Filed 6/26/18 Medvei v. Morgan Stanley Smith Barney LLC CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

ADRIEN MEDVEI, as Trustee, etc., Plaintiff, v. MORGAN STANLEY SMITH BARNEY LLC, Defendant and Respondent; SEBASTIAN M. MEDVEI, Objector and Appellant.	B275534 Los Angeles County Super. Ct. No. BP160868

APPEAL from an order of the Superior Court of Los Angeles County, David J. Cowan, Judge. Affirmed.

Medvei Law Group, Sebastian M. Medvei for Objector and Appellant.

Greenberg Traurig, Jeffrey P. Palmer for Defendant and Respondent.

No appearance for Plaintiff.

The trial court imposed $15,000 in sanctions against attorney and appellant Sebastian M. Medvei (Medvei) for continuing to litigate a frivolous petition under Probate Code section 850 against Morgan Stanley Smith Barney LLC (Morgan Stanley). Medvei appealed. We affirm and deny the parties' requests for appellate sanctions.

BACKGROUND

Medvei's daughter, attorney Adrien Medvei (Adrien), drafted a trust for Eva de Sumrak (Eva) naming Adrien as cotrustee. Eva died shortly after executing the trust. Eva's prior trust held assets in security accounts at Morgan Stanley. When Morgan Stanley learned of the second trust and a dispute regarding the ownership of the trust assets, it froze the accounts in compliance with its standard client agreement. Both trusts filed petitions in probate court, with Medvei representing Adrien. When the parties settled, Morgan Stanley released the assets into a new account. Nevertheless, Adrien continued to pursue the petition against Morgan Stanley, arguing Morgan Stanley had wrongfully taken trust assets and had acted in bad faith. The trial court granted judgment on the pleadings, dismissed Adrien's petition, and ordered sanctions against Medvei, as detailed below.

A. *The March Trust*

On March 14, 2014, Eva signed a living trust (the March Trust), with Steven Kovary as successor trustee. Upon Eva's death, the trustee was to allocate the residue of the trust estate to a separate trust for Eva's son, Andras Zahar (Andras); if Andras was not living, the trustee was to allocate the residue to a separate trust for the benefit of Nicolette de Sumak (Nicky), the granddaughter of Eva's predeceased husband.

In April 2014, Eva opened a securities account at Morgan Stanley on behalf of the March Trust, funded with trust assets. Eva signed an Account Application and Client Agreement which specified that if Morgan Stanley "receives conflicting instructions from different Trustees, or reasonably believes instructions from one Trustee might conflict with the wishes of another Trustee, [Morgan Stanley] may do any of the following: (a) choose which instructions to follow and which to disregard; (b) suspend all activity in the account until written instructions signed by all Trustees are received; (c) close the account and deliver all securities or other property, net of debits or liabilities, to the address of record; and/or (d) take other legal action. You agree that [Morgan Stanley] retains the right to require joint action of all Trustees and/or authorized persons with respect to any activity relating to the Trust Account whenever such joint action may be deemed necessary in [Morgan Stanley's] sole discretion."

B. ***The December Trust***

On December 16, 2014, Eva signed a second trust (the December Trust), drafted by Adrien. The December Trust revoked the March Trust and named Adrien and Andras as successor trustees. Upon Eva's death, Andras would receive outright and free of trust the remaining balance of the December Trust estate; when Andras died, Nicky and her brother each would receive one-half of the remaining balance.

C. ***Eva's death and the competing petitions***

Eva died on February 16, 2015. On March 6, counsel for Nicky notified Morgan Stanley that Eva had executed the December Trust when she lacked capacity and was subject to undue influence, and Nicky, as the remainder beneficiary of the March Trust, intended to file a petition to invalidate the December Trust. The letter requested that Morgan Stanley maintain the trust assets intact until the trust contest was resolved.

On March 11, 2015, Morgan Stanley notified Adrien and Kovary (the trustee of the March Trust) that it had frozen the trust account pending a resolution of the issues in court or by agreement between the parties.

On March 17, 2015, Nicky filed a petition to determine the validity of the December Trust, claiming Eva had been diagnosed with dementia and lacked the mental capacity to execute the December Trust, which was a product of Andras's undue influence. Nicky requested that the court issue an order finding the December Trust void and directing Andras to hold the assets in a constructive trust for those entitled to Eva's estate.

