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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

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| CORY L. BROOKSHIRE,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>HPG MANAGEMENT INC., et al.,<br><br>Defendants and Respondents. | B269544<br><br>(Los Angeles County Super. Ct. No. BC491762) |

APPEAL from a postjudgment order of the Superior Court of Los Angeles, Gail Ruderman Feuer, Judge. Affirmed.

L. Bishop Austin & Associates, L. Bishop Austin and Travis Poteat for Plaintiff and Appellant.

Law Office of Priscilla Slocum, Priscilla Slocum; Early, Maslach and Jason S. Wilson for Defendants and Respondents.

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Plaintiff Cory L. Brookshire (plaintiff) appeals from the trial court's order awarding him attorney fees after he prevailed in his action for breach of the implied warranty of habitability against defendants and respondents HPG Management, Inc. and Yucca Investments, Inc. (collectively, defendants). The trial court found that the applicable lease agreements limited plaintiff 's fee recovery to $1,600 and that plaintiff had not established the elements entitling him to statutory fees under Civil Code section 1942.4.[1] On appeal, plaintiff argues that under section 1717 he was entitled to reasonable attorney fees not limited by any contractual cap, and that he proved the elements of section 1942.4 at trial. Plaintiff 's arguments lack merit. Accordingly, we affirm the trial court's order.

## FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff leased four apartments from defendants at a single property. Each lease contained an identical provision entitled "ATTORNEY FEES" stating: "In the event action is brought by any party to enforce any terms of this agreement or to recover possession of the premises, the prevailing party shall recover from the other party reasonable attorney fees, not to exceed $400, including costs. It is acknowledged, between the parties, that jury trials significantly increase the costs of any litigation between the parties. It is also acknowledged that jury trials require a longer length of time to adjudicate the controversy. On this basis, all parties waive their rights to have any matter settled by jury trial."

Plaintiff sued defendants for "breach of covenant of habitable living premises" (boldface and capitalization omitted),

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[1] Undesignated statutory citations are to the Civil Code.

as well as negligent misrepresentation of facts, negligence, and violations of the Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq.). Among other things, the complaint alleged that the roof of the property leaked, and defendants did not repair it adequately. Plaintiff demanded a jury trial.

During trial, the trial court provided the jury with instructions for "Breach of the Implied Warranty of Habitability," listing five elements: (1) that plaintiff leased a residential unit from defendants; (2) that a defective condition existed that substantially breached the standards of habitability; (3) that defendants were given notice of the condition within a reasonable time; (4) that defendants were given a reasonable time to correct the condition; and (5) the condition was a substantial factor in causing harm to the plaintiff. The trial court further instructed the jury on what constituted "habitable premises," using language largely tracking that of section 1941.1.[2] The trial court also provided an instruction on "Breach," explaining in relevant part that "[t]he warranty of habitability is breached only if Defendants fail to repair a problem . . . within a reasonable period after notice." The record does not indicate that plaintiff objected to these instructions or requested any other instructions regarding habitability that the trial court did not give.

The jury was given a special verdict form that included a section for "Breach of the Implied Warranty of Habitability." It is not clear from the record which party submitted the special verdict form, but there is no indication that plaintiff objected to it.

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[2] Among other things, section 1941.1 requires "[e]ffective waterproofing and weather protection of roof and exterior walls, including unbroken windows and doors." (§ 1941.1, subd. (a)(1).)

The jury found in favor of plaintiff on the implied warranty cause of action. As indicated on the special verdict form, the jury found that plaintiff had leased the four units from defendants, that "a defective condition exist[ed] . . . that substantially breached the standards of habitability," that defendants were "on notice of the defective condition," that defendants did not "correct the condition in a reasonable time," and that the defective condition was "a substantial factor in causing harm" to plaintiff.

The jury also found in favor of plaintiff on the negligence claim, but found in favor of defendants on the negligent misrepresentation claim. The jury awarded plaintiff a rent refund of $67,200 and $10,000 for "Pain/Mental Suffering" (boldface and some capitalization omitted), with the damages split equally between the two defendants. The trial court then conducted a bench trial on the unfair competition claim, finding in defendants' favor.

