

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

RENS MASONRY, INC.,

Plaintiff and Respondent,

v.

LUCA PROPERTIES, INC.,

Defendant and Appellant.

D057698

(Super. Ct. No. 37-2008-95191-CU-  
BC-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Timothy B. Taylor, Judge. Affirmed.

Rens Masonry, Inc. sued Luca Properties, Inc. (Appellant) for breach of contract based on Appellant's failure to pay money owed to Rens Masonry for its construction of foundation walls and a fireplace. In its answer, Appellant raised an affirmative defense of offset, alleging that it had incurred damages from Rens Masonry's faulty construction of the fireplace. Appellant also filed a cross-complaint seeking recovery for damages based on the same allegations that the fireplace construction was defective.

After a jury verdict in favor of Rens Masonry, the trial court ordered Appellant to pay Rens Masonry's attorney fees. The court declined Appellant's request that the fees be apportioned between the foundation wall issue (which arose from a written contract containing an attorney fees provision), and the fireplace issue (which arose from an oral contract without an attorney fees provision). Appellant challenges this ruling on appeal.

As we shall explain, to resolve Rens Masonry's claim based on the written contract, it was necessary to litigate Appellant's defense derived from the oral contract. Accordingly, the trial court's award of fees to Rens Masonry properly included the fees incurred to defeat Appellant's defense arising from the oral contract. We affirm the judgment.

#### FACTUAL AND PROCEDURAL BACKGROUND

On April 4, 2005, Appellant and Rens Masonry entered into a written contract providing that Rens Masonry would construct foundation walls. The contract included an attorney fees provision providing for an award of fees to the prevailing party in an action arising under the contract.<sup>1</sup> Rens Masonry also submitted a bid to build a fireplace at the same project site, and Appellant orally accepted the bid.

On October 30, 2008, Rens Masonry filed a breach of contract complaint against Appellant, alleging that Appellant owed money for the work performed by Rens Masonry constructing the foundation walls and the fireplace. In its answer, Appellant set forth an

---

<sup>1</sup> The attorney fees provision states: "In the event either [Appellant] or [Rens Masonry] brings an action or proceeding, in connection with any dispute or matter arising under this Agreement, the party which prevails in such action shall be entitled to recover from the other its attorney fees in a reasonable amount."

affirmative defense alleging a right to an offset. The offset defense was based on a claim that Rens Masonry's construction of the fireplace was faulty because the fireplace was not functioning properly. In addition to its offset defense, Appellant filed a cross-complaint against Rens Masonry setting forth a breach of contract claim and other causes of action based on the same allegedly defective fireplace. Rens Masonry's position was that the agreement to build the fireplace was a modification of the written foundation wall contract, whereas Appellant's position was that the fireplace agreement was a distinct oral contract.

At trial, Rens Masonry presented evidence showing that Appellant owed \$71,443 for the masonry work, consisting of \$65,519 for the foundation walls and \$5,924 for the fireplace. To support its offset defense and cross-complaint, Appellant presented evidence showing it had incurred \$11,045 in damages because of the defective fireplace.<sup>2</sup> Appellant did not dispute that it owed money to Rens Masonry for the foundation walls, but argued the jury should reduce the amount of money owed based on the damages it had incurred due to the faulty fireplace construction.

According to the jury's special verdict, the parties had agreed to the fireplace construction under an oral contract that was distinct from the written foundation wall contract containing the attorney fees provision. Thus, there was no attorney fees provision in the oral contract governing the fireplace construction at issue in Rens Masonry's breach of contract action and Appellant's offset defense and cross-complaint.

---

<sup>2</sup> The damages consisted of \$300 to inspect the fireplace built by Rens Masonry, \$2,450 to demolish it, and \$8,295.21 to rebuild it.

The jury found in favor of Rens Masonry on both the complaint and cross-complaint. Rens Masonry was awarded \$71,443 for its breach of contract action based on the monies owed for the construction of the foundation walls (\$65,519) and fireplace (\$5,924).

