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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

8121 VAN NUYS ASSOCIATES,  
INC.,

Plaintiff and Respondent,

v.

SIM C. HOFFMAN, M.D., et al.,

Defendants and Appellants.

B276900

(Los Angeles County  
Super. Ct. No. LC100701)

APPEAL from a judgment of the Superior Court of Los Angeles County, Huey P. Cotton, Jr. and Elaine Mandel, Judges. Reversed and Remanded.

Mirman, Bubman & Nahmias and Michael E. Bubman for Defendants and Appellants.

Law Office of Constance Bessada, Constance Bessada, Law Offices of Richard T. Miller and Richard T. Miller for Plaintiff and Respondent.

Plaintiff and respondent 8121 Van Nuys Associates, Inc. (respondent) owned commercial property at 8121 Van Nuys Boulevard in Panorama City. Respondent leased space in the property to defendants and appellants Advanced Professional Imaging Medical Group and Sim Hoffman (collectively appellants). When appellants vacated the premises, respondent sued for past rent due and other damages, and appellants counter-sued for recovery of their security deposit. The court awarded each party damages and subsequently awarded respondent attorney fees. Appellants contend the trial court erroneously relied on Code of Civil Procedure section 1032 (section 1032) instead of Civil Code section 1717 (section 1717) in awarding fees in this breach of contract action. We agree with appellants and therefore reverse and remand for the trial court to exercise its discretion under section 1717.

## **BACKGROUND**

In January 2002, respondent leased commercial space to appellants under an office lease that required a \$12,926.80 security deposit. The lease allowed respondent to recover reasonable attorney fees in case of default.

Appellants gave notice to respondent that they were vacating the premises in June 2011. The day after they vacated the premises, respondent asserted that appellants failed to pay past due rent, took property belonging to respondent, and damaged the premises. Appellants responded that they had paid all rent due, that the equipment belonged to them, and that they had caused no damage.

On August 19, 2013, respondent filed a complaint against appellants alleging breach of contract and conversion. Respondent alleged that appellants failed to pay the \$11,000 monthly rent and parking fees, and that appellants took medical equipment that was in the property. Respondent asserted damages of “[r]ents, 10% monthly penalties and holdover amounts” of \$698,198.21 and unpaid parking of \$5,525. Respondent further asserted the medical equipment was worth \$200,000 and that appellants caused \$150,000 in damage to the property. Respondent sought \$1,054,000 in damages, 10 percent prejudgment interest since September 1, 2009, and attorney fees.

Appellants filed a cross-complaint, seeking recovery of their \$12,926.80 security deposit.

On October 21, 2014, respondent filed a first amended complaint alleging only breach of contract. Respondent sought rent and repair costs “ranging from \$225,000.00 to \$1,170,000.00, as well as unpaid/underpaid rents, common area changes, late payments and interest as well as unpaid parking amounts totaling approximately \$140,000.00,” for a total of \$1,340,000 in damages, plus 10 percent interest and attorney fees.

The court held a bench trial and, on March 7, 2016, the court found in favor of respondent in the amounts of \$52,447.53 in rent deficiency, \$5,969.50 in removal of medical equipment, and \$2,625 in parking fees. The court found in favor of appellants on the cross-complaint in the amount of \$18,528.41. The court therefore entered judgment in favor of respondent for the net amount of \$42,513.62. The court added that “Prevailing party for purposes of an award of costs and

attorneys' fees shall be determined by motion to be filed by the parties, should they choose to do so.”

Respondent filed a motion for attorney fees and a memorandum of costs, seeking total costs of \$51,707.21, which included \$43,123.60 in attorney fees. Appellants sought \$233,959 in attorney fees and \$24,703.63 in costs and expenses.

The court found that, because respondent received a net recovery of \$42,513.62, it was the “party with a net monetary recovery” under Code of Civil Procedure section 1032, subdivision (a)(4).<sup>1</sup> The court rejected appellant’s argument that the determination of the prevailing party required a weighing of the recovery against the relief sought, rather than the simple determination of net monetary recovery. The court found that respondent’s counsel’s hourly rate of \$260 was reasonable, but that it could not determine the reasonableness of the number of hours claimed. The court further noted that the amount respondent sought was one-sixth the amount appellant sought and thus was presumptively reasonable. The court therefore denied appellants’ motion and granted respondent’s, ordering respondent to file a brief regarding the number of hours claimed. The court entered an amended judgment, entering judgment in favor of respondent for the net amount of \$42,513.62, and awarding respondent costs of \$7,804.11 and attorney fees of \$44,980, for a total amount of \$95,294.73.

