Filed 12/6/07 Perrillo v. Picco & Presley CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

RICHARD J. PERRILLO, Plaintiff, v. PICCO & PRESLEY et al., Defendants and Respondents; WILLIAM F. ADAMS, Movant and Appellant.	B185110 (Los Angeles County Super. Ct. No. SC063100)

APPEAL from an order of the Superior Court of Los Angeles County, Cesar C. Sarmiento, Judge. Affirmed.

Appleton, Blady & Magnanimo, Heather Appleton; William F. Adams Law Offices and William F. Adams for Movant and Appellant.

Breidenbach, Huchting & Hamblet, Eugene J. Egan; Greines, Martin, Stein & Richland, Kent L. Richland, Laura Boudreau and Jeffrey E. Raskin for Defendants and Respondents Picco & Presley, Gregory Picco and Margaret Presley.

Carroll, Kelly, Trotter, Franzen & McKenna, Richard D. Carroll and David P. Pruett for Defendant and Respondent Joseph J. Iacopino.

Appellant, an attorney discharged by his client, challenges the denial of his motion for attorney fees brought against the counsel who succeeded him. Appellant sought the award based on a purported attorney fees contract between his former client and successor counsel.

Appellant contends that the trial court abused its discretion by not awarding him the appropriate amount of fees. Successor counsel argue that the dispositive issue in this appeal has been raised in a related appeal in the same case (B182561) and incorporate their arguments and the record from that appeal in support of affirmance here. They contend that they were not parties to an attorney fees contract. Appellant does not mention the related appeal, the record in that appeal, or respond to the contention that successor counsel were not parties to an attorney fees contract.

We conclude that appellant has waived the issue raised in this appeal — the *amount* of fees he should have been awarded — because he has not addressed the contention that there was no attorney fees contract *entitling* him to an award in any amount. We further conclude that successor counsel are correct that they were not parties to any such contract. We therefore affirm.

I

BACKGROUND

The following facts are taken primarily from the evidence presented at the trial, which involved a dispute between appellant's former client and successor counsel. (See *Estate of Leslie* (1984) 37 Cal.3d 186, 201 [evidence is viewed in light most favorable to prevailing party].) The facts are drawn almost entirely from successor counsel's brief and their references to the record in the related appeal. Appellant's briefs, on the other hand, provide no information about the facts or procedural history of this case. His briefs are limited to what occurred during the posttrial proceedings on the motion for attorney fees. With that attribution clear, we now describe the litigation and its procedural history.

In 1996, several individuals filed suit against Bechtel Group, alleging that while working as employees of other companies, they had sustained injuries at Elk Hills Naval

Petroleum Reserve No. 1 (Elk Hills) due to Bechtel's toxic contamination of the site (*Fanska v. Bechtel Group* (Super. Ct. S.F. City and County, 1996, No. 975205) (*Bechtel* suit)). Some of the employees' wives joined in the *Bechtel* suit, alleging claims for loss of consortium. The employees and wives (collectively *Bechtel* plaintiffs) were represented by Gregory Picco and Eileen McGruder, with the firm of Picco & Presley, as well as Joseph Iacopino and Michael Goch (collectively attorneys or civil suit attorneys).

The employees also filed workers' compensation cases. In those proceedings, the employees were represented by Margaret Presley, also with Picco & Presley. Because the wives' claims for loss of consortium were not compensable through workers' compensation, they sought relief only in the civil suit.

The *Bechtel* plaintiffs retained Cranford Scott, M.D., as a medical expert. For the workers' compensation cases, Dr. Scott performed a physical examination and medical tests on the employees. He provided written reports to Presley, outlining each employee's work history and assessing whether the employee had any diseases that might be associated with working at Elk Hills. In his practice, Dr. Scott would sometimes recommend that an employee see a specialist to obtain additional support for a workers' compensation claim.

Some of the Elk Hills employees suffered from memory impairment, cognitive dysfunction, numbness, or dizziness, leading Dr. Scott to conclude that a neurological evaluation was appropriate. In that regard, he recommended that McGruder have Richard J. Perrillo, a neuropsychologist, examine the employees.

