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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

CITY OF FRESNO,

Plaintiff and Respondent,

v.

PINEDALE COUNTY WATER DISTRICT,

Defendant and Appellant.

F064758

(Super. Ct. No. MCV043413)

OPINION

APPEAL from orders of the Superior Court of Madera County. James E. Oakley,
Judge.

Costanzo & Associates, Neal E. Costanzo and Michael G. Slater for Defendant
and Appellant.

Betts, Rubin & McGuinness, James B. Betts and Joseph D. Rubin for Plaintiff and
Respondent.

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This is the companion case to *City of Fresno v. Pinedale County Water Dist.* (Sept. 17, 2013, F064112) [nonpub. opn.], in which we affirmed the judgment entered in favor of defendant and respondent City of Fresno (City) following a court trial on the City's claims for specific performance based on breach of contract, declaratory relief, and accounting. Here, the Pinedale County Water District (District) appeals from post-judgment orders awarding costs and attorney fees to the City. We affirm.

BACKGROUND

The District and City are parties to an Agreement that requires (1) the City receive, transport, treat and dispose of the District's sewage, (2) the District bill and collect sewer charges from its customers at rates set forth by City ordinances and regulations, and (3) the District remit payment to the City as specified in the agreement. Section 18 of the Agreement includes an attorney fees provision which states that "[i]f either party is required to commence any proceeding or legal action to enforce or interpret any term, covenant or condition of this Agreement, the prevailing party in such proceeding or action shall be entitled to recover from the other party its reasonable attorney's fees and legal expenses."

Beginning in December 2007, the City informed the District it wanted to conduct an audit of the District's fiscal records pursuant to a contractual provision that states, in part, that the District shall "allow City to conduct audits of the fiscal records of District pertaining to this Agreement as City may determine necessary." The District refused to submit to an audit, contending the entirety of the contractual provision only required it to produce certain documents to the City, which the City could then examine. After an exchange of letters between the attorneys for both entities over a six month period, the City filed suit against the District, asserting claims for breach of contract, declaratory relief, and accounting, seeking both specific performance and an injunction.

A bench trial was held based solely on documentary evidence, declarations and deposition testimony. In a statement of decision, the trial court found in the City's favor

on all of its claims. The trial court issued a judgment which ordered that the City be allowed to conduct an investigation and audit of the District's internal financial controls and operations in order to determine whether the District was fulfilling its obligations under the Agreement. The judgment also provided: "The City of Fresno may recover its costs, including attorney's fees, as permitted by statute and/or contract as determined pursuant to a timely filed Memorandum of Costs."

The Motion to Tax Costs

On October 17, 2011, the City filed its Memorandum of Costs, in which it sought \$2,298.53 in total costs. On November 3, 2011, the District filed a motion to strike the memorandum of costs and tax the City's costs. In asking the trial court to strike the cost memorandum, the District noted that when something other than monetary relief is recovered, the court is required to determine the "prevailing party" and the award of costs is discretionary, citing Code of Civil Procedure section 1032, subdivision (a)(4).¹ The District contended that since the City was not entitled to recover costs as a matter of right, it could only recover costs by filing a motion for an award of costs, where the trial court could exercise its discretion to determine the prevailing party and availability of costs, and its failure to timely file such a motion was fatal to its claim for costs. In its opposition, the City argued that the trial court had already ruled in its judgment that the City was the prevailing party and was entitled to recover its costs pursuant to the filing of a memorandum of costs.

The District's motion was heard on December 8, 2011. The trial court began with its tentative ruling. It explained that it was operating under section 1032 with respect to the identification of the prevailing party, and this case came within section 1032, subdivision (a)(4), which gives the trial court discretion to allow costs and, if allowed, to apportion costs between the parties pursuant to the rules adopted under section 1034.

¹ All undesignated statutory references are to the Code of Civil Procedure.

The court stated that, “in this case, [it] does determine that the City of Fresno is the prevailing party, and will exercise its discretion to allow costs.” The court then explained that it was inclined to tax \$875 of the costs, leaving a net cost award to the City of \$1,423.53.

