Filed 8/30/16 Alcone v. SLV Associates CA4/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MATTHEW R. ALCONE, as Trustee, etc., Plaintiff and Respondent, v. SLV ASSOCIATES, LLC, et al. Defendants and Appellants.	G051813 (Super. Ct. No. 30-2014-00726318) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Franz E. Miller, Judge. Affirmed.

Neufeld Marks and Paul S. Marks for Defendants and Appellants.

Ruzicka, Wallace & Coughlin, Frank J. Coughlin and Steven E. Bolanos for Plaintiff and Respondent.

* * *

Defendants SLV Associates, LLC (SLV), Steve Valbuena, and Lynn Valbuena (the Valbuenas) appeal from the portion of the judgment awarding attorney fees and costs to plaintiff Matthew R. Alcone, as trustee of the RVA Trust. Defendants contend the trial court erred in awarding attorney fees for the time spent by plaintiff's paralegal, and against the Valbuenas individually. They also assert the court failed to exercise its discretion in the amount of legal fees it awarded. We disagree and affirm the judgment.

FACTS

In 2012, the Valbuenas entered a written lease (lease) for a high end single family home (Premises) with plaintiff, with their company SLV designated as "Tenant" and themselves as residents. They signed the lease in their capacities as the president and chief executive officer in agreeing "to rent the Premises on the above terms and conditions."

The lease contains the following clause: "In any action or proceeding arising out of this [a]greement, the prevailing party between Landlord and Tenant shall be entitled to reasonable attorney fees and costs, except as provided in paragraph 39A [relating to mediation]."

In 2013, SLV entered into a written extension, signed by the Valbuenas in their corporate capacities. Among other things, the extension provides: "All terms and accompanying addendums and documents to the original lease agreement are incorporated herein . . . ."

In April 2014, the Valbuenas signed an addendum to the lease in their individual capacities to extend the "[c]urrent lease . . . to August 31, 2014 . . . ." The addendum lists the Valbuenas as the "Buyer[s]/Tenant[s]" and includes a paragraph stating, "All terms and accompanying addendums and documents to the original lease agreement are incorporated herein . . . ."

The next month, plaintiff revoked and rescinded his offer to extend the lease, believing the Valbuenas were conspiring to defraud him. He returned all payments to the Valbuenas but they refused to quit the property. Plaintiff thereafter filed the present unlawful detainer action.

As an affirmative defense, defendants alleged the "addendum extend[ed] the lease to the end of August 2014 . . . [and the] fixed term has not expired." They further asserted "[p]laintiff offered, and defendant[s] accepted, an extension of the lease through August 31, 2014. Defendant[s] executed the addendum extending the lease through August and tendered rent through August 2014." In their prayer, defendants requested "reasonable attorney fees."

Defendants' motion for summary judgment relied on the addendum in arguing that plaintiff's return of the rent payments was ineffective to terminate their tenancy. At trial, Mr. Valbuena's deposition testimony that he believed the addendum was "effective" was read into the record. Defense counsel also argued to the jury the terms of the addendum "were essentially in effect."

The jury found in plaintiff's favor and awarded him the property, over $69,000 in damages, and attorney fees and costs. Thereafter, plaintiff moved for $95,527.50 in attorney fees, supported by his attorney's signed declaration and billing records.

The trial court's tentative ruling awarded plaintiff the requested amount "less amount charged for paralegal in excess of $125/hour" and ruled that "[e]xcept as noted, all time and rates are reasonable." After considering the parties' arguments and the evidence presented, it awarded attorney fees against SLV "in the amount of $95,200.00" and continued the hearing for further briefing on whether the Valbuenas individually could be held liable for the fees.

Subsequently, the court granted the attorney fee motion against all defendants in the amount of $95,527.50. It explained it had originally awarded fees

against SLV because it was concerned whether there was any basis to hold the Valbuenas liable for fees absent a cause of action for guarantee. But upon taking the case under submission, the court determined attorney fees could be awarded against the Valbuenas under the alternative theory that they signed the addendum, which incorporated the terms of the original lease including the attorney fee clause, as individuals. They also raised it as an affirmative defense. Citing *Windsor Pacific LLC v. Samwood Co., Inc*. (2013) 213 Cal.App.4th 263, 274 (*Windsor*), the court concluded "[p]laintiff correctly urges the defense relied significantly on that [addendum] in defending the case. Having done so, the defendants are individually liable for plaintiff's attorney fees." The signed order indicates the court awarded plaintiff $95,200 in attorney fees against SLV and the Valbuenas, jointly and severally.

