Filed 3/22/12 Liner Grode et al. v. Rotondo CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

LINER GRODE STEIN YANKELEVITZ SUNSHINE REGENSTREIF & TAYLOR, Plaintiff and Respondent, v. JOHN ROTONDO et al., Defendants and Appellants.	B221056 (Los Angeles County Super. Ct. Nos. BS120341 and BC335442)
LINER GRODE STEIN YANKELEVITZ SUNSHINE REGENSTREIF & TAYLOR, Plaintiff and Respondent, v. JOHN ROTONDO et al., Defendants and Appellants.	B223528

APPEAL from a judgment and orders of the Superior Court of Los Angeles County. Maureen Duffy-Lewis and Robert O'Brien, Judges. Judgment affirmed; orders awarding attorney fees reversed.

Andrews & Hensleigh and Barbara Hensleigh for Defendants and Appellants John Rotondo and Eric Grace.

Madden, Jones, Cole & Johnson and Montgomery Cole for Defendant and Appellant (in B221056 only) Pacific Imaging.

Ervin Cohen & Jessup and Randall S. Leff for Defendants and Appellants (in B221056) Arthur Diamond, William Bradley, Paul Berger, Joseph Martelli, Lee Secrist and Thomas Staple.

Liner Grode Stein Yankelevitz Sunshine Regenstreif & Taylor, Peter E. Garrell and Robert M. Shore for Plaintiffs and Respondents.

INTRODUCTION

The trial court confirmed an arbitration award, denied a motion for equitable setoff relating to attorney fees awarded in arbitration, awarded post-arbitration attorney fees and entered judgment without setoff. Thereafter, the trial court awarded additional post-arbitration attorney fees incurred in seeking enforcement of the arbitration award and fee award. We affirm the judgment and reverse the orders awarding attorney fees.

FACTUAL AND PROCEDURAL SUMMARY

Pacific Imaging, LLC, (Pacific Imaging or PI) owns and operates a medical diagnostic imaging facility in Redondo Beach. Its "Initial Members" (and their respective ownership interests) are identified in Pacific Imaging's Operating Agreement as follows: Eric Grace (16.66 percent); John Rotondo (16.66 percent); Arthur Oviedo (16.66 percent); William Bradley, M.D. (7 percent); Bill Glenn, M.D. (8 percent); Arthur Diamond, M.D. (8 percent); Lee Secrist, M.D. (6 percent); Paul Berger, M.D (6 percent); Tom Staple, M.D. (5 percent); Joe Martelli (5 percent); and Michael Cooney, M.D. (5 percent).[1] As set forth in the Operating Agreement, the Managing Directors were Joseph

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[1] Neither Cooney nor Glenn is a party to this appeal. (Cooney was not a party to the arbitration or other proceedings; Glenn relinquished his membership in Pacific Imaging before the parties' dispute arose, and it appears Glenn's interest was acquired by "some or all of the physician members, Martelli, and/or PI" at Glenn's cost following his termination as Pacific Imaging's Medical Director.)

Martelli, Oviedo, Rotondo and Grace (also the President, Chief Executive Officer and "Tax Matters Member ('Partner')"), but in September 2003, it was agreed the Managers would be Diamond (representing the physician members), Grace (representing Grace, Rotondo and Oviedo) and Martelli (to serve as the tiebreaker in the event of a deadlock between Diamond and Grace); Rotondo was made Pacific Imaging's President and Oviedo its Chief Operating Officer.[2]

In May 2005, Diamond, Grace and Martelli decided to terminate Oviedo's employment, and Oviedo was terminated on or about May 12, 2005.

In June, Oviedo, on behalf of Pacific Imaging, filed a derivative action against Grace and Rotondo, alleging claims for breach of the Operating Agreement, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, violation of Business and Professions Code section 17200 and constructive fraud and sought appointment of a receiver. Oviedo alleged Grace and Rotondo were looting PI by causing it to use services provided by entities Grace and Rotondo controlled and to pay inflated prices for such services; they had transferred PI's books and records off premises and refused to allow Oviedo to examine them and Rotondo was engaged in the unauthorized practice of medicine.

Pacific Imaging, joined by Rotondo and Grace, filed a petition to compel arbitration pursuant to the Operating Agreement. The trial court denied the petition, but on appeal, we reversed as to all claims except the Business and Professions Code cause of action which was stayed. As the arbitrator later observed, "Lots of fiercely fought and expensive litigation followed, including this arbitration."

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[2] The physician members and Martelli knew each other and had other business relationships together. Rotondo and Oviedo had experience as technicians at imaging centers and had worked together; Grace (who had a financial background) was a childhood friend of Rotondo's, and he introduced Rotondo and Oviedo. The intent of the Operating Agreement was that Martelli and the physician members would have a 50 percent interest in the business; Grace, Rotondo and Oviedo would own 50 percent as well.

