Filed 2/7/18 Natan v. Law Offices of Karol & Velen CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

NEDA NATAN, Plaintiff and Appellant, v. LAW OFFICES OF KAROL & VELEN et al., Defendants and Respondents.	B280039 (Los Angeles County Super. Ct. No. BC576447)

APPEAL from a judgment of the Superior Court of Los Angeles County, Daniel S. Murphy, Judge. Reversed.

Joseph J. M. Law Corporation and Joseph J. M. Lange for Plaintiff and Appellant.

Kaufman Dolowich & Voluck, Barry Z. Brodsky and Jodi L. Girten for Defendants and Respondents.

In this legal malpractice action, we reverse the summary judgment for defendants, the Law Offices of Karol & Velen and Rozanna Velen.

FACTUAL & PROCEDURAL BACKGROUND

This legal malpractice action arises from an underlying divorce case in which defendants represented plaintiff Neda Natan as successor counsel to attorney Irving Osser. (*In re Marriage of Natan* (L.A. County Super. Ct., No. BD522371)). Ms. Natan contends Mr. Osser committed malpractice in the underlying action, but she did not file a timely claim against him because defendants did not properly advise her. Her complaint alleges a single cause of action for legal malpractice against defendants based on two theories.[1] The first is defendants' failure to preserve Ms. Natan's underlying malpractice claim against Mr. Osser. The other is defendants' erroneous filing of a lis pendens in the underlying case, which resulted in a monetary sanctions order against Ms. Natan.

Defendants moved for summary judgment on the sole cause of action for legal malpractice. As to the first theory, defendants argued the evidence in the underlying divorce case showed the premarital agreement was valid, thus precluding Ms. Natan from recovering any damages based on their failure to preserve the underlying malpractice claim against Mr. Osser. As to the second, defendants argued Ms. Natan was not at risk of paying sanctions, thus eliminating any potential damages under this

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[1] A dismissal was entered as to the second cause of action for breach of fiduciary duty, request for attorney fees, and request for punitive damages.

theory.[2] The trial court found there was no triable issue of material fact as to the legal malpractice cause of action, and granted summary judgment on the complaint. Because we conclude summary judgment was improper as to the first theory, the judgment must be reversed regardless of the viability of the second theory. (See Code Civ. Proc., § 437c, subd. (f)(1) [summary adjudication may be granted only if it disposes of an entire cause of action].) We therefore focus our discussion on the first theory, the failure to preserve the underlying malpractice claim against Mr. Osser based on his mishandling of Ms. Natan's challenge to the validity of the premarital agreement in the divorce case.

In the divorce case, Ms. Natan sought to invalidate the premarital agreement. Her counsel, Mr. Osser, relied on statutory grounds, and argued the premarital agreement was invalid under Family Code section 1615, subdivision (c),[3] as amended effective January 1, 2002. In the present case, Ms. Natan contends that Mr. Osser focused on an inapplicable statute. In an effort to create a triable issue of fact as to the viability of her underlying malpractice claim, Ms. Natan sought to show that Mr. Osser negligently failed to submit available evidence she believes would have led the family law court to

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[2] Ms. Velen submitted a supporting declaration stating that Mr. Natan had entered a confidential settlement agreement and mutual release that waived his right to collect any sanctions awarded to him by the family law court against Ms. Natan. The court concluded that the evidence was undisputed Ms. Natan had not paid any sanctions to Mr. Natan, and the threat of future harm was too speculative to create a triable issue of material fact.

[3] All undesignated statutory references are to the Family Code.

invalidate the agreement on the ground that she entered it involuntarily. (See § 1615, subd. (a) [party challenging enforceability of premarital agreement bears burden of proving involuntary execution or unconscionability].)

That burden was lightened by the 2002 amendment to section 1615. The amendment created "a presumption 'that a premarital agreement was not executed voluntarily' unless the court makes five designated findings. (See Stats. 2001, ch. 286, § 2, p. 2317; *In re Marriage of Friedman* (2002) 100 Cal.App.4th 65, 72.) These include the finding that the party against whom enforcement is sought had at least seven calendar days between the date he or she was 'first presented' with the agreement and advised to seek independent counsel, and the time he or she signed the agreement. (§ 1615(c)(2).)" (*In re Marriage of Cadwell-Faso and Faso* (2011) 191 Cal.App.4th 945, 949 (*Faso*) [holding the seven-day rule does not apply where the party against whom enforcement is sought was represented by counsel from the outset of the transaction].)

