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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

GLESBY BUILDING MATERIALS  
COMPANY, INC.,

Plaintiff and Appellant,

v.

6233 SAN LEANDRO STREET  
PARTNERS,

Defendant and Respondent.

A131950

(Alameda County  
Super. Ct. No. RG08402634)

GLESBY BUILDING MATERIALS  
COMPANY, INC.,

Plaintiff, Cross-Defendant and  
Respondent,

v.

6233 SAN LEANDRO STREET  
PARTNERS,

Defendant, Cross-Complainant and  
Appellant.

A133233

(Alameda County  
Super. Ct. No. RG08402634)

A subsidiary of Glesby Building Materials Company, Inc. (Glesby) sued its landlord, 6233 San Leandro Street Partners (6233 San Leandro), to recover a \$10,500 security deposit. 6233 San Leandro cross-complained, asserting Glesby owed it more than \$80,000 in damages and holdover rent. The trial court found Glesby responsible for \$8,088.75 in damages, and thus ordered 6233 San Leandro to return only \$2,411.25 of the security deposit to Glesby. The court denied any other relief to 6233 San Leandro.

Nevertheless, because the court found Glesby responsible for some damages and thus not entitled to the return of its entire security deposit, it declared 6233 San Leandro to be the prevailing party and awarded it \$52,661 in contractual attorney fees. Glesby and 6233 San Leandro both appealed, Glesby as to the underlying prevailing party determination and 6233 San Leandro as to the amount of the fee award. We conclude neither party can be deemed the “prevailing party” in this case and therefore reverse the award of attorney fees.

### **FACTUAL AND PROCEDURAL BACKGROUND**

On March 12, 1998, Glesby signed a lease agreement with 6233 San Leandro to rent a commercial warehouse at 6315 San Leandro Street in Oakland. After 10 years under the lease, Glesby notified 6233 San Leandro it would vacate. 6233 San Leandro demanded Glesby make nearly \$24,000 in repairs to the property and refused to return Glesby’s \$10,500 security deposit.

On August 6, 2008, Glesby filed a complaint against 6233 San Leandro, claiming breach of contract based on 6233 San Leandro’s failure to return the security deposit within the 30-day timeframe specified in paragraphs 5 and 7A of the lease. Paragraph 31 of the lease authorized an award of attorney fees to a prevailing party in an action on the lease, and Glesby accordingly sought attorney fees in connection with its contract claim. In addition, Glesby alleged bad faith withholding of the security deposit in violation of Civil Code section 1950.7, unfair competition in violation of Business and Professions Code section 17200, and common law unfair competition.

On September 11, 2008, 6233 San Leandro filed a cross-complaint, claiming Glesby was the party in breach for failure to return the warehouse in good condition. 6233 San Leandro alleged damages of no less than \$25,000 for repair costs and “holdover” rent (that is, rent at a penalty rate for the length of time it made repairs and could not lease the warehouse to another tenant). 6233 San Leandro also sought contractual attorney fees.

In their trial briefs, the parties refined their contract damage assessments. Glesby, conceding it had caused some damage, asserted its security deposit refund should be between \$4,500 and \$6,900. It denied it owed any holdover rent. 6233 San Leandro, in turn, continued to insist it would prove \$22,348.42 in repair costs and \$58,626.72 in holdover rent, amounting to a net entitlement of \$70,475.14—after subtracting the \$10,500 security deposit it had admittedly withheld. Thus, 6233 San Leandro effectively claimed Glesby owed it over \$80,000.

A three-day bench trial took place in September 2010. In posttrial briefs, Glesby asserted it had shown its entitlement to a somewhat larger refund than it expected before trial, \$8,692. 6233 San Leandro stood by its pretrial calculations and asserted it was entitled to retain the entire security deposit plus recover more than \$70,000 in additional damages and holdover rent.

