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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

FIDELITY NATIONAL TITLE  
COMPANY,

Plaintiff and Respondent,

v.

1575 ADRIAN ROAD ASSOCIATES,  
LLC,

Defendant and Appellant.

A140350

(San Mateo County  
Super. Ct. No. CIV 498687)

Appellant 1575 Adrian Road Associates, LLC (Adrian Road) appeals from an order granting the motion of respondent Fidelity National Title Company (Fidelity) for attorney fees under a contractual attorney fees provision and Civil Code section 1717. Adrian Road contends the court erred because Fidelity was not a party to the contract that contained the attorney fees provision and no term in the contract permits an attorney fees award with respect to the issue on which Fidelity prevailed. We will affirm the order.

I. FACTS AND PROCEDURAL HISTORY

In May 2009, Adrian Road and Paul Leininger entered into an agreement (Purchase Agreement) by which Adrian Road would sell certain property to Leininger. Adrian Road and Leininger were the sole signatories to the Purchase Agreement. Fidelity was identified in the Purchase Agreement as the “Escrow Agent,” and in that capacity accepted a \$50,000 earnest money deposit from Leininger pursuant to the terms of the Purchase Agreement.

Section 1.3 of the Purchase Agreement provided that, if the agreement terminated by the end of the due diligence period for any reason other than Leininger's default in performance, all of the \$50,000 deposit except \$10 would be refunded to Leininger upon request, with the remaining \$10 to be paid to Adrian Road.

Section 10.10 of the Purchase Agreement provided for the recovery of attorney fees. It read: "*Attorneys' Fees.* Should either party employ attorneys to enforce any of the provisions hereof, the party against whom any final judgment is entered agrees to pay the prevailing party all reasonable costs, charges and expenses, including attorneys' fees, expended or incurred in connection therewith."

A. Leininger's Cancellation

Leininger elected not to pursue the transaction on August 7, 2009, before the end of the due diligence period.

On August 13, 2009, Fidelity asked Adrian Road and Leininger to sign mutual cancellation instructions to release the \$50,000 to Leininger. Fidelity emailed the proposed instructions to Adrian Road's broker, Mark Melbye.

On August 6, 2010—nearly a year later—Fidelity advised Leininger and Adrian Road that it had not received mutual instructions regarding the release of the deposit, and warned that it would file an interpleader action if it did not receive signed instructions from them by August 20, 2010.

Fidelity thereafter received signed cancellation instructions from Leininger, but not from Adrian Road.

B. Fidelity's Interpleader Action

On September 9, 2010, Fidelity filed its interpleader action against Leininger and Adrian Road. A default was entered against Adrian Road. But Leininger demurred to the complaint, and Fidelity thereafter filed a first amended complaint for interpleader on March 3, 2011. In the interim, Fidelity received correspondence from Adrian Road's principal, asserting a claim on the deposit.

## 1. Fidelity's First Amended Complaint

According to Fidelity's first amended complaint, Leininger claimed he was entitled to all of the deposit, while Adrian Road claimed it was entitled to some or all of the deposit because Leininger had canceled the Purchase Agreement in bad faith or otherwise breached the agreement. Fidelity alleged that it was unable to determine who was entitled to the funds, it had deposited the funds with the court, and it was entitled to its costs and attorney fees incurred as a result of the proceedings. (See Code Civ. Proc., § 386.6.)

Adrian Road responded to the first amended complaint in September 2012. It stated that it was not making any claim against the funds and did not object to Fidelity returning the \$50,000 to Leininger. In addition, Adrian Road asserted that section 9.2 of the Purchase Agreement constituted proper escrow instructions, Fidelity's mutual cancellation instructions and interpleader action were unnecessary, and Adrian Road was not responsible for paying Fidelity's attorney fees.

