Filed 6/25/12 Anna Y. v. Philip T. CA2/7

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

ANNA Y., Petitioner, v. PHILIP T., Respondent. LAW OFFICES OF JEFFREY W. STEINBERGER, Appellant.	B233524 (Los Angeles County Super. Ct. No. BF 039867)

APPEAL from an order of the Superior Court of Los Angeles County. Rafael A. Ongkeko, Judge. Reversed and remanded.

Law Offices of Jeffrey W. Steinberger, Jeffrey W. Steinberger and R. William Shpall for Appellant.

Jaffe and Clemens, William S. Ryden and Nancy Braden-Parker for Respondent.

No appearance by Petitioner.

In a paternity proceeding brought by Anna Y. against Philip T. (respondent), the trial court denied a motion for attorneys fees brought by Anna's former counsel, the Law Offices of Jeffrey Steinberger (appellant).[1] We reverse the order denying the motion and remand the matter for a hearing to determine the amount of fees due to appellant.

FACTUAL & PROCEDURAL BACKGROUND

On July 13, 2010, Anna, represented by the law firm of Phillips & Jessner (hereinafter the P & J firm), filed a petition to establish respondent's paternity of her minor child.

On October 5, 2010, Anna filed a notice that appellant would be associated as co-counsel with the P & J firm. On that same day, the P & J firm, on behalf of Anna, filed a notice of an application for Order to Show Cause (OSC) for attorney fees and costs. The supporting declarations requested fees to be paid to appellant, the P & J firm, and the accounting firm of Gursey/Schneider. Anna sought fees for appellant in the amount of $168,920 for past services,[2] $25,000 for future services and approximately $5,200 for two additional attorneys retained by appellant for limited services.

The hearing on the OSC was set for November 16, 2010, but it was later continued until January 25, 2011.

On January 18, 2011, the P & J firm, on behalf of Anna, filed a Notice of Disassociation of appellant.[3] The Notice of Disassociation was signed by the P & J firm on January 14, 2011. Also on January 18, 2011, the P & J firm filed a reply

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[1] Because this matter originated as a paternity case, we shall use initials for the parties' last names; first names are used for ease of reference.

[2] Appellant's statements showed fees of $176,420, but there was a credit applied.

[3] While Anna named "Jeffrey Steinberger of the Law Offices of Jeffrey W. Steinberger" as counsel in her notices of association and disassociation, she requested in her application for OSC that fees be awarded to the "Law Offices of Jeffery Steinberger" (appellant). Since the parties do not raise any issue about the difference in the names, we treat them as one and the same.

memorandum of points and authorities in support of the OSC for fees which stated in a footnote: "[Anna] has recently disassociated [appellant] as counsel of record in this case and has withdrawn her request for attorney's fees and costs associated with its prior representation of her."

On January 25, 2011, the date of the hearing on the OSC, appellant filed a memorandum of points and authorities in support of the court's jurisdiction to hear its request for fees. In its points and authorities, it stated that it was notified orally on January 14, 2011, of the disassociation.

Appellant appeared at the January 25th hearing, along with the P & J firm. There is no reporter's transcript of the hearing in the record, but a subsequent ruling signed by the court indicates that "At [the P & J firm]'s suggestion so as not to detract from the more pressing child support issue, and due in part to [appellant]'s late filing and service on the day of the hearing of its brief. . . the court and all counsel agreed to consider [appellant]'s motion separately in a further hearing. [Appellant]'s request for fees was taken off-calendar, without prejudice to a renewed motion." The court then awarded fees to the P & J firm and to the accountants.

On February 15, 2011, appellant filed a notice of a "Renewed *Borson*"[4] motion for attorney fees, set for hearing on March 21, 2011. Respondent filed an opposition, and appellant filed a reply memorandum of points and authorities. Neither Anna nor the P & J firm filed any responsive papers.

At the hearing on March 21st, counsel from the P & J firm stated that, "When we were in court on the Order to Show Cause for . . . the attorney's fees and for the child support. . . [t]here were significant issues that were raised. . . regarding halving the amount of income that was available to the respondent. So I felt that it was in [Anna]'s best interests to disassociate and withdraw her support for that motion at that time without prejudice. . . . But in any event, our position is that we are supportive of the

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[4] *In re Marriage of Borson* (1974) 37 Cal.App.3d 632.

request of former counsel and that we would be pleased if the court were to award fees against the respondent."

Respondent argued that Anna had previously withdrawn her support for the motion for fees and that appellant had no standing to bring the motion and the court took the matter under submission.

