Filed 9/21/17 Rianda v. Foster CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

DIA C. RIANDA, Plaintiff and Appellant, v. RICHARD J. FOSTER, Defendant and Respondent.	B271773 (Los Angeles County Super. Ct. No. BC562565)

APPEAL from an order of the Superior Court of Los Angeles County, Stephanie M. Bowick, Judge. Affirmed.

Corsiglia McMahon & Allard, B. Robert Allard and Mark. J. Boskovich for Plaintiff and Appellant.

Tracy L. Anielski for Defendant and Respondent.

Dia C. Rianda (Rianda) filed an action against Richard J. Foster (Foster) for intentional infliction of emotional distress. Foster, an attorney, responded by retaining counsel, Tracy L. Anielski (Anielski) and then moving to strike the action pursuant to Code of Civil Procedure section 425.16,[1] commonly referred to as the anti-SLAPP (strategic lawsuit against public participation) statute. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 57.)

After Foster's motion was granted, he sought, pursuant to the anti-SLAPP statute, attorney fees and costs. In opposing the fee request, Rianda did not contest Foster's entitlement to a fees and costs award, but argued that the amount sought was inflated and unreasonable. In the main, the trial court rejected Rianda's arguments, but it did reduce the recoverable amount of Foster's legal fees by approximately nine percent.

Rianda appeals from that order, arguing that Foster was not entitled to a fee award and, alternatively, that even if he was entitled to the award, the award was not supported by substantial evidence. We disagree and, accordingly affirm.

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[1] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

BACKGROUND

I. The underlying action and the anti-SLAPP motion

Rianda's unverified complaint alleged a single cause of action against Foster for intentional infliction of emotional distress. Her claim arose out of an earlier lawsuit that Rianda brought against her former employer and supervisor, who were represented by Foster. Rianda alleged that Foster knew about and encouraged a sham investigation into Rianda's allegations of wrongdoing by her former employer and supervisor that was designed to undermine her lawsuit, leaked information damaging to her lawsuit to the media, and made defamatory statements to the press, all of which caused her to suffer mental anguish and extreme emotional distress.

Instead of answering Rianda's complaint, Foster filed an anti-SLAPP motion, arguing that the conduct at issue was protected—that is, the conduct was an exercise of his right of free speech made in connection with a matter of public interest—and that Rianda could not meet her burden of establishing a probability of prevailing on the merits of her claim. Foster's motion was supported by 50 pages of evidence (declarations and deposition excerpts) from Rianda's underlying action. Rianda opposed the motion with more than 150 pages of additional evidence from the underlying action and with other materials.

The trial court, after hearing oral argument on the matter, granted Foster's motion and subsequently entered

judgment in his favor. Rianda did not appeal from the judgment.

II. The attorney fees and cost motion

Pursuant to section 425.16, subdivision (c)(1), Foster, as the prevailing party in an anti-SLAPP motion, sought his attorney fees ($40,840) and costs ($555), which totaled $41,395. In his moving papers, Foster explained that the size of his fee request was due in part to Rianda's "vigorous and lengthy opposition" to his anti-SLAPP motion. In support of Foster's fee request, Anielski submitted a declaration explaining her background and experience, her hourly rate, and the investigation and document review that was required in order to respond to Rianda's opposition to the anti-SLAPP motion. In support of his fee request, Foster also filed a declaration to which he attached, among other things, copies of Anielski's bills for her legal services.

Rianda opposed the fee request, arguing that "the reason [Foster] failed to meet his burden of proof on this motion on each component [reasonable hourly rate, reasonable number of hours] is because he intentionally overreached, padded his time, and artificially set the rate." In her opposition, Rianda made a number of specific objections to Foster's evidence. Rianda supported her opposition with, among other things, the declarations of two purported legal fee experts, Laura Liccardo (Liccardo) and Todd K. Davis (Davis).

Foster responded to Rianda's opposition by, among other things, filing evidentiary objections to the Liccardo and

Davis declarations and by submitting a supplemental declaration by Anielski that addressed various matters raised by Rianda's opposition, including her invoices to Foster and her legal education.

