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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

OCEAN VIEW RESORT
PARTNERSHIP,

Plaintiff and Appellant,

v.

MAHENDRA SOLANKI et al.,

Defendants and Respondents.

G048728

(Super. Ct. No. 30-2011-00466546)

O P I N I O N

Appeal from a judgment and an order of the Superior Court of Orange County, Robert J. Moss, Judge. Affirmed.

Aron C. Movroydis for Plaintiff and Appellant.

Busch & Caspino and Ravi Sudan for Defendants and Respondents.

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Plaintiff Ocean View Resort Partnership (Ocean View) appeals from an order granting attorney fees to defendant Mahendra Solanki after Ocean View's lawsuit for breach of lease and related tort claims ended in a demurrer sustained without leave to amend. The lease contained a broadly worded attorney fee clause. Ocean View argues the attorney fee provision does not encompass the tort claims, fees should not have been awarded for the defense of Solanki's employee, Yasmin Doshi, because she was not a party to the lease, and the attorney time billed was excessive. (We refer to Solanki and Doshi collectively as defendants.) We conclude the lease agreement properly encompasses the tort and contract claims and Doshi's defense was both necessary and inseparable from Solanki's. Further, Ocean View waived the issue of the amount of the fee award by failing to raise it below, and even if it had not, we would find no abuse of discretion.

I FACTS

On June 1, 2007, Ocean View leased a hotel property called the Capistrano Beach Resort to Solanki. The term of the lease was for two years. Solanki, according to the complaint, leased the property for the purpose of operating the hotel and managing its day-to-day affairs. The lease included the following attorney fees provision: "In the event that litigation results from or arises out of this Agreement or the performance thereof, the parties agree to reimburse the prevailing party's reasonable attorney's fees, court costs, and all other expenses, whether or not taxable by the court as costs, in addition to any other relief to which the prevailing party may be entitled."

In April 2011, Ocean View filed a complaint against Solanki for 1) breach of contract; 2) intentional misrepresentation; 3) intentional interference with prospective economic advantage; and 4) conversion. The complaint alleged Doshi was Solanki's employee, and with respect to the matters alleged in the complaint, acted within the

course and scope of her employment. Doshi was named only in the intentional misrepresentation cause of action, and no conduct by Doshi was alleged separate from Solanki's acts. The complaint sought at least \$649,000 in compensatory damages plus punitive damages.

We discuss only the causes of action that are relevant to this appeal. The interference with prospective economic advantage claim alleged Solanki interfered with Ocean View's relationship with its franchisor, Choice Hotels, by representing "that he was a partner and owner of Choice Hotels, which delayed the endorsement process to Plaintiff's detriment." The conversion claim alleged Solanki "wrongfully converted Plaintiff's URL address and website used to advertise the Property for his own use and sold this intellectual property to a foreign company."

In response to a demurrer and motion to strike, Ocean View filed a first amended complaint, which included the same causes of action and made only a few changes. Among these was adding allegations to the interference with prospective economic advantage claim that Solanki failed to maintain the property and "pocket[ed]" revenues from certain customers to induce Ocean View to believe the property was no longer attracting clientele.

Another demurrer and motion to strike followed. The court sustained the demurrer without leave to amend on the intentional interference with prospective economic advantage claim and granted leave to amend on the rest.

In the second amended complaint, Ocean View alleged only breach of contract and conversion. Doshi's name was added to the conversion cause of action. The conversion claim, as more fully developed, alleged Ocean View was the owner of the domain name www.capistranobeachresort.com, a Web site it had registered and developed. Under the lease, Solanki was entitled to use the Web site and domain name to promote and advertise the property, but Doshi, the complaint alleged, was not. Ocean

View alleged both defendants had surreptitiously and wrongfully appropriated the Web site and domain name for their own use and ultimately sold them to a foreign company. Ocean View alleged damages for this purported conversion in excess of \$25,000, and sought punitive damages.

Defendants again demurred and moved to strike. The court sustained the demurrer to the breach of contract cause of action without leave to amend as time barred and sustained the conversion cause of action with leave to amend. The motion to strike Doshi's name from the conversion cause of action was also granted.

Ocean View's third amended complaint stated a cause of action for conversion only, alleging essentially the same factual basis as the previous complaint, but adding facts to argue in favor of delayed discovery. Doshi was not named in the cause of action, but was still included in the caption. The court granted a motion to strike Doshi's name and claim for special damages, but denied the motion as to the alleged claim for punitive damages against Solanki. The court overruled Solanki's demurrer, and he answered the complaint.

While the pleadings were ongoing, the parties engaged in discovery. At the same time it overruled the demurrer to the third amended complaint, the court granted numerous discovery motions filed by Solanki, and sanctioned Ocean View approximately \$3,100. Shortly thereafter, Ocean View dismissed the remaining cause of action. According to defendants, the discovery sanctions remained unpaid.

