Filed 8/2/17 O'Neil v. Dorado CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

O'NEIL, LLP, Plaintiff and Respondent, v. DANIEL DORADO, Defendant and Appellant.	G053571 (Super. Ct. No. 30-2014-00725846) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Sheila Fell, Judge. Affirmed.

Daniel Dorado, in pro. per., for Defendant and Appellant.

William E. Halle for Plaintiff and Respondent.

INTRODUCTION

Daniel Dorado, representing himself, appeals from a judgment in favor of the law firm O'Neil, LLP, awarding it $58,000 in damages plus interest for unpaid legal fees. Dorado also represented himself in the superior court. O'Neil obtained summary adjudication on its breach of contract claim, obviating the need for a trial on the remaining causes of action. The court entered judgment for O'Neil based on the order granting summary adjudication.

We affirm the judgment. The issues Dorado has raised on appeal to attack it lack merit. Although we recognize that, as a non-lawyer, he faces a daunting task in trying to negotiate a path through the byways of legal procedure, the same rules and standards that apply to attorneys apply to him, and those rules were not followed here.

FACTS

According to O'Neil's complaint, Dorado hired the O'Neil firm in March 2010 to help him with two lawsuits: one against him by the purchaser of his property in Solana Beach and the other by him against the holder of the first trust deed on the property, which was trying to foreclose. O'Neil billed Dorado for legal services in March, April, and May 2010, by which time the fees had mounted to $58,000. The May 2010 bill was mailed to Dorado on June 29, 2010. In early July 2010, Dorado complained about the bills, claiming he owed the firm no more than the original $2,000 retainer fee. This is the last bill in the record. O'Neil appears to have ceased working for Dorado after these complaints.

The O'Neil engagement letter contained the following provision relating to arbitration: "[B]y signing this letter, [*sic*] . . . any controversy, dispute, or claim arising out of the services we [O'Neil] provide for you [Dorado] or the interpretation, performance or breach of this agreement shall be finally determined, at the request of either party, by binding arbitration in Orange County, California in accordance with the then existing rules for commercial arbitration of the American Arbitration Association,

and judgment upon any award rendered by the arbitrator may be entered in any court having jurisdiction." With respect to billing for legal services, the letter provided: "[T]he amounts reflected on each statement will be due within twenty (20) days after presentation."

O'Neil sued Dorado on May 30, 2014, for unpaid legal fees, alleging four causes of action: breach of contract, open book account, quantum meruit, and account stated. Although Dorado claims O'Neil never sent him the notice of his right to demand arbitration required by Business and Professions Code section 6201, subdivision (a), the record indicates this notice was served along with the complaint, as required by the statute, on October 13, 2014.

Dorado answered on November 17, 2014.[1] He did not include the arbitration agreement as an affirmative defense, and nothing in the record establishes that he requested mandatory fee arbitration within 30 days of receiving the notice. (See Bus. & Prof. Code, § 6201, subd. (a).)

In May 2015, O'Neil moved for summary adjudication on the first cause of action, for breach of contract. The motion was unopposed. Having found service proper,[2] the court issued a minute order granting the motion. O'Neil served a notice of entry of the order on August 12, 2015. O'Neil later applied ex parte for entry of judgment, but the court denied the application without prejudice and without explanation. Trial was set for February 16, 2016.

Dorado then noticed a motion for judgment on the pleadings for February 10, 2016. The two issues in this motion were the running of the limitations period on O'Neil's claim for fees and the arbitration provision of the engagement letter, which

---

[1] Although Dorado was served with the complaint and other documents at an address in Capistrano Beach, the caption page of his answer included an address in Solana Beach as the address of record. The Solana Beach address was also the one to which O'Neil had sent its bills for legal services.

[2] The moving papers were sent to the Solana Beach address.

Dorado claimed precluded the court from adjudicating the matter. The hearing on the motion was later set for February 16, the date of trial.

On February 16, the court denied Dorado's motion for judgment on the pleadings, on the grounds that he had never moved for arbitration, but had participated in litigation up to the time of trial, and the ruling on the summary adjudication motion on the breach of contract claim established the validity of O'Neil's claim for fees. The only remaining causes of action were two common counts – open book and account stated.[3] As these two causes of action duplicated the breach of contract claim, they were moot, and trial was not necessary. Judgment in favor of O'Neil in the amount of $58,048 plus prejudgment interest was entered on March 15, 2016. Dorado filed his notice of appeal – from judgment after an order granting a summary judgment motion – on May 20, 2016.

DISCUSSION

Someone trying to represent himself in a court of law operates at a considerable disadvantage, as would anyone trying to function in a profession or trade without training. Nevertheless, the rule is that self-represented litigants do not get special treatment. They are held to the same standards and subject to the same requirements as lawyers, including following court rules and grasping basic legal concepts. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984-985; *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246-1247.)