On April 1, 2015, Adrien, as trustee of the December Trust and represented by Medvei,[1] filed a petition under Probate Code section 850. The petition stated Morgan Stanley withheld the trust assets after learning of the December Trust, and sought a declaration that the assets belonged to the December Trust and an order directing Morgan Stanley to convey the assets to the

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[1] Medvei signed the pleadings as a member of the Law Offices of Adrien Medvei, and later as a member of the Medvei Law Group, APC, at the same address.

December Trust. (The petition made similar allegations regarding accounts with Wells Fargo Bank and Wells Fargo Advisors, who are not parties to this appeal.) The petition requested double damages "to the extent that any possessor of the [trust assets] acted in bad faith," and equitable restitution.

Adrien and Nicky settled on August 21, 2015, dismissing the petitions as to each other. Adrien did not dismiss the petition as to Morgan Stanley. In September 2015, Morgan Stanley released the frozen trust assets and transferred them to an account held on behalf of the December Trust.

Morgan Stanley filed a response to the petition stating it was a mere stakeholder with no interest in the trust assets. When it learned of the December Trust's competing claim, it had frozen the account in compliance with the Client Agreement. Morgan Stanley had released the trust assets after the parties resolved the dispute, making Adrien's petition moot, and Morgan Stanley had not acted in bad faith.

D. ***Morgan Stanley's motions for judgment on the pleadings and for sanctions***

On February 18, 2016, Morgan Stanley filed a motion for judgment on the pleadings, arguing Adrien had not pleaded facts to show that Morgan Stanley had acted in bad faith and wrongfully taken trust assets. Adrien filed an opposition.

On March 16, 2016, Morgan Stanley filed a motion for sanctions under Code of Civil Procedure section 128.7 (section 128.7) against Adrien and "her counsel of record, Medvei Law Group, APC." Morgan Stanley argued the claims against Morgan Stanley were factually and legally frivolous, attached the Client Agreement, and requested $18,000 in sanctions (attorney fees and costs).

At a hearing on March 24, 2016, the court granted Morgan Stanley's motion for judgment on the pleadings and dismissed the petition with leave to amend. The court believed it was required to allow one amendment, and warned: "Just make sure that you allege something different. I don't want to see a repeat of what you've done now." The court continued Morgan Stanley's motion for sanctions.

On April 11, 2016, Adrien filed an amended petition alleging that Morgan Stanley "dispossessed" the December Trust of the trust assets for six months, and then released "completely different assets" when it unfroze the trust account. Morgan Stanley acted in bad faith because it "knowingly disregarded the validity" of the December Trust; did not take the legal action required to freeze the trust account; "failed to exercise good faith and diligence in analyzing the frivolity of [Nicky's] adverse claims"; and intentionally withheld the funds to force a settlement in Nicky's favor, among other allegations of despicable, malicious, oppressive, and fraudulent conduct. Adrien requested the return of the trust assets and any other assets improperly withheld, an accounting, general, special, double, and punitive damages, restitution, reasonable attorney fees, and interest.

In opposition to the sanctions motion, Adrien argued that the original petition was supported in fact and law (or by "extension, modification, or reversal of existing law or the establishment of new law") and discovery was necessary to support the bad faith claim. Adrien requested sanctions of $8,800 in attorney fees for opposing the sanctions motion. Adrien submitted a declaration stating that the trust assets consisted entirely of securities worth $555,050 when Morgan Stanley froze

the accounts and $547,385.69 when Morgan Stanley returned the securities to the December Trust.

Morgan Stanley replied that the trust assets released to the December Trust were the same securities as when the account was frozen. A declaration from the custodian and attached exhibits showed the securities were identical and had actually increased in value from the date when Morgan Stanley froze the assets to the date it released the assets.

E. ***Trial court ruling***

On June 6, 2016, the trial court granted the motion for sanctions under section 128.7 against Medvei only, issuing a five-page statement of decision. The court found no factual or legal basis for the claim under Probate Code section 850. Medvei continually refused to recognize that Morgan Stanley was a mere stakeholder. Rather than taking sides in the trust dispute, Morgan Stanley properly froze the account as expressly permitted by the Client Agreement, and promptly released the funds when the parties settled. "[T]here could be no 'wrongful' refusal to return what was in the account where [Morgan Stanley] had conflicting instructions," and no evidence showed the freeze resulted in a loss of interest on the securities. Medvei's claims of bad faith under Probate Code section 859 also had no factual or legal basis, and he made no argument for extension, modification, or reversal of existing law. As none of Medvei's claims had a legal basis there was no need for discovery. Despite repeated requests, Medvei refused to dismiss the petition for six months after Morgan Stanley released the funds, notwithstanding that there was no legal basis to continue to pursue the petition, which became moot when Morgan Stanley released the funds. Discovery was unnecessary, as there was no

legal basis for a claim under Probate Code section 850. "It appears Medvei was improperly trying to wrongly continue the case in order to force [Morgan Stanley] to pay him money to which he was not entitled."

