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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

LAW OFFICE OF EDWARD M. HIGGINBOTHAM et al.,

Plaintiffs and Appellants,

v.

MICHAEL EUGENE HOREJSI,

Defendant and Respondent.

A128521

(County of Alameda Super. Ct. No. RG06285615)

Michael Eugene Horejsi hired the Law Office of Edward M. Higginbotham (Higginbotham) and separately hired the Law Office of Michael M. Sims (Sims) to represent him in various lawsuits involving a property he owns. Higginbotham and Sims claimed they were never paid for their legal services and a panel of arbitrators found in favor of them on their claims against Horejsi. Horejsi rejected the arbitrators’ decision.

Higginbotham and Sims pursued their claims of fraud and breach of contract against Horejsi in the superior court. At trial, Higginbotham appeared on behalf of Sims and Sims provided legal representation for Higginbotham. A jury found that Horejsi defrauded Higginbotham and Sims and awarded $13,338 to Sims and $23,840 to Higginbotham. The amount of $13,338 included $934, which Sims represented at trial he had paid to an accountant for work done on behalf of Horejsi.

Horejsi moved for a new trial. Attached to his motion was a declaration from an accountant. The accountant stated that Sims had not paid him his fees of $934. Sims

agreed that the trial court could reduce his award by that much on the condition that the trial court would deny Horejsi's motion for a new trial. Subsequently, Higginbotham and Sims requested attorney fees, and the trial court denied their request, citing *Trope v Katz* (1995) 11 Cal.4th 274 (*Trope*).

On appeal, Higginbotham and Sims object to the lower court's denial of their request for attorney fees. They also challenge the court's decision to reduce the award to Sims by $934. We are not persuaded by their arguments.

DISCUSSION

Horejsi owns an apartment building in Oakland. Numerous property owners sued him alleging that he allowed his property to be used as a center for significant drug trafficking activities. After losing these suits in small claims court, Horejsi hired Sims to represent him in other actions involving his neighbors and the City of Oakland. Subsequently, Horejsi hired Higginbotham to represent him in his defense against a civil injunction.

Horejsi did not pay the fees of Sims or Higginbotham and both attorneys learned about the other's outstanding bill. On August 23, 2006, Higginbotham and Sims filed a complaint in the superior court for breach of contract and fraud against Horejsi and others. Higginbotham alleged that Horejsi owed him $25,000 and Sims alleged Horejsi owed him over $10,000.

Horejsi sought fee arbitration and claimed that Higginbotham and Sims had overcharged him and had not performed their work professionally. On January 22, 2007, the arbitrators ruled in favor of Higginbotham and Sims. They awarded $10,764.04 to Sims and $21,557.25 to Higginbotham, for a total of $32,321.29.[1] Horejsi rejected this award, and filed a cross-complaint in the superior court for legal malpractice and breach of contract. On August 3, 2007, Higginbotham and Sims filed their third amended complaint for breach of contract and fraud against Horejsi and others.

[1] The trial court's order denying the request by Higginbotham and Sims for attorney fees states that the arbitrator awarded them a total of $31,500. The documents in the record indicate that the total was actually $32,321.29.

On November 2, 2009, the matter proceeded to a jury trial. Sims appeared as the attorney for Higginbotham and Higginbotham appeared as the attorney for Sims. Horejsi appeared in propria persona. The jury found that Horejsi breached his contracts with Higginbotham and Sims and had committed fraud against them by promising to pay their legal fees with no intent to honor his promises. The jury awarded $13,338 to Sims and $23,843 to Higginbotham. The amount of $13,338 awarded to Sims included $934, which Sims represented at trial he had paid to a certified public accountant (CPA) for work done on behalf of Horejsi. Judgment was filed on December 8, 2010.

On December 17, 2009, Horejsi filed a motion for a new trial. He attached as an exhibit to his motion a copy of an email from Gerald T. Kelly, CPA. In response to Horejsi's inquiry about whether Sims had paid him for his services, Kelly wrote: "I invoiced Mr. Sims on October 3, 2005[,] $934.00 for my services rendered on September 29, 2005[,] and September 30, 2005. I sent several statements and after not receiving any replies or payments, I essentially gave up and wrote this off as a bad debt effective 12/31/2006. A copy of that invoice is attached to his email."

