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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

KWANG HYUN KIM,

Plaintiff and Respondent,

v.

CHE KYUNG PARK et al.,

Defendants and Appellants.

A139056

(City & County of San Francisco  
Super. Ct. No. CGC-10-503418)

Following rescission of a contract for sale of a business, Che Kyung Park (Park) and his wife, Jin Hee Park (collectively, the Parks), appeal from orders awarding Kwang Hyun Kim (Kim) attorney fees and costs as the prevailing party, and denying the Parks' motion for attorney fees and costs. The Parks argue that they, not Kim, prevailed in the action, and that in any event certain costs were erroneously awarded. We affirm the orders.

**I. BACKGROUND**

The case was tried to the court, and the facts are taken from the court's statement of decision.

**A. The Transaction and the Lawsuit**

Kim and his wife Sung Ae Kim (the Kims) purchased The Silver Platter (the Market), a convenience and liquor store in San Francisco, from the Parks in September of 2009. They agreed on a purchase price of \$600,000, plus \$157,917 for inventory. The purchase was financed in part with October 26, 2009 promissory notes for \$200,000 and \$157,917.87 payable by the Kims to the Parks.

Kim and Park were best friends for at least ten years before they entered into this transaction. Park told Kim that the Market grossed \$80,000 to \$100,000 per month, but after Kim took over the store in September 2009, he discovered that Park had exaggerated the monthly sales. Sales were \$80,118 in October, but were only \$67,878 in November, and were on pace for only \$70,271 in December. In December and in January 2010, “Kim asked that Park ‘take back’ the store and return his monies, essentially asking for rescission of the original agreement.” They reached “similar” understandings regarding the terms of the transaction, and agreed on credit for the value of the Market’s inventory at the time of the repurchase.

Kim stopped paying his \$157,000 promissory note for the inventory, “reason[ing] that since Park and Kim would have to redo an inventory check and they would have to pay the difference at the time of the inventory re-check, his continuing monthly payment would be duplicative and would create difficult math problems. Park did not agree to [have] Kim stop making payment on the inventory note but Kim, without Park’s agreement, just stopped making payments.”

On June 1 and 8, 2010, Park was filmed stealing merchandise from the Market. During this time, “Park still frequently met with Kim. Kim did not disclose the video clips because he wanted Park to make a payment to buy back the Market before he confronted his ‘best friend’ with the burglary problem. Park finally brought the first \$30,000 and then \$22,800 and requested that they open escrow. Kim did not deposit the \$55,800 in an escrow account as Park thought he would do. Instead Kim took the \$55,800 and spent it without depositing it to open an escrow.”

Kim sued the Parks in September 2010. Kim’s first amended complaint asserted six causes of action: fraud and reformation of the purchase contract based on Park’s misrepresentation of the Market’s revenue; breach of contract and specific performance based on the oral agreement to rescind the purchase contract; and trespass and conversion based on theft of merchandise from the store. The Parks cross-complained against the Kims, asserting breach of contract causes of action based on failure to pay the \$200,000 and \$157,917.87 promissory notes for the purchase of the Market and its inventory, and

a third cause of action for making a fraudulent promise to return the market based on Kim's retention of the \$55,800 the Parks paid him to buy it back.

At trial, Kim sought damages for breach of the rescission agreement on the ground that Park broke into and took property from the Market before beginning to buy it back. Park denied that he misrepresented the Market's sales. Park claimed that he removed property from the Market "under the mistaken belief that he had the right to do so or he mistakenly broke into the Market when he was drunk." The parties stipulated that the Market's inventory at the time of sale was \$129,000 not \$157,917 due to an error in counting soft drinks.

The court found that when Kim purchased the Market, "the parties' true intention" was to transfer the business for its fair value. Kim agreed to an unfair price because Park misrepresented the Market's sales. The court therefore granted Kim's request to reform the contract, and reduced the price of the Market from \$600,000 to \$285,600, based in part on the testimony of Robert Brooks, an expert in the valuation of small businesses. The court determined that Kim had paid the Parks \$370,000 for the Market, giving him a credit of \$84,400, but that he owed the Parks \$129,000 for the inventory and the \$55,800 Park had paid him toward repurchasing the business. Netting these amounts, Kim could complete the purchase by paying the Parks \$100,400.

The court concluded that Kim had no valid claim to damages for breach of the rescission agreement because he had failed to deposit the \$55,800 repayment he received from Park into escrow, and he had defaulted on the note for the Market's inventory.

The court ruled for Kim on his causes of action for trespass and conversion, finding that Park misappropriated \$4,000 of merchandise when he broke into the Market, and assessed punitive damages of \$12,000 against Park for those acts. This \$16,000 liability reduced the sum owed by Kim under the reformed purchase contract from \$100,400 to \$84,400.

