Filed 11/9/17 Law Offices of Mark B. Plummer PC v. Bayuk CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

LAW OFFICES OF MARK B. PLUMMER PC,

Plaintiff and Appellant,

v.

CHRISTOPHER W. BAYUK et al.,

Defendants and Respondents.

G053836

(Super. Ct. No. 30-2014-00759128)

O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County, Robert J. Moss, Judge. Affirmed.

Law Offices of Mark B. Plummer and Mark B. Plummer, in pro. per., for Plaintiff and Appellant.

Bayuk & Associates, Inc. and Christopher W. Bayuk for Defendants and Respondents.

* * *

Plaintiff Law Offices of Mark B. Plummer PC[1] sued defendants Merritt McKeon and Christopher W. Bayuk for an accounting, breach of contract, and conversion. Ultimately, the trial court dismissed the action and entered judgment in McKeon and Bayuk's favor. It thereafter granted their joint motion for attorney fees.

Plummer does not challenge the amount of attorney fees awarded. Rather, he contends the trial court erred in awarding attorney fees because (1) he is the prevailing party, having voluntarily dismissed the claims for breach of contract and conversion after obtaining an accounting; (2) Civil Code section 1717, subdivision (b)(2)[2] precludes an attorney fees award, again because he is the prevailing party; (3) the law disallows the recovery of attorney fees by attorneys representing themselves and Bayuk represented both himself and McKeon; and (4) the doctrine of unclean hands bars the award of attorney fees. We reject these contentions and affirm the postjudgment order.

I

FACTS

Family Law Matter

In 2004, Slobodan Cuk sought to have his marriage annulled rather than dissolved (family law matter). The trial court found the nullity claim unwarranted, awarded attorney fees to Cuk's ex-wife, and sanctioned him $100,000.00 for pursuing frivolous claims. McKeon began representing Cuk in November 2008.

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[1] Although plaintiff is a corporation, for ease of reference we will refer to it by using the last name of its principal, Mark B. Plummer, an individual.

[2] All further undesignated statutory references will be to the Civil Code.

Malpractice Action

In September 2009, Cuk retained Plummer on a contingency basis to file a legal malpractice action (malpractice action) against Cuk's former attorneys in the family law matter, with Plummer to receive to 40 percent of any gross recovery. Two years later, McKeon replaced Plummer as counsel of record pursuant to a retainer agreement entitling her to a 40 percent lien on any net recovery in the malpractice action. Shortly after she was retained, McKeon separately settled the case with two groups of defendants. The settlement with one group of defendants included an assignment of any insurance bad faith claim to Cuk.

Collection Action

In November 2011, Plummer sued Cuk, alleging he was entitled to collect (collection action) his 40 percent contingency fee from the settlement agreements in the malpractice action plus a 40 percent lien of the net value recovery in any future bad faith claim. McKeon was added as a defendant in the first amended complaint. Plummer alleged he filed the collection action to have the trial court place the amount of his claimed attorney fees from the malpractice action into a blocked trust account pending trial. Bayuk represented both Cuk and McKeon in the collection action.

Declaratory Relief and Bad Faith Actions

In February 2013, ProCentury Insurance Company (ProCentury), the malpractice insurer for one of the defendants in the malpractice action, filed a declaratory relief action (declaratory relief action) in federal court against Cuk seeking a declaration it had no duty to defend or to pay the judgment. Cuk filed a cross-claim against ProCentury for insurance bad faith (bad faith action). Bayuk represented Cuk in both the declaratory relief and bad faith actions. McKeon did not perform any work in either action.

In June and August 2013, Cuk executed two attorney liens in favor of McKeon for the work she had performed in the family law matter. McKeon forwarded copies of the liens to counsel for ProCentury.

Settlement of Collection Action

The collection action settled on March 5, 2014. A handwritten agreement was prepared on the day of the settlement (informal settlement agreement). The informal settlement agreement did not contain a provision allowing for the recovery of attorney fees.

A formal and final written agreement was prepared and signed in March 2014 (formal settlement agreement)[3] by Plummer, McKeon, and Bayuk. As relevant, the formal settlement agreement contained a provision entitling the prevailing party to recover reasonably incurred attorney fees and costs. It also provided that, from the blocked account containing the disputed attorney fees from the malpractice action, McKeon would receive $50,000, with the balance going to Plummer. Additionally, under the formal settlement agreement, Plummer was to "receive as additional compensation ten percent (10%) of the gross attorney[] fees generated upon [Cuk's c]ross-complaint . . . only, from [the bad faith action] pending in the United District Court, Central District of California . . . . Plummer agrees and confirms . . . that no duty is owed to Plummer other than as set forth in this agreement." Plummer thereafter dismissed the collection action.

