

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

SUK E. CHO et al.,

Plaintiffs and Respondents,

v.

HAMILTON COURT, LLC et al.,

Defendants and Appellants.

B282399

(Los Angeles County  
Super. Ct. No. BC561683)

APPEAL from an order of the Superior Court of Los Angeles County, Gail Ruderman Feuer, Judge. Reversed in part; affirmed in part.

Vivoli Saccuzzo, Michael W. Vivoli, and Jason P. Saccuzzo for Defendants and Appellants Hamilton Court, LLC and 3650 Olympic, L.P.

Ropers, Majeski, Kohn & Bentley, Terry Anastassiou and Mitchell S. Kim for Plaintiffs and Respondents Suk E. Cho and Un S. Cho.

---

Hamilton Court, LLC and 3650 Olympic, L.P. (collectively, Hamilton) appeal from the trial court's order awarding attorney fees in the amount of \$95,215.30 and costs of \$10,443.74 to Suk E. Cho and Un S. Cho (collectively Cho). The trial court determined that Code of Civil Procedure section 1717, subdivision (b)(2) (section 1717(b)(2)) precluded an award of attorney fees on Cho's contract claims because the action had been dismissed pursuant to the parties' settlement. However, noting this statutory bar applies only to contract claims, the trial court concluded Cho was entitled to attorney fees on his tort claims under the attorney fee provision of the parties' agreement. Because the narrow scope of the attorney fee provision only authorizes an award based on contract claims, and section 1717(b)(2) bars an award under the circumstances, we reverse the order for attorney fees.

### **FACTUAL AND PROCEDURAL BACKGROUND**

In 2014, Cho's predecessor in interest filed this action against Hamilton, alleging breach of an easement agreement and negligence, among other claims.<sup>1</sup> After Hamilton answered and

---

<sup>1</sup> In a prior appeal, Division Five reversed a judgment quieting title to the easement in favor of Hamilton Court. (*Hamilton Court, LLC v. East Olympic, L.P.* (2013) 215 Cal.App.4th 501.)

Cho substituted in to the action, the parties filed a notice of settlement in August 2016. The settlement agreement included a provision stating that the “entitlement of any party to fees and/or costs, including the determination of prevailing party, if any, and the amount of any such fees and costs, will be determined by the Court, Hon. Gail Feuer, by noticed motion.”

On October 26, 2016, the trial court entered an order dismissing the action pursuant to the parties’ settlement, reserving jurisdiction to enforce the settlement agreement’s terms (Code Civ. Proc., § 664.6).

On January 17, 2017, Cho filed his motion for attorney fees and other costs based on the attorney fee provision in the easement agreement. Citing Code of Civil Procedure section 1021 and subdivision (a) of Civil Code section 1717, Cho contended that he was entitled to attorney fees as the prevailing party under the settlement. Cho requested \$145,802.97 in attorney fees based on a “1.5 lodestar multiplier” plus an additional \$10,443.74 in other litigation costs and expenses.

In its opposition, Hamilton quoted the attorney fee provision in the easement agreement on which Cho relied: “Should it be necessary for either party to commence any legal action or arbitration proceeding to enforce the terms or conditions hereof, the prevailing party in such action or arbitration shall be entitled to recover from the unsuccessful party reasonable legal fees, costs and expenses incurred by the prevailing party in the prosecution, defense, or arbitration in such action.” Based on this language, Hamilton argued Cho could only seek fees on his breach of contract claim, and Cho had not prevailed on this (or any) cause of action. Hamilton also argued Cho’s motion was untimely.

On March 13, 2017, the trial court awarded Cho attorney fees in the amount of \$95,215.30 and costs of \$10,443.74. As explained in the court's 13-page ruling, the court found that the attorney fee provision in the easement agreement entitled the prevailing party to attorney fees. However, section 1717(b)(2) prohibited an award of fees relating to Cho's breach of contract claim because "there shall be no prevailing party" when an action is dismissed (*ibid.*). Nevertheless, because section 1717 only applies to contract causes of action, and Cho had alleged several tort causes of action, the court concluded attorney fees relating to the noncontract claims were recoverable.

Based on its comparison of the relief Cho sought in the operative complaint and the results obtained through settlement, the trial court found Cho to be the prevailing party for purposes of attorney fees.

Hamilton timely appeals.

## DISCUSSION

### 1. Standard of Review

Generally, we review a trial court's prevailing party determination and its award of attorney fees and costs for an abuse of discretion. (*Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1332.) To determine whether an attorney fee award is warranted under a contractual attorney fees provision, however, we examine the applicable statutes and contract provisions, and where, as here, extrinsic evidence is not offered as an aid to interpret the contract and the facts are not in dispute, our review is *de novo*. (*Carver v. Chevron U.S.A., Inc.* (2002) 97 Cal.App.4th 132, 142.)

