Filed 8/17/04

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

LYLE R. MINK,

Plaintiff, Cross-Defendant, and Respondent,

v.

DAN S. MACCABEE,

Defendant, Cross-Complainant and Appellant.

B166764

(Super. Ct. No. BC 266229)

APPEAL from a judgment of the Superior Court of Los Angeles County. Emilie H. Elias, Judge. Affirmed in part and reversed in part.

Lyle R. Mink, in pro. per., for Plaintiff, Cross-Defendant and Respondent.

Law Offices of Peter A. Schwartz and Law Offices of Dan S. Maccabee, for Defendant, Cross-Complainant and Appellant.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of section 2.

This case involves two independent lawsuits: attorney Mink's suit against attorney Maccabee for attorney fees pursuant to a retainer agreement, and Maccabee's cross-complaint for an attorney referral fee in a separate matter. The cross-complaint was dismissed after the trial court sustained Mink's demurrer, on the basis that the fee splitting arrangement was not consented to by the client in accordance with rule 2-200 of the California Rules of Professional Conduct ("Rule 2-200"). The attorney fees action was tried to a jury, which returned a special verdict concluding that Maccabee had not breached the contract, and awarding no damages. The trial court granted Mink's motion for judgment notwithstanding the verdict, and awarded Mink $9,718.97 in damages.

Maccabee appeals the ruling on the demurrer, arguing that the trial court misinterpreted Rule 2-200. He also appeals the judgment in the attorney fees action, contending that the trial court erred in granting judgment notwithstanding the verdict. We agree that the court erred in sustaining the demurrer to Maccabee's cross-complaint, but find that the court properly entered judgment notwithstanding the verdict.

1. *Dismissal of cross-complaint*

Maccabee appeals the dismissal of his cross-complaint. That pleading alleges that Maccabee referred a client to Mink, who agreed to pay a fee for the referral. The cross-complaint also alleges that the requirements of Rule 2-200 of the Rules of Professional Conduct, to the effect that the client agree in writing to the referral arrangement, was met, albeit well after the matter had been successfully resolved.[1] The cross-complaint also included a cause of action in quantum meruit.

Mink demurred to the cross-complaint, arguing that the client's belated acknowledgement and consent to the referral arrangement failed to satisfy Rule 2-200 in

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[1] According to the pleadings, the referral was made in 1999, Mink received $400,000 as compensation for litigating the referred matter in October or November 2001, and the client signed an acknowledgment and consent to the division of fees on or about February 15, 2002.

two particulars: Mink contended the rule requires first that the fee-sharing arrangement be in writing and signed by Mink in order to be enforceable, and second that the client's written consent must be obtained at the outset of the litigation. The trial court determined that the client's late-obtained consent did not satisfy the rule, and so sustained the demurrer.

Interpretation of the rule here at issue is a question of law and thus subject to de novo review. (*Margolin v. Shemaria* (2000) 85 Cal.App.4th 891, 895.)

Rule 2-200 provides: "(A) A member shall not divide a fee for legal services with a lawyer who is not a part of, associate of, or shareholder with the member unless: [¶] (1) The client has consented in writing thereto after a full disclosure has been made in writing that a division of fees will be made and the terms of such division; . . ." The trial court ruled that the client's written consent, obtained after the conclusion of the representation in the referred matter, did not satisfy the requirements of Rule 2-200. We do not agree.

The rule requires that the client's written consent be obtained prior to any division of fees. This simple dictate cannot reasonably be read to require the client's written consent prior to the lawyers' entering into a fee-splitting arrangement, or prior to the commencement of work, or at any time other than prior to any division of fees. And Rule 2-200 certainly cannot be read, as Mink would have us do, to include a requirement nowhere appearing therein, that the fee-splitting agreement between the attorneys must be in writing.[2] Thus, while we agree with Mink that written agreements are preferable to oral ones, and that written consents obtained early in the process are preferable to those

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[2] As a matter of interest, Los Angeles County Bar Association Formal Opinion 467 (1993) reached these same conclusions some years ago, opining that "There is no requirement that the client's consent be obtained before the lawyer enters into a fee-sharing agreement. The Rule bars division of fees without the client's consent; i.e., it is enough that the client's consent be obtained before the division is made." The opinion also noted that there is no requirement that the fee-sharing agreement itself be in writing and signed by the lawyers.

obtained after-the-fact, those preferences are not contained in Rule 2-200, and therefore cannot invalidate a written consent which complies in all respects with the plain language of the rule.

The trial court also dismissed Maccabee's quantum meruit claim. Shortly thereafter, the Supreme Court issued its opinion in *Huskinson & Brown v. Wolf* (2004) 32 Cal.4th 453. In that case, the Court considered the issue of whether a lawyer who may not recover under a fee-splitting agreement for lack of the client's written consent may nevertheless recover in quantum meruit. The Court determined that, while a lawyer promised a referral fee may not recover for breach of contract in the absence of the client's consent to the fee-splitting arrangement, he or she may recover under the theory of quantum meruit even in the absence of the client's written consent. Thus, *Huskinson & Brown, supra,* establishes that Maccabee's cause of action in quantum meruit survives demurrer.

Mink argues on appeal that *Huskinson & Brown* does not apply to the facts of this case because "The trial court implicitly found that Mr. Maccabee's cause of action for quantum meruit was not a genuine attempt to recover for services rendered but instead was a subterfuge to recover a prohibited referral fee." However, since a demurrer does not permit the trial court to make any factual findings at all, including "implicit" ones, the argument is not persuasive.

Because we conclude that Maccabee's cross-complaint states a cause of action for breach of an oral fee-splitting agreement as well as a claim in quantum meruit, we reverse the dismissal of the cross-complaint.

