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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

HOMEPORT INSURANCE SERVICES,  
INC., et al.,

Plaintiffs and Respondents,

v.

WILLIAM LUNDY,

Defendant and Appellant.

B238296

(Los Angeles County  
Super. Ct. No. NC054268)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ross M. Klein, Jr., Judge. Affirmed.

Mower & Carreon, Patrick A. Carreon, James A. Burton for Defendant and Appellant.

Russell, Mirkovich & Morrow, Joseph N. Mirkovich, and Margaret E. Morrow for Plaintiffs and Respondents.

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Appellant William Lundy appeals from a post-judgment order awarding attorney's fees to respondents SSA Terminals LLC, SSA Terminals (Long Beach) LLC, and SSA Pacific, Inc. (collectively SSA) under Civil Code<sup>1</sup> section 1717. After Lundy was injured while working for SSA as a longshoreman in the Port of Long Beach, he filed a worker's compensation claim against SSA and a personal injury action against the City of Long Beach (City). Following a global settlement of both cases in which Lundy waived his right to seek reemployment with SSA, Lundy breached the "no reemployment" provision in his settlement agreement with the City by continuing to accept work assignments with SSA entities. In SSA's ensuing action against Lundy to enforce the "no reemployment" provision, the trial court entered summary judgment for SSA and granted SSA's motion for attorney's fees. This Court previously affirmed the judgment for SSA on the ground that the "no reemployment" provision in Lundy's settlement agreement with the City was enforceable by SSA. We now affirm the award of attorney's fees to SSA on the ground that SSA was a third party beneficiary of the settlement agreement, including the attorney's fees provision, and was therefore entitled to recover its attorney's fees under section 1717 as the prevailing party in an action to enforce the agreement.

## **FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

### **I. Settlement of Lundy's Claims Against the City and SSA**

Lundy is a longshoreman in the International Longshore and Warehouse Union (ILWU). SSA Terminals LLC, SSA Terminals (Long Beach) LLC, and SSA Pacific, Inc. are employers of longshoreman and are insured for worker's compensation benefit claims through Homeport Insurance Services, Inc. (Homeport). In May 2006, Lundy was injured while working for SSA at the Port of Long Beach on property leased by SSA from the City. Lundy filed a workers' compensation claim against SSA with the United States Department of Labor for benefits under the Longshore and Harbor Workers'

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<sup>1</sup> Unless otherwise stated, all further statutory references are to the Civil Code.

Compensation Act (LHWCA). Lundy also filed a personal injury action against the City in Los Angeles County Superior Court for damages allegedly caused by a dangerous condition of property owned by the City. Lundy was represented by separate counsel in his worker's compensation and personal injury cases.

Pursuant to its lease agreement with the City, SSA was contractually obligated to defend and indemnify the City for claims that arose on the leased property, including the claims alleged in Lundy's personal injury complaint. After accepting the defense of Lundy's complaint from the City, SSA retained counsel to defend the City and represent SSA's interests in the personal injury action.

In May 2008, Lundy agreed to settle both his workers' compensation claim against SSA and his personal injury action against the City for a total payment of \$175,000. As part of the settlement, Homeport agreed to waive its lien of \$112,742.60 for benefits paid to Lundy under the LHWCA. SSA and Homeport insisted in negotiations that neither case would settle unless Lundy agreed to a provision waiving his right to any future employment with SSA or other company insured by Homeport. After consulting with his attorneys in both cases, Lundy consented to the "no reemployment" provision.

Counsel for the City and SSA prepared a written settlement agreement for Lundy's personal injury action, which was signed by both Lundy and his personal injury attorney. The agreement included a general release of claims by Lundy against the City, its assigns, and all others acting on its behalf. It also stated that the settlement was contingent upon approval of a workers' compensation settlement by the Department of Labor. Paragraph 12 of the agreement, entitled "Plaintiff's Future Employment," specifically provided as follows: "Plaintiff specifically agrees, at any time, in the future, never to work for any company insured by or in any way affiliated with Homeport Insurance, including but not limited to SSA Marine, SSA Terminals, SSAT and Pacific Maritime Services." Paragraph 15 of the agreement, entitled "Enforcement of Agreement," set forth the following attorney's fees provision: "If any litigation should arise out of this Agreement, the prevailing party in such litigation shall recover from the losing party its reasonable attorneys' fees and costs incurred in such litigation."

