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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

SHARON NAGAOKA,

Plaintiff and Respondent,

v.

SEAN PONCE,

Defendant and Appellant.

G045562

(Super. Ct. No. 06CC10617)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, James J. Di Cesare, Judge. Affirmed.

Samuels, Green & Steel and Jeffrey S. Grider for Defendant and Appellant.

Gladych & Associates and John A. Gladych for Plaintiff and Respondent.

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This is the second appeal (Second Appeal) filed in a dispute between a homeowner, Sharon Nagaoka (Nagaoka), and a contractor, Sean Ponce doing business as Ponce Construction, Inc. (Ponce). The first appeal (*Sharon Nagaoka v. Sean Ponce* (Feb. 2, 2012, G044757) (the First Appeal)¹ was previously dismissed. The Second Appeal was taken by Ponce from an amended judgment awarding damages against him for breach of contract, plus prejudgment interest, attorney fees and costs.

We agree with Nagaoka that it is too late for Ponce to challenge the award of \$5,680 for breach of contract. An appeal from that award was properly taken in the First Appeal. However, that appeal was dismissed and Ponce cannot now pursue a challenge to that award in the Second Appeal. We consider only Ponce's challenge to the awards of prejudgment interest and attorney fees. With respect to those awards, he has not met his burden to show error. We affirm.

I

FACTS

A. Trial Court Proceedings:

Nagaoka hired Ponce to do certain work on her residential real property. A dispute between the parties ensued and, in September 2006, Nagaoka demanded a refund of all monies paid, pursuant to Business & Professions Code section 7031, subdivision (b). She asserted that Ponce had not been properly licensed to do the work on her property. Nagaoka claimed that Ponce held only swimming pool, concrete and landscaping licenses, but not the licenses required for the construction of a new balcony and certain other improvements to Nagaoka's home. She asserted Ponce performed more than \$225,000 of work for which he was not properly licensed.

¹ By order of February 29, 2012, we informed the parties that we intended to take judicial notice of the record in the First Appeal (Evid. Code, §§ 452, subd. (d), 459) and we gave the parties an opportunity to object. No party having objected, we took judicial notice of that record by order of March 13, 2012.

This notwithstanding, on October 19, 2007, Nagaoka made a Code of Civil Procedure section 998 statutory offer to compromise for the amount of \$37,999.99. Ponce rejected her offer. Then on November 5, 2007, he made a statutory offer to compromise for \$10,000. Nagaoka did not accept.

In July 2009, Nagaoka filed a first amended complaint against Ponce. She asserted causes of action for recovery of funds paid to an unlicensed contractor, breach of contract and negligence. She sought damages exceeding \$250,000.

The matter ultimately went to a jury trial. With respect to the first cause of action, the jury found that Ponce was properly licensed for all work performed. With respect to the second cause of action, for breach of contract, a jury found that Ponce had failed to do something the contract required of him, but that Nagaoka had not suffered any damage thereby. Finally, the jury found, with respect to the third cause of action, that Ponce had not committed negligence.

However the court, after hearing argument on its own motion for judgment notwithstanding the verdict, set aside the jury's verdict on the breach of contract claim and entered judgment in favor of Nagaoka on that cause of action, for \$5,680. The November 12, 2010 judgment said: "The Court stated that its reasons for granting its own JNOV included that the Court was inclined to grant Plaintiff's motion for a Directed Verdict but elected to submit the matter to the jury stating expressly that the Court would grant its own JNOV should the jury verdict on the Breach of Contract claim not be in Plaintiff's favor. The Court found that the home improvement contract at issue was subject to the consumer protection statute codified in Business & Professions Code section 7159; that the contract clearly required that certain concrete shiners be installed pursuant to an approved plan; that the shiners were uncontestedly not installed pursuant to the approved plan; that the uncontested, admitted cost to replace the shiners so that they conformed to the approved plan back in August 2006 was \$5,680.00 per admitted Trial Exhibit 51."