At the hearing on Horejsi's motion for a new trial, the court asked Sims to agree to a reduction of the jury's award as a condition of denying Horejsi's motion for a new trial. Sims agreed to a reduction in the jury verdict by the amount owed to Kelly. The record on appeal does not include any transcript of this hearing.[2]

On February 10, 2010, Higginbotham and Sims filed a motion for reconsideration of the trial court's order denying Horejsi's motion for a new trial under Code of Civil Procedure, section 1008. Sims asserted that he communicated with Kelly and Kelly confirmed that he was never paid. Sims agreed to grant Kelly a conditional lien upon his recovery for the amount of the bill if the court granted his motion for reconsideration and included in his award the amount deducted for his failure to pay Kelly's bill.

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[2] Higginbotham and Sims assert the following regarding the absence of this transcript in the record: "Unfortunately, the transcripts from that hearing have been misplaced and are unavailable. The hearing date does not even appear on the registrar of actions for Alameda County."

The trial court denied the motion by Higginbotham and Sims for reconsideration. The court explained that Higginbotham and Sims "had the opportunity to investigate the circumstances underlying the bill from expert Gerald Kelly before the trial of this case, but chose not to do so. Instead, they affirmatively misrepresented to the court and the jury that a bill from Mr. Kelly had been received and paid. [¶] [Higginbotham and Sims] have now investigated the facts and determined that, in fact, they never paid Mr. Kelly. This determination confirms the correctness of the court's prior ruling requiring a reduction in the amount of damages. It does not in any way meet the plaintiffs' burden of showing diligence under [Code of Civil Procedure] section 1008."

On February 19, 2010, Higginbotham and Sims requested attorney fees. The trial court cited the holding in *Trope*, *supra*, 11 Cal.4th 274, when it rejected their request for fees. The court explained that in *Trope,* the Supreme Court "held that 'an attorney litigating in propria persona cannot be said to 'incur' compensation for his time and his lost business opportunities,' because he does not become obligated to pay for them." Here, the trial court concluded that "[t]he sole reason for Sims and Higginbotham having appeared on each other's behalf appears to have been to avoid the rule in *Trope*. They could easily have represented themselves. In fact, viewing the conduct of the litigation from the court's vantage point, they essentially did so. Therefore, to award attorneys' fees to them would violate the policy articulated in *Trope.*"

Higginbotham and Sims filed a timely notice of appeal. Horejsi appears in propria persona.

DISPOSITION

I. *Award of Attorney Fees*

Unless authorized by either statute or agreement, attorney's fees ordinarily are not recoverable as costs. [Citations.]" (*Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 127-128.) Here, Higginbotham and Sims maintain that they were entitled to recover their attorney fees under Business and Professions Code section 6204, subdivision (d).

Business and Professions Code section 6204, subdivision (d) provides the following: "The party seeking a trial after arbitration shall be the prevailing party if that

party obtains a judgment more favorable than that provided by the arbitration award, and in all other cases the other party shall be the prevailing party. The prevailing party may, in the discretion of the court, be entitled to an allowance for reasonable attorney's fees and costs incurred in the trial after arbitration, which allowance shall be fixed by the court. In fixing the attorney's fees, the court shall consider the award and determinations of the arbitrators, in addition to any other relevant evidence."

Higginbotham and Sims claim that we review the court's denial of their request for attorney fees using the de novo standard of review. This is clearly incorrect. An attorney fee award is ordinarily reviewed for abuse of discretion. (*Citizens Against Rent Control v. City of Berkeley* (1986) 181 Cal.App.3d 213, 233.) The applicability of this standard is particularly clear in the present case since the governing statute, Business and Professions Code section 6204, subdivision (d), expressly states that in a matter subject to the mandatory fee arbitration statutes, it is up to the discretion of the court whether to award attorney fees to the party prevailing at trial after the arbitration has been held.

