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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

MARGARET A. SELTZER,  
Cross-complainant and Appellant,  
v.  
WILLIAM GWIRE,  
Cross-defendant and Respondent.

A128902

(San Francisco City & County  
Super. Ct. No. CGC-02-416192)

Appellant Margaret Seltzer unsuccessfully appealed an order awarding attorney fees pursuant to Code of Civil Procedure section 425.16, subdivision (c). On remand, the trial court granted respondent William Gwire's motion for attorney fees incurred in connection with that appeal. Seltzer now appeals the award of appellate attorney fees, raising various issues. Finding no abuse of discretion, we affirm.

**I. BACKGROUND**

The background for this appeal is provided in our prior decisions relating both to the merits of the underlying action and a prior attorney fee award pursuant to Code of Civil Procedure section 425.16, subdivision (c). (See *Seltzer v. Gwire* (Nov. 13, 2009, A119049) [nonpub. opn.] (hereafter *Seltzer I*); *Seltzer v. Gwire* (Nov. 5, 2009, A119521) [nonpub. opn.]; *Seltzer v. Gwire* (Oct. 24, 2005, A107526) [nonpub. opn.]; *Krantz v. BT Visual Images* (2001) 89 Cal.App.4th 164.) Because Seltzer does not contest Gwire's status as a prevailing party for purposes of section 425.16, subdivision (c), the details of the underlying litigation are irrelevant to the issues raised here. We therefore skip to a

discussion of the evidence relating directly to the fee application challenged by Seltzer in this appeal.

Gwire filed a motion for attorney fees incurred in proceeding *Seltzer I*, again under Code of Civil Procedure section 425.16, subdivision (c). The motion sought \$58,415 for fees associated with the appeal and \$7,000 for fees incurred or anticipated in the making of the fee application itself. The request was calculated at a rate of \$350 per hour for 166.9 hours of appellate work and 20 hours of motion work.<sup>1</sup>

The application was supported by a declaration of Gwire's appellate counsel, Tia Pollastrini. Pollastrini had also performed the work that was compensated in the trial court attorney fee award affirmed in our nonpublished decision in *Seltzer I, supra*, A119049. In the declaration, Pollastrini stated she had practiced as a civil litigator in San Francisco since 1986 and was an employee of Gwire's law firm from 1991 until February 2008. With respect to the work performed for *Seltzer I*, Pollastrini stated that Gwire asked her to represent him in August 2008, shortly after she returned from "an extended stay in Italy." Because Pollastrini had represented Gwire in the trial court proceedings, she viewed herself as "the attorney most knowledgeable and most capable of defending the attorneys' fees appeal." She undertook the representation "on terms that Mr. Gwire and I negotiated," but she did not disclose those terms. Although Pollastrini had expected the appeal to be "relatively straightforward," Seltzer had filed a 45-page opening brief raising "six separate legal grounds for reversal, each of which presented a number of sub-issues." Over the next few months, Pollastrini prepared a respondent's brief and sent Gwire monthly invoices for the work, which he paid in full. The invoices,

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<sup>1</sup> In what appears to have been a typographical error, the motion actually purported to request compensation of \$300 per hour for the appellate work, although the total amount requested was calculated at a rate of \$350 per hour. In the end, the court awarded compensation of \$350 per hour for all work.

reflecting 148.4 hours of work, were attached as an exhibit to the declaration, but the hourly and total charges were blacked out.<sup>2</sup>

In opposition, Seltzer argued Gwire had failed to carry his burden of demonstrating the requested fees were reasonably necessary and reasonable in amount. She characterized Gwire as “self-represented” on the appeal and contended he could not recover legal fees paid to his “associate” for “work performed on a contract basis.” She also argued Pollastrini’s declaration was not to be credited, contending it was “obvious” Gwire and Pollastrini “contrived to set up an inflated fee claim” by having Pollastrini spend six months working on the respondent’s brief and billing him for the work. Finally, Seltzer sought leave to conduct discovery relating to the fee request.

In an extensive but largely argumentative declaration, Seltzer recounted the history of the litigation and Gwire’s representation in it, noting Pollastrini was at one time his employee and continued to list Gwire’s law office as her business address on the California State Bar Web site. Seltzer disputed Pollastrini’s implication that the appeal was complicated, justifying her lengthy brief by noting, “The issues raised on the appeal were those raised in the trial court.” Seltzer also submitted a series of evidentiary objections to the Pollastrini declaration.

