Filed 4/12/12 P. ex rel. Dept. of Transp. v. Scotti CA3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE ex rel. DEPARTMENT OF TRANSPORTATION, Plaintiff and Respondent, v. DANIEL J. SCOTTI, Defendant and Appellant.	C067075 (Super. Ct. No. ED 07-2685)

Daniel J. Scotti, a defendant in an eminent domain action now settled and dismissed, claims he is entitled to an award of attorney fees pursuant to Code of Civil Procedure section 1268.610, subdivision (a), which entitles a defendant in an eminent domain action to recover litigation expenses if the action is dismissed “for any reason.” The trial court denied the request for attorney fees because it found that the fees were included in the settlement between Scotti and the State of California (the State). We agree and affirm. However, we remand for a trial court determination concerning litigation expenses on appeal.

BACKGROUND

Suzzan Hunt Arnold, a right of way agent for the Department of Transportation, began negotiations with Scotti in March 2007 to acquire for highway purposes property owned by Scotti in Yolo County. In December 2007, the State filed a complaint in eminent domain (Code Civ. Proc., § 1250.310), but the negotiations continued.

After expert appraisals were done on the property, Arnold and Scotti entered into an agreement, called a right of way contract, for the State to purchase the property.[1] The contract included an integration clause. In section 2(A) of the contract, the section outlining the State's duties, the right of way contract provided that the State would "[p]ay [Scotti] the sum of $617,342.00, which is inclusive of interest, fees and costs, for the property or interest conveyed . . . ." In a declaration filed in this action, Arnold, referring to this provision, stated: "The fees included not only the attorney fees, but also [Scotti's] expert witness reimbursement fees."

Escrow closed on the property on May 24, 2010, and two days later the State filed a request for dismissal of the eminent domain action, which the trial court granted.

On July 6, 2010, Scotti filed a memorandum of costs in which he requested an award of $38,957.50 in costs and attorney

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[1] The parties argue about who "insisted" on resolving the matter by contract rather than by judgment. It makes no difference who insisted.

fees. Scotti provided a proposed judgment to the court, including the $38,957.50 in costs and attorney fees, which the court signed on August 11, 2010.

However, the State moved to vacate the judgment. The trial court issued a tentative ruling granting the motion to vacate. In the tentative ruling, the court stated: "[T]he Court finds that the Right of Way Contract executed by the parties on August 18, 2009, represented the parties' agreement to settle the entire action, including attorney's fees and costs under Code of Civil Procedure section 1268.610."

Scotti did not request a hearing, so the tentative ruling, by its terms, became effective without further notice.[2] Thereafter, the trial court entered a revised judgment with no award of costs and attorney fees.

DISCUSSION

I

Recovery of Litigation Expenses in Trial Court

Scotti contends that he is entitled to recover his litigation expenses, including attorney fees. The simple answer is that he already recovered his attorney fees. But he disagrees.

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[2] The State contends that Scotti, by failing to request a hearing, waived his right to appeal. The contention is without merit; no such request is necessary. The State cites no authority that failure to request a hearing after an adverse tentative ruling waives the right to appeal, and we know of none.

Orders concerning attorney fee awards are reviewed for abuse of discretion. (*In re Marriage of Hatch* (1985) 169 Cal. App.3d 1213, 1215.) In reviewing an order for abuse of discretion, we "'consider the evidence in the light most favorable to the prevailing party, giving him the benefit of every reasonable inference, and resolving conflicts in support of the judgment.' [Citation.]" (*Hadley v. Krepel* (1985) 167 Cal.App.3d 677, 685, italics omitted.)

Code of Civil Procedure section 1268.610, subdivision (a), relating to eminent domain actions, states: "[T]he court shall award the defendant his or her litigation expenses whenever: [¶] (1) The proceeding is wholly or partially dismissed for any reason." Litigation expenses include attorney fees. (Code Civ. Proc., § 1235.140.) Here, there is no dispute concerning whether the eminent domain case was dismissed or whether Scotti is entitled to recover his attorney fees. The case was dismissed, and he is entitled to recover his attorney fees. The dispute on appeal is whether he has already recovered those fees. We conclude that he has recovered attorney fees and is not entitled to a further award.

In his opening brief, Scotti makes two arguments that miss the mark. First, he claims this is an issue of statutory interpretation and that, considering the plain language of the statute, he is entitled to recover his litigation expenses. As noted above, there is no dispute that he is entitled to recover his litigation expenses. Therefore, the statutory

interpretation issue is a straw man.[3] And second, Scotti claims that he did not waive his rights under Code of Civil Procedure section 1268.610. We agree. But that does not mean that he can recover his litigation expenses twice.

Scotti makes two arguments that are potentially dispositive: (1) the plain language of the right of way contract does not support an interpretation that Scotti's litigation expenses were included in the payment from the State and (2) Arnold's declaration stating that the fees mentioned in the right of way contract included Scotti's attorney fees cannot be used as extrinsic evidence to determine the meaning of the right of way contract. Neither argument has merit.

