Filed 12/23/19 9450 Topanga Properties, LLC v. Alpine Consultants, LLC CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

9450 TOPANGA PROPERTIES, LLC et al., Plaintiffs and Respondents, v. ALPINE CONSULTANTS, LLC et al., Defendants and Appellants.	B293178 (Los Angeles County Super. Ct. No. SC127637)

APPEAL from an order of the Superior Court of Los Angeles County, Bobbi Tillmon, Judge. Affirmed.

Nemecek & Cole and Jon D. Robinson for Defendants and Appellants.

Law Office of Kenneth R. Morris and Kenneth R. Morris for Plaintiffs and Respondents.

INTRODUCTION

Alpine Consultants, LLC (Alpine) appeals from the denial of its motion to recover attorney's fees from Colorado Wellness Research, LLC (CWR). CWR, a member of SouthPark Development, LLC (the Company), entered into the Company's Operating Agreement in 2015 (Operating Agreement or the agreement). The Operating Agreement did not identify Alpine as a party or as a member, instead identifying it as one of two managers of the Company. The Operating Agreement provided that it would be binding on the members, whereas the managers would be bound by a separate Management Agreement between them and the Company. The Operating Agreement further provided that the prevailing party in litigation pertaining to that agreement would be entitled to attorney's fees.

CWR and related co-plaintiffs sued Alpine and its principal, alleging that the principal, acting on Alpine's behalf, had fraudulently induced CWR's consent to the Operating Agreement as drafted. CWR brought no breach of contract claim and sought no contract remedy, instead bringing tort claims and praying for damages, costs, and attorney's fees. Alpine demurred to CWR's complaint. After the trial court sustained the demurrer with leave to amend, CWR declined to file an amended complaint or join the one filed by its remaining co-plaintiffs. Alpine filed a motion to recover attorney's fees from CWR under the Operating Agreement and Management Agreement. Although CWR's corporate powers were then suspended by the State of Delaware, CWR opposed the motion. The trial court denied

the motion, concluding Alpine had failed to establish an entitlement to fees. CWR subsequently revived its corporate powers.

On appeal, Alpine contends the trial court erred by denying its fee motion, arguing it was entitled to recover fees as a result of: (1) CWR's suspension at the time it opposed the fee motion; (2) the Operating Agreement; and (3) CWR's prayer to recover attorney's fees from Alpine.

Finding no error, we affirm.

FACTUAL BACKGROUND

A. *The Operating Agreement*

CWR entered into the Company's Operating Agreement in 2015. The agreement provided that it would "be binding upon and . . . inure to the benefit of the Members and their respective heirs, executors, administrators, legal representatives, successors and assigns." It further provided that it was entered into by the four existing members: CWR, Howard Weissman Trust, Southpark Investments, and Alpine Project, LLC (AP). The agreement defined AP and Alpine separately, indicating that each was a distinct limited liability company. The agreement neither stated nor suggested that Alpine did business as AP or vice versa.

Alpine was not identified as a party entering into the Operating Agreement. Nor was Alpine identified as a member. Instead, Alpine was identified -- along with Margo Consulting, LLC -- as one of two managers of the Company, who together comprised its Board. Section 6.2 of the agreement provided that the Board had the power to take

specified actions and all others necessary to carry out the Company's business and affairs. Section 7.2 provided, in relevant part, "Management responsibility is vested in the Board as provided in Article 5, [and in] the Managers pursuant to the independent Management Agreement . . . ." The Operating Agreement provided that the managers would be bound by this "separate" Management Agreement, which it defined as an agreement between the managers and the Company.

The Operating Agreement included both a "Members Signature Page" and a "Company Signature Page." CWR and the other members signed the Members Signature Page. Alpine and the other manager signed the Company Signature Page on the Company's behalf.[1]

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[1] Each member signed the Members Signature Page through an individual, and each individual's name was printed above the title "Managing Member" or "Trustee." No member had been identified in the agreement as a trustee or as a manager of the Company. Thus, these titles evidently reflected each individual's relationship to the entity for which he or she signed, not the entity's relationship to the Company.

John Pierson signed the Company Signature Page on Alpine's behalf, and his name was printed above the title "Managing Member." This title evidently reflected Pierson's relationship to Alpine, not Alpine's relationship to the Company. Contrary to Alpine's assertion that it executed the agreement as the Company's managing member, the agreement did not identify Alpine as a member.