## 2. Applicable Law

Whether a party is entitled to recover litigation costs is governed by Code of Civil Procedure section 1032. “Except as otherwise expressly provided by statute,” a “prevailing party,” as the term is defined in subdivision (a)(4) of section 1032, is entitled to recover costs “as a matter of right.” (*Id.*, subd. (b).) By its own terms, Civil Code section 1032 defines “prevailing party” for purposes of that section alone. (*Id.*, subd. (a)(4).)

Attorney fees are “allowable as costs under Section 1032” when they are “authorized by” either “Contract,” “Statute,” or “Law.” (Code Civ. Proc., § 1033.5, subd. (a)(10).) In other words, recoverable costs include attorney fees “if, but only if,” the party seeking such fees has “a legal basis, independent of the cost statutes and grounded in an agreement, statute, or other law, upon which to claim recovery of attorney fees.” (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 606 (*Santisas*).)

Any contractual attorney fee provision must be interpreted in light of Civil Code section 1717 (section 1717). (*Khan v. Shim* (2016) 7 Cal.App.5th 49, 55.) Subdivision (a) of section 1717 provides: “In 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 . . . to the prevailing party, then the party who is determined to be the party prevailing on the contract . . . shall be entitled to reasonable attorney’s fees in addition to other costs.” As relevant here, however, section 1717, subdivision (b)(2) (section 1717(b)(2)) specifies that “[w]here an action has been voluntarily dismissed or dismissed pursuant to a settlement of the case, there shall be no prevailing party for purposes of this section.” (*Santisas*, *supra*, 17 Cal.4th at p. 617 [in the case of dismissal, § 1717(b)(2)]

bars the recovery of attorney fees, overriding or nullifying contractual provisions authorizing such fees].)

This bar “applies *only* to causes of action that are based on the contract and are therefore within the scope of section 1717.” (*Santisas, supra*, 17 Cal.4th at p. 617.) Therefore, “[i]f the voluntarily dismissed action also asserts causes of action that do not sound in contract, those causes of action are not covered by section 1717, and the attorney fee provision, depending upon its wording, may afford the [the party seeking fees] a contractual right, not affected by section 1717, to recover attorney fees incurred in litigating those causes of action.” (*Ibid.*) A contractual attorney fee provision may support an award of attorney fees to the prevailing party in an action alleging both contract and tort claims—if the fee provision is phrased broadly enough. (*Id.* at p. 608.) The mutual intention of the parties at the time the contract is formed governs interpretation. (*Ibid.*) “If an action asserts both contract and tort or other noncontract claims, section 1717 applies only to attorney fees incurred to litigate the contract claims.” (*Id.* at p. 615.)

Section 1717 does not apply to tort and other noncontract claims. (*Santisas, supra*, 17 Cal.4th at p. 615.) Parties to a contract are free to agree that a party who prevails on a tort or other noncontract claim shall recover attorney fees, but the right “depends solely on the contractual language.” (*Brown Bark III, L.P. v. Haver* (2013) 219 Cal.App.4th 809, 820.)

3. Cho Is Not Entitled To Recover His Attorney Fees.

3.1 Timeliness

Rule 3.1702(b)(1) of the California Rules of Court<sup>2</sup> specifies that a motion to claim attorney fees must be filed and served within the time for filing a notice of appeal under rules 8.104 and 8.108.<sup>3</sup> As relevant here, rule 8.104(a)(1) provides that a notice of appeal must be filed on or before the earliest of: (1) 60 days after the superior court clerk serves the appealing party with notice of entry of judgment; (2) 60 days after “a party” serves notice of entry of judgment or a file-stamped endorsed copy of the judgment with proof of service; or (3) 180 days after entry of judgment. Although a voluntary dismissal is generally not appealable, it is nevertheless “effectively a ‘judgment’” for the purpose of determining the timeliness of a motion for attorney fees. (*Sanabria v. Embrey* (2001) 92 Cal.App.4th 422, 427 [construing the predecessor to rule 8.104].)

Hamilton contends the trial court erred in considering Cho’s motion because Cho filed it more than 60 days after entry of the order of dismissal, and Cho should not receive the benefit of the 180-day time limit because of his own failure to serve notice of entry.

The trial court entered the order of dismissal on October 26, 2016, and directed Cho to serve notice of its entry, but according to the record, notice of entry of the dismissal was never served—by Cho or anyone else. Therefore, the 60-day deadline was never triggered, and the 180-day time limit applies.

---

<sup>2</sup>All rule references are to the California Rules of Court.

<sup>3</sup>It is undisputed that rule 8.108 does not apply in this case.

Cho's motion, filed on January 17, 2017, satisfied this deadline, and the trial court did not err in rejecting this argument.

