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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

WILLIAM FRAZEE, Plaintiff and Appellant, v. PROSKAUER ROSE LLP et al., Defendants and Respondents.	B254569 (Los Angeles County Super. Ct. No. BC452417)

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

SJS Counsel, Samuel J. Smith; Law Offices of Louis Benowitz, Louis Max Benowitz for Plaintiff and Appellant.

Proskauer Rose LLP, Lary Alan Rappaport for Defendants and Respondents.

William Frazee sued Proskauer, Rose LLP (Proskauer) for malpractice allegedly arising from the law firm's joint representation of Frazee and his former employer. The trial court gave judgment to Proskauer and one of its partners, Anthony Oncidi, because the action has no merit. (Code Civ. Proc., § 437c.)[1] We affirm.

FACTS

Frazee has worked for many years in the entertainment industry, and was an executive at Ascent Media Group (AMG). In 2005, AMG employee Carrie Zuzenak complained of sexual harassment by Frazee. AMG investigated the complaint and reprimanded Frazee, warning him that future misconduct could result in disciplinary action, including termination. In 2006, Zuzenak sued Frazee for sexual harassment and AMG for failing to prevent the harassment. Contractual arbitration was ordered and the lawsuit was stayed.

AMG retained Proskauer to defend against Zuzenak's claims. Frazee allowed Proskauer to jointly represent him and AMG, at AMG's expense, despite receiving a letter from Proskauer in December 2006 warning of potential conflicts of interest and confidentiality risks. The letter warned that a conflict could arise if the employer learns during litigation that the represented employee engaged in unlawful conduct outside the scope of employment, causing the employer to disclaim liability for such conduct. Proskauer billed AMG for all attorney fees and costs incurred in the Zuzenak matter. Frazee paid nothing.

A settlement agreement was reached with Zuzenak during mediation. Frazee signed a short form of the agreement on February 14, 2008. At his deposition, he did not recall ever seeing the document. AMG paid the entire settlement amount; Frazee paid nothing toward it. Zuzenak released Frazee and AMG from liability and dismissed her lawsuit with prejudice.

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[1] Unlabeled statutory references in this opinion are to the Code of Civil Procedure.

In 2010, another AMG employee, Addie Hall, threatened litigation arising from misconduct by Frazee. Proskauer undertook AMG's defense. On the eve of a mediation, Proskauer sent Frazee a letter offering joint representation, at AMG's expense. Rather than accept the offer, Frazee's attorney Samuel Smith contacted Oncidi to say that he was representing Frazee.

Proskauer settled the Hall dispute at mediation on September 22, 2010. Frazee was not a party to the settlement, but AMG secured a release of liability for Frazee. AMG paid the entire settlement and all attorney fees related to the Hall dispute.

Proskauer denies representing Frazee at the Hall mediation, or in any matter other than the Zuzenak dispute; inconsistently, it sent Hall's attorney an e-mail rejecting a settlement offer on behalf of Frazee. Also, Oncidi testified that he represented AMG and all of its employees, including Frazee. Oncidi later clarified that he did not represent Frazee, only AMG, but secured a release on behalf of Frazee and all other AMG employees. In any event, Frazee was released from liability and faced no possibility of an adverse judgment.

At his deposition, Frazee testified that he did not accept Proskauer's proposal to represent him in the Hall matter: he was being represented at that time by his attorney, Mr. Smith. Frazee later learned that a monetary settlement was reached, so "I figured it had proceeded without me." Frazee did not pay any money to Hall or to Proskauer.

After settling with Hall, AMG informed Frazee that it was taking adverse action against him, including a written reprimand, the forfeiture of Frazee's bonus for 2010, and a suspension without pay. Frazee resigned and threatened to sue AMG. AMG made a demand for contractual arbitration against Frazee in November 2010, alleging a breach of Frazee's employment contract and seeking indemnification of $500,000 for attorney fees, costs and settlement payments AMG incurred in the Zuzenak and Hall disputes, on the ground that Frazee's conduct was outside the scope of his employment. Frazee counter-claimed against AMG for constructive discharge from employment; breach of contract; unfair business practices; Labor Code violations; defamation; and emotional distress. Two months after initiating arbitration, AMG withdrew its indemnification claim.

