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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

ALEVAMARE, INC., et al.,
Plaintiffs and Respondents,
v.
BECKY TRUONG et al.,
Defendants and Appellants.

A144337

(Alameda County
Super. Ct. No. HG12646342)

Plaintiffs Alevamare, Inc. and its president Allen Feng (collectively, plaintiffs) sued defendants Becky Truong and her husband Quang “Danny” Luong¹ (collectively, defendants) for breaking their agreement to purchase a restaurant business from plaintiffs. They asserted four causes of action against defendants: breach of an oral contract; common counts—open book account; accounting; and implied indemnification. Following a three-day bench trial before Judge John M. True III, Judge True found no contract had ever been formed and defendants were not liable for the back rent or vendor costs plaintiffs sought. Shortly after entering judgment in defendants’ favor, Judge True retired, and the case was assigned to Judge Stephen Pulido who ruled on the post-trial motions.

Judge Pulido granted plaintiffs’ motion for a new trial on the ground that Judge True had “erroneously asserted that all of [plaintiffs’] claims [against defendants] other

¹ For clarity and because family members with the same last name are involved in this case, we will refer to Quang Luong by his nickname Danny. For consistency among defendants, we will refer to Becky Truong as Becky.

than the First Cause of Action for Breach of Oral Contract had been resolved and/or dropped prior to trial.” He explained, “[T]he Court committed an error in law when it declined to making rulings on the Second Cause of Action (Common Counts), Third Cause of Action (Accounting) and Fourth Cause of Action (Implied Indemnification). [Citations.]” Judge Pulido also denied defendants’ motion for attorney fees. Defendants appeal both orders.

We conclude Judge True’s findings effectively disposed of all four of plaintiffs’ claims against defendants. Accordingly, we reverse Judge Pulido’s order for a new trial. We affirm in part and reverse in part his orders with respect to attorney fees.

FACTUAL AND PROCEDURAL BACKGROUND

Our factual summary is largely taken from the trial court’s Findings of Fact, Conclusions of Law and Judgment, issued by Judge True.

In late 2008, defendants orally agreed to buy from plaintiffs Bosco’s Bones & Brew, a bar and restaurant in Sunol, California. Their purchase was contingent on Alevamare transferring its liquor license to defendants. Before that condition was satisfied and the sale consummated, Danny began managing Bosco’s with the expectation he and Becky would soon own the business. During this time, Danny made rent payments to The Cerny Building, LLC, which owned the property Bosco’s occupied, and paid Bosco’s vendors from the revenues generated by the business. The rent payments were made pursuant to a written lease between Cerny and plaintiffs to which defendants were not signatories.

In late 2009, after nearly a year passed without the liquor license transfer, defendants “made reasonably prudent plans” to return management of Bosco’s to plaintiffs. With Feng’s knowledge and consent, Minh Luong² (Danny’s brother) took over managing the restaurant. In late 2011, Feng resumed operating Bosco’s when it became apparent Minh had failed to pay Bosco’s vendors and rent. Feng paid \$34,898 to

² For the reasons previously stated, we will refer to Minh Luong by his first name.

Bosco's vendors, and became liable to Cerny for a \$103,323 judgment for back rent and other damages from a separate lawsuit Cerny brought against plaintiffs.

In September 2012, plaintiffs sued Becky, Danny, and Minh seeking to recover these costs. Their complaint asserted four causes of action: (1) breach of oral agreement; (2) common counts—open book account; (3) accounting; and (4) implied indemnification. For their contract and implied indemnification claims, plaintiffs sought \$138,222 (stemming from the \$103,323.16 judgment plus \$34,898 in vendor costs). Through their common counts and accounting claims, plaintiffs also sought to recover the \$34,898 they paid to Bosco's vendors. They requested attorney fees for their contract and common counts claims, as well.

Plaintiffs later added as defendants Old Republic Title Company and Mechanics Bank, both of which had maintained escrow accounts or funds for Bosco's sale. Against these entities, plaintiffs asserted claims for negligence and breach of fiduciary duty. Plaintiffs resolved their claims with Old Republic Title Company and Mechanics Bank, and both were dismissed by the start of trial. Minh never appeared in the case.³

The parties remaining (plaintiffs and defendants Becky and Danny) tried the case to Judge True. Plaintiffs' trial brief recounted to Judge True each of their pending four causes of action—breach of oral contract, common counts—open book account, accounting, and implied indemnification—and argued why they would prevail on each one. For their second, third, and fourth causes of action, plaintiffs offered the same analysis.

Over the course of a three-day bench trial, Judge True heard sworn testimony of witnesses, received numerous documents as exhibits and oral and written arguments of counsel. In prosecuting all four of their causes of action, plaintiffs called two witnesses to the stand. In their closing argument, plaintiffs explained to Judge True they had four causes of action. Plaintiffs' post-trial submission to Judge True asserted their four causes of action pending against defendants and argued how they proved each of them at trial.

