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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

FRANK ULTIMO, Plaintiff and Appellant, v. CITY LIGHTS FINANCIAL EXPRESS INC., et al. Defendants and Respondents.	B270329 (Los Angeles County Super. Ct. Nos. BC512719, BC542849)

APPEAL from an order of the Superior Court of Los Angeles County, Dalila Lyons, Judge. Reversed.

Burkhalter Kessler Clement & George, Daniel J. Kessler and Amber M. Sanchez, for Plaintiff and Appellant.

Law Offices of Martin D. Gross and Martin D. Gross, for Defendants and Respondents.

Frank Ultimo filed a breach of contract action alleging City Lights Financial Express had failed to pay him $35,000 in real estate sales commissions. After two years of litigation, the parties settled Ultimo's claims for $25,000. The parties further agreed that Ultimo was the prevailing party, and was entitled to file a motion for attorney's fees pursuant to Civil Code section 1717.

Ultimo subsequently filed a motion seeking approximately $260,000 in fees and costs. The trial court awarded Ultimo only $20,000, concluding that the amount of his request was unreasonable given the amount that had been involved in the underlying litigation. Ultimo appeals, asserting that the trial court abused its discretion in setting the amount of the fee award. We reverse.

FACTUAL BACKGROUND

A. Summary of Events Prior to the Filing of Ultimo's Complaint

In 2010, Frank Ultimo entered into an agreement to serve as a real estate agent for City Lights Financial Express. Under the parties' written contract, City Lights was to pay Ultimo 80 percent of the "net fees" it received from his sales. The contract contained a provision entitling the prevailing party in "any action . . . to enforce . . . the terms of th[e] agreement . . . to reasonable attorney's fees." John Miller and Joseph Miller, City Lights's chief operating officer and chief executive officer, signed the agreement on behalf of the company. Ultimo also signed the contract, adding the words "DBA Team Ultimo Real Estate & Development Inc." immediately beneath his signature.

Shortly after the parties signed the agreement, City Lights transitioned its real estate brokerage services to a related entity know as "City Lights RE/MAX Estates." Ultimo did not receive a new commission agreement from City Lights RE/MAX, and continued to perform his services under the parties' original agreement.

Between 2011 and 2013, Ultimo sold four properties on behalf of City Lights that generated approximately $53,000 in fees. In early 2013, Ultimo requested that City Lights pay him $34,713 in commissions for the sales. On April 17, 2013, Joseph Miller sent a letter acknowledging Ultimo had earned $34,713 in commissions for the transactions. Miller further contended, however, that Ultimo owed City Lights $16,875 for various costs, including "desk fees, insurance, and transaction coordinator costs." Miller informed Ultimo the company would pay him the remaining amount of $17,848 if he agreed to sign a claim release. Ultimo did not believe he was required to pay the costs described in Miller's letter because they had not been disclosed in the parties' written agreement, and because he had always paid for his own insurance and office space.

On April 23, 2013, City Lights's attorney Don Lanson sent Ultimo an email stating that he had identified "numerous procedural/ethical problems as to any claim [Ultimo] may be able to assert." Lanson contended that based on his review of the case, it appeared Ultimo had engaged in various forms of conduct that violated the Department of Real Estate's (DRE) rules and regulations, which included "improperly inserting" the words "DBA Team Ultimo" into the signature page of the agreement. Lanson further asserted that he was investigating whether Ultimo was "liabl[e] for interference with contract and other

applicable torts (not to mention reimbursements of attorneys' fees and costs)." Lanson warned that "[s]uch liability could be hundreds of thousands of dollars," and "urge[d]" Ultimo to "investigate [whether he had] insurance to cover these claims."

After receiving Lanson's email, Ultimo retained Daniel Kessler and Kessler's firm, Burkhalter Kessler Clement & George LLP, to represent him in the matter. Kessler contacted Lanson to discuss the merits of the case, and explore settlement. Following their conversation, Lanson sent Kessler an email requesting that he present all legal arguments in writing. The email also stated that City Lights did not believe Ultimo was "entitled to a dime," and advised Kessler to "prepare[] a very detailed CYA letter to your client addressing all of the problems he will have in succeeding in any claim so that he can't come after you later on for malpractice."

