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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

OPTIONAL CAPITAL INC., et al.,

Petitioners,

v.

THE SUPERIOR COURT OF
LOS ANGELES COUNTY,

Respondent;

DAS CORPORATION, et al.,

Real Parties in Interest.

B261984

(L.A.S.C. No. BC474472)

(ELIZABETH R. FEFFER, Judge)

OPINION AND ORDER GRANTING
PEREMPTORY WRIT OF MANDATE

ORIGINAL PROCEEDING; petition for writ of mandate. Elizabeth R. Feffer, Judge. Petition granted.

Rehm & Rogari and Ralph Rogari, for Petitioners.

No appearance for Respondent.

Lee Tran & Liang, James M. Lee and K. Luan Tran, for Real Party in Interest DAS Corporation.

McDermott Will & Emery, Gordon A. Greenberg and Charles Edward Weir, for Real Party in Interest Akin Gump Strauss Hauer & Feld LLP.

Lewis Brisbois, Bisgaard & Smith, Kenneth Feldman, Jeffrey A. Miller, and Lann G. McIntyre, for Real Parties in Interest William Mills, David Parker, and Parker Shumaker Mills LLP.

Via petition filed on February 17, 2015, petitioners Optional Capital, Incorporated, Ralph Rogari, and Mary Lee (collectively Optional) seek a writ of mandate disqualifying respondent court (Hon. Elizabeth R. Feffer) pursuant to Code of Civil Procedure section 170.1.¹

Because Optional's statement of disqualification is not facially deficient such that it should have been stricken, we vacate the order striking Optional's statement of disqualification and remand for further proceedings consistent with section 170.3.

BACKGROUND

Optional Capital, Incorporated is a Korean corporation. Plaintiffs Ralph Rogari and Mary Lee are attorneys licensed in California who represented Optional in connection with four United States District Court actions (the Federal Cases). Defendant DAS Corporation (DAS) is a Korean corporation that conducts business in California manufacturing, selling, and distributing auto parts. Defendant Akin Gump Strauss Hauer & Feld LLP (Akin) is a law firm in California that represented DAS in the Federal Cases. Defendants David Parker, William Mills, and their law firm Parker Shumaker Mills LLP (Parker) are also attorneys in California who represented DAS in the Federal Cases.

The matters underlying Optional's complaint began in 2000 and 2001, when Optional attempted to recover assets that it contended were looted from its corporate coffers by DAS. An "extremely tangled thicket of legal proceedings in both state and federal court, as well as Switzerland" followed. (*Optional Capital, Inc. v. DAS Corporation* (2014) 222 Cal.App.4th 1388, 1392 ("*Optional I*").)

¹ Unless otherwise indicated, all further statutory references are to the California Code of Civil Procedure.

Rogari and Lee represented Optional in the Federal Cases and the prior matters before the superior court and this Court. They joined Optional's complaint as plaintiffs in this case, asserting a financial interest in the funds at issue. The complaint states causes of action against DAS, Akin, and Parker for conversion, to set aside a fraudulent transfer of assets, and for receiving and failing to return stolen property. Each of the claims relate to approximately \$13 million in a Swiss bank account. On May 23, 2013, the United States District Court entered a final *in rem* judgment, concluding that Optional owns "[a]ll funds in Credit Suisse Private Banking Account No. 0251-844548-6 in the name of Alexandria Investment, LLC as of August 8, 2005." Optional alleges that by virtue of this order in the Federal Cases, Optional was deemed to be the owner of funds in the Swiss account. Optional's complaint alleges that DAS, Akin, and Parker colluded with the principals of Alexandria Investment, LLC to have the funds, which were previously the subject of a freeze order issued by the Swiss Federation, released and transferred to a bank account held by DAS as a result of a settlement between them of separate litigation.