³ Because Minh never appeared in the case, he is not included in our collective reference to defendants, which is limited to the appealing defendants, Becky and Danny.

They asserted they won their open book account claim because the parties had entered a sales transaction and an oral agreement under which defendants agreed to pay Bosco's rent, and plaintiffs kept an accounting regarding defendants' debts to them. For their accounting claim, plaintiffs reasoned, "[I]f [they] prevail on common count, they will also prevail on claim for accounting to account for all debts owned by Defendants." They argued they would prevail on the implied indemnity claim because had defendants properly returned Bosco's to them, plaintiffs would have resumed running the business so that both Cerny and Bosco's vendors would have been timely paid.

In November 2014, Judge True issued his Findings of Fact and Conclusions of Law, and Judgment. Judge True identified all parties to the case, including Old Republic Title Company and Mechanics Bank with which "[p]laintiffs have apparently resolved their claims" and which "ha[d] been dismissed." The court also listed plaintiffs' cumulative claims against all defendants, including the dismissed entities: breach of oral agreement; common counts; accounting; implied indemnification; negligence; and breach of fiduciary duty. The court then stated: "Of these claims, only the breach of oral contract was at issue at the trial in this matter, the other claims having been resolved and/or dropped."

Judge True made additional fact findings. He found "[t]he attempted business transaction in this matter lacks an executed, bilateral buy-sell document." He found no evidence the parties ever agreed defendants would be personally responsible for Bosco's expenses. He found the lease contemplated between defendants and Cerny never materialized, and plaintiffs remained obligated to Cerny under their pre-existing lease. Thus, any rent defendants had paid to Cerny had been paid pursuant to Cerny's lease with plaintiffs. Judge True also noted that Feng, one of plaintiffs' two witnesses, was "a decidedly unpersuasive witness" whose "testimony was vague to the point of evasion, decidedly improbable in many respects, and lacking in important detail." The court expressly declined to credit Feng's testimony that he had no knowledge about Minh taking over Bosco's management from Danny.

Ultimately, Judge True ruled no oral contract ever existed between the parties, stating, “There is simply no credible evidence in this case that a contract was ever formed. The Court need not, therefore, reach the issues of breach and damages, and it declines to do so.” Judge True also found defendants were not liable to plaintiffs for back rent; he found no facts supported plaintiffs’ contention that defendants had orally entered into a binding, valid agreement to be responsible for rent payments to Cerny for some indefinite period of time. Nor were defendants liable to plaintiffs for vendor costs, concluding defendants “owe no obligations arising from other apparently unpaid debts and obligations incurred after defendants had relinquished management of Bosco’s.” Judge True entered judgment for defendants under which plaintiffs took nothing from defendants and defendants were awarded costs of suit.

Shortly after Judge True entered judgment, defendants moved for an award of attorney fees. The lease between plaintiffs and Cerny contained a fees provision which stated, “In any action or proceeding by either party to enforce this lease or any provision thereof, the prevailing party shall be entitled to all costs incurred and to reasonable attorney’s fees.” Plaintiffs moved for a new trial. Because Judge True had retired, Judge Pulido ruled on the post-trial motions.

Judge Pulido denied defendants’ motion for attorney fees. He ruled defendants were not entitled to attorney fees under Civil Code section 1717 “because the parties did not agree in the purported oral contract that the prevailing parties could recover their attorney’s fees if the other parties breached their contractual obligations.” Judge Pulido also declined to award defendants attorney fees pursuant to Civil Code section 1717.5 for plaintiffs’ open book account claim. Judge Pulido stated, “Although Plaintiffs did assert in the Second Cause of Action that they were entitled to recover their attorney’s fees for their Open Book Account claim, that claim was not tried to the Court or dealt with in [Judge True’s] order.”

Judge Pulido granted plaintiffs’ motion for a new trial. Citing to Code of Civil Procedure section 657(7), Judge Pulido stated, “[T]he Court agrees with Plaintiffs’ assertion that the Court committed an error in law when it declined to making rulings on

the Second Cause of Action (Common Counts), Third Cause of Action (Accounting) and Fourth Cause of Action (Implied Indemnification). [Citations.] Judge True erroneously asserted that all of the claims other than the First Cause of Action for Breach of Oral Contract had been resolved and/or dropped prior to trial.” The court identified no other basis for granting plaintiffs’ new trial motion.

Judge Pulido vacated Judge True’s judgment in favor of defendants. Defendants appealed.

DISCUSSION

A motion for new trial asks the trial court to reexamine one or more issues of fact or law after a trial and decision by judge or jury. (See Code Civ. Proc., §§ 656, 657.) “[T]here is a long-settled rule that in trials by the court, a party is entitled to a decision on the facts of the case from the judge who hears the evidence. [Citations.]” (8 Witkin, Cal. Procedure (5th ed. 2008), Attack on Judgment in Trial Court, § 103, p. 696.) However, where it is not possible that a motion for new trial be heard by the judge who presided at trial, another judge from the same court may hear the motion. (Code Civ. Proc., § 661.)

