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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

COMPTON COMMERCIAL DEVELOPMENT RENAISSANCE PLAZA, Cross-complainant and Respondent, v. TACO BELL CORP., Cross-defendant and Appellant.	B283393 (Los Angeles County Super. Ct. No. TC027536)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ross Klein, Judge. Affirmed.

Sheppard, Mullin, Richter & Hampton, Daniel P. Bane and Ashton M. Bracken for Cross-defendant and Appellant.

Russ, August & Kabat, Matthew A. Rips and Theresa Troupson for Cross-complainant and Respondent.

Appellant Taco Bell Corporation (Taco Bell) contends the trial court erred in refusing to award attorney fees for the costs of litigating an ejectment claim pursued by its former landlord, respondent Compton Commercial Development Renaissance Plaza, LLC (CCDRP) under the attorney fee provision in the parties' expired lease agreement. The provision covered claims "for violation of or to enforce" the lease and "suit[s] . . . for a declaration of rights hereunder." The court awarded fees associated with a breach of contract claim and an interrelated fraud claim instituted by CCDRP, both of which were resolved early in the litigation, but found that the claim for ejectment was not contractual and that the attorney fee provision did not cover tort claims. Taco Bell contends that the provision should be interpreted more broadly and that in any event, the ejectment claim was contractual. Finding no error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Lease Agreement and Assignment*

In October 1991, Taco Bell and CCDRP entered into a lease agreement for a property in Compton. The lease agreement forbade assignment without CCDRP's written consent. There were several conditions to obtaining CCDRP's consent, including its approval of the proposed assignee's credit standing and payment of "50% of all

consideration given, directly or indirectly, by the assignee to [Taco Bell] in connection with such assignment . . . ."[1]

The lease agreement contained an attorney fee provision, which stated: "In the event that Landlord should retain counsel and/or institute any suit against Tenant for violation of or to enforce any of the covenants or conditions of this Lease, or should Tenant institute any suit against Landlord for violation of any of the covenants or conditions of this Lease, or should either party institute a suit against the other for a declaration of rights hereunder, or should either party intervene in any suit in which the other is a party, to protect its interest or rights hereunder, the prevailing party, whether Landlord or Tenant, shall be entitled to all of its costs, expenses and reasonable fees of its attorney(s) in connection therewith."

In March 1998, Taco Bell executed an assignment of the lease to its franchisee, Palo Verde, Inc. One month later, it recorded a memorandum of assignment and assumption of lease. In May 1997 and February 1998, Taco Bell had contacted CCDRP's attorney, seeking execution of a consent form. CCDRP's attorney wrote back asking for certain documentation and an explanation of "the nature and extent of any consideration which changed hands regarding this transaction." Taco Bell claimed that CCDRP's counsel gave

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[1] The lease agreement had an initial 20-year term, with four options to renew for five years. CCDRP claimed the lease term ended on September 17, 2012; Taco Bell claimed it ended July 16, 2013. There is no dispute that it ended before CCDRP filed its cross-complaint against Taco Bell.

"verbal" consent, but there is no evidence that CCDRP ever consented in writing.

B. *CCDRP's Cross-complaint and Taco Bell's Demurrer*

In August 2013, Palo Verde filed an action for declaratory relief and breach of contract against CCDRP, seeking, among other things, a ruling that its attempt to exercise the option to renew the lease was timely. In September 2013, CCDRP filed an action for unlawful detainer against Palo Verde, claiming additional rent was due. The two actions were consolidated, and in February 2015, CCDRP filed a cross-complaint against Palo Verde and Taco Bell. According to the allegations of the operative first amended cross-complaint (FACC), Taco Bell received a payment of $784,000 when the lease was assigned to Palo Verde in 1998, neither Taco Bell nor Palo Verde paid any portion of that sum to CCDRP, and the 1998 assignment of the lease to Palo Verde was without CCDRP's permission. The first cause of action, breach of contract, sought payment of the amount due under the lease (50 percent of all consideration given by the assignee to Taco Bell) for CCDRP's consent to the assignment. The second cause of action, fraud, contended that Taco Bell and Palo Verde concealed the payment made for the assignment.

