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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

SIDNEY H. LEVINE et al.,

Plaintiffs and Respondents,

v.

RANDALL K. MCAVOY et al.,

Defendants and Appellants.

D058894

(Super. Ct. No. GIC878347)

APPEAL from an order of the Superior Court of San Diego County, Jeffrey B. Barton, Judge. Affirmed.

Randall and Trudy McAvoy appeal from an order denying their request for attorney fees after they prevailed in an action filed against them by Sidney and Judith Levine. The Levines sued the McAvoy's under the Uniform Fraudulent Transfer Act (UFTA) alleging that the Levines were entitled to recover monies that had been fraudulently transferred to the McAvoy's by a debtor of the Levines.

Under the well-established principle that attorney fees are generally not recoverable unless provided by contractual agreement of the parties or by statute, we hold

the trial court properly denied the McAvoy's fee request. The Levines were not parties to a contract with the McAvoy's; the Levines did not sue the McAvoy's as if the Levines were a party to a contract with the McAvoy's but rather as creditors under the UFTA; and the UFTA does not provide a statutory basis for award of attorney fees.

Overview

The case underlying the McAvoy's request for attorney fees involved an action filed by the purchasers of real property (the Levines) against the seller (Charvania Investments, Inc.). The transaction between the Levines and Charvania consisted of a sale-leaseback arrangement whereby an entity related to Charvania (Willster Construction, Inc.) had agreed to lease the real property from the Levines for a five-year period. After Willster breached the lease agreement and filed for bankruptcy, the Levines sued Charvania.

Charvania had previously purchased the property from appellants (the McAvoy's) and, at the time of Charvania's sale of the real property to the Levines, Charvania still owed money to the McAvoy's. The Levines named both Charvania and the McAvoy's in the lawsuit.

The Levines' causes of action against the McAvoy's were premised on the UFTA (Civ. Code,¹ § 3439 et seq.), which permits a creditor to seek recovery from a third party transferee when a debtor transferred property or incurred an obligation to avoid the debtor's obligations to a creditor. The UFTA broadly defines a creditor as a person who

¹ Subsequent unspecified statutory references are to the Civil Code.

has a claim for payment. The Levines alleged that they were creditors of Charvania (apparently due to Willster's breach of the lease agreement); that Charvania and Willster had transferred monies and incurred obligations to the McAvoy's in violation of the UFTA; and accordingly the Levines were entitled to recoup monies from the McAvoy's.

The McAvoy's prevailed in the litigation and requested an award of either contractual or statutory attorney fees from the Levines. The trial court denied the request. We conclude the ruling was proper. The McAvoy's' request for contractual attorney fees from the Levines was based on the contracts between Charvania/Willster and the McAvoy's when Charvania and Willster purchased the McAvoy's' property and business. Although the factual basis for the Levines' claims against the McAvoy's arose from these contracts, the Levines were not "standing in the shoes" of Charvania and Willster seeking to enforce Charvania's and Willster's contractual rights vis-à-vis the McAvoy's. Rather, the Levines were standing in their own "shoes" as UFTA creditors seeking recovery from the McAvoy's due to Charvania's and Willster's alleged fraudulent transfers to the McAvoy's. Further, the UFTA does not provide for an award of statutory attorney fees to the prevailing party.

FACTUAL AND PROCEDURAL BACKGROUND²

According to the allegations in the Levines' complaint, the McAvoy's owned industrial real property in Escondido, and they operated a cabinetry manufacturing

² The record on appeal does not include the reporter's transcript of the trial. Accordingly, our review of the trial court's order denying the fee request is confined to the pleadings, the jury's special verdict, and other documents in the appellate record.

business owned by McAvoy Construction, Inc. at the site. On June 18, 2004, the McAvoy's sold the real property and cabinetry business to two legal entities created by Charles Hughes: Charvania Investments, L.L.C. and Willster Construction, Inc. Hughes was the manager of Charvania and owned a minority membership interest in the company, and he was the sole shareholder and an officer and director of Willster.