Although defendants' notice of appeal indicates they are appealing from both the orders on their motion to tax costs and plaintiff's motion for attorney fees, the issues raised in this appeal concern the attorney fee motion only.

DISCUSSION

1. Standard of Review

"'The determination of the legal basis for an award of attorney fees is a question of law which we review de novo.'" (*Drybread v. Chipain Chiropractic Corp.* (2007) 151 Cal.App.4th 1063, 1069.) But the amount of an attorney fee award is left to the sound discretion of the trial court. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095.) The experienced trial judge is the best judge of the value of professional services rendered in his or her court. Accordingly, while the judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong, i.e., that the trial court abused its discretion. (*Ibid*.)

2. Recovery of Paralegal Fees

Defendants contend plaintiff may not recover fees for the 80.9 hours of paralegal work done by Steven E. Bolanos because he "did not qualify as a 'paralegal' under California law." We disagree.

We first address defendants' musings over whether paralegal fees may be included in an award of attorney fees. The rule is now fairly well settled that parties may recover as part of an attorney fee award reasonable amounts separately billed by law clerks, paralegals and other support staff. (See *Guinn v. Dotson* (1994) 23 Cal.App.4th 262, 269; *Bussey v. Affleck* (1990) 225 Cal.App.3d 1162, 1165-1166 (*Bussey*).) As noted in *Guinn*, at page 269, "[a]n award of attorney fees which does not compensate for paralegal service time would not fully compensate the attorney." The rationale for an award of paralegal fees is that paralegals provide attorneys necessary support services. (See *Salton Bay Marina, Inc. v. Imperial Irrigation Dist*. (1985) 172 Cal.App.3d 914, 951 (*Salton*) ["We think, however, necessary support services for attorneys, e.g., secretarial and paralegal services, are includable within an award of attorney fees"].)

Defendants assert *Bussey* was disavowed in *Hsu v. Semiconductor Systems, Inc.* (2005) 126 Cal.App.4th 1330, at page 1342, as "an unwarranted conflation of fees and costs." But *Hsu* was discussing whether expert witness fees and general photocopying expenses could "be awarded to plaintiff as an element of attorney fees under the rationale that the expenses were disbursed by the attorneys in the course of litigation." (*Id*. at pp. 1340, 1342.) *Hsu* made no mention of paralegal fees. For the same reason, we are not persuaded by defendants' claim that *Hsu* rejected *Salton*'s view concerning paralegal services.

We turn now to defendants' specific argument that the paralegal in question had not been shown to have complied with Business and Professions Code section 6450. Under subdivision (c)(3) of that section, a person qualifies as a paralegal if he or she has "[a] baccalaureate degree or an advanced degree in any subject, a minimum of one year

of law-related experience under the supervision of an attorney who has been an active member of the State Bar of California for at least the preceding three years . . . , and a written declaration from this attorney stating that the person is qualified to perform paralegal tasks."

In his declaration in support of plaintiff's reply regarding his motion for attorney fees, plaintiff's counsel declares "Bolanos graduated from the University of California, Los Angeles with a B.A. He graduated from Western State Law School in May 2014 with a Juris Doctorate degree and has worked under my supervision for over one year. [He] is therefore qualified to perform legal tasks . . . ." This satisfies the requirements of the above statute. Defendants concede as much.

Defendants maintain Bolanos did not qualify as a paralegal because there was no showing he met the requirements of Business and Professions Code section 6450, subdivision (d), which provides: "Every two years, commencing January 1, 2007, any person that is working as a paralegal shall be required to certify completion of four hours of mandatory continuing legal education in legal ethics and four hours of mandatory continuing legal education in either general law or in an area of specialized law. All continuing legal education courses shall meet the requirements of Section 6070. Certification of these continuing education requirements shall be made with the paralegal's supervising attorney. The paralegal shall be responsible for keeping a record of the paralegal's certifications." According to defendants, plaintiffs failed to show Bolanos complied with either Business and Professions Code section 6450 or 6070.

