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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

EMMA COURT LP et al., Plaintiffs and Appellants, v. UNITED AMERICAN BANK et al., Defendants and Respondents.	A144462 (San Francisco City and County Super. Ct. No. CGC-09-488187)

Plaintiffs Emma Court LP; Mark Migdal Revocable Trust; and Mark Migdal, both individually and as trustee of Mark Migdal 2000 Revocable Trust, appeal from the trial court's award of attorney fees and costs to defendants United American Bank (United American) and Lighthouse Bank (Lighthouse; collectively, defendants), and costs to defendant Geraldine Felix, following the dismissal of plaintiffs' lawsuit, which arose from an agreement between United American and Migdal for construction loan funding for two of Migdal's property development projects. On appeal, plaintiffs contend the trial court erred when it (1) awarded contractual attorney fees to United American and Lighthouse because such fees were barred by statute, and fees related to the tort and statutory claims that were not authorized by the loan agreements; (2) effectively awarded half of the attorney fees to Lighthouse, which was not a party to any of the loan agreements; (3) awarded United American and Lighthouse costs disallowed by the costs statute; and (4) awarded discretionary costs to defendants because they failed to show

that any of the costs were necessary or reasonable in amount. As we shall discuss, we find that certain costs were improperly awarded, but shall otherwise affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In 2007, Mark Migdal, a real estate developer, obtained nearly $7,000,000 in construction loans from United American for the initial phase of housing development projects in Palo Alto (Emma Court) and Hillsborough. Also in 2007, United American sold a one-half participation interest in each loan to Lighthouse.

Migdal obtained several extensions to repay the loans, but on January 5, 2009, United American recorded notices of default against the two properties. On April 5, 2009, United American served notices of trustee's sale under the deeds of trust for both properties. In June 2009, United American acquired both properties at nonjudicial foreclosure sales.

On May 8, 2009, plaintiffs filed a complaint for rescission, reformation of instruments, declaratory relief, injunctive relief, and damages, alleging 52 causes of action against United American, Lighthouse, Richard Hofstetter, Jon Sisk, Lane Lawson, William Walters, John Schrup, and/or PLM Lender Services, Inc., including 8 causes of action for interference with or inducement of the written agreement; 11 for fraud, undue influence or duress; 2 for breach of fiduciary duty; 2 for breach of agent's warranty of authority; 8 for unfair business practices; 2 for anti-trust and RICO violations; 3 for breach of contract; 4 for promissory or equitable estoppel; 2 for specific performance; 1 for imposition of constructive trust; 5 for injunctive or declaratory relief; and 4 for rescission. Plaintiffs later amended their complaint to add Felix as a defendant. According to the complaint, United American personnel had orally promised to provide additional loans to plaintiffs for all phases of development of the two properties, but had ultimately refused to provide additional loans to enable him to complete the projects.

Also on May 8, 2009, plaintiffs requested a temporary restraining order and preliminary injunction to halt the foreclosures. When plaintiffs failed to appear at the May 29 hearing, the trial court adopted its tentative ruling and denied those requests in a June 1 order. Plaintiffs filed an appeal from the court's order, but because they failed to

file an opening brief, this court dismissed the appeal on March 16, 2011. Then, on July 14, 2011, plaintiffs brought a motion to vacate the June 1 order, which the trial court denied on August 17. On September 29, plaintiffs filed an appeal from the denial of the motion to vacate. On December 19, this court found that the order appealed from was not appealable and dismissed the appeal. (See *Emma Court v. United American Bank* (A133505) [nonpub. opn.].)

Thereafter, plaintiffs filed actions against defendants and two other parties in San Mateo Superior Court (CIV508391) and Santa Clara Superior Court (112CV225897). On October 2, 2013, the trial court granted United American's motion to coordinate, transfer, and consolidate these two cases with the original action in San Francisco Superior Court.

On February 3, 2014, plaintiffs dismissed without prejudice 23 of their 52 causes of action, including four alleging inducement of breach of written or oral contract; seven alleging fraud, undue influence, or duress; two alleging anti-trust and RICO violations; four requesting injunctive relief; two alleging estoppel; and four requesting rescission.[1] Subsequently, during pretrial proceedings, plaintiffs' new counsel requested that some of those causes of action be reinstated.

On July 17, 2014, the trial court issued tentative rulings on defendants' motions in limine, including, inter alia, the tentative ruling to exclude statements and other references regarding speculative damages (motion in limine No. 1) and to exclude expert testimony on damages (motion in limine No. 3), on the grounds that the damages requested for lost profits were too speculative and any expert opinion regarding such damages would also be speculative.

Trial began on August 21, 2014. After two days of Migdal's testimony, the court ordered a continuance until November 3, due to scheduling conflicts.

[1] On May 23, 2014, after the 23 causes of action were dismissed, Migdal, acting in propria persona, filed a civil rights lawsuit in federal court against the trial judge. He also filed a statement of disqualification of the judge to hear and decide matters in this case, which the judge ordered stricken.

On October 30, 2014, plaintiffs' counsel filed with the court clerk a dismissal of the entire action without prejudice. Counsel also informed the court and opposing counsel of the dismissal and of plaintiffs' intent not to appear at trial, scheduled to resume three days later. Following a February 25, 2015 hearing, in an order for entry of judgment, the court stated that plaintiffs' purported "dismissal is not authorized under applicable law and is hereby set aside and voided." The court also granted defendants' motion for attorney fees and costs, awarding United American and Lighthouse $526,393.00 in attorney fees and $61,691.63 in non-statutory and discretionary costs, and $20,978.80 in statutory costs. It also awarded Felix $1,298.00 in discretionary costs.

On March 5, the court entered judgment in favor of United American and Lighthouse in the amount of $609,063.43, and in favor of Felix in the amount of $1,298.00. The judgment was entered "pursuant to California Code of Civil Procedure Section 581(e) and 581d, in favor of all Defendants . . . and against all Plaintiffs . . . ."

On March 2, 2015, plaintiffs filed a notice of appeal and on March 9, following entry of judgment, they filed an amended notice of appeal.

DISCUSSION

I. *The Effect of the Dismissal on Defendants' Entitlement to Attorney Fees*

Plaintiff contends the trial court erred when it awarded attorney fees to United American and Lighthouse because contract fees were barred by statute and fees based on tort and statutory claims were not authorized by the loan agreements.[2]

"Generally, the trial court's determination of the prevailing party for purposes of awarding attorney fees is an exercise of discretion, which should not be disturbed on appeal absent a clear showing of abuse of discretion. [Citations.] But the determination of the legal basis for an attorney fee award is subject to independent review. [Citation.] In such a case, the issue involves the application of the law to undisputed facts.

