Filed 11/28/16 Jogani v. Jogani CA2/1

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

SHASHIKANT JOGANI, Plaintiff and Respondent, v. HARESH JOGANI et al., Defendants and Appellants.	B268162 (Los Angeles County Super. Ct. No. BC290553) ORDER MODIFYING OPINION [NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on October 25, 2016, be modified as follows:

1. On page two, the third paragraph is modified to read:

"Glass at first attempted to mediate the dispute between the brothers, but ultimately ceased representing Haresh and continued to represent only Jogani by facilitating his retention of Steven R. Friedman and Michael E. Friedman, of the Law Office of Steven R. Friedman (collectively the Friedman Firm), for trial."

There is no change in the judgment.

CHANEY, J. JOHNSON, J.

Filed 10/25/16 Jogani v. Jogani CA2/1 (unmodified version)

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

SHASHIKANT JOGANI, Plaintiff and Respondent, v. HARESH JOGANI et al., Defendants and Appellants.	B268162 (Los Angeles County Super. Ct. No. BC290553)

APPEAL from an order of the Superior Court of Los Angeles County, Mark V. Mooney. Affirmed.

Keller/Anderle, Jennifer L. Keller, Yen-Shyang Tseng for Defendants and Appellants.

Reed Smith, Raymond A. Cardozo, David J. de Jesus; Law Office of Steven R. Friedman, Steven R. Friedman and Michael E. Friedman for Plaintiff and Respondent.

Shashikant Jogani alleges he and his brother Haresh entered into an oral partnership agreement under which Haresh would provide capital to purchase real properties that Jogani would identify, acquire and manage until Haresh's investment was recouped, after which Jogani would receive a 50 percent share of the properties' equity.

For approximately six years, Steven Glass, a transactional attorney, represented Jogani, Haresh, and the alleged partnership's holding companies by negotiating on their behalf with third parties in many real estate transactions. When the business relationship soured, Jogani filed this lawsuit against Haresh and the holding companies, alleging fraud, breach of contract, and quantum meruit.

Glass at first attempted to mediate the dispute between the brothers, but ultimately ceased representing Haresh and continued representing only Jogani by assisting Jogani's trial attorneys, Steven R. Friedman and Michael E. Friedman of the Law Office of Steven R. Friedman (collectively the Friedman Firm) with their prosecution of the lawsuit.

In a prior appeal, we held Glass's representation of both Jogani and Haresh after a dispute had arisen between them violated the Rule of Professional Conduct governing concurrent conflicting representation. We also held his subsequent representation only of Jogani violated the ethical rule against successive conflicting representation. The violations required that Glass be disqualified from representing Jogani in this litigation. (*Jogani v. Jogani* (July 24, 2015, B257750 [nonpub. opn.]).)

In this appeal, we consider whether Glass's disqualification requires that the Friedman Firm be disqualified as well.

BACKGROUND

A. Complaint

Jogani alleges that in 1995, he and two of his four brothers, Haresh and Rajesh, acting both for themselves and as agents for two other brothers, negotiated and entered into an oral general partnership agreement. Under the agreement, Jogani, an accomplished real estate developer, would identify, acquire and manage new properties on behalf of the partnership. The brothers would provide capital to acquire the properties and pay Jogani minimal compensation. After the brothers recouped their investment plus a 12-percent-per-year return, Jogani would receive half of all future profits and half the value of the partnership's portfolio.

The enterprise thrived for approximately seven years, acquiring title to hundreds of apartment buildings comprising approximately 15,900 apartment units with a value in excess of $1 billion and equity of around $550 million. According to Jogani's pleading, Haresh (acting for himself and the other brothers) removed Jogani from management of the partnership portfolio in June 2002 and refused to honor his interest in the partnership.

In February 2003, Jogani filed this action against his brothers, the holding companies, and various other family members, for breach of contract, breach of fiduciary duty, fraud, quantum meruit, and unjust enrichment. He sought at least $250 million in damages, dissolution of the partnership, an accounting, injunctive relief, institution of a constructive trust, and appointment of a receiver to manage the partnership portfolio. After substantial law and motion practice, the remaining defendants are Haresh and the holding companies, who cross-complained against Jogani, alleging he mismanaged the enterprise.

