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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

ACHIKAM SHAPIRA, Plaintiff and Appellant, v. LIFETECH RESOURCES, LLC, Defendant and Respondent.	B294622 (Los Angeles County Super. Ct. No. BC586445)

APPEAL from an order of the Superior Court of Los Angeles County, Terry A. Green, Judge. Affirmed.

Kilpatrick Townsend & Stockton, Emil W. Herich for Plaintiff and Appellant.

Conkle, Kremer & Engel, John A. Conkle, Amanda R. Washton for Defendant and Respondent.

INTRODUCTION

Plaintiff Achikam Shapira sued Lifetech Resources, LLC for breach of contract and related causes of action. The case proceeded to a bench trial. After the parties had rested but before closing arguments had been completed, Shapira attempted to dismiss his case with prejudice. The trial court rejected the request for dismissal, and after the parties filed their closing argument briefs, the court entered judgment for Lifetech. In a previous opinion, *Shapira v. Lifetech Resources, LLC* (2018) 22 Cal.App.5th 429 (*Shapira I*), we held that the trial court erred in not allowing Shapira to dismiss his action with prejudice, and therefore reversed.

Upon remand, Shapira filed a motion to recover his attorney fees on appeal. He asserted below, as he does here, that due to the reversal in *Shapira I*, he was the "prevailing party" on appeal and therefore he is entitled to attorney fees under the contract. The trial court denied the motion, and we affirm. As we stated in *Shapira I,* because Shapira dismissed his case with prejudice, an award of attorney fees is barred by Civil Code section 1717, subdivision (b)(2) (section 1717(b)(2)). Successfully appealing to correct the trial court's procedural error regarding the dismissal did not render Shapira a "prevailing party" in the action.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Previous appeal*

The relevant facts are set out in *Shapira I, supra*, 22 Cal.App.5th at pp. 432-436, so we offer only a brief summary here. Shapira sued Lifetech for breach of a consulting contract. (*Id*. at p. 432-433.) After a four-day bench trial, the parties and court agreed that closing arguments would be submitted in writing.

(*Id*. at p. 433.) Before Shapira's closing argument brief was due, he filed an ex parte application to dismiss the case with prejudice. (*Ibid.*) After the ex parte application was denied, Shapira filed a notice of voluntary dismissal. (*Id*. at p. 434.) The court issued an order stating that the voluntary dismissal was "rejected." (*Ibid.*) After the parties completed their briefing, the trial court found in favor of Lifetech, entered a judgment deeming Lifetech the prevailing party, and awarded Lifetech attorney fees pursuant to the attorney fee provision in the contract. (*Ibid*.)

Shapira appealed and we reversed. We held that under Code of Civil Procedure, section 581, subdivision (e),[1] Shapira had the right to voluntarily dismiss his case before closing arguments and submission for decision. (*Shapira I, supra*, 22 Cal.App.5th *Id*. at pp. 437-438.) We also held that because Shapira was entitled to dismiss the case, Lifetech was not entitled to attorney fees under section 1717(b)(2), which states that when a contract action "has been voluntarily dismissed or dismissed pursuant to a settlement of the case, there shall be no prevailing party for purposes" of determining entitlement to attorney fees. (*Id*. at p. 441.) We therefore reversed the judgment, awarded Shapira costs pursuant to California Rules of Court, rule 8.278(a); and remanded the case.

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[1] Code of Civil Procedure, section 581, subdivision (e) states, "After the actual commencement of trial, the court shall dismiss the complaint, or any causes of action asserted in it, in its entirety or as to any defendants, with prejudice, if the plaintiff requests a dismissal . . . ."

B. *Shapira's motion for attorney fees*

On remand, Shapira filed a motion seeking an award of attorney fees on appeal.[2] He argued that the contract at issue stated that the prevailing party was entitled to recover "all costs and expenses including reasonable attorney's fees incurred in any appeal from any action brought to enforce" the contract. He also contended that attorney fees were warranted under Civil Code section 1717, subdivision (a) (section 1717(a)), which states that a "prevailing party" in a contract action is entitled to fees when the contract provides for it. Shapira asserted that he was entitled to attorney fees as prevailing party "based on his successful prosecution of the appeal," because "there can be no dispute that [Shapira] was the prevailing party on the appeal." Shapira requested $88,679 in attorney fees and $5,255.62 in costs.

