

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

STEVEN KISSEN,

Plaintiff and Appellant,

v.

GORDON RUNYON,

Defendant and Respondent.

G044778

(Super. Ct. No. 30-2010-00348548)

O P I N I O N

Appeal from a judgment and postjudgment order of the Superior Court of Orange County, David T. McEachen, Judge. Affirmed.

Christopher L. Diener for Plaintiff and Appellant.

Strickroth & Parker and Michael J. Strickroth for Defendant and Respondent.

Steven Kissen (Kissen) appeals from the judgment and attorney fee order entered in favor of his former business partner Gordon Runyon (Runyon). Kissen's complaint sought damages for breach of oral contract, contribution, equitable indemnity, and subrogation with respect to his repayment of a \$500,000 promissory note that contained an attorney fee provision. Kissen, Runyon, Janet Kline, and Diana Jianas were the principal shareholders in the now bankrupt company, Bermuda Triangle Ventures, Inc. (BTV). Kissen settled his claims against Jianas, and dropped his claims against Kline and BTV due to their insolvency. Kissen, and the remaining shareholder, Runyon agreed to a bench trial that lasted eight hours. The court entered judgment in Runyon's favor, and later awarded him costs and attorney fees. On appeal, Kissen only challenges the court's verdict with respect to the contribution claim and the attorney fee award.

I

The following facts were undisputed: Kissen, Runyon, and others were investors and owners of BTV, selling private label wines pursuant to license agreements. Kissen was the president and Runyon was the secretary. In 2007, Kissen, Runyon, Kline, and Jianas agreed the business needed additional funds and they obtained a \$500,000 loan through Vineyard Bank. The loan was secured by the residences owned by two family trusts: (1) the Steven C. Kissen and Karen E. Kissen revocable trust (the Kissen Trust); and (2) the Jianas family trust. The term of the loan was six months, due on January 20, 2008, and it was later extended to July 20, 2008.

In January 2008, Kissen and his wife divorced and sold their residence as part of the community property distribution. At the close of escrow, \$506,240.41 of the sale was directed to Vineyard Bank to completely pay back the principal and interest owed on the business loan.

The court determined the following facts were demonstrated at trial, and included these findings in its judgment:¹ It determined Kissen paid off BTV's loan without notifying any of the other shareholders. As a result of his payment, on February 28, 2008, "BTV's [b]oard of [d]irectors agreed to compensate Kissen for all debts owed via the award of 950 shares of BTV stock, bringing [his] total ownership to 55 [percent] of BTV's stock and 1,100 total shares."

Runyon and Kline testified Kissen was paid back through the grant of increased stock in BTV. Runyon and Kline also received more stock to compensate them for various sums of money they had loaned or invested in the company. Runyon and Kline testified that because many of the shareholders had loaned BTV money, the board of directors resolved "to extinguish all debts owed by the corporation to their individual investors, including Kissen. Both Runyon and Kline testified they agreed with information contained within the February 28, 2008, minutes and that the minutes were accurate where it stated the transfer of ownership was intended to wipe out all debts owed by BTV to each individual owner."

At trial, Kissen claimed the debt to stock conversion was not intended to extinguish BTV, Runyon, Kline, and Jianas' debts to him for the Vineyard Bank loan. His witness, Malcolm McCassy (BTV's general manager) testified BTV converted only \$718,000 in Kissen's favor at the February board meeting. Kissen testified that while the loan was outstanding, it was considered a long term liability, as designated on the December 31, 2007 balance sheet. He could not "articulate why BTV's balance sheet from March 31, 2008, was not amended in such a manner to include Kissen as a 'long term liability.'"

¹ We note the judgment refers to each party and code sections using all capital letters. Throughout this opinion, and in all our quotations from this judgment, we have changed these proper names to the format designated in the California Style Manual. (Cal. Style Manual (4th ed. 2000) § 4:8, p. 124.)

The court determined all Kissen's claims lacked merit. With respect to his first cause of action for breach of oral contract, the court determined Kissen failed to present any evidence an agreement existed between him and Runyon. The court noted Kissen testified he paid off the loan to extend the due date, however the evidence showed the loan had already been extended. Moreover, Kissen's evidence the board had monthly meetings was insufficient to support the alleged terms of an oral contract with Runyon.

