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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

HAIGHT, BROWN, BONESTEEL, LLP, Plaintiff, Cross-defendant and Respondent, v. ZAKI MANSOUR, et al., Defendants, Cross-complainants and Appellants.	B230186 (Los Angeles County Super. Ct. No. BC387845)

APPEAL from orders of the Superior Court of Los Angeles County. Daniel Buckley, Judge. Affirmed in part; reversed in part.

Zuber & Taillieu, Lane E. Bender for Defendants, Cross-complainants and Appellants.

Haight Brown & Bonesteel, William E. Ireland; Fonda & Fraser, Michael A. O'Flaherty for Plaintiff, Cross-defendant and Respondent.

Zaki Mansour and Luzelba Lozano appeal from post-judgment orders in their litigation with respondent Haight, Brown & Bonesteel. We affirm in part and reverse in part.

Facts[1]

In February of 2007, appellants retained Haight Brown to represent them in litigation. Appellants did not prevail in that litigation, but instead had a judgment entered against them.

In March of 2008, Haight Brown sued appellants for unpaid fees and costs. Appellants cross-complained, bringing causes of action for malpractice, breach of fiduciary duty, fraud, negligent retention, violation of the Consumer Legal Remedies Act (Civ. Code, § 1750 et seq.), and unfair competition (Bus. & Prof. Code, §§ 17200, 17500). Factual allegations included legal malpractice and fraudulent billing.

Haight Brown's complaint alleged that appellants owed $172,538 in fees and costs. However, the day before trial began, Haight Brown acknowledged[2] that the bills it had sent to appellants, and the amount sought in the complaint, were wrong in two respects. Appellants were billed $225 an hour for associate time, although they and Haight Brown had agreed that the associate billing rate would be $200 an hour. Next, although the retainer agreement did not allow it, many of the bills charged an additional sum "to recover expenses that are not otherwise itemized in the bill," calculated at 3.95 percent of attorney time. Thus, at trial, Haight Brown sought only $163,668 in costs and fees, the amount of the corrected bills.

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[1] Appellants' request that we take judicial notice of our record in the earlier appeal in this case (B226428) is granted.

[2] Haight Brown acknowledged this by filing a motion to amend its complaint. The court heard the motion with a jury in the hallway, and denied it, finding that the matter involved a question of proof, and was one for trial.

After several days of trial, the trial court entered nonsuit on the cross-complaint for malpractice and directed a verdict on the complaint for fees. The judgment, entered on June 28, 2010, is in the amount of $163,668, "plus prejudgment interest according to proof."

On July 7, 2010, Haight Brown filed its memorandum of costs, which included a request for expert witness fees of $38,333 and $38,735 in prejudgment interest. In its motion to tax costs, appellants objected to, inter alia, those requests, contending that expert witness fees were not awardable because there had been no offer under Code of Civil Procedure section 998, and that the request for prejudgment interest was untimely and was not authorized by law.

Then, on July 30, 2010, while the motion to tax costs was pending, Haight Brown filed a motion for, inter alia, expert witness fees, seeking those fees under Code of Civil Procedure section 2033.420, concerning requests for admission.

Appellants filed their notice of appeal from the judgment in favor of Haight Brown on August 6, 2010.

In September, the court decided the motion to tax costs. The court awarded costs, but denied prejudgment interest and expert witness fees, finding that the sums were not awardable as costs and that a noticed motion was required.

In October, Haight Brown filed a motion titled "motion setting amount of prejudgment interest . . . ." The court granted the motion on November 15, 2010, awarding Haight Brown $37,610 in prejudgment interest, representing interest on $163,668, the amount awarded on the complaint, from the date the complaint was filed.

On December 1, 2010, the court awarded Haight Brown $38,333.50 in expert witness fees.

Discussion

1. Prejudgment interest

Appellants' contention is that when they filed their notice of appeal, the trial court lost jurisdiction over the motion to set prejudgment interest.

There is no case directly on point, but the relevant statutes and case law lead us to conclude that under the facts of this case, the trial court had jurisdiction to hear and decide the motion, even though appellants had already filed a notice of appeal from the judgment.

Under Code of Civil Procedure section 916, subdivision (a), "the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order, but the trial court may proceed upon any other matter embraced in the action and not affected by the judgment or order."

"The purpose of the automatic stay provision of section 916, subdivision (a) 'is to protect the appellate court's jurisdiction by preserving the status quo until the appeal is decided. The [automatic stay] prevents the trial court from rendering an appeal futile by altering the appealed judgment or order by conducting other proceedings that may affect it.' [Citation.]" (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 189.)

The "embraced in the action" and "affected by the judgment or order" provisions of Code of Civil Procedure section 916 mean that a trial court proceeding is stayed if it would have an effect on the effectiveness of the appeal. If it would not, the proceeding is permitted. Thus, a trial court proceeding is stayed if it directly or indirectly seeks to enforce, vacate or modify the appealed-from judgment or order, or if it substantially interferes with the appellate court's ability to conduct the appeal. A proceeding also affects the effectiveness of an appeal if the possible outcomes on appeal and the actual or possible results of the trial court proceeding are irreconcilable. (*Varian Medical Systems, Inc. v. Delfino, supra,* 35 Cal.4th at pp. 189-190.)

