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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

OXNARD CORNER, LLC,

Defendant and Appellant,

v.

AP-COLTON, LLC,

Defendant and Respondent.

E053678

(Super.Ct.No. CIVDS1014557)

OPINION

APPEAL from the Superior Court of San Bernardino County. David Cohn, Judge.

Affirmed.

Law Offices of Ehsan Afaghi, Ehsan Afaghi, Firouzeh Simab; Gresham Savage Nolan & Tilden, Theodore K. Stream and Jamie E. Wrage for Plaintiff and Appellant.

Barry L. Cohen & Associates, Barry L. Cohen and El Mahdi Young for Defendant and Respondent.

Plaintiff Oxnard Corner, LLC (Oxnard), owns one of seven parcels in a shopping center on which it operates a supermarket. AP-Colton (AP-C), owned the remaining six parcels, which were leased out subject to a restrictive clause prohibiting the sale of

groceries on any of AP-C's parcels. A subdivision-lessee of one tenant engaged in the prohibited activity and failed to correct the breach. Oxnard sued AP-C, its tenant and subtenant for injunctive relief, as well as for damages sounding in both contract and tort theories. While a hearing on AP-C's pleading attacks was pending, Oxnard voluntarily dismissed AP-C, and AP-C filed a memorandum of costs. AP-C subsequently filed a motion for attorneys' fees, which was granted. Oxnard appeals that order.

On appeal, Oxnard argues that the court erred (1) in awarding attorneys' fees pursuant to Code of Civil Procedure section 1032; (2) finding that AP-C was the prevailing party; (3) making an order for attorneys' fees prematurely; (4) refusing to delay ruling on the motion until after the case was concluded; (5) refusing to apportion fees between the contract and tort causes of action; and (6) violating the one-judgment rule. We affirm.

BACKGROUND

Because there was no trial, we recite the facts as they are presented in the pleadings.

Colton Shopping Center comprises seven parcels: AP-C owns parcel Nos. 1, 2, 4, 5, 6, and 7, and Oxnard owns parcel No. 3, which is improved by a supermarket plaintiff purchased from Albertson's. Pursuant to a Declaration of Restrictions and Grant of Easements (Declaration of Restrictions) covering the entire shopping center, no part of parcel Nos. 1, 2, 4, 5, 6, or 7 could be used as a supermarket, bakery, or for the sale of fresh or frozen meat, fish, poultry, or produce, for off premises consumption. This restriction was binding upon the owners of the parcels, as well as any heirs, personal

representatives, successors and assigns, and upon any person acquiring a parcel, or any portion thereof, or any interest therein for 65 years from the date of the declaration.

Prior to 1999, AP-C's predecessor in interest leased parcel No. 1 to Thrifty-Payless, a subsidiary of Rite Aid Corporation for the operation of a drug store. In May, 2010, Thrifty-Payless subleased the parcel to Just Bargain Stores. Just Bargain Stores engaged in the sale of food and grocery items in violation of the Declaration of Restrictions, despite Oxnard's demands to cease and desist. Oxnard filed a complaint against AP-C, Thrifty-Payless, Rite Aid Corporation, and Just Bargain Stores on October 20, 2010. The complaint alleged four causes of action against all four defendants: (1) Breach of Contract; (2) Breach of Implied Covenant of Good Faith and Fair Dealing; (3) Intentional Interference with Prospective Advantage; and (4) Negligent Interference with Prospective Advantage.

On November 19, 2010, AP-C filed a demurrer to the Third and Fourth Causes of Action for failing to state a cause of action because the tort claims arose from a contract, and a motion to strike the punitive damage claims, based also on the fact the matter arose from a contract. The remaining defendants answered the complaint on November 22, 2010, and cross-complained against Just Bargain Stores and its owners.

Prior to the hearing on AP-C's demurrer and motion to strike, Oxnard entered into an agreement with Just Bargain Stores and Thrifty-Payless, resulting in a Stipulation and Order for Preliminary Injunction, filed on December 6, 2010. On December 20, 2010, Oxnard filed an opposition to AP-C's demurrer and motion to strike. On December 28,

2010, Oxnard executed a voluntary dismissal of its complaint against AP-C, without prejudice, which was entered as requested on December 29, 2010, by the clerk.

