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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

INSURANCE COMMISSIONER OF THE
STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

GOLDEN EAGLE INSURANCE
COMPANY,

Defendant and Respondent;

RON LEAF,

Claimant and Appellant.

A136197

(City & County of San Francisco
Super. Ct. No. CPF-97-984502)

Ron Leaf appeals from an order denying his application for an order to show cause against the California Insurance Commissioner (commissioner) in the commissioner's capacity as statutory liquidator of Golden Eagle Insurance Company (Golden Eagle). In his application Leaf sought additional payment for legal services he provided for an insured of Golden Eagle. The trial court found the commissioner properly exercised his discretion in denying the claim as untimely. We affirm under the differential standard of review applicable in this appeal.

I. BACKGROUND

The trial court appointed the commissioner conservator of Golden Eagle in January 1997, pursuant to Insurance Code section 1011.¹ The appointment order,

¹ All further statutory references are to the Insurance Code unless otherwise noted.

inter alia, authorized the commissioner to take possession of Golden Eagle's assets and to pay proper claims or obligations of the company. The order restrained persons from instituting or maintaining any legal action against Golden Eagle absent an order from the court. In August 1997, the court approved a rehabilitation plan that provided for payment or rejection of claims in accordance with the Insurance Code (§§ 1021-1032). (See generally *Garamendi v. Golden Eagle Ins. Co.* (2005) 128 Cal.App.4th 452, 459-460.) The court's rehabilitation order provided for court review of claim denials through the order to show cause procedure specified in section 1032.

The commissioner applied to liquidate Golden Eagle less than a year after he had been appointed conservator. The trial court approved the application, and, in its order of liquidation, imposed a trust on the assets of the company. The court appointed the commissioner as trustee of the liquidating trust. The court reaffirmed its prior orders restraining legal action against Golden Eagle, except as provided in the claims procedures set forth in the rehabilitation plan (and the Insurance Code). The court issued additional orders that specified the procedures for adjudicating orders to show cause arising from claims rejected by the commissioner.²

In 1999, a Golden Eagle policyholder, Anthony Rafello, retained Leaf to represent him in a civil action in San Mateo County Superior Court. According to Leaf, Golden Eagle later agreed to pay for Leaf's services to defend Rafello in the action. (See Civ. Code, § 2860, subd. (a) [insurer's duty to provide independent counsel when conflict of interest arises].) Golden Eagle and Leaf, however, disagreed on Leaf's hourly rate. Leaf requested \$250 an hour, while Golden Eagle offered \$125. (*Id.* at subd. (c) [insurer's fee obligation for independent counsel is limited to rates actually paid by insurer to attorneys retained in ordinary course of business].)

² A separate entity, Golden Eagle Insurance Corporation, was created to administer claims arising from Golden Eagle insurance policies. In performing its duties, Golden Eagle Insurance Corporation acted on behalf of, and exercised the authority vested in, the commissioner. For simplicity, we will also use "Golden Eagle" to refer to Golden Eagle Insurance Corporation unless the context requires us to distinguish between the two Golden Eagle entities.

Leaf provided his services despite the rate dispute. In Leaf's words from a letter dated August 11, 2000, "we have agreed to disagree for the time being with regard to my rate of compensation."

Leaf submitted periodic invoices for his services to Judith Hess, a claims manager for Golden Eagle in San Diego. Leaf appears to have calculated his fees using the \$250 per hour rate. On occasion Leaf set forth his calculation (hours times rate) using \$250 per hour. More commonly, however, he listed his time spent on specific tasks and then set out an amount for total fees due without showing the calculation. Golden Eagle made partial payments on the invoices.

In November 2001, an attorney representing Golden Eagle, Richard Edwards, spoke to Leaf about the rate dispute. According to Edwards, he told Leaf that Golden Eagle "would prevail on the hourly rate issue because of the rates it paid other counsel."

Leaf sent Hess a "final statement" for his services and costs, dated April 23, 2002, requesting a balance due of \$112,441.63. In a cover letter, Leaf acknowledged the rate dispute, and he attempted to clarify why he should receive his higher, requested rate.

Leaf also sent a copy of his final statement (and the cover letter) to Liberty Mutual Group, located in South Burlington, Vermont. Liberty Mutual Group's exact role in the matter is not clear from the record; apparently, Liberty Mutual Group reviewed legal bills for Golden Eagle.³ Liberty Mutual Group responded to Leaf's final statement with an unsigned letter from "Litigation Management" dated June 17, 2002. But for one trivial cost item, Liberty Mutual Group found nothing amiss with Leaf's statement. The letter stated: "Your invoices have been reviewed and processed for payment in accordance with Liberty Mutual Group's Litigation Management Guidelines for Outside Counsel."

