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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

HARTFORD CASUALTY INSURANCE COMPANY, Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; C3 ENTERTAINMENT, INC. et al., Real Parties in Interest.	No. B176439 (Super. Ct. No. BC288501) (Aurelio N. Munoz, Judge)

ORIGINAL PROCEEDING; application for writ of mandate. Writ granted.

Michelman & Robinson, Dean B. Herman, Catherine Rivard, and Katherine Tatikian for Petitioner.

No appearance for Respondent.

Robert N. Benjamin; Roxborough, Pomerance & Nye and Drew E. Pomerance for Real Parties in Interest.

The judge presiding over this matter denied Hartford Casualty Insurance Company's (Hartford) motion for summary adjudication. The judge later realized he was disqualified because an alternative dispute provider had contacted him concerning possible employment upon his retirement from the bench. He then proceeded to recuse himself from the matter. However, when Hartford moved that the new judge assigned to the case vacate the prior judge's order, the new judge refused on the ground that Hartford had not shown good cause. That refusal was an error. Accordingly, we will grant Hartford's petition for a writ of mandate directing the respondent court to vacate its order denying Hartford's motion and enter a new and different order granting that motion.

FACTS AND PROCEDURAL HISTORY

Hartford refused to defend a lawsuit filed against its insureds, real parties C3 Entertainment, Inc., Knuckleheads, Inc. and Earl M. Benjamin (collectively referred to as C3 Entertainment). C3 Entertainment then sued Hartford for breach of contract and bad faith insurance practices, and included a claim for punitive damages. Hartford cross-complained for declaratory relief, seeking a determination that it did not breach any of its duties to C3 Entertainment. On October 16, 2003, the trial court granted C3 Entertainment's motion seeking a summary adjudication that Hartford owed it a duty to defend the underlying lawsuit. An order summarily adjudicating the issue in C3 Entertainment's favor was entered on November 13, 2003.

On November 21, 2003, Hartford filed its own motion for summary adjudication of C3 Entertainment's cause of action for bad faith insurance practices and its punitive damages claim, or for adjudication of Hartford's various claims for declaratory relief. On January 8, 2004, at a hearing on a different matter, the then-presiding trial judge agreed to refer the case to mediation as suggested orally by Hartford's co-defendant, and supported by Hartford, in order to attempt a speedy resolution of the action in light of C3

Entertainment's request to continue trial.[1] The court left it up to the parties to determine how to mediate the case.

On February 5, 2004, Hartford filed a motion to appoint a referee to determine the amount of attorney-fee damages that were at issue in the case. On the same day, the then-presiding trial judge heard argument on Hartford's motion for summary adjudication and issued an order denying the motion. However, on March 15, 2004, when the motion to appoint a referee came on for hearing, the judge revealed that he would be disqualified from presiding on the matter further pursuant to Code of Civil Procedure section 170.1, subdivision (a)(8)(B), unless the parties waived the issue. The judge revealed that within the last two years he had had discussions with multiple alternative dispute resolution providers regarding prospective employment.[2] When Hartford refused to waive the issue, the judge recused himself. No party filed a petition for writ of mandate to challenge the judge's action. (Code Civ. Proc.,[3] § 170.3, subd. (d).)

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[1] Hartford's co-defendant, Arthur J. Gallagher & Co. (Gallagher), moved for summary judgment in its favor at the same time that Hartford moved for summary adjudication of issues. Gallagher's motion was granted in the same order as is challenged here. In its Return to the petition, C3 Entertainment points out that its appeal of Gallagher's summary judgment is currently pending in this court. C3 Entertainment suggests that judgment will also have to be "vacated forthwith" if the trial judge was disqualified at the time of the ruling. However, that issue is not properly before us so we do not decide the issue here.

[2] The judge indicated he did not initiate the contacts and that it is very common for alternative dispute resolution providers to approach members of the judiciary regarding employment upon their retirement from the bench. Though his statements are ambiguous as to the extent to which he engaged in prospective employment discussions, it also appears the judge's contacts with the alternative dispute resolution providers were superficial. However, as we discuss herein, that does not alter the fact that the judge engaged in discussions the Legislature has determined disqualified him from sitting in a case in which use of a dispute resolution neutral, such as those employed by alternative dispute resolution services, is an issue.

[3] All further statutory references are to the Code of Civil Procedure.

