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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

JAMES C. HILL et al.,

Plaintiffs and Respondents,

v.

AFFIRMED HOUSING GROUP et al.,

Defendants and Appellants.

H035541

(Santa Clara County

Super. Ct. No. CV087095)

Respondents James C. Hill and Dawn L. Hill as trustees under a revocable trust dated February 17, 1977 (the Hills) sued San Jose Family Housing Partners, LLC (LLC) and appellant Affirmed Housing Group (Affirmed), a managing member of LLC. The complaint alleged LLC's construction of a multi-unit residential development obstructed the view of a billboard owned and operated by the Hills and thus violated a written easement agreement.

Following a court trial, the court found in favor of Affirmed since the Hills "introduced no evidence at trial to establish that Affirmed engaged in any actions outside of its capacity as a member of [LLC] that would give rise to the independent liability of Affirmed in this action." The court entered judgment in Affirmed's favor and determined it was "the prevailing party *with respect to claims against it* and for submission of a costs bill." (Italics added.) Affirmed subsequently moved for contractual attorney fees

pursuant to Civil Code section 1717,¹ but its motion was denied on two independent grounds: (1) Affirmed was not a prevailing party on the underlying contract; and (2) it was barred from recovery based on the principle of unity of interest.

Affirmed appeals, arguing the trial court erred in finding the Hills were the prevailing party on the underlying contract and the principle of unity of interest is not a bar to Affirmed recovering contractual attorney fees.

We agree and shall reverse.

I. FACTUAL AND PROCEDURAL BACKGROUND

LLC owns real property burdened by an easement agreement in favor of the Hills. The purpose of the easement is to allow for the operation and maintenance of a billboard. Affirmed is a managing member of LLC.

When LLC submitted plans to construct an 86-unit residential development project on its property to the City of San Jose, the Hills objected, believing the project would interfere with the visibility of their billboard and thus violate the easement. The City of San Jose declined to halt the development. The Hills subsequently filed a verified complaint against LLC, Affirmed and another defendant² seeking monetary and injunctive relief. The Hills' complaint listed causes of action for: (1) temporary restraining order and preliminary injunction; (2) declaratory relief; (3) breach of contract; and (4) civil conspiracy. Affirmed and LLC filed a joint verified answer raising a number of affirmative defenses, including the defense that Affirmed was not a proper party to the action as it had no ownership interest in the real property and was simply LLC's administrative general partner.

¹ Further unspecified statutory references are to the Civil Code.

² That defendant, Didier DeGery, was dismissed before trial and is not a party to this appeal.

The parties agreed to a court trial, at which Affirmed and LLC were jointly represented by the law firm of Incorvaia & Associates. In the joint trial brief, Affirmed argued it could not be liable, as a matter of law, for LLC's actions solely because of its status as a member of LLC, citing Corporations Code section 17101. Affirmed and LLC also jointly argued: (1) the easement could not be enforced because the billboard was an illegal structure; and (2) the easement does not expressly provide for a right to an unobstructed view.

In the first phase of the trial, the parties presented evidence on Affirmed and LLC's affirmative defense that the easement agreement could not be enforced on the grounds that the billboard was an illegal nonconforming structure. Affirmed's motion for nonsuit was denied without prejudice. On November 18, 2008, the court issued an order rejecting Affirmed and LLC's affirmative defense of illegality.

In the second phase of the trial, the parties argued whether the easement agreement could be interpreted to include a view easement, with Affirmed and LLC jointly arguing that a view easement must be express in order to be enforced. Affirmed and LLC also presented expert testimony regarding the scope of the Hills' damages, if any, that could be attributed to any obstruction of the billboard. Following the close of evidence, the trial court took the matter under submission and requested that each of the parties submit a proposed statement of decision.

In its March 25, 2009 decision and order, the trial court found that the easement agreement must be interpreted "to allow viewing of the billboard," and that LLC's development violated the easement agreement by partially obstructing that view. The court awarded damages to the Hills in the amount of \$778,539.³ As to Affirmed,

³ In a related independent appeal, we found the trial court properly awarded judgment in favor of the Hills in its action against LLC, but determined it erred in denying LLC's motion for a new trial on the issue of damages. (*Hill v. San Jose Family Housing Partners, LLC* (2011) 198 Cal.App.4th 764.) Accordingly, we remanded the (continued)

however, the trial court found that it was not a proper defendant in the action and judgment should be entered in its favor. Affirmed was deemed to be “the prevailing party with respect to claims against it and for submission of a costs bill.”