On January 14, 2011, AP-C submitted its cost memorandum, seeking filing fees in the amount of \$454, and attorneys' fees in an amount to be determined by a later motion. On February 14, 2011, AP-C filed a motion for attorneys' fees in the amount \$16,926, which Oxnard opposed. On April 25, 2011, the court heard and granted the motion, awarding \$16,926 to AP-C, finding that matter was governed by Code of Civil Procedure sections 1032 and 1033.5. Oxnard appealed from that order.¹

DISCUSSION

1. Whether AP-C Was a Prevailing Party, Entitled to Attorneys' Fees as Costs.

Oxnard argues that the trial court erred in determining that AP-C was the prevailing party and in awarding attorneys' fees to AP-C. Oxnard asserts that Code of Civil Procedure section 1032, authorizes the award of costs to a prevailing party, but does not authorize the award of attorneys' fees. We disagree.

We review the determination of the *legal basis* for an award of legal fees de novo as a question of law. (*Cullen v. Corwin* (2012) 206 Cal.App.4th 1074, 1078.) We review the trial court's decision for abuse of discretion. (*Salehi v. Surfside III Condominium Owners Assn.* (2011) 200 Cal.App.4th 1146, 1154.) The right to recover costs is purely a

¹ On May 23, 2011, after the notice of appeal had been filed, a permanent injunction was ordered upon the stipulation of Oxnard and the remaining defendants. Notice of entry of that judgment was filed on June 8, 2011, after which Oxnard dismissed the balance of the complaint as against all the defendants.

creature of statute, and the applicable statute defines the extent of a party's right to recover costs. (*People v. United States Fire Ins. Co.* (2012) 210 Cal.App.4th 1423, 1427.) Attorney fees are an element of costs if authorized by statute. (*County of Kern v. Jadwin* (2011) 197 Cal.App.4th 65, 72.) We look to the language of the contract to determine if the court properly found attorney fees are authorized, and we look to statutory and decisional law to determine if the court properly found AP-C was the prevailing party.

a. Whether Attorney Fees May Be Awarded Post-Dismissal in Contract or Tort Claims.

Prior to 1968, attorneys' fees and costs could not be awarded upon a voluntary dismissal of an action. (*Khavarian Enterprises, Inc. v. Commline, Inc.* (2013) 216 Cal.App.4th 310, 322.) Civil Code section 1717 was enacted in 1968, creating a reciprocal right to attorney fees in contracts containing unilateral attorney fee provisions. (*Id.* at p. 322, citing *International Industries, Inc. v. Olen* (1978) 21 Cal.3d 218, 223.) However, even then the Supreme Court concluded that public policy and equitable considerations required the parties to bear their own attorney fees when the plaintiff voluntarily dismissed an action prior to trial, whether the claim for fees was based on a contract provision or on the reciprocal right provided by Civil Code section 1717. (*Khavarian*, at p. 322.)

The *Olen* decision was reconsidered in *Santisas v. Goodin* (1998) 17 Cal.4th 599, where the Supreme Court held that postdismissal awards of attorney fees outside the scope of Civil Code section 1717 were not against public policy. (*Santisas*, at pp. 621-

622.) Instead, they are limited to causes of action sounding in contract and based on a contract containing an attorney fee provision. (*Khavarian Enterprises, Inc. v. Commline, Inc.*, *supra*, 216 Cal.App.4th at p. 325.)

If the contractual provision limits an award of attorney fees to the party who has prevailed on the contract, fees may be awarded only to that party, and Civil Code section 1717 is invoked. (*Maynard v. BTI Group, Inc.* (2013) 216 Cal.App.4th 984, 990.) In such a situation, the determination of prevailing party for purposes of contractual attorney fees is made without reference to the success or failure of noncontract claims, in favor of the party who obtains greater relief on the contract action. (*Ibid.*) However, an attorney fee provision in a contract need not be so limited. (*Id.* at p. 991.) Moreover, the specific language of the contract does not necessarily govern the award. (*Frog Creek Partners, LLC v. Vance Brown, Inc.* (2012) 206 Cal.App.4th 515, 545.)

