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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

HIGHLANDS OWNERS ASSOCIATION, Plaintiff and Respondent, v. JANN COBLER, Defendant and Appellant.	B216797 (Los Angeles County Super. Ct. No. BC401235)

APPEAL from orders of the Superior Court of Los Angeles County, Holly E. Kendig, Judge. Affirmed.

Gibbs, Giden, Locher, Turner & Senet, and Michael B. Geibel, for Defendant and Appellant.

Kulik, Gottesman, Mouton & Siegel, and Glen L. Kulik, for Plaintiff and Respondent.

Appellant Jann Cobler appeals from the following: (1) an order granting respondent Highlands Owners Association's (Association) motion for attorney fees and costs and denying Cobler's motion for the same; (2) an order awarding Association additional attorney fees and costs; and (3) an action of the court taking Cobler's motion to enforce liability on the bond off calendar. She argues she is entitled to her attorney fees and costs under Civil Code section 1354 as a matter of law because Association voluntarily dismissed the complaint, even though it did so only after Cobler complied with a preliminary injunction it obtained. We conclude that it was proper for the court to determine which party prevailed as a practical matter and we find no abuse of discretion in the court's determination that Association was the prevailing party. Thus, we affirm both awards of attorney fees and costs to Association. We also conclude that it was proper for the trial court to take Cobler's motion to enforce liability off calendar since the motion was stayed pending her appeal from the attorney fees and costs awards.

FACTUAL AND PROCEDURAL HISTORY

The Highlands is a condominium development containing 192 units. Association is a nonprofit mutual benefit corporation established to manage a common interest development and an association under the Davis Stirling Common Interest Development Act (Davis-Stirling Act), Civil Code section 1350 et seq. The properties in the Highlands development are subject to a restated declaration of covenants, conditions, and restrictions (CC&R's), and the condominium owners are bound by its provisions. (See Civ. Code, § 1354, subd. (a).) The CC&R's provide that Association has the duty of maintaining and operating the common areas and enforcing the governing documents of the development.

Cobler owns a penthouse unit in the development. Her unit has a roof deck reserved for her exclusive use. Her deck constitutes part of the roof over the unit owned by her downstairs neighbor. Under the CC&R's and the Davis-Stirling Act, roof decks are treated as exclusive use common areas (see Civ. Code, §§ 1351, subd. (i), 1364), and under the CC&R's it is the duty of the penthouse owner to repair and replace his or her

roof deck. The CC&R's provide that if an owner fails to make necessary repairs, the Association may do so and assess the owner for the cost.

In 2006, Cobler's deck was leaking water into the unit below. When Cobler refused to fix it, the Association exercised its right of entry, and replaced the deck's surface. The contractor, West Coast Waterproofing (West Coast), provided a five-year warranty.

The deck began to leak again in September 2007. West Coast initially refused to honor the warranty because it claimed that Cobler had voided it by placing heavy planters and furniture on the deck. Association determined that the leaks were not caused by Cobler's planters, but that she exacerbated the problem by watering her plants, causing excess water to enter the downstairs unit through cracks in the deck.

West Coast ultimately agreed to honor the warranty and repair the deck at no cost. After a patch job failed to cure the problem, West Coast said Cobler had to remove everything from the deck so it could tear up the deck, determine the location of the leaks, and make the required repairs. Cobler believed the source of the leak was a drain located just outside of her deck, and refused to remove her planters and furniture unless Association agreed to pay for the cost of moving and storing these items, and allowed her to return them unconditionally once the repairs were completed.

Association offered to pay for the costs of removing the deck items so long as Cobler agreed to get its permission before returning the items to the deck. Association was concerned about honoring weight limitations in the warranty provided by West Coast after the further repairs were finished. Cobler again refused access. The parties attempted internal dispute resolution, but it was unsuccessful. Water continued to leak into and damage the downstairs unit.

In November 2008—more than a year after the deck began to leak again—Association filed a complaint in Los Angeles Superior Court. The complaint asserted that Cobler was in violation the CC&R's by failing to maintain her deck, repair damage to it, and grant Association access to repair it. It also alleged other violations of the CC&R's, including that Cobler had placed unapproved items on her deck. The complaint

sought an injunction compelling Cobler to: (1) remove all objects from her deck so it could be evaluated and repaired; (2) allow Association and contractors access to the deck to determine the extent of necessary repairs and make those repairs; (3) refrain from placing any items back on the deck without prior approval from Association; (4) refrain from watering any object on the deck until the work was completed; and (5) refrain from using the deck in any manner that would void any warranty received after the repairs were completed. The complaint also sought attorney fees and costs.

