

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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(a). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115(a).

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

ADAN CUEVA CONTRERAS,

Plaintiff and Appellant,

v.

SILLA AMERICA, INC.,

Defendant and Respondent;

SILLA AMERICA, INC.,

Plaintiff and Respondent,

v.

C & H SPORTSWEAR et al.,

Defendants and Appellants.

B283118

Los Angeles County

Super. Ct. Nos.

BC561960, BC577425, &

BC602321

APPEAL from an order of the Superior Court of Los Angeles County, Samantha P. Jessner, Judge. Affirmed.

Chad Biggins for Plaintiff and Appellant Adan Cueva Contreras and Defendant and Appellant C & H Sportswear.

Ecoff Campain & Tilles, Lawrence C. Ecoff and Alberto Campain for Defendant and Respondent Silla America, Inc.

INTRODUCTION

California follows the “American” rule, under which each party to a lawsuit must ordinarily pay his or her own attorney’s fees absent a contractual or statutory provision to the contrary. And where a contract contains a provision allowing a party to recover attorney’s fees, Civil Code section 1717¹ generally makes that provision bilateral. But section 1717 does not allow an award of contractual attorney’s fees in a case that is voluntarily dismissed or settled.

Following a bench trial on three consolidated cases, each arising out of a separate contract, the prevailing party, appellant Adan Cueva Contreras (Cueva), requested approximately \$165,000 in attorney’s fees relating to the entirety of the litigation. The court concluded Cueva was only entitled to attorney’s fees in one of the three cases and, after an apportionment, awarded Cueva approximately \$38,000. The court denied the request for fees as to the other two cases: one of the contracts was oral and did not include any provision for attorney’s fees, and the other case was dismissed during closing argument and recovery of fees was therefore barred under section 1717.

¹ Undesignated statutory references are to the Civil Code.

Cueva contends the court erred in denying his request for fees related to the dismissed action. First, he argues a party should not be able to avoid liability for attorney's fees by dismissing a case during closing argument. But under current law, a party may voluntarily dismiss his or her case at any time prior to its submission—including during closing argument. Second, Cueva argues the contractual provision at issue is sufficiently broad to permit recovery of fees relating to noncontract claims (goods sold and delivered, and unjust enrichment). We reject this argument because the provision at issue is limited to contract claims. Finally, Cueva claims he is entitled to attorney's fees under Code of Civil Procedure section 998, a cost-shifting provision that allows recovery of some litigation expenses as costs following a rejected settlement offer. Because that section does not provide for recovery of attorney's fees as costs, we reject that argument as well and affirm the court's order.

FACTS AND PROCEDURAL BACKGROUND

The appellate record contains few facts about the underlying disputes between the parties. According to the court's statement of decision, it conducted a bench trial involving three consolidated cases. It generally found Cueva to be honest and credible, and rejected as not credible the testimony of the other parties.

The first case (No. BC561960, the machine case), brought by Cueva against Silla America, Inc. (Silla America) and Soon Gil Park, involved an oral agreement between Cueva and Park in which Cueva agreed to sell Park and Silla America two machines used to dye textiles in exchange for 12,000 t-shirts worth \$27,000. Cueva provided the machines but never received the t-shirts. And

when Cueva tried to retrieve his machines and sell them to someone else, Park was evasive. Eventually, Cueva discovered the machines had been moved by Sung K. Lee and S. K. Machinery Moving, Inc. (the moving company) from Park's business location to the moving company's storage facility. Cueva's complaint stated claims for breach of contract and fraud. The court found for Cueva on the fraud claim and awarded him \$27,000 in damages, more than \$10,000 in prejudgment interest, and \$135,000 in punitive damages.

The second case (No. BC602321, the t-shirt case), brought by Silla America against Cueva and his company, C & H Sportswear, alleged Silla America provided Cueva with over \$21,000 in merchandise that Cueva never paid for. Silla America's complaint stated claims for breach of contract, goods sold and delivered, and unjust enrichment. Silla America dismissed the t-shirt case during closing argument.

