Filed 11/17/17 Primo Hospitality Group v. The Americana at Brand CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

PRIMO HOSPITALITY GROUP, INC., Plaintiff and Appellant, v. THE AMERICANA AT BRAND, LLC, Defendant and Appellant; 530 HEWITT SUBSIDIARY, LLC, et al., Third Party Claimants and Appellants.	B271188 (Los Angeles County Super. Ct. Nos. BC432109, BC603142)

APPEAL from post-judgment orders of the Superior Court of Los Angeles County, Mark. A. Borenstein, Judge. Reversed with directions.

Law Office of Marc L. Libarle and Marc L. Libarle, for Plaintiff and Appellant.

Brown, Neri, Smith & Khan, Ethan J. Brown, Paul C. Fricke, Rowennakete P. Barnes, for Defendant and Appellant.

TroyGould, Aaron B. Bloom, Jennifer Wang, for Third Party Claimant and Appellant 530 Hewitt Subsidiary, LLC.

Zinder, Koch & McBratney, Jeffrey E. Zinder, for Third Party Claimant and Appellant Darren T. McBratney.

Haney & Young, Steven H. Haney, for Third Party Claimants and Appellants Haney Roderick Torbett & Arnold, LLP and Steven H. Haney.

Novian & Novian, Farhad Novian, William R.H. Mosher, for Third Party Claimants and Appellants Novian & Novian, LLP.

John Torbett, in pro per., for Third Party Claimant and Appellant.

Several judgment creditors appeal from a post-judgment order establishing the priority of liens under Code of Civil Procedure section 708.470.[1] In the underlying trial, the trial court awarded a restaurant owner damages of $840,000 against a mall and $560,000 against a management company, but awarded the mall unpaid rent and attorney fees of $2.5 million against the restaurant. The

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[1] Statutory references are to the Code of Civil Procedure unless otherwise indicated.

mall waived its right to set off the judgments under section 666. A third party judgment creditor filed a notice of lien on any judgment awarded to the restaurant. As to the portion of the judgment against the mall, the trial court awarded the mall priority to receive the proceeds, based on the principles underlying equitable setoff. With respect to the amount of the judgment against the management company, the court gave first priority to the attorney fee lien held by the restaurant's trial attorneys under a contingency fee agreement, second priority to a portion of an attorney fee lien held by the restaurant's prior attorneys under an hourly fee agreement, third priority to the third party judgment creditor, and lastly, the mall.

On appeal, the third party creditor contends equitable principles supporting setoff cannot be employed to give priority to the mall's judgment against the restaurant. The mall takes the position that it was entitled to priority to the proceeds paid to the restaurant on behalf of the management company as well. The trial attorneys contend that their contract provided for a contingent fee based on the gross recovery, so the trial court should have awarded an additional fee based on the amount of the judgment paid by the mall's insurer. The restaurant contends that the trial attorneys should not have been awarded any fee, because the restaurant owes a greater amount on the judgment to the mall than it received in the judgment, and therefore, the restaurant has no recovery. The hourly fee attorneys contend that the trial court should have awarded them the

full amount of their attorney fee lien, because they were not required to file a UCC financing statement to perfect a contractual attorney fee lien with respect to commercial tort claims.

We hold that the equitable principles which justify granting priority for competing judgments in the same action do not apply where a judgment debtor has waived its right to setoff in order to prevent a windfall to its insurer. The judgment must be reversed for the trial court to consider the proper lien priority to the proceeds. We also conclude that the plain meaning of a recovery in the context of a contingency fee agreement is that a client receives more in settlement or judgment than it owes the opposing party, but it does not mean that the client must be successful as to all of the parties. We further hold that California Commercial Code section 9101 does not apply to attorney fee liens, but even in the event that it did, the trial court properly applied equitable principles with respect to attorney fee liens in an exercise of its discretion. We reverse the judgment with directions.

FACTS AND PROCEDURAL BACKGROUND

In 2010, restaurant chain owner Primo Hospitality Group, Inc. filed a complaint against the mall, The Americana at Brand, LLC, and its management company, Caruso Management Company, Ltd., over issues arising from water damage to Primo's restaurant in the mall.

Americana filed a cross-complaint against Primo for breach of contract based on unpaid rent, and against two individuals for breach of lease guarantees. Primo's counsel, Novian & Novian, LLP, substituted out of the case and filed a notice of lien on May 17, 2012, for $205,109.20 in accrued hourly rate attorney fees.

