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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

TEENA HONSTETTER,

Plaintiff and Respondent,

v.

THE STOCKADE, et al.,

Defendants and Appellants.

G049980

(Super. Ct. No. 30-2012-00585097)

O P I N I O N

THE STOCKADE, et al.,

Petitioners,

v.

THE SUPERIOR COURT OF
CALIFORNIA, COUNTY OF ORANGE

Respondent;

TEENA HONSTETTER,

Real Party in Interest.

G050007

(Super. Ct. No. 30-2012-00585097)

Appeal from an order of the Superior Court of Orange County, Gregory H. Lewis, Judge. Reversed. Original proceedings; petition for a writ of mandate/prohibition

to challenge an order of the Superior Court of Orange County, Gregory H. Lewis, Judge. Petition granted. Motion to consolidate. Granted.

Gordon & Rees, Douglas Smith and Michael P. Campbell for Defendants and Appellants and for Petitioners.

Rydstrom Law Office and Richard Ivar Rydstrom for Plaintiff and Respondent and for Real Party in Interest.

No appearance for Respondent Superior Court.

* * *

Appellants and Petitioners, The Stockade, Fowler Gun Room, The Stockade, LLC, Fowler Gun Room, LLC, and Kathy Mitchell (hereinafter referred to collectively as The Stockade unless the context indicates otherwise) challenge the trial court's orders disqualifying their trial counsel and excluding the testimony of defense witnesses. In its appeal, The Stockade argues the trial court erred in disqualifying its attorney William A. Elliott. In its writ petition, The Stockade argues the court erred in excluding every witness who received all the interview summaries from Mitchell. As we explain below, we agree with both of The Stockade's contentions. We grant the petition for writ of mandate and reverse the order disqualifying Elliott.

FACTS

In July 2012, Teena Honstetter filed a complaint against her former employer The Stockade, including owner and chief executive officer Mitchell, alleging numerous employment law claims. The Stockade filed an answer. A jury trial was set to begin on January 6, 2014.

That day, Honstetter filed an emergency pretrial ex parte motion for witness tainting, which included declarations from Honstetter's attorney, Richard Rydstrom, and her former co-worker Eric Cilley. Cilley's two declarations were undated.

In one declaration, Cilley stated the following: 1. Mitchell gave him copies of witness investigation reports from him, Brian Scales, Leon Linderwell, Omar Leyva,¹ and Sean Donnelly and said she gave the others the same reports. “She told [him] her attorney told her to give them to all of us to review so we would know the facts of the case.” Cilley’s statements were misconstrued and inaccurate in the report. 2. Cilley knew Mitchell gave Linderwell all the statements and told him “to review them so he knew the facts.” 3. “Mitchell’s attorney” twice approached Cilley at work and “talked to [him] about truth and how sometimes we think we know things when we don’t, don’t know what we think we know.” Cilley believed “Mitchell’s attorney” attempted to intimidate him or influence his statements or testimony and he felt very uncomfortable. 4. Mitchell’s and “her attorney[’s]” conduct made Cilley feel very uncomfortable. 5. Cilley believed he will be fired if he does not testify in the manner “they” want him to testify. Mitchell and Cilley’s coworkers have tried to intimidate him by sharing information about Cilley’s background discovered on the Internet.

In the other declaration, as relevant here, Cilley said Elliott told him that “he was personal friends with the judge in this matter and that they the [*sic*] judge was on his side and would rule in . . . Elliott’s favor and had already done so on a motion of some type.”

Relying on Cilley’s declarations, Honstetter argued The Stockade engaged in witness tainting, creating a “[p]re-textual [s]afe-[z]one for [w]itnesses to [l]ie.” Honstetter claimed Mitchell and Elliott conspired to influence all the defense witnesses to testify similarly by distributing every witness statement to all the witnesses. She also asserted Elliott tried to intimidate Cilley into testifying consistent with the defense theory or face termination. She said Elliott’s statement to Cilley that the judge would rule in the defense’s favor contributed to the appearance the judge would not do anything to prevent

¹ Leyva’s name is alternatively spelled Levya throughout the record.