While Liberty Mutual Group may have found nothing amiss with Leaf's statement, the hourly rate dispute had not been resolved. On June 20, 2002, Edwards

³ The record does reflect that Liberty Mutual Insurance Company agreed to purchase Golden Eagle shortly after Golden Eagle was placed into conservatorship. The connection between the purchase of Golden Eagle by Liberty Mutual Insurance Company and the activities of Liberty Mutual Group, if any, is unknown.

spoke to Leaf regarding the disputed fees. Although the two had apparently discussed arbitration of the dispute in the past, Edwards insisted the Golden Eagle liquidation orders would require Leaf to apply for an order to show cause in court.

Leaf sent at least two more invoices to Hess, in which he added interest charges to the balance due. He also sent a letter, dated March 5, 2003, to Liberty Mutual Group demanding payment of the balance due plus interest. Neither Golden Eagle nor Liberty Mutual Group (if it even had that authority) made any additional payments to Leaf.

The record reflects no further active efforts by Leaf to collect the balance due until late 2007. At that time, Leaf retained an attorney, who sent a demand letter. Golden Eagle's Edwards, in a letter dated January 14, 2008, responded that Leaf's claim for fees was barred by any applicable statute of limitations and laches. Edwards noted he had spoken to Leaf over five years prior regarding Leaf's contention that additional sums were owed, and that Leaf did not pursue the matter. Edwards explained that Leaf had been paid \$125 per hour as provided under Civil Code section 2860.

Leaf still took no formal action to resolve the dispute. He did enlist his former client, Rafello, in his collection efforts, although Rafello appears to have been an unwilling participant in the matter. In addition to involving Rafello, Leaf's attorney contacted the law firm representing the commissioner. The law firm asked Edwards to respond, so he sent another letter to Leaf's attorney in which he noted seven years had now passed since he had discussed the matter with Leaf. Edwards once again explained that "[a]ny attempt to pursue the matter through the liquidation court would be completely without merit in light of the chronology of this claim."

On February 3, 2012, Leaf filed an application in the superior court for an order to show cause why the commissioner should not be ordered to pay the legal fees incurred to defend Rafello. Leaf requested, in the alternative, leave to file a complaint for money and declaratory relief. Leaf asserted in his application that his fees had been approved in full, but that to date no payment had been made. Golden Eagle opposed Leaf's application on several grounds, including timeliness (statute of limitations, laches).

The trial court denied Leaf's application, finding "any applicable statute of limitations has run." The court pointed to the passage of time since both the presentation of the bill in 2002 and the demand for payment rejected by Edwards in January 2008. The court further found the commissioner could reasonably find there was no basis to pay Leaf \$250 per hour for his services as opposed to \$125 per hour. Finally, the court noted Leaf had never actually filed a proof of claim form as required by the order approving the rehabilitation plan. The court concluded that for all these reasons, the commissioner did not abuse his discretion in denying Leaf's request for additional compensation.

Leaf filed a "notice of intention" to move to set aside the denial order and for new trial. Although the trial court expressed doubts as to its authority to consider a motion for new trial, it nevertheless reached the merits of Leaf's arguments. The court reiterated its conclusion that the applicable statute of limitations barred any claim for additional fees.

II. DISCUSSION

A. Standard of Review

Court proceedings conducted in the context of conservatorships under the Insurance Code are "special proceedings." (*Garamendi v. Golden Eagle Ins. Co.*, *supra*, 128 Cal.App.4th at p. 461, fn. 2.) The trial court's order denying Leaf's application for an order to show cause was a final determination of the parties' rights, and was in effect a final judgment in a special proceeding. (See Code. Civ. Proc., §§ 904.1, subd. (a), 1064; *cf. Church v. County of Humboldt* (1967) 248 Cal.App.2d 855, 857 [judicial denial of late claim petition under Tort Claims Act constitutes a final determination of claimant's rights].)

The standard of review in this type of proceeding has been set out in prior appellate decisions involving Golden Eagle's conservation/liquidation: "In these special proceedings for an insurer in conservation, the actions of the Commissioner are subject to judicial review, but not de novo review. The trial court reviews them under an abuse of discretion standard, asking if the action was arbitrary, i.e., unsupported by a rational basis, contrary to specific statute or discriminatory. We also test the action of the trial court by an abuse of discretion standard, employing the equivalent of the substantial

evidence test by accepting the trial court's resolution of credibility and conflicting substantial evidence, and its choice of possible reasonable inferences. [Citation.] Thus our review of factual matters is highly deferential." (*Low v. Golden Eagle Ins. Co.* (2003) 110 Cal.App.4th 1532, 1544.)

