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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

BOGDAN GRABOWIEC,

Plaintiff and Respondent,

v.

ROBERT SCHOPMEYER,

Defendant and Appellant.

G050978

(Super. Ct. No. 30-2008-00113641)

O P I N I O N

Appeal from postjudgment orders of the Superior Court of Orange County,
David T. McEachen, Judge. Affirmed.

Allan Liang for Defendant and Appellant.

Bogdan Grabowiec, in pro. per.; Telep Law and Desiree Telep for Plaintiff
and Respondent.

Last year, this court considered Robert Schopmeyer's appeal from a judgment following a bench trial in favor of his former tenant, Bogdan Grabowiec. (*Grabowiec v. Schopmeyer* (March 17, 2014, G047312) [nonpub. opn.] (hereafter *Grabowiec I*.) This prior appeal challenged a judgment awarding Grabowiec \$45,700 in combined damages due to Schopmeyer's breach of the implied warranty of habitability regarding a residential lease and his wrongful retention of the security deposit. (*Ibid.*) We agreed with Schopmeyer's contention there was insufficient evidence to support the finding he breached the warranty of habitability and struck the \$23,200 in damages relating to that cause of action and the related breach of contract action. We also modified the amount of damages awarded for wrongful retention of the security deposit because the trial court awarded Grabowiec the full \$7,500 security deposit, plus the statutory penalty of double the deposit (\$15,000), and the record showed Schopmeyer eventually refunded the security deposit to Grabowiec. Because Grabowiec suffered no actual damages in this regard, we held only the statutory penalty amount could stand. Accordingly, the judgment was affirmed and modified to strike \$30,700 from the damages award so as to reduce the award to the \$15,000 statutory penalty. (*Ibid.*)

In the appeal before us now, Schopmeyer asserts the court should have granted his motion for a setoff, motion for attorney fees, and motion for reconsideration. We conclude his contentions lack merit and the motions were properly denied. We affirm the postjudgment orders.

I

While the appeal was pending in *Grabowiec I*, Schopmeyer filed a motion for setoff. He raised the following three arguments: (1) Grabowiec agreed to settle his security deposit claim when he took Schopmeyer's \$8,120 settlement offer before trial; (2) Grabowiec promised in writing to release, indemnify, hold harmless, and forever discharge Schopmeyer from all claims; and (3) Grabowiec received \$27,500 in a good

faith settlement from Schopmeyer's two co-defendants (the leasing agents Jerry Thompson and Jennifer Falconer). Schopmeyer argued Code of Civil Procedure section 877¹ provided that when there has been a good faith settlement by co-obligors, the settlement must reduce the judgment entered against him. He asserted Grabowiec could not recover twice for the same harm.

In September 2012, the trial court ordered a stay of this motion because the matter was being appealed. The court's minute order stated it would also stay Grabowiec's motion for attorney fees and Schopmeyer's motion to strike or tax costs. These motions were not included in our record on appeal.

After *Grabowiec I* became final, Schopmeyer filed a motion requesting attorney fees and costs, incurred at both the trial and on appeal, in the amount of \$281,499. As the prevailing party, Schopmeyer asserted he was entitled to fees under Civil Code section 1717. Schopmeyer filed a motion for an order granting a peremptory challenge to the judge who presided over the trial. He filed three supplemental briefs. The first opposed Grabowiec's pending attorney fee motion, the second supported his previously filed motion to strike/tax costs, and the third supplemented his previously filed setoff motion.

On August 1, 2014, the matter was heard by a new judge. The court denied the motion for setoff and both parties' motions for attorney fees and costs. It granted Schopmeyer's motion to strike or tax costs.

In its minute order, the trial court summarized our ruling in *Grabowiec I*. Turning first to the motion for setoff, the trial court ruled Schopmeyer submitted insufficient information to show Grabowiec agreed to settle the bad faith retention of the security deposit cause of action (seventh cause of action). It found significant that this appellate court reduced the amount of the award but affirmed the judgment on the

¹ All further statutory references are to the Code of Civil Procedure, unless otherwise indicated.

seventh cause of action in Grabowiec’s favor. In addition, “[T]he court finds that the settling [d]efendants were not joint tortfeasors” with respect to the seventh cause of action and, therefore, section 877 does not permit a setoff. (Emphasis omitted.) The court explained the settling defendants were agents “of one or both of the parties in the lease transaction” and were sued for unjust enrichment. “They are not joint tortfeasors under the claim for which [Grabowiec] prevailed, nor joint obligors under the contract. The [l]ease [a]greement says ‘agency relationships are confirmed as above. Real estate brokers who are not also [l]andlords in this [a]greement are not a party to the [a]greement between [l]andlord and [t]enant.’ ([Citation to lease agreement.])”