Haney Torbett, LLP, as the successor entity to Haney, Roderick, Torbett & Arnold, LLP, and its attorneys John Torbett, Darren McBratney, and Steven Haney (collectively the Haney attorneys), substituted in as Primo's new counsel and filed a notice of attorney lien on October 26, 2012, for a 45 percent contingency interest in any recovery by Primo. The retainer agreement stated that Primo agreed to pay 45 percent "of any amount recovered on your behalf in this matter whether or not the matter proceeds to trial. In the event there is no amount recovered, no attorneys' fees will be due and payable to the Firm. The Firm's contingency fee shall be paid on the gross amount of your recovery in this Matter and costs and expenses (detailed below) incurred by you in connection with this Matter shall not be deducted from the recovery amount upon which the Firm's contingency fee is calculated."

A jury trial was held. The jury awarded Primo damages for negligence, trespass, and nuisance of $840,000 against Americana and $560,000 against Caruso, but awarded Americana unpaid rent of $1,250,000 against Primo. Americana and Caruso asked the trial court to enter separate judgments rather than apply the setoff provisions

of section 666, otherwise their insurers would receive an unfair windfall by sharing in Americana's contractual recovery. On December 21, 2012, the trial court entered judgment in accordance with the jury's verdict with blank lines for attorney fees and costs. The judgment stated that Americana's recovery was not subject to setoff against any recovery by Primo or any other party. Americana and Caruso appealed the portion of the judgment against them.

On April 30, 2013, Primo's creditor, 530 Hewitt Subsidiary, LLC, obtained a judgment in an unrelated case against Primo for $691,560, plus attorney fees and costs. On May 31, 2013, Hewitt filed a notice of lien in the instant case against any judgment in favor of Primo and a notice of judgment lien with the Secretary of State.

Americana filed a motion seeking an award of $2.9 million in attorney fees based on the lease agreement. On September 12, 2013, the trial court granted the motion for attorney fees, but reduced the amount to $1,250,000 to Americana as the prevailing party against Primo. The court also awarded Americana costs of $93,232.72. The court denied Primo's motion for attorney fees. Primo was awarded costs of $53,367.25 against Caruso. On November 4, 2013, Americana filed a notice of judgment lien with the Secretary of State with respect to the judgment against Primo and the individual judgment debtors.

On January 6, 2014, the trial court issued a written order filling in the blanks in the December 21, 2012 judgment with the amounts awarded for costs and attorney

fees in the revised judgment. On April 7, 2015, this appellate court affirmed the judgment in an unpublished opinion. (*Primo Hospitality Group, Inc. et al. v. The Americana at Brand, LLC et al.* (Apr. 7, 2015, B247394) [nonpub. opn.].)

On July 6, 2015, Hewitt filed a motion under section 708.470 for an order applying Primo's judgment against Americana and Caruso toward satisfaction of Hewitt's lien. Hewitt argued that Novian failed to perfect its lien because it had not filed a UCC financing statement with the Secretary of State. Hewitt argued Haney did not attach its fee agreement as required and did not obtain an overall net recovery, in light of the award of attorney fees to Americana.

On September 4, 2015, the Haney attorneys opposed Hewitt's motion, arguing that their lien had priority and expressly applied to the gross recovery in the case. The Haney attorneys also argued principles of equity and public policy.

Americana and Caruso filed an opposition to Hewitt's motion as well. They argued that Americana's judgment had priority based on the offsetting judgments, because a judgment obtained by a cross-claimant in the same action has priority over a judgment obtained in a later action.

Primo opposed Hewitt's motion on the ground that it did not have a net recovery from the judgment. Primo argued that Americana was the priority judgment creditor.

Novian filed a supplemental notice of lien, arguing that a contractual attorney lien takes effect when the fee

agreement is executed, even without a notice of lien, and as a matter of law, Novian's lien was senior to all other liens except as partially subrogated by agreement to the Haney attorneys.

A hearing was held on September 18, 2015. The trial court ordered limited additional briefing on Americana's efforts to enforce the judgment and any stay of enforcement. On September 29, 2015, attorneys for Americana and Caruso filed a declaration stating that Americana filed a notice of judgment lien with respect to the judgment against Primo and the individual judgment debtors with the Secretary of State on November 4, 2013. They also conducted post-judgment discovery and set a date for a judgment debtor examination to enforce the judgment. The parties entered into a mutual agreement not to execute the respective judgments during the period of the agreement to facilitate post-trial mediation conducted in late July and early August 2013, but mediation was ultimately unsuccessful.

