

**CERTIFIED FOR PUBLICATION**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

STEVEN FRYE,

Plaintiff and Appellant,

v.

TENDERLOIN HOUSING CLINIC, INC.,

Defendant and Respondent.

A104078

(San Francisco County  
Super. Ct. No. 989-112)

Roy Frye (Frye) was a former client of respondent Tenderloin Housing Clinic, Inc. (THC).<sup>1</sup> Following a successful challenge against his landlord, Frye filed an action against THC arguing that it was not entitled to the statutory attorney fees awarded by the court because THC was not authorized to practice law and improperly included a contingent fee clause in his retainer agreement. This appeal presents two issues: (1) whether the trial court erred in granting summary adjudication as to Frye’s fraud cause of action; and (2) whether the trial court erred in granting judgment on the pleadings as to the remaining causes of action for money had and received and breach of fiduciary duty. We affirm in part and reverse in part.

**BACKGROUND**

THC was incorporated in 1980 as a nonprofit public benefit corporation whose stated purpose was “to provide housing law education and information to low-income tenants in San Francisco, CA.” The by-laws expanded on this purpose to include, without limitation: “the preservation and improvement of housing, particularly

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<sup>1</sup> Roy Frye died on August 22, 2001. His son, appellant Steven Frye, was substituted as successor in interest on November 6, 2002.

residential hotels, assisting tenants to assert their legal rights, using legal skills as necessary to serve the low and moderate income residents of the Tenderloin community.” THC employs attorneys to whom it pays salaries to provide legal assistance to low-income tenants. All of the attorneys employed by THC are active members of the California State Bar. However, THC itself is not registered with the State Bar.

In 1993, THC entered into separate contingent fee retainer agreements with Frye and 14 other tenants at a residential hotel in the Tenderloin neighborhood of San Francisco to represent them in an action against their landlord regarding defective conditions at the hotel. The agreements provided the following language: “[¶] 2. A client shall pay the attorney, as attorney’s fee for such representation, thirty-three and one-third percent (33-1/3%) of any settlement reached prior to the original date set for trial in the matter, or forty percent (40%) of any recovery by settlement or trial judgment achieved on or after the original date set for trial. [¶] . . . [¶] 4. If the Clinic’s work results in the client or the Clinic being awarded attorneys fees either by statute or by a provision in a rental agreement, the Clinic shall recover whatever amount is greater between the attorneys fee award and the amount of the contingency fee.” THC attorney Stephen Collier signed the retainer agreements. At various stages of the action, Collier as well other THC attorneys appeared for Frye.

Following a one-month trial in May 1994, a jury awarded the 15 tenants a total of \$236,943.85. (*Frye, et al. v. Skyline Realty, et al.* (S.F. Super. Ct. No. 952016).) The jury award to Frye was \$10,355. The landlords appealed the judgment, which was affirmed in its entirety; a subsequent petition for review to the California Supreme Court was denied. Thereafter, THC moved for attorney fees for trial and appellate proceedings pursuant to attorney fee provisions in nine of the fifteen rental agreements, and Civil Code section 1942.4.<sup>2</sup> Frye’s rental agreement did not contain an attorney fees clause, thereby limiting the award to statutory fees only.

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<sup>2</sup> Civil Code section 1942.4 provides for statutory attorney fees to the prevailing party in cases involving uninhabitable dwellings.

The trial court awarded \$96,000 in attorney fees through trial and \$35,560 for fees on appeal for a total of \$131,560. The trial court also awarded costs of \$10,164.45 through trial and \$332.88 on appeal. In December 1996, the landlords paid \$464,723.33 to satisfy the judgment, including damages plus interest and attorney fees and costs plus interest. Since 40 percent of the final judgment amount of \$464,723.33 (\$185,889.33) was greater than the award of attorney fees plus interest (\$168,543.88), THC retained the contingency fee.