The FACC included a third cause of action, a claim entitled "[c]ommon [l]aw [e]jectment." That cause of action alleged that because the lease agreement had terminated in September 2012, neither Taco Bell nor Palo Verde was

entitled to possession of the premises. It further alleged that both Taco Bell and Palo Verde "claim that the Lease term remains and the Lease entitles them to retain possession of the Leased Premises," and that Taco Bell and Palo Verde had placed a cloud on CCDRP's title by asserting possessory rights to the premises. In its prayer, CCDRP asked for "an order ejecting [Palo Verde and Taco Bell]" and "a decree that the Lease is terminated." It did not seek attorney fees for the ejectment claim, although it had for the breach of contract and fraud claims.

Taco Bell demurred to the FACC, claiming among other things that the first and second causes of action were barred by the statute of limitations. With respect to the ejectment claim, Taco Bell contended that such cause of action could not be brought against a defendant who did not have actual physical possession of the premises, claiming that it had not had actual physical possession since assigning the lease to Palo Verde in 1998. In its opposition, CCDRP explained that it sought relief akin to quiet title to determine who had the right to possession under its theory that "there is no lease contract permitting either [Taco Bell] or [Palo Verde] to remain in possession." CCDRP further explained its belief that Taco Bell was "the actual tenant[] under the Lease," and its concern that "[a]bsent a formal disclaimer [of interest in the property], [Taco Bell] could change its position and claim wrongful eviction later on."

The court sustained the demurrer without leave to amend with respect to the breach of contract and fraud

claims, but overruled it with respect to the ejectment claim. The court's order stated: "As to the [Ejectment] Cause of Action, the demurrers must be over-ruled because Palo Verde is in possession and because Taco Bell has a potential right to possession in [the] event its lease to Palo Verde is invalidated."

C. *Taco Bell's Motion for Judgment on the Pleadings*

Taco Bell filed an answer to the FACC, in which it "specifically disclaim[ed] any and all of its purported right to the current or future possession of the subject property . . . ." It then sought judgment on the pleadings, contending that by disclaiming any right to possession of the property in the answer, it confirmed its lack of any potential possessory interest. The court denied the motion, finding it to be an improper motion for reconsideration.

D. *Taco Bell's Motion for Summary Judgment*

Taco Bell next filed a motion for summary judgment on the ejectment claim. It again relied on the "well-established law that defendant's possession at the commencement of an action is an absolute requirement to establish a claim of ejectment [citations]." It contended it had no potential right to possess the subject property whether CCDRP was right or wrong in its lawsuit against Palo Verde: "Should the Court determine that the assignment was valid and that Palo Verde properly exercised the option to extend the lease term, Palo Verde (and not Taco Bell) would have the right to

possess the subject property. [Citation.] Alternatively, should the Court find that the lease was not validly assigned (as [CCDRP] alleges in the FACC), neither Palo Verde nor Taco Bell would have any possessory interest in the subject property because the term of the original lease has indisputably expired."[2] Taco Bell further asserted that it had clarified its lack of interest in or right to possess the property by "formally disclaim[ing] 'any and all of its purported right to the current or future possession of the subject property'" in its answer to the FACC.

CCDRP opposed the motion for summary judgment, contending that if the assignment to Palo Verde was void, Palo Verde's occupancy was that of a subtenant, requiring CCDRP to join Taco Bell, the original tenant, in the ejectment action to clarify CCDRP's right to possession.

The court granted the motion for summary judgment. It found that the following facts were supported by substantial evidence and met Taco Bell's burden of proof as moving party: "1. Taco Bell was not in possession of the premises when the [FACC] was filed on May 14, 2015 and has not been in possession at any time since; [¶] 2. Taco Bell has disclaimed any present or future right to possession of the premises; and [¶] 3. Taco Bell and Palo Verde never entered into a sub-lease agreement for the property." It

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[2] Taco Bell sided with CCDRP on whether the lease term had expired, stating that "'none of the defendants have any right to possession of the [Property] because the Lease no longer permits any occupancy by any tenant or subtenant.'"

concluded that "[t]he possession of the land by the defendant at the time when the action is commenced is a necessary element of the plaintiff's right to recover in an action of his nature," and "there is no evidence showing that Taco Bell has actual possession of the premises as of the date the pleading was filed."

