2nd Civil No. B177747

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

MORGAN, LEWIS & BOCKIUS LLP,

Plaintiff, Respondent and Appellant,

vs.

RALPH CASSADY,

Defendant, Appellant and Cross-Respondent.

Appeal from the Los Angeles County Superior Court
Hon. John P. Shook, Judge
Case No. BC 277144

CROSS-APPELLANT'S REPLY BRIEF

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Ralph Cassady respectfully submits this brief reply with regard to his protective appeal from the judgment.

FACTUAL SUMMARY

1. Cassady was employed by Morgan Lewis from February 1987 to March 1988. (JA 291:11-22.)

2. In 1995, Rallie Rallis sued Cassady, Morgan Lewis and other law firms Cassady had worked with at various times, including the Hahn Cazier firm that had been absorbed into Morgan Lewis in February 1987, for alleged malpractice and other torts committed from 1982 through 1994. (JA 284-285, 290-293, 337-378.)

3. Rallis' claims for alleged malpractice and negligent misrepresentation against Cassady and Morgan Lewis arose in part from "legal activities undertaken by [them] during the period of October 1987 through February 1988." (JA 361:21-22.) In particular, Rallis' second and eighth causes of action focused on their representation of him in a transaction involving a sale of stock and an indemnity agreement. The company whose stock was sold was variously identified by the parties or the courts as Hi-Lift (Cal.) or American Hi-Lift Corporation or AHLC, the stock purchaser and indemnitee was a company known as Ackers U.S.A, and the overall transaction was called the Ackers or AHLC/Ackers transaction. (JA 361-364, 372-373.)

4. Morgan Lewis undertook to defend itself and other former Hahn Cazier attorneys in the Rallis action, but it refused to defend Cassady. Cassady therefore retained attorney Baird A. Brown to defend him against Rallis' claims. (JA 285:16-22.)

5. In August 1998, the trial court in the Rallis action summarily adjudicated all of Rallis' claims in favor of Cassady and Morgan Lewis except those arising from the Ackers transaction. (JA 392, 398.)

6. In light of a new Supreme Court decision issued after the trial court's rulings in August 1998, Cassady and Morgan Lewis filed new summary judgment motions in the Rallis action with regard to Rallis' only remaining claim, the Ackers transaction. In March 1999, the trial court granted those motions. (JA 392, 399.) These summary judgment rulings with regard to the Ackers transaction – claims that arose from legal services performed while Cassady was employed by Morgan Lewis between October 1987 and February 1988 – were affirmed on appeal. (JA 392, 405, 407.)

7. In the instant action, Cassady seeks indemnity from Morgan Lewis for attorney fees and costs he incurred in defending himself against Rallis' claims, insofar as those claims related to Cassady's services as an attorney with the Hahn Cazier firm and Morgan Lewis. (JA 293:11-16.) He calculates that fees for Attorney Brown's services in the Rallis action insofar as they related to Cassady's work with Hahn Cazier and Morgan Lewis total $270,000. (JA 255:3-10; 299:10-13.)

8. Although attorney Brown's statements for services rendered to Cassady in the Rallis action are not segregated by causes of action or by where Cassady was employed at any particular time, fees for services related solely to the Ackers transaction can be identified by simply reading the statements. (See, for example, 7/1/98 ["Review documents regarding Ackers issues"]; 7/14/98 ["Confer with Hager and Kruis regarding AHLC documents"] (JA 318-319).) The same is true for fees solely related to the second summary judgment, which only addressed the Ackers transaction. Brown's statements spell it out. (See, for example, RT 316-317, 12/16/98

["Work on motion for summary judgment"]; 12/17/98 [same]; etc., almost every day through 2/19/99 ["Attend summary judgment hearing"].)

9. Cassady submitted all of this information to the trial court in opposition to Morgan Lewis' summary judgment motion and pointed it all out to the trial court at the hearing on the cross-motions for summary judgment. (RT 5:14-25.)

