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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 THREE

MARTIN AUTOMOTIVE GROUP, Plaintiff, Cross-defendant and Respondent, v. SEAN HORTON et al., Defendants, Cross-complainants and Appellants.	B281963 (Los Angeles County Super. Ct. No. BC569814)

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

Rosner, Barry & Babbitt, Hallen D. Rosner, Christopher P. Barry and Shay Dinata-Hanson for Defendants, Cross-complainants and Appellants.

Law Office of Robert W. Beck and Robert W. Beck for Plaintiff, Cross-defendant, and Respondent.

INTRODUCTION

Martin Automotive Group (Martin) brought this action to foreclose on a lien on a Cadillac owned by defendants and cross-complainants Sean Horton and Tina Carmichael (the Hortons). The Hortons cross-complained against Martin alleging breach of the contract to service their car and conversion. The Hortons appeal from the trial court's denial of their attorney fee motion after determining under Civil Code section 1717[1] that no party prevailed on the contract. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The Hortons brought their car to Martin because it was overheating. They entered into a service contract with Martin that identified the cost to diagnose the problem as $140 (the service contract).

The service contract contained the following attorney fee provisions: "6. In addition to any and all other legal remedies available, I authorize Said Dealer to have a lien on the vehicle described herein for all charges for repairs, including labor and parts, storage and/or towing, and to enforce such lien. Said Dealer is hereby expressly authorized to sell said vehicle at public auction . . . . [T]he vehicle shall be sold to the highest cash bidder and the proceeds of sale must be used first to satisfy the lien plus storage costs and cost incident to sale, and the balance shall be forwarded to the legal owner . . . [¶] Said expenses for sale shall also include a reasonable attorney's fee, which may be necessarily incurred. [¶] 7. If any such charges remain unpaid

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[1] All further statutory references are to the Civil Code unless otherwise noted.

for thirty (30) days after such request for payment, Said Dealer may also refer such charges for collection and the client will pay a reasonable attorney's and/or collection fees."

1. *Martin's complaint*

The following month, Martin filed a notice of pending lien sale for the car and filed a complaint against the Hortons to preserve a $1,700 lien (§ 3068), of which $1,391.64 was for labor and parts. Martin alleged that the Hortons authorized Martin to perform an additional $1,400 in labor to determine the cause of the problem. However, the Hortons had a service contract on the car with Fidelity Warranty Service, who refused to pay for the repairs and so Martin ceased further work. The car remained on Martin's property, partially disassembled.

2. *The Hortons' cross-complaint*

The Hortons cross-complained against Martin for breach of the service contract and conversion of the car. In the operative breach of contract cause of action, the Hortons alleged that under the service contract, Martin agreed to service the car and diagnose the engine problem and the Hortons agreed to pay $140 for the inspection. The Hortons alleged that Martin breached the service contract by performing an engine teardown without authorization at a cost in excess of the original $140 and by demanding the Hortons pay $1,400 to Martin. The Hortons sought damages according to proof and section 1717 attorney fees.

In their operative conversion cause of action, the Hortons alleged that Martin performed an engine tear down without the Hortons' consent and demanded $1,400 from the Hortons to restore the car to its original condition and return it to them or Martin would retain possession of the car and charge a storage fee. The Hortons averred that at no time did they consent to a tear down of the engine or to a charge in excess of $140. The Hortons tendered the $140 contract amount but Martin refused to return the vehicle and intentionally and unlawfully retained possession of the car. The Hortons sought $16,000 as the estimated the value of the car, plus the loss of the car's use, enjoyment and possession, along with money paid to obtain alternative transportation while the car was in Martin's possession, and punitive damages (§ 3294).

3. *The verdict*

At the close of trial, the jury returned a verdict on special questions. On Martin's complaint, the jury found that Martin did not perform as required by the service contract. On the Hortons' breach of contract cause of action, the jury found that Martin breached the service contract but that the Hortons were not harmed by the breach. On the Hortons' conversion claim, the jury found in the Hortons' favor and awarded them $5,787.81.

4. *The Hortons' attorney fees motion* (*§ 1717*)

After judgment was entered, the Hortons moved for $147,932.50 in attorney fees as prevailing party on the breach of contract cause of action (§ 1717).[2] Although the service contract unilaterally allowed Martin to recover attorney fees, the Hortons explained that section 1717 made the provision bilateral. The Hortons argued that they prevailed on all causes of action in both Martin's complaint and their cross-complaint. They also argued that the two causes of action in their cross-complaint were "intertwined" making the conversion cause of action "on the contract" for purposes of section 1717. Therefore, they argued, as they were the prevailing party on the conversion claim, they were entitled to recover all of their attorney fees.

