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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

WILLIAM RUSSELL DOUGHERTY, Plaintiff and Appellant, v. DAVID S. KARTON, A LAW CORPORATION, Defendant and Appellant.	B275504 (Los Angeles County Super. Ct. No. BC336672)

APPEALS from an order of the Superior Court of Los Angeles County. Ruth Ann Kwan, Judge. Reversed in part and affirmed in part.

Law Offices of James T. Duff and James T. Duff; Musick, Peeler & Garrett and Cheryl A. Orr for Plaintiff and Appellant.

The David Firm and Henry S. David for Defendant and Appellant.

This matter involves cross-appeals from a trial court order granting and denying the parties' motions for attorney fees under Civil Code section 1717. We reverse that part of the order awarding attorney fees to plaintiff and appellant William Russell Dougherty, and affirm the part denying attorney fees to defendant and appellant David S. Karton, a Law Corporation (hereafter Karton except as otherwise noted).[1]

FACTS

Background

In the mid-1990s, Dougherty and Karton executed a written retainer agreement under which Karton promised to represent Dougherty in a divorce case and other legal matters, and Dougherty promised to pay attorney fees and costs to Karton for its services. In March 1999, Karton filed a collection action against Dougherty alleging that he failed to pay $65,246.63 in attorney fees and costs owed under the parties' retainer agreement. (See *David S. Karton, A Law Corp. v. Dougherty* (2009) 171 Cal.App.4th 133, 136 (hereafter interchangeably *Karton I* or the fee collection action).)

In May 1999, Karton filed a request for entry of default, followed in August 1999 by a declaration in support of its request for a default judgment. (*Karton I., supra,* 171 Cal.App.4th at pp. 137–138.) According to a spreadsheet attached to Karton's declaration, the total amount of unpaid fees

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[1] David Karton was also named as an individual defendant in this case, and various rulings were issued at different times as to him. However, David Karton is not involved in this appeal in his individual capacity, and none of the briefs offer any meaningful discussion of issues involving him. Accordingly, we limit our references to Karton, individually, except as useful to explain the context of matters involving his law corporation.

and costs was $79,349.90, not the $65,246.63 alleged in its operative pleading. (*Id*. at p. 138.) The trial court entered a default judgment for a total of $86,676.88, which included an award of interest apparently based upon Karton's request in the amount of $16,549.78. (*Id*. at pp. 138–139.) It is undisputed that by October 1999, Karton had seized approximately $56,000 of Dougherty's funds in partial satisfaction of the August 1999 default judgment. (*Id*. at p. 139.)

Karton's 1999 fee collection action against Dougherty was litigated in protracted proceedings in the trial court, and on appeal in Division One of our court. The litigation included, as noted above, a default judgment entered in 1999 in favor of Karton and against Dougherty, and an opinion on appeal 10 years later by Division One vacating that judgment, along with a series of orders associated with it. (See *Karton I, supra,* 171 Cal.App.4th 133.) Further, in 2010, a county bar association arbitration panel issued a non-binding award finding that Dougherty had already paid Karton more money than was reasonably billable for its services.[2]

The proceedings in Karton's fee collection action after Division One vacated the 1999 default judgment were later summarized in *David S. Karton, A Law Corp. v. Dougherty* (2014) 231 Cal.App.4th 600 (hereafter *Karton II*) as follows: "Karton's claims were tried to the court on February 1 through 8, 2012. In its statement of decision, the court found, based on the calculations of Karton's accounting expert, that 'by March 10, 2008, [Karton], as a result of payments by [Dougherty] and garnishments, had collected funds sufficient to cover all principal

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[2] Karton rejected the arbitration panel's decision.

and interest payments due on [Karton's] invoices under the [retainer agreement.]' The court therefore concluded that 'Dougherty's debt to [Karton] for the fees billed under the [retainer agreement] and interest on overdue amounts has been extinguished.' Thus, Dougherty's contractual debt to Karton was repaid in full, including interest, nearly one year before we filed our opinion in [*Karton I, supra,* 171 Cal.App.4th 133] in February 2009. . . ." (*Karton II, supra*, 231 Cal.App.4th at p. 606.)

