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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

STANLEY FLAKE et al.,

Plaintiffs and Appellants,

v.

ANDREW KATAKIS et al.,

Defendants and Respondents.

F060574

(Super. Ct. No. 332233)

OPINION

APPEAL from a judgment of the Superior Court of Stanislaus County. Roger M. Beauchesne, Judge.

Downey Brand, Janlynn R. Fleener, Ramaah Sadasivam and Katie Konz for Plaintiffs and Appellants.

McCormick, Barstow, Sheppard, Wayte & Carruth, D. Gregg Durbin, Todd W. Baxter and John M. Dunn for Defendants and Respondents.

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In this appeal, Stanley Flake, individually and as trustee of Capstone Trust, challenges the posttrial order awarding \$750,000 in attorney fees against all plaintiffs, jointly and severally, to defendants Andrew Katakis, his company California Equity

Management Group, Inc. (CEMG), and the Fox Hollow of Turlock Owners Association (FHOA). Flake contends the trial court erred in awarding attorney fees against him because: (1) he did not bring an action to enforce the governing documents within the meaning of Civil Code section 1354, nor did he bring an action on a contract within the meaning of section 1717; and (2) defendants did not prevail because substantial evidence did not support the unclean hands findings as to him and the trust. Alternatively, (3) the trial court abused its discretion by imposing fees jointly and severally, so the matter must be remanded for the trial court to apportion the attorney fee award among the plaintiffs. We disagree and affirm the order.

FACTUAL AND PROCEDURAL SUMMARY

The factual and procedural summary relevant to the underlying lawsuit is set forth in *Sinclair v. Katakis*, F058822 and is not repeated here. The factual and procedural summary relevant to this appeal is as follows.

Factual Summary

Stanley Flake, individually and as trustee of Capstone Trust, was a lesser player in the litigation, but his specific role never was made clear. The lack of clarity commenced with the allegations of the fifth amended complaint. Flake and Capstone Trust were two of the seven plaintiffs who brought the action. Every plaintiff alleged every cause of action against every defendant. In pertinent part, the complaint alleged:

- Mautrst, LLC (Mautrst) acquired all Fox Hollow lots subject to a blanket deed of trust on all 19 lots in favor of Capstone Trust.
- Defendants acquired title to a number of lots in Fox Hollow from the note holders and subsequent owners with knowledge of plaintiffs' prior rights and contracts and interfered with plaintiffs' ownership and contractual rights.
- Defendants wrongfully asserted claims superior to those of plaintiffs in and to the Fox Hollow properties.
- Katakis conspired with third parties to take over the FHOA to obtain control so he could acquire all the property in the subdivision and interfere with plaintiffs' ownership, acquisition, and business advantage. The conspiracy

included actions to defeat plaintiffs' ownership rights, and to gain ownership and control of all the Fox Hollow properties.

- Plaintiffs retained ownership of several of the garage lots on the premises as well as other portions of the original Fox Hollow complex, including but not limited to lots 2A, 6A, 8A, 9A and 18A (the garage lots).

The pertinent causes of action were:

- Declaratory relief as to disputes regarding the ownership interests of plaintiffs and defendants to the Fox Hollow property. Plaintiffs sought a judicial determination that their position was correct, defendants had committed the wrongs alleged, and defendants were liable to plaintiffs for damages and other remedies.
- Injunctive relief against defendants who improperly interfered with plaintiffs' ownership, acquisition, and operation of Fox Hollow and who improperly operated the homeowners association.
- Slander of title: Defendants' wrongful publication of false statements about plaintiffs' ownership of the property and wrongful nonjudicial foreclosure and subsequent mismanagement cast the property in a bad light to plaintiffs' detriment.
- Conversion: Defendants took plaintiffs' property, rents, and profits to the loss and detriment of plaintiffs.
- Misrepresentation: Defendants' misrepresentations were made without a good faith basis for believing them to be true and were relied upon to plaintiffs' financial detriment.
- Interference with contractual relationship: Defendants intentionally interfered with plaintiffs' contracts with the holder of the notes and deeds of trust and the homeowners association, to plaintiffs' detriment.
- Negligent interference with contract: Defendants negligently interfered with plaintiffs' contracts with its lenders and others, causing damages.
- To set aside foreclosure: Defendants' nonjudicial foreclosures of plaintiffs' property resulted in invalid trustees' deeds that were void.

In plaintiffs' pretrial brief, Flake, individually and as trustee, was described as "formerly an owner of Fox Hollow." Counsel asserted plaintiffs had one thing in common: they were wrongfully divested of their interests in Fox Hollow by the actions of Katakis. Plaintiffs requested the court restore title to plaintiffs and award them damages to compensate for the harm caused by defendants.