After crediting the court-ordered attorney fees paid by the landlords, THC retained \$1,203.96 from Frye's damage award to pay the balance of attorney fees due under the retainer agreement. Frye received payment in the amount of \$11,599.04. Thereafter, Frye retained an attorney and demanded an accounting of the judgment distribution. On behalf of THC, Collier wrote a letter to Frye's counsel detailing the breakdown of the judgment distribution. Frye then filed the instant action against THC in January 1998, alleging five causes of action: (1) money had and received, (2) fraud and negligent misrepresentation, (3) breach of fiduciary duty, (4) breach of contract, and (5) unfair business practices.

In February 1998, THC moved for summary judgment, or in the alternative summary adjudication as to all causes of action in the complaint. In April 1998, the trial court denied summary judgment, finding that there were triable issues of fact as to the amount of fees due under the contract. The court also denied summary adjudication as to the first, third, fourth and fifth causes of action on the same basis. However, the court granted summary adjudication as to the second cause of action, finding there were no triable issues of fact as to fraud and misrepresentation. In a subsequent order, the court again granted summary adjudication as to the second cause of action noting it was undisputed that THC is a nonprofit, tax-exempt corporation.<sup>3</sup> The court then found there was "no requirement that non-profit corporations must register with the State Bar as

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<sup>3</sup> THC asserts that this second order was never served by the court on the parties, and the parties were unaware of it during all of the subsequent proceedings below until it was discovered in the record on appeal. The record reflects THC prepared this order. However, the record is silent as to how or why this second order came to be filed.

professional law corporations. No fraud or misrepresentation therefore exists as a matter of law.”

In June 1998, Frye entered into a stipulation with THC settling his fourth and fifth causes of action in exchange for \$1,390.06, which THC states represents the difference between Frye’s jury award and the amount he received from THC.<sup>4</sup>

After the case was assigned for a bench trial, the four attorney employees of THC moved to intervene on the side of THC; the motion was granted and a complaint in intervention was filed in December 1998.

In April 2003 after various pretrial motions and rulings, THC moved for judgment on the pleadings as to Frye’s remaining causes of action relying on the recent case of *Olson v. Cohen* (2003) 106 Cal.App.4th 1209, 1211, which held that disgorgement of legal fees was an inappropriate remedy for a corporation’s failure to register with the State Bar in the absence of a client’s reliance on the existence of a corporate entity or injury caused by the corporation’s delinquency. In June 2003, the court granted THC’s motion finding the following: “The absence of any damage caused by the allegedly tortious and/or illegal conduct of THC requires this court to come to the same conclusion as was reached by the Court of Appeal in *Olson*: all of the relevant equitable factors weigh strongly in favor of denying plaintiffs relief. To require disgorgement of fees because of the failure to register THC with the State Bar of California would be utterly disproportionate to the wrong.” Thereafter, the instant appeal followed.

## **DISCUSSION**

### *A. Registration as Nonprofit Law Corporation.*

Section 6160 of the Business and Professions Code provides that “A law corporation is a corporation which is registered with the State Bar of California and has a currently effective certificate of registration . . . . Subject to all applicable statutes, rules and regulations, such law corporation is entitled to practice law.”

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<sup>4</sup> The record reflects THC deducted \$1,203.96 from Frye’s jury award. We assume the additional \$186.10 represents interest. Additionally, Frye does not appear to dispute that the \$1,390.06 payment represents the difference between his jury award and the amount he received from THC.

Prior to 1994, there was no statutory authority permitting incorporation as a professional law corporation other than for-profit corporations organized under the General Corporation Law. (See Bus. & Prof. Code, § 13401, subd. (b), added by Stats. 1968, ch. 1375, p. 2704, § 9; 75 Ops.Cal.Atty.Gen. 92, 93-94, 97 (1992); Sen. Com. on Judiciary, Analysis of Sen. Bill 312 (1993-1994 Reg. Sess.) as amended July 12, 1993.) In 1994, Senate Bill 312 (SB 312) was enacted to allow professional law corporations to incorporate as nonprofit public benefit corporations. (Sen. Com. on Judiciary, Analysis of Sen. Bill 312 (1993-1994 Reg. Sess.) as amended July 12, 1993.)

