Filed 10/3/12 Hollander v. XL London Market 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

GAIL HOLLANDER et al., Plaintiffs and Appellants, v. XL LONDON MARKET LTD. et al., Defendants and Respondents.	B229004 (Los Angeles County Super. Ct. No. BC365455)

APPEAL from an order of the Superior Court of Los Angeles County, Michael L. Stern, Judge. Affirmed.

A. Tod Hindin and Karen L. Hindin for Plaintiffs and Appellants.

Severson & Werson, Forrest Booth and Eric M. Kowalewsky for Defendants and Respondents.

Plaintiffs Gail and Stanley Hollander appeal the trial court's order awarding costs to defendants XL London Market Ltd., XL London Market Services, Ltd., and XL Services Ltd. (London Companies). The London Companies were dismissed from this action for lack of personal jurisdiction, and after we affirmed the trial court's motion to quash on appeal, the London Companies filed a cost memorandum in the trial court. The Hollanders contend that (1) the London Companies' cost memorandum was not timely filed; (2) the London Companies failed to file a motion under Code of Civil Procedure section 473[1] for relief for their late cost memorandum; and (3) even if the London Companies' cost memorandum was timely, the trial court erred in not striking their first appearance fees because the fees were not required. We affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY[2]

1. Background Facts[3]

The Hollanders own fine art by the German artist Martin Kippenberger. On January 9, 2006, employees of defendant LA Packing were hanging three paintings by Kippenberger in the Hollanders' home and damaged the frames. The Hollanders made a claim under their policy issued by defendant XL Speciality under the auspices of defendant XL Capital, Ltd.'s Fine Art & Specie brand (XL Fine Art & Specie).[4] Natasha Fekula, a XL Fine Art & Specie claims adjuster, arranged for the paintings to be returned to Kippenberger's gallery in Germany, where they were repaired at XL Specialty's expense.

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[1] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

[2] This appeal is consolidated with No. B230807, *Hollander v. XL Insurance (Bermuda), Ltd.* filed February 9, 2011. However, because the two appeals involve different defendants and different issues, we file separate opinions in each case.

[3] A portion of the facts herein is taken from our prior opinion in this matter, *Hollander v. XL London Market, Ltd*. (Apr. 16, 2010, B213864) [nonpub. opn.].

[4] XL Fine Art & Specie is a "brand" of XL Capital, Ltd., and not a separate business entity. XL Fine Art & Specie polices are issued by any number of the related XL entities; the policy at issue here was issued by XL Speciality. XL Fine Art & Specie is not a defendant in this case. XL Specialty has appeared and does not contest jurisdiction.

The Hollanders disagreed with Fekula's estimate regarding the diminution in value of the paintings, and arranged to have the paintings sold at auction.

In January 2007, the Hollanders commenced this action against XL Specialty and numerous other defendants,[5] including Doe defendants, alleging claims for breach of contract, breach of the covenant of good faith and fair dealing, breach of Insurance Code section 785, and promissory fraud, and also asserted a claim against LA Packing for negligence.

In February 2008, the Hollanders added as Doe defendants the London Companies, which are three United Kingdom corporations. These three entities are related to the other XL defendants.

In June 2008, the London Companies moved to quash service of the summons and complaint, arguing the trial court lacked personal jurisdiction over them. The hearing on the motion to quash service was heard January 27, 2009. The trial court found that California courts could not exert general jurisdiction over the London Companies because there was "no proof of any substantial continuous or systematic activities on the part of any of the moving parties." The court found no specific jurisdiction because plaintiffs had failed to meet their burden to show "any continuing relationships and obligations in California by [the London companies], that the claims bear a substantial connection to the claimed contacts, and that the exercise of jurisdiction would comport with fair play and substantial justice."

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[5] The complaint alleged claims against numerous other entities: XL Capital, Ltd., a Cayman Islands corporation; its wholly owned subsidiary corporation, XL RE, Ltd., a Bermuda corporation; XL America Group (a partnership consisting of the corporations XL Reinsurance America, Inc., a New York corporation (XLRA)); XL Insurance Company of New York, a New York corporation; XL Specialty Insurance Company, a Delaware corporation; Indian Harbor Insurance Company, a North Dakota corporation; XL Insurance America, Inc., a Delaware corporation; and XL Select Insurance Company, an Oklahoma corporation); and Greenwich Insurance Company, a Delaware corporation. Defendants XL Capital, Ltd. and XL RE, Ltd. waived jurisdiction after we ordered them to submit to discovery. (See *Hollander v. Superior Court* (Aug. 16, 2007, B200615) [nonpub. opn.].)

