

NOT TO BE PUBLISHED IN OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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

SADR & BARRERA, APLC,

Plaintiff and Respondent,

v.

KISMIT CYRIACKS et al.,

Defendants and Appellants.

D058417

(Super. Ct. No. 37-2008-00075029-
CU-BC-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Ronald L. Styn, Judge. Affirmed in part; reversed in part.

The questions in this case are whether the trial court erred by awarding a law firm contractual attorney fees when it was self-represented, and by including a reference to fraud damages in the default judgment. We answer the questions in the affirmative and reverse the judgment insofar as these issues are concerned. In all other respects, we affirm the judgment.

BACKGROUND

Sadr & Barrera, APLC (S & B) is a law firm whose principals include attorney Kasra Sadr. In 2006 S & B loaned Kismet Cyriacks¹ a total of \$35,000 under two written promissory notes. It is undisputed that Cyriacks did not repay the principal amounts of the notes.

In 2007 S & B sued Cyriacks for breach of contract, breach of the implied covenant of good faith and fair dealing, fraud, unjust enrichment and conversion.² Sadr represented S & B. In October 2009 the court granted S & B's unopposed motion for terminating sanctions against Cyriacks for her failure to comply with a court order to cooperate in discovery. The court struck Cyriacks's answer, imposed monetary sanctions against her, and ordered S & B to submit a default judgment.

In the default proceedings, S & B sought contractual attorney fees. The court questioned whether fees were proper since S & B was a pro se litigant. The court granted S & B's request to submit a brief on the issue. The brief ignored well-established California law holding that a pro se litigant may not obtain attorney fees, and rather discussed irrelevant out-of-jurisdiction authority. The court entered a default judgment that awarded S & B \$35,000 in compensatory damages, \$7,284.94 in prejudgment interest, and attorney fees of \$11,115.30. The court tentatively awarded \$20,000 in

¹ Cyriacks is also referred to in the record as Cyriacks-Vella.

² S & B later added Platinum Properties Real Estate & Management, Inc. as a defendant.

punitive damages for fraud, but after further deliberation it withdrew the award as lacking evidentiary support.

DISCUSSION

I

Attorney Fees

The legal basis for an award of attorney fees is a matter of law we review independently. (*Carpenter & Zuckerman v. Cohen* (2011) 195 Cal.App.4th 373, 378.) The award of fees here lacks a legal basis.

"California follows the 'American rule,' under which each party to a lawsuit ordinarily must pay his or her own attorney fees." (*Musaelian v. Adams* (2009) 45 Cal.4th 512, 516 (*Musaelian*)). Code of Civil Procedure section 1021, which codifies the rule, provides that the measure and mode of attorney compensation are left to the agreement of the parties except as fees are allowed by statute. "Although Code of Civil Procedure section 1021 gives individuals a rather broad right to 'contract out' of the American rule by executing such an agreement, these arrangements are subject to the restrictions and conditions of [Civil Code]³ section 1717 in cases to which that provision applies." (*Trope v. Katz* (1995) 11 Cal.4th 274, 279 (*Trope*)).

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*

³ Further undesignated statutory references are also to the Civil Code.

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." (Italics added.) Section 1717 applies to the promissory notes here, which provide: "Whether or not suit is filed, Borrower agrees to pay all reasonable attorney's fees, costs of collection, [and] costs and expenses incurred by Holder in connection with the enforcement or collection of this Note. Borrower further agrees to pay all costs of suit and the sum adjudged as attorneys' fees in any action to enforce payment of this Note or any part of it."

In *Trope, supra*, 11 Cal.4th 274, our high court held "that an attorney who chooses to litigate in propria persona and therefore does not pay or become liable to pay consideration in exchange for legal representation cannot recover 'reasonable attorney's fees' under section 1717 as compensation for the time and effort he expends on his own behalf or for the professional business opportunities he forgoes as a result of his decision." (*Id.* at p. 292.) The court in *Trope* explained "that an attorney litigating in propria persona cannot be said to 'incur' compensation for his time and his lost business opportunities." (*Id.* at p. 280.) Further, "the usual and ordinary meaning of the words 'attorney's fees,' both in legal and in general usage, is the consideration that a litigant actually pays or becomes liable to pay in exchange for legal representation. An attorney litigating in propria persona pays no such compensation." (*Ibid.*)

