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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

GUILLERMO MENDOZA LOPEZ,

Plaintiff and Appellant,

v.

MICHAEL D. WAKS,

Defendant and Respondent.

B248734

(Los Angeles County
Super. Ct. No. NC056566)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Michael P. Vicencia, Judge. Affirmed.

Younger Law Firm and Robert J. Younger for Plaintiff and Appellant.

Reback, McAndrews, Kjar, Warford, Stockalper & Moore, James J. Kjar,
Cindy A. Shapiro, and Jason J. Petersen for Defendant and Respondent.

INTRODUCTION

Guillermo Mendoza Lopez appeals from a judgment of dismissal, following an order granting summary judgment in favor of respondent Michael D. Waks. Appellant had filed a complaint, alleging that respondent, his attorney in a personal injury action, had breached the terms of a written retainer agreement by paying a workers' compensation insurance carrier \$35,000 out of a \$95,000 settlement with the at-fault third party tortfeasor. The trial court granted respondent's motion for summary judgment, after determining that respondent had committed no breach, and that appellant had suffered no actual damages. Appellant contends respondent breached the retainer agreement and failed to comply with the standard of care owed appellant by failing to negotiate a lower amount with the insurance carrier. We conclude that appellant failed to demonstrate a triable issue of fact on the breach and damages elements of his breach of contract cause of action. Accordingly, we affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On September 12, 2007, appellant, a baggage handler, suffered a workplace injury due to the actions of an employee of Delta Airlines. He sustained injuries to his chest, back, shoulder, and neck. Appellant retained respondent to represent him on his personal injury claim against Delta. The retainer agreement provided that respondent would "render legal services and do such things [as are] necessary and proper to prosecute any and all claims of the undersigned [appellant]." The agreement further provided that, "[i]t is understood that the cost of medical care and treatment is the sole obligation of the undersigned [appellant], for which the undersigned is responsible either independently or out of the undersigned's share

of any recovery as may be later directed, and does not constitute costs under this agreement nor charges against the attorney in any way.”

Appellant retained another attorney for his workers’ compensation claim with his employer. In March 2009, appellant settled the workers’ compensation claim. The settlement of the claim, memorialized in a written “Compromise and Release” (C&R), provided that in return for a payment of \$22,500, “the employee releases and forever discharges the above-named employer(s) and insurance carrier(s) from all claims and causes of action, whether now known or ascertained or which may hereafter arise or develop as a result of the above-referenced injury(ies).” According to the C&R, as of the date of the settlement, appellant had been paid weekly temporary disability benefits totaling \$2,473.47 and weekly permanent disability benefits totaling \$8,031.02. Appellant also had been paid a total of \$17,341.22 for medical bills. The C&R contemplated additional future payments, noting that the amount of permanent disability benefits was “Subject to Proof.” As to who would pay “Total Unpaid Medical Expense,” the C&R referred to “paragraph 8.” That paragraph provided that “Defendants” would “adjust/resolve/litigate liens of record as of the date of the order approving Compromise and Release.”

On June 1, 2009, the workers’ compensation insurance carrier sent a letter to all parties in the personal injury action, asserting the carrier’s subrogation lien in the amount of \$51,240.86, consisting of \$27,846.27 in medical benefits and \$23,394.59 in indemnity benefits. Respondent subsequently negotiated the carrier’s subrogation lien down to \$35,000. Respondent then settled appellant’s personal injury claim against Delta, securing for appellant \$95,000, of which \$35,000 was paid to the carrier to satisfy its subrogation lien, \$20,000 to

respondent for attorney fees, and \$425 to respondent for costs. Appellant agreed to the settlement and received the balance of \$39,575 on November 5, 2009.

On May 8, 2012, appellant filed a second amended complaint (SAC), asserting a single cause of action for breach of written contract against respondent. The SAC alleged that respondent breached his retainer agreement with appellant by paying \$35,000 to satisfy the insurance carrier's workers' compensation lien. The SAC alleged that appellant was not required to satisfy the lien because he had settled all liens pursuant to the C&R. The SAC further alleged that respondent failed to confirm that the amount sought in the lien was appropriate.

