Filed 2/22/13 Hoey v. Reiffin CA1/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

BEVERLY M. HOEY, Plaintiff and Respondent, v. MARTIN GARDNER REIFFIN et al., Defendants and Appellants.	A135591 (Alameda County Super. Ct. No. VG11564489)

Defendants Martin Gardner Reiffin and Suzanne Reiffin appeal in propria persona from the judgment for plaintiff, attorney Beverly M. Hoey who also appears in propria persona. Hoey sued to collect fees for preparing trusts for the Reiffins' property. The Reiffins mainly reargue the evidence, claiming that it should have led to a lower fee award. But "the burden [an appellant] must bear in seeking to upset the trial court's determination of reasonable attorney fees is substantial" (*Shannon v. Northern Counties Title Ins. Co.* (1969) 270 Cal.App.2d 686, 688), and the Reiffins do not carry that burden with their factual arguments. The Reiffins' legal arguments also lack merit. We affirm.

I. BACKGROUND

Pursuant to an attorney-client agreement executed on June 4, 2009, and introduced into evidence as Exhibit A, the Reiffins retained Hoey to "amend and restate [their] existing trust and . . . create a new special needs trust" for one of their sons. The Reiffins told Hoey that they wanted Mechanics Bank to be their successor trustee. The Reiffins paid a retainer of $2,250, and agreed to pay Hoey a total of $4,500 for the work, plus fees of $400 per hour for "[m]ajor revisions requested subsequent to your review appointment."

The Reiffins apprised Hoey of their assets in June or July of 2009, which included rights for certain patents being litigated against Microsoft Corporation. Apart from the patents, Hoey estimated the Reiffins' assets to be worth $2.5 to $3 million "because of the losses," presumably due to the financial crisis of 2008. Martin told Hoey that the contested patents might be worthless, but that he was seeking $50 million for them, and had turned down an offer of $5 million. In light of the litigation, Mechanics Bank was unwilling to serve as trustee of property involved in the dispute, so, instead of a single trust with special needs provisions as initially contemplated, two trusts were required, one for the patent rights (the patent trust) and one for the rest of the Reiffins' property (the non-patent trust).

Hoey wrote the Reiffins a letter dated August 6, 2009 (Exhibit K), asking for their agreement to pay additional charges at her $400 per hour rate. Martin was gravely ill that summer, and Hoey "recognized the urgency to complete your estate plan as quickly and as effectively as possible." Hoey wrote: "I want to bring to your attention that the costs of the modifications to your estate planning needs have exceeded the flat fee boundaries of services rendered (*sic*) an amendment and restatement (*sic*) your existing Trust. As you are aware, the trust that we are designing is anything but simple and, pursuant to your on-going instructions, I am currently on my 5th draft thereof. Additionally, we have had numerous, lengthy telephone conferences, and I have engaged in several, lengthy telephone conferences with the proposed successor trustee of your existing trust, Mechanics Bank. I have stopped working on other people's projects to complete yours, and I want to give you notice of these costs and I would like assurances from you that you intend to honor your contract and pay me for all of my services rendered on your behalf."

The Reiffins wrote back on August 7 (Exhibit L), stating: "We are both cognizant of the fact that due to Mechanics Bank's requirements regarding the patents and the named charities, updating the Reiffin Family Trust has become more complicated. [¶]

. . . [¶] ’There is a misunderstanding about the patents (‘603, ‘604 and prior parent (*sic)* applications filed in 1982 and 1985. [¶] ’The present status provides indispensable advantages in the litigation and cannot be changed. The present status is that the Reiffin Family Trust received by assignment on July 5, 2008 title to the patents and applications, with the right to damages for all infringements this date and thereafter. The right to damages for all infringements occurring prior to July 5, 2008 was not assigned and remains with the assignor patentee Martin G. Reiffin. [¶] ’This status should be set forth in the statement of trust assets. [¶] ’To satisfy the Mechanics Bank you may add additional provisions absolving the Bank of any duty or liability in all civil actions relating to these patents after the demise of both Martin and Suzanne. . . . [¶] . . . ’ [¶] We agree to your ‘extra service’ billing and request an itemized account for same.”

