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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

BRIAN SHUMAKE, Plaintiff and Appellant, v. DANIEL MIRISOLA, Defendant and Respondent.	B227383 (Los Angeles County Super. Ct. No. BC328672)

APPEAL from a judgment of the Superior Court of Los Angeles County. David L. Minning, Judge. Reversed in part with directions.

Brian Shumake, in pro. per., for Plaintiff and Appellant.

Robert S. Gerstein; Bernard R. Schwam, Jeffrey J. Doberman for Defendant and Respondent.

An attorney has sued his former client in a dispute over fees. The attorney was limited to a quantum meruit recovery, because there was no written retainer agreement or contingent fee agreement. A jury awarded him $29,625. None of the attorney's challenges to the trial court's rulings have any merit, apart from his claim for costs as the prevailing party. We remand the case for a determination of costs. In all other respects, we affirm the judgment.

FACTS

Respondent Daniel Mirisola hired a contractor to build a commercial structure in La Cañada. The construction was defective, causing repeated interior flooding and mold. Represented by an attorney named Treadwell, Mirisola sued the contractor. After reaching a partial settlement with the contractor, Mirisola terminated Treadwell's representation.

The partial settlement left some unresolved issues between Mirisola and the contractor. Mirisola had appellant Brian Shumake represent him in an arbitration to decide the unresolved issues. According to Mirisola, the arbitration "wasn't a big deal." The arbitration hearing in June 2003 lasted about five hours. The arbitrator awarded Mirisola $1,034,297, plus attorney fees. The bulk of the award was based on the settlement agreement negotiated by Attorney Treadwell. The trial court confirmed the award in 2004.

Shumake submitted a costs memorandum requesting attorney fees of $40,125 on behalf of Mirisola. He declared, "I spent 157.50 hours representing Dan Mirisola in this arbitration process, before preparing this declaration and the memorandum of costs," at an hourly rate of $250. Most of Shumake's time was spent on preparation: the hearing itself lasted less than a day. The arbitrator awarded Mirisola attorney fees of $40,125.

Mirisola did not see Shumake's costs memorandum before it was filed. Later, after seeing the memorandum, Mirisola described it as "all wrong." Mirisola testified that Shumake did very little work: he completed the forms requesting arbitration; picked an arbitrator; sent in the fee; sent letters to opposing counsel; made a few telephone calls; and attended the arbitration hearing. Shumake did not review any documents before the

hearing. Mirisola obtained the documents from Treadwell and had them in his possession the entire time, so he knows that Shumake did not review the documents beforehand. Mirisola located and hired all of the experts who testified at the hearing. Shumake first met the expert witnesses "at the door just before they went in to the arbitration . . . ." Shumake did not attend any depositions. After Mirisola received the $40,125 for his attorney fees, he placed it in an account where it has remained ever since, awaiting a determination as to how much Shumake is actually owed.

Shumake filed suit against Mirisola and others. The complaint asserted claims against Mirisola for conversion, fraud, trespass, and quantum meruit. In 2007, the trial court summarily adjudicated and dismissed all of Shumake's claims, except for his claim against Mirisola for quantum meruit.[1]

The matter proceeded to trial on the quantum meruit claim. The parties stipulated to an hourly rate of $250 for Shumake. Shumake asked the jury to award him $29,000 for his work on the arbitration, plus additional fees for his work converting the award into a judgment. Mirisola took the position that Shumake lied in the declaration submitted to the arbitrator, was paid in full in various increments, and nothing more is owed to Shumake for his services.

The jury found that (1) Mirisola asked Shumake to perform legal services; (2) Shumake performed the requested legal services; (3) Mirisola has not paid Shumake for the services; (4) the reasonable amount of unpaid time is 118.50 hours; and (5) the total amount due to Shumake, using an hourly rate of $250, is $29,625. The court entered judgment in favor of Shumake for $29,625, plus costs, on June 18, 2010. Shumake

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[1] Shumake pursued an appeal as to Mirisola's codefendants. We affirmed the judgment because Shumake's case was, in large part, "predicated on the existence of an enforceable contingent fee and lien agreement, and the evidence shows that (1) an 'exemplar' of the purported fee and lien agreement fails to satisfy legal requirements for enforceability, and (2) by his own admission, plaintiff agreed to work on an hourly basis, not for a contingent fee." (*Shumake v. Schwam* (Oct. 6, 2008, B199587) [nonpub. opn.].)

requested a new trial, on the grounds of inadequate damages. On September 15, 2010, Shumake appealed the judgment and the denial of his motion for new trial.