The attorney fees clause in a contract may be broad enough to cover tort as well as contract causes of action. (*Maynard v. BTI Group, Inc.*, *supra*, 216 Cal.App.4th at pp. 991-992, citing *Hasler v. Howard* (2005) 130 Cal.App.4th 1168, 1171; *Childers v. Edwards* (1996) 48 Cal.App.4th 1544, 1549.) If the provision is broad enough to cover noncontractual claims, the prevailing party entitled to recover fees will normally be the party whose net recovery is greater, in the sense of most accomplishing its litigation objectives, whether or not that party prevailed on a contract cause of action. (*Maynard v. BTI Group, Inc.*, *supra*, 216 Cal.App.4th at p. 992.)

Code of Civil Procedure section 1033.5, subdivision (a)(10), provides that attorneys' fees are allowable as costs under section 1032, when they are authorized by

either contract, statute, or law. (*Santisas v. Goodin, supra*, 17 Cal.4th at p. 606.)

Contract provisions referring to any claim “in connection with” a particular agreement (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 966), or to any action “arising out of” an agreement (*Santisas*, at p. 608), or based on the outcome of “any dispute,” encompass all claims, whether in contract, tort, or otherwise. (*Maynard v. BTI Group, Inc., supra* 216 Cal.App.4th at p. 993.)

A contract provision authorizing an award of attorney fees in an action to enforce any provision of the contract is not broad enough to cover tort claims. (*Gil v. Mansano* (2004) 121 Cal.App.4th 739, 743.) However, a defense to a tort action may be based on a provision of a contract and have the effect of enforcing the provisions of the contract. (*Ibid.*) In *Gil v. Mansano*, the contract provision related solely to “instituting” an action to enforce a provision of the contract and was held to be limited to the party filing an action based on the contract, not defending on that basis. In *Allstate Ins. Co. v. Loo* (1996) 46 Cal.App.4th 1794, language relating to “any legal action brought by either party to enforce the terms hereof or relating to the demised premises” encompassed any action, whether in contract or in tort. (*Id.* at p. 1799.)

In the present case, paragraph 6.13 of the Declaration of Restrictions governing attorney’s fees provides, “In the event any person is required to initiate or defend any legal action or proceeding to enforce or interpret any of the terms of this Declaration, the prevailing party in any such action or proceeding shall be entitled to recover its reasonable costs and attorney’s fees (including its reasonable costs and attorney’s fees on any appeal).” It expressly included both initiating and defending any legal action. The

broader language supports a broader interpretation. (*Gil v. Mansano, supra*, 121 Cal.App.4th at p. 744; *Exxess Electronixx v. Heger Realty Corp.* (1998) 64 Cal.App.4th 698, 712.)

At oral argument, Oxnard noted that in *Exxess Electronixx, supra*, the order awarding attorney's fees was reversed because the tort claims were not brought to "enforce the terms" of the lease agreement containing the attorney fee provision. In that case, the lease language provided for an award of attorney's fees "[I]f any Party or Broker brings an action or proceeding to enforce the terms hereof or declare rights hereunder, . . ." (*Exxess Electronixx v. Heger Realty Corp., supra*, 64 Cal.App.4th at pp. 702-703.) Oxnard argues that *Exxess Electronixx* is squarely on point because the "declare rights hereunder" language is synonymous with "interpret any of the terms of this Declaration" found in the present matter. We disagree.

The court in *Exxess Electronixx* held that the lease language referring to "declare rights hereunder" was a narrow term, which limited attorney's fees to actions for declaratory relief, so it did not apply to tort claims for constructive fraud and breach of fiduciary duty. (*Exxess Electronixx, supra*, 64 Cal.App.4th at pp. 710-711.) The present case does not contain such limiting language. Instead, it broadly authorizes an award of attorney's fees for initiating or defending any legal action or proceeding to enforce or interpret any of the terms of the declaration of restrictions. Having broader language, the provision is subject to a broader interpretation.

This case is more analogous to *Santisas v. Goodin, supra*, 17 Cal.4th at page 603, where the clause called for attorney's fees "[i]n the event legal action is instituted by the

Broker(s), or any party to this agreement or arising out of the execution of this agreement, . . .” Similarly, attorney’s fees were authorized in *Gonzales v. Personal Storage, Inc.* (1997) 56 Cal.App.4th 464, 480, where the clause called for attorney’s fees in “any legal action. . . .” Attorney’s fees were also properly ordered in *Drybread v. Chipain Chiropractic Corp.* (2007) 151 Cal.App.4th 1063, 1071-1072, where the lease provided for such an award “[i]n the event legal action is instituted [. . .] arising out of the execution of this agreement” The language of the declaration of restrictions in the present case is equally broad, justifying application of attorney’s fees in noncontract actions.