B. Summary Judgment and Motion to Disqualify Glass

Glass appeared as Jogani's attorney at the latter's deposition in the litigation and later testified at his own deposition, where he was represented by Jogani's then-trial counsel. At his deposition, Glass testified he had represented Jogani in connection with the lawsuit since its inception, but on the advice of trial counsel he refused to answer certain questions, asserting the attorney-client privilege.

In June 2004, defendants moved for summary judgment.

In July 2004, while the motion was pending, defendants moved to disqualify Glass, arguing his representation of Jogani and the assistance he gave to Jogani's trial attorneys violated duties of loyalty and confidentiality he owed to Haresh and the holding companies, who had also been his clients. (Rules Prof. Conduct, rules 3-310(C) & 3-310(E).)

In September 2004, the trial court granted summary judgment against Jogani, after which defendants dismissed their cross-complaint, disposing of the case. The motion to disqualify Glass was taken off calendar as moot.

We reversed the judgment. (*Jogani v. Jogani* (2006) 141 Cal.App.4th 158 (*Jogani I*).)

C. Summary Adjudication

On remand, defendants again moved for summary judgment. In December 2007, the trial court granted summary adjudication against Jogani on all of his claims except quantum meruit and unjust enrichment.

We reversed. (*Jogani v. Superior Court* (2008) 165 Cal.App.4th 901, 904 (*Jogani II*).)

D. Trial

In July 2010, we issued a peremptory writ of mandate concerning an interlocutory order. (*Jogani v. Superior Court* (July 28, 2010, B224398 [nonpub. opn.]) (*Jogani III*).)

Thereafter, Jogani's claim for quantum meruit was tried to a jury, which returned special verdicts in his favor. The trial court denied defendants' motion for judgment notwithstanding the verdict but granted their motion for new trial, finding the jury committed misconduct. Both sides appealed.

We reversed. (*Jogani v. Jogani* (Dec. 5, 2012, B222561 consol. with B228875 [nonpub. opn.]) (*Jogani IV*).)

E. Second Motion to Disqualify Glass

In December 2013, Jogani retained the Friedman Firm.

Glass then reappeared in the proceedings. In February 2014, as part of negotiations over who would have access to documents covered by a proposed protective order, the Friedman Firm sent defendants' attorneys a letter stating Glass was "advising [Jogani] on this matter" and would "have access to . . . documents," as the Friedman Firm intended "to utilize his skill and knowledge in preparing for and trying this case." The Friedman Firm asked if defendants' attorneys would require that Glass be associated "onto the case" before gaining access to the documents.

Defendants' counsel immediately demanded that Glass cease representing Jogani "and refrain from communicating with [him] or his attorneys about [defendants] or any aspect of this litigation." In response, the Friedman Firm sent defendants' counsel a letter in which it stated Glass had transmitted defendants' demand to it. "To move the matter forward," the Friedman Firm stated, "for the time being, [defendants would] not designate

Mr. Glass as trial counsel . . . ." In a third letter, the Friedman Firm stated Glass had provided it with a "procedural background of this lengthy case."

On February 18, 2014, defendants moved to disqualify Glass from acting as counsel for Jogani in this matter and to prohibit him from communicating with Jogani and his trial counsel about the case or testifying as a percipient witness at trial. The motion was supported by evidence that Glass admitted he was assisting Jogani and his attorneys in preparing the case for trial even though he had represented defendants in numerous transactions from 1995 until mid-2002—transactions that were at the center of the parties' dispute.[1]

Glass further admitted that in late 2001 he became aware of a clear conflict of interest between Jogani and defendants, which he initially attempted to mediate before resigning from his representation of defendants. He confirmed that he had shared with Jogani's trial counsel information gained in connection with his representation of defendants.

