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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re the Marriage of ARACELI G. and
BRENT M. HOGAN.

B265141

(Los Angeles County
Super. Ct. No. BD423978)

PAUL LING et al.,

Appellants,

v.

DAVID J. PASTERNAK,

Respondent.

APPEAL from order of the Superior Court of Los Angeles County, Mark A. Juhas, Judge. Affirmed.

Altshuler & Spiro and Bruce J. Altshuler for Appellants.

Akin Gump Strauss Hauer & Feld, Rex S. Heinke and Jessica M. Weisel for Respondent.

In this marital dissolution action between Araceli Hogan and Brent Hogan (the Hogans), Paul Ling and Edythe Ling (the Lings) appeal an order awarding fees to court-appointed receiver David J. Pasternak (Pasternak).

In a prior appeal, the Lings challenged the trial court's order awarding fees related to Pasternak's services in selling three apartment buildings (co-owned by the Lings and the Hogans); we affirmed the trial court's order awarding those fees to Pasternak. (*In re Marriage of Hogan* (Oct. 16, 2014, B248740) [nonpub. opn.] (*Hogan*).

Now, the Lings appeal from the trial court's order awarding fees and costs incurred by Pasternak and his attorneys in successfully defending the prior appeal; we affirm the trial court's order awarding those fees and costs to Pasternak.

BACKGROUND

I. Facts of the case

As detailed in the *Hogan* opinion, the Hogans commenced a proceeding to dissolve their marriage in April 2005. Because the Lings and the Hogans owned three apartment buildings as tenants in common, the trial court granted joinder of the Lings in the dissolution proceeding. On December 30, 2009, the court appointed Pasternak as receiver to take immediate possession of the three apartment buildings and authorized Pasternak and his office personnel to be paid their usual hourly rates and any expenses related to the operation of the receivership estate. On April 5, 2010, pursuant to court order, Pasternak listed the three properties for sale. All three buildings sold, but one of the three buildings required extensive repairs before sale. On June 29, 2011, Pasternak filed his final report and account seeking reimbursement for his service fees as receiver. (*Hogan, supra*, B248740, p. 3.)

On December 13, 2012, after the Lings objected to Pasternak's final report and account, Pasternak filed an application with the trial court seeking authorization to retain appellate counsel in the event that the Lings appealed the trial court's anticipated ruling. In January 2013, the trial court granted Pasternak's application to retain Akin Gump Strauss Hauer & Feld LLP (Law Firm) "with the fees and costs of outside co-counsel subject to Court confirmation."

In April 2013, the trial court approved Pasternak's final report and account, granted in full the receivership fees requested therein, and authorized Pasternak to receive his fees stemming from defense of his accounting. The Lings filed a notice of appeal challenging the trial court's April 2013 order. As authorized by the January 2013 court order, Pasternak retained Law Firm to represent him as appellate counsel. (*Hogan, supra*, B248740.)

In the prior appeal, among other arguments, the Lings contended that because the hourly rates charged were excessive and Pasternak failed to submit a memorandum of costs, the trial court erred in awarding Pasternak the fees incurred by him and his staff. We rejected the Lings' contentions because (1) California Rules of Court, rule 3.1184, not Code of Civil Procedure section 1032 as argued by the Lings, governed Pasternak's right to compensation; therefore, he had no obligation to submit a memorandum of costs, and (2) substantial evidence demonstrated that the hourly rates charged were reasonable and within the scope of the receivership order. We affirmed the trial court's April 2013 order. (*Hogan, supra*, B248740, pp. 2, 11.)

II. Procedural history

On March 6, 2015, Pasternak filed a "request for order" and attached a "motion for issuance of order awarding receiver and his attorneys [their] fees and costs on appeal." Among the supporting documentation, Pasternak filed these documents: a copy of the trial court's January 2013 order authorizing the receiver to retain Law Firm as counsel for the appeal; a copy of the detailed billing records of the time expended in one-tenth hour increments and a summary of the tasks performed by himself, his staff, and Law Firm's employees, during the course of the appeal and in preparation of the subsequent motion seeking fees; and a copy of the litigation-related costs incurred during the appeal. The Lings opposed the request, arguing as follows: (1) Pasternak failed to submit a memorandum of costs; (2) Pasternak failed to request in the prior appeal an award of attorney fees; (3) Pasternak failed to file with his attorney fees motion a supporting declaration from Law Firm; (4) the amount of fees requested is excessive; and (5) Pasternak cannot simultaneously seek an award of receiver fees and attorney fees.

On April 28, 2015, the trial court ordered the Lings to pay the full amount requested by Pasternak: \$23,268.14 in receivership fees and costs as well as \$102,295.89 in attorney fees and costs.

DISCUSSION

I. Applicable law

A court may appoint a receiver where necessary to preserve the property or rights of any party in a pending action or proceeding. (Code Civ. Proc., § 564.) Under the control of the court, a receiver has the power to “bring and defend actions in his [or her] name as receiver, to take and keep possession of the property, to receive rents, collect debts, . . . to make transfers, and generally to do such acts respecting the property as the court may authorize.” (Code Civ. Proc., § 568.)

