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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

MICHAEL M. KOSHAK, M.D. et al.,

Plaintiff and Respondent,

v.

HANEY MALEK,

Defendant and Appellant,

B236148

(Los Angeles County
Super. Ct. No. LC083095)

APPEAL from orders of the Superior Court of the County of Los Angeles, Frank J. Johnson, Judge. Affirmed.

Law Office of Edward J. Blum, Edward J. Blum for Defendant and Appellant.

Johnson & Higgin, Jeffery W. Johnson for Plaintiff and Respondent.

INTRODUCTION

Defendant and appellant Hany Malek (Malek) appeals from two orders of the trial court: (i) an order adopting the findings of a referee concerning the validity of claims of third-party creditors against the assets of the receivership estate; and (ii) an order denying Malek's motion to disqualify plaintiff and respondent Michael Koshak's (Koshak) attorney, the receiver, and their respective law firms. According to Malek, certain findings of the referee were made without proper notice in violation of his due process rights and the trial court's order denying his disqualification motion was an abuse of discretion.

We hold that Malek forfeited his due process challenge because he failed to raise that issue in the trial court. We further hold that the trial court did not abuse its discretion in denying Malek's motion to disqualify because that motion was not supported by competent evidence showing unauthorized disclosure and use of privileged documents. Therefore, we affirm the two orders from which Malek appeals.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Litigation and Receivership¹

In 2005, Koshak formed a business venture with Malek that operated through a medical corporation, Choice Providers Medical Group, also known as Noble Community Medical Associates, Inc. of Los Angeles (Choice Providers). In 2008, Koshak sued Malek asserting 12 causes of action and alleging generally that Malek "developed a sophisticated scheme over an extended period of time using at least 18 different bank accounts with 5 federal tax identification numbers under at least 12 different names to accomplish, [and] then disguised and hid this massive fraud from [Koshak]." United

¹ Certain of the general background facts relating to the filing of the litigation and the appointment of the receiver are taken from our published opinion in a prior appeal in this case, *Koshak v. Malek* (2011) 200 Cal.App.4th 1540.

Managed Health Care Center (United), a corporation in which Malek held a substantial interest, cross-complained against Koshak and Choice Providers alleging that Koshak was attempting to force Malek out of Choice Providers business “so that [Koshak] would be able to steal the medical practice which [United and Malek had] supported through a difficult start-up period, just as [Choice Providers] turned a corner and [became] self-sustaining.” In December 2008, with the acquiescence of Malek and Koshak, the trial court entered an order appointing David Pasternak as receiver (the receiver) to take possession, custody, and control over Choice Providers.

B. Order Appointing Referee

The receivership evolved into “a complex matter and involve[d] many parties and entities.” In August 2010, the receivership was again expanded to include Ocean Blue Investments, Inc. dba Basque Night Club (Ocean Blue). By February 2011, “the only monies left in the Receivership account [were] what . . . remained from the proceeds from a lawsuit entitled *Certain Underwriters at Lloyd’s of London Subscribing to Policy Number BG25190 v. Ocean Blue Investments, Inc.* . . . [Ocean Blue fire insurance proceeds][.]” On February 2, 2011, the trial court entered an order appointing a referee and ordering the receiver to maintain the balance of the Ocean Blue fire insurance proceeds, in the amount of \$2,145,386.35, in a segregated interest bearing account. The order further specified that the trial court was appointing the referee “pursuant to California Code of Civil Procedure (C.C.P.) section 639(5) to determine the specific issues of the validity and priority of each amount claimed (each, a ‘Claim’; collectively, the ‘Claims’) to be presently due and owing by any and all creditors of Ocean Blue (each, a ‘Creditor’; collectively, the ‘Creditors’) for a proposed disbursement of the [Ocean Blue fire insurance proceeds] in satisfaction of those Creditors’ Claims, as have been submitted to the Referee as set forth below.” The order empowered the referee “to review Creditors’ Claims, determine each Claim’s validity and priority, utilizing such methodology of establishing such priority and amount, as is customarily utilized in determining the validity and priority of claims submitted to a bankruptcy court pursuant

to the provisions of the Bankruptcy Act and the laws of the State of California and report a Statement of Decision to this Court within ninety (90) days of the Referee's appointment." The order required the referee to submit a statement of decision to the trial court within 90 days of the referee's appointment and allowed any interested party to file objections to the statement within 10 days of the service and filing of the statement.

