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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

ROYAL CAPITAL HOLDINGS, INC.,

Plaintiff and Respondent,

v.

CHASE PIZZA, INC.,

Defendant and Appellant.

B278993

(Los Angeles County
Super. Ct. No. EC063695)

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

Chad Biggins for Defendant and Appellant.

Law Office of Robert Gentino, Sherri Matta and Robert
Gentino for Plaintiff and Respondent.

Defendant and appellant Chase Pizza, Inc. (Chase) appeals from the trial court's order denying its motion for attorney fees pursuant to Civil Code section 1717 after judgment was entered in its favor in this breach of contract action brought by plaintiff and respondent Royal Capital Holdings, Inc. (Royal). Because the parties' contract contains no attorney fee provision that applies to the instant action, we affirm the order denying the motion for attorney fees.

BACKGROUND

Royal sued Chase, Central Escrow, Inc. (escrow holder), and others for breach of an agreement to sell certain Papa John's pizza restaurant locations. The purchase and sale agreement was memorialized in written escrow instructions signed by Royal and Chase. In its first amended complaint, Royal alleged that the agreement provided for payment of attorney fees and requested recovery of such fees pursuant to Civil Code section 1717.

Escrow holder was subsequently dismissed from the action, and the case proceeded to trial on a single cause of action against Chase for breach of contract. Chase prevailed at trial, and judgment was entered in its favor.

Chase filed a motion for attorney fees pursuant to Civil Code section 1717, arguing that it was the prevailing party in an action on a contract that contained an attorney fees provision. The escrow instructions contained the following pertinent provisions:

“24. **DISAGREEMENTS:** In the event of any disagreement between the undersigned or any of them, and/or the person or persons named in the foregoing instructions, and/or any other person, resulting in adverse claims and demands being made in connection with or for any papers, money or property involved herein or affected hereby, Escrow holder shall be

entitled, at its option, to refuse to comply with any such claim or demand, so long as such disagreement shall continue and in so doing, Escrow Holder shall not be or become liable for damages or interest to the undersigned or any of them or to any person named in the foregoing instructions for its failure or refusal to comply with such conflicting or adverse demands; and Escrow Holder shall be entitled to refrain and refuse to act until:

“(a) the rights of the adverse claimants have been finally adjudicated in a court assuming and having jurisdiction of the parties and the money, papers, and property involved herein or affected hereby; and/or

“(b) all differences shall have been adjusted by agreement and Escrow Agent shall have been notified thereof in writing signed by all of the persons interested;

“(c) in the event of such disagreement Escrow Holder, in its discretion, may file a suit in interpleader for the purpose of having the respective rights of the claimants adjudicated, and deposit with the court all documents and property held hereunder, and the undersigned agree to pay all costs and expenses incurred by Escrow Holder in such action, including attorney’s fees and said costs and expenses shall be included in the judgment in any such action.”

“X

“Should any dispute arise between or among the parties, or should conflicting demands or notices be served upon the Escrow Holder by the parties or any third parties, the Escrow Holder may, at its sole option and in its sole

discretion, but without limiting its other rights, do any or all of the following: Stop all proceedings in the performance of this escrow and withhold the delivery of any documents or funds in its possession until said conflicts are resolved and proof thereof, satisfactory to the Escrow Holder, is deposited in escrow; deliver the escrow file and all documents related to the Escrow Holder's attorney with instructions to attempt to resolve the dispute or conflict and to pay said attorney forthwith, out of the funds on deposit in escrow, his costs and reasonable fees; file a suit in interpleader for declaratory judgment or for other relief. If such suit be brought, the Escrow Holder shall be released and discharged from any liability and obligation to further perform any duties in connection with this escrow, and the parties jointly and severally agree to pay the Escrow Holder all costs, expenses and reasonable attorney's fees expended, or incurred by the Escrow Holder. Escrow Holder shall make payment to or for, or deliver documents to any party, only if in its sole judgment, such payment or delivery may be made without incurring any liability upon the Escrow Holder."

