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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

LYNN DARTON,

Plaintiff, Cross-Defendant and  
Respondent,

v.

PARK VASONA GAS, INC., et al.,

Defendants, Cross-Complainants  
and Appellants.

H037499

(Santa Clara County  
Super. Ct. No. CV120344)

Defendants Park Vasona Gas, Inc., Francy Amidi, and Anthony J. Ellenikiotis appeal from that part of a judgment awarding attorney fees to plaintiff Lynn Darton after plaintiff prevailed at trial in a dispute over his sale of a gas station to defendants. They contend that plaintiff was not entitled to attorney fees because he failed to propose mediation of the dispute before suing, as required by the sales contract. We agree with other courts that the contract means what it says: plaintiff's failure to seek mediation precludes an award of attorney fees. But we agree only insofar as the prosecution of plaintiff's complaint is concerned. Plaintiff also prevailed on a cross-complaint for breach of the sales contract brought by Park Vasona and is entitled to recover defensive attorney fees from Park Vasona. We therefore reverse the judgment and remand the matter for consideration of an award for plaintiff's defensive attorney fees.

## BACKGROUND

Plaintiff sold his Chevron gas station to “MIKE & FRANCY N. AMIDI AND/OR ASSIGNEE.” The purchase agreement was on a California Association of Realtors standard form designated as “BUSINESS PURCHASE AGREEMENT AND RECEIPT FOR DEPOSIT.” It included an attorney’s fee provision (Paragraph 35) that provided as follows: “In any action, proceeding, or arbitration between Buyer and Seller arising out of this Agreement, the prevailing Buyer or Seller shall be entitled to reasonable attorney’s fees and costs, except as provided in paragraph 31A.” Paragraph 31A stated the following: “Buyer and Seller agree to mediate any dispute or claim arising between them out of this Agreement, or any resulting transaction, before resorting to arbitration or court action . . . . If any party commences an action based on a dispute or claim to which this paragraph applies, without first attempting to resolve the matter through mediation, then that party shall not be entitled to recover attorney’s fees, even if they would otherwise be available to that party in any such action.”

Part of the purchase price consisted of a promissory note payable to “Darton, Inc.” by “Park Vasona Gas, Inc.” for \$275,000 signed by “Francy Amidi” and “Anthony J. Ellenikiotis” on behalf of Park Vasona. The note included an attorney fee clause providing that “Obligor promises to pay the reasonable attorney’s fees incurred by Lender from any collection action on this Note.”

The promissory note was secured by the property and fixtures of the business evidenced by a security agreement signed by Amidi and Ellenikiotis on behalf of Park Vasona. The security agreement included an attorney fee clause providing that “The prevailing party shall be entitled to reasonable attorneys fees in any legal action on this Agreement.”

The promissory note was guaranteed by Amidi and Ellenikiotis and evidenced by a guaranty agreement. The guaranty agreement recited that Amidi and Ellenikiotis guaranteed the note “in consideration of [Darton, Inc.] entering into the [promissory note]

with [Park Vasona].” It included an attorney fee clause providing that “In any action brought under this Guaranty, the prevailing party shall be entitled to reasonable attorney’s fees.”

No one made payments on the promissory note and plaintiff sued defendants without first attempting to resolve the matter through mediation. The third amended complaint is on Judicial Council Form PLD-C-001. The first cause of action is for breach of contract. It references the purchase agreement, states that the agreement was between plaintiff and Amidi and Ellenikiotis (and Michael Amidi), recites that a copy of the agreement was attached to the complaint as an exhibit, and alleges that the breach was for failure “TO PAY PURCHASE PRICE.” It prays for damages and attorney fees “according to proof. VIA CONTRACT.” The second cause of action is for common counts against Amidi and Ellenikiotis for failing to pay \$275,000. It prays for damages and attorney fees “according to proof. VIA CONTRACT.” The third cause of action is for breach of contract against Park Vasona for failing to pay the promissory note. The fourth cause of action is for common counts against Park Vasona for failing to pay \$275,000. And the fifth cause of action is against Amidi and Ellenikiotis for failing to pay on the guaranty.<sup>1</sup>

Park Vasona filed a cross-complaint against plaintiff and Darton, Inc. The first cause of action alleged breach of a separate covenant not to compete executed by Darton, Inc., in favor of Park Vasona as part of the gas station sale. And the second cause of action alleged breach of an oral agreement to sublease the automobile repair shop bays in the gas station from Park Vasona.

