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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

EMERGENCY TECHNOLOGIES, INC.,

Plaintiff, Cross-defendant and
Appellant,

v.

SUNDAY GARCIA,

Defendant, Cross-complainant and
Respondent.

G045685

(Super. Ct. No. 30-2009-00324423)

O P I N I O N

Appeal from an order of the Superior Court of Orange County,
Geoffrey T. Glass, Judge. Affirmed.

Law Offices of Matthew C. Mickelson and Matthew C. Mickelson for
Plaintiff, Cross-defendant and Appellant.

Agren Law Firm and Matthew Agren for Defendant, Cross-complainant
and Respondent.

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I.

INTRODUCTION

Emergency Technologies, Inc. (Emergency Technologies), appeals from an order awarding attorney fees to Sunday Garcia. We affirm. Emergency Technologies sought to recover damages from Garcia on a contract containing an attorney fees provision. The trial court found the contract was unenforceable because Emergency Technologies was not properly licensed. Emergency Technologies recovered nothing, which was less than the amount of Garcia's offer to compromise under Code of Civil Procedure section 998, and, as a consequence, the trial court awarded Garcia her attorney fees under the contract.

The parties have argued at length, both in their appellate briefs and at oral argument, over the extent to which an unenforceable contract may be enforced against one party and whether Emergency Technologies and Garcia are in pari delicto. The appeal is resolved, however, through a simple application of the mutuality rule of *Santisas v. Goodin* (1998) 17 Cal.4th 599, 611. Emergency Technologies would have been able to recover attorney fees if it prevailed and recovered on the contract; therefore, Garcia is entitled to recover her attorney fees by establishing the contract was unenforceable.

II.

FACTS AND PROCEDURAL HISTORY

In August 2007, Garcia, doing business as J & S Security Services, Inc., entered into an alarm monitoring services contract (the contract) with American Two-Way, a fictitious business name used by Emergency Technologies. In the contract, American Two-Way agreed to provide alarm monitoring services for Garcia's clients. The contract contained an attorney fees provision providing that "[i]n the event it shall become necessary for [American Two-Way] to institute legal proceedings to collect the

cost of any charges as set forth herein, then and in such proceedings, [J & S Security Services] shall pay to [American Two-Way] reasonable attorney's fees."

American Two-Way did not have an alarm company license required by Business and Professions Code sections 7592 and 7599.34.

In 2009, Emergency Technologies filed a complaint against Garcia to recover \$11,343.31 allegedly due and owing under the contract. The complaint prayed for attorney fees. In the answer, Garcia asserted, as an affirmative defense, that American Two-Way was not licensed and, therefore, the contract was unenforceable. Garcia also filed a cross-complaint alleging American Two-Way breached the contract by failing to provide monitoring services for a number of Garcia's clients.

In February 2010, Garcia served an offer to compromise pursuant to Code of Civil Procedure section 998 (the 998 Offer). By the 998 Offer, Garcia offered to have judgment taken against her in the sum of \$3,123.97 plus costs and reasonable attorney fees incurred by Emergency Technologies.

Emergency Technologies did not accept the 998 Offer, and the matter proceeded to a bench trial. Following trial, the court found that American Two-Way failed to prove it was licensed as a security company and therefore could not recover on the contract. The court also found that Garcia could not recover on her cross-complaint. The judgment, entered in April 2011, awarded no damages and declared, "[t]here is no prevailing party." No party appealed from the judgment, and it became final.

In May 2011, Garcia moved to recover costs and attorney fees. She argued that because the 998 Offer was greater than Emergency Technologies's recovery, she was the prevailing party under Code of Civil Procedure section 998, subdivision (c)(1) and entitled to recover costs. Emergency Technologies opposed the motion.

The trial court granted Garcia's motion to recover costs and attorney fees and awarded Garcia \$41,162 in attorney fees. Emergency Technologies timely appealed from the order granting Garcia's motion.

III.

DISCUSSION

When a plaintiff does not accept a defendant's offer to compromise made pursuant to Code of Civil Procedure section 998, 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." (Code Civ. Proc., § 998, subd. (c)(1).) In that situation, the defendant is treated as the prevailing party for recovering postoffer costs. (*Biren v. Equality Emergency Medical Group, Inc.* (2002) 102 Cal.App.4th 125, 140.) Costs under section 998, subdivision (c)(1) include attorney fees when the parties' contract includes an attorney fees provision. (*Biren v. Equality Emergency Medical Group, Inc.*, *supra*, at p. 140.)

Garcia was entitled to recover postoffer costs because Emergency Technologies did not accept the 998 Offer and failed to obtain a more favorable judgment. Emergency Technologies argues those costs cannot include attorney fees because the trial court found that the contract between the parties, which included the attorney fees provision, was unenforceable.

In *Santisas v. Goodin*, *supra*, 17 Cal.4th at page 611, the California Supreme Court stated: "The second situation in which [Civil Code] section 1717 makes an otherwise unilateral right reciprocal, thereby ensuring mutuality of remedy, is when a person sued on a contract containing a provision for attorney fees to the prevailing party defends the litigation 'by successfully arguing the inapplicability, invalidity, unenforceability, or nonexistence of the same contract.' [Citation.] Because these arguments are inconsistent with a contractual claim for attorney fees under the same agreement, a party prevailing on any of these bases usually cannot claim attorney fees as a contractual right. If section 1717 did not apply in this situation, the right to attorney fees would be effectively unilateral—regardless of the reciprocal wording of the attorney fee provision allowing attorney fees to the prevailing attorney—because only the party

seeking to affirm and enforce the agreement could invoke its attorney fee provision. To ensure mutuality of remedy in this situation, it has been consistently held that when a party litigant prevails in an action on a contract by establishing that the contract is invalid, inapplicable, unenforceable, or nonexistent, section 1717 permits that party's recovery of attorney fees whenever the opposing parties would have been entitled to attorney fees under the contract had they prevailed. [Citations.]”

If Emergency Technologies had prevailed and been able to enforce the contract, Emergency Technologies would have been entitled to recover its attorney fees against Garcia under the attorney fees provision of the contract. Thus, Garcia is entitled to recover her attorney fees by having established the contract was “invalid, inapplicable, unenforceable, or nonexistent.” (*Santisas v. Goodin, supra*, 17 Cal.4th at p. 611.)

IV.

DISPOSITION

The order granting Garcia's motion for costs, including attorney fees, is affirmed. Garcia shall recover costs incurred on appeal.

FYBEL, J.

WE CONCUR:

O'LEARY, P. J.

IKOLA, J.