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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

CYDNEY SANCHEZ,

Plaintiff and Appellant,

v.

EL MONTE INVESTMENTS, LLC,

Defendant and Respondent.

B276423

(Los Angeles County
Super. Ct. No. SC115881)

APPEAL from an order of the Superior Court of Los Angeles County, Mitchell L. Beckloff, Judge. Affirmed.

Kaplan, Kenegos & Kadin, Jerry Kaplan and David Scott Kadin, for Plaintiff and Appellant.

Law Offices of Wayne M. Abb and Wayne M. Abb for Defendant and Respondent El Monte Investments, LLC.

A dispute arose between a former property owner and her secured lender that purchased the property at a foreclosure sale following the owner's default. The dispute centered on which of them was entitled to certain insurance proceeds occasioned by fire damage to the property. The lender obtained a court order awarding it the disputed proceeds, and the former owner sued the lender for conversion. The former owner eventually assigned her conversion claim to her attorneys, who lost at trial and were ordered to pay the lender's attorney fees pursuant to a provision in the foreclosed upon deed of trust for the property. We are asked to decide whether the conversion claim is within the scope of the trust deed's attorney fee provision and, if so, whether that provision could be asserted against the attorneys that obtained the assigned conversion claim.

I. BACKGROUND¹

Defendant and respondent El Monte Investments, LLC (EMI) made two loans to Cydney Sanchez (Sanchez) secured by two deeds of trust on real property located in Los Angeles. The junior deed of trust required Sanchez to insure the property for fire damage and to name EMI as a loss beneficiary. A fire destroyed a structure on the property, and Sanchez's insurer issued benefit checks payable to both Sanchez and EMI in two installments.

Sanchez endorsed the first check to EMI, agreeing the money could be applied toward her loan balance and for work on

¹ In reciting the pertinent background facts, we draw on our prior opinion in *Sanchez v. El Monte Investments, LLC* (Jan. 19, 2017, B268717) [nonpub. opn.] (*Sanchez I*).

the property. Sanchez subsequently defaulted on the loan secured by the junior deed of trust, and EMI acquired the property by making a full credit bid at a foreclosure sale.

The insurer then issued a second check, again made payable to Sanchez and EMI. When Sanchez refused to sign over the check to EMI, EMI sued her for breach of contract and declaratory relief (hereafter, the contract action).² EMI alleged Sanchez breached the deed of trust by failing to reimburse EMI for expenses it incurred to repair the property, which allegedly exceeded the total amount of the insurance proceeds. Sanchez did not appear in the contract action, EMI was successful in having default entered against her, and the trial court ordered the insurance proceeds distributed to EMI after denying Sanchez's motion to set aside the default. Sanchez noticed an appeal from that ruling but later abandoned it.

Sanchez then sued EMI for accounting, conversion, money had and received, and unfair business practices. She attached the deed of trust to her operative complaint and sought an award of attorney fees. While the lawsuit was pending, Sanchez assigned to her attorneys—plaintiff and appellant Kaplan, Kenegos & Kadin (plaintiff)—“any and all claims, demands, causes of action, judgments, settlements and proceeds of the above in and related to the within action.” Plaintiff proceeded to a bench trial on solely the conversion claim, and introduced the deed of trust as an exhibit.

The trial court ruled in EMI's favor. The court found plaintiff had not proven conversion, which requires proof EMI

² The insurer interpleaded the funds in dispute.

wrongfully exercised dominion over the proceeds, because the decision in the contract action gave EMI “legal justification to the funds.” The court observed that if plaintiff “believed the order releasing the funds to EMI was incorrect, the proper method of addressing that ruling was by [w]rit or [a]ppeal” We affirmed the trial court’s judgment for EMI on the conversion claim. (*Sanchez I, supra*, B268717.)

On remand, EMI moved for attorney fees in the amount of \$42,350, citing an attorney fee provision in the deed of trust as justification for awarding fees.³ That provision obligated Sanchez “[t]o appear in and defend any action or proceeding purporting to affect the security hereof or the rights or powers of [EMI]; and to pay all costs and expenses, including . . . attorney’s fees in a reasonable sum, in any such action or proceeding in which [EMI] may appear, and in any suit brought by [EMI] to foreclose this [d]eed.” EMI contended it was entitled to attorney fees as provided in the deed of trust because the conversion claim “was based on [Sanchez’s] dispute of the meaning of [the insurance provision in the deed of trust]; to wit, who is entitled to the supplemental insurance proceeds.”⁴ In EMI’s view, the trust

³ EMI’s principal, Ronald Perlstein, also moved for attorney fees. Sanchez initially named Perlstein as a defendant in her lawsuit, but he was dismissed from the action with prejudice prior to trial. In its decision on the attorney fee motion, the trial court concluded Perlstein was not entitled to fees but also stated its ruling was without practical effect because Perlstein and EMI were represented by the same attorney, who worked on the same issues for both parties without distinction.

