Filed 1/8/18 Stella v. Asset Management Consultants CA2/7

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

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| MICHAEL STELLA,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>ASSET MANAGEMENT CONSULTANTS, INC. et al.,<br><br>Defendants and Respondents. | B276686<br><br>(Los Angeles County Super. Ct. No. BC508056) |

APPEAL from a postjudgment order of the Superior Court of Los Angeles County, Lisa Hart Cole. Reversed in part and affirmed in part.

Catanzarite Law Corporation, Kenneth J. Catanzarite, Nicole M. Catanzarite-Woodward and Eric V. Anderton, for Plaintiff and Appellant.

Jackson Tidus, M. Alim Malik, Kathryn M. Casey and Charles M. Clark, for Defendants and Respondents Asset Management Consultant, Inc., James R. Hopper, Gloria Hopper,

AMC-Hamilton, LLC, AMC-Baker-CAL, LLC, AMC-Overland, LLC, AMC-Wilnaldi, LLC, AMC-CAPOM, LLC' AMC-Arbor Square, LLC, and AMC-Packard, LLC.

Greenwald & Hoffman, Paul A. Hoffman, Sandra Becker-Zymet, for Defendants and Respondents Hamilton Venture, L.P., Baker-Cal Venture, L.P., Overland Venture, L.P., Wilnadi Venture, L.P., Capom Venture, L.P., Arbor Square Venture, L.P. and Packard Venture, L.P.

Law Offices of Anthony C. Duffy and Anthony C. Duffy for Defendant and Respondent Kevin James Hopper.

Cadden & Fuller, Thomas H. Cadden and John B. Taylor for Defendants and Respondents Allen L. Basso; Smith, Linden & Basso, LLP; Allen A. Basso; and August Real Estate Enterprises, LP.

Cruser Mitchell Novitz Sanchez Gaston & Zimet, Marc J. Zimet and Steven J. Markowitz for Defendants and Respondents Property Management Associates, Inc.; LM Property Services, Inc.; Thomas Spear; Joshua Fein.

Goshgarian & Marshall, John A. Marshall and Mark S. Reusch for Defendants and Respondents Davies Lemmis Raphaely Law Corporation, Merton Randel Davies and Rosemary Lemmis.

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Michael Stella unsuccessfully sued Asset Management Consultants, Inc. (AMC) and its principals James Hopper and Gloria Hopper, seven limited partnerships, their general partners and various other entities and individuals Stella believed were responsible for the preparation and distribution of private placement memoranda used to solicit his investment in the

limited partnerships. After judgment was entered in the trial court, the judicial referee, appointed pursuant to Code of Civil Procedure section 638,[1] awarded attorney fees and costs to the defendants as prevailing parties based on sections 1032 and 1033.5 and the attorney fee provision in the limited partnership agreements involved in the litigation.

We affirmed the judgment of dismissal in *Stella v. Asset Management Consultants, Inc*. (2017) 8 Cal.App.5th 181 (*Stella I*). Stella now appeals the postjudgment award of attorney fees and costs. Emphasizing his lawsuit alleged causes of action for fraud and related common law and statutory causes of action, not breach of contract, Stella argues the fee provision in the limited partnership agreements does not support the award of attorney fees. He also argues the referee erred in awarding certain of the costs claimed by defendants. Finally, he contends the trial court erred in compelling a judicial reference, an argument considered in *Stella I*, and asserts the referee had no jurisdiction to award attorney fees and costs.

We reverse the award of attorney fees as beyond the scope of the narrow attorney fee provision in the limited partnership agreements and affirm in part and reverse in limited part the order awarding costs.

## FACTUAL AND PROCEDURAL BACKGROUND

1. *The Limited Partnership Investments*

From February 2007 through February 2009 Stella invested in seven limited partnerships, each of which was formed

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[1] Statutory references are to this code unless otherwise stated.

to acquire ownership of specific real property.[2] Stella had been solicited to invest in the limited partnerships through separate private placement memoranda prepared for each of the investments by AMC and other defendants.[3] In connection with each investment Stella signed a subscription agreement to purchase a certain number of partnership units and a limited partnership agreement.

The private placement memorandum for each limited partnership offering advised potential investors that the total

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[2] The limited partnerships, each of which was named a defendant in Stella's lawsuit, were Hamilton Venture, L.P., Baker-Cal Venture, L.P., Overland Venture, L.P., Wilnaldi Venture, L.P., Capom Venture, L.P., Arbor Square Venture, L.P., and Packard Venture, L.P. Stella also named the general partners of each limited partnership, AMC-Hamilton LLC, AMC-Baker-Cal LLC, AMC-Overland LLC, AMC-Wilnaldi LLC, AMC-Capom LLC, AMC-Arbor Square LLC and AMC-Packard LLC.

