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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

FEDERICO GALAVIS, Plaintiff and Appellant, v. L.A. MODELS, INC., Defendant and Respondent.	B235476 (Los Angeles County Super. Ct. No. BC382372)

APPEAL from an order of the Superior Court of Los Angeles County. Luis A. Lavin, Judge. Affirmed.

Johnson & Johnson, Douglas L. Johnson, Lan P. Vu and Nausheen Kazalbasch for Plaintiff and Appellant.

Atkinson, Andelson, Loya, Ruud & Romo, Robert R. Roginson, Paul G. Szumiak, Barbara S. Van Ligten; Hantman & Associates and Robert J. Hantman for Defendant and Respondent.

Federico Galavis (Galavis) appeals the denial of his motion for class certification in a multi-count action against respondent L.A. Models, Inc. (L.A. Models). We find no error and therefore affirm.

L.A. Models requests sanctions against opposing counsel. The request for sanctions is denied.

FACTS

L.A. Models

L.A. Models was founded by its president, Heinz Holba (Holba). In connection with its representation of models, it uses a variety of form contracts. In 2001, the Labor Commissioner approved a form agency agreement (2001 agency agreement) that required a model to pay a 20 percent commission on all compensation for professional services. A subsequent form agency agreement was approved in 2009 (2009 agency agreement). It contained the same 20 percent commission structure. In addition, it provided: "Artist/Model understands and agrees that [L.A. Models] will from time to time incur expenses on Artists/Models [*sic*] behalf. Artist/Model agrees that all expenses, other than normal minimum office overhead expenses, incurred by [L.A. Models] on behalf of Artist/Model, including, without limitation, messenger fees, overnight courier fees, color copies, pictures, transportation and living expenses while traveling, accommodation, promotion, including, but without limitation, Interest promotion, Internet, Web and CD Rom promotion, publicity expenses and any other charges shall be promptly paid or reimbursed to [L.A. Models] by Artist/Model. Artist/Model agrees that [L.A. Models] is hereby irrevocably authorized to deduct the amount of expenses from any sums which [L.A. Models] may receive for Artist/Model [*sic*] services."

Prior to 2010, a model working for L.A. Models was asked to sign an agreement to certify that he or she was an independent contractor (Independent Contractor Agreement). That agreement provided: "I understand and agree that [L.A. Models] will from time to time charge expenses on my behalf such as color copies, pictures, airfares, hotel expenses, messengers, etc. Such expenses will be deducted from my checks, as they become available." Beginning in 2010, a model was asked to sign a disclosure agreement

(Disclosure Agreement) that certified the model's status as an independent contractor and stated: "I understand and agree that [L.A. Models] will from time to time charge expenses incurred on my behalf including, but not limited to, color copies, pictures, airfare, hotel expenses, web portfolios, website services, and messenger fees to me. I understand and agree that such expenses will be deducted from my checks as funds become available."

When L.A. Models recruits a model, the negotiations are handled by bookers. If a model is new to the industry, the booker explains the commission structure, what L.A. Models charges the model for expenses and what it charges to clients. If a model is experienced, the model is normally familiar with these charges and less time will be spent discussing them.

Even though L.A. Models uses form agreements, models can negotiate changes such as a reduction or waiver of L.A. Models's commission and its right to recoup expenses. Once L.A. Models decides to represent a model, it asks the model to sign the form agreements. However, for a variety of reasons, models often do not sign and simply begin working.

The service fee to clients

When a client hires L.A. Models, it often provides logistical services such as casting, payroll and travel arrangements. For these services, L.A. Models typically charges the client 20 percent of the amount of the model's fee, but the service fee varies from job to job. Oftentimes, the service fee is less than 20 percent. And if there is a large commission, L.A. Models will sometimes waive the service fee. No service fee is charged to the client when L.A. Models does not perform logistical services.

Disclosure of expenses and service fees to models

When a booker finishes negotiating a modeling job with a client, the booker presents the job to the model. This includes informing the model of the associated service fee and expenses. The model can offer input and ask the booker to go back to the client and negotiate the terms further. Before commencing a job, the model must agree to all the terms.

