

**MARC RESNICK, vs. JEFFREY S. BAKER, P.C.**

*Appeals Court of Massachusetts.*

*October 8, 2014.*

*By the Court (Cypher, Graham & Carhart, JJ.).*

**MEMORANDUM AND ORDER PURSUANT TO RULE 1:28**

**DECISIONS ISSUED BY THE APPEALS COURT PURSUANT TO ITS RULE 1:28 ARE PRIMARILY ADDRESSED TO THE PARTIES AND, THEREFORE, MAY NOT FULLY ADDRESS THE FACTS OF THE CASE OR THE PANEL'S DECISIONAL RATIONALE. MOREOVER, RULE 1:28 DECISIONS ARE NOT CIRCULATED TO THE ENTIRE COURT AND, THEREFORE, REPRESENT ONLY THE VIEWS OF THE PANEL THAT DECIDED THE CASE. A SUMMARY DECISION PURSUANT TO RULE 1:28, ISSUED AFTER FEBRUARY 25, 2008, MAY BE CITED FOR ITS PERSUASIVE VALUE BUT, BECAUSE OF THE LIMITATIONS NOTED ABOVE, NOT AS BINDING PRECEDENT.**

**OPINION**

The plaintiff, Marc Resnick, appeals from a Superior Court judgment, entered after a bench trial, dismissing all counts of his legal malpractice complaint, and awarding the defendants, Jeffrey S. Baker, P.C., and Jeffrey S. Baker, individually (Baker), damages, prejudgment interest, and attorney's fees.

Baker cross-appeals from the portions of the judgment denying his motion for sanctions pursuant to Mass.R.Civ.P. 11, as amended, 456 Mass. 1401 (2010), his motion for calculation of interest pursuant to G. L. c. 231, § 6B, and his motion to assess damages at 150 percent interest. He also cross-appeals from the judge's decision not to multiply damages under his G. L. c. 93A claim.

**BACKGROUND.**

Because the record in this case is lengthy and the parties are thoroughly familiar with it, only an abbreviated background is necessary to introduce our analysis of the issues on appeal.

Resnick in 1997 engaged Baker, an attorney, to represent him in a property dispute (the underlying case). Baker obtained a highly favorable result, but a motion judge allowed a motion of the defendants to strike his untimely filed application for substantial attorney's fees (the fee application). Baker's efforts to reinstate the application were unsuccessful. Aware of the potential for a malpractice claim, Baker initiated and negotiated a settlement agreement with Resnick in 2002 (settlement agreement) whereby Resnick waived a malpractice claim and Baker agreed to waive certain fees and perform additional legal work without charge.

Subsequently, Resnick entered into a business venture with Baker and Steven Holzer in 2005. A dispute arose among the parties, and Holzer filed suit against Resnick in 2006. Viewing Baker as aligned against him, Resnick chose to file an action against Baker, essentially reopening the potential malpractice matter which was the subject of the 2002 settlement agreement. Resnick asserted claims of unfair trade practices, legal malpractice, and breach of fiduciary duty. Baker counterclaimed for abuse of process, breach of contract, quantum meruit, and violation of G. L. c. 93A, § 11.

A bench trial was held over five days beginning on May 16, 2011. The trial judge issued a decision on August 5, 2011, ordering judgment for Baker on all counts of Resnick's complaint; awarding Baker \$450,000 on his abuse of process counterclaim; awarding \$152,853 on his breach of contract counterclaim; and ordering judgment for Baker on his claim of violation of G. L. c. 93A. The judge ordered Baker to file a petition for attorney's fees, stating that the clerk would schedule a hearing on the petition in September. No judgment was entered in the docket. While Baker timely served the petition, for reasons not apparent in the docket (and the retirement of the trial judge), the petition and several posttrial motions filed by Baker were not taken up by a motion judge until January, 2012. The motion judge allowed Baker's fee petition in the amount of \$107,970. On March 29, 2012, final judgment entered for Baker dismissing all of Resnick's claims, awarding Baker damages of \$602,853 (with prejudgment interest to be added), awarding attorney's fees, and denying the other posttrial motions.

**ANALYSIS.**

**1. ALLEGED NONPAYMENT FOR LEGAL WORK BY BAKER.**

In an initial argument spanning twelve pages, Resnick argues that the judge erroneously concluded that he had not paid Baker \$67,921 for his work covered in the underlying case, asserting that he paid over \$130,000 for that work.

