

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

INTEGRATED HEALTHCARE
HOLDINGS, INC.,

Plaintiff, Cross-defendant and
Appellant,

v.

ANDREW L. WEISS,

Defendant, Cross-complainant and
Respondent.

G042016

(Super. Ct. No. 07CC08659)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Robert Monarch, Judge. (Retired judge of the Orange Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Reversed in part and remanded with directions.

Enterprise Counsel Group, David A. Robinson, Benjamin P. Pugh and Thomas A. Vogele for Plaintiff, Cross-defendant and Appellant.

Andrew L. Weiss, in pro. per., for Defendant, Cross-complainant and Respondent.

* * *

This case involves claims arising from a settlement gone awry. The settlement resolved an employment dispute between Andrew L. Weiss, (Weiss) a labor and employment attorney, and Integrated Healthcare Holdings, Inc., (IHHI) a start-up company he helped launch. Each side sued the other for breach of the settlement agreement, and the resulting judgment was a mixed bag for both parties. In this appeal, plaintiff and cross-defendant IHHI appeals certain rulings, while in a related appeal (G041905), defendant and cross-complainant Weiss appeals other aspects of the judgment.

IHHI contends here the trial court erred in refusing to award damages to IHHI for Weiss's breach of the settlement agreement because the *amount* — but not the fact — of damages was “speculative.” IHHI also challenges the court's finding on Weiss's cross-complaint that IHHI breached the settlement agreement by failing to deliver 500,000 shares of the company's restricted common stock pursuant to Weiss's exercise of a stock option granted to him in the settlement agreement.

We find merit in both of IHHI's claims of error. Consequently, we reverse the corresponding parts of the judgment.¹

I

BACKGROUND FACTS AND PROCEDURE

After a year's effort helping a small group of entrepreneurs launch IHHI, Andrew Weiss got into a dispute with those individuals (the founders) about his ongoing employment with the company. Weiss characterized his treatment as a constructive discharge. At a highly contentious meeting on February 23, 2005, Weiss told the founders his work for IHHI had caused him severe stress and other injuries, and presented them with a completed workers' compensation claim form. One of the founders screamed at Weiss, crumpled up the form and threw it in the trash. Another

¹ In the related appeal (G041905), we found no error and affirmed the judgment, except as to the issues raised in this appeal.

founder instructed Weiss to leave the office and not return unless authorized. Weiss never returned to work at IHHI.

On May 27, 2005, Weiss filed a Judicial Arbitration and Mediation Services Notice of Claims (the JAMS claim) stating 12 causes of action against IHHI and the founders, including claims for breach of contract and wrongful termination in violation of public policy. The latter cause of action specifically cited Labor Code section 132a,² which prohibits discrimination against injured workers for filing a workers' compensation claim.

About eight months later, on February 10, 2006, Weiss filed two workers' compensation claims for personal injuries incurred while working for IHHI. In case No. MON0336751, Weiss asserted he incurred various work-related injuries between February 1, 2004, and February 23, 2005, the date of his confrontation with the founders. In case No. MON0336752, Weiss claimed he sustained injuries on February 23, 2005. A week after filing these two personal injury claims, Weiss filed a separate WCAB "Petition for Increased Compensation, Reinstatement and Reimbursement" under section 132a (the 132a petition).

In late June 2006, the parties settled the JAMS claim by executing a "Full Compromise Settlement & General Release" (the JAMS settlement). In the JAMS settlement, IHHI agreed to pay Weiss approximately \$690,000, with a portion paid in monthly installments, and to "issue out-of-plan stock options to purchase Five Hundred Thousand (500,000) shares of restricted common stock (the 'Option') to WEISS" at a set price ("\$.0055 per share"), exercisable within six months, subject to certain restrictions,

² All further statutory references are to the Labor Code unless otherwise specified.

including the requirement that Weiss “comply with all requirements of the securities counsel for IHHI for the purpose of issuance of the Options and underlying shares.”³

In exchange for the money and stock options from IHHI, Weiss agreed to release “all disputes, claims, liabilities and/or causes of action that WEISS may have against” IHHI and the founders, with the exception of “the executory provisions of this Agreement to be performed by IHHI and the *pending Workers Compensation Appeals Board Case No. MON0336751/2.*” (Italics added.) In paragraph 16 of the JAMS settlement, Weiss agreed not to “commence, maintain or prosecute” any claim arising out of the “facts and claims” stated in the JAMS arbitration notice of claim.

