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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

D. MARK ANDERSON et al.,

Plaintiffs and
Respondents,

v.

DAVID L. KAGEL,

Defendant and
Appellant.

B271360

(Los Angeles County
Super. Ct. No. BC496876)

APPEAL from judgments of the Superior Court of Los Angeles County, Frank J. Johnson, Judge. Appeal dismissed.

Beitchman & Zekian, David P. Beitchman and Shani Kochav for Defendant and Appellant.

Murrin Law Firm and J. Owen Murrin for Plaintiffs and Respondents.

David L. Kagel appeals from multiple judgments entered after a court trial awarding D. Mark Anderson and other investors in the Oxford Financial Group, Inc. Trust (OFG Trust) approximately \$1.3 million in damages for breach of fiduciary duty, negligence, and constructive fraud.¹ Kagel served as trustee of the OFG Trust, the principal asset of which was a life insurance policy. The trial court found that Kagel improperly sold the policy for less than fair market value to persons associated with Kagel or his attorney.

On appeal Kagel contends the trial court abused its discretion in imposing evidentiary and issue sanctions before trial, plaintiffs failed to prove their causes of action, and the damages awarded were speculative and improper.

Plaintiffs moved to dismiss this appeal under the disentitlement doctrine based on Kagel's repeated and willful failure to comply with the trial court's orders to appear for his judgment debtor examination and produce financial documents. We agree and dismiss his appeal.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Life Insurance Policy*

The OFG Trust owned an insurance policy on the lives of Gwen and James Duffy with a \$3 million death benefit. The

¹ Kagel appeals from 18 separate judgments in favor of investors D. Mark and Marleen Anderson, Bruce Bybee, Al Cleveland, Gilbert and Darla Eslinger, James Gochnauer, Bradley Lawrence, Mauggie Legg, Allen Maize, Robert Powers, Harvey and Marilyn Rich, Richard Robinson, Manuel Rose, Lance Sabin, Melvin Souza, Nick and Emmy Speir, Scott and Angela Stovall, John Thomas, and Alan and Maria Williams.

trustee of the trust was responsible for paying the insurance premiums and collecting money from investors for this purpose. The investors were the trust beneficiaries, some of whom are plaintiffs in this action. The investment agreement provided that if the escrow accounts to pay the premiums on the insurance policy were depleted, the investors had to cover the premiums. Further, the trustee was required to give the investors 90 days' advance notice that the premiums were due.

On approximately July 20, 2011 Kagel became the successor trustee of the OFG Trust. On November 18, 2011 Kagel notified the investors that the premium escrow account had been depleted and that each investor would have to pay a proportionate share of the insurance premiums. Not all investors paid their share, leaving a shortfall in the available funds to pay the premiums owed. On February 3, 2012 Kagel sold the insurance policy to an entity known as SMDC for \$340,000.

B. *Plaintiffs' Complaint*

On December 6, 2012 plaintiffs filed a complaint against Kagel alleging 10 causes of action, including breach of fiduciary duty, negligence, and constructive fraud. On February 25, 2014 the trial court consolidated this action with two related actions, *Lawrence v. Erwin* (Super. Ct. L.A. County, No. BC500253) and *Reliant Life Shares LLC v. Lawrence* (Super. Ct. L.A. County, No. LC098847). Both *Lawrence v. Erwin* and *Reliant Life Shares LLC v. Lawrence* were resolved before the trial in this action.

C. *The Discovery Disputes and Sanctions Order*²

On February 7, 2014 Kagel stipulated to substitute himself in place of his former attorney David P. Beitchman.³ On March 4, 2014 plaintiffs filed a motion to compel answers to interrogatories and responses to requests for production of documents. Kagel did not file an opposition to the motion or appear at the hearing.⁴ On April 7, 2014 the trial court granted plaintiffs' motion to compel and ordered Kagel within 10 days to answer the form and special interrogatories and to provide responsive documents, without objection. Kagel was served by mail with the trial court's April 7, 2014 order.