From the outset, Dr. Scott understood he would be paid through the workers' compensation system, not the civil suit, for the services he provided to the employees. Dr. Scott also knew that the payment arrangement for the wives would be different because they had no workers' compensation cases. He evaluated them on a "personal injury basis." To get paid with respect to the wives, Dr. Scott had each one sign a "civil lien," which, as of 1998, provided in part: "To Attorney: [¶] I hereby authorize and direct you, my attorney to pay directly to said doctor such sums as may be due and

owing him for medical service rendered me both by reason of this accident and by reason of any other bills that are due his office . . . and to withhold such sums from any settlement, judgment or verdict which may be paid to you, my attorney, or myself as a result of the injuries for which I have been treated or injuries in connection therewith.

"I fully understand that I am directly and fully responsible to said doctor for all medical bills submitted by him for service rendered and that this agreement is made solely for said doctor's additional protection and in consideration of his awaiting payment. I further understand that such payment is not contingent on any settlement, judgment, or verdict by which I may eventually recover said fee." Each lien was signed by the wife and Attorney McGruder.

In the spring of 1998, McGruder called the director of Dr. Perrillo's office, Keith Whiteman. She explained that her firm was working on a case involving a number of patients, mostly men, who had been exposed to chemicals in the process of cleaning oil wells. Some of their wives had been harmed through secondary exposure, primarily through contact with the men's clothing. McGruder said there might be a workers' compensation component to the litigation. She wanted Dr. Perrillo to serve as an expert. Whiteman replied that Dr. Perrillo did not take workers' compensation cases but would be happy to prepare the paperwork so the patients could use it in both the civil suit and the workers' compensation cases. Whiteman knew that it would be difficult to get paid "up front" and that Dr. Perrillo would have to take a civil lien. He said he would talk to Perrillo about taking the case.

Whiteman relayed this information to Dr. Perrillo, who then spoke directly with McGruder. They discussed the civil suit and the workers' compensation cases. Perrillo said he would do a neuropsychological profile on the men and a psychological profile on the women. The profile for the men would cost approximately $5,000 to $7,000, and for the women, around $3,000. Perrillo wanted to know if he could be paid in advance. McGruder said she would have to check on it. Perrillo said if that were not possible, he would take a workers' compensation lien (or, more precisely, a "Notice and Request for

Allowance of Lien") and a civil lien. Perrillo commented that taking both liens "protects my office."

McGruder asked Dr. Perrillo to write a report on each person he examined. She mentioned that some of the reports would have a workers' compensation aspect. Dr. Perrillo said he "was not interested in doing workers' comp." McGruder said he would be paid out of the civil suit settlement and that he would have a civil lien on the case.

The civil suit attorneys decided as a group to retain Dr. Perrillo and that he would have a civil lien and a workers' compensation lien. He would not be paid in advance. From Dr. Perrillo's perspective, he "was hired for the civil case." When asked at trial why he needed a workers' compensation lien, he answered, "I wanted to make sure that I was protected all the way around." And McGruder told him to obtain workers' compensation liens.

Dr. Perrillo decided to do "what was necessary to protect the patients" in the workers' compensation system, namely, draft a report that would comply with workers' compensation requirements so it could be used in both the civil suit and the workers' compensation cases. As Dr. Perrillo explained at trial, "We only do it and incur the expense to protect the patient." He did not feel he could "leave the patient hanging dry" given that "the patient can collect in both forums."

Dr. Perrillo did not go unchallenged in this regard. McGruder testified that Perrillo was retained solely for the workers' compensation cases, he was not supposed to evaluate any of the wives, and he was to have a lien only in the workers' compensation cases. McGruder said she told Perrillo he could not have a civil lien.

Beginning in May 1998, Dr. Perrillo examined approximately 40 male employees and 21 wives. Before they were examined, each of the *Bechtel* plaintiffs signed a civil lien entitled, "Notice of Doctor's Lien," which stated in part: "ATTORNEY: [¶] I hereby authorize and direct you, my attorney, to pay directly to said doctor such sums as may be due and owing Richard J. Perrillo, Ph.D. for medical/psychological services rendered me by reason of this accident/injury and by

reason of any other bills that are due [his] office and to withhold such sums from any settlement, judgment or verdict as may be necessary to adequately protect said doctor. And I hereby further give a lien on my case to said doctor against any and all proceeds of any settlement, judgment, or verdict which may be paid to you, my attorney, or myself as the result for the injuries for which I have been treated or injuries in connection therewith.