In June 2006, Diamond, Bradley, Berger, Martelli, Staple and Secrist (all physician members except Martelli), Grace and Rotondo filed their demand for arbitration, claiming Oviedo had breached contractual and fiduciary duties to PI and the Claimants, causing Pacific Imaging to suffer a loss of revenues and profits with damages exceeding $1 million. Later they said their claims were meant on behalf of PI and not individually. Oviedo filed an answer and asserted a counterclaim incorporating the arbitrable claims of his first amended complaint. In addition, he asserted Grace and Rotondo were liable to PI (a) for inappropriately causing PI to make certain specified (i) distributions to its members and (ii) payments for Rotondo and Grace, and (b) for PI not maintaining its financial statements in accordance with generally accepted accounting principles (GAAP) as required under the Operating Agreement.

Oviedo moved to dismiss for lack of standing as he said the claimants included all three Managers (Diamond, Martelli and Grace) and the claimants collectively controlled the membership interests of PI, and unlike Oviedo, they had the power to cause PI to sue Oviedo directly; yet, PI had determined it was not in its business interest not to pursue the claim. The arbitrator denied the motion without prejudice, finding the question to be a "'close one.'" At the evidentiary hearing, evidence was presented that PI was represented by Montgomery Cole in opposing Oviedo's derivative litigation "and/or" Cole counseled PI in evaluating Oviedo's derivative claims. Cole thought it would be awkward and a possible conflict if he appeared on behalf of PI against Oviedo so, to avoid PI having to engage a second lawyer in the arbitration, Claimants undertook to sue on PI's behalf and engaged a separate law firm to do so which PI paid, at least for awhile. No explanation was provided as to why PI did not engage the separate firm on its own behalf; rather it appeared PI ultimately determined to do so when claimants sought leave to add PI as a claimant days before the evidentiary hearing, but the request was denied as untimely. Ultimately, the arbitrator determined it would be "counterproductive and inefficient" not to consider the claims on the merits.

In the 47-page final arbitration award, the arbitrator (Henry J. Silberberg) reviewed the parties' claims and evidence, noting significant credibility problems and numerous deficiencies in the parties' claims. Then, turning to the question of attorneys' fees, the arbitrator stated: "Under Section 11.2 of the Operating Agreement, the prevailing party in this arbitration is entitled to 'reimbursement of attorney fees, costs and expenses incurred in connection with the arbitration.' The Interim Award, . . . , in pertinent part, noted the following: 'The result here is clearly mixed. In most respects, Oviedo appears to be the prevailing party in defense of the Claims alleged by Claimants (except Claimants on behalf of PI are being awarded $17,376.54 on the breach of contract claim and $900 on the breach of fiduciary duty claim). Similarly, in most respects, Grace and Rotondo (and to the extent untimely relief was sought against them, Diamond and Martelli) appear to be the prevailing parties on Oviedo's Counterclaim (except perhaps as to a portion of the legal fees paid by PI for which a reimbursement award may yet issue). Segregating legal fees and expenses between those incurred in defense and in prosecution may be an extremely challenging exercise for counsel. There also may be other factors to take into consideration, apart from the usual considerations such as whether the charges of counsel are reasonable under the circumstances. . . .'"

"The Interim Award (at p. 40) further stated that '[b]efore making any dispositive 'prevailing party' or indemnity rulings, I want to give the parties (including PI on the indemnity issues) an opportunity to submit such further factual and legal briefs on the issues as they think would be helpful, as well as their respective evidence in support of whatever applications for legal fees and expenses consistent with [the] Interim Award they determine to make.' The parties subsequently submitted two rounds of briefs and multiple declarations in support of and in opposition to their respective fee applications.

"On various theories, everyone claims to be 'the prevailing party'. . . . Oviedo and Claimants also each alternatively argue that if they are not determined to be the 'prevailing party,' then it can and should be determined that there is no 'prevailing party.'

In the end, the arbitrator concluded: "Claimants, including Grace and Rotondo, were mostly unsuccessful on their affirmative claims, and except for Grace and Rotondo, they were not parties on Oviedo's Counterclaim. In their post-Interim Award briefing, Claimants contend their 'Arbitration Demand was essentially a defensive pleading' and that their claims 'regarding a triggering event, dilution and buyout' 'were decidedly trivial in the grand scheme of this litigation. "Whether or not intended as a defensive tactic, such claims certainly raised important corporate governance issues which required resolution. Essentially, . . . Claimants incorrectly attempt to blur or ignore the distinction between their largely unsuccessful affirmative claims (including a number of which, as previously discussed, were simply abandoned) and the success of Grace and Rotondo in defense against Oviedo's Counterclaim. . . . Claimants also incomprehensively argue that notwithstanding the general lack of success on their affirmative claims 'Oviedo [somehow] was liable for the majority of wrongdoing that formed the basis of Claimants' primary claims."' *As such, Claimants other than Grace and Rotondo with respect to Oviedo's Counterclaims were not 'prevailing parties' and not entitled to any award of fees and expenses under the Operating Agreement*." (Italics added.)

"In determining the amounts to be awarded, I think it is important to consider the totality of the circumstances, including but not limited to (i) the fact that Oviedo was the first to sue and had he not done so Claimants probably would not have opted to bring their case; (ii) Claimants nonetheless should bear responsibility for the case they chose to bring; [and] (iii) on the related cases which each of Claimants and Oviedo chose to bring derivatively on behalf of PI, PI is not obtaining any real cognizable financial benefit . . . ."

