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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

INFINITY AIR, INC.,

Plaintiff and Respondent,

v.

MAJESTIC AIR et al.,

Defendants and Appellants;

LUFTHANSA TECHNIK
PHILLIPINES, INC.,

Defendant and Respondent.

B269680

(Los Angeles County
Super. Ct. No. PC051839)

APPEAL from orders of the Superior Court of Los Angeles County. Melvin Sandvig, Judge. Affirmed.

Carlsen Law Corporation and Miles Carlsen for Defendants and Appellants, Majestic Air, Tessie Hweling Lim (Tessie Cue) and Hong Boi Cue.

Sall Spencer Callas & Krueger, Robert K. Sall and Stephanie M. Brault for Plaintiff and Respondent, Infinity Air, Inc.

Condon & Forsyth, Scott D. Cunningham and Andrew C. Johnson for Defendant and Respondent, Lufthansa Technik Philippines, Inc.

Appellants Majestic Air (Majestic); Tessie Cue, also known as Tessie Hweling Lim (Cue); and Hong Boi Cue (Hong)¹ appeal from the trial court's orders (1) sustaining, without leave to amend, respondent Lufthansa Technik Phillipines, Inc.'s (LTP's) demurrer to appellants' cause of action against LTP for express contractual indemnity; (2) applying Code of Civil Procedure section 877.6² to determine that the settlement entered into by LTP and respondent Infinity Air, Inc. (Infinity) was in good faith; (3) dismissing appellants' breach of contract claim against LTP; and (4) barring appellants from seeking any costs in defending against Infinity's complaint against them.

We affirm the trial court's orders sustaining LTP's demurrer, applying section 877.6 to determine that the settlement between LTP and Infinity was in good faith, and dismissing appellants' breach of contract claim against LTP. Appellants' entitlement to costs is an issue that is not properly before this court, and it is therefore not addressed.

BACKGROUND

The parties

LTP provides aircraft maintenance, repair, and overhaul services to aviation companies. To perform those services, LTP maintains a limited inventory of spare aircraft parts.

¹ Because Cue and Hong Boi Cue share the same surname, we refer to Hong Boi Cue by his first name to avoid confusion. Cue, Hong, and Majestic are referred to collectively as appellants.

² All further statutory references are to the Code of Civil Procedure.

Infinity specializes in the sale and distribution of aircraft parts.

Cue is a former employee of Infinity. Cue is also a principal of Majestic, a California corporation that sells aircraft parts. Hong is Cue's husband and is also a principal of Majestic.

The Infinity Agreement

On behalf of Infinity, Cue negotiated an agreement between Infinity and LTP dated October 15, 2009 (the Infinity Agreement) pursuant to which Infinity agreed to sell LTP's excess inventory of spare aircraft parts on a consignment basis.

The Majestic Agreement

After Infinity and LTP entered into the Infinity Agreement, Cue left Infinity and formed Majestic. She then negotiated an agreement between LTP and Majestic pursuant to which Majestic agreed to sell LTP's spare aircraft parts on a consignment basis (the Majestic Agreement).³

As relevant here, the Majestic Agreement contains an indemnity provision that states in pertinent part:

“[LTP] will indemnify, defend and hold harmless [Majestic] its affiliates and their respective officers, directors, trustees, shareholders, duly authorized agents, employees, contractors, subcontractors and successors and assigns (the MA Indemnified Parties), from and against any and Claims, including reasonable attorneys' fees, arising out of or in connection with:

“(a) any breach of the representations, warranties or obligations of [LTP] under this Agreement or any

³ We granted appellants' request that we take judicial notice of the Majestic Agreement, which was not included as part of the record on appeal, but was included in the record in another case pending on appeal in this court, *Ansett Aircraft Spares & Services, Inc. v. Cue*, B272100.

other matter for which [LTP] is responsible under this Agreement; or

“(b) any negligence or misconduct by [LTP] (by act or omission), except to the extent that the Claim is caused by the negligence or misconduct of an MA Indemnified Party.”

“Claim” is defined in the Majestic Agreement as “any and all losses, claims, damages, suits, judgments and liabilities . . . including reasonable attorneys’ fees.”

The Majestic Agreement also contains certain covenants, including a covenant by LTP that it has “good and sufficient legal and marketable title” to the spare aircraft parts covered by the agreement, and that it has “full power and lawful authority to transfer title” to those parts to Majestic.