The trial court issued a statement of decision on March 3, 2011. It first rejected 6233 San Leandro's interpretation of a warranty provision in paragraph 2.2 of the lease. According to 6233 San Leandro, under that warranty Glesby was liable for any and all damages to the warehouse—even those that existed at the time of lease signing—because Glesby never listed any damages in a written notice to 6233 San Leandro at the start of the lease. The trial court then turned to the specific items of claimed damage to the warehouse and assigned blame and costs for each. Glesby was responsible for repairs and alterations to the lighting system (\$1,000); 75 percent of the repairs to the electrical system (\$2,163.75); repairing restrooms (\$3,120); disposing of heaters (\$520); replacing a crushed vent pipe (\$260); and repair of the rear dock door and a wall (\$875, \$150). Glesby was not responsible, though, for improving the lighting system (\$2,958); 25 percent of the electrical system repairs (\$721.25); the cost of demolishing the demising wall (\$4,800); damage to roof truss supports (\$767); broken glass (\$697); damages to a shed (\$3,417), or other miscellaneous clean-up work (\$899.42). Thus, while 6233 San Leandro was entitled to retain \$8,088.75 of the \$10,500 security deposit, it was not

entitled to retain the entire deposit, let alone recover any other damages. The court did find, however, that 6233 San Leandro had not withheld the security deposit in bad faith and thus was not subject to any statutory penalties for failing to timely refund the balance of the deposit.

The trial court also rejected 6233 San Leandro's claim for holdover rent. It determined the contract allowed holdover rent only for failure to vacate the warehouse, not for vacating the warehouse in an unsatisfactory condition. Moreover, the trial court found 6233 San Leandro did not prove it suffered any delay in re-letting the warehouse, and thus failed to show, in any event, entitlement to any additional rent from Glesby.

Finally, the trial court ruled: “[d]espite the fact that Glesby is entitled to a refund of \$2,411.25 and that CCP §1032(a)(4) states that ‘Prevailing party’ includes the party with a net monetary recovery, the Court finds 6233 [San Leandro] to be the prevailing party and is entitled to attorneys fees pursuant to paragraph 31 of the lease.” Although “neither party achieved a complete victory,” the trial court determined 6233 San Leandro “more fully achieved its litigation objectives.” The court’s judgment, dated March 3, 2011 and served March 14, 2011, was for 6233 San Leandro Partners and against Glesby on both the complaint and cross-complaint. The judgment simultaneously awarded 6233 San Leandro \$8,088.75 on its cross-complaint while commanding it pay a refund of \$2,411.25 to Glesby. Glesby timely filed a notice of appeal from the judgment, which included the fee entitlement determination, on May 9, 2011.

On May 13, 2011, 6233 San Leandro filed a motion seeking \$105,322 in contractual attorney fees. Glesby filed opposition, and on July 1, 2011, the trial court awarded 6233 San Leandro \$52,661 in fees. The court cut the amount sought in half based on the small amount (\$8,088.75) 6233 San Leandro had “recovered” to reduce the security deposit refund it owed and the simplicity of the issues. 6233 San Leandro served notice of entry of the fee order on July 22, 2011 and filed a notice of appeal from it on

September 20, 2011. Glesby did not appeal the July 1, 2011, order determining the amount of fees.

On June 8, 2012, we asked the parties to address whether we had jurisdiction over Glesby's May 9, 2011, appeal (see *P R Burke Corp. v. Victor Valley Wastewater Reclamation Authority* (2002) 98 Cal.App.4th 1047, 1053-1054 (*Burke*) [a bare determination of fee entitlement is generally nonfinal and nonappealable]) and whether we could and should consolidate Glesby's appeal (case No. A131950) with 6233 San Leandro's (case No. A133233). Only Glesby responded, arguing we had jurisdiction and advocating for consolidation. By order filed July 12, 2012, we consolidated the two appeals. With the records from the "entitlement" appeal and the "amount" appeal now before us, we conclude we have jurisdiction. (*Burke, supra*, 98 Cal.App.4th at p. 1055 [bar to appeal only if "no postjudgment order determining the amount of fees"]; cf. *Grant v. List & Lathrop* (1992) 2 Cal.App.4th 993, 997 [appeal from entitlement order can allow appellant to challenge amount], italics omitted.)

## DISCUSSION

### *Glesby's Entitlement Appeal*

"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, . . . shall be entitled to reasonable attorney's fees in addition to other costs. . . ." (Civ. Code, § 1717, subd. (a).)<sup>1</sup> "[T]he party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract. The court may also determine that there is no party prevailing on the contract . . . ." <sup>2</sup> (§ 1717, subd. (b)(1).)

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<sup>1</sup> All further statutory references are to the Civil Code unless otherwise indicated.

