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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

RONALD RICHARDS, Plaintiff and Respondent, v. SERGIO SILVA, Defendant and Appellant.	B267486 (Los Angeles County Super. Ct. No. SWC108482)

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

Vicki Roberts for Defendant and Appellant.

Ronald Richards, in pro. per., for Plaintiff and Respondent.

The sole issue on appeal is whether Sergio Silva (Sergio) is entitled to attorney fees as a nonsignatory to two contracts containing attorney fee provisions pursuant to Civil Code section 1717. In 1989, Helen A. Berndt (Helen) brought this complaint asserting various contract and tort causes of action against Sergio, Pedro Silva (Pedro), Sergio Development, Inc. (SDI) and other entities related to the sale and subsequent foreclosure of certain real property; she obtained a default judgment against Sergio. Subsequently, Helen died. Nearly 22 years after the default judgment, Sergio moved to vacate the judgment; the trial court granted the motion. When no representative for Helen appeared at an order to show cause, the trial court dismissed with prejudice the complaint against Sergio. After Sergio moved for an award of attorney fees as the prevailing party in the litigation, the trial court denied the motion. We affirm.

BACKGROUND

I. Facts of the case

Helen and Mary Louise Berndt (Mary) entered into a contract with buyer Push Cart Deli Inc. to sell real property located on South Normandie Avenue in Los Angeles (property) for $105,000 (purchase agreement). Push Cart Deli, Inc. and the Berndts signed the purchase contract on May 18 and May 23, 1986, respectively. The contract contained an attorney fee clause as follows: "In any action or proceeding arising out of this agreement, the prevailing party shall be entitled to reasonable attorney's fees and costs."

On July 22, 1986, Push Cart Deli, Inc. and SDI entered into a contract titled "Escrow Instructions" which amended previous "[e]scrow instructions dated May 29, 1986" by "substituting [SDI] to succeed [Push Cart Deli, Inc.] as purchaser under the above referenced escrow" (amended escrow instructions). Although the instructions stated that the "seller hereby concurs in and agrees to the above substitution," the signature line for Helen was empty. There was no reference to the purchase agreement or any attorney fee clause.

On August 17, 1989, SDI entered into an agreement to borrow $150,000 from

First Boston Credit Corporation (First Boston) in return for a promissory note secured by a deed of trust on the property (promissory note). The contract defined " 'Note Holder(s)' " as the lender First Boston "or anyone else who takes this Note by transfer and who is entitled to receive payments under this Note." The contract contained a clause as follows: "If the Note Holder has required me to pay immediately in full as described above, the Note Holder will have the right to be paid back for all its costs and expenses to the extent not prohibited by applicable law. These expenses include, for example, reasonable attorneys' fees. A default upon any interest of any Note Holder shall be a default upon all interests."

II. Procedural history

On July 28, 1989, Helen brought this lawsuit against SDI, First Boston, Century 21, Grandale Realty, Pedro, Sergio, and Jeremy D. Granderson (Granderson). The complaint alleged eight causes of action.

The complaint asserted that Helen was the owner of the property and, on May 20, 1986, she entered into an agreement with Century 21 and its employee Granderson for their services to sell the property. The complaint further alleged that Century 21 and Granderson obtained a buyer for the property (SDI) and that they prepared the papers to complete the sale, including two "Subordination Agreements, which Defendants requested Plaintiff to sign without explanation." The complaint further alleged that Sergio and SDI entered into a written contract in May 1986 to purchase the property from Helen and that Helen "was to take a cash down payment of $21,000.00, and carry back a first Deed of Trust in the face amount of $84,000.00." The complaint alleged that the sale was completed on July 28, 1986. The complaint further alleged that after SDI "fell in arrears," Helen recorded a notice of default on or about May 20, 1987. The complaint further alleged that SDI cured the default and that it obtained a loan of $150,000 from First Boston on August 17, 1986 which "became a first as to Plaintiff's Note pursuant to the Subordination Agreement." The complaint further alleged that SDI utilized the funds from the loan for purposes "other than construction purposes on the Property" contrary to the terms of the subordination agreement and that it subsequently failed to make

payments on the loan to First Boston. The complaint further alleged that First Boston filed a notice of default, it sold the property on September 16, 1988 for $220,836.75, and it failed to transfer the sum in excess of the $150,000 loan amount to Helen.

The first, third, fourth, and sixth causes of action are relevant here. The first cause of action alleged that Century 21 and Granderson breached their contract with Helen "by allowing the Plaintiff to sign the two Subordination Agreements without advising Plaintiff of their possible legal consequences." The complaint alleged that the breach caused damages to Helen totaling "$95,222.45 plus interest from and after September 16, 1988."