C. Referee's Report and Recommendations

Following his appointment, the referee gave notice of hearings to be held on creditors' claims "to all self-represented parties and to the attorneys for represented parties." Pursuant to that notice, two hearings were held on May 27, 2011, and June 3, 2011, respectively. After the hearings, the parties and their attorneys were allowed to submit written arguments in support of their claims. Based on "the written documents, the transcripts, the testimony, the law and the arguments of various parties," the referee filed his findings and recommendations with the trial court. The referee awarded the receivership \$1,128,299.85 and found that the receivership's "portion shall have the first and highest priority." The referee next awarded to claimant Corby Drapkin an unspecified amount that had been previously agreed to in a conditional settlement. Any remaining funds were awarded to claimant Mercury Casualty Company.

As to Malek, the referee found that "[t]here was no evidence submitted to the Referee that [Ocean Blue] was owned by anyone other than Malek. There was no evidence presented that any person actually had shares of stock or any other written proof of ownership in Ocean Blue. The Referee [was] aware that certain parties to this litigation claim[ed] partial ownership of Ocean Blue and/or the proceeds from the [Ocean Blue fire insurance proceeds]. There was no evidence presented to the Referee that Ocean Blue was anything other the alter ego of Malek."²

As to Koshak, the referee declined to make any findings or recommendations. And the referee denied the claims of all remaining claimants.

² We assume that this means, in effect, that Malek and Ocean Blue should be treated as being one and the same for purposes of the creditors' claims proceeding.

D. Order Adopting Findings of Referee

On July 22, 2011, the trial court held a hearing on whether to adopt the referee's report and recommendations concerning the claims asserted against the Ocean Blue fire insurance proceeds. Following the hearing, the trial court ruled as follows: "After considering the Referee's Report and Recommendations, the extensive documentation submitted by the interested parties, transcripts of the evidentiary proceedings before the Referee, all documents in the Court's file for this matter, and all other oral and documentary evidence submitted at the hearing, the Court ordered that effective forthwith: The Court adopts all of the Referee's findings and report regarding the validity or invalidity of the various claims submitted with respect to the Ocean Blue funds; [¶] \$500,000 of the remaining funds shall be disbursed for payment of receivership costs of administration; [¶] \$160,000 shall be disbursed to or for the benefit of Third Party Claimant Corby Drapkin; [¶] The balance of the Ocean Blue funds held by the receivership shall be disbursed to or for the benefit of Judgment Creditor/Lien Holder Mercury Casualty Company; and [¶] Any funds the Receiver obtains from a sale of Ocean Blue's liquor license shall be disbursed for the payment of the balance of the claim of Mercury Casualty Company and the Receiver shall not enter into any additional settlement agreements until and unless the claim of Mercury Casualty Company is paid in full utilizing the funds generated from the operation of the receivership business."

E. Order Denying Motion to Disqualify

On June 22, 2011, Malek moved to disqualify Koshak's attorney, the receiver, and their respective law firms. According to Malek, the attorneys and the receiver had "excessively reviewed documents that were attorney-client privileged communications; they did not immediately return the documents; and they have and will continue to affirmatively employ the documents against [Malek]." The notice of motion referenced a declaration from Malek's attorney, Edward Blum, but no such declaration was attached to the motion. Instead, Malek merely attached as exhibit A to his motion four pages of what appeared to be heavily redacted attorney invoices for services rendered. The receiver and

Koshak opposed the motion and Malek filed a reply brief that did not attach any evidence.

