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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

RICHARD C. BERRY,

Plaintiff and Respondent,

v.

RONALD J. BERRY,

Defendant and Appellant.

D062914

(Super. Ct. No. PN29924)

APPEAL from an order of the Superior Court of San Diego County, Ronald G. Cline, Judge. Affirmed.

Allen K. Brown for Defendant and Appellant.

Tyler & Bursch, Robert H. Tyler, Jennifer L. Bursch, Jordan N. Bursch and James A. Long for Plaintiff and Respondent.

Ronald J. Berry appeals the order denying his motion for attorney fees incurred in opposing a petition to confirm a settlement agreement filed by Richard C. Berry in a

probate proceeding concerning the Berry Trust.¹ The probate court denied the motion on the ground that Richard's voluntary dismissal of the petition prevented Ronald from being a prevailing party entitled to recover attorney fees under Civil Code section 1717. We affirm.

BACKGROUND

Doris O. Berry created the Berry Trust and, after she resigned as trustee, designated as cotrustees her two sons, Richard and Ronald, and her two daughters, Carolyn and Marilyn. Richard resigned as a cotrustee after he developed concerns his siblings were violating the fiduciary duties they owed to the non-trustee beneficiaries. Richard subsequently commenced this probate proceeding against the remaining cotrustees to prevent certain distributions of trust assets and to obtain certain trust documents.

After Doris died, Ronald produced a codicil that purportedly changed distributions to certain beneficiaries; added Richard's sons Gregory and Christopher as new beneficiaries; and deleted other beneficiaries. Richard filed a petition to invalidate the codicil on grounds of lack of capacity, undue influence, forgery, improper execution, menace, duress, coercion, and fraud.

Richard and his siblings mediated their dispute and signed a settlement agreement and mutual release of claims (hereafter, settlement agreement). They agreed, among

¹ Because the parties have the same last name, we identify them by their first names for brevity and clarity. In so doing, we intend no disrespect or undue familiarity.

other things, that (1) the codicil was "void and invalid"; (2) they would share equally in all distributions from the trust; (3) certain loans and distributions paid to Richard's siblings would be deducted from their final distributions from the trust; (4) an inventory and appraisal of all of Doris's personal property would be prepared; (5) the siblings would not pay themselves any additional fees for acting as cotrustees; (6) the siblings would provide trust financial records to Richard and an accountant to allow preparation of a complete accounting of the trust; and (7) Richard's attorney fees would be reimbursed from the trust upon receipt of proper documentation. The settlement agreement provided for a mutual release of claims and the filing of a notice of dismissal with prejudice. The settlement agreement contained several "miscellaneous provisions," including a severability clause and an attorney fee clause.² Neither Gregory nor Christopher signed the settlement agreement.

Richard did not dismiss the probate proceeding and subsequently filed a petition to confirm the settlement agreement. In that petition, he alleged his siblings had breached the agreement in several ways, including by paying themselves additional fees for acting as cotrustees, by not providing documents needed for a complete accounting of the trust, and by not paying his attorney fees. Richard asked the court to confirm and to approve

² The severability clause states: "Each paragraph of this Agreement is separate and divisible, and in the event that any paragraph shall be held to be invalid, the remaining paragraphs shall continue to be in full force and effect." The attorney fee clause states: "In the event legal proceedings are instituted to enforce any term and provision of this Agreement, the prevailing parties shall be entitled to recover his or her reasonable attorney's fees and costs incurred therein."

the settlement agreement, and specifically to hold Gregory was not a beneficiary of the trust because the codicil was "void ab initio."

In response to Richard's petition to confirm the settlement agreement, Gregory and Christopher appeared in the proceeding and filed a motion for summary judgment on the ground Richard could not enforce the settlement agreement against them. (See Code Civ. Proc., § 437c.) The probate court denied the motion on the procedural ground that Richard's petition was not susceptible to resolution via summary judgment. In the court's view, the relief Richard sought by his petition was enforcement of the settlement agreement; the proper way to obtain that relief was not by petition under the Probate Code, but by motion under Code of Civil Procedure section 664.6;³ and summary judgment cannot be had as to a motion.