Charvania purchased the real property from the McAvoy's for \$2,700,000. The financing for this purchase included a \$1,475,000 bank loan secured by a first trust deed on the property, and a \$1 million loan from the McAvoy's secured by a second trust deed on the property. Willster purchased the cabinetry business from McAvoy Construction for \$750,000. The financing for this purchase included a \$500,000 bank loan secured by interests in Willster's personalty and a \$150,000 loan from the McAvoy's secured by a third trust deed from Charvania on the real property.

From June 2004 through June 2006, the real property was owned by Charvania and occupied by Willster's cabinetry business. In January 2006, Charvania defaulted on its payments to the McAvoy's, and in March 2006 the McAvoy's recorded a notice of default and declared that the full amount of the note was now due.

On June 29, 2006, while Charvania's default was pending, the Levines purchased the real property from Charvania in a sale-leaseback transaction. The Levines bought the real property for \$3,150,000, and Willster signed a lease agreement with the Levines agreeing to lease the premises for at least five years and pay a predetermined amount of monthly rent. In the escrow for the Levines' purchase of the real property, Charvania transferred funds to the McAvoy's to pay off Charvania's \$1 million promissory note to

the McAvoy's (including a prepayment penalty and late charges), and to pay off Willster's \$150,000 promissory note to the McAvoy's which was secured by the third trust deed on the real property.

Shortly after the sale of the property to the Levines, Willster ceased its operations, and on September 12, 2006, Hughes and Willster filed for bankruptcy.

The Levines' Complaint Against Charvania and the McAvoy's

In January 2007, the Levines filed their complaint against Charvania and the McAvoy's. In their causes of action against Charvania, the Levines sought damages for fraud and failure of consideration. The Levines alleged that Charvania (through its manager Hughes) told them it would use the proceeds from the sale to the Levines to build up Willster's business, while concealing its true intent that Willster would dishonor the lease and abandon the real property immediately after the closing date of the sale. The Levines alleged that they had bargained for a commercially viable lease, whereas they actually received an "unleased, abandoned" property.

With respect to the McAvoy's, the Levines set forth three causes of action under the UFTA premised on transactions that occurred during the McAvoy's' 2004 sale of the property and business to Charvania and Willster, and during the 2006 escrow when the Levines purchased the property. The Levines sought to void these transactions and recover monies paid to the McAvoy's.

The Levines' pleadings and the special verdict form submitted to the jury reflect that the UFTA causes of action against the McAvoy's were premised on the Levines' challenges to essentially three transactions. First, the Levines alleged that Willster's

payment of \$750,000 to the McAvoy's for the purchase of the business in 2004 was an excessive price for the value of the business. Second, the Levines claimed that Charvania's issuance of the third trust deed on the real property in 2004 to secure Willster's \$150,000 loan from the McAvoy's for the purchase of the business was legally unauthorized and improper.³ During the escrow for the Levine's purchase of the property in 2006, Charvania transferred \$149,954.23 from the sale proceeds to the McAvoy's to pay off Willster's 2004 promissory note. Third, the Levines asserted that during the 2006 escrow Charvania improperly transferred \$83,304.04 from the sale proceeds to the McAvoy's to pay a prepayment penalty and late charges for Charvania's 2004 promissory note. The Levines alleged the prepayment penalty and late charges were also legally unauthorized and improper.⁴

To support their claims that these transactions were subject to avoidance and recovery under the UFTA, the Levines alleged various elements applicable under the UFTA. The UFTA "permits defrauded creditors to reach property in the hands of a transferee." (*Mejia v. Reed* (2003) 31 Cal.4th 657, 663.) The UFTA defines a "Creditor" as "a person who has a claim" (defined as "a right to payment"), and a "Debtor" as "a person who is liable on a claim." (§ 3439.01, subds. (b), (c), (e).) Under the UFTA, a

³ The Levines claimed that Hughes was not authorized to execute the third trust deed on behalf of Charvania, and Charvania did not receive any property, or satisfy or secure its debts, in exchange for the provision of the third trust deed.