## 2. Adrian Road's Cross-Complaint Against Fidelity

Meanwhile, on April 18, 2012, Adrian Road had sought and was granted leave to file a cross-complaint against Fidelity. The cross-complaint—which was purportedly never filed or served—included causes of action for breach of contract, negligence, and abuse of process.<sup>1</sup>

Adrian Road's first cause of action, for breach of a written contract, alleged that Fidelity was required by paragraphs 1.3 and 9.2 of the Purchase Agreement to disburse

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<sup>1</sup> Adrian Road represents in its appellate briefs, and maintained in the trial court, that the cross-complaint was never filed or served. Nonetheless, Fidelity answered the cross-complaint, Adrian Road requested a dismissal of two of its causes of action (representing that the cross-complaint *had* in fact been filed on April 18, 2012), and the parties proceeded on a summary judgment motion on the cross-complaint. The trial court later concluded that the fact the cross-complaint was not filed did not preclude an award of attorney fees. Indulging all reasonable inferences in support of the judgment, as we must, we conclude the cross-complaint was deemed filed and no prejudicial error arose from any anomaly in the proceedings. Neither Adrian Road nor Fidelity asserts error or prejudice based on these facts.

the \$50,000 deposit (less \$10) to Leininger. Because Fidelity did not disburse the money, and because it filed the interpleader action instead, Fidelity allegedly “breached [its] contractual obligations.” And, as a result, Adrian Road purportedly incurred attorney fees and costs, as well as attorney fees and costs that it might be ordered to pay to Leininger. On this latter point, paragraph 14 of the cross-complaint alleged: “As a direct and proximate result of *Cross-Defendants’ breach of contract*, Cross-Complainant has been forced to incur attorney’s fees and costs and incurred other damages, including, but not limited to, attorney’s fees and costs which Cross-Complainant may be ordered to pay to LEININGER, according to proof.” (Italics added.) The prayer for relief requested damages, “attorney’s fees and costs,” “indemnification of any attorney’s fees and costs Cross-Complain[an]t is required to pay to LEININGER,” and “costs of suit.”

Fidelity answered the cross-complaint in September 2012.

### 3. Fidelity’s Motions for Summary Judgment

On September 20, 2012, Fidelity filed motions for summary judgment on its first amended complaint for interpleader, the cross-complaint of Adrian Road, and a cross-complaint filed by Leininger.

As to Adrian Road’s cross-complaint, Fidelity contended that the Purchase Agreement did not constitute escrow instructions, Fidelity was not bound by the Purchase Agreement, and in any event it was necessary for Fidelity to require Adrian Road and Leininger to sign mutual cancellation instructions. In addition, Fidelity contended that it needed to file the first amended complaint for interpleader, producing evidence that Adrian Road expressed a claim on the funds in February 2011, before the first amended complaint was filed. Therefore, Fidelity urged, Adrian Road could not prevail on its breach of contract, negligence, or abuse of process claims.

Adrian Road thereafter filed a request for a voluntary dismissal with prejudice as to its second cause of action (negligence) and third cause of action (abuse of process), leaving the breach of contract claim.

In November 2012, Adrian Road filed its opposition to Fidelity's summary judgment motion, contending there were triable issues of material fact as to the breach of contract claim. Adrian Road argued that Fidelity was bound by the Purchase Agreement, and the agreement served as escrow instructions. It claimed there were questions of fact as to whether Fidelity was bound by section 9 of the Purchase Agreement, whether Fidelity was estopped to deny it was bound, whether Fidelity followed the terms of the Purchase Agreement, whether the Purchase Agreement allowed Fidelity to retain the deposit money, and whether Adrian Road was required to sign the mutual cancellation instructions. However, Adrian Road did not specify what those factual issues were, or explain how the evidence demonstrated a dispute of fact. Nor did it explain precisely why Fidelity would be bound by section 9 of the Purchase Agreement.

