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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

RAUL CARRANZA VALENCIA et al., Plaintiffs and Respondents, v. HOOMAN TOYOTA OF LONG BEACH et al., Defendants and Appellants.	B268046 (Los Angeles County Super. Ct. No. VC063530)

APPEAL from an order of the Superior Court of Los Angeles County, Daniel Ramirez, Judge. Affirmed.

Bahar Law Office and Sarvenaz Bahar for Defendants and Appellants.

Hutchens & Hutchens, Lawrence J. Hutchens and Kalman A. Hutchens for Plaintiffs and Respondents.

INTRODUCTION

The sole issue raised in this appeal brought by defendants Hooman Toyota of Long Beach (Hooman) and Toyota Financial Services CDE Corporation (Toyota Financial) is whether the trial court erred in awarding the prevailing-party plaintiffs Raul Carranza Valencia and Benjamin Carranza attorney fees pursuant to Civil Code section 1717.[1] We conclude plaintiffs' action was "on the contract" as that phrase is used in section 1717 and affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs entered into a written installment sales contract to buy a used Dodge Stratus from Hooman for $7,164.16, financed by Toyota Financial. After the purchase, plaintiffs were unable to register the vehicle because defendants did not have title. The car was repeatedly ticketed for lack of a registration. When plaintiffs went to Hooman for help, they were ushered out of the office. The vehicle was eventually repossessed and plaintiffs commenced the instant lawsuit.

The complaint's allegations are imprecise. The operative version contained causes of action entitled (1) rescission on the basis of failure of consideration and fraud; (2) revocation of acceptance; (3) violation of Vehicle Code section 11710 [dealer's bond]; and (4) fraud. Plaintiffs alleged that they entered into a sales contract with Hooman and, after the purchase, discovered that Hooman did not have clean title. Hooman refused to return the money paid by plaintiffs and "failed to provide [the] registration" to plaintiffs who "were damaged as a result of such willful *breach* and violation" of the "sales contract." (Italics

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1 All further statutory references are to the Civil Code.

added.) Plaintiffs sought to revoke acceptance of "the aforementioned contract," and requested that defendants restore the $7,164.16 in "consideration advanced by Plaintiffs." The fourth cause of action entitled "fraud" alleged that defendants knowingly concealed from plaintiffs the fact that defendants did not have clear title and could not provide plaintiffs with a valid registration.

The record contains only sparse portions of the reporter's transcript. From what we can glean, the jury was instructed on the failure of consideration and fraud by concealment. The jury found defendants liable to plaintiffs for concealment and awarded plaintiffs $10,000 in punitive damages.

Plaintiffs moved for judgment notwithstanding the verdict (JNOV) arguing that the special verdict given to the jury was incorrect because it contained a typographical error that prevented the jury from addressing plaintiffs' cause of action for failure of consideration. Specifically, the special verdict form asked, "QUESTION NUMBER ONE: Have you completed special verdict number one, re concealment? [¶] ANSWER: Yes. [¶] QUESTION NUMBER TWO: Did your answer to special verdict form number one, re concealment, result in an award of monetary damages to [plaintiffs]? [¶] ANSWER: Yes." The form then stated, "If your answer to question two is *yes*, stop here," whereas plaintiffs argued the form should have stated, "If the answer to question two is *no*, stop here." (Italics added.) Plaintiffs argued they should be entitled to elect the remedy of rescission based on a failure of consideration.

The court granted plaintiffs' JNOV motion for rescission of the conditional sales contract to extinguish the balance owing under the contract. The court entered judgment as follows:

$1,642.10, representing the down payment and five installment payments already made, and cancellation of the balance on the loan, plus $10,000 in punitive damages for the fraud.

Plaintiffs then moved for attorney fees and costs in the amount of $143,147.48, arguing that the case should have been easily settled but for defense counsel's insistence that plaintiffs were not entitled to fees under section 1717. Plaintiffs based their entitlement to fees on the following provision on the back of the sales contract: "IF YOU PAY LATE OR BREAK YOUR OTHER PROMISES [¶] . . . [¶] c. You may have to pay collection costs [¶] You will pay our reasonable costs to collect what you owe, including attorney fees, court costs . . . ." (Italics added.)

The trial court granted plaintiffs' attorney fee motion pursuant to section 1717 and awarded plaintiffs $80,806.50. Defendants filed their timely appeal from the attorney fee award.