Next, the trial court addressed the two attorney fee motions and determined neither party was the prevailing party on the contract under Civil Code section 1717. Citing relevant legal authority, the court noted designation of the prevailing party was an equitable determination of which party obtained greater relief, and “permits the court to find no party prevailed under the contract. [Citations.]” (Emphasis omitted.)

The court reasoned neither party obtained greater relief. It explained the agreement permitted attorney fees incurred “‘in any action or proceeding arising out of this [a]greement’” (emphasis omitted) and Grabowiec prevailed on his security deposit claim. The court stated this claim was both a statutory claim and one that arose under the contract because the agreement required the landlord to give a vacating tenant any remaining portion of the security deposit. On the other hand, Schopmeyer prevailed on the issue of habitability and whether rent had to be refunded but he lost on his cross-complaint seeking additional damages under the terms of the lease. The court concluded, “This is a situation in which each party obtained part of what it wanted from this contract dispute. Therefore, the court finds that neither party is the prevailing party” under Civil Code section 1717.

Schopmeyer filed a motion for reconsideration of the court’s denial of his motion for attorney fees, and for a setoff, on the grounds the court overlooked the

allegations made in the first amended complaint that the co-defendants were joint tortfeasors. The court denied the motion for reconsideration. Schopmeyer filed an appeal challenging the court's ruling on the motion for setoff and for attorney fees.

II

A. *Motion for Setoff*

Section 877 mandates, "Where a release, dismissal with or without prejudice . . . is given in good faith before verdict or judgment to one or more of a number of tortfeasors claimed to be liable for the same tort, . . . it shall have the following effect: [¶] (a) It shall not discharge any other such party from liability unless its terms so provide, but it *shall reduce the claims against the others* in the amount stipulated by the release, the dismissal . . . or in the amount of the consideration paid for it, whichever is the greater. [¶] (b) It shall discharge the party to whom it is given from all liability for any contribution to any other parties" (Italics added.)

The setoff contemplated under section 877 *applies only to economic damages*. (*Espinoza v. Machonga* (1992) 9 Cal.App.4th 268, 272.) In addition, "[A] nonsettling defendant [is] entitled to a setoff from plaintiff's award of economic damages in the amount of settlements paid prior to trial by other defendants, despite the jury's finding that the settling defendants had no fault for plaintiff's injuries." (*Poire v. C.L. Peck/Jones Brothers Construction Corp.* (1995) 39 Cal.App.4th 1832, 1837.) "This satisfies the fundamental goals of section 877, to preclude a double recovery arising out of the same wrong and encourage settlements." (*McComber v. Wells* (1999) 72 Cal.App.4th 512, 517.) As observed in *Reed v. Wilson* (1999) 73 Cal.App.4th 439, 444, "the offset provided for in section 877 assures that a plaintiff will not be enriched unjustly by a double recovery, collecting part of his total claim from one joint tortfeasor and all of his claim from another. [Citation.]"

After our ruling in *Grabowiec I*, the statutory damage award was Grabowiec's only recovery. He did not recover any economic damages. The unique

issue presented in this case is whether the settling defendants and Schopmeyer were jointly liable for the \$15,000 statutory fine. As we now explain, only landlords are liable for the statutory fine and therefore the penalty was not subject to a setoff by a sum representing actual economic damages, paid by defendants who were not landlords.

When a landlord makes a “bad faith claim or retention” of a tenant’s security deposit, the landlord may be subject to statutory damages of twice the amount of the security, plus actual damages. (Civ. Code, § 1950.5, subd. (l).) The statute “was enacted to ensure the speedy return of security deposits on the termination of tenancy and to prevent the improper retention of such deposits.” (*Granberry v. Islay Investments* (1995) 9 Cal.4th 738, 746.) A statutory penalty, like punitive damages, is designed to punish and deter future misconduct. “California courts have held that if a defendant is liable for a statutory penalty or multiple damages under a statute, the award is punitive in nature, and the award penalizes essentially the same conduct as an award of punitive damages. The plaintiff cannot recover punitive damages in addition to that recovery but must elect its remedy. [Citations.]” (*Fassberg Construction Co. v. Housing Authority of City of Los Angeles* (2007) 152 Cal.App.4th 720, 759-760.)

