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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Calaveras)

GOLD STRIKE HEIGHTS HOMEOWNERS
ASSOCIATION,

Plaintiff and Appellant,

v.

FINANCIAL PACIFIC INSURANCE COMPANY
et al.,

Defendants and Appellants.

C066240

(Super. Ct. No. CV34353)

This case arises out of the development of a new real estate subdivision for which a common area recreation facility, a clubhouse, was planned. When the clubhouse was not built, appellant Gold Strike Heights Homeowners Association (Gold Strike)¹ sued the developer, defendant Westwind Development, Inc. (Westwind), and defendant Financial Pacific Insurance Company (Financial Pacific), the surety company that issued a bond for

¹ According to the record, Gold Strike assigned at least part of its claim to Don H. Lee. As an assignee of the claim, Lee then prosecuted the action.

the building of the clubhouse. A jury awarded \$319,157 to Gold Strike, which appeared to be based on the construction estimate attached to the bond. However, the trial court granted judgment notwithstanding the verdict (JNOV) on grounds that Gold Strike failed to introduce any evidence of what it would actually cost to build the clubhouse. The trial court also ordered Gold Strike to pay attorney fees in the reduced amount of \$15,000 to Westwind and \$5,000 to Financial Pacific.

Gold Strike appeals, arguing that the trial court erred by granting defendants' JNOV motion. Gold Strike contends substantial evidence supports the award of damages for the clubhouse that was not built.

Westwind and Financial Pacific have filed protective cross-appeals. They argue that if we reverse the JNOV order, we must remand the case for retrial because the trial court committed evidentiary errors and advocated on behalf of Gold Strike when questioning witnesses. Defendants further argue that the trial court abused its discretion in awarding them only a fraction of their claimed attorney fees.

We affirm the JNOV order because Westwind had no obligation to build the clubhouse until it started to build phase two of the subdivision. Westwind expressly disclaimed any obligation to build phase two, and indeed phase two was not built. Because the obligation to build the clubhouse was not triggered, Financial Pacific did not have to pay on the surety bond. Our affirmance of the JNOV order obviates the need to address defendants' arguments that are contingent on a reversal of the

JNOV order. Finally, we reverse the order granting attorney fees because the trial court abused its discretion when it excluded hours expended by defendants' counsel in pursuing meritorious legal theories. Accordingly, we affirm the judgment but reverse the order granting attorney fees.

STANDARD OF REVIEW

The principles governing review of a trial court's granting of a motion for JNOV are well settled. As this court has previously explained, "The trial court's discretion in granting a motion for [JNOV] is severely limited." [Citation.] "The trial judge's power to grant a [JNOV] is identical to his [or her] power to grant a directed verdict [citations]. The trial judge cannot reweigh the evidence [citation], or judge the credibility of witnesses. [Citation.] If the evidence is conflicting or if several reasonable inferences may be drawn, the motion for [JNOV] should be denied. [Citations.] 'A motion for [JNOV] of a jury may properly be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence to support the verdict. If there is any substantial evidence, or reasonable inferences to be drawn therefrom, in support of the verdict, the motion should be denied.' [Citation.]" [Citation.] The trial court cannot consider witness credibility. [Citation.]" (*Hansen v. Sunnyside Products, Inc.* (1997) 55 Cal.App.4th 1497, 1510 (*Hansen*); accord *In re Coordinated Latex Glove Litigation* (2002) 99 Cal.App.4th 594, 606.)

FACTUAL AND PROCEDURAL HISTORY

Based on the applicable standard of review, we state the facts in the light most favorable to the jury's verdict.

(*Hansen, supra*, 55 Cal.App.4th at p. 1510.)

Plans for the Clubhouse

Westwind designed and built the existing portion of the Gold Strike Heights subdivision project in San Andreas, California. As stated in the Declaration of Restrictions (CC&Rs) filed for the project, the subdivision was to be built in at least two phases. The CC&Rs for the subdivision were recorded with the Calaveras County clerk-recorder in March 2002. In pertinent part, the CC&Rs state: "The first phase consists of Residential Lots 1 through 42 and 48 to 50 and Common Area Lot H" The CC&Rs also state: "Declarant [Westwind] reserves the right at its discretion to establish the order of phases, the number of Common Area Lots or Residential Lots in a phase, the number of phases, or the building types in a phase." Every prospective buyer of a lot in the subdivision received a copy of the CC&Rs.