One rule is that the summary of significant facts in the appellant's opening brief must be *limited to matters in the record.* (Cal. Rules of Court, rule 8.204 (a)(2)(C).) A handy way of thinking about this rule is that if it is not in the record, it didn't happen. Dorado's assertion that the court denied O'Neil's ex parte application to enter judgment because he had not been properly served with the summary adjudication papers finds no

[3] The quantum meruit cause of action was dismissed, per O'Neil's request, on February 1, 2016.

support in the record.[4] The court denied the application without explanation, and therefore a finding of improper service "didn't happen." Another assertion violating this rule is that it was "uncontroverted in superior court" that Dorado never received the notice of his right to request arbitration under Business and Professions Code section 6201. Not only was this assertion controverted – by the proof of service filed after service of the complaint – there is no evidence in the record – by declaration or anything else – that Dorado was *not* served with the proper notice along with the summons, the complaint, and the other documents required to be served at that time. As a widely used treatise on appellate practice points out, misrepresenting the record casts doubt on a party's credibility. (Eisenberg et al., Cal. Practice Guide: Civil Writs and Appeals (The Rutter Group 2016) ¶ 9:27, p. 9-8.)

I. Motion for Judgment on the Pleadings

Dorado first argues that the court should have granted his motion for judgment on the pleadings because the arbitration provision in the engagement letter left it with no subject-matter jurisdiction. Dorado does not understand the concept of subject-matter jurisdiction. It means the "right to adjudicate concerning the subject matter in a given case." (*Harrington v. Superior Court* (1924) 194 Cal. 185, 188; see Cal. Const., art. VI, § 10.) The superior court has subject-matter jurisdiction over any ordinary breach of contract action between California residents. (See *United States Fidelity & Guaranty Co. v. Superior Court* (1931) 214 Cal. 468, 471.)

By his jurisdiction argument, we think Dorado means that if there is a binding arbitration agreement, a court must immediately drop the case. If this is what he means, he is mistaken. A party is entitled to file a lawsuit, even when a binding arbitration agreement exists.[5] If the other party wants to arbitrate, that party files a timely

---

[4] On the contrary, at the hearing on the motion, the court found service of the moving papers to be proper.

[5] The O'Neil engagement letter mandated arbitration "at the request of either party," not automatically.

petition to compel arbitration. (Code Civ. Proc., § 1281.2.)[6] The court then evaluates the existence of the agreement and whether it is enforceable. (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413.) Of course, the parties can, if they choose, go straight to arbitration, without involving a court. But if one party to a lawsuit wants to arbitrate and the other party doesn't, the court has to get involved.

A motion for judgment on the pleadings is not the proper vehicle to enforce an arbitration agreement. If Dorado wanted to arbitrate pursuant to the binding arbitration provision in the engagement letter, he should have filed a petition to compel arbitration. He does not explain why he failed to do this. In addition, Dorado did not assert an agreement to arbitrate as an affirmative defense in his answer, thereby at the very least acting inconsistently with a right to arbitrate, and at worst waiving his right to arbitrate. (See *Oregel v. PacPizza, LLC* (2015) 237 Cal.App.4th 342, 355-356.) A party may waive the right to arbitrate by his or her conduct. (See § 1281.2, subd. (a); see also *Hoover v. American Income Life Ins. Co.* (2012) 206 Cal.App.4th 1193, 1203 [party may waive right to arbitrate by untimely demand or acts inconsistent with right to arbitrate])

When O'Neil filed its breach of contract action, the superior court gained subject-matter jurisdiction.[7] If Dorado wanted to arbitrate, he had to act. He had to petition to compel arbitration. He did not do so.

Dorado also contends that O'Neil's claim for breach of contract is time-barred. He believes his motion for judgment on the pleadings should have been granted on that basis. This argument fails for two reasons.

First, Dorado did not assert it at the proper time – the opposition to O'Neil's motion for summary adjudication. (See § 437c, subd. (p)(1) [after plaintiff proves elements of cause of action, burden shifts to defendant to show triable issue of

---

[6] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

[7] Just before oral argument, O'Neil sent the court a letter citing two additional cases on fee arbitration and jurisdiction that it intended to argue. Neither case had any effect on our decision.

fact].) Granting the motion for summary adjudication on this issue meant that "at the trial of the action, the cause or causes of action within the action, affirmative defenses, claim for damages, or issue or issues of duty as to the motion that has been granted shall be deemed to be established . . . ." (§ 437c, subd. (n)(1).) O'Neil's entitlement to damages for breach of contract was conclusively established when the court granted the motion; it was effectively removed from controversy.

