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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

EDWARD CHOI,

Plaintiff and Appellant,

v.

BASIL BEHRMAN et al.,

Defendants and Respondents.

B239288

(Los Angeles County
Super. Ct. No. BC434999)

APPEAL from an order of the Superior Court of Los Angeles County, Deirdre H. Hill, Judge. Reversed with directions.

Khashayar Law Group, Daryoosh Khashayar and Koorosh Khashayar for Plaintiff and Appellant.

Slade Law and Larry Slade for Defendants and Respondents.

INTRODUCTION

Defendants Basil Behrman (Basil) and Marc Behrman (Marc) prevailed when the trial court dismissed the lawsuit filed by plaintiff Edward Choi (Choi), individually and on behalf of Canyon River One LLC (Canyon River) (collectively plaintiffs), after sustaining plaintiffs' second amended complaint without leave to amend.¹ Defendants filed a motion for attorney's fees and were granted an award of \$25,323.83. On appeal, Choi contends that the trial court erred in awarding attorney's fees because he was not a signatory to the operating agreement and because the causes of action in the second amended complaint were based on tort, not contract. We conclude that the attorney's fee award was calculated incorrectly.

FACTUAL AND PROCEDURAL BACKGROUND

Canyon River was formed to build a four-unit property in Sherman Oaks as an investment. Basil was the managing member for Canyon River. Marc, his son, was also a member.

The building was completed in 2008. With the real property market declining, the members of Canyon River decided to rent out the units and hold the property for long-term gains. Rentals did not provide sufficient income, and Canyon River defaulted on its loan. The members of Canyon River held meetings to try and prevent a foreclosure. Ultimately, the note holder, Nevis Capital (Nevis), foreclosed on the property. After the foreclosure, Nevis allowed defendants to use one of the units rent free, instead of appointing a receiver.

On April 2, 2010, plaintiffs filed an eight-cause-of-action complaint against defendants and Nevis alleging causes of action for breach of contract, breach of implied

¹ The notice of appeal was by Choi only.

covenant of good faith and fair dealing, unlawful business practices, willful misrepresentation, negligent misrepresentation, fraud, promise without intent to perform, and breach of duty of loyalty. Plaintiffs alleged that the foreclosure was the fault of the defendants.

By order of October 5, 2010, a demurrer by Nevis was sustained, and plaintiffs' complaint was dismissed with leave to amend. The court held that plaintiffs had not properly pled any of their causes of action. The court ruled that the cause of action for unlawful business practices was "deficient since it is not apparent from the pleadings how the alleged agreement between co-defendant [Basil] and Nevis resulted in a direct, or in any injury to Choi" The court sustained the demurrers to all fraud-related claims because they did not allege fraud with the required particularity.

On October 25, 2010, plaintiffs filed a first amended complaint, again alleging the same eight causes of action.² Defendants filed demurrers to the first amended complaint. The court, by its order dated February 22, 2011, sustained the demurrer to the entire first amended complaint. The court ruled:

"Demurrer sustained to the entire complaint for failure to state sufficient facts alleging standing to bring the asserted claims based on the allegations stated. . . . Choi, an individual, is not a party to the alleged operating agreement and is not alleged to be a member of [Canyon River] or a stockholder in the corporate entity. Moreover, the allegations are insufficient to set forth a claim for a derivative action by a nominal plaintiff in the interest of either a corporate entity or [Canyon River]. The first amended complaint . . . fails to allege compliance with either [C]orporations [C]ode section[s] 17501[, subdivision](a)(1) or 17501[, subdivision](a)(2) or a basis in fact to be excused from these requirements."

As to the breach of contract cause of action, the court noted that the first amended complaint failed to specify how the contract alleged was breached, Marc was not a

² Although Nevis was named a defendant in the first amended complaint, it was subsequently dismissed from the action.

signatory to the contract, and Basil signed as trustee, not as an individual. As to the unlawful business practices cause of action, the first amended complaint failed to state a cause of action.

The court further found there were “no allegations of fact to support a fiduciary or confidential relationship or a basis for alleging Marc . . . owes any duty. . . . There are no allegations of usurpation of [Canyon River’s] opportunities. [¶] . . . The facts and circumstances stated do not state a cause of action for fraud as the required particularity remains wanting.”

The first and second causes of action for breach of contract and for breach of the implied covenant of good faith and fair dealing were dismissed without leave to amend. The remaining causes of action were dismissed with leave to amend.

On March 1, 2011, plaintiffs filed their second amended complaint. In the second amended complaint, plaintiffs alleged only causes of action for willful misrepresentation, negligent misrepresentation, fraud, and breach of duty of loyalty. The issue of standing was not addressed and the complaint continued to allege that Choi, individually, was a member of Canyon River. The second amended complaint continued to name Marc as a defendant, without any allegation of a fiduciary or confidential relationship, or contractual basis, for naming him.

The court sustained all demurrers to the second amended complaint and dismissed the complaint without leave to amend. The court held that Choi had no standing as an individual, and he failed to allege that he brought suit on behalf of his family trust. In addition, the court held the claims against defendant Marc were not properly pled, and that the claim for breach of duty of loyalty was insufficient.