The final recorded subdivision map shows that the clubhouse was planned for lot 43, which is not listed by the CC&Rs among the lots to be developed during the first phase. The clubhouse was anticipated to consist of an 1,800-square-foot structure that contained unspecified "[e]quipment." However, no architectural plans for the clubhouse were ever drawn up by Westwind. Even so, Westwind wished to refer to the clubhouse in selling lots in the Gold Strike Heights subdivision.

Surety Bond Issued by Financial Pacific

Before Westwind was allowed to mention the clubhouse in marketing phase one of the subdivision, the Department of Real Estate (Department) required the developer to secure a surety bond for the clubhouse. Chris Neri, an assistant commissioner with the Subdivision Section at the Department, testified:

"Q. [T]he bond that [*sic*] says phase one -- do you have an explanation as to why it may say phase one?

"A. Because the developer represented to the [D]epartment that they wanted to advertise the rec facility.

"Q. So the bond is stated to be for phase one to advertise. Correct?

"A. Yes."

In February 2002, Westwind secured from Financial Pacific a surety bond that was entitled "Bond (*Completion of Common Facilities*).²" In relevant part, the bond states: "This bond is given pursuant to § 11018.5(a)(2)(A)^[2] of the California

² Undesignated section references are to the Business and Professions Code.

Section 11018.5 provides: "With respect to . . . subdivisions . . . , the commissioner shall issue a public report if the commissioner finds the following with respect to any such subdivision or interest: [¶] (a)(1) Reasonable arrangements have been made to assure completion of the subdivision and all offsite improvements included in the offering. [¶] (2) If the condominium or community apartment project, stock cooperative or planned development, or premises or facilities within the common area are not completed prior to the issuance of a final subdivision public report on the project, the subdivider shall specify a reasonable date for completion and shall comply with one of the following conditions: (A) Arranges for lien and completion bond or bonds

Business and Professions Code to assure lien-free completion of the improvements described in Principal's 'Planned Construction Statement', a copy of which is attached hereto and incorporated herein by reference, for the subdivision development known as Gold Strike Heights Unit 1 (Phase 1) situated in the County of Calaveras, State of California." The bond was made "in the penal sum of Three Hundred Nineteen Thousand Six Hundred Forty Seven Dollars (\$319,647.00)" Attached to the bond was a "Planned Construction Statement" that indicated common area developments consisting of landscaping, "Asphalt & Concrete," and a "Recreation Area with Equipment." The recreation area with equipment referred to a clubhouse, and was listed as having a cost estimate of \$200,000 with an anticipated completion date of May 2002. The planned construction statement does not mention the phase in which a clubhouse was to be constructed other than to give an estimated completion date of May 2002.

Public Report

After the bond was issued, the Department prepared a public report regarding the Gold Strike Heights subdivision to be given to prospective buyers of lots within the new development. The public report required each prospective buyer to sign a receipt that he/she had received and read the report before agreeing to purchase any lot within Gold Strike Heights. The public report

in an amount and subject to such terms, conditions and coverage as the commissioner may approve to assure completion of the improvements lien free."

for the subdivision also required that a copy of the CC&Rs be provided to each prospective buyer prior to the close of escrow.

With regard to the description of the subdivision, the public report stated:

"LOCATION AND SIZE: This subdivision is located in Calaveras County at 699 Gold Strike Road and approximately 11 miles from Angels Camp, California. [¶] This is the first phase of a two phase project which consists of approximately 13.1 acres divided into 45 lots, in addition to the common area which consists of open space, with natural grasses, streets, drives, and street lighting. [¶] Additional common amenities and/or facilities consisting of landscaping, streets and *recreation area with equipment will be constructed in the second phase.* [¶] Gold Strike Heights, if developed as proposed, will consist of two phases containing 88 lots. *There is no assurance that the total project will be completed as proposed.*" (Italics added.)

The Department did not receive an application to develop phase two of the subdivision, and the clubhouse was not built.

Gold Strike Pursues the Building of the Clubhouse

In May 2008, Gold Strike claimed that Calaveras County was liable for building the clubhouse. In a letter to Gold Strike denying that Calaveras County had any liability for construction of the clubhouse, county counsel stated:

"As for the clubhouse, conditions of approval required the developer to apply for a P[lanned] [Unit] D[evelopment] permit for the clubhouse. The Planning Commission approved a P[lanned] [Unit] D[evelopment] permit for the clubhouse in 2006. Nothing

in the conditions of approval for Unit 1^[3] required the clubhouse to be built prior to the recordation of the final map for Unit 1. In recognition of the concern expressed by the Unit 1 owners about the ability of the developer to construct the clubhouse, the Planning Commission conditioned recordation of the final map of Unit 2 on completion of the clubhouse. Therefore, no parcels in Unit 2 can be legally created until the clubhouse is complete. No one from the subdivision or [Gold Strike] appealed the decision of the Planning Commission on Unit 2 to the Board of Supervisors. Your allegations about staff representations to the Board of Supervisors are false as the approval of Unit 2 never went to the Board of Supervisors."

