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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

ELIAZER ORTIZ et al., Plaintiffs and Respondents, v. CYNTHIA GOMEZ et al., Defendants and Appellants.	B226631 (Los Angeles County Super. Ct. No. VC048111)

APPEALS from a judgment and an order of the Superior Court of Los Angeles County, William J. Birney, Jr., Judge. Appeal from judgment dismissed; order affirmed.

Law Offices of Michael V. Severo and Michael V. Severo for Defendants and Appellants.

Dominguez Law Group, Aimee Dominguez, and Gabriela Vanca for Plaintiffs and Respondents.

INTRODUCTION

Defendants Cynthia Gomez and Foundations, Inc. (erroneously sued as Foundations, LLC, hereafter referred to as Foundations),[1] appeal from a judgment in favor of plaintiffs Eliazer and Silvia Ortiz in this action arising out of a contract to purchase residential property. Gomez also appeals from the postjudgment order awarding attorney fees to the Ortizes. As to the appeal from the judgment, we conclude that Gomez failed to file a timely notice of appeal and therefore the appeal from the judgment must be dismissed. Regarding the order awarding attorney fees, we find no abuse of discretion and affirm the order in favor of the Ortizes.

FACTUAL AND PROCEDURAL BACKGROUND

I. The Sale of the Property

On May 5, 2006, the parties entered into a purchase agreement for the sale of a single family residence in Downey, California (the property), which was then under construction. The agreed-upon sales price was $2.1 million. Escrow was scheduled to close on July 7, 2006. The purchase agreement listed Gomez as the seller; however, Foundations was actually the legal owner of the property and therefore the purchase agreement was amended to indicate Foundations was the owner of title. Gomez had been married to Lorenzo Espinoza, but the couple had separated in 2003 and divorced in 2006; Foundations had become the legal owner of the property in January 2005. When the sale of the property occurred, Foundations was being operated by Espinoza, pursuant to the terms of an order entered in the divorce proceedings. However, the proceeds from the sale of the property were paid to Gomez and used to pay her personal debts, again pursuant to the terms of the divorce decree.

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[1] We will often refer to Gomez and Foundations collectively as Gomez, unless the context requires otherwise.

Construction was to be completed and a certificate of occupancy (COO) was required to be issued before escrow could close. However, escrow closed prematurely on June 19, 2006, before a certificate of occupancy was obtained. The Ortizes nonetheless received marketable title, free and clear of encumbrances. The COO was not obtained until November 9, 2006, almost four months after escrow closed.

II. The Present Action

A. The Court Trial

The Ortizes filed a complaint in February 2007 against Gomez, Foundations, the real estate broker and his company, the broker's agent (Gabriela Tafolla), the escrow company (Security Land Escrow), the escrow agent (Lawrence Garces), and the appraiser (James Lewis). The operative complaint was apparently the fifth amended complaint, although none of the complaints are included in the clerk's transcript on appeal. According to Gomez, the operative complaint included causes of action for breach of contract, fraud, breach of fiduciary duty, and negligence.

Prior to trial, the action against Foundations was stayed after it filed for Chapter 11 bankruptcy. (11 U.S.C. § 362.) The matter then proceeded to a court trial against Gomez, the other defendants having settled with the Ortizes. At the conclusion of the Ortizes' presentation of their case, the court granted judgment in favor of Gomez on the fraud cause of action pursuant to Code of Civil Procedure section 631.8. Presentation of testimony concluded in late September 2009, and the parties then submitted final briefing. In their final, written argument to the court, the Ortizes sought damages in the sum of $716,350.

On February 3, 2010, the court issued a statement of decision, finding in favor of Gomez on the causes of action for fraud, negligence, and breach of fiduciary duty. The court ruled in favor of the Ortizes on the breach of contract action, finding that Gomez was the alter ego of Foundations and was therefore in privity of contract. The court awarded the Ortizes the sum of $22,000 for loss of use of the property for four months. Thereafter, on March 12, 2010, the court entered judgment in accordance with its

statement of decision. We glean from the civil case summary included in the record on appeal that notice of entry of judgment was filed by the clerk on March 12, 2010.

