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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re Marriage of JOHN
URIOSTEGUI and ANGEL MAFFEI.

B289948

(Los Angeles County
Super. Ct. No. YD054403)

JOHN G. URIOSTEGUI,

Respondent,

v.

ANGEL MAFFEI,

Appellant.

APPEAL from an order of the Superior Court of Los Angeles County, Glenda Veasey, Temporary Judge, Randall F. Pacheco, Judge. Reversed and remanded with directions.

Jeff Dominic Price for Appellant.

No appearance for Respondent.

INTRODUCTION

Angel Maffei appeals from the family law court's order denying her request for attorneys' fees incurred in a prior successful appeal. The court ruled the request was barred by res judicata. We reverse and direct the family law court to rule on the merits of the request.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Family Law Court Errs in Denying Maffei's Request To Modify Child Support, and We Reverse*

Maffei and John Uriostegui married in October 2004. In July 2008 Uriostegui filed a petition for dissolution of the marriage. Pursuant to the parties' stipulation, the family law court in November 2011 ordered Uriostegui to pay \$6,200 in monthly child support for the couple's twin sons. In June 2013 the court entered a stipulated judgment of dissolution providing that Uriostegui would pay this amount in monthly child support and that he would pay \$2,500 in monthly spousal support for three years.

In March 2014 Maffei filed a request for an order modifying child support, contending Uriostegui's income had doubled. In August 2014 the family law court, Commissioner Glenda Veasey, denied Maffei's request. In December 2016 we reversed, holding the family law court erred by applying the wrong legal standard and placing the burden of proof on the wrong party. (*In re Marriage of Uriostegui & Maffei* (Dec. 12, 2016, B259700) [nonpub. opn.])

B. *Maffei Tries To Recover Attorneys' Fees for Her Appeal*

Meanwhile, Maffei was seeking attorneys' fees from Uriostegui to pay for her appeal. In March 2015 Maffei filed a request, her first, for \$25,000 to proceed with her (ultimately successful) appeal of the family law court's order denying her request to modify child support. Counsel for Maffei filed a declaration listing the tasks he had done to designate and prepare the record on appeal, describing the work he was going to do on the appeal (such as preparing briefs and appearing at oral argument), and estimating the appeal would cost at least \$28,000. Maffei filed a declaration stating that she needed approximately \$25,000 to proceed with the appeal and that she had only \$5,900 in her bank accounts. She also submitted W-2 statements, bank statements, and an income and expense declaration.

On August 19, 2015 Commissioner Veasey denied the request, stating she had "a problem" with "pre-paying" for appellate fees. Commissioner Veasey also said that, although Maffei was "going to be entitled to some attorneys' fees," there were some "inadequacies in [the] current request" and that the court needed more "detail." Commissioner Veasey stated: "I think that, under the law, [Maffei is] going to be entitled to some attorneys' fees on appeal. But I think [Uriostegui's] concerns about lack of detail are valid at this point in time for me to evaluate. . . . So I'm not saying 'no,' but I'm saying . . . 'no for now,' because I need more detail, and deny it without prejudice."

In June 2016 Maffei filed her second request for attorneys' fees. Counsel for Maffei described the work he had done and the amount he had billed on the appeal so far (\$24,964.71), submitted

copies of his bills, and indicated Maffei had paid him \$4,000. Counsel for Maffei also estimated the number of hours he anticipated spending on various tasks associated with the appeal (such as two hours to conduct an additional review of the record, three hours to review Uriostegui's respondent's brief, and 18 hours to prepare for and attend oral argument) and the total cost of the appeal (\$40,000). Maffei submitted an income and expense declaration and a separate declaration stating her bank account balance was \$4,839. In his opposition, Uriostegui argued Maffei's request was "fatally defective" because Maffei had not submitted a proper income and expense declaration and other forms and because the fee request was unreasonable.

On August 29, 2016 Commissioner Veasey again denied the request, finding it was "fatally defective." She stated that Maffei had submitted a "woefully deficient" profit and loss statement and that counsel should "give the court a real profit and loss statement so that the court can evaluate the numbers."¹ When counsel for Maffei offered to have Maffei testify at the hearing, Commissioner Veasey asked, probably rhetorically, "And just bypass the local rules as to what you have to file and serve on the other side in what statutory periods of time to give them an opportunity to review and respond to them?" When counsel for Uriostegui objected, Commissioner Veasey stated: "It's denied without prejudice. Give them the profit and loss."

¹ Maffei said that she owned a Pilates studio from which her "monthly self-employment income is approximately \$2,300" and that she lived "paycheck to paycheck" and had "exhausted all of [her] savings and retirement funds to pay for legal fees and costs."