2. *Judgment on the complaint*[*]

[The portion of this opinion that follows is deleted from publication.
See *post*, at page 7, where publication is to resume.].

. . . .

Mink sued Maccabee to recover attorney fees due pursuant to a partly oral and partly written retainer agreement. The case was tried to a jury. The two parties were the only two witnesses. According to Mink, the parties agreed, concurrently with the execution of the written retainer agreement, that Mink would charge $300 an hour to defend Maccabee at trial in a civil lawsuit, that Maccabee would pay a $20,000 retainer, and that Mink would look only to court-awarded attorney fees pursuant to the written contract in the underlying litigation for payment of his attorney fees in excess of the retainer. According to Maccabee, after Mink agreed in writing to try the case for a $20,000 fixed fee, the parties orally agreed that Mink would recover any attorney fees awarded to him by the trial court. Both parties agreed that Maccabee would pay costs as incurred.

In addition to approximately $30,000 in attorney fees, Mink alleged that Maccabee owed him $2,144 in billed and unpaid costs. While Maccabee agreed that he owed Mink any costs which the latter actually incurred and paid, he contested approximately $5,600 in costs for "computer research," which he did not believe that Mink actually paid.

With Mink's advocacy, Maccabee won the underlying case. Pursuant to a contractual attorney fee provision in the underlying lawsuit, Mink submitted to the court a fee request of just under $198,000, which included approximately $60,000 of his own fees, with the remaining fees incurred by others (principally Maccabee) prior to Mink's retention. The court awarded total fees of approximately $30,000, without comment as to whose fees were being paid. Mink claimed entitlement to the entire fee award, while Maccabee claimed that, pursuant to their oral agreement, Mink was entitled only to his proportionate share, or approximately $7,500 of the total fee award. The fees paid by the

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[*] See footnote *ante*, page 1.

losing party in the underlying litigation were deposited into Mink's client trust account. By agreement, both Mink and Maccabee received $3,500 out of the client trust account. Thus, under Maccabee's version of events, he owed Mink approximately $4,000 in fees ($7,500 less $3,500), and Mink owed him approximately $3,500 in costs ($5,600 less $2,100).

The jury hearing Mink's complaint against Maccabee to recover fees completed a special verdict form, in which it indicated that it had accepted Maccabee's version of the oral agreement – that is, that Mink was to receive $20,000 plus all costs for defending Maccabee at trial, and any attorney fees awarded to him by the trial court in the underlying litigation. However, the jury was never asked to, and did not, calculate the sums owing as a result of their factual findings.

Mink filed a motion for new trial and for judgment notwithstanding the verdict. The court granted the latter, and awarded Mink $9,718.97. The court also designated Mink the prevailing party and awarded nearly $5,000 in attorney fees pursuant to the written retainer agreement.

On appeal, Maccabee argues that the trial court erred in entering judgment notwithstanding the verdict, since there was substantial evidence for the jury's special verdict which, according to Maccabee, entitled Mink to no damages. Notwithstanding that Maccabee had admitted during trial that he owed Mink at least $4,000, Maccabee argues that the jury's verdict mandates that Mink recover nothing on the complaint. To support that conclusion, he opines that the jury must have concluded that Mink breached the retainer agreement by refusing to discuss the fee dispute with him, and that Maccabee was therefore excused from further performance of the agreement.

A motion for judgment notwithstanding the verdict may be granted whenever a motion for a directed verdict should have been granted had a previous motion been made. (Code Civ. Proc., § 629.) A court considering a motion for directed verdict applies the same test as when ruling on a motion for nonsuit: The motion should be granted "only when, disregarding conflicting evidence and giving [the aggrieved party's] evidence all

the value to which it is legally entitled, [and] including every legitimate inference which may be drawn therefrom, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of [defendant] if such verdict was given." (*Estate of Lances* (1932) 216 Cal. 397, 400.) Maccabee contends that the jury's verdict was supported by substantial evidence, and the trial court therefore erred in granting judgment notwithstanding the verdict.

As the trial court noted, Maccabee acknowledged that he owed Mink *something*, he just disputed the amount. Maccabee's theory of the case was that Mink was entitled to his proportionate share, rather than all, of the $30,000 in attorney fees awarded by the trial court in the underlying action. Mink applied for nearly $198,000 in attorney fees in the underlying action, of which $52,170 represented fees attributable to Mink's labors. By dividing the total fee request by the fees attributable to Mink, one concludes that Mink's portion of the total fee request was approximately 26 percent. According to *Maccabee's* theory of the case, Mink was entitled to 26 percent of the total fees awarded by the trial court, or approximately $7,800. Moreover, with respect to Maccabee's challenge to Mink's billing of nearly $5,600 in computer costs, Maccabee "testified that the cost bill seemed wrong and that he could not get it straightened out by Mink. He saw conflicts in the bills and did not know if he owed Mink anything more for costs." However, a debtor's feeling that a bill "doesn't seem right" is not evidence that the amount is not owed.

In short, the jury did not award Mink any damages because the special verdict did not ask the jury if Mink was entitled to any damages. However, the trial court properly corrected this oversight by awarding damages to Mink consistent with the jury's finding that the parties had agreed to the fee arrangement testified to by Maccabee. Consequently, we affirm the judgment on the complaint as entered by the trial court.

[The balance of this opinion is to be published.]

DISPOSITION

The judgment notwithstanding the verdict on the complaint is affirmed. The dismissal of the cross-complaint is reversed. The parties are to bear their own costs on appeal.

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ARMSTRONG, J.

We concur:

TURNER, P.J.

MOSK, J.