Filed 12/18/18 MetLife Securities v. Brandt CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

METLIFE SECURITIES, INC., et al., Cross-complainants and Respondents, v. SCOTT BRANDT et al., Cross-defendants and Appellants.	B282949 (Los Angeles County Super. Ct. No. BC576608)

APPEAL from an order of the Superior Court of Los Angeles County, Kenneth R. Freeman, Judge. Affirmed.

The Milner Firm and Timothy V. Milner for Cross-defendants and Appellants.

Maynard, Cooper & Gale, Cindy M. Rucker, Brandt P. Hill and John Neiman for Cross-complainants and Respondents.

Cross-defendants and appellants Scott Brandt (Brandt) and Westbridge Financial & Insurance Services, Inc. (Westbridge) (sometimes collectively referred to as Brandt), having prevailed on a cross-complaint, appeal a postjudgment order that denied their motion to recover more than $2.3 million in attorney fees from MetLife, Inc. (MetLife) and New England Life Insurance Company (NELICO).[1]

Notwithstanding Brandt and Westbridge's status as the prevailing parties on the cross-complaint, because they failed to demonstrate either a contractual or a statutory basis for an award of attorney fees, the order denying their motion for attorney fees is affirmed.

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[1] We note that while MetLife and NELICO were defendants in the underlying action, MetLife was not a cross-complainant. The cross-complainants were NELICO and another entity, MetLife Securities, Inc. (MSI). Nonetheless, Brandt did not seek attorney fees from MSI. Brandt only moved for attorney fees as against NELICO and MetLife. Although Brandt's attorney fee motion was not directed at MSI, he designated MSI, together with NELICO, as the respondents on appeal. Therefore, the only respondents before this court are NELICO and MSI.

Thus, Brandt's initial error was in moving for attorney fees as against MetLife (not a cross-complainant) instead of against MSI (which was a cross-complainant). Then, Brandt compounded his error on appeal by designating MSI as a respondent, even though his attorney fee motion was not directed at MSI and the trial court made no ruling with respect to MSI's liability for attorney fees.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Proceedings leading up to cross-defendants Brandt and Westbridge's prevailing on the cross-complaint*.

This action was commenced by plaintiff Christine Ramirez (Ramirez), who brought claims against defendants MetLife, MSI, NELICO, Tony Russon, and Russon Financial Services, Inc., alleging various causes of action arising out of her purchase of notes issued by Diversified Lending Group, Inc. (Diversified). Ramirez allegedly invested funds with Diversified after being solicited to do so by Brandt, a NELICO agent, and was damaged when Diversified was taken over by the Securities and Exchange Commission for selling unregistered securities.

Brandt and his company, Westbridge, were not named as defendants by Ramirez. Brandt and Westbridge were brought into the litigation by way of a cross-complaint filed by NELICO and MSI, which asserted claims against Brandt and Westbridge for express contractual indemnity, equitable indemnity, contribution, and declaratory relief.

The matter was tried to a jury. The parties stipulated that Ramirez was harmed by the loss of $239,890.36, and the jury was instructed on the parties' stipulation.

The jury returned a special verdict and found, inter alia: Brandt and others were negligent; their negligence was a substantial factor in causing harm to Ramirez; Brandt was an agent of MetLife and NELICO while engaging in conduct that was a substantial factor in causing harm to Ramirez; in engaging in that conduct, Brandt acted within the scope of his MetLife and NELICO agency; Brandt did not breach his NELICO contract; and Brandt's relative share of fault was five percent.

On September 28, 2016, the trial court entered judgment on the special verdict in favor of Ramirez. The judgment further provided that NELICO and MSI take nothing on their cross-complaint against Brandt and Westbridge, and as the prevailing parties on the cross-complaint, Brandt and Westbridge were entitled to recover costs in an amount to be determined.

2. *Brandt and Westbridge's motion for attorney fees*.

a. *Brandt's initial papers*.

On or about November 28, 2016, Brandt, individually, filed a motion for attorney fees pursuant to Civil Code section 1717, as against NELICO and MetLife.[2] As the contractual basis for an award of attorney fees, Brandt invoked Paragraph 9(d) of the Incentive Career Contract (Contract) between NELICO and Brandt.