CONTENTIONS

Defendants do not challenge either the underlying liability judgment or the amount of fees awarded. Rather, they contend that section 1717 did not authorize the attorney fee award because plaintiffs' action was not "on the contract" but was based in tort, and because the fee provision in the contract was not reciprocal.

DISCUSSION

The trial court's determination whether the criteria for awarding attorney fees and costs have been met is a legal question reviewed independently by the appellate court. (*Walker v. Countrywide Home Loans, Inc.* (2002) 98 Cal.App.4th 1158, 1169; *Douglas E. Barnhart, Inc. v. CMC Fabricators, Inc.* (2012) 211 Cal.App.4th 230, 237 (*Barnhart*).)

"Section 1717 governs attorney fee awards authorized by a contract and incurred in litigating claims sounding in contract." (*Barnhart*, *supra*, 211 Cal.App.4th at p. 237.) The case law interpreting section 1717 has distilled the following principles from the phrase "action on a contract:" "An action (or cause of action) is 'on a contract' for purposes of section 1717 if (1) the action (or cause of action) 'involves' an agreement, in the sense that the action (or cause of action) arises out of, is based upon, or relates to an agreement by seeking to define or interpret its terms or to determine or enforce a party's rights or duties under the agreement, and (2) the agreement contains an attorney fees clause." (*Barnhart*, *supra*, 211 Cal.App.4th at pp. 241-242; accord, *Eden Township Healthcare Dist. v. Eden Medical Center* (2013) 220 Cal.App.4th 418, 427.) Courts liberally construe the term "on a contract" as used in section 1717. (*Barnhart*, at p. 240.)

" 'In determining whether an action is "on the contract" under section 1717, the proper focus is not on the nature of the remedy, but on the basis of the cause of action.' [Citation.]" (*Barnhart*, *supra*, 211 Cal.App.4th at pp. 240-241.) "Among the relevant factors are 'the pleaded theories of recovery, the theories asserted and the evidence produced at trial, if any, and also any additional evidence submitted on the motion in order to identify the legal basis of the prevailing party's recovery. [Citations.]' [Citation.]" (*Hyduke's Valley Motors v. Lobel Financial Corp.* (2010) 189 Cal.App.4th 430, 435 (*Hyduke's*).) If the action is " ' "based on breach of promise it is contractual; if based on breach of a noncontractual duty it is tortious. [Citation.] If unclear the action will be considered based on contract rather than tort. [Citation.] [¶] In the final analysis we look to the

pleading to determine the nature of plaintiff's claim." [Citation.]' [Citation.]" (*Amtower v. Photon Dynamics, Inc.* (2008) 158 Cal.App.4th 1582, 1602.)

Defendants are correct that "an action for fraud seeking damages sounds in tort, and is not 'on a contract' for purposes of an attorney fee award, even though the underlying transaction in which the fraud occurred involved a contract containing an attorney fee clause. (*Stout v. Turney* (1978) 22 Cal.3d 718, 730.) However, where the plaintiff's claim instead seeks rescission based on fraud, the courts have concluded such claim *does sound in contract* and permits the award of fees. [Citation.]" (*Super 7 Motel Associates. v. Wang* (1993) 16 Cal.App.4th 541, 549.) Fraud "may provide a basis for a remedy in either a tort action or in a contract action. Fraud may render a contract void or may be grounds for rescission or reformation [citations]. It is well established that where the plaintiff contracts in reliance upon the fraud of the defendant, he may elect either the contract remedy, consisting of restitution based on rescission or the tort remedy, by affirming the contract and seeking damages. [Citations.]" (*Star Pacific Investments, Inc. v. Oro Hills Ranch, Inc.* (1981) 121 Cal.App.3d 447, 461, citing Civ. Code, §§ 1689, subd. (b)(1) & 1692.)

Here, although not a model of clarity, plaintiffs' complaint was "on the contract." The first sentence of the complaint names the sales contract, and the first sentence of the first two causes of action alleged that "On or about April 10, 2013, plaintiff and Hooman . . . entered into a written contract . . . ." The first cause of action also alleged plaintiffs were damaged by defendants' "willful breach" of the conditional sales contract. Regardless of whether plaintiffs' complaint contained a cause of action

specifically entitled "breach of contract," and notwithstanding it did contain a cause of action entitled "fraud," we look to the gravamen of the complaint. (Cf. *Hyduke's*, *supra*, 189 Cal.App.4th at p. 436; *Amtower v. Photon Dynamics, Inc.*, *supra*, 158 Cal.App.4th at p. 1602.) The gravamen of plaintiffs' complaint is that they and defendants entered into the sales contract, which agreement defendants fraudulently induced and breached by failing to supply the consideration they promised, i.e., to provide title, and which contract plaintiffs wanted extinguished. (*Eden Township Healthcare Dist. v. Eden Medical Center*, *supra*, 220 Cal.App.4th at p. 426 ["an action to avoid enforcement of a contract is an action 'on a contract' within the meaning of section 1717"].) The essence of this lawsuit was to rescind the agreement. In short, this lawsuit was "on the contract" as it arose out of the sales agreement and sought cancel the deal.

