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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

CARMEN SALCIDO,

Plaintiff and Appellant,

v.

PLATINUM HOME MORTGAGE  
CORPORATION et al.,

Defendants and Respondents.

B289010

(Los Angeles County  
Super. Ct. No. KC068830)

APPEAL from an order of the Superior Court of Los Angeles County. Dan Thomas Oki, Judge. Reversed.

Herzlich & Blum, Allan Herzlich, Jerome J. Blum and Marta Roza for Plaintiff and Appellant.

Boren, Osher & Luftman, Jeremy J. Osher and Aaron M. Gladstein for Defendants and Respondents.

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Carmen Salcido appeals from an order awarding attorney fees to respondents Sanjesh Sharma (Sharma), his wife Aracely Sharma (Aracely), Platinum Home Mortgage Corporation (Platinum), and New Ventures, Inc. (NVI) (collectively, Respondents). Salcido sued Respondents, alleging that they violated court orders entered in connection with Salcido's efforts to enforce a judgment against Sharma. The judgment was entered by stipulation following Sharma's default under a settlement agreement that disposed of a prior action by Salcido against Sharma.

The trial court granted summary judgment against Salcido. We previously affirmed that ruling in a separate appeal. (*Salcido v. Platinum Home Mortgage Corporation* (June 5, 2019, B286886) [nonpub. opn.] )

Following summary judgment, Respondents moved for their attorney fees under the authority of an attorney fee provision in the settlement agreement. The trial court granted that motion, awarding Respondents attorney fees in the amount of \$137,700.

We reverse. The settlement agreement permits an award of fees to the prevailing party in an action to "enforce or interpret" the agreement. This action did not seek to enforce or interpret the settlement agreement, but sought damages for alleged violations of court orders. Moreover, once the stipulated judgment was entered, any contractual rights to attorney fees under the settlement agreement were merged into, and extinguished by, the judgment.

The trial court recognized this legal principle, but ruled that it did not apply here on the ground of judicial estoppel. The court concluded that Salcido's successful request for contractual

attorney fees in an adversary proceeding that she filed in Sharma's bankruptcy proceeding precluded Salcido from arguing that the settlement agreement's attorney fee provision was extinguished by the judgment.

As explained below, judicial estoppel does not apply here. Salcido never had to assert any position in the bankruptcy court concerning the effect of the judgment, as Sharma defaulted on the complaint that Salcido filed. Moreover, unlike Salcido's claims in this case, her complaint in the bankruptcy proceeding directly implicated the settlement agreement by alleging that Sharma defrauded her and then procured the settlement agreement through fraud. Salcido's complaint in this action did not rely upon, or even cite, the settlement agreement. Salcido therefore has not sought to benefit unfairly by taking inconsistent positions in different judicial proceedings, as the doctrine of judicial estoppel requires.

## **BACKGROUND**

### **1. The Settlement Agreement**

Salcido sued Sharma in a prior superior court action, alleging that he fraudulently induced her to invest \$240,000 in purported real estate projects. The parties settled the lawsuit in August 2008.

The parties executed a written settlement agreement (Settlement Agreement). The Settlement Agreement required Sharma to repay the \$240,000 plus 7 percent annual interest pursuant to a 10-year repayment schedule. The Settlement Agreement provided that, if Sharma defaulted on his payments, Salcido would be entitled to a stipulated judgment for \$240,000.

The Settlement Agreement contained an attorney fee provision. Paragraph 19 of the agreement stated in relevant part

that, “[s]hould suit be brought to enforce or interpret any part of this Agreement, the ‘prevailing party’ shall be entitled to recover as an element of costs of suit and not as damages, reasonable attorneys’ fees to be fixed by the Court. The ‘prevailing party’ shall be the party entitled to recover his-her-its costs of suit, regardless of whether such suit proceeds to final judgment.”

Sharma defaulted on his payments under the Settlement Agreement. On December 29, 2008, the superior court entered a stipulated judgment against Sharma for \$240,000 (the Judgment).

## **2. The Bankruptcy Proceeding**

Sharma filed a petition for bankruptcy protection in 2010. Salcido filed a complaint in the bankruptcy proceeding objecting to discharge of the Judgment under title 11 United States Code section 523. Salcido alleged that Sharma’s debts to her arose as a result of Sharma’s “false pretenses, false representations, and/or actual fraud, including but not limited to initially defrauding [Salcido] into giving [Sharma] loans and inducing [Salcido] to accept the Stipulated Judgment, which [Sharma] never intended to satisfy.”

Salcido’s adversary complaint incorporated the terms of the Settlement Agreement “as if fully set forth herein, including the attorney fees provision in ¶ 19 of that Agreement.” The prayer included a request for attorney fees “per ¶ 19 of the Settlement Agreement.”

