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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MARK E. HYATT et al., Cross-complainant and Respondents, v. AURORA WESTERN PACIFIC ADVISORS, INC., Cross-defendant and Appellant.	G052981 (Super. Ct. No. 30-2011-00473005) O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County, Thierry Patrick Colaw, Judge. Reversed and remanded.

Callahan & Blaine, Daniel J. Callahan, Robert Scott Lawrence and Jill A. Thomas for Cross-defendant and Appellant.

Cox, Castle & Nicholson, Perry S. Hughes, Alicia N. Vaz and Lynn T. Galuppo for Cross-complainants and Respondents.

* * *

When a party obtains a judgment dismissing all claims against it, may the trial court deny that party's motion for contractual attorney fees without prejudice to the party again raising the issue after the court decides the claims among the remaining parties? In this case, we answer that question in the negative.

Here, the underlying dispute involves whether Raymond Harper is a member of two limited liability companies with an obligation to pay capital calls issued by those companies. The KDF Parties[1] (KDF) are members of those companies and filed a cross-complaint against Harper for breach of the companies' operating agreements and declaratory relief. At the trial court's suggestion, KDF amended its cross-complaint to add cross-defendant and appellant Aurora Western Pacific Advisors, Inc. (Aurora) as a party on the theory Aurora was Harper's alter ego. After the case was transferred to a different court, Aurora successfully demurred to the cross-complaint on the ground California does not recognize the reverse alter ego theory alleged by KDF. After the court entered judgment dismissing the claims against Aurora, Aurora sought to have KDF pay Aurora's attorney fees under the operating agreements' fee provision. The court denied the motion without prejudice, finding it was premature because the same attorneys

[1] The KDF Parties are cross-complainants and respondents Mark E. Hyatt, KDF Communities, LLC; Almaden 1930 COGP LLC; KDF Communities-Fontaine SJC LLC; Charter Court SJC COGP LLC; Cherry Creek San Jose COGP LLC; KDF Communities-City Towers LLC; KDF Communities-Corona LLC; KDF Communities-San Bruno LLC; KDF Communities-San Bruno II LLC; David Avenue SJC COGP LLC; KDF Communities-Foxdale LLC; KDF Communities-Glen Haven LLC; KDF Communities-Glenview LLC; KDF Communities-Hallmark LLC; KDF Communities-Hermosa LLC; KDF Communities-Hesperia LLC; KDF Communities-Hesperia II LLC; KDF Communities-VAH I LLC; KDF Communities-VAH III LLC; Brea Imperial Park COGP LLC; KDF Communities-Lexington LLC; KDF Communities-Los Padres LLC; KDF Communities-Post Street LLC; KDF Communities-SJC LLC; KDF Regency LLC; KDF Communities-Valley Palms LLC; KDF Communities-Villa Monterey LLC; Windsor Concord COGP LLC; Village at Hesperia Phase I Partners LLC; Village at Hesperia Phase III Partners LLC; Fillmore Industrial Park LLC; Fillmore Riverview LLC; California General Contractors, Inc.; and Paul Fruchbom.

represented Harper, and the continuing litigation against Harper made it difficult for the court to allocate attorney fees between Harper and Aurora.

We reverse and remand for the trial court to grant Aurora's motion and exercise its discretion to allocate attorney fees between Aurora and Harper. Civil Code section 1717 generally vests the court with broad discretion to determine whether there is a prevailing party entitled to recover contractual attorney fees, but only when the results on the contract claims are mixed.[2] When one party obtains an unqualified victory on the contract, the court lacks discretion to determine there is no prevailing party. Because Aurora obtained an unqualified victory against KDF, it was entitled to recover its reasonable attorney fees as a matter of law.

The pendency and outcome of KDF's claims against Harper cannot alter Aurora's status as a prevailing party even though KDF based its claims against Aurora on Harper's conduct. The trial court therefore erred in denying Aurora's motion. The court's concerns about the earlier trial judge's suggestion that KDF consider alleging a reverse alter ego theory, and how the outcome of the claims against Harper will affect the allocation of fees between Aurora and Harper, are equitable considerations the court may consider when exercising its broad discretion to allocate the fees between Aurora and Harper. The court, however, may not rely on those considerations to deny Aurora's motion—even without prejudice—when Aurora obtained an unqualified victory.

KDF contends the trial court's order is a nonappealable, interlocutory order because the court denied Aurora's motion without prejudice. We disagree. Regardless how the court characterized its order, it denied an attorney fee motion made after the court entered a final appealable judgment on the claims between the parties. Under well-established precedent, the order is appealable.

