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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

1100 WILSHIRE PROPERTY OWNERS ASSOCIATION,

Plaintiff and Appellant,

v.

WILSHIRE COMMERCIAL, LLC,

Defendant and Respondent.

1100 WILSHIRE COMMERCIAL, LLC et al.

Cross-Complainant and Respondent,

v.

1100 WILSHIRE PROPERTY OWNERS ASSOCIATION,

Cross-Defendant and Appellant.

B281127

(Los Angeles County Super. Ct. No. BC564800)

APPEAL from an order of the Superior Court of Los Angeles County, Louis M. Meisinger, Referee. Affirmed.

Horvitz & Levy, Lisa Perrochet, Eric S. Boorstin; Cohon & Pollak, Jeffrey M. Cohon, for Plaintiff/Cross-Defendant and Appellant.

Winston & Strawn, Saul S. Rostamian, Diana Hughes Leiden, for Defendant/Cross-Complainant and Respondent.

INTRODUCTION

Winston & Strawn, attorneys of record for defendant/cross-complainant 1100 Wilshire Commercial, LLC (WC) obtained from its client attorney-client and attorney work product documents that had been prepared for plaintiff/cross-defendant 1100 Wilshire Property Owners Association (POA). WC obtained the documents because one of its managers was on the POA's board of directors.

Instead of notifying opposing counsel and returning the documents or coming to an agreement with the POA concerning their use, the law firm attached the documents to a declaration in support of a trial reply brief. The POA, previously unaware Winston & Strawn was in possession of the documents, objected and demanded the law firm's disqualification. The referee denied the POA's motion to disqualify counsel, finding no irreversible damage to the POA's case, but struck the privileged information from WC's papers. We find no abuse of discretion and affirm.

BACKGROUND

The POA is the master association for the mixed-use commercial and residential project known as 1100 Wilshire Blvd.

(Development). The Development includes commercial space, a public parking garage, and residential condominiums with their own residents' garage space. WC owns commercial "lots" in the development.[1] The Development's governing document is the Amended and Restated Declaration of Covenants, Conditions, and Restrictions and Reservation of Easements (CC&R's). The CC&R's provide for a five-member board of directors (Board), comprised of a designated "commercial director" (a Board member chosen solely by the commercial owners) and four at-large seats.[2]

By August 2014, the Board was divided concerning interpretation of the CC&R provisions for Board elections. In that month, the Board formed a governance committee to review and perhaps modify the election provisions in the CC&R's. Governance committee member Susan Spitzer prepared a memorandum in October 2014, entitled "Final Report to Governance Committee Report on Voting Rights Research" (Spitzer memo). It summarized legal advice given to the POA from three former law firms concerning voting issues and attached copies of the attorneys' emails. The Spitzer memo was distributed to all the board members, including then Commercial Director John Mackey.

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[1] WC is the collective designation for 1100 Wilshire Commercial, LLC, and 1100 Wilshire Garage, LLC. These two entities are the successors to what used to be known as Wilshire Commercial, LLC.

[2] Given the number of residential units in the Development (228), the four at-large seats are all but guaranteed to be filled by resident owners rather than owners of the commercial lots.

A simmering dispute between the POA and WC concerning security issues and physical changes in the commercial garage came to a head a month later; and in November 2014, the POA initiated this action against WC. WC cross-complained, raising a variety of issues. Each side claimed the other breached the CC&R's.[3] The CC&R's require that a referee resolve CC&R disputes, and the trial court appointed the Honorable Louis Meisinger (ret.) to that role.

The parties agreed the referee would decide the various disputed issues seriatim. The first issue concerned voting procedures for Board elections, specifically, whether only commercial owners were eligible to vote for the commercial director and if so, could they simply appoint the commercial director without a formal nomination or election if they intended to use all their votes for the same individual; and whether the commercial owners were permitted to vote for the other four director seats.

The referee was slated to decide this issue in the fall of 2016. WC filed the opening brief and the POA followed with its responsive brief. WC's reply brief was supported by the declaration of Mackey, a WC manager and former commercial director of the POA Board. His declaration included the Spitzer memo and confirmed he received it "in [his] capacity as the Commercial Director of the POA." WC quoted at length from the privileged communications and argued its interpretation of the CC&R's voting provisions was supported by the POA's own former lawyers.