Elliott from presenting a fabricated defense to the jury. As relevant here, Honstetter requested Elliott be disqualified as counsel of record and the defense be precluded from calling as witnesses Donnelly, Scales, Linderwell, Leyva, and two others, Keith Thompson and Joe Dominguez. In a minute order, the trial court vacated the trial date.

The Stockade filed an opposition to Honstetter's motion. The opposition was supported by declarations from Elliot and Kristen Knowles. The Stockade also filed evidentiary objections.²

Knowles stated she is a private investigator who Elliott hired to interview Thompson, Dominguez, Donnelly, Levya, Scales, Choi, Cilley, and Linderwell. Knowles said she personally interviewed each of them, prepared accurate typed summaries of the interviews, and provided the summaries to Elliott.

Elliott declared he hired Knowles to interview The Stockade's employees and Knowles provided him with the interview summaries. Elliott stated he met with Thompson, Dominguez, Donnelly, and Mitchell to prepare them to testify. Elliott said he provided the interview summaries to Mitchell at her request, but he did not know what she did with them. Elliott added he distributed the interview summaries to Thompson, Dominguez, and Donnelly when he met with them. He did so, he said, to "refresh" their recollection "and to see if any of [them] disagreed with the summaries." Elliott stated he explained to them "the importance of testifying based only on his or her own personal knowledge and to separate hearsay from fact." He denied conveying or intending to convey the expectation he wanted them to give untruthful testimony.

Elliott declared that "[t]o the best of [his] recollection," he spoke to Cilley once to gather facts concerning an alleged altercation between Honstetter and Dominguez. He denied the following: giving Cilley the interview summaries; expressly or impliedly telling Cilley to give untruthful testimony; telling Cilley, or anyone,

² The Register of Actions indicates The Stockade filed its own motion to disqualify Rydstrom. That motion is not part of the record on appeal.

“[s]ometimes we think we know things when we don’t, don’t know what we think we know.” Elliott stated he is not personal friends with Judge Gregory Lewis and did not discuss him with Cilley. He denied ever telling Cilley that Judge Lewis would rule in The Stockade’s favor.

As relevant here, The Stockade responded there was no legal basis for disqualifying Elliott because he did not have a conflict of interest and he was not in possession of confidential information. It stated it was Rydstrom who was in possession of The Stockade’s privileged work product. The Stockade asserted there was no genuine likelihood Elliott’s conduct would affect the outcome of the proceedings. It added that the proper mechanism would be for Honstetter’s counsel to cross-examine Cilley about any alleged improper influence. The Stockade contended Honstetter offered no legal authority to support its request to exclude the testimony of six defense witnesses.

Honstetter filed a reply, which included objections to The Stockade’s evidentiary objections. She began by noting The Stockade did not submit a declaration from Mitchell, and thus, the record is silent on the issue of whether she provided the interview summaries to “Cilley and the other witnesses . . . *to review so [they] would know the facts of the case.*” Honstetter repeated her claims Elliott and Mitchell tried to intimidate and taint the witnesses by controlling their testimony. She repeated that Elliott had not produced declarations from Mitchell, Linderwell, or the other defense witnesses stating they did not receive all the interview summaries. Honstetter concluded Elliott and/or Mitchell “created a pre-textual safe zone to use the disclosed witness statements as a road map for potential fabrication by the witnesses”

