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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

RUDOLPH G. KOPPL, Plaintiff and Respondent, v. MONICA K. ZIMMERMAN, Defendant and Appellant.	A146743 (San Francisco City & County Super. Ct. No. PTR-15-298735)

In this acrimonious, but exceedingly brief, trust dispute, Monica K. Zimmerman sought costs and attorney fees from her brother and petitioner, Rudolph G. Koppl, under Probate Code section 17211.[1] Under that section, a trial court "may award" such expenses if a trust beneficiary prosecutes a contest "without reasonable cause and in bad faith." (§ 17211, subd. (a).) The trial court, denying recovery under section 17211, found Rudolph's petition was not "totally and completely without merit" and, referencing an earlier ruling, that Rudolph had not acted in bad faith. Thus, it concluded the prerequisites for an exercise of discretion under section 17211 were not met.

While the issue of reasonable cause is a legal question we review independently, the question of bad faith is a factual one. We conclude there is some basis in the record to support the court's denial of expenses under section 17211, and therefore affirm.

[1] All further statutory references are to the Probate Code unless otherwise indicated.

BACKGROUND

Under what the parties call "Trust One," Frida Koppl is the trustor and primary beneficiary during her lifetime. When she passes, the trust transitions from revocable to irrevocable, and her two children, Monica and Rudolph, stand to benefit. Rudolph will be entitled to certain of his mother's personal effects, certain real property, and notes. Monica and her issue will be entitled to the remainder.

In Rudolph's eyes, Frida began to suffer mentally in 2013. Then, doing a "property profile" search in November 2014, he noticed a large loan had been taken out against some of Frida's property, and this struck him as unusual. Later that month, Rudolph had his lawyer write to his sister, Monica, requesting an accounting for Trust One from the date Monica became trustee through October 2014. The letter acknowledged a beneficiary of a revocable trust may not ordinarily request an accounting, but cited Probate Code section 15800 and the Restatement (Third) of Trusts as allowing an accounting in light of Frida's mental state. The letter further cited an unpublished appellate case, *Parducci v. DeMello* (July 24, 2012, A133707) [nonpub. opn.], for the proposition that this relief can to be sought without a prior court determination of incompetency.

Getting no response, Rudolph's lawyer wrote to Monica again three weeks later, on December 12, repeating the accounting request and stating Rudolph would seek court assistance absent a response.

On December 16, 2014, one of Frida's attorneys, having received the two letters from Monica, phoned Rudolph's lawyer. According to Frida's lawyer, Rudolph's lawyer "requested a number of documents that tracked his previous letter requests" given "his client had noticed that there were some transactions that were of concern." Frida's attorney furnished a copy of the document establishing Trust One and Frida's will, and confirmed that Monica was named as the "successor" trustee. There were no further discussions between the lawyers.

In the midst of all this, Monica signed a grant deed on behalf of Frida as Frida's "Attorney-in-Fact" to convey real property on behalf of Trust One. The deed, dated

December 9, 2014 and recorded on December 19, conveyed property to Monica and her husband as a "[b]ona fide gift." Previously, Frida had executed grant deeds herself.

In May 2015, Rudolph, still concerned about Frida's capacity, filed a verified petition in superior court to compel an accounting to beneficiaries. It sought, "within 30 days of . . . approval of this Petition" an order that "the Trustee provide an account for Trust One for the period beginning on November 1, 2013 and ending on the date this Petition is filed." Rudolph alleged he was "unsure whether Frida continues to act as . . . Trustee," and "[e]ven if she is formally serving as Trustee, it appears that Monica has been acting on her behalf . . . ." "Given Frida's incompetence," Rudolph alleged he was "serving this Petition upon Monica, as the successor Trustee of Trust One and as Frida's 'Attorney-in-Fact.' " Rudolph also served Frida. The petition additionally referenced the legal arguments supporting an accounting Rudolph had laid out in his letters and the unpublished appellate decision.

