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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

HAIGHT BROWN & BONESTEEL, LLP, Plaintiff, Cross-defendant and Respondent, v. ZAKI MANSOUR, et al., Defendants, Cross-complainants and Appellants.	B226428 (Los Angeles County Super. Ct. No. BC387845)

APPEAL from a judgment of the Superior Court of Los Angeles County. Daniel J. Buckley, Judge. Affirmed.

Silver & Freedman, Lane E. Bender for Defendants, Cross-Complainants and Appellants.

Haight Brown & Bonesteel, Morton G. Rosen, William E. Ireland; Fonda & Fraser, Michael A. O'Flaherty for Plaintiff, Cross-defendant and Respondent.

Zaki Mansour and Luzelba Lozano (husband and wife) appeal from the judgment entered against them and in favor of their former counsel Haight Brown & Bonesteel, on Haight Brown's complaint and appellants' cross-complaint. We affirm the judgment.

Background

In 2006, appellants were sued by a man named William Isaac, Mansour's former business partner in several real estate deals. Appellants hired a lawyer to represent them, but he soon suffered health problems, and in February 2007, Haight Brown substituted in. Haight Brown partner William Ireland was primarily responsible for the case.

The essential allegations of Isaac's complaint were that in December of 2003, Isaac lent Lozano $300,000, that Mansour agreed to repay that sum within one year, together with six percent interest, and that this agreement was evidenced in a promissory note. Appellants' defense was that the $300,000 which Lozano received from Isaac was not a loan, but was Isaac's payment of a debt he owed Mansour from the 1992 sale of a property on Witmer Street. Appellants' evidence was that the property was purchased by Mansour and Isaac in 1991, with an oral agreement that the property would be sold and the profits split. The property sold in 1992 for $453,000, but Isaac kept the entire sum. Mansour allowed this because Isaac said that he needed the money to pay 1991 and 1992 taxes.

According to Mansour, the 2003 promissory note was a phony, signed so that Isaac's wife would think that the transaction was a loan. According to Mansour, he and Isaac had done similar things in the past.

Isaac prevailed in the litigation. After our colleagues in Division Eight of this Court partially reversed on damages, finding a double recovery, he obtained a judgment of $369,940.

In March of 2008, Haight Brown, which was not appellants' counsel on the appeal, sued for unpaid fees. Appellants cross-complained. Their second amended cross-complaint brought causes of action for malpractice, breach of fiduciary duty, fraud,

negligent retention, violation of the Consumer Legal Remedies Act (Civ. Code, § 1750 et. seq.), and unfair competition (Bus. & Prof. Code, §§ 17200, 17500).[1] Factual allegations included legal malpractice and fraudulent billing.

A jury was empanelled, but after several days of trial, the trial court entered nonsuit on the cross-complaint and directed a verdict on the complaint. Judgment was entered in Haight Brown's favor in the amount of $163,668.

The complaint

Haight Brown's original complaint sought fees and costs of $172,538. At trial, it introduced into evidence its retainer agreement with appellants, and bills totaling $163,668 in fees and costs due. Haight Brown partner Ireland testified that this new total took into account two errors in the bills originally sent out, and the sum originally sought.

First, although the firm's form retainer agreement provided that associate time would be billed at $225 an hour, at Mansour's request, Haight Brown had agreed to charge $200. However, the file was erroneously set up for billing at the standard rate. Next, although the retainer agreement did not allow for the charge, many of the bills charged an additional sum "to recover expenses that are not otherwise itemized in the bill," calculated at 3.95 percent of attorney time.

Ireland testified that he learned of both problems during discovery in this case.

He also testified that he personally reviewed the bills, and testified concerning sums received from appellants. He testified that appellants never complained about the bills, but that when asked to pay the bills, suggested that they "work it out," and "do a deal." Ireland met with appellants, but they were willing to pay at most $60,000. Haight Brown could not accept that amount in satisfaction of its bill.

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[1] The statutory two causes of action were tried to the court, which found for Haight Brown. Appellants raise no contention concerning those causes of action, and we do not further discuss them.

Appellants cross-examined Ireland, but as the trial court noted on Haight Brown's motion for directed verdict, did not present expert evidence that any of the fees were excessive, or any evidence that, for instance, costs on the bill had not in fact been incurred or that time charged on the bill had not in fact been spent on the case.