The trial court found that the contract between the parties consisted of, among other writings, the purchase agreement, promissory note, security agreement, guaranty,

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<sup>1</sup> Plaintiff asserted three other causes of action that are not pertinent to the issue on appeal.

and covenant not to compete. It then found for plaintiff on the complaint and cross-complaint. And it held that plaintiff was entitled to attorney fees under the provisions of the promissory note and guaranty. After plaintiff's posttrial motion, it awarded plaintiff \$128,924 over defendants' objection that plaintiff had not attempted mediation and in accord with plaintiff's theory that he was invoking (1) the note and guaranty attorney fee clauses rather than the purchase-agreement attorney fee clause for his prosecutorial attorney fees, and (2) the note, guaranty, and purchase agreement attorney fees clauses for his defensive attorney fees.

### DISCUSSION

Defendants reiterate their legal argument and contend that the trial court erred by awarding plaintiff his attorney fees because it failed to take into account plaintiff's failure to attempt prelitigation mediation as required by the purchase contract.

“On appeal, we review the determination of the legal basis for an award of attorney fees de novo as a question of law.” (*Blackburn v. Charnley* (2004) 117 Cal.App.4th 758, 767.)

“The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity.” (Civ. Code, § 1638.) “We may not ‘create for the parties a contract which they did not make, and . . . cannot insert in the contract language which one of the parties now wishes were there.’ ” (*Ben-Zvi v. Edmar Co.* (1995) 40 Cal.App.4th 468, 473.)

In plain language, on its face, the purchase agreement authorizes an award of attorney fees to the prevailing party in a dispute between the buyer and seller, but bars an award to a party who commences an action without first attempting to resolve the dispute through mediation.

In *Frei v. Davey* (2004) 124 Cal.App.4th 1506, the court construed a similar attorney fee provision and concluded that it “means what it says and will be enforced.” (*Id.* at p. 1508.) “To recover attorney fees under the [a]greement, a party cannot

commence litigation before attempting to resolve the matter through mediation.” (*Id.* at p. 1516; accord *Lange v. Schilling* (2008) 163 Cal.App.4th 1412, 1417 [plaintiff’s “failure to meet the [mediation] condition . . . precludes any award of fees”]; *Johnson v. Siegel* (2000) 84 Cal.App.4th 1087, 1101 [“[s]eeking mediation is a condition precedent to the recovery of attorney fees.”].)

Plaintiff insists that he was seeking fees under the note and guaranty and that the mediation provision cannot be exported from the purchase agreement and inserted into the note and guaranty. We disagree with this analysis.

The controlling statute is Civil Code section 1642, which provides: “Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together.” Pursuant to this section, “it is the general rule that several papers relating to the same subject matter and executed as parts of substantially one transaction, are to be construed together as one contract.” (*Nevin v. Salk* (1975) 45 Cal.App.3d 331, 338.) “Thus, a note, mortgage and agreement of sale constitute one contract where they are a part of the same transaction [citation].” (*Huckell v. Matranga* (1979) 99 Cal.App.3d 471, 481.)

Cases have indicated that “it is a question of fact whether multiple contracts are intended to be elements of a single transaction under [Civil Code] section 1642.” (*Pilcher v. Wheeler* (1992) 2 Cal.App.4th 352, 355; accord, *BMP Property Development v. Melvin* (1988) 198 Cal.App.3d 526, 531; *Nevin v. Salk, supra*, 45 Cal.App.3d at p. 338.) “However, ‘[i]nterpretation of a contract presents a question of law unless it depends on conflicting evidence, and an appellate court is not bound by a trial court’s interpretation which does not depend on the credibility of extrinsic evidence.’ ” (*Boyd v. Oscar Fisher Co.* (1989) 210 Cal.App.3d 368, 378.)

In any event, here, the trial court specifically found that the note and guaranty were “the ‘effectuation’ of the contract.” Indeed, there is no purpose for the note and guaranty but for the contract. A breach of the contract for nonpayment will of necessity

effectuate a breach of the note and guaranty; a breach of the note and guaranty for nonpayment will of necessity effectuate a breach of the contract. Thus, plaintiff's action was necessarily an action "arising out of [the purchase agreement]." It is indisputable that the three writings constituted an indivisible transaction. It is artificial to treat the note and guaranty as stand-alone agreements apart from the contract. Civil Code section 1642 requires that the three writings be taken together as one contract.

