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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

CALIFORNIA HAND CENTER, INC., Plaintiff and Respondent, v. J. TIMOTHY KATZEN et al., Defendants and Appellants.	B259520 (consolidated with B261646) (Los Angeles County Super. Ct. No. SC119066)

APPEAL from a judgment of the Superior Court of Los Angeles County. Lisa Hart Cole, Judge and Joe W. Hilberman, Referee (Retired Judge of the Los Angeles Superior Court). Affirmed as modified.

Baker & Associates and Mark E. Baker for Defendants and Appellants.

Appell Shapiro, Scott E. Shapiro, and Sean J. Haddad for Plaintiff and Respondent.

California Hand Center, Inc. (CHC) sued J. Timothy Katzen, M.D.,[1] for causes of action arising out of Katzen's alleged breach of contract. Katzen filed a cross-complaint against CHC. A referee appointed by the court found in favor of CHC and awarded it $227,319.46 in damages, plus $164,374.50 in contractual attorneys' fees. After judgment was entered, Katzen appealed. We agree with Katzen that $50,000 of the award is not recoverable under the theories CHC asserted, but reject his other contentions. We modify the judgment accordingly, and affirm the judgment as modified.

FACTUAL AND PROCEDURAL SUMMARY

CHC is a California professional medical corporation operated by Sean Younai, M.D. Katzen is a physician specializing in weight loss surgery. On November 16, 2011, CHC and Katzen entered into a "Professional Service Agreement" (PSA). Under the PSA, Katzen agreed to perform medical services exclusively for CHC at CHC's office and "to devote all of his working time and attention to the practice of [CHC] during the term" of the PSA. He further agreed to "prepare and file . . . reports of all examinations, procedures and other medical and surgical services" that he performed and to "[c]omply with and complete administrative/billing requirements, turn in charge forms and tickets, and dictate reports to allow [CHC] to timely and accurately bill for [Katzen]." Any "income attributable to [Katzen's] professional services . . . as a result of activity started after November 16, 2011," and all "accounts receivable derived from [Katzen's] efforts and subsequent collection on such accounts receivable" belong to CHC.

CHC agreed to pay Katzen a base salary of $30,000 per month, plus "Incentive Compensation" calculated as a percentage of collections attributable to Katzen's services above a certain threshold. "All computations to be done under [the PSA] shall be done

[1] Appellants are J. Timothy Katzen, M.D., and J. Timothy Katzen, M.D., Professional Corporation. Because our analysis does not depend upon the distinction between the defendants, we will use "Katzen" to refer to the individual defendant, the corporate defendant, or both, allowing the context to determine the meaning.

by [CHC's] firm of independent certified public accountants and shall be final and binding on the parties."

The term of the PSA was three years; either party, however, could terminate the agreement upon 90 days written notice. Upon termination, CHC could offset amounts that Katzen owed to CHC against amounts that CHC owed to Katzen. CHC, was required to provide Katzen with "an accounting of all such debts and liabilities prior to . . . taking any offset."

The PSA provided that any action to interpret or enforce the agreement shall be determined by judicial reference pursuant to Code of Civil Procedure section 638. The PSA further provided for the recovery of attorneys' fees by "the prevailing party" in an "action related to the transactions contemplated hereby . . . as may be determined in the discretion" of the referee or court.

Prior to entering into the PSA, Katzen examined and treated patients at third-party facilities, including Southern California Orthopedic Medical Group (SCOMG) and clinics owned by Dr. Edward Komberg. After entering into the PSA, Katzen continued to work at these and other third-party facilities. The parties do not dispute that the money paid to Katzen for work performed at these third-party facilities during the term of the PSA belonged to CHC.

The third parties billed insurance companies for Katzen's work, and Katzen thereafter received payments for his services from either the insurance companies or the third parties. Katzen typically received these payments several months or years after he performed his services. Katzen did not provide to CHC billing information regarding the work he performed at third-party facilities.

