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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

PETER HALAMANDARIS,

Plaintiff and Appellant,

v.

STEVEN SEPHOS,

Defendant and Respondent.

C065819

(Super. Ct. No.
CV023970)

Plaintiff Peter Halamandaris (hereafter Halamandaris) appeals from an order awarding attorney fees to defendant Steven Sephos (hereafter Sephos) following entry of judgment dismissing Halamandaris's action due to dilatory prosecution. Halamandaris contends the trial court erred when it awarded attorney fees to Sephos because (a) the action was not an "action on the contract" under Civil Code section 1717, (b) the court did not have jurisdiction to award attorney fees, and (c) the fees awarded resulted from the court's abuse of its discretion. We will affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On June 18, 2004, Halamandaris and his wife, Anna,¹ filed a complaint against Sephos and Dual Arch International, Inc.,² for cancellation of deed of trust and quiet title (first cause of action), declaratory relief (second cause of action), injunctive relief (third cause of action), fraud (fourth cause of action), and slander of title (fifth cause of action). The following exhibits were attached to the complaint: a legal description of commercial real property located at 1233 East Charter Way in Stockton (Exhibit "A"), a legal description of residential real property located at 16089 Tecklenburg Road in the County of San Joaquin (Exhibit "B"), a promissory note (Exhibit "C"), a deed of trust (Exhibit "D"), and a notice of default and election to sell (Exhibit "E").

The promissory note (the note) contains the following language: "If action be instituted on the note, I promise to pay such sum as the Court may fix as attorney's fees."

Sephos filed his answer to the complaint on August 4, 2004. Thereafter, the parties engaged in law and motion, a case management conference, and a settlement conference. Jury trial was set to commence on May 31, 2005. The record, which consists mainly of the trial court register of actions, reflects that the

¹ Anna Halamandaris died in 2009.

² Dual Arch International, Inc., is not a party to this appeal.

trial date was continued several times, either by the court or at the request of the parties.

Sephos filed motions to dismiss the action for lack of prosecution on June 4, 2009, and October 23, 2009. Halamandaris opposed Sephos's motions, as well as the trial court's sua sponte motion to dismiss the action pursuant to the five-year rule set forth in Code of Civil Procedure section 583.310.³

On December 11, 2009, the court granted Sephos's motion to dismiss, and a minute order issued that day. The minute order was amended on January 11, 2010, to include the following language: "The court finds judgment for Steven A[.] Sephos against Peter Halamandaris, Anna Halamandaris in the amount of: \$0 principal, \$0 pre-judgment interest, \$0 attorney fees and \$0 costs." Halamandaris's subsequent motion for reconsideration was denied.

On February 2, 2010, Sephos filed a motion to fix attorney fees pursuant to Civil Code section 1717.⁴ The motion was

³ Code of Civil Procedure section 583.310 provides: "An action shall be brought to trial within five years after the action is commenced against the defendant."

⁴ Civil Code section 1717, subdivision (a) provides:

"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.

supported, in part, by the declarations of attorneys Joseph Nolan and Karen Sadler (wife of attorney James Sadler, who passed away on July 27, 2008).

Halamandaris opposed the attorney fees motion on the grounds that the causes of action in the complaint were not based on the contract; the order prepared by Sephos after the hearing was neither approved by Halamandaris nor consistent with the trial court's amended minute order; the memorandum of costs was not timely filed in violation of California Rules of Court, rule 3.1700(a)(1) (hereafter rule 3.1700(a)(1)); the request for fees included "inflated work hours, duplicative work, excessive hours expended and lack of documentary support"; and the request for fees contained charges which do not relate to the state court action and included costs not recoverable under Code of Civil Procedure section 1033.5.⁵

Sephos filed a supplemental notice with additional authority to support the requested attorney fees and costs,

"Where a contract provides for attorney's fees, as set forth above, that provision shall be construed as applying to the entire contract, unless each party was represented by counsel in the negotiation and execution of the contract, and the fact of that representation is specified in the contract.

"Reasonable attorney's fees shall be fixed by the court, and shall be an element of the costs of suit. . . ."

