Filed 5/31/17 LWL Investment Group v. Universal Bank CA2/3

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

**California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

| | |
|---|---|
| LWL INVESTMENT GROUP, LLC,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>UNIVERSAL BANK,<br><br>Defendant and Appellant. | B268742 c/w B271216<br><br>(Los Angeles County Super. Ct. No. BC434093) |

APPEALS from a judgment and postjudgment order of the Superior Court of Los Angeles County, Richard L. Fruin, Judge. Judgment affirmed; postjudgment order reversed and remanded with directions.

Sheppard, Mullin, Richter & Hampton, Seong H. Kim and Rebecca Edelson for Plaintiff and Appellant.

Blank Rome, Gregory M. Bordo, Christopher J. Petersen, and Harrison M. Brown for Defendant and Appellant.

Defendant and appellant Universal Bank (Universal) appeals a judgment after court trial in an action brought by LWL Investment Group, LLC (LWL). LWL cross-appeals from a postjudgment order taxing costs.

LWL deposited $2 million into escrow after it entered into an agreement with Universal to purchase certain property. Universal subsequently sold the property to another buyer, and then refused for 39 months to release LWL's $2 million escrow deposit. Shortly before LWL's motion for summary adjudication was to be heard, Universal stipulated to release the funds. The essential issue presented on appeal is whether the trial court erred in awarding prejudgment interest (Civ. Code, § 3289) to LWL for the 39-month period that the funds were withheld. We perceive no error and affirm the judgment.

With respect to the order taxing costs, we reverse and remand for further proceedings. The trial court ruled that although LWL was the prevailing party, its recoverable costs were limited to the claim on which LWL prevailed. That ruling was erroneous because, as the prevailing party in the action, LWL was entitled to recover its reasonable and necessary costs, even as to claims on which it did not prevail.

**FACTUAL AND PROCEDURAL BACKGROUND**[1]

1. *The underlying facts.*

In 2007, Universal and two participating banks, First Standard Bank (FSB) and Center Bank (CB), made a $10.75 million loan to Arkland Investments, LLC (the Arkland

---

[1] Because the trial court's factual findings are not in dispute, we derive the factual background largely from the trial court's statement of decision, as well as from the parties' joint stipulation of facts.

loan). The Arkland loan was secured by deeds of trust on two real estate parcels owned by Arkland: (1) a first deed of trust on the real property located at 601 South Commonwealth Avenue and 2990 West 6th Street in Los Angeles; and (2) a second deed of trust on the real property located at 2700 Wilshire Boulevard and 2701 West 7th Street in Los Angeles. The Arkland loan was non-performing and in default by May 2009, and Arkland filed for bankruptcy protection in December 2009.

In January 2010, Universal received offers to purchase the Arkland loan from LWL and also from Sixth & Virgil, LLC, another real estate investor.

On February 5, 2010, Universal and LWL entered into a written purchase and sale agreement (PSA) pursuant to which LWL agreed to buy the Arkland loan from Universal for $10.5 million. The terms of the PSA included that Universal and the two participating banks would provide a new loan to LWL in the amount of $6 million, with LWL paying the remaining $4.5 million through escrow. The transaction was to close by February 26, 2010, and the closing date later was extended to March 2, 2010.

While the LWL transaction was pending, Sixth & Virgil made a competing offer to purchase the Arkland loan for $10.5 million in cash, without any financing requirement.

In accordance with the PSA, on February 8, 2010, LWL deposited $2 million into an interest bearing escrow account.

Universal approved its portion of the new loan and recommended that the participating banks do the same, but both CB and FSB declined LWL's loan application.

On March 3, 2010, Universal notified LWL that the PSA had terminated because the participant banks had not approved the sale of the Arkland loan to LWL.

On March 10, 2010, Universal directed the escrow holder, Lawyers Title Insurance Company, to prepare cancellation instructions for signature, and to refund the $2 million deposit to LWL once cancellation instructions were signed.

On March 12, 2010, Universal and Sixth & Virgil entered into a contract for the purchase and sale of the Arkland loan.

On March 15, 2010, the escrow holder notified Universal that LWL refused to cancel the escrow and had indicated its intent to close the transaction.

On March 18, 2010, the sale of the Arkland loan to Sixth & Virgil closed.

2. *Legal proceedings*.

