Filed 11/15/12 Handler v. Fields, Fehn & Sherwin CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

GARY HANDLER, Plaintiff and Respondent, v. FIELDS, FEHN & SHERWIN et al., Defendants and Appellants.	B235578 (Los Angeles County Super. Ct. No. BC429510)

APPEAL from a judgment of the Superior Court of Los Angeles County, Teresa Sanchez-Gordon, Judge. Affirmed.

Gregory J. Sherwin, in pro. per.; H. Thomas Fehn, in pro. per.; Fields, Fehn & Sherwin, Orly Davidi; Edgerton & Weaver and Elizabeth Lowery for Defendants and Appellants.

Perona, Langer, Beck, Serbin & Mendoza, Ronald Beck and Ellen R. Serbin for Plaintiff and Respondent.

* * * * * *

The trial court found that appellants—the law firm Fields, Fehn & Sherwin and Attorneys H. Thomas Fehn and Gregory J. Sherwin—committed legal malpractice when representing respondent Gary Handler in an arbitration. We affirm, rejecting appellants' challenges many of which are based on facts different from those found by the trial court and on expert opinion found to lack foundation and credibility. We reject Handler's request for sanctions, concluding that the appeal, although unmeritorious, is not frivolous.

FACTUAL AND PROCEDURAL BACKGROUND

Handler worked at RBC Dain Rauscher, Inc. (RBC) as a securities broker from June 2003 to April 2007. Handler's employment agreement with RBC granted him a $25,000 travel allowance for the first 12 months of employment. During his first year, Handler was reimbursed over $50,000 in business-related expenses. In addition to the employment agreement, and as customary in the industry, RBC gave Handler a loan, which was forgiven on an annual basis. Approximately $230,000 of the almost $590,000 loan remained unpaid/unforgivable at the time Handler resigned from RBC. The promissory note, signed by Handler, stated that any unforgiven amount was due at the date of termination.

Following Handler's resignation, RBC initiated a binding arbitration with the Financial Industry Regulatory Authority (FINRA) to recover on the promissory note. Handler retained appellants, experts in securities law, to represent him in that arbitration. Handler did not dispute that he owed money on the promissory note, but sought repayment from RBC of $137,000 he had incurred in business expenses during his last three years at RBC. Handler had receipts from American Express documenting the charges and testified that the charges were necessary for his business. Handler's supervisor testified that the decision not to reimburse Handler was due to "extreme" market conditions, not because RBC concluded the expenses were unreasonable.[1]

---

[1] Handler's supervisor testified inconsistently both that Handler's business required travel and that it did not.

Appellants filed an answer in the FINRA arbitration but did not mention Labor Code section 2802 (section 2802) and did not file a counterclaim. Section 2802, subdivision (a) provides: "An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer . . . ." Sherwin informed the arbitrators of section 2802 during the arbitration by providing them with copies of the statute.

Prior to the arbitration, RBC had requested documents from Handler including documents related to reimbursable expenses. Appellants received RBC's document request but did not forward it to Handler until the day before his discovery responses were due. When they requested documents from Handler, appellants did not inform Handler that the responses were due the next day. Appellants requested, but were denied, a continuance to respond to discovery from opposing counsel.

After the arbitration, the arbitrators issued an award, requiring Handler to pay RBC $240,076, plus interest, costs, and attorney fees. In a section entitled, "other issues considered and decided" (boldface, capitalization & italics omitted), the award stated Handler "made a verbal request for reimbursement of expenses. . . . After due deliberation, the Panel denied the request." The arbitrators denied appellants' request to introduce documents related to Handler's offset claim based on business expenses.

After Handler lost the first arbitration, appellants represented him in a second arbitration in which Handler sought to recover his expenses under section 2802. Appellants did not charge Handler legal expenses incurred pursuing the second arbitration. Sherwin attached the American Express receipts that Handler had provided in response to the document requests in the first arbitration to the claim in the second arbitration. According to Handler, Sherwin told Handler he thought it was a "good case." Sherwin admitted he believed the claim was "viable." RBC opposed the claim, asserting among other things res judicata and collateral estoppel prevented the arbitrators from considering the offset claim.

