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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

MARK MUNDELL,

Plaintiff and Appellant,

v.

CITY OF SIMI VALLEY AND SIMI
VALLEY POLICE DEPARTMENT,

Defendant and Respondent.

2d Civil No. B234915
(Super. Ct. No. 56-2010-00371739-CU-
CR-SIM)
(Ventura County)

Mark Mundell appeals from the order awarding reasonable attorney fees to the City of Simi Valley (City) pursuant to Code of Civil Procedure section 1021.7.¹ Appellant contends that the trial court (1) erroneously found that his action against City had not been filed in good faith, (2) failed to provide him an opportunity to respond to evidence produced by City, and (3) abused its discretion in determining the amount of attorney fees. We affirm and remand for a determination of reasonable attorney fees on appeal.

Factual and Procedural Background

On April 15, 2010, appellant filed an action against City and the Simi Valley Police Department (respondents). The action was brought pursuant to state law and the

¹ All statutory references are to the Code of Civil Procedure unless otherwise stated.

federal civil rights statute (42 U.S.C. § 1983). (Augmented Record (AR) 1) Appellant claimed that, on April 16, 2009, police officers had used excessive force in arresting him. The excessive force occurred when a police dog bit him. Appellant's complaint alleged that, "in full and timely compliance with the California Tort Claim[s] Act [Gov. Code, § 900 et seq.]," he had filed a claim with City, which had rejected it. The timely filing of the claim was a prerequisite to bringing an action against City based on state law. (*State v. Superior Court (Bodde)* (2004) 32 Cal.4th 1234, 1237.)

On May 21, 2010, appellant filed a motion for an order allowing the filing of a late claim with City. Appellant alleged that his mother, Cindy Pritchard, had filed a claim with the wrong entity: Ventura County. Pritchard's declaration, dated May 12, 2010, was attached to the motion. She declared that her attorney had misinformed her that the claim should be filed with Ventura County instead of City. Pritchard later retained a different attorney, P. Paul Aghabala, to represent appellant. Aghabala filed the action against respondents and continues to represent appellant in this appeal.

On June 4, 2010, respondents filed a demurrer to the complaint. Two days earlier, respondents had served the demurrer by mailing a copy to appellant. The demurrer was based in part on appellant's failure to timely file a claim with City.

On July 29, 2010, the trial court denied appellant's motion to allow the filing of a late claim with City. The denial was based on appellant's failure to timely file with City an application to present a late claim. (Gov. Code, § 911.4.)

On July 29, 2010, the court also sustained, without leave to amend, respondents' demurrer to the state claims because appellant had failed to comply with the claims presentation requirements of the Tort Claims Act. The court overruled respondents' demurrer to appellant's federal claims. But on January 11, 2011, appellant voluntarily dismissed without prejudice the entire action against respondents.

Respondents subsequently moved for attorney fees pursuant to section 1021.7 on the ground that appellant's action had not been filed or maintained in good faith or with reasonable cause. In opposition to the motion, attorney Aghabala declared under penalty of perjury: Before he filed the complaint, Pritchard had informed him "that under the

advice of her personal injury attorney . . . she had filed a timely claim against [City] on October 15, 2009 and that it had been rejected on October 16, 2009." Aghabala relied on her information. When Aghabala "received [respondents'] demurrer, for the first time [he] realized that in fact the government claim had been filed with the County of Ventura instead of Simi Valley."

In their reply to appellant's opposition, respondents argued that Aghabala "had to [have] known before [receiving the demurrer] that the claim was filed with the wrong entity." Respondents mailed the demurrer to Aghabala on June 2, 2010. On May 12, 2010, 21 days before the demurrer was mailed, Pritchard had signed a declaration alleging that she had mistakenly filed the claim with Ventura County instead of City.

