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

JAMES AGEE et al.,

Plaintiffs and Respondents,

v.

OAKDALE IRRIGATION DISTRICT et al.,

Defendants and Appellants.

F070632

(Super. Ct. No. 643471)

OPINION

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

Damrell, Nelson, Schrimp, Pallios, Pacher & Silva, Roger M. Schrimp, James A. Oliveira, Fred A. Silva and Kathy Lee Monday for Defendants and Appellants.

Joseph A. Hearst for Plaintiffs and Respondents.

No appearance for Plaintiffs and Respondents James Agee, Vicki Ferreira, Barbara Ann Machado, Dale L. Reynolds, Sandra Neri-Reynolds and Jon Wood.

Defendants appeal from the order denying their motion for attorney fees and the judgment incorporating that denial. Judgment was entered in favor of defendants, after plaintiffs rested at trial without presenting any evidence. Defendants requested an award of attorney fees. The trial court denied the motion, finding that defendants failed to make an adequate showing of entitlement to an award of attorney fees under any of the legal authorities invoked. We conclude defendants have not demonstrated error in the trial court's order. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On July 20, 2009, plaintiffs filed their original complaint against the Oakdale Irrigation District (OID), five individual members of its board of directors, and its general manager. Plaintiffs alleged they were homeowners within the Deo Gloria Estates tract in Oakdale. In or about 1978, the developers of the tract and OID created an improvement district (ID 52) to provide water to the development. The developers deeded two pieces of property, referred to by plaintiffs as the "disputed parcels," to the directors of OID and their successors in office, as trustees for ID 52. Two wells and water pumping facilities that served the development were located on the disputed parcels. Plaintiffs alleged that, by accepting the deed and having it recorded, OID and its directors took title to the disputed parcels as owners in fee simple absolute.

The complaint alleged that, from 1978 to December 2008, defendants refused to acknowledge ownership of the disputed parcels, and instead represented to plaintiffs that plaintiffs owned the disputed parcels, wells, pumps, and associated infrastructure. In 2004, OID sent a letter to the members of ID 52, warning that the water system was in dire need of repairs, "both of your wells are shot," and the cost of repair would be significant. The remedy OID "urged, demanded and completed" was the replacement of the wells, the pumps, and the underground water piping and infrastructure, at a cost in excess of \$1 million, chargeable to the homeowners in ID 52. Plaintiffs alleged some of the work was unnecessary.

The original complaint contained five causes of action, for declaratory relief, breach of fiduciary duty, fraud, rescission, and an accounting. The fraud cause of action sought compensatory and punitive damages based on allegations plaintiffs agreed to the repair or reconstruction of the water system as a result of defendants' alleged misrepresentations. The breach of fiduciary duty cause of action alleged that, if defendants held the disputed parcels in trust as they claimed, they breached their fiduciary duty to plaintiffs by failing to disclose the true facts relating to the ownership, operation, maintenance, and replacement of the water facilities, and by favoring their own interests over those of plaintiffs. The declaratory relief cause of action sought a declaration as to ownership of the disputed parcels, and as to defendants' alleged wrongful conduct. The rescission cause of action sought to rescind plaintiffs' votes in favor of replacing the water system facilities and to obtain a refund of the money they paid for that project. The accounting cause of action sought an accounting of all receipts and expenditures relating to operation of ID 52.

Plaintiffs subsequently filed a first, second, third, and fourth amended complaint. The fourth amended complaint omitted the fraud cause of action. About six months prior to trial, plaintiffs obtained leave to file a fifth amended complaint, which included a cause of action for fraud and negligent misrepresentation. The trial court thereafter sustained defendants' demurrer to the fraud and negligent misrepresentation cause of action without leave to amend, and struck the request for punitive damages.