The District’s attorney argued that, as set forth in the District’s motion, it believed costs should be awarded by motion due to the nature of the case, “move[d] that the determination of prevailing party should be made after argument,” and submitted on the pleadings. The City’s attorney argued about the costs the court proposed to tax, asking it to exercise its discretion to allow some of the costs. The trial court stated it “was going to ultimately exercise its discretion as it indicated.” The City’s attorney agreed to prepare an order.

On December 15, 2011, an order was entered which stated that (1) the City was the prevailing party in this matter, (2) the District’s motion to strike the entire memorandum of costs was denied, (3) the District’s motion to tax certain cost items was granted, and (4) \$1,423.53 in costs were awarded to the City.

The Attorney Fees Motion

On December 1, 2011, the City filed a motion to fix attorney fees. The City asserted it was entitled to \$83,193 in attorney fees pursuant to the terms of the Agreement. The City sought to recover attorney fees billed by two City attorneys who handled the litigation from May 2008, when the complaint was drafted, to February 2010, when outside counsel Betts & Rubin became attorney of record for the City. One City attorney, Deputy City Attorney Shannon Chaffin, billed 160 hours at rates ranging from \$117 to \$123 per hour, while the other City attorney, Senior Deputy City Attorney Greg Myers, billed 42 hours at \$123 per hour. The billings totaled \$23,877.90. Detailed billing summaries from the City Attorney’s Office were attached to Chaffin’s declaration.

The City also sought to recover fees billed by Betts & Rubin, who became counsel of record for the City in February 2010 and were involved in written discovery, taking

and defending depositions, multiple discovery motions, and trial and post-trial matters. Joseph D. Rubin, whose billing rate was \$215 per hour, expended approximately 322.4 hours handling the matter, which resulted in the City incurring legal fees of \$69,316. In a declaration, Rubin explained that these fees do not represent all the fees that were billed to the City, as fees incurred for the services of James B. Betts and paralegal Tim Morris were not being sought. Moreover, the hourly rate billed was on the lower end of the spectrum of the rates Rubin charges. Rubin was familiar with the hourly rates charged by litigation attorneys in Fresno and believed \$215 per hour was on the lower side of the customary range of fees charged for contractual litigation by civil litigation attorneys with similar training and experience in the geographic area. In Rubin's opinion, the legal services and time spent were reasonably necessary and required to enforce the Agreement, but in an effort to avoid any argument as to the duplication of efforts or specific time entries, the City reduced its fee request from its billings of \$93,193 to \$83,193. Detailed billing summaries from Betts & Rubin were attached to Rubin's declaration.

The City argued it was entitled to recover attorney fees since the trial court had determined in the judgment that it was the prevailing party on the Agreement. The City asserted the fees incurred were reasonable because (1) to enforce and interpret the Agreement, and to defeat the District's repeated attack relating to it, the City was forced to engage in significant law and motion practice and required to brief and analyze a myriad of procedural and substantive issues; (2) the number of hours expended was reasonable, given that the City's attorneys were required to expend over 500 hours in bringing this action due to the District's tactics; and (3) the billing rates were reasonable.

The District filed written opposition to the motion in which it argued that (1) the City did not make a motion for a determination that it was the prevailing party or ask the court to determine who is the prevailing party, as required by Civil Code section 1717, and instead improperly sought fees as an allowable cost under section 1033.5; and (2) the

City did not present any evidence that the fees claimed were incurred to enforce the Agreement or that the City was billed or obligated to pay such fees. The District also filed written objections to the City's evidence. The City filed a reply brief, in which it responded to the District's arguments.

At the January 6, 2012 hearing on the motion, the trial court began by addressing the issue of whether it had determined that the City was the prevailing party, stating it believed the City was the prevailing party. The court explained that it had indicated in the statement of decision that the City "may" be awarded attorney fees and costs upon application, and while the use of the word "may" was perhaps "inartful," even if not explicitly stated in the statement of decision or judgment, "it certainly was a fact from the judgment that the [City] was the prevailing party[.]" which fact the court made explicit in its order on costs. The court understood there was a different analysis between costs and attorney fees, but with respect to the motion before it under Civil Code section 1717, it believed the City was entitled to attorney fees under the contractual provision.