On December 23, 2014, this case was reassigned to Judge Feffer. On January 27, 2015, Judge Feffer held a hearing on four matters that were pending at the time of the transfer: a special motion to strike filed on behalf of Parker, an anti-SLAPP motion filed on behalf of Akin, a demurrer filed by Akin, and a motion for judgment on the pleadings filed on behalf of Optional. Judge Feffer granted the special motion to strike, anti-SLAPP motion, and demurrer, and denied the motion for judgment on the pleadings. During the proceedings, Judge Feffer made several statements that Optional contends demonstrate that she was biased or prejudiced against Optional, Rogari and Lee: [Rogari and Lee] "in a way abandoned their role as advocates to their clients because they themselves are suing and they themselves are suing opposing counsel It's just a personal vendetta." "You see repeatedly on the proofs of service 'I'm over the age of 18 and not a party to within action . . . signed Mary Lee,' who is a party to the action. She committed perjury." "The advocates for the plaintiff in this case have forgotten that they're advocates and not personally involved. This is essentially to cover up their not

getting to the funds first and that's why they themselves are plaintiffs -- and they themselves signed the proofs of service declaring under penalty of perjury they're not parties to the action." "And plaintiffs essentially allege that there w[as] somehow collusion between the thieving Kims and DAS, even though there were adversarial proceedings with lawyers on both sides, somehow the settlement of the Superior Court case was a collusion." "[to Rogari] You're the one who made it personal by making yourself a plaintiff and then filing perjured declarations with the court saying you're not a party."

On February 2, 2015, citing these statements, Optional filed a verified statement of disqualification pursuant to section 170.1, subdivision (a)(6)(A)(iii), which provides that a judge may be disqualified if "a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial." "Bias or prejudice toward a lawyer in the proceeding" may also be grounds for disqualification. (§ 170.1, subd. (a)(6)(B).)

On February 5, 2015, Judge Feffer struck Optional's statement of disqualification on the grounds that the statement was based on Optional's opinion and dissatisfaction with the judge's statements, rulings and findings. (§ 170.4, subd. (b).) In her order striking the statement of disqualification, she included as exhibits 20 proofs of service signed by Rogari or Lee. Each proof of service, executed under penalty of perjury, was dated between March 2012 and November 2014 and included an affirmation that the signer is "not a party to the within action." At all times between those dates, Rogari and Lee actually were parties to the action. A footnote in the order striking the disqualification states that "[m]indful of the protections of and implications of the Fifth Amendment to the United States Constitution, the court intentionally did not ask Mr. Rogari or Ms. Lee any questions about the subject proofs of service." During the hearing, however, Judge Feffer stated, with respect to Mary Lee, that "[s]he committed perjury." With the order striking the statement of disqualification, Judge Feffer filed a verified answer denying that she is prejudiced or biased against or in favor of any party to this proceeding.

Optional filed this petition on February 17, 2015 challenging the order striking the statement of disqualification, and requesting that a new judicial officer be assigned. We stayed all matters pending resolution of this petition and requested opposition.

In their joint opposition, DAS, Akin and Parker asserted that Optional's statement of disqualification fails as a matter of law, and that Optional's unilateral belief that Judge Feffer is biased toward them does not satisfy the objective standard of review.

DISCUSSION

A party seeking to disqualify a judge must file a verified statement setting forth facts constituting the grounds for disqualification. (§ 170.3, subd. (c)(1).) If the judge does not consent to disqualification, he or she may file a written verified answer admitting or denying any or all of the allegations contained in the party's statement and setting forth any additional relevant material. (§ 170.3, subd. (c)(3).) The question of disqualification is then heard by another judge. (§ 170.3, subd. (c)(5).)

Notwithstanding the statutory prohibition against passing on his or her own disqualification, a judge may strike a statement of disqualification if “on its face it discloses no legal grounds for disqualification.” (§ 170.4, subd. (b).) It is not grounds for disqualification that a judge “[h]as in any capacity expressed a view on a legal or factual issue presented in the proceeding, except as provided in paragraph (2) of subdivision (a) of, or subdivision (b) or (c) of, Section 170.1.” (§ 170.2, subd. (b).)

