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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

SHERON DOLL,

Plaintiff and Appellant,

v.

MAHIN GHAFFARI et al.,

Defendants and Respondents.

B272384

(Los Angeles County
Super. Ct. No. BC421113

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard E. Rico, Judge. Affirmed.

Dentons US and Charles A. Bird for Plaintiff and Appellant.

Horvitz & Levy, David M. Axelrad and Mitchell C. Tilner, Lewis Brisbois Bisgaard & Smith, William John Rea, Jr., David B. Shapiro and Christina M. Guerin for Defendants and Respondents.

Plaintiff and appellant Sheron Doll challenges the order denying her motions for prejudgment and appellate attorney fees against her former landlord, Mahin Ghaffari, and her daughter, Fariba Ghaffari (jointly, Ghaffari). Finding no error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In 1980, Doll began living in a rent-controlled apartment in Santa Monica[1] pursuant to a written lease with the owner of the building, P&K Investments (P&K). It is undisputed that the 1980 lease was the only lease that Doll had obtained for her unit, and that the document itself had been lost.

P&K sold the apartment building to Ghaffari's predecessor. Ghaffari acquired the building in 2002. Ghaffari did not see Doll's 1980 lease with P&K Investments.

As a result of a 2007 fire in her apartment, Doll temporarily moved out of the unit while repairs were being made. Upon completion of those repairs, Doll began subletting her rent-controlled apartment to short-term renters at rates in excess of the maximum allowable rent.

The Unlawful Detainer Actions

Doll's subletting activities led Ghaffari to file two unlawful detainer actions. The first was unsuccessful.[2] The second initially resulted in a trial court judgment in favor of Ghaffari

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[1] The city's rent control law was first adopted in April 1979 (see https://www.smgov.net/Summary_of_Regulations.aspx).

[2] Ghaffari served a notice of rent increase, alleging Doll had left the apartment in the possession of a subtenant. After Doll refused to pay the increased rent, Ghaffari filed the first unlawful detainer action. Ghaffari lost that action after failing to prove that Doll was no longer residing in the apartment.

(*Ghaffari v. Doll* (Super. Ct. Los Angeles County, 2008, No. SM 08U01025)), but that judgment was reversed on appeal (*Ghaffari v. Doll* (Super. Ct. Los Angeles County, 2009, No. BV027917)). While the appeal was pending (there was no stay in effect), Ghaffari evicted Doll pursuant to a writ of possession, sold Doll's unclaimed personal belongings, and leased the apartment to a new tenant.

In reversing the unlawful detainer judgment, the appellate division reasoned that absent a conviction for subletting her apartment in violation of the rent control ordinance, Doll could not be evicted under the ordinance. Ghaffari did not seek review of the appellate division's reversal of the unlawful detainer judgment, which is final.

After the remittitur issued, Doll filed a motion in the trial court for restitution of the premises. (Code Civ. Proc., § 908.) The trial court denied the motion, citing the judge's determination in the second unlawful detainer action that Doll had unclean hands.

Doll's Present Action Against Ghaffari

After obtaining a reversal of the unlawful detainer judgment, Doll filed the present action against Ghaffari, alleging numerous causes of action including breach of lease, breach of implied covenant of good faith and fair dealing, breach of implied covenant of quiet enjoyment, declaratory relief, wrongful eviction, trespass, and financial elder abuse.

The parties filed competing motions for summary adjudication. Ghaffari's motion was denied, but Doll's motion was granted as to the contract-based causes of action. In its summary adjudication ruling, the trial court (Judge Gregory M. Alarcon) granted contract damages to Doll in the amount of

$377,130. That award was based on the deposition testimony of Doll's expert, an economist, who assessed the value of Doll's right to remain in the rent-controlled apartment for the rest of her life to be $377,130. He took into account Doll's projected life expectancy, the lower rent for the rent-controlled apartment, and the higher rent for a replacement apartment.

Following a trial on the remaining claims, the jury returned special verdict findings in March 2012. It found that Doll had suffered damages of $180,000 for wrongful eviction, $29,070.68 for trespass, and $10,000 for financial elder abuse (loss of personal property).

On July 10, 2012, Doll and her trial counsel, Kull + Hall and attorney Kevin Hall (jointly, Kull + Hall), moved for prejudgment attorney fees. Kull + Hall sought to have the fees paid to itself rather than to Doll. Kull + Hall also moved to withdraw from representing Doll.

