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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE STATE OF CALIFORNIA ex rel.
DEPARTMENT OF PARKS AND
RECREATION,

Plaintiff and Respondent,

v.

JOSEPH P. SCHOENDORF, as Trustee,
etc., et al.,

Defendants and Appellants.

H039321
(Monterey County
Super. Ct. No. M45442)

Appellants Joseph P. Schoendorf and Nancy J. Schoendorf challenge the trial court's denial of their motion seeking recovery of attorney's fees that they incurred between the time of a 2000 settlement agreement requiring respondent State of California (the State) to remove an encroaching road from their property with "reasonable diligence" and the State's 2010 removal of the encroaching road. We find no abuse of discretion in the trial court's decision that the Schoendorfs were not entitled to recover their attorney's fees under the settlement agreement's attorney's fees clause.

I. Background

The State filed a quiet title, trespass, and ejectment action against the Schoendorfs in 1999 in which the State sought damages and declaratory and injunctive relief. The

State claimed that the Schoendorfs were illegally diverting for their own use water from a creek and a spring in a state park. The State also claimed that the Schoendorfs had trespassed on state park property to build a pipeline and springbox to divert water from the state park's spring. In addition, the State asserted that it had a prescriptive easement over "Tin House Road," which ran "along" the Schoendorfs' property. The Schoendorfs filed a cross-complaint in which they alleged that they had a prescriptive right to use the spring's water and the creek.¹ The court granted the State's summary adjudication motion, which disposed of two of the State's four causes of action and two of the Schoendorfs' causes of action. The only issues that remained were the amount of damages to be awarded to the State and the creek and road issues.

The parties entered into a settlement and release agreement and a stipulation for the entry of judgment. The stipulation provided that the Schoendorfs would pay the State \$175,000 and the parties would dismiss their remaining causes of action. The stipulation expressly included the Schoendorfs' agreement to dismiss with prejudice their cause of action concerning the road.

The settlement agreement, like the stipulation, required the Schoendorfs to pay \$175,000 to the State plus interest from the date of the judgment. The settlement agreement also required the State "to proceed with reasonable diligence to remove that portion of Tin House Road presently located on Schoendorfs' property and to restore the land at that location to its natural condition." The parties mutually agreed to submit their claims regarding the creek to the State Water Resources Control Board "for resolution."²

¹ The cross-complaint does not appear in the record before us.

² The settlement agreement provided that, with the exception of one of the State's causes of action, which was dismissed without prejudice, "the parties forever release any and all claims and causes of action arising out of or in any way related to the allegations and other matters set forth in the Dismissed Claims. In consideration for the promises and covenants contained herein, the parties mutually discharge each other"

The settlement agreement contained an attorney's fees clause: "If any lawsuit or proceeding is commenced to enforce any of the terms of this Agreement, the prevailing party shall have the right to recover its reasonable attorneys' fees and costs from the other party."

In August 2000, the court entered judgment based on its order granting the State's summary adjudication motion and the parties' stipulation concerning the remaining causes of action. The stipulation and the settlement agreement appended to it were attached to the judgment. The judgment granted the State quiet title and declared that the Schoendorfs had no right to water from the spring and were barred from diverting water from it. The judgment awarded the State \$175,000 in damages plus interest from the date of the judgment, but the payment of damages was stayed pending appeal. The Schoendorfs appealed to this court, and this court affirmed the judgment in May 2002. The California Supreme Court denied review in August 2002.

After the Schoendorfs lost their appeal, the Schoendorfs' attorney began contacting the State seeking information about the State's plans for Tin House Road. He took the position that the Schoendorfs were not required to pay the damages they owed to the State under the judgment until the State relocated Tin House Road. In April 2003, the State sent the Schoendorfs' attorney a copy of a plan for the realignment of Tin House Road. Over the next year, the parties engaged in protracted negotiations concerning a boundary dispute.

