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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

CINDY WIESE,

Plaintiff and Respondent,

v.

KELLY OWEN et al.,

Defendants and Appellants.

B212235

(Los Angeles County
Super. Ct. No. BC359050)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Susan Bryant-Deason, Judge. Reversed; remanded in part.

The Law Office of John Derrick and John Derrick for Defendants and Appellants.

Western Law Connection and Christopher G. Weston for Plaintiff and
Respondent.

Kelly Owen and Owen Consulting LLC appeal from the judgment entered against them and in favor of Cindy Wiese, on Wiese's complaint, after trial to the court. We reverse.

Background

On April 23, 2003, Wiese and appellants¹ entered into a written contract in which they agreed that Owen would assist Wiese with a wide variety of services, for compensation of \$150 an hour. The contract provides, inter alia, that Owen would set up home computer systems for Wiese, provide her with career counseling and investment advice, sell her car, and perform other services, including "Work as necessary on a daily basis to reduce all issues affecting your emotional and physical health and to provide guidance in family issues, especially your daughter Jennifer."

Most relevant to this case, the contract provided that Owen would "Inventory all excess equipment which I will then remove from your home to be sold at a reasonable profit," "Hire a licensed contractor to remodel and make necessary repairs to your home under my personal guidance and direction to be completed within a four to five week period at a cost no more than \$50,000," and "Remove all personal and professional photographs taken by Robert Wiese and all other files and put on disks." (Wiese had recently been widowed. Her late husband, Robert Wiese, was a professional photographer.) The last item was "work as directed."

The arrangement fell apart in a few months. Wiese's testimony was that Owen was last at her house in early July 2003 and that she could remember no conversation with him after July.

In the meantime, Wiese gave Owen a \$50,000 cashier's check (Wiese testified that this was for an investment and Owen testified that it was a deposit for future work), a check for \$2,500, and a check for \$12,759.

¹ The trial court found that both appellants entered into the contract, a finding not challenged on appeal.

Wiese filed this suit on September 26, 2006, alleging, inter alia, that appellants had failed to perform the services agreed to, stolen her property by removing it from her house on the pretext that it would be sold, failed to give her her husband's photographs, and hired an unlicensed contractor, Manny Ojeda, whose work was poor.

The case proceeded to trial on causes of action for intentional and negligent misrepresentation, conversion, and breach of contract. Wiese presented her case largely through her own testimony and exhibits which she authenticated.

After trial on those causes of action, the court ruled from the bench in favor of Wiese, and set a trial on punitive damages. However, after appellants rested, and after the court made its tentative ruling (and before the punitive damages trial began and the subsequent statement of decision was issued), Wiese's former counsel in this case testified in other litigation, a fee dispute with Wiese. His testimony was, inter alia, that Wiese had told him that she planned to lie, fabricate evidence, and induce other witnesses to lie in this case. Appellants sought a copy of the trial transcript from former counsel, who provided the transcript to both Wiese and appellants. Once they obtained the trial transcript, appellants moved to reopen their case in chief so that they could present former counsel's testimony to impeach Wiese's credibility. The court denied the motion.

After the punitive damages trial, the court entered judgment in the amount of \$1,349,572 against Kelly Owen individually and Owen Consulting LLC, jointly and severally. Damages consisted of \$65,259 for "cash money taken by defendants," \$246,000 for "damages for the cost of and repairs of the unlicensed and illegal construction" on Wiese's property, \$338,313.30 as the value of the equipment taken from Wiese's home, \$400,000 for loss of the professional photographs in Wiese's computer, and \$50,000 for "the alleged offshore investment." These awards were based in large part on Wiese's own testimony. The court also awarded punitive damages of \$250,000. Appellants' motion for new trial was denied.

On this appeal, we find that the tort causes of action were barred by the statute of limitations and also find that the trial court erred in denying the motion to reopen. We

reverse the judgment and remand this case for further proceedings consistent with this opinion.

Facts

We limit this statement to the facts relevant to the issues on appeal.