Monica responded with a demurrer and a verified opposition, which included declarations and exhibits. Her demurrer asserted Rudolph, himself, was "unsure" about whether Monica had actually become the trustee, but nevertheless sought to compel her, and not Frida, to make an accounting. (Italics omitted.) Her verified opposition asserted the petition was meritless because, with Frida still alive, Rudolph was a mere contingent beneficiary and, as raised in the demurrer, was seeking an accounting from the wrong person, as Frida remained trustee. Monica declared she was not the trustee of Trust One and had simply acted pursuant to a power of attorney for Frida when she signed the 2014 deed.

Monica additionally filed a request to strike the portion of Rudolph's petition citing the unpublished appellate decision and a request for attorney fees as sanctions under Code of Civil Procedure section 128.5 and Probate Code section 17211. Monica's lawyer claimed Rudolph's citation to the unpublished decision, alone, caused him to incur $7,635.00 in fees, including approximately $1,750 paid to a "professional responsibility" attorney. He claimed the remainder of his work for Monica cost over $30,000.

In response to Monica's filings, Rudolph stated he would withdraw his petition. He said he now understood and believed Monica was not the trustee and that Frida both remained the trustee and had capacity. Rudolph's lawyer declared he phoned Monica's lawyer and advised him the petition would be withdrawn. He also averred he had asked that Monica's motions be withdrawn to avoid a waste of judicial resources, but Monica's lawyer had declined, asserting a right to sanctions. Monica's lawyer, in turn, admitted he insisted on costs and fees as a sanction, but said he was not asked to withdraw any motions and that the issue of conserving judicial resources never came up.

Two days before the hearing on Monica's motions, Rudolph filed a dismissal without prejudice.

Following a hearing, the trial court granted the unopposed motion to strike. Viewing the dismissal without prejudice as a ploy to avoid a ruling on the pending motions, it also sustained the unopposed demurrer without leave to amend. It further granted Monica $4,000 in sanctions under California Rules of Court, rules 2.30 and 8.1115, for Rudolph's reliance on and citation to the unpublished decision. The court, however, denied sanctions under Code of Civil Procedure section 128.5, finding the petition "was (i) not frivolous; (ii) not filed in bad faith; and (iii) not solely intended to cause unnecessary delay."

When Monica reminded the trial court of her request for expenses under Probate Code section 17211, and upped her total request to $64,762.50, the court ruled: "Respondent has not shown that the standard under Probate Code section 17211 differs from the standard under Code of Civ. Proc. section 128.5. (*Uzyel v. Kadisha* (2010) 188 Cal.App.4th 866.) The Court previously rejected Respondent's arguments under C.C.P. section 128.5." The court further found, "Respondent has not shown that the petition was 'totally and completely without merit.' "

Monica now appeals the denial of expenses under Probate Code section 17211.

DISCUSSION

"If a beneficiary contests [a] trustee's account and the court determines that the contest was without reasonable cause and in bad faith, the court may award against the

contestant the compensation and costs of the trustee and other expenses and costs of litigation, including attorney's fees, incurred to defend the account." (§ 17211, subd (a).) Similarly, the court "may award" expenses against a trustee when the trustee opposes a beneficiary's contest "without reasonable cause and in bad faith." (*Id.*, subd. (b).) There appears to be no dispute that Rudolph's petition was a contest under section 17211.

"The Legislature enacted section 17211 in 1996. (See Stats. 1996, ch. 563, § 31 p. 3158.) The Estate Planning, Trust and Probate Law Section [Law Section] of the California State Bar proposed the legislation to harmonize with section 11003, subdivisions (a) and (b),[2] which provide for attorney fees awards in the context of litigation over trustees' accounts in probate estate administrations. (*Chatard v. Oveross* (2009) 179 Cal.App.4th, 1098 . . . .) The group explained: ' "It is advisable to enact a counterpart to these provisions which would apply in settlement of a trustee's account. Without a specific counterpart in the trust law, parties challenging or defending a trustee's accounts are governed by Civil Code Procedure Sections 128.5 et seq. which provide, generally, that a trial court may order a party or the party's attorney, or both to pay any reasonable expenses incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay. Frivolous is defined as 'totally and completely without merit or for the sole purpose of harassing an opposing party.' The standards of CCP Sections 128.5 et seq. appear to be more narrow than those incorporated into Probate Code section 11003.[3] In the context of a challenge

