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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

CALIFCO, LLC, et al., Plaintiffs and Appellants, v. JOSH KIENTZ et al., Defendants and Respondents.	B280044 (Los Angeles County Super. Ct. No. SC114659)

APPEAL from an order of the Superior Court of Los Angeles County, Gerald Rosenberg, Judge. Affirmed.

The Aftergood Law Firm and Aaron D. Aftergood for Plaintiffs and Appellants.

Daniel Gunning for Defendants and Respondents.

Plaintiffs and appellants Califco, LLC, and Elshir Enterprises, LP (Elshir), challenge the trial court's order awarding contractual attorney fees in favor of defendants and respondents Josh Kientz and Christopher Rosas. Kientz and Rosas formed a company called The Office Partners, LLC (TOP) to operate a restaurant in West Hollywood. TOP leased space in a building that plaintiffs owned and managed. When the restaurant failed, plaintiffs sued Kientz, Rosas, and TOP for unpaid rent and other damages. After a bench trial, the trial court awarded damages to plaintiffs as against TOP, but found that Kientz and Rosas were not personally liable. Plaintiffs contend that the trial court awarded excessive attorney fees to Kientz and Rosas because most of defense counsel's resources were expended on the unsuccessful defense of TOP, rather than the successful defense of Kientz and Rosas. We affirm.

FACTS AND PROCEEDINGS BELOW

The restaurant at the center of this dispute, known as The Office WeHo, opened in 2011 and went out of business a few months later. Soon thereafter, plaintiffs filed suit for breach of contract and six other causes of action against TOP, Rosas, and Kientz. The complaint listed TOP, Kientz, and Rosas as defendants on all causes of action. The plaintiffs alleged that Kientz and Rosas were liable under an alter ego theory on the grounds that they had failed to maintain corporate formalities and to adequately capitalize and properly operate TOP. TOP filed a cross-complaint against plaintiffs and three individuals associated with them, seeking rescission of the lease and damages, and alleging that plaintiffs and their associates had failed to disclose problems with the physical condition of the restaurant location, which in turn harmed the restaurant's financial performance. The same attorney represented TOP, Kientz, and Rosas throughout the litigation.

After a bench trial, the court found in favor of plaintiffs with respect to their claims against TOP and awarded $728,700 in damages. The trial court found in favor of TOP with respect to one of the four claims in its cross-complaint, and awarded $45,662 in damages. Because the trial court awarded net damages of $683,038 in favor of plaintiffs, the court found that they were the prevailing party against TOP. The trial court found that there was insufficient evidence to find Kientz and Rosas personally liable, and consequently found that they were the prevailing parties in their defense against plaintiffs. Neither party requested a statement of decision, and the trial court did not explain how it calculated the damages award, nor the basis on which it found TOP liable.

The lease contained a broad provision for attorney fees for the prevailing party under any litigation relating to the lease, and Kientz and Rosas filed a motion for reimbursement of $111,567.50 in attorney fees. Plaintiffs opposed the motion, contending that Kientz and Rosas were entitled only to attorney fees pertaining to their alter ego defense, and that the trial court was required to apportion the fees accordingly. The trial court awarded Kientz and Rosas $82,500 in attorney fees, and did not reduce the award to take into account the funds expended in the unsuccessful defense of TOP.

DISCUSSION

When a contract provides for an award of attorney fees to a party enforcing its rights under the contract, the trial court must award reasonable attorney fees to the prevailing party. (Civ. Code, § 1717, subd. (a).) Contractual attorney fees are treated as "an element of the costs of suit." (*Ibid.*) " ' "When a prevailing party has incurred costs jointly with one or more other parties who are not prevailing parties for purposes of an award of costs, the judge must apportion the costs between the parties." ' " (*Charton v. Harkey* (2016) 247 Cal.App.4th 730, 743-744 (*Charton*).)

Plaintiffs' primary contention on appeal is that the trial court erred by failing to apportion attorney fees among the defendants. We disagree. Although apportionment of an attorney fee award is mandatory, the trial court retains the discretion to decide how to apportion the award. (*Charton*, *supra*, 247 Cal.App.4th at p. 744.) In this case, the trial court decided that the work done on behalf of the different defendants in this case was "inextricably intertwined," and that it was "impracticable or impossible to separate the [attorney's] activities into compensable or noncompensable time units." On the record before us, we cannot conclude that the trial court abused its discretion in reaching this conclusion, nor that it applied the wrong legal standard.

