

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

RENALD ANELLE et al.,

Plaintiffs and Appellants,

v.

LARRY LONG TRAN et al.,

Defendants and Respondents.

G048072

(Super. Ct. No. 07CC03564)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Mary Fingal Schulte, Judge. Affirmed.

Brunick, McElhaney & Kennedy and Leland P. McElhaney for Plaintiffs and Appellants.

Lund Law Group and Patrick Lund for Defendants and Respondents.

* * *

This is an appeal from an order awarding defendants Larry Long Tran et al. \$241,355,29 (of the approximately \$365,000 sought) in attorney fees pursuant to a contractual attorney fees provision. Plaintiffs Ronald Anelle et al., argue the court erred by awarding attorney fees without a valid memorandum of costs on file. They also argue the court awarded fees for tort claims rather than limiting fees to the contractual claims, and further contend the award of fees was not supported by an adequate evidentiary foundation.

We ultimately conclude plaintiffs' first argument is simply unsupported by California law; they offer no authority stating the lack of a costs memorandum precludes a party from filing a separate noticed motion for attorney fees. Plaintiffs' second argument regarding the award of fees for tort claims is misplaced because the tort and contract claims were intertwined and based on the same operative facts. With respect to plaintiffs' final claim that separate declarations from every attorney who worked on the case are needed to provide an adequate foundation for a fee award, we disagree and conclude the court acted within its discretion. We therefore affirm.

I

FACTS

The underlying facts of this case were discussed at some length in the prior appeal in this matter, *Anelle v. Tran* (Mar. 11, 2011 G042477) (nonpub. opn.), and in the interests of brevity, we shall not repeat them here. Suffice to say that the case concerns a real estate transaction in which plaintiffs were the sellers of the property and defendants were the realtor and broker. After the transaction failed, plaintiffs sued for fraud, negligence, breach of fiduciary duty, and breach of contract. Defendants cross-complained for breach of contract, seeking the \$31,500 commission they would have received if the transaction had closed. The court found in favor of the defendants on the complaint and for the plaintiffs on the cross-complaint. We affirmed judgment on the complaint, and we reversed and remanded only as to defendants' cross-complaint,

concluding the trial court had erroneously found the cross-complaint barred by the statute of limitations.

After our decision in March 2011, defendants filed an untimely motion for attorney fees and costs on appeal, which the trial court denied. In December 2011, the court entered judgment for defendants on the cross-complaint in the amount of \$31,500.

On January 3, 2012, defendants filed a memorandum of costs seeking \$75,294.14, which did not include attorney fees. E-mail correspondence between counsel for the parties followed, with plaintiffs' attorney, Lee McElhaney, arguing to defense counsel Patrick Lund that a number of the items included in the costs memorandum had already been disallowed by the court in prior motions. After some discussion, Lund agreed, via e-mail, to withdraw the memorandum of costs. Plaintiffs then filed a "notice of defendants' withdrawal of memorandum of costs," supported by McElhaney's declaration and the e-mail correspondence.

Meanwhile, on January 31, the parties had stipulated that due to their efforts to resolve the issue of attorney fees among themselves, a motion for attorney fees could be filed up to May 1.

On April 27, defendants filed a noticed motion for attorney fees and supporting evidence, seeking a total of approximately \$365,000. The motion was continued several times. On September 7, plaintiffs filed an opposition to the motion for fees, arguing that some of the fees defendants were seeking had already been disallowed by the court, that fees were not recoverable on the tort claims, and that an inadequate foundation had been laid for the fees claimed. Plaintiffs also served evidentiary objections, arguing that portions of Lund's declaration were inadmissible hearsay and lacked foundation, and the billing statements defendants submitted were inadmissible on a number of grounds.

Defendants submitted a reply brief, Lund's supplemental declaration and supporting documentation. Plaintiffs filed supplemental evidentiary objections, again

objecting to the billing statements and Lund's declaration on various grounds. A month before the again-continued hearing, plaintiffs also filed a request for judicial notice, asking the court to take judicial notice of four Rules of Court, several documents filed in the attorney fee motion and earlier motions, and Code of Civil Procedure section 1033.5, subdivision (a)(10).¹ Shortly thereafter plaintiffs filed a second request for judicial notice, listing two appellate court cases.