E. *Taco Bell's Motion for Attorney Fees*

Taco Bell moved for attorney fees under the lease agreement and Civil Code section 1717.[3] It presented evidence it had expended over $300,000 litigating the cross-complaint. It contended that all the causes of action alleged by CCDRP arose from and related to the enforcement of the lease agreement and that the attorney fee provision was "broadly worded" to permit the prevailing party in any litigation involving the lease to recover its attorney fees, whether or not the claims were contractual. It also claimed that the gravamen of CCDRP's theory in the ejectment claim was contractual, because its assertion that Taco Bell had a potential right of possession under the lease "implicate[d]

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[3] Section 1717 provides that "[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, 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," and defines "party prevailing on the contract" as "the party who recovered a greater relief in the action on the contract." (Civ. Code, § 1717, subds. (a) & (b)(1).)

the contract" and "the language under the contract . . . ." Taco Bell further contended that in pursuing the ejectment claim, CCDRP had essentially sought "a decree or declaration of the part[ies'] respective rights under the lease," bringing the ejectment claim within the "declaratory judgment" language of the attorney fee provision."

CCDRP did not dispute that Taco Bell was entitled to attorney fees for the contractual claim to which it had successfully demurred, but contended that any claim to fees ended when the demurrer to the contract and fraud causes of action was sustained early in the litigation. It asserted that the ejectment claim sounded in tort and was not covered by the attorney fee provision. CCDRP pointed out that by its terms, the attorney fee provision in the lease agreement applied to claims for "'violation of or to enforce any of the covenants or condition of this Lease,'" for "'a declaration of rights hereunder, '" or "'to enforce or protect its interest or rights hereunder,'" and did not include the language used to signal coverage of non-contract claims, such as "'arising out of the lease,'" "'related to the lease,'" "'related to the premises,'" "'concerning the subject matter hereof,'" or "'involving the relationship of the parties.'"

The trial court found that Taco Bell was entitled to attorney fees pursuant to Civil Code section 1717, "limited to the defense of the contract claim . . . ." It rejected Taco Bell's broad reading of the fee provision and found that the provision did not cover the ejectment claim. It found that 90 hours were reasonably expended to defeat the contract and

fraud claims. It awarded $47,700 in attorney fees. Taco Bell appealed the attorney fee order.[4]

DISCUSSION

Taco Bell contends the trial court erred in concluding that the litigation related to the ejectment claim was not covered by the attorney fee provision in the lease agreement. For the reasons discussed, we disagree.

A. *The Attorney Fee Provision in the Lease Agreement Did Not Encompass Tort Claims*

California generally follows the rule that each party to a lawsuit pays its own attorney fees. (*Mountain Air Enterprises, LLC v. Sundowner Tower, LLC* (2017) 3 Cal.5th 744, 751.) However, parties may validly agree that the prevailing party will be awarded attorney fees incurred in litigation between themselves, and such agreements may apply to both contract and tort claims. *(Maynard v. BTI Group, Inc*. (2013) 216 Cal.App.4th 984, 989; see Code of Civ. Proc., § 1021.) In determining whether attorney fees incurred in litigating tort claims are recoverable in a particular instance, courts must focus on "the intent of the parties: did they intend to authorize the prevailing party to recover its attorney fees for a tort cause of action[?]"

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[4] In it motion, Taco Bell also sought attorney fees as sanctions under Code of Civil Procedure section 128.5 on the ground that the claims asserted in the cross-complaint were frivolous. The court denied the request for sanctions. Taco Bell does not seek review of that denial.

