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NOT TO BE PUBLISHED IN OFFICIAL REPORTS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

DAVID ACHTERKIRCHEN et al., Plaintiffs and Respondents, v. JESUS A. MONTIEL, Defendant and Appellant.	A147386 (San Francisco City & County Super. Ct. No. CPF-11 511639)

MEMORANDUM OPINION[1]

This is the second appeal we have considered in this matter. In the first appeal, *Achterkirchen v. Montiel* (Mar. 24, 2015, A140277) [nonpub. opn.] (*Achterkirchen I*), we affirmed the trial court's confirmation of an arbitration award rendered against defendant Jesus A. Montiel.

Following the issuance of remittitur in *Achterkirchen I*, plaintiffs moved under Civil Code section 1717 for an award of the attorney fees they incurred in connection with *Achterkirchen I*. The motion was supported by the declaration of Steven H. Herman, who identified himself as "Plaintiffs' lead counsel." Herman stated that he had hired attorney Dabney Finch to handle the appeal. According to Herman, Finch's work included, but was not limited to, "opposing Defendants' writ of supersedeas, drafting and filing respondents' brief, drafting and filing a supplemental brief requested by the Court

[1] We resolve this case by a memorandum opinion pursuant to California Standards of Judicial Administration, section 8.1(1), (3).

of Appeal, and appearing at oral argument in the Court of Appeal." Other than attaching a copy of the *Achterkirchen I* decision, he provided no other information about the appeal, Finch's work on it, or Finch herself. Herman stated that he "billed each of my clients for Ms. Finch's time at her standard hourly rate of $300 for 56.2 hours . . . ." Herman also said he had retained another attorney, who was not identified in any way, to assist in preparation of the motion for attorney fees. Herman stated: "I intend to bill my clients $400 per hour for this attorney's work and I intend to bill my clients six (6) hours for preparing this motion and the accompanying declarations. . . . Overall, I expect to bill my clients approximately $4,000 for seeing this motion through . . . ." This was the sole evidence provided to the trial court regarding the work for which compensation was sought. No declarations were submitted by the attorneys who actually performed the work, nor were bills submitted describing the tasks they performed.

The motion was not heard by the judge who had entered the order from which the appeal was taken, since this judge had retired in the interim. The court awarded the requested fees for work on *Achterkirchen I*, but it limited plaintiffs' compensation for the making of the motion to $1,500. Montiel contends the evidence was insufficient to support the award. We agree.

The parties' contract permitted plaintiffs to recover "reasonable" attorney fees. Under these circumstances, the party seeking fees has the burden of providing sufficient evidence for the trial court to determine that the fees sought were reasonably incurred. (*Gorman v. Tassajara Development Corp.* (2009) 178 Cal.App.4th 44, 98.) This necessarily includes demonstrating both the reasonableness of the time spent by counsel and the reasonableness of the hourly compensation sought for that time. (See *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1131–1132 [attorney fees award must be "based on the 'careful compilation of the time spent and reasonable hourly compensation of each attorney . . . involved in the presentation of the case' "].) Although the submission of time records is not necessarily required (*Syers Properties III, Inc. v. Rankin* (2014) 226 Cal.App.4th 691, 698–699), a fee request " ' "ordinarily should be documented in great detail." ' " (*Concepcion v. Amscan Holdings, Inc.* (2014) 223 Cal.App.4th 1309,

1324.) " 'The evidence should allow the court to consider whether the case was overstaffed, how much time the attorneys spent on particular claims, and whether the hours were reasonably expended.' " (*Lunada Biomedical v. Nunez* (2014) 230 Cal.App.4th 459, 486–487 (*Lunada*).)

Here, the evidence provided to the trial court was simply too skimpy to support an award of reasonable fees. Even setting aside the hearsay nature of Herman's declaration, he provided no information about attorney Finch, and the other attorney involved was not even identified. Since no information was provided about the attorneys, it was not possible to determine whether their rates were in line with prevailing rates for similar attorneys in the area. The trial court therefore had no evidence on which to base a determination that the rate of compensation sought for their time was reasonable. Similarly, there was no information provided about the nature of the appeal or the work performed in connection with it, other than Herman's listing of a few tasks and his statement of the total number of hours Finch reported expending. The trial court therefore was without sufficient evidence on which to base a determination that the time spent was reasonable.

