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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

PETER CHONG,

Plaintiff and Appellant,

v.

MAUREEN R. KALLINS et al.,

Defendants and Respondents.

A111844

(San Francisco County
Super. Ct. No. 315887)

Appellant Peter Chong appeals from a judgment entered in favor of respondent Maureen Kallins denying recovery of attorney fees he had advanced. Chong contends Kallins breached both her fiduciary duties to him and her contract with him. We reverse.

I. BACKGROUND

A federal grand jury indicted Chong and Raymond Chow, apparently in the early 1990s, on charges of racketeering, arson, drug trafficking, extortion, murder and conspiracy. Chong was arrested, but the United States's attempt to extradite him from Hong Kong failed, and he was released. Chow hired Kallins as his attorney. His trial was assigned to Judge Lowell Jensen of the United States District Court for the Northern District of California, and ended in a hung jury. During Chow's trial, both Chong's attorney and his daughter, Sandy Chong, were in frequent telephone contact with Kallins, and Chong received information about the progress of the trial.

Chong was later re-arrested. In 2000, while Chong was awaiting extradition from Hong Kong to California, Sandy Chong contacted Kallins regarding possible

representation of her father, and Chong telephoned Kallins from the jail in Hong Kong to ask her to represent him.

In their first telephone conversation, Kallins told Chong that she knew the case well because she had represented Chow, and Chong said he wanted her to represent him because of her success in the Chow case. Kallins flew to Hong Kong and met with Chong and his family several times before extradition. Kallins was initially unwilling to take the case, but ultimately agreed to represent Chong for a fee of \$200,000.

Kallins testified at length about her conversations with Chong in Hong Kong. Chong knew that in defending Chow, Kallins had taken the position that Chong was responsible for the crimes at issue. Chong said to Kallins, “So, you blamed me”; Kallins replied, “Yeah, you weren’t there. Of course, I did”; and the two laughed. Kallins also told Chong on several occasions that the fact she had represented Chow might become an impediment to her representation and that the government would claim she had a conflict of interest. She did not believe there was such a conflict and at the time did not know Chow would “turn against” Chong and testify against him.¹ According to Kallins, Chong understood the meaning of a conflict, he understood why the judge might remove her, and he understood why she believed there was not a disqualifying conflict. Kallins did not make a written disclosure of a conflict or potential conflict of interest and did not obtain a written waiver from Chong.

The parties entered into a retainer agreement in April 2000. The agreement required Chong to pay a flat fee of \$200,000. Because of the concern that the government might seek to have Kallins disqualified because she had represented Chow, the agreement contained the following provision: “This fee is non-refundable except if representation is interrupted by judicial intervention. In that case and only in that case,

¹ Kallins testified that Chong told her of a rumor that Chow might testify against him.

attorney will refund \$150,000.00 to Client's family."² The fee became nonrefundable when Kallins made a general appearance in the case.

After Chong was extradited to California, the federal prosecutor raised the issue of a conflict of interest at Chong's court appearances with Kallins on May 30, June 5, June 8, June 30, and July 7, 2000, each time indicating he would file a motion to disqualify Kallins. He explained the nature of Kallins's prior representation of Chow and that Kallins had previously blamed Chong for the crimes that were the subject of the federal prosecution. He argued that any representation of Chong would be inconsistent with Kallins's prior representation of Chow.³ In the July hearing, he told the court that Chow would be a witness in Chong's trial. Kallins met with Judge Jensen in camera to discuss the possible conflict, and he allowed her to continue representing Chong, but set a schedule for any motion to disqualify Kallins.⁴ No motion to disqualify Kallins was filed, and no disqualification hearing took place.

In August 2000, Chong apparently wrote to the district court requesting substitution of counsel. A magistrate judge conditionally granted the request on August 15, 2000, subject to Judge Jensen's final approval. Judge Jensen thereafter told Kallins that Chong no longer wanted her to represent him and that she was being removed from the case. Chong testified at his deposition that he requested a different attorney for

² The trial court accepted as true Kallins's testimony that Chong understood the possibility that the government might seek to have her disqualified, and that both parties understood the "judicial intervention" clause to refer to the possibility that a judge might remove Kallins from the case due to a conflict of interest.

³ Chong stated in his deposition that he asked Kallins about the possible conflict; she told him that the prosecutor wanted to make them uncomfortable and that if the prosecutor were serious about the potential conflict, he would bring a motion.

⁴ Kallins testified that after she met with Judge Jensen, he said, "OK, you can proceed to represent him." On the record, Judge Jensen stated: "At our last appearance, Ms. Kallins had indicated to the court that she believed that there ought to be a meeting in camera with reference to continued representation of Mr. Chong. We did have such a meeting. Ms. Kallins appeared and we had an in camera proceeding. That means that we are continuing under the same status here, but obviously if there is a change of circumstances, then we'll have to deal with that and that's what the [proposed disqualification] motion will do."

several reasons, including Kallins's constant demands for money, her lack of communication with Chong, her failure to produce motions or other completed work, and her lack of trial preparation.

In March 2001, Chong brought this action against Kallins, alleging causes of action for rescission of contract, breach of contract, fraud, conversion, and breach of fiduciary duty. After a bench trial, the trial court entered judgment for Kallins. In doing so, the court found that Chong had read the transcripts of Chow's trial at or near the time of the trial, that Kallins had disclosed her potential conflict of interest to Chong before he signed the retainer, that he agreed to hire her despite the potential conflict, and that Kallins was not removed from Chong's case because of a conflict of interest or by judicial intervention. The court concluded that Chong was "well aware of the potential conflict of interest before and after he signed the fee agreement," that he understood the phrase "judicial intervention" to refer to the possibility Kallins might be removed from the case due to conflict of interest, that any conflict of interest in the case was resolved in Kallins's favor by "an experienced federal judge with first hand knowledge of the case," and that Kallins was not removed because of any conflict of interest, but because Chong had fired her. Accordingly, the trial court ruled that Chong was not entitled to recover damages or rescind the retainer agreement. This timely appeal ensued.