At trial, Suzanne described the additional work required of Hoey as “[m]inimal.” She testified: “[Hoey] had already updated the non-patent trust. All she had to do was take out the patent part of it and do another trust the same as the first one, but with the change with patents instead of the other assets and change the trustee.” The court did not believe this testimony.

In its “Verdict Granting Judgment to Plaintiff” filed April 5, 2012,[1] the court found: “The defendants offered evidence that the contract, as modified, did not include an agreement for an hourly fee on any but a limited scope of work/issues, however the substance of Exhibit ‘L’ does not support such an interpretation of the agreement. Further, the testamentary evidence of such a limited agreement did not persuade the court that the agreement to pay for services on an hourly fee basis was so limited.”

Hoey worked throughout August 2009 preparing the trusts, which were signed on August 28. The non-patent trust was admitted into evidence as Exhibit X. The patent trust was not introduced. Hoey testified that, after the Reiffins’ August 7 letter, Suzanne “continually faxed” her documents concerning the trusts, and that she “did my best to

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[1] One of the Reiffins’ arguments is that the court made improper “conclusory” findings in its decision, but they did not designate the decision as part of the record on appeal. We have obtained a copy of it from the Superior Court.

make sure that they understood everything that I was doing." Hoey testified: "There wasn't anything . . . orally, in writing stop, don't do this work. In fact, it was we've got to get this thing accomplished and get this done. As to explanations, when I would talk to Suzanne and she wanted explanations as to why . . . did I do this, and why did I do that, they were all explained."

On September 29, 2009, Hoey sent the Reiffins a bill for $32,339.80, detailing her services and costs. The Reiffins replied on October 6, 2009, saying that they "were shocked and appalled" by the charges. Hoey sent the Reiffins letters on December 30, 2009, and January 21, 2010, explaining her work. In March 2011, Hoey sued the Reiffins for damages of $32,339.80 for breach of contract. The case was tried to the court. The court entered a judgment for $28,135 against the Reiffins, disallowed Hoey's claims for interest and costs, and explained its decision as follows:

" . . . The elements of a breach of contract cause of action have all been proven.

"1. That plaintiff and defendants entered into a contract for plaintiff's professional services was proven by Exhibit 'A' and the modification to Exhibit 'A' occurring with Exhibit 'K' and Exhibit 'L.'

"2. That plaintiff performed all (or substantially all) of the things the Contract required of her was proven by the estate plan found in Exhibit 'X.'

"3. That defendants did not pay the fees billed by plaintiff was not contested.

[¶] . . .

"The Court makes the following findings of fact:

"Plaintiff and defendants entered into . . . agreement for professional services to be provided by plaintiff to defendants. That agreement, dated June 4, 2009, liquidated the attorney fee to plaintiff in the sum of $4,500, but contemplated a shift to an hourly rate in the event of any of several contingencies. One of them, '[m]ajor revisions requested subsequent . . . ' is the only contingency relevant to this case.

"There were major revisions to the scope of the work that arose subsequent to the contracting, and by letter modification on August 7, 2009, the defendants agreed to shift the fees earned by plaintiff from the flat fee arrangement to the hourly fee arrangement listed in the contract.

"It is manifestly unfortunate that defendants did not inquire and plaintiff did not advise that the scope of the change was huge. The first notice to defendants of the actual cost of the trusts they had requested be prepared was after all the work was completed. The defendants had agreed to the billing arrangement modification with the mistaken assumption that the extra amount of work was of a minimal nature. The plaintiff knew otherwise but neglected to advise her clients that their circumstances necessitated the kind of estate plan that generally costs in the $30,000 ─ $50,000 range.

