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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

GENNADY DOLZHENKO, Plaintiff and Appellant, v. VALLEY TEMPS, INC., Defendant and Respondent.	B209129 (Los Angeles County Super. Ct. No. LC075992)

APPEAL from an order of the Superior Court of Los Angeles County, Richard Adler, Judge. Affirmed.

Gennady Dolzhenko, in pro. per., for Plaintiff and Appellant.

Law Offices of Martin J. Trupiano and Martin J. Trupiano for Defendant and Respondent.

Gennady Dolzhenko appeals from an award of attorney fees to respondent Valley Temps, Inc., in his action for national origin employment discrimination. We find no abuse of discretion and affirm.

FACTUAL AND PROCEDURAL SUMMARY

This is an action for national origin discrimination under title VII of the federal Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq. (Title VII)). Valley Temps, Inc., the respondent, is an employment services business principally serving manufacturing businesses. Appellant applied for a temporary job as a factory assembler with respondent, but scored poorly on screening examinations including a shop safety test. In a personal interview appellant was found not to be fluent in English. Based on these results, he was determined not to be a good candidate for any electronics job then available. After respondent received communications from appellant it considered rude, condescending, and threatening, his application was closed and he was not considered for job openings.

Appellant's suit stated a single cause of action for national origin discrimination under Title VII. In its answer, respondent asserted several affirmative defenses, including appellant's failure to exhaust his administrative remedies under Title VII. Respondent moved for summary judgment on the grounds that appellant failed to exhaust his remedies, there was no evidence of national origin discrimination, and it had good faith, legitimate business reasons for rejecting appellant's application.

No opposition to the summary judgment motion was filed and appellant did not appear at the hearing on that motion. The court ruled that appellant had notice of the hearing, pointing out that the hearing date was referenced in appellant's petition for writ of mandate filed with the Court of Appeal and in his petition for review with the Supreme Court, which sought review of discovery orders.[1] Summary judgment was granted

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[1] We address the sanctions imposed on appellant for discovery violations in the companion case, *Dolzhenko v. Valley Temps, Inc.*, case No. B207346.

because appellant failed to exhaust administrative remedies, had not shown he was qualified for the position he sought, and had not produced evidence that he was discriminated against because of his national origin. In addition, he had not produced substantial evidence that respondent's stated legitimate reasons to close his application were untrue or pretextual, nor had he produced evidence that respondent acted with a discriminatory animus. Appellant does not appeal the merits of the order granting summary judgment, and we therefore do not address the merits of that ruling or the denial of appellant's post-judgment challenges made in the trial court.

Respondent moved for an award of $79,171.00 in attorney fees as prevailing party. The trial court found that this is the unusual Title VII case warranting an award of fees against the plaintiff because the claims were "'frivolous, unreasonable, or groundless.'" (*Molski v. Arciero Wine Group* (2008) 164 Cal.App.4th 786, 791, quoting *Christiansburg Garment Co. v. EEOC* (1978) 434 U.S. 412, 422 (*Christiansburg*).) Appellant opposed the request for fees.

The trial court noted that appellant's opposition "fails to present any argument showing that the claim had merit and was not 'groundless or without foundation.' *Bond v. Pulsar Video Productions* [(1996) 50 Cal.App.4th 918]. Rather, the opposition seeks to defeat the motion based on procedural grounds and, in the alternative, the reasonableness of the fees." The court rejected appellant's procedural challenges and declined to reduce the fee award to zero because the case could have been disposed of upon demurrer. Based on the totality of the circumstances, the complexity of the case, and "especially in the excessive number of Court appearances required by a number of meritless motions brought by the Plaintiff," including multiple reconsideration and discovery motions, the court found reasonable fees to be 26 hours (at $375 per hour) for the period before January 3, 2008, and 56 hours for the period after that date. The total fee award is $30,750.

Appellant's motion for reconsideration of the fee award was denied. This timely appeal followed.

DISCUSSION

I

"A trial court's exercise of discretion concerning an award of attorney fees will not be reversed unless there is a manifest abuse of discretion. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095.) '"The 'experienced trial judge is the best judge of the value of professional services rendered in his court, and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong['']—meaning that it abused its discretion. [Citations.]"' (*Ibid.*, citing *Serrano v. Priest* (1977) 20 Cal.3d 25, 49 (*Serrano III*).) Accordingly, there is no question our review must be highly deferential to the views of the trial court. [Citation.]" (*Nichols v. City of Taft* (2007) 155 Cal.App.4th 1233, 1239.)

Appellant first argues no judgment was entered, and therefore there is no basis for an award of costs. Counsel for respondent filed a notice of "entry of order granting . . . motion for summary judgment and entry of judgment" which attached the order signed by the trial court. The notice states that pursuant to the order, judgment is "accordingly entered" in favor of respondent. The order signed by the court on January 30, 2008 stated: "1. VTI's Motion for Summary Judgment is granted. [¶] 2. Judgment to be entered in favor of defendant Valley Temps, Inc., and against plaintiff Gennady Dolzhenko." In a later minute order, the court stated: "[T]he Judgment was signed on January 30, 2008." The trial court expressly rejected appellant's argument that there was no judgment as "without merit" in denying appellant's motion for reconsideration of the fee award, finding that notice of judgment was served on appellant on February 8, 2008.

