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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

BONG JE CHOI et al., Plaintiffs, Cross-defendants and Appellants, v. PRIMA ESCROW, INC., Defendant, Cross-complainant and Respondent.	B288871 (Los Angeles County Super. Ct. Nos. BC635994 and BC593911)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard L. Fruin, Judge. Affirmed in part and reversed in part.

Law Offices of Baird Brown and Baird A. Brown for Plaintiffs, Cross-defendants and Appellants.

Gutierrez, Preciado & House, Calvin House; Davis & Davis Law Group and Matthew S. Davis for Defendant, Cross-complainant and Respondent.

At the conclusion of a two-day bench trial the court entered judgment in favor of Prima Escrow, Inc., awarding it nearly $65,000 in escrow fees and more than $61,000 in attorney fees on its cross-complaint against Bong Je Choi and his wife, Hung Yeon Choi, for breach of contract following a failed real estate transaction. On appeal the Chois, the property's sellers, contend the trial court erred in denying their claims against Prima for conversion, breach of fiduciary duty and money had and received based on Prima's retention of the proposed buyer's nonrefundable deposits. The Chois also contend no escrow fees were owed Prima because the escrow never closed and attorney fees were not properly awarded under the indemnity provision in the parties' escrow agreement. We reverse the attorney fee award and affirm in all other respects.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Failed Real Estate Transaction*

The Chois owned and operated the Pasadena Inn, a hotel on Arroyo Parkway in Pasadena, through their corporation, The Good Family, Inc.[1] On August 11, 2014 the Chois entered into an agreement with CMA Real Estate Investments, Inc. to sell the Pasadena Inn for $13.5 million. The transaction included the sale of the real property as well as the hotel business. The Chois engaged Prima to serve as the escrow holder for the transaction.

The Chois, CMA and Prima entered into a contract entitled "Supplemental Escrow Instructions," which outlined the terms

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[1] The Good Family, Inc. assigned its claims against Prima to the Chois while their dispute was ongoing. For simplicity, we refer throughout to the Chois, rather than differentiate between Good Family and the Chois depending on the date involved.

and conditions of the proposed transaction.[2] As required by the instructions, CMA made an initial, nonrefundable deposit of $100,000 into a Prima escrow account on August 11, 2014 and agreed to pay the balance of the purchase price by October 24, 2014 to close escrow. An addendum to the instructions signed August 26, 2014 directed CMA to submit proof of funds by the end of the due diligence period, September 9, 2014; otherwise, CMA's initial deposit would be released to the Chois, excluding cancellation fees.

CMA failed to provide the necessary funds by the October 24 deadline; however, the parties agreed to extend the deadline to October 31, 2014. After CMA missed the October 31 deadline and yet another extended deadline date, the parties agreed escrow would close by December 10, 2014 based on CMA's acceptance of a new purchase price of $13.7 million and its agreement to deposit an additional $200,000 into escrow. CMA made the additional deposit but failed to provide the necessary funds to close escrow by December 10. Concerned the Chois would attempt to cancel the escrow, CMA emailed and faxed a letter to Prima on December 10, 2014 directing Prima not to cancel the escrow without CMA's consent.[3] CMA also requested

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[2] Although the escrow instructions are labeled "supplemental," they are the initial set of instructions for the transaction.

[3] CMA's letter stated in part, "Cancellation will require bilateral execution of appropriate escrow instruction by both buyer and seller. At this point, no such fully executed cancellation instruction exists. [¶] As such, Buyer will not cancel escrow and has all intentions and ability to close this transaction successfully in the immediate future."

Prima not release any deposited funds to the Chois until CMA agreed to a cancellation of the escrow.

On December 16, 2014 the parties established January 16, 2015 as the "new absolutely latest official date of closing of escrow" and agreed escrow would be cancelled if CMA failed to fulfill its obligations by January 15, 2015. CMA also agreed to deposit an additional $100,000 into escrow as consideration for the final extension. The amended instructions authorized Prima to release $300,000 of the $400,000 deposit, excluding escrow fees, to the Chois on or after December 19, 2014.

CMA failed to meet the January 16, 2015 deadline to close escrow. However, Prima did not release any of the deposited funds to the Chois because CMA had not agreed to cancellation of the escrow.

On January 20, 2015 the Chois submitted a completed form for cancellation of the purchase agreement, release of deposit and cancellation of escrow. The Chois mistakenly stated on the cancellation form they had already received the full deposit of $400,000 from Prima. CMA did not sign the cancellation form.

