Filed 9/24/13 DuPuis Group v. Atticus Information Systems CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE DUPUIS GROUP LLC, Plaintiff and Appellant, v. ATTICUS INFORMATION SYSTEMS, INC., et al. Defendants and Respondents.	2d Civil No. B242722 (Super. Ct. No. 56-2011-00393726 CU-BC-SIM) (Ventura County)

The DuPuis Group LLC (DuPuis) appeals an order denying its post-judgment motion for $225,750 attorney fees after DuPuis accepted a $40,000 statutory offer to settle its action for contract/negligence damages. (Code Civ. Proc., § 998.)[1] The statutory offer provides that judgment be entered "in favor of [DuPuis] in the amount of $40,000, as well as reasonable attorneys' fees and taxable costs, if appropriate. . ." The trial court denied the motion for attorney fees because the action was based on a Statement of Work agreement that lacks an attorney's fee provision. (§ 1033.5, subd. (a)(10)(A); Civ. Code, § 1717, subd. (a).) We affirm.

[1] All statutory references are to the Code of Civil Procedure unless otherwise stated.

Facts and Procedural History

Pursuant to a 2003 Engagement Letter for Services (Engagement Letter), Atticus Information Systems, Inc. (Atticus) provided DuPuis computer consulting and support services for $3,000 a month. The Engagement Letter contained an attorney's fee provision and limited Atticus' liability and damages for claims arising from or related to the Engagement Letter.[2]

On January 23, 2010, Atticus entered into a Statement of Work agreement to replace Dupuis' computer server and transfer the database from the old server to the new server. When Atticus failed to make a backup of the database and copy the database to the new server, Dupuis sued for $1.6 million damages and attorney fees.

Atticus filed a motion to strike the prayer for attorney fees on the ground that the Statement of Work did not have an attorney's fee clause. The trial court struck the request for attorney fees because the complaint failed to allege a contractual or statutory basis for the fees.

Dupuis filed a first amended complaint for breach of contract, negligence fraud, and negligent misrepresentation. Atticus filed an answer and propounded discovery on whether the action was based on the 2003 Engagement Letter or the 2010 Statement of Work. In response to a request for admissions and interrogatories, Dupuis admitted that the Statement of Work was the operative contract.

$40,000 Statutory Offer

On February 21, 2012, DuPuis accepted Atticus' $40,000 statutory offer to compromise. (CCP § 998.) The statutory offer provided that judgment be entered in favor of DuPuis "in the amount of $40,000, as well as reasonable attorneys' fees and taxable costs, if appropriate, . . . to be determined following entry of

[2] Paragraph 9.1 of the Engagement Letter provided that there would be no liability for damages, whether in contract or tort, for lost data. Paragraph 9.2 provided that Atticus' liability for any claim or damage arising from or related to the Engagement Letter would be limited to direct damages not to exceed the amount DuPuis paid for services during the most recent 12-month period that Atticus provided services.

Judgment . . . ." The trial court signed an amended judgment awarding $40,000 damages and "taxable costs, including reasonable attorneys' fees, as determined by this Court."

Postjudgment Motion for Attorney Fees

DuPuis brought a motion for $225,750 attorney's fees based on the 2003 Engagement Letter which provided: "Should a dispute arise in connection with this Agreement, the prevailing party shall be entitled to recover reasonable attorneys' fees." Denying the motion, the trial court concluded that the action was based on the 2010 Statement of Work which lacked an attorney's fee provision. The court found: "No admissible evidence established that the 2003 Engagement Letter's 'prevailing party' attorneys fee provision was intended by the parties to govern *future* agreements between Atticus and DePuis."

Attorney Fees as a Prevailing Party Cost Item

The order denying fees is reviewed de novo where, as here, the right to recover attorney fees depends upon the interpretation of a contract and no extrinsic evidence is offered to interpret the contract. (*Casella v. SouthWest Dealer Services, Inc.* (2007) 157 Cal.App.4th 1127, 1161.) The section 998 judgment provides that DuPuis shall recover "taxable costs, including reasonable attorneys' fees, as determined by [the trial] court." Citing the maxim that "[i]nterpretation must be reasonable" (Civ. Code, § 3542), DuPuis argues that an award of no fees is not reasonable attorney's fees.

We reject the argument because the statutory offer states that DuPuis will be awarded reasonable attorney fees if it is an "appropriate" cost item. (See § 1033.5, subd. (a)(10)(A); Civ. Code, § 1717, subd. (a) [attorney's fees are recoverable cost where authorized by contract].) "Section 998, subdivision (b)(1) provides that upon receipt of an offer and proof of acceptance, the clerk or the court should perform the ministerial task of entering judgment according to the parties' agreement." (*Bias v Wright* (2002) 103 Cal.App.4th 811, 819; see *Westamerica Bank v. MBG Industries, Inc.* (2007) 158 Cal.App.4th 109, 134-135.) DuPuis tried to modify the settlement terms by filing a "Notice Re Acceptance of Statutory Offer" requesting that judgment be entered "in the amount of $40,000 plus DuPuis' attorneys' fees in the amount of $202,307.00, and

DuPuis' taxable costs." It was a "rogue document" and could not change the statutory offer or settlement terms. (§ 998, subd. (b).)

