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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

CLIVE CUSSLER et al.,

Plaintiffs and Appellants,

v.

CRUSADER ENTERTAINMENT, LLC,

Defendant and Respondent.

B238364

(Los Angeles County  
Super. Ct. No. BC440326)

APPEAL from an order of the Superior Court of Los Angeles County, Susan Bryant-Deason, Judge. Reversed.

Greenberg Glusker Fields Claman & Machtinger, Bertram Fields, Elisabeth A. Moriarty and Caroline S. Heindel for Plaintiffs and Appellants.

O'Melveny & Myers, Marvin S. Putnam and Jessica L. Stebbins for Defendant and Respondent.

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## INTRODUCTION

Clive Cussler and related entities appeal a postjudgment order awarding Crusader Entertainment, Inc. (Crusader) attorney fees.<sup>1</sup> The main issue is whether the contract between the parties contains an attorney fee clause under which the prevailing party in litigation regarding the contract is entitled to recover reasonable attorney fees. We shall conclude that the contract does not contain such a clause.

## FACTS

Cussler and Crusader entered into a contract whereby Crusader purchased the rights to produce films based on Cussler's novels. In his complaint and first amended complaint against Crusader, Cussler alleged that Crusader owed him about \$8.5 million under the contract. The trial court sustained Crusader's demurrer to Cussler's first amended complaint without leave to amend, and then entered a judgment of dismissal in Crusader's favor.

After the judgment was entered, Crusader filed a motion for attorney fees. On December 6, 2011, the trial court granted the motion and awarded Crusader \$161,378.78 in fees. In so ruling, the court found that Crusader was entitled to recover attorney fees pursuant to paragraph 18 of the contract, which we shall discuss *post*. Cussler filed a timely notice of appeal of the order granting Crusader's motion for attorney fees.

## CONTENTIONS

Cussler makes two principal arguments. The first is that the contract does not contain an attorney fee clause. The second is that even assuming the contract contains such a clause, the fees awarded were not reasonable or necessary. Because we rule in Cussler's favor on his first argument, we do not reach the second.

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<sup>1</sup> The related entities are Sahara Gold, LLC, Clive Cussler Enterprises, and Sandecker, RLLP, which are owned by Mr. Cussler and his children. We shall refer to Mr. Cussler and his associated entities in the singular as "Cussler." Crusader's current name is Bristol Bay Productions.

## DISCUSSION

“Civil Code section 1717 applies to attorney fee awards that are authorized by contract and incurred in litigating claims that sound in contract.” (*Silverado Modjeska Recreation & Park Dist. v. County of Orange* (2011) 197 Cal.App.4th 282, 310.) The statute provides for an award of reasonable attorney fees to the prevailing party in a contract dispute where the contract “specifically” provides for such fees. (Civ. Code., § 1717, subd. (a).) It further provides that attorney fee provisions must be interpreted reciprocally, i.e. a party is entitled to recover attorney fees under such a clause “whether he or she is the party specified in the contract [to recover fees] or not.” (*Ibid.*; *Toro Enterprises, Inc. v. Pavement Recycling Systems, Inc.* (2012) 205 Cal.App.4th 954, 958.)

Here, paragraph 18 of the contract states the following: “**PURCHASER’S INDEMNIFICATION**. Purchaser [Crusader] agrees to indemnify and hold harmless [Cussler] and its agents, licensees, successors and assigns, from and against any and all damages, claims, demands, losses, judgments, costs and expenses (including reasonable attorneys’ fees) sustained, suffered, paid or incurred by [Cussler] or its licensees, successors or assigns as a result of or in connection with any breach or alleged breach of any warranty, undertaking, representation or agreement made or entered into hereunder by [Crusader] or any such damages, claims demands, losses, judgments, costs and expenses resulting from [Crusader’s] development, production, distribution or exploitation of the Pictures hereunder except those damages, claims, demands, losses, judgments, costs and expenses resulting from an act or omission of [Cussler] or any of them or a breach by [Cussler], or any of them, of a warranty or representation or other provision of this agreement.”

Crusader contends paragraph 18 constitutes an attorney fee provision within the scope of Civil Code section 1717 and that under the statute the provision is rendered reciprocal. We review de novo the issue of whether paragraph 18 is an attorney fee provision within the scope of Civil Code section 1717. (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865-866; *Building Maintenance Service Co. v. AIL Systems, Inc.* (1997) 55 Cal.App.4th 1014, 1028 (*Building Maintenance*).)

“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.” (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 969 (*Myers*)). A “standard” indemnity provision does not “authorize attorney fees on a dispute arising out of the contract.” (*Carr Business Enterprises, Inc. v. City of Chowchilla* (2008) 166 Cal.App.4th 14, 20 (*Carr*)).