Defendants assert that "only one cause of action went to the jury and it was for fraudulent concealment," a tort. However, defendants did not include the trial transcript in the appellate record and so we are unable to determine that defendants' breach of the sales contract for failure of consideration was *not* proved at trial. "It is the burden of the party challenging the fee award on appeal to provide an adequate record to assess error." (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295.) In the absence of an adequate reporter's transcript, the trial court's ruling is presumed correct and all intendments and presumptions are indulged to support the fee award. (*Vo v. Las Virgenes Municipal Water Dist.* (2000) 79 Cal.App.4th 440, 448.) Defendants cannot omit portions of the record to support their argument that certain events did not occur.

Nevertheless, the record shows, irrespective of the presumption of correctness on appeal, that one of the theories plaintiffs asserted at trial was the failure of consideration for the sales contract. The trial court instructed the jury on failure of consideration, an instruction it would not have given had the evidence not supported it. (*Alamo v. Practice Management Information Corp*. (2013) 219 Cal.App.4th 466, 475; *Ayala v. Arroyo Vista Family Health Center* (2008) 160 Cal.App.4th 1350, 1358 [a party is entitled to have the jury instructed on the law applicable to all their theories of the case which were supported by the pleadings and the evidence].) Moreover, plaintiffs submitted a special verdict form pertaining to rescission of the contract. The record indicates that the reason the jury did not address that portion of the special verdict was a typographical error — not a failure to try the issue. In sum, although we agree with defendants that the remedies plaintiffs sought are not determinative, plaintiffs' complaint, the special verdict, and the evidence submitted on the attorney fee motion (*Hyduke's*, *supra*, 189 Cal.App.4th at p. 435), all show that the lawsuit was "on the contract" pursuant to section 1717 and that the aim of the action was to rescind that contract.

Turning to the second prong of the test (*Barnhart*, *supra*, 211 Cal.App.4th at pp. 241-242), the sales contract at issue had an attorney fee provision. Defendants argue, even if section 1717 were to apply to this case, that the sales contract's fee provision was not reciprocal because it provided only that defendants were entitled to attorney fees to enforce the contract in the event of a purchaser's breach. We quickly dispose of this contention. Our Supreme Court has explained that "*The primary purpose of section 1717 is to ensure mutuality of remedy for attorney fee*

claims under contractual attorney fee provisions. [Citation.]" (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 610, italics added.) The statute identifies two circumstances under which an otherwise unilateral right becomes reciprocal so as to "ensur[e] mutuality of remedy." (*Id*. at p. 610.) The first is *" 'when the contract provides the right to one party but not to the other*.' [Citation.] In this situation, the effect of section 1717 is to allow recovery of attorney fees by whichever contracting party prevails, '*whether he or she is the party specified in the contract or not*' (§ 1717, subd. (a))." (*Id*. at pp. 610-611, italics added.) In the second situation, "[t]o ensure mutuality of remedy. . . , it has been consistently held that when a party litigant prevails in an action on a contract by establishing that the contract is invalid, inapplicable, unenforceable, or nonexistent, section 1717 permits that party's recovery of attorney fees *whenever the opposing parties would have been entitled to attorney fees under the contract had they prevailed*. [Citations.]" (*Id*. at p. 611, italics added.)

Here, as defendants observe, the contract at issue gives the sellers but not the buyers the right to recoup attorney fees. Section 1717 makes this provision applicable to plaintiffs as buyers to "ensur[e] mutuality of remedy." (*Santisas v. Goodin*, *supra,* 17 Cal.4th at p. 610.) Both prongs of the test for whether an action was "on the contract" under section 1717 are satisfied here. (*Barnhart*, *supra*, 211 Cal.App.4th at pp. 241-242.) Defendants have failed to demonstrate error.

DISPOSITION

The order appealed from is affirmed. Respondents to recover costs on appeal.

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ALDRICH, J.

We concur:

EDMON, P. J.

GOSWAMI, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.