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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

FISHMAN, LARSEN, GOLDRING &
ZEITLER,

Plaintiff and Respondent,

v.

BETTY BROOKS,

Defendant and Appellant.

F062012

(Super. Ct. No. 151586)

OPINION

APPEAL from a judgment of the Superior Court of Merced County. Brian L. McCabe, Judge.

Betty Brooks, in pro. per., for Defendant and Appellant.

Doerksen Taylor and Charles L. Doerksen for Plaintiff and Respondent.

-ooOoo-

Appellant Betty Brooks hired respondent, the law firm of Fishman, Larsen, Goldring & Zeitler, to represent her with regard to ongoing litigation over appellant's deceased parents' trusts. When appellant refused to pay the legal fees she had incurred, respondent filed the underlying action to recover those fees. On respondent's motion, the trial court granted summary judgment in respondent's favor.

Appellant contends the trial court erred. According to appellant, respondent was not entitled to collect its fees because the services were rendered in contradiction of the rules of professional responsibility. Appellant argues respondent committed fraud and failed to disclose conflicts of interest.

The trial court correctly granted summary judgment. Respondent met its burden of proving each element of its cause of action entitling it to judgment as a matter of law. Appellant failed to produce admissible evidence showing the existence of either a triable issue of material fact or a defense to respondent's cause of action. Therefore, the judgment will be affirmed.

BACKGROUND

Appellant was a beneficiary of two trusts that were created by her now deceased parents, Ray and Leona Buie. These trusts consisted primarily of farm real property and farm equipment. The trust real property was leased to various commercial tenants and used for active farming operations. Following Ray Buie's death, Chris Laveglia took over managing the trusts as a successor trustee.

In August 2006, appellant hired respondent to oppose an accounting prepared by Laveglia and to remove Laveglia as the successor trustee. Respondent sent an engagement letter to appellant regarding respondent's representation with regard to the Buie trusts. This letter stated that the fees would be based on time and labor required and that the account would be payable when billed. Appellant consented to this arrangement and returned a signed copy of the letter.

Over the course of respondent's representation, appellant's goals were met. In January 2007, the trial court refused to approve the accounting submitted by Laveglia and appointed an independent accountant to prepare the trust accounting. In April 2007, Laveglia was removed as the trustee and a successor trustee, who was approved by all the parties, was appointed.

As the fees mounted, respondent modified the engagement letter's arrangement for payment of fees. In February 2007, respondent agreed to wait for the substantial payment of its fees until appellant received distributions from the trusts *or* "as a result of our petition, the court has ordered the trust to reimburse you for our fees." Respondent also agreed to waive interest on the unpaid balance so long as appellant made \$500 per month payments. Appellant acknowledged this modification. In March 2007, she wrote to respondent stating "If you had not agreed to take my case, wait for your money, not charge me any interest on the unpaid balance, and only required me to pay you \$500 monthly on account for your services, I would not have been able to move forward."

By letter dated July 13, 2007, respondent informed appellant that, because appellant had failed to respond to repeated efforts to contact her, respondent was no longer able to act as appellant's counsel. Respondent enclosed a substitution of attorney and requested that appellant sign and return it. Respondent also enclosed its latest bill and noted that no \$500 monthly payments had been made since April.

By letter dated July 18, 2007, appellant responded:

"You recently sent me a bill for attorney fees. I am returning said bill to you. I do not owe you any attorney fees. I hired you to remove Christopher Laveglia (hereafter Christopher); as successor trustee. Christopher resigned. I won. Christopher committed misconduct Although Christopher resigned, it does not affect his liability for his acts or omissions. Christopher owes you your attorney fees. If you want your attorney fees, you are going to have to surcharge Christopher as the judge stated at the April 02, 2007 hearing. This will be at your own expense, not mine."

Appellant signed the substitution of attorney on July 29, 2007, and began representing herself as of August 2, 2007.

In September 2008, respondent filed the underlying complaint for breach of contract to collect the approximately \$106,000 in legal fees owed by appellant. A few months later, respondent obtained a prejudgment writ of attachment for its fees.

Appellant demanded nonbinding fee arbitration. Following a hearing, the fee arbitration panel awarded respondent \$66,576. Appellant rejected the award.

Respondent then filed a motion for summary judgment or, in the alternative, summary adjudication as to the first cause of action for breach of contract. In opposition, appellant filed a declaration with attached exhibits. Respondent filed objections to all but the first two paragraphs of appellant's declaration and all but two of the exhibits.