After noting that the trial court had further found that Karton had collected more money from Dougherty than he had actually owed under the parties' retainer agreement,[3] Division One continued: "Although the court concluded that Dougherty's contractual debt to Karton was fully repaid (with interest) nearly four years before trial and that Karton was therefore not entitled to damages or any other remedy on the breach of contract claim, the court's statement of decision states that Karton 'has established its breach of contract claim.' . . . The court appears to have reasoned that because 'Karton had to sue Dougherty to recover fees owed,' Karton should be able to recover attorney fees incurred in this litigation, pursuant to the attorney fee provision of the retainer agreement. The court's statement of decision expressly contemplates an award of attorney fees to Karton on that basis." (*Karton II, supra*, 231 Cal.App.4th at p. 606.)

Indeed, the trial court entered a judgment awarding roughly $1.1 million in favor of Karton and against Dougherty for the litigation-related attorney fees incurred by Karton in

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[3] Division One noted that Dougherty had no recourse for his over-payment because he did not file a cross-complaint in Karton's fee collection action.

pursuing its fee collection action for $65,000 to its ultimate end. (See *Karton II, supra*, 231 Cal.App.4th at pp. 606–607.)

In late 2014, Division One reversed the judgment in favor of Karton. The Court of Appeal ruled that Dougherty, and not Karton, was the prevailing party in the law firm's fee collection action against its former client. (See *Karton II, supra*, 231 Cal.App.4th at pp. 607–614.) In February 2015, the Supreme Court denied Karton's petition for review. (S223401.)

In summary, at the conclusion of roughly 15 years of litigation between the parties over the issue of whether Dougherty owed $65,000 in attorney fees to Karton under their 1990s retainer agreement, it was determined that Dougherty had owed *some* money to his former law firm at *some* point, but that the firm had collected its money, plus more, over the course of years of the litigation on the firm's claim for unpaid attorney fees.

The "Collateral Attack" Action and Present Appeal

In July 2005, in the midst of Karton's action to collect attorney fees from Dougherty that we have summarized above, Dougherty filed a so-called "collateral attack" action against Karton.[4] Dougherty alleged that the 1999 default judgment that the Karton firm had obtained in its fee collection action was "void" for a variety of reasons, and sought to stop all efforts to enforce the 1999 default judgment. The appeal before us arises from this "collateral attack" action.

We pause to observe that Dougherty's collateral attack action essentially became moot at the moment in 2009 when Division One vacated the 1999 default judgment in favor of the

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[4] The complaint also named David Karton, individually, as a defendant. As noted above (see footnote 1, *ante*), we generally disregard Karton in his individual capacity in this opinion.

Karton firm in its fee collection action (see *ante*) by its opinion in *Karton I, supra*, 171 Cal.App.4th 133. This stated, we now continue.

The first three causes of action in Dougherty's complaint sought to set aside the 1999 default judgment for the following reasons, listed respectively: lack of personal jurisdiction; lack of subject matter jurisdiction; and because the final judgment exceeded the relief demanded in the complaint. The remaining four causes of action, listed respectively, alleged: declaratory relief; abuse of process; injunctive relief from unlawful debt collection; and imposition of a constructive trust over any money received.

In August 2005, Dougherty filed a motion for a preliminary injunction to preclude Karton from pursuing efforts to enforce the 1999 default judgment in the underlying fee collection action. In September 2005, the trial court denied Dougherty's motion.

Also in August 2005, Karton filed a demurrer to all causes of action alleged in Dougherty's collateral attack complaint on the ground of res judicata. The demurrer argued that the issues presented by Dougherty's collateral attack action had already been decided in the fee collection action. In October 2005, the trial court sustained the demurrer with leave to amend.