Gwire’s reply brief was supported by another declaration from Pollastrini, who explained that although Gwire represented himself in the appeal for the first year after its filing, from September 2007 through September 2008, he did no substantive work during that time. After her retention, Pollastrini substituted as counsel of record for Gwire and prepared the respondent’s brief, which she did not discuss with Gwire prior to its filing in February 2009. Gwire resumed representing himself on the appeal in August 2009. Pollastrini denied she was an employee of Gwire, stating she was retained for the appeal as an independent contractor. She kept his law office as her listed address with the State

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<sup>2</sup> At oral argument on the fees motion, Pollastrini notified the court that the 166.9 hours requested in her papers was an arithmetical error and reduced Gwire’s request for compensation to the 148.4 hours reflected in the invoices. She provided no explanation for the error. The court’s award was based on 148.4 hours of work.

Bar for convenience and because she anticipated doing occasional work for him in the future. Pollastrini also increased Gwire's request to cover the costs of the fee motion by seven hours in light of the actual time spent in responding to Seltzer's lengthy opposition. Seltzer filed a series of evidentiary objections to this declaration.

At argument on the motion, the trial court overruled Seltzer's evidentiary objections and granted the motion as requested.<sup>3</sup> The court explained it concluded Pollastrini's work was reasonable and necessary, based on a review of the briefs and declarations submitted, this court's decision in *Seltzer I*, and Pollastrini's billing records. With respect to the hourly rate requested, the court found it "easily within the ballpark of what I see here in other fee motions." In response to Seltzer's question whether the court had "considered the appellate decision as evidence," the trial court noted, "considering the Court [of Appeal] sets forth certain findings, this Court would be bound by those findings," without explaining what facts, if any, it took from the decision. The court's written order denied Seltzer's request for discovery as "unnecessary."

## II. DISCUSSION

Seltzer contends the trial court abused its discretion because (1) Gwire was self-represented or, alternatively, represented by a "contract attorney" from his office; (2) the compensation for Pollastrini's time should be reduced because she worked from home without incurring ordinary overhead and expenses; (3) the recovery constitutes a windfall because Gwire did not pay Pollastrini the requested rate of \$350 per hour; (4) Pollastrini's work for Gwire was essentially an "agreement with an independent contractor for research and writing support services at an hourly wage rate rather than a fee and retention agreement with a separate law firm"; (5) the trial court relied on

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<sup>3</sup> The court's award included an amount for taxable costs in two appeals to which Gwire and Seltzer were parties, *Seltzer I*, *supra*, A119049 and *Seltzer v. Gwire*, *supra*, A119521. The latter was decided a few days before *Seltzer I*. Seltzer claims in a parenthesis that costs from case No. A119521 were improperly included in the order. Because Gwire was the prevailing party in case No. A119521, he appears to have been entitled to his costs. In any event, because Seltzer does not explain her reasoning in contending the award was improper, we do not consider the claim further.

statements in our decision in *Seltzer I* as “established fact” and failed to evaluate Gwire’s application independently; (6) Gwire failed to present evidence that \$200 and \$350 per hour were market rates of compensation; (7) the fee application was inflated; and (8) she was entitled to additional discovery.

We review the amount of an attorney fee award under Code of Civil Procedure section 425.16 for abuse of discretion. “An attorney fee award will not be set aside ‘absent a showing that it is manifestly excessive in the circumstances.’ ” (*Mallard v. Progressive Choice Ins. Co.* (2010) 188 Cal.App.4th 531, 544.)

**A. “Self-representation”**

Seltzer’s contention Gwire cannot recover Pollastrini’s fees because he was self-represented or had retained her as, in effect, a “contract attorney” employee reiterates a claim rejected in our decision in *Seltzer I*. In that appeal, Seltzer argued Gwire could not recover Pollastrini’s fees because she was an employee of his firm, causing him to be, in effect, self-represented, relying on the same legal authority, primarily *Trope v. Katz* (1995) 11 Cal.4th 274 (*Trope*). We distinguished *Trope*, which held that a law firm represented in litigation by its member attorneys cannot recover attorney fees under Civil Code section 1717. (*Trope*, at p. 292.) In rejecting Seltzer’s argument, we noted:

“Gwire’s representation by his employee did not constitute the type of self-representation found in *Trope*. Rather, his situation is indistinguishable from that of the defendant in *Gilbert v. Master Washer & Stamping Co.* (2001) 87 Cal.App.4th 212, in which an attorney sued in his personal capacity was represented by other members of his law firm. The court held the defendant attorney could recover attorney fees under Civil Code section 1717 because he incurred fees and was able to have an attorney-client relationship with the attorneys representing him. (87 Cal.App.4th at pp. 221–222.) So here, Gwire incurred (and actually paid) legal fees to Pollastrini and maintained an attorney-client relationship with her. He was therefore entitled to recover attorney fees for her services. (See also *Mix v. Tumanjan Development Corp.* (2002) 102 Cal.App.4th 1318, 1324–1325 [attorney who represented himself in litigation can recover attorney

fees under Civ. Code, § 1717 for supporting legal work done by retained counsel who were not counsel of record].)” (*Seltzer I, supra*, A119049.)

