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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ADAM TOAL et al.,

Plaintiffs and Appellants,

v.

VALERE A. TARDIF et al.,

Defendants and Respondents.

G044823

(Super. Ct. No. 06CC02050)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, David T. McEachen, Judge. Reversed and remanded with directions.

Law Office of Peter E. Ronay and Peter E. Ronay for Plaintiffs and Appellants.

Theodore C. Beall for Defendants and Respondents.

* * *

Plaintiffs Adam and Joy Toal appeal from the court’s order denying their motion for postarbitration attorney fees.¹ The postarbitration proceedings (here and below) included plaintiffs’ petition to confirm an arbitration award, as well as the efforts of defendants Valere and Helen Tardif to vacate the award and to deny they had ever consented to or ratified the arbitration agreement. Because plaintiffs succeeded in obtaining judicial confirmation of and judgment on the arbitration award, they were the prevailing parties in the postarbitration proceedings and therefore entitled to attorney fees pursuant to the underlying real estate contract between the parties. Accordingly, we reverse the court’s order denying plaintiffs their postarbitration attorney fees.

FACTS

Background

We draw some facts in this opening paragraph from our prior published opinion in this case. (*Toal v. Tardif* (2009) 178 Cal.App.4th 1208 (*Toal I*.) Plaintiffs sued defendants for breach of contract and other causes of action related to a house that plaintiffs bought from defendants. (*Id.* at p. 1213.) The purchase and sale agreement (the purchase contract) contained an attorney fees clause entitling the prevailing party in “any action, proceeding, or arbitration” between the parties to recover attorney fees from the non-prevailing party.² The dispute was submitted to binding nonjudicial arbitration pursuant to an arbitration agreement signed by the parties’ attorneys, but not by the parties themselves. (*Toal I*, at p. 1213.) The arbitrator awarded plaintiffs \$65,284 (*Toal*

¹ The court’s order is appealable under Code of Civil Procedure sections 904.1, subdivision (a)(2), and 1294, subdivision (e). (*Carole Ring & Associates v. Nicastro* (2001) 87 Cal.App.4th 253, 259, fn. 3 (*Ring*.)

² We granted plaintiffs’ motion to augment the record on appeal with the purchase contract, the arbitration award, and other documents.

v. Tardiff (Jan. 30, 2012, G044594 [nonpub.opn.]) (*Toal II*), but found they were *not* entitled to attorney fees because there was no prevailing party in the arbitration.³ The trial court confirmed the award. (*Ibid.*) In *Toal I*, we reversed the judgment confirming the award and remanded the matter to the trial court for an evidentiary hearing on “whether defendants consented to or ratified the arbitration stipulation, i.e., whether a valid arbitration contract exists between the parties.” (*Toal I*, at p. 1224.)

On remand, the trial court, in accordance with *Toal I*, held an evidentiary hearing on September 24, 2010 to determine whether a valid arbitration agreement exists.⁴ The court found plaintiffs had met their burden of proving the existence of an arbitration agreement between the parties, having proved defendants consented to and ratified the arbitration agreement. The court further found Helen Tardif was “bound by the arbitration agreement to which her husband consented and ratified.” Accordingly, the

³ The arbitrator’s award states: “The Arbitrator finds that the attorney fee provision set forth in Paragraph 22 of the [purchase contract] applies to both the contract and tort causes of action alleged in the complaint and to the causes of action alleged in the cross-complaint, but that there is no prevailing party. More specifically, neither party prevailed on their causes of action on the [purchase] contract. Although plaintiffs . . . are entitled to a recovery on the third and fifth causes of action of their complaint concerning the grading, the foundation and the driveway of the subject property, [defendants] have successfully defended against those causes of action, and the fourth cause of action, to the extent they concern lead-based paint. In terms of dollar amounts, those claims are roughly equal, based on the damages evidence introduced by plaintiffs . . . , and therefore, each party prevailed on claims for roughly the same amounts. The attorney fee provision does not define the terms ‘prevailing Buyer or Seller’ or ‘non-prevailing Buyer or Seller’ and the Arbitrator determines, based on the extent to which the litigation/arbitration objectives of each side were realized, that there is no ‘prevailing Buyer or Seller’ or ‘non-prevailing Buyer or Seller’ for purposes of the recovery of attorney fees pursuant to paragraph 22.”

