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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION THREE

KIET NGUYEN,

Plaintiff and Appellant,

v.

VICTOR SMITH, et al.,

Defendants and Respondents.

A129968

(Alameda County  
Super. Ct. No. RG08404170)

After the dismissal of the complaint against him, defendant Victor Smith was awarded attorney fees of \$278,015, which sum was incorporated in an amended judgment filed September 14, 2010.<sup>1</sup> Plaintiff challenges the award on various grounds, none of which is meritorious. Accordingly, we affirm.

**FACTS<sup>2</sup>**

**A. Background**

Plaintiff Kiet Nguyen (hereafter Nguyen), as “an individual,” and “on behalf of” the Nguyen Family trust (hereafter the trust), and “as members of” CDS Engineering,

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<sup>1</sup> We deem Nguyen’s October 13, 2010, notice of appeal from an August 17, 2010, order that awarded attorney fees and costs, to encompass the September 14, 2010, amended judgment, which dismissed the complaint against Victor Smith, and incorporated the award of attorney fees and costs. We dismiss the appeal from the August 17, 2010, order, which is superseded by the September 14, 2010, amended judgment. Although the amended judgment does not resolve Nguyen’s claims against all named defendants, he may appeal from the amended judgment, which is final as to his claims against Victor Smith. (See *Desaigoudar v. Meyercord* (2003) 108 Cal.App.4th 173, 182, fn. 2.)

<sup>2</sup> We recite only those facts that are relevant to the issues raised on this appeal.

LLC, CDS Group Acquisition, LLC, and Rave Precision, LLC, sued Victor Smith (Smith), “individually,” and “as [a] member of” CDS Engineering, LLC, CDS Group Acquisition [and] Rave Precision, LLC,<sup>3</sup> seeking repayment of a \$1.5 million promissory note, plus interest, costs and attorney fees. The written note was between defendants CDS Engineering, LLC, CDS Group Acquisition, LLC, and Rave Precision, LLC, as “Borrowers,” and the trust, as lender. Smith signed the note as “President” of the defendant limited liability companies. Nguyen sought to hold Smith liable both as an individual and as the alter ego of the limited liability company entities. The verified complaint included four causes of action for breach of contract of a promissory note, a common count, conversion, and fraud.

After discovery, the trial court granted Smith’s motion for summary judgment dismissing the complaint against him. The court found: “There is no triable issue of material fact that . . . Smith is not a signatory of the promissory note at issue. [Citation.] It is undisputed that the promissory note was signed by [Smith] as President and on behalf of the corporate entities. [Citation.] [Smith] did not sign the promissory note in any individual capacity. [Citation.] [¶] Further, the Court finds that Plaintiff has submitted insufficient evidence to raise a triable issue as to whether [d]efendants CDS Engineering, LLC, CDS Group Acquisition, LLC and Rave Precision LLC are the alter egos of [Smith]. [Citations.] Each cause of action in the Complaint appears to be based on this underlying fact. Thus, [Nguyen] is unable to raise a triable issue as to whether . . . Smith is legally liable . . . for payment on the promissory note.” The trial court entered judgment in favor of Smith, and, ruled that, “[a]s the prevailing party, [Smith] shall recover attorney<sup>[1]</sup>s fees and costs in this proceeding according to proof.”

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<sup>3</sup> Nguyen also named as a defendant Victor Smith’s father, Van Smith, individually and as a member and Chief Executive Officer of the named defendant limited liability companies. On April 22, 2010, the complaint against Van Smith was dismissed without prejudice.

## **B. Smith's Motion for Attorney Fees<sup>4</sup>**

In his motion for attorney fees, Smith sought to recover \$278,015 in attorney fees for services provided by his counsel between August 15, 2008 and June 30, 2010. By his counsel's declaration, Smith indicated that he had incurred \$283,850 in legal fees defending the litigation against him personally (about 570 hours at \$500 per hour), and that Nguyen had paid \$5,835 in discovery sanctions, which left a net balance due of \$278,015 in legal fees. Smith also contended that although his counsel represented two other named defendants (CDS Group Acquisition, LLC and Rave Precision LLC), "virtually all legal services provided by [counsel] were rendered to defend Smith since the other two defendants never denied the existence of the Note or that the monies due thereunder had not been paid. Admittedly, plaintiffs did propound discovery to those other defendants, however, for the most part those discovery requests were identical to the ones propounded to Smith and did not entail any significant additional time to respond to them. Unlike the discovery [plaintiff] propounded, all of Plaintiff's motions were directed to Smith personally and only Smith filed the successful [motion for summary judgment] which is the basis for this fee request."