Judge Feffer struck Optional's statement of disqualification on the ground that each of the statements made consisted of rulings and findings in connection with the pending motions under consideration. The sole question in this proceeding is whether Optional's statement of disqualification discloses no legal grounds for disqualification, such that Judge Feffer appropriately struck it without referring it to another judge for review. (§ 170.4, subd. (b).)

A determination regarding the disqualification of a judge is not an appealable order and may be reviewed only by a writ of mandate. (§ 170.3, subd. (d).) “A judge shall be disqualified if any one or more of the following are true: . . . A person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial.

[¶] . . . Bias or prejudice towards a lawyer in the proceeding may be grounds for disqualification.” (§ 170.1, subd. (a)(6)(A)(iii), B.) The standard of review is objective: “if a fully informed, reasonable member of the public would fairly entertain doubts that the judge is impartial, the judge should be disqualified.” (*Wechsler v. Superior Court* (2014) 224 Cal.App.4th 384, 391.)

Judge Feffer’s statements at the January 27 hearing regarding Rogari and Lee’s abandonment of their role as advocates to their clients and that Rogari and Lee were attempting to “cover up their not getting to the funds first” (particularly when viewed in the context of our opinion in *Optional I*), her comments about the litigation being “just a personal vendetta,” and, most importantly, her allegation that Lee committed perjury, support a conclusion that the statement of disqualification contains sufficient allegations that might cause a fully informed, reasonable member of the public to entertain doubt that Judge Feffer would be able to be impartial. (§ 170.1, subd. (a)(6)(A)(iii).) Accordingly, Judge Feffer should not have stricken *Optional*’s statement of disqualification, and should have referred it to another judge as set forth in section 170.3, subdivision (c)(5).

Judge Feffer’s statement at the hearing that Lee “committed perjury” was based solely on her review of proofs of service, and was unrelated to the motions at issue in the hearing.² Indeed, Judge Feffer stated that she “just note[d] that aside.” In connection with an allegation of perjury in particular, “[a] trial court which is contemplating a comment on perceived perjury of a party should perhaps pause, reflect, and then articulate a candid but measured response. The appearance of justice is vitally important

² A conclusion that a party “committed perjury,” moreover, implies that that the requirements for such a charge have been satisfied. Perjury is a specific intent crime. “[I]n addition to knowingly making a false statement, there must be a specific intent that the false statement be under oath or penalty of perjury.” (*People v. Viniegra* (1982) 130 Cal.App.3d 577, 586.) “It is said that: “Perjury requires a higher measure of proof than any other crime known to the law, treason alone excepted.”” (*Id.* at p. 585.)

to the administration of justice and we counsel judicial restraint in the future.” (*People v. Williams* (2007) 156 Cal.App.4th 949, 952.)

As there is not a plain, speedy and adequate remedy at law, and in view of the fact that the issuance of an alternative writ would add nothing to the presentation already made, we deem this to be a proper case for the issuance of a peremptory writ of mandate “in the first instance.” (Code Civ. Proc., § 1088; *Brown, Winfield & Canzoneri, Inc. v. Superior Court* (2010) 47 Cal.4th 1233, 1237-1238; *Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1240-1241; *Alexander v. Superior Court* (1993) 5 Cal.4th 1218, 1222-1223; *Ng v. Superior Court* (1992) 4 Cal.4th 29, 35.) We requested and received opposition and notified the parties of the court’s intention to issue a peremptory writ. (*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 180.)

We do not make a determination as to whether Judge Feffer should be disqualified. In this writ petition, we address only the issue of whether Optional’s statement of disqualification is so facially deficient that it was appropriately stricken by Judge Feffer without referral to another judge for consideration. We conclude that it is not.

DISPOSITION

Let a peremptory writ issue, directing respondent superior court to vacate its order of February 5, 2015, reinstate the statement of disqualification, and remand the matter to another judge for hearing and determination. The temporary stay order issued on February 27, 2015 is vacated.

The parties shall bear their own costs.

NOT TO BE PUBLISHED

THE COURT:

ROTHSCHILD, P. J. CHANEY, J. JOHNSON, J.