The bankruptcy court entered a default judgment in favor of Salcido on her complaint, ordering that the Judgment was nondischargeable under title 11 United States Code section 523(a)(2)(A). The default judgment denied Salcido’s request for

attorney fees “without prejudice pending compliance” with a local rule.

Salcido filed a motion to amend the default judgment to include attorney fees and costs on the basis of the Settlement Agreement. Her motion argued that she “initiated the subject lawsuit to recover the same obligation as [Sharma] had incurred to [Salcido] under the [Settlement Agreement]. Specifically, the Complaint alleged, among other things, that [Sharma] fraudulently induced [Salcido] to enter into that Settlement Agreement, having no intention to pay the debt at that time.” She claimed that, under Civil Code section 1717, as the prevailing party she “may seek the contractual attorneys’ fees, as the Settlement Agreement provides at Paragraph 19.”

Following that motion, the bankruptcy court entered an amended default judgment against Sharma that included an award of attorney fees in favor of Salcido in the amount of \$47,997.50.

### **3. This Action**

Salcido filed her complaint in this action on October 31, 2016. The gist of her complaint is that Respondents violated court orders that Salcido had obtained to enforce the Judgment. Specifically, Salcido alleged that Platinum, Sharma’s employer, misstated Sharma’s earnings and failed to withhold the proper amount of money under an earnings withholding order. She also alleged that Platinum and NVI (an entity in which Sharma was the principal) violated an assignment order requiring the assignment to Salcido of amounts owed to Sharma. Salcido’s complaint alleged claims for violation of those court orders and for alleged “Tortious Acts to Hinder, Deter & Defraud [a] Creditor.”

The trial court granted Respondents' motion for summary judgment. We affirmed that ruling on June 5, 2019. (*Salcido v. Platinum Home Mortgage Corporation, supra*, B286886.)

Respondents moved for attorney fees under the Settlement Agreement as the prevailing party. The trial court granted that motion on March 19, 2018.

The trial court rejected Salcido's argument that the attorney fee provision in the Settlement Agreement did not apply because the Judgment had extinguished any prior contractual rights. The court acknowledged the principle that, when a final judgment has been entered, prior contractual rights are merged into and extinguished by the judgment. (See *Chelios v. Kaye* (1990) 219 Cal.App.3d 75, 80 (*Chelios*).) However, the court concluded that Respondents were entitled to seek their fees under the Settlement Agreement on the ground of judicial estoppel. The court noted that Salcido sought and obtained attorney fees under the Settlement Agreement for her adversary complaint in the bankruptcy proceeding, which Salcido filed "years after" the Judgment was entered pursuant to the Settlement Agreement.

## **DISCUSSION**

### **1. Standard of Review**

Where, as here, the "material facts are largely not in dispute," a determination of the legal basis for an attorney fee award is a question of law that we review de novo. (*Mountain Air Enterprises, LLC v. Sundowner Towers, LLC* (2017) 3 Cal.5th 744, 751 (*Mountain Air*).)

## **2. The Attorney Fee Provision in the Settlement Agreement Does Not Apply to the Claims in this Action**

Under the “American rule,” each party to a lawsuit is ordinarily responsible for its own attorney fees. (*Mountain Air, supra*, 3 Cal.5th at p. 751.) The rule is codified in Code of Civil Procedure section 1021, which provides that, “[e]xcept as attorney’s fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties.”<sup>1</sup> Thus, parties to a contract may agree that a prevailing party will be awarded attorney fees in specified litigation, whether or not that litigation is based in tort or contract. (*Mountain Air*, at p. 751.)

Where litigation is based in contract, Civil Code section 1717 ensures a mutuality of remedy for attorney fee claims. It applies primarily when: (1) a contract provides for a right to attorney fees to only one party to a contract; or (2) a party defends a contract claim by challenging the validity or enforceability of the contract containing the attorney fee provision. (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 610–611.)<sup>2</sup>

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<sup>1</sup> Subsequent undesignated statutory references are to the Code of Civil Procedure.

<sup>2</sup> Neither of those circumstances applies here. The Settlement Agreement provides a *mutual* attorney fee remedy for the “prevailing party” in a suit “brought to enforce or interpret any part of this Agreement.” There is no dispute that Respondents were the prevailing parties in this action. Respondents therefore did not need to rely on the reciprocity

However, even where that section is applicable, the first step in determining whether a prevailing party has a right to attorney fees is to consider the scope of the underlying agreement. (*Mountain Air, supra*, 3 Cal.5th at p. 752.) If the scope of the parties' agreement on attorney fees does not include the particular litigation at issue, no party is entitled to fees.