To put the matter in context, Paragraph (d) was part of section 9 of the Contract, which granted the agent, i.e., Brandt, the right to use NELICO's servicemarks, trademarks and trade names, in accordance with NELICO's rules. Paragraph (d) of section 9 stated: "*Indemnification*. [¶] The Agent shall indemnify and hold harmless the Company from all claims, suits, damages, losses, costs, expenses (including without limitation reasonable attorneys' fees) and injuries suffered or incurred by the Company based upon or arising out of the Agent's activities, including, without limitation, the Agent's use of any names or marks other than the Marks." Brandt argued that although this contractual language was clearly unilateral, Civil Code section 1717 makes the provision reciprocal, so as to entitle him to recover attorney fees pursuant to Paragraph 9(d). Brandt also

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[2] We note that Westbridge was not a party to the attorney fee motion that Brandt filed on November 28, 2016.

argued that all of his attorney fees were recoverable, including fees incurred in a prior related lawsuit brought by plaintiff Lawrence Cantor against MetLife.

Brandt's moving papers did not specify the amount that he was requesting. Instead, Brandt requested an additional two weeks to file supplemental papers, including billing records, to enable him to establish the amount of the fees incurred and that the fees were reasonably related to his effective defense of the cross-complaint. However, Brandt did not file his supplemental papers until long after the MetLife parties filed their opposition papers.

The motion was scheduled to be heard on March 7, 2017.

b. *Opposition papers*.

On or about February 15, 2017, three MetLife parties—MetLife, NELICO, and MSI—filed an opposition brief. Although Brandt was not seeking attorney fees from MSI, it joined in the opposition out of an abundance of caution, because MSI was one of the parties that had cross-complained against Brandt.

The opposition papers argued that Paragraph 9(d) was not an attorney fee clause that was subject to Civil Code section 1717's reciprocity provision. Rather, Paragraph 9(d) was "a contractual indemnification provision [that] allows one party to recover costs incurred in defending actions by third parties, not attorney fees incurred in an action between the parties to the contract." The opposition also contended that Paragraph 9(d) did not entitle Brandt to recover attorney fees that he incurred in the related lawsuit brought by plaintiff Lawrence Cantor.

The opposition papers did not address the reasonableness of the fee request because Brandt still had not specified the amount of attorney fees that he was seeking—although he had

committed to doing so within two weeks of filing his motion in November 2016. The opposition argued that because the promised information had never been provided, the court was incapable of determining whether the claimed fees were reasonable and the fee request could only be denied.

c. *The trial court's tentative ruling*.

On March 7, 2017, the trial court issued a tentative ruling denying Brandt's request for attorney fees. Consistent with the opposition papers, the trial court found that Paragraph 9(d) was an indemnity provision that allowed one party to recover costs incurred in defending actions by third parties, not to recover attorney fees incurred in an action between the parties to the contract. Moreover, "[e]ven if the indemnity provision allowed Brandt to recover attorneys' fees, there is no evidence of the reasonableness of the fees, the reasonableness of any lodestar, nor the reasonableness of counsel's hourly rate. There is nothing the Court has to evaluate here. This stands as a separate, independent reason for denial of Brandt's motion."

d. *The hearing on the attorney fee motion.*

The attorney fee motion came on for hearing that same day.

At the hearing, Brandt's attorney requested a continuance "so that I can submit properly the information to the court [regarding the] reasonableness of attorney's fees which have admittedly not been submitted, and I'll explain my belief and good cause for requesting the continuance. [¶] If the court is not inclined to continue the hearing, I would request that the court consider allowing supplemental briefing by the parties so that I can submit them to the court for maybe the issues that the court, based upon its tentative, could make a ruling without having to have a further hearing."

The trial court granted the request by Brandt's attorney to submit supplemental briefing, to be filed by April 7, 2017, at which time the matter would be taken under submission. The trial court stated: "[T]he tentative is very clear on the court's reasoning, and frankly, I doubt . . . there's anything that you're going to offer by way of a supplemental brief that's going to change the court's ruling, but I'm going to permit you to file something. If it does change the court's tentative, then I will notify the parties and we will allow further briefing and further hearing on this issue[.]"

e. *Brandt and Westbridge file a supplemental brief seeking attorney fees under new and different theories.*

On April 7, 2017, Brandt, *now joined by Westbridge*, filed supplemental papers.[3] Represented by new counsel, they submitted a supplemental brief regarding attorney fees as well as about 700 pages of billing records. They requested an attorney fee award in the sum of $2,102,428.38 plus prejudgment interest.

The supplemental brief did not address the trial court's tentative ruling that Paragraph 9(d) did not provide a contractual basis for an award of attorney fees to Brandt. Instead, the supplemental brief simply acknowledged that the trial court's "tentative [ruling] on the contractual issue is currently against Mr. Brandt and Westbridge. [*Thus*,] *Mr. Brandt is presenting new arguments regarding the contractual issue*, as set forth below, but the real argument, which should change the Court's tentative *and which has not been argued before this*

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[3] Because the movants failed to establish any basis for an award of attorney fees, it is unnecessary to address the propriety of Westbridge's joining in Brandt's motion at the time the supplemental papers were filed.

