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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

ROBERT L. REEVES et al., Plaintiffs and Respondents, v. DANIEL P. HANLON et al., Defendants and Appellants.	B151460 (Los Angeles County Super. Ct. No. GC023679)

APPEAL from judgment and orders of the Superior Court of Los Angeles County, Jan A. Pluim, Judge. Affirmed in part, reversed in part and remanded.

Dwyer, Daly, Brotzen & Bruno, Toni Rae Bruno and Marlin D. Wall for Defendants and Appellants.

Arter & Hadden, David Gurnick, Sue Bendavid-Arbiv; Robert L. Reeves & Associates, Robert L. Reeves, Robert J. DuPont and Richard M. Wilner for Plaintiffs and Respondents.

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*Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for partial publication. The portions to be published are the initial paragraph on page 2, the Statement of the Case parts A, B, D and E, the first paragraph of the Discussion (page 10) and the portions of part A of the Discussion beginning on page 10 and ending on page 12, part A.1.c. (at pages 14 to 18), and the Disposition.

Appellants Daniel P. Hanlon, Colin T. Greene, and Hanlon & Greene, a professional corporation (H&G), challenge a judgment in favor of respondents Robert L. Reeves and the law offices of Robert L. Reeves & Associates, a professional corporation (RLRA), as well as the cost award and the trial court's stay of a judgment based on an arbitration award in favor of appellants and against respondents. We affirm the judgment and stay. Regarding the cost award, we affirm in part and reverse in part.

STATEMENT OF THE CASE

A. *Operative Complaints*

Reeves initiated this action against Hanlon, Greene, and H&G on August 3, 1999. Thereafter, Hanlon and H&G began a separate action against respondents on August 6, 1999. The actions were consolidated, and Greene filed a separate cross-complaint against respondents in the consolidated actions on February 14, 2000.

On February 1, 2000, respondents filed their second amended complaint, which alleged the following facts: Reeves's law firm employed Hanlon and Greene as attorneys. In 1998, Reeves entered into an agreement with Hanlon that entitled Hanlon to earn an equity position in a law firm to be called "Reeves and Hanlon." In 1999, Hanlon and Greene abruptly resigned from their positions with Reeves and Hanlon, and they improperly persuaded respondents' employees to join H&G, solicited respondents' clients to obtain services from H&G, misappropriated respondents' trade secrets, destroyed computer files, and withheld respondents' property, including a car. The second amended complaint asserted 14 claims, including intentional interference with contractual relationships, interference with prospective business opportunity, conspiracy to interfere with prospective business opportunity, misappropriation of confidential information and violation of the Uniform Trade Secrets Act (UTSA) (Civ. Code, § 3426 et seq.), unauthorized use of a corporate car, and destruction of corporate property.

Appellants also filed amended complaints containing numerous claims against respondents. Hanlon and H&G's first amended complaint, which was filed on

September 8, 1999, alleged that respondents had improperly withheld files and other materials belonging to H&G's clients after Hanlon resigned from Reeves and Hanlon, and that respondents had converted Hanlon's car. Greene's second amended cross-complaint, which was filed on May 26, 2000, alleged that respondents had failed to pay him commissions in accordance with his employment contract with Reeves and Hanlon.

B. *Stipulation and Partial Settlement*

Trial was set for July 3, 2000. On June 30, 2000, the parties stipulated to the abandonment of enumerated causes of action in the operative complaints and cross-complaint. Under the stipulation, respondents agreed to proceed to trial only on their claims for interference with contractual relationships and prospective business opportunity, conspiracy, misappropriation of confidential information and trade secrets, unauthorized use of a corporate car, and destruction of corporate property.

On July 5, 2000, the parties informed the trial court that they had a settlement of Greene's cross-complaint. The parties agreed that respondents' remaining claims would be resolved by a bench trial, that Hanlon and H&G would resolve their claims through binding arbitration, and that Greene would dismiss his separate cross-complaint in exchange for a release from various liens. The pertinent stipulation and settlement limited respondents' recovery following trial to $150,000. In addition, it guaranteed Hanlon and H&G an arbitration award "in an amount no less than $50,000 and up to a maximum amount of $150,000."

C. *Trial*

The bench trial on respondents' claims began on January 22, 2001. The evidence presented at trial supports the following version of the underlying events: Reeves established his law firm in April 1981 as a professional law corporation. The firm specialized in immigration law, and attracted clients through advertising and other means.

Because the firm's clients spoke many languages, and often had difficulty with English, it hired paralegals and secretaries fluent in foreign languages.

In September 1995, Hanlon joined the Reeves's firm, which specializes in immigration and nationality law. By July 1996, Hanlon was earning approximately $70,000 per year plus benefits, including the use of a leased BMW. The firm also advanced Hanlon $25,000 for the purchase of a home, and subsequently cancelled the promissory note that he had signed without demanding repayment. With Hanlon's encouragement, Greene joined the Reeves firm as an associate in late 1997.

In May 1998, Reeves entered into a contract that would have made Hanlon an owner of a 15 percent interest in the firm by 2000, and he advertised Hanlon as a partner, although formally Reeves and Hanlon were employees of the firm. In 1998, Hanlon's salary was $110,000.

Hanlon and Greene decided to form their own firm in February 1999, but they did not discuss their plans with Reeves or give him notice of their impending departure. Hanlon testified that he decided to leave because he believed that Reeves would renege on his agreement to give Hanlon an equity interest in the Reeves law firm. He was also upset that Reeves had reported in December 1998 that there were no profits to share. He acknowledged that he had received a $5,000 bonus in December 1998, but contended that he should have received between $40,000 and $50,000. There was also evidence that Hanlon was dissatisfied with other matters, including the manner in which cases were assigned, the firm's purchase of a conference table, and the end of the firm's policy of paying for cell phone usage. Greene testified that he decided to leave because Reeves had breached his employment contract, and because he thought that Reeves had used firm profits to pay for a yacht and the remodeling of Reeves's home.

Without seeking permission, Hanlon printed out a list of the firm's clients. Hanlon and Greene found commercial office space for their law firm, and in June 1999, they established an Internet site for this firm. They signed a lease in early June 1999.