Frazee testified that Proskauer never gave assurances that AMG would not discipline him based on the allegations in the Zuzenak and Hall matters. In fact, Frazee has no knowledge that any attorney at Proskauer was involved in AMG's decision to discipline him. AMG's in-house counsel denies consulting with Proskauer about Frazee's discipline.

PROCEDURAL HISTORY

Frazee filed this lawsuit on January 4, 2011. His third amended complaint asserts causes of action for legal malpractice, breach of fiduciary duty, and negligent misrepresentation.[2] He alleges that defendants settled the Zuzenak and Hall claims without his informed consent and without having AMG unilaterally release its right to seek indemnification from him; misrepresented that the cost of the joint representation would be borne by AMG; failed to disclose a conflict of interest or allow Frazee to consult independent counsel; disclosed confidential communications; and failed to return Frazee's client file.

In August 2013, defendants moved for summary judgment. Frazee opposed the motion. After considering the evidence and hearing argument, the trial court granted defendants' motion. The court found that (a) Frazee's claims arising from defendants' conduct in the Zuzenak dispute are time-barred; (b) Frazee cannot prove proximate causation or damages based on defendants' conduct in the Zuzenak or Hall matters because he has not shown that he could have obtained a better result than the one defendants' obtained, for which Frazee paid no money in defense costs or in settlement costs; and (c) although there is a triable issue as to whether defendants represented Frazee in the Hall matter, summary judgment is appropriate because there is a lack of proximate cause or damage. The court entered judgment for defendants on December 30, 2013. Frazee appeals.

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[2] Frazee's negligent misrepresentation cause of action seems to have fallen by the wayside, at some point.

DISCUSSION

Standard of Review

The judgment in favor of Proskauer is appealable. (§§ 437c, subd. (m)(1), 904.1, subd. (a)(1).) Summary judgment is proper if there is no triable issue of material fact and judgment is appropriate as a matter of law. (§ 437c, subd. (c).) A moving defendant must establish a complete defense, or disprove an element of each cause of action; the burden then shifts to plaintiff to show a triable issue of material fact. (§ 437c, subd. (p); *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 767-768.) Review is de novo, with an independent examination of the record in the light most favorable to the plaintiff. (*Saezler* at p. 768; *Patterson v. Domino's Pizza, LLC* (2014) 60 Cal.4th 474, 499-500.)

Issue Preclusion/Collateral Estoppel

The parties submitted further briefing as to whether Frazee is precluded from relitigating issues decided in a prior appeal before this court, *Frazee v. Niles* (Feb. 1, 2016, B258334) (nonpub. opn.). In that appeal, we reviewed the dismissal of Frazee's lawsuit against AMG and its employees, after the trial court sustained demurrers without leave to amend. A prior judgment on the merits entered after demurrers are sustained may be deployed in a res judicata challenge by a defendant, if the ruling determined that the facts alleged in the first suit do not constitute a cause of action. (*Crowley v. Modern Faucet Mfg. Co.* (1955) 44 Cal.2d 321, 323; *Berman v. Aetna Cas. & Surety Co.* (1974) 40 Cal.App.3d 908, 912.) We may take judicial notice of the prior decision. (*Legg v. Breitenbach* (1961) 198 Cal.App.2d 206, 207.)

The doctrine of collateral estoppel, or "issue preclusion," bars relitigation of issues argued and decided in a prior proceeding brought by the same party, even if the two cases raise different causes of action. (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 824.) The prior judgment "conclusively resolves" issues actually litigated, and may be used by a litigant who was *not* a party or privy in the first suit. (*Ibid.*) Proskauer may assert collateral estoppel even though it was not a party to Frazee's lawsuit against AMG.

