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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

CHEN CHUNG WEI,

Plaintiff and Appellant,

v.

CULTURE ESCROW et al.,

Defendants and Respondents.

B285327

(Los Angeles County
Super. Ct. No. BC616605)

APPEAL from an order of the Superior Court of Los Angeles County, William F. Fahey, Judge. Affirmed.

Law Offices of Vincent Y. Lin and Vincent Y. Lin for Plaintiff and Appellant.

Lex Opus, Mohammed K. Ghods, Jeremy A. Rhyne, and Lori L. Speak for Defendants and Respondents.

I. INTRODUCTION

Plaintiff Chen Chung Wei, as trustee of the Huang 2013 Family Trust dated June 19, 2013 (Huang Trust), appeals from an order granting attorney fees to defendants. Plaintiff sued defendants Culture Escrow, Inc. and Kevin Hsu (collectively defendants) for fraud, negligent misrepresentation, and breach of fiduciary duty related to a real estate transaction between plaintiff's mother Huang Miao Wei (Huang) and his stepfather Wen Tu Chen (Wen).¹

Judgment was entered for defendants, who then moved for attorney fees. The trial court awarded attorney fees to defendants under a provision in the transaction's escrow instructions. Plaintiff contends the attorney fees provision in the escrow instructions is an indemnity provision, not a prevailing party attorney fees provision, and as such does not support the award of attorney fees to defendants. We affirm.

II. BACKGROUND

Wen and Huang engaged defendant Culture Escrow, Inc. to serve as the escrow company and defendant Kevin Hsu (Hsu) to act as the escrow officer for Huang's sale of her interest in a property to Wen. The sale agreement and agreement engaging defendants were memorialized in Supplemental Sale Escrow Instructions dated May 15, 2015 (escrow instructions) and signed

¹ Because some of the individuals involved in this matter have the same or similar names, we will refer to them by their first names for clarity.

by Wen and Huang in their individual capacities and as trustees of their respective trusts.

On April 12, 2016, Huang as trustee of the Huang Trust filed suit against Wen and defendants alleging various cause of action arising out of the real estate transaction. She contended that Wen had included in the escrow instructions credits for costs that he had not incurred and a loan that he had never made, and that as a result, she received less from the property sale than she was entitled to. She also contended that defendants had made false representations to her about the escrow instructions and breached their fiduciary duties to her. After Huang's death, plaintiff filed an amended complaint in intervention as the successor trustee of the Huang Trust alleging the same causes of action against defendants.

Plaintiff's action against defendants and Wen proceeded to trial. At the end of trial, defendants moved for nonsuit or judgment pursuant to Code of Civil Procedure section 631.8. The trial court granted defendants' motion and on April 19, 2017 entered judgment against plaintiff as to all causes of action against defendants. Plaintiff prevailed against Wen.²

On June 27, 2017, defendants filed a motion for attorney fees under a provision in the escrow instructions. Paragraph 30 of the "Additional Escrow Instructions and Conditions" stated in part: "All of the parties to this escrow, jointly and severally, promise to pay promptly on demand, as well as to indemnify you and to hold [e]scrow [h]older harmless from and against all administrative governmental investigation, audit and legal fees,

² Wen appealed the judgment against him, which we affirmed in a separate unpublished opinion. (*Wei v. Chen* (Sept. 12, 2018, B283024) [nonpub. opn.])

litigation and interpleader costs, damages, judgments, attorney[] fees, arbitration costs and fees, expenses, obligations and liabilities of every kind (collectively ‘costs’) which in good faith you may incur or suffer in connection with or arising out of this escrow, whether said costs arise during the performance of or subsequent to this escrow, directly or indirectly, and whether at trial, on appeal in [*sic*] administrative action, or in an arbitration. . . . If the parties do not pay any fees, costs or expenses due [e]scrow [h]older under the escrow instructions or do not pay for costs and attorney[] fees incurred in any litigation, administration action and/or arbitration, on demand, they each agree to pay a reasonable fee for any attorney services which may be required to collect such fees or expenses, whether attorney[] fees are incurred before trial, at trial, on appeal or in arbitration.”