Defendants argued that Glass's representation of both Jogani and defendants during the years that Jogani had managed the enterprise, without obtaining waivers, breached his fiduciary duties of loyalty and confidentiality to his clients; that his continuing representation of and assistance to Jogani in this lawsuit constituted a continuing conflict of interest; and that he should not be permitted to testify at trial on Jogani's behalf.

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[1] Glass had testified at his deposition that Haresh was the nominal owner of the defendant holding companies, and that both he and Haresh had repeatedly advised lenders, judgment creditors, and others that Jogani owned no interest at all in the holding companies or the properties they held. Glass had testified that until late 2001 he saw no conflict of interest in his representation of both Jogani and defendants, and he did not advise either Haresh or Jogani on that subject.

In opposition to the motion for his disqualification, Glass offered to agree not to advise or communicate with Jogani or his trial attorney on the condition that the court make no factual or legal findings against him.

The trial court accepted Glass's offer and denied defendants' disqualification motion. Defendants appealed.

We concluded the circumstances, which no one disputed, required that Glass be disqualified both from advising Jogani as his attorney and from assisting on matters concerning which he had formerly represented defendants. We observed that "Glass represented both Jogani and the defendants for many years in many transactions and appearances that may well have important and perhaps decisive implications for the disputes raised by their current lawsuit. His . . . continuing assistance to Jogani and his counsel in their prosecution of the lawsuit against his former clients, involving transactions with respect to which he represented both parties, can only appear unseemly at best, without regard to whether their communications were confidential as between the parties, and without regard to whether they are or are not protected from disclosure in the trial of this case."

Accordingly, we reversed the trial court's order and directed the court to grant defendants' disqualification motion. (*Jogani v. Jogani* (July 24, 2015, B257750 [nonpub. opn.]) (*Jogani V*).)

F. Motion to Disqualify the Friedman Firm

On remand, defendants moved to disqualify the Friedman Firm, arguing the same considerations that required Glass's disqualification required the vicarious disqualification of any law firm he assisted.

The Friedman Firm opposed the motion. It argued Glass was disqualified solely because he breached his duty of loyalty to defendants, not

because he possessed their confidential information, and an attorney's disqualification for breach of the duty of loyalty does not vicariously extend to the attorney's law firm. The firm also argued it imposed a wall between Glass and the instant litigation as soon as it became apprised of the conflict of interest, and in any event defendants waived the conflict by waiting too long to bring their motion.

The trial court denied defendants' disqualification motion, and they now appeal.

DISCUSSION

A. Appealability

The trial court's denial of defendants' motion to disqualify the Friedman Firm is appealable either as an order denying an injunction (Code Civ. Proc., § 904.1, subd. (a)(6)), or as a final order on a collateral matter unrelated to the merits of the underlying litigation. (*Meehan v. Hopps* (1955) 45 Cal.2d 213; *Truck Ins. Exchange v. Fireman's Fund Ins. Co.* (1992) 6 Cal.App.4th 1050, 1052, fn. 1.)

B. Standard of Review

A trial court's decision on a disqualification motion is reviewed for abuse of discretion. (*In re Charlisse C.* (2008) 45 Cal.4th 145, 159.) "When reviewing an order granting or denying a motion to disqualify, a reviewing court defers to the trial court's decision, absent an abuse of discretion." (*Truck Ins. Exchange v. Fireman's Fund Ins. Co.*, *supra*, 6 Cal.App.4th at p. 1055.) "As to disputed factual issues, a reviewing court's role is simply to determine whether substantial evidence supports the trial court's findings of fact; 'the reviewing court should not substitute its judgment for . . . express or implied [factual] findings [that are] supported by substantial evidence. [Citations.]' [Citation.] As to the trial court's conclusions of law, however,

review is de novo; a disposition that rests on an error of law constitutes an abuse of discretion." (*In re Charlisse C.*, *supra*, 45 Cal.4th at p. 159.) The court's application of the law to the facts is reversible only if arbitrary and capricious. (*Ibid.*; *Fiduciary Trust Internat. of California v. Superior Court* (2013) 218 Cal.App.4th 465, 481.) However, the court's discretion is also abused when it fails to exercise discretion in a situation where the exercise of its discretion is required. (*Truck Ins. Exchange v. Fireman's Fund Ins. Co.*, *supra*, 6 Cal.App.4th at p. 1055; *Gardner v. Superior Court* (1986) 182 Cal.App.3d 335, 338-339.)

