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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

ESSEX INSURANCE COMPANY,

Plaintiff, Cross-defendant and Respondent,

v.

PROFESSIONAL BUILDING CONTRACTORS, INC.,

Defendant, Cross-complainant and Appellant.

B237236

(Los Angeles County
Super. Ct. No. BC353152)

APPEAL from an order of the Superior Court of Los Angeles County. Michael C. Solner, Judge. Affirmed.

Stanzler Law Group, Jordan S. Stanzler and Jeffrey Curtiss for Defendant, Cross-complainant and Appellant.

LeClairRyan, Peter M. Hart and Cyndi J. Claxton for Plaintiff, Cross-defendant and Respondent.

* * * * *

Defendant, cross-complainant and appellant Professional Building Contractors, Inc. (PBC) prevailed in its action for breach of contract and bad faith against plaintiff, cross-defendant and respondent Essex Insurance Company (Essex). After Essex paid the judgment and PBC executed an acknowledgment of full satisfaction of judgment, PBC moved for the recovery of fees and costs incurred both in the trial court and in a prior appeal, relying on *Brandt v. Superior Court* (1985) 37 Cal.3d 813 (*Brandt*). The trial court denied the motion.

We affirm. While we agree conceptually with PBC's position that *Brandt* can be construed to support the recovery of posttrial and appellate fees and costs when reasonably incurred to secure policy benefits, PBC's executing an acknowledgment of full satisfaction of judgment before seeking additional fees and costs bars any recovery here.

FACTUAL AND PROCEDURAL BACKGROUND¹

Verdict Against Essex Affirmed on Appeal.

In May 2006, Essex filed a declaratory relief action against PBC after agreeing to defend it in an action filed by Gary and Susan Robinson subject to a reservation of rights. PBC cross-complained, alleging causes of action for breach of contract, tortious breach of the implied covenant of good faith and fair dealing, violation of Business and Professions Code section 17200, negligent misrepresentation and negligence. A jury trial on PBC's cross-complaint commenced in October 2007.

By special verdict, the jury found that Essex materially breached the insurance policy and that the amount of the covered loss that Essex failed to pay under the policy

¹ We previously set forth the underlying facts in detail in an unpublished opinion in the first appeal, *Essex Insurance Company v. Professional Building Contractors, Inc.*, case No. B206879. We repeated some of those facts in the second appeal, *Essex Insurance Company v. Professional Building Contractors, Inc.*, case No. B215005, and again in the third appeal, *Essex Insurance Company v. Professional Building Contractors, Inc.*, case No. B221970.

was \$356,264.22. It further found that Essex breached its duty to investigate, communicate and settle, and that the total amount of the covered loss that Essex failed to pay was \$682,264.22, a sum equaling the amounts sought by PBC for settlement (\$250,000), repair costs to the Robinson house (\$106,264.22) and attorney fees (\$325,999.85). Having determined by clear and convincing evidence that Essex acted with malice, oppression or fraud, the jury awarded PBC \$2.5 million in punitive damages in a second phase of trial. The trial court denied Essex's motion for judgment notwithstanding the verdict and conditionally granted Essex's motion for new trial, ruling that the motion would be denied if PBC consented to a remittitur of a one-to-one ratio between compensatory and punitive damages.

Both parties appealed. In an unpublished opinion filed in July 2009, *Essex Insurance Company v. Professional Building Contractors, Inc.*, case No. B206879, we affirmed, concluding that the evidence supported the trial court's decision to deny Essex's motion for judgment notwithstanding the verdict and that the trial court properly exercised its discretion to reduce the punitive damages award to a one-to-one ratio on the basis of the evidence concerning Essex's reprehensibility and the amount of the compensatory damages.

Posttrial Proceedings and the Second Appeal.

At trial, the parties stipulated to the manner in which PBC would present evidence to the jury and the trial court concerning its request for attorney fees pursuant to *Brandt*, *supra*, 37 Cal.3d 813. PBC intended to request from the jury all fees incurred before a September 22, 2007 cut-off date and thereafter to submit to the trial court any request for fees incurred thereafter. Noting that *Brandt* permits a fee request to be made either to the jury or to the trial court, PBC's counsel explained: "I'm taking a hybrid. I've got 99.9 [percent] of my fees go to the jury. One percent, I can't mechanically get them to go."