⁴ EMI also asserted Sanchez’s lawsuit was “an improper attempt to circumvent the adverse ruling [against her] in the

deed's attorney fee provision was applicable to the conversion claim for two independent reasons: (1) the claim "arose from the contractual relationship between the parties" enabling an attorney fee award "on the contract" under Civil Code section 1717,⁵ and (2) the attorney fee provision was broad enough, in any event, to encompass both contract and tort claims.

Plaintiff (the law firm that formerly represented Sanchez) opposed the motion for attorney fees. It contended the conversion claim was unconnected to any contractual relationship between Sanchez and EMI and the claim was thus not within the scope of the provision in the deed of trust that authorized an award of attorney fees. Plaintiff further contended it could not be held liable for attorney fees even if the contractual provision did apply because Sanchez did not assign the deed of trust to plaintiff and plaintiff did not otherwise assume any of Sanchez's liabilities.

The trial court awarded EMI attorney fees in the amount of \$35,525. The court reasoned the conversion claim fell within the ambit of Civil Code section 1717, subdivision (a). The court reasoned the conversion claim "ar[ose] out of and rel[ied] on the

[contract action]," in which EMI had sought attorney fees pursuant to the deed of trust.

⁵ Civil Code section 1717 provides in relevant 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).)

existence and interpretation of the [deed of trust],” making it sufficiently related to the deed of trust to be considered a cause of action “on a contract” for purposes of Civil Code section 1717. The trial court further found the conversion claim “[e]ll[] within the scope of” the trust deed’s attorney fee provision because the claim “involve[d] . . . EMI’s rights and affect[ed] the security.”

In addition, the trial court found Sanchez’s assignment of her conversion claim to plaintiff included the obligation to pay attorney fees in the event EMI prevailed against plaintiff. The court noted that assignments generally transfer all incidents of the thing assigned, and Sanchez’s written assignment to plaintiff was not limited to a transfer of its benefits without its obligations.⁶

II. DISCUSSION

Whether a contractual attorney fee provision applies to a tort cause of action like conversion depends, in the first instance, on whether the words of the provision encompass the tort at issue. Here, the parties’ differing views concerning the application of Civil Code section 1717 are not dispositive because the language of the attorney fee provision in the deed of trust is broad enough to encompass the conversion claim regardless of whether that claim was an “action on a contract.” Furthermore, plaintiff, as the assignee of Sanchez’s conversion claim, was properly held liable to pay EMI’s attorney fees because plaintiff

⁶ Plaintiff did persuade the trial court, however, that the amount of fees sought was unreasonable. The court excluded some of the hours claimed by EMI’s counsel in arriving at its \$35,525 award (\$6,825 less than EMI requested).

impliedly accepted the obligation to pay attorney fees when it accepted the assignment of Sanchez’s claim.

A. *Standards Applicable to Contractual Attorney Fee Awards*

Code of Civil Procedure section 1021 codifies the “American rule” of attorney fee awards. (*Mountain Air Enterprises, LLC v. Sundowner Towers, LLC* (2017) 3 Cal.5th 744, 751 (*Mountain Air*).) The statute provides that unless attorney 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; but parties to actions or proceedings are entitled to their costs” (Code Civ. Proc., § 1021.)

A prevailing party may recover as “costs” those attorney fees that are authorized by contract, statute, or law. (Code Civ. Proc., §§ 1032, subd. (b), 1033.5, subd. (a)(10); see also *Santisas v. Goodin* (1998) 17 Cal.4th 599, 606 (*Santisas*) [“recoverable litigation costs do include attorney fees, but only when the party entitled to costs has a legal basis, independent of the cost statutes and grounded in an agreement, statute, or other law, upon which to claim recovery of attorney fees”].) “Thus, “[p]arties may validly agree that the prevailing party will be awarded attorney fees incurred in any litigation between themselves, whether such litigation sounds in tort or in contract.” [Citation.]” (*Mountain Air, supra*, 3 Cal.5th at p. 751.) Parties may also contractually “limit the recovery of fees only to claims arising from certain transactions or events, or award them only on certain types of claims.” (*Brown Bark III, L.P. v. Haver* (2013) 219 Cal.App.4th 809, 818.)