Lifetech opposed the motion. It asserted that Shapira voluntarily dismissed his action with prejudice, and therefore he was not the prevailing party. It also contended that Shapira's appeal of a narrow legal issue could not render him a prevailing party in the action. Lifetech also argued that Shapira never established that he was entitled to anything under the contract, and his "success" on appeal resulted in the ability to dismiss his contract claims with prejudice, so he could not reasonably be deemed the prevailing party for any claim relating to the contract. In addition, Lifetech noted that section 1717(b)(2) bars attorney fees in dismissed cases. Shapira filed a reply in support of his motion.

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[2] Following remand, Shapira also filed a peremptory challenge to Judge Elizabeth Allen White, who presided over the bench trial. The case was reassigned to Judge Terry A. Green.

There is no transcript of the hearing in the record on appeal. In a written ruling, the court denied Shapria's request for attorney fees, and granted his request for costs on appeal. The court noted that Shapria dismissed his case with prejudice, and said, "Thus we have a situation in which Plaintiff prevailed on the appeal, but manifestly did not prevail at the trial level. Plaintiff now seeks contractual attorney's fees on the appeal only. The question before the court is whether the outcome of an appeal can be separated from the outcome of the entire case in this manner. It cannot." The court stated that "Section 1717 asks who prevailed on the *contract*, that is, who prevailed on the *entire case* as it relates to the contract. The test for prevailing parties focuses on the overall outcome of the case, not the outcome on some particular issue. [Citations.] The overall outcome of this lawsuit was a voluntary dismissal." The court added, "To prevail on an appeal of a discrete issue is no more to prevail on the *case* than prevailing on a pre-trial motion would be." The court also noted that because plaintiff voluntarily dismissed the case, section 1717(b)(2) barred recovery of attorney fees. The court awarded Shapira his claimed costs on appeal, pursuant to this court's order.

Shapira timely appealed.

DISCUSSION

"'[I]t is a discretionary trial court decision on the propriety or amount of statutory attorney fees to be awarded, but a determination of the legal basis for an attorney fee award is a question of law to be reviewed de novo.'" (*Mountain Air Enterprises, LLC v. Sundowner Towers, LLC* (2017) 3 Cal.5th 744, 751.) "[W]here the material facts are largely not in dispute, our review is de novo." (*Ibid.*)

Section 1717(b)(2) states that "[w]here an action has been voluntarily dismissed. . . , there shall be no prevailing party for purposes of this section." Shapira dismissed his action, and therefore there was no prevailing party for purposes of an award of attorney fees under section 1717. We explicitly stated this in *Shapira I*: "Because the case should have been dismissed, section 1717(b)(2) barred an award of attorney fees." (*Shapira I, supra*, 22 Cal.App.5th at p. 441.) The fact that the trial court erred by not allowing Shapira to dismiss the case does not change this outcome.

Shapira nonetheless argues that he is entitled to attorney fees for his appeal under section 1717(a). That subdivision states that when a contract provides for attorney fees "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." (§ 1717(a).) Shapira asserts that he was the prevailing party on appeal, as demonstrated by the reversal of the judgment and this court's award of costs on appeal.

Shapira points to case law stating that the "primary purpose of section 1717 is to ensure mutuality of remedy for attorney fee claims under contractual attorney fee provisions." (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 610 (*Santisas*).) Section 1717 makes "an otherwise unilateral right reciprocal, thereby ensuring mutuality of remedy." (*Ibid.*) This typically happens in two situations. The first is when the contract provides a right to attorney fees to one party but not the other, in which case "the effect of section 1717 is to allow recovery of attorney fees by whichever contracting party prevails." (*Id.* at p.

