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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

JAMES DUNNE, Cross-complainant and Appellant, v. MICHAEL SLIFKA et al., Cross-defendants and Respondents.	B232414 (Los Angeles County Super. Ct. No. SC100477)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gerald Rosenberg, Judge. Affirmed.

Law Offices of Barry K. Rothman and Fredric R. Brandfon for Cross-complainant and Appellant.

Law Office of Philip J. Krum, Jr., and Philip J. Krum, Jr., for Cross-defendants and Respondents.

INTRODUCTION

James Dunne appeals from the judgment entered in favor of Michael and Betty Slifka and their corporation, TXL, Inc. (together, the Slifkas) following a trial to the court of Dunne's cross-complaint to recover attorney fees in defense of the underlying action pursuant to an indemnity agreement. The trial court found that the Slifkas had offered to defend Dunne in the underlying action but that Dunne had declined the offer, and that there was no actual conflict of interest that would justify Dunne's refusal to join in the defense and still recover attorney fees. Because the record supports the trial court's findings, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The litigation*

Dunne and Christopher Shepanek entered into a lease as lessees for commercial property in Corona, California. Dunne and Shepanek ran an oil change and lube service business through their corporation, Oleum, Inc. In 2003, with time left on the lease, Oleum, Inc. was dissolved and Shepanek and Dunne subleased the premises to TXL, Inc. to run a similar business. The Slifkas, on behalf of TXL, Inc., signed a guaranty of the sublease.

The guaranty provided in paragraph 6.2 of the sublease, "Subleasee agrees to protect, defend and hold harmless Sublessor from and against any loss, cost, expense (including reasonable attorney fees at trial, on appeal . . .), liability or claim arising out of or attributable to Sublessee's use of the Leased Premises or Sublessee's breach of any provision of the Master Lease, the performance or observance of which is Sublessee's responsibility under Section 6.1 above, or any other provision of this Sublease." Paragraph 9.5 reads, "If suit or action is instituted to interpret or enforce any term of this Sublease, the prevailing party shall be entitled to recover from the other party such amount as the court may adjudge reasonable as attorneys' fees at trial, on petition for review, on appeal . . . in addition to all other sums provided by law."

In 2006, TXL, Inc. vacated the premises and ceased paying rent. The landlord sent a notice of default in July 2006 and then sued all tenants and subtenants for unpaid

rent. The parties settled the lawsuit with the landlord. The Slifkas paid the entire settlement. Dunne then filed his cross-complaint against the Slifkas[1] seeking indemnity and damages for breach of contract and breach of guaranty, alleging that the Slifkas had failed to live up to their contractual obligations to defend and indemnify him. Ultimately, Dunne settled any liability between himself and the Slifkas and was not required to pay any sum in the settlement. However, he reserved the right to seek attorney fees from the Slifkas. Trial was had to resolve the attorney fee dispute.

2. *The evidence*

Dunne was the first to be served with the landlord's complaint. Dunne contacted Shepanek to inquire about the suit and faxed Shepanek a copy of the complaint. Shepanek suggested to Dunne that the two offer a settlement to resolve the litigation. Dunne agreed. Shepanek also asked his attorney to secure a defense from Slifka for Dunne because Dunne had not objected to the idea when Shepanek proposed it to him.

In July 2006, personal counsel for Shepanek tendered the defense of the action to the Slifkas' attorney. The Slifkas' counsel agreed to provide a defense for Shepanek. Shepanek's personal attorney confirmed that the Slifkas were undertaking the defense for Shepanek.

In January 2009, after the Slifka's retained new counsel, Philip J. Krum, Jr., Shepanek's personal attorney requested that Krum honor the Slifkas' earlier acceptance of Shepanek's defense. In that letter, Shepanek's personal attorney also explained "Mr. Shepanek also has a close professional relationship with James Dunne. Mr. Dunne is also hoping that you will file an appearance on his behalf."