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[3] Additional causes of action are alleged and WC cross-complained against individual Board members and others, but they are not involved in this appeal.

Citing attorney-client and work product privileges, the POA objected to Mackey's declaration and WC's use of the Spitzer memo. The POA served a written demand on Winston & Strawn for return of all POA privileged documents. The POA also insisted on Winston & Strawn's withdrawal as WC's counsel based on its possession and use in the litigation of the privileged materials. Winston & Strawn did not comply with any of the POA's demands.

The POA then sought Winston & Strawn's disqualification as WC's attorney of record, arguing the law firm failed to notify the POA it possessed a copy of the Spitzer memo and improperly used it in the litigation. WC opposed the motion, asserting the commercial director Board member was privy to attorney-client communications and was entitled to share them with his "constituents"—the commercial owners—who, in turn, were free to provide it to their counsel.

Winston & Strawn partner Saul Rostamian submitted a declaration in opposition to the disqualification motion advising that another former commercial director on the Board (not Mackey), sent him the Spitzer memo in Rostamian's role as counsel for WC. Rostamian's declaration did not state when he obtained the Spitzer memo, but added, "I determined that reviewing, retaining, and using the Spitzer Memorandum would not violate any rules or ethical obligations because I had received it from my client, who was at all relevant times included within any attorney-client privilege associated with the emails attached to the Spitzer memorandum, and further, that any such privilege would have been waived by the POA's course of conduct in treating the Commercial Director and the Commercial Owner as one and the same."

The referee denied the POA's motion to disqualify Winston & Strawn. Citing *Seahaus La Jolla Owners Assn. v. Superior Court* (2014) 224 Cal.App.4th 754 (*Seahaus*), he found the parties were not adverse to one another when the Spitzer memo was distributed to Mackey in his capacity as a member of the Board and, in any event, they shared a "common interest" in clarifying the voting procedures for Board elections. Further, there was a "unity of interest between the Commercial Owner and the Commercial Director whose seat on the Board [was] assured, thus protecting the Commercial Owner's potentially divergent interests from those of the Residential Owners, as recognized in the governing documents." Disclosure of the Spitzer memo to WC members other than Mackey was reasonably necessary "for 'the accomplishment of the purpose' for which the POA's former counsel was consulted with regard to the voting rights issues." (Fn. omitted.) Thus, the referee concluded the attorney-client privilege was not violated and Winston & Strawn did not violate any ethical mandate by using the memo against the POA without notifying the POA that WC had the memo.

In the alternative, the referee held that even if Winston & Strawn's possession and use of the Spitzer memo was improper, disqualification was not required because there were "less draconian, prophylactic measures" and no "genuine likelihood" that any such misconduct would affect the outcome of the proceedings: "The Referee does not agree with the opinions of the POA's former counsel and, since the voting issue is discrete from the remaining issues in the case, no future prejudice can come to the POA as a consequence of Winston & Strawn's use of the privileged information dealing exclusively with that issue."

Finally, to avoid the appearance of impropriety or potential disadvantage to the POA, the referee struck those portions of WC's reply brief that referred to information protected by the attorney-client and attorney work product privileges and ordered Winston & Strawn to destroy all copies of the same.

The POA appealed from the referee's denial of the disqualification motion. The referee stayed the order for destruction of the Spitzer memo pending this appeal and barred its use other than in connection with this appeal.

We previously denied the POA's petition for writ of supersedeas and advised the parties we expected them to "strictly comply" with the prophylactic measures ordered by the referee.[4]

DISCUSSION

I. Standard of Review

"A disqualification motion involves a conflict between a client's right to counsel of his or her choice, on the one hand, and the need to maintain ethical standards of professional responsibility, on the other." (*Clark v. Superior Court* (2011) 196 Cal.App.4th 37, 47.) Preserving the public's trust in the legal system and the integrity of the legal profession is the "paramount concern," so a client's right to counsel of its choosing "must yield to ethical considerations that affect the fundamental principles of our judicial process." (*People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1145 (*SpeeDee Oil*.)