[3] According to Stella's description of the role of various entities and individuals named as defendants in his lawsuit, Property Management Associates, Inc., LM Property Services, Inc., Thomas Spear and Joshua Fein were responsible for overseeing the due diligence for each of the real property acquisitions by the limited partnerships; Davies Lemmis Raphaely Law Corporation, Merton Randel Davies and Rosemary Lemmis were legal counsel for AMC; Kevin Hopper also provided legal services to AMC and acted, either directly or indirectly, as manager for the general partners of the limited partnerships; Smith, Linden & Basso, LLP and Allen L. Basso acted as accountants for the various entities; and Allen L. Basso and Allen A. Basso, as well as August Real Estate Enterprises, L.P., provided real estate services in connection with the investment transactions. (*Stella I*, *supra*, 8 Cal.App.5th at p. 185.)

price for the property being acquired included a real estate commission in a specified amount "to be paid to AMC by the Seller at closing . . . portions of which will be paid to the General Partner and other parties involved in the purchase of the Property and/or the funding of the Partnership." (*Stella I*, *supra*, 8 Cal.App.5th at p. 186.) The commissions for the seven transactions ranged from $250,000 to $1,425,000. (*Id*. at p. 188, fn. 7.) Paragraph 6.6.2 of each of the seven limited partnership agreements repeated this description of the real estate commissions, identifying payment of the commission as one of several "specifically authorized contracts with affiliates." The risk factors sections of the private placement memoranda included a further explanation of the commissions, "'The purchase price of the Property has been negotiated to include a commission to be paid to Manager of the General Partner of the General Partner's Manager by the Seller (see "General Partner's Compensation and Fees") in addition to other brokerage commissions owed by the Seller. Accordingly, the Seller would have sold the Property for a lower Purchase Price if it were not obligated to pay such commission.'" (*Id.* at p. 186.)

Each limited partnership agreement contained in paragraph 13.8 a dispute resolution provision that mandated use of a judicial reference pursuant to section 638: "Dispute Resolution. Any controversy, claim, action or dispute arising out of or relating to this Agreement, shall be heard in a court of competent jurisdiction in the County of Los Angeles, State of California, by a reference pursuant to the provisions of the California Code of Civil Procedure Sections 638 through 645.1, inclusive . . . . [¶] . . . [¶] . . . The referee shall have the power to decide all issues of fact and law and report his/her decision

thereon, and to issue all legal and equitable relief appropriate under the circumstances . . . ."

Paragraph 13.9 of each limited partnership agreement provided for an award of attorney fees and costs to the prevailing party in any litigation to enforce the provisions of the agreement: "In any action or proceeding between the parties seeking enforcement of any of the terms and provisions of this Agreement, the prevailing party in such action shall be awarded, in addition to damages, injunctive and other relief, its reasonable costs and expenses, not limited to taxable costs, and reasonable attorneys' fees."

2. *Stella's Lawsuit*

Stella filed his lawsuit in May 2013. In a 193-page first amended complaint filed in April 2015, Stella alleged nine causes of action relating to each of the seven limited partnership transactions: intentional misrepresentation, fraud by concealment, negligent misrepresentation, negligence, violations of California Corporations Code sections 25401 (fraudulent marketing of securities), 25504 (control person liability) and 25504.1 (materially aiding the fraudulent sale of securities), breach of fiduciary duty and unfair business practices in violation of the Business and Professions Code section 17200 et seq. Different groupings of defendants were named in the various claims with some (in particular, AMC and the Hoppers) included in all nine causes of action.

The gravamen of the lawsuit was that the private placement memoranda's description of a real estate commission to be paid by the seller of the property at closing was false. In fact, the payment was a syndication fee or markup, the economic burden of which was borne by the purchasers of the limited

partnership units, not the seller of the real property. As a result of this misrepresentation, Stella alleged, the private placement memoranda contained additional false representations or misleading half-truths concerning the fair market value of the property, the appraised value of the property and the compensation to be received by the general partner of the limited partnership. Stella alleged the defendants knew these representations were false and intended the investors to rely on them. He also alleged he had read the private placement memoranda and reasonably relied on the misrepresentations contained in them. Stella included a section in the first amended complaint labeled "Application of Delayed Discovery Rule," which alleged he had first discovered the misrepresentations concerning the seller-paid commissions in April 2012, slightly more than a year before he filed his complaint, when he was contacted by counsel in connection with another investment he had made.