On the first day of the court trial, defendants submitted motions in limine. Defendants' motion No. 3 sought to exclude all evidence of defendants' discretionary acts, based on governmental immunity statutes. Defendants' motion No. 4 sought to exclude all evidence of defendants' adoption of or failure to adopt any enactment, again based on immunity statutes. After initially denying motion No. 3 and granting motion No. 4, the trial court reconsidered both rulings, reversed itself, and granted motion No. 3

and denied motion No. 4. It ordered the exclusion of all evidence of defendants' discretionary acts.

After a break allowing plaintiffs' counsel to consider how to proceed, plaintiffs' counsel began to recite what he believed the evidence would have shown. When asked by the trial court, he denied he was making an opening statement and referred to it as a soliloquy. Plaintiffs rested without introducing any evidence. Defendants made a motion for judgment under Code of Civil Procedure section 631.8, which the trial court granted.

Defendants subsequently filed a motion for an award of attorney fees of approximately \$350,000 pursuant to Code of Civil Procedure section 1038, the Trust Law (Prob. Code, § 15000 et seq.), and Water Code section 23954. Plaintiffs opposed the motion. After a hearing and further briefing, the trial court denied the motion. Defendants appeal from the judgment and order denying their request for attorney fees.

DISCUSSION

I. Attorney Fees Under Code of Civil Procedure Section 1038

The first basis on which defendants sought an award of attorney fees was Code of Civil Procedure section 1038, which provides, in part:

“In any civil proceeding under the Government Claims Act ..., the court, upon motion of the defendant ... shall, at the time of the granting of any ... motion for judgment under Section 631.8, ... determine whether or not the plaintiff ... brought the proceeding with reasonable cause and in the good faith belief that there was a justifiable controversy under the facts and law which warranted the filing of the complaint If the court should determine that the proceeding was not brought in good faith and with reasonable cause, an additional issue shall be decided as to the defense costs reasonably and necessarily incurred by the party or parties opposing the proceeding, and the court shall render judgment in favor of that party in the amount of all reasonable and necessary defense costs, in addition to those costs normally awarded to the prevailing party.” (Code Civ. Proc., § 1038, subd. (a).)

“Defense costs” is defined to include reasonable attorney fees. (Code Civ. Proc., § 1038, subd. (b).)

Code of Civil Procedure section 1038 “provides public entities with a protective remedy for defending against unmeritorious litigation’ [citation] as a judicially approved alternative to a constitutionally proscribed action for malicious prosecution.” (*Knight v. City of Capitola* (1992) 4 Cal.App.4th 918, 931 (*Knight*) (disapproved on another ground in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 532, fn. 7).) To avoid an award of defense costs, a plaintiff must have filed and pursued the action both “with reasonable cause and in the good faith belief that there was a justifiable controversy under the facts and law.” (Code Civ. Proc., § 1038, subd. (a); *Hall v. Regents of University of California* (1996) 43 Cal.App.4th 1580, 1585 (*Hall*)). “The moving defendant must negate either good faith or reasonable cause in order to prevail.” (*Hall*, at pp. 1585–1586.) The statute applies not only to actions initiated in bad faith and without reasonable cause, but also to actions initiated in good faith, but subsequently maintained in bad faith and without reasonable cause. (*Id.* at p. 1586.)

“Good faith, or its absence, involves a factual inquiry into the plaintiff’s subjective state of mind”; the trial court’s finding on good faith is reviewed under the substantial evidence standard. (*Knight, supra*, 4 Cal.App.4th at p. 932, italics omitted.) “Reasonable cause is to be determined objectively, as a matter of law, on the basis of the facts known to the plaintiff when he or she filed or maintained the action. Once what the plaintiff (or his or her attorney) knew has been determined, or found to be undisputed, it is for the court to decide “whether any reasonable attorney would have thought the claim tenable ...” [Citations.] Because the opinion of the hypothetical reasonable attorney is to be determined as a matter of law, reasonable cause is subject to de novo review on appeal.” (*Ibid.*)

The trial court denied the request for fees under Code of Civil Procedure section 1038, finding plaintiffs’ action was not brought without reasonable cause or without a good faith belief there was a justifiable controversy under the facts and law. The trial court did not, either at oral argument or in its order denying the motion, expressly discuss

what facts were known by plaintiffs or their attorney at the outset, what facts may have been discovered later, or whether a reasonable attorney would have thought plaintiffs' claims were tenable either at the time the initial complaint was filed or subsequently. Defendants contend plaintiffs lacked reasonable cause to bring and maintain the action, because no reasonable attorney would have thought their claims were tenable. We review the trial court's determination of that issue de novo.