County counsel's letter concluded: "We understand your frustration with the developer in not carrying out developer promises, but most of those promises were not promises imposed by the County as part of the approval of the project. The County is committed to getting the clubhouse built and will not allow the developer, or any subsequent developer, to create any more parcels until the clubhouse is constructed."

Gold Strike subsequently sued Westwind and Financial Pacific for breach of contract and for enforcement of liability on the surety bond. A jury trial culminated in a verdict that awarded Gold Strike a total of \$319,157 in damages. The components of the damages specified by the jury exactly matched

³ The county used "units" to describe the different phases for the Gold Strike Heights subdivision.

the planned construction statement attached to the surety bond. The trial court entered judgment on the verdict, and Westwind and Financial Pacific moved for JNOV. The court granted the motion for JNOV on grounds that Gold Strike "presented no evidence of costs, oral or written, to complete the community clubhouse apart from the amount of the bond, arguing that the amount of the completion bond itself constituted proof of damages." The court then entered a judgment in favor of Westwind and Financial Pacific.

In September 2010, Gold Strike timely filed a notice of appeal. In October 2010, Westwind and Financial Pacific filed protective cross-appeals.

Westwind and Financial Pacific moved for attorney fees. Westwind claimed fees in the amount of \$151,061.50 and Financial Pacific claimed fees in the amount of \$82,350. In March 2011, the trial court awarded \$15,000 in attorney fees to Westwind and \$5,000 to Financial Pacific. Each of the parties has filed a separate notice of appeal from the order awarding attorney fees to Westwind and Financial Pacific.

DISCUSSION

APPEAL BY GOLD STRIKE

I

Whether the Obligation to Build the Clubhouse was Triggered

Gold Strike contends the trial court's granting of JNOV was in error because the jury properly found that Westwind breached its obligation to build the clubhouse during phase one of the development, causing the homeowners' association to incur

\$319,647 in damages.⁴ We reject this contention because there was no obligation to build the clubhouse during phase one.

An action for breach of contract accrues only if there is “an unjustified failure to perform a material contractual obligation when performance is due.” (*Central Valley General Hosp. v. Smith* (2008) 162 Cal.App.4th 501, 514 fn. 3.) The corollary is that if no performance is due, there can be no liability for breach of an obligation. (See *ibid.*) Because damages are limited to those flowing from the breach of contract, a lack of breach precludes any liability. (*Amelco Electric v. City of Thousand Oaks* (2002) 27 Cal.4th 228, 243.)

In this case, no competent evidence established that Westwind’s obligation to construct the clubhouse was triggered. In the absence of Westwind’s duty to build the clubhouse, Financial Pacific had no corresponding obligation to pay out the penal sum under the surety bond. Consequently, the trial court reached the correct result in granting the JNOV motion after the jury awarded damages to Gold Strike for the failure to build or fund the development’s clubhouse. We must affirm the granting of a motion for JNOV that reaches the correct result, even if the trial court’s reasoning erred. (*Stillwell v. The Salvation*

⁴ Although the jury awarded \$319,157 in damages consistent with the amounts listed in the planned construction statement, Gold Strike’s reply brief claims it was entitled to the \$319,647 penal amount listed on the surety bond. We need not determine which sum represents the correct amount of damages given our conclusion that the obligation to build the clubhouse was not triggered.

Army (2008) 167 Cal.App.4th 360, 377; *In re Marriage of Burgess* (1996) 13 Cal.4th 25, 32.)

As Gold Strike points out, the surety bond does mention phase one of the development. As relevant, the bond states that it "is given pursuant to § 11018.5(a)(2)(A) . . . to assure lien-free completion of the improvements described in Principal's 'Planned Construction Statement', . . . for the subdivision development known as Gold Strike Heights Unit 1 (Phase 1)" The surety bond was required "[b]ecause the developer represented to the department that they wanted to advertise the rec facility" *during phase one* of the development. No evidence was adduced that any of the Gold Strike residents ever saw or heard of the bond before they purchased a lot. More importantly, the public report given to the prospective buyers of the lots stated that the clubhouse was to be built during the second phase of development. The CC&Rs, also provided to prospective buyers, indicated that the subdivision was going to be built in phases and did not include the clubhouse lot in the list of lots to be developed in the first phase.