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[2] All statutory references are to the Civil Code unless otherwise stated.

Finally, KDF contends Aurora may not recover fees under the operating agreements because it is not a signatory to those agreements. KDF misconstrues and misapplies the governing law establishing a nonsignatory's right to recover attorney fees when it defeats a signatory's contract claims.

I

FACTS AND PROCEDURAL HISTORY

Fillmore Riverview, LLC and Fillmore Coe, LLC (collectively, Fillmore LLCs) are limited liability companies formed to hold title to two investment properties in Fillmore, California. KDF's numerous parties are members of the Fillmore LLCs and several other limited liability companies formed to hold title to other investment properties.

Harper is a real estate investor who has formed a variety of entities to facilitate and protect his investments, which include investments in several of the same properties as KDF. His interests in many of those entities are held by three trusts he formed to benefit his children and grandchildren (collectively, Harper Trusts). Aurora is an entity Harper formed and he is Aurora's president and sole shareholder. The Harper Trusts contracted with Aurora for consulting services and they transferred most of the distributions they received from the real estate investment companies to Aurora as consulting fees.

Starting in September 2010, the Fillmore LLCs made a series of capital calls on its members because they needed a capital infusion to conduct their business. A dispute arose between Harper and KDF over whether Harper was a member of the Fillmore LLCs and therefore required to answer the calls to contribute additional capital. Harper partially paid some of the initial calls, but refused to pay the balance, claiming he was not a member. KDF responded by withholding the Harper Trusts' distributions from other investments to cover some of Harper's capital calls. KDF relied on a provision

common to the operating agreement covering its limited liability companies that allowed the managing member to withhold distributions owed to any member if necessary to satisfy unpaid capital calls for any other entity in which the member or its principals, beneficiaries, or affiliates hold an interest.

In May 2011, the Harper Trusts' trustee filed this lawsuit to challenge KDF's actions in withholding the Trusts' distributions. The Harper Trusts alleged claims for breach of contract, breach of fiduciary duty, declaratory relief, and accounting, among others. KDF answered the complaint and filed a cross-complaint alleging various claims against the Harper Trusts. The cross-complaint added Harper as a party, and asked for declaratory relief regarding his interests in the Fillmore LLCs and his obligation to pay the capital calls. KDF did not name Aurora in their original cross-complaint. Harper answered the cross-complaint and filed his own cross-complaint against KDF.

The trial court bifurcated the declaratory relief claims and conducted a bench trial focusing on Harper's status as a member of the Fillmore LLCs and his obligation to pay the capital calls. In August 2013, the court issued it statement of decision on this first phase of the trial, finding Harper was a member of the Fillmore LLCs, he was estopped to deny his membership, and he had a contractual obligation to pay all proper capital calls. The court also found Aurora was Harper's alter ego and KDF should join Aurora in the litigation because it was an indispensable party. The court concluded its alter ego finding did not prejudice Aurora because Harper was the sole owner and controlled Aurora, he represented its interests at trial, and the same counsel represented Harper and Aurora.

Based on the trial court's ruling, KDF filed an amended cross-complaint adding Aurora as a party and alleging it was Harper's alter ego for satisfying the capital calls. KDF alleged breach of contract and declaratory relief claims against Aurora based on Harper's failure to pay the capital calls. After filing the amended cross-complaint, KDF successfully moved for writs of attachment against Harper and Aurora based on the

amount of the capital calls and KDF's attorney fees. KDF began extensive discovery to identify assets of Harper and Aurora for attachment.

Harper and Aurora asked the trial court to reconsider its ruling and reopen the first trial phase based on newly discovered evidence. The judge who heard the first phase, however, retired before ruling on the motion. The new judge assigned to the case declared a mistrial because she had not heard the evidence and therefore could not decide the motion. The case was reassigned to a third judge.

In October 2014, KDF filed a second amended cross-complaint alleging claims for breach of contract and declaratory relief against Aurora as Harper's alter ego. Aurora demurred to the new cross-complaint, arguing the claims against it failed as a matter of law because California does not recognize reverse veil piercing to hold an entity responsible for an individual's liabilities, as opposed to the traditional application of the alter ego doctrine that holds an individual responsible for the liabilities of an entity the individual controls when corporate formalities are not followed. The newly assigned judge agreed with Aurora and sustained its demurrer without leave to amend. Based on that ruling, the trial court entered a final judgment dismissing KDF's claims against Aurora. The claims among all other parties still are pending.