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[2] Section 11003 provides, in language section 17211 obviously copies: "(a) If the court determines that the contest was without reasonable cause and in bad faith, the court may award against the contestant the compensation and costs of the personal representative and other expenses and costs of litigation, including attorney's fees, incurred to defend the account . . . . [¶] [(b)] If the court determines that the opposition to the contest was without reasonable cause and in bad faith, the court may award the contestant the costs of the contestant and other expenses and costs of litigation, including attorney's fees, incurred to contest the account . . . ."

[3] Code of Civil Procedure section 128.5 provides: "(a) A trial court may order a party, the party's attorney, or both to pay the reasonable expenses, including attorney's fees, incurred by another party as a result of bad-faith actions or tactics that are frivolous

of a fiduciary's account, the broader standards of Section 11003 should be adopted and should apply whether the contest occurs during the administration of a probate estate or upon settlement of a trustee's account." ' " (*Leader v. Cords* (2010) 182 Cal.App.4th 1588, 1597–1598 (*Leader*), italics omitted.)

Section 17211 has been called a "remedial statute," one that should be construed with an eye towards effectuating its purpose. (*Leader*, *supra*, 182 Cal.App.4th at p. 1598.) Given the twin subdivisions of section 17211, one protecting against bad faith petitioners (§ 17211, subd. (a)) and one protecting against bad faith opponents (*id*., subd. (b)), the statute cannot be viewed, however, as favoring one class of litigant—trustee or beneficiary—over another.

In *Uzyel v. Kadisha* (2010) 188 Cal.App.4th 866 (*Uzyel*), the appellate court interpreted section 17211, subdivision (b), the provision allowing expenses against a defending trustee who unreasonably and in bad faith opposes a petition. It held " '[r]easonable cause,' when used with reference to the prosecution of a claim, ordinarily is synonymous with 'probable cause' as used in the malicious prosecution context." (*Uzyel*, at p. 926; cf. *Clark v. Optical Coating Laboratory, Inc.* (2008) 165 Cal.App.4th 150, 183 (*Clark*) [reaching same conclusion about the language "reasonable cause" in Code Civ. Proc., § 1038].)

Uzyel explained that probable cause "to prosecute an action means an objectively reasonable belief that the action is legally tenable" and is absent "if no reasonable attorney would believe that the action had any merit and any reasonable attorney would agree that the action was totally and completely without merit." (*Uzyel*, *supra*, 188 Cal.App.4th at p. 926.) This is the same language courts use to describe a "frivolous" action under Code of Civil Procedure section 128.5. (*Foundation for Taxpayer & Consumer Rights v. Garamendi* (2005) 132 Cal.App.4th 1375, 1388.) Probable cause is, moreover, an objective inquiry "based on the facts known to the

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or solely intended to cause unnecessary delay. . . . [¶] . . . [¶] [(b)](2) 'Frivolous' means totally and completely without merit or for the sole purpose of harassing an opposing party. . . ."

malicious prosecution defendant at the time the action was initiated or prosecuted." (*Uzyel*, at p. 926.) It "is a low threshold designed to protect a litigant's right to assert arguable legal claims even if the claims are extremely unlikely to succeed," and where the material facts are undisputed, probable cause becomes a question of law. (*Id*. at p. 927.)