In opposition, Nguyen challenged the request for attorney fees on several grounds, including that attorney fees needed to be allocated as there were multiple defendants and there was no assertion that the fees were expended exclusively on behalf of Smith as an individual as opposed to Smith in his role in any of the defendant companies; and any attorney fees should be awarded only as against the trust, which was the beneficiary of the note, and not against Nguyen as an individual, as he would not have been entitled to recover attorney fees on an individual basis had he prevailed against Smith in the litigation.

In reply, Smith's counsel submitted a supplemental declaration confirming that he had kept contemporaneous time records that he had used to summarize the fees sought to

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<sup>4</sup> Smith also sought to recover costs in the amount of \$3,395.95, which was granted by the trial court. Because Nguyen does not challenge the award of costs, we do not further address the issue.

be recovered, and copies of the redacted bills sent to Smith were submitted to the court at his request. Smith also addressed Nguyen's personal liability and again addressed the allocation of fees.

After two hearings on the matter, the trial court found that the requested attorney fees were reasonable, noting that a large portion of counsel's time had been spent responding to Nguyen's failure to participate in discovery and repeated attempts to dismiss Smith from the case; and that the large number of hours spent on the matter did not seem to be "overworked in any fashion." The trial court also indicated it would review the documents submitted by counsel "to make sure that there's not any double accounting in this case" for attorney fees incurred by "other possible responsible defendants."

In its August 17, 2010, order, the trial court awarded Smith "against Plaintiffs and each of them," "reasonable attorneys' fees in the amount of \$278,015.00" and ordered "that the Plaintiffs are jointly and severally liable for payment of the fees and costs awarded to Smith herein." In its September 14, 2010, amended judgment, the trial court entered judgment in favor of Smith dismissing the complaint against him, and ruled that "[a]s the prevailing party, defendant Victor Smith shall recover from Plaintiffs Kiet Nguyen and the Nguyen Family Trust the sum of \$281,410.95 consisting of reasonable attorneys fees in the amount of \$278,015 and allowable costs of \$3,395.95. Plaintiffs Kiet Nguyen and the Nguyen Family Trust are jointly and severally liable for payment of the amount of this judgment. Pursuant to applicable law, Smith is entitled to recover the attorneys fees and costs he incurs to collect this judgment." Nguyen filed a timely appeal.

## **DISCUSSION**

### **I. Nguyen's Liability for Payment of Attorney Fees**

"On appeal, this court reviews a determination of the legal basis for an award of attorney fees de novo as a question of law." (*California Wholesale Material Supply, Inc. v. Norm Wilson & Sons, Inc.* (2002) 96 Cal.App.4th 598, 604.)

Initially, we conclude that Smith as the prevailing party was entitled to recover his attorney fees pursuant to Civil Code section 1717,<sup>5</sup> and the case law interpreting that statute. The note, which formed the basis of all claims against Smith, contained an attorney fees clause that read: “If this Note is placed in the hands of an attorney for collection, Borrowers shall pay all costs incurred and reasonable attorneys’ fees for legal services in the collection effort, whether or not suit is brought or pursued.” Although Smith was not a “borrower,” as defined in the promissory note, Civil Code section 1717 has been interpreted “to . . . provide a reciprocal remedy for a nonsignatory defendant, sued on a contract as if he were a party to it, when a plaintiff would clearly be entitled to attorney’s fees should he prevail in enforcing the contractual obligation against the defendant.” (*Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 128.) In this case, Nguyen sought to hold Smith personally liable on all causes of action based on an assertion that Smith was the alter ego of the defendants limited liability companies. Had Nguyen prevailed on his claim, Smith would have been liable on the promissory note and subject to the attorney fees clause in the promissory note. Because Smith “would have been liable” for attorney fees pursuant to the attorney fees clause had Nguyen prevailed, Smith may recover attorney fees now that he has prevailed in the litigation. (*Id.* at p. 129.)

