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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

SURJIT P. SONI, Plaintiff, Cross-defendant and Appellant, v. CH&I TECHNOLOGIES, INC., Defendant, Cross-complainant and Appellant, LAWRENCE M. LEVENSTEIN, Defendant and Respondent.	B235130 (Los Angeles County Super. Ct. No. GC 044712)

APPEAL from orders of the Superior Court of Los Angeles County, James Kaddo, Judge. Affirmed.

The Soni Law Firm, M. Danton Richardson and Leo E. Lundberg, Jr., for Plaintiff and Appellant.

Law Offices of Michael L. McQueen, Michael L. McQueen; Ferguson Case Orr Paterson, Wendy C. Lascher and John A. Hribar for Defendant, Cross-complainant and Appellant, and Defendant and Respondent.

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Plaintiff Surjit P. Soni is an attorney who sued his former client, Defendant CH&I Technologies, Inc. (CHI), for unpaid legal fees and costs. Soni also sued the president of CHI, Lawrence M. Levenstein. Soni prevailed after a bench trial against CHI but not Levenstein. The court found Levenstein was not personally liable under the retainer agreement. Soni appeals from the trial court's order awarding Levenstein $45,030.75 in attorney fees. CHI appeals from the court's order awarding Soni $204,465.07 in attorney fees against CHI. We affirm both orders.

FACTS AND PROCEDURAL HISTORY

Soni (doing business as The Soni Law Firm, a California sole proprietorship law firm) is an attorney specializing in franchise law, intellectual property, patent, trademark, and copyright licensing. CHI, through Levenstein, retained Soni in February 2008 to perform patent and trademark prosecution and licensing work. As of December 11, 2009, CHI owed Soni $73,567.31 for services rendered and costs advanced. Soni filed an action against CHI and Levenstein to recover that amount, alleging causes of action for breach of contract, quantum meruit, money had and received, and book account. CHI filed a cross-complaint against Soni alleging breach of contract and professional malpractice. The retainer agreement provided that the client would pay any legal fees and expenses incurred in the collection of overdue balances.

The court conducted a bench trial from February 23 to 25, 2011, and on March 23, 2011. The court found as follows. Despite the recital on page one of the retainer agreement that Levenstein was the client, Levenstein merely signed the agreement as president of CHI, and the signature page indicated CHI was the client. The court recognized that the billings and invoices were sent to Levenstein, but found that those documents did not constitute the contract between the parties. Further, what payments were made to Soni were made by CHI. Therefore, CHI was the party liable to Soni under the retainer agreement. The court determined that Soni had established CHI owed him $66,317.52, plus prejudgment interest of $10,974.19. It further

determined CHI had failed to establish that Soni breached the retainer agreement or committed professional negligence, and it dismissed those cross-claims with prejudice.

As the prevailing party against CHI, Soni moved for attorney fees pursuant to Civil Code section 1717.[1] CHI opposed the motion on the ground that The Soni Law Firm was representing itself in this action, and attorney litigants may not recover attorney fees for self-representation. Counsel's declaration in support of Soni's motion stated that counsel, M. Danton Richardson, was "a member of the Soni Law Firm, counsel for Plaintiff, Surjit P. Soni dba The Soni Law Firm." Richardson also stated: "I am familiar with the record keeping and billing system of The Soni Law Firm, and I am aware of the methods by which The Soni Law Firm tracks attorney and paralegal time." On Soni's first amended complaint, Soni himself is listed as counsel on the cover page as well as Richardson, and under both names, The Soni Law Firm name and address appears. Soni's answer to the cross-complaint identifies counsel the same way, except that it adds another attorney following Richardson, Leo E. Lundberg. Later pleadings by Soni do not identify Soni himself as counsel, but continue to list Richardson and Lundberg as counsel with The Soni Law Firm as their address. State bar records identify The Soni Law Firm as the address for Richardson and Lundberg.

