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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

REGINA FLANAGAN,

Cross-Complainant and Respondent,

v.

JOHN DONOHUE et al.,

Cross-Defendants and Appellants.

A136055

(Alameda County
Super. Ct. No. RG10525950)

I.

INTRODUCTION

John Donohue, Elizabeth Donohue (also sometimes referred to in the record before us as Elizabeth Flynn), Heather Donohue, and Kerry Donohue (appellants) appeal from the trial court's denial of their motion for attorney fees. The motion was made following the pretrial voluntary dismissal of respondent Regina Flanagan's (Flanagan) cross-complaint against appellants, and after appellant John Donohue filed for bankruptcy. Appellants raise a number of contentions asserting that the trial court erred in denying their motion. However, the dispositive issue is whether the trial court erred in its conclusion that, even if appellants were otherwise entitled to bring a motion under Civil Code section 1717 (section 1717), they were not entitled to attorney fees, because Flanagan voluntarily dismissed her cross-complaint before trial under Code of Civil Procedure section 581, subdivision (b)(1).

We agree with the trial court, and affirm the order denying attorney fees.

II.

PROCEDURAL AND FACTUAL BACKGROUNDS

This civil litigation began with the filing of a complaint on July 16, 2010, by Victoria Marina Delaware LLC (VMD) against Margaret Waterhouse (Waterhouse), Tara Donohue, and Flanagan for breach of a lease agreement. The complaint alleged that defendant Tara Donohue was the assignee of rights as tenant under a written lease originally entered into between VMD and Waterhouse. After Tara Donohue breached the lease by failing to pay rent as it became due, VMD commenced proceedings to recover possession. Flanagan was named as a defendant because she allegedly signed a written guarantee agreeing to be legally responsible for Tara Donohue's performance under the lease. Before eviction proceedings began, Tara Donohue relinquished possession of the premises. As a result of her illegal possession, VMD contended that it suffered damages of approximately \$125,000, less certain credits to which the defendants were entitled.

On November 15, 2010, Flanagan filed a cross-complaint against appellants¹ and related entities alleging 11 causes of action. The general allegations in the cross-complaint stated that Flanagan was induced to give a personal guarantee for the obligations Tara Donohue assumed under the lease with VMD, by promises made by appellants that they would indemnify Flanagan from any liability arising out of the personal guarantee. Flanagan alleged that she was sued by VMD and Waterhouse to perform under her personal guarantee, and appellants wrongfully refused to indemnify her. Among other damages sought, the cross-complaint claimed that Flanagan was entitled to recover attorney fees and costs incurred to enforce the "Flanagan Agreements."

Appellants thereafter filed a demurrer to the cross-complaint on the following grounds: (1) it could not be ascertained from the cross-complaint whether the contract alleged was written, oral, or implied; (2) if based on a written contract, the terms were not

¹ According to the record before us, Tara Donohue was not named as a cross-defendant or as an appellant in the notice of appeal.

quoted in the cross-complaint nor was it attached as an exhibit; (3) agreement violated the statute of frauds; and (4) there was no partnership among appellants as alleged.

The court filed its order overruling the demurrer on all grounds on January 27, 2011. Several weeks later, appellants filed an answer generally denying the allegation against them. No affirmative defenses were pleaded.

In January 2012,² as part of its pretrial proceedings, the court entered its order deciding various motions brought by both sides. Further pretrial proceedings took place on March 14, 2012.³ At that hearing, which was unreported, appellants' counsel notified Flanagan and the court that John Donohue had recently filed for bankruptcy. Because Flanagan's counsel indicated that Flanagan had sought recovery primarily against John Donohue, a motion to dismiss without prejudice was made and granted.

In May, appellants filed a motion to recover attorney fees against Flanagan totaling \$68,818.75, pursuant to section 1717, claiming they were the prevailing parties on the cross-complaint for purposes of that statute, and thus entitled to recover their attorney fees. Flanagan filed an opposition to the motion on May 23 contending that, because she had voluntarily dismissed her cross-complaint after being advised about the bankruptcy of John Donohue, appellants were not the prevailing parties within the meaning of section 1717.

On June 7, the trial court issued its order denying the motion for attorney fees under section 1717 on three grounds: (1) it was "questionable" whether section 1717 applied to the promises of the parties since there was no recitation in the Flanagan Agreements that the prevailing party would recover attorney fees, except for those incurred in defending the main action against VMD and Waterhouse; (2) under section 1717, subdivision (b)(2), appellants were not prevailing parties because the case

² Except for a copy of the trial court's docket, there is scant evidence in the record of what transpired in the litigation from January 2011 and January 2012. Appellants' appendix on appeal is only one volume. In any case, detailed discussion concerning pretrial developments is not necessary in order to decide the pivotal issue raised on appeal.

³ All further dates are in the calendar year 2012, unless otherwise indicated.

was resolved by Flanagan’s voluntary dismissal of the cross-complaint; and (3) other than under section 1717, appellants had failed to allege any other statutory or contractual basis for an award of attorney fees.

