Filed 5/22/17 Ahern v. Asset Management Consultants CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

PRISCILLA AHERN et al., Plaintiffs and Appellants, v. ASSET MANAGEMENT CONSULTANTS, INC. et al., Defendants and Respondents.	B271851 (Los Angeles County Super. Ct. No. BC484356)

APPEAL from an order of the Superior Court of Los Angeles County, Elihu M. Berle, Judge. Affirmed.

Catanzarite Law Corporation, Kenneth J. Catanzarite, Nicole M. Catanzarite-Woodward and Eric V. Anderton for Plaintiffs and Appellants, Priscilla Ahern, Thomas Ahern, Amlap Ahern, LLC and Michael Stella.

Jackson Tidus, M. Alim Malik, Kathryn M. Casey and Charles M. Clark for Defendants and Respondents, Asset

Management Consultants, Inc., BH & Sons, LLC Argent Real Estate Associates, L.P., Argent Associates LLC, James R. Hopper and Gloria Hopper.

In *Ahern v. Asset Management Consultants, Inc.* (Aug. 11, 2015, B253974) (nonpub. opn.) (*Ahern I*) this court reversed the judgment confirming an arbitration award in favor of Asset Management Consultants, Inc., BH & Sons, LLC, Argent Associates, LLC, Argent Real Estate Associates, L.P., James R. Hopper and Gloria Hopper (collectively AMC parties) and remanded the cause with directions to the superior court to deny the AMC parties' petition to confirm the award and grant the petition to vacate the award that had been filed by Priscilla and Thomas Ahern,[1] Amlap Ahern, LLC and Michael Stella (collectively Ahern parties). Following issuance of the remittitur, the Ahern parties moved for an award of attorney fees incurred in the postarbitration judicial proceedings pursuant to Code of Civil Procedure section 1293.2.[2] The superior court denied the motion as premature. Based on the Supreme Court's recent decision in

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[1] Priscilla Ahern died in September 2016 while this appeal was pending. Thomas and Priscilla Ahern owned the investment at issue in the underlying arbitration proceeding as community property, and Thomas Ahern has succeeded to her 50 percent interest as her surviving spouse.

[2] Statutory references are to this code unless otherwise stated.

DisputeSuite.com, LLC v. Scoreinc.com (2017) 2 Cal.5th 968 (*DisputeSuite*), decided while this case was on appeal,[3] we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Ahern I and Our Reversal of the Arbitration Award in Favor of the AMC Parties*

The events preceding the motion for attorney fees at issue in this appeal are set forth in detail in our opinion in *Ahern I*. In brief, the Ahern parties sued the AMC parties and several other individuals and entities for fraud based on alleged misstatements in offering materials for limited partnership and tenant-in-common investments in commercial real property on East La Palma Avenue in Anaheim. The AMC parties successfully petitioned to compel arbitration of the Ahern parties' claims pursuant to the mandatory arbitration provision in one of the underlying agreements relating to the acquisition of the La Palma Avenue property (referred to by the parties as the iStar PSA). In response the Ahern parties elected not to pursue arbitration, dismissed their fraud claims against the AMC parties and continued with their superior court lawsuit against the remaining defendants.

Although the Ahern parties declined to arbitrate their fraud claims relating to the La Palma Avenue investment, the AMC parties, alleging the Ahern parties had breached representations and warranties made in connection with that investment, asserted a new claim for contractual indemnity and demanded arbitration of that claim based on the court's order

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[3] We invited the parties to submit supplemental letter briefs addressing the Supreme Court's decision in *DisputeSuite*.

compelling arbitration under the iStar PSA. The arbitrator found in favor of the AMC parties, awarding them all fees and costs incurred in responding to the underlying lawsuit. The superior court confirmed that award and entered judgment in favor of the AMC parties. The AMC parties then successfully moved for attorney fees under the iStar PSA as prevailing parties in connection with the cross petitions to confirm and to vacate the arbitration award. We reversed the judgment and award of attorney fees in *Ahern I* and directed the superior court to grant the Ahern parties' petition to vacate the award, holding the arbitration provision upon which the court had relied when it compelled arbitration did not apply to the limited partnership or tenant-in-common investors.