Kull + Hall was relieved as Doll's trial counsel on September 26, 2012. On January 30, 2013, the court heard the motion for attorney fees. Hall appeared for his firm, and attorney Cory Brooks appeared on behalf of Doll. The court denied the motion for attorney fees without prejudice, and continued the matter to April 8, 2013.

In the interim, on March 25, 2013, the court entered a judgment for Doll in the amount of $416,200.68. This amount consisted of the $377,130 summary adjudication award for contract damages, $25,000 for wrongful eviction and trespass, $4,070.68 for economic damages for trespass, and $10,000 for financial elder abuse.

At the continued April 8, 2013 hearing, the court found that Doll was the prevailing party on the elder abuse claim, and

requested that counsel try to agree on an appropriate fee award as to that claim On the contract claim, the court found that Doll had failed to establish the existence of a written lease that would entitle her to fees under Civil Code section 1717. The matter was continued to May 28, 2013.

After the parties were unable to agree on the amount of fees to be awarded as to the elder abuse claim, the court denied the motion for attorney fees on May 28, 2013. The court also denied Doll's request for prejudgment interest, as well as all post-judgment motions for new trial and judgment notwithstanding the verdict. It also denied the post-judgment motion by Kull + Hall to intervene and to vacate, clarify, or reconsider the order denying attorney fees.

The Previous Appeal and Cross-Appeal

In the previous appeal, Ghaffari challenged the summary adjudication of the contract-based claims and the damages awards for wrongful eviction, trespass, and financial elder abuse. We affirmed as to the contract-based claims, but reversed as to the wrongful eviction, trespass, and financial elder abuse claims. We ruled that Ghaffari was entitled to dismissal of the reversed claims, and remanded with directions to enter a new judgment in accordance with our opinion. (*Doll v. Ghaffari* (Sept. 25, 2015, No. B249582 c/w B252181) [nonpub. opn.].)

In her cross-appeal, Doll sought additional damages for wrongful eviction, trespass, and elder abuse. Given our reversal of the judgment as to those claims, we concluded that Doll's request for additional damages was moot. As to Doll's request for prejudgment interest, we concluded that because the amount of her damages did not become liquidated until the court resolved

the final amount of damages and entered judgment, she was not entitled to prejudgment interest.

As to the appeal by Kull + Hall from the denial of its post-judgment motion for attorney fees, we concluded that Kull + Hall was not a party to the lease and, therefore, lacked standing to seek attorney fees under the lease. As to the claim for attorney fees under the elder abuse statute, we concluded the appeal was moot in light of the reversal of the judgment as to that claim. We similarly concluded that the appeal from the denial of the motion for leave to intervene was moot, because the only claim on which Doll prevailed was for breach of contract, and Kull + Hall lacked standing to seek attorney fees under the lease.

Post-Remand Proceedings

After the remittitur issued, Doll filed two motions regarding attorney fees. The first, filed by Larry Jackson of Boesch Law Group, was a motion for prejudgment attorney fees. The second motion, filed by Doll's trial and appellate counsel, Charles A. Bird, sought appellate attorney fees of $308,649 under Civil Code section 1717. Both motions were heard by Judge Richard E. Rico on February 19, 2016. The court stated that Judge Alarcon previously had denied the prejudgment attorney fee motion. Ghaffari's attorney, Christina Guerin, agreed, and referred to the April 8, 2013 order of denial. After Bird argued that no ruling had been made on the motion for prejudgment attorney fees, the court continued the hearing and permitted additional briefing on the status of the previous motion.

At the continued March 30, 2016 hearing, the court adopted a new approach. It reasoned that because Doll had prevailed only on the contract claim, her right to attorney fees, whether prejudgment or appellate, turned on the existence of a

contractual basis to support such an award. The court found that regardless of the status of the previous motion, Doll had failed to establish a contractual basis to support a fee award. The court stated the evidence was undisputed that when Ghaffari purchased the property, she did not see a written lease for Doll's unit, let alone one containing a fee provision. Moreover, Doll was unable to recall whether her lease with P&K contained a fee provision.

