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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

THE REDBEAN HOUSE CORPORATION, Plaintiff, Cross-defendant and Respondent, v. COLONNADE WILSHIRE CORPORATION, Defendant, Cross-complainant and Appellant.	B276837 (Los Angeles County Super. Ct. No. BC533345)

APPEAL from an order and judgment of the Superior Court of Los Angeles County. Teresa A. Beaudet, Judge. Affirmed.

Ryan & Associates and Jeanne Collachia for Defendant, Cross-complainant and Appellant.

Russ, August & Kabat, Jules L. Kabat, Irene Y. Lee, and Robert F. Gookin for Plaintiff, Cross-defendant and Respondent.

Defendant, cross-complainant, and appellant Colonnade Wilshire Corporation (Colonnade) appeals from a June 29, 2016 postjudgment order and a July 22, 2016 amended judgment awarding plaintiff, cross-defendant, and respondent The Redbean House Corporation (Redbean) $418,730.75 in attorney fees and $16,260.79 in costs as the prevailing party under Civil Code section 1717 and Code of Civil Procedure section 1032 in an underlying action for rescission of a commercial lease. We affirm the order and the judgment.

BACKGROUND[1]

The underlying lawsuit

In May 2013, Redbean and Colonnade entered into a commercial lease for two units (the premises) in a building on West Sixth Street in Los Angeles (the building). Neither party was aware at the time they entered into the lease that the building was subject to a mandatory seismic retrofit ordinance known as Division 88 or that the aggregate occupant load in the building, excluding the premises, exceeded the maximum occupant load allowed under Division 88.

In June 2013, Redbean's contractor began demolition work at the premises without obtaining the requisite permits. While the demolition work proceeded, Redbean sought to obtain approval of its construction plans from the Los Angeles Department of Building and Safety (LADBS). In November 2013, LADBS staff informed Redbean that in order to obtain approval of its plans, it would have to show that the occupant load for the building was less than 100. If the occupant load exceeded 100,

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[1] Much of the facts are set forth in our opinion affirming the judgment entered in Redbean's favor in the underlying action for rescission of the lease. (*The Redbean House Corporation v. Colonnade Wilshire* Corporation (Dec. 20, 2016, B265968) [nonpub. opn.].) We restate the relevant facts as necessary.

Redbean would have to undertake a structural analysis of the building and provide plans to seismically retrofit the building.

Redbean sent a letter to Colonnade and requested a meeting to discuss the retrofit issue. When Colonnade did not respond, Redbean filed the underlying lawsuit against Colonnade in January 2014.[2] In its complaint, Redbean asserted causes of action for intentional and negligent misrepresentation, breach of fiduciary duty, professional negligence, and rescission based on fraud, illegality, and impossibility. In addition to rescinding the lease, Redbean sought to recover consequential damages in payments it made to its contractor and expenses it incurred in anticipation of operating a restaurant on the premises. Colonnade filed a cross-complaint against Redbean for breach of the lease, waste, and negligence per se. Colonnade sought contract damages of $695,000 and $1,070,304 in tort damages for waste.

Before the trial commenced, Redbean dismissed all of the causes of action asserted against Colonnade except its rescission claim. The matter was tried as a bench trial before Judge John L. Segal.[3] At the conclusion of Redbean's case, Judge Segal granted Redbean's motion to amend its complaint to conform to proof by adding a cause of action for rescission based on failure of consideration. After the close of evidence and closing argument, Colonnade dismissed its cause of action for breach of the lease.

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[2] Redbean also sued Colonnade's broker, Charles Dunn, and certain employees of Charles Dunn, but subsequently dismissed the individual defendants. Charles Dunn is not a party to this appeal.

[3] Judge Segal was subsequently elevated to the Court of Appeal.

In a June 8, 2015 statement of decision, Judge Segal ruled in favor of Redbean and against Colonnade on Redbean's claim for rescission based on mutual mistake. Judge Segal denied Redbean's claim for consequential damages and instead concluded that Redbean and its contractor were jointly and severally liable to Colonnade for $49,647 in damages for waste.

Judgment in the underlying action was entered in accordance with the statement of decision. Colonnade appealed, and we affirmed the judgment in a nonpublished opinion. (*The Redbean House Corporation v. Colonnade Wilshire Corporation, supra*, B265968.)

Attorney fees award

Redbean filed a motion for attorney fees on August 26, 2015. After a hearing on the motion, the trial court issued an order on February 19, 2016, that Redbean was the prevailing party entitled to recover its attorney fees under Civil Code section 1717 and its costs under Code of Civil Procedure section 1032. The trial court found, however, that the parties had not presented sufficient facts and briefing to allow the court to determine whether apportionment of fees was appropriate and requested further briefing from the parties solely on that issue.

