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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

XIN GAO,

Plaintiff, Cross-Defendant  
and Appellant,

v.

DAVID S. LIN et al.,

Defendants, Cross-Complainants,  
and Respondents.

B236041

(Los Angeles County  
Super. Ct. No. GC045681)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
C. Edward Simpson, Judge. Affirmed.

Xin Gao, in pro. per., for Plaintiff, Cross-Defendant, and Appellant.

Law Offices of David S. Lin and David S. Lin, for Defendants, Cross-  
Complainant, and Respondents.

Xin Gao appeals from an adverse judgment in this action against his former attorney for professional malpractice and breach of fiduciary duty. He also challenges the trial court's award of \$18,000 to respondent attorney, David S. Lin, and his law firm, on a cross-complaint for unpaid legal fees. Gao argues the trial court failed to try or decide his cause of action for breach of fiduciary duty. For the first time on appeal, he contends the fee award must be reversed because the retainer agreement provided for arbitration of all fee disputes. He also claims he owed nothing to Lin because he made partial payments and the remainder of his performance was excused. Gao also challenges the sufficiency of the evidence in support of the fee award.

The parties waived the provision for arbitration of fee disputes by litigating the issue in the judicial forum instead. We conclude that Gao was given a full opportunity to prove his cause of action for breach of fiduciary duty and that the trial court decided against him. Gao failed to prove the damages element of his causes of action. The billing statements were sufficient to support the award of attorney fees. Other challenges to the judgment were forfeited because Gao did not raise them in the trial court.

## **FACTUAL AND PROCEDURAL SUMMARY**

The present action and cross-action arise from Lin's representation of Gao in two underlying cases.<sup>1</sup>

### *A. Underlying Cases*

#### *1. Pasadena Action*

On August 14, 2009, Gao and Lin entered into a written retainer agreement. Lin was to provide legal services regarding Gao's claims for monetary damages against Tony Lu, Fang Zhang, and others. The agreement called for payment of an \$8,000 retainer. Paragraph 12 provided for binding arbitration of any fee dispute.

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<sup>1</sup> Lin also represented Gao in an action in Orange County, against Judy Wang and Grand Capital Financial, which does not appear to be relevant to this appeal.

In September 2009, Lin filed a complaint on behalf of Goldenman Venture Capital Group Corp. dba Deal To China, Inc.<sup>2</sup>, against Zhong Fang; Town House Land (Miami) Corporation, a Florida corporation; Town House Land (USA), Inc., a California corporation; Tony M. Lu; Janifer M. Lee; Paul Wupoo Lu; Millie Shen Lu; Kam Wing Chiu Lee; John Changwu Lee; Min Hu; James Wang; Hao Feng Gao; Grace Gao; Robert Ko; and Nancy Ko. It alleged causes of action for breach of contract, negligent and intentional misrepresentation, fraud, conspiracy to commit fraud, and fraudulent conveyance. We adopt the practice of the parties and refer to this as the Pasadena action. The complaint alleges that Deal To China and others entered into a joint venture agreement with Town House Land (Miami) Corporation, Town House Land (USA), Inc. and Zhong Fang. The complaint alleged that under this agreement, the defendants obtained a standby letter of credit in the amount of \$5 million from plaintiff Deal To China to fund a real estate development project by the two Town House Land Corporations and Zhong Fang (THL defendants). The THL defendants put up four parcels of real estate in California and Nevada as collateral. Plaintiff Deal To China recorded lien interests for various amounts on these parcels.

According to the complaint in the Pasadena action, the THL defendants, through their attorney, Tony M. Lu, filed an action entitled *Town House Land, et al. v. Deal To China, Inc. et al.*, Los Angeles Superior Court case No. GC038979 in May 2007 for contractual fraud against Deal To China, Xin Gao and others. The Pasadena action alleges that case No. GC038979 was settled. Deal To China and Xin Gao were paid a sum of money, released their recorded liens on the California properties serving as collateral for the joint venture, and reduced the lien on the Nevada property to \$350,000. Deal To China agreed to release and reduce these liens based on express representations

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<sup>2</sup> That complaint describes Goldenman Venture Capital Group Corp. dba Deal To China as a California Corporation. Gao is not an individual plaintiff in the Pasadena action, but is identified as the “principal owner” of Deal To China. Gao testified at trial that Goldenman Venture Capital Group Corp. dba Deal To China is his entity.

by various defendants in the Pasadena action that it would have a second lien position on the California properties.

The Pasadena action alleged that the defendants were aware that another large lien had been recorded against the Nevada property and that the total of the liens exceeded the value of the property. It was alleged that Deal To China then sold its remaining lien on the Nevada property at a loss of \$100,000. Defendant Town House Land then defaulted on the mortgage on the Nevada property. This resulted in a legal action in Nevada brought by the other lien holder against a number of parties, including Deal To China and Xin Gao. The complaint alleged that the liens released by Deal To China on the California properties would have been sufficient to cover its lien interest on the Nevada property and that the defendants named in the Pasadena action conspired to defraud Deal To China out of its right to the original \$350,000 for the Nevada property lien.

