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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

MARIA TLAMASICO MARTINEZ  
et al.,

Plaintiffs and Respondents,

v.

RAUL C. CONTRERAS et al.,

Defendants and Appellants.

B231471

(Los Angeles County  
Super. Ct. No. LC085023)

APPEAL from a judgment of the Superior Court for Los Angeles County,  
Richard Adler, Judge. Affirmed.

Law Offices of Tabone and Derek L. Tabone for Defendants and Appellants.

Law Office of Bruce P. Wolfe and Bruce P. Wolfe for Plaintiffs and  
Respondents.

Defendants Raul C. Contreras and Francisco Zavala (collectively, the attorneys) appeal from a judgment entered after a bench trial awarding plaintiff Maria Tlamasico Martinez \$13,333, plus \$21,102 in attorney fees and costs, on her breach of contract claim. We affirm the judgment.

## **BACKGROUND**

Martinez's son, Arturo Tlamasico, was arrested in July 2007 and charged with two counts of attempted murder, with gang and firearm allegations, arising from a drive-by shooting. Martinez met with Contreras, an attorney, and asked if he would represent her son. Martinez knew Contreras because he had represented her brother in a divorce in the 1990's and had represented Tlamasico in a juvenile proceeding.<sup>1</sup> Martinez wanted Contreras to represent her son because she had difficulty communicating with the public defender who was then representing him, since the public defender did not speak Spanish.

Martinez told Contreras, who speaks Spanish, what she knew about the case, but she could not tell him what Tlamasico was charged with, or how many charges there were. Contreras told her that, for \$1,000, he would visit with her son in jail and talk to the public defender to learn more about the case. She agreed, and paid him \$1,000. He talked to Tlamasico for an hour and a half or two hours, and then met with the public defender, who told him what the allegations were and the facts surrounding Tlamasico's arrest. The public defender would not, however, show him the police reports because he was not the attorney of record.

After meeting with Tlamasico and the public defender, Contreras had a second meeting with Martinez. He told her what he had learned, and she asked if

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<sup>1</sup> Contreras had also represented Martinez's daughter with regard to an assault investigation (no charges were filed), and represented Martinez's younger brother in another criminal case in which the brother pled to a misdemeanor.

he would represent her son. He told her he needed to think about it. He then spoke with Zavala, who was an experienced criminal attorney, because he felt it would be better if he “double-teamed” the prosecution. He and Zavala discussed the case, and determined the fee they would charge to take the case to the preliminary hearing: \$40,000. Contreras and Zavala then met with Martinez to discuss their representation of her son.

There is a dispute about what was said at that meeting, which took place on August 31, 2007. According to Contreras and Zavala, they explained the criminal procedure to Martinez and told her that for a \$40,000 fee, they would represent her son only through the preliminary hearing. They explained that they were going to conduct a thorough investigation and hire an expert in identification issues (for which she would have to pay an additional \$5,000), and that they “were going to treat [the preliminary hearing] as a trial.” They also told her that if the case went to trial, they would discuss the fee they would charge for the trial at that time. According to Martinez, Contreras and Zavala did not discuss the criminal procedure with her, and did not tell her that they were going to represent her son only through the preliminary hearing. Instead, they told her they were going to represent her son all the way to the end of the case.

During the meeting, Contreras presented to Martinez a written contract, which he drafted, setting forth the terms of the representation. The two-page contract was in Spanish (an English translation is included in the record). The contract, which has the heading “**LEGAL REPRESENTATION AGREEMENT -- CRIMINAL**” begins with the following introduction: “ATTORNEYS RAUL C. CONTRERAS and FRANCISCO ZAVALA (hereinafter ‘Attorneys’) are contracted on this 31st day of August of 2007 for Legal Representation of ARTURO SOLIZ TLAMASICO (hereinafter ‘Client’) in the matter of THE PEOPLE OF THE STATE OF CALIFORNIA VS. ARTURO SOLIZ

TLAMASICO (Los Angeles County Case number LA05640501). With MARIA TLAMASICO [Martinez] (hereinafter ‘Client’).” (Underlining omitted.) The terms of the agreement follow in numbered paragraphs, which are quoted or described below.