Meanwhile, while the second arbitration was pending, Handler was informed that unless he paid the first arbitration award, his license to practice as a securities broker would be revoked. Handler did not have the funds to pay the arbitration award. The court found: Handler "had lost a tremendous amount of money in the stock [market] crash, and did not have sufficient funds to pay the arbitration award. As a result, in June 2009, while the 'new' arbitration was still pending, [Handler] entered into a settlement with RBC confessing to a judgment and agreeing to installment payments for the full amount . . . owed on the promissory note, and released RBC for any claim of reimbursement of his business expenses."[2] Following the settlement, Handler dismissed the second arbitration and RBC urged the regulatory agency not to revoke Handler's license. Handler testified he settled with RBC because he was afraid to lose his license, his livelihood, and his clients.

At trial in the malpractice action, Handler's expert opined appellants should have raised section 2802 as a basis for an offset of the promissory note claim in the first arbitration, and their failure to do so fell below the standard of care. Handler's expert also opined that appellants' failure to timely request documents from Handler to respond to RBC's discovery fell below the standard of care, a point appellants admitted. Appellants' expert testified at his deposition that he was unfamiliar with section 2802 and could not determine whether appellants should have raised it in the first arbitration, and based on this deposition the court did not allow him to testify at trial regarding the efficacy of a section 2802 claim.[3]

The court awarded Handler a judgment in the amount of $155,839, plus costs.

---

[2] Appellants presented evidence indicating that Handler had the ability to pay. For example, Handler received almost half a million dollars when he sold his house; Handler invested money in the stock market and lost it; and Handler incurred an $18,000 gambling debt. The trial court must have credited Handler's contrary testimony when it concluded he lacked the ability to pay the arbitration award.

[3] Appellants' expert attempted to change his testimony at trial, but the court disregarded opinions different from those in his deposition.

DISCUSSION

"'In civil malpractice cases, the elements of a cause of action for professional negligence are: "(1) the duty of the attorney to use such skill, prudence and diligence as members of the profession commonly possess; (2) a breach of that duty; (3) a proximate causal connection between the breach and the resulting injury; and (4) actual loss or damage. [Citations.]" [Citation.]' [Citations.]" (*Blanks v. Seyfarth Shaw LLP* (2009) 171 Cal.App.4th 336, 356-357.) "With regard to causation and damages, the plaintiff is required to prove that but for the defendant's negligent acts or omissions, 'the plaintiff would have obtained a more favorable judgment or settlement in the action in which the malpractice allegedly occurred.' [Citation.] As such, a determination of the underlying case is required. This method of presenting a legal malpractice lawsuit is commonly called a trial within a trial. It may be complicated, but it avoids speculative and conjectural claims." (*Id*. at p. 357.)

"'The trial-within-a-trial method does not "recreate what a particular judge or fact finder would have done. Rather, the [trier of fact's] task is to determine what a reasonable judge or fact finder would have done. . . ." [Citation.] Even though "should" and "would" are used interchangeably by the courts, the standard remains an *objective* one. The trier of fact determines what *should* have been, not what the result *would* have been, or could have been, or might have been, had the matter been before a *particular* judge or jury. [Citations.]' [Citations.] [¶] If the underlying issue originally was a factual question that would have gone to a tribunal rather than a judge, it is the jury who must decide what a reasonable tribunal would have done. The identity or expertise of the original trier of fact (i.e., a judge or an arbitrator or another type of adjudicator) does not alter the jury's responsibility in the legal malpractice trial within a trial." (*Blanks v. Seyfarth Shaw LLP*, *supra*, 171 Cal.App.4th at pp. 357-358.)

1. Trial Within a Trial

Appellants argue the trial court failed to apply the "trial-within-a trial standard," which required Handler to show that he would have obtained a better result in the underlying litigation.

