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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

MONICA R. MOLINA, Plaintiff and Appellant, v. JANINE K. JEFFERY et al., Defendants and Respondents.	B225753 (Los Angeles County Super. Ct. No. BC397213)

APPEAL from a judgment of the Superior Court of Los Angeles County. David L. Minning, Judge. Affirmed.

Salvato Law Offices, Gregory M. Salvato and Joseph Boufadel for Plaintiff and Appellant.

Nemecek & Cole, Jonathan B. Cole, Susan S. Baker and Mark Schaeffer; Reily & Jeffery and Janine K. Jeffery for Defendants and Respondents Janine K. Jeffrey and Reily & Jeffery.

This matter stems from a legal malpractice action brought by Monica Molina against Janine Jeffery and Reily & Jeffery (collectively Jeffery) for failure to timely file an appeal in Molina's underlying lawsuit against her former law partner. In this appeal, Molina challenges the summary judgment entered against her. We affirm.

FACTS

Molina was hired as an associate attorney in October 2002 to work with Rita Ann Kahlenberg in her law office. In January 2003, Kahlenberg asked Molina if she was interested in becoming a partner in the law firm. It required a capital contribution of $50,000 for a full equity position in a firm to be called Kahlenberg & Molina (K&M). Under the agreement, Molina and Kahlenberg would take an equal salary base and capital accounts would be paid back after a profit was earned. Kahlenberg agreed to transfer all the money and assets from her existing practice to the new firm, including an estimated $150,000 in accounts receivable and $200,000 in other assets. Kahlenberg later transferred substantially less than that to K&M. Molina borrowed $50,000 from her mother and executed a partnership agreement in March 2003. Molina believed her capital contribution would allow K&M to continue to operate up to six months. The partnership effectively terminated by August 2003.

Molina sued Kahlenberg for fraud, breach of fiduciary duty, constructive trust and accounting on November 25, 2003, alleging Kahlenberg misused her capital contribution for personal expenses. Kahlenberg counterclaimed for fraud and breach of contract, alleging that Molina had falsely represented that she had been retained by several fee-paying clients and despite having recently been admitted to the bar, had substantial legal experience due to her work at other firms. Kahlenberg also alleged that Molina's billable hours dropped by half when she became a partner.

After discovery ended, Molina switched lawyers on May 11, 2006, and retained Jeffery to represent her at trial. A bench trial before the Honorable Phillip J. Argento began on August 2, 2006. Judge Argento issued a tentative decision on December 28, 2006, and allowed the parties to submit objections and comments on it. A final statement of decision and judgment was filed on April 30, 2007, awarding Molina $2,000 in

emotional distress damages and costs of suit on her breach of fiduciary duty claim. Kahlenberg recovered nothing on her cross-complaint. As to the fraud-based claims, Judge Argento found that the evidence was insufficient to prove Kahlenberg knew or should have known her statements to Molina were false when made. He also found Kahlenberg breached her fiduciary duties to Molina by using partnership funds for non-partnership expenses and by failing to adequately maintain the records of the partnership. However, Judge Argento held that an accounting would be futile as Molina's $50,000 capital contribution would have been lost even if no breach of fiduciary duty occurred. Both parties filed motions for new trial, which were denied on August 7, 2007. The court awarded Molina costs in the sum of $4,490.65. A notice of appeal was not filed, though the parties dispute whether it was Molina's or Jeffery's obligation to file one.

In August 2008, Molina filed suit against Jeffrey for legal malpractice and breach of fiduciary duty in failing to file a notice of appeal in the Kahlenberg action and sought damages of $150,000. Jeffrey cross-claimed against Molina for approximately $11,000 in unpaid legal fees. Jeffrey moved for summary judgment on Molina's claims on September 17, 2009. The trial court granted the summary judgment motion on March 16, 2010. Following a bench trial on Jeffrey's cross-complaint for unpaid fees, the trial court issued a judgment awarding Jeffrey $14,300.[1] Molina timely appealed from this judgment.

DISCUSSION

The elements of a cause of action for legal malpractice are: (1) the attorney-client relationship or other basis for duty; (2) a negligent act or omission; (3) causation; and (4) damages. (*Nichols v. Keller* (1993) 15 Cal.App.4th 1672, 1682.) The parties agree that "[t]he only issue before the Court is the element of causation in the legal malpractice claim asserted by Molina against Jeffery: whether Judge Argento's Statement of

[1] On appeal, Molina does not dispute the award of unpaid legal fees on Jeffery's counter-claim. She argues only that she is entitled to an offset should we reverse the trial court's summary judgment on her claims. Because we affirm the summary judgment, no offset is warranted.