In *Charton*, *supra*, 247 Cal.App.4th at p. 744, the court held that a "prevailing party who is represented by the same counsel as a nonprevailing party may only recover those costs the prevailing party incurred and were reasonably necessary to the prevailing party's conduct of the litigation, not the other jointly represented parties' conduct of the litigation." The court recognized, however, that there may be situations in which it is impossible to distinguish expenses incurred on behalf of a prevailing party from those of a nonprevailing party. When such expenses "were reasonably

necessary to the conduct of the litigation for both the prevailing and nonprevailing party," the decision whether to award costs "is left to the trial court's sound discretion based on the totality of the circumstances." (*Id.* at p. 744.)

Plaintiffs contend that the trial court's discretion under *Charton* is limited, and the court may not award a prevailing party all the costs reasonably incurred on behalf of both a prevailing and a nonprevailing party. In support of their position, plaintiffs cite several cases in which the Court of Appeal held that the trial court was required to apportion an award of costs or attorney fees. In *Slavin v. Fink* (1994) 25 Cal.App.4th 722, 724 (*Slavin*), the plaintiff, a building contractor, sued both a homeowner and the homeowner's agent for unpaid bills relating to the construction of a residence. The plaintiff prevailed with respect to the homeowner, but lost his suit against the agent. (*Ibid.*) The trial court found that virtually the entire litigation pertained to the claims against the homeowner, and there was essentially no evidence regarding the agent's personal liability. (*Id.* at pp. 724-725.) Consequently, the trial court allowed the agent to recover only 5 percent of the costs attributable to the lawsuit. (*Id.* at p. 725.) The Court of Appeal affirmed the trial court's decision to apportion the costs in this manner, stating that, "[u]nder the circumstances, it would have been unjust to allow [the agent] to impose upon [the contractor] all costs incurred which benefitted both" the agent and his principal. (*Id.* at p. 726.)

Wakefield v. Bohlin (2006) 145 Cal.App.4th 963 (*Wakefield*), disapproved on another point by *Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1330, involved a similar split between prevailing and nonprevailing defendants. The plaintiff discovered construction defects in a home he purchased from the husband-and-wife defendants. (*Wakefield*, *supra*, 145 Cal.App.4th at p. 969.) A jury found the husband liable for negligent

misrepresentation, but exonerated the wife. (*Id.* at p. 970.) The Court of Appeal held that the trial court had erred in its determination of who was a prevailing party and may have failed to understand the extent of its discretion in awarding costs; the court required the trial court on remand to apportion costs equitably between those attributable to prevailing and nonprevailing parties. (*Id.* at pp. 985-986, 990.) The court cited *Slavin* with approval, holding that by the same logic as in that case, it would be unjust not to apportion the costs incurred on behalf of the prevailing wife and the nonprevailing husband. (*Id.* at p. 986.)

Finally, in *Heppler v. J.M. Peters Co.* (1999) 73 Cal.App.4th 1265 (*Heppler*), the court provided a similar analysis. The case involved a suit brought by a group of homeowners against four subcontractors for construction defects. Three of the subcontractors prevailed, but the fourth did not. (*Id.* at p. 1272.) The court held that the trial court abused its discretion by failing to apportion an award of attorney fees to the homeowners to take into account the fees incurred in litigating against the prevailing contractors. (*Id.* at p. 1297.) The court reasoned that if not for issues pertaining to the prevailing contractors, the trial of the nonprevailing subcontractor would have been much shorter. (*Ibid.*)

Neither *Slavin*, *Wakefield*, nor *Heppler* held that a court always abuses its discretion by declining to reduce a prevailing defendant's award of costs to take account of the proportion of costs attributable to a nonprevailing codefendant. Instead, the cases held that apportionment was required under the circumstances of each case. Most notably, in all three cases, it was possible to distinguish costs or fees attributable to a prevailing party from those attributable to a nonprevailing party because the prevailing defendant played a distinct role in the litigation. In *Slavin*, the trial court explicitly found that the nonprevailing principal was the " ' "main" defendant' " in the case. (*Slavin*, *supra*, 25 Cal.App.4th

at p. 724.) The prevailing agent played only a tiny role. (*Id.* at pp. 724-725.) Similarly, in *Wakefield*, the nonprevailing husband personally remodeled the house whose construction defects were the subject of the litigation. His wife apparently did not. (See *Wakefield*, *supra*, 145 Cal.App.4th at p. 969.) In *Heppler*, the court found that there were distinct issues at trial that pertained to the prevailing defendants, as opposed to the single nonprevailing defendant. (See *Heppler*, *supra*, 73 Cal.App.4th at p. 1297.)