When a new trial is ordered, the court must have examined the entire cause, including the evidence. (Cal. Const., art. VI, § 13.) “The right to a new trial is purely statutory, and a motion for a new trial can be granted only on one of the grounds enumerated in the statute [Citations.]” (*Fomco, Inc. v. Joe Maggio, Inc.* (1961) 55 Cal.2d 162, 166 (*Fomco*)). As long as a new trial is based on one of the statutory grounds in section 657, a new trial may be granted on some issues and not others, in whole or in part. (Code Civ. Proc. § 657.) When a motion for new trial is made after a bench trial decision, the judge may change or add to the statement of decision, modify or vacate the judgment, grant a new trial on all or part of the issues or, instead of granting new trial, simply vacate and set aside the decision and judgment and reopen the case for further proceedings. (*Oliver v. Boxley* (1960) 181 Cal.App.2d 471, 476.)

In ordering a new trial, the court must have concluded a miscarriage of justice occurred. (Cal. Const., art. VI, § 13.) The error must be prejudicial, *i.e.*, a different result would have been probable if the error had not occurred. (See Code Civ. Proc., § 475.)

“No judgment . . . shall be reversed or affected by reason of any error . . . unless it shall appear from the record that such error . . . was prejudicial, and also that by reason of such error . . . the said party complaining or appealing sustained and suffered substantial injury, and that a different result would have been probable if such error, ruling, instruction, or defect had not occurred or existed. There shall be no presumption that error is prejudicial, or that injury was done if error is shown. (*Ibid.*) “[T]he error or other ground for new trial must be shown to have affected a substantial right of the moving party and have prevented that party from obtaining a fair trial.” (8 Witkin, *supra*, Attack on Judgment in Trial Court, § 132, pp. 722–723.) “Trivial or nonprejudicial errors will not warrant granting the motion and affirming it on appeal. [Citations.]” (*Id.* at p. 723.)

The standard of review on appeal is abuse of discretion. (*People v. Ault* (2004) 33 Cal.4th 1250, 1271–1272.) If “there be any grounds upon which the trial court’s action can be upheld, the order [granting a new trial] will be sustained irrespective of the particular ground given by that court.” (*Scott v. Renz* (1945) 67 Cal.App.2d 428, 432.) “ ‘But it is equally well established that the findings of a court are to receive such a construction as will uphold rather than defeat its judgment thereon [citation], and are to be read and considered together and liberally construed in support of the judgment [citations] . . . [I]f findings are made upon issues which determine a cause, other issues become immaterial and a failure to find thereon does not constitute prejudicial error [Citations.]’ ” (*Chamberlain v. Abeles* (1948) 88 Cal.App.2d 291, 299-300.)

“ ‘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].’ ” (*Eden Township Healthcare Dist. v. Eden Medical Center* (2013) 220 Cal.App.4th 418, 425.)

I.

The Trial Court Abused Its Discretion in Ordering a New Trial

A. Judge True’s Decision Was Neither Against Law Nor an Error in Law

Defendants contend Judge Pulido abused his discretion when he ruled Judge True “committed error in law because he declined to make rulings on the Second, Third, and Fourth Causes of Action.” They further argue Judge Pulido’s reliance on

subdivision (7)—the “error in law” provision of Code of Civil Procedure section 657⁴—was misplaced. They argue that under the controlling subdivision—section 657(6), which justifies new trials for decisions “against law”—no new trial was warranted.

“ ‘ “A party has the right to move for a new trial upon any or all of the grounds permitted by the statute, and if the record on which his motion is based discloses more than one ground for which a new trial should be granted, the court cannot, by stating in its order that the motion is granted upon one ground only, and denied upon the others, deprive the other party of the right to a review by this court of the entire record If there be any grounds upon which its action can be upheld, the order will be sustained, *irrespective of the particular ground given by that court*, whether in an opinion or by a statement in the order itself.” ’ (Italics added.)” (*Schmeltzer v. Gregory* (1968) 266 Cal.App.2d 420, 422 (*Schmeltzer*)). Accordingly, although Judge Pulido expressly based his new trial order on section 657(7), because plaintiffs proffered both section 657(6) and section 657(7) as bases for a new trial, we consider whether his order can be affirmed under either standard.

Under section 657(6), “ ‘A decision can be said to be “against law” . . . where there is a failure to find on a material issue.’ ” (*Tagney v. Hoy* (1968) 260 Cal.App.2d 372, 375–376.) The phrase “ ‘ “against law” refers to a situation furnishing a reason “for a re-examination of an issue of fact.” [Citation.]’ ” (*Estate of Keating* (1912) 162 Cal 406, 410.) “If the court fails to find on material issues made by the pleadings—issues as to which a finding would have the effect to countervail or destroy the effect of the other findings—and as to which evidence was introduced, the decision is ‘against law.’ In such a case, a reexamination of the facts is necessary in order that the issues of fact may be determined.” (*Schmeltzer, supra*, 266 Cal.App.2d at p. 423.) “This rule, of course, does not apply . . . where the fact is immaterial, where the fact is admitted by the pleadings, where the situation is such that it can be said that if the court had found on a material issue it would have been in such a way as to support the judgment, or where the