The third case (No. BC577425, the storage case), brought by the moving company against Cueva and C & H Sportswear, alleged Cueva owed the moving company rent relating to storage of the textile-dyeing machines. Cueva and C & H Sportswear filed a cross-complaint against Silla America, Park, and Lee, seeking damages for the cost of the trailers in which the machines had been transported—trailers that were subsequently seized by the moving company's landlord and sold at auction. The court found in Cueva's favor and awarded compensatory damages of \$500 (the amount recovered at auction) and \$5,000 in punitive damages.

After the court entered judgment, Cueva and C & H Sportswear filed a motion against Silla America and the moving company seeking \$164,945 in attorney's fees incurred in the

litigation of all three cases. The court concluded it could only award fees in the storage case and, after an apportionment, awarded attorney's fees in the amount of \$37,890 against the moving company. Cueva timely appeals the order regarding attorney's fees.

DISCUSSION

Cueva contends the court erred in denying his request for attorney's fees under the contract at issue in the t-shirt case (No. BC602321). We disagree.

1. Standard of Review

“‘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.’” (*Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1175.) Because we are primarily interpreting a contract and a statute, we apply the de novo standard of review.

2. The court properly denied Cueva's request for attorney's fees in the t-shirt case.

2.1. Because defendants dismissed the t-shirt case before the matter was submitted to the court for decision, section 1717, subdivision (b)(2), bars recovery of fees relating to contract claims.

Whether a party to litigation is entitled to recover costs is governed by Code of Civil Procedure section 1032, which provides, in subdivision (b), that “[e]xcept as otherwise expressly

provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding.” Code of Civil Procedure section 1033.5 provides, in subdivision (a)(10), that attorney’s fees are “allowable as costs under Section 1032” when they are “authorized by” either “Contract,” “Statute,” or “Law.” “Thus, recoverable litigation costs do include attorney fees, but only when the party entitled to costs 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*).)

For the purpose of determining entitlement to costs, Code of Civil Procedure section 1032 defines “‘Prevailing party’” as including, among others, “a defendant in whose favor a dismissal is entered.” (Code Civ. Proc., § 1032, subd. (a)(4).) Because Silla America voluntarily dismissed the t-shirt case with prejudice, Cueva is a defendant in whose favor a dismissal has been entered. Accordingly, he is the “prevailing party” within the meaning of Code of Civil Procedure section 1032.

Cueva contends he is entitled to attorney’s fees as costs under the t-shirt contract—a delivery receipt purportedly documenting his receipt of 219 boxes of t-shirts. That receipt includes the following statement:

“Invoices are due and payable in full cash or credit within the terms shown. An interest charge of 1% per month will be added to all past due accounts. Defective merchandise may be returned within 7 days from delivery for an exchange or a refund only with prior authorization. The purchaser agrees to pay all reasonable collection costs and attorney fee [*sic*] incurred if an overdue account is

assigned for collection. For further information, please call Silla America Sales”

Although this provision only entitles the seller (Silla America) to recover attorney’s fees, Cueva directs our attention to section 1717, subdivision (a), which 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 either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney’s fees in addition to other costs.”

Importantly for our purposes, however, section 1717, subdivision (b)(2), provides, “Where 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.” Here, Silla America dismissed its case during closing argument—a point Cueva does not dispute. Nevertheless, Cueva contends that “allowing Silla America to utilize [section] 1717(b)(2) in this situation is unfair and should not be allowed. The Court can and should pronounce a rule that prohibits a litigant from utilizing this section after trial has commenced, especially where, as here, the only reason for the dismissal was because the court signaled its intended ruling and the complaint was exposed for what it is—a fraud on the court.”

