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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

LEEANNE MATUSEK,

Plaintiff and Respondent,

v.

RODNEY BENN,

Defendant and Appellant.

B229234

(Los Angeles County
Super. Ct. No. BC274700)

APPEAL from orders of the Superior Court of Los Angeles County,
Holly E. Kendig, Judge. Reversed and remanded with directions.

Law Office of John G. Warner and John G. Warner for Defendant and Appellant.

Law Office of Henry John Matusek II and Henry John Matusek II for Plaintiff and
Respondent.

INTRODUCTION

This is the third appeal in this matter. Defendant Rodney Benn seeks review of a post-judgment order in which the trial court determined that defendants Rodney Benn, Rodney Benn Productions, Inc., and Richard Murad improperly obtained an abstract of judgment identifying plaintiff LeeAnne Matusek as the judgment creditor of these defendants, and that the court clerk erroneously issued the abstract of judgment in violation of the law; and ordered the abstract of judgment stricken from Los Angeles County Superior Court records and expunged from Los Angeles County records. The order further ordered Benn, Rodney Benn Productions, Inc., and their counsel, John G. Warner, jointly and severally to pay to plaintiff's \$5,075 in attorney fees and costs, and an additional \$250 statutory penalty for being made to seek this relief.

We find that the order striking the abstract of judgment was erroneous and should be reversed. Plaintiff Matusek contends that a \$13,608 award of attorney fees and costs to defendants and against plaintiff in the judgment was set off from the \$21,210.61 of attorney fees and costs awarded to plaintiff, and therefore it was error to obtain an abstract of judgment for \$13,608 owed by plaintiff to defendants. We disagree. When other defendants—the Murad defendants—paid that \$21,210.61 to plaintiff, it satisfied that part of the judgment, discharged Rodney Benn and Rodney Benn Productions, Inc. from liability for that amount, and extinguished any right to set off the \$13,608 that plaintiff owed defendants. Thus there was no setoff of amounts Matusek owed Benn and Rodney Benn Productions, Inc. We reverse the order striking the abstract of judgment with directions to the trial court to enter a new order for issuance of an abstract of judgment.

FACTUAL AND PROCEDURAL HISTORY

Matusek's Suit Against Defendants: The Murad defendants (Murad, Inc., Murad Skin Research Laboratories, Inc., Murad DRTV, Inc., and Richard Murad) and the Benn defendants (Rodney Benn Productions, Inc. (RBP) and Rodney Benn) contracted to create an infomercial about a Murad skin care product. The defendants hired plaintiff Matusek to appear in the infomercial. Matusek later filed suit against the Murad and

Benn defendants in relation to the infomercial, alleging, among other causes of action, breach of contract and intentional misrepresentation.

Jury Verdict and Post-Trial Orders: Following trial, a jury returned a general verdict awarding Matusek compensatory damages of \$50,160 (comprising \$43,864.07 against Murad, Inc., and \$6,000 against Richard Murad individually) and punitive damages of \$330,000 (comprising \$250,000 against Murad, Inc., \$15,000 against RBP, and \$65,000 against Richard Murad). The trial court then granted the Murad defendants' motion for judgment notwithstanding the verdict (JNOV) and, alternatively, motion for new trial, and granted the Benn defendants' motion to reduce the jury verdict and, alternatively, motion for new trial. The trial court's judgment found in favor of the Murad defendants on all Matusek's causes of action, reduced damages against the Benn defendants, and awarded Matusek compensatory damages of \$296 (solely against RBP) and punitive damages of \$1,200 (solely against RBP). Matusek appealed from the order granting defendants' post-trial motions.

Appeal (Matusek I): In the decision in the first appeal issued July 5, 2006, *Matusek I*, this court found that defendant Richard Murad was not personally liable to Matusek, and affirmed the trial court order reducing the amount of punitive damages against RBP. Otherwise this court reversed the judgment and instructed the trial court to enter a new and different judgment as follows. On Matusek's third amended complaint, the trial court was instructed to enter judgment for Matusek and against Murad, Inc., in conformity with the jury verdict as to the award of \$43,864.07 in compensatory damages and as to the award of \$250,000 in punitive damages. The trial court was also instructed to enter judgment for Matusek and against RBP awarding \$296 in compensatory damages and \$1,200 in punitive damages, and to enter judgment for individual defendants Richard Murad and Rodney Benn on Matusek's third amended complaint.

Judgment Pursuant to Remittitur: On October 27, 2006, the trial court filed an amended judgment in conformity with this court's judgment in *Matusek I*. Benn and RBP then moved for attorney fees on appeal, for contractual attorney fees pursuant to

Civil Code section 1717, and for statutory attorney fees pursuant to Civil Code section 3344, subdivision (a).