(*Allstate Ins. Co. v. Loo* (1996) 46 Cal.App.4th 1794, 1798.) "The answer to that question depends upon the language of the agreement" (*ibid.*), and "whether the type of claim is within the scope of the [attorney fee] provision." (*Exxess Electronixx v. Heger Realty Corp*. (1998) 64 Cal.App.4th 698, 708.) To determine this question courts apply "'the ordinary rules of contract interpretation,'" which entails determining the mutual intent of the parties at the time the contract was formed from the written provisions of the contract if at all possible, using the """clear and explicit' meaning of the provisions, interpreted in their 'ordinary and popular sense,"""" unless used by the parties in a technical sense or a special meaning . . . . (*Id*. at p. 709.) Where, as here, "the facts are not in dispute and the right to recover attorney fees depends upon the interpretation of a contract and no extrinsic evidence is offered to interpret the contract, we review the [trial court's] ruling de novo." (*Casella v. SouthWest Dealer Services, Inc*. (2007) 157 Cal.App.4th 1127, 1161.)

The attorney fee provision in the lease agreement provided for payment of attorney fees in four situations (1) "in the event that Landlord should retain counsel and/or institute any suit against Tenant for violation of or to enforce any of the covenants or conditions of this Lease"; (2) "should Tenant institute any suit against Landlord for violation of any of the covenants or conditions of this Lease"; (3) "should either party institute a suit against the other for a declaration of rights hereunder"; or (4) "should either party

intervene in any suit in which the other is a party, to enforce or protect its interest or rights hereunder . . . ." Each provision refers to the "Lease" itself or uses the term "hereunder" to refer to the lease.

As the cross-claim was instituted by the landlord, CCDRP, and did not involve intervention in a third-party suit, clauses (1) or (3) are the only potential bases for recovery of attorney fees.[5] With respect to the first clause, as multiple cases have found, an attorney fee provision that applies where the parties sue "to enforce" the contractual terms of the agreement does not apply to tort claims. (*Exxess Electronixx v. Heger Realty Corp*., *supra*, 64 Cal.App.4th at pp. 709-710; *Casella v. SouthWest Dealer Services, Inc*., *supra*, 157 Cal.App.4th at p. 1162; see, e.g., *Gil v. Mansano* (2004) 121 Cal.App.4th 739, 742, 744 [provision stating "'[i]n the event action is brought to enforce the terms of this [Release], the prevailing party shall be paid

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[5] Taco Bell states it would be "nonsensical and inequitable" to interpret the fourth clause to apply only where a party intervenes in a suit in which the other is a party. Taco Bell presented no evidence to suggest the provision meant anything other than what it plainly said. We cannot re-write the parties' agreement. (See *Khan v. Shim* (2016) 7 Cal.App.5th 49, 61 ["Our responsibility . . . is to interpret the contract that [the] parties agreed to"].) Moreover, even were we to find the fourth clause applicable, it is limited to suits "enforc[ing] or protect[ing]" the intervening party's interest or rights "hereunder" (under the agreement). Accordingly, for the reasons discussed, the language used by the parties demonstrates it was not intended to apply to tort actions.

his reasonable attorney[] fees'" applied only to contract claims]; *Loube v. Loube* (1998) 64 Cal.App.4th 421, 429, 430 [provision stating that fees could be awarded if "'legal action or arbitration is necessary to enforce the terms of this Agreement'" excluded tort claim for professional negligence, although claim "arose from the [contractual] relationship between [the parties]"]; *In re Zarate* (Bankr. N.D. Cal. 2017) 567 B.R. 176, 180 [provision allowing attorney fees "'[i]n [the] event suit is brought or an attorney is retained by any party to this Agreement to enforce the terms of this Agreement or to collect any moneys due hereunder,'" did not permit recovery of fees for litigating tort claims]; see *Santisas v. Goodin* (1998) 17 Cal.4th 599, 622, fn. 9 [citing with approval *Rosen v. Robert P. Warmington Co.* (1998) 201 Cal.App.3d 939, in which Court of Appeal held that party had no contractual right to recover attorney fees incurred in defense of tort claims where attorney fee provision covered claims """to recover the possession of the demised premises, collect any money due . . . or enforce any other provision, condition or agreement of this lease"""].)

