

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

STEVE C. THOMPSON et al.,
Defendants and Appellants,
v.
STEPHEN MAYO et al.,
Plaintiffs and Respondents.

A132633
(Marin County
Super. Ct. No. CIV-085131)

Steve C. Thompson (Thompson) appeals the trial court's computation of damages, following a jury verdict holding him and his architecture firm partially liable to the Stephen Mayo and Sharon Mayo (the Mayos) for architectural malpractice related to the renovation of the Mayos' home. Thompson contends the nonmonetary portions of the Mayos' prior settlements with other defendants must be credited to the amount of damages for which he is liable.¹ We shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On October 17, 2008, the Mayos filed a complaint in which they alleged that they had hired architect Thompson to prepare plans and specifications for the renovation of their residence in Mill Valley, and to supervise the construction work on the project. On Thompson's recommendation, the Mayos hired Jeff Tyler and his company, Jeff Tyler Construction, Inc. (Tyler), as the general contractor on the project. The complaint further alleged that, as a result of numerous errors and omissions on the part of Thompson and

¹ Although Thompson initially also contended he should not have been treated as a joint tortfeasor at trial, he has abandoned that claim.

Tyler, the Mayos had suffered in excess of \$1,000,000 in damages. The complaint included causes of action against Thompson for professional negligence and breach of contract, against both Thompson and Tyler for general negligence, and against Tyler for fraud, negligent misrepresentation, and unfair business practices.

Thereafter, Thompson filed a cross-complaint against the Mayos alleging breach of contract for fees owed him under their contract, and against Tyler and structural engineer Julia Chen (Chen), for indemnification and apportionment of fault. Tyler also filed a cross-complaint against Thompson, Chen, and concrete subcontractor, Gateway Construction, Inc. (Gateway), alleging, inter alia, causes of action for indemnity, comparative negligence, and contribution. Chen subsequently filed a cross-complaint against Tyler and Gateway for indemnity/comparative contribution and damages.

In a pretrial settlement between the Mayos and Tyler, Tyler agreed to pay the Mayos \$262,500 and also assigned to them his indemnity rights as to other parties. After Tyler applied for a determination of good faith settlement, the trial court found the settlement to be in good faith within the meaning of Code of Civil Procedure section 877.6.² In making this finding, the court estimated the additional value of Tyler's assignment of claims against Gateway and Chen at \$130,000,³ which, when added to the \$262,500 cash settlement, resulted in a total settlement value of \$392,500.

Chen, who had been brought into the action by way of Thompson's and Tyler's cross-complaints, subsequently entered into a settlement with the Mayos, pursuant to

² All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

Section 877.6 provides in relevant part: "(a)(1) Any party to an action in which it is alleged that two or more parties are joint tortfeasors . . . shall be entitled to a hearing on the issue of the good faith of a settlement entered into by the plaintiff . . . and one or more alleged tortfeasors"

³ As the court explained: "Plaintiffs have sued only defendants Tyler and architect Steve Thompson and the liability of cross-defendants Gateway and Chen can only come from the Tyler cross-complaint, and the assignment of Tyler's rights to plaintiffs. [Citation.] Such an assignment provides an additional value, estimated at 130,000"

which she paid them \$25,000 and assigned to them her claims against Gateway. The trial court found this settlement to be in good faith as well.⁴

Two of Gateway's insurers, brought into the action by way of Tyler's cross-complaint against Gateway and the insurers' complaint in intervention, thereafter entered into a settlement with the Mayos, pursuant to which they paid the Mayos \$50,000.⁵ The trial court also found this settlement to be in good faith.

Subsequently, at the conclusion of a jury trial between the Mayos and Thompson—the sole nonsettling defendant remaining in the action—the jury rendered a special verdict, finding that the Mayos had proven a total of \$625,000 in economic damages. It found that Thompson was responsible for 65 percent of those damages and Tyler was responsible for the remaining 35 percent. It further found that Chen and Gateway were not liable for any of the damages.