In a follow-up letter, Kessler summarized Ultimo's legal positions in writing, and offered to settle the matter for $33,512. In response, Lanson provided a three-page letter arguing why City Lights did not believe Ultimo was entitled to any recovery. First, Lanson contended the agreement between Ultimo and City Lights was not "binding" and constituted a "nullity" because Ultimo had handwritten "DBA as Team Ultimo" next to his signature. Second, Lanson asserted Ultimo had engaged in various types of misconduct with respect to the real estate sales, which included "closing transactions without advising his responsible broker"; failing to "provide the underlying files and documents"; and providing "credits without the broker's authority." Lanson claimed these "rogue" activities constituted a breach of "any agreement that may have existed" between the parties. Third, Lanson argued City Lights was entitled to recover

the costs described in Joseph Miller's April letter. Although Lanson acknowledged the parties' written agreement did not address these costs, he asserted that "[Ultimo] would be subject to an oral or implied agreement which would incorporate our client[']s normal pattern and practice of activity. . . In this regard it is standard operating procedure for brokers to charge such amount to their agents."

Finally, regarding settlement, Lanson informed Kessler that "considering all of [Ultimo's] misconduct . . ., [City Lights] would not expect a trier of fact to award more than a few thousand dollars, and again as there is arguably no written contract there would be no basis of reimbursement of attorneys' fees." Lanson's letter did not provide a counter offer to Ultimo's settlement proposal.

Based on the tone and content of Lanson's letter, Kessler concluded the parties were unlikely to resolve the matter without filing a complaint.

B. ***Summary of the Underlying Litigation***

1. Ultimo's complaint and initial settlement discussions

On June 19, 2013, Ultimo filed a complaint against City Lights alleging claims for breach of contract, quantum merit, fraud and negligent misrepresentation. All of Ultimo's claims were predicated on City Lights's refusal to pay him $34,715 in commissions, and its demand that he pay costs which were not disclosed in the written agreement.

Immediately after the complaint was filed, Lanson sent Kessler an email stating: "As your client has no right of reimbursement of fees, and considering the costs of adjudication will exceed the amount of the claim, please let me know if your

client has a reasonable proposal." Kessler declined to provide an offer, explaining that City Lights had never responded to Ultimo's initial settlement offer of $33,512. Kessler also reminded Lanson that the written agreement did in fact contain an attorney's fees provision, and requested that any settlement offer from City Lights "reflect that additional cost."

In response, Lanson offered a "cost of defense" settlement of $5,000. Lanson reiterated his belief that the parties' contract was unenforceable, and also asserted that Ultimo was liable to City Lights for "embezzlement, conversion and interference with contract." Lanson further informed Kessler that "once I have to start working on this matter in earnest, I have a feeling there will be no settlement under any circumstances, and indeed I will be instructed to take any and all action necessary to protect and preserve our client's rights and remedies, including proceeding with a cross claim."

Kessler rejected the $5,000 offer, noting that Lanson had never provided any legal authority in support of his claim that the contract was unenforceable. Kessler also noted that City Lights had previously sent Ultimo a letter acknowledging that the company owed him at least $17,841 in unpaid commissions, more than three times the amount of its current settlement offer. Kessler informed Lanson that Ultimo was willing to settle for $40,000, which reflected the additional attorney's fees he had been forced to incur since his initial settlement offer.

On July 24, 2013, Lanson made a counter offer of $20,000, which he described as City Lights's "final" offer. Lanson stated that any further litigation of the matter would involve "extensive discovery," and "various litigation maneuvering." Lanson maintained that the contract between the parties was invalid,

thereby invalidating any right to attorney's fees. Kessler provided a counter offer of $37,000.

Lanson rejected the offer, and informed Kessler that City Lights intended to "object to the complaint," and possibly proceed with a cross-complaint. Kessler requested that if City Lights intended to file a demurrer, Lanson should contact him first to investigate whether he could remedy any perceived defects in the complaint without having to brief the motion. Lanson filed the demurrer without further contact. The court sustained the demurrer with leave to amend.

Following the demurrer hearing, Amber Sanchez, an associate at Kessler's firm, contacted Stuart Cohen (an attorney at Lanson's firm) to revisit whether City Lights intended to respond to Ultimo's last settlement proposal of $37,000. Cohen declined to make a counter offer, requesting that Ultimo make another lower offer first. Cohen also warned Sanchez that Ultimo's misconduct could "jeopardize" his real estate license. Although Sanchez asserted that City Lights's threat to file an administrative complaint was unethical, the company elected to move forward with the complaint.

