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B217141

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

OASIS WEST REALTY, LLC,
Plaintiff and Respondent,

vs.

KENNETH A. GOLDMAN, et al.,
Defendants and Appellants.

AFTER A DECISION BY THE COURT OF APPEAL,
SECOND APPELLATE DISTRICT, DIVISION 5, CASE NO. B217141
SUPERIOR CASE NO. SC101564

REPLY IN SUPPORT OF PETITION FOR REVIEW

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I. Defendants' answer to the petition only serves to illustrate why review by this Court is needed to preserve the duty of loyalty lawyers owe to their clients.

In the Petition for Review, plaintiff Oasis West Realty, LLC ("Oasis") explained that review was necessary to clarify the scope of a lawyer's duty of loyalty, which has been recognized as the cornerstone of the lawyer's relationship with his or her clients. (See Petition, pp. 11-16) In its published opinion the Court of Appeal fashioned a rule under which a lawyer retained to represent a client with respect to a very specific matter (here the approval of a real estate project) could perform services for the client, receive payment for those services and then, after severing his relationship with the client, affirmatively work against the very project he was retained to support so long as the lawyer is acting on his own behalf and is not then representing another client.

In their answer to the petition, defendants Reed Smith LLP and Ken Goldman confirm that this is precisely what the Court of Appeal in fact ruled. That answer therefore serves to illustrate why review by this Court is so justified. Defendants attempt to justify the Court of Appeal's conclusion that as a matter of law there was no breach of the duty of loyalty because they did not represent a second client while Mr. Goldman affirmatively worked against the very project that was the subject of defendants' earlier

representation and because there was no affirmative evidence that confidential information was used by Mr. Goldman while he was working against that project.

As highlighted in the petition, in *Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564, 573-574, this Court described an attorney's duty of loyalty in the following broad terms: "an attorney is forbidden to do either of two things after severing his relationship with a former client. He may not do anything which will injuriously affect his former client in any manner in which he formerly represented him nor may he at any time use against his former client knowledge or information acquired by virtue of the previous relationship." Numerous other published opinions have concluded that an attorney's breach of loyalty is presumed when he switches sides in an ongoing matter. (See Petition, pages 13-16.)

The only published opinion that carves an exception to this bedrock principle when the lawyer is acting on his or her own behalf and is not representing a second client, *is the Court of Appeal opinion in this case*. Certainly, defendants cite no other authority that recognizes the sweeping exception to the duty of loyalty contained in that opinion.

Rather, defendants argue that because the cases which discuss the duty of loyalty happen to primarily arise in the context of a lawyer representing a second client, that subsequent representation must be a necessary element to a breach of the duty of loyalty claim. Defendants are mistaken. "'Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having

been so decided as to constitute precedents.' [Citation.]" (*Canales v. City of Alviso* (1970) 3 Cal.3d 118, 128, fn 2; (See *People v. Myers* (1987) 43 Cal.3d 250, 273-274 [even though the court in an earlier opinion retroactively applied a new principle of law, that case did not stand for the proposition that such retroactive application was appropriate since that was not an issue raised or resolved]; *McAdory v. Rogers* (1989) 215 Cal.App.3d 1273, 1277 [manner in which the Court of Appeal earlier calculated maximum recovery under MICRA was not controlling since in that case there was no consideration of whether the method of calculation was proper.])

Not one of the cases cited in the petition which holds that an attorney's breach of loyalty is presumed when he switches sides in an ongoing matter, predicates its holding to the fact that there happened to be a representation of a second client. Rather, each of these cases is premised on the conduct of the lawyer working against the subject of his or her earlier representation.[1]

In their answer, defendants do not even try to justify why, from the perspective of the client, it matters whether the attorney who switches sides does so on behalf of a second client or does so on his or her own behalf. As explained in the petition and largely ignored by defendants, it is an even greater betrayal if a lawyer opposes the very matter he or she was retained to support for personal rather than professional reasons. A lawyer

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[1]Of note, these cases primarily interpret the cannons of ethics and do not concern a common law claim for breach of fiduciary duty such as involved here.

who publicly acts adversely and exhorts others to join his cause will likely cause even more damage to the client than the lawyer who just represents a single, second client. Therefore, no client would ever knowingly engage nor allow himself to continue to be represented by a lawyer that publicly opposes and encourages others to join in opposing the client's still-pending interests, regardless whether the lawyer was doing so for a new client or on his own account.

Defendants seem to assume that unless the lawyer is retained by a second client, the lawyer remains neutral with respect to the subject matter of the earlier representation – in this case, however, the lawyer is working against the very project he was retained to support. Clearly, a lawyer who affirmatively works against the subject of the earlier representation is anything but neutral. It is equally clear that the former client's interests are harmed every bit as much whether the lawyer is acting on his or her own behalf or is representing a second client.