In response to the trial court's request, the parties filed supplemental briefs. Colonnade also filed, along with its brief, an expert declaration by an attorney named Andre Jardini. In his declaration, Jardini challenged the overall reasonableness of Redbean's attorney fees, as well as certain specific fee charges on the ground that the charges were for noncompensable overhead or administrative tasks. Redbean objected to the Jardini declaration on the grounds that it was outside the scope of the trial court's supplemental briefing order, irrelevant, lacked foundation, and contained improper legal conclusions. The trial

court sustained Redbean's objections and struck the declaration in its entirety.

On June 29, 2016, the trial court issued an order awarding Redbean attorney fees in the amount of $418,730.75. The court determined that enforceability of the lease was an issue common to all of the causes of action asserted in both the complaint and the cross-complaint and determined that the facts underlying Colonnade's cross-claims were "legally intertwined" with the underlying facts of Redbean's complaint. The trial court therefore concluded that apportionment was not appropriate.

This appeal followed.

CONTENTIONS ON APPEAL

Colonnade raises the following contentions:

1. The attorney fees award was improper because the contractual attorney fees provision in the lease does not cover an action for rescission.

2. The trial court erroneously determined Redbean to be the prevailing party in an action on the contract.

3. The trial court improperly struck the declaration of Colonnade's expert, Jardini.

4. The attorney fees should have been apportioned.

DISCUSSION

I. Contractual attorney fees provision

A contractual attorney fees award is governed by Civil Code section 1717. Subdivision (a) of that statute provides in pertinent part: "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." (Civ. Code, § 1717, subd. (a).)

The lease entered into by the parties contains the following attorney fees provision:

> "If either party commences litigation against the other for the specific performance of this Lease, for damages for the breach hereof or otherwise for enforcement of any remedy hereunder, the parties hereto agree to and hereby do waive any right to a trial by jury and, in the event of such commencement of litigation, the prevailing party shall be entitled to recover from the other party such costs and reasonable attorneys' fees as may have been incurred, including any and all costs incurred in enforcing, perfecting and executing such judgment."

Colonnade contends the trial court erroneously interpreted the lease provision to allow recovery of attorney fees in an action for rescission. Because the trial court interpreted the attorney fee provision without considering extrinsic evidence, we review the issue de novo. (*Kalai v. Gray* (2003) 109 Cal.App.4th 768, 777.) In doing so, we apply the ordinary rules of contract interpretation to ascertain the mutual intent of the parties at the time the contract was formed. Such intent is to be inferred, if possible, solely from the written provisions of the contract, and the clear and explicit meaning of those provisions, interpreted in their ordinary and popular sense, controls our interpretation. (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 608 (*Santisas*).)

Colonnade claims that the lease provision at issue limits recovery of attorney fees to only three types of actions: (1) an action for specific performance, (2) an action for breach of the lease, and (3) an action to enforce any remedy specified in the lease. The language of the attorney fees provision is broader than Colonnade contends. It includes actions to enforce two

specific remedies -- specific performance and damages for breach -- but also encompasses actions to enforce "any remedy hereunder." This third category of covered actions is substantially broader than Colonnade's interpretation, which would limit recovery of attorney fees to actions to enforce any remedy *specified in the lease*. Colonnade's narrow interpretation conflicts with the plain language of the lease and violates a fundamental principle of contract interpretation that prohibits courts from adding language that the parties did not include in their contract. (*Jacobson v. Simmons Real Estate* (1994) 23 Cal.App.4th 1285, 1294.) Redbean's claim for rescission was an action to enforce a remedy under the lease. (Civ. Code, § 1692; *Akin v. Certain Underwriters At Lloyd's London* (2006) 140 Cal.App.4th 291, 296 ["An action for rescission and an action for breach of contract are alternative remedies"]; 1 Miller & Starr, Cal. Real Estate (4th ed. May 2017 update) § 1:121 [rescission is a remedy available to a party seeking to disaffirm a contract because of mistake, illegality, or other justification recognized by law].)

We reject Colonnade's argument that if the attorney fees provision in the lease is interpreted to authorize a fee award on Redbean's rescission claim, the provision must also be interpreted to apply to Colonnade's tort cause of action for waste.[4] The provision at issue authorizes an attorney fees award to the prevailing party on an action to enforce any remedy under the lease. California courts have interpreted similar contract language to preclude recovery of attorney fees by a party prevailing on a tort claim. (*Santisas, supra*, 17 Cal.4th at p. 622,

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[4] Colonnade did not seek recovery of its attorney fees under Civil Code section 1717 or any other statute. We address this argument because it is possibly relevant to Colonnade's claim that the fee award should have been apportioned.

fn. 9 [lease authorizing attorney fees award in action to ""enforce any . . . provision . . . of this [contract]"" does not cover tort claims]; *Exxess Electronixx v. Heger Realty Corp.* (1998) 64 Cal.App.4th 698, 709-710 [lease provision awarding fees to prevailing party in an action "to enforce the terms hereof or declare rights hereunder" does not cover tort claims]; *De Mirjian v. Ideal Heating Corp.* (1949) 91 Cal.App.2d 905, 909-910 [lease authorizing award of attorney fees in an action "to enforce lessor's rights hereunder" does not include tort claims].)