The record belies appellants' claim. The trial court concluded that: "The 'trial-within-a-trial method' is applied to legal malpractice cases." The court also properly stated that the loss of a meritorious claim supports a malpractice lawsuit. (See *Gutierrez v. Mofid* (1985) 39 Cal.3d 892, 900.) The court further concluded that Handler showed he "would have prevailed on the offset and/or estoppel issues against RBC . . . ." In short, appellants fail to show the court applied an incorrect legal standard.[4]

In claiming the court did not apply the trial-within-a-trial standard, appellants appear to challenge the sufficiency of the evidence of Handler's offset claim, suggesting that the expenses were neither reasonable nor necessary. Substantial evidence supports the judgment. Sherwin admitted that Handler had a viable claim for offset. Moreover, Handler testified that during his first year at RBC, he was reimbursed approximately $50,000 for his expenses, supporting an inference that incurring $50,000 a year in business expenses was reasonable. Handler's supervisor testified that RBC made a business decision not to compensate Handler for his expenses; the decision did not rest on a conclusion that Handler's expenses were unreasonable. The record supports the finding that Handler incurred $137,000 in expenses over a three-year period and that such expenses were necessary for his employment.

2. Proximate Cause

It is undisputed that Handler had the burden to show proximate cause. (*Blanks v. Seyfarth Shaw LLP*, *supra*, 171 Cal.App.4th at p. 357.)

Appellants argue the record lacks sufficient evidence of proximate cause, stating that their malpractice did not cause Handler to lose his right to pursue his expense

---

[4] The statement of decision contains the following stray remark: "There is no requirement that [Handler] prove he would have won his case." This remark is inconsistent with the remainder of the statement of decision, which indicates the court applied the proper standard. When the statement of decision is considered in its entirety, appellants fail to show the trial court applied an incorrect standard. In any event, the court expressly concluded that Handler proved he would have prevailed on his offset claim, which is the key showing Handler was required to make to prove his malpractice claim.

reimbursement claim. Instead, they contend Handler lost that right by voluntarily entering into a settlement agreement and by failing to pay the judgment at a time when he had the means to pay it. They contend that Handler was required to mitigate his damages by pursuing the second arbitration to completion and either successfully obtaining an award or losing on the merits, thereby indicating he could not prevail on his offset claim. Appellants contend that Handler's premature settlement bars recovery for malpractice. Citing *Floro v. Lawton* (1960) 187 Cal.App.2d 657 (*Floro*), appellants argue that public policy bars a finding of liability because they should not be liable for litigation claims voluntarily settled or for Handler's failure to pay the first arbitration award as required by the regulatory agency.

Appellants' arguments are not based on the facts as found by the trial court. First, the court found Handler could *not* pay the award, stating "as a result of the stock [market] crash beginning in the fall of 2008 and other financial troubles, [Handler's] assets had severely depleted and he could not pay the award."[5] The court expressly rejected appellants argument that Handler was "comparatively at fault for not paying the award . . . . The Court finds that [Handler] was not negligent, and did nothing to cause the award against him and/or the loss of the right to assert claims of offset and/or estoppel on the $137,000.00 reimbursement claim." The court also rejected the argument that Handler's spending habits amounted to comparative fault finding "no credible evidence . . . support[s] this contention. [Handler's] loss occurred as a result of [appellants'] negligence as set forth above, and had nothing to do with [Handler's] finances." Because the trial court found that Handler could not afford to pay the award, appellants' predicate that Handler's voluntary failure to pay the judgment *when he had the means to pay* lacks

---

[5] In their response to the proposed statement of decision, appellants argued that this fact was contrary to undisputed evidence. That argument is incorrect as Handler testified that he did not have the ability to pay, and that although he sold the house he used the proceeds to pay other debts. On appeal, appellants ignore the evidence in support of the trial court's findings.

merit and their legal argument based on facts different from those found by the trial court is irrelevant.[6]

Second, contrary to appellants' assertions, the court did not find Handler voluntarily entered into a settlement agreement. Indeed, the court found that prior to the settlement agreement, "FINRA informed [Handler] it was suspending [his] registration or ability to work as a securities broker . . . ." "[Handler] testified that if his license was suspended and/or revoked, he would not be able to earn a livelihood and support his family." The court further explained: "[Handler's] choice to resolve his case against RBC and give up his claim against RBC in exchange for FINRA dropping the revocation and/or suspension of his license, was a Hobson's choice . . . . [Appellants] placed [Handler] in this position by its negligence and caused [Handler's] loss." Thus, the court found that had the reimbursement claim been presented in the first arbitration, Handler would not have been at risk of losing his license. It was appellants' conduct that forced him to settle; Handler did not voluntarily settle the offset claim.