In May 2004, with the boundary dispute still unresolved, the Schoendorfs filed a motion to enforce the settlement agreement's provision regarding the removal of Tin House Road from their property. The State filed a motion to enforce the Schoendorfs' obligation to pay the State \$175,000. At a July 2004 hearing on the two motions, the parties asked the court to continue the matter for 60 days, and the court did so. The matter was thereafter continued several times, and a number of status conferences were subsequently held. However, the motions were not resolved at any of these status

conferences. In 2005, Joseph Schoendorf threatened to “keep the [State] in court forever if he did not get [the water rights] he wanted” the State to provide to him.³

In February 2005, the State briefly suggested that one reason for the delay in undertaking the realignment of Tin House Road was a lack of funds, but the State almost immediately recanted that statement and insisted that it had the necessary funds. The State intended to use the funds owed by the Schoendorfs for the Tin House Road relocation project. The relocation project was complicated because the topography made a realignment challenging, particularly with the boundary dispute pending. In addition, certain biological assessments that were necessary to comply with environmental protection requirements could be completed only in specific seasons, so this too caused delays. The State considered converting the road to a trail, but eliminating access for fire crews made that choice unacceptable.

In February 2006, the State filed a negative declaration under the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.) as its environmental document for the road relocation project. In March 2006, the Schoendorfs filed a CEQA action against the State in which they claimed that an environmental impact report (EIR), rather than a negative declaration, was necessary because the Tin House Road area was populated by and provided habitat for an endangered species. In October 2006, the State agreed to prepare an EIR for the relocation project. The EIR process encountered a number of difficulties that delayed the completion of the draft EIR, including the death of one of the consultants and a major fire in the area that “destroyed all habitable buildings along Tin House Road.” The Schoendorfs and the State finally reached an agreement about the boundary lines of their parcels in February 2008. They continued to negotiate about a possible global settlement throughout 2008 and 2009.

³ The Schoendorfs objected in the trial court to the admission of this evidence, but their objection was overruled. They do not contest this ruling on appeal.

In January 2010, the superior court denied without prejudice both of the 2004 motions to enforce. The Schoendorfs then paid \$50,000 of the amount they owed the State under the judgment. The Schoendorfs still owed the State nearly \$300,000, which included interest on the judgment. The final EIR for the relocation project was completed in February 2010. In February 2010, both the Schoendorfs and the State filed renewed motions to enforce. In April 2010, the court denied both motions. The removal of Tin House Road from the Schoendorfs' property commenced in October 2010 and was completed by November 2010. In early November 2010, the State and the Schoendorfs agreed that the State would accept a payment of \$250,000 by the Schoendorfs to the State in lieu of the full amount of the judgment including interest, and the Schoendorfs paid this amount. The State preserved its right to seek its attorney's fees and costs.

In late November 2010, the State filed a motion to recover its attorney's fees and costs incurred in connection with its efforts to enforce the judgment. In March 2011, the court granted the State's motion for attorney's fees and costs and awarded the State over \$140,000 in attorney's fees.

In November 2011, the Schoendorfs filed a motion seeking to recover their attorney's fees of over \$300,000 "incurred to enforce" the State's obligation to move Tin House Road off of their property with "reasonable diligence." The State opposed the Schoendorfs' motion. It contended that the Schoendorfs' "obstruction and refusal to cooperate" was primarily responsible for the "delayed removal of the portions of Tin House Road from their property."

In November 2012, the court denied the Schoendorfs' motion for attorney's fees. "[T]he Court believes that the [State] did proceed with reasonable diligence under the circumstances to remove the encroachment and restore the land, and did not breach the settlement agreement." The Schoendorfs timely filed a notice of appeal from this order.

II. Analysis

The Schoendorfs claim that our standard of review is *de novo* and that they are entitled to fees and costs because the undisputed facts establish that the State breached the settlement agreement. The State contends that our standard of review is abuse of discretion. It asserts that the Schoendorfs are not entitled to their fees and costs because (1) they did not “commence an ‘action’ on a contract,” (2) they “are not the prevailing party to the underlying lawsuit,” and (3) the trial court correctly concluded that the State had not breached the settlement agreement.

The premise for the Schoendorfs’ request for attorney’s fees was the settlement agreement’s attorney’s fees clause. This clause entitled a party to recover fees and costs if the party *prevailed* in a *proceeding to enforce the settlement agreement*. The Schoendorfs were a party to the settlement agreement. The issue is whether they commenced and prevailed in a proceeding to enforce the settlement agreement.