Following the entry of judgment, Aurora filed a motion for attorney fees against KDF based on the fee provision in the operating agreements for the Fillmore LLCs. Aurora sought nearly $800,000 in fees, which it contended represented 50 percent of the fees it jointly incurred with Harper to defend against KDF's claims while Aurora was a party to this action. Aurora argued the fee allocation was appropriate because the claims against it were inextricably intertwined with the claims against Harper and its liability was coterminous with Harper's liability. Consequently, it was impossible to segregate the work performed by their shared counsel. KDF opposed the motion, arguing it was inequitable to award fees against them because the judge initially assigned to the case ordered them to name Aurora as a party after the first phase of the trial. They also

argued the court should limit Aurora to fees relating to the alter ego issue because Harper would have incurred all of the other fees regardless of whether Aurora was joined as a party. KDF claimed those fees were less than $15,000.

The trial court denied Aurora's fee motion "without prejudice as premature." The court explained, "There has been no final resolution of the overriding main issues of this complex lawsuit involving, in part, contract claims asserted in KDF's cross-complaint. [¶] The shared interests of Mr. Harper and [Aurora] in defending as separate defendants against the similar claims made against them, and the shared services of multiple sets of attorneys defending them, make guess-work out of the court's review of the attorney billings and any attempt in equity to apportion the fees and decide which of the services benefitted which defendant. [¶] Moving Party's suggestion that the court simply take the gross amount of fees billed and divide by 50% is not acceptable to the court, particularly at this stage of the proceedings where about 98% of the case still needs to be tried and other prevailing parties possibly determined."

II

DISCUSSION

A. *The Trial Court's Order Is an Appealable Postjudgment Order*

KDF contends Aurora has appealed from an interlocutory and nonappealable order. Based on the court's denial of Aurora's attorney fee motion without prejudice to a new motion after the litigation is resolved among all other parties, KDF contends further trial court proceedings between them and Aurora are required to reach a final determination on Aurora's attorney fees request, and therefore no appeal lies at this time. We disagree.

"A postjudgment order awarding or denying attorney's fees is separately appealable, as an order made after an appealable judgment." (*P R Burke Corp. v. Victor Valley Wastewater Reclamation Authority* (2002) 98 Cal.App.4th 1047, 1053

(*P R Burke*); see Code Civ. Proc., § 904.1, subd. (a)(2).) Here, the trial court entered a final, appealable judgment dismissing KDF's claims against Aurora after it sustained Aurora's demurrer to the second amended cross-complaint without leave to amend. That judgment left nothing to be decided regarding the underlying claims between these parties. Aurora then filed its motion for contractual attorney fees. Indeed, Aurora was required to file its fee motion within the period for filing an appeal from the underlying judgment or risk waiving its right to seek fees. (Cal. Rules of Court, rule 3.1702(b)(1); see *Russell v. Trans Pacific Group* (1993) 19 Cal.App.4th 1717, 1723-1725.) The court denied Aurora's motion in its entirety based on the issues that remained between the other parties to the litigation, not any issues that remained between KDF and Aurora.

The trial court's denial of Aurora's motion without prejudice to a future motion after the court resolved the other claims does not make the court's order interlocutory and nonappealable. No matter how the court characterized its order, the court denied an attorney fee motion brought after it entered a final judgment that resolved all the issues between Aurora and KDF. (Code Civ. Proc., § 904.1, subd. (a)(2); *P R Burke*, *supra*, 98 Cal.App.4th at p. 1053.) If the rule were otherwise, a trial court could insulate many of its appealable orders from appellate review by simply denying them without prejudice to the parties later renewing their requests for relief. That is not the law.

To support their contrary contention, KDF points to the following quote from *P R Burke*: "[I]f a judgment provides that the party seeking attorney's fees may renew the motion later, that portion of the judgment is nonfinal and nonappealable. '[Such a] ruling is in the nature of an interlocutory order directing that further proceedings be taken before a determination is made.' (*In re Marriage of Jafeman* (1972) 29 Cal.App.3d 244, 268 [(*Jafeman*)].) Similarly, if a judgment reserves jurisdiction to award attorney fees, that portion of the judgment is nonfinal and

nonappealable. (*Chapman v. Tarentola* (1960) 187 Cal.App.2d 22, 25 [(*Chapman*)].)" (*P R Burke, supra*, 98 Cal.App.4th at p. 1053.) Neither of these propositions apply here.