2. *The Lawsuit Between the Chois and CMA*

On July 8, 2015 the Chois sued CMA and Prima, seeking a judicial declaration of their rights to the $400,000 deposit. The Chois alleged that CMA had wrongly refused to cancel the escrow or allow Prima to release the deposit and that Prima had insisted, pursuant to the terms of the escrow instructions, it could not release any funds to the Chois until the court resolved the dispute between CMA and the Chois. The Chois dismissed Prima from the action before it was required to answer the complaint.

On June 16, 2016 the court entered a default judgment in favor of the Chois, finding the escrow had been cancelled and ordering the $400,000 deposit be released to the Chois.

On June 27, 2016 Prima sent the Chois a demand for payment of $64,846.60 in escrow fees, a sum calculated based on the formula on the first page of the supplemental escrow instructions. The Chois refused to pay the escrow fees because escrow had not closed. On August 23, 2016 Prima released $300,000 to the Chois and notified them it would retain the remaining $100,000 until Prima and the Chois resolved their fee dispute.

3. *Trial Between the Chois and Prima*

On October 3, 2016 the Chois sued Prima for conversion, breach of fiduciary duty and money had and received. The Chois alleged Prima was not entitled to withhold the remaining $100,000 nonrefundable deposit or to recover escrow fees because escrow had never closed and the supplemental escrow instructions did not specifically provide for the payment of a cancellation fee. Prima answered the complaint and filed a cross-complaint for breach of contract against the Chois and CMA, alleging the Chois and CMA had breached the parties' agreement by refusing to pay contractually mandated escrow fees, which Prima asserted were due whether the escrow closed or was cancelled.

a. *Testimony at trial*

Mr. Choi testified he believed he would not have to pay Prima an escrow fee if the escrow was cancelled, but admitted he never disclosed this belief to Prima. A Prima employee testified the Chois owed Prima a fee regardless of cancellation because the company had devoted considerable effort to processing the escrow

file following each of the five extensions. Prima's expert witness, an experienced escrow industry member, testified that escrow fees and cancellation fees are synonymous in the escrow business and are owed when an escrow is closed or cancelled. The expert also testified it would be appropriate to deduct the escrow fees from the deposit owed to the proposed seller.

During trial Prima requested the court amend the default judgment entered in the Chois' lawsuit against CMA to account for Prima's right to recover escrow fees from CMA and the Chois, an issue that had not been addressed in that case.

b. *The trial court's decision*

The court issued a statement of decision on November 28, 2017, ruling in favor of Prima on the Chois' causes of action for conversion, breach of fiduciary duty and money had and received and finding the Chois and CMA jointly and severally liable for escrow fees to Prima in the sum of $64,846.60 on Prima's cross-complaint for breach of contract. The court found Prima had acted properly in withholding the $100,000 remaining deposit pending resolution of the Chois' objection to payment of escrow fees because that payment was a condition precedent to the release of the deposit. Accordingly, the court amended nunc pro tunc the default judgment it had entered in the Chois' lawsuit against CMA, so that it now provided $300,000 of the deposited funds were to be disbursed immediately to the Chois and the remaining $100,000 was to be held in escrow until the parties agreed, or the court determined, the amount of escrow fees due.

As the prevailing party Prima moved to recover its attorney fees pursuant to a provision in the supplemental escrow instructions authorizing an award of attorney fees incurred by Prima in litigation arising out of the escrow. The court granted

the motion, rejecting the Chois' argument the paragraph at issue was a third party indemnity provision that was inapplicable to a dispute between Prima and one of the parties to the escrow, and awarded Prima $61,692.50 in attorney fees.

DISCUSSION

1. *The Escrow Instructions Require the Chois To Pay Prima's Fees Even Though the Escrow Was Cancelled*

a. *The relevant contract language*

The first page of the supplemental escrow instructions contains a paragraph captioned "Escrow Fee Disclosures," which describes the formula Prima would use to set its escrow fees: "Escrow fees are a base fee of $250.00 plus $2.50 per thousand of the purchase price but no less than $750.00 per each party." That paragraph also specifies certain additional fees that may be applicable (for example, fees for overnight mail and messenger/courier fees). It does not state the identified fees will only be due if the proposed transaction is completed and the escrow closes.

