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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MAIN STREET-SANTA ANA, LLC,

Plaintiff and Respondent,

v.

DONALD R. KAPPAUF,

Defendant and Appellant.

G049092

(Super. Ct. No. 30-2008-00116064)

O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County, David R. Chaffee, Judge. Affirmed in part, reversed in part, and remanded.

Gladych & Associates, John A. Gladych; Law Offices of Roxanne Huddleston and Roxanne Huddleston for Plaintiff and Respondent.

Musick, Peeler & Garrett, Cheryl A. Orr; Worthe, Hanson & Worthe, and John R. Hanson for Defendant and Appellant.

* * *

Plaintiff Main Street Santa Ana, LLC (Main Street), sued its insurance broker, defendant Donald Kappauf, for breach of contract and negligence after an insurance company denied coverage for fire damage on a policy Kappauf procured. A jury returned a defense verdict, and the court entered judgment. In a companion appeal (Case No. G048986), we are affirming the judgment. After the judgment, Kappauf submitted a memorandum of costs claiming, among other things, expert fees for five experts totaling \$227,722.09 on the basis that Main Street rejected an offer to compromise under Code of Civil Procedure section 998 (998 offer).¹ There is no dispute that Main Street rejected a valid 998 offer. The court described the amount Kappauf sought as “outrageous” and denied all recovery for expert fees. We conclude that was an abuse of discretion and reverse.

FACTS

In 2006, Main Street purchased the Hightower Building, a 10-story office building in Midland, Texas. Thomas Murray worked for Main Street managing the company’s real estate portfolio, obtaining insurance, dealing with tenants, and managing the books and cash flow. The day before the Hightower purchase closed, Murray contacted Kappauf, an insurance broker, to obtain fire insurance for the building. Kappauf filled out and signed an insurance application where he represented that the building had an operational sprinkler system. The parties disputed whether Murray told Kappauf that the building had sprinklers. It did not, in fact, have a sprinkler system.

Landmark American Insurance Company (Landmark) issued a fire insurance policy with a limit of \$14,750,000. The policy required the building to have two “protective safeguards”: an “Automatic Sprinkler System”; and an “Automatic Fire

¹

All statutory references are to the Code of Civil Procedure.

Alarm, protecting the entire building, that is [¶] a. Connected to a central station; or [¶]
b. Reporting to a public or private fire alarm system.”

In December 2006, an arsonist set fire to the building. Landmark denied coverage, stating in its denial letter, “There has been no evidence the Protective Safeguards that are a condition of this insurance were present . . . at the time of the occurrence,” citing both of the protective safeguards listed above.

Instead of repairing the building, Main Street packaged it with adjacent buildings and sold the properties as a unit. In February 2009, Main Street sued Kappauf for breach of contract and negligence.

The case has been tried twice. In the first trial, a jury awarded Main Street \$1,500,000, but the court granted a motion for new trial, which we affirmed (*Main Street v. Kappauf* (Apr. 25, 2012, G044446) [nonpub. opn.]). Prior to the second trial, Kappauf served Main Street with a 998 offer in the amount of \$300,000, which was deemed rejected after 30 days. In the second trial, a jury returned a complete defense verdict, finding Kappauf breached neither the parties’ contract nor a tort duty of care.

Kappauf called five experts during the second trial.

Delbert Kendall was a real estate appraiser, called to testify on the issue of damages. He incurred \$74,467.66 in fees.

James Greenhaw was the actual insurance adjuster who denied Main Street’s claim. He incurred \$5,574 in fees.

Dan Rush was a real estate broker who testified on the state of the real estate market in Midland, Texas, also called on the issue of damages. Due to his testimony overlapping with Delbert Kendall, the trial court significantly curtailed Rush’s testimony. He incurred \$6,630 in fees.

Joseph Callanan testified on the cost to repair the Hightower Building, which was in rebuttal to Main Street’s expert on damages. He was the only expert to have testified at the first trial. He incurred \$75,630.04 in fees in the first trial, and

\$11,076 in the second trial. Also incurred in the first trial was \$631.70 to Daderian Consulting for services rendered to assist Callanan.

Robert Ford was an insurance consultant who testified on the standard of care for insurance brokers. He incurred \$53,906.82 in fees.

After the second trial, Kappauf filed a memorandum of costs seeking, among other things, \$227,722.09 in expert witness fees. Main Street filed a motion to tax costs, contending Kappauf had not provided any supporting information to justify the award of expert fees. In response, Kappauf provided all of the invoices from his experts.

