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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

HULEN T. HARRELL,

Plaintiff and Appellant,

v.

ALAMEDA COUNTY SHERIFF'S
DEPARTMENT,

Defendant and Respondent.

A144472

(Alameda County
Super. Ct. No. RG13665188)

Plaintiff Hulen T. Harrell, appearing in propria persona, appeals from an order denying his motion to disqualify Raymond L. MacKay, a senior deputy county counsel for the County of Alameda, as counsel for defendants. We find no abuse of discretion in the trial court's order and, therefore, we shall affirm the order.

Factual and Procedural Background

On January 18, 2013, while detained at a County of Alameda jail pending trial as a sexually violent predator, plaintiff filed a complaint against the county and three individual defendants, alleging causes of action arising out of the conditions of his confinement and out of his prior criminal convictions.

On December 30, 2014, plaintiff moved to disqualify MacKay. On January 30, 2015, the court denied the motion. The court's order reads in relevant part as follows: "The motion is directed at Raymond MacKay, Senior Deputy County Counsel for the Office of County Counsel, Alameda County ('Counsel'). Plaintiff seeks to disqualify counsel from 'concurrent representation of appearing and non-appearing , non-served

named defendants with proximate causation links to [plaintiff's] 1975, 1983, and 1993 prior felony conviction judgments per Rules of Professional Conduct, rule 3-310(c) and Code of Civil Procedure section 412.20, subd. (a)(3).' The request to disqualify counsel from representing defendants who have not appeared is denied at moot, because counsel has not undertaken to represent any party who has not appeared. [¶] Plaintiff asserts that counsel has unclean hands based on material facts set out in a 12-page affidavit/declaration dated February 27, 2014 and filed with the court, in which he documented that county jail mail handlers had been advised by the Alameda County Civil Litigation Department to, in effect, obstruct, impound, censor and unseal plaintiff's outgoing 'sealed' legal mail manila envelopes 'containing summons, complaint, and the case management conference statement date [sic],' that were addressed to the named defendants who have still not appeared. Plaintiff attributes this conduct to counsel and argues that it has chilled his exercise of First Amendment rights. Plaintiff has presented no evidence that counsel had any role in the problems that plaintiff claims he encountered with the county jail mail handlers or that counsel has otherwise impeded plaintiff's ability to serve defendants who have not been served. Plaintiff's unsupported claims regarding his difficulty serving defendants who have not been served does not provide a basis to disqualify counsel from continuing to represent the defendants who have been served. Plaintiff has not presented evidence that the fairness or integrity of the proceedings has been compromised, or that any prejudice he has suffered would justify an order disqualifying counsel from continuing to represent his clients. (See *People v. Jones* (2001) 33 Cal.4th 234, 240.) [¶] Plaintiff also seeks to disqualify counsel based on his claim that counsel on behalf of his clients, made arguments based on *Heck v. Humphrey* (1994) 512 U.S. 477, 486-487, attacking plaintiff's claims arising out of his 1975, 1983 and 1993 felony convictions, while simultaneously conceding that those claims are not applicable to his clients. Plaintiff argues that counsel had misled the court by arguing that plaintiff is seeking to overturn his three prior felony convictions, when he actually seeks only monetary damages. Plaintiff asserts that counsel's arguments on the merits with regard to plaintiff's claims arising from his felony convictions create a conflict of interest

between counsel and his clients, because counsel is raising arguments that are not applicable to the claims against his clients. [¶] Even assuming that counsel has made inaccurate representations about the basis of plaintiff's pleadings, that fact would not support disqualification of counsel. Plaintiff was free to point out any inaccuracies in counsel's arguments. In particular, he could have conceded that his claims based on his prior felony convictions were not directed at the appearing defendants. That fact is not apparent from the first amended complaint. Plaintiff did not make that concession, but responded on the merits, and the court properly ruled on the merits of counsel's arguments directed at the claims based on prior felony convictions. Further, it is the court's role . . . to determine which party's arguments are correct. The fact that plaintiff disputes arguments and assertions made by counsel is neither surprising nor a basis to deprive defendants of their counsel of choice. [Citation]. [¶] Further, counsel's arguments attacking plaintiff's claims based on prior felony convictions does not create a conflict of interest with his clients. Counsel argued that those claims did not state a cause of action against his clients, which is consistent with his client's interests. In any event, plaintiff does not have standing to argue that counsel's decisions were not necessary or did not serve the best interests of his clients. Counsel's duties are owed to his clients, not plaintiff, and plaintiff's opinion about the necessity of the actions taken by opposing counsel is irrelevant and does not provide grounds to disqualify another party's attorney. [¶] Plaintiff contends that counsel, by attacking plaintiff's claims based on his prior felonies, is thereby concurrently representing the unnamed defendants who are the persons actually responsible for plaintiff's damages arising from those felony convictions. Plaintiff cites *Flatt v. Superior Court* (1994) 9 Cal.4th 275, 282, fn. 2, and 283-284. In that case, the court cited the rule that counsel may not represent a client if the representation will be directly adverse to another client. The court found that simultaneous representations of clients who have adverse interests requires automatic disqualification because it violates counsel's duty of loyalty. (*Ibid.*) The holding in *Flatt* has no application under the circumstances presented here because counsel does not represent the defendants who have not appeared. Plaintiff's citation to *People ex. rel.*

Dept. of Corporations v. Speedee Oil Change Systems, Inc. (1999) 20 Cal.4th 1135, 1146-1147, is irrelevant for the same reasons as his citation to *Flatt*. There is no basis to disqualify counsel based on concurrent representation of clients with adverse interests when there is no evidence that counsel has an attorney-client relationship with parties whose interests are adverse. Counsel is free to make any and all arguments he determines to be in the best interest of his clients, without regard to whether those arguments are adverse to the interests of individuals and clients he does not represent. [¶] Plaintiff also fails to show that counsel's arguments raising the holding of *Heck* as a defense to plaintiff's claims based on his prior convictions are adverse to the interests of non-appearing defendants. To the contrary, plaintiff concedes in his reply brief that those arguments are beneficial to the interests of the unserved, non-appearing defendants."

Plaintiff timely filed a notice of appeal.

Discussion

"Generally, a trial court's decision on a disqualification motion is reviewed for abuse of discretion. [Citations.] If the trial court resolved disputed factual issues, the reviewing court should not substitute its judgment for the trial court's express or implied findings supported by substantial evidence. [Citations.] When substantial evidence supports the trial court's factual findings, the appellate court reviews the conclusions based on those findings for abuse of discretion." (*People ex rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc., supra*, 20 Cal.4th at pp. 1143-1144.)

In this case, the trial court provided a comprehensive explanation for its ruling. The court's factual findings are supported by substantial evidence. Specifically, MacKay's declaration, in which he denies that either he or the office of county counsel was undertaking to represent any non-served, non-appearing defendants, amply supports the court's finding that there was no concurrent representation. Likewise, despite his arguments on appeal, we, like the trial court, find no evidence in the record suggesting that MacKay was involved with plaintiff's alleged difficulties with the county jail mail

handlers. Accordingly, we find no abuse of discretion in the court's conclusion that there is no basis on which to disqualify MacKay.¹

Disposition

The order denying plaintiff's motion to disqualify is affirmed.

Pollak, Acting P.J.

We concur:

Siggins, J.

Jenkins, J.

¹ Plaintiff's motion for modification of this court's November 2, 2015 order authorizing the late filing of his reply brief is denied.