[3] The opening brief refers to these documents as the first and second settlement agreements, whereas the respondents' brief identifies them as exhibit Nos. 1 and 2, respectively.

Settlement of Declaratory Relief and Bad Faith Actions

The declaratory relief and bad faith actions settled in June 2014. As relevant here, ProCentury agreed to pay Bayuk a total of $50,000 in gross attorney fees, and to pay an undisclosed amount to two lien claimants, including McKeon, pursuant to separate settlement agreements.[4] The amount paid to McKeon related solely to the liens she held against Cuk for her work in the family law matter.

On June 17, 2014, counsel for ProCentury sent Bayuk a check for $50,000. After subtracting costs incurred in the bad faith action, Bayuk transmitted a check to plaintiff in the amount of $3,785.37, with a letter stating it represented "10% of the gross attorneys fees received by [Bayuk's] office in [the] ProCentury v. Cuk matter[s]. We will be closing our file on these matters."

On September 1, 2014, Plummer wrote to Bayuk, requesting copies of the retainer agreement, the bad faith settlement agreement and the settlement checks. With the retainer agreement having been previously produced in the collection action, Bayuk forwarded copies of the settlement agreement and the settlement check he received. Bayuk received no further responses or inquiries from Plummer until his office received the complaint in the current action.

Current Action

Plummer sued McKeon and Bayuk in early December 2014, alleging causes of action for accounting, breach of contract, and conversion (current action). Bayuk retained Glen Duvel to represent him but with Bayuk, as counsel for McKeon, taking "the lead on pursuing discovery and law & motion" to "decrease the duplication of time and expense."

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[4] The other lienholder was the law firm representing Cuk's former wife in the family law matter.

Shortly after the complaint was filed, and again in March 2015, Bayuk, representing both McKeon and himself, requested a dismissal of the case. Plummer did not respond.

In August 2015, Bayuk, on behalf of McKeon and himself, filed a motion to enforce the settlement. McKeon submitted a supporting declaration, asserting, among other things: "(12) At no time prior to the filing of the lawsuit, did I receive any sort of request from . . . Plummer . . . for an accounting or for any information pertaining to the [b]ad [f]aith action. [¶] (13) All monies paid to me by ProCentury . . . was a result of their purchasing the outstanding lien I held against . . . Cuk based upon the work I performed for him in his family law matter . . . ." Bayuk provided a similar declaration, attesting that before the lawsuit was filed, he never received "any sort of request from . . . Plummer . . . for an accounting or for any information pertaining to the [b]ad [f]aith action, other than the September 1, 2014, letter" and that the only money his law firm received from the bad faith action was the $50,000.00. The motion was denied.

At the one-day trial held on November 23, 2015, Plummer admitted he had received his portion of attorney fees from the blocked account as provided for in the formal settlement agreement in the collection action, and the only issue left was "the 10 percent of the gross attorney[] fees in the assigned insurance bad-faith case." He stated he had filed the current action to get an accounting because he believed he was owed more. Plummer explained his primary reason for filing the current action was to obtain an accounting, but he now knew what happened and did not have any reason to believe McKeon and Bayuk had received more attorney fees than Bayuk had represented. Plummer also said he believed Bayuk's law firm intended to collect more from Cuk and if so, Plummer intended to collect his 10 percent. Plummer indicated he was not asking to be paid 10 percent from amounts that have not been collected from Cuk.

The trial court questioned, "So why are we here," as "[it] seems like you got your accounting" and there was no breach of contract. Plummer agreed. The court

indicated it was inclined to dismiss the case given that Plummer had "gotten his relief on the accounting" and was not entitled to recover on his breach of contract or conversion claims. Plummer again agreed.

On December 22, 2015, the trial court entered judgment in favor of Bayuk and McKeon and against Plummer. No statement of decision was requested. Notice of entry of judgment was served on February 22, 2016. Plummer did not appeal from the judgment.

McKeon and Bayuk jointly moved for an award of attorney fees under the attorney fees provision contained in the formal settlement agreement for the collection action. The trial court deemed Bayuk and McKeon to be the prevailing parties, found a contractual basis for awarding attorney fees, and granted the motion. The postjudgment order awarding attorney fees was entered on June 23, 2016, and notice was served that same date. On July 29, 2016, Plummer filed a notice of appeal from the June 23 order.