The court ordered Cobler to show cause why a preliminary injunction should not be entered against her. Cobler argued the leaks were caused by cracks in the drain located outside her deck. She stated she had been willing to cooperate, but would not allow Association to remove her personal property. Instead, her property could be moved from each side of the deck while the opposite side was fixed.

Association replied that the source of the leak could not be determined without a full inspection, which West Coast asserted required the deck to be cleared of all items and torn up. Association stated the case was not about who caused the damage to the deck, but about Association obtaining access to test and repair the deck. It argued "[w]hether this damage was caused by nature, poor construction, or Cobler herself, the issue remains the same—the roof deck must be repaired immediately to prevent further damage from occurring."

The court granted the preliminary injunction on December 12, 2008. It ruled: "Regardless of the initial cause [of the leaks], . . . [t]he Association is entitled to have access to the deck [under the CC&R's] and have the necessary repairs performed without Cobler's interference." Cobler was ordered to grant access to the deck and to remove her belongings from it during the pendency of the case. Association was ordered to post a $30,000 bond in the event the injunction was wrongly issued, which it did.

Repairs were scheduled, but Cobler's counsel pointed out that since Association failed to obtain a signed court order, Cobler was not yet required to remove her property or grant access. Association obtained a signed order on January 20, 2009. The order required Cobler to: (1) remove all items from the deck within 72 hours; (2) grant access

to the deck to Association and its contractors; and (3) obtain written consent from Association or move for a modification of the preliminary injunction prior to returning the items to the deck. The order also compelled Cobler to pay for the costs associated with removal and storage of the plants and deck furniture.

The work was scheduled to begin on February 2. Cobler noticed depositions for employees of West Coast for that date. Association related that such depositions would not be necessary because Association would dismiss the case once the repairs were completed, and objected that the depositions would further delay the repairs. It eventually filed for a protective order.

The work was completed on February 14. Association advised Cobler she could return all her items to the deck so long as she maintained her deck as required by the CC&R's and kept the deck and drain free of leaves and plant debris. Association wrote Cobler's attorney that since the work was completed the case was moot and it would be voluntarily dismissed. Association voluntarily dismissed the complaint without prejudice on February 19.

On February 25, Association moved to recover $24,017 in attorney fees and costs. On March 6, Cobler moved to recover $36,528.50 in attorney fees and costs and separately moved to enforce liability on the bond posted by Association.

On April 9, the court granted Association's motion for fees and costs. It determined Association was the prevailing party because it had achieved its litigation objective—to access Cobler's roof deck in order to inspect and repair it. It denied Cobler's motion to recover fees and costs. The court dismissed Cobler's motion to recover money on the bond, without prejudice, because her briefing on the issue presumed that she was the prevailing party. Since the court determined Cobler was not the prevailing party, it suggested that her attorney file another motion with the proper briefing. Cobler appeals from the court's order finding Association to be the prevailing party.

On July 17, Association moved to recover its attorney fees incurred as a result of defending against Cobler's two additional motions. The court awarded Association an additional $10,621 in attorney fees and costs. Cobler appeals from this order as well.

On August 18, the court heard Cobler's re-filed motion to recover against the bond. It ruled that since Cobler's two appeals were still pending, the motion to enforce liability on the bond, which sought attorney fees and costs, was stayed pending our decision on the two appeals. The court took the motion off calendar and invited Cobler to re-file at the conclusion of this appeal. We denied Cobler's petition for a writ of mandate requesting that we order that she be paid on the bond. (B219177.) Cobler then filed a separate appeal from the minute order taking the motion off calendar.

The parties stipulated to consolidate Cobler's appeals and we granted the consolidation motion.

DISCUSSION

I

The primary issue in this case is whether the trial court's determination that Association rather than Cobler was the prevailing party was erroneous. Cobler claims the court should have adopted the definition of prevailing party found in the general cost statute (Code Civ. Proc., § 1032, subd. (a)(4)) to determine the prevailing party for the award of costs and attorney fees under Civil Code section 1354. The determination of the legal basis for an attorney fees award is a question of law, which we review de novo. (*Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1213-1214.)