A number of other provisions in the agreements signed by the Chois also referred to their obligation to pay fees. Paragraph C of the "additional terms, conditions and instructions" in the supplemental escrow instructions provides, "The Buyer shall provide the Seller with proof of funds during the due diligence period. If the Buyer fails to provide bank statements/bank letter showing the sufficient funds, initial deposit in the amount of $100,000.00 shall be non-refundable and will be released to the Seller after deducting cancellation fees and expenses without any further instructions necessary."

The sixth unnumbered paragraph in the "general instructions" section of the supplemental escrow instructions

further provides that "in the event of cancellation, [the Chois and CMA] shall pay [Prima] a sum sufficient to pay you for any expense which you have incurred pursuant to forgoing instructions and a reasonable cancellation fee for services rendered by you." The Chois also agreed to a "Seller(s) Only" provision in the supplemental escrow instructions that stated they approved and accepted their obligation to pay Prima's "escrow charges . . . whether or not this escrow is consummated."

In amended escrow instructions dated December 16, 2014, the Chois agreed Prima would release $300,000 from the buyer's deposit "excluding escrow fees." And in the "cancellation instructions" dated January 20, 2015, the Chois again agreed they would receive CMA's deposit after "deducting cancellation costs."

b. *Governing law and standard of review*

"Escrow instructions may be analyzed under contract principles." (*Rideau v. Stewart Title of California, Inc.* (2015) 235 Cal.App.4th 1286, 1294 (*Rideau*).) The fundamental goal of contract interpretation is to give effect to the mutual intention of the parties as it existed at the time they entered into the contract. (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264; *Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 864-865.) That intent is determined according to objective, rather than subjective, criteria. (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1126.)

When the contract is clear and explicit, the parties' intent is determined solely by reference to the language of the agreement. (See Civ. Code, §§ 1638 ["language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity"], 1639 ["[w]hen a contract is

reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible"]; see also *Coast Plaza Doctors Hospital v. Blue Cross of California* (2000) 83 Cal.App.4th 677, 684 ["[i]n interpreting an unambiguous contractual provision we are bound to give effect to the plain and ordinary meaning of the language used by the parties"].) The words are to be understood "in their ordinary and popular sense" (Civ. Code, § 1644), and the "whole of [the] contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." (Civ. Code, § 1641.)

Interpretation of a written contract is a question of law for the court unless the interpretation depends upon resolving a conflict in properly admitted extrinsic evidence. (See *City of Hope National Medical Center v. Genentech*, *Inc.* (2008) 43 Cal.4th 375, 395; *Garcia v. Truck Ins. Exchange* (1984) 36 Cal.3d 426, 439 ["[i]t is solely a judicial function to interpret a written contract unless the interpretation turns upon the credibility of extrinsic evidence, even when conflicting inferences may be drawn from uncontroverted evidence"]; *Hanna v. Mercedes-Benz USA, LLC* (2019) 36 Cal.App.5th 493, 507 ["in the absence of any conflict in extrinsic evidence presented to clarify an ambiguity," written agreements are interpreted de novo].)

c. *The parties' agreement expressly provides the Chois and CMA will pay Prima a fee for its services*

The term "escrow fees" as used in the parties' agreement denotes sums due an escrow company for its services involving the escrow. The plain meaning of the term does not suggest a successful closing is required to trigger the obligation to pay those fees. (Cf. *Pasternak v. Boutris* (2002) 99 Cal.App.4th 907,

919 [statutory definition of escrow "does not require a completed delivery from escrow in order for there to be an escrow"; an escrow requires only that the transaction contemplate such delivery through an initial deposit].) Furthermore, the contract here explicitly requires the Chois to pay Prima escrow fees following cancellation of the transaction. As discussed, in the "Seller(s) Only" provision in the supplemental escrow instructions, the Chois agreed to pay "escrow charges . . . whether or not this escrow is consummated." (See *Weisblat v. City of San Diego* (2009) 176 Cal.App.4th 1022, 1040 ["'[f]ee'" and "'charge'" are interchangeable terms].) Other portions of the documents executed by the Chois and CMA during the course of the multiple extensions of the closing date, as quoted above, confirmed that upon cancellation of the escrow the Chois were to receive only so much of the buyer's nonrefundable deposits as exceeded the escrow fees to which Prima was entitled.