Gold Strike also relies on the "Common Area Completion Security Agreement and Instructions to Escrow Depository -- § 11018.5(a)(2)" to argue that the clubhouse was to be built as part of phase one. However, as Gold Strike notes, this document was not admitted into evidence. Instead, the document was attached as an exhibit to Gold Strike's motion for attorney fees.

An exhibit not admitted into evidence cannot support Gold Strike's sufficiency of the evidence argument. "It is axiomatic that in reviewing the liability aspect of a judgment based on a jury verdict, we may not review exhibits identified, but not admitted at trial." (*Frank v. County of Los Angeles* (2007) 149 Cal.App.4th 805, 815.) In a footnote, Gold Strike asserts that the document "was not admitted into evidence by the Court below in error." However, Gold Strike fails to develop any argument on this point. Consequently, the assertion of error is forfeited. (*People v. Stanley* (1995) 10 Cal.4th 764, 793.)

Gold Strike urges us to "[k]eep in mind that the marketing map used to sell homes in Phase 1 indicated that the clubhouse was to be built in Phase 1 on Lot 43." The marketing map does show where the clubhouse was to be located in relation to the other lots. However, that same map also included lots 44 through 47, which were also excluded from phase one development. Nothing on the marketing map indicates when, or in which phase, any of the lots were to be developed. Instead, the map includes the clubhouse because of its geographic location among the lots to be developed and sold as part of phase one.

The Department's public report expressly informed prospective buyers that the clubhouse was to be built as part of phase two, and that phase two might never be built. Similarly, the CC&Rs, also provided to prospective buyers, stated that the subdivision was going to be built in at least two phases, and listed the lots to be developed during the first phase. The map shown to buyers indicated the clubhouse stood on a lot that the

CC&Rs did not slate for development during the first phase. As did the public report, the CC&Rs cautioned that subsequent phases might never be built.

Finally, Gold Strike relies on the testimony of Brenda Bayers, a sales agent for the Gold Strike development. Gold Strike asserts that she "testified that there was a promise by [defendant] Westwind of a clubhouse to be built on lot 43 in Phase I before December 2006." An examination of Bayers's testimony does not establish that there was ever a *written* promise to build a clubhouse as part of phase one. To the contrary, Bayers testified that she would not have made any oral representations that conflicted with the Department's public report that was made available to prospective buyers.

To the extent that Bayers testified there were oral representations about when the clubhouse would be built, such oral representations are not recognized in the sale of real property. An oral promise to build real estate fails to satisfy the statute of frauds. "The statute of frauds requires contracts and options for the sale of real property to be in writing. (Civ. Code, § 1624.)" (*Alameda Belt Line v. City of Alameda* (2003) 113 Cal.App.4th 15, 20.) Thus, a promise to build real property must satisfy the statute of frauds. (*Ellis v. Klaff* (1950) 96 Cal.App.2d 471, 478, disapproved on other grounds in *Sterling v. Taylor* (2007) 40 Cal.4th 757, 769.)

No competent evidence established that Westwind's obligation to build the clubhouse for the Gold Strike Heights subdivision was triggered. Consequently, no damages could be

awarded for failure to build or fund the clubhouse. The trial court thus reached the correct result in granting the motion for JNOV.

CROSS-APPEAL BY WESTWIND AND FINANCIAL PACIFIC

II

Protective Cross-appeal Issues

After Gold Strike filed its appeal to challenge the granting of the JNOV motion, both Westwind and Financial Pacific filed protective cross-appeals. (See *Mason v. Lake Dolores Group* (2004) 117 Cal.App.4th 822, 831 [failure to file protective cross-appeal after appeal from order granting JNOV requires automatic affirmance of judgment entered on jury's verdict].) Given the possibility of reversal of the order granting JNOV, Westwind and Financial Pacific advance arguments to challenge the jury's verdict. Our affirmance of the order granting JNOV obviates the need to address the arguments made by Westwind and Financial Pacific in their protective cross-appeals.

APPEAL BY WESTWIND AND FINANCIAL PACIFIC

III

Attorney Fees

Though we affirm the order granting JNOV, we must nonetheless address the arguments by Westwind and Financial Pacific in which they challenge the trial court's award of attorney fees to them. Both Westwind and Financial Pacific argue that the trial court abused its discretion when awarding them \$15,000 and \$5,000, respectively, in attorney fees. Both

contend they should have received substantially more of their fees in this litigation. We conclude that the trial court abused its discretion when it excluded hours expended pursuing meritorious legal theories and reverse the attorney fees order.