But as plaintiff points out, "two years had not passed since the time . . . Bolanos first met the required paralegal qualifications, and [defendants] presented no evidence that it had . . . [or] that the certification required by subdivision (d) was ever triggered." (See *Ellis v. Toshiba America Information Systems, Inc*. (2013) 218 Cal.App.4th 853, 889 [rejecting argument "that compliance with the educational requirements of Business and Professions Code section 6540 is in every case a

prerequisite to the recovery of paralegal fees" where federal cases cited by the defendant "do not bind us, and in any event they do not hold, and we have found no California state cases holding" such is required].) Because plaintiff has not shown Bolanos did not meet the requirements of Business and Professions Code section 6450, the cases he cites are inapposite.

3. Award of Attorney Fees Against the Valbuenas

The Valbuenas argue the court erred in awarding legal fees against them individually under Civil Code section 1717, subdivision (a).[1] According to them, the statute does not apply because the subject contract was first raised as an affirmative defense.

Section 1717 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." (§ 1717, subd. (a).)

"By its terms . . . section 1717 has a limited application. It covers *only* contract actions, where the theory of the case is breach of contract, and where the contract sued upon itself specifically provides for an award of attorney fees incurred to enforce *that* contract. Its only effect is to make an otherwise unilateral right to attorney fees reciprocally binding upon all parties to actions to enforce the contract." (*Xuereb v. Marcus & Millichap, Inc*. (1992) 3 Cal.App.4th 1338, 1342 (*Xuereb*).)

An action for unlawful detainer may be an action on a contract or one sounding in tort depending on the nature of the claim. (*Mitchell Land & Improvement Co. v. Ristorante Ferrantelli, Inc.* (2007) 158 Cal.App.4th 479, 486.) "[I]f an unlawful

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[1] All further undesignated statutory references are to this code.

detainer action is based on an alleged breach of the lease during an unexpired term (e.g., nonpayment of rent, improper use of the premises), then it is an action sounding in contract. If an unlawful detainer is brought to oust a holdover tenant following expiration of a lease, then the action is premised on tortious conduct (e.g., trespass), and it is an action sounding in tort." (*Ibid.*)

The unlawful detainer action here is of the latter type. In his complaint, plaintiff "demand[ed] possession [of the property] from each defendant because of expiration of a fixed-term lease." The action thus sounds in tort and attorney fees would not have been recoverable under section 1717 based on the complaint alone. But putting aside the issue of whether defendants' assertion of the addendum as affirmative defense transformed the action in one that was "on a contract" within the meaning of section 1717, subdivision (a), the trial court did not err in awarding attorney fees to plaintiff under the plain terms of the attorney fee provision in the lease.

Section 1717 does not "supersede or limit the broad right of parties pursuant to Code of Civil Procedure section 1021 to make attorney fees agreements." (*Xuereb*, *supra*, 3 Cal.App.4th at p. 1342.) "Code of Civil Procedure section 1021 provides the basic right to an award of attorney fees. [Citation.] It states: 'Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties; but parties to actions or proceedings are entitled to their costs, as hereinafter provided.' Under this statute, the allocation of attorney fees is left to the agreement of the parties. There is nothing in the statute that limits its application to contract actions alone." (*Id*. at pp. 1341-1342.) Rather, "'[p]arties may validly agree that the prevailing party will be awarded attorney fees incurred in any litigation between themselves, whether such litigation sounds in tort or in contract.'" (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 608 (*Santisas*).)

The attorney fee provision in this case applies to "any action or proceeding *arising out of* this [a]greement." (Italics added.) Cases have held that such broad "arising out of" language embraces all claims, whether sounding in contract or tort, in a legal action between the parties. (See *Santisas*, *supra*, 17 Cal.4th at p. 608 ["On its face, the provision embraces all claims, both tort and breach of contract, in plaintiffs' complaint, because all are claims 'arising out of the execution of th[e] agreement or the sale'"]; *Xuereb*, *supra*, 3 Cal.App.4th at p. 1340 ["'If this Agreement gives rise to a lawsuit or other legal proceeding between any of the parties hereto . . . the prevailing party shall be entitled to recover actual court costs and reasonable attorneys' fees in addition to any other relief to which such party may be entitled'"].)