Although it was not the basis for the court's ruling, in addition to the frivolous litigation, Medvei had been dishonest in the amended petition and had litigated in bad faith. "The first amended petition asserts that Morgan Stanley returned different securities than it froze. In fact, the securities were exactly the same. If it was not enough that there was no legal basis for continued pursuit of the initial petition, Medvei then had the temerity to follow it up by a further petition that appears to have been false." Medvei continually ignored the court's admonitions, causing additional expense to Morgan Stanley, who was simply protecting the account until the trusts resolved the dispute. "[T]his was not a case where an attorney needs to be given 'breathing room to develop and assert factual and legal arguments.' " Noting it had never before awarded such sanctions, the court ordered Medvei to pay Morgan Stanley $15,000 in attorney fees.

Medvei subsequently dismissed the amended petition after Morgan Stanley filed a demurrer.

Medvei filed a timely notice of appeal from the sanctions order. With its respondent's brief, Morgan Stanley filed a motion for sanctions for filing a frivolous appeal. Medvei also filed a motion for sanctions on appeal.

DISCUSSION

We review a section 128.7 sanctions award for an abuse of discretion, presuming the trial court's order is correct. (*Bucur v. Ahmad* (2016) 244 Cal.App.4th 175, 190.) We do not substitute

our judgment for the trial court's unless the court's action was a manifest miscarriage of justice. (*Ibid.*) We review the trial court's factual findings for substantial evidence. (*Conservatorship of Becerra* (2009) 175 Cal.App.4th 1474, 1481-1482.)

Section 128.7, subdivision (b)(1) states that an attorney who signs, files, or otherwise presents a pleading or petition to the court certifies that it is not being presented for an improper purpose, such as harassment or delay, or a needless increase in litigation costs. The attorney also certifies that the claims and legal contentions are supported by existing law or a nonfrivolous argument to extend, modify, or reverse existing law or the establishment of new law. (*Id.*, subd. (b)(2).) Further, the attorney certifies that the factual contentions have evidentiary support, or will have after a reasonable opportunity for further discovery. (*Id.*, subd. (b)(3).) If after affording notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, it may impose "an appropriate sanction upon the attorneys, law firms, or parties" responsible for the violation. (*Id.*, subd. (c).)[2]

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[2] Medvei does not argue that Morgan Stanley did not comply with the safe harbor provision of section 128.7, subdivision (c)(1), which requires the party moving for sanctions to allow a 21-day period during which the other party may withdraw the offending pleading. (*Bocur v. Ahmad*, *supra*, 244 Cal.App.4th at p. 190.) Medvei also does not argue that the sanctions motion was defective or that he was denied due process. Although Morgan Stanley's notice of motion sought sanctions against "Petitioner Adrien Medvei ('Petitioner') and her counsel of record, Medvei Law Group, APC ('Counsel')," and the court sanctioned Medvei individually, Medvei forfeited this issue by not raising it in his

Adrien's petition was under Probate Code section 850, subdivision (a)(3)(B), which allows a trustee to file a petition "where the trustee has a claim to real or personal property, title to or possession of which is held by another."

A. ***The sanctions award was not an abuse of discretion***

In his 61-page opening brief, Medvei advances many reasons why the court abused its discretion in finding he violated section 128.7. We address his arguments in turn; none has merit.

Medvei argues that when Morgan Stanley froze the account, it was undisputed that Adrien (on behalf of the December Trust) had title to and the right to possession of the trust assets in the Morgan Stanley account. To the contrary, as the trial court found, Morgan Stanley froze the account after it received notice from Nicky of a dispute (Nicky's challenge to the December Trust), and Nicky filed her petition shortly thereafter. The trial court explicitly found there was no evidence that Morgan Stanley would have known Nicky's claim was frivolous, or that her claim was in fact frivolous, and found that Morgan Stanley froze the account in accordance with the Client Agreement. Further, Eva opened the Morgan Stanley account in April 2014 on behalf of the March Trust, eight months before she signed the December Trust, in December 2014. Medvei points to no evidence that Morgan Stanley was aware of the existence of the December Trust before Nicky notified Morgan Stanley of the

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appellate briefs. (See *Kurinij v. Hanna & Morton* (1997) 55 Cal.App.4th 853, 867 ["an appellant must present argument and authorities on each point to which error is asserted or else the issue is waived"].)

dispute, much less that the December Trust had an "undisputed" right to the trust assets.