B. The Motion for Attorney Fees, and the Related Notice of Appeal

On May 3, 2010, the Ortizes filed a motion for attorney fees pursuant to Civil Code section 1717, based upon the attorney fee provision in the parties' purchase agreement. Gomez filed opposition, contending that the Ortizes were not the prevailing parties because they prevailed on only one of four causes of action and recovered a fraction of the damages they sought (although they recovered substantial damages from other defendants who settled with them before trial), and that the fees requested were unreasonable because the Ortizes made no attempt to apportion the attorney fees attributable to the contract claim versus the tort claims. The Ortizes filed a reply, in which they argued they were the prevailing parties, defended the reasonableness of the fees requested, and argued that the settlements with the other defendants, which were approved by the court as having been entered into in good faith, were of no consequence.

On June 3, 2010, the trial court entered an order granting attorney fees in favor of the Ortizes in the amount of $155,807, finding the Ortizes to be the prevailing parties. The court noted that "[i]t was difficult, almost impossible, to separate the legal work of the six prior defendants from the defendant that was before us." The court found that Gomez had failed to cooperate in discovery, leading to an increase in the fees expended. The original fee request exceeded $162,000, but the Ortizes reduced it to $155,807 to limit their request to only those fees related to Gomez. The trial court accepted that counsel for the Ortizes limited the request for fees to work pertaining to Gomez.

On July 30, 2010, Gomez filed a notice of appeal from the June 3, 2010 order awarding attorney fees, stating that she "hereby appeals from this court's final order awarding attorney's fees to plaintiffs. The order was entered on June 3, 2010. Notice of the order was given to defendant's counsel by mail on June 15, 2010."

C. The Motion to Amend the Judgment, and the Subsequent Notice of Appeal

On July 29, 2010, the Ortizes filed a motion to amend the judgment asking the court to enter judgment against Foundations, as to which the bankruptcy stay had been lifted. They argued that the court should exercise its supervisory powers under Code of Civil Procedure section 187 to add Foundations as a judgment debtor. Gomez did not oppose the motion but objected to the entry of judgment on jurisdictional grounds, claiming the case was already on appeal. The trial court entered an amended judgment on September 15, 2010, adding Foundations as a judgment debtor.

On November 22, 2010, Gomez and Foundations filed a notice of appeal from the court's amended judgment, which had been entered on September 15, 2010. Notice of entry of the amended judgment had been filed on September 21, 2010.

We thereafter ordered the two appeals (from the amended judgment and the order awarding attorney fees) to be consolidated.

DISCUSSION

I. The Appeal from the Judgment Against Gomez for Breach of Contract

Gomez contended at trial that she could not be held liable for breach of contract because the legal owner of the property was Foundations. However, the trial court concluded that "Gomez, individually and through her alter ego Foundations, LLC, was in privity of contract with plaintiffs," and Gomez could therefore be found to have breached the contract. In attempting to appeal from the amended judgment, Gomez and Foundations now challenge that finding and the ensuing judgment. Because, as we shall explain, we conclude that the notice of appeal was untimely, we dismiss the appeal.

A final judgment was entered against Gomez on March 12, 2010, and notice of entry of judgment was filed by the clerk on that date. Pursuant to California Rules of Court, rule 8.104, "a notice of appeal must be filed on or before the earliest of: [¶] (1) 60 days after the superior court clerk serves the party filing the notice of appeal with a document entitled 'Notice of Entry' of judgment or a file-stamped copy of the judgment,

showing the date either was served; [¶] (2) 60 days after the party filing the notice of appeal serves or is served by a party with a document entitled 'Notice of Entry' of judgment or a file-stamped copy of the judgment, accompanied by proof of service; or [¶] (3) 180 days after entry of judgment. . . ."

