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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DAVID AZOULAY,

Plaintiff and Appellant,

v.

VALLEY VIEW MEDICAL CLINIC INC.
et al.,

Defendants and Respondents.

G044942

(Super. Ct. No. 39-2008-00115416)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, David T. McEachen, Judge. Affirmed in part and reversed in part with directions.

Law Offices of William B. Hanley and William B. Hanley; Gerald N. Shelley, for Plaintiff and Appellant.

Jones Day and Thomas R. Malcolm; Roland E. Bye, for Defendants and Respondents.

INTRODUCTION

Appellant David Azoulay, a physical therapist, alleged that he formed a partnership with respondent Bill Yeung, a physician, and his wife, respondent Janet Yeung, to provide physical therapy services at their medical clinic in La Mirada.¹ When the Yeungs sold the clinic in 2008, Azoulay sued them for breach of fiduciary duty and constructive fraud.²

Pursuant to respondents' motion in limine, the court tried the equitable defense of illegality first. The court rendered judgment for the Yeungs, ruling that if any partnership had existed – a doubtful proposition – it would have been illegal under the Labor Code, which prohibits physicians from referring patients to health care entities in which they have a financial interest. The court also denied Azoulay's motion to tax \$35,740 in costs requested by the Yeungs. The bulk of the costs were for expert witness fees, which the Yeungs claimed after Azoulay and his coplaintiff professional corporation did not accept offers to compromise.

We affirm for the most part. The court correctly found that if any partnership existed, it would have been an illegal one; being a physician, Dr. Yeung cannot refer his patients to physical therapy services in which he has a financial interest, unless certain statutory exceptions apply. They do not apply in this case. The court cannot enforce an illegal agreement, by estoppel or otherwise, in the absence of unjust enrichment.

We part company with the trial court on the motion to tax costs. We agree that the two offers to compromise were both valid and reasonable. The court was therefore within its discretion to award reasonable sums to cover expert witness fees. The fees, however, must be for actual expert witnesses, not for extra lawyers. One of the

¹ Azoulay also sued Dr. Yeung's professional corporation, Valley View Medical Clinic, Inc. For convenience, we refer to all respondents as the Yeungs.

² Azoulay dismissed a third cause of action just before trial.

Yeungs' experts was a lawyer, and it appears to us that he was hired to do legal research on the successful illegality defense. Accordingly, we return the motion to tax costs to the trial court for further inquiry as to the nature of the Yeungs' legal expert's services.

FACTS

The Yeungs operated Valley View Medical Clinic, in which Dr. Yeung treated primarily industrial accident patients covered by workers' compensation insurance. Over two decades, the Yeungs had built up an extensive network of several hundred referring employers, who sent their injured workers to the clinic for diagnosis and treatment.

In 2002, Dr. Yeung and his wife met with Azoulay several times to discuss his providing physical therapy services in their clinic. Azoulay maintained they formed a partnership with an indefinite term, one lasting as long as he (Azoulay) was able to work. Azoulay initially operated out of the same suite as the clinic; between January 2004 and November 2008, when Dr. Yeung's medical practice was sold, Azoulay (and later his corporation) operated out of another suite across the hall, which had been rented by Dr. Yeung's professional corporation. The clinic handled billing and collections for the physical therapy practice; Azoulay received 60 percent of the receipts and the clinic 40 percent. The rent on the additional suite was evenly split.

The Yeungs maintained that Azoulay was at all times an independent contractor, hired to provide physical therapy services to the clinic. Twice a month, Azoulay received 60 percent of the physical therapy receipts as his compensation. There was no written agreement of any kind between the Yeungs and Azoulay. At trial, Dr. Yeung testified about his understanding that the law prohibited physicians from entering into financial relationships with persons or entities to which they refer patients for health care services.

Dr. Yeung sold his practice to Concentra in early November 2008, and Azoulay was notified of the sale approximately 10 to 15 days before it took effect.³ Azoulay filed suit on November 26, 2008. Among other things, Azoulay claimed the sale to Concentra included his physical therapy practice at the clinic, and he was therefore entitled to 60 percent of the sale proceeds attributable to the physical therapy part of the practice.

The Yeungs moved in limine to have the equitable issues tried first, particularly the issue of whether any partnership between them and Azoulay would be illegal. The court granted this motion. After a one-day bench trial, the court found in favor of the Yeungs. It found that if the partnership existed, it would have been both at-will and illegal. It also did not find any equitable reason to enforce the partnership despite its illegality.

