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

WALEED MARI et al.,

Plaintiffs and Appellants,

v.

RODRICK H. HAWKINS et al.,

Defendants and Respondents.

F062563

(Super. Ct. No. 634903)

**OPINION**

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

Wylie P. Cashman for Plaintiffs and Appellants.

Ericksen Arbuthnot, Sharon L. Hightower and Nathaniel R. Lucey for Defendants and Respondents.

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Plaintiff Waleed Mari, doing business as Waleed Mari & Associates, retained the surveying services of defendants, Rodrick H. Hawkins, doing business as Hawkins & Associates Engineering, and Hawkins & Associates Engineering, Inc., to determine the corners and boundaries of plaintiff's land. The survey performed by defendants was in error, which plaintiff did not discover until after he had relied on it to his detriment. Plaintiff filed a lawsuit for damages in superior court, alleging both contract and tort causes of action against defendants. At the same time, plaintiff demanded arbitration of the dispute pursuant to the terms of the parties' contract. One month later, the parties agreed to proceed in superior court rather than go to binding arbitration. Following a bench trial, the trial court found that plaintiff prevailed on his cause of action for professional negligence and a monetary judgment was entered in his favor. Plaintiff moved for recovery of his attorney fees pursuant to paragraph 37 of the parties' contract. The trial court denied the motion on the ground that paragraph 37 only authorized an award of attorney fees in the limited context of arbitration proceedings. Plaintiff appeals from that order, arguing that the trial court misconstrued the terms of the contract regarding attorney fee recovery. We will affirm.

### **FACTS AND PROCEDURAL HISTORY**

Plaintiff needed an accurate survey of his property in Modesto, California, in order to proceed with plans to develop a strip mall. He entered into a contract with defendants by which defendants agreed to perform the necessary survey (the contract). The survey was completed by defendants, and plaintiff constructed the strip mall in accordance with the corners and boundaries shown on the survey. Thereafter, plaintiff discovered the survey was inaccurate and the inaccuracy resulted in a loss of use of a portion of his land. On December 5, 2008, plaintiff filed a complaint against defendants in superior court, alleging causes of action for breach of contract, professional negligence, fraud and negligent misrepresentation.

Concurrent with filing the complaint, plaintiff also served a demand for arbitration of the dispute. The reason for the demand was that the contract expressly provided, in paragraph 37, that “[a]ny dispute arising out of or related to this Agreement shall be resolved by binding arbitration and not in a court of law.” On January 5, 2009, counsel for the parties agreed that the matter would be resolved in superior court, rather than arbitration, and the demand for arbitration was withdrawn. The agreement to proceed in superior court was confirmed in writing, and it constituted a modification of the terms of the contract.<sup>1</sup>

Trial commenced in May 2010. After hearing the evidence at trial, posttrial briefs were filed by the parties and the trial court took the matter under submission. The trial court issued a tentative decision and, at the request of counsel, a statement of decision was issued. An amended statement of decision was issued on October 15, 2010. In the amended statement of decision, the trial court found that plaintiff had succeeded in proving his cause of action for professional negligence, but not the other three causes of action. The trial court found plaintiff was damaged in the amount of \$155,134, but due to a provision in the contract limiting liability to \$50,000 (¶ 25), the damage award was reduced to that amount. On December 20, 2010, judgment was entered in plaintiff’s favor in the amount of \$50,000.

On March 11, 2011, plaintiff filed his motion for attorney fees. The motion pointed out that the contract actually had three provisions relating to attorney fees: paragraphs 37, 39 and 40. Of the three provisions, he acknowledged that paragraphs 39 and 40 were inapplicable and, therefore, he requested fees under paragraph 37. Paragraph 37 provided, in relevant part, as follows:

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<sup>1</sup> The trial court found it was a valid modification of the terms of the original contract, which finding has not been challenged.

“37. **Arbitration of Disputes.** Any dispute arising out of or related to this Agreement shall be resolved by binding arbitration and not in a court of law. The dispute will be settled in accordance with the Rules of the American Arbitration Association, and judgment will be entered on the award. *The arbitrator will award attorney’s fees to the prevailing party.*” (Italics added.)

Defendants filed opposition to the motion for attorney fees. Defendants argued that paragraph 37 was limited to arbitration proceedings and it only authorized the arbitrator to award attorney fees. Since the case was litigated in superior court before a judge, defendants claimed no fees could be awarded. The trial court agreed with defendants’ position and denied the motion. The trial court held that the parties had stipulated to litigate their dispute in superior court rather than by binding arbitration as required by paragraph 37, resulting in a modification of their contract; and that the provision in paragraph 37 for an award of attorney fees by the arbitrator applied only in binding arbitration.

Plaintiff appealed from the order denying his motion for attorney fees.

