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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

LENDING TEAM MORTGAGE, INC., and WING CHAN, Plaintiff, Cross-defendant and Appellants, v. TAK TSUI MORTGAGE, INC., TAK TSUI and GRACE LAW, Defendants, Cross-complainants and Respondents.	A127818 (San Francisco County Super. Ct. No. CGC-06-458970)

Appellants Lending Team Mortgage, Inc., (LTM) and Wing Chan challenge the trial court's order denying their motion to disqualify attorney Frannie Mok as counsel for respondents Tak Tsui Mortgage, Inc., Tak Tsui and Grace Law. They contend Mok should have been disqualified as respondents' counsel because it is conclusively presumed she obtained confidential information from Chan when she represented him in a prior matter. We reject the contention and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

LTM filed an action against respondents[1] on December 21, 2006. The first amended complaint, which is the operative complaint, is not a part of the record, but the parties describe the action as one involving an allegation that respondents engaged in

[1] California Properties and Loans, Inc., was also named as a defendant but has been dismissed without prejudice and is not a party to this appeal.

business using LTM's trade name without LTM's consent.[2] Respondents appeared in the matter through their attorney of record, Mok, who filed a demurrer to the complaint. LTM filed a first amended complaint on March 12, 2007, and on June 12, 2008, Tsui filed a cross-complaint against Chan, the sole owner and president of LTM. The trial court granted respondents' motion for a separate trial on their statute of limitations defense, and that trial was scheduled for December 14, 2009.

On November 19, 2009, appellants filed an ex parte application to disqualify Mok as counsel for respondents and alternatively for an order shortening time. Counsel for appellants submitted a declaration stating Chan "brought up for the first time" on October 29, 2009, that Mok had represented him in 1999. Chan submitted a declaration stating he and Tsui met "almost twenty years ago" and that their relationship "continued to grow into a close personal friendship with daily contact" and "discussion of many business matters." Chan was involved in a "serious legal matter" in 1999 and, upon Tsui's advice, "engaged the services of" Mok. He disclosed confidential information to Mok over the course of "a month or more" and Mok advised him and wrote several letters on his behalf. He did not mention Mok's representation of him to his attorneys because he did not realize that her representation of respondents "m[ight] be illegal." He never consented to Mok's representation of Tsui and Mok did not ask him to sign a conflict waiver. Chan attached to his declaration several letters between Mok and an insurance company and one letter from Mok to Chan, all dated from March 16 to 29, 1999, and relating to the withdrawal of an insurance claim for a "theft" that occurred on July 13, 1998.

Respondents opposed the application and request to shorten time on the ground the matter was not one that should be heard on an ex parte or shortened time basis. Respondents stated they would be in a "better position to evaluate the merits" of the claims once they took Chan's noticed deposition on November 25, 2009. Mok submitted

[2] According to appellants, the complaint alleges causes of action for fraud and deceit, breach of oral agreement, breach of fiduciary duty, conversion, conspiracy to defraud, constructive trust, unjust enrichment, and accounting.

a declaration stating she began representing Tsui in the instant litigation in December 2006. She had never represented LTM, the plaintiff in the matter, and her office conflict check did not detect any conflict. She first learned of the "alleged conflict of interest" on November 13, 2009, and after "diligently search[ing] for all records," "discovered that [she had] assisted, at [Tsui's] request, [Chan] and his family member in a very minor personal matter by writing some letters to an insurance company on his behalf." Tsui was her church friend, and "as a courtesy to Mr. Chan based upon his friendship with [her] long-standing friend and client Mr. Tsui," Mok "made one phone call and wrote three short letters to the counsel of an insurance company to confirm that when the policyholder . . . (Mr. Chan's father), withdrew the claim for theft at his residence, the file would be closed with no further investigation." "Upon reviewing the documentary evidence submitted by" Chan, Mok recalled meeting with Chan once, with Tsui present. The next time she saw or communicated with Chan was when she deposed him for the instant litigation in April 2007. When she met with Chan and Tsui in 1999, there was no discussion of any business matters and Chan provided no confidential information or any information that could be related to the instant litigation. LTM was not incorporated until September 2002, and the March 1999 matter, which related to an insurance claim, did not contain the same subject matter and created no "substantial relationship [to] the instant litigation which involves business transaction disputes [that] purportedly began in 2003." Tsui was Chan's insurance agent and presumably had more information about the insurance claim than she did.