Pursuant to the attorney fees provision in the written foundation wall contract, Rens Masonry requested an award of attorney fees for the trial, totaling approximately \$300,000. In opposition, Appellant argued the attorney fees award should be substantially reduced because there was no right to fees for the issues arising from the oral contract for the fireplace construction. Appellant asserted that the fireplace construction issues (which encompassed most of the litigation), were entirely distinct from the issues concerning the written contract for the foundation walls. Rejecting Appellant's contention, the court ordered that Appellant pay Rens Masonry's attorney fees for the entire trial, totaling \$318,469.82.

#### DISCUSSION

Appellant argues the trial court's award of fees for the entire trial was improper. It asserts the court should have apportioned the fees between the written and oral contract claims, and awarded fees only for the claim on the written contract. Apart from this apportionment issue, Appellant does not otherwise dispute the trial court's calculation of the fee amount.

When a contract provides for the recovery of attorney fees in an action on the contract, the party who prevails in the contract action is entitled to be compensated for the fees incurred in the lawsuit. (*Gil v. Mansano* (2004) 121 Cal.App.4th 739, 742.) The

contractual attorney fees award includes fees incurred by the prevailing party to pursue or defeat a claim raised as a *defense* to the contract cause of action. (*Siligo v. Castellucci* (1994) 21 Cal.App.4th 873, 876-880 (*Siligo*); *Finalco, Inc. v. Roosevelt* (1991) 235 Cal.App.3d 1301, 1306-1308; see also *Wagner v. Benson* (1980) 101 Cal.App.3d 27, 37.)

For example, in *Siligo*, the plaintiff sued for monies due under a contract, and the defendant raised an offset defense and filed a cross-complaint based on allegations of fraud. (*Siligo, supra*, 21 Cal.App.4th at p. 876.) The plaintiff prevailed, and the trial court denied contractual attorney fees for the portion of the litigation related to defeating the defendant's fraud claim. (*Id.* at pp. 876-877.) The appellate court reversed, explaining: "[T]he pivotal point in the analysis whether a prevailing party is entitled to recover contractual attorney fees for defending against a competing . . . claim [for which fees are not available] is not whether the fees can be apportioned between the theories *but whether a defense against the [competing] claim is necessary to succeed on the contractual claim.*" (*Id.* at p. 879, italics added.) The *Siligo* court concluded, "[Plaintiff] was required to defend against fraud in order to succeed on his complaint to enforce the agreements. . . . The cost of litigating the [fraud claim] . . . therefore constituted part of the cost of enforcing the contracts. The trial court therefore erred in apportioning its award of attorney fees between the offensive and defensive aspects of this case." (*Id.* at p. 880.)

Here, Rens Masonry filed a complaint to obtain payment for its masonry work, which included construction of foundation walls pursuant to a written contract containing an attorney fees provision, and construction of a fireplace pursuant to an oral contract

with no attorney fees provision. In response, Appellant raised an affirmative defense of offset alleging faulty construction of the fireplace by Rens Masonry, and also filed a cross-complaint based on the same defective fireplace issue. Appellant's offset claim and cross-complaint were designed to defeat the claim for monies due under the oral contract, and to diminish the claim for monies owed for the foundation walls under the written contract. Thus, to obtain the full amount of monies due under the written contract, Rens Masonry had to defeat Appellant's offset defense and cross-complaint. Accordingly, Rens Masonry was entitled to recover the fees incurred in defending against Appellant's offset claim and cross-complaint arising from the oral contract for construction of the fireplace.

To support its position that the trial court was required to apportion fees between the written and oral contract claims, Appellant raises various contentions that relate to the severability of the two contracts; i.e., they were found by the jury to be factually distinct contracts, they involved unrelated construction projects, and the billing entries by respondent's counsel can be divided into time spent on each contract. Appellant's contention is unavailing because regardless of the severability of the two contracts, Rens Masonry is entitled to recoup the attorney fees incurred to defeat the offset defense and cross-complaint *raised as a defense to the written contract claim*. Apportionment of fees is appropriate when an attorney-fee-recoverable cause of action is joined with an attorney-fee-nonrecoverable cause of action, and the issues concerning the two causes of action are not interrelated and can be separated. (See *Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124,129-130; *Akins v. Enterprise Rent-A-Car Co.* (2000) 79

