

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

TERRY L. FLEMING, SR.,

Plaintiff and Appellant,

v.

JEAN VICTOR PELOQUIN et al.,

Defendants and Respondents.

E063069

(Super.Ct.No. CIVNS1300018)

OPINION

APPEAL from the Superior Court of San Bernardino County. Brian S.

McCarville, Judge. Affirmed.

Law Offices of Paul D. Bojic and Paul D. Bojic for Plaintiff and Appellant.

Teeple Hall, Grant G. Teeple, Gregory M. Garrison, Frederick M. Reich, and Julia M. Williams for Defendants and Respondents.

Terry L. Fleming, Sr. (Fleming) filed this action, alleging that he invested in a company that was going to develop a mobile home park, but the various defendants defrauded him and the deal went bad. The trial court sustained a demurrer with leave to

amend; when Fleming failed to amend, it dismissed the action. The trial court then awarded attorney fees against Fleming.

Fleming appeals from the order awarding attorney fees. He contends:

1. Fleming's claims were based on a different contract than the one containing the attorney fee provision.

2. A Fleming family trust was the only entity potentially liable for attorney fees, not Fleming individually.

3. The trial court should have awarded only half of the fees sought because two of the four defendants were not parties to the relevant attorney fee provision.

Finding no prejudicial error, we will affirm.

## I

### FACTUAL BACKGROUND

#### A. *The Operating Agreement.*

On or about May 31, 2004, three parties:

1. Capital Source Partners (CSP);
2. J. Victor Construction Inc. (Construction); and
3. VLD LLC<sup>1</sup>

entered into a written agreement (Operating Agreement) to form a limited liability company called Havasu Lakeshore Investments, LLC (Havasu). CSP was to be the

---

<sup>1</sup> VLD LLC is not a party to this action.

managing member of Havasu. The Operating Agreement did not include an attorney fee provision.

B. *The Admission Agreement.*

On or about November 1, 2004, the parties to the Operating Agreement, plus Fleming and Fleming's son, entered into a written agreement (Admission Agreement) to add Fleming and Fleming's son as members of Havasu.

The Operating Agreement was an exhibit to the Admission Agreement.

The Admission Agreement provided: "The Operating Agreement is amended by this agreement and to the extent that there is a conflict between the Operating Agreement and this agreement this agreement shall prevail and control."

It also provided: "This Agreement and all Exhibits hereto, as well as agreements and other documents referred to in this Agreement constitute the entire agreement between the parties with regard to the subject matter hereof and thereof."

Finally, the Admission Agreement also included an attorney fee provision, which provided, as relevant here:

"If either party to this Agreement shall bring any action, suit, counterclaim, appeal, arbitration, or mediation for any relief against the other, declaratory or otherwise, *to enforce the terms hereof or to declare rights hereunder* (collectively an Action), the losing party shall pay the prevailing party a reasonable sum for attorneys fees and costs . . . incurred in bringing and prosecuting such Action and/or enforcing any judgment, order, ruling, or award (collectively, a Decision) granted therein . . . ." (Italics added.)

## II

### PROCEDURAL BACKGROUND

In 2013, Fleming filed this action against CSP, Construction, Jean Victor Peloquin, and Linda Peloquin (defendants).

In his original complaint, he alleged causes of action for breach of contract, breach of fiduciary duty, fraud, and negligent misrepresentation. The breach of contract cause of action was asserted solely against CSP. It alleged that CSP had breached the Operating Agreement by “siphon[ing] off” some \$6.5 million from Havasu, some of which went to Construction and the Peloquins.

Fleming also filed a first and second amended complaint. However, these are not in the record.<sup>2</sup>

Defendants filed a demurrer to the second amended complaint. The trial court sustained the demurrer with 30 days’ leave to amend (provided Fleming complied with certain specified conditions). Fleming did not comply with the conditions and did not further amend the complaint. Accordingly, the trial court entered a judgment of dismissal.

Defendants then filed a motion for attorney fees. The motion was based on the attorney fee provision in the Admission Agreement. Defendants argued that the

---

<sup>2</sup> Fleming makes a number of assertions about the contents of the second amended complaint. However, he has not cited these to the record, as required. (Cal. Rules of Court, rule 8.204(a)(1)(C).) Indeed, as he has not included the second amended complaint in the record, he could not do so. We therefore disregard these assertions.

Operating Agreement and the Admission Agreement constituted a single integrated contract.

In his opposition to the motion, Fleming argued that he had not asserted any cause of action for breach of the Admission Agreement, and that the Operating Agreement did not have an attorney fee provision. He also argued that the Operating Agreement and the Admission Agreement should not be treated as a single integrated contract.

The trial court granted the motion and awarded defendants \$127,764.32 in attorney fees.

### III

#### THE SCOPE OF THE ATTORNEY FEE PROVISION

Fleming contends that, because his complaint was for breach of the Operating Agreement, it was not within the scope of the attorney fee provision in the Admission Agreement.

““On review of an award of attorney fees after trial, the normal standard of review is abuse of discretion. However, de novo review of such a trial court order is warranted where the determination of whether the criteria for an award of attorney fees and costs in this context have been satisfied amounts to statutory construction and a question of law.”” [Citation.]” (*In re Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1213.)

““When a trial court’s interpretation of a written agreement is appealed and no conflicting extrinsic evidence was admitted, the interpretation of the contract is a question of law which we review de novo. [Citations.]’ [Citation.]” (*Rancho Pauma*

*Mutual Water Company v. Yuima Municipal Water District* (2015) 239 Cal.App.4th 109, 115.)