"In contrast," *Uzyel* further explained, " 'bad faith' " refers to a "subjective state of mind and cannot be inferred from the absence of probable cause alone." (*Uzyel*, *supra*, 188 Cal.App.4th at p. 926, fn. 47; *Evilsizor v. Sweeney* (2014) 230 Cal.App.4th 1304, 1311 (*Evilsizor*) ["bad faith generally requires a subjective element" (italics omitted)]; cf. *Clark*, *supra*, 165 Cal.App.4th at p. 183 [describing similar language in Code Civ. Proc., § 1038].) "[B]eing wrong on the law does not mean one has acted in bad faith," (*McGill v. Superior Court* (2011) 195 Cal.App.4th 1454, 1517), but taking a meritless position can be evidence of it (*Orange County Dept. of Child Support Services v. Superior Court* (2005) 129 Cal.App.4th 798, 804). Subjective bad faith is a question of fact, reviewed only for substantial evidence. (See *Evilsizor*, at p. 1311; see also *Sabek, Inc. v. Engelhard Corp.* (1998) 65 Cal.App.4th 992, 1001.)

Both objective unreasonableness and subjective bad faith are perquisites to any exercise of discretion under section 17211. Accordingly, if a trial court finds either requirement lacking, it must deny expenses sought under that provision. In other words, it is only when there is both objective unreasonableness and subjective bad faith, that a court becomes vested with discretion to award or deny expenses, and a court's exercise of that discretion is reviewed only for abuse of discretion. (See *Davis v. Farmers Ins. Exchange* (2016) 245 Cal.App.4th 1302, 1328 [abuse of discretion standard in reviewing fee award under "may award" language of Code Civ. Proc., § 1021.5]; *Amtower v. Photon Dynamics, Inc.* (2008) 158 Cal.App.4th 1582, 1601 [same language in Securities Act[4], same result]; see generally *Smith v. Selma Community Hospital* (2010) 188 Cal.App.4th 1, 26–28 [comparing "shall" and "may"].)

[4] Title 15 United States Code section 77k.

Monica contends *Uzyel* is not controlling because the court dealt with a claim for expenses under section 17211, subdivision (b), and not subdivision (a), which pertains to her claim against Rudolph as the petitioning beneficiary. This argument borders on the specious. The pivotal language—"without reasonable cause and in bad faith"—in subdivisions (a) and (b) is *identical.* We cannot fathom that the Legislature would have used exactly the same language within the same statute for the same purpose (to set forth the requisite threshold for an award of any expenses), but intended that it have a different meaning within the two subdivisions. (See *People v. Cornett* (2012) 53 Cal.4th 1261, 1269, fn. 6 (*Cornett*); *Pedro v. City of Los Angeles* (2014) 229 Cal.App.4th 87, 105–106 (*Pedro*).) Furthermore, the courts have construed this same language in other California statutes in the same fashion. (E.g., *Clark*, *supra,* 165 Cal.App.4th at p. 183.)

Monica also contends *Uzyel* was wrongly decided because it adopts standards assertedly at odds with the Law Section's statement in support of the legislation recounted in *Leader* and which we have quoted above, and specifically to the comment that parties challenging or defending a trustee's accounts were previously governed " ' "by Civil Code Procedure Sections 128.5 et seq. which provide, generally, that a trial court may order a party or the party's attorney, or both to pay any reasonable expenses incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay" ' " and the standards of those sections " ' "appear[ed] to be more narrow than those incorporated into Probate Code section 11003," ' " on which section 17211 was based. (*Leader*, *supra*, 182 Cal.App.4th at p. 1597.) The Law Section urged that " ' "[i]n the context of a challenge of a fiduciary's account, the broader standards of Section 11003 should be adopted and should apply whether the contest occurs during the administration of a probate estate or upon settlement of a trustee's account." ' " (*Id.* at pp. 1597–1598.)[5]

[5] Monica's deferred request for judicial notice, filed January 6, 2016, was unopposed as to exhibit 1, legislative history regarding section 17211, and is granted as to that exhibit. It is denied as to exhibit 2, a 2003 report regarding the work of California