[2] Although plaintiffs challenge the propriety of awarding any attorney fees to defendants, they do not challenge the court's calculation of the fees awarded.

[Citation.]" (*Kim v. Euromotors West/The Auto Gallery* (2007) 149 Cal.App.4th 170, 176 (*Kim*).)

The loan documents in this case contained a number of attorney fees provisions. The provision in the construction loan agreement provided in relevant part: "Borrower agrees to pay upon demand all of Lender's costs and expenses, including Lender's attorneys' fees and Lender's legal expenses, incurred in connection with the enforcement of this Agreement. . . . Costs and expenses include Lender's attorneys' fees and legal expenses whether or not there is a lawsuit . . . . Borrower also shall pay all court costs and such additional fees as may be directed by the court." Other documents, including the promissory notes, deeds of trust, and commercial guarantees, contained similar attorney fees provisions. There were also two indemnity provisions in the construction loan agreement, each of which included an attorney fees clause.

A. *Fees on the Contract Claims*

Plaintiffs first argue that the trial court erred when it awarded attorney fees to defendants on the contract causes of action because plaintiffs voluntarily dismissed the action, and an award of such fees is statutorily prohibited after a voluntary dismissal. (See Civ. Code, § 1717, subd. (b)(2).)

"Unless authorized by either statute or agreement, attorney's fees ordinarily are not recoverable as costs. [Citations.]" (*Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 127 (*Reynolds*), citing Code Civ. Proc., § 1021 ["Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties"].)[3]

Civil Code section 1717, subdivision (a), provides in relevant part: "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

[3] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

or the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs." Subdivision (b)(2) of Civil Code section 1717, however, contains an exception to the recovery of attorney fees in an action on a contract: "Where 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." (See Civ. Code, § 1717, subd. (b)(2).) This exception reflects a policy of encouraging settlements and discouraging the maintenance of pointless litigation. (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 613 (*Santisas*) [" 'permitting recovery of attorney fees by defendant in all cases of voluntary dismissal before trial would encourage plaintiffs to maintain pointless litigation in moot cases or against insolvent defendants to avoid liability for those fees' "].)

Section 581 provides for various ways in which a party or the trial court can dismiss an action, depending on the circumstances. As relevant here, subdivision (b)(1) of section 581 permits a party to dismiss an action "[w]ith 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 . . . ." Also relevant are subdivisions (d) and (e) of section 581, which the court cited in its order for entry of judgment and its judgment.[4] Subdivision (d) provides: "Except as otherwise provided in subdivision (e), the court shall dismiss the complaint . . . in its entirety or as to any defendant, with prejudice, when upon the trial and before the final submission of

[4] The court added handwritten language to the judgment in this case, adding, after the typed words stating that judgment was entered "pursuant to California Code of Civil Procedure Section 581(e)," the words "and 581d." It is not clear whether the court was referring to subdivision (d) of section 581, which is how the parties interpret the added language, or section 581d, which pertains to written dismissals generally. It seems to us more likely that the court was referring to section 581d, but, regardless, examining voluntariness in the context of both subdivisions (d) and (e) of section 581, as both parties do in their briefing, is helpful in determining whether the dismissal in this case was voluntary.

the case, the plaintiff abandons it." (§ 581, subd. (d).) Subdivision (e) provides: "After the actual commencement of trial, the court shall dismiss the complaint . . . in its entirety or as to any defendants, with prejudice, if the plaintiff requests a dismissal, unless all affected parties to the trial consent to a dismissal without prejudice or by order of the court dismissing the same without prejudice on a showing of good cause." (§ 581, subd. (e).)

In this case, plaintiffs filed a dismissal of the action with the clerk *during trial*, purportedly *without* prejudice, which is not permitted under section 581. The issue thus is whether plaintiffs' dismissal of the present action "without prejudice" during trial was voluntary, such that there was no prevailing party entitled to recover attorney fees under the contract. (See Civ. Code, § 1717, subd. (b); § 581.) Because this issue involves only a question of law based on undisputed facts, it is subject to de novo review. (See *Kim*, *supra*, 149 Cal.App.4th at p. 176.)

At the hearing on defendants' motion for attorney fees and costs, which took place after plaintiffs had filed their purported dismissal without prejudice with the court clerk, plaintiffs' counsel asserted that the court could not award attorney fees on the contract causes of action because Civil Code section 1717, subdivision (b)(2) prohibited such an award following plaintiffs' dismissal of the action. The court disagreed, explaining: "I believe that Civil Code Section 1717[, subdivision] (b)(2) does not apply here. It does not apply here to the contractual analysis of the attorney's fees request here. It only applies to the statutory right that would be in addition to the contractual analysis, but, in any event, it does not apply to a dismissal, a purported dismissal without prejudice once the trial has started. [¶] The idea that [] is being argued here by the plaintiff is that you can run up litigation costs, start your trial, give up in the middle of the trial, for whatever reason, and without judicial approval simply decide not to come back, and thereby avoid the impact of your contract. That's not what the case is saying and that's not what the law is." Plaintiffs' counsel acknowledged that "a plaintiff must apply to the court for a dismissal during trial," but that plaintiffs "did not do that here. They filed . . . a dismissal without prejudice." He argued, however, that "[t]he most this court could possibly do is

deem that dismissal to have been with prejudice, which does not affect the right to fees in any respect." The court thereafter awarded defendants the attorney fees they incurred in defending the action.

In its order for entry of judgment, the trial court stated that plaintiffs' filing of a dismissal of the action without prejudice "is not authorized under applicable law and is hereby set aside and voided." The court subsequently entered judgment "as to all causes of action and all defendants pursuant to [sections 581, subdivision (e)] and 581d, in favor of all defendants . . . ."