Kagel failed to comply with the discovery order. On June 16, 2014 plaintiffs filed a motion to find Kagel in contempt of court, for an order that the truth of matters specified in plaintiffs' requests for admissions be deemed admitted, and for terminating sanctions, monetary sanctions, removal of Kagel as trustee, and other relief. Plaintiffs served Kagel with the motion by mail. Kagel did not file an opposition to the motion. On

² Although we do not reach the merits of the appeal, we provide the procedural history in the trial court to highlight Kagel's failure to comply with the trial court's orders dating back to the court's April 7, 2014 order that he respond to plaintiffs' discovery.

³ Kagel was self-represented from February 7, 2014 until December 1, 2015, when he substituted Beitchman back in as his counsel. However, Kagel is an attorney licensed to practice in the State of California, except during an eight-month suspension starting in 2012.

⁴ No proof of service for plaintiffs' motion is included in the appellate or superior court records. However, Kagel does not contend he was not served with plaintiffs' motion.

July 25, 2014 the trial court issued an order granting plaintiffs' motion to deem the requests for admissions admitted and ordering payment of monetary sanctions, but denying the motion as to the requests for contempt, terminating sanctions, and removal of Kagel as a trustee.

On September 30, 2014 plaintiffs filed a motion for summary judgment or summary adjudication and to impose issue and evidence sanctions on Kagel. On January 14, 2015 the trial court denied the motion for summary judgment or summary adjudication, and granted the motion for sanctions.⁵ However, the court deferred a ruling on the extent of the sanctions. On April 21, 2015 the trial court ruled, "In light of Defendant Kagel's failure to participate in discovery, failure to obey court orders, and failure to appear at court, the Court hereby imposes issue sanctions in the form of a directed verdict on certain causes of action. In other words, David Kagel will not be allowed to contest liability as to the following causes of action," including for breach of fiduciary duty, negligence, and constructive fraud, and seven other causes of action.

The April 21, 2015 order also barred Kagel from presenting evidence controverting certain matters, including, inter alia, that

⁵ Because the appellate record is incomplete, we obtained the superior court file to facilitate our review. On our own motion we augment the record to include the following documents filed in the superior court: the minute orders dated January 14, 2015, July 28, 2016, August 19, 2016, August 31, 2016, and September 7, 2016, "Plaintiff Investors' Notice of Motion for Summary Judgment/Adjudication Against David Kagel" filed on September 30, 2014, and the "Application and Order for Appearance and Examination" dated April 11, 2016. (See Cal. Rules of Court, rule 8.155(a)(1)(A).)

Kagel wrongfully took over as trustee, failed to advise investors of the circumstances regarding his purported appointment, failed timely to advise investors of the lapse of the insurance policy, allowed the sale of the insurance policy at less than fair value, failed to give investors the required 90 days' notice before the policy premiums were due, failed to inform investors of the policy sale until after he sold the policy, and improperly withheld investor funds after sale of the policy. The order concluded, "It should not be suggested that by allowing issue and/or evidentiary sanctions, the Court has made an adjudication on the merits of the underlying lawsuit. The actions ordered herewith are for violations relating to the abuse of the judiciary process and are not due to a determination on the merits."

D. *The Trial and Entry of Judgments*

On December 1, 2015 a three-day court trial commenced. After plaintiffs rested their case, Kagel filed a motion for a judgment under Code of Civil Procedure section 631.8, subdivision (a). The trial court denied the motion as to the causes of action for breach of fiduciary duty, negligence, and constructive fraud; the court instead found in favor of plaintiffs on the three causes of action.⁶ The trial court granted Kagel's motion as to plaintiffs' causes of action for interference with

⁶ Notwithstanding the trial court's April 21, 2015 ruling on plaintiffs' request for sanctions that Kagel would not be allowed to contest liability as to these three causes of action, the trial court allowed the presentation of evidence at trial relating to the causes of action and ruled on Kagel's motion for judgment.

contract, securities and Corporations Code violations, and an accounting.⁷

On February 17, 2016 the trial court filed a statement of decision finding Kagel liable for breach of fiduciary duty, negligence, and constructive fraud. The court found that Kagel breached his fiduciary duty to the plaintiffs by dissipating the entire corpus of the trust. As to plaintiffs' negligence cause of action, the court "concluded that [Kagel] either outright stole the proceeds of the OFG Trust or, alternatively, his stewardship of the OFG Trust's assets was so lamentably bad that he negligently allowed the OFG Trust to dissipate." The court found further that the \$340,000 sale price was "a fire sale price that should never have been allowed to occur." The trial court found as to plaintiffs' claim for constructive fraud that Kagel, as a fiduciary to the investors, took advantage of them instead of protecting them.