Hanlon and Greene abruptly resigned from the Reeves firm on the morning of Wednesday, June 30, 1999, taking with them a list of the firm's approximately 2,100 clients. On that date, Hanlon had some responsibility for up to approximately 1,500 cases. Neither Hanlon nor Greene left a memorandum concerning impending activity in cases for which they were responsible, and Hanlon left without providing a list of his cases. According to Reeves, Hanlon's and Greene's conduct in this regard caused the Reeves firm to miss a significant filing deadline for at least one client.

In addition, Hanlon retained some of the firm's library books in his possession. He did not return a car leased by the Reeves firm, and it was subsequently taken from him. Reeves testified that Hanlon and Greene also removed other property, including training tapes and software.

There was conflicting evidence regarding the extent to which Greene copied and destroyed files in the firm's computer system. Greene testified that he had copied and deleted only some personal form files in his personal computer. By contrast, Reeves testified that on the date that Greene resigned, all of the information in Greene's computer directory was missing. Elizabeth Sykes, a computer expert, testified that "a lot of client files" -- as many as 318 files containing approximately 10 megabytes of information -- had been deleted, although she was unable to determine who had destroyed these files, and she acknowledged that some of the information in these files might be recoverable from other locations.

Hanlon and Greene sent a notice to all the clients of the Reeves firm announcing the opening of H&G. The abrupt departure and notice confused many of the Reeves firm's clients, who phoned to inquire whether the Reeves firm was still in business and whether anyone was handling their cases.

Hanlon and Greene never discussed issuing a joint notice with Reeves, and there is a conflict in the evidence as to whether Hanlon and Greene had good reason to believe that Reeves would not have cooperated with such a notice. Hanlon testified that Reeves had immediately terminated Kevin Garcia, another attorney who gave notice, and thus

Hanlon believed that Reeves would have acted in a similar manner towards Hanlon and Greene. Similarly, Greene testified that he believed there was no realistic possibility Reeves would issue a joint notice.

Reeves denied that he had immediately terminated Garcia. Furthermore, he testified that in at least one previous instance, he had issued a joint notice when a lawyer left the Reeves firm. He also stated that he would have tried to iron out Hanlon's complaints about the firm had Hanlon discussed them with him.

At the time of Hanlon's and Greene's resignation, the Reeves firm had eight attorneys and approximately 30 support staff. Shortly thereafter, six paralegals and secretaries from the Reeves firm followed Hanlon and Greene to their new firm, and the Reeves firm otherwise lost two more attorneys. Hanlon and Greene eventually hired approximately 11 former employees of the Reeves firm.

The record raises conflicting inferences as to when Hanlon and Greene began to encourage employees of the Reeves firm to join H&G. Hanlon and Greene testified that shortly after they resigned from the Reeves firm, they talked to several paralegals and secretaries employed by the Reeves firm, and persuaded them to work for H&G.

However, the record indicates that prior to their departure, they told some employees at the Reeves firm that they planned to establish their own law firm. These employees later joined H&G. While employed by the Reeves firm, Hanlon and Greene also told fellow employees to complain to the United States Department of Labor about issues regarding overtime pay, and they urged employees to stop making payments to the firm's retirement plan when the firm changed its policy of contributing to the plan.

After Hanlon and Greene departed from the Reeves firm, they directly contacted clients of the Reeves firm and solicited their business, although the record raises conflicting inferences regarding the number of clients they contacted, and what they said. There was also conflicting expert testimony regarding whether they had engaged in unethical conduct.

Hanlon testified that he called about 30 of the clients with whom he had personal contact at the Reeves firm. Similarly, Greene testified that he personally contacted less than 10 clients, and (with one exception) only clients that he had brought into the Reeves firm.

By contrast, Reeves testified that over a period of 20 years, the Reeves firm generally lost about 12 clients a year to other law firms, and the loss of 140 or so clients in a single year to a single law firm was unprecedented. He also stated that "[m]any, many clients" told his staff that they had received calls from Hanlon and Greene "asking them to come over to their offices."

Furthermore, Khawja Mortuj, a client of the Reeves firm, testified that Hanlon phoned him, told him that he was transferring Mortuj's case to H&G, and he would charge Mortuj $300 for his services. Hanlon did not tell him that he had any choice in the matter. Mortuj's file stayed with Hanlon for three to five months before Mortuj returned to the Reeves law firm.

In addition, Sandra Bryngelson, another client of the Reeves firm, testified that Hanlon originally handled her case, and that after he left, he phoned her three or four times. She could not recall exactly what Hanlon said, but believed that he told her she had a choice of staying with the Reeves firm or moving to his firm. She decided to stay with the Reeves firm.

Reeves and Joyce Wang, the head bookkeeper at the Reeves firm, testified regarding losses to the Reeves firm. Wang testified that as a general matter, the average client agreement was worth $2,000 to the firm. According to Reeves, 155 clients had moved as of the date of trial, the plurality of which transferred within three months after Hanlon and Greene departed. Wang and Reeves indicated that of these clients, 147 clients had failed to pay their outstanding balances regarding their contracts with the Reeves firm. The outstanding balances due from these clients totaled $121,000.

Based on Wang's experience, she expected that the Reeves firm would have collected approximately 75 percent of this sum, had the clients remained with the Reeves

firm. Reeves concurred with Wang's estimates. He also testified that the net lost income to the firm from the 147 clients amounted to $83,000, a sum adjusted for overhead, attorney's salaries, and the historical collection rate.

In addition, Wang estimated that the Reeves firm usually expected to receive $1 in new business for every $3 charged to an existing client through new matters from the existing client. Due to the clients who transferred to H&G, Wang calculated that the Reeves firm lost approximately $100,000 in gross income new business, of which the Reeves firm would have eventually collected $75,000. Reeves agreed with these figures, and testified that because the average profit rate per client was 50 percent, the lost profits from new business amounted to $37,500.

Finally, Wang and Reeves testified that due to the departure of Hanlon and Greene, the Reeves firm incurred expenses (above the historical baseline) of approximately $41,000 for advertising, $20,000 for employee recruitment, and $32,000 for new brochures and stationery. Wang also indicated that the Reeves firm was compelled to hire temporary employees.

