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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

MASOOD BEHSHID et al.,

Plaintiffs and Appellants,

v.

WASIL PETROS,

Defendant and Respondent.

B236530

(Los Angeles County
Super. Ct. Nos. YC060939, 08Z00277)

APPEAL from an order of the Superior Court of Los Angeles County. William G. Willett, Judge. Reversed.

Salek Law Firm and Keith Salek for Plaintiffs and Appellants.

Law Offices of Larry Fabrizi and Larry Fabrizi for Defendant and Respondent.

INTRODUCTION

Appellants Masood and Tahareh Behshid filed a complaint alleging that respondent Wasil Petros violated the terms of a lease agreement by failing to pay rent and subletting the property to a third party. The complaint asserted claims for breach of contract, fraud and civil conspiracy. In his answer, Petros alleged that a third party had forged his signature on the lease agreement. The Behshids then voluntarily dismissed him from the lawsuit.

Following his dismissal, Petros filed for attorney's fees incurred in defense of the noncontract claims. In opposition, the Behshids asserted that Petros could not enforce the attorney's fees provision because he admitted that he was not a party to the lease agreement.

The trial court ruled that although Petros was not a party to the agreement, Civil Code section 1717 permitted him to enforce the attorney's fees provision on the noncontract claims. The court entered an order awarding Petros approximately \$50,000 in attorney's fees. The Behshids appeal, arguing that section 1717 does not permit a nonsignatory to enforce a contractual attorney's fees provision on noncontract claims. We agree and reverse.

FACTUAL AND PROCEDURAL BACKGROUND

A. Events Preceding Petros's Motion for Attorney's Fees

Appellants Masood and Tahareh Behshid filed a complaint alleging that Wasil Petros signed a lease agreement that required him to pay \$7,000 a month to reside in a house located in Rancho Palos Verdes, California.¹ The Behshids further alleged that, shortly after signing the lease, Petros transferred possession of the home to a third party, Marie Bruno, and failed to make rent payments. The complaint, which listed several co-

¹ The Behshids filed an original complaint and four amended complaints. This procedural summary refers to the allegations in the third and fourth amended complaints, which include identical allegations against Petros.

defendants and over a dozen causes of action, asserted only three claims against Petros: breach of contract, fraud in the inducement and civil conspiracy. The fraud and conspiracy claims alleged that, prior to signing the lease, Petros misrepresented that he would occupy the residence when, in fact, he intended to sublet the premises to Bruno and her family. The complaint was accompanied by a copy of the lease agreement, which appeared to be signed by Petros.

In his answer, Petros asserted that he “did not sign the documents set forth in [the complaint]” and that the “signature to the documents purporting to be that of [Petros] was forged and made without [his] authority.” During the litigation, Petros also filed a declaration in support of a motion for summary judgment stating that he had not signed the lease agreement or authorized anyone to sign the agreement. The declaration further stated that he did not know any of the co-defendants named in the lawsuit. While the motion for summary judgment was pending before the court, the Behshids filed a request to dismiss all claims against Petros with prejudice. On June 6, 2011, the court granted the request.

B. Petros’s Motion for Attorney’s Fees

After being dismissed from the lawsuit, Petros filed a motion arguing that he was entitled to attorney’s fees incurred in defense of the noncontract claims pursuant to a clause in the lease agreement stating: “In any action or proceeding arising out of this Agreement, the prevailing party between Landlord and Tenant shall be entitled to reasonable attorney’s fees and costs. . . .” Petros asserted that, in light of this contractual provision, the trial court was authorized to award him attorney’s fees under Civil Code section 1717 or as a form of recoverable cost under Code of Civil Procedure sections 1032 and 1033.5, subdivision (a)(10).²

Petros argued that although he was not a signatory to the lease agreement, section 1717’s reciprocity provisions permitted him to enforce the attorney’s fees provision. Petros acknowledged that, under section 1717, subdivision (b)(2), the Behshids’

² Unless otherwise noted, all further statutory citations are to the Civil Code.

voluntary dismissal precluded him from recovering fees incurred in defense of the breach of contract claim. He asserted, however, that subdivision (b)(2) did not preclude him from recovering fees incurred in defense of the Behshids' fraud-based claims. Petros also argued that the trial court should not apportion fees among the contract and fraud claims because all of the claims involved common issues.