On December 2, 2015, the trial court issued a written decision containing the following rulings. First, the court noted that the judgments were not offset, so Americana's statutory priority was based on the date that Americana recorded its notice of lien. Although judgments in the same case typically should be offset to determine the net amount owed, there is no offset between Primo and Americana. The parties specifically asked the court not to apply the usual rule concerning offsets under section 666. As a result, until the parties perfect their judgment liens, the judgment itself

does not constitute a prior claim. Americana's claim is measured from its September notice of lien in the amount of its judgment against Primo of $1,275,250 plus interest.

The trial court found that although Hewitt's lien was perfected on May 31, 2013, there was no reason the agreement waiving offset between Primo and Americana to prevent windfall to the insurer should benefit Hewitt. "Hewitt offers no authority that the usual rule in [Code of Civil Procedure section] 666 should be inapplicable." Applying the "no-offset" agreement with respect to Hewitt's judgment lien would provide a windfall to Hewitt. Other than the no-offset provision in the judgment, the practical impact of the rulings in the case led to the conclusion that Primo was not successful and did not prevail against Americana, as the trial court later found, and only the Caruso portion of the judgment in favor of Primo was not netted against any funds owed to Americana. Accordingly, only that portion of the judgment that could not be offset under section 666, is subject to Hewitt's lien notice.

Liens by attorneys for services rendered do not need to be recorded or filed and can remain secret until actually asserted. The lien is perfected as of the date the engagement letter is executed. Novian's agreement is dated December 9, 2009, and the subordination agreement confirming that Primo owed $205,109.20 plus interest was executed August 12, 2011. Haney's contingent fee agreement was signed August 16, 2011. After January 1, 2002, however, the legislature amended section 9109 of the Commercial Code to

exempt assignments of tort claims from recording requirements, except for commercial tort claims. The court found that an attorney's contractual lien for services on a commercial tort claim was an assignment of the client's recovery and the attorneys had to comply with the recording provisions of the Commercial Code. Haney's lien was effective October 26, 2012, but Novian's was not effective until 2014, if at all.

The trial court found Primo did not prevail against Americana because the general rule of offset applied to non-parties, including the attorneys. Primo prevailed only against Caruso, and therefore, Haney was entitled to 45 percent interest as to the Caruso judgment. The Novian claim was not contingent and is entitled to the full amount after payment of senior liens.

The trial court concluded that it retained equitable jurisdiction to enforce an attorney's right to payment. Novian subordinated its claims in order that Primo could retain the Haney attorneys and reduced that amount it would collect to give the Haney attorneys incentive to take the matter. Primo's success against Caruso is due in part to Novian's work. Under equitable principles applicable in this case, Novian's attorney lien in the amount of $102,554.60 as specified in the August 12, 2011 agreement shall be enforced after the Haney lien.

The court found the amount of the judgment against Caruso, plus interest, was $725,084.93. The court ordered that the Haney attorneys were entitled to 45 percent of the

judgment, plus interest, for a total fee of $326,288.22. Novian was entitled to $102,554.60 plus interest, for a total of $146,751.42.

Hewitt was entitled to the remaining amount, plus interest, for a total of $252,045.29. Caruso's insurer filed an interpleader action and deposited the amount awarded to Primo as against Americana and Caruso with the trial court.

On January 28, 2016, the trial court entered its order consistent with the written decision on lien priorities and claims. The parties filed motions for reconsideration. The trial court denied the motions for reconsideration. The Haney attorneys filed a motion to amend the order to provide for payment of costs of $53,367.25 plus interest to Primo against Caruso. On March 23, 2016, the court entered the order amending the January 28, 2016 order to provide costs to Primo against Caruso. The court issued an amended order on March 28, 2016 to adjust the amounts of the payments. Hewitt, the Haney attorneys, Novian, Americana, and Primo each filed a notice of appeal from the order. Some of the parties included the interpleader action in an abundance of caution.[2]

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[2] The Haney attorneys' requests for judicial notice filed June 8 and July 27, 2017, are denied. The documents were not before the trial court and are not relevant to the issues on appeal.

DISCUSSION

Statutory Scheme and Standard of Review

A judgment creditor with a money judgment against a judgment debtor who is a party to a pending action may obtain a lien on the debtor's rights to money or property under any judgment that the debtor obtains in the action. (§ 708.410, subd. (a).) The judgment creditor can file a motion to have the judgment debtor's rights to money or property applied to satisfy the lien: "If the judgment debtor is entitled to money or property under the judgment in the action or special proceeding and a lien created under this article exists, upon application of any party to the action or special proceeding, the court may order that the judgment debtor's rights to money or property under the judgment be applied to the satisfaction of the lien created under this article as ordered by the court." (§ 708.470, subd. (a).) A judgment creditor is deemed to be a party to the action for the purposes of an application under section 708.470. (§ 708.430, subd. (b).)