D. *Arbitration*

On March 15, 2001, the arbitrator issued his award regarding Hanlon's and H&G's claims against respondents. The arbitrator ruled against Hanlon and H&G on all their claims, with the exception of their claim that the respondents had improperly delayed turning over client files after substitutions of attorneys had been signed and filed. The arbitrator awarded $5,000 in damages for this misconduct, and raised this sum to $50,000 in accordance with the "high-low" provision of the parties' stipulation and settlement.

E. *Judgment, Costs, and Stay*

On April 11, 2001, the trial court issued a statement of decision, concluding that appellants had engaged in interference with contracts and prospective business opportunity,

and misappropriation of trade secrets, resulting in damages totalling $182,180.18. The trial court found the following damages: (1) $62,540.50 owed by 144 clients[1] who transferred to H&G; (2) $36,000 in lost future business revenue;[2] (3) $61,639.68 in expenses incurred to mitigate appellants' wrongful acts, including $41,630.49 for advertising and $20,009.19 for recruitment expenses; and (4) $22,000 for unjust enrichment due for the theft of confidential information.[3]

Citing the parties' stipulation and settlement, the trial court reduced the award of damages to $150,000. A judgment awarding respondents this sum in damages and costs was filed on April 26, 2001.

On May 1, 2001, the trial court granted Hanlon and H&G's motion to confirm the arbitration award, and judgment was subsequently entered on this award. Respondents sought a stay of the enforcement of this judgment, and submitted a memorandum of costs, seeking $63,320 in costs. Appellants opposed this request for a stay, and filed motions to tax costs and for a new trial.

The trial court stayed enforcement of the judgment based on the arbitration award pending the resolution of any appeal from the judgment in respondents' favor. On June 26, 2001, the trial court granted the motion to tax costs in part, and denied it in part. Respondents were awarded $47,427.63 in costs. On the same date, the trial court denied the motion for a new trial. This appeal followed.

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1 The trial court determined that only 144 of the 147 clients who left the Reeves firm without paying their balances acted on the basis of misconduct by Hanlon and Greene.

2 In calculating for lost future business revenue, the trial court determined that one-third of the 144 clients who transferred to H&G would have furnished 48 new contracts, each having a contract of approximately $2,000, and it applied a collection rate of 7 percent and a profit rate of 50 percent to these contracts.

3 The trial court determined that the list identified 2,200 clients, and it imposed a royalty fee of $10 per client (Civ. Code, § 3426.3, subd. (b)).

DISCUSSION

Appellants contend: (1) the interference claims fail as a matter of law and for want of substantial evidence; (2) the claim for misappropriation of confidential information and trade secrets is unsupported by substantial evidence; (3) the trial court erred in awarding costs; and (4) enforcement of the arbitration award judgment was improperly stayed.

A. *Interference Claims*

Appellants raise numerous contentions of error regarding the trial court's determinations that they had engaged in tortious interference with contractual relationships and with prospective economic advantage. We do not find reversible error in these determinations.

The two torts in question, though related, are distinct. (*Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 392.) "In its simplest terms, to be liable for inducing breach of contract, there must be a valid contract. [Citation.] In comparison, a cause of action for interference with prospective economic advantage necessarily assumes that a contract has not yet been formulated." (*PMC, Inc. v. Saban Entertainment, Inc.* (1996) 45 Cal.App.4th 579, 595.) As our Supreme Court explained in *Della Penna v. Toyota Motor Sales, U.S.A., Inc.*, *supra*, 11 Cal.4th at page 392, courts must "firmly distinguish the two kinds of business contexts, bringing a greater solicitude to those relationships that have ripened into agreements, while recognizing that relationships short of that subsist in a zone where the rewards and risks of competition are dominant."

The two torts thus differ in their elements. "The elements which a plaintiff must plead to state the cause of action for intentional interference with contractual relations are (1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship;

and (5) resulting damage." (*Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1126.)

By contrast, the elements of the tort of interference with prospective economic advantage include: "'(1) the existence of a prospective business relationship containing the probability of future economic rewards for plaintiff; (2) knowledge by defendant of the existence of the relationship; (3) intentional acts by defendant designed to disrupt the relationship; (4) actual causation; and, (5) damages to plaintiff proximately caused by defendant's conduct. [Citation.]'" (*PMC, Inc. v. Saban Entertainment, Inc.*, *supra*, 45 Cal.App.4th at p. 595.)

In addition, the plaintiff must establish that the defendant "engaged in conduct that was wrongful by some legal measure other than the fact of interference itself." (*Della Penna v. Toyota Motor Sales, U.S.A., Inc., supra,* 11 Cal.4th at p. 393.) As our Supreme Court clarified in *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 56, this additional requirement of independent wrongfulness does not apply to the tort of interference with contract.

To the extent that appellants challenge the trial court's factual determinations, we examine the record for substantial evidence to support the trial court's findings. (*Nordquist v. McGraw-Hill Broadcasting Co.* (1995) 32 Cal.App.4th 555, 561.) By contrast, we independently review the trial court's resolution of questions of law. (*Home Depot, U.S.A., Inc. v. Contractors' State License Bd.* (1996) 41 Cal.App.4th 1592, 1599.)

At the outset, we observe that appellants' challenges to the trial court's factual determinations selectively emphasize evidence and inferences supporting appellants' position. However, review for substantial evidence is not trial de novo. (*Angela S. v. Superior Court* (1995) 36 Cal.App.4th 758, 762.) On review for substantial evidence, "all the evidence must be examined, but *it is not weighed*. All the evidence most favorable to the respondent must be accepted as true, and that unfavorable discarded as not having sufficient verity, to be accepted by the trier of fact. If the evidence so viewed

is sufficient as a matter of law, the judgment must be affirmed." (*Estate of Teel* (1944) 25 Cal.2d 520, 527, italics added.)

1. *Interference With Contractual Relations*

We begin with appellants' contentions regarding interference with contractual relations.

a. *Blurring of Torts*

Appellants contend that the trial court improperly blurred the distinction between the two torts in predicating its findings regarding both torts on 144 clients who left the Reeves firm without paying their outstanding balances. This contention is meritless. The trial court recognized the distinction between the torts, determining that 144 clients breached their *existing* contracts with the law firm, and that their departure also resulted in the loss of *prospective* contracts through referrals to new matters.[4]

b. *Substantial Evidence*

Appellants also contend that substantial evidence does not support the determination that Hanlon's and Greene's conduct caused 144 clients from the Reeves firm to breach their contracts in moving to H&G. We disagree.