"On balance, (a) I award to Grace and Rotondo fees and expense under Section 11.2 of the Operating Agreement of $330,000 plus the entire $30,961.25 incurred in compelling arbitration for a total of $360,961.25, and (b) I award Oviedo fees and expenses of $285,000 under Section 11.2 of the Operating Agreement against each of the

Claimants (including Grace and Rotondo), jointly and severally. . . . I further find that Oviedo has the right to indemnity from PI under Section 11.1 of the Operating Agreement for the foregoing $285,000 sum to the extent such sum is not paid to him by Claimants within 60 days after entry of judgment confirming this Final Arbitration Award. There is no merit to Claimants' arguments that Oviedo was not sued as a PI agent or member or that Section 11.1 of the Operating Agreement or Corporations Code Section 317 only allows indemnity of corporate agents sued by third parties, and not by or on behalf of the corporation." (Grace and Rotondo had not requested and were not awarded indemnity relief.) The final arbitration award was served on August 5, 2008.

In January 2009, Oviedo assigned his right, title and interest in the $285,000 fee award, along with "any further entitlement to fees, costs or other compensation that may arise as a result of efforts to enforce the Fee Award, including but not limited to interest" to his law firm Liner Yankelevitz Sunshine & Regenstreif (now known as Liner Grode Stein Yankelevitz Sunshine Regenstreif & Taylor (Liner Grode)).

In April, Liner Grode filed a petition to confirm the arbitration award. Grace and Rotondo, represented by the law firm representing Martelli and the physician member claimants at arbitration, opposed Liner Grode's petition, filed their own petition to confirm and filed a motion for equitable setoff, arguing among other things, Oviedo was "admittedly impecunious" as he had transferred his interest in certain real property to a third party and his counsel had moved to withdraw when he was no longer paying fees (after reportedly paying $1 million).[3] The Derivative Action and Petitions to Confirm were deemed related and transferred and reassigned (Hon. Maureen Duffy-Lewis). The parties filed amended pleadings. In its points and authorities filed in June, pursuant to Oviedo's assignment of his right to "any further entitlement to [attorney] fees, costs or

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[3] According to Rotondo's arbitration testimony, his interest in PI (equivalent to Oviedo's) was worth $225,000.

other compensation that may arise as a result of efforts to enforce the Fee Award," Liner Grode requested its post-arbitration attorney fees in the amount of $41,008.85 in connection with the pending motions. In its opposition papers filed in July, Liner Grode stipulated it would not seek to collect on the judgment against Grace and Rotondo and offered to enter into a stipulation in this regard. In filing its renewed and amended points and authorities in support of its petition to confirm the arbitration award (in August), Liner Grode requested attorney fees in the amount of $48,516.50. In its opposition to Liner Grode's petition to confirm the arbitration award and request for attorney fees, Rotondo and Grace argued Liner Grode was not entitled to its post-arbitration attorney fees because, according to Rotondo and Grace, they were the prevailing parties at arbitration under Civil Code section 1717 as they had obtained the "greater relief."

At the September 18 hearing, Liner Grode again offered to stipulate on the record "we will not collect any portion of the judgment against Mr. Grace and Mr. Rotondo. As far as we are concerned, they're free and clear. We will only collect the judgment against the 'Doctor Defendants' [Martelli and the Physician Member Claimants]."

That day, after hearing argument, the trial court issued a ruling from the bench, followed by a minute order the same day. "Grace and Rotondo seek to enforce the arbitration award. No opposition. They also seek a 'set off.' Liner Grode, et al., former counsel for Oviedo, oppose the 'equitable request' for a set off. Oviedo assigned his rights to the $285,000 to Liner Grode. Liner Grode as assignees move to have it enforced without the set-off. Motion of Grace and Rotondo to confirm arbitration award GRANTED. Motion of Grace and Rotondo for set off DENIED. This would be in the providence of the arbitrator and should have been asked of him. Thus, the court does not have jurisdiction. The awards are made as to different parties. The other six doctors are included joint and severally with regard to Oviedo's award. There is no mutuality and there can be no set-off. Eistrat v. Humiston (1958) [160] Cal.App.2d 89, 92. Equity does not support the requested order. As to the motion of Liner Grode to confirm arbitration

award, as to fees there is no opposition, GRANTED. However, the amount is reduced. The court awards $20,000."

Thereafter, Rotondo and Grace (now joined by Martelli and the Physician Claimants) objected to Liner Grode's proposed judgment (originally served on August 21, 2009). With respect to the attorney fee award to Liner Grode, Rotondo and Grace (and Martelli and the Physician Claimants) objected that Rotondo and Grace were the prevailing parties under Civil Code section 1717.

