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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

TSE WORLDWIDE PRESS, INC., Plaintiff, Cross-defendant and Appellant, v. DEPENDABLE HIGHWAY EXPRESS, INC., Defendant, Cross-complainant and Respondent.	B269747 (Los Angeles County Super. Ct. No. BC524676)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gregory W. Alarcon, Judge. Reversed and remanded with directions.

Tepper Law Firm, Nicholas Tepper and Jairo Lopez, for Plaintiff, Cross-defendant and Appellant.

David E. R. Woolley for Defendant, Cross-complainant and Respondent.

Appellant TSE Worldwide Press, Inc. contends the trial court's award of $72,000 in attorney fees to respondent Dependable Highway Express, Inc. after respondent recovered $3,096.94 on its cross-claim for breach of contract was not supported by the evidence submitted by respondent, and that the trial court relied on irrelevant evidence in making the fee award. For the reasons set forth below, we reverse and remand.

FACTUAL AND PROCEDURAL BACKGROUND

In October 2013, appellant brought suit against respondent and The Custom Companies, Inc. (Custom) for breach of contract, misrepresentation, negligence and conversion.[1] The complaint alleged that respondent promised to deliver several pallets of yearbooks to New York by a certain date, that it failed to pick up the pallets on the day scheduled, that appellant cancelled its shipping contract

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[1] Custom is not a party to this appeal.

and hired another company to deliver the yearbooks, that respondent mistakenly picked up the yearbooks a day late, and that respondent, in conjunction with Custom, thereafter delivered the yearbooks late. Appellant contended the late delivery caused it to suffer damages to its reputation and goodwill. It sought $60,000 in compensatory damages, plus punitive damages.

In February 2014, respondent cross-claimed for the agreed charges for delivering the yearbooks. Respondent sought attorney fees under a provision of a written contract signed by appellant that stated: "In the event Customer's [appellant's] account is turned over to an attorney or other agency for collection/resolution, . . . Customer shall pay all reasonable agency fees, attorney's fees and court costs incurred by [respondent]."

In August 2014, after Custom filed an unsuccessful motion for judgment on the pleadings, respondent attempted to remove the matter to federal court on the ground federal law preempted appellant's state law claims. On October 20, 2014, the federal court issued an order of remand, finding the removal untimely.

According to appellant's unchallenged assertions little discovery was conducted during the litigation. There were

no interrogatories, requests for admission or document demands served by either party. Appellant and respondent each deposed a single witness. Respondent's deposition of appellant's witness lasted 43 minutes.

On February 10, 2015, appellant requested dismissal of its entire complaint without prejudice.[2] The cross-complaint proceeded to trial on March 23, 2015. After a 90-minute hearing, the court found in favor of respondent, awarding $3,096.94 for unpaid freight and delivery charges.

In May 2015, respondent filed a motion for attorney fees. Its attorney, David Woolley, contended that the issues raised in the cross-complaint were "inextricably intertwined" with the complaint, and that the "gist of the complaint was preserved and litigated as [appellant's] defense." Woolley also asserted that appellant's chief executive testified at trial that the complaint was filed in order to avoid paying the

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[2] In its brief, respondent contends "the voluntary dismissal without prejudice was converted to an involuntary dismissal with prejudice by stipulation of counsel." However, the record states that appellant's counsel stipulated to convert the "'without prejudice' dismissal" to a "'with prejudice' dismissal." Nothing in the record suggests the dismissal was not voluntary.

freight and delivery charges due respondent.[3] Attached as an exhibit was a one-page summary showing that Woolley billed respondent a total of $110,999.40 between January 2014 and February 2015.[4] Woolley stated in his declaration that he was experienced in maritime and transportation law, and that his billing rate went as high as $720 per hour, but that he generally charged respondent $450 per hour. He stated that the fees for the period through January 2014 were for "the initial procedure, in respect of a major case"; the fees for the period through September 2014 were for "the motion for judgment on the pleadings and the removal"; the fees for the period though October 2014 were for "the remand order"; and the fees for the period through February 2015 were for "preparation for the major trial where [appellant] was plaintiff." Woolley further stated that he

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[3] Appellant denied that its chief executive made such a statement. There was no reporter's transcript or settled statement prepared.