Plaintiff argues that Ellenikiotis was not a party to the purchase agreement and therefore cannot invoke the mediation provision. Plaintiff's analysis is erroneous.

Again, the writings must be taken together as one contract. In any event, plaintiff sued Ellenikiotis on the contract. The first cause of action alleges that Ellenikiotis was a party to the contract and breached the contract by failing to pay the purchase price. It attaches a copy of the contract and prays for an award of contractual attorney fees.

Civil Code section 1717, subdivision (a) states, in relevant part: "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs."

"The primary purpose of [Civil Code] section 1717 is to ensure mutuality of remedy for attorney fee claims under contractual attorney fee provisions. [Citation.] Courts have recognized that [Civil Code] section 1717 has this effect in at least two distinct situations. [¶] The first situation in which [Civil Code] section 1717 makes an otherwise unilateral right reciprocal, thereby ensuring mutuality of remedy, is 'when the contract provides the right to one party but not to the other.' [Citation.] In this situation, the effect of [Civil Code] section 1717 is to allow recovery of attorney fees by whichever contracting party prevails, 'whether he or she is the party specified in the contract or not.'"

(*Santisas v. Goodin* (1998) 17 Cal.4th 599, 610-611 (*Santisas*)).

“The second situation in which [Civil Code] section 1717 makes an otherwise unilateral right reciprocal, thereby ensuring mutuality of remedy, is when a person sued on a contract containing a provision for attorney fees to the prevailing party defends the litigation ‘by successfully arguing the inapplicability, invalidity, unenforceability, or nonexistence of the same contract.’ ” (*Santisas, supra*, 17 Cal.4th at p. 611.) This includes cases in which “a party is sued on a contract providing for an award of attorney fees to which he is not a party.” (*Topanga and Victory Partners v. Toghia* (2002) 103 Cal.App.4th 775, 780.)

The California Supreme Court has explained that Civil Code section 1717 “would fall short of th[e] goal of full mutuality of remedy if its benefits were denied to parties who defeat contract claims by proving that they were not parties to the alleged contract or that it was never formed.” (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 870.) “Because these arguments are inconsistent with a contractual claim for attorney fees under the same agreement, a party prevailing on any of these bases usually cannot claim attorney fees as a contractual right. If [Civil Code] section 1717 did not apply in this situation, the right to attorney fees would be effectively unilateral--regardless of the reciprocal wording of the attorney fee provision allowing attorney fees to the prevailing attorney--because only the party seeking to affirm and enforce the agreement could invoke its attorney fee provision. To ensure mutuality of remedy in this situation, it has been consistently held that when a party litigant prevails in an action on a contract . . . [Civil Code] section 1717 permits that party’s recovery of attorney fees whenever the opposing parties would have been entitled to attorney fees under the contract had they prevailed.” (*Santisas, supra*, 17 Cal.4th at p. 611.)

Here, neither the trial court’s statement of decision nor its judgment makes clear whether plaintiff prevailed against Ellenikiotis on the first cause of action (necessarily affirming that Ellenikiotis was a party to the contract) or Ellenikiotis prevailed against plaintiff on the first cause of action (because Ellenikiotis was not a party to the contract).

The statement and judgment speak to Ellenikiotis's liability as a guarantor but do not parse out an exoneration under the first cause of action. But the point is of no moment given that plaintiff sued Ellenikiotis as if he were a party to the contract. If plaintiff prevailed against Ellenikiotis on the first cause of action, the attorney fee clause would apply against Ellenikiotis; and if Ellenikiotis prevailed against plaintiff on the first cause of action, the attorney fee clause would apply in favor of Ellenikiotis. Under either scenario, the clause is operable vis-à-vis Ellenikiotis. Since the clause includes the mediation provision, the mediation provision is operable vis-à-vis Ellenikiotis.

Plaintiff, however, prevailed against Park Vasona on the cross-complaint.

The filing of a cross-complaint "institute[s] a ' . . . separate, simultaneous action' " distinct from the initial complaint and makes the cross-defendant a defendant. (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 51.) The result is " "two simultaneous actions pending between the same parties wherein each is at the same time both a plaintiff and a defendant." ' ' (*Id.* at p. 52.) That the Legislature changed the definition of a complaint to mean either a complaint or cross-complaint "reinforces [the] treatment of all cross-actions as independent suits." (*Id.* at p. 52, fn. 2.)