Plaintiff argued this provision applied only to indemnification and collection actions and did not allow defendants to recover attorney fees in direct actions as prevailing parties. On August 8, 2017, the trial court granted defendants’ motion for attorney fees and awarded defendants \$157,650 in fees.

III. DISCUSSION

The only disputed issues are whether paragraph 30 of the escrow instructions is properly interpreted as a prevailing party attorney fees provision as defendants contend or as an indemnity provision as plaintiff argues, and whether defendants are entitled to an award of attorney fees under paragraph 30. The parties do

not dispute that defendants were the prevailing parties or the reasonableness of defendants' attorney fees.

"Escrow instructions may be analyzed under contract principles. . . ." (*Rideau v. Stewart Title of California, Inc.* (2015) 235 Cal.App.4th 1286, 1294 (*Rideau*).) When the trial court was not required to consider extrinsic evidence in interpreting the contract, we review this question of interpretation de novo. *Mountain Air Enterprises, LLC v. Sundowner Towers, LLC* (2017) 3 Cal.5th 744, 751 (*Mountain Air*); *Campbell v. Scripps Bank* (2000) 78 Cal.App.4th 1328, 1336 (*Campbell*).) "[W]e . . . exercis[e] our independent judgment in interpreting the clause without giving any deference to the trial court's ruling." (*Ibid.*)

A. *The Parties to the Contract*

Our first task is to decipher the persons referenced in paragraph 30—"the parties," "[e]scrow [h]older," and "you." The escrow instructions use "the parties" as shorthand for the signatories, Wen and Huang, in their individual capacities and as trustees. The instructions refer to "[a]ll undersigned parties," "[t]he parties' signatures," and "[e]ach party signing these instructions." The only signatories were Wen and Huang.³

"Escrow [h]older" obviously refers to Culture Escrow, Inc. because it was holding the deposits and disbursing money at the

³ Because plaintiff succeeded Huang as the trustee of the Huang Trust, he became obligated under the escrow instructions to the same extent Huang as the trustee was. (See *Moeller v. Superior Court* (1997) 16 Cal.4th 1124, 1131 [new trustee succeeds to all rights, duties, and responsibilities of predecessor].)

closing of escrow, which is a primary purpose of an escrow holder. (Fin. Code, § 17004 [“Escrow agent’ means any person engaged in the business of receiving escrows for deposit or delivery”]; Greenwald et al., Cal. Practice Guide: Real Property Transactions (The Rutter Group 2018) ¶ 4:565 [“The terms ‘escrow,’ ‘escrow holder’ and ‘escrow agent’ are sometimes used interchangeably”].)

“You” refers to Hsu and Culture Escrow, Inc., on whose behalf Hsu was acting. The purpose of escrow instructions is for the buyer and seller to instruct the escrow holder on its obligations. (*Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co.* (2002) 27 Cal.4th 705, 711 [escrow holder obligated “to carry out the instructions of each of the parties to the escrow”].) Wen and Huang (“I/We” in the instructions) were instructing Hsu and Culture Escrow, Inc. (“you” in the instructions).⁴

B. *Interpretation of Paragraph 30*

Having defined the persons at play, we can move on to the substance of paragraph 30. Usually each party to a lawsuit pays his or her own attorney fees. (*Mountain Air, supra*, 3 Cal.5th at p. 751.) However, “[p]arties may validly agree that the prevailing party will be awarded attorney fees incurred in any litigation between themselves, whether such litigation sounds in tort or in contract.”” (*Ibid.*; see also Code Civ. Proc., §§ 1032,

⁴ A separate section of the escrow instructions—the “Privacy Act Notice”—refers to Culture Escrow, Inc. as “we” and to the buyer and seller as “you.” Given the context of the escrow instructions, we construe the meaning of “we” and “you” in the Privacy Act Notice section as limited to that section only.

