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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

PADRAIC C. LANE et al.,

Plaintiffs and Appellants,

v.

ZINDER & KOCH et al.,

Defendants and Respondents.

B266457

(Los Angeles County
Super. Ct. No. PC055667)

APPEAL from a judgment of the Superior Court of Los Angeles County, Melvin Sandvig, Judge. Affirmed.

Thomas Anton and Associates, Thomas J. Anton and Becky M. Brooks, for Plaintiffs and Appellants.

Klinedinst, Heather L. Rosing and Leah A. Plaskin, for Defendants and Respondents.

Padraic C. Lane and Lane Family Funeral Home (LFFH) sued their former attorney and his firm, Jeffrey Zinder and Zinder & Koch (jointly, Zinder), after the Department of Consumer Affairs, Cemetery and Funeral Bureau (CFB) revoked Lane's funeral director license and LFFH's funeral establishment license following a disciplinary action. The trial court granted Zinder's motion for summary judgment and dismissed the complaint, finding that Lane failed to establish any harm he may have suffered was caused by Zinder's alleged malpractice. We affirm.

FACTUAL AND PROCEDURAL SUMMARY

The underlying disciplinary action in this case, filed in 2012, was not the first time Lane had been sanctioned for violating funeral industry regulations. In 2006, Lane was convicted after pleading nolo contendere to one felony count of violating preneed trust agreements.¹ (Bus. & Prof. Code, § 7735.) The court suspended imposition of sentence and placed Lane on three years of formal probation. In 2007, the CFB filed an accusation against Lane for breaching the preneed agreements. The CFB alleged that Lane negotiated preneed agreements for several clients but deposited the funds he received in LFFH's general account instead of purchasing insurance or placing the

¹ A preneed trust agreement is a contract between a funeral establishment and a client to guarantee the cost of future burial or funeral services in exchange for a fixed sum of money. A funeral establishment is required by law to either place the funds in a trust account or purchase an insurance policy for the client. Preneed funds cannot be comingled with a funeral home's general operating account. (Bus. & Prof. Code, §§ 7735, 7737; Cal. Code Regs., tit. 16, § 1275.)

funds in a trust account. As a result, Lane diverted almost \$20,000 of his clients' preneed funds.

In the 2007 disciplinary hearing, an administrative law judge (ALJ) found cause to revoke or suspend Lane's licenses because he violated preneed agreements, committed acts of fraud or misrepresentation, failed to properly supervise LFFH's business practices, and committed acts of negligence, incompetence, and unprofessional conduct. But the ALJ noted several mitigating factors: Lane was facing financial hardship when he diverted the funds; he reimbursed the clients when CFB began its investigation; and he assured the ALJ that he would have performed under the agreements. The ALJ also noted Lane had been criminally punished, admitted guilt, and appeared remorseful. Lane's licenses were revoked, but the revocation was stayed for a three-year probationary period. Between 2009 and 2012, Lane was cited three times for price list irregularities.

The disciplinary action for which Lane retained Zinder originated with a complaint filed by Albert Keene, who had been a part-time employee at LFFH. Keene's aunt, Myrtle Cason, passed away in January 2011, and LFFH handled her funeral. The nursing home where Cason had resided provided a \$763.22 check to LFFH to cover a portion of the funeral expenses. Lane later admitted the check was deposited in LFFH's general account and was never refunded. Lane dealt exclusively with Keene on the funeral arrangements. Keene told Lane that his uncle, John Stover, would sign the contract and pay for the funeral services. However, Lane did not meet with Stover prior to the funeral, nor did he provide Stover with any price lists.

Lane prepared the contract, which included charges of \$1,850 for funeral services, \$695 for the casket, \$1,000 for

cemetery costs, \$650 for transportation, and a \$8.50 Department of Consumer Affairs (DCA) fee. Several prices were higher than the amounts quoted on LFFH's price lists, resulting in overcharges of \$200 for the casket, \$432 for the cemetery costs, and over \$500 for transportation costs. Lane was aware of the overcharges. According to Lane, Keene urged him to "bump up" the prices because the family could afford it. Lane asserted he was reluctant but eventually agreed to do so. Months after the funeral, Lane discovered that Keene was using a company credit card for personal expenses. Lane terminated him and filed a police report. In February 2012, Keene filed a complaint with CFB regarding the overcharges for Cason's funeral.

In April 2012, CFB field representatives interviewed Lane at LFFH and examined the company's records. Acting without an attorney, Lane prepared and signed a sworn declaration in which he admitted that he "overcharged the family \$200.00 for the cloth covered casket," and "overcharged the family transportation costs [and] cemetery fees." In his declaration, Lane stated that Keene "insisted" on bumping up the prices, and although he did not agree, he carried out Keene's "unusual request." Lane also stated that he thought Keene's complaint was retaliatory. A review of LFFH's records showed that approximately 178 families were charged the \$8.50 DCA fee.