A trial court’s determination of “the propriety or amount of statutory attorney fees to be awarded” is reviewed under an abuse of discretion standard, “but a determination of the legal basis for an attorney fee award is a question of law to be reviewed de novo.’ [Citations.]” (*Mountain Air, supra*, 3 Cal.5th at p. 751; see also *Khan v. Shim* (2016) 7 Cal.App.5th 49, 55 (*Khan*) [interpretation of contractual attorney fee provision that does not turn on extrinsic evidence is subject to de novo review].)

*B. The Deed of Trust’s Attorney Fee Provision
Encompasses Sanchez’s Conversion Claim*

The attorney fee provision in the deed of trust states Sanchez must “appear in and defend any action or proceeding purporting to affect the security hereof or the rights or powers of [EMI]; and . . . pay all costs and expenses, including . . . attorney’s fees in a reasonable sum, in any such action or proceeding in which [EMI] may appear, and in any suit brought by [EMI] to foreclose this [d]eed.” Thus, the provision requires Sanchez to pay EMI’s reasonable attorney fees in any action purporting to affect (1) “[EMI’s] security” or (2) its “rights or powers” under the trust deed.

“If a contractual attorney fee provision is phrased broadly enough, . . . it may support an award of attorney fees to the prevailing party in an action alleging both contract and tort claims” (*Santisas, supra*, 17 Cal.4th at p. 608.) The trust deed’s attorney fee language is just such a provision. It is not limited to contract claims and instead uses broad terms that encompass tort claims so long as they are asserted in an action or proceeding “purporting to affect” EMI’s “security” or its “rights or

powers” under the deed of trust. Sanchez’s conversion claim satisfies that description.

The deed of trust required Sanchez, in order “[t]o protect the [s]ecurity,” to insure the property for fire damage with EMI named as a loss payee and to reimburse EMI for its expenditures. Sanchez’s operative complaint alleged EMI converted the insurance proceeds because it “received more monies than it was entitled to under the [d]eed of [t]rust” and did not use the funds it received to repair the property as promised.

As articulated in the complaint Sanchez filed, the conversion cause of action purported to affect EMI’s “security” and “rights and powers” under the deed of trust. (See *Mountain Air, supra*, 3 Cal.5th at p. 752 [a court determines intent of parties’ attorney fee contract by looking first to the writing itself, which the court interprets by applying ““the meaning a layperson would ascribe to [the] contract language [if] not ambiguous””].) Because the conversion claim falls within the ambit of the broad attorney fee provision in the trust deed, it does not matter whether the claim sounds in contract or tort.⁷ (*Khan, supra*, 7 Cal.App.5th at pp. 59-62 [tort claims fell within contractual attorney fee provision applying to “*any litigation . . . concerning [the contract’s] terms, interpretation or enforcement or the rights*

⁷ It also does not matter, as plaintiff argues, that the prayer for relief in EMI’s answer to Sanchez’s complaint did not seek attorney fees. (*North Associates v. Bell* (1986) 184 Cal.App.3d 860, 865, fn. 2 [“The fact that Bell did not seek attorney’s fees in his answer to the first amended complaint is not material, since the lack of such a prayer would not have barred him from recovery if he had prevailed”].)

and duties of any party in relation thereto”]; *Xuereb v. Marcus & Millichap, Inc.* (*Xuereb*) (1992) 3 Cal.App.4th 1338, 1342-1343 [attorney fee provision applying to “any ‘lawsuit or other legal proceeding’ to which ‘this Agreement gives rise’” interpreted as encompassing tort claims].)

Because the attorney fee provision in the deed of trust covers the asserted conversion claim, we need not address the applicability of Civil Code section 1717. EMI, as the party seeking attorney fees, is entitled to fees under the express language of the deed of trust. (See *Xuereb, supra*, 3 Cal.App.4th at p. 1342 [“limited application” of Civil Code section 1717, whose “only effect is to make an otherwise unilateral right to attorney fees reciprocally binding upon all parties to actions to enforce the contract,” does not “supersede or limit the broad right of parties pursuant to Code of Civil Procedure section 1021 to make attorney fees agreements,” including agreements providing for attorney fee awards in tort actions].)

C. Plaintiff, as the Assignee of Sanchez’s Conversion Claim, Must Pay EMI’s Reasonable Attorney Fees

Certain causes of action may be assigned by their owners. (Civ. Code, § 954 [“A thing in action, arising out of the violation of a right of property, or out of an obligation, may be transferred by the owner”].) It is a “general rule that “[t]he assignee ‘stands in the shoes’ of the assignor, taking his rights and remedies, subject to *any defenses* which the *obligor* has against the assignor prior to notice of the assignment.” [Citations.]” (*Cal-Western Business Services, Inc. v. Corning Capital Group* (2013) 221 Cal.App.4th 304, 310-311; see also Code Civ. Proc., § 368 [“In the case of an assignment of a thing in action, the action by the assignee is

without prejudice to any set-off, or other defense existing at the time of, or before, notice of the assignment”]; Civ. Code, § 1084 [“The transfer of a thing transfers also all its incidents, unless expressly excepted; but the transfer of an incident to a thing does not transfer the thing itself”].)