While the Law Section may have perceived some difference in the legal import of the proposed Probate Code language and the language of Code of Civil Procedure section 128.5, this is not conclusive as to legislative intent. (See *Peltier v. McCloud River R.R. Co.* (1995) 34 Cal.App.4th 1809, 1820 ["the State Bar's view of the meaning of proposed legislation, even if it authored that legislation, is not an index of legislative intent"].) It does not overcome the longstanding principle of statutory construction that the Legislature generally intends that the same language has the same meaning, particularly when used in the same statute. (See *Cornett*, *supra*, 53 Cal.4th at p. 1269, fn. 6; *Pedro*, *supra*, 229 Cal.App.4th at pp. 105–106.) And it does not detract from what the courts, including the Supreme Court, have consistently said about the meaning of "without reasonable cause and in bad faith." (See *Austin B. v. Escondido Union School Dist.* (2007) 149 Cal.App.4th 860, 888 [under Code Civ. Proc., § 1038, " '[r]easonable cause' is an objective standard which asks whether any reasonable attorney would have thought the claim tenable"]; *Guardianship of K.S.* (2009) 177 Cal.App.4th 1525, 1535 [using the word "frivolous" to explain conduct "without reasonable cause" under Prob. Code, § 2622.5]; *Chatard v. Oveross* (2009) 179 Cal.App.4th 1098, 1110 (*Chatard*) ["in enacting section 17211, the Legislature intended to discourage *frivolous* litigation" (italics added)]; see also cases *ante*, at p. 7.)

Monica similarly asserts *Uzyel* is contrary to *Chatard* and *Leader*. However, while these two cases may have quoted from the Law Section's statement, neither is at odds with *Uzyel*'*s* discussion of what "without reasonable cause and in bad faith" as used in section 17211 actually means. *Chatard* cited the statement in rejecting an argument about the significance of a spendthrift provision. (*Chatard*, *supra*, 179 Cal.App.4th at pp. 1104–1111.) In *Leader* the issue was whether the dispute at issue was a "contest of the trustee's account." (*Leader*, *supra*, 182 Cal.App.4th at p. 1158.) Furthermore, in remanding the case for the probate court to determine whether the trustee had defended

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trial courts that was not presented to the trial court and does not have relevance to this appeal.

against the contest in "good faith," the appellate court cited to *Hall v. Regents of University of California* (1996) 43 Cal.App.4th 1580, 1582–1583, which involved a fee provision under the Tort Claims Act (Code Civ. Proc., § 1038; Gov. Code, § 810 et seq.) and applied the well-established meaning of objective "reasonable cause" and subjective "good faith" that we have discussed above.

We therefore reject Monica's invitation to view the identical "without reasonable cause and in bad faith" language in subdivisions (a) and (b) of section 17211 as setting forth different standards, with the language of subdivision (a) having a slightly less onerous meaning than the interpretation in *Uzyel* of that the identical language in subdivision (b).

We therefore turn to Monica's claim that Rudolph's petition was objectively unreasonable, which means, as we have discussed, that "no reasonable attorney would believe that the action had any merit and any reasonable attorney would agree that the action was totally and completely without merit." (*Uzyel*, *supra*, 188 Cal.App.4th at p. 926.) Monica points out that when a trust, such as Trust One, is revocable, under California Supreme Court precedent, a beneficiary's "interest . . . is contingent only" and can be revoked while the settlor is alive. (*Estate of Giraldin* (2012) 55 Cal.4th 1058, 1062 (*Giraldin*).) So long as the settlor lives, "the trustee needs to account to the settlor only and not also to the beneficiaries." (*Ibid.*)

However, *Giraldin*, itself, addresses a contingency aside from the settlor's death that would give a beneficiary the right to an accounting: the settlor's incompetence. (*Giraldin*, *supra*, 55 Cal.4th at p. 1067.) Thus, beneficiaries of " 'a revocable living trust' " may " 'petition the court concerning the internal affairs of the trust' " if " 'the settlor, or other person holding the power to revoke, is unable to exercise a power of revocation, whether *due to incompetence* or death.' " (*Ibid.*, italics added; § 15800; see *Drake v. Pinkham* (2013) 217 Cal.App.4th 400, 408–409.) Rudolph's petition, then, was not "directly contrary" to binding Supreme Court precedent.

