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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

CESAR ECHEVERRIA, Cross-Complainant and Respondent, v. CATREEN COHEN, Cross-Defendant and Appellant.	B285085 (Los Angeles County Super. Ct. No. BC536220)

APPEAL from an order of the Superior Court of Los Angeles County. Frederick Shaller, Judge. Affirmed.

Richard I. Wideman; Law Offices of Rafi Moghadam and Rafi Moghadam for Appellant.

Jeffrey Lewis for Respondent.

Freddie Shaham and Catreen Cohen, D.D.S., a Professional Dental Corporation (Cohen Inc.) sued their landlord, Cesar Echeverria, over the termination of their commercial lease. Echeverria filed a cross-complaint against Catreen Cohen individually, along with Shaham and Cohen Inc. Echeverria prevailed over Shaham and Cohen Inc. on both the complaint and cross-complaint, but Cohen, the individual, was found not liable for any damages suffered by Echeverria. The trial court denied Cohen's subsequent request for $244,625 in attorney fees on the ground she was not a prevailing party. Cohen appeals; we affirm.

FACTS

In 2004, Shaham and Cohen Inc. leased office space from Echeverria to run a dental and medical clinic. When the lease terminated in 2014, they sued Echeverria for breach of contract, fraud, and interference with economic advantage. They alleged Echeverria provided less square footage than was promised, failed to give them credit for advance payment of rent, demanded payment of amounts not due under the lease, and was obligated, but refused, to negotiate an option to renew the lease. They also alleged Echeverria interfered with the sale of their business in 2010 by refusing to transfer the lease to the potential buyer. Shaham and Cohen Inc. recovered nothing by way of their complaint.

Echeverria filed a cross-complaint for breach of lease (first cause of action), waste (second cause of action), and vandalism and theft (third cause of action). He named Shaham and Cohen, in their individual capacities, along with Cohen Inc. as cross-defendants. The first two causes of action were alleged against the "Tenant Cross-Defendants" and the third cause of action was alleged against "All Cross-Defendants." Among other things,

Echeverria alleged the cross-defendants breached the lease by preventing Echeverria from accessing the property, by holding over after the lease expired, and by failing to pay rent and property taxes that were owed. In addition, the cross-defendants allegedly damaged the property and removed items of personal property from the premises after the lease expired, including HVAC units, lighting fixtures, interior doors, door frames, door hardware, security lighting, electrical and hydraulic lines, sinks, and cabinets.

After a bench trial, the court awarded Echeverria $197,804.22 in damages for the breach of lease claim and $4,626.48 for the third cause of action, which the court construed as a trespass claim, for a total of $202,430.70 in damages. Judgment was entered in favor of Echeverria on the complaint and the cross-complaint, though there was no recovery against Cohen in the cross-complaint. As part of its 60-page statement of decision, the trial court found Cohen had no personal liability because Echeverria failed to meet his burden to prove liability under an alter ego theory or any other theory of vicarious liability. Further, the trial court found Echeverria failed to demonstrate Cohen personally engaged in any wrongdoing.

Cohen Inc. and Shaham filed a motion for new trial, which was denied. Cohen then moved for $244,625 in attorney fees on the theory she was a prevailing party in the cross-complaint because the trial court found she was not personally liable for any damages. The trial court initially denied Cohen's fee motion because it was untimely. Cohen subsequently filed a motion for relief with an attorney affidavit of fault under Code of Civil Procedure section 473. The trial court granted the motion for relief from default, but determined an award of compensatory

fees and costs for vacating the original order denying fees was mandatory. After briefing from both parties, the court ordered Cohen's counsel to pay Echeverria's counsel $5,597 in compensatory fees and costs incurred as a result of his error.

The trial court denied Cohen's motion for attorney fees, finding the lease limited attorney fees only to the parties to the lease, which Cohen was not. The trial court further found that "[o]nly the third Cause of Action was asserted against Cohen, on a tort theory." The lease did not provide a basis for Cohen to recover attorney fees for defense of a tort claim.

Cohen timely appealed the order denying her motion for attorney fees.

DISCUSSION

Cohen asserts the trial court's finding that she could not be held personally liable for any of the damages suffered by Echeverria renders her a prevailing party on the cross-complaint, who is entitled to attorney fees. We disagree.