Our inquiry into this contention follows established principles. First, the intentional conduct required for interference with contract occurs not only when "'the

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[4] On these matters, the trial court found that Hanlon and Greene had improperly demoralized employees of the Reeves firm before Hanlon and Greene departed, and that they had engaged in unethical conduct regarding clients after they departed, thereby disrupting "the firm's ongoing relationships and contracts with clients and relationships with employees." Furthermore, it determined that Hanlon's and Greene's wrongful conduct regarding clients interfered with "likely future relationships between the firm and its clients," and resulted in "lost business comprised of referrals of new matters and new clients from the existing clients."

actor acts for the primary purpose of interfering with the performance of the contract,'" but also when "'the actor does not act for the purpose of interfering with the contract or desire it but knows that the interference is certain or substantially certain to occur as a result of his action.'" (*Quelimane Co. v. Stewart Title Guaranty Co.*, *supra*, 19 Cal.4th at p. 56, quoting Rest.2d Torts, § 766, com. j, p. 12.) Second, as a general rule, causation may be established by direct or circumstantial evidence. (*Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 483-484.) Third, to the extent that the finding that 144 clients breached their contracts is relevant to damages, "the measure of damages to be awarded need only be shown with the degree of certainty that the circumstances of the case permit." (*Lueter v. State of California* (2002) 94 Cal.App.4th 1285, 1303.)

In our view, sufficient evidence supports the determination that Hanlon and Greene intended to lure away clients of the Reeves firm, and they acted in a manner reasonably certain to cause the 144 clients to breach their contracts. To begin, there is direct evidence that their departure was calculated to cripple the Reeves firm's ability to provide legal services: they left abruptly, damaged computer files, removed firm property, and failed to provide adequate guidance concerning their open cases.

There is also evidence indicating that Hanlon and Greene phoned far more clients than the 40 or so clients they admitted to contacting, and they exploited these clients' lack of facility with English and ignored their rights concerning the selection of counsel (1 Witkin, Cal. Procedure (4th ed. 1996) Attorneys, § 103, pp. 140-141). Reeves testified that "[m]any, many clients" told his staff that Hanlon and Greene had "ask[ed] them to come over to their offices." Mortuj, who had evident difficulties with English, testified that Hanlon phoned him, told him that he was Hanlon's client, required him to pay $300, and kept his legal files at H&G for three to five months. The testimony from Bryngelson, another client with evident difficulties with English, indicated that Hanlon repeatedly asked her to choose between representation of the Reeves firm and H&G, even though she had other options concerning representation.

Finally, the evidence indicates that Hanlon's and Greene's departure disrupted the Reeves firm in an unprecedented manner. Prior to their departure, the Reeves firm lost about 12 clients a year, notwithstanding the fact that, on average, three or four lawyers had left the Reeves firm per year.[5] By contrast, following their departure, 155 clients moved from the Reeves firm to H&G over a two-year period, most of whom moved within three months. Of these 155 clients, 147 clients -- including 144 clients to whom Hanlon had provided legal services while he was employed at the Reeves firm -- subsequently failed to pay their outstanding balances to the Reeves firm. This loss of clients and revenue was well above historical rates.

The trial court inferred that Hanlon and Greene contacted numerous clients and applied the tactics described by Mortuj and Bryngelson, thereby causing at least 144 of them to breach their contracts with the Reeves firm. In our view, the direct evidence bearing on Hanlon's and Greene's misconduct, coupled with the circumstantial evidence concerning the effects of their departure, adequately support this inference.

c. *At-Will Employment Contracts*

Finally, citing *GAB Business Services, Inc. v. Lindsey & Newsom Claim Services, Inc.* (2000) 83 Cal.App.4th 409 (*GAB*), appellants contend that the contract interference claim fails insofar as it charges that they induced at-will employees from the Reeves firm to breach their employment contracts.

We decline to follow *GAB*. In *GAB*, a regional vice-president of a large public adjusting company accepted an offer from a competitor. (*GAB, supra*, 83 Cal.App.4th at pp. 413-414.) Before he left the public adjusting company, he successfully recruited several at-will employees to join the competitor. (*Ibid*.) Thereafter, the public adjusting company asserted claims of breach of fiduciary duty, unfair competition,

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5 Reeves estimated that during Hanlon's four-year period of employment with the Reeves firm, it lost approximately 15 lawyers.

misappropriation of trade secrets, and inference with contract against the former vice-president and the competitor. (*Id*. at p. 415.) A jury rendered verdicts unfavorable to the public adjusting company on all these claims. (*Ibid*.)

The court in *GAB* held that the claim for interference with the at-will employment contracts failed as a matter of law. (*GAB, supra*, 83 Cal.App.4th at pp. 426-428.) Although the *GAB* court recognized that an at-will nature of a contract, in itself, does not preclude an interference claim, it nonetheless reasoned that employers could not assert claims of interference of contract based on their at-will relationships with employees. (*Id*. at p. 427.) On this matter, it cited an apparent lack of case law expressly authorizing such claim, as well as public policy supporting the mobility of employees. (*Id*. at pp. 427-428.)

We respectfully disagree with the court in *GAB*, to the extent that it may have held that a third party is not liable for inducing at-will employees to breach their employment contracts, even though the third party acted in an unjustifiable manner. Any such conclusion is irreconcilable with the case law governing interference with contract claims.

As Witkin observes, the tort in question originated in a case in which an employer sought relief for interference with an employee's contract: "In the celebrated case of *Lumley v. Gye* (1853) 118 Eng.Rep.R. 749, Miss Wagner, an opera singer, had agreed to sing exclusively for plaintiff, and defendant, with knowledge of the contract, persuaded her to refuse to perform. The court held that an action would lie for wilfully inducing the breach of contract. The doctrine of this case has been gradually extended to apply to inducing breach of any type of contract . . . ." (5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 642, p. 732.)