Under current law, a professional corporation is defined as “a corporation organized under the General Corporation Law or pursuant to subdivision (b) of Section 13406 that is engaged in rendering professional services in a single profession.” (Corp. Code, § 13401, subd. (b), amended by Stats. 1993, ch. 955, p. 5497 [SB 312].) Corporations Code section 13406, subdivision (b) provides, in pertinent part, the following: “A professional law corporation may be incorporated as a nonprofit public benefit corporation under the Nonprofit Public Benefit Corporation Law under either of the following circumstances: [¶] (1) the corporation is a qualified legal services project or a qualified support center within the meaning of subdivisions (a) and (b) of Section 6213 of the Business and Professions Code. [¶] (2) The professional law corporation otherwise meets all of the requirements and complies with all of the provisions of the Nonprofit Public Benefit Corporation Law, as well as all of the following requirements . . . . (D) *The corporation shall not enter into contingency fee contracts with clients.*” (Italics added.) THC does not appear to meet the criteria of either a “qualified legal services project” or “qualified support center” as it has not presented evidence that its current “primary purpose” is to provide legal services or legal training without charge to indigent persons. (See Bus. & Prof. Code, § 6213, subds. (a) & (b).) Thus, it seems if THC were registered, it would be prohibited from entering into contingent fee agreements.

THC argues that it is not required to register with the State Bar because incorporation under Corporations Code section 13406, subdivision (b) is “permissive.”

This argument is without merit. The only thing “permissive” about section 13406, subdivision (b) is that a corporation practicing law may be incorporated as a for-profit or a nonprofit corporation, provided that it complies with code requirements pertaining to each. Either way, however, registration is required.

THC further argues that even if Corporations Code section 13406, subdivision (b) requires registration, it was not in existence at the time Frye’s retainer agreement was signed in April 1993 and nothing in SB 312 indicated a retroactive application. This argument ignores a 1992 opinion in which the Attorney General observed that the prohibition against corporations practicing law except as provided in Business and Professions Code section 6160, is subject to three limited exceptions: (1) legal aid societies operating as private nonprofit associations which historically have performed a public service by providing *free legal services* to the indigent; (2) benevolent associations which provide legal services *to their members* in matters of common interest; and (3) organizations similar to the NAACP, which are established and operated for preservation of constitutional and legal rights in which “*litigation is not a technique of resolving private differences . . . [but] a form of political expression.*” (*N.A.A.C.P. v. Button* (1963) 371 U.S. 415, 429, italics added (*Button*); 75 Ops.Cal.Atty.Gen. 92, 95 (1992).)

Citing to *Button, supra*, 371 U.S. 415, THC argues that it is analogous to the NAACP and that registration with the State Bar is not required. Contrary to THC’s assertion, *Button* does not stand for the proposition that registration of nonprofit legal corporations is not required. In *Button, supra*, 371 U.S. 415, 423-424, 431-432, the issue was not registration with the State Bar, but whether a Virginia statute forbidding solicitation of a legal business by a “runner” or “capper” infringed upon the First Amendment freedoms of the NAACP.<sup>5</sup> In fulfillment of its purpose to eliminate racial barriers, the NAACP “devotes much of its funds and energies to an extensive program of assisting certain kinds of litigation . . . .” (*Id.* at pp. 419-420.) “In the context of NAACP

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<sup>5</sup> The Virginia statute at issue included in its definition of a “runner” or “capper” an “agent for an individual or organization which retains a lawyer in connection with an action to which it is not a party and in which it has no pecuniary right or liability.” (*Button, supra*, 371 U.S. at p. 423.)

objectives, litigation is not a technique of resolving private differences . . . . It is . . . a form of political expression.” (*Id.* at p. 429.) The court held that the activities of the NAACP were protected by the First and Fourteenth Amendments, which could not be prohibited by the State of Virginia as improper solicitation of legal business. (*Id.* at pp. 436-437.) Here, THC has failed to establish that the litigation it pursues is a form of political expression. Moreover, registration with the State Bar presents no First Amendment concerns.<sup>6</sup>

Based on the record before us, THC is not entitled to an exemption from registration with the State Bar.