A. A civil proceeding under the Government Claims Act

Initially, we reject plaintiffs' argument that Code of Civil Procedure section 1038 did not apply at all because many of plaintiffs' causes of action were not "under the Government Claims Act." The Government Claims Act (Gov. Code, § 810 et seq.; "the Act") provides that "no suit for money or damages may be brought against a public entity on a cause of action for which a claim is required to be presented ... until a written claim therefor has been presented to the public entity and has been acted upon by the board, or has been deemed to have been rejected by the board." (Gov. Code, § 945.4.) The Act requires presentation of "all claims for money or damages against local public entities," with specified exceptions not applicable here. (Gov. Code, § 905.) "Contract claims fall within the plain meaning of the requirement that 'all claims for money or damages' be presented to a local public entity." (*City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 738 (*City of Stockton*).

While section 814 of the Act provides that "[n]othing in this part affects liability based on contract or the right to obtain relief other than money or damages against a public entity or public employee," the Supreme Court has held this provision "pertains only to immunity from liability, and has no effect on the claims requirements." (*City of Stockton, supra*, 42 Cal.4th at p. 740.) Thus, contract claims are not excluded from the Act; this prompted the court in *City of Stockton* to determine that the Act, which until then had traditionally been referred to as the "Tort Claims Act," should thereafter be referred to as the "Government Claims Act." (*City of Stockton*, at pp. 741–742.) To the

extent plaintiffs have argued that the Act, and therefore Code of Civil Procedure section 1038, did not apply to this action because some of plaintiffs' claims were based on contract, the argument is without merit.

Plaintiffs assert on appeal that their claims for declaratory relief, rescission, and an accounting were not claims for money or damages governed by the Act. Each of those causes of action, however, included a request for money or damages. The declaratory relief cause of action, after alleging the matter was in dispute, sought a declaration that "Defendants are obliged to recompense all monies assessed by Defendants and paid by Plaintiffs." The accounting cause of action alleged "it is impossible to determine the amounts of money owed to Plaintiffs by Defendants as a result of Defendants' deception, fraud, extortion and wrongful assessments without an accounting by a third party." Plaintiffs sought a judgment "for whatever sums may be found due and owing to Plaintiffs under the accounting."

The traditional equitable action to have the rescission of a contract adjudged was abolished in 1961 by the repeal of former Civil Code section 3406. (4 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 541, p. 668.) Under current law, rescission of a contract is effected by giving notice to the other party and restoring, or offering to restore, to the other party everything of value received from that party under the contract.¹ (Civ. Code, § 1691.) Notice and an offer to restore may be given by service on the other party of a pleading seeking relief based on rescission. (*Ibid.*) When a contract has been rescinded, any party may bring an action for restitution, damages, or other relief to which the party may be entitled.

¹ We note that the complaints did not allege rescission of a *contract*. Although plaintiffs' counsel himself asked at trial, "how do you rescind anything other than a contract," he repeatedly asserted plaintiffs were seeking rescission of their votes for replacement of the water system and financing of that work.