Following the filing of the original complaint, all defendants filed or joined motions for a general reference pursuant to section 638 and the dispute resolution provisions of the limited partnership agreements. Stella objected, arguing, in part, the fraud and fraud-related claims asserted in the complaint did not arise out of or relate to the limited partnership agreements. The trial court granted the motions.

After Stella filed his first amended complaint, the defendants demurred, noting the lawsuit had been filed more than four years after the closing of the last of the seven limited partnership transactions and arguing all claims were barred by the governing statutes of limitation. The referee sustained the demurrers without leave to amend. The trial court entered a judgment of dismissal pursuant to section 644, subdivision (a).

We affirmed, holding Stella's allegations failed, as a matter of law, to trigger the delayed discovery rule given the clear and specific statements in the private placement memoranda that the purchase price for the properties had been negotiated to include the commission to be paid to AMC and related entities (*Stella I*, *supra*, 8 Cal.App.5th at p. 193.) We also held any error in the trial court's general reference order was harmless. (*Id.* at p. 198.)

3. *The Award of Attorney Fees and Costs*

While Stella's appeal was pending, defendants moved for awards of attorney fees and costs pursuant to paragraph 13.9 of the limited partnership agreements. Stella opposed the fee motions and moved to strike certain cost items requested by several of the defendants.

On April 22, 2016 the referee issued a statement of decision, corrected on May 10, 2016, granting defendants' motions, finding "[e]ach cause of action, either directly or indirectly, challenged or sought to enforce the provisions of the Limited Partnership Agreements, each of which contained provisions for the award of attorney fees and costs to the prevailing party in any action to enforce its terms and conditions." The referee awarded a total of $657,000 in attorney fees to six sets of counsel for different groups of defendants and an aggregate sum of $57,374 in additional costs.[4]

The trial court entered judgment based on the statement of decision and corrected statement of decision on July 1, 2016.

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[4] Several of the defendants had also moved for imposition of monetary sanctions on the ground the first amended complaint was frivolous and had been filed for the sole purpose of harassing and annoying them. The referee denied the request.

Stella filed a timely notice of appeal from this postjudgment order.

## DISCUSSION

1. *Standard of Review*

a. *Attorney fees*

"'"On review of an award of attorney fees after trial, the normal standard of review is abuse of discretion. However, de novo review of such a trial court order is warranted where the determination of whether the criteria for an award of attorney fees and costs in this context have been satisfied amounts to statutory construction and a question of law."'" [Citations.] In other words, 'it is a discretionary trial court decision on the propriety or amount of statutory attorney fees to be awarded, 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 (*Mountain Air*).) Similarly, "[w]hen the facts are not in dispute and the right to recover attorney fees depends upon the interpretation of a contract and no extrinsic evidence is offered to interpret the contract, we review the ruling de novo." (*Casella v. SouthWest Dealer Services, Inc.* (2007) 157 Cal.App.4th 1127, 1161; accord, *Khan v. Shim* (2016) 7 Cal.App.5th 49, 55 [interpretation of a contractual fee provision for which no party has offered extrinsic evidence as an aid in interpretation is reviewed de novo]; see *Carver v. Chevron U.S.A., Inc.* (2002) 97 Cal.App.4th 132, 142 [same].)

b. *Costs*

The standard of review applicable to a cost order depends on the issue raised on appeal. Under section 1032 the prevailing party is entitled as a matter of right to recover costs.

Section 1033.5 identifies cost items that are allowable in subdivision (a), identifies items that are not allowable in subdivision (b), and provides in subdivision (c)(4) that "[i]tems not mentioned in this section . . . may be allowed or denied in the court's discretion." Any allowable costs must be "reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation'" and reasonable in amount. (§ 1033.5, subd. (c)(2), (3); see *Bender v. County of Los Angeles* (2013) 217 Cal.App.4th 968, 989-990.) Thus, when the question is whether a claimed cost comes within the general cost statutes and is recoverable at all, it is one of statutory interpretation, subject to de novo review. Whether a cost item was reasonably necessary to the litigation, however, '"'"presents a question of fact for the trial court and its decision is reviewed for abuse of discretion.'"'" (*Coalition for Adequate Review v. City and County of San Francisco* (2014) 229 Cal.App.4th 1043, 1050-1051.)

c. *General judicial reference*

Section 638, subdivision (a), provides that a referee may be appointed to hear and determine all issues in an action and to report a statement of decision "upon the agreement of the parties filed with the clerk, or judge, . . . or upon the motion of a party to a written contract or lease that provides that any controversy arising therefrom shall be heard by a referee if the court finds a reference agreement exists between the parties." An order compelling a judicial reference, if challenged on the ground the contract between the parties did not contain a reference agreement, is reviewed under the standard rules for contract interpretation. Accordingly, when, as here, no extrinsic evidence has been introduced to interpret ambiguous terms, we review the

order de novo. (See *City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 395 [interpretation of a written contract is a question of law for the court unless the interpretation depends upon resolving a conflict in properly admitted extrinsic evidence].)