The record on appeal does not contain a document entitled "notice of entry of judgment" indicating service of such document on Gomez on a particular date. The civil case summary indicates such a document was filed by the clerk, and we may presume that the clerk performed his or her official duty by serving notice of entry of judgment on the parties on that date. (Evid. Code, § 664.) In any event, Gomez did not file a notice of appeal with regard to the judgment until November 22, 2010, well beyond 180 days after the judgment was entered on March 12, 2010. Even then, the notice of appeal stated that it was taken from the amended judgment entered on September 15, 2010, notice of entry of which Gomez acknowledged had been filed on September 21, 2010. It cannot be disputed that the findings and judgment entered on March 12, 2010, by which the trial court awarded the Ortizes $22,000 against Gomez for breach of contract based in necessary part on its finding that Gomez was the alter ego of Foundations, were not challenged by way of a timely notice of appeal.

The only arguably timely notice of appeal filed by Gomez was from the *amended* judgment.[2] We must therefore determine whether the amended judgment somehow revived Gomez's opportunity to challenge on appeal the findings and judgment entered against her on March 12, 2010. If the appeal is untimely, this court has no jurisdiction to consider it, and it must be dismissed. (Cal. Rules of Court, rule 8.104(b); *Estate of Hanley* (1943) 23 Cal.2d 120, 123.) The resolution of this issue turns on the question whether the amended judgment superseded the original judgment for purposes of computing the time in which to file a notice of appeal. (*Dakota Payphone, LLC v.*

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[2] The postjudgment award of attorney fees is separately appealable as an order after judgment. (*Building a Better Redondo, Inc. v. City of Redondo Beach* (2012) 203 Cal.App.4th 852.) The notice of appeal as to the award of attorney fees has no effect here.

Alcaraz (2011) 192 Cal.App.4th 493, 504 (*Dakota Payphone*).) We conclude that it did not.

A trial court may amend a judgment to add a judgment debtor where the latter is the alter ego of a defendant against whom the plaintiff obtained a judgment. (*NEC Electronics, Inc. v. Hurt* (1989) 208 Cal.App.3d 772, 778.) "This is an equitable procedure based on the theory that the court is not amending the judgment to add a new defendant but is merely inserting the correct name of the real defendant. [Citations.]" (*Ibid.*) "The ability under [Code of Civil Procedure] section 187 to amend a judgment to add a defendant, thereby imposing liability on the new defendant without a trial, requires *both* (1) that the new party be the alter ego of the old party *and* (2) that the new party had controlled the litigation, thereby having had the opportunity to litigate, in order to satisfy due process concerns." (*Triplett v. Farmers Ins. Exchange* (1994) 24 Cal.App.4th 1415, 1421.)

However, this is not a case in which a previously unknown party was added as a judgment debtor after trial. (Cf. *Misik v. D'Arco* (2011) 197 Cal.App.4th 1065.) Rather, Foundations was a named defendant from the outset of the action, and was not included as a debtor in the initial judgment only because a bankruptcy stay was in place as to it. The amended judgment served only to reinstate the action against Foundations after the bankruptcy stay was lifted. All of the essential factual findings and conclusions of law were contained in the initial judgment, including on the alter ego issue and Gomez's liability for breach of contract, and the amended judgment did not substantially modify the judgment. It merely reinstated Foundations as a defendant against whom judgment was being entered.

"Not every alteration of a judgment by the court which rendered it will operate as a readjudication of the case. [Citation.] In *Spencer v. Troutt*, 133 Cal. 605, the court stated (p. 607): 'The test as to whether the period in which the party must act in order to get relief from an order or judgment against him must be, whether he could have obtained the desired relief (on a proper showing) before the *nunc pro tunc* order was made. Could he have made his application as the judgment, order, or record was? . . . Could petitioner,

