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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sutter)

THOMAS W. VAN ALSTYNE,

Plaintiff and Appellant,

v.

MICHAEL READ et al.,

Defendants and Respondents.

C076039

(Super. Ct. No.
CVCS 10-2717)

Plaintiff Thomas W. Van Alstyne, an attorney appearing in propria persona, unsuccessfully sued his neighbors Steven and Deborah Carter and, as relevant here, was ordered to pay the Carters \$62,638.20 in expert witness fees. Van Alstyne appealed from the postjudgment order awarding expert witness fees, and this court ordered the appeal into mediation, which resulted in a written agreement. The next day, a dispute arose over the scope of that agreement, namely whether it settled the issues raised in the appeal or all issues arising from the underlying lawsuit. When the parties were unable to agree on the scope of the agreement, Van Alstyne initiated the present action against the Carters'

attorney, Michael Read, and Read's law firm Read & Aliotti (collectively Read) for breach of contract, declaratory relief, deceit, strict liability, restitution, and statutory damages.

In this appeal, Van Alstyne challenges the trial court's grant of summary judgment in Read's favor. We shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Underlying Action (Van Alstyne v. Carter, Sutter County Superior Court Case No. CVCS 05-0969)*

In 2005, Van Alstyne sued the Carters, alleging that water from their rice field damaged his property. Read represented the Carters in that action. The trial court granted the Carters' motion for a nonsuit on some of the causes of action, and the jury found against Van Alstyne on his remaining claims. Thereafter, the Carters filed a memorandum of costs, seeking, among other things, expert witness fees in the amount of \$66,525. Van Alstyne filed a motion to tax costs, including the expert witness fees. The trial court awarded the Carters \$15,920.38 in ordinary costs, but taxed their expert witness fees. Van Alstyne appealed from the underlying judgment, and the Carters' cross-appealed from the postjudgment order denying expert witness fees. This court affirmed the judgment, but vacated the postjudgment order taxing the Carters' expert witness fees, and remanded the matter to the trial court to determine the reasonableness of the expert witness fees claimed by the Carters. (*Van Alstyne v. Carter* (Apr. 14, 2009, C056440) [nonpub. opn.])

In November 2009, the trial court issued an order awarding the Carters \$62,638.20 in expert fees. Van Alstyne offered to make immediate payment of \$62,638.20 "as full satisfaction of the Order After Hearing entered herein, subject to stipulation by [the Carters] that such payment is without prejudice to [Van Alstyne's] rights to prosecute any appeal of the above order, and that [the Carters] will promptly execute and deliver to

[Van Alstyne] an Acknowledgement of Full Satisfaction of Judgment therefor.” The offer was rejected, and Van Alstyne deposited \$62,638.20 with the court clerk. This court affirmed the trial court’s postjudgment order awarding expert witness fees. (*Van Alstyne v. Carter* (Oct. 18, 2011, C064004) [nonpub. opn.].)

Meanwhile, on May 19, 2010, while Van Alstyne’s appeal of the post-judgment order awarding expert witness fees was pending, the parties participated in a mediation through this court’s appellate mediation program. At the mediation, the parties reached an agreement that was memorialized in writing. It provides as follows:

“In the appeal between Appellant Mr. Thomas Van Alstyne and Respondent Carter, Case No. C064004, the parties agree as follows:

“1. Mr. Van Alstyne shall pay, by personal check, to Nationwide Mutual Insurance Company . . . the sum of \$46,250 within 10 days of those funds being released to his control from the trust fund at Sutter County Superior Court. Mr. Van Alstyne shall request that the money be released by the Sutter County Clerk within seven (7) days. Both sides agree to execute any documents required for such a release as soon as requested and to take all action necessary to expedite such a release of funds.

“2. Each side shall bear its own attorneys fees and costs for this action and neither side shall be considered a prevailing party for any purpose.

“3. A copy of this agreement shall be valid as an original and the parties may execute duplicate originals. Facsimile signatures are deemed originals for all purposes.

“4. This agreement shall be deemed a stipulation for purposes of dismissing the present appeal and the parties request that the Court of Appeal dismiss the appeal directing each side to bear their own attorneys’ fees and costs. Both sides want this agreement to be enforceable.