While it is labeled "Order" granting summary judgment rather than "Judgment" it is clear the trial court treated this as the judgment in this case. This judgment in favor of respondent provided the requisite basis for a fee award.

II

Appellant argues counsel for respondent improperly prolonged the litigation because they failed to terminate the action at the outset by filing a demurrer based on appellant's failure to exhaust his administrative remedies under Title VII. He cites various rules of the California Rules of Professional Conduct in support of his argument.

"Before filing suit on a claim under title VII, a plaintiff must file a charge with the [Equal Employment Opportunity Commission] and obtain a right-to-sue letter." (*Roman v. County of Los Angeles* (2000) 85 Cal.App.4th 316, 325.) The court in *Roman* sustained a demurrer to a Title VII cause of action on this ground. (*Id*. at p. 326.) It is uncontested that appellant did not allege compliance with this jurisdictional requirement. Under the principles of stare decisis, we infer the trial court would have sustained a demurrer brought by respondent on this ground. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Reversal of the trial court's fee award on this basis would require us to substitute our own opinion about litigation strategy for the decision by counsel for respondent to bypass a demurrer and seek summary judgment. As the trial court put it in rejecting this argument: "[S]ince the Plaintiff would have been given leave to amend, it is unknown how Plaintiff would have addressed the issue of the 'right-to-sue' letter, which can be alleged in conclusionary [form]. Further, there is no case law found or cited which would permit a Court to drastically reduce otherwise valid and justified attorney fees on the basis that the Court proposes a different defense strategy." As we discuss below, we infer the trial court took this issue into account in cutting respondent's fee request from $79,171 to $30,750, a reduction of more than 60 percent. The court concluded that the smaller figure represented the reasonable fees for litigation of this matter. We decline to reduce the award to zero because no demurrer was brought on the failure to exhaust defense.

To the extent appellant's challenge to the fee award is based on asserted improper conduct by former counsel for respondent, we find no abuse of discretion in the fee

award. This argument was thoroughly presented to the trial court in more than one context. The trial court was fully aware of appellant's claim that counsel for respondent breached their professional obligations in litigating the case. We are satisfied the court took this argument into account in determining the reasonable amount of fees awarded respondent.

Appellant complains the trial court gave preferential treatment to counsel for respondent, contrasting the award of attorney fees to respondent with the discovery sanctions imposed on him. In support of this argument, appellant reiterates his charges that former counsel for respondent engaged in unethical conduct. The trial court made no finding that counsel acted unethically, and we find no indication of preferential treatment on this record. We address the propriety of the sanctions award in the companion appeal in case No. B207346.

III

We turn to the standards for awarding attorney fees to a prevailing defendant under Title VII.

Title VII contains an attorney fee provision: "'In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee . . . .'" (*Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970, 984-985, citing 42 U.S.C. § 2000e-5(k).) In *Chavez*, the Supreme Court followed the established practice of looking to federal decisions construing Title VII's attorney fee provision in interpreting attorney fee provisions under FEHA. (*Id.* at p. 985.) It cited *Christiansburg, supra*, 434 U.S. 412, the leading case, which held in a Title VII case, "a *prevailing defendant* may recover attorney fees only when the plaintiff's action was frivolous, unreasonable, without foundation, or brought in bad faith." (*Ibid.*) The Supreme Court examined the relevant legislative history and concluded that "'Congress intended to "deter the bringing of lawsuits without foundation" by providing that the "prevailing party"—be it plaintiff or defendant—could obtain legal fees.' [Citation.]" (*Christiansburg, supra*, 434 U.S. at p. 420.) It concluded that a court "may in its

discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." (*Id*. at p. 421.) The Supreme Court explained that "the term 'meritless' is to be understood as meaning groundless or without foundation, rather than simply that the plaintiff has ultimately lost his case, . . ." (*Ibid.*)

The *Christiansburg* court cautioned, however, "In applying these criteria, it is important that a district court resist the understandable temptation to engage in post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success." (*Christiansburg, supra*, 434 U.S. at pp. 421-422, see also *Rosenman v. Christensen, Miller, Fink, Jacobs, Glaser, Weil Shapiro* (2001) 91 Cal.App.4th 859, 865, citing *Christiansburg, supra.*)

Appellant contends his action was not frivolous, arguing that he did not receive a fair hearing. He complains that because he is self-represented, he believed no appearance was necessary at the hearing on the motion for summary judgment because he had petitioned to stay the matter. He cites the denial of his motions for new trial and reconsideration. Appellant also challenges the evidence in support of the motion for summary judgment. In addition, he argues the trial court improperly denied his discovery of information related to the merits of his case. In his reply brief, appellant argues he was qualified for a job through respondent, challenges the test results cited by respondent as a basis for terminating his application, contends the reasons given by respondent were pretextual, and asserts that English fluency was not a legitimate job qualification.