Finally, although we believe the ordinary meaning of the terms is clear, any possible ambiguity created by use of both the terms "escrow fees" and "cancellation fees" in the parties' agreement was resolved by the undisputed opinion testimony of Prima's expert witness, who explained that in the escrow industry "escrow fees" and "cancellation fees" are "the same" and may be used interchangeably.

In sum, the parties' agreement obligated the Chois and CMA to pay Prima its fees for escrow services, as the trial court ruled. It is, of course, irrelevant to our conclusion that Mr. Choi may have subjectively believed escrow fees referred only to fees due at the closing of an escrow. (See *G & W Warren's, Inc. v. Dabney* (2017) 11 Cal.App.5th 565, 577 [undisclosed subjective intent of a party is irrelevant to determining the meaning of

contractual language]; *Winet v. Price* (1992) 4 Cal.App.4th 1159, 1166, fn. 3 [same].)

d. *The Chois' alternative arguments challenging the award of escrow fees lack merit*

The Chois' alternative argument, that the escrow fees charged were unreasonable, is equally without merit. The formula to be used by Prima to calculate its fees is clearly stated on the first page of the supplemental escrow instructions, and the Chois agreed to pay those fees when they signed the instructions. Moreover, Prima's expert witness testified the fees charged, discounted by Prima from the agreed-to formula, were reasonable. No other evidence of the reasonable value for Prima's services was presented to the trial court. Whether measured by the formula itself or assessment on a reasonable basis, the court's determination that Prima was entitled to that $64,846.60 for the services performed by Prima is supported by substantial evidence and was well within its discretion. (See *Devers v. Greenwood* (1956) 139 Cal.App.2d 345, 352 [absent agreement of the parties as to escrow fees, trial court may award reasonable value of services provided; appellate court reviews award for substantial evidence]; cf. *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095 [trial court's decision on the reasonable value of legal services reviewed under the abuse of discretion standard]; *Watson v. Wood Dimension, Inc.* (1989) 209 Cal.App.3d 1359, 1365-1366 [trial court's determination of value in quantum meruit case reviewed for substantial evidence].)[4]

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[4] The trial court explained in its Statement of Final Decision, "The escrow fee that Prima Escrow claims per the escrow instructions totals $64,846.60. See, Exhibit 24. (The actual fee if

There is similarly no merit to the Chois' contention the award of fees to Prima violates Financial Code section 17421.5, which permits an escrow company to charge a fee for administering an escrow that has been cancelled if certain requirements are met.[5] Those requirements were all satisfied here: Cancellation resulted from an act or omission of a party to the escrow (CMA); the fee (the formula for calculating it) was described in the written instructions in not less than 8-point type on the front page of the document; and the instructions were signed and each page was initialed by the Chois.

2. *The Chois' Claims for Conversion, Breach of Fiduciary Duty and Money Had and Received Were Properly Denied*

The June 16, 2016 default judgment the Chois obtained against CMA after dismissing Prima from the action directed Prima to pay to the Chois the $400,000 deposited into escrow by

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computed per the agreement would be higher; Prima Escrow, however, discounted its fee to $64,846.60.) The court finds that $64,846.60 to be a reasonable escrow fee for the services performed by Prima Escrow."

[5] Financial Code section 17421.5, subdivision (a), provides, "[A] licensee may charge a fee for administering an escrow that has been postponed for at least two months from the most recent closing date agreed upon by the parties in the written instructions or has been canceled if all of the following requirements are met: [¶] (1) The postponement or cancellation resulted from the acts or omissions of the parties to the escrow transaction. [¶] (2) The fee was disclosed in the written instructions in not less than 8-point bold type on the face or front page of the instructions. [¶] (3) The principal parties to the escrow transaction have executed the written fee instructions by initialing those instructions."

CMA, the defaulting buyer. The Chois' subsequent claim against Prima for conversion was predicated on that default judgment: They alleged Prima had improperly delayed distributing $300,000 from the escrow account from June 16, 2016 to August 24, 2016 and continued to improperly withhold the remaining $100,000 balance in the account.

