Filed 9/27/19 Rusnak/SouthBay v. Glukel Group CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

RUSNAK/SOUTH BAY, LLC, Plaintiff and Appellant, v. GLUKEL GROUP, LLC, Defendant and Appellant.	B286513 Los Angeles County Super. Ct. No. BC601222

APPEALS from an order of the Superior Court of Los Angeles County, Joseph R. Kalin, Judge. Affirmed.

Epport, Richman & Robbins, Steven N. Richman and Tyler R. Dowdall for Defendant and Appellant.

Glaser Weil Fink Howard Avchen & Shapiro, Peter Sheridan, Alex Linhardt and Rory S. Miller for Plaintiff and Appellant.

Defendant Glukel Group, LLC (Glukel) appeals from an order awarding it only 20 percent of its requested attorney fees under a contractual fee provision, after plaintiff Rusnak/South Bay, LLC (Rusnak) voluntarily dismissed its complaint. The trial court ruled Glukel's request for $177,712 in attorney fees was "clearly excessive," in part because Civil Code section 1717, subdivision (b)(2) barred recovery of the fees incurred to defend Rusnak's contract claims.[1] Section 1717, subdivision (b)(2) provides that, "[w]here an action has been voluntarily dismissed or dismissed pursuant to a settlement of the case, there shall be no prevailing party for purposes of this section." As the trial court correctly recognized, the statute bars the recovery of fees incurred to defend voluntarily dismissed contract claims, even when the relevant contractual fee provision provides otherwise, but it permits the recovery of fees reasonably incurred to defend noncontract claims, so long as the contract provides for their recovery. (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 602 (*Santisas*).) As for the noncontract claims, the trial court determined, from "a review of the invoices" Glukel submitted, that the charges were "excessive and/or unreasonable." We find no abuse of discretion.

Rusnak cross-appeals the same order, arguing the court erred in determining Glukel was the prevailing party on the noncontract claims. The contention has no merit. As our Supreme Court held in *Santisas*, when noncontract claims are resolved by voluntary dismissal, the clear and unambiguous contract language governs whether a party is a "prevailing party" for purposes of awarding attorney fees under a contractual fee provision. (*Santisas, supra,* 17 Cal.4th at p. 608.) The fee provision here defines "prevailing party" to include "without limitation" a party "who substantially obtains or *defeats* the relief

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

sought, as the case may be, whether by compromise, settlement, judgment, or the *abandonment* by the other Party . . . of its claim." (Italics added.) Rusnak abandoned its noncontract claims, making Glukel the prevailing party under the unambiguous terms of the parties' contract. We affirm the attorney fee order.

FACTS AND PROCEDURAL BACKGROUND

In the summer of 2014, Rusnak began designing and preparing a new automotive dealership in Torrance, California. While scouting potential locations, Rusnak developed the idea of renting two adjacent properties—one owned by Glukel and another owned by Thomas Najarian LLC (Najarian)—and combining them into a single dealership site. Among other things, Rusnak anticipated that opening the combined dealership site would entail structural renovations and improvements that would need to comply with municipal drainage and storm water management requirements. Rusnak also anticipated that connecting the Glukel and Najarian properties would require the creation of a passageway through a common wall between the two properties.

In August 2014, Rusnak entered into separate commercial tenant leases for each of the two properties. Despite Rusnak's intention to combine the two properties into one dealership site, the fully integrated lease with Glukel (and the lease with Najarian) was silent as to the combination of the two properties.

After execution of the lease, Rusnak demanded that Glukel consent to the combination of the properties by signing a number of covenants with the City of Torrance (the City). Additionally, Rusnak demanded that Glukel agree to a perpetual easement in favor of the City. Rusnak also demanded that Glukel execute a "Landlord Waiver" for automobile inventories that Rusnak financed through its lender. Glukel refused the requests.

In November 2015, Rusnak sued Glukel and others, claiming Glukel breached the lease and/or fraudulently induced

the agreement. Glukel successfully demurred to the original complaint and, in April 2016, Rusnak filed its operative first amended complaint, asserting the following contract and tort causes of action: (1) breach of contract (three separate counts relating to different alleged covenants); (2) breach of covenant of good faith and fair dealing (two separate counts relating to different covenants); (3) fraudulent inducement; (4) intentional misrepresentation; and (5) declaratory relief. Glukel demurred and moved to strike portions of the first amended complaint. On September 28, 2016, the trial court overruled the demurrer and denied the motion.