The *Jafeman* and *Chapman* cases cited in *P R Burke* are readily distinguishable because they are family law cases; neither is a civil action in which the trial court entered a final appealable order resolving all issues between the parties on the underlying claims. (*Jafeman, supra*, 29 Cal.App.3d at pp. 250-251; *Chapman, supra*, 187 Cal.App.2d at pp. 24-25.) Family law courts routinely retain jurisdiction to decide ongoing and future disputes among the parties. Here, there was no further dispute between Aurora and KDF.

P R Burke likewise is readily distinguishable. There, the trial court's judgment denied the plaintiff relief and stated the defendant shall recover its attorney fees under the parties' contract. The defendant then brought a motion to establish the fee amount and the court awarded the defendant approximately $65,000. On the plaintiff's appeal from the postjudgment order, the defendant argued the plaintiff could challenge the amount of fees, but not the defendant's entitlement to fees, because the plaintiff failed to timely appeal from the judgment deciding the defendant's right to fees. (*P R Burke, supra*, 98 Cal.App.4th at pp. 1051-1052.) In rejecting this argument, the appellate court explained the portion of the judgment deciding the entitlement issue was interlocutory and nonappealable because further judicial action to decide the amount of fees was required to finally determine the attorney fee issue. *P R Burke* allowed the plaintiff to attack both the entitlement to and the amount of fees on the plaintiff's appeal from the postjudgment order because that was the first order that finally determined the entire attorney fee issue. (*Id*. at pp. 1054-1055.)

In contrast, the trial court here did not decide a portion of Aurora's attorney fee motion and leave a portion for later determination. Rather, the court denied the motion in its entirety, forcing Aurora to wait until the claims of the other parties are resolved. No further judicial action was required on this motion, and therefore the court's

order is final and appealable under Code of Civil Procedure section 904.1, subdivision (a)(2). KDF cites no authority to support its contention to the contrary.[3]

B. *The Attorney Fee Provision in the Operating Agreements Applies to a Nonsignatory that Defeated a Signatory's Contract Claims*

KDF contends Aurora may not recover its attorney fees under the fee provision in the Fillmore LLCs' operating agreements because Aurora is not a party to those agreements. KDF misconstrues the governing law.

"A party may not recover attorney fees unless expressly authorized by statute or contract. [Citations.] In the absence of a statute authorizing the recovery of attorney fees, the parties may agree on whether and how to allocate attorney fees." (*Brown Bark III, L.P. v. Haver* (2013) 219 Cal.App.4th 809, 818 (*Brown Bark*); Code Civ. Proc., § 1021.) "To ensure mutuality of remedy, however, section 1717 makes an attorney fee provision reciprocal even if it would otherwise be unilateral either by its terms or in its effect." (*Brown Bark,* at p. 818.)

Section 1717's reciprocity principles enable a nonsignatory to recover attorney fees under a contract's attorney fee provision when the nonsignatory defeats a signatory's efforts to enforce the contract. (*Brown Bark, supra,* 219 Cal.App.4th at p. 819.) As our Supreme Court has explained, "Its purposes require section 1717 be interpreted to further provide a reciprocal remedy for a nonsignatory defendant, sued on a

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[3] KDF's string cite to *Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 698, *Pacific Corporate Group Holdings, LLC v. Keck* (2014) 232 Cal.App.4th 294, 305-306, and *Meyers v. Guarantee Savings & Loan Assn.* (1978) 79 Cal.App.3d 307, 313, does not support its position. *Griset* simply states and applies the one final judgment rule, but it does not involve a postjudgment attorney fee motion. Although *Pacific Corporate Group* and *Meyers* involved orders on attorney fee requests, those orders were nonappealable because they were made before judgment and other claims between the parties remained. The order here is appealable because it is an order entered after the trial court entered a final, appealable judgment resolving all claims between Aurora and Hyatt.

contract as if he were a party to it, when a plaintiff would clearly be entitled to attorney[] fees should he prevail in enforcing the contractual obligation against the defendant." (*Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 128; see *Brown Bark*, at pp. 819-820 ["'in cases involving nonsignatories to a contract with an attorney fee provision, the following rule may be distilled from the applicable cases: A party is entitled to recover its attorney fees pursuant to a contractual provision only when the party would have been liable for the fees of the opposing party if the opposing party had prevailed'"].)