In the rescission cause of action, plaintiffs demanded “the return of monies extracted from them [by] Defendants,” and alleged plaintiffs had been damaged by defendants’ actions. They prayed for “damages by way of restitution.” In *City of Stockton*, the court concluded a restitution claim is not one for money or damages under the Act if it is “a claim for specific property effectively held by the government as a ‘bailee’ for the claimant.” (*City of Stockton, supra*, 42 Cal.4th at p. 743.) “When a claim for ‘money or damages’ is not based on a governmental obligation to return specific property,” however, it falls within the Act. (*Ibid.*) Plaintiffs did not seek the return of specific funds defendants held as bailees. Rather, they sought reimbursement of money paid for repairs to the water system. Thus, plaintiffs’ claim for restitution of money they paid as assessments constituted a claim for money or damages within the Act.

Plaintiffs’ request for an accounting was incidental to their claims for damages for fraud and breach of fiduciary duty; it was sought merely as a means of determining the amount of damages to which plaintiffs might be entitled. Their request for rescission and restitution of amounts they paid for repair and replacement of the water system and its infrastructure constituted a claim for money or damages under the Act. The declaratory relief cause of action sought a declaration establishing defendants’ wrongful conduct, as a basis for a judgment for damages. Accordingly, we conclude plaintiffs’ action was a “suit for money or damages” against a public entity, which constituted a “civil proceeding under the Government Claims Act” as that term is used in Code of Civil Procedure section 1038, subdivision (a).

B. Reasonable cause

1. Claims based on misrepresentation of ownership

Reasonable cause must be determined on the basis of the facts known to the plaintiff at the time of filing or maintaining the action. (*Knight, supra*, 4 Cal.App.4th at p. 932.) The facts known by plaintiffs at the time the action was filed are those contained in their original complaint and its attachments. The original complaint alleged OID was

“a political subdivision of the State of California duly organized and existing under Division 11 of the California Water Code.” Further, in 1978, the developers of Deo Gloria Estates and OID created an improvement district, ID 52, to provide water to the development. Plaintiffs alleged ID 52 was created:

“For the operation, maintenance, repair, upkeep and/or replacement of the pumping plants and appurtenant equipment, structures and pipelines to be furnished and installed by property owners within proposed Improvement District No. 52; to furnish the necessary power for the operation of said pumps, to raise funds therefor from the land in said Improvement District No. 52 by means of assessments or charges for the use of water furnished by means of the Improvement District works, and to do any and all things necessary for the efficient and economical operation of said proposed Improvement District No. 52.”

Division 11 of the Water Code (Wat. Code, § 20500 et seq.) governs irrigation districts. Part 7 of Division 11 (Wat. Code, § 23600 et seq.) governs improvement districts within irrigation districts. When an improvement district is proposed, the board of the irrigation district prepares an estimate of the cost of the proposed improvements and proposes an assessment for the cost, apportioned to each tract of land in the proposed improvement district. (Wat. Code, § 23626.)² After hearings, if the board determines formation of the improvement district would be in the best interests of the irrigation district and the proposed improvement district, it forms the improvement district, levies an assessment, if needed, and apportions the assessment to the land in the improvement district. (Wat. Code, §§ 23645–23667.) The assessment may be made payable in annual installments. (Wat. Code, §§ 23670, 23670.1.) Procedures are provided for making subsequent assessments. (Wat. Code, §§ 23850–23865.)

“The board of the district may in lieu in whole or in part of levying assessments for the operation of improvement district works fix and collect charges for the use of

² The term “district” as used in Division 11 of the Water Code refers to an irrigation district. The term “board” refers to the board of directors of the irrigation district. (Wat. Code, §§ 20513, 20521.)

water or for any other service furnished by means of the improvement district works” (Wat. Code, § 23954.) The board may also “provide for the maintenance and operation of the works of an improvement district from the funds of the irrigation district, in lieu of levying further improvement district assessments for such purposes.” (Wat. Code, § 23955.) The chapter of Division 11 governing “funds” provides: “The cost of improvement district improvements shall be paid only out of the proceeds of an improvement district assessment levied upon and collected from the land in the improvement district for improvement purposes.” (Wat. Code, § 24525.) The cost of an improvement in an improvement district may be advanced by the irrigation district, and returned when assessments have been collected for the improvement district. (Wat. Code, § 24528.)