The Behshids, in opposition, argued that Petros was not entitled to fees on any of their claims. First, the Behshids agreed with Petros that, under section 1717, subdivision (b)(2), their voluntary dismissal precluded Petros from recovering fees incurred on the breach of contract claim. Second, they argued that section 1717 did not allow a nonsignatory to enforce an attorney's fees provision on fraud-based claims.

After hearing argument, the trial court awarded Petros attorney's fees on the fraud-based claims only. In regards to the contract claim, the court explained that Petros was "not entitled to his attorney's fees pursuant to California Civil Code section 1717 as Plaintiffs' [complaint] was dismissed with prejudice." In regards to the fraud-based claims, the court stated: "Plaintiffs' counsel argued because Petros did not sign the lease agreement . . . , there is no contract and therefore Petros is not entitled to attorney's fees he incurred in defending the tort causes of action. This Court finds said argument unpersuasive. [¶] . . . Petros does not have to be a signatory to the contract before he can enforce the provision of attorney's fees in said contract. In *Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 128 [*Reynolds*], the Supreme Court interpreted section 1717 to provide a reciprocal remedy for a nonsignatory defendant, sued on a contract as if he were a party to it, when a plaintiff would clearly be entitled to attorney's fees should he prevail in enforcing the contractual obligation against the defendant."

The court concluded that, as in *Reynolds*, Petros had been sued on a contract that would have entitled the Behshids to attorney's fees had they prevailed in the action. As a result, section 1717 permitted Petros to enforce the attorney's fees provision on the noncontract claims. The court also concluded that it was not required to apportion attorney's fees among the contract and fraud-based claims because the "breach of contract and the tort related causes of action are intertwined." The court awarded Petros

\$49,500 “as reasonable attorney’s fees in defending this action.” The Behshids filed a timely appeal of the order.

DISCUSSION

The Behshids argue that the trial court erred in concluding that section 1717 permitted Petros, a nonsignatory, to enforce the lease agreement’s attorney’s fees provision for costs incurred in defense of their noncontract claims. The Behshids contend that while section 1717 has been interpreted to allow a nonsignatory to enforce an attorney’s fees provision in contract actions, the section does not apply to the tort-based claims at issue here. They further contend that Petros’s status as a nonsignatory precludes an award of attorney’s fees under Code of Civil Procedure section 1033.5.³

A. Standard of Review

“The issues presented by this appeal involve statutory and case law respecting an award of attorney’s fees. We, therefore, review the matter as a pure question of law. [Citation.] There are no relevant evidentiary disputes and the determination of the trial court did not require an exercise of discretion. Consequently, this appeal does not involve the resolution of disputed facts, and is subject to the appellate court’s de novo review.” (*Topanga and Victory Partners v. Toghia* (2012) 103 Cal.App.4th 775, 779-780 (*Topanga*).)

³ The Behshids raise several additional arguments regarding the award of attorney’s fees, including: (1) the trial court erred in concluding that Petros qualified as a “prevailing party”; (2) the trial court was required to apportion attorney fees between the contract and noncontract claims; and (3) Petros failed to submit sufficient evidence to demonstrate the reasonableness of his fee request. Because we conclude that Petros was not entitled to recover attorney fees on any of the Behshids’ claims, we need not address these additional issues.

B. Summary of Relevant Statutes and Case Law

In the trial court proceedings, Petros asserted that he was entitled to attorney's fees pursuant to two different statutes: Civil Code section 1717 and Code of Civil Procedure section 1033.5. As summarized below, both sections describe circumstances under which a trial court may award attorney's fees pursuant to a contractual provision.

