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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ERIK AARON,

Plaintiff, Cross-defendant and
Respondent,

v.

JOANNA FARAJI,

Defendant and Appellant;

RICHARD DEAN KELLEY,

Defendant, Cross-complainant and
Appellant.

G046457

(Super. Ct. No. 30-2010-00381602)

O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County,
David R. Chaffee, Judge. Affirmed as to Joanna Faraji; dismissed as to Richard Dean
Kelley.

Law Offices of John. F. Oakes, John F. Oakes and Robert A. Newton for
Defendants and Appellants.

Millar Hodges & Bemis and Richard W. Millar, Jr., for Plaintiff and
Respondent.

* * *

Defendant Joanna Faraji also known as Joanna Faraji-Kelley appeals from
an order awarding attorney fees to plaintiff Erik Aaron after he prevailed on his action to
compel specific performance of a real estate purchase agreement.

Defendant contends the purchase agreement bars plaintiff from recovering
attorney fees because he did not first attempt to mediate the dispute. She also contends
the court wrongly held her liable for fees plaintiff incurred litigating against her husband,
defendant and cross-complainant Richard Dean Kelley (Kelley).¹

We hold plaintiff may recover his attorney fees. The record supports the
finding that plaintiff attempted mediation before filing suit, as the agreement requires.
And the award reasonably included attorney fees plaintiff incurred demurring
(unsuccessfully) to Kelley’s first amended cross-complaint and moving to lift the
automatic stay imposed by Kelley’s bankruptcy. We affirm.

¹ Kelley purports to appeal from the attorney fee order. But Kelley is not
aggrieved by the order, which was sought and entered only against defendant. To have
appellate standing, “[t]he test is twofold — one must be both a party of record to the
action and aggrieved to have standing to appeal.” “One is aggrieved when the judgment
has an immediate, pecuniary, and substantial effect on his interests or rights.” (*Shaw v.*
Hughes Aircraft Co. (2000) 83 Cal.App.4th 1336, 1342.) The order against defendant
does not have a sufficient effect on Kelley, despite their marriage. We dismiss the
appeal as to him.

FACTS

Defendant sold her Mission Viejo condominium to plaintiff in April 2010. The attorney fee clause in their industry-standard “RESIDENTIAL PURCHASE AGREEMENT” provided: “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, except as provided in paragraph 17A.” Paragraph 17A required the parties to mediate any dispute before filing suit. It provided: “[Plaintiff] and [defendant] agree to mediate any dispute arising between them out of this Agreement, or any resulting transaction, before resorting to arbitration or court action If, for any dispute or claim to which this paragraph applies, any party commences an action without first attempting to resolve the matter through mediation, or refuses to mediate after a request has been made, then that party shall not be entitled to recover attorney fees, even if they would otherwise be available to that party in any such action.”

Plaintiff’s counsel wrote a letter to defendant’s counsel on June 3, 2010. The letter began: “Pursuant to paragraph 17A of the California Residential Purchase Agreement, [plaintiff] hereby demands mediation.” Plaintiff also suggested using a certain retired judge as the mediator.

Defendant’s counsel faxed back a letter on June 11. He replied Kelley intended to file bankruptcy, and “[i]ncluded in the Chapter 7 Bankruptcy will be the disputed contract for the sale and purchase of [the condominium].” Counsel stated Kelley “did not sign the Purchase and Sale Agreement and under California Law the contract in and of itself is void for the failure of both spouses to join in the execution of the contract. As previously stated, Mr. Kelley did not have the intent to convey his community real property interest.” Defendant’s counsel continued: “Please be further

advised that it was my clients' intent to participate in Mediation. However, upon learning that Mr. Kelley had retained a Bankruptcy attorney, I do not believe Mediation is appropriate and cannot go forward because of the automatic stay."

Plaintiff's counsel responded in a letter e-mailed on June 14, 2010. The letter stated in its entirety: "Thank you for your letter of June 11, 2010. [¶] We interpret it as a rejection of mediation and we will proceed accordingly." That same day, defendant's counsel responded with a letter stating in its entirety: "My clients are not rejecting Mediation. If you want to set up the Mediation, you may proceed. My letter was intended to give you a courtesy notice of them filing bankruptcy."

Plaintiff filed his complaint for specific performance on June 17, 2010. He alleged defendant "attempted to cancel the Agreement and refused to close." He further alleged defendant refused to mediate the dispute.