Alpine signed the Management Agreement on its own behalf. The Management Agreement provided that it was entered into by Alpine, the Company, and the Company's other manager. The managers "accept[ed] the appointment as 'Managers' of [the Company] on the terms and conditions provided in the Operating Agreement and this Agreement . . . [and] agree[d] to be bound by the terms of the Operating Agreement as Managers."

The Operating Agreement and Management Agreement each included provisions referring to the recovery of attorney's fees. In section 12.4, entitled "Remedies," the Operating Agreement provided, "The prevailing party in any litigation pertaining to this Agreement shall . . . be entitled to recover its costs and expenses, including reasonable attorneys' fees." Similarly, the Management Agreement provided, "In the event that litigation results from or arises out of this Agreement or the performance thereof, the Parties agree to reimburse the prevailing Party's reasonable attorneys' fees, court costs, and all other expenses . . . ." The Operating Agreement included a second provision referring to attorney's fees. In section 12.5, entitled "Jurisdiction," the Operating Agreement provided, "Any suit, action or proceeding under or with respect to this Agreement brought by any Member or the Company shall be brought through binding arbitration in Denver, Colorado . . . . The prevailing party in any action shall be entitled to reasonable attorney fees and costs." The Management Agreement provided that section 12.5 of the Operating Agreement would govern "[a]ll disputes arising out of" the Management Agreement.

B. *CWR's Complaint*

CWR and related co-plaintiffs filed a complaint against Alpine and related codefendants in June 2017, followed by a first amended complaint several months later.[2] As CWR characterizes its complaint, the complaint arose from a dispute between the "Nygård parties" and "Pierson parties." CWR's co-plaintiffs included Peter and Kai Nygård, whom the complaint identified as CWR's principals or managers, and other entities affiliated with the Nygårds. Similarly, Alpine's codefendants included attorney John Pierson (Alpine's principal), Pierson's law firm, and another entity affiliated with Pierson.

CWR and the other Nygård parties alleged that they hired Pierson to represent them in setting up businesses, including the Company, in California and Colorado. However, they never intended for the Pierson parties to be managers or co-owners of the new businesses. Nevertheless, when drafting and arranging for execution of the companies' operating agreements, Pierson fraudulently inserted provisions making his affiliated entities managers or co-owners -- including the provisions making Alpine a manager of the Company. Pierson fraudulently concealed his scheme, including by tricking Kai Nygård into signing agreements by falsely representing their terms or their approval by Peter

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[2] AP was not named as a defendant, but CWR alleged, on information and belief, that Alpine sometimes did business as AP.

Nygård. Pierson's fraud on Alpine's behalf (and his own) caused CWR to enter into the Operating Agreement. CWR raised causes of action against Alpine for: (1) breach of fiduciary duties; (2) fraudulent concealment; and (3) fraudulent misrepresentation. CWR prayed for damages, costs, and attorney's fees. It did not pray for rescission or any other contract remedy.

Alpine demurred to CWR's complaint. It argued, inter alia, that CWR's claims were fatally uncertain with respect to the parties' relationships, and that each cause of action failed as a matter of law because the Operating Agreement and other deal documents refuted CWR's core allegations. CWR requested that the trial court take judicial notice of the Operating Agreement, among other documents.

The trial court took judicial notice of the Operating Agreement and sustained the demurrer with leave to amend (except with respect to one of CWR's co-plaintiffs, which was not granted leave to amend). Although CWR's remaining co-plaintiffs filed a second amended complaint, CWR did not join that complaint or file any other amended pleading. Unlike the first amended complaint, the second did not allege that Alpine did business as AP.

C. *Alpine's Fee Motion*

Alpine filed a motion to recover attorney's fees from CWR under the Operating Agreement and the Management Agreement, arguing that it had prevailed on CWR's claims by virtue of CWR's failure to join or file an amended complaint after the court sustained Alpine's demurrer with

leave to amend. CWR opposed the motion, arguing (inter alia) that Alpine was not entitled to fees because CWR and Alpine were not co-parties to the Operating Agreement or the Management Agreement. In a reply brief, Alpine argued, for the first time, that even if it and CWR were not co-parties to any contract, Alpine was entitled to fees under Civil Code section 1717 because CWR had prayed for attorney's fees in its complaint against Alpine.[3] Also for the first time, Alpine argued that the court was required to grant its fee motion because the State of Delaware had suspended CWR's corporate status, rendering CWR's opposition to the motion invalid.