The trial court calculated the aggregate loss to the investors at approximately \$2.8 million. The court based this calculation on the expert testimony of Richard Schwartz, who testified that the policy was later sold to another group of investors for over \$2 million. The total damages awarded also included \$121,000, representing the present value of the funds Kagel wrongfully failed to distribute to the investors, as well as 10 percent interest on the calculated loss. The court determined each plaintiff's damages based on his or her percentage ownership interest in the OFG trust. On February 17 and 23,

⁷ At the commencement of trial plaintiffs voluntarily dismissed the remaining causes of action alleged in their complaint.

2016 the court entered 18 separate judgments in favor of the plaintiffs, totaling \$1,317,653.25.

On April 4, 2016 Kagel timely appealed from entry of the judgments.

E. Postjudgment Proceedings and Plaintiffs' First Motion To Dismiss

On March 11, 2016 the trial court ordered Kagel to appear for a judgment debtor examination on March 24, 2016; Beitchman was personally served with the order. On March 11 plaintiffs also personally served Beitchman with a notice to appear and produce documents for inspection at the debtor examination. The debtor examination was later taken off calendar at the request of plaintiffs, and on April 11, 2016 the court ordered Kagel to appear for a judgment debtor examination on June 16, 2016. Kagel failed to appear or to produce documents on June 16. Beitchman told the trial court that Kagel did not appear because he had sick parents who “may have been out of state,” although Kagel was 78 years old at the time. The trial court issued and held a bench warrant until June 27, 2016. When Kagel failed to appear on June 27, the court released the bench warrant and set bail at \$15,000.

On July 12, 2016 plaintiffs filed a “Motion to Dismiss Appeal Under Disentitlement Doctrine.” Plaintiffs argued that Kagel’s willful failure to comply with the court orders both before and after the entry of judgment justified a discretionary dismissal. Kagel opposed the motion, representing that he planned to surrender on the bench warrant the following day.

On July 28, 2016 we issued an order denying the motion to dismiss, stating, “respondents’ motion is denied without prejudice

to filing a new motion if appellant willfully disobeys additional orders of the superior court entered in postjudgment collection proceedings.”

F. *Further Postjudgment Proceedings and Plaintiffs’ Second Motion To Dismiss*

On July 28, 2016 Kagel appeared in the trial court and the court recalled the bench warrant. The court continued the judgment debtor examination to August 19, 2016. On August 19 Kagel appeared for his judgment debtor examination. However, he did not produce any documents. At the beginning of the examination, Beitchman stated that Kagel was recently discharged from the hospital, was wearing a heart monitor, and was taking eight medications. Plaintiffs’ attorney J. Owen Murrin conducted a brief portion of the examination, then Beitchman requested a continuance in light of Kagel’s poor health. Beitchman, Kagel, and Murrin then appeared before the trial court. Beitchman explained that Kagel was served with the document subpoena, but did not comply because he passed out in his bathroom and was taken to the hospital, and then was under his doctor’s orders and bed rest. However, Kagel did not testify under oath as to his medical condition during the debtor examination, nor did he make a statement to the court the same day. Neither Kagel nor Beitchman produced medical records supporting Beitchman’s assertions as to Kagel’s medical condition. Beitchman agreed that Kagel would produce the documents by August 31, 2016; Kagel added, “Uh-huh.” The trial court ordered Kagel to return for his debtor examination on August 31 with the documents.

On August 31, 2016 Kagel failed to appear for his examination or to produce any documents. The minute order of

that date states, “Counsel represents that judgment debtor David Kagel is unavailable this date due to medical reasons and will not appear.” The trial court continued the examination to September 7, 2016 and then to September 9, 2016. When Kagel failed to appear on September 9, 2016, the court issued a second bench warrant and set bail at \$25,000. The minute order of that date states, “Counsel for the judgment debtor represents that [Kagel] is still ill and will not be appearing this date. Counsel acknowledges that he has no documentation supporting defendant’s claim. Counsel represents that they can provide some of the documents subpoenaed by the judgment creditor. [¶] The Court notes that no evidence has been presented to support the judgment debtor’s contentions.”