*B. The Trial Court Properly Granted Summary Adjudication as to Frye’s Cause of Action for Fraud and Misrepresentation.*

The trial court correctly granted summary adjudication as to Frye’s cause of action for fraud and misrepresentation, as Frye suffered no actionable damages.

1. Standard of Review

We review the trial court’s grant of summary judgment de novo, applying the same standards that governed the trial court. (*Zavala v. Arce* (1997) 58 Cal.App.4th 915, 925.)

2. Discussion

The elements of a cause of action for fraud are: (a) misrepresentation (false representation, concealment, or nondisclosure), (b) knowledge of falsity (or scienter), (c) intent to defraud, (d) justifiable reliance, and (e) resulting damage. (*Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 173.) The tort of negligent misrepresentation does not require scienter or intent to defraud. (*Ibid.*)

A challenged representation must ordinarily be an affirmation of fact. (See 5 Witkin, Summary of Cal. Law (9th ed. 1988 & 2004 supp.) Torts, § 677; Civ. Code, § 1710.) In moving for summary judgment, THC argued that no fraud or

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<sup>6</sup> While claiming that it serves the needs of low-income plaintiffs, THC somewhat inconsistently also argues that Corporations Code section 13406, subdivision (b)(2)(C) constitutes “content-based” discrimination by reason of its requirement that 70 percent of its clients must be low income.

misrepresentation existed because there was no misrepresentation in the retainer agreement regarding the fees or that THC was licensed to practice law. While the fee disclosure appears to be devoid of misrepresentation, the same is not true regarding the issue of THC's right to practice law and collect legal fees. It is undisputed that THC is not registered with the State Bar. Accordingly, it is not authorized to practice law. (Bus. & Prof. Code, § 6160.) From Frye's perspective, the retainer agreement was with THC not attorney Collier. The retainer agreement provides that it was entered into by "the Tenderloin Housing Clinic . . . herein referred to as the attorney." It also provides that if "the Clinic's work results in . . . attorneys fees . . . the Clinic shall recover whatever amount is greater between the attorneys fee award and the amount of the contingency fee." The trial court originally granted summary adjudication as to the fraud cause of action finding no triable issues of fact and then later finding that in the absence of a requirement that nonprofit corporations practicing law register with the State Bar there could be no fraud as a matter of law. While we find the trial court erred when it found that there was no duty to register and for that reason there was no misrepresentation, the fact remains that Frye was not damaged. (*Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1088.) The requirement that there be damage is a way of stating that there must be detrimental reliance upon a misrepresentation.<sup>7</sup>

Our review of the record establishes summary adjudication was properly granted not because there was no misrepresentation, but because Frye presented no evidence of damages. "Misrepresentation, even maliciously committed, does not support a cause of action unless the plaintiff suffered consequential damages. [Citations.] And the damages suffered must be referable to, and caused by, the fraud. [Citations.]" (*Conrad v. Bank of*

<sup>7</sup> Citing to *Consumer Cause, Inc. v. SmileCare* (2001) 91 Cal.App.4th 454, Frye argues that he was not required to produce evidence of reliance because THC did not base its motion for summary judgment on the reliance issue. Contrary to Frye's assertion, *Consumer Cause* does not hold that if a party moving for summary judgment fails to address a particular element of plaintiff's cause of action, the plaintiff has no duty to produce evidence to support that element. Rather, the court held that a different burden of proof is involved when a defendant moves for summary judgment by asserting an affirmative defense. (*Id.* at pp. 467-468.) *Consumer Cause* does not apply here as THC did not move for summary adjudication based on an affirmative defense.

*America* (1996) 45 Cal.App.4th 133, 159, rejected on other grounds in *Lovejoy v. AT&T Corp.* (2001) 92 Cal.App.4th 85, 92.)

