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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

ARTEFEX LP, et al.,

Defendants and Appellants,

v.

ROBERT M. BUSHMAN, et al.,

Plaintiffs and Respondents.

2d Civil No. B260737
(Super. Ct. No. 56-2012-00413857
CU-BC-TA)
(Ventura County)

Don and Kathleen Koszyk and their company, Artefex, LP (appellants) appeal from the judgment, entered after a jury trial, awarding respondents Robert and Joni Bushman and their family trust (respondents) \$15,000 in damages for breach of contract, \$191,250 in attorney's fees and \$11,778.37 in other costs. Appellants contend the trial court abused its discretion in determining the amount of the attorney's fee award because it did not apportion fees between the breach of contract claim, on which respondents prevailed, and the tort claims they voluntarily dismissed. They further contend the trial court erred when it denied their motion for an award of costs under Code of Civil Procedure section 998.¹ We agree.

Respondents prevailed on their breach of contract claim and were entitled to recover a reasonable attorney's fee under their contract. However, they voluntarily

¹ All statutory references are to the Code of Civil Procedure unless otherwise stated.

dismissed causes of action for fraud and negligent misrepresentation, and abandoned numerous other breach of contract theories. We conclude the trial court abused its discretion in determining the amount of the fee award because it failed to apportion fees between respondents' prevailing and non-prevailing claims. We reverse the judgment and remand the matter to permit the trial court to apportion attorneys' fees. Because the resulting fee award may change which party recovered the more favorable judgment for purposes of section 998, we further direct the trial court to reconsider its orders on the parties' respective motions for an award of costs pursuant to that statute.

Facts

In the late 1990s, appellants purchased property on Eastman Avenue in Ventura and built an 89,000 square foot commercial building on it. In 2000, appellants sued their architect, general contractor and structural engineer, alleging defects in the design of "spandrel walls and supporting elements at the entrance and the loading dock" of the building. The matter was submitted to arbitration before an arbitrator who was also a structural engineer. Appellants recovered an award of \$61,791, an amount the arbitrator found sufficient to install additional lateral support and braces at the loading dock and other areas of the building.

Appellants used the building to house their own business until 2010, when they sold the building to respondents for \$6,300,000. They did not disclose the arbitration award or alleged structural defects to respondents in connection with the sale. The parties' contract contains an attorney fee provision, allowing the prevailing party in "an action or proceeding . . . involving the Property whether founded in tort, contract or equity, or to declare rights hereunder, " to recover "reasonable attorneys' fees."

In late 2011, respondent Robert Bushman found a box marked "lawsuit" inside the building which contained documents from the arbitration. When he confronted appellant Don Koszyk about his discovery, appellant recalled the arbitration, apologized for not disclosing it and showed respondent the steel support members in the loading dock that were referred to in the arbitration award.

In March 2012, respondents filed a complaint against appellants, alleging that appellants breached their contract by failing to disclose the arbitration and 12 broad categories of "construction defects and violations of law" in the building. These included: "inadequate preparation of the plans, specifications and calculations of the building;" "inadequate roof and certain spandrel walls and supporting columns[;]" unspecified defects in the interior offices, bathroom, front entrance, parking lot median, truck bay and fire safety sprinklers; failure to prepare adequate "as built" plans; "failure to obtain building permits for construction defect repairs;" cracks in the loading dock area; and "failure to obtain any governmental agency inspections of any construction defect repairs." Respondents further alleged that the failure to disclose these conditions amounted to fraud and negligent misrepresentation. Before filing their answer, appellants made a section 998 statutory offer to compromise by having judgment entered against them in the amount of \$87,500. Respondents did not accept the offer.

In June 2013, four months before the first scheduled trial date, respondents moved to compel the deposition of appellant Don Koszyk. That motion was denied after appellants demonstrated Koszyk's inability to testify due to his Alzheimer's disease. The trial date was later continued to February 2014.

Respondents voluntarily dismissed without prejudice their causes of action for fraud and negligent misrepresentation in December 2013. They informed appellants and the trial court that they would proceed to trial solely on the claim that appellants breached the contract by failing to disclose that steel support members were installed at the loading dock without a building permit. Around the same time, both parties acknowledged that one of respondents' non-retained experts, Mark Rogers, was terminally ill and would not be able to participate in the trial. Rogers was a structural engineer who had performed the calculations and investigation required to confirm allegations made by appellants in the arbitration. Specifically, Rogers had been expected to testify that, at the time of the arbitration, the building's roof was defective, posed safety concerns and required significant repairs. Due to his illness, he could neither sit for a deposition nor testify at trial.

