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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

KEVIN JOHNSON,

Plaintiff and Respondent,

v.

DARRYL JOHNSON, as Trustee, etc.,

Defendant and Appellant.

B242770

(Los Angeles County
Super. Ct. No. BP124530)

APPEAL from a judgment of the Superior Court of Los Angeles County. Reva G. Goetz, Judge. Affirmed in part and reversed in part and remanded.

Darryl Johnson, in pro. per.; and Bruce D. Stuart for Defendant and Appellant.
[Retained.]

Kevin C. Johnson, in pro. per., for Plaintiff and Respondent.

* * * * *

Plaintiff and respondent Kevin Johnson (Kevin) filed a petition alleging that defendant and appellant Darryl Johnson committed breaches of trust in his position as the trustee of their father's trust. Following a bench trial on appellant's objections to that petition, as well as Kevin's objections to an accounting submitted by appellant, the trial court ruled that appellant owed the trust approximately \$38,000, removed appellant as trustee, ordered that he take nothing further from the trust, and awarded Kevin \$25,000 in attorney fees from the trust under the common fund doctrine.

We reverse the amount of the attorney fee award and remand the matter for the limited purpose of recalculating that award. In all other respects we affirm the judgment. The trial court properly exercised its discretion in excluding evidence of appellant's request for compensation under an advance health care directive, as that document did not authorize payment for appellant's services. While the trial court also properly exercised its discretion in making an attorney fee award under the equitable common fund doctrine, it failed to exercise its discretion to determine the amount of the award, either by utilizing a percentage basis of the recovery or considering evidence of time actually spent on the matter.

FACTUAL AND PROCEDURAL BACKGROUND

In September 1996, Louise O'Rourke died and her estate was subsequently divided into sixths. Her son Ervin Johnson (trustor) received one share, as did her grandsons appellant and Kevin. Appellant's and Kevin's siblings and a grandnephew received the remaining shares.

In August 2007, the trustor appointed appellant as his agent under a durable power of attorney and an advance health care directive. Appellant served as the trustor's primary caretaker. In January 2008, the trustor executed a revocable living trust (trust), which became irrevocable upon the trustor's death in May 2009; appellant served as the successor trustee under the trust. The trust provided that the trustor's assets should be distributed with 40 percent going to appellant and 20 percent each to Kevin and his siblings.

The O'Rourke estate was not settled and distributed until 2010, at which point appellant petitioned to receive his share as trustee of the trust. In May 2010 appellant received a distribution of \$46,367.50 on behalf of the trust, and in September 2010 he received an additional \$916.67 on the trust's behalf. In addition to those distributions, the trustor also had assets consisting of an annuity in the amount of \$20,873.10, though some of those funds were used to pay the trustor's mortuary and funeral expenses. Appellant paid himself compensation from the trust in the amount of approximately \$43,000 for the time he oversaw the trustor's care, and he did not distribute any trust assets to his siblings. Appellant also paid himself \$5,000 in "agent fees" for dealing with the trustor's care. In large part, he calculated what was owed to him on the basis of what he would have received from the personal training clients he lost due to time spent on the trustor. In making these payments to himself, he relied on the advice of an estate planning firm, the Watkins Group.

In September 2010, Kevin filed a petition to compel the trustee to account. The trial court ordered appellant to provide an accounting for the time period between May 2009 and October 2010, due no later than December 17, 2010. On and before the due date, appellant filed two responses to the petition as well as a document captioned an "accounting." Kevin objected and the trial court directed appellant to provide an accounting in the correct format. Kevin again objected to the amended accounting appellant filed in March 2011, and in July 2011 the trial court again ordered appellant to file a proper accounting.

After appellant filed an accounting without any supporting documents in August 2011, Kevin filed a petition for relief from breach of trust (breach of trust petition). In response, appellant filed a supplement to the accounting and Kevin thereafter filed objections. In January 2012, the trial court set for trial Kevin's objections to the accounting and appellant's objections to the breach of trust petition. The contested issues included whether certain expenses identified on the accounting were legitimate trust expenses, whether certain action and inaction by appellant constituted a breach of trust,

and whether a portion of the annuity balance should have been applied as compensation for appellant's services to the trust.

On March 12, 2012, the trial court held a bench trial. Appellant sought to admit an itemized statement of the time he spent both caring for the trustor and addressing the accounting issues between April 2007 and August 2011. He calculated that he had rendered 984.05 hours of service and concluded the reasonable value of those services was \$49,202.50 assuming a \$50 hourly rate. At the beginning of trial, the trial court ruled that evidence concerning appellant's request for compensation for the trustor's care was irrelevant and therefore inadmissible because the advance health care directive did not provide for any manner of payment for care.

