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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

DAVID DESHAY,

Plaintiff and Appellant,

v.

JAMES POCRASS,

Defendant and Respondent.

B248844

(Los Angeles County
Super. Ct. No. BC466716)

APPEAL from an order of the Superior Court of California, County of Los Angeles. Ronald Sohigian, Judge. Affirmed.

Paul Kujawsky for Plaintiff and Appellant.

Reback, McAndrews, Kjar, Warford, Stockalper & Moore, James J. Kjar, Cindy A. Shapiro and Jason J. Petersen for Defendant and Respondent.

Appellant David DeShay agreed with Paul DeVore to fund and coordinate a lawsuit between DeVore and a third party in exchange for a defined portion of any recovery. Respondent James Pocrass, an attorney related to DeVore, encouraged DeVore to settle the litigation and advised that settlement proceeds be wired directly to DeVore's account rather than to Pocrass's client trust fund.

DeShay sued Pocrass, alleging his advice to DeVore breached fiduciary duties Pocrass owed to DeShay and interfered with his prospective economic advantage. The trial court granted summary judgment to Pocrass on the ground that DeShay adduced no evidence of damages. We affirm on that ground.¹

BACKGROUND

In 2007, DeShay, a self-described sophisticated businessman, and Edward Akselrod agreed to fund and supervise a lawsuit to be filed by DeVore against Robert Assil concerning a dispute between those two over real property. DeShay's stated goal was to "ultimately monetize[e] [DeVore's] claims." The parties agreed DeShay's "agreement would be required in connection with any resolution of the claims, or any portion thereof." For their services, DeShay and Akselrod agreed to accept reimbursement of their expenses off the top of any recovery plus 50 percent of any funds remaining after payment of \$800,000 to DeVore. DeShay and Akselrod would decide between themselves how to split their expenses and 50 percent share. DeVore filed the lawsuit, and DeShay successively engaged a number of attorneys to prosecute it.

In 2009, Pocrass, an attorney related to DeVore by marriage, began offering legal advice to DeVore and DeShay concerning the litigation, and continued to do so into 2011. Pocrass informed DeShay that he did not represent him and would not do so unless a retainer agreement was signed and \$5,000 paid. DeShay refused to do either. He nevertheless contended Pocrass represented him, as evidenced by the facts that (1) in communications with DeShay regarding the DeVore litigation, Pocrass used pronouns

¹ Appellant's and respondent's motions to augment the record are granted. Respondent's request for judicial notice is granted.

such as “we” and “our” in such a way as to include DeShay as a member of the litigation team, and (2) DeShay felt Pocrass was representing him. It is undisputed DeShay never paid Pocrass anything.

The DeVore-Assil litigation eventually went to arbitration, and in 2011 an arbitrator awarded DeVore \$2,562,610. In June 2011, DeVore and Assil, against DeShay’s wishes, agreed to settle the case for \$2 million. Assil then paid that amount directly to DeVore, also against DeShay’s wishes.

A dispute arose between DeVore and DeShay over payment, and DeShay and Akselrod filed the instant lawsuit against DeVore, later amending it to include Pocrass. Plaintiffs asserted causes of action for breach of fiduciary duty and intentional interference with prospective economic advantage against Pocrass, alleging he had become their attorney during the course of the DeShay-Assil litigation and had undermined their interests by (1) encouraging DeShay to settle with Assil and (2) advising Assil to wire the \$2 million directly to DeVore’s private account rather than to Pocrass’s client trust fund. Plaintiffs alleged they suffered approximately \$1.4 million in compensatory damages, including \$465,000 in unreimbursed expenses.

After one demurrer and a motion to strike plaintiffs’ claim for punitive damages, the third amended complaint is operative.

On February 8, 2013, the trial court granted DeVore’s motion for summary judgment against Akselrod. On February 20, the court granted Pocrass’s motion for summary judgment against Akselrod. Those rulings have not been appealed.

On January 17, 2013, Pocrass moved for summary judgment against DeShay, contending he had never represented DeShay and thus owed him no fiduciary duty and had breached no duty. Pocrass also contended DeShay had suffered no damages because the settlement proceeds to which he alleged he was entitled were being held in trust for him by DeVore. Pocrass supported the motion with a declaration from DeVore himself, who stated \$1,250,000 of the DeVore-Assil settlement proceeds remained available, awaiting only resolution of the instant lawsuit or an agreement as to what amount DeShay was entitled. DeVore stated he was unable to determine the amount to which DeShay

was entitled because DeShay had not yet provided an accounting of legal fees he incurred in the DeVore-Assil litigation. Pocrass did not argue in his motion that the agreement between DeShay and DeVore was unenforceable or void. Nor did he argue DeShay had no legally cognizable interest in preventing settlement of the DeVore-Assil litigation or in dictating to which account settlement funds should be transferred.