KDF acknowledges these principles, but nonetheless contends Aurora may not recover attorney fees as a nonsignatory who defeated KDF's contract claims because Aurora cannot show KDF would have been entitled to recover its fees if it had prevailed. According to KDF, section 1717's reciprocity principles do not apply here because KDF could not have prevailed on its claims against Aurora *as a matter of law* based on the trial court's ruling KDF's reverse alter ego theory was against public policy and not allowed under California law. Stated differently, KDF argues it had no chance to prevail and recover its attorney fees, and therefore Aurora cannot recover its attorney fees. In support, KDF relies on cases holding that no party may recover contractual attorney fees when the court finds the underlying contract is unenforceable as against public policy. (See, e.g., *Yoo v. Jho* (2007) 147 Cal.App.4th 1249, 1256 (*Yoo*); *Bovard v. American Horse Enterprises, Inc.* (1988) 201 Cal.App.3d 832, 844; *Geffen v. Moss* (1975) 53 Cal.App.3d 215, 227.) KDF misconstrues and misapplies these authorities.

The reason why the signatory's contract claims failed generally is irrelevant to the nonsignatory's right to recover attorney fees for defeating those claims. Regardless whether the nonsignatory defeated the signatory's contact claims on the ground they were legally or factually deficient, it is entitled to its attorney fees if the signatory would have been able to recover its fees had it prevailed on its contract claims. The proper analysis *assumes* the signatory prevailed on its contract claims without considering the likelihood

of that outcome, and then asks whether that signatory would have been entitled to recover its attorney fees under the contract.

The cases on which KDF relies establish a limited exception for illegal contracts. "Because courts generally will not enforce an illegal contract, there is no need for a mutual right to attorney fees since neither party can enforce the agreement." (*Yuba Cypress Housing Partners, Ltd. v. Area Developers* (2002) 98 Cal.App.4th 1077, 1082; see, e.g., *Yoo*, *supra*, 147 Cal.App.4th at p. 1256.) The rationale for this limited exception is to deter illegal conduct. As one court explained, "'[k]nowing that they will receive no help from the courts and must trust completely to each other's good faith, the parties are less likely to enter an illegal arrangement in the first place.'" (*Yoo*, at p. 1255.)

Section 1717's reciprocity principles, however, allow a party to recover attorney fees when it defeats a contract claim on the grounds the contract is inapplicable, invalid, unenforceable, or nonexistent for any reason other than illegality. Indeed, "'If section 1717 did not apply in this situation, the right to attorney fees would be effectively unilateral . . . because only the party seeking to affirm and enforce the agreement could invoke its attorney fee provision.'" (*Brown Bark, supra,* 219 Cal.App.4th at p. 819.)

Here, there is no claim the Fillmore LLCs' operating agreements are illegal or unenforceable in any way. Rather, the court found KDF's contract claims failed because they based the claims on a reverse alter ego theory California law does not recognize.[4] KDF cites no authority denying a successful nonsignatory its attorney fees when the signatory's claims fail because they are against public policy, as opposed to the underlying contact being against public policy. Thus, public policy prohibited KDF's

[4] We express no opinion on whether California law recognizes a reverse alter ego theory and, if so, under what circumstances. The trial court ruled California law does not recognize that theory and KDF did not challenge that ruling. We therefore accept it for this appeal.

theory of liability, but not the underlying contract. Aurora is entitled to the benefit of the attorney fee provision in the Fillmore LLCs' operating agreements.

C. *The Trial Court Erred in Failing to Find Aurora Was the Prevailing Party on the Contract*

1. Governing Legal Principles

When the parties' contract authorizes attorney fees, the trial court must award reasonable attorney fees to "the party prevailing on the contract." (§ 1717, subd. (a); *EnPalm, LLC v. Teitler* (2008) 162 Cal.App.4th 770, 774 (*EnPalm*).) Upon motion by a party, the trial court must "determine who is the party prevailing on the contract." (§ 1717, subd. (b)(1).) "Except [where an action has been voluntarily dismissed or dismissed pursuant to a settlement], the party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract. The court may also determine that there is no party prevailing on the contract for purposes of this section." (*Ibid.*)