We reject the State’s claim that the Schoendorfs did not *commence* a proceeding to enforce the settlement agreement. The Schoendorfs twice filed motions to enforce the settlement agreement. These motions *commenced* proceedings to enforce the settlement agreement. We also find no merit to the State’s contention that the Schoendorfs were ineligible to recover their fees under the settlement agreement’s attorney’s fees clause because they did not prevail in the “underlying lawsuit.” The attorney’s fees clause in the settlement agreement unambiguously contemplated that it would apply to proceedings to enforce the settlement agreement, which would necessarily occur after the entry of the judgment in the “underlying lawsuit,” a judgment that occurred at the same time as and incorporated the settlement agreement. The attorney’s fees clause did not premise a party’s entitlement to fees on their status in the underlying lawsuit; it plainly applied to both the State and the Schoendorfs.

The Schoendorfs were entitled to their attorney’s fees under the attorney’s fees clause *only if* the trial court found that the Schoendorfs *prevailed* in the proceedings to

enforce the settlement agreement. The only enforcement “proceeding[s]” were the motions brought by the Schoendorfs and the State. The Schoendorfs sought to enforce the State’s obligation to remove Tin House Road from their property “with reasonable diligence,” and the State sought to enforce the Schoendorfs’ obligation to pay damages to the State. The original 2004 motions were denied without prejudice in January 2010 without either side having achieved its objective. The renewed 2010 motions were denied in April 2010, again without either side having achieved its objective. Both obligations were fulfilled in November 2010. The State then sought and was granted its attorney’s fees. The Schoendorfs did not appeal from that order. They sought their own attorney’s fees, but their motion was rejected.

The Schoendorfs claim that the record indisputably establishes that the State breached its contractual obligation to remove the road from the Schoendorfs’ property with reasonable diligence. The trial court found that the State did not breach its contractual obligation. As the State points out, the facts *were not undisputed*. The Schoendorfs presented evidence that the State’s fulfillment of its contractual obligation was unreasonably tardy. The State presented evidence that it proceeded with reasonable diligence. Although a decade elapsed between the settlement agreement and the fulfillment of the State’s obligation, the State presented evidence that its reasonable efforts to complete the project were forestalled by numerous time-consuming difficulties. These impediments to the State’s completion of the project included a protracted boundary dispute with the Schoendorfs that precluded coming up with a firm plan, challenging topography that complicated the task, a lengthy effort to satisfy CEQA, and a major fire in the area. It was undisputed that the State completed the project fairly readily after it had completely satisfied CEQA.

This was not a case in which the Schoendorfs were completely victorious on all contract claims. The dueling motions to enforce were all denied. The State was ultimately successful in obtaining substantial fulfillment of the Schoendorfs’ obligation to

pay the State the damages, as it had sought. And the road was removed from the Schoendorfs' property, as the Schoendorfs had sought. While both the State and the Schoendorfs had sought the earlier fulfillment of these obligations, both obligations were eventually fulfilled. The best that can be said of the Schoendorfs' level of success is that it was quite limited. They did not achieve earlier fulfillment of the State's obligation, and they had to fulfill their own obligation. Both obligations were set forth in the settlement agreement and subject to the attorney's fees clause. "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." (*Scott Co. v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1109, italics added (*Scott*)). "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.' [Citation.]" (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 876.)

Since neither the State nor the Schoendorfs achieved a "complete victory" on their contract claims, our standard of review is abuse of discretion. (*Scott, supra*, 20 Cal.4th at p. 1109.) "The party prevailing on the contract is the party who recovered 'greater relief in the action on the contract' (§ 1717, subd. (b)(1)), and the only way to determine prevailing party status is by evaluating the parties' comparative litigation success." (*Silver Creek, LLC v. BlackRock Realty Advisors, Inc.* (2009) 173 Cal.App.4th 1533, 1540.) The Schoendorfs never succeeded on their claim that the State had been remiss in failing to more expeditiously remove Tin House Road from their property. The mere fact that the State ultimately fulfilled its obligation to remove Tin House Road from the Schoendorfs' property did not establish that the Schoendorfs were successful in their motions to enforce but only that the State had successfully satisfied its contractual obligation. By concluding that the State had not breached the settlement agreement, the trial court necessarily found that the Schoendorfs had not achieved any litigation success.

Indeed, the court's award of attorney's fees to the State suggested that the State was the prevailing party.

The court did not abuse its discretion in finding that the Schoendorfs were not entitled to recover their attorney's fees under the settlement agreement's attorney's fees clause.

III. Disposition

The order is affirmed.

Mihara, J.

WE CONCUR:

Premo, Acting P. J.

Elia, J.