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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

VICTORIA AKOPYAN, Plaintiff and Respondent, v. ARA KARAMANOUKIAN, Defendant and Appellant.	B233224 (Los Angeles County Super. Ct. Nos. BC356977 and BC415376)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark V. Mooney, Judge. Reversed and remanded.

Ervin Cohen & Jessup, Karina B. Sterman, Rodney C. Lee and Kevin J. Pavlik for Defendant and Appellant.

Law Office of Lawrence P. House and Lawrence P. House for Plaintiff and Respondent.

Ara Karamanoukian appeals from the judgment entered after the trial court granted a motion for summary adjudication in favor of Victoria Akopyan in this action for breach of contract and declaratory relief. We reverse.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The First Action, the Settlement Agreement and the Second Action for Breach of the Settlement Agreement*

In July 2006 Karamanoukian and his business partner, Alan Baronian, purchased a majority interest in a corporation that operates an adult daycare center from Akopyan, its sole shareholder. Immediately after the purchase a dispute arose between Karamanoukian and Baronian, on one hand, and Akopyan and her then-boyfriend Hovik Krboyan, on the other hand. In August 2006 Akopyan filed an action against Karamanoukian, Baronian and others; Karamanoukian and Baronian filed a cross-complaint against Akopyan and Krboyan.

In February 2008 the parties settled the action. The settlement agreement did not require the payment of money at that time. Rather, because the parties believed McGuire Woods LLP, the law firm representing Karamanoukian and Baronian in connection with the stock purchase, had committed misconduct that provoked the underlying dispute, the settlement agreement provided Karamanoukian and Baronian (or either one of them alone) would pursue a legal malpractice action against McGuire Woods and share half of any recovery with Akopyan.[1] With respect to the costs and fees associated with the malpractice action, the settlement agreement provided, "[T]he first $50,000 [] in fees and/or costs of bringing and prosecuting the anticipated malpractice action shall be born[e] equally 50/50 by Hovik Krboyan, on the one hand, and Karamanoukian . . . , on the other hand. Should the fees and/or costs of bringing and prosecuting the [a]nticipated [m]alpractice [a]ction exceed $50,000, Hovik Krboyan shall be solely responsible for paying such fees and/or costs. Any attorney(s) engaged for the purpose of prosecuting

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1 Because Baronian is not a party to this action, we will not continue to refer to him.

the [a]nticipated [m]alpractice [a]ction shall be instructed to [] bill the parties accordingly."

The settlement agreement also provided Karamanoukian would pay Akopyan $100,000 if the malpractice action was not "initiated or prosecuted" to judgment, settlement or award unless one of four exceptions were met: "(1) after diligent search, no attorney can be found to take on the [m]alpractice [a]ction; (2) the prosecuting attorney, after initiating the [m]alpractice [a]ction, elects to withdraw from the action; (3) this Agreement is not fully executed until after the statute of limitations has expired; or (4) Hovik Krboyan fails to pay his share of the costs/fees associated with the [m]alpractice [a]ction."

The malpractice action was not filed before the statute of limitations on the claims had expired. On June 9, 2009 Akopyan filed a complaint for breach of contract and declaratory relief against Karamanoukian, alleging he was required to pay her $100,000 because he had failed to timely initiate the malpractice action.

2. *The Cross-motions for Summary Adjudication and Summary Judgment*

a. *The pleadings*

In September 2010 Akopyan moved in the alternative for summary judgment or summary adjudication. In October 2010 Karamanoukian filed a cross-motion for summary judgment or summary adjudication, arguing he was excused from paying the $100,000 because Krboyan had refused to pay his share of the retainer fee required to initiate the malpractice action.

In a declaration filed in support of his motion, Karamanoukian explained he had consulted with four attorneys before finding one who would take the case. Although Art Kalantarian had agreed to represent Karamanoukian, he required a $50,000 retainer and execution of an engagement agreement by both Karamanoukian and Krboyan. Karamanoukian called Krboyan five or six times in an attempt to collect Krboyan's 50 percent share of the retainer and obtain his signature, but Krboyan never answered the telephone or attempted to call Karamanoukian back. Because Karamanoukian could not reach Krboyan and the statute of limitation was going to expire soon, Karamanoukian's

attorney sent a letter to Ali Taheripour, the attorney who had represented Krboyan in the underlying action, and Lawrence House, counsel for Akopyan, requesting they contact Krboyan.

