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

DEBORAH ANNE MARCHI-FRIEL,
Plaintiff and Appellant,
v.
ROBERT RAGO,
Defendant and Respondent.

A130125
(San Francisco City & County
Super. Ct. No. CGC-06-454367)

Appellant Deborah Anne Marchi-Friel¹ prevailed at trial, but her posttrial requests for attorney fees were denied. She appeals, contending that the trial court erred in concluding that these fees were unauthorized by various statutes. (See Code Civ. Proc.,² §§ 871.5, 2033.420; Civ. Code, § 1717.) We affirm the trial court's denial order.

I. FACTS³

Appellant Deborah Anne Marchi-Friel owned a residence on Yerba Buena Avenue in San Francisco for many years. In 2003, she did not pay certain mortgage payments and other amounts due. By January 2004, the property was encumbered by a \$395,000 mortgage evidenced by a deed of trust in favor of Downey Savings and Loan (Downey);

¹ By April 2010, Marchi-Friel had changed her name to Vanessa Deborah Marchi. For convenience, we refer to her by the name she used at the time this action was filed.

² All statutory references are to the Code of Civil Procedure unless otherwise indicated.

³ The facts relating to the underlying judgment are taken from the trial court's February 2010 statement of decision. The appeals from the resulting March 2010 judgment were dismissed by order in October 2010, rendering the judgment final.

several judgment, tax and utility liens; and a lis pendens filed by Charles Friel—Marchi-Friel's former spouse—pursuant to a marital settlement agreement. She entered into an agreement to sell the property to Jon Ridenhour, who sued Marchi-Friel and filed his own lis pendens against the property after she reneged on the sale. Soon, Downey began foreclosure proceedings, further complicating matters.

Marchi-Friel turned for help to respondent Robert Rago, another former spouse. Rago agreed to repay some of Marchi-Friel's loans, medical fees and legal expenses. In exchange, Marchi-Friel agreed to repay Rago when her financial situation improved or if she sold or refinanced the Yerba Buena property. They agreed that he would advance her funds to prevent foreclosure and to improve the house for resale.

Marchi-Friel executed a May 2004 promissory note, purporting to secure a loan of as much as \$700,000. In fact, there was no accompanying loan agreement. Rago did not sign the promissory note, nor did he secure financing or lend Marchi-Friel any money pursuant to it. He recorded a deed of trust against the Yerba Buena property for \$700,000.

In July 2004, Downey sought to foreclose against the property and Ridenhour sued to enforce the sales agreement. Ridenhour named Rago as a party to his action. In November 2004, the Ridenhour suit was settled for \$5,000 cash and a \$170,000 promissory note and deed of trust against the property, subordinate only to the Downey first deed of trust. Marchi-Friel executed a marital settlement agreement giving Charles Friel a \$243,000 interest in the property. Downey also agreed not to foreclose on the property in exchange for Rago's \$23,719 cash payment.

Marchi-Friel and Rago tried to refinance the property. Marchi-Friel agreed to give Rago \$50,000 for the proceeds of any refinance that they could agree on. To facilitate the refinance, Marchi-Friel agreed to transfer title to the property to Rago, who had a better credit rating. In November 2004, Marchi-Friel signed two more promissory notes in Rago's favor for \$200,000 and \$25,000. These notes were to represent the anticipated cost of improving the property after the refinance was approved and the amount that Rago advanced to prevent foreclosure. Each contained a clause providing that if Marchi-

Friel failed to pay an amount due under the notes, Rago was entitled to recover attorney fees he incurred “in collecting any sum due on this Note or otherwise enforcing any of its rights hereunder.” The related deeds of trust were never recorded and Rago never attempted to collect on these promissory notes.

In January 2005, Marchi-Friel signed and had notarized a grant deed, conveying the Yerba Buena property to Rago. Rago recorded it. Marchi-Friel continued to live at the residence, so she agreed to pay Rago \$3,000 per month to cover the cost of the mortgage. She also agreed that if she failed to make these payments, Rago had the right to sell the house and that she would cooperate with the sale. She advised Downey that Rago was authorized to assume her first deed of trust and related promissory note, in an informal loan assumption.