Decision contains any reversible errors such that, but for Jeffery's failure to file a timely Notice of Appeal, Jeffery is the proximate cause of Molina's damages." Thus, we are presented with "a trial within a trial to establish that, but for the lawyer's negligence, the client would have prevailed in the underlying action." (*United Community Church v. Garcin* (1991) 231 Cal.App.3d 327, 334; *Sukoff v. Lemkin* (1988) 202 Cal.App.3d 740, 744.)

Molina asserts she would have prevailed on appeal in her action against Kahlenberg because Judge Argento: "(1) incorrectly applied a heightened burden of proof for finding [constructive] fraud, (2) fashioned equitable remedies rather than ordering an accounting that was awarded because [he] erroneously determined that an accounting would be 'futile,' and (3) narrowly and unjustly applied the benefit of the bargain measure of damages under Civil Code section 3333 in assessing Kahlenberg's tortuous breach of fiduciary duty." We disagree.

A. Standard of Review

Given the layered procedural posture with which we are faced, we first consider the principles governing a review of summary judgment on legal malpractice complaints. "[C]ausation . . . is ordinarily a question of fact which cannot be resolved by summary judgment. The issue of causation may be decided as a question of law only if, under undisputed facts, there is no room for a reasonable difference of opinion. [Citation.]" (*Nichols v. Keller, supra*, 15 Cal.App.4th at p. 1687.) "The question about what would have happened had [the lawyer] acted otherwise is one of fact unless reasonable minds could not differ as to the legal effect of the evidence presented. [Citation.]" (*United Community Church v. Garcin, supra*, 231 Cal.App.3d at p. 334.)

Here, the trial court considered whether an appeal of these issues would have been successful. In determining that issue, the trial court addresses the subject as though it were sitting as a Court of Appeal. The parties must address and argue the issues as if they were addressing the Court of Appeal. (*United Community Church v. Garcin, supra*, 231 Cal.App.3d at p. 334.) In this context there are legal concepts peculiar to appellate law which must be considered. One of the essential rules of appellate law is that "[a]

judgment or order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness. [Citations.]" (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) It is the duty of the appellant to present an adequate record to the court from which prejudicial error is shown. (*Null v. City of Los Angeles* (1988) 206 Cal.App.3d 1528, 1533.) Also, the appellant must present argument and authorities on each point to which error is asserted, or else the issue is waived. (*Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 216, fn. 4.)

Because these issues were presented to the trial court in a motion for summary judgment, it was incumbent upon Jeffery to first present a prima facie showing that Molina's appeal would not have been successful. To do so, she was required to show that one or more elements of Molina's cause of action could not be established or that Jeffery had a complete defense to the complaint. (*Nichols v. Keller, supra*, 15 Cal.App.4th at pp. 1681-1682; Code Civ. Proc., § 437c.) If Jeffery meets that burden, the burden of proof then shifts to Molina to show that a triable issue of one or more material facts exists. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476-477; Code Civ. Proc., § 437c, subd. (o).) In addition, we are still guided by the traditional rules of summary judgment which direct us to construe the evidence of the moving party strictly and that of the opposing party liberally, and to make our own independent or de novo determination of the construction and effect of the papers submitted. (*Nichols v. Keller, supra*, 15 Cal.App.4th at p. 1682.)

B. Constructive Fraud

Molina first contends summary judgment should have been denied because had Jeffrey filed an appeal, she would have prevailed on a constructive fraud claim owing to Judge Argento's error in applying the standard of proof. We find no merit to this contention.

Section 1573 of the Civil Code provides: "Constructive fraud consists: [¶] 1. In any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or any one claiming under him, by misleading another to his prejudice, or

to the prejudice of any one claiming under him; or, [¶] 2. In any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud." (*See also Solon v. Lichtenstein* (1952) 39 Cal.2d 75, 82.)

The breach of duty referred to in Civil Code section 1573 must be one created by the confidential relationship, which is one of the facts constituting the fraud. (*Byrum v. Brand* (1990) 219 Cal.App.3d 926, 937-938; *Mary Pickford Co. v. Bayly Bros., Inc.* (1939) 12 Cal.2d 501, 525.) This distinguishes constructive fraud from other forms of actual fraud, including negligent misrepresentation, which may occur in any type of relationship. (Civ. Code, §§ 1572, subd. (2), 1709, 1710, subd. (2); *cf. Hayter v. Fulmor* (1949) 92 Cal.App.2d 392, 398, disapproved on another point in *Gagne v. Bertran* (1954) 43 Cal.2d 481, 488, fn. 5.) "'Constructive fraud exists in cases in which conduct, although not actually fraudulent, ought to be so treated – that is, in which such conduct is a constructive or quasi fraud, having all the actual consequences and all the legal effects of actual fraud. [Citations.]'" (*Efron v. Kalmanovitz* (1964) 226 Cal.App.2d 546, 560.) Once constructive fraud has been established, the burden is shifted to the party gaining the advantage to show fairness and good faith in all respects. (*Boyd v. Bevilacqua* (1966) 247 Cal.App.2d 272, 290-291.)