Following entry of judgment in its favor, Affirmed submitted a memorandum of costs, which the Hills neither challenged nor moved to tax. On October 23, 2009, Affirmed moved to recover attorney fees and costs pursuant to section 1717. Affirmed’s motion was based on an attorney fees provision in the easement agreement which reads: “If any proceeding or court action arising out of this Agreement is subsequently initiated by any party hereto, the prevailing party in such action shall be entitled to costs, including reasonable attorney’s fees.” The Hills argued in their opposition papers that they should be deemed the prevailing parties on the contract, rather than Affirmed.

The Hills subsequently filed a motion for attorney fees,⁴ and in their reply papers, argued that Affirmed was barred from recovering contractual attorney fees under the unity of interest principle.

Affirmed’s motion was initially heard on December 4, 2009, but argument was continued to January 29, 2010, to coincide with the hearing on the Hills’ attorney fees motion. At the continued hearing, Affirmed’s counsel responded to the Hills’ unity of interest argument by pointing out that the argument had first been raised in the reply papers in support of the Hills’ motion for attorney fees. Affirmed’s counsel was thus “not sure it was properly brought up.” However, counsel did not request a postponement of the hearing or an opportunity to further respond to the argument in writing, but briefly addressed the issue on the merits.

matter for a new trial limited to the issue of damages, but stayed further proceedings between the Hills and LLC pending final resolution of the City of San Jose’s efforts to remove the Hills’ billboard. (*Id.* at p. 780.)

⁴ The motion was untimely, but the Hills sought and obtained relief from the late filing of their motion pursuant to Code of Civil Procedure section 473.

In a written order, the trial court denied Affirmed's motion, finding it was "not the prevailing party on the underlying contract as Plaintiff's [*sic*] recovered the greater relief in the action on the contract within the meaning of Civil Code section 1717. The Court finds that Plaintiffs, who recovered a monetary judgment in the amount of \$778,539.00, are the prevailing parties as they received the greater relief, as opposed to Affirmed which was dismissed from the action based solely upon its status as the managing partner of [LLC]. Defendant Affirmed did not receive a monetary award." The court also found that Affirmed was "barred from recovery of an award of attorney's fees based upon principles of unity of interest with co-defendant [LLC.]"

Affirmed timely appealed.

II. DISCUSSION

A. Standard of review

On appeal from an attorney fees order under section 1717, the trial court has wide discretion in determining which party has prevailed and we will not disturb that determination unless "a manifest abuse of discretion, a prejudicial error of law, or necessary findings not supported by substantial evidence" is demonstrated. (*Yield Dynamics, Inc. v. TEA Systems Corp.* (2007) 154 Cal.App.4th 547, 577.)

B. Prevailing party

Affirmed contends the trial court erred in finding the Hills were the prevailing party on the contract for purposes of attorney fees under section 1717. Affirmed argues that it obtained an unqualified victory against the Hills, who failed to establish any basis for recovering damages or obtaining any relief against Affirmed, and simply because the Hills obtained a substantial judgment against LLC does not mean that they achieved their litigation objectives as to Affirmed as well. We agree.

Where one party obtains " 'a simple, unqualified win' " by either completely succeeding on its contract claim or by defeating the contract claim, the trial court cannot deny an award of fees under section 1717. (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 876

(*Hsu*.) “The words ‘shall be [awarded]’ reflect a legislative intent that [the prevailing party] receive attorney fees *as a matter of right* (and that the trial court is therefore *obligated* to award attorney fees) whenever the statutory conditions have been satisfied.” (*Id.* at p. 872.) Conversely, where neither party achieves a complete victory, the trial court has discretion to determine “which party prevailed on the contract or whether, on balance, neither party prevailed sufficiently to justify an award of attorney fees.” (*Scott Co. v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1109.)

“[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.) Courts must “respect substance rather than form” in determining the prevailing party: “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.) It is also well-established that “the party recovering ‘greater relief in the action on the contract’ under section 1717, subdivision (b)(1) does not necessarily mean the party receiving the greater monetary judgment.” (*Sears v. Baccaglio* (1998) 60 Cal.App.4th 1136, 1154.)

Following the close of evidence at trial, the court entered judgment in Affirmed’s favor because it was immune from suit under Corporations Code section 17101 and the Hills had presented *no* evidence to show that it engaged in any conduct outside of its

capacity as a member of LLC.⁵ Affirmed was thus able to avoid *any* liability for paying the substantial damages awarded to the Hills against its codefendant LLC. We cannot imagine how Affirmed's victory in this case could be described as anything less than complete.

The Hills sought a permanent injunction and an award of monetary damages against Affirmed. They obtained neither. The Hills's recovery against LLC, a separate party, is irrelevant. It is also irrelevant that Affirmed did not obtain a monetary award against the Hills, since Affirmed sought no such award. Under *Hsu*, the trial court had no choice but to grant Affirmed's motion for attorney fees, and its failure to do so was an abuse of discretion. (*Hsu, supra*, 9 Cal.4th at p. 876.)