At the first hearing on Soni's motion, the court stated that its tentative decision was to deny without prejudice because Richardson's declaration was insufficient to show that he was akin to in-house counsel -- for which attorney fees were available -- and "not merely a member of the firm assigned to represent the firm pro se." The court ultimately continued the hearing and deferred ruling to allow Soni to file supplemental materials. Soni filed a supplemental declaration of Richardson that stated he was a "member of the Soni Law Firm" but also stated as follows:

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[1] All further statutory references are to the Civil Code.

"As set forth in my original declaration, I have served as lead counsel in this matter including handling the trial and all post judgment matters. I have been assisted by Messrs. Lundberg and Perez [another attorney identified in Soni pleadings]. My client, as reflected in this caption of this matter, is Surjit P. Soni dba The Soni Law Firm, which is a sole proprietorship. Neither myself nor Messrs. Lundberg and Perez are partners nor associates of 'The Soni Law Firm.' We do not receive a fixed salary nor do we share in the profits of Mr. Soni's dba, 'The Soni Law Firm.' We are each paid based on the hours that we bill. In working on this matter, we are not representing our own interests but instead those of Mr. Soni."

Soni also filed a declaration in which he stated as follows:

"3. I am an attorney and practice law as a sole proprietorship under the business name 'The Soni Law Firm.' Stated differently, 'The Soni Law Firm' is simply a dba for my law practice. There is no separate entity such as a partnership or a legal corporation. As part of my law practice I employ other attorneys to work for me and I pay each such attorney based on the number of hours they work, including each of my attorneys in this action, M. Danton Richardson, Leo E. Lundberg, Jr., and Ronald E. Perez. None of these individuals share in any of the profits (or losses) or the expenses related to my law practice and they do not have any interest in the claims against [CHI] in this action. Those claims are solely mine as an individual who is doing business as The Soni Law Firm.

"4. The more senior attorneys that I employ are commonly referred to as 'members' while the more junior attorneys I have employed have been referred to as 'associates' of the firm. Neither Messieurs Richardson, Lundberg or Perez are actually members of any 'firm' as 'The Soni Law Firm' is simply a business name, not a separate legal entity.

"5. The references to 'members' and 'associates' is simply the use of common parlance used in the legal profession as a means of indicating those attorneys who are more senior (members) and those that are more junior (associates). This is necessary, especially in dealing with insurance carriers, who differentiate between the billable rates they pay between 'members' or 'partner' level attorneys and those who are associate level.

"6. I have not represented myself in this action but have instead been represented by my counsel, M. Danton Richardson, Leo E. Lundberg, Jr., and Ronald E. Perez. I have never signed any pleadings,

nor made any appearances or arguments in this matter, nor does the attorneys' fees sought include any of my time spent regarding this matter (which was substantial)."

At the continued hearing on the motion, the court indicated that it was satisfied, based on the supplemental filings, that this was not a case of self-representation, and it granted Soni's motion for attorney fees.[2] It awarded him fees in the amount of $204,465.07 against CHI. CHI timely appealed from this order.

Levenstein also moved for attorney fees on the ground that he prevailed against Soni when the court found that he was not a client and therefore not liable under the retainer agreement. Levenstein and CHI were represented by the same attorney. Levenstein argued that he agreed with counsel to split the fees and costs for the matter evenly with CHI. Thus, he was seeking half the fees incurred in defending the action -- $45,030.75. The court granted his motion and awarded him that amount in fees. Soni timely appealed from this order.

STANDARD OF REVIEW

We review the trial court's determination of whether a party prevailed for purposes of awarding attorney fees under the abuse of discretion standard. (*Ritter & Ritter, Inc. Pension & Profit Plan v. The Churchill Condominium Assn.* (2008) 166 Cal.App.4th 103, 126.) We also review the amount of attorney fees awarded for abuse of discretion. (*Dzwonkowski v. Spinella* (2011) 200 Cal.App.4th 930, 934.)

