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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

DAN CARDONA,

Plaintiff and Respondent,

v.

LICHER PRINTING AND DIRECT
MAIL, INC., et al.,

Defendants and Appellants.

B277573

(Los Angeles County
Super. Ct. No. BC341804)

APPEAL from an order of the Superior Court of Los Angeles County. Robert L. Hess, Judge. Affirmed in part and reversed in part.

Arminak Law, Tamar G. Arminak for Defendants and Appellants.

Law Offices of Zeutzius & LaBran, Ronald M. LaBran and William J. Zeutzius for Plaintiff and Respondent.

* * * * *

In *Cardona v. Licher Direct Mail, Inc.* (B254783, Aug. 6, 2015) [nonpub. opn.] (*Cardona I*), we affirmed the trial court's order holding a debtor's employer and its president liable for violating an earnings withholding order, but remanded to the trial court to recalculate the amount owed. The trial court elected to adopt the creditor's proffered recalculation without further explanation. The employer and its president appeal. We conclude that trial court erred, and set forth what we conclude is the proper calculation of the amount to be withheld.

FACTS AND PROCEDURAL BACKGROUND

I. Underlying Judgment Against Employee

Dan Cardona (Cardona) obtained a \$2,135,019.03 judgment against Don McWhirter (McWhirter).

II. Motion to Impose Liability Upon Employee's Employer

In March 2012, Cardona filed an earnings withholding order on whom he believed to be McWhirter's employer, Licher Direct Mail, Inc. (LDM). Pursuant to that order, LDM withheld \$8,610.86.

In November 2013, Cardona filed a motion to impose liability upon LDM and its president, Wayne Licher (Licher). Invoking Code of Civil Procedure section 701.020,¹ Cardona asserted that LDM and Licher had helped McWhirter evade the withholding order.

The trial court granted the motion and ordered LDM and Licher to pay Cardona an additional \$44,298.08, plus \$5,000 in attorney's fees. Although the court's order is silent on this point,

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

we infer that the court calculated the \$44,298.08 as follows:

(1) McWhirter was entitled to commissions on the amounts that M&M Advertising paid to LDM in the 17-month period between October 2011 and February 2013; (2) a summary of the total amounts paid to LDM during that period came to \$2,116,357.57; (3) McWhirter's commission was 10 percent, which comes to \$211,636; (4) Cardona was entitled to 25 percent of that amount pursuant to the terms of the earnings withholding order, which comes to \$52,908.94; and (5) subtracting the amount already withheld (\$8,610.86) yields \$44,298.08.

III. Prior Appeal

LDM and Licher appealed the trial court's order, and we affirmed in part and reversed in part.

We concluded that Cardona's motion was based on an inapplicable procedural vehicle (namely, section 701.020), but reasoned that he was still able to impose liability upon LDM and Licher for failure to comply with an earnings withholding order under section 706.154. We ruled that sufficient evidence supported the trial court's finding that LDM had not properly withheld McWhirter's earnings from M&M Advertising and that Licher was personally liable due to his participation in a game of "hide the ball."

We nevertheless reversed the trial court's order and remanded for two reasons: (1) the \$5,000 attorney's fee award was invalid because such fees may not be awarded under section 706.154; and (2) section 706.154 applies only to the withholding of earnings while a debtor is an employee. Because McWhirter was an employee of LDM between June 1, 2012 and August 2013, the trial court's calculation was invalid because it was based upon the total amount of M&M Advertising invoices between

October 2011 and February 2013, which includes a period of time when McWhirter was not an LDM employee (namely, between October 2011 and June 2012), and does not include several months during which he *was* an employee (namely, between February 2013 and August 2013). Accordingly, we remanded “so that the trial court may calculate the amount LDM and Licher should have withheld as 25 percent of the commissions McWhirter earned between June 1, 2012, and his termination in August 2013.”

IV. Proceedings on Remand

Cardona, as well as LDM and Licher, filed multiple papers regarding how the trial court should recalculate the amount to be withheld.²

LDM and Licher sought to introduce individual invoices from M&M Advertising for the period of McWhirter’s employment (that is, between June 2012 and August 2013). LDM and Licher then argued that McWhirter was entitled to commissions only on \$246,873 from those invoices, which translated to a 10 percent commission of \$24,687.30 and thus a 25 percent withholding of \$6,171.83. Because LDM had already withheld \$8,610.86, LDM and Licher contended that Cardona owed them a refund of \$2,439.

Cardona proffered two different calculations. First, he urged the trial court not to consider LDM and Licher’s newly presented invoices, to vacate the \$5,000 attorney’s fee award, and to calculate the amount to be withheld by subtracting three months’ worth of commissions (for March, April, and May 2012)

² The parties also litigated discovery motions, but those are not at issue on appeal.

from its prior calculation of the amount to be withheld. Cardona calculated the three-month commission amount as \$2,381.28 (but did so without showing his math), such that the amount to be withheld would be \$41,916.80 (the \$44,298.08 previously withheld less \$2,381.28).³ Second, and in the alternative, Cardona contended that if the court reduced the commissions from M&M Advertising in accordance with the newly supplied invoices, the court should nevertheless hold LDM and Licher liable for amounts not withheld from payments M&M Advertising made to McWhirter’s alter ego company. This would, according to Cardona, render LDM and Licher liable for an additional \$40,473.53 in withholdings.

The trial court adopted Cardona’s first calculation. The court declined to consider the newly supplied invoices for two reasons: (1) a “narrow reading” of *Cardona I* did not allow for the presentation of “supplemental documentation presented after remand”; and (2) LDM and Licher “had a full and fair opportunity to present” the invoices previously, and their failure to do so amounted to a forfeiture. Without further explanation, the court then “adopt[ed] [Cardona’s] Option 1” and stated (without showing its math) that the amount to be withheld was \$44,219.91. In the alternative, the court indicated that, if it is required to consider the additional invoices, it would adopt Cardona’s “Option 2” because it “more reliably captures the compensation provided to . . . McWhirter and his entities during the pertinent time period.”

