Filed 3/27/19 Ossur Americas, Inc. v. Lasso CA4/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ÖSSUR AMERICAS, INC., Plaintiff, Cross-Defendant and Respondent, v. JOHN LASSO, Defendant, Cross-Complainant and Appellant.	G055125 (Super. Ct. No. 30-2016-00884951) O P I N I O N

Appeal from An order of the Superior Court of Orange County, John C. Gastelum, Judge. Affirmed.

Haight Brown & Bonesteel, William O. Martin, Jr., Vangi M. Johnson, R. Bryan Martin, Kristian Moriarty, Frances Ma; and Brownstone Law Group, and Thomas A. Moore, for Defendant, Cross-Complainant and Appellant.

Call & Jensen, Scott R. Hatch, and Joshua G. Simon, for Plaintiff, Cross-Defendant and Respondent.

* * *

Team Makena, LLC is a closely-held manager-managed limited liability company with only two owners – respondent Össur Americas, Inc, (81.5 percent owner) and appellant John Lasso (18.5 percent owner). The law firm of Call & Jensen represented Team Makena and Össur in a lawsuit against Lasso, which was based on Lasso's alleged wrongdoing while serving as Team Makena's president. Lasso filed a cross-complaint against Össur, which included a derivative claim against four Össur-appointed managers of Team Makena. Call & Jensen then withdrew from representing Team Makena.

Lasso moved to disqualify Call & Jensen as Össur's counsel, arguing that its previous representation of Team Makena precluded its successive representation of Össur. The trial court denied the motion, after finding "there is no information Call & Jensen could have received from Team Makena that is different from the information Call & Jensen received from Össur." We affirm.

I

FACTUAL AND PROCEDURAL BACKGROUND

On November 3, 2016, Team Makena and Össur filed a complaint against Lasso, alleging claims for breach of fiduciary duty and unfair competition. Call & Jensen was counsel of record for both Team Makena and Össur.

On January 25, 2017, Lasso filed a cross-complaint against Össur, Team Makena, Otto Fernandez, Mark Tymchenko, Olafur Gylfason, and Christian Robinson. The cross-complainant's fourth cause of action alleged a shareholder derivative claim for breach of fiduciary duty brought on behalf of Team Makena against the individual defendants, who were allegedly Össur-appointed managers of Team Makena.

On February 7, 2017, Team Makena substituted in new counsel – Jeffrey Shields of Shields Law Offices – in place of Call & Jensen.

On February 9, 2017, Lasso moved to disqualify Call & Jensen as Össur's counsel. Lasso argued "there exists an actual conflict of interest between Team Makena and Ossur such that Call & Jensen, APC's successive representation of Ossur mandates disqualification." According to Lasso, "[u]nlike most situations the confidential information of Team Makena does not overlap with the confidential information of Ossur" because Ossur is a manufacturer of medical devices while Team Makena is a distributor of those devices.[1]

In opposition, Call & Jensen asserted that all confidential information it received from Team Makena came from Össur-appointed managers, to which Össur had access. Thus, according to Call & Jensen, "there is no information that [it] now has from or about Team Makena that the Össur Managers do not also already possess."

In support of Call & Jensen's opposition to Lasso's motion to disqualify, Fernandez submitted a sworn declaration stating he is both a manager of Team Makena and a vice-president of Össur. Fernandez explained that as the majority owner, Össur had the right to appoint up to five of Team Makena's seven managers. A majority of Team Makena's managers, consisting of Fernandez and other Össur-appointed managers, hired Call & Jensen to prosecute Team Makena's and Össur's claims against Lasso. Fernandez further stated: "During the time Call & Jensen represented both Össur and Team Makena against Lasso, all information Call & Jensen was provided by Team Makena for purposes of rendering legal services and advice came from the Össur Managers of Team Makena. Össur had access to all corporate information of Team Makena to which Call & Jensen had access."

On May 8, 2017, the trial court denied Lasso's motion to disqualify Call & Jensen. In its written ruling, the court stated "[t]he evidence proffered in connection with this motion establishes that Team Makena was managing this litigation through Managers

[1] Lasso did not seek to disqualify Call & Jensen from representing the individual Össur-appointed managers.

appointed by Ossur Americas. Accordingly, it appears there is no information Call & Jensen could have received from Team Makena that is different from the information Call & Jensen received from Ossur Americas, and Mr. Lasso provides no evidence to the contrary. Therefore, on the record presented and the authority discussed above, it appears Call & Jensen's continued represent[ation] of Ossur Americas poses no threat to Call & Jensen's continuing duty of confidentiality to Team Makena."

