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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

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| SIMON COHEN et al.,<br><br>Plaintiffs and Appellants,<br><br>v.<br><br>JAMSHID LAVI,<br><br>Defendant and Respondent. | B279597<br><br>(Los Angeles County Super. Ct. No. SC120085) |

APPEAL from an order of the Superior Court of Los Angeles County, Lisa Hart Cole, Judge. Affirmed.

Abir Cohen Treyzon Salo, Boris Treyzon and Cynthia Goodman for Plaintiffs and Appellants.

Law Offices of Daniel B. Spitzer and Daniel B. Spitzer for Defendant and Respondent.

After Jamshid Lavi (Lavi) prevailed in an action on a contract containing an attorney fees provision against Simon and Shahrzad Cohen (collectively the Cohens), the trial court awarded Lavi his attorney fees. The Cohens now appeal that attorney fees order, contending that Lavi refused to mediate, thereby violating a condition precedent to any attorney fees award. We reject that contention and affirm the order.

## BACKGROUND

I. The Cohens and Lavi enter into a contract containing a mediation provision

The Cohens bought residential real property from Lavi. The purchase agreement provided that the prevailing party in any action arising out of the agreement shall recover attorney fees, "*except as provided in paragraph 17A*." (Italics added.) Paragraph 17A, a mediation provision, stated: "Buyer and Seller agree to mediate any dispute or claim arising between them out of this Agreement, or any resulting transaction, before resorting to arbitration or court action. Paragraphs 17B(2) and (3) below apply to mediation whether or not the Arbitration provision is initialed. . . . *If, for any dispute or claim to which this paragraph applies, any party commences an action without first attempting to resolve the matter through mediation, or refuses to mediate after a request has been made, then that party shall not be entitled to recover attorney fees*, even if they would otherwise be available to that party in any such action." (Italics added.)

Not long after the parties entered into the agreement, the Cohens' house sustained significant water damage. In accordance with paragraph 17A, the Cohens' attorney Robert H. Roe sent a letter, dated February 1, 2013, to Lavi at his home

address in Westlake Village via United States express overnight mail. Roe stated he was writing "pursuant to section 910 and related sections of the . . . Civil Code. Under section 913 of the Civil Code, you will have fourteen (14) days after receipt of this notice to acknowledge receipt and to elect to follow the statutory prelitigation procedures specified by the Civil Code. If you refuse or fail to comply with these statutory procedures, we will file a lawsuit and pursue all legal remedies against you. [¶] Alternatively, we offer to participate in a mediation of this dispute with you before a mutually-acceptable private mediator."[1]

On February 15, 2013, having received no reply to the letter, the Cohens filed their complaint for breach of contract, breach of the implied warranty of fitness, negligence, and fraud. Lavi answered the complaint and asserted as his 12th affirmative defense that the Cohens were barred from recovering attorney fees because they failed to comply with the mediation provision.

At the same time he answered the complaint, Lavi cross-complained against the Cohens for equitable indemnity, contribution, apportionment, breach of contract, rescission and restitution, and negligence. Thereafter, he amended his cross-complaint to name a contractor who performed work on the property.

Ultimately, the trial court granted summary judgment in Lavi's favor on the complaint.

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[1] The letter also detailed the alleged defects in the property that caused water damage.

II. Lavi moves for attorney fees

Having prevailed, Lavi moved for $187,171.60 in attorney fees plus costs. He argued that paragraph 17A did not preclude him from getting attorney fees because he never received Roe's letter requesting mediation; hence, he never refused to mediate. He first saw the letter on July 30, 2013, when he received the summons and complaint.

The Cohens opposed Lavi's motion, maintaining that they asked Lavi to mediate, before and after initiating the action. In his supporting declaration, Roe said he sent the February 1, 2013 letter to Lavi at Lavi's last known address in Westlake Village, and Roe attached the post office express mail receipt for the letter.[2] The letter was never returned, and Roe received no notice that the letter was undeliverable. Roe also received no response from Lavi to the letter. Because the statute of limitations was running, Roe filed the complaint, which had the letter attached.[3]

Simon Cohen also declared that before the complaint was filed, he spoke to Lavi and suggested Lavi contact the Cohens' attorneys and attempt to mediate the matter.

Lavi, however, denied having any such conversation with Simon Cohen, although he would have "welcomed an opportunity to mediate this dispute," but "[he] was never asked to mediate by the Cohens or anyone representing them." (Italics and boldface

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[2] Lavi did not dispute that he resided at that address.

[3] Escrow closed on February 19, 2010, and Roe therefore calculated the applicable statute of limitations as running on February 15, 2013.

omitted.) Indeed, on his case management statement, Lavi indicated that he was willing to participate in mediation and a settlement conference.

III. The trial court grants Lavi's motion for attorney fees

The trial court found that Lavi rebutted any presumption he received the letter and that Lavi's assertion of his 12th affirmative defense corroborated his claim he never got the letter. Further, Lavi's case management statement indicated a willingness to mediate. Yet, there was no evidence the Cohens repeated the mediation request or took any steps to encourage mediation notwithstanding Lavi's answer and case management statement. The court therefore found that Lavi never received the letter and never refused to mediate. The court awarded Lavi $173,969.95 in attorney fees.[4]

## DISCUSSION

The Cohens contend that Lavi was not entitled to attorney fees because he did not satisfy the contractual condition precedent—that he agree (or not refuse) to mediate— to such an award. We reject that contention.

