Filed 4/18/17 Moore v. Orloff & Associates CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

RONALD L. MOORE, Cross-complainant and Respondent, v. ORLOFF & ASSOCIATES APC, Cross-defendant and Appellant.	G052463 (Super. Ct. No. 30-2011-0513640) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Linda S. Marks, Judge. Affirmed.

Orloff & Associates and Paul Orloff for Cross-defendant and Appellant.

Law Office of Andrew D. Weiss and Andrew D. Weiss for Cross-complainant and Respondent.

INTRODUCTION

This is our second look at competing liens against funds belonging, somewhat ephemerally, to Robert Prestwood. The first time around, the contestants were Ronald L. Moore, who had a substantial judgment against Prestwood from the bankruptcy court, and Paul Orloff and Orloff & Associates, APC (Orloff) – Prestwood's erstwhile lawyers – who asserted an attorney lien. Both were competing for about $17,000 interpleaded by Wells Fargo Bank pursuant to a settlement with Prestwood. Orloff won that round, and Moore appealed.

We sent the case back with instructions to vacate all orders and dismiss the case because the causes of action Prestwood, or rather Orloff, had alleged against Wells Fargo belonged to the bankruptcy estate. Prestwood had no standing to file the case, and the state court had no jurisdiction to adjudicate any issue arising from it.[1]

Prestwood initiated a new state court action centering on some post-bankruptcy-filing real-estate activities (the Prestwood action). Moore promptly filed his notice of lien. Orloff represented Prestwood for a while, but substituted out. The case ultimately settled, creating a settlement fund. Moore and Orloff squared off over the fund in a court trial, and Moore won the second round. Orloff now appeals.

We affirm the judgment for two reasons. First, Orloff ignored the well-settled rule that a lawyer can enforce an attorney lien only through a separate action *against the client*. The record contains no trace of any such action between Orloff and Prestwood. Consequently there was no enforceable attorney lien to put up against Moore's judgment lien, and judgment was properly rendered for Moore. Second, assuming the trial court had jurisdiction to examine the Orloff lien in the absence of a separate action, it determined that the lien was not fair and reasonable to the client. It

[1] (*Moore v. Prestwood* (Jan. 28, 2015, G049565) [nonpub. opn.].)

also determined that Orloff had abandoned Prestwood, by substituting out at a particularly perilous moment.

In essence, then, the court did not decide the Moore lien had priority. It decided the Orloff lien was unenforceable, thereby eliminating it as a competitor for the settlement fund. This is the kind of scrutiny a court would have applied in a separate action between Orloff and Prestwood, so Orloff's failure to get a separate judgment confirming its lien was mitigated. Substantial evidence supported the trial court's assessment of Orloff's lien, so we affirm on that ground as well.

FACTS

Prestwood filed the Prestwood action against various people and entities in October 2011. Orloff represented him. Moore filed the notice of his bankruptcy judgment lien in December 2011. Various cross-complaints were filed in the course of litigation, as reflected in the court's docket, although not in the appellant's appendix. The only cross-complaint in the record is one for declaratory relief in which Moore was the cross-complainant and Prestwood and the three law firms that had represented him at various points in the Prestwood action were the cross-defendants.[2] Orloff substituted out as Prestwood's attorney in October 2012, leaving Prestwood to represent himself. The firm later sent him a single bill, dated January 2013, for all the legal services provided since September 2011. The entries went through December 2012, despite the substitution of attorney the previous October.

[2] One of the Prestwood action defendants filed a cross-complaint against Moore and the three law firms in November 2013. Another cross-complaint was filed against Moore and the law firms in December 2013 by several other Prestwood action defendants. Neither cross-complaint is in the record, so we do not know what they alleged. They did serve, however, to make Moore a party to the Prestwood action independently of his status as a judgment creditor; he answered on December 24, 2013. He filed his own cross-complaint in February 2014.

The Prestwood action settled in April 2014, and a settlement fund of $30,000 was created. At first Moore and the three law firms vied for the money. Eventually two firms dropped out, and the only ones left standing were Moore and Orloff.

A court trial on Moore's cross-complaint for declaratory relief was held on March 27, 2015, to decide who got the $30,000 in the settlement fund. Although Prestwood was a party, he did not appear at trial, and the court was informed that he did not intend to appear. Because he had not appeared at a previous trial call, the court determined Prestwood was in default.[3]

After hearing testimony, the court determined Moore was entitled to the settlement fund. The court held that Orloff's claim for fees was not fair and reasonable to Prestwood, as required by Rules of Professional Conduct, rule 3-300. The court noted in particular that Prestwood had resolved the case on his own, Orloff having substituted out after representing Prestwood for a year. During Orloff's representation, it failed to respond to discovery requests, leaving Prestwood facing terminating sanctions after Orloff bowed out. Orloff also seemed unable to draft a complaint that stated certain causes of action; the defendants' demurrers were sustained more than once.

