

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

AMY LYNN BAILLIE et al.,
Plaintiffs and Respondents,
v.
PROCESSING SOLUTIONS, LLC et al.,
Defendants and Appellants.

A130795 and A131921
(Alameda County
Super. Ct. No. RG 07327031)

In these consolidated appeals, defendants and appellants Processing Solutions, LLC et al., (collectively, Processing Solutions) appeal the trial court’s orders awarding attorney fees to plaintiffs and respondents Amy Lynn Baillie et al., (collectively, Baillie) under Civil Code, section 1717 (section 1717) for fees incurred by Baillie in opposing Processing Solutions’ motion to compel arbitration and in responding to Processing Solutions’ petition for certiorari in the high court. Processing Solutions contends that the trial court erred by awarding attorney fees under section 1717 prior to a final resolution of the case and a determination of the prevailing party at that time. We agree, and accordingly, we reverse the trial court’s attorney fee orders.

FACTUAL AND PROCEDURAL BACKGROUND

The facts in brief are as follows:¹ “Defendant Processing Solutions, LLC is a Delaware company that acts as a servicing company for defendant MTE Financial Services,

¹ Facts are not in dispute on this appeal so we reiterate only key background facts culled from the opinion we issued on the first appeal in this case, *Baillie v. Processing*

doing business as Instant Cash USA (MTE). Processing Solutions assists MTE in marketing loans over the internet and processes loan applications submitted electronically to MTE online. [¶] In early July 2006, [Amy Baillie] submitted an application via the internet for a short-term loan in the amount of \$300 from MTE.” (*Baillie I, supra*, at p. *1.) The terms of the Loan Note and Disclosure (Note) issued to and accepted by Baillie required that she “repay the \$300 advanced plus a \$90 finance charge in one single payment due on July 14, 2006, unless the loan was renewed. If the loan was renewed, the borrower paid only the finance charge of \$90 on July 14, 2006, and would accrue a new finance charge of \$90. On the fifth renewal of the loan, and every renewal thereafter, the borrower had to pay the \$90 finance charge and pay the loan down by \$50, to continue until the loan was paid in full. The Note discloses that the annual percentage rate under the terms of the loan agreement is 1,216.667 percent and authorizes the lender to debit the borrower’s bank account automatically in order to collect payments due under the Note.” (*Ibid.*) Additionally, the Note contains a provision entitled “AGREEMENT TO ARBITRATE ALL DISPUTES.” Also, the Note contains a provision entitled “AGREEMENT NOT TO BRING OR JOIN OR PARTICIPATE IN CLASS ACTIONS,” which states in pertinent part, “You agree to the entry of injunctive relief to stop such a lawsuit or remove you as a participant in the suit. *You agree to pay the costs we incur, including our court costs and attorney’s fees, in seeking such relief.*” (*Baillie I, supra*, at pp. *1-2.)

“On August 13, 2007, [Baillie] filed her second amended complaint (SAC), a putative class action, against Processing Solutions, MTE and others. In the SAC, plaintiff alleged that between July 14, 2006 and December 1, 2006, defendants automatically debited a total of \$977 from her bank account and then transferred the Note to a debt collection agency reflecting an amount due of \$430. As a representative party on behalf of others similarly situated, plaintiff asserted causes of action for Usury and Unconscionable Lending, Injunctive Relief and Restitution pursuant to Business and Professions Code section 17200 et seq., Unjust Enrichment, and An Accounting.” (*Baillie I, supra*, at p. *2.) In March

Solutions, LLC (May 27, 2010, A125167) (2010 WL 2127000) (*Baillie I*). (2010 Cal.App. Unpub. Lexis 4069.)

2009, Processing Solutions filed a Notice of Motion and Motion for Stay Pending Arbitration. Subsequently, the trial court filed an order denying Processing Solutions' motion to compel arbitration on the grounds that the arbitration agreement was unconscionable, and Processing Solutions appealed. (See *ibid.*)

In *Baillie I*, we affirmed the trial court's denial of Processing Solutions' motion to compel arbitration. Relying principally on *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148 (*Discover Bank*), abrogated by *AT&T Mobility LLC v. Concepcion et ux.* (2011) 131 S.Ct. 1740 (*AT&T*), we affirmed the trial court's order on the grounds that the arbitration agreement at issue was unconscionable, in part because it was a contract of adhesion containing a class action waiver. (See *Baillie I, supra*, at pp. *5-7.) The California Supreme Court denied review in *Baillie I* on August 11, 2010 (2010 Cal. Lexis 7899). This court issued the remittitur on August 13, 2010. In January 2011, the United States Supreme Court denied Processing Solutions' petition for writ of certiorari. (*Processing Solutions, LLC et al. v. Baillie* (2011) 131 S.Ct. 1003, 2011 U.S. Lexis 726.) In April 2011, the high court issued its decision in *AT&T*.²