In considering the scope of the Settlement Agreement's attorney fee provision, we apply "traditional rules of contract interpretation." (*Mountain Air, supra*, 3 Cal.5th at p. 752.) We consider the "mutual intention of the parties," focusing first on the writing alone. (*Ibid.*) If the meaning of the relevant provisions is clear when interpreted in their ordinary and popular sense, we apply that meaning. (*Ibid.*) However, we also recognize the interpretational principle that the agreement must be understood with reference to the circumstances in which it was made and the matter to which it relates. (*Ibid.*)

This action cannot reasonably be viewed as an action to "enforce or interpret" the Settlement Agreement. None of Salcido's causes of action in this case relied upon or even

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provision in Civil Code section 1717 to support their fee request. The parties' arguments directed to whether this action was "on a contract" for purposes of Civil Code section 1717 are therefore largely irrelevant.

Respondents do rely on the language in Civil Code section 1717 permitting a reciprocal right to fees for a prevailing party "whether he or she is the party specified in the contract or not." Respondents cite that language in arguing that Platinum, NVI and Aracely are entitled to fees even though they were not parties to the Settlement Agreement. In light of our holding, we do not need to consider this argument.



mentioned the Settlement Agreement. Nor did they seek relief based upon the alleged breach of *any* contractual obligation. Rather, they sought damages based upon allegations that Respondents: (1) violated a court order to withhold earnings; (2) violated an order to assign money due to Sharma; and (3) committed “Tortious Acts to Hinder, Deter & Defraud [a] Creditor.”

Thus, Salcido’s claims did not even directly seek enforcement of the *Judgment*, much less the Settlement Agreement that authorized the Judgment. The basis of Salcido’s complaint was that Respondents allegedly violated court orders. Salcido obtained those orders pursuant to the Judgment, but she sought to enforce the orders, not the Judgment itself.

Salcido’s complaint did include a prayer for attorney fees. However, the prayer did not mention the Settlement Agreement (or any other contract) as the basis for that request. Rather, the complaint suggests that the alleged authority for the requested fees was statutory, not contractual.

The complaint contains specific requests for attorney fees only in the first and second causes of action for alleged violation of the withholding and assignment orders. These fee requests were purportedly based on Respondents’ “willful, intentional and malicious failure” to obey the court orders. Salcido represented in the trial court that she hoped to obtain attorney fees pursuant to section 701.020, subdivision (c), which provides for an award of attorney fees in the court’s discretion based upon a third party’s refusal without good cause to make required payments to a levying officer.

Thus, Salcido’s attorney fee claim here is far different from the claim at issue in *Blickman Turkus, LP v. MF Downtown*

*Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 895, which Respondents cite. Unlike that case, where there was “no colorable basis” for an attorney fee request other than the contract at issue, here there is a highly plausible alternative basis. (*Ibid.*) Whether or not Salcido could have successfully recovered her attorney fees under section 701.020, the complaint supports her contention that the basis for her fee request was statutory rather than contractual.

Respondents do not cite any case supporting the conclusion that an agreement authorizing attorney fees for a prevailing party in an action to interpret or enforce a settlement agreement applies to an action to enforce court collection orders entered pursuant to a subsequent judgment. Indeed, as the trial court recognized, the general rule is that when a lawsuit on a contractual claim has been reduced to a final, nonappealable judgment, “all of the prior contractual rights are merged into and extinguished by the monetary judgment, and thereafter the prevailing party has *only* those rights as are set forth in the judgment itself.” (*Chelios, supra*, 219 Cal.App.3d at p. 80 [party could not seek contractual attorney fees incurred in collecting on a subsequent judgment].)<sup>3</sup>

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<sup>3</sup> In response to the holding in *Chelios*, the Legislature amended section 685.040 to provide that a party is entitled to attorney fees incurred in enforcing a judgment if the contract sued upon provided for attorney fees, *and* attorney fees were included in the judgment. (§ 685.040; *Gray1 CPB, LLC v. SCC Acquistions, Inc.* (2015) 233 Cal.App.4th 882, 890–891.) This amendment “did not abrogate *Chelios*’s holding that contractual rights merge into the judgment.” (*Ibid.*) The amendment does

This rule is “an aspect of the doctrine of res judicata.” (*Gietzen v. Covenant RE Management, Inc.* (2019) 40 Cal.App.5th 331, 337.) Under the principle of merger, “ [a] valid final judgment in favor of the plaintiff merges the claim in the judgment. The cause of action is extinguished and the only remaining right of action is on the judgment.’ ” (*Ibid.*, quoting 7 Witkin, Cal. Procedure (5th ed. 2008) Judgment, § 401, p. 1034.)

Thus, there is no contractual basis for the attorney fees that the trial court awarded to Respondents.