b. Prevailing Party Determination

As to which party is the prevailing party in the case before us, we look to the statute. Code of Civil Procedure section 1032, subdivision (b), provides that except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding. Subdivision (a)(4) of section 1032 defines “prevailing party,” in relevant part, as one with a net monetary recovery, a defendant in whose favor a dismissal is entered, a defendant where neither plaintiff nor defendant obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against that defendant. “If a party fits one of the definitions of ‘prevailing’ listed in C.C.P. 1032(a)(4) . . . that party is entitled as a matter of right to recover costs.” (*Zintel Holdings, LLC v. McLean* (2012) 209 Cal.App.4th 431, 441.)

The term “net monetary recovery” refers to the party who gains money that is free from all deductions. (*Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1334.) “Net

monetary recovery” is determined without regard to settlements or other contributions from unrelated defendants or from other parties. (*Id.* at p. 1335, citing *Wakefield v. Bohlin* (2006) 145 Cal.App.4th 963, 982.) A plaintiff who obtains a verdict against a defendant that is offset to zero by settlements with other defendants does not gain any money free from deductions and gains nothing. (*Ibid.*, citing *Wakefield*, at p. 992.)

Here, AP-C was voluntarily dismissed from the action before Oxnard negotiated the stipulated preliminary injunction against Thrifty Payless and Just Bargain Stores, and while hearing on AP-C’s demurrer to the tort causes of action was pending. AP-C qualified as a defendant “in whose favor a dismissal was entered,” and as a defendant as against “those plaintiffs who d[id] not recover any relief against that defendant.” Because we must determine whether Oxnard experienced a “net monetary recovery” without regard to settlements with other defendants, the dismissal of AP-C made it the prevailing party, and entitled AP-C to recover costs as a matter of right. There was no error in determining whether AP-C was the prevailing party and entitled to attorneys’ fees as costs pursuant to Code of Civil Procedure sections 1032 and 1033.5.

2. Whether the Motion for Allowance of Attorneys Fees’, As An Element of Costs, Was Made Prematurely.

At the hearing, the trial court indicated its tentative ruling to grant AP-C’s motion for attorneys’ fees. Oxnard’s counsel indicated that whether or not it had achieved its litigation goals was premature because a case management conference was scheduled for a later date, and the case might settle in Oxnard’s favor. Although the court did not

expressly deny the request to continue the hearing, it proceeded to grant the motion. It therefore denied the continuance impliedly.

On appeal, Oxnard argues that the court erred in granting the motion before final disposition of the litigation and before the entry of a final judgment. In a separate argument, Oxnard contends that the order awarding attorneys' fees violated the "One Final Judgment Rule."

A dismissal with prejudice is the equivalent of a final judgment on the merits, barring the entire cause of action. (*Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 793; *Torrey Pines Bank v. Superior Court* (1989) 216 Cal.App.3d 813, 821-822.) A dismissal without prejudice is not a bar to another action by the plaintiff on the same cause. (*Gagnon Co. v. Nevada Desert Inn, Inc.* (1955) 45 Cal.2d 448, 455.) However, in other respects, a dismissal without prejudice has the effect of a final judgment in favor of the defendant, for it terminates the action and concludes the rights of the parties in that particular action. (*Ibid.*)

In the trial court, Oxnard did not object on the ground that the motion was premature for lack of a notice of entry of judgment. Instead, Oxnard's objection was that it was premature to determine whether Oxnard has achieved its litigation goals at this point, because it might settle the case with the remaining defendants. Whether or not Oxnard was able to settle with the other defendants would not alter the fact that AP-C was a prevailing party pursuant to Code of Civil Procedure section 1032, because the "net monetary recovery" determination must be made without regard to settlements or other

contributions from other defendants or from other parties. (*Goodman v. Lozano, supra*, 47 Cal.4th at p. 1335.) Thus, it was not an abuse of discretion to deny a continuance.

A motion for attorney's fees must be served and filed within the time for filing a notice of appeal under California Rules of Court, rule 8.104 and 8.108. (Cal. Rules of Court, rule 3.1702.) There are no rules governing time limits for motions for attorney's fees made upon the entry of a voluntary dismissal by the plaintiff, but as an item of costs, the rules governing the filing of a memorandum of costs are instructive.