In *Kaufman & Broad Bldg. Co. v. City & Suburban Mortg. Co.* (1970) 10 Cal.App.3d 206 (*Kaufman*), the Court of Appeal addressed what constitutes an abandonment of an action under former subdivision 4 (now subdivision (d)) of section 581. The court first explained that this subdivision "is the foundation for the procedure of voluntary dismissal with prejudice on motion of the plaintiff and order of the court. [Citations.] [¶] Although the section appears to grant to the court a power to dismiss, the reported cases interpreting this section all proceeded on some affirmative action by the plaintiff in abandoning his cause of action. [Citations.] In other words, section 581, subdivision 4 has traditionally been a mechanism by which a plaintiff (*and not the court*) voluntarily dismissed an action which has been expressly and intentionally abandoned." (*Kaufman*, at pp. 212-213.) The court then held "that the provisions of section 581, subdivision 4 provide for a voluntary dismissal which must be predicated upon a clear, unequivocal and express intent to abandon an action. Such intent must be demonstrated to the court by way of a motion to dismiss, stipulation of the parties or some other form of express intent on the record." (*Id.* at p. 213.)

In *D & J, Inc. v. Ferro Corp.* (1986) 176 Cal.App.3d 1191 (*D & J, Inc.*), the appellate court addressed the similar question of whether dismissal of an action at the plaintiff's request under former subdivision 5 (now subdivision (e)) of section 581 was voluntary. The court agreed with the plaintiff's position that "[b]ecause the plaintiff initiated the request for dismissal, and because it was with prejudice, the court performed only a ministerial function in entering it. Thus, the dismissal must be viewed as

voluntary." (*D & J, Inc.* at p. 1193.) The court rejected the defendant's argument that any dismissal entered after the commencement of trial must be considered involuntary, explaining: "It is not the stage of the proceedings which distinguishes a voluntary dismissal from an involuntary one. Rather, the key is the plaintiff's role, if any, in bringing it about." (*Id.* at p. 1194.)

These cases make clear that, had plaintiffs in this case asked the court to dismiss the case *with prejudice*, there would be no question that the dismissal was voluntary under either subdivision (d) or (e) of section 581, or both. (See *D & J, Inc.*, *supra*, 176 Cal.App.3d at p. 1193; *Kaufman*, *supra*, 10 Cal.App.3d at pp. 212-213.) However, this is not what happened. Instead, plaintiffs attempted to file a dismissal without prejudice with the clerk, which they were no longer permitted to do because trial had already begun. (See § 581, subd. (b)(1).) The court therefore voided that dismissal and entered judgment in favor of defendants pursuant to subdivision (e) (and possibly subdivision (d)) of section 581.

According to defendants, plaintiffs, in purporting to dismiss their action without prejudice, were improperly attempting to keep open the option of later refiling the action and, therefore, the court's subsequent dismissal with prejudice constituted an *involuntary* dismissal for purposes of obtaining attorney fees under Civil Code section 1717. We find that, regardless of plaintiffs' actual motives, their attempted unqualified dismissal of the action, which the court found was unauthorized, did not, first of all, constitute "a clear, unequivocal and express intent to abandon [their] action." (*Kaufman*, *supra*, 10 Cal.App.3d at p. 213; see § 581, subd. (d).) Moreover, unlike in *D & J, Inc.*, the dismissal was *not* "with prejudice" and the court did *not* "perform[] only a ministerial function in entering it." (*D & J, Inc.*, *supra*, 176 Cal.App.3d at pp. 1193, 1194 ["the key [to whether a dismissal is voluntary] is the plaintiff's role, if any, in bringing it about"]; § 581, subd. (e).) To obtain a dismissal without prejudice at that late stage of the proceedings, plaintiffs were required to either obtain the consent of defendants or show good cause to the court for an order dismissing the action without prejudice. (§ 581,

subd. (e).) They did neither. Instead, the court had to set aside the unauthorized dismissal without prejudice and enter a new order dismissing the action with prejudice.

In the circumstances of this case, the court's ultimate dismissal of the action with prejudice did not constitute a voluntary dismissal for purposes of the award of attorney fees under Civil Code section 1717, subdivision (b)(2). (Compare *D & J, Inc.*, at p. 1193; see *Kaufman, supra*, 10 Cal.App.3d at p. 213.)

In arguing that the improper filing of a dismissal without prejudice should nonetheless be considered a voluntary dismissal, plaintiffs point out that a number of cases have found that an attempt to dismiss an action without prejudice after trial has started must be considered a dismissal *with* prejudice, in light of section 581's rule that only actions dismissed before trial may be dismissed without prejudice. For example, in *Burnett v. Burnett* (1948) 88 Cal.App.2d 805, 806, the plaintiff had moved to dismiss an action without prejudice during trial. The Court of Appeal held that the trial court could treat the motion as an implied finding of abandonment and dismiss the action with prejudice under former subdivision 4 (now subdivision (d)) of section 581. (*Burnett*, at p. 807.) (See also *Carvel v. Arents* (1954) 126 Cal.App.2d 776, 780 [finding that, insofar as judgment entered by clerk dismissing plaintiff's action during trial "purports to be a dismissal without prejudice it is void"]; *Fisher v. Eckert* (1949) 94 Cal.App.2d 890, 893 [same].)

None of these older cases addressed the question raised here: whether a purported dismissal without prejudice filed with the court clerk during trial is a voluntary dismissal for purposes of Civil Code section 1717, subdivision (b)(2). Rather, they interpreted section 581 and held only that "a dismissal obtained 'without prejudice' will nevertheless be 'with prejudice' if obtained in contravention of the statute." (*Hehr v. Swendseid* (1966) 243 Cal.App.2d 142, 151-152 [while plaintiffs may not have intended a dismissal with prejudice, their counsel " 'was presumed to know the law which required the dismissal to be filed "with prejudice" at the time it was filed, and that any other form of dismissal by plaintiff at that time would be improper under the statute' "].) These cases were concerned with a different issue and merely highlight the impropriety of a plaintiff

attempting to file with the court clerk a dismissal of the action without prejudice during trial.