In the present case, the total awarded to Sims and Higginbotham by the arbitrator was less than the total awarded to them by the jury, and therefore the court had the discretion to award them fees under Business and Profession Code section 6204, subdivision (d). The trial court, however, determined that fees were not warranted. It concluded that Higginbotham and Sims provided legal representation for each other with the purpose of avoiding the consequences of *Trope*, *supra*, 11 Cal.4th 274, which disallowed fees for an attorney litigating in propria persona. The trial court emphasized that Higginbotham and Sims could easily have represented themselves and, "[i]n fact, viewing the conduct of the litigation from the court's vantage point, they essentially did so. Therefore, to award attorneys' fees to them would violate the policy articulated in *Trope.*"

In *Trope,* the Supreme Court denied fees under Civil Code section 1717 to a self-represented lawyer-litigant. (*Trope, supra,* 11 Cal.4th at p. 292.) The court explained that Civil Code section 1717 provides for an award of reasonable attorney fees "incurred" by the prevailing party in certain actions. The court observed: "To 'incur' a fee, of

course, is to 'become liable' for it [citation], i.e., to become obligated to *pay* it. It follows that an attorney litigating in propria persona cannot be said to 'incur' compensation for his time and his lost business opportunities." (*Trope, supra,* at p. 280.) The court also examined the word "fee" and concluded that "the usual and ordinary meaning of the words 'attorney's fees,' both in legal and in general usage, is the consideration that a litigant actually pays or becomes liable to pay in exchange for legal representation. An attorney litigating in propria persona pays no such compensation." (*Ibid.*)

The court in *Trope* expressed its principal reason for denying attorney fees to an attorney litigating in propria persona as follows: "Were we to construe the statute [so as to permit recovery of fees], we would in effect create two separate classes of pro se litigants—those who are attorneys and those who are not—and grant different rights and remedies to each." (*Trope, supra,* 11 Cal.4th at p. 277.) The court elaborated, "such disparate treatment would conflict with the legislative purpose of [Civil Code] section 1717. The statute was designed to establish mutuality of remedy when a contractual provision makes recovery of attorney fees available to only one party, and to prevent the oppressive use of one-sided attorney fee provisions. [Citations.] If an attorney who is the prevailing party in an action to enforce a contract with an attorney fee provision can recover compensation for the time he expends litigating his case in propria persona, but a nonattorney pro se litigant cannot do so regardless of the personal and economic value of such time simply because he has chosen to pursue a different occupation, *every* such contract would be oppressive and one-sided." (*Trope, supra,* 11 Cal.4th at pp. 285-286.)

Higginbotham and Sims maintain that *Trope* applies only to requests for attorney fees under Civil Code section 1717 and only when the attorney-litigant is in propria persona. They stress that in the present case they were not acting in propria persona and they are not requesting fees under Civil Code section 1717. They emphasize that their claims against Horejsi were not simply based on breach of contract, but also included fraud claims, and they assert that he filed a frivolous malpractice counter-suit. Moreover, they point out that they attempted to settle with Horejsi for $19,000, but he refused. They claim that their representation of each other is similar to representation being provided by

in-house counsel and the Supreme Court has held that litigants can recover the reasonable value of legal services provided by in-house counsel even though the litigants do not "incur" fees. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084 (*PLCM*); see also *Gilbert v. Master Washer & Stamping Co.* (2001) 87 Cal.App.4th 212 [allowed an attorney represented by other members of his law firm to recover attorney fees under Civ. Code, § 1717]; *Farmers Insurance Exchange v. Law Offices of Conrado Joe Sayas, Jr.* (9th Cir. 2001) 250 F.3d 1234 (*Farmers Insurance*) [the Ninth Circuit, interpreting California Law, held that two law firms that had jointly represented a client, and who subsequently hired each other to recover the contingent fee due under the initial client retainer agreement, were entitled to attorney fees].)