The third cause of action alleged that SDI committed fraud against Helen. The complaint alleged that Helen relied on SDI's fraudulent representations that the loan funds from First Boston pursuant to the promissory note would be used for construction purposes related to the property and that the resultant damage to Helen totaled $95,222.45 as of September 16, 1988. The complaint also requested $100,000 in exemplary damages.

The fourth cause of action alleged that SDI is a shell company without capital assets, stock, or shareholders and that Pedro and Sergio created the company to avoid individual liability for the company's actions. The complaint thus requested a declaration by the court that Pedro and Sergio are alter egos of SDI and that they are personally responsible for the debts and liabilities of the corporation. The complaint requested $100,000 in exemplary damages.

The sixth cause of action alleged that First Boston and SDI entered into the promissory note and that Helen is a third party beneficiary of that loan agreement because of her status as the owner of the second deed of trust on the property. The complaint further alleged that First Boston breached the agreement "by allowing the loan funds to be diverted from the 'Property,' thus over-encumbering the property as to Plaintiff's Note and Deed of Trust." The complaint requested the amount of $95,222.45 "plus attorney's fees, costs and interest."

On November 19, 1993, Helen obtained a default judgment against Sergio, Pedro, and SDI.

Subsequently, Helen died on a date not disclosed in the record.

In May 2013, Ronald Richards (Richards) filed an "acknowledgment of assignment of judgment" with the trial court whereby Mary as assignee for Helen declared as follows: (1) Helen had received no payment from Sergio, Pedro, or SDI pursuant to the judgment and (2) Mary had assigned "all title rights, and interest in" the judgment to Richards.

On January 27, 2015 (nearly 22 years after the 1993 default judgment), Sergio filed a motion to vacate the judgment. He claimed that Helen never served the summons and complaint on him and that he first became aware of the judgment "in the late fall of 2014 when [he] received notice from the county recorder that a Notice of Involuntary Lien (an Abstract of Judgment) was recorded against [his] house in Covina."

On June 17, 2015, the trial court found that there was no service of process of the summons and complaint upon Sergio and therefore it granted his motion to vacate the judgment. The trial court also set an "Order to Show Cause re dismissal and status conference for June 30, 2015."

On June 30, 2015, because there was no appearance by or on behalf of the plaintiff, the trial court dismissed the complaint against Sergio with prejudice. On the same day, Sergio filed a motion for attorney fees and costs as the prevailing party in the litigation. On September 11, 2015, the trial court denied the motion. On September 21, 2015, Sergio filed a notice of appeal.

DISCUSSION

I. Standard of review

We review de novo a determination of the legal basis for an award of attorney fees. (*Sessions Payroll Management, Inc. v. Noble Construction Co.* (2000) 84 Cal.App.4th 671, 677 (*Sessions*).)

II. Applicable case law

Each party to a lawsuit must pay for his or her own attorney fees except where a statute or contract provides otherwise. (Code Civ. Proc., § 1021.) Where a contract specifically provides for an award of attorney fees incurred to enforce the provisions of the contract, the prevailing party in an action on the contract is entitled to reasonable attorney fees. (Civ. Code, § 1717, subd. (a).)

As a general rule, the courts grant an award of attorney fees only when the lawsuit is between the signatories to the disputed contract containing the attorney fee provision. (*Real Property Services Corp. v. City of Pasadena* (1994) 25 Cal.App.4th 375, 379–380 (*Real Property*).) However, in the seminal case of *Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124 (*Reynolds*), the California Supreme Court interpreted Civil Code section 1717 as permitting in certain circumstances an award of attorney fees to litigants who are *not* signatories to the contract. The high court reasoned that because the plaintiff would have been entitled to recover its attorney fees against the defendants had the plaintiff prevailed, defendants should also be entitled to their attorney fees when they prevail. (*Id.* at p. 128.) Otherwise, when a party sued on a contract containing a provision for attorney fees defends the litigation by asserting that contract is inapplicable, invalid, unenforceable, or nonexistent, the right to attorney fees would effectively be unilateral: only the plaintiff asserting the contract would be able to invoke the attorney fee provision. (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 611.) In order to prevent the oppressive use of one-sided attorney fee provisions in contracts, the California Supreme Court interpreted Civil Code section 1717 as establishing a mutuality of remedy. (*Reynolds*, at p. 128.)

Although *Reynolds*, *supra*, 25 Cal.3d 124 involved a signatory plaintiff who sued nonsignatory defendants, later cases have applied the reciprocity rationale to a nonsignatory plaintiff who sued signatory defendants. (*Real Property*, *supra*, 25 Cal.App.4th at p. 380.) Thus, in cases involving nonsignatories to a contract with an attorney fee provision, a party is entitled to recover its attorney fees pursuant to a contractual provision when "(1) he or she was sued on a contract containing an attorney fee provision; (2) he or she prevailed on the contract claims; and (3) the opponent would have been entitled to recover attorney fees had the opponent prevailed." (*Brown Bark III, L.P. v. Haver* (2013) 219 Cal.App.4th 809, 820 (*Brown Bark III*).)