Paragraph 1 states: “The Attorneys shall represent the Client in the defense of the criminal matter. The services of the attorney shall be complete upon conclusion of the aforementioned criminal procedure.”

Paragraph 2 sets forth the fees to be paid, with \$20,000 to be paid upon signing the agreement and another \$20,000 to be paid on or before October 15, 2007.

Paragraph 3 requires the Client to pay all reasonable and necessary expenses, including for the services of a private investigator, legal assistant, expert witnesses, transcripts, and other items. It requires the Client to deposit \$5,000 into the Attorneys’ trust account for these expenses on October 5, 2007.

Paragraph 4 states that “[t]he Attorneys will withdraw from this case if the Client does not pay the aforementioned amounts.”

Paragraph 5 is an attorney fee provision for any legal proceeding to recover amounts owed under the agreement.

Paragraph 6 states that “[t]he services of the Attorneys do not include” a jury trial, appeal, retrial or representation in any related matter, or probation violation proceedings.

Paragraph 7 provides: “The Client understands that new arrangements for payment shall have to be made for any representation after the municipal court or any representation mentioned in paragraph six.”

Paragraph 8 states that “[t]he Client understands and agrees that the attorneys cannot promise and have not promised any result, agreement, or

settlement in any manner,” and that, by signing, the Client acknowledges receiving a copy of the agreement.

The contract was signed on August 31, 2007, by Martinez, Contreras, and Zavala. According to Contreras, that same day he gave a copy of the contract to Martinez, as well as a letter (in Spanish) thanking her for retaining them and stating that she has hired them to represent her son until the preliminary hearing. Martinez denies that she received that letter. Martinez made all the payments as required under the contract, in addition to the \$1,000 she paid Contreras for his initial investigation, for a total of \$46,000.

Contreras and Zavala substituted into the criminal case and began to work on the defense. They obtained discovery from the prosecution, hired an investigator (and an interpreter for the investigator) who took measurements and photos at the location of the shooting and spoke to witnesses and the victims, and hired an identification expert. After numerous continuances (most of which were due to counsel for Tlamasico’s co-defendants), the preliminary hearing was held in March 2008, with a day and a half of testimony. Zavala announced, in English, at the start of the hearing that he and Contreras were retained only through the preliminary hearing; Martinez did not have an interpreter with her and did not understand what was said. Zavala aggressively cross-examined the prosecution’s witnesses, but did not present any witnesses for the defense. Tlamasico was bound over for trial.

Martinez met with Contreras and Zavala at Contreras’ office within days after the preliminary hearing. At that meeting, Contreras told her that her son was going to have a jury trial, and she would need to pay an additional \$30,000 or

\$35,000 if she wanted them to keep representing him.<sup>2</sup> Martinez told them she did not have any more money. After that meeting, Contreras prepared a memo for the file, outlining the information he and Zavala had collected and how it could be used to defend Tlamasico, and turned his file over to the trial court for use by Tlamasico's appointed counsel. New counsel was appointed for Tlamasico at his arraignment on April 2, 2008. That attorney negotiated a plea agreement with the District Attorney, resulting in a 17-year prison sentence for Tlamasico.

Martinez filed the instant lawsuit a year later, in April 2009, alleging that Contreras and Zavala breached their contract by abandoning their representation of Tlamasico, and alleging a common count for money had and received.<sup>3</sup> Following a bench trial, the trial court issued a statement of decision in which it found that the language of paragraph 1 -- stating that the attorneys would represent Tlamasico in the "criminal matter" and that their services "shall be complete upon conclusion of the aforementioned criminal procedure" -- means that the attorneys would represent Tlamasico for the entire case, and that the exclusions set forth in paragraph 6 did not mean that the attorneys' representation ended, but simply that, under paragraph 7, the client must pay an extra fee for those services. The court also found there was nothing in the language of the contract that provided that the fees Martinez paid did not include services after the preliminary hearing and before commencement of a jury trial, i.e., trial preparation, particularly in light of the

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<sup>2</sup> Contreras disputes that he asked for \$30,000 or \$35,000. Instead, he testified that he told Martinez before the preliminary hearing that he and Zavala would each charge an additional \$10,000 to continue representing her son if the case continued after the preliminary hearing.