According to Murrin, he attempted to have Kagel appear for his debtor examination on October 14, 2016 and November 7, 2016, but to no avail. On December 14, 2016 Murrin e-mailed Beitchman, noting that the bench warrant was still outstanding and the judge in a related case had ordered Kagel to appear for his deposition on January 16, 2017. Murrin proposed that Kagel sit for both his deposition and the judgment debtor examination. Beitchman responded simply, “????”

As to plaintiffs’ requests for production of documents, Kagel contends that on June 16, 2016 his attorney produced a banker’s box of documents. However, Beitchman provides as evidence only a June 16, 2016 e-mail from Murrin stating that some documents had been provided. Moreover, the documents produced related only to the OFG Trust, not Kagel’s personal assets from which a judgment could be satisfied. As Beitchman stated in his declaration, Kagel produced “the entirety of the OFG Trust file as requested by [plaintiffs].” Notably, however,

plaintiffs' notice to produce documents served on Beitchman in connection with the March 24, 2016 debtor examination requested 107 categories of documents including, inter alia, "[d]ocuments evidencing [Kagel's] assets." Plaintiffs' second request to produce documents served on Beitchman in connection with the August 31, 2016 debtor examination requested 132 categories of documents, similarly including "[d]ocuments evidencing [Kagel's] assets."

On December 28, 2016 plaintiffs filed a second "Motion to Dismiss Appeal Under Disentitlement Doctrine." As of December 28, Kagel had not appeared for his debtor examination and the bench warrant had not been recalled. Neither had Kagel produced any documents responsive to plaintiffs' multiple document requests. On February 17, 2017 we issued an order deferring our consideration of the motion until our consideration of the appeal.

DISCUSSION

A. *The Disentitlement Doctrine*

An appellate court has the inherent power under the disentitlement doctrine to dismiss an appeal by a party that refuses to comply with a trial court order. (*Ironridge Global IV, Ltd. v. ScripsAmerica, Inc.* (2015) 238 Cal.App.4th 259, 265 (*Ironridge*); *Gwartz v. Weilert* (2014) 231 Cal.App.4th 750, 757 (*Gwartz*); *Stoltenberg v. Ampton Investments, Inc.* (2013) 215 Cal.App.4th 1225, 1229 (*Stoltenberg*).)

"This doctrine of disentitlement is not jurisdictional, but is a discretionary tool that may be used to dismiss an appeal when the balance of the equitable concerns makes dismissal an appropriate sanction. [Citation.] The rationale underlying the

doctrine is that a party to an action cannot seek the aid and assistance of an appellate court while standing in an attitude of contempt to the legal orders and processes of the courts of this state.” (*Gwartz, supra*, 231 Cal.App.4th at p. 757; accord, *Ironridge, supra*, 238 Cal.App.4th at p. 265; *Stoltenberg, supra*, 215 Cal.App.4th at p. 1230.) It is not necessary for a moving party to obtain a formal judgment of contempt; rather, “[a]n appellate court may dismiss an appeal where the appellant has willfully disobeyed the lower court’s orders or engaged in obstructive tactics.” (*Gwartz*, at pp. 757-758; accord, *Stoltenberg*, at p. 1230.) The merits of the appeal are not relevant to a determination whether application of the doctrine supports dismissal of the appeal. (*Ironridge*, at p. 265; see *Gwartz*, at p. 757 [“Because the motion to dismiss will be granted, this opinion . . . does not reach the merits of the appeal.”].)

“The disentitlement doctrine has been applied to a wide range of cases, including cases in which an appellant is a judgment debtor who has frustrated or obstructed legitimate efforts to enforce a judgment.” (*Gwartz, supra*, 231 Cal.App.4th at p. 758 [appeal dismissed where debtor made 47 transfers from his bank account to related entities and to pay expenses in violation of trial court’s order]; see, e.g., *Ironridge, supra*, 238 Cal.App.4th at pp. 264, 266-267 [appeal dismissed where debtor transferred stock to third parties in violation of trial court’s order]; *Stoltenberg, supra*, 215 Cal.App.4th at pp. 1228, 1234 [appeal dismissed where debtors were held in contempt for their violation of trial court’s order to comply with postjudgment subpoena for financial information]; *TMS, Inc. v. Aihara* (1999) 71 Cal.App.4th 377, 380 [appeal dismissed where debtors willfully refused to comply with trial court’s order that they