Martin's opposition to the Hortons' fee motion did not directly address the threshold determination of prevailing party under section 1717. Instead, Martin effectively challenged the amount of fees requested, arguing that the Hortons' litigation style ran up the costs. Specifically, Martin argued that this was really a limited civil case, but because the Hortons repeatedly requested punitive damages, it was reclassified to unlimited jurisdiction and then the trial court denied the punitive damages claim. The majority of the Hortons' attorney time was spent in propounding discovery which was both unnecessary and would have been disallowed in a court of limited civil jurisdiction. Martin also observed that this case took longer than necessary

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[2] Martin also sought to recover attorney fees under section 1717. However, Martin has not appealed from the trial court's denial of its motion and so we do not address that portion of the trial court's ruling.

because the Hortons were in the midst of separate litigation with Fidelity Warranty Service over the service contract and arbitration with Allen Cadillac, from whom they purchased their vehicle. Martin accused the Hortons of running up their legal fees in this lawsuit to recover their losses in the other two actions.

The trial court tentatively denied both sides' fee requests. The Hortons claim they objected to the tentative ruling and so the trial court set a second hearing and a briefing schedule. However, the following week, the court took the hearing off calendar and issued its final ruling stating that its tentative was correct and again denying both attorney fee motions. In the minute order reflecting the ruling, the court stated that the result of this litigation was a " 'tie' or 'draw' " on the contract claims. The court rejected the Hortons' argument that the attorney fee provision in the service contract could be read to include tort claims such as conversion.

The Hortons filed their timely appeal. They also elected to proceed with a settled statement under California Rules of Court, rule 8.137 of the hearing on the parties' attorney fee motions because the argument had not been recorded. The trial court denied the motion for a settled statement ruling that the minute order denying the attorney fee requests "is sufficient for purposes of appeal as the minute order sets forth the full basis for the court's ruling."

CONTENTIONS

The Hortons' assignments of trial court error are: (1) failing to issue a settled statement of the hearing on the attorney fee motions; (2) ruling that the Hortons were not the prevailing party on the contract claims; and (3) ruling that the Hortons' conversion cause of action was not "on the contract."

DISCUSSION

1. *No abuse of discretion in denying the Hortons' motion for a settled statement*

California Rules of Court, rule 8.137 governs the preparation of a settled statement to provide a record for appeal in civil cases.[3] The trial court has discretion to deny a motion for a settled statement. (*Mooney v. Superior Court* (2016) 245 Cal.App.4th 523, 531.) "That discretion, however, is limited and must be exercised in a manner that does not interfere with the litigant's statutory right to appeal." (*Randall v. Mousseau* (2016) 2 Cal.App.5th 929, 934; *Rhue v. Superior Court* (2017) 17 Cal.App.5th 892, 895.) If the court denies the motion, "it must provide reasons demonstrating a ' "justifiable excuse" why a settled statement could not be produced using the established procedures.' [Citation.]" (*Rhue*, at p. 896.)

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[3] The version of the rules of court in effect at the time the Hortons filed their request for a settled statement read in relevant part that when an appellant elected to proceed with a settled statement instead of a reporter's transcript, it must file a motion "supported by a showing that: [¶] . . . [¶] . . . (B) The designated oral proceedings were not reported." (Cal. Rules of Court, former rule 8.137(a)(2)(B).) "If the court denies the motion, the appellant must file a new notice designating the record on appeal under rule 8.121." (*Id.*, (a)(3).)

The Hortons contend that the trial court erred in denying their motion for a settled statement of the oral proceedings on the parties' section 1717 attorney fee motions. We disagree. The court's reason for denying the motion was that the full basis for its ruling was set out in the minute order. That excuse was justifiable as the proceeding was oral argument on a motion, the determination of which involved purely legal questions of the application of the law to the language of the contract (see *Carver v. Chevron U.S.A., Inc.* (2002) 97 Cal.App.4th 132, 142 (*Carver*)), and to the pleadings and other documentation contained in the record (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 871 (*Hsu*)). The denial did not interfere with the Hortons' appellate rights merely because their objections to the tentative ruling were not memorialized.