The trial evidence did not clarify Flake's interests in Fox Hollow. Flake testified he was a plaintiff as the trustee of Capstone Trust. Flake held Fox Hollow for about 16 months and did little to improve the property physically while he held it. He filed the first subdivision map, however, which created four separate lots at Fox Hollow, although the improvements required by the City of Turlock to create those lots had not been completed. Flake then sold the property to Gregory Mauchley for a substantial profit, which was the result of the illusory increased value of the property with the individual lots.

When Flake sold Fox Hollow to Mauchley in 1997, he formed Capstone Trust to hold the \$444,888 promissory note and deed of trust he carried back from Mauchley. The note and deed of trust were subordinate to notes and deeds of trust to GMAC Mortgage Corporation (GMAC). Mauchley made some payments to him, but the note was still in force when Mauchley transferred Fox Hollow to Mautrst in July 1998. Flake made a demand on the Mautrst–Mauchley escrow for the full amount due on the \$444,888 note plus interest. He testified he was paid out of the escrow but did not remember the amount. Documentary evidence indicated Mauchley's finance of the Fox Hollow lots generated enough funds to pay Flake fully.

In 1998, Flake advanced Mautrst \$271,000 on a “blanket second note and deed of trust” covering the 18 residential lots and the common areas of Fox Hollow. Neither Flake nor Mauchley recalled the purpose for the \$271,000 advance. Adding to the confusion, Flake testified that although the loan was to Mautrst, Flake believed Mauchley owed him the money. Both Mauchley and Richard C. Sinclair “continued to recognize that obligation,” and Flake believed “they intend[ed] to pay.”

Flake, as trustee for Capstone Trust, joined Mautrst's 2001 settlement agreement with GMAC regarding lots 1, 11, 18, and 19 as a means of reducing the \$271,000 note. The GMAC foreclosures eliminated the property securing Flake's \$271,000 note. The settlement agreement, which Sinclair negotiated, provided that Flake, for Capstone Trust,

would purchase the lots from GMAC and sell them at a profit to Sinclair. The profit would reduce the amounts Mautrst owed Capstone Trust on the promissory note.

Sinclair testified that Mauchley continued to own the garage lots after he sold Fox Hollow to Mautrst. Mauchley testified Flake retained a security interest in the garage lots that were not attached to a unit. Flake testified his collateral included the garage lots.

Additional evidence raised an inference that Flake and Capstone Trust continued to assert an interest in Fox Hollow when this litigation commenced in April 2003. In October 2002, Sinclair wrote Katakis that he represented Mautrst; Brandon Sinclair; Mauchley; Capstone, LLC; Lairtrust, LLC and Flake, who collectively “own more than 5% of Fox Hollow.” Sinclair objected, for the owners, to the proposed meeting to hold elections for the board of directors of the FHOA. Sinclair wrote the board of directors two weeks later, reiterated that he represented the owners of six lots plus a number of garages, and objected to the board’s actions, which he alleged were outside the scope of its authority under the covenants, conditions, and restrictions (CC&R’s) and the bylaws. Two months later, Sinclair again wrote for plaintiffs and threatened the FHOA board “with a number of baseless charges while claiming the prior Board had in fact not resigned.” Again, in July 2003, after this lawsuit was filed, Sinclair wrote Katakis on behalf of Mautrst; Lairtrust, LLC; Capstone, LLC; Brandon Sinclair; himself; Mauchley and “Stan Flake” and objected to FHOA actions, including the special assessments.

Further, in 2008, Sinclair sent each Fox Hollow tenant a notice of termination of tenancy that said, “NOTICE IS HEREBY GIVEN that you must remove yourself from and deliver up possession ... of the premises described above [the common area] ... to [Sinclair] for and on behalf of its owner, Mautrst LLC, and Greg Mauchley, or their predecessor in interest, *[sic]* Stanley Flake, Trustee, on or before May 19, 2008.” Sinclair testified he did not believe Mautrst or Mauchley or Flake owned the common area but sent the notice because Katakis asserted the prior owners had not properly deeded the common area to the FHOA.

Finally, Flake testified he challenged the foreclosure sales of lots 3, 7, 9, and 14, which Mauctrst was seeking to set aside, based on his being the holder of a second trust deed on those lots. He was cooperating with Sinclair in the lawsuit to help Mauchley recover the money necessary to pay off the note to Capstone Trust.