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<sup>1</sup> Although the trial was presided over by Judge Huey P. Cotton, the matter subsequently was transferred to Judge Elaine Mandel, who presided over the attorney fee motion.

## DISCUSSION

Appellants challenge the attorney fee award on appeal. They contend the trial court erroneously relied on section 1032 instead of section 1717, and that the court erred in finding that respondent was the prevailing party. We conclude that the court should have relied on section 1717. Because the court did not conduct the requisite inquiry for determining the award of fees under section 1717, we remand for the court to make the determination in the first instance.

“Generally, a trial court’s determination that a litigant is a prevailing party, along with its award of fees and costs, is reviewed for abuse of discretion. [Citations.]” (*Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1332.) However, appellants here contend the trial court erred by applying the incorrect statute, “a question of law that we review de novo. [Citation.]” (*Ibid.*; *Khan v. Shim* (2016) 7 Cal.App.5th 49, 55 (*Khan*) [“Because our determination of whether the trial court’s fee award violated section 1717(b)(2) involves issues of law, our review is de novo.”]; *Robinson v. City of Chowchilla* (2011) 202 Cal.App.4th 382, 391 [reviewing de novo whether the superior court applied the proper legal standards in determining attorney fees].)

“Section 1032 is the fundamental authority for awarding costs in civil actions. It establishes the general rule that ‘[e]xcept as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding.’ [Citation.] For purposes of section 1032, a party with a net monetary recovery, like [respondent] here, is a “[p]revailing party.” [Citation.]” (*Scott Co. v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1108 (*Scott*).)

“Code of Civil Procedure section 1033.5 provides, in subdivision (a)(10), that attorney fees are ‘allowable as costs under Section 1032’ when they are ‘authorized by’ either ‘Contract,’ ‘Statute,’ or ‘Law.’ Thus, 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.” (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 606.)

“While it is true Code of Civil Procedure section 1033.5 allows fees to be considered as costs in contract cases under section 1032, it does not follow that section 1032 is the exclusive statute governing recovery of fees in contract actions. By its own terms, section 1032 defines prevailing party only for ‘costs’ under that section and does not purport to define it for other statutes. [Citation.]” (*Sears v. Baccaglio* (1998) 60 Cal.App.4th 1136, 1142.)

Here, the attorney fee provision in the lease gave only respondent, not appellant, the right to attorney fees. “[W]here a contract provides that only one party may obtain attorney fees in litigation, [section 1717] makes the right to such fees reciprocal, such that the “party prevailing on the contract” claim will be entitled to recovery of fees “whether he or she is the party specified in the contract or not.” [Citations.]’ [Citation.]” (*Kachlon v. Markowitz* (2008) 168 Cal.App.4th 316, 346; *Scott, supra*, 20 Cal.4th at p. 1109 [section 1717 rendered the unilateral attorney fee provision in the contract mutual, “giving either plaintiff or

defendant, if a prevailing party, a right to attorney fees on any claims based on the contract”].)<sup>2</sup>

The trial court here found that respondent was the prevailing party under section 1032 because respondent was the “party with a net monetary recovery.” However, this was a breach of contract action, and “[c]ourts have consistently held the prevailing party for the award of costs under section 1032 is not necessarily the prevailing party for the award of attorney’s fees in contract actions under section 1717.’ [Citations.]” (*Zintel Holdings, LLC v. McLean* (2012) 209 Cal.App.4th 431, 438 (*Zintel*)). “The determination of the party prevailing *on the contract* for purposes of awarding attorney fees under section 1717 must be made independently of the determination of the party prevailing *in the overall action* for purposes of awarding costs under Code of Civil

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<sup>2</sup> “Attorney’s fees awarded pursuant to Section 1717 of the Civil Code are allowable costs under Section 1032 as authorized by subparagraph (A) of paragraph (10) of subdivision (a).” (Code Civ. Proc., § 1033.5, subd. (c)(5)(B).) Section 1717 provides in pertinent part: “(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. [¶] . . . [¶] (b)(1) The court, upon notice and motion by a party, shall determine who is the party prevailing on the contract for purposes of this section, whether or not the suit proceeds to final judgment. Except as provided in paragraph (2), the party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract.”