On February 7, 2017, the parties participated in a mediation. After the matter failed to settle, Glukel propounded discovery and began preparing a motion for summary judgment. Shortly before depositions of its employees were scheduled to occur, Rusnak dismissed its lawsuit.

Glukel moved for an award of $177,712 in attorney fees under the lease's attorney fee provision.[2] The provision states in relevant part:

> "**Attorneys' Fees:** If any Party or Broker brings an action or proceeding involving the Premises whether founded in tort, contract or equity, or to declare rights hereunder, the Prevailing Party (as

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[2] Glukel's principal, Daryoosh Noparast, also moved for an award of attorney fees under the lease. The trial court ruled Noparast was not entitled to a fee award because he was not a party to the lease and, therefore, the attorney fee provision in the contract did not apply to him. That ruling was plainly correct. (See *Brown Bark III, L.P. v. Haver* (2013) 219 Cal.App.4th 809, 830 (*Brown Bark*) [recognizing allocation "generally is required when the same lawyer represents one party that is entitled to recover its attorney fees and another party that is not"]; see also *Zintel Holdings, LLC v. McLean* (2012) 209 Cal.App.4th 431, 443.)

> hereafter defined) in any such proceeding, action, or appeal thereon, shall be entitled to reasonable attorneys' fees. . . . The term 'Prevailing Party' shall include, without limitation, a Party or Broker who substantially obtains or defeats the relief sought, as the case may be, whether by compromise, settlement, judgment, or the abandonment by the other Party or Broker of its claim or defense. The attorneys' fees award shall not be computed in accordance with any court fee schedule, but shall be such as to fully reimburse all attorneys' fees reasonably incurred."

The trial court granted Glukel's attorney fee motion, but awarded it only 20 percent of the requested amount. The court found Glukel was the "prevailing party" as defined in the lease, as it "substantially defeated the relief sought . . . through [Rusnak's] abandonment of its claims via the dismissal." However, the court concluded section 1717, subdivision (b)(2) barred Glukel from recovering the attorney fees incurred in defending the contract claims. As for the tort causes of action, the court ruled Glukel was entitled to its reasonable attorney fees under the lease and the Supreme Court's holding in *Santisas*. The court then gave the following explanation for reducing the fee award:

> "The request for an award of $177,712.00 in attorneys' fees is clearly excessive. This is not a case that involved difficult issues or a lot of law and motion. Plaintiff filed its action on November 17, 2015, and dismissed the action on April 11, 2017. During this time, the Court ruled on a demurrer to the complaint and a demurrer to and motion to strike portions of the first amended complaint. Moreover, a review of the invoices submitted by Defendants reveals excessive and/or unreasonable charges – *503.44 hours of legal work*. [Citations.] Additionally,

> as discussed above, [Glukel] is only entitled to an award of attorneys' fees incurred in defending against Plaintiff's *tort claims*. [Glukel's] request for attorneys' fees is based on the fees purportedly incurred . . . to defend against all Plaintiff's claims.
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> "In light of the excessive request for fees and the Court's ruling that [Glukel] is only entitled to an award of attorneys' fees based on the fees incurred to defend against Plaintiff's *tort claims*, the Court finds a severe reduction is warranted. The Court reduces [Glukel's] request for attorney fees by 80%."

Glukel and Rusnak, respectively, filed a timely appeal and cross-appeal from the order awarding attorney fees.

DISCUSSION

1. *Legal Principles: Section 1717 and* Santisas

Section 1717, subdivision (a) provides: "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs."

Section 1717, subdivision (b)(2) states: "Where an action has been voluntarily dismissed or dismissed pursuant to a settlement of the case, there shall be no prevailing party for purposes of this section."

In *Santisas*, our Supreme Court addressed the extent to which section 1717, subdivision (b)(2) precludes the recovery of attorney fees when "a plaintiff has voluntarily dismissed before trial an action asserting both tort and contract claims, all of which arise from a . . . contract containing a broadly worded attorney fee provision." (*Santisas, supra,* 17 Cal.4th at p. 602.)