In plaintiffs' posttrial brief, counsel again reiterated that plaintiffs wrongfully were divested of their interests in the lots by the actions of Katakis. Plaintiffs asked the trial court to use its equitable powers to fashion a remedy to set aside the wrongful foreclosures of lots 1 and 19, and 3, 7, 9, and 14 and to restore record title to "Plaintiffs," and to award damages to plaintiffs to compensate them for the harm caused by defendants. Plaintiffs specifically requested damages of \$57,326 for "Stanley Flake" on plaintiffs' interference with contract claims related to lots 11 and 18. Plaintiffs did not specify any damages for Capstone Trust.

The trial court recognized the intertwined nature of all plaintiffs' claims and found against all plaintiffs on all causes of action.

Procedural Summary

After the trial court entered judgment for defendants on plaintiffs' complaint, defendants moved to be declared the prevailing parties and sought attorney fees of \$1,202,604.50. Defendants contended they were the prevailing parties entitled to fees pursuant to Civil Code section 1354, subdivision (c) on claims to enforce the governing documents of the FHOA, and pursuant to section 1717 on claims based on the contracts containing an attorney fee provision—the promissory notes and deeds of trust on lots 3, 7, 9, and 14 and the FHOA CC&R's. Defendants used the lodestar method, supported by detailed declarations and exhibits, to justify the amount of fees requested. They asserted the fees should be awarded to all defendants against all plaintiffs.

Sinclair filed opposition on behalf of all plaintiffs, the rulings of which are at issue in *Sinclair v. Katakis*, F060497. Flake hired new counsel and filed separate opposition. Flake asserted, without citation to authority, that defendants bore the burden of

segregating the time they spent defending each cause of action so that Flake would not be saddled with the entire cost of the litigation. He insisted each cause of action was distinct, so defendants' failure to "distinguish between the time spent defending the deed of trust alleged by Mr. Mauchley, that which is strictly alleged by Mr. Sinclair, and that which is simply alleged by the trusts of Mr. Flake" was fatal to their claim for fees against him. Flake conceded, "[this wa]s a sprawling mess of a case and fragmented." But, "clearly, some [causes of action] apply to only Mr. Sinclair and some apply to Mr. Mauchley." "As such, it cannot be said that the entirety of the award can be made as against Mr. Flake or his trusts ..., those who mistakenly and tangentially trusted [Sinclair,] in hopes of reaping an unwarranted, massive judgment." Flake did not delineate the causes of action that applied to him nor did he propose a fee allocation he viewed as fair.

At the hearing, Flake's counsel stated they were arguing the issue of apportionment of fees only. Flake "was not an active participant in the plans and machinations" of Sinclair and had only a minor role in the litigation. Flake should not be made responsible for "the sins and misdemeanors of Mr. Sinclair."

The trial court asked Flake's counsel:

"Based on your argument that the Court should allocate fees proportionately, how do I make that determination? I can't just pick a number out of the clear blue sky. Do I have counsel submit follow-up declarations indicating 'I spent this many hours on these causes of action'? I think that's a practical impossibility at this point to go back in time in that regard. What portion of trial days were allocated to the causes of action to which Mr. Flake was only involved? How do I do it?"

Counsel responded, "I don't know. But that's not my burden.... Mr. Flake wasn't in any part of the causes of action that allowed for attorney's fees." Counsel urged the court to impose no liability for attorney fees on Flake.

The trial court recognized the intertwined nature of plaintiffs' claims and the defendants' burden in defending against those ill-defined claims. The court awarded

defendants attorney fees of \$750,000—about 62.5 percent of the \$1.2 million requested—against all plaintiffs, jointly and severally, to compensate defendants for the cost of defending the portions of the action to enforce the Fox Hollow governing documents and on the promissory notes and deeds of trust. Flake filed a separate appeal from the order.

DISCUSSION

1. Award of Attorney Fees

The trial court found that defendants were the prevailing parties on an action to enforce the governing documents of the FHOA and were entitled to an award of attorney fees under Civil Code section 1354, subdivision (c). It also found they were the prevailing parties in an action on contract (the CC&R's, promissory notes, and deeds of trust, which had attorney fee clauses) and thus were entitled to an award of reasonable attorney fees under section 1717. Further, the issues related to the defense of the action to enforce the governing documents and the defense of the action on the promissory notes and deeds of trust were inextricably intertwined. Therefore, the court exercised its discretion not to apportion fees among the various causes of action on which fees were awardable and awarded them against each plaintiff jointly and severally.

Flake contends the court erred in awarding attorney fees against him individually and as trustee because (a) he did not bring any action to enforce the governing documents within the meaning of Civil Code section 1354, and (b) he did not bring any action on a contract within the meaning of section 1717. He seeks to limit his role in the lawsuit to the tort claims of contract interference related to lots 11 and 18 and thereby shield himself and Capstone Trust from liability for attorney fees. He argues that, as a matter of law, he asserted no claim to enforce the governing documents of the FHOA, which were alleged only in relation to lots 1 and 19, and no claim on the contracts underlying the foreclosures of lots 3, 7, 9, and 14.