We interpret an indemnity clause according to the particular language of the clause using ordinary rules that govern the interpretation of contracts. (*Carr, supra*, 166 Cal.App.4th at p. 20.) This means we interpret the clause as a whole and in context of the entire contract (Civ. Code, § 1641; *Campbell v. Scripps Bank* (2000) 78 Cal.App.4th 1328, 1337 (*Campbell*)) and consider, inter alia, the subject matter heading of the paragraph which includes the indemnity clause (*Building Maintenance, supra*, 55 Cal.App.4th at p. 1030). “Generally, the inclusion of attorney fees as an item of loss in a third party claim-indemnity provision does not constitute a provision for the award of attorney fees in an action on the contract which is required to trigger [Civil Code] section 1717.” (*Carr*, at p. 20; accord *Myers, supra*, 13 Cal.App.4th at p. 971; *Southern Pacific Thrift & Loan Assn. v. Savings Assn. Mortgage Co.* (1999) 70 Cal.App.4th 634, 642-643 (*Southern Pacific*)).

In *Myers, Building Maintenance, Southern Pacific, Campbell*, and *Carr*, the courts held that the provisions at issue were simply indemnity clauses applying to third party claims, and not attorney fee provisions within the scope of Civil Code section 1717. (*Myers, supra*, 13 Cal.App.4th at p. 962; *Building Maintenance, supra*, 55 Cal.App.4th at p. 1030; *Southern Pacific, supra*, 70 Cal.App.4th at p. 642; *Campbell, supra*, 78 Cal.App.4th at p. 1337; *Carr, supra*, 166 Cal.App.4th at p. 20.) The same is true of paragraph 18 in the present case.

The title of paragraph 18 states that it relates to indemnification, not attorney fees in disputes between the parties. Moreover, the contents of the paragraph indicate that the parties only contemplated indemnification for third party claims. For example, paragraph

18 requires Crusader to indemnify Cussler for “alleged” breaches of any warranty, undertaking, representation or agreement made by Crusader. This clearly cannot apply to Crusader’s alleged breaches of its contract with Cussler. If it did, the contract would absurdly permit Cussler to recover his attorney fees from Crusader merely by *alleging* Crusader breached the contract, even if this allegation were completely meritless. We must avoid any interpretation of the contract that leads to absurd conclusions. (Civ. Code, § 1638; *ASP Properties Group, L.P. v. Fard, Inc.* (2005) 133 Cal.App.4th 1257, 1269.)

Paragraph 18 does not “specifically” provide for attorney fees in disputes between the parties over the contract. By contrast, paragraph 4 of the contract does specifically provide for the prevailing party to recover attorney fees in the event of an arbitration over a narrowly defined intellectual property issue. Paragraph 4 states: “The prevailing party in such arbitration shall be entitled to recover fees and costs in connection therewith . . . .” This demonstrates that when the parties intended to include an attorney fee clause within the meaning of Civil Code section 1717, they used specific, straightforward language to accomplish that goal. No such language can be found in paragraph 18.

Crusader argues paragraph 18 specifically provides that Crusader must indemnify Cussler for attorney fees connected to Crusader’s “breach” of the “agreement,” which Crusader contends means breach of the contract between Cussler and Crusader. This takes the word “agreement” out of context and does not take into account the nature of the contract and paragraph 18. Paragraph 18 states Crusader will indemnify Cussler for “any breach or alleged breach of any warranty, undertaking, representation or agreement *made or entered into hereunder . . . .*” (Italics added.) The italicized words indicate that the term “agreement” refers to a contract other than the agreement between Cussler and Crusader. By contrast, throughout the contract, including paragraph 18, the contract between Cussler and Crusader is referred to as “this agreement” or “this Agreement.”

This interpretation of paragraph 18 is consistent with the nature of the contract. Under the contract, in order to produce films, Crusader was obligated to make and enter into warranties, undertakings, representations and agreements *with third parties*. Paragraph 18 simply states that if any of those third parties sue Cussler for damages arising from any such “warranty, undertaking, representation or agreement,” Crusader will indemnify and hold harmless Cussler.

Crusader argues, alternatively, that paragraph 7 of the contract constitutes an attorney fee provision. Paragraph 7 provides, in part: “Owner [Cussler] does hereby and shall at all times indemnify and save harmless Purchaser [Crusader], its subsidiary and affiliated companies, its officers, directors and employees, and its exhibitors, licensees and assignees, of and from any and all claims, liabilities, demands and causes of action, arising out of or relating to the Granted Rights, not including any claims, liabilities, demands or causes of action, arising out of or relating to [Crusader’s] breach of any warranty or representation hereunder or any material added to the Pictures hereunder by parties other than [Cussler] not contained in the Literary Material, but including without limitation any infringement or violation of the rights of any person, firm or corporation, throughout the world, because of plagiarism, infringement of patent, libel, slander, the Granted Rights, or connected with or resulting from any breach by [Cussler] of any of its representations, warranties, covenants or undertakings under this Agreement. [Crusader] shall have the right and is hereby authorized and empowered by [Cussler], to appear by its attorneys in any such action, to adjust, settle, compromise, litigate, contest, satisfy judgments and take any other action necessary or desirable for the disposition of such claim, demand or action.”<sup>2</sup>