On September 7, 2011, defendants filed a motion for contractual attorney’s fees as costs of suit. The motion was granted on December 9, 2011. In the order that was filed on January 27, 2012, the court ordered plaintiffs to pay defendants’ attorney’s fees in the amount of \$25,323.83.

DISCUSSION

Waiver of Claims

Initially, defendants contend that because plaintiffs failed to comply with the requirements of California Rules of Court, rule 8.204, their claims should be waived.³ Specifically, defendants contend that plaintiffs have not provided a sufficient summary of the relevant facts, there is no reference to a matter in the record by a citation to the volume and page number, and plaintiffs improperly captioned their appeal.

It is well established that, in addressing an appeal, we begin with the presumption that the judgment of the trial court is correct. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133; *Fleishman v. Superior Court* (2002) 102 Cal.App.4th 350, 357.) The appellants have “the burden of showing reversible error by an adequate record.” (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574; *Robbins v. Los Angeles Unified School Dist.* (1992) 3 Cal.App.4th 313, 318.) Meeting this burden requires citations to the record to direct the court to the pertinent evidence or other matters in the record which demonstrate reversible error. (Cal. Rules of Court, rule 8.204(a)(1); *Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115; *Culbertson v. R. D. Werner Co., Inc.* (1987) 190 Cal.App.3d 704, 710.) It also requires a summary of relevant facts. (Cal. Rules of Court, rule 8.204(a)(2)(C).) The failure to meet this burden waives the issues on appeal. (*Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545-546.)

While it is clear from his brief that Choi is contesting the award of attorney’s fees, the brief is certainly devoid of citations to the record as well as a summary of the relevant facts. In addition, the record Choi designated on appeal is insufficient to review his claim of error. We have granted defendants’ motion to augment the record and elect nevertheless to decide the appeal on the merits.

³ California Rules of Court, rule 8.204(a)(1)(C) & (2)(C) requires that a party’s brief must “[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears” and must “[p]rovide a summary of the significant facts limited to matters in the record.”

Plaintiff as Nonsignatory on Contract

In California, the parties to a lawsuit must pay their own attorney's fees unless a contract or statute provides otherwise. (*Woodland Park Management, LLC v. City of East Palo Alto Rent Stabilization Bd.* (2010) 181 Cal.App.4th 915, 919; *Kangarlou v. Progressive Title Co., Inc.* (2005) 128 Cal.App.4th 1174, 1178.) Whether a legal basis exists for an award of attorney's fees is a question of law which we review de novo. (*PNEC Corp. v. Meyer* (2010) 190 Cal.App.4th 66, 69; *Woodland Park Management, LLC, supra*, at p. 919.)

In this case, the trial court awarded defendants attorney's fees pursuant to Civil Code section 1717 (section 1717). Subdivision (a) of section 1717, in pertinent part, provides that "[i]n any action on a contract, where the contract specifically provides that attorney's fees and cost, 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. [¶] Where a contract provides for attorney's fees, as set forth above, that provision shall be construed as applying to the entire contract, unless each party was represented by counsel in the negotiation and execution of the contract, and the fact of that representation is specified in the contract."

In asserting an entitlement to attorney's fees, defendants rely on the Canyon River operating agreement. Section 9.2 of the operating agreement provides in part as follows: "If any proceeding or arbitration is brought by any Member against any other Member that arises out of this Agreement, then the prevailing Member in such proceeding or arbitration shall be entitled to recover reasonable attorneys fees and costs. Subject to the restrictions set forth in Article VI, this Agreement shall inure to the benefit of and shall bind the parties hereto and their respective personal representatives, successors, and assigns."

Choi contends that since the trial court found he did not have standing to pursue a claim under the operating agreement, attorney's fees were improperly awarded. We disagree.

Section 1717 has been interpreted broadly in order to give effect to its purpose, which is to establish a mutuality of remedy and "prevent oppressive use of one-sided attorney's fees provisions." (*Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 128; *Lewis v. Alpha Beta Co.* (1983) 141 Cal.App.3d 29, 33.) Thus, it has been interpreted to provide for an award of attorney's fees to a defendant who has not signed a contract, but is sued as if it had, if the plaintiff would have been able to recover attorney's fees under the contract if the plaintiff prevailed. (*Reynolds Metals Co.*, *supra*, at p. 128; *Lewis*, *supra*, at p. 33.) Likewise, attorney's fees are available to a signing defendant in an action by a nonsignatory plaintiff. (*Brusso v. Running Springs Country Club, Inc.* (1991) 228 Cal.App.3d 92, 109; *Jones v. Drain* (1983) 149 Cal.App.3d 484, 488-490.) Additionally, a third party beneficiary of a contract, as Choi claimed to be, is entitled to attorney's fees if he is a prevailing party in litigation on the contract. (*Steve Schmidt & Co. v. Berry* (1986) 183 Cal.App.3d 1299, 1313, 1315-1317.)