In early November 2005, Dougherty filed a first amended complaint alleging the same causes of action as in his original complaint. Karton filed another demurrer to all causes of action, again based on res judicata. In January 2006, the trial court sustained the demurrer brought by Karton without leave to amend.

In February 2006, the trial court (Hon. Jon M. Mayeda) entered a judgment on the demurrer in favor of Karton and against Dougherty in his collateral attack action. In April 2006, the court entered an order awarding Karton roughly $96,000 for attorney fees incurred in defending against Dougherty's action.

For roughly four years, Dougherty's collateral attack action appears to have rested dormant. Then, in late 2010, nearly two years after Division One issued its 2009 opinion vacating the 1999 default judgment in the fee collection action (see *Karton I, supra*, 171 Cal.App.4th 133), Dougherty filed a motion to vacate the trial court's 2006 judgment in his collateral attack action. In other words, Dougherty filed a motion to revive the action to challenge a judgment which, at the time of the motion, no longer existed. This said, we can see a good reason for Dougherty to have wanted the 2006 judgment in his collateral attack action to be vacated, as it included a $96,000 award in favor of Karton.

In December 2010, the trial court (Hon. Ruth A. Kwan)[5] entered an order vacating the 2006 judgment in Dougherty's collateral attack action, including the award of $96,000 in attorney fees. The court vacated the judgment because it had been based on the res judicata effect of the 1999 judgment in the law firm's fee collection action, which had been vacated by Division One in *Karton I, supra*, 171 Cal.App.4th 133.

In early March 2013, a little over two years after his collateral attack action had been revived, Dougherty filed a voluntary dismissal of a number of his causes of action alleged in his first amended complaint. Specifically, Dougherty dismissed his first cause of action to set aside the 1999 default judgment for

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[5] Judge Mayeda apparently retired before Dougherty sought to vacate the 2006 judgment in his collateral attack action.

lack of personal jurisdiction, his fifth cause of action for abuse of process, and his seventh cause of action for a constructive trust.

In late March 2013, Karton filed a renewed demurrer to the remaining causes of action in Dougherty's first amended complaint. In September 2013, the trial court sustained the law firm's demurrer to Dougherty's second and third causes of action to set aside the judgment for lack of subject matter jurisdiction and for exceeding the demand in Karton's action to collect attorney fees, and fourth cause of action for declaratory relief. The court ruled that Dougherty's claims were moot in light of the fact that the 1999 default judgment in favor of Karton in its fee collection action had been vacated by Division One in 2009 in *Karton I, supra*, 171 Cal.App.4th 133. Consequently, there was nothing that the law firm could do to collect on the judgment. At the same time, the court granted Dougherty leave to amend as to his sixth cause of action for injunctive relief, apparently in recognition of his argument that there might still be some form of activity being pursued by Karton which was amenable to an injunction.[6]

In September 2013, Dougherty filed a second amended complaint. Dougherty alleged a single cause of action for injunctive relief to prevent Karton from enforcing any alleged indebtedness owed by Dougherty under the parties' retainer agreement, or pursuant to the 1999 default judgment in the firm's fee collection action. Dougherty also sought to enjoin the firm from enforcing the 2012 judgment in its fee collection action

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[6] The court sustained the demurrer in its entirety as to attorney Karton, in his individual capacity, without leave to amend. As we noted above, this ruling is not at issue in the present appeal.

that it had obtained after the 1999 default judgment had been vacated by Division One.[7]

In October 2013, Karton filed a demurrer to Dougherty's second amended complaint. The firm's primary argument was that "Dougherty's claim for injunctive relief [was] moot" because the 1999 default judgment and its related fee awards had already been declared void by Division One and "Karton [could not] enforce void orders." In addition, the law firm represented to the trial court in its demurrer that injunctive relief was not necessary because the firm had not attempted to enforce the 1999 default since Division One had issued its ruling in 2009 in *Karton I, supra*, 171 Cal.App.4th 133, and that the firm did not intend to do so. With respect to the subsequent 2012 judgment in favor of Karton, the firm argued that the matter was then pending on appeal and that Division One had stayed enforcement until the appeal was decided.[8] Karton asked the trial court to take judicial notice of the fact that Dougherty had already obtained a temporary stay order from Division One preventing enforcement of the 2012 judgment.

