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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

MEIR J. WESTREICH et al.,

Plaintiffs and Appellants,

v.

RANDALL R. HIGA et al.,

Defendants and
Respondents.

B279492

(Los Angeles County
Super. Ct. No. BC488506)

APPEAL from an order of the Superior Court of Los Angeles County, Holly E. Kendig, Judge. Affirmed in part and reversed in part.

Meir J. Westreich for Plaintiffs and Appellants.

Fidelity National Law Group, Kevin R. Broersma for
Defendants and Respondents.

INTRODUCTION

Spouses Meir Westreich and Maria Ruiz (plaintiffs) brought an action against their next-door neighbors Randall and Janice Higa (defendants) concerning a boundary line dispute. Defendants prevailed in that action and judgment was entered in their behalf.¹ As the prevailing parties (Code Civ. Proc., §§ 1032, subd. (b); 1033.5),² defendants claimed \$69,824 in costs. This sum included defendants' filing fees, service of process fees, deposition costs, court reporter fees, cost of trial transcripts, and costs for "[m]odels, blowups, and photocopies of exhibits." This amount also included \$38,229.00 in expert fees incurred after plaintiffs failed to accept defendants' section 998 offer.

Plaintiffs moved to strike and/or tax costs, challenging every category except filing fees. Defendants opposed the motion. The hearing on plaintiffs' motion was not reported and was held without Westreich, who arrived late, after the trial court ruled. Plaintiffs' motion was denied in its entirety.

On appeal, plaintiffs initially challenged the denial of the motion as to the following categories only: court reporter fees and trial transcripts (§ 1033.5) and expert witness fees (§ 998). They subsequently withdrew their challenge to the section 1033.5 costs and limited the appeal to the award of expert witness fees pursuant to section 998.

¹ We affirmed the judgment in defendants' favor in an unpublished opinion also filed today. (*Westreich v. Higa* (April 16, 2018, B270413).)

² All statutory references are to the Code of Civil Procedure.

DISCUSSION

Before trial, defendants made the following section 998 offer to plaintiffs:

“Defendants Randall T. Higa and Kana Janice Higa (‘collectively Higa’), jointly and severally, hereby offer pursuant to *California Code of Civil Procedure* § 998, to compromise the above-entitled action for the total sum of Three Thousand Five Hundred and One dollar (\$3,501.00), inclusive of all claims for damages, attorneys’ fees, costs, expense and interest, payable jointly and severally, to Plaintiffs Meir J. Westreich and Maria Ruiz in exchange for:

“1. A dismissal with prejudice of Plaintiffs’ First Amended Complaint as to all defendants; and

“2. A general release by both Plaintiffs of all defendants, and their agents, employees, representatives, heirs, assigns, parents, affiliates, predecessors, subsidiaries, successors, insurers, and attorneys, past, present, and future, from and on account of any and all claims, demands, damages, actions, losses, damages and causes of action, including a waiver of all known and unknown claims, and a waiver of all rights and benefits under California *Civil Code* § 1542.”

The offer also included the requisite provision concerning written acceptance. (§ 998, subd. (b).)

Plaintiffs did not accept defendants’ section 998 offer and did not obtain a more favorable result at trial. Bare bones though it was, plaintiffs’ trial court challenge to defendants’ section 998 request for \$38,229.00 in expert witness fees (“No showing or documentation that . . . a valid and qualifying § 998 offer was made to each Plaintiff”) was sufficient to preserve the issue for appeal.

As the Court of Appeal has noted, “in a desire to encourage settlement of civil cases the Legislature has borrowed a controversial cost-shifting approach from England called the ‘payment into court’ scheme. Embodied in section 998, this approach authorizes either party to submit a written, binding settlement offer. If the other party chooses to refuse this offer, it proceeds to trial at its own risk [and may become] liable for its opponent's costs,” including expert witness fees. (*Valentino v. Elliott Sav-On Gas, Inc.* (1988) 201 Cal.App.3d 692, 696-697 (*Valentino*), fn. omitted.)

The inclusion of a general release of all claims and a Civil Code section 1542 waiver³ invalidates the section 998 offer, however.⁴ As *Valentino* held, a section 998 offer may not require the offeree to relinquish claims outside or beyond those at issue in the current lawsuit. (*Valentino, supra*, 201 Cal.App.3d at pp. 696-697; see also *Chen v. Interinsurance Exchange of Automobile Club* (2008) 164 Cal.App.4th 117, 121 [to be valid, a section 998 offer “must not dispose of any claims beyond the claims at issue in the pending lawsuit”]; *McKenzie v. Ford Motor Company* (2015) 238 Cal.App.4th 695, 706 [“a section 998 offer requiring the release of claims . . . not involved in the litigation is invalid”].)

³ Civil Code section 1542 provides: “A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.”

⁴ Because we reverse based on the general release issue, we do not reach plaintiffs’ companion claim that a joint and several offer to spouses also renders the section 998 offer invalid.

DISPOSITION

That portion of the order denying plaintiffs' motion to tax costs based on the section 998 offer is reversed. Costs in the amount of \$38,229.00 are taxed, leaving defendants with a costs award of \$31,595.00. The parties are to bear their own costs on appeal.

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DUNNING, J.*

We concur:

KRIEGLER, Acting P. J.

BAKER, J.

* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.