The matter was reassigned to the current trial judge. Hartford then brought a motion to vacate the February 5, 2004 ruling of the prior judge denying its motion for summary adjudication, arguing the judge had been disqualified as of the January 8, 2004 reference to mediation.[4] However, the current trial judge denied the motion, concluding that Code of Civil Procedure section 170.3, subdivision (b)(4), imposed a good cause requirement for vacating the orders of a disqualified judge, but no good cause was shown. This petition followed.

DISCUSSION

Code of Civil Procedure, section 170.1, subdivision (a)(8)(B), clearly states that a judge shall be disqualified if,

> "(8) The judge has a current arrangement concerning prospective employment or other compensated service as a dispute resolution neutral or is participating in, or, within the last two years has participated in, discussions regarding such prospective employment or service, and . . . : [¶] . . . [¶] (B) [t]he matter before the judge includes issues relating to the enforcement of an agreement to submit a dispute to alternative dispute resolution or the appointment or use of a dispute resolution neutral."

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[4] The issue presented by Hartford's motion and its petition to this court was whether the January 8, 2004 mediation reference triggered the judge's disqualification. Accordingly, the validity of the October 16, 2003 order granting summary adjudication of Hartford's duty to defend is not at issue here. In a footnote to its petition, Hartford expresses a suspicion that disqualification occurred even earlier, making the October 16, 2003 order subject to attack as well. We do not address that contention, as the issue was not properly raised in this proceeding. We also question whether Hartford can mount any further challenges to the prior judge's orders. (See, e.g., *People v. Scott* (1997) 15 Cal.4th 1188, 1207; *Betz v. Pankow* (1993) 16 Cal.App.4th 931, 940; *Muller v. Muller* (1965) 235 Cal.App.2d 341, 345; *Oak Grove School Dist. v. City Title Ins. Co.* (1963) 217 Cal.App.2d 678, 704.)

A "dispute resolution neutral" is further defined as "an arbitrator, mediator, temporary judge appointed under section 21 of Article VI of the California Constitution, referee appointed under [Code of Civil Procedure] Section 638 or 639, special master, neutral evaluator, settlement officer, or settlement facilitator." (§ 170.1, subd. (a)(8).) Thus, under the plain terms of the statute, a judge is obligated to recuse himself whenever he: a) has participated in discussions regarding prospective service as a dispute resolution neutral, and b) presides over a case in which the potential use of an arbitrator, mediator, settlement officer, or other type of dispute resolution neutral, arises. The language used by the Legislature in the statute is unambiguous, and must be applied as stated.[5] (§ 1858; *People v. Johnson* (2002) 28 Cal.4th 240, 244; *People v. Lawrence* (2000) 24 Cal.4th 219, 230-231; *Rex Club v. Workers' Comp. Appeals Bd.* (1997) 53 Cal.App.4th 1465, 1474.)

Indeed, the initial trial judge in this case concluded that his contacts with alternative dispute resolution providers were sufficient to disqualify him from presiding under the provisions of section 170.1, subdivision (a)(8)(B). Once he was called upon to decide Hartford's motion requesting appointment of a referee, the judge understood that he became disqualified and took action to recuse himself. The judge's action was not challenged by the parties in a petition for writ of mandate and we do not question his action here. (§ 170.3, subd. (d).) However, the judge overlooked the fact that the same disqualifying factors existed before he was asked to appoint a referee, and so he should have recused himself even earlier in the litigation. Specifically, on January 8, 2004, when the parties requested referral to mediation, the litigation became one in which there was an issue relating to "the appointment or use of a dispute resolution neutral." (§ 170.1, subd. (a)(8)(B).) That, coupled with the judge's admitted discussions with

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[5] Hartford's request that we take judicial notice of the legislative history of section 170.1, subdivision (a)(8), is denied. Where the terms of a statute are unambiguous, courts need not look to outside sources to discern their meaning. (*General Electric Capital Auto Financial Services, Inc. v. Appellate Division* (2001) 88 Cal.App.4th 136, 143.)

alternative dispute resolution providers regarding prospective employment, operated to disqualify him from further acting in the case. (§ 170.1, subd. (a)(8)(B); § 170.4, subd. (d).)