Even if the contract is inapplicable, invalid or unenforceable, attorney's fees may be awarded. (*Rainier National Bank v. Bodily* (1991) 232 Cal.App.3d 83, 86; *North Associates v. Bell* (1986) 184 Cal.App.3d 860, 865.) Application of 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*, *supra*, at p. 86; *North Associates*, *supra*, at p. 865.)

We agree with defendants that Choi's lack of standing does not preclude the award of attorney's fees. (*Real Property Services Corp. v. City of Pasadena* (1994) 25 Cal.App.4th 375, 383-384). Neither does the fact that this case was decided on demurrer: "Whether a party is entitled to attorneys fees for the purpose of invoking . . . section 1717 depends not on the evidence adduced at trial or some interim proceeding, but on the pleadings." (*Manier v. Anaheim Bus. Center Co.* (1984) 161 Cal.App.3d 503, 508.)

The fact that Choi signed the operating agreement, albeit in his capacity as trustee, and failed to plead the relationship properly, should not shield him from responsibility for attorney fees. The trial court did not err in requiring Choi to pay attorney's fees pursuant to section 1717.

Causes of Action Not On a Contract

Choi contends that he cannot be responsible for the prevailing defendants' attorney's fees because the second amended complaint raised only tort claims. There is some merit to Choi's contention.

While the second amended complaint arguably sets forth tort causes of action, the complaint makes numerous allegations referring to the operating agreement, including that "the agreement and the terms and conditions associated with said agreement are void and invalid as they have been premised on fraud, misrepresentation, concealment, and tricky [*sic*]." Plaintiffs also based their fraud claim on Basil's alleged failure "to comply with [his] obligations under the terms of [Canyon River]." The second amended complaint still alleged that plaintiffs are entitled to recover attorney's fees, as did the previous two complaints.

California courts liberally construe the term "on a contract," as used in the statute authorizing an award of attorney's fees to a prevailing party in an action on a contract. (*Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 894.) Where, as here, the attorney's fee provision authorizes an award of attorney's fees "to the prevailing party in any proceeding or action arising out of the agreement," a signatory party prevailing on a tort claim arising out of the agreement is entitled to attorney's fees. (*Miske v. Coxeter* (2012) 204 Cal.App.4th 1249, 1262, fn. 5; *Xuereb v. Marcus & Millichap, Inc.* (1992) 3 Cal.App.4th 1338, 1342-1343.) The second amended complaint, while attempting to only state tort claims, "arises out of [the] Agreement" within the meaning of section 9.2 and is therefore on the contract for purposes of the court awarding attorney's fees pursuant to section 1717.

Moreover, the court could also properly look at the complaint and the first amended complaint in justifying the attorney's fee order. Plaintiffs filed three complaints, propounded extensive discovery requests, requiring defendants to participate in meet and confer efforts toward discovery, sanctions and ultimately dismissal of the claims filed by plaintiffs. The original complaint and the first amended complaint, as stated above, set forth eight causes of action based upon the operating agreement. Thus, that the second amended complaint contains only tort causes of action does not preclude an award of attorney's fees.

However, while the motion for attorney's fees was made by Basil and Marc, only Basil signed and was sued on the contract. Plaintiff only pled tort claims against Marc. A prevailing nonsignatory cannot recover fees incurred in litigating non-contract claims. (*Super 7 Motel Assocs. v. Wang* (1993) 16 Cal.App.4th 541, 548-549.)

“[S]ection 1717 applies only to actions that contain at least one contract claim.” (*Topanga & Victory Partners v. Toghia* (2002) 103 Cal.App.4th 775, 786.) If an action asserts only tort causes of action, section 1717 does not apply. (See *Moallem v. Coldwell Banker Com. Group, Inc.* (1994) 25 Cal.App.4th 1827, 1830-1832.) Inasmuch as no contract claims were asserted against Marc, he is not entitled to recover attorney's fees. Since it appears that the trial court awarded attorney's fees as to both defendants, the matter must be remanded for the trial court to recalculate the amount of the award to which Basil only is entitled.

Request for Sanctions

Defendants request sanctions, alleging that the appeal is substantively frivolous and it fails to comply with the rules of appellate procedure. We decline to do so.

An appeal should be held frivolous and sanctions imposed “only when it is prosecuted for an improper motive—to harass the respondent or delay the effect of an adverse judgment—or when it indisputably has no merit—when any reasonable attorney would agree that the appeal is totally and completely without merit.” (*In re Marriage of*

Flaherty (1982) 31 Cal.3d 637, 650; see also Code Civ. Proc., § 907.) While we do not find Choi's arguments in the appeal persuasive and find that attorney's fees were properly awarded, we do not find that the appeal was frivolous and prosecuted for an improper motion.

DISPOSITION

The order is reversed, and the trial court is directed to recalculate the award of attorney's fees in a manner consistent with the views expressed herein. The parties are to bear their own costs on appeal.

JACKSON, J.

We concur:

WOODS, Acting P. J.

ZELON, J.