Nor is it the case that the duty of a lawyer to maintain confidential information fully protects the client against improper conduct by a lawyer who switches sides on his or her own behalf, as defendants argue. (Answer p. 12.) Indeed, this is the same flawed reasoning as contained in the Court of Appeal opinion. It will be the rare case that a client is able to actually demonstrate that a lawyer who affirmatively works against the client is using confidential information which was obtained during the lawyer's earlier representation of the client. The former client will not be privy to what the lawyer is

doing outside the public view. Nor will the client know what motivated the lawyer to suddenly switch sides and affirmatively work against a project he had been retained to support. Certainly, the client could not expect the attorney to voluntarily admit he has used confidential information.

As explained in the petition, this is the very reason why the Courts have crafted a conclusive presumption that the lawyer has acquired confidential information while representing the client. That rule has been "justified as a rule of necessity, 'for it is not within the power of the former client to prove what is in the mind of the attorney. Nor should the attorney have to engage in a subtle evaluation of the extent to which he acquired relevant information in the first representation and of the actual use of that knowledge and information in the subsequent representation.'" (*Global Van Lines, Inc. v. Superior Court* (1980) 144 Cal.App.3d 487, 489.)

In its answer, defendants argue that this conclusive presumption has no application here because they concede that Goldman obtained confidential information during his earlier representation of Oasis. According to defendants the sole question here is whether there is affirmative evidence that Mr. Goldman actually used that confidential information when he affirmatively worked against the project following his representation. (Answer, p. 15.) Defendants miss the point.

If as defendants argues, it is not presumed that the lawyer who switched sides actually used that confidential information against the former client, the conclusive

presumption that the lawyer obtained confidential information would be of little use to the client. While the client would not have to prove that the lawyer possessed confidential information, the client would still have to establish that the lawyer personally used that information in opposing the very subject matter of the earlier representation. In order for a client to establish that the lawyer violated a duty not to use confidential information against the client, the client would therefore have to clear the very high hurdle (prove what is in the mind of the lawyer when he was acting adverse to the former client) that the conclusive presumption was designed to remove.

Moreover, defendants' argument ignores the pernicious effect its proposed rule would have on the lawyer client relationship. If a client knows that (1) its lawyer could affirmatively work against the very project as to which he was retained to represent the client so long as that lawyer is acting on his or her own behalf and (2) the only protection the client has is if it is able to introduce affirmative evidence that the lawyer actually used confidential information, then the client may very well be reluctant to disclose all of the confidential information that is necessary for the lawyer to fully represent the client.

Finally, as to this issue, it is of note that in its answer defendants do not even attempt to justify the Court of Appeal opinion as to prong one of the anti-SLAPP standard on public interest grounds. As explained in the petition, in concluding that Goldman nevertheless did not violate his duty of loyalty even though he unquestionably acted adversely to the former client by switching sides in an ongoing matter, the Court of

Appeal reasoned: "We cannot find that by representing a client, a lawyer forever after forfeits the constitutional right to speak on matters of public interest." (Opinion, p. 17.) But as earlier explained, the Court's analysis was flawed because not only did Goldman have no right to affirmatively work against the very project he had been retained and paid for to support, but the matter was still ongoing. None of the cases on which the Court of Appeal relied was to the contrary and the fact that defendants do not even attempt to justify the Court's opinion as to prong one of the anti-SLAPP standard is testament to this fact.

II. Nothing defendants argue justifies the Court of Appeal's misapplication of the anti-SLAPP standard.

In the petition, Oasis explained that an independent reason why review was necessary was because of the manner in which the Court of Appeal analyzed the anti-SLAPP statute. As part of its determination whether the first prong of the anti-SLAPP analysis was satisfied (whether the action fell within the anti-SLAPP statute), the Court skipped to the second prong (the merits of the action) and concluded that because plaintiffs failed to demonstrate that the duty of loyalty had been breached, prong one of the analysis was satisfied. The very recent opinion in *Hilton v. Hallmark Cards* (9th Cir. 1010) __ F.3d __ [2010 U.S. App. LEXIS 6104, * 9-10] however, specifically explains

such an approach is improper, holding "[A]n anti-SLAPP motion requires the court to ask, first, whether the suit arises from the defendant's protected conduct and, second, whether the plaintiff has shown a probability of success on the merits. If the first question is answered in the negative, then the motion must fail, even if the plaintiff stated no cognizable claim.")

