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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

FILED

MAY 21 1997

MULTIWAVE INNOVATION, INC.,
Plaintiff and Respondent,
v.
KRIS TECHNOLOGIES, INC., et al.,
Defendants and Appellants.

Court of Appeal - Sixth App.

H015543

(Santa Clara County
Super. Ct. No. CV753395)

Kris Technologies, Inc. (KTI) and Chan-Yong Chew appeal from an order of the trial court denying their motion to disqualify the Law Offices of Ann Koo from representing Multiwave Innovation Inc. (Multiwave) in this litigation. For reasons we shall explain, we reverse the order.

FACTS

KTI is a Delaware corporation that sells and distributes multimedia computer products. Its parent company is KCM Holdings, Inc. (KCM), which is currently owned 51 percent by appellant Chew and 49 percent by Ivan Lek. Prior to January 1994, however, Lek owned 70 percent of the holding company. At that time KCM took out a loan, and the lender demanded a personal guarantee from Chew, who had substantial real estate holdings in

Santa Clara County. In return for the guarantee, Lek transferred shares to Chew that gave him a majority (51 percent) interest in KCM.¹

In February 1995, Lek retained the Law Offices of Ann Koo to handle various legal matters for him, including the incorporation of a company known as ACS-Multimedia. (Lek, a resident of Singapore, owned several other ACS affiliates, including ACS Computer Pte. Ltd. Of Singapore.)

In the summer and fall of 1995, Lek entered into negotiations with Chew to buy out Chew's 51 percent interest in KCM. Lek's counsel, Ann Koo, and various associates in her firm, met with Chew several times in connection with this possible buy-out.

At these meetings, Chew discussed with the firm various other legal problems KTI was facing. Specifically, Chew asked for advice regarding potential trade secret and customer list misappropriation by one of KTI's employees, Jerry Wang, and various creditors'² claims. In June 1995, KTI paid the firm

¹ The agreement transferring the shares to Chew allegedly gave Lek an option to repurchase the shares when the loan was paid in full. In a separate lawsuit for specific performance, Lek is claiming that the loan was paid, that he attempted to exercise the option, and that Chew refused to turn the shares over. The trial court took judicial notice of the Lek complaint, Santa Clara County Superior Court number CV 756483.

² KTI obtains the computer products it sells from a number of suppliers around the world. Among these suppliers are respondent Multiwave, a creditor named Prospect Electronic Corp., and Lek's ACS companies. KTI's sale manager, Jerry Wang, who was allegedly (Continued.)

\$2,200 from its corporate account. Lek declared that the check was written for his personal legal expenses and that Chew agreed they could be paid from the corporate account. Chew, on the other hand, declared that payment was for legal services provided to KTI.

Following these conversations concerning creditor claims and the Wang/Multiwave misappropriation situation, the Koo firm drew up various documents, which it faxed to Chew on August 31, 1995, "for your review."³ The fax cover sheet asked Chew to "[p]lease call me if you have any questions or comments with respect to these drafts." The 14-page fax packet included a draft entitled "KRIS TECHNOLOGIES, INC. CONFIDENTIAL SEPARATION AGREEMENT AND RELEASE" to be used for each employee being laid off; another draft with the same title "KRIS TECHNOLOGIES, INC. CONFIDENTIAL SEPARATION AGREEMENT AND RELEASE" to be used specifically for Jerry Wang, and finally a draft entitled "KRIS TECHNOLOGIES, INC. ACTION BY UNANIMOUS WRITTEN CONSENT OF THE BOARD OF DIRECTORS," which concerned the transfer and assignment of a limited partnership. Attached to these draft documents were various exhibits and a promissory note.

diverting business away from KTI and to Multiwave now works for Multiwave.

³ The fax cover sheet listed under the heading "CLIENT/MATTER," "IVAN LEK/KRIS TECHNOLOGIES, INC." It did not state, however, that copies of these draft documents were also being sent to Lek.

KTI gave the Koo firm both its corporate records and KCM's corporate records. In addition, Chew declared under penalty of perjury that KTI signed a retainer agreement with the Koo firm in August 1995 and that the firm has a copy of that agreement. Ann Koo, also under penalty of perjury, claims this is untrue and that she made it clear to Chew that she was representing only Lek and not KTI. She attached billing statements made out in Lek's name only.

