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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Lassen)

CHARLES R. BOGGS et al.,

Plaintiffs and Appellants,

v.

DELMAR HAWKINS et al.,

Defendants and Appellants.

C065278

(Super. Ct. No. 46340)

Plaintiffs Charles and Tracy Boggs purchased a 962-acre ranch (the property) from Tom Gifford, financing the lion's share of the purchase by assuming Gifford's promissory note (the Hawkins note) and deed of trust in favor of defendants Delmar and Leanna Hawkins. Gifford financed the remaining portion of the purchase by taking a second note (the Gifford note) and deed of trust. Plaintiffs later sought to obtain bank financing in order to complete construction of a house on the property. Because the bank would only agree to hold a second deed of trust, plaintiffs sought to pay off the Hawkins note. Defendants agreed to early payoff on the condition that plaintiffs pay the remaining

principal on the note, plus a prepayment penalty equal to the prospective interest that would otherwise have accrued under the note. Plaintiffs paid the prepayment penalty under protest and then sued defendants, seeking return of the interest paid and reasonable attorneys fees and costs.

The trial court concluded the penalty amount demanded by defendants on that portion of the property which the court deemed to be residential exceeded the maximum allowable prepayment penalty permitted by Civil Code section 2954.9 (further unspecified section references are to the Civil Code) and entered judgment in plaintiffs' favor accordingly. The court subsequently awarded plaintiffs their costs of suit.

On appeal, plaintiffs seek reimbursement of the entire prepayment penalty paid, contending: (1) none of the documents evidencing their agreement with defendants prohibited them from prepaying the Hawkins note; (2) the controlling agreement was the agreement whereby they assumed the Hawkins note (the assumption agreement), which neither prohibited prepayment of the Hawkins note nor provided for imposition of a prepayment penalty and, as such, defendants' imposition of a prepayment penalty was a violation of the implied covenant of good faith and fair dealing; (3) section 2954.9 entitles plaintiffs to restitution of the entire prepayment penalty they paid to defendants; (4) section 2954.9 prohibited the trial court from charging the statutory maximum prepayment penalty in the absence of a written agreement to the contrary; and (5) plaintiffs are entitled to recover their attorneys fees as the prevailing parties pursuant to section 1717.

Defendants' cross-appeal, arguing plaintiffs are not entitled to reimbursement of all or any portion of the monies paid as penalty for prepayment of the Hawkins note. Defendants contend: (1) section 2954.9 does not apply here where the loan, at the time of its execution, is not secured by residential property; (2) plaintiffs failed to produce evidence to overcome the presumption that the trial court's judgment is correct; (3) defendants did not violate the covenant of good faith and fair dealing; (4) the parties

agreed, by novation, that the Hawkins note would not be paid off early; and (4) plaintiffs are not entitled to recover their attorneys fees.

As we will explain, plaintiffs have conceded their first two contentions are without merit by virtue of the settled statement. Plaintiffs' remaining three contentions fail because the trial court erroneously found section 2954.9 applied to the transaction at issue. In so concluding, we address each of defendants' claims. We therefore reverse the judgment granting plaintiffs partial relief.

FACTS AND PROCEEDINGS

The parties stipulated to use of a settled statement of the facts established at trial as set forth in the following portions of the trial court's statement of decision. The parties further stipulated that the following facts are "accurate and undisputed":

"Defendants entered into a Land Conservation Contract (Williamson Act) [(Gov. Code, § 51200 et seq.)] with Lassen County for Defendants' ranch parcels in Bieber, California, in February of 1991. In exchange for favorable tax treatment, the land's zoning classification changed from agricultural to a more restrictive zoning classification allowing the land only to be used for agricultural purposes from [that] time forward.

"Defendants sold 962 acres of that Bieber ranchland to Tom Gifford in August of 2002. Mr. Gifford financed the purchase partly through obtaining seller financing from Defendants. Mr. Gifford gave Defendants a Note for \$650,000 [the Hawkins note] and a Deed of Trust against the ranch in order to secure payment. The [Hawkins note] provided for interest accruing at 7% per year and required annual payments of \$61,355.40 due on or about October 15 of each year, with the balance to be paid on October 15, 2012.

