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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

JENNITA FOSTER,

Plaintiff and Appellant,

v.

OLD REPUBLIC DEFAULT  
MANAGEMENT SERVICES,

Defendant and Respondent.

B280006

(Los Angeles County  
Super. Ct. No. BC422057)

APPEAL from an order of the Superior Court of Los Angeles County. Ernest M. Hiroshige, Judge. Affirmed.

Jennita Foster, in pro. per., for Plaintiff and Appellant.

Zieve, Brodnax & Steele, John M. Steele and Namson N. Pham for Defendant and Respondent.

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Jennita Foster and her limited liability company, GHM007, LLC (GHM), previously appealed from a judgment entered in favor of Old Republic Default Management Services (Old Republic). We affirmed the judgment and awarded costs on appeal to Old Republic. Pursuant to a contractual attorney fees provision, the trial court awarded attorney fees of \$41,658.75 to Old Republic after the matter was remitted. Foster appeals a second time, contending Old Republic was not the prevailing party and that attorney fees should not have been included in the costs calculation or otherwise awarded. We affirm.

### **PROCEDURAL BACKGROUND**

Banco Popular North America held a note secured by a first deed of trust on an apartment building Foster purchased. Old Republic served as the trustee. Foster defaulted on the note and the apartment building was sold in a trustee's foreclosure sale in 2009. Foster and GHM filed an action against Banco Popular and Old Republic to set aside the trustee's sale of the apartment building. The complaint also alleged statutory violations associated with the foreclosure. The trial court granted summary judgment in favor of Old Republic. Foster and GHM appealed.<sup>1</sup>

Subsequent to the filing of Foster's notice of appeal in the underlying judgment, Old Republic moved for attorney fees in the amount of \$62,629. Foster failed to oppose the motion. The trial court granted the motion for the full amount requested and notice of entry of the order was served on September 9, 2014. Foster did not appeal the 2014 attorney fees award.

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<sup>1</sup> The trial court granted summary judgment as to Banco Popular. Foster's separate appeal of that judgment was dismissed for failure to file an opening brief.

In an opinion filed on October 22, 2015, we affirmed the judgment and ordered that Old Republic was to recover its costs on appeal. (*Foster v. Old Republic Default Mgmt. Servs.* (Oct. 22, 2015, B255615) [nonpub. opn.]<sup>2</sup> When the matter was remitted to the trial court, Old Republic moved to recover \$41,658 in attorney fees incurred during the appeal. Foster opposed, contending Old Republic was not a true prevailing party and it was not entitled to its attorney fees. The trial court awarded Old Republic the requested amount by order dated November 9, 2016. It reasoned the deed of trust provided for attorney fees incurred in connection with the performance of any act permitted under that instrument. Because the action sought to set aside a foreclosure sale based on the underlying deed of trust, and Old Republic was the prevailing party, it was entitled to attorney fees incurred on appeal pursuant to Civil Code section 1717, subdivision (a). Foster appealed.

### DISCUSSION

Foster contends Old Republic was not entitled to attorney fees, but does not contest the amount that was awarded.<sup>3</sup> Specifically, Foster claims Old Republic is not entitled to attorney

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<sup>2</sup> Foster's petition for review was denied by the California Supreme Court as was Old Republic's request for publication of the opinion. (*Foster v. Old Republic Default Management Services*, review denied Jan. 27, 2016, S230731.)

<sup>3</sup> Although Foster makes brief references to the improper addition of pre-appeal fees into the post-appeal fee award, she fails to support these contentions with citations to the record or to any authority that would demonstrate error. We therefore disregard these points. (*McComber v. Wells* (1999) 72 Cal.App.4th 512, 522–523.)

fees because it is not a prevailing party and the trial court erred by including attorney fees in the costs on appeal. We find these arguments lack merit. We find Foster's remaining contentions forfeited for her failure to raise them in the trial court.

## **I. Old Republic is the Prevailing Party**

Foster contends Old Republic is not the prevailing party because her previous appeal was wrongly decided. In particular, she takes issue with our 2015 decision that GHM could not assign its appellate rights to Foster. She contends this holding runs contrary to Supreme Court precedent. We disagree.

### **A. Procedural Background**

After the trial court granted Old Republic's motion for summary judgment, Foster filed a notice of intent to move for new trial. At the time, Foster was representing herself. Shortly thereafter, GHM's attorney of record substituted out of the case. Foster, for herself and apparently as the general manager of GHM, filed a substitution of attorney form indicating that "plaintiffs" would thereafter be representing themselves. Old Republic objected to the substitution of attorney as to GHM, arguing that Foster, who was not an attorney, could not represent GHM, a limited liability company, and that it could only appear in the action through an attorney. The trial court sustained Old Republic's objection.

Foster then filed a new trial motion and a "Notice of Assignment," which indicated that GHM had assigned its interests in the case to Foster personally. Old Republic again objected on the ground that Foster could not represent GHM because she was not an attorney. The trial court entered judgment in Old Republic's favor. Thereafter, the trial court

denied the motion for new trial and struck Foster’s Notice of Assignment.

