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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

PROFESSIONAL COLLECTION CONSULTANTS et al., Plaintiffs, Cross-defendants and Appellants, v. SCOTT L. BROWN, Defendant, Cross-complainant and Respondent.	2d Civil No. B270128 (Super. Ct. No. 1403098) (Santa Barbara County)

After prevailing in an action to collect a $10,000 credit card debt, plaintiff Professional Collection Consultants (PCC) asked the trial court to award it $148,792 in contractual attorney fees, against defendant Scott Brown. Alternatively, PCC requested $800 in statutory attorney fees.

The trial court correctly denied PCC's request for fees. First, the action is not based on a contract containing an attorney fees clause, so fees are not authorized by Civil Code

section 1717.[1] Second, PCC cannot recover in attorney fees fixed by statute because it is collecting credit card debt owed to a bank. (§ 1717.5, subd. (c).)

FACTS

Scott Brown owed money to Chase Bank USA, N.A. on his credit card account. The debt was eventually assigned to PCC, a collection agency. PCC sued Brown on his unpaid account, asserting common counts on an open book account and on an account stated. Brown cross-complained against PCC for violating the federal and state Fair Debt Collection Practices (FDCP) Acts.

On summary judgment, PCC prevailed in both the main action and the cross-action. The trial court awarded PCC $10,000 principal and $6,153 interest. PCC made a timely request for attorney fees. (Cal. Rules of Court, rule 3.1702(a)-(b)(1).)

PCC recited two bases for a fee award. First, it sought $148,792 based on a contract provision, though neither PCC nor Brown asserted a cause of action for breach of contract in their complaint or cross-complaint. (§ 1717.) Second, PCC requested statutory fees of $800, because it recovered on an open book account. (§ 1717.5.)

The trial court denied PCC's motion for attorney fees. It wrote, "PCC has always denied the existence of any written contract. It maintained this action on theories of open book account and account stated with respect to Brown's credit card account." The court added, "Nor did Brown sue on [a] contract in his cross-complaint. He sued for violations of [the FDCP Acts]"

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[1] Undesignated statutory references in this opinion are to the Civil Code.

and did not show that any written contract existed. It concluded, "[t]here was no action on a contract. No party is entitled to attorney fees under Civil Code § 1717." Next, the court examined the legislative history of section 1717.5, which "does not apply if a bank is a party." The court determined that the law does not authorize an attorney fee award to PCC, as the assignee of a bank.

DISCUSSION

The order denying attorney fees is appealable. (Code Civ. Proc., § 904.1, subd. (a)(2); *R.P. Richards, Inc. v. Chartered Construction Corp.* (2000) 83 Cal.App.4th 146, 158.) In California, litigants pay their own attorney fees, unless a contract, a statute or an equitable consideration commands otherwise. (Code Civ. Proc., § 1021; *Trope v. Katz* (1995) 11 Cal.4th 274, 278-279.) PCC contends that a contract provision and a statute entitle it to fees.

De novo review of an attorney fees order "'is warranted where the determination of whether the criteria for an award of attorney fees and costs . . . have been satisfied amounts to statutory construction and a question of law.'" (*Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1175-1176; *Carver v. Chevron U.S.A., Inc.* (2002) 97 Cal.App.4th 132, 142.)

1. Attorney Fees Based on an Express Contract Provision

Attorney fees must be awarded to the prevailing party "[i]n 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[.]" (§ 1717, subd. (a).)

"Civil Code section 1717 does not apply to tort claims; it determines which party, if any, is entitled to attorneys' fees on

a *contract claim only*. [Citation.]" (*Exxess Electronixx v. Heger Realty Corp.* (1998) 64 Cal.App.4th 698, 708.) "'[T]ort claims do not "enforce" a contract' and are not considered actions on a contract[.]'" (*Kangarlou v. Progressive Title Co., Inc.* (2005) 128 Cal.App.4th 1174, 1178.)