In *Imperial Ice Co. v. Rossier* (1941) 18 Cal.2d 33, 36-38, our Supreme Court adopted the majority rule governing this tort, as codified in the first Restatement of Torts, stating that "an action will lie for unjustifiably inducing a breach of contract." (*Id*. at p. 39.) The court in *Rossier* explained: "[A]n action will lie for inducing breach of

contract by a resort to means in themselves unlawful such as libel, slander, fraud, physical violence, or threats of such action. [Citations.] Most jurisdictions also hold that an action will lie for inducing a breach of contract by the use of moral, social, or economic pressures, in themselves lawful, unless there is sufficient justification for such inducement. [Citations.] [¶] Such justification exists when a person induces a breach of contract to protect an interest that has greater social value than insuring the stability of the contract." (*Id*. at p. 35.)

Subsequently, in *Buxbom v. Smith* (1944) 23 Cal.2d 535, the Supreme Court applied these principles in circumstances resembling the facts before us. In *Buxbom*, the owner of a chain of markets entered into contracts with a handbill publisher to prepare and distribute a weekly advertising newsletter. (*Id*. at pp. 538-539.) To fulfill these contracts, the publisher hired more employees to handle the distribution, including supervisors and crews of delivery boys. (*Id*. at pp. 539, 544-545.) After the market owner breached the contracts and hired the publisher's distribution employees, the publisher sued the market owner, seeking damages for, inter alia, "the loss of plaintiff's trained organization [and] supervisors . . . ." (*Id*. at pp. 538-539, 540-541.) Following a bench trial, judgment was entered in the publisher's favor. (*Id*. at p. 538.)

The court in *Buxbom* held that the publisher had established tortious interference with his employment contracts. (*Buxbom v. Smith, supra,* 23 Cal.2d at pp. 546-548.) It stated: [I]t is not ordinarily a tort to hire the employees of another for use in the hirer's business. [Citations.] [¶] This immunity against liability is not retained, however, if unfair methods are used in interfering with such advantageous relations." (*Id*. at p. 547.) Turning to the facts before it, the *Buxbom* court concluded that the market owner had lost any such immunity from liability, pointing to evidence that soon as he became familiar with the distribution process, he had terminated the contracts and taken over the distribution organization. (*Id*. at p. 544.) The court reasoned that by breaking the contracts, the market owner had unfairly deprived the publisher of the means of retaining his employees. (*Id*. at p. 548.)

The court in *Buxbom* did not identify the employees in question as at will, and thus it did not discuss whether its reasoning hinged on the nature of their employment contracts. However, any unclarity regarding the latter point was apparently resolved shortly after *Buxbom* in *Speegle v. Board of Fire Underwriters* (1946) 29 Cal.2d 34.

In *Speegle*, an insurance agent employed at will by several insurers alleged that an association of insurers had induced some insurers to end their agency contracts with him. (*Speegle v. Board of Fire Underwriters, supra,* 29 Cal.2d at pp. 37-39.) The court in *Speegle* held that his complaint alleged a tenable claim for interference with contract, reasoning that "the great majority of the cases have held that unjustifiable interference with contracts terminable at will is actionable." (*Id*. at p. 39.)

Among the key cases the *Speegle* court cited in connection with this proposition is *Hitchman Coal & Coke Co. v. Mitchell* (1917) 245 U.S. 229, 262, in which the United States Supreme Court affirmed an injunction obtained by an employer barring a union from inducing at-will employees to breach their employment contracts. In view of *Hitchman*, *Speegle* indicates that interference with at-will employment contracts is actionable *by employers*.

Buxbom and *Speegle* were followed in *Diodes, Inc. v. Franzen* (1968) 260 Cal.App.2d 244, 255-256, and *Hollingsworth Solderless Terminal Co. v. Turley* (9th Cir. 1980) 622 F.2d 1324, 1337, which held that an employer may assert a claim for unfair competition against a third party that uses unfair methods in hiring its at-will employees. In so concluding, the court in *Diodes, Inc.* indicated that its determination could also be "bottled" under the label "contract interference . . . ." (260 Cal.App.2d at p. 255; see also *Pacific Gas & Electric Co. v. Bear Stearns & Co*., *supra*, 50 Cal.3d at p. 1127 [affirming that interference with at-will contracts is generally actionable by parties to the contract].)

Buxbom, *Speegle*, and the other cases discussed above pre-date *Quelimane Co. v. Stewart Title Guaranty Co., supra*, 19 Cal.4th at page 56, in which our Supreme Court clarified the elements of tortious interference with an existing contract. The *Quelimane* court stated that a plaintiff asserting this tort need not establish that the defendant's

conduct was "wrongful apart from the interference with the contract itself," but indicated that the defendant is not liable if it shows that the interference was "'a minor and incidental consequence'" of proper conduct (quoting Rest.2d Torts, § 766, com. j at p. 12) or that the defendant "had a legitimate business purpose which justified its actions . . . ." (19 Cal.4th at pp. 55-57.)

Viewed through the lens of *Quelimane*, the holdings in *Buxbom* and *Speegle* imply that an employer may recover for interference with the employment contracts of its at-will employees by a third party when the third party does not show that its conduct in hiring the employees was justifiable or legitimate. (See also Rest.2d Torts, § 768.) Nothing in this authority or any other authority cited in *GAB* supports the contrary view, namely, that a person who hires the at-will employees of another employer enjoys a special immunity from liability for tortious interference, notwithstanding the person's use of unjustifiable or unfair methods to lure these employees. We therefore depart from *GAB*, to the extent that it endorses this view.

Here, the evidence indicates that Hanlon and Greene engaged in unfair and unjustifiable misconduct in the course of hiring employees from the Reeves firm. As we explain further below (see pts. A.2.a. and C., *ante*), there is substantial evidence that they mounted a campaign against the Reeves firm involving destruction of computer records, misuse of confidential information, and unethical conduct, of which the cultivation of employee discontent was only a component. This campaign unfairly impaired the Reeves firm's ability to retain its employees. For this reason, we conclude that a claim for interference with contract was proper under *Buxbom* and *Speegle*.[6]

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[6] Finally, we observe that even if the interference claim cannot rest on the hiring of at-will employees, this error is not prejudicial. Although the trial court found there were damages of $182,180.18, it limited the damage award to $150,000 in accordance with the parties' stipulation and settlement. Because only $20,009.19 of these damages are attributable to appellants' improper solicitation of the Reeves firm's employees, error regarding this item of damages would not require a modification of the judgment.