Further asserting that this finding "became the basis for the court's multiple findings of liability against Resnick, resulting in a massive and unfair judgment against him," he asks that the judgment against him on Baker's abuse of process, breach of contract, and c. 93A claims be vacated.

The judge stated that "[t]here has been a great deal of confusion as to what was owed by Resnick to Baker. This was fueled in large part by a lack of documentation. . . . However, this Court finds that it is more likely than not that Resnick did not pay Baker in full for his work and that Baker was still owed money." The judge found: "As of the date that Baker prepared his petition for attorney[]s fees, Resnick had paid a total of \$69,983.52 for Baker's legal work since the commencement of the underlying case. This court rejects wholly Resnick's testimony to the effect that he had paid Baker a sum of money in excess of \$100,000."

In further considering whether Baker was owed money, the judge, referring to the settlement agreement, stated, "[I]t would make no sense for Resnick to agree to split any fees which might be reinstated with Baker if Baker had already been paid either all or a substantial amount of what was owed."<sup>2</sup>

We conclude that the judge's findings, based on her careful and detailed attention to the record, are not clearly erroneous.

## **2. THE MALPRACTICE CLAIM.**

Resnick asserts that the judge erred in ruling that his malpractice claim failed. He claims the judge appears to have based her ruling on a determination that he was "better off" with the settlement agreement where he agreed not to pursue a malpractice claim against Baker than he would have been without it.

We briefly examine the reasons for the negotiations leading to the settlement agreement. As we noted previously, when Baker became aware of the potential for a malpractice claim after he erred in failing to timely file the fee application in the underlying case, he began negotiations with Resnick in an effort to eliminate any harm caused to Resnick by his error. We first look to the judge's lengthy and thorough evaluation of the negotiations. She found that Baker "communicated with Resnick all of the material facts regarding this problem. . . . [H]e was scrupulously honest and detailed in [explaining] the problem and in accepting it as his responsibility. He was scrupulously honest and forthcoming to Resnick that as the client, Resnick had a right to pursue a malpractice claim against Baker."

At trial both Resnick and Baker relied on experts. The judge, agreeing with Baker's expert's opinion, found "that the agreement was clear and contained all of the necessary information for Resnick to know about prior to releasing his claim against Baker. . . . [H]e had access to an attorney and plenty of time to review the document and make edits. Finally, and significantly, the expert noted that Resnick had over four years to complain about the agreement and yet was silent. . . ."

In reviewing Resnick's expert's opinions, the judge noted that "much of what [he] discussed could more accurately be described as 'the better practice' and not what an average qualified attorney would do." Moreover, "he did not offer any opinion as to whether or not Resnick suffered any harm from any of [the deficiencies he discussed]."

While an attorney is liable for any reasonably foreseeable loss caused by his negligence, *Fishman v. Brooks*, 396 Mass. 643, 646 (1986), the judge ruled that here "no credible evidence was introduced that Resnick suffered any harm as a result of Baker's error (or errors)."

The judge concluded that Resnick suffered no harm because he was adequately compensated. "[B]ecause of the terms of the agreement and what Baker gave up, Resnick was better off than if [the petition for attorney's fees had been allowed]."<sup>3</sup> We conclude, as did the judge, that the malpractice claim fails because there is no evidence of harm to Resnick.

In contrast, the petition for attorney's fees which was deemed untimely, requested \$130,869.25. There is evidence that Resnick regarded \$130,000 as his loss if the appeal failed, and as the judge noted, "looked to [Baker] to make him whole for his loss."

## **3. OTHER CLAIMS.**

In her rulings of law, the judge addressed three additional claims made by Resnick. Because we discern no appellate argument on these claims, we only summarily note the judge's rulings on them.

### **A. FRAUD.**

The judge noted that it did not appear that fraud was specifically pleaded, but addressed it nonetheless. Resnick sought to vacate the settlement agreement — asserting that lack of full disclosure and misrepresentations regarding Baker's efforts to reinstate the fee application constituted fraud. The judge, referring to her analysis and findings in the above malpractice section (see part 2, *supra*), concluded that there was no credible evidence to support this claim. b. *Breach of fiduciary duty*. The judge stated that Resnick relied on the same alleged nondisclosures as in his claim of fraud, and failed to show a duty owed, a breach of that duty, or harm caused.