At the hearing on the fee request, the trial court "announce[d] its ruling on all evidentiary objections" and took the matter under submission. Twelve days later, the trial court issued a written ruling granting, in large part, the fee request. In determining the amount of legal fees, the trial court "applie[d] the 'lodestar' method., i.e., the number of hours reasonably expended multiplied by the reasonable hourly rate." The court found that an attorney-client relationship existed between Foster and Anielski and that her billing rate of $400 per hour was "reasonable in light of the number of years practiced by Ms. Anielski, the going market rates in the community, and the type of case involved." After a "thorough" review of the billing statements, the trial court found that the total number of hours was "excessive in a few instances" and, accordingly, reduced the requested legal fees by 8.0 percent or $3,272. The trial court did not consider the Liccardo and Davis declarations because it did "not deem the two declarants [to be] experts."

DISCUSSION

On appeal, Rianda raises two principal arguments. First, "the crux of the appeal" is Rianda's contention that Anielski's representation of Foster was a sham, a "set-up for claiming fees." According to Rianda, Foster's retention of

Anielski makes no sense: "Logically, a skilled attorney having 32 years experience is not likely to pay another to handle something he is fully equipped to address himself, particularly at th[e] rate [of $400 per hour.]" Rianda reasons that, since there was no logical reason for Foster to retain an attorney to represent him, the fee request must be a "sham," that Foster and Anielski engaged in a "subterfuge" in which the legal fees at issue were "never incurred." In other words, Rianda argues that Foster is not entitled to any legal fees because, even though he was the prevailing party, he was in reality self-represented.

Second, Rianda contends that even if an attorney-client relationship existed between Anielski and Foster, the legal fees charged by Anielski were unreasonable in a number of respects, including most notably her hourly rate: "there was no admissible evidence substantiating the reasonable hourly rate prevailing in the community for similar work, which was required on Foster's motion."

As discussed below, each argument suffers from a fatal procedural defect.

I. Entitlement to fees

A. STANDARD OF REVIEW AND GUIDING PRINCIPLES

" ' "The issue of a party's entitlement to attorney's fees is a legal issue which we review de novo." ' " (*Ellis Law Group, LLP v. Nevada City Sugar Loaf Properties, LLC* (2014) 230 Cal.App.4th 244, 252 (*Ellis*).)

The anti-SLAPP statute provides that "a prevailing defendant on a special motion to strike *shall* be entitled to

recover his or her attorney's fees and costs." (§ 425.16, subd. (c)(1), italics added.) Accordingly, our Supreme Court has held that under this provision, "any SLAPP defendant who brings a successful motion to strike is *entitled to mandatory attorney fees*." (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1131, italics added.)

Notably, self-represented attorneys, however, are an exception to the statute's fee-shifting provision. (*Trope v. Katz* (1995) 11 Cal.4th 274, 279–280, 292.) Self-represented attorneys include law firms that are represented by the firms' own attorneys (*Witte v. Kaufman* (2006) 141 Cal.App.4th 1201, 1210 (*Witte*)), law firms that are represented by "of counsel" attorneys (*Sands & Associates v. Juknavorian* (2012) 209 Cal.App.4th 1269, 1298) and firms who are represented by semi-permanent "contract" attorneys. (*Ellis*, *supra*, 230 Cal.App.4th at pp. 257–260.) The key factor in determining whether a law firm or a solo practitioner is entitled to its attorney fees as a prevailing anti-SLAPP defendant is the existence of an attorney-client relationship between the defendant and its trial counsel. (*Witte*, at p. 1208.) "An attorney appearing in an action on his [or her] own behalf may nevertheless retain outside counsel for assistance, and the legal expenses incurred for such outside representation may be included in an award of attorney fees." (*Id.* at pp. 1211–1212.)

B. RIANDA WAIVED HER ENTITLEMENT ARGUMENT

Rianda does not dispute that Foster prevailed on his anti-SLAPP motion. Instead, she disputes whether Anielski

actually represented him: "The trial court . . . fail[ed] to explore the fraud being perpetrated upon Rianda in the fee request. . . . The trial court ignored facts . . . demonstrating a sham fee request."

