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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

RAYMOND A. HOPPER,

Plaintiff and Appellant,

v.

SEARS, ROEBUCK AND CO.,

Defendant and Respondent.

H036754

(Santa Clara County
Super. Ct. No. 110CV165454)

Plaintiff Raymond A. Hopper (plaintiff) appeals from an order granting in part his motion for an award of attorney's fees and costs from defendant Sears, Roebuck and Co. (defendant). Plaintiff contends that he is entitled to an award of all his reasonably incurred attorney's fees and costs, and that the trial court abused its discretion in awarding only \$6,245.54 of his requested \$35,287.46. As we find no abuse of discretion, we will affirm the trial court's order.

BACKGROUND

On or about September 5, 2009, plaintiff applied for and received a Sears Citibank MasterCard with a credit limit exceeding \$2,500. On September 5, 2009, he used the account to purchase five \$500 Sears gift cards. He gave the gift cards to a friend, but when the friend attempted to use them to purchase a refrigerator at a Sears store, the gift cards were not honored. On or about November 11, 2009, plaintiff opened a dispute with

Citibank regarding defendant's failure to redeem the gift cards, which included a dispute of any finance charges or late fees associated with the purchase of the gift cards. On March 2, 2010, plaintiff notified defendant in writing of his contention that its conduct constituted anticompetitive, unfair and deceptive practices, and his demand that defendant rectify the situation pursuant to Civil Code section 1770.¹ On March 4, 2010, plaintiff filed a complaint for injunctive relief against defendant, requesting "an order permanently enjoining defendant SEARS from using or employing any method, act, or practice found by the court to be unlawful by Section 1770"; "reasonable attorney's fees according to proof, pursuant to . . . § 1780 and/or [Code of Civil Procedure] § 1021.5"; and "costs of suit."

On May 25, 2010, plaintiff signed a settlement agreement and release of claims which states in pertinent part: "In consideration for the release of all claims and a dismissal of the subject Action, Defendant will pay to Plaintiff six thousand five hundred dollars (\$6,500.00), issue a credit to the Account in the amount of two thousand five hundred dollars (\$2,500.00), along with any finance charges or late fees associated with the September 4, 2009 purchase of the subject gift cards, extinguish the late fees and finance charges associated therewith, restore the credit line/limit to its pre-default level of nine thousand dollars (\$9,000.00), request that Citibank remove negative credit reporting on the Account from September 2009 to the date of this Agreement, and cause Citibank to issue a letter from Citibank's presidential communication group stating plaintiff's credit history as clean and never delinquent." "This amount is to be paid by Defendant and shall be paid to Plaintiff upon execution of the Agreement by Plaintiff. The settlement check shall be made payable to [plaintiff's attorney] and sent to said attorney. The date for payment shall be no later than thirty (30) days after Plaintiff signs this

¹ All further statutory references are to the Civil Code unless otherwise specified.

Agreement and returns a copy of the signatures to counsel for Defendant.” “Plaintiff on one hand, and Defendant and Citibank on the other, each agreed to bear their own attorneys’ fees or other costs of representation which each side has incurred with respect to the dispute concerning the purchase of the subject gift cards on September 4, 2009.” “Plaintiff represents and warrants . . . that Plaintiff has the sole right and exclusive authority to execute this Agreement and receive the sums specified in it”

Plaintiff provided defendant an executed copy of the agreement on May 25, 2010. A representative of defendant signed the settlement agreement on June 2, 2010, and provided plaintiff a fully executed copy of the agreement on June 8, 2010. On or about June 7, 2010, Citibank notified plaintiff that it had sent to the credit reporting agencies a notice to correct plaintiff’s account payment history to show that his account was current.

Thereafter, a dispute arose regarding the payment of the \$6,500, as defendant initially refused to issue a check for that amount until plaintiff provided defendant with his social security number, and plaintiff refused to provide defendant his social security number even though he had provided it when he applied for his Sears Citibank MasterCard. On July 27, 2010, 63 days after being provided an executed copy of the settlement agreement, defendant sent plaintiff’s attorney a check for \$6,500. Plaintiff’s attorney did not cash the check, but held on to it for about one month before sending it back to defendant’s attorney.

