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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

JEFFREY A. PRINCE et al., Plaintiffs and Respondents, v. THOMPSON BUILDING MATERIALS, Defendant and Appellant.	B280813 (Los Angeles County Super. Ct. No. YC059602)

APPEAL from an order of the Superior Court of Los Angeles County. Stuart M. Rice, Judge. Affirmed.

Prenovost, Normandin, Bergh & Dawe, Michael Dawe for Defendant and Appellant.

Greenberg, Whitcombe, Takeuchi, Gibson & Grayver, Richard C. Greenberg, John D. Whitcombe, Michael J. Weinberger for Plaintiffs and Respondents.

Thompson Building Materials (Thompson) appeals from an order denying its request for attorney fees following judgment entered in its favor and against respondents Jefferey A. Prince and Sherri Prince (collectively, the Princes) after a bench trial.

In April 2009, the Princes filed suit against Thompson based on its sale of defective flagstone to their masonry subcontractor, Simich Construction, Inc. (Simich) (Thompson/Simich contracts). The Princes sought, among other things, to enforce contractual warranties under a third party beneficiary theory. Although the Thompson/Simich contracts contained an attorney fees provision, the trial court denied Thompson's request for attorney fees, ruling the express language of that provision only affected the buyer and seller to the agreement, that is, Thompson and Simich, and not the Princes as third party beneficiaries. Thompson contends the trial court erred because its ruling conflicts with Civil Code section 1717,[1] which mandates mutual attorney fees on "any action on a contract" regardless of "whether he or she is the party specified in the contract or not." We disagree with Thompson and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In connection with construction work done at their Redondo Beach property, the Princes hired a general contractor, who in turn hired Simich, to lay flagstone in their patio and pool area. From June 2005 to December 2006, Simich purchased approximately 16 orders of flagstone from Thompson. Following each transaction, Thompson sent an "invoice" to Simich, which contained the terms and conditions of each sale.

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1 All further statutory references are to Civil Code.

The reverse of each invoice contained the header "TERMS AND CONDITIONS OF SALE" and stated: "You the ('Buyer') and our company ('Seller') agree that the following terms and conditions shall govern the sale of the goods described on the reverse side of this page." Paragraph 10 was entitled "ATTORNEY'S FEES," and stated: "The seller is entitled to recover its actual out of pocket attorneys fees and cost of suit and collection including any damages (collection or arbitration) in any action brought against the Buyer to interpret or enforce this agreement." The invoice also contained a warranty disclaimer, which stated in pertinent part: "THERE ARE NO IMPLIED WARRANTIES OF MERCHANTIBILITY OR FITNESS FOR A PARTICULAR PURPOSE AND BUYER HEREBY ACKNOWLEDGES THAT THE GOODS ARE SOLD 'AS IS'."

Within a couple of months of installation, the flagstone which Thompson sold to Simich began to deteriorate. The Princes decided to remove the defective flagstone and replace it with a different material; however, Thompson refused to pay for the replacement.

On April 22, 2009, the Princes filed suit against Thompson alleging claims for negligence, breach of the implied warranty of fitness for a particular purpose, and breach of the implied warranty of merchantability. As to the implied warranty claims, although the Princes argued they were third party beneficiaries of the Thompson/Simich contracts, they also sought to preclude the enforceability of the warranty disclaimer, contending, among other things, it was "inconspicuous," "did not compel notice," and was "at best ambiguous."

In July and August of 2011, Thompson filed motions for summary judgment, which were granted by the trial court. In December 2012, after judgment was entered in favor of Thompson, the Princes appealed, and we

issued an unpublished opinion reversing the trial court's ruling as to the claims for negligence and breach of implied warranty of merchantability. (May 13, 2015, B246384.)

In January of 2016, following remand, the bench trial for the remaining claims took place. On July 1, 2016, the trial court entered judgment in favor of Thompson and against the Princes. The trial court ruled Thompson satisfied its burden of proving the warranty disclaimer contained in the Thompson/Simich contracts was legally enforceable, thereby excluding any guarantees related to the flagstone.

