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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

LEZLIE J. GUNN,

Petitioner,

v.

THE SUPERIOR COURT OF ORANGE
COUNTY,

Respondent;

MAI KAI COMMUNITY
ASSOCIATION,

Real Party in Interest.

G046989

(Super. Ct. No. 30-2011-00480761)

O P I N I O N

Original proceedings; petition for writ of mandate to challenge an order of the Superior Court of Orange County, Jamoa A. Moberly, Judge. Denied. Request for sanctions. Denied.

Weil & Drage, Christine E. Drage, Harry V. Peetris and Anthony D. Platt for Petitioner.

No appearance for Respondent.

Harle, Janics & Kannen and Rosa Kwong for Real Party in Interest.

* * *

INTRODUCTION

Lezlie J. Gunn appeals from the trial court's order granting the motion of Mai Kai Community Association (the Association) to strike or tax Gunn's memorandum of costs. Although the Association voluntarily dismissed its lawsuit against Gunn before she responded to the complaint, her memorandum of costs sought to recover nearly \$145,000 which included \$134,070 in attorney fees.

We resolve doubts about our appellate jurisdiction by exercising our discretion to treat Gunn's appeal as a petition for writ of mandate. We deny writ relief. Gunn did not file a properly noticed motion to recover attorney fees, which was ground alone to strike her request for such fees. The trial court also did not err in finding that neither Gunn nor the Association was the prevailing party under Civil Code section 1354, subdivision (c) (section 1354(c)). We deny the Association's request for sanctions on appeal because the Association did not file a separate sanctions motion.

FACTS AND PROCEDURAL HISTORY

The Association is a homeowners association established as a common interest development as defined in Civil Code section 1351. Gunn owns a condominium unit in the development and therefore is a member of the Association. Gunn's property was subject to the amended and restated declaration of covenants, conditions, and restrictions (CC&R's) of the Association.

In June 2011, the Association filed a complaint asserting causes of action for injunctive relief, breach of contract, and nuisance against Gunn. The complaint alleged that during heavy storms in late November or early December 2009, Robert H. Murphy, who lived in a condominium unit directly below Gunn's, noticed water leaking onto his unit from Gunn's balcony/deck. Murphy reported the leak to the Association,

which conducted inspections and determined the source of the leak was Gunn's balcony/deck. Gunn refused the Association's requests for access to her unit to repair the leak. The complaint sought an injunction granting the Association access to Gunn's unit to repair the balcony/deck.

Three days after the complaint was filed, the Association filed an ex parte application seeking "immediate injunctive relief" (capitalization omitted) for access to Gunn's condominium unit to repair the balcony/deck. The Association was unable, however, to serve the summons, complaint, and ex parte application on Gunn, who never formally responded to the complaint.

In June 2011, counsel for the Association and Gunn reached an agreement to resolve the dispute. Pursuant to a release agreement signed by the parties, Gunn agreed to provide access to a contractor to prepare a proposal and to conduct repairs and other work pursuant to the proposal.

In December 2011, the Association filed a request for dismissal of the complaint without prejudice, and a dismissal was entered on the same date. Notice of entry of the dismissal was filed in February 2012.

In March 2012, Gunn filed a memorandum of costs seeking a total of \$144,689.84. That amount consisted of \$134,070 for attorney fees, \$7,367.50 for expert fees, \$295.68 for models, blowups, and photocopies of exhibits, and \$2,956.66 for other costs.

The Association filed a motion to strike/tax the costs and attorney fees that Gunn had requested. She filed an opposition to the motion that was combined with a "Counter-Motion for Attorneys' Fees and Costs."

The trial court granted the Association's motion to strike/tax costs and attorney fees on these grounds: "Pursuant to Civil Code[]§ 1354 (c), neither party is the prevailing party. The court adopts the 'practical level' of *Heather Farms Homeowners Assn. v. Robinson* (1994) 21 Cal.App.4th 1568, 1574. [¶] In this case, the dispute was

resolved before Ms. Gunn filed a responsive pleading. Both sides are satisfied with the resolution. As prayed in the Complaint, the Association was granted access to the private balcony. ¶¶ The extensive dispute between the parties was independent of the limited issues presented in the Complaint.”

APPELLATE JURISDICTION

First, we address whether we have jurisdiction over Gunn’s appeal. The Association contends we lack jurisdiction because an order granting a motion to strike/tax costs following a voluntary dismissal without prejudice does not qualify as a postjudgment order directly appealable under Code of Civil Procedure section 904.1, subdivision (a)(2).