Notwithstanding the stricken Notice of Assignment, Foster appealed on behalf of “Jennita Foster, and GHM [by] Jennita Foster as Assignee of [GHM].” In our 2015 opinion, we concluded that GHM could not participate in the appeal because it was not represented by an attorney in our court. (See *Caressa Camille, Inc. v. Alcoholic Beverage Control Appeals Bd.* (2002) 99 Cal.App.4th 1094, 1101–1102.) Accordingly, we dismissed the appeal to the extent it was prosecuted on behalf of GHM by Foster.

### **B. Analysis**

There is no dispute the judgment in favor of Old Republic was affirmed in its entirety in 2015. As a result, Old Republic was the prevailing party on the appeal. (*Mustachio v. Great Western Bank* (1996) 48 Cal.App.4th 1145, 1150; *Coltrain v. Shewalter* (1998) 66 Cal.App.4th 94, 107; see Code Civ. Proc., § 1032.)

Nevertheless, Foster contends that Old Republic was not the prevailing party on appeal because the appeal was wrongly decided. According to Foster, we erred in holding that GHM’s assignment of its appellate rights to Foster was invalid. Foster’s claim is merely an impermissible attempt to revisit the issue decided in 2015, which is final.<sup>4</sup> (Cal. Rules of Court, rules 8.264(b), 8.500.) We will not do so.

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<sup>4</sup> Foster contends the Supreme Court’s denial of Old Republic’s request for publication of our 2015 opinion somehow renders Old Republic a nonprevailing party on appeal, “leaving both parties with losses.” The denial of a request for publication

In any event, the Supreme Court opinion which Foster contends we disregarded, *Essex Ins. Co. v. Five Star Dye House, Inc.* (2006) 38 Cal.4th 1252, 1259, has no relevance here. *Essex* decided whether an assignee of a bad faith claim could also recover attorney fees. (*Ibid.*) This holding has nothing to do with whether a limited liability corporation may assign its appellate rights in an improper attempt to circumvent the rules requiring corporations to be represented by attorneys.

## **II. Old Republic Was Entitled to Attorney Fees Incurred on Appeal**

Foster contends the award of costs to Old Republic in our 2015 opinion may not include attorney fees. We review the issue de novo and conclude Old Republic is entitled to attorney fees as a calculation of costs. (*Sessions Payroll Management, Inc. v. Noble Construction Co.* (2000) 84 Cal.App.4th 671, 677.)

A prevailing party is entitled to recover costs in any action or proceeding, “[e]xcept as otherwise expressly provided by statute.” (Code Civ. Proc., § 1032, subd. (b).) These costs, however, do not include the attorney fees the prevailing party has incurred in the litigation unless (1) an agreement between the parties provides for the recovery of those fees, or (2) a statute creates a right of recovery. (Code Civ. Proc., §§ 1021, 1033.5, subd. (a); *Butler-Rupp v. Lourdeaux* (2007) 154 Cal.App.4th 918, 923.)

When authorized by contract, the right to attorney fees is made reciprocal by Civil Code section 1717, which provides: “In any action on a contract, where the contract specifically provides that attorney’s fees and costs, which are incurred to

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is not a factor used to determine who is the prevailing party. This argument is meritless.

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." (Civ. Code, § 1717, subd. (a).) This provision has been interpreted to mean that when a court determines the prevailing party for purposes of contractual attorney fees, such as here, the determination is "to be made without reference to the success or failure of noncontract claims." (*Hsu v. Abbata* (1995) 9 Cal.4th 863, 873–874.)

In addition, it is settled "that statutes authorizing attorney fee awards in lower tribunals include attorney fees incurred on appeals of decisions from those lower tribunals." (*Morcos v. Board of Retirement* (1990) 51 Cal.3d 924, 927 (*Morcos*); *Dankert v. Lamb Finance Co.* (1956) 146 Cal.App.2d 499, 503–504 (*Dankert*) [" 'A contract for a reasonable attorney's fee in enforcing its provisions embraces an allowance for legal services rendered upon appeal as well during the trial' "].) Therefore, when a Civil Code section 1717 fee award is made at the trial level, the prevailing party may later request attorney fees attributable to a subsequent appeal. (*Morcos, supra*, at p. 927; *Serrano v. Unruh* (1982) 32 Cal.3d 621, 637.) Code of Civil Procedure section 1033.5, subdivision (a)(10), expressly includes attorney fees in the calculation of costs when it is authorized by contract, statute, or law.

In this case, attorney fees are authorized by contract because the deed of trust contains an attorney fees provision. Specifically, paragraph 39 of the deed of trust states:

“39. REIMBURSEMENT. Borrower shall reimburse Trustee and Lender for any costs, fees (including reasonable attorneys’ fees) and expenses which either may incur, expend or sustain in connection with the execution of the trusts created hereunder or in the performance of any act required or permitted hereunder or by law or in equity or otherwise arising out of or in connection with this Instrument, the Note any other note secured by this Instrument or any other instrument executed by Borrower in connection with the indebtedness secured hereby. To the extent permitted by applicable law, Borrower shall pay to Trustee and Lender a reasonable fee in connection with Trustee and Lender providing documents or services, arising out of or in connection with this Instrument, the Note, any other note secured by this Instrument or any other instrument executed by Borrower in connection with the indebtedness secured hereby.”