Recognizing that section 1717's "operative language" specifically limits its application to attorney fees " '[i]n *any action on a contract,* . . . which are incurred *to enforce that contract*,' " the court held, "[if] an action asserts both contract and tort or other noncontract claims, section 1717 applies only to attorney fees incurred to litigate the contract claims." (*Santisas*, at p. 615.)

With respect to the contract claims, the *Santisas* court construed section 1717, subdivision (b)(2) "as overriding or nullifying conflicting contractual provisions, such as provisions expressly allowing recovery of attorney fees in the event of voluntary dismissal or defining 'prevailing party' as including parties in whose favor a dismissal has been entered." (*Santisas, supra,* 17 Cal.4th at p. 617.) The court explained: "When a plaintiff files a complaint containing causes of action within the scope of section 1717 (that is, causes of action sounding in contract and based on a contract containing an attorney fee provision), and the plaintiff thereafter voluntarily dismisses the action, section 1717 bars the defendant from recovering attorney fees incurred in defending those causes of action, *even though the contract on its own terms authorizes recovery of those fees*." (*Ibid.*)

As for tort and other noncontract claims, the *Santisas* court held Code of Civil Procedure section 1033.5's general authorization for attorney fees as provided by contract governs. (*Santisas, supra,* 17 Cal.4th at pp. 606, 617.)[3] Thus, in determining whether fees are available, a court must look to "the attorney fee provision, [which,] depending upon its wording, may afford the defendant a contractual right, not affected by section 1717, to recover attorney fees incurred in litigating [noncontract] causes of action." (*Id.* at p. 617.) Similarly,

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[3] Code of Civil Procedure section 1033.5, subdivision (a)(10)(A) provides that attorney fees shall be allowable as costs under Code of Civil Procedure section 1032, "when authorized by . . . Contract."

the court explained, "if a plaintiff voluntarily dismisses an action asserting *only* tort claims (which are beyond the scope of section 1717), and the defendant, relying on the terms of a contractual attorney fee provision, seeks recovery of *all* attorney fees incurred in defending the action, the plaintiff could not successfully invoke section 1717 as a bar to such recovery." (*Ibid.*)

With these principles in place, we turn to the parties' arguments in their respective appeal and cross-appeal from the order awarding contractual attorney fees.

2. *The Trial Court Reasonably Exercised Its Discretion in Reducing the Attorney Fee Award*

"[A] court assessing attorney fees begins with a touchstone or lodestar figure, based on the 'careful compilation of the time spent and reasonable hourly compensation of each attorney . . . involved in the presentation of the case.' " (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1131–1132 (*Ketchum*), citing *Serrano v. Priest* (1977) 20 Cal.3d 25, 48 (*Serrano III*).) To determine what is " '*reasonable*' compensation" for attorney services rendered, "trial courts must carefully review attorney documentation of hours expended; 'padding' in the form of inefficient or duplicative efforts is not subject to compensation." (*Ketchum*, at p. 1132; *Serrano III*, at p. 48.) "[T]he lodestar is the basic fee for comparable legal services in the community; it may be adjusted by the court based on factors including . . . (1) the novelty and difficulty of the questions involved, (2) the skill displayed in presenting them, (3) the extent to which the nature of the litigation precluded other employment by the attorneys, (4) the contingent nature of the fee award. [Citation.] The purpose of such adjustment is to fix a fee at the fair market value for the particular action. In effect, the court determines, retrospectively, whether the litigation involved a contingent risk or required extraordinary legal skill justifying augmentation of the unadorned lodestar in order to approximate the fair market rate for such services. The ' "experienced trial judge is the best judge

of the value of professional services rendered in his court, and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong." ' " (*Ketchum,* at p. 1132; *Serrano III,* at p. 49.)