In December 2012, the court granted all three of Fidelity's summary judgment motions. On February 1, 2013, the court entered a "Revised Order Granting Plaintiff Fidelity National Title Company's Motions for Summary Judgment," which set forth the court's reasons for its rulings. The court found that, as of the time Fidelity filed the interpleader action, it was not clear that Adrian Road agreed to the return of the deposit to Leininger, since Fidelity had not received signed mutual cancellation instructions from Adrian Road but had received correspondence from Adrian Road's principal expressing a claim on the money. In addition, the court found that Adrian Road was wrong in asserting that the Purchase Agreement contained sufficient escrow instructions, since Fidelity was not a party to the Purchase Agreement: "While the Court notes that it is both LEININGER and ADRIAN ROAD's positions that this [Purchase] Agreement governs the process for return of escrow funds, it remains undisputed that FIDELITY TITLE was not a party to said [Purchase] Agreement."

#### 4. Fidelity's Motion for an Award of Attorney Fees and Costs

In May 2013, Fidelity filed motions for attorney fees and costs against Adrian Road and Leininger under Civil Code section 1717. As to Adrian Road, Fidelity

alleged it incurred \$17,936.40 in attorney fees and \$1,108.10 in costs in defending against Adrian Road's cross-complaint. Fidelity contended it was entitled to recover these fees and costs because, although Fidelity was not a signatory to the Purchase Agreement containing the attorney fees provision, Adrian Road's cross-complaint was premised on the allegation that Fidelity had breached the Purchase Agreement.

Adrian Road filed an opposition to the motion, contending it could not be liable for attorney fees to Fidelity because Fidelity was not a party to the Purchase Agreement. It did not explain why it had sued Fidelity for breaching the Purchase Agreement if Fidelity was not bound by its terms as a party.

After a hearing, the court issued a written order in September 2013 granting Fidelity's motion for attorney fees and costs. The court found that Adrian Road's cross-complaint specifically sought to hold Fidelity liable based on Fidelity's alleged breach of section 9.2 of the Purchase Agreement, Adrian Road sought attorney fees as damages against Fidelity, the Purchase Agreement provided for attorney fees to the prevailing party, and Fidelity was the prevailing party. The court added: "The court does not find persuasive [Adrian Road's] contention that Fidelity is not entitled to an award of fees because it was not a signatory to the contract. [Adrian Road] filed an action under that contract and sought to hold Fidelity responsible under the contractual terms, thus, the attorneys' fees provision applies equally to Fidelity even though it did not sign the agreement."

This appeal followed.

## II. DISCUSSION

Adrian Road contends there was no legal basis for the attorney fees award based on the language of the Purchase Agreement. It does not contest the court's calculation of the amount of the award or raise any issue concerning the apportionment of the fees to the contract cause of action. The parties therefore agree we review the matter de novo. (*Sessions Payroll Management, Inc. v. Noble Construction Co.* (2000) 84 Cal.App.4th 671, 677 (*Sessions*).

We begin with the language of the attorney fees provision. As mentioned, section 10.10 of the Purchase Agreement read as follows: “Should either party employ attorneys to enforce any of the provisions hereof, the party against whom any final judgment is entered agrees to pay the prevailing party all reasonable costs, charges and expenses, including attorneys’ fees, expended or incurred in connection therewith.”

The requirements for an award of attorney fees, as set forth in the language of section 10.10, were met. Adrian Road, a “party” to the Purchase Agreement, “employ[ed] attorneys to enforce [section 9.2 of the Purchase Agreement].” The “party against whom [] final judgment [was] entered” on the cross-complaint was Adrian Road. The “prevailing party” in the litigation was Fidelity. Accordingly, under the terms of section 10.10, Adrian Road must pay Fidelity “all reasonable costs, charges and expenses, including attorneys’ fees, expended or incurred in connection [with Adrian Road’s cross-complaint].”

Adrian Road nonetheless argues that Fidelity cannot recover attorney fees under section 10.10 because Fidelity was not itself a “party” to the *Purchase Agreement*: the Purchase Agreement identified only Leininger and Adrian Road as signatories; Fidelity was identified only as the escrow agent; and Fidelity alleged in its interpleader complaint, and the court expressly found, that Fidelity was not a party to the Purchase Agreement. The argument is unavailing, for two reasons.