By June 2005, Marchi-Friel had refused to agree to a refinance, refused to make the Ridenhour settlement payments, failed to cooperate on the assumption of the Downey deed of trust and failed to pay him the rent she owed him, even after that rent was reduced. Rago did not refinance the property. Instead, he advised Marchi-Friel that he intended to sell it. He entered into a sales agreement with Peter Naughton, which Marchi-Friel tried to prevent from completion. Naughton sued Rago for breach of the purchase agreement, resulting in a \$30,000 settlement payment. In July 2006, Rago evicted Marchi-Friel from the Yerba Buena property, after which he repaired and improved it.

Marchi-Friel filed action against Rago in July 2006, seeking to cancel the grant deed, deeds of trust and promissory notes. Until a few days before the filing, she occupied the Yerba Buena residence.

By October 2008, Marchi-Friel’s fourth amended complaint alleged two fraud claims, and causes of action for constructive trust, cancellation instruments, unfair business practices and declaratory relief. Marchi-Friel alleged that Rago fraudulently induced her to execute the grant deed as a means of assisting her to refinance the property.

Jury trial on the fraud claims was severed from the other issues in the case, which were tried to the court in 2009. An expert witness opined that the Yerba Buena property had a fair market value of \$1,150,000 in January 2009. At the time of trial, Rago was renting out the house for \$1,800 per month. Rago offered evidence that he made more than \$280,000 in improvements to the Yerba Buena residence. From 2004-2008, Rago alleged that he incurred \$195,207 in costs including taxes, insurance, utilities, and mortgage payments. He claimed to have incurred nearly \$100,000 in legal fees, to have paid \$65,000 in settlements, and to have provided \$202,000 in cash, motor vehicles and commissions to Marchi-Friel in order to release his secured interest in the property, which he valued at \$243,000.

In a February 2010 statement of decision, the trial court established a constructive trust giving title and possession of the property to Marchi-Friel. It ruled that the terms of the agreement between the parties required that Rago refinance the property before selling it. Once Rago failed to refinance, Marchi-Friel's duty to perform under the contract was terminated. Her transfer of title to Rago then became voidable. The grant deed was cancelled. The trial court also cancelled the \$200,000 promissory note and deed of trust, but an equitable lien in that amount was established against the property for improvements Rago made to it. The \$25,000 promissory note and related deed of trust were also cancelled, but another equitable lien was established in the amount of \$23,719—the actual amount Rago paid to prevent Downey from foreclosing against the property. The \$700,000 promissory note and deed of trust were also cancelled for lack of consideration and because they were conditioned on Rago's refinance of the property, which he failed to obtain. The trial court denied Marchi-Friel relief on her unfair competition law and declaratory judgment causes of action, deeming the relief granted to her under the other causes of action to be sufficient. It found no basis for Marchi-Friel's allegations of fraud in Rago's part.⁴ In all, Rago was given a \$223,719 equitable lien against the property.

⁴ Marchi-Friel dismissed the two fraud causes of action in March 2010.

In March 2010, the trial court’s judgment on the remaining causes of action was filed, consistent with its statement of decision. The grant deed, the promissory notes and the deeds of trust were all cancelled. Despite the judgment giving Marchi-Friel possession of the Yerba Buena property, Rago had to be evicted from it.

Rago and Marchi-Friel each moved for attorney fees. A hearing was conducted on the motions in June 2010. In August 2010, the trial court—finding that Marchi-Friel was the prevailing party—denied both parties’ motions for attorney fees.⁵

II. STANDARD OF REVIEW

Marchi-Friel contends that the trial court erred when denying her attorney fees, citing three statutory grounds that she argues would support an award. (§§ 871.5, 2033.420; Civ. Code, § 1717.) Initially, the parties disagree about the standard of review we should apply to the issues posed on appeal. Marchi-Friel argues that we must use our independent judgment on appeal, while Rago contends that we must apply a deferential abuse of discretion standard.

Generally, an order granting or denying an award of attorney fees is reviewed for an abuse of discretion. However, when the issue posed on appeal is whether the statutory criteria for an attorney fees award has been satisfied, the proper statutory construction poses a question of law for us to determine anew on appeal. (*Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1213; *Carver v. Chevron U.S.A., Inc.* (2002) 97 Cal.App.4th 132, 142; see Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2011) ¶¶ 8:94.2 to 8.94.4, pp. 8-43 to 8-45.) Thus, our standard of review turns on the issues raised in each of Marchi-Friel’s three claims of error on appeal.

III. SECTION 871.5

On the merits of her appeal, Marchi-Friel first contends that the trial court erred by denying her motion for attorney fees and expert witness costs pursuant to section 871.5.

