Filed 5/9/12 Choi v. Katofsky CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

SUNHEE CHOI, INC., Plaintiff and Respondent, v. JEFF KATOFSKY, et al., Defendants and Appellants.	B232580 (Los Angeles County Super. Ct. No. BC425490)

APPEAL from an order of the Superior Court of Los Angeles County. Joseph Kalin, Judge. Reversed.

Jeff Katofsky for Defendants and Appellants David Richman and Harriet Richman.

Lloyd K. Chapman for Defendants and Appellants Jeff Katofsky and Property Managers, LLC.

No appearance for Plaintiff and Respondent.

Defendants Jeff Katofsky, David M. Richman, Harriet Richman and Property Managers, LLC appeal the trial court's order denying their motion for an award of attorney fees. We reverse the order and remand the matter to the trial court for a hearing on defendants' motion.

FACTUAL AND PROCEDURAL SUMMARY

Plaintiff Sunhee Choi, Inc. dba City Roofing and Construction (City Roofing) sued Frito Bandito, LLC, Jeff Katofsky, David M. Richman, Harriet Richman and Property Managers, LLC to recover $22,950 due on account of roofing work which City Roofing completed on the building located at 16817 Ventura Boulevard in Encino (the Property) and housing the Frito Bandito restaurant. Mr. Katofsky was alleged to be the "owner and operator" of Frito Bandito, LLC, while the Richmans were alleged to hold an ownership interest in the Property.

City Roofing's first amended complaint alleged causes of action against all defendants for breach of a written contract and oral amendment to the contract; promissory estoppel; breach of a quasi- or implied-in-fact contract; unjust enrichment; quantum meruit; open book account; account stated; false promise; conversion and constructive trust. City Roofing attached to the complaint as Exhibit 1 the written contract which it alleged the defendants breached by refusing to pay the contract price for the new roof, and which contained a provision entitling City Roofing to recover attorney fees and costs incurred in enforcing the terms of the contract. Exhibit 1 names "Frito Bandito, LLC" as the Property owner retaining City Roofing's services, and was signed by Mr. Katofsky as "managing member." The names of no other defendant appear in Exhibit 1.

Trial was to the court. At the conclusion of City Roofing's case-in-chief, the court granted defendants' motions for nonsuit as to all causes of action save that against Frito Bandito, LLC in quantum meruit. After taking account of additional agreed upon work performed by City Roofing, damages to the Property by City Roofing, and an offset due

Frito Bandito, the court entered judgment in favor of City Roofing in the amount of $19,005.

As prevailing parties, Mr. Katofsky, Mr. Richman, Ms. Richman and Property Managers, LLC filed a notice of motion and motion for award of attorney fees. The motion was placed on and off calendar through a series of ex parte motions. Ultimately, without conducting a hearing on the motion, the trial court denied the request: "In its statement of decision the Court found that there was no written contract between the parties and thus no basis to award attorney fees to either party." The defendants who were dismissed at trial (appellants) timely appealed this order.

MOTION TO DISMISS

Initially, we address City Roofing's motion to dismiss this appeal. City Roofing contends that the trial court's March 30, 2011 order from which appellants appealed was a ruling on a motion for reconsideration, which is not an appealable order. The contention is without merit. City Roofing's denomination of the order as one for reconsideration does not make it so. Appellants promptly noticed a motion for attorney fees after having been dismissed from the action by nonsuit. The trial court never heard the motion, having determined that there was no contract between the parties and thus no basis for a fee award under Civil Code section 1717. City Roofing cites no authority for the proposition that appellants were required to appeal the denial of their fee motion before the motion was heard and decided. Moreover, even if we were to accept City Roofing's contention that the February 16, 2011 judgment was a de facto denial of the dismissed appellants' fee motion as opposed to an adjudication of the rights of the parties still litigating the matter, that denial would be reviewable upon timely appeal of the judgment. As City Roofing acknowledges, appellants' April 21, 2011 Notice of Appeal, filed within 60 days after City Roofing served the Notice of Entry of Judgment on February 22, 2011, was timely. The motion to dismiss is therefore denied.

DISCUSSION

Appellants contend that they were prevailing parties as a matter of law, and that the trial court was without discretion to deny them their costs and reasonable attorney fees. We agree.

Code of Civil Procedure section 1032, subdivision (a)(4) provides in pertinent part: "'Prevailing party' includes the party with a net monetary recovery, a defendant in whose favor a dismissal is entered, a defendant where neither plaintiff nor defendant obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against that defendant." Here, appellants won a nonsuit, and were dismissed as to all causes of action brought against them. Thus, pursuant to Code of Civil Procedure section 1032, subdivision (a)(4), each appellant is a prevailing party.

The trial court denied appellants their requested attorney fees not because they did not prevail, but because "there was no written contract between the parties and thus no basis to award attorney fees to either party." However, the fact that there was no written contract between the parties does not necessarily lead to the legal conclusion that there was no basis to award attorney fees. To the contrary, it has long been the law in California that "Under Civil Code section 1717, the prevailing party is entitled to attorney fees even when it wins on the grounds that the contract is inapplicable, invalid, unenforceable or nonexistent, so long as the party pursuing the lawsuit would have been entitled to attorney's fees had it prevailed. [Citations.] The rationale is that Civil Code section 1717 is guided by equitable principles, including mutuality of remedy, and it would be inequitable to deny attorney's fees to one who successfully defends, simply because the initiating party filed a meritless case." (*Rainier National Bank v. Bodily* (1991) 232 Cal.App.3d 83, 86, citing *Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 128-129; see also, *Bovard v. American Horse Enterprises, Inc.* (1988) 201 Cal.App.3d 832, 842; *On v. Cow Hollow Properties* (1990) 222 Cal.App.3d 1568, 1574; *Schlocker v. Schlocker* (1976) 62 Cal.App.3d 921, 923.)

Here, City Roofing sued appellants for breach of a written contract which contained an attorney fees provision. City Roofing specifically prayed "for judgment

against defendants and each of them . . . [f]or attorney's fees pursuant to contract under California Civil Code Section 1717." If City Roofing had prevailed at trial against appellants, it would have been entitled to recover its reasonable attorney fees. Pursuant to the reciprocity provisions of Civil Code section 1717, appellants, as the prevailing parties, are therefore entitled to recover their reasonable attorney fees.

DISPOSITION

The trial court's order denying appellants' motion for award of attorney fees is reversed, and the matter is remanded to the trial court for further proceedings. Appellants are to recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ARMSTRONG, J.

We concur:

TURNER, P. J.

KRIEGLER, J.