The trial court held a hearing on February 24, 2014. The Stockade’s counsel, the same counsel representing The Stockade on appeal and writ proceedings, argued against the trial court’s tentative ruling to grant Honstetter’s motion. When counsel argued the trial court’s ruling excluding all the defense witnesses from testifying was essentially a “terminating sanction,” the court replied that was what Honstetter’s

counsel requested. Counsel began to argue there was no case law to support giving a “terminating sanction[]” when the court responded it did not give such a sanction, acknowledging though that may be the effect of its ruling. The court explained there was evidence Mitchell provided the witness statements to all the witnesses to refresh their memory but “that is not the guise under which they were truly given, and as a result and the conduct surrounding it, I’m not going to allow them to testify.” Counsel argued excluding all the defense witnesses required the assumption all the witnesses were intimidated into changing their testimony based on distribution of the witness statement and this required “several inferences.” The court disagreed, relying on Cilley’s declaration concerning the fact he felt intimidated. When counsel asked whether the proceedings had been tainted if it was Mitchell’s intent to intimidate the witnesses, the court said, “Absolutely.” Counsel argued case law required a lesser sanction that allowed a trial on the merits. Counsel repeated cross-examination would reveal whether Elliott or Mitchell tried to intimidate the defense witnesses into changing their testimony.

The trial court stated that Elliott’s conduct, if true, would not only require disqualification but the conduct was unethical and illegal. The court added, however, Cilley did not identify Elliott by name and there was a discrepancy about how many times they met. The court also said Mitchell harassed and intimidated Cilley by threatening to reveal personal information about him and “strong-arm[ed]” him to testify in a certain manner. The court concluded the fact Mitchell failed to submit a declaration meant “we can assume that [Cilley’s] allegations against her . . . are true.” The court opined that when Mitchell gave each witness all the other witness statements “she potentially tainted their testimony and undermine[d] their credibility.” The court ordered that those witnesses who received copies of all the witness statements could not testify.

With regard to Honstetter’s motion to disqualify Elliott, the trial court stated it was a “drastic measure” and it would take the matter under submission for one week to allow Cilley to file a supplemental declaration. The court was not interested in

The Stockade's counsel's attempt to explain why Mitchell did not file a declaration and indicated it would draw an adverse inference from the absence of her declaration. When the court said he was not concerned with the alleged fact Elliott said he and the judge were friends, The Stockade's counsel indicated the comment referred to the prior judge assigned to the case.

The court took under submission the issue of whether Elliott should be disqualified and later issued a minute order reflecting its rulings. As relevant here, the order stated: "The motion of . . . Honstetter for order re: witness tainting is granted. The court finds that . . . Mitchell engaged in improper coaching of witnesses by providing copies of all interview statements to each witness. Defendants will be precluded from calling as witnesses those individuals who were given copies of all interview statements by . . . Mitchell." (Bold omitted.)

Elliott filed a supplemental declaration. Elliott stated he was the attorney for The Stockade and to the best of his knowledge other counsel never spoke with any witnesses. Cilley also filed a supplemental declaration. Cilley stated that when he referred to "Mitchell's attorney," he meant Elliott.

The trial court granted Honstetter's motion to disqualify Elliott. Honstetter's counsel gave notice. The Stockade appealed from the court's order disqualifying Elliott. The Stockade filed a petition for writ of mandate/prohibition on the issue of whether the court properly granted Honstetter's motion to exclude witnesses from testifying. We issued an order to real party to show cause why a writ of mandate should not issue, and placed the appeal and writ proceeding on the same oral argument calendar. We stayed all proceedings in the trial court pending further order of this court. On our own motion, we now consolidate the appeal and writ petition.

DISCUSSION

I. Exclusion of Witnesses

In its petition, The Stockade argues the trial court erred in excluding witnesses who received all the interview summaries from Mitchell. We agree.