The case against Gwire’s recovery here is even weaker. Contrary to Seltzer’s claim, there is no evidence to suggest Gwire was “self-represented” on the appeal. While he initially appeared pro se, Pollastrini was substituted as counsel of record before Gwire’s appellate brief was prepared. Her declaration and invoices demonstrate she performed all substantive work on the appeal while appearing as counsel of record. Nor was Pollastrini even arguably Gwire’s employee. Her declaration makes clear she was an independent contractor when she performed work on the appeal. Seltzer’s only evidence for employee status is Pollastrini’s use of Gwire’s office for receipt of mail, fax, and telephone messages, which Pollastrini adequately explained. Even if Pollastrini had been an employee, however, Gwire would have been entitled to recover her fees under our decision in *Seltzer I*.<sup>4</sup>

**B. *The Cost to Gwire of Pollastrini’s Work***

Seltzer’s contends the compensation for Pollastrini’s time should be reduced because she worked from home without ordinary overhead and expenses, and the recovery constitutes a windfall because Gwire did not pay Pollastrini a rate of \$350 per hour. These contentions are based on the presumption an award of attorney fees should compensate the amount actually expended for the legal services provided. This misunderstands California law governing the award of attorney fees.

Under the leading case *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084 (*PLCM Group*), the trial court must base an award of attorney fees on the market value of

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<sup>4</sup> Seltzer also faults the fee application for failing to disclose the time Gwire himself spent on the appeal. Because, as she contends, such time would not be compensable, there would have been no point in Gwire’s including his own time. Further, as Pollastrini states, she was solely responsible for preparation of the respondent’s brief, which undoubtedly consumed the bulk of the time spent opposing the appeal.

the services provided, rather than on their actual cost.<sup>5</sup> “[T]he fee setting inquiry in California ordinarily begins with the ‘lodestar,’ i.e., the number of hours reasonably expended multiplied by the reasonable hourly rate. ‘California courts have consistently held that a computation of time spent on a case and the reasonable value of that time is fundamental to a determination of an appropriate attorneys’ fee award.’ [Citation.] The reasonable hourly rate is that prevailing in the community for similar work. [Citations.] The lodestar figure may then be adjusted, based on consideration of factors specific to the case, in order to fix the fee at the fair market value for the legal services provided. [Citation.] Such an approach anchors the trial court’s analysis to an objective determination of the value of the attorney’s services, ensuring that the amount awarded is not arbitrary.” (*PLCM Group*, at p. 1095.) *PLCM Group* affirmed a trial court’s refusal to award compensation for in-house counsel work on the basis of the attorney’s salary plus overhead, rather than on the lodestar method. (*Id.* at p. 1097.) The court rejected the claim such an approach resulted in a windfall if the resulting award was greater than the actual cost incurred by the prevailing party. (*Ibid.*)

Cases decided since *PLCM Group* have made clear that courts are *not* to base fee awards on the actual cost of the services provided. (*In re Tobacco Cases I* (2011) 193 Cal.App.4th 1591, 1604–1605; *City of Santa Rosa v. Patel* (2010) 191 Cal.App.4th 65, 71.) On the contrary, a prevailing party need not even literally “incur” fees in order to be entitled to an award of attorney fees. (*Persson v. Smart Inventions, Inc.* (2005) 125 Cal.App.4th 1141, 1174; *International Billing Services, Inc. v. Emigh* (2000) 84 Cal.App.4th 1175, 1194–1195, disapproved on other grounds in *M. Perez Co., Inc. v. Base Camp Condominiums Assn. No. One* (2003) 111 Cal.App.4th 456, 467.) Accordingly, it is irrelevant to the validity of the fee award that Pollastrini may have had lower overhead costs than comparable full-time counsel or that Gwire did not actually pay Pollastrini the hourly rate requested.

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<sup>5</sup> Although *PLCM Group* concerned an award pursuant to a contractual attorney fees provision, the same approach has been applied to an award under Code of Civil Procedure section 425.16. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1131–1132.)