Supplemental Brief is that there is a statute[, Labor Code section 2802,] that definitively addresses this issue." (Italics added.)[4] The supplemental brief argued the jury had determined that Brandt was an *employee* of MetLife and NELICO, and Labor Code section 2802 therefore obligated MetLife and/or NELICO to pay legal fees for Brandt's defense in the companion cases brought by MetLife customers.[5]

In addition, the supplemental brief invoked a different provision of the Contract, Paragraph 8, pertaining to a covenant not to compete, as a contractual basis for an award of attorney fees.[6] The supplemental brief argued that the attorney fee

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[4] Labor Code section 2802 states in relevant part: "(a) An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying the directions, believed them to be unlawful. [¶] . . . [¶] (c) For purposes of this section, the term 'necessary expenditures or losses' shall include all reasonable costs, including, but not limited to, attorney's fees incurred by the employee enforcing the rights granted by this section."

[5] We note the special verdict determined that "Brandt was an *agent* of MetLife and NELICO while engaging in conduct that was a substantial factor in causing harm to Christine Ramirez." (Italics added.) The jury did not find that Brandt was an *employee* of MetLife and/or NELICO.

[6] The supplemental brief erroneously cited Paragraph 8, the Contract's covenant not to compete, as Paragraph 7(b). Paragraph 8 states: "**Covenant Not to Compete**. For a period of two years after termination of the Contract, the Agent shall

provision in the covenant not to compete was made reciprocal by Civil Code section 1717, so as to entitle Brandt and Westbridge to recover attorney fees as the prevailing parties on the cross-complaint that had been brought against them.

On April 18, 2017, Brandt and Westbridge filed an addendum to their supplemental brief for attorney fees, requesting an additional $273,253.78 for fees incurred in defending the cross-complaint.

f. *The trial court denies Brandt and Westbridge's request for attorney fees under Paragraph 9(d) and declines to consider their newly raised alternative theories.*

On May 2, 2017, the trial court issued an order reiterating its tentative ruling that Paragraph 9(d) was an indemnity

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not, directly or indirectly, contact the policyholders or contractholders of the Company in the territory of the Managing Partner or policyholders or contractholders of the Company owning Products for which the Agent is agent of record for the purpose of inducing any policyholder or contractholder to lapse, cancel, fail to renew or replace any Product. For a period of one hundred eighty (180) days after termination of the Contract the Agent shall not, directly or indirectly, contact or contract with any agent of the Managing Partner for the purpose of inducing such agent to solicit in the territory of the Managing Partner on behalf of any other insurance company or financial services organization. If the 180 day or two year periods referred to herein shall be deemed unenforceable at law, then such periods shall be reduced to such periods as shall be legally enforceable. [¶] The Managing Partner and the Company may pursue all remedies, including injunction, to assure compliance with the covenants in this Section *and shall, if successful, be entitled to recover from the Agent all costs and expenses incurred in pursuing such remedies, including reasonable attorney's fees.*" (Italics added.)

provision, not an attorney fee provision, and thus did not enable Brandt and Westbridge to recover attorney fees as the prevailing parties on the cross-complaint. The trial court declined to consider the new theories that Brandt and Westbridge raised in their supplemental brief, and thus denied their motion for attorney fees.

The trial court explained: "At the hearing on the motion for fees, Cross-Defendants' then-counsel, Stephanie Ames, requested a continuance of the hearing in order to allow her to submit information regarding the *reasonableness* of attorneys' fees sought. The Court permitted counsel to [submit] supplemental briefing. However, on April 10, 2017, the Court received a substitution of attorney, substituting in [new counsel] for Cross-Defendants Brandt and Westbridge. In the supplemental brief submitted to the Court, counsel raised a new argument—that Cross-Defendants are entitled to fees pursuant to Labor Code § 2802. . . . Cross-Defendants also argue, for the first time, that the employment agreement between MetLife/NELICO and Mr. Brandt contains a further attorney's fees clause [in Paragraph 8, the covenant not to compete,] under which fees should be awarded, pursuant to Civil Code § 1717.

"The Court has not considered these new arguments. Neither the [Labor Code] § 2802 argument nor the argument premised on the [covenant not to compete] was raised in connection with Cross-Defendant's initial motion for fees. The Court's grant of supplemental briefing was, as Ms. Ames requested at the hearing, for the limited purpose of allowing counsel to provide documentation justifying the fees sought. It was not to provide Cross-Defendants an opportunity to brief entirely new theories of recovery. To consider this new argument

would result in prejudice to the MetLife Defendants. [¶] For these reasons, the motion for fees brought by Cross-Defendants Brandt and Westbridge is denied." (Original italics.)