The conclusion that the judge was disqualified as soon as the relevant factors arose is consistent with case law considering similar situations. For example, in *Urias v. Harris Farms, Inc.* (1991) 234 Cal.App.3d 415, 423, a judge who apparently did not know his former law firm represented the defendant in an action in which he presided was later deemed to have been disqualified when he entered summary judgment for that defendant. Accordingly, the judgment he entered was considered ineffective and was subject to attack by the plaintiff, even after the action had concluded. (*Id.* at pp. 423-424.) Similarly, in *Tatum v. Southern Pacific Co.* (1967) 250 Cal.App.2d 40, 42, decided under the prior disqualification statutes, a judge who forgot that a trust portfolio he oversaw contained the stock of a defendant appearing before him was nevertheless considered disqualified and without authority to act, making his prior rulings in the action void. And, in *Giometti v. Etienne* (1934) 219 Cal. 687, 688-89, also decided under the former disqualification statutes, a supreme court order granting review of a case was considered void because one of the justices who signed it did not realize his relative represented the petitioner. As the *Giometti* court explained, it is the *fact* of disqualification that controls, not subsequent judicial action on that disqualification. (But see, *Sincavage v. Superior Court* (1996) 42 Cal.App.4th 224, 231 [judge misled into believing she did not substantively participate in prior prosecution of defendant not disqualified until actual facts were called to her attention].) That rule is confirmed by decisions holding that a judge who improperly rejects a timely filed statement of disqualification is disqualified as of the time the challenge was filed. (E.g., *Ziesmer v. Superior Court* (2003) 107 Cal.App.4th 360, 363-364; *Zilog, Inc. v. Superior Court* (2001) 86 Cal.App.4th 1309, 1323; *In re Jenkins* (1999) 70 Cal.App.4th 1162, 1165-1167; see also *Geldermann, Inc. v. Bruner* (1991) 229 Cal.App.3d 662, 665.)

The remaining question in this case is what becomes of the rulings made by the disqualified trial judge after he should have recused himself. C3 Entertainment suggests

the judge's rulings may only be vacated upon a showing of good cause. It points to the provisions of section 170.3, subdivision (b)(4), which provide,

> "In the event that grounds for disqualification are first learned of or arise after the judge has made one or more rulings in a proceeding but before the judge has completed judicial action in a proceeding, the judge shall, unless the disqualification be waived, disqualify himself or herself, but in the absence of good cause the rulings he or she has made up to that time shall not be set aside by the judge who replaces the disqualified judge."

However, by its terms, that section does not apply to the current situation. In this case, the grounds for disqualification at issue were not "first learned of" and did not "arise" after the judge made his disputed ruling. Rather, according to the judge's own statements, the fact that the judge engaged in discussions with an alternative dispute resolution agency was fully known to him at the time he agreed to refer the matter to mediation. The judge's inadvertent failure to consider that the contacts he had with alternative dispute resolution providers effected his disqualification is of no moment.[6] It was his responsibility to disqualify himself once factors that triggered the provisions of section 170.1, subdivision (a)(8)(B), arose. (*Betz*, *supra*, 16 Cal.App.4th at p. 937; *Urias*, *supra*, 234 Cal.App.3d at p. 425.)

The decision in *Urias v. Harris Farms*, *supra*, 234 Cal.App.3d 415 is again instructive. The *Urias* court found that a judge who granted summary judgment for a defendant that had been represented by the judge's former law firm was disqualified from presiding in the case. However, by the time the disqualifying factors were discovered, a judgment had already been entered on the judge's summary judgment order. Thus, by its

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[6] There is nothing in the record to suggest the judge's failure to timely recuse himself was due to anything other than inadvertence. In fact, we commend the judge for promptly disqualifying himself as soon as he realized the need.

terms, section 170.3, subdivision (b)(4), did not govern: the judge had completed judicial action in the case. (*Id*. at p. 423.) The *Urias* court was left to apply the disqualification rules that developed prior to the 1984 enactment of section 170.3, subdivision (b)(4), in deciding what effect to give the disqualified judge's summary judgment. Under those rules, the *Urias* court deemed the judge's summary judgment order to be voidable. (*Id*. at pp. 423-424.)