On November 10, 2009, after conducting two hearings on the judgment and objections (on November 5 and November 10) and taking the matter under submission, the trial court (Hon. Robert O'Brien) overruled Rotondo and Grace's objections and ordered "the court accepts and will execute th[e Liner Grode proposed] judgment," directing Liner Grode to submit a modified judgment filling in the blanks as indicated. At the November 10 hearing, counsel for Liner Grode had argued "Judge Duffy-Lewis granted us [$]20,000 based on the proceedings through that date, presumably on the assumption that judgment would be entered then. I don't think that at the time she issued the award, she anticipated two further hearings and a couple of rounds of [further pleadings]." When the trial court inquired, "[I]s it your intent to ask [for] more than the [$]20,000?" Liner Grode's counsel said "Yes." "[I]f there are further attorney fees due . . . they need to be considered in a post-judgment hearing if otherwise proper."[4] The trial court executed the judgment on November 13, 2009; all blanks except the amount of

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[4] At the first hearing, the trial court (Hon. Robert O'Brien) stressed that "whatever Judge Duffy-Lewis ruled that is not unclear to me is going to be in the bank. I'm not going to change any ruling that she made." At the second hearing, when counsel for Rotondo and Grace attempted to challenge the merits of the September order (which included the $20,000 attorney fee award to Liner Grode), the trial court interjected, "But I think what you're doing is you're questioning [Judge Duffy-Lewis's] ruling, if I'm getting the right vibration here." When counsel acknowledged, "I am questioning her ruling," the trial court (Hon. Robert O'Brien) responded, "I think I indicated the other day I wasn't going to be doing that."

attorney fees had been replaced with dollar amounts as specified. On November 16, Liner Grode filed notice of entry of the November 13 judgment.

On December 9, Rotondo and Grace filed a notice of appeal from the "judgment entered on November 13, 2009, and all rulings incidental thereto." On December 21, Martelli and the Physician Claimants also filed notice of appeal from the November 13, 2009 judgment, "and all rulings incidental thereto." On January 11, 2010, Pacific Imaging LLC also filed notice of appeal from the November 13, 2009 judgment and all rulings incidental thereto.

On December 23, Liner Grode filed a motion for additional attorney fees, arguing that after Judge Duffy-Lewis awarded Liner Grode $20,000 in attorney fees in September, it was forced to incur additional attorney fees to secure entry of judgment because Rotondo and Grace and Martelli and the Physician Claimants refused to accept the adverse rulings; therefore, Liner Grode requested additional fees in the amount of $11,745.50 for a total attorney fee award in the amount of $31,745.50. In opposing Liner Grode's request for additional fees, in addition to reiterating their claim that they (Rotondo and Grace, not Oviedo) prevailed for purposes of Civil Code section 1717, Rotondo and Grace (joined by Martelli and the Physician Claimants and Pacific Imaging) argued the Operating Agreement was not assignable and a law firm cannot recover fees for the work of its own employees.

After taking the matter under submission, the trial court (Hon. Robert O'Brien) granted Liner Grode's motion "in the amount of $14,745"--$3000 more than Liner Grode had requested. Rotondo and Grace filed their own "Counter Notice of Entry of Ruling," asserting that the trial court had actually substituted the lower amount of $14,745 for the $20,000 previously awarded. Liner Grode filed an ex parte application for clarification of the order. At the hearing, Liner Grode noted the January 29, 2010 minute order contained a clerical error in its favor in the amount of $3,000. On its own motion, the trial court corrected the January 29, 2010 minute order nunc pro tunc to read "Motion

granted in the amount of $11,745," and further "clarifie[d]" that "the $11,745 award is in addition to the $20,000 previously awarded on 9/18/09."

On April 1, 2010, Rotondo and Grace filed notice of appeal (in BS 120341 (Liner Grode's petition to confirm arbitration award)) "from all post-judgment [o]rders, and all rulings incidental thereto."[5]

DISCUSSION

The Setoff Appeal (B221056)

According to Rotondo and Grace, the trial court erred in entering judgment and ordering attorneys fees as they were entitled to an equitable offset as a matter of right, leaving them with a net award against Oviedo in the amount of $75,761.25; instead, they say, they are left with an uncollectible judgment against Oviedo while Liner Grode may collect against Grace, Rotondo and "the other Appellants."[6] We disagree.

"It is a general rule that the right to setoff exists when the parties hold mutual

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[5] That same day, Rotondo and Grace also filed notice of appeal from the "judgment entered on December 24, 2009, notice of which was given by [Rotondo and Grace] on February 8, 2010, and all rulings incidental thereto." According to the record, however, judgment was entered in Rotondo and Grace's favor (against Oviedo) on December 24, 2009, after the trial court granted Rotondo and Grace's motion for summary judgment on Oviedo's nonarbitrable cause of action for violation of Business and Professions Code section 17200. Rotondo and Grace's separate motion for additional post-arbitration attorney fees was later granted, and it appears no issues are raised here in this regard.

[6] Rotondo and Grace repeatedly refer to Oviedo as "admittedly impecunious," but the record does not support this assertion. Rotondo and Grace cite Liner Grode's motion for withdrawal from representing Oviedo following Oviedo's failure to pay outstanding fees (over and above $1 million in attorney fees already paid) and Oviedo's subsequent assignment of his arbitration award to Liner Grode and note Oviedo's transfer of his interest in certain real property—in close proximity to notice of the award. However, Rotondo and Grace do not mention Oviedo's interest in Pacific Imaging or establish that there are no other avenues they may pursue in order to satisfy their judgment against Oviedo.

cross-demands under such circumstances that in equity they should be applied one against the other." (*Eistrat v. Humiston* (1958) 160 Cal.App.2d 89, 91, citing *Harrison v. Adams* (1942) 20 Cal.2d 646.) "However, in order to warrant an offset the debts must be mutual and the principle of mutuality requires that the debts should not only be due to and from the same person, but in the same capacity." (*Eistrat v. Humiston, supra*, 160 Cal.App.2d at p. 91, citations omitted.) "The doctrine of setoff is preeminently an equitable doctrine." (*Id.* at p. 92, citation omitted.)