2. *Interference With Prospective Economic Advantage*

We now turn to appellants' contentions regarding interference with prospective economic advantage.

a. *Independently Wrongful Acts*

Appellants contend that there is insufficient evidence of independently wrongful conduct that caused respondents to lose new contracts through the departure of the 144 clients. However, as we have indicated, ample evidence supports the determination that Hanlon and Greene engaged in intentional conduct that caused 144 clients to breach their contracts with the Reeves firm (see pt. A.1., *ante*). In view of this evidence, the trial court could reasonably infer that clients who breached their own contracts with the Reeves firm would also not refer new clients and new matters to that firm.

Accordingly, the only issue is whether Hanlon's and Greene's conduct was "wrongful by some legal measure other than the fact of interference itself." (*Della Penna v. Toyota Motor Sales, U.S.A., Inc.*, *supra*, 11 Cal.4th at p. 393.) On this matter, the trial court concluded that Hanlon and Greene engaged in the requisite wrongful conduct, reasoning that (1) Greene destroyed computer files, (2) Hanlon and Greene misappropriated confidential information, (3) Hanlon breached his fiduciary duties to the Reeves firm, and (4) Hanlon and Greene breached their ethical responsibilities to the clients of the Reeves firm.

Again, we agree with the trial court. The misappropriation of confidential information, coupled with other illegal or unethical misconduct, constitutes independently wrongful conduct. (*Gemini Aluminum Corp. v. California Custom Shapes, Inc.* (2002) 95 Cal.App.4th 1249, 1258-1259; *PMC, Inc. v. Saban Entertainment, Inc.*, *supra*, 45 Cal.App.4th at pp. 602-603.)

Furthermore, substantial evidence supports the trial court's determinations. There is ample evidence that Greene deleted client files, and as we explained below (see pt. C., *ante*), Hanlon and Greene violated the UTSA by misappropriating the client list that they

obtained from the Reeves firm and using it to solicit clients. Moreover, in view of the agreement that granted Hanlon an equity share in the Reeves firm and Reeves's treatment of Hanlon as a partner, as well as Hanlon's own testimony that he was Reeves's fiduciary, Hanlon had fiduciary duties to the Reeves firm. (*Fox v. Abrams* (1985) 163 Cal.App.3d 610, 616-617.)

Finally, in withdrawing from the Reeves firm, Hanlon and Greene were required to keep their clients "reasonably informed of significant developments" relating to the representation (Bus. & Prof. Code, § 6068, subd. (m); Rules Prof. Conduct of the State Bar, rule 3-500), and to respect the client's right to choose representation (*Jewel v. Boxer* (1984) 156 Cal.App.3d 171, 177). The evidence that Hanlon and Greene solicited the Reeves firm's clients in an improper and misleading manner supports the determination that they engaged in unethical conduct under these standards.

Citing *Wilhelm v. Pray, Price, Williams & Russell* (1986) 186 Cal.App.3d 1324, 1333, footnote 5, *Noble v. Sears, Roebuck & Co.* (1973) 33 Cal.App.3d 654, 658-659, *Mirabito v. Liccardo* (1992) 4 Cal.App.4th 41, 46, and rule 1-100 of the Rules of Professional Conduct of the State Bar, appellants argue that violation of an ethical rule, by itself, is not necessarily the basis for an independent tort. We do not disagree with this proposition or the cited authority. However, the key issue here is whether Hanlon's and Greene's misconduct satisfied a requirement of the tort of interference with prospective economic advantage. For the reasons cited above, we conclude that they engaged in wrongful conduct, some of which was independently actionable. This misconduct satisfied the requirement in question. (*Gemini Aluminum Corp. v. California Custom Shapes, Inc.*, *supra*, 95 Cal.App.4th at pp. 1258-1259; *PMC, Inc. v. Saban Entertainment, Inc.*, *supra*, 45 Cal.App.4th at pp. 602-603.)

b. *Damages*

Appellants also raise two contentions regarding damages. First, they contend that there is insufficient evidence regarding the Reeves firm's lost profits due to the

interference with prospective economic advantage. This contention is meritless, given the testimony from Wang and Reeves on this matter.

Second, appellants contend that the trial court erred in awarding approximately $41,000 in damages to compensate respondents for their additional advertising to attract new clients. They argue that these mitigation damages exceeded the $36,000 in lost profits established by respondents, and thus they were unreasonable as a matter of law.

However, "[t]he reasonable cost involved in mitigating damages is always recoverable, provided it does not exceed the damages prevented or reasonably anticipated. [Citations.]" (*Kleinclaus v. Marin Realty Co*. (1949) 94 Cal.App.2d 733, 739; accord, *Brandon & Tibbs v. George Kevorkian Accountancy Corp.* (1990) 226 Cal.App.3d 442, 465.) Here, given Hanlon's and Greene's conduct, respondents could have reasonably expected that departing clients would deprive the Reeves firm of future business *and* balances owing under current contracts. Because the total damages from loss of future business and breach of current contracts was established to be $98,540.50, the item of mitigation damages in question is not excessive as a matter of law.[7]

B. *Conspiracy to Infer With Prospective Economic Advantage*

Given our conclusions regarding the inference claims (see pt. A., *ante*), it is unnecessary for us to address appellants' contention that the conspiracy claim fails for want of an underlying tort.

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[7] During oral argument, appellants also argued that, as a matter of law, the trial court could not award the costs that the Reeves firm incurred in additional advertising and recruitment to replace its lost clients and employees as mitigation damages for the interference claims. We disagree. (See *Brandon & Tibbs v. George Kevorkian Accountancy Corp.*, *supra*, 226 Cal.App.3d at pp. 450-453 [plaintiff accounting firm is properly awarded as mitigation damages its net losses incurred in creating new branch office to replace branch office lost through breach of contract].)

C. *Violation of UTSA and Misappropriation of Confidential Information*

Appellants contend that the trial court erred in determining that Hanlon and Greene violated the UTSA in exploiting the client list that they obtained from the Reeves firm. They are mistaken.

Under the UTSA, a customer list may constitute a trade secret if it "'(1) [d]erives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and (2) [¶] [i]s the subject of efforts that are reasonable under the circumstances to maintain its secrecy.'" (*Morlife, Inc. v. Perry* (1997) 56 Cal.App.4th 1514, 1520-1521, quoting Civ. Code, § 3426.1, subd. (d).)