Richard then filed a motion to enforce the settlement agreement under Code of Civil Procedure section 664.6. The probate court denied the motion on two grounds: (1) the record contained no evidence the court had retained jurisdiction to enforce the settlement agreement (see *Wackeen v. Malis* (2002) 97 Cal.App.4th 429, 440 (*Wackeen*))

³ Although this ruling has not been challenged on appeal, it was incorrect. The summary enforcement procedure of Code of Civil Procedure section 664.6 "is not the exclusive means to enforce a settlement." (*Levy v. Superior Court* (1995) 10 Cal.4th 578, 586, fn. 5.) Alternative procedures include a motion for summary judgment, a separate suit in equity, and amendment of the pleadings in the action to allege a claim for breach of contract. (*Ibid.*; *Robertson v. Chen* (1996) 44 Cal.App.4th 1290, 1293 (*Robertson*.) Richard's petition to confirm the settlement agreement arguably could be considered a motion for summary judgment to resolve the entire dispute, or an amendment to his earlier pleadings which added a count seeking specific performance of the settlement agreement.

[to enforce settlement agreement after dismissal of case, parties must request retention of jurisdiction in writing signed by parties or orally before court while case is still pending]);⁴ and (2) the settlement agreement was not enforceable because it was not signed by Gregory and Christopher, who were interested parties in that their rights under the codicil would be extinguished by the settlement agreement (see *Levy, supra*, 10 Cal.4th at p. 586 [settlement not enforceable under Code Civ. Proc., § 664.6 if not signed by parties themselves]).

After the probate court refused to enforce the settlement agreement under Code of Civil Procedure section 664.6, Ronald, Carolyn, Marilyn, Gregory, and Christopher filed a motion to dismiss Richard's petition to confirm the settlement agreement. Ronald and the other moving parties argued Richard's petition should be dismissed with prejudice because the probate court's prior order denying his motion to enforce the settlement agreement rendered the petition moot and barred by principles of res judicata and collateral estoppel. The day his opposition to the motion was due, Richard filed a request for dismissal with prejudice of his petition to confirm the settlement agreement, and the court clerk entered the dismissal that day.

Next, Ronald, Carolyn, Marilyn, Gregory, and Christopher invoked the attorney fee clause of the settlement agreement (see fn. 2, *ante*) and moved for an award of fees

⁴ Although this ruling has not been challenged on appeal, it was incorrect. Since neither the probate proceeding nor any of the parties had been dismissed before Richard filed his motion to enforce the settlement agreement, there was no need to ask the probate court to retain jurisdiction to enforce it. (See *Casa de Valley View Owner's Assn. v. Stevenson* (1985) 167 Cal.App.3d 1182, 1191-1192 [court may enforce settlement agreement under Code Civ. Proc., § 664.6 prior to dismissal of entire action].)

they incurred in litigating Richard's petition to confirm the settlement agreement. The probate court denied the motion on the ground that under Civil Code section 1717, subdivision (b)(2), Richard's voluntary dismissal of the petition prevented any party from being a prevailing party entitled to recover attorney fees.

Ronald filed a notice of appeal from the order denying attorney fees. (Prob. Code, § 1300, subd. (e).)

DISCUSSION

Ronald argues the probate court erred in relying on Civil Code section 1717, subdivision (b) and ruling that Richard's voluntary dismissal of his petition to confirm the settlement agreement prevented Ronald from being a prevailing party entitled to recover attorney fees. According to Ronald, the dismissal was not truly "voluntary" because it was filed while a motion to dismiss the petition was pending and after the court had ruled the settlement agreement was unenforceable. We disagree.

Where, as here, a party invokes a contractual fee provision to recover attorney fees incurred in litigating contract claims, Civil Code section 1717 governs. (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 614-615; *Douglas E. Barnhart, Inc. v. CMC Fabricators, Inc.* (2012) 211 Cal.App.4th 230, 237.) Section 1717, subdivision (a) authorizes "the party prevailing on the contract" to recover reasonable attorney fees. A party who defeats a contract action by proving no enforceable contract exists may be the prevailing party. (*Santisas*, at p. 611; *Jones v. Drain* (1983) 149 Cal.App.3d 484, 490.) Section 1717, subdivision (b)(2), however, provides: "*Where an action has been voluntarily dismissed or dismissed pursuant to a settlement of the case, there shall be no prevailing party for*

purposes of this section." (Italics added.) Here, Richard voluntarily dismissed his petition to enforce the settlement agreement before the probate court made any decision on it. Therefore, there was no prevailing party entitled to recover contractual attorney fees. (*Ibid.*; *Santisas*, at p. 617; *Del Cerro Mobile Estates v. Proffer* (2001) 87 Cal.App.4th 943, 947-948.)