"On or about April 8, 2006, Plaintiffs entered into a contract to purchase the 962 acre ranch from Mr. Gifford. As part of the financing of that transaction, Plaintiffs assumed [the Hawkins note] and Deed of Trust to Defendants. Defendants agreed to do

so on the condition that the note not be paid off early. Plaintiffs agreed in writing to Defendants' request that the note not be paid off early. In addition, as part of the sale, Mr. Gifford agreed to also take a note [the Gifford note] and deed of trust for a portion of the purchase price. Plaintiffs agreed not to pay off [the Gifford note] early. In conjunction with the purchase of the property, Plaintiffs and Defendants executed an Addendum, April 12, 2006. The Addendum provided that [the Hawkins note] could not be paid off early, and annual payments could not be made in advance of the yearly due date, without Defendants' consent.

“Plaintiffs’ purchase of the ranch from Mr. Gifford closed on May 9, 2006. Plaintiffs began building a house on the ranch in the spring of 2007. During 2007, Plaintiffs received loan approval from Tri-Counties Bank for the construction of that house, however, the Bank would only agree to hold a second deed of trust on the ranch, but not a third. Plaintiffs contacted Mr. Gifford regarding paying [the Gifford note] off early, but Mr. Gifford would not agree to an early payoff.

“Plaintiffs contacted Defendants on November 8, 2007, as their house was nearing completion, and inquired about paying off [the Hawkins note]. Defendants did not want their note paid off early, but eventually conceded that they would agree to the early pay off if all of the interest that would have accrued over the remaining term of the note were paid in full. Plaintiffs objected, and Plaintiffs['] counsel wrote a letter to Defendants informing them he believed the demand to be illegal.

“Nevertheless, when Defendants held firm, Plaintiffs authorized the payment under protest and the re-finance closed in December of 2007. Plaintiffs made payment on December 31, 2007. Within one week Defendants received payment on the remaining principal amount of [the Hawkins note], \$574,608.23, as well as an amount equal to the prospective interest that would have accrued had the note run its course, \$197,779.05.

“Plaintiffs filed suit in this matter on January 18, 2008, alleging four separate causes of action: usury, breach of the implied covenant of good faith and fair dealing,

unjust enrichment, and money had and received. Plaintiffs sought compensatory damages, treble damages for violation of the usury laws, disgorgement of all interest paid, disgorgement of unjust enrichment, prejudgment interest, reasonable attorney's fees, and costs of suit. Defendants filed their answer on March 18, 2008, raising a number of affirmative defenses therein, and seeking no relief for Plaintiffs as well as attorney's fees and costs incurred in defense of suit."

"Plaintiffs have expended substantial resources to transform a portion of their property into their residence. At the time of purchase, both parties believed the property to be within the Williamson Act, and for good reason--except for two dilapidated houses deemed uninhabitable, the property was almost entirely devoid of any semblance or sign of a residence. Since purchase, Plaintiffs have rehabilitated an existing house on the property and constructed a second house which is more luxury home than farmhouse. Plaintiffs have also adapted significant portions of their property to residential use--roads, a bridge leading to a newly formed twenty acre-plus lake, water wells, lighting, fences, trees, and remarkably extensive ornamental and wildlife-attracting landscaping. It is undeniable that these portions of Plaintiffs' 962 acre property are in fact owner-occupied residential property which falls within the protections of [section] 2954.9. It is equally undeniable that portions of the property, such as the adjacent agricultural land and the remote northeastern section of land, are not owner-occupied residential property within the meaning of [section] 2954.9. The Court finds that 220 of Plaintiffs' 962 acres are owner-occupied residential property."

The trial court concluded plaintiffs failed to sustain their burden with respect to their causes of action for usury, breach of the implied covenant of good faith and fair dealing, and unjust enrichment. As for the cause of action for money had and received, however, the court found plaintiffs demonstrated 220 acres of the 962-acre property were residential and therefore subject to the protections of section 2954.9, and that the payment demanded by defendants violated section 2954.9 by exceeding the maximum

allowable prepayment penalty. The court ordered defendants to return to plaintiffs the amount of \$34,824.73, with each party to bear their own fees and costs. The court later amended the amount of the award to plaintiffs to \$40,027.44.

Plaintiffs filed a motion to modify the statement of decision, arguing that, pursuant to section 2954.9, defendants were not entitled to any prepayment penalty on the residential parcels in the absence of an agreement between the parties to the contrary. Plaintiffs sought restitution of the excessive sums paid to defendants on 709.10 of the 962 acres, as well as an award of costs of suit. Defendants opposed the motion on the grounds that section 2954.9 is inapplicable. The trial court denied the motion, but awarded plaintiffs their costs.