<sup>2</sup> "[T]he definition of 'prevailing party' in . . . section 1717 is mandatory and cannot be altered or avoided by contract." (*Jackson v. Homeowners Assn. Monte Vista*

“When a party obtains a ‘ “simple, unqualified win” ’ by completely prevailing on, or defeating, the contract claims in the action and the contract contains a provision for attorney’s fees, the successful party is entitled to attorney’s fees as a matter of right, eliminating the trial court’s discretion to deny fees under section 1717. (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 875-876 . . . (*Hsu*.) ‘If neither party achieves a complete victory on all the contract claims, it is within the discretion of the trial court to determine which party prevailed on the contract or whether, on balance, neither party prevailed sufficiently to justify an award of attorney fees.’ (*Scott Co. of California v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1109 . . . .) ‘Because the statute allows such discretion, it must be presumed the trial court has also been empowered to identify the party obtaining “a greater relief” by examining the results of the action in relative terms: the general term “greater” includes “[l]arger in size than others of the same kind” as well as “principal” and “[s]uperior in quality.” [Citation.]’ (*Sears v. Baccaglio* (1998) 60 Cal.App.4th 1136, 1151 . . . .)” (*Silver Creek, LLC v. Blackrock Realty Advisors, Inc.* (2009) 173 Cal.App.4th 1533, 1538 (*Silver Creek*), italics omitted.) Nonetheless, a trial court’s discretion in this regard is not unbounded. (*Id.* at p. 1541 [“Although a trial court has broad discretion to determine the prevailing party in a mixed result case, its discretion is not unlimited.”].)

“When determining the prevailing party under section 1717, the trial court ‘is to 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.’ (*Hsu, supra*, 9 Cal.4th at p. 876.) Additionally, ‘in determining litigation success, courts should respect substance rather than form, and to this extent should be guided by “equitable considerations.” For example, a party who

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*Estates-East* (2001) 93 Cal.App.4th 773, 785; *Wong v. Thrifty Corp.* (2002) 97 Cal.App.4th 261, 264 [“This definition is mandatory and cannot be avoided or altered by contract; contractual provisions conflicting with it are void.”].)

is denied direct relief on a claim may nonetheless be found to be a prevailing party if it is clear that the party has otherwise achieved its main litigation objective. [Citations.]’ (*Id.* at p. 877, italics omitted.)” (*Silver Creek, supra*, 73 Cal.App.4th at p. 1539.)

Although 6233 San Leandro claims it obtained a “simple, unqualified win” on the contract claims, that is hardly the case. Glesby’s contract claim sought recovery of the \$10,500 security deposit. 6233 San Leandro’s cross-complaint, also on the contract, claimed not only entitlement to the entire security deposit, but significant additional damages and holdover rent. By the time of trial, Glesby, admitting some damages, sought only a partial refund of the security deposit, in the range of \$4,500 to \$8,692. 6233 San Leandro continued to insist it was entitled to damages and hold over rent totaling more than \$80,000 (the entire \$10,500 deposit plus more than \$70,000 in additional damages and holdover rent). Glesby recovered \$2,411.25, only about half of the security deposit it claimed it was entitled to at the time of trial. 6233 San Leandro recovered \$8,088.75, about one-tenth of what it claimed it was owed under the lease, plus it was required to refund the balance of the security deposit to Glesby. By no means, did 6233 San Leandro obtain an “unqualified win.”

While the trial court concluded only the tenant, Glesby, and not the landlord, 6233 San Leandro, was in breach of the lease, focusing on that, alone, even assuming it was an accurate assessment of which party was in breach of the lease, is the exaltation of form over substance that *Hsu* discourages. Section 1717 does not reward a technical or “pyrrhic” victory. (*Foothill Properties v. Lyon/Copley Corona Associates, L.P.* (1996) 46 Cal.App.4th 1542, 1555-1556.) Furthermore, 6233 San Leandro was not blameless here, since it was contractually obligated to return within 30 days any part of the security deposit not legitimately withheld and it failed to do so. In addition, its claim that it was owed an additional \$70,000 in damages and holdover rent was a serious overreach.

Even under a mixed results analysis, neither party, on this record, can be deemed to be the prevailing party. Sometimes, “the results of litigation may be so equivocal as to

permit *or even require* that no party be found to have prevailed for purposes of attorney fees under section 1717.” (*Hsu, supra*, 9 Cal.4th at p. 874, italics added.) For the reasons just discussed, this is such a case. “[I]n good conscience we cannot say attorneys’ fees should be awarded either for the trial or for this appeal.” (*Kytasty v. Godwin* (1980) 102 Cal.App.3d 762, 774; see also *Hilltop Investment Associates v. Leon* (1994) 28 Cal.App.4th 462, 468 [no award of fees when result a “draw”].)