On September 2, 2016 Maffei filed her third request for fees. This time, counsel for Maffei stated that he had billed \$24,850 on the appeal so far (as documented by his invoices) and that he anticipated the total cost of the appeal would be at least \$39,200. Maffei stated that Uriostegui's monthly income was more than \$78,000, which "dwarf[ed]" her monthly income of \$5,401 as a self-employed Pilates instructor, and that she was unable to pay for her attorney to work on the appeal. Maffei submitted an income and expense statement, a 2015 Profit or Loss From Business (Sole Proprietorship) (IRS Form 1040, Schedule C) showing a net profit from her yoga and Pilates business of \$7,167, and an IRS Form 8879 showing her adjusted gross income in 2015 was \$4,558. Maffei stated in her supporting declaration that her current monthly self-employment income was \$5,401 and that she had "exhausted [her] savings and retirement funds to pay for legal fees and costs." She also stated: "I am 45 years old and am self-employed as a Pilates instructor and it is not practical for me, while taking care of our children, who are ten years of age, to seek to obtain other or different employment."

On October 19, 2016 Commissioner Veasey again denied the request. The minute order stated: "The Court finds that the request for attorney fees is fatally defective and [Maffei] is not entitled to a statement of decision. [Maffei] must show current income information. The Court denies the request on the basis the request is fatally defective." At the hearing, Commissioner Veasey stated there was "no information as to [Maffei's] current income or her current profit and loss expenses. There's nothing with respect to her income from 2016." When counsel for Maffei began to respond by saying, "That is untrue because her

declaration—,” Commissioner Veasey asked, “So you’re calling the court a liar?” When counsel for Maffei explained he could not attach pay stubs to Maffei’s income and expense declaration to corroborate her 2016 income or her profit and loss statements because Maffei was self-employed, Commissioner Veasey stated Maffei still had to provide some “back-up documentation.”

Commissioner Veasey stated: “I think your request—again—is fatally defective, because if you want to say that [Maffei is] entitled to or needs attorneys’ fees based on need, you need to be able to show the court that need by complying with the court rules and give current information as to income.” When counsel for Maffei stated he did just that, Commissioner Veasey stated, “I find it to be defective, deficient and incomplete, because she is self-employed, and it provides absolutely no profit and loss statements and no back-ups as to her alleged income from self-employment or any expenses from her self-employment for the entirety of 2016.” When counsel for Maffei asked, “What form of evidence can we provide the court to assist the court in this matter,” Commissioner Veasey stated: “Well, it is not the court’s job to educate counsel as to what is necessary to comply with the rules of court. But we have had this conversation now four times—on four different occasions as to the adequacy. And we’re just going to agree to disagree. But I am the judicial officer here. If we have a disagreement, if you want to stand on your position which is in opposition to the court’s position, that is your choice. But I’m the one who has to make the decisions.” Counsel for Maffei responded: “I hear what the court says. The court cannot rule because the court believes that the information is simply not present.”

Commissioner Veasey stated her ruling was to deny the request for fees “on the basis that the request is fatally defective. . . . If the court will make the determination as to the actual calculation of an attorneys’ fees and award them, there may be an entitlement to findings and a statement of decision with respect to those findings. But we don’t get to that point in this case because the court finds that the request is defective and is denying it on that basis.” Two months later, in December 2016, Maffei prevailed in the appeal for which her attorney sought unsuccessfully to obtain attorneys’ fees.

C. Maffei Tries Again To Recover Her Appellate Attorneys’ Fees

On August 11, 2017 Maffei filed her fourth request for attorneys’ fees.² This time, Maffei sought \$102,425.25 in fees, pointing out she “successfully appealed the decision of the court denying a modification of child support” and was seeking “attorney fees for her successful appeal and for the filing and hearing of motions in this court for payment of attorney fees on appeal.” Counsel for Maffei again listed all the tasks he performed in the appeal. Maffei stated in her declaration: “I am fortunate that my attorney stuck with the appeal and handled the appeal for close to three years without being paid beyond a \$4,000 retainer I paid him” She also stated that her average monthly income as a self-employed Pilates instructor, as reflected in her income and expense declaration, was \$2,235, but that in

² Maffei also filed a peremptory challenge under Code of Civil Procedure section 170.6 to Commissioner Veasey and a notice of not stipulating to any commissioner for any purpose in the case.

2016 her average monthly income was \$632. Maffei submitted an income and expense declaration showing average monthly income from self-employment of \$1,430, a 2015 Profit or Loss From Business (Sole Proprietorship) (Form 1040, Schedule C) showing a net profit of \$7,167, a 2016 Profit or Loss From Business (Sole Proprietorship) (Form 1040, Schedule C) showing a net profit of \$7,477, and a profit and loss statement from January to June 2017 showing a net profit of \$13,410.