The judgment also directed that Nagaoka take nothing on the claims for recovery of funds paid to an unlicensed contractor and for negligence. It further stated that the rights to prejudgment interest, attorney fees, and costs would be determined by postjudgment motions and memoranda of costs. The parties thereafter filed competing motions for attorney fees and costs, and Ponce filed a motion to tax costs.

On May 25, 2011, the court entered an “amended judgment.” It was nearly identical to the original judgment, except that it added two paragraphs of discussion on Nagaoka’s motion for attorney fees and another paragraph on prejudgment interest and costs. It also restated the amount awarded to Nagaoka for breach of contract as \$5,680 “plus prejudgment interest at the rate of 10% from August 31, 2006 to the date of this Amended Judgment” and awarded her \$35,000 in contractual attorney fees and \$8,235.85 in costs.

B. Appellate Court Proceedings:

On February 3, 2011, Nagaoka filed an appeal from the November 12, 2010 judgment. (*Sharon Nagaoka v. Sean Ponce* (Feb. 2, 2012, G044757) (the First Appeal)). Ponce filed a cross-appeal four days later. On July 19, 2011, Ponce’s cross-appeal was dismissed for failure to timely deposit costs for the preparation of the record and the remittitur was issued thereafter. On October 20, 2011, Nagaoka’s appeal was dismissed at her request, and the remittitur was issued as to that appeal on the same day.

On July 22, 2011, Ponce filed an appeal from the May 25, 2011 amended judgment (the Second Appeal). In his opening brief on appeal, he raised issues pertaining not only to the award of attorney fees and costs, but also as to the \$5,680 award against him for breach of contract. In her respondent’s brief, filed January 18, 2012, Nagaoka asserted that it was too late to challenge the \$5,680 award. She explained that Ponce’s cross-appeal from the November 12, 2010 judgment had been dismissed, and that the Second Appeal was filed too late to challenge the award contained in that judgment.

The next day, Ponce filed, in the long-since dismissed appeal from the November 12, 2010 judgment, a motion to vacate the dismissal of the cross-appeal and to recall the remittitur. That motion was denied by order of this court on February 2, 2012.

II

DISCUSSION

A. Timeliness of Appeal:

As we have noted above, Nagaoka asserts that it is too late for Ponce to challenge the \$5,680 award, as originally stated in the November 12, 2010 judgment. Ponce, in reply, says he has twice filed a timely appeal from that award, and he maintains there is no procedural bar to this court's review of it. He also says, in his appellant's reply brief in this Second Appeal, that if for any reason this court should disagree, then we should reconsider our denial of his motion to vacate the dismissal in the First Appeal.

Nagaoka is correct. The notice of entry of the November 12, 2010 judgment was served on December 9, 2010. The time for filing an appeal from that judgment expired 60 days thereafter. (Cal. Rules of Court, rule 8.104(a).) Nagaoka's appeal from that judgment was timely filed, as was Ponce's cross-appeal. However, Ponce's cross-appeal was dismissed. Consequently, Ponce has no pending appeal from that judgment and the Second Appeal he filed on July 22, 2011, if construed as an attempted appeal from the November 12, 2010 judgment, is untimely.

“If the appeal is untimely, this court has no jurisdiction to consider it, and it must be dismissed. [Citations.] The resolution of this issue turns on the question whether the amended judgment superseded the original judgment for purposes of computing the time in which to file a notice of appeal.” (*Dakota Payphone, LLC v. Alcaraz* (2011) 192 Cal.App.4th 493, 504.) “[W]hen an amended judgment results in a substantial modification of a judgment, the amended judgment supersedes the original and become the one final, appealable judgment in the action. [Citation.] The question then becomes what is a ‘substantial modification’ of a judgment?” (*Ibid.*) “[T]here is no

substantial modification to a judgment when it is merely amended to add costs, attorney fees and interest. [Citation.]” (*Id.* at pp. 504-505; see also *Torres v. City of San Diego* (2007) 154 Cal.App.4th 214.)