Krum was willing to defend Dunne on behalf of the Slifkas and communicated that fact to Shepanek's attorney. By email *to all parties*, including Dunne, on January 16, 2009, Krum stated, "I believe my client will tender the defense as requested in accordance with the provisions of the sublease." After identifying a potential conflict of

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[1] Shepanek also filed a cross-complaint against the Slifkas but dismissed it as part of the settlement with the landlord.

interest, Krum stated, "In any event I will make sure that we answer the complaint on behalf of both Mr. Dunne and Mr. Shepanek. . . . But I do want to give everyone a heads-up as to some of these thorny issues that will have to be resolved down the road." The Slifkas accepted Dunne's tender of defense and, based on the date he was served with the complaint, identified February 2, 2009 as the date for Dunne to file his answer.

Although Krum saw the possibility that a conflict could arise if the Slifkas failed to honor the indemnity agreement, he did not otherwise see a conflict. He did not believe Shepanek and Dunne had any actual conflict. Krum came to the conclusion that he would be able to resolve any potential conflicts among the four defendants and so he did not see any actual conflict of interest posed by the allegations in the landlord's complaint.

Shepanek knew the Slifkas had offered a defense to both him and Dunne. His personal attorney thought that Krum believed he was accepting a tender of defense on behalf of both Dunne and Shepanek. Shepanek's personal attorney believed potential conflicts could be resolved if the Slifkas signed an agreement. Shepanek's personal attorney emailed Krum on January 21, 2009 to stay "Thank you . . . and I know [Shepanek] and [Dunne] are very pleased that you have agreed to appear for them to save the cost of them having to retain separate counsel." Dunne was copied on this email.

Less than two hours later, Krum responded that he had heard from attorney Rothman who indicated he would represent Dunne and answer the complaint on Dunne's behalf. Rothman expressed concern to Krum about potential conflicts of interest. According to Krum, Rothman gave him a lecture on the conflict of interest and explained that was the reason he was representing Dunne. Rothman "*was well aware . . .* [*Slifka*] *had offered* [*a*] *defense to his client*, Krum testified." (Italics added.) When Krum attempted to discuss the guaranty Dunne had signed in connection with the original lease and how it might relate to the case, Rothman cut him off. "Mr. Rothman had no interest in pursuing that. He informed me that he drafted the original document or at least had been somewhat involved in the preparation and knew all about it and had no interest in discussing it," Krum testified.

Krum also testified that Rothman knew that the Slifkas were prepared to defend Dunne. But, Rothman was not interested in a defense from the Slifkas. Shepanek's personal attorney suggested that the parties set a conference call with Rothman to discuss a joint defense agreement. Rothman was not interested in a joint defense.

Rothman denied that an offer had been made to defend Dunne. Rothman described three conflicts of interest and admitted they could each be resolved by a conflict waiver.[2] Dunne testified that he was aware of his right to a defense and indemnity under the sublease. Instead of contacting the Slifkas to request they perform these obligations under paragraph 6.2 of the sublease, he sought Rothman's advice. Dunne "[did not] understand or [did not] believe a defense was offered to me."

3. *The judgment*

The trial court ruled that a defense was offered to Dunne and declined by Rothman. Dunne requested Rothman represent him because of a perceived conflict between Dunne and the other parties. However, the trial court ruled there was never an actual conflict of interest. Dunne filed his timely appeal.

CONTENTIONS

Dunne contends that the trial court erred in (1) finding that a defense to the underlying action was offered to Dunne and rejected by him; and (2) finding there was no conflict of interest that precluded Slifka's attorney from representing Dunne.

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[2] Rothman described the first conflict as between Dunne and the Slifkas because *if* Dunne became liable to the landlord, he had an indemnification right from the Slifkas *and if* the Slifkas did not indemnify, Dunne would have to sue them. The second conflict was between Shepanek and Dunne because of a side indemnity agreement in which Shepanek agreed to be personally liable for half of anything that Dunne had to pay. An adversarial position *would* arise *if* Shepanek did not honor his side agreement with Dunne. The third conflict existed because the complaint identified different theories as against the different defendants. Rothman did concede, however, that the landlord was seeking the same relief from all named defendants.