DISCUSSION

I

Agreement Prohibiting Prepayment

Plaintiffs contend there was no enforceable agreement prohibiting them from paying off the Hawkins note early, nor was there an agreement allowing for the imposition of a prepayment penalty in the event they did. Specifically, they contend the April 12, 2006 addendum (addendum two) was a novation subject to the statute of frauds and, because it was not signed by Leanna Hawkins, it was not a valid, binding contract as a matter of law. Plaintiffs further contend that addendum two, as well as additional escrow instructions signed by some but not all of the parties, were superseded by the May 3, 2006, assumption agreement which “specifically reaffirmed the provisions of the original Hawkins note, including its provision which allowed for early payments.” As we shall explain, the parties’ stipulation to the undisputed facts in the settled statement is dispositive of plaintiffs’ contentions.

“In reviewing the cause we are confined to the record of the proceedings which took place in the court below and are brought up for review in a properly prepared record

on appeal which, in this case, is the settled statement.” (*People ex rel. Department of Public Works v. Keligian* (1960) 182 Cal.App.2d 771, 774 (*Keligian*)).

A settled statement is intended to record what actually took place in proceedings for which a reporter's transcript or notes are unavailable. (*People v. Anderson* (2006) 141 Cal.App.4th 430, 440.) “Consistent with this limited purpose, the settled statement is ‘intended to ensure that the record transmitted to the reviewing court preserves and conforms to the proceedings actually undertaken in the trial court.’ ” (*Ibid.*)

When a case such as this comes to us on a settled statement, “[e]vidence to support the findings of fact and conclusions of law and the judgment must appear in the settled statement [citation]; we are bound to assume that enough appears in the settled statement to enable us to decide whether reversible error was committed; and we must make our ruling upon what is affirmatively shown by the record [citation].” (*People ex rel. Department of Public Works v. Bond* (1964) 231 Cal.App.2d 435, 437 (*Bond*)).

Here, according to the settled statement, plaintiffs assumed the Hawkins note as part of the financing for the purchase of the ranch. Defendants agreed to that arrangement on the condition that the note not be paid off early, and “[p]laintiffs agreed in writing to [d]efendants’ request that the note not be paid off early.” (Underscoring omitted.) The settled statement further provides that, in conjunction with the purchase of the property, plaintiffs and defendants executed addendum two, which “provided that the [Hawkins note] could not be paid off early, and annual payments could not be made in advance of the yearly due date, without [d]efendants’ consent.”

The parties stipulated that the record on appeal would consist of specific portions of the trial court’s statement of decision, and that those facts “are accurate and *undisputed*.” (Italics added.) Therefore, pursuant to the parties’ stipulation, it is undisputed that plaintiffs agreed, in writing, not to pay off the Hawkins note early.

As for plaintiffs’ contention that addendum two is unenforceable without Leanna Hawkins’ signature, we are again bound by the settled statement. Because there appears

on the record no objection to the addendum on the grounds asserted here, we assume plaintiffs made none. (*Waller v. Waller* (1970) 3 Cal.App.3d 456, 464; *Bond, supra*, 231 Cal.App.2d at p. 437.) The settled statement affirms plaintiffs' agreement in writing to the prohibition of early payoff of the Hawkins note. Plaintiffs stipulated to that fact. We reject their attempt to retreat from their stipulation here on appeal.

We similarly reject plaintiffs' assertion that all parties executed an assumption agreement after addendum two and the additional escrow instructions, thus superseding any inconsistent terms contained in the earlier-signed documents, including the prohibition on early payoff of the Hawkins note. "The settled statement cannot be impeached by charges contained in a brief." (*Keligian, supra*, 182 Cal.App.2d at p. 774.) The settled statement is silent as to any of these matters. More to the point, the assumption agreement, although in the record on appeal, is not authenticated in the settled statement. As a consequence, these matters "may not be considered." (*Ibid.*)

Plaintiffs agreed in writing not to prepay the Hawkins note. They are bound by that agreement.