The Pasadena action also alleged that before settlement of the action against Gao and Deal To China (including the release of the lien on three California parcels), each of the California parcels was transferred to other defendants in fraudulent conveyances which thwarted Deal To China's lien interests on the properties. It was alleged that these transfers were between defendants who were related to each other.

Declarations were submitted by various defendants disclaiming any family connection with other defendants, and any knowledge of or participation in the matters alleged in the Pasadena action. As a result, defendants Tony Lu, Janifer Lee, Paul Wupoo Lu, and Millie Shen Lu were dismissed by attorney Lin without prejudice from the Pasadena action in January 2010. A dispute arose between Gao and Lin over these dismissals. Defaults were obtained against defendants Zhong Fang and Town House Land.

Lin moved to be relieved as counsel in the Pasadena action in March 2010 after Gao refused to execute a substitution of attorney form. Lin was relieved by the court on April 6, 2010. Gao filed a request for dismissal of the entire action without prejudice on April 27, 2010 and dismissal was entered on that date.

## *2. Downtown Los Angeles Action*

Gao and Lin executed another retainer agreement on September 9, 2009 under which Lin was to provide legal services in defense of Gao in *Town House Land v. Xin Gao et al.*, Los Angeles Superior Court case No. BC394400, referred to by the parties as the Downtown Los Angeles Action. Gao agreed to pay a retainer of \$6,000. The retainer agreement included a provision for binding arbitration of any fee dispute.

Neither Gao nor Lin explains the status or disposition of the Downtown Los Angeles case in their briefs. Lin's final billing on the case indicates that discovery was in progress. Lin prepared a substitution of attorney for new counsel for Gao, John Ma.

### *B. Present Action*

Gao, acting in pro. per., sued Lin and his wife, Cheryl Pei Yang, for fraud, professional malpractice, and breach of fiduciary duty in July 2010. Lin demurred to the complaint and cross-complained for breach of contract for unpaid fees. He sought damages, plus interest, costs of suit, and fees. Gao answered the cross-complaint. A first amended complaint (the charging pleading) was filed against the same defendants alleging the same causes of action. Lin's demurrer to the cause of action for fraud was sustained without leave to amend.<sup>3</sup>

The trial court conducted a bench trial at which only Gao and Lin testified. The court took the matter under submission. The next day it issued its ruling denying Gao's claims and entering judgment in favor of Lin. The court found that "plaintiff has failed to carry his burden as to both damages and his ability to have prevailed on the underlying litigation." Lin was awarded \$18,000 on his cross-complaint, less than Lin had sought. The court found there "was insufficient evidence of the costs advanced and some of the work performed appears duplicative and unnecessary." Interest was awarded from June 1, 2010. The trial court stated, "Exhibits returned to parties to be held pending the expiration of the appeal period."

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<sup>3</sup> Defendant Cheryl Yang's demurrer was sustained as to all causes of action without leave to amend and she is not a party to this appeal.

Gao's objections to the proposed judgment were rejected and judgment was entered. The judgment stated that Gao "has failed to carry his burden as to both his claims for damages and his ability to have prevailed on the underlying litigation." Gao moved for a new trial, and Lin filed opposition. The record on appeal, including the civil case summary, does not reflect a ruling on the new trial motion; we infer it was denied since the parties proceeded with this appeal. Gao appeals from the judgment.

## **DISCUSSION**

### **I**

While Gao's brief is unclear, he appears to be arguing that Lin committed legal malpractice and breached his fiduciary duty by dismissing the four defendants from the Pasadena action. We first address Gao's claim the trial court did not allow him to present evidence regarding his cause of action for breach of fiduciary duty, and failed to decide that claim. In a related argument Gao complains the trial lasted only one hour instead of the estimated two days.

At the outset of trial, the court said: "[L]et me just . . . point out to Mr. Gao, you have a cause of action remaining for breach of fiduciary duty, you have a cause of action remaining for legal malpractice. [¶] Now, in order to prevail on your legal malpractice cause of action, you're going to have to prove that you would have prevailed or you would have won on the underlying case. That's one of the elements that you're going to have to prove no matter what Mr. Lin did in that case, you're going to have to establish the fact that you would have, you would have prevailed, you would have won on that case. That's one of the elements that you're going to be required to prove." The court then asked Gao how he was going to present his evidence.<sup>4</sup> Gao launched into a discussion of email communications with Lin that resulted in a consultation and the decision to file the Pasadena action. Gao said he paid an initial deposit with the

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<sup>4</sup> This bench trial was conducted informally, with neither Gao nor Lin sworn as witnesses.

understanding that if Lin decided he could not file the lawsuit, he would keep \$500 for the consultation. Later, Lin told Gao he would dismiss defendant Tony Lu for lack of evidence.