The hearing on the motion for attorney fees was held in November, and the court took the matter under submission after hearing argument. Plaintiffs again argued a timely memorandum of costs was required before attorney fees could be awarded.

On December 10, defendants filed a motion requesting leave to file a supplemental memorandum of costs pursuant to section 473. They argued the first memorandum of costs was withdrawn due to mistake, inadvertence, surprise and neglect. Plaintiffs, unsurprisingly, opposed, arguing, among other things, that the lack of a memorandum of costs precluded defendants from recovering attorney fees.

On January 29, 2013, the court ruled via minute order. The court granted defendants a total of \$241,355.29 in attorney fees. The court found that defendants had filed a timely memorandum of costs which had never been withdrawn by Lund. The section 473 motion was therefore ordered off calendar as moot. With respect to the apportionment of fees between the contract and tort claims, the court found the defense of the tort claims was integral to prevailing on the contract claims. The court reduced the fee amount significantly in some respects (precluding fees for the appeal and for paralegal work), but found overall that the documentation provided by defendants was sufficient.

Plaintiffs now appeal.

¹ Subsequent statutory references are to the Code of Civil Procedure unless otherwise indicated.

II DISCUSSION

A. Presence of a Valid Memorandum of Costs

Plaintiffs' first argument hinges on the notion that without a valid memorandum of costs on file, the court could not award defendants any attorney fees as a matter of law. We need not decide whether a valid costs memorandum was on file, because this argument is simply wrong.

Plaintiffs actually spend very little time discussing this point, instead assuming it is true, and cite only a few authorities. None of those authorities say what plaintiffs seem to think they say. Section 1033.5, subdivision (a)(10), states that attorney fees can be recovered as costs when authorized by contract, statute or law. Nothing in the statute, however, says the Judicial Council form² is required. The line for attorney fees on the form states that an amount may be entered "if contractual or statutory fees are fixed without necessity of a court determination; otherwise a noticed motion is required." (Italics omitted.)

The Rules of Court upon which plaintiffs rely are equally unhelpful. Rule 3.1700 (a)(1) states the time frame for filing a request for costs. Rule 3.1702 (c)(1) states the time for "[a] notice of motion to claim attorney's fees on appeal" must be filed within the time for filing a memorandum of costs under rule 8.278(c)(1).³ It says nothing indicating a memorandum of costs must also be filed. Rule 8.278(c)(1), relating to costs on appeal, states "a party claiming costs awarded by a reviewing court must serve and file in the superior court a verified memorandum of costs under rule 3.1700." Subsection

² The memorandum of costs summary form can be downloaded at <http://www.courts.ca.gov/documents/mc010.pdf> (viewed Mar. 12, 2014). The form, along with MC-010 (the memorandum of costs worksheet) and MC-025 (attachment) are listed in Appendix A to the California Rules of Court as "Approved for Optional Use."

³ Due to the parties' stipulation extending the time for filing a motion for attorney fees, there is no issue here regarding the timeliness of the motion.

(d)(2) of that rule states that “an award of costs neither includes attorney’s fees on appeal nor precludes a party from seeking them under rule 3.1702.” Taken together or separately, nothing in any of these rules supports plaintiffs’ assertion that a memorandum of costs is required when the party seeking fees instead files a noticed motion.

Nor do the cases plaintiffs rely upon. In *Hydratec, Inc. v. Sun Valley 260 Orchard & Vineyard Co.* (1990) 223 Cal.App.3d 924, the court held that attorney fees must be requested within the same time limits as a memorandum of costs. (*Id.* at p. 929.) It did not state that a separate memorandum of costs was mandatory. Similarly, in *Sanabria v. Embrey* (2001) 92 Cal.App.4th 422, the court held that both the memorandum of costs and motion for attorney fees were untimely; again, the court did not state that a memorandum of costs was required. (*Id.* at pp. 425-428.)