⁴ Unless stated otherwise, all statutory references in Section I are to the Code of Civil Procedure.

correction of defective or omitted findings, or findings outside the issue, would not change the result. [¶] If the findings which are made necessarily dispose of the case, the decision is not ‘against law.’ [Citations.]” (*Renfer v. Skaggs* (1950) 96 Cal.App.2d 380, 383–84.) Thus, “[i]f the complaint . . . sets forth two or more grounds for relief, either of which is sufficient to support a judgment . . . , a finding upon one of such issues is sufficient, and a failure to find upon the other does not constitute a mistrial, or render the decision ‘against law.’ ” (*Brison v. Brison* (1891) 90 Cal. 323, 329.)

Under section 657(7), a new trial may be granted on a showing that an “[e]rror in law occur[ed] at the trial and [was] excepted to by the party making the application [for new trial].” (§ 657(7).) Under this ground, which is “confusingly similar” to section 657(6), “a trial court may grant a new trial if ‘its original ruling, as a matter of law, was erroneous.’ [Citation.]” (*Collins v. Sutter Memorial Hospital* (2011) 196 Cal.App.4th 1, 17–18.) “[A]n error of law is committed when the court . . . makes some erroneous order or ruling on some question of law which is properly before it.” (*Pratt v. Pratt* (1903) 141 Cal. 247, 251.) The error complained of must have resulted in a miscarriage of justice in the court’s view. (Cal. Const., art. VI, § 13; *Kostecky v. Henry* (1980) 113 Cal.App.3d 362, 374–375.)

Judge True’s decision omitting rulings on plaintiffs’ second, third, and fourth causes of action was neither against law under section 657(6) nor an error in law under section 657(7). As we explain below, with respect to each of these claims, Judge True did not fail to find on any material issue necessary to resolve them. The findings Judge True made effectively disposed of all plaintiffs’ claims against defendants, and no aspect of Judge True’s decision resulted in a miscarriage of justice.

Plaintiffs’ denominated second cause of action for common counts—open book account requires no additional findings for its resolution. “It is settled that where a common count follows a count wherein all of the facts on which the plaintiff’s demand is based are specifically pleaded and it is clear that the common count is based on the same set of facts, the common count is to be considered not as a different cause of action, but

as an alternative method of pleading the plaintiff's right to recover. [Citations.]" (*City of Oakland v. Oakland Etc. Sch. Dist.* (1956) 138 Cal.App.2d 406, 411.)

Plaintiffs' common counts—open book account claim relies on the same facts pleaded for their breach of contract claim. Like their contract claim, plaintiffs' open book account claim alleges liability based on defendants' purported failure to pay vendor bills. For these unpaid vendor bills, plaintiffs seek to recover the exact same amount of \$34,898 in both causes of action. Plaintiffs' complaint makes clear their common count is premised on the same activity and seeks the same relief as included in plaintiffs' breach of contract claim. Since Judge True expressly found plaintiffs were not entitled to recover these vendor costs under their contract claim, they cannot recover them under this common count either. (See *Maselli v. E.H. Appleby & Co., Inc.* (1953) 117 Cal.App.2d 634, 637.)

Plaintiffs' third cause of action for accounting also requires no additional findings to be resolved. A claim for accounting may take the form of a legal remedy or an equitable claim. If alleged as a legal remedy, the "request for legal accounting must be tethered to relevant actionable claims." (*Hafiz v. Greenpoint Mortg. Funding, Inc.* (N.D. Cal. 2009) 652 F.Supp.2d 1039, 1043 (*Hafiz*)). In this light, "the right to an accounting is derivative and depends on the validity of a plaintiff's underlying claims." (*Duggall v. G.E. Capital Communications Services, Inc.* (2000) 81 Cal.App.4th 81, 95; see also *Janis v. California State Lottery Com.* (1998) 68 Cal.App.4th 824, 833–834 (*Janis*)). However, if alleged as a claim, "[a] cause of action for an accounting requires a showing that a relationship exists between the plaintiff and defendant that requires an accounting, and that some balance is due the plaintiff that can only be ascertained by an accounting. [Citations.] [¶] An action for accounting is not available where the plaintiff alleges the right to recover a sum certain or a sum that can be made certain by calculation. [Citations.]" (*Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 179 (*Teselle*)).

