Filed 11/27/18 Frontline Medical Assocs. v. DeWitt, Algorri & Algorri CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

FRONTLINE MEDICAL ASSOCIATES, INC. et al., Plaintiffs and Appellants, v. DEWITT, ALGORRI & ALGORRI et al., Defendants and Respondents.	B285143 (Los Angeles County Super. Ct. No. BC480141)

APPEAL from a judgment of the Superior Court of Los Angeles County, Victor E. Chavez, Judge. Affirmed.

Law Offices of Matthew D. Rifat, APC and Matthew D. Rifat for Plaintiffs and Appellants Frontline Medical Associates, Inc. and Accounts Receivables Acquisitions, LLC.

Baker, Keener & Nahra, LLP, Robert C. Baker and Derrick S. Lowe for Defendants and Respondents DeWitt, Algorri & Algorri, APC and Bergener & Associates.

Frontline Medical Associates, Inc. (Frontline) and Accounts Receivable Acquisitions, LLC (ARA) (collectively Frontline/ARA), as assignees of Munir Uwaydah, M.D. and Hollywood Community Hospital (the Hospital) respectively, filed a complaint for breach of contract against the law firms of DeWitt, Algorri & Algorri, APC (Algorri) and Bergener & Associates (Bergener), contending they failed to honor medical liens on their client's recovery from a personal injury suit.[1] After Frontline/ARA's presentation of evidence at trial, Algorri and Bergener filed a motion for nonsuit, which the trial court granted. Frontline/ARA appeals from the judgment subsequently entered. We affirm.

FACTUAL AND PROCEDURAL SUMMARY[2]

After sustaining injuries in an accident, Dietrich Canterberry retained Bergener as his attorney. Bergener referred Canterberry to Uwaydah for medical treatment, and Uwaydah performed surgery on Canterberry at the Hospital. In connection with this treatment, Canterberry and Bergener[3]

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[1] Frontline/ARA also asserted conversion and negligence causes of action but proceeded to trial on the breach of contract causes of action only.

[2] Because this appeal involves the trial court's grant of nonsuit, we view the evidence presented at trial in the light most favorable to Frontline/ARA. (*Edwards v. Centex Real Estate Corp.* (1997) 53 Cal.App.4th 15, 28.)

[3] Case manager Jana Frizelle was authorized to sign the form on behalf of Bergener.

signed medical lien forms in favor of Uwaydah and the Hospital.[4]

Bergener received bills from Uwaydah in the amount of $53,625 and from the Hospital in the amount of $139,837.80 for Canterberry's treatment.[5]

When Bergener was unable to settle the Canterberry matter, in March 2008, he filed a complaint on Canterberry's behalf against the party responsible for his injuries, and then sent the case to Algorri for litigation. Algorri associated in as trial counsel for Canterberry in April 2008 and "took over." As evidenced by the substitution of attorney form filed on that date, Bergener "substituted out" of the case on October 2, 2009.

Uwaydah had agreed to testify as an expert[6] in Canterberry's trial, but in June 2010, Algorri notified the court that he was unable to reach Uwaydah and was informed he was out of the country. When Canterberry's trial proceeded in October 2010, Uwaydah did not testify. Based on the testimony of the expert retained in Uwaydah's absence, Algorri conceded that Uwaydah's bills were unreasonable and argued that the value of Canterberry's past medical expenses was $75,000.

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[4] We set forth the relevant terms of those liens in section 3 of our Discussion.

[5] Uwaydah represented that he owned and controlled the Hospital.

[6] Algorri testified that he may have had nine cases with Uwaydah at about the same time, and Algorri's understanding was that if Uwaydah provided the treatment, he agreed to be the expert. Before Canterberry, none of Uwaydah's cases had ever gone to trial.