Plaintiffs contend Montiel waived this issue by failing to object to Herman's declaration as hearsay in the trial court. Montiel's argument, however, is not merely that Herman's declaration contained hearsay. It is that the trial court lacked substantial evidence on which to base a determination of reasonableness. The argument that a ruling is not supported by substantial evidence is generally not waived by the failure to raise it below. (*Beverly Hills Unified School Dist. v. Los Angeles County Metropolitan Transportation Authority* (2015) 241 Cal.App.4th 627, 674.) In any event, Montiel's written opposition in the trial court did raise the issue. It contained a three-page section entitled, "Plaintiffs Have Entirely Failed to Sustain Their Burden to Show an Amount of Fees That Was Either Reasonable or Necessary," making just this point.

Even if we focus on the narrow issue of the hearsay nature of Herman's declaration, we would conclude that the issue was adequately raised. In his brief in the trial court, Montiel made the point that "[t]here are no declarations in the moving papers

. . . from the attorneys who are said to have done the work. . . . [T]he only facially pertinent declaration, that of attorney Steven H. Herman, is both devoid of any probative facts and pure hearsay . . . ." Montiel's attorney repeated this precise point during oral argument on the motion. Plaintiffs cite no authority to support their position that a more formal notice of objection, such as a separate document, was necessary in order to preserve the issue of the hearsay nature of the Herman declaration. The point, however, is truly moot. For the reasons stated above, plaintiffs' application was wholly inadequate even if Herman's declaration is taken at face value.[2]

Plaintiffs also contend that a defendant can establish an entitlement to attorney fees by submitting a declaration from counsel instead of billing records, citing *Lunada, supra*, 230 Cal.App.4th at pages 487–488. The burden, however, cannot be carried by submitting just *any* declaration by counsel. The declaration must contain sufficient facts from which the trial court can determine that the amount sought is reasonable. In *Lunada*, for example, the party seeking fees submitted attorney declarations describing "the time they spent on various tasks," as well as other information. (*Id.* at p. 487.) Similarly, in *Bernardi v. County of Monterey* (2008) 167 Cal.App.4th 1379, while the party seeking fees did not submit time records, it did submit declarations of the plaintiff, the primary attorney, and two experts on attorney fees, among others. (*Id.* at p. 1389.) The attorney declaration "detailed each step of the lengthy . . . litigation," while one of the experts opined "that she was an experienced land use lawyer; that she was familiar with the case, which was unusually difficult 'due to the complexity of the legal issues and the long time period over which the case was litigated'; [and] that an hourly rate of $375 was appropriate for [the primary attorney] due to his outstanding knowledge of the [relevant substantive law]." (*Ibid.*)

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[2] At oral argument in this appeal, plaintiffs contended that Montiel's attorney waived this issue by stating at the outset of oral argument on the motion that he "is not objecting to the portion of the tentative ruling or any portion of the tentative ruling that exists." The exact meaning of counsel's pronouncement is unclear from the record, but its meaning is immaterial. A party does not waive the right to appeal an issue merely by electing not to contest a tentative ruling.

Nothing comparable was submitted here. Plaintiffs rely heavily on Herman's characterization of himself as "lead counsel," but there is nothing in his declaration to support the characterization. Not only did he perform no work in connection with the appeal, his declaration does not even state that he reviewed Finch's work. As far as the evidence demonstrates, Herman did nothing more than receive bills from appellate counsel and divide them among his clients for payment. In any event, as discussed above, Herman provided little or no useful evidence regarding the issue of reasonable fees.[3]

Plaintiffs have requested that we remand for a new hearing to allow them to cure the failure to provide sufficient evidence. We decline to do so, since plaintiffs have already had a "full and fair opportunity to present [their] case." (*Kelly v. Haag* (2006) 145 Cal.App.4th 910, 919.) In those circumstances, remand for a second bite at the apple is generally not appropriate. (*Ibid.* [party cannot cure on remand the failure to introduce sufficient evidence in support of request for punitive damages]; see similarly *Cardinal Health 301, Inc. v. Tyco Electronics Corp.* (2008) 169 Cal.App.4th 116, 154.)

The trial court's order awarding attorney fees is reversed. Montiel may recover his costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1), (2).)

[3] Plaintiffs also contend their failure to provide sufficient evidence was "harmless," arguing the amount of fees was small enough that it should be assumed reasonable. The relatively small amount of the requested fees, however, did not relieve plaintiffs of their burden of producing evidence of reasonableness.

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Margulies, J.

We concur:

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Humes, P.J.

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Dondero, J.