Filed 11/18/19 Durack v. Wang CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

ALEXSEI DURACK et al., Plaintiffs and Appellants, v. ADA WANG, Defendant and Respondent.	B293597 (Los Angeles County Super. Ct. No. BC557122)

APPEAL from an order of the Superior Court of Los Angeles County, Stephanie M. Bowick, Judge. Affirmed.

Law Office of Christie Gaumer and Christie Gaumer for Plaintiffs and Appellants.

The Duringer Law Group, Stephen C. Duringer and Edward L. Laird for Defendant and Respondent.

INTRODUCTION

This is the second appeal regarding attorneys' fees in this action between members of a homeowners association. In the first appeal, *Durack v. Wang* (Sept. 25, 2017, B276086) [nonpub. opn.] (*Durack I*), we reversed the trial court's order denying a motion by Ada Wang for attorneys' fees as the prevailing party on causes of action for negligence and breach of fiduciary duty asserted against her by Alexsei Durack and Colin Fulford. After Wang filed a peremptory challenge under Code of Civil Procedure section 170.6 to the judge who decided the first motion for attorneys' fees, a judge in a different department granted Wang's second motion for attorneys' fees and awarded her, after certain deductions, $67,458.07. Durack and Fulford appeal. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Durack and Fulford owned a condominium in a five-unit building. They brought this action against the homeowners association and several members of the board of directors, including Wang, for conduct they alleged interfered with their efforts to renovate, lease, and sell their unit. Durack and Fulford alleged seven causes of action against Wang. The trial court dismissed five of those causes of action on demurrer, leaving two: negligence and breach of fiduciary duty. These two causes of action were the only two for which the prevailing party was entitled to statutory attorneys' fees. (*Durack I*, *supra*, B276086 at p. 1.)

At a mandatory settlement conference, Durack and Fulford reached a settlement with all defendants except Wang. Durack, Fulford, and Wang proceeded to prepare for a seven- to eight- day trial. Several days after the scheduled trial date, while the case

was "trailing" and waiting for another trial in the department to conclude, Durack and Fulford dismissed their complaint against Wang without prejudice. (*Durack I*, *supra*, B276086 at p. 2.)[1]

Wang filed a motion for attorneys' fees, which the trial court denied, finding there was no prevailing party. Wang appealed, and we reversed. We held Wang was entitled to attorneys' fees incurred in defending the negligence and breach of fiduciary duty causes of action under Civil Code section 5975, subdivision (c), which provides that in an action to enforce the governing documents of a homeowner association, the prevailing party shall recover its reasonable attorneys' fees and costs. We held Durack and Fulford's causes of action for negligence and breach of fiduciary duty sought to enforce the governing covenants, conditions, and restrictions. (*Durack I*, *supra*, B276086 at pp. 2-6.)

On remand, Wang filed a peremptory challenge under Code of Civil Procedure section 170.6. The court accepted the challenge, finding it was "timely filed" and "in proper format," and reassigned the case to a different department. Wang filed her second motion for attorneys' fees in the new department, seeking $72,158.57 in attorneys' fees incurred in defending the causes of action for negligence and breach of fiduciary duty and prosecuting the appeal in *Durack I*.

The trial court ruled that, as of the date of the ruling on the demurrer that eliminated five of Durack and Fulford's seven causes of action, "the only operative causes of action against Wang were the third cause of action for negligence and the ninth cause of action for breach of fiduciary duty" and that these were

---

[1] We augment the record to include the trial court's January 20, 2016 and January 22, 2016 minute orders trailing the trial. (See Cal. Rules of Court, rule 8.155(a)(1)(A).)

the two causes of action this court held in *Durack I* entitled Wang to attorneys' fees. Recognizing it was bound by this court's directions in *Durack I*, the trial court rejected Durack and Fulford's request to deny the motion in its entirety, stating the request was "patently improper in light of the Court of Appeal's direction to grant Wang's motion for attorneys' fees." The trial court found that counsel for Wang's hourly rates of $395 were reasonable and that most of the hours spent were also reasonable. The court deducted 2.0 hours counsel for Wang spent preparing for a deposition he did not attend and 9.9 hours counsel for Wang spent on the appeal in *Durack I*. For the demurrer that eliminated the five "non-compensable" causes of action, leaving only the two "compensable" causes of action, the court reduced the amount of time spent on the demurrer by five-sevenths (a reduction of $4,933.93), which Wang had proposed and to which Durack and Fulford did not object. The court found the apportionment was "reasonable in light of the demurrers and supporting documents filed prior to the demurrer ruling." The court also found the time spent by a law clerk working for Wang's counsel was reasonable and recoverable.