The jury found the defendant liable for Canterberry's injuries and awarded him $75,000 in past medical expenses. As Canterberry and Algorri left the courthouse after the trial, Algorri was upset because Uwaydah's charges were "totally unjustifiable," and Algorri believed that Uwaydah had damaged Canterberry's case. Algorri told Canterberry, "I'm not going to pay Dr. Uwaydah a penny."[7]

Canterberry's case was then settled with a gross payout of $185,000. When this sum was deposited into Algorri's client trust account, Algorri removed $74,000 in attorney fees and reimbursed his firm for its costs. He held in reserve amounts due for Canterberry's Kaiser medical bills and a lien for a loan Canterberry had obtained, and forwarded the remaining $58,000 to Canterberry.[8]

After Frontline/ARA's presentation of evidence, Algorri and Bergener filed their motion for an order granting nonsuit. (Code Civ. Proc., § 581c, subd. (a).) Algorri and Bergener argued that: (1) Algorri never signed the liens, meaning that it had no contract with him; and (2) Bergener's performance was excused because he was not Canterberry's attorney of record and had no control of the settlement proceeds.

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[7] Algorri testified that Canterberry instructed him not to pay Uwaydah's bills and instructed him to issue the check to Canterberry instead. However, Canterberry testified that he had not told Algorri not to pay any of his bills.

[8] Frontline/ARA had named Canterberry as a defendant (along with Algorri and Bergener) on the breach of contract claims, but Canterberry filed for bankruptcy and was dismissed from this action before trial.

In opposition, Frontline/ARA argued Bergener had signed an agreement to pay for medical services, and therefore no more was required. Algorri had an implied-in-fact contract in which Frontline/ARA would enter into an agreement with Bergener, Frontline/ARA would provide medical care on the promise of receiving funds from settlement proceeds, and Algorri, once he got a recovery in a case, would make sure Frontline/ARA was paid. Frontline/ARA also argued that it was logically inconsistent for Algorri and Bergener to deny the contract while asserting Uwaydah breached a contractual obligation to appear at Canterberry's trial for payment.

The trial court granted the motion. Algorri and Bergener dismissed their cross-complaint against Uwaydah and Frontline/ARA, and the trial court entered judgment in favor of Algorri and Bergener.

DISCUSSION

1. *Standard of Review*

If the trial court determines that, as a matter of law, the evidence presented by the plaintiff is insufficient to permit a jury to find in his or her favor, the defendant is entitled to a nonsuit. (*Campbell v. General Motors Corp*. (1982) 32 Cal.3d 112, 117–118.) Similarly, on appeal, we view the evidence most favorably to appellants, resolving all presumptions, inferences and doubts in their favor, and uphold the trial court's ruling only if it was required as a matter of law. (*Edwards v. Centex Real Estate Corp., supra,* 53 Cal.App.4th at p. 28.)

2. *Applicable Law*

In order to establish a breach of contract cause of action, a plaintiff must establish (1) the existence of a contract,

(2) plaintiff's own performance or excuse for nonperformance, (3) defendant's breach, and (4) resulting damages to the plaintiff. (*Jade Fashion & Co., Inc. v. Harkham Industries, Inc.* (2014) 229 Cal.App.4th 635, 645.) The fundamental goal of contract interpretation is to give effect to the mutual intention of the parties as it existed at the time the contract was executed (*id.* at p. 652), and if contractual language is clear and explicit, it governs (Civ. Code, § 1638).

3. *Breach of Contract as to Bergener*

Frontline/ARA contends that Bergener breached the lien agreements by failing to pay Frontline/ARA "either from the proceeds of the settlement *or from the funds received by them as payment of their fees*."[9] (Italics added.) We disagree.

By the lien agreements' express terms, Canterberry authorized "you, my attorney," to pay directly to the provider such sums as may be due and "to withhold such sums from any settlement." Canterberry gave a lien to the provider "against any and all proceeds of [his] settlement." Canterberry agreed not to rescind the lien, acknowledged that he was fully responsible for all of his medical bills, and confirmed that the lien agreement was made solely for the provider's further protection and "in consideration of his awaiting judgment." Canterberry further instructed that "in the event another attorney is substituted in this matter, the new attorney honor this lien . . . ."

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[9] Without further discussion, Frontline/ARA incorrectly states that the motion for nonsuit was "initially styled to cover only [Algorri]."