"An issue of law concerning entitlement to attorney fees is reviewed de novo. [Citations.] 'When a trial court has resolved a disputed factual issue, an appellate

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[2] The court stated: "Plaintiff has now presented further evidence in the declaration of Mr. Soni to support the entitlement to attorney's fees. The declaration states that The Soni Law Firm is just a dba for Surjit P. Soni, an individual. There is no firm in the sense of an entity of some type. . . . [¶] He further states that Mr. Richardson is a member who has no partnership interest, no share of profits, no salary, but rather bills the firm on an hourly basis. Mr. Soni, therefore, has incurred fees by having to pay these hourly bills."

court reviews the ruling according to the substantial evidence rule. The trial court's resolution of the factual issue must be affirmed if it is supported by substantial evidence.'" (*Carpenter & Zuckerman, LLP v. Cohen* (2011) 195 Cal.App.4th 373, 378 (*Carpenter*).)

DISCUSSION

1. Soni's Appeal

Soni contends that the trial court erred in awarding Levenstein $45,030.75 in attorney fees for several reasons: (1) the court erred in finding Levenstein was not a client under the retainer agreement and he therefore was not a prevailing party; (2) even if Levenstein was not a client, he was not a prevailing party because he "merely avoided liability"; (3) there was no evidence that he separately incurred any attorney fees; and (4) an award of 50 percent of the fees incurred in defending the action is not a reasonable allocation. We hold the court did not err.

First, Soni has forfeited any challenge to the trial court's finding that Levenstein was not a client and therefore not liable under the retainer agreement. The court's findings, including the finding at issue, were entered on May 3, 2011. The court entered judgment on May 16, 2011. Soni served notice of entry of the judgment on June 14, 2011. His time to appeal from the judgment expired on August 15, 2011. (Cal. Rules of Court, rule 8.104, subd. (a)(1)(B).) He did not file a notice of appeal from the judgment; his notice of appeal was filed in September 2011 and states only that he was appealing from the postjudgment attorney fees order. If Soni wanted to challenge the court's findings at trial *and* the attorney fees order, he should have filed two appeals -- one from the final judgment and one from the postjudgment attorney fees order. (*Torres v. City of San Diego* (2007) 154 Cal.App.4th 214, 222.) Even if he had filed a timely appeal from the judgment, Soni provides us no means to review the court's finding because he has not included in the record the transcripts of trial or any other evidence adduced at trial that we might need to assess the factual finding. (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 132 [rejecting the

defendants' contention because they failed to provide a record adequate to evaluate the contention].)

Second, the trial court did not abuse its discretion in finding Levenstein was the prevailing party on Soni's claims against him. Levenstein moved for attorney fees pursuant to section 1717. Section 1717, subdivision (a), states in part: "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs." In determining whether a party is the "'party prevailing on the contract,' the trial court is to compare the relief awarded on the contract claim or claims with the parties' demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources. The prevailing party determination is to be made only upon final resolution of the contract claims and only by 'a comparison of the extent to which each party ha[s] succeeded and failed to succeed in its contentions.'" (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 876.) Here, as between Levenstein and Soni, Levenstein obtained an unqualified win on the contract claims against him. The court found plain and simple that Levenstein was not personally liable under the retainer agreement because he was not a party to the agreement. Soni completely failed in his attempt to hold Levenstein personally liable, regardless of whether Soni prevailed on the claims against CHI. The court did not err in determining Levenstein was the prevailing party on the claims against him. (*Pueblo Radiology Medical Group, Inc. v. Gerlach* (2008) 163 Cal.App.4th 826, 828-829 [court did not err in determining corporate executives were prevailing parties under § 1717 when it held they were not alter egos of corporation and therefore not liable for breach of contract, "effectively end[ing] the case as to them," even though court had yet to determine whether corporation itself was liable for breach of contract].)

Third, the court did not abuse its discretion in awarding 50 percent of the defense fees to Levenstein. Soni contends there was no evidence that Levenstein -- as opposed to CHI -- incurred these fees. Soni is wrong. He points to the absence of a written fee agreement reflecting a split of the fees, and the fact that the invoices are all addressed to CHI. But counsel for Levenstein and CHI, Michael McQueen, submitted a declaration that stated Levenstein *and* CHI retained him to represent them in the case. McQueen stated that he was charging Levenstein *and* CHI $295 per hour and that the total amount of fees owing was $90,064.50, and he attached the invoices for the services he provided in defense of the lawsuit. The clear implication from McQueen's declaration was that both parties had incurred the fees, and the declaration was sufficient evidence that Levenstein had incurred fees.

