Filed 10/10/18 Jarrett v. Diversis Management, LLC CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

JACLYNN JARRETT, et al., Plaintiffs and Appellants, v. DIVERSIS MANAGEMENT, LLC, et al., Defendants and Respondents.	B277835, B279242 (Los Angeles County Super. Ct. No. BC546626)

APPEALS from judgments and an order of the Superior Court of Los Angeles County, Frederick Shaller, Judge. Dismissed in part and reversed in part.

Law Offices of John A. Belcher and John A. Belcher for Plaintiffs and Appellants.

Beaudoin & Krause-Leemon and David R. Krause-Leemon for Defendants and Respondents Diversis Management, LLC, Nylon Media, Inc. and Marc Luzzatto; Clarkson Riley Rubin and Brett Rubin for Defendant and Respondent Nylon Media, Inc.

No appearance for Defendants and Respondents Donald Hellinger, Jami Pearlman, and Nylon Holding, Inc.

Plaintiffs Jaclynn Jarrett, Marvin Scott Jarrett, and Creator LLC (collectively, plaintiffs) appeal from judgments entered against them after the trial court granted summary judgment motions in favor of Donald Hellinger, Jami Pearlman, and Nylon Holding, Inc. (collectively, the Holding defendants), and Marc Luzzatto, Diversis Management, LLC, and Nylon Media, Inc. (collectively, the Media defendants) in this action arising from the sale of Nylon Holding's assets to Nylon Media. Plaintiff Creator, which the Jarretts owned, was a shareholder of Nylon Holding. Plaintiffs maintain the asset sale was unlawful, unfair, and violated a contract.

In a consolidated appeal, plaintiffs challenge the trial court's post-judgment order granting the Media defendants' motion for attorney fees as the prevailing parties on causes of action arising from the asset purchase agreement.

We dismiss plaintiffs' appeal from the summary judgments, finding plaintiffs have abandoned all issues on appeal by failing to present adequate appellate briefing. We reverse in part the order awarding the Media defendants attorney fees, for the reasons explained below.

BACKGROUND[1]

Although we are dismissing plaintiffs' appeal from the summary judgments, we include the following background facts because a summary of the pertinent contracts, asset sale, and plaintiffs' causes of action is germane to our review of the post-judgment attorney fees award.

Plaintiffs Jaclynn and Marvin Jarrett founded a fashion magazine called Nylon in 1999. In need of funds, in 2004, they took $1 million in loans from a company run by defendant Donald Hellinger. When they defaulted on their obligations, Hellinger's company assumed ownership of the collateral securing the loan—Nylon's assets. In 2005, Hellinger formed defendant Nylon Holding, Inc. (Holding), the assignee of Nylon's assets. Hellinger became president of Holding. Defendant Jami Pearlman, one of Holding's other owners,[2] acted as Holding's chief financial officer. Hellinger and Pearlman also served as Holding's directors. Jaclynn Jarrett continued to serve as Nylon magazine's publisher, and Marvin Jarrett as its editor in chief.

---

[1] As explained in more detail below, the trial court sustained the vast majority of defendants' objections to the evidence plaintiffs submitted in opposition to the summary judgment motions. Plaintiffs do not challenge the evidentiary rulings on appeal. Their opening appellate brief includes much of the excluded evidence in their "overview" of the case. Our statement of the facts omits plaintiffs' inadmissible evidence. Plaintiffs did not file evidentiary objections to defendants' evidence. Accordingly, all of defendants' evidence is admissible.

[2] Holding's other owners are not parties to this appeal.

The 2007 Independent Contractor Services Agreement

On November 13, 2007, Holding entered into the Independent Contractor Services Agreement (ICSA) with Toystore, LLC, a company owned by the Jarretts. Under the ICSA, Toystore agreed to publish and edit Nylon magazine (and its multi-media brand extensions), and Holding agreed to pay Toystore $25,000 per month, plus the rent, cable, phone, and other utilities for a New York City apartment. During the six and a half years the ICSA was in effect, Holding paid monthly rent payments, ranging from $10,000 to $11,000, on an apartment the Jarretts occupied.

The parties to the ICSA also agreed they would offer Nylon's assets for sale when Holding's gross revenues reached $10 million (or before, if both parties consented), and Toystore would receive 49 percent of the profits remaining after enumerated obligations were paid. The ICSA further provided: "The parties will attempt to agree on the terms and conditions the business will be offered for sale and the terms of the sale. If the parties are unable to agree the Company [Holding] shall make the final determination in its sole discretion. The properties will only be offered for sale through an entity that has experience in the sale of magazine publishers."