The "excess equipment"

Appellants and Wiese agreed that Owen would inventory excess equipment in Wiese's home and sell it at a reasonable profit. Wiese's evidence, through her own testimony and that of several friends or relatives, was that her garage and several rooms of her house were full of such equipment. Wiese testified that this consisted primarily of stereo, computer, and photographic equipment, much of it new and still in boxes, and of professional quality.

Wiese testified that Owen removed all this property in late April or early May of 2003, with the help of three or four people. It took six or seven trips, using a "huge" rented truck, a rented trailer, and SUVs, vans, and station wagons.

Wiese called other witnesses on this point:² Five friends, Wiese's mother, and Wiese's stepbrother, described rooms of neatly organized, boxed, new or nearly new equipment which included expensive photographic equipment, commercial printers, and computers. Two of those witnesses, Marilyn Mooney and Thomas O'Connell, also testified that they saw Owen remove equipment using several assistants and a large van or trailer.

Wiese introduced into evidence numerous receipts from stores such as Best Buy and Fry's, and testified that each receipt showed purchases by her and her late husband, and that the items on the receipts were the items Owen took from her home.

² Except for testimony by Weise's daughter concerning Ojeda's misdeeds, and testimony by a friend who had also hired, and sued, Owen, this was the only issue on which Wiese presented testimony by anyone other than herself.

Many of the receipts list the customers, who are, variously, Robert Wiese, or Robert Wiese and Virginia Wiese (Robert's mother), or Virginia Wiese alone, or Charles Wiese (Robert's father), or Lunada Photographic, one of Robert Wiese's businesses. The receipts are for televisions, computer monitors, CDs and DVDs, speakers, headphones, software, cables, and so on. Some are undated, and the rest bear dates from 1997 to 2002. During closing argument, counsel for Wiese represented that the receipts totaled \$338,313.30, and the court accepted that number.

On cross-examination, Wiese was asked whether she had any opinion about the market value of the items removed, as of the time they were removed, and answered that she did not. Also on cross-examination, she testified that a number of the items were used.

Owen testified that the equipment was removed over two or three days and consisted largely of broken or used furniture, speakers, computers, and software. The items had little or no intrinsic value and were sold at a garage sale for \$1,000 or \$1,200. The money was applied to storage fees and other expenses.

Wiese also introduced a handwritten list which she testified was a partial list of the items removed from her home, which she had prepared as the items were removed. There are two signatures on the list. One is Wiese's. She testified that the other signature was Owen's, and that he signed it in her presence. Owen testified that the signature was not his and that he first saw the document during discovery in this case.

Wiese and Owen agreed that he did not prepare an inventory, though Owen testified that they had agreed that an inventory was not worth the time, given the poor condition of the equipment.

The photographs

Wiese testified that her husband's photographs (and business records) existed only in digital form, on one (or more, the evidence is unclear) of the computers Owen removed and that Owen did not retrieve the photographs before he disposed of the computers. After the computers were removed, she asked him for the photographs

"numerous times." He said that he was working on it, and put her off. Owen's testimony was the opposite, that he took "a gig's worth" of photos from one of the computers and gave them to Wiese on four or five CDs.

On the value of the photographs, Wiese testified that her husband had photographed surfing competitions, ski events, and so on. He had produced billboards, worked for car dealerships, taken photographs for music videos, and photographed the Sundance Film Festival. He photographed Richard Pryor at one of his performances, and photographed Mel Gibson, Pamela Anderson, and others. Robert Downey, Jr., paid her husband \$50,000 for the rights to photographs. Her husband had sold "photo rights" 55 or 60 times in the 5 years she and he were together.

The remodel

Under the contract, Owen was to hire a licensed contractor "to remodel and make necessary repairs to [Wiese's home], under Owen's guidance." The parties agree that Owen actually recommended, and Wiese actually hired, an unlicensed contractor or handyman named Manny Ojeda.

Owen testified that he and Wiese agreed that a licensed contractor would be too expensive, that she should hire a handyman, and that he would not supervise the handyman. Wiese recalled no such agreement.