Moreover, Soni has not established that the trial court abused its discretion in the amount of fees it awarded to Levenstein. (*Dzwonkowski v. Spinella*, *supra*, 200 Cal.App.4th at p. 934 [amount of the fee award lies within the sound discretion of the trial court]; see also *Slavin v. Fink* (1994) 25 Cal.App.4th 722, 726 [when several defendants are united in interest in action, but not all prevail, the amount of costs awarded to the prevailing defendants lies within the sound discretion of the trial court].) Soni does not deny the court had the discretion to apportion the attorney fees, but argues that Levenstein did not establish the 50/50 fee-splitting agreement. Even assuming there was no written agreement to apportion defense fees thusly, Soni has not established why awarding Levenstein 50 percent of the fees was an unreasonable apportionment. He asserted all causes of action against both Levenstein and CHI. Levenstein and CHI filed a joint answer asserting the same defenses and McQueen jointly represented them through trial. The trial court did not determine Levenstein was free from liability until after trial, when it made its findings. Under these circumstances, we see no abuse of discretion in awarding Levenstein 50 percent of the defense fees. The order awarding Levenstein attorney fees should be affirmed.

2. CHI's Appeal

CHI appeals from the court's order awarding Soni $204,465.07 in attorney fees, contending that Soni cannot recover fees because his law firm was representing itself in this action, and the law does not allow recovery of attorney fees in cases of self-representation. Although this may be a correct statement of the law under section 1717, the trial court did not find that Soni was representing himself or that Soni's firm was representing itself. The evidence supported the court's conclusion that Soni was not representing himself, and we therefore hold the court did not err in concluding Soni was entitled to attorney fees.

a. Case Law

In *Trope v. Katz* (1995) 11 Cal.4th 274 (*Trope*), our Supreme Court resolved "whether an attorney who successfully represents himself in litigation may recover attorney fees when such fees are provided for by contract or statute." (*Id.* at p. 278.) The answer was "no," when that attorney sought an award under section 1717. The court held that "an attorney who chooses to litigate in propria persona and therefore does not pay or become liable to pay consideration in exchange for legal representation cannot recover 'reasonable attorney's fees' under section 1717 as compensation for the time and effort he expends on his own behalf or for the professional business opportunities he forgoes as a result of his decision." (*Id.* at p. 292.) An attorney acting in propria persona should not be entitled to payment for lost opportunity costs, as it were. (*Id.* at p. 285.) The court observed that "the usual and ordinary meaning of the words 'reasonable attorney's fees' is the consideration that a litigant pays or becomes liable to pay in exchange for legal representation," and that construing the statute to permit a pro se attorney litigant to obtain attorney fees while prohibiting a pro se nonattorney litigant from obtaining fees "would in effect create two separate classes of pro se litigants -- those who are attorneys and those who are not -- and grant different rights and remedies to each." (*Id.* at pp. 277, 282.) The court rejected the argument that the Legislature, through section 1717, wanted to encourage self-representation by attorney litigants, observing that "a lawmaking body

may instead prefer to discourage attorneys from electing to appear in propria persona because such self-representation may often conflict with the general public and legislative policy favoring the effective and successful prosecution of meritorious claims." (*Id.* at p. 292 ["'The adage that "a lawyer who represents himself has a fool for a client" is the product of years of experience by seasoned litigators.'"].)