Approximately one month after entering into the PSA, Katzen decided he would keep the money he received for his work at the third-party facilities. At trial, he explained that he made this decision because he believed that CHC owed him money for work he performed in July 2011, before they entered into the PSA, and for three days in December 2011. He did not turn over to CHC any of the money he received for his work at the third-party facilities and did not tell CHC that he had received such payments.

Nor did he provide CHC with documents or information that would have enabled CHC to determine the amounts Katzen owed to CHC under the PSA. When Dr. Younai asked Katzen for billing information pertaining to his work at third-party facilities, Katzen told him: " 'Go find [it] yourself.' "

CHC paid Katzen the salary called for under the PSA for the period from November 16, 2011 to February 29, 2012.

On March 6, 2012, Katzen sent CHC written notice that he was terminating the PSA, effective 90 days thence. CHC received the notice on March 7 or 8, 2012. Although Katzen was ready, willing, and able to work during the 90-day notice period, CHC informed him that his services were no longer needed and canceled Katzen's appointments with CHC patients. CHC did not pay Katzen after February 2012.

In November 2012, CHC commenced the underlying action and, in July 2013, filed a first amended complaint. CHC sought damages, a constructive trust, and an accounting based on Katzen's alleged fraud, breach of contract, and conversion.

Katzen filed a cross-complaint seeking damages for breach of the PSA, an accounting, and injunctive relief concerning material on CHC's website.

The court referred the matter to a referee in accordance with the PSA. A hearing before the referee was held in January 2014. Katzen did not dispute that he had withheld money he was obligated to turn over to CHC; the primary issue was the determination of the amount Katzen withheld. That determination was problematic because Katzen did not keep or provide to CHC records of the patients he saw, the dates he saw them, the services he performed, or the amounts billed or paid for his work. Katzen explained this at trial by stating, "I'm a surgeon. I'm not an accountant. I'm not a biller."

Although CHC obtained records of the checks Katzen received as payment for his services at third-party facilities, the checks did not include information that could connect the payment to the date of service for which the payment was made. It was thus "impossible," as Katzen put it, to know whether a particular check "was for a patient [he] had seen three months prior or six to seven years prior." This impossibility was

CHC's problem, or so Katzen believed, because it was CHC's responsibility under the PSA "to track down the accounting."

In the absence of complete records connecting Katzen's receipts for work performed during the PSA term, CHC relied on forensic accountant and applied mathematics expert, Thomas Neches. Neches explained his method for estimating the amount Katzen owed to CHC as follows. Using Katzen's bank statements, Neches determined that Katzen deposited approximately $1.5 million into his accounts from November 2011 through June 2013; Neches verified that the deposits were payments for Katzen's professional services and not from other sources of income, and excluded CHC's salary payments to Katzen; using documents obtained from some of the insurance companies that paid Katzen, Neches identified the dates of service associated with 199 payments;[2] although these 199 payments were a fraction of the payments Katzen received, they provided what Neches believed was a random sample of payments to Katzen; for each payment in the sample, Neches determined the time lags between Katzen's services and the payments.

Neches determined that none of the 199 payments was for work performed in the month preceding the payment; 4.5 percent of the payments were for services performed two months prior; 12.1 percent of the payments were for services performed three months prior; 21.1 percent of the payments were for services performed four months prior; "and so on and so on and so on until you come up with all the months and it comes up to a hundred percent." Based on his assumption that the 199-payment sample was representative of other payments Katzen received, Neches applied these percentages to the sum of payments Katzen received in a particular month in order to estimate the amount that Katzen was paid for services he performed in a prior month. Thus, 4.5 percent of the money Katzen received in August 2012, for example, reflected payments for services performed two months earlier, in June 2012; 12.1 percent of the

[2] Neches stated that CHC's attorneys subpoenaed 40 or 50 insurance companies. Approximately 12 to 15 of those companies produced documents in response to the subpoenas.