⁵ Code of Civil Procedure section 1033.5, subdivision (a)(10) provides that attorney fees are allowable as costs under Code of Civil Procedure section 1032 when authorized by contract, statute, or law.

namely, Code of Civil Procedure sections 1021⁶ and 1033.5, subdivision (a)(10). The supplemental notice argued the requested fees were allowable on contract as well as tort theories, and that the cost bill filed before entry of judgment was timely and valid given an absence of prejudice to Halamandaris.

On June 29, 2010, having heard oral argument, the court granted Sephos's motion and awarded him \$75,000 "as reasonable attorney's fees expended in the defense of this case."

On July 23, 2010, the court filed an order prepared by Sephos granting the motion for attorney fees. The order, which was not approved by Halamandaris as to form or content, included the following language: "The motion of defendant, Steven A. Sephos, for an order fixing an amount of attorneys' fees to be awarded to him, as an element of his costs of suit, as the prevailing party in this action, came on regularly for hearing The matter was taken under submission, and the court issued its Minute Order on 6/29/10 granting the motion in the amount of \$75,000.00."

Sephos filed a notice of entry of order on August 2, 2010.

⁶ Code of Civil Procedure section 1021 provides: "Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties "

DISCUSSION

I

Action on the Contract

Halamandaris contends the trial court made an erroneous determination that Sephos was entitled to recover attorney fees because the action was not one "on the contract" within the meaning of Civil Code section 1717. We disagree.

Absent a statutory or contractual provision to the contrary, each party to a lawsuit must bear its own attorney fees. (Code Civ. Proc., § 1021.) However, parties to a deed of trust may agree to incorporate a fee-shifting provision. (See, e.g., *Star Pacific Investments, Inc. v. Oro Hills Ranch, Inc.* (1981) 121 Cal.App.3d 447, 463.)

Here, the note contained the following language: "If action be instituted on the note, I promise to pay such sum as the Court may fix as attorney's fees." Broadly-phrased contractual attorney fee provisions such as this may support an award of attorney fees to the prevailing party in an action alleging both contract and tort claims. (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 608 (*Santisas*); *Cruz v. Ayromloo* (2007) 155 Cal.App.4th 1270, 1276.)

Contractual fee-shifting provisions are subject to subdivision (a) of Civil Code section 1717. The purpose of that section is to ensure mutuality of remedy for attorney fee claims where a contract contains a one-sided attorney fee provision, like the one here. (*Santisas, supra*, 17 Cal.4th at p. 610.)

"On review of an award of attorney fees after trial, the normal standard of review is abuse of discretion. However, de novo review of such a trial court order is warranted where the determination of whether the criteria for an award of attorney fees and costs in this context have been satisfied amounts to statutory construction and a question of law. [Citations.] [¶] Stated another way, to determine whether an award of attorney fees is warranted under a contractual attorney fees provision, the reviewing court will examine the applicable statutes and provisions of the contract. Where extrinsic evidence has not been offered to interpret the [contract], and the facts are not in dispute, such review is conducted de novo. [Citation.] Thus, it is a discretionary trial court decision on the propriety or amount of statutory attorney fees to be awarded, but a determination of the legal basis for an attorney fee award is a question of law to be reviewed de novo. [Citation.]" (Carver v. Chevron U.S.A., Inc. (2002) 97 Cal.App.4th 132, 142; see also Exarhos v. Exarhos (2008) 159 Cal.App.4th 898, 903.)

As framed by the parties, the dispositive question is whether the complaint was an action "on a contract," i.e., the promissory note and deed of trust containing the attorney fees clause.

Halamandaris claims none of the five causes of action in the complaint alleges breach of contract, and none seeks enforcement of the contract or asks the court to interpret the contract. Instead, he urges, the complaint alleges tort causes of action based on fraud which seek to void the contract.

Sepkos argues that the fact Halamandaris is seeking to cancel the promissory note renders the complaint an action "on the contract," thus entitling Sepkos to an award of reasonable attorney fees. Sepkos has the meritorious argument.