On July 30, 2010, plaintiff filed a first amended complaint for injunctive relief and damages against defendant and Citibank. On September 1, 2010, defendant filed its first of three applications for an order entering judgment pursuant to Code of Civil Procedure section 664.6. Plaintiff filed opposition to the motions, contending in part that there was no binding settlement agreement to enforce, as defendant did not pay the agreed-to amount of \$6,500 within 30 days of receipt of plaintiff’s signature. At an October 26, 2010 hearing, defendant’s counsel argued to the court that defendant had substantially complied with the written settlement agreement. The trial court denied the motion to

enforce the settlement agreement stating: "Sears should have handled it differently." "It would have been better if Sears just paid it on time." A formal order denying defendant's motion was filed November 3, 2010.

On November 12, 2010, plaintiff signed a new settlement agreement and release of claims which states in pertinent part: "In consideration for the release of all claims and a dismissal of the subject Action, Defendant Sears will pay to Plaintiff two thousand dollars (\$2,000.00), Sears and Citibank will continue to honor the previously issued credits to the Account in the amount of two thousand five hundred dollars (\$2,500.00), plus the credits of \$49 for fees and \$160 in finance charges, all of which have been previously credited to the Account. The parties agree that no further credits are due and owing to Plaintiff in connection with the disputed \$2,500 gift cards." "In further consideration for the release of all claims and a dismissal of the subject Action, with the exception of the above two thousand dollars (\$2,000.00), Sears will not report to the I.R.S. as income taxable to plaintiff personally any monetary relief flowing from this or the previous agreement signed by the parties to this agreement. With respect to the above two thousand dollars (\$2,000.00) payment only, plaintiff consents to the release of his social security number by Citibank to Sears." "In further consideration for the release of all claims and a dismissal of the subject Action, Sears agrees to pay Plaintiff[']s attorneys' fees and costs incurred in this Action, in an amount to be determined by the Court on noticed motion, or subsequent agreement of the parties signed by counsel for the parties." "The payment of the above two thousand dollars (\$2,000.00) shall be paid to Plaintiff's attorney upon execution of the Agreement by Sears and Citibank, with the settlement check made payable to 'Raymond A. Hopper.' The date for payment shall be no later than fourteen (14) days after Sears and Citibank execute this Agreement and return a copy of the signatures to counsel for Plaintiff." "Plaintiff[']s costs, including attorney's fees, shall be paid to Plaintiff[']s attorney within fourteen (14) days of the

court's determination of the amount, or within fourteen (14) days of prior stipulation of the parties, made payable to [plaintiff's attorney]."

Defendant's representative signed the new settlement agreement on November 15, 2010, and Citibank's representative signed it on November 16, 2010.

On January 4, 2011, plaintiff filed a motion for an award of attorney's fees and costs pursuant to sections 1780, subdivision (e), 1748.7, 1785.31, and the new settlement agreement. Attached to the motion were copies of invoices showing that plaintiff's counsel had spent 5.5 hours on the case at \$410 per hour between February 24, 2010, and March 1, 2010 (for total fees of \$2,255),² and that counsel had spent an additional 63.1 hours at \$450 per hour, on the case between March 2, 2010, and January 4, 2011. The total amount of attorney's fees plaintiff was requesting was \$30,650.³ In addition, plaintiff was requesting \$817.46 in costs. Defendant filed opposition to plaintiff's motion on January 21, 2011, arguing in part that "any fees incurred by Plaintiff following execution of Initial Agreement were unreasonable and should not be recovered." In plaintiff's reply, he requested "an award of attorney's fees for all time incurred, plus the anticipated 8 hours to conclude this matter, for a total of 76.6 hours @ \$450.00 per hour, resulting in a lodestar of \$34,470.00, and that the court determine an appropriate multiplier to compensate plaintiff's counsel for the contingent nature of the award, for 91% of the pre-settlement portion of the lodestar. [¶] Further, plaintiff requests the additional costs of \$817.46"

² The original invoice dated March 5, 2010, claimed 5.5 hours at \$450 per hour, for a total of \$2,475.00, but it also included a discount of \$220. So, the invoice was actually for \$2,255.00, which is 5.5 hours at \$410 per hour.