Attorney fee provisions have been held to extend to costs incurred in litigating tort claims only where the language is more expansive. For example, in *Santisas v. Goodin*, *supra*, 17 Cal.4th 599, where the attorney fee provision in the real estate purchase agreement applied to all claims "arising out of the execution of the agreement or the sale," the court found the provision was "phrased broadly enough" to "embrace[] all claims, both tort and breach of

contract, in plaintiffs' complaint." (*Id*. at pp. 607-608; see also *Xuereb v. Marcus & Millichap, Inc*. (1992) 3 Cal.App.4th 1338, 1341, 1342 [where agreement provided for attorney fees to the prevailing party in "any 'lawsuit or other legal proceeding' to which '[it] gives rise,'" court found the phrase broad enough to encompass tort claims for negligence, breach of fiduciary duty, concealment and misrepresentation];[6] *Cruz v. Ayromloo* (2007) 155 Cal.App.4th 1270, 1276, 1277 [lease stating attorney fees were awardable "'[i]f civil action is instituted in connection with this Agreement'" permitted trial court to award fees incurred in litigating tort claims asserted by tenants] (italics omitted); *3250 Wilshire Blvd.*

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[6] Taco Bell attempts to rely on *Xuereb*, contending the court "reasoned that 'but for the Purchase Agreement by which the allegedly defective property was sold to respondent, the dispute between the parties would not have arisen'" and that CCDRP "would have no ejectment action against Taco Bell but for its claim that Taco Bell violated the covenants and conditions of the Lease by assigning it to Palo Verde without [CCDRP's] consent." (Italics omitted.) Preliminarily we note that CCDRP's right to possession arose from the absence of any lease giving Taco Bell or any assignee or subtenant the right to occupy the premises, not from a purported breach of the lease agreement. Moreover, the *Xuereb* court based its conclusion that the attorney fee provision applied to claims that would not have materialized "but for" the Purchase Agreement on the "ordinary and usual sense of the phrase 'gives rise to,'" which the court found "must be interpreted expansively, to encompass acts and omissions occurring in connection with the Purchase Agreement and the entire transaction of which it was the written memorandum." (*Xuereb v. Marcus & Millichap, Inc., supra,* at p. 1344.) No such expansive language appears in the attorney fee provision here.

Bldg v. W.R. Grace & Co. (9th Cir. 1993) 990 F.2d 487, 489 [contract providing for fees for any suit "'with respect to the subject matter . . . of this agreement'" covered tort claims].) In line with these authorities, we conclude that because the first clause permitted recovery of attorney fees only for violation of or to enforce the terms of the contract, by its plain language it did not apply to tort claims.

The third clause covers claims for "a declaration of rights" under the agreement. Even in the absence of such language, claims for declaratory relief are generally covered under the view that they are contract claims instituted to "enforce" the contract. (See, e.g., *Harbour Landing-Dolfann, Ltd. v. Anderson* (1996) 48 Cal.App.4th 260, 263 [declaratory relief action seeking interpretation of lease as to whether tenant was required to pay increased rent was action to enforce parties' rights under the lease].) However, as we discuss in Part B, a claim for ejectment sounds in tort, not contract, and although CCDRP included language in the ejectment cause of action indicating it sought a declaration that the lease agreement was terminated, that language did not transform the ejectment claim into one for declaratory relief.

B. *CCDRP's Claim for Ejectment Was a Tort Claim*

"An action in ejectment . . . is not an action on the contract. It is, in reality, exactly the contrary, for it is based on the non-existence of the contract." (*Paap v. Von Helmholt* (1960) 185 Cal.App.2d 823, 828, italics omitted; see also *U.S.*

v. Triple A Mach. Shop, Inc. (9th Cir. 1988) 857 F.2d 579, 584 [landlord (U.S. government) not required to comply with dispute resolution clause of lease prior to filing ejectment action against tenant, because dispute did not arise under the lease where "the lease ha[d] . . . expired" and the government "had no obligation to renew [it]"].) To state a claim for ejectment, the plaintiff need plead only its ownership of an interest in real property, the defendant's possession and withholding, and the damage to the plaintiff, if any. (See 5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 634, p. 67; *Haggin v. Kelly* (1902) 136 Cal. 481, 483 ["The essential allegations necessary to [an ejectment] action are the estate of plaintiffs, possession by defendants at the commencement of the action, and their wrongful withholding of the same"]; *Payne & Dewey v. Treadwell* (1860) 16 Cal. 220, 244 [substance of a complaint in ejectment is "A owns certain real property, or some interest in it; the defendant has obtained possession of it, and withholds the possession from him"].)