"[T]he trial judge has discretion to determine 'the value of professional services rendered in his [or her] court . . . .' [Citation.] However, since determination of the lodestar figure is so '[f]undamental' to calculating the amount of the award, the exercise of that discretion must be based on the lodestar adjustment method." (*Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311, 322; *Serrano III, supra,* 20 Cal.3d at pp. 48–49.) "[T]he lodestar figure may be increased by application of a fee enhancement, or reduced as appropriate, after the trial court has considered [the lodestar adjustment] factors." (*Ketchum, supra,* 24 Cal.4th at p. 1134.)

Glukel argues the trial court abused its discretion in two ways. First, Glukel argues the court should not have determined it was barred from recovering attorney fees incurred to defend the contract claims because those claims were "inextricably intertwined" with the tort claims for which it was entitled to reasonably incurred fees under *Santisas.* Second, Glukel argues the court failed to conduct the prescribed lodestar analysis in reducing the fee award by 80 percent. We disagree on both counts.

a. *The court did not abuse its discretion in apportioning fees between the contract and tort claims*

"A litigant may not increase his recovery of attorney's fees by joining a cause of action in which attorney's fees are not recoverable to one in which an award is proper." (*Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 129.) Thus, when attorney fees are authorized for some claims, and prohibited for others, "[t]he prevailing party . . . must generally allocate the attorney fees it incurred between" the causes of action for which recovery is permitted and the causes of action for which it is not.

(*Brown Bark, supra,* 219 Cal.App.4th at p. 829; *Reynolds,* at p. 129.) It is only when "the issues are 'so interrelated that it would have been impossible to separate them into claims for which attorney fees are properly awarded and claims for which they are not' " that an "allocation is not required." (*Amtower v. Photon Dynamics, Inc.* (2008) 158 Cal.App.4th 1582, 1604 (*Amtower*); see *Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, 1111 [allocation not required when the claims are " ' "inextricably intertwined" ' [citation], making it 'impracticable, if not impossible, to separate the multitude of conjoined activities into compensable or noncompensable time units' "].)

"Where fees are authorized for some causes of action in a complaint but not for others, allocation is a matter within the trial court's discretion. [Citation.] A trial court's exercise of discretion is abused only when its ruling ' " ' "exceeds the bounds of reason, all of the circumstances before it being considered." ' " ' " (*Amtower, supra,* 158 Cal.App.4th at p. 1604.) " ' "The burden is on the party complaining to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power." ' " (*Silver v. Boatwright Home Inspection, Inc.* (2002) 97 Cal.App.4th 443, 449 (*Silver*), quoting *Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.)

As an initial matter, Glukel argues our Supreme Court's holding in *Santisas* "require[d] the trial court to determine whether the services rendered in defending the contract causes of action overlapped or were 'inextricably intertwined' with the services rendered in defending against the fraud causes of action." In fact, the *Santisas* court expressly declined to reach that issue, observing: "We foresee that upon remand a question may arise regarding defendants' right to recover as costs attorney fees they incurred to litigate issues common to the contract and

tort claims. (Cf. *Reynolds Metals Co. v. Alperson, supra,* 25 Cal.3d 124, 129-130.) Because the Court of Appeal did not address this allocation issue, and because the parties did not brief it in this court, *we decline to express any opinion here on its proper resolution*." (*Santisas, supra,* 17 Cal.4th at p. 623, fn. 10, italics added; cf. *Khan v. Shim* (2016) 7 Cal.App.5th 49, 63–64 [recognizing the *Santisas* court expressly declined to decide the allocation question, but observing the high court's citation to *Reynolds* suggests it would endorse awarding fees for contract claims that are inextricably intertwined with recoverable tort claims under section 1717, subdivision (b)(2)].)

In any event, even if we assume the trial court *could have* awarded Glukel the attorney fees it incurred to litigate issues common to the contract and tort claims, we conclude Glukel has failed to establish the court abused its discretion in declining to do so. Glukel essentially argues the trial court was compelled to award fees for the contract claims, notwithstanding the mandate in section 1717, subdivision (b)(2), because Rusnak alleged a set of facts common to all claims for relief and "incorporated [the allegations] by reference" into each separately pled cause of action—"both contract and tort." (Underscore omitted.) Glukel's demurrer to the operative first amended complaint undermines its argument.