On July 19, 2006, shortly after the parties settled the JAMS claim, IHHI filed an answer to the still-pending 132a petition. IHHI asserted, among other defenses, that Weiss “is not entitled to reinstatement” or “any lost wages or benefits” because he settled his 132a claim in the JAMS settlement. On October 27, Weiss filed a “Declaration of Readiness” to set the 132a petition for trial. A few days later, IHHI filed an objection to the Declaration of Readiness, again asserting Weiss had settled his 132a claim for reinstatement and back wages in the JAMS settlement.

³ The settlement terms regarding the “Option” are as follows: “IHHI shall issue out-of-plan stock options to purchase Five Hundred Thousand (500,000) shares of restricted common stock (the ‘Option’) to WEISS as follows: [¶] 1. An Option to purchase Five Hundred Thousand (500,000) shares of restricted common stock of IHHI be granted on July 1, 2006 (or upon compliance with applicable rules of corporate governance and both California and Federal Securities Laws); [¶] 2. The Option shall be exercisable at the Founder’s price of \$0.0055 per share; [¶] 3. The right to exercise the Option shall expire on January 15, 2007; [¶] 4. The Option and underlying shares shall not be registered and there are no registration rights granted by IHHI, including but not limited to, piggy-back registration rights; [¶] 5. WEISS must complete the necessary documentation for the issuance of the Options, including a written representation that he is acquiring the Options and the underlying shares for investment purposes, without the intent to redistribute and that he must hold the underlying shares for a minimum of 12 months; and [¶] 6. WEISS will further comply with all requirements of the securities counsel for IHHI for the purpose of issuance of the Options and underlying shares.” (JAMS settlement, ¶ 3f.)

Meanwhile, pursuant to the JAMS settlement, IHHI gave Weiss a “Notice of Stock Option Award” dated July 1, 2006, which listed the price per share, and number of shares offered, consistent with the terms of the JAMS settlement, as well as the “Total Exercise Price” of \$2,750. The notice stated Weiss’s option to purchase shares was “subject to the terms and conditions” of the notice and of the “Stock Option Award Agreement . . . attached hereto[.]” On January 11, 2007, Weiss timely delivered to IHHI a \$2,750 check (the “Total Exercise Price”) and all the executed documents necessary to exercise the stock options: the Notice of Stock Option Award, the Stock Option Award Agreement (option agreement), and its two exhibits, the “Exercise Notice” and “Investment Representation Statement.”

Among the various “terms and conditions” set forth in the option agreement was the following stricture: “No Shares will be delivered to the Grantee or other person pursuant to the exercise of the Option until the Grantee or other person has made [acceptable] arrangements . . . for the satisfaction of applicable income tax and employment tax withholding obligations Upon exercise of the Option, the Company may offset or withhold or collect from the Grantee . . . an amount sufficient to satisfy such tax withholding obligations.” (Option Agreement, § 2(c).) Like the option agreement, the Exercise Notice contained a specific acknowledgement of the “Grantee’s” obligation to comply with tax withholding requirements: “The Grantee agrees to satisfy all applicable non-U.S., federal, state and local income and employment tax withholding obligations and herewith delivers to the Company the full amount of such obligations or has made arrangements acceptable to the Company to satisfy such obligations.” (Exercise Notice, ¶ 6.)

On January 26, 2007, IHHI sent a letter to Weiss acknowledging his exercise of the stock options and declaring IHHI’s willingness to issue the restricted common shares “as soon as you have complied with the requirements of Paragraph 6 of the Exercise Notice and Section 2(c) of the Stock Option Award Agreement” — i.e., the

tax withholding requirements. The letter stated IHHI's payroll department determined "the amount to be withheld for this transaction is \$83,423.62, based on the difference between the fair market value of the common shares covered by your Exercise Notice and the applicable exercise price for such shares." The letter directed Weiss to send IHHI a check for the taxes owed.

As of March 9, Weiss had not sent a check and was conferring with a tax advisor. He told IHHI in an email, "I . . . will provide a response regarding the demand for \$83,423.62 upon an assessment of my tax situation related to the option." On April 17, Weiss's attorney sent a demand letter to IHHI asserting the company breached the JAMS settlement by "withhold[ing] payroll deductions from the monthly settlement payments" made to him. The letter further advised that Weiss planned to meet "with a qualified tax attorney . . . in an effort to ascertain his options and position relative to the IHHI stock issue."

On June 11, 2007, the WCAB approved the parties' settlement of Weiss's personal injury claims, Case Nos. MON0336751 and MON0336752, for \$10,000. The agreement specified that it did "not cover any aspects of the 132a discrimination case(s) [and] applicant [Weiss] reserves all rights [and] claims associated therein."