2. *The Limited Partnership Agreements Do Not Authorize an Award of Attorney Fees Against Stella*

a. *Governing law*

Section 1033.5, subdivision (a)(10)(A), authorizes the trial court to award reasonable attorney fees as costs under section 1032 when authorized by a contract between the parties. (See § 1021 ["[e]xcept as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties"]; *Mountain Air*, *supra*, 3 Cal.5th at p. 751 ["section 1021 permits parties to "'contract out" of the American rule' by executing an agreement that allocates attorney fees"].) ""[P]arties may validly agree that the prevailing party will be awarded attorney fees incurred in any litigation between themselves, whether such litigation sounds in tort or in contract."" (*Mountain Air*, at p. 751; accord, *Santisas v. Goodin* (1998) 17 Cal.4th 599, 608 ["[i]f a contractual attorney fee provision is phrased broadly enough, . . . it may support an award of attorney fees to the prevailing party in an action alleging both contract and tort claims"]; *Xuereb v. Marcus & Millichap, Inc.* (1992) 3 Cal.App.4th 1338, 1342 (*Xuereb*) ["under proper circumstances attorney fees may be awarded pursuant to . . . section 1021 in a tort action"]; see *Maynard v. BTI Group, Inc.* (2013) 216 Cal.App.4th 984, 991-992 ["[w]hile it is clear that an attorney fee provision may authorize an award of fees only to the

party who prevails on a claim to enforce the terms of the contract containing the provision, it is equally clear that an attorney fee provision need not be so limited"].)

In determining the breadth of a contractual attorney fee provision, we necessarily focus on the words the parties elected to use. (See *Exxess Electronixx v. Heger Realty Corp.* (1998) 64 Cal.App.4th 698, 708 ["[a]s to tort claims, the question of whether to award attorneys' fees turns on the language of the contractual attorneys' fee provision, i.e., whether the party seeking fees has 'prevailed' within the meaning of the provision and whether the type of claim is within the scope of the provision"]; see also *Santisas v. Goodin*, *supra*, 17 Cal.4th at p. 602 ["[w]hether attorney fees incurred in defending tort or other noncontract claims are recoverable after a pretrial dismissal depends upon the terms of the contractual attorney fee provision"].) Well-developed case law considering this issue provides clear guidance in parsing the parties' language.

On the one hand, attorney fee provisions held to be broad enough to cover tort or other noncontractual claims have referred to claims "arising out of the execution of this agreement" (*Santisas v. Goodin*, *supra*, 17 Cal.4th at p. 607); litigation "*concerning [the agreement's] terms, interpretation or enforcement or the rights and duties of any party in relation thereto*" (*Khan v. Shim*, *supra*, 7 Cal.App.5th at p. 59); "any dispute" between the parties (*Miske v. Coxeter* (2012) 204 Cal.App.4th 1249, 1250); a civil action "*instituted in connection with*" the parties' agreement (*Cruz v. Ayromloo* (2007) 155 Cal.App.4th 1270, 1277); or "'any action or proceeding arising out of this agreement'" (*Lerner v. Ward* (1993) 13 Cal.App.4th 155, 159). On the other hand, attorney fee provisions using narrower language, typically

referring only to an action to "enforce" the agreement, have been held to permit an award of attorney fees only in connection with contract claims—for example, "an action or proceeding to enforce the terms hereof or declare rights hereunder" (*Exxess Electronixx v. Heger Realty Corp.*, *supra*, 64 Cal.App.4th at p. 702); an action "brought to enforce the terms of this [Release]" (*Gil v. Mansano* (2004) 121 Cal.App.4th 739, 742); or a legal action or arbitration "to enforce the terms of the agreement" (*Loube v. Loube* (1998) 64 Cal.App.4th 421, 429).

b. *The attorney fee provision in the limited partnership agreements applies only to contract claims*

Paragraph 13.9 of the limited partnership agreements, the basis for the fee awards in this case, authorizes an award of attorney fees to the prevailing party only in an "action or proceeding between the parties seeking enforcement of any of the terms and provisions of this Agreement." That language closely tracks the wording of the fee provisions in cases holding an award of attorney fees was authorized only in connection with contract claims. (See, e.g., *Casella v. SouthWest Dealer Services, Inc.*, *supra*, 157 Cal.App.4th at p. 1162 ["the language of the prevailing-party attorney fees provision only provided for recovery of fees in actions brought to enforce the parties' agreement"; claims for wrongful termination in violation of public policy, fraud and violation of provisions of the Labor Code "do not seek to enforce the employment agreement"]; *Exxess Electronixx v. Heger Realty Corp.*, *supra*, 64 Cal.App.4th at p. 709 ["tort claims do not 'enforce' a contract"]; see also *Xuereb*, *supra*, 3 Cal.App.4th at pp. 1342-1343 [attorney fees not permitted on

tort claims under contractual provision authorizing fees in an action to interpret or enforce the contract].[5])