⁴ The Levines claimed that the prepayment penalty and late charges demanded by the McAvoy's were unauthorized or excessive under the law or the terms of Charvania's promissory note.

debtor's transfer or incurrence of an obligation may be fraudulent if the debtor has the intent to hinder, delay or defraud any creditor, and the third party transferee has knowledge of this intent. Alternatively, UFTA fraud may be shown if the debtor did not receive a reasonably equivalent value in exchange for the transfer or obligation, and a statutory element showing the debtor's fraudulent intent (actual fraud) or depletion of assets (constructive fraud) is satisfied. The constructive fraud element can be satisfied if any one of the following circumstances exist: the debtor had unreasonably small remaining assets in relation to the transaction; the debtor intended to incur (or believed or reasonably should have believed it would incur) debts beyond its ability to pay; or the debtor was insolvent or became insolvent due to the transfer or obligation. (§§ 3439.04, subd. (a), 3439.05, 3439.08, subd. (a); *Mejia, supra*, at pp. 664, 669-670; *Annod Corp. v. Hamilton & Samuels* (2002) 100 Cal.App.4th 1286, 1294-1295; 16A Cal.Jur.3d (2011) Creditors' Rights and Remedies, § 326, pp. 424-425, § 402, pp. 495-496.)⁵

The Levines' complaint alleged that they had a right to payment as creditors under the UFTA, apparently because Willster had breached the lease agreement. They alleged that Charvania and Willster failed to receive a reasonably equivalent value in exchange for the transfers or obligations, and that the circumstances showed the required statutory element relating to fraudulent intent and/or depletion of assets. Based on these allegations, the Levines sought recovery of monies transferred to the McAvoy's pursuant

⁵ The fraudulent transfer provisions apply to creditors whose claims arose either before or after the transfer or obligation (§ 3439.04, subd. (a)), except for the provision concerning constructive fraud based on the debtor's insolvency which applies only to creditors whose claims arose before the transfer or obligation (§ 3439.05).

to Willster's purchase of the business in 2004, and pursuant to Charvania's escrow disbursements in 2006 to pay off Willster's promissory note and to pay the prepayment penalty and late charges on Charvania's promissory note.

Charvania defaulted on the Levines' complaint, and a judgment was later entered against it. The UFTA causes of action against the McAvoy's proceeded to trial before a jury.

The Jury's Verdict

In the special verdict form submitted to the jury, the jury was initially asked the following two questions: (1) Do the Levines have a right to payment from Willster based on Willster's payment of \$750,000 to the McAvoy's for the business in 2004? (2) Do the Levines have the right to payment from Charvania based on Charvania's issuance of the third trust deed to secure Willster's \$150,000 loan from the McAvoy's to purchase the business? The jury answered "No" to both of these questions.

Based on the jury's threshold findings that the Levines had no right to payment from Willster or Charvania, the special verdict form instructed the jury to sign the form and not answer any of the additional questions set forth in the form. The additional questions concerned such matters as the amount of money necessary to satisfy the Levines' claims; whether Charvania and Willster received reasonably equivalent value in exchange for the transfers or obligations and, if not, whether the required UFTA statutory element concerning Charvania's and Willster's fraudulent intent and/or asset depletion was satisfied; whether the Levines were harmed; and whether Willster's and Charvania's conduct was a substantial factor in causing the harm.

The trial court entered judgment in favor of the McAvoy's, finding that the Levines were not entitled to any recovery from them and awarding costs to the McAvoy's.