II. DISCUSSION

Where the issue on appeal is one of law, we exercise our independent judgment, giving no deference to the trial court's ruling. (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799). Where the issue on appeal is a question of fact, however, we apply a different standard of review. We determine whether there is any substantial evidence which will support the conclusion of the trier of fact, and review the trial court's factual and evidentiary determinations in the light most favorable to the prevailing party. (*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053.) All issues of credibility are within the province of the trier of fact. (*Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 925-926.) Where the facts reasonably support more than one inference, we may not substitute

our judgment for that of the trier of fact. (*In re Walter E.* (1992) 13 Cal.App.4th 125, 139-140.)

Chong contends that under the Rules of Professional Conduct, Kallins was required to disclose in writing the nature of her potential conflict and obtain Chong's written waiver, that she breached her fiduciary duty to him by failing to do so, and that she should therefore forfeit the fees she received from him. Rule 3-310(B)(2) of the Rules of Professional Conduct⁵ requires an attorney to provide written disclosure of conflicts to a client where the attorney knows that the attorney "previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter," and the previous relationship "substantially affects" the attorney's representation. Rule 3-310(C) provides that an attorney must obtain the informed written consent of each client when the attorney accepts "representation of more than one client in a matter in which the interests of the clients potentially" or "actually conflict." The purpose of the disclosure requirement is to inform the client of the relevant circumstances and the reasonably foreseeable adverse consequences, and to allow the client to make an informed decision to continue the representation. (*Day v. Rosenthal* (1985) 170 Cal.App.3d 1125, 1149.) Chong argues, and we agree, that the interests of Chow and Chong were in at least potential conflict, and that Kallins therefore was required to disclose the conflict in writing and obtain a written waiver. Her failure to do so meant that from the inception of the representation of Chong, she was in violation of her ethical obligations.

As a general rule, "an attorney may not recover for services rendered if those services are rendered in contradiction to the requirements of professional responsibility." (*Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 618 (*Goldstein*); see also *Cal Pak Delivery, Inc. v. United Parcel Service, Inc.* (1997) 52 Cal.App.4th 1, 14; *A.I. Credit Corp., Inc. v. Aguilar & Sebastinelli* (2003) 113 Cal.App.4th 1072.) It is true, as Kallins points out, that a technical violation of the Rules of Professional Conduct does not automatically preclude an attorney from obtaining fees under a retainer agreement. (*Pringle v. La*

⁵ All rule references are to the California Rules of Professional Conduct.

Chapelle (1999) 73 Cal.App.4th 1000, 1005-1006 (*Pringle*); *Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1097). In *Pringle*, for instance, an attorney drafted a retainer agreement acknowledging potential conflicts of interest in her defense of both a corporation and an officer of the corporation in a lawsuit. (*Pringle, supra*, 73 Cal.App.4th at p. 1002). After the representation ended, the officer, who was informed of the potential conflict, tried to escape the attorney fee obligation because the officer had signed the fee agreement in his individual capacity and not in his capacity as an officer of the corporation, a violation of rules 3-310 and 3-600. (*Pringle*, at pp. 1004-1005). The court concluded that there must be a “serious violation of the attorney’s responsibilities before an attorney who violates an ethical rule is required to forfeit fees.” (*Id.* at p. 1006). Relying on *Clark v. Millsap* (1926) 197 Cal. 765, 785, the court stated that “ “[f]raud or unfairness on the part of the attorney will prevent him from recovering for services rendered; as will acts in violation or excess of authority, and acts . . . incompatible with the faithful discharge of [his professional] duties.” ’ ” (*Pringle, supra*, 73 Cal.App.4th at p. 1006.) Similarly, in *In re Marriage of Friedman* (2002) 100 Cal.App.4th 65, 71, the court concluded that a law firm’s failure to obtain a written waiver of a potential conflict of interest was merely a “technical violation” of rule 3-310. The law firm there had represented both the husband and the wife on an estate plan, but represented only the husband on a postnuptial agreement.

The rule violation here, however, is not a minor technical violation of the rules. At Chow’s trial, Kallins had blamed Chong for the crimes with which Chow was charged. Chong was fighting federal criminal charges, and faced a mandatory minimum sentence of 10 years, with the possibility of imprisonment for life. The potential conflict went to the heart of Kallins’s loyalty to her client, and the stakes for Chong were exceedingly high. In the circumstances, Kallins’s failure to inform Chong in writing of the potential conflict and to obtain his written waiver was not excusable.

We recognize that the district court never ruled that Kallins was disqualified from representing Chong. However, Kallins has not pointed us to any authority for the proposition that an attorney loses the right to collect fees generated in violation of the

ethical rules only if a court disqualifies her. The ethical violation here was serious enough that we must apply the general rule—that is, that an attorney is not entitled to fees for services rendered in violation of the rules of professional responsibility. (*Goldstein, supra*, 46 Cal.App.3d at p. 618.)

Because we decide the case on this ground, we need not reach Chong’s argument that Kallins breached the fee agreement.⁶

III. DISPOSITION

The judgment is reversed.

RIVERA, J.

We concur:

RUVOLO, P.J.

SEPULVEDA, J.

⁶ Kallins has not contended that she would have been entitled to some or all of the fees under the doctrine of quantum meruit; accordingly, we do not consider the issue.