Ronald contends there "was no 'voluntary' dismissal by [Richard] on the eve of the motion to dismiss when he had knowledge of the [c]ourt's indication of the legal merits and procedural inaccuracies of his [p]etition," based on the probate court's prior rulings on the motion for summary judgment and the motion to enforce the settlement agreement. In support of this contention, Ronald relies on the general rule that a dismissal is not voluntary when it is requested "in the light of a public and formal indication by the trial court of the legal merits of the case." (*Franklin Capital Corp. v. Wilson* (2007) 148 Cal.App.4th 187, 200 (*Franklin*)). We reject this contention.

The probate court's prior rulings gave no indication of its ultimate view of the merits of Richard's petition to confirm the settlement agreement. In denying Gregory and Christopher's motion for summary judgment directed at the petition, the court stated the proper procedure to enforce the settlement agreement was the summary procedure specified by Code of Civil Procedure section 664.6. And in denying Richard's subsequent section 664.6 motion, the court ruled the agreement was not enforceable because certain procedural requirements of the statute (namely, a formal request for retention of jurisdiction and a settlement agreement signed by all parties) were not satisfied. (See *Levy, supra*, 10 Cal.4th at p. 586; *Wackeen, supra*, 97 Cal.App.4th at

p. 440.) The failure of the settlement agreement to satisfy the procedural prerequisites of section 664.6, however, "does not render it per se unenforceable." (*Stewart v. Preston Pipeline Inc.* (2005) 134 Cal.App.4th 1565, 1585.) "Even when the summary procedures of section 664.6 are not available, a settlement agreement might be enforceable by [other means]." (*Robertson, supra*, 44 Cal.App.4th at p. 1293.) Thus, in refusing to enforce the settlement agreement by the summary procedure of section 664.6, the probate court did not determine the agreement was unenforceable by any means and thereby effectively deny Richard's petition on the merits.

Even had the probate court's prior rulings given some indication of its view of the merits of Richard's petition to confirm the settlement agreement, that indication was not broad enough to render Richard's dismissal of the petition involuntary and thereby subject him to liability for attorney fees under the fee clause of the settlement agreement. California courts repeatedly have held that Civil Code section 1717, subdivision (b)(2) bars a defendant from recovering contractual attorney fees from a plaintiff who voluntarily dismisses an action, even though prior to the dismissal the defendant filed dispositive motions on *all* of the plaintiff's claims and the court made adverse rulings on *only some* of those claims. (See, e.g., *Gogri v. Jack in the Box Inc.* (2008) 166 Cal.App.4th 255, 260, 274 (*Gogri*) [fees erroneously awarded when plaintiff dismissed complaint after court sustained demurrer to some claims without leave to amend and defendant filed motion for summary judgment on remaining claims]; *Chase Manhattan Mortgage Corp. v. Lessel* (1997) 55 Cal.App.4th 10, 12, 13 [fees properly denied when plaintiff dismissed lawsuit after court determined on summary judgment that most of

plaintiff's claims were precluded as a matter of law]; *Rosen v. Robert P. Warmington Co.* (1988) 201 Cal.App.3d 939, 941-944 [same when plaintiff dismissed action after trial court granted defendant's motion for judgment on the pleadings on one claim and defendant noticed motion for summary judgment on others].)

Here, the probate court's ruling on Richard's motion under Code of Civil Procedure section 664.6 that the settlement agreement was unenforceable, because it purported to extinguish the rights of Gregory and Christopher created by the codicil even though they had not signed the settlement agreement, might have indicated Richard's petition to confirm the settlement agreement would fail *to the extent it sought to invalidate the codicil on the basis of that agreement*. That ruling, however, did not necessarily portend the failure of Richard's petition to the extent it sought to force his siblings, who did sign the settlement agreement, to perform their obligations not to pay themselves additional fees for acting as cotrustees, to provide trust documents to Richard and the accountant, and to reimburse his attorney fees. Those obligations appear unrelated to, and may have been severable from, the provision of the settlement agreement invalidating the codicil. (See, e.g., *Simmons v. Cal. Institute of Technology* (1949) 34 Cal.2d 264, 275 ["a contract may be severable as to some of its terms, or for certain purposes"]; *Timney v. Lin* (2003) 106 Cal.App.4th 1121, 1126-1130 [severing unenforceable provision from settlement agreement and enforcing remainder].) The settlement agreement contains a severability clause (see fn. 2, *ante*); and in supplemental briefing we solicited on the severability issue, the parties dispute whether the unenforceable provision voiding the codicil may be severed from the other provisions,

with Richard asserting that "the remaining portions of the [s]ettlement [a]greement are still valid and fully enforceable," and Ronald countering that all of the provisions "are dependent upon and not severable from each other."