### ***C. The Independence of Pollastrini's Work***

Seltzer's argument that Pollastrini's work for Gwire was essentially an "agreement with an independent contractor for research and writing support services at an hourly wage rate rather than a fee and retention agreement with a separate law firm" is not supported by the evidence. Pollastrini is an experienced member of the State Bar. She stated in her declaration she performed all appellate work herself without consulting Gwire. There is nothing in the record to contradict this assertion and no reason to doubt it. The same is true of Pollastrini's statement she was self-employed. Accordingly, Pollastrini's services were performed by an independent attorney rather than by an attorney working under Gwire's supervision as "support" for his own efforts.

### ***D. The Trial Court's Purported Reliance on Our Decision***

We find no substance to Seltzer's claim that the trial court improperly relied on statements in our decision in *Seltzer I, supra*, A119049 as a basis for its award. Contrary to Seltzer's contention, there is no suggestion in the record the trial court failed to perform its own examination of the record and "rubber-stamped" the fee application on the basis of our decision. Seltzer's argument the court based its findings that the hours worked and the rate requested were reasonable on our decision is refuted by the court's statement at the hearing that it based these findings on its examination of Pollastrini's invoices and its experience with other fee applications. Moreover, there is nothing in our prior decision that would have provided a factual foundation for either finding, and Seltzer fails to point to any specific "fact" from the decision on which the trial court purportedly relied.<sup>6</sup>

### ***E. Gwire's Failure to Present Evidence of Market Rates***

Seltzer points out that Gwire's fee application failed to provide any evidentiary support for his request for a market rate of \$350 per hour. Pursuant to *PLCM Group*,

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<sup>6</sup> Seltzer also complains the trial court failed to make formal findings, but such findings were unnecessary. (*California Common Cause v. Duffy* (1987) 200 Cal.App.3d 730, 754.)

however, such evidence is unnecessary if, as here, the trial judge is familiar with local market conditions.

In discussing the trial court's role with respect to fee applications, *PLCM Group* noted: “ ‘The “experienced trial judge is the best judge of the value of professional services rendered in his court, and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong”—meaning that it abused its discretion.’ . . . [¶] . . . [¶] ‘ . . . The value of legal services performed in a case is a matter in which the trial court has its own expertise. [Citation.] The trial court may make its own determination of the value of the services *contrary to, or without the necessity for, expert testimony.*’ ” (*PLCM Group, supra*, 22 Cal.4th at pp. 1095–1096, italics added.)

In determining the reasonableness of Gwire's requested hourly rate, the trial court relied on its experience in connection with other fee applications, explaining the requested rate was “easily within the ballpark of what I see here in other fee motions.” The explanation makes clear the court's familiarity with the local market for attorneys' services and the reasonableness of the request in relation to that market. Seltzer provided no evidence on which it can be argued the court's determination was “clearly wrong.” (*PLCM Group, supra*, 22 Cal.4th at p. 1095.)

#### **F. *Inflated Application***

Seltzer claims Gwire's fee application was “inflated in two ways,” by both the rate requested and hours claimed. There is no evidence to support either point. Pollastrini attached her invoices as evidence of her effort. They are consistent with the type of work expected of an appellate attorney and the specific issues raised by Seltzer's opening brief in *Seltzer I*. The burden was therefore on Seltzer to point to specific examples of duplicative or excessive work. (*Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.* (2008) 163 Cal.App.4th 550, 564.) Although in possession of these detailed invoices, Seltzer has not pointed to a single aspect of the work that was unnecessary or not credible.

The trial court noted the requested hourly rate was actually modest in comparison with other fee requests it had evaluated. There is no basis in the record for concluding the trial court abused its discretion in reaching this conclusion.

**G. Discovery**

We review the trial court’s denial of additional discovery to Seltzer for abuse of discretion. (*Oak Grove School Dist. v. City Title Ins. Co.* (1963) 217 Cal.App.2d 678, 712.) Seltzer was permitted to depose Pollastrini at length in connection with the fee application considered in *Seltzer I*. To the extent Seltzer sought further discovery here, it was largely with respect to matters irrelevant to the court’s decision, such as the rate at which Pollastrini billed Gwire, her overhead, and her exact contractual relationship to Gwire. While Seltzer claims “the evidence proffered by the pro se attorney shows the likelihood that the claim is inflated [or] is a subterfuge,” there was no evidence of deceit. The invoices prepared by Pollastrini were credible on their face and, as the trial court found, reasonable. We find no abuse of discretion in the trial court’s conclusion that further discovery was superfluous.

**III. DISPOSITION**

The judgment of the trial court is affirmed.

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Margulies, J.

We concur:

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Marchiano, P.J.

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Banke, J.