The trial court denied Alpine's motion. The court concluded that Alpine had failed to show an entitlement to fees under the contracts because Alpine was not a party to the Operating Agreement and not entitled to enforce the Management Agreement against CWR, a nonparty to that

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[3] Civil Code section 1717 provides that in any action "on a contract" where the contract awards attorney's fees "incurred to enforce that contract" to the prevailing party or to one specified party, the party prevailing "on the contract" is entitled to attorney's fees (even if it is not the specified party). (Civ. Code, § 1717, subd. (a).) The party prevailing *on* the contract need not be a party *to* the contract; the statute "entitles a noncontracting party to recover contractual attorney fees when it defeats a contract-based cause of action that would have made the noncontracting party liable for contractual attorney fees had it lost." (See *Brown Bark III, L.P. v. Haver* (2013) 219 Cal.App.4th 809, 814-815 (*Brown Bark*).)

agreement. It further concluded that Alpine had failed to show an entitlement to fees as a result of CWR's prayer for fees because Alpine had not shown that CWR would have been entitled to fees had it prevailed.[4]

Alpine timely appealed. While this appeal was pending, the State of Delaware revived CWR's corporate status. On CWR's request, we have taken judicial notice of its certificate of revival.

DISCUSSION

Alpine contends the trial court erred by denying its motion to recover attorney's fees from CWR, arguing it was entitled to recover fees as a result of: (1) CWR's suspension at the time it opposed the fee motion; (2) the Operating Agreement; and (3) CWR's prayer to recover attorney's fees from Alpine.[5] We review the trial court's assessment of

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[4] The trial court additionally concluded that awarding fees on grounds Alpine raised for the first time in its reply brief would have violated CWR's due process rights. The court did not explicitly address Alpine's argument based on CWR's suspension. However, the court did not cite any evidence submitted by CWR or rely on any affirmative defense raised by it.

[5] Alpine asserts in a heading in its opening brief that the Management Agreement incorporated the Operating Agreement's attorney's fee provision, but develops no argument challenging the trial court's conclusion that Alpine could not enforce the Management Agreement against CWR, a nonparty to that agreement. Thus, Alpine has forfeited any such challenge. (See *Otay Land Co., LLC v. U.E Limited, L.P.* (2017) 15 Cal.App.5th
(*Fn. is continued on the next page.*)

Alpine's entitlement to attorney's fees de novo. (*Orozco v. WPV San Jose, LLC* (2019) 36 Cal.App.5th 375, 406.)

A. *CWR's Suspension Did Not Entitle Alpine to Fees*

CWR's suspension by the State of Delaware at the time it opposed Alpine's fee motion did not entitle Alpine to fees. "If a corporation fails to pay its taxes, the state may suspend its corporate powers. The state may later revive those powers when the corporation pays its taxes." (*Bourhis v. Lord* (2013) 56 Cal.4th 320, 323 (*Bourhis*); see also Rev. & Tax. Code, §§ 23305 [authorizing revival of suspended or forfeited "taxpayer"], 23305.5, subd. (a)(2) [defining "taxpayer" to include limited liability company].)[6] "In general, a 'corporation may not prosecute or defend an action . . . while its corporate rights are suspended for failure to pay taxes.' [Citation.]" (*Bourhis*, *supra*, at p. 324.) However, "'[i]n a number of situations the revival of corporate powers by the payment of delinquent taxes has been held to validate otherwise invalid prior action.' [Citation.]" (*Ibid.*) "The retroactive effect of revivor on maintenance or defense of an

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806, 837, fn. 19 (*Otay*) [appellate court may deem assertion unsupported by argument forfeited].)

[6] Alpine relies solely on California law in its arguments on appeal, including its arguments concerning the effect of the State of Delaware's suspension and revival of CWR's status. It has therefore forfeited any argument premised on Delaware law. (See *Otay*, *supra*, 15 Cal.App.5th at p. 837, fn. 19.)

action extends only to procedural acts." (9 Witkin, Summary of Cal. Law (11th ed. 2019) Corporations, § 238.) But this limitation is narrow, as "'[m]ost litigation activity has been characterized as procedural for purposes of corporate revival.' [Citation.]" (*Longview Internat., Inc. v. Stirling* (2019) 35 Cal.App.5th 985, 989; see also *Bourhis*, *supra*, at p. 323 ["revival of corporate powers validates an earlier notice of appeal"].)

Here, CWR's revival retroactively validated its opposition to Alpine's fee motion. (See *Moofly Productions, LLC v. Favila* (2018) 24 Cal.App.5th 993, 1000 [limited liability company's revival retroactively validated its opposition to order to show cause why it should not be required to pay attorney's fees as sanctions].) Thus, we need not decide whether the trial court erred by considering CWR's opposition to Alpine's fee motion. Any such error has been cured.