"[I]ssue preclusion applies (1) after final adjudication (2) of an identical issue (3) actually litigated and necessarily decided in the first suit and (4) asserted against one who

was a party in the first suit or one in privity with that party." (*DKN Holdings LLC v. Faerber*, *supra*, 61 Cal.4th at p. 825.) "The bar is asserted against a party who had a full and fair opportunity to litigate the issue in the first case but lost. [Citation.] The point is that, once an issue has been finally decided *against* such a party, that party should not be allowed to relitigate the same issue in a new lawsuit." (*Id.* at pp. 826-827.) The "identical issue" requirement looks at the sameness of the factual allegations in the two lawsuits. (*Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 511-512.)

The genesis of *Frazee v. Niles* was Frazee's alleged constructive termination by AMG, when the employer disciplined him as a result of the Zuzenak and Hall claims. Frazee asserted that AMG fabricated his coworkers' claims, falsely accused him of wrongdoing, then breached his employment contract (and damaged his reputation) by demoting him and reducing his pay. This court found that Frazee was not harmed by AMG's disciplinary actions: "Frazee voluntarily left his job with AMG. He cannot claim a wrongful discharge for intolerable working conditions after agreeing to the punitive measures imposed by his employer in 2008. A demotion, even when accompanied by a reduction in pay, does not constitute an intolerable working condition necessary to support a claim of constructive discharge. (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1247.)" We found that AMG had a legal duty to pursue harassment claims made by Frazee's coworkers, so that the company's investigation and report leading to his reprimand was privileged and could not be the subject of a defamation claim. We rejected Frazee's allegations that AMG fabricated his coworkers' harassment claims to deceive him into agreeing to a pay reduction: Frazee did not rely on AMG's representations about the harassment claims, as a matter of law, because he knew (per his pleadings) that he engaged in no sanctionable misconduct with his coworkers.

In the current appeal, Frazee's brief states that he was harmed "by Proskauer's failure to inform its joint client, Frazee, that Proskauer's other joint client, [AMG], could use the settlements of the Zuzenak Arbitration and the Hall Dispute . . . to negatively impact Frazee's employment." We previously found in *Frazee v. Niles* that Frazee was an at-will employee who could be terminated at any time without cause; that he

voluntarily quit his job; that he cannot claim a constructive discharge owing to his demotion and pay cut; and that AMG had a legal duty to investigate its employees' harassment claims against Frazee.

Frazee is estopped from blaming Proskauer for causing a negative impact on his employment at AMG. Frazee chose to leave his job after his employer disciplined him, twice, while carrying out its legal duty to investigate and address harassment complaints. As a result, Frazee cannot claim that Proskauer caused him to lose his job.

The Elements of Frazee's Claims

The elements of a legal malpractice suit arising from a civil proceeding are (1) the attorney's duty to use the same skill, prudence, and diligence as other members of the profession; (2) breach of that duty; (3) a proximate causal connection between the breach and the resulting injury; (4) actual loss or damage resulting from the attorney's negligence. (*Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194, 1199.) The elements of a breach of fiduciary duty claim are (1) a fiduciary relationship; (2) its breach; (3) damage proximately caused by the breach. (*Knox v. Dean* (2012) 205 Cal.App.4th 417, 432; *Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1086-1087.) The trial court found that "Frazee cannot prove proximate causation or damages."

Proximate Causation

Frazee states that "[t]o prevail on the issue of causation, Frazee must demonstrate that he would have obtained a better result absent the malpractice," citing *Filbin v. Fitzgerald* (2012) 211 Cal.App.4th 154, 165. He continues, "Frazee received one thing, and one thing only from the settlements—a release from the claimants." This is untrue. Zuzenak sought general damages, special damages, punitive damages, attorney fees and costs.[3] By virtue of the settlement, Frazee paid Zuzenak no damages of any kind, nor did he pay for his own or Zuzenak's attorney fees and costs. His employer paid for everything. The same holds true for the Hall dispute.

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[3] The Fair Employment and Housing Act (FEHA) authorizes an award of attorney fees and costs to a prevailing party. (Gov. Code, § 12965, subd. (b).)