This timely appeal followed.

III. ANALYSIS

On appeal, appellants claim the trial court misread section 1717 and misapplied the case law interpreting this statute in finding that Flanagan’s voluntary dismissal of her cross-complaint precluded the trial court from declaring appellants prevailing parties and awarding them attorney fees. In addressing the merits of appellants’ arguments, our review is de novo. (*Leamon v. Krajkievcz* (2003) 107 Cal.App.4th 424, 431.)

Our resolution of this appeal begins and ends with the unambiguous provisions of section 1717. In relevant part, subdivision (a) of section 1717 sets forth when a party is entitled to seek attorney fees incurred in a contract action: “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).)

It is undisputed that Flanagan made a motion to dismiss her cross-complaint against appellants without prejudice at the March 14 hearing, which was granted by the trial court. That motion was made pursuant to Code of Civil Procedure section 581, subdivision (b)(1), which states: “(b) An action may be dismissed in any of the following instances: [¶] “(1) With or without prejudice, upon written request of the plaintiff to the clerk, filed with papers in the case, or by oral or written request to the court at any time before the actual commencement of trial, upon payment of the costs, if any.”

In light of that dismissal, subdivision (b)(2) of section 1717 clarifies that a party dismissed by motion under Code of Civil Procedure section 581, subdivision (b)(1), may not be found to be a prevailing party in an action brought on a contract for purposes of

recovering attorney fees. That section provides “[w]here an action has been voluntarily dismissed or dismissed pursuant to a settlement of the case, there shall be no prevailing party for purposes of this section.” (§ 1717, subd. (b)(2).)

Interpreting section 1717, subdivision (b)(2), the California Supreme Court in *Santisas v. Goodin* (1998) 17 Cal.4th 599, 613 (*Santisas*), stated: “When a plaintiff files a complaint containing causes of action within the scope of section 1717 (that is, causes of action sounding in contract and based on a contract containing an attorney fee provision), and the plaintiff thereafter voluntarily dismisses the action, section 1717 bars the defendant from recovering attorney fees incurred in defending those causes of action” (*Santisas*, at p. 617.) The statute is based on a public policy meant to encourage plaintiffs to discontinue litigation rather than continue in an effort to avoid a fee award. (*International Industries, Inc. v. Olen* (1978) 21 Cal.3d 218, 224-225; *Santisas*, at p. 613.)

Despite its plain text and the statutory interpretation rendered by our high court, appellants claim that section 1717, subdivision (b)(2) does not “operate to divest the Court of jurisdiction to award fees after the plaintiff has voluntarily dismissed the action” Appellants interpret section 1717, subdivision (b)(2) as “merely remov[ing] the statutory presumption . . . which would otherwise automatically establish that the dismissed defendant is deemed to be a ‘prevailing party.’ ” In short, appellants argue that section 1717, subdivision (b)(2) does not entirely foreclose their entitlement to attorney fees, and that the trial court still retained discretion to determine whether they were prevailing parties for purpose of awarding attorney fees under section 1717.

Appellants’ interpretation of section 1717, subdivision (b)(2) as giving the trial court discretionary authority to award attorney fees despite Flanagan’s voluntary dismissal of her cross-complaint is without legal support. In *Topanga and Victory Partners v. Toghia* (2002) 103 Cal.App.4th 775 (*Topanga*), Topanga and two other entities sued an entity called Omni Medical Centers, Inc. and its principal, Nicholas Toghia, for breach of contract, torts, and statutory claims. A demurrer brought by defendants was overruled, and the case proceeding to trial. Following opening statements

and after two days of testimony, counsel for Topanga informed the court that all of the parties, except Toghia had reached a settlement as to all claims. Topanga entered a dismissal against Toghia. (*Id.* at p. 778.)

Toghia then filed a motion for attorney fees under section 1717. The motion did not seek fees incurred in the defense of the contract-related claims because Toghia was not the prevailing party in light of the voluntary dismissal of the action as to him, and under section 1717, subdivision (b)(2).⁴ Nevertheless, the trial awarded Toghia \$134,885.87 in attorney fees. (*Topanga, supra*, 103 Cal.App.4th at p. 779.) The appellate court concluded that Toghia was not entitled to an award of attorney fees under any of its causes of action, including non-contract based claims, in light of the voluntary dismissal of the entire action. (*Ibid.*)

Similarly, in *Marina Glencoe, L.P. v. Neue Sentimental Film AG* (2008) 168 Cal.App.4th 874 (*Marina Glencoe*), the bar on the recovery of attorney fees under section 1717, subdivision (b)(2), was applied after the plaintiff suing on a commercial lease against an “alter ego” defendant dismissed its complaint. The dismissal came after the commencement of trial and after the trial judge took under submission the mid-trial motion by the alter ego defendant for judgment pursuant to Code of Civil Procedure section 631.8.⁵ (*Marina Glencoe*, at p. 876.) The *Marina Glencoe* court held that any dismissal entered on plaintiff’s motion or request, before or during trial, is “voluntary” within the meaning of section 1717 and prevents an attorney fee award. (*Marina Glencoe*, at pp. 877-878.)

