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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

MORRIS JAFFER et al.,

Plaintiffs and Respondents,

v.

ODED AVIEL,

Defendant and Appellant.

B281917

(Los Angeles County
Super. Ct. No. BC536320)

APPEAL from an order of the Superior Court of Los Angeles County. Gregory Keosian, Judge. Affirmed.

John A. Tkach for Defendant and Appellant.

Stephen J. Chazen for Plaintiffs and Respondents.

* * * * *

Oded Aviel (defendant) challenges the trial court's order denying his motion for attorney's fees under Civil Code section 1717.¹ We conclude there was no error, and affirm.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

Plaintiffs Morris Jaffer and Anthony Fertitta (plaintiffs) were partners with Brent Mann and JBA Group, Inc. (collectively, Mann) in selling life insurance policies. Plaintiffs would advance Mann funds to conduct his sales activities, and Mann would repay them with a share of his commissions from those sales. In 2012, however, Mann gave \$800,000 of plaintiffs' money to defendant, who orally promised to use the money to "purchase gold in Ghana and then sell [it] in Dubai for a profit."

When Mann's deal with defendant did not pan out, Mann promised to repay plaintiffs for the funds he wrongfully diverted and, to do so, he executed (1) a Promissory Note to plaintiffs for \$1,318,645 (corresponding to the \$800,000 plus interest and costs), and (2) a Pledge and Security Agreement granting plaintiffs Mann's interest in the gold. Each document provided that plaintiffs were entitled to any attorney's fees incurred enforcing the debt or its security. When plaintiffs learned that \$354,000 of their \$800,000 was sitting in a bank account in Ghana, defendant signed a document stating: "At the request of [Mann], I . . . hereby assign without recourse, all my right, titles, and interest" in the Ghana bank account to plaintiffs (Assignment Agreement). The Assignment Agreement had no attorney's fees clause.

¹ All further statutory references are to the Civil Code unless otherwise indicated.

Mann defaulted on the promissory note, and defendant later transferred the \$354,000 in the bank account to Mann (rather than plaintiffs).

II. Procedural Background

A. *Texas Lawsuit*

Plaintiffs sued Mann on the Promissory Note and Pledge and Security Agreement in Texas, and obtained a judgment.

B. *The Lawsuit In This Case*

1. Adjudication of the Merits

Plaintiffs sued defendant in California for breach of contract, fraud, rescission, unjust enrichment, negligence, and common counts. Three of the claims (breach of contract, fraud, and common counts) alleged that defendant had breached the Assignment Agreement “[b]y not paying plaintiffs directly the \$354,000” in the Ghana bank account. The remaining five claims (a second breach of contract claim, rescission, unjust enrichment, negligence, and a second common counts) alleged that defendant had breached his oral agreement with Mann to turn a profit on the purchase and sale of the gold. Plaintiffs alleged that the Pledge and Security Agreement gave them standing to sue for breach of defendant’s oral agreement with Mann. Plaintiffs did not seek any attorney’s fees.

Following a one-day bench trial, the trial court ruled for defendant. Specifically, the court found that (1) the Assignment Agreement was between defendant *and Mann*, and defendant had “complied with” (and thus did not breach) the agreement when he assigned his interests in the account to plaintiffs, and (2) plaintiffs had not presented any evidence on the remaining claims. The court entered judgment on July 7, 2016, and served a notice of entry of judgment on July 15, 2016.

2. *Attorney's Fees Motion*

On July 22, 2016, defendant filed a motion seeking \$87,201 in attorney's fees, asserting that he was the "prevailing party" and entitled to contractual attorney's fees under section 1717 pursuant to the terms of the Pledge and Security Agreement.