Haight Brown's motion for directed verdict was made at the close of evidence, and sought a judgment in the amount of $163,668. Appellants opposed the motion on the ground that Haight Brown had not met its burden of proof, contending that Ireland's testimony was not enough.

On appeal, appellants argue that Haight Brown's evidence was inconsistent and that Haight Brown's "shifting claims" raised credibility issues which could only be decided by the jury. Appellants cite the evidence that at trial, Haight Brown sought a different amount than it had before suit was filed and in the complaint, the evidence that Haight Brown made other adjustments in the bill over time, and such things as Ireland's deposition testimony, read into the record at trial, that the retainer agreement did allow for the 3.95 percent charge.

Our review is de novo. We interpret the evidence in the light most favorable to the appellant, and affirm the judgment only if it is required as a matter of law. (*Baker v. American Horticulture Supply, Inc.* (2010) 186 Cal.App.4th 1059, 1072.) This is such a case. While Haight Brown's claims did change over time, its evidence at trial was unimpeached: it entered into a contract with appellants and performed services in accord with that contract. In the absence of any other evidence, it was entitled to payment in accord with contract, which is what it sought.

The Cross-complaint

Nonsuit

As we earlier noted, the cross-complaint included causes of action based on allegations of malpractice in the Isaac litigation, and allegations concerning Haight Brown's bills and billing practices. The court ordered a nonsuit on the cross-complaint,

on all causes of action. Appellants make many procedural arguments concerning the nonsuit, contending that the court acted sua sponte, without a motion from Haight Brown, and that when a motion was finally made, it was deficient because it did not identify the grounds for the motion. Appellants argue that these procedural problems require reversal, but they do not, for two reasons.

First, in the trial court, appellants did not object to the procedures the court employed. More importantly, with the exception of the causes of action related to malpractice, appellants make no claim of substantive error. Appellants have thus not shown that any error resulted in a miscarriage of justice, and without such a showing, no error is reversible error. (Cal. Const., art. VI, § 13; *Cucinella v. Weston Biscuit Co.* (1954) 42 Cal.2d 71, 83.)

The malpractice case

1. Background

Appellants' answer in the Isaac litigation included a defense of setoff (Code Civ. Proc., § 431.70), principally based on a document the parties refer to as the Witmer Agreement. However, no jury instruction on setoff was requested. Although the cross-complaint alleged numerous instances of malpractice, at trial and on appeal, appellants' malpractice case comes down to an allegation that Haight Brown failed to assert this setoff defense.

The Witmer Agreement was an exhibit at this trial. It was signed on May 7, 1999, and there was apparently no dispute that it was signed by both Isaac and Mansour. In it, Isaac and Mansour acknowledge that they had agreed to share in the expense of acquiring, and profit from selling, the property on Witmer Street; that Isaac had contributed $165,000 to acquire the property and Mansour $31,000 plus his time, and that Mansour had additionally delivered two gold coins and an antique watch to Isaac for safekeeping; that the Witmer Street property had sold for $453,734, and that Isaac had kept the entire proceeds of the sale and Mansour's coins and watch.

The parties also acknowledge that Isaac and Mansour had jointly contributed to the defense of a lawsuit titled *Tepper v. Isaac, Mansour, et al.*, which was concluded favorably; that Isaac was a plaintiff in litigation titled *Isaac v. City of Los Angeles*, in which he expected to recover $83,000; and that Isaac was a plaintiff in a class action titled *Camido v. City of Los Angeles*.

The agreement then provides that "Mansour and Isaac desire at this time to reduce and memorialize their previous understanding and agreements in writing." Isaac then agrees to reimburse Mansour for "his share of the Witmer sale," in the sum of $159,867; "to reimburse Mansour for the usage of the money generated from the sale of Witmer at %6 per annum an amount of $70,341 as of May 1, 1999," and to return the coins and watch or pay Mansour their appraised value.

Isaac also agreed to reimburse Mansour for sums Mansour had paid to Seyforth, Shaw (Mansour testified that he hired that firm in connection with *Isaac v. City of Los Angeles*), and to share equally with Mansour all sums he received, in excess of legal fees, in that case and in the Camido litigation. Finally, Isaac agreed to execute a power of attorney, appointing Mansour his attorney in fact for purposes of the pending litigation.