The trial court has discretion to grant a motion to apply the judgment proceeds to satisfy the lien. (*Brown v. Superior Court* (2004) 116 Cal.App.4th 320, 334.) In general, we review an order granting or denying a motion to enforce a lien under section 708.470 for an abuse of discretion. (*Id*. at pp. 334–335.)

"'Under no circumstances is the discretion of the Court to be exercised arbitrarily, but it is a discretion governed by legal rules, to do justice according to law or to the analogies of the law, as near as may be . . . . It must be exercised within the limitations above stated to promote substantial justice in the case.' [Citation.] [¶] Discretion is abused in the legal sense whenever, in its exercise, a court exceeds the bounds of reason, all the circumstances before it being considered. [Citation.]" (*Nicoletti v. Lizzoli* (1981) 124 Cal.App.3d 361, 366–367 (*Nicoletti*).)

"The relative priority of the parties' claims is a legal issue that we review de novo. (*Brienza v Tepper* (1995) 35 Cal.App.4th 1839, 1843.)" (*Pou Chen Corp. v. MTS Products* (2010) 183 Cal.App.4th 188, 192.) "[I]t is an abuse of discretion for a trial court to make an order that deprives any party of the legal rights to which it is entitled in terms of the priority of its lien, in the absence of appropriate equitable considerations." (*Pangborn Plumbing Corp. v. Carruthers & Skiffington* (2002) 97 Cal.App.4th 1039, 1049 (*Pangborn*).)

Lien Priorities Generally

All things being equal, Civil Code section 2897 awards priority to liens on the same property based on the date of their creation. (*Cetenko v. United California Bank* (1982) 30 Cal.3d 528, 531 (*Cetenko*).) Priority for certain statutory liens, such as judgment liens, is based on the date of notice,

while no notice is required in order for a contractual lien for attorney fees to be valid and protect against a levy by a judgment creditor. (*Pangborn*, *supra*, 97 Cal.App.4th at pp. 1050–1051.)

A lien established under section 708.410 may be subordinate to other claims, and "questions of priority ought to be decided by reference to general principles of equity." (*Nicoletti*, *supra*, 124 Cal.App.3d at p. 368.) Things are not equal between a statutory judgment lien and a right of equitable offset obtained in the same action; the offset obtained in the same action is given an equitable preference. *(Salaman v. Bolt* (1977) 74 Cal.App.3d 907, 918 (*Salaman*).)

"An attorney's lien on a judgment for services prevails over later encumbrances. (*Cetenko*, *supra*, 30 Cal.3d at p. 534; *Pangborn*, *supra*, 97 Cal.App.4th at p. 1051.) [¶] Public policy favors the priority of the attorney lien. 'If an attorney's claim for a lien on the judgment based on a contract for fees earned prior to and in the action cannot prevail over the lien of a subsequent judgment creditor, persons with meritorious claims might well be deprived of legal representation because of their inability to pay legal fees or to assure that such fees will be paid out of the sum recovered in the latest lawsuit. Such a result would be detrimental not only to prospective litigants, but to their creditors as well.' (*Cetenko*, *supra*, 30 Cal.3d at pp. 535–536.)" (*Waltrip v. Kimberlin* (2008) 164 Cal.App.4th 517, 525 (*Waltrip*).) "Equitable considerations and public policy may

also determine the priority of an attorney lien." (*Id.* at p. 527.)

Equitable Principles Underlying Offset

The trial court gave Americana's judgment priority to receive the proceeds of the judgment against Americana based on the equitable principles underlying statutory and equitable setoff. Hewitt contends that after Americana waived statutory setoff, the trial court could not apply equitable setoff principles to give Americana priority to the proceeds that Primo received from Americana's insurer. Americana contends that despite waiving statutory setoff, it had priority to receive any judgment that Primo obtained in the same action, and therefore, the trial court should have given Americana priority to the proceeds that Primo received from both defendants. We conclude that the equitable principles underlying setoff do not justify a priority payment to Americana.

Section 666 provides for statutory setoff as follows: "If a claim asserted in a cross-complaint is established at the trial and the amount so established exceeds the demand established by the party against whom the cross-complaint is asserted, judgment for the party asserting the cross-complaint must be given for the excess; or if it appears that the party asserting the cross-complaint is entitled to any other affirmative relief, judgment must be given accordingly. [¶] When the amount found due to either party exceeds the

sum for which the court is authorized to enter judgment, such party may remit the excess, and judgment may be rendered for the residue."