The court held the contribution claim failed because "all rights to contribution were extinguished upon Kissen's receipt of stock on [February 28, 2008] Civil Code section 1432^[2] provides for a right to 'contribution' from all joint parties where one party to a joint obligation pays more than his share of the joint obligation. Kissen's right to contribution was extinguished upon his receipt of increased BTV ownership." The court mentioned Kissen was unable to explain why the balance sheet immediately following the February 2008 meeting omitted him as a long term liability when he believed BTV (as a co-maker of the loan) owed him a proportionate share. The court believed Runyon's and Kline's testimony the stock Kissen received was to compensate Kissen for his repayment of the loan and to eliminate all debt owed to Kissen. "By eliminating Kissen's debt, the only party with the ability to seek contribution was BTV; not Kissen."

The court determined the implied contractual indemnity claim failed because "Kissen presented no evidence demonstrating anything more than a possibility of liability to Vineyard as it pertained to the Vineyard loan." The court again referred to the fact Kissen's argument he paid the loan to extend the due date was not supported by the evidence. Without evidence of an incurring liability, Kissen's actions of paying the loan were those of a volunteer, and he, therefore, could not seek indemnity from Runyon.

² All further statutory references are to Civil Code, unless otherwise indicated.

For the same reason, the court determined Kissen's surety claim failed. It explained that to be equitably subrogated, Kissen needed to provide evidence the payment was to protect a personal interest and not volunteered. The court stated Kissen voluntarily paid the loan five months before it was due. This fact prevented him (and the family trust) from being subrogated into Vineyard's status as a creditor.

Finally, the court found merit with Runyon's affirmative defense of accord and satisfaction. It stated, "Assuming Kissen met his burden to demonstrate Runyon to be liable in any fashion, Kissen's outstanding debt was ultimately satisfied by Kissen's acceptance of BTV's awarding 950 shares of BTV stock in exchange for his retirement of 'all' debts owed by BTV to Kissen. The question of whether the parties intended to make a final settlement of an obligation is a pure question of fact. [Citation.]"

To support its conclusion on this issue, the trial court delineated over a page of factual findings regarding what occurred at the February 2008 board meeting when Kissen was given the additional shares. It stated, "On February 28, 2008, after learning that Kissen had in fact paid off the Vineyard loan, the BTV [b]oard of [d]irectors resolved to convert all of BTV's debts to its respective shareholders into new ownership/equity. The minutes explicitly state that the conversion was intended to extinguish 'all' debt owed to each individual shareholder, including Kissen and Runyon. [¶] Testimony received from both Runyon and Kline supports this. [They] testified that at no point in time did Kissen object to receiving any stock as compensation for BTV's debts owed to him. Furthermore, both Runyon and Kline did not hear from Kissen regarding these debts until October 5, 2009, when both received demand letters. Based on [their testimony] BTV intended that Kissen be fully compensated via increase in BTV stock ownership in exchange for retirement of all debts held. [Kissen's testimony] supports the proposition that the intent of the February 28, 2008 debt conversion was to retire all debt."

Furthermore, the court held Kissen's cross-examination testimony supported the finding all debt was extinguished at that February meeting, "[a]lthough Kissen continues to state that he only converted approximately \$700,000 of his debt into stock." However, evidence from the minutes "demonstrates that each share of BTV [stock] was worth approximately \$1,250.00. As a result of this debt conversion, Kissen received 1,100 shares for his debt (a net increase of 950 BTV shares). The value of Kissen's net increase in stock ownership, based on the figures contained in the February 28, 2008 minutes, was worth approximately \$1.19 million." This evidence belied Kissen's testimony he was only compensated for about \$700,000 of debt and not the additional \$500,000 loan repayment.

The court determined McCassy's testimony did not support Kissen's claim that only \$700,000 was converted from debt to BTV stock. It noted McCassy prepared exhibit No. 18 in January 2008, which accurately depicted the sums converted by BTV from debt into stock. However, McCassy was unable to explain why the exhibit prepared in January 2008, contained entries from late February 2008. He was unable to explain why Kissen's February 1, 2008 payment to Vineyard Bank was omitted from the exhibit. McCassy could not explain why Runyon received 90 more shares than Kline received on February 2008, despite Runyon loaning BTV approximately \$21,000 less than Kline when the exhibit was prepared.