“The right to appeal is wholly statutory.” (*Dana Point Safe Harbor Collective v. Superior Court* (2010) 51 Cal.4th 1, 5.) In civil matters, Code of Civil Procedure section 904.1 identifies appealable judgments and orders. (*Dana Point Safe Harbor Collective v. Superior Court, supra*, at p. 5.)

Code of Civil Procedure section 904.1, subdivision (a)(2) permits an appeal “[f]rom an order made after a judgment made appealable by [section 904.1, subdivision (a)(1)],” that is, a final judgment. Numerous cases have held that a postjudgment order on a motion to tax costs and an order on a motion for attorney fees are appealable as orders made after an appealable judgment. (E.g., *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 648 [order on motion for attorney fees]; *People v. Bhakta* (2008) 162 Cal.App.4th 973, 981 [order on motion for attorney fees]; *Blue v. City of Los Angeles* (2006) 137 Cal.App.4th 1131, 1155 [order on motion to tax costs]; *Whiteside v. Tenet Healthcare Corp.* (2002) 101 Cal.App.4th 693, 706 [order on motion for attorney fees].) Those are certainly true propositions when the postjudgment order is made after a *judgment*, i.e., a final disposition of all claims between all parties.

But a voluntary dismissal without prejudice is a different matter. “A voluntary dismissal under Code of Civil Procedure section 581, subdivision (b)(1) by

written request to the clerk is not a final judgment, as no judgment, final or otherwise, is necessary to the dismissal. [Citations.] A voluntary dismissal is a ministerial act, not a judicial act, and not appealable. [Citations.]”¹ (*H. D. Arnaiz, Ltd. v. County of San Joaquin* (2002) 96 Cal.App.4th 1357, 1364-1365 (*Arnaiz*); see also *Gray v. Superior Court* (1997) 52 Cal.App.4th 165, 170 [a plaintiff’s voluntary dismissal is nonappealable].) In *Arnaiz*, the defendant appealed from an order granting the plaintiff’s motion to vacate the plaintiff’s voluntary dismissal. (*Arnaiz, supra*, at p. 1360.) The Court of Appeal dismissed the appeal because a voluntary dismissal is not an appealable judgment, and, therefore, an order granting a motion to vacate a voluntary dismissal is not an order made after an appealable judgment. (*Id.* at p. 1366.)

There is authority to support a contrary view. In *Pazderka v. Caballeros Dimas Alang, Inc.* (1998) 62 Cal.App.4th 658, 662 (*Pazderka*), the trial court granted the plaintiffs’ motion for attorney fees brought after entry of judgment pursuant to Code of Civil Procedure section 998. The defendant moved for reconsideration of the attorney fees order and to vacate the judgment, and, while that motion was under submission, appealed from the judgment. (*Pazderka, supra*, at p. 664.) After the defendant filed the notice of appeal, the trial court granted the defendant’s motion and vacated the judgment. (*Id.* at pp. 664-665.) The Court of Appeal, in affirming its own jurisdiction, concluded an order denying a motion to vacate a judgment entered pursuant to section 998 is appealable, even though the parties waive any right to appeal from that judgment. (*Pazderka, supra*, at pp. 668-669.) The court reasoned, “[o]rdinarily, a party cannot appeal from an order to vacate the judgment, if the underlying order is not appealable. The rule prevents piecemeal appeals which would be oppressive and costly. [Citation.]

¹ An exception to this rule is a voluntary dismissal with prejudice may be treated as an appealable judgment to expedite an appeal if the judgment was entered after an adverse ruling by the trial court. (*Stewart v. Colonial Western Agency, Inc.* (2001) 87 Cal.App.4th 1006, 1012.) This exception is inapplicable.

The section 998 judgment order is not interlocutory, and the rule barring piecemeal appeals has no applicability.” (*Id.* at p. 668.)

In *Eichenbaum v. Alon* (2003) 106 Cal.App.4th 967, 973-974

(*Eichenbaum*), the plaintiff filed an appeal from an order imposing sanctions in an amount less than \$5,000 after voluntary dismissal of the lawsuit. Under Code of Civil Procedure section 904.1, subdivision (b), such an order may only be reviewed on an appeal after entry of final judgment. The Court of Appeal denied the defendant’s request to dismiss the appeal: “Although the statute [citation] speaks of an appeal after entry of final judgment, the manifest policy, of deferring appellate review of a lesser sanctions order to the conclusion of the case in the trial court, is satisfied once the action has been voluntarily dismissed with prejudice.” (*Eichenbaum, supra*, at p. 974.)