Even had we found that CWR's opposition remained invalid, we would not find that the absence of a valid opposition entitled Alpine to fees. Alpine has cited no authority -- and we are unaware of any -- holding that a trial court must grant an unopposed fee motion even if it finds, as the court did here, that the fee claimant failed to establish an entitlement to fees. CWR's suspension could not deprive the trial court of its power to deny a meritless request for relief. (See 9 Witkin, *supra,* Corporations § 238, [suspension "does not affect the power of the court to render a valid judgment"]; *Tabarrejo v. Superior Court* (2014) 232 Cal.App.4th 849, 863-867 [where suspended corporation

appealed from Labor Commissioner award and posted required undertaking, trial court had power to accept appeal and release undertaking to respondent upon appeal's dismissal, even though corporation had no intent to seek revival].)[7]

B. *The Operating Agreement Did Not Entitle Alpine to Fees*

The trial court properly concluded that Alpine had no entitlement to attorney's fees under the Operating Agreement because it was not a party to that agreement. (See *Topanga and Victory Partners v. Toghia* (2002) 103 Cal.App.4th 775, 786 (*Toghia*) [nonparty to contract could not recover fees under it "because he simply was not a party to that contract"].) The Operating Agreement provided that it was entered into by its members and binding on them. Alpine was not identified as a party or as a member.

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[7] Contrary to Alpine's contention, *Alhambra-Shumway Mines, Inc. v. Alhambra Gold Mine Corp.* (1957) 155 Cal.App.2d 46 is inapposite. There, the trial court entered judgment in favor of a suspended corporation, and the Court of Appeal reversed the judgment on the ground that it was improperly based on affirmative defenses the defendant had raised while suspended. (*Id.* at pp. 50-51.) Here, the trial court's order was not based on any affirmative defense raised by CWR, or even on any evidence submitted by it. The order merely denied Alpine relief to which Alpine had not shown itself entitled.

Alpine argues it was a party to the Operating Agreement for several reasons, but none are persuasive. We address each in turn.

First, Alpine argues that it was a party to the Operating Agreement because sections 6.2 and 7.2 of the agreement purportedly bound Alpine, in its capacity as a manager, to covenants and obligations. But neither those sections, nor any other provision of the Operating Agreement, identified the managers as parties. Although section 6.2 described powers the managers would have, section 7.2 provided that they would have management responsibility under the "independent" Management Agreement. These terms became binding on Alpine only through their incorporation by reference into the Management Agreement, in which Alpine accepted its appointment as a manager and agreed to be bound by the Operating Agreement's terms "as [a] Manager[]." Indeed, the Operating Agreement provided that the managers would be bound by the "separate" Management Agreement.

Second, Alpine argues that it is a party to the Operating Agreement because it signed the agreement. As we have explained, however, the agreement expressly identified its four parties as the members. Although Alpine and the other manager signed the agreement's "Company Signature Page," that page reflected no intent to recognize Alpine as a party. On the contrary, it indicated that the managers were signing on the Company's behalf, and it was separated from the "Members Signature Page," which bore

the signatures of the parties expressly identified in the agreement.

Finally, Alpine argues that CWR judicially admitted that Alpine was a party to the Operating Agreement by alleging that Alpine did business as AP, which the agreement expressly identified as a party. However, "not every factual allegation in a complaint automatically constitutes a judicial admission. Otherwise, a plaintiff would conclusively establish the facts of the case by merely alleging them . . . . [¶] Rather, a judicial admission is ordinarily *a factual allegation by one party that is admitted by the opposing party*." (*Barsegian v. Kessler & Kessler* (2013) 215 Cal.App.4th 446, 452 (*Barsegian*).) Here, the record does not show that Alpine admitted CWR's allegation. On the contrary, Alpine demurred to CWR's claims on the ground that they were fatally uncertain with respect to the parties' relationships, and successfully requested that the trial court take judicial notice of the Operating Agreement -- which defined Alpine and AP as separate entities.[8] Thus, Alpine did not admit the doing-business-as allegation in a manner giving it effect as a judicial admission. (See *id.* at pp. 451-453 [where defendants reserved right to contest plaintiff's allegation that all defendants acted as each other's agents, that allegation was not judicial admission, and thus

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[8] Alpine also argued that the Operating Agreement and other deal documents refuted CWR's core factual allegations, defeating each of CWR's causes of action as a matter of law.

did not entitle defendants to enforce each other's arbitration agreements].)[9]