“5. Both Nationwide Mutual Insurance Company and Mr. Read agree to provide Mr. Alstyne with their respective T.I.N. numbers within a reasonable time and before Mr. Van Alstyne issues the above referenced check to Nationwide for \$46,250.”

The agreement was signed on May 19, 2010, by Van Alstyne, a representative of Nationwide, and Read.

The following day, Van Alstyne mailed Read a proposed stipulation, stating in pertinent part: “The parties have reached a contingent settlement of all matters in this action and hereby stipulate and agree that the aforementioned funds on deposit shall be released immediately to Thomas Van Alstyne.” Read objected to the inclusion of the phrase, “The parties have reached a contingent settlement of all matters in this action” on the ground that “[t]he only matter that has been settled is the pending appeal of the order awarding expert witness fees.” Read proposed the following language instead: “The parties hereby stipulate and agree that the aforementioned funds on deposit shall be released immediately to Thomas Van Alstyne.” On June 3, 2010, this court ordered that all proceedings in the appeal were to recommence as if the notice of appeal had been filed June 3, 2010.

B. The Present Action (Van Alstyne v. Read, Sutter County Superior Court Case No. CVCS 10-2717)

In November 2010, Van Alstyne sued Read. The operative first amended complaint alleges causes of action for breach of contract, declaratory relief, deceit, strict liability, restitution, and statutory damages.¹

The trial court granted Read’s motion for summary judgment, finding, among other things, that “there was no contract in existence between the parties.”

DISCUSSION

The standard of review for an order granting a motion for summary judgment is de novo. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860.) We apply the same

¹ The complaint also alleges a cause of action for violation of the Fair Debt Collection Practices Act (15 U.S.C. § 1692 et seq.); however, that cause of action was removed to federal court, and is stayed pending the resolution of this action.

three-step process as the trial court. “Because summary judgment is defined by the material allegations in the pleadings, we first look to the pleadings to identify the elements of the causes of action for which relief is sought. . . . We then examine the moving party’s motion, including the evidence offered in support of the motion.” (*Baptist v. Robinson* (2006) 143 Cal.App.4th 151, 159.) A defendant moving for summary judgment has the initial burden of showing that a cause of action lacks merit because one or more elements of the cause of action cannot be established or there is a complete defense to that cause of action. (Code Civ. Proc., § 437c, subd. (p)(2); *Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 168-169.)² If the defendant fails to make this initial showing, it is unnecessary to examine the plaintiff’s opposing evidence and the motion must be denied. (§ 437c, subd. (p)(2); *Teselle*, at p. 169.) However, if the moving papers make a prima facie showing that justifies a judgment in the defendant’s favor, the burden shifts to the plaintiff to make a prima facie showing of the existence of a triable issue of material fact. (§ 437c, subd. (p)(2); *Teselle*, at p. 169.)

We may affirm on any ground supported by the record; we are not bound by the trial court’s reasoning. (*California School of Culinary Arts v. Lujan* (2003) 112 Cal.App.4th 16, 21-22; *Salazar v. Southern Cal. Gas Co.* (1997) 54 Cal.App.4th 1370, 1376.)

I

Summary Judgment Was Properly Granted as to the Breach of Contract and Deceit Causes of Action

The operative first amended complaint alleges that Read anticipatorily breached the agreement reached at the appellate mediation by denying that the agreement settled the entire underlying lawsuit, including any claims for attorney fees and any derivative claims such as malicious prosecution. With respect to the deceit cause of action, the

² Further undesignated statutory references are to the Code of Civil Procedure.

complaint further alleges that Read entered into the agreement “without any intention of performing a full release and waiver of claims against [Van Alstyne] arising from the underlying litigation.”

