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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

CALIFORNIA BANK AND TRUST, Plaintiff and Appellant, v. MERUELO PROPERTIES, INC., Defendant and Respondent.	B277691 (Los Angeles County Super. Ct. No. BC537439)

APPEAL from an order of the Superior Court of Los Angeles County. Stephanie M. Bowick, Judge. Reversed.

Buchalter, Barry A. Smith, Michael B. Fisher, and Robert M. Dato for Plaintiff and Appellant.

Neufeld Marks, Paul S. Marks, and Jennifer MikoLevine for Defendant and Respondent.

Appellant California Bank and Trust (California Bank or "the bank") sued Meruelo Properties, Inc. (Meruelo), alleging a claim for breach of a guaranty of completion and performance contract. Two days before the trial was set to begin, the court granted two defense motions in limine excluding opinion testimony regarding the relevant market value of the property at issue and related appraisal reports. California Bank subsequently voluntarily dismissed the action, without prejudice. Meruelo did not move to vacate the dismissal, but sought an award of contractual attorney fees as the "prevailing party." California Bank objected that, under Civil Code section 1717, subdivision (b)(2), there is no prevailing party for purposes of contractual attorney fees when the action has been voluntarily dismissed. The trial court disagreed and awarded Meruelo attorney fees. We reverse the trial court order.

FACTUAL AND PROCEDURAL BACKGROUND

In February 2014, California Bank filed a complaint against Meruelo. The complaint alleged that in 2007, Pacific Commerce Bank, N.A. (Pacific Commerce) entered into a construction loan agreement with Homero Meruelo, Belinda Meruelo, and the Meruelo Living Trust (the borrowers), to fund the construction of a single family residence in Whittier. Pacific Commerce loaned the borrowers a principal sum of $4 million. The borrowers executed a construction deed of trust in favor of Pacific Commerce. In addition, Meruelo, the defendant and respondent here, executed a guaranty of completion and performance regarding construction of the property. The borrowers defaulted under the terms of the construction loan when it matured in October 2009. The construction was not completed. In August 2010, the property was sold at a

foreclosure sale; Pacific Commerce purchased the property with a credit bid of $2.6 million. Pacific Commerce later assigned all of its rights and interest in the guaranty to California Bank.

The complaint alleged that at the time of the default and foreclosure sale, had the construction been completed the property would have had a value greater than the outstanding loan balance of $860,436.03. Thus, according to the complaint, "but for the failure to complete construction, Pacific Commerce would have been paid in full all amounts due and owing under the terms of the Loan Documents either at the time of the foreclosure sale or the sale of the Property once ownership transferred to Pacific Commerce." The complaint asserted a cause of action for breach of the guaranty agreement and sought damages of at least $860,436.03.

In September 2015, the trial court denied California Bank's motion for summary judgment or summary adjudication. The court found, in part, that Meruelo raised a triable issue of fact regarding the amount of California Bank's damages. In its written ruling, the court explained the parties agreed the proper measure of damages resulting from the breach of a completion guarantee is the difference in value of the property with and without the promised performance, as set forth in *Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 Cal.App.3d 101. The court noted that at the time of the hearing on the motion, Meruelo had not obtained an appraisal of the property. However, by the time of the ruling, Meruelo had submitted an appraisal with a property valuation different from the other appraisals existing in the case. Three prior appraisals conducted in 2009 valued the property "as if" fully constructed at $4 million or more, while the new Meruelo appraisal set an "as if"

value of only $2.7 million. Two of the prior appraisals—the Curtis Rosenthal appraisals—valued the "as is" value of the property at over $2 million, leading to well over $1 million in damages. The new Meruelo appraisal resulted in a calculation of only $280,000 in damages. Thus, the court concluded the amount of damages was contested and the issue would have to be resolved at trial.

In December 2015, Meruelo filed two motions in limine in advance of the January 2016 trial date. The first motion sought to exclude evidence of the three prior appraisal reports from 2009. Meruelo argued the 2009 appraisal reports were inadmissible hearsay and irrelevant because they set an "as if" value for the property several months before the foreclosure sale.