"[M]utuality is essential, that is, the judgments must be *between the same parties in the same right*." (*Harrison v. Adams, supra*, 20 Cal.2d at pp. 649-650, italics added, citations omitted; and see *First Sec. Bank of Cal. v. Paquet* (2002) 98 Cal.App.4th 468, 474-475 ["In a shareholder derivative action, the cause of action being asserted belongs to the *corporation*, not to the plaintiff shareholder"].) As the arbitrator essentially emphasized and as argued to the trial court, mutuality was lacking here.

Even without Oviedo's assignment to Liner Grode, in collecting on his $285,000 fee award, Rotondo and Grace do not address the fact that *Oviedo* would have been able to proceed against Martelli and the Physician Member Claimants (but not Rotondo and Grace), as Martelli and the physician members were jointly and severally liable for the amount, without entitlement to any offset. (See *Bank of America v. Duer* (1941) 47 Cal.App.2d 100, 102, citation omitted ["'where it clearly appears that the releasor intended to release a particular joint obligator only and to retain his rights against others, that intent will be given effect'"]; *McCall v. Four Star Music Co.* (1996) 51 Cal.App.4th 1394, 1399, citing Civil Code, § 1543 ["A release of one or more joint debtors does not extinguish the obligations of any of the others"].) It follows that Oviedo's assignee (Liner Grode) could do the same. Moreover, apart from proceeding against Rotondo and Grace, in addition to pursuing Martelli and the Physician Claimants, Oviedo was entitled to proceed against Pacific Imaging as an additional judgment debtor if the amount due Oviedo was not paid within 60 days of entry of judgment. Because Martelli and the Physician Member Claimants were judgment debtors but not judgment creditors, the trial

court was correct in denying the motion for equitable offset for lack of mutuality. (*Harrison v. Adams, supra,* 20 Cal.2d at pp. 649-650, italics added ["[M]utuality is essential, that is, the judgments must be *between the same parties in the same right*"].)

Further, even if the arbitrator did not expressly state that a request from Rotondo and Grace for an "equitable setoff" was denied (and as Rotondo and Grace note, there was still another inarbitrable cause of action waiting to be resolved in the trial court at the time of the arbitrator's decision), the arbitrator's 47-page award contains multiple references to "the equities," fairness, the totality of the circumstances, the opportunities to address any competing interests with respect to the awards (and indemnity rights), and the arbitrator expressly stated that the claimants (including the "Doctor Defendants"—Martelli and the Physician Member Claimants) were not prevailing parties in any respect and were responsible for the action they chose to bring. Further, all defenses were denied in the award itself. "Any doubts as to the meaning or extent of an arbitration award are for the arbitrators and not the court to resolve. (*Morris v. Zuckerman* (1968) 69 Cal.2d 686, 690-691 [72 Cal.Rptr. 880, 446 P.2d 1000].)" (*Valsan Partners Limited Partnership v. Calcor Space Facility, Inc.* (1994) 25 Cal.App.4th 809, 818.) "'*Neither the merits of the controversy . . . nor the sufficiency of the evidence to support the arbitrator's award are matters for judicial review.*' [Citation.] Although the court may vacate an award if it determines that '[the] arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted' (Code Civ. Proc., § 1286.2, subd. (d)), it may not substitute its judgment for that of the arbitrators. Arbitrators can apply both legal and equitable principles in deciding the ultimate issue submitted to them." (*Morris v. Zuckerman, supra,* 69 Cal.2d at pp. 690-691, citations omitted.) Rotondo and Grace have failed to demonstrate error in the trial court's denial of their motion for setoff. (*Keith G. v. Suzanne H.* (1998) 62 Cal.App.4th 853, 860-861, citation and internal quotations omitted ["The right [to setoff] exists independently of statute and rests upon the inherent power of the court to do justice to the parties before it."

The Attorney Fee Appeal (B223528)

As noted in the factual and procedural summary above, although the trial court (Hon. Maureen Duffy-Lewis) awarded Liner Grode post-arbitration attorney fees in the amount of $20,000 at the time it ruled on Rotondo and Grace's motion for equitable setoff, Liner Grode made clear its intention to seek *additional post-arbitration fees* incurred prior to the hearing. Indeed, when the trial court executed the underlying judgment in this case on November 13, 2009, all blanks *except the amount of attorney fees* had been replaced with dollar amounts as specified. Rotondo and Grace filed a notice of appeal from the "judgment entered on November 13, 2009, and all rulings incidental thereto" on December 9, 2009.