California courts liberally construe the phrase "'on a contract'" as used within Civil Code section 1717. (*California Wholesale Material Supply, Inc. v. Norm Wilson & Sons, Inc.* (2002) 96 Cal.App.4th 598, 605.) "'As long as the action 'involve[s]' a contract it is 'on [the] contract'" within the meaning of section 1717. [Citations.]" [Citations.]' [Citation.] Where an attorney fee clause provides for an award of fees incurred in enforcing the contract, the prevailing party is entitled to fees for any action 'on the contract,' whether incurred offensively or defensively. [Citations.] Such fees are properly awarded under section 1717 'to the extent that the action in fact is an action to enforce—or avoid enforcement of—the specific contract.' [Citation.]" (*Turner v. Schultz* (2009) 175 Cal.App.4th 974, 979-980.)

Here, the first cause of action in the complaint seeks cancellation of the deed of trust and to quiet title. That cause of action "reallege[s] and incorporate[s] by reference" the allegations common to all causes of action, including paragraphs 12 through 18, which allege facts related to the creation of the promissory note and deed of trust, and the acts or omissions of the parties with respect thereto. In addition, the first cause of action alleges that Halamandaris "has

suffered" and "will continue to gravely suffer damage to his credit" if the note and deed of trust "are left outstanding."

Each of the remaining four causes of action similarly realleges and incorporates by reference the common allegations, and contains additional allegations related to the note and deed of trust. All five causes of action pray for the same relief, including judgment against defendants for quiet title to the properties at issue in favor of Halamandaris and confirmation that defendants have no interest therein; a declaration that the note and deed of trust are "void and of no effect, and operate[] as a cloud on Plaintiffs' title to the properties"; that the note and deed of trust be delivered to the clerk of the court "for cancellation"; that defendants "have no right to conduct the sale, because the promissory note and deed of trust . . . is not genuine, valid, or legal"; and that the court issue a preliminary and permanent injunction restraining the sale of the properties at issue under the deed of trust or by foreclosure. As such, the issues in the lawsuit necessarily relate to issues of enforcement (or avoidance thereof) or interpretation of the note and deed of trust. Thus, this is an action "on [the] contract" for purposes of Civil Code section 1717.

II

Trial Court Has Jurisdiction to Award Attorney Fees

"A prevailing party who claims costs must serve and file a memorandum of costs within 15 days after the date of mailing of the notice of entry of judgment or dismissal by the clerk under Code of Civil Procedure section 664.5 or the date of service of

written notice of entry of judgment or dismissal, or within 180 days after entry of judgment, whichever is first. . . ." (Rule 3.1700(a)(1).)

Halamandaris claims the memorandum of costs was filed prior to the filing of the notice of entry of judgment and is therefore untimely, thus divesting the trial court of jurisdiction to award fees pursuant to rule 3.1700(a)(1).

Sepkos argues the memorandum of costs was filed within 15 days of December 11, 2009, the date of service by the clerk (at the trial court's direction) of notice of entry of the court's minute order granting the motion to dismiss. In any event, he urges, Halamandaris has shown no prejudice resulting from the early filing of the cost bill. Again, Sepkos has the better argument.

The time limitation within which a memorandum of costs must be filed does not constitute a matter of jurisdiction; rather, it is directed to the sound discretion of the court. (*Le Deit v. Ehlert* (1962) 205 Cal.App.2d 154, 170.) "'In the absence of prejudice, the trial court has broad discretion in allowing relief on grounds of inadvertence from a failure to timely file a cost bill. [Citations.]'" (*Wilson v. Hinkle* (1977) 67 Cal.App.3d 506, 513.)

In *Parker v. City of Los Angeles* (1974) 44 Cal.App.3d 556 (*Parker*), the plaintiffs filed their cost bill prematurely. The then-existing version of Code of Civil Procedure section 1033 specified that a cost bill must be filed "'at any time after the verdict or decision of the court, and not later than 10 days

after the entry of the judgment.'" The plaintiffs filed their cost bill seven days prior to the filing of the trial court's decision (its findings of fact and conclusions of law). The court determined that the error was not fatal, stating, "It was a mere irregularity and not jurisdictional. It did not render the cost bill itself a nullity. [Citation.]" (*Parker*, at pp. 565-566.) The court further found that the city suffered no prejudice by reason of the premature filing and thus there was no reversible error. (See Cal. Const., art. VI, § 13; Code Civ. Proc., § 475; *Parker*, *supra*, 44 Cal.App.3d at p. 566.)