### 3.2 Section 1717(b)(2) and the Contract Claims

Hamilton contends the trial court correctly determined that section 1717(b)(2) precludes an attorney fee award on Cho's contract claims because the action was dismissed pursuant to settlement. (*Santisas, supra*, 17 Cal.4th at p. 617.) Cho argues that Hamilton has waived this issue on appeal because he failed to cite section 1717(b)(2) in his opposition to Cho's motion in the trial court. Cho's argument is meritless because the trial court recognized the statute's application to Cho's contract claims, and the order is properly affirmed with respect to the contract claims on this ground. To the extent Cho appears to argue section 1717(b)(2) does not apply because the settlement agreement permitted him to file his motion for attorney fees, he is mistaken. (*Santisas, supra*, 17 Cal.4th at p. 617 [with respect to contract claims, section 1717(b)(2) overrides contractual attorney fee provisions where a case has been voluntarily dismissed or dismissed pursuant to settlement].) In *Jackson v. Homeowners Assn. Monte-Vista Estates-East* (2001) 93 Cal.App.4th 773, 785, the court found that section 1717(b)(2) did not apply because the parties had settled but had not dismissed the action. Similarly, in *Khavarian Enterprises, Inc. v. Commline, Inc.* (2013) 216 Cal.App.4th 310, 323, we determined that section 1717(b)(2) did not apply because attorney fees were requested under a statute authorizing the award, not pursuant to a contractual provision subject to section 1717(b)(2). Neither case supports Cho's assertion.



### 3.3 Noncontract Claims and the Agreement's Fee Provision

Hamilton contends the trial court erred by awarding Cho attorney fees for his tort claims because the fee provision in their easement was narrowly drawn to cover only contract claims. Cho argues that Hamilton never mentioned the concept of narrow versus broad attorney fee provisions in the trial court and waived the issue. However, in its opposition to Cho's motion for attorney fees, Hamilton specifically argued that Cho had failed to meet "the most basic threshold required to justify an award of attorney fees"—prevailing "on a contract that authorizes an award of fees." Although Cho had not done so in his own motion, Hamilton quoted the attorney fee provision, arguing that by its terms, attorney fees could only be awarded to the party prevailing in an action "to enforce the terms or conditions" of the easement agreement as alleged in Cho's breach of contract claim. "To establish an entitlement to fees under the Easement Agreement," Cho had to prevail "in enforcing some provision of the Easement Agreement," and to the extent Cho relied on Hamilton's purported negligence, the attorney fee provision applicable to an action "to enforce the terms or conditions" of the easement agreement was not implicated. Hamilton argued the limited scope of the attorney fee provision, and in any event, the issue presents a pure question of law. (*Hale v. Morgan* (1978) 22 Cal.3d 388, 394 [litigant may raise for the first time on appeal a pure question of law presented by undisputed facts].)

As explained in *Santisas, supra*, 17 Cal.4th at pages 608 and 617, if drafted broadly, an attorney fee provision may encompass noncontractual claims. (*Orien v. Lutz* (2017) 16 Cal.App.5th 957, 964.) Here, however, the attorney fee provision

authorizes fees in an action to enforce the terms or conditions of the agreement—“language too narrow to encompass noncontractual claims.” (*Id.* at p. 965, citing *Exxess Electronixx v. Heger Realty Corp.* (1998) 64 Cal.App.4th 698, 702–703 (*Exxess*); see *Gil v. Mansano* (2004) 121 Cal.App.4th 739, 745.) Indeed, section 1717(a) applies to “any action on a contract,” where the contract specifically provides for an award of attorney’s fees and costs “incurred to enforce that contract.” The language of the attorney fee provision essentially corresponds to section 1717(a), limiting fees to those incurred “to enforce the terms or conditions” of the easement agreement. (See *Exxess, supra*, 64 Cal.App.4th at p. 709 [“tort claims do not ‘enforce’ a contract”].)

Because section 1717(b)(2) bars Cho’s contract claims and the scope of the attorney fee provision is limited to contract claims, the attorney fee award must be reversed. In light of this resolution, we need not consider Hamilton’s remaining contentions as to the trial court’s exercise of discretion in finding Cho to be the prevailing party and in setting the amount of the fee award.<sup>4</sup>

---

<sup>4</sup> Because Hamilton’s appellate briefing addresses only the attorney fee award and presents no discussion or legal argument regarding the award of costs, Hamilton has forfeited any issue in this regard. (*Ewald v. Nationstar Mortgage, LLC* (2017) 13 Cal.App.5th 947, 948 [failure to provide legal authorities to support arguments forfeits contentions of error]; see rule 8.204(a)(1)(B), (C).)

### **DISPOSITION**

The order is reversed with respect to the award of \$95,215.30 in attorney fees and affirmed as to the award of \$10,443.74 in costs. The parties are to bear their own costs on appeal.

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

MICON, J.\*

We concur:

WILLHITE, Acting P.J.

COLLINS, J.

---

\*\*Judge of the Los Angeles County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.