Since *Trope*, our courts have made clear that *Trope* does not preclude recovery of attorney fees in other circumstances where the litigant did not actually incur out-of-pocket fees, such as for work performed by in-house counsel. (*Taheri Law Group v. Evans* (2008) 160 Cal.App.4th 482, 494.) In *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084 (*PLCM*), our Supreme Court held that a corporate litigant represented by in-house counsel, i.e., counsel who was an employee of the party, could recover attorney fees under section 1717 for the services of that counsel. (*Id.* at pp. 1091-1092.) The court in *PLCM* concluded that none of the considerations supporting denial of the fee award in *Trope* applied to the case: "There is no problem [in this case] of disparate treatment; in-house attorneys, like private counsel but unlike pro se litigants, do not represent their own personal interests and are not seeking remuneration simply for lost opportunity costs that could not be recouped by a nonlawyer. A corporation represented by in-house counsel is in an agency relationship, i.e., it has hired an attorney to provide professional legal services on its behalf. Nor is there any impediment to the effective and successful prosecution of meritorious claims because of possible ethical conflict or emotional investment in the outcome. The fact that in-house counsel is employed by the corporation does not alter the fact of representation by an independent third party. Instead, the payment of a salary to in-house attorneys is analogous to hiring a private firm on a retainer." (*Id.* at p. 1093.) The court "discern[ed] no basis for discriminating between counsel working for a corporation in-house and private counsel engaged with respect to a specific matter or on retainer. Both are bound by the same fiduciary and ethical duties to their clients. [Citation.] Both are qualified to provide, and do provide, equivalent legal

services. And both incur attorney fees and costs within the meaning of . . . section 1717 in enforcing the contract on behalf of their client." (*Id.* at p. 1094.)

Building on *Trope* and *PLCM*, the court of appeal in *Gilbert v. Master Washer & Stamping Co.* (2001) 87 Cal.App.4th 212, 214 (*Gilbert*) held that "a lawyer represented by other members of his law firm is entitled to recover reasonable attorney fees where the representation involved *the lawyer's personal interests and not those of the firm*." (Italics added.) In that case, an attorney litigant was sued in his individual capacity for alleged acts he committed in the course of representing a client. His law firm was not sued. (*Id.* at p. 214.) The court observed that the attorney litigant had actually incurred fees for the services of the other members of his firm, and an attorney-client relationship existed when the members of his firm were representing not their personal interests or even those of their firm, but the separate and distinct interests of the attorney litigant himself. (*Id.* at pp. 220-222.) The court also observed that inequality between attorney pro se litigants and nonattorney pro se litigants was absent "where an attorney litigant is represented by members of his or her firm, because like a corporation represented by in-house counsel, the represented attorney seeks to recover fees for work done by others on his behalf. Indeed, it would be inequitable in the extreme to permit [the attorney litigant] to recover fees incurred by outside counsel, but deny him such recovery merely because his counsel are members of the same law firm as he." (*Id.* at p. 223.)

In *Witte v. Kaufman* (2006) 141 Cal.App.4th 1201, 1211 (*Witte*), the court distinguished *Trope*, *PLCM*, and *Gilbert* and held that a law firm sued in its own right could not recover attorney fees when represented by several of its attorneys. The court observed that there was "no attorney-client relationship between KLA [the firm] and its individual attorneys. The individual KLA attorneys are not comparable to in-house counsel for a corporation, hired solely for the purpose of representing the corporation. The attorneys of KLA are the law firm's product. When they represent the law firm, they are representing their own interests. As such, they are comparable to a sole practitioner representing himself or herself. Where, as in *Gilbert*, an attorney is sued

in his or her individual capacity and he obtains representation from other members of his or her law firm, those other members have no personal stake in the matter and may, in fact, charge for their work. Not so with a law firm that is sued in its own right and appears through various members." (*Ibid*.)