Although review of claim determinations by the commissioner is circumscribed (*Low v. Golden Eagle Ins. Co.* (2002) 104 Cal.App.4th 306, 315), whether the commissioner properly interpreted the law is a question for the courts (*Garamendi v. Golden Eagle Ins. Co.* (2004) 116 Cal.App.4th 694, 703).

B. Statute of Limitations Issues

Leaf tenders eight issues. The issues overlap, and we agree with Golden Eagle⁴ that they can be grouped into three categories: (1) The statute of limitations; (2) the proper hourly rate; and (3) due process rights. Because the statute of limitations issues are dispositive of this appeal, we need not and do not reach the question of whether Leaf should have been paid \$250 per hour or \$125 an hour. After discussing Leaf's statute of limitations arguments, we will close with Leaf's due process complaints.

1. Tolling of the Statute of Limitations

The trial court believed the applicable limitations period was four years for an action on a written contract (Code Civ. Proc., § 337), while Golden Eagle suggests the applicable period was two years for an action on an oral contract (*id.* at § 339). Which

⁴ Both Golden Eagle and the commissioner are respondents in this appeal. Golden Eagle, however, has taken the lead in responding to Leaf's arguments. The commissioner joins in Golden Eagle's arguments and adds only two brief comments to the effect that (a) permitting untimely claims would impair the commissioner's ability to conduct an orderly liquidation of failed insurers, and (b) Leaf's due process claims are little more than a belated, collateral attack on the rehabilitation process. We express no opinion on the first point, but we agree with the second point.

particular statute applies, however, is not at issue.⁵ Instead, Leaf contends any limitations period was tolled by the provisions in the conservation and liquidation orders restraining legal action against Golden Eagle. He cites Code of Civil Procedure section 356, which tolls or suspends the limitations period when an action is stayed by an injunction.⁶

Leaf's reliance on Code of Civil Procedure section 356 is misplaced. At no time was Leaf precluded from filing an application in court to resolve his dispute with Golden Eagle. The conservation, rehabilitation and liquidation orders provided for the resolution of claims against Golden Eagle. The orders restrained legal action against Golden Eagle only outside of the claims process, or absent a court order. Whatever complaints Leaf may have about the handling of his particular claim, he does not challenge the constitutionality of the order to show cause procedure or the relevant Insurance Code provisions. (See *Low v. Golden Eagle Ins. Co.* (2002) 101 Cal.App.4th 1354 [no denial of due process where claimants had right to judicial review of Commissioner's decision on claim].) Leaf simply failed to avail himself of the process for judicial review in a timely manner.

2. Estoppel

Leaf also contends Golden Eagle should be estopped from relying on the statute of limitations. This contention is premised on Leaf's view that his April 2002 final statement was approved for payment. This is a common theme running through many of Leaf's arguments—he believes the June 17, 2002 letter from Liberty Mutual Group

⁵ For the first time in his reply brief, Leaf argues Golden Eagle waived the statute of limitations defense by failing to plead the applicable code section. Leaf's argument is difficult to follow, but apparently he believes some other, unidentified limitations statute applies because Golden Eagle retained him pursuant to Civil Code section 2860. Even if we were able to follow Leaf's belated argument, we would not consider it. (*Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 295 [obvious reasons of fairness militate against consideration of an issue raised initially in the reply brief of an appellant].)

⁶ Code of Civil Procedure section 356 provides: "PROVISION WHERE ACTION IS STAYED BY INJUNCTION. When the commencement of an action is stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action."

approved his fee request, therefore, there was no statute of limitations issue or even any need to file a claim.

We first observe that the June 17, 2002 letter does not explicitly state payment is forthcoming. The letter merely indicates Leaf's invoices have been "reviewed" and "processed for payment." If there had been no dispute over Leaf's hourly rate, perhaps Leaf might have reasonably expected Golden Eagle to pay him the additional amount he requested, but Leaf knew his hourly rate (as opposed to the number of hours billed) was disputed.