After the court entered its judgment, the Yeungs moved for \$35,740 in costs, which included \$26,000 for expert fees authorized by statute. One expert, Charles Oppenheim, was identified in the expert witness declaration as an attorney with a specialty in health law. He prepared a memorandum, in which he stated that he had been asked to opine “whether (1) a physician or professional medical corporation wholly owned by a physician, on the one hand, and (2) a physical therapist or physical therapy professional corporation wholly owned by a physical therapist, on the other hand, could form a partnership in California for the purpose of providing physical therapy services to the physician’s patients. . . .” He subsequently gave it as his opinion that such a partnership, if it existed, “would have violated California law.” After a lengthy discussion of the relevant statutes, Oppenheim concluded, “Dr. Yeung would have been

³ Dr. Yeung was 67 years old and suffering from Meniere’s disease, which causes dizzy spells and hearing loss, at the time he decided to sell his practice. His decision was also influenced by the state of the economy and by Concentra’s offer to consider hiring the clinic’s employees.

prohibited from referring his workers' compensation patients to the Alleged Partnership for physical therapy services” Opposing Azoulay’s motion to tax costs, the Yeungs’ counsel stated, “Mr. Oppenheim’s research and testimony was especially critical to the defense of the action, since it formed the basis for the motion, at trial, to try the affirmative defense of illegality first, and since that lead [*sic*] to judgment for defendants.”⁴ Of the \$26,000 sought for expert witness fees, \$20,000 was attributed to Oppenheim.

Azoulay’s motion to tax costs was denied. Azoulay appeals both from the judgment and from the denial of his motion to tax costs.

DISCUSSION

Azoulay presents five issues for our review: (1) whether a partnership existed between him and the Yeungs; (2) whether the partnership agreement would be illegal under Labor Code section 139.3; (3) whether the exceptions listed in Labor Code section 139.31 applied to the alleged partnership; (4) whether respondents are estopped from asserting illegality under Labor Code section 139.3; and (5) whether the court correctly awarded costs under Code of Civil Procedure section 998. We need not discuss the first issue, because even if the partnership existed, it would not have been enforceable.

I. Enforceability of the Partnership Agreement

A contract that violates an express provision of law is void. (Civ. Code, §§ 1598, 1608, 1667.) Whether an agreement is illegal is a question of law “to be determined from the circumstances of each particular case [citation]” and subject to de novo review. (*Timney v. Lin* (2003) 106 Cal.App.4th 1121, 1126.) If the evidence is not in conflict, this is a pure question of law, which we review independently. If the

⁴ According to the bills submitted with the motion to tax costs, Oppenheim was deposed on February 24, 2010. He billed 4.5 hours for travel and deposition time. He did not testify at trial.

resolution involves contested evidence, we review the trial court’s factual findings for substantial evidence. (*Ibid.*) In addition, statutory construction and application are questions of law, requiring independent review. (*Ibid.*)

A. Labor Code section 139.3

Because Dr. Yeung was providing his services to patients covered by workers’ compensation, he was subject to Labor Code provisions regarding his reimbursement for these services. Labor Code section 139.3, subdivision (a), provides in pertinent part: “[T]o the extent those [medical] services are paid pursuant to Division 4 (commencing with Section 3200 [of the Labor Code]), it is unlawful for a physician to refer a person for . . . physical therapy . . . if the physician or his or her immediate family has a financial interest⁵ with the person or in the entity that receives the referral.” Although we have found no published opinions interpreting Labor Code section 139.3, the statutory language appears clear enough.⁶ If there were any partnership agreement between Azoulay and Dr. Yeung whereby Dr. Yeung referred patients needing physical therapy to Azoulay, this agreement would give Dr. Yeung a financial interest in the referral – because he would share in the fees paid for the services⁷ – and would be unlawful. Therefore even if such a partnership agreement existed, an issue we need not reach, it would be an illegal agreement and unenforceable. (See *Timney v. Lin, supra*, 106 Cal.App.4th at p. 1128 [illegal forfeiture provision of settlement agreement invalid].)

⁵ Labor Code section 139.3, subdivision (b)(4) defines “financial interest” to include “any type of ownership, interest, debt, loan, lease, compensation, remuneration, discount, rebate, refund, dividend, distribution, subsidy, or other form of direct or indirect payment” “A financial interest also exists if there is an indirect relationship between a physician and the referral recipient, including, but not limited to, an arrangement whereby a physician has an ownership interest in any entity that leases property to the referral recipient.”

⁶ Business and Professions Code section 650.01 prohibits *all* physician referrals to persons or entities in which a physician has a financial interest in language very similar to that of the Labor Code section. We have found no published opinions interpreting Business and Professions Code section 650.01 either.