We have two responses to this argument. First, the appellate record does not reveal why Silla America dismissed its case nor does it contain any indication of the court’s probable disposition of the case. Accordingly, we ignore Cueva’s discussion of those purported facts. Second, and in any event, we decline

Cueva’s invitation to rewrite section 1717, subdivision (b)(2), so that a “voluntary dismissal” for purposes of that statute means something different from what Code of Civil Procedure section 581 provides. Our colleagues in Division Four of this court recently explained that under Code of Civil Procedure section 581, subdivision (e), a party may properly dismiss its case at any time prior to the submission of the matter for decision.² (*Shapira v. Lifetech Resources, LLC* (2018) 22 Cal.App.5th 429, 437.) Submission occurs “ ‘when the court, trying the [case] without a jury, has heard the evidence *and the arguments of counsel* and has taken the case under advisement.’ ” (*Ibid.*) Here, Silla America dismissed the case during closing argument and before the court submitted the matter for decision. And having dismissed its case prior to submission, Silla America successfully avoided liability for attorney’s fees as costs under Code of Civil Procedure section 1032. We take Cueva’s point to be that a party should not, as a matter of fairness, be allowed to avoid such liability after putting the other party to the ordeal and expense of defending against an action all the way through trial. That argument, however, is best presented to the Legislature, as we

² Code of Civil Procedure section 581, subdivision (d), provides: “Except as otherwise provided in subdivision (e), the court shall dismiss the complaint, or any cause of action asserted in it, in its entirety or as to any defendant, with prejudice, when upon the trial and before the final submission of the case, the plaintiff abandons it.” Subdivision (e) provides: “After the actual commencement of trial, the court shall dismiss the complaint, or any causes of action asserted in it, in its entirety or as to any defendants, with prejudice, if the plaintiff requests a dismissal, unless all affected parties to the trial consent to dismissal without prejudice or by order of the court dismissing the same without prejudice on a showing of good cause.”

have no authority to rewrite either Code of Civil Procedure section 581 or section 1717 in the manner Cueva suggests.

2.2. The fee provision in the t-shirt contract does not provide a basis for recovery of attorney's fees relating to noncontract claims.

As a fallback position, Cueva asserts that even if section 1717, subdivision (b)(2), bars recovery of attorney's fees, it does so only with respect to the causes of action sounding in contract. Accordingly, Cueva contends, he is still entitled by contract to recover fees incurred to defend against Silla America's noncontract claims (goods sold and delivered, unjust enrichment) in the t-shirt case.

As a general rule, a contractual provision for attorney's fees does not give rise to a right to recover fees related to noncontract claims under section 1717. "Where a cause of action based on the contract providing for attorney's fees is joined with other causes of action beyond the contract, the prevailing party may recover attorney's fees under section 1717 only as they relate to the contract action. [Citations.] Describing the attorney's fees provision, section 1717 specifically refers to fees 'incurred to enforce the provisions of [the] contract.' A litigant may not increase his recovery of attorney's fees by joining a cause of action in which attorney's fees are not recoverable to one in which an award is proper. ..." (*Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 129–130.) But as with most rules, this one is subject to several exceptions.

In some situations, an attorney's fee provision in a contract is so broadly worded that it allows a prevailing party to recover fees related to litigation of both contract and noncontract claims. Specifically, Cueva relies on *Santisas*, in which plaintiffs filed a

suit against the sellers of a residential property, alleging the sellers failed to disclose defects in the property. The plaintiffs' complaint asserted causes of action for breach of the purchase agreement, negligence, and fraud, and sought attorney's fees. (*Santisas, supra*, 17 Cal.4th at p. 603.) The purchase agreement included this provision: " 'In the event legal action is instituted by the Broker(s), or any party to this agreement, arising out of the execution of this agreement or the sale, or to collect commissions, the prevailing party shall be entitled to receive from the other party a reasonable attorney fee to be determined by the court in which such action is brought.' " (*Ibid.*) Before trial, the plaintiffs voluntarily dismissed their action with prejudice and the defendants moved to recover their attorney's fees as costs under Code of Civil Procedure sections 1021, 1032, and 1033.5, citing the fee provision in the purchase agreement. The plaintiffs asserted section 1717, subdivision (b)(2), prohibited an award of attorney's fees following a voluntary dismissal of the action.