In our view, plaintiffs' accounting cause of action seeks a legal remedy and does not assert a separate claim. As with their open book account claim, the accounting claim is premised on the same activity and seeks the same relief as their breach of contract

claim. Like their breach of contract claim, plaintiffs' third cause of action seeks relief based on defendants' purported failure to pay Bosco's vendors. Plaintiffs' allegation of a sum certain—\$34,898—further supports the conclusion the accounting plaintiffs seek is a remedy, rather than an independent claim. (*See Teselle, supra*, 173 Cal.App.4th at 179 [claim for accounting unavailable where plaintiff alleges right to recover sum certain]). As such, the claim is tethered to and derivative of plaintiffs' breach of contract cause of action. Since Judge True expressly found plaintiffs were not entitled to recover under their contract claim any vendor costs incurred after defendants relinquished control of Bosco's, plaintiffs' accounting request also fails. (*Janis, supra*, 68 Cal.App.4th at 833–834; *Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 593–594 [plaintiffs have no right to accounting where defendant proved it engaged in no misconduct].)

Plaintiffs' fourth cause of action for implied indemnification, which seeks the same \$103,323 in back rent and \$34,898 in vendor costs as prior claims, is also readily disposed of by Judge True's findings. "Generally, 'indemnity refers to "the obligation resting on one party to make good a loss or damage another party has incurred."' [Citations.] There are two basic types of indemnity: express indemnity, which relies on an express contract term providing for indemnification, and equitable indemnity, which embraces 'traditional equitable indemnity' and implied contractual indemnity." (*Jocer Enterprises, Inc. v. Price* (2010) 183 Cal.App.4th 559, 573 (*Jocer*)). "[I]mplied contractual indemnity presupposes a contractual relationship that supports a right to indemnification not rooted in an express contract term." (*Ibid.*) "The right to implied contractual indemnity is predicated [on] the indemnitor's breach of contract" (*Sehulster Tunnels/Pre-Con v. Traylor Brothers, Inc./Obayashi Corp.* (2003) 111 Cal.App.4th 1328, 1350 (*Sehulster Tunnels*)). Meanwhile, "[t]raditional equitable indemnity is 'rooted in principles of equity' [citation] and 'requires no contractual relationship between an indemnitor and an indemnitee' [citation]." (*Jocer, supra*, 183 Cal.App.4th at p. 573.) "The basis for the remedy of equitable indemnity is restitution. ' "[O]ne person is unjustly enriched at the expense of another when the other discharges liability that it should be his responsibility to pay." ' [Citation.]" (*Children's Hospital v.*

Sedgwick (1996) 45 Cal.App.4th 1780, 1786.) While “traditional equitable indemnity requires no contractual relationship between an indemnitor and an indemnitee” it “is premised on a joint legal obligation to another for damages.” (*Prince v. Pacific Gas & Electric* (2009) 45 Cal.4th 1151, 1158 (*Prince*).

Here, none of these forms of indemnity provides plaintiffs with a rationale to prevail on their indemnity claim in the face of Judge True’s findings.⁵ A motion for new trial as to this claim fails under section 657(6) or 657(7). Plaintiffs cannot prevail on an implied contractual indemnity claim because Judge True’s findings are clear no contract ever existed between the parties. Judge True found “[t]he attempted business transaction in this matter lacks an executed, bilateral buy-sell document.” He found “no credible evidence . . . a contract was ever formed.” Plaintiffs have no basis for implied contractual indemnity where the trial court could not find a contract.

Judge True’s findings also preclude plaintiffs from prevailing under a traditional equitable indemnity analysis, which requires a “ ‘joint legal obligation to another for damages.’ ” (*Prince, supra*, 45 Cal.4th at p. 1158.) Judge True found no facts to support plaintiffs’ contention defendants had entered into a binding, valid agreement to become responsible for rent payments to Cerny for some indefinite period of time. He also found defendants “owe no obligations arising from other apparently unpaid debts and obligations incurred after Defendants had relinquished management of Bosco’s.” Thus, the trial court’s findings establish defendants shared no joint obligation with plaintiffs to Cerny for the back rent or to Bosco’s vendors for unpaid bills. Absent such a joint obligation, plaintiffs have no basis for a traditional equitable indemnity claim. In any form, plaintiffs’ indemnity claim fails under Judge True’s existing factual findings.

Plaintiffs dispute their common counts-open book account and accounting claims are dependent or derivative of their contract claim. Seeking to establish their open book

⁵ Designating their claim as one for “implied indemnification,” plaintiffs nowhere contend they are entitled to indemnity based on an express contractual provision and identify no evidence of any such express obligation. We therefore do not consider this form of indemnity.

account claim as an independent cause of action, plaintiffs explain, “The first cause of action requires an oral contract and a breach, while the second cause of action is based on financial transactions.” The argument is not developed beyond this and requires little attention. (See *Picerne Construction Corp. v. Castellino Villas* (2016) 244 Cal.App.4th 1201, 1211.) Even had it been developed more fully, we fail to see this distinction as a real difference. Both claims involve defendants’ alleged failure to pay the same \$34,898 in vendor costs, or the same financial transactions. Plaintiffs’ own trial brief argued they would prevail on their common count in part because the parties entered “an oral agreement where . . . Defendants paid for . . . vendors’ bills.” On appeal, plaintiffs may not disentangle their open book account and contract claims to justify the grant of a new trial.