### **C. GENERAL LAWS C. 93A.**

Resnick claimed a violation of G. L. c. 93A on two grounds — nondisclosure of material facts, and disregard of known contractual arrangements. The judge concluded that there was insufficient evidence of a failure to disclose material facts in all of Baker's dealings with him, and — disagreeing with Resnick's reading of the settlement agreement — determined that Baker did not violate the contractual arrangements.

#### **4. BAKER'S COUNTERCLAIMS.**

##### **A. ABUSE OF PROCESS.**

The judge determined that Resnick "did not appear to have any grounds to bring the case since he knew he had not been harmed." Rather, she found "[t]here is ample direct evidence in Resnick's words in which he made clear that he was bringing this claim not from a desire to be made whole for some loss sustained when he settled his potential malpractice claim against Baker. . . . There can be no doubt that Baker has proven that Resnick has brought the instant action for no purposes other than to punish, retaliate, harass and harm Baker, professionally and personally."<sup>4</sup> The judge also stated that, in the wake of the Holzer litigation, "Resnick specifically told Holzer that his plan was to damage Baker's professional standing as an attorney and specifically referenced taking steps to affect Baker's license to practice law. . . . In a conversation in February of 2006, Resnick told Baker he intended to ruin Baker's life, his law practice and his license to practice law."

Accordingly, following *Millennium Equity Holdings, LLC v. Mahlowitz*, 456 Mass. 627 (2010), the judge awarded Baker damages in specific amounts for attorney's fees and expenses, for emotional harm, and for interference and intrusion into his practice of law.

Resnick's arguments in opposition center on the awards for emotional distress and interference with Baker's practice of law. We delay considering Resnick's argument on attorney's fees to our analysis of the motion judge's rulings on Baker's posttrial motions in part 5, *infra*, of this decision.

##### **I. DAMAGES FOR EMOTIONAL DISTRESS.**

Resnick argues that the award for emotional harm was excessive and that the judge did not indicate the basis for that award. Resnick asserts that the award should be reduced for the lack of corroborating medical or psychological evidence and appears to assert that Baker's distress was not so disabling that he could not maintain a very busy law practice. However, no showing of physical harm is required for damages resulting from abuse of process, and recovery may be had for mental suffering, distress, harassment, and "feelings." *Millennium Equity Holdings, LLC v. Mahlowitz*, *supra* at 648, and cases cited. The trial judge found that "Baker also suffered personally. This lawsuit has clearly been intrusive, upsetting and a source of huge emotional distress to Baker." In evaluating Baker's extensive testimony<sup>5</sup> describing the impact of the litigation on him, the judge found that "the accusation of malpractice, as Baker put it, 'goes right to the essence of what it is to be a lawyer' and this case has gone to his 'very soul.'" The judge found that the award was made on the basis of five years of litigation which "has been lengthy, heated and at many times, including during the trial, downright nasty," referring to it as "scorched earth" litigation. It long has been within the discretion of the trier of fact to assess claims of damages for emotional distress and to determine the monetary amount that constitutes just compensation. Because there is little legal authority to guide the fact finder, the range of discretion is very broad. Compare *LaBonte v. Hutchins & Wheeler*, 424 Mass. 813, 824 (1997), and cases cited. Here we discern no abuse of discretion and do not disturb the judge's findings.

##### **II. DAMAGES FOR HARM TO BAKER'S BUSINESS AND REPUTATION.**

Resnick also challenges this award of \$50,000. This award appears to be contrary to the judge's finding that she did "not find that Baker has proven that he actually lost business or that his professional reputation was injured in any specific manner." However, she found that "there has been harm by way of interference and intrusion into his practice of law which this Court finds to be a general item of damage." Resnick argues that it was improper to make such an award of general damages for business interference in connection with an abuse of process claim without affirmative proof of "specific damages." *Millennium Equity Holdings, LLC v. Mahlowitz*, *supra* at 645. Moreover, such an award in this case is duplicative of the judge's award of \$100,000 to Baker for his time spent working on this case (see part 5a, *infra*). Accordingly, we vacate the award of \$50,000 to Baker on this basis.