Defendants counter that Flake joined the other plaintiffs on every claim made, and all plaintiffs had a collective litigation goal to protect their alleged common ownership

and financial interests in Fox Hollow. Thus, the trial court did not err in awarding attorney fees against Flake.

In analyzing this issue, we note that although Flake, individually and as trustee of Capstone Trust, was a lesser player in the litigation, his specific role never was made clear. He did not define his claims in the pleadings—he, individually and as trustee, brought and sought relief on every cause of action against every defendant. Nor did he adequately delimit his role at trial. Accordingly, his belated attempt to limit his role on appeal fails.

A. Waiver

Defendants claim Flake is attempting to raise five issues on appeal that he did not raise in the trial court: (1) Flake did not bring the underlying lawsuit to enforce the FHOA governing documents; (2) neither Flake nor Capstone Trust were signatories to the Granite Bay Funding notes and deeds of trust or the CC&R's; (3) he did not bring the underlying lawsuit “on the contract” based on the Granite Bay Funding notes and deeds of trust or the CC&R's; (4) defendants are not prevailing parties because Flake did not bring claims either to enforce a contract or to enforce the CC&R's; and (5) there is no substantial evidence to support the court's finding that Flake engaged in unclean hands.

Flake responds that these issues were raised in Sinclair's opposition on behalf of all plaintiffs, including the Flake plaintiffs. We generally agree.

Although the first four issues were not raised with the specificity with which they are addressed on appeal, they were raised.¹ Sinclair's opposition argued that “[a]ll Plaintiffs did not make claims to enforce governing documents under [Civil Code section] 1354” and “all Plaintiffs did not make claims on contract.” Only Lairtrust, LLC, and Capstone, LLC, brought claims to enforce the governing documents, and only Mautrst brought claims under the promissory notes and deeds of trust. There were no

¹We address Flake's challenge to the unclean hands finding under part 2, *post*.

fee claims brought on behalf of Flake or Capstone Trust. Flake acted as trustee seeking to enforce the GMAC settlement agreement and no attorney fees are recoverable for this tort claim. “All Plaintiffs that are not signatories are not responsible for fees under [Civil Code section] 1717.” While the Sinclair opposition did not discuss the issues with the depth Flake employs on appeal, we cannot say the issues were not raised in the trial court. Accordingly, we will consider Flake’s statutory challenges to the award of attorney fees.

B. Standard of Review

On appeal, we review the determination of the legal basis for an award of attorney fees de novo. (*Sessions Payroll Management, Inc. v. Noble Construction Co.* (2000) 84 Cal.App.4th 671, 677.) We review an order awarding attorney fees to the prevailing party for an abuse of discretion. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095.)

C. Statutory and Contractual Bases for Attorney Fee Award

Flake contends the court erred in awarding attorney fees against him, individually and as trustee, because (1) he did not bring an action to enforce the governing documents within the meaning of Civil Code section 1354, and (2) he did not bring any action on a contract within the meaning of section 1717. Defendants assert that Flake joined the other plaintiffs on every claim made, and all plaintiffs had a collective goal to protect their alleged common ownership and financial interests in Fox Hollow. We conclude there was no error.

(1) Civil Code section 1354

Civil Code section 1354, subdivision (c) provides that in an action to enforce the governing documents of a common interest development, the prevailing party shall be awarded reasonable attorney fees and costs.

Flake argues he cannot be liable for attorney fees under Civil Code section 1354 because he did not sign the CC&R’s, either individually or as trustee, and had no ownership interest in any Fox Hollow lot when the claims arose. While Capstone Trust

had a second deed of trust on all lots within Fox Hollow, the deed was a security interest and did not entitle Capstone Trust to membership in the FHOA. Further, Flake did not testify regarding the allegations pertaining to the CC&R's. Therefore, neither Flake individually nor as trustee sought to enforce the terms of the CC&R's or to challenge the foreclosures of lots 1 and 19 because he had no ownership or security interest in the lots.