DISCUSSION

1. The Arbitration Award Is Not Res Judicata

By motion in limine, Shumake argued that the arbitrator's 2003 attorney fee award of $40,125 has a binding res judicata effect that cannot be modified. Shumake maintained that the arbitrator approved all of the hours he claimed to have spent on Mirisola's case, a finding that is "conclusive as to the reasonable value of [appellant's] services." The trial court denied Shumake's motion.

In support of his position, Shumake cites the doctrine of arbitral finality, which states that an arbitrator's decision cannot be judicially corrected for error, unless the arbitrator exceeded his powers. (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 8-13.) For example, an arbitrator's refusal to award attorney fees cannot be corrected by the trial court if the arbitrator was empowered to deny fees under the parties' contract. (*Moshonov v. Walsh* (2000) 22 Cal.4th 771, 773.) *Moncharsh* and *Moshonov* curtail judicial oversight of arbitration awards. Neither case presents the issue of whether an arbitration decision has a res judicata effect in a subsequent judicial proceeding.

The Supreme Court addressed the question of whether an arbitration decision has a res judicata effect in *Vandenberg v. Superior Court* (1999) 21 Cal.4th 815. The court held that "a private arbitration, even if judicially confirmed, can have no collateral estoppel effect in favor of third persons unless the arbitral parties agreed, in the particular case, that such a consequence should apply." (*Id*. at p. 834.) The court expressly rejected the view that a private arbitration award can automatically have a collateral estoppel effect in favor of nonparties to the arbitration. (*Id*. at pp. 834-835.)

Shumake is not an "arbitral party." The arbitral parties were Mirisola and his contractor, who disputed liability for construction defects. Mirisola and his contractor never agreed that the arbitrator's decision would have a binding effect in a subsequent judicial dispute between Mirisola and his attorney. While he acted as Mirisola's attorney

at the arbitration, Shumake was not one of the "parties to the proceeding who contested liability." (*Grinham v. Fielder* (2002) 99 Cal.App.4th 1049, 1054.) He is a nonparty.

Absent proof that the arbitral parties intended the arbitration award to be binding on Mirisola in litigation against Shumake, the amount of the award cannot be used against Mirisola. Mirisola never saw the cost memorandum before Shumake submitted it to the arbitrator, and testified that it is "all wrong." Mirisola's debt to Shumake was not fully and fairly litigated in the arbitration. The trial court properly denied Shumake's motion in limine.

2. Quantum Meruit Instruction

The trial court gave the jury the standard instruction for quantum meruit.[2] The court rejected a special instruction formulated by Shumake, which he now contends is legal error. Shumake's special instruction was given by the trial court in *Fergus v. Songer* (2007) 150 Cal.App.4th 552, and comprised nine different factors for the jury to consider. The need for a special instruction in *Fergus* arose after the trial court permitted the plaintiff attorney "to testify that he had a contingent-fee arrangement with respondent whereby he would 'get paid at the end based upon the . . . results that are obtained,' not on the number of hours worked." Fergus "did not accurately keep track of all of his hours" because he believed that he was working on a contingent fee basis. In light of Fergus's testimony, the special instruction included wording that the fee award could be based on "'the results obtained.'" (*Id*. at p. 561.)

Fergus is inapposite. Shumake did not work on a contingent fee basis, as he admitted in a sworn declaration. That is the conclusion in our opinion in *Shumake v. Schwam* (see fn. 1, *ante*), which is binding under principles of res judicata. Because Shumake kept track of his hours, and was not working on a contingent fee basis, there

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[2] The standard instruction states that plaintiff must prove: (1) defendant requested services from plaintiff; (2) plaintiff performed the requested services; (3) defendant has not paid for the services; and (4) the value of the services. (CACI No. 371.)

was no need for a special instruction. The standard quantum meruit instruction was appropriately given in this case.

3. Prejudgment Interest

An award of prejudgment interest is mandated if the plaintiff "is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover [ ] is vested in him upon a particular day . . . ." (Civ. Code, § 3287, subd. (a).) Shumake argues that his damages became certain on the day that the arbitrator issued his attorney fee award based on Shumake's unopposed cost memorandum. Shumake's argument presumes that the arbitrator's award has a preclusive effect in this litigation. It does not. The amount of Shumake's damages did not become certain until the jury listened to the evidence and decided the reasonable number of hours Shumake worked on the arbitration case. Shumake is not entitled to prejudgment interest.