On March 19, 2010, LWL filed suit against Universal, alleging a cause of action for breach of contract based on Universal's refusal to close the transaction and seeking specific performance of the agreement.[2]

On June 17, 2010, LWL requested that the escrow holder release the $2 million deposit to LWL. By letter dated June 21, 2010 to LWL and the escrow holder, Universal objected to the release of the funds from escrow and maintained that until LWL's lawsuit "has been resolved, the escrow should not be disturbed." Universal took the position that because LWL's lawsuit was seeking specific performance, the $2 million deposit needed to complete the purchase should not be released.

---

[2] LWL also sued Sixth & Virgil and dismissed its claims against that defendant after obtaining a $2.4 million settlement.

On September 28, 2010, LWL filed a first amended complaint, seeking damages or specific performance as alternative remedies for Universal's alleged breach of the PSA. LWL also added the allegation that Universal breached the contract by "refus[ing] to execute documents to release Plaintiff's deposit monies from escrow. Pursuant to the terms of the Agreement, Seller was the terminating party and had the duty to take action to notify the escrow holder of said termination. To date, Seller refuses, even after repeated requests, to notify the escrow holder to permit release of Plaintiff's deposit, and the loss of use of such funds has caused Plaintiff to suffer significant damages."

LWL also named the escrow holder in the suit. On May 3, 2011, Lawyers Title filed a motion seeking permission to deposit the $2 million plus accrued interest with the superior court. On July 19, 2011, the trial court granted the motion and ordered the funds deposited with the clerk of the court in an "interest-bearing account pending final adjudication of the conflicting claims to the fund." On August 1, 2011, Lawyers Title deposited the sum of $2,006,453.21 with the clerk of the court.

After filing the first amended complaint, LWL amended its pleading five more times. Three years into the litigation, on March 28, 2013, Universal filed an answer to LWL's sixth amended complaint, which is the operative pleading. Universal denied LWL's allegations in their entirety, including LWL's averment that it was entitled to "release of its deposit funds."

On June 21, 2013, LWL filed a motion for summary adjudication, requesting the release of the funds plus accrued interest. LWL asserted Universal had a duty to agree that the monies held in the court's account pursuant to the July 19, 2011

order "shall be released to LWL at this time, and to refrain from asserting any claim to those Monies and not to demand that they remain [interpled] with the Court." LWL reasoned that although the parties disputed the propriety of Universal's termination of the PSA and sale of the property to another party, "there can be no dispute that it is Universal's position that the Agreement terminated and thus Universal had a duty to agree that LWL's $2 million escrow deposit be returned to LWL. Universal cannot refuse to consummate the Arkland Loan transaction with LWL and at the same time prevent the return to LWL of its $2 million deposit."

On August 23, 2013, shortly before the hearing on the summary adjudication motion, LWL and Universal entered into a stipulation for release of the funds to LWL. LWL finally recovered the deposited funds on September 12, 2013. On December 23, 2013, the trial court disbursed another $32,211.96 in accrued interest to LWL.

LWL's lawsuit against Universal came on for a court trial in April 2015 on causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing. In an extensive statement of decision, the trial court rejected LWL's claim that Universal breached the PSA by causing the participating banks to decline LWL's application. It ruled that LWL failed to prove that Universal breached its obligation to present LWL's proposal fairly to the participant banks for their independent evaluation.

The trial court did find, however, that Universal breached the PSA by instructing the escrow holder not to return LWL's deposit and by "opposing, during the next three years of the litigation, LWL's efforts to recover its $2 million deposit." The

trial court found said conduct violated the PSA and entitled LWL to recover statutory prejudgment interest of 10 percent on the $2 million deposit, amounting to an additional $607,362.23.[3]

The trial court further found that neither party was the prevailing party for purposes of recovering attorney fees under the fee provision in the PSA, but that LWL was the prevailing party for purposes of recovering statutory costs of suit.

On November 6, 2015, Universal filed a timely notice of appeal from the judgment entered on September 11, 2015. (No. B268742.) On November 23, 2015, LWL filed a timely notice of cross-appeal from the judgment.

On March 24, 2016, LWL filed another notice of appeal, specifying a January 15, 2016 postjudgment order on Universal's motion to tax costs. (No. B271216.) Notice of entry of that order was served on January 28, 2016, making said notice of appeal timely.

We consolidated the appeals.

