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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

NIKOLA AXTEN,

Plaintiff and Respondent,

v.

JOHN FOSTER, LLC,

Defendant and Appellant.

G049665

(Super. Ct. No. 30-2012-00601531)

O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County,
Glenn R. Salter, Judge. Affirmed.

Blackmar, Principe & Schmelter, Timothy D. Principe and Matthew A.
Law for Defendant and Appellant

Law Offices of Foroozandeh and Majid Foroozandeh for Plaintiff and
Respondent.

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INTRODUCTION

In 1997, defendant Gregory W. Axten entered into an operating agreement with his son (the operating agreement) to form defendant entity John Foster, LLC (the Company). When Gregory Axten's marriage to plaintiff Nikola Axten dissolved in 2004,¹ Gregory and Nikola entered into an agreement whereby Nikola acquired a 47.5 percent member interest in the Company. The Company generated revenue by collecting rent on commercial property it owned. The Company's primary tenant was defendant American Geotechnical. Gregory was American Geotechnical's chief executive officer; he was also its majority shareholder.

In 2012, Nikola filed a lawsuit against the Company, Gregory, and American Geotechnical, alleging that American Geotechnical leased commercial property from the Company below fair market value, thereby increasing profits for American Geotechnical and Gregory at the expense of Nikola's interest in the Company. After the trial court sustained the Company's demurrer to the claims asserted against it in the second amended complaint, the court entered judgment dismissing the Company from the action with prejudice; the entry of the judgment of dismissal is not at issue in this appeal. The Company solely argues the trial court erred by denying its motion for attorney fees, which was based on a prevailing party attorney fees clause found within an arbitration provision contained in the operating agreement.

We affirm. The operating agreement provided that "[t]he prevailing party shall be entitled to reimbursement of attorney fees, costs, and expenses incurred in connection with the arbitration." The Company did not incur attorney fees in connection with an arbitration because no arbitration of Nikola's claims against the Company occurred. As there was no other basis for awarding the Company its attorney fees, the trial court properly denied the motion.

¹ We refer to Nikola Axten and Gregory Axten by their first names for the purpose of clarity. We intend no disrespect.

BACKGROUND

In 2012, Nikola filed a complaint against Gregory, the Company, and American Geotechnical, asserting claims for breach of contract, fraud, breach of fiduciary duties, intentional interference with prospective economic relations, constructive trust, and equitable lien. The complaint alleged Gregory was the Company's sole owner and operator, and, upon the dissolution of Nikola and Gregory's marriage, Nikola and Gregory each received a 47.5 percent interest in the Company, and their son received a 5 percent interest in the Company. The complaint further alleged Gregory was the chief executive officer and controlling majority shareholder of American Geotechnical, which was the Company's primary tenant.

The complaint stated Gregory "arbitrarily set the monthly rent below fair market value to the financial detriment of [the Company] and to the financial betterment of defendant American Geotechnical and thereby increasing profits for the latter at the expense of the former and [Nikola]." The complaint stated Nikola sought, inter alia, over \$1 million in damages. It further stated: "The subject operating agreement provides for attorney fees and litigation costs to the prevailing party when an action of this nature has been filed and served. . . . [P]laintiff will be seeking reimbursement of attorney fees and litigation costs upon judgment being entered in her favor."

After the Company filed a demurrer asserting, inter alia, the complaint failed to allege sufficient facts to state any claim against it, the demurrer was mooted when Nikola filed a first amended complaint containing a single claim for breach of the implied covenant of good faith and fair dealing against the Company. The trial court sustained the Company's demurrer to the one claim alleged against it in the first amended complaint, and provided Nikola 15 days' leave to amend.²

² The first amended complaint also contained claims for breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty, and negligence against

Nikola filed a second amended complaint that asserted claims against the Company for breach of the implied covenant of good faith and fair dealing, negligence, and conversion.³ The Company demurred to each of the causes of action asserted on the ground the second amended complaint failed to allege sufficient facts to state a cause of action against it.

The trial court sustained the Company's demurrer as to the claims for breach of the implied covenant of good faith and fair dealing and negligence asserted against it, without leave to amend. The court sustained the demurrer as to the conversion cause of action against the Company and granted Nikola 20 days' leave to amend that cause of action.

Nikola did not file a third amended complaint and thus did not amend her conversion claim as asserted against the Company. The trial court dismissed the second amended complaint with prejudice as to the Company, and entered judgment in favor of the Company accordingly. The court's judgment of dismissal further stated that the Company "shall recover from Plaintiff Defendant's costs of suit in accordance with a bill of costs."