"I further understand that I will be held responsible for all collection costs, arbitrations, and/or legal fees used to recover said doctor's bills. . . .

"I fully understand that I am directly responsible to said doctor for all medical bills submitted by the office of [Dr. Perrillo] for services rendered me and that this agreement is made solely for the said doctor's additional protection and in consideration of [his] awaiting payment. And I further understand that such payment is not contingent on any settlement, judgment or verdict by which I may eventually recover said fee."

Dr. Perrillo did not discuss the language of the lien provisions with the civil suit attorneys. Although the liens contained a signature line for one of the attorneys, Perrillo never sent the liens to the attorneys for signature. Nor did any of the attorneys sign the liens. The attorney's signature line was prefaced as follows: "ACKNOWLEDGMENT OF ATTORNEY [¶] The undersigned being attorney of record for the above patient does hereby agree to observe all the terms of the above and agrees to withhold such sums from any settlement, judgment or verdict as may be necessary to adequately protect Richard J. Perrillo, Ph.D." There was no signature line for Dr. Perrillo, and he did not sign the liens either.

In addition to the civil liens, the employees signed a "Notice and Request for Allowance of Lien" — an official workers' compensation form — requesting that the amount of Dr. Perrillo's bill be deducted from their respective workers' compensation recoveries. (For convenience, we refer to those requests as workers' compensation liens.)

To prepare the medical reports in accordance with workers' compensation requirements, Dr. Perrillo retained a workers' compensation assistant, Kathryn Greve,

whom he paid on an hourly basis. All of the reports on the employees used the same format. Under workers' compensation regulations, medical-legal reports are coded 101 through 104, depending on the complexity of the evaluation. (See Cal. Code Regs., tit. 8, § 9795.) Dr. Perrillo used an ML 104 code on his reports, indicating that they were the most complex within the meaning of the regulations and that he should be paid the highest possible fee. (*Ibid*.)

For each of the *Bechtel* plaintiffs, Greve prepared an itemized bill that indicated the medical tests conducted, the length of the examination, the time spent preparing the report, and the cost of each item. The bills complied with workers' compensation formalities. (See Lab. Code, § 4626; Cal. Code Regs., tit. 8, § 9794.)

Finally, as to the employees, Dr. Perrillo completed a workers' compensation form entitled, "Doctor's First Report of Occupational Injury or Illness," which identified the employer, the workers' compensation carrier (carrier), the "accident or exposure," the employee's "subjective complaints," and the diagnosis. The "Doctor's First Reports" were sent to the appropriate carriers.

In 1999, after Dr. Perrillo completed his written work, he entered the amount of the bill on each workers' compensation lien, and sent the completed liens, medical reports, and itemized bills to the carriers and the Workers' Compensation Appeals Board (WCAB). He filed a lien in each of the workers' compensation cases. In response, he received offers of payment from some of the carriers and accepted payments on behalf of three employees. Dr. Perrillo's reports were not submitted in the civil suit.

In 2000, the civil suit attorneys and Presley, the workers' compensation attorney, tried to reach a global settlement of the civil suit and the workers' compensation cases. The civil suit attorneys deliberately did not inform opposing counsel that Dr. Perrillo had evaluated the *Bechtel* plaintiffs, but Bechtel learned about his involvement through the workers' compensation proceedings. Bechtel subpoenaed Dr. Perrillo's records through the civil suit. Presley asked Dr. Perrillo to send a copy of the records to her so she could review them before the production. The records were copied and delivered

around March 17, 2000. After reviewing them, Presley called Perrillo's office to say she was missing some of the civil liens, and they were sent to her.

On or about August 7, 2000, the *Bechtel* plaintiffs accepted Bechtel's offer to settle the civil suit alone for $1.5 million. Bechtel did not offer any settlement money for the wives. The workers' compensation cases remained active.

Presley contacted Dr. Perrillo to see if he would give up his civil liens in light of the low settlement amount. She said he could seek payment for the *employees* through workers' compensation. The civil suit attorneys offered to pay him $53,000 out of the settlement for his work on behalf of the *wives* and *one of the employees* who did not have a workers' compensation case. Dr. Perrillo rejected this proposal in its entirety and insisted on receiving payment out of the settlement for *all* of the *Bechtel* plaintiffs. This dispute was not resolved. Dr. Perrillo did not accept any money from the settlement. The $53,000 is still being held in trust for him.