Thereafter, the trial court (Hon. Robert O'Brien) granted Liner Grode's motion for additional post-arbitration attorney fees "in the amount of $14,745"--$3000 more than Liner Grode had requested. Rotondo and Grace filed their own "Counter Notice of Entry of Ruling," asserting that the trial court had actually substituted the lower amount of $14,745 for the $20,000 previously awarded. Liner Grode filed an ex parte application for clarification of the order. At the hearing, Liner Grode noted the January 29, 2010 minute order contained a clerical error in its favor in the amount of $3,000. On its own motion, the trial court corrected the January 29, 2010 minute order nunc pro tunc to read "Motion granted in the amount of $11,745," and further "clarifie[d]" that "the $11,745 award is in addition to the $20,000 previously awarded on 9/18/09." On April 1, 2010, Rotondo and Grace filed an additional notice of appeal (in BS 120341 (Liner Grode's petition to confirm arbitration award)) "from all post-judgment [o]rders, and all rulings incidental thereto."

In their attorney fee appeal (B223256), Rotondo and Grace argue Liner Grode was not entitled to any post-arbitration attorney fees whatsoever for several reasons. First, Rotondo and Grace assert, Liner Grode is not entitled to attorney fees as the prevailing party if we reverse or modify the judgment pursuant to their appeal from the trial court's

denial of their motion for setoff. Next, Rotondo and Grace say, Liner Grode cannot recover attorney fees because the firm is not a party to the parties' Operating Agreement. Third, citing *Trope v. Katz* (1995) 11 Cal.4th 274, Rotondo and Grace say, a law firm does not "incur" attorney fees and therefore is not entitled to recover such fees. Finally, Rotondo and Grace argue, they (and not Oviedo) were the "prevailing parties" within the meaning of Civil Code section 1717 at arbitration so the trial court erred.

In Liner Grode's view, Rotondo and Grace may not challenge the determination Liner Grode is *entitled* to post-arbitration attorney fees because, at the time the trial court entered judgment, the court had already awarded Liner Grode $20,000 in attorney fees, and Rotondo and Grace failed to address the attorney fee award in its setoff appeal. According to Rotondo and Grace, however, they properly appealed from the order determining the total amount of post-arbitration attorney fees. On this issue, we agree with Rotondo and Grace.

Where a judgment determines *entitlement* to attorney fees, and a post-judgment order determines the *amount*, on appeal from the post-judgment order, review of *both* the determination of entitlement in the judgment as well as the determination of the amount in the post-judgment order is proper. (Eisenberg et al., Cal. Prac. Guide: Civil Appeals and Writs (The Rutter Group 2011) ¶ 2:156.2a, p. 2-74 (rev. # 1, 2011), citing *P R Burke Corp. v. Victor Valley Wastewater Reclamation Authority* (2002) 98 Cal.App.4th 1047, 1053-1055 (*P R Burke*).)

As the court explained in *P R Burke, supra,* 98 Cal.App.4th 1047, "A postjudgment order awarding or denying attorney's fees is separately appealable, as an order made after an appealable judgment. (Code Civ. Proc., § 904.1, subd. (a)(2)); *Raff v. Raff* (1964) 61 Cal. 2d 514, 519 [39 Cal. Rptr. 366, 393 P.2d 678]; *Norman I. Krug Real Estate Investments, Inc. v. Praszker* (1990) 220 Cal. App. 3d 35, 45-46 [269 Cal. Rptr. 228].) In an appeal from a postjudgment order, however, 'the issues raised by the appeal from the order must be different from those arising from an appeal from the judgment. [Citation.] "The reason for this general rule is that to allow the appeal from [an order

raising the same issues as those raised by the judgment] would have the effect of allowing two appeals from the same ruling and might in some cases permit circumvention of the time limitations for appealing from the judgment." [Citation.]' (*Lakin v. Watkins Associated Industries* (1993) 6 Cal. 4th 644, 651 [25 Cal. Rptr. 2d 109, 863 P.2d 179], quoting *Rooney v. Vermont Investment Corp*. (1973) 10 Cal. 3d 351, 358 [110 Cal. Rptr. 353, 515 P.2d 297].) Thus, 'an appeal from a postjudgment order [granting or] denying attorneys' fees does not reopen the time for appealing from the underlying judgment.' (*CC-California Plaza Associates v. Paller & Goldstein* (1996) 51 Cal. App. 4th 1042, 1047 [59 Cal. Rptr. 2d 382].)

"In general, '"where no issue is left for future consideration except the fact of compliance or noncompliance with the terms of the first decree, that decree is final, but where anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, the decree is interlocutory." [Citations.]' (*Griset v. Fair Political Practices Com.* (2001) 25 Cal. 4th 688, 698-699 [107 Cal. Rptr. 2d 149, 23 P.3d 43], quoting *Lyon v. Goss* (1942) 19 Cal. 2d 659, 670 [123 P.2d 11].) A judgment, however, may have both final, appealable portions and interlocutory, nonappealable portions. (*Degnan v. Morrow* (1969) 2 Cal. App. 3d 358, 362-365 [82 Cal. Rptr. 557]; *La Jolla Casa de Manana v. Hopkins* (1950) 98 Cal. App. 2d 339, 344 [219 P.2d 871].) For example, if a judgment provides that the party seeking attorney's fees may renew the motion later, that portion of the judgment is nonfinal and nonappealable. '[Such a] ruling is in the nature of an interlocutory order directing that further proceedings be taken before a determination is made. (*In re Marriage of Jafeman* (1972) 29 Cal. App. 3d 244, 268 [105 Cal. Rptr. 483].) Similarly, if a judgment reserves jurisdiction to award attorney fees, that portion of the judgment is nonfinal and nonappealable. (*Chapman v. Tarentola* (1960) 187 Cal. App. 2d 22, 25 [9 Cal. Rptr. 228].)