Frazee avoided payment of untold thousands of dollars *and* was released from liability by Zuzenak and Hall. Frazee's own expert, Christopher Rolin, declares that "plaintiff does not contend that the results obtained in the matters were inadequate." Given Frazee's conceded satisfaction with the results, ending his coworkers' claims against him without his financial participation, Frazee cannot prove to a legal certainty that but for Proskauer's alleged negligence he would have obtained a better settlement or judgment at trial in the Zuzenak or the Hall disputes. (*Viner v. Sweet* (2003) 30 Cal.4th 1232, 1241; *Namikas v. Miller* (2014) 225 Cal.App.4th 1574, 1582 [one must determine what a reasonable jury or court would have done if the underlying matter had been tried instead of settled, in a "'trial-within-a-trial'"].) Proof of damages to a legal certainty is particularly difficult to show in "'settle and sue'" cases, which are inherently speculative. (*Namikas*. at pp. 1582-1583.)

"In legal malpractice claims, the absence of causation may be decided on summary judgment 'only if, under undisputed facts, there is no room for a reasonable difference of opinion.'" (*Namikas v. Miller*, *supra*, 225 Cal.App.4th at p. 1583.) There is no basis for concluding that Frazee would have obtained a better result at trial than Proskauer's settlement: Frazee paid nothing to the claimants, paid nothing to the claimants' attorneys, and paid nothing to his attorneys, and was released from liability. Frazee is concededly happy about this, and it is difficult to imagine a better result.

While Frazee likes the results obtained by Proskauer vis-à-vis Zuzenak and Hall, he does not like the results vis-à-vis AMG. The complaint alleges that Proskauer allowed AMG to take adverse action against him, resulting in his loss of bonuses, raises, benefits, job responsibilities, and wages. Proskauer failed to inform Frazee that AMG might use the settlements "to negatively impact Frazee's employment."

Proskauer could not ethically instruct AMG to ignore employee claims against Frazee. Frazee engaged in misconduct even after he was disciplined and required to undergo antiharassment and sensitivity training in 2005, drawing AMG into litigation twice. To protect civil rights, employers are required to comply with FEHA, which includes "prompt and remedial internal procedures and monitoring so that worksites will

be maintained free from prohibited harassment." (Historical and Statutory Notes, 32E pt. 2 West's Ann. Gov. Code (2011 ed.) foll. § 12940, p. 198.) Under FEHA, an employer is strictly liable for all acts of workplace sexual harassment by a supervisor such as Frazee. *(Patterson v. Domino's Pizza, LLC*, *supra*, 60 Cal.4th at p. 491.)

AMG has a legal duty to safeguard the integrity of its workplace by disciplining a wayward employee. No reputable attorney would (or should) advise a client to violate FEHA by ignoring an employee's misconduct. Frazee mistakenly believes that his behavior has no consequences, that he could continue on, undisciplined, while his employer absorbed all of the costs arising from his misconduct and the attendant damage to its business reputation. The law does not support Frazee's belief. Proskauer did not instigate AMG's internal investigation, or have a duty to protect Frazee from discipline.

Frazee's claim that Proskauer's legal work led to AMG's disciplinary measures has no merit. There is no link between Proskauer's legal work in settling the claims of Frazee's coworkers (which Frazee concedes was a good result) and AMG's performance of its legal duty to take prompt remedial measures against Frazee. Proskauer's joint representation of AMG and Frazee in the Zuzenak and Hall disputes did not lead to Frazee's constructive discharge. There is no "reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact" of the events that transpired after Proskauer settled the claims against Frazee and AMG. (*Viner v. Sweet*, *supra*, 30 Cal.4th at p. 1243.)

Nor was Proskauer's conduct "a substantial factor" in causing Frazee's supposed harm in being constructively discharged. (*Yanez v. Plummer* (2013) 221 Cal.App.4th 180, 190.) As discussed in *Frazee v. Niles*, *supra*, B258334, Frazee's employment contract allows for "termination of employment without cause," "at any time" and for any reason. Frazee cannot claim constructive discharge merely because he was demoted and his pay was reduced. *Frazee v. Niles* buttresses the lack of causal connection between Proskauer's legal representation and Frazee's decision to quit his job.

