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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

LEE BARFIELD,

Plaintiff and Appellant,

v.

**ECOLOGY CONTROL
INDUSTRIES, INC.,**

Defendant and Respondent.

A131883

**(Alameda County
Super. Ct. No. RG07337778)**

Plaintiff Lee Barfield (Barfield) appeals from the trial court’s judgment awarding defendant Ecology Control Industries, Inc. (Ecology Control), attorney fees for proceedings on Ecology Control’s successful motion to compel arbitration. We affirm.

BACKGROUND¹

In May 2005, Ecology Control hired Barfield to be the general manager of its Richmond office. At the same time, it also hired Barfield’s wife, Jeanne Barfield, to be the billing manager in the Richmond office. At the time they were hired, both Barfield and his wife were employed by a competitor of Ecology Control, Consolidated Waste.

Barfield’s May 2005 employment agreement (Agreement) contains an arbitration provision, which states: “This Agreement will be governed by the laws of the State of California, applicable to employment contracts and all controversies relating to it,

¹ This summary is drawn in part from our unpublished decision in *Barfield v. Ecology Control, Inc.* (Apr. 30, 2009, A120168) (*Barfield I*).

including work-related controversies between you and other company employees, will be settled by final and binding arbitration (other than the Company's election in Paragraph 4) held in Torrance, California, pursuant to the Arbitration Rules of the American Arbitration Association, by an arbitrator chosen from the AAA Labor Arbitrators Panel. Any such arbitration must be requested in writing, no later than one (1) year from the date the controversy arose, and can be brought by you only after you have exhausted the Company problem resolution procedures. The losing party will pay all reasonable attorneys' fees incurred by the prevailing party."

In July 2007, Barfield and his wife filed a lawsuit against Ecology Control in the Alameda County Superior Court.² Barfield asserted a single cause of action for constructive termination in violation of public policy. He alleged that Ecology Control demanded that he "secure his wife's agreement to terminate her employment" and that he resign after his wife "refused to execute paperwork relinquishing all rights in monies owed her" by Ecology Control. Barfield contended that the constructive termination was in violation of public policy "to foster and protect marriage, to make it a permanent and public institution, to encourage the parties to live together, and to prevent separation."

In October 2007, Ecology Control moved to compel arbitration. The trial court denied the motion to compel, concluding that the Agreement was procedurally unconscionable and that the arbitration provision was so one-sided as to be substantively unconscionable. Ecology Control appealed.

In *Barfield I*, this court reversed and remanded the matter with instructions that the trial court enter a new order granting the motion to compel arbitration. On remand, the court granted the motion and awarded Ecology Control contractual attorney fees in the amount of \$37,500. The court stayed payment "until this action is terminated either by a judgment or by a settlement."

In January 2011, the arbitrator issued a final award in favor of Ecology Control. The arbitrator treated Barfield's constructive termination cause of action as a claim under

² Jeanne Barfield is not a party to this appeal.

the California Fair Employment and Housing Act (Gov. Code, § 12900 et seq.; the FEHA), ruled that Barfield had not shown a violation of the FEHA, and denied Ecology Control’s request for attorney fees under the FEHA standards for fee awards. Thereafter, Ecology Control filed a motion to confirm the arbitration award and the previously awarded attorney fees. Barfield opposed the request for confirmation of the attorney fee award. In April 2011, the trial court granted the motion to confirm the arbitration award and the \$37,500 attorney fee award. The court entered judgment accordingly on April 26, 2011, and this appeal followed.

DISCUSSION

Barfield’s primary contention on appeal is that the trial court erred in awarding attorney fees to Ecology Control because its victory on the motion to compel arbitration was not a decision on the merits entitling it to fees under Civil Code section 1717.³ “ ‘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.)

Section 1717 governs awards of attorney fees based on a contract and authorizes an award of attorney fees “[i]n any action on a contract” to “the party prevailing on the contract” if the contract provides for an award of attorney fees. (§ 1717, subd. (a).)⁴ “[T]he party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract.” (§ 1717, subd. (b)(1).) The legislative history to section 1717 “generally reflects a legislative intent to establish uniform treatment of fee recoveries in actions on contracts containing attorney fee provisions and to eliminate distinctions based on whether recovery was authorized by statute or by contract.” (*Santisas v. Goodin*

³ All undesignated section references are to the Civil Code.