C. *Unity of interest*

We next turn to whether the trial court's decision could be justified by application of the unity of interest principle.

1. *Affirmed's procedural objection is waived*

Affirmed argues the trial court should never have considered this argument in the first place. The principle was not raised in the Hills's opposition to Affirmed's motion for attorney fees, but rather was mentioned in the Hills's reply in favor of their separately-noticed motion for attorney fees. Affirmed contends it was a violation of due process for the court to rely on this principle without first giving Affirmed the opportunity to brief the issue.

Affirmed's procedural objection is untimely. If Affirmed desired an opportunity to further brief the matter or prepare for argument, it should have made that request of the trial court. Accordingly, we consider the objection waived. (*Hepner v. Franchise Tax Bd.* (1997) 52 Cal.App.4th 1475, 1486.)

⁵ The Hills did not appeal from the judgment entered in favor of Affirmed, and that judgment is final.

2. *Unity of interest principle does not apply to section 1717*

Affirmed argues that the trial court erred in applying the unity of interest principle to a claim for contractual attorney fees under section 1717, as opposed to an application for costs under Code of Civil Procedure section 1032. In support of this argument, Affirmed notes that all the published decisions discussing the unity of interest principle involve costs bills, not contractual attorney fee claims. However, even if the principle were applicable, Affirmed asserts that it prevailed against the Hills on a defense that was entirely separate from those raised by LLC and was thus not united in interest with that entity.

Under Code of Civil Procedure section 1032, subdivision (b), a prevailing party is entitled “as a matter of right” to recover its costs. However, “where one of multiple, jointly represented defendants presenting a unified defense prevails in an action, the trial court has discretion to award or deny costs to that party.” (*Textron Financial Corp. v. National Union Fire Ins. Co.* (2004) 118 Cal.App.4th 1061, 1075.) As we noted in *Wakefield v. Bohlin* (2006) 145 Cal.App.4th 963, the unity of interest principle “originally was a creature of statute.” (*Id.* at p. 984; and see, e.g., *Smith v. Circle P Ranch Co.* (1978) 87 Cal.App.3d 267, quoting former Code Civ. Proc., § 1032.)⁶ “In those instances in which several defendants are united in interest and/or join in making the same defenses in the same answer, the allowance or disallowance of an award to prevailing defendants lies within the sound discretion of the court.” (*Smith v. Circle P Ranch Co., supra*, at p. 272.) Though the statute’s language has changed, nothing

⁶ Former Code of Civil Procedure section 1032 allowed costs as a matter of right to “ ‘the defendant upon judgment in his favor . . . [and] when there are several defendants in any action . . . not united in interest, and making separate defenses by separate answers, and plaintiff fails to recover judgment against all, the court must award costs to such of the defendants as have judgment in their favor.’ ” (Former Code Civ. Proc., § 1032, subd. (b), as quoted in *Smith v. Circle P Ranch Co., supra*, 87 Cal.App.3d at p. 271, italics omitted.)

suggests that the Legislature intended to change its meaning as well, and it is clear “the underlying precept enunciated in *Smith* continues to apply.” (*Wakefield v. Bohlin, supra*, at p. 985.)

Prior versions of section 1717, conversely, did *not* confer discretion on the trial court, in cases involving multiple defendants, to allow or disallow an award of attorney fees to a prevailing defendant who had a unity of interest with a (presumably nonprevailing) codefendant. Given this lack of a statutory antecedent, it is not surprising that our research has disclosed no published California authority extending the unity of interest principle to claims for contractual attorney fees under section 1717. We see no reason to extend that principle here, either.

However, even assuming the unity of interest principle is equally applicable to claims for contractual attorney fees, we conclude it would not operate to bar Affirmed’s claim for attorney fees in this case because Affirmed prevailed at trial on an *entirely separate* defense from those raised by LLC. Although Affirmed filed a joint answer with LLC, was represented by the same counsel throughout the case and joined in all the substantive arguments raised by LLC,⁷ ultimately Affirmed was found not liable due to its statutory immunity.

III. DISPOSITION

The order denying Affirmed’s motion for attorney fees is reversed and the matter is remanded to the trial court for a determination of the amount of reasonable attorney fees to be awarded to Affirmed. We express no opinion on the amount of attorney fees

⁷ We note the record does not disclose whether or not Affirmed moved for summary judgment on its affirmative defense of statutory immunity. Since the Hills presented no evidence at trial to overcome that defense, we presume Affirmed would have prevailed on such a motion, thus avoiding the (likely substantial) attorney fees generated both in preparing for trial and in the course of the trial itself.

that the trial court, in its “wide discretion,” should award on remand. (*Heppler v. J.M. Peters Co.* (1999) 73 Cal.App.4th 1265, 1297.)

Affirmed shall recover its costs on appeal.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.