Another provision of the ICSA, relevant to the present action, states: "The parties agree to enter into a new agreement with respect to a new company called Nylon Licensing[,] Inc. ('Licensing') which will exploit the Nylon brand via licensing. [Holding] grants Licensing a gratis license in perpetuity to use the applicable Nylon Trademark for such purpose. To date, Licensing has entered into agreements for Nylon Korea, Nylon TV and Urban Outfitters for the exploitation of Nylon clothing

and housewares. The parties agree that profits from Nylon Korea, Nylon TV, Urban Outfitters and any future licensing agreements developed by [Toystore] will be placed into Nylon Licensing, Inc. and that [Toystore] owns 50% of that company. The parties agree that profits in that company will be distributed monthly and that set asides may be made in anticipation of future expenses that will be incurred for Nylon TV staff, travel related to licensing activities, commissions for artists and professional services. The parties further agree that Licensing shall be sold at the same time as [Nylon's assets] are sold."

The initial term of the ICSA was five years, but it provided for automatic renewal for one-year terms, unless either party terminated it by providing 60 days' written notice "prior to the end of the then current term." The ICSA also could be terminated by either party for a material breach, after 30 days' written notice of the breach.

Licensing

Licensing was incorporated, but there is no evidence the parties "enter[ed] into a new agreement" regarding Licensing, as the parties stated they would do in the above-quoted provision of the ICSA. Nor is there evidence the parties placed profits into Licensing or that Licensing entered into any agreements to exploit the brand, as anticipated in the ICSA. Pearlman stated in her declaration in support of defendants' summary judgment motions, "Licensing ceased doing business by December 31, 2008 and had no assets." Although plaintiffs produced no evidence refuting that statement, they maintain Licensing had assets that should have been sold along with Nylon's assets in the 2014 sale they contest in this action.

Between 2007 and 2012, Holding (not Licensing) negotiated license agreements with foreign companies to publish Nylon magazine in Japan, Korea, Mexico, Indonesia, Singapore, and Thailand. Despite Marvin Jarrett's assertion in his declaration in opposition to the Media defendants' summary judgment motion, "I always understood that I was negotiating licensing deals on behalf of Nylon Licensing," a 2008 license agreement to publish Nylon magazine in Mexico demonstrates Marvin Jarrett negotiated and executed the agreement on behalf of Holding, not Licensing.

2009 Amendment to the Independent Contractor Services Agreement

On January 22, 2009, Holding entered into an amendment to the November 13, 2007 ICSA (the Amendment) with Creator, LLC, the successor in interest to Toystore. The Amendment gave Creator a 49 percent ownership interest in Holding, a share of Holding's profits,[3] and 49 percent of the profits from the sale of Nylon's assets.

The Amendment also provided that Holding would pay Creator $10,000 per month, beginning January 1, 2009, as an advance against Holding's profits. In her deposition, Jaclynn Jarrett testified that Holding made the $10,000 monthly payments to Creator from January 2009 through December 2013. These payments were in addition to the $25,000 monthly payments Holding paid Creator, and the monthly rent Holding

[3] As stated in the Amendment, "[p]rior to the sale of [Nylon's assets], and until recoupment of the unreimbursed capital investment," Creator was to receive only 30 percent of Holding's profits rather than 49 percent.

paid for the apartment the Jarretts occupied, as required under the terms of the ICSA.

Sale of Nylon's Assets

In 2010, Holding's gross revenues reached $10 million, and the provision in the ICSA regarding sale of Nylon's assets was triggered. In November 2010, Holding retained a company that specialized in mergers and acquisitions involving media companies, AdMedia Partners, to find potential buyers. The Jarretts participated in discussions with AdMedia and potential buyers. Only one offer resulted from these efforts and it was not acceptable to the owners of Nylon's assets or the Jarretts. After nearly three years of attempting to locate a buyer, Holding terminated its retainer agreement with AdMedia in August 2013.

Also in August 2013, a man named Joe Mohen approached Hellinger about purchasing Nylon's assets. The Jarretts, along with Hellinger and Pearlman, participated on a telephone call with Mohen and his partner, Dana Fields. Thereafter, the Jarretts decided they did not want to work with Fields, and Mohen decided he did not want to work with the Jarretts, regarding a potential sale. Although Jaclynn Jarrett expressed her feelings to Pearlman, she nonetheless provided Pearlman with materials for Mohen's due diligence review of Nylon. In late 2013, Mohen stopped communicating with Hellinger and Pearlman, and it appeared there would not be a deal.