The trial court stated it used the lodestar method of determining reasonable fees, and was inclined to find: (1) Rubin's hours prior to the filing of the motion were 322.4 and his hourly rate of \$215 was reasonable, for a total of \$69,316; (2) Chaffin's hours were 160 at an hourly rate of \$117, for a total of \$18,720; (3) Myers' hours were 42, at an hourly rate of \$123, for a total of \$5,166; (4) the City's fees totaled \$93,202; (5) the City requested the fees be reduced to \$83,193; (6) Rubin spent 9.5 hours at \$215 per hour, for a total of \$2,042.50, in preparing this motion; and (7) the court was inclined to grant attorney fees of \$85,235. The court ruled on the District's evidentiary objections, sustaining some and overruling others. The court further explained that it did not find it necessary to consider what other courts had done elsewhere and that it could use its own judgment from having heard many cases of this type about what are reasonable hours and rates. There was no question in the court's mind that the rates for all of the attorneys "were extraordinarily modest."

The District's attorney responded that the trial court did not have any evidence before it on which to base an attorney fee award under Civil Code section 1717, as there was no evidence of the fees the City actually incurred, namely what it paid or became liable to pay. The trial court, however, stated it was appropriate to use the reasonable value of the attorney's services, based upon prevailing market rates for attorneys of comparable experience, and the rates being claimed in this case were extremely modest compared to what the court would view as the prevailing market rate for attorneys of comparable experience. The court did not believe the bills themselves were necessary and from the evidence presented, it had been established what had been incurred and paid.

A written order subsequently was entered which stated, as pertinent here: (1) the City was the prevailing party in this matter; (2) the claims in the lawsuit fell under the scope of the attorney fees provision; (3) the rates charged and hours expended by Rubin and the City Attorney's office were reasonable; (4) the City's motion to fix attorney fees was granted; and (5) the City "shall recover" from the District its legal fees in the amount of \$85,235, as part of the judgment. An amended judgment was entered which provided that the City recover from the District its fees and costs in the amount of \$86,658.53.

DISCUSSION

I. The Memorandum of Costs

The District contends the trial court erred in awarding costs to the City because the City did not bring a motion for a discretionary determination of prevailing party status and the right to costs.

The parties agree that the determination of who was the prevailing party in this case is governed by the second sentence of section 1032, subdivision (a)(4), which provides: "When any party recovers other than monetary relief . . . the 'prevailing party' shall be as determined by the court, and under those circumstances, the court, in its discretion, may allow costs or not and, if allowed may apportion costs between the parties

on the same or adverse sides pursuant to the rules adopted under Section 1034.” This provision requires the trial court to determine which party is prevailing and then exercise its discretion in awarding costs; it does not require the trial court to award costs to the prevailing party “as a matter of right[,]” as stated in section 1032, subdivision (b).² (*Texas Commerce Bank v. Garamendi* (1994) 28 Cal.App.4th 1234, 1248-1249.)

The District asserts the trial court abused its discretion in awarding costs to the City because it treated the City’s memorandum of costs as an application for a cost award by the prevailing party, as set forth in California Rules of Court, rule 3.1700,³ “based on the false assertion that the judgment determined [the City] was the prevailing party.” Although the District claims this assertion was “false,” the trial court reasonably could conclude that the judgment it signed in fact determined the City to be the prevailing party, as the judgment states that the City “may recover its costs . . . as determined by a timely filed Memorandum of Costs.” Since the trial court had determined the City to be the prevailing party, the City properly sought to recover its costs by serving and filing a memorandum of costs pursuant to rule 3.1700, which provides, in pertinent part, that “[a] prevailing party who claims costs must serve and file a memorandum of costs within 15 days after the date of mailing of the notice of entry of judgment . . .”.

The District next asserts the trial court treated the City as if it were the prevailing party and entitled to costs as a matter of right, and therefore applied an improper legal standard in determining whether to award costs, as it never made a determination of prevailing party status. The District argues application of an improper legal standard amounts to an abuse of discretion, citing *Costco Wholesale Corp. v. Superior Court*

² Section 1032, subdivision (b) provides: “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.”

³ Subsequent references to Rules are to the California Rules of Court.