1. Attorney's fees as a recoverable cost under Civil Code sections 1032 and 1033.5

Code of Civil Procedure sections 1032 and 1033.5 authorize a trial court to award attorney's fees as a form of costs if the parties have entered into a contractual provision that permits such an award. Section 1032, subdivision (b) states that "a prevailing party" is "entitled as a matter of right to recover costs in any action or proceeding." Section 1033.5, subdivision (a)(10), in turn, "provides . . . that attorney fees are 'allowable as costs under Section 1032' when they are 'authorized by' either 'Contract,' 'Statute,' or 'Law.'" Thus, recoverable litigation costs do include attorney fees, but only when the party entitled to costs has a [contractually based right or other] legal basis, independent of the cost statutes." (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 606-607 (*Santisas*).)

To assess whether a prevailing party is entitled to fees under section 1033.5, courts must determine: (1) whether the parties entered into a contract containing an attorney's fees provision, and (2) whether the language of the contractual provision permits recovery for the type of claim on which the party prevailed. (See generally *Super 7 Motel Associates v. Wang* (1993) 16 Cal.App.4th 541, 544 (*Super 7 Motel*).) For example, a provision providing attorney's fees for any claim "arising out of th[e] agreement" has been held to be "sufficiently broad 'to encompass both contract actions and actions in tort,'" which includes "any action for fraud arising out of the agreement." (*Lerner v. Ward* (1993) 13 Cal.App.4th 155, 160.)

2. Section 1717 and reciprocity of attorney's fees

Section 1717, subdivision (a) states, in relevant 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 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 in which section 1717 makes an otherwise unilateral right reciprocal, thereby ensuring mutuality of remedy, 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].” (*Santisas, supra*, 17 Cal.4th at pp. 610-611.)

“The second situation in which section 1717 makes an otherwise unilateral right reciprocal, thereby ensuring mutuality of remedy, 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.]” (*Santisas, supra*, 17 Cal.4th at p. 611.) This includes cases in which “a party is sued on a contract providing for an award of attorney fees to which he is not a party.” (*Topanga, supra*, 103 Cal.App.4th at p. 780.)

The California Supreme Court has explained that section 1717 “would fall short of th[e] goal of full mutuality of remedy if its benefits were denied to parties who defeat contract claims by proving that they were not parties to the alleged contract or that it was never formed.” (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 870.) “Because these arguments are inconsistent with a contractual claim for attorney fees under the same agreement, a

party prevailing on any of these bases usually cannot claim attorney fees as a contractual right. If section 1717 did not apply in this situation, the right to attorney fees would be effectively unilateral—regardless of the reciprocal wording of the attorney fee provision allowing attorney fees to the prevailing attorney—because only the party seeking to affirm and enforce the agreement could invoke its attorney fee provision. 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 . . . 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.” (*Santisas, supra*, 17 Cal.4th at p. 611.)

Section 1717 has two significant limitations. First, the statute is “limited [to] *only* contract actions, where the theory of the case is breach of contract, and where the contract sued upon itself specifically provides for an award of attorney fees incurred to enforce *that* contract.” (*Xuereb v. Marcus & Millichap, Inc.* (1992) 3 Cal.App.4th 1338, 1342.) Section 1717 generally does not apply to noncontract causes of action, such as “fraud [based claims] arising out of a contract” that contains an attorney fees provision. (*Stout v. Turney* (1978) 22 Cal.3d 718, 730.) “If an action asserts both contract and tort or other noncontract claims, section 1717 applies only to attorney fees incurred to litigate the contract claims. [Citation.]” (*Santisas, supra*, 17 Cal.4th at p. 615.)

Second, section 1717 does not permit an award of attorney’s fees if the plaintiff voluntarily dismisses his or her contract claims against the defendant. The statute states that there shall be no prevailing party where “[w]here an action has been voluntarily dismissed or dismissed pursuant to a settlement of the case.” (§ 1717, subd. (b)(2).) Therefore, “[w]hen a plaintiff files a complaint containing causes of action within the scope of section 1717 (that is, causes of action sounding in contract and based on a contract containing an attorney fee provision), and the plaintiff thereafter voluntarily dismisses the action, section 1717 bars the defendant from recovering attorney fees incurred in defending those causes of action” (*Santisas, supra*, 17 Cal.4th at p. 617.)