In sum, there is simply no basis for the argument that the lack of a memorandum of costs precludes a motion for attorney fees as a matter of law. Recently, in *In re Marriage of Sharples* (2014) 223 Cal.App.4th 160, the court rejected the argument the Judicial Council form was required when one party sought pendente lite attorney fees. The court held that comparable declarations were sufficient. (*Id.* at p. 163.) The court distinguished between mandatory and optional forms, noting “optional forms must bear the words, “Form Approved for Optional Use” or “Optional Form” (rule 1.35(c)).” (*Id.* at p. 166.) The court continued: “Here, there is no dispute that the declarations provided by Wife and her counsel provided the substance of what is called for in form FL-319; i.e., they are comparable to form FL-319. Therefore, the court erred in concluding that form FL-319 was mandatory.” (*Id.* at p. 167.) The same is true here. The memorandum of costs form itself is optional, and the relevant information was included in defendants’ separately noticed motion.

While both a memorandum of costs and a motion for attorney fees are filed in typical cases, and perhaps it is the better practice to file both, the lack of a memorandum of costs does not preclude a party from filing a motion for attorney fees

either as a matter of statute or court rule. Nor should it. As long as the opposing party has adequate notice of the fees sought by the moving party, and a chance to respond, there is no reason as a matter of policy or logic that failing to fill out a form should negate the right to attorney fees under a contract. This motion was vigorously litigated and contested, and plaintiffs were well aware that attorney fees were a continuing issue throughout 2012. Plaintiffs' argument on this point therefore is rejected.

B. Fees for Contract vs. Tort Claims

Plaintiffs next argue the court erred by awarding fees incurred in defending against tort claims. Except where a contract or statute states otherwise, each party to a lawsuit must pay its own attorney fees. (§ 1021.) Civil Code section 1717, subdivision (a), states that “[i]n 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 . . . then the party who is determined to be the party prevailing on the contract . . . shall be entitled to reasonable attorney’s fees in addition to other costs.”

“If a cause of action is ‘on a contract,’ and the contract provides that the prevailing party shall recover attorney[] fees incurred to enforce the contract, then attorney[] fees must be awarded on the contract claim in accordance with Civil Code section 1717.” (*Exxess Electronixx v. Heger Realty Corp.* (1998) 64 Cal.App.4th 698, 706 (*Exxess*)). The phrase “on a contract” contained within section 1717 requires consideration of the basis of the cause of action, not the remedy sought. (*Kachlon v. Markowitz* (2008) 168 Cal.App.4th 316, 347 [finding declaratory relief and injunctive relief causes of action to be ““on the contract””].)

Civil Code section 1717 does not apply to tort claims. (*Exxess, supra*, 64 Cal.App.4th at p. 708.) “As to tort claims, the question of whether to award attorneys’ fees turns on the language of the contractual attorneys’ fee provision, i.e., whether the

party seeking fees has ‘prevailed’ within the meaning of the provision and whether the type of claim is within the scope of the provision. [Citation.]” (*Ibid.*)

The relevant contract provision here stated: “In any action, proceeding, or arbitration between Owner and Broker regarding the obligation to pay compensation under this Agreement, the prevailing Owner or Broker shall be entitled to reasonable attorney fees.” Plaintiffs argue this provision is simply not broad enough to cover the defense of any tort claim whatsoever, citing *Hasler v. Howard* (2004) 120 Cal.App.4th 1023 (*Hasler*). In that case, the attorney fee provision awarded fees “to the prevailing party in an action regarding broker’s compensation.” (*Id.* at p. 1024.) The plaintiff sued his real estate broker alleging causes of action for fraud, breach of fiduciary duty, and breach of the duty to disclose, alleging the house sold below its value. (*Id.* at p. 1025.) The plaintiff sought the difference between the sale price and the value, but not the amount of the defendant’s commission, and attorney fees and costs. (*Ibid.*) Prior to trial, the plaintiff voluntarily dismissed his complaint. (*Ibid.*) The defendant then moved for attorney fees, and the Court of Appeal held no fees were permissible due to the scope of the attorney fee provision. (*Id.* at p. 1027.)