The narrow scope of this provision—applicable only to lawsuits to enforce the terms of the limited partnership agreements—is accentuated by comparing it to the preceding paragraph in the limited partnership agreements. Paragraph 13.8, the dispute resolution clause, applied without limitation to "[a]ny controversy, claim, action or dispute arising out of or relating to this Agreement." Plainly, the drafters of the limited partnership agreements knew how to phrase a provision broadly when that was their intent. (Cf. *Khan v. Shim*, *supra*, 7 Cal.App.4th at p. 61 [emphasizing the parties "could easily have negotiated" a narrow fee provision had they wanted to; "[t]hey instead chose much different language"].)

As discussed, the thrust of Stella's lawsuit was that the private placement memoranda falsely represented the nature of the fee labeled a real estate commission purportedly to be paid by the seller of the properties being acquired by the limited partnerships and, as a result, misstated the fair market value of the properties and the compensation to be paid the general partner. Those allegations of fraud in the private placement memoranda formed the factual core for each of the nine causes of

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[5] After explaining that tort claims would not be covered by a fee provision limiting an award of attorney fees to actions brought to interpret or enforce a contract, the court in *Xuereb, supra*, 3 Cal.App.4th 1338 held the language of the fee provision before it—authorizing "attorney fees and costs in any 'lawsuit or other legal proceeding' to which 'this Agreement gives rise'"—"is broad enough to encompass both contract actions and actions in tort." (*Id.* at pp. 1342-1343.)

action alleged as to the seven limited partnership transactions—the five tort claims (intentional misrepresentation, fraudulent concealment, negligent misrepresentation, negligence and breach of fiduciary duty), as well as the four statutory causes of action (for violation of the unfair competition law and securities fraud under the Corporate Securities Law of 1968). Although the alleged misrepresentation concerning payment of the so-called real estate commission to AMC was repeated in the body of the limited partnership agreements, Stella's lawsuit did not seek to enforce that provision, which simply confirmed the misstatements and omissions in the private placement memoranda that Stella asserted were actionable.[6]

To be sure, as pointed out by the parties we identified as "lawyer defendants" in the prior appeal (see *Stella I*, *supra*, 8 Cal.App.5th at p. 185), each private placement memorandum stated it did not purport to be all-inclusive and cautioned its descriptions of the terms of the subscription and limited partnership agreements were subject to, and qualified in their entirety by, the actual documents, which were attached as appendices. Accordingly, the private placement memoranda continued, the terms and conditions of the offering and the rights and liabilities of the limited partners "will be governed by the limited partnership agreement . . . ." But those warnings to potential investors to read all relevant documents hardly convert a lawsuit alleging the offering materials contained intentionally

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[6] Paragraph 6.6.2 of the limited partnership agreement expressly approves the "real estate commission" to be received by AMC upon acquisition "from the seller of the Property" even though the transaction might otherwise be deemed to involve a prohibited conflict of interest.

false representations and material omissions into an action to enforce the underlying limited partnership agreement.

Acknowledging at least implicitly that Stella's tort and statutory claims are not covered by the fee provision in the limited partnership agreement if that provision is narrowly construed, as we conclude it must be, AMC and other defendants argued in the trial court and again in their briefs on appeal that the attorney fees award was nonetheless proper because they successfully advanced affirmative defenses that enforced one or more of the provisions in the limited partnership agreements (for example, paragraph 6.6.2, in which the limited partners specifically approved payment of the real estate commission, and paragraph 13.8, which authorized the petition for appointment of a referee).[7] However, the argument that raising an affirmative defense based on a contract's terms is equivalent to bringing an action or proceeding to enforce the contract for purposes of a narrowly drawn attorney fee clause relied on *Windsor Pacific LLC v. Samwood Co., Inc.* (2013) 213 Cal.App.4th 263 and other court of appeal decisions disapproved earlier this year in *Mountain Air*, *supra*, 3 Cal.5th 744. (See *id.* at p. 756, fn. 3.)[8] In

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[7] The referee did not explain in his statement of decision or during the telephonic hearing on the motions for attorney fees and costs his finding that each of Stella's causes of action, "either directly or indirectly, challenged or sought to enforce the provisions of the Limited Partnership Agreements." Accordingly, we cannot determine if his ruling accepted defendants' argument that raising an affirmative defense based on a contract's terms is equivalent to bringing an action to enforce the contract.