Medvei argues that as the cotrustee of the December Trust, Adrien had a fiduciary duty to bring the original petition. There was no fiduciary duty to litigate the petition against Morgan Stanley on claims lacking a legal and factual basis, or to continue to litigate those claims for six months after Morgan Stanley released the funds. "[E]ven though an action may not be frivolous when it is filed, it may become so if later-acquired evidence refutes the findings of a prefiling investigation and the attorney continues to file papers supporting the client's claims." (*Bucur v. Ahmad*, *supra*, 244 Cal.App.4th at p. 190.)

Medvei argues Morgan Stanley was required to interplead the property to absolve itself from liability for withholding it. Interpleader under Code of Civil Procedure section 386, subdivision (a) is an option that a defendant *may* elect to pursue. Under subdivision (b), where there are conflicting claimants, the defendant *may* bring an action against the claimants to compel them to interplead. Interpleader is a legal option for resolving competing claims, not a mandatory action. (*Southern California Gas Co. v. Flannery* (2014) 232 Cal.App.4th 477, 489.) The cases cited by Medvei hold that a custodian who interpleads funds (rather than resolving competing claims) is not liable in tort for conversion. (*Shopoff & Cavallo LLP v. Hyon* (2008) 167 Cal.App.4th 1489, 1508; *Messerall v. Fulwider* (1988)199 Cal.App.3d 1324, 1332-1333; see *Virtanen v. O'Connell* (2006) 140 Cal.App.4th 688, 709.) Medvei made no claim for conversion against Morgan Stanley.

Medvei argues that Financial Code section 1450 required Morgan Stanley to deliver the trust assets to Adrien on demand.

The trial court correctly rejected that argument. Section 1450 states, "Notice to any *bank* of an adverse claim . . . to a deposit standing on its books shall be disregarded," and requires that on demand the bank "shall deliver the property to the person for whose account the property is held." (Italics added.) Morgan Stanley is a broker-dealer, not a bank.

Medvei argues that the trial court erred when it found that the Client Agreement allowed Morgan Stanley to freeze the trust account. We disagree. The language could not be clearer. The Client Agreement provides that if Morgan Stanley "receives conflicting instructions from different Trustees, or reasonably believes instructions from one Trustee might conflict with the wishes of another Trustee," Morgan Stanley could "suspend all activity in the account until written instructions signed by all Trustees are received." Upon learning of Nicky's trust contest, Morgan Stanley certainly could reasonably believe that conflicting instructions from various trustees might follow. Medvei also argues the Client Agreement was void for illegality, an argument Medvei did not make in the trial court and therefore has forfeited.

Medvei argues that Adrien's petition was not moot after Morgan Stanley released the assets. The trial court remarked that Medvei continued to litigate after Morgan Stanley released the funds, "notwithstanding that there was no legal basis for continued pursuit of the petition, and during all of which time the petition was moot as to Morgan Stanley." The court awarded sanctions because there was no legal basis, and no factual basis, for the petition against Morgan Stanley. Mootness was not the basis for sanctions. We agree, however, that once Morgan Stanley released the trust assets, Adrien had no basis for a

petition under Probate Code section 850. Section 850, subdivisions (a)(3)(A)-(C) allows a trustee such as Adrien to file a petition where the trustee has possession of, or holds title to, property that is claimed to belong to another; where the trustee has a claim to real or personal property whose title or possession is held by another; or where the trust property is claimed to be subject to a creditor of the settlor of the trust. Once Morgan Stanley transferred the trust assets to the December Trust's account, it was not in possession of the trust assets, and it was never a creditor of the trust.

Medvei argues that even if the petition was moot, Adrien was entitled to continue to pursue it to recover costs, as Adrien became the prevailing party when Morgan Stanley released the trust assets to the December Trust account. Adrien was in no sense a prevailing party. After she settled with Nicky, Adrien dismissed her claim against Nicky, and Adrien's claims against Morgan Stanley were dismissed by the trial court. Further, Adrien did not make this claim in the trial court, or contend she was otherwise entitled to a costs award.