II

DISCUSSION

A. *Law on Attorney 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.'" (*People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc*. (1999) 20 Cal.4th 1135, 1145 (*SpeeDee Oil*); see Code Civ. Proc., § 128, subd. (a)(5).) "Generally, a trial court's decision on a disqualification motion is reviewed for abuse of discretion. [Citations.] If the trial court resolved disputed factual issues, the reviewing court should not substitute its judgment for the trial court's express or implied findings supported by substantial evidence. [Citations.] When substantial evidence supports the trial court's factual findings, the appellate court reviews the conclusions based on those findings for abuse of discretion. [Citation.] . . . In any event, a disqualification motion involves concerns that justify careful review of the trial court's exercise of discretion." (*SpeeDee Oil*, *supra*, 20 Cal.4th at pp. 1143-1144.)

"Disqualification motions implicate competing considerations. On the one hand, these include clients' rights to be represented by their preferred counsel and deterring costly and time-consuming gamesmanship by the other side." (*Banning Ranch*

Conservancy v. Superior Court (2011) 193 Cal.App.4th 903, 911.) "Balanced against these are attorneys' duties of loyalty and confidentiality and maintaining public confidence in the integrity of the legal process." (*Ibid.*) """A conflict of interest exists when a lawyer's duty on behalf of one client obligates the lawyer to take action prejudicial to the interests of another client; i.e., 'when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.'""" (*Coldren v. Hart, King & Coldren, Inc.* (2015) 239 Cal.App.4th 237, 248, italics omitted.)

"California courts have identified two separate categories in which actual or potential conflicts of interest arise in counsel's representation of multiple clients. One is the successive representation of multiple clients resulting in a conflict of interest, i.e., where the attorney's representation of the current client may conflict with the interests of a former client. . . . Under those circumstances, 'the courts have recognized that the chief fiduciary value jeopardized is that of client *confidentiality*.' [Citation.] The other circumstance is the concurrent (or dual) representation of multiple clients resulting in a conflict of interest . . . , in which '[t]he primary value at stake . . . is the attorney's duty—and the client's legitimate expectation—of *loyalty*, rather than confidentiality.'" (*M'Guinness v. Johnson* (2015) 243 Cal.App.4th 602, 613 (*M'Guinness*).)

"In successive representation cases, where the former client seeks to disqualify counsel from representing a successive client in current litigation adverse to the former client's interest, the former client must 'demonstrate a "*substantial relationship*" between the subjects of the antecedent and current representations.' [Citation.] A substantial relationship exists where 'the attorney had a direct professional relationship with the former client in which the attorney personally provided legal advice and services on a legal issue that is closely related to the legal issue in the present representation.'" (*M'Guinness*, *supra*, 243 Cal.App.4th at p. 614.) "'Where the requisite substantial relationship between the subjects of the prior and the current representations

can be demonstrated, access to confidential information by the attorney in the course of the first representation (relevant, by definition, to the second representation) is *presumed* and disqualification of the attorney's representation of the second client is mandatory. . . [Citation.].'" (*Ontiveros v. Constable* (2016) 245 Cal.App.4th 686, 696 (*Ontiveros*).)

This matter involves derivative claims. In a derivative lawsuit, "although the company is named as a nominal defendant based on the insiders' refusal to bring the lawsuit on the company's behalf, the company is the true plaintiff." (*Beachcomber Management Crystal Cove, LLC, v. Superior Court* (2017) 13 Cal.App.5th 1105, 1118 (*Beachcomber Management*). "The company's status as the true plaintiff prevents an attorney from representing both the company and its insiders in a derivative lawsuit that alleges the insiders breached their duties owed to the company or otherwise injured the company. Such representation would be an impermissible concurrent representation of clients with conflicting interests." (*Ibid*.)

"Successive representation rules, however, generally do not prevent an attorney from continuing to represent insiders in a derivative lawsuit even though a substantial relationship exists between the attorney's previous representation of the company and the attorney's current representation of insiders in the company's lawsuit against them. [Citations] This separate rule derives from a recognition that insiders are the source of a closely held company's confidential information. [Citations.]" (*Beachcomber Management, supra*, 13 Cal.App.5th at pp. 1118-1119.) In a closely held company, the few insiders responsible for operating a small company often know all of the company's confidential information. "In that situation, it would be meaningless to apply the successive representation rules to prevent an attorney who previously represented the company from representing the company's insiders." (*Id*. at p. 1119)

