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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JAMES E. ADRIAN, Individually and as
Trustee, etc.,

Plaintiff and Respondent,

v.

CARL WAYNE ADRIAN,

Defendant and Respondent.

D058877

(Super. Ct. No. 37-2008-00078774-
CU-OR-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Luis R. Vargas, Judge. Affirmed.

James E. Adrian (James) and Carl Wayne Adrian (Wayne),¹ brothers, inherited undivided quarter interests in investment real estate from their mother. The Carl Adrian Trust B (the Trust), of which the brothers were beneficiaries and James was trustee, owned the other undivided half of the real estate. Disputes arose between the brothers and James sued to partition the property. The brothers settled the action by agreeing to

¹ In the interests of clarity we refer to the parties by their given names. We refer to Wayne by his middle name, as that is how he refers to himself in his briefing. We intend no disrespect.

partition by sale and to release each other from all other claims. According to James, Wayne interfered with the sale, including by damaging the property. Wayne bought the property through the partition sale process.

In determining the final allocation of sale proceeds, James and the Trust moved to have certain of his attorney fees and the costs for injunction proceedings against Wayne, repairing damage, and lease enforcement proceedings against a tenant of the property (a corporation owned by Wayne), determined to be costs of partition and charged against Wayne's share. The court ordered as against Wayne's share of the distribution that James be paid \$28,439.37 and the Trust be paid \$57,393.63.

Wayne appeals, asserting the court erred in allocating costs against his share of the distribution proceeds because (1) the attorney fees awarded to James for the injunction proceedings were not "costs of partition," but were a result of an independent, collateral dispute between the parties; (2) the attorney fees awarded to James for the injunction proceedings were not proper costs of partition based upon the court's finding they were for the "common benefit of the property," not the parties; (3) the \$57,393.62 awarded to the Trust for costs of repair to the property were not proper costs of partition based upon the court's finding they were for the "common benefit of the property," not the parties; and (4) the award of attorney fees for the lease enforcement proceedings should have been divided equally among the parties, not as against Wayne's interest, because they were caused by Wayne's company, not him personally. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Properties

The jointly owned properties consisted of a commercial building located at 3755-3757 Park Boulevard and 1818 Robinson Avenue, San Diego, California (collectively, the Park Property) and an apartment complex located at 1231 Valley View Boulevard, Glendale, California.

California Uniforms, Inc. (CUI), a corporation owned by Wayne, occupied the suite of the Park Property located at 3755 Park Boulevard.

B. The Dispute Following Agreement To Partition the Park Property

In February 2008 James sued Wayne and CUI for partition of all the real estate. Subsequently, in February 2009 James and Wayne agreed to settle their disputes by a mutual general release and partition by sale.

After entering into the settlement agreement, the parties agreed upon and the court appointed a referee, Andrew Allcroft, to oversee the partition.

With the concurrence of Allcroft, James began to renovate the 1818 Robinson space when a tenant vacated it after approximately 18 years of occupancy. However, Wayne entered into the space and damaged interior partitions, interior lighting and ceiling tiles. James obtained a temporary restraining order directing Wayne and CUI not to enter into 1818 Robinson or cause any further damage to the premises. The court then issued a preliminary injunction prohibiting the same conduct. In doing so, the court found that "Defendant Wayne's actions will prevent a future lease of the space, significantly impair the property's actual and potential stream of rental income, and

would necessarily decrease the marketability and fair market value of the subject property for its impending sale, all of which injures Plaintiff's interests as cotenant." The court also found that "Defendant is clearly violating the release provisions of the settlement agreement in this case by driving the value of the [Park] Property down by attempting to move California Uniforms into the [1818 Robinson] Space permanently, and rent-free."

After obtaining the temporary restraining order, James began to repair the damage Wayne caused to 1818 Robinson. Wayne admitted that the property was in a state of disrepair and that repairing the unit would "add value to that unit. That will make that unit habitable. That will make the property valuable. [¶] There needs to be a ceiling put up. . . . There needs to be lighting." Wayne further admitted that performing repair work would "increase the value of the property for everybody, it will increase the marketability of the space."

James invited bids from a number of contractors. Wayne knew as of July 10, 2009, at the latest, that James and Allcroft intended to continue the repair process as necessary to sell the Park Property.