II

DISCUSSION

A. Standard of Review

"""On review of an award of attorney fees after trial, the normal standard of review is abuse of discretion. However, de novo review of such a trial court order is warranted where the determination of whether the criteria for an award of attorney fees and costs in this context have been satisfied amounts to statutory construction and a question of law."""" (*Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1213; see *Douglas E. Barnhart, Inc. v. CMC Fabricators, Inc*. (2012) 211 Cal.App.4th 230, 237 ["court reviews a determination of the legal basis for an award of attorney fees" independently as a question of law].) "The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason." (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478-479.)

B. Prevailing Party

Plummer contends the trial court did not have jurisdiction to award attorney fees to McKeon and Bayuk because he was the prevailing party, not them. According to Plummer, he prevailed on the accounting cause of action, "[t]he only cause of action which was adjudicated" and then "voluntarily dismissed" his breach of contract and conversion claims. We are not persuaded.

First, Plummer does not explain how the trial court "adjudicated" the accounting cause of action in its favor. The court never ordered an accounting and merely observed Plummer had obtained the accounting he had wanted. Because Plummer did not ask for declaratory relief, the court stated it would not grant such relief. The court thereafter entered judgment in McKeon and Bayuk's favor. By doing so, the court adjudicated all causes of action against Plummer, making McKeon and Bayuk the prevailing parties.

Second, the record does not support Plummer's contention he "voluntarily dismissed" its breach of contract and conversion causes of action. Whether dismissal of the action in this case was voluntary, such that there is no "prevailing party" for purposes of recovering attorney fees under the contract, poses a question of law based on undisputed facts. We independently review such issues. (*Kim v. Euromotors West/The Auto Gallery* (2007) 149 Cal.App.4th 170, 176.)

In this case, Plummer never requested a dismissal and the cited portion of the reporter's transcript show the trial court initiated the dismissal process, not Plummer. Plummer agreed he was not entitled to relief on either claim and that the case should be dismissed. But his agreement did not thereafter transform the dismissal into a voluntary one because the court then proceeded to enter judgment against Plummer and in favor of McKeon and Bayuk.

We do not consider Plummer's claims that "[a]s a practical matter," McKeon and Bayuk breached the contract and perpetrated a conversion. Plummer did

not appeal from the judgment entered on December 22, 2015, for which notice of entry was served on February 22, 2016. Plummer appealed only from the separately appealable postjudgment order awarding attorney fees. (Code Civ. Proc., § 904.1, subd. (a)(2); *Norman I. Krug Real Estate Investments, Inc. v. Praszker* (1990) 220 Cal.App.3d 35, 46.) The notice of appeal, filed on July 29, 2016, specifies the appeal is limited to the order filed on July 23, 2016, which is the postjudgment order awarding attorney fees. Because Plummer did not appeal from the December 2015 judgment, and his notice of appeal does not mention it, we lack jurisdiction to review it. (*Ibid*.)

C. Section 1717, Subdivision (b)(2)

Plummer argues he was the prevailing party for purposes of section 1717, subdivision (b)(1) because he prevailed on his accounting claim and voluntarily dismissed the others. We reject these arguments for the reasons we did above.

Hidden under this same heading is Plummer's assertion that Bayuk is not entitled to recover his attorney fees because he was not a party to the formal settlement agreement in the collection action. The failure to assert this argument under a separate heading violates California Rules of Court, rule 8.204(a)(1)(B), which required Plummer to "[s]tate each point under a separate heading or subheading summarizing the point, and support each point by argument and, if possible, by citation of authority." "This is not a mere technical requirement; it is 'designed to lighten the labors of the appellate tribunals by requiring the litigants to present their cause systematically and so arranged that those upon whom the duty devolves of ascertaining the rule of law to apply may be advised, as they read, of the exact question under consideration, instead of being compelled to extricate it from the mass.' [Citations.]" (*In re S.C.* (2006) 138 Cal.App.4th 396, 408.) "Failure to provide proper headings forfeits issues that may be discussed in the brief but are not clearly identified by a heading." (*Pizarro v. Reynoso* (2017) 10 Cal.App.5th 172, 179.) The issue is forfeited.

Even if not forfeited, Plummer's contention lacks merit because the attorney fees clause in the formal settlement agreement for the collection action does not require the prevailing party to be a party. It provides, as relevant: "4. Each party to this agreement waives any claim to fees and costs incurred to date against any other party to this agreement. In the event of any controversy, claim, or dispute based upon, arising out of, or related to the breach of or enforcement of any of the provisions of this Agreement, the prevailing Party (or parties), in such controversy, claim or dispute, are entitled to recover their actual attorneys fees, costs, and expenses, which are reasonably incurred, from the non-prevailing Party (or Parties)."

