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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

BREA IMPERIAL, INC.,

Plaintiff and Appellant,

v.

AUTOMOTIVE WHEELS, INC.,

Defendant and Respondent.

G045241

(Super. Ct. No. 05CC06828)

O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County,
Franz E. Miller, Judge. Affirmed.

Hart, King & Coldren, Robert S. Coldren, Christopher R. Elliott, and
Rhonda H. Mehlman for Plaintiff and Appellant.

Bononi Law Group, William S. Waldo and Lizbeth Ochoa for Defendant
and Respondent.

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Plaintiff Brea Imperial, Inc. (BII), appeals from an order awarding costs on appeal to defendant Automotive Wheels, Inc. (AWI), contending AWI wrongly recovered almost \$180,000 in appeal bond premiums. But the court did not abuse its discretion by finding the bond was necessary. Nor did it abuse its discretion by finding it reasonable to allow AWI to recover all of the premiums. We affirm.

FACTS

This case involves the award of costs on appeal in *Brea Imperial, Inc. v. Automotive Wheels, Inc.* (Nov. 8, 2010, G040674) [nonpub. opn.] (*Brea I*). At trial, BII showed AWI damaged the warehouse it had leased from BII. The jury found AWI liable, awarding total damages exceeding \$4.3 million: “(1) breach of contract, \$689,945; (2) trespass, \$840,000; (3) negligence, \$300,000; (4) fraudulent inducement, \$279,970; (5) fraud, \$279,970; (6) waste, \$248,690; and (7) conspiracy, \$1,668,370.” It found AWI acted with malice, oppression, or fraud, though the court later found the lease barred recovery of punitive damages. The court entered judgment notwithstanding the verdict for AWI on the waste and fraudulent inducement causes of action, reducing BII’s damages to just under \$3.8 million.

Both parties appealed, and we reversed and remanded with directions to enter a reduced judgment for BII. (*Brea I, supra*, G040674) We held BII could recover all of the contract and negligence damages, and some of the trespass damages: a total of about \$1.14 million. The damages above this amount were duplicative. Finally, we held the lease did not bar recovery of punitive damages and directed the court to determine the appropriate amount, if any. We stated: “AWI shall recover its costs on appeal.” (*Ibid.*)

Meanwhile, as *Brea I* was pending on appeal, the court conducted proceedings to determine whether AWI’s parent corporation, Titan International, Inc. (Titan), was its alter ego. The court found it was, and we affirmed the order adding Titan

as a judgment debtor. (*Brea Imperial, Inc. v. Automotive Wheels, Inc.* (Feb. 10, 2011, G041803, G042385, G041926, G042148, G042153) [nonpub. opn.] (*Brea II*)). We reversed the judgment, though, for the limited purpose of allowing the court to determine the amount of punitive damages, if any, to impose against AWI and Titan.

AWI filed a memorandum of costs to recover costs incurred on appeal in *Brea I*. BII moved to tax. After the hearing, the court awarded over \$187,000 in costs to AWI — including \$179,856 for about three years of 1 percent premiums incurred to maintain a \$5,995,152 appeal bond.

DISCUSSION

“[A] prevailing party is entitled as a matter of right to recover costs in any action or proceeding.” (Code Civ. Proc., § 1032, subd. (b).) In particular, “the party prevailing in the Court of Appeal in a civil case other than a juvenile case is entitled to costs on appeal.” (Cal. Rules of Court, rule 8.278(a)(1).)¹ The rule limits recovery to specified costs, and only “if reasonable.” (Rule 8.278(d)(1).) Recoverable costs include “[t]he cost to procure a surety bond, including the premium and the cost to obtain a letter of credit as collateral, unless the trial court determines the bond was unnecessary.” (Rule 8.278(d)(1)(F).) In appeals, bonds are most typically posted to stay execution of judgment. (Code Civ. Proc., § 917.1, subd. (a)(1).)

“If the items on a verified cost bill appear proper charges, they are prima facie evidence that the costs, expenses and services therein listed were necessarily incurred.” (*Seever v. Copley Press, Inc.* (2006) 141 Cal.App.4th 1550, 1557 (*Seever*)). “[I]t is not enough for the losing party to attack submitted costs by arguing that he thinks the costs were not necessary or reasonable. Rather, the losing party has the burden to

¹ All further rule references are to the California Rules of Court.

present evidence and prove that the claimed costs are not recoverable.” (*Ibid.*) We review the court’s determination of necessity and reasonableness for an abuse of discretion. (*Id.* at pp. 1556-1557.)

As a threshold matter, AWI is generally entitled to recover its costs incurred on the *Brea I* appeal. “The prevailing party is the respondent if the Court of Appeal affirms the judgment without modification or dismisses the appeal. The prevailing party is the appellant if the court reverses the judgment in its entirety.” (Rule 8.278(a)(2).) “If the Court of Appeal reverses the judgment in part or modifies it, or if there is more than one notice of appeal, the opinion must specify the award or denial of costs.” (Rule 8.278(a)(3).) “In the interests of justice, the Court of Appeal may also award or deny costs as it deems proper.” (Rule 8.278(a)(5).) In *Brea I*, each party filed a notice of appeal. As for AWI’s appeal, we reversed the \$4.3 million judgment for BII, and remanded with directions to enter a new \$1.14 million judgment for BII. As for BII’s appeal, we reversed the order denying it punitive damages. For these reasons, we were called upon to specify the award of costs. (See Rules 8.278(a)(3), 8.278(a)(5).) We did so, awarding costs on appeal to AWI. AWI is thereby entitled to recover its costs incurred in the *Brea I* appeal. Nothing in *Brea II* changes this.²