2. *The Ahern Parties' Motion for Attorney Fees*

On November 23, 2015, after our decision in *Ahern I* was final and the remittitur had issued, the Ahern parties moved for an award of approximately $465,000 in attorney fees against the AMC parties. Relying on section 1293.2, which authorizes an award of costs to the prevailing party in judicial actions relating to arbitration proceedings, the Ahern parties argued they were entitled to recover not only their ordinary costs but also attorney fees under the fee provisions of the iStar PSA and the parties' tenancy in common agreements.

In opposition the AMC parties argued the contractual dispute regarding their indemnification rights had not been resolved by *Ahern I*, but had simply been transferred to a different, nonarbitration forum. The claims made in the arbitration proceeding, the AMC parties explained, had been reasserted in causes of action for breach of contract and indemnity by way of cross-complaint in one of the Aherns parties'

still-pending fraud actions and an independent lawsuit filed by AMC and seven limited liability corporations that managed various investments in which the Aherns and Michael Stella had participated. Accordingly, the fee motion was premature: Until final determination of the parties' rights and responsibilities, they argued, there could be no overall prevailing party within the meaning of Civil Code section 1717, which governed the award of attorney fees in this case.

The AMC parties also asserted (echoing a position advanced by the Ahern parties in *Ahern I*) the dispute concerning misrepresentations and the right to indemnification was outside the scope of the attorney fee provision in the iStar PSA. In addition, although the tenancy in common agreements between the parties contained attorney fee provisions, those agreements were not the basis for the initial court order for arbitration and were not at issue in the underlying arbitration or the judicial proceedings to vacate or confirm the arbitration award. Finally, the AMC parties asserted the fees sought by the Ahern parties were unreasonable and not supported by the evidence.

After receiving a reply memorandum from the Ahern parties and hearing oral argument, the superior court denied the motion as premature, explaining, "Given that the case has not been completed, the court is going to deny the motion for attorneys' fees. It's without prejudice to [the Ahern parties] renewing the motion at the conclusion of the case."

DISCUSSION

1. *Governing Law*

Section 1293.2 provides, "The court shall award costs upon any judicial proceeding under this title [governing arbitration] as provided in Chapter 6 (commencing with Section 1021) . . . of this

code." The judicial proceedings covered by this provision include postarbitration petitions to confirm or vacate an arbitration award. (§ 1285.) The award of costs pursuant to section 1293.2 is mandatory. (*Corona v. Amherst Partners* (2003) 107 Cal.App.4th 701, 707 ["[a] court must award costs in a judicial proceeding to confirm, correct or vacate an arbitration award"]; accord, *Marcus & Millichap Real Estate Investment Brokerage Co. v. Woodman Investment Group* (2005) 129 Cal.App.4th 508, 513 (*Marcus & Millichap*); *Carole Ring & Associates v. Nicastro* (2001) 87 Cal.App.4th 253, 260.)

Section 1033.5, part of chapter 6 of the Code of Civil Procedure, provides that items recoverable as costs include attorney fees when authorized by contract. (§ 1033.5, subd. (a)(10)(A).) Accordingly, if the parties arbitrated a dispute pursuant to an agreement with an enforceable attorney fee provision, the successful party in postarbitration judicial proceedings is entitled to recover its attorney fees if the court determines it is the prevailing party within the meaning of Civil Code section 1717.[4] (See *Carole Ring & Associates v. Nicastro*,

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[4] Civil Code section 1717, subdivision (a), provides in 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 or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs." Subdivision (b)(1) of the statute provides: "The court, upon notice and motion by a party, shall determine who is the party prevailing on the contract for purposes of this section, whether or not the suit proceeds to final judgment. Except as provided in paragraph (2) [relating to

supra, 87 Cal.App.4th at p. 260 ["the superior court was required to award [the prevailing party] reasonable attorney fees and costs for postarbitration judicial proceedings, pursuant to the statutory scheme governing arbitration"]; see also *Marcus & Millichap*, *supra*, 129 Cal.App.4th at p. 516.)