As a prevailing party, Solanki brought a motion for attorney fees, requesting \$46,321. Ocean View opposed, arguing Solanki was not entitled to fees because he was not the prevailing party, three of the four causes of action were based on tort rather than contract law, the case was voluntarily dismissed, and Solanki was not entitled to fees incurred for Doshi.

The court granted Solanki’s motion, ordering Ocean View to pay \$46,206 in attorney fees and an additional \$2,185.88 in costs. Ocean View now appeals.

II

DISCUSSION

General Principles and Standard of Review

Except where a contract or statute states otherwise, each party to a lawsuit must pay its own attorney fees. (Code Civ. Proc., § 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.”

When the legal basis for an attorney fee award is at issue, we review the question independently. (*Amtower v. Photon Dynamics, Inc.* (2008) 158 Cal.App.4th 1582, 1605.) “In particular, we independently review the trial court’s determination with respect to whether the terms of a written agreement constitute a legal basis for awarding attorney’s fees. [Citation.]” (*Ibid.*) But most other matters regarding attorney fees are reviewed for abuse of discretion, including the allocation between contract and noncontract causes of action (*id.* at p. 1604), whether to apportion fees between coparties (*Hill v. Affirmed Housing Group* (2014) 226 Cal.App.4th 1192, 1197-1198 (*Hill*)), and the amount of the award (*id.* at pp. 1198-1199).

Scope of Attorney Fee Award

Ocean View’s first complaint is that the trial court permitted fees to be recovered on the tort claims for conversion and interference with prospective economic advantage. “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. [Citation.]” (*Exxess Electronixx v. Heger Realty Corp.* (1998) 64 Cal.App.4th 698, 706-707, fn. omitted (*Exxess*)). The phrase “on a contract” contained within Civil Code 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”].)

The attorney fee clause at issue here states: “In the event that *litigation results from or arises out of this Agreement or the performance thereof*, the parties agree to reimburse the prevailing party’s reasonable attorney’s fees, court costs, and all other expenses. . . .” (Italics added.) 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.*) But attorney fees can still be recovered for tort claims, if authorized by contract or statute, as costs. “[U]nder proper circumstances attorney fees may be awarded pursuant to [Code of Civil Procedure] section 1021 in a tort action.” (*Xuereb v. Marcus & Millichap, Inc.* (1992) 3 Cal.App.4th 1338, 1342.)

The question, then, is whether the language in the agreement is sufficiently broad to encompass tort claims. Language such as “arises out of this Agreement” has been given a broad interpretation by prior cases. (See *Xuereb v. Marcus & Millichap, Inc., supra*, 3 Cal.App.4th at pp. 1340, 1344, [the language “[i]f this Agreement gives rise to a lawsuit” warranted recovery of attorney fees for tort-based claims]; *Santisas v. Goodin* (1998) 17 Cal.4th 599, 608 [“arising out of” language in a contract was “phrased broadly enough” to support an award to the prevailing party in an action alleging both contract and tort claims]; *Lerner v. Ward* (1993) 13 Cal.App.4th 155, 157-158, 160

[phrase ““arising out of this agreement”” supported an award of attorney fees for tort-based causes of action].) We presume the parties chose this language deliberately and with good reason; narrower language, such as “to enforce the Agreement” was certainly a choice the parties could have made, but evidently chose not to.

Ocean View argues the prior authority addressed conduct that related directly “to either the transaction memorialized in the agreement, or the occurrences set forth in the performance of the same.” It argues the causal relationship between the interference with prospective economic advantage and conversion actions are simply too tenuous.

We disagree. The basis for the interference with prospective economic advantage claim, which appeared only in the first two complaints, was that Solanki interfered with Ocean View’s relationship with its franchisor, made various false representations, and failed to maintain the property. The conversion claim arose from Solanki and Doshi’s alleged actions with regard to the domain name.

The conversion action is actually the simplest to dispense with, because according to Ocean View’s own pleadings, Solanki’s use of the domain name was permitted under the lease. “By virtue of the Lease Agreement, SOLANKI was entitled to use the website and the domain name to promote and advertise the Property.” It is therefore specious to argue that any dispute about the domain name did not “result[] from or arise[] out of” the lease. Of course it did. The dispute was a direct result of the contractual relationship, governed by the lease the parties had entered into. It is irrelevant if, as Ocean View claims, Solanki’s acts went far beyond any conduct contemplated by the lease. It was nonetheless directly related to the lease’s provision allowing Solanki to use the domain name and therefore it arose from that agreement. Ocean View’s attempt to reduce this to a foreseeability analysis, going so far as to cite

Palsgraf v. Long Island Railroad Co. (1928) 248 N.Y. 339 [162.N.E. 99], is creative but simply unsupported by case law.

With respect to interference with prospective economic advantage, the same conclusion is dictated by the facts. All of the acts alleged — interference with the relationship between Ocean View and its franchisor, Solanki’s alleged “pocketing” of revenues and his failure to maintain the property — arose out of his obligations under the lease. (This, frankly, was the inherent problem with this cause of action in the first place, as the trial court correctly noted.) Despite Ocean View’s attempts to distinguish authority such as *Xuereb v. Marcus & Millichap, Inc.*, *supra*, 3 Cal.App.4th at p. 1338 and *Santisas v. Goodin*, *supra*, 17 Cal.4th 599, this case is no different. The acts alleged as tortious were directly related to, and therefore arose from, the performance of the contract. Accordingly, they are within the scope of the attorney fee clause.

