Filed 2/27/18 Vermeer Mfg. Co. v. RDO Equipment Co. CA2/1

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

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| VERMEER MANUFACTURING COMPANY,<br>Plaintiff,<br>v.<br>RDO EQUIPMENT COMPANY,<br>Defendant and Appellant;<br>THE ALTMAN LAW GROUP,<br>Defendant and Respondent. | B280400<br>(Los Angeles County Super. Ct. No. BC403095) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Stephen M. Moloney, Judge. Affirmed.

Law Offices of Robert F. Schauer, Robert F. Schauer, and Noah K. McCall for Defendant and Appellant RDO Equipment Company.

The Altman Law Group, Bryan C. Altman, and Joel E. Elkins for Defendant and Respondent The Altman Law Group.

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RDO Equipment Co. (RDO) appeals from a judgment awarding The Altman Law Group (ALG) certain funds that had been interpleaded by a third party. The judgment is based on the court's determination that ALG's engagement agreements with its clients created a lien against the interpleaded funds superior to RDO's claim to the same funds. We review the court's interpretation of the agreements independently and come to the same conclusion. We therefore affirm the judgment.

## FACTUAL AND PROCEDURAL SUMMARY

In 2008, Michael Galam and certain entities affiliated with Galam (collectively, MGM) retained ALG to represent MGM in a lawsuit against Vermeer Manufacturing Company (Vermeer) and others (the Vermeer action). In a separate action, RDO sued MGM to recover on a promissory note. The two lawsuits were consolidated for trial.

In 2011, a jury found in favor of MGM and against Vermeer, and awarded MGM $1,375,913.89. The jury also returned a defense verdict in favor of MGM on RDO's claim. RDO then moved for judgment notwithstanding the verdict or, alternatively, a new trial. The trial court granted RDO's motion for judgment notwithstanding the verdict. MGM and Vermeer appealed.

In February 2015, we affirmed the judgment in MGM's favor, but reduced the award to $453,440. (*MGM Equipment Leasing Company, LLC v. Vermeer Manufacturing Company* (Feb. 11, 2015, B239253) [nonpub. opn.], p. 16 (*MGM Equipment Leasing*).)[1] We also reversed the order granting RDO's motion for judgment notwithstanding the verdict and directed the court to grant RDO's alternative motion for new trial. (*Ibid.*)

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[1] On our own motion, we take judicial notice of our prior opinion in *MGM Equipment Leasing*, *supra*, B239253.

In March 2016, after the remand for retrial of RDO's claims against MGM, RDO obtained a judgment against MGM for $1,179.615.60.[2] RDO thereafter sought to recover from the MGM-Vermeer judgment.

In April 2015, Vermeer interpleaded the amount of $637,153.17, representing the sum of the judgment in favor of MGM, plus fees, costs, and interest. Vermeer named MGM and RDO as defendants.

In August 2016, ALG intervened in the interpleader action and asserted that it had a lien against the MGM-Vermeer judgment based on its engagement agreements with MGM.

In September 2016, MGM assigned any right it had to the interpleaded funds to RDO.

In December 2016, the interpleader action was tried to the court. RDO did not dispute the amount of ALG's claim, and ALG did not dispute the amount of RDO's claim. The issue was whether ALG had a valid lien against the interpleaded funds based on engagement agreements between ALG and MGM. RDO did not dispute that, if ALG had a valid lien, that lien would be superior to RDO's claim to the funds. (See *Cetenko v. United California Bank* (1982) 30 Cal.3d 528, 531.)

Three engagement agreements between ALG and MGM were introduced into evidence. The first agreement was entered into in 2008 (the 2008 agreement) and expressly included the Vermeer action within its scope. The agreement provided for a fee equal to 40 percent "of any settlement amount or amount decided by arbitrators or mediators or of any settlement amount agreed upon between the parties or obtained by judgment during or after trial at any time from the start of this representation to the end of time."

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[2] In its opening brief, RDO states that its judgment against MGM has been partially satisfied, and that $629,615.30 remains due.

(Boldface and underlining omitted.) The 2008 agreement expressly excluded from the scope of the engagement the handling of any appeal concerning the Vermeer action or a retrial of the case. MGM had the "option of retaining new counsel to handle any appeal or to enter into a new fee agreement with [ALG] to handle any appeal."

On January 4, 2012—after the trial in the Vermeer action—Bryan Altman, an attorney with ALG, presented to Galam a proposed engagement agreement that "supersedes and replaces" the 2008 agreement. Altman and Galam thereafter exchanged emails regarding the agreement on January 4, January 12, and January 17. Galam signed the agreement (the 2012 agreement) on January 18, 2012.