In opposition to the request, Uriostegui argued Maffei's request for attorneys' fees was "exorbitant and unsupportable," Maffei's income and expense declaration did not comply with the California Rules of Court, and Uriostegui did not have the ability to pay Maffei's attorneys' fees. Uriostegui did not argue the court should deny the request for fees because Commissioner Veasey had denied the prior request with prejudice or because the doctrine of res judicata barred Maffei's request.

On March 9, 2018 the family law court, Judge Randall Pacheco, denied Maffei's request for attorneys' fees. Judge Pacheco stated: "I've read the transcript [of the October 19, 2016 hearing]. There's nothing in the statement by Commissioner Veasey that indicates . . . that ruling was without prejudice." Judge Pacheco also stated: "My belief is that the rule is that, once a case is presented for decision and there's a determination, it's with prejudice, unless it's specifically stated otherwise." The court, Judge Pacheco explained, "has its own interest in not re-litigating matters when a decision has been made. So we just simply need to be able to say that once a decision is made, it's made, and the proper procedures if that decision's considered inappropriate need to be followed to overturn that decision, such as . . . appeal" Judge Pacheco concluded, "I believe that

unless a ruling is expressly stated to be without prejudice, it's a hearing on the matter. It's res judicata. It is with prejudice."

DISCUSSION

Until recently, the Supreme Court often used "res judicata" as "an umbrella term encompassing both claim preclusion and issue preclusion, which [the Court] described as two separate 'aspects' of an overarching doctrine." (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 823 (*DKN Holdings*).) In *Samara v. Matar* (2018) 5 Cal.5th 322, however, the Supreme Court adopted the "more modern terminology" that employs separate terms to refer to these two doctrines. (*Id.* at p. 326 & fn. 1.) "Claim preclusion prevents relitigation of entire causes of action. [Citations.] Claim preclusion applies only when 'a second suit involves (1) the same cause of action (2) between the same parties [or their privies] (3) after a final judgment on the merits in the first suit.' [Citation.] Issue preclusion, by contrast, prevents 'relitigation of previously decided issues,' rather than causes of action as a whole. [Citation.] It applies only '(1) after final adjudication (2) of an identical issue (3) actually litigated and necessarily decided in the first suit and (4) asserted against one who was a party in the first suit or one in privity with that party.'" (*Id.* at pp. 326-327; see *DKN Holdings*, at p. 825.) "In considering whether these criteria have been met, courts look carefully at the entire record from the prior proceeding" (*Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 511.)

Claim and issue preclusion usually do not apply when "the first ruling was not in a *former* action" but instead "was an earlier ruling in the *same* action." (*Lennane v. Franchise Tax Bd.*

(1996) 51 Cal.App.4th 1180, 1185.) But there are exceptions. For example, “a prior appealable order becomes ‘res judicata’ in the sense that it becomes binding in the same case” if the aggrieved party does not appeal the order. (*Id.* at pp. 1185-1186; see *In re Marriage of Gruen* (2011) 191 Cal.App.4th 627, 638 [“If an order is appealable, . . . and no timely appeal is taken therefrom, the issues determined by the order are res judicata.”].) In addition, claim or issue preclusion “applies to final adjudications rendered in the course of a divorce proceeding over which a court may have continuing jurisdiction and which may require several orders for its ultimate disposition.” (*Wodicka v. Wodicka* (1976) 17 Cal.3d 181, 188.)

Judge Pacheco ruled that Commissioner Veasey’s October 19, 2016 order denying Maffei’s third request for fees was with prejudice and that “res judicata” barred her fourth request. Judge Pacheco did not distinguish between claim preclusion and issue preclusion or identify the particular “aspect” of res judicata he believed applied. Claim preclusion did not apply because there was no cause of action to apply it to and no final judgment. (See *DKN Holdings, supra*, 61 Cal.4th at p. 825.) Judge Pacheco may have been referring to issue preclusion, meaning that Commissioner Veasey’s October 19, 2016 determination that Maffei was not entitled to attorneys’ fees precluded relitigation of that issue on Maffei’s fourth request for attorneys’ fees. But even assuming the issues presented were identical,³ and assuming the

³ Arguably, they were not. For example, Maffei’s fourth request sought fees she had actually incurred in the appeal, rather than fees counsel anticipated she would incur (see *In re Marriage of Stachon* (1978) 77 Cal.App.3d 506, 509 [family law court may award attorneys’ fees to pursue or defend an appeal

parties were the same (Maffei and Uriostegui), was there a “final adjudication” of an issue that was “actually litigated and necessarily decided”? We think not.