"The evidence is persuasive that the plaintiff justifiably believed, based on information provided by defendants, that defendants owned an asset (patent(s)) with a value between five million and fifty million dollars and that the defendants were involved in litigation with Microsoft regarding the patents. The evidence is persuasive that plaintiff believed, based on information provided by the defendants, that the defendants desired the Mechanics Bank to administer the trust after both defendants die.

"Both of those beliefs were probably incorrect. The patent litigation needed to be favorably resolved before the patents had any large value, and the litigation would be extremely difficult to pursue if Mr. Reiffin were to die. And, the defendants, while desiring that Mechanics Bank be the successor trustee, were not and are not insistent on that choice.

"These facts however, as reasonably believed by the plaintiff, ratcheted up the work needed by defendants on their estate plan for two reasons: First, the need to draft a trust that the Mechanics Bank would agree to administer required a huge investment of time and interaction with the bank's employee. Second, if the estate was in danger of a significant estate tax consequence absent a sophisticated estate plan, an estate planning attorney would be quite remiss to not draft something to address that contingency.

"Perhaps all of the failure of communication by defendants and by plaintiff would either not have occurred or would have been minimized if Mr. Reiffin had not become extremely ill in mid August 2009. This circumstance justifiably caused plaintiff to accelerate the time frame for completion of the work, and the documents were completed and signed in late August 2009.

"The estate plan was not the 'simple trust' the defendants initially asked plaintiff to prepare, but it was the type of estate plan called for in an estate with assets as understood by plaintiff which accomplished their estate planning goals."

II. DISCUSSION

A. Arguments Based on the Evidence

The reasonableness of an attorney fee is a question of fact (*Anderson v. Brady* (1957) 151 Cal.App.2d 545, 557) involving numerous considerations. Some of them are specified in Rule 4-200 of the State Bar Rules of Professional conduct, which provides: "(A) A member shall not enter into an agreement for, charge, or collect an illegal or unconscionable fee. [¶] (B) Unconscionability of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events. Among the factors to be considered, where appropriate, in determining the conscionability of a fee are the following: [¶] (1) The amount of the fee in proportion to the value of the services performed. [¶] (2) The relative sophistication of the member and the client. [¶] (3) The novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly. [¶] (4) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the member. [¶] (5) The amount involved and the results obtained. [¶] (6) The time limitations imposed by the client or by the circumstances. [¶] (7) The nature and length of the professional relationship with the client. [¶] (8) The experience, reputation, and ability of the member or members performing the services. [¶] (9) Whether the fee is fixed or contingent. [¶] (10) The time and labor required. [¶] (11) The informed consent of the client to the fee."[2]

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[2] Similar considerations are identified by the Alameda County Bar Association in questions and answers concerning attorney fee arbitration: "The arbitrator's decision will be based on a number of factors. These include, among other things, how difficult the

"Verdicts and judgments for the reasonable value of attorneys' services are usually upheld. The only basis for reversal would be that the amount was so large (or so small) as to 'shock the conscience' and suggest that passion and prejudice influenced the determination. However, the factors to be considered . . . give such wide discretion to the trial court or jury that attempts to show an abuse on appeal are seldom successful." (1 Witkin, Cal. Procedure (5th ed. 2008) Attorneys, § 205, p. 275 (Witkin).) Under the abuse of discretion standard that governs here, our review of the evidence extends no further than to determine whether there were reasonable grounds for the trial court's decision. Resolution of an attorney fee dispute " ' "will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.' [Citations.]" ' " (*Christian Research Institute v. Alnor* (2008) 165 Cal.App.4th 1315, 1323 (*Christian*).) "[T]he appellate court will not try the issue de novo . . . ." (1 Witkin, *supra*, Attorneys, § 205, pp. 275-276.)