(2009) 47 Cal.4th 725, 733; and *Dyer v. Department of Motor Vehicles* (2008) 163 Cal.App.4th 161, 174. Contrary to the District's characterization of the record, the reporter's transcript of the hearing on the motion to tax costs shows that the trial court recognized it had discretion to determine who was the prevailing party and how costs should be apportioned. The record further reveals the trial court used its discretion to determine the City was the prevailing party and to award the City a portion of the costs it was claiming. There is no abuse of discretion.

Moreover, even if the City were required to file a separate motion to have itself declared the prevailing party, the District has not shown it was prejudiced by the City's failure to proceed in this manner. The District makes no argument that the trial court would have reached a different decision on the issue of the prevailing party had such a motion been filed. An exercise of discretion will not be disturbed on appeal unless it is shown that a clear abuse of discretion resulted in a miscarriage of justice. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 331; *Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.) Moreover, a judgment will not be reversed on the basis of such an error unless prejudice is affirmatively demonstrated. (§ 475; Cal. Const., art. VI, § 13.) Prejudice is not presumed and the burden is on the appellant to show its existence. (*Winfred D. v. Michelin North America, Inc.* (2008) 165 Cal.App.4th 1011, 1038.) Having failed to show prejudice, the District's claim of error in apportioning costs to it fails.

II. Attorney Fees Motion

The standard of review of an award of attorney fees after trial is abuse of discretion. (*Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1175.) The trial judge is considered the best assessor of the value of professional services in his or her court. (*Graciano v. Robinson Ford Sales, Inc.* (2006) 144 Cal.App.4th 140, 148.) As a result, the decision will not be disturbed unless it is shown that it is clearly wrong or is inconsistent with applicable legal principles. (*Ibid.*)

A. The City Attorney Fees

The District first contends the City is not entitled to recover the fees incurred for the services of the City Attorney's Office. Likening the Deputy City Attorneys who worked on this litigation, Chaffin and Myers, to pro se attorney litigants who may not recover attorney fees under Civil Code section 1717, the District asserts the City cannot recover the fees for their City attorneys' work because (1) there is no evidence the City incurred any fee in paying for their work, as the attorneys are City employees, and (2) Chaffin and Myers were representing their own interests as City attorneys when they represented the City in this litigation, namely "the interest in advancing their perverse interpretation of the agreement and validating the correctness of their determination and demand that [the District] could be subjected to an audit."

In *Trope v. Katz* (1995) 11 Cal.4th 274 (*Trope*), our Supreme Court considered the limited question of "whether an attorney who chooses to litigate in propria persona rather than retain an attorney to represent him [or her] in an action to enforce a contract containing an attorney fee provision can recover attorney fees under Civil Code section 1717[.]" and answered that question in the negative. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1092 (*PLCM*)). The Court in *PLCM* pointed out "that, by definition, the term 'attorney fees' implies the existence of an attorney-client relationship, i.e., a party receiving professional services from a lawyer." (*Ibid.*, citing *Trope, supra*, 11 Cal.4th at p. 280.)

As summarized in *Ramona Unified School Dist. v. Tsiknas* (2005) 135 Cal.App.4th 510, 524: "Where an attorney-client relationship exists, the courts uniformly allow for the recovery of attorney fees under Civil Code section 1717. (*PLCM, supra*, 22 Cal.4th at p. 1093 [party represented by in-house lawyers]; *Mix v. Tumanjan Development Corp.* (2002) 102 Cal.App.4th 1318, 1321 [successful pro per litigant can recover attorney fees under Civil Code section 1717 for legal services of assisting counsel even though they did not appear as attorneys of record]; *Gilbert v.*

Master Washer & Stamping Co. (2001) 87 Cal.App.4th 212, 220 [attorney represented by other members of his or her own law firm entitled to recover contractual attorney fees].)” (See also *Musaelian v. Adams* (2009) 45 Cal.4th 512, 520 [explaining that in cases in which the California Supreme Court held that attorney fees could be recovered by the Labor Commissioner who represented a party without charge, in-house counsel, and a party represented by an attorney under a contingency fee arrangement, “. . . attorney fees were ‘incurred’ in the sense that there was an attorney-client relationship, the attorney performed services on behalf of the client, and the attorney’s right to fees grew out of the attorney-client relationship.”].) As our Supreme Court has explained, in cases where an attorney-client relationship exists, such as where a litigant is represented by in-house counsel, the in-house counsel, unlike a pro se litigant, does not represent his or her “own personal interests and [is] not seeking remuneration simply for lost opportunity costs that could not be recouped by a nonlawyer.” (*PLCM, supra*, 22 Cal.4th at p. 1093.)