There is a very compelling reason why the trial court failed to explore the purported fraud alleged by Rianda—she *never* raised this issue with the trial court. As noted above, her opposition to Foster's fee motion was limited to issues regarding "padding and over reaching," not to whether the attorney-client relationship between Anielski and Foster was a complete sham.

In the proceedings below, Rianda did argue that some of the legal bills must have been inflated, because she speculated that Foster must have devoted some time to helping prepare the anti-SLAPP motion, such as "preparing his own declaration." However, in her opposition, she stops well short of arguing that all of Anielski's bills were a sham. Rianda's far more limited position in the proceedings below, as opposed to the position she adopts on appeal, is mirrored by the documents supporting her opposition to the fee request. For example, the declaration by Rianda's counsel did not question Anielski's status as Foster's bona fide attorney; instead, it did the exact opposite, referring to her as "defense counsel" and to Foster as her "client." In addition, the declarations by Rianda's proffered experts—Davis and Liccardo— did not challenge Anielski's standing as Foster's properly retained outside counsel; instead, they

were concerned solely with the reasonableness of Anielski's rates.

Rianda's failure to present the trial court with her sham fee theory is fatal to her claim on appeal. " ' "[I]t is fundamental that a reviewing court will ordinarily not consider claims made for the first time on appeal which could have been but were not presented to the trial court." Thus, "we ignore arguments, authority, and facts not presented and litigated in the trial court. Generally, issues raised for the first time on appeal which were not litigated in the trial court are waived. [Citations.]" ' [Citation.] 'Appellate courts are loath to reverse a judgment on grounds that the opposing party did not have an opportunity to argue and the trial court did not have an opportunity to consider. [Citation.] In our adversarial system, each party has the obligation to raise any issue or infirmity that might subject the ensuing judgment to attack. [Citation.] Bait and switch on appeal not only subjects the parties to avoidable expense, but also wreaks havoc on a judicial system too burdened to retry cases on theories that could have been raised earlier.' " (*Kashmiri v. Regents of University of California* (2007) 156 Cal.App.4th 809, 830, 838 & fn. 12.)

Since Rianda failed to raise her sham argument below, we hold that she forfeited the argument on appeal.

II. Amount of fees

A. METHODOLOGY AND STANDARD OF REVIEW

The amount of an attorney fee award under the anti-SLAPP statute is computed by the trial court in accordance

with the familiar "lodestar" method. (*Ketchum v. Moses*, *supra*, 24 Cal.4th at pp. 1135–1136.) Under that method, the court "tabulates the attorney fee touchstone, or lodestar, by multiplying the number of hours reasonably expended by the reasonable hourly rate prevailing in the community for similar work." (*Christian Research Institute v. Alnor* (2008) 165 Cal.App.4th 1315, 1321.) In the present case, the trial court's fee award order shows on its face that this method was the one the court used in calculating the awards.

In reviewing the trial court's application of the lodestar method to the circumstances of a specific case, we apply the abuse of discretion standard. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095.) " 'The "experienced trial judge is the best judge of the value of professional services rendered in his court, 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." (*Ibid.*)

" ' "While the concept 'abuse of discretion' is not easily susceptible to precise definition, the appropriate test has been enunciated in terms of whether or not the trial court exceeded ' "the bounds of reason, all of the circumstances before it being considered . . . ." ' [Citations.]" [Citation.] "A decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.' [Citations.] In the absence of a clear showing that its decision was arbitrary or

irrational, a trial court should be presumed to have acted to achieve legitimate objectives and, accordingly, its discretionary determinations ought not be set aside on review." [Citation.]' [Citation.] Accordingly, an abuse of discretion transpires if " 'the trial court exceeded the bounds of reason' " in making its award of attorney fees." (*Maughan v. Google Technology, Inc.* (2006) 143 Cal.App,4th 1242, 1249–1250.)

B. FAILURE TO PROVIDE AN ADEQUATE RECORD

Although cast as a challenge for abuse of discretion, Rianda's position is essentially that the trial court's ruling is not supported by substantial evidence: "The trial court imposed attorney fees on the basis of defective declarations and unauthenticated invoices in derogation of its duty to 'ascertain' whether the claimed sum was reasonable and proper. The fee award was, thereby, arbitrary."