##### **B. BREACH OF CONTRACT.**

Finding that Resnick was in breach of the agreement not to sue for malpractice, the judge stated that Baker had proved damages totaling over \$152,000. See also note 3, *supra*. Resnick complains that the award of damages for Baker's breach of contract counterclaim resulted in an impermissible windfall to Baker. In a convoluted argument, Resnick asserts that if the remedy of rescission, rather than damages for breach of contract, was applied, the parties could be restored to the status quo ante, but Baker would be permitted to charge Resnick for his continuing legal

work and Resnick would be permitted to sue Baker for malpractice. We discern no merit in this argument, and because it does not appear that it was raised in the trial court, we decline to consider it. Mass.R.A.P. 16(a)(4), as amended, 367 Mass. 921 (1975).

The judge properly awarded restitution damages. The restitution measure of damages in a contract action is "an amount corresponding to any benefit conferred by the plaintiff upon the defendant in performance of the contract disrupted by the defendant's breach." *Fecteau Benefits Group, Inc. v. Knox*, 72 Mass.App.Ct. 204, 209 (2008), quoting from *Sullivan v. O'Connor*, 363 Mass. 549, 583 (1973).

### **C. QUANTUM MERUIT.**

Because the judge awarded damages for breach of contract, she made no award under this theory.

### **D. GENERAL LAWS C. 93A, § 11.**

The judge stated that Resnick's pursuit of this litigation, in addition to constituting abuse of process and breach of contract, also constituted a violation of c. 93A, but declined to order multiple damages. The judge stated that Resnick's claim of harm by Baker's mistake "was all done with a single purpose and one which is prohibited by those engaged in trade or commerce as Resnick concedes he was with Baker (by virtue of his claim against Baker for this same cause of action)."<sup>6</sup> However, "given the scorched earth nature of this litigation, which this Court witnesses firsthand," she awarded attorney's fees. The judge ordered Baker to file a petition and the clerk to schedule a hearing in September.

### **5. BAKER'S POSTTRIAL MOTIONS.**

As we noted in the background section of this decision, following the trial judge's opinion issued on August 5, 2011, her retirement, and several posttrial motions filed by Baker, action on these matters was considered by a motion judge beginning in January, 2012.

Here, we note the motion judge's approach to winding up the issues presented to him. He stated that "[i]t would be difficult enough for a judge who had not presided over the trial to rule on the petition for attorney[']s[] fees, however, that is not the only post-trial motion now before the court, as Baker proceeded to serve and file, seriatim, a number of additional motions." He issued a decision on March 28, 2012, which we review as follows.

### **A. GENERAL LAWS C. 93A PETITION FOR ATTORNEY'S FEES.**

Following the trial judge's ruling that Resnick violated G. L. c. 93A, she ordered Baker to serve a petition for attorney's fees. As we have noted, the petition was not acted upon until a motion judge took up the several posttrial motions beginning in January, 2012. Baker sought an award of \$434,728 which the motion judge found reasonable, considered under the lodestar method. He found, however, that the request for fees included work for a period of time before the date the c. 93A claim was added to the case, and deducted the amount of \$264,575.50 which had been charged for that period. Next, the motion judge noted that the trial judge had awarded \$90,000 to Baker which he had paid to two attorneys as part of the abuse of process damages. He calculated that a proportional amount of \$35,190<sup>7</sup> must be deducted to prevent a double recovery, leaving \$134,962.50 as the lodestar value for the legal work performed after the c. 93A claim was asserted and not already included as damages for abuse of process. Finally, the motion judge deducted ten percent for his doubt about the accuracy of the time records of one attorney, and an additional ten percent for what he observed was work of an administrative nature of the other attorney. Accordingly, he awarded \$107,970 in additional fees as a consequence of the c. 93A violation.