**CONTENTIONS**

Universal contends: LWL was not entitled to prejudgment interest on the $2 million escrow deposit because the deposit was properly retained in escrow pending resolution of the litigation; LWL received the interest it was contractually entitled to receive; even if LWL were entitled to an award of interest, the trial court

---

[3] The trial court awarded prejudgment interest from June 17, 2010, when LWL requested that the escrow holder release the $2 million deposit, through September 13, 2013, upon the disbursement of the interpleaded funds to LWL. The prejudgment interest award of $607,362.23 is separate from the interest that actually accrued in the escrow and interpleader accounts.

erred in failing to consider LWL's delays in pursuing the escrowed funds; the trial court abused its discretion in finding that neither party prevailed for purposes of attorney fees; and the trial court abused its discretion in determining that LWL was the prevailing party entitled to costs.

On cross-appeal, LWL contends the trial court erred in ruling that LWL was entitled to recover only the costs it incurred in connection with the claims upon which it prevailed.

## DISCUSSION

1. *LWL was entitled to recover its $2 million escrow deposit without awaiting the resolution of its action against Universal for specific performance; the PSA does not bar an award of prejudgment interest on the improperly withheld escrow deposit.*

Universal contends that LWL was not entitled to prejudgment interest on the escrowed funds because the funds were properly retained in escrow following the termination of the PSA, and further, the PSA's limitation on remedies barred an award of prejudgment interest to LWL.

As for the alleged prohibition on prejudgment interest, Universal relies on section 3.9 of the PSA, which states in relevant part: "Limitation on Buyer's Remedies. If Buyer claims that Seller has failed to perform any of its obligations under this Agreement on or before the Close of Escrow, [and] Seller's breach remains uncured beyond the ten (10) Business Day cure period . . . , *Buyer agrees that its sole and exclusive remedy on account of such breach shall be either* (i) *to terminate this Agreement* by giving notice of such termination to Seller within three (3) Business Days after the expiration of such ten (10) Business Day cure period, in which event the Parties shall take the actions described in Section 3.8 above *and Escrow Holder*

*shall refund to Buyer the full amount of the Purchase Price paid by Buyer*; OR (ii) *to seek specific performance of Seller's obligations under the terms of this Agreement*. Buyer acknowledges and agrees (1) that the remedies set forth in this Section shall constitute the sole and exclusive remedies available to Buyer in the event of a breach by Seller of any of its obligations under this agreement prior to the Close of Escrow; and (2) Buyer waives all other rights and remedies, whether at law or in equity, that Buyer would otherwise have against Seller arising out of or as a result of such breach by Seller, including all rights to any consequential or other damages of any kind." (Italics added.)

Universal's interpretation of section 3.9 is that LWL had two remedies available at the time Universal terminated the PSA: LWL could accept the termination, in which case escrow would be canceled *and the escrowed funds returned to LWL*; or alternatively, LWL could sue for specific performance. Universal's theory appears to be that section 3.9 *implicitly* requires the escrowed funds to remain in escrow in the event the buyer sues for specific performance, in which case the escrowed funds would be applied to the purchase price in the event the buyer were to prevail in its specific performance action. Universal then reads into section 3.9 a prohibition on an award of prejudgment interest.

We disagree. Section 3.9 of the PSA enables a buyer either to terminate the escrow or to sue for specific performance. However, the PSA is silent as to what happens to the escrowed funds if the buyer sues for specific performance. Further, section 3.9 of the PSA does not speak to the issue of prejudgment interest, and it does not purport to bar an award of prejudgment

interest in the event the seller improperly refuses to release the buyer's escrow deposit.

Further, Universal's position that the PSA entitled Universal to refuse to release the escrowed funds during the pendency of the specific performance action is not supported by the evidence or by the law.

Universal's assertion it properly refused to release the escrowed funds is defeated by the testimony of Visman Chow and Silvia Gonzales, two Universal vice presidents who managed the transaction. They testified they knew of no reason why the $2 million deposit was not returned to LWL once Universal notified LWL that the PSA had terminated. The trial court found "[t]heir statements were admissions against [Universal's] interest." Given this testimony with respect to Universal's understanding of the PSA, the trial court properly concluded that Universal was unjustified in its refusal to release LWL's funds after Universal terminated the PSA and sold the property to Sixth & Virgil.