⁷ The Corporations Code defines “partnership” as “an association of two or more persons to carry on as coowners a business for profit” (Corp. Code, § 16101, subd. (9).)

B. Labor Code section 139.31

In the best legislative tradition, Labor Code section 139.31 provides a host of exceptions to the categorical prohibition of Labor Code section 139.3, subdivision (a). Azoulay asserts that Labor Code section 139.31, subdivision (e), provides the exception he needs to escape illegality under the prior section.

Labor Code section 139.31, subdivision (e), provides in pertinent part: “The prohibitions of Section 139.3 shall not apply to any service for specific patient that is performed within . . . a physician’s office Further, the provisions of Section 139.3 shall not alter, limit, or expand a physician’s ability to deliver, or to direct or supervise the delivery of, in-office goods and services according to the laws, rules, and regulations governing his or her scope of practice. . . . [F]or physical therapy services . . . the referring physician obtains [*sic*] a service preauthorization from the insurer or self-insured employer. Any oral authorization shall be memorialized in writing within five business days.”

We have not unearthed any published opinion interpreting this statute either, and the language is somewhat more obscure than that of the previous statute. Nevertheless, it does not help Azoulay out of his difficulties. The statute clearly applies only to services for a specific patient. So, for example, if Dr. Yeung had a financial interest in Azoulay’s practice, and Azoulay provided physical therapy to a certain patient referred by Dr. Yeung, and Dr. Yeung had obtained a service preauthorization for this patient’s treatment, and Azoulay provided his services in Dr. Yeung’s office, this specific patient referral would not be unlawful.⁸ The statute does not, however, spread a blanket of general approval over a partnership between a physician and a physical therapist that includes the physician’s referring his patients to the therapist. Azoulay suggests no other exception that would apply to legalize his alleged partnership.

⁸ There was no evidence at trial regarding any specific patient referral or a service preauthorization for any specific referral.

Azoulay argues that *California Physicians' Service v. Aoki Diabetes Research Institute* (2008) 163 Cal.App.4th 1506 (*California Physicians'*) supports the enforcement of the contract despite its illegality. California Physicians' Services, aka Blue Shield, suddenly decided that the diabetes treatment the defendant institute had been providing to Blue Shield patients for several years was actually experimental, and Blue Shield therefore did not have to pay for it. (*Id.* at p. 1512.) Because these patients had advanced diabetes, the institute continued to treat them, and it sued to recover its fees from Blue Shield. (*Id.* at p. 1513.)

At trial, Blue Shield claimed it did not have to pay for the diabetes treatments because the institute was a corporation illegally engaged in the practice of medicine, and therefore any contract between it and Blue Shield was unenforceable. (*California Physicians', supra*, 163 Cal.App.4th at p. 1514.) While acknowledging the institute had violated the ban on the corporate practice of medicine, the reviewing court found this fact did not necessarily render the contract between it and Blue Shield unenforceable. An exception to the rule against enforcing illegal contracts applies when not enforcing the contract would unjustly enrich one party and would cause the other party to suffer a disproportionately harsh penalty. (*Id.* at pp. 1516.) Azoulay argues that the same exception should apply in this case. We disagree.

Azoulay did not sue to be paid for his physical therapy services. The undisputed testimony established that he collected all of the physical therapy fees to which he was entitled, even after the sale of the practice. He sued instead for 60 percent of the price paid by Concentra for the physical therapy portion of Dr. Yeung's practice and the future income he would have obtained from continuing his physical therapy practice at the clinic. Azoulay never established that Dr. Yeung's practice had a physical therapy component. In fact, Azoulay acknowledged that Concentra paid the entire purchase price for the good will of the practice, that is, the 400 employees that sent their

injured workers to Dr. Yeung for treatment. Azoulay had no part in building up this referral base. He also never established a term for the alleged partnership that would have entitled him to future fees. There is no evidence in this record to support a conclusion that selling the practice to Concentra unjustly enriched the Yeungs at Azoulay's expense.⁹

C. Estoppel to Assert Illegality

Azoulay asserts that the Yeungs are estopped to assert the illegality of the partnership agreement, although it is not exactly clear why this should be so. What is clear, however, is that “the defense of estoppel ‘is not available where the contract is illegal. [Citations.]’” (*Embassy LLC v. City of Santa Monica* (2010) 185 Cal.App.4th 771, 778.)