In conclusion, the court held, "Based on information presented by Kissen, regarding the February 28, 2008, debt conversion, when accounting for all net gains/loss in BTV ownership by all shareholders, that fact extinguished all debts owed to Kissen by BTV. Testimony and evidence demonstrates that as of February 28, 2008, BTV's board of directors offered 950 shares of BTV, at a value of \$1.19 million to Kissen, in exchange for Kissen's agreement to accept the shares in lieu of all debts held over BTV, and its shareholders/directors (including Runyon). Kissen's acceptance of this offer, constituted

a full and complete satisfaction of all debts BTV owed Kissen, and precludes any recovery in this matter.”

In the final written judgment, the court ruled in favor of Runyon on every cause of action and awarded him costs. A few weeks later, Runyon moved to be named the prevailing party and for \$25,780 in attorney fees. Kissen opposed the motion and also filed a motion to tax Runyon’s memorandum of costs. At the hearing, the parties submitted to the tentative ruling, which the trial court deemed to be the final ruling. The order stated, “Runyon was clearly the prevailing party on all claims asserted [by] Kissen. (*Hsu v. Abbarra* (1995) 9 Cal.4th 863, 876 [“Thus when a defendant defeats recovery by the plaintiff on the only contract claim in the action, the defendant is the party prevailing on the contract under section 1717 as a matter of law”].) [Kissen’s] contention that the court resolved this matter simply based on the affirmative defense of accord and satisfaction misstates the record. The court specifically found in favor of . . . Runyon on . . . Kissen’s four causes of action for affirmative relief in addition to finding for [Runyon] on the affirmative defense of accord and satisfaction [citation to final judgment]. Also . . . Kissen sought attorney[] fees pursuant to an agreement against all defendants so . . . Runyon is entitled to seek attorney[] fees based on this same agreement. [Citing to *Reynolds Metal, Co. v. Alperson* (1979) 25 Cal.3d 124 (*Reynolds Metal*)].”

II

A. *The Contribution Cause of Action*

On appeal, Kissen only challenges the trial court’s ruling on his contribution cause of action. Kissen’s brief devotes three pages to his first argument that the evidence establishes, as a matter of law, that Kissen was entitled to contribution for Runyon’s pro rata share of the amount paid on the Vineyard Bank promissory note. He is wrong.

“[S]ection 1432 provides: ‘Except as provided in [s]ection 877 [effect of release, dismissal, or covenant not to sue] of the Code of Civil Procedure, a party to a joint, or joint and several obligation who satisfies more than his share of the claim against all, may require a proportionate contribution from all the parties joined with him.’ [¶] [S]ection 2848 authorizes a surety to pursue a contribution action against cosureties. [¶] ‘A claim for contribution . . . stems from a legally recognized right forged from principles of equity and natural justice. [Citations.] The right of contribution, although necessarily related to some former transaction or obligation, exists as an entirely separate contract implied by law. [Citation.] In situations where two or more parties are jointly liable on an obligation and one of them makes payment of more than his share, the one paying possesses a new obligation against the others for their proportion of what he has paid for them. [Citation.]’ [Citation.]” (*Morgan Creek Residential v. Kemp* (2007) 153 Cal.App.4th 675, 683-684, fn. omitted (*Morgan Creek*).

“‘Equitable contribution is . . . the right to recover, not from the party *primarily* liable for the loss, but from a *co-obligor* who *shares* such liability with the party seeking contribution. [Fn. noting the right is codified in . . . section 1432.] . . . Equitable contribution permits reimbursement to the [party] that paid on the loss for the excess it paid over its proportionate share of the obligation, on the theory that the debt it paid was *equally* and *concurrently* owed by [others] and should be shared by them pro rata in proportion to their respective coverage of the [insurance] risk. The purpose of this rule of equity is to accomplish substantial justice by equalizing the common burden shared by [co-obligors], and to prevent one [obligor] from profiting at the expense of others. [Citations.]’ [Citation.]” (*Morgan Creek, supra*, 153 Cal.App.4th at p. 684.)

