Filed 2/19/13 Marik v. University Village CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

JAROSLAV MARIK et al., Plaintiffs and Appellants, v. UNIVERSITY VILLAGE, LLC, et al., Defendants and Respondents.	B236248 consolidated w/B236249 (Los Angeles County Super. Ct. Nos. BC330740 & BC335861)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mary Ann Murphy, Judge. Reversed in part and remanded with directions and affirmed in part.

Joseph J. M. Lange Law Corporation and Joseph J. M. Lange for Plaintiffs and Appellants.

Daniels, Fine, Israel, Schonbuch & Lebovits, Moses Lebovits, Robert P. Moore and Scott Brooks for Defendants and Respondents.

Plaintiffs and appellants Jaroslav Marik (Marik) and Letkov Financial Partners, L.P. (Letkov) (collectively, plaintiffs or Marik) appeal a judgment insofar as it awarded attorney fees to defendants and respondents in the sum of $130,137.50, which the defendants incurred in connection with plaintiffs' previous appeal from a judgment confirming an arbitration award.

The essential issue presented is whether there was a contractual basis for the award of attorney fees to the nine discrete defendants and respondents, namely: Peter Henman aka Peter Henman-Laufer (Henman); Jerry L. Kay (Kay); Moravan Management, Inc. (Moravan); University Village, LLC (UV-LLC); University Village-Phase 1A, LLC (erroneously sued as University Village Building A, LLC) (hereafter, UV 1-A); University Village Building B, LLC (UV-B); University Village Building E (UV-E); University Village Building F/G (UV-F/G); and University Village Building 5 (UV-5) (collectively, the UV defendants).

We conclude the trial court erred in making a collective award of attorney fees to all nine moving defendants without a contractual basis for doing so. The attorney fee ruling is reversed and the matter is remanded to determine the amount of attorney fees, if any, to be awarded pursuant to the UV-E, UV-F/G and UV-5 operating agreements.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Earlier proceedings*.

This dispute arose from the operation and management of the University Village real estate development near UC Riverside.

On March 23, 2005 and June 29, 2005, Marik filed two related lawsuits against the various defendants, asserting claims for breach of fiduciary duty, common counts, dissolution of limited liability companies, and sought damages of $3 million, as well as an accounting, declaratory relief, appointment of a receiver and injunctive relief.

The trial court granted motions to compel arbitration in both actions, pursuant to the arbitrations provisions in the various written agreements. The matter was arbitrated before retired Judge Letteau, who returned an award in favor of the UV defendants in the sum of $516,947.69.

The UV defendants filed a petition in the superior court to confirm the award and to reduce the award to judgment.

Marik filed opposition to the petition to confirm the award and filed a cross-petition to vacate the award in its entirety. Marik contended vacatur was required because the arbitrator failed to disclose facts which would cause a reasonable person to doubt his ability to be impartial.[1] Marik asserted the arbitrator was obligated to disclose he had been admonished by the Commission on Judicial Performance in five different matters for bias and other misconduct, and the arbitrator's history surely would have caused a person who was aware of the facts to reasonably entertain a doubt that the arbitrator would be able to be impartial and to have substantial doubt as to his capacity to be impartial.

The supporting declaration of Marik's attorney, Joseph Lange (Lange) stated he was unaware of the arbitrator's admonishments by the Commission until late November or early December 2008, when he did a Google search on Judge Letteau. By then, the arbitrator already had issued his award in favor of the University Village defendants. Lange asserted he never would have agreed to allow Judge Letteau to serve as arbitrator had he known of the judge's disciplinary history.

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[1] Code of Civil Procedure section 1281.9 provides in relevant part: "(a) In any arbitration pursuant to an arbitration agreement, when a person is to serve as a neutral arbitrator, the proposed neutral arbitrator shall disclose all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial . . . ."

On March 23, 2009, the matter came on for hearing. The trial court denied Marik's cross-petition to vacate the arbitration award and granted the petition by the University Village defendants to confirm the award.