The second motion sought the exclusion of any opinion testimony on the fair market value of the property. Meruelo argued California Bank had neither designated an expert witness qualified to testify about the fair market value of the property, nor listed any witness who was an owner of the property and could testify about the market value, as required by Evidence Code section 813.[1] Although California Bank had apparently included the authors of the 2009 Curtis Rosenthal appraisal

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[1] Under Evidence Code section 813, the value of the property may be shown only by the opinions of: "(1) Witnesses qualified to express such opinions. [¶] (2) The owner or the spouse of the owner of the property or property interest being valued. [¶] (3) An officer, regular employee, or partner designated by a corporation, partnership, or unincorporated association that is the owner of the property or property interest being valued, if the designee is knowledgeable as to the value of the property or property interest." (Evid. Code, § 813, subd. (a).)

reports on its general witness list, it had not designated them as expert witnesses.[2] Meruelo argued the court should therefore exclude these witnesses based on the bank's failure to designate them as expert witnesses.[3] Meruelo further contended: "Without an expert witness to testify about the fair market value of the subject real property, plaintiff cannot prove its damages case. This motion (and the accompanying motion to exclude expert appraisal reports) are therefore potentially case-dispositive."

California Bank opposed the motions, arguing the two appraisers it planned to call at trial were percipient witnesses. According to the bank, the appraisers conducted an appraisal of the property in anticipation of the 2010 foreclosure sale. Pacific Commerce used one of the challenged appraisal reports to formulate its credit bid at the sale. California Bank argued that, like a treating physician, these nonretained appraisers could testify about their opinions even without being designated as

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[2] According to Meruelo, California Bank originally designated a different appraiser as an expert witness, but it withdrew that expert right before his deposition was set to begin. California Bank did not designate a different appraiser as an expert witness.

[3] Code of Civil Procedure section 2034.300 provides that on the objection of a party who has complied with expert disclosure requirements, and subject to certain exceptions, "the trial court shall exclude from evidence the expert opinion of any witness that is offered by any party who has unreasonably failed to . . . [¶] (a) List that witness as an expert under Section 2034.260. [¶] (b) Submit an expert witness declaration. [¶] (c) Produce reports and writings of expert witnesses under Section 2034.270. [¶] (d) Make that expert available for a deposition under Article 3 (commencing with Section 2034.410)."

experts. The bank contended the 2009 appraisal report was admissible as a business record. It also asserted that even if the appraisers' opinion testimony was excluded, an officer or employee of Pacific Commerce could testify about the value of the property, since Pacific Commerce had a collateral interest in the property.

California Bank argued that allowing the bank to present the appraisers' opinion testimony would not prejudice Meruelo. Meruelo knew about the 2009 appraisers throughout the action and had issued deposition notices and subpoenas to them. Meruelo had interviewed the appraisers and secured a signed declaration from one of them regarding the 2009 appraisal, which it then used to oppose summary judgment. Meruelo's own appraisal expert reviewed the challenged appraisal and, according to California Bank, he relied on it in forming his own opinion. The bank further represented the appraisers were available to be deposed if necessary.

In addition to opposing the motions in limine, California Bank filed an ex parte application seeking to augment its expert witness list. The trial court denied the request.

On January 12, 2016, at the final status conference, the trial court granted Meruelo's motions in limine, ruling it would exclude the testimony of the authors of the 2009 Curtis Rosenthal appraisals, "or any other person as to market value." The court also excluded the appraisal reports. Following that ruling, the status conference continued, with a discussion of jury instructions, special verdict forms, and other trial presentation issues. Trial was set to start two days later. However, on the same day of the final status conference, California Bank filed a

request for a dismissal without prejudice. The voluntary dismissal was entered that day.

In March 2016, Meruelo filed a motion seeking attorney fees as the prevailing party under the guaranty agreement and Civil Code section 1717 (section 1717). Meruelo argued California Bank's dismissal of the case was not "truly voluntary" since, according to Meruelo, the trial court's ruling on the motions in limine eliminated California Bank's ability to prove its damages. Meruelo asserted the outcome of the case was a "foregone conclusion." In opposition, California Bank asserted there was no determination of the issues in the case and, despite the in limine ruling, the bank had other methods to establish the damage portion of its claims, such as bank records and the statements of Meruelo and the borrowers.

At a hearing on the motion, the court acknowledged Meruelo had not filed a dispositive motion, but suggested that if the case had gone to trial, the defense would have filed a motion for nonsuit. California Bank argued it had other ways to prove damages, including testimony from 14 other witnesses, and it was speculative to conclude the bank could not prove its case. The court granted the motion, subject to further hearing on the amount of fees. At a subsequent hearing following the production of Meruelo's unredacted time records, California Bank's counsel asked if the court was converting the voluntary dismissal to a dismissal with prejudice. The court indicated it was not altering the dismissal and explained that although there was no dispositive motion, "it's clear that the court's ruling on the motion in limine is what the catalyst was for the plaintiff to dismiss."