During the hearing on the motion for attorney fees, respondents presented evidence discovered by their counsel the previous day. The evidence was a fax from Aghabala's office to Simi Valley Deputy City Attorney Felicia Liberman. The fax had been sent on April 29, 2010, 34 days before the demurrer was mailed to Aghabala. The fax cover sheet has a blank space next to "SENDER." In that space, someone had written the name, "Paul Aghabala." Without objection, the fax was marked as Exhibit A and received by the court. The fax included (1) the claim filed by Pritchard, showing that Ventura County had received it on October 15, 2009; and (2) Ventura County's rejection letter dated the following day and addressed to Pritchard.

Respondents' counsel argued that the fax showed that, long before Aghabala received the demurrer, he had known that the claim had been filed with the wrong entity. Counsel contended that it is reasonable to infer that Pritchard gave the wrongly filed claim and rejection letter to Aghabala when she met with him before the action was filed on April 15, 2010. Counsel continued: "[T]here's an instruction on a witness willfully false who is to be distrusted in other areas of his testimony, and based on what Mr. Aghabala has told the Court today and on other occasions, I don't think you can just take at face value the representations that he's made." At the conclusion of the hearing, the court took the matter under submission.

The court's ruling is set forth in a minute order. The court concluded that respondents "are entitled to recover \$11,857.50 in attorney's fees incurred in defending against [appellant's] state law claims . . . pursuant to [section] 1021.7 because they demonstrate that [appellant's] state law claims were filed or maintained without 'good faith' or 'reasonable cause.'" The court explained: "Facts adduced at the hearing, and corroborated by the Court's review of the court file, flatly contradict so many of Mr. Aghabala's claims that they belie the veracity of those remaining. In short, the Court concludes that Mr. Aghabala knowingly filed this action based upon a defective Tort Claim, and, therefore, did so in bad faith."

Section 1021.7

Section 1021.7 applies to an action for damages against a peace officer, or a public entity employing a peace officer, if the action arises out of the performance of the peace officer's duties. In such actions, section 1021.7 gives the court discretion to award reasonable attorney fees to the defendants "upon a finding . . . that the action was not filed or maintained in good faith *and* with reasonable cause." (§ 1021.7, italics added.) Despite the use of the conjunction "and," the statute has been interpreted as permitting the recovery of attorney fees upon a finding that the action was not filed or maintained in good faith *or* with reasonable cause. (*Salazar v. Upland Police Dept.* (2004) 116 Cal.App.4th 934, 949 ["the absence of either condition [good faith or reasonable cause] is sufficient grounds for awarding fees under sections 1038 and 1027.1"]; *Kobzoff v. Los Angeles County Harbor/UCLA Medical Center* (1998) 19 Cal.4th 851, 855 [similar language in section 1038 interpreted as meaning "that the trial court may award section 1038 costs if it finds plaintiffs brought or maintained their action without either good faith or reasonable cause"].)

Finding that Action Had Not Been Filed in Good Faith

The trial court found that Aghabala had not acted in good faith because he had "knowingly filed this action based upon a defective Tort Claim." Appellant contends that the court's finding was erroneous.

The term "good faith" as used in sections 1021.7 and 1038 is construed the same. (*Salazar v. Upland Police Dept.*, *supra*, 116 Cal.App.4th at p. 949.) " 'Good faith, or its absence, involves a factual inquiry into the plaintiff's subjective state of mind [citations] A subjective state of mind will rarely be susceptible of direct proof; usually the trial court will be required to infer it from circumstantial evidence. Because the good faith issue is factual, the question on appeal will be whether the evidence of record was sufficient to sustain the trial court's finding.' " (*Clark v. Optical Coating Laboratory, Inc.* (2008) 165 Cal.App.4th 150, 183.)

" 'In reviewing the sufficiency of the evidence, we must consider all of the evidence in the light most favorable to the prevailing party, accept as true all the evidence and reasonable inferences therefrom that tend to establish the correctness of the trial court's findings and decision, and resolve every conflict in favor of the judgment. [Citation.] "It is not our task to weigh conflicts and disputes in the evidence; that is the province of the trier of fact. Our authority begins and ends with a determination as to whether, on the entire record, there is *any* substantial evidence, contradicted or uncontradicted, in support of the judgment." [Citation.]' " (*DiPirro v. Bondo Corp.* (2007) 153 Cal.App.4th 150, 189.) "An appellate court does not . . . evaluate the credibility of witnesses, but rather defers to the trier of fact. [Citations.]" (*Cahill v. San Diego Gas & Elec. Co.* (2011) 194 Cal.App.4th 939, 958.)