Mok further declared that disqualification would unduly prejudice her clients. As lead counsel, she had reviewed over 17 boxes of documents, had written most of the motions including a summary judgment motion, and was defending respondents in their depositions. Attorney George Lee, whom she had associated to assist her at trial, was an experienced civil litigator but did not "understand Chinese," which was respondents' primary language and Mok's native language. She had spent substantial time preparing for a jury trial that was scheduled to commence on December 14, 2009, including issuing

and arranging service of subpoenas, preparing trial exhibits, hiring Chinese interpreters for depositions and trial, and communicating with and retaining experts.

At a November 20, 2009, hearing, the trial court denied appellants' request to have the matter heard on an ex parte or shortened time basis. The trial court further ordered that respondents be permitted to take the deposition of Chan on November 25, 2009, on the limited topic of the alleged prior representation by Mok. The trial court vacated the trial date of December 14, 2009, and scheduled a hearing on the motion to disqualify for January 29, 2010.

Respondents submitted an opposition to the motion to disqualify on January 14, 2010, and attached certain portions of the transcript from Chan's November 25, 2009, deposition. At his deposition, Chan testified he had "[v]ery frequent contact" with Tsui before the instant litigation commenced and that they discussed "everything," including business and personal matters. In 1998 or 1999, he told Tsui his house was burglarized, and Tsui advised him not to make a claim because it could increase his insurance premium. When Chan's house was burglarized a second time the same year, the total loss was $20,000 to $30,000, and Chan's wife insisted on filing a claim. Tsui urged Chan to make a false claim because the reimbursement would otherwise be "pretty small" for the cash and jewelry that was stolen. After the insurance company sent a representative to his house and "deposed" him, Chan told Tsui he no longer wished to make the claim "because it's a fraud." Tsui then referred Chan to Mok, an attorney who was Tsui's close friend and was representing him in Tsui's divorce case. By the time Chan called Mok, Tsui had already explained the situation to Mok so she was "aware of what [was] going on." The meeting between Chan and Mok[3] therefore lasted "[n]o more than 15 minutes" and "the purpose of [the] meeting . . . was only to sign [some] papers." Chan told Mok he did not "want any trouble" and that he would rather take a loss than have the insurance company investigate him and Tsui. Mok told Chan she would call the insurance

[3] Chan testified Tsui was not present at the meeting.

company and request that the claim be dropped, and that it was a "simple" matter and "not that big a deal."

Chan testified that after the insurance matter was resolved, he spoke to Mok, "off and on," or "pretty sporadic[ally]" about other matters. He did not recall how many times he spoke to her but thought it was "no more than five times." He testified there were five general categories of confidential information he provided to Mok: (1) his family history; (2) his family credit; (3) tax information; (4) information regarding commissions; and (5) his desire to start a company. In particular, he told her his marriage status and income, his brother-in-law's income, his father-in-law's name, age and income, and the fact that his in-laws had "applied for someone to come over to this country from China." He also told Mok that he was the owner of the house in which he lived even though his father-in-law's name was on title because Chan had filed for bankruptcy. He asked Mok how he would pay referral fees and how he could avoid paying too much in taxes if he were to start a company. He did not remember what Mok told him in response. Chan testified that all information he disclosed to Mok had already been disclosed to Tsui because Chan never lied to Tsui about anything and "[a]mong our group of friends nobody held any secrets." He also did not think there was anything about his personality that Mok learned that Tsui did not already know.

Mok submitted a second declaration in which she reiterated she had met with Chan (together with Tsui) only once, in March 1999. She stated, "I have no recollection and have searched and found no records showing that I have ever had any meeting or conversation with Mr. Chan after March 1999. Indeed, from April of 1999, I had a complicated pregnancy which required that I stay home [on] bed rest for several months."