2. *No abuse of discretion under section 1717*

Under the so-called American rule, each party to a lawsuit is responsible for his or her own attorney fees. (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 607, fn. 4; Code Civ. Proc., § 1021.)[4] Attorney fees "incurred in prosecuting or defending an action may be recovered as costs only when they are otherwise authorized by statute or by the parties' agreement." (*Santisas*, at

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[4] Section 1032 of the Code of Civil Procedure establishes the general rule 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 Civ. Proc., § 1032, subd. (b).) Code of Civil Procedure section 1033.5 further specifies the "items . . . allowable as costs under Section 1032." One category of costs is "[a]ttorney fees, when authorized by . . . [¶] (A) Contract." (Code Civ. Proc., § 1033.5, subd. (a)(10)(A).)

p. 604, fn. 4.) When there is a written agreement that requires one party to pay the attorney fees of the other in the event of litigation, section 1717 requires that the remedy be reciprocal. That statute provides, "[i]n 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. [¶] . . . [¶] Reasonable attorney's fees shall be fixed by the court, and shall be an element of the costs of suit." (§ 1717, subd. (a), italics added.)

Section 1717 directs the trial court to decide who is the party prevailing on the contract and permits the court to determine that there is *no party prevailing on the contract*. (§ 1717, subd. (b)(1).) Those determinations are committed to the sound discretion of the trial court. (*Hsu*, *supra*, 9 Cal.4th at p. 871.) We will disturb the exercise of discretion only when there is clear abuse of that discretion. (*Kachlon v. Markowitz* (2008) 168 Cal.App.4th 316, 349; *Deane Gardenhome Assn. v. Denktas* (1993) 13 Cal.App.4th 1394, 1397 (*Deane*).) However, when the determination whether the criteria for an award of attorney fees have been satisfied amounts to statutory construction, it is a question of law which we review de novo. (*Carver*, *supra*, 97 Cal.App.4th at p. 142.)

Section 1717 defines "the party prevailing on the contract" as, "the party who recovered a greater relief in the action on the contract" (§ 1717, subd. (b)(1)), "without reference to the success or failure of noncontract claims." (*Hsu*, *supra*, 9 Cal.4th at pp. 873–874.) "When a party obtains a simple, unqualified victory by *completely* prevailing on or defeating all contract claims in the action and the contract contains a provision for attorney fees, section 1717 entitles the successful party to recover reasonable attorney fees incurred in prosecution or defense of those claims. [Citation.]" (*Scott Co. v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1109 (*Scott*), italics added, citing *Hsu*, *supra*, 9 Cal.4th at p. 877.) "[W]hen the decision on the litigated contract claim is purely good news for one party and bad news for the other," the trial court "has no discretion to deny attorney fees to the successful litigant." (*Hsu*, at p. 876.)

However, when "the results of the litigation are mixed, a court has discretion to find there was no prevailing party. [Citation.]" (*Carole Ring & Associates v. Nicastro* (2001) 87 Cal.App.4th 253, 261.) "If neither party achieves a *complete* victory on all the contract claims, it is within the discretion of the trial court to determine which party prevailed on the contract or whether, on balance, neither party prevailed sufficiently to justify an award of attorney fees." (*Scott*, *supra*, 20 Cal.4th at p. 1109, italics added.) Reviewing the authorities, our Supreme Court observed that for the most part, in those cases where the trial court determined that there was no party prevailing on the contract, they have involved situations "in which the opposing litigants could each legitimately claim some success in the litigation." (*Hsu*, *supra*, 9 Cal.4th at p. 875, citing *Bankes v.* Lucas (1992) 9 Cal.App.4th 365, 369; *McLarand, Vasquez &*

Partners, Inc. v. Downey Savings & Loan Assn. (1991) 231 Cal.App.3d 1450, 1456; *Deane*, *supra*, 13 Cal.App.4th at p. 1398.) " '[T]ypically, a determination of no prevailing party results when both parties seek relief, but neither prevails, or when the *ostensibly prevailing party receives only a part of the relief sought*.' [Citation.]" (*Hsu*, at p. 875, italics added, quoting from *Deane*, at p. 1398.)

In determining the prevailing party on the contract for purposes of section 1717, trial courts are "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.' " (*Hsu*, *supra*, 9 Cal.4th at p. 876.) "[I]n determining litigation success, courts should respect substance rather than form, and to this extent should be guided by 'equitable considerations.' For example, a party who is denied direct relief on a claim may nonetheless be found to be a prevailing party if it is clear that the party has otherwise achieved its main litigation objective." (*Id*. at p. 877, italics omitted.)

Here, the trial court did not abuse its discretion in concluding that there was no prevailing party on the contract. (§ 1717.) The jury found against Martin on the service contract but found that the Hortons were not damaged. Accordingly, the result was a tie: neither party succeeded on their contentions and neither obtained an unqualified victory. (*Scott*, *supra*, 20 Cal.4th at p. 1109.)

