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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

JUSTIN SELTZER, Plaintiff and Appellant, v. R.W. SELBY & COMPANY, INC., Defendant and Respondent.	B270168 (Los Angeles County Super. Ct. No. BC476270)

APPEAL from an order of the Superior Court of Los Angeles County. John Shepard Wiley, Jr., Judge. Reversed and remanded with directions.

Law Office of Michael A. Conger, Michael A. Conger; Seltzer Caplan McMahon Vitek, Michael A. Leone for Plaintiff and Appellant.

Michelman & Robinson, Sanford Michelman, Todd H. Stitt, Jordan R. Bernstein, Robin James for Defendant and Respondent.

Appellant Justin Seltzer (Seltzer) appeals from an order awarding $29,409 in attorney fees in his favor following final approval of his class action settlement with respondent R.W. Selby & Company, Inc. (Selby). He contends that because attorney fees were awarded pursuant to Code of Civil Procedure section 1021.5,[1] the trial court erred by calculating attorney fees based on the percentage-of-recovery method rather than the lodestar method. We agree, finding the trial court abused its discretion by failing to calculate attorney fees based on the lodestar method. We reverse the trial court's order and remand the matter for redetermination of a reasonable attorney fees award.

FACTUAL AND PROCEDURAL BACKGROUND

On January 4, 2012, Seltzer, a former tenant of an apartment complex managed by Selby, filed a class action complaint against Selby and others alleging a pattern and practice of improperly withholding security deposits in violation of Civil Code section 1950.5. In June 2014, following the denial of Selby's motion for summary judgment and less than a week before the deposition of Selby's person most knowledgeable was scheduled to take place, the parties reached a settlement.

The proposed settlement defined the class as: "Former tenants in Defendants[']apartment buildings who vacated a lease[d] premises at any time after January 4, 2008, to the date of preliminary approval of class action settlement, who did not receive the full amount of the security deposit." Each class member who submitted a valid claim would be eligible for a payment, as follows: (1) $63 if the individual were charged for painting; (2) $225 if the individual were charged for replacement of carpet; and (3) $288 if the

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

individual were charged for both painting and replacement of carpet. The parties further agreed that attorney fees and costs would be resolved by way of a motion brought by Seltzer pursuant to section 1021.5,[2] which Selby expressly reserved the right to challenge. On March 18, 2015, the trial court granted preliminary approval of the proposed class settlement.

The class consisted of 10,538 members. On May 6, 2015, the claims administrator sent notice to 7,901 class members, the number of individuals who had valid addresses on file. Notice was also published in the Los Angeles Times on May 6, May 7 and May 8, 2015, and Seltzer's counsel obtained media coverage of the settlement on the Los Angeles news outlet KNBC4, which provided a link to the settlement documents. Among other things, the notice informed the class that Seltzer would be seeking attorney fees which then totaled $406,024.92, and that any fees paid would not reduce payments made to the class members.

As of July 24, 2015, the claims administrator had received a total of 755 responses, of which 551 claims were approved, totaling $83,979. No objections to the proposed settlement were received from any of the class members. The Post Office returned to the claims administrator 1,946 of the notices; ultimately, the claims administrator deemed 1,919 notices to be undeliverable. On August 28, 2015, the trial court granted final approval of the class settlement. The trial court found the settlement "[was] in all respects fair, reasonable, adequate and in the best interests of the Settlement Class . . . ."

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[2] Section 1021.5 provides in part: "Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest . . . ."

On September 29, 2015, Seltzer filed his motion for attorney fees. Utilizing the lodestar method, he requested a total award of $945,872.28, consisting of a lodestar of $472,936.14, multiplied by a factor of 2.0, primarily based on arguments that the lawsuit was "'risky'" and there had been a "substantial delay in payment." On November 12, 2015, Selby filed its opposition to the motion, arguing that no attorney fees should be awarded, but to the extent the trial court was inclined to do so, the lodestar figure was not supported by the evidence and was grossly inflated, and the circumstances in this case did not support a multiplier.[3] Neither party argued that attorney fees under section 1021.5 should be calculated using the percentage-of-recovery method.

On December 8, 2015, the trial court granted Seltzer's motion for attorney fees, allowing $29,409, one-third of the $88,227 class recovery. In announcing its ruling, the trial court stated that while it had conducted a lodestar analysis, it decided the better method was to calculate attorney fees based on the percentage-of-recovery approach. The trial court found it was "appropriate to gauge Seltzer's fee recovery" for three reasons. First, Seltzer sought recovery of patently excessive amounts. Second, the settlement was for a nuisance value. According to the trial court, "Selby denied wrongdoing and settled to stop the bleeding. This was not a victory for the public interest." Third, the trial court was concerned about the "familial relationship" between Seltzer and his counsel. Seltzer was related to two of his lawyers, his father and brother. The trial court found there was "reason

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[3] In its opposition, Selby acknowledged that the final payments to the class totaled $88,227, an amount slightly greater than that earlier reported by the claims administrator and that between the date of the claims administrator's declaration and the date Selby filed its opposition to the attorney fees motion, eight additional claims had been approved, increasing the total of approved claims to 559.

to doubt class representative Justin Seltzer ever told his father, his brother, or his father's partners and associates 'I think you should seek more for the class I represent and less for yourselves.'"