The letter dated June 25, 2008 stated, "This letter is to inform you that Mr. Karamanoukian has been trying to contact Mr. Krboyan for the past three to four weeks regarding the payment and retention of an attorney to commence the [a]nticipated [m]alpractice [a]ction. However, as of the date of this letter, Mr. Krboyan has not returned any of Mr. Karamanoukian's phone calls. [¶] Accordingly, we are requesting that one of you contact Mr. Krboyan and inform him that the retainer agreement and payment must be received by Mr. Karamanoukian in a sufficient amount of time to allow the complaint to be filed before the expiration of the statute of limitations. . . . By our estimation, the controlling statute of limitations will expire on July 5, 2008. Therefore, Mr. Krboyan will most likely need to pay his half of the $50,000 retainer and sign the fee agreement by no later than June 30, 2008." In his declaration, Karamanoukian stated Krboyan called him a few days after the letter was sent and said he did not know Kalantarian and would not sign the engagement agreement or pay any share of the retainer.

In opposition to Karamanoukian's motion, Akopyan argued the settlement agreement only required Krboyan to pay 50 percent of legal fees billed to him by an attorney after the fees had been incurred, not to advance any portion of fees required to initiate the action, which, she contended, was Karamanoukian's obligation. Akopyan further argued, supported by declarations from Krboyan and Taheripour, that Krboyan had never received any telephone calls from Karamanoukian; Krboyan had not been told about the June 25, 2008 letter to Taheripour because Taheripour no longer represented Krboyan and did not know how to contact him; Krboyan did not speak to Karamanoukian after the letter had been sent; and it was suspicious that Karamanoukian had failed to attach the proposed engagement agreement from Kalantarian to his moving papers or produce it in discovery.

b. *The trial court's order*

After a hearing on February 9, 2011 the trial court denied Akopyan's motion for summary judgment but granted summary adjudication in favor of Akopyan on the cause of action for breach of contract.[2] The court explained, "The settlement agreement . . . has nothing in there that requires anyone to advance fees. It's an agreement where they are going to split the fees as they are . . . billed, essentially, that the parties' settlement agreement obligates the defendants to either commence the anticipated malpractice action or pay the $100,000 within 30 days. Well, they did not commence the action. [T]hey were the ones who had to get the ball rolling on this. And whether or not they could find an attorney who could do it for a contingency and not put anything out front, but pay only fees as they come up, whether they found someone who had to, who was going to charge a retainer, that is not spelled out in the settlement agreement. . . . What is spelled out, though, is that defendants were to begin this action. That didn't happen. So then they're obligated to pay the $100,000 within 30 days. The agreement itself did not obligate Hovik, Mr. Krboyan to advance costs or to sign any representation agreement. . . . He did not have a legal malpractice claim. He was not represented by the Woods firm. So, you know, there is no reason for him to even sign a representation agreement, nor was that a condition precedent to initiate this action."

With respect to the claim for declaratory relief, the court treated Karamanoukian's motion as a motion for judgment on the pleadings and granted it. The court found the claim did not present a controversy for which declaratory relief could be issued because there was no continuing obligation between the parties.[3] The court's rulings on the cross-motions resolved all claims in the action. Judgment was entered on February 22, 2011. Karamanoukian filed a timely notice of appeal.

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2 The court denied Karamanoukian's summary judgment motion and motion for summary adjudication with respect to Akopyan's breach of contract cause of action.

3 The parties do not dispute the trial court's ruling on the cause of action for declaratory relief.

DISCUSSION

1. *Standard of Review*

A motion for summary judgment or summary adjudication is properly granted only when "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) We review a grant of summary judgment or summary adjudication de novo and decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law. (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348.) We view the evidence in the light most favorable to the opposing party, liberally construing the opposing party's evidence and strictly scrutinizing the moving party's. (*O'Riordan v. Federal Kemper Life Assurance Co.* (2005) 36 Cal.4th 281, 284.)