August payments was for work performed in May; and so on. After Neches made this calculation as to each month for which he had records of Katzen's deposits, he added together the estimated amounts for the months when the PSA was in effect to estimate the total amount Katzen received for work performed during the PSA term.

Based on this method, and after making adjustments for money CHC owed to Katzen, Neches estimated that, if the contract term ended on March 8, 2012, Katzen owed CHC $268,415.56. Because the date the contract term ended was a disputed issue, Neches also provided various totals corresponding to different contract termination dates.

Neches also performed an alternative analysis based upon the theory of rescission, which, he explained, revealed the amount of money that CHC "would have today if it had never met Dr. Katzen in the first place."[3] That amount was $162,192.61, which included $50,000 in expenses related to modifying CHC's websites to promote Katzen's association with CHC.

Katzen relied on economist Dr. Hyowook Chiang. Chiang criticized three aspects of Neches's analysis. First, the 199 payments that Neches used for his sample did not include checks from all of the insurance companies that paid Katzen; it was not, therefore, "a purely random sample." Second, Neches placed all payments from the sample that had a service-to-payment lag time of more than 12 months into a single category. Thus, a payment that lagged behind its corresponding service by two years was placed in the same category as a payment with a 13-month service-to-payment lag time. In Chiang's opinion, this increased Neches's estimate of the amount that fell within the PSA term. Third, Neches failed to take into account the fact that checks for larger amounts tended to have longer service-to-payment lag times.[4]

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[3] The referee allowed Neches's testimony about this analysis over Katzen's objection on the ground that CHC had not alleged rescission.

[4] Katzen's counsel asked Neches on cross-examination whether he took into account the size of the payments in determining the service-to-payment lag time. Neches said he did not "[b]ecause there's no statistically significant correlation between the amount of payment and the time of payment." He also stated that placing all payments

Chiang also created a list of checks and electronic deposits that Katzen's counsel informed him were for services performed outside the PSA term. This list—trial exhibit 255—purportedly reduced the nearly $1.5 million in deposits that Neches used as a starting point in his analysis by approximately $1.2 million, with a corresponding reduction in the amount of damages.

By the end of the trial, each side dismissed its claims against the other, except for the breach of contract claims.

In February 2014, the referee issued a "Report of Referee," in which he found that the contract terminated on March 8, 2012. That finding is not challenged on appeal. The "essence of this dispute," the referee observed, was "the amount in controversy under the terms of the PSA." The referee noted that neither side was able to produce "the actual bills and records of payment" that could have established the amount Katzen owed to CHC. The referee then discussed Neches's "regression analysis," noted Dr. Chiang's criticisms of that analysis, and found that CHC's "theory and calculations of damages sustained are reasonable . . . and adequate to support a finding in favor of [CHC] and against [Katzen]." In determining damages, the referee generally accepted Neches's method, but subtracted from Neches's calculation certain amounts the referee found were outside the PSA term or otherwise not recoverable or proven. The referee found "against the cross-complaint," and set CHC's damages in the amount of $227,319.46. The referee concluded that CHC was the prevailing party for purposes of the PSA's attorneys' fee provision.

Katzen filed objections to the report and CHC filed a response to the objections. The referee subsequently issued a "Statement of Decision," which restated the findings in the prior report and added that the referee found "the testimony of Neches to have been more persuasive than that of Chiang," and that the referee "adopt[ed] [CHC's] calculation of damages" with specified reductions.

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with a lag time of more than one year into one category "was a reasonable simplification that would not materially affect the results of [his] analysis."

Regarding the attorneys' fees provision, the referee stated that "both parties prevailed, inasmuch as [CHC] recovered on the breach of contract claim but [Katzen] prevailed on the fraud cause of action by the dismissal of that claim at the time of the trial."