I. Applicable Law

When a lawsuit involves a contract containing an attorney fees clause, the court examines the contract to determine whether the parties to the lawsuit and the nature of the claims fall within the intended scope of the attorney fees clause. (*Xuereb v. Marcus & Millichap, Inc.* (1992) 3 Cal.App.4th 1338, 1342–1344; *Meininger v. Larwin-Northern California, Inc.* (1976) 63 Cal.App.3d 82, 84; *Canal-Randolph Anaheim, Inc. v. Wilkoski* (1978) 78 Cal.App.3d 477, 485.) Civil Code section 1717 (section 1717) "make[s] reciprocal any provision awarding attorney fees regardless of any wording purporting to make the right unilateral." (*Wilson's Heating & Air Conditioning v. Wells Fargo Bank* (1988) 202 Cal.App.3d 1326, 1332.)

Section 1717 does not apply to an action asserting only tort claims, however. (*Douglas E. Barnhart, Inc. v. CMC Fabricators, Inc.* (2012) 211 Cal.App.4th 230, 241 (*Douglas E. Barnhart, Inc.*).) Further, where a cause of action based on a contract which includes an attorney fees provision is joined with other causes of action beyond the contract, the prevailing party may recover attorney fees under section 1717, only as they relate to the contract action. (*Stout v. Turney* (1978) 22 Cal.3d 718.) So, a litigant may not increase his recovery of attorney fees by joining a cause of action in which attorney fees are not recoverable to one in which an award is proper. In sum, attorney fees incurred by a defendant solely for defending causes of action not related to a contract with an attorney fees provision are not recoverable. (*Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 128 (*Reynolds*).)

We review for abuse of discretion a trial court's denial of an attorney fees request. (*Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1175.) " '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.' " (*Ibid.*)

II. Cohen is Not Entitled to Attorney Fees

Cohen asserts she is entitled to an attorney fees award under contract. She is mistaken. It is undisputed Cohen was not a party to the lease and thus, not entitled to attorney fees under the lease.

Cohen rests her attorney fees demand on paragraph 31 of the lease, which provides in pertinent part: "If any Party or Broker brings an action or proceeding involving the Premises

whether founded in tort, contract or equity, or to declare rights hereunder, the Prevailing Party (as hereafter defined) in any such proceedings, action, or appeal thereon, shall be entitled to reasonable attorneys' fees . . . . The term, 'Prevailing Party' shall include, without limitation, a Party or Broker who substantially obtains or defeats the relief sought, as the case may be, whether by compromise, settlement, judgment, or the abandonment by the other Party or Broker of its claim or defense."

"Party" is defined as the lessor (Echeverria) or the lessee (Shaham and Cohen Inc.). The term "Broker" is defined as the real estate brokers representing the lessor or the lessee in the transaction. No brokers are specifically identified in the lease. However, it is undisputed Cohen was not a party or a broker on the lease. As a result, the express terms of the attorney fees clause exclude Cohen from being a prevailing party under the lease.

A. Mutuality of Remedies Doctrine Does Not Apply

To avoid the express terms of the attorney fees provision, Cohen contends she is entitled to attorney fees under the mutuality of remedies doctrine contained in Section 1717. Again, she is mistaken.

The mutuality of remedies doctrine "require[s] section 1717 be interpreted to further provide a reciprocal remedy for a nonsignatory defendant, sued on a contract as if he were a party to it, when a plaintiff would clearly be entitled to attorney's fees should he prevail in enforcing the contractual obligation against the defendant." (*Reynolds*, *supra*, 25 Cal.3d at p. 128; *Real Prop. Servs. Corp. v. City of Pasadena* (1994) 25 Cal.App.4th 375, 382.) "An action (or cause of action) is 'on a contract' for purposes of section 1717 if (1) the action (or cause of action) 'involves' an

agreement, in the sense that the action (or cause of action) arises out of, is based upon, or relates to an agreement by seeking to define or interpret its terms or to determine or enforce a party's rights or duties under the agreement, and (2) the agreement contains an attorney fees clause." (*Douglas E. Barnhart, Inc., supra,* 211 Cal.App.4th at pp. 241–242.)