Public policy favors mediation as a preferable alternative to litigation to preserve resources. (*Lange v. Schilling* (2008) 163 Cal.App.4th 1412, 1417.) Paragraph 17A thus requires a party to attempt to mediate a dispute before commencing an action. (See generally *ibid.*; *Johnson v. Siegel* (2000) 84 Cal.App.4th 1087, 1101 ["Seeking mediation is a condition precedent to the recovery of attorney fees *by the party who*

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[4] The Cohens do not challenge the amount of attorney fees awarded to Lavi.

*initiates the action*"].) The flip side of this requirement is that a party who *refuses* to mediate may not recover attorney fees if that party prevails in the action. (*Frei v. Davey* (2004) 124 Cal.App.4th 1506, 1508.)

Here, the Cohens argue that Lavi is not entitled to attorney fees because he refused their offer to mediate. We generally review the legal basis for an attorney fees award de novo. (*Cullen v. Corwin* (2012) 206 Cal.App.4th 1074, 1078; *Blackburn v. Charnley* (2004) 117 Cal.App.4th 758, 767; *Leamon v. Krajkiewcz* (2003) 107 Cal.App.4th 424, 431.) However, to the extent the trial court's decision was based on historical facts, we determine whether there is substantial evidence to support the court's findings. (*Cullen*, at p. 1078; *Frei v. Davey*, *supra*, 124 Cal.App.4th at p. 1512.)

This leads us to the first problem with the Cohens' argument: the trial court's decision rests on a factual finding, which, if supported by substantial evidence, we cannot disturb. The evidence was that Roe mailed the February 1, 2013 letter by overnight mail to Lavi at Lavi's home address. "A . . . correctly addressed and properly mailed [letter] is presumed to have been received in the ordinary course of mail." (Evid. Code, § 641.) This presumption, however, may be rebutted, and Lavi rebutted it by denying that he received the letter. (See, e.g., *Bear Creek Master Assn. v. Edwards* (2005) 130 Cal.App.4th 1470, 1486 [receiving party's denial of receipt is sufficient to rebut presumption].) The trial court made an express finding that Lavi did not receive the February 1, 2013 letter requesting mediation. There being sufficient evidence to support that finding—i.e., Lavi's declaration to that effect—Lavi did not refuse to mediate.

Stated otherwise, Lavi never received the offer to mediate, and therefore he never had the opportunity to refuse any offer.

The Cohens, however, argue that Lavi otherwise refused to mediate. They point out that Lavi admits he received the letter at least as of July 30, 2013, because it was attached to the complaint, which was served at that time. Instead of then agreeing to mediate, Lavi challenged the "efficacy of the offer" by asserting an affirmative defense that the Cohens were barred from recovering attorney fees because they failed to comply with the mediation provision. We fail to see how Lavi's affirmative defense is related to or relevant to a refusal to mediate. The mediation provision required the Cohens to attempt to mediate *before* initiating an action. Therefore, if service of the complaint was the first time an offer was made, it was invalid because it was untimely. Therefore, Lavi was merely pointing out via his affirmative defense that should the Cohens ultimately prevail they were not entitled to attorney fees because they did not comply with paragraph 17A. This affirmative defense therefore is simply not indicative of a refusal to mediate. " 'To refuse is to decline the acceptance of something offered, or to fail to comply with some requirement.' " (*Frei v. Davey*, *supra*, 124 Cal.App.4th at p. 1513; *Cullen v. Corwin*, *supra*, 206 Cal.App.4th at p. 1079 [refusal to mediate until discovery was completed precluded award of attorney fees].)

Indeed, the trial court further found that Lavi "indicate[d] a willingness to mediate" because he checked the mediation box on his case management statement. However, other than the February 1, 2013 letter, the court noted that the Cohens did not pursue mediation: "At no time did you request mediation. At no time in the beginning, middle, or end of this case did you request

mediation to pursue your request." Although the Cohens may have had no obligation to continue pursuing mediation under paragraph 17A, the point is that this is further evidence that Lavi *never* refused a mediation request, either before or after the Cohens commenced the action.

Finally, the Cohens assert that even if Lavi did not refuse to mediate, he still is not entitled to attorney fees because he commenced an action—i.e., filed his cross-complaint—without first attempting to resolve the matter through mediation. The Cohens did not raise this issue in the trial court, and an appellant generally may not raise new issues for the first time on appeal. "Appellate courts are loath to reverse a judgment on grounds that the opposing party did not have an opportunity to argue and the trial court did not have an opportunity to consider. [Citation.] In our adversarial system, each party has the obligation to raise any issue or infirmity that might subject the ensuing judgment to attack. [Citation.] Bait and switch on appeal not only subjects the parties to avoidable expense, but also wreaks havoc on a judicial system too burdened to retry cases on theories that could have been raised earlier." (*JRS Products, Inc. v. Matsushita Electric Corp. of America* (2004) 115 Cal.App.4th 168, 178; *Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.* (2008) 163 Cal.App.4th 550, 564; *Kashmiri v. Regents of University of California* (2007) 156 Cal.App.4th 809, 830.) The principle is particularly apt where, as here, the issue could depend on resolution of a factual dispute. The issue therefore is forfeited.

## DISPOSITION

The order is affirmed. Jamshid Lavi is awarded his costs on appeal.

NOT TO BE PUBLISHED.

DHANIDINA, J.

We concur:

EDMON, P. J.

LAVIN, J.