Procedure section 1032. [Citations.]” (*Douglas E. Barnhart, Inc. v. CMC Fabricators, Inc.* (2012) 211 Cal.App.4th 230, 239; see *Khan, supra*, 7 Cal.App.5th at p. 55 [stating that “[a]ny contractual attorney fee provision . . . has to be interpreted in light of section 1717”].)

Thus, for example, in *Zintel*, the owner of an apartment building sued its tenant to invalidate or reform the residential lease, which included an attorney fee provision. The tenant cross-complained for breach of the implied covenant of quiet enjoyment and other torts. The trial court denied relief on both the complaint and the cross-complaint, and awarded costs to the tenant as the prevailing party under section 1032, subdivision (a)(4),<sup>3</sup> but denied attorney fees to both parties, finding that there was no prevailing party under section 1717 “because neither party obtained relief.” (*Zintel, supra*, 209 Cal.App.4th at p. 437.) The appellate court agreed with the trial court that, although the tenant was the prevailing party under section 1032, this “was not determinative of whether she was also the prevailing party entitled to recover ‘reasonable attorney’s fees in addition to other costs’ under the lease agreement and section 1717.” (*Id.* at p. 438.) The court explained that, because “[t]here was no absolute or complete winner” on the claims based on the lease agreement, “the court was obligated to determine whether there was a prevailing party under section 1717.” (*Id.* at p. 439.)

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<sup>3</sup> The prevailing party includes “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.” (§ 1032, subd. (a)(4).)



The decision in *Hsu v. Abbata* (1995) 9 Cal.4th 863 (*Hsu*), “the governing case for ‘prevailing party’ determinations under section 1717,” “represents the effort of the high court to reconcile what we might call the ‘discretion clause’ of section 1717 with the ‘entitlement clause’ of section 1717. [Citation.] Both clauses are set forth in subdivision (b)(1) of the statute. Structurally, the entitlement clause comes first, with the statute first declaring that (a) the trial court must determine who is the ‘prevailing party,’ and then (b) defining the ‘prevailing party’ as the party who recovered a greater relief in the action on the contract. (‘The court, upon notice and motion by a party, *shall* determine who is the party prevailing on the contract for purposes of this section, whether or not the suit proceeds to final judgment. Except as provided in paragraph (2), *the party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract.*’ (Italics added.)) But then comes the discretion clause, which gives a court permission to determine no party prevailed on the contract. (‘The court may also determine that there is no party prevailing on the contract for purposes of this section.’) [Citation.]” (*De La Cuesta v. Benham* (2011) 193 Cal.App.4th 1287, 1292–1293 (*De La Cuesta*).)

*Hsu* held that a “‘simple, unqualified win’” on a contract claim entitled the party to attorney fees, but when the results were mixed and “‘opposing litigants could each legitimately claim some success in the litigation,’” the trial court was required to “‘attain an overview of the totality of the case, then compare the *extent* to which each party has

won and lost.” (*De La Cuesta, supra*, 193 Cal.App.4th at pp. 1293-1294.) *Hsu* therefore held that “in deciding whether there is a “party prevailing on the contract,” the trial court is to compare the relief awarded on the contract claim or claims with the parties’ demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources. The prevailing party determination is to be made only upon final resolution of the contract claims and only by “*a comparison of the extent* to which each party ha[s] succeeded and failed to succeed in its contentions.” [Citation.]” (*Id.* at p. 1294.)