On the record before us, however, there is no indication of exactly what evidence was admitted and what evidence was excluded. Nor could there be. At the hearing on the fees motion, as stated in the accompany minute order, the trial court "announce[d] its rulings on all evidentiary objections in open court." However, the record before us does not contain a reporter's transcript of the hearing.

In an appeal, the appellate court is constitutionally required to presume the superior court's judgment correct. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) The appellant has the burden of overcoming that presumption by, most fundamentally, providing an adequate record for

review. (See *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295–1296 [no rehearing on attorney fees because appellant failed to provide reporter's transcript].) " 'A necessary corollary to this rule is that if the record is inadequate for meaningful review, the appellant defaults and the decision of the trial court should be affirmed.' " (*Gee v. American Realty & Construction, Inc*. (2002) 99 Cal.App.4th 1412, 1416 (*Gee*).) A judgment will be affirmed on an inadequate record because "[a]ll intendments and presumptions are indulged to support it on matters as to which the record is silent." (*Denham v. Superior Court*, *supra*, 2 Cal.3d at p. 564.) Thus, if an appellant asserts error based on only a partial record, and the missing part of the record could provide grounds for affirming the order granting or denying a motion, the appellate court will affirm the judgment. (*Gee*, at p. 1416.)

By failing to provide an adequate record, Rianda cannot meet her burden to show error. As a result, we resolve any challenge to the order awarding Foster his attorney fees against Rianda.[2]

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[2] In addition to containing the trial court's evidentiary rulings, the transcript may (or may not) contain other matters of evidentiary import. For example, in his respondent's brief, Foster makes a number of assertions about what occurred at the hearing, including the following: "At oral argument, . . . Anielski testified under penalty of perjury as an officer of the Court, that she had personally performed all of the work reflected in her invoices to Foster, and that Foster did not perform any of that work." In her reply brief, Rianda did not directly challenge the accuracy of

III. Motion for Sanctions

Foster has filed a motion requesting that this court impose $50,000 in sanctions and other penalties on Rianda and her counsel for filing a frivolous appeal that was brought solely for purposes of delay. (See Code Civ. Proc., § 907; Cal. Rules of Court, rule 8.276.) The court in *In re Marriage of Flaherty* (1982) 31 Cal.3d 637 (*Flaherty*) set forth the standards for determining whether an appeal is frivolous. An appeal may be found frivolous and sanctions imposed when (1) the appeal was prosecuted for an improper motive to harass the respondent or delay the effect of an adverse judgment; or (2) the appeal indisputably has no merit, that is, when any reasonable attorney would agree the appeal is totally and completely without merit. (*Id*. at p. 650.) But the *Flaherty* court cautioned 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

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this statement about Anielski's purported testimony at the hearing; instead, she states only that Foster "cannot be allowed to assert that the deficiencies [in his fee request] were so remedied at the hearing merely by saying so in his brief to this court." The limited record before us does not resolve the issue—neither the relevant minute orders nor the written ruling provide any indication about whether Anielski testified under penalty of perjury as an officer of the court.

they will win on appeal. An appeal that is simply without merit is *not* by definition frivolous and should not incur sanctions." (*Ibid*.)

Although Rianda's contentions on appeal are procedurally flawed, and although her appellate briefs are marred by a number of offensive and unsupported claims against Foster and his counsel (for example, Rianda suggests, without evidence, that Foster and his counsel committed perjury), nevertheless, we do not find the appeal to be sufficiently egregious so as to be considered frivolous or brought in bad faith. Accordingly, we deny the motion for sanctions. (Cf. *In re Koven* (2005) 134 Cal.App.4th 262, 274–277 [attorney fined $2,000 for contempt by "impugning the integrity of everyone in the legal system," including Court of Appeal].)

DISPOSITION

The order awarding Richard Foster his attorney fees is affirmed. Foster is entitled to his costs on appeal.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, P. J. CHANEY, J.