Filed 8/3/12 Hadley v. The Cochran Firm CA2/8

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

ANTHONY HADLEY et al., Plaintiffs and Appellants, v. THE COCHRAN FIRM et al., Defendants and Respondents.	B233093 (Los Angeles County Super. Ct. No. BC411326)

APPEAL from a judgment of the Superior Court of Los Angeles County. Rolf M. Treu, Judge. Affirmed.

Michael A. Lotta for Plaintiffs and Appellants Theresa Theus, Albert Noble, Daniel Pittman, Donte Rhea, Steven Green, and Willie Williams.

Anthony Hadley, in pro. per., for Plaintiff and Appellant.

Lewis Brisbois Bisgaard & Smith, Kenneth C. Feldman and Barry Zoller for Defendants and Respondents.

Plaintiffs Theresa Theus, Jeffrey Gray, Anthony Hadley, Albert Noble, Daniel Pittman, Donte Rhea, Steven Green, and Willie Williams[1] sued The Cochran Firm, and Attorneys Daniel H. Cargnelutti and Brian Dunn (defendants) alleging causes of action for negligence, breach of fiduciary duties, and fraud arising from defendants' representation of plaintiffs in a lawsuit against their employer, Parsec, Inc. Plaintiffs claim that defendants tricked them into settling their claims against Parsec by inducing them to sign a supposed confidentiality agreement at a mediation, and later appending the signature sheet to a settlement agreement.

The trial court granted defendants' motion in limine to dismiss the complaint, concluding that because the alleged deception occurred during a mediation, the mediation confidentiality provisions of the Evidence Code prevented plaintiffs from proving their claims. (See, e.g., Evid. Code, § 1119.) On appeal, plaintiffs claim that because they did not intend to settle their claims at the mediation, this action is not "mediation related" and is therefore not barred by section 1119. They also claim that an attorney should not be permitted to commit fraud and avoid liability by "[hiding] behind the Mediation privilege." Alternatively, plaintiffs claim that mediation confidentiality was waived. We find no merit in plaintiffs' arguments and affirm.

FACTS AND PROCEDURAL BACKGROUND

The facts pleaded in the operative complaint are as follows: The Cochran Firm represented plaintiffs in an action for racial discrimination against their employer. A mediation of the dispute was held on July 26, 2008. The day of the mediation, The Cochran Firm asked plaintiffs to sign a confidentiality agreement. Plaintiffs later learned that their signatures were appended to a Confidential Settlement Agreement and General Release, purporting to settle and dismiss their claims against their employer. Plaintiffs claim they did not authorize the settlement.

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[1] Plaintiff Jeffrey Gray is not a party to this appeal. Plaintiff Anthony Hadley filed an opening brief joining in the arguments by the other plaintiffs. He filed a separate reply brief.

The complaint specifically alleges that "a Mediation [was] held about July 26, 2008 . . . . THE CASE AND CLAIMS WERE NOT SETTLED AT THE MEDIATION. [¶] . . . Plaintiffs are informed and believe[] and thereon allege[] that the defendants, and each of them, are claiming the plaintiffs, and each of them, executed a document entitled Confidential Settlement Agreement and General Release at Mediation. The plaintiffs deny this. THE PLAINTIFFS, AND EACH OF THEM, DID NOT SIGN ANY DOCUMENT KNOWN TO BE A CONFIDENTIAL SETTLEMENT AGREEMENT AND GENERAL RELEASE AT ANY MEDIATION. The document purporting to be the Confidential Settlement Agreement and General Release was not signed at any Mediation. [¶] . . . [¶] On or about July 26, 2008, the plaintiffs were asked to sign a confidentiality agreement. . . . The plaintiffs signed a page. The document that was signed was ***not*** . . . a Confidential Settlement and Release. . . . [¶] On or about July 31, 2008, the several of the plaintiffs went to the office of the defendants, . . . and [were] told for the first time that the plaintiffs had allegedly settled their claims. . . . [P]laintiffs were provided with what is now claimed to be the Confidential Settlement Agreement and General Release."

Defendants brought a motion in limine seeking to exclude evidence of the malpractice and to dismiss plaintiffs' complaint, reasoning the claims were barred by the mediation confidentiality statutes under the holding in *Cassel v. Superior Court* (2011) 51 Cal.4th 113 (*Cassel*). The trial court granted the motion and dismissed the complaint. This timely appeal followed.

DISCUSSION

Defendants' motion in limine sought to "exclude all evidence" and dismissal of all plaintiffs' claims because they are based on "events and statements that occurred at an underlying mediation," and therefore barred as a matter of law by the mediation confidentiality statutes. Defendants' supplemental brief in support of their motion included deposition testimony from plaintiffs' legal malpractice expert, who opined that it was below the standard of care for defendants to settle the underlying case without plaintiffs' consent. This opinion was based on a hypothetical where plaintiffs signed a

signature sheet and " 'did not know or understand that the defendants . . . were going to attach the sheet they signed to a settlement agreement.' "

Because the motion in limine contended that plaintiffs were precluded from proving their claims under the mediation confidentiality statutes, even if it were true that defendants fraudulently induced plaintiffs to settle their lawsuit, the motion in limine "operated as a general demurrer to [the complaint] or a motion for judgment on the pleadings." (*Edwards v. Centex Real Estate Corp.* (1997) 53 Cal.App.4th 15, 27 (*Edwards*).) To the extent that defendants also relied on evidence obtained during discovery (to demonstrate the scope of plaintiffs' claims), the motion was the functional equivalent of a motion for nonsuit. (*Ibid.*) In either case, our review is de novo. (*Id.* at pp. 26-28; see also *Baker v. American Horticulture Supply, Inc.* (2010) 186 Cal.App.4th 1059, 1072.)