Then, in early 2014, Mohen came to Pearlman and/or Hellinger with an offer to purchase Nylon's assets. He was planning to form a media company with an investment from defendant Diversis Management, LLC (Diversis), a private equity firm. The media company would acquire Nylon's assets. Mohen offered $1.3 million for Nylon's assets, plus the right for Holding

to obtain certain receivables (which wound up totaling $1 million when they were collected).

The owners of 51 percent of Holding's shares approved the sale of Nylon's assets to newly formed defendant Nylon Media, Inc. (Media). The Jarretts' company, plaintiff Creator, which owned 49 percent of Holding's shares, was not asked to approve the sale. On May 5, 2014, Holding (with Pearlman as the signatory) and Media entered into the Asset Purchase Agreement.

The last day the Jarretts worked at Nylon magazine was Friday, May 2, 2014. On Saturday, May 3, 2014, Pearlman sent Jaclynn Jarrett an email, advising her and Marvin of the sale of Nylon's assets and informing them their "engagement as independent contractors [was] terminated effective" immediately. Media began operating Nylon magazine on Monday, May 5, 2014, the date it acquired Nylon's assets.

Plaintiffs' Complaint

Three weeks after the sale, on May 27, 2014, plaintiffs (as defined above as Creator, Jaclynn Jarrett, and Marvin Jarrett) filed this action against the Holding defendants (as defined above as Hellinger, Pearlman, and Holding), Diversis, Luzzatto (a founding member of Diversis), and other entities and individuals who are not parties to this appeal.

Media, the purchaser of Nylon's assets, was not named as a defendant in the complaint. On June 20, 2014, plaintiffs substituted Media in place of fictitious defendant Doe 1. None of the 26 causes of action in the complaint were asserted against Doe 1 or "defendants" generally. Some of the causes of action were asserted against "conspirators," a term that was not defined to include any Doe defendants.

Plaintiffs asserted the following causes of action against Hellinger, Pearlman, Diversis and Luzzatto: conversion of assets of Holding and Licensing, fraudulent conveyance of properties of Holding and Licensing, conspiracy to fraudulently convey and convert properties of Holding and Licensing, rescission of purported sale of Nylon Properties, intentional interference with prospective economic advantage, negligent interference with prospective economic advantage, breach of contract (two causes of action), money had and received, account stated, violations of Delaware General Corporation Law, violations of Pennsylvania Corporations Code, constructive trust, violations of California Business and Professions Code section 17200, accounting, defamation and slander, injunctive relief, and declaratory relief.

Plaintiffs asserted the following additional causes of action against Hellinger and Pearlman: breach of fiduciary duty owed to Holding and Licensing, breach of fiduciary duty owed to plaintiffs, fraud and deceit, constructive fraud, usurpation of corporate opportunity, and defamation and breach of contractual nondisparagement.

Plaintiffs also asserted additional causes of action against Diversis and Luzzatto for intentional interference with contractual relations and negligent interference with contractual relations.

In their prayer for relief, plaintiffs asked that the transfer of assets "be set aside and declared void," that defendants be restrained from doing anything with the assets, that the court order an accounting, and that they be awarded compensatory and punitive damages, among other things.

In the complaint, plaintiffs allege Hellinger, Pearlman, Diversis, and Luzzatto "surreptitiously and literally under cover

of night conspired with each other to secretly steal well known and valuable Nylon brand and trademark" from plaintiffs. They further allege: "Plaintiffs were not given notice, formal or informal of the transaction, despite their rights as shareholders, in particular their 50% interest in Licensing whose assets are a critical part of the scheme and the transactions carried out in furtherance of the scheme."[4] According to plaintiffs, Hellinger only informed them he wanted to sell "the equity interest he controlled in Holding and Licensing," not that he intended to sell Nylon's assets. Plaintiffs also assert the assets that were sold "vastly exceed[ed] the $1.3 million purchase price," and the deal did "not include any holdback or reserve for debts and liabilities." The complaint alleges defendants' "intentional purpose for proceeding with an asset sale, instead [of] an equity purchase, was to strip Holding and Licensing of any value or assets and leaving Holding and Licensing as mere corporate shells, thereby rendering Plaintiffs' ownership interests in Holding and Licensing worthless, effectively eliminating Plaintiffs' ownership right without notice or due compensation."