On April 5, 2011, the court ruled that it had no jurisdiction to hear and that appellant had no standing to bring the renewed motion for fees. It explained in its written ruling that the motion should have been filed before Anna formally disassociated appellant. Once Anna withdrew her request for fees, appellant had no independent standing to seek such fees. Appellant appealed this ruling.

DISCUSSION

Family Code section 270 provides that "If a court orders a party to pay attorney's fees or costs under this code, the court shall first determine that the party has or is reasonably likely to have the ability to pay." Family Code section 272 provides that when the court determines that one of the parties shall be liable for the attorney fees and costs of the other party, the court has the discretion to specify that the fees and costs be paid in whole or in part to the attorney.

We review the trial court's ruling on a motion for attorney fees and costs for an abuse of discretion. (*In re Marriage of Sullivan* (1984) 37 Cal.3d 762, 768-69; *In re Marriage of Rosen* (2002) 105 Cal.App.4th 808, 829.)

In *In re Marriage of Borson, supra*, 37 Cal.App.3d 632, a wife in marital dissolution proceedings discharged her attorneys. After their discharge, the attorneys moved for permission to withdraw and requested on the wife's behalf that the husband be directed to pay them additional attorneys fees. The wife did not expressly consent to the motion for fees, but did not object. At the hearing, the court granted the motion to withdraw and postponed consideration of the fee request. The wife subsequently substituted in new counsel and withdrew her consent to proceed with the fee request made by the discharged attorneys. New counsel then negotiated a settlement in which the former attorneys were allowed to recover fees. The husband appealed, asserting that the

award of fees was in excess of the trial court's jurisdiction. On appeal, the court noted that since the request for fees had been made before new counsel had been substituted in, the former attorneys continued to represent the wife for purposes of winding up the relationship, which included making the fee motion on her behalf. (*Id*. at p. 637.) The appellate court also noted that the wife's objection to the motion surfaced only at the time the fee motion was heard and reasoned that her failure to object earlier led her former attorneys to believe that they had the authority to act on her behalf in pursuing the fee request. (*Id*. at pp. 637-638.) As a result, the trial court had the jurisdiction to make the award. (*Id.* at p. 639.)

Borson acknowledged that in *Meadow v. Superior Court* (1963) 59 Cal.2d 610, the Supreme Court held that discharged attorneys had no proprietary interest in the fees, but their right to the fees was derived from the right of the former client/spouse. (*Id*. at pp. 615-616.) The only recourse of the discharged attorneys was to initiate a separate action against their former client to recover fees. The *Borson* court distinguished *Meadow* on the basis that the wife had previously discharged the attorneys and affirmatively opposed the payment of fees.

In *Borson*, the motion for fees was filed at the same time as the motion to withdraw as counsel. (*In re Marriage of Borson*, *supra*, 37 Cal.App.3d at p. 637.) Here, appellant's first request for fees was filed several months before the notice of disassociation was filed. There was no need to substitute new counsel after appellant was disassociated since co-counsel, the P & J firm, remained counsel of record.[5]

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[5] Since written notice is not required to effect a disassociation of co-counsel (See *Wells Fargo & Co. v. City and County of San Francisco* (1944) 25 Cal.2d 37, 43; *Johnston, Baker & Palmer v. Record Machine & Tool Co.* (1960) 183 Cal.App.2d 200), the date upon which appellant was disassociated would appear to be January 14, 2011, and not January 25, 2011, the date of filing of the notice. However, we do not feel that this technical difference of dates is dispositive since Anna never expressly objected to the request for fees.

The trial court's denial of the motion was based on a lack of standing by appellant and a lack of jurisdiction of the court to hear the motion. It held that "[t]he absence of a *Borson* motion filed before [appellant's] disassociation on 1/18/11 is fatal and cannot be saved by the OSC for fees filed more than three months earlier." However, in examining the record closely, it is apparent that at the January 25, 2011, hearing on the first OSC for fees, the trial court expressly took the matter of appellant's fees off calendar without prejudice, with the understanding that the motion would be resubmitted. Neither the memorandum of points and authorities in support of fees filed on January 25, 2011, nor the "renewed *Borson*" motion filed on February 15, 2011, can be considered new motions, but renewals of the first request made on October 5, 2010. Therefore, the request for fees was technically made before appellant was disassociated as counsel.

Respondent cites *In re Marriage of Read* (2002) 97 Cal.App.4th 476 in support of the trial court's ruling. He also asserts that appellant does not have standing to bring this appeal, citing *In re Marriage of Tushinsky* (1988) 203 Cal.App.3d 136).