The Water Code also provides: “The board may also hold property used or acquired in connection with the improvement in the name of the directors and their successors in office as trustees for the improvement district.” (Wat. Code, § 23951.) Plaintiffs’ original complaint alleged the developers of Deo Gloria Estates conveyed two parcels of land within the development to the OID board of directors, by a grant deed to the individual directors and their successors in office as trustees for ID 52. Based upon this grant deed and the board’s action in accepting and recording the deed, plaintiffs alleged OID and the board owned the parcels in fee simple absolute, rather than in trust. Their claims of fraud were based on allegations that the board misrepresented the ownership of the two parcels on which the wells were located, by representing the water system was owned by plaintiffs or was “yours.” The assumption implicit in plaintiffs’ allegations is that, because OID or its directors “owned” the two parcels, they, rather than plaintiffs, were legally responsible for bearing the cost of repairing or replacing the wells, pumps, underground pipes, and other infrastructure that made up the water system serving the homeowners within ID 52.

A reasonable attorney, prior to filing suit against an irrigation district and the members of its board of directors based on actions they took in repairing or replacing improvements within an improvement district in the irrigation district and levying assessments on the property within the improvement district to pay for those improvements, would have consulted the Water Code and acquainted himself or herself with its provisions. The statutes authorizing the board to levy assessments or collect charges from the homeowners within an improvement district to pay for maintenance, repair, or replacement of the improvements apply regardless whether the board owns any property in the improvement district, and regardless whether it holds any property in the improvement district “in the name of the directors and their successors in office as trustees for the improvement district” (Wat. Code, § 23951). Thus, ownership of the two pieces of land on which the wells and pumping facilities were located had no effect on the board’s authority to assess the homeowners within the improvement district for the costs of maintaining the water system.

A reasonable attorney would have concluded that the ownership of the disputed parcels and the manner in which title to them was held were irrelevant to the propriety of the assessments levied by the board against the property owners within ID 52 for the repair of the water system. The board’s alleged representations about ownership of the disputed parcels (i.e., that they were held by the directors in trust for ID 52) were supported by the grant deed, which was attached to plaintiffs’ original complaint. But even if those representations were inaccurate, as plaintiffs alleged, the manner in which title to the disputed parcels was held did not affect the board’s statutory authority to levy the challenged assessments for repair of ID 52’s water system. Accordingly, to the extent plaintiffs’ action was based on alleged misrepresentations as to ownership and title to the disputed parcels, it failed to present tenable claims that a reasonable attorney would have pursued.

2. Other claims

A reasonable attorney contemplating filing a civil action against a public entity would have also consulted the statutory provisions concerning governmental immunity. (Gov. Code, § 815 et seq.) Generally, “a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused.” (Gov. Code, § 820.2.) A public entity generally “is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability.” (Gov. Code, § 815.2, subd. (b).) Thus, when the employee has discretionary immunity, the public entity is also immune. (*Masters v. San Bernardino County Employees Retirement Assn.* (1995) 32 Cal.App.4th 30, 40.)

A “‘workable definition’ of immune discretionary acts draws the line between ‘planning’ and ‘operational’ functions of government. [Citation.] Immunity is reserved for those ‘*basic policy decisions* [which have] ... been [expressly] committed to coordinate branches of government,’ and as to which judicial interference would thus be ‘unseemly.’” (*Caldwell v. Montoya* (1995) 10 Cal.4th 972, 981.) “[I]mmunity should attach to those decisions which involve ‘basic policy’ choices which, because they constitute an exercise of governmental administration, should “‘remain beyond the range of judicial inquiry.’”” (*Ronald S. v. County of San Diego* (1993) 16 Cal.App.4th 887, 896.) “On the other hand, ... there is no basis for immunizing lower-level, or ‘ministerial,’ decisions that merely implement a basic policy already formulated.” (*Caldwell*, at p. 981.)

