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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

KARENA WHERRY et al.,

Plaintiffs and Respondents,

v.

AWARD, INC., et al.,

Defendants and Appellants.

G045520

(Super. Ct. No. 30-2008-00108123)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Kirk H. Nakamura, Judge. Reversed.

Law Office of Michael A. Conger, Michael A. Conger; and Richard H. Benes for Defendants and Appellants.

Law Offices of Jason L. Oliver; Jason L. Oliver; Law Offices of John W. Dalton and John W. Dalton for Plaintiffs and Respondents.

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This is the third time this case has been before us. In the most recent opinion we affirmed the denial of a petition to compel arbitration filed by defendants Award, Inc., Award-Superstars, Century 21 Superstars, and Gregory Britton, the latter not a party to this appeal. (*Wherry v. Award, Inc.* (2011) 192 Cal.App.4th 1242, 1245; *Wherry I.*) After the remittitur was issued, the trial court granted the motion filed by plaintiffs Karena Wherry and Rocelyn Traieh for attorney fees incurred in defeating the motion.

Defendants appeal on several grounds, claiming the contractual provision that was the basis of the fee award was unenforceable because we found it unconscionable in *Wherry I.*; the award was based on judicial and collateral estoppel; the motion was premature absent a prevailing party in the underlying action; the motion was untimely; and the amount of the award was excessive in violation of the court's discretion. We conclude that, although the attorney fees provision is not unconscionable but is enforceable, plaintiffs are not entitled to fees at this stage of the case.

FACTS

The substantive facts leading to the dispute in this action are set out in *Wherry I.* and we do not repeat them at length. Suffice it to say that plaintiffs each entered into an independent contractor agreement (agreement) with defendant Award, Inc., to work as a real estate salesperson. The contracts contained an arbitration paragraph that provided all disputes between plaintiffs and Award, Inc., would be arbitrated using procedures set out in the bylaws of the California Association of REALTORS®. After plaintiffs and defendant severed their relationships, plaintiffs sued defendants under the California Fair Employment and Housing Act (Gov. Code, § 12900 et seq.; FEHA) for sexual harassment, gender discrimination, and retaliation. The trial

court denied defendants' petition to compel arbitration, and we affirmed that order on appeal. (*Wherry I, supra*, 192 Cal.App.4th at p. 1245.)

After remittitur issued both plaintiffs filed a motion for attorney fees, essentially relying on the attorney fees provision in the agreement and Civil Code section 1717 (all further references to this statute are designated as section 1717). The court denied the motion as to defendant Britton but granted it as to all other defendants, awarding the sum of just over \$163,000, the amount plaintiffs sought less any amounts actually or possibly attributed to work done for Britton.

DISCUSSION

1. Validity of Attorney Fees Provision

A main premise of defendants' appeal is the claim that in our prior opinion we completely invalidated the attorney fees paragraph in the agreements. That is a misreading of *Wherry I*.

Each attorney fees provision states: "In any action, proceeding, or arbitration between [defendants] and [plaintiffs] arising from or related to this [a]greement, the prevailing [party] shall be entitled to reasonable attorney fees and costs." In *Wherry I*, where we decided the *arbitration provision* was substantively unconscionable, we relied in part on this paragraph. (*Wherry I, supra*, 192 Cal.App.4th at p. 1249.) As we explained, in a FEHA action, a plaintiff who prevails generally is entitled to attorney fees but a prevailing defendant may recover fees only if the court finds the case was filed in bad faith or frivolous. (*Ibid.*) The attorney fees provision in the agreements did not limit defendants' right to recover fees, thus making the arbitration requirement unconscionable and as a result unenforceable under *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83. (*Wherry I, supra*, 192 Cal.App.4th at p. 1249.) We did not, however, rule that the attorney fees provision was

unenforceable generally. In the context of the entire agreement, there are disputes that would be subject to an award of attorney fees, including, perhaps, the one at hand.

Nor is the award barred by judicial or collateral estoppel or the law of the case doctrine. Judicial estoppel bars a party from taking a position after succeeding on a contradictory position earlier in the case. (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 183.) Defendants assert that in the writ petition in the trial court and in their respondents' brief in *Wherry I* plaintiffs argued the fee provision was unenforceable but actually they merely claimed what we ultimately held, that defendants' contractual unlimited right to attorney fees was a factor in holding the arbitration provision unconscionable.