In the written ruling that followed, the trial court concluded the dismissal was not "truly 'voluntary,' but rather [was] a result of determinative rulings by this Court." The court explained: "[The in limine ruling] was clearly unfavorable to Plaintiff [California Bank]. While the Court agrees with Plaintiff's assessment that the rulings on the motions in limine were not officially dispositive of the case, and opening statements had not been given or witnesses sworn, the rulings were substantive and critically affected Plaintiff's ability to move forward at trial. The Court finds that by excluding Plaintiff's market value evidence, it affected Plaintiff's ability to present sufficient evidence as to the damages and therefore the outcome was akin to a dispositive motion." The court found Meruelo was a prevailing party under section 1717, reasoning: "[I]n light of the circumstances involved and Plaintiff's dismissal at such a late stage in the proceedings subsequent to the Court's substantive rulings against it, fairness dictates allowing Defendant to seek its attorneys' fees." The trial court awarded Meruelo $240,731 in attorney fees. This appeal followed.

DISCUSSION

California Bank argues the trial court exceeded its jurisdiction in awarding attorney fees following the voluntary dismissal. The bank further contends the in limine ruling was not dispositive and therefore did not foreclose the bank's right to voluntarily dismiss the case. We agree the trial court erred in awarding attorney fees.

I. The Voluntary Dismissal Was Timely and Foreclosed a Contractual Fee Award

A. The Trial Court Could Not Award Attorney Fees Under Section 1717 Unless the Voluntary Dismissal Was Invalid

Meruelo sought attorney fees in this case pursuant to a provision in the guaranty agreement and section 1717. Under section 1717, in any action on a contract containing an attorney fee provision, the party determined to be the prevailing party on the contract is entitled to reasonable attorney fees. However, section 1717, subdivision (b)(2), provides: "Where an action has been voluntary dismissed . . . there shall be no prevailing party for purposes of this section." Parties may not contract around this provision. "When a plaintiff files a complaint containing causes of action within the scope of section 1717 (that is, causes of action sounding in contract and based on a contract containing an attorney fee provision), and the plaintiff thereafter voluntarily dismisses the action, section 1717 bars the defendant from recovering attorney fees incurred in defending those causes of action, *even though the contract on its own terms authorizes recovery of those fees*." (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 617.)

In light of section 1717, subdivision (b)(2), the trial court could not award Meruelo contractual attorney fees without first finding the dismissal was invalid. (*Mesa Shopping Center-East, LLC v. O Hill* (2014) 232 Cal.App.4th 890, 902-903; *Bank of America, N.A. v. Mitchell* (2012) 204 Cal.App.4th 1199, 1209 (*Mitchell*); *Gogri v. Jack in the Box Inc.* (2008) 166 Cal.App.4th 255, 274 (*Gogri*).) While Meruelo did not seek to vacate the dismissal, it essentially argued California Bank no longer had the

right to voluntarily dismiss its case after the trial court's ruling on the motions in limine. The trial court's written ruling was not explicit on this point; the court did not, for example, vacate or strike the dismissal. Still, we understand the court's indication that the dismissal was not "voluntary," and the court's subsequent award of attorney fees, as a determination that the dismissal was invalid. We disagree with the court's conclusion.

II. The Dismissal Was Valid

A. Applicable Legal Principles and Standard of Review

Under Code of Civil Procedure section 581, subdivision (b)(1), "[a]n action may be dismissed . . . [¶] [w]ith or without prejudice, upon written request of the plaintiff to the clerk, filed with papers in the case, or by oral or written request to the court at any time before the actual commencement of trial, upon payment of the costs, if any." "Apart from certain . . . statutory exceptions, a plaintiff's right to a voluntary dismissal pursuant to [former subdivision 1] appears to be absolute. [Citation.] Upon the proper exercise of that right, a trial court would thereafter lack jurisdiction to enter further orders in the dismissed action." (*Wells v. Marina City Properties, Inc.* (1981) 29 Cal.3d 781, 784.)