The complaint attached a document entitled, "Home Improvement Agreement Three Party Joint Venture," the three parties being Wiese, Owen, and Ojeda. (Ojeda was not a witness in this case.) The document is dated May 1, 2003. It states that Ojeda "has no license of any kind at [Wiese's address]." The signature line for Ojeda bears a signature, but the signature lines for Wiese and for Owen are blank. Owen testified that he never signed the contract and never saw it until it was produced in discovery.

Wiese testified that Ojeda worked between May 2003 and "the very first part" of July 2003, and that she saw the document towards the end of June. She also testified that she paid Ojeda \$196,000 in cash by giving money to Owen, who in turn gave it to Ojeda. Ojeda's work was poor, and he and his crew drank, used drugs, and had sex at her house.

Owen received a kickback from Ojeda, in cash on Fridays. Wiese based her testimony on the kickback from her daughter's observation of Owen and Ojeda with a briefcase full of cash and a clause in the Home Improvement Agreement which reads, "Mrs. Wiese to pay Kelly who is to pay MJO Enterprise, Manny compensation, wages and 50% profit of work." Wiese testified that she never approved this provision.

Owen denied any involvement in Wiese's payment to Ojeda.

Ojeda began work in May. Wiese fired him in the first part of July. She did this because her house was "a wreck." There was mold on bathroom walls Ojeda had replaced, a window was installed backwards, water pipes had been broken, a fence wasn't finished, and the dog had been electrocuted in the Jacuzzi. She hired a new contractor and paid him "about anywhere between 40 and \$50,000" to do corrective work.

The investment

Wiese testified that she gave Owen a \$50,000 cashier's check, to be invested in offshore investment through someone named Brian, whose last name she did not recall. Owen's testimony was that he introduced her to Brian Elrod, who sold investment opportunities. However, Owen did not ultimately recommend that Wiese invest with Elrod, and did not believe that she had done so. He testified that the check was a deposit on future work, and that he gave her a credit memo.

The court's ruling

Evidence and argument on the first phase of this trial ended on February 14, 2008. The court ruled from the bench, awarding the damages summarized above. The court also ruled that appellants' conduct was malicious and ordered a trial on punitive damages. That trial began on June 23, 2008, after the court denied appellants' motion to reopen their case in chief. (That motion is discussed later in this opinion.)

On September 4, 2008, the court issued its statement of decision. The court found that Owen was arrogant, untruthful, and deceitful, that he took advantage of Wiese, a widow, "by promising to provide things and services which he could not deliver and misrepresenting to her all the things that he promised her that he could and would do so

that he could gain access to her possessions and her money. . . ." The court then found that appellants were in material breach of the contract in numerous ways, finding, inter alia, that appellants failed to hire a licensed contractor, to sell excess equipment at a reasonable profit, or to provide Wiese with her husband's photographs.

The court also found material misrepresentation of fact intended to induce justifiable reliance, and fraud, in Owen's promise to buy Wiese a Mercedes out of the proceeds of the sale of excess equipment, to supervise the construction work at Wiese's home, to negotiate checks from an escrow account, to provide assistance in clearing Wiese's debt and credit status, to provide an investment strategy and career counseling, and to work on a daily basis to reduce issues affecting Wiese's emotional and physical health.

Discussion

1. *Statute of Limitations*

Appellants contend that all tort claims were barred by the three year statute of limitations in Code of Civil Procedure section 338. We agree.

This suit was filed on September 26, 2006. The allegedly tortious acts took place during the period in which Owen worked for Weise, that is, between April 23, 2003, and late May or early June of that year.

The tort claims were for intentional and negligent misrepresentation of fact (the promises in the contract) and for conversion. The statute of limitations on conversion run from the date of the conversion, except where it is alleged there was a fraudulent concealment. (*Maheu v. CBS, Inc.* (1988) 201 Cal.App.3d 662, 673.) The statute of limitations for negligent and intentional misrepresentation runs from the "discovery, by the aggrieved party, of the facts constituting the fraud . . ." (Code Civ. Proc., § 338, subd. (d)), that is, after the aggrieved party "has knowledge of facts sufficient to make a reasonably prudent person suspicious of fraud, thus putting him on inquiry." (*Vega v. Jones, Day, Reavis & Pogue* (2004) 121 Cal.App.4th 282, 298.)