Mansour testified that the parties signed the agreement because Isaac's age and health did not permit him to participate in the pending litigation, so that a power of attorney was necessary. On cross-examination of Mansour, Haight Brown read Mansour's deposition testimony into the record, to the effect that Isaac prepared the Witmer Agreement, and did so after Mansour "asked him, you know, 'Bill, when are you going to pay me?'" Mansour also testified that he and Isaac did not have a dispute in May 1999, but that the Witmer Agreement was created to "memorialize a contract between [Isaac] and I, what it is about."

Later, appellants moved to reopen their case, and made an offer of proof, that if called Mansour would testify that he in fact undertook the prosecution of *Isaac v. City of Los Angeles* and the Camido case on Isaac's behalf, that in 2001 Isaac obtained $80,000 in *Isaac v. City of Los Angeles* but concealed that fact from Mansour, that Mansour

discovered the truth in 2002, and at that point he made a demand for payment. Counsel for appellants also represented to the court that the Camido case did not conclude until 2001.

2. The issue, the trial court ruling

The parties filed trial briefs on the characterization of the Witmer Agreement, with appellants contending that it was a contract, and Haight Brown that it was a demand for performance of the 1991 oral agreement to share the profits on the sale of the Witmer Street property.[2] The argument is essentially one about statutes of limitations. That is because a claim may be the basis of an equitable setoff under Code of Civil Procedure section 431.70[3] only if it exists simultaneously with the claim to be offset, and is not barred by the statute of limitations when the other claim comes into existence.

The parties agree that Isaac's claim against appellants came into existence in December 2003, with the promissory note. Thus, appellants' claim against Isaac can only be a valid setoff if it existed in December 2003 and was not barred by the statute of limitations at that time.

Under appellants' theory, the Witmer Agreement was a contract which did not specify a time for performance, so that the statute of limitations began to run on Mansour's 2002 demand for payment. (*Leonard v. Rose* (1967) 65 Cal.2d 589, 592–593 ["Where no time is specified for performance, a person who has promised to do an act in the future and who has the ability to perform does not violate his agreement unless and

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[2] Haight Brown also argued that if the document was a contract, the statute of limitations ran in May of 2003, four years after the document was signed, so that the claim was not in existence when Isaac's claim arose.

[3] The statute provides that "Where cross-demands for money have existed between persons at any point in time when neither demand was barred by the statute of limitations, and an action is thereafter commenced by one such person, the other person may assert in the answer the defense of payment in that the two demands are compensated so far as they equal each other, notwithstanding that an independent action asserting the person's claim would at the time of filing the answer be barred by the statute of limitations."

until a demand for performance is made and performance is refused, . . ."]; *Cochran v. Cochran* (1997) 56 Cal.App.4th 1115 [cause of action for breach of contract accrues at the time of breach].)

The trial court found that the Witmer Agreement was not a contract but was "a memo -- a listing of previous understandings and agreements," and in essence a demand for immediate performance on the 1992 oral agreement, so that the statute began to run on the date the Witmer Agreement was signed -- the date of demand. The court made its ruling after noting the language of the agreement which recited that it memorialized an earlier agreement, and noting the lack of consideration, and the trial testimony. As to appellants' offer of proof, the court also found that while appellants would be entitled to reopen, the testimony proffered by appellants would not be relevant.

3. Discussion

Appellants' argument is that with the provisions concerning the pending litigation, the Witmer Agreement created new, bilateral obligations, in that Isaac was required to share his recovery in the pending litigation, and Mansour to undertake to prosecute those cases. They further argue that the final amount due to Mansour could not be determined until the pending litigation concluded. Thus, appellants conclude, the agreement was a contract.

We independently review the ruling on a motion for nonsuit, guided by the same rules that govern the trial court. We interpret the evidence in favor of the plaintiff and sustain the judgment only if it is required as a matter of law. (*Pinero v. Specialty Restaurants Corp*. (2005) 130 Cal.App.4th 635, 639.)

Applying those rules, we come to the same conclusion as did the trial court. The Witmer Agreement itself states that it is not a new contract, but that it memorializes the parties' earlier agreement. To the extent that the agreement is ambiguous, Mansour's testimony confirms this: the agreement was prepared because he made a demand for payment, and memorialized his earlier contract with Isaac concerning the Witmer Street property.