Floro does not support appellants' argument that Handler forfeited his malpractice claim by settling with RBC and dismissing the second arbitration. In *Floro*, a plaintiff sued his attorney for malpractice following an error by the trial court in concluding that a cause of action had been abandoned. (*Floro*, *supra*, 187 Cal.App.2d at pp. 665, 666.) The attorney had put into evidence "everything which was available by way of proof" and no evidence had been overlooked. (*Id*. at p. 664.) The trial court granted nonsuit on the malpractice claim. (*Id*. at p. 660.) The appellate court found the attorney had not abandoned the cause of action, and the trial court's error in so-concluding was not attributable to the attorney. (*Id*. at p. 672.) Further, the plaintiff did not appeal from the incorrect judgment and thereby deprived the attorney of the opportunity to correct it. (*Ibid*.)

---

6 At oral argument, appellants acknowledged that if Handler lacked the means to pay the arbitration award, his attorneys were not shielded by Handler's decision to settle.

In contrast to *Floro*, here the court found the errors resulting in the loss of Handler's offset claim were attributable to appellants, not to the trier of fact. Whereas in *Floro*, the appellate court found that the error could have been corrected through an appeal, here even assuming the second arbitration was not barred by collateral estoppel or res judicata, its prosecution required Handler to risk losing his license to practice his profession in order to proceed. *Floro* does not require Handler to bear that risk to demonstrate malpractice on the part of his attorneys. Handler would not have suffered the potential loss of his livelihood if his reimbursement claim – which the trial court found would have been meritorious – had been timely raised. Because of appellants' malpractice, Handler lost his ability to assert his offset claim without jeopardizing his professional license and livelihood. This harm supports the trial court's finding of proximate cause. (See *Lombardo v. Huysentruyt* (2001) 91 Cal.App.4th 656, 666 [causation question of fact unless no reasonable person could find defendant's conduct was substantial factor in causing harm].)

3. Evidentiary Issues

A. Tape Recording

The trial court excluded an audio recording of the first arbitration, portions of which had been transcribed by appellants. The court found that the recording was hearsay.

Neither the audio recording nor the transcript is in our record for review, and appellants therefore fail to carry their burden of demonstrating error. (*Oliveira v. Kiesler* (2012) 206 Cal.App.4th 1349, 1362 [judgment must be affirmed when appellant fails to present adequate record for review].) Additionally, appellants also fail to address the specific basis for the court's ruling excluding the evidence and therefore fail to show the evidence should have been admitted.

The only legal authority appellants cite to support their claim that the tape recording should have been admitted is *Lynn v. Cable* (1950) 95 Cal.App.2d 696, which is inapposite. That case involved a lawsuit for breach of a lease. (*Id*. at p. 697.) The court awarded judgment in favor of the landlord but provided the tenant an offset. (*Id*. at

p. 698.) The tenant then filed another lawsuit alleging the landlord had breached the agreement. (*Ibid*.) The trial court found the second lawsuit was barred by res judicata and the appellate court affirmed. (*Ibid*.) *Lynn* does not support appellants' argument that the tape recording of the arbitration was admissible.

B. Expert Testimony

The court made the following findings with respect to appellants' expert: Appellants "claimed through an expert witness that the arbitrators in the underlying arbitration could have completely ignored California law and all law, and would have ruled in favor of RBC. The Court finds that [appellants'] expert lacked credibility, was severely impeached at trial on material issues, admitted that he knew nothing about Labor Code § 2802 and never heard of it, did not have a foundation to give an expert opinion as to the meritoriousness of [Handler's] claim, and therefore his opinion on whether [Handler] 'would have won' the arbitration is speculative and unpersuasive at best."