Kevin and appellant testified. At the conclusion of trial, the trial court determined appellant owed the trust \$38,371. It calculated that amount by reducing the \$47,284 that appellant had paid himself in compensation by the \$25,000 that Kevin stated he paid in attorney fees. It then determined that under the trust appellant was entitled to 40 percent of that reduced balance—or \$8,914—and subtracted that figure from the amount appellant had already paid to himself to reach the \$38,371 amount owing. It denied Kevin's claim for damages under Probate Code section 859 for breach of trust, finding credible appellant's testimony that he relied on estate planning advice from professionals. The trial court further denied appellant any compensation for his role as trustee, ordered that he have no further beneficial interest in the trust, removed him as trustee of the trust and directed that Kevin recover \$25,000 from the trust for his attorney fees and costs pursuant to the common fund doctrine. Judgment was entered on May 21, 2012 and this appeal followed.¹

¹ Though appellant did not include the judgment in his appendix, it is attached to the notice of appeal in our file; on our own motion, we have taken judicial notice of it. (Evid. Code, § 452, subd. (d).)

DISCUSSION

Appellant challenges the judgment on limited grounds. First, he contends that he should have been permitted to present evidence supporting his request for compensation under a quantum meruit theory. Second, he contends that the award of attorney fees was improper because Kevin neither complied with the applicable procedural rules in making the request and the amount sought was unsupported by substantial evidence. Only the final contention has merit.

I. The Trial Court Properly Exercised Its Discretion in Excluding Evidence of Appellant's Itemized Compensation Request.

Appellant prepared an exhibit that detailed by date, task and number of hours the services he provided to secure appropriate care for the trustor. He calculated \$49,202.50 as the total reasonable value of his services. Some of the tasks for which he sought compensation included researching residential care facilities, consulting with doctors and nurses, and visiting and calling the trustor's residential care facility. Kevin sought to exclude the evidence on the ground that nothing in the trustor's advance health care directive authorized an award of compensation for services provided thereunder. The trial court agreed, ruling that because the advance health care directive did not provide appellant would be compensated for his services, evidence of any request for compensation was irrelevant and inadmissible. We review any ruling by the trial court as to the admissibility of evidence for an abuse of discretion. (*Dart Industries, Inc. v. Commercial Union Ins. Co.* (2002) 28 Cal.4th 1059, 1078; *Tudor Ranches, Inc. v. State Comp. Ins. Fund* (1998) 65 Cal.App.4th 1422, 1431.)

Appellant contends the trial court abused its discretion because the evidence was relevant to support his claim to recovery of compensation in quantum meruit. The doctrine of quantum meruit allows a party who has provided work or services for the benefit of another to recover the reasonable value of the services from the person who benefited from the services. (*Palmer v. Gregg* (1967) 65 Cal.2d 657, 660.) "However, it is well settled that there is no equitable basis for an implied-in-law promise to pay

reasonable value when the parties have an actual agreement covering compensation. [Citation.]” (*Hedging Concepts, Inc. v. First Alliance Mortgage Co.* (1996) 41 Cal.App.4th 1410, 1419.) Stated another way, “[q]uantum meruit is an equitable theory which supplies, by implication and in furtherance of equity, implicitly missing contractual terms. Contractual terms regarding a subject are not implicitly missing when the parties have agreed on express terms regarding that subject. A quantum meruit analysis cannot supply ‘missing’ terms that are not missing.” (*Ibid.*; accord, *Maglica v. Maglica* (1998) 66 Cal.App.4th 442, 449, fn. 4 [quantum meruit recovery cannot conflict with contract terms].)

Here, the tasks for which appellant sought compensation were those specified in the trustor’s advance health care directive. In that document, the trustor designated and appointed appellant as his agent for health care, and authorized appellant to make health care and personal care decisions on his behalf. But nowhere in the advance health care directive did the trustor provide or even suggest that appellant was entitled to compensation for any services he might provide as an agent. Accordingly, appellant was not entitled to seek recovery of compensation in quantum meruit because the advance health care directive provided that he was not entitled to compensation. In turn, because appellant was precluded from seeking equitable relief, the evidence detailing his request for compensation was irrelevant, and the trial court properly exercised its discretion in excluding it from evidence. (See Evid. Code, §§ 210, 350.)

II. The Trial Court Properly Exercised Its Discretion in Awarding Kevin Attorney Fees Under a Common Fund Theory, but Failed to Exercise Its Discretion Concerning the Amount of the Award.

At the conclusion of trial, the trial court asked Kevin’s counsel the amount of the attorney fees that had been incurred. Counsel stated that he was planning to submit a declaration regarding fees, but estimated that the fees were between \$10,000 and \$15,000. Kevin immediately interjected that the total amount of the fees was up to \$25,000. The trial court then utilized that \$25,000 figure in two ways. First, it subtracted

that amount from the \$47,284 it found that appellant had wrongfully taken from the trust in order to calculate appellant's 40 percent share of the trust assets. Second, it ordered that Kevin could recover \$25,000 from the trust pursuant to the common fund doctrine. We review the trial court's decision to grant a fee request payable from trust assets for an abuse of discretion.² (See *Kasperbauer v. Fairfield* (2009) 171 Cal.App.4th 229, 234; *Terry v. Conlan* (2005) 131 Cal.App.4th 1445, 1461; *Estate of Ott* (1979) 99 Cal.App.3d 605, 614.)