In its demurrer, Glukel argued the parol evidence rule barred all of Rusnak's contract claims (the first through fifth causes of action) because the lease was fully integrated and its express written terms could not be interpreted to include the obligations that Rusnak alleged had been breached. As for the declaratory relief claim, Glukel separately argued Rusnak could not establish the elements needed to impose an easement by estoppel. But, with respect to the tort claims for fraudulent inducement and fraudulent representation, Glukel asserted wholly different arguments, uniquely applicable to fraud-based tort claims, including (1) fraud could not be asserted as a

substitute for an enforceable contract; (2) the good faith failure to perform a contract is not fraud; (3) fraud-based claims are subject to a heightened pleading standard; and (4) fraud claims cannot be pled with allegations based on " 'information and belief.' " In fashioning these discrete legal arguments, Glukel's attorneys were plainly able to separate the legal work required to challenge the contract claims, on the one hand, from the work needed to independently contest the tort claims, on the other. The demurrer demonstrates these claims were not inextricably intertwined.

Glukel also fails to establish the court committed reversible error in allocating a percentage of the disallowed fees to the contract claims, without determining how many hours Glukel's attorneys spent exclusively on that work. Although a court generally should perform such an analysis (see *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 812), this obligation is premised on the *prevailing party* meeting *its* burden to make the requisite allocation between compensable and noncompensable claims when applying for an award of attorney fees in a mixed case. (See *Brown Bark, supra,* 219 Cal.App.4th at p. 829.) While a handful of entries in Glukel's attorney billing records specify the time spent on discrete arguments advanced in the demurrer (further demonstrating the attorneys' ability to segregate this work), the majority of the entries contain general descriptions such as "Draft demurrer to first amended complaint" or "Continue to prepare demurrer."[4] Moreover, notwithstanding

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[4] Some entries had sufficient detail to permit the requisite allocation, such as "Research Parol[ ] Evidence Rule, new and developing case law re same, case law re 'ambiguity in this context' " or "Research breach of contract allegations not amounting to fraud and updating prior cases and legal authority in brief." Like the demurrer itself, these entries demonstrate the ability of Glukel's attorneys to segregate the work performed on

its burden to do so, Glukel made no effort in its motion to guide the court in identifying the time exclusively attributable to the contract claims, versus the time exclusively attributable to the tort claims, and the time jointly related to both the contract and tort claims. (See *Cassim,* at p. 812 [explaining prescribed method for determining the percentage allocable to compensable and noncompensable fee claims].) Having failed to meet its burden as the prevailing party to allocate fees (see *Brown Bark,* at p. 829), Glukel cannot complain that it was prejudiced by the court's inability to perform a detailed analysis with respect to the fees that were recoverable and those that were barred under section 1717, subdivision (b)(2). (See *Silver, supra,* 97 Cal.App.4th at p. 449.)

Here, it appears the trial court disallowed a large percentage of the requested attorney fees based on the proportion of contract claims (six out of eight) to tort claims (two). This was reasonable given the showing Glukel made in its fee motion. Glukel has failed to establish an abuse of discretion. (*Silver, supra,* 97 Cal.App.4th at p. 449.)

b. *The court did not abuse its discretion in reducing the lodestar amount*

Glukel contends the trial court failed to use the lodestar analysis in calculating a reasonable attorney fee award. The record does not support its claim of error.

The lodestar method has the " 'virtue of being relatively easy to administer.' " (*Serrano v. Unruh* (1982) 32 Cal.3d 621, 642.) It does not require " ' "a [trial] court, in setting an attorney's fee, [to] become enmeshed in a meticulous analysis of every detailed facet of the professional representation." ' " (*Ibid.*) The same is true of the lodestar adjustment method. The trial court " 'may increase or decrease [the lodestar] amount by

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the tort and contract claims, and to allocate their time between the two.

applying a positive or negative "multiplier" to take into account a variety of other factors, including the quality of the representation, the novelty and complexity of the issues, the results obtained, and the contingent risk presented.' " (*Laffitte v. Robert Half Internat. Inc.* (2016) 1 Cal.5th 480, 489.) "To the extent a trial court is concerned that a particular award is excessive, it has *broad discretion* to adjust the fee downward or deny an unreasonable fee altogether." (*Ketchum, supra,* 24 Cal.4th at p. 1138, italics added.) As with all orders and judgments, an attorney fee order "is presumed correct, all intendments and presumptions are indulged in its favor, and ambiguities are resolved in favor of affirmance." (*Hirshfield v. Schwartz* (2001) 91 Cal.App.4th 749, 765–766, citing *Denham v. Superior Court, supra,* 2 Cal.3d at p. 564.)