Following full briefing, the trial court denied the motion. As a threshold matter, the court noted that defendant's motion was untimely because he did not serve plaintiffs until January 2017, but concluded that plaintiffs were not prejudiced by the delay in service. On the merits, the court held that defendant was not entitled to attorney's fees under the Pledge and Security Agreement because plaintiffs never alleged that defendant "breached any provisions" of that agreement. The court acknowledged that the Pledge and Security Agreement was *mentioned* in plaintiff's complaint, but ruled that it was "merely relevant background to plaintiffs' claims that [defendant] breached the Assignment Agreement." Because the Assignment Agreement did "not include an attorney's fees provision," defendant had not demonstrated a contractual right to such fees.

3. *Appeal*

Following the entry of judgment, defendant filed a timely notice of appeal.

DISCUSSION

Defendant argues that the trial court erred in denying his motion for attorney's fees under section 1717. Where, as here, we are determining whether there is a legal basis for attorney's fees on undisputed facts, our review is de novo. (*Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 894; *Khan v. Shim* (2016) 7 Cal.App.5th 49, 55.)

Section 1717 is an exception to the American rule that parties bear their own attorney's fees insofar as it authorizes courts to enforce contractual provisions that award attorney's fees to the prevailing party in any dispute "on the contract." (§ 1717, subd. (a); see also Code Civ. Proc., § 1021.) Courts have interpreted this provision to impose a mutuality of remedy: If one party would be entitled to attorney's fees under the terms of the contract should it prevail, the opposing party is also so entitled—even if the contract did not so provide and even if the opposing party is not a signatory to the contract. (E.g., *Tract 19051 Homeowners Assn. v. Kemp* (2015) 60 Cal.4th 1135, 1146; *Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 128; accord, *Steve Schmidt & Co. v. Berry* (1986) 183 Cal.App.3d 1299, 1314-1315.)

The trial court was right to reject defendant's request for attorney's fees because a key prerequisite to that relief was missing—namely, that plaintiffs would have been entitled to attorney's fees had they prevailed. Plaintiffs' complaint sought relief on a variety of theories for defendant's alleged breach of two contracts—the Assignment Agreement and the oral agreement to "flip" the gold. Neither agreement had an attorney's fees provision. Because plaintiffs would not have been entitled to attorney's fees had they prevailed, defendant is not entitled to such fees under section 1717.

Defendant makes two responsive arguments.

First, he asserts that he should win because plaintiffs are barred from disputing any award of attorney's fees because they did not file a cross-appeal. Defendant is wrong. A party must file a cross-appeal before it may attack a trial court's order on appeal or seek affirmative relief (*Celia S. v. Hugo H.* (2016) 3

Cal.App.5th 655, 665; *Bonfigli v. Strachan* (2011) 192 Cal.App.4th 1302, 1317, fn. 12), but a party need not file a cross-appeal before *defending* a trial court's order.

Second, defendant urges that plaintiffs' claims all have a "nexus" with the Pledge and Security Agreement—namely, that "but for" the Pledge and Security Agreement, plaintiffs would not be a third party "creditor beneficiary" able to step into Mann's shoes and sue defendant. However, section 1717 does not use a "nexus" or "but for" test. Instead, it provides for the award of attorney's fees to a prevailing party when a contract would have entitled the losing party to such fees; as explained above, that is not true here. Indeed, were we to award defendant fees under his "nexus" or "but for" theories, we would be construing section 1717 to award fees to him when plaintiffs would not have been entitled to such fees; this result goes far beyond section 1717's purpose of "ensur[ing a] mutuality of remedy . . . 'when [a] contract provides the right [to fees] to one party but not to the other.' [Citation.]" (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 610-611.)²

² In light of our conclusion, we have no occasion to reach plaintiffs' alternative arguments that: (1) defendant's motion was untimely; (2) Texas law should be applied under the Pledge and Security Agreement's forum selection clause; and (3) the amount of fees sought was excessive.

DISPOSITION

The order is affirmed. Plaintiffs are entitled to their costs on appeal.

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_____, J.
HOFFSTADT

We concur:

_____, P. J.
LUI

_____, J.
ASHMANN-GERST