The McAvoy's' Motion for Attorney Fees

Thereafter, the McAvoy's filed a motion to recoup the attorney fees they had incurred for the litigation. The trial court denied the motion, finding that there was no contract between the Levines and the McAvoy's which would allow payment of fees, and the Levines were not third party beneficiaries or assignees who were "stand[ing] in the contracting party's shoes" to permit fee recoupment under Charvania's and Willster's contracts with the McAvoy's. Additionally, the court concluded that fees were not statutorily available based on the UFTA claims for fraudulent transfer.

DISCUSSION

The McAvoy's argue the trial court erred in finding that they were not entitled to contractual attorney fees. Alternatively, they contend the trial court erred in concluding attorney fees were not statutorily available under the UFTA, and we should remand the matter for the trial court to consider an equitable award of fees under the UFTA.

General Legal Principles Governing Attorney Fee Awards

Generally, "[e]ach party to a lawsuit must pay his or her own attorney fees except where a statute or contract provides otherwise." (*Cargill, Inc. v. Souza* (2011) 201 Cal.App.4th 962, 966; Code of Civ. Proc., § 1021.) Where a contract provides for an award of attorney fees in an action on the contract, the reciprocity provisions of section 1717 allow for recovery of fees by whichever party prevails in an action on the contract, regardless of whether the contract specifies that party. (§ 1717, subd. (a); *Cargill, supra*,

at p. 966; *Milman v. Shukhat* (1994) 22 Cal.App.4th 538, 543-545; *Xuereb v. Marcus & Millichap, Inc.* (1992) 3 Cal.App.4th 1338, 1342.) The contracting parties may also agree to a broader attorney fees provision which permits recovery of fees in both contract and noncontract actions. (*Xuereb, supra*, 3 Cal.App.4th at pp. 1342-1343 [provision for payment of fees in a " 'lawsuit or other legal proceeding' to which 'this Agreement gives rise' " allowed for recovery of fees in tort action].)

Absent contractual language providing otherwise, a contract providing for attorney fees to be awarded to a contracting party does not typically apply to a nonsignatory party. (See *Cargill, Inc. v. Souza, supra*, 201 Cal.App.4th at pp. 966, 968-969.) However, a nonsignatory party may be entitled to contractual attorney fees for litigation in which "the nonsignatory party 'stands in the shoes of a party to the contract.' " (*Id.* at p. 966.) That is, if the nonsignatory party sues or is sued "as if he were a party" to the contract containing the attorney fees provision, the prevailing party may be entitled to an award of fees. (*Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 127-128 [nonsignatory party who was sued as alter ego of signatory party entitled to contractual attorney fees]; *California Wholesale Material Supply, Inc. v. Norm Wilson & Sons, Inc.* (2002) 96 Cal.App.4th 598, 601, 608 [nonsignatory party who brought action based on assignment of contract rights from signatory party required to pay contractual attorney fees]; *Exarhos v. Exarhos* (2008) 159 Cal.App.4th 898, 900, 903-908 [nonsignatory party who sued as deceased contracting party's successor in interest required to pay contractual attorney fees].)

On appeal, we review de novo the question of whether there is a legal basis to award attorney fees. (*Cargill, Inc. v. Souza, supra*, 201 Cal.App.4th at p. 966.)

Contractual Attorney Fees

As the McAvoy's recognize, there was no contract between them and the Levines. Rather, the contracts were between the McAvoy's and Charvania/Willster in 2004, and then between Charvania/Willster and the Levines in 2006. Nevertheless, the McAvoy's argue that they are entitled to recover contractual attorney fees from the Levines under the 2004 contracts between the McAvoy's and Charvania/Willster. In support, the McAvoy's contend that although the Levines "styled" their causes of action as UFTA claims, they were in actuality nothing more than attacks on the contracts underlying the 2004 transaction between the McAvoy's and Charvania/Willster, and the Levines were effectively "standing in the shoes" of Charvania and Willster with respect to the 2004 contracts.⁶ We are not persuaded.