Respondent filed an answer, generally denying the allegations. He also asserted numerous affirmative defenses, including the statute of limitations under California Code of Civil Procedure section 340.6, which provides that a legal malpractice claim must be brought within one year from the date of the injury or discovery of the injury.¹

On November 16, 2012, respondent moved for summary judgment pursuant to Code of Civil Procedure section 437, subdivision (c), contending that respondent did not breach the retainer agreement in paying the subrogation lien, and that appellant suffered no damages as a result of the payment of the lien.² In the motion, respondent noted that California law authorizes an employer who becomes obligated to pay workers' compensation benefits to an employee injured by a third party to recover the total amount paid from the entire amount of settlement reached by an injured employee and the third-party tortfeasor. Accordingly, respondent

¹ As we conclude the trial court properly dismissed the SAC on other grounds, we need not reach the statute of limitations issue.

² All further statutory citations are to the Code of Civil Procedure, unless otherwise indicated.

argued, he did not breach the retainer agreement by paying the subrogation lien. Additionally, respondent contended that appellant had not been harmed, and that respondent's conduct in negotiating a reduced amount of the lien had benefitted appellant.

The motion for summary judgment attached the declaration of Amy Stody, an attorney specializing in workers' compensation law. Stody opined that an insurance carrier has the legal right to seek recovery of payments made on behalf of an injured worker against an at-fault third party, and that the C&R did not include a release of that right. She further opined that any disparity between the figures for medical and indemnity benefits in the C&R and those in the June 1, 2009 subrogation claim letter reflected ongoing payments made to appellant following the resolution of the workers' compensation claim. Finally, Stody opined that respondent had not breached the retainer agreement and had acted within the standard of care owed appellant by negotiating a reduction in the lien amount and paying the carrier's subrogation claim.

Appellant filed an opposition to the motion for summary judgment, arguing there was a triable issue of material fact as to respondent's failure to comply with his duties under the retainer agreement. Appellant argued (1) that respondent failed in his duty to secure the underlying documents supporting the alleged workers' compensation lien; (2) that respondent failed to reduce the lien by the temporary and permanent disability already credited in the C&R; and (3) that respondent failed to obtain a reduction in the lien for attorney fees. According to appellant, after deducting \$6,277.03 for charges listed as "manag" by the insurance carrier, permanent and temporary disability benefits listed in the C&R, and attorney fees, the amount of the subrogation lien totaled \$27,156.05. Thus,

appellant contended, he suffered damages of at least \$7,843.95 when respondent paid the insurance carrier \$35,000.00.

In support of his opposition, appellant submitted excerpts from uncertified deposition transcripts. Respondent objected on the basis that appellant had failed to lodge a full and complete copy of the entire deposition transcripts for the court's consideration. At the hearing on the motion for summary judgment, the trial court sustained respondent's evidentiary objections.

Respondent's reply argued that appellant had produced no expert declaration or admissible evidence demonstrating that respondent had breached any duty to appellant or failed to properly substantiate the amounts of the subrogation lien. Respondent further argued that the subrogation lien could not be reduced by the temporary and permanent disability payments, as those payments were part of the total payments made to appellant and recoverable in the subrogation lien. Finally, respondent argued that no case law or statutory authority provided that the subrogation lien be reduced by third-party attorney fees.

On January 31, 2013, after a hearing, the trial court granted respondent's motion for summary judgment in its entirety. The court determined that respondent did not commit malpractice or breach his contract with appellant, and that the amount paid to satisfy the subrogation lien was proper. A judgment dismissing the SAC with prejudice was entered February 26, 2013.

On March 7, 2013, appellant moved for a new trial, arguing that the \$6,227.03 in "manag" payments raised a triable issue of fact and precluded summary judgment. Respondent opposed the motion, arguing that it raised no new issue of law or fact. Moreover, respondent argued, even were the \$6,277.03 not recoverable, appellant could demonstrate no actual harm, as respondent had

reduced the subrogation lien by more than that amount. On April 24, 2013, the trial court denied appellant's motion for a new trial.

