very same case," the court found "a substantial relationship between the former representation and the current representation." That substantial relationship between the prior and current representations gave "rise to a presumption that confidential information material to this matter was conveyed" to McKibbin and Stone | Dean by Prashant, and the presumption of such disclosure was dispositive.¹

II. DISCUSSION

Govind argues the trial court abused its discretion in ordering disqualification because it "appears" that the court did not consider whether the disqualification motion was being used for an improper purpose and because the court "failed to state on the record its factual findings in support of the required balancing process" for disqualification motions. He also asserts there is no actual conflict of interest that requires disqualification. These mere assertions are not enough. As the

¹ In addition, the court found Govind failed to make a "showing of sufficient delay or prejudice to establish [the doctrine of] laches should bar this motion."

appellant, Govind has the burden to affirmatively demonstrate the trial court erred (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 (*Denham*)) and without a reporter's transcript of the key hearing, we have no reliable means of assessing what the trial court considered or all it may have said in justifying its ruling. As we briefly explain, Govind's failure to carry his burden to provide an adequate record is fatal to his appeal.

Under rule 8.120(b) of the California Rules of Court, "[i]f an appellant intends to raise any issue that requires consideration of the oral proceedings in the superior court, the record on appeal must include a record of these oral proceedings in the form of one of the following: [¶] (1) A reporter's transcript under rule 8.130; [¶] (2) An agreed statement under rule 8.134; or [¶] (3) A settled statement under rule 8.137."

"[I]n the absence of a required reporter's transcript and other [relevant] documents, we presume the judgment is correct." (*Stasz v. Eisenberg* (2010) 190 Cal.App.4th 1032, 1039.) "A necessary corollary to this rule [is] that a record is inadequate, and appellant defaults, if the appellant predicates error only on the part of the record he provides . . . , but ignores or does not present to the appellate court portions of the proceedings below which may provide grounds upon which the decision of the trial court could be affirmed.' [Citation.]" (*Osgood v. Landon* (2005) 127 Cal.App.4th 425, 435.)

It is well-established that "[i]n light of the importance the law places on clients' ability to retain an attorney of their choice and waive any potential conflict," California courts have held that "trial judges must indicate on the record they have considered the appropriate factors and make specific findings of fact when weighing the conflicting interests involved in

recusal[/disqualification] motions.” (*Smith, Smith & Kring v. Superior Court* (1997) 60 Cal.App.4th 573, 582.) But Govind has not demonstrated the trial court failed to fulfill its obligations because he has not provided us with a reporter’s transcript of the hearing on Prashant’s disqualification motion or a settled or agreed statement. This omission is devastating in light of the disputed factual issues at play in deciding whether disqualification of McKibbin and Stone | Dean was warranted. We therefore affirm because Govind has not affirmatively shown error. (*Denham, supra*, 2 Cal.3d at p. 564; *Southern California Gas Co. v. Flannery* (2016) 5 Cal.App.5th 476, 483 [“In many cases involving the substantial evidence or abuse of discretion standard of review . . . , a reporter’s transcript or an agreed or settled statement of the proceedings will be indispensable”].)

DISPOSITION

The trial court's disqualification order is affirmed.
Respondent Prashant Vaghashia is awarded his costs on appeal.

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BAKER, J.

We concur:

RUBIN, P. J.

MOOR, J.