### **DISCUSSION**

The issue before us is one of contractual interpretation; namely, whether the language of the attorney fees provisions in the contract would permit an award of attorney fees to plaintiff under the circumstances presented. We apply a de novo review to the interpretation of a written contract where, as here, such interpretation does not depend on the credibility of conflicting extrinsic evidence. (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865-866.)

The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties. (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264.) Where the contract is reduced to writing, the intention of the parties is to be inferred, if possible, solely from the written provisions of the contract. (Civ. Code, § 1639.) If contractual language is clear and explicit, it governs. (*Bank of the West v. Superior Court, supra*, at p. 1264; Civ. Code, § 1638.) Further, “[t]he whole of a contract

is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.” (Civ. Code, § 1641.)

We agree with the trial court that paragraph 37 did not allow attorney fees recovery in the present case. The subject matter addressed by paragraph 37 was that of binding arbitration and, along with requiring arbitration of disputes, the paragraph also provided the terms or conditions applicable to such arbitration proceedings. Included as one of the terms or conditions applicable to arbitration was that “[t]he arbitrator will award attorney’s fees to the prevailing party.” Said attorney fees provision, being contained within an arbitration clause and delineating one aspect of how that arbitration would be conducted, was plainly not meant to be applied outside of the arbitration context. Even if there were any doubt, and there is none, we think the fact that paragraph 37 expressly conferred authority to award attorney fees only to the “the arbitrator” confirms this interpretation. We conclude the trial court correctly ruled that paragraph 37 applied only in binding arbitration. Since, in this case, the parties modified their contract to litigate their dispute in superior court rather than by means of binding arbitration, paragraph 37 (including the attorney fees provision therein) was clearly inapplicable.

This construction was consistent with the *other* attorney fees provisions in the contract—paragraphs 39 and 40. Paragraph 39, entitled “Attorney’s Fees,” provided that “[i]f any proceeding is brought to enforce or interpret the provisions of this Agreement, the prevailing party therein shall be entitled to receive from the losing party therein, its reasonable attorneys’ fees ....” Paragraph 40, entitled “Costs of Dispute Resolution,” stated that “[i]n the event [plaintiff] institutes a proceeding against [defendants], either directly or by way of cross-complaint, including a claim for ... alleged negligence ... wherein: (a) [plaintiff] fails to obtain a judgment or award in [plaintiff’s] favor, (b) the action is dismissed, or (c) judgment is or award is rendered for [defendants], [plaintiff] agrees to pay [defendants] immediately following the proceedings all costs of defense,

including, but without limitation, reasonable attorneys' fees, expert witness fee, court costs, and any and all other expenses of defense.” It is clear from the broad terms used in paragraphs 39 and 40 to describe their applicability that they were not limited to binding arbitration but applied with respect to *any* proceedings, including judicial or court proceedings. Additionally, paragraphs 39 and 40 were plainly much narrower in scope than paragraph 37 in regard to the recovery of attorney fees. That is, paragraph 39 only allowed recovery of attorney fees to a party prevailing in an action on the contract; while paragraph 40 permitted *defendants* to recover attorney fees *from plaintiff* in the event that plaintiff instituted a negligence action against defendants but did not prevail.<sup>2</sup>

The only reasonable conclusion to draw from these several provisions addressing the subject of attorney fees is that the parties intended to broadly allow attorney fees to the prevailing party in any dispute resolved through binding arbitration, as provided in paragraph 37. However, if for any reason a dispute between them was litigated in a judicial proceeding, then the narrower provisions of paragraphs 39 and 40 would apply.<sup>3</sup> So construed, the several provisions make sense and are given effect, thereby adhering to

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<sup>2</sup> The attorney fees provision in paragraph 40 was obviously one-sided. The validity of that provision is not at issue in this appeal. We note that the mutuality requirements of Civil Code section 1717 are not applicable where, as here, the cause of action on which the party prevailed was for professional negligence rather than on the contract. (*Loube v. Loube* (1998) 64 Cal.App.4th 421, 430.) We also observe the trial court found that both parties had equal bargaining power and dealt at arm's length, which finding was not challenged.

<sup>3</sup> A rationale for treating arbitration differently may be that the parties assumed that arbitration would be considerably less expensive. (See *Trabuco Highlands Community Assn. v. Head* (2002) 96 Cal.App.4th 1183, 1188 [arbitration favored in California law as a speedy & inexpensive means of settling disputes].) In any event, we reject plaintiff's suggestion that because arbitration and judicial process are both means of dispute resolution we should treat them as interchangeable and insert the term “Superior Court Judge” for arbitrator and “judicial process” for arbitration in construing paragraph 37. The contract clearly treated these two distinct means of resolving disputes differently, and we must do likewise. (Civ. Code, § 1638.)

the rule that “[t]he whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.” (Civ. Code, § 1641.)