After trial, PBC moved for an award of over \$250,000 in attorney fees incurred between June 2007 and November 2007 that had not previously been submitted to the jury. The trial court denied the motion in large part, ruling that PBC had waived its right

to attorney fees recoverable under *Brandt* (*Brandt* fees) incurred prior to the September 2007 cut-off date by not presenting those amounts to the jury, *Brandt* fees incurred after the jury went out on October 15, 2007 were not recoverable, and PBC's evidentiary showing was inadequate as to any potentially recoverable *Brandt* fees. After PBC twice failed to present sufficient evidence to show specifically what fees and expenses were incurred in prosecuting its claim for policy benefits, the trial court denied the motion. It also denied a motion for reconsideration and a subsequent motion for attorney fees. Following those denials, the trial court entered judgment as proposed by Essex, which did not include an amount for postverdict, prejudgment interest or permit PBC a further trial on its cause of action under Business and Professions Code section 17200.

PBC appealed. In an unpublished opinion filed in April 2010, *Essex Insurance Company v. Professional Building Contractors, Inc.*, case No. B215005, we affirmed the denial of PBC's request for additional *Brandt* fees and the order denying PBC's request for a further trial, but reversed the judgment to the extent it excluded an amount for prejudgment interest. With respect to the denial of *Brandt* fees, we premised our conclusion on factual considerations, explaining: "While neither we nor the parties have been able to locate any published authority addressing whether attorney fees incurred during posttrial proceedings are recoverable under *Brandt*, we need not resolve that larger question here. Though we can envision circumstances under which such fees might be properly recoverable, we agree with the trial court that the parties' stipulation precludes their recovery here." We further stated: "The only reasonable interpretation of the stipulation is that PBC intended to present to the court for determination any attorney fees it incurred during the course of the jury trial. Recovery of attorney fees for posttrial proceedings exceeded the scope of the stipulation."

PBC has estimated that the amount spent on attorney time and costs on the portion of the appeal involving the right to prejudgment interest totals \$33,558.45.

Punitive Damages Judgment and the Third Appeal.

In December 2009, the trial court entered judgment on punitive damages in an amount that accounted for a settlement payment from another insurer. PBC appealed

and, in a third unpublished opinion filed in October 2010—*Essex Insurance Company v. Professional Building Contractors, Inc.*, case No. B221970—we reversed, holding: “The one-to-one ratio between punitive and compensatory damages should have been calculated using the jury’s compensatory damages award. The amount of the jury’s compensatory damages award was not altered by a setoff for a third-party settlement.”

Further Posttrial Proceedings.

Cost memorandum.

On April 1, 2009, PBC submitted a cost memorandum in the amount of approximately \$85,000, and Essex responded by filing a motion to strike or tax costs. The trial court, however, initially rejected the cost memorandum because the judgment contained no provision for an award of costs. In June 2009, the trial court granted PBC’s motion to correct the judgment to include costs and directed that the judgment be interlineated to include a cost award of \$23,837.55.

To secure its cost award, PBC incurred attorney fees and costs in the amount of \$5,407.45.

Motion to deposit funds into court.

In June 2009, Essex moved to deposit funds into the court in the amount of the compensatory damage award plus costs during the pendency of the first and second appeals. PBC opposed the motion and the trial court denied it. PBC incurred attorney fees in the amount of \$2,070 for this work.

Entry of judgment.

Following the issuance of the remittitur after the first appeal, PBC submitted a proposed judgment in October 2009. Essex objected and offered its own proposed judgment. The trial court’s entry of Essex’s proposed judgment precipitated the third appeal. PBC incurred attorney fees and costs in the amount of \$2,858.50 for work performed prior to appeal in connection with the proposed judgment.

Peremptory challenge.

After the issuance of the remittitur following the second appeal, PBC successfully challenged the trial court judge who had signed the judgment in accordance with Code of

Civil Procedure section 170.6.² The attorney time and costs for the challenge totaled \$2,883.40.

Motion to compel payment of interest.

Also after the second appeal, PBC moved to compel payment of interest pursuant to the appellate decision. It sought entry of a judgment that reflected an interest computation of \$84.18 per day. The trial court took the motion off calendar and never ruled on it. PBC incurred attorney fees and costs in the amount of \$2,688.30 for the motion.

Motion for entry of judgment.

PBC filed a motion for entry of judgment and award of interest following the issuance of the remittitur after the third appeal. It calculated that Essex owed \$53,909.34 in interest on the compensatory damages award and \$46,152.11 in interest on the punitive damages award. In August 2011, Essex issued a check to cover the amounts requested and PBC signed an acknowledgement of full satisfaction of judgment on September 19, 2011.

Motion for Attorney Fees.

On September 29, 2011, PBC moved for an award of attorney fees and expenses pursuant to *Brandt, supra*, 37 Cal.3d 813. It asserted that it was entitled to fees and expenses incurred after the verdict to obtain the benefits of the insurance policy, including work on posttrial proceedings in the trial court and on the second appeal. It sought \$68,104.90 in attorney fees and \$2,424.50 in expenses incurred between January 2008 and June 2011.