Association brought the instant case to enforce the CC&R's under the Davis-Stirling Act. The Act states that the CC&R's of a common interest development "shall be enforceable equitable servitudes, unless unreasonable, and shall inure to the benefit of and bind all owners of separate interests in the development. . . . [T]hese servitudes may be enforced by any owner of a separate interest or by the association, or by both." (Civ. Code, § 1354, subd. (a).)

The Davis-Stirling Act also provides: "In an action to enforce the governing documents, the prevailing party shall be awarded reasonable attorney's fees and costs." (Civ. Code, § 1354, subd. (c); see also *Heather Farms Homeowners Assn. v. Robinson* (1994) 21 Cal.App.4th 1568, 1571 (*Heather Farms*).) The section does not define "'prevailing party.'" "It only provides that 'the prevailing party shall be awarded reasonable attorney's fees and costs.' [Citation.] 'The words "shall be [awarded]" reflect a legislative intent that [the prevailing party] receive attorney fees *as a matter of right* (and that the trial court is therefore *obligated* to award attorney fees) whenever the statutory conditions have been satisfied.'" (*Salehi v. Surfside III Condominium Owners Assn.* (2011) 200 Cal.App.4th 1146, 1152 (*Salehi*), quoting *Hsu v. Abbara* (1995) 9 Cal.4th 863, 872.) The CC&R's in this case state, "[i]n any action arising from the Governing Documents, the prevailing party shall recover his, her, and its reasonable attorneys fees and costs."

Cobler claims the court should have adopted the definition of prevailing party found in the general cost statute, Code of Civil Procedure section 1032. That statute provides that a "'prevailing party'" includes "a defendant in whose favor a dismissal is entered . . . ." (*Id.* at subd. (a)(4).) Cobler argues that this definition of "prevailing party" should apply to the undefined prevailing party provision in Civil Code section 1354, subdivision (c). Under this theory, she contends she is the prevailing party since Association eventually dismissed the complaint.

Courts that have addressed this issue have rejected the argument that a litigant who prevails under the general cost statute is automatically the prevailing party under Civil Code section 1354. (*Salehi, supra*, 200 Cal.App.4th at p. 1153; *Heather Farms, supra,* 21 Cal.App.4th at p. 1572; see also *Galan v. Wolfriver Holding Corp.* (2000) 80 Cal.App.4th 1124, 1128-1129 [definition in Code of Civil Procedure section 1032 inapplicable to Civil Code section 1942.4, subdivision (b)]; *Gilbert v. National Enquirer, Inc.* (1997) 55 Cal.App.4th 1273, 1276-1277 [Code of Civil Procedure section 1032 does not apply to Civil Code section 3344].) The reason is that Code of Civil Procedure section 1032, subdivision (a) only defines "'"[p]revailing party"' as the term is used 'in

that section.' It does not purport to define the term for purposes of other statutes." (*Heather Farms, supra,* 21 Cal.App.4th at p. 1572.) In denying Cobler's motion for attorney fees and costs, the trial court relied on *Heather Farms, supra*, 21 Cal.App.4th 1568. In that case, a plaintiff homeowners association sued a condominium owner for unauthorized modifications to his unit, in violation of the CC&R's. (*Id.* at p. 1570.) The plaintiff dismissed the complaint without prejudice under the terms of a settlement agreement reached with the owner's co-defendants, even though the owner himself did not participate in the agreement. (*Id.* at p. 1570.) The owner maintained that he was the prevailing party as a matter of law since a dismissal was entered in his favor. (*Id.* at p. 1572.)

The appellate court concluded that in determining the "prevailing party" under Civil Code section 1354, the trial court should analyze "which party . . . prevailed on a practical level." (*Heather Farms, supra,* 21 Cal.App.4th at p. 1574.) Applying this analysis it reasoned there was no prevailing party because the plaintiff had dismissed its action as part of a global settlement agreement, not because the defendant had succeeded on a procedural issue or otherwise achieved what he wanted. (*Id.* at p. 1574.)