At trial, respondents presented evidence only on the claim that appellants breached the contract by failing to disclose that repairs were made to the loading dock without obtaining a building permit. A structural engineer testified that the repairs identified in the arbitrator's award had not been made. Building permits were not obtained for steel members installed in the loading dock area. Cracks had formed in the wall above these elements, indicating they were installed incorrectly or were inadequate to carry the full load placed on them. The expert witness later clarified that cracks in the spandrel wall above the loading dock indicated "the building is experiencing some kind of distress that is causing that problem, especially at that boundary element. . . . [¶] That concrete spandrel acts as a belt around the belly. It's holding the roof diaphragm. [¶] When there's a crack there, that means that – there's a pressure there, and there's distress there that is causing that particular crack."

After a seven-day trial, the jury found in favor of respondents and awarded \$15,000 in damages. Both parties filed motions to be declared the prevailing party and to recover their costs and attorneys fees under section 998.

Respondents, who contended they were the prevailing party because they obtained a judgment on the breach of contract claim, requested an award of \$290,827 in attorney fees. This amount included fees incurred to litigate the causes of action for fraud and negligent misrepresentation and the breach of contract claim relating to the failure to disclose other alleged defects in the building. Respondents explained they were forced to dismiss the tort claims because appellant Don Koszyk was unavailable due to his Alzheimer's disease and Mark Rogers was unavailable due to his terminal leukemia. This prevented respondents from proving appellants' knowledge, and intentional or negligent concealment of the construction defects. Respondents argued there was no need to apportion fees between the various causes of action because the contract's attorney's fees clause applied to both contract and tort actions, and because "all of the fees were inextricably intertwined" They did not further explain or provide any evidence supporting the assertion that it would have been impossible to separate fees incurred to

prove their narrow breach of contract claim from those incurred to pursue the claims they ultimately abandoned.

Appellants contended they were the prevailing parties because respondents voluntarily dismissed two of the three causes of action alleged in their complaint and tried only one of the 12 breaches of contract originally alleged. In addition, the damages awarded for breach of contract were well below appellants' \$87,500 statutory offer to compromise. At most, appellants contended, attorney's fees should be apportioned and the award limited to fees incurred on the breach of contract claim respondents took to trial.

The trial court found that respondents were the prevailing party and awarded them attorney fees of \$191,250 and costs of \$11,778.37. It found respondents' recovery was greater than appellants' section 998 offer because the damage award, pre-offer costs and pre-offer attorney fees totaled \$123,217.50. According to the trial court, "The attorney fees incurred by [respondents] in prosecuting its claims were inextricably intertwined or inseparable such that it would be both impractical and pointless to parse or allocate them between the causes of action." It further explained that it was not required to apportion fees because respondents "had to drop the fraud and negligent misrepresentation claims based on [appellant] Don Koszyk's Alzheimer's and [Rogers'] terminal cancer. At the time the fees were incurred they were reasonable and necessary for [respondents'] claims. [Appellants] claim that many of [respondents'] fees were attributable to claims of undisclosed construction defects, which claim was dropped just before trial. That is true. But the question is whether they were reasonably and necessarily incurred at that time. The Court concludes that the preoffer time was reasonable."

Standard of Review

We review the trial court's order awarding contractual attorney's fees for abuse of discretion. (*Carver v. Chevron U.S.A., Inc.* (2002) 97 Cal.App.4th 132, 142.) The same standard applies to our review of the trial court's award of costs under section 998. (*Bates v. Presbyterian Intercommunity Hosp., Inc.* (2012) 204 Cal.App.4th 201, 221.) In applying this deferential standard of review, "we ask whether the trial court's findings of fact are supported by substantial evidence, whether its rulings of law are correct, and whether its application of the law to the facts was not arbitrary or capricious. (*Haraguchi v. Superior Court* [(2008) 43 Cal.4th 706,] 711-712. . . .) Critical to the resolution of this case, we note that when a trial court's decision rests on an error of law, that decision is an abuse of discretion." (*People v. Superior Court* (2008) 43 Cal.4th 737, 746.)