On appeal, Kissen asserts there is no dispute Kissen, Runyon, Jinias, Kline, and BTV executed the Vineyard Bank note as co-makers, jointly promising to pay the bank \$500,000 plus interest. The “promise to pay” was joint and several and it is presumed each was liable for his or her own proportionate share (one-fifth or \$100,000

each). Based on this premise, Kissen argues that when he paid off the note in its entirety, he satisfied more than his one-fifth share and he was entitled to obtain a proportionate contribution from those jointly liable with him. Recognizing two of the five co-makers were insolvent at the time of trial, Kissen argued that under California law, the others must contribute as if the insolvent person had not participated. Thus, Kissen, Runyon, and Jinas were each responsible for one-third of the note, or \$167,710.47. Kissen concludes, *as a matter of law*, he was entitled to a contribution from Runyon for one-third of the amount paid on the note.

This argument fails because it completely ignores the court's ruling "all rights to contribution were extinguished upon Kissen's receipt of stock on [February 28, 2008] Kissen's right to contribution was extinguished upon his receipt of increased BTV ownership." In other words, the court concluded Kissen obtained more than a proportionate contribution from those jointly liable to him. Specifically, BTV contributed the entire loan amount to Kissen in the form of shares in the company. Kissen accepted the shares. In the end, BTV paid more than its share of the obligation. As aptly noted by the trial court, by BTV paying Kissen the entire sum, "the only party with the ability to seek contribution was BTV; not Kissen."

Kissen does not address this key portion of the trial court's ruling finding the cause of action invalid. He mistakenly asserts the "sole articulated basis" for denying the contribution claim was the trial court's finding of an accord and satisfaction (and he devoted the remainder of his brief to attack the court's ruling on this affirmative defense). He is wrong. The judgment contains two reasons for ruling in Runyon's favor. Indeed, the trial court clarified in its later ruling on attorney fees, "[Kissen's] contention that the court resolved this matter simply based on the affirmative defense of accord and satisfaction *misstates the record*. The court specifically found in favor of . . . Runyon on . . . Kissen's four causes of action for affirmative relief in addition to finding for

[Runyon] on the affirmative defense of accord and satisfaction [citation to final judgment].” (Italics added.)

We conclude the trial court’s ruling on the affirmative defense was secondary to its ruling on the merits of the contribution claim. In essence, it can be viewed as dicta. Accordingly, we deem Kissen’s complete failure to address the heart of the trial court’s ruling on the merits as a waiver for purposes of appellate review. An appellant must affirmatively demonstrate error through reasoned argument and discussion of legal authority. (See *Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115-1116; *Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979.) Kissen’s assertion the contribution claim must be decided as a matter of law in his favor, forgetting about the strong contrary evidence and court findings, borders on the frivolous.

The trial court’s ruling on the contribution claim is affirmed. We need not address Kissen’s alternative appellate challenge to the trial court’s findings on accord and satisfaction. The judgment is affirmed.

B. Attorney Fees

The court awarded Runyon his request for \$25,780 in attorney fees. Kissen challenges this order on several grounds: (1) the court applied the wrong legal standard to the question of fee reciprocity; (2) the scope of the fee provision does not cover lawsuit between the note’s co-makers; (3) the assignment of the Kissen Trust’s subrogation rights to Kissen rendered the note null and void. We conclude each of these contentions lack merit.

i. Statutory Background & General Legal Principles

Except where a contract or statute provides otherwise, each party to a lawsuit must pay its own attorney fees. (Code Civ. Proc., § 1021.) Section 1717, subdivision (a), provides in part: “In any action on a contract, where the contract specifically provides that attorney’s fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the

party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs. . . ." This provision was enacted to "establish mutuality of remedy where [a] contractual provision makes recovery of attorney's fees available for only one party [citations] . . . and to prevent oppressive use of one-sided [attorney fee] provisions. [Citation.]" (*Reynolds Metals, supra*, 25 Cal.3d at p. 128.)³

The second paragraph of section 1717, subdivision (a), provides, "Where a contract provides for attorney's fees, as set forth above, that provision shall be construed as applying to the entire contract, unless each party was represented by counsel in the negotiation and execution of the contract, and the fact of that representation is specified in the contract." This paragraph was added by the Legislature to overturn an earlier court decision limiting the scope of an attorney fee provision in a contract. (*Harbor View Hills Community Assn. v. Torley* (1992) 5 Cal.App.4th 343, 348 (*Torley*)). Under this provision, the parties may not "limit an award of attorney fees to certain actions or specific provisions of the contract" unless the contract specifies that each party was represented in the negotiation and execution of the contract. (*Ibid.*) "[S]ection 1717 has been broadened to include all contract actions which include provisions for attorney's fees." (*Sears v. Baccaglio* (1998) 60 Cal.App.4th 1136, 1148.) In this case, representation was not specified in the contract, and therefore, the attorney fee provision must be construed as applying "to the entire contract[.]" (§ 1717, subd. (a).)