An “indispensable part of the receiver’s duties” is not only to file an accounting but also to defend against challenges to the receiver’s accounting. (*Macmorris Sales Corporation v. Kozak* (1967) 249 Cal.App.2d 998, 1005.) Upon approval of the court, a receiver may employ an attorney to assist in defending such actions; the receiver’s application for approval to employ an attorney must be in writing and state, inter alia, the necessity for the employment and the name of the attorney. (Cal. Rules of Court, rule 3.1180.)

Receivers are “entitled to compensation for their own services and the services performed by their attorneys.” (*City of Chula Vista v. Gutierrez* (2012) 207 Cal.App.4th 681, 685.) The cost of defending against an unfounded challenge to a receiver’s account is “regarded as a necessary expense incurred in the course of his official duties for which he is entitled to reimbursement out of the estate.” (*People v. Riverside University* (1973) 35 Cal.App.3d 572, 587; see *Macmorris Sales Corporation v. Kozak*, *supra*, 249 Cal.App.2d at p. 1005.)

California Rules of Court, rule 3.1184(d) provides: “If any allowance of compensation for the receiver or for an attorney employed by the receiver is claimed in an account, it must state in detail what services have been performed by the receiver or

the attorney and whether previous allowances have been made to the receiver or attorney and the amounts.”

Because a determination on the receiver fees and attorney fees for defending an action against the receiver is within the broad discretion of the trial court, we do not disturb the court’s order fixing fees absent a clear showing of an abuse of discretion. (*Melikian v. Aquila, Ltd.* (1998) 63 Cal.App.4th 1364, 1368.) As to the trial court’s resolution of disputed factual issues, we review the court’s express and implied factual findings to determine whether substantial evidence supports them. (*Khani v. Ford Motor Co.* (2013) 215 Cal.App.4th 916, 919–920.)

II. The trial court did not abuse its discretion in awarding Pasternak the attorney fees and costs generated by Law Firm during the first appeal.

The Lings contend the trial court erred in awarding Pasternak the attorney fees generated by Law Firm in defense of the prior appeal because California Rules of Court, rule 8.278(c)(1) allegedly requires as a prerequisite the receiver’s submission of a memorandum of costs which Pasternak failed to submit. We disagree.

As explained in the *Hogan* opinion, a receiver is an agent of the court and the right to compensation for the services of the receiver or his attorney is “governed by the provisions of California Rules of Court, rule 3.1184.” (*Hogan, supra*, B248740, pp. 9–10 [rejecting Lings’ argument that Pasternak had obligation to submit memorandum of costs]; see Cal. Rules of Court, rule 3.1184.)

In contrast, California Rules of Court, rule 8.278 applies to an award of “costs” on appeal to “the party prevailing” in the Court of Appeal and therefore does not apply here. The Lings’ citations to *Moulin Electric Corp. v. Roach* (1981) 120 Cal.App.3d 1067 [prevailing party sought fees based on provision in alleged contract], *Hydratec, Inc. v. Sun Valley 260 Orchard & Vineyard Co.* (1990) 223 Cal.App.3d 924 [defendant alleged

itself to be prevailing party in construction lawsuit],¹ *Fennessy v. Deleuw-Cather Corp.* (1990) 218 Cal.App.3d 1192 [prevailing party in wrongful discharge case], and *In re Marriage of Freeman* (2005) 132 Cal.App.4th 1 [sanctions for allegedly increasing cost of litigation unnecessarily], are misleading. None of those cases pertain to a receivership; the Lings are unable to direct us to any case in support of their position.

Moreover, in this case, the trial court, of which the receiver was an appointed officer, had already authorized Pasternak to retain appellate counsel for the prior appeal and to receive compensation for attorneys' fees incurred, subject to final court confirmation. Thus, Pasternak properly filed with the trial court a motion seeking final court confirmation for the requested attorney fees pursuant to the trial court's order; he had no obligation to file a memorandum of costs in addition to the motion.

Similarly, the Lings contend that the trial court improperly awarded Pasternak the litigation costs incurred by Law Firm including charges for Westlaw legal research, postage costs to mail items to the clerk of the appellate court, and photocopying costs. Again relying on its characterization of the award as governed by California Rules of Court, rule 8.278, the Lings argue that Pasternak had an obligation to file a memorandum of costs for certain costs (e.g., mail postage costs) and that the court rules do not authorize the remaining costs. Because the trial court's January 2013 order and California Rules of Court, rule 3.1184 govern the cost reimbursement here, we also reject the Lings' argument on this point.

Next, the Lings contend that there was not substantial evidence supporting Law Firm's hourly rates upon which the trial court based the fee award. Specifically, the

¹ Although the Lings contend that *Hydratec, Inc. v. Sun Valley 260 Orchard & Vineyard Co.*, *supra*, 223 Cal.App.3d 924 "was a receivership case," they are incorrect. Nothing in the opinion indicates that defendant was a court-appointed receiver. What is most troubling to this court is that the second half of the block quotation the Lings provide on page 10 of their opening brief, which seems to suggest the *Hydratec* appellate court referred to a "Receiver" and "Receiver's fees," does not actually appear in the opinion.