1033.5, subd. (a)(10)(A).) When a contract provides that attorney fees “incurred to enforce that contract” shall be awarded to one party, Civil Code section 1717 makes the obligation mutual even if the party prevailing on the contract was not the party specified to receive attorney fees in the contract. (Civ. Code, § 1717, subd. (a).) Parties also may agree to a unilateral indemnity provision “by which one engages to save another from a legal consequence of the conduct of one of the parties, or of some other person.” (*Id.* § 2772.) “[A]n indemnification clause will not give rise to a Civil Code section 1717 contractual claim for an award of attorney fees.” (*Campbell, supra*, 78 Cal.App.4th at p. 1336.) Thus, a prevailing party attorney fees provision is always mutual, whereas an indemnity provision allows an award of attorney fees only in one direction—to the indemnified party.

When a party’s right to recover attorney fees depends on whether the contract provision is a prevailing party provision or indemnity provision, we must interpret the contract. Determining “whether the parties entered an agreement for the payment of attorney fees and, if so, the scope of the attorney fee agreement” requires applying “traditional rules of contract interpretation.” (*Mountain Air, supra*, 3 Cal.5th at p. 752.) Likewise, “[i]ndemnity agreements are construed under the same rules which govern the interpretation of other contracts.” (*Continental Heller Corp. v. Amtech Mechanical Service, Inc.* (1997) 53 Cal.App.4th 500, 504 (*Continental*).) We look at the words of the contract “in their ordinary and popular sense” unless the parties used them in a technical or special sense. (Civ. Code, § 1644.) We consider the entire contract “so as to give effect to every part, if reasonably practicable, each clause helping to

interpret the other.” (*Id.* § 1641.) The goal is “to give effect to the mutual intention of the parties.” (*Id.* § 1636.)

Numerous decisions analyzing attorney fees language provide guidance and some basic principles. If a contract expressly provides for attorney fees incurred as a result of a breach of the contract or to enforce a contract, the provision will trigger Civil Code section 1717 and allow the prevailing party on such a claim to recover attorney fees. (See, e.g., *Continental, supra*, 53 Cal.App.4th at p. 508 [contract “expressly provides for attorney fees incurred as the result of any breach of the contract”]; *Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 968 [“contract provides for attorney fees in an action to enforce the contract”].) On the other hand, “[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.” (*Id.* at p. 969; *Rideau, supra*, 235 Cal.App.4th at p. 1294 [use of “‘hold Stewart Title harmless from any loss or damage’ defines this portion of the Instructions as an indemnity agreement”].) “In the context of escrow agreements, an indemnification clause usually provides for recovery of funds, including attorney fees or costs, under circumstances in which the escrow holder has incurred extraordinary fees and costs as the result of disputes between the principals, or the principals and third parties.” (*Id.* at p. 1297.)

In *Carr Business Enterprises, Inc. v. City of Chowchilla* (2008) 166 Cal.App.4th 14, 20-23 (*Carr*), the court analyzed the language of five contracts presented in five different cases to sort them into the two categories. Provisions determined to be

“standard indemnity provisions, which do not authorize attorney fees on a dispute arising out of the contract” (*id.* at p. 20), shared certain characteristics. They stated that one party would “indemnify” and “hold harmless” the other party, referred to third party claims, and allowed the indemnified party to recover costs, including attorney fees, incurred in connection with the performance of the contract. (*Id.* at pp. 21-22.) “Generally, the inclusion of attorney fees as an item of loss in a third party claim-indemnity provision does not constitute a provision for the award of attorney fees in an action on the contract which is required to trigger section 1717.” (*Id.* at p. 20.)

In contrast, provisions determined to authorize the recovery of attorney fees under Civil Code section 1717 as the prevailing party referred to fees incurred in “an action between the parties to enforce their agreement,” or “*on account of any breach*” of the contract. (*Carr, supra*, 166 Cal.App.4th at pp. 22-23.) An attorney fees provision subject to Civil Code section 1717 may be contained within an indemnity provision. (*Ibid.*, citing and discussing *Baldwin Builders v. Coast Plastering Corp.* (2005) 125 Cal.App.4th 1339, 1346 (*Baldwin*) [“the express language of the attorney fee clauses authorizes the recovery of attorney fees where one of the parties to the agreement brings an action to enforce the indemnity”].)