<sup>3</sup> Tlamasico was also a plaintiff in the original complaint, but he was voluntarily dismissed after trial.

attorneys' statements to Martinez that they intended to prepare for the preliminary hearing as though it were a trial.

The trial court rejected the attorneys' argument that the letter they gave Martinez at the meeting in which she signed the retainer agreement, stating that she had hired them to represent Tlamasico until the preliminary hearing, shows the parties' intent that the attorneys would not continue their representation beyond the preliminary hearing. The court found that the letter, which thanks Martinez for retaining them, necessarily was given to Martinez *after* she executed the contract, and therefore merely expresses the attorneys' post-execution intent and not the parties' mutual intent in entering into the agreement. Therefore, the court concluded the letter was parol evidence that cannot be used to vary or contradict the terms of the contract.

Based upon these findings, the trial court found that Contreras and Zavala breached the contract by failing to continue their representation for a sufficient period of time after the preliminary hearing to try to negotiate a plea agreement. The court determined that Martinez retained them to provide three types of services -- to investigate the facts, represent Tlamasico in court, and negotiate a plea agreement -- and that Contreras and Zavala withdrew from the case without making any significant efforts to negotiate a plea agreement. Therefore, the court concluded that Martinez did not receive the benefit of the bargain with the attorneys, and was entitled to be reimbursed for one-third of the fees she paid under the contract, i.e., \$13,333, plus costs and attorney fees.<sup>4</sup> The court subsequently awarded Martinez \$19,075 in attorney fees, and entered judgment in favor of Martinez in the amount of \$34,435 (\$13,333 in damages, \$19,075 in

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<sup>4</sup> The court found that the sum of \$26,666 (the amount the attorneys would retain) was adequate compensation for the services they actually rendered.

attorney fees, and \$2,027 in costs). Contreras and Zavala timely filed a notice of appeal from the judgment.

## **DISCUSSION**

On appeal, Contreras and Zavala challenge both the trial court’s finding that there was a breach of contract and the damages award. First, they argue that the most reasonable interpretation of the contract is that their representation would end at the conclusion of the preliminary hearing, and therefore there was no breach. Second, they contend that Martinez’s failure to demand performance after the preliminary hearing precludes her from any recovery for the alleged breach. Finally, they contend the award of damages was excessive because Tlamasico was represented by appointed counsel after the preliminary hearing and therefore there was no additional cost to complete the services allegedly bargained for, and in any event, the amount awarded was arbitrary and unsupported by the evidence. We are not persuaded.

### *A. Interpretation of the Contract*

In challenging the trial court’s finding of a breach of contract, Contreras and Zavala assert that “[t]he issue here is when the parties intended that Defendant’s [*sic*] representation of Arturo [Tlamasico] would end.” They argue that the trial court erred in its interpretation of the contract, and that the most reasonable interpretation of paragraphs 1, 6, and 7 is that their representation would end at the conclusion of the preliminary hearing. We disagree.

“In interpreting the provisions of a contract, the rules are well settled. ‘The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.’ [Citations.] ‘Courts must interpret contractual language in a manner which gives force and



effect to every provision, and not in a way which renders some clauses nugatory, inoperative or meaningless.’ [Citations.] The contract must also be ‘interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful.’ [Citation.] ‘Such intent is to be inferred, if possible, solely from the written provisions of the contract.’ [Citation.] “‘In construing a contract which purports on its face to be a complete expression of the entire agreement, courts will not add thereto another term, about which the agreement is silent. [Citation.]’” [Citation.] When determining the intent of the parties, the court will consider a particular provision paramount over a general provision. [Citation.]” (*Ratcliff Architects v. Vanir Construction Management, Inc.* (2001) 88 Cal.App.4th 595, 601-602.)