611.) The second is when a party successfully defends the litigation by arguing that the contract is inapplicable, invalid, or unenforceable, which is "inconsistent with a contractual claim for attorney fees under the same agreement." (*Ibid.*) "To ensure mutuality of remedy in this situation, it has been consistently held that when a party litigant prevails in an action on a contract by establishing that the contract is invalid, inapplicable, unenforceable, or nonexistent, section 1717 permits that party's recovery of attorney fees whenever the opposing parties would have been entitled to attorney fees under the contract had they prevailed." (*Ibid.*)

Shapira references this reasoning in the application of section 1717 and contends, "The fact that it is undisputed that [Lifetech] would have been entitled to its attorney fees had it prevailed on the appeal, in and of itself, compels the conclusion that [Shapira] should have been awarded [his] attorney's fees incurred in his entirely successful appeal." According to Shapira, this would be "consistent with the equitable considerations that underlie Section 1717."

Although Shapira calls this "a case of first impression in California contractual attorney's fees jurisprudence," it is not. California case law is "clear that section 1717 does not support an award to the prevailing party on appeal, but only to the prevailing party in the lawsuit." (*Wood v. Santa Monica Escrow Co.* (2009) 176 Cal.App.4th 802, 808 (*Wood II*).) "[T]he trial and appeal are treated as parts of a single proceeding. The party prevailing on appeal is not necessarily the prevailing party for the purposes of awarding contractual attorney fees." (*Wood II, supra*, 176 Cal.App.4th at p. 806.) Instead, "the prevailing party

must be determined by who prevails overall in the lawsuit." (*Ibid.*)

Various iterations of Shapira's argument have been consistently rejected since the 1970's. In *Varco-Pruden, Inc. v. Hampshire Construction Co.* (1975) 50 Cal.App.3d 654, following reversal of a summary judgment on appeal, the Court of Appeal rejected a party's request for attorney fees on appeal under section 1717. The court stated, "There has not yet been any 'recovery' by Varco or any final judgment. In the event that Varco recovers judgment on its complaint, attorney's fees for this appeal may be included in the attorney's fees awarded." (*Id.* at p. 664.)

Similarly, in *Presley of Southern California v. Whelan* (1983) 146 Cal.App.3d 959, the defendant successfully moved for summary judgment, but the Court of Appeal reversed. After remand, the plaintiff sought attorney fees under section 1717 as the prevailing party on appeal, but the superior court denied the motion. The Court of Appeal affirmed, stating, "[I]t is well settled a party who prevails on appeal is not entitled under a section 1717 fee provision to the fees he incurs on appeal where the appellate decision does not decide who wins the lawsuit but instead contemplates further proceedings in the trial court." (*Id.* at p. 961.)

In *Snyder v. Marcus & Millichap* (1996) 46 Cal.App.4th 1099, the plaintiff sued the defendant for real estate fraud, and the trial court awarded compensatory damages, as well as damages for emotional distress and punitive damages. (*Id.* at p. 1101.) On appeal, the defendant, Marcus & Millichap, challenged the emotional distress and punitive damages, but did not challenge the plaintiff's entitlement to compensatory damages. The appeal was successful and the award was reduced. The

defendant then sought attorney fees under section 1717 as the prevailing party on appeal. The trial court denied the request and the Court of Appeal affirmed, stating, "Marcus & Millichap was not the prevailing party in the lawsuit because it suffered a net judgment against it of $834,900. While Marcus & Millichap had prevailed on its partial appeal in reducing the amount of this judgment by $1,070,000, Marcus & Millichap was still only the prevailing party in its partial appeal, not the prevailing party in the lawsuit. Therefore, the trial court properly awarded Marcus & Millichap its appellate costs, but not its attorney fees, in the prior appeal." (*Id*. at p. 1102.)