In *Santisas v. Goodin, supra*, 17 Cal.4th 599, the Supreme Court clarified that section 1717, subdivision (b)(2)’s voluntary dismissal provisions do not apply to

attorney's fees incurred in defense of noncontract claims that would otherwise be recoverable as a cost under section 1033.5, subdivision (a)(10). The plaintiffs in *Santisas* filed an action alleging that the sellers of a residential property failed to disclose "certain . . . defects in [the] home." (*Id.* at p. 603.) The complaint included numerous causes of action arising from the nondisclosures, including breach of the purchase agreement, negligence and deceit. The complaint was accompanied by a copy of the purchase agreement, which contained the following provision: "In the event legal action is instituted by . . . any party to this agreement, or arising out of the execution of this agreement or the sale, . . . the prevailing party shall be entitled to receive from the other party a reasonable attorney fee to be determined by the court in which such action is brought." (*Ibid.*)

After discovery proceedings, the plaintiffs voluntarily dismissed the action with prejudice. The defendants "then moved to recover their attorney fees as costs under Code of Civil Procedure sections . . . 1032, and 1033.5, and under the attorney fee provision in the real estate purchase agreement." (*Santisas, supra*, 17 Cal.4th at pp. 603-604.) In opposition, plaintiffs argued that section 1717, subdivision (b)(2) "preclude[d] an award of attorney fees under a contractual attorney fee provision following a voluntary dismissal of the action." (*Id.* at p. 604.) The trial court, however, concluded that section 1717 only applied to the contract claim and awarded fees incurred on the plaintiffs' noncontract claims.

The California Supreme Court granted review on the following issue: "When a plaintiff has voluntarily dismissed before trial an action asserting both tort and contract claims, all of which arise from a . . . contract containing a broadly worded attorney fee provision, may the defendant recover any of the attorney fees incurred in defending the action? Or is any or all of such recovery precluded by . . . Civil Code section 1717 . . .?" (*Santisas, supra*, 17 Cal.4th at p. 602.)

The court concluded that section 1717, subdivision (b)(2)'s voluntary dismissal provision "applies *only* to causes of action that are based on the contract and are therefore within the scope of section 1717. If the voluntarily dismissed action also asserts causes

of action that do not sound in contract, those causes of action are not covered by section 1717, and the attorney fee provision, depending upon its wording, may afford the defendant a contractual right, not affected by section 1717, to recover attorney fees incurred in litigating those causes of action. Similarly, if a plaintiff voluntarily dismisses an action asserting *only* tort claims (which are beyond the scope of section 1717), and the defendant, relying on the terms of a contractual attorney fee provision, seeks recovery of *all* attorney fees incurred in defending the action, the plaintiff could not successfully invoke section 1717 as a bar to such recovery.” (*Santisas, supra*, 17 Cal.4th at p. 617.)

In summarizing its holding, the court reiterated that although a plaintiff’s voluntary dismissal precludes a defendant from recovering fees incurred in defending contract claims, a dismissal does “not affect the . . . defendants’ right to recover as costs the attorney fees they incurred in defense of the tort claims. Because section 1717 does not apply to those claims [citations], it does not bar recovery of attorney’s fees that were incurred in litigation of those claims and that are otherwise recoverable as a matter of contract law.” (*Santisas, supra*, 17 Cal.4th at p. 619.)