On July 20, 2016, Thompson filed its motion for attorney fees, citing section 1717. It argued that under section 1717, because the Princes sought to obtain the "'benefit'" of the Thompson/Simich contracts in the form of implied warranties, they were equally bound to bear the "'burden'" of the attorney fees provision in those contracts.

The Princes opposed the motion, arguing no attorney fees should be awarded because, had they prevailed, they "'would have had no possibility of recovering attorneys fees under the contract.'" Relying on *Sessions Payroll Management, Inc. v. Noble Construction Co.* (2000) 84 Cal.App.4th 671, 680-681 (*Sessions*), they argued attorney fees should only be awarded if the contracting parties intended the fee provision to apply to third parties. Because the attorney fees provision contained in the Thompson/Simich contracts provided for fees only in actions instituted by the "seller" against the "buyer," the Princes argued it did not apply to third party beneficiaries.

On December 16, 2016, the trial court denied Thompson's motion for attorney fees, applying the principles of reciprocity, i.e., because the Princes would not have been entitled to attorney fees had they prevailed on their third party beneficiary theory, then Thompson as the prevailing party was

not entitled to attorney fees against the Princes. In support of its ruling, the trial court examined the attorney fee provision contained in the Thompson/Simich contracts and agreed with the Princes' interpretation that it "affected only Thompson and Simich as seller and buyer" to the agreement.

Thompson timely filed a notice of appeal.

CONTENTIONS

Thompson contends because the Princes sought to enforce contract-based rights under the Thompson/Simich contracts, under the "mutuality override" of section 1717, the trial court, as matter of law, should have held the Princes responsible to bear the "burden" of the attorney fees provision in those contracts. Thompson also contends it was improper for the trial court to rely on the "specific intent" test applied in *Sessions* because it is "potentially being at odds" with the "sufficient nexus" test applied by our colleagues in Division 5 in *Real Property Services Corp. v. City of Pasadena* (1994) 25 Cal.App.4th 375, 380 (*Real Property*).[2] According to Thompson, the trial court should have applied the "sufficient nexus" test articulated in *Real Property* because it complies with the public policy of section 1717 and mandates attorney fees in favor of Thompson.

The Princes disagree, contending Thompson "advances a false dichotomy between the rationale of *Sessions* and *Real Property*," and there

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[2] In its brief, Thompson characterizes the holding in *Sessions* as the "specific intent" test because it contends the court focused on the language of the attorney fee provision itself and whether it reflected an intent of the contracting parties to include a claim made by a third party; and it characterizes the holding in *Real Property* as the "sufficient nexus" test because it contends the court focused on whether there was "simply a generalized 'sufficient nexus'" between the nonsignatory plaintiff and signatory defendant.

are no separate "specific intent" and "sufficient nexus" tests to determine third party rights to attorney fees. Rather, they contend the proper analysis is whether the contracting parties intended to provide a third party with the benefit of the attorney fees provision. Because "the fee provision cannot be read to include anyone other than Thompson and Simich," the Princes contend the trial court properly denied Thompson's request for attorney fees.

DISCUSSION

A. Standard of Review

"On appeal this court reviews a determination of the legal basis for an award of attorney fees de novo as a question of law." (*Sessions*, 84 Cal.App.4th at p. 677.)

B. The Trial Court Did Not Err in Denying Thompson's Motion for Attorney Fees

Attorney fees ordinarily are not recoverable as costs unless authorized by either statute or agreement. (§ 1021.) Where a contract specifically provides for an award of attorney fees, section 1717 ensures "mutuality of remedy" for an attorney fees claim. (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 610 ["The primary purpose of section 1717 is to ensure mutuality of remedy for attorney fee claims under contractual attorney fee provisions."].)

Section 1717 provides in pertinent part: "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs." (Civ. Code, § 1717, subd. (a).)