³ Cardona’s papers set forth \$42,219.91 as the amount to be withheld, but that amount is arithmetically incorrect.

V. Appeal

LDM and Licher filed this timely appeal.

DISCUSSION

LDM and Licher argue that the trial court again erred in calculating the amount of McWhirter's earnings they are responsible for withholding. Specifically, they assert that the court erred in (1) not considering the newly proffered M&M Advertising invoices, and in any event (2) calculating the amount to be withheld. We review the first question for an abuse of discretion (*Faulkner v. Faulkner* (1957) 148 Cal.App.2d 102, 108 [decision whether to "hear . . . additional evidence" reviewed for an abuse of discretion]), and the second question de novo because it involves "[t]he question of whether 'a certain measure of damages is permissible'" under the law (*JMR Construction Corp. v. Environmental Assessment & Remediation Management, Inc.* (2015) 243 Cal.App.4th 571, 583; *Scheenstra v. California Dairies, Inc.* (2013) 213 Cal.App.4th 370, 404).

I. Consideration of Invoices

Our prior decision in *Cardona I* is "the law of the case," and as such obligated the trial court "to follow the rules laid down" in that case, "whether such rules are right or wrong."⁴ (*People v. Barragan* (2004) 32 Cal.4th 236, 246, quoting *Estate of Baird* (1924) 193 Cal. 225, 234.) "[N]othing in the law of the case doctrine itself limits the additional evidence that a party may introduce on retrial," at least if that evidence "could not have

⁴ Consequently, we decline to consider Cardona's renewed arguments that LDM and McWhirter should be obligated to withhold McWhirter's earnings starting in March 2012, rather than the June 1, 2012 date we ruled was appropriate in *Cardona I*.

been presented at the first trial through the exercise of due diligence.’ [Citation.]” (*Barragan*, at p. 247.) And even then, it is up to the trial court “in the first instance” to decide whether to consider new evidence. (*People v. Jordan* (2004) 121 Cal.App.4th 544, 565.)

The trial court acted within its discretion in declining to consider the M&M Advertising invoices LDM and Licher proffered for the first time on remand. To begin, LDM and Licher provide no reason why those invoices—which clearly existed at the time the trial court first considered the issue—were not presented to the court at that time. Further, the trial court had an ample basis to question the accuracy of those invoices, which cut the total amount subject to commissions by nearly 90 percent (from more than \$2 million to under \$250,000), in light of LDM’s and Licher’s “history of manipulati[ng]” McWhirter’s earnings to avoid withholding. LDM and Licher respond that the invoices are not “new” evidence, but merely the documentation underlying the summary of invoice amounts previously presented. This assertion ignores that the information in the individual invoices (in particular, the amounts LDM and Licher say are exempt from commissions) was new, and that the invoices cover a different time period (June 2012 to August 2013) than the previously produced summary (October 2011 to February 2013).

II. Recalculation of Amount To Be Withheld

The trial court recalculated the amount LDM and Licher were to withhold by taking the withholding amount it previously calculated and lopping off three months’ worth of commissions from that amount.

The trial court’s approach is incorrect for three reasons. First, the trial court’s previously calculated amount was based on

the commissions McWhirter earned over a 17-month period—from October 2011 through February 2013. *Cardona I* ruled that LDM and Licher were required to withhold commissions during the period McWhirter was their employee, which was the 15-month period from June 1, 2012 through August 2013. If the trial court were to use its prior calculation as a baseline, it should have lopped off two months—not three. Second, the trial court accepted without question Cardona’s calculation that LDM and Licher should have withheld commissions of \$2,381.28 for those three months. The appellate record does not contain Cardona’s initial filing demonstrating how he came up with that figure, and we have been unable to surmise it for ourselves. This is one of those instances where failing to show one’s math itself makes the answer wrong. Lastly, the amount the trial court stated should be withheld—\$44,219.91—is \$2,000 more than what Cardona calculated based on the same premises and is \$2,303.11 more than how we calculate what Cardona was requesting (*ante*, at p. 5). The court proffered no explanation for these discrepancies.

To avoid further litigation on this issue, we hold that the amount LDM and Licher still owe Cardona is \$38,073.50. We reach this figure as follows: The M&M Advertising invoice summary initially reflects billing of \$2,116,357.57 over a 17-month period (October 2011 to February 2013), for a monthly average of \$124,491.62. It is fair to surmise that M&M Advertising continued to bill LDM from March 2013 (after the summary of invoices stops) through August 2013 (when McWhirter was terminated as an LDM employee), particularly in light of LDM’s submission of invoices from M&M Advertising during that period. If we take the monthly average bill, and

multiple it by the 15 months that McWhirter was an LDM employee (and hence subject to the earnings withholding order), that comes to total billing of \$1,867,374.33. McWhirter would earn a 10 percent commission on those bills, which comes to \$186,737.43; and LDM and Licher are obligated to withhold 25 percent of those commissions, which comes to \$46,684.36. Because LDM and Licher have already withheld \$8,610.86, the amount that LDM and Licher still owe Cardona is \$38,073.50. (And, as noted above, attorney's fees may not be imposed.)

We defer to the trial court to determine whether any administrative fees affect the \$38,073.50 that remains owing.

DISPOSITION

The judgment is reversed and remanded for proceedings in accordance with this opinion. Parties to bear their own costs on appeal.

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_____, J.
HOFFSTADT

We concur:

_____, P. J.
LUI

_____, J.
CHAVEZ