Johnson v. Johnson (1987) 192 Cal.App.3d 551 (cited in Azoulay's brief as “*Zella v. Johnston*”) does not aid Azoulay. The illegality in *Johnson* was the defendant son's applying for and obtaining a GI loan in his own name to buy a house intended for his parents. (*Id.* at p. 556.) The agreement on which the mother sued her son when he tried to evict her after his father's death was not illegal. Therefore, even though the mother had gone along with the son's fraud in obtaining the GI loan, the court could, and did, take into account the equities between the mother and the son. (*Id.* at p. 557.) The court was not called upon to enforce an illegal contract.

Assuming a partnership between Azoulay and the Yeungs existed, it would have been an illegal one. The court properly refused to enforce an illegal contract.

II. Denial of Motion to Tax Costs

The Yeungs served separate offers to compromise for \$10,000 under Code of Civil Procedure section 998 to Azoulay and to his coplaintiff corporation, Active Care

⁹ Another difference between this case and *California Physicians'* is that Blue Shield never denied it had a contract with the institute. By contrast, the Yeungs vigorously denied they had ever entered into a partnership deal with Azoulay, and Azoulay was not able to produce a “scintilla of written evidence as to a partnership.” Dr. Yeung testified as to his understanding that any such partnership would have been illegal.

Physical Therapy, Inc. The plaintiffs did not accept these offers. Under Code of Civil Procedure section 998, subdivision (c)(1), if the plaintiff does not accept a defendant's offer and then fails to obtain a more favorable judgment, the defendant may be entitled to reasonable expert witness expenses, in the court's discretion. We review the denial of a motion to tax costs for abuse of discretion. (*Chaaban v. Wet Seal, Inc.* (2012) 203 Cal.App.4th 49, 52.)

Azoulay makes three arguments with respect to costs. First, he asserts that the offers to compromise were invalid and therefore ineffective to shift costs to him. Second, he claims the offers were merely token offers, and he should not be penalized for rejecting them. Finally, he asserts that the expert witness fees the Yeungs requested were unreasonable. We address each in turn.

A. Validity of the Offers to Compromise

The wording of the two offers to compromise was virtually identical: "Pursuant to CCP §998, defendants Valley View Medical Clinic, Inc., Bill. W.B. Yeung and Janet Yeung hereby offer to have judgment entered against them, jointly and severally, in this action in favor of plaintiff [David Azoulay] [Active Care Physical Therapy, Inc.] in the sum of \$10,000 in satisfaction of all claims for damages, costs and expenses, attorney fees and interests in this action. All parties are to bear their own fees and costs." Each offer was addressed to only one plaintiff, and each offer had a signature line for only one plaintiff. Azoulay claims, however, that the offers required a joint acceptance by both plaintiffs and therefore were invalid.

Azoulay relies on cases dealing with single offers to compromise made to multiple parties, which create problems of apportionment and uniformity of acceptance. (See *Menees v. Andrews* (2004) 122 Cal.App.4th 1540, 1541 [Code Civ. Proc., § 998 offer valid only where offer properly allocated and allowed individual offerees to accept or reject]; *Wickware v. Tanner* (1997) 53 Cal.App.4th 570, 577; *Hutchins v. Waters*

(1975) 51 Cal.App.3d 69, 73.) There are no such problems in this case. Each document contains a separate, stand-alone offer, capable of being accepted or rejected without reference to the other. The offers to compromise were therefore valid. (See *Santantonio v. Westinghouse Broadcasting Co.* (1994) 25 Cal.App.4th 102, 112-113 [with separate offer to each plaintiff, no problem with apportionment among plaintiffs or all-or-nothing acceptance or rejection].)

B. Reasonableness of Offers

The Yeungs served their offers to compromise on February 24, 2010. At that point, trial was set for March 8, 2010. Had Azoulay accepted the offers on behalf of himself and his corporation, he could have put \$20,000 in his pocket before trial.¹⁰ In light of the defense verdict, the offer was prima facie reasonable, and it is Azoulay's burden to show that the court abused its discretion in rejecting this argument. (See *Adams v. Ford Motor Co.* (2011) 199 Cal.App.4th 1475, 1484 (*Adams*).)