DISCUSSION

1. *The record contains substantial evidence that a defense was offered to Dunne and that he rejected the offer*.

Civil Code section 2778, subdivision (4)[3] establishes the obligation of the indemnitor to defend the indemnitee upon request.

Dunne contends the trial court erred in finding that a defense to the underlying action was offered and rejected by him. He recognizes that the court's ruling resolved a factual dispute and that therefore we review the record under the substantial evidence standard. (*Winograd v. American Broadcasting Co*. (1998) 68 Cal.App.4th 624, 632.) Under that standard, "[i]f the trial court's resolution of the factual issue is supported by substantial evidence, it must be affirmed. [Citation.]" (*Ibid.*) Thus, Dunne's "burden is a heavy one; he must show that there is no substantial evidence whatsoever to support the findings of the trier of fact. [Citation.] . . . ." (*Service Employees Internat. Union v. County of Los Angeles* (1990) 225 Cal.App.3d 761, 769-770.)

Toward that end, Dunne contends that there is nothing in the record to indicate that *Dunne* was offered a defense. He cites to Rothman's testimony in which he stated he could not recall there ever being an offer to provide a defense, and to the various emails and letters between Shepanek's personal attorney and Krum to argue that no offer to defend was ever conveyed to Dunne or to Rothman for Dunne.

However, the record shows that Dunne was copied on the correspondence about the defense tender sent between Shepanek's personal attorney and the Slifkas' counsel Krum. Additionally, Krum testified that Rothman "was well aware . . . that [Slifka] had offered [a] defense to his client[.]" Asked, "did Mr. Rothman know that you offered to defend his client when you talked to him," Krum answered, "Yes, he did." The trial court asked Krum to describe his first telephone conversation with Rothman. Krum testified,

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[3] Civil Code section 2778, subdivision (4) reads, "The person indemnifying is bound, on request of the person indemnified, to defend actions or proceedings brought against the latter in respect to the matters embraced by the indemnity, but the person indemnified has the right to conduct such defenses, if he chooses to do so."

"Mr. Rothman informed me that *he was not going to have his client accept our offer of defense*. [¶] He was going to represent Mr. Dunne. [¶] *He was well aware of the fact that we had offered the defense to his client*[.] (Italics added.)

Krum's testimony is sufficient evidence that a defense was offered and that offer was communicated to Dunne and Rothman rejected it. The trial court was entitled to discount Rothman's testimony to the contrary. "[I]t is not the function of a reviewing court to reweigh the evidence, judge credibility of witnesses, or to determine the weight to be given . . . . Those are exclusively functions of the trier of fact. As has been so often said, our function as a reviewing court begins and ends with the determination whether there is any substantial evidence, contradicted or uncontradicted, which would support the trial court's findings. [Citations.]" (*Beckman Instruments, Inc. v. County of Orange* (1975) 53 Cal.App.3d 767, 775-776.) There is substantial evidence to support the trial court's finding "that a defense to the action was offered to indemnitee James Dunne which was declined by his attorney Barry Rothman."

2. *The record contains substantial evidence to support the trial court's finding no conflict of interest precluded the Slifkas' Attorney, Krum, from defending Dunne.*