The 2012 agreement expressly covered ALG's work on the appeals from the judgment in the Vermeer action and any re-trial. It further provided that MGM would pay ALG 50 percent "of any settlement amount or amount decided by arbitrators or mediators or of any settlement amount agreed upon between the parties or obtained by judgment during or after the re-trial at any time from the start of this Engagement to the end of time." (Boldface and underlining omitted.) This provision "cover[ed] all fees relating to any and all work performed through the conclusion of the Engagement." (Boldface and underlining omitted.)

As RDO points out, the 2012 agreement does not expressly provide for ALG to be paid from any amount that MGM recovers by means *other than* settlement, arbitration, mediation, or " 'judgment during or after re-trial.' "

The 2012 agreement included two provisions concerning the creation of a lien in favor of ALG. The first states that MGM grants ALG "a lien on any and all recovery (including a judgment or settlement amount) you receive for all of the firm's attorneys' fees, and costs and expenses." The second provides: "In the event of litigation, [MGM] hereby grants to [ALG] to the extent of [ALG'S]

attorneys' fees and un-reimbursed costs, a lien on any recovery of any kind achieved for [MGM] by [ALG]. This lien acts as security for payment due to [ALG] by [MGM]."

In March 2015, after we filed our opinion in *MGM Equipment Leasing*, ALG and MGM entered into its third engagement agreement (the 2015 agreement), which "memorializes and further clarifies [the parties'] prior oral and written agreements." This agreement recited 19 matters in which ALG was representing MGM, none of which included the Vermeer action or appeal, and provided that ALG will charge MGM for its services in the specified matters "on an hourly basis" at rates set forth in the agreement. The fees in the specified matters "are separate from and in addition to the fees that are owed to [ALG] pursuant to the [2012 agreement]."

The 2015 agreement provides that MGM "granted a lien to [ALG]" for fees on the specified matters "on any recovery of any kind achieved for [MGM] by [ALG] in any matter and, more specifically, in the 'Vermeer litigation' which includes, among other matters, [the Vermeer action]." The agreement concludes by providing that the parties "agree and acknowledge that [ALG] has and continues to assert a lien for its fees and costs in the Vermeer litigation as provided for in [the 2012 agreement]."

At the outset of the trial, the court denied RDO's motion in limine to exclude evidence of the emails between Altman and Galam concerning the 2012 agreement.

After trial, the court found that, based on its interpretation of the 2012 agreement, with the aid of the emails, ALG had a valid lien against the interpleaded funds in the amount of $324,601.48, and that based on the 2015 agreement, ALG had a valid lien against the interpleaded funds in the amount of $552,191.04. The court further found that these liens have priority over RDO's claim against the funds. The total amount secured by the ALG liens is

$876,792.52. Because this amount exceeded the interpleaded $637,153.17, the court awarded the entire sum to ALG.

## DISCUSSION

### I.

When, as here, there is no conflict in the evidence, we interpret the meaning of a contract independent of the trial court's determination. (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865; *Winet v. Price* (1992) 4 Cal.App.4th 1159, 1166.)

" 'The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties.' [Citation.] 'Such intent is to be inferred, if possible, solely from the written provisions of the contract.' " (*County of San Diego v. Ace Property & Casualty Ins. Co.* (2005) 37 Cal.4th 406, 415; see Civ. Code, § 1636.) Extrinsic evidence, however, may be considered in interpreting a contract and shedding light on "the 'circumstances surrounding the making of the agreement' " (*Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 40), in order to ascertain the meaning of patent or latent ambiguities, but not "to add to, detract from, or vary the terms of a written contract." (*Id.* at p. 39; see also *Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 391; Code Civ. Proc., § 1856, subd. (g).) Whether a contract is ambiguous is a question of law we review de novo.

" 'An interpretation which gives effect to all provisions of the contract is preferred to one which renders part of the writing superfluous, useless or inexplicable.' " (*Carson v. Mercury Ins. Co.* (2012) 210 Cal.App.4th 409, 420; see Civ. Code, § 1641.) Courts will also reject an interpretation that leads to an absurd result. (*Eucasia Schools Worldwide, Inc. v. DW August Co.* (2013) 218 Cal.App.4th 176, 182; *Bill Signs Trucking, LLC v. Signs Family Limited Partnership* (2007) 157 Cal.App.4th 1515, 1521; Civ. Code, § 1638.)