PCC denied the existence of a written contract. It asserted that its action "supersedes and extinguishes all underlying contracts." PCC did not allege a right to contractual attorney fees under section 1717. Brown's cross-action sought statutory attorney fees under the FDCP Acts; he did not invoke section 1717.

Though the parties claim no right to contractual attorney fees in their respective actions, PCC argues that Brown's FDCP Act tort suit is an "action on a contract." To reach its conclusion, PCC relies on a contract that was never shown to exist, a purported "Cardmember Agreement" that Brown alluded to in his cross-complaint, identifying Delaware as the controlling state law.

In his opposition to PCC's summary judgment motion, Brown offered seven *exemplars* of cardmember agreements from various banks. His attorney declared, "it is inconceivable to me that Brown's Chase account is not governed by a cardholder agreement that does not contain a Delaware choice of law provision," similar to the ones in the exemplars. Yet counsel did not claim that any of the exemplars is a bona fide contract between Brown and Chase. The trial court wholly rejected the exemplars, deeming them "not relevant."

More to the point, there is no proof of a cardmember agreement, specifically applying to Brown, which contains an attorney fee clause. The trial court referred to the concept as "the

imagined cardmember agreement." Without an admissible attorney fees clause, there is no colorable claim under section 1717.

Given its fervent denials on summary judgment that the "imagined cardmember agreement" ever existed—and the trial court's adoption of that position—PCC cannot now claim that the illusionary agreement does exist, or speculate that this chimera contains some sort of attorney fees clause that broadly embraces Brown's FDCP Act claims. The courts cannot enforce an attorney fees clause that has not been shown to exist, the terms of which are unknowable.

Section 1717 applies to "any action on a contract." In *Santisas v. Goodin* (1998) 17 Cal.4th 599, an attorney fees clause in a real estate sales contract covered "all claims, both tort and breach of contract." (*Id.* at p. 608.) The Supreme Court wrote, "section 1717 applies only to actions that contain at least one contract claim": the plaintiffs' allegations of "a breach of contract consisting of the seller defendants' failure to perform repairs and other remedial work required by the contract in connection with the sale . . . sounds in contract, not tort, and is therefore an 'action on a contract' within the meaning of section 1717." (*Id.* at p. 615.) In this case, unlike *Santisas*, neither party filed an action that contained at least one contract claim.

PCC relies upon, but is not assisted by, *Douglas E. Barnhart, Inc. v. CMC Fabricators, Inc.* (2012) 211 Cal.App.4th 230, a breach of contract suit between a general contractor and a subcontractor. Barnhart's complaint incorporated by reference CMC's bid containing an attorney fees clause covering "'any dispute that arise[s] between the parties[.]'" (*Id.* at p. 235.) "Barnhart specifically alleged that the '[b]id constituted an offer'

[and] that 'Barnhart accepted the [b]id *and a contract was formed*[.]'" (*Id.* at p. 238.) By invoking the bid as the basis for its unsuccessful breach of contract claim, Barnhart was liable to CMC for attorney fees under section 1717. (*Id.* at p. 239.) Conversely, CMC did not have to pay attorney fees for Barnhart's successful promissory estoppel claim, because promissory estoppel is not a claim "on a contract" under section 1717. (*Id.* at p. 249.)

This case is not comparable to *Barnhart*. Neither PCC nor Brown made a breach of contract claim. PCC denied the existence of a written contract. Neither party alleged that they entered a contract with an attorney fees clause covering "any dispute" between them. Brown asserted only tort claims against PCC. In this situation, "the phrase 'action on a contract' as used in section 1717 does *not* include an action asserting only tort claims[.]" (*Barnhart, supra,* 211 Cal.App.4th at p. 241.) A reference in Brown's cross-complaint to a hypothetical cardmember agreement does not change the character of his tort action.