Wiese testified that she started asking Owen to return some items immediately after the first items were removed from her house, in late April or early May 2003. Some items were returned, but some were not. She started asking for the photographs after the computers were taken from her home, but Owen "just put me off." She testified that in the first part of July 2003, after learning about problems with Ojeda, Owen called her and offered to pay half her losses. She recalled additional conversations with Owen in July, but could recall no conversation in August or at any time thereafter.

Thus, according to Wiese's testimony, by August 2003, she knew that a large amount of equipment had been removed from her home, and that although she had sought return of some items, some had not been returned. She had received no payment. She knew that the pictures had been removed from her home and had not been provided to her. When she asked about them, Owen put her off. Owen was no longer coming to her house, and they were no longer speaking. A reasonably prudent person would have been on inquiry notice before September 2003.

Further, there can have been no late discovery on any tort associated with the remodel. Wiese obviously knew from the beginning that Owen was not supervising Ojeda, because, according to all the testimony, he was not doing so. She could not have had a delayed discovery of the quality of Ojeda's work, because she observed his crew misbehaving and actually fired him for poor work in the first part of July.

As Wiese argues, the first amended complaint alleges that "from May 2003 through October 2003 Plaintiff Wiese believed and relied upon Defendant Owen's false and soothing assurances that the personal property so removed by Defendant Owen was in the process of being sold for Plaintiff's benefit, as called for by the contract. It was not until sometime after October 2003 that Plaintiff Wiese first suspected that Defendant Owen was not telling her the truth and that he would not likely turn over to her any proceeds from the sale of said property." However, the evidence was otherwise.

Any tort claims, including claims of misrepresentation, which arose from the construction work, removal of the photographs, or removal of the excess equipment were

barred by the statute of limitations. The only damages which could be awarded were contract damages, which means, of course, that there can be no punitive damages.

We do not agree with appellants that Wiese cannot recover for the equipment and photographs under a contract theory. The complaint alleges that appellants breached the contract by failing to give the photographs to Wiese and by failing to sell the equipment at a reasonable profit, and the court so found. Contract damages may be recovered.³

2. The motion to reopen

Evidence and argument on the first phase of this trial ended on February 14, 2008. The court ruled from the bench, awarding the damages later reflected in the Statement of Decision. The court also ruled that appellants' conduct was malicious and ordered a trial on punitive damages. That trial did not begin until June 23, 2008.

In the meantime, Wiese was involved in another trial, a fee dispute with her former lawyer in this case, J.J. Little. In that case, the court found that Wiese had waived the attorney-client privilege for purposes of that dispute, and Little's testimony, on May 22, 2008, was to the effect that he had withdrawn from his representation of Wiese because she had sought his participation in the fabrication of evidence.

³ Our ruling on the motion to reopen means that we do not have to rule on appellants' excess damages claims. However, for the benefit of the court and the parties on remand, we note that, for instance, a receipt showing that a laptop computer was purchased for \$1,149 in 1997 does not establish that a sale for "reasonable profit" in 2003 would garner \$1,149, and that evidence that rights to photographs were sold for \$50,000 is not evidence that copies of the photographs were worth that much to Wiese, but was instead evidence that the photographs had no monetary value to her, the rights having already been sold. We also agree with appellants that the award of all sums Wiese spent on Ojeda and on the new contractor fails to take into account that she had planned to spend \$50,000 on home improvement and apparently ended up with an improved home (she alleged in her complaint that "the remodel" cost \$250,000), and fails to take into account Wiese's knowledge that Owen was not supervising Ojeda and her knowledge of Ojeda's failings. Finally, we agree with appellants that the court erred by awarding \$50,000 in "cash money taken by defendants," and \$50,000 for an offshore investment, when the evidence was that there was only one \$50,000 check.