“All other parts of the judgment not affected by the modification remained valid and could have been challenged by appeal.” (*Dakota Payphone, LLC v. Alcaraz, supra*, 192 Cal.App.4th at p. 509.) Although, an appeal from the November 12, 2010 judgment was filed, in the First Appeal, that appeal was dismissed. Consequently, the opportunity to challenge the \$5,680 award has been lost.

Although the Second Appeal, as an appeal from the May 25, 2011 amended judgment, is timely, that does not mean the Second Appeal constitutes a timely challenge to the November 12, 2010 judgment. (*Torres v. City of San Diego, supra*, 154 Cal.App.4th at p. 218.) The Second Appeal is timely as to the award of interest, attorney fees and costs, but not as to the award of \$5,680 in damages, which could have been challenged in the First Appeal.

Ponce claims *Dakota Payphone, LLC v. Alcaraz, supra*, 192 Cal.App.4th 493 and *Torres v. City of San Diego, supra*, 154 Cal.App.4th 214 are distinguishable because those cases did not involve instances wherein a first appeal was dismissed due to nonpayment of fees for preparation of the record. He points out that the record that would have been prepared for the First Appeal is the same record that will be used in the Second Appeal and that he will, in essence, cure the default in the First Appeal by paying for the record now. However, he cites no authority that would permit the late payment of fees to resurrect an appeal that has already been dismissed.

For several reasons, we will not entertain Ponce’s entreaty that this court reconsider the order denying the motion to vacate the dismissal, filed in the First Appeal. Ponce has filed his request in the wrong proceeding (the Second Appeal rather than the First Appeal), he has failed to file a noticed motion at all (Cal. Rules of Court, rule 8.54; *Thompson v. Boyd* (1963) 217 Cal.App.2d 365, 387; cf. *Kinney v. Overton* (2007) 153

Cal.App.4th 482, 497, fn. 7), and the remittitur has already been issued in the First Appeal in any event. The authorities he cites (see e.g., Code Civ. Proc. § 473, subdivision (b); *Estate of Hanks* (1967) 255 Cal.App.2d 674; and *Thornburg v. Rais* (1950) 100 Cal.App.2d 735), do not get him out of this predicament. We will proceed to consider his appeal from the awards of prejudgment interest and attorney fees, but we have no jurisdiction to consider his challenge to the award of \$5,680 in damages.

B. Prejudgment Interest:

As stated in the amended judgment, the court found “that the contract clearly required that certain concrete shiners be installed pursuant to an approved plan; that the shiners were uncontestedly not installed pursuant to the approved plan; that the uncontested, admitted cost to replace the shiners so that they comported to the approved plan back in August 2006 was \$5,680.00 per admitted Trial Exhibit 51.”² The court awarded Nagaoka \$5,680 “plus prejudgment interest at the rate of 10% from August 31, 2006 to the date of [the] Amended Judgment”

Ponce challenges the award of prejudgment interest, stating that it should not have been allowed under Civil Code section 3287, subdivision (a). He claims that before judgment was entered, it was uncertain whether he was liable for contract damages at all, and if so, in what amount.

“Civil Code section 3287, subdivision (a) provides that a party is entitled to recover prejudgment interest on an amount awarded as damages from the date that the amount was both (1) due and owing and (2) certain or capable of being made certain by calculation. [Citations.]” (*Uzyel v. Kadisha* (2010) 188 Cal.App.4th 866, 919.)