Plaintiffs further allege: "In or about February 2014, Creator, through the efforts of Jaclynn and Marvin, located a potential strategic buyer for Hellinger's equity ownership who was not only an established magazine publisher with numerous titles in circulation, but an owner of printing facilities and a distribution network as well." Plaintiffs maintain Pearlman refused to provide some of the due diligence material the

---

[4] As set forth above, Creator was a shareholder of Holding and Licensing. The Jarretts were not. Defendants dispute Licensing had any assets to sell.

potential buyer requested. Apparently the potential buyer never made an offer.

According to the complaint, plaintiffs learned about the sale of Nylon's assets from a Web site article published on May 2, 2014. Plaintiffs contend the press release disparaged or interfered with plaintiffs' reputations by indicating their relationship with Nylon magazine had terminated, and defendants also falsely verbally communicated that the Jarretts were terminated. Plaintiffs further contend Holding breached the ICSA by terminating the agreement without notice and without cause.

Plaintiffs also claim Holding has refused to reimburse Jaclynn Jarrett for $110,640 she incurred on a credit card in paying Nylon magazine's expenses.

Defendants' Motions for Summary Judgment

In March 2016, Hellinger and Pearlman moved for summary judgment/summary adjudication of the causes of action in plaintiffs' complaint. Also in March 2016, the Media defendants (Luzzatto, Diversis, and Media) moved for summary judgment/summary adjudication of the causes of action in plaintiffs' complaint. Plaintiffs filed written oppositions to both summary judgment motions.

The trial court granted both summary judgment motions and entered judgment in favor of the moving defendants.[5] The court also sustained the majority of defendants' objections to plaintiffs' evidence.

---

[5]On Hellinger and Pearlman's summary judgment motion, the trial court also entered judgment in favor of Holding on all derivative claims asserted on behalf of this nominal defendant.

DISCUSSION

Appeal No. B277835 – Review of Summary Judgments

For the reasons explained below, plaintiffs' appellate briefing is so inadequate that we find plaintiffs have abandoned all contentions on appeal regarding the summary judgments and, accordingly, we dismiss this appeal.

A judgment is presumed correct and reversible error must be affirmatively shown. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) "Though summary judgment review is de novo,[6] review is limited to issues adequately raised and

---

[6] A trial court should grant summary judgment "if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) A defendant may establish a right to summary judgment by showing that one or more elements of the cause of action cannot be established or that there is a complete defense to the cause of action. (Code Civ. Proc., § 437c, subd. (p)(2).) Once the moving defendant has satisfied this burden, the burden shifts to the plaintiff to show that a triable issue of material fact exists as to each cause of action. (*Ibid.*) A triable issue of material fact exists where "the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.)

"We review the trial court's decision de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections were made and sustained." (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 65-66.) We view the evidence and the inferences reasonably drawn from the evidence "in the light most favorable to the opposing party." (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 843.)

supported in the appellant's brief." (*Christoff v. Union Pacific Railroad Co.* (2005) 134 Cal.App.4th 118, 125.)

An appellant's brief should "point out portions of the record that support the position taken on appeal. The appellate court is not required to search the record on its own seeking error." (*Del Real v. City of Riverside* (2002) 95 Cal.App.4th 761, 768.) The "failure of an appellant in a civil action to articulate any pertinent or intelligible legal argument in an opening brief may, in the discretion of the court, be deemed an abandonment of the appeal justifying dismissal." (*Berger v. Godden* (1985) 163 Cal.App.3d 1113, 1119.)

Plaintiffs' briefing fails to include discussion of the allegations/causes of action in their complaint

"The complaint limits the issues to be addressed at the motion for summary judgment. The rationale is clear: It is the allegations in the complaint to which the summary judgment motion must respond." (*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258.)

Defendants moved for summary judgment/summary adjudication of the 26 causes of action in plaintiffs' complaint. Plaintiffs' appellate briefing, however, neglects to reference these 26 causes of action or summarize the allegations supporting these causes of action. Further, plaintiffs' briefing fails to explain to which cause(s) of action their various arguments relate. Thus, it is not clear on which causes of action plaintiffs maintain defendants did not meet their burden on summary judgment/summary adjudication and/or on which causes of action plaintiffs maintain they have raised a triable issue of material fact.

These omissions render plaintiffs' contentions on appeal unintelligible. This court is not tasked with attempting to make sense of plaintiffs' legal arguments by linking them with one or more causes of action to which they might pertain.