The question raised by Nguyen is whether he can be held personally liable for the attorney fees awarded to Smith. The amended judgment incorporating the award of attorney fees was entered against both Nguyen and the trust. However, a trust is merely “ ‘a fiduciary relationship with respect to property.’ ” (*Ziegler v. Nickel* (1998) 64 Cal.App.4th 545, 548.) Because a trust cannot sue or be sued (*Presta v. Tepper* (2009) 179 Cal.App.4th 909, 914), “[a]s a general rule, the trustee is the real party in interest with standing to sue and defend on the trust’s behalf. [Citations.]” (*Estate of*

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<sup>5</sup> Civil Code section 1717, subdivision (a), reads, in pertinent part: “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 . . . shall be entitled to reasonable attorney’s fees in addition to other costs.”

*Bowles* (2008) 169 Cal.App.4th 684, 691.) Also, the trust, which was not a named party to the litigation, is not a “person against whom a judgment” can be rendered by the court. (Code Civ. Proc., §§ 680.250 [judgment debtor is “the person against whom a judgment is rendered”], 680.280 [trust is not included in definition of person deemed a judgment creditor].) Consequently, the amended judgment against the trust is without legal effect.

Nevertheless, the amended judgment was properly entered against Nguyen—a party to the litigation and a proper judgment debtor. We see no relevance to the fact that Nguyen filed his lawsuit as an individual as well as in his capacity as trustee of the trust. Because legal title to the note was vested in Nguyen, it was not necessary for him “to state in the complaint the means by which [he] acquired [the note], and so far as concerns [Smith] [Nguyen] is the real party in interest and may sue in his own name. [Citations.]” (*McKoin v. Rosefelt* (1944) 66 Cal.App.2d 757, 768-769.) In the Restatement Second of Trusts, section 280, it is stated: “The trustee can maintain such actions at law or suits in equity or other proceedings against a third person as he could maintain if he held the trust property free of trust.”<sup>6</sup> Thus, a trustee “can proceed in the action as though he were the owner of the claim which he is enforcing. If he does describe himself as trustee the description is treated as surplusage.” (*Id.*, com. h.)

Contrary to Nguyen’s contention, “the fact that trustees act *as individuals* when carrying out trust business is illustrated by *Nicholson v. Fazeli* (2003) 113 Cal.App.4th 1091, a malicious prosecution case. There, the court concluded that trustees of a trust,

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<sup>6</sup> Consequently, Nguyen’s reliance on *Leach v. Home Savings & Loan Assn.* (1986) 185 Cal.App.3d 1295, is misplaced. In that case, a plaintiff beneficiary of a testamentary trust sought to remove a cloud on title to real property that had been encumbered by contractual loans secured by promissory notes and executed by the trustee. (*Id.* at pp. 1299-1300.) The promissory notes contained an attorney fee clause in favor of the lenders. (*Id.* at pp. 1304-1305.) Although the lenders successfully defended against the litigation, the appellate court upheld the trial court’s denial of their request for attorney fees on the ground that the loan contracts and promissory notes had been executed by the trustee, not plaintiff beneficiary; and as a plaintiff who was not a signatory to the contracts and promissory notes, the beneficiary would have no independent right to recover fees under the attorney fee clause in those documents. (*Id.* at p. 1307.) In this case, however, Nguyen is the actual party to the note as the trust “is not an entity separate from its trustees.” (*Powers v. Ashton* (1975) 45 Cal.App.3d 783, 787.)

who had filed an allegedly malicious cross-complaint against plaintiff, were not immune from liability as individuals: ‘Polad and Piruz Fazeli assert that they cannot be held liable because their cross-complaint was brought solely in their capacity as trustees of the Trust. We disagree. “[T]he trustee, rather than the trust, is the real party in interest in litigation involving trust property.” [Citations.] Since the cross-complaint was “litigation involving trust property,” the trustees, Polad and Piruz Fazeli, were parties to that litigation and therefore could be held liable for malicious prosecution of the cross-complaint. Whether the Trust must indemnify them is an issue not before us.’ (*Id.* at pp. 1102–1103.)” (*Presta v. Tepper, supra*, 179 Cal.App.4th at pp. 914-915.)