Plummer's current action against McKeon and Bayuk constitutes a controversy, claim, or dispute arising out of or related to an alleged breach of the formal settlement agreement in the collection action. Although the complaint cited only the handwritten (or first) agreement, Plummer agreed with the trial court during trial that the formal settlement agreement was a formalization of the handwritten one. Under the terms of the formal settlement agreement, McKeon and Bayuk, as the prevailing parties in the current action, were entitled to recover their reasonable attorney fees.

D. Recovery of Attorney fees for Work Done by Bayuk and Duvel

Plummer argues McKeon and Bayuk were not entitled to recover attorney fees because (1) Bayuk represented McKeon along with himself and self-represented attorneys cannot recover attorney fees, and (2) Duvel did nothing other than review Bayuk's work and was "a straw man there to drive up fees." We disagree.

"[A]n attorney who chooses to litigate in propria persona and therefore does not pay or become liable to pay consideration in exchange for legal representation cannot recover 'reasonable attorney fees' under section 1717 as compensation for the time and effort he expends on his own behalf or for the professional business opportunities he forgoes as a result of his decision." (*Trope v. Katz* (1995) 11 Cal.4th

274, 292.) This rule extends to attorneys representing their spouses where "a true attorney-client relationship [does not] exist[] between spouses[,] . . . [t]here is no indication that [one spouse] suffered any damages apart from those suffered by [the other,] [t]heir interests in [the] matter appear to be joint and indivisible[,] [and t]here is no claim that [the attorney] spent extra time . . . representing his wife in addition to the time he spent representing himself[or that] each of them owes half [the attorney] fees. Their community estate is liable for their contracts." (*Gorman v. Tassajara Development Corp.* (2009) 178 Cal.App.4th 44, 95.)

By contrast, a defendant-client who prevails in an action is entitled to recover attorney fees, even if the attorney who provided the services is a codefendant. (*Ramona Unified School Dist. v. Tsiknas* (2005) 135 Cal.App.4th 510, 524-525 [where attorney-client relationship exists, *Trope* does not preclude award of attorney fees for attorney who was codefendant with clients to whom she rendered legal services]; see *Healdsburg Citizens for Sustainable Solutions v. City of Healdsburg* (2012) 206 Cal.App.4th 988, 997-998 [award of attorney fees proper where work performed by party-attorney benefited her copetitioners as well as herself].)

As to McKeon, it is undisputed she had an attorney-client relationship with Bayuk. Bayuk attested to that fact in his declaration in support of the attorney fees motion, and there is no claim or evidence to the contrary. "Where an attorney-client relationship exists, the courts uniformly allow for the recovery of attorney fees under . . . section 1717." (*Ramona Unified School Dist. v. Tsiknas*, *supra*, 135 Cal.App.4th at p. 524.) Additionally, Bayuk's defense of McKeon presented different issues from Bayuk's defense of himself. As to McKeon, Bayuk argued Plummer had "forfeited/waived any and all other rights [he] might have . . . against her" as a result of Plummer's settlement with her in the collection action and the money paid to her by ProCentury "was the result of a formal lien against the recovery arising from her representation of . . . Cuk in the family matter." In his own defense, Bayuk advised

Plummer that he had paid Plummer the amount owed under that same settlement, i.e., 10 percent of the gross attorney fees recovered from the bad faith action. For these reasons, McKeon, the defendant-client, is entitled to recover the attorney fees billed to her by Bayuk, notwithstanding the fact that Bayuk, who represented her as well as himself, is a codefendant who also benefitted from his work.

We also reject Plummer's contention with respect to the attorney fees incurred by Bayuk for Duvel's legal services. Plummer forfeited the issue by failing to raise it in his opposition to the attorney fees motion. (See, e.g., *Wood v. Santa Monica Escrow Co*. (2007) 151 Cal.App.4th 1186, 1192 [where defendant did not request that trial court apportion fees, appellate court refused to consider issue on appeal].) Further, "An individual who elects to represent himself or herself may also retain counsel to assist in the prosecution or defense of the action. The retained attorney hired to assist a litigant in propria persona has an attorney-client relationship with the litigant and owes the litigant fiduciary and ethical obligations. Such a retained attorney serves the purposes of providing an independent third party's judgment . . . . 'Legal counsel is just as necessary—perhaps more necessary—for the party who endeavors to represent himself, as it is for the person who has counsel of record. . . .' [Citations.] If an attorney is in fact retained by the pro se litigant and renders legal services assisting in the lawsuit, the attorney need not be an attorney of record in order for the reasonable fees of the attorney to be awarded to a prevailing party. [Citation.]" (*Mix v. Tumanjan Development Corp.* (2002) 102 Cal.App.4th 1318, 1324.) The trial court properly awarded Bayuk the attorney fees he incurred in retaining Duvel to represent him.