⁵ In her reply brief, Marchi-Friel contends that Rago’s brief fails to support its factual assertions with record citations and, in some instances, miscites the record. (See Cal. Rules of Court, rule 8.204(a)(1)(C).) As we rely on the record for our understanding of the underlying facts of this case, we disregard any references to facts outside that record. (See *id.*, rule 8.204(e)(2)(C).)

A person who makes an improvement to land in good faith under the mistaken belief that he or she is the owner of that land is a good faith improver. (§ 871.1, subd. (a).) A good faith improver may file an action or cross-action to recover the value of those improvements. (§ 871.3, subd. (a).) When a good faith improver action or cross-action has been brought pursuant to section 871.3, the trial court balances the rights and equities of both the good faith improver and the property owner. It seeks both to avoid unjust enrichment of the owner and to protect that owner against pecuniary loss. As part of its efforts to avoid pecuniary loss to the owner, the trial court must “take into consideration” the expenses that the owner has incurred in that action, including reasonable attorney fees. (§ 871.5.)

In its statement of decision on the attorney fees issues, the trial court found that this provision was inapplicable, because Marchi-Friel did not bring a complaint or cross-complaint pursuant to section 871.3. The statement of decision on the underlying judgment cited the good faith improver law when it cancelled Rago’s deeds of trust, promissory notes and grant deed and granted him an equitable lien to compensate him for \$200,000 he spent on improvements and \$23,719 he paid to prevent Downey from foreclosing on Marchi-Friel. The trial court also denied other relief that Rago sought because he failed to seek affirmative relief by cross-complaint.

We conduct a de novo review of whether the statutory basis for an attorney fees award was met pursuant to section 871.5. (*Conservatorship of Whitley, supra*, 50 Cal.4th at p. 1213; *Carver v. Chevron U.S.A., Inc., supra*, 97 Cal.App.4th at p. 142.) Marchi-Friel contends that an award of attorney fees under this provision was required, despite the fact that Rago did not file a good faith improver action or cross-action. A key case that she cites in support of this contention is clearly distinguishable, because in that matter the good faith improver filed a cross-action. (See *Tremper v. Quinones* (2004) 115 Cal.App.4th 944, 946.) In fact, she cites no case in which a good faith improver action or cross-action was not filed, but attorney fees were awarded under section 871.5.

As we read the statute, the filing of a good faith improver action or cross-action pursuant to section 871.3 is a prerequisite to a section 871.5 attorney fees award.

(§ 871.5.) Rago did not file a cross-action under section 871.3. As Marchi-Friel sought equitable relief, Rago asked the trial court to use its equitable powers to give him a lien for the cost of improvements to the Yerba Buena property. The trial court allowed him to recover \$200,000 attributable to those improvements as part of his equitable lien. Rago did not obtain this award by filing a section 871.3 cross-action. Thus, as a matter of law, Marchi-Friel was not entitled to an attorney fees award under section 871.5.⁶

IV. CIVIL CODE SECTION 1717

Marchi-Friel also contends that Civil Code section 1717 entitled her to an award of attorney fees because the cancelled promissory notes contained attorney fees clauses, she was the prevailing party, and the case was one “ ‘on a contract’ ” within the meaning of that statute. In an action on a contract, when the contract specifically provides that attorney fees and costs incurred to enforce that contract shall be awarded to one of the parties or to the prevailing party, that party who actually prevails on the contract shall be entitled to reasonable attorney fees in addition to other costs. (Civ. Code, § 1717, subd. (a).) The trial court determines who is the prevailing party. (*Id.*, subd. (b)(1).)

The trial court found Marchi-Friel to be the prevailing party. The November 2004 promissory notes contained clauses providing for attorney fees when incurred “by the holder in collecting any sum due on this Note or otherwise enforcing any of its rights hereunder.” However, the trial court found that Rago did not seek to collect on any of the promissory notes Marchi-Friel signed. It found that these promissory notes were not at issue in the case. Marchi-Friel’s claim was that because Rago obtained title to her property by fraud, the grant deed should be cancelled and the property returned to her. Once the trial court cancelled the deed, it also cancelled the promissory notes out of an abundance of caution to prevent any future litigation about them between these contentious parties. As the promissory notes were not at issue in the case, the trial court

⁶ We also find Marchi-Friel’s contention that the trial court had equitable authority to give her attorney fees despite the statute’s requirement of a pleading to be unavailing. The record satisfies us that the trial court did not believe that an attorney fees award would serve equity.

concluded that the attorney fees clauses contained in those notes could not serve as a basis for an attorney fees award to either party.