Some jobs are confirmed orally, and others are confirmed in writing. When jobs are confirmed in writing, the writing typically states the rate of compensation for the model. It also provides for the payment of a service fee to L.A. Models. Target Stores, an L.A. Models client, uses a form contract that states: "Unless otherwise agreed in writing [Target Stores] will pay [L.A. Models] a fee equal to 20 % on Model's total compensation (excluding expenses). Model warrants and represents that [Target Stores] will not be under any obligation for the payment of any commission or fees to any other third party as a result of this Contract." A model who works on a job for Target Stores must sign the form contract.

In order for a model to be paid on a job, the model and client must sign a voucher form. The voucher forms used by L.A. Models provide for the rate paid to the model and a 20 percent service fee.

Galavis's action

Galavis, a model, sued L.A. Models on behalf of himself and similarly situated models. He alleged that L.A. Models breached the 2001 agency agreement and the 2009 agency agreement by charging clients a 20 percent service fee, and that it breached the Independent Contractor Agreements and the Disclosure Agreements by charging models for improper or fraudulent expenses. Based on these facts, Galavis further alleged that L.A. Models is liable for breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty, unjust enrichment, accounting and unfair business practices.

The motion for class certification

In his motion for class certification, Galavis defined the class as "[a]ll current and former models who have entered into written standard form agency agreements with [L.A. Models] from December 17, 2003[,] to the date of judgment." He claimed that the size of the proposed class was at least 3,500 members, and that the members were readily identifiable from L.A. Models's business and accounting records. As for the class claims, Galavis argued that L.A. Models is guilty of uniform and systematic wrongdoing because it collected an undisclosed 20 percent service fee from the earnings of class members and also charged them for excessive and unsubstantiated expenses such as:

(1) a $40 monthly charge to each model who is posted on L.A. Models's Web site; (2) a $50 charge for posting a model's picture on a third-party Web site, L.A. Model Casting, even though this is a free service; (3) a $1 charge for each color copy made for model cards that are sent to potential clients; (4) an excessive 5 percent advance fee for checks given to models; (5) FedEx and messenger fees incurred every time L.A. Models unilaterally sends a model's cards and/or portfolios to clients; (6) parking costs and airfare on modeling jobs; and (7) every other possible cost associated with each modeling job.

The trial court denied the motion. The decision, in part, was based on the recognition that there would have to be individualized inquiry as to whether L.A. Models failed to disclose service fees. In addition, inter alia, the trial court concluded that "the highly individualized nature of the damages will defeat the commonality that might otherwise exist."

This timely appeal followed.

DISCUSSION

I. Standard of Review.

An order denying class certification is reviewed for an abuse of discretion. (*Osborne v. Subaru of America, Inc.* (1988) 198 Cal.App.3d 646, 654.) As our Supreme Court instructs, an appellate court will "not disturb a trial court ruling on class certification which is supported by substantial evidence unless (1) improper criteria were used [citation]; or (2) erroneous legal assumptions were made [citation]." (*Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470 (*Richmond*).) Thus, "'[s]o long as [the trial] court applies proper criteria and its action is founded on a rational basis, its ruling must be upheld.' [Citations.]" (*Dean Witter Reynolds, Inc. v. Superior Court* (1989) 211 Cal.App.3d 758, 764–765.)

II. Class Action Law.

When a party seeks class certification, he or she must establish "an ascertainable class and a well-defined community of interest among the class members. [Citation.]" (*Richmond, supra,* 29 Cal.3d at p. 470.) The existence of a well-defined community of

interest is determined by looking at three factors: "(1) [whether] common questions of law or fact [predominate]; (2) [whether the] class representative [has] claims or defenses typical of the class; and (3) [whether the] class representative[] . . . can adequately represent the class. [Citation.]" (*Richmond, supra*, 29 Cal.3d at p. 470.)

To determine whether common questions predominate, we must examine "'the issues framed by the pleadings and the law applicable to the causes of action alleged.' [Citation.]" (*Ali v. U.S.A. Cab Ltd.* (2009) 176 Cal.App.4th 1333, 1347.) When compared to issues requiring separate adjudication, the common issues must be sufficiently numerous and substantial to make the class action advantageous to the judicial process and litigants. (*Washington Mutual Bank v. Superior Court* (2001) 24 Cal.4th 906, 913–914.) A "'court may properly deny certification where there are diverse factual issues to be resolved even though there may also be many common questions of law.'" (*Soderstedt v. CBIZ Southern California, LLC* (2011) 197 Cal.App.4th 133, 154.) If disparate proof of damages is required, a trial court has discretion to either grant or deny class certification. (*Evans v. Lasco Bathware, Inc.* (2009) 178 Cal.App.4th 1417, 1430 (*Evans*) ["[A]lthough a trial court has *discretion* to permit a class action to proceed where the damages recoverable by the class must necessarily be based on estimations, the trial court equally has discretion to deny certification when it concludes the fact and extent of each member's injury requires individualized inquiries that defeat predominance"].)