Cal.App.4th 1127, 1133.) However, when the nonrecoverable claim is a *defense* to the recoverable claim, resolution of the nonrecoverable claim is—by its very nature—essential to resolution of the recoverable claim and hence part of the cost of litigating the recoverable claim. Thus, attorney fees are recoupable for litigation associated with a nonrecoverable claim raised in a defensive fashion against a recoverable claim, regardless of the severability of the issues involved in the two claims. (*Siligo, supra*, 21 Cal.App.4th at p. 879.)<sup>3</sup>

Appellant argues that in cases awarding attorney fees for both attorney fee recoverable and nonrecoverable claims, the claims arose from the same contractual transaction (see, e.g., *Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, 1104-1105, 1111), whereas here the offset claim and cross-complaint arose from a distinct contractual transaction. The distinction is of no import. When contracting parties agree to pay attorney fees for an action arising from the contract, to resolve the action the parties must litigate any defenses raised by the opposing party. The fact that a defense may be derived from a distinct contract does not remove the defense from the issues that must be litigated to resolve the action based on the recoverable claim.

Appellant cites *Arntz Contracting Co. v. St. Paul Fire and Marine Insurance Co.* (1996) 47 Cal.App.4th 464 and *Hunt v. Fahnestock* (1990) 220 Cal.App.3d 628 for the

---

<sup>3</sup> Given our holding based on the fact the fireplace issue was raised as a defense to the foundation wall claim under the written contract, we need not evaluate whether the fireplace issue was otherwise intertwined with the foundation wall issue. We note that Rens Masonry's breach of contract claim involved Appellant's failure to pay for both the foundation walls and the fireplace, and arguably the trial court could reasonably find these two issues were intertwined. In any event, we need not resolve this issue.

proposition that attorney fees must be separately evaluated for each distinct contract at issue in a lawsuit. These cases do not support Appellant's position because they involve the determination of prevailing party status, and they do not address an award of fees for litigating a defense to an attorney fee recoverable claim. (See *Arntz, supra*, at p. 491; *Hunt, supra*, at p. 630.)

Appellant also argues that a fee award based on the oral contract at issue in the cross-complaint is contrary to the reciprocity principles governing contractual attorney fee awards because had it prevailed on its cross-complaint, it would not have been entitled to an award of fees given that the oral contract had no attorney fees provision. We are not persuaded. If Appellant had succeeded on its cross-complaint/offset defense, it could properly be deemed the prevailing party in the foundation wall contract litigation because it would have succeeded on the sole disputed issue concerning the foundation wall contract—i.e., that the amount due under the foundation wall contract should be reduced based on the damages incurred from the defective fireplace. (See Civ. Code, § 1717, subd. (b)(1); *Sears v. Baccaglio* (1998) 60 Cal.App.4th 1136, 1139, 1143 [prevailing party for contractual attorney fees need not be party with net monetary recovery; rather it is party who achieves " 'greater relief' in the action on the contract"]; see also *Hsu v. Abbara* (1995) 9 Cal.4th 863, 877, citing *National Computer Rental, Ltd. v. Bergen Brunswig Corp.* (1976) 59 Cal.App.3d 58, 63 ["defendant awarded fees under section 1717 because it prevailed on the only disputed claim, even though plaintiff obtained judgment on undisputed claims"].)

Appellant further contends that awarding fees based on two completely separate contracts is contrary to public policy because it would have a chilling effect on a party's use of affirmative defenses and joinder of related complaints into one lawsuit. The argument is not relevant to the facts of this case because Rens Masonry's breach of contract complaint included a claim for monies due for both the foundation walls and the fireplace. Because payment for the fireplace was part of the complaint, the litigation necessarily would have involved the question of whether the fireplace was defective even if Appellant had not raised the defective fireplace issue as a defense to the amounts owing for the foundation walls. Moreover, as stated, Appellant could have been awarded attorney fees under the foundation wall contract had it succeeded on its defective fireplace defense to the foundation wall contract claim. Under these facts, there is no chilling effect.

#### DISPOSITION

The judgment is affirmed. Appellant to pay respondent's costs on appeal.

HALLER, Acting P. J.

WE CONCUR:

McDONALD, J.

IRION, J.