In addition, case law makes it clear that leaving escrowed funds in place is not a prerequisite to a buyer's suit for specific performance. *Jeppi v. Brockman Holding Co.* (1949) 34 Cal.2d 11 (*Jeppi*) is instructive. There, after a corporate president signed an escrow agreement, the corporation and its president refused to convey the real property. (*Id.* at pp. 13-14.) The buyers sued. The lower court granted nonsuit based on the corporate president's lack of authority to bind the corporation to the sale. (*Id.* at p. 14.) The Supreme Court reversed, finding it "reasonably may be inferred that the board of directors had authorized her to enter into the contract and to bind the corporation." (*Id.* at p. 15.)

The Supreme Court then went on to address the defendants' argument that "the '[buyers] having themselves cancelled the contract cannot seek relief pursuant thereto.' They rely in this connection on [plaintiff] Jeppi's withdrawal of his deposit and the title company's action in marking the escrow instructions 'cancelled.' But all of this occurred a week after the . . . corporation, by its telegram to the title company, repudiated the contract and notified [the buyers] of the sale of the property to [another buyer]. Such acts clearly amounted to an anticipatory breach of the contract, giving the appellants a cause of action *and avoiding the necessity of continuing to tender performance of their obligation under the contract*. [Citations.]" (*Jeppi*, *supra*, 34 Cal.2d. at p. 18, italics added.)

Guided by *Jeppi*, the court in *Cohen v. Shearer* (1980) 108 Cal.App.3d 939 (*Cohen*), held a purchaser could seek specific performance even after recovering its escrow deposit. In *Cohen,* the sellers agreed to sell their home to buyers for the sum of $177,000. Disputes arose during escrow, resulting in the sellers' instruction to the escrow agent to cancel the escrow. When advised of the cancellation, the buyers filed suit for specific performance of the sale agreement. Four days later, the buyers requested that the escrow agent refund the monies they had previously deposited into escrow. The escrow agent refused the request because the sellers had not consented to the refund. The buyers then filed another action against the escrow agent and sellers in an effort to recover the deposit. (*Id*. at p. 940.) On June 22, 1976, both sellers and buyers executed a document addressed to the escrow agent, which provided in pertinent part: " 'All previous instructions given by Buyer and Seller in the above escrow are hereby cancelled, and this escrow is not to be

consummated.' " (*Id*. at p. 941.) The escrow agent then refunded buyers' deposit and the action to recover those monies was dismissed as moot. (*Ibid*.)

The lower court thereafter dismissed the initial action, i.e., the specific performance action, on the ground that "the June 22, 1976, instruction to the escrow agent that the escrow was not to be consummated constituted a mutual disaffirmance or rescission by [buyers] and [sellers] of the property sale agreement." (*Cohen*, *supra*, 108 Cal.App.3d at p. 941.)

The reviewing court reversed and remanded, finding that the lower court erred in ruling that the buyers could not sue for specific performance. (*Cohen*, *supra*, 108 Cal.App.3d at p. 942.) The court explained, "it appears, as appellants [buyers] maintain, that they immediately filed their suit for specific performance upon respondents' initial cancellation of the escrow. Thereafter they attempted to have returned to them pending resolution of that suit the monies they had deposited in escrow, *as they were entitled to do*. (See *Jeppi v. Brockman Holding Co*. (1949) 34 Cal.2d 11.) When the escrow agent refused their request, they took further action against it, and relinquished *that* action when they otherwise secured the monies through the June 22 instruction." (*Cohen*, *supra*, at p. 942, certain italics added.)

*Cohen* concluded that nothing in the June 22 instruction, "which related only to the *escrow*, makes any reference to the contract of sale nor to the specific performance suit, nor is there anything else in the record to suggest that resolution of the deposit money question was intended as a rescission of the one or an abandonment of the other." (*Cohen*, *supra*, 108 Cal.App.3d at p. 942.)

Applying the principles of *Jeppi* and *Cohen* to the present case, we conclude that once Universal terminated the escrow and sold the property to Sixth & Virgil, LWL was no longer required to continue to tender its performance under the contract. (*Jeppi*, *supra*, 34 Cal.2d at p. 18.) Accordingly, LWL was entitled *both* to recover its $2 million deposit and to pursue its specific performance action against Universal. (*Cohen*, *supra*, 108 Cal.App.3d at p. 942.) Universal's improper refusal to release the escrowed funds to LWL during the pendency of the specific performance action entitled LWL to prejudgment interest, and section 3.9 of the PSA was not a barrier to such an award.