In finding against the Chois on their conversion claim, the trial court explained in its statement of decision that, when it had signed the form of default judgment submitted by the Chois, it was unaware Prima contended escrow fees were payable from the funds being held in the escrow account. In submitting the proposed form of default judgment, the court continued, the Chois' counsel had failed to inform the court about the dispute regarding payment of escrow fees. The court then stated, "The court's judgment could not, of course, deprive Prima Escrow of its rights to be paid because Prima Escrow's rights were not adjudicated in that litigation." Thus, based on the existence of a valid dispute as to the payment of fees and the Chois' failure to advise the court of that dispute, the court could properly find that neither Prima's two-month delay in distributing $300,000 from the deposit nor its retention of the remaining $100,000 until payment was received for its escrow fees was wrongful. (Cf. *Alki Partners, LP v. DB Fund Services, LLC* (2016) 4 Cal.App.5th 574, 592 (*Alki Partners*) ["[a] party's failure to perform a condition precedent will preclude an action for breach of contract. [Citation.] Where one party's obligation is dependent on the prior proper performance of the other party, and that other party does not perform, the obligation is excused"]; *Cline v. Yamaga* (1979) 97 Cal.App.3d 239, 247 [when a condition precedent is adopted by the parties to a contract, the court will not find a party liable for

its failure to perform if the condition was not met].)[6] To the contrary, as the trial court found, Prima's "conduct was proper and prudent." Substantial evidence supports that finding.

The Chois' cause of action for breach of fiduciary duty and common count for money had and received are both based on the same allegedly wrongful conduct as their conversion claim—Prima's two-month delay in paying out $300,000 following entry of the default judgment and its refusal to distribute the remaining $100,000 until the escrow fee dispute was resolved. Because substantial evidence supports the trial court's finding that Prima's conduct was "proper and prudent," those two claims fail as well.

3. *The Trial Court Erred in Awarding Prima Attorney Fees*

a. *The relevant contract language*

The seventh unnumbered paragraph in the "general instructions" section of the supplemental escrow instructions contains the parties' only agreement regarding payment of attorney fees:

"If conflicting demands are made or notice served upon you or legal action is taken in connection with this escrow, you shall

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[6] The Chois' failure to advise the court of their dispute with Prima regarding payment of escrow fees when seeking a default judgment that directed nonparty Prima to pay over the full $400,000 held in the escrow account, together with the court's subsequent finding the Chois' payment of contracted-for escrow fees was a condition precedent to Prima's release of the remaining $100,000, constituted good cause for the court's nunc pro tunc modification of the June 16, 2016 default judgment. (See *Scalice v. Performance Cleaning Systems* (1996) 50 Cal.App.4th 221, 239 [nunc pro tunc power properly exercised to protect the rights of a party that would otherwise be lost].)

not be required to determine the same or take any action in the premises, but may withhold and stop all further proceedings without liability therefore [*sic*], or you may file suit in interpleader or for declaratory relief. If you are required to respond to any legal summons or proceedings, or if any action of interpleader or declaratory relief is brought to you, or if conflicting demands or notice by parties to this escrow or by any other party or parties is served upon you, we jointly and severally agree to pay reasonable escrow fees and all costs, expenses, and reasonable attorney's fees expended or incurred by you as a result of any of the above described events, and a lien is hereby created in your company's favor to cover said items. We agree to save you harmless as Escrow Holder hereunder from all losses and expenses, including reasonable attorney's fees and court costs sustained by reason of any claim, demand, or action filed, legal or otherwise, which may in any manner arise out of, or from the property which is the subject of this escrow, or out of or from this escrow, before or after closing, notwithstanding anything in these instructions to the contrary, and in addition hereto, we jointly and severally agree to pay reasonable escrow fees therefor."

The trial court ruled Prima was entitled pursuant to this paragraph to recover its attorney fees in the instant litigation because "[t]he Chois are a party to the escrow; the Chois served a conflicting demand and followed-up with a lawsuit against the escrow company; and the escrow company incurred legal fees to defend itself from claims made by the Chois." As they did in the trial court, the Chois argue this paragraph does not authorize an award of attorney fees in a lawsuit between Prima and one of the principal parties to the escrow transaction regarding their

respective rights and obligations under the supplemental escrow instructions.[7]

b. *Governing law and standard of review*

Under the American rule, codified in Code of Civil Procedure section 1021, a prevailing litigant generally is not entitled to an award of attorney fees in the absence of express statutory or contractual provisions: "Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties . . . ." (See *Trope v. Katz* (1995) 11 Cal.4th 274, 278 ["California follows what is commonly referred to as the American rule, which provides that each party to a lawsuit must ordinarily pay his own attorney fees"]; see also *City and County of San Francisco v. Sweet* (1995) 12 Cal.4th 105, 115.)

