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CERTIFIED FOR PARTIAL PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

COUNTY OF SACRAMENTO,

Plaintiff and Appellant,

v.

JAMES D. SANDISON et al.,

Defendants and Respondents.

C058396

(Super. Ct. No.
00AS05196)

APPEAL from a judgment of the Superior Court of Sacramento County, Stacy Boulware Eurie, Judge. Affirmed.

Robert A. Ryan, Jr., County Counsel, Lura L. O'Brien, Keith W. Floyd, Deputies County Counsel, for Plaintiff and Appellant.

Millstone, Peterson & Watts, Glenn W. Peterson for Defendants and Respondents.

This is an appeal from an order awarding attorney's fees, pursuant to contract, in a contempt proceeding to enforce an injunction to abate a nuisance.¹

Appellant County of Sacramento contends the trial court erred in awarding the fees because: (1) there was no final resolution of its claim warranting the finding that respondents were prevailing parties, and (2) the amount of the award should have been limited, under Government Code section 25845 (hereafter section 25845), to the amount of attorney's fees incurred by the county. We disagree.

In the published portion of the opinion² we conclude that the provision of section 25845, subdivision (c), limiting the amount of the prevailing party's attorney fees to those incurred by the county, upon which the county relies, applies only to attorney's fees authorized by a county ordinance. By contrast, subdivision (b) provides that the recovery of attorney fees not

¹ Five months after the completion of the briefing in this case, the parties, on April 9, 2009, submitted a request for dismissal of the appeal. We decline the request. "Although this development suggested that the case had become moot, and, as a general rule, [an appellate] court will not render an advisory opinion [citation omitted], we instead follow the well established line of judicial authority recognizing an exception to the mootness doctrine, and permitting the court to decline to dismiss a case rendered moot by stipulation of the parties where the appeal raises issues of continuing public importance." (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1202, fn. 8, citations omitted.)

² The Reporter of Decisions is directed to publish the opinion except for Part I of the Discussion.

predicated upon a county ordinance "shall be in addition to and shall not limit any prevailing party's right to recover costs pursuant to [Code of Civil Procedure] Sections 1032 and 1033.5" Subdivision (a)(10) of Code of Civil Procedure section 1033.5 includes as costs attorney's fees authorized by contract.

We shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In September 2000 the county filed an action against James and Julianne Sandison (the Sandisons) as owners of a parcel on Freeman Road in Wilton, alleging that they were maintaining a second dwelling on the property without required conditional use and building permits. In April 2001 the parties entered into a written settlement agreement and a written stipulation for a permanent injunction. The stipulation was approved and entered by the court in January 2002.

The stipulated injunction provides that the Sandisons are: (1) not to maintain the second dwelling unit without a conditional use permit, (2) not to take any construction actions pertaining to the structure without obtaining appropriate permits and adhering to them, and (3) to remove the structure or apply for, be granted, and adhere to a replacement building permit covering conversion of the barn structure to a second unit "as originally required." The settlement agreement, executed contemporaneously, provides: "If it is necessary to enforce the Permanent Injunction, or otherwise enforce either parties' rights regarding issues raised in this complaint against [the Sandisons], the prevailing party shall be entitled

to recover reasonable attorney's fees and costs from non-prevailing party."

Sometime during 2007 the county attempted to enforce the injunction through contempt proceedings. The Sandisons were served with an order to show cause re contempt in violating the injunction. The matter came on for hearing on September 21, 2007. The Sandisons contended that they had substantially complied with the injunction by applying for a building permit they believed complied with the building code in effect at the time the barn structure was originally built in 1979. They contended that the county had wrongfully rejected the application because it did not comply with current codes.

After three days of hearing, the trial court found that the county failed to meet the burden of showing willful violation of the injunction. The court said that the language in the injunction concerning the time of the applicable building standards "is vague, ambiguous, and unartful at best."

On October 29, 2007, the Sandisons filed a written motion for an award of \$44,089.50 in attorney's fees for the contempt proceedings pursuant to Civil Code section 1717.³ They relied

³ Civil Code section 1717, subdivision (a), in pertinent part, is as follows:

"(a) 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,

upon the attorney's fees provision in the settlement agreement. The county opposed the motion. On December 26, 2007, after oral argument and supplemental briefing, the court, in a written ruling, awarded fees in the amount of \$29,674. The county appeals from the order awarding the attorney's fees. The Sandisons make no appearance on appeal.

DISCUSSION

I

The county contends that the trial court erred in awarding any attorney's fees to the Sandisons. The county argues that the trial court erred in making the prerequisite finding that the Sandisons were the "prevailing parties" because the court did not make a determination in the contempt proceedings on "the ultimate question of code compliance." The contention of error is not meritorious.