Section 1717 therefore vests the trial court deciding a contractual attorney fee motion with discretion to determine which party prevailed on the contract, or that no party prevailed, but that discretion is not unlimited. "'If neither party achieves a complete victory on all the contract claims, it is within the discretion of the trial court to determine which party prevailed on the contract or whether, on balance, neither party prevailed sufficiently to justify an award of attorney fees.' . . . [A] party who obtains an unqualified victory on a contract dispute, including a defendant who defeats recovery by the plaintiff on the plaintiff's entire contract claim, is entitled as a matter of law to be considered the prevailing party for purposes of section 1717. [Citation.] But 'when the results of the [contract] litigation are mixed,' the trial court has discretion under the statute to determine that no party has prevailed.'" (*DisputeSuite.com, LLC v. ScoreInc.com* (Apr. 6, 2017, S226652) ___ Cal.4th ___, ___ [2017 Cal.LEXIS 2550,

*6].) Section 1717 therefore "allow[s] those parties whose litigation success is not fairly disputable to claim attorney fees as a matter of right, [and] reserv[es] for the trial court a measure of discretion to find no prevailing party when the results of the litigation are mixed." (*Hsu v Abbara* (1995) 9 Cal.4th 863, 876 (*Hsu*).)

"[I]n deciding whether there is a 'party prevailing on the contract,' the trial court is to compare the relief awarded on the contract claim or claims with the parties' demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources. The prevailing party determination is to be made only upon final resolution of the contract claims and only by 'a comparison of the extent to which each party ha[s] succeeded and failed to succeed in its contentions.'" (*Hsu*, *supra*, 9 Cal.4th at p. 876.) "*[I]n determining litigation success*, courts should respect substance rather than form, and to this extent should be guided by 'equitable considerations.' For example, a party who is denied direct relief on a claim may nonetheless be found to be a prevailing party if it is clear that the party has otherwise achieved its main litigation objective." (*Id.* at p. 877.)

"A trial court has wide discretion in determining which party is the prevailing party under section 1717, and we will not disturb the trial court's determination absent 'a manifest abuse of discretion, a prejudicial error of law, or necessary findings not supported by substantial evidence.'" (*Silver Creek, LLC v. BlackRock Realty Advisors, Inc.* (2009) 173 Cal.App.4th 1533, 1539.)

2. Aurora Is the Prevailing Party Because It Obtained an Unqualified Victory Against KDF

Aurora contends the trial court erred in denying its fee motion—even though the court denied it without prejudice—because Aurora obtained an unqualified victory against KDF on all contract claims it alleged against Aurora, and therefore was the prevailing party as a matter of law. We agree.

Aurora became a party to this lawsuit only after the trial court conducted a bench trial on the declaratory relief claims and found Aurora was Harper's alter ego. Based on the court's finding, KDF amended its cross-complaint to add Aurora as a cross-defendant and to allege breach of contract and declaratory relief claims against Aurora. No other parties alleged a claim against Aurora and it did not allege a claim against any party. Aurora defeated all claims KDF alleged against it when the court sustained Aurora's demurrer without leave to amend and entered judgment in Aurora's favor. This can only be viewed as a complete victory for Aurora. Indeed, KDF sought to hold Aurora liable as Harper's alter ego on the breach of contract and declaratory relief claims, but the court dismissed those claims against Aurora with prejudice and the court's judgment prevents KDF from seeking to renew them. The court therefore had no discretion to deny Aurora's attorney fee motion under section 1717, and erred in doing so. (*Hsu*, *supra*, 9 Cal.4th at p. 877 [defendant who obtained judgment on only contract claim plaintiff alleged was prevailing party entitled to contractual attorney fees as matter of law]; *de la Cuesta v. Benham* (2011) 193 Cal.App.4th 1287, 1299 [trial court abused discretion in denying contractual attorney fees to landlord who succeeded in recovering possession of leased property and 70 percent on monetary damages sought from tenant].)

That the underlying breach of contract and declaratory relief claims remain pending against Harper, as do all other claims alleged in this action, does not alter the fact Aurora obtained a complete victory against KDF. No matter how those other claims eventually are decided, KDF cannot obtain any relief from Aurora on those claims. The judgment the trial court entered ended this litigation as to Aurora even though, in the words of the court, "[t]here has been no final resolution of the overriding main issues of this complex lawsuit involving, in part, contract claims asserted in . . . KDF[']s] . . . cross-complaint."