The court granted the motion to tax costs, describing Kappauf's expert fees as "an outrageous amount" and commenting that "it is not clear from the invoices provided that the services provided were reasonable and necessary." Rather than awarding a reduced amount of fees, the court simply denied Kappauf expert fees altogether. The court also disallowed \$38,565.72 in costs for models, blowups, and photocopies of exhibits; and disallowed \$6,701.90 in "other" costs. After Main Street appealed from the judgment, Kappauf appealed from the ruling on the motion to tax costs.

DISCUSSION

If a settlement offer under section 998 is not accepted, the following consequences ensue: "If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff shall not recover his or her postoffer costs and shall pay the defendant's costs from the time of the offer. In addition, in any action or proceeding other than an eminent domain action, the court or arbitrator, in its discretion, may require the plaintiff to pay 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

arbitration, or during trial or arbitration, of the case by the defendant.” (§ 998, subd. (c)(1).) We review the court’s decision for abuse of discretion. (*Thompson v. Miller* (2003) 112 Cal.App.4th 327, 338.)

The purpose of section 998 “is to encourage settlement by providing a strong financial disincentive to a party — whether it be a plaintiff or a defendant — who fails to achieve a better result than that party could have achieved by accepting his or her opponent’s settlement offer. (This is the stick. The carrot is that by awarding costs to the putative settler the statute provides a financial incentive to make reasonable settlement offers.)” (*Bank of San Pedro v. Superior Court* (1992) 3 Cal.4th 797, 804.)

There is no dispute that Kappauf served a valid section 998 offer and that Main Street did not accept it. Further, Main Street does not challenge the reasonableness of the offer. (See *Essex Ins. Co. v. Heck* (2010) 186 Cal.App.4th 1513, 1528-1529 [trial court has discretion to deny fees where offer is unreasonable under the circumstances].) Nor does anyone dispute that Kappauf was required to retain experts to properly litigate the case. Main Street simply argues the fees were inflated in various ways, or insufficiently documented to assess their reasonableness. These may have been good reasons to award a reduced amount (we express no opinion on that), but they are not good reasons for denying an award outright. Doing so undercut the purpose of the statute, which is to encourage settlement by creating a financial disincentive to rejecting a reasonable offer. The court’s order was arbitrary and thus an abuse of discretion.

Next, Kappauf contends the court abused its discretion by taxing his costs for “models, blowups and photocopies of exhibits” in the amount of \$38,565.72. Section 1033.5, subdivision (a)(13), permits these costs to the extent they are “reasonably helpful to aid the trier of fact.” The court taxed these costs because Kappauf merely attached a bunch of invoices without bothering to point out what exactly the invoices were for and

how they related to matters helpful to the trier of fact.² He has taken the same approach in this court. Accordingly, he has not shown that the court abused its discretion in taxing these costs.

Lastly, Kappauf contends the court erred denying costs under the “other” category. (See § 1033.5, subd. (c)(4) [“Items not mentioned in this section and items assessed upon application may be allowed or denied in the court’s discretion].) In his memorandum of costs, he sought \$6,701.90 under this category, of which the court taxed the entire amount. The court noted that the invoices attached comprised photocopying services and attorney service fees, and Kappauf offered no argument as to why these costs were reasonable and necessary. On appeal, Kappauf contends, “KAPPAUF also attached to his opposition invoices amounting to \$539.41 in ‘other costs’ that on their face were clearly incurred for service of process and court filing fees. [Citation.] These costs were actually incurred and paid, and are clearly allowable under the statute.” However, Kappauf claimed \$2,025 in “[f]iling and motion fees” and \$480.90 in “[s]ervice of process” fees in his memorandum of costs, neither of which were taxed. To the extent Kappauf is now claiming he buried certain filing and service invoices in with his photocopying invoices and forgot to claim them in the appropriate location, it is far too late to be claiming additional fees at this stage. The claim is forfeited.

²

The court also noted that the invoices Kappauf supplied only added up to \$26,113.31 — a disparity of more than \$12,000.

DISPOSITION

The order taxing Kappauf's expert witness costs is reversed and the matter is remanded for the trial court to award expert witness costs consistent with this opinion. The order taxing Kappauf's costs for models, blowups and photocopies of exhibits is affirmed. The order taxing Kappauf's other costs is affirmed. Kappauf shall recover his costs incurred on appeal.

IKOLA, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

ARONSON, J.