As the prevailing party on an action for rescission -- an action to enforce a remedy under the lease -- Redbean was entitled to recover contractual attorney fees. The California Supreme Court has concluded that a party may recover attorney fees under Civil Code section 1717 even if the party is not seeking to enforce the contract, but to render it invalid, unenforceable, or nonexistent. (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 870 (*Hsu*).) Appellate courts are in accord on this issue. (See *Hastings v. Matlock* (1985) 171 Cal.App.3d 826, 840-841; *Star Pacific Investments, Inc. v. Oro Hills Ranch, Inc.* (1981) 121 Cal.App.3d 447, 463.)

II. Redbean as the prevailing party

A. Applicable law and standard of review

Civil Code section 1717, subdivision (b) requires the court, upon notice and motion by a party, to "determine who is the party prevailing on the contract" for purposes of an attorney fees award.

The statute provides that "the party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract" and that "[t]he court may also determine that there is no party prevailing on the contract." (Civ. Code, § 1717, subd. (b).)

"'[I]n 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 statements." (*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. [Citations.]" (*Id.* at p. 877.)

A party who obtains an unqualified victory on a contract claim is entitled as a matter of law to be considered the prevailing party for purposes of Civil Code section 1717. (*DisputeSuite.com, LLC v. Scoreinc.com* (2017) 2 Cal.5th 968, 973.) "'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.' [Citation.]" (*Ibid.*) A trial court has broad discretion in determining which party has prevailed on the contract, or that no party has prevailed, when ruling on a motion for fees under Civil Code section 1717. (*Ibid.*) When reviewing a trial court's exercise of discretion to determine the prevailing party under Civil Code section 1717, "[w]e are required to uphold a reasonable ruling even if we might not have ruled the same way and a contrary ruling would also be sustainable. [Citations.]" (*In re Tobacco Cases I* (2013) 216 Cal.App.4th 570, 578.)

B. Redbean was the prevailing party on its rescission claim

Colonnade contends Redbean was not the prevailing party on its rescission claim because Redbean sought but did not recover consequential damages on that claim. A party need not recover all of the relief it sought in order to be found a prevailing party for purposes of a contractual attorney fees award. (*Hsu, supra*, 9 Cal.4th at p. 877.) Although Redbean did not recover all of the relief it sought under its rescission claim, the trial court found that the relief Redbean did obtain -- rescission of the lease -- was its primary litigation objective. At the time the underlying judgment was entered, the rescission claim was the only contract claim in the action. The trial court's determination that Redbean was the prevailing party in an action on the contract was not an abuse of discretion. (*Id.* at p. 876.)

C. Civil Code section 1717, subdivision (b)(2) did not bar Redbean's recovery of fees

Colonnade claims the trial court erroneously based its prevailing party determination on Colonnade's voluntary dismissal of its cross-claim for breach of the lease and that Civil Code section 1717, subdivision (b)(2) barred Redbean's recovery of its attorney fees. 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."

The trial court found Redbean to be the prevailing party on the contract, not as the result of Colonnade's dismissal of its breach of contract cross-claim, but as the prevailing party on Redbean's claim for rescission, "a claim 'on the contract' for purposes of Civil Code [section] 1717" and "the only contract claim that was tied to the judgment." The trial court rejected Colonnade's argument that Civil Code section 1717, subdivision

(b)(2) barred Redbean's recovery of attorney fees, and cited *CDF Firefighters v. Maldonado* (2011) 200 Cal.App.4th 158 (*Maldonado*) in support of its ruling.

In *Maldonado,* a labor union filed a breach of contract action against two former members for failure to pay fines that had been levied against them. The complaint alleged two causes of action -- one for a $22,000 fine that accrued in 2004, and the second for a $743 fine that accrued in 2003. After six years of litigation, the $22,000 was found to be invalid, and Maldonado, one of the former members, was granted a partial judgment on the pleadings. The labor union thereafter dismissed its remaining claim for $743. The court in *Maldonado* held that the labor union's dismissal of its remaining claim for $743 did not negate Maldonado's status as the prevailing party on the adjudicated $22,000 claim and his entitlement to contractual attorney fees. (*Maldonado, supra*, 200 Cal.App.4th at pp. 161, 167.)