There are two factual scenarios where courts have awarded attorney fees in cases involving a nonsignatory to a contract that contains an attorney fee provision. First, courts have awarded fees where a nonsignatory party " 'stands in the shoes of a party to the contract.' " (*Cargill, Inc. v. Souza* (2011) 201 Cal.App.4th 962, 966.) In *Reynolds, supra*, 25 Cal.3d 124, the plaintiff brought an action against two individuals who were shareholders and directors of bankrupt corporations to recover on promissory notes signed by the plaintiff and the corporations. Asserting that the individual defendants were "alter egos" of the corporations, the plaintiff contended that those individuals were personally liable for the debts that the corporations owed the plaintiff. The individual defendants prevailed in the litigation by proving they were not the corporation's alter egos and therefore the plaintiff could not enforce the notes against them (*id*. at p. 127); nevertheless, although the individual defendants had not signed the promissory notes which contained the attorney fee provision, the California Supreme Court held that the individual defendants were entitled to recover their attorney fees under Civil Code section 1717. The rationale was that if the plaintiff had succeeded in enforcing the notes against the nonsignatory individual defendants, it would have been entitled to recover its fees under the attorney fee provision; thus, the reciprocity concept embodied in Civil Code section 1717 entitled the individual defendants to the same relief. (*Id*. at p. 129.)

The second scenario occurs when the nonsignatory litigant is a third party beneficiary of the contract containing the attorney fee provision. (*Cargill, Inc. v. Souza*,

supra, 201 Cal.App.4th at p. 966.) The test for determining whether a nonsignatory litigant is a third party beneficiary of the contract is whether the terms of the agreement reflect the intent of the contracting parties to benefit the third person or a class of which the third person is a member. (*Id.* at p. 967.) In *Real Property*, *supra*, 25 Cal.App.4th 375, a city and developer entered into a lease agreement for the construction of a movie theater complex which expressly identified a sublessee who would operate the movie theater; after both entities terminated the lease due to construction problems, the sublessee sued the city for breach of contract and attorney fees under the lease agreement. (*Id*. at pp. 377–378.) The city prevailed in the litigation by proving that the sublessee lacked standing to proceed in the litigation as a third party beneficiary; nevertheless, although the sublessee was not a signatory to the lease agreement containing the attorney fee provision, the appellate court held that the city was entitled to an award of attorney fees under Civil Code section 1717. Again, the rationale was that if the sublessee had prevailed on its breach of contract claim against the city, it would have been entitled to attorney fees under the attorney fee provision in the lease agreement; thus, the reciprocity principle set forth in Civil Code section 1717 entitled the city to the same remedy.

III. The attorney fee provision in the purchase agreement between Helen and Push Cart Deli, Inc.

Sergio seeks to recover his attorney fees based on the attorney fee provision in the purchase agreement between Helen and Push Cart Deli, Inc. However, an essential element for the mutuality provision in Civil Code section 1717 is that the movant "was sued on a contract containing an attorney fee provision." (*Brown Bark III*, *supra*, 219 Cal.App.4th at p. 820.) Here, Helen did not sue Sergio for breach of contract on the purchase agreement; indeed, Sergio was not a signatory to the purchase agreement. Rather, the two causes of action against Sergio alleged fraud based on misrepresentations concerning the promissory note, not the purchase agreement, and alter ego liability for SDI.

Even under the alter ego scenario where a nonsignatory (Sergio) "stands in the shoes" of a party to the contract (SDI), the attorney fee provision could not apply here:

again, Helen did not sue SDI for breach of contract on the purchase agreement and SDI was not a signatory to the purchase agreement. (See *Cargill, Inc. v. Souza*, *supra*, 201 Cal.App.4th at p. 966.) Rather, the sole cause of action against SDI alleged breach of contract based on the promissory note, not the purchase agreement. None of the cases cited by Sergio involve a scenario where neither the alter ego *nor the shell company* was a signatory to the contract containing the attorney fee provision. (See *Reynolds*, *supra*, 25 Cal.3d 124 [alleged shell companies were signatories].)

Sergio contends that "the contract of sale between Plaintiff and Sergio had a provision for attorney's fees" and "the original buyer, Push Cart Deli, Inc., was replaced with Sergio through escrow." Sergio cites the amended escrow instructions and Helen's statements in her complaint that SDI purchased the property.

However, the record on appeal does not contain a copy of any purchase agreement between SDI and Helen to allow this court to determine whether that agreement contained an attorney fee provision. The only contract in the record signed by SDI related to its purchase of the property is the amended escrow instructions. The amended escrow instructions do not contain an attorney fee provision and do not refer to, or incorporate by reference, the purchase agreement or the attorney fee provision therein. The record also does not contain a copy of the original escrow instructions dated May 29, 1986 to allow this court to determine whether that agreement contained an attorney fee provision. Thus, there is no evidence to support Sergio's contentions relying on the attorney fee provision in the purchase agreement.