[8] The Supreme Court's decision in *Mountain Air*, *supra*, 3 Cal.5th 744 was filed after briefing was completed. Prior to

that case the Supreme Court unanimously held the assertion of the provisions of an agreement with an attorney fee provision as an affirmative defense to a lawsuit is not an action or proceeding brought for the enforcement of that contract and does not justify an award of attorney fees under a narrow attorney fee provision limited to such actions or proceedings. (*Id.* at pp. 755-756; see *id.* at p. 761 (dis. opn. of Kruger, J.).) As the Court explained, "[W]hile an affirmative defense is a 'real *part of* any action [citation], it does not, in and of itself, constitute an 'action' for purposes of recovering attorney fees." (*Id.* at p. 753.) In addition, "[w]hile the word 'proceeding' can generally refer to '"a mere procedural step that is part of the larger action or special proceeding"' [citation], we conclude that it is used here in a narrower sense, similar to 'an action . . . before a court.'" (*Id.* at p. 754.)[9]

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setting the case for oral argument, we invited the parties to submit supplemental letter briefs addressing the effect of *Mountain Air* on the issues raised in the appeal.

[9] The plaintiff seller in *Mountain Air* brought a breach of contract action against defendant buyers for failing to purchase certain property. The buyers asserted an affirmative defense of novation, arguing they were not liable under the purchase agreement because it had been superseded by the parties' subsequent option agreement, which granted them the exclusive right, but not the obligation, to purchase the property. (*Mountain Air, supra*, 3 Cal.5th at p. 747.) The option agreement had a broad attorney fee clause, providing, "'Litigation Costs. If any *legal action or any other proceeding*, including arbitration or an action for declaratory relief[,] is brought for the enforcement of this Agreement or *because of an alleged dispute, breach, default, or misrepresentation in connection with any provision of this*

Although the Supreme Court in *Mountain Air* held the assertion of an affirmative defense was not a legal action or other proceeding to enforce a contract, rejecting a broad reading of the word "proceeding" used in the attorney fee provision at issue in that case, at oral argument AMC and the other defendants referred to the Supreme Court's observation that "[t]he word 'proceeding' can take on 'different meanings in different contexts'" (*Mountain Air*, *supra*, 3 Cal.5th at p. 754, quoting *Zellerino v. Brown* (1991) 235 Cal.App.3d 1097, 1105)[10] and argued

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*Agreement*, the prevailing party shall be entitled to recover reasonable attorney fees, expert fees and other costs incurred in that action or proceeding, in addition to any other relief to which the prevailing party may be entitled.'" (*Id*. at p. 757, italics added by Supreme Court.) Although all seven justices agreed the affirmative defense of novation did not constitute an action or proceeding for the enforcement of the option agreement since the buyers had no obligation to exercise the option, a closely divided Court held an award of attorney fees to the buyers was nonetheless proper because the parties disputed whether the option agreement reflected an intent to extinguish the purchase agreement the seller was attempting to enforce. Justice Kruger, joined by Justices Corrigan and Liu, dissented from that portion of the Court's opinion. (See *Mountain Air*, *supra*, 3 Cal.5th at pp. 761-762 (dis. opn. of Kruger, J.).) In light of the narrow language of the attorney fee provision in the limited partnership agreement, that point of disagreement in *Mountain Air* provides no help to defendants here.

[10] The court of appeal in *Zellerino* held a discovery demand was a "proceeding" for purposes of obtaining relief under section 473, which at the time authorized the court to allow a party "'to amend any pleading or proceeding . . . by correcting a mistake . . . ,'" as well as to "relieve a party or his or her legal representation from a judgment, order, or other proceeding taken

paragraph 13.9 should be construed to authorize the fee award (or a portion of it) based on their successful motion to enforce the dispute resolution provision of the limited partnership agreement, as well as their successful statute-of-limitations demurrer, which they contend was based on "enforcement" of notice provided by paragraph 6.6.2 of the limited partnership agreement.[11] Each of those procedural steps, they contend, constituted a "proceeding between the parties seeking enforcement of any of the terms and provisions" of the limited partnership agreements. This proposed expansive definition of "proceeding" to include any procedural step taken in a case, rather than being comparable to the entire legal action, is inconsistent with the general usage of the term and cannot be reconciled with the language of paragraph 13.9.