respond to postjudgment interrogatories]; *Stone v. Bach* (1978) 80 Cal.App.3d 442, 443-444, 448 [appeal dismissed after debtor held in contempt for his pretrial failure to deposit partnership receipts into a separate account and a second time for his postjudgment refusal to be sworn for a debtor examination]; *Tobin v. Casaus* (1954) 128 Cal.App.2d 588, 589, 592-593 (*Tobin*) [appeal would be dismissed within 30 days if debtor failed to appear in the trial court for his debtor examination after the trial court had issued a bench warrant for the debtor's failure to appear at his examination]; cf. *Polanski v. Superior Court* (2009) 180 Cal.App.4th 507, 530, 538, 550 [declining to apply fugitive disentitlement doctrine to dismiss fugitive Roman Polanski's petition for a writ of mandate where Polanski presented evidence of judicial and prosecutorial misconduct, but concluding the trial court did not abuse its discretion in applying the doctrine to deny Polanski's motion to dismiss the criminal prosecution].)

B. *The Disentitlement Doctrine Applies Here*

Kagel initially failed to appear or produce documents for his court-ordered debtor examination on June 16, 2016. On this date Beitchman provided Kagel's first excuse for his failure to appear—that Kagel had to take care of sick parents who “may have been out of state.” The trial court issued and held a bench warrant until June 27, 2016, but issued the warrant when Kagel still failed to appear. No documentation has ever been provided as to this failure to appear.

Only after plaintiffs filed their first motion to dismiss the appeal on July 12, 2016 did Kagel appear in the trial court, on July 28, 2016, at which time the trial court recalled the bench warrant and ordered Kagel to appear for his debtor examination

on August 19, 2016. On July 28 we denied plaintiffs' motion to dismiss without prejudice to their filing a second motion if Kagel continued willfully to disobey the trial court's orders. Kagel did precisely that.

On August 19, 2016 Kagel appeared for his debtor examination briefly, but still did not produce any documents. He ended the examination early, this time claiming he had recently been released from the hospital with heart issues. Yet Kagel never testified as to his medical condition or produced documentation of his hospital admission. Rather, only Beitchman described the hospital visit and medication Kagel was taking.

Although Kagel was present in court when the trial court ordered him to appear for a continued examination and to produce documents on August 31, 2016, Kagel once again failed to appear or produce documents. Beitchman provided no documentation to the trial court to support Kagel's claimed medical condition. After Kagel failed to appear again on September 7 and September 9, 2016, the trial court issued a second bench warrant and set bail at \$25,000. That bench warrant is outstanding today. Despite Murrin's efforts to have Kagel appear on October 14, 2016, November 7, 2016, and January 16, 2017, Kagel has continued to evade his debtor examination.

In his opposition to plaintiffs' second motion to dismiss, Kagel concedes he "has admittedly failed to appear for his judgment debtor examination on some occasions," but contends he "did not willfully fail to appear nor did he fail to appear with the deliberate intent to frustrate the trial court's judgment. Instead, [Kagel] was unable to appear as he was tending to an ill

family member.” As noted above, Kagel has never provided documentation to support this excuse. Neither has he provided documentation of a hospital admission for heart issues to support his ending the August 19, 2016 debtor examination early.

As to his failure to appear on August 31, 2016 and September 9, 2016, Kagel points to a medical record from an August 29, 2016 emergency room visit in which the record reflects that he had a back injury and an “abrasion of [his] left thigh.” According to the medical report, his MRI also revealed a prostate mass. However, Kagel has not provided documentation to show any impact that visit had on his failures to appear on August 31, September 7, and September 9. The medical record only states that Kagel should “[i]ce injured areas for 20 minutes every 2-3 hours” and should “[a]mbulate with [a] walker.” Although perhaps this might have excused his failure to appear on August 31 (had he requested relief from the trial court), no explanation is given for his failures to appear on September 7 and September 9.