Citing *Building Maintenance Service Co. v. AIL Systems, Inc.* (1997) 55 Cal.App.4th 1014 (*AIL*), the Hortons assert that they were the prevailing party because they defeated Martin's contract claim, even though they recovered nothing on their own contract cause of action. But, *AIL* is inapposite because *the contract there did not contain an attorney fee provision and so section 1717 did not apply*. (*AIL,* at pp. 1031–1032.) Instead, the *AIL* court employed the test for prevailing party under Code of Civil Procedure section 1032, the factors for which determination are different than those under section 1717, particularly because, as is relevant here, section 1717 allows a trial court to decide that *no party* prevailed on the contract. (*AIL*, at p. 1021; *Sears v. Baccaglio* (1998) 60 Cal.App.4th 1136, 1156.)[5]

The Hortons next contend that the trial court erred in ruling that their conversion cause of action, a tort, was not "on the contract" for purposes of determining the prevailing party under section 1717. They argue that had Martin not breached the contract, then they would not have had a claim for conversion. Also, they argue that their cause of action arose out of a relationship "originally created by contract" (*Carver*, *supra*,

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[5] The *AIL* court explained that the test for prevailing party under Code of Civil Procedure section 1032 is not determinative of the question of entitlement to attorney's fees under section 1717. (*AIL*, *supra*, 55 Cal.App.4th at p. 1021.) Instead, "[t]he historical context of the various statutes and amendments establishes section 1717 as the fundamental statute to be applied to fees and costs claimed under a contract." (*Sears v. Baccaglio*, *supra*, 60 Cal.App.4th at p. 1158.) Hence, cases involving prevailing-party determinations under Code of Civil Procedure section 1032, and those cases that predate the 1968 enactment of section 1717, such as *Schrader v. Neville* (1949) 34 Cal.2d 112 cited by the Hortons, are simply inapplicable here.

97 Cal.App.4th at p. 149) because they alleged in the conversion cause of action that they were damaged by Martin's unauthorized teardown of the engine and wrongful retention of the car. Finally, the Hortons contend that the service contract's attorney fee provision was broad enough to encompass their conversion claim. (See *Exxess Electronixx v. Heger Realty Corp*. (1998) 64 Cal.App.4th 698, 708 ["As 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"]; *Brown Bark III, L.P. v. Haver* (2013) 219 Cal.App.4th 809, 827–828 [same].)

Even assuming without deciding that the trial court erred as a matter of law in ruling that Hortons' tort cause of action for conversion was not "on the contract," the result would be the same. (See, e.g., (*Belair v. Riverside County Flood Control Dist*. (1988) 47 Cal.3d 550, 568 ["a ruling or decision correct in law will not be disturbed on appeal merely because it was given for the wrong reason. If correct upon any theory of law applicable to the case, the judgment will be sustained regardless of the considerations that moved the lower court to its conclusion"]; 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 346, p. 397 ["If the decision of the lower court is right, the judgment or order will be affirmed regardless of the correctness of the grounds on which the court reached its conclusion"].) In their conversion cause of action, the Hortons sought (1) the estimated $16,000 value of the vehicle, (2) reimbursement for the loss of the use, possession and enjoyment of the car, (3) the daily cost of alternative transportation for the month the car was in Martin's

possession, along with (4) punitive damages (§ 3294), which is measured as a multiple of the total recovery. The Hortons' litigation objectives were hence to defeat Martin's claim, eliminate the lien, and recover hundreds of thousands of dollars. Instead, the jury awarded the Hortons a mere $5,787.81 on the conversion claim. Consequently, even factoring into the prevailing-party calculation the conversion cause of action, the result of this litigation remains mixed. Although the Hortons ostensibly prevailed on that claim, they received only a tiny fraction of the amount they sought – and not even half of what they claimed the car was worth. (*Hsu*, *supra*, 9 Cal.4th at p. 875; *Nasser v. Superior Court* (1984) 156 Cal.App.3d 52, 60 [no § 1717 prevailing party where tenant won declaratory relief validating option but judgment established a monthly rent higher than tenant asked for]; *Kytasty v. Godwin* (1980) 102 Cal.App.3d 762, 774 [no § 1717 prevailing party where defendant's right to easement was validated, but the scope of the easment was curtailed].) The Hortons did not achieve their litigation objectives. (*Hsu,* at p. 876.) The trial court did not abuse its discretion in determining that the Hortons were not the prevailing party, even if the conversion cause of action were "on the contract."

DISPOSITION

The order appealed from is affirmed. Each party to bear its own costs on appeal.

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KALRA, J.*

WE CONCUR:

EDMON, P. J.

EGERTON, J

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