Plaintiff requested $146,670 in attorney fees based on the lease agreements and the statutory fee provision in section 1942.4, subdivision (b)(2). The trial court found that plaintiff was entitled to contractual attorney fees, but that the applicable lease provisions capped fees at $400 per lease. The trial court further ruled that, based on the special verdict form, the jury had found in plaintiff 's favor only on a common law claim for breach of the implied warranty of habitability, and had not made "the essential factual conclusions establishing a violation of Civil Code section 1942.4." Thus, plaintiff was "not a 'prevailing party' under the statute" and not entitled to statutory attorney fees. Accordingly, the trial court never ruled on the reasonableness of plaintiff 's requested fees, and instead awarded plaintiff $400 per lease for a total of $1,600 in attorney fees.

Plaintiff appealed from the trial court's order awarding attorney fees.

## STANDARD OF REVIEW

A trial court's decision as to " 'the propriety or amount of statutory attorney fees to be awarded' " is reviewed for abuse of discretion, but " 'a determination of the legal basis for an attorney fee award is a question of law to be reviewed de novo.' " (*Mountain Air Enterprises, LLC v. Sundowner Towers, LLC* (2017) 3 Cal.5th 744, 751.)

## DISCUSSION

### A. The Trial Court Correctly Awarded $1,600 In Attorney Fees Under The Lease Agreements

The four lease agreements between plaintiff and defendants provide that "[i]n the event action is brought by any party to enforce any terms of this agreement or to recover possession of the premises, the prevailing party shall recover from the other party reasonable attorney fees, not to exceed $400, including costs." The parties do not dispute that plaintiff 's habitability action fell within this provision, or that plaintiff was the "prevailing party." Plaintiff argues, however, that under section 1717, he was entitled to reasonable attorney fees not limited by the $400 cap. Plaintiff is incorrect.

Section 1717 provides, in relevant part, that "[i]n 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." (§ 1717, subd. (a).) As plaintiff concedes, section 1717 "was designed to establish mutuality of remedy when a contractual provision makes recovery of attorney fees available to only one party, and to prevent the oppressive use of one-sided attorney fee provisions." (*Trope v. Katz* (1995) 11 Cal.4th 274, 285.) Thus, " '[W]here a contract provides that only one party may obtain attorney fees in litigation, [section 1717] makes the right to such fees reciprocal, such that the "party prevailing on the contract" claim will be entitled to recovery of fees " 'whether he or she is the party specified in the contract or not.' " ' " (*Kachlon v. Markowitz* (2008) 168 Cal.App.4th 316, 346.)

Section 1717 does not restrict contracting parties' ability to limit attorney fees, however, so long as the limits apply to all parties equally. In *511 S. Park View, Inc. v. Tsantis* (2015) 240 Cal.App.4th Supp. 44 (*Tsantis*), the superior court appellate division held that a lease provision limiting attorney fees at $750 did not contravene section 1717. (*Id.* at p. 48.) The court reasoned that the purpose of section 1717 was to "ensure mutuality of remedy," and thus a bilateral attorney fee provision capping fees at a certain amount was valid. (*Id.* at p. 48.) Similarly, in *Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124 (*Reynolds Metals*), our Supreme Court held that because the promissory notes at issue contained a provision limiting attorney fees to a percentage of the amount of the notes, "recovery of fees under section 1717 must be similarly limited. . . . [T]he section establishes a reciprocal right to attorney's fees, and the statutory right should be no greater than the contractual right." (*Id.* at p. 130.)

Here, the contractual attorney fees provision, including the $400 limitation, applied equally to plaintiff and defendants. Under *Reynolds Metals* and *Tsantis*, therefore, the provision did not contravene section 1717, and the trial court properly limited plaintiff 's recovery to $400 per lease. Plaintiff cites no authority to the contrary.

Plaintiff argues that the $400 cap "is the kind of oppressive one-sided provision [section] 1717 was meant to address," noting that he "was not represented by counsel when the lease agreement was signed" and that defendants "are multi-million dollar corporations." Plaintiff fails to explain how a contractual provision that applies to all parties is "one-sided." To the extent plaintiff is suggesting the provision is invalid for some reason other than a lack of mutual remedy, he has neither provided argument nor cited authority in support. We thus have no basis to consider plaintiff 's contention. (See *Carson v. Mercury Ins. Co.* (2012) 210 Cal.App.4th 409, 430 [issue deemed waived if unsupported by " 'reasoned argument and citations to authority' "].)