Flake's arguments—in essence, that he lacked standing to bring these claims—ignores case law that a plaintiff's standing is irrelevant to the prevailing party's right to attorney fees under Civil Code section 1354. For example, in *Farber v. Bay View Terrace Homeowners Assn.* (2006) 141 Cal.App.4th 1007, the court affirmed the dismissal of a condominium unit seller's complaint against her former homeowners association for lack of standing to sue and awarded the association attorney fees. The seller claimed the CC&R's required the association to fix the buyer's roof. Her suit was an attempt to enforce the CC&R's when she no longer owned the condominium unit, so her action properly was dismissed for lack of standing. (*Id.* at p. 1012.) Because the lawsuit was an action to enforce the CC&R's, the association was the prevailing party entitled to attorney fees under section 1354. (*Farber v. Bay View Terrace Homeowners Assn.*, *supra*, at p. 1014; accord, *Martin v. Bridgeport Community Assn., Inc.* (2009) 173 Cal.App.4th 1024, 1038-1039 [award of attorney fees to homeowners association was mandatory under Civ. Code, § 1354, subd. (c) after plaintiffs brought action to enforce governing documents but were unsuccessful because they lacked standing].)

Likewise in this case, even if Flake, individually and as trustee, lacked standing to assert claims against the FHOA, he is liable for attorney fees under Civil Code section 1354 if he brought an action to enforce the governing documents of the FHOA. To make this determination, we look to the gist of the action as revealed by the record. (*Kaplan v. Fairway Oaks Homeowners Assn.* (2002) 98 Cal.App.4th 715, 720.)

Flake contends the record made clear that the claims regarding the governing documents of the homeowners association related only to lots 1 and 19. And only

Sinclair, Brandon Sinclair and their companies had an interest in and brought the claims regarding lots 1 and 19. In addition, Flake did not testify regarding the allegations that Katakis had wrongfully reconstituted the FHOA board of directors or that Katakis breached his fiduciary duty as a director of the FHOA. As such, Flake did not bring the claims to enforce the governing documents, and it was error to find him liable for attorney fees pursuant to Civil Code section 1354. Alternatively, even assuming the declaratory and injunctive relief causes of action contained allegations relating to the CC&R's and the FHOA, those allegations relate only to lots 1 and 19, as shown by the statement of decision, and neither Flake nor Capstone Trust had any interest in those lots.

Flake's contentions disregard the allegations of the complaint that all plaintiffs retained an interest in Fox Hollow and that defendants' wrongful acts in relation to the homeowners association interfered with "Plaintiffs' ownership ... and business advantage." Moreover, the evidence at trial did not establish as a matter of law that Flake did not have—or claim to have—an interest in Fox Hollow. There was ambiguity as to whether he retained or claimed to retain an interest in the Fox Hollow common area, which was threatened by Katakis's alleged wrongful acts with respect to the homeowners association. Further, letters written shortly before and after the litigation was filed stated that Flake asserted an interest in Fox Hollow and challenged the homeowners association's decisions and assessments.

Flake's belated assertion on appeal that there was no evidence he authorized Sinclair to send the letters on his behalf does not change the evidence. Flake's repeated assertion that "the record is clear" regarding who brought which claim does not make it so. Flake made all the allegations jointly with the other plaintiffs. He was an active participant in the case where the stated goal was to protect plaintiffs' common ownership and financial interests in Fox Hollow. Given the indefinite allegations and evidence regarding Flake's claims and the remedies he sought, the trial court did not err in making Flake, individually and as trustee, liable for attorney fees under Civil Code section 1354.

(2) *Civil Code section 1717*

Flake next contends there was no basis in contract for defendants to recover attorney fees from him under Civil Code section 1717 because: he, individually and as trustee, never signed the notes or deeds of trust that contained the attorney fee provisions, he was not a party to those contracts, and neither he nor Capstone Trust brought the underlying claims on those contracts. We disagree.

Civil Code section 1717, subdivision (a) provides that in any action on a contract, which provides that attorney fees incurred to enforce the contract shall be awarded either to one of the parties or to the prevailing party, the prevailing party shall be entitled to reasonable attorney fees.

a. Contracts with attorney fee provisions

The Granite Bay Funding promissory notes and deeds of trust for lots 3, 7, 9, and 14 included attorney fee provisions. The notes provided that the borrower will pay the costs and expenses of enforcing the note to the lender, or anyone who took the note “by transfer and who is entitled to receive payments under” the note. The deeds of trust provided that in a legal proceeding involving the breach of the security instrument, or in legal proceedings to protect the lender’s rights in the property, the lender may do and pay for whatever is necessary to protect the value of the property and the lender’s rights in the property. Further, the “Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided [upon the buyer’s default], including ... reasonable attorneys’ fees.”

Here, all plaintiffs, including Flake individually and as trustee, alleged that defendants’ wrongful acts deprived them of their interests in lots 3, 7, 9, and 14. Plaintiffs alleged that defendants improperly interfered with their ownership, negligently and intentionally interfered with their contracts with the holder of the notes and deeds of trust, and wrongfully foreclosed. Plaintiffs asked the trial court to restore record title to them and to award damages to them. In response to discovery requests and at trial, Flake

asserted that he was challenging the foreclosure sales of lots 3, 7, 9, and 14 based on the second deed of trust he held on those lots.