2. Statutory Fees For Prevailing on a Book Account

In an action on a book account that does not provide for attorney fees, the prevailing party is entitled to reasonable attorney fees of up to $800 for recovering on an account owed by a person for goods and services. (Former § 1717.5, subd. (a).)[2] The statute "does not apply to any action in which a bank . . . is a party." (§ 1717.5, subd. (c).)

The trial court observed that Brown's account was with Chase Bank, and the bank would not be entitled to

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[2] A recent amendment increased the fee amount to $960 but does not apply retroactively to this case.

attorney fees under section 1717.5, if it was a party to the action.[3] The court concluded that PCC, as an assignee, has no greater rights than the bank; further, the legislative history does not support PCC's claim to fees. The court denied fees under section 1717.5.

We look first at the statutory language, giving effect to its plain meaning. If the words are clear, "we may not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history." (*Burden v. Snowden* (1992) 2 Cal.4th 556, 562.) The language of section 1717.5 is clear: banks are not entitled to attorney fees. The statute does not say whether bank assignees are entitled to attorney fees when they sue to collect a credit card debt owed to a bank.

An assignment merely transfers the interest of the assignor. The assignee stands in the shoes of the assignor, and can recover no more than could the assignor. (*Balfour, Guthrie & Co. v. Hansen* (1964) 227 Cal.App.2d 173, 187; *Salaman v. Bolt* (1977) 74 Cal.App.3d 907, 919.) This rule of recovery encompasses the assignee's right to attorney fees. (*Searles Valley Minerals Operations Inc. v. Ralph M. Parsons Service Co.* (2011) 191 Cal.App.4th 1394, 1402. See *Essex Ins. Co. v. Five Star Dye House, Inc.* (2006) 38 Cal.4th 1252, 1263-1265 [the assignee of an insurance bad faith claim may recover the same attorney fees that the assignor could recover].)

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[3] The court wrote, "Chase is not a party." The record suggests that Chase is a party brought in by PCC as a cross-defendant. Though served with notices, the bank declined to participate in this appeal.

PCC submitted the legislative history of section 1717.5, which does not support PCC's claim of entitlement to attorney fees when collecting a credit card debt owed to a bank. The legislation, sponsored by the California Association of Collectors, allows attorney fees on delinquent sales accounts that lack an attorney fees clause, when the debt is so small that the creditor has little incentive to sue. (See Sen. Rules Com., Off. of Sen. Floor Analyses, Sen. Com. on Judiciary, com. on SB 1934 (1985-1986 Reg. Sess.) May 1986.) It repeatedly cites, as examples, periodic payments made for a television set purchased at an appliance store, or a patient's open book account for services rendered by a physician. The history underscores a distinction between "provisions for the award of attorney fees . . . contained in the Unruh Act ([§] 1801 et seq.), *pertaining to charge accounts and credit sales,"* and the "delinquent sales contracts" that are the subject of section 1717.5. (*Id.* at pp. 1 & 3, italics added.)

Nothing in the legislative history suggests that the Legislature created new law regarding the rights of an assignee collecting on a bank credit card account. Rather, the history references small retail/service accounts, and disavows the law's application to "charge accounts and credit sales." (See *Seibert v. Sears, Roebuck and Co.* (1975) 45 Cal.App.3d 1, 22 [the prevailing party may seek attorney fees under section 1811.1, part of the Unruh Act, in an action on a revolving charge account].) There is no basis for concluding that the Legislature intended a bank's assignee to recover fees that the bank itself could not recover under section 1717.5.

DISPOSITION

The judgment (order denying attorney fees) is affirmed. Respondent Scott Brown is entitled to recover his costs on appeal. (Cal. Rules of Court, rule 8.27(a)(1)-(2).)

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

James E. Herman, Judge
Superior Court County of Santa Barbara

Law Offices of Clark Garen, Clark Garen and Greg Lawrence for Plaintiffs, Cross-defendants and Appellants.

No appearance for Defendant, Cross-complainant and Respondent.