³ The total amount of attorney fees invoiced through June 2, 2010, was \$5,630, and the total amount of costs invoiced through the same date was \$395.54.

The hearing on the motion was held February 3, 2011, before a different judge than had heard the motion to enter judgment on the initial settlement agreement. Plaintiff's attorney informed the court that the case "is fully concluded, except for the issues of attorney's fees and costs."⁴ The court told the parties that "I'm a little bit disturbed that what was \$6,500 or so in fees escalated into \$34,000 in fees." After hearing argument from the parties, the court took the matter under submission, and it filed its order later the same day. In pertinent part, the order states: "Plaintiff Raymond A. Hopper's motion for attorney's fees is GRANTED, in part. The court does not find plaintiff's request to be reasonable. As an example, plaintiff contends he incurred \$4500 in attorney's fees and costs when he sent a demand letter on March 2, 2010. . . . In reviewing plaintiff's billing statements, the court notes that plaintiff had only incurred approximately \$3100 in attorney's fees and costs by that date. . . . In this court's review, the court finds that attorney's fees and costs incurred through June 2, 2010 to be the reasonable value of services incurred. (See *Gorman v. Tassajara Development Corp.* (2009) 178 Cal.App.4th 44 [(*Gorman*)].) Plaintiff Raymond A. Hopper[] shall recover reasonable attorney's fees and costs from defendant Sears, Roebuck & Co. in the amount of \$6,245.54."

Plaintiff filed a timely notice of appeal from the court's February 3, 2011 order.

DISCUSSION

Plaintiff contends that he is entitled to all reasonably incurred attorney fees and costs, and he "asks this court to rule that the failure to award any fees and costs whatsoever following the date the initial superseded settlement agreement was signed, for fees incurred in obtaining the final settlement agreement, constituted an abuse of discretion." He argues that it was defendant's conduct that required him to oppose the

⁴ Neither a judgment nor an order of dismissal is included in the record on appeal.

motions to enforce the initial settlement agreement, to work out a new settlement agreement, and to file his motion for attorney's fees and costs.

Defendant contends that “[t]he only reasonable interpretation of the Final Agreement is that both parties agreed to defer to the court to determine [plaintiff’s] attorney’s fees and costs. Relying on the Final Agreement and the parties’ moving papers, the court found attorney’s costs and fees in the amount of \$6,245.54 to be reasonable. The court was well within its discretion to award an amount of attorney’s fees and costs it deemed to be reasonable in light of the circumstances of the matter.”

Section 1780 states in pertinent part: “(a) Any consumer who suffers any damage as a result of the use or employment by any person of a method, act, or practice declared to be unlawful by Section 1770 may bring an action against that person to recover or obtain any of the following: [¶] (1) Actual damages [¶] (2) An order enjoining the methods, acts, or practices. [¶] . . . [¶] (5) Any other relief that the court deems proper. [¶] . . . [¶] (e) The court shall award costs and attorney’s fees to a prevailing plaintiff in litigation filed pursuant to this section.”

“Section 1780 provides remedies for consumers who have been victims of unfair or deceptive business practices. (*Id.*, subd. (a); see also § 1770.) The provision for recovery of attorney’s fees allows consumers to pursue remedies in cases as here, where the compensatory damages are relatively modest. To limit the fee award to an amount less than that reasonably incurred in prosecuting such a case, would impede the legislative purpose underlying section 1780.” (*Hayward v. Ventura Volvo* (2003) 108 Cal.App.4th 509, 512 (*Hayward*).)