The Company filed a motion seeking an award of \$27,287.50 in prevailing party attorney fees, plus \$810.59 in costs pursuant to its memorandum of costs. The Company argued the second amended complaint (as well as prior pleadings in this action) "contained a cause of action for breach of [the Company]'s Operating Agreement,

Gregory; a claim for intentional interference with prospective economic relations against American Geotechnical; and a claim for constructive trust against both Gregory and American Geotechnical. The trial court sustained the demurrer filed by Gregory and American Geotechnical as to the claims contained in the first amended complaint alleged against them with leave to amend.

³ The second amended complaint asserted claims for breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty, negligence, and conversion against Gregory; and claims for intentional interference with prospective economic relations, inducing breach of contract, and intentional interference with contractual relations against Gregory and American Geotechnical.

pursuant to which [Nikola] sought damages as well as contractual attorney's fees under the Agreement's fee provision." The fee provision referenced in the Company's motion is contained within article X of the operating agreement, which is entitled "Arbitration" and provides as follows: "Any action to enforce or interpret this Agreement or to resolve disputes between the Members for or against any Member shall be settled by arbitration in accordance with the rules of the arbitration company, JAMS/ENDISPUTE, Orange, California, and shall be the exclusive dispute resolution process in the State of California, but arbitration shall be a nonexclusive process elsewhere. Any party may commence arbitration by sending a written demand for arbitration to other parties. Such demand shall set forth the nature of the matter to be resolved by arbitration. Arbitration shall be conducted in Orange, California. The substantive law of the State of California shall be applied by the arbitrator to the resolution of the dispute. The parties shall share equally all initial costs of arbitration. *The prevailing party shall be entitled to reimbursement of attorney fees, costs, and expenses incurred in connection with the arbitration.* All decisions of the arbitrator shall be final, binding, and conclusive on all parties. Judgment may be entered upon any such decision in accordance with applicable law in any court having jurisdiction thereof." (Italics added.)

The trial court denied the Company's motion for attorney fees. The court's minute order stated: "Attorney fees may be awarded only if provided for by statute or contract. Article X of the Operating Agreement allows for attorney fees in arbitration disputes. This was an action filed in Superior Court. As such, attorney fees are not recoverable here. [¶] Although trial courts may not rely on unpublished opinions as authority, courts may adopt the analysis of an unpublished opinion as its own, if it finds such analysis persuasive. This court notes that almost the identical arbitration provision under very similar facts was construed in *Bolton v. Heyermann* (Dec. 14, 2005, 6th Dist.) 2005 WL 3418392. In that case, the Court of Appeal drew the same conclusion this court has (see *supra*) and distinguished the primary case relied upon by defendant here. This

court finds the analysis in that case persuasive and adopts it as its own.” (Boldface omitted.)

The Company appealed.

DISCUSSION

I.

Applicable Legal Standards Regarding Prevailing Party Attorney Fee Awards and Contract Interpretation; Governing Standard of Review

“Under Code of Civil Procedure section 1033.5, subdivision (a)(10), attorney fees are allowable as costs under Code of Civil Procedure section 1032, ‘when authorized by any of the following: [¶] (A) Contract. [¶] (B) Statute. [¶] (C) Law.’ [Fn. omitted.] As pointed out by the Supreme Court in *Santisas v. Goodin* [(1998) 17 Cal.4th 599, 607, footnote 4], ‘Code of Civil Procedure section 1021 does not independently authorize recovery of attorney fees. Rather, consistent with subdivision (a)(10) of Code of Civil Procedure section 1033.5, Code of Civil Procedure section 1021 recognizes that attorney fees incurred in prosecuting or defending an action may be recovered as costs only when they are otherwise authorized by statute or by the parties’ agreement.’” (*Carver v. Chevron U.S.A., Inc.* (2002) 97 Cal.App.4th 132, 143-144.)

The Company argues article X of the operating agreement provided a contractual basis for its recovery of prevailing party attorney fees. Section 1717, subdivision (a) of the Civil Code provides in part: “In 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 either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney’s fees in addition to other costs.”

“‘The words of a contract are to be understood in their ordinary and popular sense.’ [Citations.]” (*Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2003) 109 Cal.App.4th 944, 955.) Civil Code section 1638 states, “[t]he language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity.”

“‘On review of an award of attorney fees after trial, the normal standard of review is abuse of discretion.’” (*Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1175.) However, “to determine whether an award of attorney fees is warranted under a contractual attorney fees provision, the reviewing court will examine the applicable statutes and provisions of the contract. Where extrinsic evidence has not been offered to interpret the [agreement], and the facts are not in dispute, such review is conducted de novo.” (*Carver v. Chevron U.S.A., Inc., supra*, 97 Cal.App.4th at p. 142.)

II.

The Company Failed to Show It Was Entitled to Contractual Prevailing Party Attorney Fees.