"The purpose behind the right of a plaintiff to voluntarily dismiss a case under Code of Civil Procedure section 581 'is to allow a plaintiff a certain amount of freedom of action within the limits prescribed by the code.' [Citation.] Where this right does not conflict with other statutory provisions, judicial procedures or public policy, the dismissal is valid." (*Zapanta v. Universal Care, Inc.* (2003) 107 Cal.App.4th 1167, 1174 (*Zapanta*).) Since a plaintiff has a statutory right to dismiss, "in order to curtail the plaintiff's privilege of dismissing his action voluntarily, 'the

defendant must clearly and specifically bring himself within the terms of the statute; i.e., request affirmative relief, or prove that plaintiff has made an opening statement, or that a witness has been sworn or evidence introduced.' [Citation.]" (*Cal-Vada Aircraft, Inc. v. Superior Court* (1986) 179 Cal.App.3d 435, 440 (*Cal-Vada Aircraft*).)

California courts have interpreted the "commencement of trial" to include more than an opening statement or the swearing of the first witness. (Code Civ. Proc., § 581, subd. (a)(6).) Commencement of trial " 'includes *pretrial* procedures that *effectively dispose of the case.*' [Citation.] For example, a plaintiff's right to voluntarily dismiss his or her action under section 581 is cut off when a general demurrer is sustained without leave to amend, or when a general demurrer is sustained with leave to amend and the plaintiff fails to amend within the time allowed by the court, even if the trial court has not yet entered a judgment of dismissal on the sustained demurrer." (*Lewis C. Nelson & Sons, Inc. v. Lynx Iron Corp.* (2009) 174 Cal.App.4th 67, 76 (*Lewis C. Nelson & Sons*).)

In *Franklin Capital Corp. v. Wilson* (2007) 148 Cal.App.4th 187 (*Franklin*), the appellate court reviewed the many relevant dismissal cases, distilling them to a single test. As the *Franklin* court explained, courts deem the trial to have commenced, disallowing a voluntary dismissal, "[w]hen the dismissal could be said to have been taken [¶] —(a) in the light of a public and formal indication by the trial court of the legal merits of the case, or [¶] —(b) in the light of some procedural dereliction by the dismissing plaintiff that made dismissal otherwise *inevitable,* then the voluntary dismissal is ineffective." (*Id.* at p. 200.) The *Lewis C. Nelson & Sons* court similarly reasoned the plaintiff

may no longer voluntarily dismiss "if the action ' " 'has proceeded to a determinative adjudication, or to a decision that is tantamount to an adjudication . . .' " [citation]' [citation], or if the case has 'reached a stage where a final disposition was a mere formality[.]' " (*Lewis C. Nelson & Sons, supra,* 174 Cal.App.4th at pp. 76–77, citing *Zapanta, supra,* 107 Cal.App.4th at pp. 1171, 1174; *Gogri, supra,* 166 Cal.App.4th at p. 268, fn. 9 [although *Franklin* "mere formality" test is not the exclusive test for timeliness, it is a sufficiently accurate rule of thumb for application of section 581 to undisputed facts].)

The question confronting us is whether the instant case had reached this dispositive stage. This issue involves the application of law to undisputed facts, thus our review is de novo. (*Lewis C. Nelson & Sons, supra,* 174 Cal.App.4th at p. 75; *Gogri, supra,* 166 Cal.App.4th at p. 262.)

We disagree with Meruelo that this court's discussion of the standard of review in *Tire Distributors, Inc. v. Cobrae* (2005) 132 Cal.App.4th 538 (*Tire Distributors*), is applicable here. In *Tire Distributors*, the plaintiff voluntarily dismissed the action against one of three related defendants while that defendant's summary judgment motion was pending and after the time for opposition had passed. By the time of the appeal, the procedural history was complex. The record included significant disputed facts and competing evidence about what motivated the dismissal—a settlement agreement or the pending summary judgment motion. In that context, we concluded abuse of discretion was the proper standard of review. Here, in contrast, there was no summary judgment or other dispositive motion pending and the relevant facts are undisputed. In *Tire Distributors*, we acknowledged earlier decisions held that where

the facts are undisputed, the standard of review is de novo. (*Id.* at p. 544.) This is such a case.[4] (*Gogri, supra,* 166 Cal.App.4th at p. 262, fn. 6.)

B. Discussion

A motion in limine is not a dispositive motion and it typically does not place an action in a posture such that a final disposition is a mere formality.[5] Here, Meruelo succeeded in excluding the opinion evidence of the appraisers who issued two appraisals in 2009, upon which California Bank apparently intended to rely, and the appraisal reports. But the function of

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4 In *Tire Distributors,* this court also explained that a discretionary ruling must be "guided and controlled by fixed legal principles and must be in keeping with the spirit of the law in order to subserve the ends of substantial justice." (*Tire Distributors, supra,* 132 Cal.App.4th at p. 544.) Even under an abuse of discretion standard of review, we would conclude reversal is necessary in this case.