Regarding element (1), in *Morlife, Inc. v. Perry*, *supra*, 56 Cal.App.4th at page 1522, the court explained: "As a general principle, the more difficult information is to obtain, and the more time and resources expended by an employer in gathering it, the more likely a court will find such information constitutes a trade secret. [Citation.] [¶] The requirement that a customer list must have economic value to qualify as a trade secret has been interpreted to mean that the secrecy of this information provides a business with a 'substantial business advantage.' [Citation.] In this respect, a customer list can be found to have economic value because its disclosure would allow a competitor to direct its sales efforts to those customers who have already shown a willingness to use a unique type of service or product as opposed to a list of people who only might be interested."

On this matter, the trial court found that the Reeves firm's client list was confidential data "developed at great effort and expense over a period of 21 years of practice by advertising, client intake, representation and the good will developed therefrom . . . ." This finding is supported by Reeves's testimony, who indicated that his firm engaged in a specialized practice, and that his existing clients were a fertile source of new business. In view of this testimony, the trial court could properly conclude that the

client list had independent economic value because it would allow a competitor to target its efforts to acquire clients.

Regarding the second element, the trial court made elaborate findings regarding the Reeves firm's measure to protect its client list from outsiders. These findings are adequately supported by testimony from Reeves and Wang, who stated that the Reeves firm was located in a building with a security guard; the attorney work area was closed to the public, absent an invitation, and monitored by receptionists; the client list was stored in a computer system requiring password access; confidentiality policies regarding client information were stated in the employee handbook, which was signed by all employees; and the importance of client confidentiality was discussed at employee meetings.

Appellants nonetheless contend that the trial court erred, arguing that their use of the client list to announce their new firm, by itself, was not a violation of the UTSA. Once again, we do not disagree with this proposition, but it is irrelevant to the trial court's determination that their conduct violated the UTSA.

As the court explained in *American Credit Indemnity Co. v. Sacks* (1989) 213 Cal.App.3d 622, 636, the UTSA does not bar an employee who renders personal services to clients from using a confidential client list to announce a change of employment. Nonetheless, the UTSA precludes such employees from improperly exploiting the list to solicit clients. (*Ibid*.) As the court in *American Credit Indemnity Co.* put the point: "Providing personal service to a customer whose identity is a trade secret does not thereafter render that customer fair game for solicitation. In fact, it is against those very employees who personally service customers that employers are most in need of protection." (*Ibid*.)

Here, the trial court found that beyond a simple announcement of the creation of H&G, Hanlon and Greene made significantly improper use of the client list. As we have

indicated (see pt. A., *ante*), this finding rests on substantial evidence. Accordingly, the trial court did not err in determining that Hanlon and Greene violated the UTSA.[8]

D. *Costs*

Appellants challenge numerous items of costs awarded by the trial court. The items in question total $31,059.41.

Generally, "[i]f the items appearing in a cost bill appear to be proper charges, the burden is on the party seeking to tax costs to show that they were not reasonable or necessary. On the other hand, if the items are properly objected to, they are put in issue and the burden of proof is on the party claiming them as costs. [Citations.] Whether a cost item was reasonably necessary to the litigation presents a question of fact for the trial court and its decision is reviewed for abuse of discretion. [Citation.] However, because the right to costs is governed strictly by statute [citation] a court has no discretion to award costs not statutorily authorized. [Citations.]" (*Ladas v. California State Auto. Assn.* (1993) 19 Cal.App.4th 761, 774.)[9]

1. *Costs Related to Arbitration*

Appellants contend that the trial court improperly awarded $23,269 that respondents incurred in connection with the arbitration.

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[8] Appellants also argue that in assessing the damages for violation of the UTSA, the trial court determined that the list contained 2,200 clients, whereas the highest figure indicated in the evidence is 2,100 clients. However, assuming that the trial court erred in this matter, this error does not require modification of the judgment. It merely dictates reduction of the damages by $1,000 (100 clients at $10 each) to $181,180.18, well above the maximum of $150,000 in damages agreed upon by the parties and awarded in the judgment.

[9] At the outset, we observe that appellants' contentions are sometimes stated in conclusory terms. Because they have the burden of establishing error on appeal, we limit our inquiry to items of costs identified in appellants' opening brief and accompanied by argument. (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115; *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785.)

On this matter, the record indicates that the arbitrator concluded that respondents were the prevailing parties in the arbitration, but declined to award costs. On April 20, 2001, respondents submitted a memorandum of costs regarding the arbitration in connection with the proceedings to confirm the arbitration award. The memorandum enumerated $37,922 in costs. In confirming the arbitration award, the trial court denied this request for costs.

Following the bench trial, respondents submitted a memorandum of costs. Appellants objected that items totaling $23,269 were substantially identical to items that respondents had previously claimed as arbitration costs. The items in question included filing fees for several pleadings, ordinary witness costs, and expert fees.

On this matter, respondents submitted declarations indicating: (1) the items had been incurred in connection with the trial; (2) none of the items applied exclusively to the arbitration; (3) the trial and arbitration involved overlapping issues, and thus the items could have been recovered in connection with either proceeding; and (4) respondents would not have sought an award for the items had they recovered their costs in the arbitration proceeding. Respondents also submitted evidence that appellants had rejected settlement offers more favorable to them than the ultimate judgment, thereby entitling the trial court to award respondents their expert witness fees. (Code Civ. Proc., § 998, subd. (c)(1).) In our view, the declarations and other evidence is sufficient to support the items at issue.

Citing *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, appellants argue that in awarding these items, the trial court improperly invaded the arbitrator's determinations. We disagree. Respondents' evidence indicates that they would have incurred these costs in connection with the trial of their claims, regardless of whether the arbitration of appellants' claims had taken place. Accordingly, the items were properly incurred in the litigation of respondents' claims, even though they were also related to the arbitration. (Cf. *Siligo v. Castellucci* (1994) 21 Cal.App.4th 873, 879 [plaintiff's attorney fees incurred in defense of tort cross-claim may be awarded as costs under contractual

attorney fee provision covering litigation of contractual claims, given necessary connection between contractual claims and tort cross-claim].)

2. *Investigation Costs*

Appellants contend that the trial court improperly awarded $1,188 in investigation expenses. Code of Civil Procedure section 1033.5, subdivision (b)(2) provides that "[i]nvestigation expenses in preparing the case for trial" are not allowable as costs, "except when expressly authorized by law[.]"