A reasonable attorney, before filing suit and causing both plaintiffs and defendants to incur substantial attorney fees and costs, would have analyzed the effect of this discretionary immunity on plaintiffs’ claims, to determine whether plaintiffs’ claims would be barred by it. As to the claims plaintiffs alleged that were not based on misrepresentation of ownership of the disputed parcels, we believe such an attorney

would have concluded that the board's decisions regarding whether and when the ID 52 water system required major repairs, the scope of the needed repairs, and the means by which ID 52 and its property owners would finance the project constituted planning functions within the discretion of the board, which fell within the immunity for discretionary decisions under Government Code sections 820.2 and 815.2, subdivision (b).

The breach of fiduciary duty and declaratory relief causes of action, however, included allegations that, if OID and the board held the disputed parcels and associated infrastructure as trustees for the benefit of plaintiffs, they owed a fiduciary duty to plaintiffs in the operation and maintenance of the disputed parcels and associated facilities. Defendants allegedly failed to maintain the water system, failed to provide plaintiffs with requested information concerning the repair project for which assessments were levied, unnecessarily replaced underground piping with nearly identical piping, obtained \$10,000 from plaintiffs for one purpose, but diverted it to other uses, financed the project through a bank in which one or more of the directors was involved in an administrative capacity, creating a conflict of interest, and failed to restore the streets in the subdivision to their previous condition after replacing the underground piping.

At the outset of trial, the trial court determined discretionary immunity applied to the matters alleged by plaintiffs and granted defendants' motion in limine to exclude all evidence of defendants' discretionary decisions. Plaintiffs then rested without attempting to present any evidence. By doing so, they effectively conceded they had insufficient evidence of the alleged wrongful conduct to support any of their remaining causes of action in the absence of evidence of the board's discretionary acts.

Reasonable cause to bring an action is determined according to the facts known to plaintiffs at the time they brought the action; reasonable cause to maintain the action is determined according to the facts known at any time thereafter when the defendant contends the plaintiff reasonably should have known the claims had become untenable.

Based on the facts alleged in the original complaint, which reflect the facts known by plaintiffs at the time the action was filed, we cannot say as a matter of law that a reasonable attorney would have believed plaintiffs did not have any tenable claims at that time.

The line between basic policy decisions at the planning stage, to which discretionary immunity applies, and operational or ministerial decisions or actions, to which the immunity does not apply, is not clearly defined. Further, the record does not contain information regarding what was included in the project when the board made the decision to undertake repairs to the water system. Thus, we cannot determine at what level specific decisions were made. For example, plaintiffs alleged defendants represented the water flow rate, including the flow rate for water used for fire suppression, was inadequate and needed remediation. They also alleged the existing piping was replaced with almost identical piping. If the choice of replacement piping was made in implementing the discretionary decision to repair the system, then that choice may constitute merely an operational or ministerial decision not within the immunity for discretionary decisions. Likewise, the alleged failure to restore the streets after replacing the underground piping may have been an operational decision made in the course of the implementation of the decision to repair the water system.

As to maintaining the action without reasonable cause, defendants have not asserted or demonstrated that plaintiffs acquired further information during the course of the litigation that would have led a reasonable attorney to conclude all of plaintiffs' causes of action were untenable.

Accordingly, we conclude the trial court did not abuse its discretion by denying defendants' request for attorney fees under Code of Civil Procedure section 1038, on the ground defendants failed to demonstrate the action was brought without reasonable cause or a good faith belief there was a justifiable controversy under the facts and law.

II. Attorney Fees Under Water Code Section 23954

Defendants also sought an award of attorney fees under Water Code section 23954, which provides:

“The board of the district may in lieu in whole or in part of levying assessments for the operation of improvement district works fix and collect charges for the use of water or for any other service furnished by means of the improvement district works in the same manner and with the same effect as charges are made and collected by districts for the use of water or for services.” (Wat. Code, § 23954.)