2. *The Superior Court Did Not Abuse Its Discretion in Ruling the Ahern Parties' Motion for Fees Was Premature*

In their briefs in this court the Ahern parties rely principally on our decision in *Marcus & Millichap*, *supra,* 129 Cal.App.4th 508 to argue the superior court erred in suggesting the postarbitration judicial proceedings were not final and ruling their fee motion was premature. That reliance, while understandable, is no longer justified.

In *Marcus & Millichap*, *supra*, 129 Cal.App.4th 508 we affirmed the superior court's award of attorney fees and costs following an order vacating an arbitration award without a concurrent order for further arbitration proceedings, holding the court properly found the party who had successfully sought to vacate the arbitration award was the prevailing party entitled to an award of fees and costs under the parties' real estate listing agreement. In reaching this result we held the judicial proceeding initiated by Marcus & Millichap Real Estate Investment Brokerage Co. pursuant to section 1288 to confirm its arbitration award against Woodman Investment Group and its

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voluntary dismissals and settlements], the party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract. The court may also determine that there is no party prevailing on the contract for purposes of this section."

managing partner was "final" for purposes of an award of fees, pointing out that section 1294, subdivision (c), "expressly provides that an order vacating an arbitration award is appealable 'unless a rehearing in arbitration is ordered.' Thus, while an order vacating an arbitration award and ordering rehearing is an 'intermediate ruling,' a similar order vacating an award without ordering rehearing is, of necessity, 'final.'" (*Marcus & Millichap*, at pp. 514-515.) We also explained the finality of the postarbitration judicial proceedings, in which Marcus & Millichap's petition to confirm was denied and Woodman's petition to vacate the arbitration award was granted on a procedural ground,[5] was not affected by Marcus & Millichap's ability to initiate another arbitration proceeding to determine its right to a commission under the parties' listing agreement. We distinguished cases in which appellate courts had held an award of attorney fees would be premature following the denial of a petition to compel arbitration "because the claims of the parties remained before the court and subject to judicial determination." (*Id.* at pp. 515-516.) Finally, we interpreted the

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[5] The arbitrator had found Woodman liable for a commission under the parties' listing agreement and the managing partner liable as Woodman's alter ego. (*Marcus & Millichap*, *supra*, 129 Cal.App.4th at p. 511.) Woodman and its managing partner petitioned to vacate the award, arguing its managing partner was not a signatory to the parties' listing agreement, which included the agreement to arbitrate, and the arbitrator lacked jurisdiction over him. (*Ibid.*) The superior court agreed and vacated the arbitration award. As we expressly noted, "Marcus & Millichap did not request, and the court's order vacating the arbitration award did not include an order for rehearing the arbitration pursuant to section 1287." (*Ibid.*)

language in the fee provision of the parties' listing agreement to authorize the award of fees to the prevailing party in any discrete proceeding, whether or not the merits of the underlying contract claim had been resolved. (*Id.* at p. 516.)

The Ahern parties argue their case is directly analogous to *Marcus & Millichap*. Although the Ahern parties had originally sued the AMC parties for fraud in superior court, once arbitration was ordered, their claims against the AMC parties were dismissed. Accordingly, as in *Marcus & Millichap* the matter before the superior court with respect to the AMC parties was solely a postarbitration judicial proceeding to confirm or to vacate the arbitration award. Also as in *Marcus & Millichap* our decision in *Ahern I* finally resolved the dispute in favor of the party opposing the arbitration award, and this court's direction to the superior court to grant the Ahern parties' petition to vacate that award, as well as to vacate its September 19, 2012 order compelling arbitration, did not order a rehearing. Whether or not the AMC parties could initiate new litigation raising the same issues (as they in fact did), *Ahern I* was not an "interim ruling"; nothing remained to be resolved in the underlying superior court action between the Ahern parties, on the one hand, and the AMC parties, on the other hand.[6] As the party who unquestionably