The Company argues the second amended complaint included a claim arising out of the operating agreement and, thus, it should be able to invoke the prevailing party attorney fees provision in article X of that agreement and be awarded prevailing party attorney fees. Article X constitutes an arbitration agreement between the Company’s members to submit any “action to enforce or interpret” the operating agreement to, or “resolve disputes between the Members for or against any Member” by way of, final and binding arbitration.

We do not need to address whether the second amended complaint constituted an “action to enforce or interpret” the operating agreement or “to resolve disputes between the Members for or against any Member” within the meaning of article X. Even assuming it did, and further assuming the Company had standing to

enforce article X against Nikola or vice versa, article X does not provide for prevailing party attorney fees outside of the arbitration context. Article X's attorney fees provision is expressly limited to fees "incurred in connection with the arbitration." None of the claims alleged against the Company (or any other defendant) has been submitted to arbitration. Consequently, article X's prevailing party attorney fees provision was never triggered and the prevailing party attorney fees provision therefore does not apply.

In *Kalai v. Gray* (2003) 109 Cal.App.4th 768, 771 (*Kalai*), the trial court granted summary judgment in favor of the defendant on the ground the parties had agreed to arbitrate their dispute. The court included in the judgment that the plaintiff had waived his right to arbitrate his claims by filing a lawsuit in court. (*Ibid.*) In addition, the trial court awarded the defendant attorney fees pursuant to the prevailing party attorney fees provision in the parties' arbitration agreement. (*Ibid.*) A panel of this court held the trial court erred by including in the judgment the statement the plaintiff had waived his right to arbitrate by filing his lawsuit, concluding that "[a]t most, such an effort might lead to a waiver of that party's right to thereafter enforce the arbitration agreement against an unwilling opposing party." (*Ibid.*, italics omitted.) The *Kalai* court held the trial court erred by awarding prevailing party attorney fees to the defendant, based upon the prevailing party attorney fees provision contained in the arbitration agreement. (*Ibid.*)

The court in *Kalai, supra*, 109 Cal.App.4th at page 777, stated: "The parties' agreement allows for an award of fees only in favor of the 'prevailing party to [the a]rbitration.' Simply put, there has not yet been a prevailing party to the arbitration, because there has not been an arbitration. The clear intent of the parties' provision is that the one who ultimately prevails in a final resolution of their dispute shall be entitled to recover his fees. When there is such a resolution—and if [the defendant] prevails—he will be entitled to recover his fees. Moreover, that recovery could include the fees [the defendant] incurred in the court action, as the scope of recoverable fees is fairly broad,

including all fees ‘incurred by said prevailing party *in connection with* the Arbitration proceedings.’”

Here, unlike *Kalai*, Nikola’s claims against the Company are finally resolved as the Company was dismissed from the case with prejudice following the trial court sustaining the Company’s demurrer to the second amended complaint. As there has not been, nor will there be, any attorney fees “incurred in connection with the arbitration” as to Nikola’s claims against the Company, there was no contractual basis for awarding the Company prevailing party attorney fees.

In its opening brief, the Company cites *Ajida Technologies, Inc. v. Roos Instruments, Inc.* (2001) 87 Cal.App.4th 534, in support of its argument that “a contract provision that permits the recover[y] of fees in arbitration also includes the right to recover fees in judicial proceedings.” *Ajida Technologies, Inc.* does not stand for such a broad proposition. That case involved an appeal from a judgment confirming an arbitration award. (*Id.* at p. 537.) As pertinent to this appeal, the appellate court held that “a contract provision that permits the recovery of fees in arbitration is broad enough to include fees in related judicial proceedings, including an appeal from the judgment confirming the [arbitrator’s] award.” (*Id.* at p. 552.) *Ajida Technologies, Inc.* is inapplicable to this case where no arbitration has occurred.

We agree with the Company that the trial court should not have cited to an unpublished appellate court opinion in its minute order denying the motion for prevailing party attorney fees. Rule 8.1115(a) of the California Rules of Court states in part, “an opinion of a California Court of Appeal or superior court appellate division that is not certified for publication or ordered published must not be cited or relied on by a court or a party in any other action.” We acknowledge the trial court clarified that the court adopted the reasoning of the cited unpublished case, but did not otherwise rely on it. Any error resulting from the trial court’s citation is without prejudice to the Company. Our

review of the order denying the Company's motion for prevailing party attorney fees is de novo. For the reasons we have explained, the trial court properly denied the motion.

DISPOSITION

The postjudgment order is affirmed. Respondent shall recover costs on appeal.

FYBEL, J.

WE CONCUR:

ARONSON, ACTING P. J.

IKOLA, J.