On October 28, 2013, Ultimo filed a first amended complaint. City Lights filed a second demurrer, which the court again sustained with leave to amend. On January 9, 2014, Ultimo filed a second amended complaint that contained the same claims set forth in the original complaint. City Lights filed a third demurrer.

While the third demurrer was pending, Lanson contacted Kessler to inquire whether Ultimo was willing to make another settlement offer. Lanson instructed that any such offer should reflect that the contract was not enforceable, thereby negating

any basis for recovery of attorney's fees. In a response email, Kessler emphasized that City Lights had still failed to provide any legal authority in support of its assertion that the contract was unenforceable. Kessler further explained that Ultimo had been forced to incur significant fees in opposing the demurrers and responding to discovery, and offered a settlement figure of $70,000. Lanson rejected the offer without providing a counter proposal.

In March of 2014, the court overruled the demurrer to Ultimo's second amended complaint. Shortly thereafter, City Lights RE/MAX filed a separate civil action against Ultimo regarding the same real estate transactions at issue in Ultimo's complaint. After filing the action, Lanson sent Kessler an email stating that Ultimo would "never get reimbursed a penny of the [attorney's] fees that he has incurred as there is no binding agreement . . . and indeed he faces a claim for reimbursement of tens of thousands of dollars. . . . This entire matter will ultimately be a disaster for your client. . . . At this point, . . . a resolution would require a payment of some amount [from] your client."

2. Summary of discovery

Several weeks after Ultimo had filed his original complaint (which occurred in June of 2013), City Lights served 43 requests for production and 164 special interrogatories. It subsequently filed 97 additional requests for production, and 203 interrogatories. In March of 2014, Ultimo served his own discovery, which included requests for admission, interrogatories and demands for production. City Lights filed a uniform objection to every request for production, and 37 of the 38 requests for admission. Ultimo challenged the adequacy of City

Lights's disclosures, which required the parties to meet and confer on the issue. City Lights did not provide any substantive responses to Ultimo's discovery requests until July of 2014.

In April of 2014, Ultimo noticed the depositions of several City Lights principals. After City Lights filed the administrative complaint against Ultimo, it requested a delay of the depositions, contending it would be inappropriate to conduct the depositions in light of the ongoing administrative action. After further scheduling delays, Lanson sent Kessler an email asserting that the depositions would cost more than Ultimo could hope to recover, and inquired whether there was "a cost of defense amount that [Ultimo] would accept." In response, Kessler stated that unless City Lights was willing to make a "good faith settlement offer," he believed any further negotiations would "likely be a waste of time." Kessler proposed that the parties pursue mediation in light of their clients' divergent positions, and offered to "push back the depositions."

In response, Lanson informed Kessler that City Lights would not be "strong arm[ed]" into changing its position through mediation, and asked that Kessler not raise the issue of mediation again.

3. City Lights's withdrawn settlement and replacement of counsel

On January 21, 2015, City Lights produced its first employee for deposition. Several hours into the witness's testimony, City Lights's president John Miller interrupted the deposition and stated that the company intended to "settle the matter right now." Miller directed the witness to "go home," and requested the parties go "off the record." During an off-the-record discussion, the parties agreed to settle the matter for $100,000.

Kessler then came back on the record, and announced the parties had agreed in principal to a settlement. The next day Lanson sent Kessler a draft of the settlement agreement. Over the next several days, Kessler and Lanson exchanged drafts of the settlement. On January 30, however, Lanson informed Kessler that City Lights was "no longer interested in an amicable resolution," withdrew the settlement and requested that the parties move forward with depositions.

On February 25, 2015, Ultimo provided an offer to compromise under Civil Code of Procedure Section 998 in the amount of $26,999, plus costs and reasonable attorney's fees as determined by the court. City Light's declined the offer.

In June of 2015, City Lights retained Martin Gross to replace Lanson as its attorney. Gross immediately agreed to attend a mediation, and the parties reached a settlement. Under the terms of the settlement, City Lights agreed to pay Ultimo $25,000 for his claims, and dismiss the administrative complaint it had initiated with the DRE and its civil suit. The settlement further provided that Ultimo was the prevailing party in the action, and was authorized to bring a motion for attorney's fees pursuant to Civil Code section 1717.