"Generally, indemnity is defined as an obligation of one party to pay or satisfy the loss or damage incurred by another party." (*Rideau, supra,* 235 Cal.App.4th at p. 1294; see Civ. Code, § 2772 ["indemnity is a contract by which one engages to save another from a legal consequence of the conduct of one of the parties, or of some other person"].) "A contractual indemnity provision may be drafted either to cover claims between the contracting parties themselves, or to cover claims asserted by third parties." (*Rideau*, at p. 1294; see *Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 968 (*Myers*) ["[a]n indemnitor in an indemnity contract generally undertakes to protect the indemnitee against loss or damage through liability to a third

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[7] The Chois do not contest the amount of fees awarded, only Prima's right to recover any attorney fees.

person"].) But "[i]n the context of escrow agreements, an indemnification clause usually provides for recovery of funds, including attorney fees or costs, under circumstances in which the escrow holder has incurred extraordinary fees and costs as the result of disputes between the principals, or the principals and third parties." (*Rideau*, at p. 1297; see *Alki Partners*, *supra*, 4 Cal.App.5th at p. 606 [an indemnity clause that does not specifically refer either to actions to enforce the contract or to the prevailing party is a third party indemnity clause]; *Myers*, at p. 969 ["[a] clause which contains the words 'indemnify' and 'hold harmless' is an indemnity clause which generally obligates the indemnitor to reimburse the indemnitee for any damages the indemnitee becomes obligated to pay third persons"]; see also *Queen Villas Homeowners Assn. v. TCB Property Management* (2007) 149 Cal.App.4th 1, 8 [California courts have found the words "'hold harmless'" to be "synonymous with third party indemnity situations"].)

Notwithstanding this general rule, "each indemnity agreement is 'interpreted according to the language and contents of the contract as well as the intention of the parties as indicated by the contract. [Citation.] The extent of the duty to indemnify is determined from the contract. [Citation.] The indemnity provisions of a contract are to be construed under the same rules governing other contracts with a view to determining the actual intent of the parties.'" (*Wilshire-Doheny Associates, Ltd. v. Shapiro* (2000) 83 Cal.App.4th 1380, 1396; accord, *Myers*, *supra*, 13 Cal.App.4th at p. 968 ["[a]n indemnity agreement is to be interpreted according to the language and contents of the contract as well as the intention of the parties as indicated by the contract"].)

"'It 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.) Similarly, "[w]hen 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 ruling de novo." (*Casella v. SouthWest Dealer Services, Inc.* (2007) 157 Cal.App.4th 1127, 1161; accord, *Khan v. Shim* (2016) 7 Cal.App.5th 49, 55 [interpretation of a contractual fee provision for which no party has offered extrinsic evidence as an aid in interpretation is reviewed de novo].)

c. *The supplemental escrow instructions do not authorize an award of attorney fees in a dispute between a principal party and the escrow holder to enforce the contract*

The trial court erred in awarding Prima attorney fees based on the conflicting demands provision in the supplemental escrow instructions. Although the Chois and CMA did issue inconsistent instructions to Prima regarding cancellation of the escrow and release of CMA's nonrefundable deposits, that conflict was fully resolved by entry of the default judgment in the Chois' lawsuit against CMA, which cancelled the escrow and directed distribution of the deposits to the Chois. The subsequent dispute between the Chois and Prima, the subject matter of the instant lawsuit, concerned Prima's entitlement to escrow fees and its right to retain a portion of the CMA deposits until those fees were paid. CMA had no active role in that controversy.

As an alternate basis to uphold the trial court's award of attorney fees, Prima points to the "save you harmless" language

in the attorney fee provision and argues its fees constitute "losses and expenses, including reasonable attorney's fees and court costs sustained by reason of any claim, demand, or action" that "arise[s]" "out of or from this escrow." Reasonably understood, however, this language in the escrow instructions is a third party indemnity agreement that does not apply to an action, like the case at bar, between the escrow holder and one of the principal parties to interpret or enforce the escrow instructions. (See, e.g., *Myers*, *supra*, 13 Cal.App.4th at pp. 963-964, 973 [provision stating "Contractor shall indemnify and hold harmless the Owner and the Architect and their agents and employees from and against all claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from the performance of the Work" was intended to be a third party indemnity provision, not a provision for an award of attorney fees in an action to enforce the contract, because it contained standard indemnification language such as "indemnify" and "hold harmless" and only referred generally to "all claims"]; *Carr Business Enterprises, Inc. v. City of Chowchilla* (2008) 166 Cal.App.4th 14, 23 [provision stating "'[Carr] shall indemnify and hold harmless [Chowchilla] . . . and its officers, officials, employees, agents of the above from and against all claims, damages, losses and expenses including attorney fees *arising out of the performance of the work* described herein, caused in whole or in part by any negligent act or omission of [Carr],'" language that paralleled the language analyzed in *Myers*, was similarly a third party indemnity clause].)