Cobler contends that *Heather Farms* was wrongly decided because the court did not base its decision on the Legislature's intent in enacting Code of Civil Procedure section 1032. She claims the Legislature's intent was to unify the various costs statutes and it did so by providing a universal definition for prevailing party to apply to all other statutes that allow the prevailing party to recover its attorney fees and costs. She asks that we take judicial notice of the statute's history. We have done so.

In 1986, the Legislature repealed the former version of Code of Civil Procedure section 1032 and enacted the statute in its current form. (Stats. 1986, ch. 377, §§ 5-6, pp. 1578-1579; see also *Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1335.) "The purpose of the 1986 legislation . . . was to streamline the rules and procedures on the award of litigation costs, which were deemed 'hard to find and hard to follow.'" (*Ibid.*) As the California Supreme Court stated in *Goodman v. Lozano*, "at the time current [Code of Civil Procedure] section 1032 was reenacted, the 'existing statutes d[id] not

fully explain the concept of the "prevailing party,"' and . . . a 'comprehensive definition' was necessary to 'further eliminate confusion.'" (*Id.* at p. 1336, citing Rep. on Sen. Bill No. 654 (1985-1986 Reg. Sess.) as amended July 8, 1986, pp. 1, 3.)

Cobler is correct that the legislative intent was to unify the cost statutes that existed at the time the current Code of Civil Procedure section 1032 was reenacted. It did so by repealing those statutes and enacting Code of Civil Procedure section 1032 in its current form. However, Civil Code section 1354 was added in 1990, after Code of Civil Procedure section 1032 was reenacted. (Stats. 1990, ch. 1517, § 3, p. 3; see also *Harbor View Hills Community Assn. v. Torley* (1992) 5 Cal.App.4th 343, 349-350.)

While the 1986 legislation amended other attorney fees and costs statutes to make them consistent with the new Code of Civil Procedure section 1032, it left intact other statutes with conflicting provisions. Civil Code section 1717, even though amended by the 1986 legislation, retained its own conflicting definition of prevailing party. It provided, "[w]here an action has been voluntarily dismissed or dismissed pursuant to a settlement of the case, there shall be no party prevailing on the contract for purposes of this section." (Sen. Bill No. 654, *supra*, at § 1.) This provision remains the same. (See Civil Code, § 1717, subd. (b)(2).) This indicates that the Legislature did not intend that all costs statutes contain the prevailing party definition added to Code of Civil Procedure section 1032. Because the Legislature later added a new and separate costs statute for actions to enforce CC&R's, its intent in reenacting Code of Civil Procedure section 1032 in 1986 does not compel the conclusion that when a plaintiff dismisses a complaint without prejudice, the defendant in the action is the prevailing party under Civil Code section 1354 as a matter of law.

In *Santisas v. Goodin* (1998) 17 Cal.4th 599 (*Santisas*), the California Supreme Court implicitly affirmed the *Heather Farms* rationale and applied it to the award of contractual attorney fees.[1] (*Salehi*, *supra*, 200 Cal.App.4th at p. 1154.) It concluded: "[A]ttorney fees *should not be awarded automatically* to parties in whose favor a

[1] Neither party contends they are entitled to contractual attorney fees and costs under Civil Code section 1717.

voluntary dismissal has been entered. In particular, it seems inaccurate to characterize the defendant as the 'prevailing party' if the plaintiff dismissed the action only after obtaining, by means of settlement or otherwise, *all or most of the requested relief*, or if the plaintiff dismissed for reasons, such as the defendant's insolvency, that have nothing to do with the probability of success on the merits. . . . If . . . [a] contract allows the prevailing party to recover attorney fees but does not define 'prevailing party' or expressly either authorize or bar recovery of attorney fees in the event an action is dismissed, a court may base its attorney fees decision on a pragmatic definition of the extent to which each party has realized its litigation objectives, whether by judgment, settlement, or otherwise. [Citation.]" (*Santisas*, at pp. 621-622, italics added.)

Cobler misstates the court's holding in *Santisas*. She says "the Supreme Court in *Santisas* held that the definition codified in [Code of Civil Procedure section] 1032[, subd. (a)(4)] stating that a dismissal makes the defendant the prevailing party, is the common and ordinary meaning of the term 'prevailing party' and thus should be implied into a contract that did not define the term."