Maldonado supports the trial court's determination that Colonnade's voluntary dismissal of its breach of contract claim did not affect Redbean's status as the prevailing party on a claim for rescission of the lease. Colonnade's attempts to distinguish *Maldonado* are unpersuasive.

D. The cost award was not an abuse of discretion

Colonnade contends the trial court confused the standard for determining entitlement to costs as the prevailing party under Code of Civil Procedure section 1032 with the analysis for determining the prevailing party on the contract and entitlement to attorney fees under Civil Code section 1717. Colonnade further contends the trial court improperly awarded Redbean $1,885 in court reporter costs that Redbean had not paid.

The trial court awarded Redbean its costs as the prevailing party under Code of Civil Procedure section 1032 and its attorney

fees as the prevailing party on the contract under Civil Code section 1717. The record discloses no confusion between the two awards or the trial court's analysis in determining Redbean's entitlement to those awards. With regard to the challenged court reporter costs, the trial court found that Colonnade failed to meet its burden of showing that the costs were unnecessary or had already been paid. Colonnade fails to establish any abuse of discretion. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 331; *Heller v. Pillsbury Madison & Sutro* (1996) 50 Cal.App.4th 1367, 1395.)

E. The underlying judgment supports the fee award

Colonnade argues that the trial court's prevailing party determination was contrary to Judge Segal's statement of decision and the judgment entered in the underlying action.

The statement of decision reads "Redbean has shown it is entitled to rescind the lease because it (and Colonnade Wilshire) entered into the lease based on . . . mistake" and that mistake "is a proper basis for rescission" under Civil Code section 1689. The underlying judgment is "in favor of Redbean and against Colonnade" on Redbean's cause of action for rescission and "declares that the subject Lease Agreement is rescinded." Both the judgment and the statement of decision support the trial court's determination that Redbean was the prevailing party in an action on the contract.[5]

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[5] Colonnade accuses the trial court of having "engaged in a buckshot approach when precise analysis is required." Unfortunately, Colonnade employs this very approach in much of its opening brief, positing hypothetical outcomes that differ from the actual judgment, alternate theories under which Redbean or Colonnade could have been awarded costs, and speculation as to whether Judge Segal's interlineations on a proposed judgment submitted by Redbean reflected an inclination to deny Redbean recovery of contractual attorney fees. We disregard these speculative musings.

III. Apportionment

A. Evidentiary ruling

Colonnade challenges the trial court's evidentiary ruling sustaining Redbean's objections to the Jardini declaration as exceeding the scope of the court's request for supplemental briefing, lacking foundation, and providing opinions on issues of law. In its request for supplemental briefing, the trial court stated that additional briefing was required on the issue of allocation because "[t]he Court finds that the parties have not presented sufficient evidentiary facts and briefing to allow the Court to determine whether apportionment is necessary and/or practical. The Court requests further briefing from the parties solely on this issue." The Jardini declaration, which challenges the reasonableness of Redbean's attorney fees, exceeds the scope of that request. As Jardini was neither a party nor counsel for any party in the underlying action, the trial court's determination that Jardini's declaration regarding evidentiary facts lacked foundation was not an abuse of discretion.

B. The trial court properly exercised its discretion regarding apportionment of the fee award

"Once a trial court determines entitlement to an award of attorney fees, apportionment of that award rests within the court's sound discretion. [Citations.]" (*Carver v. Chevron U.S.A., Inc.* (2004) 119 Cal.App.4th 498, 505.) An abuse of discretion occurs if the trial court's determination exceeds the bounds of reason given the circumstances before it. (*Ibid.*)

Generally, "[w]here 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 [Civil Code] section 1717 only as they relate to the contract action. [Citations.] . . . 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.) Fees "need not be apportioned," however, "when incurred for representation on an issue common to both a cause of action in which fees are proper and one in which they are not allowed." (*Id.* at pp. 129-130.) A party prevailing on a contract claim may also recover attorney fees incurred in defending against cross-claims that are inextricably entwined with or necessary to enforce the contract claim. (*Calvo Fisher & Jacob LLP v. Lujan* (2015) 234 Cal.App.4th 608, 623; *Siligo v. Castellucci* (1994) 21 Cal.App.4th 873, 877-879; *Finalco, Inc. v. Roosevelt* (1991) 235 Cal.App.3d 1301, 1307.)

The trial court in this case determined that enforceability of the lease was an issue common to all of the causes of action asserted in Redbean's complaint and Colonnade's cross-complaint. Colonnade fails to establish that this determination was an abuse of discretion.

DISPOSITION

The June 29, 2016 order and the July 22, 2016 amended judgment awarding Redbean its attorney fees and costs are affirmed. Redbean is awarded its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
CHAVEZ

We concur:

_____, J.
HOFFSTADT

_____, J*
GOODMAN

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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.