Plaintiffs also contend their cause of action for accounting asserts an independent claim. They emphasize they presented evidence regarding the fiduciary relationships between the parties and argue, “[T]his issue is . . . completely separate from whether or not there was an oral contract between parties, giving rise to the unpaid debt.” We are unpersuaded. The accounting claim basically re-alleges the same facts asserted for their breach of contract claim without pleading any additional distinct facts. Plaintiffs’ trial brief had also acknowledged “if Plaintiffs prevail on common count,”—which in and of itself was derivative of the contract claim—“they will also prevail on claim [*sic*] for accounting to account for all debts owed by Defendants.” On this record, we decline to see their cause of action for accounting as a distinct, independent claim. (See *Hafiz*, *supra*, 652 F.Supp.2d at p. 1043.)

Even if we were to recognize their accounting claim as independent, Judge True’s findings would adequately dispense of the claim in defendants’ favor. Judge True found defendants “owe[d] no obligations arising from other apparently unpaid debts and obligations incurred after Defendants had relinquished management of Bosco’s—balancing up the books as they did so.” Thus, when the vendor costs at issue were incurred, defendants no longer had a relationship with plaintiffs upon which to base an

accounting. Thus, plaintiffs' request for accounting requires no further findings and cannot be the basis for a new trial.

Plaintiffs' effort to maintain their indemnity claim fares no better. For their fourth cause of action, plaintiffs latch on to Judge True's finding that the parties "reached an oral agreement pertaining to the sale of Bosco's" and defendants acted as managers pending escrow. Based on these findings, plaintiffs urge "there had to be some sort of agreement between parties regarding the management and business" from which indemnity can be implied. But plaintiffs' selective reading of the trial court's Findings of Fact, Conclusions of Law and Judgment disregards Judge True's complete findings. Judge True found the "oral agreement" reached by the parties had been conditioned on the transfer of plaintiffs' liquor license to defendants, which never occurred. As discussed above, Judge True was equally clear no contract ever existed between the parties. Absent a contract, we have no basis to imply any obligation by defendants for contractual indemnity. (See *Sehulster Tunnels*, *supra*, 111 Cal.App.4th at 1351.)

Judge True's findings completely resolve the indemnity claim even as submitted and argued by plaintiffs. At the trial court, plaintiffs argued they would prevail on the implied indemnity claim based on defendants' failure to return Bosco's to plaintiffs when they left and their failure to request plaintiffs' consent to allow Minh to manage the restaurant, which plaintiffs contend they would have refused. Judge True's findings addressed these points: He found Minh took over managing Bosco's with Feng's knowledge and consent, and he discredited Feng's testimony that this management change took place without his knowledge. These findings squarely undermined the bases for plaintiffs' indemnity claim and disposed of it on the very grounds plaintiffs argued.

Thus, to the extent plaintiffs' second, third, and fourth "causes of action" assert independent causes of action, Judge True's findings effectively disposed of them. As a result, Judge True's decision which failed to state a ruling on these claims did not result in a miscarriage of justice. Accordingly, we conclude Judge True's decision was neither against law under section 657(6) or an error in law under section 657(7). On these grounds, no new trial is justified.

B. None of the Other Statutory Grounds in Section 657 Justify a New Trial

Our conclusion that Judge True's decision regarding plaintiffs' second, third, and fourth causes of action was neither against law under section 657(6) nor an error in law under section 657(7) does not end our analysis. We "remain[] under an express statutory duty to affirm [a new trial] order if the record will support any ground listed in the motion." (*Schmeltzer, supra*, 266 Cal.App.2d at p. 422.) None of the other grounds plaintiffs assert support a new trial.

Plaintiffs contend Judge True made another error in law by granting defendants' Motion in Limine No. 2. That motion sought to exclude all evidence in support of plaintiffs' claim for back rent under the statute of frauds under Civil Code section 1624, which invalidates any contract incapable of being performed within a year of its making if not reduced to writing. Plaintiffs contend Judge True was wrong to apply the statute of frauds because the agreement at issue was intended to be completed within a year, rendering the statute inapplicable. Even if this were so, Judge True's decision to grant the in limine motion could not have resulted in prejudice or a miscarriage of justice necessary to justify a new trial. Notwithstanding his ruling on the pre-trial motion, Judge True's findings plainly state, "[T]he Court permitted Plaintiffs to attempt to lay a factual foundation for the proposition that Defendants had entered into a binding, valid agreement" to pay the back rent to Cerny for a period of time. Thus, the trial court did not deprive defendants of their ability to present evidence in support of their back rent claim, which they did. There was no prejudice or miscarriage of justice, and Judge True's in limine ruling cannot be the basis for a new trial.

Plaintiffs contend Judge True's finding that Alevamare lacked the legal capacity to contract or to sue upon a contract was another error in law. Again, plaintiffs' selective reading of the trial court's Findings of Fact, Conclusions of Law and Judgment disregards other factual findings. Judge True expressly stated Alevamare's legal capacity "makes no difference to the outcome in this case," given he ultimately found no contract was ever formed between the parties. Thus, Judge's True's finding related to Alevamare's legal

capacity, even if an error, did not result in prejudice to plaintiffs or a miscarriage of justice requiring a new trial. (§ 475; Cal. Const., art. VI, § 13.)