Following our decision in *Baillie I*, Baillie filed a motion in the trial court pursuant to section 1717 seeking costs and attorney fees incurred in opposing Processing Solutions' motion to compel arbitration. The trial court subsequently granted Baillie's motion, awarding Baillie \$119,775.00 in attorney fees and \$827.36 in costs. Notice of Entry of the trial court's order granting costs and attorney fees on the motion to compel arbitration was served on November 1, 2010, and Processing Solutions filed a timely notice of appeal of the trial court's fee order on December 29, 2010 (appeal No. A130795).

² Subsequently, relying on the high court's decision in *AT&T, supra*, Processing Solutions filed a renewed motion to compel arbitration in the trial court, which the trial court denied. Processing Solutions appealed the trial court's denial of its renewed motion to compel arbitration. In *Baillie v. Processing Solutions, LLC* (Sept. 21, 2011, A132713; 2011 WL 4378154; 2011 Cal.App. Unpub. Lexis 7157; *Baillie II*), we granted Baillie's motion to dismiss the appeal, concluding that Processing Solutions' renewed motion to compel arbitration, filed pursuant to Code of Civil Procedure, section 1008, subdivision (b), was a non-appealable order. (See *Baillie II, supra*, at p. *3.)

Thereafter, Baillie filed a “Motion for Supplemental Award of Reasonable Attorneys’ Fees and Costs (Re Arbitration),” seeking costs and attorney fees incurred in opposing Processing Solutions’ petition for certiorari in the high court and the motion to stay trial court proceedings pending the outcome on the petition for certiorari. The trial court granted Baillie’s motion for a supplemental award of costs and fees, awarding Baillie an additional \$28,300.00 in attorney fees and \$533.95 in costs. Notice of Entry of the court’s supplemental fee order was served on April 22, 2011, and Processing Solutions filed a timely notice of appeal of the court’s supplemental fee order on May 4, 2011 (Appeal No. 131921).³

DISCUSSION

The applicable standard of review on the issue before us is de novo: “ ‘On appeal this court reviews a determination of the legal basis for an award of attorney fees de novo as a question of law.’ [Citation.]” (*Butler-Rupp v. Lourdeaux* (2007) 154 Cal.App.4th 918, 923.)

Processing Solutions contends that the trial court erred by awarding prevailing party attorney fees pursuant to section 1717 in an ongoing action on the contract; according to Processing Solutions, contractual attorney fees under section 1717 should not be awarded until the underlying contract action is resolved. Baillie, however, counters that an award of attorney fees under section 1717 is not contingent on resolution of the parties’ substantive rights and that fees may be awarded to a party who successfully opposes a motion to compel arbitration, regardless of the final outcome in the underlying litigation.⁴ Based on the recent

³ We consolidated the appeals in an order dated May 17, 2011.

⁴ Baillie also contends that, irrespective of section 1717, she is entitled to attorney fees for arbitration proceedings pursuant to Code of Civil Procedure, section 1293.2 (section 1293.2) and section 1033.5 (section 1033.5). Section 1293.2 provides, “The court shall award costs upon any judicial proceeding under this title [Title 9 Arbitration of Part 3 Of Special Proceedings of a Civil Nature] as provided in Chapter 6 (commencing with Section 1021) of Title 14 of Part 2 of this code.” Section 1032 provides that “a prevailing party is entitled as a matter of right to recover costs in any action or proceeding.” (§1032, subd. (b).) Section 1033.5 provides that items allowed as costs under section 1032 includes attorney’s fees “when authorized by . . . Contract.” (§1033.5, subd. (a)(10)(A).) In turn,

decision issued by Division Five of this Court directly addressing this question, see *Frog Creek Partners, LLC, v. Vance Brown, Inc.* (2012) 206 Cal.App.4th 515 (*Frog Creek*), we agree with Processing Solutions, and, consequently, conclude that the trial court's attorney fee orders were issued in error.

