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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

HALEY DARIA,

Plaintiff and Appellant,

v.

LEVEL STUDIOS, INC., et al.,

Defendants and Respondents.

2d Civil No. B249801
(Super. Ct. No. SB1341441)
(Santa Barbara County)

Level Studios, Inc. (Level) and Thomas Adamski (collectively "respondents") are the prevailing parties in an action brought by Haley Daria. The trial court determined, inter alia, that Daria's claims were precluded by an earlier settlement agreement. Respondents moved for an award of attorney fees based on a provision in the agreement entitling the prevailing party to fees in any dispute arising under it. (See Civ. Code, § 1717.)¹ The trial court granted the motion.

Daria contends the trial court erroneously relied upon a "materially altered" version of the settlement agreement. This argument was not raised in the trial court; therefore, we do not consider it on appeal. (See *Hepner v. Franchise Tax Bd.* (1997) 52 Cal.App.4th 1475, 1486.) We reject her other contentions and affirm.

¹All statutory references are to the Civil Code unless otherwise stated.

FACTS AND PROCEDURAL BACKGROUND

Daria owned stock in Level's predecessor, Web Associates, Inc. ("Web Associates"). When Web Associates informed its stockholders that it was considering a merger with WA Associates, LLC, Daria objected. In 2007, Web Associates and Daria resolved her concerns about the merger through a comprehensive Terms of Settlement Agreement and Release. The settlement agreement included a section 1542 waiver by Daria of all known and unknown claims against Web Associates and its officers, directors and successors in interest, including respondents. It also provided that "[i]n any dispute arising under this Agreement, the prevailing party shall be entitled to attorneys' fees and costs, including all expenses reasonably necessary and actually incurred by the prevailing party."

Subsequently, Daria sued respondents and others for fraud, conversion and related claims relating to the merger. After successfully demurring to certain causes of action, respondents moved for summary judgment on the remaining claims. The trial court granted the motion, concluding the claims were released under the settlement agreement. Daria appealed the judgment, which we affirmed. (*Daria v. Level Studios, Inc.* (July 24, 2014, B243554) [nonpub. opn.])

As the prevailing parties, respondents moved for an award of attorney fees under section 1717. Following a hearing on November 14, 2012, the trial court granted the motion and amended the judgment to award respondents \$254,886 in fees. Daria appeals.

DISCUSSION

"[T]he party prevailing on the contract" is entitled to recover reasonable attorney fees if the contract "specifically provides" for such recovery. (§ 1717, subd. (a); see Code Civ. Proc., § 1033.5, subd. (a)(10)(A).) A trial court's determination of whether a party is entitled to an award of attorney fees, and the calculation of such a fee award,

are both reviewed for abuse of discretion. (*Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311, 315.)

Daria contends the trial court abused its discretion by awarding attorney fees based on the fee clause in the settlement agreement. As in her previous appeal, Daria's briefs do not comply with the rules of appellate procedure. For the most part, they reargue the merits of that appeal and raise a number of disjointed, unintelligible arguments unrelated to the fee award. Daria also fails to provide an adequate record for our review. Her four-volume appendix is largely irrelevant, as it does not include the motion, her opposition or a reporter's transcript of the hearing. The only documents particularly germane to this appeal are the declaration of respondents' counsel filed in support of the motion, the exhibits attached to the declaration, including the settlement agreement, the court's tentative decision to grant the motion (which we discovered in the clerk's file) and the amended judgment.²

Daria contends the copy of the settlement agreement provided with the motion, which is attached as Exhibit A to this opinion, is a "materially altered" version of the actual agreement. She acknowledges signing the agreement, but claims that before signing it, she modified it to include additional terms. Daria asserts respondents "whited out" those additional terms and provided her, and later the trial court, with the altered version. She does not have a copy of the unaltered version and claims respondents have refused to produce it.

It is appellant's burden to affirmatively demonstrate error. (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 132-133; *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) That Daria is self-represented does not change this burden.