The Supreme Court agreed with the plaintiffs, but only to a point. The court held that section 1717, subdivision (b)(2), barred recovery of attorney's fees incurred on the breach of contract claim. But the court noted that section 1717, subdivision (b)(2), is expressly limited to contract claims. The attorney's fees provision at issue in the real estate contract, however, was expansive: "On its face, the provision embraces all claims, both tort and breach of contract, in plaintiffs' complaint, because all are claims 'arising out of the execution of th[e] agreement or the sale.' [Citation.] ... If a contractual attorney fee provision is phrased broadly enough, as this one is, it may support an award of attorney fees to the prevailing party in an action alleging both contract and tort claims: '[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.’ [Citation.]” (*Santisas, supra*, 17 Cal.4th at p. 608.)

Contrary to Cueva’s assertion, the attorney’s fees provision at issue is not broad enough to encompass noncontract claims. As noted, the fee provision states: “The purchaser agrees to pay all reasonable collection costs and attorney fee [*sic*] incurred if an overdue account is assigned for collection.” Even if this provision could give rise to the right to attorney’s fees in a breach of contract action, it is plainly too narrow to encompass noncontract claims, inasmuch as it focuses specifically on a collection action following the buyer’s failure to pay for purchased goods. It does not contain any of the broad language (“any litigation” brought by “any party”) found to support an award of fees relating to the tort claims in *Santisas*. (And see, e.g., *Drybread v. Chipain Chiropractic Corp.* (2007) 151 Cal.App.4th 1063, 1071–1072 [clause providing for fees in “‘any action or other proceeding arising out of this Sublease’” broad enough to encompass noncontract claims such as unlawful detainer action]; *Gonzales v. Personal Storage, Inc.* (1997) 56 Cal.App.4th 464, 480 [clause calling for attorney’s fees in “‘any legal action’” applied to tort action].)

2.3. Code of Civil Procedure section 998 does not provide a basis for recovery of attorney’s fees.

Finally, Cueva contends that a voluntary dismissal necessarily constitutes the failure to obtain a judgment more favorable than a rejected settlement offer and therefore triggers entitlement to attorney’s fees under Code of Civil Procedure section 998. We disagree. Although it is well settled that Code of Civil Procedure section 998 may give rise to the right to recover

postoffer expert witness fees as costs, that is not the case with respect to attorney's fees, absent some other basis for the recovery of such fees.

In his opening brief, Cueva asserts that “[b]ecause a voluntary dismissal constitutes a failure to obtain a judgment more favorable than a rejected § 998 offer, it triggers the discretionary award of expert and attorney’s fees under § 998: ‘While a lawsuit may be concluded by a voluntary dismissal, the price of such a dismissal is the payment of costs under [Code of Civil Procedure] section 1032 ... (S)ection 998 expands those costs to include the discretionary award of expert witness [and attorney’s] fees. *Mon Chong Loong Trading Corp. v. [Superior Court]* (2013) 218 Cal.App.4th 87, 93–94 & fn. 6 [(*Mon Chong Loong*)]’.” (Second brackets in Cueva’s brief.) We take exception to Cueva’s insertion of the phrase “[and attorney’s]” in his quoted case excerpt because it substantially changes the meaning of the case’s holding.³

In *Mon Chong Loong*, the court noted that, by statute, voluntary dismissal of a lawsuit is always conditioned upon payment of the opposing party’s costs. (*Mon Chong Loong, supra*,