Appellant filed a timely appeal from the judgment.

DISCUSSION

A. *Standard of Review*

“A defendant is entitled to summary judgment if the record establishes as a matter of law that none of the plaintiff's asserted causes of action can prevail. [Citation.]” (*Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1107.) Generally, “the party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact.” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) In moving for summary judgment, “all that the defendant need do is to show that the plaintiff cannot establish at least one element of the cause of action -- for example, that the plaintiff cannot prove element X.” (*Id.* at p. 853.)

“Review of a summary judgment motion by an appellate court involves application of the same three-step process required of the trial court. [Citation.]” (*Bostrom v. County of San Bernardino* (1995) 35 Cal.App.4th 1654, 1662.) The three steps are (1) identifying the issues framed by the complaint, (2) determining whether the moving party has made an adequate showing that negates the opponent's claim, and (3) determining whether the opposing party has raised a triable issue of fact. (*Ibid.*)

“Although we independently review the grant of summary judgment [citation], our inquiry is subject to two constraints. First, we assess the propriety of summary judgment in light of the contentions raised in [appellant’s] opening brief. [Citation.] Second, to determine whether there is a triable issue, we review the evidence submitted in connection with summary judgment, with the exception of evidence to which objections have been appropriately sustained. [Citations.]” (*Food Safety Net Services v. Eco Safe Systems USA, Inc.* (2012) 209 Cal.App.4th 1118, 1124.) Here, appellant does not attack the trial court’s evidentiary rulings on appeal. Thus, he has forfeited any contentions of error regarding them. (*Wall Street Network, Ltd. v. New York Times Co.* (2008) 164 Cal.App.4th 1171, 1181.)

B. *The Second Amended Complaint and Motion for Summary Judgment*

In assessing the propriety of summary judgment, we look first to appellant’s allegations in his SAC, which frame the issues pertinent to a motion for summary judgment. (*Bostrom v. County of San Bernardino, supra*, 35 Cal.App.4th at p. 1662.) As discussed previously, appellant alleged a single cause of action for breach of contract against respondent. The elements of a claim for breach of contract are the existence of the contract, performance by the plaintiff or excuse for nonperformance, breach by the defendant, and damages. (*First Commercial Mortgage Co. v. Reece* (2001) 89 Cal.App.4th 731, 745.)

In moving for summary judgment, respondent presented evidence showing there was no triable issue whether respondent had breached the retainer agreement or whether appellant had suffered actual damages. There is no dispute that a workers’ compensation insurance carrier, who has paid an employee benefits for workplace injuries caused by a third-party tortfeasor, may assert a subrogation lien on the monies received by the employee in settlement or judgment from the third

party. (See Lab. Code, §§ 3852 [an employer may recover from third-party tortfeasor “all salary, wage, pension, or other emolument paid to the employee”], 3856 [if employee alone brings an action against third-party tortfeasor and obtains a judgment, the court shall allow as a first lien against the amount of the judgment, the amount of the employer’s expenditure for compensation, after deducting reasonable litigation expenses incurred], 3860, subd. (b) [“the entire amount of [a] settlement [with a third party], with or without suit, is subject to the employer’s full claim for reimbursement for compensation he has paid or become obligated to pay”]; see also *New Plumbing Contractors, Inc. v. Nationwide Mutual Ins. Co.* (1992) 7 Cal.App.4th 1088, 1093 [“An employer who becomes obligated to pay workers’ compensation benefits to an employee injured by a third party has a right to recover the total amount of compensation paid in addition to ‘damages for which [the employer] was liable’”].) Stody, an expert in workers’ compensation law, opined that respondent satisfied his duty of care to appellant because he negotiated a reduction in a legally valid subrogation lien asserted by the insurance carrier. Accordingly, respondent made an adequate showing that appellant could not establish either the breach or damages element of his breach of contract claim. In granting summary judgment, the superior court determined that appellant failed to raise a triable issue of fact. We agree.