C. Petros Is Not Entitled to Attorneys Fees Incurred in Defending the Noncontract Claims

The parties are in agreement with respect to a number of issues. First, the parties agree that, under section 1717, subdivision (b)(2), Petros is not eligible to recover attorney’s fees incurred in defending the breach of contract claim because he was voluntarily dismissed from the action. Second, they agree that, under the Supreme Court’s holding in *Santisas*, section 1717, subdivision (b)(2) does not preclude Petros from recovering attorney’s fees incurred in litigating the noncontract claims if such fees “are otherwise recoverable as a matter of contract law.” (*Santisas, supra*, 17 Cal.4th at p. 619.) Third, the parties do not dispute that the language of the attorney’s fees provision in the lease agreement, which applies to all claims “arising from the contract,” is broad enough to encompass the type of tort claims alleged in the Behshids’ complaint. Accordingly, the only issue in this case is whether Petros may enforce the lease

agreement's attorney's fees provision to recover fees he incurred in defense of the fraud-based claims.

The Behshids argue that fundamental principles of contract law dictate that Petros cannot enforce the attorney's fees provision in regards to the fraud-based claims because he was not a signatory to the lease agreement. The Behshids contend that although the reciprocity provisions in section 1717 permit a nonsignatory to enforce a contractual attorney's fees provision when he or she prevails on a contract claim, the section does not permit a nonsignatory to recover fees for noncontract claims.

Petros, however, argues that the trial court correctly concluded that his status as a nonsignatory did not preclude him from enforcing the attorney's fees provision in regards to the noncontract claims. Alternatively, Petros contends that, despite his repeated admissions that he was a nonsignatory to the lease agreement, we must treat him as a signatory because the Behshids' complaint alleges he signed the document.

1. Section 1717 does not permit a nonsignatory to enforce an attorney's fees provision on noncontract claims

We first consider whether Petros, as a prevailing nonsignatory, is entitled to enforce an attorney's fees provision on noncontract claims. The trial court answered this question in the affirmative, explaining that, under the Supreme Court's holding in *Reynolds, supra*, 25 Cal.3d 124, "Petros does not have to be a signatory to the contract before he can enforce the provision of attorney's fees in said contract." In *Reynolds*, the Supreme Court held that section 1717 "provide[s] a reciprocal remedy for a nonsignatory defendant, sued on a contract as if he were a party to it, when a plaintiff would clearly be entitled to attorney's fees should he prevail in enforcing the contractual obligation against the defendant." (*Id.* at p. 128.)

Two cases decided after *Reynolds* have concluded that section 1717's reciprocity provisions do not apply to a nonsignatory seeking to recover fees incurred in litigating noncontract claims. In *Super 7 Motel Associates v. Wang, supra*, 16 Cal.App.4th 541, plaintiffs filed a complaint alleging that a seller and its real estate broker, Kenneth Wang,

“had engaged in fraud by failing to disclose certain information” about a property. (*Id.* at p. 544.) Although the plaintiffs prevailed against the seller, they received no relief against Wang. Wang moved for attorney’s fees pursuant to a provision in the sales contract stating: ““In any action or proceeding arising out of this agreement, the prevailing party shall be entitled to reasonable attorney’s fees and costs.”” (*Id.* at p. 544.) Wang asserted that, regardless of whether he was a party to the contract, he was permitted to enforce this provision pursuant to section 1717. The trial court agreed and granted the motion.

The appellate court reversed. The court began its analysis by summarizing the “fundamental principles” that govern whether a party is entitled to contractual attorney’s fees. (*Super 7 Motel, supra*, 16 Cal.App.4th at p. 544.) The court explained that “[o]rdinarily, [contractual] attorney fees can only be awarded when the lawsuit (1) involves a claim covered by a contractual attorney fee clause [citation] and (2) is between the parties to that contract [citation]. The first issue (the claims issue) essentially . . . requires the court to examine the language of the contractual clause to determine whether the nature of the claims asserted by plaintiff fall within the intended scope of the attorney fee clause. [Citation.] [¶] The second issue (the parties issue) also requires that [the court] examine the operative contract to determine if the parties to the lawsuit were also parties to the attorney fee clause covering the disputed claims. In some cases, however, the parties issue also involves the reciprocity principles embodied in Civil Code section 1717, because under some circumstances a nonsignatory to the contract will be *deemed* entitled to the benefits of the attorney fee clause” (*Id.* at pp. 544-545.)