The mutuality of remedies doctrine does not apply in this case because Cohen was not sued "on the contract." It is clear from the record that Echeverria did not allege a breach of lease claim against Cohen, but only against Shaham and Cohen Inc. The third cause of action, which is the only one alleged against Cohen,[1] does not seek to define or interpret the terms of the lease or seek to determine or enforce a party's rights or duties under the lease. It instead alleged that all cross-defendants participated in removing fixtures and other improvements after the lease terminated.

Relying on a typographical error in the cross-complaint, Cohen asserts she was sued on the contract because she was named in the first cause of action for breach of the lease. The trial court rejected this argument, and so do we.

The cross-complaint mistakenly identified the "Tenant Cross-Defendants" as "Shaham and Cohen" rather than Shaham and Cohen Inc. The first cause of action for breach of lease and second cause of action for waste were alleged against the "Tenant Cross-Defendants." The trial court found this was "a typographical error in the Cross-Complaint," explaining that

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[1] Alternatively, Cohen argues the third cause of action is not solely a tort claim, but is "grounded" in contract because the cause of action "incorporated all prior allegations." We find this claim has no merit.

all other proceedings demonstrated Echeverria intended to sue Shaham and Cohen Inc. on these claims with only "one reference to Cohen without the Inc. on it in the Cross-Complaint." By contrast, the trial court noted: (1) the captions to the causes of action indicated the first two causes of action applied to Cohen Inc., (2) the parties treated Cohen Inc. as the cross-defendant to those causes of action in the demurrer and the answer, and (3) Cohen Inc. was the cross-defendant throughout pre-trial and trial proceedings, including in the summary judgment proceedings. The trial court concluded Cohen's argument was "really futile."

Cohen counters that Echeverria never amended the cross-complaint to add "Inc." to the definition of "Tenant Cross-Defendants" to indicate the first two causes of action were against the dental corporation and not Cohen individually. According to Cohen, the failure to do so meant Echeverria must be held to his typographical error. Not so. It is apparent the parties understood that Cohen Inc. was a "Tenant Cross-Defendant" and not Cohen individually. Contrary to Cohen's contention, resolution of this issue does not rest solely on the allegations in the cross-complaint.

The California Supreme Court's analysis in *Hsu v. Abbara* (1995) 9 Cal.4th 863 (*Hsu*) is instructive. It held that "in deciding whether there is a 'party prevailing on the contract,' the trial court is to compare the relief awarded on the contract claim or claims with the parties' demands on those same claims and their litigation objectives *as disclosed by the pleadings, trial briefs, opening statements, and similar sources*. The prevailing party determination is to be made only upon final resolution of the contract claims and only by 'a comparison of the extent to which

each party ha[s] succeeded and failed to succeed in its contentions.' [Citation.]" (*Id.* at p. 876, italics added.)

Just as in *Hsu*, we look to the pleadings, trial briefs, summary judgment proceedings, and similar sources to determine whether Cohen is a party prevailing on the contract. The record supports the finding that the contract claim was directed toward Cohen Inc. rather than Cohen individually. Without a contract claim directed to Cohen as an individual, the mutuality of remedies doctrine does not apply in this case to award attorney fees to Cohen as a prevailing party.

We also reject Cohen's argument that she is entitled to attorney fees because Echeverria sought attorney fees from her based on the lease. Cohen may not rely on the mutuality of remedies doctrine for this proposition. The caselaw holds that a nonsignatory is only entitled to attorney fees if the opposing party would "clearly" be entitled to attorney fees should he prevail. (*Reynolds, supra*, 25 Cal.3d at p. 128.) A mere allegation in a cross-complaint did not "clearly" entitle Echeverria to attorney fees from Cohen. Indeed, it is unlikely that Echeverria would have been awarded attorney fees based on the lease provisions since Cohen was not a party to it.

B. The Alter Ego Claim Does Not Render Cohen a Signatory

Cohen next attempts to overcome her nonsignatory status by arguing Echeverria pursued her under an alter ego theory. We are not persuaded.