Strictly speaking, if a voluntary dismissal is not an appealable judgment under Code of Civil Procedure section 904.1, subdivision (a)(1), then the order granting the Association’s motion to strike/tax costs and attorney fees is not an order made after a judgment made appealable by section 904.1, subdivision (a)(2). This appeal does not follow a judgment entered pursuant to Code of Civil Procedure section 998 and does not implicate the policies which led the *Eichenbaum* court to treat a voluntary dismissal as a final judgment. Yet, the order granting the Association’s motion effectively resolves the lawsuit—there is nothing left to be decided. Unlike an order granting a motion to vacate a dismissal, which reopens the case and leads to further proceedings, the order granting the Association’s motion closed the case and, at least for the time being, ended the trial court proceedings.

Given those circumstances, we could construe the voluntary dismissal and the order granting the Association’s motion together as constituting a judgment that is directly appealable under Code of Civil Procedure section 904.1, subdivision (a)(1). We might do so, but for one glitch: the Association dismissed the case without prejudice. By definition, a judgment is a final determination of the parties’ rights (Code Civ. Proc.,

§ 577) and leaves nothing to be done but enforcement (*Sullivan v. Delta Air Lines, Inc.* (1997) 15 Cal.4th 288, 304). Although the Association’s request for injunctive relief apparently has become moot, the dismissal without prejudice does not in itself foreclose further proceedings in the trial court.

The resolution to this conundrum is to resolve any doubts about appellate jurisdiction in favor of exercising our discretion to treat Gunn’s appeal as a petition for writ of mandate. In *Arnaiz*, the court so construed the appeal from the order vacating the voluntary dismissal and declared, “a petition for a writ of mandate is the appropriate vehicle to review an order on a motion to vacate a voluntary dismissal.” (*Arnaiz, supra*, 96 Cal.App.4th at p. 1366.) In *Eichenbaum*, the court did the same thing: “Moreover, even if a different construction of [Code of Civil Procedure] section 904.1, subdivision (b) were appropriate, the interests of justice would warrant resolving this fully briefed appeal—which defendant did not earlier move to dismiss—by treating it as a petition for extraordinary writ, as permitted by the same subdivision.” (*Eichenbaum, supra*, 106 Cal.App.4th at p. 974.)

We may treat an improper appeal as a petition for writ of mandate in unusual circumstances. (*Olson v. Cory* (1983) 35 Cal.3d 390, 400-401.) It is appropriate to treat an appeal from a nonappealable judgment as a petition for extraordinary writ when requiring the parties to wait for entry of final judgment might lead to unnecessary trial proceedings, the briefs and the record include the necessary elements for a writ of mandate, there is no indication the trial court would appear as a party in the writ proceeding, the appealability of the order was not clear, and all parties urge the court to decide the issue rather than dismiss the appeal. (*Ibid.*)

Here, the briefs and the record include the necessary elements for a writ of mandate, there is no indication the trial court would appear in a writ proceeding, and the appealability of the order granting the Association’s motion to strike/tax costs and attorney fees is not at all clear. Because the lawsuit was voluntarily dismissed, a final

appealable judgment might never be entered. For that reason too, Gunn might never had an adequate legal remedy. Although the Association would like us to dismiss the appeal for lack of jurisdiction, on balance, the circumstances justify treating Gunn’s appeal as a petition for writ of mandate.

STANDARDS OF REVIEW

We review an order granting or denying a motion to tax costs under an abuse of discretion standard. (*Chaaban v. Wet Seal, Inc.* (2012) 203 Cal.App.4th 49, 52.) “To the extent the statute grants the court discretion in allowing or denying costs or in determining amounts, we reverse only if there has been a “clear abuse of discretion” and a “miscarriage of justice.”” (*Ibid.*)

“The proper standard of review was set forth in *Carver v. Chevron U.S.A., Inc.* (2002) 97 Cal.App.4th 132, 142 . . . : ‘On review of an award of attorney fees after trial, the normal standard of review is abuse of discretion. However, de novo review of such a trial court order is warranted where the determination of whether the criteria for an award of attorney fees and costs in this context have been satisfied amounts to statutory construction and a question of law.’” (*Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1175.) In *Carver v. Chevron U.S.A., Inc.* (2002) 97 Cal.App.4th 132, 142, the court stated: “Thus, it is a discretionary trial court decision on the propriety or amount of statutory attorney fees to be awarded, but a determination of the legal basis for an attorney fee award is a question of law to be reviewed de novo.”

DISCUSSION

I.

Gunn Cannot Recover Attorney Fees.

