Filed 3/14/12 Farhangui v. Bay Area Surgical CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

BIJAN FARHANGUI, Plaintiff and Appellant, v. BAY AREA SURGICAL GROUP, INC., et al., Defendants and Respondents.	H035808 (Santa Clara County Super. Ct. No. CV110458)

John Anthony Bijan Farhangui (hereafter "appellant") appeals from the trial court's ruling awarding attorney fees to certain defendants (hereafter "respondents") in this action. We conclude that the court's ruling was correct and will affirm the resulting postjudgment order.

FACTS AND PROCEDURAL BACKGROUND

Respondents Julia Hashemieh, Bobby Sarnevesht, Javad Zolfaghari, and Abbas Khoshnevissan owned, together with appellant, the Bay Area Surgical Group limited-liability corporation. Originally appellant and Hashemieh formed the corporation as the sole members, owned a 50 percent share each, and were comanagers, but the others' investments later brought about broader ownership of the corporation, which came to be owned 25 percent by appellant, 25 percent by Hashemieh, 20 percent by Zolfaghari, 20 percent by Khoshnevissan, and 10 percent by Sarnevesht.

There was some evidence that the principals originally planned to make the facility a colonoscopy center. Ultimately, however, they adopted a plan for a broadly based outpatient surgery facility. The plan required obtaining permits from the City of Santa Clara, which precipitated a delay with financial implications. Zolfaghari alerted appellant and Hashemieh that they would have to contribute more money if the cost of the revised business venture exceeded $800,000.

At the same time, Hashemieh and her husband were trying to finish building four houses in the City of Los Gatos, a separate business venture that was encountering its own financial difficulties. Zolfaghari and Khoshnevissan agreed to help Hashemieh and her husband move forward by lending them $420,000, all of the money remaining in the Bay Area Surgical Group's bank account (apparently Hashemieh had removed $167,000 earlier and, Zolfaghari testified, appellant had no money in the account at that time), while that money was sitting idle pending issuance of the needed municipal permits. Hashemieh and Zolfaghari testified that appellant agreed to the loan, and Zolfaghari testified that appellant wanted him to lend money to Hashemieh (whether appellant knew it would come from the corporation's bank account was not resolved in Zolfaghari's testimony), although in his testimony appellant denied knowing anything about the withdrawals from the corporation's account, let alone authorizing them.

While the Bay Area Surgical Group venture was in this suspended state, appellant had a falling out with his fellow investors that eventually proved fatal to the joint venture. Appellant had decided to develop another outpatient surgical facility in the City of Fremont. When certain members discovered his plans, all members met. Appellant said that the Santa Clara facility would not succeed—"you guys don't know what you're doing and you're not doctors," Hashemieh testified that appellant contended—and he wanted to end his involvement with Bay Area Surgical Group and pursue the Fremont venture.

Bay Area Surgical Group members met at their attorney's office on May 12, 2004, to sign dissolution papers. About a month later, everyone except appellant formed a new corporation under essentially the same name, substituting "Inc." for "LLC."

Two years later, in 2007, the newly constituted Bay Area Surgical Group was in operation and earned $2,313,116. In 2008, appellant sued his erstwhile fellow investors. He claimed breach of fiduciary duty and fraud, alleging intentional concealment of material facts, and for each claim alleged that the other investors told him that unless he reduced his ownership interest from 25 to 15 percent they would dissolve the corporation by majority vote, and proceeded to do so, but concealed their plans to resume the venture without him, forming the new corporate entity under its slightly different name. "Defendants breached their fiduciary duty as majority members of the Bay Area Surgical Group, LLC, by utilizing the assets and business opportunities of Bay Area Surgical Group, LLC to form [a] new corporation[,] thereby depriving plaintiff of his ownership interest in the new corporate entity," the complaint alleged. "Defendants . . . falsely represented to plaintiff that they were dissolving and winding up Bay Area Surgical Group, LLC when in truth and in fact they were forming a new corporate entity, Bay Area Surgical Group, Inc. of which they were going to be the sole shareholders[,] thereby depriving plaintiff of any ownership interest in the new corporate entity. Plaintiff is informed and believes and thereon alleges that all of the permits and business development efforts made by plaintiff to develop the warehouse were utilized by defendants in forming the new corporation. Plaintiff, a minority shareholder[,] was thereby eliminated from a potentially prosperous business enterprise thereby depriving him of enjoying future earnings from said business enterprise."

In this vein, appellant testified before the jury that Hashemieh told him "I need to reduce my shares from 25 percent to 15 percent" and that "[i]f you don't reduce the shares, we're going to dissolve the company."