In *Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, our Supreme Court further interpreted section 1717 to include a person who had not signed the contract, if that person would clearly be entitled to attorney fees had he or she prevailed in the enforcement of the contract. (*Id.* at p. 128.) In that case, plaintiff, a supplier of aluminum goods, sued defendants, the shareholders and directors of a company, for the company's unpaid promissory notes under an alter ego theory. (*Id.* at p. 127.) The promissory notes had provided for recovery of collection costs, including attorney fees in the event of a default. (*Ibid.*) Following a bench trial, the trial court rejected the alter ego theory, entered judgment in favor of defendants, and awarded them attorney fees. (*Ibid.*) The Supreme Court affirmed the award of attorney fees, ruling "[s]ince [defendants] would have been liable for attorney's fees pursuant to the fees provision had plaintiff prevailed, they may recover attorney's fees pursuant to section 1717 now that they have prevailed." (*Id.* at p. 129.)

Although *Reynolds* involved a signatory plaintiff who sued a nonsignatory defendant under an alter ego theory,[3] later cases have applied the reciprocity rationale to situations similar to this case—i.e., a nonsignatory plaintiff who sued a signatory defendant under a third party beneficiary theory. As noted above, pertinent here are the rulings in *Real Property* and *Sessions*.

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[3] We agree with the Princes that an alter ego claim is distinctly different from a third party beneficiary claim and therefore Thompson's comparison of the facts of *Reynolds* to this case is misplaced. (See *Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 897 [noting an alter ego "stands in the shoes of a party to the contract" while a third party beneficiary is "one for whose benefit the contract was made"].)

In *Real Property*, a city and developer entered into a lease agreement for the construction of a movie theater complex which expressly identified a sublessee to operate the movie theater. (*Real Property*, 25 Cal.App.4th at p. 377.) After both entities terminated the lease due to construction problems, the sublessee sued the city for breach of the lease agreement and attorney fees under a third party beneficiary theory. (*Id.* at pp. 377-378.) The lease agreement contained a provision for attorney fees, which stated: "In the event of any action or proceeding brought by either party against the other under this Lease, the prevailing party shall be entitled to recover for the fees of its attorneys in such action or proceeding . . . ." (*Ibid.*) Although the city prevailed in the litigation, the trial court denied the city's motion for attorney fees. (*Id.* at p. 378.) The Court of Appeal reversed the attorney fees decision, ruling because the lease explicitly provided for the sublessee to operate the movie theater, had the sublessee prevailed, it had every right to expect that it would have been entitled to attorney fees, and therefore under section 1717, the city as the prevailing party was entitled to an award of attorney fees. (*Id.* at pp. 383-384.) The Court of Appeal further provided, "[w]here there is a sufficient nexus between the lessor and sublessee, a nonsignatory sublessee is entitled to enforce an attorney fee provision in the lease as a third party beneficiary against a signatory landlord." (*Id.* at p. 383.)

In *Sessions*, a payroll servicer sued a general contractor and subcontractor seeking to recover wages it had paid on behalf of the subcontractor under a third party beneficiary theory. (*Sessions*, 84 Cal.App.4th at p. 676.) The agreement between the general contractor and subcontractor contained a provision for attorney fees, which stated: "'In the event it becomes necessary for *either party* to enforce the provisions of this Agreement . . . the prevailing party shall be entitled to recover from the other

party all costs and expenses associated with such action, including statutory interest and reasonable attorney fees.'" (*Id.* at p. 677.) After sustaining the general contractor's demurrer without leave to amend, the trial court awarded the general contractor attorney fees based on the attorney fees provision contained in its agreement with the subcontractor. (*Id.* at pp. 676-677.) The Court of Appeal reversed the award of attorney fees, ruling that had the payroll servicer prevailed on its third party beneficiary claim, it could not have recovered attorney fees, and therefore should not have attorney fees imposed against it. (*Id.* at p. 681.) In so ruling, the Court of Appeal observed that the contract between the general contractor and subcontractor not only expressly disclaimed that it created any benefits to third parties, but it interpreted the term "either" in the attorney fees provision to refer only to the two parties to the contract, thereby excluding nonsignatories from the scope of the attorney fees provision. (*Id.* at 680-681.)