“In determining the amount of reasonable attorney fees to be awarded under a statutory attorney fees provision, the trial court begins by calculating the ‘lodestar’ amount. (*Ketchum [v. Moses]* (2001) 24 Cal.4th [1122,] 1131 [(*Ketchum*)]; *Meister v. Regents of University of California* (1998) 67 Cal.App.4th 437, 448-449 (*Meister*).) The ‘lodestar’ is ‘the number of hours reasonably expended multiplied by the reasonable

hourly rate.’ (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095.) To determine the reasonable hourly rate, the court looks to the ‘hourly rate . . . prevailing in the community for similar work.’ (*Ibid.*) Using the lodestar as the basis for the attorney fees award ‘anchors the trial court’s analysis to an objective determination of the value of an attorney’s services, ensuring that the amount awarded is not arbitrary. [Citation.]’ (*Ibid.*)” (*Bernardi v. County of Monterey* (2008) 167 Cal.App.4th 1379, 1393-1394 (*Bernardi*); see also *Gorman, supra*, 178 Cal.App.4th at pp. 63-64; *Flannery v. California Highway Patrol* (1998) 61 Cal.App.4th 629, 640 (*Flannery*).)

“The California Supreme Court has further instructed that attorney fees awards ‘should be fully compensatory.’ (*Ketchum, supra*, 24 Cal.4th at p. 1133.) Thus, in the absence of ‘circumstances rendering the award unjust, an attorney fee award should ordinarily include compensation for *all* the hours *reasonably spent*, including those relating solely to the fee. [Citation.]’ (*Ibid.*) However, ‘[a] fee request that appears unreasonably inflated is a special circumstance permitting the trial court to reduce the award or deny one altogether.’ (*Serrano v. Unruh* (1982) 32 Cal.3d 621, 635.)” (*Bernardi, supra*, 167 Cal.App.4th at p. 1394.) “ ‘If . . . the Court were required to award a reasonable fee when an outrageously unreasonable one has been asked for, claimants would be encouraged to make unreasonable demands, knowing that the only unfavorable consequence of such misconduct would be reduction of their fee to what they should have asked in the first place. To discourage such greed, a severer reaction is needful. . . .’ [Citation.]” (*Serrano v. Unruh, supra*, at p. 635, see also *id.* at fn. 21.)

“As this court has previously observed, ‘California courts have long held that trial courts have broad discretion in determining the amount of a reasonable attorney’s fee award. This determination is necessarily ad hoc and must be resolved on the particular circumstances of each case.’ (*Meister, supra*, 67 Cal.App.4th at p. 452.) In exercising its discretion, the trial court may accordingly ‘consider all of the facts and the entire procedural history of the case in setting the amount of a reasonable attorney’s fees

award.’ (*Ibid.*) An attorney fees award ‘ “will not be overturned in the absence of a manifest abuse of discretion, a prejudicial error of law, or necessary findings not supported by substantial evidence. [Citations.]” [Citation.]’ [Citation.]

“In reviewing the trial court’s exercise of its discretion, we also recognize that ‘[t]he “experienced trial judge is the best judge of the value of professional services rendered in his [or her] court, and while his [or her] judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong.”’ (*Serrano v. Priest* (1977) 20 Cal.3d 25, 49)” (*Bernardi, supra*, 167 Cal.App.4th at p. 1394; see also *Flannery, supra*, 61 Cal.App.4th at p. 647 [“Whether an award is justified and what amount that award should be are two distinct questions, and the factors relating to each must not be intertwined or merged”].)

There is no dispute that the trial court properly determined in this case that an award of attorney’s fees to plaintiff was justified. The parties’ new settlement agreement indicates that plaintiff was the prevailing party in his action seeking an injunction and damages under section 1770 for defendant’s allegedly unfair or deceptive business practices. As a result of the settlement agreement, plaintiff obtained the reversal of credit card fees, the correction of his credit report, and \$2,000 in damages from defendant. The settlement agreement also allowed plaintiff to receive an additional amount to cover his reasonable attorney fees as the prevailing party. (See § 1780, subd. (e); *Hayward, supra*, 108 Cal.App.4th at p. 512.)

The settlement agreement indicates that the parties agreed to allow the trial court to determine what attorney’s fees were reasonably incurred by plaintiff in prosecuting his case if the parties could not agree on an amount. In determining the amount of reasonable attorney fees to be awarded under section 1780, the trial court would begin by calculating the “lodestar” amount, which is the number of hours reasonably expended multiplied by the reasonable hourly rate. (*Bernardi, supra*, 167 Cal.App.4th at p. 1393.) Although the amount awarded by the court should be fully compensatory, when a fee

request appears to the court to be unreasonably inflated the trial court may, in the exercise of its discretion, reduce an award or deny it altogether. (*Id.* at p. 1394.)