2. *No merit to Universal's contention that LWL was limited to the interest that actually accrued in the interest bearing accounts, first in the escrow account, and thereafter in the interpleader account.*

Universal contends that LWL was only entitled to the interest that actually accrued in the two interest bearing accounts, i.e., the escrow account and later the interpleader account, because that is "precisely what [LWL] bargained for." Universal relies on section 2.4.1 of the PSA, which states in relevant part that "Escrow Holder is authorized and instructed to place the Deposit in an interest bearing account at a federally-insured financial institution *pending the Close of Escro*w, with interest on the Deposit accruing for the benefit of Buyer . . . ." (Italics added.) While the $2 million was on deposit with the escrow holder, until August 2011, interest accrued in the sum of $6,453.21. Thereafter, the funds accrued another $32,211.96 in interest while on deposit in the court account. Thus, LWL received $38,665.17 that actually accrued in the interest bearing

accounts, and Universal asserts that pursuant to the PSA, LWL was entitled to nothing more by way of interest.

Universal's reliance on the language of the PSA to preclude LWL from recovering prejudgment interest under Civil Code section 3289 is unpersuasive. The statute provides "[i]f a contract . . . does not stipulate a legal rate of interest, the obligation shall bear interest at a rate of 10 percent per annum after a breach." (Civ. Code, § 3289, subd. (b).) By its terms, the PSA merely governed the interest that would accrue on the $2 million deposit "*pending the Close of Escrow*." (Italics added.) The PSA did not address the rate of interest that would apply after the PSA was terminated.

Further, the PSA contemplated only a brief escrow; the PSA called for escrow to close within 15 calendar days of the buyer's due diligence expiration date, with the buyer required to complete its due diligence by the fifth calendar day after the agreement execution date of February 5, 2010. In entering into the PSA, which called for a speedy escrow, LWL did not agree to have its $2 million deposit tied up for another 39 months while earning only a nominal rate of interest.

In sum, while the PSA addressed the issue of interest that would accrue "pending the Close of Escrow," it did not purport to dictate the rate of interest that would apply *after* Universal terminated the PSA. Therefore, the trial court did not err in concluding that the statutory 10 percent rate is controlling. (Civ. Code, § 3289.)

3. *No merit to Universal's contention that the trial court failed to consider LWL's delays in pursuing the escrowed funds.*

a. *No merit to Universal's claim that LWL's failure to secure return of the $2 million deposit was "a failure of its own making."*

Universal contends that LWL failed to diligently pursue recovery of the escrowed funds, and that LWL was not entitled to prejudgment interest during any period that it had dominion and control over the money. Universal's argument is not supported by the facts or by the law.

Universal principally relies on *Greg Opinski Construction, Inc. v. City of Oakdale* (2011) 199 Cal.App.4th 1107 (*Opinski*). However, that case is distinguishable.

As stated in *Opinski*, the rule "is that if, during any prejudgment period, a party has dominion and control over money that is awarded to it as damages, it is not entitled to prejudgment interest for that period." (*Opinski*, *supra*, 199 Cal.App.4th at p. 1119.) The *Opinski* court "conclude[d] that the city had the power to withdraw the money from the escrow account when it determined that Opinski had breached the contract. Therefore, [the city] had dominion and control over the money from the time of the breach and was not entitled to prejudgment interest." (*Id.* at p. 1120)

In the instant case, however, Universal has not shown that LWL had the ability to access the $2 million deposit without Universal's consent. Therefore, *Opinski* is of no assistance to Universal.

Universal makes much of the fact that in March 2010, LWL had declined a refund of its $2 million escrow deposit. However, LWL took that position because it wanted to consummate the

escrow. By June 2010, after the sale to Sixth & Virgil had closed, LWL requested the release of its escrow deposit. Universal's attempt to attribute the prolonged delay in refunding the escrow deposit to LWL is meritless.

Turning to the relevant 39-month time frame for purposes of the award of prejudgment interest, the record reflects: On June 21, 2010, Universal's counsel sent LWL and the escrow holder a letter objecting to the release of the $2 million deposit due to LWL's pending lawsuit. Three years into the litigation, on June 21, 2013, LWL filed a motion for summary adjudication requesting the release of the funds plus accrued interest. On August 23, 2013, shortly before the summary adjudication motion was to be heard, Universal stipulated to release the funds to LWL. The check disbursing the funds from the interpleader account to LWL was dated September 12, 2013.