We briefly address two arguments presented by plaintiff in support of his contention that he should have been awarded attorney fees under the terms of the contract. First, he argues that the parties intended merely to substitute “a Judge of the Superior Court in the place of an arbitrator and the judicial process in the place of the binding arbitration process,” but that the remaining terms of paragraph 37—including its attorney fees provision—were intended to remain intact. In this regard, plaintiff refers to the trial court’s enforcement of paragraph 25 (the limitation on liability) as purported evidence that all of the provisions of the contract were intended to remain operative in the judicial proceeding—even the provisions of paragraph 37. Plaintiff’s argument ignores the obvious fact that paragraph 37 is a self-contained provision that addresses binding arbitration of disputes and outlines terms or conditions of such arbitration. Once the contract was modified and the parties agreed not to use arbitration at all, paragraph 37 became moot and the remaining attorney fees provisions took effect. We agree with defendants’ position that “an interpretation finding the broader attorney’s fees provision in Paragraph 37 applied in a judicial setting would mean that the limitations placed on attorney’s fee[s] in Paragraphs 39 and 40 would not be given any effect.” Such a result would not only violate Civil Code section 1641, but would require us to disregard the parties’ clear intention in the contract to distinguish between arbitration and other (i.e., judicial) proceedings with respect to attorney fees awards.

Plaintiff’s second argument is that he is entitled to recover his attorney fees based on paragraph 39 of the contract. Paragraph 39 provided that “[i]f any proceeding is brought to enforce or interpret the provisions of this Agreement, the prevailing party therein shall be entitled to receive from the losing party therein, its reasonable attorneys’ fees ....” Even though the trial court found that plaintiff failed to prove his cause of

action for breach of contract, plaintiff nonetheless argues that the attorney fees provision in paragraph 39 was applicable here because (i) the trial court considered the nature of the parties' contractual relationship in determining that defendants were professionally negligent, and (ii) the trial court enforced the limitation of liability provision set forth in paragraph 25 of the contract. Based on these facts, plaintiff contends that the trial court "enforce[d]" or "interpret[e]d" the contract in connection with his victory on the professional negligence cause of action.

Defendants respond that we should disregard this argument because it was not raised in the trial court and, moreover, it is contrary to the position plaintiff took in the motion for attorney fees. As noted earlier, plaintiff conceded in the trial court that paragraphs 39 and 40 were inapplicable and, therefore, it was unnecessary for the trial court or defendants to address the applicability of those provisions. Now, on appeal, he has reversed that position. "The rule is well settled that the theory upon which a case is tried must be adhered to on appeal. A party is not permitted to change his position and adopt a new and different theory on appeal. To permit him to do so would not only be unfair to the trial court, but manifestly unjust to the opposing litigant." (*Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334, 1350-1351, fn. 12; *Ernst v. Searle* (1933) 218 Cal. 233, 240-241.) Applying the theory of the case doctrine, we agree that under the circumstances plaintiff is not permitted to unfairly reverse his position regarding the basis of his claim for attorney fees. (See *Planned Protective Services, Inc. v. Gorton* (1988) 200 Cal.App.3d 1, 12-13 [theory of case prevented appellant from changing on appeal the statutory ground of his attorney fees claim].)<sup>4</sup>

But even if we were to consider plaintiff's argument that he was entitled to attorney fees under paragraph 39, we would reject it. Plaintiff prevailed on a tort cause of

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<sup>4</sup> This case was disapproved on other grounds in *Martin v. Szeto* (2004) 32 Cal.4th 445, 451, footnote 7.

action for professional negligence. Paragraph 39 was limited to causes of action “to enforce or interpret the provisions” of the contract. Clearly, this language cannot be stretched to include plaintiff’s tort cause of action. In *Loube v. Loube, supra*, 64 Cal.App.4th at pages 429 through 430, the Court of Appeal found that a similarly worded attorney fees provision (i.e., allowing fees in an action “to enforce” an agreement) was too narrow to permit an award of fees where the plaintiff prevailed on a cause of action for professional negligence, even though, as here, the professional negligence cause of action arose out of the parties’ contractual relationship. Likewise, plaintiff’s attempt to bring his cause of action within the scope of paragraph 39 is unconvincing. Furthermore, the fact that the trial court enforced the contract’s limitation of liability provision (§ 25) did not change the nature of *plaintiff’s* cause of action, but rather operated more as a partial defense. That is, limiting liability as required by paragraph 25 of the contract did not convert plaintiff’s cause of action for professional negligence into an action to enforce or interpret the contract. (See *Plemon v. Nelson* (1983) 148 Cal.App.3d 720, 724-725 [limitation of liability asserted defensively did not convert negligence claim into an action on the contract].)

**DISPOSITION**

The order of the trial court is affirmed. Costs on appeal are awarded to defendants.

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Kane, J.

WE CONCUR:

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Hill, P.J.

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Levy, J.