Following a hearing, the trial court sustained all of respondent's objections to appellant's evidence. The trial court also granted appellant's oral motion to strike any reference to the parties' prior arbitration.

The court noted that appellant failed to comply with the procedural requirements of Code of Civil Procedure section 437c, subdivision (b)(3), in that she failed to file a memorandum of points and authorities in opposition to the motion and failed to state whether she disputed the material facts respondent contended were undisputed. Nevertheless, the court decided to exercise its discretion and review appellant's documents to determine whether appellant had met her burden of showing that a triable issue existed as to respondent's breach of contract claim.

Upon review, the court concluded that respondent had met its burden of showing that a prima facie case for breach of contract existed and that there was no defense. The court found that appellant did not dispute that she entered into a fee agreement with respondent, that respondent performed legal services, that appellant stopped paying for those services and that appellant had an outstanding balance of \$105,986.12. The court further found that appellant had failed to raise a triable issue as to respondent's breach of

contract claim or as to any asserted affirmative defense. Accordingly the court granted respondent's motion for summary judgment. Appellant's notice of appeal is from this judgment.

DISCUSSION

1. *Standard of review*

A party moving for summary judgment bears the burden of persuading the trial court that there is no triable issue of material fact and that it is entitled to judgment as a matter of law. (*Brown v. Ransweiler* (2009) 171 Cal.App.4th 516, 525 (*Brown*)).) Once the moving party meets this initial burden, the burden shifts to the opposing party to establish, through competent and admissible evidence, that a triable issue of material fact still remains. If the moving party establishes the right to the entry of judgment as a matter of law, summary judgment will be granted. (*Ibid.*)

On appeal, the reviewing court must assume the role of the trial court and reassess the merits of the motion. (*Brantley v. Pisaro* (1996) 42 Cal.App.4th 1591, 1601.) The appellate court applies the same legal standard as the trial court to determine whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law. The court must determine whether the moving party's showing satisfies his or her burden of proof and justifies a judgment in the moving party's favor. (*Brown, supra*, 171 Cal.App.4th at p. 526.) In doing so, the appellate court must view the evidence and the reasonable inferences therefrom in the light most favorable to the party opposing the summary judgment motion. (*Essex Ins. Co. v. Heck* (2010) 186 Cal.App.4th 1513, 1522.)

Where, as here, the moving party is the plaintiff, that party meets its statutory burden of showing that there is no defense to a cause of action if it has proved each element of the cause of action entitling the party to judgment on that cause of action. (*Oldcastle Precast, Inc. v. Lumbermens Mutual Casualty Co.* (2009) 170 Cal.App.4th 554, 562 (*Oldcastle Precast*)).) The burden then shifts to the defendant to produce

admissible evidence showing that “a triable issue of one or more material facts exists as to that cause of action or a defense thereto.” (*Riverside County Community Facilities Dist. v. Bainbridge* 17 (1999) 77 Cal.App.4th 644, 653.) The plaintiff’s initial burden does not include disproving any affirmative defenses asserted by the defendant. Rather, the burden is on the defendant to demonstrate that a defense exists. (*Oldcastle Precast, supra*, at p. 564.)

2. Respondent met its initial burden of proof.

Respondent moved for summary judgment on its breach of contract cause of action. To recover for breach of contract, a plaintiff must plead and prove “(1) a contract, (2) plaintiff’s performance or excuse for nonperformance, (3) defendant’s breach, and (4) damage to plaintiff.” (*Walsh v. West Valley Mission Community College Dist.* (1998) 66 Cal.App.4th 1532, 1545 (*Walsh*).

Here, as found by the trial court, respondent established these elements and appellant did not dispute that they existed. The parties entered a contract under which respondent was to perform legal services for appellant for an hourly fee, respondent performed the legal services, and appellant stopped paying for the legal services, leaving an outstanding balance of approximately \$106,000. Accordingly, respondent met its initial burden of proof on its breach of contract cause of action.

3. Appellant did not meet her burden of establishing either a triable issue of material fact or a defense.

The grounds for reversal urged by appellant relate to an alleged procedural irregularity, a claimed disputed fact, and asserted defenses. However, appellant does not dispute that a contract existed, that respondent performed legal services and that she did not pay for all of the services rendered, i.e., the elements of a breach of contract cause of action.

Appellant argues that the summary judgment must be reversed because respondent did not follow all of the procedural requirements. According to appellant, respondent’s

separate statement of undisputed facts was not in the proper format. Regardless, appellant did not make this objection in the trial court and therefore cannot raise this issue on appeal. New defense theories may not be asserted for the first time on appeal. (*Bardis v. Oates* (2004) 119 Cal.App.4th 1, 13-14, fn. 6.)