This section authorizes the board of directors of an irrigation district to take certain actions. It does not authorize a trial court to award attorney costs as fees to a party who prevailed in litigation. The trial court properly denied defendants’ request for attorney fees based on this statute.

III. Attorney Fees Under the Trust Law

Defendants assert they held the property of the improvement district in trust under the Trust Law (Prob. Code, § 15000 et seq.), as authorized by the Water Code (Wat. Code, §§ 22437, 23951). They assert a trustee is entitled to pay attorney fees, incurred in administration of the trust, out of the trust assets. (See, e.g., Prob. Code, §§ 16243, 16347, 16239.) They argue that, in this case, the attorney fees should be chargeable only against the trust beneficiaries who brought the unsuccessful litigation against OID and the board members.

“Attorneys hired by a trustee to aid in administering the trust are entitled to reasonable fees paid *from trust assets*.” (*Kasperbauer v. Fairfield* (2009) 171 Cal.App.4th 229, 235, italics added.) “[T]he Probate Code is studded with provisions authorizing the trustee to hire and pay (or seek reimbursement for having paid) attorneys to assist in trust administration.” (*Hollaway v. Edwards* (1998) 68 Cal.App.4th 94, 97.) The issue before the trial court in ruling on defendants’ motion for attorney fees was not whether defendants, as trustees carrying out the duties of ID 52, were entitled to incur

attorney fees and pay them out of the assets of ID 52 or charge them in some way to the homeowners in ID 52. The complaint did not include any allegations about a dispute as to that issue, and it was not before the trial court for decision. Rather, the issue before the trial court was whether defendants, having prevailed in the litigation commenced by plaintiffs, were entitled to an award of attorney fees as prevailing parties.

Generally, “a prevailing party is entitled as a matter of right to recover costs” in the action. (Code Civ. Proc., § 1032, subd. (b).) Recoverable costs include attorney fees, when authorized by contract, statute, or law. (Code Civ. Proc., § 1033.5, subd. (a)(10).) Defendants do not contend any contract, or any statute forming part of the Trust Law, authorized an award of attorney fees as costs in this case. Rather, they contend they are entitled to an award under equitable principles as expressed in case law. The cases they cite, however, do not support an award under the circumstances of this case.

The cases cited by defendants recognize that a trial court may be authorized to award attorney fees to a party prevailing in litigation under either its supervisory power or its equitable power. (*Bauguess v. Paine* (1978) 22 Cal.3d 626, 635–636 (*Bauguess*); *Rudnick v. Rudnick* (2009) 179 Cal.App.4th 1328, 1333 (*Rudnick*).) Under its supervisory power, “a court may take appropriate action to secure compliance with its orders, to punish contempt, and to control its proceedings.” (*Bauguess*, at p. 637.) The *Bauguess* court concluded: “It would be both unnecessary and unwise to permit trial courts to use fee awards as sanctions apart from those situations authorized by statute. If an attorney’s conduct is disruptive of court processes or disrespectful of the court itself, there is ample power to punish the misconduct as contempt.” (*Id.* at pp. 637–638.) Thus, under its supervisory power, a trial court may award attorney fees as sanctions only when authorized by statute.

“Courts have used their inherent equitable power in limited situations to award attorney’s fees when it was warranted by the equities of the case. For example, one who preserves a common fund may recoup his or her attorney’s fees from that fund, thus

allocating the burden among all those who are to share in the fund. Also, one who acts as a ‘private attorney general’ to further an important public policy, and one who confers a substantial benefit on a defendant or a large class, may be awarded attorney’s fees.

[Citation.] In these cases, the fee award serves a dual purpose. It allocates the financial burden of litigation in an equitable manner and provides individuals with an incentive to bring litigation which benefits a larger group.” (*Bauguess, supra*, 22 Cal.3d at p. 636.)