A. Gunn Failed to Bring a Noticed Motion to Recover Attorney Fees.

Under section 1354(c), the prevailing party in an action to enforce the governing documents of a homeowners association “shall be awarded reasonable

attorney's fees and costs." Gunn claimed her attorney fees under section 1354(c) as the prevailing party in an action to enforce the Association's CC&R's.

Attorney fees based on statute may be recovered (1) on noticed motion, (2) at the time a statement of decision is rendered, (3) on application supported by affidavit made concurrently with a claim for other costs, or (4) on entry of a default judgment. (Code Civ. Proc., § 1033.5, subd. (c)(5).) Attorney fees based on contract or law must be claimed by noticed motion or upon entry of judgment unless the parties stipulate otherwise. (Code Civ. Proc., § 1033.5, subd. (c)(5); see Civ. Code, § 1717, subd. (b) [court must determine prevailing party on a contract by noticed motion]; Cal. Rules of Court, rule 3.1702 ["Except as otherwise provided by statute, this rule applies in civil cases to claims for statutory attorney's fees and claims for attorney's fees provided for in a contract"]; see also *612 South LLC v. Laconic Limited Partnership* (2010) 184 Cal.App.4th 1270, 1284 ["Unless otherwise provided by statute, a noticed motion is required to determine a reasonable fee"].)

Gunn did not follow the statutory requirements for recovering attorney fees. She entered the attorney fees on her cost memorandum but did not support the memorandum with a declaration. The worksheet attached to the memorandum of costs did not provide evidentiary support for Gunn's claim for attorney fees and was not signed under penalty of perjury. She did not bring a properly noticed motion to recover attorney fees. Although she included a so-called "Counter-Motion for Attorneys' Fees" in her opposition to the motion to strike/tax costs and attorney fees, the countermotion was not properly noticed because it was filed only 11 days before the scheduled hearing date. (Code Civ. Proc., § 1005, subd. (b) [moving and supporting papers must be filed and served at least 16 court days before the hearing].) The Association challenged Gunn's attempt to recover attorney fees by the improperly noticed countermotion.

Gunn's failure to follow the correct procedure to recover attorney fees is reason in itself to uphold the trial court's order granting the Association's motion to strike/tax costs and attorney fees.

B. *The Trial Court Did Not Abuse Its Discretion
in Finding No Prevailing Party.*

Gunn argues the trial court abused its discretion by finding neither she nor the Association was the prevailing party for purposes of awarding attorney fees. We strongly disagree.

Section 1354(c) states, "the prevailing party shall be awarded reasonable attorney's fees and costs" but does not define "prevailing party." In cases involving recovery of attorney fees under Civil Code section 1717, when a party obtains a "simple, unqualified victory" by prevailing on or defeating all contract claims in the action and the contract contains an attorney fees provision, that party is entitled to recover attorney fees. (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 876-877.) If neither party obtains a complete victory, the trial court must determine the prevailing party by "compar[ing] 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." (*Id.* at p. 876.) In that situation, the court has discretion to determine that "neither party prevailed sufficiently to justify an award of attorney fees." (*Scott Co. v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1109.)

These same principles apply in determining the prevailing party under section 1354(c). (*Salehi v. Surfside III Condominium Owners Assn.* (2011) 200 Cal.App.4th 1146, 1153-1154; *Heather Farms Homeowners Assn. v. Robinson* (1994) 21 Cal.App.4th 1568, 1574 (*Heather Farms*).) In *Heather Farms*, a homeowners association brought an action against a homeowner to enforce the CC&R's of a residential development. (*Heather Farms, supra*, at p. 1570.) The complaint "spawned a complex series of cross-complaints and subsidiary actions" involving numerous parties. (*Ibid.*)

After years of litigation, all of the parties except the homeowner had entered into a settlement agreement that required the homeowners association to dismiss its suit against the homeowner without prejudice. (*Ibid.*) The judge who negotiated the settlement found there were no prevailing parties, and stated: ““This dismissal is part of an overall complex piece of litigation . . . that’s been resolved by a negotiated settlement. There are no winners. There are no favorable parties in this case.”” (*Id.* at p. 1571.)