“Damages are certain or capable of being made certain by calculation, or ascertainable,

² The reporter’s transcript contains a statement by counsel for Nagaoka that exhibit 51 “was the change order that Mr. Ponce himself prepared for the cost of redoing the shiners.”

for purposes of Civil Code section 3287, subdivision (a) if the defendant actually knows the amount of damages or could compute that amount from information reasonably available to the defendant. [Citation.]” (*Uzyel v. Kadisha, supra*, 188 Cal.App.4th at p. 919.) “In contrast, damages that must be judicially determined based on conflicting evidence are not ascertainable. [Citations.] A legal dispute concerning the defendant’s liability or uncertainty concerning the measure of damages does not render damages unascertainable. [Citations.] On appeal, we independently determine whether damages are ascertainable for purposes of the statute. [Citation.]” (*Ibid.*)

Applying these principles, we see the fact that Ponce did not know whether he would be held liable at trial did not preclude an award of prejudgment interest. (*Uzyel v. Kadisha, supra*, 188 Cal.App.4th at p. 919.) The only question is whether the damages were ascertainable, that is, whether Ponce actually knew the amount of damages or could have determined the amount from information reasonably available to him. (*Ibid.*)

Ponce contends “[t]here was conflicting evidence submitted as to the cost of removing the shiners ranging from zero to \$5,680, or even above that, due to changes in labor and material costs since 2006.” However, in his discussion of prejudgment interest, he does not provide one single record reference. We were able to locate, in his discussion of purported errors in the judgment notwithstanding the verdict, a number of record references purportedly pertaining to such conflicting evidence. Yet not one of those record references pertains either to testimony or to documentary evidence concerning the amount of the damages in question. Most of the record references pertain to portions of the reporter’s transcript having to do with discussions between the court and counsel. In some of that discussion, the court and counsel made specific reference to the \$5,680 figure. In other portions of the discussion, counsel for Ponce alluded to various issues affecting the fixing of damages, including the possibility of conflicting evidence.

The point of the matter is that this discussion is not evidence. It is the burden of Ponce, as the appellant, to cite the portions of the record that support his point. (*Del Real v. City of Riverside* (2002) 95 Cal.App.4th 761, 768.) He has failed to cite any evidence whatsoever that contradicts the court's finding that "the uncontested, admitted cost to replace the shiners so that they comported to the approved plan back in August 2006 was \$5,680.00 per admitted Trial Exhibit 51." If there is a copy of exhibit 51 anywhere in the record, Ponce has not cited it, and we have not located it on our own. Just as it is Ponce's burden to provide record references, it is also his burden to provide an adequate record for review. (*Tudor Ranches, Inc. v. State Comp. Ins. Fund* (1998) 65 Cal.App.4th 1422, 1433.) The long and the short of it is that Ponce has failed either to provide an adequate record for review or to provide record references that enable us to determine whether the court erred in finding that trial exhibit 51 supported an award of prejudgment interest in this matter. He has not met his burden to show error.

C. Nagaoka's Attorney Fees:

(1) Motion and ruling—

In her motion, Nagaoka sought only attorney fees incurred with respect to the breach of contract cause of action, on which she prevailed. She noted that the contract between the parties contained an attorney fees clause providing that the prevailing party on a suit to enforce the contract would be entitled to attorney fees and costs. She conceded that most of the attorney fees incurred in the litigation arose out of the noncontract causes of action and were not recoverable. Nagaoka asked for \$35,000 out of the total \$102,051 in attorney fees she incurred. Attached to Nagaoka's motion were the declaration of her attorney, the attorney's billing records, and copies of the Code of Civil Procedure section 998 offers to compromise. According to Nagaoka's attorney, at the time Ponce offered to compromise for \$10,000, Nagaoka had already incurred \$22,795 in attorney fees, and more than \$1,000 in costs.

In the amended judgment, the court granted Nagaoka's motion for attorney fees, stating: "[Nagaoka] prevailed on the breach of contract cause of action which was the only cause of action . . . for which [she] could recover attorneys' fees pursuant to Civil Code Section 1717. The Court considered the hourly rates charged by [Nagaoka's] counsel and found them to be reasonable. The Court further found that the number of hours spent prosecuting the case as a whole was reasonable and necessary. Although the Court could have awarded [Nagaoka] more attorney's fees, [she] herself limited her request to only the sum of \$35,000.00 for the work related solely to the contract cause of action. The Court further notes that there were three causes of action and [Nagaoka] prevailed on only one cause of action. The requested and awarded attorneys' fees are approximately only one-third (1/3) of the total reasonable fees incurred. The Court awards [Nagaoka], the sole prevailing party on the contract claim, the requested attorney's fees in the sum of \$35,000.00."