On January 14, 2014, the trial court sustained Karton's demurrer without leave to amend, ruling that Dougherty's claim for injunctive relief was moot. On February 10, 2014, the trial

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[7] At this time in September 2013, the 2012 judgment in favor of the Karton firm in its fee collection action had not yet been reversed by Division One. (See *Karton II, supra*, 231 Cal.App.4th 600, decided Nov. 14, 2014.)

[8] As noted above, the fee award in the 2012 judgment was subsequently vacated by Division One in *Karton II, supra*, 231 Cal.App.4th 600.

court entered judgment in favor of Karton and against Dougherty in his collateral attack action.

After entry of judgment, Karton and Dougherty both sought an award for their litigation-related attorney fees. The parties' dispute over their competing cross-claims for attorney fees went on for nearly two years, and multiple rounds of very voluminous papers were filed by both sides. At a hearing on February 18, 2016, the parties argued their respective positions as to which of them should be awarded their attorney fees as the "prevailing party" in Dougherty's collateral attack action between 2005 and 2014. At the beginning of the hearing, the parties stipulated that Civil Code section 1717—which governs the award of attorney fees in an action "on a contract"—applied to Dougherty's collateral attack action, and the trial court accepted the parties' stipulation.

On May 17, 2016, the trial court entered an order finding: (1) Karton, as an individual defendant, was the prevailing party in Dougherty's collateral attack action and was entitled to an award of attorney fees in the amount of $17,000; (2) Karton was not the prevailing party in Dougherty's collateral attack action and was not entitled attorney fees; (3) Dougherty was the prevailing party in his collateral attack action as to Karton, and was entitled to an award of $122,000 for his attorney fees.

In June 2016, Karton filed a notice of appeal from the $122,000 award of attorney fees in favor of Dougherty. In July 2016, Dougherty filed a timely notice of cross-appeal.

DISCUSSION

Karton's Appeal

I. Dougherty as the Prevailing Party

Karton contends the trial court erred in determining that Dougherty was the prevailing party in his collateral attack action against the law firm. We agree.

The Governing Law and Legal Principles

The parties stipulated in the trial court that this case is governed by Civil Code section 1717 (hereafter section 1717). This said, we turn to subdivision (a), which provides generally that, in any action "on a contract" with an attorney fee provision, the party "prevailing on the contract," shall be entitled to reasonable attorney fees in addition to other costs.[9] Section 1717, subdivision (b)(1), provides:

> "The court . . . shall determine who is the party prevailing on the contract for purposes of this section, whether or not the suit proceeds to final judgment. . . . [T]he party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract. The court may also determine that there is no party prevailing on the contract for purposes of this section."

In deciding who is a "party prevailing on the contract" within the meaning of section 1717, subdivision (b)(1), the trial court must compare (1) the " 'relief awarded on the [parties' competing] contract claim or claims,' " with (2) the parties' " 'demands on those same claims' " and (3) the parties' " "litigation objectives' " as disclosed by the pleadings, trial briefs,

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[9] All further references to section 1717 are to that section of the Civil Code.

opening statements, and similar sources. (*Scott Co. v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1109 (*Scott*), quoting *Hsu v. Abbara* (1995) 9 Cal.4th 863, 876 (*Hsu*).) Thus, the determination of which party is the prevailing party in an action on a contract is to be made "only upon final resolution of the contract claims and only by 'a comparison of the extent to which each party . . . succeeded and failed to succeed in its contentions.' " (*Hsu, supra,* 9 Cal.4th at p. 876.)

"If neither party achieves a complete victory on all the contract claims, it is within the discretion of the trial court to determine . . . whether, on balance, *neither party prevailed* sufficiently to justify an award of attorney fees." (*Scott, supra*, 20 Cal.4th at p. 1109, italics added.) In accord with this principle, "the appellate courts have continued to recognize the trial court's authority to determine that there is no party prevailing on the contract for purposes of contractual attorney fees . . . ." (*Hsu, supra*, 9 Cal.4th at p. 875.)