As a result of managing the repair and renovation, James discovered that Wayne had neglected the Park Property during Wayne's tenure as the property manager. Wayne had installed plumbing that did not comply with requirements of the Americans with Disabilities Act (ADA). Wayne had also made improvements without a permit. The improvements made without a permit delayed completion of the repair and renovation of 1818 Robinson from June 2009 to November 2009. The contractor hired by James was

forced to remodel the bathroom to make it comply with the ADA. The contractor had to install new lighting and fix other damage caused by Wayne.

Finally, as a result of the damage Wayne caused to the floor when he tore out the partitions, the contractor was forced to remove asbestos from the floor. Wayne knew of the asbestos issue and admitted that remediation of the asbestos issue would increase the value of the property. Wayne's counsel stated that the asbestos could make a buyer walk away from a potential sale and that, if the asbestos is remedied, "[e]verybody benefits from that situation."

James incurred \$57,393.63 to repair and refurbish 1818 Robinson to make it fit for sale.

During this process, CUI withheld rent due for the suite at 3755 Park Boulevard. James wrote many letters demanding that Wayne and CUI pay the rent and was forced to serve CUI with three-day notices to pay rent or quit on June 17, 2008, January 16, 2009, and October 1, 2009. CUI paid the rent in response to the notices.

B. Motion Seeking Costs of Partition

James moved to recover attorney fees and to allocate costs, seeking to shift the burden of expenses he and the Trust incurred to Wayne. On August 4, 2010, the court granted James's request that Wayne reimburse the Trust \$57,393.62 in repair costs necessitated by Wayne's conduct. It found that portions of James's requested attorney fees and expenses were costs of partition, allocated those costs to Wayne, and denied other portions of James's request. James requested \$134,468.24 in attorney fees and costs. The court granted \$28,439.37 in attorney fees as proper costs of partition. The

court denied James's request for attorney fees incurred to advance the partition action after the settlement agreement. The court determined that each party had agreed by way of settlement to bear those attorney fees and costs. The court also denied James's request for fees incurred to enforce the settlement agreement.

In awarding fees and costs to James and the Trust, the court found that the attorney fees and costs incurred by James "in protecting the value of the property" were "for the common benefit of the property." The court also found that "the attorney fees and costs incurred in connection with the injunction proceedings and the Three-Day Notice to pay rent were incurred for the common benefit of the property." The court also found that the repair costs incurred by the Trust were "incurred for the common benefit of the property." Finally, the court found that "[t]he equities support the allocation of all these[] [fees and] costs to [Wayne]."

DISCUSSION

A. *Applicable Legal Principles*

As a general rule, litigants pay their own attorney fees. (See Code Civ. Proc., § 1021; *Trope v. Katz* (1995) 11 Cal.4th 274, 278-279.) But there are exceptions, including those provided by statute. (*Trope*, at p. 279.)

The court ordered the allocation of attorney fees and costs under sections of the Code of Civil Procedure (all further undesignated statutory references are to the Code of Civil Procedure) that authorize the recovery of attorney fees as costs in partition actions. One of the provisions, section 874.010, provides in relevant part: "The costs of partition include: [¶] (a) Reasonable attorney's fees incurred or paid by a *party for the common*

benefit." (Italics added.) Another, section 874.020, provides in relevant part: "The costs of partition include reasonable expenses, including attorney's fees, necessarily incurred by a party *for the common benefit in prosecuting or defending other actions or proceedings for the protection . . . of the property*" (Italics added.)

Section 874.040 provides for the manner of allocation of costs of partition: "Except as otherwise provided in this article, the court shall apportion the costs of partition among the parties in proportion to their interests *or make such other apportionment as may be equitable.*" (Italics added.)

To qualify under these statutory provisions, the fees must be incurred for the common benefit of the *owners* of the property sought to be partitioned. (See *Finney v. Gomez* (2003) 111 Cal.App.4th 527, 548-549.)

B. *Injunctive Relief Proceedings*

Wayne asserts that the court erred in awarding fees and costs to James related to the injunctive relief he obtained against Wayne because (1) it found that they were for the common benefit of the *property*, not the parties; and (2) those proceedings constituted "an independent cause of action against Wayne for damages and an injunction [against Wayne] for 'waste.'" (Italics omitted, fn. omitted.) We reject these contentions.