On August 7, 2007, IHHI filed the instant action against Weiss for breach of contract, declaratory relief, and breach of the implied covenant of good faith and fair dealing. Essentially, IHHI alleged Weiss's continued prosecution of the 132a petition breached the JAMS settlement agreement. The complaint alleged that paragraph 16 of the JAMS settlement required Weiss to dismiss with prejudice his 132a petition.

Weiss filed a cross-complaint against IHHI alleging, essentially, that IHHI breached the JAMS settlement by (1) withholding taxes from the monthly settlement payments owed to him, and (2) not delivering the "500,000 shares of restricted common stock options" he was granted under the JAMS settlement.

Meanwhile, the 132a petition was still proceeding before the WCAB. IHHI moved to dismiss the 132a petition on the ground Weiss waived in the JAMS settlement his right to further prosecute the 132a claim. The WCAB administrative law judge denied the motion, specifically rejecting “[IHHI’s] argument that the Labor Code § 132a Petition has been settled as part of the terms of the JAMS Arbitration[.]”

IHHI timely filed a WCAB petition for reconsideration and removal, but the WCAB administrative law judge who heard the case issued a recommendation to deny IHHI’s petition. The WCAB followed that recommendation, denying the petition for reconsideration and removal. IHHI filed a writ petition seeking review of the WCAB decision, which this court summarily denied.

A bench trial of IHHI’s complaint and Weiss’s cross-complaint began in late October 2008 and lasted three days. The primary issue at trial concerned whether the specific exclusion of the pending WCAB cases (“MON0336751/2”) from the comprehensive “release” and “waiver” provisions of the JAMS settlement referred only to the two personal injury claims or also included the section 132a claim.

The court set forth its findings in a statement of decision which favored IHHI on some points and Weiss on others. The court construed the “carve out language” in the JAMS settlement agreement as excluding from the release “only . . . the personal injury claims set forth in Case Numbers MON 0336751 and MON 0336752.” Consequently, the court found Weiss’s “continued prosecution of the 132a Petition constituted a breach of Paragraph 16 [of the JAMS settlement agreement]. Accordingly, IHHI shall have judgment against WEISS based on its request for Declaratory Relief. However, the Court is not precluding the continued prosecution of the 132a Petition.” Significantly, the court refused to award IHHI any damages for that breach, concluding IHHI failed to establish the *amount* of those damages with sufficient certainty. The court entered judgment for Weiss on IHHI’s claims for breach of contract and breach of the implied covenant.

As for Weiss's cross-complaint, the court found IHHI breached the agreement "by failing to deliver the 500,000 shares of its restricted common stock." The judgment ordered IHHI to "forthwith distribute said shares" to Weiss. The court found IHHI did not breach the JAMS settlement agreement "by withholding a sum representing taxes from the distributions to WEISS."⁴

Weiss filed an appeal from the judgment (G041905) and IHHI filed this cross-appeal, which was denominated a separate but related appeal.

II

DISCUSSION

A. IHHI Was Entitled to an Award of Damages Against Weiss for Breach of Contract

IHHI rightly argues the trial court erred in refusing to award damages against Weiss for breach of contract. The court's error is plain.

The trial court found Weiss breached the JAMS settlement by continuing to prosecute the 132a petition before the WCAB. In the related appeal (G041905), we affirmed that finding. Given this breach by Weiss, it is axiomatic IHHI was entitled to recover its consequential damages. The court, however, mistakenly "decline[d] to award such damages" because it concluded the damage calculation would involve impermissible speculation. The court explained its reasoning as follows: "The evidence presented by [IHHI] to establish damages in the form of attorneys fees expended to defend the 132a Petition requires the Court to speculate as to the amount of its claim that is reasonably related to such defense." In other words, the court concluded IHHI failed to present an adequate accounting that segregated the fees it spent on defending the 132a petition from the legal fees it expended for other, nonrecoverable purposes. In the absence of such proof, the court refused to "speculate" on the correct *amount* due to IHHI, and instead

⁴ In the related appeal, Weiss contests this finding and also challenges the court's interpretation of the "carve out language" of the JAMS settlement as excluding only the WCAB personal injury claims from the scope of the release.

denied any recovery whatsoever. The court erred because IHHI presented a sufficient basis to determine its damages.