Bird asserted that Ghaffari should be judicially estopped to deny the existence of an attorney fee provision based on her unlawful detainer pleading in which the box had been checked to indicate there was a written agreement between the parties that provides for attorney fees. Although Ghaffari later explained the box had been checked by mistake, Bird argued Ghaffari cannot "have it both ways." Bird contended that as a successor to P&K, Ghaffari was subject to the terms of the 1980 lease. In response to the objection that this was an unbriefed issue, Bird argued that the entire premise of the motion was successorship.

The court indicated that judicial estoppel was not a viable theory. When Bird sought to differ, the court stated: "We're not arguing about it. Again, I repeat myself for the third time. Show me the contract with the attorney's fee provision."

Bird sought to prove the existence of an attorney fee provision in the lost lease through the declaration of Joan Caplis, a real estate broker in the Santa Monica area for over 30 years. Caplis stated that "[i]n the early 1980s, it was standard practice and customary for residential lease agreements in the City of Santa Monica to contain attorneys' fees provisions." Based on this standard industry practice, Bird argued it was more probable than not that Doll's lease contained an attorney fee provision.

The court found this argument to be "unpersuasive for several reasons. First, points raised in a reply brief for the first time will not be considered unless good cause is shown for the failure to present them before. (*Balboa Ins. Co. v. Aguirre* (1983) 149 Cal.App.3d 1002, 1010.) Second, the court may not take judicial notice of the truth of the matters asserted in the declaration. Doing so would go against the purpose of judicial notice, which is to expedite by simplifying the process of proving matters on *which there can be no reasonable dispute.* (See *Mozzetti v. City of Brisbane* (1977) 67 Cal.App.3d 565.) Finally, Plaintiff's underlying argument that absent a written contract, the court may look to 'standard practice' for the inclusion of attorney fees, is completely unsupported."[3]

In response to the first point, Bird argued that the Caplis declaration had been timely filed. The court replied that it had "read . . . and obviously . . . considered" the Caplis declaration, and that timeliness was not an issue. Next, Bird agreed with the legal principle that the contents of a declaration are not subject to judicial notice. As to the third issue, Bird cited *Midwest Television, Inc. v. Scott, Lancaster, Mills & Atha, Inc.* (1988) 205 Cal.App.3d 442 (*Midwest Television*) for the proposition that evidence of custom and practice is admissible to prove the contents of a lost document.

Guerin argued that the only relevant custom and practice is that of P&K, and given the lack of evidence regarding P&K's leases, there is no factual basis from which to infer the contents of the lost 1980 lease. Guerin also pointed out that there are

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[3] The quoted language appears in the court's tentative ruling, which the court explicitly adopted as its final ruling at the conclusion of the March 30, 2016 hearing.

different types of fee provisions—some impose limitations on fee awards and some require mediation—and it is impossible to know the type of fee provision, if any, that was included in Doll's lost lease.

Bird contended that Ghaffari should have provided her own expert witness regarding custom and practice. When the court stated that Ghaffari did not have the burden of proof, Bird acknowledged the burden of proof rested with Doll.

Bird argued that Doll had met her burden of proof under the probability formula of "r squared," stating: "if [Caplis] testifies that 90 percent of the leases in this market" had attorney fee provisions, then "the correlation is .9," which means the "prediction that this lease has it is the r squared[, which] is .81. We have to get to 50.001. There is lots of clearance there." The court rejected the "r squared" method of proof, stating, "That's not the way it works."

In conclusion, Bird argued there are four rules in every residential lease: "You can't have a dog; you can't have a cat; you are not getting your deposit back; and if you get in a fight with your landlord, you're paying its attorney fees." The court replied that for "every one of those statements, I've seen the opposite." The court adopted its tentative ruling, and denied the motions for prejudgment and appellate attorney fees. Doll timely appealed from the order of denial.

DISCUSSION

Doll contends "the court's only ground for denying the motions was that [she] could not produce the missing lease," and "[t]he court would not consider argument on any other issue . . . ." We do not agree. The record shows that after considering each of

the grounds raised by Doll, the court found the evidence insufficient to establish the existence of an attorney fee provision in the lost lease.

As to the alleged exclusion of the Caplis declaration, the transcript of the March 30, 2016 hearing proves otherwise. According to the tentative ruling, which the court adopted as its final ruling, the court found the Caplis declaration to be "unpersuasive for several reasons." The court, after considering the arguments and evidence—including the Caplis declaration—was not persuaded that Doll had met her burden of proof.