In *Santisas*, the plaintiffs brought contract and tort actions but dismissed both with prejudice before trial. (*Santisas, supra*, 17 Cal.4th at p. 603.) The parties' purchase agreement provided that the prevailing party would be entitled to reasonable attorney fees in any action by a party to the agreement or arising from a breach of the agreement. (*Ibid*.) But the contract did not say that the prevailing party was entitled to its costs. (*Ibid*.) The trial court awarded attorney fees to the defendants, and the appellate court affirmed. (*Id.* at p. 604.)

The California Supreme Court engaged in a two-step inquiry. First, it examined who prevailed under the terms of the purchase agreement. As we have stated, because the contract did not define the term "'prevailing party,'" the court gave it its "ordinary or popular meaning" and analyzed whether the plaintiffs achieved their main litigation objective. (*Santisas, supra*, 17 Cal.4th at p. 609.) It found that since "plaintiffs did not obtain by judgment any of the relief they requested, nor . . . obtained this relief by

another means, such as settlement . . . defendants are the 'prevailing part[ies]'" under the terms of the contract. (*Ibid.*)

Second, the court considered whether the defendants were precluded from an attorney fees award by statute. It noted that Civil Code section 1717, which applies to actions to enforce contracts that contain an award for attorney fees and costs, provides that no party prevails when there is a voluntary dismissal. It held "in voluntary pretrial dismissal cases, Civil Code section 1717 bars [a defendant's] recovery of attorney fees incurred in defending contract claims." (*See Santisas, supra*, 17 Cal.4th at p. 602.) But since Civil Code section 1717 applies only to contract claims, the defendants in *Santisas* were not precluded from obtaining the fees they incurred in defending against plaintiffs' noncontractual claims.

Because the contract was silent as to costs, the court applied Code of Civil Procedure section 1032, rather than the pragmatic test, to determine whether the defendants were entitled to recover their costs. (*Santisas, supra*, 17 Cal.4th at pp. 605-606.) That statute defines prevailing party to include a defendant who obtains a dismissal in his or her favor. As a result, the court awarded the defendants their costs. (*Id.* at p. 606.) Included in the costs award were the attorney fees incurred in defending the tort claim under Code of Civil Procedure section 1033.5. (*Id.* at pp 606-607, 622.)

Applying the *Santisas* analysis to this case does not result in reversal. Here, the CC&R's provide that in any action to enforce the CC&R's, the prevailing party shall be awarded attorney fees and costs, but they do not define "prevailing party" so the court should give it its "ordinary or popular meaning" and determine whether the plaintiff achieved its main litigation objective. (See *Santisas, supra,* 17 Cal.4th at p. 609.) The trial court did this analysis and determined that Association prevailed. We review the relevant statute de novo to see if it compels a different outcome. Civil Code section 1354 is consistent with the CC&R's and provides that the prevailing party shall be awarded its attorney fees and costs. It does not define prevailing party either, and case law holds that courts should analyze which party has prevailed on a practical level. Since the trial court applied this test in making its determination, the outcome remains the same.

Santisas does not support Cobler's position that whenever a plaintiff dismisses its complaint, the defendant is the prevailing party entitled to attorney fees and costs. Accordingly, we join the *Heather Farms* line of cases in concluding that since Civil Code section 1354 does not define "prevailing party," courts should analyze which party has prevailed on a practical level.

II

Cobler contends that the court erroneously found Association to be the prevailing party under the pragmatic test. A trial court's determination that a litigant is a prevailing party is reviewed for an abuse of discretion. (*Goodman v. Lozano, supra*, 47 Cal.4th at p. 1332.) The appropriate test for an abuse of discretion is whether the trial court exceeded the bounds of reason. (*Id*. at p. 1339.) The judgment of the trial court is presumed correct, and the trial court's resolution of any factual disputes arising from the evidence is conclusive. (*Salehi, supra*, 200 Cal.App.4th at p. 1154.)

In "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." (*Hsu v. Abbara, supra*, 9 Cal.4th at p. 877, italics omitted.)

Applying these rules here, the court concluded Association was the prevailing party. It credited Association's stated purpose for the injunction was to obtain unfettered access to Cobler's roof, which it was entitled to do under the CC&R's. It concluded that Cobler did not abide by these provisions and the downstairs unit was suffering water damage because of this. It determined that Association dismissed the complaint because it had achieved its objective and the case was moot, not because Cobler had prevailed on an issue.