The court further explained that, under the Supreme Court’s holding in *Reynolds*, the “circumstances” under which section 1717 permits a nonsignatory to enforce a contractual attorney’s fees provision includes cases where the ““defendant [is] sued on a contract as if he were a party to it’ [Citation.]” (*Super 7 Motel, supra*, 16 Cal.App.4th at pp. 548.) According to the court, the statute did not apply to noncontract

claims such as “fraud,” even if “the underlying transaction in which the fraud occurred involved a contract containing an attorney fee clause.” (*Id.* at p. 549.)

The court found that the language of the operative contract demonstrated that Wang was not a party to the relevant attorney’s fees provision. The court further concluded that the plaintiffs’ claims against Wang “sound[ed] in tort,” and therefore section 1717 did not apply. Accordingly, Wang’s status as a nonparty precluded him from enforcing the contractual fees provision.

More recently, in *Topanga v. Toghia*, *supra*, 103 Cal.App.4th 775, Division Four of this district held that section 1717’s reciprocity provisions did not apply to nonsignatories attempting to recover fees incurred in defending noncontract causes of action. The plaintiffs filed a complaint against a medical center and its corporate officer, Nicholas Toghia, alleging breach of contract and various related tort claims. Toghia demurred to the complaint, alleging that he was not a party to the underlying contract and that plaintiffs had failed to state the elements of various tort claims. The demurrer was overruled. The plaintiffs subsequently settled with the medical center and dismissed all claims against Toghia.

Toghia then filed a motion for attorney’s fees based on a provision in the contract stating: “‘If either [plaintiffs] or [the medical center] commences or engages in, or threatens to commence or engage, in any action or litigation . . . against the other party arising out of or in connection with the Lease, . . . the prevailing party shall be entitled to have and recover from the losing party reasonable attorneys’ fees and other costs. . . .’” (*Topanga*, *supra*, 103 Cal.App.4th at p. 779.) Toghia argued that although, under section 1717, subdivision (b)(2), plaintiffs’ voluntary dismissal precluded him from recovering fees on the breach of contract claim, the Supreme Court’s holding in *Santisas* demonstrated he could still recover fees incurred in defending the tort causes of action that fell within the scope of the attorney’s fees provision.

The plaintiffs opposed the motion, arguing that Toghia could not recover fees related to the tort claims because he had previously admitted he was not a signatory to the contract. The specific question before the court was “whether a defendant who is not a

party to a contract but is sued for breach of that contract and various related tort and statutory causes of action may recover attorney's fees incurred in defending the noncontract causes of action if the plaintiff files a voluntary dismissal with prejudice." (*Topanga, supra*, 103 Cal.App.4th at p. 778.) The court concluded that, under such circumstances, section 1717 did not permit recovery.

In conducting its analysis, the court initially observed that Toghia's status as a nonparty precluded him from recovering attorney's fees as a form of cost under section 1033.5: "Toghia was not a party to the contract underlying the breach of contract cause of action and cannot rely on Code of Civil Code of Procedure section 1033.5 subdivision (a)(1)(A), authorizing an award of attorney fees as costs pursuant to a contract between the parties." (*Topanga, supra*, 103 Cal.App.4th at p. 783.)

The court then considered whether section 1717 permitted a nonsignatory to enforce an attorney's fees provision for costs incurred in defending noncontract claims. The court concluded that the Supreme Court's decisions in *Reynolds* and *Santisas* "[u]ndisputedly" demonstrated "th[at] . . . application of section 1717 is restricted to actions on contracts." (*Topanga, supra*, 103 Cal.App.4th at p. 785.)