³ Section 1717 is "part of an overall legislative policy to enable consumers and others who may be in a disadvantageous contractual bargaining position to protect their rights through the judicial process by permitting recovery of attorney's fees incurred in litigation in the event they prevail. (See e.g., . . . § 1811.1 [Installment Sales Contracts]; . . . § 2983.4 [Conditional Sales Contracts]; . . . [citations to other types of contracts].)" (*Coast Bank v. Holmes* (1971) 19 Cal.App.3d 581, 597, fn. 3.)

Our standard of review is as follows: “On review of an award of attorney fees after trial, the normal standard of review is abuse of discretion. However, de novo review of such a trial court order is warranted where the determination of whether the criteria for an award of attorney fees and costs . . . have been satisfied amounts to statutory construction and a question of law. [Citations.] [¶] Stated another way, to determine whether an award of attorney fees is warranted under a contractual attorney fees provision, the reviewing court will examine the applicable statutes and provisions of the contract. Where extrinsic evidence has not been offered to interpret the [contract], and the facts are not in dispute, such review is conducted de novo. [Citation.] Thus, it is a discretionary trial court decision on the propriety or amount of statutory attorney fees to be awarded, but a determination of the legal basis for an attorney fee award is a question of law to be reviewed de novo. [Citation.]” (*Carver v. Chevron U.S.A., Inc.* (2002) 97 Cal.App.4th 132, 142.)

ii. The Court’s Decision on Fee Reciprocity

In granting Runyon’s motion for attorney fees, the court noted in its minute order, “Kissen sought attorney[] fees pursuant to an agreement against all defendants so . . . Runyon is entitled to seek attorney[] fees based on this same agreement.” Kissen asserts the court improperly determined Runyon was entitled to reciprocal attorney fees “not on Kissen’s actual right to recover attorneys’ fees as a hypothetical ‘prevailing party,’ but on his *alleged* right to do so.” Kissen correctly cites to case authority holding, one may recover attorney fees pursuant to section 1717 if one “would have been liable” for such fees had the opposing party prevailed. (*Reynolds Metals, supra*, 25 Cal.3d at p. 129.)

Kissen argues Runyon cannot recover attorney fees because he could not have recovered attorney fees against Runyon. Not so. Attorney fee provisions were contained in both the promissory note and the business loan agreement. The fee provisions contained similar language, stating if the lender incurred legal expenses in

connection with the note or loan agreement, then the borrower would be responsible for the related legal expenses.⁴

The original claim for attorney fees was contained in Kissen’s fourth cause of action for surety subrogation. In the complaint, Kissen alleged, “48. By virtue of executing the [l]oan [a]greement and related documents, the Kissen Trust undertook and acted in the capacity of a surety or guarantor of all of the obligations due Vineyard [Bank] from [d]efendants and each of them, under the [n]ote and [l]oan [a]greement. [¶] 49. The Kissen Trust satisfied the joint and several principal obligations of the [d]efendants and each of them, by repaying all sums due Vineyard [Bank] on the [n]ote; on or about February 4, 2008[,] the principal balance of \$500,000, plus accrued interest in the amount of \$6,135.41, a total of \$506,135.41 was paid over to Vineyard [Bank] by the Kissen Trust, to retire the Vineyard [Bank] loan. [¶] 50. The principals, BTV, Runyon, Kline[,] and Jianas, and each of them, are bound to reimburse the Kissen Trust for what it has disbursed, including necessary costs and expenses. . . . [¶] [¶] 52. The [n]ote, under

⁴ The promissory note stated: “ATTORNEYS’ FEES; EXPENSES. Lender may hire or pay someone else to help collect this [n]ote if [b]orrower does not pay. [b]orrower will pay [l]ender that amount. This includes, subject to any limits under applicable law, [l]ender’s attorney’s fees and [l]ender’s legal expenses, whether or not there is a lawsuit, including attorneys’ fees, expenses for bankruptcy proceedings (including efforts to modify or vacate any automatic stay or injunction), and appeals. Borrower also will pay any court costs, in addition to all other sums provided by law.” (Bold type omitted).