Over Atticus' objection, DuPuis filed a proposed amended judgment providing that DuBuis "shall recover" $40,000 damages and "taxable costs, including reasonable attorneys' fees, as determined by [the trial] Court."[3] Consistent with the statutory offer, the trial court concluded that attorney fees was a cost item and must satisfy Civil Code section 1717, subdivision (a) which requires that the action be based on a contract with an attorney fee provision. Section 998 did not provide greater rights to attorney fees than those provided by the underlying contract or statute sued upon. (Weil & Brown, Cal. Practice Guide (The Rutter Group 2012) Civil Procedure Before Trial [¶] 12:648.5a, p. 12(II)-45; see e.g., *Mangano v. Verity, Inc.* (2008) 167 Cal.App.4th 944, 951 [prevailing defendant denied attorney fees in Fair Employment and Housing Act suit (Gov. Code, § 12965, subd. (b)].)

Action on a Contract

"As a general rule, attorneys fees are awarded only when the action involves a claim covered by a contractual attorney fee provision and the lawsuit is between signatories to the contract. [Citation.]" (*Real Property Services Corp. v. City of Pasadena* (1994) 25 Cal.App.4th 375, 379-380.) Here the underlying action was based on the Statement of Work. As indicated (*infra* p.2) DuPuis admitted the Statement of Work was the operative contract.

DuPuis argues that the Statement of Work (executed six years after the 2003 Engagement Letter) is a supplemental agreement and incorporates paragraph 6 of

[3] DuPuis argues that Atticus did not appeal from the amended judgment and is barred from challenging the judgment's language awarding reasonable attorney fees. Section 998 judgments are not appealable. (*Pazderka v. Caballleros Dimas Alang, Inc.* (1998) 62 Cal.App.4th 658, 667.) The amended judgment provides that the trial court shall retain jurisdiction and determine taxable costs including reasonable attorney fees. (See *P.R Burke Corp v. Victor Valley Wastewater Reclamation Authority* (2002) 98 Cal.App.4th 1047, 1053 [postjudgment order awarding or denying attorney fees is separately appealable].)

the Engagement Letter which states: "In the event that Atticus and Client agree that Atticus shall provide services to Client beyond the scope of the Services, then the terms and conditions in this Agreement shall apply to the provision of such services."

The Statement of Work does not refer to the 2003 Engagement Letter. If it did, the limitation on liability and damages set forth in the Engagement Letter would bar the action. DuPuis' complaint, the first amended complaint, and DuPuis' discovery responses identify the Statement of Work as the operative contract. The trial court found that "throughout this litigation, Plaintiff DuPuis has consistently disputed and downplayed the Engagement Letter as being part of the parties' agreement. This is not surprising, given that the Engagement Letter contains express, restrictive 'Limitations of Liability' and 'Limitations of Damages' terms . . . . [¶] . . . DuPuis' own complaint and first amended complaint in this action ignore the Engagement Letter (and its attorneys fee provision in its attachment Exhibit B). Instead, the only contract referred to (and attached to) Plaintiff DuPuis' original and first amended complaints is the [Statement] of Work Agreement."

After the case settled, DuPuis "flip-flopped" and claimed that the attorney fee provision in the Engagement Letter governed. The trial court correctly found that DuPuis' attorney fees are not a recoverable cost within the meaning of Civil Code section 1717, subdivision (a). " ' [C]ourts have consistently held that the award of Civil Code section 1717 contractual attorney's fees is to be governed by equitable principles' [Citations.] . . . . [DuPuis] cannot be allowed to win on its contract action by championing one contract without an attorney fee provision, and then turn around and ask for attorney fees as prevailing party based on a different contract . . . . That would provide a new twist to the concept of contract shopping. . . . '[S]ection 1717 . . . only comes into play where a contract specifically provides for attorney fees. . . . It cannot be bootstrapped to provide for attorney fees for breach of a contract that has no attorney fees provision.' [Citation.]" (*Brittalia Ventures v. Stuke Nursery Co., Inc.* (2007) 153 Cal.App.4th 17, 31.)

DuPuis claims that it is entitled to prevailing party attorney fees because Atticus raised the Engagement Letter as a defense. Civil Code 1717, subdivision (a) states in pertinent part: "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded . . . to the prevailing party, then the party who is determined to be the party prevailing on the contact, . . . shall be entitled to reasonable attorney's fees in addition to other costs."