On February 4, 2016, Seltzer timely filed a notice of appeal challenging the amount of attorney fees awarded in his favor by the trial court.

CONTENTIONS

Seltzer contends the trial court erred by calculating attorney fees under section 1021.5 based on the percentage-of-recovery method because the Supreme Court made clear in *Serrano v. Priest* (1977) 20 Cal.3d 25, 48, fn. 23 (*Serrano III*) that """[t]he starting point of every fee award . . . must be a calculation of the attorney's services in terms of the time he has expended on the case,""" which is the lodestar method. He also contends the trial court's analysis supporting the fee award is flawed. Seltzer argues that factors such as whether the settlement was for a nuisance value or whether there exists a conflict of interest between himself and his counsel are issues concerning the adequacy of the class action settlement, which the trial court had already resolved by granting final approval of the settlement terms.

Selby contends the trial court did not err because *Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 49 (*Lealao*) "clearly allows a trial court to award attorney fees in a class action based on a percentage of the class recovery, provided that the trial court starts with a lodestar amount and uses the percentage of the recovery as a cross-check" which is what the trial court did. Selby also contends the trial court's reasoning in support of its use of the percentage-of-recovery method is supported by substantial evidence and is therefore reasonable. Thus, according to Selby, "if the trial court's choice of the percentage-of-recovery method was error, it was harmless."

DISCUSSION

The issue on appeal is whether the trial court abused its discretion by calculating attorney fees pursuant to section 1021.5, a fee shifting statute,[4] based solely on the percentage-of-recovery method.

A trial court's determination of reasonable attorney fees is reviewed for abuse of discretion. (*Laffitte v. Robert Half Internat., Inc.* (2016) 1 Cal.5th 480, 488.) "'The scope of discretion always resides in the particular law being applied, i.e., in the "legal principles governing the subject of [the] action . . . ." Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an "abuse" of discretion.'" (*Lealao*, *supra*, 82 Cal.App.4th at p. 25.)

California recognizes "[t]wo primary methods of determining a reasonable attorney fee in class action litigation . . . ." (*Laffitte*, *supra*, 1 Cal.5th at p. 489.) The percentage method "calculates the fee as a percentage share of a recovered common fund or the monetary value of plaintiffs' recovery." (*Ibid.*) The lodestar method is based on "a careful compilation of the time spent and reasonable hourly compensation of each attorney . . . involved in the presentation of the case." (*Serrano III*, *supra*, 20 Cal.3d at p. 48.) The "lodestar" figure may then be increased or reduced "'by applying a positive or negative "multiplier" to take into account a variety of other

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[4] "Class action litigation can result in an attorney fee award pursuant to a statutory fee shifting provision or through the common fund doctrine . . . ." (*Laffitte*, *supra*, 1 Cal.5th at p. 489.) "'Fee shifting,'" which is at-issue in this case, "refers to an award under which a party that did not prevail in the litigation is ordered to pay fees incurred by the prevailing party." (*Ibid.*) In contrast, "fee spreading" occurs "when a settlement or adjudication results in the establishment of a separate or so-called common fund for the benefit of the class. Because the fee awarded class counsel comes from this fund, it is said that the expense is borne by the beneficiaries." (*Lealao*, *supra*, 82 Cal.App.4th at p. 26.)

factors, including the quality of the representation, the novelty and complexity of the issues, the results obtained, and the contingent risk presented.'" (*Laffitte*, *supra*, 1 Cal.5th at p. 489.)

"When a party is entitled to attorney fees under section 1021.5, the amount of the award is determined according to the guidelines set forth by this court in *Serrano III*" which requires the trial court to calculate attorney fees using the lodestar method.[5] (*Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311, 321 (*Press*).) This approach "'anchors the trial court's analysis to an objective determination of the attorney's services, ensuring that the amount awarded is not arbitrary.'" (*Graciano v. Robinson Ford Sales, Inc.* (2006) 144 Cal.App.4th 140, 154.) "If there is no reasonable connection between the lodestar figure and the fee ultimately awarded, the fee does not conform to the objectives established in *Serrano III*, and may not be upheld." (*Press*, at p. 324.)