Following a hearing on August 17, 2011, the trial court denied the motion. In ruling on the motion, the trial court explained its reasoning as follows: “I’ve read and considered the motion and the responses and oppositions thereto. The first problem with the motion is that the documents which are attached as exhibits lack the evidentiary foundation which would allow the court to consider them. [¶] There was no declaration by anybody from either the law firm in question or from the defendant himself that these documents accurately reflect the transaction at issue. [¶] But getting beyond that issue, it seems as if the moving party had, at all times, the ability to object to the production of these documents, to the seizure of these documents if you want to call it that; that he did not do so. And frankly, as far as the court is concerned, the issue has been waived both by Mr. Malek and his attorneys. [¶] And these documents were referred to in the referee’s proceeding that we just concluded a while back, and so far as I know, it’s happened without objection; so I think this issue has been waived. [¶] Even without a waiver, it seems like there’s really—there has not really been any prejudice shown by moving party here. It’s entirely speculative how any advantage was derived or any effect at all on the future of this case, or anything that happened before for that matter, has been suffered by the moving parties.”

DISCUSSION

A. Standards of Review

Malek’s procedural due process challenge to the trial court’s order adopting the findings of the referee is reviewed de novo. “‘Appellate courts conduct an independent review of questions of law; they decide them without deference to the decision made below.’ (*Coburn v. Sievert* (2005) 133 Cal.App.4th 1483, 1492 [35 Cal.Rptr.3d 596].) Determining if the trial court adhered to a constitutional principle is solely a question of law. (*California Assn. of Dispensing Opticians v. Pearle Vision Center, Inc.* (1983) 143

Cal.App3d 419, 426 [191 Cal.Rptr. 762].) The issue of whether [a trial court complied with the mandates of] procedural due process . . . is a question of law. Therefore, we review this issue de novo.” (*Conservatorship of Christopher A.* (2006) 139 Cal.App.4th 604, 609-610)

Malek’s challenge to the trial court’s denial of his motion to disqualify counsel and the receiver is governed by an abuse of discretion standard of review. “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. [Citation.] However, the trial court’s discretion is limited by the applicable legal principles. [Citation.] Thus, where there are no material disputed factual issues, the appellate court reviews the trial court’s determination as a question of law. [Citation.] In any event, a disqualification motion involves concerns that justify careful review of the trial court’s exercise of discretion.’ ([*People ex rel. Dept. of Corporations v. Speedee Oil [Change Systems, Inc.* (1999)] 20 Cal.4th [1135,] at pp. 1143-1144.)” (*Kirk v. First American Title Ins. Co.* (2010) 183 Cal.App.4th 776, 791-792.)

B. Order Adopting Referee’s Findings

Malek contends that the referee made findings at the claims hearings concerning Malek being the alter ego of Ocean Blue without providing Malek with notice and an opportunity to be heard on the issue. According to Malek, the referee’s failure to provide adequate notice that the alter ego issue would be litigated at the claims hearings violated Malek’s right to procedural due process. Koshak counters that Malek “waived”³ the due

³ “As the United States Supreme Court has clarified, the correct term is ‘forfeiture’ rather than ‘waiver,’ because the former term refers to a failure to object or to invoke a right, whereas the latter term conveys an express relinquishment of a right or privilege. (See, e.g., *United States v. Olano* (1993) 507 U.S. 725, 733 [123 L.Ed.2d 508, 113 S.Ct. 1770]; *In re S.B.* (2004) 32 Cal.4th 1287, 1293, fn. 2 [13 Cal.Rptr.3d 786, 90 P.3d 746] (*S.B.*); *People v.*

process contention in the trial court. As discussed below, we conclude that Malek forfeited the due process claim on appeal by failing to raise that issue with the trial court.

