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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

MONTEBELLO UNIFIED SCHOOL
DISTRICT,

Plaintiff, Cross-defendant and
Respondent,

v.

FITNESS PROFILE, INC., et al.,

Defendants, Cross-
complainants and Appellants.

B267436

(Los Angeles County
Super. Ct. No. BC485485)

APPEAL from a judgment of the Superior Court of Los
Angeles County. Susan Bryant-Deason, Judge. Reversed.

Musick, Peeler & Garrett, Cheryl A. Orr; Law Offices of James T. Duff and James T. Duff for Defendants, Cross-complainants and Appellants.

Baker, Keener & Nahra, Robert C. Baker; Kenney & Kopf and David K. Kenney for Plaintiff, Cross-defendant and Respondent.

Fitness Profile, Inc. (FPI), and Dennis D. Windscheffel (collectively, Windscheffel) appeal from an order awarding attorney fees in favor of the Montebello Unified School District (the District) in connection with the District's successful breach of contract action against Windscheffel. Windscheffel separately appealed from the judgment on the underlying action involving the District's claims for breach of contract, conversion, and punitive damages, and Windscheffel's cross-complaint for breach of contract. Our opinion in that appeal (B264341) summarizes the background facts, which we will not repeat here.

The attorney fee award was predicated on an identical indemnification provision in each of the five contracts (the ASSETs Contracts) that were the subject of the District's successful action for breach.¹ Windscheffel argues that these provisions concerned indemnification of the District for claims by third parties and did not authorize attorney fees for actions to

¹ As discussed in the related appeal, the ASSETs Contracts concerned Windscheffel's provision of after school services to three high schools under the After School Safety and Enrichment for Teens program, funded through the No Child Left Behind Act of 2001. (Pub.L. No. 107-110 (Jan. 8, 2002) 115 Stat. 1425.)

enforce the ASSETs Contracts themselves. We agree, and therefore reverse the trial court's judgment awarding attorney fees.

BACKGROUND

1. *The District's Motion*

The trial court entered an amended judgment in the underlying action on March 30, 2015, that awarded attorney fees to the District. The District filed its motion for attorney fees on May 28, 2015, supported by declarations and the ASSETs Contracts. The trial court held a hearing on August 17, 2015, following which it awarded attorney fees to the District in the amount of \$672,317.96. The trial court entered a judgment awarding fees in that amount on October 15, 2015.

2. *The Indemnification Provisions*

The ASSETs Contracts each contain an identical indemnification provision that is the asserted basis for the District's attorney fees award. The provision reads in its entirety:

“23. INDEMNIFICATION AND HOLD HARMLESS

“CONTRACTOR shall defend, hold harmless and indemnify, the District, its officers, employees, administrators, agents, attorneys, volunteers, subcontractors and the District's Board of Education ('DISTRICT indemnitees') against all liability, loss, damage and expense (including reasonable attorney's fees), resulting from or arising out of this Master Contract or its performance to the extent that such loss, damage or liability was proximately caused by an act or omission of CONTRACTOR, its officers, agents or employees, subcontractors or anyone employed directly or indirectly by it (excluding

DISTRICT and DISTRICT indemnitees) and from every claim or demand which may be made by reason of:

“A. Any injury to person or property sustained by the CONTRACTOR or by any person, firm, or corporation, employed directly or indirectly by them upon or in connection with his performance under the Master Contract, however caused, unless such injury is caused by the negligence or willful misconduct of the District.

“B. Any injury to person or property sustained by any person[,] firm or corporation, caused by any act, neglect, default, or omission of the CONTRACTOR or of any person, firm, or corporation, indirectly employed by them upon or in connection with his performance under the Master Contract.

“C. Any liability that may arise from the CONTRACTOR or any of its employees, agents, or subcontractors furnishing or sue [*sic*] of any copyrighted composition or patented invention, under this Master Contract.”

DISCUSSION

1. *Standard of Review*

“The indemnity provisions of a contract are to be construed under the same rules governing other contracts with a view to determining the actual intent of the parties.” (*Myers Building Industries, Inc.* (1993) 13 Cal.App.4th 949, 969 (*Myers*).) Neither party points to any extrinsic evidence concerning the meaning of the indemnification provisions at issue, and both parties agree that determining whether a contract provides for the recovery of attorney fees is a question of law. We therefore review de novo whether the relevant provisions in the ASSETs Contracts provide for attorney fees resulting from actions for breach. (*Id.* at p. 974;

Building Maintenance Service Co. v. AIL Systems, Inc. (1997) 55 Cal.App.4th 1014, 1021 (*Building Maintenance*).)

2. *The Indemnification Provisions in the ASSETs Contracts Do Not Provide for Attorney Fees Incurred in Actions Under the Contracts*

“ ‘Unless authorized by either statute or agreement, attorney’s fees ordinarily are not recoverable as costs.’ ” (*Myers, supra*, 13 Cal.App.4th at p. 968, quoting *Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 127.) Where a contract provides a right to attorney fees to one party, Civil Code section 1717 makes the right reciprocal for all parties to the contract. (*Myers*, at p. 968.)

The District argues that paragraph 23 provides a contractual basis for the award of attorney fees. The District claims that paragraph 23 is broad enough to apply not only to attorney fees incurred in connection with the defense of third party claims but also to actions to enforce the ASSETs Contracts.

The argument is foreclosed by the plain language of the provisions. Paragraph 23 is entitled, “INDEMNIFICATION AND HOLD HARMLESS.” The first sentence of the provision provides that the “CONTRACTOR [Windscheffel] shall *defend, hold harmless and indemnify* the District . . . against all liability, loss, damage and expense (including reasonable attorney’s fees).” (Italics added.) The plain language of this sentence shows that Windscheffel agreed to pay the District’s attorney fees as a component of the District’s losses in connection with Windscheffel’s indemnification obligation. It does not support the claim that the District is entitled to attorney fees as the prevailing party in an action against Windscheffel for breach.