Our conclusion is consistent with both the language of and policy underlying subdivision (b)(2) of section 1717: to not penalize parties who *voluntarily* dismiss an action before a final decision is rendered. (See *Santisas*, *supra*, 17 Cal.4th at p. 613.) As discussed, no such voluntary dismissal occurred in this case, where the plaintiffs failed to comply with section 581's requirements for dismissing an action during trial and, furthermore, failed to unambiguously indicate that they would no longer pursue this action, which had been winding its way through the courts for some five years. (See *Kaufman*, *supra*, 10 Cal.App.3d at p. 213.)[5] Nor did the court perform only a ministerial function when it voided the improper dismissal and entered judgment dismissing the action with prejudice. (See *D & J, Inc.*, *supra*, 176 Cal.App.3d at p. 1193.) The trial court did not err when it awarded attorney fees for defense of the contract claims to defendants, as the parties prevailing on the contract. (See Civ. Code, § 1717, subd. (a).)[6]

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[5] Plaintiffs argue that they could not have prolonged the litigation by attempting to later refile their complaint because all parties understood that the applicable statutes of limitations barred their claims at the time they filed their dismissal. Defendants express doubt about plaintiffs' intentions, and point out that just before trial began, plaintiffs' new counsel indicated that there were 10 dismissed equitable causes of action "that we are asking the court to consider reinstating." It is not for us to speculate whether plaintiffs would have attempted or could have succeeded in any efforts to further prolong the litigation had they been permitted to dismiss the action without prejudice. Regardless of whether or not plaintiffs had a viable way forward after the dismissal, we have found that their attempt to dismiss without prejudice did not *objectively* demonstrate "a clear, unequivocal and express intent to abandon [their] action," as is required for a voluntary dismissal under section 581. (*Kaufman*, *supra*, 10 Cal.App.3d at p. 213.) (Cf. *Cano v. Glover* (2006) 143 Cal.App.4th 326, 330 [where court held that dismissal under section 581, subdivision (f)(2), which gives defendant option to obtain dismissal of action after court sustains demurrer with leave to amend and plaintiff fails to amend within time allowed, is necessarily *with* prejudice, since a "dismissal without prejudice puts defendant in perpetual limbo, even on the issue of costs and attorney fees," and because " '[s]omewhere along the line, litigation must cease' "].)

[6] In light of this conclusion, we will not address defendants' alternative argument that the dismissal was untimely because the trial court's July 17, 2014 tentative rulings to

B. *Fees on Tort and Statutory Claims*

Plaintiffs further argue that the court erred in awarding attorney fees to defendants on the non-contract causes of action because the contractual language in the loan documents was not broad enough to encompass such fees.

At the time of the dismissal of plaintiffs' action, 29 causes of action remained, including a mix of contract, tort, and statutory causes of action.[7] Specifically, there were five contract causes of action: two for breach of written contract, one for breach of oral contract, and two for promissory estoppel. There were 12 tort causes of action, including 2 for intentional interference with prospective economic relationship, 4 for fraud, 2 for breach of fiduciary duty, 2 for negligent interference with prospective economic relationship, and 2 for wrongful foreclosure. Finally, there were 10 statutory causes of action, including 2 for breach of agent's warranty of authority and 8 for unfair business practices.

"Civil Code section 1717 does not apply to tort claims; it determines which party, if any, is entitled to attorneys' fees on a *contract claim only*. [Citations.] As to tort claims, the question of whether to award attorneys' fees turns on the language of the contractual attorneys' fee provision, i.e., whether the party seeking fees has 'prevailed' within the meaning of the provision and whether the type of claim is within the scope of the provision. [Citation.]" (*Exxess Electronixx v. Heger Realty Corp.* (1998) 64

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exclude references to and expert testimony regarding lost profits constituted a tentative ruling on a dispositive motion. (See, e.g., *Gogri v. Jack in the Box, Inc.* (2008) 166 Cal.App.4th 255, 267 [discussing "certain summary judgment cases that have held section 581 voluntary dismissals to be untimely filed [where] either prior tentative rulings or other special circumstances [were involved,] making judgment for the defendant inevitable"].)

[7] In addition, two of the causes of action were for an injunction, which involved a remedy, rather than a substantive theory for recovery. (See, e.g., *Art Movers, Inc. v. Ni West, Inc.* (1992) 3 Cal.App.4th 640, 647 ["A permanent injunction is merely a remedy for a proven cause of action"].)

Cal.App.4th 698, 708 (*Exxess Electronixx*), citing *Santisas*, *supra*, 17 Cal.4th at pp. 602, 608-609, 615, 617, 619.)

In *Exxess Electronixx*, *supra*, 64 Cal.App.4th at pages 708-709, the appellate court examined the language of the fee provision in the parties' lease agreement to determine whether the defendant was entitled to attorney fees on the plaintiffs' tort causes of action. The lease provided for an award of attorney fees to the prevailing party " '[i]f any Party or Broker brings an action or proceeding to enforce the terms hereof or declare rights hereunder.' " (*Ibid.*) The court concluded that plaintiff's tort "claims for constructive fraud and breach of fiduciary duty were not brought to 'enforce the terms' of the lease." (*Id.* at p. 709.) As the court explained, "Civil Code section 1717, subdivision (a), makes clear that a tort claim does not 'enforce' a contract. . . . Because section 1717 does not encompass tort claims [citations], it follows that tort claims do not 'enforce' a contract." (*Ibid.*; accord, *Casella v. SouthWest Dealer Services, Inc.* (2007) 157 Cal.App.4th 1127, 1160, 1162 [contract provided only for recovery of attorney fees " 'incurred in enforcing or attempting to enforce any of the terms, covenants, or conditions . . . .' " of agreement]; *Gil v. Mansano* (2004) 121 Cal.App.4th 739, 742 (*Gil*) [narrowly drawn provision contemplating recovery of fees in an action " 'brought to enforce the terms of this [Release]' " did not encompass fraud cause of action); compare *Santisas*, *supra*, 17 Cal.4th at pp. 603, 608, 622 [where provision included language entitling prevailing party to fees for action, inter alia, " 'arising out of the execution of this agreement or the sale,' " court found that, "[o]n its face, the provision embraces all claims, both tort and breach of contract, in plaintiffs' complaint, because all are claims 'arising out of the execution of th[e] agreement or the sale' "].)

In this case, the language of the relevant provision in the construction loan agreement, like the provision discussed in *Exxess Electronixx*, was narrowly drawn and related only to fees "incurred in connection with the enforcement of this Agreement." We therefore agree with plaintiffs that the attorney fees provision was not broad enough to encompass the noncontract causes of action. (See *Exxess Electronixx*, *supra*, 64 Cal.App.4th at pp. 708-709.)