Cobler contends that Association's main litigation objective was to make her liable for the leaks and repairs and to restrict her use of the deck. But in her opposition to the preliminary injunction she stated, "The fact is that [Association's] motion does not

allege that Ms. Cobler is the cause or contributed to the water leaks, but that she violated numerous provisions of the CC&R's." Association's litigation objective is a determination of fact, and when considered with Cobler's admission, we find no reason why the court's finding that the objective was to obtain access was erroneous.

Cobler also argues the Association "refused" Alternate Dispute Resolution (ADR) before filing the lawsuit, in violation of Civil Code section 1369.520.[2] Civil Code section 1369.580 provides: "In an enforcement action in which fees and costs may be awarded pursuant to subdivision (c) of [Civil Code] Section 1354, the court, in determining *the amount of the award*, may consider whether a party's refusal to participate in alternative dispute resolution before commencement of the action was reasonable." (Italics added.) Cobler does not challenge the amount of the award as being unreasonable, but argues that because Association refused ADR prior to filing its lawsuit, she is the prevailing party.

Civil Code section 1369.580 does not say that a party's refusal to participate in ADR factors into the court's analysis of who prevailed in the action, and Cobler provides no reason why it should. We note that the parties did participate in internal dispute resolution under Civil Code section 1363.840, but it produced no agreement. Further, Association filed a certificate under Civil Code section 1369.560, subdivision (a)(3), claiming that immediate relief was necessary and this exigency excused ADR prior to filing the lawsuit. The court concluded that immediate relief was needed since Cobler's downstairs neighbor continued to suffer harm each day the deck remained unrepaired. Also, Cobler did not request ADR until after the preliminary injunction was granted. Thus, it is inaccurate to say Association refused ADR, and in any event, this fact is irrelevant to the prevailing party determination.

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[2] This statute provides: "An association or an owner or a member of a common interest development may not file an enforcement action in the superior court unless the parties have endeavored to submit their dispute to alternative dispute resolution pursuant to this article." (Civ. Code, § 1369.520, subd. (a).)

Cobler makes numerous other arguments, which attempt to re-litigate the merits of the preliminary injunction, but she does not identify how the court abused its discretion in finding that Association was the preliminary party.[3]

In sum, the trial court found that Cobler was in violation of the CC&R's, Association brought suit to enforce the CC&R's, and Association dismissed the case because it had become moot once it gained access to the deck, located the sources of the leaks, and made the repairs. As we have stated, on appeal from an attorney fee award, the judgment of the trial court is presumed correct, and the trial court's resolution of any factual disputes arising from the evidence is conclusive. (*Salehi, supra*, 200 Cal.App.4th at p. 1154.) We find no abuse of discretion in the court's application of the pragmatic test to determine that Association was the prevailing party.

III

Cobler contends the court's award of further attorney fees and costs was void. She argues that once she filed her appeal from the court's first award of fees and costs, Code of Civil Procedure section 916 required the court to stay further proceedings related to its determination that Association was the prevailing party.

In general, "the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order . . . ." (Code Civ. Proc., § 916, subd. (a).) Jurisdiction over the matter appealed from shifts to the court of appeal, and the trial court's power to enforce, vacate or modify the appealed judgment or order is suspended while the appeal is pending. (See *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 196-198 (*Varian*).) Conversely, the trial court has jurisdiction to

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[3] For example, Cobler claims that Association falsified a 25-pound weight limitation in West Coast's warranty in order to obtain the preliminary injunction. Review of the court's order and the transcripts from the hearing show the court did not grant the preliminary injunction because of any weight warranty. Rather, it granted the preliminary injunction because Cobler was in violation of the CC&R's and had refused to allow Association to inspect and repair the deck.

"proceed upon any other matter embraced in the action and not affected by the judgment or order" on appeal. (Code Civ. Proc., § 916, subd. (a).)