Likewise, collateral estoppel is inapplicable. *Wherry I* did not concern or decide the enforceability of the attorney fees provision. (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341-342 [necessary element of collateral estoppel is litigation of "identical issue"].) Similarly the law of the case does not bar enforcement of the attorney fees provision because in *Wherry I* we did not hold as a matter of law that the attorney fees provision was unenforceable. (*Yu v. Signet Bank/Virginia* (2002) 103 Cal.App.4th 298, 309 [law of the case applies when court of appeal "stat[es] a rule of law necessary to the decision of the case . . . and makes it determinative of the rights of the same parties in any subsequent retrial or appeal in the same case""].)

2. *Plaintiffs as Prevailing Parties*

The other core issue in this appeal is whether plaintiffs are entitled to attorney fees as the prevailing parties. Plaintiffs assert they are, pointing to the language of the agreements and Civil Code section 1717. We review the issue de novo. (*PNEC Corp. v. Meyer* (2010) 190 Cal.App.4th 66, 69.)

As noted above, each agreement states that the prevailing party is entitled to attorney fees "[i]n any action, proceeding, or arbitration" between the parties "arising

from or related to this [a]greement.” Section 1717, subdivision (a), declares: “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.” Section 1717, subdivision (b)(1) defines the the prevailing party as the one “who recovered a greater relief . . . on the contract.”

The dispute here is whether plaintiffs may recover fees before the main action is resolved. Relying on several cases, including *Hsu v. Abbara* (1995) 9 Cal.4th 863, defendants claim plaintiffs have not yet “prevailed” because the lawsuit is still pending. According to *Hsu*, “The prevailing party determination is to be made only upon final resolution of the contract claims and only by ‘a comparison of the extent to which each party ha[s] succeeded and failed to succeed in its contentions.’ [Citation.]” (*Id.* at p. 876.) To arrive at this determination, “the trial court is to compare the relief awarded on the contract claim or claims with the parties’ demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources.” (*Ibid.*)

We conclude that the award of attorney fees to plaintiffs at this stage in the proceedings was premature. The underlying action, in which the petition to arbitrate was filed, has not been concluded and thus, under section 1717, there is not yet a prevailing party. “[A]ttorney fees should be awarded to the party who prevails on a petition to compel arbitration only when the resolution of that petition terminates the entire ‘action on the contract.’” (*Frog Creek Partners, LLC v. Vance Brown, Inc.* (2012) 206 Cal.App.4th 515, 531-532 (*Frog Creek*).

The court in *Frog Creek* conducted an exhaustive examination and thorough analysis of the development of the law dealing with the question facing us. Although the issue was not identical to the one at bar, the case is instructive.

In *Frog Creek*, at the time the plaintiff filed a lawsuit for breach of contract and other causes of action, there were two versions of the underlying contract, each of which contained an alternative dispute resolution provision. When the defendant filed a petition to compel arbitration the court denied it because the plaintiff had not signed the contract on which the defendant relied; the Court of Appeal affirmed that decision. The defendant then filed another petition based on the contract the plaintiff had signed. When the trial court again denied the petition, the Court of Appeal reversed and the case ultimately proceeded to arbitration, resulting in an award in the defendant's favor.

The defendant then filed a motion for attorney fees, seeking to recover, in part, the fees incurred for its first petition to arbitrate. The plaintiff also filed a motion for attorney fees under section 1717 based on its success in defeating the first petition to arbitrate. The trial court awarded the defendant fees because it was the prevailing party in the arbitration but also ruled the plaintiff was entitled to attorney fees because it had defeated the defendant's original petition to arbitrate.

The appellate court reversed, holding that the defendant, not the plaintiff, was entitled to attorney fees in connection with the first petition to arbitrate. (*Frog Creek, supra*, 206 Cal.App.4th at p. 536.) The basis for the holding was that, under section 1717, "there may only be one prevailing party entitled to attorney fees on a given contract in a given lawsuit." (*Ibid.*, fn. omitted.) Here, because the case has not yet concluded, there is a possibility defendants will prevail overall in the action, thus potentially giving them the right to recover fees.

Plaintiffs point to cases that allow recovery of attorney fees before the case is concluded, including *Otay River Constructors v. San Diego Expressway* (2008) 158 Cal.App.4th 796 (*Otay*), *Turner v. Schultz* (2009) 175 Cal.App.4th 974 (*Turner*), *Acosta*

v. Kerrigan (2007) 150 Cal.App.4th 1124, *Benjamin, Weill & Mazer v. Kors* (2011) 195 Cal.App.4th 40 (*Kors*), and *Christensen v. Dewor Developments* (1983) 33 Cal.3d 778. But they are all distinguishable.