This conclusion does not, however, end our inquiry. As defendants point out, although the general rule is that, "[w]hen a cause of action for which attorney fees are provided by statute is joined with other causes of action for which attorney fees are not permitted, the prevailing party may recover only on the statutory cause of action[,] . . . the joinder of causes of action should not dilute the right to attorney fees. Such fees need not be apportioned when incurred for representation of an issue common to both a cause of action for which fees are permitted and one for which they are not. All expenses incurred on the common issues qualify for an award. [Citation.] When the liability issues are so interrelated that it would have been impossible to separate them into claims for which attorney fees are properly awarded and claims for which they are not, then allocation is not required. [Citation.]" (*Akins v. Enterprise Rent-A-Car Co.* (2000) 79 Cal.App.4th 1127, 1133, citing *Reynolds*, *supra*, 25 Cal.3d at pp. 129-130 ["[a]ttorney's fees need not be apportioned when incurred for representation on an issue common to both a cause of action in which fees are proper and one in which they are not allowed"]; accord, *Abdallah v. United States Savings Bank* (1996) 43 Cal.App.4th 1101, 1111 (*Abdallah*) [trial court reasonably found that appellants' various claims were " ' "inextricably intertwined," ' " which made it " 'impracticable, if not impossible, to separate the multitude of conjoined activities into compensable or noncompensable time units' "].)

"The amount of an attorney fee to be awarded is a matter within the sound discretion of the trial court. [Citation.] The trial court is the best judge of the value of professional services rendered in its court, and while its judgment is subject to our review, we will not disturb that determination unless we are convinced that it is clearly wrong. [Citations.]" (*Akins*, *supra*, 79 Cal.App.4th at p. 1134.) Moreover, the burden is on plaintiffs " 'to establish that discretion was clearly abused and a miscarriage of justice resulted.' [Citation.]" (*Hjelm v. Prometheus Real Estate Group, Inc.* (2016) 3 Cal.App.5th 1155, 1177.)

Here, at the hearing on defendants' motion for attorney fees, the trial court repeatedly made clear that it believed all of the causes of action in the complaint involved

plaintiffs' efforts to enforce their version of what the parties agreed to. When plaintiffs' counsel, arguing that the language of the contract did not encompass an award of attorney fees for non-contract causes of action, stated that United American's counsel had drafted the contractual provisions, all of which involved enforcement of the terms of the agreement, the court responded, "That's exactly what your client did. He filed a lawsuit with 52 causes of action to enforce what he said was the agreement. That's what the whole lawsuit is about." The court later stated, "This whole case is about what did the parties agree to do . . . . I think my job is to enforce contracts in the right context and this is it."

Near the conclusion of the hearing, the court summarized: "[W]hat was this case about? I listened to [plaintiff Migdal] for two days testifying. That's how I evaluated what this case was about and I read his pleadings. The complaint is really what governs here, but his testimony was that everybody knows when you get a construction loan, you get a takeout loan. That's what he said. He said that is the custom and practice. It always has been that way, he has testified, with him and with banks, and he told me [plaintiffs] were prepared to put experts on to say that, that the contract for a construction loan included a takeout loan. [¶] That's what this was all about. His evidence, in part, was that was his personal experience. He ended up with—I think it was two claimed prior examples of that, but that's what he said. It was what was the agreement of the parties? That is what you put in front of me? [¶] . . . [¶]

"Sure there was a component of fraudulent inducement, but the focus of this trial was that this is how these loans work always. [¶] There was a reformation cause of action, rescission of certain things, so I think that what I'm doing here is simply enforcing the contract; no equity, no punishment, no fundamental fairness. That's what the agreement said, and the law is not in my mind such that I could ignore the language of the agreements in the face of plaintiff [Migdal] seeking to enforce the agreement as he understood it or at least he claimed he understood it. That's what this case was about."

The trial court thus reasonably found that the entire case, including the pleadings and plaintiff Migdal's two days of testimony, involved plaintiffs seeking to enforce the

agreement as they understood it, and that all of their claims were based on a common underlying issue: whether defendants had failed to fulfill the terms of their agreement. Indeed, all of the causes of action arose from the same series of events and all relied on and incorporated by reference the same 212 paragraphs of factual allegations set forth in the complaint. (See *Drouin v. Fleetwood Enterprises* (1985) 163 Cal.App.3d 486, 493 ["Attorneys fees need not be apportioned between distinct causes of action where plaintiff's various claims involve a common core of facts or are based on related legal theories"], cited in *Hjelm v. Promethius Real Estate Group, Inc., supra,* 3 Cal.App.5th at p. 1178.) Plaintiffs have not shown that the court's conclusion that the fundamental issue in this litigation was enforcement of the contract was "clearly wrong." (*Akins, supra*, 79 Cal.App.4th at p. 1134.)[8]

Accordingly, plaintiffs have not carried their burden of showing the court abused its discretion when it awarded defendants attorney fees for its defense as to all causes of action, based on the implied finding that it would be impracticable to apportion fees between the interrelated contract and other causes of action, which all involved the same underlying facts and the basic claim that defendants had failed to abide by the terms of the parties' agreement.[9] (See *Calvo Fisher & Jacob v. Lujan, LLP* (2015) 234 Cal.App.4th 608, 626 [where party alleged identical facts in support of all claims, it was impracticable to separate joined defensive activities into compensable and

[8] Plaintiffs argue that because defendants foreclosed on the real property that was security for its loans, defendants had already enforced the loan agreements. That foreclosure took place early in the action does not, however, negate the fact that plaintiffs continued both to claim that defendants had breached the contract and to litigate this action in which, as the trial court found, plaintiffs attempted to enforce what they asserted were the terms of the contract. Likewise, defendants, in defending against plaintiffs' claims, were relying in large part on the terms of the loan agreements.

[9] In light of this conclusion, we need not address defendants' alternative argument that the indemnity provisions in the loan agreement were broad enough to include attorney fees for tort claims.

noncompensable time units]; see also *Reynolds*, *supra*, 25 Cal.3d at pp. 129-130; *Akins*, at p. 1133; *Abdallah*, *supra*, 43 Cal.App.4th at p. 1111.)[10]

II. *Award of Attorney Fees to Lighthouse*

Plaintiffs contend the trial court erred when it effectively awarded half of the attorney fees to Lighthouse, which was not a party to any of the loan agreements.

Although Lighthouse was not a party to the contract between United American and plaintiffs that contained the attorney fees clause, United American sold it a participation interest in plaintiffs' loans, which was permitted under the contract between plaintiffs and United American. Under the agreement between the two banks, United American was responsible for taking any actions related to the loans but, upon request, Lighthouse was required to reimburse it the pro rata share of any amount it paid third parties in connection with enforcing the loan. Lighthouse apparently did reimburse United American for one-half of the attorney fees United American incurred.