The court concluded that Toghia was not entitled to fees on any of the claims raised in the suit: "Toghia simply misconstrues the application of section 1717 to apply to noncontract causes of action. In this case, Toghia was sued on a contract to which he was not a party and is entitled to section 1717 as applied in *Reynolds* [citation], but is denied that relief because the action was voluntarily dismissed. [Citation.] He, however, is not in the same position as the defendants in *Santisas*, who were also denied attorney fees incurred in the defense of the contract action based on section 1717, subdivision (b)(2), but were awarded attorney fees incurred to defend the noncontract causes because they were signatories to the underlying contract providing for attorney fees. Toghia cannot recover attorney fees under that contract and claim to be the prevailing party pursuant to Code of Civil Procedure section 1032 . . . because he simply was not a party to that contract. No application of section 1717 or case authority on which Toghia relies changes this result." (*Topanga, supra*, 103 Cal.App.4th at p. 786. Where, as in these tort

claims, section 1717 does not provide a basis for relief, it is the terms of the contract that determine the scope of the right to fees; a nonsignatory has no such rights unless granted by the parties. See also *Moallem v. Coldwell Bank Commercial Group* (1994) 25 Cal.App.4th 1827 [section 1717 does not permit prevailing party on noncontract claim to enforce a unilateral attorney's fees provision].)

Super 7 Motel and *Topanga* specifically concluded that where a nonsignatory defendant prevails on a tort claim arising from a contract containing an attorney fee provision, section 1717 does not permit that party to recover fees. *Topanga*, in particular, is indistinguishable from the facts presented here. Like the plaintiffs in *Topanga*, the Behshids filed a complaint asserting both contract and noncontract causes of action against Petros arising from an agreement containing a broadly worded attorney's fees provision. Like the defendant in *Topanga*, Petros responded to that complaint by denying that he was a party to the contract and was then voluntarily dismissed from the action. Petros now argues that, despite his status as a nonparty, he may recover attorney's fees incurred in defense of the noncontract claims because the plaintiffs would have been entitled to attorney's fees under the contract had they prevailed. That is the same claim that was considered and rejected in *Topanga*.

Petros, however, argues that *Topanga* is distinguishable because the defendant in that case only sought fees under section 1717, whereas Petros has requested fees under section 1717 and Code of Civil Procedure section 1033.5. Petros appears to argue that, even if section 1717 does not apply to his noncontract claims, section 1033.5 provides an independent basis for an award of fees. Section 1033.5, however, merely authorizes the trial court to award attorney's fees as a form of cost where such fees are otherwise recoverable as a matter of contract law. *Topanga* addressed this point, explaining that although the defendant had not sought recovery of attorney fees under section 1033.5, he would have been precluded from doing so: "Toghia was not a party to the contract underlying the breach of contract cause of action and cannot rely on Code of Civil Code of Procedure section 1033.5 subdivision (a)(1)(A), authorizing an award of attorney fees as costs pursuant to a contract between the parties." (*Topanga, supra*, 103 Cal.App.4th at

p. 783.) Similarly, in *Santisas*, the Supreme Court explained that, in the absence of section 1717, a party who successfully argues that he or she is not subject to a contract containing an attorney's fees provision "cannot claim attorney fees as a contractual right." (*Santisas, supra*, 17 Cal.4th at 611.) These authorities make clear that, without the reciprocity provisions of section 1717, a prevailing party is generally precluded from enforcing an attorney's fees provision appearing in a contract to which he was not a party.

In sum, "fundamental principles" of contract law dictate that a defendant may not enforce a contractual attorney's fees provision unless he or she was a party to the contract. (*Super 7 Motel, supra*, 16 Cal.App.4th at p. 544.) Although section 1717 alters those rules when a defendant has prevailed on a contract claim, the statute does not apply to the fraud-based claims at issue here. Thus, the normal rules of contract law apply and Petros's status as a nonparty precludes him from enforcing the attorney fee provision.

2. *Petros is bound by his admission that he did not sign the lease agreement*

For the first time on appeal, Petros raises an alternative argument regarding his entitlement to attorney's fees. Petros contends that, despite his repeated admissions that he did not sign the lease agreement, we must treat him as a signatory because the Behshids' complaint alleges that he signed the document.