In seeking to delay its determination of the prevailing party question, the trial court apparently relied on the statement in *Hsu* that "[t]he prevailing party

determination is to be made *only upon final resolution of the contract claims* and only by 'a comparison of the extent to which each party ha[s] succeeded and failed to succeed in its contentions.'" (*Hsu*, *supra*, 9 Cal.4th at p. 876, italics added.) But the court resolved the contract claims between KDF and Aurora and the judgment completely disposes of those claims. Indeed, a comparison of the relative success of the parties' contentions reveals that Aurora completely succeeded on its claim that it cannot be liable for Harper's actions as a matter of law, and KDF completely failed on its contention that Aurora was liable as Harper's alter ego.

To support the trial court's decision, KDF cites *Hilltop Investment Associates v. Leon* (1994) 28 Cal.App.4th 462 (*Hilltop Investment*), which involved a dispute among producers and investors regarding ownership of a film. The investors sued the producers for breach of contract and open account, and they joined the individual appellant as the producers' alter ego. The investors prevailed on their claims against the producers and obtained a judgment for more than $200,000, but the court entered judgment for the individual appellant on the alter ego claim because the court found the investors failed to show he was the producers' alter ego even though he controlled them and directed their actions. The individual appellant then moved for contractual attorney fees against the investors, but the court denied the motion because it determined there was no prevailing party when it viewed the lawsuit as a whole. The court explained fairness dictated that the court determine the individual appellant was not the prevailing party because he directed and controlled the actions that gave rise to the judgment against the producers even though he was not individually liable. The individual appellant appealed. (*Id*. at pp. 464-465.)

Recognizing the broad discretion the trial court had under section 1717 to determine the prevailing party, the Court of Appeal affirmed because it found the trial court did not abuse its discretion. The *Hilltop Investment* court explained, "Technically speaking, appellant was 'a prevailing party' in that personal liability was not visited upon

him in the concept of alter ego. However, respondents were also prevailing parties in relation to the partnership over which appellant exerted control causing [the investors] to have to sue. While the court found insufficient evidence to pierce the corporate veil, it did find that appellant was, in effect, the cause of the action taken by the [producers] resulting in litigation. Under the circumstances the result was a draw . . . ." (*Hilltop Investment, supra*, 28 Cal.App.4th at p. 468.)

At first blush, *Hilltop Investment* has some visceral appeal as a basis for upholding the trial court's decision because it involves a party who successfully defeated an alter ego claim similar to KDF's claim against Aurora. Upon closer examination, however, *Hilltop Investment* is distinguishable on at least two important grounds that render it inapplicable here.

First, *Hilltop Investment* involved a traditional alter ego claim that sought to hold an individual liable for the actions of an entity the individual controlled and directed. Although the trial court found the alter ego doctrine did not apply (apparently because the individual followed the corporate formalities and did not commingle assets), the court found fairness dictated the conclusion that the individual was not the prevailing party because he nonetheless controlled and directed the actions of the entities that gave rise to the judgment against the entities.

Here, KDF pursued a *reverse* alter ego claim, seeking to hold the entity (Aurora) liable for the actions of the individual (Harper). The trial court dismissed that claim because it concluded California law does not recognize a reverse alter ego theory of liability. In entering judgment for Aurora and denying the fee motion, the court did not find that Aurora controlled or directed Harper's actions giving rise to the claims against him. Accordingly, the central fact that supported the trial court's determination there was no prevailing party in *Hilltop Investment* is absent here.

Second, the *Hilltop Investment* trial court made its prevailing party determination after all claims alleged in the action had been decided and the court had

entered judgment as to all parties. Here, as the trial court emphasized, the vast majority of the claims remain to be decided. KDF does not cite any authority that allows a trial court indefinitely to delay its prevailing party determination until other claims in the case are decided. Aurora successfully defeated all claims against it and it had a right to seek its attorney fees.

We are sympathetic to the trial court's concerns about the potential difficulty in apportioning attorney fees for the work performed by Aurora's and Harper's shared attorneys, but those are apportionment concerns. They have no bearing on the prevailing party determination. The court must make that determination based on a comparison of the relative success of Aurora and KDF on the contract claims between them. As explained above, the claims between Harper and KDF have no impact on that determination.

We also recognize KDF did not initially include Aurora in this lawsuit, and it only added its claims against Aurora after the first trial judge found Aurora was Harper's alter ego and suggested KDF add Aurora as a party. KDF nonetheless made the final decision to join Aurora as a party and Aurora ultimately prevailed on every claim KDF alleged against Aurora. KDF also did not appeal from the judgment to challenge the ruling in Aurora's favor. These are all equitable considerations that could have been considered if this was a case with mixed results, which would allow the trial court discretion to decide whether Aurora was a prevailing party. But Aurora obtained an unqualified victory, and therefore the court lacked discretion to determine Aurora did not prevail. The experienced and conscientious judge in this case may weigh these equitable considerations when he exercises his discretion to apportion the attorney fees between Aurora and Harper.