This provision of the deed of trust is made reciprocal under Civil Code section 1717 and broadly provides for attorney fees incurred by a prevailing party in the performance of any act permitted in connection with that instrument.

Foster’s lawsuit sought to set aside the trustee’s foreclosure sale, which is authorized by the deed of trust. Foster’s claims therefore rest on the deed of trust, and reasonable attorney fees incurred by Old Republic, the trustee, in defending against Foster’s lawsuit are recoverable under paragraph 39. (*Kachlon v. Markowitz* (2008) 168 Cal.App.4th 316, 348.) Moreover, under *Morcos* and *Dankert*, the attorney fees incurred in the subsequent appeal are embraced within the same fee provision as those



awarded pre-appeal. Thus, Old Republic is entitled to recover the attorney fees it incurred on appeal.

### **III. Foster Has Forfeited Her Arguments Regarding the Validity of the Attorney Fees Provision**

In an effort to avoid paragraph 39, Foster contends the attorney fees provision is invalid for a variety of reasons. This constitutes the majority of Foster's arguments on appeal. Foster has forfeited these arguments, however, because she failed to raise them in the trial court when it first awarded attorney fees to Old Republic in 2014.

At that time, Old Republic was awarded its pre-appeal attorney fees based on paragraph 39 in the deed of trust. The trial court found Foster and GHM alleged they were entitled to attorney fees based on the reciprocity provision of Civil Code section 1717. Because the causes of action were based on the underlying deed of trust and promissory note, the trial court held Old Republic was entitled to the attorney fees it incurred in defending itself against Foster and GHM's complaint.

Foster did not oppose or appeal the trial court's conclusion that Old Republic was entitled to attorney fees. She now seeks to revisit the trial court's conclusion by arguing paragraph 39 should not be applied to award fees to Old Republic because its terms are unconscionable, it is not reciprocal, and it was extinguished at the time of the trustee's sale. She further claims paragraph 39 does not apply to the causes of action at issue because they are based on tort and statutory violations, not contract.<sup>5</sup> Foster is not entitled to a second bite at the apple.

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<sup>5</sup> Foster extends this point by making a convoluted argument that the cause of action to set aside the trustee sale was alleged only by GHM, not her. As far as we can tell, Foster contends any

Instead, Foster has forfeited these contentions. (See *Children’s Hospital & Medical Center v. Bontá* (2002) 97 Cal.App.4th 740, 776 (*Bontá*) [argument that attorney fee award was beyond court’s jurisdiction “doubly waived” because not presented to trial court and raised for first time on appeal in supplemental letter brief].) As in *Bontá*, Foster “doubly waived” these issues because she failed to present these issues to the trial court in 2014. She then failed to appeal from the fee award. Even if she had appealed from the 2014 fee award, she could not have raised these issues in that appeal. Therefore, she may not now, on her second appeal, make arguments she could not have made in the first appeal. The trial court has already determined that paragraph 39 authorizes attorney fees and the causes of action are based on the deed of trust, thus entitling Old Republic to attorney fees on appeal. We decline to disturb these findings four years after they were made.

Foster denies forfeiture applies in this case. She contends that the 2016 fee award “reopened” the appeal period to the 2014 award because the 2014 fee award was “substantially modified and incorporated into the 11/10/16 Order.” Alternatively, she appears to argue that the time to appeal from the 2014 fee award never began to run because she never received notice of the 2014 fee award. She provides no legal authority for the proposition that she may ignore the time limits of rule 8.104 of the California

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attorney fees related to the first appeal were not recoverable under the contract because the only claim related to the contract was dismissed when GHM was dismissed from the appeal. There is no merit to this claim. Foster ignores the fact that the appeal and our 2015 opinion addressed all the causes of action alleged in the complaint, not solely Foster’s.

Rules of Court and appeal from an order issued three years before the present notice of appeal. We reject these baseless contentions.

In her reply brief, Foster urges us for the first time to set aside a void judgment or order pursuant to section 473, subdivision (d) of the Code of Civil Procedure (section 473(d)). We interpret Foster's argument to be a request to vacate or set aside the 2014 fee award. We decline to do so. Even were we to consider this contention, we cannot discern the nature of Foster's allegations regarding section 473(d). In her reply brief, she merely sets forth numerous quotes from cases discussing section 473(d), but provides no analysis as to how it applies to this case. In particular, she does not explain how the 2014 fee award is void on its face, which is required under section 473(d). Foster may not rely on section 473(d) to avoid the findings made in the 2014 fee award.

### **DISPOSITION**

The order granting attorney fees to Old Republic is affirmed. Respondent Old Republic to recover its costs on appeal.

BIGELOW, P.J.

We concur:

GRIMES, J.

GOODMAN, J.\*

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