CFB filed a formal accusation against Lane and LFFH for fraud and misrepresentation, false advertising, and unprofessional conduct. The accusation alleged that Lane overcharged for the casket, transportation, and cemetery costs. Lane also was accused of receiving and cashing the check from Cason's nursing home, failing to provide price lists, and unlawfully collecting DCA fees from 178 families without

remitting funds to the State. The accusation noted Lane's 2007 felony conviction and three-year probation for violating preneed trust agreements in addition to several citations between 2009 and 2012.

Lane retained Zinder in May 2012. After reviewing Lane's declaration, Zinder informed him that his admissions were problematic and repeatedly stated that they had a "huge mountain to climb." Zinder attempted to settle the case but was advised by a deputy attorney general that CFB "would not propose settlement terms and settlement of the matter was impossible." The administrative hearing was held in August 2013. Zinder argued that Lane's actions were not fraudulent, rather he made a mistake which did not justify revoking his licenses. Lane testified, providing his explanation of what had occurred. He explained that Keene told him to bump up the prices and was aware of the LFFH price list. On cross-examination, Lane acknowledged that his declaration stated he overcharged the family, and admitted to charging DCA fees without remitting funds to the state.

In late 2013, the ALJ issued his decision. The ALJ found that: (1) Lane overcharged Cason's family by \$1135.74 for the casket, transportation and cemetery costs; (2) Lane deposited the check from the nursing home but did not inform Stover of the payment, did not apply it towards the funeral expenses, and did not refund it to Stover; (3) Lane conceded charging DCA fees without remitting funds to the State; and (4) Lane's declaration contained admissions that he overcharged for services and collected DCA fees. Lane's explanation regarding the overcharges was determined to be not credible. The ALJ found cause to discipline Lane based on fraud and misrepresentation,

false and misleading advertising, and failure to provide price lists.

The ALJ revoked Lane's licenses, determining that the public would be at risk if he continued operating a funeral home. The ALJ based this decision on several factors. Lane's actions were "severe, demonstrating fraud, misrepresentation, and misleading conduct." He "failed to admit to these acts" and his "defenses were specious." Even though Lane was on probation between 2007 and 2010 for prior violations, he engaged in the conduct at issue just four months after his probation ended. The ALJ concluded that "the evidence does not support a conclusion that the imposition of probation would serve its purpose, as its previous imposition was unsuccessful The public's safety and welfare can therefore only be achieved by revocation." The license revocations are now final.

In November 2014, Lane and LFFH filed a first amended complaint against Zinder and his firm, alleging causes of action for breach of written contract, legal malpractice, breach of fiduciary duty, fraudulent concealment, constructive fraud, and negligent misrepresentation. In March 2015, Zinder filed a motion for summary judgment or, in the alternative, summary adjudication. Zinder's motion principally argued that Lane could not establish causation because there was no evidence to show that but for Zinder's alleged negligence, Lane would have obtained a more favorable outcome. Lane opposed the motion on several grounds, including that Zinder failed to meet the threshold burden of showing lack of causation.

The trial court issued a tentative ruling granting Zinder's motion. The court reasoned that all of Lane's causes of action claimed Zinder's poor representation resulted in the license

revocations; however, because Lane admitted guilt during and before the administrative hearing, he failed to alleged that Zinder caused his damages. The court noted that Lane provided no evidence or case law suggesting that the ALJ's decision was not the result of his admittedly fraudulent conduct. Nor did Lane provide any evidence that a different strategy by Zinder would have resulted in a different outcome. Following oral argument, the court confirmed its tentative ruling and entered judgment. This timely appeal followed.

DISCUSSION

We review an order granting summary judgment de novo, considering all the evidence set forth in the moving and opposition papers, except that to which objections have been made and sustained. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860 (*Aguilar*).) A summary judgment motion “shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” (Code Civ. Proc., § 437c, subd. (c).) We first decide whether the defendant has satisfied his or her burden of persuasion that one or more elements of the cause of action in question cannot be established, or whether there is an affirmative defense. (*Id.* at subd. (o)(2).) The burden then shifts to the plaintiff to present evidence showing a triable issue of material fact. (*Id.* at subd. (p)(2).) We view the evidence in the light most favorable to the plaintiff, liberally construing his submissions while strictly scrutinizing the defendant's showing, and resolving any evidentiary doubts or ambiguities in the plaintiff's favor. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768 (*Saelzler*).)