According to Molina, Judge Argento's findings support the conclusion that she established constructive fraud by a preponderance of the evidence and thus the burden should have been shifted to Kahlenberg to rebut this presumption by showing Kahlenberg acted fairly and in good faith. Molino claims Judge Argento misapplied the standard of proof, holding Molina to the incorrect, higher clear and convincing standard. As a result, Molino claims Judge Argento erroneously found she had not met her burden to establish constructive fraud and the burden of proof never shifted to Kahlenberg.

Jeffery argues that Molina never raised this issue at the trial level and has forfeited it.[2] Molina fails to rebut Jeffery's point and appears to abandon the issue. Our review of

[2] Jeffery also contends that the constructive fraud discussion was made only in the context of addressing punitive damages and thus Judge Argento's application of the clear and convincing standard of proof was correct. Molina does not address this issue either.

the record shows Molina did not make the argument below, and has thus forfeited it. (*Hepner v. Franchise Tax Bd.* (1997) 52 Cal.App.4th 1475, 1486.)

But even more importantly, Molina never asserted constructive fraud as a substantive cause of action. Indeed, Molina's fraud allegations solely relate to statements made by Kahlenberg before any confidential relationship was formed between them, that is, statements that induced Molina to make the $50,000 capital contribution to K&M. There is no indication that Molina asserted constructive fraud as a substantive cause of action in the underlying case or raised the issue with Judge Argento in her briefing on his tentative ruling. As a result, Judge Argento analyzed the issue of constructive fraud solely within the context of punitive damages. Molina cannot raise this issue for the first time on appeal after failing to allege constructive fraud as a cause of action in her complaint in the Kahlenberg action or otherwise providing Judge Argento or the court below an opportunity to address the issue.

We also note that Molina mischaracterizes Judge Argento's analysis. Judge Argento did not find that she had established constructive fraud by a preponderance of the evidence. Instead, he clearly presented the issue "[f]or the sake of discussion." He "assumed" that the presumption of fraud applied and "assumed" that the presumption of fraud was established by a preponderance of the evidence. If Molina had raised the issue of constructive fraud in the Kahlenberg action, Judge Argento would have been provided the opportunity to discuss the evidence supporting that claim rather than make assumptions about it.

C. Accounting

Molina next contends she would have prevailed in an appeal because Judge Argento erred by failing to order an accounting by an outside entity. We disagree.

In his analysis regarding Molina's breach of fiduciary duty claim, Judge Argento explained that Kahlenberg's record keeping was so shoddy that it was unlikely an accounting to the standard of generally accepted accounting principles could be made. Accordingly, he declined to order an accounting by an outside entity despite finding that Molina had established she was entitled to one. Instead, Judge Argento conducted his

own analysis of the financial records admitted into evidence and concluded that K&M would have suffered a loss in any event.

1. Judge Argento's Ruling

After trial, Judge Argento awarded an accounting to Molina but then stated that he would not order it. Judge Argento explained, "In regard to the fiduciary duty to account in such a manner as is 'reasonably required for the proper exercise of the partner's right and duties under the partnership agreement or this chapter' Kahlenberg's financial record keeping practices fell grossly short. Indeed, Valle [a certified public accountant retained to audit K&M's records] described the records kept as a 'glorified check register.' The records presented to Valle and the manner in which they were presented were insufficient for Valle to derive an accounting of K&M that would be consistent with generally accepted accounting principles. . . . Thus, Molina could not reasonably exercise her rights and duties as [] susceptible to presentation consistent with general accounting principles. This was not done during the partnership and has not been done to date. Indeed, it probably cannot be done because it is reasonable that Valle would have done it. There is an irony here in that, although a proper accounting is justifiable as the remedy sought by Molina's last cause of action, it does not appear feasible."

After considering the evidence presented at trial, including Valle's and Kahlenberg's testimony, Judge Argento exhaustively conducted his own calculations, accounting for the legitimate and illegitimate expenses that were deducted from Molina's capital contribution.[3] After doing so, he found Molina was not entitled to any further monetary award.