We need not and do not resolve the parties' dispute about severability. The important point for purposes of this appeal is that the dispute existed and required resolution by the probate court before it could dispose of Richard's petition to confirm the settlement agreement on the merits. (See, e.g., *Keene v. Harling* (1964) 61 Cal.2d 318, 320 [whether contract is severable is question of construction for court based on language, subject matter, and parties' intent]; *Sanchez v. Western Pizza Enterprises, Inc.* (2009) 172 Cal.App.4th 154, 178 [same].) The court, however, had no occasion to consider, and did not decide, the severability issue in its order denying Richard's motion to enforce the settlement agreement; and Richard subsequently prevented resolution of the issue by dismissing with prejudice his petition to enforce the settlement agreement. Therefore, because "at the time [Richard] filed his . . . voluntary dismissal, the [probate] court had not yet made any decision or taken any other action that effectively disposed of the entire [petition]," the dismissal was voluntary and prevented Ronald from being a prevailing party for purposes of recovering attorney fees under Civil Code section 1717. (*Gogri, supra*, 166 Cal.App.4th at p. 267.)

Ronald ignores the *Gogri* line of cases and instead relies on cases prohibiting a plaintiff from voluntarily dismissing an action *without prejudice* when the case has advanced to the point that a judgment adverse to the plaintiff is inevitable. (See, e.g., *Groth Bros. Oldsmobile, Inc. v. Gallagher* (2002) 97 Cal.App.4th 60, 73 [plaintiff that did not oppose demurrer could not voluntarily dismiss action without prejudice after trial court made tentative ruling to sustain demurrer without leave to amend]; *Cravens v. State Bd. of Equalization* (1997) 52 Cal.App.4th 253, 257 [plaintiff who did not oppose summary judgment motion could not avoid judgment "by the stratagem of filing a last minute request for dismissal without prejudice"]; *Mary Morgan, Inc. v. Melzark* (1996) 49 Cal.App.4th 765, 767 ["plaintiff may not dismiss an action without prejudice after an adverse tentative summary judgment ruling has been announced"]; see also *Franklin, supra*, 148 Cal.App.4th at pp. 202-203 [collecting cases].) These cases are not on point. "Unlike the plaintiffs in those cases, [Richard] filed a voluntary dismissal *with prejudice*. [His] intent was to end the litigation [concerning the settlement agreement], not to manipulate the judicial process to avoid its inevitable end. This was entirely proper." (*Marina Glencoe, L.P. v. Neue Sentimental Film AG* (2008) 168 Cal.App.4th 874, 878, some italics added.)

Ronald also cites *Bank of America, N.A. v. Mitchell* (2012) 204 Cal.App.4th 1199, 1212, in support of his argument that when Richard filed his request for dismissal, "judgment against [him] had already 'ripened to the point of inevitability.'" *Mitchell* is distinguishable, however, because in that case the plaintiff sought to dismiss its action with prejudice after the trial court sustained the defendant's demurrer *to the entire complaint* without leave to amend and after the defendant filed a motion for attorney fees under Civil Code section 1717. (*Mitchell*, at p. 1208.) In that situation, the Court of Appeal held the defendant "no longer had the right to voluntarily dismiss its action," and affirmed the award of attorney fees to the defendant. (*Id.* at pp. 1212, 1213.) Here, by contrast, the probate court made no dispositive ruling on the entirety of Richard's petition before he requested dismissal, nor had Ronald moved for attorney fees before the request. Unlike the situation in *Mitchell*, a final disposition of the entirety of the petition against Richard was not inevitable. Hence, *Mitchell* does not support an award of attorney fees under section 1717 in this case.

Finally, we note our conclusion that Civil Code section 1717, subdivision (b)(2) prohibits Ronald from recovering contractual attorney fees from Richard makes it unnecessary to address the parties' arguments as to whether the order denying Richard's motion to enforce the settlement agreement bars Ronald's claim for fees under the

doctrine of res judicata or collateral estoppel, or whether the probate court had discretion to deny the motion for attorney fees. We therefore express no opinion on those issues.

DISPOSITION

The order denying Ronald's motion for attorney fees is affirmed.

IRION, J.

WE CONCUR:

NARES, Acting P. J.

AARON, J.