Forrest v. Baeza (1997) 58 Cal.App.4th 65 (*Forrest*) is instructive. There, a minority shareholder in two closely held corporations brought a derivative suit against the other two shareholders. The minority shareholder sought to disqualify the attorney

who represented both the corporations and the majority shareholders in the lawsuit. The Court of Appeal affirmed the trial court's order, which granted the motion to disqualify the attorney from representing the corporations, but denied the motion to disqualify the attorney from representing the majority shareholders. (*Forrest*, *supra*, 58 Cal.App.4th at pp. 68-72.) The *Forrest* court explained that "in the factual circumstances of this case, where [the attorney] has been representing a corporation comprised of three shareholders solely by virtue of his relationship with . . . the majority directors/shareholders, it is impossible to conceive of confidential information [the attorney] could have received from the 'corporation' that is different from information he received from the [majority shareholders]." (*Id*. at p. 82.) Relying on *Forrest*, various Courts of Appeal have reached similar results. (See, e.g., *Gong v. RFG Oil, Inc.* (2008) 166 Cal.App.4th 209, 217 [reversing trial court's order disqualifying attorney from continuing to represent 51 percent majority shareholder]; see also *Blue Water Sunset, LLC v. Markowitz* (2011) 192 Cal.App.4th 477, 490-491 [affirming trial court's order allowing attorney to continue representing one 50 percent member in certain LLC's]; *Ontiveros*, *supra*, 245 Cal.App.4th at pp. 699-700 [holding that the trial court erred in disqualifying attorney from representing majority shareholders].)

B. *Motion to Disqualify Call & Jensen*

Here, the trial court found that "there is no information Call & Jensen could have received from Team Makena that is different from the information Call & Jensen received from Ossur Americas, and Mr. Lasso provides no evidence to the contrary." Fernandez's uncontradicted declaration supports the trial court's finding. On this record, Call & Jensen's continued representation of Össur poses no threat to Call & Jensen's continuing duty of confidentiality to Team Makena. (See *Ontiveros*, *supra*, 245 Cal.App.4th at p. 700 [where trial court found that "*Forrest*'s 'intertwined' scenario 'seems to describe what we have here'" and "Ontiveros does not cite any record evidence

to the contrary," "Counsel's continued representation of the [majority shareholders] poses no threat to Counsel's continuing duty of *confidentiality* to [the company]."].)

Lasso contends this case is distinguishable from *Forrest* because (1) the majority shareholder here is a corporate entity that appoints managers for Team Makena who are concurrently officers and/or directors of the corporate entity, and (2) Call & Jensen continued to receive Team Makena's confidential information from the corporate entity. We do not find Lasso's contentions persuasive.

It is well-established that a corporation is "an artificial person" that "acts through its members, or officers, or agents." (*Dearborn v. Grand Lodge, A.O.U.W.* (1903) 138 Cal. 658, 663; see also *Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 77 ["A corporation can act only through its individual employees."].) Here, Össur controlled Team Makena's litigation decisions through its agents – the Össur-appointed managers. Those agents – who are also officers and/or directors of Össur – had access to Team Makena's confidential information, and the agents' knowledge can be inputted to Össur. (See *People v. Parker* (1965) 235 Cal.App.2d 86, 93 ["A corporation, of course, can acquire knowledge only through its officers and agents."].) The Össur-appointed managers provided Team Makena's confidential information to Call & Jensen and as the trial court found, Call & Jensen would not receive different information from the Össur-appointed managers.

Call & Jensen's purported continued receipt of Team Makena's confidential information from Össur-appointed managers does not change our analysis. Rather, it confirms that "it is impossible to conceive of confidential information [Call & Jensen] could have received from the [Team Makena] that is different from information he received from [Össur]." (*Forrest*, *supra*, 58 Cal.App.4th at p. 82.) In sum, the trial court properly denied Lasso's motion to disqualify Call & Jensen from

continuing to represent Össur because the continued representation does not pose any threat to Call & Jensen's continuing duty to preserve Team Makena's confidences.[2]

III

DISPOSITION

The order denying the motion to disqualify is affirmed. Respondent is entitled to its costs on appeal.

ARONSON, J.

WE CONCUR:

O'LEARY, P. J.

BEDSWORTH, J.

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[2] Lasso's reliance on *Hernandez v. Paicius* (2003) 109 Cal.App.4th 452 (*Hernandez*), disapproved on other grounds by *People v. Freeman* (2010) 47 Cal.4th 993, is misplaced. *Hernandez* involved dual representation, not successive representation. (See *Hernandez*, 109 Cal.App.4th at p. 466 ["Defendant counsel's firm was simultaneously representing defendant *and* Aengst."].)