It is “the general rule that while a plaintiff must show with reasonable certainty that he has suffered damages by reason of the wrongful act of defendant, once the cause and existence of damages have been so established, recovery will not be denied because the damages are difficult of ascertainment.” (*Stott v. Johnston* (1951) 36 Cal.2d 864, 875 (*Stott*)). “Where the fact of damages is certain, as here, the *amount* of damages need not be calculated with absolute certainty. The law requires only that some reasonable basis of computation be used, and the result reached can be a reasonable approximation.” (*Acree v. General Motors Acceptance Corp.* (2001) 92 Cal.App.4th 385, 398, fns. omitted, original italics (*Acree*); *GHK Associates v. Mayer Group, Inc.* (1990) 224 Cal.App.3d 856, 873.)

In refusing to “speculate” as to the *amount* of IHHI’s damages, the trial court implicitly acknowledged plaintiff had incurred *some* damages. Under the case law, then, IHHI was entitled to *some* recovery, notwithstanding the difficulty of “ascertain[ing]” the size of an appropriate damage award. (*Stott, supra*, 36 Cal.2d at p. 875.) At the least, the court was required to award nominal damages. (See Civ. Code, § 3360; *Hotel & Restaurant Employees etc. Union v. Francesco’s B. Inc.* (1980) 104 Cal.App.3d 962, 973.)

Importantly, the trial court recognized that the proper measure of IHHI’s damages is the amount of money IHHI expended for attorney fees in defending the section 132a claim after the parties settled the JAMS claim. As IHHI points out, but for Weiss’s breach, the cost of filing an answer to the 132a petition would have been the only legal expense incurred. But Weiss’s refusal to dismiss the 132a petition forced IHHI to litigate before the WCAB not only the issue of whether the JAMS settlement barred Weiss from proceeding, but also the merits of the petition itself.

To prove those consequential legal expenses, IHHI introduced into evidence the monthly bills submitted to IHHI by its WCAB counsel, Robert Willyard, from July 31, 2006, through July 31, 2008. In testifying about those bills, Willyard could not state exactly the amount of fees IHHI incurred for defending the 132a petition, nor could he state the total amount billed. He conceded the bills included some nonrecoverable fees for services on the personal injury claims, which settled in early June 2007, and also for minor work in connection with the civil case, such as reviewing the “JAMS documents” and “reviewing correspondence . . . re reply for summary adjudication.” The trial court expressed its frustration at this failure: “I am not going to add this all up. Don’t we have a total someplace?”

In its “closing argument brief,” IHHI supplied the calculation its witness Willyard failed to provide in his testimony. In the section of the brief devoted to its damages claim, IHHI stated that its fees, after “*subtracting fees for this civil action and the two personal injury claims*, totaled \$86,606.78.” The brief referred the court to an attached “Exhibit A,” which provided a monthly breakdown of Willyard’s fees from July 31, 2006, through July 31, 2008, taken from the bills submitted into evidence. This “Summary” specified the total amount billed for each month, the amount billed for “MON” (the two personal injury claims) and the “Civil Case” and, after deducting those unrecoverable amounts from the monthly total, the monthly “Net Fees & Costs” billed for the “§ 132a Case.” This billing summary showed that of the total \$96,011.78 Willyard billed, about 10 percent did not apply to defending the 132a petition. Consequently, IHHI incurred the remaining amount, \$86,606.78, in fees spent defending Weiss’s post-JAMS settlement prosecution of his 132a petition.

Despite IHHI’s indirect approach to proving its damages, it provided the trial court with “some reasonable basis of computation” to use in determining the amount of the damages caused by Weiss’s breach. (*Acree, supra*, 92 Cal.App.4th at p. 398.) The legal bills submitted into evidence stated the dates on which Willyard performed

specified services, a detailed description of those services, and the respective fees associated with those services. Moreover, the summary IHHI provided in its closing argument brief, based on evidence it introduced at trial, provided the necessary calculations from those bills, and the billing descriptions supported the deductions made for unrecoverable fees.

Because Weiss breached the JAMS agreement, “the fact of damages [was] certain,” and the trial court had “some reasonable basis” for computing IHHI’s damages, the court erred in refusing to award damages to IHHI for Weiss’s breach. (*Acree, supra*, 92 Cal.App.4th at p. 398.) Thus, we remand the matter to the trial court to determine the amount of damages that are due IHHI.⁵

B. IHHI Did Not Breach the JAMS Settlement by Failing to Deliver the Stock Shares to Weiss

IHHI contends the trial court erred in finding it breached the JAMS settlement when it failed to deliver the 500,000 shares of stock to Weiss upon his exercise of the stock options. The contention is meritorious.

