Filed 5/10/12 Sverdlin v. Yollin CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

DON SVERDLIN, Plaintiff and Respondent, v. ANTHONY CHRIS YOLLIN, Defendant and Appellant; FRANCES M. O'MEARA et al., Objectors and Appellants.	B234184 (Los Angeles County Super. Ct. No. SC109964)

APPEAL from a judgment of the Superior Court of Los Angeles County, Linda K. Lefkowitz, Judge. Reversed and remanded.

Kaufman Dolowich Voluck & Gonzo, Frances M. O'Meara, Stephen M. Caine and Holly Teel for Objectors and Appellants and for Defendant and Appellant.

Schorr Law, Zachary D. Schorr and Catherine Mina Kim for Plaintiff and Respondent.

Appellants Anthony Yollin and his attorneys Frances O'Meara and Holly Teel appeal from an order awarding attorney fees and costs under Code of Civil Procedure section 128.7, subdivision (c)(1)[1] in favor of plaintiff and respondent Dan Sverdlin. Appellants contend the trial court failed to apply the proper standard in determining whether an award of attorney fees and costs was warranted. We agree. Therefore, we reverse the order and remand the matter to the trial court for further proceedings.

FACTS AND PROCEDURAL BACKGROUND

On October 18, 2010, Sverdlin filed a three-page complaint against Yollin for negligence, breach of professional duties, and unfair competition which alleged the following. Sverdlin sold a parcel of real property to Mal and Maggie Ward. Yollin was the Wards' real estate broker. Although Sverdlin was also represented by a broker, he frequently communicated with Yollin directly. The purchase agreement allowed Sverdlin to remain in possession of the property for 90 days after escrow closed. Yollin breached his duty of honesty and fair dealing, was negligent, and engaged in unfair competition by yelling at Sverdlin on the telephone, requiring an excessive security deposit for the lease term, providing misleading information about unlawful detainer actions in order to coerce a reduction in the purchase price, and obtaining Sverdlin's assistance to deceive the Wards' lender by leasing the property back to Sverdlin outside of escrow for a lengthier term than allowed by the bank. Sverdlin suffered damage in the form of the $30,500 commission paid to Yollin.

Yollin filed an answer on November 19, 2010. That day, Yollin served Sverdlin with a request to withdraw the complaint or Yollin would file a motion for sanctions pursuant to section 128.7 based on the complaint's complete lack of merit. He attached evidence of the following facts: Yollin would have been entitled to a commission of

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[1] All further statutory references are to the Code of Civil Procedure, unless otherwise stated.

$40,500 based on the purchase price, but he voluntarily relinquished $10,000 to assist the parties in reaching an agreement on the price. The purchase agreement allowed Sverdlin to lease the property back for 90 days for one dollar. After Sverdlin accepted the Wards' purchase offer, he disclosed that a tenant living on the property was delinquent on the rent payments. Yollin suggested that Sverdlin give $10,000 to the tenant as a relocation payment, which corresponded to the amount Yollin had reduced his commission. However, the tenant vacated the premises without payment, and Sverdlin kept the entire amount of the purchase proceeds. The Wards' bank required a shorter lease than had been specified in the purchase agreement. Sverdlin and the Wards entered into a written agreement by which Sverdlin leased the property back for 59 days. The lease payment was one dollar per month. The agreement did not require a security deposit, and Sverdlin never paid a security deposit. After escrow closed, the Wards orally agreed to lease the property to Sverdlin for an additional 30 days after the expiration of the 59-day agreement. The oral agreement did not require the payment of any rent or security deposit. Yollin also provided evidence that he had incurred $10,000 in attorney fees to defend the action. Yollin filed the motion for sanctions on December 17, 2010, with a hearing date of March 22, 2011.