Hoey supported her fee claim with detailed billing records, including entries for work not charged. Before the Reiffins agreed to pay Hoey additional hourly fees, they had received her letter confirming the urgency of the project and advising that she had stopped working for other clients in order to complete it – factors that favored recovery of the amount billed. (Rules Prof. Conduct, rules 4-200(B)(4), (B)(6).) The court could reasonably find that Hoey's communications with Mechanics Bank were necessary to obtain the Bank's agreement to serve as successor trustee as the Reiffins wished. The

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case was and the skill needed by the lawyer to handle it; whether the lawyer was prevented from taking other cases because he or she was hired by you; how much the case was worth and what the final results were; any circumstances or time limitations that may have required that the lawyer spend additional hours; the lawyer's experience and ability; the time the lawyer spent on the case; and, whether you understood and agreed to the fee arrangement. [¶] . . . [¶] The arbitrator also looks at the lawyer's 'performance' in deciding the amount of the fee. For example, did the lawyer spend too much time on a specific task, or did the lawyer make mistakes that required extra time to fix?" (https://www.acbanet.org/UserFiles/files/PDFs/FeeArb/PreparingForFeeArbHearing.pdf (as of February 7, 2013.)

court could also reasonably find that the overall amount of time Hoey spent on the trusts was appropriate in view of the value Martin placed on his patents. (Rules Prof. Conduct, rule 4-200(B)(1).) The Reiffins introduced no evidence that called into question the court's finding that Hoey's work "accomplished their estate planning goals." (Rules Prof. Conduct, rule 4-200(B)(5).) While we recognize that substantial fees were awarded, in light of the work involved we cannot say they were so excessive as to be "shocking" or indicative of passion or prejudice. (1 Witkin, *supra*, Attorneys, § 205, p. 275.) Accordingly, we cannot conclude the decision was an abuse of discretion.

The Reiffins' appeal focuses primarily on evidence they contend should have led to a smaller award. But their focus is misplaced because we must uphold the trial court's decision if it was reasonable, " '[e]ven though contrary findings *could* have been made . . . .' " (*Christian*, *supra*, 165 Cal.App.4th at p. 1323.)

For example, the Reiffins say that Hoey's alleged mistaken belief that "judgments are not enforceable" led her to expend excessive time on the trust revision, and is "the major error upon which [they] rely." In her December 30, 2009, letter to the Reiffins explaining her work on the trusts, Hoey identified estate tax liability that could arise from values placed on the patents in the litigation as "a big issue in your overall estate plan." Hoey said she was concerned that Martin might reach a substantial settlement with Microsoft, and that the trusts would have insufficient assets to pay estate taxes on the settlement "if Microsoft dragged payment of the settlement beyond the due date for payment of the estate taxes." Hoey reiterated her concerns in a January 21, 2010, letter, adding that "Microsoft . . . often . . . drags out the payment of . . . damages . . . ." Hoey testified that she had been advised by three patent attorneys that this was Microsoft's practice. The Reiffins contend that Hoey's concern about delayed payment of damages was illusory because Rules 62 and 69 of the Federal Rules of Civil Procedure (28 U.S.C.) provide for prompt enforcement of federal court judgments.

However, Hoey's concerns were not confined to delayed payment of judgments. Counsel for Mechanics Bank testified that the Internal Revenue Service would value the patent litigation for estate tax purposes before it was concluded, and she and Hoey testified that they were concerned about the tax liability in that situation. That concern is apparent on review of the non-patent trust, where the Reiffins acknowledged that estate tax liability associated with the patents could reduce or eliminate funding of the special needs trust and gifts the Reiffins contemplated, even if the patent litigation was only in settlement negotiations at the time of a settlor's death.[3] The Reiffins state that the patents had been held to be invalid in 2003, and thus the IRS was powerless to attribute any value to them until they were reinstated in a new judgment. But they provide no legal authority to support their proposition, or evidence that they apprised Hoey of it.