Sergio also contends that Helen's fraud claim against Sergio is "based on the contract claim" and cites paragraph 28 of Helen's complaint as support. He also contends that because Helen asserted a claim that Sergio is the alter ego of SDI, "this necessarily means that the breach of contract claims apply to Appellant [Sergio], since if successful in this alter ego claim, Appellant would be personally liable on said contract." However, paragraph 28 of the complaint reads: "Defendants, SERGIO, and Does 21 to 50, entered into a written contract in May of 1986, to purchase the 'Property' from Plaintiff." As discussed above, no such contract exists in the record; further, the mere

allegation in a complaint that a contract exists does not constitute a claim for breach of contract.

Another crucial element for application of the mutuality provision in Civil Code section 1717 was also missing here: "the opponent would have been entitled to recover attorney fees had the opponent prevailed." (*Brown Bark III*, *supra*, 219 Cal.App.4th at p. 820.) If Helen had prevailed on her causes of action against Sergio or SDI (claim 3 for fraud against Sergio based on the promissory note, claim 4 for alter ego against Sergio, and claim 6 for breach of contract against SDI based on the promissory note), she could not have relied on the attorney fee provision in the purchase agreement to seek an award of attorney fees from Sergio. Thus, the mutuality principle in Civil Code 1717 did not apply here to permit Sergio his attorney fees either. (See *Reynolds*, *supra*, 25 Cal.3d at p. 128.)

IV. The attorney fee provision in the promissory note between SDI and First Boston

Sergio also seeks to recover his attorney fees based on the attorney fee provision in the promissory note between SDI and First Boston. The issue for this court is whether the promissory note's contractual language evidences an intent on the part of SDI and First Boston to benefit Helen such that she constitutes a third party beneficiary of the contract. (*Cargill, Inc. v. Souza, supra,* 201 Cal.App.4th at p. 967.)

The attorney fee provision in the promissory note permits recovery of attorney fees only to the note holder: a term defined in the contract as First Boston "or anyone else who takes this Note by transfer and who is entitled to receive payments under this note." Because the promissory note was never transferred to Helen, she does not fall within the definition of note holder. By using a specific definition that limited recovery of attorney fees to only the note holder, the plain terms of the contract reflect an intent by SDI and First Boston to exclude nonnote holders such as Helen. In contrast, attorney fee provisions typically contain broader language, such as the one in the purchase agreement, which permits recovery of attorney fees to "the prevailing party" or "any party." (See, e.g., *Cargill, Inc. v. Souza, supra,* 201 Cal.App.4th at p. 965.)

The contract in this case contains limiting language similar to the agreements in *Sessions, supra*, 84 Cal.App.4th 671 and *Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858. In *Sessions*, the disputed contract contained an attorney fee provision permitting recovery of fees " '[i]n the event it becomes necessary for *either party* to enforce the provisions of this Agreement' "; the contract further contained a provision stating that " '[e]xcept as specifically prescribed herein, *this Agreement shall not create any rights of or confer benefits upon, third parties*.' " (*Id.* at p. 676.) The appellate court held that because the terms of the agreement reflected that the two party signatories intended only each other the right to obtain attorney fees, the nonsignatory plaintiff could not recover attorney fees under this contract. (*Id.* at p. 680–681.)

Similarly, in *Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC*, *supra*, 162 Cal.App.4th 858, the attorney fee provision in the disputed contract provided for attorney fees by the prevailing party in " 'any litigation *between the parties hereto* to enforce any provision of this Agreement.' " (*Id.* at p. 893, italics added.) The appellate court held that because the plain terms of the contract limited recovery of fees to litigation between the signatories, the nonsignatory defendant could not recover attorney fees under this contract. (*Id*. at p. 896.)

In contrast, this case is unlike *Real Property*, *supra*, 25 Cal.App.4th 375 or *Loduca v. Polyzos* (2007) 153 Cal.App.4th 334, where the appellate courts permitted an award of attorney fees because the contract containing the attorney fee provision identified the third party beneficiary by name. (*Loduca*, at p. 343; *Real Property*, at p. 383.) Here, the promissory note does not identify Helen by name.

Sergio contends that Helen is *a* note holder of *a* note secured by the property and therefore she would have been able to invoke the attorney fee provision in the promissory note had she prevailed in the litigation. However, the attorney fee provision in the promissory note specifically defines note holder to mean a holder on the promissory note, not any note related to the property. Thus, we reject Sergio's argument on this point.

DISPOSITION

The order is affirmed. Ronald Richards shall recover costs on appeal.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

CHANEY, Acting P. J. LUI, J.