In *Frog Creek*, two parties, Frog Creek Partners, LLC (Frog Creek) and Vance Brown, entered a construction contract with an arbitration clause and a separate attorney fee provision; subsequently a dispute arose and Frog Creek sued Brown for breach of contract and other causes of action. Brown petitioned to compel arbitration, his petition was denied and the appellate court affirmed. Subsequently, Brown filed a renewed petition to compel arbitration based on Frog Creek's version of the contract, prevailed on his petition on appeal, and the dispute was sent to arbitration. Brown obtained an arbitration award in his favor, including an award of attorney fees and costs, but the arbitrator declined to rule on whether attorney fees and costs might be awarded for litigation activity prior to arbitration. The trial court ruled on that issue; the trial court determined Frog Creek was the prevailing party on the initial petition to arbitrate, awarded Frog Creek \$125,000 for attorney fees incurred in the initial petition, including the first appeal, and denied Brown attorney fees incurred in the initial petition. Brown appealed the trial court's award of attorney fees to Frog Creek on the initial petition to arbitrate. (*Frog Creek, supra*, 206 Cal.App.4th at pp. 521-523.)

The appellate court in *Frog Creek* characterized the issue before it as follows: "Two parties enter into a contract with an arbitration clause and a separate attorney fee provision. A dispute arises, a lawsuit is filed, and the defendant petitions to compel arbitration. Under Civil Code section 1717, if the plaintiff defeats that petition, is it entitled to recover attorney fees, even if the plaintiff ultimately loses the substantive contractual dispute?" (*Frog Creek, supra*, 206 Cal.App.4th at p. 520.) The court held that "under Civil Code section 1717, there may only be one prevailing party entitled to attorney fees on a given contract in a

attorney's fees are "authorized by Contract" as provided under section 1717. Therefore, section 1033.5 does not confer a right to contractual attorney fees independent of section 1717. Accordingly, Baillie's contention fails.

given lawsuit.” (*Ibid.*) On that basis, the court reversed the trial court’s fee award, “which awarded attorney fees to both parties on the same contract in the same lawsuit” and on remand, directed the trial court to award Brown reasonable attorney fees for the proceedings on its first petition to compel arbitration. (*Ibid.*)

In arriving at its holding, the *Frog Creek* court began with section 1717, noting that it authorizes an award of attorney fees “ ‘in any action on a contract’ ” to “ ‘the party prevailing on the contract.’ ” (*Frog Creek, supra*, 206 Cal.App.4th at p. 523, fn. 5, and pp. 523-524.)⁵ The court noted the issue on appeal presented a “critical issue of statutory interpretation”—namely, whether Frog Creek’s success in defeating Brown’s initial petition to compel arbitration made Frog Creek “ ‘the party who recovered a greater relief in the action on the contract’ within the meaning of Civil Code section 1717, such that the trial court could award Frog Creek fees for prevailing on the petition and also award Brown fees for prevailing on the underlying contract claims.” (*Id.* at p. 524.) In resolving this issue of statutory interpretation, the court examined at length the legislative history behind the 1987 act amending section 1717 to provide a fee award to “the prevailing party.” The court concluded that in amending Civil Code section 1717 in 1987, the Legislature did not intend to deviate from the longstanding rule “that in any given lawsuit there can only be one prevailing party on a single contract for the purposes of an entitlement to attorney fees. [Citation.]” (*Id.* at p. 531.)⁶

⁵ “In *any action on a contract*, where the contract specifically provides that attorney’s fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party *who is determined to be the party prevailing on the contract*, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney’s fees in addition to other costs. (§1717, subd. (a) [italics added].)

⁶ Rather, the court concluded the Legislature intended “to provide guidance to the courts on the determination of the identity of the prevailing party where there are multiple contract claims or contract and noncontract claims. Section 1717 as amended in 1987, makes it clear that the party who obtains greater relief on the contract action is the prevailing party entitled to attorney fees under section 1717, regardless of whether another party also obtained lesser relief on the contract or greater relief on noncontractual claims.” (*Frog Creek, supra*, 206 Cal.App.4th at p. 531.)

The court next examined cases addressing attorney fees on arbitration petitions. Preliminarily, the court noted that in the absence of an existing contract action, a petition to compel arbitration under Code of Civil Procedure section 1281.2 commences an independent lawsuit to enforce the arbitration agreement; on the other hand, if there is an existing lawsuit involving the same underlying contractual dispute, the petition to compel arbitration must be filed *within* the existing suit. (*Frog Creek, supra*, 206 Cal.App.4th at p. 532.) Thus, where a petitioner succeeds on an independent petition to arbitrate, the lawsuit is not finally resolved and an award of attorney fees under section 1717 must await a determination of the prevailing party based on the substantive rights of the parties. (*Id.* at pp. 532-533, citing *Lachkar v. Lachkar* (1986) 182 Cal.App.3d 641, 648-649.) “On the other hand, when a party *defeats* an independent petition to compel arbitration, the action is terminated and the prevailing party on the petition is entitled to fees under Civil Code section 1717.” (*Frog Creek, supra*, 206 Cal.App.4th at p. 533, citing *Otay River Constructors v. San Diego Expressway* (2008) 158 Cal.App.4th 796, 800, 801.) Based on its review of the case law, the court concluded that a petition to compel arbitration filed in a pending lawsuit is not a “ ‘discrete action’ providing a basis for a Civil Code section 1717 attorney fee award, even though that could result in multiple prevailing parties on one contract in a given lawsuit” in contradiction to the intent of section 1717 reflected in its legislative history. (*Id.* at p. 537.)