To warrant an award of attorney's fees pursuant to section 1717 there must be a party "prevailing on the contract" under subdivision (b).⁴ Similarly, an attorney's fees award under

shall be entitled to reasonable attorney's fees in addition to other costs."

Further references to section 1717 are to this statute.

⁴ Section 1717, subdivision (b) in pertinent part is as follows. "(b) (1) The court, upon notice and motion by a party, shall determine who is the party prevailing on the contract for purposes of this section, whether or not the suit proceeds to final judgment. Except as provided in paragraph (2), the party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract."

Government Code section 25845, subdivision (c),⁵ is for a "recovery . . . by the prevailing party" The county argues the Sandisons were not prevailing parties because the ultimate contract claim, violation of the settlement agreement *vel non*, was not resolved in the contempt proceedings. The county points to a passing remark in *Hsu v. Abbara* (1995) 9 Cal.4th 863, 876: "[T]he prevailing party determination 'is to be made only upon *final resolution of the contract*" However, this remark in *Hsu* refers to success only on an interim appeal which results in a remand for retrial in the same, uncompleted action or proceeding.

The county also cites *In re Estate of Drummond* (2007) 149 Cal.App.4th 46, which does support its argument. In *Drummond* the court of appeal upheld a denial of attorney's fees by the trial court in a probate proceeding. The proponent of the award won a procedural determination that the claim should have been

⁵ Section 25845, subdivision (c) provides: "A county may, by ordinance, provide for the recovery of attorneys' fees in any action, administrative proceeding, or special proceeding to abate a nuisance. If the ordinance provides for the recovery of attorneys' fees, it shall provide for recovery of attorneys' fees by the prevailing party, rather than limiting recovery of attorneys' fees to the county if it prevails. The ordinance may limit recovery of attorneys' fees by the prevailing party to those individual actions or proceedings in which the county elects, at the initiation of that individual action or proceeding, to seek recovery of its own attorneys' fees. In no action, administrative proceeding, or special proceeding shall an award of attorneys' fees to a prevailing party exceed the amount of reasonable attorneys' fees incurred by the county in the action or proceeding."

pursued, under the compulsory cross-complaint rule, in another active pending action. The *Drummond* opinion reasons as follows. "The dismissal of his petition in the probate matter did not defeat his contract claims; it merely deflected or forestalled them. By achieving that result, appellants no more 'prevailed' than does a fleeing army that outruns a pursuing one. Living to fight another day may be a kind of success, and surely it is better than defeat. But as long as the war goes on, neither side can be said to have prevailed." (*Id.* at p. 53.) However, we distinguish *Drummond* on two grounds. In that case an alternative proceeding was presently pending. Thus, the resolution there "bore less resemblance to the final termination of a special proceeding than to the sustaining of a plea in abatement on grounds that an action on the same subject matter was already pending in another forum." (*Id.* at p. 52.)

The second distinction is that in *Drummond* the trial court had denied the request for fees. "Moreover, even accepting appellants' premise that the court below had the power to award fees, it need only have done so if it found, or was required by law to find, that appellants had prevailed on the contract. We think the interim nature of appellants' success provided a sound basis for a discretionary finding that neither party prevailed on the contract. We must therefore infer, in support of the order under review, that the trial court made such a finding, and that the order denying fees rests upon it. That being so, the order cannot be disturbed on appeal." (149 Cal.App.4th at

p. 54.) Thus, the holding in *Drummond* is that in those circumstances the denial of a fee award was not an abuse of the trial court's discretion.

In this case, unlike *Drummond*, we review the *grant* of an award, *after the final termination of a special proceeding*. "Although prosecuted under the title of the main action or proceeding, contempt is nevertheless a separate proceeding." (3 Witkin, Cal. Proc. (5th ed. 2008) Actions, § 69, p. 142.) In this case there was no other active proceeding pending in which the same contract claims were already in issue. Thus, *Drummond* is inapposite; the applicable authority is cases in which awards of attorney fees to a party obtaining a judgment in a discrete legal proceeding have been upheld, even though further litigation was possible. (See *Otay River Constructors v. San Diego Expressway* (2008) 158 Cal.App.4th 796, 807-808 and cases cited therein.) The trial court did not abuse its discretion in finding that the Sandisons were prevailing parties for purposes of an attorney's fees award in the contempt proceeding. (See generally *Share v. Casiano Bel-Air Homeowners Assn.* (1989) 215 Cal.App.3d 515.)

II

The county contends that the trial court erred in making an award in fees "exceed[ing] the amount of reasonable attorneys' fees incurred by the county in the action or proceeding" as provided in section 25845, subdivision (c). The county argues that the limitation in section 25845 supersedes any right of

greater recovery under the contract provision in the settlement agreement. The argument is unpersuasive and the contention of error is not meritorious.