Here, an attorney-client relationship existed between the City Attorney’s Office and the City. As explained in the declaration of Assistant City Attorney Francine Kanne, Myers “was involved in the representation of the City” prior to outside counsel taking over the litigation. Chaffin states in his declaration that he has been “the attorney of record to the City” regarding District matters, he had litigated a variety of claims on behalf of the City and was handling the litigation in this case until outside counsel took over the litigation. Moreover, Fresno City Charter Section 803 provides that City Attorney’s powers include: “(a) Represent and advise the Council and all city officers in all matters of law pertaining to their offices; (b) Represent and appear for the city in any or all actions or proceedings in which the city is concerned or is a party. . . .” There is no question that, in litigating this case, the attorneys in the City Attorney’s Office were performing services on the City’s behalf, not their own, and the fees incurred grew out of that relationship. (See, e.g., *Gutierrez v. G & M Oil Co., Inc.* (2010) 184 Cal.App.4th 551, 559 [In-house counsel has attorney-client relationship with employer].)

B. Fees for Outside Counsel

The District next contends the trial court erred in awarding fees for the work of outside counsel Betts & Rubin because (1) no evidence was presented concerning the market value of outside counsel's services, (2) no bills were presented with Rubin's declaration, and (3) there is no evidence the City incurred fees for the hours reflected in the billing summary or that the City actually paid those fees. The District asserts that to recover attorney fees, the City was required to disclose "what the precise arrangements are with respect to the hourly rate and what was actually charged and paid for or which Fresno became liable to pay." The District also contends the fees awarded were not reasonable because the billing summary attached to Rubin's declaration shows the "vast majority of time is spent on duplicative efforts to conduct discovery and prepare the matter for trial and to try the case on the basis of what amounts to a procedure similar to the unfiled summary adjudication motion prepared by the City attorneys."

An appellate court will reverse an award of attorney fees as excessive only where there has been a manifest abuse of discretion. (*EnPalm, LCC v. Teitler Family Trust* (2008) 162 Cal.App.4th 770, 774 (*EnPalm*)). Reasonable attorney fees authorized by contract shall be awarded to the prevailing party as "fixed by the court," giving the trial court broad discretion to determine the amount considered reasonable, governed by equitable principles. (*Ibid.*) The pleadings, depositions, and other evidence of actual work performed by the City's counsel are before the court, and upon this evidence, the court alone has the discretion to set the fee award. (*Melnyk v. Robledo* (1976) 64 Cal.App.3d 618, 624.)

The first step in determining the amount of fees is using the lodestar figure, a calculation based on the number of hours reasonably expended by the attorney multiplied by the attorney's hourly rate. (*EnPalm, supra*, 162 Cal.App.4th at p. 774.) After determining the lodestar figure, the court considers whether the total award calculated under all of the circumstances of the case is more than a reasonable amount, and if it is,

the court can reduce the award. (*Id.* at p. 775.) Some factors considered to assess reasonableness are the necessity and nature of the litigation, skill required, experience of counsel, attention given, and the success or failure of the case. (*Id.* at p. 774.)

In some instances, an award of attorney fees may be made solely on the basis of the experience and knowledge of the trial judge without the need to consider any evidence. (*Fed-Mart Corp. v. Pell Enterprises, Inc* (1980) 111 Cal.App.3d 215, 226.) Moreover, it is well established detailed billing records are *not* required to affirm an attorney fees award. “In California, an attorney need not submit contemporaneous time records in order to recover attorney fees. . . . Testimony of an attorney as to the number of hours worked on a particular case is sufficient evidence to support an award of attorney fees, even in the absence of detailed time records.” (*Martino v. Denevi* (1986) 182 Cal.App.3d 553, 559; see also *Steiny & Co. v. California Electric Supply Co.* (2000) 79 Cal.App.4th 285, 293.)