Medvei argues that the trial court erred in finding no evidence supported double damages for bad faith by Morgan Stanley. The court stated, "Where there was no basis for a violation of sec. 850, under these circumstances, there was similarly no evidence offered for double damages based on bad faith under sec. 859." The court was correct. Probate Code section 859 provides for double damages where a "court finds that a person has in bad faith wrongfully taken, concealed, or disposed of property belonging to . . . the estate of a decedent." The court must first find that the evidence establishes a wrongful taking under Probate Code section 850 before it can consider damages,

including bad faith damages under section 859. (*Estate of Young* (2008) 160 Cal.App.4th 62, 89-90.)

Medvei argues the trial court erred when it stayed discovery. The court stayed discovery at a status hearing in October 2015 pending a hearing on January 22, 2016, when the court again stayed discovery pending its ruling on the motion for judgment on the pleadings. The trial court explained in the sanctions order that no discovery was required to determine if Morgan Stanley acted in bad faith if there was no predicate liability under Probate Code section 850, as that would have compounded the unnecessary expense to Morgan Stanley. Further, Medvei did not show how discovery would overcome the fatal defects in the petition. The trial court did not abuse its broad discretion to manage the discovery process. (*MacQuiddy v. Mercedes-Benz USA, LLC* (2015) 233 Cal.App.4th 1036, 1045.)

Finally, the trial court's grant of leave to amend the petition is not inconsistent with its conclusion that the petition was frivolous. The court explained it "granted leave to amend where it believed it was required to do so where it was an initial petition." At the hearing, the court warned Medvei not to repeat the same allegations.

The trial court's conclusion that the petition was frivolous was within its wide discretion and is amply supported by its careful statement of decision in support of its ruling awarding sanctions to Morgan Stanley. Nothing Medvei argues on appeal shows a miscarriage of justice or a lack of substantial evidence to support the court's factual findings.

B. ***We deny the motions for sanctions on appeal***

Morgan Stanley filed a motion for sanctions (attorney fees on appeal) for filing a frivolous appeal, accompanied by a request

for judicial notice. Medvei then filed a motion for sanctions on appeal, arguing that Morgan Stanley's brief violated court rules and that the motion for sanctions and the request for judicial notice are frivolous. Medvei requested we order Morgan Stanley to pay a fine to the Court of Appeal to compensate the public for the judicial resources expended on Morgan Stanley's brief and the motion for sanctions.

Whether to impose appellate sanctions is a matter within our discretion. (*Winick Corp. v. County Sanitation Dist. No. 2* (1986) 185 Cal.App.3d 1170, 1181-1182 (*Winick*).) Under Code of Civil Procedure section 907 and California Rules of Court, rule 8.276(a)(1), the reviewing court may award sanctions when the appeal is frivolous and taken solely to cause delay. "[A]n appeal should be held to be frivolous only when it is prosecuted for an improper motive—to harass the respondent or delay the effect of an adverse judgment—or when it indisputably has no merit—when any reasonable attorney would agree that the appeal is totally and completely without merit. [Citation.]" (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.) Sanctions for a frivolous appeal should be used as punishment only to deter the most egregious conduct. (*Id.* at pp. 650-651.)

"Affirmance of sanctions does not itself justify further sanctions. [Citation.] [¶] If lack of merit were the only test for imposing sanctions on appeal, we would then be empowered to impose sanctions on virtually all appeals affirming a trial court's imposition of sanctions. . . . The statutes imposing sanctions on appeal 'must be read as requiring an inquiry into the motive of an appellant for prosecuting his appeal . . . .' " (*Winick Corp. v. County Sanitation Dist. No. 2*, *supra*, 185 Cal.App.3d at p. 1182.)

The question is whether in this case, Medvei prosecuted the appeal for an improper motive.

Although we conclude the trial court's awarding of sanctions on the basis that the petition was frivolous was within its discretion and Medvei's appeal has no merit, it does not follow that Medvei's purpose in filing the appeal was delay or harassment, or that any reasonable attorney would agree the appeal is "totally and completely without merit." (*In re Marriage of Flaherty*, *supra*, 31 Cal.3d at p. 650.) We therefore exercise our discretion not to impose sanctions on Medvei on appeal.

Medvei's sanctions motion is meritless.

We deny Morgan Stanley's motion for sanctions and the accompanying request for judicial notice, and we deny Medvei's motion for sanctions.

DISPOSITION

The order granting sanctions is affirmed. The motions for appellate sanctions are denied. Morgan Stanley Smith Barney LLC is awarded its costs on appeal.

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EGERTON, J.

We concur:

LAVIN, Acting P. J.

KALRA, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.