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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

MICHAEL MOSSMAN et al.,

Plaintiffs and Respondents,

v.

JUAN C. NARANJO et al.,

Defendants and Appellants.

D059054

(Super. Ct. No. 37-2009-00064181-
CU-BC-EC)

APPEAL from a judgment of the Superior Court of San Diego County, Laura W. Halgren, Judge. Affirmed.

Respondents Michael Mossman and Jasmine Mossman filed a complaint alleging breach of contract, intentional misrepresentation, negligent misrepresentation, and concealment against appellants Juan C. Naranjo and Isabel Naranjo. A jury found in favor of the Mossmans on their intentional misrepresentation, negligent misrepresentation and concealment claims. Additionally, the jury found clear and convincing evidence the Naranjos acted with malice, oppression and fraud. On the remaining cause of action for

breach of contract, the jury found in favor of the Naranjos. Both parties moved for attorney fees and the trial court denied both motions.

On appeal the Naranjos contend they were the prevailing party on the only contract claim in the action and were entitled to attorney fees as a matter of law. They further contend they are entitled to attorney fees without apportionment between fees incurred on the tort claims and fees incurred on the breach of contract cause of action.

We affirm. The standard real estate agreement which the parties signed permits the prevailing party in actions "arising out of" the agreement to recover reasonable attorney fees and costs. Both the Mossmans' breach of contract and tort claims arose out of the real estate agreement. Accordingly, in determining whether the Naranjos were prevailing parties entitled to recover their attorney fees, the trial court was required to consider the Mossmans' success on their tort claims. In light of that success, the Naranjos were not entitled to recover any attorney fees.

PROCEDURAL AND FACTUAL BACKGROUND

The Mossmans purchased a home from the Naranjos. Prior to the sale the Mossmans observed water damage and asked the Naranjos about it. The Naranjos stated water intrusion occurred several years earlier but repairs had been made and it was no longer a problem.

Five months after taking possession of the home, the Mossmans' home suffered from incidents of severe water intrusion. The Mossmans later learned the water intrusion was the result of improper and substandard grading adjacent to the home. There was also no water proofing on portions of a wall which was below grade.

After several attempts to resolve their concerns, the Mossmans filed a complaint alleging breach of contract, intentional misrepresentation, negligent misrepresentation and concealment. Following a trial the jury found for the Mossmans on their intentional misrepresentation, negligent misrepresentation and concealment causes of action and awarded the Mossmans \$35,000 in damages. However, the jury found the Naranjos were not liable for breach of contract. Both parties filed motions for attorney fees and both motions were denied.

The trial court denied the Naranjos' motion for attorney fees because, although they had succeeded on the Mossmans' contract claim, the Naranjos had not provided any apportionment of fees incurred on the contract and tort claims. The court further found the Mossmans' tort claims presented the predominant issues in the case and that any attorney fees incurred on the breach of contract cause of action were nominal.¹

DISCUSSION

The Naranjos contend that because the jury found in their favor for the breach of contract cause of action, they were the prevailing party and, as such, were entitled to reasonable attorney fees. We disagree.

¹ The trial court denied the Mossmans' motion because, although the trial court found the parties' agreement was broad enough to permit a prevailing party to recover attorney fees incurred on tort claims, the agreement required the Mossmans attempt to mediate their claims before initiating any litigation. The Mossmans did not appeal from this aspect of the trial court's judgment.

The parties' purchase agreement provides the prevailing party in any litigation "arising out of" the agreement may recover its attorney fees.² It is now well established such an attorney fee provision permits recovery of fees incurred in prosecuting or defending tort claims which arise out the agreement. (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 608 (*Santisas*); *Xuereb v. Marcus & Millichap, Inc.* (1992) 3 Cal.App.4th 1338, 1341.) "If a contractual attorney fee provision is phrased broadly enough, as this one is, it may support an award of attorney fees to the prevailing party in an action alleging both contract and tort claims." (*Santisas, supra*, 17 Cal.4th at p. 608.)

There is no dispute the Mossmans' tort claims arose out of the purchase agreement and thus permitted recovery of fees incurred with respect to those tort claims. (See *Xuereb v. Marcus & Millichap, Inc., supra*, 3 Cal.App.4th at p. 1341.) Importantly where, as here, there is a broad attorney fee provision and the parties' agreement does not otherwise define the term "prevailing party," in litigation involving contract and tort claims an award of attorney fees is left to a court's pragmatic determination "of the extent to which each party has realized its litigation objectives, whether by judgment, settlement, or otherwise." (See *Santisas, supra*, 17 Cal.4th at p. 622.) Contrary to the Naranjos' contention, this is not a case where the trial court was limited to consideration of the outcome of the contract cause of action.

² The attorney fees provision states: "In any action, proceeding, or arbitration between Buyer and Seller arising out of the Agreement, the prevailing Buyer or Seller shall be entitled to reasonable attorney fees and costs from the non-prevailing Buyer or Seller except as provided in paragraph 12A."

The jury's verdict here provided the Mossmans with virtually all of their litigation goals and little, if any, of the Narnajos' goals. Thus there was no basis upon which the trial court could find the Naranjos were the prevailing party within the meaning of the parties' agreement. (*Ibid.*) Accordingly, the trial court did not error in denying the Naranjos' motion.³

DISPOSITION

Judgment affirmed.

Respondents to recover their costs of appeal.

BENKE, Acting P. J.

WE CONCUR:

HUFFMAN, J.

AARON, J.

³ Because we find that the trial court did not error in denying the Naranjos' motion, we need not reach the Naranjos' further contention they are entitled to attorney fees without apportionment of the fees incurred on the contract and tort claims.