Preliminarily, we note that in their briefing on appeal the McAvoy's have not cited to any specific contractual attorney fees provisions in the 2004 contracts to support their claim that attorney fees are contractually authorized in this case. Rather, they simply argue in general fashion (without citation to the record) that the 2004 contracts "contained broadly-worded attorneys' fees provisions." Given their failure to provide us

⁶ In some circumstances, contractual attorney fees may also be available when the nonsignatory party is a third party beneficiary of the contract. (*Cargill, Inc. v. Souza, supra*, 201 Cal.App.4th at pp. 966, 970.) The McAvoy's do not contend that the Levines were third party beneficiaries of the 2004 contracts.

with the authorizing contractual language, they have not carried their burden on appeal to present a record and argument sufficient to show their entitlement to contractual attorney fees. (See *In re Marriage of Lusby* (1998) 64 Cal.App.4th 459, 470; *MST Farms v. C. G. 1464* (1988) 204 Cal.App.3d 304, 306.)⁷

In any event, even assuming arguendo the existence of an applicable contractual attorney fees clause, we agree with the trial court that the McAvoy's are not entitled to recover their fees in this case. The Levines did not "stand in the shoes" of a contracting party (i.e., Charvania/Willster) in their litigation against the McAvoy's. Rather, the Levines sued as creditors who had a right to payment from Charvania and Willster under the UFTA, for which the McAvoy's were liable due to their status as transferees who had received monies from Charvania and Willster.

The record shows that in the Levines' UFTA causes of action against the McAvoy's, the Levines were not seeking to prosecute *Charvania's and Willster's rights under the contracts* associated with Charvania's and Willster's purchase of the McAvoy's property and business in 2004. Instead, the Levines' UFTA claims were seeking to prosecute *the Levines' rights as creditors who had been defrauded by Charvania and Willster*. Although the facts alleged in support of the fraudulent transfer claims were

⁷ The McAvoy's written fee motion presented to the trial court (which is included in the appellate record) contains quotations of several fee provisions in the 2004 contractual documents. In our review of the record we have found copies of some (but not all) of these documents. The written fee motion also quotes an attorney fees provision in the 2006 escrow documents for the Levines' purchase of the property from Charvania. On appeal, the McAvoy's have presented no argument for fees under the 2006 escrow documents.

derived from matters associated with the 2004 contracts (i.e., that Willster paid too much for the business; that Charvania should not have issued the third trust deed to secure Willster's purchase of the business and should not have paid off Willster's promissory note; and that Charvania should not have paid the prepayment penalty and late charges for its promissory note on the real property), this did not transform the UFTA causes of actions into claims by the Levines that were vindicating Charvania's and Willster's rights under the contracts. To the contrary, the Levines were attempting to vindicate their own rights to recover monies paid to the McAvoy's because of Charvania's and Willster's alleged fraudulent transfers to the McAvoy's.

In short, regardless of the *factual underpinnings* of the Levines' lawsuit, the *legal underpinnings* were based solely on the Levines' rights under the UFTA. As such, the Levines did not "stand in the shoes" of Charvania and Willster as if the Levines were a party to the 2004 contracts; rather the Levines stood "in their own shoes" under the UFTA.

Moreover, even if, *arguendo*, the Levines could have had a legal basis to assert Charvania's and Willster's contractual rights vis-à-vis the McAvoy's, it is clear from the record that this was not the posture of the case presented to the jury for resolution. The special verdict form submitted to the jury turned entirely on whether Charvania and Willster had engaged in conduct that gave the Levines *a right to payment from Charvania and Willster as debtors of the Levines*. The Levines' alleged right to payment from the McAvoy's was premised on the McAvoy's status as *transferees who had received money*

from *Charvania and Willster*, not on the McAvoy's contractual obligations to Charvania and Willster.