To prove causation in a legal malpractice action, the plaintiff must “establish that, but for the alleged malpractice, trial, settlement of the underlying lawsuit would have resulted in a better outcome. [Citations.]” (*Filbin v. Fitzgerald* (2012) 211 Cal.App.4th 154, 166.) “[T]he crucial causation inquiry is what would have happened if the defendant attorney had not been negligent.” (*Viner v. Sweet* (2003) 30 Cal.4th 1232, 1242, italics omitted.) “Because causation is a question of fact for the jury, it ordinarily cannot be resolved on summary judgment. [Citation.] In legal malpractice claims, the absence of causation may be decided on summary judgment ‘only if, under undisputed facts, there is no room for a reasonable difference of opinion.’ [Citation.]” (*Namikas v. Miller* (2014) 225 Cal.App.4th 1574, 1583.)

Applying the foregoing principles, we must first determine whether Zinder satisfied his initial burden of showing that causation cannot be established. The inquiry is whether—but for Zinder’s actions—the disciplinary hearing would have resulted in a better outcome, that is, the CFB would not have revoked Lane’s licenses.

There are two pieces of undisputed evidence demonstrating that Zinder’s actions were not the cause of the harm Lane suffered when his licenses were revoked. First, *before* Zinder was retained, Lane admitted that he overcharged Cason’s family for the casket, transportation and cemetery costs. The ALJ specifically relied on these admissions when it found cause to discipline Lane. After reviewing Lane’s declaration containing these admissions, Zinder emphasized that the admissions presented a major challenge. Second, Lane’s prior history of CFB sanctions and his criminal conviction were important factors in

the ALJ's decision to revoke his license. The ALJ noted that Lane was on probation from 2007 to 2010, and then just four months later engaged in the unlawful conduct at issue in this case. Zinder was not responsible for the court's determination that Lane was a recidivist.

We agree with the trial court that Zinder satisfied his initial burden of demonstrating lack of causation. There is simply no evidence in the record showing that but for Zinder's alleged negligence, Lane would have obtained a more favorable outcome. (Code Civ. Proc., § 437c, subd. (p)(2).) The burden thereby shifted to Lane to demonstrate that a triable issue of material facts exists with regard to causation. (*Aguilar, supra*, 25 Cal.4th at p. 849.) Although we must construe the evidence in the light most favorable to the plaintiff and make all reasonable inferences in his favor (*Saelzler, supra*, 25 Cal.4th at p. 768), “[t]he plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.’

[Citation.]” (*Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1205-1206; accord *Saelzler*, at pp. 775-776.)

Lane contends that had Zinder “used a different trial strategy, provided meaningful character evidence, presented testimony and evidence corroborating [Lane’s] testimony, then the outcome would have been drastically different.” He notes that the ALJ did not accept the defense’s argument that the overcharges were a mistake rather than fraudulent. Lane

separately argues that admitting guilt and “falling on the sword” would have been a better defense strategy. He maintains that a “jury could reasonably infer that, had [he] admitted guilt and accepted responsibility, the ALJ would have viewed him in a kinder light” and not revoked his licenses. Lane refers to his prior disciplinary hearing in 2007 as an example of how admitting guilt and seeking lenience from the ALJ would have resulted in a better outcome.

These arguments are not persuasive. It is speculative to conclude that had Lane admitted guilt and sought lenience, the CFB would have allowed him to continue operating the funeral home. Referring to the 2007 disciplinary action as a model defense strategy does not bolster Lane’s case. There were mitigating factors in 2007 that were not present in 2012: Lane had been facing financial hardship; he had reimbursed the preneed funds to the clients; he had made assurances that he would have fully performed under the preneed agreements; and he had been criminally punished for his actions. In the 2012 disciplinary action, on the other hand, Lane’s own admissions established a higher degree of culpability and the ALJ found no mitigating factors. It is conjecture to suggest that “falling on the sword” for a second time would have resulted in a better outcome; the ALJ specifically found that the prior imposition of probation was ineffective and therefore Lane’s licenses should be revoked.

Lane has not presented evidence that affords a reasonable basis to conclude that Zinder’s actions during the representation caused the ALJ to revoke his licenses. Lane’s prior disciplinary and criminal history, together with his admissions of guilt prior to the beginning of the representation, presented an intractable challenge. Zinder’s attempts to settle the case with the CFB were

rebuffed. His ability to maneuver was restricted by Lane's prior admissions that he agreed to and was ultimately responsible for the overcharges. Accordingly, Zinder's argument that Lane made a mistake by agreeing to increase the prices at Keene's suggestion was reasonable under the circumstances. Lane's proposed trial strategies do not constitute evidence that is sufficient to raise a triable issue of material fact regarding causation. (See Code Civ. Proc., § 437c, subd. (p)(2).)

In sum, we agree with the trial court that Lane failed to produce evidence to justify a finding that triable issues of fact exist as to whether, but for Zinder's alleged negligence, Lane would have been able to retain his licenses. Lane's criminal and disciplinary history, together with his admission of guilt, preceded Zinder's involvement in the case; and Lane provided no evidence from which we may reasonably conclude that a different trial strategy would have resulted in a better outcome.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to defendants.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.