Contrary to Glukel's contention, the trial court's written ruling confirms it applied the prescribed lodestar analysis. The court wrote: "The request for an award of $177,712.00 in attorneys' fees is clearly excessive. This is not a case that involved difficult issues or a lot of law and motion. Plaintiff filed its action on November 17, 2015, and dismissed the action on April 11, 2017. During this time, the Court ruled on a demurrer to the complaint and a demurrer to and motion to strike portions of the first amended complaint. Moreover, a review of the invoices submitted by Defendants reveals excessive and/or unreasonable charges – *503.44 hours of legal work*."

Reasonably construed, the written ruling indicates the court accepted that Glukel's attorneys charged a reasonable hourly rate, but concluded that the number of hours expended was too high given the stage of the litigation and the simplicity of the issues involved—factors that indisputably justify a downward adjustment under the lodestar method. (See *Ketchum, supra,* 24 Cal.4th at p. 1132.) While Glukel complains the trial court should have given a more detailed accounting of "how many hours were compensable, or for which tasks," nothing in our

precedents demands that kind of granular analysis when the trial court determines to adjust the unadorned lodestar amount. (See *Center for Biological Diversity v. County of San Bernardino* (2010) 185 Cal.App.4th 866, 901 ["the trial court was not required to explain how it calculated an enhancement factor, and 'we will generally presume the attorney fee award was correct " ' "on matters as to which the record is silent" ' " ' "].) We find no abuse of discretion.

3. *Rusnak's Cross-Appeal Has No Merit; Glukel Is the "Prevailing Party" as Defined in the Lease*

In its cross-appeal, Rusnak argues the trial court erred in determining Glukel was the "prevailing party" on the tort causes of action. Because there is "no indication in the record that Rusnak voluntarily dismissed its claims due to any perceived defects in its allegations or . . . potentially damaging evidence," Rusnak argues its dismissal was insufficient to support the finding. The law and controlling language of the fee provision manifestly defeat the argument.

In *Santisas*, after determining section 1717, subdivision (b)(2) precludes a prevailing party finding for voluntarily dismissed contract claims, our Supreme Court addressed the availability of a fee award for noncontract claims under a contractual attorney fee clause. For noncontract claims, the court held the general rule for the availability of attorney fees authorized by a contract applies—namely, that the trial court must "determine whether there is a prevailing party, and if so which party meets that definition, *by examining the terms of the contract at issue, including any contractual definition of the term 'prevailing party'* and any contractual provision governing payment of attorney fees *in the event of dismissal*." (*Santisas, supra,* 17 Cal.4th at p. 622, italics added.) In other words, under *Santisas,* if the contractual fee provision defines "prevailing party" to include a party in whose favor a voluntary dismissal is entered, that party is the prevailing party for purposes of

awarding attorney fees for the noncontract claims. (*Id.* at p. 617 [in determining whether a party is entitled to fees, the court must look to "the attorney fee provision, [which,] depending upon its wording, may afford the defendant a contractual right, not affected by section 1717, to recover attorney fees incurred in litigating [voluntarily dismissed noncontract] causes of action"].)

Here, the lease's attorney fee provision unambiguously defines "prevailing party" to include a defendant who defeats a claim for relief by a plaintiff's voluntary dismissal. The provision states: "The term 'Prevailing Party' shall include, *without limitation*, a Party or Broker who substantially obtains or *defeats the relief sought*, as the case may be, whether by compromise, settlement, judgment, or *the abandonment by the other Party or Broker of its claim* or defense." (Italics added.)