## II.

RDO contends that the unambiguous terms of the 2012 agreement permit ALG to recover its fees from three sources: (1) "any settlement amount or amount decided by arbitrators or mediators"; (2) "any settlement amount agreed upon between the parties"; and (3) "judgment during or after the re-trial." RDO argues that these sources did not encompass MGM's judgment in the Vermeer action. That judgment was not the result of a mediation or arbitration, a settlement, or re-trial; it was determined by the jury after the first and only trial, then reduced by this court on appeal and affirmed. Therefore, according to RDO, ALG was not entitled to recover any fees from MGM.

RDO's interpretation ignores other language in the contract that, at a minimum, renders the language it relies upon uncertain or ambiguous. The reference to any amount "obtained by judgment during or after the re-trial" is immediately followed by the clause, "*at any time from the start of this Engagement* to the end of time." (Italics added and underlining omitted.) The "Engagement" is defined as the "prosecut[ion of MGM's] interests against Vermeer in connection with any appeal by [MGM] from and/or legal action pertaining to the decision that was reached in the trial of [the Vermeer action] in which the jury rendered a verdict in favor of [MGM], and with any re-trial of this matter that may take place." The "Engagement" thus includes time prior to any possible re-trial. Although the words "during or after the re-trial" arguably modify and limit the meaning of the phrase "obtained by judgment" to mean a judgment obtained after a re-trial begins, the next clause—"at any time from the start of this Engagement"—indicates that ALG can recover fees from a judgment obtained any time after the engagement began, which would appear to include the judgment we subsequently modified and affirmed in 2015. Indeed, if RDO's interpretation is adopted, the "at any time" clause would be

surplusage, a construction courts prefer to avoid. (See Civ. Code, § 1641.)

The provisions in the agreement concerning the creation of a lien also suggest that the sources of recovery are not as limited as RDO contends. (See Civ. Code, § 1641 [each clause in a contract may aid the interpretation of other clauses].) In one part, the 2012 agreement provides that MGM grants to ALG "a lien on *any and all recovery* (including a judgment or settlement amount) [MGM] receive[s] for all of the firm's attorneys' fees, and costs and expenses." (Italics added and boldface omitted.) In another part, MGM grants to ALG "a lien on *any recovery of any kind* achieved for [MGM]." (Italics added.) If ALG would be paid only from the sources RDO identifies, there would appear to be no point in providing for the possibility of a lien on funds obtained from other sources. Again, courts prefer a construction that gives effect to all provisions of the agreement and to avoid interpretations that render part of the contract superfluous. (*Carson v. Mercury Ins. Co.*, *supra*, 210 Cal.App.4th at p. 420.)

Because the agreement is ambiguous as to whether ALG can recover its fees from a judgment affirmed after the parties entered into the 2012 agreement, we may consider the parol evidence of the emails admitted at trial. These emails reveal that Altman and Galam understood that the 2012 agreement was to be on the same general terms as the 2008 agreement, with the exceptions that (1) ALG would represent MGM on appeal and in any retrial, and (2) the contingency fee would increase from 40 percent to 50 percent. Indeed, the 2012 agreement is substantially similar to the 2008 agreement except in these two respects, and the provisions regarding MGM's grant of a lien are unchanged. Although the word "trial" in the critical language regarding the fee in the 2008 agreement was changed to "re-trial" in the 2012 agreement, the change, when viewed in the context provided by the emails, appears

to have been intended to cover the possibility of a retrial, not to cancel ALG's right to receive a fee at all in the event the judgment was affirmed on appeal.

The parties' understanding that ALG continued to have the right to recover a fee under the 2012 agreement if the judgment was affirmed on appeal is also evident from the 2015 agreement. MGM and ALG entered into the 2015 agreement approximately three weeks after we filed our opinion affirming (after reducing) MGM's judgment against Vermeer. If RDO's interpretation of the 2012 agreement is correct, ALG was not at that point entitled to a fee and there was no meaningful prospect that it would ever recover a fee because our opinion did not call for a retrial of MGM's case against Vermeer. Nevertheless, the 2015 agreement provides that the fees for the 19 matters covered by that agreement "are separate from and in addition to *the fees that are owed* to [ALG] pursuant to the [2012 agreement]." (Italics added.) The 2015 agreement further provides that the parties "agree and acknowledge that [ALG] *has* and continues to assert a lien for its fees and costs in the Vermeer litigation as provided for in [the 2012 agreement]." (Italics added.) By providing that fees "are owed" to ALG and that it "has" a lien despite the fact that no retrial was in the offing, these provisions reflect the parties' understanding that the 2012 agreement provided ALG with the right to recover its fees, and established a lien for such fees, even though there would be no retrial of the case after the appeal. Although we are ultimately concerned with the parties' understanding at the time they entered into the 2012 agreement, not their understanding about that agreement in 2015, there is no evidence to suggest or reason to believe that their understanding in 2015 about their 2012 agreement was any different than their understanding at the time they entered into the earlier agreement. (See *Tanner v. Title Ins. & Trust Co.* (1942) 20 Cal.2d 814, 823 ["the interpretation placed upon