Contreras and Zavala argue that several facts support their argument that the contract should be interpreted to provide that their representation ended at the conclusion of the preliminary hearing. None is availing.

First, the attorneys note that paragraph 6 lists services the attorneys would not provide, including jury trial, and paragraph 7 provides that new payment arrangements must be made for any representation “after the municipal court” or for the excluded services. They concede that the clause referring to the municipal court was “inartfully drafted” in light of the consolidation of the courts, but they assert that “no attorney who practices criminal law could miss the meaning -- that representation ends after the preliminary hearing.” Putting aside the obvious fact that Martinez was not a criminal law attorney, provisions requiring additional payments for certain services do not establish that the attorneys’ representation would end after the preliminary hearing, particularly in light of the clear statement in paragraph 1 that “[t]he services of the attorneys shall be complete upon conclusion of the aforementioned criminal procedure,” i.e., the criminal case against Tlamasico. As the trial court aptly noted, “[t]he phrase ‘new arrangements

for payment’ does not mean the same thing as automatic termination, but rather that the client must pay an extra fee for representation for the services that had been excluded. . . . The meaning, at least from the ‘Client’ perspective is that representation continues and Client pays later” -- which was the arrangement provided in paragraph 2, i.e., Martinez was to pay \$20,000 at signing and would pay the remaining \$20,000 on a later date.

Second, the attorneys assert that the more specific provisions regarding what services were included and excluded should control over the more general provisions that the attorneys were retained to represent Tlamasico in “the criminal matter.” While it is true that “[a] specific provision relating to a particular subject will govern in respect to that subject, as against a general provision” (*San Francisco Taxpayers Assn. v. Board of Supervisors* (1992) 2 Cal.4th 571, 577), the two provisions at issue here relate to different subjects. Paragraph 1 specifically addresses when the attorneys’ representation will end -- i.e., “upon conclusion of the aforementioned criminal procedure” -- while paragraphs 6 and 7 address the services for which additional payment arrangements must be made. Thus, the latter paragraphs do not control over former.

Finally, the attorneys contend the conduct of the parties at and after the preliminary hearing supports their assertion that they were hired to represent Tlamasico only through the preliminary hearing. They note that they announced at the preliminary hearing that they were retained only for that hearing, they met with Martinez after the hearing and quoted her a price to take the case through trial, and neither Martinez nor Tlamasico said anything about their withdrawal from representation until the instant lawsuit was filed. While the attorneys’ conduct at and after the preliminary hearing may demonstrate *their* understanding of the contract, it says nothing about what Martinez understood, and therefore is irrelevant to show the *mutual* intent of the parties at the time of contracting.

(*Ratcliff Architects v. Vanir Construction Management, Inc.*, *supra*, 88 Cal.App.4th at p. 602 [contract must be ““interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting””]; see also *Titan Group, Inc. v. Sonoma Valley County Sanitation Dist.* (1985) 164 Cal.App.3d 1122, 1127 [“It is the objective intent, as evidenced by the words of the contract, rather than the subjective intent of one of the parties, that controls interpretation”].) Nor does the fact that, until the instant lawsuit was filed, Martinez did not challenge the attorneys’ post-preliminary hearing assertion about the termination of their representation demonstrate Martinez’s understanding of the contract at the time she entered into it. Martinez, a layperson, was told by the attorneys who drafted the contract that the contract provided for representation only through the preliminary hearing. Her failure to challenge the attorneys’ interpretation after the preliminary hearing is not evidence that she understood the contract to limit the attorneys’ representation to the preliminary hearing. In fact, she testified that she believed the attorneys would represent Tlamasico “all the way to the end,” and that she would not have paid them \$40,000 if they had told her they would represent him for only half of the case.

In short, we conclude that the contract obligated Contreras and Zavala to represent Tlamasico until the criminal case against him was concluded, albeit with an obligation on the part of Martinez to make arrangements for additional payment for the excluded services, and the attorneys breached the contract by immediately withdrawing from representation upon the conclusion of the preliminary hearing.