Homeport prepared a separate written settlement agreement for Lundy's worker's compensation claim, which was signed by both Lundy and his worker's compensation attorney. Paragraph 1(n) of the agreement, entitled "Adequacy Of Settlement," included the following provision: "As part of this consideration, claimant has agreed not to return to work for any Homeport Insurance insured. If claimant does return to work with a Homeport Insurance insured, he is in violation of this agreement and is to return all settlement amounts. This clause has been explained to the claimant in full by his attorneys of record." Following Homeport's submission of the settlement agreement for approval under the LHWCA, the Department of Labor issued an order approving Lundy's worker's compensation settlement without modification.

In June 2008, counsel for the City and SSA sent the settlement payment owed under the parties' global settlement to counsel for Lundy. Lundy accepted the settlement payment and did not return any of the consideration paid. However, following the settlement of his personal injury and worker's compensation claims, Lundy repeatedly breached the "no reemployment" provision in both settlement agreements by accepting dispatch assignments from his union to work for SSA. When Lundy refused SSA's request to cease accepting such work assignments, the underlying lawsuit followed.

## **II. SSA's Action to Enforce the "No Reemployment" Provision**

In March 2010, SSA and Homeport filed the instant action against Lundy for specific performance of the personal injury settlement agreement with the City and a permanent injunction barring Lundy from working at SSA or other Homeport-insured company. The parties thereafter brought cross-motions for summary judgment in which they disputed the enforceability of the "no reemployment" provision. Lundy contended that the provision was void as against public policy because it constituted unlawful discrimination or retaliation under Labor Code section 132a, the LHWCA, and the California Fair Employment and Housing Act (FEHA). Lundy also claimed that the provision was severable from the settlement agreement and that its purported illegality did not void the entire agreement, including the consideration paid to Lundy. SSA

countered that the “no reemployment” provision was part of a freely negotiated global settlement which was approved by Lundy, his counsel, and the Department of Labor, and that SSA was entitled to enforce the provision as a third party beneficiary of Lundy’s settlement agreement with the City.

The trial court granted summary judgment for SSA and denied summary judgment for Lundy.<sup>2</sup> The trial court found that the evidence did not support an inference of discriminatory or retaliatory animus by SSA in conditioning the settlement on the “no reemployment” provision, but rather showed that Lundy voluntarily agreed to the provision with the assistance of counsel and ratified the settlement by refusing to return the consideration paid. The trial court also found that “[a]s part of a global settlement, the plaintiffs are third party beneficiaries of the settlement with the City of Long Beach.” Following entry of a final judgment permanently enjoining Lundy from working for SSA, Lundy filed an appeal challenging the enforceability of the “no reemployment” provision. In a nonpublished opinion, this Court affirmed summary judgment in SSA’s favor on the ground that the “no reemployment” provision in Lundy’s settlement agreement with the City was enforceable by SSA. (*Homeport Insurance Services, Inc., et al. v. Lundy* (Nov. 5, 2012, B236276 [nonpub. opn.].)

### **III. SSA’s Motion for Attorney’s Fees**

SSA moved for a post-judgment award of attorney’s fees pursuant to section 1717. In its moving papers, SSA argued that it had prevailed in its action to enforce the terms of Lundy’s settlement agreement with the City and that the settlement agreement expressly provided for attorney’s fees to the prevailing party in any litigation arising out of the agreement. Lundy opposed the motion on the grounds that SSA had failed to prove that

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<sup>2</sup> The trial court also denied summary judgment for Homeport on the ground that the “no reemployment” provision was too uncertain to be enforceable as to Homeport because it failed to identify which entities other than SSA were insured by Homeport. Following the denial of its summary judgment motion, Homeport voluntarily dismissed its complaint against Lundy without prejudice and is no longer a party to this action.

it was a third party beneficiary of the fee provision in the agreement, and failed to prove that Lundy would have been entitled to recover his attorney's fees from SSA if he had been the prevailing party. In its reply, SSA asserted that it was not required to prove that it was an intended beneficiary of the fee provision as long as it was an intended beneficiary of the "no reemployment" provision at issue in the underlying action. SSA also reasoned that, because the fee provision inured to the benefit of the prevailing party in any action arising out of the agreement, SSA was entitled to attorney's fees as the prevailing party in its action to enforce the "no reemployment" provision.

In a written decision, the trial court granted SSA's motion for attorney's fees in the amount of \$129,525. With respect to the legal basis for the award, the trial court stated as follows: "As the Court has found that the Plaintiffs prevailed in this action, they are entitled to attorney fees pursuant to Civil Code section 1717(a) and section 15 of the settlement agreement that is being enforced." Following the entry of the trial court's post-judgment order awarding attorney's fees to SSA, Lundy filed the current appeal challenging the legal basis for the fee award.