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<sup>2</sup> Paragraph 7 further provides: “Notwithstanding the foregoing [Cussler’s] indemnification obligations under this paragraph with respect to claims, liabilities, demands and causes of action, arising out of or relating to the Granted Rights shall be limited to the following. If there is a judicial finding as to the foregoing adverse to [Cussler], [Cussler] within fifteen (15) days after demand therefore by [Crusader], shall fully reimburse [Crusader] for all such payments and expenses, (or in the case of a mutually approved settlement [Cussler] shall reimburse fifty percent (50%) thereof)

The gist of this paragraph is that if a third party sues Crusader in connection with Cussler's "Granted Rights"—the rights to Cussler's novels—then Cussler will indemnify Crusader. Most of the terms of paragraph 7 only make sense in the context of a third party claim against Crusader. For example, paragraph 7 authorizes Crusader to appear in and settle lawsuits. This is clearly referring to actions by third parties. We agree with the trial court that paragraph 7 is merely a "standard third-party indemnity provision" and not an attorney fee clause within the meaning of Civil Code section 1717

Crusader's reliance on *Continental Heller Corp. v. Amtech Mechanical Services, Inc.* (1997) 53 Cal.App.4th 500 (*Continental*) is misplaced. There, the cross-complainant settled claims asserted by a third party and then sought indemnification from the cross-defendant pursuant to a contractual indemnity provision. (*Id.* at p. 503.) The issue was whether the trial court properly awarded the cross-complainant attorney fees incurred in

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including attorneys' fees. If [Cussler] shall fail so to reimburse [Crusader], then, without waiving its right otherwise to enforce such reimbursement, [Crusader] shall have the right to deduct the said amount of such payments and expenses, or any part thereof, from any sums accruing under this Agreement. In the event that any claim is made with respect to which the provisions of this paragraph apply, [Crusader], shall have the right to withhold from disbursements to or for the account of [Cussler], and to deposit in an interest bearing account ("the Claims Account") a sum otherwise payable to [Cussler] hereunder which in [Crusader's] reasonable opinion may be reasonably necessary to satisfy any [Cussler's] liability in the event of a judicial finding adverse to [Cussler] or [Cussler's] share of any mutually approved settlement in connection with such claim, plus a reasonable amount to cover the expenses of contesting or defending such claim and shall have the further right to apply the amount withheld to the satisfaction of such liability or settlement and to reimbursement of such expenses. However, if a party making a claim does not file a legal action in connection therewith within six (6) months of [Crusader] depositing sums into the Claims Account for such claim, [Crusader] shall release to [Cussler] all sums so withheld in connection with such claims, including the interest earned thereon, but if such party subsequently files a legal action with respect to such claim and thereafter there is a judicial finding with respect to such claim adverse to [Cussler] or mutually approved settlement, [Cussler], within fifteen (15) days after demand therefore by [Crusader], shall fully reimburse [Crusader] for all payments and expenses, (or in the case of a mutually approved settlement [Cussler] shall reimburse fifty percent (50%) thereof) with respect to such claim including attorneys' fees. In addition to the other remedies available to [Crusader] hereunder, [Crusader] may resume depositing in the Claims Account sums otherwise due to [Cussler] hereunder."

an action to enforce the indemnity agreement. (*Id.* at p. 508.) We do not face the same issue here because Crusader did not settle a third party claim. *Continental* thus lends no support to Crusader's arguments.

*Dream Theater, Inc. v. Dream Theater* (2004) 124 Cal.App.4th 547 (*Dream Theater*) and *Zalkind v. Ceradyne, Inc.* (2011) 194 Cal.App.4th 1010 (*Zalkind*) are also distinguishable from the present case. In *Dream Theater*, the indemnity clause provided for indemnification against all losses “ ‘whether or not arising out of third party Claims.’ ” (*Dream Theater*, at p. 556.) This language clearly indicates that the indemnification provision applied to claims other than third party claims, namely claims asserted by one party against the other. Similarly, in *Zalkind*, one party agreed to indemnify the other for losses “ ‘whether or not they have arisen from or were incurred in or as a result of any demand, claim, action, assessment or other proceeding or any settlement or judgment[.]’ ” (*Zalkind*, at p. 1028.) The *Zalkind* court found this language to suggest a second category of indemnification “not limited to third party claims.” (*Ibid.*) No similar language exists in paragraphs 18 and 7 of the present contract.

Crusader's reliance on *Torres v. City of San Diego* (2007) 154 Cal.App.4th 214 (*Torres*) is also unpersuasive. In *Torres*, the action did not “concern an indemnity contract between the parties, but a public agency resolution.” (*Id.* at p. 225.) Because the construction of statutes governing a municipal resolution is different than the interpretation of a contractual indemnity provision, *Torres* is distinguishable from this case.

When viewed as a whole and in context, the contract in this case included mutual indemnity provisions under which each party would be indemnified by the other against certain third party claims. It did not, however, include an attorney fee clause applicable to lawsuits pursuant to Civil Code section 1717. Therefore the trial court's order granting Crusader attorney fees was erroneous.

**DISPOSITION**

The order dated December 6, 2011, is reversed. Appellants are awarded costs on appeal.

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KITCHING, J.

We concur:

CROSKEY, Acting P. J.

ALDRICH, J.