

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

AAWESTWOOD, LLC,

Plaintiff and Respondent,

v.

LIBERAL ARTS 677  
BENEVOLENT FOUNDATION,

Defendant and Appellant.

B275717

(Los Angeles County  
Super. Ct. No. BC504513)

APPEAL from an order of the Superior Court of Los Angeles County, Debre K. Weintraub, Judge. Reversed and remanded.

Law Offices of Lawrence M. Lebowsky, Lawrence M. Lebowsky and Andrew B. Kahng, for Defendant and Appellant.

Law Offices of Edward A. Hoffman, Edward A. Hoffman, for Plaintiff and Respondent.

This appeal concerns the interplay between “prevailing party” findings under Code of Civil Procedure section 1032, subdivision (a)(4) (section 1032(a)(4)) and Civil Code section 1717 (section 1717). In this case, the judgment declared defendant Liberal Arts 677 Benevolent Foundation the prevailing party *in the lawsuit* under section 1032(a)(4). Postjudgment, defendant sought attorney fees under section 1717 as the prevailing party *on the contract*. The trial court denied the section 1717 motion without finding that defendant was not the prevailing party on the contract. The record fails to demonstrate as a matter of law that defendant either was or was not the prevailing party on the contract. Accordingly, we reverse and remand the matter to the trial court to determine in the first instance whether defendant prevailed on the contract under section 1717.

### **FACTUAL AND PROCEDURAL BACKGROUND**

As the only issue on appeal concerns defendant’s right, if any, to attorney fees under section 1717, we dispense with the usual recitation of facts other than to note the following: Plaintiff, claiming an easement, sought to quiet title in six parking spaces that had been the subject of a longterm lease between the parties. The parking spaces were also the subject of a recorded City of Los Angeles form document, the “Covenant and Agreement Regarding Maintenance of Off-Street Parking Space’ (‘FORM’).” The lawsuit included a cause of action for forcible entry and detainer based on defendant’s chaining off the spaces to prevent plaintiff’s use. The operative pleading, the first amended complaint, was verified, and plaintiff sought attorney fees, as provided for in the lease, on both causes of action.

Defendant responded with a verified cross-complaint for quiet title and declaratory relief. The declaratory relief cause of action was based both on the FORM and the leases. Defendant also sought contractual attorney fees.

The parties proceeded with a bench trial.<sup>1</sup> The trial court issued a statement of decision, concluding defendant held title to the six parking spaces “free and clear of any covenant and/or easement” and “[p]laintiffs [had] no right to possession to the [p]arking [s]paces.” The trial court also determined the lease for the parking spaces expired in 2012 and became a month-to-month tenancy, requiring defendant to initiate unlawful detainer proceedings to evict plaintiff from the spaces. By blocking access to the parking spaces, defendant resorted to self-help instead, entitling plaintiff to damages in the net amount of \$3,809.52.

The statement of decision explained plaintiff “asserts its right to the [p]arking [s]paces by and through the FORM, which it claims created a covenant that granted an easement in [its] favor . . . in perpetuity. The Court finds there is no covenant.” The trial court also rejected plaintiff’s contention that the leases established a prescriptive easement. The statement of decision simply provided, “Defendant’s request for declaratory relief is granted,” without explaining whether the ruling was based on the FORM or the lease.

The trial court declared defendant to be the prevailing party under section 1032(a)(4): “The Court must determine the prevailing party as the Court has awarded non-monetary as well as monetary recovery to the parties. See, [s]ection 1032(a)(4).

---

<sup>1</sup> The record does not include a reporter’s transcript or suitable substitute for the trial proceedings or all the trial court documents.

The Court awarded non-monetary recovery to [defendant] and monetary recovery to [plaintiff]. The Court found in favor of [defendant] on the entirety of it[s] cross complaint for quiet title and declaratory relief and in its favor on [plaintiff's] quiet title cause of action. The Court awarded monetary damages of \$3,809.52 to [plaintiff] on its forcible detainer/forcible entry cause of action, but did not award it restitution of the [p]arking [s]paces. The Court finds [defendant] to be the prevailing party. Further, given the facts and circumstances of the case as fully discussed above, the Court in its discretion finds that each party should bear its own costs.”

Notice of entry of judgment was entered August 17, 2015. Defendant’s motion for attorney fees under section 1717 was filed October 16, 2015, the last day to do so. The motion itself requested reasonable attorney fees, but did not specify a dollar amount. The sum sought, \$250,826.79, was set forth in counsel’s declaration, which attached the law firm’s invoices. The declaration and its attachment were not served or filed along with the motion, however; instead, defendant served and filed them later under a “Notice of Errata.”

The attorney fees motion was argued on the record on February 1, 2016. The trial court announced a tentative ruling and both sides submitted. The trial court rejected plaintiff’s assertion that the late-filed, but personally served, declaration and billing records rendered the motion untimely.