Marik appealed the judgment confirming the award.

In *Marik v. Keele* (Nov. 23, 2010, B216304 & B216035) [nonpub. opn.] this court affirmed the judgment confirming the arbitration award. We held, "Guided by the Supreme Court's recent decision in *Haworth v. Superior Court* (2010) 50 Cal.4th 372 (*Haworth*), which is binding on this court (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455), we conclude the arbitrator was not required to disclose to the parties his admonishment by the Commission. Therefore, the judgment is affirmed." (Slip opn., pp. 2-3, fn. omitted.)

The remittitur issued on March 9, 2011.

2. *Subsequent proceedings in the trial court.*

a. *Motion of UV defendants for appellate attorney fees*.

On or about April 12, 2011, the nine UV defendants filed a motion for an award of attorney fees incurred in connection with Marik's appeal from the judgment confirming the arbitration award. The UV defendants contended that as the prevailing party in the action, they were entitled to an award of reasonable attorney fees incurred in connection with Marik's appeal, in the amount of $130,137.50. The UV defendants relied on the arbitrator's earlier determination that they were entitled to an award of attorney fees pursuant to the various operating agreements as the basis for an award of appellate attorney fees.

b. *Marik's opposition to the motion for attorney fees*.

Marik's opposition focused on the general rule that a prevailing party is not entitled to attorney fees unless authorized by statute or contract. (*Deane Gardenhome Assn. v. Denktas* (1993) 13 Cal.App.4th 1394, 1397.) Marik enumerated the seven pertinent contracts and asserted there was no basis to award attorney fees to the defendants herein.

Specifically, four of the contracts, namely, the UV-LLC Operating Agreement, the UV-1A Operating Agreement, the UV-B Operating Agreement, and the agreement with Kay for legal services, did not contain an attorney fee provision.

Two of the contracts, namely the UV-E Operating Agreement and the UV-F/G Operating Agreement, did contain an attorney fee provision, but Marik was not a party to those contracts.

Only one of the contracts to which Marik was a party, namely, the UV-5 Operating Agreement, contained an attorney fee provision. Marik argued that although UV-5 could assert an entitlement to attorney fees pursuant to the terms of the UV-5 Operating Agreement, UV-5 was not entitled to fees because its conduct was not the subject of the litigation.

As for the remaining moving defendants, Henman and Moravan, they had no right to attorney fees because they were not parties to any of the three contracts which provided for attorney fees.

c. *Reply papers*.

In their reply papers, the UV defendants did not dispute Marik's position that the UV-5 Operating Agreement was the sole contract containing an attorney fee provision to which Marik was a party. The UV defendants argued they were entitled to an award of attorney fees "in that plaintiff's claims against them were based upon the operating agreements *in total*." (Italics added.) The UV defendants dismissed Marik's argument that they were "not entitled to attorneys' fees because not all of the Operating Agreements contain an attorneys' fees clause and because not all of the Defendants were signatories to every Operating Agreement. . . . Plaintiff sued Defendants for investments he made to other separate and distinct entities. Only by couching his case based upon the totality of the Operating Agreements could he hope to receive a judgment in his favor."

The UV defendants also relied on the arbitrator's determination they were entitled to attorney fees under the terms of the various operating agreements as support for their request for *appellate* attorney fees.

d. *Trial court's ruling*.

On June 29, 2011, the matter came on for hearing. The trial court ruled it was not bound by the arbitrator's earlier determination that defendants were entitled to attorney fees in the underlying arbitration; instead, the court would make an independent determination as to whether the defendants were entitled to their *appellate* attorney fees.