The attorney fee provision considered in *Campbell v. Scripps Bank* (2000) 78 Cal.App.4th 1328 closely resembles the language at issue here, and the court of appeal's analysis is

instructive. In *Campbell* the seller sued the escrow holder for negligence. (*Id.* at p. 1332.) The trial court granted the escrow holder's motion for summary judgment and awarded attorney fees to the escrow holder based on language in the escrow instructions that, in addition to providing for fees in a case of conflicting demands, stated: "The Principals, jointly and severally, hereby promise and agree to pay promptly on demand, as well as to indemnify you and hold you harmless against and in respect of any and all litigation and interpleader costs, claims, losses, damages, recoveries, judgments, and expenses, including, without limitation, reasonable attorneys fees that you may incur or suffer, which arise, result from or relate to this escrow." (*Id.* at p. 1336.)

The court of appeal held this provision was a third party indemnity clause and reversed the trial court's award of attorney fees. The court explained, "Within context, these sentences construed together provide for attorney fees in the event of litigation arising out of conflicting demands made on the escrow holder or any dispute or controversy that arises between the principals or with any third person regarding the terms of the escrow. [Citation.] They do not provide for the recovery of attorney fees in actions between a principal and the escrow holder to enforce the general escrow instructions. [Citation.] 'What the parties no doubt had in mind and which appears to be reasonable, was that although the fee the escrow holder exacts for the ordinary service of transferring the documents and money between the parties to an escrow is adequate for that purpose, it is certainly not sufficient to cover any extraordinary services arising out of the situations it may face in its status as an escrow holder, such as those mentioned in the instructions at bar, . . .

and that under such circumstances [the parties to the escrow] should provide the escrow holder with reimbursement over and above the usual escrow fees.'" (*Campbell v. Scripps Bank*, *supra*, 78 Cal.App.4th at p. 1337.)

Like the language at issue in *Campbell*, the fee provision here does not, either directly or indirectly, refer to actions to enforce the escrow agreement. Rather, again as in *Campbell*, the hold harmless language is set forth in the context of a provision intended to protect the escrow company from claims involving the underlying real estate transaction, either between the buyer and seller or brought by a third party. Accordingly, the award of fees to Prima was improper. (See *Otis Elevator Co. v. Toda Construction* (1994) 27 Cal.App.4th 559, 564 [absent explicit language authorizing recovery of attorney fees to enforce contract, indemnity agreement authorizing attorney fees as element of damages does not encompass recovery of attorney fees incurred in actions to enforce the contract].)

Baldwin Builders v. Coast Plastering Corp. (2005) 125 Cal.App.4th 1339 (*Baldwin Builders*), relied upon by Prima, involved significantly different indemnity language and does not support its right to recover attorney fees. The relevant language in that case provided, "The undersigned Subcontractor hereby agrees to indemnify [Baldwin] . . . against any claim, loss, damage, expense or liability arising out of acts or omissions of Subcontractor in any way connected with the performance of the subcontract . . . unless due solely to [Baldwin's] negligence. . . . Subcontractor shall, on request of [Baldwin] . . . but at Subcontractor's own expense, defend any suit asserting a claim covered by this indemnity. Subcontractor shall pay all costs,

including attorney's fees, incurred in enforcing this indemnity agreement." (*Id.* at p. 1342.)

The court of appeal held, although the initial portion of this provision read like a standard third party indemnity clause, the closing phrase "'*incurred in enforcing this indemnity agreement*'" demonstrated the parties unambiguously contemplated an action between themselves to enforce the indemnity agreement. (*Baldwin Builders*, *supra*, 125 Cal.App.4th at p. 1345.) The clause thus authorized the recovery of attorney fees in an action between the parties to enforce the indemnity clause. (*Id.* at p. 1346.) No such language is present here.

DISPOSITION

The order awarding attorney fees to Prima is reversed. In all other respects the judgment is affirmed. The parties are to bear their own costs on appeal.

PERLUSS, P.J.

We concur:

SEGAL, J.

FEUER, J.