LEGAL DISCUSSION

THE EVIDENCE ESTABLISHED TRIABLE ISSUES OF MATERIAL FACT AS TO CASSADY'S RIGHT TO INDEMNIFICATION FOR LEGAL FEES HE INCURRED DEFENDING CLAIMS ARISING OUT OF HIS EMPLOYMENT WITH MORGAN LEWIS; MORGAN LEWIS WAS NOT ENTITLED TO SUMMARY JUDGMENT ON THE THEORY THAT FEES COULD NOT BE APPORTIONED.

To prevail on its summary judgment motion, Morgan Lewis had to demonstrate that Cassady had no evidence, and could not reasonably obtain evidence, to support his claim for indemnification under Labor Code section 2802. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854.)

Morgan Lewis may have disagreed with Cassady's method of apportioning the fees he incurred in defending the Rallis action, and Morgan Lewis may have disputed whether Cassady was entitled to the defense of Rallis' claims arising from his work before he joined Morgan Lewis (even though Morgan Lewis provided a defense to others in the same situation), but Morgan Lewis did not and could not establish that *none* of the fees incurred by Cassady in defending the Rallis action were unrelated

to Cassady's employment with Morgan Lewis. That was Morgan Lewis' burden of proof on its summary judgment motion. (*Tsemetzin v. Coast Federal Savings & Loan Assn.* (1997) 57 Cal.App.4th 1334, 1342 ["The moving party must demonstrate that under *no* hypothesis is there a material factual issue requiring a trial"(emphasis added)]; *DeCastro West Chodorow & Burns, Inc. v. Superior Court* (1996) 47 Cal.App.4th 410, 422 [Section 437c "does not permit summary adjudication of a single item of compensatory damage which does not dispose of an entire cause of action"].) Morgan Lewis failed to carry that burden.

Burden of proof aside, there *are* material issues of disputed fact whether at least *some* of the fees itemized by Cassady in opposition to Morgan Lewis' summary judgment motion were related to the defense of claims arising from Cassady's employment with Morgan Lewis within the meaning of Labor Code section 2802. As detailed in the Factual Summary above, the second and eighth causes of action of Rallis' complaint related solely to his claims against Cassady and Morgan Lewis for their representation of him in the Ackers transaction from October 1987 through February 1988, while Cassady was employed by Morgan Lewis. (JA 291:11-22; 361-364; 372-373.) There are time entries and fees charged by attorney Brown to Cassady solely relating to the second and eighth causes of action. In particular, nearly $20,000 in charges related to the second summary judgment motion filed in the Rallis action, a motion that was directed solely to the second and eighth causes of action. (JA 316-317, 399.)

That should be the end of the matter. There are triable issues of fact that preclude summary judgment. Although Cassady made the point regarding the Rallis claims during the original summary judgment motion (RT 5:14-25), the trial court did not get it (RT 14:10-12). The court did get the point after trial, when the court was better able to focus on the complex

details of the Rallis action and the claims of the parties as presented by the supporting materials in the original summary judgment motion. [RT 361:4-6 ["the court is more focused on the issues because of the trial that we had on the cross-complaint"]; RT 361:25-28 ["Again, I'm a lot more focused on the issues and the facts of this case based on the fact that we had a trial in the case and we had witnesses come in"].)

Morgan Lewis' argument that a trial judge cannot, on his or her own, place a value on legal services unless the services were performed as part of the case being heard by the judge (Combined Appellant's Reply Brief at pp. 12-13) is flatly wrong. "The value of attorney's services is a matter with which a judge must necessarily be familiar. When the court is informed of the extent and nature of such services, its own experience furnishes it with every element necessary to fix their value." (*Spencer v. Collins* (1909) 156 Cal. 298, 307; *Elconin v. Yalen* (1929) 208 Cal. 546, 549-550.)

CONCLUSION

The trial court erred in granting summary judgment to Morgan Lewis on Cassady's claim for indemnity. If the trial court's order granting a new trial is for some reason reversed, the judgment in favor of Morgan Lewis on that claim must nevertheless be reversed as well.

Dated: December 6, 2005

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 14(c)(4), the attached **Cross-Appellant's Reply Brief** is proportionately spaced, has a typeface of 13 points and contains _____ words.

Dated: December __, 2005

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