In *Mustachio v. Great Western Bank* (1996) 48 Cal.App.4th 1145, the plaintiff sued her bank following "unauthorized access to [her] safe deposit box"; the bank filed a cross-complaint against a third party. (*Id*. at p. 1148.) After a jury trial, the court awarded plaintiff damages, and entered judgment in favor of the bank on the cross-complaint. (*Ibid*.) After appeals "by all parties," the Court of Appeal modified the judgment to reduce some of the damages awarded to the plaintiff, but affirmed the portion of the judgment finding the bank liable for the plaintiff's loss. (*Id*. at pp. 1148-1149.) The plaintiff, who had previously been awarded attorney fees under the safe deposit box contract, also sought to recover her attorney fees on appeal. The bank opposed her request, asserting in part that the plaintiff was not the prevailing party on appeal. The Court of Appeal rejected the bank's argument and held that the plaintiff was entitled to fees, stating, "Here, upon final resolution, Mustachio was the party prevailing on the contract. While her claim for punitive damages was rejected on appeal, she was ultimately awarded damages in

excess of $200,000 as a result of the breach of contract and conversion claims." (*Id*. at p. 1150.)

Wood II, supra, 176 Cal.App.4th 802 is similar to the instant case in that it involved a dismissal by the plaintiff and an argument, similar to Shapira's here, that the mutuality provision in section 1717 supported a fee award on appeal. In *Wood II*, the plaintiff, Wood, sued the defendants for multiple causes of action including breach of contract relating to a loan. Wood dismissed his claims against the escrow company defendant, Santa Monica Escrow Company (Santa Monica), which then sought attorney fees based on a provision in the escrow instructions. Santa Monica conceded it was not entitled to fees under section 1717(b)(2), but sought fees on other grounds. The trial court denied the request, Santa Monica appealed, and the Court of Appeal affirmed the order in a published decision, *Wood v. Santa Monica Escrow Co*. (2007) 151 Cal.App.4th 1186 (*Wood I*).

Upon remand, Wood filed a motion seeking attorney fees based on the escrow instructions and section 1717, and the trial court denied the motion. (*Wood II, supra*, 176 Cal.App.4th at p. 805.) Wood appealed, contending that he was entitled to attorney fees because "the appeal was a proceeding in which he was unequivocally the prevailing party." (*Ibid*.) The Court of Appeal disagreed, stating that "the prevailing party must be determined by who prevails overall in the lawsuit" (*id*. at p. 806), and "Santa Monica was the prevailing party because Wood dismissed his lawsuit against Santa Monica with prejudice." (*Id*. at p. 807.)

Wood also asserted, as Shapira does here, that the mutuality provision in section 1717(a) supported his claim for attorney fees. The court stated that Wood "claims he is entitled to an award of fees because Santa Monica would have been

entitled to fees had it prevailed on the appeal. But we held in [*Wood I*] that Santa Monica was not entitled to fees under section 1717 as a matter of law. It would be absurd to conclude that, although Santa Monica is not entitled to fees under section 1717, the reciprocity provision of the same section requires an award to Wood." (*Wood II, supra*, 176 Cal.App.4th at p. 807.)

The *Wood II* court's reasoning applies equally here. Shapira was not the prevailing party in the lawsuit, because he dismissed his action against Lifetech with prejudice. Shapira was not the party who "prevailed overall in the lawsuit," and was not entitled to attorney fees. (*Wood II, supra*, 176 Cal.App.4th at p. 805; see also *Hsu v. Abbara* (1995) 9 Cal.4th 863, 876 ["when a defendant defeats recovery by the plaintiff on the only contract claim in the action, the defendant is the party prevailing on the contract under section 1717 as a matter of law."].) "[I]n any given lawsuit there can only be one prevailing party on a single contract for the purposes of an entitlement to attorney fees." (*Frog Creek Partners, LLC v. Vance Brown, Inc.* (2012) 206 Cal.App.4th 515, 531; see also *Bank of Idaho v. Pine Avenue Associates* (1982) 137 Cal.App.3d 5, 15 (*Bank of Idaho*) [section 1717 does not "suggest that there may be more than one prevailing side ultimately in a given lawsuit."]; *de la Carriere v. Greene* (2019) 39 Cal. App.5th. 270, 279 [the party who "recovered the 'greater amount on the action on the contract'" was the prevailing party and "the only party entitled to attorney fees," despite the other party's limited success on appeal].)

As in *Wood II*, the mutuality provision in section 1717(a) also does not justify an award of attorney fees here. Shapira is correct that had we affirmed the judgment in Lifetech's favor, Lifetech would have been the prevailing party on the contract

and would have been entitled to attorney fees. However, there is no authority supporting Shapira's contention that a successful appeal on a procedural issue allowing Shapira to dismiss his case with prejudice rendered him the prevailing party entitled to attorney fees.