As a general rule, a party employing an attorney must pay the attorney fees. (Code Civ. Proc., § 1021; *Summers v. Newman* (1999) 20 Cal.4th 1021, 1031; *Estate of Gump* (1982) 128 Cal.App.3d 111, 118.) The equitable "common fund" doctrine operates as a well-established exception to that rule. (*City and County of San Francisco v. Sweet* (1995) 12 Cal.4th 105, 110–111; *Gray v. Don Miller & Associates, Inc.* (1984) 35 Cal.3d 498, 505.) "The common fund doctrine recognizes the common law 'historic power of equity to permit the trustee of a fund or property, or a party preserving or recovering a fund for the benefit of others in addition to himself, to recover his costs, including his attorneys' fees, from the fund or property itself or directly from the other parties enjoying the benefit. . . .' [¶] While the doctrine was first recognized and applied in a situation in which a common fund was created [citations][,] it was extended to an action where no fund was created but the party sharing in the attorney fee expense was benefited by the litigation." (*City and County of San Francisco v. Sweet, supra*, at p. 110; accord, *Estate of Marré* (1941) 18 Cal.2d 191, 192 ["plaintiffs who have succeeded in protecting, preserving or increasing a fund for the benefit of themselves and others may be awarded compensation from the fund for the services of their attorneys"].) The doctrine applies in trust litigation. (E.g., *Estate of Reade* (1948) 31 Cal.2d 669, 671–

² We reject Kevin's argument that appellant has no basis to challenge the award because it was payable from the trust. The \$25,000 amount was also utilized in calculating appellant's 40 percent share of the trust assets, and a different fee award would necessarily affect the amount of that share.

672; *Winslow v. Harold G. Ferguson Corp.* (1944) 25 Cal.2d 274, 277; *Hutchinson v. Gertsch* (1979) 97 Cal.App.3d 605, 617.)

Here, the trial court acted within its discretion in determining that Kevin's efforts benefited all trust beneficiaries, which included his two siblings. Appellant had depleted the trust assets to zero. As a result of Kevin's efforts, the trial court ordered that appellant pay the amount of \$38,371 to the trust and removed appellant as the trustee. The common fund doctrine is based on the principle that "where a common fund exists to which a number of persons are entitled and in their interest successful litigation is maintained for its preservation and protection, an allowance of counsel fees may properly be made from such fund." (*Winslow v. Harold G. Ferguson Corp.*, *supra*, 25 Cal.2d at p. 277.) Because Kevin's successful litigation served to increase the trust assets, an award of attorney fees under the common fund doctrine was appropriate.

Appellant asserts that the attorney fee award was improper because Kevin did not satisfy the applicable procedural requirements for claiming prejudgment costs (Cal. Rules of Court, rule 3.1700), claiming attorney fees pursuant to statute or contract (Cal. Rules of Court, rule 3.1702) or seeking attorney fees in an action on a contract (Civ. Code, § 1717). But the fee award was not made pursuant to statute or contract; rather, the trial court expressly issued its attorney fee award pursuant to the common fund doctrine, which is a nonstatutory, equitable principle. (See *Jordan v. Department of Motor Vehicles* (2002) 100 Cal.App.4th 431, 446.) Accordingly, compliance with the procedures relating to statutory or contractual fee awards was not required.

Appellant further contends that there was insufficient evidence to support the amount of the attorney fee award. The court in *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794 explained the two methods employed to calculate attorney fees in common fund cases. A percentage of the benefit method may be used when the amount of the fund is a certain or easily calculable sum of money. (*Id.* at p. 1809.) "The alternate approach is the 'lodestar' or 'touchstone' method, '[by] which the court calculates base amounts from a compilation of time spent and reasonable hourly compensation of each attorney and then may adjust the base amounts in light of various

factors. [Citations.]’ [Citation.]” (*Id.* at p. 1810.) While trial courts have wide discretion to award fees under either methodology (*Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 39–40), the trial court here employed neither.

“A failure to exercise discretion is an abuse of discretion. [Citation.]” (*Kim v. Euromotors West/The Auto Gallery* (2007) 149 Cal.App.4th 170, 176; accord, *Garcia v. Santana* (2009) 174 Cal.App.4th 464, 477; *In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 315.) The record shows no exercise of discretion by the trial court in making the \$25,000 attorney fee award. The trial court did not consider whether \$25,000 was an appropriate percentage recovery on a \$38,000 award, nor did it calculate a lodestar amount on the basis of time spent, counsel’s hourly rate and factors specific to the case. Indeed, beyond Kevin’s statement that “[t]he total amount is probably—by now it’s probably up to \$25,000,” the trial court received no evidence concerning the amount of attorney fees incurred in this matter. Accordingly, we must remand the matter to enable the trial court to exercise its discretion in fashioning an appropriate attorney fee award under either the percentage recovery or lodestar method.

DISPOSITION

The amount of the attorney fee award is reversed and the matter is remanded for recalculation of the award in accordance with the views expressed herein and for recalculation of any other monetary figures affected by that award. In all other respects, the judgment is affirmed. Parties to bear their own costs on appeal.

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_____, P. J.
BOREN

We concur:

_____, J.
ASHMANN-GERST

_____, J.
CHAVEZ