In the course of pretrial proceedings, the complaint was amended twice. The second amended complaint added an allegation that "Unbeknownst to plaintiff, defendant Julia Hashemieh withdrew $420,000 from the bank accounts held in the name of the LLC. The first withdrawal was for $100,000 in February of 2004. The remaining amounts were withdrawn between February and May 12, 2004, with the final sum of $170,000 having been withdrawn on May 12, 2004 prior to the meeting to dissolve the LLC. None of the withdrawals was made with the knowledge or consent of plaintiff. All of the withdrawals were made to fund the construction of personal residences owned by defendant Hashemieh and third parties completely unrelated to the LLC.
[¶] . . . Defendants were aware of the withdrawals and permitted defendant Hashemieh to make them knowing that the LLC would be rendered insolvent. Defendants represented at the meeting that there were no funds left to operate the LLC and that they were shutting it down. The true facts were that defendants planned to continue in the development of the warehouse as a surgical center using the permits previously applied for by Bay Area Surgical Group, LLC and utilizing the plans previously paid for by Bay Area Surgical Group, LLC. Defendants formed a new corporate entity, Bay Area Surgical Group, Inc., which thereafter developed the warehouse as a surgical center. . . ."

Trial by jury began in December of 2009. The jury returned verdicts that substantially favored respondents, including special findings that appellant suffered no harm from any improper failure to disclose facts by any defendant and that no defendant breached a fiduciary duty to him. Respondents moved to recoup attorney fees. The trial court ruled in writing that "[p]laintiff's claims for fraud and breach of fiduciary duty arise from his relationship with defendants as members of Bay Area Surgical Group, LLC, and these claims are contemplated by the provision for attorney's fees contained in the parties' contract." The members' written agreements consisted of an operating agreement and a membership interest purchase agreement. In its oral pronouncement of the ruling, the court stated that appellant's "claims are contemplated by the provisions for attorney's

fees contained in both the Operating Agreement and the Membership Interest Purchase Agreement." The court filed an order awarding $214,189.50 in attorney fees and entered judgment in respondents' favor on the attorney fees and costs issue, assessing appellant $224,639.83, representing the attorney fees award and $10,450.33 in costs. This was a separate judgment from the judgment on the verdict, which the court had entered about half a year earlier.

DISCUSSION

Appellant may appeal the postjudgment order awarding attorney fees against him. (Code Civ. Proc., § 904.1, subd. (a)(1), (2); *R. P. Richards, Inc. v. Chartered Construction Corp*. (2000) 83 Cal.App.4th 146, 158.)

An attorney fees provision in a contract is interpreted under ordinary contract principles. (*Gil v. Mansano* (2004) 121 Cal.App.4th 739, 743; see *Santisas v. Goodin* (1999) 17 Cal.4th 599, 608.) Here as in *Gil*, we "must determine whether the contract provides for attorney fees in a tort action under the procedural posture of the particular case." (*Gil*, *supra*, at p. 743.)

" 'Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs interpretation. (Civ. Code, § 1636.) Such intent is to be inferred, if possible, solely from the written provisions of the contract. (*Id*., § 1639.) The "clear and explicit" meaning of these provisions, interpreted in their "ordinary and popular sense," unless "used by the parties in a technical sense or a special meaning is given to them by usage" (*id.*, § 1644), controls judicial interpretation. (*Id.*, § 1638.) Thus, if the meaning a layperson would ascribe to contract language is not ambiguous, we apply that meaning.' " (*Santisas v. Goodin*, *supra*, 17 Cal.4th at p. 608.)

Under the foregoing principles, and as alluded to in *Gil v. Mansano*, *supra*, 121 Cal.App.4th at page 743, attorney fees may be recoverable to the prevailing party in a tort action. " '[P]arties may validly agree that the prevailing party will be awarded attorney

fees incurred in any litigation between themselves, whether such litigation sounds in tort or in contract.' " (*Santisas v. Goodin*, *supra*, 17 Cal.4th at p. 608.)

When, as is true here for reasons we will explain, the contract interpretation does not turn on extrinsic evidence, we interpret the provision utilizing independent review. (*R. P. Richards, Inc. v. Chartered Construction Corp*, *supra*, 83 Cal.App.4th at p. 154.)

With these precepts in mind, we turn to the language of the parties' agreements. As noted, there were two of them: the membership interest purchase agreement and the operating agreement.

The membership interest purchase agreement provided:

"6.5 Legal Fees. In the event of any action at law, suit in equity or arbitration proceeding relating to this Agreement, the prevailing party or parties shall be entitled to collect costs and attorney fees from the party or parties who do not prevail."