2. *The Trial Court Erred in Granting Summary Adjudication in Favor of Akopyan*

a. *The law generally governing contract interpretation*

Absent conflicting extrinsic evidence, the interpretation of a written contract is a question of law. (*City of Hope Nat. Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 395; *Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865.) The fundamental goal of contract interpretation is to give effect to the mutual intention of the parties as it existed at the time they entered into the contract. (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264; *Parsons*, at p. 865; see also Civ. Code, § 1636.) That intent is interpreted according to objective, rather than subjective, criteria. (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1126.) When the contract is clear and explicit, the parties' intent is determined solely by reference to the language of the agreement. (Civ. Code, §§ 1638 ["language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity"]; 1639 ["[w]hen a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible"].)

The words in a contract are to be understood "in their ordinary and popular sense" (Civ. Code, § 1644), and the "whole of [the] contract is to be taken together, so as to give

effect to every part, if reasonably practicable, each clause helping to interpret the other." (Civ. Code, § 1641.) An interpretation that renders part of the instrument surplusage should be avoided. (*City of El Cajon v. El Cajon Police Officers' Assn.* (1996) 49 Cal.App.4th 64, 71.) Finally, "[a] contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties." (Civ. Code, § 1643; see *Bill Signs Trucking, LLC v. Signs Family Limited Partnership* (2007) 157 Cal.App.4th 1515, 1521 ["'[i]nterpretation of a contract "must be fair and reasonable, not leading to absurd conclusions"'"].)

b. *The contract obligated Krboyan to pay 50 percent of any retainer required to initiate the action*

Akopyan contends the parties intended Krboyan pay 50 percent of litigation fees and expenses that had been incurred, not share the cost of any deposit or retainer required to initiate the action, and argues this intention is made clear by the absence in the settlement agreement of an express requirement that Krboyan advance costs. Instead, the agreement provides "any attorney(s) engaged for the purpose of prosecuting the [a]nticipated [m]alpractice [a]ction shall be instructed to [] bill the parties accordingly." To be sure, the settlement agreement is silent on how the parties are to proceed under the circumstances that actually occurred. Nevertheless, reading the contract as a whole, it is unreasonable to conclude the parties did not intend Krboyan would be responsible for 50 percent of a retainer required to initiate the action. Even if they did not contemplate this precise situation, such an implied term is required to make the contract reasonable in light of the general intent gleaned from the express provisions. As such, it is properly considered part of the parties' agreement. (See Civ. Code, §§ 1655 ["[s]tipulations which are necessary to make a contract reasonable . . . are implied, in respect to matters concerning which the contract manifests no contrary intention"], 1656 [necessary incidents implied including covenant of good faith and fair dealing].)[4]

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4 "The implied covenant imposes on a contracting party not only a duty to refrain from acting in a manner that frustrates performance of the contract '"but also the duty to

The settlement agreement expressly placed the responsibility on Karamanoukian to do all the work associated with initiating and maintaining the malpractice action—that is, to find an attorney willing to take the case and to participate in the prosecution—while limiting his financial exposure to $25,000 in fees and costs. To ensure his financial exposure would be limited, the agreement provided "[T]he first $50,000 . . . in fees and/or costs of *bringing* and prosecuting the anticipated malpractice action shall be born[e] equally 50/50" by Krboyan and Karamanoukian and Krboyan would be "solely responsible" for paying any "fees and/or costs of *bringing* and prosecuting" the matter in excess of $50,000 (italics added). Just as this operative provision does not expressly address an advance of fees, it also does not expressly limit the obligation to pay fees to those for services already rendered or costs actually incurred.

Moreover, to interpret the contract to exclude a requirement Krboyan share in the payment of a retainer would ignore the repeated use of the word "bring," one of the definitions of which is to "initiate (legal action) against someone." (Oxford Dictionaries Online <http://www. oxforddictionaries. com (as of June 25, 2012); see Merriam–Webster Online <http:// www. merriam- webster. com (as of June 25, 2012).) A retainer is simply "[a]n advance payment of fees for work that the lawyer will perform in the future" (see Black's Law Dict. (9th ed. 2009) p. 1430), often required before an attorney will file an action on behalf of a new client or do any work whatsoever. Akopyan's focus on the additional requirement that "[a]ny attorney(s) engaged . . . shall be instructed to

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do everything that the contract presupposes that he will do to accomplish its purpose."'" (*Brehm v. 21st Century Ins. Co.* (2008) 166 Cal.App.4th 1225, 1242; see *Pasadena Live v. City of Pasadena* (2004) 114 Cal.App.4th 1089, 1093 [theatre company's agreement to pay for renovation of city-owned facility, with payments to be credited against license fees for use of facility in future, contemplated theatre company would submit applications for approval of events; city's refusal to consider such events supports claim for breach of implied covenant of good faith and fair dealing].) Here, the settlement agreement also expressly provided the parties would act in good faith: "The parties agree that they will not take any action that would interfere with the performance of this Agreement by any of the other parties hereto or that would adversely affect the rights provided for herein."