The instant action

Infinity’s complaint against LTP and appellants

Infinity filed the instant action against appellants and LTP on October 31, 2011. In its operative second amended complaint, Infinity asserted a single cause of action against LTP for breach of the Infinity Agreement. Against appellants, Infinity asserted causes of action for interference with contractual relationship, misappropriation of trade secrets, and unfair competition.

Majestic’s cross-complaint against LTP

Majestic cross-complained against LTP, asserting in its second amended cross-complaint multiple causes of action, including express contractual indemnity. Majestic alleged that the Majestic Agreement contained an express covenant by LTP that it had “good and sufficient legal and marketable title” to the aircraft parts consigned to Majestic and had agreed to indemnify Majestic against any liabilities, damages, and attorney fees resulting from LTP’s breach of its covenants.

LTP demurred to the express contractual indemnity cause of action on the ground that Majestic's claim was based entirely on the allegations in Infinity's second amended complaint, and that LTP could not legally be held liable for any of the claims asserted by Infinity against appellants. LTP argued that as a party to the Infinity Agreement, it could not be held liable, and therefore owed no indemnity obligation to appellants, for interfering with or inducing the breach of that agreement. LTP further argued that Infinity's unfair competition causes of action against appellants were based solely on alleged violations of law relating to appellants' alleged tortious interference with or inducement to breach the Infinity Agreement.

The trial court sustained LTP's demurrer without leave to amend on the ground that, as a matter of law, appellants could not seek express contractual indemnity for Infinity's claims against appellants.

Appellants thereafter filed a third amended cross-complaint against LTP that asserted causes of action for statutory indemnity/tort of another, declaratory relief, and breach of contract.

LTP's cross-complaint against Infinity and Majestic

LTP filed a cross-complaint against Infinity, alleging causes of action for rescission of the Infinity Agreement based on fraud, mutual and unilateral mistake of fact; common count for goods sold and delivered; common count for money had and received; and breach of the covenant of good faith and fair dealing. As against Majestic, LTP asserted claims for breach of contract, claim and delivery, declaratory relief, common count for goods sold and delivered, and conversion.

The related Ansett action

On June 4, 2012, the trial court issued an order that the instant action was deemed related to *Ansett Aircraft Spares &*

Services, Inc. v. Tessie Cue, Infinity Air, Inc., Majestic Air, Inc., Los Angeles County Superior Court Case No. BC482166, filed on April 12, 2012 (the *Ansett* action). The *Ansett* action arose out of Cue's participation in contract negotiations that predated the negotiation of the Infinity Agreement. Before her employment with Infinity, Cue was employed by Ansett Aircraft Spares & Services, Inc. (Ansett). On behalf of Ansett, Cue participated in contract negotiations between Ansett and LTP for the consignment sale of spare aircraft parts. While those contract negotiations were still pending, Ansett terminated Cue's employment. Cue then became employed by Infinity and on Infinity's behalf negotiated the contract between Infinity and LTP.

Ansett sued Infinity, Cue, and Majestic for, among other claims, misappropriating trade secrets and interfering with Ansett's prospective economic relationship with LTP. Infinity and appellants filed cross-claims against LTP, who in turn filed a cross-complaint against Infinity.

Settlement between LTP and Infinity

On September 7, 2015, LTP and Infinity settled their claims against one another in both the instant action and the *Ansett* action. Under the terms of the settlement, LTP paid Infinity \$450,000 in cash, waived its right to \$255,000 in receivables allegedly owed by Infinity, and transferred to Infinity title of aircraft parts in Infinity's possession as of September 7, 2015; Infinity and LTP agreed to dismiss with prejudice their operative complaints or cross-complaints against each other in both the instant action and the *Ansett* action and waived their claims for attorney fees and costs against each other; Infinity agreed to dismiss with prejudice its claims against appellants and waived its claim for attorney fees and costs in prosecuting its complaint and amended complaints against appellants; and LTP

agreed to dismiss with prejudice its operative cross-complaint against appellants in the instant action.

LTP and Infinity then filed separate motions for a good faith settlement determination pursuant to section 877.6. Appellants refused to participate in the settlement and opposed the motions for a good faith settlement determination.

Good faith settlement determination and dismissal of action

On November 18, 2015, the trial court granted the motions for determination of good faith settlement under section 877.6. In granting Infinity's motion, the trial court ordered "[t]hat all further, present and future claims, Complaints and Cross-Complaints by any joint tortfeasor or co-obligor for equitable comparative contribution or partial or total equitable comparative indemnity against [Infinity] related to the subject matter of the above-captioned litigation are dismissed with prejudice and forever barred, and that [appellants] are barred from seeking any costs in defending against Infinity's Complaint, based on [Infinity's] dismissal of its Complaint against [appellants], pursuant to the terms and conditions of the settlement between [Infinity] and [LTP]."