DISCUSSION

A. *Standard of Review*

"'"On review of an award of attorney fees after trial, the normal standard of review is abuse of discretion. However, de novo review of such a trial court order is warranted where the determination of whether the criteria for an award of attorney fees and costs in this context have been satisfied amounts to statutory construction and a question of law."' [Citations.] In other words, 'it is a discretionary trial court decision on the propriety or amount of statutory attorney fees to be awarded, but

a determination of the legal basis for an attorney fee award is a question of law to be reviewed de novo.'" (*Mountain Air Enterprises, LLC v. Sundowner Towers, LLC* (2017) 3 Cal.5th 744, 751; see *Roe v. Halbig* (2018) 29 Cal.App.5th 286, 298.)

B. *The Trial Court Did Not Abuse Its Discretion in Ruling Wang Was Entitled to Attorneys' Fees*

We held in *Durack I* that Wang prevailed on Durack and Fulford's causes of action for negligence and breach of fiduciary duty because she "achieved her litigation objective: She is not liable for negligence or breach of fiduciary duty." (*Durack I*, *supra*, B276086 at p. 4.) Therefore, she is entitled to attorneys' fees under Civil Code section 5975, subdivision (c). (See *Rancho Mirage Country Club Homeowners Assn. v. Hazelbaker* (2016) 2 Cal.App.5th 252, 258; *Almanor Lakeside Villas Owners Assn. v. Carson* (2016) 246 Cal.App.4th 761, 773.)

Durack and Fulford make several arguments why, despite this court's holding in *Durack I* that Wang is entitled to fees, the trial court erred in awarding her fees. First, they argue the trial judge who heard the first motion should not have accepted Wang's peremptory challenge under Code of Civil Procedure section 170.6 But Durack and Fulford cannot raise this argument in this appeal. A party seeking appellate review of a trial court's ruling on a peremptory challenge under Code of Civil Procedure section 170.6 must do so by filing a petition for writ of mandate. Such a ruling is not appealable and is not reviewable from the judgment. (See Code Civ. Proc., § 170.3, subd. (d) ["The determination of the question of the disqualification of a judge is not an appealable order and may be reviewed only by a writ of mandate from the appropriate court of appeal sought only by the parties to the proceeding."]; *People v. Chatman* (2006) 38 Cal.4th 344, 362 [Code of Civil Procedure section 170.3, subdivision (d),

applies to both peremptory challenges and challenges for cause]; *Frisk v. Superior Court* (2011) 200 Cal.App.4th 402, 409 ["the determination whether to accept or reject a peremptory challenge" is "reviewable only by immediate writ of mandate, not by appeal from a subsequent judgment"]; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2018) ¶ 15:125 ["a timely writ petition is the exclusive avenue for appellate court review" of judicial disqualification under Code of Civil Procedure section 170.6].)[2] Durack and Fulford did not file a petition for writ of mandate challenging the trial court's order accepting the peremptory challenge, and we cannot review that order now.

Second, they argue, without citation to the record, the trial court hearing the second motion for attorneys' fees "did not consider any aspects of the work done, the results or gains in the case, [or] the conduct in the case (such as the inconsistent statements and the failure to attend the [Mandatory Settlement Conference], which had swayed the lower court before)." They assert the trial court "failed to assess the actual work done as

---

[2] "Writ review is the exclusive avenue of appellate review for such rulings. The fundamental public policy underlying the rule is twofold: First, it promotes judicial economy by eliminating the waste of time and money that might result if litigation were allowed to continue, only to be vacated later on appeal because the later rulings and judgment were declared void by virtue of a wrongly-denied disqualification motion. Second, it prevents a party from obtaining a windfall by waiting for the outcome of litigation, then challenging a disqualification only if the result were unfavorable. Therefore, section 170.3, subdivision (d) promotes fundamental fairness by ensuring that the parties receive a speedy appellate determination by way of writ of mandate." (*Sears, Roebuck & Co. v. National Union Fire Ins. Co. of Pittsburgh* (2005) 131 Cal.App.4th 1342, 1348-1349.)

compared to the causes of action remaining, and as to which this Court allowed fees." In a related argument, Durack and Fulford assert that "the court failed to properly assess the fee and non-fee claims" and that "all the work was nonfee-shifting work."