*C. **Ultimo's Motion for Attorney's Fees***

1. Summary of Ultimo's initial motion

On August 11, 2015, Ultimo filed a motion seeking $251,846.52 in attorney's fees and costs. Ultimo, Kessler and Sanchez each provided a declaration in support of the motion that contained a history of the litigation, and a description of their interactions with the defendant and opposing counsel. Each declaration also provided copies of numerous emails and other

correspondence verifying their accounts of what had occurred. Kessler's declaration contained a lodestar calculation, explaining that his firm had billed 633.06 hours at an average hourly rate of $355.70. He also listed the qualifications and billing rate of each person who had worked on the matter, and provided verified billing records.

Ultimo's memorandum in support of the motion argued that his fee request was reasonable given the manner in which City Lights had elected to litigate the case. Specifically, Ultimo argued the evidence showed his attorneys had repeatedly "attempted to settle the case," while City Lights had "engaged in a pattern of unmeritorious intimidation specifically designed to force [him] to incur a debilitating amount of fees." Ultimo noted that during the two-year litigation, City Lights had filed three demurrers that did not result in the dismissal of any of his claims, served extensive discovery requests and filed multiple actions against him. In addition, City Lights had withdrawn from a $100,000 settlement agreement, forcing the parties to proceed with additional discovery. Ultimo also argued that Kessler and Sanchez's billing rates were at or below the average rate of attorneys with their respective skill level practicing in Southern California

City Lights opposed the fee request, arguing that the requested amount was unreasonable given that Ultimo had only sought $35,000 in damages on his claims. City Lights contended that throughout the litigation, Ultimo's counsel had "aggressively maintained" his "unreasonable position" that the written agreement Ultimo signed with City Lights was enforceable. City Lights further asserted the agreement was "cancelled" when City Lights created City Lights RE/MAX, and that Ultimo was

thereafter operating under the "RE/MAX contract." City Lights's opposition provided no legal argument or evidentiary citation in support of its assertions that the original agreement was unenforceable, or that Ultimo had entered into a new agreement with City Lights RE/MAX.[1]

City Lights's opposition acknowledged, however, that its former attorney Don Lanson was partially responsible for the manner in which the case had been litigated, explaining that "both [parties'] law firms [sic] interest in their client's well-being was the furthest thing from their minds." City Lights president Joseph Miller provided a declaration asserting that Kessler and Lanson had both failed to "perform their duties to the best of their ability . . . by allowing this case to drag on for two and a half years." Miller further asserted that after City had hired Gross to replace Lanson, the company became "privy to email chains . . . demonstrating how both attorneys abused their clients, . . . and how unable they were to come to any sort of agreement let alone communicate effectively." According to Miller, "Ultimo was abused by his attorney as [City Lights] was equally abused by [its] former attorney, Don Lanson." Miller believed "each side should file complaints against their attorneys for such egregious conduct," and that each party should bear the costs of its attorney's misconduct.

The motion was heard by Honorable Dalila Lyons, who had not presided over any of the preceding litigation. At the hearing, the court inquired why the parties had not settled the fees at the

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[1] City Lights also asserted, without legal or evidentiary citation, that the parties' discovery had revealed Ultimo engaged in "unethical breaches," and was "as ethically reprehensible a real estate sale agent as they come."

mediation. Ultimo's counsel explained that while the parties did discuss the issue of fees during the mediation, they had agreed that the best solution was to settle the merits of the case, and allow the court to decide the amount of fees. The trial court then asked City Lights attorney Martin Gross what amount of fees he believed would be reasonable. Gross recommended $7,500. The court denied the motion without prejudice, instructing the parties to attempt to settle the matter, and "file another motion" if they were unable to do so. The court further instructed that it believed Ultimo's current request was "excessive and unreasonable. . . . I carefully looked at all the factors that are required under 1717 and . . . as requested, I think the fees are unreasonable."

In its opposition to the renewed motion, City Lights argued that $20,000 would be a reasonable fee given the amount that had been in dispute in the case. City Lights did not provide any analysis regarding how it had arrived at the figure.