"XII

"The parties hereto, joint and severally, promise to pay on demand, as well as to indemnify and hold the Escrow Holder harmless from any and all costs, damages, judgments, attorney's fees, expenses and liabilities of any kind or nature whatsoever, occasioned by any party, including costs incurred by the Escrow Holder in connection with instituting, prosecuting, or defending litigation, which in good faith the Escrow

Holder may thus incur and sustain. Further, the Escrow Holder is hereby given a lien upon all of the rights, titles and interests of each of the undersigned in all papers, property, and funds deposited in escrow, to protect the Escrow Holder's rights and to indemnify and reimburse it for any such expenses incurred and sustained."

The trial court denied the motion for attorney fees, finding that the plain language of the escrow instructions required Chase and Royal to pay attorney fees incurred by the escrow holder, and not by one another. The trial court further concluded that the mutuality of remedy provided in Civil Code section 1717 would permit Chase to recover attorney fees only if such fees were being sought from the escrow holder. This appeal followed.

DISCUSSION

I. Applicable law and standard of review

"Attorney fees are not recoverable as costs unless a statute or contract expressly authorizes them. [Citations.]" (*Sessions Payroll Management, Inc. v. Noble Construction Co.* (2000) 84 Cal.App.4th 671, 677 (*Sessions*)). The issue presented here is whether Civil Code section 1717 or Code of Civil Procedure sections 1032 and 1033.5 authorize an attorney fee award based on the attorney fee provisions in the escrow instructions.

Code of Civil Procedure section 1032, subdivision (b) grants prevailing parties the right "to recover costs in any action or proceeding." Section 1033.5 lists those expenses of litigation that may be claimed as recoverable costs by a prevailing party. Included among those expenses are "Attorney fees, when authorized by . . . : [¶] (A) Contract. [¶] (B) Statute. [¶] (C) Law." (§ 1033.5, subd. (a)(10).) Section 1033.5 also provides that

attorney fees awarded under Civil Code section 1717 are allowable costs under Code of Civil Procedure section 1032.

Civil Code section 1717 provides in pertinent 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.”

Civil Code section 1717 “ensures mutuality of remedy for attorney fee claims under contractual attorney fee provisions . . . in at least two situations. [Citation.]” (*Sessions, supra*, 84 Cal.App.4th at p. 678.) The first situation involves a unilateral attorney fee contract, which provides the right to recover attorney fees to one party but not to the other. (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 610-611 (*Santisas*)). In such circumstances, Civil Code section 1717 allows recovery of attorney fees by “whichever contracting party prevails,” whether or not the contract specifies that party. (*Santisas*, at p. 611.)

The second situation in which Civil Code section 1717 applies is when a defendant sued on a contract containing an attorney fee provision successfully defends against the action by establishing that the contract is invalid, inapplicable, unenforceable, or nonexistent. “If section 1717 did not apply in this situation, the right to attorney fees would be effectively unilateral -- regardless of the reciprocal wording of the attorney fee provision allowing attorney fees to the prevailing attorney -- because only the party seeking to affirm and enforce the agreement could invoke its attorney fee provision. To ensure mutuality of remedy in this situation, 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.]” (*Santisas, supra*, 17 Cal.4th at p. 611.)

Because the trial court interpreted the contractual attorney fee provisions at issue without resorting to extrinsic evidence, we apply a de novo review, exercising our independent judgment in interpreting the provisions without deference to the trial court's conclusions. (*Campbell v. Scripps Bank* (2000) 78 Cal.App.4th 1328, 1336 (*Campbell*)). The usual rules of contract interpretation govern our review, and we strive to determine the actual intent of the parties at the time they entered into the contract. (*Id.* at p. 1337.)