Below, Read asserted that Van Alstyne could not prevail on his breach of contract cause of action because Read was not a party to the agreement reached at the appellate mediation. In support of his assertion, Read noted that he represented the Carters in the underlying litigation that gave rise to the appeal that was the subject of the mediation, and that the agreement itself states, “In the appeal between Appellant Mr. Thomas Van Alstyne and Respondent Carter, Case No. C064004, the parties agree” In his opposition to the motion, Van Alstyne notes that Read signed the agreement, without an designation of agency” While Van Alstyne is correct, he failed to point to any evidence that would support a finding that Read signed the agreement in any capacity other than as the Carters’ attorney. Van Alstyne’s assertion on appeal that “READ had no authority to compromise claims for the original defendant CARTER without his client’s signature” is specious. Section 283, relied on by Van Alstyne, provides that an attorney has the authority “[t]o bind his client in any of the steps of an action or proceeding by his agreement filed with the Clerk, or entered upon the minutes of the court, and not otherwise[.]” As our Supreme Court has explained, “This provision represents neither a grant nor a limitation of substantive authority; rather, it is a prescription of the form of stipulations.” (*Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 404, fn. 7.) Courts have interpreted this statute to mean an “attorney is authorized by virtue of his employment to bind the client in procedural matters arising during the course of the action but he may not impair the client’s substantial rights or the cause of action itself. [Citations.]” (*Linsk v. Linsk* (1969) 70 Cal.2d 272, 276; see also *Bowden v. Green* (1982) 128 Cal.App.3d 65, 73.) An attorney may not compromise or surrender a substantial right of the client without his or her actual knowledge and express consent. (*Levy v. Superior Court* (1995) 10 Cal.4th 578, 583 (*Levy*).) In *Levy*, also relied on by

Van Alstyne, our Supreme Court considered “whether the written stipulation must be signed personally by the litigant . . . to create a settlement enforceable under section 664.6” (*id.* at p. 580) and concluded that the written stipulation must be signed by the litigants if they wish to avail themselves of the procedure set forth in section 664.6. (*Levy*, at pp. 583-584.) Section 664.6 sets forth an expedited procedure to enforce settlement agreements.³ (*Levy*, at p. 584-585.) Significantly, that procedure is not at issue here. Thus, the fact that the Carters did not personally sign the agreement or provide Read with written authorization to do so is of no consequence, and certainly does not constitute evidence that Read signed the agreement in his individual capacity as Van Alstyne appears to suggest. Having failed to establish a triable issue of material fact as to whether Read was a party to the agreement reached at the mediation, summary judgment was properly granted as to the breach of contract cause of action.

Even assuming for argument’s sake that Van Alstyne did establish a triable issue of material fact on that issue, the agreement reached at the mediation is not susceptible to the interpretation urged by Van Alstyne, namely that it encompassed all claims arising from the underlying litigation.

“In interpreting a written agreement, we ‘look first to the language of the contract . . . to ascertain its plain meaning or the meaning a layperson would ordinarily attach to it.’ [Citation.] ‘A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful.’ (Civ. Code, § 1636.) The intent is to be inferred, if possible, solely from the

³ Section 664.6 provides in its entirety: “If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement.”

written provisions of the contract. (Civ. Code, § 1639.) Language in a contract must be interpreted as a whole and in the circumstances of the case, and cannot be deemed ambiguous in the abstract.” (*In re Marriage of Facter* (2013) 212 Cal.App.4th 967, 978, italics omitted.) “ ‘[I]t is the objective intent, as evidenced by the words of the contract, rather than the subjective intent of one of the parties, that controls interpretation’ [citation]. The parties’ undisclosed intent or understanding is irrelevant to contract interpretation.” (*Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2003) 109 Cal.App.4th 944, 956.)

The agreement provides pertinent part: “In the appeal between Appellant Mr. Thomas Van Alstyne and Respondent Carter, Case No. C064004, the parties agree as follows:

“1. Mr. Van Alstyne shall pay, by personal check, to Nationwide Mutual Insurance Company . . . the sum of \$46,250 within 10 days of those funds being released to his control from the trust fund at Sutter County Superior Court. Mr. Van Alstyne shall request that the money be released by the Sutter County Clerk within seven (7) days. Both sides agree to execute any documents required for such a release as soon as requested and to take all action necessary to expedite such a release of funds.

“2. Each side shall bear its own attorneys fees and costs for this action and neither side shall be considered a prevailing party for any purpose. [¶] . . . [¶]

“4. This agreement shall be deemed a stipulation for purposes of dismissing the present appeal and the parties request that the Court of Appeal dismiss the appeal directing each side to bear their own attorneys’ fees and costs. Both sides want this agreement to be enforceable.”