In *Peat, Marwick, Mitchell & Co. v. Superior Court* (1988) 200 Cal.App.3d 272 (*Peat*), the State of California sued petitioner for providing a negligent audit for a thrift and loan corporation placed in liquidation by the California Commissioner of Corporations. The accounting firm the State retained as an expert witness on professional negligence and other issues engaged in conduct raising egregious conflicts of interest, including simultaneously negotiating a merger with petitioner and failing to ensure petitioner's employees were not aware of information about the State's case. The trial court precluded petitioner from introducing any evidence on the standard of care and negligence. (*Id.* at pp. 280-281.) The trial court found the State's ability to prepare and present its case had been seriously hampered and the integrity of the judicial system had been harmed because of the potential that confidential information had been compromised. (*Id.* at pp. 282-283.) The appellate court ruled the order was not a discovery sanction but rather a remedy for abuse of the litigation process and affirmed as an exercise of the court's inherent power to prevent injustice. (*Id.* at pp. 285-287.) The court explained that under such circumstances, the trial court may act to prevent the taking of an unfair advantage and to preserve the integrity of the judicial system. The court concluded petitioner "seriously damaged the [State's] case." (*Id.* at p. 289.) The court opined the same deferential standard of review applies to rulings on motions requesting a trial court to preclude evidence under its inherent authority "to police an abuse of the litigation process" and unlike discovery, the trial court was not required to consider lesser sanctions. (*Id.* at pp. 286, 291.)

Continental Ins. Co. v. Superior Court (1995) 32 Cal.App.4th 94, 98 (*Continental*), involved numerous petitions arising from wrongful death and personal injury actions concerning a fire at a Los Angeles high-rise building. Defendants filed a motion to disqualify plaintiffs' counsel and his law firm because plaintiffs' counsel

indicated to a former employee of one of the defendants, who was a witness, that he represented defendant. (*Id.* at p. 99.) There were competing declarations from the witness and plaintiffs' counsel. (*Id.* at pp. 100-101.) The trial court denied the motion to disqualify plaintiffs' counsel, on the condition that the witness not testify. (*Id.* at p. 103.) The court of appeal concluded the trial court abused its discretion in conditioning the denial of the attorney disqualification motion on the exclusion of the witness. (*Id.* at p. 108.) The court reasoned there was no legal or factual basis to support the conclusion "petitioner's . . . blatantly and intentionally abused the litigation process[.]" (*Ibid.*) The court also held the trial court failed to conclude the content of the witness's testimony was improperly influenced by the plaintiffs' attorney. (*Id.* at p. 109.)

Here, the trial court abused its discretion in excluding from trial every witness who received from Mitchell all the interview summaries. Similar to *Continental*, there was no factual basis to conclude The Stockade blatantly and intentionally abused the litigation process. We are mindful we pay great deference to the trial court in deciding whether an evidentiary sanction is appropriate. The trial court excluded all the witnesses from testifying based on Mitchell's conduct. But unlike *Peat*, the evidence does not support the conclusion Mitchell's conduct seriously damaged Honstetter's case. There was no evidence any of the other witnesses were improperly influenced by Mitchell's conduct. To conclude Mitchell intimidated all the witnesses based solely on Cilley's declaration is purely speculative. Cilley's declaration does not provide factual support for the court's order excluding all the witnesses who received all the interview summaries. The fact Mitchell did not submit a declaration denying Cilley's accusations does not alter our conclusion. We conclude, Honstetter failed her burden of proving with ponderable legal significance all the witnesses were tainted.

As to Cilley, we also conclude the trial court's exclusion of his testimony goes too far. By excluding Cilley, assuming Cilley is excluded because the court's order does not specify which witnesses are excluded, the court excluded testimony that

arguably could have been helpful to Honstetter. In his declaration, Cilley suggests his testimony could be damaging to The Stockade. Cilley is on Honstetter's witness list. Additionally, although the *Peat* court stated that in the context of an evidentiary sanction a trial court need not consider lesser sanctions (*Peat, supra*, 200 Cal.App.3d at p. 291), Honstetter can cross-examine any defense witnesses on the issue of whether Mitchell tried to improperly influence testimony. Thus, we conclude the court's order excluding all the witnesses who received all the witness interview transcripts exceeds the bounds of reason because Mitchell's conduct did not result in an unfair advantage to The Stockade.

II. Disqualification of Counsel

In its appeal, The Stockade contends the trial court erred in disqualifying Elliott. Again, we agree.