The court determined that the "main claims" in the Parks' cross-complaint were unenforceable because of Park's misrepresentation of the Market's sales. The cross-complaint sought recovery on: the Kims' \$200,000 promissory note, which was given in

addition to the \$370,000 they paid toward purchase of the Market; the Kims' note for the Market's inventory; and the \$55,800 Kim received from Park. The court denied any recovery on the \$200,000 note, but gave the Parks credit for the inventory note and the \$55,800 payment against the adjusted price of the Market. The judgment incorporated the foregoing rulings, with provisions for monthly payments of the \$84,400 Kim would owe to complete the purchase of the Market under the reformed contract.

The judgment included an alternative order that Park could repurchase the Market "if he advances the necessary funds plus the costs of such a sale." The repurchase price was set at \$330,200. To effect that transaction, the judgment ordered Park to deposit \$340,200 in available funds with the court or in his attorney's trust account within 60 days. This sum represented the "\$370,000 amount paid by Kim, minus \$55,800 prior amount paid by Park, plus inventory removal [theft] of \$4,000, plus exemplary damages of \$12,000, plus an allowance for costs of the sale of \$10,000."

The Parks' indicate in their briefing that they repurchased the Market.

#### B. Costs and Attorney Fees

Both sides moved for costs and attorney fees. Section 14 of the agreement for the Kims' purchase of the Market stated: "In any action, proceeding or arbitration arising out of this Agreement, the prevailing party shall be entitled to reasonable attorneys' fees and costs." The Kims' promissory notes to the Parks also included provisions for payment of attorney fees to the prevailing party in any collection action. The court found that Kim was the prevailing party, and ordered the Parks to pay him \$107,450 for attorney fees and \$22,318.45 for costs in the case, pursuant to a payment schedule set forth in the order. The court entered a separate order denying the Parks' motion.

## II. DISCUSSION

#### A. Attorney Fees

Under Civil Code section 1717, subdivision (b)(1), the court "shall determine who is the prevailing party on the contract," and "the party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract." The court has "wide discretion" in determining who has prevailed (*Silver Creek, L.L.C. v. BlackRock*

*Realty Advisors, Inc.* (2009) 173 Cal.App.4th 1533, 1539), and its decision must be upheld absent a “clear abuse” of that broad discretion (*Sears v. Baccaglio* (1998) 60 Cal.App.4th 1136, 1158).

There was no abuse of discretion in this case. The court ruled for Kim on the central issue—whether Park misrepresented the revenue of the business—and found that the Market was worth only \$285,600, not the \$600,000 Park charged for it. The judgment granted Kim’s request for reformation of the contract at this reduced price, and denied Park any recovery on the \$200,000 promissory note Kim allegedly owed him in addition to the \$370,000 Kim had already paid. Park prevailed only to the extent that he was given credit, whether Kim retained the Market or Park bought it back, for the unpaid inventory Kim obtained when he took over the business, and for the \$55,800 Park paid toward the rescission agreement. The court could very reasonably conclude that, on balance, Kim obtained the greater recovery.

The Parks argue that attorney fees cannot be awarded under the contract for purchase of the business because that contract was extinguished when the court found the parties made an enforceable agreement to rescind it. However, a party who obtains the greater relief in an action on a contract can enforce the contract’s attorney fee provision even if the contract is rescinded. (*Hastings v. Matlock* (1985) 171 Cal.App.3d 826, 840–841; *Star Pacific Investments, Inc. v. Oro Hills Ranch, Inc.* (1981) 121 Cal.App.3d 447, 463; see also *Wong v. Davidian* (1988) 206 Cal.App.3d 264, 270; *Leaf v. Phil Rauch, Inc.* (1975) 47 Cal.App.3d 371, 378–379.)

The Parks argue that they were entitled to attorney fees under the fee provision in the Kims’ promissory note for the inventory they acquired when they took over the business. However, the Parks did not prevail in their cause of action on this note. They sought to hold the Kims liable for the value of the unpaid inventory in addition to the \$600,000 they allegedly owed for the purchase of the Market. Instead, the court merely gave them credit for unpaid inventory in the transactions contemplated by the judgment. The Kims would have to pay \$129,000 for the inventory if they purchased the Market under the reformed contract, but the Kims succeeded in reducing the purchase price by a

far greater amount. If the Parks reacquired the Market, the judgment provided that the “purchase price will be \$330,300 (before inventory adjustments).” With those adjustments, the Kims would presumably have no liability for inventory if the business had more inventory when they returned it than when they acquired it.