(2) Nature of lawsuit and reasonableness of fees—

Ponce contends the court erred in awarding attorney fees to Nagaoka because the thrust of her lawsuit was not a breach of contract claim, but rather an attempt to hit the refund lottery on an unlicensed contractor claim. In support of his factual allegation, he cites simply "Tab 14" of the appellant's appendix—a 75-page span consisting of Nagaoka's attorney fees motion plus attachments. He does not discuss any particular portion of those 75 pages until he reaches a separate subtopic heading on the unreasonableness of the award. There, Ponce picks out "just a few representative examples" of attorney billing entries he says demonstrate the nature of the lawsuit. Although he gives the date, description, and dollar amount billed for his various examples, he again provides no pinpoint page references, citing only "Tab 14." Ponce is cautioned to use page-point references in his citations to the record. It is not the obligation of this court to go through 75 pages of the appellant's appendix line-by-line in search of factual support for his claim. (*Evans v. Centerstone Development Co.* (2005))

134 Cal.App.4th 151, 166; *Del Real v. City of Riverside*, *supra*, 95 Cal.App.4th at p. 768.)

Ponce says that Nagaoka made no attempt to allocate fees to contract and noncontract claims and that she failed to cite any legal authority in support of the assertion that an arbitrary request for \$35,000 out of the total fees incurred was justifiable. However, it is Ponce's burden, as the appellant, to demonstrate trial court error. To do so, he is the one who must cite legal authority in support of his point. (*Roden v. AmerisourceBergen Corporation* (2010) 186 Cal.App.4th 620, 648-649.) He has cited no legal authority for the proposition that an award of approximately one-third of the total fees incurred was unjustifiable under the circumstances of this case.

However, we observe that case law recognizes it may be ““impracticable, if not impossible, to separate the multitude of conjoined activities into compensable or noncompensable time units.”“ [Citation.]” (*Erickson v. R.E.M. Concepts, Inc.* (2005) 126 Cal.App.4th 1073, 1085.) When that is the case, the allocation of time between compensable and noncompensable matters is not required, although the court, in its discretion, may choose to reduce fees. (*Akins v. Enterprise Rent-A-Car Co.* (2000) 79 Cal.App.4th 1127, 1133; *Graciano v. Robinson Ford Sales, Inc.* (2006) 144 Cal.App.4th 140, 161.) Here, the court reduced the total amount of fees incurred by approximately two-thirds to arrive at its award. The fact that Nagaoka was the one who suggested the fraction does not mean that the court abused its discretion in adopting it, particularly when the court stated it would have felt justified in awarding her more.

Ponce nonetheless claims that the amount of attorney fees awarded to Nagaoka was unreasonable. In support of this assertion, he says “[e]ven a cursory review of the legal bills attached to [Nagaoka's] Motion . . . compels the conclusion that virtually all of the work performed pertained to preparing the case for disgorgement due to licensure deficiencies.” We disagree.

As we have already noted, it is not the obligation of this court to do an unassisted review of the record for evidence in support of his point. (*Del Real v. City of Riverside, supra*, 95 Cal.App.4th at p. 768.) Even so, just a cursory review of the first three pages of the billings shows several entries that do not appear to be tied only to disgorgement issues. For example, the first page of the billings contained an entry dated September 15, 2006 for one hour spent reviewing and analyzing the “contract case” and preparing a letter to Ponce. The second page of the billings contains an entry dated October 12, 2006 for 1.1 hours spent in an exchange of e-mails with the client regarding “completion of unfinished work.” The third page shows two entries, one dated October 17, 2006 and one dated October 20, 2006, pertaining to the review and analysis of updates from the client. That “cursory review” of the first few pages of the billings indicates that licensing issues were not the only issues being addressed by Nagaoka’s attorney.