Under the Court of Appeal's approach the scope of the anti-SLAPP statute is expanded tremendously. Courts could force plaintiffs to satisfy their burden under prong two of the anti-SLAPP standard even though, on the face of the complaint, the defendant is not entitled to the protections of the anti-SLAPP statute.

In their answer, defendants initially argue that plaintiffs were required to file a petition for rehearing to raise this issue pursuant to California Rules of Court, rule 8.500(c)(2). (Answer p. 17.) Defendants are mistaken. It is Oasis's position that the manner in which the Court of Appeal resolved the matter was legally flawed. Oasis is not contending that the Court of Appeal omitted or misstated an issue or fact.

Next, contrary to defendants' claim, the fact that the manner in which the Court of Appeal analyzed the matter contravenes other existing authority is a reason why review of this issue is warranted, and not the other way around, as defendants argue. (Answer p. 18.) The published opinion in this case erroneously signals that contrary to settled authorities, courts are entitled to evaluate the merits of the plaintiffs' claim to determine whether prong one of the anti-SLAPP standard is satisfied.

Defendants are further mistaken in arguing that Oasis ignores the First Amendment in the petition. (Answer p. 18.) Oasis explains in detail why the particular conduct in which Mr. Goldman engaged was simply the "evidentiary landscape" (*Hylton v. Frank E. Rogozienski, Inc.* (2009) 177 Cal.App.4th 1261, 1272) for this action and did not implicate free speech. (Petition pp. 20-24.) Rather, the genesis of Oasis's claims was defendants' conduct abandoning Oasis's interest and assuming a directly opposing position thus violating the duty of loyalty owed to Oasis, which as a number of Courts recognize is not protected by the anti-SLAPP statute, even if the particular manner in which the attorney violated that duty involved activity that would otherwise be protected by the First Amendment.

III. **Defendants' efforts to factually diminish Oasis's claim are unfounded.**

Throughout their answer to the petition, defendants seek to minimize both the conduct Mr. Goldman took following his representation or Oasis and the damages Oasis suffered as a result of that conduct. At various points defendants characterize Goldman's post representation activities as "modest" (Answer pp. 1, 7) or "limited" (Answer p. 5). The response to these efforts to diminish the nature of Oasis's claim is straightforward: As to the nature of Mr. Goldman's post representation conduct, the Court of Appeal recognized that "unquestionably [Goldman] acted against the interest of his former client,

on the issue on which he was retained." (Opinion, p. 13.) The Court further recognized that Goldman's actions did "injuriously affect his former client in [a] manner in which he formerly represented him." (See Opinion, pp. 13-14.)

Therefore, this petition focuses squarely on the issue presented: does the duty of loyalty extend to post-representation conduct taken on the lawyer's own behalf or does it instead apply only when there is a second client? While there is disagreement here about the extent of Mr. Goldman's conduct, there could be no dispute that if the duty of loyalty applies to lawyer's conduct on his or her own behalf absent a second client, then that duty was violated here. Defendants' quibble with the amount of Mr. Goldman's conduct goes only to the extent of his breach and not to whether he breached. In view of the fact that this matter arises in the context of a dismissal based on the anti-SLAPP statute, any breach by Mr. Goldman would have been enough to require the denial of the motion.

Exactly the same is true as to the amount of damages Oasis incurred. While the Court of Appeal (and defendants) denigrate Oasis's claim that it sustained $4 million in damages, it was not necessary for Oasis to prove the extent of its damages in order to avoid dismissal under the anti-SLAPP statute. Rather, it was only necessary for Oasis to demonstrate the fact of some cognizable damage. This, it clearly did.

CONCLUSION

In sum, for the reasons explained in the petition and this reply, there are two independent reasons review is warranted: (1) to preserve the duty of loyalty which is so critical to the attorney-client relationship and (2) to ensure that the ant-SLAPP procedure is not stretched to apply well beyond its intended scope by allowing courts to consider the merits of the plaintiff's claim in deciding whether that claim falls within the scope of the anti-SLAPP statute.

Dated: May 12, 2010

ROSOFF, SCHIFFRES & BARTA

ESNER & CHANG

By: _____
Stuart B. Esner

Attorneys for Petitioner

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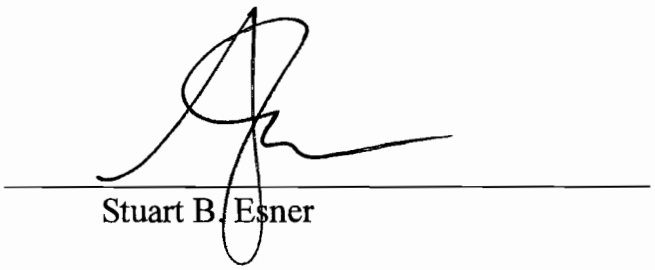

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