First, section 10.10 does *not* state that a nonsignatory to the Purchase Agreement cannot recover attorney fees if it is sued by a party. To the contrary, it provides that the “prevailing party” in the litigation *is* entitled to recover attorney fees. And Fidelity was, in fact, the “prevailing party.”

Second, even if the language in section 10.10 were meant to limit the recovery of attorney fees to a prevailing party who was *also* a party to the Purchase Agreement, as a matter of law the provision would have to be interpreted under Civil Code section 1717 (section 1717) to require a signatory to the Purchase Agreement—such as Adrian Road—to compensate even a nonsignatory—such as Fidelity—for its attorney fees if the nonsignatory prevailed in its litigation.

Section 1717, subdivision (a) provides: “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.” The legislature’s goal in enacting section 1717 was to ensure the mutuality of an attorney fees remedy in contractual attorney fees provisions. (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 610 (*Santisas*); *Hsu v. Abbara* (1995) 9 Cal.4th 863, 870.) There are two aspects to this mutuality: (1) an attorney fees provision entitling only one party to fees must be interpreted to allow fees to whichever party prevails; and (2) a nonsignatory sued under the contract may recover attorney fees just as a signatory would, under certain circumstances. (*Santisas, supra*, 17 Cal.4th at pp. 610-611.) The latter aspect is pertinent here.

As our Supreme Court has explained, section 1717 provides “a reciprocal remedy for a nonsignatory defendant, sued on a contract *as if* he were a party to it, when a plaintiff would clearly be entitled to attorney’s fees should he prevail in enforcing the contractual obligation against the defendant.” (*Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 128 (*Reynolds*) [defendants sued as alter egos were entitled to recover their attorney fees under section 1717, since plaintiff would have recovered attorney fees against them if it had prevailed], italics added.)

Here, Adrian Road sued nonsignatory Fidelity on the Purchase Agreement *as if* Fidelity were a party to it, alleging that Fidelity “breached [*its*] contractual obligations” under section 9.2 of the Purchase Agreement and damages arose “[a]s a direct and proximate result of [*Fidelity’s*] breach of contract.” (Italics added.) In the rubric of section 10.10, Adrian Road was a “party” that employed attorneys to enforce a provision of the Purchase Agreement. If Adrian Road had *prevailed* on its breach of contract claim, Fidelity would have been found, at least implicitly, *to be a party* to the Purchase Agreement, since there was no other asserted basis for Adrian Road’s claim that Fidelity was required to perform pursuant to the agreement. Fidelity would then

have been the “party against whom any final judgment is entered” as set forth in section 10.10, and Fidelity would have had to “pay the prevailing party [Adrian Road] all reasonable costs, charges and expenses, including attorneys’ fees, expended or incurred in connection therewith.” In short, if Adrian Road had prevailed in the litigation, it would have recovered its fees from Fidelity. And since Adrian Road would have recovered its fees from Fidelity if Adrian Road had prevailed, *Reynolds* and section 1717 demand that Fidelity recover its fees from Adrian Road because Fidelity prevailed.

Illustrative of this principal is *Brown Bark III, L.P. v. Haver* (2013) 219 Cal.App.4th 809 (*Brown Bark*). There, a creditor had entered into contracts with a corporation for a revolving line of credit, and these contracts contained an attorney fees provision. Later, the creditor’s assignee sued the defendant for breach of contract, alleging the defendant was a successor to the debtor corporation. The defendant prevailed in the litigation and, although it was not a signatory to the contracts creating the line of credit and containing the attorney fees provision, it was entitled to recover its attorney fees on the breach of contract claim because the assignee would have recovered its attorney fees if it had prevailed on its contract claim based on the successor liability theory. (*Id.* at pp. 821-827.)