On May 31, 2017, Brandt and Westbridge filed a timely notice of appeal from the May 2, 2017 postjudgment order denying their motion for attorney fees.

CONTENTIONS

Brandt and Westbridge contend: they were the prevailing parties pursuant to Code of Civil Procedure section 1032,[7] and are entitled to costs, including attorney fees, under section 1033.5; Labor Code section 2802 requires MetLife and/or NELICO to pay legal fees for Brandt's defense in the cases brought by the MetLife customers; MetLife and NELICO's employment agreement contained a second attorney fee clause in the covenant not to compete, under which Brandt and Westbridge could have recovered attorney fees under Civil Code section 1717; the trial court committed reversible error in ignoring controlling law; and Brandt and Westbridge incurred over $2 million in legal fees to defend the cross-complaint and the companion cases brought against them.

Notwithstanding these multiple contentions, the dispositive issue is whether Brandt and Westbridge established a legal basis for recovering attorney fees as the prevailing parties on the cross-complaint. As discussed below, they failed to do so.

DISCUSSION

1. *General principles*.

A prevailing party may recover attorney fees incurred in prosecuting or defending an action as costs only when recovery of

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[7] All unspecified statutory references are to the Code of Civil Procedure.

attorney fees is authorized by the parties' agreement or by statute. (§§ 1021, 1033.5, subd. (a)(10); *Santisas v. Goodin* (1998) 17 Cal.4th 599, 607, fn. 4.)

Ordinarily, a ruling on a motion for attorney fees is reviewed under the abuse of discretion standard. (*Carver v. Chevron U.S.A., Inc.* (2002) 97 Cal.App.4th 132, 142.) However, "[w]hether a legal basis exists for an award of attorney fees is a question of law, which the reviewing court examines de novo. [Citation.]" (*Linear Technology Corporation v. Tokyo Electron Ltd.* (2011) 200 Cal.App.4th 1527, 1535, citing *Sessions Payroll Management, Inc. v. Noble Construction Co.* (2000) 84 Cal.App.4th 671, 677; accord, *Soni v. Wellmike Enterprise Co. Ltd.* (2014) 224 Cal.App.4th 1477, 1481.)

2. *Denial of attorney fee motion was proper because Brandt failed to show a legal basis for an award of attorney fees.*

a. *Brandt abandoned Paragraph 9(d) as a legal basis for an award of attorney fees.*

Brandt initially sought attorney fees pursuant to Paragraph 9(d) of the Contract. In its tentative ruling, the trial court rejected that theory, stating that Paragraph 9(d) was an indemnity provision that allowed a party to recover costs incurred in defending actions by third parties, not to recover attorney fees incurred in an action between the parties to the Contract. The trial court granted Brandt's request to submit supplemental papers, but Brandt thereafter abandoned his theory that attorney fees were recoverable pursuant to Paragraph 9(d). Instead, Brandt's supplemental brief shifted his focus to Labor Code section 2802, as well as Paragraph 8 of the Contract, pertaining to a covenant not to compete, as potential bases for an award of attorney fees. Likewise, Brandt's appellate

briefs do not rely on Paragraph 9(d) as a contractual basis for recovery of attorney fees.

Thus, Brandt has abandoned his Paragraph 9(d) argument, which was the only theory of recovery that he properly presented in his moving papers below.

b. *The trial court acted within its discretion in declining to consider the two new theories that Brandt introduced in his supplemental papers below.*

As noted, the trial court declined to address Brandt's newly raised theories that Labor Code section 2802 and/or Paragraph 8 of the Contract furnished a legal basis for an award of attorney fees. The trial court reasoned that those new arguments were beyond the scope of the supplemental briefing, which was granted "for the limited purpose of allowing counsel to provide documentation justifying the fees sought. It was not to provide Cross-Defendants an opportunity to brief entirely new theories of recovery."

The record fully supports the trial court's exercise of its discretion to disallow Brandt's new arguments, which were belatedly raised in supplemental briefing. Brandt contends the supplemental briefing was timely in that it was filed on April 7, 2017, which was the deadline specified by the trial court in its March 7, 2017 order allowing Brandt to submit supplemental briefing. However, the new arguments contained in the supplemental briefing were procedurally improper.