As our high court has stated, "counsel fees may be allowed under the [statute] for services rendered for the common benefit *even in contested partition suits.*" (*Capuccio v. Caire* (1932) 215 Cal. 518, 528-529, italics added.) "The presence and litigation of controversial issues between all the parties does not preclude the allowance of attorney's fees for services connected with such issues where such services are found to be for the

common benefit of the parties." (*Randell v. Randell* (1935) 4 Cal.2d 575, 582, citing *Capuccio*.)

Here, the fact that the court referred to the benefit derived as being a "common benefit to the property," not to the "parties" is of no consequence. Obviously, any benefit to the property would inure to the benefit of each of the parties holding an interest in the Park Property. Indeed, this is shown in the language of the court's order granting injunctive relief to prevent further damages to the property: "Defendant Wayne's actions will prevent a future lease of the space, significantly impair the property's actual and potential stream of rental income, and would necessarily decrease the marketability and fair market value of the subject property for its impending sale, all of which injures Plaintiff's interests as cotenant." The court also found that, "Defendant is clearly violating the release provisions of the settlement agreement in this case by driving the value of the [Park] Property down by attempting to move California Uniforms into the [1818 Robinson] Space permanently, and rent-free."

Moreover, section 874.020 specifically provides for costs, including attorney fees, "necessarily incurred by a party for the common benefit in prosecuting or defending other actions or proceedings for the protection . . . of *the property*" (Italics added.)

Thus, there is no merit to Wayne's contention the attorney fees and costs incurred in conjunction with the injunction proceedings were not for the common benefit of the parties.

Similarly, Wayne's contention the fees related to the injunction proceedings were not proper costs of partition because those proceedings constituted an independent action

for waste is unavailing. James never alleged a cause of action for waste. Rather, the injunction proceedings were an integral part of the partition proceeding itself, aimed at protecting the value of the property from Wayne's conduct that was in violation of the parties' settlement agreement and the court's partition order. Indeed, as Wayne himself concedes, a preliminary injunction to, among other things, protect the property is among the express powers of the court in a partition proceeding. (See § 872.130, subs. (a) & (b).)

Nevertheless, Wayne asserts that fees related to the injunction proceedings were not properly awarded because they were "collateral matters, whose resolution simply benefits the winner at the expense of the loser, as between strangers, and is not essential to completion of the case." However, as explained, *ante*, the injunction proceedings *were* an integral part of the partition proceedings that were necessary to protect the value of the property for the benefits of *both* parties.

Moreover, the cases cited by Wayne in support of this proposition do not support his position. In a lengthy discussion, Wayne cites *Capuccio v. Caire, supra*, 215 Cal. 518 in support of his contention that fees expended for the injunction proceedings are "collateral matters" that cannot be partition costs. However, the California Supreme Court in that case upheld the award of fees in that partition action as being for the "common benefit" of the parties. (*Id.* at p. 529.) Wayne merely cites language from that case where the court noted the plaintiff's counsel, in arriving at the amount of fees sought, "excluded all services performed on the motion to modify the referees' report, on the motion to fix counsel fees, and on any and all collateral matters." (*Id.* at p. 527.) Wayne

also cites language from that case that when the plaintiff's expert testified as to the reasonable value of the attorney fees in that case he also "excluded from consideration all collateral matters." (*Ibid.*) However, nothing in that case supports the proposition that injunction proceedings in a partition action to restrain one party's misconduct constitute "collateral matters" that are not for the common benefit of the parties.

Wayne also cites three cases for the proposition that whereas the court is empowered in a partition action to order an accounting, such accounting proceedings, like injunctions, are collateral matters. However, these cited cases also do not support this contention. In *Watson v. Sutro* (1894) 103 Cal. 169, our high court did not discuss the relationship between accounting actions and partition actions. Rather, the issue was the reasonableness of the fees incurred. (*Id.* at p. 171.) *Deacon v. Deacon* (1929) 101 Cal.App. 195 involved an independent action for an accounting that later was expanded to include partition of a parcel of property. (*Id.* at pp. 201-202.) Nearly all of the fees expended were in relation to the accounting action, and, accordingly, the Court of Appeal remanded the case to the trial court to award fees on the partition action only. (*Id.* at p. 202.) Similarly, in *Williams v. Miranda* (1958) 159 Cal.App.2d 143, the court found the fees awarded were improper because "[a]lthough plaintiff's action purports to be one in partition, from its very inception it developed into a proceeding to establish plaintiff's ownership to an undivided one-half interest in the subject property free and clear of the claims of the minor children under the trust agreement. All of the efforts of plaintiff both in the trial court and upon this appeal were and have been directed to this end. It is

therefore clear that such services as were rendered by counsel for the plaintiff were in the interest of plaintiff alone and not for the common benefit." (*Id.* at p. 158.)