## **DISCUSSION**

In this appeal, Lundy does not dispute that SSA was the "prevailing party" in an "action on the contract" within the meaning of section 1717. Nor does Lundy dispute the reasonableness of the amount of attorney's fees awarded to SSA. Rather, Lundy's arguments on appeal are that SSA was not entitled to recover its attorney's fees under section 1717 because (1) SSA did not meet its burden of proving that it was a third party beneficiary of the attorney's fees provision in Lundy's settlement agreement with the City, and (2) SSA did not meet its burden of proving that Lundy would have been entitled to recover his attorney's fees from SSA had Lundy prevailed in the underlying action.

### **I. Section 1717 and Nonsignatory Parties**

The determination of the legal basis for an award of attorney's fees is a question of law subject to de novo review. (*Cargill, Inc. v. Souza* (2011) 201 Cal.App.4th 962,

966 (*Cargill*); *Sessions Payroll Management, Inc. v. Noble Construction Co.* (2000) 84 Cal.App.4th 671, 678 (*Sessions*).) Ordinarily, each party to a lawsuit must bear its own attorney's fees except where a statute or contract provides otherwise. (Code Civ. Proc., § 1021; *Reynolds Metal Co. v. Alperson* (1979) 25 Cal.3d 124, 127.) Where there is a contractual fee provision, section 1717, subdivision (a) states, in pertinent part, as follows: "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 primary purpose of section 1717 is to ensure mutuality of remedy for attorney fee claims under contractual attorney fee provisions. [Citation.] Courts have recognized that section 1717 has this effect in at least two distinct situations. [¶] The first situation . . . is 'when the contract provides the right to one party but not to the other.' [Citation.] In this situation, the effect of section 1717 is to allow recovery of attorney fees by whichever contracting party prevails, 'whether he or she is the party specified in the contract or not.' [Citation.] [¶] "The second situation . . . is when a person sued on a contract containing a provision for attorney fees to the prevailing party defends the litigation 'by successfully arguing the inapplicability, invalidity, unenforceability, or nonexistence of the same contract.' [Citation.] . . . To ensure mutuality of remedy in this situation, it has been consistently held that when a party litigant prevails in an action on a contract by establishing that the contract is invalid, inapplicable, unenforceable, or nonexistent, section 1717 permits that party's recovery of attorney fees whenever the opposing parties would have been entitled to attorney fees under the contract had they prevailed. [Citations.]" (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 610-611.)

To effectuate its purpose, section 1717 has been interpreted to provide a reciprocal remedy in actions between signatory and nonsignatory parties. (*Reynolds Metal Co. v. Alperson, supra*, 25 Cal.3d at pp. 128-129; *Cargill, supra*, 201 Cal.App.4th at pp. 969-970; *Loduca v. Polyzos* (2007) 153 Cal.App.4th 334, 343-344 (*Loduca*); *Real Property*

*Services Corp. v. City of Pasadena* (1994) 25 Cal.App.4th 375, 383-384 (*Real Property Services*).) In cases involving a nonsignatory to a contract with an attorney's fees provision, "[a] party is entitled to recover its attorney fees pursuant to a contractual provision only when the party would have been liable for the fees of the opposing party if the opposing party had prevailed." (*Real Property Services, supra*, at p. 382; see also *Hyduke's Valley Motors v. Lobel Financial Corp.* (2010) 189 Cal.App.4th 430, 435 ["nonsignatory who prevails in an action on the contract is entitled to attorney fees provided it would have been liable for fees had the other party prevailed"]; *Alhambra Redevelopment Agency v. Transamerica Financial Services* (1989) 212 Cal.App.3d 1370, 1381 ["nonsignatory party may recover attorney's fees under Civil Code section 1717 provided the signatory party 'would clearly be entitled to attorney's fees should he prevail in enforcing the contractual obligation against the [nonsignatory party]'"].)

As the Court of Appeal explained in *Cargill*, "[t]wo situations may entitle a nonsignatory party to attorney fees. First is where the nonsignatory party 'stands in the shoes of a party to the contract.' [Citation.] Second is where the nonsignatory party is a third party beneficiary of the contract." (*Cargill, supra*, 201 Cal.App.4th at p. 966.) At issue in this appeal is whether SSA was entitled to recover its attorney's fees as a third party beneficiary of Lundy's settlement agreement with the City.