On December 3, 2015, appellants filed and served a memorandum of costs against Infinity and LTP, and LTP filed and served a memorandum of costs against Majestic. Infinity and LTP then filed motions to tax costs as to Majestic's memorandum of costs.

Appellants filed the instant appeal on January 15, 2016. On March 2, 2016, appellants, Infinity, and LTP entered into a stipulation to defer further litigation on their requests for costs and attorney fees until after the disposition of the appeal in this

case.⁴ The parties stipulated that they would have until 40 days after the issuance of remittitur to file and serve any memoranda of costs and any motions for attorney fees, including attorney fees incurred on appeal, and that they would file and serve any motions to tax costs and oppositions to any attorney fees motions nine days before the court hearing on such motions. The parties requested that the trial court take off calendar the previously filed motions to tax costs and for attorney fees without prejudice to the refiling of such motions in accordance with the terms of their stipulation.

DISCUSSION

I. Demurrer

A. *Standard of review*

“On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. We give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.]” (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865.) “When a demurrer is sustained, we determine whether the complaint states facts sufficient to state a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse. [Citation.]” (*Ibid.*) The legal sufficiency of the complaint is

⁴ We granted appellants request for judicial notice of the parties’ stipulations extending the time to file memoranda of costs and motions for attorney fees and motions to tax costs and oppositions to attorney fee motions, and to defer the trial court’s rulings on any such memoranda, motions, and oppositions until after this appeal.

reviewed de novo. (*Montclair Parkowners Assn. v. City of Montclair* (1999) 76 Cal.App.4th 784, 790.)

B. The demurrer was properly sustained as to the express contractual indemnity claim

Appellants contend the trial court erred by sustaining LTP's demurrer to their express contractual indemnity cause of action. They argue that the terms of the Majestic Agreement obligated LTP to indemnify appellants against Infinity's claims.

Under California law, "[o]ne can only indemnify against 'claims for damages' that have been resolved against the indemnitee, i.e., those as to which the indemnitee has actually sustained liability or paid damages." (*Crawford v. Weather Shield Mfg., Inc.* (2008) 44 Cal.4th 541, 559.) Appellants sustained no liability and paid no damages in the instant action. Their indemnity claim for liability and damages against LTP was eliminated by Infinity's dismissal of its second amended complaint in its entirety, including the claims asserted against appellants. Appellants are not entitled to indemnity for attorney fees incurred in defending against Infinity's complaint because the claims asserted by Infinity against appellants do not come within the scope of the Majestic Agreement's contractual indemnity provision.

The Majestic Agreement's indemnity provision expressly excludes claims "caused by the negligence or misconduct of" appellants, and all of the causes of action asserted by Infinity against appellants allege affirmative misconduct by Cue and by appellants. In its causes of action for interference with contractual relationship and inducing breach of contract, Infinity alleges that Cue, on behalf of Infinity, negotiated the Infinity Agreement and knew that the agreement gave Infinity the exclusive right to sell the spare aircraft parts covered by that agreement; that Cue occupied a position of trust during her

employment with Infinity and signed a nondisclosure agreement prohibiting her, both during and after her employment with Infinity, from disclosing or using for her benefit or the benefit of others Infinity's commercial and contractual relationships with others; that appellants formed Majestic for the express purpose of engaging in the sale of aircraft parts in competition with Infinity; that appellants engaged in conduct that interfered with Infinity's contractual relationship with LTP; and that appellants induced LTP to breach the Infinity Agreement. In its causes of action for unfair competition, Infinity alleges that appellants' conduct in interfering with the Infinity Agreement constituted unfair, unlawful, and fraudulent business practices in violation of California law.

Appellants argue that LTP's indemnity obligations under the Majestic Agreement include liabilities resulting from breach of LTP's covenants and representations that it "shall have full power and lawful authority to transfer title to" the aircraft parts covered by the agreement. Appellants further argue that Infinity's claims against them are based on allegations that appellants took possession of and sold aircraft parts that LTP had consigned to Infinity. These allegations, appellants claim, triggered LTP's indemnity obligations for breach of its covenants and representations.