The evidence at trial disclosed that Mauchley, as borrower, and Granite Bay Funding, as lender, were the original parties to the notes and deeds of trust. Defendant CEMG was the successor of Granite Bay Funding and, as such, was subject to the terms of the notes and deeds of trust. Mauchley assigned his rights and obligations, as borrower, under the notes and deeds of trust to Mautrst. The trial court found Mauchley and Sinclair were the alter egos of Mautrst,² making those plaintiffs expressly liable for attorney fees under the promissory notes and deeds of trust.

Flake was not a party to either contract nor was he found to be an alter ego of Mautrst. But Flake joined all the allegations asserted by those plaintiffs and pursued the meritless action that challenged the legality of the foreclosure sales related to the notes and deeds of trust based on his second deed of trust on those lots. Flake testified he challenged the foreclosure sales of lots 3, 7, 9, and 14, which Mautrst was seeking to set aside, based on his being the holder of a second trust deed on those lots. He pursued the lawsuit for himself and Capstone Trust to help make Mauchley whole so Mauchley could, in turn, repay the debt Mauchley owed Flake on Capstone Trust's second trust deed.

b. The law

California courts liberally construe “on a contract” to extend to any action that involves a contract and one of the parties would be entitled to recover attorney fees under the contract if that party prevailed in its lawsuit. (*California Wholesale Material Supply, Inc. v. Norm Wilson & Sons, Inc.* (2002) 96 Cal.App.4th 598, 605.) Because Flake, individually and as trustee, joined the allegations of every cause of action, he brought the

²Mauchley did not challenge the finding on appeal and Sinclair's challenge to the finding was rejected in *Sinclair v. Katakis*, F058822.

underlying claims on the notes and deeds of trust. Defendants incurred attorney fees to enforce CEMG's rights against plaintiffs' claims involving the notes and deeds of trust. As the prevailing parties, defendants were entitled to attorney fees under the attorney fee clauses and Civil Code section 1717 from plaintiffs, the nonprevailing parties. The issue before this court is whether those fees were properly imposed against Flake.

In actions on a contract, where a nonsignatory plaintiff sues a signatory defendant who prevails, the signatory defendant is entitled to attorney fees only if the nonsignatory plaintiff would have been entitled to fees had the plaintiff prevailed. (*Sessions Payroll Management, Inc. v. Noble Construction Co.*, *supra*, 84 Cal.App.4th at p. 679; *Leach v. Home Savings & Loan Assn.* (1986) 185 Cal.App.3d 1295, 1307.) The court does not consider whether the nonsigning plaintiff could have prevailed, only whether if it had prevailed, it would have been entitled to fees. (*Exarhos v. Exarhos* (2008) 159 Cal.App.4th 898, 906.)

Case law is instructive but not dispositive.³ Flake relies on *Leach v. Home Savings & Loan Assn.*, *supra*, 185 Cal.App.3d 1295. In *Leach*, Bell and Leach were entitled to the remainder of a trust, whose primary asset was their mother's residence. Bell, acting as trustee, repeatedly encumbered the property. (*Id.* at pp. 1298-1300.) Leach learned of the encumbrances and sued Bell and the lenders to have the various deeds of trust declared void. Leach alleged that Bell had no authority to act as trustee when the loans were made. The lenders successfully moved for summary judgment on the ground they were unaware of Bell's purported lack of authority to act as trustee. (*Id.* at p. 1300.) The lenders, as prevailing parties, argued they were entitled to attorney fees from Leach under Civil Code section 1717 and the attorney fee clauses in the promissory notes and deeds of trust. The court disagreed. The signatory defendant lenders sought fees from the nonsignatory plaintiff Leach, who had no contractual or statutory right to

³An overview of the pertinent case law is found in 7 Witkin, California Procedure (5th ed. 2008) Judgment, sections 208-209, pages 767-772.

receive fees if she had prevailed. Leach's allegation in the complaint that she was entitled to receive attorney fees did not provide a sufficient basis for awarding them to the prevailing opposing party.⁴ Where the plaintiff did not sign the contracts containing attorney fee provisions and had no independent right to recover fees under contractual attorney fee clauses, the defendants, as prevailing parties, could not recover attorney fees from the plaintiff. (*Leach v. Home Savings & Loan Assn.*, *supra*, at p. 1307.)