If the plaintiff recovers on the complaint and the defendant recovers on the cross-complaint, the trial court enters a single net judgment under section 666. (*American Nat. Bank v. Stanfill* (1988) 205 Cal.App.3d 1089, 1095.) The statutory setoff rule eliminates an unnecessary exchange of money between the parties and protects each party from a potentially unfair distribution of loss as a result of the other party's insolvency. (*Jess v. Herrmann* (1979) 26 Cal.3d 131, 134 (*Jess*).)

In *Jess,* the California Supreme Court held that the statutory setoff rule was subject to equitable exceptions and should not be applied in a comparative fault case where opposing parties were both insured. (*Id.* at pp. 142–143.) The court found setoff would conflict with California's financial responsibility laws because it would provide the insurance companies with "a fortuitous windfall simply because each insured happens to have an independent claim against the person he has injured." (*Id.* at pp. 134–135.) Setoff is not required "in cases in which such a setoff will defeat the principal purpose of California's financial responsibility law and will provide an inequitable windfall to an insurance carrier at the expense of the carrier's insured." (*Id.* at p.143.) The court reversed the judgment and remanded the matter for the trial court to consider the

parties' insurance status and the effect that setoff would have on the parties' ultimate financial recovery.

The *Jess* court noted that in many cases, an insured party will benefit from not setting off the judgments even if the other negligent party is uninsured and insolvent. (*Jess*, *supra*, 26 Cal.3d at p.141, fn.5.) "In that situation the insured will frequently be able to obtain at least some recovery by levy and execution on the sums which its insurer pays to the uninsured party." (*Ibid*.) The dissent in *Jess* stated that Hermann was reportedly under-insured, so she was not likely to obtain any recovery from the judgment even without setoff, because the amount she recovered from the opposing party's insurer in the absence of setoff would be subject to levy and execution by the opposing party. (*Id.* at p. 147, fn. 5 (dis. opn. of Manuel, J.).)

A lien is a charge imposed on specific property as security for the payment of an obligation. (Civ. Code, § 2872.) Equitable offset, on the other hand, "is a means by which a debtor may satisfy in whole or in part a judgment or claim held against him out of a judgment or claim which he has subsequently acquired against his judgment creditor." (*Salaman*, *supra*, 74 Cal.App.3d at p. 918.) "Offset is expressed as a right of the judgment debtor." (*Margott v. Gem Properties, Inc.* (1973) 34 Cal.App.3d 849, 855.) "In effect, the judgment debtor satisfies the claim against him by discharging a separate claim he has against the judgment creditor. The offset is the equivalent of payment." (*Id.* at p. 856.)

"The right exists independently of statute and rests upon the inherent power of the court to do justice to the parties before it. [Citations.] . . . '[I]t is well settled that a court of equity will compel a set-off when mutual demands are held under such circumstances that one of them should be applied against the other and only the balance recovered. The insolvency of the party against whom the relief is sought affords sufficient ground for invoking this equitable principle. [Citations.] And a judgment debtor who has, by assignment or otherwise, become the owner of a judgment or claim against his judgment creditor, may go into the court in which the judgment against him was rendered and have his judgment offset against the first judgment. [Citations.]' [Citation.]" (*Salaman, supra,* 74 Cal.App.3d at p. 918.)

"[T]he rights acquired by a lien claimant are never greater than those of his judgment debtor. As a general rule, the assignee of a chose in action stands in the shoes of his assignor, taking his rights and remedies subject to any right to offset or other defenses existing against the assignor prior to actual notice of the assignment." (*Salaman, supra,* 74 Cal.App.3d at p. 919.) "[T]he offset of judgment against judgment is a matter of right absent the existence of some facts establishing an equitable principle precluding it." (*Ibid.*)

Americana had a statutory and equitable right to have Primo's judgment offset against its own to avoid an unnecessary exchange of funds, and to minimize the risk of an unfair distribution of loss in the event that Americana

paid the judgment against it and Primo was insolvent. Americana did not have an equitable right to be paid first on its judgment. Americana chose to waive its right to have the judgments offset against each other so that its insurer would not receive a windfall, and it chose to have its insurer pay Primo the amount of the judgment. The trial court entered separate judgments accordingly, and expressly ordered that Americana's recovery was not subject to setoff against any recovery by Primo or any other party.