But the trial court did all those things. The court followed this court's holding that Wang achieved her litigation objectives entirely by obtaining, by demurrer and by her adversaries' request before trial commenced, dismissal of all causes of action against her. The court considered the work counsel for Wang did in the trial court and on appeal and reduced the amount of recoverable fees for work the court found was unsupported or unreasonable. Where appropriate, the court made an apportionment for time spent litigating causes of action that did not allow Wang to recover attorneys' fees under Civil Code section 5975, subdivision (c). Durack and Fulford may not have agreed with the court's evaluation of the legal work Wang's attorneys performed, but that does not mean the court did not conduct an evaluation of that work. And the trial court could not have found that all the work by counsel for Wang was "nonfee-shifting work" after we held to the contrary in *Durack I*.

Third, Durack and Fulford contend Wang was not entitled to attorneys' fees because, although we held in *Durack I* that Wang prevailed on two of her causes of action, she did not prevail on her specific factual defense that she did not own a unit in the building. They argue: "Because Wang[ ] did not succeed on her defense and only obtained dismissal because of someone else's payment, the lodestar calculation as to Wang's requested fees should have been commensurate, and as such, should have resulted in virtually no fees being awarded." They emphasize that "Wang did not succeed on proving she did not own the unit." But a party "need not be the prevailing party on every issue" in a case to be the "prevailing party." (*Kunec v. Brea Redevelopment*

Agency (1997) 55 Cal.App.4th 511, 526; see *National Parks and Conservation Assn. v. County of Riverside* (2000) 81 Cal.App.4th 234, 239 ["a party 'need not prevail on every claim presented . . . to be considered a successful party'"].) And Civil Code section 5975, subdivision (c), refers to the prevailing party "[i]n an action," not on an issue or defense. As we explained in *Durack I*, "'the test for prevailing party is a pragmatic one, namely whether a party prevailed on a practical level by achieving it main litigation objectives.'" (*Durack I*, *supra*, B276086 at p. 4.) Wang's main litigation objective was to defeat all of the causes of action against her, which she did. Whether she was able to prove or disprove a particular factual allegation, either in the complaint or the answer, did not determine whether she prevailed on the two causes of action seeking to enforce the governing documents.

Fourth, citing *EnPalm, LLC v. Teitler* (2008) 162 Cal.App.4th 770 and asserting it "is directly on point," Durack and Fulford argue the court should have recognized there were "special circumstances" in this case that justified reducing the amount of the award or "deny[ing] it altogether" because Wang's defense that she did not own one of the condominiums was "a lie."[3] But the parties never litigated the issue whether Wang

---

[3] Durack and Fulford cite *Serrano v. Unruh* (1982) 32 Cal.3d 621 as their basis for invoking the "special circumstances" rule. The Supreme Court in that case stated: "*Prevailing parties* are compensated for hours reasonably spent on fee-related issues. A fee request that appears unreasonably inflated is a special circumstance permitting the trial court to reduce the award or deny one altogether." (*Id.* at p. 635.) In *Durack I*, this court held Wang was a prevailing party, the trial court compensated her for hours reasonably spent on the two fee-related causes of action,

owned the unit; Durack and Fulford dismissed their complaint against Wang before a trial could resolve that issue. Thus, there was no "lie"; there was only a difference of opinion and perhaps conflicting evidence. And the court in *EnPalm* held the trial court in that case did not abuse its discretion in reducing a lodestar amount because the court found the prevailing party's litigation conduct in intentionally lying "under oath about various material matters" caused "'the vast majority of the time incurred'" to be unreasonable. (*Id.* at pp. 773, 777-778.) The trial court here made no such finding about Wang's litigation conduct. In fact, it was the opposition by Durack and Fulford to Wang's motion for attorneys' fees that the court described as "based almost entirely upon unsupported argument." *EnPalm* does not stand for the proposition that a trial court abuses its discretion in failing to reduce or deny an award of attorneys' fees in the absence of a finding of litigation misconduct.[4]

Finally, Durack and Fulford argue counsel for Wang did not "actively work on the case," deferred "work to other counsel," and failed to appear at the settlement conference "only so that Wang could make this fees motion." They do not cite to any evidence in support of these accusations, nor do they argue

---

and as we will discuss, counsel for Wang's fee request did not appear inflated, unreasonable or otherwise.