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[6] In fact, in October 2016, approximately eight months after entry of the order denying their motion for attorney fees as premature and while this appeal was pending, the Ahern parties filed a second amended complaint in the underlying action, reasserting their fraud and related claims against the AMC parties. The AMC parties again petitioned for an order compelling arbitration, this time based on the arbitration agreement in the parties' cotenancy agreement. The superior court granted the petition on January 27, 2017.

prevailed in the postarbitration judicial proceedings, the Ahern parties contend, the award of attorney fees, as well as costs, was mandatory under the terms of the iStar PSA and Civil Code section 1717.

In their respondents' brief the AMC parties contend *Marcus & Millichap* is not applicable and assert the case at bar is more akin to *Green v. Mt. Diablo Hospital Dist*. (1989) 207 Cal.App.3d 63, which denied attorney fees following an unsuccessful motion to compel arbitration, one of the cases we distinguished in *Marcus & Millichap*, and *Frog Creek Partners, LLC v. Vance Brown, Inc.* (2012) 206 Cal.App.4th 515 (*Frog Creek*), which held under Civil Code section 1717, "there may only be one prevailing party entitled to attorney fees on a given contract in a given lawsuit." (*Frog Creek,* at p. 520.)

In *Frog Creek* a property owner sued a builder for breach of an agreement to construct improvements on the property; the builder cross-complained. The builder's initial petition to compel arbitration under one version of the parties' contract was denied; that denial was affirmed on appeal. Substituting a different iteration of the parties' agreement, the builder filed a second petition to compel arbitration. The trial court again denied the petition, but the court of appeal reversed and directed the trial court to stay the proceedings and send the dispute to arbitration. (*Frog Creek*, *supra*, 206 Cal.App.4th at pp. 521-522.) The arbitration panel found in favor of the builder, awarding it nearly $2 million in damages and $2.5 million in attorney fees for the arbitration proceedings. (*Id.* at p. 522.) The arbitrators declined to rule whether attorney fees and costs might be awarded for litigation activity before the arbitration. (*Ibid*.)

After arbitration was completed, the builder moved in superior court for attorney fees pursuant to Civil Code section 1717 for prearbitration and postarbitration litigation activity, including attorney fees for its initial petition to compel arbitration. The property owner filed its own motion for attorney fees in connection with its successful opposition to the first petition and the subsequent appeal of that order. The property owner argued it was the prevailing party on the builder's unsuccessful effort to compel arbitration under the first version of the parties' agreement presented to the court. (*Frog Creek*, *supra*, 206 Cal.App.4th at p. 523.) The superior court determined the builder was the prevailing party in the arbitration, but the property owner was the prevailing party on the initial petition to compel arbitration. Accordingly, it awarded attorney fees to both sides. (*Ibid.*)

In a comprehensive opinion that examined the legislative history and case law interpreting Civil Code section 1717, Justice Simons, writing for Division Five of the First Appellate District—the same division that had decided *Green v. Mt. Diablo Hospital Dist.*, *supra*, 207 Cal.App.3d 63—held attorney fees for the first petition to compel should have been awarded to the builder, who had prevailed on the contract dispute as a whole, rather than to the property owner, who won only an interim victory on the first petition. That victory did not make the property owner the prevailing party on the contract under Civil Code section 1717 because denial of the petition to compel arbitration "did not resolve the parties' contract dispute; instead, the merits of that dispute remained before the court in [the property owner's] complaint and [the builder's] cross-complaint." (*Frog Creek*, *supra*, 206 Cal.App.4th at p. 546.) That dispute was

ultimately resolved in the builder's favor through arbitration. The builder was thus the prevailing party on the contract and, under prior appellate decisions, was "entitled to all of its fees, including fees incurred during the lawsuit in proceedings where it did not prevail." (*Ibid.*)

Frog Creek, like *Green v. Mt. Diablo Hospital Dist.*, is distinguishable from *Marcus & Millichap* and the case at bar because the unsuccessful petition to compel for which the opposing party sought its fees did not conclude the judicial proceeding in which motion had been filed. Indeed, the court in *Frog Creek* cited *Marcus & Millichap* for precisely that point. (See *Frog Creek*, *supra*, 206 Cal.App.4th at p. 535 [explaining *Marcus & Millichap* had distinguished *Green* "on the basis that 'no claim of either party remains before the court or otherwise subject to judicial determination . . .'"].) The significance of that distinction, however, has been fundamentally eroded by the Supreme Court's decision in *DisputeSuite*, *supra*, 2 Cal.5th 968.