Judgment for the $30,000 was entered in Moore's favor. Orloff filed a motion for reconsideration, which the court denied on its merits and because it failed to meet the requirements of Code of Civil Procedure section 1008. Orloff appealed from the judgment.

DISCUSSION

Moore's lien was a judgment lien, for a judgment obtained in the bankruptcy court against Prestwood. He filed his notice of lien early in the Prestwood action, pursuant to Code of Civil Procedure sections 708.410 et seq. Orloff, however,

[3] In its tentative ruling after trial, the court stated it had been informed that Prestwood was homeless and could not be located.

claimed to have an attorney lien. Such a lien is *created* when the attorney and client enter into a contractual relationship for legal services, and no notice of lien is necessary. (*Brown v. Superior Court* (2004) 116 Cal.App.4th 320, 327 (*Brown*).)

To *enforce* an attorney lien, however, what *is* necessary is an independent action between attorney and client establishing the existence, value, and enforceability of the lien. (*Mojtahedi v. Vargas* (2014) 228 Cal.App.4th 974, 978; *Cal-Western Reconveyance Corp. v. Reed* (2007) 152 Cal.App.4th 1308, 1321; *Brown, supra,* 116 Cal.App.4th at 329; *Carroll v. Interstate Brands Corp*. (2002) 99 Cal.App.4th 1168, 1177; *Epstein v. Abrams* (1997) 57 Cal.App.4th 1159, 1166; *Law Offices of Stanley J. Bell v. Shine, Browne & Diamond* (1995) 36 Cal.App.4th 1011, 1019-1020 (*Bell*); *Valenta v. Regents of University of California* (1991) 231 Cal.App.3d 1465, 1470; *Bandy v. Mt. Diablo Unified Sch. Dist.* (1976) 56 Cal.App.3d 230, 234.) Nothing in the record before us indicates Orloff ever filed such an action, let alone obtained a judgment on it. Thus, as far as the Prestwood action was concerned, there was no enforceable attorney lien to compete against Moore's judgment lien.

In *Brown*, the court held that an attorney who had not filed an independent action to ratify his lien could not enforce it in the underlying suit, although he could assert his claim to the funds in that action. (*Brown, supra,* 116 Cal.App.4th at p. 329.) The court decided, however, that judgment should not have been entered in the judgment creditor's favor without giving the attorney a "fair opportunity to first litigate the validity of his lien claim in a separate action." (*Id.* at p. 335.) The court based this decision in part on the attorney's reliance on several appellate cases that suggested he could intervene in the client's action and on the lack of any "published appellate decision . . . addressing how and where a conflict between a creditor claiming a judgment lien . . . and an attorney claiming a contractual lien on the proceeds of the same judgment is to be resolved." (*Id.* at p. 336.)

In Orloff's case, however, these circumstances do not apply. We specifically told Orloff in the prior opinion that it could enforce its lien only in a separate action, citing *Brown*.[4] Our prior opinion was filed on January 28, 2015. Orloff disregarded this admonition and went forward with the trial against Moore at the end of March 2015. Unlike the attorney in *Brown*, Orloff had a "fair opportunity" to file a separate action regarding its lien. (*Brown, supra,* 116 Cal.App.4th at p. 329.)

There are, however, some significant differences between this case and the numerous cases, like *Brown*, holding that a separate action is needed because the lien-holding attorney is not a party to the underlying litigation, and the court has no jurisdiction over him or her. (See, e.g., *Cal-Western Reconveyance Corp. v. Reed*, *supra*, 152 Cal.App.4th at p. 1321; *Brown, supra,* 116 Cal.App.4th at pp. 328-329; *Carroll v. Interstate Brands Corp., supra,* 99 Cal.App.4th at pp. 1176-1177.) In this case, the court did have jurisdiction over Orloff. The law firm was a cross-defendant in a cross-complaint brought by Moore for declaratory relief, a cross-complaint that included Prestwood as well. The declaratory relief action, although brought by Moore, not Orloff, sought a declaration of the priority of the respective liens. And, in fact, at the trial (unattended by Prestwood), Moore's attorney cross-examined Paul Orloff regarding several items on the bill supporting the attorney lien. He even challenged the validity of the bill as a whole.