By contrast, where an action's primary goal is to partition property, and it seeks an accounting as an incidental feature of that action, fees are allowable for the accounting portion so long as they were incurred for the common benefit. (*Regalado v. Regalado* (1961) 198 Cal.App.2d 549, 551.) Likewise, here the injunction proceedings were incidental to the partition action and, as discussed, *ante*, the attorney fees were incurred for the common benefit of the parties.

C. Repairs to Property

Wayne asserts that the court erred in finding that the expenses incurred in repairs made at the Park Property were for the common benefit of the property, and not the parties, because there was no evidence that the repairs resulted in a net increase in the value to the property. This contention is unavailing.

Section 874.010, subdivision (e) provides that the recoverable costs of partition include "[o]ther disbursements or expenses determined by the court to have been incurred or paid for the common benefit."

As noted above, the court's finding the repairs were for the common benefit of the property, as opposed to the parties is of no moment. A benefit to the property is also a benefit to the parties.

Further, there is no authority for the proposition that expenses incurred under section 874.010, subdivision (e) must result in an increase in the value of the property to be a common benefit, and thus a recoverable cost of partition. It is enough that the

expenses were incurred for the common benefit, which the court determines based upon the particular circumstances of each case. (*Stewart v. Abernathy* (1944) 62 Cal.App.2d 429, 433.)

As is detailed, *ante*, James presented substantial evidence the repairs were necessary to the partition sale, restored value to the Park Property, and there is no assertion any of repair costs were excessive or unnecessary.

Moreover, James stated in a declaration that the repairs did increase the value of the property significantly. An owner may offer an opinion as to the value of his or her property. (Evid. Code, § 813, subd.(a)(2).)

D. Apportionment to Wayne of Fees Incurred to Enforce Lease

Wayne asserts that the court erred in apportioning to him the attorney fees incurred to force his company, CUI, to pay rent because any fault lay with the company, not him personally, and there was no finding that he was the alter ego of CUI. We reject this contention.

As noted, *ante*, section 874.040 provides that while costs of partition are ordinarily apportioned to the parties' interest, the trial court may "make such other apportionment as may be equitable."

Case law provides that "ordinarily" or "normally" costs of partition are awarded according to the parties' respective interests in the property. (*Finney v. Gomez, supra*, 111 Cal.App.4th at pp. 545-546.) A court's decision to make a different apportionment must be supported by substantial evidence in the record. (*Id.* at p. 547)

Wayne provides no authority for the proposition that to apportion fees to him to enforce the lease against CUI, the court was required to find that he was the alter ego of CUI.

Moreover, there is substantial evidence that Wayne himself caused the attorney fees to be incurred in enforcing the lease, thus supporting the court's decision that it was equitable to apportion those fees to him. In the settlement agreement, Wayne, on behalf of CUI, agreed to pay an increased amount of rent per month. But in the partition process after that settlement, Wayne caused CUI (a company he wholly owned and controlled) to withhold rent. James wrote several letters demanding that Wayne/CUI pay the rent, and was forced to serve three-day notices to pay rent or quit on CUI on June 17, 2008, January 16, 2009, and October 1, 2009. Only then did Wayne cause CUI to pay the rent demanded in the three-day notices. James's actions were necessary to protect the value of the Park Property and to prevent Wayne from driving down the value by having a nonpaying tenant in the property. Indeed, the court found that *Wayne* was "clearly violating the release provisions of the settlement agreement in this case by driving the value of the [Park] Property down by attempting to move California Uniforms into the [1818 Robinson] Space permanently, and rent-free."

On this record we cannot say the court abused its discretion in apportioning those fees to Wayne.

DISPOSITION

The judgment is affirmed. James shall recover his costs on appeal.

NARES, J.

WE CONCUR:

McCONNELL, P. J.

BENKE, J.