Without citing to any of the grounds in section 657, plaintiffs also argue a new trial was warranted because of Judge True's incorrect finding that Mary Truong was Feng's spouse and his suggestion she should have been called as a witness. In plaintiffs' view, this reflects a "misunderstanding of the case." However, "[t]he right to a new trial is purely statutory, and a motion for a new trial can be granted only on one of the grounds enumerated in the statute." (*Fomco, supra*, 55 Cal.2d at p. 166.) Given plaintiffs' failure to tether these arguments to one of the grounds of section 657, Judge True's statement that Mary Truong was Allen Feng's spouse does not support a new trial either.

Plaintiffs additionally dispute Judge True's assertion that defendants testified without equivocation or material evasions, citing examples of what they believe to be questionable, uncertain, or not credible testimony. While their brief on appeal fails to cite to any of the statutory grounds in section 657, their trial court papers argued such testimony represented irregularities in the proceedings under section 657(1) or accidents or surprises under section 657(3). But plaintiffs failed to cite to any authority or offer any legal argument to the trial court or on appeal discussing how such testimony constitutes irregularities, accidents, or surprises within their statutory meanings. We need not consider these grounds. (See *Cresta Bella, LP v. Poway Unified School Dist.* (2013) 218 Cal.App.4th 438, 452, fn. 9 [declining to evaluate contentions not supported by developed argument].)

Finally, plaintiffs make an insufficiency of the evidence argument under section 657(6), contending there was "insufficient evidence to justify the Judgment." However, a trial court order cannot be affirmed on the ground of insufficient evidence unless that ground was stated in the order granting the motion. (§ 657; *Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 899.) Nowhere in Judge Pulido's order does he specify insufficient evidence as the basis for his order. This may not now be offered as a basis to affirm Judge Pulido's order.

Having considered the entire record on which Judge Pulido’s decision was based, we have found no error upon which his order for a new trial can be upheld. The order granting the motion for a new trial must be reversed.⁶

II.

Defendants Are Not Entitled to Recover All Their Attorney Fees

A. Defendants Cannot Recover Their Fees Under Civil Code § 1717 or Pursuant to the Written Lease Between Plaintiffs and Cerny

Generally, “each party to a lawsuit must pay its own attorney fees unless a contract or statute or other law authorizes a fee award. [Citations.]” (*Douglas E. Barnhart, Inc. v. CMC Fabricators, Inc.* (2012) 211 Cal.App.4th 230, 237 (*Barnhart*)). Where a contract authorizes recovery of fees incurred to enforce the contract, Civil Code section 1717(a)⁷ provides such fees “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.”

“If a cause of action is ‘on a contract,’ and the contract provides that the prevailing party shall recover attorneys’ fees incurred to enforce the contract, then attorneys’ fees must be awarded on the contract in accordance with . . . section 1717. [Citation.]” (*Exxess Electronixx v. Heger Realty Corp.* (1998) 64 Cal.App.4th 698, 706.) “[T]he statute generally must apply in favor of the party prevailing on a contract claim whenever that party would have been liable under the contract for attorney fees had the other party prevailed.” (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 870–871.) “[A] party is entitled to attorney fees under section 1717 ‘even when the party prevails on grounds the contract is inapplicable, invalid, unenforceable or nonexistent, if the other party would have been entitled to attorney’s fees had it prevailed.’ [Citations.]” (*Id.* at p. 870.)

⁶ Because our conclusion resolves this issue on the merits, we do not address defendants’ argument that Judge Pulido’s order must be reversed because he purportedly failed to examine the entire record before granting plaintiffs a new trial.

⁷ Unless stated otherwise, all statutory references in Section II are to the Civil Code.

Although defendants without question prevailed on plaintiffs’ breach of contract claim, they are not entitled to attorney fees under section 1717. We cannot conclude this case was “on a contract” within the meaning of Section 1717. “An action (or cause of action) is ‘on a contract’ for purposes of section 1717 if (1) the action (or cause of action) ‘involves’ an agreement, in the sense that the action (or cause of action) arises out of, is based upon, or relates to an agreement by seeking to define or interpret its terms or to determine or enforce a party’s rights or duties under the agreement, and (2) the agreement contains an attorney fees clause.” (*Barnhart, supra*, 211 Cal.App.4th at pp. 241–242.) This case certainly arises from an alleged verbal contract, the terms of which plaintiffs sought to enforce against defendants. Plaintiffs’ first cause of action, entitled “Breach of Oral Agreement,” alleges defendants “entered into an oral agreement to purchase the restaurant and to assume the Lease” and seeks relief because defendants allegedly “breached the oral agreement by failing to pay rents . . . and . . . vendor bills.” However, defendants have not directed us to any evidence indicating the oral contract plaintiffs sued on contained an attorney fees provision. Nor have we seen any evidence in the record showing an attorney fees provision was even discussed or assented to by the parties prior to their oral agreement. Absent such evidence, we cannot award defendants attorney fees as the prevailing party.