In addition, there was no objection to the trial court's hearing and adjudicating the lien issue. Prestwood was in default and could not object, and Moore agreed to go forward. "[W]hen the parties to an action allow the trial court to adjudicate a contractual lien in the underlying case without objection, that adjudication – although in

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[4] "The court resolved the conflict over the settlement proceeds in Orloff's favor, even though Orloff was 'intervening' in Prestwood's case to establish the validity of its lien and to contest the validity of Moore's lien, as it was not entitled to do. (See, e.g., *Brown v. Superior Court, supra,* 116 Cal.App.4th at pp. 323-324, 328.) The validity of an attorney lien can be established only through a separate action. (*Id.* at p. 324.)" (*Moore v. Prestwood, supra,* G049565 at p. 4.)

excess of the court's jurisdiction – is nevertheless valid." (*Brown*, *supra*, 116 Cal.App.4th at p. 332.) In *Brown*, by contrast, the party challenging the attorney lien had objected on the ground of lack of jurisdiction. (*Id*. at pp. 332-333.)

Assuming, then, that Moore's declaratory relief action fulfills the requirement of a "separate action" to establish the existence and enforceability of the Orloff attorney lien, we will examine the trial court's decision on the merits.

When an issue is purely legal or the facts are undisputed, we use the de novo standard of review. (*Wells Fargo Bank v. Neilsen* (2009) 178 Cal.App.4th 602, 608; *Dolan-King v. Rancho Santa Fe Assn*. (2000) 81 Cal.App.4th 965, 974.) When, however, the facts are disputed and the trial court relies on evidence to make its decision, we examine the record to determine whether substantial evidence supports the decision. (See *Bree v. Beall* (1981) 114 Cal.App.3d 650, 661[substantial evidence supported court's refusal to enforce attorney lien]; *Gostin v. State Farm Ins. Co*. (1964) 224 Cal.App.2d 319, 325 [no evidence of performance or of reasonable value of legal services]; but see *Estate of Falco* (1987) 188 Cal.App.3d 1004, 1020 [decision to impose attorney lien discretionary] (*Falco*).)

A basic question here is whether the Orloff retainer agreement was a contingency fee agreement or one for legal services based on hourly rates. After hearing testimony and reviewing the documentary evidence, the trial court analyzed the retainer agreement both ways. On appeal, Orloff insists that the agreement was an hourly fee agreement.

Section 6 of the retainer agreement states: "For the services to be provided by [Orloff], [Prestwood] shall pay [Orloff] the Fee Rate of $300.00 per hour plus Costs and Expenses. It is understood and agreed that [Orloff] shall seek recovery of attorney fees from Defendant(s)."[5] This section set an hourly rate of $300, chargeable to

[5] Except for "Defendant(s)," the capitalized words are defined terms.

Prestwood, but then memorialized an agreement to look to the defendants to pay the bill. In the next section, Prestwood was permitted to make partial payments on the balance "when such balance should have been paid in full when billed" without mentioning the defendant(s).

In the following section – "Oldest Obligations Paid First" – the agreement stated: "[M]onthly statements shall be prima facie evidence of the date, amount, [and] performance, of the tasks described, necessity of the tasks described, and reasonableness of the charges *unless prior to the end of the month in which the statements were mailed,* [*Prestwood*] *shall have notified* [*Orloff*] *in writing that there is a dispute with or objection to any entry on the statement. Such notice shall specifically describe the disputed entry and the objection.* All previous balances shown on a monthly statement shall be prima facie evidence that such amounts are due and owing for the period(s) before the then current monthly statement, unless written notice shall have been previously given . . . ."

I. Hourly Fee Agreement

Orloff asserts that the retainer agreement is one based on hourly fees. If so, then under *Fletcher v. Davis* (2004) 33 Cal.4th 61, the lien based on it is subject to Rules of Professional Conduct, rule 3-300 as an interest adverse to the client.[6] (*Id.* at p. 69.) As the California Supreme Court stated, "[I]t was reasonably foreseeable the charging lien could become detrimental to the client." (*Id.* at p. 68.) "[A] charging lien grants the attorney considerable authority to detain all or part of the client's recovery whenever a dispute arises over the lien's existence or its scope. That would unquestionably be

[6] Rule 3-300 of the Rules of Professional Conduct provides: "A member shall not enter into a business transaction with a client; or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, unless each of the following requirements has been satisfied: [¶] (A) The transaction or acquisition and its terms are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which should reasonably have been understood by the client; and [¶] (B) The client is advised in writing that the client may seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice; and [¶] (C) The client thereafter consents in writing to the terms of the transaction or the terms of the acquisition."

detrimental to the client." (*Id.* at p. 69.) The court specifically referred to the problems an attorney with a lien can cause by holding up the disbursal of settlement proceeds. (*Ibid.*)

The trial court in this case found that the lien did not meet the standards of Rules of Professional Conduct, rule 3-300, in that it was not "fair and reasonable" to the client, Prestwood. The court noted the disarray in which Orloff left the case when it substituted out – leaving Prestwood to fend for himself in extremely hazardous circumstances – the problematic billing, and Orloff's knowledge of Prestwood's financial situation (still in bankruptcy) when it took the case.[7] The court also noted that Moore's lien was not dischargeable, so Prestwood's inability to pay it down created a substantial and long-term financial hardship for him.