Also instructive to some extent is a case on which Fidelity relies, *Manier v. Anaheim Business Center Co.* (1984) 161 Cal.App.3d 503 (*Manier*). There, Manier had signed a real estate purchase agreement to acquire real property from Anaheim Business Center Co. (ABCC). ABCC canceled the agreement. Manier and his wife sued ABCC and Martens, ABCC’s president—who was not a party to the contract—for failing to assist Manier in obtaining financing for the project. ABCC and Martens prevailed in the lawsuit, and then both sought attorney fees from Manier and his wife under section 1717 and a contract clause entitling the prevailing party to attorney fees in the event a party sued on the agreement. (*Id.* at p. 505.) On appeal, the court ruled that the prevailing party in a contract action, in which the opposing party seeks contractual attorney fees, is entitled to recover his own fees whether or not the contract

is upheld. (*Id.* at pp. 505, 507.) It also held that both Manier and his nonsignatory wife were liable for the attorney fees, because both had sued ABCC and Martens on the contract. (*Id.* at p. 508.) In the end, both a signatory (Manier) and a nonsignatory (Manier’s wife) were held liable to a signatory (ABCC) and a nonsignatory (Martens) because the plaintiffs sought to hold them liable under a contract containing an attorney fees clause. Although the court did not explicitly address whether nonsignatory Martens could recover his fees, that was the result, consistent with the outcome here that signatory Adrian Road pay the attorney fees of nonsignatory Fidelity because the signatory sought unsuccessfully to hold the nonsignatory liable under the contract.<sup>2</sup>

We also find it both logical and equitable that Adrian Road should receive no reprieve from the fact that the court found Fidelity was not a party to the Purchase Agreement. Since Adrian Road sued Fidelity for breach of the Purchase Agreement as if Fidelity were a party, the court’s finding that Fidelity was not a party established that Adrian Road was wrong in its claim, the contract did not apply, and Adrian Road had no contract cause of action at all. The fact that Adrian Road had no case should not be the reason it avoids compensating Fidelity for the attorney fees Fidelity incurred in defending against it. (*Brown Bark, supra*, 219 Cal.App.4th at p. 827 [regardless of the merit of the theory on which plaintiff based its claim that the nonsignatory was liable under a contract, the fact that the plaintiff sued the nonsignatory on that theory, and

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<sup>2</sup> Another case on which Fidelity relies concluded that a signatory could recover attorney fees from a nonsignatory where it was sued unsuccessfully by the nonsignatory. (*California Wholesale Material Supply, Inc. v. Norm Wilson & Sons, Inc.* (2002) 96 Cal.App.4th 598 (*California Wholesale*).) Although here the roles were reversed—the nonsignatory recovered attorney fees from a signatory after being sued unsuccessfully by the signatory—*California Wholesale* does exemplify the reciprocal effect of section 1717. (*California Wholesale* at pp. 604-610 [signatory’s assignee who lost on its lawsuit against another signatory was liable for that signatory’s attorney fees, since the assignee would have recovered attorney fees if it had won]. See *Real Property Services Corp. v. City of Pasadena* (1994) 25 Cal.App.4th 375, 382-384 [where nonsignatory had asserted it was a third party beneficiary of the contract and unsuccessfully sued a signatory, signatory could recover its fees from the nonsignatory because the nonsignatory would have expected to recover fees if it had prevailed].)

required the nonsignatory to incur attorney fees in defending against it, supported the nonsignatory's claim for attorney fees]; see *Reynolds, supra*, 25 Cal.3d at p. 128 [section 1717 “refers to ‘any action on a contract’ thus including any action where it is alleged that a person is liable on a contract, whether or not the court concludes he is a party to that contract”]; *Santisas, supra*, 17 Cal.4th at p. 611 [section 1717 allows a litigant to recover attorney fees under a contract if it shows the “ ‘inapplicability, invalidity, unenforceability, or nonexistence’ ” of the contract containing the attorney fees provision].) Or, as other courts have put it: “ ‘We believe that it is extraordinarily inequitable to deny a party who successfully defends an action on a contract, which claims attorney's fees, the right to recover its attorney's fees and costs simply because the party initiating the case has filed a frivolous lawsuit.’ ” (*Manier, supra*, 161 Cal.App.3d at p. 508, quoting *Jones v. Drain* (1983) 149 Cal.App.3d 484, 489-490.)