Essex opposed the motion on the grounds that comparable requests had previously been denied, the motion was untimely and *Brandt, supra*, 37 Cal.3d 813 does not authorize recovery of posttrial fees and expenses.

² Unless otherwise indicated, all further statutory references are to the Code of Civil Procedure.

Following a November 1, 2011 hearing, the trial court denied the motion in its entirety. Though finding that the motion was timely, the trial court concluded that the circumstances before it were distinct from those in *Baron v. Fire Ins. Exchange* (2007) 154 Cal.App.4th 1184, which permitted the recovery of *Brandt* fees incurred in defending an appeal.

PBC appealed.

DISCUSSION

PBC contends the trial court erred in denying its motion for posttrial and appellate fees and costs, asserting that *Brandt, supra*, 37 Cal.3d 813 and its progeny would support such recovery here. While we typically review an order granting or denying an award of attorney fees for an abuse of discretion, we independently review an issue of law concerning a party's entitlement to fees.³ (E.g., *Rickley v. Goodfriend* (2012) 207 Cal.App.4th 1528, 1533; *Carpenter & Zuckerman, LLP v. Cohen* (2011) 195 Cal.App.4th 373, 378; *Topanga and Victory Partners v. Toghia* (2002) 103 Cal.App.4th 775, 779–780.)

³ We reject Essex's assertion that we need not review the merits of PBC's appeal according to multiple doctrines—*res judicata*, collateral estoppel and law of the case—because we previously resolved the same issue in the second appeal, *Essex Insurance Company v. Professional Building Contractors, Inc.*, case No. B215005. (See, e.g., *Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 701–702 [“The doctrine of law of the case applies to later proceedings in the same case. [Citation.] The doctrines of *res judicata* and collateral estoppel apply to later litigation to give conclusive effect to a former judgment or an issue determined in a former proceeding”].) The issue of PBC's entitlement to attorney fees and costs incurred after January 2008 in the trial court and on appeal was not before us, and we expressly stated that we were not resolving the “larger question” of a party's entitlement to posttrial fees and costs under *Brandt, supra*, 37 Cal.3d 813. “It is axiomatic an appellate court's opinion is not authority for propositions never considered or questions not decided. [Citations.]” (*City of Los Angeles v. Animal Defense League* (2006) 135 Cal.App.4th 606, 624–625.)

I. Legal Principles Concerning *Brandt* Fees.

In *Brandt, supra*, 37 Cal.3d at page 817, our Supreme Court held an insured's reasonable attorney fees incurred to compel payment of benefits due under an insurance policy are recoverable as damages in a bad faith action against the insurer. "The *Brandt* rule is now a well-settled but narrow exception to the general rule that each party in litigation must pay its own attorney fees." (*Essex Ins. Co v. Five Star Dye House, Inc.* (2006) 38 Cal.4th 1252, 1259.) *Brandt* fees are considered a type of damages rather than attorney fees: "When an insurer's tortious conduct reasonably compels the insured to retain an attorney to obtain the benefits due under a policy, it follows that the insurer should be liable in a tort action for that expense. The attorney's fees are an economic loss—damages—proximately caused by the tort. [Citation.] These fees must be distinguished from recovery of attorney's fees *qua* attorney's fees, such as those attributable to the bringing of the bad faith action itself." (*Brandt, supra*, at p. 817.) Only those fees attributable to the insured's efforts to recover contract benefits may be awarded, and recoverable fees "may not exceed the amount attributable to the attorney's efforts to obtain the rejected payment due on the insurance contract. Fees attributable to obtaining any portion of the plaintiff's award which exceeds the amount due under the policy are not recoverable." (*Id.* at p. 819; accord, *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 806–807.)

Because *Brandt* fees "are recoverable as damages, the determination of the recoverable fees must be made by the trier of fact unless the parties stipulate otherwise. [Citation.]" (*Brandt, supra*, 37 Cal.3d at p. 819.) *Brandt* found a stipulation for a postjudgment allocation of fees as preferable, because "the determination then would be made after completion of the legal services [citation], and proof that otherwise would have been presented to the jury could be simplified because of the court's expertise in evaluating legal services. [Citations.]" (*Id.* at pp. 819–820, fn. omitted; see also *Campbell v. Cal-Gard Surety Services, Inc.* (1998) 62 Cal.App.4th 563, 571–572 [approving stipulation procedure].)