Sverdlin opposed the motion and requested an attorney fees award of $18,078. He argued that the motion served on him had improperly failed to specify the date and time of the hearing, he had not had an opportunity to conduct discovery, and a motion for sanctions should not be used in place of demurrer. He also argued that there was substantive law to support the complaint. Sverdlin submitted his declaration stating that Yollin had yelled on the telephone and used rude language when he learned Sverdlin's broker could not be reached. At the time that Sverdlin entered into the purchase agreement with the Wards, he did not have any concerns about the tenant that he was in the process of evicting. He had a good relationship with the tenant and Sverdlin believed he would be able to deliver possession of the property. Sverdlin considered Yollin's threats that the Wards would breach the purchase agreement to be bullying. Yollin had tried to insist on a security deposit for the lease-back period, but later abandoned the

requirement. Sverdlin's broker had assigned any claim that he had against Yollin to Sverdlin. In conclusion, Sverdlin believed Yollin made a routine real estate transaction very stressful and difficult, and he felt victimized by Yollin's conduct. Based on Yollin's treatment, Sverdlin felt Yollin should not be able to retain the commission that he received.

Yollin filed a reply. On March 16, 2011, Yollin took the motion off calendar. On March 17, 2011, Sverdlin filed a request for attorney fees of $18,078 against Yollin and his attorneys of record, O'Meara and Teel, as the prevailing party on Yollin's motion for sanctions under section 128.7, subdivision (c)(1). On May 9, 2011, Sverdlin filed another motion for attorney fees of $22,138 and costs of $40.

Yollin, O'Meara, and Teel opposed the motion for attorney fees and costs on the grounds that Yollin withdrew the sanctions motion in order to file a revised motion with additional evidence, Sverdlin was not the prevailing party, and Yollin would have prevailed in a determination on the merits of the motion. They argued that the trial court was required to determine whether Yollin would have prevailed on the sanctions motion had it not been withdrawn. Sverdlin filed a reply.

A hearing was held on June 3, 2011. The trial court noted that it was unusual to have filed a motion for sanctions rather than a demurrer, and that Sverdlin's attorney spent a substantial amount of time preparing an opposition to the motion. The court also noted that the motion was withdrawn right before the hearing. Although Yollin had represented that he would file a revised motion with new facts, none had been filed. The court concluded that Sverdlin was entitled to compensation. The court also stated the motion should not have been filed if it was going to be withdrawn.

O'Meara stated she should not have withdrawn the motion. She explained that she had intended to file a new motion to address the assignment allegations in Sverdlin's opposition, but the new facts were unnecessary. Even with the new allegations in the opposition, there was no causation and Sverdlin had suffered no damages. O'Meara sought to make an offer of proof as to the additional evidence, but the trial court declined to hear it.

The trial court expressly stated that it had not reached the merits of the sanction motion, because the motion had been withdrawn. The court found the motion for sanctions had been withdrawn, the court did not know the reason for the withdrawal, and Sverdlin expended substantial time preparing an opposition. The court noted that Yollin should have brought a demurrer, rather than a motion for sanctions.

The trial court granted Sverdlin's motion for attorney fees and costs. The court found Sverdlin succeeded on a practical level. Yollin's argument that there was no prevailing party because he intended to file his motion again at an unspecified date was not supported by authority, especially considering that the motion was not filed again. Therefore, the court determined Sverdlin to be the prevailing party, because he realized his equitable objectives. The court found the amount requested was unreasonable and reduced the amount to $13,250 for attorney fees and costs. Yollin, O'Meara, and Teel filed a notice of appeal from the order assessing attorney fees and costs.

Yollin filed a motion for summary judgment. Sverdlin proceeded in pro. per. The motion was granted and a judgment of dismissal was entered in favor of Yollin on November 7, 2011.

DISCUSSION

Appellants contend the trial court failed to apply the correct standard for awarding attorney fees and costs under section 128.7, subdivision (c), because the court explicitly refused to consider whether Yollin's motion for sanctions had merit or make any finding concerning Yollin's reasons for withdrawal of the motion. We agree.