"More to the point, if a judgment determines that a party is entitled to attorney's fees but does not determine the amount, that portion of the judgment is nonfinal and

nonappealable. This is clear from *Kan v. Tsang* (1948) 87 Cal. App. 2d 699 [197 P.2d 378]. There, the trial court confirmed a sale of property, directed a receiver to pay people who had rendered services to the estate, and ordered the receiver to distribute the assets. It also stated that the amount of attorney's fees to be awarded was to '"be fixed by agreement of the parties, subject to the approval of this court."' The appellate court held that those portions of the order which confirmed the sale, directed payment, and ordered distribution were final and appealable. It noted, however, that the portion regarding attorney's fees was interlocutory because it did not 'call[] for judicial action "essential to a final determination of the rights of the parties." [Citation.]' (*Id*., at p. 700, quoting *Lyon v. Goss, supra*, 19 Cal. 2d at p. 670.)

"Here, the provision of the judgment that the Authority 'shall be entitled to . . . attorney's fees' was nonfinal. *Further judicial action was necessary to determine the extent of the Authority's entitlement to attorney's fees. . . .* This did not detract from the judgment's appealability in other respects. (*Eldridge v. Burns* (1978) 76 Cal. App. 3d 396, 403-405 [142 Cal. Rptr. 845].) In an appeal solely from the judgment, however, we could not have reviewed the entitlement to attorney's fees as long as the amount of fees remained undetermined.

"This is consistent with the policy against piecemeal appeals. A hypothetical should make this even clearer. Suppose, for a moment, the judgment was silent regarding attorney's fees. Later, after the Authority filed a motion for attorney's fees, the trial court entered a postjudgment order ruling that the Authority was entitled to fees, but directing the parties to submit additional evidence and/or argument regarding the amount. Finally, in a second postjudgment order, the trial court awarded the Authority $64,619.50 in attorney's fees. Under the Authority's logic, Burke could have had to file two separate notices of appeal, one from the first order and one from the second order. The issues, however, would be those arising from a single motion.

"At first blush, *Grant v. List & Lathrop* (1992) 2 Cal. App. 4th 993 [3 Cal. Rptr. 2d 654] may seem inconsistent with our reasoning, but it is not at all. It held that 'when a

judgment awards costs and fees to a prevailing party and provides for the later determination of the amounts, the notice of appeal subsumes any later order setting the amounts of the award.' (*Id*., at p. 998.) 'The cases . . . confirm the ability to challenge an award of costs and/or fees by filing a separate notice of appeal. . . . [¶] However, requiring a separate appeal from such an order when the judgment expressly makes an award of costs and/or fees serves no apparent purpose.' (*Id*., at p. 997.) It follows that, in an appeal from the judgment, we could have reviewed the postjudgment order determining the amount of fees.

"*Grant* did not hold, however, that an appellate court could review a determination of the entitlement to fees in a judgment even if there were no postjudgment order determining the amount of fees. To the contrary, *Grant* reasoned, in part, that, if the postjudgment order had to be appealed separately, 'we could review only part of the judgment from which the appeal was taken and in essence rule upon a judgment containing blanks. We see no policy reason favoring that approach and respondents have not cited any authority requiring us to follow it.' (*Grant v. List & Lathrop, supra,* 2 Cal. App. 4th at p. 997.) Moreover, *Grant* noted that an appellant seeking review of an attorney's fee award has the option of appealing either from the judgment or from the postjudgment order. Thus, it suggested that the scope of the review would be the same under both scenarios.

"We conclude that an order determining the entitlement to attorney's fees, but not the amount of the fee award, is interlocutory. This is true even if such an order is contained in what is otherwise an appealable judgment. It follows that, in an appeal from a postjudgment order awarding attorney's fees, we may review the entitlement to, as well as the amount of, the fees awarded." (*P R Burke, supra,* 98 Cal.App.4th at pp. 1053-1055, italics added.)

Similarly, for the reasons explained in *P R Burke, supra,* 98 Cal.App.4th 1047, inasmuch as the trial court initially determined Liner Grode's entitlement to attorney fees in the amount of $20,000 in this case but specifically directed Liner Grode to file a

further motion because Liner Grode expressed its intention to seek *additional post-arbitration attorney fees*, the judgment in this case had both final, appealable portions and interlocutory, nonappealable portions. (*Id.* at p. 1053.) Because the judgment determined Liner Grode was entitled to attorney's fees but did not determine the amount, that portion of the judgment was nonfinal and nonappealable and "in the nature of an interlocutory order directing that further proceedings be taken before a determination is made." (*Ibid.*) "[*I*]*f a judgment reserves jurisdiction to award attorney fees, that portion of the judgment is nonfinal and nonappealable*." (*Ibid.*, italics added, citation omitted.)