²After filing her notice of appeal, Daria filed a series of motions and requests for judicial notice in an attempt to augment the record with documents she claims evidence a fraud upon the trial court. We denied the requests, with one exception. We granted her request to take judicial notice of the record in her earlier appeal (No. B243554). Our review of that extensive record does not disclose any additional documents relating to the motion for attorney fees.

(*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246-1247; *Dowden v. Superior Court* (1999) 73 Cal.App.4th 126, 129-130.) Although she claims the trial court improperly based the fee award on a "materially altered" version of the agreement, nothing in the record before us suggests that she objected to the version provided with the motion or that she submitted evidence to demonstrate the purported alteration. The issue is not mentioned in the trial court's four-page tentative ruling, and neither Daria's opposition to the motion nor the hearing transcript is available for review. Absent any indication the issue was raised in connection with the motion, we deem it forfeited on appeal. (See *SCI Calif. Funeral Services, Inc.* (2012) 203 Cal.App.4th 549, 563-565; *Duronslet v. Kamps* (2012) 203 Cal.App.4th 717, 726 [failure to object to evidence admitted by the trial court forfeits on appeal the argument such evidence was inadmissible]; *Hepner v. Franchise Tax Bd.*, *supra*, 52 Cal.App.4th at p. 1486 ["Points not raised in the trial court will not be considered on appeal"].)

The trial court's tentative ruling reflects that Daria opposed the motion on four grounds: (1) it was premature; (2) the settlement agreement was "rescinded" by the court; (3) an insurance carrier was responsible for respondents' defense costs; and (4) there was incompetent proof of the amount of fees incurred. The court properly rejected these arguments. The motion was appropriately filed following entry of judgment. (§ 1717, subd. (b)(1).) There was no evidence of any rescission of the agreement, and it is well settled that a prevailing party may recover attorney fees regardless of whether they are being paid by an insurance carrier. (*Lolley v. Campbell* (2002) 28 Cal.4th 367, 373; *Staples v. Hoefke* (1987) 189 Cal.App.3d 1397, 1410.) As to reasonableness of the fees, the court remarked: "As set forth in Exhibit F, [counsel] spent a total of 1112.9 hours for a total fee of \$254,886[], yielding an average rate of \$229.03 per hour. The court agrees with defendants that the rates charged by defendants' counsel are reasonable. The court is very familiar with this litigation. The action has been tenaciously litigated by Daria, which necessarily caused defendants to incur substantial

fees in defense of the action. Daria presents no evidence that the amount of fees claimed is unreasonable." To the extent Daria challenges these findings, she has failed to demonstrate error.

DISPOSITION

The amended judgment awarding attorney fees to respondents is affirmed. Respondents shall recover their costs on appeal.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

EXHIBIT A

TERMS OF SETTLEMENT AND RELEASE

1. Upon execution of this Agreement by Daria and the issuance of an additional Thirty Three Thousand (33,000) shares of Web Associates Common Stock (the "Additional Shares") to Daria by Web Associates, Daria hereby completely releases and forever discharges Web Associates, WA and each of their past or present and future officers, directors, employees, insurers, agents, attorneys, representatives, partners, members, owners, predecessors and successors-in-interest, of and from any and all claims, including without limitation any claims related to the Merger, Merger Agreement or the issuance of shares to Daria or the ownership of shares by Daria. Daria further agrees to consent to the Merger with respect to both the Existing Shares and the Additional Shares and to not seek dissenters' or appraisal rights with respect to any such shares. Daria acknowledges that upon consummation of the Merger all such shares will be exchanged for consideration by the Exchange Agent under the Merger Agreement and Escrow Agreement in accordance therewith. Daria further agrees that following the Merger and the tendering of her shares to the Exchange Agent in accordance therewith, she will not dispute and will accept all final decisions of Web Associates, WA, the Exchange Agent and the Stockholders' Representative under the Merger Agreement and Escrow Agreement so long as she is treated in a manner substantially consistent with the other former stockholders of Web Associates.