In analyzing statutory language, this court must look to “‘the object to be achieved and the evil to be prevented by the legislation.’ [Citation.]” (*City of Long Beach v. California Citizens for Neighborhood Empowerment* (2003) 111 Cal.App.4th 302, 306.) The plain language of Civil Code section 1950.5, subdivision (l), seeks to address the evil of landlords and no others. Similarly, the other subdivisions of Civil Code section 1950.5 are plainly devoted to describing the rights, duties, and remedies of landlords and tenants, who are the only parties to a rental agreement. We found no language suggesting the statutory damages could be imposed against anyone other than a landlord. Thus, much like a punitive damage award, the statutory penalty is personal to the landlord and intended to punish only the landlord. Schopmeyer cites to no legal authority, and we found none, holding real estate agents or other parties tangentially

connected to a rental agreement are also subject to Civil Code section 1950.5, subdivision (l)'s statutory penalties. Therefore, if the two real estate agents (Thompson and Falconer) had not reached a settlement with Grabowiec before trial, the court would have lacked authority to impose the statutory fine jointly against all defendants. The penalty was personal to the landlord.

We note there is no dispute the settling parties were not landlords. They were not parties to the lease agreement, and they owed no statutory duty or contractual duty to refund the tenant's security deposit. Section 877 applies only to an award of economic damages between joint tortfeasors. The award here is a penalty, not economic damages, and we found no legal authority holding real estate agents can be held jointly liable with a landlord for payment of a Civil Code section 1950.5 award.

B. Attorney Fees

Citing Civil Code section 1717, Schopmeyer asserts a prevailing party on the contract is the party who obtained a greater relief on the contract claims. Schopmeyer makes the following arguments to support his theory he is the prevailing party: (1) the statutory damages awarded under Civil Code section 1950.5 were not provided for in the lease agreement, and therefore, Grabowiec's recovery of this fine does not make him a prevailing party on a contract claim; (2) If the statutory damages are discounted, Grabowiec did not obtain greater relief on the contract claims and the judgment in this regard was in Schopmeyer's favor; (3) If we reverse the court's ruling regarding the right to a setoff, Grabowiec will recover nothing from Schopmeyer and is no longer the party with a net monetary recovery; and (4) When neither a plaintiff nor defendant obtains any relief, the defendant is the prevailing party for the purpose of attorney fees and costs under section 1032, subdivision (a)(4).

In making these arguments Schopmeyer fails to mention he lost on his cross-complaint seeking additional damages for Grabowiec's purported breach of the lease agreement. Contrary to Schopmeyer's contention, this is not a simple case of a

defendant prevailing in a contract dispute. Here, each party sued the other claiming breach of the contract, but neither party prevailed (and neither recovered damages). Thus, regardless of how one characterizes the statutory damages award, Schopmeyer is certainly not the prevailing party on a contract claim.² The trial court concluded that fairness and equity required each side should pay their own attorney fees. Under the circumstances, we conclude this was a proper exercise of discretion.

We recognize the court's minute order designated Schopmeyer was the prevailing party under section 1032, but it denied costs on the basis he untimely filed his memorandum of costs. On appeal, Schopmeyer suggests his status as a prevailing party under section 1032 means he should recover attorney fees. However, it is well settled the prevailing party for the award of costs under section 1032 is not necessarily the prevailing party for the award of attorney fees. "Civil Code section 1717 declares the party recovering a greater relief in the action on the contract is the prevailing party. But it further provides the trial court may '*determine that there is no party prevailing on the contract for purposes of [section 1717].*' [Citation.]" (*McLarand, Vasquez & Partners, Inc. v. Downey Savings & Loan Assn.* (1991) 231 Cal.App.3d 1450, 1456.) Schopmeyer's briefing contains no discussion or relevant legal analysis to support his theory attorney fees are mandatory under section 1032. "An appellate court is not required to consider alleged errors where the appellant merely complains of them without

² In his reply brief, Schopmeyer asserts this court "implicitly ruled in his favor" on the cross-complaint. He reasons the claim against Grabowiec was for a wrongful abandonment of the lease and failure to pay rent for one year. Grabowiec's excuse for abandonment was the property was uninhabitable. Schopmeyer asserts that in *Grabowiec I*, this court ruled the property was habitable and therefore Schopmeyer implicitly prevailed on his cross claim. Not so. Our holding was limited to a review of the causes of action and judgment entered on Grabowiec's complaint. In footnote 5 of the opinion, we stated the trial court "found in Grabowiec's favor on Schopmeyer's breach of contract cross-complaint and Schopmeyer does not challenge that ruling." (*Grabowiec I*.) Accordingly, we did not review or disturb the trial court's judgment in favor of Grabowiec on the cross-complaint.

pertinent argument” (*Strutt v. Ontario Savings & Loan Assn.* (1972) 28 Cal.App.3d 866, 873), including when “the relevance of the cited authority is not discussed or points are argued in conclusory form[.]” (*Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979).

III

The postjudgment orders are affirmed. Neither party shall recover their costs or attorney fees on appeal.

O’LEARY, P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.