Furthermore, whereas the *Frog Creek* court acknowledged the “distinctive characteristics” of a petition to compel arbitration — (1) it is “a preliminarily and analytically distinct proceeding in the lawsuit, and an order denying such a petition is separately appealable” and (2) if not for the existence of an ongoing action, the party seeking to enforce the arbitration agreement would have been able to file an independent action on the sole issue of arbitrability — it concluded that such distinctions are not “sufficient to justify treating a petition to compel arbitration filed in a pending lawsuit as a distinct action on the contract under Civil Code section 1717.” (*Frog Creek, supra*, 206 Cal.App.4th at p. 537.) On this point, the court reasoned that “even though a ruling on a petition to compel is appealable, had the Legislature intended to authorize a fee award in

that context, it could have done so expressly,” as it did under the anti-SLAPP statute. (*Frog Creek, supra*, 206 Cal.App.4th at pp. 537-538.) Also, the court stated “it is hardly unique that a petition to compel arbitration, though independent of the other contract claims in a lawsuit, must be filed in that suit,” noting, for example, the compulsory cross-complaint rule, under which “a defendant must assert in a cross-complaint all claims that arise ‘out of the same transaction, occurrence, or series of transactions or occurrences as the cause of action which the plaintiff alleges in his complaint.’ (Citations.)” (*Id.* at p. 538.)

We are persuaded by the reasoning of the *Frog Creek* court and concur in its holding that “under Civil Code section 1717, there may only be one prevailing party entitled to attorney fees on a given contract in a given lawsuit.” (*Frog Creek, supra*, 206 Cal.App.4th at p. 520.) The corollary of the *Frog Creek* holding is that an award of attorney fees to a party who prevails on a petition to compel arbitration—filed within an existing action on the contract—must await the trial court’s determination of the “prevailing party” as defined in section 1717. (See *id.* at pp. 532, 537.)

Applying *Frog Creek*’s rationale to the facts in this case, Baillie did not prevail on an independent action brought by Processing Solutions to compel arbitration under the Note (in which case Baillie would have been entitled to attorney fees). (Cf. *Otay River Constructors v. San Diego Expressway* (2008) 158 Cal.App.4th 796, 807 [where Otay filed an independent action to compel arbitration against Expressway on contract claims and the latter prevailed, Expressway was entitled to attorney fees under section 1717 because it obtained a “ ‘simple, unqualified win’ on the only contract claim at issue in the action – whether to compel arbitration under the Coordination Agreement”].) Rather, Baillie filed suit against Processing Solutions on the Note and, as part of that action, Processing Solutions moved to compel arbitration based on the arbitration provision in the Note. Baillie prevailed in that stage of the litigation because we affirmed the trial court’s denial of Processing Solutions’ motion to compel arbitration. However, if Baillie is awarded section 1717 attorney fees at this juncture on the grounds she prevailed on the motion to compel arbitration, and Processing Solutions subsequently prevails on the merits of Baillie’s underlying claims, the result would be two prevailing parties under section 1717 for

purposes of attorney fees. Such an outcome conflicts with the rule “that in any given lawsuit there can only be one prevailing party on a single contract for the purposes of an entitlement to attorney fees. [Citation.]” (*Frog Creek, supra*, 206 Cal.App.4th at p. 531.) Accordingly, the trial court’s attorney fee orders must be reversed.⁷

DISPOSITION

The trial court’s fee orders are reversed. Baillie shall bear costs on appeal.

Jenkins, J.

We concur:

McGuinness, P. J.

Siggins, J.

⁷ In reversing the trial court’s fee order under the rationale of *Frog Creek, supra*, we leave for another day, should it arise, Processing Solutions’ alternate argument that the attorney fee clause at issue is limited to the Class Action provision of the contract and does not apply to the “entire contract,” within the meaning of section 1717, subdivision (a).