C. Rules Governing Attorney Disqualification

Rule 3-310 of the Rules of Professional Conduct[2] requires that attorneys avoid representing clients with conflicting interests (at least without the clients' informed written consent). Rule 3-310(E) deals with conflicting representations that might be either concurrent or successive: "A member shall not . . . accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment."

In cases of successive representation, "'the chief fiduciary value jeopardized is that of client confidentiality'"—the former client's right to rely on the confidentiality of communications with his or her former counsel. The rule in such cases is that disqualification of the attorney is required, but only if there is "'a "substantial relationship"'" between the former and the current representations, which gives rise to a presumption that confidential communications passed between them. (*In re Charlisse C.*, *supra*, 45 Cal.4th at p. 161, quoting *Flatt v. Superior Court* (1994) 9 Cal.4th 275, 283.)

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[2] References to professional rules are to the Rules of Professional Conduct of the State Bar of California.

"In cases involving the representation of a client against a former client, 'the initial question is "whether the former representation is 'substantially related' to the current representation."'" "If a substantial relationship exists, courts will presume that confidences were disclosed during the former representation which may have value in the current relationship. Thus, actual possession of confidential information need not be proven when seeking an order of disqualification." (*Truck Ins. Exchange v. Fireman's Fund Ins. Co.*, *supra*, 6 Cal.App.4th at p. 1056; *Civil Service Com. v. Superior Court* (1984) 163 Cal.App.3d 70, 79-80.)

D. Glass's Disqualification

"A trial court's authority to disqualify an attorney derives from the power inherent in every court '[t]o control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto.' [Citations.] Ultimately, disqualification motions involve a conflict between the clients' right to counsel of their choice and the need to maintain ethical standards of professional responsibility. [Citation.] The paramount concern must be to preserve public trust in the scrupulous administration of justice and the integrity of the bar. The important right to counsel of one's choice must yield to ethical considerations that affect the fundamental principles of our judicial process. [Citations.]

"Protecting the confidentiality of communications between attorney and client is fundamental to our legal system. The attorney-client privilege is a hallmark of our jurisprudence that furthers the public policy of ensuring "'the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice and a proper defense." [Citation.]' [Citation.] To this

end, a basic obligation of every attorney is '[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.' [Citation.]

"To protect the confidentiality of the attorney-client relationship, the State Bar Rules of Professional Conduct, rule 3-310 (rule 3-310) prohibits attorneys from accepting, without the client's informed written consent, 'employment adverse to the client or former client where, by reason of the representation of the client or former client, the [attorney] has obtained confidential information material to the employment.' [Citations.] Where an attorney successively represents clients with adverse interests, and where the subjects of the two representations are substantially related, the need to protect the first client's confidential information requires that the attorney be disqualified from the second representation. [Citation.] For the same reason, a presumption that an attorney has access to privileged and confidential matters relevant to a subsequent representation extends the attorney's disqualification vicariously to the attorney's entire firm." (*People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1145-1146.)