A.

Order Awarding Attorney Fees

Gold Strike's operative complaint was filed against Westwind and Financial Pacific "to collect on the bond issued for the 'Clubhouse' promised to be built by [Westwind]." The surety bond was required under the completion security agreement that has a fee-shifting clause. To this end, Gold Strike's complaint sought "attorneys fees [incurred] in enforcing the liability on this surety bond"

As we noted above, the completion security agreement was not introduced into evidence during trial. (See part I, *ante*.) Nonetheless, this action was clearly one to enforce the bond that was secured pursuant to the completion security agreement. The jury found that Westwind and Financial Pacific entered into an agreement requiring the issuance of a bond for which Gold Strike was the intended beneficiary and which guaranteed performance of a promise to build a common area clubhouse. Although later reversed by the court's grant of JNOV, the jury awarded "damages [accrued] at the time of the breach of [Westwind]'s obligations *under the bond*" (Italics added.)

After securing judgment in its favor on the jury verdict, Gold Strike moved for attorney fees in the amount of \$50,910.50.

In support of the motion, Gold Strike attached the completion security agreement, which was authenticated by a declaration noting that the parties had stipulated to its admissibility. In pertinent part, the completion security agreement states that "[t]o secure the timely completion of the Improvements free of all liens and claims, the Subdivider has procured the issuance of the: [¶] surety bond in the sum of Three Hundred Nineteen Thousand Six Hundred Forty Seven Dollars" The completion security agreement further provides: "In any action or proceeding arising out of this Agreement, the prevailing party or parties shall be entitled to reasonable attorney's fees." In the event of Westwind's failure to construct the clubhouse, enforcement of the surety bond is one of the actions specifically mentioned in the completion security agreement. Both the planned construction estimate for the clubhouse and the bond itself were attached to Gold Strike's motion.

In support of attorney fees before the trial court, Gold Strike argued: "Importantly, the contract allowing for attorney's fees can be read broadly to include claims outside of the contract but peripherally related to the contract. (See, *Santisas v. Goodin* (1998) 17 Cal.4th 599, 608.) When the dispute between the parties concerns several contracts and only one of those contains a fee-shifting clause, the documents are generally construed as one contract for the purposes of awarding fees. (*Torrey Pines Bank v. Hoffman* (1991) 231 Cal.App.3d 308, 325; *Niederer v. Ferreira* (1987) 189 Cal.App.3d 1485, 1505 (guarantor liable for attorney's fees due to provision in

separate contract for award of fees.) [¶] In our case, the Completion Agreement, to which [Gold Strike] and Westwind are parties, contains an attorney's fees provision and specifically references and incorporates the bond. [Citation.] But for Westwind's failure to perform as required under the Completion Agreement, no action would have been brought on the Bond which specifically secured performance under the Completion Agreement." Gold Strike also argued that Financial Pacific was liable for attorney fees because the surety's liability was commensurate with that of Westwind.

When the trial court granted the JNOV motion and issued an amended judgment in favor of defendants, Westwind and Financial Pacific brought their own motions for attorney fees. Westwind sought \$151,061.50 in attorney fees, and Financial Pacific requested \$82,350.

The trial court granted attorney fees to Westwind and Financial Pacific, but in a fraction of the amounts claimed. In an order explaining its award, the trial court states:

"[H]ow much are defendants entitled to as reasonable attorney fees?

"To answer this question, the court first determines the 'lodestar' figure for each defendant's attorney fees. That requires the court to determine the reasonable hours expended by each attorney and multiply those hours times the reasonable hourly rate for each attorney. What is reasonable in the court's opinion is not necessarily equal to what each counsel claims.

"In the court's opinion, the defendants expended more hours than reasonably necessary. The court does not doubt the hours listed, just the reasonableness of all those hours. As to reasonable hourly rates for the work performed, the court finds, in civil trial in Calaveras County, where this trial was held, an hourly fee of \$200 is an appropriate and reasonable hourly rate.

"Once the court has determined the 'loadstar' figures, it may then increase or reduce the loadstar figures so the amounts are reasonable under the circumstances of this case.