In *Otay*, the plaintiff filed a separate petition to compel arbitration before a suit on the underlying dispute was filed. After the court denied it, it also denied the defendant's motion for attorney fees, finding it was not a prevailing party because there was additional litigation to come. (*Otay, supra*, 158 Cal.App.4th at p. 801.) The appellate court reversed, holding that under section 1717 the petition "was an 'action on the contract'" for which the defendant had secured a ""simple, unqualified win"" on the only contract claim at issue in the [discrete] action—whether to compel arbitration [Citations.]" This made the defendant the prevailing party and thus entitled to attorney fees. (*Id.* at p. 807.)

In *Turner*, the plaintiff sued the defendants, for among other things, fraud in the inducement to enter into the agreement, which contained an arbitration provision. He also filed a separate declaratory relief action seeking a determination the defendants were barred from arbitrating the action. The trial court entered judgment for the defendants in that action and granted their motion for attorney fees pursuant to the contract.

The court of appeal affirmed the fee award, even though the underlying dispute had not been concluded, relying in part on *Otay* and reasoning that "the only issue before the court—whether the arbitration should be allowed to proceed—was resolved in [the] defendants' favor in this discrete legal proceeding. [Citation.]" (*Turner, supra*, 175 Cal.App.4th at p. 983.)

Frog Creek echoes this point of view, stating "when a party defeats an independent petition to compel arbitration, the action is terminated and the prevailing party on the petition is entitled to fees under Civil Code section 1717." (*Frog Creek, supra*, 206 Cal.App.4th at p. 533, italics omitted.) But that is not the case here, where

there is no discrete action; instead the defendants filed a petition to compel arbitration in plaintiffs' already existing lawsuit. Thus, *Otay* and *Turner* do not support the order.

Kors did award fees to the defendant who prevailed on a petition to compel arbitration filed within an existing lawsuit before the action was litigated on the merits. (*Kors, supra*, 195 Cal.App.4th at p. 47-48, 80.) But as support for the award it relied on *Otay* and *Turner*. (*Id.* at pp. 76-78.) As we have seen, awards in those cases resulted from a determination there was a prevailing party in a discrete contract action. Thus, in the context of this case we decline to follow *Kors*.

Plaintiffs dispute a rule that would require a separate action be filed in order to recover fees but deny fees to the prevailing party in a petition to compel arbitration in an existing action. They claim *Otay* and *Turner* did not limit their holdings to that fact scenario. But while perhaps technically correct, it is not consistent with what actually happened in those cases and is a fine point we will not put on their holdings.

We also reject plaintiffs' argument that "adopting" such a rule would provide an incentive for parties to file more independent lawsuits in the hopes of securing an immediate award of attorney fees rather than waiting until the conclusion on the merits of the lawsuit. First this rule already exists. Our case is not breaking any new ground on this issue, and there is nothing before us to suggest such a rush to the courthouse to file separate cases to compel arbitration. Second, while some parties may perceive an incentive, there is also the concomitant risk of being forced to pay attorney fees in the event the other party prevails in the action and defeats an order for arbitration. (See *Frog Creek, supra*, 206 Cal.App.4th at p. 538, fn. 18 [for a discussion and rejection of this argument].)

Nor does *Acosta* support plaintiffs' position. It was decided solely on contractual language and did not involve section 1717, as does our case. (*Acosta v. Kerrigan, supra*, 150 Cal.App.4th at p. 1132 & fn. 16.)

Finally *Christensen* did not even consider the issue before us. There the trial court denied the plaintiffs' petition to compel arbitration, finding they had waived the right to arbitrate by filing a complaint. The defendants' motion for attorney fees pursuant to a provision in the contract at issue was denied. On appeal, the court reversed the attorney fees ruling. But the issue was whether the defendants had complied with section 1717's procedural requirements. (*Christensen v. Dewor Developments, supra*, 33 Cal.3d at p. 786.) The question of entitlement to fees was not raised or discussed. (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 620 [case authority only for issues raised and decided].) Granted, the court appeared to assume defendants were entitled to the fees, but the case had been dismissed, albeit without prejudice, and therefore, unless a new complaint was filed, the action was concluded. That is not the status of the case at issue.

We agree with the court in *Frog Creek*, which confirmed that "defeating a petition to compel arbitration filed in a pending contract action does not justify a grant of fees under . . . section 1717 where the merits of the contract claims remain pending in that action." (*Frog Creek, supra*, 206 Cal.App.4th at p. 535.) An "action on the contract" refers to the contract claims in the lawsuit as a whole rather than each discrete contractual cause of action or claim that arises in the course of the lawsuit." (*Id.* at p. 540.)