"In order to seek disqualification, the former client need not establish that the attorney actually possesses confidential information. It is enough to show that there was a 'substantial relationship' between the former and the current representation. If the former client establishes the existence of a substantial relationship between the two representations the court will conclusively presume that the attorney possesses confidential information adverse to the former client and order disqualification." (*Henriksen v. Great American Savings & Loan* (1992) 11 Cal.App.4th 109, 114.) "As a general

rule in California, where an attorney is disqualified from representation, the entire law firm is vicariously disqualified as well." (*Id*. at p. 114)

In *Jogani V*, we held Glass was disqualified because of his concurrent conflicting representation of Jogani and defendants. He "represented both Jogani and defendants with respect to their joint operation of the real estate investment enterprise, during which period neither Glass nor the parties perceived any actual conflict of interest. Then, after the conflict between the parties became apparent, Glass tried for at least a brief period to continue acting on behalf of both Jogani and defendants, and apparently even to mediate their disputed rights with respect to their interests in the real estate enterprise. During that period he was concurrently representing clients with conflicting interests, prohibited by rule 3-310(C) without regard to whether his representation threatened client confidences." (*Jogani V*, *supra*, at p. 20.)

We also held Glass was disqualified because of his successive conflicting representation of Jogani and defendants. "[W]hen he was discharged by defendants, but continued to represent Jogani—including assisting him and his trial counsel to prosecute this lawsuit against his former clients—his disqualification was mandatory for that reason as well." (*Jogani V*, *supra*, at p. 20.)

E. Imputation of Glass's Disqualification to the Friedman Firm

The vicarious disqualification of an attorney extends also to the attorney's co-counsel. (*Pound v. DeMera DeMera Cameron* (2005) 135 Cal.App.4th 70, 77 [disqualifying firm that retained conflicted independent attorney].)

Here, Glass was disqualified from representing Jogani because he had previously represented defendants on matters that were substantially related to his current representation of Jogani, and he neglected to obtain from

defendants a written waiver of the conflict of interest. That disqualification extends vicariously to his law firm, to other attorneys in that firm, and to any attorney who retains him as co-counsel with respect to the same matters.

However, no evidence suggests the Friedman Firm has retained Glass or even consulted him on any substantive matter. The first February 2014 letter from the Friedman Firm to defendants' counsel stated Glass was advising *Jogani*, and the firm *planned* to give him access to documents in the future and "to utilize his skill and knowledge in preparing for and trying this case." In the third February 2014 letter, the Friedman Firm stated Glass had provided it with a procedural background of the case. No evidence suggests Glass advised the Friedman Firm about the substance of the case.

Defendants argue that in opposition to their motion to disqualify the Friedman Firm, the firm admitted that Glass accompanied Jogani to a meeting where Jogani and the firm negotiated terms of the firm's retention. At the meeting, Glass stated that trial was set for August 2014 and that prior counsel, who was by then deceased, had propounded discovery, and he offered to assist in locating the prior attorney's documents. The Friedman Firm accepted his offer. Defendants argue this establishes that Glass assisted the firm in prosecuting this litigation. We disagree. Glass's conduct at the retention meeting suggests only that he represented Jogani in retention negotiations and facilitated transfer of the case to the Friedman Firm. Although the firm planned to consult Glass further, no evidence suggests it actually did so before he was disqualified.

Defendants observe that we held in *Jogani V* that Glass, "when he was discharged by defendants, but continued to represent Jogani," was "assisting him and his trial counsel *to prosecute* this lawsuit against his former clients." (*Jogani V*, *supra*, at p. 20, italics added.) Defendants argue this is the law of

the case, such that Jogani cannot now deny that Glass assisted the Friedman Firm in "prosecuting" this lawsuit. We disagree. Although defendants accurately quote our opinion in *Jogani V*, the only assistance Glass provided in prosecuting the lawsuit before he was disqualified was to facilitate retention of the Friedman Firm and delivery of prior counsel's files to it. Although we held Glass was disqualified from doing even this, his assistance in retaining the Friedman Firm and in delivering case documents to it does not suggest the firm retained him, associated him into the case, or substantively consulted with him. To hold otherwise would be to disqualify not only a conflicted attorney but also any subsequent attorney to whom he delivered the client's file. No authority has yet extended the taint of disqualification so far.

We conclude no basis exists to extend Glass's disqualification to the Friedman Firm. We do not reach Jogani's other arguments.

DISPOSITION

The order denying defendant's motion to disqualify the Friedman Firm is affirmed. Respondent is to recover his costs on appeal.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.