The business loan agreement stated: “Attorneys’ Fees: Expenses. Borrower agrees to pay upon demand all of [l]ender’s costs and expenses, including [l]ender’s attorneys’ fees and [l]ender’s legal expenses, incurred in connection with the enforcement of this [a]greement. Lender may hire or pay someone else to help enforce this [a]greement, and [b]orrower shall pay the cost and expenses of such enforcement. Costs and expenses include [l]ender’s attorneys’ fees and legal expenses whether or not there is a lawsuit, including attorneys’ fees and legal expenses for bankruptcy proceedings (including efforts to modify or vacate any automatic stay or injunction), appeals and any anticipated post-judgment collection services. Borrower also shall pay all court costs and such additional fees as may be directed by the court.” (Bold type omitted).

the heading of Attorneys' fees: Expenses; permits the [l]ender to hire counsel to collect on the [n]ote if the borrower(s) do not pay. It further requires the borrower(s) to pay the [l]ender's attorney fees and legal expenses. [Kissen] is incurring and will continue to incur considerable attorney[] fees expenses in prosecuting this collection action against BTV, Runyon, Kline, and Jianas." Kissen alleged attorney fees were authorized by section 2848 [the surety acquires the right of the creditor upon satisfying the obligation of the principal].)

The court ruled Kissen's surety claim failed based on its factual determination the Kissen Trust voluntarily paid the loan five months before it was due. In its ruling, the court explained that for Kissen (presumably as trustee of the family trust) to be equitably subrogated he needed to provide evidence the payment was to protect a personal interest and the payment was not volunteered. In other words, the court's factual finding Kissen's trust voluntarily paid the note prevented him (or the trust) from being subrogated into Vineyard Bank's status as a creditor. However, if theoretically Kissen had managed to prove he did not act as a volunteer and prevailed under the subrogation theory, he would have been entitled to attorney fees having acquired the full rights of the creditor. We conclude the court properly applied the section 1717 mutuality of remedy for attorney fee claims.

iii. The Scope of the Attorney Fee Provision

Kissen maintains the applicability of the attorney fee provision is limited to the context of enforcement of a promissory note. He points out it is an agreement between a lender and a borrower, which in this case referred to all five comakers collectively and in the singular. Moreover, the note specified all obligations were joint and several. Kissen asserts the note permitted the lender to recover fees against the borrower, but "does not reflect an intention to permit one comaker to recover his attorney[] fees in a suit against another co-maker." He maintains that if the parties had

intended to create such a right, they would have written the attorney fee provision more broadly or created a separate fee-shifting agreement.

In essence, Kissen contends the attorney fee provision would only be reciprocal under section 1717 if the lawsuit related to a typical lender/borrower enforcement of the note or loan agreement. This is no longer the law. The Legislature amended section 1717 in 1983 to overturn several cases limiting recovery of attorney fees to a particular type of claim. (*Torley, supra*, 5 Cal.App.4th at p. 349.) The Legislature amended the law “to provide complete mutuality of remedy where a contractual provision makes recovery of attorney fees available to one party.” (*Ibid.*) As we discussed above, absent exceptions not applicable in this case, parties may not limit recovery of attorney fees to a particular type of claim, such as a collection action. “Where a contract provides for attorney’s fees . . . that provision shall be construed as applying *to the entire contract . . .*” (§ 1717, subd. (a), italics added.) As mentioned previously, if Kissen prevailed under his subrogation theory, he would have been entitled to collect attorney fees standing in the shoes of the lender in his action against all comakers, including Runyon. We find no problem with the scope of the attorney fee provision covering Runyon’s fees.

iv. Assignment of the Kissen Trust’s Subrogation Rights to Kissen

Kissen alleged his family trust paid off the Vineyard Bank loan as a guarantor of the debt, thereby subrogating to Vineyard Banks’s rights and remedies pursuant to section 2848. Kissen asserts, “those rights, according to the complaint, were then judicially assigned to Kissen, by virtue of the final judgment of dissolution of marriage, dated February 11, 2010.” Kissen maintains he alleged in the complaint that he was personally entitled to enforce the note (and the attorney fee provision) against Runyon and other comakers. On appeal, Kissen now argues he was wrong and he actually had no right whatsoever to enforce the attorney fee provision after he was judicially assigned the debt.