In opposition to the motion, DeShay argued Pocrass had represented him as an attorney during the DeVore-Assil litigation and breached fiduciary duties owed him by encouraging DeVore to settle the litigation for \$2 million, even though the arbitrator had awarded more, and by directing Assil to wire the settlement funds directly to DeVore's private account rather than Pocrass's client trust fund. DeShay essentially ignored the issue of damages, arguing only that he was owed \$440,000 in expenses and claiming Pocrass was "complicit" in depriving him of settlement funds. At the same time, DeShay admitted \$1.2 million remained in DeVore's account awaiting an accounting.

On March 8, 2013, the trial court granted summary judgment, finding DeShay possessed no evidence of damages because it was undisputed the money to which he alleged he was entitled was available pending an accounting only he could provide.

Judgment was entered in due course, from which DeShay timely appealed.

On September 18, 2013, DeShay settled with DeVore for \$825,000. Pocrass then filed a motion to dismiss this appeal as moot, which we denied.

DISCUSSION

Preliminary Considerations

We have no occasion to comment on seemingly obvious threshold issues concerning enforceability of the DeShay-DeVore agreement (see *Estate of Molino* (2008) 165 Cal.App.4th 913, 922 [any agreement that authorizes a nonattorney to control another's litigation is contrary to public policy and void *ab initio*]), DeShay's supposed interest in controlling DeVore's litigation (see *Estate of Butler* (1947) 29 Cal.2d 644, 647-648 [a nonlawyer may not intervene for profit in the conduct of legal proceedings]), or a creditor's putative interest in dictating from which account he will be paid, as the parties did not raise these questions below and do not raise them here. Neither is the

\$825,000 DeVore paid to DeShay directly relevant, as it was not paid until after summary judgment. The only question before us is whether the trial court correctly concluded no triable issue existed as to damages because it was undisputed the funds to which DeShay alleged he was entitled were available, awaiting only his own accounting.

Standard of Review

A defendant is entitled to summary judgment if the record establishes there is no question of material fact and as a matter of law none of plaintiff's asserted causes of action can prevail. (Code Civ. Proc., § 437c, subd. (c); *Travelers Property Casualty Company of America v. Superior Court* (2013) 215 Cal.App.4th 561, 574.) To obtain summary judgment, a moving defendant must show one or more elements of each cause of action cannot be established or a complete defense exists. (Code Civ. Proc., § 437c, subd. (p)(2).) Once the defendant has met his burden, the burden shifts to the plaintiff to show a triable issue of material fact exists as to each cause of action. (*Ibid.*) We review the trial court's ruling on a motion for summary judgment de novo, viewing the facts in a light most favorable to the opposing party. (*Adams v. Explorer Ins. Co.* (2003) 107 Cal.App.4th 438, 445.)

Application

DeShay asserted causes of action for breach of fiduciary duty and intentional interference with prospective economic advantage. "The elements of a cause of action for breach of fiduciary duty are the existence of a fiduciary relationship, breach of fiduciary duty, and damages." (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820.) "The five elements for intentional interference with prospective economic advantage are: (1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant." (*Youst v. Longo* (1987) 43 Cal.3d 64, 71, fn. 6.)

As noted, the trial court granted summary judgment to Pocrass on the ground that DeShay failed to establish evidence of damages. DeShay's response on appeal is virtually incomprehensible. He does not contend, for example, that the \$1.2 million in DeVore's account or the \$825,000 ultimately paid was less than he was owed by DeVore. Instead, he insists either amount would be irrelevant to Pocrass's liability because the damages caused by him were "completely distinct" from those caused by DeVore. (Italics omitted.)

What damages? First, DeShay contends he was injured by being forced to expend "time, money and sweat in funding and managing" the DeVore-Assil litigation, and he cites *Sutter v. General Petroleum Corp.* (1946) 28 Cal.2d 525, 534 (*Sutter*) for the general proposition that loss of time and effort constitutes a compensable injury. DeShay fails to explain how Pocrass caused him to expend time, money or effort in a manner "completely distinct" from his obligation to do so pursuant to his agreement with DeVore. He does not, for example, contend Pocrass caused him to expend *more* money or effort than he otherwise would have. And *Sutter* offers no support. There, the plaintiff alleged he was induced by the defendants' fraud to expend his efforts and time in operating a project that ultimately failed, also due to the fraud. The Supreme Court observed that the measure of damages is generally the amount that would compensate a plaintiff for all the detriment proximately caused by the fraud. Because the plaintiff's efforts turned out to be fruitless, his time and effort were "lost," and the reasonable value of his services was compensable. (*Id.* at pp. 534-535.) Here, DeShay's efforts in managing the DeVore-Assil litigation were not fruitless. On the contrary, \$1.2 million was available to pay him (and \$825,000 was ultimately paid).²