Commissioner Veasey made it clear at the October 19, 2016 hearing she was not deciding or adjudicating the merits of the request. Commissioner Veasey stated she was denying the request because, in her view, Maffei had not submitted sufficient documentation of her current income, profits, and expenses for the court to rule on the motion. Commissioner Veasey stated that Maffei’s request was “defective, deficient, and incomplete,” not that it was meritless. (See *Hernandez v. City of Pomona*, *supra*, 46 Cal.4th at p. 511 [for issue preclusion to apply, “the decision in the former proceeding must be final and on the merits”]; *Hong Sang Market, Inc. v. Peng* (2018) 20 Cal.App.5th 474, 491, fn. 4 [“Issue preclusion, or collateral estoppel, does not apply unless the issue was actually litigated and necessarily decided in the former proceeding.”]; *Bridgeford v. Pacific Health Corp.* (2012) 202 Cal.App.4th 1034, 1042 [“An issue was ‘actually litigated’ for purposes of collateral estoppel only if it was properly raised, submitted for determination, and decided in the prior proceeding.”].) Commissioner Veasey never ruled Maffei was not entitled to fees for the appeal, and she indicated, as she had before,⁴ Maffei might be entitled to an “actual calculation” of

while the appeal is pending]), and sought fees incurred in filing the previous requests for attorneys’ fees.

⁴ As stated, at the hearing on Maffei’s first request, Commissioner Veasey indicated Maffei was entitled to some fees for her appeal, but was uncomfortable awarding those fees in advance. The family law court, however, may make an order for

attorneys' fees if she complied with certain rules of court and submitted more information or documentation. Commissioner Veasey stated that she would not "get to that," however, because the request was defective and that she was "denying it on that basis."

Of course, Commissioner Veasey could have stated she was denying Maffei's request for attorneys' fees because three unsuccessful requests for the same attorneys' fees was enough and the court would not consider any further requests for appellate fees. But Commissioner Veasey did not say that. To the contrary, she gave every indication Maffei could re-file the request with "current income information" and the other additional documentation the court was requiring, effectively (if not expressly) denying the request without prejudice. (See *Farber v. Bay View Terrace Homeowners Assn.* (2006) 141 Cal.App.4th 1007, 1015 ["Denial of a motion without prejudice impliedly invites the moving party to renew the motion at a later date, when he can correct the deficiency that led to the denial."].)

appellate fees, even while the appeal is pending and even if the spouse requesting fees does not prevail in the appeal. (See *In re Marriage of Macfarlane & Lang* (1992) 8 Cal.App.4th 247, 258 ["parties may recover fees even if they do not prevail on appeal"]; *Hunter v. Hunter* (1962) 202 Cal.App.2d 84, 93 ["To tell a woman who wishes in good faith to appeal a judgment in a divorce action and who is without funds to pay necessary counsel fees that no such fees will be allowed except possibly on an application for a final decree is practically equivalent to denying her the right to appeal unless her attorney is willing to act without compensation or for the mere possibility that some attorney's fee may be awarded later."].)

And when counsel for Maffei stated he understood the court could not make a ruling because the court did not have enough information, the court did not correct him or state Maffei had had enough chances or suggest the court would not entertain another request with proper documentation.⁵

Judge Pacheco also stated that, because Commissioner Veasey's October 19, 2016 ruling did not use the talismanic words "without prejudice," her order denying Maffei's request was "with prejudice." What is important, however, is what Commissioner Veasey did, not whether she remembered to use the words "without prejudice." (See *In re Marriage of Eben-King & King* (2000) 80 Cal.App.4th 92, 115 ["A court will look to the substance of an order or judgment rather than its chronology or form."].) And Commissioner Veasey never denied Maffei's request for attorneys' fees on the merits.

⁵ Commissioner Veasey did state the third request was not just "defective," but "fatally defective," adopting a term in Uriostegui's opposition papers. But Commissioner Veasey did not equate fatal defectiveness with denial on the merits: She stated her denial of Maffei's second request was without prejudice, even though she found it, too, was not just defective, but "fatally" so. Under Commissioner Veasey's rulings, even fatally defective fee requests could be resuscitated. Her use of "fatally" appears to have meant "materially"; i.e., a procedural defect significant enough to preclude her from ruling on the request.

DISPOSITION

The order denying the request for attorneys' fees is reversed, and the matter is remanded with directions to hear Maffei's request for attorneys' fees on the merits, as well as any further request for fees incurred in this appeal. Maffei is to recover her costs on appeal.

SEGAL, J.

We concur:

ZELON, Acting P.J.

FEUER, J.