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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

NAJAY SERVICE CORPORATION,

Petitioner,

v.

THE SUPERIOR COURT OF
SAN BERNARDINO COUNTY,

Respondent;

YVETTE SMITH,

Real Party in Interest.

E056460

(Super.Ct.No. CIVDS1007710)

OPINION

ORIGINAL PROCEEDINGS; petition for writ of mandate. John M. Pacheco and Brian S. McCarville, Judges. Petition granted.

Ericksen Arbuthnot, George J. Hernandez, Jr., Robert W. Lofton; Graves & King and Dennis J. Mahoney for Petitioner.

No appearance for Respondent.

Law Office of Twila S. White, Twila S. White; Carpenter, Zuckerman & Rowley and Nicholas C. Rowley for Real Party in Interest.

DISCUSSION

In this matter, we have reviewed the petition, the opposition filed by real party in interest, and petitioner's reply. We have determined that resolution of the matter involves the application of settled principles of law, and that issuance of a peremptory writ in the first instance is therefore appropriate. (*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 178.)

Code of Civil Procedure section 170.6, subdivision (a)(2), allows a party to file a peremptory challenge to a judge who has been assigned to the case for all purposes "within 15 days after notice of the all purpose assignment, or if the party has not yet appeared in the action, then within 15 days after the appearance." In this case, petitioner filed its challenge on May 8, 2012, at the same time it filed a demurrer and motion to strike. The filing of these motions constituted a "general appearance." (Code Civ. Proc., § 1014.) No conduct by petitioner prior to that time so qualified.

By executing the acknowledgment of receipt of summons pursuant to Code of Civil Procedure section 415.30, petitioner conferred initial personal jurisdiction upon the trial court (see *Tandy Corp. v. Superior Court* (1981) 117 Cal.App.3d 911) but did not *appear*. Real party in interest's construction would require a served party to file a disqualification before its time to plead expired and, thus, before it had decided how to defend the case—an absurd result.

The presence of real party in interest’s counsel at a hearing on a motion or motions with which it was not directly concerned was similarly not a “general appearance.” Counsel’s physical presence did not implicitly recognize the court’s jurisdiction over petitioner (see *Air Machine Com SRL v. Superior Court* (2010) 186 Cal.App.4th 414), and there was certainly no attempt to rely on the power of the court in petitioner’s favor. (Cf. *Mansour v. Superior Court* (1995) 38 Cal.App.4th 1750 [involving both attorney participation in a hearing and the sending out of discovery subpoenas].)

DISPOSITION

Accordingly, the peremptory challenge was timely and Judge Pacheco acted correctly in disqualifying himself. Judge McCarville—even if he had the power to do so, which we do not determine—should not have reinstated Judge Pacheco’s assignment. The petition for writ of mandate is granted.

Let a peremptory writ of mandate issue directing the Superior Court of San Bernardino to vacate its order purporting to reject petitioner’s peremptory challenge and to reassign Judge Pacheco to the case, and to enter a new order confirming the disqualification of Judge Pacheco.

Petitioner to recover its costs. The previously ordered stay is lifted.

Petitioner is directed to prepare and have the peremptory writ of mandate issued, copies served, and the original filed with the clerk of this court, together with proof of service on all parties.

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KING
Acting P. J.

We concur:

McKINSTER
J.

RICHLI
J.