On January 28, 2009, the trial court entered its order of dismissal of the London Companies from the action and order granting their motion to quash service.

On January 30, 2009, the Hollanders appealed the trial court's order granting the London Companies' motion to quash the summons and complaint. On the same date, the Hollanders filed and served a notice of entry of order of dismissal and order granting motion to quash.

On April 30, 2009, the Hollanders filed an ex parte application to stay the proceedings asserting that all parties except the London Companies had agreed to a stay. The London Companies' refusal was based upon their insistence that a motion to compel discovery be heard on May 8, 2009.

The trial court issued an order to show cause on April 20, 2009 why the matter should not be stayed pending the outcome of the Hollanders' appeal.

On April 28, 2009, the London Companies filed a memorandum stating that they supported a stay of the matter following the May 8, 2009 hearing.

On April 30, 2009, the court issued its order staying the entire action pending appeal.

We affirmed the trial court's ruling on the London Companies' motion to quash summons and complaint on April 16, 2010. (*Hollander v. XL London Market, Ltd*., *supra*, B213864.)

The remittitur issued on August 2, 2010.

2. The London Companies' Cost Memorandum

On September 7, 2010, the London Companies filed a cost memorandum seeking $20,415.33 in costs.

On September 22, 2010, the parties stipulated that the Hollanders would have an extension of time until October 26, 2010 to file their motion to strike or tax costs.

On October 26, 2010, the Hollanders filed their motion to strike or tax the London Companies' costs, arguing it was (1) not timely filed pursuant to California Rules of Court, rule 3.1700, within 15 days of the dismissal of the London Companies on January 30, 2009,

but was instead filed over 18 months late, and the court lacked discretion to permit a late filing; and (2) the cost memorandum lacked backup data, thus the Hollanders could not determine whether they were necessary or reasonable.

On November 2, 2010, the London Companies filed an amended cost memorandum, seeking $23,750.12 in costs, which included backup documentation for the costs sought.

On November 3, 2010, the London Companies filed their response to the Hollanders' motion to tax costs. They asserted that backup documentation was not required; all costs were reasonable and necessary; their filing fees were recoverable because although they specially appeared and filed a motion to quash, pursuant to Government Code section 70611, the filing fee was required. Further, they asserted the filing of the cost memorandum was timely because the superior court action was stayed pending the outcome of the Hollanders appeal pursuant to section 916, subdivision (a). In the event the trial court found their cost memoranda untimely, they requested relief under section 473 for inadvertence based upon their belief the notice of appeal stayed the action for all purposes. The London Companies filed backup documentation for their costs.

In reply, the Hollanders asserted that the time to file the cost memorandum was not stayed by the pending appeal; the trial court had no discretion to disregard the timeliness of the cost memorandum; the London Companies failed to move for relief under section 473; and as parties contesting the court's jurisdiction, the London Companies were not required to pay a first appearance fee, and thus filing fee costs were not reasonably incurred.

On November 18, 2010, the trial court denied the Hollanders' motion to tax costs, entered its partial judgment awarding the London Companies $23,750.12 in costs.

On November 19, 2010, the Hollanders' filed a motion to tax costs directed at the London Companies amended cost memorandum filed November 2, 2010, arguing the second memorandum was untimely filed because it added $2,254.79 in costs not previously requested and there was no provision for the filing of an amended memorandum.

On November 22, 2010, the Hollanders appealed the partial judgment.

On December 21, 2010, the London Companies responded, arguing that the Hollanders waived any objection to the amended cost memorandum by failing to file a response, and the court had lost jurisdiction to consider the motion based on the Hollanders' appeal from the original cost memorandum; and the court had discretion to consider the cost memorandum even if filed late.

On January 6, 2011, the trial court denied the Hollanders' motion, finding that it had already ruled on the motion and therefore viewed the Hollanders' motion as a motion for reconsideration; in any event, even if properly a motion for reconsideration, the trial court denied the motion because it was based upon no new law or facts, and the court lacked jurisdiction to rule on it.

On February 9, 2011, the Hollanders appealed the trial court's ruling denying their second motion to tax costs.

DISCUSSION

The Hollanders argue that (1) the London Companies' cost memorandum was filed 18 months late, and the court was without discretion to entertain it; (2) the notice of appeal filed January 30, 2009 did not stay the action with respect to costs; (3) the London Companies failed to bring a motion for relief pursuant to section 473; and (4) the first appearance fees paid by the London Companies were not required and thus those fees should have been stricken.

