Filed 1/14/15 Emergency Med. Services Group v. Zurcher CA5

NOT TO BE PUBLISHED IN THE OFFICAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

EMERGENCY MEDICAL SERVICES GROUP, INC., Plaintiff and Respondent, v. RAYMOND ZURCHER, Defendant and Appellant.	F067509 (Super. Ct. No. S-1500-CV-272930) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Sidney P. Chapin, Judge.

Borton Petrini, George F. Martin and Michael J. Stump for Defendant and Appellant.

Michelman & Robinson, Andrew H. Selesnick, Damaris L. Medina, and Robin James for Plaintiff and Respondent.

-ooOoo-

Appellant Raymond Zurcher, M.D. (appellant), appeals the trial court's denial of his motion to disqualify attorney Andrew Selesnick and Selesnick's law firm, Michelman & Robinson, LLP, from representing respondent Emergency Medical Services Group,

Inc. (EMSG), in the underlying lawsuit that EMSG filed against appellant. Appellant argues that Selesnick's disqualification is required because, when appellant was a shareholder and director of EMSG, he formed an attorney-client relationship with Selesnick in the course of Selesnick's representation of EMSG. Appellant further asserts that Selesnick must be disqualified because appellant has identified Selesnick as a material witness in the underlying case.

The trial court did not abuse its discretion in denying appellant's disqualification motion. Appellant did not establish either a prior attorney-client relationship with Selesnick or that Selesnick's testimony will be needed in the underlying case. Accordingly, the order will be affirmed.

BACKGROUND

EMSG is a medical corporation that was created to provide emergency physician services to hospitals. EMSG entered into a contract with San Joaquin Community Hospital (Hospital) under which EMSG was the exclusive provider of emergency medical physician services for Hospital's emergency room.

At all relevant times, EMSG had four equal shareholders: appellant; Garrett Lee M.D.; Thomas Reilly, M.D.; and Kevin Schmidt, D.O. These shareholders also comprised EMSG's entire board of directors. Schmidt was EMSG's president. Terry Hilliard and The Hilliard Group provided administrative, management, and consulting services to EMSG under a management services agreement.

EMSG owned a one-third interest as a shareholder in Premier Physicians Alliance (Premier), a multi-specialty independent provider network affiliated with Hospital. Appellant was a member of Premier's board of directors and its president.

In 2009, EMSG's board of directors retained Selesnick to represent EMSG in a litigation matter unrelated to this case. Selesnick also acted as general corporate counsel. The engagement agreement between Selesnick and EMSG identified EMSG as the only client.

Later that year, EMSG's directors decided to sell the Hospital contract to another emergency physician group and retained Selesnick to assist EMSG with the sale. In accordance with his law firm's policy, Selesnick sent a new matter engagement letter to EMSG. By incorporating the earlier engagement letter by reference, Selesnick again identified EMSG as the only client. The engagement agreement further specified:

> "We have not been engaged to act as counsel for, or to assume any duties toward, any affiliated or related parties, including parent, subsidiary or commonly owned corporations or entities; family members; officers; directors; agents; or employees. If in connection with the discharge of our responsibilities, we consult with any such person or entity, that will not create any attorney-client relationship between us and that person or entity, though such communications will fall within the scope of the privilege between you and us to the extent applicable law permits."

Eventually, Hospital selected California Emergency Physicians Medical Group (CEP), to take over the staffing of the Hospital emergency department. Thereafter, Schmidt, as EMSG's president, directed Selesnick to negotiate with CEP on behalf of EMSG to complete the sale. However, Selesnick did not set the price or value of the contract. Rather, extensive negotiations took place directly between the two parties.

During the entire transaction, Selesnick took direction from Schmidt as president of EMSG. Selesnick also received input from EMSG's administrative consultant, Hilliard. At Schmidt's instruction, Selesnick kept the board of directors regularly informed on the progress of the sale by e-mail to all of the directors as a group.