2. This Agreement constitutes and is intended as a full and complete release of any and all claims that Daria might have by reason of the matters described above, and all related subsequent events and proceedings. Daria hereby warrants and represents that she is unaware of any other unrelated claims or potential claims against Web Associates or WA of any kind. This Agreement constitutes a full settlement of any and all claims related to or arising out of such events, occurrences, and proceedings, and Daria hereby releases Web Associates, WA and each of their past or present and future officers, directors, employees, insurers, agents, attorneys, representatives, partners, members, owners, predecessors and successors-in-interest,

from any and all liability of any nature whatsoever for a loss, damage, or injury to person or property, specifically including any expense which she may have been put, and also including any and all consequential and/or punitive damage to her on account of injuries or damages to others as well as for all consequences, effects and results of any loss or injury whether the same are known or unknown, or expected or unexpected or have already appeared and developed and may be latent, or may in the future appear or develop. Further, Daria hereto expressly waives all of her rights under California Civil Code §1542 which provides:

A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with any debtor.

4. Daria hereby waives and relinquishes any right or benefit which she might have under Section 1542 of the Civil Code of the State of California, and all similar provisions of law of other jurisdictions, to the extent that she might lawfully waive each and all such rights, and benefits pertaining to the subject matter of this instrument. In connection with such waiver and relinquishment, Daria hereby acknowledges that she is aware that she may hereafter discover facts in addition to or different from those which she now knows or believes to be true with respect to the subject matter of this Agreement, but that it is her intention to hereby fully, finally and forever to settle and release all matters, disputes and differences, known or unknown, suspected or unsuspected, which does now exist, may exist or heretofore may have existed by her against Web Associates, WA, and each of their past or present and future officers, directors, employees, insurers, agents, attorneys, representatives, partners, members, owners, predecessors and successors-in-interest, and assigns and that, in furtherance of such intention, the release given herein shall be and remain in effect as a full and complete general release notwithstanding the discovery or existence of any such additional or different facts.

5. Daria hereby acknowledges that she has had the opportunity to consult with an attorney regarding this Agreement and the dispute which is being settled and compromised hereby. Other than the covenants and representations set forth herein, there have been no promises, representations, or inducements of any kind made to induce Daria's agreement to the terms herein.

6. This Agreement shall be binding upon and inure to the benefit of the respective parties hereto, and their past or present and future officers, employees, insurers, agents, attorneys, representatives, partners, members, owners, predecessors and successors-in-interest.

7. This Agreement memorializes and constitutes the entire Settlement Agreement and Release of All Claims between the parties, and there are no other agreements modifying its terms. The terms of this Agreement can only be modified in writing.

8. The parties to this Agreement hereby agree that it may be executed and signed in counterpart.

9. In any dispute arising under this Agreement, the prevailing party shall be entitled to attorneys' fees and costs, including all expenses reasonably necessary and actually incurred by the prevailing party.

9A. Notwithstanding anything in the foregoing to the contrary, Daria shall not be releasing any claim she may have against Joseph Elliott with respect to up to 12,000 shares of Web Associates Common Stock held by Joseph Elliott. Any shares Daria may hereafter acquire from Joseph Elliott or from any other person shall be treated in the same manner as her Existing Shares and Additional Shares for the purposes of this Agreement.

10. The parties hereby agree not to disclose the terms of this Agreement, and to keep the terms of this Agreement confidential.

January 10, 2007

Haley Daria
Haley Daria

January 10, 2007

WEB ASSOCIATES, INC.

By:

TOM ADAMSILI, CEO

Donna D. Geck, Judge
Superior Court County of Santa Barbara

Haley Daria, in pro. per., for Plaintiff and Appellant.

Kaufman Dolowich, Voluck & Gonzo, LLP, Kathleen M. Hurly, Gabriel
Rubin for Defendants and Respondents.