In a judgment pursuant to remittitur filed on September 28, 2007, the trial court ordered Matussek to have judgment against Murad Inc., Murad Skin Research Laboratories, Inc., and Murad DRTV, Inc., jointly and severally, for \$43,864.07 in compensatory damages and \$250,000 in punitive damages, which amount was to accrue interest at 10 percent per annum from April 30, 2004. The judgment ordered Matussek to have judgment against RBP for \$296 in compensatory damages and \$1,200 in punitive damages, which was to accrue interest at 10 percent per annum from April 30, 2004. The judgment found Rodney Benn, individually, to be the alter ego of RBP, a suspended California Corporation, and that Rodney Benn was jointly and severally liable to Matussek on the judgment to the same extent as his alter ego, the suspended RBP.

In the judgment pursuant to remittitur, the trial court further found that Richard Murad individually and the Murad corporate defendants were united in interest, and that Matussek was the prevailing party in the action against these defendants within the meaning of Code of Civil Procedure section 1032, subdivision (a)(4).¹ The trial also found that Rodney Benn individually and RBP, a suspended California corporation, were united in interest and that Matussek was the prevailing party in the action against these defendants within the meaning of section 1032, subdivision (a)(4). The judgment awarded Matussek pre-judgment costs of suit of \$15,432.52, and ordered that Matussek recover and have judgment for costs of appeal against Murad, Inc., Murad Skin Research Laboratories, Inc., Murad DRTV, Inc., RBP, Rodney Benn individually, and Richard Murad individually in the amount of \$5,778.09. Having prevailed on non-suit as to the fifth cause of action in Matussek's complaint, Richard Murad was awarded \$4,536 in reasonable costs and attorney fees incurred to defend the cause of action arising under Civil Code section 3344, and Rodney Benn individually and RBP, were each awarded

¹ Unless otherwise specified, statutes in this opinion will refer to the Code of Civil Procedure.

\$4,536 in reasonable costs and attorney fees to defend the cause of action arising under section 3344, for a total of \$9,072.

Benn and RBP appealed from this judgment.

The Murad defendants did not appeal from the judgment, having previously on May 8, 2007, paid plaintiff \$403,877.99 in satisfaction of the judgment against them. This amount included the \$15,432.52 in prejudgment costs of suit and the \$5,778.09 in costs on appeal, totaling \$21,210.61. Plaintiff provided a satisfaction of judgment in favor of all Murad defendants on April 14, 2008.

Appeal (Matusek II): In the decision in the second appeal issued October 29, 2009, *Matusek II*, this court dismissed RBP because its corporate status was suspended. *Matusek II* further found that the trial court properly found that a unity of interest existed between Benn and RBP, which gave the trial court discretion to determine an award of costs between the parties under section 1032. *Matusek II* held that the trial court properly determined Matusek to be prevailing party in the action against Benn and RBP and that the award of costs against Benn and RBP and in favor of Matusek was not an abuse of discretion.

Matusek II rejected defendants' claim that they were entitled to recover attorney fees pursuant to a contractual attorney fee clause in a contract between Richard Murad and the American Federation of Television and Radio Artists. Finally, *Matusek II* concluded that the trial court's award of attorney fees to Benn and RBP pursuant to Civil Code section 3344 was not an abuse of discretion, and denied the Benn defendants' request to recover statutory attorney fees pursuant to Civil Code section 3344 incurred in *Matusek I* and in *Matusek II*. *Matusek II* affirmed the judgment.

On January 29, 2010, the attorney for Rodney Benn applied for an abstract of judgment against Matusek, stating that the total amount of the judgment was \$4,536. The superior court clerk rejected the application, stating that the total was to be \$13,608 for three judgment creditors and that names of judgment creditors had to be the names as on the judgment. On March 8, 2010, Benn's attorney submitted a second application for an abstract of judgment against Matusek for \$13,608 for judgment creditors Rodney Benn

individually, RBP, and Richard Murad individually. That application was approved and on June 8, 2010, the Benn defendants received an abstract of judgment claiming an indebtedness of \$13,608.