In *Reynolds*, *supra*, 25 Cal.3d at page 128, our Supreme Court explained that the purposes of Civil Code section 1717—"to establish mutuality of remedy where contractual provision makes recovery of attorney's fees available for only one party" and "to prevent oppressive use of one-sided attorney's fees provisions"—"require section

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[10] Plaintiffs attempt to distinguish three cases relied on by defendants—*Siligo v. Castellucci* (1994) 21 Cal.App.4th 873, *Finalco, Inc. v. Roosevelt* (1991) 235 Cal.App.3d 1301, and *Wagner v. Benson* (1980) 101 Cal.App.3d 27—on the ground that those cases involved a distinct situation in which lenders who succeeded in actions to collect on a note were also entitled to fees for successfully defending against the borrower's tort claims challenging the validity of the note even though the attorney fees provision did not authorize fees to a party who prevailed on a tort claim. According to plaintiffs, because those cases all involved the lender actually pursuing an action to enforce the agreement, and the lenders could only prevail in those actions by successfully defending against the tort claims, the cases do not support defendants' position. However, the propriety of the court's refusal to apportion fees does not depend on the factual scenario found in those three cases. Rather, as discussed in the text, *ante*, in any action in which contract and noncontract claims are intertwined and based on the same facts, apportionment may be impracticable. (See, e.g., *Calvo Fisher & Jacob v. Lujan*, *supra*, 234 Cal.App.4th at p. 626 [permitting recovery for *defending against* plaintiff's action, which contained intertwining contract and noncontract claims].)

1717 be interpreted to further provide 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*, at p. 128; accord, *Real Property Services Corp. v. City of Pasadena* (1994) 25 Cal.App.4th 375, 380-383 [applying *Reynolds* rule to recovery of fees by nonsignatory plaintiff].)

Here, had plaintiffs prevailed on their contract claims, brought against both United American and Lighthouse, they presumably would have been entitled to recovery of attorney fees from both banks. In plaintiffs' complaint, in which they attempted to enforce the contract, they asserted numerous identical causes of action against both United American and Lighthouse or its personnel; prayed for identical relief against both, including recovery of their attorney fees; and claimed that Lighthouse stood in the shoes of United American for purposes of its liability on all causes of action. Thus, plaintiffs sued nonsignatory Lighthouse and its officers on the construction loan agreement as if they were parties to it. In addition, the attorney fees provision does not state that a nonsignatory to the agreement cannot recover attorney fees if it is sued by a party. Lighthouse was therefore entitled to recover attorney fees pursuant to Civil Code section 1717, despite the fact that it was not a signatory to the original contract between plaintiffs and United American that contained the attorney fees provision. (See *Reynolds*, *supra*, 25 Cal.3d at p. 128.)

Plaintiffs argue that even if Lighthouse "was entitled to benefit from the reciprocity provisions of [Civil Code] section 1717 regarding contract claims in the action, those benefits did not extend to tort claims because [Civil Code] section 1717 does not apply to tort claims." (See *Topanga & Victory Partners, LLP v. Toghia* (2002) 103 Cal.App.4th 775, 786 [although party who is nonsignatory to contract may in some circumstances recover attorney fees related to contract causes of action under Civil Code section 1717, it cannot recover fees related to tort causes of action, to which that section is not applicable].) Having already found that the trial court did not abuse its discretion in refusing to apportion the attorney fees award between the contract and noncontract

causes of action in the particular circumstance of this case (see pt. I.B., *ante*), we reject this identical assertion in the context of Lighthouse's entitlement to noncontract fees. (See *Reynolds*, *supra*, 25 Cal.3d at pp. 129-130; *Akins*, *supra*, 79 Cal.App.4th at p. 1133; *Abdallah*, *supra*, 43 Cal.App.4th at p. 1111.)

For these reasons, the trial court did not err when it awarded attorney fees to both United American and Lighthouse.[11]

III. *Award of Non-Statutory Costs*

Plaintiffs contend the trial court improperly awarded defendants costs disallowed by the relevant costs statute, section 1033.5. Plaintiffs acknowledge that, as defendants in whose favor a dismissal was entered, United American and Lighthouse are "prevailing parties" under section 1032, subd. (a)(4), and are therefore "entitled as a matter of right to recover" their costs. (§ 1032, subd. (b).) They concede that defendants were entitled to recover $20,978.80 in requested statutory costs, pursuant to section 1033.5, subdivision (a). They assert, however, that the court improperly awarded defendants an additional $22,655.19 in disallowed costs, which included $11,847.20 for expert witness fees, $7,052.18 for copies, $1,354.67 for computer research, $639.70 for FedEx charges, $483.83 for postage, and $1,322.61 for telephone charges.

Section 1033.5, subdivision (b) provides in relevant part: "The following items are not allowable as costs, except when expressly authorized by law:

"(1) Fees of experts not ordered by the court.

"(2) Investigation expenses in preparing the case for trial.

"(3) Postage, telephone, and photocopying charges, except for exhibits. . . ."

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[11] In light of this conclusion, we will not address defendants' argument that the award of attorney fees to Lighthouse was appropriate pursuant to the collateral source rule. (See *Mize-Kurzman v. Marin Community College District* (2012) 202 Cal.App.4th 832, 872 [" 'Simply stated, the collateral source rule provides that "if an injured party receives some compensation for his [or her] injuries from a source wholly independent of the tortfeasor, such payment should not be deducted from the damages which the plaintiff would otherwise collect from the tortfeasor' "].)