The civil suit attorneys took their share of the settlement funds first — "off the top" — and then distributed the remaining proceeds. Dr. Scott was paid $48,000 for his work. The employees received various amounts. The wives did not receive anything.

On September 14, 2000, Dr. Perrillo filed this case against Picco & Presley, Gregory Picco, Joseph Iacopino, and Margaret Presley. Eileen McGruder was not sued. Michael Goch was sued but settled for $50,000. (We now include Presley and exclude McGruder and Goch in using "attorneys" and "civil suit attorneys.") Dr. Perrillo was represented by Lopez, Hodes, Restaino, Milman & Skikos (Lopez Hodes). The original complaint alleged that the civil suit attorneys had refused to pay Dr. Perrillo for his services in the *Bechtel* suit, contrary to the terms of the civil liens.

The complaint was amended on two occasions. The second amended complaint alleged 10 causes of action, including conversion, breach of fiduciary duty, and intentional interference with contractual relations. It alleged, as before, that the civil suit attorneys had not paid Dr. Perrillo's bills in accordance with the civil liens. As relief, Dr. Perrillo sought damages in the amount of the liens, prejudgment interest,

general and punitive damages, and an award of attorney fees. He sought relief based on the services he had provided to the *Bechtel* plaintiffs.

In March 2002, Lopez Hodes requested that appellant William Adams, Esq., assist in representing Dr. Perrillo. Adams, a sole practitioner, worked on the case, performing various tasks. On or about June 6, 2003, Lopez Hodes associated in Cassinat Law Corporation as counsel for Dr. Perrillo. John Cassinat, Esq., was to try the case. In late June 2003, Adams filed a notice of withdrawal as counsel, believing Perrillo had discharged him.

In June 2004, on the eve of trial, Dr. Perrillo sought leave to amend the operative complaint to add a cause of action for breach of contract, alleging that the civil suit attorneys had agreed to pay him out of the settlement in the civil suit and had breached that promise. At the close of Dr. Perrillo's case, the trial court granted the motion to amend.

After both sides rested, the jury was instructed. On July 26, 2004, the jury returned a special verdict, finding the civil suit attorneys liable for breach of contract, conversion, intentional interference with contractual relations, intentional breach of fiduciary duty, and negligent breach of fiduciary duty. The jury found that the civil suit attorneys had entered into a valid contract with Dr. Perrillo to pay for his services out of the civil settlement. It awarded him $307,146.59 in past economic losses — the exact amount he had requested for the unpaid bills plus $837.49 in photocopy expenses incurred in responding to Bechtel's subpoena in the civil suit.

The trial court reduced the verdict by Goch's $50,000 settlement payment. On January 3, 2005, judgment was entered for $257,146.59, plus prejudgment interest of $80,802.36, calculated at 7 percent, for a total of $337,948.95.

In posttrial proceedings, Cassinat Law Corporation and Lopez Hodes — Dr. Perrillo's counsel of record — filed separate motions for attorney fees against the civil suit attorneys based on the fee provision in the civil liens. Adams filed a similar motion on his own behalf. The civil suit attorneys filed an opposition to each motion,

arguing in part that they were not parties to the civil liens or bound by the attorney fees provision.

The motions were heard on March 24, 2005, and were taken under submission. By minute order dated April 21, 2005, the trial court awarded $465,283.50 in attorney fees to Cassinat Law Corporation and $91,899.00 in fees to Lopez Hodes. The court denied Adams's motion on the grounds that (1) he had not submitted sufficient billing details or records and (2) it was unclear if Adams's work had been duplicated by the other firms. Adams filed a motion for reconsideration (Code Civ. Proc., § 1008) and a motion for relief based on his alleged inadvertence, mistake, or excusable neglect (*id.*, § 473), both of which were denied. Adams appealed.

II

DISCUSSION

The civil suit attorneys contend that Adams's appeal is untimely and that the trial court lacked authority to entertain his motion for attorney fees. We reject both contentions. We conclude instead that Adams has not adequately presented the issue on appeal, resulting in a waiver. In addition, the evidence shows that he did not have a contractual entitlement to any fees against the civil suit attorneys.