The operating agreement provided:

"12.13 Attorney Fees. In the event that any dispute between the Company and the Members or among the Members should result in litigation or arbitration, the prevailing party in such dispute shall be entitled to recover from the other party all reasonable fees, costs and expenses of enforcing any right of the prevailing party, including without limitation, reasonable attorneys' fees and expenses."

Appellant's first argument is textual: that the term "relating to" in the membership interest purchase agreement is ambiguous and therefore extrinsic evidence should be considered in interpreting the provision. This argument fails for multiple reasons.

First, the term "relating to" is not contained in the operating agreement, which appellant agrees is one of the "Two Pertinent Agreements" that cover this dispute. Therefore, even if the membership interest purchase agreement required construction from extrinsic sources, appellant would still need to demonstrate that respondents are not entitled to attorney fees under the operating agreement, which applies to "any dispute . . . among the Members."

Second, even if the term "relating to" is ambiguous, and we are not persuaded that it is, appellant is not able to point to any extrinsic evidence that would show that the parties intended to exclude appellant's lawsuit from the scope of the membership interest purchase agreement's attorney fees provision.

This latter point brings us to the heart of the matter. Appellant argues that the trial court "fastened upon the fact that plaintiff could only have brought suit if he was a member and therefore his membership status alone brought the two tort claims within the ambit of the fee provision." We do not perceive that it did so, but even if it did, it remains that we review the provisions independently. It is unavoidable that this controversy was an instance of "any dispute . . . among the Members" (the operating agreement's language) and that it precipitated a lawsuit "relating to this Agreement" (the language of the membership interest purchase agreement). Appellant sued on a claim that the other Bay Area Surgical Group members dishonestly and pretextually dissolved the corporation, concealing from him an ulterior purpose to resurrect it without him and exclude him from the profits that were eventually realized.

Appellant insists that "[t]here was no logical connection between defendants' subsequent dissolution of the LLC [the original Bay Area Surgical Group corporation] and the formation of a new corporation, to 'freeze' or 'squeeze' plaintiff out of the LLC, and the terms of the purchase agreement." Elsewhere, however, appellant's descriptions of the controversy show that a dispute with the other members precipitated his lawsuit. "Plaintiff's claim was that he was deprived of the benefit of participating in the new corporate entity by the majority members of the LLC by their withdrawing all of the assets and utilizing the business opportunities developed by the LLC to form the new corporation, thereby depriving plaintiff of an ownership interest in the new corporate entity." "His claim arose from the failure to disclose the intent to form a new business and not include him as a shareholder." These descriptions are accurate summaries of the

record before us and establish that the attorney fees clauses apply to the question of recovery of costs by the prevailing parties.

Appellant asserts that "neither party sought attorneys fees at the inception of the litigation. Plaintiff did not include a claim for attorneys fees in any of the three complaints filed by him. Defendants did not assert a claim for attorneys fees in their answer." That statement is accurate as far as respondents' answer is concerned, but appellant's second amended complaint prayed for "costs of suit incurred herein." More to the point, however, appellant acknowledges that respondents' omission to request attorney fees is not dispositive, and we agree. A party seeking to recover attorney fees under a contractual provision need no longer "plead entitlement to attorney fees as an item of damages in order to recover them in California." (*Allstate Ins. Co. v. Loo* (1996) 46 Cal.App.4th 1794, 1797.) "It is now well-settled that attorney fees, whether authorized by contract or statute, are recoverable under section 1033.5, subdivision (a)(10) as an element of costs, and rather than claim attorney fees as an element of damages, the proper method to recover attorney fees is as an item of costs awarded upon noticed motion. [Citation.] Attorney fees based on a contract provision do not need to be demanded in the complaint." (*Chinn v. KMR Property Management* (2008) 166 Cal.App.4th 175, 194.) "Prior to 1990 it was not entirely clear what the proper method was to obtain an award of attorney fees. In particular, there was no agreement about whether such an award should be claimed as an element of damages or as an item of costs. [Citations.] To end this confusion the Legislature enacted Code of Civil Procedure section 1033.5 and declared: 'The Legislature finds and declares that there is great uncertainty as to the procedure to be followed in awarding attorney's fees where entitlement thereto is provided by contract to the prevailing party. It is the intent of the Legislature in enacting this act to confirm that these attorney's fees are costs which are to be awarded only upon noticed motion, except where the parties stipulate otherwise or judgment is entered by default.' [Citations.]" (*Allstate*, *supra*, at pp. 1797-1798.)

DISPOSITION

The postjudgment order awarding attorney fees is affirmed.

RUSHING, P.J.

WE CONCUR:

PREMO, J.

ELIA, J.