Whether a particular matter is subject to a stay depends on whether appellate jurisdiction would be frustrated by further trial court proceedings on the matter. (*In re Marriage of Varner* (1998) 68 Cal.App.4th 932, 936.) If trial proceedings would have any impact on the effectiveness of the appeal, they are stayed. (*Varian, supra*, 35 Cal.4th at p. 189.) For example, where the proceeding seeks to enforce, vacate, or modify the appealed order, where the possible outcomes on appeal and in the trial court are irreconcilable, or where the purpose of the appeal is to avoid the need for further trial court action, the action is stayed. (See *id.* at pp. 189-190.) An appeal from a costs and fee order awarded under Civil Code section 1354 automatically stays the *enforcement* of that order under Code of Civil Procedure section 916. (*Chapala Management Corp. v. Stanton* (2010) 186 Cal.App.4th 1532, 1546-1547 (*Chapala*), italics added; accord *Ziello v. Superior Court* (1999) 75 Cal.App.4th 651, 655.)

Courts that proceed in contravention of Code of Civil Procedure section 916, act in excess of their jurisdiction. "'Supersedeas' is the appropriate remedy for a refusal to acknowledge the applicability of statutory provisions automatically staying the judgment while an appeal is pursued." (*Chapala, supra*, 186 Cal.App.4th at p. 1541, fn. 8; see also 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 285, p. 337.)

Association moved for additional attorney fees and costs not claimed in its first motion on the ground that after it filed its motion, Cobler filed her own motion for attorney fees and costs, a cost memorandum, and a motion to enforce the bond. Association's attorney opposed these motions and incurred additional fees. It argues that Cobler appealed from the court's determination of prevailing party, and its motion for additional fees did not impact this issue. Rather, it contends the award of additional fees was a purely ministerial act to account for the additional work its attorneys were required to do to oppose Cobler's motions, which were filed after its first request for fees.

As we have discussed, an appeal from an award of attorney fees and costs under Civil Code section 1354 stays enforcement of that order. (*Chapala, supra*,

186 Cal.App.4th at pp. 1546-1547.) Neither party cites authority addressing whether an appeal from an award of attorney fees and costs stays trial court proceedings to award additional fees to the prevailing party as determined by the court in the earlier award.

In *Warsaw v. Chicago Metallic Ceilings, Inc.* (1984) 35 Cal.3d 564 (*Warsaw*), the trial court reserved jurisdiction to award the plaintiffs additional damages for each day that the defendant did not comply with a mandatory injunction. (*Id.* at p. 573.) The defendant challenged the court's jurisdiction to make additional damages awards under Code of Civil Procedure section 916 because it had appealed from the court's underlying injunction. (*Ibid.*) The California Supreme Court noted that if the defendant prevailed on appeal, there would be no basis for the award. (*Id.* at p. 574.) However, it upheld the trial court's jurisdiction and concluded that "a stay in the enforcement of the judgment during the pendency of the appeal does not a fortiori prevent the accrual of the damages which become part of the judgment if and when the judgment becomes final and enforceable." (*Ibid.*; see also *Palmco Corp. v. Superior Court* (1993) 16 Cal.App.4th 221, 225 [*Warsaw* does not require trial court to expressly reserve jurisdiction for award of future damages].)

Here, the award of additional attorney fees is similar to the award for future damages at issue in *Warsaw*. While Cobler appealed the trial court's prevailing party finding, Association continued to accrue fees and costs as Cobler filed additional motions in the trial court. If Cobler prevailed on appeal, there would be no basis for the award of additional fees, but this did not divest the trial court's jurisdiction to award these additional costs. In addition, the motion did not impact the appealed-from matter—the trial court's determination that Association was the prevailing party. Thus, we conclude the trial court retained jurisdiction to make the award of additional attorney fees. Since Cobler does not challenge the reasonableness of these fees, we affirm the trial court's award.

IV

Cobler purports to appeal from the court's refusal to hear her motion to recover under the bond. A trial court's refusal to hear a motion is not an appealable judgment; it is properly challenged by a petition for a writ of mandate. (See *Andruss v. Superior Court* (1996) 46 Cal.App.4th 1276, 1279-1280 [granting writ of mandate to direct trial court to vacate its order taking a motion off calendar].)

On February 25, 2009, Association moved for attorney fees and costs. On March 6, Cobler filed her own motion for attorney fees and costs and a separate motion to enforce liability on the bond posted by Association to secure the preliminary injunction. In the motion to enforce liability on the bond, Cobler argued that Association obtained the preliminary injunction by making factual misrepresentations to the court. She contended also that Association's voluntary dismissal of the injunction had the effect of fixing its liability on the bond as a matter of law.