Finally, Kagel points to a note from his doctor stating that he had been receiving treatment for the prostate mass with “testosterone deprivation” since November 4, 2016, that he was scheduled to undergo radiation during the period from January 19, 2017 through March 22, 2017, and that his symptoms would resolve within 6 to 8 weeks following treatment. Again, however, the doctor’s note fails to address whether Kagel could have appeared on any date after August 29, 2016 (when the prostate mass was discovered) to the completion of his cancer treatment in March 2017. It is not credible that Kagel was unable to appear for his debtor examination on a single day

during this seven-month period or to produce the requested documents.

Moreover, Kagel does not explain why he never provided documentation of his medical condition to the trial court or requested a continuance of his debtor examination and additional time in which to produce documents. Instead, Kagel allowed the bench warrant to remain outstanding during this entire period, and to the present.

Kagel's continued failure to complete his judgment debtor examination and produce financial documents over a two-year period without a valid excuse, even after our clear warning, compels the conclusion that his failure to comply with the trial court's orders was willful. Kagel "cannot seek the aid and assistance of an appellate court while standing in an attitude of contempt to the legal orders and processes of the courts of this state." (*Gwartz, supra*, 231 Cal.App.4th at p. 757; accord, *Ironridge, supra*, 238 Cal.App.4th at p. 265; *Stoltenberg, supra*, 215 Cal.App.4th at p. 1230.) We conclude, as did the Court of Appeal in *Tobin*, "It seems incredible that with the imminent prospect of losing his right of appeal in this case, appellant would persist in ignoring the court process. Yet if he has to this day taken any steps to surrender on the bench warrant, they have not been called to our attention. One who, with knowledge that he is being sought pursuant to court process, absents himself or flees, is a fugitive from justice." (*Tobin, supra*, 128 Cal.App.2d at p. 592.)

Further, Kagel's failure to appear for his debtor examination or to produce necessary financial documents has in essence achieved a stay of execution of plaintiffs' money judgment without posting a bond to stay enforcement under Code of Civil

Procedure section 917.1.⁸ (See *Stoltenberg, supra*, 215 Cal.App.4th at p. 1232 [debtor’s failure to comply with postjudgment discovery “demonstrates a deliberate effort to achieve a stay of execution of the money judgment against [them] without complying with legal procedures.”]; *Stone v. Bach, supra*, 80 Cal.App.3d at p. 448 [same].) Although Kagel argues that plaintiffs have remedies available to them to enforce their judgment, including a writ of execution, this is a meaningless remedy given Kagel’s concealment of the assets plaintiffs would otherwise seek to attach. Indeed, Kagel has had every opportunity over a two-year period to dispose of his assets to keep them from plaintiffs. Thus, the equities support our discretionary granting of plaintiffs’ motion to dismiss the appeal.

We reject Kagel’s final argument that we should delay dismissal of the appeal to allow him one last opportunity to appear for his debtor examination and produce the requested documents, as the court did in *Tobin*. In *Tobin*, the court delayed dismissal of the appeal for 30 days to allow the debtor to appear for his debtor examination. (See *Tobin, supra*, 128 Cal.App.2d at p. 593.) However, the court cautioned, “if appellant fails to [comply with the trial court’s order] for any reason whatever, or if he resorts to evasive or dilatory tactics in either the court below or this court, the motion to dismiss is to be granted without further hearing or opinion.” (*Ibid.*)

Here, Kagel has ignored our warning in denying plaintiffs’ first motion to dismiss that we would consider a renewed motion

⁸ Code of Civil Procedure section 917.1, subdivision (a), provides as to money judgments, “Unless an undertaking is given, the perfecting of an appeal shall not stay enforcement of the judgment or order in the trial court”

if Kagel “willfully disobey[ed] additional orders of the superior court entered in postjudgment collection proceedings.” Indeed, we denied plaintiffs’ first motion to dismiss based on Kagel’s representation that he would surrender to the trial court on July 28. But since that time, Kagel has continued to disobey the trial court’s orders and comes before us with an outstanding bench warrant issued on September 9, 2016. After two years of broken promises, Kagel’s assertion that he has “every intention of completing his judgment debtor exam” rings hollow.

DISPOSITION

The appeal is dismissed. Plaintiffs are entitled to recover their costs on appeal.

FEUER, J.*

WE CONCUR:

ZELON, Acting P. J.

SEGAL, J.

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