The court has discretion to award prejudgment interest "based upon a cause of action in contract where the claim was unliquidated." (Civ. Code, § 3287, subd. (b).) The court denied prejudgment interest to Shumake. Among the reasons it listed for the denial was that Shumake started out with 10 causes of action and ended up with one; and he made an initial demand of $400,000 and ended up with an award of $29,000 and change, "a modest amount." Shumake contends that the court abused its discretion.

The discretionary award of prejudgment interest applies to "a cause of action in contract." This was not a cause of action on a contract; rather, it was an action on a common count for quantum meruit. This Court has held that "where there is no express contract and the action is in *quantum meruit* to recover the reasonable value of services rendered, interest is not recoverable prior to judgment." (*Parker v. Maier Brewing Co.* (1960) 180 Cal.App.2d 630, 634.) Under *Parker*, Shumake has no right to prejudgment interest on his claim for services rendered.

Even if Shumake's quantum meruit claim is treated as a quasi-contractual claim "arising upon contract" (*George v. Double-D Foods, Inc.* (1984) 155 Cal.App.3d 36, 46-47), the trial court did not abuse its discretion. Generally, interest is not allowed for an unliquidated debt, but may be awarded as an element of damages to give the plaintiff

"fair compensation" or to make a party "whole in respect to what it lost." (*Continental Oil Co. v. United States* (9th Cir. 1950) 184 F.2d 802, 822-823.) The court does not abuse its discretion by denying prejudgment interest when "there was a bona fide dispute of a complicated nature." (*Moreno v. Jessup Buena Vista Dairy* (1975) 50 Cal.App.3d 438, 448.)

The trial court felt that Shumake received fair compensation and did not need prejudgment interest to be made whole. In addition, this was a bona fide dispute of a complicated nature. As the court noted, Shumake started out with many claims against many defendants, and sought a large amount of money. By the time the dust settled, there was one defendant, one claim, and a modest recovery. The court did not exceed the bounds of reason by denying prejudgment interest. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.)

4. <u>Reinstatement of Claims Previously Dismissed</u>

Shumake asked the trial court to reinstate his claims against Mirisola for conversion and trespass (dismissed in 2007 following summary adjudication), because when he opposed summary judgment, certain evidence "was mistakenly not presented." The conversion and trespass claims were dismissed because Shumake did not address them in his opposition to Mirisola's motion. The court denied Shumake's request to reinstate the two previously dismissed claims.

State law does not permit relitigation of causes of action that have been summarily adjudicated. "If a motion for summary adjudication is granted, at the trial of the action, the cause or causes of action . . . shall be deemed to be established and the action shall proceed as to the cause or causes of action, affirmative defense or defenses, claim for damages, or issue or issues of duty remaining." (Code Civ. Proc., § 437c, subd. (n)(1).) The policy behind summary adjudication is to promote expeditious litigation and eliminate needless trials. (*Catalano v. Superior Court* (2000) 82 Cal.App.4th 91, 96.) This policy would be undermined if a party is allowed to reinstate claims that were already considered and summarily adjudicated.

Although Shumake was barred from litigating at trial the causes of action that were summarily adjudicated, he was not without a remedy. After judgment, Shumake could seek review of "any intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects the judgment or order appealed from or which substantially affects the rights of a party . . . ." (Code Civ. Proc., § 906.) Thus, even if the summary adjudication order was not appealable when it was made, we have jurisdiction to review that order once a final judgment is entered. (*Travelers Casualty & Surety Co. v. Transcontinental Ins. Co.* (2004) 122 Cal.App.4th 949, 952, fn. 2.)

Shumake has not asked us to review the trial court's intermediate order granting summary adjudication on his causes of action for conversion and trespass. Evidently, there is nothing to review, as Shumake presented no evidence and no opposition to the motion requesting summary adjudication of these two claims.

5. Shumake's Right to Recover Costs as Prevailing Party

Shumake argues that he is entitled to recover his costs, as the prevailing party in the litigation. (Code Civ. Proc., § 1032, subd. (b).) A prevailing party is the person with a net monetary recovery. (*Id.,* subd. (a)(4).) Mirisola concedes that Shumake is the prevailing party and is entitled to recover his costs. The case must be remanded to the trial court to determine and award Shumake his costs under Code of Civil Procedure section 1032, after considering Shumake's costs memorandum and Mirisola's motion to tax costs.

DISPOSITION

The case is reversed in part and remanded to the trial court with directions to award appellant his litigation costs under Code of Civil Procedure section 1032. In all other respects, the judgment is affirmed. The parties are to bear their own costs on appeal.

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BOREN, P.J.

We concur:

DOI TODD, J.

ASHMANN-GERST, J.