“Indemnity is a contract by which one engages to save another from a legal consequence of the conduct of one of the parties, or of some other person.” (Civ. Code, § 2772.) “A clause which contains the words ‘indemnify’ and ‘hold harmless’ is an indemnity clause which generally obligates the indemnitor to reimburse the indemnitee for any damages the indemnitee becomes obligated to pay third persons.” (*Myers, supra*, 13 Cal.App.4th at p. 969.)

Several cases have held that indemnification language very similar to that at issue here does not create a right to attorney fees on actions under the contract. In *Building Maintenance*, the relevant contractual indemnification provision stated: “Seller . . . further agrees to indemnify and save Buyer . . . harmless from any and all losses, liabilities, damages, claims, demands, suits, actions, proceedings, subrogations and expenses including court costs and reasonable attorney’s fees, related in any way to this Order, or the services performed or goods delivered under this Order . . . which are claimed or made by any person, firm, association or corporation, including employees, workmen, servants or agents of the Seller and his subcontractors arising from any cause or for any reason whatsoever.” (*Building Maintenance, supra*, 55 Cal.App.4th at p. 1022.) The court rejected the prevailing party’s argument that this sentence was broad enough to constitute an attorney fees provision for actions to enforce the contract “because it provides for the recovery of costs, including attorney’s fees, for ‘any claim arising for any reason or cause whatsoever’ and which is ‘related in any way to this Order.’” (*Id.* at p. 1029.) The court concluded that the provision was intended to deal only with third party claims, and that there was no language in the provision “from which we may

reasonably infer that the contracting parties intended to address claims made against each other.” (*Id.* at p. 1030.)

Similarly, in *Myers* the court held that several indemnification provisions failed to provide any basis for an award of attorney fees in actions under the contract. There, as here, the provisions at issue stated that a contractor would be obligated to pay attorney fees as an element of costs in connection with an obligation to “indemnify” and “hold harmless” the other party to the contract. (*Myers, supra*, 13 Cal.App.4th at pp. 963–965, 973–974.) The court concluded that the provisions in question were intended to apply only to third party claims. (*Id.* at pp. 973–974.)

The District acknowledges that “[o]rdinarily, an indemnification provision allows one party to recover costs incurred defending actions by third parties, not attorney fees incurred in an action between the parties to the contract.” Citing *Myers, supra*, 13 Cal.App.4th at page 969, the District also agrees that “[t]he key indicator is an express reference to indemnification.” However, the District cites *Continental Heller Corp. v. Amtech Mechanical Services, Inc.* (1997) 53 Cal.App.4th 500 (*Continental Heller*) for the principle that, when contractual language “goes beyond general indemnity language,” an indemnification provision may properly be interpreted as a “more generalized attorney fee provision in favor of the prevailing party.”

Continental Heller does not help the District. In that case, the court upheld an award of attorney fees incurred in prosecuting an action to enforce an indemnity provision. The court relied upon the final paragraph of the indemnification provision at issue, which expressly stated that “ ‘the

Subcontractor shall indemnify the Contractor, and save it harmless from any and all loss, damage, costs, expenses and attorney's fees suffered or incurred *on account of any breach of the aforesaid obligations and covenants, and any other provision or covenant of this Subcontract.'*" (*Continental Heller, supra*, 53 Cal.App.4th at pp. 508–509.)

Thus, unlike here, the provision at issue in *Continental Heller* expressly permitted attorney fees for the action that the contractor brought for breach. Indeed, the court in that case stated that, if the contract had contained only standard indemnification language, such as the language in the ASSETs Contracts, the court would have agreed that "Continental is not entitled to attorney fees incurred in prosecuting this action for breach." (*Continental Heller, supra*, 53 Cal.App.4th at p. 508.)²

The District also argues for the first time on appeal that the "additional attorney's fees language in Paragraph 5 of the Contracts" goes beyond an indemnification obligation and creates the right to attorney fees for actions under the Contracts. Paragraph 5 required Windscheffel to comply with applicable laws and District policies, and provided that Windscheffel "shall indemnify the DISTRICT under the provisions of SECTION 22 of this Master Contract for all liability, loss, damage and expense (including reasonable attorney's fees) resulting from or arising

² The standard indemnification language in the contract in *Continental Heller* was similar to the language at issue here in obligating the indemnifying party to "indemnify Continental from all loss, damage, etc., 'including attorney's fees,' which 'arises out of or is in any way connected with the performance of work under this Subcontract.'" (*Continental Heller, supra*, 53 Cal.App.4th at p. 508.)

our [*sic*] of CONTRACTOR’S failure to comply with DISTRICT policies.” Because the District did not raise this argument below, we decline to consider it on appeal. (*Planned Protective Services, Inc. v. Gorton* (1988) 200 Cal.App.3d 1, 13, disapproved on other grounds in *Martin v. Szeto* (2004) 32 Cal.4th 445, 451, fn. 7.)³

DISPOSITION

The trial court’s judgment dated October 15, 2015, awarding attorney fees to the District is reversed. Windscheffel is entitled to his costs on this appeal.

NOT TO BE PUBLISHED.

LUI, J.

We concur:

CHANEY, Acting P. J.

JOHNSON, J.

³ Although we do not reach the issue, we note that the sentence in paragraph 5 on which the District relies also refers to an obligation to “indemnify” and does not contain an express term permitting attorney fees on an action for breach.