against objection, have maintained an appeal from the judgment as first entered?' Under the test stated in *Spencer v. Troutt*, if a party can obtain the desired relief from a judgment before it is amended, he must act—appeal therefrom—within the time allowed after its entry. If the amendment materially and in a substantial respect affects the judgment and the rights of a party against whom it is rendered, and a party desires relief therefrom, he must appeal from the corrected judgment within the time allowed after entry thereof. [Citations.]" (*George v. Bekins Van & Storage Co.* (1948) 83 Cal.App.2d 478, 481-482.) Here, Gomez could have obtained the desired relief from the initial judgment of March 12, 2010, before it was amended, by filing a timely notice of appeal. She failed to do so. The unforeseen circumstance that the Ortizes later brought a successful motion to amend to add Foundations as a judgment debtor did not serve to give Gomez a second chance to challenge on appeal the court's conclusion that she was the alter ego of Foundations. The amended judgment did not materially affect the conclusions of law and judgment, or the rights of the party against whom it was rendered; it was not a readjudication of the case such that the amended judgment constituted a new judgment from which an appeal would lie. (*Id.* at p. 480. See also *Dakota Payphone*, *supra*, 192 Cal.App.4th at pp. 504-509.) "'A party who fails to take a timely appeal from a decision or order from which an appeal might previously have been taken cannot obtain review of it on appeal from a subsequent judgment or order. [Citations.]' [Citation.]" (*Dakota Payphone*, *supra*, at p. 509.) We therefore dismiss as untimely the appeal in case number B229145, by which Gomez and Foundations sought to challenge the judgment awarding the Ortizes $22,000 for breach of contract.

II. The Appeal from the Attorney Fee Award

Gomez also appeals from the postjudgment order awarding the Ortizes $155,807 in attorney fees. She contends that because the court found in her favor on the causes of action for fraud, breach of fiduciary duty, and negligence, and the Ortizes were awarded only a fraction of their claimed damages on their cause of action for breach of contract, they were not the prevailing parties. She also asserts that the amount of attorney fees

awarded by the court was erroneous because the Ortizes did not adequately limit the fees they requested to only those fees attributable to pursuing the contract cause of action, and the court "ignored" the rule limiting recovery of attorney fees to those fees spent litigating the breach of contract action.

A. Prevailing Party

The Ortizes were awarded attorney fees pursuant to Civil Code section 1717, and based on the language in the purchase agreement that "[i]n any action, proceeding, or arbitration between Buyer and Seller arising out of this Agreement, the prevailing Buyer or Seller shall be entitled to reasonable attorney fees and costs from the non-prevailing Buyer or Seller." Attorney fees to which a party is entitled under Civil Code section 1717 are treated as an item of costs. (Code Civ. Proc., § 1033.5, subds. (a)(10) & (c)(5).) "Except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding." (Code Civ. Proc., § 1032, subd. (b).) Similarly, "the operative provision of section 1717 states that '[i]n *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.' (Italics added.) The words 'shall be entitled' reflect a legislative intent that a party prevailing on a contract receive attorney fees *as a matter of right* (and that the trial court is therefore *obligated* to award attorney fees) whenever the statutory conditions have been satisfied." (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 871-872 (*Hsu*).)

Regarding whether the statutory conditions have been satisfied, Civil Code section 1717, subdivision (b)(1) provides that the prevailing party is "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." Code of Civil Procedure

section 1032, subdivision (a)(4) defines the prevailing party as "the party with a net monetary recovery."