Kissen relies on legal authority holding the assignment of a joint and several debt to one of the co-obligors extinguishes the debt and no action can be maintained on the original debt. He concludes the assignment amounted to a payment, rendering evidence of that debt (the note) “*functus officio* (of no further effect).” (*Great Western Bank v. Kong* (2001) 90 Cal.App.4th 28, 32-33 [enforcement of judgment by assignee against his partners] (*Great Western Bank*)). Kissen contends two cases, *Great Western Bank*, and *Quality Wash Group V, Ltd. v. Hallak* (1996) 50 Cal.App.4th 1687 (*Quality Wash Group*), are particularly instructive on this point.

We conclude Kissen’s entire argument is based on the faulty premise Kissen’s complaint contained allegations Vineyard Bank’s rights to enforce the note were judicially assigned to him. The complaint simply stated the Kissen Trust paid off the obligation to Vineyard Bank. And as discussed above in more detail, the fourth cause of action (surety) did not allege there was an assignment of any rights to Kissen individually. To the contrary, Kissen alleged the Kissen Trust “undertook and acted in the capacity of a surety or guarantor of all of the obligations due Vineyard” Bank under the note and loan agreement. The complaint alleged the guarantor, the Kissen Trust, repaid all sums due and the co-obligators were “bound to reimburse the Kissen Trust for what it . . . disbursed” and for costs incurred to pursue a lender’s collection action, including attorney fees.

The cases cited by Kissen are inapt as they consider whether a few co-obligors who settle with a creditor and become assignees of a deficiency judgment can enforce that judgment against nonsettling co-obligors. (*Great Western Bank, supra*, 90 Cal.App.4th at p. 30.) In *Great Western*, the court held, “[T]he assignee partners do not acquire the assignor’s rights with respect to the judgment. Rather, the assignment of a joint and several debt to one or more of the co-obligors extinguishes that debt.” (*Ibid.*) The court explained the assignment of a joint and several debt to a co-obligor extinguishes that debt because the assignment amounts to payment, and the evidence of

the debt, i.e., the note or judgment, becomes of no further effect. (*Id.* at p. 32.) This rule only applies where the co-obligors share primary liability. (*Id.* at pp. 32-33.) In this case, it was never alleged the Kissen Trust and Kissen (individually) shared primary liability with the other co-makers. Rather, the Kissen Trust was a guarantor, whose liability was second to the co-obligors. There is no question, “[T]he surety or guarantor can maintain an action on the original obligation against the party primarily liable for its payment.” (*Ibid.*)

Similarly *Quality Wash Group, supra*, 50 Cal.App.4th 1687, addressed the liability of primary, and not secondary, obligors. In that case, the court stated, “It was undisputed that Quality’s liability under the Allan note was primary. Thus, contrary to the court’s finding that Quality was a holder in due course of the Allan note, Quality’s payment of the note extinguished the liability of any other co-obligor under the note, rendering the note *functus officio* (of no further effect). Consequently, no action could be maintained on the note itself. [Citations.] Quality’s remedy, if any, against the Hallaks as co-obligors with joint and several liability would not be an action on the note but rather one for contribution. [Citations.]” (*Id.* at p. 1700, fn. omitted.) The case is inapt.

In conclusion, Kissen did not allege in his complaint a judicial assignment of the Kissen Trust’s rights under the note to Kissen individually, to render the note and the loan agreement void. To the contrary, to support the surety claim, Kissen alleged the family trust was still the guarantor of the debt and maintained it retained the right to bring a collection action against the comakers of the loan. This claim failed on the merits for other reasons. Nevertheless, the court could rely on Kissen’s subrogation claim he stood in the shoes of the Kissen Trust as creating a reciprocal right to the prevailing party (Runyon) to recover attorney fees under section 1717.

III

The judgment is affirmed. Respondent shall recover his costs on appeal.

O'LEARY, P. J.

WE CONCUR:

RYLAARSDAM, J.

IKOLA, J.