Under Civil Code section 2778, subdivision (3), "An indemnity against claims, or demands, or liability, expressly, or in other equivalent terms, embraces the costs of defense against such claims, demands, or liability *incurred in good faith, and in the exercise of a reasonable discretion*." (Italics added.) The indemnitee may conduct his own defense if he chooses. (*Buchalter v. Levin* (1967) 252 Cal.App.2d 367, 371; Civ. Code, § 2778, subd. (4).) However, the indemnitee may not refuse the indemnitor's good faith offer of a complete defense and later collect reimbursement from the indemnitor for the defense costs the indemnitee has voluntarily incurred. (*Buchalter v. Levin, supra,* at pp. 374–375; *Goodman v. Severin* (1969) 274 Cal.App.2d 885, 897; see also *Crawford v. Weather Shield Mfg., Inc*. (2008) 44 Cal.4th 541, 555.) Thus, "absent some contractual privilege so to do or some showing of sufficient justification, an indemnitee ordinarily may not refuse to join or cooperate with the indemnitor's proffered

defense and still recover his separate counsel fees. [Citation.]" (*Goodman v. Severin, supra,* at p. 897.)

Citing *Safeway Stores, Inc. v. Massachusetts Bonding & Ins. Co.* (1962) 202 Cal.App.2d 99 (*Safeway*), Dunne contends that a clear conflict of interest existed between him and the Slifkas and between him and Shepanek that justified his refusing the Slifkas' after to defend him, but did not absolve them of the obligation to pay for his defense.

In *Safeway,* the indemnitor undertook the defense of the action and filed answers on behalf of all parties. (*Safeway*, *supra*, 202 Cal.App.2d at p. 114.) But, during the defense, the indemnitor "began to change his position." (*Ibid.*) It later became apparent to the indemnitee that the indemnitor had his own interests in mind and "took the position that he would not be liable under the indemnity provisions, if [the indemnitee] were negligent." (*Id*. at p. 115.) After discussions, the indemnitee hired separate counsel because it felt that the situation "*thus developed* presented a conflict of interests *to the point where* the defense of the damage actions should not be handled by the above [indemnitor's] attorney." (*Id*. at p. 114, italics added.) The *Safeway* court held that despite the fact the indemnitor was mistaken about his obligations under the contract, "the trial court could have well believed that [the indemnitee] had good reason to conclude [the indemnitor] was not fully representing [the indemnitee's] interests and therefore would not fully comply with his agreement. Indeed [the indemnitor's] defense of [the indemnitee] became qualified and technical rather than fully promotive of [the indemnitee's] interests as the agreement contemplated. From the above evidence, the court below could have reasonably inferred that [the indemnitor's] position amounted to a refusal to defend the real interests of the indemnitee and hence a failure and refusal to perform his obligations under the indemnity contract." (*Id*. at pp. 115-116.) The appellate court affirmed the judgment allowing the indemnitee to recover all expenses. (*Id*. at pp. 104, 116, 119.)

Unlike *Safeway* where an actual conflict of interest developed during litigation (*Safeway*, *supra*, 202 Cal.App.2d at pp. 114, 115), here, any conflict was potential only,

i.e., a mere expectancy. Krum undertook Dunne's complete defense. No conflict actually arose during litigation of the underlying action by the landlord here, let alone one that amounted to a refusal to perform the indemnity obligations. (*Id.* at p. 116.) The entire action was settled and the Slifkas, not Shepanek or Dunne, paid the settlement. Although Krum initially perceived a potential for conflict, he ultimately determined that the interests of Shepanek, the Slifkas, and Dunne were all consistent and he understood the parties were willing to sign a separate agreement to resolve any conflicts that might arise between them and Dunne. Therefore, although Dunne was entitled to retain separate counsel to defend the underlying action, he is not entitled to recover the costs of such defense from the Slifkas. (Civ. Code, § 2778, subds. (3) & (4).)

On appeal, Dunne describes circumstances in which a conflict might have arisen. Dunne commences each such scenario with "if:" "[I]f Dunne were to lose his case on the Master Lease Guaranty . . . ." "[I]f [Dunne] had waited . . . and if, ..."[4] Certainly, if a conflict had arisen during the underlying litigation here, under *Safeway*, Dunne would have had the right to retain separate counsel and recover the costs of his defense from the Slifkas. But, as explained, that is not what occurred here.

[4] See footnote 2, ante.

DISPOSITION

The judgment is affirmed. Respondents to recover costs on appeal.

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ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.