After hearing the matter, the trial court awarded $130,137.50, as requested, to the nine moving parties. The trial court reasoned: "Ordinarily if you have seven operating agreements, four don't have attorneys' fees, three do, we have to undertake an analysis of which work was done on which, whether there was overlapping work, whether they can be allocated. . . . But this now is a little bit of a different situation since it's an appeal from one order. So I think we're a little bit out in uncharted territory here. . . . [¶] . . . ¶] . . . [I]f this were the arbitration it would be a fairly simple exercise to look at the seven operating agreements, who did what work on each, what was intertwined, what wasn't. That's the standard form analysis of an attorneys' fee motion. We're one step removed. Now it's an appeal from one order, just one order that involved some with attorneys' fees provisions, some that didn't have. [¶] Is the correct analysis that you get everything because it was an appeal that had to be defended? It's not like seven operating agreements, it's one order, one appeal? So that analysis would be you get a hundred percent of your attorneys' fees on appeal. That would be the proper analysis."

The trial court concluded it was sufficient "[i]f there was one operating agreement that you prevailed on that had attorneys' fees in it, . . . because you had to defend that award because it was a generic attack on Judge Letteau[.]"

On August 1, 2011, the trial court entered an amended judgment, awarding $130,137.50 in attorney fees to the UV defendants in connection with Marik's appeal from the judgment confirming the arbitration award. Marik timely appealed.

CONTENTIONS

Marik contends the trial court erred in awarding attorney fees to defendants because there was no contractual basis to award attorney fees to any of the defendants except for possibly UV-5.

DISCUSSION

1. *Standard of appellate review.*

Attorney fees are not recoverable as costs unless a statute or contract expressly authorizes them. (*Sessions Payroll Management, Inc. v. Noble Construction Co*. (2000) 84 Cal.App.4th 671, 677 (*Sessions*).) "On appeal this court reviews a determination of the legal basis for an award of attorney fees de novo as a question of law. [Citations]." (*Ibid*.)

2. *Arbitrator's determination that he was empowered to award attorney fees to the UV defendants did not bind the trial court and is not binding on this court.*

The UV defendants, in their respondents' brief, cite Judge Letteau's determination that the rules of the American Arbitration Association (AAA), under which the parties agreed to arbitrate, empower the *arbitrator* to award attorney fees "if all parties have requested such an award."

However, the issue at this juncture is not whether the *arbitrator* was empowered to award attorney fees to the prevailing parties in the arbitration proceeding. Rather, the inquiry is whether the UV defendants, as prevailing parties in Marik's previous appeal, are entitled to recover reasonable appellate attorney fees they incurred in resisting the prior appeal.

On that question, neither the trial court nor this court is bound by Judge Letteau's ruling. To reiterate, "[o]n appeal this court reviews a determination of the legal basis for an award of attorney fees de novo as a question of law. [Citations]." (*Sessions, supra*, 84 Cal.App.4th at p. 677.)

3. *Trial court erred in awarding appellate attorney fees to all nine moving defendants; the right to attorney fees derives from the language of the operating agreements, not from the nature of Marik's challenge to Judge Letteau's ruling.*

The UV defendants urge this court to affirm the trial court's award of attorney fees as to all nine UV defendants, on the ground it is sufficient that at least "one of the several operating agreements provided the basis for an award of attorneys' fees."

As indicated, the trial court reasoned it was sufficient if just one of the operating agreements contained an attorney fees provision "because you had to defend that award because it was a generic attack on Judge Letteau[.]"

The trial court's ruling was clearly erroneous. Merely because Marik's previous appeal sought to overturn the arbitrator's decision on the ground of undisclosed bias was not a basis for awarding appellate attorney fees to *all nine* UV defendants after they successfully resisted Marik's appeal. Any right the UV defendants have to appellate attorney fees as the prevailing parties derives purely from the language of the various Operating Agreements.

a. *The UV-LLC, UV-1A, UV-B and Kay agreements*.

As indicated, four of the contracts, namely, (1) the UV-LLC Operating Agreement, (2) the UV-1A Operating Agreement, (3) the UV-B Operating Agreement, and (4) the agreement with Kay for legal services, do not contain an attorney fee provision. Therefore, the parties to said four agreements have no right to attorney fees.

b. *The UV-E and UV-F/G agreements*.