A. Timeliness of Appeal

On April 21, 2005, the trial court served its minute order denying the motion for attorney fees, giving Adams 60 days — until June 20 — to file an appeal. His subsequent motion for reconsideration added 30 days to the appeal period, extending the deadline to July 20. (See Cal. Rules of Court, rule 8.108(d), former rule 3(d).) The notice of appeal was filed on July 18, 2005. The appeal is therefore timely.

B. Trial Court's Authority to Hear the Motion

The civil suit attorneys argue that Adams had to file a separate lawsuit to seek attorney fees against them, that is, he could not simply file a motion for attorney fees in this action, to which he was not a party. We disagree.

This argument ignores the *basis* of Adams's motion. He sought attorney fees under a purported contract between Dr. Perrillo and the civil suit attorneys, namely, the

civil liens. His motion expressly relied on Civil Code section 1717 (section 1717) and section 1033.5 of the Code of Civil Procedure (section 1033.5). Section 1717, subdivision (a), states: "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees *in addition to other costs*." (Italics added.) Section 1033.5, subdivision (a)(10)(A), lists attorney fees awarded by contract as a type of "cost," and the second paragraph of subdivision (c)(5) states that attorney fees authorized by section 1717 are a type of cost covered by section 1033.5. Attorney fees sought under these statutes must be requested at the end of the litigation in which they are incurred. (See Cal. Rules of Court, rule 3.1702(b), former rule 870.2(b).)

The civil suit attorneys confuse Adams's *motion for costs* with an independent action by discharged counsel against *successor counsel* for failing to honor a *lien* (see *Carroll v. Interstate Brands Corp*. (2002) 99 Cal.App.4th 1168, 1173; *Hansen v. Jacobsen* (1986) 186 Cal.App.3d 350, 355) or an independent action by discharged counsel against a *former client* seeking a *quantum meruit recovery* (see *Fracasse v. Brent* (1972) 6 Cal.3d 784, 790–791; *Meadow v. Superior Court* (1963) 59 Cal.2d 610, 616).[1] Here, Adams filed a motion for costs, not a claim for damages. It follows that the civil suit attorneys' reliance on cases involving standing, civil procedure, and jurisdiction is misplaced. (See *Padilla v. McClellan* (2001) 93 Cal.App.4th 1100, 1103–1106 [Family Code provision authorizing trial court to determine "costs" in approving minor's compromise permits court to allocate attorney fees between former and current counsel in main action; separate action is unnecessary].)

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[1] We take no position on whether either of these alternatives remains available to Adams.

Consequently, the trial court had the authority to hear Adams's motion for attorney fees.

C. Waiver of Issue on Appeal

The only issue addressed in Adams's appellate briefs is the *amount* of attorney fees that should have been awarded. He barely mentions the basis for such an award: the attorney fees provision in the civil liens. He assumes, without discussion, that the civil suit attorneys were bound by the fee provision *as parties* to the liens.

In their respondents' brief, the civil suit attorneys — unlike Adams — inform us of a related appeal in this case that raises the same issue (B182561). Incorporating their arguments and the record from the other appeal, they assert here that they were not parties to the written liens. In his reply brief, Adams does not respond to this assertion. Thus, he has failed to establish a basis for a fee award in any amount. By failing to respond to the civil suit attorneys' argument, Adams has waived the issue on appeal. (See *Schoendorf v. U.D. Registry, Inc*. (2002) 97 Cal.App.4th 227, 237; *Kurinij v. Hanna & Morton* (1997) 55 Cal.App.4th 853, 865.)

D. Lack of Contractual Basis for Attorney Fees

Notwithstanding Adams's failure to discuss whether the civil suit attorneys were bound by the attorney fees provision, we address that question on the merits and conclude that they were not.

In the special verdict, the jury found that Dr. Perrillo had "enter[ed] into a valid contract with [the civil suit attorneys] whereby he was to evaluate and prepare reports for the [*Bechtel* plaintiffs] referred to him by the [attorneys] in the civil case and, in exchange, he would be paid for his services from the civil settlement of the [*Bechtel*] litigation according to the terms of the civil liens signed by the [*Bechtel* plaintiffs]."

In postjudgment proceedings, Dr. Perrillo's counsel, including Adams, filed motions for attorney fees pursuant to the attorney fees provision in the civil liens. That provision stated: "I further understand that I will be held responsible for all collection costs, arbitrations, and/or legal fees used to recover said doctor's bills. . . ." As noted,

the liens were signed by the *Bechtel* plaintiffs only; neither the civil suit attorneys nor Dr. Perrillo signed them.