Each side filed competing motions for attorneys' fees, memoranda of costs, and motions to tax costs. After a hearing, the referee reversed its earlier determination that both parties prevailed, and found that CHC was the sole prevailing party. The court adopted the referee's findings and awarded CHC $227,319.46 in damages, statutory costs in the amount of $31,851.52, plus "reasonable attorneys' fees" in the amount of $164,374.50.

Katzen filed separate appeals from the judgment and the order awarding attorneys' fees, and we consolidated the two appeals.

DISCUSSION

I. *Issues Concerning Neches's Damages Analysis*

Katzen contends that Neches's expert testimony was fundamentally flawed and unreliable, and the court erred by relying on it. We disagree.

Generally, a plaintiff injured by a breach of contract is entitled to the benefit of the contractual bargain and to be put " 'in as good a position as he or she would have occupied' if the defendant had not breached the contract." (*Lewis Jorge Construction Management, Inc. v. Pomona Unified School Dist.* (2004) 34 Cal.4th 960, 967.) In order to put CHC in that position, the referee needed to award CHC an amount of money equal to the amount that others paid to Katzen for his services during the PSA term, less any amount that CHC owed to Katzen. That amount could not be precisely determined because payments to Katzen lagged behind the related services by months or years, and the parties did not have the information needed to correlate the payments he received to the services he performed.

When, as here, it is certain that the plaintiff has been injured by a breach of contract and the amount of damages cannot be calculated with absolute certainty, the court may base an award on an approximation so long as the court uses " 'some

reasonable basis of computation.' " (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 774-775, quoting *GHK Associates v. Mayer Group, Inc.* (1990) 224 Cal.App.3d 856, 873-874.) An estimate or approximation of damages is particularly appropriate when the difficulty of ascertaining the amount of damages is due to the wrongful conduct of the defendant. (See *Brandon & Tibbs v. George Kevorkian Accountancy Corp.* (1990) 226 Cal.App.3d 442, 458; *Zinn v. Ex-Cell-O Corp.* (1944) 24 Cal.2d 290, 297-298.)

Here, Katzen not only failed to turn over money that belonged to CHC, but failed to keep or provide records that would have allowed the parties to determine the amount he owed. Although CHC agreed to perform the "computations" required under the PSA, Katzen had a duty to provide CHC with "reports of all examinations, procedures and other medical and surgical services," and other documents that would have allowed CHC to "timely and accurately bill" for such services. Moreover, the PSA, like all contracts, included implied duties " 'to refrain from doing anything which would render performance of the contract impossible by any act of his own, [and] the duty to do everything that the contract presupposes that he will do to accomplish its purpose.' " (1 Witkin, Summary (10th ed. 2005) Contracts, § 798, p. 892, quoting *Harm v. Frasher* (1960) 181 Cal.App.2d 405, 417.) Thus, although Katzen was not an accountant or "biller," as he insisted, he was also more than a surgeon—he was a party to a contract that obligated him to provide CHC with the information it needed to make the "computations" the contract required.

Complying with these duties would not have been difficult or burdensome. As Katzen admitted during trial, it would have taken no more than a few minutes after treating a patient to make notes indicating the patient's name, and the nature, location, and date of service for each patient he examined or treated. He also had the ability to print "face sheets" with patient billing information regarding his services at third-party facilities during the PSA term, but did not do so.

Had Katzen provided CHC with basic information about his services, the parties and the referee could have correlated the payments Katzen received to the services he

performed. As Neches explained, determining the amount Katzen owed to CHC would then have been a matter of simply adding up the applicable payments; no experts would have been necessary. Instead, Katzen placed CHC in the difficult position of having to prove how much of his income was attributable to services he performed during the term of the PSA. Under these circumstances, Katzen "cannot complain because the court [had to] make an estimate of damages rather than an actual computation" (*Benard v. Walkup* (1969) 272 Cal.App.2d 595, 606) or rely on expert testimony to do so.[5]

We have reviewed Neches's testimony, his reports, and the evidentiary basis for his opinions. He reasonably relied on the materials upon which he based his opinion—Katzen's bank records and a substantial sampling of payment records—and his assumptions and conclusions flowed logically from consideration of those records. In light of what Katzen described as an "impossible" task, Neches's analysis provided a reasonable basis for estimating the amount of money Katzen received for services performed during the PSA term. The criticisms Dr. Chiang raised during trial bear upon the weight to be given Neches's testimony, not its admissibility.