The equitable principles underlying statutory and equitable setoff do not support giving a priority for payment to Americana. The plain language of the judgment states that the recoveries are not subject to setoff. Americana is not simply seeking a credit toward its own debt. Americana's insurer paid the judgment owed to Primo. Americana did not pay any of its own funds to satisfy the judgment against it, so there was no risk of an unfair distribution of loss in the event that Primo is insolvent. Even if Primo is insolvent, Americana is in a better position to recover on its judgment than it would have been if the judgments were set off, because the insurer's payment to Primo may assist Americana to obtain some measure of recovery through levy and execution. The insurer's payment to Primo increased the total available assets to satisfy Primo's creditors, including Americana.

There was also no exchange of funds between Americana and Primo that would implicate the principles of equitable setoff. Americana did not give Primo the funds at

issue, such that Primo would be simply returning them as payment of the competing judgment, which is the other rationale for setoff. The insurance proceeds did not belong to Americana, and Americana would have had no right to the funds otherwise. Americana asserts that California law provides parties to a judgment with priority over all other claimants based on an equitable principle that the parties to the action expended time and financial resources litigating and obtaining a judgment in the action. Hewitt also expended time and financial resources to litigate and obtain a judgment against Primo, and the funds that Americana is seeking were paid by Americana's insurer as a result of Americana's own negligence.

A judgment debtor holding a competing judgment has an equitable right to setoff, which allows the debtor to avoid paying on the judgment. After Americana waived its right to setoff, it was entitled to enforce its judgment against Primo's assets as provided by statute. The priority that the trial court awarded Americana to receive payment from Primo was not related to equitable setoff. No other equitable principle has been identified to support giving Americana priority as a judgment creditor over the other lienholders in this case. It was an abuse of discretion to give Americana priority over the other lien claimants, contrary to legal criteria for lien priorities, without justification in equity. The trial court's order must be reversed and the matter remanded for the trial court to exercise its discretion within the legal limitations.

Contingency Fee Agreement

The parties dispute the proper interpretation of "gross recovery" in the contingency fee agreement between the Haney attorneys and Primo. The Haney attorneys contend the trial court should have awarded them a contingency fee on the portion of the judgment that Primo was awarded from Americana, including priority over other lienholders. Primo contends that the trial court should not have awarded the Haney attorneys any contingency fee, including the fee awarded on the judgment recovered from Caruso. We conclude that the agreement provides for attorney fees based on a gross recovery with respect to a particular defendant, which the trial court must determine based on the facts.

"Fee agreements between attorneys and their clients 'are evaluated at the time of their making [citation] and must be fair, reasonable and fully explained to the client. [Citations.] Such contracts are strictly construed against the attorney. [Citations.]' [Citations.] Client agreements are construed by the court under traditional principles of contract interpretation [citation], and 'any uncertainties [are resolved] in favor of a fair and reasonable interpretation.' [Citation.] If ambiguities are present in the engagement agreement, they are to be resolved 'in favor of the client and against the attorney. [Citation.]' [Citation]." (*M'Guinness v. Johnson* (2015) 243 Cal.App.4th 602, 617–618.)

The primary goal is to give effect to the parties' mutual intent at the time of contracting. (*Founding Members of the*

Newport Beach Country Club v. Newport Beach Country Club, Inc. (2003) 109 Cal.App.4th 944, 955 (*Founding Members*).) "When a contract is reduced to writing, the parties' intention is determined from the writing alone, if possible" and "'[t]he words of a contract are to be understood in their ordinary and popular sense.' [Citations.]" (*Ibid.*) We also consider the circumstances under which the contract was made and the matter to which it relates. (Civ. Code, § 1647; *Lloyd's Underwriters v. Craig & Rush, Inc.* (1994) 26 Cal.App.4th 1194, 1197–1198.)

"[T]he contract must be construed as a whole and the intention of the parties must be ascertained from the consideration of the entire contract, not some isolated portion [citations]; a contract entered into for the mutual benefit of the parties is to be interpreted so as to give effect to the main purpose of the contract and not to defeat the mutual objectives of the parties [citations]; language which is inconsistent with the objective of the contract shall be rejected [citations]. Also, where a contract is susceptible of two interpretations, the courts shall give it such a construction as will make it lawful, operative, definite, reasonable and capable of being carried into effect if it can be done without violating the intention of the parties [citations]. And last, but not least, the court shall avoid an interpretation which will make a contract extraordinary, harsh, unjust, inequitable or which would result in absurdity [citations]." (*County of Marin v. Assessment Appeals Bd.* (1976) 64 Cal.App.3d 319, 325, italics omitted.)