The civil suit attorneys filed an opposition to each motion, arguing that they had not agreed to the attorney fees provision. The trial court granted all but Adams's motion and awarded $557,182.50 in fees. The court relied entirely on the jury's purported finding that the civil suit attorneys were parties to the civil liens, which contained the fees provision.

We do not read the jury's finding so broadly because such a reading is not supported by the evidence or the law. Simply put, the attorneys were not parties to the written liens. The evidence shows that the attorneys and Dr. Perrillo entered into an *oral* contract obligating him to evaluate the *Bechtel* plaintiffs and to prepare medical reports in exchange for payment out of the civil settlement. Under the oral contract, Dr. Perrillo was retained as an expert in the civil suit. Nothing was said during the parties' negotiations or included in the oral contract about the recovery of attorney fees. The jury found that Dr. Perrillo "would be *paid* for *his services from the civil settlement* of the [*Bechtel*] litigation according to the terms of the civil liens signed by the [*Bechtel* plaintiffs]." (Italics added.) This finding expressly refers to *compensating* Dr. Perrillo for his *work*, not to the entirely separate subject of liability for attorney fees in the event of a dispute between the parties. The reference to the civil liens merely reflects that Dr. Perrillo was to be paid out of the settlement, nothing more. The finding cannot be interpreted to mean that the written liens *enlarged* the scope of the prior oral contract to include an unmentioned attorney fees provision. (See *Khajavi v. Feather River Anesthesia Medical Group* (2000) 84 Cal.App.4th 32, 60–62 (*Khajavi*).)

The insurmountable problem with Adams's position is that the civil suit attorneys did not sign the liens. He does not cite any authority for the proposition that a *proposed* contract with a blank signature line can bind the nonsigning party to undiscussed material terms. "'One of the essential elements of a contract is the consent of the parties. . . . This consent must be mutual. . . . "Consent is not mutual, unless the parties all agree upon the same thing in the same sense." . . . It is only on evidence of

such consent that the law enforces the terms of a contract or gives a remedy for the breach of it. One cannot be made to stand on a contract to which he has never consented.'" (*Khajavi*, *supra*, 84 Cal.App.4th at p. 60, citations omitted.)

Arguably, in negotiating the oral contract, the parties here contemplated the subsequent creation of the written liens. "But the fact that the[] subsequent written [liens] included additional clauses did not enlarge [the parties'] earlier oral agreement — until such time both parties had agreed to those additional clauses: 'Where a person offers to do a definite thing and another introduces a new term into the acceptance, his answer is a mere expression of [his] willingness to treat or . . . is [treated by the law as] a counter-proposal, and in neither case is there a contract; if it is a new proposal and it is not accepted it amounts to nothing.'" (*Khajavi*, *supra*, 84 Cal.App.4th at p. 60; accord, *Amer. Aero. Corp. v. Grand Cen. Aircraft Co.* (1957) 155 Cal.App.2d 69, 78–83, superseded by statute on another point as stated in *Beavers v. Allstate Ins. Co.* (1990) 225 Cal.App.3d 310, 324–325.) In this case, then, the oral contract remained binding, and any new term in the civil liens — such as the attorney fees provision — was of no force or effect. (See *Khajavi*, *supra*, 84 Cal.App.4th at pp. 61–62; *Amer. Aero. Corp. v. Grand Cen. Aircraft Co.*, *supra*, 155 Cal.App.2d at pp. 82–83.)

Dr. Perrillo never asked the civil suit attorneys to sign the liens or sent the liens to them for signature. Rather, he sent a box containing *all* of his medical records, including the unsigned liens, to the attorneys in March 2000 in response to Bechtel's subpoena. As a result of the subpoena, the civil suit attorneys wanted to review Dr. Perrillo's records before the date of production. During that process, they saw the civil liens for the first time.

"'It may . . . be supposed that the written contract[, here, the civil lien,] was made and was signed by but one party, although a signing by both parties was contemplated. "It is the undoubted rule that where the contract contemplates the execution of it by signing, either party has the right to insist upon [that] condition, and mere acts of performance upon the part of one who has not signed will not validate the contract."'" (*Amer. Aero. Corp. v. Grand Cen. Aircraft Co.*, *supra*, 155 Cal.App.2d at pp. 80–81.)