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[3] More specifically, Judge Argento explained: "Exhibit 149 has its shortcomings, but its Income Statement on page 1 shows that K&M between formation in March and December 31, 2003 generated $171,016.61 in income. $43,654.60 of it is attributable to rent paid to K&M. Page 3 lists the tenants, but it is not clear who are actual subtenants of K&M and who are subtenants under the master lease. Similar problems arise as to tenant parking, photocopying, and faxes. For the sake of discussion, if the $43,654.60 is subtracted from K&M income, the remainder is $127,362.01.

"As to operating expenses, the Income Statement shows a total of $295,225.12, with rent shown at $91,533.90. Subtracting $43,654.60 from $91,533.90 = $47,879.30.

2. Analysis

An accounting cause of action is equitable in nature, and may be sought " 'where . . . the accounts are so complicated that an ordinary legal action demanding a fixed sum is impracticable.' " (*Civic Western Corp. v. Zila Industries, Inc.* (1977) 66 Cal.App.3d 1, 14.) An accounting may be ordered where the plaintiff establishes he has a relationship with the defendant that requires an accounting, and that some balance is due to him that can only be ascertained by an accounting. (*Brea v. McGlashan* (1934) 3 Cal.App.2d 454, 460; 5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 819, p. 236.)

This is the amount K&M paid in rent over and above what it received. Of that amount, with Kahlenberg's representation to Molina that K&M's share was $4507 after tenants, then given a time frame of March through August 31, a time frame of six months, then 6 x $4507 = $27,042 as a legitimate K&M rental expense. From operating expenses of $295,225.12 is subtracted $91,533.90 = $203,691.22, to which is added $27,042, for a recalculated operating expense of $230,733.22. The difference between income and expenses over the history of the firm is a loss of $103,371.21. This is sufficient to exhaust Molina's capital contribution and $53,371.12 of Kahlenberg's capital contribution.

"If K&M expenses were further reduced by parking overpayments of $5820, Heidi Kahlenberg's payments of $7679.04, Maria De La Cruz payments of $770.30 and Kathy Wolf's insurance of $594.06 ($21,863.34), that is $103,371.21 - $21,863.34 = $81,000.87 as the amount by which K&M's expenses exceeded its income.

"Exhibit 149's financial statements page 1 shows owners' equity to be a loss of $25,538.51 as of December 31, 2003. When $25,538.51 is subtracted from $81,000.87, it supports an inference that the remaining $55,462.36 reduced the difference between K&M income recalculated to exclude improper income and K&M expenses recalculated to exclude improper expenses. That $55,462 is more than Molina's contribution to capital for legitimate purposes. The $50,000 in improper use of partnership funds 'recovered' here in this hypothetical exercise and then reallocated to apparently legitimate expenditures still results in a net loss to K&M. This exercise supports an inference that Molina has in effect suffered no financial damage as a result of the at least grossly negligent breaches of fiduciary duty because had they not occurred, K&M would still have suffered a loss. In other words, Molina's evidence, though sufficient to show breach of fiduciary duty, was insufficient to prove those breaches to be a legal cause of the financial failure of the firm and the her loss of her capital contribution. Put another way, Molina's evidence is insufficient to prove that, had the fiduciary duty not been breached, the firm would have been profitable such that she would not have suffered a loss of the $50,000 capital contribution. [Emphasis added.]"

Though Molina contends she was denied an accounting, it is apparent that Judge Argento provided her with one.[4] We do not interpret Judge Argento's refusal to order an outside accounting to mean that no accounting was done. When read within the context of the 48-page decision, we interpret his ruling to mean that Molina was awarded an accounting but it was unnecessary to refer the accounting to an outside entity such as a referee or accountant. As shown from our extensive recital of the decision in footnote 3, *ante*, Judge Argento had a thorough understanding of K&M's financial records and conducted a detailed analysis of it from the evidence produced at trial.

It is well settled that "[o]rdering a reference is generally within the discretion of the trial judge and the judge may take the accounting himself from the evidence as presented." (*Baxter v. Krieger* (1958) 157 Cal.App.2d 730, 732; *Berkowitz v. The Kiener* Co. (1940) 37 Cal.App.2d 419, 426.) In *Berkowitz*, the defendant acted to deprive the plaintiffs of commissions owed under a contract. The court held that the evidence was sufficient to support the trial court's findings with regard to the amounts that were due and that the transfers were made to deprive the plaintiffs of their commissions. The trial court was not obligated to refer the accounting to a referee. (*Id.* at p. 426.) "The trial court may well have concluded from the evidence in this case that reference to an accountant would not help the court in a correct determination of the issues involved." (*Ibid.*)