The court repeatedly attempted to understand the evidence Gao had to support his claim against defendant Tony Lu in the Pasadena action. Gao referred to other actions brought against him by others, which were dismissed. The court told Gao that he was not focusing on what it understood to be his basic contention, that Lin dismissed the Pasadena case against defendant Tony Lu and that this was not appropriate. Although Gao responded, in effect, that this was not his basic contention, he then went on to discuss Lin's recommendation that various defendants had to be dismissed. The court asked again for evidence that this was not appropriate advice. Gao repeated his claim that Lin told him various defendants should be dismissed from the Pasadena action, that the Pasadena action was not necessary, and that they should focus on the Los Angeles action. The court asked again for evidence that it was inappropriate to dismiss some defendants from the Pasadena action. Gao said he consulted with other legal advisors who said, in effect, that the lawyer had to finish the job and could not dismiss some defendants, keep others, and leave the case. The court asked once more for evidence to support that assertion, explaining that Gao needed to present testimony or written evidence to support his claim that dismissal of defendants was professional negligence. Gao responded that Lin had dismissed some of the Pasadena action defendants.

The court then attempted to understand Gao's interest in the properties which were the basis for the claims in the Pasadena action. Gao's response was rambling and largely not intelligible. He mentioned that "we" had loaned money, but did not have evidence in court of that transaction.<sup>5</sup> The court then said it would hear from Lin on the complaint and then on the cross-complaint. It said: "I'm not satisfied that I'm making much progress listening from Mr. Gao any relevant facts other than his complaint."

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<sup>5</sup> Gao said "we" have a federal contract in another case, and referred to another case number in Pasadena, which he forgot. He also said it was alleged in the Pasadena action.

Lin said that based on documentation provided by Gao at their initial consultation, some of the named defendants involved in the allegedly fraudulent land conveyances appeared to be the parents and in-laws of defendant Tony Lu. After the Pasadena action was filed, Tony Lu as well as his wife, Janifer Lee, provided documentation and declarations to the effect that the individuals named in the Pasadena action were not their parents. The defendants in question also provided declarations establishing that they were not related in any way to Tony Lu or Janifer Lee. Lin said he told Gao repeatedly that he needed to dismiss these defendants because there was no evidence to support the claims against them. He explained that the defendants would be dismissed without prejudice so they could be named again if evidence was discovered tying them to the transactions in question. Lin said he unsuccessfully urged Gao to provide evidence of the involvement of these defendants in the transactions.

Gao wanted Tony Lu and Janifer Lee to sign a declaration accepting liability for all damages under the complaint if their declarations regarding the absence of relationships with the other defendants were found to be untrue. Both refused to execute those declarations. At that point, Lin felt he had no choice but to dismiss these defendants from the Pasadena action without prejudice, and to withdraw from representing Gao, who by then was threatening to sue him. Lin argued there was no basis for Gao's claims of professional negligence and breach of fiduciary duty.

The court asked Gao how he had been damaged by Lin's dismissal of the four defendants from the Pasadena action. Gao said Lin "broke the whole case." The remainder of his statement was unintelligible.

The gravamen of Gao's causes of action for professional negligence and breach of fiduciary duty are nearly identical. In each, Gao claims that Lin failed to exercise due diligence in investigating the Pasadena defendants before filing the action and that the dismissal of some defendants was improper. The cause of action for breach of fiduciary duty alleges that Lin knew he had breached the standard of care, but concealed this from Gao in order to continue billing him for services. It also alleges a conflict of interest



involving Lin and attorneys for the dismissed Pasadena defendants as well as Tony Lu, noting that all of them are members of the Taiwanese American Lawyers Association.

In its ruling, the trial court said: “Plaintiff’s claims are denied.” It continued: “[P]laintiff has failed to carry his burden as to both damages and his ability to have prevailed on the underlying litigation.” The judgment stated, “Plaintiff GAO’s claims are denied. . . . Plaintiff has failed to carry his burden as to both his claims for damages and his ability to have prevailed on the underlying litigation.”

In light of the court’s statements, both written and oral, the only reasonable interpretation is that the court considered and decided both of Gao’s causes of action. It provided Gao with repeated opportunities to explain the basis for his claim that the dismissal of some Pasadena defendants was improper, a claim essential to both causes of action. At no time during the trial did Gao complain that he had not been given a full opportunity to present his case. We are satisfied that the trial court did not err in its treatment of the breach of fiduciary duty cause of action.