"The court follows the guidance of *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4[t]h 1084, and *EnPalm, LCC v. Teitler Family Trust [sic]* (2008) 162 Cal.App.4th 770, and cases cited in these decisions. As stated, 'The factors to be considered include the nature and difficulty of the litigation, the amount of money involved, the skill required and employed to handle the case, the attention given, the success or failure, and other circumstances in the case and . . . the necessity for and nature of the litigation.' (*PLCM, supra [sic]* at p. 1095.)

"Although there have been voluminous filings in this case and reams of paper used, including filing three demurrers, and filing eleven court files, in the court's opinion this was not a difficult case. Plaintiff proceeded pro per during most of the pleading stages (almost two years) by way of an assignment to Don Lee, a non-lawyer.

"In the court's opinion, the issues in this case did not require exceptional skills by defendants' attorneys. And as to

success, the plaintiff initially won; the jury awarded the plaintiff the full amount it sought. Defendants prevailed only when the court granted a JNOV for plaintiff's failure to prove its damages. Thus, the JNOV win by defendants was not because of exceptional skill or attention devoted to the legal issues, but by plaintiff's failure to call a single expert witness to tell the jury what the costs would be to construct the clubhouse. A clubhouse the jury found was promised by Westwind and secured by [Financial Pacific]'s performance bond. The court finds much of defendants' trial efforts were spent trying to obfuscate the promise to construct or pay up to the amount of its surety bond on the clubhouse. [¶] . . . [¶]

"THEREFORE, IT IS ORDERED THAT

"1. Defendant [Westwind] shall recover its attorney's fees from Plaintiff [Gold Strike] in the amount of \$15,000.

"2. Defendant [Financial Pacific] shall recover its attorneys' fee[s] from Plaintiff [Gold Strike] in the amount of \$5,000."

B.

Discretion to Determine Reasonable Attorney Fees

On the issue of contractual attorney fees, the California Supreme Court has explained, "Civil Code section 1717 provides that '[r]easonable attorney's fees shall be fixed by the court.' As discussed, this requirement reflects the legislative purpose 'to establish uniform treatment of fee recoveries in actions on contracts containing attorney fee provisions.' (*Santisas v. Goodin, supra*, 17 Cal.4th at p. 616.) Consistent with that

purpose, the trial court has broad authority to determine the amount of a reasonable fee. (*International Industries, Inc. v. Olen* [(1978)] 21 Cal.3d [218,] 224 ['[E]quitable considerations [under Civil Code section 1717] must prevail over . . . the technical rules of contractual construction']; *Beverly Hills Properties v. Marcolino* (1990) 221 Cal.App.3d Supp. 7, 12 ['the award of attorney fees under section 1717, as its purposes indicate, is governed by equitable principles']; *Montgomery v. Bio-Med Specialties, Inc.* (1986) 183 Cal.App.3d 1292, 1297 [trial court has 'wide latitude in determining the amount of an award of attorney's fees' under Civil Code section 1717]; *Vella v. Hudgins* (1984) 151 Cal.App.3d 515, 522 ['The amount to be awarded in attorney's fees is left to the sound discretion of the trial court'].) As we have explained: 'The "experienced trial judge is the best judge of the value of professional services rendered in his [or her] court, and while his [or her] judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong' -- meaning that it abused its discretion. (*Serrano v. Priest* (1977) 20 Cal.3d 25, 49; *Fed-Mart Corp. v. Pell Enterprises, Inc.* (1980) 111 Cal.App.3d 215, 228 [an appellate court will interfere with a determination of reasonable attorney fees 'only where there has been a manifest abuse of discretion'].)" (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1094-1095 (*PLCM Group*)).

The specific methodology for determining the proper award of attorney fees "begins with the 'lodestar,' i.e., the number

of hours reasonably expended multiplied by the reasonable hourly rate. 'California courts have consistently held that a computation of time spent on a case and the reasonable value of that time is fundamental to a determination of an appropriate attorneys' fee award.' (*Margolin v. Regional Planning Com.* (1982) 134 Cal.App.3d 999, 1004-1005.) The reasonable hourly rate is that prevailing in the community for similar work. (*Id.* at p. 1004; *Shaffer v. Superior Court* (1995) 33 Cal.App.4th 993, 1002.) The lodestar figure may then be adjusted, based on consideration of factors specific to the case, in order to fix the fee at the fair market value for the legal services provided. (*Serrano v. Priest, supra*, 20 Cal.3d at p. 49.) Such an approach anchors the trial court's analysis to an objective determination of the value of the attorney's services, ensuring that the amount awarded is not arbitrary. (*Id.* at p. 48, fn. 23.)" (*PLCM Group, supra*, 22 Cal.4th at p. 1095.)