Universal's contention that the trial court erred "in failing to consider LWL's delays in pursuing the escrowed funds" is simply an invitation to this court to reweigh the evidence. We reject Universal's contention that the delay in restoring the funds to LWL should be attributed to LWL rather than to Universal. As indicated, two Universal vice presidents testified they knew of no reason why the $2 million deposit was not returned to LWL once Universal notified LWL that the PSA had terminated. The record thus supports the trial court's decision to hold Universal liable for its own intransigence in refusing to release the funds to LWL.

b. *No merit to Universal's argument that LWL's entitlement to prejudgment interest ceased as of the date Universal stipulated to release the escrowed funds*.

On August 23, 2013, Universal stipulated to release of the funds; on August 28, 2013, the trial court signed the stipulation and entered an order releasing the interpled funds; and on September 12, 2013, the County Auditor Controller issued the $2,006,453.21 check to LWL's counsel.

Again relying on *Opinski*, *supra*, 199 Cal.App.4th 1107, Universal contends that LWL is not permitted to recover interest beyond the date of the stipulation. The argument is meritless because LWL continued to lack "dominion and control" (*id.* at p. 1119) over the funds until the funds were actually disbursed to LWL.

4. *Trial court acted within its discretion in concluding that neither Universal nor LWL were prevailing parties for purposes of recovering attorney fees pursuant to the fee provision in the PSA.*

*a. Universal did not waive its claim to attorney fees by failing to bring a noticed motion.*

As a threshold issue, LWL contends Universal waived any argument that Universal was the prevailing party entitled to attorney fees because Universal did not bring a noticed motion for attorney fees. The argument is unpersuasive.

The record reflects that on or about August 3, 2015, Universal submitted a proposed judgment which provided that Universal was the prevailing party for both attorney fees and costs. On September 11, 2015, in its statement of decision, the trial court ruled "that neither party is the prevailing party" for purposes of attorney fees. Given the trial court's ruling that there was no prevailing party, it would have been an idle act for

Universal to bring a motion for attorney fees; at that juncture, the issue was moot.

b. *Trial court acted within its discretion in finding that neither party prevailed for purposes of recovering attorney fees.*

Universal contends the trial court abused its discretion in determining that neither party was the prevailing party for purposes of the PSA's attorney fee provision, and that the trial court should have found that Universal was the prevailing party. The argument fails.

Our review is governed by settled principles. Typically, " 'a determination of no prevailing party results when both parties seek relief, but neither prevails, or when the ostensibly prevailing party receives only a part of the relief sought.' [Citation.] By contrast, when the results of the litigation on the contract claims are *not* mixed—that is, when the decision on the litigated contract claims is purely good news for one party and bad news for the other—the Courts of Appeal have recognized that a trial court has no discretion to deny attorney fees to the successful litigant. Thus, when a defendant defeats recovery by the plaintiff on the only contract claim in the action, the defendant is the party prevailing on the contract under section 1717 as a matter of law. [Citations.] Similarly, a plaintiff who obtains all relief requested on the only contract claim in the action must be regarded as the party prevailing on the contract for purposes of attorney fees under section 1717. [Citations.]" (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 875-876.)

Here, the trial court found in favor of Universal on LWL's claim that Universal breached the contract by causing the participating banks to reject LWL's proposal for its purchase of

the Arkland loan. However, the trial court found that Universal "is liable for breach of the PSA contract for instructing the PSA escrow to not return LWL's $2 million deposit and for opposing, during the next three years of the litigation, LWL's efforts to recover its $2 million deposit." The trial court ruled that said conduct by Universal entitled LWL to recover statutory 10 percent prejudgment interest for that period.

Thus, the outcome of the litigation was not a " 'simple, unqualified win' " for Universal. (*Hsu v. Abbara*, *supra*, 9 Cal.4th at p. 876.) Accordingly, the trial court acted within the bounds of its discretion in refusing to deem Universal the prevailing party for purposes of recovering attorney fees.[4]

---

[4] *Silver Creek, LLC v. BlackRock Realty Advisors, Inc.* (2009) 173 Cal.App.4th 1533 (*Silver Creek*), cited by Universal, is distinguishable. There, the finding of no prevailing party was overturned because the lower court "oversimplified its duties by counting the number of contract claims presented and essentially declaring a tie because each party won one of the claims presented for resolution." (*Id.* at p. 1540.) Further, in *Silver Creek*, the party that sought to be declared the prevailing party, the seller, actually prevailed on its affirmative claim for declaratory relief; the court determined the seller validly terminated a $29.75 million sale agreement; as for the buyer in that case, it obtained recovery of a $1.13 million deposit but failed to accomplish its desired goal of obtaining the real property. (*Id.* at p. 1540.) Thus, the seller "clearly . . . obtained greater relief on the contract in [that] mixed result case." (*Id.* at p. 1536.) In the instant case, Universal did not seek affirmative relief and did not obtain any relief -- it merely defeated a portion of LWL's claims. Thus, the circumstances in the instant case are factually different from those presented in *Silver Creek*.