Respondents submitted evidence that these investigation costs arose through attempts to serve witnesses who had been evading service. In view of this evidence, the costs were allowable under Code of Civil Procedure section 1033.5, subdivision (a)(4)(B), which permits the recovery of costs "incurred in effecting service, including, but not limited to, a stakeout or other means employed in locating the person to be served . . . ."

3. *Messenger Services*

Respondents challenge $1,415.13 in fees for messenger and courier services.

"Messenger fees are not expressly authorized by statute, but may be allowed in the discretion of the court. [Citations.]" (*Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 132.) Generally, items of cost consigned to the trial court's discretion are allowable only if they are "reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation." (Code Civ. Proc., § 1033.5, subd.(c)(2).) Thus, in *Ladas v. California State Auto. Assn.*, *supra*, 19 Cal.App.4th at page 776, the court held messenger fees were properly awarded as costs because there was sufficient evidence that they "were related to trial preparation, and were incurred for such matters as filing documents with the court, complying with appellants' document demands, and transporting exhibits to and from the courtroom."

Here, respondents submitted declarations stating that messenger fees had been incurred for document delivery "immediately prior to the July 2000 trial." However, as appellants observe, the receipts for $1,415.13 in requested messenger fees do not meet this description. These receipts concern the filing of pretrial pleadings primarily in 1999 and early 2000, including requests for injunctive relief and an opposition to a demurrer by appellants, and the transportation of subpoenas and other documents immediately prior to the bench trial in January 2001.

Nonetheless, respondents presented evidence that the injunctive relief was intended to prevent damage to the Reeves firm, and the receipts themselves indicate that the other documents were reasonably related to the prosecution of respondents' claims. We therefore decline to find an abuse of discretion on this matter.

4. *Remaining Cost Items*

Finally, appellants challenge $5,187.28 in costs for items involving computer expenses, transcripts, copying, postage, telephone expenses, parking fees, attorney lunches and other matters.

Code of Civil Procedure section 1033.5, subdivision (a)(12) permits the trial court to award as costs expenses for "[m]odels and blowups of exhibits and photocopies of exhibits . . . if they were reasonably helpful to aid the trier of fact." However, as we have explained (see pt. D.2., *ante*), it generally bars an award of costs for investigation expenses related to trial. In addition, it precludes awards for "[p]ostage, telephone, and photocopying charges, except for exhibits," as well as for "[t]ranscripts of court proceedings not ordered by the court," absent express statutory authorization. (§ 1033.5, subds. (b)(3), (b)(5).) Finally, it limits awards for food and lodging to expenses incurred by jurors. (§ 1033.5, subd. (a)(2).) Thus, the trial court may not award as costs expenses for attorney lunches related to depositions. (*Ladas v. California State Auto. Assn.*, *supra*, 19 Cal.App.4th at pp. 774-775.)

Regarding the challenged items, respondents submitted evidence that they incurred $3,093.69 in expenses related to the production and copying of trial exhibits. Moreover, the challenged items include a messenger charge of $138.50 that appellants otherwise concede is a proper item of costs. The trial court therefore did not err in awarding these items as costs.

By contrast, nothing indicates that the remaining items totaling $1,955.09 were authorized costs, and respondents argue only that they were properly awarded as discretionary costs. However, the trial court may not award discretionary costs for items expressly enumerated as "not allowable as costs . . . ." (§ 1033.5, subds. (b), (c)(4); see *Ladas v. California State Auto. Assn.*, *supra*, 19 Cal.App.4th at p. 776.) Because the remaining items either fall within proscribed categories or are unsupported by evidence that they were reasonably necessary to the litigation, the trial court erred in awarding them. Accordingly, the costs award must be reduced by $1,955.09.

E. *Stay*

Finally, appellants contend that the trial court improperly stayed enforcement of the arbitration award judgment pending the resolution of this appeal.

Section 918.5 of the Code of Civil Procedure provides: "(a) The trial court may, in its discretion, stay the enforcement of a judgment or order if the judgment debtor has another action pending on a disputed claim against the judgment creditor. [¶] (b) In exercising its discretion under this section, the court shall consider all of the following: [¶] (1) The likelihood of the judgment debtor prevailing in the other action. [¶] (2) The amount of the judgment of the judgment creditor as compared to the amount of the probable recovery of the judgment debtor in the action on the disputed claim. [¶] The financial ability of the judgment creditor to satisfy the judgment if a judgment is rendered against the judgment creditor in the action on the disputed claim."

As the court explained in *Airfloor Co. of California, Inc. v. Regents of University of California* (1979) 97 Cal.App.3d 739, 741, the rationale for this rule is based on

equitable principles. If the trial court lacked the power to stay the enforcement of judgment in favor of a potentially impecunious party pending the resolution of another action against this party, there would be inequitable results: such a situation would "unfairly deprive[] the judgment debtor of not only his right of set-off, but with an impecunious creditor, the right to receive any recovery whatsoever." (*Ibid*.)

Here, the trial court stayed the enforcement of the arbitration award judgment "until the Appellate Court has made a ruling regarding any appeal to be filed." In imposing the stay, the trial court indicated that it had considered all the factors enumerated above.

We do not find error. Appellants' sole contention is that the trial court lacked sufficient evidence of their financial condition. However, during trial, the trial court was presented with evidence that H&G is a relatively new firm, that Hanlon, its principal attorney, had signed a promissory note for $25,000 from the Reeves firm to buy a new house, and that the Reeves firm subsequently cancelled this note without demanding repayment. In view of this evidence, the trial court could reasonably conclude that there was a significant risk that appellants could not satisfy the $150,000 judgment against them.

DISPOSITION

The order denying the motion to tax costs is reversed solely to the extent that it awards respondents the items valued at $1,955.09 and identified in part D.4, *supra*, and the matter is remanded to the trial court to vacate this order and enter a new order regarding costs in accordance with this opinion. The judgment, orders of the trial court, and stay are otherwise affirmed in all respects. The parties are to bear their own costs.

CERTIFIED FOR PARTIAL PUBLICATION

CURRY, J.

We concur:

VOGEL (C.S.), P.J.

EPSTEIN, J.