However, the statutory grounds of the 2002 amendment cited by Mr. Osser—that Ms. Natan was not represented by counsel when the premarital agreement was signed, and the signing occurred less than seven days before the religious (Ketubah) marriage ceremony—do not apply because the amendment is not retroactive and does not apply to premarital agreements executed before 2002. (*In re Marriage of Howell* (2011) 195 Cal.App.4th 1062, 1071–1077.)

Ms. Natan argued that because she had a viable claim that Mr. Osser was negligent in not presenting a stronger case in the divorce action to demonstrate that she did not voluntarily sign

the premarital agreement, she suffered damages as a result of defendants' failure to preserve that claim.

Included in the summary judgment record is the family law court's September 22, 2011 minute order enforcing the premarital agreement. Following is a summary of the family law court's relevant findings:

- The Natans signed the premarital agreement on August 3, 2001. Ms. Natan was not represented by counsel when the agreement was signed, and there was "no clear evidence that the document as executed was presented to [her] earlier than August 3." The Natans signed the agreement two days before their religious (Ketubah) ceremony on August 5, 2001, and eight days before their civil marriage ceremony on August 11, 2001.
- During discovery, Mr. Osser provided no evidence to support Ms. Natan's position that the premarital agreement was invalid because she had signed it under duress. Mr. Osser argued only that the agreement was invalid as a matter of law under section 1615, subdivision (c), as amended effective January 1, 2002. He claimed the agreement was invalid because it "was signed only two days before the wedding on August 5 [referring to the Ketubah ceremony] and [Ms. Natan] did not have legal representation."
- At trial, Ms. Natan testified she signed the premarital agreement under duress. Her testimony about duress was insufficient to invalidate the agreement. The evidence showed Ms. Natan had

signed the agreement "voluntarily even if she did so with the belief that refusal to sign the agreement would lead to a cancelation of the wedding. In the circumstances of this proceeding, the Court finds that despite the embarrassment [Ms. Natan] would experience from the wedding's cancelation in the event she did not sign the agreement, there was no surprise or trickery involved in conditioning the wedding on execution of the agreement, given the evidence adduced at trial."

- Alternatively, the court found Mr. Natan's motion in limine to exclude Ms. Natan's evidence of duress was well taken because that defense was not identified by Ms. Natan during discovery. Because Ms. Natan's evidence of duress had not been presented during discovery, it was inadmissible for the reasons advanced by Mr. Natan in his motion and objections. This constituted an alternative and independent ground for the decision to enforce the premarital agreement.

Ms. Natan's opposition to the summary judgment motion included her declaration explaining why execution of the premarital agreement was not voluntary. Her declaration asserted:

- When Mr. Natan initially raised the issue of a premarital agreement in late 1999 or early 2000, Ms. Natan told him she was not opposed to a premarital agreement so long as it was fair and the property acquired during their marriage (including appreciation of existing real estate) belonged to both

spouses as husband and wife under California law. Mr. Natan agreed to this, and the matter was not discussed again for almost two years.

- In June 2001, the Natans held an engagement party for over 120 guests. Ms. Natan and her family are of limited financial means, and spent more than $30,000 for the party.
- A few weeks later, Mr. Natan told Ms. Natan that he wanted a premarital agreement. When Ms. Natan asked him why he did not tell her this before the engagement party, he replied, "what's the difference." She told him that it would depend on the terms of the agreement. He said that a friend was working on the agreement.
- The Natans' Ketubah ceremony was scheduled for August 5, 2001. Ms. Natan is from a traditional Iranian and Orthodox Jewish family, and she could not marry Mr. Natan without a Ketubah ceremony. They invited more than 80 guests, many from distant places including Israel.
- The civil marriage ceremony was scheduled for August 11, 2001, at the Biltmore Hotel in downtown Los Angeles. Over 400 guests were coming from Israel, New York, and various places throughout California.
- Less than one week before the Ketubah ceremony, Mr. Natan gave Ms. Natan a sample premarital agreement that was "very informal (like something from the internet) and not prepared by an attorney." It contained a waiver of child and spousal support.