In *De La Cuesta*, the trial court awarded the plaintiff landlord 70 percent of the damages he sought, while the defendant tenant received zero percent. (*De La Cuesta, supra*, 193 Cal.App.4th at p. 1296.) The landlord also achieved one of its “main litigation objectives” when the tenant vacated the premises the day before trial, “which, in equitable terms, was a clear victory for the landlord,” and the trial court “unequivocally rejected all of the tenant’s fraud claims.” (*Ibid.*) Nonetheless, the trial court found there was no prevailing party under section 1717. The appellate court reversed, relying on *Hsu* to compare “the relative extent of the success of each party in comparison to its basic litigation position.” (*Ibid.*) The court found the result “so lopsided that, even under an abuse of discretion standard, it was unreasonable to say the landlord was not the prevailing party.” (*Id.* at p. 1290.)

Here, Judge Cotton awarded both sides damages on their claims. Respondent sought \$1,340,000 in damages and received approximately

\$61,000, while appellants sought and received \$18,528.41 (their \$12,926.80 security deposit plus 10% prejudgment interest). Thus, despite respondent's net monetary recovery, it cannot be said that respondent obtained "a 'simple, unqualified win'" on its claims. (*De La Cuesta, supra*, 193 Cal.App.4th at p. 1293.) Instead, both sides can "legitimately claim some success in the litigation." (*Ibid.*) In considering the attorney fee motions, Judge Mandel thus was required "to compare the relief awarded on the contract claim or claims with the parties' demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources." [Citation.] (*Scott, supra*, 20 Cal.4th at p. 1109.)

The court did not conduct the requisite inquiry under section 1717, instead relying solely on section 1032's definition of a prevailing party as a party with a net monetary recovery. The court incorrectly rejected appellants' reliance on section 1717, stating that "[t]he amount each side argued should be awarded at trial is irrelevant." (Compare *Silver Creek, LLC v. BlackRock Realty Advisors, Inc.* (2009) 173 Cal.App.4th 1533, 1540 [trial court abused its discretion under *Hsu* when it failed to evaluate each party's comparative litigation success and instead "oversimplified its duties by counting the number of contract claims presented"].)

Respondent urges us to affirm on the ground that we may "affirm the ruling if it is correct on any ground, regardless of the trial court's stated reasons," citing *Truck Ins. Exchange v. County of Los Angeles* (2002) 95 Cal.App.4th 13, 20. That case, however, was an appeal from a

grant of summary judgment. Here, the trial court failed to exercise its discretion to determine the prevailing party under section 1717.

In the substantial evidence context, courts have explained that “[o]rdinarily, when the court gives an incorrect legal reason for its ruling, we look for any other correct legal basis on which to sustain the order. [Citations.] . . . However, . . . the record must show the court *actually performed* the factfinding function. Where the record demonstrates the trial judge did not weigh the evidence, the presumption of correctness is overcome. [Citation.]” (*Kemp Bros. Construction, Inc. v. Titan Electric Corp.* (2007) 146 Cal.App.4th 1474, 1477 (*Kemp Bros.*)). In *Kemp Bros.*, the trial court “never engaged in the process of weighing the evidence” because it erroneously relied on “the preclusive effect of prior litigation.” (*Id.* at pp. 1477, 1478.) The appellate court thus reversed and remanded for the trial court to weigh the relevant factors. (*Id.* at p. 1478; see also *Affan v. Portofino Cove Homeowners Assn.* (2010) 189 Cal.App.4th 930, 945 [reversing and remanding for further proceedings where “the trial court did not weigh the evidence”].)

Each party urges us to determine that it is the prevailing party under the factors to be considered under section 1717. However, we remand for the trial court to conduct the requisite section 1717 inquiry in the first instance. (See *Khan, supra*, 7 Cal.App.5th at p. 63 [remanding “for proper application of the relevant law” where trial court’s award of fees “erroneously disregarded section 1717(b)(2)”]; *Ryan v. Crown Castle NG Networks Inc.* (2016) 6 Cal.App.5th 775, 786, 797

[reversing and remanding where the trial court refused to fulfill its obligation to evaluate evidence]; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2017) ¶ 8:105, p. 8-76 [citing cases and explaining that where the record shows the trial court did not exercise its discretion, “the appellate court will reverse and remand for the required exercise of discretion”].)

### **DISPOSITION**

The judgment is reversed and the matter remanded for the trial court to determine which party is the prevailing party under the factors to be considered under section 1717. Appellants are entitled to costs on appeal.

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WILLHITE, Acting P. J.

We concur:

MANELLA, J.

COLLINS, J.