Adrian Road's remaining arguments are also unconvincing. Adrian Road contends it could not have recovered attorney fees from Fidelity because a “non-contracting party cannot be saddled with contractual attorney's fees in a contract it did not sign or agree to.” Ironically, this argument is inconsistent with Adrian Road's essential position in the litigation—that Fidelity *could* be saddled with escrow obligations in the Purchase Agreement it never signed. In fact, Adrian Road *sought* attorney fees against Fidelity in its cross-complaint. Moreover, Adrian Road's argument is simply wrong on the law, as our Supreme Court indicated decades ago. (*Reynolds, supra*, 25 Cal.3d at p. 128.) A nonsignatory may indeed be liable to a signatory for attorney fees, if the signatory proves the nonsignatory is liable for the alleged breach of contract. (E.g., *CB Richard Ellis, Inc. v. Terra Nostra Consultants* (2014) 230 Cal.App.4th 405, 410-411, 415-417 [CB Richard Ellis, Inc. (CBRE) and Jefferson, a limited liability company, signed a listing agreement that contained an attorney fees clause; Jefferson dissolved and its members received its assets; CBRE enforced its breach of contract cause of action against the members under former Corporations Code section 17355, and Jefferson's members were deemed statutory parties to the listing agreement; signatory CBRE was entitled to recover its attorney

fees from nonsignatory members, even though they were not signatories to the listing agreement].) Adrian Road ignores *Reynolds* and provides no relevant legal authority to support its assertion.

Adrian Road further asserts that the “Purchase Agreement does not contain any provision that would allow the prevailing party to be awarded its attorney’s fees.” It is unclear what Adrian Road means by this, since section 10.10 of the Purchase Agreement clearly does allow the prevailing party to be awarded its attorney fees, by requiring the party against whom a judgment is entered to “pay *the prevailing party* all reasonable costs, charges and expenses, including *attorneys’ fees*, expended or incurred in connection therewith.” (Italics added.) And certainly Adrian Road’s claim that Fidelity breached section 9.2 of the Purchase Agreement fell within the scope of the attorney fees clause, since section 10.10 provided for an attorney fees award if “either party employ[ed] attorneys to enforce *any of the provisions*” of the Purchase Agreement.

Lastly, Adrian Road points out that Fidelity did not include a prayer for attorney fees in its answer to Adrian Road’s cross-complaint. But Adrian Road provides no authority for the proposition that this is required (see Code Civ. Proc., § 431.30), or that the absence of a request for attorney fees in a defendant’s answer precludes the defendant from subsequently recovering attorney fees upon noticed motion. Besides, Adrian Road waived this argument by not raising it in the trial court.

Adrian Road fails to establish error.<sup>3</sup>

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<sup>3</sup> This case is plainly distinguishable from one in which the nonsignatory was alleged to be a third party beneficiary of the contract despite express language in the contract that the contract created no rights in third parties. (See *Sessions, supra*, 84 Cal.App.4th at pp. 679-681 [nonsignatory not entitled to attorney fees as a third party beneficiary to a contract containing an attorney fees provision because the contract expressly disavowed conferring any rights on third parties].) Nor is this a case in which the contract expressly limited the character of the litigation to which the attorney fees provision might apply. (See *Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 896-902 (*Blickman Turkus*) [alleged third party beneficiary not entitled to attorney fees under a contract provision limiting recovery of fees to “litigation *between the parties hereto* to enforce any provision of this Agreement”], italics added.) Adrian Road makes no such argument under *Sessions* or *Blickman Turkus*.

III. DISPOSITION

The order is affirmed.

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NEEDHAM, J.

We concur.

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JONES, P. J.

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SIMONS, J.