In *PLCM*, *supra,* 22 Cal.4th 1084, the Supreme Court held that a corporation represented by in-house lawyers was entitled to contractual legal fees under Civil Code section 1717. The court distinguished the situation with in-house counsel from an attorney acting in propria persona and stated: "None of the foregoing considerations [involved in *Trope*] apply in the case of in-house counsel. There is no problem of disparate treatment; in-house attorneys, like private counsel but unlike pro se litigants, do not represent their own personal interests and are not seeking remuneration simply for lost opportunity costs that could not be recouped by a nonlawyer. . . . The fact that in-house counsel is employed by the corporation does not alter the fact of representation by an independent third party." (*PLCM, supra,* at p. 1093; see also *Ketchum v. Moses* (2001) 24 Cal.4th 1122 [held that defendant represented by lawyer under contingent fee arrangement was entitled to fees when attorney successful in obtaining a dismissal]; *Lolley v. Campbell* (2002) 28 Cal.4th 367 [held that legal services provided by labor Commissioner were at no cost to the successful litigant, but fees were recoverable under Lab. Code, § 98.2, subd. (c)].)

We agree that *PLCM* has limited the holding in *Trope.* However, courts have not restricted the application of *Trope* to apply only to requests for attorney fees under Civil Code section 1717. (See, e.g., *Taheri Law Group v. Evans* (2008) 160 Cal.App.4th 482 [applied *Trope* when a propria persona attorney sought fees under Code of Civil

Procedure section 425.16]; *Musaelian v. Adams* (2009) 45 Cal.4th 512, 520 [applied *Trope* when attorney fees sought under Code Civ. Proc., § 128.7].) The problem of one-sidedness identified by the *Trope* court applies equally here. Under Business Code section 6204, subdivision (d), Horejsi could not have recovered his fees if he had prevailed at trial. The statute permits the court to award the prevailing party attorney fees incurred and, since Horejsi litigated his case in propria persona, he would not have been entitled to fees.

Higginbotham and Sims claim that they had an attorney-client relationship with distinct interests between the attorney and client. They claim there was no evidence to support the lower court's conclusion that they appeared on behalf of each other solely to avoid the consequences of *Trope* and they maintain that *Farmers Insurance* "provides better guidance."

Higginbotham and Sims ignore the fact that they were not seeking fees mandated by a statute, but were seeking fees that the trial court had the *discretion* to award. The district court in *Farmers Insurance* had decided to award fees and the Ninth Circuit simply concluded that the lower court had not abused its discretion when it decide that the *Trope* rule should not apply because "*Trope's* overriding concern about the disparate treatment of non-attorney pro se litigants was not present in this case; [and] to hold that *Trope* applied would be to deny a party the benefit of retaining an attorney who is already familiar with the case[.]" (*Farmers Insurance, supra,* 250 F.3d at pp. 1237-1238.) Thus, the posture of this case is different from *Farmers Insurance*; here, the lower decided not to award fees. Furthermore, as already stressed, the problem of one-sidedness identified by the *Trope* court applies here.

The trial court's conclusion that Higginbotham and Sims represented each other to avoid the effect of *Trope* was based on its own observations during the course of the trial. " 'The value of legal services performed in a case is a matter in which the trial court has its own expertise.' " (*White v. Dorfman* (1981) 116 Cal.App.3d 892, 900.) The trial court was in the best situation to assess whether Higginbotham and Sims were essentially representing themselves with no distinctive interests between them. Indeed, other than

assert in a conclusory fashion that they had separate and distinct interests from each other, Higginbotham and Sims provide no support for this argument.

We conclude that the lower court did not abuse its discretion in denying the request by Higginbotham and Sims for attorney fees under Business and Professions Code section 6204, subdivision (d).

II. *Deduction of $934*

Sims[3] objects to the trial court's reducing Sims's award by $934, the amount of money owed to the CPA, Kelly, for work Kelly had done on behalf of Horejsi. The jury's award included this sum based on Sims's testimony that he had paid this bill. In support of his motion for a new trial, Horejsi submitted an email from Kelly that indicated that he billed Sims this amount but never received any payment.

Sims contends that the trial court should not have considered the email from Kelly because it was inadmissible hearsay and was not presented during the discovery process nor introduced at trial. He also claims the court's order is void and complains about various alleged procedural errors. Sims's failure to cite to the record to support this argument is sufficient, in itself, to reject these contentions. (See Cal. Rules of Court, rule 8.204(a)(1)(C); *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246 [failure to support an argument with the necessary record citations will result in waiver of the argument].)