Turning now to the bond, the court did not abuse its discretion by finding the bond was necessary. “[T]he necessity for the bond [is] measured as of the time of perfecting the appeal.” (*Stockton Theatres, Inc. v. Palermo* (1958) 51 Cal.2d 346, 350 (*Stockton*)). And “necessity” is a loose term here. (See *id.* at p. 348 [bond securing attachment pending appeal was necessary, given judgment debtor’s uncertain assets];

² In *Brea II*, we affirmed an order awarding contractual attorney fees to BII as the prevailing party in this case. We did not undo our *Brea I* award of costs on appeal to AWI. BII cites no persuasive authority that a cost award is ephemeral, dissipating if the recovering party does not prevail at case’s end. To the contrary, we consider the award of costs as each appeal is decided. (Rule 8.278(a)(1).)

Jewell v. Bank of America (1990) 220 Cal.App.3rd 934, 940-941 [bond staying execution pending appeal was necessary, though appellant could have pursued other means for obtaining stay].) The court has discretion to determine what is necessary, and may consider practical considerations like expediency and risk. (*Jewell*, at p. 941.)

BII contends it was unnecessary for AWI to stay execution pending appeal because AWI had a negative net worth and was thus judgment-proof.³ But a company with a negative net worth may still have assets to protect from execution. Thus, to rebut the bond's prima facie necessity, BII had "the burden to present evidence" (*Seever*, *supra*, 141 Cal.App.4th at p. 1557) with its motion to tax costs showing AWI had no assets that could satisfy a judgment "as of the time of perfecting the appeal" (*Stockton*, *supra*, 51 Cal.2d at p. 350) — i.e., as of July 2008. BII failed to offer any such evidence. And nothing stated in the *Brea I* and *Brea II* opinions forecloses the possibility AWI had some unencumbered, nonexempt assets as of July 2008.

BII further contends the bond must have been unnecessary for AWI because Titan paid for the bond. BII asserts Titan did so to advance its position that BII's judgment against AWI could be satisfied without imposing alter ego liability on Titan. (See *Brea II*, *supra*, G041803, G042385, G041926, G042148, G042153 [rejecting Titan's contention].) Even if so, the source of AWI's premiums is of no concern to BII.⁴

And the court did not abuse its discretion by finding it reasonable to award all of the bond premiums to AWI. To be sure, the *Brea I* decision preserved a \$1.14 million judgment for BII. From this, BII concludes the court should have

³ The court had not yet determined AWI's net worth when AWI perfected its *Brea I* appeal in July 2008. The court concluded the alter ego proceeding in December 2008, and rendered its decision in February 2009. (*Brea II*, *supra*, G041803, G042385, G041926, G042148, G042153.) Thus, the record as of July 2008 did not demonstrate an appeal bond was unnecessary.

⁴ If anything, the possibility of alter ego liability made it reasonable for Titan to pay for AWI's bond. That does not change the fact it was, in fact, AWI's bond.

apportioned the bond premiums accordingly so it is not effectively paying to secure its own judgment. But how was AWI to know “as of the time of perfecting the appeal” that part of BII’s judgment would survive intact? (*Stockton, supra*, 51 Cal.2d at p. 350.)

The kind of apportionment that BII seeks was endorsed in *Stockton* only in dissent. The dissent noted that “although plaintiff prevailed on the appeal, it prevailed to the extent of an increase of *only* \$32,333.44 over its trial court judgment . . . and *not to the extent* of the \$116,341.25 increase which it had claimed on appeal and on which (doubled) the bond premium was based. [Citation.] Thus the sum of \$32,333.44 won by plaintiff on the appeal was the only claim with respect to which it was justified in fairness and in law to claim and recover ‘necessary’ costs on appeal.” (*Stockton, supra*, 51 Cal.2d at p. 353 (dis. opn. of Schauer, J.)) The dissent lamented: “The majority must consider the entire amount to be necessary as a matter of law because they . . . remand the cause ‘with directions to the trial court to allow the [entire amount of] premiums on said bond.’” (*Ibid.*) That is exactly what the Supreme Court majority did. It allowed recovery of all of the bond premiums, with no apportionment. (*Id.* at p. 352.) Allowing AWI to recover all of its bond premiums here is just as reasonable.

BII’s apportionment claim is not supported by *Heppler v. J.M. Peters Co.* (1999) 73 Cal.App.4th 1265, which arises from distinguishable facts. *Heppler* reversed an order requiring the sole liable defendant to pay all of the plaintiffs’ attorney fees and costs, including those incurred in plaintiffs’ losing battle against three other defendants. (*Id.* at p. 1297.) The four defendants were subcontractors in the seven-week construction defect case, and the court could have allocated at least some of the plaintiffs’ fees and costs among the individual defendants. (*Ibid.* [segregation is “‘difficult,’” but not “‘impossible’” — for example, the liable defendant was a roofer and “there were multiple days of trial that were devoted exclusively to soil issues”].) Unlike the situation in *Heppler*, the court here is not forcing BII to pay for costs that AWI incurred pursuing

unsuccessful claims against other parties. The court merely awarded to AWI the premiums paid for reasonably bonding the entire judgment against it pending appeal.

DISPOSITION

The order is affirmed. AWI shall recover its costs incurred on this appeal.

IKOLA, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

FYBEL, J.