Marchi-Friel contends that the trial court misconstrued this statute. Her right to an attorney fees award pursuant to Civil Code section 1717 turns on the proper construction of that statute, posing a question of law for us to determine anew on appeal.

(*Conservatorship of Whitley*, *supra*, 50 Cal.4th at p. 1213; *Carver v. Chevron U.S.A., Inc.*, *supra*, 97 Cal.App.4th at p. 142.)

In order to prevail on appeal, Marchi-Friel must establish that the underlying legal action was based on the promissory notes. (Civ. Code, § 1717.) Whether an action is “on a contract” within the meaning of Civil Code section 1717 depends on the nature of the cause of action. (*Kachlon v. Markowitz* (2008) 168 Cal.App.4th 316, 347.) The statutory term “ ‘on a contract’ ” is construed liberally. (*Turner v. Schultz* (2009) 175 Cal.App.4th 974, 979.) The statute provides for an award of attorney fees to the extent that the action in fact is one to enforce or avoid enforcement of that contract. (*Id.* at p. 980.) An action grounded in tort is not one “on a contract” within the meaning of section 1717 of the Civil Code. (See *Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 129.)

Marchi-Friel asked the trial court to cancel the promissory notes. However, the trial court found that the underlying action did not turn on the promissory notes, but was focused on whether Rago fraudulently obtained a *grant deed* from Marchi-Friel. This is consistent with Marchi-Friel’s position at trial. The parties did not contest the validity of the promissory notes. Rago did not attempt to enforce the promissory notes or to collect on them. Although the trial court ultimately cancelled them as Marchi-Friel asked, it did so in a manner consistent with its conclusion that the promissory notes were not central to the case, but were tangential to it. Under these circumstances, we are satisfied that the trial court properly concluded that Marchi-Friel’s action was not grounded in the promissory notes, and as such, was not one “on a contract” for purposes of section 1717 of the Civil Code.

V. SECTION 2033.420

Finally, Marchi-Friel contends that section 2033.420 entitled her to an award of attorney fees. The trial court denied her motion for attorney fees under this provision, finding that Marchi-Friel failed to make a detailed factual showing of the statute's applicability to her or of her entitlement to recover all her attorney fees and costs under its terms. At the hearing on the attorney fees motion, the trial court also stated that this attorney fees provision did not apply when an opposing party refused to admit matters that went to the heart of the action.

During discovery, parties are sometimes asked to admit the genuineness of documents or the truth of specified matters. (§ 2033.010.) In this matter, Marchi-Friel submitted requests for admissions to Rago, asking him to admit inter alia that he was not the owner of the Yerba Buena property and that Marchi-Friel was the owner of it. Rago denied these facts. Ultimately, Marchi-Friel was found to be the owner of the property.

If a party is asked to make an admission and fails to do so, and the party requesting the admission proves the genuineness or truth at a later trial, the party requesting the admission may ask the trial court for an order requiring the other party to pay reasonable expenses incurred in proving those facts, including reasonable attorney fees. (§ 2033.420, subd. (a).) The trial court may deny the requested order for expenses and attorney fees on various grounds, such as if the party failing to make the admission has reasonable grounds to believe that it would prevail on the matter. The trial court may also deny the order if it has good cause to do so. (*Id.*, subd. (b)(3)-(4).)

On appeal, Marchi-Friel argues that she was entitled to an award of attorney fees under section 2033.420. We disagree. Courts have interpreted this provision as vesting the trial court with discretion to determine whether a party is entitled to expenses. On appeal, we review the trial court's denial of attorney fees for an abuse of discretion. If the trial court's exercise of its discretion was reasonable, we must uphold it. (See *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1275-1276; *Stull v. Sparrow* (2001) 92 Cal.App.4th 860, 864 [former § 2033, subd. (o) [now § 2033.420]; *Wimberly v. Derby*

Cycle Corp. (1997) 56 Cal.App.4th 618, 637, fn. 10.) We perceive no abuse of discretion on the trial court's part. Marchi-Friel's motion for attorney fees was properly denied.⁷

The order is affirmed.

Reardon, J.

We concur:

Ruvolo, P.J.

Rivera, J.

⁷ In light of this conclusion, we necessarily reject Marchi-Friel's claim—either as a sanction or because she prevailed on appeal—that Rago should be ordered to pay her costs on appeal. (See Cal. Rules of Court, rules 8.276, 8.278.)