Shapira asserts that we should follow *Bank of Idaho, supra,* 137 Cal.App.3d 5. For the most part, *Bank of Idaho* is in accord with the above cases in holding that the "statutory language [in section 1717] contemplates only one side being '*the* prevailing party,' to wit, '*the* party in whose favor final judgment is rendered.'" (*Id*. at p. 15 (emphasis in original).) The court stated that the plaintiff's successful appeal on an interim issue "does not qualify as a final judgment in plaintiff's favor making it 'the prevailing party' most successful in this litigation." (*Ibid*.)

The *Bank of Idaho* court nevertheless assumed, without analysis, that at the termination of the litigation the plaintiff could be entitled to an offset for the attorney fees on appeal, even if the defendant ultimately prevailed in the action: "Plaintiff also suggests that in the event the case does proceed to judgment in favor of defendants, it will be troublesome to adjust the parties' offsetting rights to fees. We see no serious difficulty in ascertaining defendants' entitlement to fees; those incurred in the former appeal would be excluded, and plaintiff's fees on such appeal would constitute an offset to any award of fees to defendants for other aspects of the case." (*Id*. at pp. 17-18.)

In the 37 years since *Bank of Idaho* was decided, no other case that we have found has embraced its "offset" reasoning. To the contrary, the idea of an offset was rejected just one year later in *Presley, supra,* 146 Cal.App.3d at p. 962, in which the court stated, "Apportionment of fees is surely correct where the final

result in a case is both victory and loss for both sides, e.g., where plaintiff recovers on his complaint and defendant recovers on a cross-claim. Apportionment, however, should not be based on the fact a party makes successful procedural maneuvers during trial but loses the case." The court also stated, "A party who wins an outright victory should recover all his fees without offset for the fees incurred by the other party." (*Id*. at p. 963.) And after calling *Bank of Idaho*'s offset paragraph "ambiguous dictum," the court in *Snyder, supra,* 46 Cal.App.4th at p. 1103, stated, "We agree with the *Presley* court's disapproval of the *Bank of Idaho* dictum." Like *Presley* and *Snyder*, we find no support in section 1717 for an offset or apportionment of attorney fees.

Lifetech also points out that the mutuality provision of section 1717 cannot apply here because *Shapira I* involved a procedural issue in the trial court, not the parties' substantive contentions relating to the contract. "[T]o invoke section 1717 and its reciprocity principles a party must show (1) he or she was sued on a contract containing an attorney fee provision; (2) he or she *prevailed on the contract claims*; and (3) the opponent would have been entitled to recover attorney fees had the opponent prevailed." (*Brown Bark III, L.P. v. Haver* (2013) 219 Cal.App.4th 809, 820 [emphasis added].) As Shapira cannot show that he "prevailed on the contract claims," the mutuality provision of section 1717 cannot apply.[3]

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[3] For the first time in his reply brief, Shapira cited a series of cases including *Turner v. Schultz* (2009) 175 Cal.App.4th 974, *Acosta v. Kerrigan* (2007) 150 Cal.App.4th 1124, and *Otay River Constructors v. San Diego Expressway* (2008) 158 Cal.App.4th 796. At oral argument, Shapira argued that these cases control, and should be relied on here. We reject this contention. First, we do not ordinarily consider arguments made for the first time in a

Shapira offers no basis to depart from the well-established authority holding that under section 1717, attorney fees are not warranted for a successful appellant who is not otherwise the prevailing party on the contract claims in the case.

DISPOSITION

The court's order denying Shapira's request for attorney fees is affirmed. Lifetech is entitled to recover its costs on appeal.

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COLLINS, J.

We concur:

MANELLA, P. J.

WILLHITE, J.

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reply brief. (*Hernandez v. First Student, Inc.* (2019) 37 Cal.App.5th 270, 277-278.) Second, these cases address attorney fees arising from court proceedings in cases that also involve arbitration, and therefore are not applicable here.