The state of the law concerning the recovery of *Brandt* fees incurred during posttrial proceedings and on appeal has remained unchanged since our observations over two years ago in the second appeal, *Essex Insurance Company v. Professional Building Contractors, Inc.*, case No. B215005. Still, no published decision in California has addressed the availability, scope and/or manner of recovery of attorney fees incurred during posttrial proceedings to obtain policy benefits. And still, while *Baron v. Fire Ins. Exchange, supra*, 154 Cal.App.4th at pages 1197 to 1198 authorizes the recovery of *Brandt* fees incurred by the insured to defend a judgment against the insurer's appeal, no published authority addresses the propriety of recovering *Brandt* fees to prosecute an appeal against an insurer to obtain policy benefits. (See also *Track Mortgage Group, Inc. v. Crusader Ins. Co.* (2002) 98 Cal.App.4th 857, 871 [addressing insured's request for attorney fees on appeal under *Brandt, supra*, 37 Cal.3d 813 and holding "Track is entitled to fees only to the extent Crusader's appeal attacked the judgment in favor of Track on the contract causes of action"]; *McGregor v. Paul Revere Life Ins. Co.* (9th Cir. 2004) 369 F.3d 1099, 1101 [where insured proved bad faith to the jury, but could not obtain the policy benefits until she prevailed on insurer's appeal, appellate court held that insured's attorney fees "incurred on appeal were necessary to obtaining her policy benefits, [and] the logic of *Brandt* necessarily implies that they should be recoverable".])

II. The Trial Court Properly Denied PBC's Motion for Additional *Brandt* Fees.

On September 29, 2011, PBC brought a motion for attorney fees and costs pursuant to *Brandt, supra*, 37 Cal.3d 813. It sought recovery of fees incurred for two categories of legal work. The first involved PBC's efforts in the trial court to obtain the benefits of the verdict, which included moving to correct the judgment to include costs, opposing Essex's motion to deposit funds into court, proposing judgments and filing briefs in support of those proposals, preparing a peremptory challenge in accordance with section 170.6, moving to compel payment of interest awarded by the second appeal and moving for entry of judgment. The second category involved time spent on the second appeal specifically to secure the payment of prejudgment interest from the date of the

verdict pursuant to Civil Code section 3287, subdivision (a). PBC maintains that the award of interest was a policy benefit which its efforts on appeal were reasonably designed to obtain.

Conceptually, we agree with PBC's position that *Brandt* fees incurred during posttrial proceedings or on appeal that are reasonably necessary to secure policy benefits are recoverable. (See, e.g., *Essex Ins. Co v. Five Star Dye House, Inc.*, *supra*, 38 Cal.4th at p. 1258 [“[t]he tort of bad faith against the insured entitles the insured to recover the policy benefits *in full*, undiminished by attorney fees”].) We find applicable the reasoning expressed in *Baron v. Fire Ins. Exchange*, *supra*, 154 Cal.App.4th at page 1198 “that attorney fees the insured has incurred to defend a judgment against the insurer’s appeal are a logical extension of the fees incurred in pursuing the recovery in the trial court. The collection of the benefits due is not complete when the insurer resists the judgment by challenging the judgment on appeal.” Likewise, posttrial fees incurred in the trial court or fees incurred on appeal may be the logical extension of those incurred to obtain recovery at trial. We can envision circumstances where an insured’s collection of policy benefits is not complete when the insurer resists payment of the judgment in the trial court or an insured’s appeal is necessary to vindicate its right to full policy benefits.

Here, however, because PBC did not file its attorney fee motion until 10 days after it signed an acknowledgement of full satisfaction of judgment, we need not resolve whether the specific fees and costs PBC sought in its motion were recoverable under *Brandt*, *supra*, 37 Cal.3d 813.⁴ We likewise need not determine at what point PBC’s posttrial efforts might support the recovery of *Brandt* fees because they became too attenuated from its prior stipulation, which we previously found operated to preclude PBC’s recovery. We conclude that PBC is barred from relying on *Brandt* to escape the

⁴ We note, however, that several of the tasks for which PBC sought recovery seem, at best, only tenuously connected to the recovery of policy benefits, including correcting the judgment to include costs, opposing the motion for the deposit of funds, bringing a challenge under section 170.6, preparing a punitive damages judgment and filing a motion to compel payment of interest which was taken off calendar.

limitations on recovering attorney fees embodied in the statutory scheme governing the enforcement of judgments, section 680.010 et seq.