Respondents have chosen not to file a brief in this matter. While this circumstance permits us to accept as true the facts stated in appellant's opening brief, it does not mandate automatic reversal. "Instead, we examine the record and reverse only if prejudicial error is found. (Cal. Rules of Court, rule 8.220(a), (b); *Estate of Supeck* (1990) 225 Cal.App.3d 360, 365.)" (*Petrosyan v. Prince Corp.* (2013) 223 Cal.App.4th 587, 593, fn. 2; see also *Smith v. Smith* (2012) 208 Cal.App.4th 1074, 1077-1078.)

Discussion

Appellants contend the trial court erred when it found respondents were the prevailing party because they voluntarily dismissed their causes of action for fraud and negligent misrepresentation and proceeded to trial on only one of many alleged breaches of contract. Although they recovered damages for that breach, respondents' recovery was only \$15,000. Appellants further contend the trial court erred when it awarded attorney fees for time spent on the dismissed claims and that it erred in its application of section 998. We agree with the contentions and reverse.

Contract-Based Attorney's Fees

Tort Claims

The trial court erred as a matter of law to the extent it found respondents were the prevailing party on their causes of action for fraud and negligent misrepresentation because respondents voluntarily dismissed those causes of action. Civil Code section 1717 governs the interpretation of contractual attorney's fees clauses. Subdivision (a) mandates an award of fees to the prevailing party, "whether he or she is the party specified in the contract or not" (Civ. Code, § 1717, subd. (a).) Subdivision (b)(2) of the statute provides, "Where an action has been voluntarily dismissed . . . there shall be no prevailing party for purposes of this section." In *Santisas v. Goodin* (1998) 17 Cal.4th 599, our Supreme Court construed subdivision (b)(2) "as overriding or nullifying conflicting contractual provisions, such as provisions expressly allowing recovery of attorney fees in the event of voluntary dismissal When 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, even though the contract on its own terms authorizes recovery of those fees." (*Id.* at p. 617, emphasis removed.) Because respondents voluntarily dismissed their causes of action for fraud and negligent misrepresentation, as a matter of law, neither party prevailed on those causes of action for purposes of an award of contractual attorney's fees.

Breach of Contract

The trial court properly found respondents to be the prevailing party on their cause of action for breach of contract because the jury awarded them damages of \$15,000. Under the parties' contract, the prevailing party in "an action or proceeding . . . involving the Property whether founded in tort, contract or equity, or to declare rights hereunder, " is entitled to recover "reasonable attorneys' fees." Respondents recovered damages on their breach of contract claim and were, therefore, the prevailing party. (*Hsu*

v. Abbara (1995) 9 Cal.4th 863, 876 (trial court lacks discretion to deny contractual attorney's fees where "one party obtains a 'simple, unqualified win' on the single contract claim presented by the action . . .").)

The trial court found respondents' reasonable attorney's fees were \$191,250. Of this amount, \$107,822.50 were incurred before appellants made their § 998 offer. The award includes fees and costs incurred to litigate both the breach of contract claim on which respondents prevailed, and the tort claims they dismissed. Appellants contend the trial court abused its discretion in determining the amount of the fee award because it did not apportion respondents' attorney's fees between the prevailing contract claim and the non-prevailing tort claims. We agree.

In determining the amount of a fee award, the trial court should take into consideration the degree of success or failure obtained by the prevailing party. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1096 [determination of reasonable fee is made after considering the results obtained, among other factors]; *Heppler v. J.M. Peters Co.* (1999) 73 Cal.App.4th 1265, 1297-1298 [abuse of discretion to deny fee apportionment after seven week trial where claims supporting fee award could have been tried in less time than those for which fees were not available].) When a cause of action for which contractual attorneys fees are available is joined with other causes of action, for which fees are not available, the prevailing party may recover attorney's fees "only as they relate to the contract action." (*Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 129-130.) But the right to recover contractual attorney fees should not be diluted by the joinder of claims for which fees are not available. (*Id.* at p. 130.) Instead, fees should be apportioned between fee and non-fee claims unless the various claims " 'involve a common core of facts or are based on related legal theories,' " such that "it would be impractical or impossible to separate the attorney's time into compensable and noncompensable units." (*Graciano v. Robinson Ford Sales, Inc.* (2006) 144 Cal.App.4th 140, 159 see also *Reynolds Metals Co., supra*, 25 Cal.3d at p. 130 [fees need not be apportioned when incurred on an issue common to both attorney fee claims and non-fee claims]; *Akins v. Enterprise Rent-A-Car Co. of San Francisco* (2000) 79

Cal.App.4th 1127, 1133 [allocation not required when liability issues are interrelated and it would be "impossible to separate them" into fee claims and non-fee claims].)