Counsel for appellants monitored the fee trial, and asked Little for a transcript of the trial. In reply, Little sent the transcript to counsel for appellants and counsel for Wiese. Counsel for appellants obtained the transcript on June 13. On June 23, appellants moved to reopen the defense case to offer new evidence which came to light in the fee dispute -- that Wiese had formed a plan to lie, fabricate evidence, and perpetrate a fraud on the court.

In support, appellants asked the court to take judicial notice of Little's August 2007, motion to withdraw in this case and of excerpts from the trial transcript in the fee dispute. The excerpts consist of portions of Little's opening statement, portions of his testimony, and portions of his cross-examination by Wiese.

In sum, the proffered transcript establishes that Little testified and represented to the court that he withdrew from this case because Wiese "wanted me to lie, wanted me to participate and conspire with her in fabricating evidence against Kelly Owen." When he asked Wiese if there was any additional evidence about items removed from her home, she named new witnesses, saying that Sharon Lesker, Mary Lou Murphy, and Tommy O'Connell would testify that they saw Owen take the equipment from her home. Wiese told Little that these people would say anything she wanted them to. She belatedly produced the list of items Owen removed from her home and admitted that it was a recent fabrication. She also said that she knew (because her stepbrother told her so) that Owen was not to be trusted, and would "rip her off" almost immediately on signing the agreement with him. In response, Little explained that she had a serious problem with the statute of limitations.

Appellants did not ask the court to admit the transcript excerpts into evidence in this trial, or to make any ruling based on those excerpts other than a ruling permitting them to reopen their case and present their evidence.

The trial court denied the motion, finding that the evidence did not "rise to the point of re-opening the case," and that Wiese had not waived the attorney-client privilege for this proceeding, and also citing the fact that the motion did not include the entire

transcript of the action or the verdict in the fee action. In the motion for new trial, appellants argued that to the extent that the court denied the motion based on privilege, the court had made a mistake of law. That motion, too, was denied.

We find that the court erred when it denied the motion to reopen.

First, appellants' motion was timely. It was made very soon after the new evidence was discovered, and it was made before the judgment in this case -- indeed, before trial was completed. (*Stoumen v. Munro* (1963) 219 Cal.App.2d 302, 319 [trial not complete until findings are signed and filed].) In this court trial, with further proceedings already scheduled, allowing appellants to reopen to call Little would not have significantly delayed matters. This is especially true because the evidence to be presented went to the heart of Wiese's case, which rested on her credibility, and, moreover, concerned a grave matter, a party's attempt to perpetrate a fraud on the court.

Next, the motion established good cause to reopen. Wiese presented her case almost entirely through her own testimony. She called no percipient or expert witnesses to testify concerning the quality of Ojeda's work or concerning the value of the photographs, or almost anything else. She did call percipient witnesses to testify in general terms to the amount and condition of the items taken from her home, but that is the precise issue on which she told Little she could obtain false testimony. It is true that, as Wiese argues, only one of the witnesses she named as being willing to provide false testimony actually testified on this subject, but that is not the point. The point is Wiese's willingness to obtain and present perjury.

Little's testimony in the fee dispute established that if called in this trial, he would have offered highly relevant evidence. He had once testified that Wiese had formed a plan to lie, suborn perjury, and fabricate evidence, and there can be no doubt that he would have given the same testimony in this trial. As appellants argued to the trial court, "the facts . . . that could be testified to by Mr. Little could well change the nature of the case"

Wiese's credibility was central to her case. Moreover, testimony that a party had formed a plan to offer false testimony and to fabricate evidence and had sought the assistance of counsel in so doing is of central importance to any trial, and to the administration of justice. Sworn testimony to that effect cannot be ignored, and where there is such sworn testimony, a motion to reopen should not be lightly denied.

Nor do we see that the motion could properly have been denied because it did not attach a full transcript of the fee dispute or evidence of the result in that dispute. Appellants did not seek to admit the transcript excerpts into evidence in this trial, and did not argue that any findings in the other trial were binding here. Instead, the transcript had another purpose, which was to show good cause to reopen. Further, Wiese had as much information about the trial as appellants did. Little sent the transcripts to both parties. If the full transcript had been in any way illuminating, Wiese could have offered it to the trial court. Appellants established that Little testified Wiese's plan to deceive the court. That alone was good cause to reopen.