Here, the record shows that plaintiff filed a complaint for injunctive relief and attorney's fees against defendant, and plaintiff's attorney negotiated a settlement agreement with defendant as a result of the lawsuit. The settlement agreement stated in part that defendant was to pay plaintiff \$6,500 within 30 days and that the parties were to bear their own attorney's fees. A representative of defendant signed the settlement agreement on June 2, 2010, while plaintiff's counsel had invoiced plaintiff \$5,630 for attorney's fees and \$395.54 in costs through that date. Defendant sent plaintiff's attorney a check for \$6,500, but it did not do so until 33 days after the date set forth in the settlement agreement. Plaintiff's attorney did not cash the check. Rather, he held on to it while filing an amended complaint seeking damages as well as injunctive relief, and then he opposed defendant's motion for enforcement of the settlement agreement. When defendant's motion for enforcement of the settlement agreement was denied, plaintiff's counsel negotiated a new settlement agreement. The new settlement agreement stated in part that defendant was to pay plaintiff \$2,000, plus attorney's fees and costs in an amount to be determined by the parties or the court. Plaintiff's counsel then filed a motion seeking more than \$31,000 in attorney's fees and costs.

The original settlement agreement signed by defendant's representative on June 2, 2010, provided that \$6,500 was to be paid to plaintiff and that he was to pay his own attorney's fees. The new settlement agreement provided that \$2,000 was to be paid to plaintiff and that his attorney's fees and costs were to be paid by defendant in an amount to be determined by the parties or the court. The trial court determined that the reasonable amount of plaintiff's attorney's fees and costs to be paid by defendant to plaintiff was \$6,245.54. This amount represents the total amount of hours spent by plaintiff's counsel up to June 2, 2010, the date the original settlement agreement was signed by a representative of defendant, multiplied by \$450 per hour (that is, \$5,850),

plus the \$395.54 in costs the attorney had expended up to the same date. On this record, we cannot say that the trial court abused its discretion in making its determination.

Plaintiff had filed a lawsuit seeking an injunction, attorney's fees and costs. The original settlement agreement provided that defendant was to pay plaintiff a small amount (about \$500) more than his approximately \$6,000 in invoiced attorney's fees and costs. Citing *Gorman*, the trial court found that the attorney's fees and costs incurred through June 2, 2010, the date defendant's representative signed the original settlement agreement, to be the reasonable value of services incurred. In *Gorman*, this court stated that "[a] reduced award might be fully justified by a general observation that an attorney overlitigated a case or submitted a padded bill or that the opposing party has stated valid objections." (*Gorman, supra*, 178 Cal.App.4th at p. 101.) The trial court could have reasonably determined in this case that plaintiff's attorney's reasonable hourly rate was \$450 as claimed, that plaintiff's attorney was entitled to be compensated at that rate for all hours reasonably expended even though the attorney had originally invoiced 5.5 hours at \$410 per hour, and that plaintiff's attorney reasonably expended all the hours claimed up to the date that defendant's representative signed the original settlement agreement. The new settlement agreement provided that plaintiff was to be paid \$2,000, but his attorney was claiming over \$31,000 in attorney's fees and costs. On the record before it, the trial court could have also reasonably determined that the attorney fee request was unreasonably inflated, permitting the court to reduce the award or deny it altogether. (*Serrano v. Unruh, supra*, 32 Cal.3d at p. 635; *Bernardi, supra*, 167 Cal.App.4th at p. 1394.) As we are not convinced that the trial court's order, which reduces the attorney's fees award to an amount compensating plaintiff's attorney for the time and costs spent up to the time defendant's representative signed the original settlement agreement, is clearly wrong (*Serrano v. Priest, supra*, 20 Cal.3d 25; *Bernardi, supra*, at p. 1394), we will not disturb the trial court's order.

DISPOSITION

The order of February 3, 2011, is affirmed.

BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

MIHARA, J.

DUFFY, J.*

*Retired Associate Justice of the Court of Appeal, Sixth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.