Respondents filed a reply brief on January 22, 2010. The trial court denied the motion at a hearing on January 29, 2010, and in a written order filed February 22, 2010, stated, "The moving parties have not demonstrated that any confidential information was imparted to Ms. Mok during the alleged prior representation, or that the alleged prior representation has any substantial relationship to Ms. Mok's representation of defendants in the instant matter." Appellants filed a notice of appeal on February 25, 2010.

DISCUSSION

General principles

Disqualification of counsel may be ordered "when necessary in furtherance of justice. (Code Civ. Proc., § 128, subd. (a)(5).)" (*Elliott v. McFarland Unified School Dist.* (1985) 165 Cal.App.3d 562, 567.) In ruling on a motion for disqualification, " '[t]he court must weigh the combined effect of a party's right to counsel of choice, an attorney's interest in representing a client, the financial burden on a client of replacing disqualified counsel and any tactical abuse underlying a disqualification proceeding against the fundamental principle that the fair resolution of disputes within our adversary system requires vigorous representation of parties by independent counsel unencumbered by conflicts of interest. [Citations.]' " (*In re Marriage of Zimmerman* (1993) 16 Cal.App.4th 556, 562-563.) "The paramount concern must be to preserve public trust in the scrupulous administration of justice and the integrity of the bar." (*People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1145 (*SpeeDee*).)

The trial court's decision on disqualification will not be disturbed on appeal absent an abuse of discretion. (*Elliott v. McFarland Unified School Dist., supra*, 165 Cal.App.3d at p. 566.) On appeal from the denial of a motion to disqualify counsel, "[t]he judgment of the trial court is presumed correct, all intendments and presumptions are indulged to support the judgment, conflicts in the declarations must be resolved in favor of the prevailing party, and the trial court's resolution of any factual disputes arising from the evidence is conclusive. [Citation]." (*McMillan v. Shadow Ridge at Oak Park Homeowner's Assn.* (2008) 165 Cal.App.4th 960, 965.)

Appellants' contention

Appellants contend it is conclusively presumed that Mok obtained confidential information during her representation of Chan because "the prior matter and [the] current matter" are "substantially related." We disagree.

Under California Rules of Professional Conduct Rule 3-310(E), an attorney "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 [attorney] has obtained confidential information material to the employment." Thus, "a former client may seek to disqualify a former attorney from representing an adverse party by showing that the former attorney possesses confidential information adverse to the former client. [Citation.]" (*Henriksen v. Great American Savings & Loan* (1992) 11 Cal.App.4th 109, 113.)

The former client need not establish that the attorney actually possesses confidential information. (*Henriksen v. Great American Savings & Loan, supra,* 11 Cal.App.4th at p. 114.) Rather, possession of confidential information is conclusively presumed and disqualification is proper where there is a " 'substantial relationship' " between the former representation and current representation. (*SpeeDee, supra,* 20 Cal.4th at p. 1146; *Flatt v. Superior Court* (1994) 9 Cal.4th 275, 283.) In determining whether a substantial relationship exists, a court should " 'focus on the similarities between the two factual situations, the legal questions posed, and the nature and extent of the attorney's involvement with the cases. As part of its review, the court should examine the time spent by the attorney on the earlier cases, the type of work performed, and the attorney's possible exposure to formulation of policy or strategy.' " (*H. F. Ahmanson & Co. v. Salomon Brothers, Inc.* (1991) 229 Cal.App.3d 1445, 1455.)