Katzen further contends that Neches's analysis was flawed and unreliable because it ignored a stipulation between the parties that the checks and deposits identified in exhibit 255 were not covered by the PSA. Based on this stipulation, Katzen argues, the starting point for Neches's analysis should have been $254,095, instead of the nearly $1.5 million of deposits Neches used. We agree with CHC, however, that "[n]o such stipulation ever occurred." Although CHC stipulated that checks Katzen received prior to November 16, 2011 (when the PSA term began), and checks that reflect service dates outside the PSA term are not included in CHC's claim, the record does not indicate that

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[5] CHC contends that because Katzen was receiving money for CHC's benefit, he was CHC's agent with a fiduciary duty to account for the funds he received. Citing to *Kennard v. Glick* (1960) 183 Cal.App.2d 246, CHC argues that Katzen's failure to comply with this duty creates a presumption that all money deposited into Katzen's accounts that is "not already shown to fall outside the PSA belong to [CHC]," and it was Katzen's burden to rebut that presumption. It does not appear from our record, however, that CHC asserted this argument below or that the referee considered it. We therefore decline to address it.

CHC stipulated that the checks and electronic deposits listed in Exhibit 255 were outside the contract period.

Katzen also argues that Neches improperly failed to consider documents received from some of the third parties that billed for Katzen's services. These documents include copies of checks and spreadsheets produced in response to subpoenas. When asked about the documents, Neches indicated that they were incomplete in one manner or another, or illegible, and could not be incorporated into his analysis. Spreadsheets produced by Dr. Komberg's clinics (exhibits 7, 8 & 9), for example, show amounts paid to Katzen for particular services by date, but do not indicate the dates Katzen received the payments, which were required for Neches's analysis.[6] Neches's explanation for rejecting them was reasonable. His method required information connecting specific payments with the related services to determine the service-to-payment lag time. The documents to which Katzen refers did not provide this information and were, therefore, irrelevant to Neches's analysis.

II. *The Referee's Award Of Damages For The Cost Of Modifying CHC's Website*

Katzen argues that the court erred by awarding $50,000 in damages for expenses CHC incurred to modify its website upon Katzen's association with CHC. We agree.

"Under contract principles, the nonbreaching party is entitled to recover only those damages . . . which are 'proximately caused' by the specific breach. [Citations.] Or, to put it another way, . . . the breaching party is only responsible to give the nonbreaching party the benefit of the bargain to the extent the specific breach deprived that party of its bargain." (*Postal Instant Press, Inc. v. Sealy* (1996) 43 Cal.App.4th 1704, 1709; see generally 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 870, p. 956 ["It is essential to establish a causal connection between the breach and the damages sought."].)

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[6] Katzen also referred Neches to copies of checks produced by U.S. HealthWorks (exhibit 70) and SCOMG (exhibit 71). The U.S. HealthWorks documents show payments made to Katzen, but do not indicate the service dates for the payments. Documents produced by SCOMP include spreadsheets showing payments made to Katzen and other spreadsheets showing the dates that services were performed, but nothing to indicate how the payments to Katzen and the service dates are correlated.

Here, Katzen's breach consisted of his failure to pay CHC the money he received for services performed during the term of the PSA. That "specific breach" did not proximately cause CHC to incur expenses to modify its website because CHC would have incurred such expenses regardless of whether Katzen turned over the challenged payments.