In *Ripley v. Pappadopoulos* (1994) 23 Cal.App.4th 1616 (*Ripley*), the Third District Court of Appeal disagreed with an earlier opinion from Division Four of this District, *Bussey v. Affleck* (1990) 225 Cal.App.3d 1162, which had held that non-statutory costs, such as expert witness fees and other nonallowable costs of litigation, "may be included in an award of contractual attorney fees. [The *Ripley* court stated,] "We cannot adhere to that approach. In the absence of some specific provision of law otherwise, attorney fees and the expenses of litigation, whether termed costs, disbursements, outlays, or something else, are mutually exclusive, that is, attorney fees do not include such costs and costs do not include attorney fees. [Citations]" (*Ripley*, at pp. 1626-1627.) The *Ripley* court therefore concluded that, "assuming expert witness fees may be recovered under a contractual provision, they must be specially pleaded and proven at trial rather than included in a memorandum of costs." (*Id.* at p. 1627.) The court reached the same conclusion "with respect to the expenses of copying documents, Federal Express and postage charges . . . ." (*Ibid.*)

Numerous subsequent decisions have agreed with the holding in *Ripley*. (See, e.g., *Benson v. Kwikset Corp.* (2007) 152 Cal.App.4th 1254, 1280-1282 [Fourth District, Division Three—expert witness fees and other non-statutory expenses]; *Hsu v. Semiconductor Systems, Inc.* (2005) 126 Cal.App.4th 1330, 1341-1342 [Division Four of this District—expert witness fees and general photocopying costs]; *Carwash of America—PO LLC v. Windswept Ventures No. I, LLC* (2002) 97 Cal.App.4th 540, 544 [Third District—expert witness fees]; *Fairchild v. Park* (2001) 90 Cal.App.4th 919, 931 [Second District, Division One—expert witness fees, photocopying, telephone calls, postage, and mileage]; *First Nationwide Bank v. Mountain Cascade, Inc.* (2000) 77 Cal.App.4th 871, 878 (*First Nationwide Bank*) [a panel of this Division—expert witness fees]; *Robert L. Cloud & Associates, Inc. v. Mikesell* (1999) 69 Cal.App.4th 1141, 1153-1154 [Division Five of this District—expert witness fees].)[12]

[12] We find unpersuasive defendants' citation to an unpublished District Court opinion, in which the court disagreed with *Ripley* and similar cases, and instead followed

More recently, in *Thrifty Payless, Inc. v. Mariners Mile Gateway, LLC* (2010) 185 Cal.App.4th 1050, 1065-1067 (*Thrifty Payless*), Division Three of the Fourth District Court of Appeal disagreed with the *Ripley* line of cases to the extent they held that, even where a contract contemplates recovery of expert witness or other non-statutory costs, entitlement to such costs must be pleaded and proved at trial, rather than included in a memorandum of costs. The *Thrifty Payless* court held that expert witness fees are "recoverable as costs when the parties specifically agree to such a provision in a freely negotiated contract. [¶] This does not mean—and we do not hold—that expert witness fees are recoverable in every case where 'costs' are merely mentioned in a contract. A general cost provision should be interpreted according to the established statutory definition. [Citation.] But where sophisticated parties knowingly and intentionally negotiate a broader standard into their contract—and particularly where, as here, that standard specifically includes 'witness and expert fees'—the intent of the parties should be upheld by the court." (*Id.* at p. 1066.)

Again, the construction loan agreement in this case contained the following relevant contractual provision: "Borrower agrees to pay upon demand all of Lender's costs and expenses, including Lender's attorneys' fees and Lender's legal expenses, incurred in connection with the enforcement of this Agreement. . . ." We conclude the various non-statutory costs allowed by the trial court were not properly awarded under the vague "legal expenses" language of the agreement "because such '[s]pecial contract damages are subject to pleading and proof in the main action and cannot be recovered by mere inclusion in a memorandum of costs. [Citations.]' [Citation.]" (*First Nationwide Bank*, *supra*, 77 Cal.App.4th at p. 878 [expert witness fees were improperly awarded under contractual provision authorizing recovery of all "necessary expenses" as well as attorney fees, where prevailing party made no attempt to plead or prove entitlement to such fees under that contractual theory].)

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the reasoning in *Bussey v. Affleck*, *supra*, 225 Cal.App.3d 1162. (See *Cataphora Inc. v. Parker* (N.D.Cal. 2012) 2012 [WL 174817].)

As we explained in *First Nationwide Bank*, "The reasons for this pleading and proof requirement are readily apparent. As our Supreme Court observed in *Davis* [*v. KGO-T.V., Inc.* (1998) 17 Cal.4th 436, 447, footnote 5, disapproved on another ground in *Williams v. Chino Valley Independent Fire Dist.* (2015) 61 Cal.4th 97, 107], the proper interpretation of a contractual agreement for shifting litigation costs is a question of fact that 'turns on the intentions of the contracting parties.' [Citation.] Where the contractual provision is ambiguous, extrinsic evidence may be warranted. Adverse parties must be put on notice through the pleadings that this contractual theory will be asserted, and the issue must be submitted to the trier of fact for resolution pursuant to a prejudgment evidentiary proceeding, not a summary postjudgment motion." (*First Nationwide Bank, supra*, 77 Cal.App.4th at p. 879.)

Although, in this case, the costs were awarded pre-judgment, the brief discussion of costs at the hearing on attorney fees plainly did not constitute an evidentiary hearing at which defendants' entitlement to such costs as "legal expenses" under the contract was resolved. (See *First Nationwide Bank, supra*, 77 Cal.App.4th at pp. 878-879.)[13] Moreover, even were this general contractual provision specific enough to encompass some or all of the various non-statutory costs awarded, recovery of such costs pursuant to a memorandum of costs alone was not sufficient even under the reasoning of *Thrifty Payless*, since it cannot be said that the parties to this standard construction loan agreement "specifically agree[d] to such provision in a freely negotiated contract." (*Thrifty Payless, supra*, 185 Cal.App.4th at p. 1066.) Accordingly, the trial court erred when it awarded defendants $22,655.19 in disallowed costs.

IV. *Award of Discretionary Costs*

Plaintiffs contend the trial court improperly awarded discretionary costs to defendants, who failed to show that those costs were necessary or reasonable in amount.

[13] At the hearing, which focused primarily on the award of attorney fees, plaintiffs' counsel argued against an award of non-statutory costs and the court stated, "I think they are covered by the contract. It's a separate claim apart from the statutorily-based costs and all of those appeared reasonable."

The court awarded $40,334.44 in discretionary costs to defendants, including $166.20 for delivery service expenses; $6,878.62 for court filing service fees; $1,300 for outside mediation (JAMS) fees; $17 for parking; $1,993.62 for travel expenses, which included $1,298 in travel expenses for defendant Felix; and $29,979 for "other costs (including PLM Lender fees)." In his declaration, defendants' attorney stated that these costs "were actually incurred, timely processed and billed, and actually paid . . . ." Counsel also submitted a "Detail Cost Transaction File List," which listed each cost detail and the amount paid by date. Plaintiffs objected to the award of these discretionary costs by asserting that defendants had failed to show that they were necessary to the litigation and reasonable in amount. The court found that all of the requested costs were reasonable.