C. *CWR's Prayer for Fees Did Not Entitle Alpine to Fees*

The trial court properly concluded that Alpine failed to establish it was entitled to the benefit of Civil Code section 1717's reciprocity rule, and that Alpine therefore was not entitled to fees as a result of CWR's prayer for fees. "Civil Code section 1717 makes an otherwise unilateral attorney fee provision reciprocal and entitles a noncontracting party to recover contractual attorney fees when it defeats a contract-based cause of action that would have made the noncontracting party liable for contractual attorney fees had it lost." (*Brown Bark*, *supra*, 219 Cal.App.4th at pp. 814-815.) To recover fees, the noncontracting party must show "the opponent would have been entitled to recover attorney fees had the opponent prevailed." (*Id.* at p. 820.) The

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[9] Even had we found that Alpine admitted CWR's allegation in a manner that could give it effect as a judicial admission, we would find that the trial court relieved CWR from any such effect. (See *Barsegian*, *supra*, 215 Cal.App.4th at p. 452, fn. 2 [trial court "has discretion to relieve a party from the effects of a judicial admission by permitting amendment of a pleading"], quoting 4 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 454, p. 587.) After the trial court granted leave to amend, CWR's remaining co-plaintiffs omitted the doing-business-as allegation from their amended complaint. CWR did not renew the allegation either, instead declining to file any amended pleading.

noncontracting party must also show that its opponent's claims were contract-based, as "[t]ort and other noncontract claims are not subject to section 1717 and its reciprocity principles." (*Ibid.*; see also *id.* at pp. 821-829 [where nonparty to contracts was sued for breach of contract and related torts, trial court properly denied it fees on tort claims, even though Civil Code section 1717 entitled it to fees on breach of contract claims]; *Toghia*, *supra*, 103 Cal.App.4th at pp. 783-786 [where nonparty to contract was sued for breach of contract and related torts, trial court erred by awarding it fees on tort claims, to which Civil Code section 1717 did not apply].) "An action for damages for fraudulent inducement to enter into a contract is not an action on the contract and does not bring C.C. 1717 into operation." (7 Witkin, Cal. Procedure (5th ed. 2008) Judgment, § 182, p. 733, citing *Schlocker v. Schlocker* (1976) 62 Cal.App.3d 921.)

Here, the trial court concluded that Alpine was not entitled to fees under Civil Code section 1717's reciprocity rule because Alpine had "fail[ed] to establish that [CWR] would have been entitled to recover attorney's fees from Alpine had [CWR] prevailed." On appeal, Alpine has not argued that CWR would have been entitled to fees if it had prevailed. Instead, Alpine has merely asserted that CWR would have filed a motion for attorney's fees if it had prevailed. This assertion falls far short of a legal argument that CWR would have been entitled to succeed on such a motion. Alpine has therefore forfeited any challenge to the

trial court's conclusion on this issue. (See *Otay*, *supra*, 15 Cal.App.5th at p. 837, fn. 19.)

Moreover, Alpine was not entitled fees under Civil Code section 1717's reciprocity rule because CWR's claims were not contract-based. The gravamen of CWR's causes of action for fraudulent concealment, fraudulent misrepresentation, and breach of fiduciary duty was that Alpine (through Pierson, acting on its behalf) fraudulently induced CWR's consent to the Operating Agreement. CWR sought only damages, not rescission or any other contract remedy. Thus, the claims were not "on the contract" within the meaning of Civil Code section 1717.[10] (See 7 Witkin, *supra,* Judgement § 182, p. 733.) Because the claims were noncontractual, Alpine was not entitled to fees on them under Civil Code section 1717's reciprocity rule. (See *Brown Bark*, *supra*, 219

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[10] Indeed, Alpine itself suggests that CWR's claims fell outside the scope of Civil Code section 1717. The statute provides that in an action on a contract, there is no prevailing party if the action is voluntarily dismissed. (Civ. Code, § 1717, subd. (b)(2).) Alpine argues that even if CWR voluntarily dismissed its claims (which Alpine disputes), Civil Code section 1717's voluntary dismissal rule did not apply because CWR brought tort claims, not claims for breach of contract.

We need not decide whether Alpine was a prevailing party, as we conclude that Alpine failed to establish an entitlement to fees even if it was. (Cf. *Lopez v. Routt* (2017) 17 Cal.App.5th 1006, 1014 [under traditional American rule, prevailing party is generally not entitled to attorney's fees].)

Cal.App.4th at pp. 827-829; *Toghia*, *supra*, 103 Cal.App.4th at pp. 783-786.)

DISPOSITION

The order is affirmed. CWR is entitled to its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MANELLA, P. J.

We concur:

WILLHITE, J.

CURREY, J.