Defendants cite *Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101. There, after a foreclosure sale, the appellants sued the lenders for fraud and breach of contract in connection with the foreclosure, including claims that the lenders violated the bankruptcy court's automatic stay. Although appellant Fred Abdallah had not signed the note or deed of trust—the other two appellants had—the complaint alleged that Fred Abdallah owned a legal and equitable interest in the property, and he had acted as the appellants' agent in dealing with the respondents. After the respondents' demurrers were sustained without leave to amend and judgment entered for them, the court ordered the appellants to pay the respondents' attorney fees. (*Id.* at pp. 1104-1106.)

Fred Abdallah argued on appeal that he was not liable for attorney fees because he was not a signatory to the contracts on which the fee awards were based. (*Abdallah v. United Savings Bank*, *supra*, 43 Cal.App.4th at p. 1111.) The court concluded that although Fred Abdallah did not sign the note or deed of trust, he sued the respondents for breach of those contracts, and he sought to recover attorney fees from the respondents on his breach of contract action and related claims. The court found Fred Abdallah's status as a nonsignatory irrelevant; the only question was whether he would have been entitled to his fees if he had prevailed. Since it was undisputed that he would have been entitled

⁴Subsequent case law has clarified that where a plaintiff brings an action on a contract and claims a right to attorney fees, the prevailing defendant is not entitled to its fees on an equitable estoppel theory if the contract does not provide for fees. (*Real Property Services Corp. v. City of Pasadena* (1994) 25 Cal.App.4th 375, 382, fn. 5.)

to fees had the appellants prevailed, there was no question that he was liable for fees as a losing party. (*Ibid.*)

Flake's situation is more analogous to Abdallah's than Leach's. Flake, like Abdallah, alleged an interest in the property related to the notes and deeds of trust, and he joined in the other plaintiffs' allegations of wrongful foreclosure and interference with contract. Flake maintained this position during discovery and did not disavow an interest in the four lots at trial. Further, the trial court did not find that Flake had no interest under the notes and deeds of trust.

If plaintiffs had prevailed on their claims, they would have been entitled to attorney fees under the notes and deeds of trust and Civil Code section 1717. Because plaintiffs employed a single law firm and the same counsel to represent all of their interests, Flake would have reaped the benefit of the fee award had plaintiffs prevailed on their claims on the notes and deeds of trust. Moreover, because Flake joined all the allegations, defendants had to defend against his allegations and incurred attorney fees to establish that Flake's allegations on the contracts were meritless. Because Flake failed to limit his claims until appeal, fairness dictates that he share the burden of attorney fees that his claims engendered. (See, e.g., *Feminist Women's Health Center v. Blythe* (1995) 32 Cal.App.4th 1641, 1671-1672 [because plaintiff was compelled to retain counsel to secure an order enjoining conduct engaged in by all defendants, it is proper to hold all accountable for plaintiff's attorney fees].) Thus, the trial court did not err in finding Flake was liable for attorney fees, along with the other nonprevailing plaintiffs, on the contract claims under Civil Code section 1717.

Flake also argues that he, individually, should not be liable for attorney fees because he did not, and could not, bring an action on the notes and deeds of trust. We are not persuaded. The reasons set forth above apply equally to Flake as an individual and as the trustee for Capstone Trust. Flake, individually and as trustee, made every allegation

in the complaint and did not establish during trial that his claims were limited as he now asserts on appeal. We conclude there was no error.

Both parties address whether Flake was a third party beneficiary under the contracts with attorney fee clauses. Given our conclusion that the trial court did not err in finding Flake liable for attorney fees under the allegations of the complaint and the evidence at trial, we need not consider this additional theory of liability, which was not raised in the trial court.

2. Finding of Unclean Hands

Flake contends, “[t]he sole basis for the trial court’s determination that [defendants] had prevailed against the Flake [plaintiffs] was its finding that [defendants] had established their equitable defense of unclean hands. (SCT 26.)” He continues, because there is no substantial evidence to support the unclean hands findings as to the Flake plaintiffs, the court abused its discretion in finding defendants to be the prevailing parties for purposes of a fee award against the Flake plaintiffs.

The issue—a substantial evidence challenge to the trial court’s unclean hands findings—is not cognizable in this appeal. The issue was raised and decided in *Sinclair v. Katakis*, F058822, the appeal of the underlying judgment. We need not address it again.

3. Apportioning Attorney Fees Among Plaintiffs

Finally, Flake claims the trial court abused its discretion by imposing attorney fees against all plaintiffs jointly and severally. He concedes that liability for a fee award against multiple parties is presumed to be a joint obligation. But, he argues, in light of his lesser involvement in the case, he should not be equally liable for fees. In his reply brief, Flake urges us to apportion fees by excluding him from liability for the fees. We conclude there was no abuse of discretion.