#### B. *Demand for Performance*

Contreras and Zavala contend that Martinez is precluded from recovering damages because she failed to demand that the attorneys complete their obligations under the contract. Citing to Witkin and cases cited therein, they argue that a

demand for performance under a contract is required except when the contract contains an unconditional promise to perform at a fixed time or if the contract calls for payment of money by the promisor. (See 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 760, p. 852, citing, inter alia, *Cox v. Delmas* (1893) 99 Cal. 104, 120.) But as Witkin and other cases observe, no demand for performance is necessary “[w]here demand would be futile, as where the defendant has previously refused to perform.” (1 Witkin, *supra*, Contracts, § 760, p. 852; see also *Cox v. Delmas*, *supra*, 99 Cal. at pp. 120-121 [“it is well settled that previous demand is not required when, as in the case at bar, it fully appears that it would have been unavailing, when it would not have changed the rights and relations of the parties, and would have been a mere useless and idle ceremony”].)

In this case, Martinez testified that when she met with Contreras and Zavala after the preliminary hearing, Contreras told her that they would not continue to represent Tlamasico unless she paid them an additional \$30,000 or \$35,000. In other words, the attorneys made clear to Martinez their position that they had no further obligation to perform under the contract. Under these circumstances, demand for performance would have been futile, and therefore was not required. (*Cox v. Delmas*, *supra*, 99 Cal. at pp. 120-121; see also *Moore v. Fellner* (1958) 50 Cal.2d 330, 341 [where attorney breached contract with client by demanding payment of money if client wanted attorney to handle an appeal, client was justified in accepting attorney’s conduct as a termination of relationship and was not bound to demand further performance].)

### C. *Damages*

As noted, in awarding damages, the trial court determined that Martinez retained Contreras and Zavala to provide three types of services, and that the attorneys withdrew without making any attempt to provide the third type, i.e.,

negotiating a plea agreement. The court then divided the fees Martinez paid into thirds, determined that two-thirds -- \$26,666 -- was adequate compensation for the services the attorneys actually provided, and awarded Martinez the remainder -- \$13,333 -- as damages for the attorneys' failure to provide the third type of service for which she contracted.

Contreras and Zavala challenge the damages award in two ways.

First, they argue that "[t]he proper measure of damages in a services contract where the Defendant has substantially, but not fully performed, is the cost in excess of the agreed price to complete the job." (Citing *Taylor v. N. P. C. R.R. Co.* (1880) 56 Cal. 317 (*Taylor*) and *Amerson v. Christman* (1968) 261 Cal.App.2d 811, 823.) They assert that, since an attorney was appointed to represent Tlamasico after they withdrew, and Martinez did not have to pay that attorney, the proper measure of damages was zero. But the fact that Martinez did not have to pay appointed counsel to represent Tlamasico does not establish that Martinez suffered no damages when Contreras and Zavala failed to complete the representation for which Martinez paid \$40,000. As the Supreme Court observed in one of the cases the attorneys cite in support of their argument, where party A pays party B to provide services and party B does not perform, party A's recovery for breach is not limited to the amount party A subsequently pays another to perform those services. Instead, party A is damaged in the amount that party paid party B for the services that were not performed. (*Taylor, supra*, 56 Cal. at pp. 318-319.) So it is here. Martinez was damaged in the amount she paid the attorneys to negotiate a plea agreement, which the trial court determined was one-third of the total amount paid under the contract.

Second, Contreras and Zavala argue the damages award is arbitrary and unsupported by the evidence because there was no evidence that the three services the trial court found Martinez contracted for were of equal value. While the

attorneys are correct that no such specific evidence was presented, that does not mean the award was arbitrary or without any support. The attorneys presented at trial an estimate of the hours they each spent on Tlamasico's case. The trial court thus had before it evidence from which it could, and did, determine the reasonable compensation for the services they provided, and awarded Martinez the balance of the amount she paid. We conclude the court's method for determining the damages was sound, and its award was supported by substantial evidence.

### **DISPOSITION**

The judgment is affirmed. Martinez shall recover her costs on appeal.

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WILLHITE, Acting P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.