In *Campbell*, the escrow instructions contained a provision with language on key points nearly identical to paragraph 30. (*Campbell, supra*, 78 Cal.App.4th at p. 1336.)⁵ The court

⁵ Defendants emphasize that *Bruckman v. Parliament Escrow Corp.* (1987) 190 Cal.App.3d 1051 also concerned escrow instructions “using nearly identical language.” (Emphasis omitted.) However, the issue there was the appropriateness of a

concluded the provision “provide[d] for attorney fees in the event of litigation arising out of conflicting demands made on the escrow holder or any dispute or controversy that arises between the principals or with any third party regarding the terms of the escrow.” (*Id.* at p. 1337.) In sum, it was “a standard indemnity provision.” (*Id.* at p. 1338.) That case did not analyze the impact of the phrase “as well as” in the sentence “[a]ll of the parties to this escrow, jointly and severally, promise to pay promptly on demand, as well as to indemnify you and to hold [e]scrow [h]older harmless . . . ,” which defendants argue makes paragraph 30 both a prevailing party provision and an indemnity provision.

However, paragraph 30 differs from the provision in *Campbell* in an important respect—paragraph 30 contains an additional sentence at the end. The last sentence of paragraph 30 states: “If the parties do not pay any fees, costs or expenses due [e]scrow [h]older under the escrow instructions or do not pay for costs and attorney[] fees incurred in any litigation, administration action and/or arbitration, on demand, they each agree to pay a reasonable fee for any attorney services which may be required to collect such fees or expenses, whether attorney[] fees are incurred before trial, at trial, on appeal or in arbitration.”

Defendants argue this last sentence is a reciprocal attorney fees provision under Civil Code section 1717, citing to *Kangarlou v. Progressive Title Co., Inc.* (2005) 128 Cal.App.4th 1174 (*Kangarlou*). In *Kangarlou*, the court concluded that a similar

fee award for a negligence action. (*Id.* at p. 1059.) That case did not address whether the language amounted to an indemnity or prevailing party fee provision. (*Campbell, supra*, 78 Cal.App.4th at p. 1338, fn. 6 [*“Bruckman offers us no analytical guidance”*].)

sentence in an escrow agreement was a reciprocal attorney fees provision under Civil Code section 1717 entitling the party prevailing on the contract to attorney fees. (*Id.* at pp. 1177-1178.) Even though the provision was limited to the failure to pay fees and expenses due to the escrow holder, Civil Code section 1717 made the provision applicable to any action between the parties and escrow holder arising out of the contract. (*Id.* at p. 1178.)

Standing alone, the last sentence of paragraph 30, as interpreted by *Kangarlou*, is a prevailing party attorney fees provision. But the last sentence does not stand alone; it is part of paragraph 30, the balance of which plaintiff contends is an indemnity provision. Whether or not plaintiff is correct makes no difference. Language authorizing the recovery of attorney fees for actions arising out of the contract, even if contained in an indemnity provision, is subject to Civil Code section 1717. (*Carr, supra*, 166 Cal.App.4th at pp. 22-23 [discussing the holding of *Baldwin, supra*, 125 Cal.App.4th at p. 1342].) Defendants are entitled to an award of fees as the prevailing parties on an action arising out of the contract. (*Kangarlou, supra*, 128 Cal.App.4th at p. 1179 [holding that similar breach of fiduciary claim against escrow holder was an action arising out of the escrow instructions because it was premised on the escrow holder's duties under the instructions].)

A final note: paragraph 30 makes Wen and Huang “jointly and severally” responsible for paying the escrow holder’s attorney fees. No one argued that Wen was responsible for some or all of the attorney fees awarded to defendants. The trial court properly could rule according to paragraph 30 that plaintiff was to pay the attorney fees defendants incurred.

IV. DISPOSITION

The order granting attorney fees is affirmed. Defendants Culture Escrow, Inc. and Kevin Hsu are entitled to recover their costs on appeal.

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SEIGLE, J.*

We concur:

BAKER, Acting P.J.

MOOR, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.