Appellants argue the court was precluded from disregarding their expert. They cite *Huber, Hunt & Nichols, Inc. v. Moore* (1977) 67 Cal.App.3d 278, 313, in which a proposed jury instruction improperly instructed jurors that the testimony of experts as to proper professional standards "could be disregarded if the standards did not conform to the jury's concept and determination of what was 'due care.'" *Moore* is not on point because here the court did not instruct jurors to disregard expert testimony. The court found the expert lacked credibility and the expert's opinion was not supported by an adequate foundation. Under such circumstances, the court properly disregarded the expert testimony; "[a]n expert opinion has no value if its basis is unsound." (*Lockheed Litigation Cases* (2004) 115 Cal.App.4th 558, 564; see also *Casey v. Perini Corp.* (2012) 206 Cal.App.4th 1222, 1236.)

4. Statement of Decision

Appellants claim that the trial court's statement of decision was insufficient and point out that they requested additional factual findings in posttrial briefing. We have reviewed the statement of decision and find it to be a thorough factual recitation and analysis of the material issues at trial. The fact that the court did not include every

conceivable fact in its statement does not show that reversal is required. The "trial court is not required to respond point by point to issues posed in a request for a statement of decision. '"The court's statement of decision is sufficient if it fairly discloses the court's determination as to the ultimate facts and material issues in the case." [Citations.]' [Citation.]" (*Ermoian v. Desert Hospital* (2007) 152 Cal.App.4th 475, 500; see also *In re Marriage of Balcof* (2006) 141 Cal.App.4th 1509, 1530.)

5. Sanctions

Finally, we deny Handler's motion for sanctions, concluding the appeal is not frivolous.

Our high court recently reiterated the standard for determining whether an appeal is frivolous.

"On the one hand, '[a]n appeal taken for an improper motive represents a time-consuming and disruptive use of the judicial process. Similarly, an appeal taken despite the fact that no reasonable attorney could have thought it meritorious ties up judicial resources and diverts attention from the already burdensome volume of work at the appellate courts.' [Citation.]

"On the other hand, we observed that 'any definition [of a frivolous appeal] must be read so as to avoid a serious chilling effect on the assertion of litigants' rights on appeal. Counsel and their clients have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win on appeal. An appeal that is simply without merit is *not* by definition frivolous and should not incur sanctions. Counsel should not be deterred from filing such appeals out of a fear of reprisals. Justice Kaus stated it well. In reviewing the dangers inherent in any attempt to define frivolous appeals, he said the courts cannot be "blind to the obvious: the borderline between a frivolous appeal and one which simply has no merit is vague indeed. . . . The difficulty of drawing the line simply points up an essential corollary to the power to dismiss frivolous appeals: that in all but the clearest cases it should not be used." [Citation.]' [Citation.] 'The same may be said about the power to punish attorneys for prosecuting frivolous appeals: the punishment should be used most sparingly to deter only the most

egregious conduct.' [Citation.] In short, 'the imposition of sanctions in this context remains a delicate task, because an overbroad exaction of damages may significantly chill every litigant's enjoyment of the fundamental protections of the right to appeal.' [Citation.] 'Thus, an appeal should be held to be frivolous only when it is prosecuted for an improper motive—to harass the respondent or delay the effect of an adverse judgment— or when it indisputably has no merit—when any reasonable attorney would agree that the appeal is totally and completely without merit.' [Citation.]" (*In re Reno* (2012) 55 Cal.4th 428, 513, italics omitted.)

We conclude that although the case lacks merit, it is not such that any reasonable attorney would agree that the appeal is totally and completely without merit. Nor has Handler demonstrated that it was prosecuted for an improper motive. For these reasons, Handler's request for sanctions is denied.

DISPOSITION

The judgment is affirmed. Handler is entitled to costs on appeal.

FLIER, J.

WE CONCUR:

RUBIN, Acting P. J.

SORTINO, J.*

---

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