Notwithstanding the "prevailing party" definition in the lease, Rusnak argues the trial court was nevertheless required to assess which party "had all the momentum in the litigation prior to [Rusnak's] voluntary dismissal of the case" before it could find the dismissal made Glukel the prevailing party on the tort claims. Rusnak bases the argument on a passage from *Santisas*, where, in the course of explaining why it was *walking back from* its prior opinion in *International Industries, Inc. v. Olen* (1978) 21 Cal.3d 218 (*Olen*), the high court summarized the *Olen* majority's underlying rationale for imposing a blanket rule denying contractual attorney fees in all voluntary pretrial dismissal cases. In the passage, which we quote with its full context, the *Santisas* court explained:

> "Moreover, upon fresh consideration of the matter, we are of the view that the practical difficulties associated with contractual attorney fee cost determinations in voluntary pretrial dismissal cases are not as great as suggested by the majority in *Olen, supra,* 21 Cal.3d 218. The *Olen* majority soundly reasoned that attorney fees should not be

awarded *automatically* to parties in whose favor a voluntary dismissal has been entered. In particular, it seems inaccurate to characterize the defendant as the 'prevailing party' if the plaintiff dismissed the action only after obtaining, by means of settlement or otherwise, all or most of the requested relief, or if the plaintiff dismissed for reasons, such as the defendant's insolvency, that have nothing to do with the probability of success on the merits. The *Olen* majority also soundly reasoned that scarce judicial resources should not be used to try the merits of voluntarily dismissed actions merely to determine which party would or should have prevailed had the action not been dismissed. But *we do not agree* that the only remaining alternative is an inflexible rule denying contractual attorney fees as costs in all voluntary pretrial dismissal cases. Rather, a court may determine whether there is a prevailing party, and if so which party meets that definition, *by examining the terms of the contract at issue*, *including any contractual definition of the term 'prevailing party' and any contractual provision governing payment of attorney fees in the event of dismissal*. If, as here, the contract allows the prevailing party to recover attorney fees but does not define 'prevailing party' or expressly either authorize or bar recovery of attorney fees in the event an action is dismissed, a court may base its attorney fees decision on a pragmatic definition of the extent to which each party has realized its litigation objectives, whether by judgment, settlement, or otherwise." (*Santisas,*

supra, 17 Cal.4th at pp. 621–622, first italics in original, subsequent italics added.)[5]

Rusnak suggests the passage referring to "the defendant's insolvency" or the "probability of success on the merits" means a trial court must *always* examine the plaintiff's "reasons" for dismissing the case in making a prevailing party determination. The context makes clear this is not the rule under *Santisas*. On the contrary, only when the contract "does *not* define 'prevailing party' or expressly either authorize or bar recovery of attorney fees in the event an action is dismissed," may the trial court "base its attorney fees decision on a pragmatic definition of the extent to which each party has realized its litigation objectives." (*Santisas, supra,* 17 Cal.4th at p. 622, italics added.) But where, as here, the contract defines the term "prevailing party" to expressly authorize the recovery of attorney fees in the event the action is dismissed, the trial court is bound by the contract's terms to award fees according to that definition. (*Id.* at pp. 621–622; see also *id.* at p. 608 ["Are the seller defendants 'prevailing part[ies]' within the meaning of their own agreement? To answer this question, we apply the ordinary rules of contract interpretation. 'Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs interpretation. [Citation.] Such intent is to be inferred, if possible, solely from the written provisions of the contract.' "].)

The lease defines "Prevailing Party" to include a party "who substantially . . . defeats the relief sought . . . by compromise, settlement, judgment, *or the abandonment of the other Party . . . of its claim*." (Italics added.) The trial court

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[5] After giving this explanation, the *Santisas* court concluded *Olen* had "merely construed section 1717" and had "been effectively superseded by the 1981 amendment of section 1717," which added subdivision (b)(2). (*Santisas, supra,* 17 Cal.4th at p. 622; see also *id.* at p. 602 [discussing 1981 amendment].)

correctly concluded Glukel is the "prevailing party under the terms of the [lease]" with respect to the tort claims, because Glukel "substantially defeated the relief sought in this action through [Rusnak's] abandonment of its claims via the dismissal." Rusnak's cross-appeal has no merit.

DISPOSITION

The order is affirmed. The parties shall bear their own costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EGERTON, J.

We concur:

LAVIN, Acting P. J.

DHANIDINA, J.