"The basic goal of contract interpretation is to give effect to the parties' mutual intent at the time of contracting. [Citations.]" (*Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2003) 109 Cal.App.4th 944, 955.) "The parties' intent is ascertained from the language of the contract alone, 'if the language is clear and explicit, and does not involve an absurdity.' [Citation.] Extrinsic evidence is admissible to explain the meaning of a contract if 'the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible.' [Citation.]" (*DVD Copy Control Assn., Inc. v.*

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[3] The State requests judicial notice of the legislative history of Code of Civil Procedure section 1268.610. Because we need not interpret that section, the request is denied.

Kaleidescape, Inc. (2009) 176 Cal.App.4th 697, 712; see also *Huong Que, Inc. v. Luu* (2007) 150 Cal.App.4th 400, 412 [parol evidence rule does not prevent use of extrinsic evidence to resolve ambiguity in integrated contract].)

We therefore turn to the question of whether the parties intended the term "fees and costs" in the right of way contract to include Scotti's attorney fees. The right of way contract states that the payment by the State is "inclusive of interest, fees and costs, for the property or interest conveyed . . . ." Concerning this clause, Scotti states: "The [right of way contract] multiple times states that the $617,342 payment . . . is payment for the property being taken by the State. Never once does it say that it is in any part payment for attorney's fees incurred by Scotti in the eminent domain lawsuit. Never once does it say Scotti waives his rights under [Code of Civil Procedure section] 1268.610. Indeed, never once does it even mention litigation expenses, attorney's fees, or [section] 1268.610."

While Scotti is correct that the right of way contract does not explicitly cite Code of Civil Procedure section 1268.610 or use the term "attorney fees," his argument goes too far when he claims that the contract does not address attorney fees. It explicitly addresses "fees and costs." The question is whether that refers to attorney fees. In that regard, the contract is ambiguous.

Challenging the finding of ambiguity, Scotti states that the "fees and costs" cannot be interpreted to include attorney

fees because: (1) the “fees and costs” are “for the property,” (2) the only specific references to fees in the right of way contract are to escrow and recording fees, and (3) the right of way contract could have explicitly addressed attorney fees but did not.

While Scotti’s arguments are plausible interpretations of the right of way contract, they do not definitively resolve the question of whether the parties intended the reference in the right of way contract to “fees and costs” to include attorney fees. It does no violence to the meaning of the words in the contract to say that “fees and costs” included attorney fees. Therefore, extrinsic evidence of the parties’ intent is admissible and necessary. (*DVD Copy Control Assn., Inc. v. Kaleidescape, Inc., supra,* 176 Cal.App.4th at p. 712.)

The extrinsic evidence, construed in the light most favorable to the trial court’s ruling, establishes that “fees and costs” included attorney fees incurred by Scotti in the eminent domain action. Arnold stated: “The fees included not only the attorney fees, but also [Scotti’s] expert witness reimbursement fees.”

Scotti argues, however, that any ambiguities in the right of way contract must be construed against the State because the State drafted the contract. (See *Victoria v. Superior Court* (1985) 40 Cal.3d 734, 739 [ambiguities in standard form or adhesion contracts construed against drafter].) This argument fails to persuade because it is contrary to the facts. The evidence presented by the State established that there was give

and take on the terms of the contract; it was not a take-it-or-leave-it or adhesion contract.

In their right of way contract, the parties settled the issue of attorney fees. Accordingly, the trial court was correct in relying on that settlement to conclude that the State had already paid Scotti's attorney fees, which it was required to do pursuant to Code of Civil Procedure section 1268.610, subdivision (a), which entitles a defendant in an eminent domain action to recovery of litigation expenses if the action is dismissed "for any reason." (See Code Civ. Proc., § 664.6 [court may enter judgment pursuant to terms of settlement].)

II

Recovery of Litigation Expenses on Appeal

Scotti contends that he is entitled to recover his litigation expenses on appeal. The State does not respond to this argument. Notably, the State does not contend that the attorney fees addressed in the right of way contract covered the appeal. Scotti's contention is therefore correct.

"Litigation expenses recoverable in eminent domain proceedings include reasonable attorney fees incurred during trial 'and in any subsequent judicial proceedings.' (Code Civ. Proc., § 1235.140, subd. (b); [citation].)" (*City of Oakland v. Oakland Raiders* (1988) 203 Cal.App.3d 78, 85 (*City of Oakland*).)

As did the court in *City of Oakland*, we must remand to the trial court for determination of recoverable litigation expenses on appeal. (*City of Oakland, supra,* 203 Cal.App.3d at pp. 85-86.)

DISPOSITION

The order denying attorney fees is affirmed. Scotti is awarded litigation expenses on appeal, and the case is remanded for a determination of the litigation expenses. (Code Civ. Proc., § 1268.610; Cal. Rules of Court, rule 8.278(a)(5).)

NICHOLSON, J.

We concur:

RAYE, P. J.

MAURO, J.