Frazee complains that he was harmed because Proskauer did not require AMG to release Frazee from a possible indemnification lawsuit by AMG to recoup its losses in

settling the Zuzenak and Hall disputes.[4] Frazee speculates that AMG may have given him a release from liability had Proskauer (or independent counsel) asked for one, because Frazee generated revenue for AMG. The evidence does not support his claim. On the contrary, AMG's in-house counsel declares that had a unilateral release been requested to prevent AMG from seeking indemnification, the request would have been denied. Frazee's claim that AMG might have given him a unilateral release from liability is based on impermissible speculation and conjecture. (*Viner v. Sweet, supra,* 30 Cal.4th at p. 1241.) As the trial court observed, Frazee's argument that AMG "would have given him a release because he allegedly generated substantial revenue for the company . . . contradicts Frazee's other argument that [AMG] sought to use the results of the underlying Zuzenak Arbitration and Hall Dispute to constructively discharge him. Those are fundamentally inconsistent arguments."

Frazee argues that, had he been advised that AMG might seek indemnification, he would have contributed financially to the Zuzenak and Hall settlements in order to obtain a release from AMG and his coworkers. Proskauer's role was to get the best possible result for Frazee against Zuzenak and Hall: the results were satisfactory and Frazee does not claim otherwise. Frazee will never contribute toward the settlements or the attorney fees because AMG dismissed its indemnification claim. It is untenable that Frazee accuses Proskauer of wrongdoing for failing to make him, personally, pay Zuzenak and Hall. This position is at odds with Frazee's expert, who declared that the results secured by Proskauer with respect to coworker claims are not being challenged.

In sum, Frazee did not show a triable issue as to his malpractice and breach of fiduciary duty claims. Specifically, Proskauer's joint representation did not proximately cause him actual loss or injury. """[I]f the allegedly negligent conduct does not cause damage, it generates no cause of action in tort."""" (*Moua v. Pittullo, Howington, Barker,*

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[4] AMG initially sought indemnification from Frazee in its demand for contractual arbitration, then withdrew the claim two months later. Frazee does not contend that he ever repaid AMG for any of the attorney fees or settlement costs it incurred.

Abernathy, LLP (2014) 228 Cal.App.4th 107, 112-113.) Because there is no triable issue as to proximate cause or damage, we need not reach Frazee's arguments relating to the expiration of the statute of limitations on his claims. (*Id.* at p. 118)

Evidentiary Rulings

"We review a trial court's evidentiary rulings for abuse of discretion. [Citation.] This is particularly so with respect to rulings that turn on the relevance of the proffered evidence. . . . Discretion is abused only when in its exercise, the trial court 'exceeds the bounds of reason, all of the circumstances before it being considered.' (*Denham v. Superior Court* [1970] 2 Cal.3d [557,] 566.) There must be a showing of a clear case of abuse and miscarriage of justice in order to warrant a reversal. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 331.)" (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 281.)

The trial court excluded, on relevance grounds, the declaration of Mike Albert, an executive at one of AMG's clients. Albert opined that Frazee was professional and courteous, and his company hired AMG "primarily" because Frazee provided outstanding customer service. Contrary to Frazee's contentions, Albert's declaration does not prove, even circumstantially, AMG's purported willingness to sign a unilateral release of claims against Frazee because he was a valued employee. The trial court did not exceed the bounds of reason by excluding this evidence.

The trial court excluded a paragraph of Frazee's declaration, which listed his damages. Frazee's inability to establish proximate causation means that we need not address evidence listing his damages. In any event, the excluded paragraph is a verbatim repetition of the allegations in the complaint.

Finally, Frazee's attorney Smith attached to his declaration several depositions, in their entirety, in rough draft form, over 1,000 pages of material without any highlighting. The trial court excluded the evidence. When deposition testimony is used, "[o]ther than the title page, the exhibit must contain only the relevant pages of the transcript" and "[t]he relevant portion of any testimony in the deposition must be marked in a manner that calls attention to the testimony." (Cal. Rules of Court, Rule 3.1116.) The trial court

did not abuse its discretion by excluding the submission of excessive evidence, most of which is not pertinent to Frazee's opposition.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

BOREN, P.J.

We concur:

ASHMANN-GERST, J.

CHAVEZ, J.