The agreement was entered into at the court ordered mediation of Van Alstyne’s appeal of the trial court’s order awarding the Carters expert witness fees. The agreement itself states at the outset that it is made in the context of that appeal. It says nothing about settling the “entire lawsuit” or releasing “derivative claims.” Rather, it states that the

agreement shall be “deemed a stipulation for purposes of dismissing *the present appeal*.” (Italics added.) Van Alstyne’s reliance on the phrase “this action” in paragraph 2 of the agreement is misplaced. When read in the context of the entire agreement and the circumstances in which the agreement was entered, it is clear that it does not extend to the entire underlying action. Thus, Read’s statement that “[t]he only matter that has been settled is the pending appeal of the order awarding expert witness fees,” was accurate and did not constitute an anticipatory breach of the agreement reached at the mediation. Summary judgment was properly entered as to the breach of contract and deceit causes of action.

II

Summary Judgment Was Properly Granted as to the Declaratory Relief Cause of Action

The operative complaint alleges that Van Alstyne and Read are parties to the written agreement executed at the appellate mediation, and seeks a declaration that such agreement “is a full and final settlement of all matters arising from the underlying litigation in Sutter County Case No. CVCS 05-00969, and operates as a full release by Defendants, their agents, principals, and assigns of all matters arising therefrom.” The complaint further alleges that Van Alstyne “made a written offer of tender of the underlying cost award as set for herein pursuant to Civil Code §1504” and seeks a declaration that such tender “stop[ped] any accrual of interest to that judgment, and has the same effect upon all its incidents as performance by [Van Alstyne] of the obligation therein.”

To prevail on a declaratory relief cause of action, a plaintiff must establish the existence of an “actual controversy relating to the legal rights and duties *of the respective parties*” under a written instrument. (§ 1060, italics added.)

As detailed above, Van Alstyne failed to establish a triable issue of material fact as to whether Read was a party to agreement executed at the appellate mediation, and we have concluded as a matter of law that the agreement did not constitute a full and final

settlement of all matters arising from the underlying litigation in Sutter County case No. CVCS 05-00969. Nor did it operate “as a full release . . . of all matters arising therefrom.” Accordingly, Van Alstyne is not entitled to a declaration declaring otherwise.

Turning to the declaratory relief he seeks related to his offer of tender, Civil Code section 1504 provides in pertinent part: “An offer of payment . . . stops the running of interest on the obligation, and has the same effect upon all its incidents as a performance thereof.” Here, Van Alstyne offered to pay the Carters “\$62,638.20 as full satisfaction of the Order After Hearing entered herein,” subject to certain conditions. As the offer states, it was intended to satisfy a postjudgment order awarding the Carters \$62,638.20 in expert fees. The clear purpose of this aspect of the declaratory relief cause of action is to establish that Van Alstyne’s offer stopped the running of interest on the cost award. As previously discussed, it is undisputed that Read was not a party to the underlying action in which the award was made. Rather, he represented the Carters, in whose favor the award was made, and to whom the offer was made. As Van Alstyne acknowledges in his opening brief, Read acted as an agent for the Carters when he declined the offer.⁴ Accordingly, the declaratory relief Van Alstyne seeks concerning his offer of tender can only be granted, if at all, in an action against the Carters.

Summary judgment was property entered as to the declaratory relief cause of action.

⁴ While Van Alstyne claims that “it is uncertain who owned the judgment awarding expert witness costs when READ declined the Offer,” he goes on to point to evidence which he contends suggests Nationwide had an interest in the obligation. Such evidence, however, fails to establish a triable issue of material fact as to whether Read had an interest in the obligation or any interest which may have accrued.

III

Summary Judgment Was Properly Granted as to the Strict Liability Cause of Action

The operative complaint alleges that “Read and his law firm willfully ignored a deposition subpoena lawfully served upon them,” and thus, Van Alstyne is entitled to statutory damages as set forth in section 1992 of \$500, plus all damages incurred as a result of Read and his firm’s disobedience.

Section 1992 provides: “A person failing to appear pursuant to a subpoena or a court order also forfeits to the party aggrieved the sum of five hundred dollars (\$500), and all damages that he or she may sustain by the failure of the person to appear pursuant to the subpoena or court order, which forfeiture and damages may be recovered in a civil action.”