The proposed buy-out of Chew by Lek did not materialize, and the parties had a falling out. Within seven weeks of the time the Koo firm faxed the above-named documents to Chew, it had filed three suits against KTI. Two of these were collection actions brought by unpaid creditors. One of the creditors was Prospect; the other was Multiwave.⁴ A third lawsuit is a shareholder derivative action brought by Lek (as 49 percent shareholder) against Chew, KCM, and KTI. Following the filing of the three lawsuits, KTI demanded that the Koo firm return its and KCM's corporate records, which was done. KTI then filed a motion to disqualify the Koo firm. The court denied the motion, and KTI timely appealed.

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⁴ This appeal is from the denial of the motion to disqualify brought in the Multiwave collection suit. It is not known whether KTI filed similar motions in the two other cases.

STANDARD OF REVIEW

"In our review of disqualification motions, as elsewhere, the judgment of the lower court is presumed correct and all intendments and presumptions are indulged to support it on matters as to which the record is silent. [Citation.] Conflicts in the declarations are resolved in favor of the prevailing party and the trial court's resolution of factual issues arising from competing declarations is conclusive on the reviewing court. [Citations.]" (H. F. Ahmanson & Co. v. Salomon Brothers, Inc. (1991) 229 Cal.App.3d 1445, 1451.)

However, "[t]he discretion of a trial judge is not a whimsical, uncontrolled power, but a legal discretion, which is subject to the limitations of legal principles governing the subject of its action, and to reversal on appeal where no reasonable basis for the action is shown." (9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 277, pp. 287-288.)

DISCUSSION

A. KTI's Contentions

KTI contends the trial court abused its discretion in denying the disqualification motion because (1) the Koo firm previously represented KTI, (2) the matters discussed in the previous representation were substantially related to the matters in the instant suit, (3) the Koo firm currently represents KTI, in that shareholder derivative actions are brought on behalf of, as a guardian ad litem and trustee, of the corporation, and (4) the Koo firm's conduct is adverse to Lek who is a 49 percent

shareholder in KTI. KTI also argues that Lek cannot consent to the conflict of interest, and it points out that disqualification of one attorney in a law firm results in vicarious disqualification of the entire law firm.⁵ Because we agree with KTI's first contentions, and these require that the firm be disqualified, we need not reach the remaining arguments.

B. The Law Regarding Attorney Conflict of Interest

"It is beyond dispute a court may disqualify an attorney from representing a client with interests adverse to those of a former client. [Citations.]" (H. F. Ahmanson & Co. v. Salomon Brothers, Inc., supra, 229 Cal.App.3d at p. 1451.)

"Disqualification in cases of successive representation is based on the prohibition against 'employment adverse to a . . . former client where, by reason of the representation of the . . . former client, the [attorney] has obtained confidential information material to the employment. . . .' (Rule 3-310, Rules Prof. Conduct)" (H. F. Ahmanson & Co. v. Salomon Brothers, Inc., supra, 229 Cal.App.3d at p. 1451.) Furthermore, it is not necessary for a former client to show that the former attorney actually possesses confidential information. "It is

⁵ This is a correct statement of law. As the California Supreme Court recently observed, "Where the requisite substantial relationship between the subjects of the prior and the current representations can be demonstrated, . . . disqualification of the attorney's representation of the second client is mandatory; indeed, the disqualification extends vicariously to the entire firm. [Citations.]" (Flatt v. Superior Court (1994) 9 Cal.4th 275, 283.)

enough to show a 'substantial relationship' between the former and current representation. [Citation.]" (H. F. Ahmanson & Co. v. Salomon Brothers, Inc., supra, 229 Cal.App.3d at p. 1452; emphasis added.)

"The 'substantial relationship' test mediates between two interests that are in tension in such a context -- the freedom of the subsequent client to counsel of choice, on the one hand, and the interest of the former client in ensuring the permanent confidentiality of matters disclosed to the attorney in the course of the prior representation, on the other. 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" (Flatt v. Superior Court (1994) 9 Cal.4th 275, 283, italics omitted.)