We have reviewed the reporter’s transcript of the trial. We agree with the trial court that Gao failed to prove damages as a result of Lin’s representation. It is difficult, if not impossible, to understand his statements to the trial court regarding damages. He did not support his claims with any evidence. Actual loss resulting from an attorney’s negligence is an element of the cause of action for professional negligence. (*Hall v. Kalfayan* (2010) 190 Cal.App.4th 927, 933.) Similarly, proof of damages caused by the breach of fiduciary duty is an element of that cause of action. (*Knox v. Dean* (2012) 205 Cal.App.4th 417, 432.) The record on appeal supports Lin’s position that the dismissal of certain defendants from the Pasadena action was without prejudice. If sufficient evidence of their culpability was obtained later, Gao could have sought leave to amend the complaint to name them as defendants. In addition, it was Gao who dismissed the Pasadena action after Lin withdrew. Gao failed to satisfy the damages element of either cause of action and therefore judgment was properly entered in favor of Lin on Gao’s complaint.

Gao made no objection to the procedure or evidence presented. But in his briefs on appeal, Gao raises a number of new issues. For example, he claims that Lin had a conflict of interest because he, defendant attorney Tony Lu, and the attorneys for the defendants dismissed from the Pasadena action were members of the Tawainese American Lawyers Association. Although this was alleged in the first amended complaint, no evidence was submitted to support the allegation at trial, nor was it shown that Lin breached any duty to Gao by reason of membership with others in some professional bar organization. All issues raised for the first time on appeal are forfeited. (*Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, 847 (*Mattco*).)

## II

Gao also challenges the award of \$18,000 in fees on Lin's cross-complaint. He argues, for the first time on appeal, that the fee dispute should have been submitted to binding arbitration under the terms of the retainer agreement. The right to arbitrate may be forfeited by “conduct so inconsistent with the exercise of the right to arbitration as to constitute an abandonment of that right.” [Citation.]” (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1201.) Submitting an issue to a judicial forum for resolution of arbitrable issues, coupled with failure to request arbitration, has been found to constitute waiver of the right to arbitrate. (*Pulli v. Pony Internat., LLC*. (2012) 206 Cal.App.4th 1507, 1515.) Here arbitration was never mentioned and the case was litigated to judgment in the trial court. Any claim to arbitration was forfeited.

Gao now claims that he was relieved from any obligation to pay Lin by Lin's breach of fiduciary duty. He did not present this argument at trial, and it therefore is forfeited. (*Mattco, supra*, 52 Cal.App.4th at p. 847.) Moreover, as we have concluded, Gao failed to prove breach of fiduciary duty.

Gao also challenges the sufficiency of the evidence to support the fee award. He contends the billings were self-serving without support, that the total amount billed did not add up, and that Lin should have mitigated damages by withdrawing from representation at an earlier point, when Gao first objected to the dismissal of defendants.

None of these arguments was raised at trial, and therefore are forfeited. (*Mattco, supra*, 52 Cal.App.4th at p. 852.)

In a related argument, Gao argues the trial court only identified the exhibits presented by the parties, but did not admit them. While there is no express statement in the reporter's transcript that the exhibits were admitted, the court's ruling on submitted matter makes it clear that they were. First, the ruling discusses the contents of the exhibits submitted in support of Lin's cross-complaint for fees. Second, the ruling states that exhibits will be returned to the parties to be retained for appeal. The only inference to be drawn from these statements is that the court admitted and considered the exhibits submitted by the parties.

Lin explained his billing statements, marked as exhibit 40, to the trial court in detail. He explained that the unpaid balance due was a total of \$23,562 (\$15,870 on the Pasadena action and \$7,755 on the Los Angeles action). At trial, Gao took the position that Lin created a dispute between them while negotiating the dismissal of defendants from the Pasadena action. The trial court awarded \$18,000 in fees, a reduction from the \$23,562 claimed by Lin. It found that some of the charges were duplicative and that charges for costs were not supported by evidence.

We are bound by the applicable standard of review. "When an appellant contends the evidence is insufficient to support a judgment, order, or factual finding, we apply the substantial evidence standard of review. 'Where findings of fact are challenged on a civil appeal, we are bound by the "elementary, but often overlooked principle of law, that . . . the power of an appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted," to support the findings below. [Citation.] We must therefore view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor in accordance with the standard of review so long adhered to by this court.' [Citation.] . . . An appellate court presumes in favor of the judgment or order all reasonable inferences. [Citation.] If there is substantial evidence to support a finding, an appellate court must uphold that finding even if it would have made a different finding

had it presided over the trial. [Citations.] An appellate court does not reweigh the evidence or evaluate the credibility of witnesses, but rather defers to the trier of fact. [Citations.]” (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 957–958.)

We have reviewed the billing statements submitted by Lin and his testimony at trial regarding that exhibit. Substantial evidence supports the award of \$18,000 in outstanding fees to Lin.

### **DISPOSITION**

The judgment is affirmed. Lin is to have his costs on appeal.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

SUZUKAWA, J.