5 In fact, the Superior Court of Los Angeles County, Local Rules, rule 3.57(b) prohibits the use of motions in limine as a means of seeking summary judgment or summary adjudication. Under the rule: "A motion *in limine* may not be used for the purpose of seeking summary judgment or the summary adjudication of an issue or issues. Those motions may only be made in compliance with Code of Civil Procedure section 437c and applicable court rules." Similarly, numerous courts have criticized the use of motions in limine as a substitute for dispositive motions. (*Pellegrini v. Weiss* (2008) 165 Cal.App.4th 515, 530; *Amtower v. Photon Dynamics, Inc.* (2008) 158 Cal.App.4th 1582, 1594–1595 (*Amtower*) [use of motions in limine to test the factual basis of a claim pose a risk to the fair adjudication of factual issues]; *R & B Auto Center, Inc. v. Farmers Group, Inc.* (2006) 140 Cal.App.4th 327, 333.)

the motion in limine was simply to exclude this particular evidence. Ruling on the motions in limine did not require the court to assess or determine whether, without the excluded evidence, California Bank would be unable to prove its case altogether. In opposition to the motion for attorney fees, California Bank argued it in fact had other witnesses who could provide evidence of the value of the property sufficient to establish damages. Meruelo contends California Bank never described these witnesses or the evidence with any specificity. Yet, there was no formal opportunity for California Bank to do so.

This is not a case in which the court or the parties converted the motion in limine into a means of evaluating the entirety of California Bank's evidence. The court did not order the plaintiff to set forth its "best case scenario," or hold an evidentiary hearing to determine the scope or existence of the evidence to prove the plaintiff's case. (See *Amtower*, *supra,* 158 Cal.App.4th at pp. 1592, 1594; *Panico v. Truck Ins. Exchange* (2001) 90 Cal.App.4th 1294, 1296.) Meruelo *argued* that California Bank could not prove its damages without the excluded evidence, but there was no evidentiary proceeding or formal motion establishing this was the case. No judgment was anticipated or would result from the in limine ruling. Thus, while courts have in some cases treated a motion in limine as essentially a nonsuit, the motions did not serve that function here. California Bank was never provided an opportunity to establish whether it had other evidence to prove its damages and the trial court never made a determination that California Bank's evidence was insufficient to support a judgment in its favor.

Indeed, cases that have found a voluntary dismissal untimely are easily distinguishable because they involve more than one party's mere assertion—unsupported by an evidentiary showing—that the case would imminently be resolved adversely to the plaintiff. (*Gogri, supra,* 166 Cal.App.4th at pp. 267–268 [rejecting "conclusory assertion" that summary judgment was inevitable; dismissal valid when entered after plaintiff opposed summary judgment motion but before court ruled or issued tentative]; *Zapanta, supra,* 107 Cal.App.4th at pp. 1173–1174.)

For example, in *Mitchell*, *supra,* 204 Cal.App.4th at page 1208, the court vacated a voluntary dismissal as untimely when it was entered after the court had sustained a demurrer without leave to amend. In *Mary Morgan, Inc. v. Melzark* (1996) 49 Cal.App.4th 765, the court struck a voluntary dismissal entered after the trial court had issued a tentative ruling granting summary judgment and continuing the hearing for the sole purpose of allowing the plaintiff additional time to produce opposition evidence. In *Cravens v. State Bd. of Equalization* (1997) 52 Cal.App.4th 253, summary judgment in favor of the defendant was "a formality" because the plaintiff failed to oppose the motion. A dismissal filed after the time for opposition had passed was invalid. (See also *Franklin, supra,* 148 Cal.App.4th at pp. 199–205 [collecting and analyzing cases].)

A ruling may be the "catalyst" of a voluntary dismissal without necessarily being a dispositive ruling or one that renders the entry of judgment a "mere formality." (See, e.g., *Law Offices of Andrew L. Ellis v. Yang* (2009) 178 Cal.App.4th 869, 878, 881 [dismissal entered after anti-SLAPP motion was filed was valid; trial court had not made tentative or definitive ruling and it was not inevitable the complaint would be stricken]; *Parsons v.*

Umansky (1994) 28 Cal.App.4th 867, 871 [voluntary dismissal valid when filed after demurrer sustained with leave to amend and time to amend had not expired]; *Cal-Vada Aircraft, supra,* 179 Cal.App.3d at pp. 446–448 [summary adjudication of some but not all issues did not cut off plaintiff's right to voluntarily dismiss].) Respondent has argued the dismissal was not "truly voluntary" because it was prompted by the damaging in limine ruling. But the in limine ruling did not itself effectively dispose of the action or obviate the need for trial.