While the language in the attorney fee provision and this case is similar to *Hasler*, the remaining facts are not. *Hasler* was a straightforward case alleging a dispute over the valuation of the property. Here, there were many additional facts, including the presence of a breach of contract action by plaintiffs⁴ and the defendants’ cross-complaint on the same claim. Therefore, it is indisputable that at least part of this lawsuit was indeed based on breach of contract. The question then becomes whether the attorney fees

⁴ Plaintiffs now argue that their breach of contract claim was not really a claim for breach of contract because it incorporated allegations of tortious misconduct by reference. But that cause of action also stated that plaintiffs performed all conditions on their part, and defendants breached the agreement by their acts and omissions, resulting in damages. The same facts can constitute both torts and breaches of a contract. Plaintiffs cannot simply ignore this cause of action now because it is inconvenient.

require apportionment between the contract and noncontract claims. The language of the contractual attorney fee provision is the beginning of the analysis, not the end.

“[T]he pivotal point in the analysis whether a prevailing party is entitled to recover contractual attorney fees for defending against a competing noncontractual claim (when the language of the agreement does not encompass noncontractual claims or is ambiguous) is not whether the fees can be apportioned between the theories but whether a defense against the noncontractual claim is necessary to succeed on the contractual claim.” (*Siligo v. Castellucci* (1994) 21 Cal.App.4th 873, 879 (*Siligo*)). The “[a]ppportionment of a fee award between fees incurred on a contract cause of action and those incurred on other causes of action is within the trial court’s discretion” (*Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, 1111; see also *Amtower v. Photon Dynamics, Inc.* (2008) 158 Cal.App.4th 1582, 1604.)

The trial court’s order stated: “Defendants . . . did not just win a \$31,500 judgment on a cross-complaint. They successfully defended allegations of fraud, negligence, breach of fiduciary duty and breach of contract.” In its analysis of the divisibility of the fees between tort and contract claims, the court noted: “So, the question is, was the tort action based on a provision of the contract? If so, the defense of the tort claims may have the effect of enforcing the provisions of the contract. The tort theories were fraud, breach of fiduciary duty, and negligence: causes of action which [defendants] claim stem from the Listing Agreement. The contract would have been unenforceable had [defendants] been assessed tort liability. The Listing Agreement created the duties described in the tort claims.” Quoting from our opinion in the prior appeal, the court noted that we had “recognized the contract claims were an integral part of the underlying complaint. The Court of Appeal referred to the trial court’s finding that ‘Defendants’ duties to Plaintiffs were stated in the Listing Agreement.’ In footnote 4, the Court of Appeal commented ‘Plaintiffs also argue that the contract was unenforceable (a

rather interesting argument given their own breach of contract claim arising from the same contract). . . .”

The trial court also found the “pleadings filed by plaintiffs disclose that the claims were intricately bound together. The [first amended complaint] . . . alleges fraud, negligence, breach of fiduciary duty and breach of contract. Paragraph 6 alleges the existence of the Listing Agreement, wherein defendants ‘undertook to act as plaintiffs’ agent and sell the Property.’ Paragraph 7 alleges that *as agent*, Larry Tran owed fiduciary duties to the plaintiffs. And, in paragraph 22 they even state, ‘The aforesaid listing agreement provides that in any action, proceeding or arbitration, the prevailing party shall be entitled to reasonable attorney’s fees and costs.’ Clearly they were suing on the contract. Their fourth cause of action . . . says they performed under the written Listing Agreement and that defendants *breached that agreement* . . . by their acts described in [other paragraphs in the first amended complaint]. Paragraph 42 claims damages of over \$300,000 ‘as a result of defendants’ breach of the agreement. . . .”

We agree with the trial court. The fiduciary duty plaintiffs alleged defendants breached arose in its entirety from the contract — without it, there would have been no fiduciary relationship. The same applies to defendants’ duty with respect to plaintiffs’ claim for negligence and fraud — without the contract, there would have been no occasion for such claims to arise. Had plaintiffs succeeded on their claim that defendants had breached their fiduciary duty, committed fraud or acted negligently, defendants could not have prevailed on their cross-complaint. Thus, “a defense against the noncontractual claim [was] necessary to succeed on the contractual claim.” (*Siligo, supra*, 21 Cal.App.4th at p. 879.)