The California Supreme Court has held that a nonsignatory found to be the alter ego of a signatory corporation may recover its attorney fees under section 1717. (*Reynolds, supra,* 25 Cal.3d at pp. 128–129.) In *Reynolds,* the plaintiffs sought to recover on

two promissory notes that were signed by a bankrupt corporation. The notes contained an attorney fees clause. The defendant did not sign the notes, but was alleged to be the alter ego of the bankrupt corporation. (*Id.* at p. 127.) The high court determined the nonsignatory could be deemed a contractual party subject to the attorney fees clause. Because the nonsignatory would stand in the corporation's shoes for purposes of the contract, the plaintiff would have been "clearly" entitled to attorney fees if he had prevailed on the contract. As a result, the nonsignatory who successfully defended against the plaintiff's contract claim could recover its attorney fees under section 1717. (*Reynolds,* at p. 127.)

The alter ego theory does not bring Cohen within the ambit of section 1717 here, however, because no contract cause of action was alleged against her under an alter ego theory or otherwise.[2]

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[2] At oral argument, Cohen's appellate counsel indicated the alter ego theory was not limited to the third cause of action, but that it was pursued against Cohen at trial with respect to the other claims as well. There are no reporter's transcripts to show what was argued or presented at the bench trial. In Cohen's opening and reply briefs on appeal, she cited only to Echeverria's closing brief and the trial court's statement of decision to support this argument. In each document, it is clear the alter ego theory was limited to the third cause of action. In Echeverria's closing brief, the alter ego argument comes under the heading, "Cohen has Personal Liability for the Theft, Waste, Vandalism and Conversion Committed." These torts are all contained within the third cause of action. More importantly, they are all torts, meaning the alter ego theory was not asserted in connection with a contract claim by Echeverria. Further, in its statement of decision, the trial court addresses the parties' causes of action separately. Its alter ego analysis comes after its discussion of the

The record shows any alter ego liability was limited to the third cause of action, which is a tort claim. Specifically, in Echeverria's closing brief, he argued Cohen had personal liability for the theft and vandalism cause of action under an alter ego theory as well as from her personal involvement in committing those torts. He also argued, "Cohen, in addition to Shaham and Cohen Corporation, are responsible for the tortious acts committed and all three must be subjected to claims for punitive damages."

Unlike in *Reynolds,* Cohen did not stand in the shoes of Cohen Inc. for purposes of the contract. Instead, Cohen Inc., and not Cohen personally, was properly named as a defendant in the breach of lease cause of action and found liable for Echeverria's damages. As we discussed above, section 1717 limits its reach to claims "on the contract" and does not extend to tort claims. (*Douglas E. Barnhart, Inc., supra,* 211 Cal.App.4th at p. 241.)

III. The Appeal of the Sanctions Award is Not Properly Before This Court

Cohen was represented below by Richard Wideman. Wideman was ordered by the trial court to pay to opposing counsel compensatory fees and costs of $5,597 (sanctions award) for his failure to timely file Cohen's attorney fees motion. Wideman continued to represent Cohen on appeal. He filed Cohen's notice of appeal, which indicated she was appealing from an order dated July 27, 2017, the day the trial court denied Cohen's request for attorney fees.

Wideman also filed Cohen's opening brief. Although there was no notice of appeal filed from the October 10, 2017 sanctions award, Wideman argued for a reversal of it in the opening brief.

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merits of the third cause of action with no indication that the analysis applies to the contract cause of action as well.

Cohen subsequently retained new counsel and Rafi Moghadam substituted in to the appeal on April 25, 2018. Moghadam filed Cohen's reply brief and argued Cohen's appeal of the denial of her attorney fees request should be bifurcated from Wideman's appeal of the sanctions award.

We decline to entertain either Wideman's argument for reversal or Moghadam's argument for bifurcation. Each presumes Wideman appealed from the sanctions award. He did not. (*Norman I. Krug Real Estate Investments, Inc. v. Praszker* (1990) 220 Cal.App.3d 35, 46 [aggrieved parties must file timely appeal or forever lose the opportunity for appellate review].) Neither did Cohen herself, for that matter. Even if she did appeal from the sanctions award, Cohen lacked standing to do so because she was not a party aggrieved by it. (*United Investors Life Ins. Co. v. Waddell & Reed, Inc.* (2005) 125 Cal.App.4th 1300, 1304; Code Civ. Proc., § 902.) As a result, the issue is not properly before us.

DISPOSITION

The order denying Cohen's motion for attorney fees is affirmed. Respondent Echeverria is awarded costs on appeal.

BIGELOW, P.J.

We concur:

RUBIN, J.

GRIMES, J.