Here, Sanchez assigned plaintiff “any and all claims, demands, causes of action, judgments, settlements and proceeds” of her lawsuit for conversion. Upon accepting the assignment, plaintiff stepped into Sanchez’s shoes with respect to the subjects assigned. Because Sanchez would have been liable for EMI’s attorney fees as an incident to the conversion claim in the absence of the assignment, plaintiff is properly made to bear that liability in her stead.⁸ (See *Allstate Ins. Co. v. Loo* (1996) 46 Cal.App.4th 1794, 1799-1800 [insurer who chooses to prosecute insured’s claim under principles of subrogation assumes insured’s contractual obligation to pay attorney fees if the other party prevails, for the defendant’s “obligation to defend against the action was the same irrespective of the identity of the plaintiff”]; *Meyers v. Bank of America etc. Assn.* (1938) 11 Cal.2d 92, 94 [“assignment of an assignable cause of action is but one of the recognized forms of subrogation” and an assigned cause of action

⁸ Plaintiff maintains that in accepting Sanchez’s assignment, it “sought only to prosecute the assignor’s rights in her absence [due to incarceration] and not accept [the] assignor’s liabilities.” That cannot be permissible. If it were, plaintiffs seeking to avoid the prospect of paying attorney fees to a prevailing defendant could simply assign the prosecution of their claims to their litigation attorneys.

“is subject to the same defenses as though no assignment thereof of any sort had been made”].)

To the same point, Sanchez’s conversion action, which plaintiff prepared as her counsel, sought an award of attorney fees based, presumably, on the attorney fee provision in the deed of trust.⁹ Had plaintiff prevailed at trial, it would have been well within its rights to seek attorney fees pursuant to the deed of trust and the reciprocity principles of Civil Code section 1717. (See *Vons Companies, Inc. v. Lyle Parks, Jr., Inc.* (2009) 177 Cal.App.4th 823, 833 [assignment of causes of action “necessarily include[d] all the incidents of those causes of action, including [the original plaintiff’s] right to costs, ‘unless expressly excepted’”]; see also *id.* at pp. 834-835 [suggesting the plaintiff’s assignee would have been entitled to contractual attorney fees if the assigned claims had been premised on the enforcement of a contract containing an attorney fee provision]; *Adjustment Corp. v. Marco* (1929) 100 Cal.App. 338, 341 [assignment of lessor’s claim against lessee carried with it right to attorney fees provided in lease agreement].) Where the shoe is on the other foot, as it is here, plaintiff “must take the bitter with the sweet”

⁹ Sanchez’s operative complaint stated claims for accounting, conversion, money had and received, and violation of the unfair competition law (Bus. & Prof. Code, § 17200 et seq.). Attorney fees are not recoverable for violations of the unfair competition law unless the plaintiff is entitled to them under a private attorney general theory. (*Zhang v. Superior Court* (2013) 57 Cal.4th 364, 371, fn. 4.) Given the inapplicability of the private attorney general doctrine in this case, we presume Sanchez’s request for attorney fees was predicated on the parties’ conduct in relation to the deed of trust.

(*Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194, 211)—particularly considering the broad language used in the assignment. (See *Hearn Pacific Corp. v. Second Generation Roofing Inc.* (2016) 247 Cal.App.4th 117, 135 & fn. 12 [plaintiff-assignee’s prayer for attorney fees demonstrated it was keen to benefit from a contractual attorney fee provision if it prevailed and that it impliedly agreed, therefore, when it accepted the assignment, to assume any payment of attorney fees if it lost]; *Erickson v. R.E.M. Concepts, Inc.* (2005) 126 Cal.App.4th 1073, 1087 [“absent evidence showing the parties did not intend to transfer to [the plaintiff-assignee] the attorney fee obligations of [the plaintiff], assumption of such obligations may properly be implied by [the plaintiff-assignee’s] acceptance of the benefits of [the assignment]”]; see also Civ. Code, § 3521 [“He who takes the benefit must bear the burden”].)

DISPOSITION

The order is affirmed. El Monte Investments, LLC is entitled to recover its costs on appeal.

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BAKER, J.

We concur:

KRIEGLER, Acting P.J.

KIM, J.*

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