The deposition subpoena at issue here was served in 2009 in connection with the trial court’s determination of the reasonableness of the expert witness fees sought by the Carters. It is undisputed that while Read objected to the subpoena on behalf of the Carters, documents responsive to the subpoena ultimately were produced. Moreover, to avail himself of the benefits of section 1992, Van Alstyne was required to bring the alleged disobedience to the attention of the trial court. (*Filipoff v. Superior Court of Los Angeles County* (1961) 56 Cal.2d 443, 450-451.) He failed to do so. While he initially brought a motion to declare the validity of the subpoena, he withdrew the motion after the documents were produced. Thus, summary judgment was properly granted as to the strict liability cause of action.

IV

Summary Judgment Was Properly Granted as to the Restitution Cause of Action

The operative complaint alleges that Van Alstyne is entitled to restitution for money he paid in discovery sanctions. More particularly, the complaint alleges that when those sanctions were reversed on appeal, Read failed to return the full amount, with

interest. Because it is undisputed that Van Alstyne was paid the sums due him, summary judgment was properly entered on his restitution cause of action.

It is undisputed that Van Alstyne was entitled to \$4,331.30, plus \$100.16 in interest. It is also undisputed that he was paid \$4,331.30, plus \$136.16. Contrary to Van Alstyne's apparent assertion, the origins of these funds have no bearing on his restitution cause of action. It is undisputed that Van Alstyne has received the monies he is due in connection with the discovery sanctions, and summary judgment was properly granted as to the restitution cause of action.

V

Summary Judgment Was Properly Granted as to the Statutory Damages Cause of Action

The operative complaint alleges that Van Alstyne is entitled to statutory damages pursuant to section 724.050 based on Read's failure to provide him with a *full* acknowledgement of satisfaction of the judgment against him.

This cause of action is based on Read's receipt, on behalf of the Carters, of the \$62,638.20 Van Alstyne had deposited in the Sutter County Superior Court following the trial court's order awarding the Carters expert witness fees in that amount. Following receipt of the funds, Read, on behalf of the Carters, executed an "Acknowledgement of Satisfaction of Judgment (*Partial*)," which designated "Steven and Debbie Carter" as judgment creditors. (Italics added.)

Section 724.050, subdivision (a) provides in pertinent part: "If a money judgment has been satisfied, the judgment debtor . . . may serve personally or by mail on the judgment creditor a demand in writing that the judgment creditor do one or both of the following: [¶] . . . [¶] (2) Execute, acknowledge, and deliver an acknowledgment of satisfaction of judgment to the person who made the demand." "If the judgment has been satisfied, the judgment creditor shall comply with the demand not later than 15 days after actual receipt of the demand." (§ 724.050, subd. (c).) "If the judgment has been satisfied and the judgment creditor fails without just cause to comply with the demand within the

time allowed, the judgment creditor is liable to the person who made the demand for all damages sustained by reason of such failure and shall also forfeit one hundred dollars (\$100) to such person.” (§ 724.050, subd. (e).)

Any claim Van Alstyne may have under section 724.050 is against the Carters, not Read. That section expressly states that it is the judgment creditor who must comply with a demand for an acknowledgement of satisfaction of judgment. As the trial court observed, neither Read nor his law firm were parties to the litigation that resulted in the order to pay the expert witness fees at issue, and thus had no obligation to acknowledge payment. “ ‘Judgment creditor’ means the person in whose favor a judgment is rendered or, if there is an assignee of record, means the assignee of record.” (§ 680.240.) Van Alstyne does not contend that Read was the assignee of record; rather, he claims that, because no interest was owed, Read was obligated to execute a full acknowledgement of satisfaction pursuant to his agency authority under section 283. That section provides that an attorney has the authority “to receive money claimed by his client in an action or proceeding during the pendency thereof, or after judgment, unless a revocation of his authority is filed, and upon the payment thereof, and not otherwise, to discharge the claim or acknowledge satisfaction of the judgment.” Van Alstyne also cites section 724.060, subdivision (c), which provides that the acknowledgement of satisfaction of judgment shall be executed and acknowledged by the judgment creditor, assignee of record, or the attorney for the judgment creditor. Van Alstyne confuses authority with duty. While Van Alstyne may be correct that his offer stopped the accrual of interest and that he is therefore entitled to a full acknowledgement of satisfaction (see *Stockton Theatres, Inc. v. Palermo* (1961) 55 Cal.2d 439, 442-443), it is the judgment creditor, not his or her counsel, who is liable under section 724.050 for the failure to provide it. (§ 724.050,