Plaintiff's complaint for unlawful detainer arose out of the lease. Because the addendum, signed by the Valbuenas individually, *was part of that lease*, plaintiff was entitled to attorney fees against the Valbuenas individually, *regardless of any affirmative defenses asserted by defendants*. Neither the parties nor the trial court recognized the broadness of the attorney fee provision made it applicable to all claims, including plaintiff's action for unlawful detainer. Nevertheless, we review the court's ruling not its rationale and an order correct under the appropriate legal standard will not be reversed as long as it can be supported on any legal theory. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 980-981.) Because it is correct under the theory just discussed, we need not address defendants' claim that attorney fees are not recoverable where the contract containing an attorney fee clause is asserted as a defense to an action.

The cases cited by defendants are inapposite because the attorney fee clauses in those cases are significantly more narrow than the one at bar. In *Exxess Electronixx v. Heger Realty Corp.* (1998) 64 Cal.App.4th 698 (*Exxess*), a provision in a lease allowed for an award of attorney fees to the prevailing party "'[i]f any Party or Broker *brings an action* or proceeding to enforce the terms hereof or declare rights hereunder . . . ." (*Id*. at p. 702, italics added.) The lessee cross-complained against its

real estate broker, asserting various contract and tort causes of action. Before trial, the action was settled and the cross-complaint dismissed with prejudice. (*Id*. at p. 704.) Because the broker had dismissed the cross-complaint in the settlement, the court held that section 1717, subdivision (b)(2) ["'[w]here an action has been voluntarily dismissed or dismissed pursuant to a settlement of the case, there shall be no prevailing party for purposes of this section'"] precluded the recovery of attorney fees on the broker's claim for declaratory relief. (*Exxess*, at p. 707.)

The broker maintained that it was entitled to attorney fees because "its *defense* to the cross-complaint was based on a provision of the lease, in particular, the 'as-is' clause." (*Excess*, *supra*, 64 Cal.App.4th at p. 711.) *Exxess* disagreed because it could not "equate raising a 'defense' with bringing an 'action' or 'proceeding.' By asserting a defense to the cross-complaint, [the broker] did not bring an action or proceeding to enforce the lease or to declare rights under it" within the meaning of the attorney fee clause. (*Id*. at p. 712, fn. omitted.) Although the court sympathized with the broker's position, it stated it could not rewrite the fee provision, which it noted to be "quite narrow." (*Ibid*.)

Gil v. Mansano (2004) 121 Cal.App.4th 739 (*Gil*) involved a similar attorney fee clause providing for an award of attorney fees to the prevailing party "'[i]n the event action is *brought to enforce* the terms of this [Release].'" (*Id*. at p. 742, italics added.) The defendant was sued for fraud and asserted the release as an affirmative defense. After prevailing on summary judgment, the trial court awarded him attorney fees under the release. (*Id*. at p. 741.) The majority in *Gil* reversed the fee award, concluding "the assertion of a contractual defense to a tort action is not an 'action brought to enforce the contract.'" (*Ibid*.) It observed the attorney fee clause before it was "very narrowly drawn. It requires action brought to enforce the terms of the release. Plaintiff did not bring an action on the release; he sued in tort for fraud. Thus, the mutuality and reciprocity provisions of . . . section 1717 are inapplicable. The fraud

action is certainly not an action to enforce the release. Neither is the assertion of the affirmative defense of release an action brought to enforce the release. Accordingly, no action was brought by either party to enforce the terms of the release and defendant may not recover attorney fees as the prevailing party in the fraud action." (*Id*. at p. 745.)

By contrast, Justice Armstrong in his dissent opined that the word "'action,'" "base[d] on [its] ordinary use" "includes both an answer and an affirmative defense" such that "fees should have been awarded." (*Gil*, *supra*, 121 Cal.App.4th at pp. 746-747.) According to him, "In an everyday sense, 'action' includes both an answer and an affirmative defense, for the simple reason that the two are in many ways alike. The defendant has the burden of proof on the affirmative defense just as the plaintiff does on a complaint. The rules which relate to pleading a cause of action in a complaint also apply to pleading an affirmative defense in an answer. Because there is no replication in California, affording a plaintiff a chance to deny the allegations of affirmative defense, they are deemed controverted. If the defendant prevails on the release defense, it will only be because the court has 'enforced' the release. . . . Raising a release as an affirmative defense is legally the same as bringing an 'action' to enforce it. The defendant becomes an actor." (*Id*. at p. 747.)