Viewing the evidence in the light most favorable to respondents, we conclude that substantial evidence supports the trial court's finding that Aghabala had not acted in good faith. Aghabala declared under penalty of perjury that, when he "received [respondents'] demurrer, for the first time [he] realized that in fact the government claim had been filed with the County of Ventura instead of Simi Valley." The demurrer was mailed to Aghabala on June 2, 2010. But on April 29, 2010, Aghabala sent a fax to City that included (1) the claim filed by Pritchard, showing that Ventura County had received it on October 15, 2009; and (2) Ventura County's rejection letter dated the following day and addressed to Pritchard. Based on the fax, it is reasonable to infer that, more than one month before the demurrer was mailed to him, Aghabala knew that the claim had been

filed with the wrong entity. We presume that the trial court drew this inference. (*Cahill v. San Diego Gas & Elec. Co.*, *supra*, 194 Cal.App.4th at p. 958 ["An appellate court presumes in favor of the judgment or order all reasonable inferences"].) Thus, the fax provides a factual basis which supports the trial court's determination that Aghabala was not credible. This is fatal to the appeal. (*In re Marriage of Greenberg* (2011) 194 Cal.App.4th 1095, 1099.)

It is also reasonable to infer that Aghabala obtained the faxed claim and rejection letter from Pritchard. We know that she had these documents in her possession. She declared that, when she filed the claim with Ventura County, the clerk stamped "received" on a copy and gave it to her. (ICT 131, line 10). Pritchard further declared that she had received the rejection letter "on or about October 20, 2009." (ICT 131, lines 11-13) Moreover, as argued by respondents' counsel at the hearing, it is reasonable to infer that Pritchard gave Aghabala the claim and rejection letter when she met with him before the action was filed. Any competent attorney would have reviewed these documents before filing the complaint. Accordingly, the court reasonably concluded that Aghabala had "knowingly filed this action based upon a defective Tort Claim."

In any event, irrespective of the good faith issue, the trial court did not err in determining that the action had been filed without reasonable cause. " *Reasonable cause* is to be determined objectively, as a matter of law, on the basis of the facts known to the plaintiff when he or she filed or maintained the action. Once what the plaintiff (or his or her attorney) knew has been determined, or found to be undisputed, it is for the court to decide " 'Whether any reasonable attorney would have thought the claim tenable ' " [Citations.] Because the opinion of the hypothetical reasonable attorney is to be determined as a matter of law, reasonable cause is subject to de novo review on appeal.' [Citation.]" (*Hall v. Regents of University of California* (1996) 43 Cal.App.4th 1580, 1586.) As discussed above, it is reasonable to infer that, before Aghabala filed the action against respondents, Pritchard had given him documents showing that the mandatory pre-

filing claim had been presented to Ventura County instead of City. In these circumstances, no reasonable attorney would have thought the claim tenable.²

Trial Court's Alleged Failure to Provide

Appellant Opportunity to Respond to Fax

Appellant argues: "The trial court violated [appellant's] and Attorney Aghabala's due process rights by depriving them of an opportunity to respond to this new evidence, produced for the first time [at the hearing] after the parties had fully briefed the issues." But the court gave appellant an opportunity to respond. The court asked Aghabala: "What about this fax to the City of Simi Valley on your fax machine? What do you know about that?" Aghabala neither requested additional time to respond to the fax nor objected to its consideration by the court. Appellant, therefore, has forfeited the issue. "As a general rule, a claim of error will be deemed to have been forfeited when a party fails to bring the error to the trial court's attention by timely motion or objection. [Citations.]" (*Avalos v. Perez* (2011) 196 Cal.App.4th 773, 776.)

Amount of Attorney Fees

"The amount of attorney fees to be awarded is within the trial court's sound discretion. [Citations.] The experienced trial judge is the best judge of the value of professional services rendered in his or her court, and a reviewing court will not disturb a trial court's award unless it is convinced that the trial court's award is clearly wrong.