As part of the sale, CEP required EMSG's shareholders to execute collectively a partnership admission agreement. This agreement was drafted by CEP. Each EMSG shareholder was admitted as a partner of CEP, agreed to perform clinical services for CEP, and agreed to "[noncompete] covenants" in exchange for a $15,000 payment. However, the noncompete covenants excluded Premier and West Side Urgent Care. Some of EMSG's shareholders, including appellant, were involved with Premier, and others were involved with West Side Urgent Care.

Initially, CEP wanted to pay the sales proceeds directly to the EMSG shareholders. However, based on advice from its tax attorney, EMSG insisted that the payments be made to EMSG. CEP agreed to that payment structure. The sale was effective January 4, 2011.

On February 3, 2011, EMSG's board of directors held a special meeting during which appellant was removed from the board. The board also voted to discontinue paying distributions to appellant. In May 2011, EMSG terminated appellant's employment.

On February 18, 2011, EMSG filed the underlying action against appellant for damages for fraud and breach of fiduciary duty. EMSG alleges that Premier had a contract with the California Department of Corrections and Rehabilitation (CDCR) to provide medical services to CDCR inmates and that EMSG provided emergency room services to CDCR's inmate patients at Hospital. EMSG further alleges that Premier, through appellant as Premier's president, insisted that EMSG bill Premier for services rendered to those inmate patients and represented that Premier would then reimburse EMSG. According to EMSG, CDCR paid Premier for the services rendered to inmates by EMSG, but Premier did not pay EMSG as promised. Rather, EMSG alleges, Premier siphoned off the money to Premier MSO, an entity created by Premier for that purpose.

In November 2011, appellant filed a cross-complaint against EMSG, its shareholders, Schmidt, Reilly and Lee, and management consultant Hilliard. Appellant alleges he had wanted CEP to distribute the proceeds from the sale of the Hospital contract to the individual shareholders but, at the urging of the remaining shareholders and Hilliard, consented to the proceeds being distributed to EMSG. According to appellant, EMSG has continued to receive distributions from CEP and has been making distributions to the other shareholders while excluding appellant. Appellant's causes of action include claims for fraudulent inducement, constructive fraud and deceit, conversion, breach of fiduciary duty, and violation of his right of privacy. Appellant

further seeks an accounting and reinstatement of his EMSG board position and employee status.

In February 2013, Selesnick substituted in as counsel of record for EMSG for the purpose of prosecuting EMSG's complaint against appellant. Appellant responded by filing the subject disqualification motion. According to appellant, Selesnick is subject to disqualification because Selesnick had a prior attorney-client relationship with appellant; will be a witness in the underlying case; and failed to identify the client for whom he acted in dealing with EMSG's "directors, officers, employees, members, shareholders, or other constituents" as required by the Rules of Professional Conduct of the State Bar of California, rule 3-600(D).[1]

At the hearing on appellant's disqualification motion, the trial court announced its tentative ruling to deny the motion. The court explained that the moving papers did not establish an attorney-client relationship between appellant and Selesnick but, rather, established that the attorney-client relationship was between EMSG and Selesnick. The court further noted that the engagement letter met the requirements of rule 3-600(D). The court also concluded that Selesnick was not subject to recusal because of an advocate-witness situation.

Appellant then requested a continuance to allow him to procure telephone records he believed would support the existence of an attorney-client relationship. Appellant further wanted the court to order Selesnick to provide billing records for his office and permit appellant to voir dire Selesnick on the attorney-client issue. The trial court took the matter under submission.

Approximately one month after the hearing, appellant filed an application for leave to file a supplemental declaration along with copies of appellant's cellular telephone records. The trial court denied the application.

---

[1]All further rule citations are to the Rules of Professional Conduct of the State Bar of California.

Thereafter, the trial court denied appellant's disqualification motion by minute order.