Ultimately, the lodestar method must yield an equitable result. For this reason, "the determination of what constitutes reasonable attorney fees is committed to the discretion of the trial court. . . . [Citations.] The value of legal services performed in a case is a matter in which the trial court has its own expertise. [Citation.] The trial court makes its determination after consideration of a number of factors, including the nature of the litigation, its difficulty, the amount involved, the skill required in its handling, the skill employed, the attention given, the success or failure, and other circumstances in the case.' (*Melnyk v. Robledo* (1976) 64

Cal.App.3d 618, 623-624.)” (*PLCM Group, supra*, 22 Cal.4th at p. 1096.)

When much of the trial is found to be unnecessary, a trial court has discretion to reduce the lodestar figure to a reasonable amount. (*EnPalm, LCC v. Teitler* (2008) 162 Cal.App.4th 770, 774-775.) However, a trial court abuses its discretion when it makes a determination based on legal error. (*Bell v. Bayerische Motoren Werke Aktiengesellschaft* (2010) 181 Cal.App.4th 1108, 1122 (*Bell*)).

C.

Attorney Fees Awarded to Westwind and Financial Pacific

1. Pretrial

Westwood and Financial Pacific argue that the trial court failed to properly account for the extensive pretrial costs. Specifically, Westwind and Financial Pacific emphasize their extensive pretrial work, which included the filing of three demurrers. We conclude that Westwind and Financial Pacific’s challenges to the trial court’s reduction of attorney fees for pretrial litigation are forfeited.

Westwind and Financial Pacific have not provided an adequate record of pretrial litigation. “It is the burden of the party challenging the fee award on appeal to provide an adequate record to assess error.” (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295.) The record does not include the demurrers or any of the other pretrial motions -- other than some of the in limine motions filed on the eve of trial. Westwind and Financial Pacific designated only the inclusion of *post-judgment*

motions and documents in their notices of appeal from the order awarding attorney fees. Thus, we do not have a record on which to assess defendants' contentions regarding the necessity of their apparently extensive pretrial motions.

Westwind and Financial Pacific could have designated the necessary documents for inclusion in the clerk's transcript. (Cal. Rules of Court, rule 8.122(a)(2).) Alternately, they could have had the original superior court file transmitted to this court for review. (Cal. Rules of Court, rule 8.128(a); Ct. App., Third Dist., Local Rules of Ct., rule 2 [Stipulation for use of original superior court file].) For lack of an adequate record, their contentions regarding pretrial litigation not being properly accounted for by the trial court are forfeited.

2. Trial

The trial court awarded substantially less in attorney fees than claimed by Westwind and Financial Pacific. In doing so, the court reduced the hourly rate of compensation and the number of hours expended during trial.

Westwind and Financial Pacific's counsel both claimed an hourly rate of \$250 for trial. However, the trial court found that \$200 per hour constituted a reasonable rate of compensation for civil litigation in Calaveras County. Neither Westwind nor Financial Pacific challenges that hourly rate as unreasonable. Instead, Westwind and Financial Pacific challenge the trial court's reduction in claimed fees, which substantially reduced the number of hours compensated to 75 hours for Westwind and 25 for Financial Pacific.

While a trial court has discretion to reduce the lodestar figure to a reasonable amount, a trial court abuses its discretion when it makes a determination based on legal error. (*Bell, supra*, 181 Cal.App.4th at p. 1122.)

Among the reasons given by the trial court in reducing the number of hours to which Westwind and Financial Pacific were entitled to fees was the following: "The court finds much of defendants' trial efforts were spent on trying to obfuscate the promise to construct or pay up to the amount of its surety bond on the clubhouse." The court also found that Westwind and Financial Pacific initially lost because the jury awarded Gold Strike the full measure of claimed damages. In the court's view, Westwind and Financial Pacific did not so much win at trial as Gold Strike lost by failing to prove damages.

Based on our examination of the record, the trial court's comments about defendants' efforts to "obfuscate" two issues at trial could only have referred to their repeated arguments that (1) the obligation to build the clubhouse was not triggered during construction of phase one of the Gold Strike Heights subdivision, and (2) Gold Strike failed to adduce any evidence of the actual cost necessary to build the clubhouse. The trial court erred in excluding hours spent by counsel for Westwind and Financial Pacific in arguing and presenting evidence on these two points.