Prior to the hearing, the court issued a tentative ruling granting Ultimo's motion for attorney's fees in the amount of $20,000. After listing the factors courts may consider in determining whether to increase or decrease the lodestar amount, the court explained the basis for its ruling: "This litigation was not particularly complicated, and neither party argues it was. Plaintiff had an agreement for real estate commissions with Defendant and alleged that Defendant failed to pay the owed commission. Plaintiff admits the amount in dispute in the matter was approximately $35,000. Plaintiff cannot settle for $25,000 and attempt to obtain a backdoor windfall through his request for attorney's fees and costs. Plaintiff's hours are extremely excessive, such as billing for 43.39 hours on the

original motion for attorney's fees in the amount of $14,970, and now seeks an increase in $10,590.59 from the [original] motion. This motion is not complicated and such a request for the instant motion is wholly unjustified. Plaintiff cannot use the requests for costs and attorney's fees as a backdoor to enhance his recovery. The Court finds defendant's offer of $20,000 to be reasonable for a case that involved $35,000 and settled for $25,000."

At the hearing, Ultimo's counsel argued that the court's tentative ruling did not appear to include any lodestar analysis, and asserted that City Lights's recommendation of a $20,000 fee award was wholly arbitrary, with no connection to the "actual reasonable time spent." In response, the court explained that the amount of Ultimo's fee request was "unreasonable" in comparison to the amount in dispute, and would result in a "backdoor windfall." Ultimo's counsel, however, argued that the evidence offered in support of the motion showed City Lights had chosen to pursue an aggressive defense strategy that forced the plaintiff to incur more costs than would normally be expected in such a case.

The trial court elected to adopt its tentative order, and stated that it had considered "the factors under 1717. I looked at the nature of the litigation, the difficulty, the amount of money involved in the litigation. And based on all those circumstances . . . determined that this is a reasonable amount."[2]

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[2] In his statement of appealability (see Cal. Rules of Court, rule 8.204, subd. (a)(2)(B)), Ultimo asserts that the trial court's attorney's fees order is appealable as an "order made after judgment" (Code of Civil Proc., § 904.1, subd. (a)(2)). Although "postjudgment orders granting or denying motions for attorney's fees are deemed to be appealable" (*Apex LLC v. Korusfood.com* (2013) 222 Cal.App.4th 1010, 1015 (*Apex*)), there is no indication in the record that the trial court ever entered a judgment.

DISCUSSION

A. Summary of Applicable Legal Principles

"Civil Code section 1717 (§ 1717) provides that reasonable attorney fees authorized by contract shall be awarded to the prevailing party as 'fixed by the court.' The trial court has broad discretion to determine the amount of a reasonable fee, and the award of such fees is governed by equitable principles.

Instead, the hearing transcript shows that the trial court informed the parties it was "dismiss[ing] the case without prejudice," but intended to retain jurisdiction to enforce the settlement. Generally, a "dismissal without prejudice is not a final judgment." (*Areso v. CarMax, Inc.* (2011) 195 Cal.App.4th 996, 1001; see also *H.D. Arnaiz, Ltd. v. County of San Joaquin* (2002) 96 Cal.App.4th 1357, 1364-1365.)

We nonetheless conclude the order is directly appealable under the collateral order doctrine. (See *Apex, supra,* 222 Cal.App.4th at p. 1015 ["order granting . . . attorney fees directly appealable . . . under the collateral order doctrine"]; see also *In re Marriage of Skelley* (1976) 18 Cal.3d 365, 368 [summarizing collateral order doctrine].) "To qualify as appealable under the collateral order doctrine, the interlocutory order must (1) be a final determination (2) of a collateral matter (3) and direct the payment of money or performance of an act." (*Apex, supra,* 222 Cal.App.4th at p. 1016.) The trial court's attorney's fees order qualifies as a "final determination" because "'further judicial action is not required on the matters dealt with by the order.' [Citation.]" (*Ibid.*) The issue of attorney's fees is a "collateral matter" because it is "'distinct and severable' from the subject matter of the underlying litigation" (*ibid.*), which involved Ultimo's entitlement to commission payments. "Finally, by awarding attorney fees, . . . the order directs the payment of money." (*Ibid.*)

[Citation.]" (*EnPalm, LLC v. Teitler Family Trust* (2008) 162 Cal.App.4th 770, 774 (*EnPalm*).)