Code of Civil Procedure section 22 defines an "action" as "an ordinary proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the

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again him or her through his or her mistake, inadvertence, surprise, or excusable neglect.'" (*Zellerino v. Brown*, *supra*, 235 Cal.App.3d at p. 1104.) While the issue before the court was whether relief for a discovery error could be obtained by motion under section 473 or was limited to the provisions of the discovery statutes, there could be no question that in the context being considered "proceeding" did not refer to the action as a whole.

[11] In fact, our opinion in *Stella I* held Stella's argument for application of the delayed discovery rule failed because of statements in the private placement memoranda, not the limited partnership agreements. (See *Stella I*, *supra*, 8 Cal.App.5th at p. 193.)

punishment of a public offense." Section 23, in turn, provides, "Every other remedy is a special proceeding." That is, action and special proceeding refer to the whole or entirety of a lawsuit—the means by which a party seeks ultimately to vindicate a claim or right. Accordingly, absent some indication in the language of an agreement or admissible extrinsic evidence that the parties intended a different meaning, when the word "proceeding" is used in the parallel phrase "action or proceeding," as here, the two terms should be interpreted to be of the same kind or character—that is, as referring to litigation generally, whether initiated by complaint, petition or demand for arbitration.

Rather than supporting the broad interpretation of the term "proceeding" urged by AMC and other defendants, the language of paragraph 13.9 indicates the parties intended both "action" and "proceeding" to connote the entire lawsuit, whether formally denominated a civil action or other form of litigation. Paragraph 13.9 states, "In any action or proceeding between the parties seeking enforcement of any of the terms and provisions of this Agreement, the prevailing party *in such action* shall be awarded . . . ." (Italics added.) "Such action" in this context plainly refers to both "action" and "proceeding" and leaves no room for doubt that both terms refer to the entirety of a lawsuit. Thus, while AMC's motion for a judicial reference sought to enforce one of the provisions of the limited partnership agreements, its successful pursuit of that motion did not trigger its right to recover attorney fees under paragraph 13.9.

Finally, our conclusion the trial court erred in awarding attorney fees to defendants is not at odds with cases holding an action for rescission of a contract, one aspect of the relief Stella sought on his claims for violations of the Corporations Code, is an

action "on the contract" within the meaning of Civil Code section 1717. (See *Super 7 Motel Associates v. Wang* (1993) 16 Cal.App.4th 541, 549 ["an action for fraud seeking damages sounds in tort, and is not 'on a contract' for purposes of an attorney fee award, even though the underlying transaction in which the fraud occurred involved a contract containing an attorney fee clause. [Citation.] However, where the plaintiff's claim instead seeks rescission based on fraud, the courts have concluded such claim does sound in contract and permits the award of fees."]; *Hastings v. Matlock* (1985) 171 Cal.App.3d 826, 841 ["[i]n an action to enforce the rescission of a written land sale agreement, containing a clause for attorney's fees which does not limit recovery of such fees to any particular form of action involving the contract, the prevailing party is entitled to an award of such fees"]; cf. *Star Pacific Investments, Inc. v. Oro Hills Ranch, Inc.* (1981) 121 Cal.App.3d 447, 461.)

Prospective investors who decided to purchase units in the limited partnerships, as marketed through the private placement memoranda, completed a subscription agreement and provided a check in the requisite amount for the specified number of limited partnership units being acquired. The sale was completed when the subscription was accepted by the partnership. Although the investor was required to sign and return the limited partnership agreement with the executed subscription agreement, the contract that effectuated the purchase—that is, the agreement that Stella sought to rescind—was the subscription agreement, not the limited partnership agreement. The subscription agreement, however, contained no attorney fee provisions. Thus, even if rescission, rather than damages, was an available remedy as to some of the named defendants for the fraud-based securities

law violations, no award of attorney fees would be justified based on paragraph 13.9 of the limited partnership agreement.

In sum, because none of the claims asserted by Stella in his first amended complaint sought to enforce any of the terms of the limited partnership agreement or was otherwise "on the contact," none fell within the narrow scope of that agreement's attorney fees provision.

3. *There Was No Abuse of Discretion in the Cost Award Other Than One Item Awarded to the Lawyer Defendants*

Stella contends the referee abused his discretion in awarding several items of costs that were improper on their face. First, as to AMC and James and Gloria Hopper, Stella argues the referee allowed a double recovery for a portion of their share of referee fees (apparently $1,693) and awarded $3,480 in appearance fees that, although actually paid by AMC, was an overcharge by the Los Angeles Superior Court. Stella also argues the referee erred in failing to tax or reduce the cost bill of the lawyer defendants by $2,500 because they, and then the referee, did not recognize this sum was an up-front retainer against which other items, also recognized as recoverable costs, had been charged.