Similar to *Witte*, the court in *Carpenter, supra*, 195 Cal.App.4th at page 385, held that a law firm litigant could not recover attorney fees when represented by an associate of the firm (Candace Klein). To begin with, the court observed that "the issue of whether Ms. Klein was acting in her capacity as an associate attorney or as an independent contractor is significant to the disposition of the appeal. And, the trial court found she was an associate, a factual finding that was supported by substantial evidence . . . ." (*Id*. at p. 384.) From there, the court held: "Ms. Klein was representing the interests of the law firm for which she worked -- not just the personal interests of individual partners in that firm, such as in *Gilbert* [citation]. Although she was not a partner in that firm, she, as an employee of the firm, acted on behalf of the firm in protecting it from potential liability from defendants' cross-claims. Moreover, unlike the in-house counsel in *PLCM* [citation], who was employed by and represented the interests of the corporation, Ms. Klein's status as an associate suggests that she was hired primarily to represent the interests *of the clients* of the law firm plaintiff. There is no suggestion that she functioned as in-house counsel to the firm. Based on Ms. Klein's status as an associate, the law firm and its partners, in seeking to recover the reasonable value of her services on appeal, in effect, were seeking to recover 'lost opportunity costs . . . .'" (*Id.* at p. 385.) Klein "was an employee of that firm hired primarily to perform services for firm clients and, presumably, to generate profits for the firm. This status distinguishes her from the 'independent third party' in-house counsel in *PLCM* and makes her status analogous to the attorneys who represented their pro se law firm in *Witte* [citation]." (*Ibid.*)

b. Application

In the case at bar, the trial court found that Soni was *not* a law firm appearing through its various members -- in other words, he was not a pro se attorney litigant. It

implicitly found that Richardson and Soni's other counsel were not representing their own personal interests, but those of Soni, the individual. We hold the trial court did not err, and because Soni was not a pro se attorney litigant, he could recover attorney fees.

From the beginning of the lawsuit, long before the issue of attorney fees arose, Soni presented himself as an individual practitioner doing business as The Soni Law Firm. Paragraph one of the first amended complaint states that "Plaintiff Surjit P. Soni dba The Soni Law Firm ('Plaintiff') is a California sole proprietorship law firm . . . ." CHI's cross-complaint similarly states that "Cross-defendant Surjit P. Soni is an attorney licensed to practice law in the State of California and does business as the Soni Law Firm." Soni's declaration in support of the attorney fees motion stated that The Soni Law Firm is not a legal corporation or partnership, but is merely a name for his law practice. Unlike *Witte* and *Carpenter*, the litigant here is not a law firm, but is an individual with his own distinct, personal interests.

Moreover, the evidence shows that Soni's attorneys did not have the same interests in recovering from CHI that he did. Soni's attorneys in this action do not receive a fixed salary from or share in the profits and losses of Soni. Soni employs them on matters for him, and they bill him for the number of hours they work. Likewise, Soni pays them based on the number of hours they bill, including for this case. They are essentially contractors who Soni was required to pay regardless of whether he recovered from CHI. In this sense, Soni actually incurred fees and became liable to pay his attorneys in exchange for legal representation. (*Trope*, *supra*, 11 Cal.4th at p. 282 ["the usual and ordinary meaning of the words 'reasonable attorney's fees' is the consideration that a litigant pays or becomes liable to pay in exchange for legal representation"].) He is paying out of pocket for those fees and not abstractly for lost opportunity costs. For this reason, the concern the *Trope* court voiced about inequality between attorney and nonattorney pro se litigants is not present. The situation is more akin to *Gilbert*, *supra*, 87 Cal.App.4th at page 223, in that it would be inequitable to deny recovery merely because Soni employed attorneys for this matter

who do other work for him, while permitting recovery if he had retained attorneys who do not perform regular work for him.

The other policy concern over self-representation by attorneys that animated the *Trope* court is also not present. As in *PLCM*, given their business arrangement, Soni's attorneys were sufficiently independent from him such that "possible ethical conflict[s]" or an "emotional investment in the outcome" would not impede the "effective and successful prosecution of meritorious claims." (*PLCM*, *supra*, 22 Cal.4th at p. 1093.) The trial court did not err in awarding Soni his attorney fees.

DISPOSITION

The orders are affirmed. Levenstein may recover costs from Soni on Soni's appeal. Soni may recover costs from CHI on CHI's appeal.

FLIER, J.

WE CONCUR:

RUBIN, Acting P. J.

GRIMES, J.