Soon thereafter, plaintiff's counsel notified defendant's counsel that plaintiff was "still amenable to mediation. Please let me know if Judge Seymour is acceptable as a mediator, and I will initiate the arrangements." Defendant's counsel responded on June 30, 2010. His letter stated: "It is my opinion that your client has waived the right to attorneys' fees by filing your Complaint before proceeding to Mediation." It continued: "Knowing that Mr. Kelley is filing bankruptcy, he does not intend to pay any administration fees for ADR."

Plaintiff later amended his complaint to assert a declaratory relief cause of action against Kelley. He alleged Kelley had filed for bankruptcy protection, identifying the condominium as "100% — Potential Community Property Spouse's Name Only." Plaintiff further alleged the bankruptcy court granted relief from the automatic stay "on [the] condition that . . . Kelley be named as a party in this action so that his claim of an interest in the property can be adjudicated."

Kelley filed a cross-complaint against plaintiff. After the court sustained plaintiff's demurrer, Kelley filed a first amended cross-complaint. He asserted causes of action to establish his community property interest in the condominium, cancel the purchase agreement, and quiet title to the condominium. Plaintiff filed another demurrer, but the court overruled it.

After a bench trial, the court entered judgment for plaintiff on the complaint and cross-complaint in October 2011. The court found the condominium was defendant's separate property and the purchase agreement was enforceable. It directed defendant to convey the condominium to plaintiff upon his payment of the purchase price, less \$9,600 for plaintiff's incidental damages. It also awarded costs of suit to plaintiff.

Later that month, plaintiff moved to recover his attorney fees. In an opposition brief, defendant noted Kelley was not a party to the purchase agreement. Defendant also contended plaintiff should not recover \$7,760 in attorney fees incurred in lifting the automatic bankruptcy stay, or \$1,840 incurred demurring unsuccessfully to Kelley's first amended cross-complaint. In his reply brief, plaintiff clarified "the award for attorney's fees is sought only against [defendant]."

The court granted plaintiff's attorney fee motion. It found plaintiff tried to mediate the dispute, but defendant and Kelley "attempt[ed] to refuse to mediate without stating so outright." The court further found: "The argument regarding the demurrer hearing and efforts to be relieved from the automatic stay are not convincing. With regard to the demurrer, Plaintiff had little choice but to defend his pleading [(sic) — the demurrer was plaintiff's] or to risk a demurrer being sustained without leave to amend. With regard to Plaintiff's efforts to be relieved from the automatic stay, these expenses are allowable and do not seem unreasonable under the circumstances." After disallowing

some other attorney fees, the court awarded plaintiff \$53,116.54 in attorney fees “**as against [defendant].**”

DISCUSSION

Defendant raises three meritless issues on appeal.

First, defendant contends plaintiff cannot recover attorney fees because he filed suit “without first attempting to resolve the matter through mediation,” as the agreement requires. We construe the agreement independently, and determine whether substantial evidence supports the court’s factual findings. (*See Frei v. Davey* (2004) 124 Cal.App.4th 1506, 1511-1512 (*Frei*).

The record sufficiently shows plaintiff “attempt[ed] to resolve the matter through mediation.” Plaintiff’s counsel’s June 3 letter to defendant’s counsel stated that plaintiff “demands mediation” and recommended a specific mediator. Defendant’s counsel rejected the demand on June 11: “I do not believe Mediation is appropriate and cannot go forward because of the automatic stay.”

Defendant’s refusal to mediate ends the matter. “[W]hen a contract conditions the recovery of attorney fees on a party’s willingness to participate in mediation before the litigation begins, the window for agreeing to mediate does not remain open indefinitely.” (*Frei, supra*, 124 Cal.App.4th at p. 1517.) “While a party must be given a reasonable time to respond to a contractual request for mediation, as a practical matter that time ends when the party rejects the request.” (*Id.* at pp. 1516-1517 [construing same form purchase agreement; prevailing party cannot recover attorney fees after it refuses initial demand to arbitrate].)