While judicial action has not been completed in this case, the matter similarly falls outside the terms of section 170.3, subdivision (b)(4), because the grounds for disqualification were known *before* the judge made his challenged ruling on Hartford's summary adjudication motion. Thus, as the *Urias* court did, we will look to the general rules governing actions of disqualified judges in order to determine what effect to give the order challenged here. There is a split of authority on whether orders issued by disqualified judges are void or voidable. Some case law indicates that the orders of disqualified judges are void outright and must be vacated. (E.g., *Giometti*, *supra*, 219 Cal. at p. 689; *Ziesmer*, *supra*, 107 Cal.App.4th at p. 364; *Zilog*, *supra*, 86 Cal.App.4th at p. 1323; *In re Jenkins*, *supra*, 70 Cal.App.4th at pp. 1165-1167; *In re Jose S.* (1978) 78 Cal.App.3d 619, 628.) Other courts have considered the purpose behind vacating the orders of a disqualified judge, and have concluded that a rule of voidability by an aggrieved party is the better course because the superior court itself, if not the disqualified judge, retains fundamental subject matter jurisdiction. (*Betz*, *supra*, 16 Cal.App.4th at pp. 939-940; see also, *People v. Barrera* (1999) 70 Cal.App.4th 541, 549-51; *Urias*, *supra*, 234 Cal.App.3d 415, 423-424; *In re Christian J.* (1984) 155 Cal.App.3d 276, 279-280.) For our purposes, however, we need not decide which of those approaches are preferable. The fact is that Hartford challenged the order denying its summary adjudication motion as having been made by a disqualified judge. Thus, whether void or voidable, the order must be vacated in this case.

Finally, we acknowledge the potential for mischief attendant to our holding. It is true that parties dissatisfied with a judge's rulings in a case may request appointment of a dispute resolution neutral, wagering that the judge may have discussed future

employment as a dispute resolution neutral and so will become disqualified. That tactic certainly will undermine the time and number limitations imposed by section 170.6 on parties' ability to jettison a judge they feel is unfavorable. However, we are bound to apply the disqualification provisions of section 170.1, subdivision (a)(8)(B), as written by the Legislature. (*Rex Club*, *supra*, 53 Cal.App.4th at p. 1474.) Besides, if judges who have discussed potential employment as a dispute resolution neutral reveal that fact at the outset of a litigation, recognizing the use of such a neutral is likely to become an issue in every case, they may take waivers of that potential disqualification before making any rulings that might be vacated. (§ 170.3, subd. (b) [parties may waive most judicial disqualification issues].) And, even judges who have made rulings in a case, then become disqualified when the use of a dispute resolution neutral arises as an issue, can protect their prior rulings by promptly disqualifying themselves when the need arises and avoiding entry of any orders subject to challenge. On balance, the countervailing policy consideration of providing relief to parties from orders entered by a judge who, in good faith or bad, failed to properly disqualify himself, outweighs any concerns of gamesmanship that litigants might attempt. (See *Tatum*, *supra*, 250 Cal.App.2d at p. 42 [policy of preventing the taint of any appearance of judicial interest in pending cases].)

Because we find that the ruling denying Hartford's motion for summary adjudication must be vacated, we need not reach the further issue raised by Hartford of whether that order was entered in violation of California Rules of Court, rule 391. We decline C3 Entertainment's request that we consider the merits of Hartford's summary adjudication motion to determine whether Hartford was prejudiced by that motion's being denied by a disqualified judge. That is merely a disguised attempt to have this court impose a good cause requirement on the determination of whether the disqualified judge's order should be vacated. We have already concluded the order was made by a disqualified judge. Hartford has objected to that order and is entitled to have it vacated.

In conclusion, we hold that rulings made by a judge disqualified in a particular case by the provisions of section 170.1, subdivision (a)(8)(B), requiring *both* discussions within the preceding two years with a dispute resolution neutral regarding prospective

employment *and* the existence of an issue regarding appointment or use of a dispute resolution neutral, must be vacated. Until an issue regarding appointment or use of a dispute resolution neutral has arisen, however, rulings made by a judge who has discussed future employment with a dispute resolution neutral are not subject to attack.

DISPOSITION

The petition for writ of mandate is granted. The respondent court is directed to vacate its June 30, 2004 order, which denied Hartford's motion to vacate the March 4, 2004 order denying its motion for summary adjudication, and enter a new and different order granting Hartford's motion to vacate. Petitioner is awarded its costs in this proceeding.

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ARMSTRONG, J.

We concur:

TURNER, P.J.

MOSK, J.