## **II. SSA did not waive its arguments on appeal.**

As a preliminary matter, we address Lundy's contention that SSA waived its primary arguments on appeal by failing to timely raise them in the trial court. As Lundy points out, SSA did not argue that it was entitled to recover its attorney's fees as a third party beneficiary until its reply brief in support of its motion for attorney's fees. Additionally, SSA never directly argued in the trial court proceedings that Lundy would have been allowed to recover his attorney's fees from SSA had he prevailed in the underlying action. We conclude, however, that there has been no waiver by SSA.

The record reflects that SSA first argued that it was a third party beneficiary of Lundy's settlement agreement with the City in its motion for summary judgment, and the



trial court made a specific factual finding that SSA was a third party beneficiary of the agreement in granting summary judgment in its favor. The record also reflects that SSA then moved for an award of attorney's fees on the ground that the settlement agreement signed by Lundy specifically provided for attorney's fees to the prevailing party in any action arising out of the agreement and that SSA's successful action to enforce the "no reemployment" provision in the agreement was an action on the contract under section 1717. In its reply brief in support of the attorney's fees motion, SSA addressed Lundy's opposition argument that it was not a third party beneficiary of the fee provision in the agreement, and at the hearing on the motion, SSA's counsel argued that Lundy would have been allowed to seek his attorney's fees had he pursued an action against SSA arising out of the agreement. In light of this record, the legal issues presented in this appeal were adequately raised in the trial court and have not been waived by SSA.<sup>3</sup>

### **III. The attorney's fees provision was intended to benefit SSA.**

Although Lundy concedes that SSA was an express third party beneficiary of the "no reemployment" provision in his settlement agreement with the City, he contends that SSA was not entitled to recover its attorney's fees under section 1717 because it failed to prove that it was a third party beneficiary of the attorney's fees provision. SSA responds that it did not have to prove that it was an intended beneficiary of the fee provision in particular, and even if such a showing was required, the "no reemployment" provision created a sufficient nexus between SSA and Lundy which extended to the enforcement of the fee provision.

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<sup>3</sup> In a single footnote in its respondent's brief, SSA stated that, in addition to being a third party beneficiary of Lundy's settlement agreement with the City, SSA was "like an assignee" because SSA accepted the City's tender to defend and indemnify it in Lundy's personal injury action. Lundy requests that this argument also be disregarded on appeal because it was never raised in the trial court. In light of our conclusion that SSA was entitled to enforce the fee provision as a third party beneficiary, we need not consider the parties' arguments regarding SSA's purported status as an assignee.

“A third party beneficiary may enforce a contract made expressly for his or her benefit. [Citation.]” (*Sessions, supra*, 84 Cal.App.4th at p. 680.) A party not named in a contract may also qualify as a third party beneficiary “where the agreement reflects the intent of the contracting parties to benefit the unnamed party.” (*Cargill, supra*, 201 Cal.App.4th at p. 967.) “The party claiming to be a third party beneficiary bears the burden of proving that the contracting parties actually promised the performance which the third party beneficiary seeks. This remains largely a question of interpreting the written contract. [Citation.]” (*Sessions, supra*, at p. 680.) In the context of attorney’s fees, “[a] nonsignatory seeking relief as a third party beneficiary may recover fees under a fee provision only if it appears that *the contracting parties intended* to extend such a right to one in his position. [Citation.]’ [Citation.]” (*Hyduke’s Valley Motors v. Lobel Financial Corp., supra*, 189 Cal.App.4th at p. 436.)

In *Sessions*, the Court of Appeal reversed an award of attorney’s fees to a prevailing signatory defendant on the ground that the nonsignatory plaintiff could not have recovered its fees under a third party beneficiary theory had it prevailed in the action. (*Sessions, supra*, 84 Cal.App.4th at p. 674.) The nonsignatory plaintiff, a payroll company, sued the signatory defendant, a general contractor, for breach of a contract between the general contractor and its subcontractor. (*Id.* at pp. 674-675.) The court concluded that the contract did not reflect an intent by the general contractor and the subcontractor to include the payroll company within the contract’s fee provision. (*Id.* at p. 680.) Rather, the contract stated that “[e]xcept as specifically prescribed herein, *this Agreement shall not create any rights of or confer benefits upon, third parties.*” (*Ibid.*) The contract contained “no express recognition” of the payroll company and its fee provision only permitted the recovery of attorney’s fees “[i]n the event it becomes necessary for *either party* to enforce the provisions of this Agreement . . . .” (*Id.* at p. 681.) The court reasoned that “[e]ither’ refers only to the two parties to the contract,” and if the parties had “wanted to include someone else, their contract would have referred to ‘any’ party.” (*Ibid.*; see also *Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 896 [contractual provision for attorney’s fees in “any

litigation *between the parties hereto* to enforce any provision of this Agreement . . . ’ limit[ed] fees to litigation between the signatories”].)