**2. Respondents Are Not Entitled to Attorney Fees Under the Doctrine of Judicial Estoppel**

As they did below, Respondents argue on appeal that, despite the merger principle discussed above, they are contractually entitled to their attorney fees in this case under the doctrine of judicial estoppel. Respondents argue that the trial court correctly ruled that Salcido’s successful effort to obtain attorney fees under the Settlement Agreement in the bankruptcy proceeding precludes her from disputing the applicability of the Settlement Agreement’s attorney fee clause here.

Judicial estoppel is a discretionary doctrine that “ ‘precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position.’ ” (*Aguilar v. Lerner* (2004) 32 Cal.4th 974, 986 (*Lerner*), quoting *Koo v. Rubio’s Restaurants, Inc.* (2003) 109 Cal.App.4th 719, 735.) Judicial estoppel may preclude a particular argument when “ ‘(1) the same party has taken two

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not apply in this case; the Judgment here did not include any amount for attorney fees.

positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.’ ” (*Lerner*, at pp. 986–987, quoting *Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 183; *Scripps Clinic v. Superior Court* (2003) 108 Cal.App.4th 917, 943.)

Salcido did not take a different position in the bankruptcy proceeding concerning the principle of merger discussed above. Indeed, the issue did not arise at all. Salcido obtained attorney fees in the bankruptcy proceeding following a default judgment on her adversary complaint. Her motion for attorney fees based on the attorney fee provision in the Settlement Agreement was apparently unopposed. Thus, Salcido had no reason to make *any* argument concerning the merger doctrine, which, as an aspect of *res judicata*, was an affirmative defense that Sharma was required to assert. (See Fed. Rules Civ. Proc., rule 8(c)(1), 28 U.S.C.; *Hulsey v. Koehler* (1990) 218 Cal.App.3d 1150, 1156–158.) Sharma’s default waived that defense. Judicial estoppel does not require Salcido to waive her defense based on the merger doctrine in this action just because Sharma chose not to assert that defense in the bankruptcy action.

Moreover, even if Salcido were precluded from asserting the merger doctrine, she would not be judicially estopped from arguing that the attorney fee provision in the Settlement Agreement is inapplicable to her claims in this case under a plain understanding of the language in the agreement. The position she took in the bankruptcy action is consistent with that argument. Her request for attorney fees under the Settlement

Agreement in the bankruptcy action was based on a very different claim.

As mentioned, in the bankruptcy proceeding Salcido claimed that the Judgment should not be discharged because it was based on fraud. That alleged fraud included both “initially defrauding [Salcido] into giving [Sharma] loans and inducing [Salcido] to accept the Stipulated Judgment, which [Sharma] never intended to satisfy.” (See 11 U.S.C., § 523(a)(2)(A).) In her motion for attorney fees under the Settlement Agreement in the bankruptcy proceeding, she argued that she filed the adversary complaint “to recover the same obligation” that Sharma owed under the Settlement Agreement. She pointed out that her complaint “alleged, among other things, that [Sharma] fraudulently induced [Salcido] to enter into that Settlement Agreement, having no intention to pay the debt at that time.”

Thus, Salcido’s complaint in the bankruptcy proceeding was directly linked to the circumstances surrounding the Settlement Agreement and the nature of the claims that it settled. Her adversary claim would have required the bankruptcy court to “interpret” the Settlement Agreement by analyzing the claims underlying the settlement to determine whether the ensuing Judgment was for fraud. And her claim requested the court to “enforce” the Settlement Agreement by giving effect to the Judgment that Sharma agreed could be entered.

In contrast, as discussed above, Salcido’s complaint in this case did not seek any relief based upon the Settlement Agreement, but rather sought damages for alleged violations of court orders. Her argument in the bankruptcy case that the Settlement Agreement’s attorney fee provision applied to her

claim in that case is therefore very different from, and not inconsistent with, her argument that the fee provision is inapplicable here.

We also reject Respondents' argument that *International Billing Services, Inc. v. Emigh* (2000) 84 Cal.App.4th 1175 supports the application of judicial estoppel here. It is questionable whether that decision is still good law. (See *Hart v. Clear Recon Corp.* (2018) 27 Cal.App.5th 322, 330–331.) *International Billing Services* stands only for the proposition that, where a plaintiff asserts a claim for attorney fees under a contract, the plaintiff is judicially estopped from denying that the defendant is entitled to attorney fees if the defendant prevails. (*International Billing Services*, at pp. 1186–1192.) The court expressly limited its ruling to the situation “where a party brings a breach of contract action and the contract contains some provision which the party asserts operates as a fees provision.” (*Id.* at p. 1187.) As discussed above, Salcido made no such claim here.

**DISPOSITION**

The order awarding attorney fees is reversed. Salcido is entitled to her costs on this appeal.

NOT TO BE PUBLISHED.

LUI, P. J.

We concur:

ASHMANN-GERST, J.

CHAVEZ, J.