As we explained in part I, *ante*, the contention that the duty to build the clubhouse was not triggered has merit. And, although we do not reach the issue of whether the evidence of

the cost to build the clubhouse was sufficient, the trial court found the contention to be meritorious because it granted the JNOV motion on this ground. Rather than obfuscate the issues of whether the duty to build had been triggered and whether any evidence proved the cost to construct the clubhouse, we conclude that Westwind and Financial Pacific presented meritorious motions on these two points at least three times: (1) before trial via in limine motions; (2) during trial by motions for directed verdict; and (3) after trial by motion for JNOV. The trial court failed to rule on dispositive motions.

With regard to the in limine motions, the trial court noted that some of the in limine motions were dispositive. For example, one motion argued that Gold Strike was unable to prove that a duty to build the clubhouse had been triggered. Another motion granted by the trial court resulted in the exclusion of any evidence of the cost to build the clubhouse.⁵ Instead of ruling on the dispositive in limine motions, the trial court directed counsel to proceed with presenting evidence to the jury.

After Gold Strike rested its case, defendants moved for a directed verdict on two grounds: (1) the obligation to build the clubhouse was not triggered; and (2) the lack of proof of any damages. Even though the trial court found it "troublesome" that the duty to build was not part of phase one and there was

⁵ Gold Strike stated the motion was unnecessary because it did not intend on presenting any expert testimony on damages. It was relying on the amount stated in the bond.

no evidence of the cost to build the clubhouse, the trial court denied defendants' motions for a directed verdict.

Not until after a jury trial did the trial court finally rule in defendants' favor based on the lack of any evidence of damages. This was one of the issues that defendants had raised repeatedly before and during trial. At the end of its ruling, the trial court admitted that it should have granted defendants' motions for a directed verdict. Specifically, the trial court stated that "[a]fter weighing all the evidence, the court is convinced from the entire record, including reasonable inferences therefrom, that the Court should have granted Defendants' motion for a Directed Verdict when Plaintiff rested."

Without citing any authority, Gold Strike asserts that the award of attorney fees to Financial Pacific violated "the general rule that a surety cannot recover attorneys' fees as a prevailing party" on an agreement to which the surety was not a party. For lack of legal authority or any developed argument in support of the asserted "rule," Gold Strike's contention is forfeited. (*In re S.C.* (2006) 138 Cal.App.4th 396, 408; *Atchley v. City of Fresno* (1984) 151 Cal.App.3d 635, 647.)

Moreover, Gold Strike's contention has no merit. Civil Code section 1717 makes reciprocal any provision awarding attorney fees. (*Real Property Services Corp. v. City of Pasadena* (1994) 25 Cal.App.4th 375, 379.) "Under some circumstances, . . . the reciprocity principles of Civil Code section 1717 will be applied in actions involving signatory and

nonsignatory parties." (*Id.* at p. 380, italics added.) The purposes of Civil Code section 1717 require it to "be interpreted to further provide a reciprocal remedy for a nonsignatory defendant, sued on a contract as if he were a party to it, when a plaintiff would clearly be entitled to attorney's fees should he prevail in enforcing the contractual obligation against the defendant." (*Real Property Services, supra*, at p. 380.) In *T&R Painting Constr. v. St. Paul Fire & Marine Ins. Co.* (1994) 23 Cal.App.4th 738, a surety on a construction bond was required to pay attorney fees to a beneficiary of the bond who was not a signatory to the bond. In *T&R Painting*, the Court of Appeal held that the nonsignatory beneficiary of a bond became entitled to attorney fees after successfully proving the principal's liability -- a liability covered by the bond. (*Id.* at pp. 744-746.) Here, as Gold Strike itself argued in the trial court, it would have been entitled to attorney fees against Financial Pacific if it had prevailed in enforcing the bond. Based on the reciprocity provision of Civil Code section 1717, Financial Pacific is entitled to recover attorney fees for its successful defense of the same action on the bond.

Both Westwind and Financial Pacific were entitled to attorney fees after they prevailed against Gold Strike's action on a bond that was subject to a fee-shifting provision. On this record, the trial court was clearly wrong and abused its discretion in excluding hours spent by Westwind's and Financial Pacific's counsel in pursuing meritorious arguments that the

duty to build the clubhouse was not triggered and that Gold Strike failed to adduce any evidence of damages.

DISPOSITION

The judgment is affirmed and the order granting attorney fees to Westwind Development, Inc., and Financial Pacific Insurance Company is reversed. Westwind Development, Inc., and Financial Pacific Insurance Company are entitled to their own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1) & (5).)

HOCH, J.

We concur:

HULL, Acting P. J.

MAURO, J.