A trial court is given "wide discretion" in determining which party prevailed in an action "on a contract," and its determination will not be reversed on appeal "absent a clear abuse of discretion." (*Sears v. Baccaglio* (1998) 60 Cal.App.4th 1136, 1158.) A trial court abuses its discretion when it issues a ruling that is "arbitrary, capricious or patently absurd," and results in a miscarriage of justice. (*In re Karla C.* (2003) 113 Cal.App.4th 166, 180.)

Analysis

We find Dougherty was not the prevailing party on his collateral attack action. Put simply, Dougherty obtained no measure of success insofar as to his litigation objectives were concerned as a result of bringing his collateral attack action.

As a matter of procedural history, Dougherty lost just about every step of the way in bringing his collateral attack action. First, rightly or wrongly, he lost a judgment on demurrer in favor of Karton in 2006. Second, after that 2006 judgment was vacated, he lost another judgment on demurrer in favor of Karton in 2014.

As to the substance of Dougherty's "litigation objectives" (see *Scott, supra*, 20 Cal.4th at p. 1109), the record allows only one conclusion—Dougherty was equally ineffective on the substance of his collateral attack action as he was procedurally. To the extent that Dougherty, in the end, did not have to pay any more money to Karton beyond that which Karton had already collected, Dougherty obtained that relief through his attack on the 1999 default judgment within Karton's fee collection action, including obtaining the favorable judgment in *Karton I, supra*, 171 Cal.App.4th 133. In other words, Dougherty obtained "contract relief" as to Karton because Division One vacated the 1999 default judgment within the framework of Karton's collection action, and not because Dougherty succeeded in his collateral attack action.[10] We simply see no causal relationship between Dougherty's collateral attack action on the one hand, and his success in obtaining his litigation objectives, that is, defeating Karton's contract-based claims for money, on the other hand.

Because Dougherty obtained no true contract relief as a result of his collateral attack action, we find the trial court abused its discretion when it found him to be the prevailing party

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[10] We believe the attorney fees would more likely have been appropriately awarded in the Division One appeal.

in that action. For this reason, he was not entitled to his litigation-related attorney fees in that action.

II. Karton as the Prevailing Party

Karton contends the trial court erred in determining that the law firm was not the prevailing party in Dougherty's collateral attack action against the 1999 default judgment. We disagree.

Karton's litigation objective in Dougherty's collateral attack action was to preserve and defend the firm's 1999 default judgment in its fee collection action. Karton did not successfully preserve its 1999 default judgment in Dougherty's collateral attack action. Because Karton obtained no substantive contract relief as a result of defending against Dougherty's collateral attack action, we cannot say the trial court erred in finding that the law firm did not prevail in the action. Accordingly, we find the trial court properly found that the law firm was not entitled to its litigation-related attorney fees in Dougherty's collateral attack action.

Dougherty's Appeal

Dougherty contends the trial court erred in calculating the amount of attorney fees to which he was entitled as the "prevailing party" in his collateral attack action against Karton. More specifically, Dougherty argues that he submitted declarations from his attorneys showing that their bills totaled $196,923, and that the court should have awarded this "undisputed" amount, rather than the $122,000 that it did. Because we have agreed with Karton that the trial court should not have found Dougherty to be the prevailing party in his collateral attack action, we summarily reject Dougherty's claim of error as to the amount of attorney fees awarded in his favor. As a

non-prevailing party, Dougherty was not entitled to any award of attorney fees.

DISPOSITION

The judgment awarding attorney fees to William Russell Dougherty is reversed. The judgment denying attorney fees to David S. Karton, a Law Corporation is affirmed. The parties are to bear their own costs on appeal.

BIGELOW, P.J.

We concur:

RUBIN, J.

FLIER, J.