In *Read, supra,* 97 Cal.App.4th 476, the wife discharged her attorneys and ordered them to withdraw a pending application for OSC for attorney's fees and to cease all work on her behalf. After a substitution of attorney form was filed, the discharged attorneys continued to pursue the fee award over the wife's objection. The court of appeal concluded that there was no basis upon which the discharged attorney firm "could reasonably believe" it had implied authority to pursue the request on wife's behalf. (*Id.* at p. 481.)

In *Tushinsky, supra,* 203 Cal.App.3d 136, an attorney representing the wife in a dissolution action filed an application for an order to show cause for attorneys fees and costs. The attorneys were also engaged to represent the wife in another related lawsuit. While the application was on file, but before a hearing was held, the wife engaged co-counsel, then discharged the first attorneys. The motion for fees was taken off calendar. The attorneys filed a motion to restore the hearing on the order to show cause. Both the wife and the husband objected to the restoration to calendar of the motion for fees. (*Id.* at p. 140.) The commissioner granted the motion to restore the hearing on the

order to show cause for fees as it applied to the dissolution action. Later the commissioner awarded the discharged attorneys only a portion of the fees and the former attorneys appealed. The court of appeal held that the former attorneys were not "aggrieved" within the meaning of Code of Civil Procedure section 902 and thus had no standing to appeal. It cited *Meadow v. Superior Court, supra,* 59 Cal.2d 610 for the proposition that the right to such fees and costs belongs to the spouse to whom they were awarded, and not the attorney, even if the award is made directly payable to the attorney. (*Tushinsky, supra,* 203 Cal.App.3d at p. 142.)

Cases since *Tushinsky,* however, employ the *Borson* analysis on the issue of standing as a question of consent by the client.

In *In re Marriage of Erickson and Simpson* (2006) 141 Cal.App.4th 707, 710, the wife in a dissolution action filed a motion requesting attorney fees, then filed a notice of substitution of attorneys. The hearing on the motion for fees was not heard until after the substitution form was filed. The *Erickson* court reviewed the decisions in *Meadow, Borson,* and *Read* and concluded that the "pivotal factor" in determining whether a trial court has jurisdiction to award fees to a discharged attorney is whether the client authorized the former attorney to make the fee request on the client's behalf. (*In re Marriage of Erickson and Simpson, supra,* 141 Cal.App.4th at p. 710.)

In re Marriage of Green (2006) 143 Cal.App.4th 1312 held that even though an attorney's right to fees in a dissolution action is derivative of the client's right, once judgment is entered, the attorney can enforce the fee award directly. The *Green* court reasoned that since the right to fees is derived from the client's right, the client must expressly or impliedly authorize a discharged attorney to move for such fees, citing *Erickson and Simpson*. (*In re Marriage of Green, supra,* 143 Cal.App.4th at p. 1321.)

Therefore, we determine whether appellant had the full consent and authorization of Anna when it requested payment of fees. From *Borson,* we can infer that Anna's lack of objection indicated her implied consent to the October 2010 request for fees (*In re Marriage of Borson, supra,* 37 Cal.App.3d at pp. 637-638). Anna then withdrew her consent to the motion in January 2011, before the hearing on the OSC. At the hearing,

there was no ruling on appellant's right to fees, but the matter was taken off calendar, without prejudice. When the motion was renewed, Anna did not file an objection and later explicitly stated at the hearing that she did not withdraw the motion because she objected to the payment of fees, and that she now supported the motion.

The facts of this case do not lead to the conclusion that appellant had no basis upon which it could reasonably believe that it was acting against Anna's express wishes. At the time the motion for fees was filed on appellant's behalf in October 2010, appellant reasonably believed that it had Anna's consent to request fees. Unlike *Read*, there was no express order to appellant to withdraw its request and Anna did not object. Any doubt about Anna's consent to the request for fees was dispelled by her oral representation at the March 21, 2011, hearing that she supported the granting of the motion and only withdrew her request in January because of tactical issues, not because she opposed the award of fees. Appellant therefore had standing to request fees and the trial court had jurisdiction to award them. The trial court erred by not considering appellant's motion. The matter must therefore be remanded for a determination of whether appellant is entitled to fees in whole or in part, and if so, whether respondent should pay for them.

DISPOSITION

The order denying appellant's motion for an award of fees is reversed and the cause is remanded for further proceedings consistent with the views expressed herein. Costs on appeal are awarded to appellant.

WOODS, Acting P. J.

We concur:

ZELON, J. **JACKSON, J.**