Lings contend that Pasternak's motion for attorney fees failed to include (1) a declaration from Law Firm employees identifying their experience in appellate law and their usual hourly rates and (2) a copy of the formal fee agreement between Law Firm and Pasternak.

Lings' contentions are without merit. Substantial evidence supports the trial court's use of Law Firm's stated hourly rates. In his initial application seeking court approval to employ an attorney to defend him in the prior appeal, Pasternak submitted to the trial court a declaration, signed by Pasternak under penalty of perjury, describing his proffered lead counsel's appellate experience and Law Firm's hourly rates at the time. The trial court approved Pasternak's application and issued an order authorizing Pasternak to retain Law Firm and to receive compensation for the fees and costs incurred. In his postremand motion seeking final court confirmation of the attorney fees, Pasternak provided a copy of Law Firm's legal bills reflecting the tasks and hours expended on the prior appeal and Law Firm's hourly rates at the time. Pasternak also provided a declaration, signed under penalty of perjury, declaring that Law Firm's hourly rates are "the various attorneys' then-standard hourly billing rates." The evidence described is sufficient to support the trial court's findings that the hourly rates relied upon are reasonable.

Although the Lings rely on *People ex rel. Dept. of Transportation v. Yuki* (1995) 31 Cal.App.4th 1754 to assert the impropriety of the agreement (between Pasternak and Law Firm) that Law Firm would only receive payment upon a favorable outcome on the merits in the prior appeal, that case is inapposite. In *Yuki*, the defendants and their legal counsel entered into a contingency fee agreement whereby the attorneys would receive payment of 40 percent of any net recovery amount; the trial court subsequently awarded attorney fees based on a surcharge that resulted in a fee of more than 70 percent of the net amount recovered by the defendants at trial. (*Id.* at pp. 1762, 1771–1772.) The appellate court determined the surcharge improper because, inter alia, it bore no relationship to the amount of time actually incurred by the attorneys in preparation and trial of the case. (*Id.* at pp. 1770–1773.) Here, the attorney fee award did not stem from a percentage of a net recovery amount but rather the actual hours expended by Law Firm's employees.

We find no abuse of discretion in the trial court's determination in this respect.

III. The trial court did not abuse its discretion in awarding Pasternak the receiver fees incurred during the first appeal and postremittitur.

The Lings contend that because the receiver retained counsel to represent him in defending the prior appeal, Pasternak (who is also an attorney) cannot simultaneously receive receiver fees incurred by himself and his staff in assisting his retained legal counsel. We disagree.

It is well settled that a receiver's duties include defending a challenge to his or her accounting in a legal proceeding and that the receiver can receive compensation for performing his official duties. (Code Civ. Proc., § 568; *People v. Riverside University, supra*, 35 Cal.App.3d at p. 587.)

Here, the record shows that Pasternak sought fees incurred by himself and his staff, at their standard hourly rate, on tasks related to defending the prior appeal in his role as receiver (e.g., communicating with Law Firm, assisting with compilation of the appellate record, and reviewing drafts of the appellate brief). Such tasks are appropriate for a receiver and his staff to perform to assist their legal counsel in handling the prior appeal, regardless of whether the receiver is also an attorney. Substantial evidence supports the trial court's award of such fees.

The Lings' reliance on *Trope v. Katz* (1995) 11 Cal.4th 274, *Carpenter & Zuckerman, LLC v. Cohen* (2011) 195 Cal.App.4th 373, and *Sands & Associates v. Juknavorian* (2012) 209 Cal.App.4th 1269, is misplaced. Those cases did not concern a receivership but rather improper awards of attorney fees to an attorney, or law firm, who chose to litigate in propria persona rather than retain independent legal counsel. Here, Pasternak retained independent legal counsel to represent him in the prior appeal and did not proceed in propria persona; the challenged fees properly compensated Pasternak for services performed in his role as a receiver, not as a pro. per. attorney litigant.

The Lings essentially contend that while a receiver can receive fees for defending against an unfounded challenge to the receiver's account, a receiver who is also a licensed attorney cannot receive such fees. No case law supports their argument—which,

if correct, would discourage counsel from undertaking receivership positions.

We conclude that the trial court did not abuse its discretion in awarding the challenged fees.

Although Pasternak asks us to consider awarding him the fees incurred by himself, his staff, and his attorneys, during *this* appeal in anticipation that the Lings may file a third appeal, we decline to do so; it is for the trial court to exercise its discretion to award fees in the first instance. (See *Melikian v. Aquila, Ltd., supra*, 63 Cal.App.4th at p. 1368.)

DISPOSITION

The order is affirmed. David J. Pasternak is to recover his costs on appeal.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

CHANEY, J.