Based on a paragraph in the complaint, appellant asserts that there was an issue of disputed fact. In its complaint, respondent alleged that “Ms. Brooks discharged Plaintiff as her counsel in all matters.” Appellant claims that this statement is false because she did not discharge respondent but rather respondent withdrew as her counsel. However, the manner in which this attorney-client relationship terminated is irrelevant to respondent’s breach of contract claim. Appellant was liable for the fees incurred under the contract regardless of whether she discharged respondent or respondent withdrew. Proof that appellant discharged respondent was not an element of the cause of action. (*Walsh, supra*, 66 Cal.App.4th at p. 1545.) Therefore, appellant has not shown the existence of a triable issue of *material fact*.

As a defense, appellant contends that respondent was not entitled to recover its fees because two of the attorneys who represented her did not disclose that they had conflicts of interest. The Buie trusts had loans from RCO Ag Credit, Anderson Clayton and Bank of America. According to appellant, trust property was sold to pay these creditors. Appellant alleges that Robert Fishman had a prior relationship with Anderson Clayton and Bank of America because Fishman’s former law firm represented these parties while Fishman was with that firm. Similarly, appellant alleges that Peter Zeitler had a prior relationship with RCO Ag Credit because Zeitler’s former law firm represented RCO Ag Credit while Zeitler was with that firm. Appellant argues that Fishman and Zeitler intentionally concealed these past relationships.

However, appellant did not produce any admissible evidence to support these claims. The majority of appellant’s declaration in opposition to the summary judgment motion and the attached exhibits were ruled inadmissible. Appellant has not challenged

this evidentiary ruling on appeal and thus we presume it was correct. (*Stockinger v. Feather River Community College* (2003) 111 Cal.App.4th 1014, 1022.) Accordingly, appellant's evidence consisted of her recitation of her family history (pars. 1 & 2 of appellant's declaration), an incomplete copy of the supplemental objection to the petition of account and approval of trustee's fees (exh. 10), and a redacted page from a trust accounting (exh. 21). Thus, appellant did not meet her burden of producing admissible evidence showing a triable issue of material fact or a defense.

In her briefs, appellant relies on her declaration in support of her motion for a new trial and the attached exhibits to support her argument. However, these documents were filed after entry of the judgment that appellant appealed from. Accordingly, this evidence will not be considered. When reviewing a trial court's judgment, the appellate court will consider only matters that were part of the record when the judgment was entered. (*Reserve Insurance Co. v. Pisciotto* (1982) 30 Cal.3d 800, 813.)

Moreover, even if we were to consider appellant's evidence, she has not demonstrated that either Fishman or Zeitler had a conflict of interest due to successive representation of clients with potentially adverse interests.

Under rule 3-310(E) of the Rules of Professional Conduct of the State Bar of California, an attorney cannot, "without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment." The primary purpose of this rule is to protect the confidential relationship between attorney and client. (*Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 619.) Thus, for the rule to apply there must be a substantial relationship between the current case and the matters handled by the firm-switching attorney's former firm. The question is whether confidential information material to the current dispute would normally have been imparted to the attorney by virtue of the nature of the former

representation. (*Ibid.*; *Adams v. Aerojet-General Corp.* (2001) 86 Cal.App.4th 1324, 1331, 1340.)

Here, there is no evidence that the matters handled by the former firms of Fishman and Zeitler had any relationship to respondent's representation of appellant. The former firms performed unspecified work for these lenders. There is no evidence that this work related to the Buie trust loans. More importantly, respondent's representation of appellant was not related to the loans from Bank of America, Anderson Clayton or RCO Ag Credit. Rather, appellant hired respondent to oppose an accounting and remove the successor trustee. Since the evidence proffered by appellant does not demonstrate that either Fishman or Zeitler had a conflict of interest, appellant failed to meet her burden of establishing this asserted defense.¹

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to respondent.

Kane, J.

WE CONCUR:

Wiseman, Acting P.J.

Cornell, J.

¹ Relying on the arbitration hearing transcript, respondent argues that this defense fails because appellant admitted under oath that the various loans were valid loans and that neither she nor the trusts had any dispute with the lenders. Respondent acknowledges that the trial court excluded the evidence relating to the arbitration proceeding and asserts that it should have been admitted. However, because respondent did not appeal this evidentiary ruling, we lack jurisdiction to review it. (*Unilogic, Inc. v. Burroughs Corp.* (1992) 10 Cal.App.4th 612, 623.)