We reach the same result here. According to Halamandaris, the notice of entry of the court's December 23, 2009, order of dismissal was filed on January 21, 2010, and Sephos's memorandum of costs was "served and filed on December 18, 2009."⁷ The fact that the memorandum of costs was filed prematurely is "a mere irregularity and not jurisdictional," and does "not render the cost bill itself a nullity." (*Parker*, *supra*, 44 Cal.App.3d at p. 566.) The ultimate goal, of course, is to ensure the parties receive proper notice in a timely manner. Halamandaris does not deny he received the cost bill, albeit earlier than was required by statute. More importantly, however, he fails to demonstrate how he suffered prejudice as a result of the premature filing of

⁷ It should be noted that the record does not include Sephos's memorandum of costs, the court's December 23, 2009, dismissal order, or the January 20, 2010, notice of entry of that order.

that document. In the absence of prejudice, there is no reversible error.

III

No Abuse of Discretion in Amount of Fees Awarded

Finally, Halamandaris contends the attorney fees award was arbitrary and capricious because it was based on block billings and fees that were duplicative, excessive, fabricated, and unrelated to the litigation.

We review the trial court's award of attorney fees for abuse of discretion and ask whether the award exceeded the bounds of reason. (*Christian Research Institute v. Alnor* (2008) 165 Cal.App.4th 1315, 1323 (*Christian Research*); *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 785 (*Dove*).)

"We may not reweigh on appeal a trial court's assessment of an attorney's declaration. [Citation.] 'The trial court, with declarations and supporting affidavits, [is] able to assess credibility and resolve any conflicts in the evidence. Its findings . . . are entitled to great weight. Even though contrary findings *could* have been made, an appellate court should defer to the factual determinations made by the trial court when the evidence is in conflict. This is true whether the trial court's ruling is based on oral testimony or declarations. [Fn. omitted.]" [Citation.]" (*Christian Research, supra*, 165 Cal.App.4th at p. 1323.)

Sephos requested attorney fees totaling \$93,185.41. The motion was supported by points and authorities, as well as the

declarations of attorneys Joseph Nolan, Karen Sadler (wife of then-deceased attorney James Sadler), and Walter Schmidt attesting to fees and costs incurred in representing Sephos in the civil action and related bankruptcy proceedings.

Halamandaris opposed the attorney fees motion on the same grounds he argues here on appeal. Sephos filed a supplemental notice with additional authority to support the motion.

The court awarded Sephos \$75,000 "as reasonable attorney's fees expended in the defense of this case." Although the court did not state how it arrived at the award or indicate why the award was \$18,185.41 less than the amount sought in the attorney fees motion, a statement of decision was neither requested nor required. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1294.) We presume the court's order is supported by the record. (*Christian Research, supra*, 165 Cal.App.4th at p. 1323; Evid. Code, § 664.)

In any event, the court's minute order reflects that the court considered the documentary evidence (including the declarations with which Halamandaris takes issue) and the oral and written arguments of the parties, and took the matter under submission before making its determination. The fact that the court reduced the award by nearly \$20,000 reflects that it assessed the value of the legal services rendered before making a final decision as to the proper award. We afford that decision great deference. (*Nichols v. City of Taft* (2007) 155 Cal.App.4th 1233, 1239.)

The award of attorney fees does not exceed the bounds of reason. (*Dove, supra*, 47 Cal.App.4th at p. 785.) We find no abuse of discretion.

DISPOSITION

The award of attorney fees is affirmed. Sephos is awarded his costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

_____ RAYE _____, P. J.

We concur:

_____ NICHOLSON _____, J.

_____ HOCH _____, J.