Other decisions have similarly held that a defendant who has been voluntarily dismissed from an action is not a prevailing party under section 1717, and thus is not

⁴ In fact, Toghia conceded that section 1717, subdivision (b)(2) precluded an award of attorney fees because he was not the prevailing party within the meaning of that statute in light of the dismissal. (*Topanga, supra*, 103 Cal.App.4th at p. 780.)

⁵ Section 631.8, subdivision (a), states in material part: “After a party has completed his presentation of evidence in a trial by the court, the other party, without waiving his right to offer evidence in support of his defense or in rebuttal in the event the motion is not granted, may move for a judgment.” (Code Civ. Proc., § 631.8, subd. (a).)

entitled to recover attorney fees under that statute. (*CDF Firefighters v. Maldonado* (2011) 200 Cal.App.4th 158, 164-165; *Aronson v. Advanced Cell Technology* (2011) 196 Cal.App.4th 1043, 1050.)

In light of these authorities, we have no hesitation in agreeing with the trial court that, in light of Flanagan’s voluntary pretrial dismissal of her cross-complaint against appellants, appellants were not entitled to recover their attorney fees against Flanagan under section 1717.

Despite these authorities, appellants argue that the cases are in “conflict” with *Chinn v. KMR Property Management* (2008) 166 Cal.App.4th 175 (*Chinn*). There is no conflict. The civil action in *Chinn* did not involve claims based on contract, but only for negligence against the property management company managing the property where plaintiff was assaulted by the property manager. (*Id.* at p.180.) Indeed, the court specifically stated that section 1717 was inapplicable because “Civil Code section 1717 does not apply to attorney fees incurred to litigate noncontract causes of action. [Citation.]” (*Chinn*, at p. 192.) Moreover, in the *Chinn* opinion’s discussion concerning the applicability of the Supreme Court decision in *Santisas, supra*, 17 Cal.4th 599, the court reaffirmed the unassailable legal rule that a party to an action brought on a contract may not recover attorney fees under section 1717 where the plaintiff voluntarily dismisses the complaint, because the dismissed defendants are not “prevailing parties” under the statute. (*Chinn*, at p 193.) Therefore, there is nothing in the *Chinn* decision that in any material way conflicts with *Topanga* and *Glencoe*, discussed above.

We also reject appellants’ contention that the trial court erred because it denied them attorney fees, not under section 1717, subdivision (b)(2), but because of “its mistaken belief that because the action terminated by way of a dismissal rather than by way of trial, the Court no longer had jurisdiction to award fees.” The trial judge was not laboring under any mistaken belief that it lacked jurisdiction to award fees.

In discussing the effect of section 1717, subdivision (b)(2) on appellants’ motion, the court stated in full: “Second, even if section 1717 did apply to the Contract, the statute expressly provides that ‘[w]here an action has been voluntarily dismissed . . . ,

there shall be no prevailing party for purposes of this section.’ [Citation.] The cross-complaint was voluntarily dismissed before any verdict or determination on the merits. Thus, Cross-Defendants cannot be determined to be prevailing parties on the Contract for purposes of section 1717. (See, e.g., *Topanga*[, *supra*,] 103 Cal.App.4th [at p.] 786.)”

There is nothing to suggest that the court refused to award fees because it lacked jurisdiction to do so. Clearly, the court refused to award fees because section 1717, subdivision (b)(2) declared the cross-defendants were not prevailing parties under the statute, and therefore, not entitled to fees.

Equally meritless is appellants’ argument that section 1717 entitles them to fees because an indemnity agreement in the Flanagan Agreements contained a clause by which she “accepts all responsibility for legal fees, costs and expenses incurred by Waterhouse, Landlord, or Guarantor” This assertion is simply a rebuttal to the trial court’s initial concern that it was “questionable” whether appellants’ could be entitled to attorney fees under section 1717 based on the above-quoted language in the indemnity agreement. The point the trial court was making, and which we reinforce here, is that even if there were a clause meeting the requirements of section 1717 for attorney fee purposes, the dismissal prevents appellants from being declared prevailing parties under subdivision (b)(2) of the statute.⁶

⁶ Because we affirm on the basis of section 1717, subdivision (b)(2), which assumes that there was contractual right to recover fees if one of the contracting parties was a prevailing party, we need not, and do not, reach the issue of whether such a foundational contract right was proven. We also need not, and do not, decide other defenses raised by Flanagan in her respondent’s brief on appeal, including that appellants’ motion below was supported by “bogus” invoices, and a false declaration by appellants’ counsel.

IV.
DISPOSITION

The order denying appellants' attorney fees is affirmed. Flanagan is entitled to recover her costs on appeal.

RUVOLO, P. J.

We concur:

REARDON, J.

HUMES, J.