II. The relevant contract provisions do not authorize an attorney fee award to Chase

The relevant contract provisions, read as a whole and in context, operate as an indemnity agreement to the escrow holder and not as an attorney fee provision obligating the losing party in an action on the contract between Chase and Royal to pay the other's attorney fees. Paragraphs 24 and X of the escrow instructions authorize the escrow holder to stop all further escrow proceedings without liability, or to sue in interpleader when conflicting demands are made on the escrow holder or any dispute or controversy arises between the principals or with a third party relating to the escrow. Paragraph 24(c) and the penultimate sentence of paragraph X provide that the principals to the escrow shall pay all litigation and interpleader costs, including reasonable attorney fees, incurred by the escrow holder in the event of litigation that arises between them or with a third party. The plain language of these provisions does not provide

for the recovery of attorney fees in an action between Chase and Royal with regard to the purchase and sale transaction.

Paragraph XII is an express indemnity that obligates Chase and Royal to “indemnify and hold the Escrow Holder harmless” from all costs, damages, liabilities and attorney fees occasioned by either of them. It does not operate as an attorney fee provision obligating the losing party in an action on the contract between Chase and Royal to pay the other’s attorney fees.

In *Campbell*, the court interpreted an indemnity provision substantially similar to the one at issue here and concluded that the relevant contract language was an indemnity provision that allowed the escrow holder to be reimbursed for damages, including attorney fees, incurred in actions relating to the escrow. (*Campbell, supra*, 78 Cal.App.4th at pp. 1336, 1337-1338.) The court in *Campbell* further concluded that the language at issue was not an attorney fee provision that would allow the parties to the contract to recover fees as the prevailing party in an action on the contract. (*Id.* at pp. 1337-1338.) Other courts considering similar clauses have reached the same conclusion. (See, e.g., *Paul v. Schoellkopf* (2005) 128 Cal.App.4th 147, 149, 152-153 [provision for attorney fees in escrow instructions limited to fees incurred by the escrow company does not apply to disputes between the buyer and seller over their land sale contract]; *Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 971 (*Myers*) [“A provision including attorney fees as an item of loss in an indemnity clause is not a provision for attorney fees in an action to enforce the contract” and is not made reciprocal and applicable to the entire contract by Civil Code section 1717].)

Here, as in *Campbell*, the contractual provisions at issue clearly and unambiguously constitute a third party indemnity

agreement, not a provision for an award of attorney fees to the contracting parties in actions arising out of an alleged breach of contract. Chase is accordingly not entitled to an award of attorney fees as the prevailing party in the action against Royal.

III. Royal’s allegation of entitlement to attorney fees did not create a right to such fees in an action between the parties

Chase argues that Royal’s request for contractual attorney fees in its first amended complaint, and its initial inclusion of the escrow holder as a defendant in this action allow for the recovery of attorney fees between Royal and Chase based on the reciprocity provision of Civil Code section 1717. “[M]ere allegation of a contractual right to attorney fees is not sufficient to create an estoppel where [a party] would not actually have been entitled to attorney fees under the contract if [that party] had prevailed. [Citations.]” (*Myers, supra*, 13 Cal.App.4th at p. 962, fn. 12.) “[A] party claiming attorney fees [must] establish that the opposing party actually would have been entitled to receive them if the opposing party had prevailed. The mere allegation in a complaint that the plaintiff is entitled to receive attorney fees does not provide a sufficient basis for awarding them to the opposing party if the plaintiff does not prevail.” (*Sessions, supra*, 84 Cal.App.4th at pp. 681-682.) That Royal initially sued escrow holder does not alter the result, as escrow holder was subsequently dismissed and the only cause of action to proceed to trial was a breach of contract claim against Chase.

We affirm the order denying Chase’s motion for attorney fees, and we reject Royal’s argument in this appeal that it is entitled to recover attorney fees.

DISPOSITION

The order denying the motion for attorney fees is affirmed.
Royal shall recover its costs on appeal.

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_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.*
GOODMAN

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