Here, we are not persuaded by Thompson's contentions that the holding in *Sessions* is contrary to the public policy of section 1717 and "at odds" with the holding in *Real Property*. As the Princes point out, Thompson's argument "presupposes that [under section 1717] a prevailing defendant would *always* be entitled to an award of attorney's fees against a third party beneficiary plaintiff." That is simply not the law. (*Real Property*, 25 Cal.App.4th at p. 380 ["Under *some circumstances* . . . the reciprocity principles of Civil Code section 1717 will be applied in actions involving signatory and nonsignatory parties."].) (Italics added.) As our Supreme Court held in *Reynolds Metals Co. v. Alperson,* a nonsignatory to a contract is only entitled to attorney fees if he clearly would be entitled to attorney fees had he prevailed in the litigation. (25 Cal.3d at p. 128). The holdings in both *Real Property* and *Sessions* follow the guiding principles set forth in *Reynolds*.

In *Real Property*, the Court of Appeal's decision on whether to award attorney fees examined the language in the lease agreement, which expressly provided that the sublessee would operate the movie theater, thereby establishing a nexus between the sublessee and the city and entitling the sublessee to proceed against the city for breach of the lease agreement and attorney fees. (25 Cal.App.4th at p. 383.) Similarly, in *Sessions*, the Court of Appeal examined the language of the agreement between the general contractor and subcontractor, which expressly disclaimed that it created any benefits to third parties, thereby excluding the payroll servicer from the scope of the attorney fee provision. (84 Cal.App.4th at pp. 680-681.) In both cases, the courts focused on whether the nonsignatory party would have been entitled to attorney fees had he prevailed. (*Real Property*, *supra*, 25 Cal.App.4th at p. 382; *Sessions*, *supra*, 84 Cal.App.4th at p. 678*; Whiteside v. Tenet Healthcare Corp.* (2002) 101 Cal.App.4th 693, 708 [defining "sufficient nexus" as whether the terms of the contract contemplate the award of attorney fees to persons in addition to the signatories].)

In this case, following the principles set forth in *Reynolds*, in determining whether Thompson would be entitled to attorney fees, the trial court focused on whether "plaintiffs would also have been entitled to attorneys' fees had they prevailed" by examining the language of attorney fees provision in the Thompson/Simich contracts. The trial court noted that the contracts specifically stated that attorney fees were only available to the "buyer" and "seller." Based on this language, the trial court ruled the Thompson/Simich contracts did not give the right to third parties to recover attorney fees in a suit brought to enforce contractual provisions. This ruling was correct. Unlike the contract in *Real Property*, the Thompson/Simich contracts did not name the Princes or otherwise specifically confer rights

upon them. (Accord, *Loduca v. Polyzos* (2007) 153 Cal.App.4th 334, 343-344 [homeowner who sued subcontractor for breach of contract between subcontractor and general contractor to build the homeowner's home (and that specifically named the homeowner) could recover attorney fees when contract provided for fees "if a court action is brought"].) And like the contract in *Sessions*, the Thompson/Simich contracts only conferred a right to obtain attorney fees upon "either party" to the contract rather than upon "any" party or "any" claim. (*Sessions, supra*, 84 Cal.App.4th at pp. 680-688; accord, *Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC, supra,* 162 Cal.App.4th at pp. 896-900 [declining to award fees to third party beneficiary when attorney fees clause reached the "parties" to the contract].)

Accordingly, we affirm the trial court's order denying Thompson's request for attorney fees.

DISPOSITION

The trial court's order is affirmed. The Princes are to recover their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

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GOODMAN, J.*

We concur:

ASHMANN-GERST, Acting P.J.

HOFFSTADT, J.

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* Retired judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.