A memorandum of costs must be filed within 15 days after the date of mailing of the notice of entry of judgment *or dismissal* by the clerk under Code of Civil Procedure section 664.5, or the date of service of written notice of entry of judgment or dismissal, or within 180 days after entry of judgment, whichever is first. (Cal. Rules of Court, rule 3.1700 [*italics added*].) The time limitation within which a memorandum of costs must be filed does not constitute a matter of jurisdiction; rather, it is directed to the sound discretion of the court. (*Le Deit v. Ehlert* (1962) 205 Cal.App.2d 154, 170.) A dismissal is entered when it is entered in the clerk's register; it is thereafter effective for all purposes. (*Boonyarit v. Payless Shoesource, Inc.* (2006) 145 Cal.App.4th 1188, 1192.)

However, entry of a judgment is not required. (*Fries v. Rite Aid Corp.* (2009) 173 Cal.App.4th 182, 183, 188.) The 15-day period within which to file a costs bill commences to run upon notice to the defendant of entry of dismissal. (*Ibid.*) In *Boonyarit, supra*, the court addressed the legal effectiveness of a dismissal of defendant *Payless* that had not been entered by the clerk. The court held the dismissal was

ineffective because it was never entered, so *Payless* failed to perfect its statutory right to costs. (*Boonyarit v. Payless Shoesource, Inc.*, *supra*, 145 Cal.App.4th at pp. 1192-1193.)

Here, the dismissal had been duly entered by the clerk before AP-C submitted its memorandum of costs. It was properly and timely filed. However, the motion for attorneys' fees was technically filed prematurely, since such motions are usually filed postjudgment. Nevertheless, as to AP-C, the action had concluded and the voluntary dismissal was not an appealable judgment. Whether it was made before the entry of judgment is irrelevant as to AP-C. In any event, the premature determination of attorneys' fees inured to Oxnard's interest because it prevented AP-C from incurring subsequent additional fees for postdismissal activities. The early filing of the motion to allow attorneys' fees was harmless error.

As to the asserted violation of the "one final judgment" rule, we find none. That doctrine deals with the appealability of prejudgment rulings, not a postjudgment motion for attorneys' fees. Under the one final judgment rule, an appeal may be taken only from the final judgment in an entire action. (*In re Baycol Cases I & II* (2011) 51 Cal.4th 751, 756.) The theory behind the rule is that piecemeal disposition and multiple appeals in a single action would be oppressive and costly and that a review of intermediate rulings should await the final disposition of the case. (*Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 697.)

A trial court does not violate the one final judgment rule by making a ruling on a motion. Instead, a party violates the rule by attempting to appeal from an intermediate

ruling. Entertaining the motion for attorneys' fees did not violate the one final judgment rule.

3. *Whether the Attorneys' Fees Should Have Been Apportioned Between the Contract and Non-Contract Claims.*

Oxnard argues that the trial court erred by failing to apportion attorneys' fees between the contract and tort causes of action, thereby awarding an unreasonable amount of attorneys' fees. We disagree.

The attorney fee clause contained in the Declaration of Restrictions encompasses both contract and noncontract claims. In such cases, in awarding fees to the prevailing party it is unnecessary to apportion fees between those claims. (*Maynard v. BTI Group, Inc., supra*, 216 Cal.App.4th at p. 992, citing *Cruz v. Ayromloo* (2007) 155 Cal.App.4th 1270, 1277 [language of the attorney fee clause covered all fees in any civil action stemming from the lease, so court did not have to base award solely on breach of contract damages and was not required to apportion fees between contract and tort causes of action].)

The pivotal point in the analysis of whether a prevailing party is entitled to recover contractual attorney fees for defending against a competing non-contractual claim (where the contract language does not encompass non-contractual claims or is ambiguous) is not whether the fees can be apportioned between the theories, but whether a defense against the non-contractual claim is necessary to succeed on the contractual claim. (*Siligo v. Castellucci* (1994) 21 Cal.App.4th 873, 879.)

As explained *ante*, the attorney fee provision of the parties' Declaration of Restrictions was broad enough to cover both contract and tort claims. As a result, apportionment of the attorney fees was not required.

DISPOSITION

The judgment awarding attorneys' fees is affirmed. AP-C is entitled to costs on appeal.

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RAMIREZ
P. J.

We concur:

McKINSTER
J.

MILLER
J.