⁴ Section 1717, subdivision (a) provides in 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 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.”

(1998) 17 Cal.4th 599, 616 (*Santisas*.) The determination of which party prevailed in an action on a contract is within the discretion of the trial court. (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 871 (*Hsu*.)

In arguing that the trial court erred in awarding Ecology Control attorney fees before resolution of the merits of the complaint, Barfield relies on the *Hsu* decision. There, the California Supreme Court considered the scope of a trial court's discretion to determine that no party prevailed on the contract. (*Hsu, supra*, 9 Cal.4th at p. 871.) The court explained that “ ‘[t]ypically, a determination of no prevailing party results when both parties seek relief, but neither prevails, or when the ostensibly prevailing party receives only a part of the relief sought.’ [Citation.] By contrast, when the results of the litigation on the contract claims are *not* mixed,” “a trial court has no discretion to deny attorney fees to the successful litigant. Thus, when a defendant defeats recovery by the plaintiff on the only contract claim in the action, the defendant is the party prevailing on the contract under section 1717 as a matter of law. [Citations.] Similarly, a plaintiff who obtains all relief requested on the only contract claim in the action must be regarded as the party prevailing on the contract for purposes of attorney fees under section 1717. [Citations.]” (*Hsu*, at pp. 875-876.) When “the results of the litigation are mixed,” the trial court must “compare the relief awarded on the contract claim or claims with the parties’ demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources.” (*Id.* at p. 876.) Finally, “[t]he prevailing party determination is to be made only upon final resolution of the contract claims and only by ‘a comparison of the extent to which each party ha[s] succeeded and failed to succeed in its contentions.’ [Citation.]” (*Ibid.*; see also *Estate of Drummond* (2007) 149 Cal.App.4th 46, 51 [“the phrase ‘prevailing on the contract,’ . . . implies a strategic victory at the end of the day, not a tactical victory in a preliminary engagement”].) In *Hsu*, the Supreme Court concluded the trial court had no discretion to conclude there was no prevailing party on the contract, because the defendants won on the only contract claim in the lawsuit. (*Hsu*, at p. 876.)

In this court’s very recent decision in *Frog Creek Partners, LLC v. Vance Brown, Inc.* (May 24, 2012, A129651) __ Cal.App.4th __ [2012 Cal. App. Lexis 625] (*Frog Creek*), we concluded that the trial court erred in awarding section 1717 attorney fees to the party who filed a successful petition to compel arbitration in a pending lawsuit, where that party was not the ultimate prevailing party on the underlying breach of contract claims. The court in *Lachkar v. Lachkar* (1986) 182 Cal.App.3d 641, 644, 649, held it was improper to make an interim award of attorney fees under section 1717 following grant of an independent petition to compel arbitration; there, the issues for the arbitration involved disputes regarding the interpretation and application of contract terms. In the present case, the arbitration ultimately involved only a FEHA claim. Nevertheless, if there was the potential that the arbitration would involve contract claims, the trial court was obligated under the rationale of *Frog Creek*, *Lachkar*, and *Hsu*, to wait until the end of the action to determine who was “the party prevailing on the contract.” (§ 1717, subd. (b)(1).) But at this point there *is* a final judgment in the lawsuit. Therefore, although the trial court technically made an interim award of attorney fees, we can uphold the judgment in this appeal.⁵

In light of the judgment entered by the trial court, it is clear that Ecology Control was the prevailing party on the contract action, because the motion to compel arbitration was “the only contract claim in the action.” (*Hsu, supra*, 9 Cal.4th at pp. 875-876.) To the extent Barfield contends that a motion to compel arbitration does not constitute a contract claim within the meaning of *Hsu*, his position is contrary to case authority that a prevailing party may, in appropriate circumstances, obtain a section 1717 attorney fee award encompassing proceedings on a petition or motion to compel arbitration. (See