C. Application of the Law to the Facts in this Case

Here one issue is whether there was any former representation of KTI by the Koo firm. As far as formal representation is concerned, Chew claims that KTI entered into a retainer agreement with the Koo firm in August 1995. Attorney Ann Koo claims otherwise. Likewise, Chew claims that KTI's payment to the firm was for legal services provided to KTI; Lek and his lawyers stated the payment was made by the company for Lek's personal legal expenses. The trial court implicitly

resolved these conflicts in the declarations in favor of the Koo firm, and its determination "is conclusive on the reviewing court. [Citations.]" (H. F. Ahmanson & Co. v. Salomon Brothers, Inc., supra, 229 Cal.App.3d at p. 1451.)

That leaves the question of whether there was some sort of representation, short of a formal retainer arrangement. The trial court noted in its notice of decision that "[i]n the instant case, some of the evidence suggests that legal advice was rendered for the benefit of the Kris Corporation" This finding is clearly supported by substantial evidence in the record.

The 14 pages of draft documents the Koo firm faxed to Chew in August 1995 were not related in any way perceptible to this court to the attempted buy-out of KTI by Lek. Instead, they dealt with the termination of Jerry Wang, now employed by respondent Multiwave, and other employees, and the acquisition of a limited partnership.

Why, then, did the Koo firm undertake these projects apparently on KTI's behalf? There is no explanation in their declarations. They do not deny that Chew discussed creditor claims or the Wang/Multiwave situation with them. Nor do they attempt to explain how the faxed documents tie in with the proposed buy-out. Their only answer is that the documents, which were faxed to Chew, not Lek, stated under the heading "CLIENT/MATTER," the following: "LEK/KRIS TECHNOLOGIES, INC." They emphasize that they repeatedly told Chew they were acting as Lek's attorneys. The declarations are therefore not in conflict

on whether Chew discussed with the Koo firm KTI's legal problems with creditors and with Wang.

After observing that "some of the evidence suggests that legal advice was rendered for the benefit of the Kris Corporation," the trial court goes on to make the following legal conclusion: "however, the vagueness of the declarations and the lack of particulars fail to establish the necessary 'substantial relationship.'"⁶ We disagree.

The documents themselves establish the requisite substantial relationship. Whether the Koo firm undertook these projects that benefited KTI in the expectation that at some time KTI would be owned entirely by its client Lek, or whether the firm undertook these projects on a pro bono basis, does not matter. What is important is whether "by reason of the representation of the

⁶ Presumably, the court was referring to the following vague statements in Chew's declaration: ". . . I communicated with at least two attorneys at the Koo firm . . . about various legal projects that the Koo firm was handling for Kris [¶] 6. . . . I was introduced to Ann Koo by Lek as being an attorney that he recommended Kris hire as its corporate counsel. . . . If I had suspected that she was going to claim that she represented only Lek's individual interests, I certainly would not have agreed to discuss Kris' confidential matters with her [and] I would have utilized separate legal counsel to safeguard the corporation's interests. . . . [¶] 8. . . . I had a number of conversations with Koo and Foletta about legal issues that were facing Kris, during which I openly discussed with them the corporation's legal problems and my concerns about the various pending creditor claims. . . . [¶] 10. Kris' retention of the Koo firm occurred at a time that it was facing substantial creditor claims and the need to deal with the Jerry Wang/Multiwave breach of fiduciary duty situation. The legal work previously handled by the Koo firm encompassed matters which directly overlap with issues related in the pending cases against Kris"

. . . former client, the [attorney] has obtained confidential information material to the employment." (Rules Prof. Conduct, rule 3-310(E).)

"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" (Flatt v. Superior Court, supra, 9 Cal.4th at pp. 275, 283, italics omitted.)

Currently, the Koo firm is representing two of the creditors about whose claims Chew sought legal advice. One of those creditors is Multiwave, the company to which Jerry Wang allegedly diverted business. It was because of this misappropriation that the Koo firm drew up documents for Wang's termination.

Under these circumstances, disqualification of the Koo firm was not only appropriate, it was mandatory. Accordingly, we shall reverse the trial court's order denying KTI's motion to disqualify.

DISPOSITION

The order denying KTI's motion to disqualify the Koo firm from representing Multiwave in this litigation is reversed. KTI is awarded its costs on the appeal.

Cottle, P.J.

WE CONCUR:

Premo, J.

Bamattre-Manoukian, J.

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