On May 17, 2011, following submission of arguments and evidence by the parties, the trial court issued its judgment on the jury verdict, ordering Thompson to pay the Mayos \$287,500 plus costs. This amount was derived from the jury verdict awarding \$625,000 in total damages to the Mayos, reduced by the prior settlements, which the court valued at \$337,500. The \$337,500 valuation of the prior settlements was based on the total of the cash portions of the Tyler settlement (\$262,500), the Chen settlement (\$25,000), and the Gateway insurers' settlement (\$50,000). No credit for assigned indemnity rights was included in the offset.

⁴ Neither the settlement agreement between the Mayos and Chen nor the trial court's good faith ruling placed a specific value on the indemnity rights Chen assigned to the Mayos. The only apparent mention of the monetary value of those rights was in Chen's motion for an order confirming that the settlement was in good faith, in which she estimated their value at \$2,500.

⁵ Gateway was a suspended corporation and two of its insurers, First Financial Insurance Company and Wellington Specialty Insurance Company, faced potential liability for any judgment against Gateway on Tyler's cross-complaint. The insurers had therefore intervened in the action to assert Gateway's defenses and protect their own interests.

Thompson moved for a new trial or, in the alternative, to vacate the judgment and enter a new judgment or, in the alternative, for a judgment notwithstanding the verdict. On July 8, 2011, the trial court denied the motion.

On July 14, 2011, Thompson filed a notice of appeal.

DISCUSSION

Trial Court's Failure to Include the Value of The Assigned Rights in Thompson's Offset

Thompson contends nonmonetary portions of the Mayos' prior settlements with other defendants must be credited to the amount of damages for which he was found liable. Specifically, he asserts that the assigned indemnity rights of Tyler, valued at \$130,000, and the assigned indemnity rights of Chen, valued at \$2,500, should have been included in the offset.

Section 877 provides that where a release, dismissal, or covenant not to sue "is given in good faith before verdict or judgment to one or more of a number of tortfeasors claimed to be liable for the same tort . . . : [¶] (a) It shall not discharge any other such party from liability unless its terms so provide, but it shall reduce the claims against the others in the amount stipulated by the release, the dismissal or the covenant, or in the amount of the consideration paid for it, whichever is the greater."

Nonsettling defendants, upon the court's finding of good faith pursuant to section 877.6, are thus entitled to reduce their liability to a plaintiff in the amount of the credit provided by section 877. "Insulating the settling defendants from future indemnity claims encourages settlement. Allowing the nonsettling defendants a credit against a future judgment promotes equitable sharing of fault and prevents the plaintiff from obtaining an unfair double recovery. Thus, the settlement credit is a 'fundamental feature' of the good faith settlement process. [Citation.] It 'assures that a plaintiff will not be enriched unjustly by a double recovery, collecting part of his total claim from one joint tortfeasor and all of his claim from another.' [Citation.]" (*Wade v. Schrader* (2008) 168 Cal.App.4th 1039, 1046; see also *Abbot Ford, Inc. v. Superior Court* (1987) 43 Cal.3d 858, 871-873 & fn. 15.)

The amount of the offset pursuant to section 877, subdivision (a), is the amount of the consideration paid by the settling defendant for the release or dismissal. (*Franklin Mint Co. v. Superior Court* (2005) 130 Cal.App.4th 1550, 1557, fn. omitted.) “But the amount of *consideration* paid within the meaning of section 877, subdivision (a) is not necessarily the amount of *money* paid. Often ‘the amount of the offset is clouded by injection of noncash consideration into the settlement.’ [Citations.]” (*Ibid.*) Hence, an assignment of rights valued by the parties at a certain amount “must also be included in the credit to be accorded the nonsettling defendants. The parties’ valuation of this intangible asset should be considered to be like any other form of consideration paid for the settlement, and thus appears to be a proper item of credit to be accorded the nonsettling defendant.” (*Erecca’s v. Superior Court* (1993) 19 Cal.App.4th 1475, 1502 (*Erecca’s*.)