Furthermore, a cursory review of the motion also shows that Nagaoka conceded “most of the total attorney’s fees incurred in the case as a whole are fairly attributable to work related to other non-contract causes of action — for which attorney’s fees are not recoverable, and thus should not be recovered.” That is exactly why Nagaoka requested only \$35,000 of the total \$102,051 in attorney fees incurred.

On a related point, Ponce also says the fees awarded were excessive inasmuch as the billing records contain some duplicate entries. Perhaps so, but the court did not award attorney fees for all time charged, or anywhere near it.

(3) *Code of Civil Procedure section 1033*—

Next, Ponce argues that the court abused its discretion in awarding attorney fees to Nagaoka because she could have obtained her \$5,680 award in a limited civil case. “Under Code of Civil Procedure section 1033, if a plaintiff brings an unlimited civil action and recovers a judgment within the \$25,000 jurisdictional limit for a limited civil action, the trial court has the discretion to deny costs to the plaintiff. [Citation.]”

(*Carter v. Cohen* (2010) 188 Cal.App.4th 1038, 1052.) However, “the trial court may properly award costs to a plaintiff who recovers less than the jurisdictional amount for an unlimited civil case when he or she reasonably and in good faith initiated the action believing that the ultimate recovery would exceed the jurisdictional limit. [Citation.]” (*Id.* at p. 1053.) Ponce has neither shown that Nagaoka commenced an unlimited civil action in bad faith, particularly when she sought over \$250,000 in damages, or that the trial court abused its discretion in awarding attorney fees to her.

(4) *Code of Civil Procedure section 998*—

Finally, Ponce says Nagaoka should not have been able to recover any attorney fees incurred after he made his November 5, 2007 Code of Civil Procedure section 998 settlement offer and she rejected the same. As Ponce points out, section 998, subdivision (c)(1) provides in pertinent part: “If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff shall not recover his or her postoffer costs and shall pay the defendant’s costs from the time of the offer.”

As Ponce explains, he offered to settle for \$10,000, with each party to pay his or her own attorney fees, costs, and expert fees. As he views it, because Nagaoka was awarded only \$5,680 in damages, she obtained an award less favorable than the amount he offered.

However, Ponce overlooks Code of Civil Procedure section 998, subdivision (c)(2)(A), which provides: “In determining whether the plaintiff obtains a more favorable judgment, the court . . . shall exclude the postoffer costs.” As a corollary, “[i]t is well settled . . . that ‘to determine whether the plaintiff obtained a judgment more favorable than defendant’s offer, preoffer costs [including statutory attorney fees] are added to the award of damages.’ [Citations.]” (*Duale v. Mercedes-Benz USA, LLC* (2007) 148 Cal.App.4th 718, 725, fn. 3.) Attorney fees authorized by contract are attorney fees authorized by statute, pursuant to Code of Civil Procedure section 1033.5,

subdivision (a)(10)(A), and such proffer attorney fees are costs added to the award of damages for the purpose of determining whether the plaintiff obtains a more favorable judgment.

That is exactly what the court did in this case. Although Ponce does not discuss it, we located on our own the portion of the reporter's transcript wherein the court disclosed its thinking on the Code of Civil Procedure section 998, subdivision (c) determination. At the hearing on the attorney fees motion, the court took the \$5,680 damages award, added one-third of the \$22,795 in attorney fees that Nagaoka had incurred before Ponce made his offer, and determined that the sum of the two figures was more than the \$10,000 Ponce offered.

Although Ponce argued that the court should consider only about two percent of the total proffer attorney fees, inasmuch as Nagaoka only recovered about two percent of the total she sought to recover in the lawsuit, the court rejected this suggestion. The court explained: "You know, the way I saw it . . . is that the claimed attorney fees of \$102,000 were both reasonable in time and reasonable in amount. Based upon the case, I think I would be justified in awarding much more than one-third in my sound discretion. So I don't think an allocation of one-third is unreasonable at all given the time, the effort that went into this case [¶] I know your argument, and I considered it very carefully. . . . And I don't think the upside potential is the true test. I don't think that really equates. And the case was tried. It was tried in totality with a lot of intermingled issues, all of which to some degree may be dependent upon the evidence. Just because the amount on which they prevailed was not \$340,000, they still prevailed. It still took a substantial effort for them to prevail, in large part because of the tremendous defense that you had mounted."