Moreover, several courts have rejected the idea that the equities alone can justify the termination of the plaintiff's right to voluntary dismiss a case. (*Lewis C. Nelson & Sons, supra,* 174 Cal.App.4th at p. 78 [plaintiff's subjective lack of good faith in seeking dismissal does not by itself terminate the right to dismiss]; *Franklin, supra,* 148 Cal.App.4th at p. 207.) In general, the timeliness of a dismissal is based on an objective standard, not a subjective one. That standard focuses on the "commencement of trial," either in a conventional sense, or in the sense that the outcome of the case has already been effectively or actually determined adversely to the plaintiff. (*Lewis C. Nelson & Sons, supra,* 174 Cal.App.4th at p. 80 [rejecting argument that dismissal should not be allowed because it was a "tactical ploy" to avoid enforcement of settlement].) Indeed, even cases considering the good faith or motivation of the plaintiff in evaluating the validity of a dismissal have done so in contexts in which there was a *dispositive motion pending* when the plaintiff sought dismissal, such that an involuntary termination of the action was otherwise imminent. (See, e.g., *Marina Glencoe, L.P. v. Neue Sentimental Film AG* (2008) 168 Cal.App.4th 874, 877–878 (*Marina Glencoe*) [motion for judgment pending; dismissal

was timely]; *Tire Distributors, supra,* 132 Cal.App.4th at pp. 543–544 [summary judgment motion pending; dismissal was timely].)[6]

Here, the trial court excluded some of California Bank's critical evidence. But there was no dispositive motion pending, no public and formal indication by the trial court regarding the merits of the case overall (*Lewis C. Nelson & Sons, supra,* 174 Cal.App.4th at p. 78), no procedural failing on the part of California Bank that would make a defense judgment inevitable (*Franklin, supra,* 148 Cal.App.4th at p. 200), and no showing that an adverse judgment was a foregone conclusion (*Lewis C. Nelson & Sons, supra,* at pp. 78–79). As California Bank notes, following the ruling on the motions in limine, the court and the parties proceeded to discuss jury instructions and trial procedures, a further illustration that, while it was clear California Bank's case was damaged by the ruling on the motions, a defense judgment

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[6] We acknowledge some courts have disagreed with our opinion in *Tire Distributors* to the extent that decision suggested the timeliness of a voluntary dismissal depends solely on a subjective evaluation of the plaintiff's motivation or good faith. (*Lewis C. Nelson & Sons, supra,* 174 Cal.App.4th at p. 78, fn. 7; see also *Gogri, supra,* 166 Cal.App.4th at p. 265, fn. 8; *Franklin, supra,* 148 Cal.App.4th at pp. 207–209.) We do not revisit that aspect of our prior decision because, as discussed above, we understand *Tire Distributors* in the context of its particular facts and do not find it applicable here. In this case, there was no dispositive motion filed or pending. The sole question is whether there was any existing or imminent ruling or determination that had or would effectively dispose of the action and obviate the need for trial, cutting off the plaintiff's statutory right to voluntarily dismiss.

was not a foregone conclusion, a mere formality, or the inevitable result of the court's ruling.[7]

We conclude there was no commencement of trial and California Bank's dismissal was timely. As a result, under section 1717, subdivision (b)(2), the trial court erred in finding Meruelo to be a prevailing party and in awarding attorney fees on that basis. (*Marina Glencoe, supra,* 168 Cal.App.4th at p. 874 [section 1717 is not intended to punish a party; it specifically contemplates voluntary dismissal as an exception to an award of fees to the prevailing party].)

DISPOSITION

The trial court order is reversed. Appellant to recover its costs on appeal.

BIGELOW, P. J.

We Concur:

RUBIN, J. FLIER, J.

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[7] At a hearing on the attorney fee motion, the trial court noted that had the case continued, Meruelo likely would have filed a motion for nonsuit. Had Meruelo filed a motion for nonsuit, it would presumably have occurred after California Bank made its opening statement or presented evidence. The trial court would then have been called upon to determine whether, as a matter of law, California Bank's evidence was insufficient to permit a jury to find in its favor. (Code Civ. Proc., § 581c, subd. (a); *County of Kern v. Sparks* (2007) 149 Cal.App.4th 11, 16.) No such determination was made in this case.