We begin with the basic rule that " '[a] judgment or order of the lower court is *presumed correct.* All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. . . .' [Citations.]" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) In the present case, Sims has failed to present any evidence from the record that affirmatively shows that the lower court's ruling was error.

Furthermore, " ' '[i]t is settled law that incompetent testimony, such as hearsay or conclusion, if received without objection takes on the attributes of competent proof when considered upon the question of sufficiency of the evidence to support a finding." '

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[3] This issue only concerns Sims, although both Higginbotham and Sims challenge this ruling.

[Citations.]" (*People v. Panah* (2005) 35 Cal.4th 395, 476.) Thus, Sims's assertion that Kelly's declaration is inadmissible hearsay cannot be raised for the first time on appeal. Sims claims that the transcript of the hearing on the motion for a new trial has been "misplaced" and is "unavailable." He provides no explanation as to how the transcript became "misplaced" and he, as the appellant, bears the burden of citing to the record to show that he raised this issue in the trial court. (*K.C. Multimedia, Inc. v. Bank of America Technology & Operations, Inc.* (2009) 171 Cal.App.4th 939, 948.)

Sims's challenge to the deduction of $934 is particularly disingenuous given that Sims agreed to this deduction, but in his briefs in this court, fails to acknowledge this or cite to the record where this acknowledgement is made. In his declaration submitted in support of his motion for reconsideration and filed on February 10, 2010, Sims avows: "Because of evidence presented by [Horejsi] that the bill to Mr. Kelly had not actually been paid, but might have been written off as a bad debt, the court requested that I agree to a reduction of the jury's award, as a condition of denying [Horejsi's] motion for new trial. I agreed to a reduction in the amount owed to Mr. Kelly." Thus, Sims readily and voluntarily agreed to this reduction and cannot now complain on appeal that the reduction was improper.

In the reply brief, Sims raises for the first time a challenge to the court's order denying the motion for reconsideration. Raising this issue for the first time in the reply brief violates the rules of appellate practice, as it does not provide the other party an opportunity to respond. (See *Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 335, fn. 8 [arguments raised for the first time in a reply brief are ordinarily forfeited unless good cause is shown for failing to raise them earlier].) In any event, this argument is wholly without merit.

Sims moved for reconsideration under Code of Civil Procedure section 1008. The prevailing view is that an order denying a motion for reconsideration is not an appealable order under any circumstances. (See, e.g., *Association for Los Angeles Deputy Sheriffs v. County of Los Angeles* (2008) 166 Cal.App.4th 1625, 1633.) The minority view is that an appeal may be taken from an order denying a motion for reconsideration if (1) the

underlying order was appealable, and (2) the motion for reconsideration actually presented new or different facts. (*Santee v. Santa Clara County Office of Education* (1990) 220 Cal.App.3d 702, 710-711.)

Even if we consider the merits of this challenge, Sims cannot prevail. To obtain reconsideration under Code of Civil Procedure section 1008, a party must show "new or different facts, circumstances, or law," and must present a "satisfactory explanation" for failing to provide the new evidence or law earlier. (*Baldwin v. Home Savings of America* (1997) 59 Cal.App.4th 1192, 1200.) The standard of review of the trial court's ruling is abuse of discretion. (*Glade v. Glade* (1995) 38 Cal.App.4th 1441, 1457.)

Here, Sims has failed to meet his burden to justify reconsideration. He never explained why he affirmatively misrepresented to the jury that he had received and paid the bill from Kelly. He also failed to provide a satisfactory explanation as to why he did not know at the time of trial about his own failure to pay the bill. His assertion that he just learned that the bill was outstanding shows either a lack of candor during the trial or a complete lack of diligence. Indeed, a grant of reconsideration in this case would have been an abuse of discretion.

Accordingly, Sims' challenge to the court's decision to reduce his award by $934 is entirely without merit.

DISPOSITION

The judgment and the denial of attorney fees are affirmed. Higginbotham and Sims are to pay the costs of appeal.

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Lambden, J.

We concur:

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Kline, P.J.

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Haerle, J.