Ponce does not cite any case law at all construing Code of Civil Procedure section 998, subdivision (c)(2). He has not shown that the court erred in adding one-third of the proffer attorney fees to the damages award to determine that Nagaoka recovered a

judgment greater in amount than the amount for which Ponce offered to settle.

D. Ponce as Prevailing Party:

When addressing whether Nagaoka should recover attorney fees as the prevailing party, Ponce, as we have noted, insists that the lawsuit was in reality just an overblown unlicensed contractor claim based on statute, not a contract claim. But when addressing whether he should recover attorney fees as the prevailing party, Ponce maintains that this is purely a breach of contract lawsuit—for failure to maintain proper licensing per contract requirements, failure to perform in a workman like manner as required by contract, and failure to do work according to approved plans. Ponce further says Nagaoka prevailed on only one out of three causes of action and recovered only about two percent of the money she sought, in this lawsuit based on contract. Consequently, as he views it, he was the prevailing party in an action on a contract and he should have recovered his attorney fees and costs.

The trial court has broad discretion to determine which party is the prevailing party for purposes of Civil Code section 1717 and we will not disturb that determination on appeal absent a showing of a clear abuse of discretion. (*Sears v. Baccaglio* (1998) 60 Cal.App.4th 1136, 1158.) “[I]n deciding whether there is a ‘party prevailing on the contract,’ 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. 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.]” (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 876.) “[A] plaintiff who obtains all relief requested on the only contract claim in the action must be regarded as the party prevailing on the contract for purposes of attorney fees under section 1717. [Citations.]” (*Ibid.*)

Here, Ponce does not discuss the trial briefs, opening statements or closing statements. He mentions only Nagaoka's initial demand letter, seeking full disgorgement of fees paid, a draft complaint, the original complaint, and the first amended complaint. In so doing, Ponce provides no record references at all. We could stop here and say that he has waived any argument that the court abused its discretion in failing to determine him to be the prevailing party. (*Del Real v. City of Riverside, supra*, 95 Cal.App.4th at p. 768.)

However, we were able to locate on our own most of the documents he mentioned. We find the first amended complaint to be most pertinent. In the first amended complaint, Nagaoka asserted three causes of action—breach of contract (failure to install concrete shiners according to plans), recovery of funds paid to unlicensed contractor (Bus. & Prof., § 7031, subd. (b)), and negligence (negligent design and construction of balcony and French door system). She framed one contract claim, one statutory claim, and one tort claim. Nagaoka obtained all relief requested on the only contract claim in the action, the claim that Ponce failed to install the concrete shiners according to agreed drawings.

Generally speaking, “[i]f an action asserts both contract and tort or other noncontract claims, section 1717 applies only to attorney fees incurred to litigate the contract claims. [Citation.]” (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 615.) Although in a given case, the attorney fees provision in a contract may be so broadly worded as to permit recovery of attorney fees incurred in litigating tort claims as well as contract claims (*id.* at p. 608; *Mitchell Land & Improvement Co. v. Ristorante Ferrantelli, Inc.* (2007) 158 Cal.App.4th 479, 486), here Ponce fails to discuss the contract language on attorney fees. He provides no record reference to direct us to the fee provision at issue. Consequently, we have no basis for concluding that the contract language should have been construed so as to permit recovery of attorney fees incurred in litigating tort or other noncontract claims. Ponce has not met his burden to show error.

IV
DISPOSITION

We affirm. Nagaoka shall recover her costs on appeal.

MOORE, J.

WE CONCUR:

O'LEARY, P. J.

BEDSWORTH, J.