Which brings us to the second point: Nothing in this record would support a reasonable belief that Liberty Mutual Group in Vermont had unconditionally approved payment of the \$112,774.63 Leaf requested. There is no evidence anyone at Golden Eagle had moved one inch on the hourly rate dispute or that the dispute had been serendipitously resolved. That Leaf himself did not believe payment was forthcoming is demonstrated by his disingenuous March 2003 letter to Liberty Mutual Group. In that letter, Leaf demanded payment while feigning ignorance as to why he had not been paid: "We are uncertain as to why GEIC/Liberty Mutual has chosen to let interest accrue on our fees at the rate of ten percent per annum rather than making final payment of the amount conceded to be owed." Neither the letter nor any other correspondence in the record indicates the rate dispute was settled. The letter omits any mention of the rate dispute.

A cause of action for unpaid attorney fees generally accrues when the attorney's services end. (See *E.O.C. Ord, Inc. v. Kovakovich* (1988) 200 Cal.App.3d 1194, 1203 [defendant breaches his obligation to pay at time plaintiff completes performance of requested act].) A defendant, however, may be estopped from relying on the statute of limitations if he or she has induced the plaintiff to delay in commencing an action. (*Vu v. Prudential Property & Casualty Ins. Co.* (2001) 26 Cal.4th 1142, 1152-1153.)

Leaf cannot plausibly argue he was induced to delay, in any substantial way, filing his application for an order to show cause. His final statement indicates he last provided legal services for Rafello on December 3, 2001. Even if he was temporarily lulled into

inaction by Liberty Mutual Group's June 17, 2002 letter, Leaf then waited nearly *10 years* to file his application for an order to show cause. The trial court's observation that at some point, "long ago," Leaf knew he was not going to be paid without court intervention, is amply supported by this record.

3. *Res Judicata*

Leaf argues *res judicata* precluded the commissioner or Golden Eagle from relitigating, and then denying or rejecting his claim.

Administrative determinations of fact or status, under certain circumstances, may be final and binding in subsequent proceedings. (*Olive Proration etc. Com. v. Agri. etc. Com.* (1941) 17 Cal.2d 204, 209; see 7 Witkin, Cal. Procedure (5th ed. 2008) Judgment, § 359, p. 975.) "Res judicata precludes relitigation of issues in a case when the same issue has already been litigated and finally decided in a prior case involving the same parties. [Citation.]" (*Pacific Coast Medical Enterprises v. Department of Benefit Payments* (1983) 140 Cal.App.3d 197, 214.)

The parties (Leaf, Golden Eagle, the commissioner) did not litigate Leaf's entitlement to additional fees until he filed his application for an order to show cause. Leaf, nevertheless, once again relies on the June 17, 2002 letter from Liberty Mutual Group, which he believes approved his claim, and was a final and binding determination. Leaf lightly skips over the question of whether the letter was an administrative determination by the commissioner. In any event, the letter did not approve his claim, nor did it represent a full and fair hearing on a disputed issue. Leaf's *res judicata* argument has no merit.

4. *Notice of Claim Rejection*

Leaf asserts the failure of the commissioner or Golden Eagle to send him a formal notice rejecting his claim for additional compensation "precluded the Liquidation Court from denying [his] OSC."

Leaf did not file a claim for his fees in the manner and in the form required by the Insurance Code. (See §§ 1021, subd. (a), 1023; Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2013) ¶ 10:21, p. 10-8 (rev. #1, 2011).) In turn,

Golden Eagle never issued a formal rejection notice in the form required by the trial court's order to show cause procedure. These details would make for a lively debate if the trial court had rejected Leaf's application for an order to show cause on jurisdictional grounds. A proper claim is a prerequisite to an application for an order to show cause. (See § 1024 [no action may be maintained on claim unless it is filed in manner and within time provided in Insurance Code]; § 1032 [claimant has 30 days from notice of rejection of claim to apply for order to show cause]; see also *Garamendi v. Golden Eagle Ins. Co.*, *supra*, 128 Cal.App.4th at p. 464 [describing claims procedure].)

The trial court, however, denied Leaf's application on the merits: "The issue before me is whether the Insurance Commissioner abused his discretion in denying a claim." The court found the commissioner did not abuse his discretion because (a) any applicable statute of limitations on what was essentially a contract claim had run, and (b) the commissioner could reasonably conclude there was no basis to pay Leaf \$250 per hour. The court did observe that Leaf had never filed a proof of claim form, but only in the context of rejecting Leaf's factual assertion that his claim had been approved. The court did not deny Leaf's application on jurisdictional grounds.

Leaf does not connect the lack of a formal rejection notice to the statute of limitations. He does not explain how the lack of notice delayed the accrual of his cause of action, or how it tolled the statute of limitations. He seems to argue that, absent a rejection notice, he could wait indefinitely to assert his claim. He cites no legal authority supporting that argument. Perhaps lack of notice bolsters his estoppel argument, but as we have already discussed (*ante*), we agree with the trial court that Leaf knew Golden Eagle was not going to pay him long ago.