DISCUSSION

I. Standard of review

A trial court's ruling on a disqualification motion is reviewed for abuse of discretion. (*Apple Computer, Inc. v. Superior Court* (2005) 126 Cal.App.4th 1253, 1263.) If the trial court resolved disputed factual issues, we will not substitute our judgment for the trial court's express or implied findings that are supported by substantial evidence. (*Sharp v. Next Entertainment Inc.* (2008) 163 Cal.App.4th 410, 425.) Accordingly, we presume the trial court's judgment is correct and resolve all conflicts in the declarations in favor of the prevailing party. The trial court's resolution of any factual disputes arising from the evidence is conclusive. (*Strasbourger Pearson Tulcin Wolff Inc. v. Wiz Technology, Inc.* (1999) 69 Cal.App.4th 1399, 1403 (*Strasbourger*).)

II. Appellant did not meet his burden of establishing an attorney-client relationship with Selesnick

Rule 3-310(E) provides:

> "A member shall not, without the informed written consent of the client or former client, 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."

Appellant contends this rule requires that Selesnick be disqualified from representing EMSG.

However, before an attorney can be disqualified because his or her representation is adverse to the interest of a current or former client, the party seeking the attorney's disqualification must establish the existence of an attorney-client relationship with that attorney. (*Koo v. Rubio's Restaurants, Inc.* (2003) 109 Cal.App.4th 719, 729 (*Koo*).) The party seeking disqualification has the burden to establish this relationship. (*Ibid.*)

Except where an attorney is appointed by the court, the attorney-client relationship is created by some form of contract, express or implied, formal or informal. (*Responsible Citizens v. Superior Court* (1993) 16 Cal.App.4th 1717, 1732 (*Responsible Citizens*).) Both express and implied contracts are based on the expressed or apparent intent of the parties. With an implied contract, that intent is manifested by conduct. (*Id*. at pp. 1732-1733.)

In determining whether the parties' conduct implies the existence of an attorney-client relationship, primary attention should be given to whether the totality of the circumstances implies an agreement by the attorney not to accept other representations adverse to the putative client's personal interests. (*Responsible Citizens, supra,* 16 Cal.App.4th at p. 1733.) One of the most important facts involved in this analysis is "'the expectation of the client based on how the situation appears to a reasonable person in the client's position.'" (*Ibid*.)

As evidence of an attorney-client relationship with Selesnick, appellant submitted his own declaration. With regard to the sale of the Hospital contract, appellant stated "it was my understanding based upon the nature of the transaction and his advice to me, Dr. Schmidt, Dr. Reilly and Dr. Lee, that Mr. Selesnick and his firm represented my personal best interests in the transaction," and "I relied upon the advice and counsel of Mr. Selesnick …." Appellant further declared, "Over the course of his representation of me Mr. Selesnick and I had private communications, communications that I assumed and expected he would keep confidential." As to the partner-admission agreement, appellant stated that, before he signed the agreement, "Mr. Selesnick also began giving the individual shareholders advice concerning that sale," and "it was my understanding that Mr. Selesnick rendered legal advice and consultation to me, individually, and I relied upon that advice and consultation of Mr. Selesnick …." On the structure of the sale, appellant declared that, "[u]pon the advice of Mr. Selesnick …, I ultimately agreed to

structure the sale consistent with Mr. Selesnick's recommendations, such that payments were payable not to the individual doctor-shareholders, but instead to EMSG."

Thus, appellant claimed an attorney-client relationship based on his understanding and belief that he was being individually represented by Selesnick and had received advice from Selesnick. However, "[a]n attorney-client relationship is not created by the unilateral declaration of one party to the relationship." (*Koo, supra,* 109 Cal.App.4th at p. 729.) There must have been an express or implied contract between the parties. Appellant's conclusory statements without particulars do not rise to the level of substantial evidence that Selesnick represented appellant. (*Strasbourger, supra,* 69 Cal.App.4th at p. 1406.) Appellant's state of mind is not sufficient to create an attorney-client relationship. (*Fox v. Pollack* (1986) 181 Cal.App.3d 954, 959.)