By signing the attorney portion[10] of the lien agreements, Bergener, "being attorney of record," agreed to "observe" the terms of the liens (which specified that payment was not due until settlement or judgment), to "withhold . . . from any settlement" funds owed on the lien, and to "issue such sums withheld" from settlement to the named provider. "Any nonperformance of a duty under a contract when performance is due is a breach." (*Linden Partners v. Wilshire Linden Associates* (1998) 62 Cal.App.4th 508, 531–532.)

It is undisputed that, when Canterberry's case was settled after trial in October 2010, Algorri—not Bergener—was Canterberry's attorney of record.[11] It was Algorri, and not Bergener, who received and controlled the settlement proceeds—when performance was due. (See *Sperber v. Robinson* (1994) 26 Cal.App.4th 736, 744 ["[the injured person's prior attorney] had no control whatsoever concerning the judgment [the injured person] received in the underlying case, and so [the prior attorney] could not be subjected to any liability with respect to the disbursement of the funds received on the judgment"].)

Moreover, the parties to the lien agreement specifically contemplated the possibility of Canterberry's substitution of a

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[10] In full, the attorney portion of the medical liens states: "The undersigned being attorney of record for the above patient does hereby agree to observe all the terms of the above and agrees to withhold such sums from any settlement, judgment or verdict as may be necessary to adequately protect above-named and to issue such sums withheld to the above-named doctor."

[11] The trial court took judicial notice of the substitution of attorney filed on October 2, 2009.

new attorney, as was his right, and provided that, in that event, Canterberry would instruct "the new attorney" to honor the lien. "The parties to the contract in essence create a mini-universe for themselves . . . in which they define their respective obligations, rewards, and risks." (*Applied Equipment Corp. v. Litton Saudi Arabia, Ltd.* (1994) 7 Cal.4th 503, 517 (*Applied Equipment*).)

Nothing in the lien agreement supports the inference that Bergener agreed to *guarantee* payment of Canterberry's medical bills, even if he no longer represented Canterberry at the time of settlement, or that he was obligated to reimburse Uwaydah or the Hospital out of his share of attorney fees.[12] To the contrary, under the lien terms, the providers agreed to look to Canterberry and the "new attorney" for payment at the time of settlement. (*Applied Equipment, supra,* 7 Cal.4th at p. 517 ["it is appropriate to enforce such obligation as each voluntarily assumes and to give him only such benefits as he expected to receive; this is the function of contract law . . . ."].) It follows that Frontline/ARA did not establish breach of contract claims against Bergener.[13]

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[12] When Bergener received payment from Algorri, it was for his share of attorney fees pursuant to an agreement between the two attorneys. "[A]s a matter of law, the amount recovered by the plaintiff in a personal injury lawsuit always goes first to satisfy the attorney lien for fees and costs before it is used to satisfy medical liens." (*Gilman v. Dalby* (2009) 176 Cal.App.4th 606, 620.)

[13] As to Bergener, Frontline/ARA asserts it also has the right to enforce the lien agreements as a third party beneficiary. The issue is not whether Frontline/ARA is entitled to enforce the lien agreements, but rather whether the lien agreements are enforceable against Bergener. Frontline/ARA fails to explain how purported third party beneficiary status would make breach of

4. *Breach of Contract as to Algorri*

Frontline/ARA contends the breach of contract claims as to Algorri are established by evidence that Algorri received a file containing the lien agreements—which expressly imposed a contractual duty on Algorri to honor the liens—but ignored this instruction and refused to pay Frontline/ARA after receiving settlement proceeds.[14]

Frontline/ARA further contends that it is disingenuous for Algorri to claim that he owed no contractual duty to Frontline/ARA because the existence and terms of an implied contract are manifested by conduct (Civ. Code, § 1621), and Algorri's conduct shows that he believed he had a contractual relationship with Frontline/ARA (presumably referring to Uwaydah, Frontline's assignor) because he had, "on a number of occasions, engaged Frontline/ARA on [his] cases and honored [Uwaydah's] liens." The record does not support Frontline/ARA's characterization of the evidence.