Arguably, the website expenses may have been recoverable as restitution based upon a theory of rescission. (See generally 1 Witkin, Summary of Cal. Law, *supra*, Contracts, § 937, p. 1031.) Indeed, Neches included such expenses only in his alternative analysis of damages based on rescission. As Katzen pointed out to the referee in his objection to such evidence, however, CHC never alleged it had rescinded the PSA or asserted a claim for rescission. In response to this objection, CHC's counsel argued that rescission damages are recoverable under its fraud cause of action. Even if this is true, CHC ultimately dismissed its fraud cause of action and, on appeal, does not assert rescission as a theory for upholding the $50,000 award.[7]

CHC, citing *Cederberg v. Robison* (1893) 100 Cal. 93, argues that the website expenses constitute " 'outlay expenses' " that are appropriate against one "who has 'voluntarily and wrongfully put an end to the contract.' " Here, although Katzen breached the agreement by failing to turn over money he received to CHC, he did not *wrongfully* put an end to the contract. The PSA was terminable at will by either side upon 90 days notice. Katzen gave the required notice and remained ready, willing, and able to work through the 90-day period.

CHC also asserts that the referee, in an exercise of discretion, awarded $50,000 in website expenses "in lieu of also awarding net lost profits for" the period after the PSA had terminated. This argument suggests that the award of $50,000 for website expenses

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[7] Katzen argues that CHC's website costs are, "at best," special damages for which CHC had to prove that Katzen either knew or should have known at the time of contracting that CHC would incur. (See *Lewis Jorge Construction Management, Inc. v. Pomona Unified School Dist.*, *supra*, 34 Cal.4th at pp. 968-969.) Because CHC does not contend that the challenged expenses are special damages, we do not address this argument.

was the referee's way of mitigating his decision not to award additional contract damages for the post-termination period. CHC does not cite to the record or to legal authority for this argument, and we reject it.

Because there is no legal basis for the award of $50,000 for CHC's website expenses, we will reduce the judgment by that amount.[8]

III. *The Referee's Prevailing Party Determination*

Katzen contends that it is a prevailing party under the PSA and is entitled to an award of attorneys' fees and costs. We disagree.

"Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties." (Code Civ. Proc., § 1021.) CHC and Katzen expressly provided for the recovery of attorneys' fees in the PSA as follows: "In the event that any party shall submit an issue for reference or bring an action for specific performance or breach of this Agreement, or in any action related to the transactions contemplated hereby, the prevailing party . . . shall be entitled to recover . . . all reasonable . . . attorneys' fees . . . ."

Normally, the prevailing party is "the party whose net recovery is greater, in the sense of most accomplishing its litigation objectives." (*Maynard v. BTI Group, Inc.* (2013) 216 Cal.App.4th 984, 992; see also Code Civ. Proc., § 1032, subd. (a)(4) [prevailing party for purposes of recovering costs "includes the party with a net monetary recovery"].) This is true even when the party with the net monetary recovery received only a "partial recovery." (*Michell v. Olick* (1996) 49 Cal.App.4th 1194, 1199.) A court may, however, "base its attorney fees decision on a pragmatic definition of the extent to which each party has realized its litigation objectives, whether by judgment, settlement, or otherwise." (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 622.)

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[8] Katzen also contends that $14,382.10 in business development expenses should not have been included in damages for the same reason the $50,000 in website expenses should not have been included. The record does not support this contention.

"The trial court is given 'wide discretion' in determining which party prevailed, and we will not overturn that determination 'absent a clear abuse of discretion.' " (*Acree v. General Motors Acceptance Corp.* (2001) 92 Cal.App.4th 385, 400, footnote omitted; see also *Salehi v. Surfside III Condominium Owners Assn* (2011) 200 Cal.App.4th 1146, 1154 (*Salehi*).) No such abuse appears here. As a result of the award of $227,319.46 in damages and the referee's finding "against [Katzen's] cross-complaint," CHC indisputably obtained a net monetary recovery. Even after our $50,000 reduction in the award, CHC's still has a net monetary recovery.