[4] The summary showed $15,840 charged in January 2014 for 35.2 hours worked; $685 charged in February 2014 for .3 hours worked; $38,055 charged in September 2014 for 82.7 hours worked; $15,558 charged in October 2014 for 34.50 hours worked; and $40,860 charged in February 2015 for 90.8 hours worked.

had charged an additional $26,408 between February 24, 2015 and April 22, 2015, which "include[d] the period of preparation for trial and trial." Respondent also presented evidence that it had made a series of settlement offers requesting payment by appellant. The first was for $3,096.94, with no provision for attorney fees. Subsequent offers followed, culminating in an offer shortly before trial for payment by appellant of $72,000, which would have resolved both respondent's claimed damages and its attorney fees.

The trial court issued an order awarding respondent $72,000 in fees. The court stated that the final settlement offer was "persuasive in informing the Court as to the value [respondent's attorney] puts on his time." The court found the fees incurred after February 2015 "unreasonable" because "trial preparation should have been completed on February 24, 2015 [the original date assigned for trial]." The court observed that "[a]ttorneys fees in the amount of $72,000.00, at a rate of $450.00/hour, compensates [respondent] for 160 hours of work." Appellant noticed an appeal from the attorney fee order.

DISCUSSION

In an action on a contract containing an attorney fee provision, the prevailing party is entitled to reasonable fees. (Civ. Code, § 1717, subd (a); *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1094-1095; *Douglas E. Barnhart, Inc. v. CMC Fabricators, Inc.* (2012) 211 Cal.App.4th 230, 249.) To fix the amount of awardable fees, the trial court must determine the number of hours reasonably expended on the case and assign a reasonable hourly rate for the work. (*Douglas E. Barnhart, Inc.*, *supra*, at p. 249.)

"The [party] seeking fees and costs "'bear[s] the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates." [Citation.]'" (*Christian Research Institute v. Alnor* (2008) 165 Cal.App.4th 1315, 1320.) "[T]here is no legal requirement that an attorney supply billing statements to support a claim for attorney fees" (*Mardirossian & Associates, Inc. v. Ersoff* (2007) 153 Cal.App.4th 257, 269); however, the party or its attorney must "explain, in more than general terms, the extent of services rendered to the client." (*Martino v. Denevi* (1986) 182 Cal.App.3d 553, 559-560; see, e.g., *Mardirossian & Associate, Inc. v. Ersoff*, *supra*, at pp. 270-271 [no billing statements supplied, but each attorney "testified at length

concerning the work he or she performed, the complexity of the issues and the extent of the work that was required"]; *City of Colton v. Singletary* (2012) 206 Cal.App.4th 751, 785 [attorney's declaration in support of motion provided a breakdown of his activities]; *Steiny & Co., Inc. v. California Electric Supply Co.* (2000) 79 Cal.App.4th 285, 293 [attorney's declaration in support of motion "included detailed evidence of hours spent, tasks concluded, and billing rates"]; *Weber v. Langholz* (1995) 39 Cal.App.4th 1578, 1586-1587 [attorney's declaration in support of motion described hours billed and work performed].)

In fixing the amount of reasonably necessary fees, the court should consider whether """counsel's skill and effort were wisely devoted to the expeditious disposition of the case""" or whether instead the matter was "overlitigat[ed]." (*In re Marriage of Turkanis & Price* (2013) 213 Cal.App.4th 332, 356; accord, *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132 [reasonable compensation should not include "inefficient or duplicative efforts"]; *Gorman v. Tassajara Development Corp.* (2009) 178 Cal.App.4th 44, 101 ["A reduced award might be fully justified by a general observation that an attorney overlitigated a case or submitted a padded bill . . . ."].) "'[T]he unquestioning award

of generous fees may encourage duplicative and superfluous litigation and other conduct deserving no such favor.'" (*Donahue v. Donahue* (2010) 182 Cal.App.4th 259, 272, quoting *Thayer v. Wells Fargo Bank* (2001) 92 Cal.App.4th 819, 839.)