When determining a fee award, the trial court must first determine the lodestar figure, which it "'"tabulates . . . by multiplying the number of hours reasonably expended by the reasonable hourly rate prevailing in the community for similar work. [Citations.]"' [Citation.]" (*569 East County Boulevard LLC v. Backcountry Against the Dump, Inc.* (2016) 6 Cal.App.5th 426, 432; see also *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1294 (*Maria P.*) ["the trial court [must] first determine a touchstone (or lodestar) figure based on the time spent and reasonable hourly compensation for each attorney involved in the case"]; *EnPalm, supra,* 162 Cal.App.4th at p. 774 ["the first step involves the lodestar figure – a calculation based on the number of hours reasonably expended multiplied by the lawyer's hourly rate"].)

"The lodestar figure may then be adjusted [upward or downward], based on consideration of factors specific to the case, in order to fix the fee at the fair market value for the legal services provided." (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095 (*PLCM*); see also *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1134 (*Ketchum*) ["the lodestar figure may be increased or decreased depending on a variety of factors"].) "The major factors the trial court must consider in determining an attorneys' fee award include: the nature of the litigation and its difficulty; the amount of money involved in the litigation; the skill required and employed in handling the litigation; the attention given to the case; the attorney's success, learning, age and experience in the particular type of work demanded; the intricacy and importance of the litigation; the labor and necessity for skilled legal training and ability in trying the case; and . . .

the amount of time spent on the case." (*In re Tobacco Cases I* (2013) 216 Cal.App.4th 570, 587.) The court may also consider "other circumstances in the case," including whether "a party . . . engaged in litigation conduct that . . . caused the prevailing party to spend more time on a case than was otherwise reasonably necessary." (*EnPalm*, *supra*, 162 Cal.App.4th at p. 774, 777; see also *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 582-583 ["fees . . . may be [adjusted] when a defendant's opposition . . . creates extraordinary difficulties"]; *In re Marriage of Falcone and Fyke* (2012) 203 Cal.App.4th 964, 975 [court may properly consider "the other party's trial tactics"].) "[A]bsent circumstances rendering the award unjust, an attorney fee award should ordinarily include compensation for all the hours reasonably spent, including those relating solely to the fee." (*Ketchum*, *supra*, 24 Cal.4th at p. 1133.)

A trial court is not required to provide a statement of decision to explain how it calculated an award of attorney's fees. (See *Maria P., supra,* 43 Cal.3d at p. 1294; *Ketchum, supra*, 24 Cal.4th at p. 1140.) The award must, however, "be supported by a record showing, in formal findings or otherwise, that it was calculated from a base "compilation of the time spent and reasonable hourly compensation of each attorney" [citations.] In other words, the record need only show that attorney fees were awarded according to the 'lodestar' or 'touchstone' approach." (*Rebney v. Wells Fargo Bank* (1991) 232 Cal.App.3d 1344, 1348-1349; see also *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1810 [reversal is proper when the record contains no information "showing that fees were actually awarded using the lodestar method"].) "[W]here the award corresponds to either the lodestar amount, some multiple of that amount, or some fraction

requested by one of the parties, the court's rationale for its award may be apparent on the face of the record, without express acknowledgment by the court of the lodestar amount or method." (*Gorman v. Tassajara Development Corp.* (2009) 178 Cal.App.4th 44, 101.)

"The standard of review on issues of attorney's fees and costs is abuse of discretion." (*Finney v. Gomez* (2003) 111 Cal.App.4th 527, 545.) ""'The 'experienced trial judge is the best judge of the value of professional services . . ., and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong'" —meaning that it abused its discretion.' [Citation.] "'The scope of discretion always resides in the particular law being applied, i.e., in the 'legal principles governing the subject of [the] action.' [Citation.] Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an 'abuse' of discretion.'" [Citation.]" (*Holguin v. DISH Network LLC* (2014) 229 Cal.App.4th 1310, 1329; see also *Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 25.) In the attorney's fees context, "'the exercise of . . . discretion must be based on the lodestar adjustment method.'" [Citation.]" (*Ketchum, supra,* 24 Cal.4th at p. 1134.)

"When the record is unclear whether the trial court's award of attorney fees is consistent with the applicable legal principles, we may reverse the award and remand the case to the trial court for further consideration and amplification of its reasoning." (*Graciano v. Robinson Ford Sales, Inc.* (2006) 144 Cal.App.4th 140, 149.)