As set forth in some detail above, on November 28, 2016, Brandt filed the subject motion for attorney fees. At that time, he represented that within two weeks, he would file supplemental papers, including billing records, to enable him to establish the amount of the fees incurred and that the fees were reasonably

related to his effective defense of the cross-complaint. Brandt failed to do so. At the time the MetLife parties filed their opposition papers on February 15, 2017, Brandt still had not filed the promised supplemental papers, and he thereby prevented the MetLife parties from being able to address the reasonableness of any fees that Brandt was requesting. It was not until April 7, 2017, one month *after* the March 7, 2017 hearing on the motion, that Brandt filed his supplemental brief as well as voluminous billing records. Thus, after the matter had been briefed by both sides, and after the trial court had conducted its hearing on the motion, Brandt's supplemental papers injected entirely new theories into the proceeding, accompanied by new evidence, to which the MetLife parties did not have an opportunity to respond. By raising new legal theories in his supplemental papers, Brandt flouted basic rules of procedure, and he failed to show good cause—either in the trial court or on appeal—for doing so.

It is rudimentary that a memorandum of points and authorities in support of a civil motion "must contain a statement of facts, a concise statement of the law, evidence and arguments relied on, and a discussion of the statutes, cases, and textbooks cited in support of the position advanced." (Cal. Rules of Court, rule 3.1113(b).) The rule is consistent with the basic requirement that a "moving party must carry the initial burden of informing its opponent and the court of the specific basis for its motion. [Citation.]" (*People v. Williams* (1999) 20 Cal.4th 119, 129, discussing former rule 313, the predecessor to rule 3.1113.)

It is established that the trial court has broad discretion to disregard legal arguments or other matter not presented in a party's moving papers. (See, e.g., *Plenger v. Alza Corp*. (1992)

11 Cal.App.4th 349, 362, fn. 8 [inclusion of new evidentiary matter with the reply should only be allowed in exceptional cases]; *San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 310 [summary judgment reversed because trial court erred in considering evidence first submitted with the reply]; *Alliant Ins. Services, Inc. v. Gaddy* (2008) 159 Cal.App.4th 1292, 1308 [trial court had discretion in preliminary injunction proceeding to determine whether or not to accept new evidence with reply papers]; *Padron v. Watchtower Bible & Tract Society of New York, Inc.* (2017) 16 Cal.App.5th 1246, 1267 [same rule applies at the appellate level so as to preclude new arguments from being introduced in an appellant's reply brief] (*Padron*); see generally, Weil & Brown et al., Cal. Prac. Guide: Civ. Pro. Before Trial (The Rutter Group 2018) ¶ 9:106.1, p. 9(l)–91 [trial court is likely to refuse to consider new evidence or arguments first raised in reply papers]; see also *id.*, ¶ 7:122.9, p. 7(l)–54 ["court may disregard arguments or grounds for demurrer first raised in a reply brief"].)

Accordingly, the trial court acted well within its discretion in refusing to entertain Brandt's new theories concerning Labor Code section 2802 and Paragraph 8 of the Contract, which Brandt introduced in the supplemental papers that he filed after the hearing on the attorney fee motion.[8]

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[8] In the appellants' reply brief, Brandt and Westbridge argue that respondents are required by the Restatement Second of Agency, sections 438 and 439, to pay the legal fees that Brandt and Westbridge incurred as respondents' agents. We do not consider this argument, which was not raised below, and which first appeared in the appellants' reply brief. New substantive arguments raised by appellants in their reply brief are deemed forfeited. (*Padron*, *supra*, 16 Cal.App.5th at p. 1267.)

In sum, Brandt has not shown the trial court erred in refusing to make an award of attorney fees to the prevailing parties on the cross-complaint.

3. *Respondents' procedural argument relating to MSI's inclusion as a respondent.*

Brandt's case information statement listed MSI as a respondent. The respondents' brief asserts MSI should not have been included as a respondent because Brandt and Westbridge did not seek fees against MSI, only against NELICO and MetLife, and the trial court's fee order did not adjudicate anything as between MSI and Brandt and Westbridge. Therefore, the respondents' brief requests that this court dismiss MSI as a respondent.

We note MSI joined in the opposition to Brandt's attorney fee motion and also has participated in the appeal, having joined in the respondents' brief. Further, it does not appear that MSI is aggrieved by its inclusion as a respondent, given that the trial court's order denying Brandt's fee motion is being affirmed. Therefore, it is unnecessary at this juncture to eliminate MSI as a respondent.

Further, at oral argument, appellants' counsel raised another new theory—that the broad scope of the supplemental papers was authorized by the trial court pursuant to an oral motion for relief under Section 473. This argument, which did not appear in the appellate briefs, likewise is forfeited.

DISPOSITION

The May 2, 2017 order denying Brandt and Westbridge's motion for attorney fees is affirmed. Respondents shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

EGERTON, J.

DHANIDINA, J.