Further, the fact that Selesnick's actions for the benefit of EMSG may have appeared to be for the benefit of appellant as a shareholder and director did not make Selesnick appellant's personal attorney. (*Meehan v. Hopps* (1956) 144 Cal.App.2d 284, 293.) "In representing a corporation, an attorney's client is the *corporate entity*, not individual shareholders or directors, and the individual shareholders or directors cannot presume that corporate counsel is protecting their interests." (*La Jolla Cove Motel & Hotel Apartments, Inc. v. Superior Court* (2004) 121 Cal.App.4th 773, 784.)

Moreover, Selesnick directly contradicted appellant. In opposition to appellant's disqualification motion, Selesnick declared that he did not represent appellant individually. Rather, he represented EMSG, not the individual shareholders and directors. On review, this conflict in the evidence must be resolved in favor of Selesnick, the prevailing party. (*Strasbourger, supra,* 69 Cal.App.4th at p. 1403.)

Appellant contends the trial court relied solely on the engagement agreement in finding there was no attorney-client relationship and therefore abandoned the "totality of the circumstances" test. The engagement letter established that Selesnick represented only EMSG, and appellant failed to present substantial evidence to the contrary. Thus,

the trial court relied on the only substantial evidence before it. It did not abandon the "totality of the circumstances" test. Rather, appellant failed to meet his burden to demonstrate the existence of an attorney-client relationship.

Appellant's argument that the trial court abused its discretion by requiring appellant to demonstrate that Selesnick had received confidential information is also unavailing. Appellant is correct that, once an attorney-client relationship is established, the transmission of confidential information to the attorney is presumed. (*Flatt v. Superior Court* (1994) 9 Cal.4th 275, 283.) However, contrary to appellant's position, the trial court did not require appellant to prove Selesnick had access to confidential information. Rather, the trial court found appellant had not established an attorney-client relationship with Selesnick.

III. The trial court did not abuse its discretion when it denied appellant's request for a continuance and refused to consider appellant's telephone records

As noted above, the trial court ultimately denied appellant's request for a continuance of the hearing on his disqualification motion. Appellant had wanted to introduce his personal cell phone records, obtain an in camera review of Selesnick's billing records, and voir dire Selesnick. The court also denied appellant's application to file a supplemental declaration that incorporated selected cell phone records. Appellant argues the trial court prevented him from submitting substantial evidence of an attorney-client relationship and therefore abused its discretion.

However, appellant has not shown that any of this "evidence" would have been probative. Appellant argues that he was deprived of the ability to cross-examine Selesnick regarding his communications with appellant and the nature of the advice given. But, Selesnick had already declared that he did not represent appellant in his individual capacity. Accordingly, it is highly unlikely that appellant's voir dire of Selesnick would have resulted in substantial evidence of an attorney-client relationship.

Similarly, Selesnick declared that all of his work in relation to the sale of the Hospital contract was invoiced to, and paid by, EMSG. Selesnick further averred that at no point in his representation was he paid on behalf of, or for the representation of, any of the individual shareholders. Consequently, the billing records were not likely to lead to substantial evidence. Thus, it was not unreasonable for the court to deny appellant's request for an in camera a review of those records.

Finally, the trial court did not abuse its discretion in refusing to consider appellant's cell phone records. According to appellant, these records reflect nine telephone calls from or to his cell phone from or to Selesnick. These calls are short, ranging from one to nine minutes. However, besides the date and length of each call, appellant provides no other detail. He does not explain the purpose of these calls, whether anyone else participated, or who said what to whom. As with the other evidence proffered by appellant, this vague and flimsy evidence is not of the type that connotes attorney representation. (Cf. *Strasbourger, supra,* 69 Cal.App.4th at p. 1407.)

IV. The trial court did not err in failing to disqualify Selesnick under the advocate-witness rule.

The "advocate witness" rule prohibits an attorney from acting both as an advocate and a witness in the same proceeding. (*Kennedy v. Eldridge* (2011) 201 Cal.App.4th 1197, 1208.) Here, before Selesnick substituted in, appellant identified Selesnick as a witness. Appellant argues that his intent to call Selesnick during trial requires Selesnick's disqualification.