In her reply brief, Monica contends Rudolph's petition could not seek an accounting under 16061, as it did, because that section only allows a beneficiary to obtain

" 'requested information . . . relating to the administration of the trust relevant to the beneficiary's interest.' " To begin with, that Rudolph may have improperly invoked that particular code section, does not change the fact that under *Giraldin* he could arguably seek some sort of judicial oversight. Furthermore, Monica cites no authority in support of her assertion that Rudolph could not invoke section 16061 because, as a beneficiary promised only specific bequests, he assertedly had no need of an accounting of any trust activities. It is not at all clear that this is, or should be, so. Certainly, trust activities could affect specific bequests.

We therefore conclude the trial court did not err in determining Rudolph lacked any reasonable cause to file the challenged petition.

Even if the trial court's ruling on reasonable cause was problematic, the court additionally was required to find Rudolph acted in subjective bad faith in order to establish the predicate for it to exercise its discretion to award expenses.

Monica maintains Rudolph acted in bad faith, stringing together the following claims: Rudolph's demand letters were unjustified; the petition was filed without diligent investigation of the facts; the petition was patently unreasonable given *Giraldin* and the allegation Rudolph was "unsure" as to whether she or their mother was the trustee; and the petition was actually aimed at learning the identity of the trustee and not to secure an accounting as it stated.

Ultimately, however, it appears the trial court was persuaded that whatever imprudence Rudolph's counsel may have displayed in his prelitigation discovery and communications, he had some basis for believing the petition was legitimate and took appropriate steps to terminate it after deciding pursuing the petition was no longer in his client's interest—including choosing to not oppose Monica's demurrer, opposition, and motion to strike, as well as to dismiss the proceeding. Monica urges that this court "may and *should* draw the reasonable inference" that Rudolph's professed interest in information as to the identity of the trustee was a post hoc, bad faith pretext to cover his unjustified demand, in the demand letters and petition, for an accounting. However, it is not our role to draw an inference contrary to that which the trial court could have drawn.

The trial court had the opportunity to observe and listen to Rudolf's counsel, and it made a call as to his subjective intent. This is not a finding we will reverse on the basis of a record like that in this case. Indeed, the court also had before it evidence that both parties could be faulted for allowing the litigation to balloon unnecessarily. Clearly, neither party sufficiently met and conferred with the other before petitioning, on the one hand, and before pursuing motion relief, on the other.

We also reject Monica's assertion the trial court's finding of no bad faith—made in the Code of Civil Procedure section 128.5 ruling and incorporated into the section 17211 ruling—was conclusory and somehow not specific enough. The trial court's ruling was sufficient, and its level of specificity does not bear on our analysis. (*Richardson v. Franc* (2015) 233 Cal.App.4th 744, 753, fn. 2 [the trial court need not make specific factual findings on every evidentiary point, even when a litigant requests a statement of decision].)

Given that we have concluded there is some basis in the record to support the trial court's conclusion Rudolf did not act unreasonably or in bad faith, we affirm the order denying expenses. There must be *both* objective unreasonableness *and* subjective bad faith before the court may even exercise its discretion under section 17211. Thus, even if the court's objective reasonableness determination is questionable, its subjective good faith determination, alone, precludes an award of expenses under that provision.

Finally, we note that even if the court had concluded Rudolf acted both unreasonably *and* with bad faith, that would not mean Monica was necessarily entitled to an award of expenses under section 17211. Rather, that would have established only the requisite foundation for the court to exercise its discretion to award expenses or not. As the trial court observed in connection with Code of Civil Procedure section 128.5, "it's a pretty tall hill to climb to get to that bad faith." On appeal, an appellant must scale a virtual mountain to show an abuse of discretion. The trial court awarded $4,000 in sanctions related to Rudolph's reliance on the unpublished appellate decision. It would have been within the bounds of reason to conclude that sanction was a sufficient penalty in this case.

DISPOSITION

The order denying expenses under section 17211 is affirmed. Costs to respondent.

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Banke, J.

We concur:

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Humes, P.J.

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Dondero, J.