We review attorney fee awards under the deferential abuse of discretion standard (*PLCM Group, Inc. v. Drexler*, *supra*, 22 Cal.4th at pp. 1095-1096), but our deference is not unlimited. Reversal of an attorney fee award is appropriate where "the trial court has applied 'the wrong test' or standard in reaching its result" (*Nichols v. City of Taft* (2007) 155 Cal.App.4th 1233, 1239), or "the record is unclear whether the trial court's award of attorney fees is consistent with the applicable legal principles . . . ." (*In re Vitamin Cases* (2003) 110 Cal.App.4th 1041, 1052; see *Gorman v. Tassajara Development Corp., supra,* 178 Cal.App.4th at p. 101; *Donahue v. Donahue, supra,* 182 Cal.App.4th at pp. 268-269.)

Appellant contends that respondent and its attorney provided insufficient evidence to support a $72,000 award, and the court's reliance on the settlement offer to determine

the fee award was improper.[5] Respondent's attorney submitted a single page containing five lines of text

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[5] Appellant also contends that its voluntary dismissal of its complaint bars recovery of attorney fees, citing Civil Code section 1717, subdivision (b)(2) and *Mitchell Land & Improvement Co. v. Ristorante Ferrantelli, Inc*. (2007) 158 Cal.App.4th 479 (*Mitchell Land*). 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." This provision precludes a fee award "regardless of whether the action is dismissed with or without prejudice, so long as the plaintiff voluntarily brought about the dismissal pursuant to section 581." (*Mesa Shopping Center-East, LLC v. O Hill* (2014) 232 Cal.App.4th 890, 903; accord, *D & J, Inc. v. Ferro Corp*. (1986) 176 Cal.App.3d 1191, 1193-1195 [contractual claims dismissed with prejudice during trial].) However, the bar "applies only to causes of action that are based on the contract . . . [i]f the voluntarily dismissed action also asserts causes of action that do not sound in contract, those causes of action are not covered by section 1717, and the attorney fee provision, depending upon its wording, may afford the defendant a contractual right, not affected by section 1717, to recover attorney fees incurred in litigating those causes of action." (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 617, italics omitted; accord, *Mitchell Land*, *supra*, at p. 486; ["[S]ection 1717, subdivision (b)(2)'s prohibition against an attorney fee award when there has been a voluntary dismissal applies only to contract claims . . . and does not apply to tort claims otherwise encompassed by a broadly worded contract attorney fees clause"];
(Fn. continued on next page.)

describing the amounts billed between January 2014 and February 2015. The summary did not include a description of the work performed during those periods, and Woolley's declaration provided only a cursory account: "initial procedures in respect of a major case," "preparation for the . . . trial," etc. The record indicates that the only pleadings respondent filed were an answer and a three-page cross-complaint. A motion for judgment on the pleadings was

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Drybread v. Chipain Chiropractic Corp. (2007) 151 Cal.App.4th 1063, 1071; *Silver v. Boatwright Home Inspection, Inc.* (2002) 97 Cal.App.4th 443, 450; *Carver v. Chevron, U.S.A., Inc*. (2002) 97 Cal.App.4th 132, 151.)

Here, respondent seeks compensation for the cost of litigating appellant's tort claims. Assuming the attorney fee provision was broad enough to encompass noncontract claims, which appellant does not dispute, and that respondent was obliged to defend the fraud claim in order to prevail on the contract claims as it contends, Civil Code section 1717, subdivision (b)(2) would not apply. (See *Calvo Fisher & Jacob LLP v. Lujan* (2015) 234 Cal.App.4th 608, 622 [contractual provision stating "'In the . . . event that we are required to institute legal proceedings to collect fees and costs, the prevailing party would be entitled to reasonable attorney's fee and other costs of collection'" broad enough to encompass defense of fraud claims].) The trial court did not make the latter factual finding, however, and the record before us is insufficient to permit us to make such a determination.