Infinity's claims against appellants are not based on allegations that appellants merely took possession of aircraft parts that had been assigned previously to Infinity. Rather, Infinity alleges that appellants knew that those aircraft parts had previously been consigned to Infinity under the terms of the Infinity Agreement, and that appellants intended to cause LTP to breach that agreement and induced such breach. Infinity's claims are also based on allegations that appellants misappropriated Infinity's trade secrets, that Cue knowingly

violated the terms of a nondisclosure agreement that precluded her from using Infinity's confidential business information after her employment with Infinity had terminated, and that appellants formed Majestic for the express purpose of competing with Infinity and interfering with Infinity's contractual relationship with LTP. The alleged acts on which Infinity's claims against appellants are based come within the exception to LTP's indemnity obligations in the Majestic Agreement for misconduct by an indemnified party.

Appellants contend that issues as to whether Infinity's claims against them resulted from appellants' own misconduct could not be adjudicated on demurrer because resolution of those issues required evidence regarding Infinity's and Majestic's respective pre-contract negotiations with LTP and the parties' performance under their respective contracts. Appellants ignore the allegations contained in the pertinent pleadings and impermissibly seek to manufacture factual questions that are not relevant to a ruling on a demurrer. "It is an elementary rule that the sole function of a demurrer is to test the sufficiency of the challenged pleading. It cannot, properly, be addressed to or based upon evidence or other extrinsic matters.' [Citations.]" (*Childs v. State of California* (1983) 144 Cal.App.3d 155, 163, quoting *Cravens v. Coghlan* (1957) 154 Cal.App.2d 215, 217.) The trial court did not err by sustaining the demurrer to appellants' contractual indemnity cause of action against LTP.

Plaintiffs fail to suggest how they would amend their complaint to correct the defects noted above. The burden of proving a reasonable possibility of amending the complaint to state a cause of action "is squarely on the plaintiff." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) The trial court therefore did not abuse its discretion by sustaining the demurrer without leave to amend.

II. Section 877.6

A. Applicable law and standard of review

Section 877.6, subdivision (a)(1) provides in relevant part: “Any party to an action in which it is alleged that two or more parties are joint tortfeasors or co-obligors on a contract debt shall be entitled to a hearing on the issue of the good faith of a settlement entered into by the plaintiff or other claimant and one or more alleged tortfeasors or co-obligors.” The effect of such a good faith settlement determination is set forth in subdivision (c) of the statute: “A determination by the court that the settlement was made in good faith shall bar any other joint tortfeasor or co-obligor from any further claims against the settling tortfeasor or co-obligor for equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault.” (§ 877.6, subd. (c).)

A trial court’s determination of the good faith or lack of good faith of a settlement is reviewed for an abuse of discretion; however, whether a determination of a good faith settlement applies to a party or a particular claim is a question of law subject to de novo review. (*Willdan v. Sialic Contractors Corp.* (2007) 158 Cal.App.4th 47, 54.) Because appellants challenge the trial court’s application of section 877.6 to the Infinity/LTP settlement rather than the merits of the good faith adjudication, de novo review applies.

B. The statute applies to the settlement

Appellants contend section 877.6 does not apply to the settlement, which resolved only LTP’s contract liability under the Infinity Agreement. Appellants argue that because they were not parties to the Infinity Agreement, and because Infinity asserted no tort claims against LTP, appellants and LTP were neither co-obligors on a contract debt nor joint tortfeasors within the meaning of section 877.6.

The term “joint tortfeasors” as used in section 877.6 is broadly construed. “In many cases courts have construed the term ‘joint tortfeasor,’ as used in Code of Civil Procedure sections 877 and 877.6, quite broadly to apply not only to ‘those who act in concert in causing an injury’ [citation] but generally to ‘joint, concurrent and successive tortfeasors’ [citations], and even more generally to ‘all tortfeasors joined in a single action’ whose acts or omissions ‘concurred to produce the sum total of the injuries to the plaintiff.’ [Citations.]” (*Topa Ins. Co. v. Fireman’s Fund Ins. Companies* (1995) 39 Cal.App.4th 1331, 1341; see also *PacifiCare of California v. Bright Medical Associates, Inc.* (2011) 198 Cal.App.4th 1451, 1459-1460; *Gackstetter v. Frawley* (2006) 135 Cal.App.4th 1257, 1272 (*Gackstetter*).)