The trial court here applied the percentage-of-recovery method, awarding Seltzer the amount of $29,409, which was one-third of the class recovery of $88,227. The trial court imposed a one-third split based on its concept that "[a] traditional and accepted division of recovery between attorney and client is one-third for counsel and two-thirds for the client." Selby contends the trial court's calculation is proper because it comports with

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[5] We note that in *Laffitte* the California Supreme Court held that the percentage method may be used to calculate an attorney fees award from a class action common fund as a percentage of the fund. (1 Cal.5th at p. 503.) The Court declined to address "whether or how the use of a percentage method may be applied when there is no conventional common fund out of which the award is to be made . . . ." (*Ibid.*) Thus, until the Supreme Court revisits the standard set forth in *Serrano III*, we are bound by that approach. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d. 450, 455-456.)

the holding in *Lealao* by making a "downward adjustment [to the lodestar figure] based on the percentage of the class recovery."[6] We disagree.

Although *Lealao* suggests it is permissible for a court to "'cross-check'" the lodestar figure against the amount of recovery, that did not happen in this case. (*Lealao*, *supra*, 82 CalApp.4th at p. 49.) The trial court did not use Seltzer's lodestar figure, nor did it use a multiplier or perform a "'cross-check.'" Rather, the trial court devised its own formula, combining the percentage method with its belief in an appropriate fee percentage, which had no "reasonable connection" to the skill, time and effort expended by Seltzer's attorneys. This was an abuse of discretion. (*See Press*, *supra*, 34 Cal.3d at pp. 323-324 [trial court abused its discretion because "arbitrary formula" used to determine the amount of fees was "an illogical measure of the results obtained by the litigation"]; *Graciano v. Robinson Ford Sales, Inc.* (2006) 144 Cal.App.4th 140, 164 [attorney fee award reversed when trial court "imposed a downward adjustment based on its notion of an appropriate contingent fee percentage, regardless of the amount of attorney fees [plaintiff's] counsel assertedly incurred"].)

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6 Selby further contends that if the trial court erred in awarding attorney fees, such error was harmless because Seltzer was not entitled to attorney fees under section 1021.5. Generally, """a respondent who has not appealed from the judgment may not urge error on appeal."'" (*Celia S. v. Hugo H.* (2016) 3 Cal.App.5th 655, 665.) However, section 906 provides a limited exception and permits review "where a respondent asserts an alternate legal theory upon which the judgment may be affirmed . . . ." (*Preserve Poway v. City of Poway* (2016) 245 Cal.App.4th 560, 586.) Section 906 does not apply here because Selby is not asserting additional grounds in support of the calculation of attorney fees, but rather seeks to reverse the portion of the order entitling attorney fees. (*Ibid.*) Because Selby did not file a cross-appeal from the trial court's order, it has forfeited this issue on appeal.

We also find error in the trial court's reasoning in support of its decision to "gauge Seltzer's fee recovery." "Whether an award is justified and what amount that award should be are two distinct questions, and the factors relating to each must not be intertwined or merged." (*Ramos v. Countrywide Home Loans, Inc.* (2000) 82 Cal.App.4th 615, 626.) The trial court commingled its analysis concerning the entitlement to attorney fees under section 1021.5 with its view of the amount which should be awarded. After the trial court granted final approval of the class action settlement, it was not appropriate to use in its analysis factors such as the familial relationship between the class representative and his attorneys.

While we agree with the trial court that exorbitant fee awards "fuel[] public cynicism about class actions claiming to be in the public interest," we also recognize that "awards that are too small can also be problematic, as they chill the private enforcement essential to the vindication of many legal rights and obstruct the representative actions that often relieve the courts of the need to separately adjudicate numerous claims." (*Lealao*, *supra*, 82 Cal.App.4th at p. 53.) This is especially true in cases involving section 1021.5. Our Supreme Court has instructed that attorney fee awards under section 1021.5 "should be fully compensatory" and "absent circumstances rendering the award unjust, an attorney fee award should ordinarily include compensation for *all* the hours *reasonably spent* . . . ." (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1133, original emphasis.) In this case, the benefit to the class resulting from the settlement if *all* class members had presented valid claims was not of mere nuisance value. Based on 10,538 class

members, the total settlement value ranged from $663,894 to $3,034,944.[7] The circumstance that only 559 valid claims were submitted does not diminish the results obtained by the litigation. "[T]he resulting fee must still bear some reasonable relationship to the lodestar figure and to the purpose of the private attorney general doctrine." (*Press*, *supra*, 34 Cal.3d at p. 324.)

DISPOSITION

The trial court's order is reversed as to the amount of attorney fees awarded. The case is remanded to determine a reasonable amount of attorney fees based on the lodestar method. Appellant is entitled to costs and attorney fees on appeal. (Cal. Rules of Court, rule 8.278(a)(1) & § 1021.5.)

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GOODMAN, J.*

We concur:

ASHMANN-GERST, Acting P.J.

HOFFSTADT, J.

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[7] We calculated the settlement range by multiplying the total number of class members (10,538) by the lowest ($63) and highest ($288) amounts eligible for payment on a valid claim.

* Retired judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.