The attorney fee provision in the Admission Agreement applied to any action “to enforce the terms hereof or to declare rights hereunder . . . .”

The Admission Agreement expressly incorporated the Operating Agreement. It provided, “This Agreement and all Exhibits hereto, as well as agreements . . . referred to in this Agreement constitute the entire agreement between the parties . . . .” The Operating Agreement was an exhibit to the Admission Agreement; it was also an “agreement[] referred to in th[e Admission] Agreement . . . .” Finally, the Admission Agreement provided that it “amended” the Operating Agreement. Any new party admitted to membership under the Admission Agreement thereby became a party to the Operating Agreement. If such a party sued for breach of the Operating Agreement, then that party was necessarily seeking to “enforce the terms” of the Admission Agreement.

This is consistent with the general rule that “[w]hen the transaction between the parties is expressed in several documents, and only one of those documents contains a fee-shifting clause, the documents are generally construed as one contract (see [Civ. Code,] § 1642) and the fee clause is applied even if the action is to enforce a document that does not contain a fee-shifting clause. [Citation.]” (Pearl, Cal. Attorney Fee Awards (Cont.Ed.Bar. 3d ed. 2015) § 4.33, p. 4-23.)

Fleming claims that defendants somehow admitted that the complaint did not seek to enforce the Admission Agreement. Actually, in their motion for attorney fees, they

stated: “Plaintiff will likely argue that he did not attach the Admission Agreement to his complaint and, therefore, there is no attorneys’ fees provision upon which to base such an award. *This argument ignores both the law, the pleadings, and the undisputed facts.*” (Italics added.) In other words, defendants argued that, even though Fleming did not attach the Admission Agreement to his complaint, he was still seeking to enforce his rights under the Admission Agreement. We agree.

#### IV

#### FLEMING, NOT THE FLEMING TRUST, IS A PARTY TO THE ADMISSION AGREEMENT

Fleming contends that he is not liable for attorney fees because it was a Fleming family trust that was a member of Havasu, not Fleming individually.

##### A. *Additional Factual and Procedural Background.*

The Operating Agreement provided: “The Initial Capital Contributions of each Member and the number of Units are listed on Exhibit B.”

The copy of the Operating Agreement that is in the record has three different versions of Exhibit B.

The first one is dated August 14, 2004 and entitled “As Is.” (Capitalization altered.) It lists the members as CSP, Construction, and VLD LLC.

The second one is dated September 14, 2004 — i.e., before the Admission Agreement — and entitled “Proposed Exhibit B.” In addition to the members on the “As Is” list, it also lists “Terry Fleming Family Trust, et al.” (Capitalization altered.)

The third one is dated December 14, 2004 — i.e., after the Admission Agreement — and entitled “Revised Exhibit B.” In addition to the members on the “As Is” list, it also lists “Terry Fleming Family Trust” and “Terry Fleming, Jr.” (Capitalization altered.)

B. *Discussion.*

The Admission Agreement named Fleming as a party. It referred to Fleming throughout as an individual, not as trustee of a trust. Indeed, it never mentioned the trust. And Fleming executed the Admission Agreement in his individual capacity. The only reasonable construction of the Admission Agreement is that it made Fleming, not the trust, a member of Havasu.

In arguing that the trust became a member of Havasu, Fleming cites Exhibit B of the Operating Agreement. However, as noted, there are three different versions of Exhibit B. None of them is signed. There is no evidence from which we could conclude that they state the effect of the Admission Agreement more accurately than the Admission Agreement itself does.

Also, as defendants point out, the Admission Agreement provides, “[T]o the extent that there is a conflict between the Operating Agreement and this agreement this agreement shall prevail and control.” Thus, the list of parties in the Admission Agreement is controlling over the list of parties in Exhibit B, which is part of the Operating Agreement.

Finally, we also note that, in his original complaint, Fleming alleged that he “received a membership interest” in Havasu. In his cause of action for breach of the

Operating Agreement, he alleged again that he was a member of Havasu; had he not been a member, he would not have had standing. Last but not least, in his opposition to the motion for attorney fees, he stated again that he was a member of Havasu. Thus, even assuming the trial court erred, the error was invited. (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 403.)

## V

### FEE AWARD TO THE INDIVIDUAL DEFENDANTS

Fleming contends that the individual defendants, the Peloquins, cannot recover attorney fees because they were not parties to the Admission Agreement. He asserts — as he asserted below — that the trial court should have cut the fee award by 50 percent for this reason.

We may assume, without deciding, that Fleming is correct and the trial court erred by awarding attorney fees to the Peloquins. Even if so, he has not satisfactorily explained how he was prejudiced. (See Cal. Const., art. VI, § 13; Cal. Code Civ. Proc., § 475.) The attorney fees were incurred by “[d]efendants.” Thus, at least on this record, it appears that CSP, which was a party to the admission Agreement, was jointly and severally liable for all of the attorney fees. Fleming has never tried to show that any particular work done by the attorneys was for the sole benefit of a nonsignatory rather than a signatory of the Admission Agreement. Rather, he has demanded a blanket 50 percent reduction. This is not required. (Cf. *Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 129-130 [“Attorney’s fees need not be apportioned when incurred for representation on an issue

common to both a cause of action in which fees are proper and one in which they are not allowed.”].) Thus, the trial court properly awarded all the fees sought; its error, if any, in awarding it to all defendants was harmless.

VI

DISPOSITION

The order appealed from is affirmed. Defendants are awarded costs on appeal against Fleming.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ

P. J.

We concur:

MILLER

J.

CODRINGTON

J.