In opposing summary judgment, appellant presented no expert testimony on the standard of care owed by respondent. (See *Star v. Mooslin* (1971) 14 Cal.App.3d 988, 999 [“Expert evidence in a malpractice suit is conclusive as to the proof of the prevailing standard of skill and learning in the locality and of the propriety of particular conduct by the practitioner in particular instances because such standard and skill is not a matter of general knowledge and can only be supplied by expert testimony.”].) Rather, he relied on various legal contentions

and excerpts from deposition transcripts. The trial court sustained evidentiary objections to the excerpts. As appellant failed to challenge those rulings, the excerpts are not in the record on appeal and we do not consider them. (See *Food Safety Net Services v. Eco Safe Systems USA, Inc.*, *supra*, 209 Cal.App.4th at p. 1124.)³

As to appellant's legal contentions, we find them without merit. Appellant's first contention is that the insurance carrier waived its right to assert a subrogation lien in the C&R. Our independent review of the C&R shows there was no such waiver. Rather, it was appellant who waived and released his claims against the insurance carrier in exchange for \$22,500 less certain payments and advances.

In a related contention, appellant notes that the C&R detailed the benefits that had already been paid to him. He contends the amount of the subrogation lien should have been reduced by those benefit amounts. Again, our independent review of the C&R reveals no agreement to reduce any subrogation lien by any amount. Thus, as provided by California law, the insurance carrier was entitled to recover from the settlement the entire amount it had paid to appellant or on his behalf. (See *New Plumbing Contractors, Inc. v. Nationwide Mutual Ins. Co.*, *supra*, 7 Cal.App.4th at p. 1093.)⁴

³ At oral argument, appellant contended that the deposition transcript excerpts were not excluded, relying on the trial court's statement that "even without sustaining the [evidentiary] objections, it's clear to the court that . . . the defendant did not commit malpractice or breach his contract." That statement, however, does not demonstrate that the trial court reversed its evidentiary rulings. Accordingly, as appellant failed to challenge those rulings, the excluded evidence is not before us.

⁴ In the trial court, appellant contended that the amount of the subrogation lien should have been limited to the amounts listed in the C&R. Appellant does not raise this argument on appeal and thus has forfeited it. More important, appellant

Appellant next contends that the subrogation lien should have been reduced for attorney fees, apparently on the ground that the insurance carrier should shoulder some of the legal expenses incurred in reaching a settlement with, or obtaining a judgment against, the third-party tortfeasor. While reasonable legal expenses are deducted from the total amount of settlement before an insurance carrier's full subrogation lien may be imposed (see Lab. Code, §§ 3856 & 3860, subd. (b)), here, attorney fees were deducted before the insurance carrier's subrogation lien was paid. Out of the \$95,000 settlement, the attorney received \$20,000 in fees and \$425 in costs. Appellant cites no legal authority for a reduction in the subrogation lien for attorney fees, and we have found none. Such additional reduction would double-count attorney fees, and be contrary to the Labor Code.

Finally, appellant contends that of the \$51,240.86 asserted in the subrogation lien, \$6,277.03 in "manag" charges were not recoverable, as "manag" charges were neither medical nor disability benefits. Appellant produced no admissible evidence that these charges were not recoverable. Thus, he cannot show that respondent breached the retainer agreement in paying those charges. Moreover, even were the charges not recoverable, appellant was not actually harmed. Absent the "manag" charges, the insurance carrier would have been entitled to assert a subrogation lien in the amount of \$44,963.03. Appellant paid only \$35,000 to satisfy the subrogation lien. Thus, he suffered no actual damages, and in fact benefitted from respondent's negotiations with the insurance carrier that resulted in reducing the lien from over \$51,000 to \$35,000. Accordingly, appellant demonstrated no triable

has not disputed that the workers' compensation insurance carrier paid \$51,240.86 on his behalf.

issue as to either the breach or damages element of his claim, and the trial court properly granted summary judgment.

DISPOSITION

The judgment is affirmed. Respondent is awarded his costs on appeal.

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MANELLA, J.

We concur:

WILLHITE, Acting P. J.

COLLINS, J.