At issue in *DisputeSuite* was whether the trial court had erred in denying the motion for attorney fees under Civil Code section 1717 filed by the defendant in an action for breach of contract and fraud after the defendant had obtained a dismissal of the lawsuit based on forum selection clauses in the parties' agreements. The Supreme Court held the defendant's victory in moving the litigation from California to Florida, the jurisdiction specified in the agreements, did not make it the prevailing party under Civil Code section 1717 as a matter of law, "and the trial court therefore acted within its discretion in denying [the defendant's] motion for attorney fees." (*DisputeSuite*, *supra*, 2 Cal.5th at pp. 981-982.) "Considering that the action had already been refiled in the chosen jurisdiction and the parties'

substantive disputes remained unresolved, the [trial] court could reasonably conclude neither party had yet achieved its litigation objectives to an extent warranting an award of fees." (*Id.* at p. 971.)

The *DisputeSuite* Court explained that a trial court ruling on a motion for fees under Civil Code section 1717 is vested with discretion in determining which party has prevailed on the contract or that no party has. (*DisputeSuite*, *supra*, 2 Cal.5th at p. 973.) Although the defendant had succeeded in enforcing the forum selection clauses in the parties' agreements, it had not defeated the plaintiff's breach of contract and related claims, which were ongoing in Florida. Accordingly, the California trial court was in no position to compare the relief awarded on the contract claims with the plaintiff's demands and litigation objectives—the inquiry necessary for an award of fees under Civil Code section 1717 and the Supreme Court's landmark case, *Hsu v. Abbara* (1995) 9 Cal.4th 863, 876 (prevailing party determination is to be made by comparing the parties' relative degree of success "upon final resolution of the contract claims"). To be sure, the Court recognized that "[a] procedural victory that finally disposes of the parties' contractual dispute, such as an involuntary dismissal with prejudice and without any likelihood of refiling the same litigation in another forum," may justify an award of fees under Civil Code section 1717 (*DisputeSuite*, at p. 981), but it expressly held a trial court may consider the fact that the contract claims at issue remain unresolved and are pending in a refiled action in determining that neither party had yet prevailed on the contract. (*Id.* at p. 979.) As part of its analysis the Supreme Court summarized the *Frog Creek* decision and found, although "not closely analogous to this case

procedurally," *Frog Creek* "supports the denial of fees in this case by its invocation of the general principle, equally applicable here, that fees under section 1717 are awarded to the party who prevailed on the contract overall, not to a party who prevailed only at an interim procedural step." (*DisputeSuite*, *supra*, 2 Cal.5th at p. 977.)

Turning to *Profit Concepts Management, Inc. v. Griffith* (2008) 162 Cal.App.4th 950 and *PNEC Corp. v. Meyer* (2010) 190 Cal.App.4th 66, two cases in which the Courts of Appeal had affirmed trial court orders awarding attorney fees under Civil Code section 1717 to defendants who had successfully ended state court litigation on procedural grounds (for lack of personal jurisdiction in *Profit Concepts* and forum non conveniens in *PNEC Corp*.), the Supreme Court noted that in each case it was unclear whether the action had been refiled in a more appropriate forum at the time fees were awarded. (*DisputeSuite*, *supra*, 2 Cal.5th at p. 978.) Moreover, because the issue on appeal is whether the trial court has abused its discretion in ruling on the fee motion, review of a fee award is different from review of the denial of fees. (*Ibid*.) Accordingly, the Supreme Court explained, that the courts in those two cases "may have acted within their discretion in awarding fees for obtaining a dismissal does not imply it is an abuse of that discretion to rule, as did the court here, that fees should not yet be awarded because the dismissal did not end the contractual litigation but merely moved it to another forum." (*Id.* at p. 979.)[7]

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[7] The appeal in *Marcus & Millichap*, like those in *Profit Concepts* and *PNEC Corp*., reviewed the superior court's award of attorney fees under Civil Code section 1717, not the denial of fees.