[4] Citing a passage from the court's opinion in *Sokolow v. County of San Mateo* (1989) 213 Cal.App.3d 231 that states a "reduced fee award is appropriate when a claimant achieves only limited success" (*id.* at p. 249), Durack and Fulford argue Wang achieved only limited success. As explained in *Durack I*, however, Wang achieved complete success by defeating all of Durack and Fulford's claims against her and meeting all of her litigation objectives. (*Durack I*, *supra*, B276086 at p. 4.)

substantial evidence did not support the trial court's findings to the contrary. (See *Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1175-1176 [factual findings on a motion for attorneys' fees are reviewed for substantial evidence].)

C. *The Trial Court Did Not Abuse Its Discretion in Awarding Wang $67,458.07 in Attorneys' Fees*

As stated, the trial court, after making several deductions for time the court determined was unsupported or unreasonable, awarded Wang $67,458.07 in attorneys' fees. Durack and Fulford raise several challenges to the trial court's lodestar calculations, none of which has merit.

First, Durack and Fulford argue the time spent by a law clerk working for Wang's counsel "is not chargeable to the client in full and, as such, it should not be chargeable to [them]." As the trial court correctly ruled, however, legal assistant and "[s]upport staff time is routinely included in attorney fee awards." (See *Roe v. Halbig*, *supra*, 29 Cal.App.5th at p. 312; *Collins v. City of Los Angeles* (2012) 205 Cal.App.4th 140, 149; *Guinn v. Dotson* (1994) 23 Cal.App.4th 262, 269; *Salton Bay Marina, Inc. v. Imperial Irrigation Dist.* (1985) 172 Cal.App.3d 914, 951.) Durack and Fulford also complain the time the law clerk spent on certain tasks was "excessive and unreasonable," including 28.5 hours on a (more than 70 percent successful) demurrer, 9.5 hours on an answer, and 1.5 hours on a statement for the first, unsuccessful mandatory settlement conference. 28.5 hours on a demurrer in a case like this may be a little high. But the trial court did not abuse its discretion in finding the time spent on these tasks was reasonable. (See *Goglin v. BMW of North America, LLC* (2016) 4 Cal.App.5th 462, 473 [trial court had discretion to determine whether "the time spent by . . . counsel on litigation activities was reasonable"]; *Chavez v. Netflix, Inc.*

(2008) 162 Cal.App.4th 43, 64 ["the trial court has wide discretion in making reductions based on its estimate of time spent on activities that are noncompensable in whole or in part"].) If anything, counsel for Wang (who only spent 6.4 hours on the demurrer, plus the hearing) may have delegated too much to his law clerk, which only served to reduce the amount of an otherwise reasonable fee award.

Second, Durack and Fulford argue the block-billing entries in counsel for Wang's time sheets were improper and showed counsel for Wang spent unreasonable amounts of time on certain tasks. For example, Durack and Fulford point to counsel for Wang's billing 1.2 hours for reviewing and revising a demurrer, 0.7 hours for speaking with counsel in a related case and adding arguments to the demurrer, 3.0 hours for preparing a reply to the opposition to the demurrer, 0.8 hours for calendaring, 3.0 hours for attending the hearing on the demurrer, and 5.0 hours for attending a site inspection. Durack and Fulford also object to the 22.6 hours counsel for Wang spent on trial preparation and the 10.5 hours counsel spent on the motion for attorneys' fees.

Block billing, however, though not always preferred, does not preclude a trial court from ruling on a motion for attorneys' fees. (See *Lunada Biomedical v. Nunez* (2014) 230 Cal.App.4th 459, 487 [evidence was sufficient for the court to rule on a motion for attorneys' fees under Code of Civil Procedure section 425.16, subdivision (c), despite the contention the "defendants submitted 'block billing' of their attorney fees that did not amount to careful compilations of the time spent"]; *Jaramillo v. County of Orange* (2011) 200 Cal.App.4th 811, 830 ["block billing is not objectionable 'per se,' though it certainly does increase the risk that the trial court, in a reasonable exercise of its discretion, will discount a fee request"]; *Christian Research Institute v. Alnor* (2008) 165 Cal.App.4th 1315, 1325 [block billing is "not