Thus, Hoey's allegedly mistaken beliefs about the enforceability of judgments and Microsoft's practices in paying them were, at most, misconceptions about peripheral matters. The Reiffins maintain that Hoey either committed "perjury when she testified that she spent only 'ten minutes' " worrying that Microsoft might not promptly pay a settlement, or "fraud" when she billed hours for her work on that problem. But the Reiffins have not shown Hoey's concern about potential estate tax liability due to the patent litigation to be spurious. It was understandable why she would worry that the bank, as possible successor trustee of the non-patent trust, would insist on language addressing the consequences of potential estate tax liability to its satisfaction.

The Reiffins observe that Hoey falsely claimed in her December 2009 and January 2010 letters to have secured an agreement from the bank, reflected in the trust documents, to loan the patent trust the money necessary to pay the potential estate tax.

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[3] The trust stated: "If the assets of the 1985 [patent] Trust are illiquid at the time that estate taxes are due and payable, but the assets are appraised to have substantial value as of date of death (for example, there are settlement negotiations but no final agreement), the settlers acknowledge that the Internal Revenue Service shall hold the trustee of the 2009 [non-patent] Trust liable to pay the estate tax owing in the surviving settlor's estate up to the value of the trust estate. The trustee may be obligated to liquidate all (or a significant portion) of the assets of the 2009 Trust to pay the estate tax. [¶] As a result of such liquidation, there may not be assets to fund any of the gifts contemplated above (or the funding will be de minimus). If the trustee of the 1985 Trust is unable or unwilling to reimburse the trustee of the 2009 Trust for its pro rata share of estate tax and the trustee of the 2009 Trust has liquidated the trust assets, the Special Needs Trust . . . will not be funded."

Hoey went so far as to claim that she thereby saved the Reiffins "hundreds of thousands of dollars in penalty and interest payments to the IRS," and deserved a "bonus" for this part of her work. However, the bank's counsel testified that the bank did not agree to make such a loan, and never would have so agreed, and Hoey admitted at trial that her letters were mistaken about that alleged agreement. But the amount Hoey may have billed for negotiating this nonexistent loan agreement was not established at trial, and any such negotiation would have been very brief given the bank's unwillingness to make the proposed loan. Thus, the court could have reasonably concluded that Hoey's erroneous claim to have obtained a loan agreement did not compel reduction of her bill.

The Reiffins note that Hoey's December 30 letter purported to be "a detailed explanation of why I continued to negotiate with Mechanics' Bank . . . after you had instructed me not to." The letter argued that Hoey was ethically obligated to act in the Reiffins' best interests, and explained, among other things, that she had to communicate with the bank to obtain its agreement to act as successor trustee. In their October 6, 2009, letter complaining to Hoey about her bill, the Reiffins stated that they instructed Hoey in an August 6 telephone conference not to engage in any patent-related negotiations with the bank. However, in their letter of August 7, the Reiffins implicitly authorized such negotiations when they directed Hoey to add patent-related language to the trusts that would satisfy the bank. Moreover, Hoey testified that she kept the Reiffins apprised of her work, which included communications with the bank, and that they never told her to stop what she was doing. Thus, the evidence did not compel reduction of the bill on the ground that Hoey's communications with the bank were unauthorized.

B. Other Arguments

The Reiffins contend that the court's findings were too conclusory to permit meaningful appellate review of the decision. We disagree. The court gave a reasoned explanation showing that the decision was not beyond " ' " ' " 'the bounds of reason, all of the circumstances before it being considered.' " ' " ' " (*Christian, supra,* 165 Cal.App.4th at p. 1323.)

The Reiffins argue that "jurisdiction over this controversy lies exclusively with the federal courts because the sole genuine dispute involves the legal effect of the Federal Rules of Civil Procedure on settlement judgments entered in federal patent infringement actions litigated exclusively in the federal courts." The Federal Rules of Civil Procedure have little to do with this case. It is a breach of contract action to collect an attorney fee, and is properly brought in state court. (1 Witkin, *supra*, Attorneys, § 209, p. 279.)