In contrast, the Court of Appeal in *Real Property Services* held that a prevailing signatory defendant was entitled to attorney’s fees in an action brought by a nonsignatory plaintiff for breach of a lease agreement. (*Real Property Services, supra*, 25 Cal.App.4th at p. 377.) The agreement signed by the defendant lessor specifically provided that the property would be subleased to the plaintiff. (*Ibid.*) Although a fee provision in the agreement limited the recovery of attorney’s fees to “any action or proceeding brought by either party against the other under this Lease,” the court concluded that the nonsignatory plaintiff would have been entitled to recover its fees as a third party beneficiary had it prevailed in the action. (*Id.* at pp. 377, 383.) The court explained that the agreement expressly provided for the plaintiff to be the sublessee of the property, “thereby establishing a nexus” between the signatory lessor and the nonsignatory sublessee. (*Id.* at p. 383.) Because the lessor would have been liable for the sublessee’s attorney’s fees if it had breached the lease agreement, it was entitled to recover its fees from the sublessee in successfully defending the action. (*Id.* at pp. 383-384.)

Similarly, in *Loduca*, the Court of Appeal affirmed an award of attorney’s fees to a nonsignatory plaintiff, a property owner, who successfully sued a signatory defendant, a subcontractor, for breach of a construction contract between the subcontractor and the general contractor. (*Loduca, supra*, 153 Cal.App.4th at p. 337.) The contract included a fee provision stating that “[i]f a court action is brought, prevailing party to be awarded attorney fees and collection costs . . . .” (*Ibid.*) In determining that the nonsignatory property owner was entitled to enforce the fee provision as a third party beneficiary, the court noted that “[u]nlike the clause at issue in either *Sessions Payroll* or *Real Property Services*, this clause makes no reference to a particular party to the contract bringing the suit. It simply states if a court action is brought, presumably on the contract, then the party that prevails in the action will be awarded fees.” (*Id.* at p. 343.) Additionally, “[t]he contract contains no limitation by [the subcontractor] on any rights that [the owner] could derive from the contract . . . . Since [the owner] had paid [the subcontractor]

directly, [the subcontractor] likely understood the party most likely to bring such a claim was [the owner]. (*Id.* at p. 345.) Under such circumstances, the court concluded that the contracting parties “intended [the owner’s] enforcement right to include a right to attorney fees.” (*Id.* at p. 344; see also *Cargill, supra*, 201 Cal.App.4th at pp. 969-970 [fee provision applied to nonsignatory where contract “reflect[ed] an intent to benefit” nonsignatory and did “not express a clear intent to limit attorney fees” to signatories].)

In this case, the record reflects that SSA was an intended beneficiary of Lundy’s settlement agreement with the City, including the attorney’s fees provision. As the lessee of the property on which Lundy was injured, SSA had a contractual duty to defend and indemnify the City in Lundy’s personal injury action. Lundy’s settlement agreement with the City was part of a global settlement of both his workers’ compensation and personal injury claims and was contingent upon the Department of Labor’s approval of his settlement agreement with SSA. Both Lundy and his counsel also understood that his settlement agreement with the City was contingent upon the inclusion of the “no reemployment” provision, which Lundy concedes was made for the express benefit of SSA. After agreeing to the “no reemployment” provision, Lundy accepted the settlement payment directly from SSA and reasonably should have known that SSA was the party most likely to bring a claim if he breached the provision. Lundy admits that the underlying action arose out of his breach and SSA ultimately prevailed in enforcing the provision as a third party beneficiary. Indeed, in granting summary judgment to SSA on the ground that the “no reemployment” provision was valid and enforceable, the trial court specifically found that SSA was a third party beneficiary of Lundy’s settlement agreement with the City and Lundy did not appeal that finding.