Accordingly, the trial court properly granted summary adjudication of the fraud cause of action.

C. *The Trial Court Erroneously Granted Judgment on the Pleadings as to Frye's Causes of Action for Money Had and Received and Breach of Fiduciary Duty.*

1. Standard of Review

In reviewing the trial court's order granting defendant's motion for judgment on the pleadings, we apply the de novo standard of review. "We independently review a judgment on the pleadings, and review the judgment, not the court's rationale." (*Harris v. Grimes* (2002) 104 Cal.App.4th 180, 185.)

2. Discussion

Shortly after the decision in *Olson v. Cohen, supra*, 106 Cal.App.4th 1209, THC moved for judgment on the pleadings as to Frye's remaining causes of action for money had and received and breach of fiduciary duty.<sup>8</sup> The *Olson* court held that disgorgement of legal fees was an inappropriate remedy for Mr. Cohen's failure to register his corporation with the State Bar in the absence of a client's reliance on the existence of a corporate entity *or* injury caused by the corporation's delinquency. (*Id.* at p. 1211.) Frye argues that *Olson* is not applicable because it was decided on facts different than those presented here. We agree.

In *Olson*, the former client alleged that the corporation was engaged in the unauthorized practice of law by failing to register with the State Bar and as a result the fee agreements were void. (*Olson v. Cohen, supra*, 106 Cal.App.4th at p. 1214.) There, like here, plaintiff sought disgorgement of attorney's fees. (*Id.* at pp. 1211, 1214.) That is where the similarities between *Olson* and the instant case end. The corporation in *Olson* registered with the State Bar, albeit tardily. (*Id.* at pp. 1212-1213.) Here, THC

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<sup>8</sup> Though separately pleaded causes of action, we shall discuss them together as they are both based on Frye's assertions that THC is not authorized to practice law, it entered into an illegal agreement with Frye, and it retained money to which it was not entitled.

maintains that it need not and apparently has no intention of registering because it contends nonprofit corporations are not required to do so.

The *Olson* court found disgorgement was inappropriate, noting that while the corporation's temporal failure to register with the State Bar may have exposed the individual attorney to individual liability, the object of the agreements was not in violation of law. (*Olson v. Cohen, supra*, 106 Cal.App.4th at pp. 1212-1213.) Here, the THC fee agreement calls for payment of a contingent fee prohibited by statute. (Corp. Code, § 13401, subd. (b).) Moreover, we are concerned that THC intends to continue the practice of law without registering with the State Bar. Although it is true that in partial settlement of this case, THC returned that part of the contingent fee in excess of the attorney fee award, the fact remains that it has retained substantial legal fees and it is not authorized to practice law.

Inasmuch as the trial court mistakenly believed there was no duty to register, and therefore no misrepresentation, it is not surprising that it found *Olson v. Cohen, supra*, 106 Cal.App.4th 1209 persuasive and granted judgment on the pleadings as to Frye's remaining causes of action. We, on the other hand, having concluded there is a duty to register, and in light of the fact that THC refuses to so register, are not persuaded that *Olson* is applicable to the instant case.

Citing to *Flannery v. Prentice* (2001) 26 Cal.4th 572, THC argues that its individual principals who rendered the legal services should be permitted in any event to the awarded fees as they are licensed to practice and registered with the State Bar. If so, that is something that has not been adjudicated. It is for the trial court to decide whether and in what amounts Frye or the individual attorneys should be entitled to the awarded fees.

## **DISPOSITION**

The order granting summary adjudication as to the fraud cause of action is affirmed. The order granting judgment on the pleading as to the money had and received

and breach of fiduciary duty is reversed. The matter is remanded for further proceedings not inconsistent with this opinion. Each party to bear their own costs on appeal.

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Kay, P.J.

We concur:

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Sepulveda, J.

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Rivera, J.

Trial Court: San Francisco County Superior Court

Trial Judge: Honorable Thomas Mellon  
Honorable David Garcia

Counsel for Appellant: Law Offices of Andrew M. Zacks  
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