After determining that Association was the prevailing party, the court dismissed Cobler's motion to enforce liability on the bond on the ground that her brief assumed she was entitled to recover on the bond as a prevailing party. Cobler re-filed the motion twice, and the court took it off calendar, determining that since the appeal from the court's determination of prevailing party was pending, proceedings to enforce liability on the bond were stayed under Code of Civil Procedure section 996.440. She filed a petition for a writ of mandate, which we denied.

Cobler argues that her motion is not stayed pending the appeal because she is entitled to recover under the bond regardless of whether we agree that Association is the prevailing party. She relies on *Special Editions v. Kellison* (1982) 129 Cal.App.3d 803 (*Special Editions*) and *Adams v. National Auto Ins. Co.* (1943) 56 Cal.App.2d 905 (*Adams*). These cases are distinguishable.

Under Code of Civil Procedure section 529, the liability of the sureties arises only when it is finally determined that the plaintiff is not entitled to the injunction. At this point, liability on the bond can be enforced by a motion in the action, without the filing of an independent action. (Code Civ. Proc., § 996.440, subd. (a).) Such a motion can be

made up to a year after, but not before, entry of the final judgment and expiration of the time for appeal, or the final determination on appeal. (Code Civ. Proc., § 996.440, subd. (b).)

In *Adams* and *Special Editions*, the courts addressed whether a defendant can recover under the bond when the plaintiff dismisses the action before the court makes a final determination that the plaintiff was not entitled to the injunction. In both cases the court held that a defendant can bring a motion to enforce liability in this instance. (*Special Editions*, *supra*, 129 Cal.App.3d at p. 808; *Adams*, *supra*, 56 Cal.App.2d at p. 910.) Even though there was no final determination that the plaintiff was not entitled to the injunction, the courts treated the plaintiff's dismissal as a final determination that the plaintiff was not entitled to the injunction. This allowed the defendant to bring the motion to enforce liability and prove its damages. (*Special Editions*, at p. 808; *Adams*, at p. 910.)

In neither of these cases, however, did the court specifically find that the plaintiff dismissed the action because it achieved its litigation objective through defendant's compliance with the preliminary injunction. Here, we have a factual finding by the court that Association obtained all the relief it sought and dismissed the case because it was moot. The court concluded that Association did not dismiss the complaint to avoid liability on the bond.

Further, in neither of the cases cited by Cobler did the parties claim to be a prevailing party entitled to statutory attorney fees and costs. This is likely because both cases predate the enactment of Civil Code section 1354 and reenactment of Code of Civil Procedure section 1032.

"Generally speaking, the sole purpose of requiring a plaintiff to furnish a bond or undertaking as a provisional remedy is 'to protect the defendant against loss incurred if the defendant *prevails* in the main action.'" (*West Hills Farms, Inc. v. RCO Ag Credit, Inc.* (2009) 170 Cal.App.4th 710, 717, fn. 8, quoting 6 Witkin, Cal. Procedure (5th ed. 2008) Provisional Remedies, § 10, p. 32, italics added.) A defendant who does not prevail is not entitled to collect under a bond posted to secure a preliminary injunction.

As we have discussed, Cobler did not prevail in the action. Thus, she cannot recover under the bond. To hold otherwise would defeat the purpose of requiring a plaintiff to furnish a bond.

Accordingly, it was proper for the court to stay Cobler's motion to enforce liability pending appellate review of the prevailing party determination.

V

Association seeks attorney fees incurred in this appeal. "'[I]t is established that fees, if recoverable at all–pursuant . . . to statute . . . –are available for services at trial and on appeal.'" (*Morcos v. Board of Retirement* (1990) 51 Cal.3d 924, 927, italics omitted.) Association is the prevailing party in this appeal, and thus it is entitled to its fees. "Although this court has the power to fix attorney fees on appeal, the better practice is to have the trial court determine such fees." (*Security Pacific National Bank v. Adamo* (1983) 142 Cal.App.3d 492, 498.)

DISPOSITION

The orders are affirmed. Association is entitled to attorney fees and costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EPSTEIN, P. J.

We concur:

WILLHITE, J.

SUZUKAWA, J.