Further, even if this principle did not apply, all of the claims arose from the same operative facts — plaintiffs readily admit as much with respect to their claim for breach of contract. In such cases, the court is not required to apportion the attorney fee award between those entitled to attorney fees and those that are not. The “joinder of

causes of action should not dilute [a party's] right to attorney's fees. Attorney's fees need not be apportioned when incurred for representation on an issue common to both a cause of action in which fees are proper and one in which they are not allowed." (*Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 129-130; see also *Bell v. Vista Unified School Dist.* (2000) 82 Cal.App.4th 672, 687 ["Apportionment is not required when the claims for relief are so intertwined that it would be impracticable, if not impossible, to separate the attorney's time into compensable and noncompensable units"]; *Drouin v. Fleetwood Enterprises* (1985) 163 Cal.App.3d 486, 493 ["Attorneys fees need not be apportioned between distinct causes of action where plaintiff's various claims involve a common core of facts or are based on related legal theories."].) We find no error in the trial court's decision not to apportion attorney fees in this case.

C. Evidentiary Basis for the Fee Request

Finally, plaintiffs argue that defendants provided an insufficient evidentiary foundation to justify the fee request.⁵ Rather than obtaining individual declarations from each of the attorneys and paralegals⁶ who worked on the case, Lund's declaration set forth how many hours each attorney had worked and billed. According to plaintiffs, the declaration did not establish Lund had personal knowledge regarding the amount of hours each attorney worked, and his statements were hearsay. Whether viewed as a matter of the admissibility of evidence or the appropriateness of an attorney fee award, our review is for abuse of discretion. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132; *Pannu v. Land Rover North America, Inc.* (2011) 191 Cal.App.4th 1298, 1317.)

⁵ To the extent plaintiffs merely list a number of objections offered in the trial court without any argument in their brief as to why those objections should have been granted, those issues are waived. "An appellate court is not required to examine undeveloped claims, nor to make arguments for parties. [Citation.]" (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 106.)

⁶ The court disallowed paralegal fees in any event.

Plaintiffs' briefs offer no legal analysis of why the statements are hearsay, so we need not address that issue further. (*Paterno v. State of California, supra*, 74 Cal.App.4th at p. 106.) With regard to whether Lund's declarations demonstrate the requisite personal knowledge, the trial court's ruling stated that "[c]ase law discussing attorney fee awards does not require the type of documentation plaintiffs demand." We agree. In *In re Sutter Health Uninsured Pricing Cases* (2009) 171 Cal.App.4th 495 (*Sutter Health*), a settlement objector claimed the attorney fee request lacked "detailed time records" of all the attorneys involved. (*Id.* at p. 511.) The case had involved a number of firms working for the plaintiffs, and each firm "submitted declarations attesting to the hours worked and hourly rates of the various specific attorneys who worked on this case." (*Id.* at p. 512.) The court held this was sufficient, indicating the trial judge was in the best position to verify the claims by referencing the various proceedings in the case. (*Ibid.*) We agree, and therefore conclude the plaintiffs' proposed requirement that every attorney who ever worked on the case submit a separate declaration is neither legally required nor particularly useful. Personal knowledge does not require a supervising attorney to stand over the attorney performing the work and observe every moment of their progress. It is sufficient that the supervising attorney received the finished product, which is a fair inference from Lund's declaration.

Like the trial judge in *Sutter Health*, the judge who presided over this trial heard the fee motion in this case, and subsequently ruled on it in a detailed six-page order. The order evaluated the value of the various categories of work described by Lund and made "what the Court believes is a thoughtful assessment of the reasonableness and necessity of the work performed, given the result achieved." This review resulted in a significant reduction from defendants' original request, and was well within the court's discretion.

III
DISPOSITION

The order is affirmed. Defendants are entitled to their costs on appeal.
Any motion for attorney fees on appeal shall be filed with the trial court.

MOORE, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

FYBEL, J.