None of these arguments is a basis to overturn the trial court's ruling that the action was frivolous. As the trial court pointed out, not only was the action barred because appellant failed to exhaust his administrative remedies under Title VII (see *Christiansburg, supra*, 434 U.S. at p. 422), but appellant presented no evidence of a prima facie case of national origin discrimination in opposition to the motion for

summary judgment. Respondent presented evidence of a legitimate reason for removing appellant from its applicant list because of his lack of English fluency, poor test scores, and threatening behavior. "Pro. per. litigants are held to the same standards as attorneys." (*Kobayashi v. Superior Court* (2009) 175 Cal.App.4th 536, 543.) In opposition to summary judgment, the "'plaintiff must produce evidence which permits an inference of illegal intentional discrimination.'" (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1118, quoting *Heard v. Lockheed Missiles & Space Co.* (1996) 44 Cal.App.4th 1735, 1755.)

To the extent that appellant is challenging the showing made by respondent in support of the motion for summary judgment, we decline to review that issue. Appellant chose not to appeal the merits of the judgment, and we therefore may not review the court's rulings on summary judgment or on the motions for new trial and reconsideration. His notice of appeal is from an order for fees made after judgment, under Code of Civil Procedure section 904.1, subdivision (a)(2).

IV

We turn to the amount of the fee award. Appellant raises detailed challenges to the fees claimed by respondent. These arguments were not made in the trial court. We quote appellant's entire argument on the point from his opposition to the fee request: "**Amount of Attorney's Fees Requested by Defendant's Attorneys is Unreasonable and Excessive, in That It Is not Supported by the Evidence.** [¶] Defendant's attorneys never submitted any evidence that their client paid them for their useless and unjustified 'work' in the amount of $79,171. Taking into consideration that Valley Temps is a small employment agency that does not have insurance coverage (as defendant's attorneys declared in discovery motions), the amount of $79,171 does not look truthful." The detailed challenges appellant now raises were not presented to the trial court and therefore are not preserved for appeal. (*Children's Hospital & Medical Center v. Bonta´* (2002) 97 Cal.App.4th 740, 776.)

We have reviewed the attorney fee request and the supporting declarations. Mindful of the deference we must accord the trial court's determination of reasonable fees (see *PLCM Group, Inc. v. Drexler*, *supra*, 22 Cal.4th at p. 1095), we find no abuse of discretion. As we have discussed, the trial court reduced respondent's fee request by more than 60 percent. While the case may at first glance appear straightforward, the litigation was prolonged by appellant's repeated and unsuccessful motions for reconsideration, new trial, and other pleadings. The trial court was in the best position to determine that 82 hours was a reasonable figure for the work done by respondents. We find no abuse of discretion in this determination.

V

At the conclusion of its reply brief, respondent requests an award of its costs and fees incurred in obtaining a copy of the record on appeal pursuant to California Rules of Court, rule 8.278 (a)(5) (governing costs on appeal) and rule 8.276(a)(4) (governing sanctions on appeal).[2] No other authority is cited, nor is a declaration in support of the request provided.

Rule 8.278(a)(5) provides for an award of costs on appeal "[i]n the interests of justice" as the court "deems proper." Rules 8.278(d)(2) provides: "Unless the court orders otherwise, an award of costs neither includes attorney's fees on appeal nor precludes a party from seeking them under rule 3.1702." Rule 3.1702(c) provides that a motion to claim attorney fees on appeal under a statute requiring the court to determine entitlement to the fees, the amount of fees, or both, must be served and filed with this court within the time for filing a memorandum of costs under rule 8.278(c). The deadline under that rule is 40 days after notice of the remittitur.

Rule 8.276(a)(4) allows for an award of sanctions, including an award of costs, for a violation of the rules on appeal. Rule 8.276(b)(1) provides: "A party's motion under (a) must include a declaration supporting the amount of any monetary sanction sought

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[2] Respondent states these fees were incurred after appellant "'was unable to lend the record because he 'left them at a bus stop on his way to the downtown law library.'"

. . . ." We decline to consider the request for sanctions because no supporting declaration or separate sanctions motion was brought.

On August 28, 2009, we denied respondent's motion to compel appellant to lend the record for copying or for explanation as to how the records were lost. We indicated the record was available in the clerk's office for copying and noted we have "discretion to include cost of doing so in our adjudication." We conclude that respondent is entitled to its costs on appeal, not including attorney fees, but including the cost of copying the record on appeal at the clerk's office for the Second District.

DISPOSITION

The order awarding attorney fees to respondent is affirmed. Respondent is to have its costs on appeal.

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EPSTEIN, P.J.

We concur:

MANELLA, J.

SUZUKAWA, J.