Plaintiffs also maintain that, because this is a FEHA action, there are no other contract issues in the case and thus defendants will not be entitled to attorney fees even if they prevail. They again rely on *Kors*, where, in a FEHA action, the plaintiff defeated a petition to compel arbitration and was awarded fees before the underlying action was fully litigated. We have already disagreed with the holding in *Kors*, as explained above. But there is another reason this argument does not persuade.

Defendants assert their affirmative defense that plaintiffs are independent contractors is based on a provision in the agreements giving a party the right to terminate

the association with the other “with or without cause” and thus is a defense based on the contract. Plaintiffs argue this defense has nothing to do with the agreements.

Without deciding that dispute, it may be that there are no more contract issues to be determined, but it is certainly possible that plaintiffs or defendants will amend their pleadings to include a contract claim. *Frog Creek* held “that, under . . . section 1717, there may only be one prevailing party entitled to attorney fees on a given contract in a given lawsuit.” (*Frog Creek, supra*, 206 Cal.App.4th at p. 520, fn. omitted.) Awarding fees now would allow for the possibility of two prevailing parties if defendants succeeded on any additional contract claims.

Of course, if the matter is tried without any additional contract claims, then plaintiffs are the prevailing parties on the contract. But if there are additional claims, the court must determine who prevailed on contract claims as a whole, if anyone, and decide on a fee request accordingly.

Attacking from another angle, plaintiffs argue the court need not wait until resolution of the entire action based on the language in the agreements, i.e., that the prevailing party may recover attorney fees in connection with, not just an action, but a *proceeding* as well. They point to language in *Otay* stating that the statutes governing petitions to compel arbitration are located within that portion of the Civil Code that deals with “special proceedings.” (*Otay, supra*, 158 Cal.App.4th at p. 802.) But *Otay* discussed this in the context of whether an order denying arbitration was appealable. (*Id.* at pp. 802-803.) Moreover, *Otay*’s holding actually is consistent with our decision in this case. As noted above, it decided only that a party was entitled attorney fees when a separate action to compel had been filed, not the case here. (*Id.* at p. 799.)

Further, *Frog Creek* discussed and disposed of this argument and we agree with its reasoning. In *Acosta v. Kerrigan, supra*, 150 Cal.App.4th 1124, another case on which plaintiffs rely, the contract at issue contained two attorney fees provisions. One stated attorney fees could be awarded to a prevailing party in an arbitration. The other

was within the arbitration provision itself, and provided if a party “institute[d] any legal action or administrative proceedings . . . other than . . . arbitration,” the other party could recover attorney fees, in addition to damages and costs “incurred as a result of such action.” (*Id.* at p. 1126.) After the plaintiff filed a complaint, the court granted the defendant’s motion to compel arbitration and awarded fees.

On appeal the court affirmed, relying on what it labeled “an independent provision of the contract . . . entitl[ing him to fees] even if he loses the case on the merits in the arbitration.” (*Acosta v. Kerrigan, supra*, 150 Cal.App.4th at p. 1132, fn. omitted.) As noted above, section 1717 was not the basis for the award.

Frog Creek specifically disagreed with *Acosta*’s reasoning that a so-called “independent” contractual provision could support an award of attorney fees as being contrary to section 1717. (*Frog Creek, supra*, 206 Cal.App.4th at p. 543.) It cited *Santisas v. Goodin, supra*, 17 Cal.4th 599, which “reject[ed a] construction of section 1717” that would “never . . . bar recovery of attorney fees that would otherwise be recoverable as a matter of contract law” as “inconsistent with the legislative history of section 1717.” (*Id.* at p. 616, italics omitted.) That intent was “to establish uniform treatment of fee recoveries in actions on contracts containing attorney fees provisions A holding that in contract actions there is still a separate contractual right to recover fees that is not governed by section 1717 would be contrary to this legislative intent.” (*Ibid.*; see also *Walker v. Ticor Title Co. of California* (2012) 204 Cal.App.4th 363, 372-373 “[W]hile the availability of an award of contractual attorney fees is created by the contract [citation], the specific language of the contract does not necessarily govern the award. . . . Parties to a contract cannot . . . enforce a definition of ‘prevailing party’ different from that provided in . . . section 1717”].)

Thus, the “proceeding” language on which plaintiffs rely does not justify attorney fees. Nor is there any other basis to affirm the award.

3. Timeliness of Request for Attorney Fees and Amount of Award

Because we reverse the fee award we have no need to decide whether plaintiffs timely filed the motion. If they are entitled to fees after the case is resolved they will need to file another motion. For the same reason, the objection to the amount of fees is moot at this juncture in the case.

DISPOSITION

The order is reversed. Appellants are entitled to costs, but not attorney fees, on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

ARONSON, J.

IKOLA, J.