The homeowner subsequently sought to recover his attorney fees pursuant to Civil Code section 1354 and argued he was the prevailing party by virtue of receiving a dismissal. (*Heather Farms, supra*, 21 Cal.App.4th at p. 1571.) The trial court agreed with the settlement judge and concluded there was no prevailing party within the meaning of section 1354. (*Heather Farms, supra*, at p. 1571.) The Court of Appeal affirmed. It concluded that in determining who is the prevailing party within the meaning of section 1354, the trial court should analyze “which party . . . prevailed on a practical level.” (*Heather Farms, supra*, at p. 1574.) The Court of Appeal reasoned there was no prevailing party because the homeowners association had dismissed its action against the homeowner “as part of a global settlement agreement, not because he succeeded on some procedural issue or otherwise received what he wanted.” (*Ibid.*)

The trial court in this case correctly applied the “practical level” test of *Heather Farms* to find neither the Association nor Gunn prevailed in the litigation. Although Gunn obtained a dismissal without prejudice, the Association achieved a substantial portion of its litigation goals. As disclosed by the complaint and the ex parte application, the Association’s primary goal was to obtain access to Gunn’s balcony/deck to inspect and, if necessary, conduct repairs. In opposing the motion to strike/tax costs and attorney fees, Gunn contended the Association’s true goal was to remove her balcony/deck at her own expense and the claimed leak was merely a pretext. The Association’s complaint, ex parte application, and other court filings do not reveal that

goal. Gunn never responded to the complaint, but we will assume her litigation goal was to prevent the Association from accomplishing its goal.

The release agreement granted the Association the right, with the specified notice, to have a contractor enter Gunn's condominium unit to inspect the deck, prepare a work proposal, and to conduct the work, and to have a structural engineer enter the unit to monitor the work and inspect the deck to determine the source of the leak. Gunn achieved the right to veto the Association's chosen contractor and require the Association to obtain proposals from and select between two other contractors. Given that the Association prevailed in its primary goal of gaining access to Gunn's balcony/deck, the trial court did not abuse its discretion in finding no party prevailed.

At oral argument, Gunn's counsel argued for the first time that under Code of Civil Procedure section 1032, subdivision (b), Gunn was entitled as a matter of right to recover costs, including attorney fees, because she was a defendant in whose favor a dismissal was entered. Gunn's counsel argued that under section 1032, the trial court did not have discretion to deny Gunn recovery of attorney fees. We deem the argument waived because Gunn did not raise it in her appellate briefs. (*Kelly v. CB&I Constructors, Inc.* (2009) 179 Cal.App.4th 442, 451-452.) The argument, nevertheless, has no merit. A defendant in whose favor a dismissal is entered is entitled to recover costs as a matter of right. (Code Civ. Proc., § 1032, subs. (a)(4), (b).) Costs include attorney fees when authorized by contract, statute, or law. (*Id.*, § 1033.5, subd. (a)(10).) Gunn's claim for attorney fees was based on statute, namely, section 1354(c), under which the trial court has discretion to determine that no party prevailed. (*Heather Farms, supra*, 21 Cal.App.4th at p. 1574.)

II.

The Costs Claimed By Gunn Are Not Allowable.

In addition to attorney fees, Gunn sought recovery of \$7,367.50 for expert fees, \$295.68 for models, blowups, and photocopies of exhibits, and \$2,956.66 for

“[o]ther” costs. As noted, a defendant in whose favor a dismissal is entered is entitled to recover costs as a matter of right. (Code Civ. Proc., § 1032, subds. (a)(4), (b).) However, none of the costs claimed by Gunn was allowable.

Allowable costs of suit are identified in Code of Civil Procedure section 1033.5, subdivision (a). Subdivision (a)(8) of section 1033.5 allows recovery of “[f]ees of expert witnesses ordered by the court.” No such order was ever issued in this case. Expert witness fees were not recoverable under Code of Civil Procedure section 998 because an offer to compromise under section 998, subdivision (b) was never made.

Subdivision (a)(13) of Code of Civil Procedure section 1033.5 allows recovery of the cost of models, blowups, and photocopies of exhibits “if they were reasonably helpful to aid the trier of fact.” The case was not tried, and an evidentiary hearing was never conducted before a trier of fact. Nor was there any showing that such material would have been “reasonably helpful to aid the trier of fact.”

The “[o]ther” costs claimed by Gunn were travel expenses to and from the Association’s board of directors meetings. Nothing in Code of Civil Procedure section 1033.5 or any other statute permits Gunn to recover those costs.

III.

Sanctions

In the respondent’s brief, the Association requests that we impose sanctions against Gunn in the amount of \$7,265 on the ground her appeal is objectively frivolous. The Association has not, however, filed a separate motion for sanctions as required by California Rules of Court, rule 8.276(b)(1). (*Cowan v. Krayzman* (2011) 196 Cal.App.4th 907, 919.) “Sanctions cannot be sought in the respondent’s brief.” (*Ibid.*)

DISPOSITION

Gunn's appeal from the order granting the Association's motion to strike/tax costs and attorney fees is deemed to be a petition for writ of mandate and is denied. The Association shall recover costs incurred in this proceedings.

FYBEL, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

ARONSON, J.