On August 10, 2010, Matusek filed a motion to amend the judgment nunc pro tunc to add Matusek's costs on appeal of \$534.05 since November 18, 2009; to strike the June 8, 2010, abstract of judgment or in the alternative to enter satisfaction of that judgment and for costs; and for an order to show cause why counsel for defendants should not be cited and found guilty of contempt for violation of Revenue and Taxation Code section 19719. With respect to the motion to strike the abstract of judgment, Matusek's motion argued that the judgment was against the Murad defendants and the Benn defendants jointly and severally, that Richard Murad, Rodney Benn, and RBP each obtained a small offset toward the limit of personal liability, and that no defendant received a separate, enforceable judgment in his favor upon which this abstract could properly issue. Alternatively, Matusek's motion argued that because of the concurrent judgment in favor of Matusek and against defendants, the trial court should order the alleged judgment in favor of defendants satisfied by Matusek.

On October 8, 2010, the trial court granted Matusek's motion to amend the judgment nunc pro tunc to add plaintiff's costs on appeal of \$534.05 against Benn and RBP. The trial court also ordered the June 8, 2010, abstract of judgment stricken and its recording expunged, and ordered defendants' counsel, John G. Warner, and Benn and RBP jointly and severally, to pay attorney fees of \$5,075 pursuant to section 724.080 to plaintiff's counsel, and to pay \$250 pursuant to section 724.070 to plaintiff and plaintiff's counsel.

Defendants filed a timely notice of appeal.²

² Section 904.1, subdivision (b) makes an order made after an appealable judgment an appealable order, but to be appealable, a postjudgment order must satisfy two additional requirements. (*Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 651.) First, the issues raised by the appeal from the postjudgment order must be different from those arising from an appeal from the judgment. (*Ibid.*) Second, the order must either affect the final judgment in some manner, or bear some relation to it either by

ISSUES

The issues in this appeal are:

1. Whether the Murad defendants' payment of prejudgment costs of suit and costs on appeal discharged Benn and RBP from liability for those judgment amounts;
2. Whether amounts Mausek owed to Benn and RBP were set off from amounts which the Murad defendants paid for prejudgment costs of suit and costs on appeal;
3. Whether defendants could properly recover an award of statutory attorney fees and costs pursuant to Civil Code section 3344;
4. Whether plaintiff's motion for sanctions on appeal should be granted.

DISCUSSION

1. *The Murad Defendants' Payment of Prejudgment Costs of Suit and Costs on Appeal Discharged Benn and RBP from Liability for Those Judgment Amounts*

The September 28, 2007, judgment pursuant to remittitur found that Mausek was the prevailing party in the action against Richard Murad, the Murad defendants, Rodney Benn individually, and RBP, and that Mausek should recover costs of suit against these defendants. The September 28, 2007, judgment pursuant to remittitur awarded Mausek pre-judgment costs of suit of \$15,432.52. The September 28, 2007, judgment pursuant to remittitur also ordered Mausek to have judgment for costs of appeal of \$5,778.09 against the Murad defendants, Richard Murad individually, Rodney Benn individually, and RBP.

On May 8, 2007, the Murad defendants paid Mausek \$403,877.99 in satisfaction of the judgment against the Murad defendants, comprising the amount of general and punitive damages, prejudgment costs, costs on appeal, and interest. The Murad defendants' \$403,877.99 payment to Mausek included payment of the \$15,432.52 prejudgment costs of suit and the \$5,778.09 costs of appeal awarded against the Murad

enforcing it or staying its execution. (*Id.* at p. 652.) An order granting a motion to expunge the abstract of judgment satisfies both criteria. Prior courts have accepted appeals from orders granting or denying a motion to expunge an abstract of judgment. (*Crevolin v. Crevolin* (1963) 217 Cal.App.2d 565, 568, 574-575; *David v. Hermann* (2005) 129 Cal.App.4th 672, 680). The order is appealable.

defendants, Rodney Benn individually, and RBP. Payment in full by the judgment debtor satisfies and extinguishes the judgment. (*Salveter v. Salveter* (1936) 11 Cal.App.2d 335, 337; Code Civ. Proc., § 724.010, subd. (a).) “ ‘There can be only one satisfaction for any injury; hence satisfaction of the judgment by . . . payment by one or more of the joint or current tortfeasors, extinguishes the obligation and discharges the liability of all the others[.]’ ” (*McCall v. Four Star Music Co.* (1996) 51 Cal.App.4th 1394, 1398, italics omitted.) A defendant’s payment of amounts the judgment awards to the plaintiff discharges all other defendants who may be liable for the same injury. (*Id.* at p. 1399; *Fletcher v. California Portland Cement Co.* (1979) 99 Cal.App.3d 97, 99.) Therefore the Murad defendants’ payment to Matusek of prejudgment costs of suit and costs of appeal discharged Rodney Benn individually and Rodney Benn Productions, Inc. of liability to Matusek for those judgment amounts.