bill the parties accordingly" is misplaced because that provision presupposes an attorney has been engaged. Here, Kalantarian would not take the case—that is, the action could not be initiated—unless and until the retainer fee was paid[5] and the engagement agreement was signed by both the client and the person partially responsible for paying the fees.[6] If properly notified, Krboyan was required to participate in the payment of that fee; and his failure to do so excused any obligation Karamanoukian had to pay the $100,000 penalty.

c. *There are disputed issues of fact regarding notice to Krboyan*

Akopyan finally argues, even if Karamanoukian's interpretation of the settlement agreement is correct, he was not excused from paying her the $100,000 penalty—and the judgment in her favor should be affirmed—because there was no evidence Krboyan was

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5 Akopyan's argument there is no evidence Kalantarian required a $50,000 retainer to commence the action is simply wrong. Karamanoukian's declaration states, "I called [Krboyan] several times . . . to ask him to sign the Representation Agreement required by Mr. Kalantarian and to make the 50% payment on the *required* $50,000 retainer." (Italics added.) Additionally, Karamanoukian's counsel's letter to counsel for Akopyan and Krboyan states Kalantarian "is requiring an upfront payment of $50,000." Whether Karamanoukian failed to produce the retainer agreement during discovery or submit a declaration from Kalantarian confirming he truly required a $50,000 retainer to initiate the malpractice action does not render this evidence nonexistent or create, in the absence of admissible evidence to the contrary, a disputed issue of fact. Moreover, Akopyan's inability to reach Kalantarian to obtain verification is not evidence Kalantarian did not require a retainer.

6 Although Krboyan had not been represented by McGuire Woods and did not have a malpractice claim against the firm, it was perfectly appropriate for Kalantarian, the only attorney identified who was willing to bring the malpractice action, to ask both Krboyan and Karamanoukian to sign an engagement letter to memorialize the billing/payment arrangements and to satisfy the requirements of rule 3-310(F) of the Rules of Profession Conduct regarding acceptance of compensation for representing a client from one other than the client. If, as Akopyan contends, Krboyan had no implied duty to sign the engagement letter that Kalantarian required as a precondition to undertaking the representation, then Karamanoukian's obligation to pay her $100,000 would be excused because, after diligent search, he could not find an attorney to take on the malpractice action.

aware of Karamanoukian's attempts to contact him before the statute of limitations on the malpractice claim had expired. That argument is belied by the record: Karamanoukian presented a declaration asserting he had spoken with Krboyan a few days after the June 25, 2008 letter was sent by his counsel and Krboyan refused to pay his share of the retainer. That evidence is sufficient to defeat Akopyan's motion.

For his part, Karamanoukian contends not only did the trial court err in granting Akopyan's motion for summary adjudication of the breach of contract cause of action but also it improperly denied his own motion directed to that claim. But Karamanoukian's evidence regarding his conversation with Krboyan was contradicted by Krboyan's declaration stating the conversation did not occur. That factual dispute may not be material if the June 25, 2008 letter from Karamanoukian's attorney to Krboyan's former attorney, which no one disagrees was, in fact, sent and received, was sufficient notice to Krboyan under principles of agency. (See Civ. Code, §§ 2317 [ostensible authority], 2355 [means of termination of agency].) However, neither party has addressed this issue on appeal, and we are unable to determine whether additional evidence relating to it exists or if the parties had an adequate opportunity to present the evidence or conduct discovery on the issue. (Cf. Code Civ. Proc., § 437c, subd. (m)(2).) Accordingly, it must be resolved in the first instance in the trial court, either by further motion practice or at trial. (See generally *Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6 ["[a]lthough our review of a summary judgment is de novo, it is limited to issues which have been adequately raised and supported in [appellant's] brief"]; *Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979.)

DISPOSITION

The judgment is reversed, and the matter remanded for further proceedings not inconsistent with this opinion. Karamanoukian is to recover his costs on appeal.

PERLUSS, P. J.

We concur:

WOODS, J.

JACKSON, J.