We decline to hold that attorneys are bound by an unsigned contract first discovered in a box of records acquired and reviewed in response to a subpoena from an opposing party. The purpose of reviewing the records at that juncture is to screen the material in connection with discovery, not to determine what obligations the attorneys supposedly assumed years before or to raise objections against *the person producing the documents.* Here, the attorneys' silence after reviewing the box of documents did not constitute belated consent to the attorney fees provision; they had no duty to speak. (See *Petersen v. Securities Settlement Corp*. (1991) 226 Cal.App.3d 1445, 1457 [party had no duty to speak unless it knew that other party was unaware of important fact]; *Clegg v. Sansing* (1961) 196 Cal.App.2d 575, 578–579 [where parties *signed* a contract for sale of a business, thereby justifying reliance and further action on part of buyer, seller could not remain silent about its lack of consent to transaction].) "As a matter of contract law, a party is entitled to the benefit of only those provisions to which the contracting parties agreed, not the ones to which they might have subsequently agreed." (*Khajavi*, *supra*, 84 Cal.App.4th at p. 60.) "In this case, there was no mutual consent as to an attorney fees provision with respect to [the] contract: The parties had never discussed it, let alone agreed to it." (*Ibid.*)

Nor did the civil suit attorneys retroactively consent to the attorney fees provision by using Dr. Perrillo's reports or services after they learned about the liens. The oral contract already gave them the right to rely on his work and assistance, and Dr. Perrillo provided no new consideration for the fees provision. The oral contract therefore remained intact and unaltered. (See *O'Byrne v. Santa Monica-UCLA Medical Center* (2001) 94 Cal.App.4th 797, 808; 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 218, pp. 251–252.)

We also reject the theory that the civil liens were "standard" liens, such that, when McGruder told Dr. Perrillo in 1998 that he could have a civil lien, she implicitly agreed to the attorney fees provision. Under this theory, a "civil lien" necessarily includes, and is understood to include, an attorney fees provision. But the evidence on this matter was insufficient. For example, in another action pending at the same time as

the *Bechtel* suit, Dr. Perrillo did not use an attorney fees provision in his liens. Dr. Scott did not use such a provision in 1998 either. McGruder testified that, in August 2000, she first saw Dr. Perrillo's liens in the *Bechtel* suit; she could not recall if she read them but thought that "on their face," they "looked pretty standard"; and she would not have been surprised if they were "almost identical" to Dr. Scott's liens, which she had signed. As stated, Dr. Scott's 1998 liens did not contain an attorney fees provision. Thus, in light of the evidence of Perrillo's and Scott's *actual* use (or, more accurately, nonuse) of attorney fees provisions, McGruder's vague testimony does not constitute substantial evidence that a civil lien routinely included a fees provision. (See *Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651 [discussing substantial evidence test].)

Finally, Adams is not aided by cases in which a *nonsignatory* to a contract was permitted to recover, or was found liable for, attorney fees. (See *California Wholesale Material Supply, Inc. v. Norm Wilson & Sons, Inc.* (2002) 96 Cal.App.4th 598, 608; *Steve Schmidt & Co. v. Berry* (1986) 183 Cal.App.3d 1299, 1315–1317.) In general, those cases involved a nonsignatory who was (1) an alter ego, assignee, or guarantor of a signatory or (2) a third party beneficiary of the contract. (See *Wilson's Heating & Air Conditioning v. Wells Fargo Bank* (1988) 202 Cal.App.3d 1326, 1332–1334 & fns. 6, 7; *Niederer v. Ferreira* (1987) 189 Cal.App.3d 1485, 1505–1506; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2007) ¶¶ 1:250 to 1:273, pp. 1-40 to 1-44.) They are not applicable here.

"'In the absence of a statute authorizing attorneys' fees as an element of damages, or of a contract to pay such fees in event of the party's recovery, attorneys' fees paid by a successful party in an action are never recoverable against the unsuccessful party.'" (*Khajavi, supra*, 84 Cal.App.4th at p. 62.) As a result, the trial court properly denied Adams's motion for attorney fees.

III

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED.

MALLANO, Acting P. J.

We concur:

VOGEL, J.

JACKSON, J.*

* Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.