D. *We Remand for the Trial Court to Apportion Fees Between Aurora and Harper*

Aurora contends the trial court abused its discretion by failing to allocate to Aurora 50 percent of the attorney fees it jointly incurred with Harper while it was a party to this lawsuit. According to Aurora, a 50/50 division between it and Harper is the only reasonable allocation because Aurora's potential liability mirrored Harper's based on KDF's alter ego theory. Aurora contends we therefore should remand with directions for the trial court to award it 50 percent of the fees, or approximately $783,000. Although we agree the court abused its discretion in failing to apportion the attorney fees, we do not agree a 50/50 allocation is the only reasonable allocation.

"The trial court has broad discretion to determine the amount of a reasonable fee, and the award of such fees is governed by equitable principles." (*EnPalm, supra,* 162 Cal.App.4th at p. 774.) In making a contractual attorney fee award, the trial court generally is required to allocate fees "when the same lawyer represents one party that is entitled to recover its attorney fees and another party that is not." (*Brown Bark III, supra,* 219 Cal.App.4th at p. 830.) Indeed, "[a] prevailing defendant 'may recover only reasonable attorney fees incurred in [its] defense of the action by [the plaintiff].'" (*Hill v. Affirmed Housing Group* (2014) 226 Cal.App.4th 1192, 1197 (*Hill*).)

"'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.'" (*Hill, supra,* 226 Cal.App.4th at p. 1197.) "[A]llocation among jointly represented parties 'is not required when the liability of the parties is "so factually interrelated that it would have been impossible to separate the activities . . . into compensable and noncompensable time units."'" (*Brown Bark, supra,* 219 Cal.App.4th at p. 830; see *Hill,* at p. 1197.) At the same time, "'"[a] court may apportion fees even where the issues are connected, related or intertwined."' [Citation.] And, '"although time-keeping and billing procedures may make a requested segregation difficult, they do not, without more, make it impossible."'" (*Hill,* at p. 1197;

see *Zintel Holdings, LLC v. McLean* (2012) 209 Cal.App.4th 431, 443 (*Zintel Holdings*).) Accordingly, whether and how to allocate fees in cases involving jointly represented parties and intertwined claims is vested in the trial court's sound discretion, and will be disturbed on appeal only for a manifest abuse of that discretion. Indeed, the appellate courts have upheld both the decision to allocate and the decision not to allocate depending on the facts of the case. (See, e.g., *Hill*, *supra*, 226 Cal.App.4th at pp. 1196-1198 [upholding award despite no allocation]; *Cruz v. Ayromloo* (2007) 155 Cal.App.4th 1270, 1273-1274, 1277-1278 [upholding trial court's allocation].)

Here, the trial court erred when it declined to designate Aurora as the prevailing party and when it refused to exercise its discretion to allocate attorney fees between Aurora and Harper at the time it heard Aurora's motion, concluding it could not fairly do so until all of the other claims were resolved. In the court's words, "[it] kick[ed] this can down the line until [it] find[s] out what's going to happen in some of the other aspects of the case." As explained above, Aurora was the prevailing party as a matter of law, and therefore the court was required to exercise its discretion and determine how to allocate the attorney fees between Aurora and Harper.

Both sides argue we should allocate the fees and direct the trial court to award a specific amount. As stated, Aurora contends the only reasonable allocation is a 50/50 division that awards approximately $783,000 in attorney fees. KDF contends the only reasonable allocation limits Aurora strictly to the fees incurred on the alter ego issues and results in an award of approximately $15,000.

Each of those is certainly a possible allocation, but we cannot determine which is the appropriate allocation in the first instance. The discretion to make that allocation is vested in the trial court, and it is the best judge of the value of professional services rendered in its court. We therefore remand for the trial court to make this determination. (*Brown Bark*, *supra*, 219 Cal.App.4th at p. 830; *Zintel Holdings*, *supra*, 209 Cal.App.4th at p. 444.)

III

DISPOSITION

The order is reversed and remanded for the trial court to grant Aurora's motion and exercise its discretion to allocate attorney fees between Aurora and Harper. Aurora shall recover its costs on appeal.

ARONSON, J.

WE CONCUR:

O'LEARY, P. J.

THOMPSON, J.