Ms. Natan asked why he presented the sample agreement to her only one week before the wedding (referring to the Ketubah ceremony). They argued, and Mr. Natan threatened to cancel the wedding. They did not speak for a day or two, but Mr. Natan continued to make arrangements for the Ketubah ceremony.

- On Friday, August 3, 2001, two days before the scheduled Ketubah ceremony, Mr. Natan appeared at Ms. Natan's office during her lunch break and showed her a version of the premarital agreement. She had not seen it before. He drove her to a notary's office in order to sign it. Ms. Natan had only 10 or 15 minutes to read the agreement, which was over 15 pages, and she was "crying and shaking." In this version, all assets in Mr. Natan's name, regardless of when and how acquired, would remain his separate property; Ms. Natan would waive her right to spousal support (she was to receive $10,000 for each completed year of marriage), retirement plans, and inheritance as a wife after Mr. Natan's death.
- When Ms. Natan signed the agreement on August 3, 2001, she felt compelled to do so because she had lost her virginity to Mr. Natan a few weeks earlier, believing they would be married and he loved her. In her culture and religion, it is expected for women to remain virgins until marriage. They had discussed "many times" before signing the premarital agreement that once she lost her

virginity to him she could not marry anyone else. Before her engagement to Mr. Natan, Ms. Natan had been engaged to someone else, and "[i]n [her] culture, breaking off a second engagement would have made it almost impossible for [her] to get a date, let alone become engaged for a third time." She was 32 years old at the time of the wedding, and in her culture she was late in starting a family. Because her family and friends were coming from great distances to attend the Ketubah and wedding ceremonies, Ms. Natan did not feel she could cancel these events at the last moment. Doing so would cause her family and herself great embarrassment and disgrace.

- Before she signed the agreement on August 3, 2001, Mr. Natan yelled and screamed that unless she did so he would cancel the wedding. She knew he was serious because something similar had happened to several women in her community. These women "could not get married and their bad reputations stayed with them forever." She had spent her life savings on wedding jewelry, the engagement party, the Ketubah ceremony, and the wedding party. She felt she would become an outcast in her Persian Jewish community if she canceled her wedding. She worried about growing old and being alone with no husband and children. She felt suicidal and depressed.
- During their August 3, 2001 discussion, Ms. Natan kept telling Mr. Natan she did not want to sign the

> premarital agreement. Mr. Natan kept threatening to cancel the wedding and never see her again if she did not. Because she felt she had no choice, she signed the agreement while in tears. She did not speak to Mr. Natan during the entire drive back to her office.

In reply, defendants argued that in the underlying action Ms. Natan had an opportunity to testify on the issues of duress and voluntariness, and much of the information in her declaration had been presented in the divorce action. Defendants contended that because the family law court upheld the premarital agreement after a full and fair trial, Ms. Natan cannot prove the family law court would have set aside the premarital agreement based on the reasons stated in her declaration.

In granting the summary judgment motion, the trial court found no triable issue of material fact on the issue of voluntary execution of the premarital agreement, stating: "Plaintiff contends that evidence involving her cultural and religious background and her previous engagement were not presented at the hearing [in the underlying action], and that such evidence could have proven duress. However, even if this evidence were presented in the Dissolution Proceeding, *it cannot be said with certainty* that Plaintiff would have prevailed in a legal malpractice action against Osser. The [family law] court specifically took into consideration Plaintiff's 'embarrassment' in cancelling the wedding. The [family law] court specifically found that 'there was no surprise or trickery involved.' Furthermore, even if Osser had submitted additional evidence of cultural and religious pressures, this evidence would be insufficient to overcome the finding that the 'requirement for a prenuptial

agreement was known to [Plaintiff] long before the agreement was signed' and that she 'aid[ed] the preparation of the document.' Plaintiff does not dispute that she was aware of the premarital agreement requirement when she started dating Mr. Natan in 1999 or 2000, or that she provided Mr. Natan with a list of her assets to be included in the premarital agreement." (Italics added.)

Ms. Natan objected at the summary judgment hearing that the court's use of language regarding certainty was erroneous because the standard for summary judgment is whether there is a triable issue of material fact.