In *Rudnick*, three of the beneficiaries of a trust opposed the sale of the trust’s principal asset. (*Rudnick, supra*, 179 Cal.App.4th at p. 1330.) The trustee petitioned the probate court for instructions, requesting approval of the sale of the asset and distribution of the proceeds to the beneficiaries. The probate court determined the opposition to the sale was motivated by bad faith and a desire to delay the sale. (*Ibid.*) It awarded attorney fees to the trustee, chargeable against the trust distributions to the three challenging beneficiaries. (*Ibid.*) This court approved the attorney fee award under the probate court’s broad equitable powers, concluding: “In sum, when a trust beneficiary instigates an *unfounded* proceeding against the trust *in bad faith*, a probate court has the equitable power to charge the reasonable and necessary fees incurred by the trustee in opposing the proceeding against that beneficiary’s share of the trust estate.” (*Id.* at pp. 1333, 1335, italics added.)

Similarly, in *Conley v. Waite* (1933) 134 Cal.App. 505, the court stated: “when an unfounded suit is brought against [a trustee] by the *cestui que trust*, attorney’s fees may be allowed him in defending the action and may be made a charge against the interest in the estate of the party causing the litigation.” (*Id.* at p. 506.)

In *Estate of Ivey* (1994) 22 Cal.App.4th 873, the trial court awarded the trustee and other beneficiaries of the trust their attorney fees as sanctions against the beneficiary who filed objections to the trustee’s third account, based on findings the objections were frivolous and in bad faith. (*Id.* at pp. 877–878.) On appeal, the court found the order instructing the trustee to pay the attorney fees out of the objecting beneficiary’s trust

distributions was properly based on the trial court's equitable powers. (*Id.* at pp. 882–883.) “We are persuaded that pursuant to its equitable powers and authority over the administration of the trust, the probate court could provide that the reasonable and necessary legal fees incurred by respondents in opposing appellant’s frivolous bad faith attacks on the trustee’s accounting may be made payable out of appellant’s share of the trust. Otherwise, a beneficiary with no substantial separate assets could engage in frivolous bad faith litigation against the trust, contrary to the interests of the remaining beneficiaries, knowing that the other beneficiaries would have to bear the ultimate cost of protecting their own interests. This would be inequitable.” (*Id.* at p. 884.)³

Thus, the cases cited by defendants approve shifting the trustee’s attorney fees to the beneficiary who commenced the litigation, when the beneficiary’s action was “unfounded,” “frivolous,” and brought “in bad faith.” The trial court found plaintiffs’ action was not brought in bad faith. Defendants have not demonstrated that factual finding was unsupported by substantial evidence. We have concluded that, contrary to defendants’ contention, plaintiffs’ action was not entirely unfounded or frivolous. Accordingly, defendants have not established the trial court abused its discretion by denying an award of attorney fees under the Trust Law or the trial court’s equitable power to shift the attorney fees to the trust beneficiaries who pursued unsuccessful, bad faith and frivolous litigation against the trustees.

³ We note that, subsequent to the decision in *Estate of Ivey*, *supra*, 22 Cal.App.4th 873, the Trust Law was amended to add a provision for recovery of attorney fees by a trustee “[i]f a beneficiary contests the trustee’s account and the court determines that the contest was without reasonable cause and in bad faith.” (Prob. Code, § 17211, subd. (a).) In that event, the award is a charge against the interest of the contesting beneficiary in the trust; the beneficiary is personally liable for any amount in excess of his or her interest in the trust. (*Ibid.*) Thus, the Legislature adopted the requirement that the contestant must have acted in bad faith and without reasonable cause in order to justify an award of attorney fees to the prevailing trustee.

DISPOSITION

The October 2, 2014, order denying defendants' motion for attorney fees and the judgment incorporating that order are affirmed. Plaintiffs are entitled to their costs on appeal.

HILL, P.J.

WE CONCUR:

FRANSON, J.

MCCABE, J.†

† Judge of the Merced Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.