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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

SHENGHUA NI,

Plaintiff and Respondent,

v.

KUN YUAN et al.,

Defendants and Appellants.

B234774

(Los Angeles County
Super. Ct. No. KC056031)

APPEAL from an order of the Superior Court of Los Angeles County.
Salvatore Sirna, Judge. Affirmed.

Law Offices of Eugene Alkana, Eugene S. Alkana; Law Offices of Kathy Q. Hao
& Associates, and Kathy Q. Hao for Defendants and Appellants.

Kenner Law Group and Jason J.L. Yang for Plaintiff and Respondent.

Defendants Kun Yuan and East Super King Buffet, Inc. (Buffet) appeal from the trial court's order denying their motion for attorney fees. We affirm because the contractual provision on which Yuan and Buffet rely is merely an indemnity provision. It consequently does not provide for the recovery of attorney fees in this action, which does not involve indemnity claims.

BACKGROUND

The operative first amended complaint alleges that Yuan and Shenghua Ni each owned half the shares of Buffet. Ni allegedly contracted to sell his shares to Buffet, and Yuan allegedly guaranteed Buffet's performance of the contract.

Ni filed suit against Buffet and Yuan for breach of contract, breach of surety agreement, breach of fiduciary duty, and fraud,¹ alleging that Yuan had failed to disclose that before entering into the contract she had already sold Buffet to a third party. Ni sought damages and attorney fees on each cause of action. Defendants prevailed at trial on all claims.

Defendants then moved for an award of attorney fees. In their memorandum of points and authorities in support of the motion, defendants did not identify any provisions of the contract as potential bases for the award, but at the hearings on the motion, defendants relied on both paragraph 9.5, entitled "Arbitration[.]" and paragraph 9.6, entitled "Indemnification."

On appeal, defendants rely on only paragraph 9.6, which provides as follows: "Each Party shall pay, indemnify and hold the other harmless against and with respect to any 'Loss.' 'Loss' shall mean the amount of any obligation, claim, damage, liability, or expense expressly including attorneys' fees and costs sustained by the other arising out of or based upon any misrepresentation or breach of any warranty or covenant set forth in this Agreement, or as set forth in any agreement attached hereto as an exhibit, or in any certificate, schedule, exhibit or writing relating hereto or thereto or delivered pursuant to

¹ Ni alleged the breach of contract claim against both Buffet and Yuan on the basis of alleged alter ego liability; he alleged the remaining three causes of action against Yuan alone.

any of such agreements. The Parties' obligations to indemnify each other hereunder in each instance shall not be enforceable until the total collective liability or damage to the injured Party exceeds a threshold of \$5,000.00. [¶] The indemnifying Party hereunder shall have the exclusive right to retain counsel and conduct investigations and defense of any action. The indemnified Party shall notify the other Party promptly after it receives notice of such claim or action but in any event within ten (10) days of such notice of the claim. The indemnified Party shall cooperate fully with the other Party in connection with such a claim, provided the indemnifying Party shall bear all costs incurred by the indemnified Party."²

The trial court denied defendants' attorney fees motion. Defendants timely appealed.

STANDARD OF REVIEW

We review de novo the trial court's determination of a party's entitlement to an award of attorney fees. (*Sessions Payroll Management, Inc. v. Noble Construction Co., Inc.* (2000) 84 Cal.App.4th 671, 677.)

DISCUSSION

Defendants argue that the trial court erred by denying their motion for attorney fees, because paragraph 9.6 authorizes an award of attorney fees to the prevailing party. We disagree.

"Unless authorized by either statute or agreement, attorney's fees ordinarily are not recoverable as costs." (*Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 127.) The inclusion of attorney fees as an item of loss in an indemnity provision does not provide a basis for an award of attorney fees in an action to enforce the contract. (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 968-972 (*Myers*).)

² Because on appeal defendants do not advance any arguments based on paragraph 9.5, we deem such arguments abandoned. (See *Behr v. Redmond* (2011) 193 Cal.App.4th 517, 538.)

Paragraph 9.6 is an indemnity provision. It is entitled “Indemnification” and provides that each party shall “indemnify” and “hold the other harmless” against certain losses exceeding \$5,000. It requires the indemnified party to give timely notice of the claim to the indemnifying party, and it gives the indemnifying party “the exclusive right” to retain counsel and investigate and defend the claim. Those provisions would make no sense if paragraph 9.6 were anything other than an indemnity provision. (Cf. *Myers*, *supra*, 13 Cal.App.4th at p. 969 [“A clause which contains the words ‘indemnify’ and ‘hold harmless’ is an indemnity clause which generally obligates the indemnitor to reimburse the indemnitee for any damages the indemnitee becomes obligated to pay third persons”].)

Because paragraph 9.6 is an indemnity provision, its inclusion of attorney fees as a recoverable item of loss does not provide a basis for an award of attorney fees in an action to enforce the contract. The trial court therefore properly denied defendants’ motion.

Defendants argue that paragraph 9.6 “is not strictly an indemnity provision” (bold and block capitals omitted), but their arguments are not persuasive. First, defendants point out that paragraph 9.6 “is mutual in nature.” The mutuality of the provision does not support defendants’ position, however, because indemnity provisions can be mutual. (See, e.g., *Kidron v. Movie Acquisition Corp.* (1995) 40 Cal.App.4th 1571, 1576.) Second, defendants contend that “there is no requirement that there be a third party claim in order to trigger the right to recover under [p]aragraph 9.6,” presumably because paragraph 9.6 does not expressly mention third parties. But a provision’s failure to refer expressly to third parties has not prevented courts from interpreting the provision as nothing more than an indemnity provision. (See *Myers*, *supra*, 13 Cal.App.4th at pp. 963-964, 973 [concluding that a particular contractual provision was “a standard indemnity provision” concerning “third party tort claims” even though the provision did not refer to third parties]; *Meininger v. Larwin-Northern California, Inc.* (1976) 63 Cal.App.3d 82, 84-85 [similar].) We conclude that defendants have failed to show that paragraph 9.6 is not an indemnity provision. We also note that

defendants have failed to explain what paragraph 9.6 could possibly be if not an indemnity provision.

Finally, defendants argue that they are entitled to attorney fees because (1) Ni's complaint sought an award of attorney fees, and (2) *International Billing Services, Inc. v. Emigh* (2000) 84 Cal.App.4th 1175, 1190, held that when a party "claims a contract allows fees and loses, it must pay fees." The argument lacks merit, however, because *International Billing Services, Inc. v. Emigh* was overruled on that point by *M. Perez Co., Inc. v. Base Camp Condominiums Assn. No. One* (2003) 111 Cal.App.4th 456, 465-467, which held that "a prevailing party is entitled to attorney fees only if it can prove it would have been liable for attorney fees had the opponent prevailed." Defendants would not have been liable for attorney fees if Ni had prevailed, because this was an action to enforce the contract, not an indemnity claim. Defendants therefore are not entitled to attorney fees.³

DISPOSITION

The order is affirmed. Respondent shall recover his costs of appeal.

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ROTHSCHILD, Acting P. J.

We concur:

CHANEY, J.

JOHNSON, J.

³ The motion to strike appellants' reply brief is denied.