Plaintiffs' briefing omits relevant procedural history and fails to differentiate the two summary judgments

Although plaintiffs filed notices of appeal from both the judgment in favor of the Holding defendants and the judgment in favor of the Media defendants, plaintiffs' briefing does not differentiate between the summary judgment motions and judgments. Their opening brief fails to indicate there were two, separate summary judgment motions and judgments. Plaintiffs omitted all procedural history from their opening brief.[7]

Plaintiffs have left it to this court to determine which arguments relate to which summary judgment motion, which cause of action, and which defendant. This court's function, however, is to review "issues adequately raised and supported in the appellant's brief." (*Christoff v. Union Pacific Railroad Co.*, *supra*, 134 Cal.App.4th at p. 125.) This court is not required to study the record, attempting to match up plaintiffs' arguments with the applicable cause of action, defendant, and judgment.

---

[7] Plaintiffs did not include a statement of facts in their opening brief. The "overview" section of their brief contains a mixture of admissible evidence, inadmissible evidence, and argument. Below, we address plaintiffs' citation of inadmissible evidence.

Plaintiffs' briefing ignores the trial court's evidentiary rulings, citing excluded evidence as if it were admissible

Plaintiffs neglect to mention in their briefing that both the Holding defendants and the Media defendants filed extensive objections to the evidence plaintiffs submitted in opposition to the summary judgment motions. Nor do plaintiffs mention that, out of the 109 objections the Media defendants made to plaintiffs' evidence, the trial court sustained 100 of them and overruled nine; out of the 78 objections the Holding defendants made to plaintiffs' evidence, the court sustained 64 of them and overruled 14.[8]

To create a triable issue of material fact, a party opposing a summary judgment motion must present admissible evidence. (Code Civ. Proc., § 437c, subd. (d).) We disregard evidence the trial court excluded. (*Johnson v. City of Loma Linda*, *supra*, 24 Cal.4th at pp. 65-66.)

Here, plaintiffs chose to ignore the trial court's evidentiary rulings, improperly referencing the inadmissible evidence throughout their briefing as if it were admissible, and leaving it to this court to parse the cited evidence to determine if any admissible evidence supports their arguments. " ' "It is not the function of this court to comb the record looking for the evidence or absence of evidence to support [a party's] argument." ' " (*Garcia v. Seacon Logix, Inc.* (2015) 238 Cal.App.4th 1476, 1489.)

---

[8] Plaintiffs do not challenge the evidentiary rulings on appeal, as they failed to mention the objections or rulings in their briefing.

We dismiss plaintiffs' appeal from the two summary judgments. Plaintiffs' briefing fails to disclose to which cause of action, which defendant, and which judgment their legal arguments pertain. Plaintiffs attempt to support their arguments with evidence the trial court excluded, without challenging the evidentiary rulings. Based on these significant deficiencies in plaintiffs' briefing, plaintiffs have failed to adequately raise "any pertinent or intelligible legal argument," and we therefore find they have abandoned their contentions on appeal. (*Berger v. Godden*, *supra*, 163 Cal.App.3d at p. 1119.) Dismissal is the appropriate disposition. (*Ibid.*)

Appeal No. B279242—Review of Attorney Fees Award

Proceedings below

After the trial court entered judgment in favor of the Media defendants, they moved for an award of $161,110.14 in attorney fees, based on a provision in the Asset Purchase Agreement, stating: "The prevailing party in any Proceeding to enforce any provision of the Transaction Documents shall be reimbursed by the other party for its reasonable attorneys' fees and other costs and expenses incurred in connection with such Proceeding." As set forth above, the parties to the Asset Purchase Agreement were Holding and Media.

In their motion, the Media defendants argued: "Here, there is no doubt that Plaintiffs' claims against the Media Defendants were an action 'on the contract,' as the entire premise underlying Plaintiffs' claims was that the APA [Asset Purchase Agreement] was not valid and that the APA should be rescinded. Although Plaintiffs themselves are not parties to the APA, they sued derivatively on behalf of Holding, which is a party to the APA. By claiming that they were, in essence, Holding, Plaintiffs sued

as a party to the APA, which entitles the Media Defendants to recover their attorneys' fees for being forced to take action to defend and enforce their rights under the APA."