II

Implied Covenant of Good Faith and Fair Dealing

Plaintiffs contend the assumption agreement was the "only operative contract between [the parties]" and, because it did not provide for a prepayment penalty, defendants violated the implied covenant of good faith and fair dealing when they imposed a penalty as a condition of early payoff of the Hawkins note.

As set forth in part I of this opinion, plaintiffs stipulated that the facts in the settled statement represented the facts established at trial, and that such facts were accurate and undisputed. The settled statement establishes that plaintiffs agreed in writing not to prepay the Hawkins note. The settled statement is silent as to the assumption agreement on which plaintiffs' contention relies, thus resolving the issue against plaintiffs. (*Keligian, supra*, 182 Cal.App.2d at p. 774.)

III

Restitution

Plaintiffs contend they are entitled to restitution of the entire amount they paid in prepayment penalties pursuant to section 2954.9, subdivision (b) (hereafter section 2954.9(b)), because the entire property was secured by the deed of trust and was “owner-occupied residential real property” at all relevant times.

Defendants counter that section 2954.9 does not apply where, as here, there were no habitable houses on the property at the inception of the Hawkins note and thus there was no “residential structure” securing the loan as required by section 2954.9, subdivision (a)(1) (hereafter section 2954.9(a)(1)).

As we shall explain, the trial court erred when it decided section 2954.9 applies in this case, where the Hawkins note was neither “a loan for residential property” under subdivision (a)(1), nor a “loan secured by a mortgage or deed of trust on owner-occupied residential real property” under subdivision (b).

Section 2954.9(a)(1), provides that, “where the original principal obligation is a loan for residential property of four units or less, the borrower under any note or evidence of indebtedness secured by a deed of trust or mortgage . . . shall be entitled to prepay the whole or any part of the balance due, together with accrued interest, at any time.”

Section 2954.9(b), provides that, except in circumstances not relevant here, “the principal and accrued interest on any loan secured by a mortgage or deed of trust on owner-occupied residential real property containing only four units or less may be prepaid in whole or in part at any time but only a prepayment made within five years of the date of execution of such mortgage or deed of trust may be subject to a prepayment charge and then solely as herein set forth. An amount not exceeding 20 percent of the original principal amount may be prepaid in any 12-month period without penalty. A prepayment charge may be imposed on any amount prepaid in any 12-month period in excess of 20 percent of the original principal amount of the loan which charge shall not

exceed an amount equal to the payment of six months' advance interest on the amount prepaid in excess of 20 percent of the original principal amount.”

In order to resolve the issues before us, we must interpret section 2954.9. We apply the independent standard of review to questions of statutory interpretation. (*Burden v. Snowden* (1992) 2 Cal.4th 556, 562.) In discerning the meaning of section 2954.9, we proceed according to well-established principles of statutory construction. “ ‘Our fundamental task in interpreting a statute is to determine the Legislature’s intent so as to effectuate the law’s purpose. We first examine the statutory language, giving it a plain and commonsense meaning. We do not examine that language in isolation, but in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment. If the language is clear, courts must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend. If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute’s purpose, legislative history, and public policy. [Citations.]’ (*Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737.) ‘If the meaning of the statute remains unclear after examination of both the statute’s plain language and its legislative history, then we proceed cautiously to . . . apply “reason, practicality, and common sense to the language at hand.” [Citation.]’ (*Ailanto Properties, Inc. v. City of Half Moon Bay* (2006) 142 Cal.App.4th 572, 583.) With the consequences that will flow from our interpretation in mind, we must give the words of the statute a workable and reasonable interpretation. [Citation.]” (*Watkins v. County of Alameda* (2009) 177 Cal.App.4th 320, 336.)

The settled statement states that “[d]efendants sold 962 acres of . . . ranchland to Tom Gifford in August of 2002.” Plaintiffs purchased the entire 962-acre ranch from Gifford in May 2006. At that time, “both parties believed the property to be within the Williamson Act, and for good reason--except for two dilapidated houses deemed

uninhabitable, the property was almost entirely devoid of any semblance or sign of a residence.”

Giving section 2954.9(a)(1) its plain and commonsense meaning, it is clear that the original principal obligation (i.e., the Hawkins note) was not a loan for *residential property of four units or less*. There were no habitable houses, nor was there any evidence of a residence, on the property when the Hawkins note was created or later, when plaintiffs purchased it from Gifford and assumed the Hawkins note.