In *Adams*, wrongful death plaintiffs sought over \$2 million in damages; Ford offered a total of \$10,000 to compromise the claim. (*Adams, supra*, 199 Cal. App.4th at p. 1479.) The reviewing court regarded the offer as reasonable in light of the facts of the case and saw no reason to overturn the decision of the trial judge, who was on the spot. (*Id.* at p. 1487.)¹¹

We likewise find no abuse of discretion here. Azoulay's case was extremely weak, if only in light of Labor Code section 139.3. The amount he sought in damages is not the yardstick of reasonableness; it is the amount he was realistically likely

¹⁰ Because the offers to compromise included waivers of costs, their actual value exceeded \$20,000. By accepting the offer, Azoulay could have avoided the significant costs for which he is now liable. (See *Jones v. Dumrichob* (1998) 63 Cal.App.4th 1258, 1264.) Although the offer is evaluated in light of the offeree's knowledge at the time it is made (*Burch v. Children's Hospital of Orange County Thrift Store, Inc.* (2003) 109 Cal.App.4th 537, 548), by February 24, 2010, Azoulay had to know that costs – particularly expert witness fees – were mounting up. For example, on that day, he took the deposition of an expert witness who charged \$685 an hour.

¹¹ As the trial court noted in the *Adams* case, ““\$10,000, once you've won the case, looks like you're overpaying.”” (*Adams, supra*, 199 Cal.App.4th at p. 1484.)

to recover that matters. (See *Adams, supra*, 199 Cal.App.4th at pp. 1485-1496.) The trial court properly denied the motion to tax costs on this ground.

C. Reasonableness of Expert Witness Fees

If a plaintiff does not accept a defendant's offer to compromise and then fails to do better at trial, the court may award the defendant "a reasonable sum to cover costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, preparation for trial . . . , or during trial . . . , of the case by the defendant." (Code Civ. Proc., § 998, subd. (c)(1).) The Yeungs requested \$6,000 in expert witness fees for two certified public accountants, one to opine on the way Azoulay was compensated for his services and the other to rebut Azoulay's economic expert. The Yeungs also requested \$20,000 for an attorney expert. None of these experts testified, because the trial was over before their testimony was needed. This fact would not preclude an award of expert fees, however, because the statute permits the defendant to recover expert fees incurred for trial preparation, not just trial testimony. (Code Civ. Proc., § 998, subd. (c)(1).)

The trial court did not specifically address this issue in the ruling or at the hearing when he denied the motion. We review the reasonableness of the fees requested for abuse of discretion. (*Adams, supra*, 199 Cal.App.4th at p. 1487.)

Awarding expert fees for the services of certified public accountants who are slated to testify on economic issues presents nothing out of the ordinary. Awarding expert fees for a lawyer who is slated to testify about whether a partnership would have violated the law or would have been prohibited by statute is quite another thing.

Azoulay raised this issue during pretrial arguments on motions in limine,¹² but the court did not rule at that time, because it had decided to try the illegality defense

¹² Azoulay made a motion in limine to exclude Oppenheim's testimony on these grounds.

first. Oppenheim never testified, so we do not know whether the court would ultimately have excluded his testimony as an inadmissible expert opinion on an issue of law (see *Summers v. A. L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1179-1185), or whether Oppenheim would have properly testified about factual issues and non-legal opinions.

The primary evidence in the record before us of what Oppenheim was hired to do is his memorandum, and this memorandum looks remarkably like legal research.¹³ In fact, it looks like the attorney work-product the Yeungs' own counsel would have prepared if they had had the necessary background in health law. There is, of course, nothing wrong with hiring outside counsel to assist in trial preparation by doing research in a specialized area of the law and reaching conclusions based on this research; in fact, this is one way in which an attorney can fulfill his or her professional duty to practice competently. (See Rules Prof. Conduct, rule 3-110(C).) But the outside lawyer who does this research and reaches these conclusions is not an expert within the meaning of Code of Civil Procedure section 998 such that the opposing party can be made to pay his or her fees. Code of Civil Procedure section 998 does not permit the offeror to shift fees for attorneys to the offeree, only fees for expert witnesses.

Accordingly, we return the motion to tax costs to the trial court in order that it may look more closely at the Oppenheim fees and determine what charges, if any, can be classified as expert fees as opposed to fees paid to outside counsel for legal work. The court may wish to ask for supplemental briefing on this issue, but that it up to the court.

DISPOSITION

The judgment is affirmed. The order denying the motion to tax costs is reversed as to the fees for the services of Charles Oppenheim, and the court is directed to review the amounts sought for this witness to insure that respondents do not recover attorney fees in the guise of expert witness fees. In all other respects, the order denying

¹³ According to his bills, Oppenheim spent at least 15 hours on this memorandum, by far the most time spent on any single task for which he billed.

the motion to tax costs is affirmed. Respondents are to recover their costs on appeal.

BEDSWORTH, J.

WE CONCUR:

O'LEARY, P. J.

FYBEL, J.