E. Unclean Hands

Plummer contends the unclean hands doctrine hands prohibits the attorney fees award to McKeon and Bayuk because they misrepresented that $3,785.37 was the amount owed to him when in fact he was owed much more. The contention lacks merit.

Plummer forfeited the argument by failing to raise it in his opposition to defendants' motion for attorney fees. (*Federal Deposit Ins. Corp. v. Dintino* (2008) 167 Cal.App.4th 333, 355 [unclean hands argument forfeited for failure to raise in trial court].) It is well established that the defense of unclean hands raises a question of fact (*Kendall-Jackson Winery, Ltd. v. Superior Court* (1999) 76 Cal.App.4th 970, 978) and, thus, must be raised in the trial court proceedings prior to judgment (*Marshall v. Marshall* (1965) 232 Cal.App.2d 232, 253; *Behm v. Fireside Thrift Co*. (1969) 272 Cal.App.2d 15, 21 (*Behm*)).

Plummer cites *Katz v. Karlsson* (1948) 84 Cal.App.2d 469, for the proposition that he may raise the issue "for the first time on appeal." But in *Katz*, the facts relevant to determining whether a party had acted with unclean hands were clear, unambiguous and undisputed in the record in the form of material contradictions in sworn statements by the party in question. (*Id*. at pp. 470-472.) The *Katz* court explained that, in the interest of justice and to protect the integrity of the court, a reviewing court has a duty to invoke the doctrine of unclean hands on appeal where the trial court record shows on its face that a party has perpetrated a fraud on the trial court or otherwise failed to act in good faith toward the trial court, with the result that the court issued an order favoring the party. (*Id*. at pp. 472-474.) No similar facts exist here.

In *Behm*, *supra*, 272 Cal.App.2d 15, the plaintiff made the same claim as Plummer based on *Katz* and similar cases. The trial court responded that "the cases cited by Behm for this proposition are cases involving 'flagrantly unconscionable' conduct in which the doctrine was applied to protect the court's integrity (see *Katz v. Karlsson,* [*supra*,] 84 Cal.App.2d 469). In the instant case, Fireside's conduct can hardly be called 'flagrantly unconscionable' nor can it be said that the trial court's integrity would have been compromised by granting the relief requested." (*Behm*, at p. 21.) Likewise, in this case, Plummer has not identified any conduct, much less unequivocal evidence of

"flagrantly unconscionable" conduct, by McKeon or Bayuk that compromised the court's integrity.

Moreover, even if the evidence supported Plummer's claim of "unclean hands," the trial court could not have applied the doctrine to deny McKeon and Bayuk an award of attorney fees under section 1717. "We agree that *in determining litigation success*, courts should respect substance rather than form, and to this extent should be guided by 'equitable considerations.' . . . But when one party obtains a 'simple, unqualified win' on the single contract claim presented by the action, the trial court may not invoke equitable considerations unrelated to litigation success, such as the parties' behavior during settlement negotiations or discovery proceedings, except as expressly authorized by statute. [Citations.] To admit such factors into the 'prevailing party' equation would convert the attorney fees motion from a relatively uncomplicated evaluation of the parties' comparative litigation success into a formless, limitless attack on the ethics and character of every party who seeks attorney fees under section 1717. We find no evidence that the Legislature intended that the prevailing party determination be made in this way." (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 877.)

Since McKeon and Bayuk obtained an unqualified win, the trial court was required to award them attorney fees. Granted, a party's litigation conduct may be considered when the court determines whether the fees requested are reasonable or should be reduced because the fees were due to the party's unreasonable conduct. (See, e.g., *EnPalm, LCC v. Teitler* (2008) 162 Cal.App.4th 770, 773 [permissible to reduce $50,000 fee to $5,000 because action could have been resolved early in the litigation had client been more truthful].) But here, Plummer does not challenge the reasonableness of the fees awarded or claim they should be reduced.

III

DISPOSITION

The postjudgment order awarding attorney fees to McKeon and Bayuk is affirmed. McKeon and Bayuk shall recover their costs on appeal.

MOORE, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

ARONSON, J.