As a general rule, "the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon matters embraced therein or affected thereby, including enforcement of the judgment or order." (§ 916, subd. (a).) This stay divests the trial court of the power to act on matters embraced in or affected by the appealed judgment. (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 189.) One exception to the stay is the trial court's power to award costs, which remains unaffected. (*Bankes v. Lucas* (1992) 9 Cal.App.4th 365, 368.) "Although a prevailing party at trial may not be the prevailing party after an appeal, it has been held that a motion for attorney fees is not premature despite the filing of a notice of appeal." (*Id.* at p. 368.) As *Bankes* noted, "a

postjudgment award of attorney fees may be subsumed in a previously filed notice of appeal." (*Ibid.)* In sum, *Bankes* found that a postjudgment award of attorneys fees as costs was a collateral matter which, pursuant to section 916, was embraced within the action but not affected by the order from which the appeal was taken. (*Id.* at p. 369.) As a result, a party's failure to request an award of costs or attorneys' fees pending appeal may be treated as a waiver of such award. (*Nazemi v. Tseng* (1992) 5 Cal.App.4th 1633, 1640.)

The prevailing party is entitled to costs as a matter of right. (§ 1032, subd. (b).) If the items on the face of a cost memorandum appear to be proper charges, the verified memorandum of costs is prima facie evidence of their propriety, and the burden is on the other party to show the costs were not reasonable or necessary. (*Ladas v. California State Auto. Assn.* (1993) 19 Cal.App.4th 761, 773–774.) If costs are put in issue, the burden is on the party seeking costs to justify them. (*Ibid.*)

Cost awards are subject to certain procedural requirements, including time limitations. "Except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding." (§ 1032, subd. (b).) Allowable costs are set forth section 1033.5, and include filing, motion, and jury fees. (§ 1033.5, subd. (a)(1).) To obtain costs, the prevailing party must file and serve a memorandum of costs. (Cal. Rules of Court, rule 3.1700(a).) Supporting documentation is not required if the initial memorandum of costs is verified. Supporting documentation is required only where the costs are put in issue by a motion to tax costs. (*Jones v. Dumrichob* (1998) 63 Cal.App.4th 1258, 1267.)

The costs memorandum must be served and filed within the earlier of (1) 15 days after mailing of the clerk's notice of entry of judgment; (2) 15 days after any party's service of such notice, or (3) 180 days after entry of judgment. (Cal. Rules Court, rule 3.1700(a)(1).) However, absent an agreement of the parties, the court may extend the deadline for up to 30 days. (Cal. Rules Court, rule 3.1700(b)(3); *Adam v. De Charon* (1995) 31 Cal.App.4th 708, 713.) In *Adams*, the court heard a motion for attorneys' fees filed more than 15 days after the judgment, but within 30 days after the 15 days had

elapsed, which was permissible under California Rules of Court, rule 3.1700(b)(3).[6] (*Adam*, at p. 713.) The court may grant the 30-day extension on its own motion. (*Cardinal Health 301, Inc. v. Tyco Electronics Corp.* (2008) 169 Cal.App.4th 116, 155.) Some courts have found these times limit mandatory, and any delay may result in a waiver of costs. (See, e.g., *Hydratec, Inc. v. Sun Valley 260 Orchard & Vineyard Co.* (1990) 223 Cal.App.3d 924, 929.)

Some cases have held that the time limits set forth in rule 3.1700 bar late-filed cost memoranda. (See, e.g., *Russell v. Trans Pacific Group* (1993) 19 Cal.App.4th 1717, 1726 (*Russell*).) The Third District in *Russell* rejected more lenient authority permitting late cost filings which included attorneys' fees requests, finding that the time limitations for cost memoranda, while not jurisdictional, were mandatory. (*Ibid.*) *In Nazemi v. Tseng, supra*, 5 Cal.App.4th 1633, the prevailing party waited until the appeal had concluded to file a motion for attorney fees, seeking to recover fees for both the appeal and the trial, although the trial had concluded more than a year earlier. The trial court granted the request and the Court of Appeal reversed, because "[a]ccording to statute and rule, attorney fees, when an item of costs, must be claimed within specified time limits," and "the trial court abused its limited discretion by considering [the] motion for attorney fees for trial long after the . . . maximum time extension allowed by rule." (*Id.* at p. 1641.) On the other hand, this district in *Gunlock Corp. v. Walk on Water, Inc.* (1993) 15 Cal.App.4th 1301 relied on the more lenient authorities (later rejected by the Third Appellate District in *Russell*) permitting late filing of attorney fee requests, and found the trial court has "substantial latitude in allowing fees to be awarded without strict compliance with statutory temporal and procedural limitations" where the violation was technical and there was no prejudice from the violation. (*Gunlock, supra*, at pp. 1304–1305.)