Because in this case, just as in *P R Burke, supra,* 98 Cal.App.4th 1047, "Further judicial action was necessary to determine the *extent* of [Liner Grode's] entitlement to attorney fees," we conclude that Rotondo and Grace's attorney fee appeal (B223528) properly raises the issue of Liner Grode's *entitlement* to the attorney fees ultimately awarded. "In an appeal solely from the judgment . . . , we could not have reviewed the entitlement to attorney's fees as long as the amount of fees remained undetermined." (*Id.* at p. 1054.) It follows that, in an appeal from a postjudgment order awarding attorney's fees, we may review the *entitlement* to, as well as the amount of, the fees awarded." (*Id.* at p. 1055, italics added.)

According to Rotondo and Grace, Liner Grode is not *entitled* to its attorney fees because a law firm does not "incur" attorney fees and therefore is not entitled to recover such fees. We agree.

In reviewing the trial court's award of attorney's fees under Civil Code section 1717 (section 1717), four cases guide our resolution of the issue. In *Trope v. Katz, supra,* 11 Cal.4th at page 292, cited by Rotondo and Grace, our Supreme 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." The *Trope* court explained that section 1717 was enacted "to

establish mutuality of remedy when a contractual provision makes recovery of attorney fees available to only one party, and to prevent the oppressive use of one-sided attorney fee provisions. [Citations.] If an attorney who is the prevailing party in an action to enforce a contract with an attorney fee provision can recover compensation for the time he expends litigating his case in propria persona, but a nonattorney pro se litigant cannot do so regardless of the personal and economic value of such time simply because he has chosen to pursue a different occupation, every such contract would be oppressive and one-sided." (*Trope*, *supra*, 11 Cal.4th at pp. 285-286, italics omitted.)

Then, in *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084 (*PLCM*), cited by Liner Grode, the California Supreme Court addressed the question "whether an entity that is represented by in-house counsel may recover attorney fees under Civil Code section 1717." (*PLCM Group, Inc.*, *supra*, 22 Cal.4th at p. 1088.) *PLCM* answered that question in the affirmative, concluding that "[l]ike private counsel, in-house counsel stand in an attorney-client relationship with the corporation and provide comparable legal services." (*Ibid*.)

The *PLCM* court distinguished *Trope*, explaining that "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. . . . 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." (*PLCM Group, Inc. v. Drexler*, *supra*, 22 Cal.4th at p. 1093, fn. omitted.)

In *Gilbert v. Master Washer & Stamping Co*. (2001) 87 Cal.App.4th 212, 220, the court held that "an attorney litigant represented by other attorneys in his firm[] is not a litigant in propria persona and thus *Trope* does not bar his recovery of reasonable attorney fees under Civil Code section 1717." The court explained that the attorney

litigant incurs fees within the meaning of section 1717 because he or she "will experience a reduced draw from the partnership (or a reduced salary from the professional corporation) to account for the amount of time his or her partners or colleagues have specifically devoted to his or her representation, or absorb a share of the reduction in other income the firm experiences because of the time spent on the case. This is different from the 'opportunity costs' the attorney loses while he or she is personally involved in the same case, because the economic detriment is caused not by the expenditure of his or her own time, but by other attorneys working on his or her behalf." (*Gilbert, supra,* at p. 221.)

Finally, in *Witte v. Kaufman* (2006) 141 Cal.App.4th 1201, the court addressed the question whether a law firm whose members successfully represented it on a special motion to strike pursuant to Code of Civil Procedure section 425.16 was entitled to attorney's fees under that section. The court concluded the law firm, KLA, was not entitled to attorney's fees. (*Witte, supra,* 141 Cal.App.4th at p. 1211.) It explained that, "unlike *PLCM Group* and *Gilbert*, but like *Trope*, there is no attorney-client relationship between KLA 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. [¶] Here, KLA incurred no attorney fees in bringing its motion to strike, because all the work was done by members of the firm on their own behalf. Thus, KLA [was] not entitled to attorney fees." (*Ibid.*)

Here, Oviedo assigned his arbitration award plus "any further entitlement to fees, costs or other compensation that may arise as a result of efforts to enforce the Fee

Award" to Liner Grode in January 2009. Thereafter, when Liner Grode filed its petition to confirm the arbitration award in its own name and sought post-arbitration attorney fees in its own right, it was acting on the firm's own behalf and appeared through the firm's attorneys. For the reasons explained in *Witte v. Kaufman, supra,* 141 Cal.App.4th 1201, "unlike *PLCM Group* and *Gilbert,* but like *Trope,* there is no attorney-client relationship" between Liner Grode and its individual attorneys under these circumstances. (*Id.* at p. 1211.) Liner Grode incurred no attorney fees in proceeding on its own petition to confirm the arbitration award, notwithstanding its requests for a total (post-arbitration) attorney fee award in the amount of $31,745 (comprised of the interlocutory $20,000 amount and the "additional" $11,745), because all the work was done by the firm's own attorneys. (*Ibid.*) Therefore, Liner Grode is not entitled to its attorney fees, and the trial court erred in awarding such fees.

DISPOSITION

The judgment is affirmed. The orders awarding Liner Grode attorney fees are reversed. The parties are to bear their own costs of appeal.

WOODS, Acting P. J.

We concur:

ZELON, J. **JACKSON, J.**