Algorri testified that he had some other cases involving Uwaydah at about the same time as Canterberry's, but Frontline/ARA identifies no evidence that Algorri discussed, let alone, honored, any of Uwaydah's other liens to any extent before distributing Canterberry's settlement proceeds. Moreover, Algorri's understanding that Uwaydah agreed to testify as an

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contract claims against Bergener viable where claims as assignees are not.

[14] Frontline/ARA relies on the following paragraph of the lien agreements: "I [referring to Canterberry] hereby instruct that in the event another attorney is substituted in this matter, the new attorney honor this lien as inherent to the settlement and enforceable upon the case as if it were executed by him."

expert at trial in cases in which he provided treatment (and his filing of a cross-complaint based on Uwaydah's failure to do so) does not constitute evidence that the parties understood Algorri was obligated to pay Uwaydah and the Hospital on Canterberry's medical liens. Uwaydah did not testify, and Frontline/ARA presented no evidence of his intent. (*Division of Labor Law Enforcement v. Transpacific Transp. Co.* (1977) 69 Cal.App.3d 268, 277 [the "very heart" of an enforceable implied in fact contract is the mutual intention of the parties; the assumption, intention, or expectation of either party alone cannot support an inference of an implied contract].)

It is undisputed that only Canterberry and Bergener signed the lien agreements, which were addressed to Bergener. Algorri testified that he never orally represented he would pay any liens to any Uwaydah entity, Uwaydah never asked him to sign the liens, and Algorri never signed them. Frontline/ARA has failed to cite any evidence of prior conduct establishing the existence and terms of a contract obligating Algorri to pay medical liens in Canterberry's case. Frontline/ARA cites no authority in support of the assertion that Algorri breached a contract with Frontline/ARA as "successor" to the lien agreements under these circumstances. We find no error. (See *Gilman v. Dalby, supra,* 176 Cal.App.4th at p. 614 [successor attorney who was aware of but did not sign medical lien signed by client and client's former attorney had no contractual duty to medical provider's assignee].)

5. *Judicial Estoppel*

Citing *Blix St. Records, Inc. v. Cassidy* (2010) 191 Cal.App.4th 39, Frontline/ARA contends that, under the doctrine of judicial estoppel, neither Bergener nor Algorri can deny the existence of a contract with Uwaydah and the Hospital because

Bergener and Algorri alleged breach of a contract in their cross-complaint. The contention is meritless.

Judicial estoppel is an equitable doctrine to protect against fraud on the courts. (*M. Perez Co., Inc. v. Base Camp Condominiums Assn. No. One* (2003) 111 Cal.App.4th 456, 463.) The doctrine should be applied with caution and limited to egregious circumstances because of its harsh consequences. (*Gottlieb v. Kest* (2006) 141 Cal.App.4th 110, 132.)

Algorri and Bergener deny that they breached the lien agreements as alleged in Frontline/ARA's complaint. In their cross-complaints, Bergener and Algorri allege Uwaydah breached an agreement to testify to the reasonableness of his medical bills at Canterberry's trial. Frontline/ARA fail to explain how these are two "totally inconsistent" positions warranting the application of judicial estoppel to prevent a fraud on the court.[15] (*Daar & Newman v. VRL International* (2005) 129 Cal.App.4th 482, 491; see also *Blix St. Records, Inc. v. Cassidy, supra,* 191 Cal.App.4th at p. 51 [gravamen of judicial estoppel is the intentional assertion of an inconsistent position that perverts the judicial machinery].)

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[15] Frontline/ARA also contends that Algorri invited the trial court's error in granting nonsuit because Algorri cited *Farmers Ins. Exchange v. Smith* (1999) 71 Cal.App.4th 660 (*Farmers*), confusing the difference between the express liens at issue in this case and equitable liens as addressed in *Farmers*. There is no indication in the record that the trial court relied on *Farmers* or was confused about the applicable law. For the reasons explained in the text, we conclude that nonsuit was properly granted on the grounds Algorri and Bergener presented to the trial court.

DISPOSITION

The judgment is affirmed. Respondents shall have their costs on appeal.

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MICON, J.*

We concur:

WILLHITE, Acting P. J.

COLLINS, J.

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