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[4] We also deny WC's motion to augment the record with the reporter's transcripts for the referee's May 22, 2017 and July 27, 2017 hearings. Those hearings were conducted after the court ruled on the disqualification motion.

Generally, we review a trial court's decision on an attorney disqualification motion for abuse of discretion. (*SpeeDee Oil, supra,* 20 Cal.4th at p. 1143.) We do not substitute our judgment for the trial court's implied or express findings of fact, provided they are supported by substantial evidence. (*Ibid.*)

II. Analysis

Both sides agree the Spitzer memo is an attorney-client and work product privileged document. (Evid. Code, § 952.)[5] When Winston & Strawn obtained the Spitzer memo (at an undisclosed time between 2014 and 2016), the law was well settled concerning the steps an attorney ethically is obligated to take when he or she *inadvertently* receives attorney-client privileged information: "[Counsel] should refrain from examining the materials any more than is essential to ascertain if the materials are privileged, and shall immediately notify the sender that he or she possesses material that appears to be privileged. The parties may then proceed to resolve the situation by agreement or may resort to the court for guidance with the benefit of protective orders and other judicial intervention as may

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[5] Evidence Code section 952 provides, a "'confidential communication between client and lawyer' means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship."

be justified." (*State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 656-657 (*State Fund*).) *State Fund* cautioned that "'[m]ere exposure to the confidences of an adversary does not, standing alone, warrant disqualification. Protecting the integrity of the judicial proceedings does not require so draconian a rule. . . . Nonetheless, we consider the means and sources of breaches of attorney-client confidentiality to be important considerations' . . . [and] do not rule out the possibility that in an appropriate case, disqualification might be justified if an attorney inadvertently receives confidential materials and fails to conduct himself or herself in the manner specified above, assuming other factors compel disqualification." (*Id.* at p. 657.)

In *Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807, 817 (*Rico*), our Supreme Court extended the *State Fund* rule to inadvertently disclosed documents protected by the work product privilege. (See also, Code Civ. Proc., §§ 2018.020, 2018.030.) The *Rico* court affirmed the trial court's disqualification order, noting the attorney disseminated and used the protected document in a manner that caused "unmitigable" and "irreversible" damage. (*Rico, supra,* 42 Cal.4th at p. 819.)

McDermott Will & Emery LLP v. Superior Court (2017) 10 Cal.App.5th 1083 (*McDermott*) was decided after Winston & Strawn used the privileged Spitzer memo and the referee denied the POA's disqualification motion. There, several law firms received a privileged document from their own clients. Although the document was clearly a confidential communication, one receiving attorney, contending the attorney-client privilege had been waived, thoroughly reviewed it, did not advise opposing counsel he possessed it, and used it in a deposition. The trial

court disqualified that attorney and his firm. The Court of Appeal affirmed, with one justice dissenting.

The *McDermott* majority declined "to limit [the *State Fund* rule] to privileged materials an attorney receives through *the inadvertence of opposing counsel during litigation*. Although the *State Fund* rule originated in the context of one attorney inadvertently producing his client's privileged documents to the opponent's attorney during litigation, neither the statement of the rule nor the policy underlying it supports limiting the scope of the rule to that one circumstance." (*McDermott, supra,* 10 Cal.App.5th at p. 1109.) Instead, the *McDermott* majority concluded the *State Fund* rule is "triggered when the attorney receives a communication that is presumptively privileged . . . ." (*Id.* at pp. 1112-1113.) So it was here.

Winston & Strawn obtained documents containing legal advice from attorneys retained by its client's adversary. The law firm's receipt of the documents triggered its obligations pursuant to *State Fund* to notify the POA. That obligation was not negated by the fact that Commercial Director Mackey legitimately received the Spitzer memo in his capacity as a member of the Board before this litigation ensued. (*State Fund, supra,* 70 Cal.App.4th at pp. 656-657; *Rico, supra,* 42 Cal.4th at p. 818; *McDermott, supra,* 10 Cal.App.5th at p. 1092.) Instead, Winston & Strawn decided for itself the privilege had been waived and then thoroughly reviewed and attempted to use the documents to its advantage.[6] This conduct was inconsistent with *State Fund's* ethical obligations.