That Infinity asserted no tort claim against LTP in the instant action does not preclude application of section 877.6 because Majestic asserted tort cross-claims against LTP in the instant action and Infinity asserted cross-claims for equitable indemnity and contribution against LTP in the related *Ansett* action that was also part of the settlement. Courts have held that section 877.6 applies when the settling party is a cross-defendant in an action for comparative or equitable indemnity, even when that party was not sued by the plaintiff in the main action. (*Widson v. International Harvester Co.* (1984) 153 Cal.App.3d 45, 57 (*Widson*); *Mattco Forge, Inc. v. Arthur Young & Co.* (1995) 38 Cal.App.4th 1337, 1347-1348 (*Mattco*).)

In *Widson*, the plaintiff was injured by machinery manufactured and owned by International Harvester while working at a construction site at which Louetto Construction was the general contractor. Widson sued Harvester for negligence and product defect, and Harvester cross-complained against Louetto for equitable indemnity. Widson did not sue Louetto as a defendant because the applicable statutory period for filing the

service of summons had expired. Widson thereafter settled with Louetto, and the trial court approved the settlement as a good faith settlement under section 877.6 and dismissed Harvester's cross-complaint against Louetto. Harvester argued on appeal that the trial court erred as a matter of law in finding a good faith settlement between Louetto and Widson because Widson had no "viable claim" against Louetto. (*Widson, supra*, 153 Cal.App.3d at p. 57.)

The court in *Widson* affirmed the good faith settlement determination. The court reasoned that "[t]he policy of the law is to discourage litigation and favor compromises" and that nothing in the applicable case authority limited application of section 877.6 solely to a "defendant." (*Widson, supra*, 153 Cal.App.3d at p. 57.) The court in *Widson* noted that section 877.6, as well as a related statute, section 877, "use the word 'tortfeasor,' not 'defendant,' thus implying a broader scope of applicability. [Citation.]" (*Widson*, at p. 57.) The statutory language, the court concluded, "is not limited to a claim made by a plaintiff. Rather, it implies a recognition of liability arising from one set of circumstances regardless of who makes the claim, whether it be the plaintiff directly, the defendant or third party by way of cross-complaint." (*Ibid.*, see also *Mattco, supra*, 38 Cal.App.4th at pp. 1347-1348.)

Appellants argue that *Widson* is inapposite because the settling cross-defendant in that case, although not sued by the plaintiff, settled its potential tort liability to the plaintiff; whereas LTP in the instant case settled only its contractual liability under the Infinity Agreement. As support for their argument, appellants cite *SEC v. Medical Capital Holdings, Inc.* (C.D.Cal. 2013) 2013 U.S. Dist. LEXIS 100083, a non-published federal decision in which the district court denied a section 877.6 motion because the settlement involved only a breach of contract

claim against the defendant, who was neither a joint tortfeasor nor co-obligor on the contract with any of the other defendants. *Medical Capital* is distinguishable from the instant case.

Here, the settlement between LTP and Infinity encompassed not only claims they asserted against each other in the instant action, but also claims for contribution and indemnity asserted by Infinity in its cross-complaint against LTP in the *Ansett* action. As a cross-defendant sued in tort both by appellants in the instant case and by Infinity in the related *Ansett* case, LTP was entitled to a good faith settlement determination under section 877.6. (*Widson, supra*, 153 Cal.App.3d at p. 57; *Mattco, supra*, 38 Cal.App.4th at pp. 1347-1348.)

C. Breach of contract claim against LTP

Appellants argue that the trial court erred by dismissing their breach of contract claim against LTP as barred by section 877.6. Appellants claim the dismissal was in error because their breach of contract claim did not seek indemnity but compensatory damages for LTP's breach of an express covenant that it had the right to consign and deliver aircraft parts to Majestic.

Appellants did not oppose LTP's request for dismissal of their breach of contract claim, or any of their other cross-claims against LTP, in the trial court below and arguably forfeited the right to do so for the first time on appeal. Even absent such forfeiture, appellants fail to establish any error.

"A claim by a joint tortfeasor seeking neither indemnity nor contribution survives a good faith settlement under section 877.6. But a party may not avoid a section 877.6 motion by providing different labels for what are in reality indemnity or contribution claims. [Citation.] The words 'indemnity' or 'contribution' need not be used. It is the substance of the claim that is

determinative. [Citations.] ‘Following a good faith determination, the judge doubtless may dismiss disguised or artfully pleaded claims for indemnity or contribution -- i.e., causes of action purporting to state direct claims but which, in fact, seek to recover derivative damages.’ [Citations.]” (*Gackstetter, supra*, 135 Cal.App.4th at p. 1274.) In determining the good faith of a settlement, a trial court has “discretion to ferret out those claims that are in fact claims for indemnity” that would be barred by the good faith settlement. (*Cal-Jones Properties v. Evans Pacific Corp.* (1989) 216 Cal.App.3d 324, 327-328.)