According to section 685.040, a judgment creditor may recover the “reasonable and necessary costs of enforcing a judgment,” including attorney fees if “the underlying judgment includes an award of attorney’s fees to the judgment creditor pursuant to subparagraph (A) of paragraph (10) of subdivision (a) of Section 1033.5.” (§ 685.040.) In turn, section 1033.5, subdivision (a), lists the items that are allowed as costs in obtaining a judgment, including: “Attorney’s fees, when authorized by . . . [¶] . . . [¶] (C) Law.” (§ 1033.5, subd. (a)(10)(C).) Section 685.070 provides that a judgment creditor may claim certain costs of enforcing a judgment, including “[a]ttorney’s fees, if allowed by Section 685.040.” (§ 685.070, subd. (a)(6).) The judgment creditor may request costs including attorney fees by either filing a memorandum of costs (§ 685.070, subd. (b)) or a noticed motion (§ 685.080, subd. (a)). (*Carnes v. Zamani* (9th Cir. 2007) 488 F.3d 1057, 1060 [applying California law].) “Under either section, the judgment creditor must request postjudgment attorney fees before the underlying judgment is fully satisfied. [Citations.]” (*Ibid.*) Section 685.070, subdivision (b) requires that the memorandum of costs be filed “[b]efore the judgment is fully satisfied,” and section 685.080, subdivision (a) requires that “[t]he motion shall be made before the judgment is satisfied in full”

The statutory scheme therefore unambiguously requires the judgment creditor to request costs including attorney fees before the underlying judgment has been fully satisfied. In other words, once a judgment has been satisfied in full—as here—the judgment creditor may not later seek additional attorney fees and costs. As explained in *Lucky United Properties Investment, Inc. v. Lee* (2010) 185 Cal.App.4th 125, 144, “the statutory purpose of requiring that the motion for enforcement costs be brought ‘before the judgment is satisfied in full’ [citation] is to avoid a situation where a judgment debtor has paid off the entirety of what he believes to be his obligation in the entire case, only to be confronted later with a motion for yet more fees.”

That purpose is evident here. PBC executed an acknowledgement of full satisfaction of judgment, thereby leading Essex to believe it had satisfied its entire obligation. (See § 724.010, subd. (a) [“A money judgment may be satisfied by payment of the full amount required to satisfy the judgment”]; *Kemp v. Barnett* (1976) 62 Cal.App.3d 245, 248 [“There can only be one satisfaction of the judgment”].) Ten days later, PBC sought recovery of additional damages in the form of *Brandt* fees. We find no merit to PBC’s contention that its claim for *Brandt* fees is not governed by the statutes relating to the enforcement of judgments. The court in *Carnes v. Zamani, supra*, 488 F.3d 1057 rejected a comparable assertion. There, two months after executing a full satisfaction of judgment, the plaintiffs filed a motion for attorney fees and costs incurred in enforcing the judgment, and the appellate court affirmed the order finding it untimely. (*Id.* at p. 1059.) The court specifically rejected the plaintiffs’ contention that the statutory scheme governing the enforcement of judgments did not apply “because California common law and section 1717 authorize an award of postjudgment attorney fees independent of section 685.040” (*Id.* at p. 1061.) Finding that the satisfaction of judgment essentially extinguished any other right of the plaintiffs to attorney fees, the court determined that “[a]ny right the Carneses [plaintiffs] had under California law to recover attorney fees incurred in enforcing their judgment was dependent on section 685.040 of the [enforcement of judgments law].” (*Ibid.*)

We find these circumstances akin to those in *Carnes v. Zamani, supra*, 488 F.3d 1057. The judgment awarding PBC compensatory damages, including *Brandt* fees, was initially entered in March 2009 and the vast majority of the work for which PBC has sought recovery occurred after that date. As with attorney fees authorized by section 1717, we find no basis in law or policy to permit the recovery of postjudgment *Brandt* fees following a full satisfaction of judgment. Accordingly, we follow the conclusion reached in *Carnes v. Zamani, supra*, at page 1061: “Because their right to recover postjudgment attorney fees is dependent on section 685.040, [PBC was] required to comply with the timeliness requirements for postjudgment attorney fee motions set forth in the [enforcement of judgment law]. Sections 685.070 and 685.080 require that a

motion for fees incurred in enforcing a judgment be filed before the underlying judgment is fully satisfied. Because [PBC filed its] postjudgment fee motion after the underlying judgment was fully satisfied, the motion was untimely.”⁵

DISPOSITION

The order denying PBC’s motion for attorney fees and costs is affirmed. Essex is entitled to its costs on appeal.

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_____, Acting P. J.

DOI TODD

We concur:

_____, J.

ASHMANN-GERST

_____, J.

CHAVEZ

⁵ Our untimeliness determination is distinct from the trial court’s finding that the motion was timely, as that finding was directed to the contention that the motion should have been filed within 60 days after notice of entry of judgment.