objectionable per se," but can exacerbate the vagueness of a fee request]; *Nightingale v. Hyundai Motor America* (1994) 31 Cal.App.4th 99, 102-103 [monthly statements containing block billing were sufficient for the trial court "to determine whether the tasks described in each month's statement reasonably required the total amount of time billed each month"]; 2 Pearl, Cal. Attorney Fee Awards (Cont.Ed.Bar. 3d ed. 2010) Determining the Lodestar, § 9.84 ["block billing is not automatically suspect or grounds for a fee reduction" and "is commonly used and is not intended to facilitate 'padding' of hours but simply reflects the interrelated nature of many tasks performed during a day"].) That trial courts have "discretion 'to penalize block billing when the practice prevents them from discerning which tasks are compensable and which are not'" (*In re Marriage of Nassimi* (2016) 3 Cal.App.5th 667, 695) does not mean a trial court abuses its discretion when it does not penalize a block-biller.

Moreover, with one exception (discussed in the next paragraph), the examples cited by Durack and Fulford were not really instances of block billing. "Block billing occurs when 'a block of time [is assigned] to multiple tasks rather than itemizing the time spent on each task.'" (*Mountjoy v. Bank of America, N.A.* (2016) 245 Cal.App.4th 266, 279.) Billing 1.2 hours for working on a demurrer, 3 hours to attend a court hearing, and 2 hours to prepare for a deposition is just descriptive billing; there is nothing block about it. In any event, none of the entries Durack and Fulford identify as objectionable was particularly unreasonable. Court hearings often require three hours, site inspections can take most of an afternoon, and spending less than an hour discussing new legal arguments and incorporating them into a motion seems like a pretty valuable and efficient use of attorney time. And preparing for trial is particularly time-

intensive, even if the case settles or is dismissed shortly before trial or where, as here, the parties had actually appeared at trial. Because Durack and Fulford refused to include Wang in the otherwise global settlement, counsel for Wang had no choice but to prepare for where all unresolved lawsuits go: trial.

Finally, Durack and Fulford mention that counsel for Wang did not provide the trial court with "separate entries" for the appellate work done in connection with *Durack I*. There is some truth to their accusation: Counsel for Wang in his declaration stated only that he spent 85.6 hours (which at his hourly rate of $395 amounted to $33,812) on the appeal,[5] which was essentially one large block of time. Time sheets or billing records, however, are not required; an attorney's declaration can support an award of attorneys' fees. (See *Lunada Biomedical v. Nunez*, *supra*, 230 Cal.App.4th at pp. 487-488 ["A defendant . . . can carry its burden of establishing its entitlement to attorney fees by submitting a declaration from counsel instead of billing records or invoices."]; *Syers Properties III, Inc. v. Rankin* (2014) 226 Cal.App.4th 691, 698 ["It is well established that 'California courts do not require detailed time records, and trial courts have discretion to award fees based on declarations of counsel describing the work they have done and the court's own view of the number of hours

---

[5] On July 5, 2019, almost a year after the trial court granted Wang's motion for attorneys' fees, Wang filed a document titled "Notice of Errata re Motion for Attorney Fees" attaching a chart providing the detail for counsel for Wang's work on the appeal. We do not consider this document. (See *Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3 ["normally 'when reviewing the correctness of a trial court's judgment, an appellate court will consider only matters which were part of the record at the time the judgment was entered'"]; *Weiss v. City of Del Mar* (2019) 39 Cal.App.5th 609, 625 [same].)

reasonably spent.'"]; *Concepcion v. Amscan Holdings, Inc.* (2014) 223 Cal.App.4th 1309, 1324 ["It is not necessary to provide detailed billing timesheets to support an award of attorney fees under the lodestar method."]; *Mardirossian & Associates, Inc. v. Ersoff* (2007) 153 Cal.App.4th 257, 269 ["'An attorney's testimony as to the number of hours worked is sufficient evidence to support an award of attorney fees, even in the absence of detailed time records.'"].) True, the declaration of Wang's appellate counsel did not include any detail. But the significance of detailed time entries is reduced for appellate work—there are only four or five kinds of tasks an appellate lawyer generally records on a time sheet: review the record, read the briefs, conduct research for the briefs, write the briefs, and argue the briefs. And $33,000 is a very reasonable amount for an appeal, particularly where the attorney is representing the appellant and files an opening and reply brief, appears for oral argument, and obtains a reversal. It is hard to imagine an appeal like *Durack I* reasonably could have been done for much less than that.

DISPOSITION

The order is affirmed.

SEGAL, J.

We concur:

PERLUSS, P. J. FEUER, J.