Further, we see no new obligations which could have led to a setoff in the Isaac litigation. Appellants do not seem to argue that Mansour's promise to undertake the prosecution of the pending litigation constituted consideration for Isaac's promise to pay Mansour his share of the Witmer Street proceeds, and indeed, that could not be the case. It is clear that the consideration for Isaac's promise to share the proceeds was Mansour's original contribution to the purchase and sale.

It is certainly true that the Witmer Agreement obligates Mansour to prosecute *Isaac v. City of Los Angeles*, and obligates Isaac to reimburse Mansour for fees which Mansour paid in the litigation, and to share any proceeds in excess of fees. However, Mansour was also a plaintiff in *Isaac v. City of Los Angeles*, and the case concerned a tax which the City assessed on the sale of the Witmer Street property. The case thus determined the amount of profit the two would realize on the Witmer Street sale, and added nothing new to the parties' rights and obligations.

The record does not explain *Camido v. City of Los Angeles*. We see nothing concerning this case in appellants' evidence or offer of proof, except for the offer of proof that Mansour expended fees and costs prosecuting the claim and the representation that the case was not concluded until 2001. We do not know what the case concerned, how much Mansour spent, and whether there was any recovery. We find in the evidence nothing which would establish that any meaningful setoff was available to Mansour in the Isaac litigation, based on Mansour's prosecution of the Camido case or any recovery in that case.

As appellants acknowledge, the trial court finding that the Witmer Agreement was not a contract means that Mansour did not have a cause of action for breach of contract which existed simultaneously with Isaac's claim. That means that no setoff defense was available, and it cannot have been malpractice to fail to assert such a defense.

We thus need not and do not consider appellants' contentions concerning the trial court ruling excluding their expert witness.

Disposition

The judgment is affirmed. Respondent to recover costs on appeal.

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ARMSTRONG, J.

I concur:

TURNER, P. J.

MOSK, J., Dissenting

I respectfully dissent.

I do not agree that a nonsuit should have been granted as to cross claim. The trial court's decision is predicated on the so-called Witmer Agreement being a demand and not a contract. Thus, if that document was a demand, the statute of limitations would have barred any setoff. It is defendants' failure to assert a set off in the underlying case that is the basis of the malpractice claim. If the document is an agreement, then its alleged breach could be the basis of such a setoff.

The Witmer Agreement signed by both parties does not look to me like a demand as opposed to an agreement. It is labeled as an agreement. It calls for the sharing of monies arising out of expected monies from a lawsuit and the appointment of Mansour as attorney-in-fact in handling certain litigation in the future. The agreement refers to a previous oral agreement to share in the expenses and profit from a joint venture in connection with real property and then specifies the distribution. There is no time period specified for the payment of any consideration in the agreement. The document is a bilateral agreement in which both parties undertook new obligations. As has been said, if it "looks like a duck, walks like a duck and quacks like a duck, it is likely to be a duck." (*In re Deborah C.* (1981) 30 Cal.3d 125, 141 (conc. opn.).) Here, the Witmer Agreement certainly looks like an agreement and not a demand.

Because a nonsuit precludes a plaintiff from submitting to the jury, nonsuits are only to be granted "under very limited circumstances." (*Carson v. Facilities Development Co.* (1984) 36 Cal.3d 830, 838.) Here we deal with the interpretation of an agreement that seems clear on its face—a legal issue we decide de novo. (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865.) Haight Brown does not set forth in its brief sufficient facts relating to this issue. But even if there is parol evidence, we must indulge "every legitimate inference which may be drawn from the evidence in plaintiff[s] favor. (*Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 291.) "We will not sustain the judgment '"unless interpreting the evidence most favorably to plaintiff's case

and most strongly against the defendant . . . is required as a matter of law."' [Citations.]" (*Ibid.*)

After the nonsuit, plaintiff sought to reopen the evidence to provide further testimony concerning the nature and ultimate breach of the Witmer Agreement. At the very least, he should have been given that opportunity. (See *R&B Auto Center, Inc. v. Farmers Group, Inc.* (2006) 140 Cal.App.4th 327, 240.)

I express no view on the merits, other than with respect to the nonsuit. I would reverse as to the nonsuit.

MOSK, J.