We cannot see that the trial court proceeding on Haight Brown's motion to set the amount of prejudgment interest had any effect on the effectiveness of appellants' earlier appeal. Nor did the motion, or the court's ruling on it, enforce, vacate, or modify the judgment appealed from, or interfere with our ability to conduct that appeal. We thus hold that the proceeding was not stayed. (See *Bankes v. Lucas* (1992) 9 Cal.App.4th 365 [filing of a notice of appeal does not deprive the trial court of jurisdiction to award attorney fees as costs]; *Guseinov v. Burns* (2006) 145 Cal.App.4th 944 [amended judgment which merely quantified the amount of prejudgment interest awarded in the original judgment did not substantially change the original judgment for purposes of one final judgment rule].)

Nor are we persuaded that *North Oakland Medical Clinic v. Rogers* (1998) 65 Cal.App.4th 824 compels reversal here. In that case, the prevailing plaintiff did not request prejudgment interest in the costs bill, or include any mention of prejudgment interest in the judgment, or include a request in their motion for new trial (on the issues on which plaintiff did not prevail). Instead, the request for prejudgment interest was first made when plaintiffs presented the court with the costs order which included an award of prejudgment interest. While acknowledging, as did the parties, that no statute or rule of court established a procedure for requesting an award of prejudgment interest or a time limit for such a request, the court held that "prejudgment interest should be awarded in the judgment on the basis of a specific request therefor made *before* entry of judgment," or, at the latest, a part of a motion for new trial. (*Id*. at p. 830.)

North Oakland presented "extreme facts" (*Steiny & Co. v. California Elec. Supply Co*. (2000) 79 Cal.App.4th 285, 294), and they are not our facts.[3] In this case, an award of prejudgment interest was part of the judgment. Only the amount was left to be

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[3] As *Steiny* saw it, *North Oakland* held only that "prejudgment interest may not be sought by inserting amount at last minute in cost award, without notice to other party, and after verdict and post-judgment motions for new trial and to tax costs had been heard and decided." (*Steiny & Co. v. California Elec. Supply Co., supra,* 79 Cal.App.4th at p. 294, italics omitted.)

determined. Appellants characterize this as a mere "placeholder" provision in the judgment, but in fact it was part of the judgment signed by the court, and was thus valid. At any rate, we see nothing in *North Oakland*, or in any statute or court rule, which barred the court from proceeding as it did here.

2. Expert witness fees

Haight Brown moved under Code of Civil Procedure section 2033.420, which provides that "(a) If a party fails to admit the genuineness of any document or the truth of any matter when requested to do so under this chapter, and if the party requesting that admission thereafter proves the genuineness of that document or the truth of that matter, the party requesting the admission may move the court for an order requiring the party to whom the request was directed to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees."

In this instance, the requests for admission which appellants denied addressed various affirmative defenses which appellants asserted in response to Haight Brown's complaint for fees. The requests asked appellants to admit that they had "no facts" to support the affirmative defenses of negligence, bad faith conduct on the part of Haight Brown, misrepresentation as to attorney fees, unconscionable fees, fraud, misrepresentation, and breach of fiduciary duty.

In its motion, Haight Brown argued that these requests for admission were, in essence, addressed not just to appellants' affirmative defenses, but to appellants' cross-complaint for malpractice. In a declaration accompanying the motion, Haight Brown's counsel declared that "As a direct result of defendants' refusal to admit the statements contained in [Haight Brown's] Requests for Admission, . . . [¶] . . . [Haight Brown] was forced to hire an expert witness, Bruce Friedman, Esq. Mr. Friedman's bill for review and deposition testimony, which was limited solely to [appellants'] claim of legal malpractice, was $38,333.50."

We agree with appellants that Haight Brown was not entitled to expert witness fees.

First, it cannot be said that appellants had "no facts" to support their malpractice causes of action. Indeed, as his dissent in the earlier appeal in this case establishes, Justice Mosk of this Division believed that the facts appellants produced proved their case.

Further, the cross-complaint included allegations that Haight Brown had sent false and excessive bills, and had, for instance, billed a surcharge of 3.95 percent of attorney time, although Haight Brown had never told appellants that it would charge such a fee, and appellants had never agreed to pay it. At the time appellants responded to requests for admission, Haight Brown had not yet acknowledged that the bills it had sent -- indeed, the amount sought in the complaint -- were wrong. Again, it cannot be said that appellants had "no facts" to support their causes of action.

The nonsuit which the court entered on the cross-complaint does not change this analysis. By the time the court made that ruling, Haight Brown had acknowledged that its bills were wrong, and was seeking a lesser amount than that sought in the complaint.

Disposition

The order awarding prejudgment interest is affirmed. The order awarding expert witness fees is reversed. Each party to bear its own fees on appeal.

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ARMSTRONG, J.

We concur:

TURNER, P. J.

MOSK, J.