Once defendant flatly rejected mediation, plaintiff had no need to make any further attempts. He had already satisfied the agreement’s mediation condition. Thus, it

is immaterial whether defendant tried to recant in her June 14 letter (or, for that matter, whether defendant reinstated her initial refusal on June 30). Defendant's June 14 letter was too little, too late. (See *Frei, supra*, 124 Cal.App.4th at p. 1517 [mediation window closes upon rejection].) Besides, her letter was indifferent at best. Defendant claimed she was "not rejecting Mediation," but that rings hollow. Defendant did not agree to mediation, either. Nor did she take any step toward participating in mediation. She did not accept the recommended mediator, propose another mediator, suggest a date or time or location, or address any of the logistics. Instead, defendant struck a passive-aggressive tone along the lines of "suit yourself" — "If you want to set up the Mediation you may proceed." On its face, the letter is reasonably construed (as the court put it) as an "attempt[] to refuse to mediate without stating so outright."

Second, defendant contends the court erred by awarding the attorney fees plaintiff incurred demurring to the first amended cross-complaint. Defendant notes the minute order incorrectly states plaintiff opposed the demurrer and, in any event, plaintiff's demurrer was overruled.

Neither observation requires reversal. First, we review the court's ruling, not the reasoning in its minute order. (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 19.) Second, defendant wrongly "focus[es] on procedural victories during the course of trial rather than on the final disposition of the substantive issues." (*Presley of Southern California v. Whelan* (1983) 146 CalApp.3d 959, 962.) "A party who wins an outright victory should recover all his fees without offset for the fees incurred by the other party." (*Id.* at p. 963; accord *PNEC Corp. v. Meyer* (2010) 190 Cal.App.4th 66, 73 [prevailing defendant may recover all of its attorney fees, including those unrelated to dispositive motion].) The agreement authorized the court to award plaintiff all of his "reasonable attorney fees" The court permissibly found the demurrer, although unsuccessful, was reasonable. Plaintiff did not have to show anything more than that.

(See *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095 (*PLCM*) [“the trial court has broad authority to determine the amount of a reasonable fee”].) And defendant offers no authority to the contrary.

Finally, defendant contends the court wrongly awarded the attorney fees plaintiff incurred in moving to lift the automatic stay. Defendant notes “these fees were incurred entirely in Richard Kelley’s bankruptcy case,” which “did not ‘arise out of the agreement’” and was not “between the parties to the contract”

But the agreement’s attorney fee clause is broad. Defendant agreed to be liable “[i]n any action . . . between [plaintiff] and [defendant] arising out of this agreement” for any of plaintiff’s “reasonable attorney fees” This action — the specific performance action in which attorney fees were awarded — was between plaintiff and defendant, and arose out of the purchase agreement. So the remaining issue is whether plaintiff’s “reasonable attorney fees” include those he incurred in the bankruptcy proceeding.

The court has “wide latitude” to apply “equitable principles” when determining reasonableness. (*PLCM, supra*, 22 Cal.4th at p. 1095.) Accordingly, a prevailing party may recover contractual attorney fees for legal work performed in another action, as long as the “fees were reasonably and necessarily incurred at that time by the prevailing party.” (*Stokus v. Marsh* (1990) 217 Cal.App.3d 647, 655 (*Stokus*) [court permissibly awarded attorney fees that prevailing party incurred in prior action]; accord *Children’s Hospital & Medical Center v. Bonta* (2002) 97 Cal.App.4th 740, 779 [private attorney general statute allows court “to award a fee that compensates work performed in a collateral action”].)

Here, the record shows it was necessary for plaintiff to move to lift the automatic stay. Defendant’s counsel maintained the purchase agreement was void because Kelley had a community property interest in the condominium, which would be

“[i]ncluded in the Chapter 7 bankruptcy” And defendant’s counsel asserted mediation “cannot go forward because of the automatic stay.” Defendant thus used Kelley’s bankruptcy to hinder plaintiff from enforcing the agreement — and gave plaintiff little choice but to move to lift the automatic stay. “[E]quitable considerations” prevail when awarding contractual attorney fees. (*PLCM, supra*, 22 Cal.4th at p. 1095.) It is perfectly reasonable to compensate plaintiff for attorney fees he incurred clearing procedural hurdles at defendant’s insistence. (See *Stokus, supra*, 217 Cal.App.3d at p. 656 [plaintiff may recover fees incurred in prior action he voluntarily dismissed only “to avoid unnecessary litigation” over “technically defective” notice].)

DISPOSITION

The postjudgment order is affirmed as to Joanna Faraji. Appeal dismissed as to Richard Dean Kelley. Plaintiff shall recover his costs on appeal.

IKOLA, J.

WE CONCUR:

ARONSON, ACTING P. J.

FYBEL, J.