the contract by the parties themselves, as evidenced by their conduct subsequent to its execution, may be considered" in interpreting the contract]; *Western Medical Enterprises, Inc. v. Albers* (1985) 166 Cal.App.3d 383, 391 [the "construction given a contract by the parties before any controversy has arisen as to meaning will, when reasonable, be adopted by the courts"].)

RDO's interpretation would also lead to an unfair and absurd result, which courts prefer to avoid. (*California National Bank v. Woodbridge Plaza LLC* (2008) 164 Cal.App.4th 137, 143.) According to RDO, just prior to entering into the 2012 agreement, ALG had the right to be paid 40 percent of the MGM-Vermeer judgment. Although ALG, under the 2012 agreement, would be undertaking a significant expansion of its engagement by agreeing to work on the appeal and a possible retrial of the case, RDO contends that ALG agreed to be paid nothing in the event the judgment in MGM's favor was affirmed on appeal. There is nothing in the record to support this absurd result and, as set forth above, substantial evidence to support ALG's interpretation.

RDO also argues that any ambiguity in the 2012 agreement should be construed against the party that drafted the agreement—in this case, ALG. (See Civ. Code, § 1654.) Courts apply this rule, however, only when they cannot resolve the uncertainty with other rules of construction and the consideration of extrinsic evidence. (*Vine v. Bear Valley Ski Co.* (2004) 118 Cal.App.4th 577, 590, fn. 2; *Oceanside 84, Ltd. v. Fidelity Federal Bank* (1997) 56 Cal.App.4th 1441, 1448.) Because we have resolved the uncertainty by other means, we do not apply this rule.

## III.

RDO contends that the court erred in determining that the 2015 agreement established a lien against the Vermeer judgment. RDO argues that the 2015 agreement is based upon an oral agreement and that an attorney's charging lien must be fully disclosed to the client in writing. (See Rules Prof. Conduct, rule 3-300; *Fletcher v. Davis* (2004) 33 Cal.4th 61, 69.) The argument appears to be misplaced, however, because ALG does not rely on any oral agreement for a lien; the 2012 and 2015 agreements are in writing.

RDO next argues that there is no evidence that MGM had a reasonable opportunity to consult with an independent attorney about the lien created by the 2015 agreement, as required by Rule 3-300(B) of the Rules of Professional Conduct.[3] RDO did not raise this argument below and has therefore failed to preserve it for appeal. (See *Araiza v. Younkin* (2010) 188 Cal.App.4th 1120, 1127.) In any event, the argument is belied by the terms of the 2015 agreement in which the parties represented and acknowledged that MGM "has been and hereby is advised . . . that [MGM] has the right to (and [ALG] recommends that [MGM] does) consult an independent attorney to review and advise [MGM] as to all of the terms of this Agreement." RDO speculates that "ALG apparently got MGM to first orally consent to the adverse attorney lien, without any written advisement that MGM could seek independent legal advice, then got MGM's consent to the lien." RDO does not cite to any facts in the record to support this argument and has

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[3] Rule 3-300(B) of the Rules of Professional Conduct requires that prior to taking a security interest adverse to the client, the client must be "advised in writing that the client may seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice."

failed to satisfy its burden on appeal of demonstrating error. (See *Alki Partners, LP v. DB Fund Services, LLC* (2016) 4 Cal.App.5th 574, 589; *Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 685.)

**IV.**

For the foregoing reasons, we interpret the 2012 and 2015 agreements as creating liens against the funds interpleaded to satisfy the MGM-Vermeer judgment in order to secure the payment of fees owed to ALG. Because RDO does not dispute that if such liens exist they have priority over its claim to the interpleaded funds and secure an amount greater than the interpleaded funds, the court correctly awarded the entire sum to ALG.

**DISPOSITION**

The judgment is affirmed. Respondent The Altman Law Group shall recover its costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur.

CHANEY, J.

JOHNSON, J.