No extrinsic evidence was introduced to support either party's interpretation of the contingency fee agreement. "When no extrinsic evidence is introduced, or when the competent extrinsic evidence is not in conflict, the appellate court independently construes the contract. [Citations.] When the competent extrinsic evidence is in conflict, and thus requires resolution of credibility issues, any reasonable construction will be upheld if it is supported by substantial evidence. [Citations.]" (*Founding Members*, *supra*, 109 Cal.App.4th at pp. 955–956.)

"We review the trial court's findings of fact to determine whether they are supported by substantial evidence. [Citation.] To the extent the trial court drew conclusions of law based upon its findings of fact, we review those conclusions of law de novo. [Citation.]" (*Westfour Corp. v. California First Bank* (1992) 3 Cal.App.4th 1554, 1558.)

"The term 'contingency fee contract' is ordinarily understood to encompass any arrangement that ties the attorney's fee to successful performance, including those which incorporate a noncontingent fee based on a fixed rate of payment. As Witkin explains, the term refers to a contract '"providing for a fee the size or payment of which is conditioned on some measure of the client's success."' (1 Witkin, Cal. Proc. (5th ed. 2008) Attorneys, § 176, p. 245.)" (*Arnall v. Superior Court* (2010) 190 Cal.App.4th 360, 370.) "Contingency fee agreements typically provide that counsel shall recover a flat or sliding-scale percentage of 'any'

recovery, that is, *if* there is a recovery. [Citations.] Fees under a contingency fee agreement are not a sure thing. No recovery means no fees." (*Estate of Stevenson* (2006) 141 Cal.App.4th 1074, 1084.)

In this case, the Haney attorneys contend the judgment awarded against Americana is a recovery by Primo upon which they are entitled to collect a contingency fee under the parties' contract. Primo contends it is not a recovery under the contract, because Primo was not successful in the action and is required to pay more to Americana than the judgment against Americana. The contract does not contain a definition of recovery or gross recovery, but the calculation of whether a client has a recovery must take into account a judgment against the client. The interpretation proposed by the Haney attorneys, which would calculate the client's recovery based on any amount received by the client regardless of the liability for a competing judgment, would lead to absurd results. Under the Haney attorneys' interpretation of the agreement, if Americana had exercised its right to statutory setoff and the judgment reflected a net judgment in favor of Americana, Primo would have owed Americana a net judgment, and the Haney attorneys would have no right to a contingent fee. Because the judgment stated the amount that Primo owed to Americana and that Americana owed to Primo separately based on the same jury findings, the Haney attorneys contend they are owed a substantial contingent fee on the portion awarded to Primo, and Primo is liable for a far

greater payment to Americana. The parties could not have intended that the Haney attorneys' right to a contingent fee depended on how the judgment was accounted for. It is sensible that the Haney attorneys are entitled to a contingent fee if Primo has a recovery from the action as to Americana, which it did not, because of the contractual damages awarded against Primo.

In cases where the right to setoff has been waived in order to prevent a windfall to the parties' insurers, the trial court must make a finding of fact as to whether the party with the lower judgment has a gross recovery for purposes of a contingency fee agreement. If both parties receive payment on their competing judgments from third-party insurers, it may be that each party has secured a gross recovery for the purposes of contingency fee agreements. In this case, if Primo is in fact required to pay more to Americana on the cross-complaint than Primo recovered from Americana's insurer on the complaint, Primo does not have a gross recovery in this case. The parties' waiver of the right to set off competing judgments does not control the determination of whether Primo obtained a gross recovery as against Americana in this case.

The trial court's findings with respect to the contingent fees awarded from the Caruso judgment, however, are supported by substantial evidence. Caruso was named as a separate defendant by Primo and treated as a separate defendant. The jury calculated a separate award of damages. Caruso did not have a cross-complaint against

Primo. Caruso's insurer, although it was also Americana's insurer, paid the judgment owed to Primo, and there was no competing judgment. This evidence supports the trial court's finding that the amount paid by Caruso was a recovery by Primo under the contingency fee contract for which the Haney attorneys were entitled to receive fees.

Application of Commercial Code to Attorney Liens

Novian contends attorneys are not required to file UCC financing statements to perfect contractual attorney fee liens with respect to commercial tort claims, and as a result, the trial court should have awarded Novian the full amount of its attorney fee lien. Hewitt contends that since Novian did not comply with the requirements of the California Commercial Code, Novian did not have a perfected lien, and the trial court could not apply equitable principles to give priority to a portion of Novian's attorney lien. We conclude the requirements of the Commercial Code do not apply to attorney fee liens, but even if they did, the trial court properly applied equitable principles to award fees to Novian. On remand, the trial court may reconsider the proper amount of the fee award.