The county principally relies upon *Carver v. Chevron U.S.A., Inc.* (2002) 97 Cal.App.4th 132.⁶ In *Carver* service station franchisees brought an action against Chevron claiming breach of the agreements and the Cartwright Act. They lost and the trial court awarded Chevron more than \$6 million dollars attorneys fees, expert fees, and costs for the defense of both contract and Cartwright Act claims. The court of appeal reversed and remanded for reduction of the amount of the award incurred in defense of the Cartwright Act claims. (*Id.* at p. 155.) The *Carver* opinion decided that the statutory attorney's fees provision is not reciprocal, the award could only be made in favor of the party claiming injury under the Cartwright Act. (*Id.* at p. 147.) It also decided that "the Cartwright Act fees provision is the kind of 'other statutory provision' that will override a general litigation costs entitlement under Code of Civil Procedure section 1032, for purposes of assessing attorney fees as costs under Code of Civil Procedure section 1033.5,

⁶ The county also points to *Parrott v. Mooring Townhomes Assn.* (2003) 112 Cal.App.4th 873. However, *Parrott* does not support the county's claim that the statute overrides a right to a contractual fee award. *Parrott* says only that where the fee award is proper under a statutory fee award provision, it cannot be overridden by a limitation that only pertains to contractual fee awards.

subdivision (a)(10).”⁷ (*Ibid.*) That is to say, the Cartwright Act non-reciprocal fees provision overrode the attorney fees clause in the lease agreements upon which Chevron relied. (*Ibid.*)

The county’s implicit argument is that whenever there is an applicable statutory attorney’s fees provision, a limitation in that provision precludes the parties from contracting for an award without such a limitation. We do not think that *Carver* can or should be extended so broadly. Rather, the question is whether the statutory attorney’s fees provision expressly, or the policy of the statute implicitly, overrides the freedom to contract for a different outcome.

The county relies upon the last sentence in section 25845, subdivision (c) (see fn. 5, *ante*, at p. 6.): “In no action, administrative proceeding, or special proceeding shall an award of attorneys’ fees to a prevailing party exceed the amount of reasonable attorneys’ fees incurred by the county in the action or proceeding.” This sentence certainly applies where the county has, as here, enacted an ordinance under the

⁷ Section 1032, subdivision (b) provides: “(b) *Except as otherwise expressly provided by statute*, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding.” (Italics added.)

Section 1033.5, subdivision (a)(10) provides: “(a) The following items are allowable as costs under Section 1032: . . . [¶s] (10) Attorney fees, when authorized by any of the following: [¶] (A) Contract. [¶] (B) Statute. [¶] (C) Law.”

authorization of section 25845 providing for the recovery of attorneys' fees in any action or proceeding to abate a nuisance and a recovery is sought under the ordinance. More questionable is whether it should apply to a recovery where there is an ordinance but recovery is sought under some other authority. More problematic still is whether it should apply to a recovery where there is no such ordinance and recovery is sought under some other authority. The optional nature of such an ordinance suggests that the policy concerning limitation of attorney's fees awards should pertain only to awards under the authorization of section 25845.

This view finds textual support in section 25845, subdivision (b):

"In any action to abate a nuisance, whether by administrative proceedings, judicial proceedings, or summary abatement, the owner of the parcel upon which the nuisance is found to exist shall be liable for all costs of abatement incurred by the county, including, but not limited to, administrative costs, and any and all costs incurred in the physical abatement of the nuisance. Recovery of costs pursuant to this section shall be in addition to and shall not limit any prevailing party's right to recover costs pursuant to Sections 1032 and 1033.5 of the Code of Civil Procedure or any other provision of law."

As related, recovery of costs pursuant to Code of Civil Procedure section 1033.5, subdivision (a)(10), (fn. 7, *ante*, p. 10) includes, inter alia, attorney's fees, when authorized by contract. Thus, section 25845, subdivision (b), indicates that

a recovery of attorney's fees authorized by contract is to be in addition to, not limited by, section 25845.

For all the foregoing reasons, we conclude that section 25845 is not, in Carver's words: "the kind of 'other statutory provision' that will override a general litigation costs entitlement under Code of Civil Procedure section 1032, for purposes of assessing attorney fees as costs under Code of Civil Procedure section 1033.5, subdivision (a)(10)." The trial court did not err in failing to apply the limitation of section 25845 to the contractual award of attorney's fees made in this case.

DISPOSITION

The judgment (order awarding attorney's fees) is affirmed.

BLEASE, Acting P. J.

We concur:

SIMS, J.

NICHOLSON, J.