³ Cueva drops a footnote, stating “The trial court took issue with Cueva’s insertion of the bracketed addition of ‘attorney’s’ in this quote. ... The insertion was only to be consistent with the cases which discuss attorney’s and expert fees together. The *Mon Chong* case only involved expert fee[s], so Cueva added ‘attorney’s’ to be consistent with *Scott* [*Co. v. Blount, Inc.* (1999) 20 Cal.4th 1103 (*Scott*)] and [*On-Line Power, Inc. v.*] *Mazur* [(2007) 149 Cal.App.4th 1079 (*Mazur*)] which expressly hold attorney’s fees are also recoverable under CCP § 998. Cueva did not intend to mislead the court, nor does he believe the insertion is misleading.” As we explain, however, *Scott* and *Mazur* are distinguishable.

218 Cal.App.4th at p. 93; Code Civ. Proc., §§ 581, subd. (b)(1), 1032, subd. (a)(4).) Further, the court observed, it is well established that Code of Civil Procedure section 998, a cost-shifting provision designed to encourage settlement, provides that a party that declines a settlement offer and fails to obtain a better result at trial will be obligated to pay not only costs of suit as provided by Code of Civil Procedure section 1032, but also additional costs set forth in Code of Civil Procedure section 998 which, importantly, explicitly authorizes the discretionary award of expert witness fees as costs: “If an offer made by a plaintiff is not accepted and the defendant fails to obtain a more favorable judgment or award in any action or proceeding other than an eminent domain action, the court or arbitrator, in its discretion, may require the defendant to pay a reasonable sum to cover postoffer costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the plaintiff, in addition to plaintiff’s costs.” (Code Civ. Proc., § 998, subd. (d).) Reading the cost and dismissal provisions together, the Court of Appeal held that if a party makes a settlement offer that is rejected and the opposing party later dismisses the action, the offering party may recover costs under Code of Civil Procedure section 1032 as expanded by Code of Civil Procedure section 998.

In contrast to expert witness fees, however, Code of Civil Procedure section 998 does not provide for the recovery of attorney’s fees as costs under Code of Civil Procedure section 1032. So Cueva’s insertion of “[and attorney’s] fees” in his quotation from *Mon Chong Loong* significantly changes the meaning of the quoted statement.

We are unaware of any case holding that Code of Civil Procedure section 998 authorizes a discretionary award of attorney's fees as costs in the absence of some other statutory or contractual right to such fees. (See, e.g., *Mangano v. Verity, Inc.* (2008) 167 Cal.App.4th 944, 951 [discussing award of attorney's fees under FEHA and noting "section 998 does not grant greater rights to attorney's fees than those provided by the underlying statute"].) And none of the cases Cueva cites stands for such a bold proposition—and one that plainly conflicts with the language of the statute itself.

Scott, supra, 20 Cal.4th at p. 1103, cited by Cueva, illustrates the point. There, the plaintiff rejected a \$900,000 settlement offer from the defendants prior to trial and later obtained a judgment of approximately \$442,000. The Supreme Court held the defendants were the prevailing parties under Code of Civil Procedure section 998 and were therefore entitled to costs under Code of Civil Procedure section 1032. But although the court also endorsed the award of attorney's fees, it did so because the contract at issue provided for an award of attorney's fees to the prevailing party, not because Code of Civil Procedure section 998 allowed their recovery. (*Scott*, at pp. 1114–1116.) Similarly, *Mazur, supra*, 149 Cal.App.4th at p. 1079, cited by Cueva, which sanctioned an award of attorney's fees following a rejected settlement offer, involved a suit under Labor Code section 218.5, which provides for recovery of attorney's fees in specific circumstances.

In sum, Cueva's reliance on Code of Civil Procedure section 998 as an independent basis for the recovery of attorney's fees is fatally flawed.

DISPOSITION

The order granting in part and denying in part Cueva's motion for attorney's fees is affirmed. In the interest of justice, each side shall bear its own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, Acting P. J.

WE CONCUR:

EGERTON, J.

KALRA, J.*

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