The court in *Trope* also recognized that awarding fees to self-represented attorneys but not to other self-represented parties "would be to hold that the time and opportunity that an attorney gives up when he chooses to litigate a case in propria persona are

somehow qualitatively more important and worthy of compensation than those of other pro se litigants." (*Trope, supra*, 11 Cal.4th at p. 285.) This "would in effect create two separate classes of pro se litigants—those who are attorneys and those who are not—and grant different rights and remedies to each." (*Id.* at p. 277.) The court concluded " 'the public perception of fairness in the legal system is of greater moment than a lawyer litigant's claim to an attorney fee award if he elects to represent himself.' " (*Id.* at p. 286.)

S & B ignores the controlling *Trope* opinion, even after Cyriacks discussed it in her respondent's brief. In fact, S & B cites *no* California law on attorney fees. Rather, as it did at the trial court, S & B relies on foreign authorities with no precedential value.⁴ "Arguments should always be supported by *California* authorities whenever there is such authority on point." (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2010) ¶ 9:49, p. 9-15 (rev. #1, 2008).) A party has a duty to "[b]e 'up front' about cases that appear to be against your position. . . . Your failure to confront unfavorable relevant holdings will be regarded as an attempt to deceive and mislead the court." (*Id.*, ¶ 9:58, pp. 9-17 to 9-18.)

⁴ For instance, S & B cites *Ellis v. Cassidy* (9th Cir. 1980) 625 F.2d 227, 230-231 (*Ellis*), in which the court upheld an award of attorney fees to a pro se attorney under federal law when the opposing party acted oppressively. S & B asserts that Cyriacks should be subject to fees because she was uncooperative in the litigation. The citation to *Ellis* is improper, however, because it was disapproved of on that point in *Elwood v. Drescher* (9th Cir. 2006) 456 F.3d 943, 946-947. Moreover, the court held in *Musaelian, supra*, 45 Cal.4th at page 520, that a pro se attorney could not obtain fees as a sanction for the opposing party's bad conduct.

Under *Trope* and its progeny (see, e.g., *Musaelian, supra*, 45 Cal.4th at p. 514; *Gonzalez v. Chen* (2011) 197 Cal.App.4th 881, 888; *Bleavins v. Demarest* (2011) 196 Cal.App.4th 1533, 1544, fn. 1), S & B did not incur any attorney fees within the meaning of section 1717 because it was self-represented. Accordingly, the court erred as a matter of law by awarding it fees.⁵

II

Fraud

Cyriacks also persuasively contends the reference in the default judgment to damages for fraud and intentional deceit is improper and should be deleted. Under the category of "Damages," the form judgment shows damages of \$35,000, the principal amount of the promissory notes. Under the category of "Other," the form states in type, "Damages on Fraud and Intentional Deceit, Breach of Contract, Unjust Enrichment, Conversion and Breach of Fair Dealing." No monetary amount is included in this "Other" category. An element of fraud is that "' ' 'as a result of the concealment or suppression of fact, the plaintiff must have sustained damage.' " " (*Jones v. ConocoPhillips Co.* (2011) 198 Cal.App.4th 1187, 1198.) When a default is taken, "[a]ny fraud damages . . . must be established by a prove-up hearing." (*Doppes v. Bentley Motors, Inc.* (2009) 174 Cal.App.4th 967, 997.) The record shows that the only damages

⁵ Given our holding, we are not required to address S & B's request for attorney fees on appeal.

S & B sought for fraud were punitive damages,⁶ and the court ultimately declined to award any such damages.

DISPOSITION

The judgment is reversed to delete the attorney fees award and the reference to damages for fraud and intentional deceit. In all other respects, the judgment is affirmed. Appellant Cyriacks is entitled to costs on appeal.

McCONNELL, P. J.

WE CONCUR:

NARES, J.

McDONALD, J.

⁶ Sadr presented a declaration for the prove-up hearing that states, "The calculation for damages in this matter . . . includes \$500,000 punitive damages, and \$35,000 in monies loaned to [Cyriacks] but not repaid . . . that was required pursuant to the original contracts."