These requested costs were neither specifically allowable under subdivision (a) of section 1033.5, nor specifically prohibited under subdivision (b) of that section. Instead, they are the type of costs recoverable in the discretion of the court if reasonable in amount and reasonably necessary to the conduct of the litigation. (§ 1033.5, subd. (c).)[14] As a panel of this Division recently explained in *Sanford v. Rasnick* (2016) 246 Cal.App.4th 1121 (*Sanford*): " 'If the items appearing in a cost bill appear to be proper charges, the burden is on the party seeking to tax costs to show that they were not reasonable or necessary. On the other hand, if the items are properly objected to, they are put in issue and the burden of proof is on the party claiming them as costs. [Citations.] Whether a cost item was reasonably necessary to the litigation presents a question of fact for the trial court and its decision is reviewed for abuse of discretion. [Citation.]

[14] Section 1033.5, subdivision (c) provides in relevant part: "Any award of costs shall be subject to the following: [¶]

"(2) Allowable costs shall be reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation.

"(3) Allowable costs shall be reasonable in amount.

"(4) Items not mentioned in this section and items assessed upon application may be allowed or denied in the court's discretion."

However, because the right to costs is governed strictly by statute [citation], a court has no discretion to award costs not statutorily authorized. [Citations.]' " (*Sanford*, at pp. 1128-1129, quoting *Ladas v. California State Auto. Assn.* (1993) 19 Cal.App.4th 761, 773-774 (*Ladas*).)

We do not agree with plaintiffs that their objection to these items in defendants' costs bill automatically shifted the burden to defendants to demonstrate that their costs were reasonable and necessary. " '[T]he mere filing of a motion to tax costs may be a "proper objection" to an item, the necessity of which appears doubtful, or which does not appear to be proper on its face. [Citation.] However, "[i]f the items appear to be proper charges the verified memorandum is prima facie evidence that the costs, expenses and services therein listed were necessarily incurred by the defendant [citations], and the burden of showing that an item is not properly chargeable or is unreasonable is upon the [objecting party]." [Citations.]' [Citation.]" (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 856 (*Benach*), quoting *Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 131.)

First, as to the $166.20 requested for delivery service costs, "[m]essenger fees may be allowed in the discretion of the court. [Citation.]" (*Benach*, *supra*, 149 Cal.App.4th at p. 858; accord, *Ladas*, *supra*, 19 Cal.App.4th at p. 776.) The costs memorandum (which was an exhibit to the declaration of defendants' attorney, filed in support of the motion for fees and costs) and the detailed cost list also submitted by defendants were prima facie evidence that the delivery service fees were necessarily incurred. (See *id.* at p. 856.) Plaintiffs' general objection that these costs were not "necessary to the litigation or reasonable in amount" was insufficient to show the court abused its discretion in awarding them. (See *Sanford*, *supra*, 246 Cal.App.4th at pp. 1128-1129.) Second, plaintiffs' general objection regarding the $6,878.62 for court filing service fees likewise did not show that the court abused its discretion in awarding these costs, which appeared proper on their face. (See *ibid.*) Third, as to the $1,300 for mediation fees, we have found that such fees are recoverable under subdivision (c) of section 1033.5 (*Sanford*, at p. 1133), and plaintiffs' assertion to the contrary in its motion to tax costs was incorrect.

In addition, like the other costs just discussed, plaintiffs' general objection was not sufficient to counter defendants' memorandum and detailed cost list and shift the burden of proof to defendants. (See *id*. at pp. 1128-1129.)

Fourth and fifth, the court awarded $17 in parking costs and $1,993.62 in costs for travel expenses, which included $1,298 for defendant Felix's travel. Subdivision (a)(3)(C) of section 1033.5 expressly identifies "travel expenses to attend depositions" as allowable costs. As to other travel-related costs, in *Ladas*, *supra*, 19 Cal.App.4th at pages 775-776, we found that counsel's declaration failed to demonstrate how any of the charges for local travel unrelated to depositions was necessary, rather than merely convenient. (See also *Gorman v. Tassajara Development Corp.* (2009) 178 Cal.App.4th 44, 72-73 ["By negative implication, [section 1033.5] does not provide for recovery of local travel expenses by attorneys and other firm employees unrelated to attending depositions"].) In this case, defendants did not specify in their memorandum which of the travel and parking costs were incurred to attend depositions. The detailed list they submitted shows that much of these costs resulted from travel to local courthouses and to other locations in the Bay Area. Only two entries describe "Travel and parking for deposition." In the case of defendant Felix, she states in a declaration that she paid for nonrefundable airline tickets to the Bay Area and a rental car.

Because defendants may recover only those costs related to local travel and parking for depositions or non-local travel (see *Gorman v. Tassajara Development Corp.*, *supra*, 178 Cal.App.4th at pp. 72-73; *Ladas*, *supra*, 19 Cal.App.4th at pp. 775-776), we find that defendants did not satisfy their burden of showing that the parking and travel costs not identified as being within those two categories were "reasonably necessary to the conduct of the litigation rather than merely convenient . . . ." (§ 1033.5, subd. (c)(2).) Defendants have specifically shown entitlement to costs only for the $146 described in their costs list as being for travel and parking for depositions, as well as the $1,298 for defendant Felix's travel to the Bay Area. Consequently, the court's award of the remaining portion of the of discretionary costs for parking and travel, totaling $566.62, was an abuse of discretion.

Finally, we also find problematic the court's award of $29,979 for "other costs (including PLM Lender fees)." Unlike most of the other discretionary costs requested by defendants, this request " 'does not appear to be proper on its face.' " (*Benach*, *supra*, 149 Cal.App.4th at p. 856.) The memorandum provides no information about the nature of these costs, except for the mention of "PLM Lender fees," which it does not explain in any way. Therefore, the defendants did not satisfy their burden of showing that the "other costs" listed were necessarily incurred, and the trial court abused its discretion when it awarded the requested amount. (See *ibid.*)

DISPOSITION

The award of costs to defendants is modified to strike (1) $22,655.19 in costs prohibited under subdivision (b) of section 1033.5, and (2) $30,545.81 in parking, travel, and "other" costs improperly awarded under subdivision (c) of section 1033.5. In all other respects, the judgment is affirmed. The parties shall bear their own costs on appeal.

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Kline, P.J.

We concur:

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Stewart, J.

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Miller, J.