The court granted the motion for summary judgment and entered judgment for defendants. This timely appeal followed.

DISCUSSION

On appeal, an order granting summary judgment is independently reviewed. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.) The appellate court applies the same legal standard as the trial court in determining whether there is an issue of material fact. "We accept as true the facts shown by the losing party's evidence and reasonable inferences therefrom, and we resolve evidentiary doubts or ambiguities in the losing party's favor. [Citations.]" (*Spinner v. American Broadcasting Companies*, *Inc.* (2013) 215 Cal.App.4th 172, 184.)

In reviewing the record, "we apply the same three-step analysis as the trial court. First, we identify the issues framed by the pleadings. Next, we determine whether the moving party has established facts justifying judgment in its favor. Finally, if the moving party has carried its initial burden, we decide whether the opposing party has demonstrated the existence of a

triable, material fact issue." (*Chavez v. Carpenter* (2001) 91 Cal.App.4th 1433, 1438.)

The 2002 amendment to section 1615 was adopted in response to *In re Marriage of Bonds* (2000) 24 Cal.4th 1 (*Bonds*). (See *Faso*, *supra*, 191 Cal.App.4th at p. 956.) In *Bonds*, "the fiancée of Barry Bonds, whose native language was Swedish, received a premarital agreement prepared by Bonds's attorney on the eve of their wedding. The fiancée signed the agreement without the benefit of independent counsel and was subsequently held to it in litigation. The issue was whether she entered the agreement voluntarily. The trial court said she did, and the Supreme Court determined that finding was supported by substantial evidence, reversing the Court of Appeal holding that premarital agreements are subject to strict scrutiny where the less sophisticated party does not have independent counsel. ([*Bonds*, *supra*,] at pp. 6, 37–38.)" (*Faso*, at p. 956.)

The statute in effect when *Bonds* was decided "did not define the term 'voluntarily' and placed the burden on the party seeking to block enforcement to prove that he or she did not execute the agreement voluntarily. [Citation.]" (*Faso*, *supra*, 191 Cal.App.4th at p. 956.) In *Bonds*, the fact that one of the parties was not represented by independent counsel was one of several factors to be considered in deciding whether the premarital agreement was entered voluntarily. (*Bonds*, *supra*, 24 Cal.4th at p. 6.) The determination of voluntary execution and undue influence are questions of fact. (*Id.* at p. 31.)

Premarital agreements executed before the 2002 amendment to section 1615 will be upheld "unless the party resisting enforcement of the agreement can demonstrate either (1) that he or she did not enter into the contract voluntarily, or

(2) that the contract was unconscionable when entered into and that he or she did not have actual or constructive knowledge of the assets and obligations of the other party and did not voluntarily waive knowledge of such assets and obligations." (*Bonds*, *supra*, 24 Cal.4th at p. 15, italics omitted.)

Coercion in the premarital context may be demonstrated by a number of factors such as lack of capacity, duress, fraud, and undue influence. (*Bonds*, *supra*, 24 Cal.4th at p. 20.) In evaluating these factors, the "subtle coercion that would not be considered in challenges to ordinary commercial contracts may be considered in the context of the premarital agreement. (See, e.g., *Lutgert v. Lutgert* [(Fla.Dist.Ct.App. 1976)] 338 So.2d [1111,] 1113–1116 [agreement presented too close to the wedding, with passage booked on an expensive cruise].)" (*Bonds*, at p. 26.) In light of "[t]he obvious distinctions between premarital agreements and ordinary commercial contracts[, the] factual circumstances relating to contract defenses (see Civ. Code, § 1567) that would not necessarily support the rescission of a commercial contract may suffice to render a premarital agreement unenforceable. The question of voluntariness must be examined in the unique context of the marital relationship. [Citations.]" (*Id.* at pp. 26–27.)