Under section 128.7, subdivision (b), an attorney who presents a pleading or other similar paper to the court "is certifying that to the best of the person's knowledge, information, and belief" after a reasonable inquiry, the paper meets all of the following conditions: 1) "[it] is not being presented primarily for an improper purpose," 2) the legal contentions are "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law," 3)

the factual contentions have evidentiary support or are likely to have it, and 4) any denials are warranted.

Section 128.7, subdivision (c) authorizes parties to file a motion for sanctions based on a violation of section 128.7, subdivision (b). "If warranted, the court may award to the party prevailing on [a motion for sanctions under this section] the reasonable expenses and attorney's fees incurred in presenting or opposing the motion." (§ 128.7, subd. (c)(1).)

"Attorney fees may be awarded to the party prevailing on a motion for sanctions under section 128.7 only '[i]f warranted.' [Citation.]" (*Musaelian v. Adams* (2011) 197 Cal.App.4th 1251, 1257 (*Musaelian*).) We are guided by federal decisions interpreting "the virtually identical provision of rule 11 of the Federal Rules of Civil Procedure (28 U.S.C.) (Rule 11), upon which section 128.7 was modeled. [Citation.]" (*Musaelian, supra,* at p. 1257, fn. omitted.) "Attorney fees incurred in defending against a Rule 11 motion are '"infrequently granted where the motion was not clearly frivolous, filed for an improper purpose, or not well-grounded in fact or law."' (*E. Gluck Corp. v. Rothenhaus* (S.D.N.Y. 2008) 252 F.R.D. 175, 183; see also *Richelson v. Yost* (E.D.Pa. 2010) 738 F.Supp.2d 589, 602 [denying request for attorney fees incurred in defending against Rule 11 motion in part because (1) party had supplied no reason for awarding fees except its conduct was not sanctionable, and (2) motion was not objectively unreasonable]; *Haniotakis v. Nassan (In re Zion)* (W.D.Pa. 2010) 727 F.Supp.2d 388, 413 [declining to address plaintiffs' demand for counsel fees incurred in responding to Rule 11 motion where plaintiffs had not filed motion and likelihood of award in their favor was 'remote' because motion did not appear frivolous]; *G–I Holdings, Inc. v. Baron & Budd* (S.D.N.Y., Aug. 21, 2002, No. 01 Civ. 0216 (RWS)) 2002 U.S. Dist. Lexis 15443, pp. 54-55 [attorney fees for cost of defending against Rule 11 motion not warranted where motion was 'not clearly frivolous and in fact presented a close question'].) Thus, although Rule 11 does not explicitly require a separate finding of violation of Rule 11 to award attorney fees incurred in opposing a Rule 11 motion, it appears that such fees are normally not awarded if the Rule 11 motion was not frivolous, unfounded, filed for an

improper purpose, or otherwise unreasonable. Such a conclusion is consistent with the purpose of section 128.7, as well, which is '"to deter frivolous filings."' (*Hart v. Avetoom* (2002) 95 Cal.App.4th 410, 414.)" (*Musaelian*, *supra*, at pp. 1257-1258.)

"[T]he propriety or amount of an attorney fees award is reviewed using the abuse of discretion standard. [Citation.]" (*Castro v. Superior Court* (2004) 116 Cal.App.4th 1010, 1017.) The interpretation of a statutory term is a question of construction that we review de novo. (*Ibid*.)

In this case, the trial court expressly refused to consider whether Yollin's motion for sanctions had merit or Yollin's reason for withdrawal of the motion. Therefore, the award of attorney fees and costs must be reversed and remanded to allow the trial court to determine whether Yollin's motion for sanctions was frivolous, unfounded, filed for an improper purpose, or otherwise unreasonable, such that an award of attorney fees to Sverdlin is warranted.

DISPOSITION

The order awarding attorney fees and costs against appellants Anthony Yollin, Frances O'Meara and Holly Teel is reversed and remanded for further proceedings in accordance with this opinion. Appellants Anthony Yollin, Frances O'Meara, and Holly Teel are awarded their costs on appeal.

KRIEGLER, J.

We concur:

ARMSTRONG, Acting P. J. MOSK, J.