Even assuming section 2954.9(b), not section 2954.9(a)(1), is the operative statute as plaintiffs contend, the result is the same. Giving section 2954.9(b) its plain and commonsense meaning, it is equally clear that the Hawkins note did not secure *owner-occupied residential real property containing only four units or less*. Again, the settled statement confirms that there was no residence on the property for plaintiffs to occupy at the time they purchased the property from Gifford.

Plaintiffs aver that, according to *Garver v. Brace* (1996) 47 Cal.App.4th 995 (*Garver*), section 2954.9(b) applies to loans securing residential real property, not a dwelling or residence, and does not expressly require that the property be owner-occupied when the loan is executed. (*Garver*, at p. 1002.)

In *Garver*, the only reported California case considering the applicability of section 2954.9, the borrowers financed their purchase of a parcel of unimproved agricultural property by borrowing a significant portion of the purchase price from the sellers. The loan was evidenced by a promissory note providing for imposition of a prepayment penalty for payment made prior to the note’s 10th anniversary. The purchase contract required the buyers to build a home on the property within one year of the purchase date, an obligation they fulfilled. (*Garver, supra*, 47 Cal.App.4th at pp. 998-999.)

Four years after purchasing the property, the buyers sold it and eventually capitulated to the seller’s demand to pay a prepayment fee. (*Garver, supra*, 47

Cal.App.4th at p. 999.) Thereafter, the buyers sued for restitution, claiming the prepayment fee violated section 2954.9(b) and was unconscionable, illegal, unreasonable, unsupported by consideration, and obtained by duress. (*Ibid.*) The trial court ruled that section 2954.9 did not apply because the property was not “owner-occupied residential real property” when the note was executed. (*Garver*, at p. 1001.)

The court of appeal reversed. The court noted that nothing in the statute defined the terms “owner-occupied” or “residential,” and that no reported California case had considered whether section 2954.9 applies where “the property, by prior agreement between lender and borrower, becomes owner-occupied residential real property after the loan is made and before the prepayment fee is due.” (*Garver*, *supra*, 47 Cal.App.4th at p. 1001; see also *id.* at p. 1003.) The court held the statute “applies to loans securing ‘residential real property,’ not a dwelling or residence,” and does not “expressly require that the property be ‘owner-occupied’ or ‘contain[] . . . four units or less’ when the loan is executed.” (*Garver*, at p. 1002.) Noting that the purchase agreement and the deed of trust required the buyers to complete construction of their residence within one year, the court found that, by the time the buyers paid the prepayment fee, they had fulfilled that obligation and thus “the property securing the note was owner-occupied real property under any definition of that term.” (*Id.* at p. 1002.) The court noted the uniqueness of the circumstances, and concluded that “where, *by prior agreement between lender and borrower*, the property securing the loan becomes an owner-occupied residence after the loan has been executed and before the prepayment fee is paid,” section 2954.9 applies. (*Ibid.*, italics added.)

Without disagreeing with *Garver*, we conclude that its holding is reliant on several unique circumstances not present in this case. For instance, here, unlike *Garver*, there was no prior agreement between plaintiffs and defendants obligating plaintiffs to construct and occupy a residence on the property within a time certain of assuming the Hawkins note, or at all. In fact, the purchase agreement between plaintiffs and Gifford (a

document which by implication was authenticated by the settled statement) indicates the contrary, that “Buyer does not intend to occupy the Property as Buyer’s primary residence.”

Plaintiffs contend defendants knew of their intention to make the ranch their primary residence by virtue of addendum three, executed on April 27, 2006, which includes language that “Buyer intends to create a parcel for the construction of a primary dwelling,” and that Gifford and defendants would “release said parcel for payment.” Plaintiffs argue addendum three constituted an agreement made at the time of purchase obligating them to construct their primary residence on the ranch. We disagree.

Addendum three is not mentioned in the settled statement, and thus we are at a loss as to what part, if any, that document may have played in the trial court’s decision-making process. Even assuming consideration of addendum three were proper, its language merely reflects plaintiffs’ intent to create a parcel upon which to construct their primary residence; it does not evidence an agreement between the parties obligating plaintiffs to construct their residence within a specified amount of time, or at all. We are left to rely on the purchase agreement indicating plaintiffs’ intent not to occupy the ranch property as their residence.