“The forfeiture rule generally applies in all civil and criminal proceedings. (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 400, pp. 458-459; 6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Reversible Error, § 37, pp. 497-500.) The rule is designed to advance efficiency and deter gamesmanship. As we explained in *People v. Simon*, [*supra*], 25 Cal.4th 1082 . . . : “““The purpose of the general doctrine of waiver [or forfeiture] is to encourage a defendant to bring errors to the attention of the trial court, so that they may be corrected or avoided and a fair trial had” [Citation.] “No procedural principle is more familiar to this Court than that a *constitutional* right,” or a right of any other sort, “may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.” . . .’ [Citation.] [¶] ‘The rationale for this rule was aptly explained in *Sommer v. Martin* (1921) 55 Cal.App. 603 at page 610 [204 P. 33] . . . : ““In the hurry of the trial many things may be, and are, overlooked which would readily have been rectified had attention been called to them. The law casts upon the party the duty of looking after his legal rights and of calling the judge’s attention to any infringement of them. If any other rule were to obtain, the party would in most cases be careful to be silent as to his objections until it would be too late to obviate them, and the result would be that few judgments would stand the test of an appeal.”” [Citation.]” (Fn. omitted; [citations].)’ (*Simon*, *supra*, 25 Cal.4th at p. 1103, italics added.)” (*Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 264-265.)

The record shows that the referee gave notice to all parties of the claims hearings. It is unclear from the record, however, whether the notice Malek received included

Simon (2001) 25 Cal.4th 1082, 1097, fn. 9 [108 Cal.Rptr.2d 385, 25 P.3d 598] (*Simon*.) As a practical matter, the two terms on occasion have been used interchangeably. (*Simon*, at p. 1097, fn. 9; *People v. Saunders* (1993) 5 Cal.4th 580, 590, fn. 6 [20 Cal.Rptr.2d 638, 853 P.2d 1093] (*Saunders*.)” (*In re Sheena K.* (2007) 40 Cal.4th 875, 880, fn.1.) Because the issue is whether Malek’s failure to raise a contention in the trial court precludes him from raising it for the first time on appeal, we use the term forfeiture in analyzing the issue.

information sufficient to apprise him of the referee's intention to adjudicate the alter ego issue at the claims hearings. But even if we assume that Malek did not receive notice regarding the alter ego issue, it is undisputed that Malek's counsel appeared at the hearings, albeit solely on behalf of Malek's mother. Thus, Malek knew or should have known that alter ego was an issue at the hearings; yet he failed to address the issue or object to its adjudication.

Moreover, Malek received the referee's report and his counsel appeared in the trial court for the hearing on whether to approve and adopt the findings of the referee, although his counsel again purported to appear and argue solely on behalf of Malek's mother.⁴ Despite having notice of the referee's findings, including the finding on the alter ego issue, as well as notice of the hearing on whether to approve and adopt those findings, Malek failed to raise the due process issue with the trial court. Had Malek done so, Koshak and the receiver could have addressed Malek's due process contention, and the trial court could have then considered the issue and taken corrective action, if warranted. By failing to afford the parties and the trial court a fair opportunity to consider and cure the due process claim, Malek forfeited it on appeal. (See *People v. Riccardi* (2012) 54 Cal.4th 758, 801.)

C. Order Denying Disqualification Motion

Malek argues that the trial court abused its discretion when it denied his motion to disqualify Koshak's counsel, the receiver, and their respective law firms. According to Malek, there was no dispute that the attorney invoices in issue were privileged or that the attorneys for Koshak and the receiver were ethically bound to return those invoices without reviewing them for substance.

As the trial court noted, Malek's motion was submitted without any competent supporting evidence. Thus, on that evidentiary basis alone, it was not an abuse of discretion to deny the motion based on a complete failure of proof.

⁴ Malek's mother submitted written objections to the referee's report and recommendations, but Malek failed to do so.

DISPOSITION

The two orders from which Malek appeals are affirmed.

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MOSK, J.

We concur:

TURNER, P. J.

KRIEGLER, J.