A demurrer tests the legal sufficiency of the complaint. We review the complaint to determine whether it alleges facts sufficient to state a cause of action. For purposes of review, we accept as true all material facts alleged in the complaint, but not contentions, deductions or conclusions of fact or law. We also consider matters that may be judicially noticed. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "The scope of a trial court's inquiry on a motion for nonsuit is similarly limited. A motion for nonsuit or demurrer to the evidence concedes the truth of the facts proved, but denies as a matter of law that they sustain the plaintiff's case. A trial court may grant a nonsuit only when, disregarding conflicting evidence, viewing the record in the light most favorable to the plaintiff and indulging in every legitimate inference which may be drawn from the evidence, it determines there is no substantial evidence to support a judgment in the plaintiff's favor." (*Edwards, supra,* 53 Cal.App.4th at pp. 27-28, italics omitted.)

Under Evidence Code section 1119, subdivisions (a) and (b), evidence of anything said for the purpose of, in the course of, or pursuant to a mediation cannot be disclosed in a legal proceeding, with certain statutory exceptions. Writings prepared for the purpose

of, in the course of, or pursuant to a mediation are also protected from disclosure.[2] Under subdivision (c), "[a]ll communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential." "[T]he confidentiality rule in section 1119 sweeps broadly: it bars discovery and evidence of 'anything said' not merely 'in the course of' mediation, but 'for the purpose of . . . , or pursuant to' mediation." (*Eisendrath v. Superior Court* (2003) 109 Cal.App.4th 351, 364.) By using the broad phrase "in the course" of a mediation, the Legislature intended to protect a broad range of statements from later use as evidence in litigation. (*Ryan v. Garcia* (1994) 27 Cal.App.4th 1006, 1009-1010 [interpreting former section 1152.5, repealed by Stats. 1997, ch. 772, § 5].) "Judicial sifting of statements made at a confidential mediation to select those which can be used as evidence . . . contravenes the legislative intent underlying adoption of [the confidentiality provisions]." (*Ryan*, at p. 1011.)

The mediation confidentiality provisions are "clear and absolute. Except in rare circumstances, they must be strictly applied and do not permit judicially crafted exceptions or limitations, even where competing public policies may be affected." (*Cassel*, *supra*, 51 Cal.4th at p. 118.) In *Cassel*, the appellant sued his attorneys for malpractice, claiming they improperly pressured him to accept an inadequate settlement at a mediation. (*Id.* at pp. 119-120.) The attorneys moved in limine to exclude evidence of communications between the appellant and the attorneys related to the mediation. (*Id.*

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[2] Evidence Code section 1119, subdivisions (a) and (b) state: "Except as otherwise provided in this chapter: (a) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given. [¶] (b) No writing, as defined in Section 250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given."

at p. 121.) The trial court granted the motion, but the Court of Appeal reversed, finding that the mediation confidentiality provisions did not apply to communications between a party and his or her own counsel. The California Supreme Court reversed, concluding that "the statutory protection extends beyond discussions carried out directly between the opposing parties to the dispute, or with the mediator, during the mediation proceedings themselves. All oral or written communications are covered, if they are made 'for the purpose of' or 'pursuant to' a mediation." (*Id.* at p. 128.) Therefore, communications between a client and his or her attorney are covered by the confidentiality provisions, even if their application would preclude a client from seeking redress for attorney malpractice. (*Ibid*.)

Plaintiffs seek to distinguish *Cassel*, insisting they "are not seeking to disclose . . . communications made during mediation. The [plaintiffs] are seeking to have the trier of fact determine whether or not they actually settled their case." (Boldface omitted.) However, plaintiffs cannot establish their claims without delving into the circumstances under which they were allegedly fraudulently induced to sign a document at the mediation that their counsel later represented to be a settlement agreement. The trier of fact must necessarily consider the circumstances under which the purported settlement agreement came to exist. To the extent counsel's alleged deception occurred at the mediation, it was "in the course of, or pursuant to, a mediation" under the expansive interpretation given to those terms. (Evid. Code, § 1119, subd. (a); *Eisendrath*, *supra*, 109 Cal.App.4th at p. 364.) As *Cassel* made clear, section 1119 renders such evidence inadmissible, even if it would "unfairly" shield an attorney from liability. (*Cassel*, *supra*, 51 Cal.4th at p. 136.)

Plaintiffs alternatively maintain that confidentiality was waived. Evidence Code section 1122 provides that mediation confidentiality may be expressly waived, either orally or in writing. Here, the settlement agreement provided: "The Parties agree that sections 1115 through 1128 of the California Evidence Code applicable to mediation do not apply to the terms of this Agreement. The Parties further agree that this Agreement is admissible and subject to disclosure in a court of law for the purpose of proving up and/or

enforcing the terms of such Agreement, which the parties acknowledge is fully enforceable by and binding against them." These provisions did not waive the confidentiality of communications made during the mediation, but instead clarified that the parties agreed their settlement was not confidential and was admissible in court in an action by any party to enforce the settlement agreement. (See *Lane-Wells Co. v. Schlumberger etc. Corp.* (1944) 65 Cal.App.2d 180, 184 [construction of contract containing no ambiguity or uncertainty "must be derived solely from its language"].) We therefore conclude that confidentiality concerning what was said at the mediation was not waived (Evid. Code, § 1119, subd. (a)), although the parties clearly waived confidentiality of the written settlement agreement. (*Id*., § 1119, subd. (b).)

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

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GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.