Defendants contend we must not look at the “label” plaintiffs applied to their first cause of action but rather look to the substance of the claim. They argue plaintiffs’ first cause of action—although labeled “Breach of Oral Agreement”—sought to determine defendants’ obligations under a written lease which does contain an attorney fees provision, and that it was not limited to the oral agreement to purchase Bosco’s. Defendants also contend this case was indeed “on a contract” and refer to several allegations in the complaint setting forth their purported obligations “under the lease” plaintiffs sought to enforce, as well as plaintiffs’ own express prayer for attorney fees pursuant to the lease.

We understand the written lease is related to plaintiffs’ lawsuit—it was after all the basis for Cerny’s separate judgment against plaintiffs for back rent, which plaintiffs

now seek to recover from defendants. Nevertheless, we disagree this case ever endeavored to determine defendants' obligations, if any, under that written lease. Defendants were never parties to the written lease. In fact, Judge True found, "The contemplated lease between Defendants and Cerny never materialized Plaintiffs remained, and still remain, obligated to Cerny under their preexisting lease." Judge True's own analysis reflects the trial court's focus was whether an oral contract existed between plaintiffs and defendants. In determining whether defendants owed plaintiffs anything, Judge True observed "there is no document executed by the parties that, on its face, evidences a buy-sell contract." Judge True found "no credible evidence . . . that a contract was ever formed." He also found no facts supporting plaintiffs' contention defendants had orally entered into a "binding, valid agreement" to become responsible for rent payments to Cerny. Having been relieved of all contractual liability based on the nonexistence of an alleged oral contract, defendants cannot now claim entitlement to the attorney fees contemplated in an entirely different agreement.

Plaintiffs' express prayer for attorney fees pursuant to the lease provides no basis to award defendants fees either. "To visit a losing claimant's own demands upon him might appeal to a sense of playground justice, but it has no basis in our law. . . . We know of nothing in our law that justifies awarding such fees to a party merely because his opponent asked for them." (*Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 899.) We will not order plaintiffs to pay defendants' attorney fees simply because plaintiffs made a claim to such fees in their complaint.

Finally, defendants contend had plaintiffs "successfully shown [defendants] actually were assignees of the lease and had failed to pay rent or other items payable under the lease, [defendants] would have been liable for [plaintiffs'] attorney fees." The argument is conclusory and unaccompanied by any compelling explanation of why if the result were different, defendants' liability for attorney fees would be a given. As noted above, simply because plaintiffs prayed for attorney fees against defendants does not mean defendants would have owed them had they lost. Moreover, never as part of its analysis did the trial court have to define, interpret, let alone enforce any provision of the

written lease, including Section 16, which covers assignments and which would have presumably been addressed had the issue required resolution for disposal of the contract claim. Based on Judge True's findings focusing on the nonexistence of the oral contract, we doubt even Judge True thought he was enforcing the written lease against defendants who were not even a party to it.

Judge Pulido properly denied defendants' section 1717 claim for attorney fees.

B. Defendants May Recover Attorney Fees Under Civil Code § 1717.5

Civil Code section 1717.5 provides, in part: "[I]n any action on a contract based on a book account, . . . which does not provide for attorney's fees and costs, as provided in Section 1717, 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, § 1717.5, subd. (a).) The attorney fees available under section 1717.5 shall be fixed by the court. The fees awarded may not exceed \$960 where the contract was primarily for personal, family, or household purposes; \$1,200 for all other book accounts; or 25 percent of the principal obligation owed under the contract, whichever is lesser.⁸ (*Ibid.*) Thus, section 1717.5 applies only in the absence of a contract containing an express provision for attorney fees.

We have determined the contract at issue in this case is the oral contract lacking an attorney fees provision. We have further determined Judge True's findings disposed of plaintiffs' open book account cause of action with defendants the prevailing party. Accordingly, we conclude defendants are permitted an award of attorney fees under section 1717.5 in an amount to be determined by the trial court.

DISPOSITION

The order granting plaintiffs' motion for new trial is reversed. With respect to attorney fees, we affirm the order denying defendants' attorney fees pursuant to Civil

⁸ These amounts reflect the authorized limits of recovery under section 1717.5, which increased as of January 1, 2016. When defendants submitted this appeal, section 1717.5 awarded to the prevailing party no more than \$800 where the contract was primarily for personal, family, or household purposes and \$1,000 for all other book accounts.

Code section 1717 but reverse the order denying defendants attorney fees pursuant to Civil Code section 1717.5. The trial court shall determine what constitutes a reasonable attorney fees award under section 1717.5.

Each party shall bear its own costs on appeal. (Cal. Rules of Court, rules 8.278(a)(3),(5).)

Jones, P.J.

We concur:

Simons, J.

Bruiniers, J.

A144337