In *Bonds*, the Supreme Court found substantial evidence supported the trial court's finding that there had been no coercion. The trial court found that Barry Bonds's fiancée (Sun) "had not been subjected to any threats, that she had not been forced to sign the agreement, and that she never expressed any reluctance to sign the agreement. It found that the temporal proximity of the wedding to the signing of the agreement was not coercive, because under the particular circumstances of the case,

including the small number of guests and the informality of the wedding arrangements, little embarrassment would have followed from postponement of the wedding. It found that the presentation of the agreement did not come as a surprise to Sun, noting that she was aware of Barry's desire to 'protect his present property and future earnings,' and that she had been aware for at least a week before the parties signed the formal premarital agreement that one was planned. [¶] These findings are supported by substantial evidence. Several witnesses, including Sun herself, stated that she was not threatened. The witnesses were unanimous in observing that Sun expressed no reluctance to sign the agreement, and they observed in addition that she appeared calm, happy, and confident as she participated in discussions of the agreement. Attorney Brown testified that Sun had indicated a desire at their first meeting to enter into the agreement, and that during the discussion preceding execution of the document, she stated that she understood the agreement. As the trial court determined, although the wedding between Sun and Barry was planned for the day following the signing of the agreement, the wedding was impromptu—the parties had not secured a license or a place to be married, and the few family members and close friends who were invited could have changed their plans without difficulty. (For example, guests were not arriving from Sweden.) In view of these circumstances, the evidence supported the inference, drawn by the trial court, that the coercive force of the normal desire to avoid social embarrassment or humiliation was diminished or absent. Finally, Barry's testimony that the parties early in their relationship had discussed their desire to keep separate their property and earnings, in addition to the testimony of Barry and

Brown that they had met with Sun at least one week before the document was signed to discuss the need for an agreement, and the evidence establishing that Sun understood and concurred in the agreement, constituted substantial evidence to support the trial court's conclusion that Sun was not subjected to the type of coercion that may arise from the surprise and confusion caused by a last-minute presentation of a new plan to keep earnings and property separate during marriage. In this connection, certain statements in the opinion rendered by the Court of Appeal majority—that Sun was subjected to aggressive threats from financial adviser Mel Wilcox; that the temporal proximity of the wedding was coercive under the circumstances of this case; and that defects in the text of the agreement indicate it was prepared in a rush, came as a surprise when presented, and was impossible to understand—are inconsistent with factual determinations made by the trial court that we have determined are supported by substantial evidence." (*Bonds*, *supra*, 24 Cal.4th at pp. 32–33.)

Ms. Natan's declaration presented a different picture. In addition to resolving all ambiguities and doubts in favor of Ms. Natan, we also must examine her testimony in the "unique context of the marital relationship" (*Bonds* at p. 26), particularly the expectations of Ms. Natan's conservative Persian Jewish community, friends, and family. Unlike Mrs. Bonds who "understood and concurred in the agreement" (*id.* at p. 33.), Ms. Natan repeatedly told Mr. Natan she did not want to sign the August 3 version of an agreement that differed from previous versions. She was not shown the August 3 version until shortly before the Ketubah ceremony and during a brief lunch break while being driven to a notary's office. It contained several new

provisions Ms. Natan claims she did not anticipate, including loss of community property rights, inheritance rights, and pension rights. Earlier, she told Mr. Natan she would accept an agreement that was fair and preserved her community property rights. While she reviewed the August 3 agreement, Mr. Natan was yelling at her that he would cancel the wedding if she did not sign it. She was shaking and crying while thinking of the many guests who would be traveling from Israel and other distant places. Unlike the small and informal wedding in *Bonds*, the Natans had invited over 400 guests to their wedding at the Biltmore Hotel. Ms. Natan testified that she felt suicidal when presented with the August 3 agreement because she was 32 years old, which in her community is considered old to bear children. Moreover, because she no longer was a virgin and had been engaged to someone else before becoming engaged to Mr. Natan, she feared she would become an outcast and bring shame upon her family if she were to cancel the wedding at that late date. Thinking she had no other choice, she testified that she signed the agreement under duress.

We conclude Ms. Natan's declaration created a triable issue of material fact on the issue of voluntariness. The facts stated in her declaration, if believed by a trier of fact, are sufficient to support a factual finding that her consent was not voluntary but coerced. Accordingly, summary judgment was improper.

DISPOSITION

The judgment is reversed. Ms. Natan is awarded her costs on appeal.

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EPSTEIN, P. J.

We concur:

MANELLA, J.

COLLINS, J.