Two of the contracts, namely, the UV-E Operating Agreement and the UV-F/G Operating Agreement, do contain an attorney fee provision. Marik contends

these two agreements are unavailing to defendants because Marik was not a party to said agreements.

It is not that simple. " 'Where a nonsignatory plaintiff [i.e., Marik] sues a signatory defendant in an action on a contract and the signatory defendant prevails, the signatory defendant is entitled to attorney fees only if the nonsignatory plaintiff would have been entitled to its fees if the plaintiff had prevailed.' " (*Sessions, supra*, 84 Cal.App.4th at p. 679.) Therefore, an issue to be addressed on remand is whether, if Marik had prevailed on the UV-E and UV-F/G operating agreements, would Marik have been entitled to an award of attorney fees pursuant to the language found in the UV-E and UV-F/G attorney fees provisions?[2] If Marik would have been entitled to such attorney fees, then the defendants who are parties to the UV-E and UV-F/G operating agreements would be entitled to attorney fees as the prevailing parties, even though Marik was not a signatory to said operating agreements. (*Ibid*.)

With respect to UV-E and UV-F/G, there is also a question as to whether they have actually incurred any attorney fees. At Marik's request, this court has taken judicial notice of the records of the California Secretary of State, which show that UV-E and UV-F/G have cancelled their status as limited liability companies. Marik contends these filings indicate that said entities did not incur any attorney fees in this matter.

However, the cancellation of UV-E and UV-F/G does not support Marik's assertion those entities did not incur any attorney fees. Corporations Code section 17354 specifically provides at subdivision (a): "A limited liability company that is

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[2] Marik contends the attorney fee provisions in the UV-E and UV-F/G operating agreements are inapplicable because they only cover disputes "between the Company and any of its Members" and plaintiffs were not members of those entities. It is unnecessary to resolve that issue at this juncture. On remand the parties can make their arguments with respect to the scope of the pertinent attorney fee provisions.

dissolved nevertheless continues to exist for the purpose of winding up its affairs, prosecuting and defending actions by or against it in order to collect and discharge obligations, disposing of and conveying its property, and collecting and dividing its assets." Therefore, another issue to be determined on remand is whether UV-E and UV-F/G actually incurred attorney fees in defending the previous appeal.

c. *The UV-5 agreement.*

The seventh agreement is the UV-5 Operating Agreement. The UV-5 agreement does contain an attorney fee provision *and* Marik is a party to said operating agreement.

Nonetheless, Marik contends UV-5 is not entitled to recover attorney fees because UV-5 did not actually incur any attorney fees. Marik again relies on the records of the California Secretary of State, which shows that UV-5 has cancelled its status as a limited liability company. As discussed above, such a change in the entity's status does not support the conclusion that said entity could not have incurred any attorney fees. On remand, the trial court shall determine whether UV-5 actually incurred any attorney fees in defending the previous appeal.

d. *Apportionment of fees among the various defendants.*

Lastly, we address the trial court's concern regarding the complete overlap of the respondents' positions on the prior appeal, in which Marik made a so called "generic attack" on Judge Letteau's award based on undisclosed bias.

To the extent that "shared counsel engaged in litigation activity on behalf" of the various UV defendants, the trial court has "broad discretion to apportion fees" among those defendants which are entitled to recover attorney fees. (*Zintel Holdings, LLC v. McLean* (2012) 209 Cal.App.4th 431, 443.)

DISPOSITION

The amended judgment entered August 1, 2011 is reversed insofar as it awards $130,137.50 in attorney fees to the various moving defendants; in all other respects, the judgment is affirmed. The matter is remanded to the trial court for further proceedings with respect to the amount of attorney fees, if any, to be awarded pursuant to the attorney fees provisions in the UV-E, UV-F/G and UV-5 operating agreements, to be guided by the principles set forth herein. Marik shall recover costs on appeal.

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KLEIN, P. J.

We concur:

CROSKEY, J.

ALDRICH, J.