As AMC and the Hoppers note, Stella made the same arguments regarding these cost items before the referee. Of course, the referee's rejection of Stella's position does not necessarily mean it was a proper exercise of discretion to do so. Yet as to the referee's fees, although Stella cites pages in the record relating to his claim, his briefs on appeal do not provide any explanation of the JAMS invoices or their relationship to AMC's and the Hoppers' costs requests that would permit us to conclude there indisputably was a double recovery. Similarly,

although based on the superior court civil fees schedule it seems AMC and the Hoppers may have been charged more than proper in appearance and complex case fees, other than assert they should have requested a refund, Stella fails to carry his burden to show the referee's decision to award the full amount actually paid constituted an abuse of discretion. (See *Adams v. Ford Motor Co.* (2011) 199 Cal.App.4th 1475, 1482 ["[t]he party appealing the trial court's decision to award costs bears the burden '"to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice, a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power"'"]; *Seever v. Copley Press, Inc.* (2006) 141 Cal.App.4th 1550, 1557 ["'[i]f the items on a verified cost bill appear proper charges, they are prima facie evidence that the costs, expenses and services therein listed were necessarily incurred'"].)

The lawyer defendants, however, do not challenge Stella's explanation of the $2,500 retainer or contest his argument that their cost award improperly included that sum. Accordingly, we direct that their postjudgment cost award be reduced by that amount.

4. *The Order for a General Reference Is Not Properly Before the Court*

In his appeal from the judgment of dismissal of his lawsuit, Stella argued reversal was required because the trial court had erred in ordering a general reference pursuant to section 638. (*Stella I*, *supra*, 8 Cal.App.5th at pp. 184, 198.) He asserted, for example, the dispute resolution provision in the limited partnership agreements was unenforceable because it did not unambiguously establish a forum other than a judicial forum, the

scope of the dispute resolution provision did not include fraud in the solicitation and sale of the limited partnership units; and those defendants who were not signatories to the limited partnership agreement lacked standing to compel a judicial reference. In affirming the judgment, we rejected Stella's argument, holding any error in ordering the general reference was harmless. (*Id.* at p. 198.)

In this postjudgment appeal Stella repeats his arguments challenging the order for a judicial reference, contending, because the order was made in error, the referee lacked authority to award attorney fees and costs. Stella is not entitled to relitigate an issue decided in a previous appeal. (See *Searle v. Allstate Life Ins. Co.* (1985) 38 Cal.3d 425, 434; *Sargon Enterprises, Inc. v. University of Southern California* (2013) 215 Cal.App.4th 1495, 1505; *Santa Clarita Organization For Planning The Environment v. County of Los Angeles* (2007) 157 Cal.App.4th 149, 156.)

Stella attempts to escape from this well-established rule by insisting, if the reference was not properly made in accordance with section 638, then the referee had no jurisdiction and the fees and costs award is void in its entirety for want of subject matter jurisdiction. As such, the postjudgment order is subject to direct or collateral attack at any time. (*People v. American Contractors Indemnity Co.* (2004) 33 Cal.4th 653, 660; see *Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 119.) Stella is mistaken.

If the trial court has subject matter jurisdiction to hear or determine a case and personal jurisdiction over the parties, an order or judgment rendered in excess of the court's jurisdiction, such as by its failure to follow fundamental procedures prescribed by statute, remains valid but voidable. (*In re Marriage of*

*Jackson* (2006) 136 Cal.App.4th 980, 988.) "Essentially, jurisdictional errors are of two types. 'Lack of jurisdiction in its most fundamental or strict sense means an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties.' . . . [¶] However, 'in its ordinary usage the phrase "lack of jurisdiction" is not limited to these fundamental situations.' [Citation.] It may also 'be applied to a case where, though the court has jurisdiction over the subject matter and the parties in the fundamental sense, it has no "jurisdiction" (or power) to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites.' [Citation.] '"[W]hen a statute authorizes [a] prescribed procedure, and the court acts contrary to the authority thus conferred, it has exceeded its jurisdiction."' [Citation.] When a court has fundamental jurisdiction, but acts in excess of its jurisdiction, its act or judgment is merely voidable." (*People v. American Contractors Indemnity Co.*, *supra*, 33 Cal.4th at pp. 660-661.)

Under these settled principles the order of general reference, even if made in error, was voidable, not void in the required fundamental sense, and is not subject to a renewed challenge on appeal.

## DISPOSITION

The award of attorney fees is reversed. The cost award is affirmed except the amount awarded to Davies Lemmis Raphaely Law Corporation, Merton Randel Davies and Rosemary Lemmis must be reduced by $2,500. Stella is to recover his costs on appeal.

PERLUSS, P. J.

We concur:

ZELON, J.

SEGAL, J.