In this case, by contrast, the trial court found that it was impossible to separate the work defense counsel performed on behalf of Kientz and Rosas from his work for the benefit of TOP. Nothing in *Slavin*, *Wakefield*, or *Charton* directs the trial court as to how it may exercise its discretion to apportion fees when this is the case. For guidance, the trial court relied on *Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101 (*Abdallah*), a case addressing the apportionment of attorney fees between causes of action for which the prevailing party was eligible for an award of attorney fees pursuant to Civil Code section 1717, and those for which the prevailing party was not eligible. In *Abdallah*, the plaintiff unsuccessfully sued for causes of action based on contract, tort, and an alleged RICO violation. (*Abdallah*, *supra*, 43 Cal.App.4th at pp. 1110-1111.) The court held that the trial court had not abused its discretion by failing to reduce the defendant's award of attorney fees on the ground that the defendant was entitled to reimbursement for attorney fees only on the contract cause of action. (*Ibid.*) The court reasoned that the trial court "could reasonably find that appellants' various claims were ' "inextricably intertwined" ' [citation], making it 'impracticable, if not impossible, to separate the multitude of conjoined activities into compensable or noncompensable time units.' " (*Id.* at p. 1111.)

Plaintiffs are correct that *Abdallah* does not address the same form of apportionment as in this case. The attorney fee provision in this case was broad, and neither side claimed that it did not cover all of plaintiffs' causes of action. Nevertheless, *Abdallah* addresses a closely related question to the one presented here, and nothing in the court's reasoning contradicts *Slavin*, *Wakefield*, or *Charton*. Indeed, the court in *Heppler* suggested that apportionment may not be required in situations such as that presented in *Abdallah*. (See *Heppler*, *supra*, 73 Cal.App.4th at p. 1297 [" 'The recognized barrier to segregation for purposes of calculating fee awards is inextricably intertwined issues.' "] Nor do we agree that the trial court's reliance on *Abdallah* results in a windfall to Kientz and Rosas. By finding that the defense counsel's representation of Kientz and Rosas was inseparable from his representation of TOP, the trial court essentially found that all of the attorney's work, and the resulting fees, were necessary to the successful defense of Kientz and Rosas. The trial court's award of attorney fees is no more a windfall than was the award of fees in *Abdallah* for the defense of intermixed claims in that case. The trial court's citation of *Abdallah* does not show that the court applied the wrong standard to apportionment.

Finally, plaintiffs contend that the trial court abused its discretion by finding that defense counsel's work on behalf of Kientz and Rosas was inextricably intertwined with his work on behalf of TOP. They argue that Kientz and Rosas were in essentially the same position as TOP, with the sole exception of the issue of alter ego liability. According to plaintiffs, the only way the trial court could have found TOP liable for damages, and Kientz and Rosas not liable, was by finding the plaintiff's allegations true, except as to the issue of alter ego liability. They argue that the trial court therefore should have awarded Kientz and Rosas attorney fees only with respect to the amount of time their attorney spent on the alter

ego defense. According to the documentation provided in support of the motion for attorney fees, the defendants' attorney spent only a handful of hours defending the alter ego claim. Consequently, plaintiffs argue that the trial court should have issued a drastically reduced attorney fee award to Kientz and Rosas.

We are not persuaded. In the absence of a statement of decision, plaintiffs' analysis of the trial court's reasoning is little more than speculation. As Kientz and Rosas point out, the complaint named them as defendants alongside TOP with respect to all causes of action, including those for conversion and theft of fixtures, and damage to property. It is impossible to say on the record before us that the only reasonably necessary and successful work defense counsel performed on behalf of Kientz and Rosas was in defending them from alter ego liability. Kientz and Rosas contend that they, not the insolvent TOP, were the primary target of the litigation. We cannot rule out that possibility, and if it is true, it suggests that defense counsel would have spent more than a handful of hours on the defense of Kientz and Rosas. The abuse-of-discretion standard we apply in this case requires us to defer to the trial court's judgment that defense counsel's representation of Kientz and Rosas was inextricably intertwined with his defense of TOP, and that an apportionment of attorney fees would have been impossible.

DISPOSITION

The trial court's order is affirmed. Respondents are awarded their costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

LUI, J.