In sum, on the statute of limitations issues, we find substantial evidence supports the trial court's factual findings, and that the court acted within its discretion in denying Leaf's application for an order to show cause.

C. Due Process Issues

Leaf asserts his right to due process was violated by (1) Golden Eagle's attorney, Edwards, acting as witness, advocate, and claims adjudicator; and, (2) the trial court

treating his approved claim as a denied claim. The first issue was not properly raised below. The second issue has not the slightest merit.

1. Edwards Role in Denying Leaf's Claim

Leaf contends Edwards violated his “due process rights by refusing payment on [Leaf’s] invoices.” Leaf states Edwards was the “representative” to advocate against the claim, while being the “adjudicator” to hear and decide the claim. Leaf suggests the same principles that support judicial disqualification for an appearance of bias should apply here.

According to the declaration Edwards filed in the order to show cause proceeding, Edwards was counsel of record for Golden Eagle Insurance Corporation. From the declaration and supporting documents, we know Edwards spoke to Leaf in November 2001, as counsel for Golden Eagle, and “advised” him that Golden Eagle would prevail on the hourly rate issue. They discussed settlement. Edwards spoke to Leaf again June 2002. At that time Edwards insisted Leaf would need to file an application for order to show cause. In 2008 and in 2010, Edwards sent letters to Leaf’s attorney rejecting demands for payment, citing the statute of limitations and laches. During that time period Edwards also responded to letters from Leaf’s former client Rafello. Edwards advised Rafello, “[o]n behalf of Golden Eagle,” that his claim for additional payment for legal fees (for Leaf) had been denied by Golden Eagle.

We know nothing more about Edwards’s role in thwarting Leaf’s request for additional compensation. Why? Primarily because Leaf did not raise any due process concerns regarding the claims process until his reply to the opposition to the motion for new trial. Even then, he did not mention Edwards by name until the hearing on the new trial motion.

Leaf argues he can belatedly raise a constitutional issue in a new trial motion or on appeal. He cites *Hoffman-Haag v. Transamerica Ins. Co.* (1991) 1 Cal.App.4th 10, 16. But as that decision explains, a party may change legal theories, whether on appeal or on a motion for new trial, “so long as the new theory presents a question of law to be applied to undisputed facts in the record. [Citations.]” (*Id.* at pp. 15-16, italics added.)

Because Leaf only belatedly questioned Edwards's part in denying the claim, there are insufficient undisputed facts in the record to consider Leaf's new theory. There is also the matter of fairness—Golden Eagle had no chance to explain Edwards's role. We can speculate or we can decide the issue based on an incomplete record. Either way Leaf loses. Nothing in the record shows Edwards adjudicated Leaf's claim, and even if we speculate that Edwards did, he presumably exercised powers delegated by the commissioner. Under the Insurance Code, the commissioner acts both as receiver or trustee for the troubled insurer, and as the adjudicator of claims against the company. (*Garamendi v. Golden Eagle Ins. Co.*, *supra*, 128 Cal.App.4th at p. 465.) The claimant's right to a fair determination is protected by court review of the commissioner's (or his delegate's) decision. (See *id.* at pp. 465-466.)

2. *The Trial Court's Review of the OSC Application*

Leaf complains the trial court violated his due process rights by treating his application for an order to show cause as if his claim had been rejected. Leaf once again recycles his arguments that his claim had been approved, or at least not rejected. Therefore, according to Leaf, he was deprived of notice of the nature of the proceedings, and the opportunity to prepare and submit evidence and argument related to a rejected claim.

The statute of limitations, the proper hourly rate, and the claim requirements were briefed and argued, with supporting evidence, in the order to show cause proceeding. As we explained at the outset, the statute of limitations issues were dispositive. Edwards informed Leaf no later than 2008 that Golden Eagle would resist any attempt to claim additional legal fees based on the statute of limitations and laches. Leaf cannot legitimately claim surprise or lack of notice that Golden Eagle would resist his application for an order to show cause on statute of limitations grounds.

All of Leaf's perceived "irregularities" in the handling of his claim lead right back to his failure to invoke the claims resolution procedures in a timely manner. We agree with Golden Eagle that the statute of limitations ran, and the trial court properly denied Leaf's application because of Leaf's own inaction.

III. DISPOSITION

The order denying the application for order to show cause is affirmed.

REARDON, J.

We concur:

RUVOLO, P. J.

HUMES, J.