Windsor, *supra*, 213 Cal.App.4th 263, distinguished *Exxess* and *Gil* on the basis that the attorney fee provision in that case did not include the word "'brings' or 'brought.'" (*Windsor*, at p. 276.) Rather the fee provision in *Windsor* stated: "'In any action or proceeding *to enforce or interpret* the provisions of this Agreement, the prevailing party . . . shall . . . be entitled to its reasonable attorneys' fees . . . ." (*Id*. at p. 268, fn. 1, italics added.) Thus, *Windsor* focused on whether the action was one "to enforce or interpret" the Agreement's provisions. (*Id*. at p. 274.) It concluded it was. (*Id*. at pp. 266, 274.) Agreeing with Justice Armstrong's dissent in *Gil*, *Windsor* held the prevailing party was entitled to attorney fees "not only where the plaintiff's allegations in the complaint seek to enforce or interpret the contract, but also where the defendant seeks

to do so by asserting an affirmative defense [e.g., equitable estoppel] raised in its answer." (*Windsor*, at pp. 266, 274.)

Windsor reasoned that it had to interpret the subject agreement in order to determine whether the plaintiff should be "equitably estopped from" taking a certain position. In its view therefore the "action is an 'action or proceeding to . . . interpret the provisions of this Agreement' within the meaning of the [agreement] whether [the plaintiff] seeks to enforce or interpret the [the agreement] in its complaint or [the defendant] seeks to do so in its answer." (*Windsor*, *supra*, 213 Cal.App.4th at p. 274.) "Put another way, it does not matter whether such interpretation has been sought by the allegations of a complaint or by affirmative defenses in an answer. We understand the words 'action or proceeding,' used in accordance with their ordinary and popular sense, to encompass the entire action or proceeding, including both the complaint and any responsive pleading, such as an answer. [Citations.] In our view, an action in which a party seeks to enforce or interpret a contract in connection with either a claim alleged in the complaint or a defense alleged in an answer will constitute an action to 'enforce or interpret' the contract." (*Id*. at pp. 274-275.)

Here, the attorney fee clause is even broader than the one in *Windsor*, encompassing "any action or proceeding *arising out of*" the lease." (Italics added.) In their original opposition to plaintiff's motion for attorney fees, defendants conceded the "fee clause is broad enough to encompass tort claims." This would include plaintiff's cause of action for unlawful detainer. As such, it is unnecessary to address defendants' claims (1) *Exxess* and *Gil* "are more persuasive" than *Windsor*, which was wrongly decided, and (2) the California Supreme Court granted review in *Mountain Air Enterprises, LLC v. Sundowners Towers* (2014) 231 Cal.App.4th 805, review granted March 18, 2015, S223536, to address whether (a) "the assertion of an agreement as an affirmative defense implicate[s] the attorney fee provision in that agreement" and (b) "the

term ‘action’ or ‘proceeding’ in . . . section 1717 and in attorney fee provisions encompass the assertion of an affirmative defense.”

4. Exercise of Discretion

Defendants argue the trial court failed to exercise its discretion in awarding attorney fees to plaintiff because it ruled only that requested amount was reasonable without addressing any of their challenges as to why the fees should be reduced. The contention lacks merit.

The plaintiff in *Ketchum v. Moses* (2001) 24 Cal.4th 1122 made a similar argument, i.e., “that the superior court erred by failing to provide a ‘reasoned explanation’ for denying his objections to specific items in the billing records.” (*Id*. at p. 1140.) Rejecting this claim, the court stated: “The superior court was not required to issue a statement of decision with regard to the fee award. [Citation.] Moreover, although [defendants] opposed the motion for attorney fees, [they] did not request a statement of decision with specific findings. ‘“All intendments and presumptions are indulged to support [the judgment] on matters as to which the record is silent, and error must be affirmatively shown.”’” (*Ibid*.)

Here, neither defendants’ original opposition nor their supplemental opposition to plaintiff’s attorney fees motion requested a statement of decision, much less one with specific findings. Moreover, in ruling that “all time and rates are reasonable,” the trial court indicated it had “fully considered the arguments of all parties, both written and oral, as well as the evidence presented.” The court also reduced the “amount charged for paralegal in excess of $125/hour.” These factors show the court exercised its discretion.

Defendants do not otherwise challenge the amount of the legal fees awarded. The court thus did not abuse its discretion in awarding attorney fees and its ruling will not be disturbed on appeal.

DISPOSITION

The judgment is affirmed. Respondent shall recover his costs on appeal.

THOMPSON, J.

WE CONCUR:

O'LEARY, P. J.

ARONSON, J.