5. *Contentions regarding trial court's determination of costs.*

a. *No merit to Universal's contention that the trial court abused its discretion in finding LWL was the prevailing party entitled to costs.*

Code of Civil Procedure section 1032 provides in relevant part at subdivision (a)(4): " 'Prevailing party' includes the party *with a net monetary recovery*, a defendant in whose favor a dismissal is entered, a defendant where neither plaintiff nor defendant obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against that defendant." (Italics added.) LWL, having been awarded $607,362.23 in prejudgment interest, was the party with a net monetary recovery. Therefore, the trial court properly found LWL was the prevailing party for purposes of recovering costs of suit.

In this regard, Universal simply argues that because the trial court erred in ruling that LWL was entitled to prejudgment interest, it necessarily erred in ruling that LWL was the prevailing party for purposes of costs. Our earlier conclusion that the trial court properly awarded LWL prejudgment interest disposes of Universal's argument that LWL was not the prevailing party for purposes of costs.

b. *LWL's contention on cross-appeal that the trial court erred in limiting its costs to the claim on which LWL prevailed is meritorious.*

LWL filed a memorandum of costs seeking $129,174.11. Universal filed a motion to tax costs, challenging various items and seeking a reduction in costs.

On November 19, 2015, the trial court heard the matter and ruled as follows: "*The recoverable costs, in this case, should*

*be apportioned to the claims on which plaintiff* [*LWL*] *prevailed*. Otherwise plaintiff will be allowed to shift costs incurred for claims on which plaintiff did not prevail. . . . . [¶] Universal Bank should pay plaintiff's recoverable costs (as defined in CCP [§] 1033.5) that plaintiff incurred in obtaining through its prosecution of this litigation the return of the $2 million deposit. Plaintiff's subsequent recovery was limited to statutory interest for the period that Universal Bank wrongfully prevented the return of the $2 million deposit. The court is unable to calculate whether any of the recoverable costs incurred by plaintiff in proceedings after the return of the $2 million deposit are attributable to its prove-up of its statutory interest claim for the period Universal Bank prevented the return of the deposit, that is, during the period June 17, 2010 through September 13, 2013. [¶] Within three days, Universal Bank is to lodge an order that calculates plaintiff's recoverable costs for that period and awards such costs to plaintiff. All other costs claimed by plaintiff are taxed." (Italics added.)

Universal then submitted a proposed order awarding costs to LWL in the sum of $14,038.81. LWL filed objections to Universal's proposed order, and the trial court ultimately awarded costs to LWL in the sum of $24,601.99.

On cross-appeal, LWL contends the trial court erred in taxing those costs that it found were *not* incurred in connection with the claim on which LWL did prevail (i.e., the claim regarding the improper retention of the $2 million deposit and prejudgment interest thereon). The contention is meritorious. A "successful plaintiff is entitled to recover the whole of his or her costs, despite a limited victory." (*Mitchell v. Olick* (1996) 49 Cal.App.4th 1194, 1200 (*Mitchell*).) Here, because LWL

"obtained a net recovery, [it] is entitled to recover [its] costs as a matter of right, even though some or all of the costs may pertain to causes of action upon which [it] did not prevail." (*Id.* at pp. 1200-1201.)

Although the trial court lacked discretion to deny LWL costs it incurred in connection with claims on which LWL did not prevail, the trial court "may disallow particular items which it determines are unnecessary or unreasonable." (*Mitchell*, *supra*, 49 Cal.App.4th at p. 1201.) We remand for further proceedings on those questions. (*Ibid.*)

## DISPOSITION

The judgment is affirmed. The postjudgment order taxing costs is reversed and the matter is remanded for further proceedings consistent with this opinion. LWL shall recover its costs on appeal.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

EDMON, P. J.

We concur:

ALDRICH, J.

JOHNSON (MICHAEL), J.*

---

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