Molina acknowledges that an accounting was done by Judge Argento but attacks it as "speculative, incomplete, and inconsistent." We disagree. Judge Argento conducted his accounting after the presentation of evidence at trial. The parties also submitted supplemental trial briefs on the issue of K&M's finances. Jeffery (on behalf of Molina) provided extensive analysis of K&M's finances and submitted evidence supporting the contentions they make on appeal, including that there existed receivables and income that

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[4] Molina also contends that Judge Argento erred when he dismissed Kahlenberg's counter-claims against her as an attempt "to render justice" with respect to her accounting claim. We find Judge Argento's decision to dismiss the counter-claims to be irrelevant to the accounting issue.

should have been attributed to K&M, that there were miscalculations regarding income received by tenants and checks paid to the landlord, that Kahlenberg paid her daughter and her housekeeper from K&M funds and that Molina paid certain payroll taxes. Molina does not contend that Jeffery's arguments and calculations in the supplemental trial brief are inconsistent or incomplete or speculative. Having considered extensive briefing and trial evidence on the issue, it is obvious the amounts at issue were given due consideration in Judge Argento's calculations. Molina argument is an impermissible attempt to have us conduct an independent accounting. We find substantial evidence supports Judge Argento's calculations. (*Baxter v. Krieger, supra*, 157 Cal.App.2d at p. 732.) Therefore, Molina has failed to establish a triable issue of fact on this point.

D. Damages Calculation

Lastly, Molina contends Judge Argento improperly determined the amount of damages she suffered. Again, we find her contention lacks merit.

In limiting Molina to $2,000 in emotional distress damages on her breach of fiduciary duties claim, Judge Argento applied Civil Code section 3333, and explained:

> "Kahlenberg and Molina bargained for the Partnership, with respect to which losses are as foreseeable as profits, even when all capital contributions and fees generated and best efforts are made. Thus, given best efforts, the benefit of the bargain ranges from reasonably foreseeable profit to reasonably foreseeable loss; a breach must be shown by at least gross negligence with regard to a fiduciary duty and then that breach to have resulted in less profit or higher loss than if the bargain had been properly carried out. Assuming that the fiduciary duty to properly use Partnership funds had not been breached, where is the expert testimony, aside from Kahlenberg's optimistic representations, to prove by a preponderance of the evidence that the firm have been a financial success for both Molina and Kahlenberg? Or that it would have incurred less loss? And, if so, in what amount that would count as damage to Molina. In other words, the present evidence is insufficient to

prove either loss of profit or mitigated loss if the bargain had been properly carried out by best efforts including the avoidance of at least gross negligence by both partners."

Molina contends Judge Argento erred when he applied the benefit of the bargain approach to the breach of fiduciary duty claim. Molina argues she is entitled "[a]t a minimum, [to] the out-of-pocket loss" of her $50,000 capital contribution and up to $108,221, representing Kahlenberg's misappropriation of funds and prejudgment interest.

Civil Code section 3333 states: "For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not." "[I]n cases involving a breach of loyalty, '"'the trier of the fact should have some discretion to fix the damages in accordance with the nature and degree of the breach . . . . Thus, what constitutes making 'good' the loss may vary according to the circumstances.'" [Citation.]" (*Strebel v. Brenlar Investments, Inc.* (2006) 135 Cal.App.4th 740, 750.) We find Judge Argento properly fixed the measure of damages.

None of the cases relied upon by Molina stand for the proposition that out of pocket losses is always the proper measure of damages in a breach of fiduciary duty claim. (*See Overgaard v. Johnson* (1977) 68 Cal.App.3d 821 [out of pocket]; *Salahutdin v. Valley of California, Inc.* (1994) 24 Cal.App.4th 555 [benefit of the bargain]; *Pepitone v. Russo* (1976) 64 Cal.App.3d 685, 688-689 [benefit of the bargain].) Nor do they support the contention that Molina is entitled to essentially rescind her contract with Kahlenberg and recover her $50,000 capital contribution or reap the benefit of a 100 percent return on her money. Instead, the caselaw clearly furnishes a trial court with the discretion to determine the proper measure of damages pursuant to Civil Code section 3333. (*Strebel v. Brenlar, supra,* 135 Cal.App.4th at p. 750.) We find no abuse of discretion in the trial court's damages award. As a result, Molina has not established the underlying judgment would have been reversed on this point. Summary judgment was therefore properly granted in favor of Jeffery as no triable issue of fact has been raised.

DISPOSITION

The judgment is affirmed.

BIGELOW, P. J.

We concur:

RUBIN, J.

GRIMES, J.