Here, Thompson argues that the court had no discretion after trial to eliminate either the \$130,000 credit or the \$2,500 credit for Tyler and Chen’s assigned indemnity rights, included in the prior settlements, given that the court had previously found both of those settlements to be good faith. (See § 877.) We disagree.

In the particular circumstances of this case, we conclude the trial court was reasonable in calculating the credit to Thompson based on events occurring after the Mayos settled with Tyler, during the course of the same proceedings. Those later events consisted of the Mayos’ settlement with two parties they had not sued—Gateway’s insurers and Chen—which essentially liquidated the assigned indemnity rights. These subsequent settlements clearly provide a more accurate assessment of the assignments’ value than the parties’ good faith estimates. (See *Erecca’s, supra*, 19 Cal.App.4th at p. 1491 [“[i]n evaluating the accuracy of the settling parties’ valuation, the court ‘may not be able to do more than simply make its best estimate’ ”]; cf. *Jhaveri v. Teitelbaum* (2009) 176 Cal.App.4th 740, 753 [nonsettling defendants were entitled to offset of amount settling tortfeasor paid before declaring bankruptcy, rather than amount specified in settlement agreement].)

Indeed, had the trial court included the value of the assigned rights in the offset, Thompson would have unfairly received a double credit, both for the assignment of the indemnity rights *and* for the satisfaction of claims based on those rights.⁶ Instead, the trial court’s ruling harmonized the competing policy interests underlying sections 877 and 877.6: that, “while the nonsettling defendant is entitled to a fair setoff, the injured plaintiff also has a right that the setoff not be excessive.” (*Erecca’s, supra*, 19 Cal.App.4th at p. 1500; cf. *Garcia v. Duro Dyne Corp.* (2007) 156 Cal.App.4th 92, 100 [“awarding a nonsettling defendant an offset credit for settlement monies that have not been paid would frustrate the various public policies and objectives underlying section 877”].)

Accordingly, given all these circumstances, the trial court did not abuse its discretion when it considered the situation existing at the time of judgment in determining the amount of credit to which Thompson was entitled under section 877. The amount of that credit—\$337,500, which reduced Thompson’s liability for the \$625,000 in damages to \$287,500—was appropriate in the circumstances. (Cf. *El Escorial Owners’ Assn. v. DLC Plastering, Inc.* (2007) 154 Cal.App.4th 1337, 1351 [in complex construction defect case, trial court must “have the latitude to adjust offsets in response to evidence educed in trial”]; *Regan Roofing Co. v. Superior Court* (1994) 21 Cal.App.4th 1685, 1705 [recognizing that after future trial of plaintiffs’ claims against

⁶ We also observe that, as to Chen’s assignment of her indemnity rights against Gateway to the Mayos, it appears that only in Chen’s memorandum of points and authorities in support of her motion for an order confirming that the settlement was in good faith, is \$2,500 suggested as the value of those rights. Neither the settlement agreement between the Mayos and Chen nor the trial court’s ruling on the motion for a finding of good faith settlement placed a specific value on the Chen’s assigned rights. Hence, since there was no official valuation given to this assignment of rights, it is unlikely that such rights could have been included in the credit to Thompson in any event. (See *Alcal Roofing & Insulation v. Superior Court* (1992) 8 Cal.App.4th 1121, 1124-1125 [“In a situation where the cash amount of the settlement does not dictate the amount of the offset, the settling parties must include an allocation or a valuation in their agreement”].)

nonsettling defendants, trial court may have to take evidence to calculate offset due those defendants]; cf. also *Jhaveri v. Teitelbaum, supra*, 176 Cal.App.4th at p. 753 .)

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to plaintiffs Stephen Mayo and Sharon Mayo.

Kline, P.J.

We concur:

Lambden, J.

Richman, J.