² For the first time in his reply brief, appellant contends that section 1021.7 authorizes the award of attorney fees only if the court finds that the entire action was not filed or maintained in good faith or with reasonable cause. Because the court here found that only a portion of the action - the state law claims - had not been filed or maintained in good faith or with reasonable cause, appellant argues that section 1021.7 is inapplicable. "[Appellant] offers no explanation why these contentions were not presented earlier in [his] opening brief. Because arguments raised for the first time in the reply brief are considered untimely and may be disregarded by the reviewing court [citation], we deem these contentions forfeited. [Citations.]" (*Peninsula Guardians, Inc. v. Peninsula Health Care Dist.* (2008) 168 Cal.App.4th 75, 86, fn. 6; see also *SCI Cal. Funeral Services, Inc. v. Five Bridges Foundation* (2012) 203 Cal.App.4th 549, 573, fn. 18.)

[Citation.]" (*Foundation for Taxpayer and Consumer Rights v. Garamendi* (2005) 132 Cal.App.4th 1375, 1394.)

Appellant contends that the trial court abused its discretion in determining the amount of attorney fees because "[n]ot a single billing statement or similar support [was] provided to the trial court or [appellant's] counsel to authenticate [respondents'] counsel's declaration he spent the hours he claims on the matter." The contention is meritless. Respondents' counsel submitted 51 pages of billing statements setting forth in detail the services that he had provided. Moreover, "there is no legal requirement that an attorney supply billing statements to support a claim for attorney fees." (*Mardirossian & Associates, Inc. v. Ersoff* (2007) 153 Cal.App.4th 257, 269.)

Appellant argues that "the trial court improperly awarded fees attributable to defenses upon which [respondents] did not prevail" and "failed to require [respondents] to differentiate between fees incurred defending the viable federal claims and the state claims." We disagree. Respondents requested attorney fees of \$46,639.50. (2CT 184) The total fees awarded were \$11,857.50, approximately 25 percent of the amount requested. The court allowed attorney fees only for the defense of the state claims at a rate of \$155 per hour. Respondents' counsel declared under penalty of perjury that he had spent 76.5 hours defending against the state claims and 224.4 hours defending against the federal claims. "Testimony of an attorney as to the number of hours worked on a particular case is sufficient evidence to support an award of attorney fees, even in the absence of detailed time records. [Citations.]" (*Martino v. Denevi* (1986) 182 Cal.App.3d 553, 559.)

Respondents' Request for Attorney Fees on Appeal

Respondents request "a finding of entitlement to attorney's fees on appeal and remand to the lower court for determination of the amount." (RB 21) Section 1021.7 contains no language specifically excluding appeals. It therefore permits an award of attorney fees on appeal. (*Morcos v. Board of Retirement* (1990) 51 Cal.3d 924, 929 ["the general rule [is] that statutory attorney fee provisions are interpreted to apply to attorney fees on appeal unless the statute specifically provides otherwise".]) "[S]ince attorney fees

are properly recoverable in the trial court for [respondents'] success there, they should be recoverable for his continued success on appeal. [Citation.]" (*Id.*, at pp. 929-930.)

"Accordingly, we grant [respondents'] attorney fee request and remand the matter for the trial court to determine the amount of the award in compliance with rule [3.1702] of the California Rules of Court." (*Vo v. Las Virgenes Municipal Water Dist.* (2000) 79 Cal.App.4th 440, 448.)

Disposition

The order awarding attorney fees to respondents is affirmed. Respondents shall recover their costs and reasonable attorney fees on appeal in an amount to be determined by the trial court on noticed motion.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

David R. Worley, Judge
Superior Court County of Ventura

Payam P. Aghabala and Thomas E. Beck, for Plaintiff and Appellant.

David L. Caceres, Assistant City Attorney, City of Simi Valley and
Benjamin F. Coats, Andrew H. Covner; Engle, Carobini, Covner & Coats, for
Respondents.