2. *There Was No Setoff of Amounts Matusek Owed to Benn and RBP*

The September 28, 2007, judgment stated that Richard Murad, Rodney Benn individually and RBP, a suspended California Corporation, prevailed on non-suit as to the fifth cause of action in Matusek’s third amended complaint, and awarded each of these three defendants \$4,536 in costs and attorney fees incurred to defend the statutory cause of action under Civil Code section 3344.³

Matusek claims that these amounts awarded to these three defendants for attorney fees and costs against Matusek should be set off against the payment of \$15,432.52 prejudgment costs of suit and \$5,778.09 costs of appeal. We disagree.

We caution that because Rodney Benn Productions, Inc. is a suspended corporation, Revenue and Taxation Code section 23301 prohibits the delinquent corporation from enjoying the ordinary privileges of a corporation in good standing (*Boyle v. Lakeview Creamery Co.* (1937) 9 Cal.2d 16, 19). A suspended corporation may not prosecute or defend an action or appeal from an adverse judgment (*id.* at pp. 20-21;

³ Civil Code section 3344, subdivision (a) states, in relevant part: “The prevailing party in any action under this section shall also be entitled to attorney’s fees and costs.”

Grell v. Laci Le Beau Corp. (1999) 73 Cal.App.4th 1300, 1306; *Gar-Lo, Inc. v. Prudential Sav. & Loan Assn.* (1974) 41 Cal.App.3d 242, 245), and cannot enforce the judgment against Matussek. (Rev. & Tax. Code, § 23301.)

With regard to the \$4,536 in costs and attorney fees awarded to Rodney Benn individually, the Murad defendants' \$403,877.99 payment to Matussek included payment of the \$15,432.52 prejudgment costs of suit and the \$5,778.09 costs of appeal which were awarded against Benn, RBP, and the Murad defendants. As we have stated, the Murad defendants' payment of these amounts discharged Rodney Benn individually and RBP of liability for prejudgment costs of suit and costs of appeal. Thus Matussek could not set off the \$4,536 which plaintiff owed Benn (or the \$4,536 which plaintiff owed RBP, or the \$4,536 which plaintiff owed Richard Murad) against the \$21,210.61 of prejudgment costs of suit and costs of appeal, because that amount had already been paid and that judgment debt extinguished. A setoff can be allowed where there are judgments in favor and against each of the parties (*Blake v. Arp* (1920) 48 Cal.App. 715, 717) and where it would eliminate a superfluous exchange of money between the parties (*Jess v. Herrmann* (1979) 26 Cal.3d 131, 137). Setoff is not appropriate where the judgment against which the setoff would occur has been paid and satisfied. (*Blake v. Arp, supra*, 48 Cal.App. at p. 718.)

3. *Benn Did Not Exercise His Right to Offset, and the Right to Offset Was Extinguished When the Murad Defendants Paid the Judgment*

Matussek appears to argue that by making an award to plaintiff against defendants, and awards to defendants against plaintiff, the judgment set off the amount plaintiff owed defendants from the amount defendants owed plaintiff.

A setoff “ [is] founded on the equitable principle that “either party to a transaction involving mutual debts and credits can strike a balance, holding himself owing or entitled to the net difference[.]” [Citation.] ” (*Keith G. v. Suzanne H.* (1998) 62 Cal.App.4th 853, 859.) Setoff is allowed in actions to enforce a money judgment. Offset, however, is a right of the judgment debtor, who may elect to exercise or to refrain from exercising it. (*Margott v. Gem Properties, Inc.* (1973) 34 Cal.App.3d 849, 855.) The right may be

exercised: (1) by an equitable action by the debtor against the judgment creditor to have the claim offset against the judgment (*Harrison v. Adams* (1942) 20 Cal.2d 646, 651); (2) a cross-complaint by the debtor in an action brought by a judgment creditor against the debtor (*Miller v. Murphy* (1921) 186 Cal. 344, 347); or (3) a motion by defendant in that action after judgment has been given for the creditor (*Layne v. Superior Court* (1932) 121 Cal.App. 206, 207). Here the judgment debtor, Benn, did not exercise that right of offset. And as we have stated, the payment of the judgment for plaintiff by the Murad defendants extinguished the judgment for plaintiff and the right of offset alike.

4. *The Trial Court Had Discretion and Authority to Award Statutory Attorney Fees and Costs to Defendants as Prevailing Parties in Plaintiff's Action Pursuant to Civil Code Section 3344*

A. *The Trial Court Had Discretion to Award Statutory Attorney Fees and Costs to Defendants Pursuant to Civil Code Section 3344*

Matusek argues that plaintiff is the prevailing party, which is law of the case pursuant to *Matusek II*, and therefore defendant has no right to recover costs and has no enforceable money judgment.