Substantial evidence supports the trial court's decision. In addition to the facts mentioned in the minute order, we also note that the lien in this case echoed the one from the prior case, the one involving the Wells Fargo interpleader. In that case the bulk of the interpleaded funds – $15,000 of the $17,000 – were earmarked for Orloff. In this case, Orloff claimed *all* the settlement funds – funds Orloff had no part in obtaining, unless it could assert the defendants settled over a year later because they had grown tired of having to file demurrers and discovery motions.

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[7] Orloff failed on at least two occasions to draft a demurrer-proof complaint, while charging for these dubious services. More troubling, Orloff failed to respond to discovery requests, leading to the imposition of, first, monetary sanctions and then to a threat of terminating sanctions. The firm took itself off at the point when terminating sanctions were imminent, leaving Prestwood to represent himself.

According to Orloff's bill, defendants served written discovery requests on November 16 and December 15, 2011. A motion to compel responses was filed and received on January 11, 2012. Orloff did not begin drafting responses to some form interrogatories until February 6. Two days later, another motion to compel responses landed.

The first motion to compel responses was heard on May 4, 2012. According to the bill, Orloff spent 14.5 hours on the day before the hearing preparing discovery responses and another 2.75 hours on the day of the hearing. Paul Orloff told the court at the hearing that he had the responses with him, except for a few of the responses to special interrogatories that he "didn't all get quite finished." The court imposed monetary sanctions on both Orloff and Prestwood.

Responses to discovery served in November 2011 were being started six months later, and only after the expense of a motion to compel, which Orloff did not oppose.

A lien as founded on an hourly fee agreement must be fair and reasonable to the client, and substantial evidence supports the trial court's conclusion that Orloff's lien was not.

II. Contingency Fee Agreement

While the retainer agreement used language usually found in an hourly fee agreement, the facts as developed in the trial suggested another interpretation. Orloff did not bill Prestwood monthly, as would a law firm working on an hourly basis. Instead it waited until several months after it had substituted out, gathered up all the charges for over a year (including charges for services supposedly rendered *after* the substitution), and compiled an omnibus bill for all services, dated January 2013. Moreover, it was not established at trial when Prestwood became homeless and untraceable, so it was not established that he ever saw the bill. There was certainly no evidence at trial that he had received monthly statements that would have allowed him to object to or dispute any charges, as mandated by the retainer agreement.

Orloff agreed to represent Prestwood at a time when he was still in bankruptcy.[8] At some point, unestablished in the record, he became homeless and indigent. Orloff therefore knew that any payment would have come from a settlement or judgment in the Prestwood action. Orloff did not bill Prestwood monthly because it realized that if it was going to get paid, the money would have to come from the proceeds of the lawsuit.

To the extent that Orloff's ability to be paid depended upon a favorable outcome of the Prestwood action, it was a contingency fee agreement. But the Orloff agreement differed from the typical contingency fee agreement in one important respect. Usually a contingency fee agreement allocates a certain percentage of the recovery to the lawyer. In this case, however, there was no agreed-upon percentage. In effect, then, the

[8] The retainer agreement was executed in October 2011. Prestwood's bankruptcy closed at the end of December 2011.

retainer agreement permitted Orloff to appropriate the entire recovery to itself – and that is what it attempted to do with its lien.

The appellate court in *Plummer v. Day/Eisenberg, LLP* (2010) 184 Cal.App.4th 38, following an opinion by the California State Bar, determined that a contingency fee agreement was not subject to rule 3-300. "'[A] charging lien is an equitable corollary to, and thus inherent in, a *contingency* fee contract because, unlike the situation in *hourly* fee agreements: (a) the attorney and client have agreed that the attorney's fee will be limited to a percentage of, and derived only from, a successful recovery created by the attorney's work; (b) the attorney and client share the risk of a recovery; (c) any fee the attorney earns or receives is delayed until the client obtains a recovery, usually at the very end of the representation; and (d) the recovery often represents the only source of funds from which the attorney can ever be paid. For these reasons, charging liens are not only inherent in contingency fee contracts, they are almost universally found and almost universally uncontroversial in such contracts.' [Citation.] Requiring attorneys to advise their clients to seek independent counsel would be futile because 'the independent lawyer would likely confirm that charging liens are universally included in contingent fee contracts, that their inclusion in such contracts has consistently been upheld by the courts, and that the client would be hard pressed to find a competent lawyer to take a case on a contingency fee basis without a charging lien.' [Citation.]" (*Id.* at pp. 49-50, fn. omitted.)