Pertinent to the issue before us in this case, Nguyen pursued a lawsuit against Smith involving trust property. The amended judgment entered against Nguyen will permit Smith to recover his attorney fees from any assets in the trust. Whether the trust will have to indemnify Nguyen if Smith successfully recovers any portion of his attorney fees from Nguyen’s personal assets is an issue that is not before us on this appeal. (See Cal. Law Revision Com. com., 54A West’s Ann. Prob. Code (2011 ed.) foll. § 18005, p. 385 [“[w]here judgment is entered against the trustee individually, the question of the trustee’s right to reimbursement may be settled . . . in a separate proceeding in the probate court”]; see also Prob. Code, §§ 15684 (repayment for expenditures) & 18005 [“[t]he question of liability as between the trust estate and the trustee personally may be determined in a proceeding under Section 17200”].)<sup>7</sup>

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<sup>7</sup> In light of our determination, we need not address the parties’ other contentions challenging Nguyen’s personal liability for the award of attorney fees. Additionally, Smith filed a motion to augment the record on appeal to include a copy of Nguyen’s request for entry of default against defendant “Rave Precision Inc.,” which default was entered by the clerk as requested on April 26, 2011. Nguyen’s request for entry of default was vacated and set aside and the default was set aside by the superior court on its own motion on May 18, 2011. On June 7, 2011, we construed Smith’s motion as a request for judicial notice and deferred consideration of the matter to this time. In his request, Smith argues that Nguyen’s act of taking a default against “Rave Precision Inc.” demonstrates that Nguyen should be held personally liable for Smith’s attorney fees. We now deny Smith’s request for judicial notice because our consideration of Nguyen’s act of taking a default against “Rave Precision Inc.” is not necessary to resolve this appeal.

## II. Award of Attorney Fees

Nguyen challenges the award of attorney fees on the ground that the trial court failed to allocate fees attributable to work done for defendants, other than Smith, and for causes of action other than breach of contract. In support of his argument, Nguyen asserts that “[a]lthough there may have been some interrelatedness” between the four causes of action in the complaint, “it stretches credulity to believe that virtually all of the time billed by [Smith’s] counsel could somehow be linked to the contract cause of action and therefore recoverable.” Nguyen additionally argues that despite Smith’s assertion that his counsel’s fees excluded time devoted specifically and uniquely to the defendant limited liability companies, no amount of time or fees was ever disclosed as being excluded from the attorney fees motion. We conclude Nguyen’s contentions are unavailing.

The trial court’s award of attorney fees is reviewed for an abuse of discretion. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095.) “The ‘experienced trial judge is the best judge of the value of professional services rendered in his court, and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong.’ [Citations.]” (*Serrano v. Priest* (1977) 20 Cal.3d 25, 49.) In this case, we cannot conclude the trial court was clearly wrong.

Unlike the situation in *Ajaxo Inc. v. E\*Trade Group Inc.* (2005) 135 Cal.App.4th 21, 65, cited by Nguyen, in this case Smith submitted evidence indicating his counsel’s qualifications and experience to support the requested billing rate *and* the details of the services provided on behalf of Smith. We see no reason to set aside the trial court’s implicit acceptance of counsel’s assertion that the services for which fees were sought on behalf of Smith excluded those services that related solely to defending the defendant limited liability companies. We also see no reason to disturb the trial court’s implicit finding that all of the causes of action against Smith were sufficiently interrelated to justify a fee award without allocating fees related only to the breach of contract cause of action. (*Reynolds Metals Co. v. Alperson, supra*, 25 Cal.3d at pp. 129-130 [attorney fees

did not need to be apportioned when incurred for representation on an alter ego issue common to both a cause of action in which fees are proper and one in which they are not allowed].)<sup>8</sup>

**DISPOSITION**

The appeal from the order filed August 17, 2010, is dismissed. The amended judgment filed September 14, 2010, is affirmed. Victor Smith is awarded costs on this appeal.

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McGuiness, P.J.

We concur:

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Pollak, J.

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Jenkins, J.

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<sup>8</sup> We express no opinion on Smith's claim that he is entitled to an award of attorney fees for defending this appeal. However, he may pursue his request for such fees in the trial court, which shall determine, in the first instance, his entitlement to such fees and the amount of such fees, if appropriate.