In the statement of decision, the trial court explained its finding that IHHI breached the contract as follows: “All . . . conditions required by the Settlement Agreement precedent to the issuance of said shares have been performed by WEISS. The Settlement Agreement does not require WEISS to pay taxes as a condition precedent to the distribution of said shares. Accordingly, IHHI shall forthwith distribute said shares to WEISS, and WEISS shall have judgment against IHHI in connection with his cross-complaint to this effect.”

⁵ In making that determination, the trial court should not feel constrained by this court’s “supplemental award of reasonable attorney’s fees to” Weiss in its 2008 summary denial of IHHI’s writ petition challenging the WCAB orders (G040260), based on our finding there was “no reasonable basis for the petition.” Having concluded in related appeal G041905 that IHHI properly challenged Weiss’s right to continue prosecuting the 132a petition, we are no longer persuaded IHHI’s writ petition lacked a “reasonable basis.”

There is a fatal flaw in the court’s reasoning. The court erroneously presumed the JAMS settlement required IHHI to issue *shares of stock* to Weiss upon his satisfaction of all conditions precedent. In fact, the JAMS settlement says nothing about a duty to issue *shares*. Instead, the JAMS settlement obligated IHHI only to issue *stock options* to Weiss, and it indisputably issued those options. (See JAMS settlement, ¶ 3f, quoted *supra* at pg. 4, fn. 2 [“IHHI shall issue out-of-plan stock options to purchase . . . (500,000) shares of restricted common stock . . . to WEISS”].) The trial court’s crucial failure to recognize the distinction between “stock options” and “shares of stock” led it to mistakenly conclude Weiss established his breach of contract claim.⁶

In *Steiner v. Thexton* (2010) 48 Cal.4th 411, the California Supreme Court reviewed the fundamental rules regarding options. The high court explained: “‘When by the terms of an agreement the owner of property binds himself to sell on specified terms, and leaves it discretionary with the other party to the contract whether he will or will not buy, it constitutes simply an optional contract.’ [Citation.] Thus, an option to purchase property is ‘a unilateral agreement. The optionor offers to sell the subject property at a specified price or *upon specified terms* and agrees, in view of the payment received, that he will hold the offer open for the fixed time. Upon the lapse of that time the matter is completely ended and the offer is withdrawn. . . .’ [Citation.]” (*Id.* at p. 418, italics added.)

Here, the option agreement gave Weiss the right to the issuance of the 500,000 shares (*and obligated IHHI to issue those shares*), conditioned upon Weiss’s performance of various conditions precedent, including the duty to pay all taxes owed on the transaction: “No Shares will be delivered to the Grantee or other person pursuant to the exercise of the Option until the Grantee or other person has made [acceptable]

⁶ The interpretation of the agreement is subject to de novo review. (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865-866.)

arrangements . . . for the satisfaction of applicable income tax and employment tax withholding obligations” (Option Agreement, § 2(c); see also Exercise Notice, ¶ 6.)

Weiss concedes he did not comply with IHHI’s demand that he send a check for \$83,423.62 to pay the taxes due for the stock transaction. Nor did he agree to pay “any amount of money to IHHI in connection with withholding taxes for [his] exercise of [his] stock options[.]” At trial, Weiss testified he did not pay the taxes demanded because he thought they were “excessive.” He faulted IHHI both for overvaluing the stock and putting him in the 50 percent tax bracket when calculating how much he owed.

Regardless of his reasons, in refusing to pay the taxes IHHI demanded, Weiss failed to satisfy one of the express terms for issuance of the shares under the option agreement. IHHI cited this failure as the basis for its own refusal to issue the shares. Whether or not Weiss’s failure to meet this condition excused IHHI’s performance is a dispute under the option agreement, not the JAMS settlement. Thus, the trial court’s finding that “the Settlement Agreement does not require WEISS to pay taxes as a condition precedent to the distribution of said shares” is beside the point. Because IHHI had no duty under the JAMS settlement to issue shares, its refusal to do so did not breach that agreement as a matter of law. Consequently, the court erred in finding IHHI breached the JAMS settlement.

III

DISPOSITION

The judgment is reversed in two respects. First, the judgment is reversed as to the court’s finding IHHI breached the settlement agreement by failing to deliver 500,000 shares of IHHI stock to Weiss and the related order that IHHI “forthwith distribute said shares” to Weiss. Second, the judgment is reversed as to the ruling that IHHI “shall not recover any damages from” Weiss. The matter is remanded to the trial court for the limited purpose of determining the amount of damages owed to IHHI by

Weiss for his breach of the JAMS settlement by continuing to prosecute the 132a petition after releasing that claim in the settlement. In all other respects, the judgment is affirmed. Appellant is entitled to its costs on appeal.

ARONSON, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

IKOLA, J.