Here, it is undisputed that Mok assisted Chan in withdrawing an insurance claim in March 1999 after his home was burglarized. It is also undisputed that the instant litigation, filed in December 2006, relates to the misuse of LTM's trade name. As Mok declared, LTM was not incorporated until September 2002—three and a half years after the insurance claim was closed—and the business disputes that resulted in the instant litigation did not arise until 2003. Appellants argue the matters are similar because Tsui, who encouraged Chan to file a fraudulent insurance claim in connection in 1998 or 1999, is now being sued for fraudulent use of the LTM trade name, i.e., both matters involve fraud. Appellants state, "In other words, central to both issues was/is Mr. Tsui's honesty, veracity, and tendency to (allegedly) commit/advise toward misrepresentations." The credibility of a party, however, is at issue in most cases, and the fact that Tsui may have

been accused of being a dishonest person in connection with both matters does not establish a substantial relationship between those matters. (See *Santa Teresa Citizen Action Group v. City of San Jose* (2003) 114 Cal.App.4th 689, 711 [it is not enough to show the former and current representations involve the same general subject matter].)

Further, the evidence shows that Mok's representation of Chan in the March 1999 matter was limited. In addition to writing several letters, Mok had possibly one phone conversation with Chan and a meeting that lasted "[n]o more than 15 minutes" and was held for the sole purpose of signing some papers. The letters Mok wrote were short and related only to the issue of withdrawing the insurance claim. Although Chan testified he also spoke to Mok after the conclusion of the March 1999 matter, his testimony showed he called her "no more than five times," "off and on," or "pretty sporadic[ally]," and provided her only with information already known to Tsui and their group of friends. His testimony relating to the business issues he said he discussed with Mok was vague and indicated at most that he told her he was interested in starting a business and asked her general questions relating to referral fees and taxes to which he did not recall receiving any specific response. Further, Mok stated in her second declaration that she did not recall, and she found no records showing, she ever met with or had a conversation with Chan after she assisted him with his insurance claim. There was ample evidence supporting the trial court's finding that there was no substantial relationship between the March 1999 matter and the instant litigation.[4]

The two cases on which appellants primarily rely do not support their contention. First, appellants cite *Knight v. Ferguson* (2007) 149 Cal.App.4th 1207, 1213 (*Knight*), for its holding that the substantial relationship test "is broad and not limited to the 'strict facts, claims, and issues involved in a particular action.' " In *Knight*, however, an

[4] Appellants argue the trial court erred in issuing a "bare bones Order," which "left [them] wondering [about] the facts and law upon which the Court issued its order." The trial court, however, issued a written order setting forth its findings. Appellants did not request—and have cited no authority for their position the trial court was required to issue—more specific findings of fact. We therefore reject this argument. We also deny respondents' belated motion to augment the record with documents relating to this issue.

attorney was disqualified from representing the defendants in a partnership dissolution action where the attorney had previously represented both the plaintiff and the defendants with regard to the formation *of the very partnership that was issue in the action*. (*Id.* at p. 1211.) The Court of Appeal affirmed the trial court's order disqualifying the attorney, concluding that although the legal issues and strategies discussed during the two representations were different, a substantial relationship existed because the two matters involved the same partnership and the prior representation occurred "at a critical stage, when [plaintiff] was creating the business entity [that] is at the heart of this action." (*Id.* at p. 1213.) In contrast, here, Mok's representation of Chan in the March 1999 matter did not relate in any way to the business disputes that arose several years later.

Second, appellants cite *City and County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, in support of their argument that an attorney's possession of confidential information is conclusively presumed where there is a "prior, direct relationship" between the attorney and the former client. The case, however, held: "To determine whether there is a substantial relationship between successive representations, a court must first determine whether 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.*" (*Id.* at p. 847, italics added; see also *Jessen v. Hartford Casualty Ins. Co.* (2003) 111 Cal.App.4th 698, 710-711 [same].) It did not hold that a "prior, direct relationship" *alone* was sufficient to create a conclusive presumption that the attorney obtained confidential information.[5]

[5] Appellants also argue the trial court erred in finding respondents would be prejudiced by Mok's disqualification. Although, as noted, Mok set forth in her declaration how respondents would be prejudiced by her disqualification, the trial court did not make any findings as to prejudice and does not appear to have based its decision on this ground. In any event, we note that any implied finding by the trial court that respondents would be prejudiced was supported by Mok's declaration, which constituted substantial evidence in support of such a finding.

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

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McGuiness, P.J.

We concur:

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Siggins, J.

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Jenkins, J.