Two points make *Plummer* inapplicable to the present case. First, the quoted portion of State Bar opinion adopted by the court dealt with whether a lawyer with a contingency fee agreement had to advise the client to seek independent counsel regarding a lien, per rule 3-300. That is not the issue here. More importantly, the contingency fee agreement being discussed is the traditional percentage-of-recovery

variety. It is not the lawyer-take-all agreement Orloff had with Prestwood.[9] (See *Yagman v. Galipo* (CV 12-7908-GW(SHx), Aug. 15, 2013) 2013 U.S. Dist. LEXIS 120497 *13-15.)

In any event, considering the retainer agreement as a contingency agreement does not change the outcome. An attorney with a contingency agreement who voluntarily withdraws from a case without justification is not entitled to a quantum meruit recovery of fees. So a lien for attorney fees cannot be enforced. (*Falco, supra,* 188 Cal.App.3d at p. 1014.)

Falco relied in part on an earlier decision, *Hensel v. Cohen* (1984) 155 Cal.App.3d 563 (*Hensel*), which dealt with similar facts: "May an attorney accept a personal injury case on a contingent fee basis, determine that it is not worth his time to pursue the matter, instruct his client to look elsewhere for legal assistance, but hedge his bet by claiming a part of the recovery if a settlement is made or a judgment obtained through the efforts of a subsequent attorney? We answer this question with a resounding 'No.'" (*Id.* at p. 564.) The law firm in *Hensel* withdrew from representing a plaintiff after deciding that the case was a "dead-blank loser." (*Id*. at p. 568.) Nevertheless, the firm asserted its right to quantum meruit fees. (*Id.* at p. 567.)

The *Hensel* court held that an attorney who withdraws without a justifiable reason or good cause cannot assert a lien on a subsequent recovery by the client. (*Hensel, supra,* 155 Cal.App.3d at pp. 567-568.) The court in *Falco* agreed. (*Falco, supra,* 188 Cal.App.3d at p. 1014.)

Orloff insists that it did not "withdraw" – because it got out through a substitution of attorney rather than a motion to withdraw. During trial, the court was careful to preserve this distinction. After considering all the evidence, however, the court

[9] The retainer agreement did not restrict the fees to which the lien would apply to those incurred in the Prestwood action, but allowed Orloff to collect for "any obligation due [Orloff] from [Prestwood]." Orloff had expected to collect from the Wells Fargo settlement in the prior case, but that money had to go back to Wells Fargo.

saw it differently – more like quitting to avoid getting fired. There was a motion for terminating sanctions on deck when Orloff left; another one was filed two weeks afterward. And Prestwood did not have new counsel. He was left to represent himself.

As the court stated in *Hensel*, "[The law firm] maintains that their abandonment of the case was proper, since [the client] knowingly and freely assented to termination of their employment. [Citation.] However, employing the proper procedure in withdrawing from a case is not synonymous with withdrawal for justifiable cause." (*Hensel, supra,* 155 Cal.App.3d at p. 568.) The trial court determined, in effect, that Orloff did not withdraw for justifiable cause. Assuming, therefore, the retainer agreement was a contingency agreement, substantial evidence supported the trial court's conclusion that Orloff was not entitled to a quantum meruit recovery for its legal services. (See *Falco, supra,* 188 Cal.App.3d at pp. 1017, 1019-1020.)

The fact is that the settlement in this case was achieved despite Orloff. When Orloff left the scene, Prestwood was facing terminating sanctions for discovery misuse. Had the court imposed these sanctions, there would have been no settlement, no settlement fund, and an outright dismissal of the Prestwood action in defendants' favor. Only long after Orloff's departure did the defendant groups put up the settlement money.[10] The record does not reflect who pulled this modest victory from the jaws of defeat, but whoever it was, it was not Orloff.

[10] Orloff substituted out in October 2012. The dismissal pursuant to the settlement was filed in April 2014.

DISPOSITION

The judgment is affirmed. Respondent is to recover his costs on appeal.

BEDSWORTH, ACTING P. J.

WE CONCUR:

MOORE, J.

FYBEL, J.