“The trial court's decision on a motion for disqualification is usually reviewed for abuse of discretion. [Citation.] The court's discretion is limited by the applicable legal principles and is subject to reversal when there is no reasonable basis for the action. [Citation.] ‘[W]here there are no material disputed factual issues, we review the trial court's determination as a question of law, and we defer to a trial court's express or implied factual decisions on disputed factual issues only if that decision is supported by substantial evidence. Importantly, although an inference can serve as substantial evidence for a finding, “the inference must be a reasonable conclusion from the evidence and cannot be based upon suspicion, imagination, speculation, surmise, conjecture or guesswork. [Citation.] Thus, an inference cannot stand if it is unreasonable when viewed in light of the whole record. [Citation.]’ [Citation.]” [citation.]” (*DeLuca v. State Fish Co., Inc.* (2013) 217 Cal.App.4th 671, 685 (*DeLuca*).)

“The trial court's power to disqualify counsel is derived from the court's inherent power “[t]o control in furtherance of justice, the conduct of its ministerial officers.” [Citations.] Disqualification motions implicate several important interests, among them are the clients' right to counsel of their choice, the attorney's interest in

representing a client, the financial burden of replacing a disqualified attorney, and tactical abuse that may underlie the motion. [Citation.] The “paramount” concern in determining whether counsel should be disqualified is “the preservation of public trust in the scrupulous administration of justice and the integrity of the bar.” [Citations.] It must be remembered, however, that disqualification is a drastic course of action that should not be taken simply out of hypersensitivity to ethical nuances or the appearance of impropriety.’ [Citation.]” (*DeLuca, supra*, 217 Cal.App.4th at pp. 685-686.)

Here, we conclude the trial court erred in disqualifying Elliott because the evidence failed to rise to the level necessary for the drastic measure of attorney disqualification. Preliminarily, Honstetter spends much time discussing how Mitchell’s conduct, when considered together with Elliott’s conduct, created a “pre-textual safe-zone for witnesses to lie.” But Mitchell’s misconduct, if any, is not a proper basis to disqualify Elliott. The only proper basis to disqualify Elliott would have been based on his own misconduct. But his actions too are insufficient to support the trial court’s order.

Cilley claimed that when Elliott approached him, he “felt very uncomfortable” and suspected Elliott was trying to influence his testimony. Elliott denied telling Cilley he was friends with the trial judge, and more importantly denied questioning Cilley about what he knew to be the facts in an attempt to influence his testimony. Elliott denied either expressly or impliedly influencing Cilley into giving false testimony. Elliott explained that unlike the other witnesses who he met with to prepare them for testimony, he could only remember meeting Cilley one time and that was to gather facts not to prepare him for testimony. Elliott stated he told the defense witnesses what he tells all witnesses—“the importance of testifying based only on his or her own personal knowledge and to separate hearsay from fact.” When viewed in light of the whole record, we cannot conclude the evidence demonstrates Elliott tried to improperly influence Cilley’s testimony.

Additionally, when we balance this speculative assertion of witness tainting against the important interests implicated when an attorney is disqualified, we are convinced Elliott's disqualification was improper. First and foremost, The Stockade has a right to counsel of its choice and Elliott has a significant interest in representing The Stockade. The Stockade also has a significant financial interest in keeping Elliott as its counsel of record. We conclude the trial court's ruling Elliott improperly tried to influence Cilley's testimony was too speculative. Thus, Elliott's disqualification, a drastic course of action, was unwarranted.

DISPOSITION

The motion to consolidate is granted. The order disqualifying Elliott is reversed on appeal. The petition is granted. Let a peremptory writ of mandate issue, directing the Superior Court of Orange County to vacate its orders granting real party in interest's motion to exclude witnesses and to enter a new order denying the motion. Having served its purpose, the order to show cause is discharged. The stay is dissolved upon the finality of the opinion as to this court. Appellants/Petitioners are awarded their costs on appeal and in the writ proceeding.

O'LEARY, P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.