The plain language of the fee provision in Lundy’s settlement agreement further supports the conclusion that it was intended to benefit SSA. As in *Loduca*, the fee provision at issue here does not limit the recovery of attorney’s fees to the signatories to the settlement agreement. It makes no reference to a particular party to the agreement bringing a legal action or recovering attorney’s fees. Rather, it broadly provides that “[i]f any litigation should arise out of this Agreement, the prevailing party in such litigation

shall recover from the losing party its reasonable attorneys' fees and costs incurred in such litigation." The other provisions in the settlement agreement likewise impose no express limitation on third party rights. Under these circumstances, SSA's rights as a third party beneficiary of the "no reemployment" provision included a right to recover its attorney's fees as the prevailing party in an action to enforce such provision.

#### **IV. The attorney's fees provision reflects a mutuality of remedy.**

Alternatively, Lundy asserts that even if SSA met its burden of showing that it was a third party beneficiary of the fee provision, it failed to prove that Lundy would have been entitled to recover his attorney's fees from SSA had he prevailed in the underlying action. Lundy reasons that if he had prevailed in the action by successfully arguing that the "no reemployment" provision was void as against public policy, the entire settlement agreement would have been deemed illegal, thereby precluding the recovery of attorney's fees by either party. This argument also fails.

Ordinarily, a prevailing party "is entitled to attorney fees under section 1717 'even when the party prevails on grounds the contract is inapplicable, invalid, unenforceable or nonexistent, if the other party would have been entitled to attorney's fees had it prevailed.' [Citations.]" (*Hsu v. Abbata* (1995) 9 Cal.4th 863, 870.) However, as noted in *Bovard v. American Horse Enterprises, Inc.* (1988) 201 Cal.App.3d 832 (*Bovard*) and *Geffen v. Moss* (1975) 53 Cal.App.3d 215 (*Geffen*), "a different rule applies where a contract is held unenforceable because of illegality." (*Bovard, supra*, at p. 843, citing *Geffen, supra*, at p. 227.) "A party to a contract who successfully argues its illegality stands on different ground than a party who prevails in an action on a contract by convincing the court the contract is inapplicable, invalid, nonexistent or unenforceable for reasons other than illegality." (*Bovard, supra*, at p. 843.) "[W]here neither party can enforce the agreement there is no need for a mutual right to attorney's fees." (*Ibid.*)

This case, however, is distinguishable from *Bovard* and *Geffen*. Unlike the prevailing parties in those cases, Lundy did not successfully argue the illegality of the contract at issue. Although Lundy contended that the "no reemployment" provision in

his settlement agreement with the City was void as against public policy, the trial court concluded that the “no reemployment” provision was valid and enforceable by SSA and this Court previously affirmed that ruling. Moreover, Lundy’s position in the underlying action and in his prior appeal was that the “no reemployment” provision was severable such that if the provision was held to be invalid, the rest of the settlement agreement would remain fully enforceable, including the consideration paid to Lundy. Therefore, if Lundy had prevailed in the action and obtained the specific relief that he sought, he would have been entitled to enforce the attorney’s fee provision.

Contrary to Lundy’s contention, the plain language of the fee provision also supports the conclusion that SSA would have been liable for Lundy’s attorney’s fees if Lundy had been the prevailing party. The fee provision clearly reflects the mutuality of remedy required by section 1717. Accordingly, if Lundy had prevailed in the underlying action by proving that the “no reemployment” provision was unenforceable, he would have been entitled to recover his attorney’s fees from SSA. Likewise, if Lundy had brought a separate action against SSA arising out of the settlement agreement and had prevailed in that action, the fee provision would have allowed Lundy to recover his attorney’s fees from SSA. The fact that SSA was a nonsignatory to the settlement agreement would not have precluded Lundy from asserting a contractual right to attorney’s fees as a prevailing party. As the Court of Appeal stated in *Real Property Services*, “[w]here a nonsignatory plaintiff sues a signatory defendant in an action on a contract and the signatory defendant prevails, the signatory defendant is entitled to attorney fees . . . if the nonsignatory plaintiff would have been entitled to its fees if the plaintiff had prevailed.” (*Real Property Services, supra*, 25 Cal.App.4th at p. 382.)

Because SSA was entitled to recover its attorney’s fees from Lundy as a third party beneficiary of the fee provision, Lundy would have had the same right to recover his attorney’s fees from SSA if he had been the prevailing party. Consequently, the trial court did not err in awarding attorney’s fees to SSA under section 1717.

## **DISPOSITION**

The post-judgment order awarding attorney's fees to SSA is affirmed. SSA shall recover its costs on appeal.

ZELON, J.

We concur:

PERLUSS, P. J.

SEGAL, J.<sup>\*</sup>

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<sup>\*</sup> Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.