As a "defendant" in Park Vasona's action, plaintiff could be entitled to recover attorney fees incurred for its defense. (See *Johnson v. Siegel, supra*, 84 Cal.App.4th 1087, 1101 [affirming fee award to the defendant under mediation clause similar to this case where the plaintiff filed complaint without first seeking to mediate].)

Although the covenant not to compete does not contain an attorney fee clause, the covenant specifically makes itself effective upon the consummation of the gas station sale and the trial court found that the covenant was one of the writings that effectuated the purchase agreement. The covenant must therefore be taken together with the purchase agreement. (Civ. Code, § 1642.) The cause of action for breach of the covenant was therefore an action "arising out of [the purchase agreement]," giving plaintiff the right to attorney fees for successfully defending that cause of action.

Similar reasoning applies to the cause of action for breach of an oral agreement to sublease the automobile repair shop bays. The trial court found that a written lease of the bays, which was incorporated into the purchase agreement and made effective on consummation of the purchase agreement, was one of the writings that effectuated the purchase agreement. The lease contained an attorney fee clause in favor of the prevailing party should “either party be compelled to commence or sustain an action at law or in equity to enforce their rights pursuant to this agreement.” The trial court articulated that Park Vasona’s claim was that plaintiff made oral promises to lease the bays for an extended time after expiration of the lease’s term. It found against Park Vasona because, among other reasons, the written lease provided that any extension would be on a month-to-month basis. Thus, although the alleged oral promise to lease is without an attorney fee clause, plaintiff defended the cause of action by enforcing his rights under the written lease. And the cause of action is also an action “arising out of [the purchase agreement]” given that the written lease is a part of the purchase agreement by statute and incorporating language. Plaintiff therefore has the right to attorney fees for successfully defending the cause of action.

Where, as here, plaintiff’s prosecutorial claims are not covered by the attorney fee provision but his defensive claims are covered by the attorney fee provision, attorney fees may be awarded and the trial court may apportion the fees to award those incurred in connection with the defensive claims. (*Walker v. Countrywide Home Loans, Inc.* (2002) 98 Cal.App.4th 1158, 1179-1180; see also *Santisas, supra*, 17 Cal.4th at p. 615.)

“The recognized barrier to segregation for purposes of calculating fee awards is inextricably intertwined issues. Thus, although timekeeping and billing procedures may make a requested segregation difficult, they do not, without more, make it impossible.” (*Diamond v. John Martin Co.* (9th Cir. 1985) 753 F.2d 1465, 1467; see *Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 129 [“[w]here a cause of action based on the contract providing for attorney’s fees is joined with other causes of action beyond the

contract, the prevailing party may recover attorney's fees under [Civil Code] section 1717 only as they relate to the contract action.”]; *Amtower v. Photon Dynamics, Inc.* (2008) 158 Cal.App.4th 1582, 1604 [“[w]here fees are authorized for some causes of action in a complaint but not for others, allocation is a matter within the trial court's discretion.”].)

On remand, the trial court shall allow the parties to submit further papers on the issue of reasonable allocation of plaintiff's attorney fees to the defense of the cross-complaint. (See *Smith v. Circle P Ranch Co.* (1978) 87 Cal.App.3d 267, 279-280 [remand appropriate where insufficient showing made as to allocation].)

Defendants claim that plaintiff's attorney fee motion was an “action” or “proceeding” that arose out of the purchase agreement and that, if they are “prevailing” parties on this appeal, they have the contractual right to attorney fees for defending plaintiff's motion and prosecuting this appeal. We disagree.

“[T]he trial and appeal are treated as parts of a single proceeding. The party prevailing on appeal is not necessarily the prevailing party for the purposes of awarding contractual attorney fees.” (*Wood v. Santa Monica Escrow Co.* (2009) 176 Cal.App.4th 802, 806 (*Wood*).) A prevailing party in a contract action is the “party who recovered a greater relief in the action on the contract.” (Civ. Code, § 1717, subd. (b)(1).)

Here, plaintiff is indisputably the prevailing party in this action. Not only did he win the lawsuit (*Wood, supra*, 176 Cal.App.4th at p. 807), but the trial court also declared plaintiff to be the prevailing party by awarding him contractual, prevailing-party attorney fees.

#### DISPOSITION

The judgment is reversed. Upon plaintiff's motion, the trial court is directed to consider the allocation of plaintiff's attorney fee award to the defensive aspects of this litigation. Costs on appeal are awarded to defendants.

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Premo, Acting P.J.

WE CONCUR:

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Mihara, J.

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Márquez, J.