B. The Record Contains No Indication that the Court Conducted a Lodestar Analysis

Ultimo argues the trial court abused its discretion because it failed to utilize the lodestar method in determining the fee award. According to Ultimo, the record shows that rather than calculating the lodestar amount, and then adjusting that amount upward or downward based on the relevant circumstances of the case, the court chose a figure based solely on the amount at issue in the dispute. We agree with Ultimo in part, concluding that the record contains no indication that the trial court utilized the lodestar approach in calculating its award.

Ultimo's renewed motion and supporting materials provided a detailed lodestar calculation, explaining that his attorneys had billed 667.93 hours on the matter at an average hourly rate of $357.70, resulting in a total fee of $238,917.70. Ultimo's counsel submitted verified billing records in support of the calculation, and a summary of the qualifications and billing rates of each attorney who had worked on the matter.

City Lights's opposition, in contrast, contained no lodestar analysis. The opposition did not provide any evidence or argument that the requested hourly rate of $357.70 was unreasonable,[3] nor did it provide any analysis explaining what

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[3] Although City Lights's opposition did assert that "the combined hourly rate exceeds the community standards for such a case," it failed to cite any evidentiary or legal authority in support of this conclusory statement, and failed to provide any analysis as to what rate would have been reasonable. (See *Nielsen v. Gibson* (2009) 178 Cal.App.4th 318, 324 [parties are required to "support arguments with appropriate citations to the

number of hours would have been reasonable. Instead, the opposition focused almost exclusively on the amount involved in the litigation, contending that the size of the fee request was unreasonable given that Ultimo had only sought to recover $35,000 on his claims.[4] In the concluding paragraph of its opposition, City Lights "recommend[ed] that a fee award of $20,000 [wa]s appropriate." City Lights's briefing contains no indication that the figure of $20,000 was based on a specific fraction of Ultimo's lodestar calculation, or on City Lights's view of how much time his attorneys should have spent on the case. Instead, the figure appears tethered solely to the amount in controversy ($35,000) and the amount recovered ($25,000).

The trial court's order likewise contains no indication that it performed a lodestar calculation. The court's written ruling does not address whether the hourly fee Ultimo used in his lodestar calculation was reasonable, nor does it state what number of hours the court believed would have been reasonable to litigate the case. Instead, the court's analysis lists the factors that are to be applied after the lodestar has been calculated, and

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material facts in the record. If [they] fail[] to do so, the argument is forfeited"].)

[4] City Lights's opposition did raise some arguments regarding specific parts of the fee request, contending, among other things, that the firm spent too much time preparing the motion for attorney's fees, that the billing records contained excessive redactions and that the use of multiple attorneys on the case was unnecessary. The opposition did not, however, provide any argument regarding what amount of time should have been spent on the case in light of these perceived defects, or what hourly rate would have been reasonable.

relies on two of those factors – the complexity of the case and the amount of money involved – to conclude that Ultimo's fee request would result in a "backdoor windfall." The ruling then adopts City Lights's recommended fee award, explaining that "Defendant's [proposal] of $20,000 [is] reasonable for a case that involved $35,000 and settled for $25,000."

As noted above, however, opposing counsel's proposed figure of $20,000 was not based on any lodestar calculation, but rather on the amount in controversy in the underlying litigation.[5] Although the amount in dispute "'is an important factor in determining an award of attorneys' fees, . . . it is [not] a controlling factor.' [Citation.]" (See *Boyd v. Oscar Fisher Co.* (1989) 210 Cal.App.3d 368, 381 [citing and quoting *Niederer v. Ferreira* (1987) 189 Cal.App.3d 1485, 1507].) The fact that the amount involved in the litigation was low in comparison to the fee request did not relieve the court from performing a lodestar analysis. (See *Ketchum*, *supra*, 24 Cal.4th at p. 1134 ["the determination of the lodestar figures is . . . fundamental to arriving at an objectively reasonable amount"].)[6]

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[5] At oral argument, Ultimo raised these issues with the court, asserting that the tentative ruling appeared to lack any form of lodestar analysis. The court, however, reiterated that the amount Ultimo had sought would result in a "windfall," and elected to adopt its tentative without modification.

[6] The trial court's ruling did find that the amount of time Ultimo's counsel had billed for one particular task, preparing the motion for attorney's fees (43.39 hours), was excessive. The court did not explain, however, why excessive billing on one task warranted a 90 percent departure from Ultimo's lodestar calculation.