Appellants did not seek to persuade the court to allow them to reopen based on speculation about evidence which might be presented, but instead demonstrated that Little would testify to Wiese's complete lack of credibility. It cannot be common for a party to discover new evidence through sworn trial testimony, and we can think of nothing else more probative of the evidence which could be presented.

Finally, we disagree with the trial court ruling on privilege, and agree with appellants that the Evidence Code section 965 exception applies. Under that statute, "There is no privilege . . . if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud." In order to invoke the exception, the proponent must make a prima facie showing that the exception applies. (*BP Alaska Exploration, Inc. v. Superior Court* (1988) 199 Cal.App.3d 1240, 1262.)

Little represented to the court in the fee dispute that Wiese "began to insist that I take with respect to her claims against Kelly Owen a position, legal and strategic positions, factual positions which were -- which ran the gamut of being unsupported by

fact, were just plain fabricated or just weren't supported by law." In other words, she sought Little's services to assist her in prosecuting a fraudulent case, deceiving the trier of fact, and obtaining a judgment against or settlement from, appellants. The crime/fraud exception applies in such circumstances. (*State Farm Fire & Casualty Co. v. Superior Court* (1997) 54 Cal.App.4th 625, 647-649 [crime/fraud exception applies to communications concerning fraud in claims handling and coverage/bad faith litigation].)

3. *Other contentions*

Appellants also contend that the judgment must be reversed because the court failed to make various findings in the statement of decision. Given our other rulings, it is a contention we need not consider. Finally, appellants contend that the correct remedy is a new trial. They do not cite authority in support, and we do not see that we can make that order.

Disposition

The judgment is reversed, and the case remanded to the trial court on the contract causes of action only. Appellants to recover costs on appeal.

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ARMSTRONG, Acting P. J.

I concur:

MOSK, J.

J. KRIEGLER, Concurring & Dissenting.

I concur in the majority's determination of the statute of limitations issue on the tort claim, but respectfully dissent from that portion of the judgment holding the trial court abused its discretion in denying appellant Kelly Owen's motion to reopen the presentation of evidence. In my view, the record does not support a holding that the trial court acted arbitrarily or capriciously in rejecting Owen's attempt to present additional testimony after the cause had been submitted for decision.

First, the trial court's ruling is immune from attack on the simple basis that Owen failed to present a complete transcript of the testimony of respondent Cindy Wiese's former attorney, James J. Little. Owen offered only a partial transcript of Little's testimony, leaving the trial court with an incomplete picture of the evidence to be presented if the motion to reopen were granted. Wiese had no obligation to obtain the balance of the transcript for the trial court—the motion to reopen was made by Owen, and the burden of convincing the trial court remained the obligation of Owen, not Wiese.

Second, Owen did not present a prima facie case that Wiese sought or obtained Little's services in order to commit a crime or fraud. (*BP Alaska Exploration, Inc. v. Superior Court* (1988) 199 Cal.App.3d 1240, 1262 [proponent asserting the Evid. Code, § 956 exception to the attorney-client privilege must make a prima facie showing that the services of the lawyer were sought or obtained to enable or to aid commission of a crime or fraud]; *National Football League Properties, Inc. v. Superior Court* (1998) 65 Cal.App.4th 100, 110.) Owen presented no evidence as to how or why Wiese sought or obtained Little's services.

Third, this was a bench trial, and the trial court was in the best position to determine whether additional evidence on the issue of credibility was necessary. The trial court could reasonably find that the additional testimony of Little, to the limited extent it was set forth in the excerpt of his testimony in another matter, was insufficient to warrant a different result in this action. This is not an abuse of discretion, particularly in

a case in which the trial court had concluded that Owen had no credibility. (*Broden v. Marin Humane Society* (1999) 70 Cal.App.4th 1212, 1222 [trial court does not abuse its discretion when its refuses to reopen a case for new evidence that will not produce a different result]; *Gluskin v. Lehrfeld* (1955) 134 Cal.App.2d 804, 810.)

KRIEGLER, J.