Here, the trial court declined to apportion attorney's fees for two reasons. First, it found respondents "had to drop the fraud and negligent misrepresentation claims based on [appellant] Don Koszyk's Alzheimer's and their [expert's] terminal cancer. At the time the fees were incurred they were reasonable and necessary for [respondents'] claims" Second, the trial court found, "The fees do not need to be apportioned because the fees were inextricably intertwined and properly incurred for the compensable portions of the action."

In determining whether to apportion attorney's fees among prevailing and non-prevailing claims, the question is not whether fees incurred to litigate the non-prevailing claims were reasonable or necessary. The only relevant question is whether the prevailing and non-prevailing claims involve a common core of facts or related legal theories, so that the claims "are so inextricably intertwined that it would be impractical or impossible to separate the attorney's time into compensable and noncompensable units." (*Graciano v. Robinson Ford Sales, Inc.*, *supra*, 144 Cal.App.4th at p. 158; see also *Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, 1110.)

The trial court concluded respondents' breach of contract claim was inextricably intertwined with their fraud and negligent misrepresentation claims. It did not explain the factual basis for that conclusion. Our review of the record shows that the very narrow claim respondents brought to trial did not share a common core of facts or related legal theories with respondents' tort claims or with the laundry list of construction defects respondents originally alleged had been concealed. Although each cause of action relied, in part, on the allegation that appellants failed to disclose material facts about the building, they are otherwise unrelated. Whether appellants obtained a building permit before installing steel support members at the loading dock is factually distinct from the question of whether the building's construction plans and specifications were adequate or whether its roof is structurally sound. Neither respondents nor the trial court have explained why it would have been impossible or impractical to separate attorney's

fees incurred in the search for the building permit from those incurred to investigate the many other claimed defects and failures to disclose that respondents abandoned before trial.

The trial court abused its discretion in determining the amount of respondents' fee award because there is no showing that all of respondents' claims were inextricably intertwined. (*Haraguchi v. Superior Court, supra*, 43 Cal.4th at pp. 711-712.) As a consequence of this erroneous finding, the trial court failed to make any apportionment of the attorney's fees respondents' incurred on their prevailing and non-prevailing claims. (*Zintel Holdings, LLC v. McLean* (2012) 209 Cal.App.4th 431, 444.) This was error. We remand the matter for a determination of the reasonable attorney fees respondents incurred on the breach of contract claim. (*Id.*; *Brown Bark III, L.P. v. Haver* (2013) 219 Cal.App.4th 809, 830; *Boquilon v. Beckwith* (1996) 49 Cal.App.4th 1697, 1722-1723.)

Section 998 Attorney's Fees and Costs

Section 998 provides, "If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff shall not recover his or her postoffer costs and shall pay the defendant's costs from the time of the offer." (§ 998, subd. (c)(1).) To determine whether respondents' judgment was "more favorable" than appellants' section 998 offer, the trial court was required to compare the amount of the offer "with the [respondents'] judgment plus preoffer costs including attorney's fees." (*Heritage Engineering Const., Inc. v. City of Industry* (1998) 65 Cal.App.4th 1435, 1441; see also *Arias v. Katella Townhouse Homeowners Ass'n., Inc.* (2005) 127 Cal.App.4th 847, 854 [preoffer costs are added to damages award to determine whether judgment is more favorable than § 998 offer, but postoffer costs are excluded].)

The trial court found respondents recovered a more favorable judgment because their attorney's fees of \$107,822.50 exceeded appellants' section 998 offer. Appellants contend the trial court erred because it did not deduct from respondents' preoffer attorney's fees any of the fees they incurred on the non-prevailing claims. We

agree for the reasons we have previously stated. On remand, after it has determined which fees to apportion to the claims on which respondents' prevailed and reconsidered the amount of the attorney's fees award, the trial court shall also reconsider which party prevailed for purposes of section 998 and award fees and costs accordingly.

Conclusion

The judgment is reversed insofar as it awards respondents their attorney's fees. The matter is remanded to the trial court with directions to determine the amount of attorney's fees to be awarded to respondents, and to reconsider the parties' entitlement to attorney's fees and costs under section 998, in accordance with the views expressed in this opinion. Appellants shall recover their costs on appeal.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Kent Kellegrew, Judge
Superior Court County of Ventura

David Z. Ribakoff; Enenstein, Ribakoff, LaVina & Pham, for Defendant
and Appellants.

No appearance for Plaintiff and Respondent. .