From a pragmatic perspective, CHC achieved substantially less than the $454,161.83 identified in Neches's broadest measure of damages and abandoned its claims for tort and punitive damages when it dismissed its non-contract causes of action. Although this less-than-total victory may explain why the referee stated at one point that "both parties prevailed," the court could reasonably conclude that CHC had substantially realized its litigation objectives and that Katzen had not. Its final determination that CHC was the sole prevailing party was well within its discretion.

Katzen contends that he is a prevailing party because CHC dismissed its fraud and conversion causes of action. He asserts that *Childers v. Edwards* (1996) 48 Cal.App.4th 1544 is "on point." In *Childers*, the buyers of real property sued the sellers for damages under contract and tort theories. In granting the sellers' motion for judgment, the court found that although the sellers had misrepresented flooding and drainage problems, the buyers failed to prove damages. (*Id.* at p. 1547.) The court later denied the sellers' motion for contractual attorneys' fees on the ground that neither side prevailed. The Court of Appeal reversed, stating that the "buyers failed to prove damages or to obtain any other relief against the [sellers]." (*Id.* at p. 1549.) In that situation, the trial court had no discretion to determine the prevailing party. (*Id.* at p. 1551.) *Childers* is not on point because, unlike the buyers in that case, CHC did obtain relief and a net monetary recovery. The fact that CHC dismissed some of its causes of action does not preclude a finding that it was the prevailing party in the litigation. (See *Maynard v. BTI Group, Inc.*, *supra*, 216 Cal.App.4th at p. 994 [plaintiff entitled to recovery as prevailing party even

though the court awarded her damages on one cause of action only and found for defendant on six other causes of action].)

Salehi, *supra*, 200 Cal.App.4th 1146, upon which Katzen relies, is distinguishable for the same reason. The plaintiff in *Salehi* dismissed eight of 10 causes of action on the eve of trial. While the remaining causes of action were pending, the defendant moved for an award of contractual attorneys' fees as the prevailing party. The trial denied the motion and the Court of Appeal reversed, stating that the plaintiff "prevailed on no level whatsoever, let alone on a 'practical level.' " (*Id.* at p. 1150.) Unlike the plaintiff in that case, CHC prevailed on its breach of contract claim, on Katzen's cross-complaint, and by obtaining a net monetary recovery.

Katzen further contends that the attorneys' fees provision in the PSA is unique in that it provides for the recovery of fees by "the prevailing party on 'an issue.' " He then identifies numerous "issues" on which he claims to have prevailed, including: Although CHC prayed for $1,000,000 in its first amended complaint, it recovered only $227,319.46 (now reduced to $177,319.46); the referee rejected CHC's claim to a particular website domain name; and Katzen was successful in defeating CHC's pretrial application for an attachment order. The argument suggests that the referee was required to determine which party prevailed as to each issue in the case and award fees accordingly. Aside from the practical problems with this approach, the argument is unsupported by the contractual language.

The attorneys' fee provision states: "In the event that any party shall submit *an issue* for reference or bring an action for specific performance or breach of this Agreement, or in any action related to the transactions contemplated hereby, the prevailing party in such reference or action, as may be determined by the referee . . . shall be entitled to recover from the losing party in such an action also as determined by the judge or court having jurisdiction, all reasonable costs and expenses of litigation, including costs of attorneys' fees, reference fees, . . . in such amount as may be determined in the discretion of such referee, judge or court." (Italics added.) The "an issue" phrase appears solely in the opening clause, which identifies a party's

submission of "an issue for reference" as one of three events that trigger application of the provision; the other two are: (1) a party brings an action for specific performance or breach of the agreement, and (2) the existence of any action related to the transactions contemplated by the agreement. If any of these events occur, "the prevailing party *in such reference or action*" shall be entitled to recover attorneys' fees. (Italics added.) Significantly, the provision does not provide for the recovery of fees by the prevailing party as to each issue, but as to *such reference or action* in which the issue was submitted. Although there were many issues decided, there was but one reference and action.