Taco Bell contends that the gravamen of CCDRP's ejectment claim was the determination of Taco Bell's status under the lease, and that resolution of the ejectment cause of action required a declaration of the parties' respective rights to possession under the lease. Although CCDRP alleged that it was entitled to possession because "[t]he Lease terminated on September 17, 2012" and sought "a decree that the Lease is terminated," this language is properly considered surplusage. A claim for ejectment need only assert title or

similar interest; the titleholder's right to possession "is considered a legal conclusion from the fact of ownership and need not be alleged." (5 Witkin, *supra*, § 636, p. 68; see *Payne & Dewey v. Treadwell*, *supra*, 16 Cal at p. 243 ["It is sufficient . . . in a complaint in ejectment for the plaintiff to aver in respect to his title, that he seized of the premises, or of some estate therein in fee, or for life, or for years, according to the fact. The right to the possession follows as a conclusion of law from the seizin, and need not be alleged"].) Moreover, it is unnecessary for a plaintiff to allege that the defendant's possession is "'wrongful or unlawful'": "Not only is this a conclusion of law, but it is surplusage, for the main allegation of plaintiff's present ownership implies his or her legal right to present possession and the unlawfulness of defendant's possession." (Witkin, *supra*, § 637, p. 69.) Put another way, the plaintiff meets its burden of proof in an ejectment claim by pleading and establishing some interest in the property entitling him to possession; it is up to the defendant to assert and prove a superior basis for possession as an affirmative defense. (*Johnson v. Vance* (1890) 86 Cal. 128, 131 ["If the defendant's holding rests upon any existing right, he should be compelled to show it affirmatively in defense. The right of possession accompanies the ownership, and from the allegation of the fact of ownership, which is the allegation of seisin in 'ordinary language,' the right of present possession is presumed as a matter of law"]; *Davis v. Crump* (1912) 162 Cal. 513, 516 ["[A]ll that was necessary for [the plaintiff] to do in order to put defendants to the

necessity of meeting his claim [for ejectment or quiet title] was to present such evidence as would make out for him a prima facie case of ownership"] (italics omitted); see, e.g., *Haggin v. Kelly, supra,* 136 Cal. at pp. 483-484 [answer pled that plaintiff's title was lost by forfeiture or abandonment]; *Hayden v. Collins* (1905) 1 Cal.App. 259, 262 [defendant's answer denied plaintiff was the owner and claimed title had been conveyed to him].)

The above-quoted language in the cross-complaint represented CCDRP's attempt to anticipate Taco Bell's possible affirmative defense asserting some claim to possession.[7] However, as we have seen, Taco Bell agreed with CCDRP that the lease had expired prior to the filing of the cross-complaint in May 2015, and made clear in its answer that it did not seek possession or claim any right under the lease. Taco Bell established its right to summary judgment by proving it was not in possession of the premises when the FACC was filed, had not been in possession at any time since, and had disclaimed any present or future right to possession of the premises. Accordingly, the terms of the lease agreement were never in issue, and the court was never required to issue a declaration of rights under the lease in order to resolve the ejectment claim.

Taco Bell also points out that CCDRP repeatedly opposed Taco Bell's attempts to persuade the trial court that

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[7] We note that the lease agreement gave the tenant the option to renew, and that Palo Verde had contended in its complaint that it had properly exercised the option.

it was not in possession of the premises by asserting that the transfer to Palo Verde did not follow the lease's requirements, leaving Taco Bell as the legitimate tenant. Its claim that this established the contractual nature of the ejectment claim confuses CCDRP's rationale for including Taco Bell in the cross-complaint with the elements of the claim. As neither Taco Bell nor CCDRP sought to establish that Taco Bell had any existing rights under the lease, and the trial court resolved the claim without resort to interpretation of the lease, CCDRP's arguments did not transform the ejectment claim into a claim to enforce the contract.