The Parks renew the argument they made in the trial court that the billing records submitted by the Kims’ counsel were inadequate to permit apportionment of fees incurred for contract and non-contract causes of action. The Parks’ principal complaint is that the daily billing records submitted in support of the fee motion were entirely redacted to avoid disclosure of information protected by the attorney-client privilege. However, a party “can carry its burden of establishing its entitlement to attorney fees by submitting a declaration of counsel instead of billing records or invoices” (*Lunada Biomedical v. Nunez* (2014) 230 Cal.App.4th 459, 487–488.) Here, counsel submitted a declaration describing the work performed on a monthly basis, and advised the court that he would be bringing complete billing records to the hearing so they could be inspected in camera if necessary. This showing was sufficient to support the fee award. (*Ibid.*; see *Trustees of Cent. States v. Golden Nugget, Inc.* (C.D.Cal 1988) 697 F.Supp. 1538, 1558–1559 [noting that “California courts do not require contemporaneous time records be submitted in support of a motion for attorney’s fees,” and rejecting a claim that the fee documentation in the case was too vague to determine the work’s “relatedness to the contract claim”].)<sup>1</sup>

#### B. Costs

The Parks also renew their trial court objections to the awards of costs of \$14,653.73 for court reporter fees, \$4,775 for interpreter fees, and \$3,140 for expert witness fees. Kim has not, in the trial court or on appeal, briefed the issues of his entitlement to these costs. But, the costs were properly awarded.

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<sup>1</sup> The court awarded the Kims \$107,450 out of the \$108,266.25 in fees they requested. The Parks cannot claim that the award was unreasonable since they sought a comparable award of \$101,040 in their attorney fee motion.

The reporter's transcript is not included in the appellate record, but according to the Parks' briefing Kim retained a court reporter who transcribed all but the first and last days of the 15-day trial. Government Code section 68086, subdivision (d)(2) directs the Judicial Council to adopt rules to ensure "[t]hat if an official court reporter is not available, a party may arrange for the presence of a certified shorthand reporter to serve as an official pro tempore reporter, the costs therefor recoverable as provided in subdivision (c)." Subdivision (c) of the statute states that "[t]he costs for the services of the official court reporter shall be recoverable as taxable costs by the prevailing party as otherwise provided by law." California Rules of Court, rule 2.956(c) provides: "If the services of an official court reporter are not available for a hearing or trial in a civil case, a party may arrange for the presence of a certified shorthand reporter to serve as an official pro tempore reporter. It is that party's responsibility to pay the reporter's fee for attendance at the proceedings, but the expense may be recoverable as part of the costs, as provided by law." Recovery of the cost of the privately-retained reporter is "provided by law" in Code of Civil Procedure section 1033.5, subdivision (a)(11), which includes "[c]ourt reporter fees as established by statute" among allowable costs. These provisions authorized the award of reporter fees in this case.

The Parks' theory to the contrary is that the reporting firm Kim hired "fail[ed] to qualify as an official pro tempore reporter" because it did not provide a "complete record of the proceedings." But the Parks offer no support for this theory, and none is found in the statutes and court rule, which equate privately-retained reporters with official pro tempore reporters for cost-recovery purposes and make no exception for partial transcripts.

The Parks note that court interpreter fees are listed in Code of Civil Procedure section 1033.5 as allowable costs only if they are for "a qualified court interpreter authorized by the court for an indigent person represented by a qualified legal services project, as defined in Section 6213 of the Business and Professions Code, or a pro bono attorney as defined in Section 8030.4 of the Business and Professions Code." (Code Civ. Proc., § 1033.5, subd. (a)(12).) Contrary to the Parks' argument, the ability to award

interpreter’s costs for indigent litigants or pro bono attorneys does not preclude recovery of the cost of privately-retained interpreters. Subdivision (c) of the statute provides that “[i]tems not mentioned in this section and items assessed upon application may be allowed or denied in the court’s discretion” (Code Civ. Proc., § 1033.5, subd. (c)(4)), if they are “reasonably necessary to the conduct of the litigation” (Code Civ. Proc., § 1033.5, subd. (c)(2)). The Parks make no attempt to show any abuse of this discretion to award the interpreter fees. In fact, their counsel’s declaration in support of their motion to tax Kim’s costs acknowledged that “[t]he parties to this action both needed an interpreter for their respective clients . . . .”

The Parks advise that the court disallowed fees of \$1,640 for an expert witness who did not testify at trial, but awarded \$1,500 for the fees of valuation expert Brooks. The Parks assert without elaboration that those fees were not recoverable because Code of Civil Procedure section 1033.5, subdivision (b)(1) provides that fees of experts not ordered by the court “are not allowable as costs, except when expressly authorized by law.” However, insofar as it appears from the record, Brooks’ testimony may have been ordered by the court. Thus, the Parks have not met their burden of establishing any error on the point. (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal § 355, p. 409 [presumption in favor of the judgment].)

### **III. DISPOSITION**

The cost and attorney fee orders are affirmed. Kim is entitled to recover his reasonable attorney fees on appeal, in an amount to be determined by the trial court.

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Siggins, J.

We concur:

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Pollak, Acting P.J.

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Jenkins, J.