III. The Trial Court Properly Denied Class Certification Because the Fiduciary Duty Cause of Action would Require an Individualized Inquiry as to whether L.A. Models Made Secret Profits.

Galavis contends that L.A. Models systematically breached its fiduciary duties by collecting undisclosed service fees. Indeed, an agent must make a full disclosure to the principal when the agent has dealings with the subject matter of the agency. As a result, an agent is barred from making secret profits. (*Store of Happiness v. Carmona & Allen* (1957) 152 Cal.App.2d 266, 276.) And if an agent "makes any secret profits from his

agency[,] the principal can recover them. [Citations.]" (*Rodes v. Shannon* (1963) 222 Cal.App.2d 721, 725.)

The trial court found that the service fee issue would require an individualized inquiry. That finding was supported by substantial evidence. Holba filed a declaration stating that new models are informed of the service fee. That may or may not be the case with experienced models because they are already familiar with the concept of agencies imposing a service fee. A booker discusses service fees with each model on a continuing basis throughout their relationship. Thus, as the trial court found, the claim that service fees were undisclosed would require an examination of each model's level of experience and what they already understood about industry practice. Then, as to each job booked by L.A. Models, there would have to be an examination of the model and booker.

Even if there were common issues, the individual issues pertaining to the service fees justified the denial of class certification.

IV. The Trial Court Properly Denied Class Certification for the Additional Reason that Damages would Require Individualized Inquiries.

There is no dispute that damages would require individualized inquiries as to each model in the class. Indeed, as for any unlawful or unfair expenses passed on to the models, the trier of fact would have to engage in a model by model examination of those expenses. As for service fees imposed on the models' employers in breach of the fiduciary duty of disclosure, the trier of fact's examination would have to cover every job involving such a fees. The fact that issues related to damages are so individualized simply bolsters the trial court's ruling that certification was inappropriate. (*Evans*, *supra*, 178 Cal.App.4th at p. 1427 ["there was substantial evidence to support the trial court's conclusion that . . . class treatment was inappropriate because individualized trials for each class member's damages would be required to determine the appropriate award for each class member"].)

Galavis suggests that disparate damages should not stand in the way of class certification because all of the expenses and service fees can be discerned from L.A. Models's records. Because the trial court relied on individualized liability issues as well

as individualized damages issues, this argument does not have any traction. In any event, on the merits, the argument fails.

This case is unlike *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695. There, the complaint alleged the existence of two subclasses that had been overcharged when using the taxicab services of the defendant. It was alleged that the exact amount of the overcharge could be ascertained from defendant's books and records and from information within the defendant's knowledge. (*Id*. at pp. 713–714.) The court concluded that a class action was proper because the two classes were entitled to recover the overcharges under a common set of facts and because "[p]roof of separate claims would not be required. [Citations.]" (*Id*. at p. 714.) Here, a simple review of L.A. Models's records would not disclose the degree to which the expenses and service fees were disclosed or not disclosed, and whether the expenses were substantiated, reasonable or otherwise consented to.

V. Sanctions.

L.A. Models moves for sanctions against opposing counsel for committing unreasonable violations of the California Rules of Court. (Cal. Rules of Court, rule 8.276(a)(4).) According to L.A. Models, Galavis miscited the appellate record, made unsupported or false factual assertions, misstated the trial court's rulings, argued objections that have been waived and changed theories on the undisclosed expenses and service fees. Upon review of Galavis's appellate briefs and the record, we conclude that this is not an appropriate case for sanctions.

The motion for sanctions is denied.

DISPOSITION

The order is affirmed.

L.A. Models shall recover its costs on appeal.

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_____, J.
ASHMANN-GERST

We concur:

_____, Acting P. J.
DOI TODD

_____, J.
CHAVEZ