⁵ As Ecology Control points out in its brief on appeal, the recent decision in *Benjamin, Weill & Mazer v. Kors* (2011) 195 Cal.App.4th 40, 79 (*Kors*), supports the proposition that a party may obtain an interim contractual attorney fee award for prevailing on a petition to compel arbitration filed in the pending lawsuit. However, we decline to rely on the *Kors* decision. For the reasons stated in *Frog Creek, supra*, [2012 Cal. App. Lexis 625, pp. *42-*46, *68-*69], we disagree with the analysis in the *Kors* decision justifying a fee award under section 1717 and as a matter of contract interpretation.

Christensen v. Dewor Developments (1983) 33 Cal.3d 778, 786 [party that successfully opposed a petition to compel arbitration could move for an award of attorney fees under section 1717]; *Otay River Constructors v. San Diego Expressway* (2008) 158 Cal.App.4th 796, 799 [same]; *Green v. Mt. Diablo Hospital Dist.* (1989) 207 Cal.App.3d 63, 77 [party who successfully opposed motion to compel arbitration could obtain fees for those proceedings if it ultimately prevailed in the contract action].) Although in those cases the prevailing parties successfully *opposed* efforts to enforce arbitration agreements, a party successfully enforcing an arbitration agreement has a comparable right to fees, if it is the ultimate prevailing party on the contract action under *Hsu, supra*, 9 Cal.4th 863. Any other conclusion would be contrary to the Legislature’s intent, in enacting section 1717, to ensure mutuality in contractual fee awards. (See *Santisas, supra*, 17 Cal.4th at p. 610 [“The primary purpose of section 1717 is to ensure mutuality of remedy for attorney fee claims under contractual attorney fee provisions. [Citation.]”].)

In conclusion, because Ecology Control’s successful motion to compel arbitration was the only contract claim involved in the lawsuit, Ecology Control was “the party prevailing on the contract” under section 1717, subdivision (b)(1). It was proper for the trial court’s judgment to include an attorney fee award to Ecology Control for the proceedings on the motion.

Barfield also contends the trial court’s attorney fee award was improper because the arbitrator expressly declined to award fees for the arbitration proceedings and because Ecology Control did not ask the arbitrator to award fees for the proceedings on the motion to compel arbitration. Barfield relies on *Corona v. Amherst Partners* (2003) 107 Cal.App.4th 701, 706-707 (*Corona*), which held in part that a trial court could not award attorney fees incurred in an arbitration where the fee issue was within the scope of the arbitration but the party seeking the fees failed to request fees from the arbitrator. However, the *Corona* court also held that the party *could* seek from the trial court an award for “the attorney fees and costs he incurred in the judicial proceedings.” (*Id.* at p. 707.) The fee award at issue in the present case is for the judicial proceedings on the motion to compel arbitration, not for any fees incurred in the arbitration. Thus, the trial

court did not err in failing to defer to the arbitrator on the fee issue or in awarding the fees absent a request by Ecology Control at the arbitration.

Finally, Barfield asserts in passing that the trial court's attorney fee award was unreasonable because it may include fees for hours dedicated to Jeanne Barfield's claims. However, Barfield makes no reasoned argument with citations to the record demonstrating that the court's award encompasses any such hours. Notably, the court was not obligated to exclude from the award hours that were dedicated to the claims of *both* plaintiffs. (See *Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 129-130 ["Attorney's fees need not be apportioned when incurred for representation on an issue common to both a cause of action in which fees are proper and one in which they are not allowed."].) Barfield has failed to meet his burden of showing error, and this court is not inclined to make his argument for him. (See *Del Real v. City of Riverside* (2002) 95 Cal.App.4th 761, 768 ["The appellate court is not required to search the record on its own seeking error."].)⁶

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to Ecology Control.

SIMONS, Acting P.J.

We concur.

NEEDHAM, J.

BRUINIERS, J.

⁶ Because Barfield does not prevail in his appeal, we need not and do not address his request for attorney fees.