⁴ Pursuant to Evidence Code sections 452, subdivision (d), and 459, we take judicial notice of the record on appeal in *Toal II*, *supra*, G044594.

court granted plaintiffs' petition to confirm the arbitration award. The court entered judgment on the award on November 17, 2010. We affirmed the judgment in *Toal II*.

Plaintiffs' Motion for Postarbitration Attorney Fees

On November 29, 2010, plaintiffs moved for an award of about \$32,000 in attorney fees they incurred in obtaining judicial confirmation of the arbitration award. They asserted their attorney's "post appeal services required several court appearances, [m]otions, depositions, and the [e]videntiary [h]earing," and "were necessary to show, by preponderance of the evidence, that [d]efendants consented to and ratified the agreement for binding arbitration, as required by the [r]emand from the [a]ppellate [c]ourt." Plaintiffs argued that a prevailing party on a petition to confirm an arbitration award is entitled to attorney fees for the confirmation proceedings, even if the arbitration award did not include attorney fees for the arbitration.

As discussed in more detail below, the court, in December 2010, denied plaintiffs' motion for postarbitration attorney fees.

DISCUSSION

The Court Erred by Denying Plaintiffs' Motion for Postarbitration Attorney Fees

Plaintiffs contend the court erred by concluding that the arbitrator's finding there was no prevailing party for purposes of the arbitration also applied to postarbitration proceedings. They argue they were clearly the prevailing parties in the postarbitration proceedings.

The "normal" standard of review for an award of attorney fees is abuse of discretion. (*Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1175.) Where statutory construction is involved, however, our review is de novo. (*Ibid.*) And where the material facts "are largely undisputed" (*id.* at p. 1175), the controversy over whether a

litigant is entitled to attorney fees can be a question of law subject to de novo review (*id.* at pp. 1175-1176).

Under Code of Civil Procedure section 1032, subdivision (b), “[e]xcept as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding.”⁵ But attorney fees are allowable as costs under section 1032, only when authorized by contract, statute, or law. (§ 1033.5, subd. (a)(10)(A)(B)(C).)

Civil Code section 1717 governs contractual attorney fees in a contract action. Where a contract provides for attorney fees “to the prevailing party, then the party who is determined to be the party prevailing on the contract” is entitled to reasonable attorney fees. (*Id.*, subd. (a).) Civil Code section 1717 generally defines “prevailing party” as “the party who recovered a greater relief in the action on the contract.” (*Id.*, § 1717, subd. (b)(1).)

In judicial proceedings relating to arbitration under the Code of Civil Procedure’s statutory scheme on arbitration, a court must award costs in accordance with the Code of Civil Procedure’s chapter which includes sections 1032 and 1033.5. (§ 1293.2.) The Code of Civil Procedure’s statutory scheme governing arbitration includes section 1285, under which a party may petition the court to confirm, correct or vacate an arbitration award.

Here, the attorney fee clause in the purchase contract provides: “In any action, proceeding, or arbitration between Buyer and Seller arising out of this Agreement, the prevailing Buyer or Seller shall be entitled to reasonable attorney fees and costs from the non-prevailing Buyer or Seller,” subject to exceptions not relevant here.

Ring, supra, 87 Cal.App.4th 253 involved a contractual attorney fee clause and a procedural posture similar to the case before us. (*Id.* at pp. 254, 256, fn. 2.) The

⁵ All statutory references are to the Code of Civil Procedure unless otherwise stated.

defendant in *Ring* prevailed in an arbitration between the parties, but the arbitrator directed the parties to bear their own respective attorney fees. (*Id.* at pp. 254, 256.) The plaintiff petitioned the trial court to vacate the arbitration award. (*Id.* at p. 256.) The trial court granted her petition. (*Ibid.*) The defendant appealed and the appellate court reversed the trial court's order. (*Id.* at p. 257.) On remand, the trial court denied the defendant's motion for arbitration and postarbitration attorney fees.