The record discloses no abuse of discretion. Appellants’ breach of contract claim alleges that LTP breached a warranty that it was entitled to consign aircraft parts to Majestic, and that as a result of that breach, appellants were sued by Infinity. Appellants’ claimed damages from the alleged breach are the same as those sought against them by Infinity. Appellants’ breach of contract claim was simply an alternative means of pleading indemnity. The trial court did not err by dismissing that claim as an implied claim for indemnity.

D. Claims against Infinity by other joint tortfeasors or co-obligors

Appellants contend the trial court erred by barring all present and future claims by any joint tortfeasor or co-obligor for contribution or equitable indemnity against Infinity because section 877.6 does not apply to a settling plaintiff such as Infinity. They cite *Doose Landscape, Inc. v. Superior Court* (1991) 234 Cal.App.3d 1698 (*Doose*) as support for this argument. In *Doose*, the plaintiff homeowners’ association (HOA) filed a construction defect action against the defendant developer, who in turn filed a cross-action for indemnity against a subcontractor. The subcontractor then filed a cross-complaint for indemnity

against both the developer and the HOA. The HOA and the developer entered into a settlement in which the developer agreed to pay the HOA \$3.5 million. The HOA then moved for a determination of good faith settlement to bar the subcontractor's cross-claim for indemnity against it. The court held that section 877.6, subdivision (c) barred claims for equitable or comparative contribution and indemnity only against a settling tortfeasor and that the statute did not apply to claims against the settling plaintiff and that in the settlement before it, the HOA was the plaintiff and the developer was the settling tortfeasor. (*Id.* at p. 1701.) The court further held that it lacked jurisdiction under section 877.6 to bar cross-claims for equitable indemnity against the HOA as a settling plaintiff. (*Ibid.*)

Infinity argues that *Doose* is distinguishable because the settlement with LTP encompassed tort claims LTP asserted against Infinity and Majestic in this action and in the related *Ansett* action. LTP asserted no tort cross-claims against Infinity in the instant action.⁵ Because the record on appeal contains none of the pleadings from the *Ansett* action, we are unable to determine whether LTP asserted any tort claims against Infinity in that action.

We need not, however, decide whether Infinity is a settling plaintiff who is not protected by section 877.6 against claims by other joint tortfeasors or co-obligors for contribution or equitable indemnity, because Majestic, the only non-settling tortfeasor who is a party to this action, asserted no such claims against Infinity.

⁵ There is nothing in the record to support Infinity's claim that LTP asserted a fraud counter-claim against Infinity in the instant action. LTP asserted a contract claim against Infinity for rescission based on fraud, but no tort claim. LTP's assertion of tort cross-claims against Majestic has no relevance to Infinity's status as a settling plaintiff rather than a settling tortfeasor.

The issue, therefore, is not properly before this court. (See *Fowler v. Ross* (1983) 142 Cal.App.3d 472, 480 [issue not asserted in the relevant pleadings not properly before appellate court].)

III. Order barring cost claim by Majestic against Infinity

Appellants contend the trial court erred by barring them from seeking any costs in defending against Infinity's complaint.

"The right to recover costs is wholly dependent on statute." (*Great Western Bank v. Converse Consultants, Inc.* (1997) 58 Cal.App.4th 609, 612, quoting *Crib Retaining Walls, Inc. v. NBS/Lowry, Inc.* (1996) 47 Cal.App.4th 886, 889.) Section 877.6 does not address costs and does not expressly extinguish the right to move for a cost award under section 1032. (See *Reliance Electric Co. v. Superior Court* (1986) 190 Cal.App.3d 369, 374.) The issue of appellants' entitlement to costs, however, is not properly before this court, in light of the parties' stipulation to defer the trial court's ruling on their respective memoranda of costs and motions to tax costs. We therefore decline to address that issue.

DISPOSITION

The orders sustaining, without leave to amend, LTP's demurrer to appellants' cause of action for express contractual indemnity, and determining that the settlement entered into by LTP and Infinity was in good faith pursuant to section 877.6 are affirmed. LTP and Infinity are awarded their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
HOFFSTADT