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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

CHARLES PETERS,

Plaintiff and Appellant,

v.

LAW OFFICES OF JAMES J. REGAN  
et al.,

Defendants and Respondents.

B232623

(Los Angeles County  
Super. Ct. No. SC101321)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Cesar C. Sarmiento, Judge. Affirmed.

The Law Offices of Benjamin Brandt Wasson, Benjamin Brandt Wasson for  
Plaintiff and Appellant.

Law Offices of Arthur W. Francis, Jr., Arthur W. Francis, Jr., for Defendants and  
Respondents.

Plaintiff Charles Peters appeals the dismissal of his lawsuit for breach of fiduciary duty following the trial court's entry of a judgment of nonsuit in favor of defendant Law Offices of James J. Regan and James J. Regan (hereafter together referred to as defendant). Finding no error, we affirm.

#### FACTUAL AND PROCEDURAL SUMMARY

Plaintiff retained defendant in order to pursue legal action against a former friend, David Burke. In this connection, on plaintiff's behalf, defendant filed and prosecuted a lawsuit against Mr. Burke and intervened in his bankruptcy proceeding. Plaintiff alleges that these proceedings were unsuccessful, as they were admittedly pursued without probable cause and with his malicious intention of harassing Mr. Burke.

Plaintiff filed his initial complaint in this action in January 2009. In his first amended complaint, the operative pleading herein, plaintiff alleged causes of action for breach of contract, breach of fiduciary duty, negligence, professional negligence, constructive trust, an accounting, and fraud. The trial court sustained defendant's demurrer to all causes of action except breach of fiduciary duty and an accounting, and granted defendant's motion to strike punitive damages.

The factual allegations underlying the remaining causes of action were that defendant conspired to create fictional billing statements, failed to perform its duties, "expressed intent to conceal these facts from Plaintiff [and] intended to defraud Plaintiff by transferring monies paid to Defendant for his personal gain and fraudulently charged and billed Plaintiff." Defendant filed and served an answer, as well as a cross-complaint.

In September 2009, defendant propounded a Request for Admissions, to which plaintiff did not respond. The trial court granted defendant's Motion that Matters be Deemed Admitted in January 2010. Thus, the fact that plaintiff received, did not object to and owed defendant all amounts billed was conclusively established, a result confirmed by the pretrial grant of a motion in limine to preclude plaintiff from introducing any evidence as to the reasonableness of legal fees billed to and paid by

plaintiff. As a consequence of this ruling, the court dismissed the accounting cause of action.

On February 4, 2011, a jury was empanelled to hear the single cause of action for breach of fiduciary duty. Plaintiff's counsel made an opening statement in which he explained that his client was diagnosed with Bipolar Disorder; that he had developed an obsession for David Burke, an Australian actor and bodybuilder; that the two were close friends until the time that Mr. Burke got married; and that when the cordial relationship ended, plaintiff decided to harass Mr. Burke by initiating and prosecuting a groundless lawsuit. Defendant undertook to represent plaintiff in this pursuit, knowing that there was no probable cause to sue Mr. Burke, and that plaintiff was motivated by malicious intent. Plaintiff was apparently proceeding on the theory that defendant breached his fiduciary duty to plaintiff by agreeing to represent him in his lawsuit against Mr. Burke, and by doing so.

Defendants moved for nonsuit at the conclusion of plaintiff's opening statement, which motion the trial court granted. Plaintiff timely appealed the judgment subsequently entered.

## DISCUSSION

Code of Civil Procedure section 581c, subdivision (a) provides in pertinent part: "Only after, and not before, the plaintiff has completed his or her opening statement, or after the presentation of his or her evidence in a trial by jury, the defendant, without waiving his or her right to offer evidence in the event the motion is not granted, may move for a judgment of nonsuit." A nonsuit is appropriate where the motion involves the legal effect of admitted facts (*Mendibles v. City of San Diego* (1950) 100 Cal.App.2d 502, 507) or where the evidence fails to establish a prima facie case. (*Jones v. Ortho Pharmaceutical Corp.* (1985) 163 Cal.App.3d 396, 404; *Beyer v. City of Los Angeles* (1964) 229 Cal.App.2d 378, 382.) Such is the case here.

"The relation between attorney and client is a fiduciary relation of the very highest character, and binds the attorney to most conscientious fidelity . . . ." (*Cox v. Delmas*

(1893) 99 Cal. 104, 123, cited in *Barbara A. v. John G.* (1983) 145 Cal.App.3d 369, 383.)  
"The basic fiduciary obligations are twofold: undivided loyalty and confidentiality. . . .'  
(1 *Mallen & Smith, Legal Malpractice* (3d ed.) § 11.2, p. 631.)" (*Pierce v. Lyman* (1991)  
1 Cal.App.4th 1093, 1102.)

As noted above, plaintiff alleged that defendant breached his fiduciary obligations by engaging in fraudulent billing practices. Such allegations state a claim for breach of fiduciary duty. (*Charnay v. Cobert* (2006) 145 Cal.App.4th 170, 182 ["[B]y alleging [defendant] and his firm improperly inflated the billings sent to [plaintiff] by including tasks not performed and incorrectly using higher hourly rates than justified, [plaintiff] has adequately pleaded a claim for breach of fiduciary duty"]; *Bird, Marella, Boxer & Wolpert v. Superior Court* (2003) 106 Cal.App.4th 419, 431 [client who alleged former defense counsel fraudulently inflated his charges stated a cause of action for breach of fiduciary duty, as all members of the bar owe clients a "fiduciary duty to charge only fair, reasonable and conscionable fees"].)

In his opening statement, plaintiff's counsel made no mention of the fraudulent billing practices alleged in the complaint as the basis of his breach of fiduciary duty claim. To the contrary, the opening statement focused on plaintiff's mental and emotional state which resulted in his obsession with and animosity toward Mr. Burke. Plaintiff contends in his brief on appeal that his opening statement presented "the Key Evidence comprised of 191 Plaintiff's exhibits, composed of medical conditions related to Plaintiff's mental health and numerous letters of correspondence, that would be presented to the jury as to the cause of action for breach of fiduciary duty and accounting." Plaintiff does not, however, explain how any of this evidence is relevant to his claim that defendant "create[d] fictional billing statements" and "intended to defraud Plaintiff by transferring monies paid to Defendant for his personal gain . . . ."

In sum, the trial court correctly concluded that plaintiff's opening statement failed to make out a prima facie case for his sole remaining cause of action. Consequently, the court properly granted defendant's motion for nonsuit.

DISPOSITION

The judgment is affirmed.

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ARMSTRONG, J.

We concur:

TURNER, P. J.

KRIEGLER, J.