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[6] In a two-sentence argument, WC argues we should affirm the referee's order on the theory the POA waived the attorney-client and work product privileges by discussing the contents of

National Football League Properties, Inc. v. Superior Court (1998) 65 Cal.App.4th 100 (*NFLP*) is analogous and instructive. There, the Oakland Raiders sued the National Football League and related entities, including National Football League Properties, Inc. (NFLP), the separate corporation for National Football League merchandising. (*Id.* at pp. 102-103.) One position on the NFLP's board of directors was reserved for, and filled by, a Raiders representative. In formal discovery, the Raiders sought attorney-client and work product privileged documents belonging to NFLP, arguing in part that since the Raiders had a seat on the NFLP Board of Directors, they were entitled to inspect all corporate documents.

The Court of Appeal disagreed: "While a director may be entitled to review corporate legal documents, where the director sues in his capacity as a shareholder, rather than a director, the attorney-client and work product privileges are properly upheld by the corporation." (*NFLP, supra,* 65 Cal.App.4th at p. 109.) The court added the Raiders-designated member of the Board "cannot put on his director's hat and request privileged corporate documents which he intends to pass on to a shareholder, the Raiders, for use in litigation against the corporation. Such an act would be inconsistent with his fiduciary duty to the corporation.

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the Spitzer memo with other commercial owners and sitting on its rights for over two years. Because the referee expressly did not address WC's waiver argument (although it did rule the POA had not slept on its rights), we do not reach this issue on appeal. (*Rutan v. Summit Sports* (1985) 173 Cal.App.3d 965, 974 ["'Although an appellate court may affirm an order upon a theory of law other than that adopted by the trial court, it is not appropriate to do so by exercising a discretion and making factual decisions to which the trial court has never addressed itself'"].)

[Citation.] For the same reason, he cannot delegate his director's right of inspection to the Raiders. Thus, we reject the Raiders' argument that the club is entitled, either as a 'member' of the NFLP board of directors, or as an 'agent' of [the Raiders-designated] director . . . to inspect NFLP's attorney-client privileged documents." (*Id.* at pp. 109-110, fn. omitted.)

The same rationale applies here. Mackey obtained the Spitzer memo in his capacity as a POA Board member.[7] Mackey could not take off his director's hat and provide a copy to WC for its use in litigation against the POA. Winston & Strawn would have been denied access to the Spitzer memo through formal discovery and could not surreptitiously obtain it from a manager of its client who also happened to be a member of the POA's Board. Winston & Strawn, as WC's counsel, should have recognized as much and immediately complied with the *State Fund* protocols.[8]

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[7] He then gave the Spitzer memo to a WC colleague, himself a former Board member. This individual forwarded the Spitzer memo to Winston & Strawn.

[8] The referee's reliance on *Seahaus, supra,* 224 Cal.App.4th 754 and the common interest doctrine was misplaced. Under *Seahaus*, when two or more parties have a common interest in securing legal advice on the same matter, the party securing the legal advice—the holder of the privilege—does not waive the privilege *as to third parties* by sharing the privileged advice with the common interest party. Here, the "parties" with the common interest were WC and the Board's commercial member and the party securing the legal advice was the POA. As *NFLP, supra,* 65 Cal.App.4th at page 109 makes clear, neither WC nor the Board's commercial member was a holder of the privilege.

Nonetheless, the referee did not abuse his discretion in declining to disqualify the law firm. The ethical breach involved only the Spitzer memo and did not result in "irreversible" damage to the POA. (*Rico, supra,* 42 Cal.4th at p. 819.) The Spitzer memo dealt with interpretations of the written CC&R's and concerned the discrete voting rights issue. The POA's in terrorem arguments notwithstanding, neither the referee nor this court was presented with any evidence that the ethical lapse had an unmitigable or irreversible effect on the litigation. The referee struck those portions of WC's reply brief that referred to the POA's attorney-client and work product privileged information and ordered Winston & Strawn to destroy all copies of any POA privileged material. This was a sufficient remedy.

DISPOSITION

The order is affirmed. In the interests of justice, the parties are ordered to bear their own costs on appeal.

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DUNNING, J.*

We concur:

KRIEGLER, Acting P. J.

BAKER, J.

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