Plaintiff suggests the trial court erred by limiting fees to $1,600 "despite . . . the contract's limitation on attorney's fees being based upon a ban against a jury trial[ ] and . . . a jury trial occurring despite the ban." Although the waiver of jury trial was included in the same contractual provision of the leases as the attorney fee limitation, there is no language suggesting that the fee limitation was dependent on the jury waiver. Thus, the fact that the parties proceeded with a jury trial cannot be construed as a waiver of the limitation on attorney fees. Moreover, the record does not indicate that plaintiff objected to trying the case before a jury—indeed, he demanded a jury trial in the operative

complaint, with no indication that he conditioned his demand on a waiver of the fee limit. Having requested a jury trial despite the clear language in the leases limiting attorney fees to $400, he cannot now complain that the trial court was unreasonable in not granting him a higher fee award.

Plaintiff also states the trial court's ruling "shocked the conscience by allowing the parties to waive the contract's ban on a jury trial while keeping attorney [fees] limited to $400—an unreasonable amount for a jury trial." Plaintiff does not cite any authority holding that a court "shock[s] the conscience" by applying a fee limit to which the parties have agreed.

### B. Plaintiff Did Not Prevail Under Section 1942.4

Section 1942.4 provides a "statutory cause of action available to the residential tenant where the premises are untenantable and other circumstances exist." (*Erlach v. Sierra Asset Servicing, LLC* (2014) 226 Cal.App.4th 1281, 1298 (*Erlach*).) A plaintiff prevails on the cause of action if he or she establishes: "(1) the dwelling is untenantable as defined under . . . section 1941.1, is in violation of section 17920.10 of the Health and Safety Code, or is deemed and declared substandard under section 17920.3 of the Health and Safety Code; (2) a public officer [has] inspect[ed] the premises and give[en] the landlord written notice that it must abate the nuisance or repair the property; (3) the conditions have not been remedied within 35 days of the notice; and (4) the substandard conditions were not caused by the tenant's acts or omissions." (*Erlach*, *supra*, 226 Cal.App.4th at p. 1298, citing § 1942.4, subd. (a).) The prevailing party in an action brought under section 1942.4 "shall be entitled to recovery of reasonable attorney's fees and costs of the suit in an amount fixed by the court." (§ 1942.4, subd. (b)(2).)

A cause of action under section 1942.4 differs from a common law cause of action for a breach of the implied warranty of habitability, the elements of which are "the existence of a material defective condition affecting the premises' habitability, notice to the landlord of the condition within a reasonable time after the tenant's discovery of the condition, the landlord was given a reasonable time to correct the deficiency, and resulting damages." (*Erlach*, *supra*, 226 Cal.App.4th at p. 1297.)

As the trial court correctly concluded, it is evident from the special verdict that the jury found the elements of a common law habitability claim, and not a statutory claim under section 1942.4. The jury found that defendants were on notice of a defective condition, an element of the common law claim, but did not find that "a public officer" had provided that notice following an inspection as required by section 1942.4, subdivision (a)(2). Moreover, the special verdict form did not request that the jury make such a finding. The jury found that defendants failed to correct the condition "in a reasonable time," but the special verdict form did not specify a particular period of time, nor did it ask the jury to state what period the jury considered reasonable. Thus, the special verdict did not indicate that the jury necessarily found that defendants failed to address the condition within 35 days of receiving notice, as required by section 1942.4, subdivision (a)(3).

Nor can we infer that in reaching its special verdict, the jury unquestionably found that plaintiff had proved the elements of section 1942.4. The jury instructions said nothing about a public officer conducting an inspection, and did not define "reasonable time" as 35 days or any other specific period. Although plaintiff contends that he proved those elements at

trial, we cannot agree given that the instructions and special verdict form did not ask the jury to make any findings regarding those elements.

Plaintiff states that "[b]ecause the claim for [attorney] fees is incidental to the cause of action, it stands to reason that the attorney fees motion will often be supported by evidence that was not part of the trial." To the extent plaintiff is arguing that the trial court independently could find defendants liable under section 1942.4 and award fees on that basis, we reject this contention. Assuming arguendo that the trial court had authority to make such a finding, there is no indication in the record that plaintiff ever requested the trial court do so—indeed, it appears plaintiff is raising this issue for the first time on appeal. Plaintiff's motion for attorney fees in the trial court claimed entitlement to section 1942.4 fees based on the jury's verdict (which, as we have explained, did *not* include statutory liability), with no request or suggestion that the trial court make additional findings. Nor did plaintiff's attorney fee motion cite or direct the trial court to any evidence in support of any additional findings. In the absence of a request for particular findings, plaintiff cannot now imply that the trial court erred by not making those findings.

## DISPOSITION

The order awarding attorney fees is affirmed. Defendants are awarded their costs on appeal.

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.