Second, the bar of the statute of limitations is an affirmative defense, and Dorado thus bore the burden of establishing it by a preponderance of the evidence. (See *Samuels v. Mix* (1999) 22 Cal.4th 1, 8; Evid. Code, § 500.) A number of venerable California cases address the accrual of a cause of action for nonpayment of attorney fees. They all hold the same thing: a cause of action for nonpayment of attorney fees does not accrue until the representation is finished. (*Hancock v. Pico* (1873) 47 Cal. 161, 162; *E.O.C. Ord, Inc. v. Kovakovich* (1988) 200 Cal.App.3d 1194, 1203; *Brooks v. Van Winkle* (1958) 161 Cal.App.2d 734, 742-743; *Mitchell v. Towne* (1939) 31 Cal.App.2d 259, 263; *Platnauer v. Forni* (1933) 131 Cal.App. 393, 400; *Atchison v. Hulse* (1930) 107 Cal.App. 640, 645; *Cullinan v. McColgan* (1927) 87 Cal.App. 684, 693-694; see *Johnson v. Bank of Lake* (1899) 125 Cal. 6, 9, disapproved on other grounds in *Coulter Dry Goods Co. v. Wentworth* (1915) 171 Cal. 500.) At no time did Dorado offer any evidence regarding the date O'Neil ceased to represent him.

Although the record does not establish exactly when O'Neil's representation of Dorado ceased, the evidence submitted with O'Neil's summary adjudication motion indicates that Dorado first expressed his dissatisfaction with the state of the bills on July 3, 2014, no doubt prompted by the bill sent on June 29. He engaged new counsel who contacted an O'Neil partner about the bills on July 14. The firm appears to have ceased working for Dorado after July 3, 2010, and his engagement of new counsel strongly suggests the end of the representation. This is the only evidence in the entire record bearing on the limitations period. It does not aid Dorado's argument.

II. Summary Adjudication Motion

Dorado's argument on this subject is extremely confusing, but we believe it is based on his misunderstanding of the significance of what happened when O'Neil applied ex parte for judgment in August 2015 and what occurred thereafter at the trial-that-did-not-happen in February 2016.

The court granted O'Neil's unopposed summary adjudication motion on the first cause of action for breach of contract. In effect, it determined there were no triable issues of fact as to this cause of action and O'Neil was entitled to its legal fees as a matter of law. (See § 437c, subds. (c), (f)).) More specifically, granting summary adjudication meant that the court determined there was no affirmative defense – such as the expiration of a limitations period – to the cause of action. (§ 437c, subd. (f)(1).) As the plaintiff, O'Neil met its burden of proof to show no defense by proving each element of the cause of action for breach of contract. The burden then shifted to Dorado to show the existence of a triable issue of fact as to a defense. (See *ibid*.) He failed to do so.

O'Neil then applied ex parte for entry of judgment for the entire case, in effect abandoning the remaining causes of action as there was no need to try them – O'Neil already had the court's approval of a cause of action for its fees. The application to enter a final judgment was denied without prejudice and without explanation.

At the trial in February 2016, the judge (a different judge from the one who had granted the summary adjudication motion) saw that O'Neil had obtained summary adjudication on its breach of contract action – establishing it for purposes of trial (see § 437c, subd. (n)(1)) – and perceived, correctly, that trying the common counts was unnecessary, because the only relief O'Neil could have receive on the common counts duplicated the relief to which it was already entitled after summary adjudication. Accordingly, the common counts were dismissed. Ultimately, judgment was entered pursuant to the motion for summary adjudication on the first cause of action.

Where Dorado got off the track was at the ex parte application for entry of judgment. He appears to believe that denying the ex parte application reversed the order granting summary adjudication. It did no such thing. The court merely refused to enter a final judgment ex parte. It did not touch the order granting summary adjudication.[8]

In line with this misconception, Dorado accuses the trial judge of conducting another summary judgment motion hearing sua sponte at the February trial, or of improperly reconsidering the summary adjudication motion, or of reinstating the summary adjudication order after it had been denied. That is not what happened. Instead, the trial judge recognized that O'Neil had already received summary adjudication on one cause of action, gave it the recognition required under the Code of Civil Procedure, and adjudicated accordingly. The judge did not hold another summary judgment hearing or reconsider or reinstate a denied summary judgment adjudication order.

DISPOSITION

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

BEDSWORTH, J.

WE CONCUR:

O'LEARY, P. J.

ARONSON, J.

[8] If Dorado was not served with the moving papers for the summary adjudication motion, as he now claims, he should have moved under section 473, subdivision (b), to have the order set aside. (See *Huh v. Wang* (2007) 158 Cal.App.4th 1406, 1419 [relief available after unopposed summary judgment granted].) He received notice of entry of the order in August 2015. (See *id*. at p. 1421.)