6233 San Leandro cites *Sears v. Baccaglio* (1998) 60 Cal.App.4th 1136 (*Sears*), as support for the fee award. In that case, the guarantor of a tenant’s lease sued the landlord to invalidate his guaranty and recover \$112,000 he had paid on the guaranty under protest. The trial court held the guaranty was valid. (*Id.* at pp. 1140-1141.) But while the guarantor’s lawsuit was pending, the landlord received significant payments from the tenant’s bankruptcy estate and from rents paid by a new tenant who took over the leased space. Thus, after a hearing on damages, the trial court found the landlord had acquired a surplus of funds and owed the guarantor a refund of \$67,829.46. (*Id.* at p. 1141.) The trial court found the landlord was the prevailing party and awarded fees. “ ‘In short the whole thrust of this Court’s decision is to give effect to the guaranty (which was hotly disputed) and award [the landlord] Baccaglio the damages to which he was entitled under that contract. By no stretch of the imagination can [the guarantor] Sears claim that he was in fact the prevailing party because, having lost on his principal claim that the contract was ineffective, he recovered more of the \$112,000 than Baccaglio.’ ” (*Ibid.*)

The Court of Appeal affirmed the fee award, concluding Sears got a refund “not because the [trial] court found Baccaglio liable for breach of contract. Instead, the [trial] court ordered Baccaglio to return a portion of Sears’s payment because of the fortuitous circumstances of Baccaglio’s collecting from Tonko’s bankruptcy estate in March 1994 and mitigating the damages by re-leasing a portion of the building.” (*Sears, supra*, 60 Cal.App.4th at p. 1159.) Given this, the appellate court found no abuse of discretion. (*Ibid.*)

*Sears* is distinguishable. First, it involved a guarantee, not a security deposit governed by the provisions of section 1950.7, which gives tenants a special interest in having deposits timely refunded. Second, *Sears* “lost on his principal claim that the contract was ineffective.” (*Sears, supra*, 60 Cal.App.4th at p. 1141.) Here, although the trial court declared Glesby in breach, Glesby won a key interpretation battle (concerning the warranty provision), and defeated a claim for over \$70,000 in additional damages and holdover rent, establishing that 6233 San Leandro’s repair damages claims were exorbitant to the point Glesby was due at least partial refund of its security deposit. *Sears* also involved “fortuitous circumstances” in which the landlord Baccaglio obtained relief from third parties that reduced the guarantor’s liability. Here, in contrast, it was Glesby’s own defense that buffeted 6233 San Leandro’s cross-claims.

6233 San Leandro contends the trial court’s fee entitlement decision could also be upheld under two alternative code provisions, Code of Civil Procedure sections 1021 and 1032. Neither helps 6233 San Leandro. Section 1021 provides: “Except as attorney’s fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties . . . .” (Code Civ. Proc., § 1021.) This section merely codifies the “American rule . . . that each party to a lawsuit must ordinarily pay his own attorney fees.” (*Trope v. Katz* (1995) 11 Cal.4th 274, 278.) It is section 1717 that provides the applicable exception to the rule for contracts with fee shifting provisions. (*Tropez v. Katz, supra*, at p. 279.) As we have already discussed, the trial court’s entitlement determination cannot be upheld under that section.

As for Code of Civil Procedure section 1032, which governs the award of costs, even if it could be read to provide an alternate basis for an attorney fee award, Civil Code section 1717, again, controls contractual fee awards and displaces it. (*Sears, supra*, 60 Cal.App.4th at p. 1157 [“section 1717 is the applicable statute when determining whether and how attorney’s fees should be awarded under a contract. It is the statute that

expressly deals with attorney's fees under a contract, and to apply section 1032 in such cases would obviate section 1717".)

We therefore reverse the trial court's ruling that 6233 San Leandro is the prevailing party and entitled to a contractual fee award under section 1717. We further conclude, on this record, neither party can be deemed the prevailing party and there can be no award of contractual attorney fees in this case. We therefore do not reach 6233 San Leandro's appeal from as to the amount of fees awarded.

**DISPOSITION**

The judgment, to the extent it determines that 6233 San Leandro is the prevailing party and entitled to an award of contractual attorney fees, is reversed and modified to provide that there is no prevailing party entitled to contractual attorney fees in this case. Each party to bear its own costs on appeal.

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Banke, J.

We concur:

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Marchiano, P. J.

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Dondero, J.