The Reiffins argue that there was no "meeting of the minds" here as required for formation of a contract because, as the trial court found, they did not appreciate the extent of the work they were asking Hoey to perform. A contract may be rescinded based on a unilateral mistake of fact if, among other things, enforcement of the contract would be unconscionable. (*Donovan v. RRL Corp.* (2001) 26 Cal.4th 261, 282.) But the Reiffins have not shown that they sought rescission of the contract in the trial court, and cannot properly raise this new defense for the first time on appeal. (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2012) ¶ 8:231, p. 8-156 (rev. #1 2011); see also 5 Witkin, *supra*, Pleading, § 1093, p. 523 [facts establishing right to rescind must be specially pleaded].)

The Reiffins suggest the judge was biased against them, observing that at one point he admonished Martin not to ask "stupid questions." Their brief states that the court's "injudicious ad hominem insults . . . have been unprecedented in Mr. Reiffin's experience of sixty-four years of litigation before a wide assortment of federal judges ranging from Learned Hand to newly appointed district judges, and including fifteen years as the principal patent trial attorney for IBM."

The admonition the Reiffins single out occurred when Martin attempted to ask Hoey about section 6(a) of the original attorney-client agreement, which authorized hourly-rate charges in addition to the specified flat fee for "[e]xtra conferences with you, your family, or other parties beyond your initial consultation, review, and execution conferences." Section 6(a) was one of several providing for additional hourly charges, including 6(c), the one that applies in this case, for "[m]ajor revisions requested subsequent to your review appointment."[4]

The Reiffins write: "The trial judge did not understand that the contract (Exhibit A) expressly limited billing on an hourly basis to a period 'beyond . . . the execution conference' which took place on August 28, 2009. However, Ms. Hoey switched to an hourly basis on August 6, 2009, contrary to the contract." But the Reiffins, not the trial judge, are mistaken. Services after the execution conference were just one category of additional hourly fees permitted under the contract, and that category was essentially irrelevant here because only $80 of the hourly fees Hoey charged were incurred after the August 28 execution conference.

When Martin broached section 6(a) of the contract with Hoey at trial, the court took judicial notice that "August the 6th precedes August the 29th," and asked Martin to "get to something that is relevant." When Martin responded with another question about section 6(a), the court interjected: "Mr. Reiffin, look. I know that you are not an experienced trial lawyer, but I have got to decide who is right and who is wrong in this case. You are not helping me to understand who is right and who is wrong in this case by asking stupid questions. Okay? [¶] If you want to argue that the contract is ambiguous, led you astray, you can save that for argument, but when it's perfectly clear to me that this person's motivation for switching you to a different fee basis is not based on the fact that you had already finished, had your stuff done, had your execution conference, and then came back for some changes later, which is what clearly this is referring to. So look, we are going to try to do this where you are asking the questions that might actually help

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[4] Section 6 of the contract set forth "[t]he following . . . examples of services . . . that may be billed to you on an hourly basis in addition to your base flat fee: [¶] (a) Extra conferences with you, your family, or other parties, beyond your initial consultation, review, and execution conferences. [¶] (b) Home or hospital visits (including travel time). [¶] (c) Major revisions requested subsequent to your review appointment. [¶] (d) Any service performed not in direct relation to your living trust, such as retirement benefit and/or tax planning."

me understand who is right and who is wrong here. And don't waste your time, my time, her time, her time, his time and her time on stuff that doesn't help you."

The court's remarks, in context, were merely expressions of "understandable frustration" and do not demonstrate bias. (*People v. Brown* (1993) 6 Cal.4th 322, 337; *Hall v. Harker* (1999) 69 Cal.App.4th 836, 843.)

III. DISPOSITION

The judgment is affirmed.

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Siggins, J.

We concur:

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McGuiness, P. J.

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Pollak, J.