On the merits, the trial court reminded counsel it previously exercised its discretion under section 1032(a)(4) to order the parties to bear their own costs, even though it declared defendant the prevailing party. The judge stated, “Because this court exercised its discretion under section 1032(a)(4) to decline

to award costs to either party—that is, each side was to bear its own costs—this necessarily included the cost element of attorney fees as well. [¶] Accordingly, because this court has already determined that the defendant shall bear its own costs, this necessarily includes the cost element of attorney fees as well.” The judge added, “Defendant does not cite any language in those cases which show that if the court in its discretion denies costs to one party under section 1032(a)(4), it can still award attorney fees to that same party under Civil Code section 1717.”

## DISCUSSION

Pursuant to section 1032(a)(4), there is always a prevailing party in a civil action.<sup>2</sup> But section 1032(a)(4) expressly authorizes trial courts to exercise discretion under certain circumstances to deny costs to the prevailing party. (*Charton v. Harkey* (2016) 247 Cal.App.4th 730, 738 [“This prong of the statute thus calls for the trial court to exercise its discretion both in determining the prevailing party and in allowing, denying, or

---

<sup>2</sup> Section 1032 (a)(4) provides in pertinent part, “Prevailing party’ includes the party with a net monetary recovery, a defendant in whose favor a dismissal is entered, a defendant where neither plaintiff nor defendant obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against that defendant. If any party recovers other than monetary relief and in situations other than as specified, the ‘prevailing party’ shall be as determined by the court, and under those circumstances, the court, in its discretion, may allow costs or not . . . .”

Section 1032, subdivision (b) adds, “Except as otherwise expressly provided by statute, [e.g., section 1032(a)(4),] a prevailing party is entitled as a matter of right to recover costs in any action or proceeding.”

apportioning costs. It operates as an express statutory exception to the general rule that a prevailing party is entitled to costs as a matter of right”].) That discretion was reserved to the trial court here.

Under section 1717,<sup>3</sup> trial courts retain discretion under certain circumstances to determine no party prevailed sufficiently *on the contract* “to justify an award of attorney fees.” (*Scott Co. v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1109; *Hsu v. Abbata* (1995) 9 Cal.4th 863, 875 (*Hsu*).) A determination that no party has prevailed on a contract must be supported by substantial evidence. (*Hsu, supra*, 9 Cal.4th at p. 876.)

Once a trial court determines a party has prevailed on a contract under section 1717, however, it loses the discretion to refuse to award attorney fees. *Hsu* is clear and controlling on this point: “[W]hen one party obtains a ‘simple, unqualified win’ on the single contract claim presented by the action, the trial court may not invoke equitable considerations unrelated to litigation success, such as the parties’ behavior during settlement negotiations or discovery proceedings, except as expressly authorized by statute. [Citations.] To admit such factors into the ‘prevailing party’ equation would convert the attorney fees motion from a relatively uncomplicated evaluation of the parties’ comparative litigation success into a formless, limitless attack on

---

<sup>3</sup> The relevant portion of section 1717 provides, “(a) 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.”

the ethics and character of every party who seeks attorney fees under section 1717. We find no evidence that the Legislature intended that the prevailing party determination be made in this way.” (*Hsu, supra*, 9 Cal.4th at p. 877.)

On the record before us, we cannot determine as a matter of law that defendant either was or was not the prevailing party on the contract. (*Hsu, supra*, 9 Cal.4th at p. 877.) Defendant clearly was the prevailing party under section 1032(a)(4). But the trial court’s reliance on its prevailing party determination under section 1032 does not resolve the section 1717 issue. In *Goodman v. Lozano* (2010) 47 Cal.4th 1327, the Supreme Court “reject[ed] [the] contention that [it] must construe section 1032(a)(4) in light of Civil Code section 1717.” (*Id.* at p. 1335, fn. 3.) “The definition of prevailing party under section 1717 . . . differs significantly from section 1032. Rather than focusing on who receives the net monetary award, section 1717 defines the prevailing party as the one who recovers ‘a greater relief in the action on the contract.’” (*Sears v. Baccaglio* (1998) 60 Cal.App.4th 1136, 1143.) As the Court of Appeal more recently noted, “the ‘prevailing party’ inquiries under Civil Code section 1717 and Code of Civil Procedure section 1032 are distinct.” (*PNEC Corp. v. Meyer* (2010) 190 Cal.App.4th 66, 70, fn. 2, disapproved on another point in *DisputeSuite.com, LLC v. Scoreinc.com* (2017) 2 Cal.5th 968, 979.)

In ruling on defendant’s attorney fees motion under section 1717, the trial court did not exercise its discretion to make the separate—but required—determination as to whether defendant

prevailed *on the contract*. The trial court must make this determination in the first instance.<sup>4</sup>

---

<sup>4</sup> We return the matter to the trial court for this limited purpose only and reject plaintiff's suggestion that, upon remand, it should be permitted to seek its own attorney fees as the prevailing party on the contract.

In reversing the postjudgment order with directions, we also reject plaintiff's argument that we should find defendant's attorney fees motion to have been untimely and affirm on that basis. The trial court expressly ruled the motion was timely.



### **DISPOSITION**

The order is reversed and remanded to the trial court with directions to determine whether defendant prevailed on the contract and, if so, to award reasonable attorney fees pursuant to section 1717. Defendant is awarded costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

DUNNING, J.\*

We concur:

KRIEGLER, Acting P. J.

BAKER, J.

---

\* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to Article VI, section 6 of the California Constitution.