"As one Court of Appeal has explained, '[t]ypically, a determination of no prevailing party results when both parties seek relief, but neither prevails, or when the ostensibly prevailing party receives only a part of the relief sought.' (*Deane Gardenhome Assn. v. Denktas* (1993) 13 Cal.App.4th 1394, 1398.) By contrast, when the results of the litigation on the contract claims are *not* mixed—that is, when the decision on the litigated contract claims is purely good news for one party and bad news for the other—the Courts of Appeal have recognized that a trial court has no discretion to deny attorney fees to the successful litigant. . . . [Thus], a plaintiff who obtains all relief requested on the only contract claim in the action must be regarded as the party prevailing on the contract for purposes of attorney fees under section 1717. [Citations.]" (*Hsu*, *supra*, 9 Cal.4th at pp. 875-876.) We emphasize that for purposes of determining who the prevailing party is, or whether there was a prevailing party at all, the court considers only the outcome of the contract claim or claims. To wit: "In 1987, the Legislature amended section 1717 to its current form. (Stats. 1987, ch. 1080, § 1, p. 3648.) The Legislature replaced the term 'prevailing party' with the term 'party prevailing on the contract,' evidently to emphasize that the determination of prevailing party for purposes of contractual attorney fees was to be made *without reference to the success or failure of noncontract claims*." (*Id.* at pp. 873-874, italics added.)

When a party obtains a simple, unqualified victory by completely prevailing on, or defeating, all contract claims and the contract provides for attorney fees, that party is entitled to recover reasonable attorney fees. (*Scott Co. v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1109.) Here, however, the court found against the Ortizes on some factual matters related to their claim for breach of contract, such as the claim that Gomez wrongfully raised the sales price, failed to explain the terms of loan documents, and failed to provide a transfer disclosure statement. As a result, the Ortizes were awarded $22,000 (based on Gomez's failure to timely obtain the COO), rather than the $716,350 they sought.

Therefore, "in deciding whether there [wa]s a 'party prevailing on the contract,' the trial court [wa]s 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.' (*Bank of Idaho v. Pine Avenue Associates* (1982) 137 Cal.App.3d 5, 15.)" (*Hsu*, *supra*, 9 Cal.4th at p. 876.)

Where, as here, the results of the litigation are mixed, it is within the trial court's exercise of discretion to determine whether there was a prevailing party for purposes of awarding attorney fees. (*Hsu*, *supra*, 9 Cal.4th at p. 876.) We will affirm the trial court's order unless there is a clear showing by the appellants of an abuse of that discretion. Gomez has failed to make such a showing. While the Ortizes did not obtain all of the relief they sought on their cause of action for breach of contract, they clearly prevailed by recovering damages based upon Gomez's delay in obtaining the COO. As a result, the Ortizes were "the part[ies] who recovered a greater relief in the action on the contract." (Civ. Code, § 1717, subd. (b)(1).) The outcome of the other causes of action has no bearing on the determination of prevailing party status.

B. The Amount of Fees Awarded

Finally, Gomez asserts that the trial court erred by awarding an excessive amount of attorney fees because it "ignored" "the rule that limits the recovery of attorney's fees to reasonable fees spent litigating the breach of contract action."[3] As to this contention,

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[3] Gomez cites for this proposition *Santisas v. Goodin* (1998) 17 Cal.4th 599, 615, and *Exxess Electronixx v. Heger Realty Corp.* (1988) 64 Cal.App.4th 698. However, we note that "'[a]ttorney's fees need not be apportioned when incurred for representation on an issue common to both a cause of action in which fees are proper and one in which they are not allowed.' (*Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 129-130.)" (*Wilshire Westwood Associates v. Atlantic Richfield Co.* (1993) 20 Cal.App.4th 732, 747.)

we conclude that Gomez has failed to affirmatively demonstrate error on appeal by explaining with specificity what she claims is the appropriate apportionment of fees related to the various causes of action. Indeed, the sum total of her legal argument regarding this issue is the following statement: "Moreover, nothing in the record substantiates an apportionment. The motion's supporting declarations is devoid [*sic*] of any method by which the attorney's fees that may have been expended on litigating the claim where plaintiffs received an award could be computed." Gomez does not direct us to specific portions of the record or provide any further detail. Her failure to do so precludes any meaningful review of the issue, and we consider the argument to have been forfeited.

DISPOSITION

The appeal from the judgment in B229145 is dismissed as untimely. The order awarding attorney fees in B226631 is affirmed. Costs on appeal are awarded to the Ortizes.

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SUZUKAWA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.