Taco Bell cites a number of cases involving unlawful detainer, contending that they provide support for a finding that a claim for ejectment may sound in contract. It is true that courts have held that a claim for unlawful detainer may, under some circumstances, be viewed as contractual, and under others be deemed tort-based. However, the distinction recognized by the courts provides no support for Taco Bell's position that CCDRP's ejectment claim here was contractual, as the finding that the unlawful detainer action sounds in contract is dependent on the action being brought during the unexpired term of the lease at issue. For example, in *Fragomeno v. Insurance Co. of the West* (1989) 207 Cal.App.3d 822, disapproved of in part on other grounds in *Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, cited by Taco Bell, the court held: "If the right to recover realty emanates from the breach of a lease provision occurring during an unexpired term of a lease, then the right to

recover has its inception in a contractual arrangement between the parties. If the right to recovery is based upon a civil wrong such as possession of property . . . by a holdover tenant as a resulting trespasser . . . then the right to recover possession of the property by way of the summary and statutory procedure of unlawful detainer has its inception in tortious conduct." (*Id.* at pp. 830-831.) Applying that principle to the case before it, the court found the unlawful detainer claim to be contractual because "the landlord's right to recover the real property emanated from the breach of the lease occurring within the unexpired term of the lease by reason of the lessee's unagreed to use of the premises." (*Id.* at p. 831.)

Fragomeno was followed in *Mitchell Land & Improvement Co. v. Ristorante Ferrantelli, Inc.* (2007) 158 Cal.App.4th 479, also cited by Taco Bell. Following the principle announced in *Fragomeno*, the court found the unlawful detainer at issue to be contractual because it was "based upon [the tenant's] alleged breach of the lease covenant concerning use of the premises during an unexpired term." (*Id.* at p. 488.) In contrast, in *Drybread v. Chipain Chiropractic Corp.* (2007) 151 Cal.App.4th 1063, the court applied the *Fragomeno* rule and found the unlawful detainer at issue to be a tort claim because it "was based on a claim of unlawful holdover possession after expiration of the lease." (*Id.* at p. 1076.) The court explained that an unlawful detainer action "d[oes] not sound in contract simply

because the parties were previously bound by a contract." (*Id*. at p. 1077.)

Here, there is no dispute that the lease term had expired prior to the filing of the claim for ejectment. Even were we inclined to conclude that claims for ejectment should be governed by the same rules applicable to unlawful detainer, we would be obliged to find that the underlying ejectment claim sounded in tort.[8] Under the narrow attorney fee provision contained in the lease agreement, tort claims were not covered. Accordingly, the trial court did not err in limiting the attorney fee recovery to the contractual claims resolved on demurrer well before the ejectment claim was resolved.

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[8] The other landlord/tenant cases cited by Taco Bell are equally inapt. *Roth v. Morton's Chefs Services, Inc*. (1985) 173 Cal.App.3d 380 involved a claim for unlawful detainer brought during the term of the lease, and required the landlord to plead and prove a violation of the lease. (*Id*. at p. 385.) The attorney fee provision in *North Associates v. Bell* (1986) 184 Cal.App.3d 860 specifically applied to claims for "recovery of the premises," language the attorney fee provision in the lease agreement at issue here lacks. (*Id*. at p. 862.) *Hjelm v. Prometheus Real Estate Group, Inc.* (2016) 3 Cal.App.5th 1155 involved not unlawful detainer, but tenants suing a landlord after their apartment was infested by bedbugs. (*Id*. at p. 1168.) The court found their claim for breach of the warranty of habitability to be a contract claim, and that because the attorney fee provision in the parties' lease "applie[d] to virtually any situation under which [the landlord might] seek[] to take action against its tenants," the tenants were entitled to fees under Civil Code section 1717, which requires attorney fee provisions to be reciprocal. (*Hjelm v. Prometheus Real Estate Group, Inc., supra,* at p. 1176.)

DISPOSITION

The judgment is affirmed. CCDRP is awarded its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

WILLHITE, Acting P. J.

COLLINS, J.