The answer Petros filed in the trial court states that he did not sign the lease agreement containing the attorney fee provision and that his signature was forged on the document without his authority. Petros never wavered from this position during the trial court proceedings. A declaration Petros filed in support of his motion for summary judgment states, under the penalty of perjury, that he did not sign the lease agreement or "authorize anyone" to sign the agreement on his behalf. Petros made identical statements in his sworn discovery responses.

Normally, when a "pleading[] contain[s] allegations of fact in support of a claim or defense, the opposing party may rely on the factual statements as [a] judicial

admission[. [Citation.]]” (*Myers v. Trendwest Resorts, Inc.* (2009) 178 Cal.App.4th 735, 746.) “Facts established by pleadings . . . “ . . . may not be contradicted by the party whose pleadings are used against him or her.” [Citations.] “[A] pleader cannot blow hot and cold as to the facts positively stated.” [Citation.]’ [Citation.]” (*Ibid.*) Petros’s answer, which denies that he signed or otherwise entered into the lease agreement, qualifies as a pleading. (*Ibid.*; see also Code of Civ. Proc., § 422.10.) Thus, under standard rules of procedure, it is clear that Petros would be bound by his allegation that he was neither a signatory nor a party to the lease agreement.

Petros, however, argues that different rules apply in the context of this case. In support, he cites language in *Manier v. Anaheim* (1984) 161 Cal.App.3d 503 (*Manier*) stating that “[w]hether a party is entitled to attorney fees for the purpose of invoking Civil Code section 1717 depends not on the evidence adduced at trial or some interim proceeding, but on the pleadings.” (*Id.* at pp. 508.) Petros contends that, under *Manier*, courts must look solely at the allegations in the complaint when assessing whether a litigant is a party to a contractual attorney’s fees provision. This argument is without merit.

The language Petros cites from *Manier* refers to the procedure courts use to determine whether a prevailing defendant sued on a contract containing an attorney’s fees provision is entitled to mutuality of remedy under section 1717. The plaintiff in *Manier* alleged that the defendant breached a contract that contained an attorney’s fees provision. The plaintiff sought contract damages and attorney’s fees. After a bench trial, the court, ruled that the evidence showed the contract was not an enforceable agreement. Thereafter, the defendant moved for attorney’s fees pursuant to section 1717. The trial court denied the motion, concluding that section 1717 was inapplicable because the contract was unenforceable.

The appellate court reversed, explaining that, for the purposes of section 1717, it was irrelevant that plaintiffs “failed” to “prov[e] the viability” of their contract claim. (*Manier, supra*, 161 Cal.App.3d at p. 508.) The court then employed the language cited by Petros, stating that the allegations in the pleadings controlled whether a prevailing

defendant was entitled to mutuality of remedy under section 1717, not the evidence introduced at trial. According to the court, the key inquiry was whether the plaintiff “would have been entitled to attorneys fees if their complaint had merit.” (*Ibid.*)

The language from *Marnier* is merely a restatement of the well-established rule 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’s fees whenever the opposing parties would have been entitled to attorney’s fees under the contract had they prevailed.” (*Santisas, supra*, 17 Cal.4th at p. 611.)⁴ This rule has no relevance to noncontract claims, which are not governed by section 1717.

DISPOSITION

The trial court’s order awarding attorney’s fees is reversed. Appellants shall recover their costs on appeal.

ZELON, J.

We concur:

PERLUSS, P. J.

JACKSON, J.

⁴ Several courts have criticized *Marnier* to the extent it suggests that section 1717 permits a prevailing nonsignatory to recover fees whenever the losing party has claimed a contractual entitlement to such fees. According to these courts, the rule, properly stated, is that the prevailing nonsignatory must “show the plaintiff[s] would *actually* have been entitled to fees” had they prevailed on their claims. (*Super 7 Motels, supra*, 16 Cal.App.4th at p. 549; *Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 897-902.) That issue is not relevant here.