The Court of Appeal affirmed the court's denial of arbitration attorney fees, but reversed as to postarbitration fees. (*Ring, supra*, 87 Cal.App.4th at pp. 255, 261-262.) As to *arbitration* attorney fees, the appellate court held the defendant was bound by the arbitrator's decision directing the parties to bear their own respective fees, because the arbitrator never designated a prevailing party. (*Id.* at pp. 258, 259, fn. 5.) But the appellate court held that, under sections 1293.2 and 1285, and Civil Code section 1717, the trial court was required to award the defendant "*postarbitration* attorney fees . . . incurred at the judicial level." (*Ring*, at pp. 260-261.) Inter alia, the Court of Appeal concluded the defendant was clearly the prevailing party in the postarbitration judicial proceedings which resulted in judgment confirming the arbitration award. (*Id.* at p. 261.) The appellate court explained: "The arbitrator's earlier refusal to award attorney fees in the arbitration proceeding was not dispositive on the issue of postarbitration attorney fees. The arbitrator obviously did not, and could not, make a determination with respect to which, if either party, would be the prevailing party in subsequent postarbitration proceedings." (*Ibid.*) The appellate court concluded: "Because [the defendant] was the prevailing party as a matter of law, the mandatory language of the contractual attorney fees clause and section 1293.2 entitle [him] to reasonable attorney fees and costs incurred in postarbitration judicial proceedings." (*Ibid.*)

Here, the court, in denying plaintiffs' motion for postarbitration attorney fees, distinguished *Ring* on grounds (1) the arbitrator there "made no finding [as] to the applicability of the attorney fee provision and instead merely decided to exercise his

prerogative to direct the parties to bear their own fees and costs,” and (2) “the defendant defeated the plaintiff at arbitration on the only contract claim and ultimately prevailed in the judicial proceeding with respect to the plaintiff’s motion to vacate the award.” The court contrasted this with the situation here, where “the arbitrator specifically found there was no prevailing party for purposes of awarding attorney fees, because both parties prevailed on claims of roughly equal value.” The court noted that none of the cases on which plaintiffs relied — *Ring, supra*, 87 Cal.App.4th 253; *Marcus & Millichap Real Estate Investment Brokerage Co. v. Woodman Investment Group* (2005) 129 Cal.App.4th 508; and *Corona v. Amherst Partners* (2003) 107 Cal.App.4th 701 — “involved the situation where, as here, the arbitrator made an express finding as to the prevailing party for purposes of attorney fees, and that finding was confirmed as part of the arbitration award. Moreover, unlike the instant action, none of the cases involved ‘mixed results’ litigation. [¶] Where the result are mixed — i.e., where the ostensibly prevailing party receives only a portion of the relief sought, and thus, the judgment is considered both good news and bad news for each of the parties — it may be determined that there is no prevailing party on the contract. [Citation.] If there is no prevailing party on the contract, then neither party is entitled to attorney fees.”

This analysis, however, while applicable to arbitration attorney fees, fails to account for the plaintiffs’ status as prevailing parties in the postarbitration judicial proceedings (which resulted in the granting of their petition for judicial confirmation of the arbitration award and which were greatly prolonged by defendants’ allegation they never consented to or ratified the arbitration agreement). The purchase contract provided for attorney fees in any action, proceeding, or arbitration between the parties. The statutes cited in *Ring, supra*, 87 Cal.App.4th 253 — sections 1293.2 and 1285, and Civil Code section 1717 — apply equally here to entitle plaintiffs to postarbitration attorney fees as a matter of law. So does *Ring’s* conclusion the court was required to award

postarbitration attorney fees because plaintiffs were the prevailing parties in those proceedings as a matter of law.

DISPOSITION

The order is reversed. On remand, the trial court is directed to award plaintiffs reasonable attorney fees incurred in postarbitration judicial proceedings. Plaintiffs are entitled to their costs on appeal.

IKOLA, J.

WE CONCUR:

MOORE, ACTING P. J.

ARONSON, J.