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[6] Attorney's fees are recoverable by prevailing parties as costs under section 1032, subdivision (b) when authorized by contract. (§ 1033.5, subd. (a)(10)(A).) California Rules of Court, rule 3.1702 outlines the process for obtaining attorneys' fees.

Here, as we are not dealing with attorneys' fees, but with costs, we apply the reasoning of *Gunlock* and conclude that unless prejudice can be shown from a late-filed cost memorandum, the court has discretion in such instance to award costs notwithstanding the failure to comply with the time limits of rule 3.1700. (See *Gunlock, supra*, 15 Cal.App.4th at p. 1304 [time limits pertaining to cost memoranda are not jurisdictional, and "'trial court has broad discretion in allowing relief from a late filing where . . . there is an absence of showing of prejudice to the opposing party'"].)

Here, the filing of the Hollander's notice of appeal did not stay the proceedings with respect to the recovery of the London Companies' costs. The London Companies were required to file their cost memorandum within 15 days of January 30, 2009; they did not do so. However, the matter was stayed during the period April 30, 2009 to August 2, 2010, which meant that no cost bill could be filed or acted upon in the trial court during that time. When the remittitur issued, the London Companies filed their first cost memorandum within approximately 30 days. As a result, the London Companies cost memorandum was approximately 90 days late, not 18 months as the Hollanders assert. Furthermore, the Hollanders have not cited, either in their briefs to this court or in their presentation to the trial court, any prejudice they claim they suffered from the late filing of the London Companies' cost memoranda. To the contrary, they argued to the trial court that no showing of prejudice was necessary. Not until oral argument before us did the Hollanders assert that the filing of two separate appeals—one from the substantive ruling of the trial court and one from the cost award—caused them any prejudice. This late assertion is not adequate, as the role of this court is to review the decision of the trial court based on the issues presented to the trial court. Thus, we conclude the trial court did not err in considering the London Companies' cost memoranda, and further because the court had discretion to consider the memoranda, the London Companies were not required to move for relief under section 473.

II. FILING FEES

The Hollanders argue that the first appearance fees of $960 paid by the London Companies are not recoverable as costs because they were not necessary—as parties contesting the court's in personam jurisdiction, they were not required to pay a fee, and even if they did pay the fee, they should have sought a refund of the fees paid from the trial court. For this proposition, the Hollanders rely on a conversation their attorney (Karen Hindin) had with a superior court clerk, who informed Hindin that no filing fee was required for a motion to quash under section 418.10, but that if such a fee was paid, it would be accepted by the clerk and would be refunded on request if the motion was successful.

Contrary to the Hollanders' assertion, there is no authority for an exemption or waiver of fees on a motion to quash. Government Code section 70612 provides that "(a) The uniform fee for filing the first paper in the action or proceeding described in Section 70611 on behalf of any defendant, intervenor, respondent, or adverse party, whether separately or jointly, except for the purpose of making disclaimer, is three hundred fifty-five dollars ($355)." Citing Government Code section 70612, the Los Angeles Superior Court filing fee schedule describes the fee required on a "first paper" filed by each party other than the plaintiff.

Notably, the payment of a filing fee does not constitute a general appearance. (*Josephson v. Superior Court* (1963) 219 Cal.App.2d 354, 362–363, fn. 4.) Consistent with these authorities, the London Companies were required to pay fees with the filing of the motion to quash because it was their "first paper" in the action, although the payment of such fee did not constitute a general appearance.

Even if we accept the Hollanders' assertion that such a fee was not required, the court was within its discretion in awarding such costs pursuant to section 1033.5, subdivision (c)(4), which permits the award of a cost neither specifically recoverable nor specifically disallowed under section 1033.5, subdivision (b). Such costs must be reasonable in amount and reasonably necessary to the conduct of the litigation. (*Applegate*

v. St. Francis Lutheran Church (1994) 23 Cal.App.4th 361, 363–364.) Given that the Superior Court fee schedule specifies that a fee is required for a "first paper," the payment of such a fee was reasonably necessary to the litigation.

DISPOSITION

The order is affirmed. Respondents are to recover costs on appeal.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

MALLANO, P. J.

ROTHSCHILD, J.