Doshi’s Attorney Fees

Ocean View next argues no attorney fees should have been awarded for Doshi’s defense because she was not a party to the lease. Ocean View’s pleadings alleged that Doshi was Solanki’s employee and acting within the course and scope of her agency and employment when she committed the allegedly wrongful acts. When she was served with the complaint, she requested defense and indemnity from Solanki, and she was defended by common counsel.

The question is not, as Ocean View frames it, whether Doshi was a party to the lease pursuant to Civil Code section 1717. The question is whether it was reasonable to apportion fees between Doshi and Solanki. The trial court impliedly found it was not, and we agree.

“To the extent [a prevailing defendant’s] shared counsel engaged in litigation activity on behalf of [a codefendant] for which fees are not recoverable, the

[trial] court has broad discretion to apportion fees.” (*Zintel Holdings, LLC v. McLean* (2012) 209 Cal.App.4th 431, 443.) “Allocation of fees incurred in representing multiple parties is not required,” however, when the claims at issue are “““inextricably intertwined,””” to the extent it is not possible to separate compensable and noncompensable attorney fees. (*Cruz v. Ayromloo* (2007) 155 Cal.App.4th 1270, 1277.)

In *Hill, supra*, 226 Cal.App.4th 1192, the Hills sued an LLC and Affirmed Housing Group (Affirmed), a managing member of the LLC, for allegedly violating a written easement. (*Id.* at p. 1194.) The defendants were jointly represented. The defendants prevailed, and Affirmed moved for attorney fees, and it ultimately won a fee award before the trial court. (*Id.* at p. 1195.) The Court of Appeal ultimately rejected the Hills’ argument that fees should have been apportioned between Affirmed and the LLC. “The Hills maintain that all of the fees related to the joint defenses should be allocated to LLC because those defenses were raised by LLC, and Affirmed did not incur ‘separate and distinct attorney’s fees’ in connection with those defenses. But that contention simply proves that apportionment was not required because the defenses asserted by LLC and Affirmed were ‘so interrelated that it would have been impossible to separate them into [time units billed on behalf of Affirmed] for which attorney fees are properly awarded and [time units billed on behalf of LLC] for which they are not.’ [Citation.]” (*Id.* at p. 1197.) Thus, the court concluded, apportioning the fees between jointly represented defendants was impracticable because their claims were inextricably intertwined. (*Ibid.*)

In this case, the trial court found “that the liability of the two defendants was so interrelated that it would be impossible to apportion time spent on the case to discreet defendants.” Ocean View simply offers no cogent argument this finding was an abuse of discretion. It barely mentions this issue in its opening brief, instead relying primarily on Civil Code section 1717 to argue Doshi was not a party to the contract. In

its reply brief, it argues the pleadings “easily separate[] out each cause of action as to each defendant according to their conduct.” Even if this were true, it does not necessarily follow the time spent on demurrers, motions to strike, and discovery motions can be so easily segregated from each other. It certainly does not establish an abuse of discretion.

Ocean View’s request, therefore, that we “subtract any amounts of time billed for the work done exclusively for Doshi” and “divide in half the time spent on that particular cause of action, assessing half to Doshi” is without merit. It was Ocean View’s misguided decision to drag Doshi into this case as a party, rather than a mere witness, in the first place. The trial court was within its discretion to determine that the time spent defending Solanki and Doshi could not be apportioned.

Amount of Fees

Finally, in a three-paragraph argument, and for the first time on appeal, Ocean View argues the amount of fees awarded was excessive. First, by failing to raise this issue in its opposition to Solanki’s motion for attorney fees, it is waived on appeal. “[I]t is fundamental that a reviewing court will ordinarily not consider claims made for the first time on appeal which could have been but were not presented to the trial court.’ Thus, ‘we ignore arguments, authority, and facts not presented and litigated in the trial court. Generally, issues raised for the first time on appeal which were not litigated in the trial court are waived. [Citations.]’” (*Newton v. Clemons* (2003) 110 Cal.App.4th 1, 11, fns. omitted.)

Second, even if we did consider this argument on its merits, we would reject it. Ocean View simply asks the court to substitute Ocean View’s opinion regarding what would have been a reasonable amount of fees for the trial courts, and that we decline to do. It offers no citations to similar cases where the time spent or hourly rate billed was reversed as an abuse of discretion, instead simply stating “the attorney time

billed goes beyond excessive to simply shocking.” Hyperbole does not constitute precedent, however, and we would therefore reject this argument.

III

DISPOSITION

The judgment and order granting attorney fees are affirmed. Defendants are entitled to their costs on appeal, and may bring any motion for attorney fees on appeal before the trial court.

MOORE, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

BEDSWORTH, J.