Next, the residence in *Garver* was completed within one year of execution of the note and prior to the request for prepayment. (*Garver, supra*, 47 Cal.App.4th at p. 999.) The *Garver* court noted that, “[u]nder *the unique facts* alleged in the complaint, section 2954.9 applies to this note because, by prior agreement, the property securing the note became an owner-occupied residence shortly after the note was executed.” (*Id.* at p. 998, italics added.) Here, in contrast, plaintiffs did not begin construction of what was to become their residence until nearly a year after they assumed the Hawkins note. According to the settled statement, plaintiffs requested the early payoff “as their house was nearing completion.” Although plaintiffs assert that “they were residing at the ranch” when they sought to prepay the Hawkins note, the settled statement states simply

that, “[s]ince purchase,” plaintiffs “rehabilitated an existing house on the property and constructed a second house,” saying nothing about where plaintiffs resided. Thus, there is no evidence before us that construction on plaintiffs’ primary residence on the property was complete, or that plaintiffs occupied that residence, at the time they requested early payoff of the Hawkins note in November or December of 2007. The “unique circumstance” in *Garver* is not present here. (*Garver, supra*, 47 Cal.App.4th at p. 1002.)

We also note that, here, the trial court determined portions of the ranch property were adapted to “residential use,” a term neither found in section 2954.9 nor implied by its language. Instead, section 2954.9 requires that the loan be secured by “owner-occupied residential real property,” a phrase which, as plaintiffs correctly point out, is not explicitly defined in the statute. In our opinion that phrase, given its plain and commonsense meaning, clearly requires that the real property be residential (as opposed to commercial or agricultural, for instance) and that the owner of the property occupy it as his or her residence. Neither was true here. “ ‘When statutory language is . . . clear and unambiguous there is no need for construction, and courts should not indulge in it.’ [Citation.]” (*People v. Cole* (1982) 31 Cal.3d 568, 572.)

Nonetheless, plaintiffs urge that the Legislature’s 1979 amendment to section 2954.9(a)(1) eliminating the \$100,000 cap on loans that can be prepaid without penalty shows that section 2954.9 was enacted to save homeowners from the “untenable position of being forced to pay large prepayment penalties, whenever they wished or needed to re-finance or sell their homes,” and that the statute was never intended “to punish farmers, ranchers and/or other owner-occupants with exorbitant prepayment penalties simply because their homes sit on land which is not used exclusively for ‘residential purposes.’ ”

Plaintiffs ignore a key portion of the legislative history which states that the 1979 changes to section 2954.9 were intended to “extend the limitation on prepayment penalties from (present law) *single-family, owner-occupied dwellings* to (the bill) *four or fewer residential units, owner-occupied.*” (Italics added.) That language reveals the

Legislature’s intent that the statute apply to residential property encumbered with owner-occupied “dwellings” or “units,” as opposed to agricultural property, a portion of which is later utilized for a residence or which is put to “residential use” by improvements such as roads, bridges, fences, trees, landscaping, and the like.

We conclude that where, at the time the loan is assumed, the property does not contain an owner-occupied primary residence and it is not contemplated that it will contain such a residence in the immediate future, section 2954.9(b) does not apply.

IV

Statutory Maximum Prepayment Penalty

Plaintiffs contend that where, as here, none of the agreements between the parties provided for the imposition of a prepayment penalty, section 2954.9(b) prohibited the trial court from charging the statutory maximum prepayment penalty. As explained at length in parts III and IV of this opinion, section 2954.9 does not apply under these facts. We reject plaintiffs’ contention on that basis.

V

Attorneys Fees

Plaintiffs contend they are entitled to an award of attorneys fees pursuant to section 1717 based on the “one-sided attorneys fees provision” in the Hawkins deed of trust, and because they were the prevailing parties below. We disagree. Whether or not section 1717 is applicable, we conclude plaintiffs were not the prevailing parties on any of their claims. Hence, they are not entitled to attorneys fees.

DISPOSITION

We find no merit in any of plaintiffs’ contentions on appeal. On defendants’ cross-appeal, we reverse the award of damages in the amount of \$40,027.44 to plaintiffs, as well as the award to plaintiffs of their costs of suit. We affirm the judgment in all

other respects. Defendants are awarded their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1), (2).)

_____ HULL _____, J.

We concur:

_____ BLEASE _____, Acting P. J.

_____ DUARTE _____, J.