Here, the trial court found both that Rubin’s hourly rate and the time spent on this litigation were entirely reasonable. Contrary to the District’s assertion, the City was not required to produce evidence of the “precise arrangements” it had with Betts & Rubin or that the City actually incurred the fees. The evidence clearly shows that Betts & Rubin had an attorney-client relationship with the City, as the City retained the firm to represent it in this litigation. Numerous circumstances exist in which attorney fees are awarded even though not they are not actually incurred. A prime example is in our Supreme Court’s decision in *PLCM, supra*, 22 Cal.4th at pp. 1094-1095, holding that attorney fees may be recovered under Civil Code section 1717 for the work of in-house counsel. The Court expressly held the trial court was not required to use a “cost-plus approach,” namely a calculation of the actual salary, costs and overhead of in-house counsel, and could instead use market value to determine reasonable attorney fees. (*Id.* at pp. 1096-1097.) This conclusion was reached even though Civil Code section 1717 specifically refers to fees which are “incurred.” (See also *Lolley v. Campbell* (2002) 28 Cal.4th 367,

371, 374 [rejecting contention that attorney fees “incurred” under a Labor Code provision means only fees a litigant actually pays or becomes liable to pay from his own assets; court could award fees to employee who could not afford counsel and was represented by Labor Commissioner]; *Beverly Hills Properties v. Marcolino* (1990) 221 Cal.App.3d Supp. 7, 12 [affirming an award of reasonable attorney fees under Civ. Code, § 1717 for pro bono services].⁴

While the District complains that the fees awarded are not reasonable, generalized and unsubstantiated objections to a fee award that do not address specific costs are inadequate to rebut the presumption that the City’s fees are reasonably and necessarily incurred. (*Hadley v. Krepel* (1985) 167 Cal.App.3d 677, 684 (*Hadley*)). In *Hadley*, the defendant who prevailed in an action on a contract appealed from an award of attorney fees and costs that totaled less than 20 percent of his actual expenses, asserting the award was unreasonably low. (*Id.* at p. 680.) In determining how the trial court reached its decision, the appellate court noted the plaintiff had claimed that certain attorney fees were unreasonable because they were for duplicative services incurred as a result of his adversary’s need to hire a new attorney. (*Id.* at p. 683.) While the appellate court was unable to determine from the record precisely what portion of the defendant’s total fees were attributable to work of a repetitive nature, it identified two possible items of work,

⁴ In *Trope*, *supra*, 11 Cal.4th at p. 280, which the District cites, our Supreme Court observed that “the usual and ordinary meaning of the words ‘attorney’s fees,’ both in legal and in general usage, is the consideration that a litigant actually pays or becomes liable to pay in exchange for legal representation.” In *PLCM*, the Supreme Court explained that its reference in *Trope* “was not intended to imply that fees can be recovered only when, and to the extent that, a litigant incurs fees on a fee-for-service basis, a question not raised therein.” (*PLCM*, *supra*, 22 Cal.4th at p. 1097, fn. 5.) *Trope* held that an attorney who represents himself cannot recover attorney fees under Civil Code section 1717; “otherwise, we would in effect create two separate classes of pro se litigants – those who are attorneys and those who are not – and grant different rights and remedies to each.” (*Trope*, *supra*, 11 Cal.4th at p. 277.)

but noted they accounted for no more than 25 hours of the total claimed. (*Ibid.*) The plaintiff also objected to other items he believed were unreasonable by setting forth a string of dates and fees corresponding to those contained in the defendant’s cost bill instead of explaining the basis for their generalized objections, which the appellate court found to be an inadequate challenge. (*Id.* at 684.)

Here, while the District complains that the “vast majority” of outside counsel’s work was duplicative, the trial court did reduce the fees awarded, at the City’s request, to take into account duplicate work. The District does not demonstrate on appeal that this was an abuse of discretion. Instead, the District asserts that the billing summary attached to Rubin’s declaration shows the trial court should have reduced the fees significantly more, but fails to identify precisely what portion of outside counsel’s fees are attributable to work of a repetitive nature. The District has not alleged its objections with enough specificity to rebut the presumption that the City’s fees were reasonably incurred.

In sum, the District has not shown that the trial court abused its discretion in its award of attorney fees to the City.

DISPOSITION

The trial court’s post-judgment orders are affirmed. Respondent shall recover its costs on appeal.

Gomes, Acting P.J.

WE CONCUR:

Detjen, J.

Franson, J.