Katzen also relies upon the referee's statement in the statement of decision that "both parties prevailed, inasmuch as [CHC] recovered on the breach of contract claim but [Katzen] prevailed on the fraud cause of action by the dismissal of that claim at the time of trial." As Katzen acknowledges, however, the referee reconsidered this finding and determined that CHC was the sole prevailing party. The referee was not bound by his interim ruling. (See *Kerns v. CSE Ins. Group* (2003) 106 Cal.App.4th 368, 388 ["trial courts have the inherent power to reconsider and correct their own interim decisions"].)

Katzen contends that he also prevailed "on equitable grounds." The litigation, he asserts, could be viewed as a draw, with both sides bearing their costs and fees. Even if it was possible for the referee to have concluded that the litigation was a draw, the question on appeal is whether the referee's finding that CHC prevailed was an abuse of discretion. For the reasons set forth above, it was not.

IV. *Katzen's Arguments Regarding The Statement Of Decision*

Katzen contends the referee failed to address the following issues in its statement of decision: (1) Why the referee relied upon Neches's "fatally flawed estimate over actual evidence of money received by Katzen"; (2) Why Katzen was not awarded $20,000 for work performed after the PSA was terminated; (3) Why the court mixed benefit of the bargain and restitution damages in awarding $50,000 for CHC's website expenses; and (4) Why the court reversed its finding that both sides had prevailed. We address each in turn.

The statement of decision adequately explains why the referee relied on Neches's analysis. The referee discussed the parties' inability "to produce complete records for . . . analysis" of Katzen's receipts and the lack of " 'hard' financial information," thus necessitating an approximation of damages and the use of experts. The referee found that Neches was "qualified to express expert opinions," discussed his method, noted Dr. Chiang's criticisms, and made specific modifications to Neches's calculations. The referee further found that Neches's testimony was more persuasive than Dr. Chiang's testimony, and that his theory and calculations were reasonable. The referee thus adequately explained his reasons for relying upon Neches's analysis.

The reason why the referee did not award Katzen $20,000 for work performed after the PSA was terminated is also apparent from the referee's reliance on Neches's analysis. Neches identified 19 specific payments that CHC received for services Katzen performed after February 2012, for which Katzen had not been paid. The receipts for these services, together with receipts for services performed before the beginning of the PSA term, totaled $14,118.72. Neches's calculation included this amount (less a 7 percent collection fee) as a setoff in Katzen's favor. The referee applied this setoff when he generally adopted Neches's analysis. Katzen's claim that CHC owed him an additional $20,000 is based solely on his testimony that he worked an additional, unspecified 10 days at CHC offices, and that he typically saw 40 to 50 patients per day for which he would have billed $2,000 per day. He offered no more specific information or documents to support this claim. The referee could reasonably have accepted Neches's testimony, disregarded Katzen's testimony, and concluded, as he did, that Katzen failed to prove this claim.

Regarding the award of $50,000 for website expenses, as explained above, we agree with Katzen that this award must be reversed and the judgment modified accordingly. His argument regarding the statement of decision, therefore, is moot.

Finally, the referee was not required to explain why he reversed his prior finding that both sides had prevailed. Just as a trial court has inherent authority to change a

decision any time prior to entry of judgment (*Darling, Hall & Rae v. Kritt* (1999) 75 Cal.App.4th 1148, 1156), so does a court-appointed referee.

DISPOSITION

The judgment filed July 1, 2014, is modified to award CHC damages in the amount of $177,319.46. The judgment is affirmed as modified. Upon remand, the court shall issue an amended judgment reflecting this modification.

The trial court's order as to the parties' motions for attorneys' fees and motions to tax/strike costs dated January 15, 2015, is affirmed.

Respondent entitled to its costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

JOHNSON, J.

LUI, J.