Regarding attorney fees awarded to Benn and RBP for defense of Matusek's fifth cause of action for violation of Civil Code section 3344, *Matusek II* cited the rule that where fees are authorized for some causes of action but not for others, allocation of attorney fees is a matter within the trial court's discretion (*Thompson Pacific Construction, Inc. v. City of Sunnyvale* (2007) 155 Cal.App.4th 525, 555). *Matusek II* concluded that the trial court's apportionment of fees, and its determination of the amount of fees, in the September 28, 2007, judgment pursuant to remittitur was within its discretion, and affirmed that award to Benn and RBP.

B. The Trial Court Had Authority to Award Statutory Attorney Fees and Costs to Defendants Who Prevailed in Plaintiff's Action for Violation of Civil Code Section 3344

Matusek appears to argue that no defendant received a money judgment and that because Matusek was the prevailing party, no defendant had a right to recover costs and had no enforceable money judgment. This is erroneous. Section 578 states: "Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves." Each cause of action retains its distinctive identity. When a plaintiff recovers or fails to recover on each cause of action, the trial court has discretion to award attorney fees and costs to defendants who prevail on a cause of action in which a statute entitles the prevailing party to them. There is no reason to deny defendants costs against a plaintiff who fails to establish her cause of action. (*Fields v. Napa Milling Co.* (1958) 164 Cal.App.2d 442, 449-450.) The right to costs is to be determined with respect to each cause of action and not in light of the aggregate amounts awarded in the judgment.

C. The Judgment Did Not Violate the Single Judgment Rule

Matusek argues that the award of attorney fees and costs to Murad, RBP, and Benn violates the single judgment rule by allowing for several judgments payable by multiple parties and subject to offsets between the parties. "There can be but one final judgment in an action, and that judgment must resolve all causes of action pending between the parties." (*Trani v. R. G. Hohman Enterprises, Inc.* (1975) 52 Cal.App.3d 314, 315.) The September 28, 2007, judgment pursuant to remittitur was the sole judgment in this action, and resolved all causes of action pending between the parties. The award of attorney fees and costs to defendants in that judgment does not violate the single judgment rule.

5. The Order Awarding Matusek Attorney Fees and Imposing a Fine Was Erroneous and Should Be Reversed

Pursuant to sections 724.070 and 724.080⁴, the trial court ordered Benn, RBP, and their counsel John G. Warner jointly and severally to pay plaintiff's counsel \$5,075 in attorney fees and a \$250 statutory penalty because they were required to seek this relief. Benn claims that this was error. We agree.

Section 724.070, subdivision (a) states: "If a judgment creditor intentionally conditions delivery of an acknowledgment of satisfaction of judgment upon the performance of any act or the payment of an amount in excess of that to which the judgment creditor is entitled under the judgment, the judgment creditor is liable to the judgment debtor for all damages sustained by reason of such action or two hundred fifty dollars (\$250), whichever is the greater amount."

Benn, the judgment creditor, has not conditioned delivery of an acknowledgment of satisfaction of judgment on the performance of an act or payment of an amount in excess of that to which Benn is entitled under the judgment. The order awarding Matusek attorney fees and imposing a fine was erroneous and should be reversed.

6. Matusek's Motion for Sanctions on Appeal Is Denied

Matusek has filed a motion for sanctions against Benn and Benn's counsel for taking a frivolous appeal. That motion is denied.

⁴ Section 724.080 states: "In an action or proceeding maintained pursuant to this chapter, the court shall award reasonable attorney's fees to the prevailing party."

DISPOSITION

The orders are reversed, and the matter is remanded with directions to the trial court to vacate its October 8, 2010, order and its December 20, 2010, amended order striking the June 8, 2010, abstract of judgment and ordering expungement from the records of the County Clerk, and to vacate its orders that Rodney Benn, Rodney Benn Productions, Inc., and John G. Warner, jointly and severally, pay to plaintiff's counsel \$5,075 in attorney fees and costs and a \$250 statutory penalty, and to enter a new and different order for issuance of an abstract of judgment reflecting judgment for defendant Richard Murad and against plaintiff for \$4,536 in reasonable costs and attorney fees, and judgment for defendant Rodney Benn individually and against plaintiff for \$4,536 in reasonable costs and attorney fees.

The parties are ordered to bear their own costs on appeal.

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KITCHING, J.

We concur:

KLEIN, P. J.

CROSKEY, J.