Resnick complains that the trial judge improperly found he had violated c. 93A because he asserts the parties' dispute was not a commercial transaction and the court was without jurisdiction to consider an "internal business dispute" to which the act does not apply. The argument is unavailing. Resnick overlooks the judge's conclusion that "the manner in which Resnick has pursued Baker in this litigation, which this Court has already found to constitute an abuse of process as well as a breach of contract . . . also constitute[s] a violation of G. L. c. 93A," further stating that "Resnick's actions as described in the findings of fact have been unfair as is defined by the statute."<sup>8</sup>

### **B. RULE 11 MOTION.**

Baker sought an award of attorney's fees under Mass.R.Civ.P. 11, as amended, 456 Mass. 1401 (2010), and G. L. c. 231, § 6F, against Resnick's attorney.<sup>9</sup> The motion judge first noted that the motion, filed four months after the trial judge issued her opinion, and six months after the trial, might be reason enough to deny the motion, but concluded that the trial judge's refusal to double or treble c. 93A damages, signaled that Resnick and his attorney had not willfully engaged in conduct that violated c. 93A, or that there was a "willful violation" of rule 11, and properly denied the motion.

### **C. THE G. L. C. 231, § 6F, MOTION.**

The motion judge denied this motion for the same reasons as he denied the rule 11 motion, essentially because the motion was not timely filed, and also that "the award of additional fees in this case would appear to be redundant," given the several awards of damages for abuse of process.<sup>10</sup>

#### **D. INTEREST MOTION.**

The motion judge noted that the trial judge awarded Baker \$152,853 as damages for his claim that Resnick breached their settlement agreement. That amount was the total of legal fees Baker agreed to forego in the settlement agreement. In this motion, Baker argued that interest should apply to the damages from the date legal work was performed. The motion judge, however, correctly ruled that "[t]o the extent breach of contract damages apply in this case, the breach occurred when Resnick filed this action thereby breaching the settlement agreement and that is the date from which interest at the statutory rate should accrue."

#### **CONCLUSION.**

The trial judge awarded attorney's fees to Baker under c. 93A. We allow Baker's request for appellate attorney's fees as they pertain to his defense of the c. 93A award, but disallow any amount of fees and costs attributable to Baker's unsuccessful cross appeal and unsuccessful argument pertaining to the \$50,000 damage award for harm to Baker's business and reputation. Baker may submit his claim for appellate attorney's fees in accordance with these directions within fourteen days of the date of the rescript. Resnick will have fourteen days within which to respond.

See *Fabre v. Walton*, 441 Mass. 9, 10-11 (2004).

The portion of the final judgment entered on March 29, 2012, that awards \$50,000 in damages for business interruption is vacated, and the judgment is reduced accordingly. In all remaining respects, the judgment is affirmed. *So ordered.*

#### **FOOTNOTES**

1. Jeffrey S. Baker is also sued individually.

2. It was agreed by the parties that, as consideration for the agreement, "[i]n the event that either the Superior Court or the Appeals Court (or any other court) shall award fees, you and I shall split the fees as awarded."

3. "The value of the fees for which Baker did legal work but was not paid by Resnick, all of which was to have been waived by Baker in exchange for a release of malpractice liability is as follows": \$67,955.21 (balance owed for handling the underlying litigation); \$60,832 (owed for legal services between October 2001 and June 25, 2002); \$11,500 (owed for fees incurred to settle the cases); and \$3,600, \$7,500, and \$1,500 (owed for [other] services . . .)." The total value of these services is over \$152,000. The judge found that the billing rates charged by Baker and his associate were reasonable during the time work was performed on all the matters referenced in her decision.

4. We note some of the judge's findings. "Resnick used Baker's predicament to his advantage and negotiated a settlement agreement which was initially for Resnick, a good one and as events unfolded, became a windfall."

5. A single-spaced presentation of this testimony in Baker's brief at 34, covers two pages.

6. Resnick's complaint alleged that Baker was engaged in "trade or commerce."

7. This amount differs slightly from the amount reported in the judge's decision because of a multiplication error. We have similarly corrected the other amounts affected by that error.

8. On his cross appeal, Baker argues that the trial judge was required to order multiple damages because she found a violation of c. 93A and awarded attorney's fees for that violation. Because the judge here did not find a wilful or knowing violation of G. L. c. 93A, § 11, an award of attorney's fees alone was not an abuse of discretion. *v. ,* 159 n.20 (2013).

9. We acknowledge the brief filed by Attorney Fanger. Fanger's request for costs and fees pursuant to Mass.R.A.P. 25, as appearing in 376 Mass. 949 (1979), is denied.

10. Baker argued that if the § 6F motion were allowed, then he should be entitled to interest at 150 percent as set out in G. L. c. 231, § 6C. The judge noted he had denied the § 6F motion.