In their written opposition to the motion for attorney fees, plaintiffs argued: "In this case, the basis of the allegations against the Diversis defendants arose out of the breaches of the Independent Contractor Services Agreement, which barred the sale of Nylon Holding's assets without Nylon Licensing. Plaintiffs alleged that Diversis conspired with Hellinger and Pearlman to breach the Independent Contractor Services Agreement. In other words, the basis of Plaintiffs' claims turned on the Independent Contractor Services Agreement, not on the Asset Purchase Agreement. Indeed, the terms of the Asset Purchase Agreement was [*sic*] kept secret from Plaintiffs. Plaintiffs did not obtain a copy of the Asset Purchase Agreement and did not know its terms until after this lawsuit was filed."

Plaintiffs also argued, "To the extent . . . [plaintiff] Creator, LLC is a 'party' [to the Asset Purchase Agreement] because it brought derivative claims, no such finding can be made against Jaclynn and Marvin Scott Jarrett." Plaintiffs asserted the Jarretts "brought suit as individuals."[9]

In their reply brief in support of the motion, the Media defendants argued: "For more than two years, plaintiffs Marvin Jarrett, Jaclynn Jarrett and Creator, LLC . . . all claimed to be the owners of Nylon Holding, Inc. and all claimed to have the right to sue derivatively on behalf of Nylon Holding. For more than two years, Plaintiffs, on behalf of Nylon Holding, vigorously

---

[9] Plaintiffs further argued the fee request was excessive, an argument they do not raise on appeal.

sought to overturn the asset purchase agreement between Nylon Holding and Nylon Media, Inc. Only now that Plaintiffs have realized that there are consequences to suing derivatively as Nylon Holding do they try to change their tune and disavow their earlier positions." The Media defendants pointed to plaintiffs' complaint and discovery responses, in which they stated the Jarretts personally had an ownership interest in Holding (even though they did not), and that all plaintiffs, including the Jarretts, were suing derivatively on behalf of Holding.

On October 31, 2016, after taking the matter under submission after hearing, the trial court awarded the Media defendants $79,803 in attorney fees, against all plaintiffs, jointly and severally. In its written ruling, the court found the Media defendants were the prevailing parties in this litigation and were entitled to fees under the attorney fees provision in the Asset Purchase Agreement. The court concluded: "When Plaintiffs derivatively sought to rescind and invalidate a contract that Nylon Holding was a party to, they 'stood in the shoes' of Nylon Holding at least as far as the attorney's fees provisions. Had Plaintiffs prevailed on such a claim, then they would have been entitled to recover attorney's fees as to that aspect of the litigation 'on the contract.' In such a case, it would be appropriate to find that the Media Defendants are entitled to an award of attorney's fees." The court further explained it awarded the Media defendants less than half of the fees they requested because (1) they were only entitled to fees on the contract and not fees incurred in defending the tort claims, and (2) the court found some of the hours billed and some of the billing rates to be "unreasonably high."

Analysis

Plaintiffs contend the trial court erred in awarding the Media defendants attorney fees against plaintiffs under the Asset Purchase Agreement. Plaintiffs make the same arguments here that they made below (as summarized above), except they do not challenge the amount of the award.

Civil Code section 1717, subdivision (a) provides in pertinent part: "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." The Asset Purchase Agreement between Holding and Media contains such an attorney fees clause.

A review of plaintiffs' complaint makes clear plaintiffs (all three of them) intended to sue the Media defendants derivatively on behalf of Holding to void and set aside the asset purchase. Plaintiffs' derivative claims were "on the contract"—the Asset Purchase Agreement—within the meaning of Civil Code section 1717.

The fact of the matter is, however, the Jarretts were not shareholders of Holding and had no right to sue derivatively on behalf of Holding. Accordingly, the Jarretts would not have been entitled to attorney fees under the Asset Purchase Agreement. (See *Santisas v. Goodin* (1998) 17 Cal.4th 599, 611 [Civil Code section 1717 permits a "party's recovery of attorney fees whenever the opposing parties would have been entitled to

attorney fees under the contract had they prevailed"].) Thus, we reverse the award of attorney fees as to the Jarretts.

We affirm the award as to Creator, a shareholder of Holding, who sued derivatively on behalf of Holding (a party to the Asset Purchase Agreement) to void and set aside the asset purchase.

DISPOSITION

Plaintiffs' appeal from the summary judgments is dismissed. The post-judgment order awarding the Media defendants attorney fees is reversed as to Jaclynn Jarrett and Marvin Jarrett and affirmed as to Creator. Each side is to bear its own costs on appeal.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, P. J.

BENDIX, J.