C. The Court Failed to Consider Opposing Counsel's Litigation Tactics in Assessing the Reasonableness of the Fee Request

The court's assessment of Ultimo's fee request also does not appear to have considered whether opposing counsel's litigation tactics forced his attorneys to expend more time and resources than would normally be expected in a case of this nature. (*Serrano v. Unruh* (1982) 32 Cal.3d 621, 638 [a party "cannot litigate tenaciously and then be heard to complain about the time necessarily spent by the plaintiff in response"]; *EnPalm, supra,* 162 Cal.App.4th at p. 777 [opposing party's litigation tactics is an appropriate factor to consider in determining a fee award].) As set forth more fully in the factual summary above, Ultimo provided evidence showing that prior to the filing of the complaint, Lanson had asserted Ultimo was not entitled to "one dime" of recovery because the written agreement was unenforceable (a position for which he never provided any legal authority), and declined to respond to Ultimo's pre-litigation settlement offer of $33,000. After Ultimo filed his complaint, Lanson made a settlement offer of only $5,000, less than one-third the amount City Lights had previously acknowledged that it owed to Ultimo. Lanson then declined multiple additional settlement offers at or below $40,000, filed three demurrers (none of which resulted in the dismissal of any of Ultimo's original claims), served extensive discovery requests and initiated multiple legal proceedings against Ultimo.

The evidence further shows that after 18 months of litigation, City Lights agreed to settle the matter for $100,000, and then abruptly withdrew from the settlement a week later, forcing the parties to continue with depositions and other

discovery. Six months before settling the case, City Lights rejected a statutory offer to compromise that was only $1,700 more than the amount it ultimately agreed to pay.

In its opposition to the motion for attorney's fees, City Lights effectively admitted that Lanson was partially responsible for the amount of time and resources that had been expended on the case. City Lights president John Miller provided a declaration stating that Lanson and Ultimo's attorney had both engaged in "abusive" tactics and "egregious conduct." Martin Gross, who City Lights hired to replace Lanson, provided a second declaration asserting that his predecessor had "badly managed" the case.

When, as here, the record contains extensive evidence that the opposing party and its counsel engaged in aggressive litigation tactics, the trial court should consider that factor in assessing the reasonableness of the moving party's request. (See generally *Stokus v. Marsh* (1990) 217 Cal.App.3d 647, 653-654 [""Parties who litigate with no holds barred in cases . . . [where] the prevailing party is entitled to a fee award[] assume the risk they will have to reimburse the excessive expenses they force upon their adversaries"]; *Serrano, supra*, 32 Cal.3d at p. 638; *Peak-Las Positas Partners v. Bollag* (2009) 172 Cal.App.4th 101, 114.) The court's written ruling and the hearing transcripts contain no indication that occurred here. The court's analysis of Ultimo's fee request does not reference City Lights's conduct in the proceedings, nor does it address City Lights's acknowledgment that its former counsel engaged in abusive practices.

Moreover, the amount of the court's award strongly suggests it gave no consideration to Lanson's conduct in assessing the reasonableness of the fee request. Under the hourly rate set forth in Ultimo's lodestar calculation ($357),[7] the court's award of $20,000 amounts to less than 56 hours of work, a 92 percent reduction in the number of hours that Ultimo's attorneys actually billed in the case. The court provided no explanation or indication why it believed Ultimo's counsel should have expended less than 60 hours to resolve the case given the manner in which City Lights elected to litigate its defense.

Although the trial court retains broad discretion "to award attorney fees in an amount that is less than the lodestar amount" (*Christian Research Institute v. Alnor* (2008) 165 Cal.App.4th 1315, 1321-1322), the record in this case contains no indication that the court actually performed a lodestar calculation. Instead, the court's written ruling makes clear its determination of the fee award was based almost entirely on the amount in dispute, without any consideration as to whether opposing counsel's aggressive litigation tactics caused Ultimo to incur a higher amount of fees than he would have otherwise.

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[7] As explained above, City Lights did not provide any evidence or legal authority indicating that the average hourly rate of Ultimo's attorneys was unreasonable, and the court made no finding that the rate was unreasonable.

DISPOSITION

The trial court's order is reversed, and the matter is remanded for further consideration of Ultimo's motion for attorney's fees consistent with this opinion. Ultimo shall recover his costs and attorney's fees on appeal.

ZELON, J.

We concur:

PERLUSS, P. J.

BENSINGER, 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.