Here, the trial court found that the issues related to the defense of the action to enforce the governing documents and the defense of the action on the promissory notes

and deeds of trust were inextricably intertwined. It, however, expressly did not award fees for time spent on nonfee claims. Further, in response to Flake's counsel's arguments that the court should apportion attorney fees, the trial court asked, "[H]ow do I make that determination? ... I think that's a practical impossibility at this point to go back in time in that regard." Flake's counsel responded, "I don't know." The trial court ultimately exercised its discretion not to apportion fees among the various causes of action on which fees were awardable and imposed the award against each plaintiff, jointly and severally.

Liability for an attorney fee award imposed on more than one party is presumed to be joint and several. The nonprevailing parties are not entitled to apportionment of the award among themselves. (*Friends of the Trails v. Blasius* (2000) 78 Cal.App.4th 810, 838.) Rather, the trial court's decision whether to apportion the award is within its broad discretion. The trial court abuses its discretion only when it exceeds the bounds of reason under the circumstances before it. (*Carver v. Chevron U.S.A., Inc.* (2004) 119 Cal.App.4th 498, 505.) The party challenging the award bears the burden of establishing the trial court abused its discretion and a miscarriage of justice resulted. (*Ibid.*)

A court need not allocate attorney fees when the liability of the parties is so factually interrelated that it would be impractical, if not impossible, to separate the attorneys' time into compensable and noncompensable units. (*Cruz v. Ayromloo* (2007) 155 Cal.App.4th 1270, 1277.) For example, in *Friends of the Trails v. Blasius, supra*, 78 Cal.App.4th 810, the court rejected an argument that the trial court had abused its discretion in failing to apportion attorney fees because one party was less culpable than the other parties. The court noted that the nonprevailing parties, generally, are not entitled to an apportionment of their liability for attorney fees. (*Id.* at pp. 837-838.) And the nonprevailing party had cited no case law holding that the trial court abused its discretion by failing to apportion an award upon request. (*Id.* at p. 838.)

While case law recognizes that the trial court may exercise its discretion and assess a greater percentage of an attorney fee award against one party (e.g., *Sokolow v.*

County of San Mateo (1989) 213 Cal.App.3d 231, 250-251), we have found no case law holding that the trial court abuses its discretion in failing to apportion the award among multiple unsuccessful parties. (See, e.g., 1 Pearl, Cal. Attorney Fee Awards (Cont.Ed.Bar 3d ed. 2012) § 2.42, pp. 53-54 [cases cited] and 7 Witkin, Cal. Procedure, *supra*, Judgment, § 320, pp. 927-928 [same].)

In his briefs, Flake contends the trial court abused its discretion in not apportioning fees because his “alleged misconduct” was not on the same scale as that of the other plaintiffs. He argues that he should not be liable for any attorney fees because he did not join the other plaintiffs in every claim alleged, his claims were not inextricably intertwined with the claims of the other plaintiffs, and the trial court made no findings that warrant the imposition of attorney fees as to him.

Those arguments fail here as they did in the trial court. First, Flake, individually and as trustee, alleged every cause of action against every defendant. His assertion, in effect, that he did not intend to do so is irrelevant. Second, because he alleged every claim and failed to delimit his claims during discovery or at trial, his claims were inextricably intertwined with those of the other plaintiffs. Third, the trial court, in its statement of decision, found against “plaintiffs,” which the court defined as including Stanley Flake and Capstone Trust, on all of their claims. While the trial court occasionally mentioned individual plaintiffs by name, it made all of its findings against all “plaintiffs.” As such, Flake presents nothing to suggest that the trial court abused its discretion in imposing attorney fees against him.

Flake’s claim that he did not have the burden to apportion attorney fees for the trial court may be correct in principle but is counterproductive in this case. As his counsel conceded, “[this wa]s a sprawling mess of a case” and he did not know how to apportion attorney fees fairly among plaintiffs.

The blame for the “sprawling mess” lies squarely with plaintiffs, including Flake in his individual and trustee capacities. Plaintiffs failed adequately to define and

segregate their individual claims before, during, and after trial. As such, the trial court appropriately found that it could not separate out individual claims for purposes of apportioning attorney fee liability because the claims were inextricably intertwined. Flake has failed to show that the trial court abused its discretion in imposing the attorney fee award against plaintiffs jointly and severally under the circumstances before it.

DISPOSITION

The order is affirmed. The defendants are awarded their costs on appeal. The trial court is directed to determine the amount of attorney fees to be awarded to defendants for legal services on appeal. (*Abdallah v. United Savings Bank, supra*, 43 Cal.App.4th at p. 1112.)

CORNELL, J.

WE CONCUR:

WISEMAN, Acting P.J.

LEVY, J.