Civil Code section 1717, subdivision (a) speaks in the singular, i.e., to "a contract" and refers to attorney fees "incurred to enforce that contract . . . ." The right to prevailing party attorney fees derives from the underlying contract sued upon, in this case the Statement of Work. (See *Lanyi v. Goldblum* (1986) 177 Cal.App.3d 181, 187, citing *Folsom v. Butte County Assn. of Governments* (1982) 32 Cal.3d 668, 678.) Where a different contract (i.e., the Engagement Letter) is asserted as a defense, attorney fees are not a recoverable cost unless the contract sued upon by the plaintiff has an attorney's fee provision. (*Plemon v. Nelson* (1983) 148 Cal.App.3d 720, 724-725; *Gil v. Mansano* (2004) 121 Cal.App.4th 739, 743-744.) DuPuis sued for $1.6 million damages based on the Statement of Work and Atticus defensively used the Engagement Letter to limit its liability. There was no action to enforce the 2003 Engagement Letter.[4] (See e.g., *Exxess Electronixx v. Heger Realty Corp.* (1998) 64 Cal.App.4th 698, 712.)

[4] In *Windsor Pacific LLC v. Samwood Co., Inc.* (2013) 213 Cal.App.4th 263 (*Windsor*), the Court of Appeal distinguished *Gil v. Mansano, supra*, on the ground that an attorney fee clause, if worded broadly enough, can authorize a fee award in any litigation between the contracting parties. (*Id.*, at pp. 273-274.) There, the complaint (an action for quiet title, ejectment and declaratory relief) and defendant's answer sought enforcement of the same easement agreement. Defendant prevailed at trial and was awarded fees. The Court of Appeal affirmed the fee award, concluding that "an action in which a party seeks to enforce or interpret a contract in connection with either a claim alleged in the complaint or a defense alleged in an answer . . . constitute[s] an action to 'enforce or interpret' the contract." (*Id.*, at p. 275.) Unlike *Windsor*, a different contract [the Engagement Letter] was defensively used to limit Atticus' liability. Atticus did not seek to enforce the Engagement Letter attorney's fee provision, and for good reason. The attorney's fee clause in the Engagement Letter is limited to disputes "between the parties . . . in

In *Gil v. Mansano, supra,* 121 Cal.App.4th 739, a business owner sued another business owner for fraud. Defendant filed an answer alleging that the action was barred by a release the parties previously signed. The release contained the following attorney's fee provision: " 'In the event action is brought to enforce the terms of this [Release], the prevailing party shall be paid his reasonable attorney[] fees and costs incurred therein.' " (*Id.*, at p. 742.) The trial court granted defendant summary judgment and awarded defendant prevailing party attorney fees. The Court of Appeal reversed, holding that attorney's fees clause did not apply to fees incurred defending against the action. (*Id.*, at p. 743.) "Where a contract authorizes an award of attorney fees in an action to enforce any provision of the contract, a defense to a tort action based on a provision of the contract may have the effect of enforcing the provisions of the contract. [Citations.] However, the assertion of a defense does not constitute the bringing of an action to accomplish that goal. [Citations.] Raising a defense may not be equated with bringing an action. [Citation.]" (*Id.*, at pp. 743-744.)

The same principle applies here. Atticus did not bring an action to enforce the Engagement Letter. DuPuis argues that the statutory offer and amended judgment narrowed the trial court's "subject matter jurisdiction" to determine the amount of fees but not the entitlement to fees. DuPuis' construction of the statutory offer puts the cart (attorney fee amount) before the horse (entitlement to fees) and erases the phrase "if appropriate."[5] It violates the rule that attorney fees, when authorized by contract or statute, is a cost item to be determined by the trial court. (§ 1033.5, subd. (a)(1); *Santisas v. Goodin* (1998) 17 Cal.4th 599, 606.) "Ordinarily, contractual attorney's fees

---

connection with *this* Agreement. . . " (Italics added.) There is no evidence that the attorney's fee provision in the 2003 Engagement Letter was intended to govern future agreements between Atticus and Dupuis.

[5] General rules of contract construction apply to section 998 settlement offers. (*Linthicum v. Butterfield* (2009) 175 Cal.App.4th 259, 272.) A cardinal rule of construction is that "[t]he whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." (Civ. Code, § 1641.)

must be sought by noticed motion. [Citations.] This is true regarding both the entitlement to, and the amount of the fees. . . [Citation.]" (*P.R Burke Corp v. Victor Valley Wastewater Reclamation Authority, supra,* 98 Cal.App.4th 1047, 1052.)

The trial court correctly found that attorney fees are not a recoverable cost based on the pleadings and contract (i.e., Statement of Work) sued upon. (§ 1033.5, subd. (a)(10)(A); Civ. Code, § 1717 subd. (a).) DuPuis is precluded from rewriting the statutory offer or the section 998 judgment, or switching contracts to do an end run around Civil Code section 1717, subdivision (a).

The judgment (order denying attorney fees as a cost item) is affirmed. Atticus is awarded costs on appeal.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Barbara Lane, Judge

Superior Court County of Santa Barbara

_____

John Derrick, for Appellant.

Anthony Ellrod, Candace E. Kailberg; Manning & Kass, Ellrod, Ramirez, Trester, for Atticus Information Systems, Inc., Respondent.