"Civil Code section 2881 declares a lien may be created by contract and Civil Code section 2883 permits an agreement to create a lien on property to be acquired in the future. In California, a lien in favor of an attorney upon the proceeds of a prospective judgment may either be created by

express contract or implied from a retainer agreement that indicates the attorney is to look to the judgment for payment of his fee." (*Waltrip, supra,* 164 Cal.App.4th at p. 525.)

"An attorney's contractual lien is created and takes effect when the fee agreement is executed. [Citations.] A contractual lien for attorney fees is a secret lien; no notice is required before it is effective against a judgment creditor who levies on the judgment." (*Waltrip, supra,* 164 Cal.App.4th at p. 525.)

California Commercial Code section 9109 expressly states that the division on secured transactions does not apply to a lien "given by statute or other rule of law for services or materials." (Cal. U. Com. Code, § 9109, subd.(d)(2).) The Official Comments on Uniform Commercial Code section 9109, subdivision (d)(2), notes that "most jurisdictions provide special liens to suppliers of many types of services and materials, either by statute or by common law. With the exception of agricultural liens, it is not necessary for this Article to provide general codification of this lien structure, which is determined in large part by local conditions and which is far removed from ordinary commercial financing. As under former Section 9-104(c), subsection (d)(2) excludes these suppliers' liens (other than agricultural liens) from this Article." A contractual attorney lien is one of the liens permitted under other rule of law for services.

Hewitt contends that Novian was required to comply with the provisions governing secured transactions under

California Commercial Code section 9109, subdivision (d)(12). Section 9109, subdivision (d)(12), provides that the division does not apply to "[a]n assignment of a claim arising in tort, other than a commercial tort claim, however Sections 9315 and 9322 apply with respect to proceeds and priorities in proceeds." In other words, the division applies to an assignment of a commercial tort claim.

Commercial Code section 9109, subdivision (d)(12), does not apply to attorney fee liens. Novian did not have an assignment of a commercial tort claim. Novian had an assignment of future proceeds of a commercial tort claim to the extent necessary to satisfy the firm's interest, but not an assignment of the present claim. The distinction is explained in the Official Comments to Uniform Commercial Code section 9109, subdivision (d)(12), which states that "once a claim arising in tort has been settled and reduced to a contractual obligation to pay [as in, but not limited to, a structured settlement] the right to payment becomes a payment intangible and ceases to be a claim arising in tort." We note that the division applies to all payment intangibles under Commercial Code section 9109, subdivision (a)(3), unless another subdivision provides otherwise. As we explained above, Commercial Code section 9109, subdivision (d)(2), provides an exception for attorney fee liens because they are a lien for services allowed by statute and by other rules of law.

Even if California Commercial Code section 9109 did apply, we would conclude that the trial court properly

applied equitable principles to award Novian's attorney fees priority. "Equitable considerations also favor the attorney lien. It is a principle of equity that 'those whose labor, skills and materials resulted in the creation of a fund should be entitled to priority in the payment of their claims from such source.' (*Pangborn, supra,* 97 Cal.App.4th at p. 1054.) . . . It is the attorney's labor, skill and materials, and his willingness to take the risk of no recovery, that results in the judgment or settlement paid to the debtor. (*Ibid.*) '"The special or charging lien of an attorney has been held to be an equitable right to have the fees and costs due to him for services in a suit secured to him out of the judgment or recovery in the particular action, the attorney to the extent of such services being regarded as an equitable assignee of the judgment. It is based, as in the case of a lien proper, on the natural equity that a party should not be allowed to appropriate the whole of a judgment in his favor without paying for the services of his attorney in obtaining such judgment.'" (*Haupt v. Charlie's Kosher Market* (1941) 17 Cal.2d 843, 845.)" (*Waltrip, supra,* 164 Cal.App.4th at pp. 525–526, fn. omitted.)

DISPOSITION

The post-judgment order establishing lien priority under Code of Civil Procedure section 708.470 is reversed. The trial court is directed to enter a new and different order exercising its discretion to establish lien priorities within legal limitations consistent with this opinion, including: (1) no attorney lien should be reduced or denied for failure to file a UCC financing statement with the Secretary of State, and (2) in exercising its discretion, the trial court may rely on applicable equitable considerations other than equitable setoff. The parties are to bear their own costs on appeal in the interests of justice.

KRIEGLER, Acting P.J.

We concur:

BAKER, J.

DUNNING, J.*

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