Contrary to Doll's contention, the trial court did not lose sight of the admissibility of secondary evidence to prove the contents of a lost document. The assertion that the court committed legal error by stating "[s]how me the contract with the attorney's fees provision" is unavailing. *Dart Industries*, *Inc. v. Commercial Union Ins. Co.* (2002) 28 Cal.4th 1059, 1068–1069, in which secondary evidence of a lost policy was presented by an insurance broker, is distinguishable. In that case, an insurance broker who had personal knowledge of the plaintiff's lost policy provided competent direct testimony regarding the policy's provisions. (*Id.* at pp. 1065, 1075.) There is no comparable evidence in this case.

Given her inability to recall whether the 1980 lease contained a fee provision, Doll relied on Caplis's declaration. Without defining the terms "standard practice" and "customary," or explaining how many leases were reviewed and what percentage of those contained (or did not contain) attorney fee provisions, Caplis provided only a vague idea of what constitutes a prevailing industry practice.

Based on this imprecise information, Doll argues it is more probable than not that her lost lease contained a fee provision. At oral argument, Bird referred to the prediction theory that if r is .9, then r squared is .81, which more than satisfies Doll's burden of proving the existence of an attorney fee provision. However, the prediction theory rests on an assumption that r is .9, which is not supported in the record. Because we do not know the total number of leases involved, or the percentage of the total number which contained a fee provision, the prediction analysis is speculative at best. If, for example, we were to assume r is .7, then r-squared would be .49, which would not satisfy Doll's burden of proof. [4]

The authority Doll cites, *Midwest Television*, *supra*, 205 Cal.App.3d 442, is distinguishable because the court did not consider whether a prevailing industry custom alone would be sufficient to prove the contents of a lost document. *Midwest Television* addressed a different issue: whether the defendant, an advertising agency, was bound as a party to contracts it signed as the agent of a known principal. (*Id.* at p. 451.) Ordinarily, an agent is not a party to contracts signed on behalf of a known principal. (*Ibid.*) But in *Midwest Television*, the appellate court held that the advertising agency was bound to the contracts under the "prevailing industry custom [that] binds those engaged in the business." (*Ibid.*) In this case, because we know Doll is a party to the lost lease, it is unnecessary to determine

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[4] The approach urged by appellant is similar to the "product rule" rejected in a classic case, *People v. Collins* (1968) Cal.2d 319, 325–333.

whether she is bound by a prevailing industry custom as in *Midwest Television*.

Doll contends that because Ghaffari asserted a right to contractual attorney fees in a previous unlawful detainer action, the doctrine of judicial estoppel precludes Ghaffari from taking an inconsistent position by denying the existence of an attorney fee provision in this case. We are not persuaded.

Judicial estoppel is a discretionary doctrine that "should be invoked . . . only in egregious cases [citation] where a party misrepresents or conceals material facts. [Citation.]" (*Safai v. Safai* (2008) 164 Cal.App.4th 233, 246.) Its primary purpose "'is not to protect the litigants but to protect the integrity of the judiciary . . . .' [Citation.] The doctrine applies when: '"(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake."' [Citations.]" (*Ibid.*)

The requirements of judicial estoppel have not been met in this case. Because Ghaffari did not recover attorney fees in the previous action, she was not successful in asserting the first position. (See *Safai v. Safai*, *supra*, 164 Cal.App.4th at p. 246.) And in the present action, the court accepted Ghaffari's explanation that her previous request for attorney fees was due to a mistake. (See *ibid.*) The trial court acted within its discretion by refusing to apply the doctrine in this case.

The decision cited by Doll, *International Billing Services, Inc. v. Emigh* (2000) 84 Cal.App.4th 1175, 1186–1187, does not

compel a different result. The application of judicial estoppel in *International Billing* has been substantially limited to the facts of that case. (See *M. Perez Co., Inc. v. Base Camp Condominiums Assn. No. One* (2003) 111 Cal.App.4th 456, 465, 469–470]; *Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 899.*)*

DISPOSITION

The order denying the motions for prejudgment and appellate attorney fees is affirmed. Ghaffari is entitled to her costs on appeal.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.