² Even this was arguably more than was due. DeShay and Akselrod agreed at the outset to accept jointly 50 percent of DeVore's recovery after both expenses and \$800,000 were deducted. DeVore's recovery was \$2 million. Thus DeShay's and Akselrod's share would have been \$440,000 (expenses) plus 50 percent of \$760,000 (\$2 million - \$440,000 - \$800,000), for another \$380,000, reaching a total of \$820,000. DeShay was paid \$825,000. DeShay argued below that his recovery should have been based on the arbitrator's award of \$2.6 million, not on the \$2 million settlement. The

“For the breach of an obligation not arising from contract, the measure of damages . . . is the amount which will compensate for all the detriment proximately caused thereby” (Civ. Code, § 3333.) DeShay was entitled to recover as compensatory damages only the amount that would compensate him for the detriment proximately caused by Pocrass’s tortious conduct. (*Dean W. Knight & Sons, Inc. v. First Western Bank & Trust Co.* (1978) 84 Cal.App.3d 560, 568.) He could not be placed in a better position than that which he would have occupied absent the breach. (*Ibid.*) Whether it was detrimental for DeShay to spend time and effort on the DeVore-Assil litigation depends on whether he was compensated for his efforts. It was undisputed funds were available to compensate him, and no evidence suggests and he does not contend the amount would have been inadequate. His time and effort were therefore not “lost” and did not constitute a compensable injury.

DeShay argues the DeVore settlement cannot be considered when determining whether he has a claim for damages against Pocrass because (1) the \$825,000 he received was far less than the amount he requested in the complaint, (2) his claims against DeVore and Pocrass were not the same, and (3) the amount of damages would not be known until determined by a jury. None of this is relevant. DeShay presented no evidence the damages occasioned by DeVore and Pocrass were nonidentical and no evidence he was entitled to more than was available to pay him. He thus presented no evidence he suffered any damage at all.

trial court properly rejected the argument, as DeShay had no enforceable interest in preventing DeVore from settling with Assil. A client’s “lawsuit is his own. He may drop it when he will. Even an express agreement to pay damages for dropping it without his lawyer’s consent would be against public policy and void.” (*Hall v. Orloff* (1920) 49 Cal.App. 745, 749, citation omitted; see *Abbott Ford, Inc. v. Superior Court* (1987) 43 Cal.3d 858, 883 [nonparty settlement veto power “conflicts with the public policy which favors the full settlement of litigation and may frequently result in unnecessary trials”]; *Lemmer v. Charney* (2011) 195 Cal.App.4th 99, 105 [“the law will not enforce an agreement between the parties constraining a client to pursue an unwanted lawsuit” and “does not recognize a tort cause of action for damages for the client’s decision to abandon it”].)

DeShay next argues, with no explanation or citation to evidence, that he was forced to commit more “time, money and sweat to try to right his affairs after Pocrass violated his fiduciary duty.” Whatever time and effort DeShay spent to “right his affairs” is not compensable absent evidence that the affairs needed righting. DeShay makes no attempt to explain or adduce evidence about what needed righting.

DeShay finally argues delayed receipt of \$825,000 constitutes a financial loss for which he should be compensated. He implies (but does not state outright) that payment was delayed because Pocrass persuaded Assil to wire the \$2 million settlement directly to DeVore’s account instead of to Pocrass’s client trust fund. The argument is without merit. Economic loss occasioned by delay in payment of amounts due may be compensable under certain circumstances, such as when the creditor incurs borrowing or holding costs during the delay or is somehow deprived of an economic opportunity. (*Dean W. Knight & Sons, Inc. v. First Western Bank & Trust Co.*, *supra*, 84 Cal.App.3d at p. 568.) But nothing in the record suggests, and DeShay fails to explain, how deposit of the Assil settlement into DeVore’s account caused any more delay than would have resulted from the money being paid into Pocrass’s client trust fund. In either event DeShay would have been forced to negotiate with DeVore for payment, as Pocrass could hardly pay a nonparty out of his trust fund without the beneficiary’s consent.

A plaintiff opposing summary judgment must adduce evidence supporting the challenged elements of his causes of action. Pocrass established DeShay suffered no damages by showing full compensation was available from DeVore. It then became DeShay’s burden to state what his damages were and indicate why a payment from DeVore would not cover them. He made no attempt to do so, contending instead that any payment from DeVore would be irrelevant. He was incorrect.

DISPOSITION

The judgment is affirmed. Respondent is to recover his costs on appeal.
NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.