heard by the court, but it was prepared and submitted by Custom and its counsel. Respondent does not dispute appellant's assertion that the parties neither served nor responded to written discovery. Only two depositions were taken, one of which lasted less than an hour. The trial, at which respondent sought only to recover its freight and delivery charges, lasted 90 minutes. The record reflects counsel's untimely attempt to have the litigation removed to federal court, but that work was neither occasioned by appellant's conduct nor of benefit to respondent.[6]

Respondent points to the fact that the complaint sought significant damages as it included a request for punitive damages. It contends that because recovery of its freight charges was dependent on defeating appellant's claims, it was entitled to recover without allocating between the complaint and cross-complaint. Generally, "[w]here a cause of action based on the contract providing for attorney's fees is joined with other causes of action beyond the contract, the prevailing party may recover attorney's fees under

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[6] It appears from Woolley's declaration that all of the billings for September and October 2014 -- 117.2 hours and over $53,000 in charges -- were in connection with the removal and remand.

section 1717 only as they relate to the contract action." (*Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 129.) Separation of time expended on noncontractual claims is not required, however, when the claims are so intertwined "'it would be impracticable, if not impossible, to separate the attorney's time into compensable and noncompensable units.'" (*Maxim Crane Works, L.P. v. Tilbury Constructors* (2012) 208 Cal.App.4th 286, 298.) Moreover, courts have held that where a party asserting a contract claim must defend against a non-contractual cross-claim in order to prevail, the party may be entitled to all its fees, without the need for allocation. (See, e.g., *Calvo Fisher & Jacob, LLP v. Lujan*, *supra*, 234 Cal.App.4th at pp. 614, 622-626 [time spent by law firm defending against client's cross-claims was compensable where firm brought suit for breach of contract to recover balance owed by client and client cross-claimed on grounds including negligence and fraud]; *Siligo v. Castellucci* (1994) 21 Cal.App.4th 873, 879 ["[T]he pivotal point in the analysis whether a prevailing party is entitled to recover contractual attorney fees for defending against a competing noncontractual claim . . . is not whether the fees can be apportioned between the theories but whether a defense against the noncontractual claim is necessary to

succeed on the contractual claim"]; *Wagner v. Benson* (1980) 101 Cal.App.3d 27, 36-37 [where bank and borrower agreed prevailing party would be compensated for reasonable attorney fees incurred in collecting balance due on note, and bank's collection efforts were interrelated with its defense against borrower's fraud allegations, fees incurred in defending fraud were compensable].) Here, however, we have been provided no record permitting us to determine what issues were raised in connection with the cross-complaint, whether they were inextricably intertwined with the issues raised in the complaint or whether respondent's pursuit of its cross-claim for freight and delivery charges required it to defeat the allegations of the complaint.

Nor did the trial court say anything in its order that would allow us to conclude that it found the two matters inextricably connected or the success of respondent's cross-claim depended on defeating the claims raised in appellant's complaint. In its order, the court made no reference to the trial or pre-trial proceedings, or to the character or reasonableness of the work performed by counsel. Its only findings were that the $72,000 settlement offer represented a good indication of "the value [respondent's attorney] puts on his time," and that the amounts incurred after February

24, 2015 were "unreasonable." Although the court observed that its award of $72,000 represented 160 hours of work compensated at a rate of $450 per hour, it did not state that it found 160 hours to be a reasonable amount of time for an attorney to have billed during the litigation or $450 to be a reasonable hourly fee.[7] As the court's explanation relied on the final settlement offer, rather than on the amount of work the court determined was reasonably performed by respondent's counsel, and did not indicate whether pursuit of the cross-complaint was inextricably intertwined with defending against the complaint, the order must be reversed.

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[7] Although Woolley stated that he billed respondent at a rate of $450 per hour, the court made a specific finding that counsel's highest rate of $720 per hour was "high, [but not] unreasonable." It made no further reference to that rate in assessing fees.

DISPOSITION

The attorney fee award is reversed. The matter is remanded to allow the trial court to reconsider respondent's request for attorney fees and to make appropriate findings in conformity with the views expressed herein. Appellant is awarded its costs on appeal.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.