Like the defendant in *DisputeSuite*, the Ahern parties rely on *Turner v. Schultz* (2009) 175 Cal.App.4th 974 to support their claim for attorney fees. *Turner* involved a dispute over the amount offered by a corporation for the shares of a terminated employee-shareholder pursuant to the terms of a buy/sell stock agreement. The corporation demanded arbitration pursuant to the arbitration clause in the parties' agreement. Turner refused to arbitrate absent a court order that he do so, contending the agreement was void because it was procured by fraud in the inception. (*Turner*, at p. 977.) Turner sued the corporation and two of its other shareholders in Contra Costa County Superior Court alleging fraud. He then filed a second lawsuit in San Francisco Superior Court against the same defendants, as well as the American Arbitration Association, seeking a declaration they could not proceed with arbitration relating to the buy/sell agreement without first obtaining a court order. (*Id*. at pp. 977-978.) Shortly thereafter, the defendants in the Contra Costa action petitioned to compel arbitration, and the court granted the petition. The San Francisco court then granted a motion for judgment on the pleadings and awarded the defendants in that action their attorney fees. The Court of Appeal affirmed the award of fees, concluding, "The fees at issue were incurred in connection with an independent complaint for declaratory and injunctive relief. . . . Under the circumstances, it appears that defendants' entitlement to attorney fees in this legal action is independent of the outcome of the arbitration of the merits of the underlying dispute . . . ." (*Id*. at p. 983.)

The Supreme Court rejected the argument that *Turner*'s holding supported the view the trial court in *DisputeSuite* had abused its discretion in denying attorney fees "for a preliminary

decision determining the proper forum." (*DisputeSuite*, *supra*, 2 Cal.5th at p. 980.) As the Court explained, *Turner* did not involve a situation in which fees were sought at an intermediate stage of a lawsuit where the contract claims at issue remained unresolved and were pending in a refiled action: "The California and Florida actions in the present case were not substantively independent in the manner of the San Francisco and Contra Costa actions in *Turner*. Whereas in Mr. Turner's San Francisco action only the question of arbitration was at issue, and not the substance of the contractual dispute being litigated in Contra Costa County, here DisputeSuite's California lawsuit put at issue the entirety of its claims against Score, claims that, at the time the California court denied Score's fee motion, were still being litigated in Florida." (*Ibid*.)

The superior court's determination the Ahern parties' fee motion was premature is not distinguishable in any meaningful way from the ruling denying attorney fees affirmed by the Supreme Court in *DisputeSuite*. The proceedings leading to our decision in *Ahern I* put at issue the entirety of the AMC parties' contractual indemnity claims against the Ahern parties. When it heard the motion, the court was aware the substantive breach of contract and indemnity disputes between the parties remained unresolved and the AMC parties' claims had been refiled in actions then pending in the Los Angeles Superior Court. Although the postarbitration judicial proceedings had been finally concluded in favor of the Ahern parties, those proceedings were only an interim procedural step in the parties' ongoing litigation over the La Palma Avenue property investment. Like the defendant in *DisputeSuite* that successfully moved to dismiss the California action, the Ahern parties were not the prevailing

party under Civil Code section 1717 as a matter of law. Properly exercising its discretion, the superior court could reasonably conclude neither side had yet achieved its litigation objectives to an extent warranting an award of fees.

DISPOSITION

The order denying the Ahern parties' motion for fees is affirmed. The parties are to bear their own costs on appeal.

PERLUSS, P. J.

We concur:

ZELON, J.

SEGAL, J.