In deciding whether to disqualify an attorney under the advocate-witness rule, the court must balance several competing interests. The court must consider both the strong interest parties have in representation by counsel of their choice and the substantial hardship on the disqualified attorney's innocent clients, who must bear the monetary and other costs of finding a replacement. The court must also consider the possibility the motion to disqualify is being used for purely tactical reasons. Finally, the court must

determine whether counsel's testimony is, in fact, genuinely needed. (*Smith, Smith & Kring v. Superior Court* (1997) 60 Cal.App.4th 573, 580-581 (*Smith*).) "In determining the necessity of counsel's testimony, the court should consider 'the significance of the matters to which he might testify, the weight his testimony might have in resolving such matters, and the availability of other witnesses or documentary evidence by which these matters may be independently established.'" (*Id*. at p. 581.)

In seeking to disqualify Selesnick, appellant declared that he intended to call Selesnick as a witness to testify regarding the facts and circumstances surrounding appellant's decision to sign the partner-admission agreement; the proper CEP valuation process; the value of the unpaid Premier claims; comments appellant made during a conference with Schmidt, Lee, Reilly and Hilliard; and the negligible impact the unpaid Premier claims had on the CEP sale price.

The trial court determined that the elements for disqualifying Selesnick under the advocate-witness rule were not met. The court concluded that appellant failed to prove that the information he sought to obtain from Selesnick was not available from another source.

The trial court did not abuse its discretion in making this finding. Appellant can testify as to the circumstances surrounding his decision to sign the partner-admission agreement and his comments made during a conference with the other parties. Further, appellant has not shown that Selesnick has any independent knowledge of, or is the only source of information on, the various valuations. In fact, Selesnick declared that he did not determine the value of the contract. Rather, the price was set by the parties. Thus, appellant failed to provide an adequate evidentiary showing as to why Selesnick must testify. Appellant's speculative contentions cannot justify disqualification of counsel. (*Smith, supra,* 60 Cal.App.4th at p. 582.)

Appellant argues that "the trial court appears to have wrongly concluded that appellant was engaged in 'tactical abuse' of the recusal procedure" and contends that the

evidence demonstrates that this was not the case. Therefore, appellant asserts, the court erred in not disqualifying Selesnick under the advocate-witness rule. However, as discussed above, the trial court relied primarily on its finding that appellant did not demonstrate why Selesnick's testimony was necessary and unobtainable from other witnesses.

V. The trial court did not err in refusing to disqualify Selesnick under rule 3-600(D).

Rule 3-600(D) provides:

> "In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a member shall explain the identity of the client for whom the member acts, whenever it is or becomes apparent that the organization's interests are or may become adverse to those of the constituent(s) with whom the member is dealing. The member shall not mislead such a constituent into believing that the constituent may communicate confidential information to the member in a way that will not be used in the organization's interest if that is or becomes adverse to the constituent."

The trial court concluded that the engagement letter met the requirements of rule 3-600(D). This letter clearly identified EMSG as the only client.

Appellant argues the court erred because, by the time Selesnick was advising appellant, and appellant believed that he was individually represented by Selesnick, circumstances had changed sufficiently so as to render the engagement letter irrelevant to subsequent representation.

Appellant's argument is premised on his having had an attorney-client relationship with Selesnick. However, as discussed above, appellant did not establish that such a relationship ever existed. Rather, Selesnick represented only EMSG and explained his representation in the engagement letter. Contrary to appellant's position, the representation did not change. Therefore, the trial court did not err in refusing to disqualify Selesnick under rule 3-600(D).

DISPOSITION

The order is affirmed. Costs on appeal are awarded to respondent.

_____
Smith, J.

WE CONCUR:

_____
Poochigian, Acting P.J.

_____
Peña, J.