Significantly, this is *not* a case involving litigation based on the assignment of a party's contractual rights to a nonsignatory party. By way of comparison, in *California Wholesale Material Supply, Inc. v. Norm Wilson & Sons, Inc.*, *supra*, 96 Cal.App.4th at pages 602-606, the plaintiff had received an assignment of contractual rights from a party who had contracted with the defendant, and, based on that assignment, the plaintiff alleged a statutory right to recovery from the defendant. The *California Wholesale* court concluded that the prevailing party defendant was entitled to contractual attorney fees even though the plaintiff's pleadings relied solely on the statutory right. (*Id.* at pp. 604-606.) The court reasoned that the plaintiff as an assignee of the contractual rights had "stepped into [the signatory party's] shoes as a matter of law," and the record showed that the parties necessarily litigated the plaintiff's right under the assignment to enforce the contract. (*Ibid.*) In contrast here, there is no showing that the Levines had acquired a right to enforce Charvania's, Willster's, or Hughes's rights under the 2004 contracts. Further, unlike the circumstances in *California Wholesale*, the Levines' statutory claims against the McAvoy's were not derived from an assignment of rights under the 2004 contracts, but rather from the McAvoy's status as transferees of the Levines' debtors.

In support of their contention that the Levines were asserting Charvania's contractual rights, the McAvoy's cite the fact that during the litigation the Levines filed a motion requesting to intervene and defend Charvania as real parties in interest on a cross-

complaint filed by the McAvoy's against Charvania.⁸ The Levines' intervention motion was denied, and the McAvoy's have not explained what became of their cross-complaint. We note that there is nothing in the jury's special verdict referencing the McAvoy's cross-complaint.⁹ Standing alone, these pleadings do not show the Levines effectively stepped into Charvania's "shoes" with respect to the litigation of the Levines' UFTA action against the McAvoy's.

The McAvoy's also cite a July 2007 written agreement between Hughes and the Levines in which Hughes granted the Levines an option to purchase certain rights from Hughes. This option was apparently never exercised. The trial court excluded this evidentiary item in its ruling on the attorney fees motion, and the McAvoy's have not challenged this ruling on appeal. In any event, the McAvoy's have not shown that the option to purchase placed the Levines in Hughes's "shoes" with respect to the 2004 contracts.

We conclude the trial court properly denied the McAvoy's request for attorney fees pursuant to the 2004 contracts between the McAvoy's and Charvania/Willster. The Levines were not a signatory party to the 2004 contracts, nor do they fall within a

⁸ The McAvoy's cross-complaint included causes of action against Charvania for breach of the implied covenant of good faith and fair dealing and for contribution and indemnity.

⁹ In arguments before the trial court during the hearing on the attorney fees motion, the Levines' counsel responded to the McAvoy's argument based on the Levines' intervention motion, stating: "[T]he court denied the Levines' request to intervene. If that request had been granted, the case might be in a different posture. So because the Levines didn't intervene, that's not applicable. [¶] Also, on that particular cross claim, it was abandoned. . . ."

category of nonsignatories governed by the contractual attorney fees provision. The Levines did not bring the action as if they were parties to the 2004 contracts, but rather as creditors of a contracting party.

Statutory Attorney Fees Under the UFTA

The McAvoy's argue that the trial court erred in concluding that statutory attorney fees were unavailable under UFTA. They recognize that the UFTA does not contain a provision authorizing an award of fees. However, they cite a UFTA provision permitting "[a]ny other relief as the circumstances may require" (§ 3439.07, subd. (a)(3)(C)), and assert that we should remand the matter to the trial court for it to consider an award of fees, apparently under principles of equity. We decline to do so. As stated earlier, the well-established general rule is that attorney fees are recoverable only as provided by statute or agreement of the parties. The Legislature has not provided for statutory attorney fees in UFTA cases, and we see no basis to otherwise authorize attorney fees.

DISPOSITION

The order is affirmed. Appellants to pay respondents' costs on appeal.

HALLER, J.

WE CONCUR:

NARES, Acting P. J.

O'ROURKE, J.