

MARK ROMEO, Plaintiff and Respondent, v. KATZIR'S FLOOR AND HOME DESIGN, INC., et al., Defendants and Appellants.

G033439

**COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT,
DIVISION THREE**

2004 Cal. App. Unpub. LEXIS 8827

September 28, 2004, Filed

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PRIOR HISTORY: Appeal from a postjudgment order of the Superior Court of Orange County, Jane D. Myers, Commissioner. No. 02CC13756.

DISPOSITION: Affirmed.

COUNSEL: Law Office of Martin L. Horwitz and Martin L. Horwitz for Defendants and Appellants.

Karlin & Karlin and Marc A. Karlin for Plaintiff and Respondent.

JUDGES: FYBEL, J.; SILLS, P. J., MOORE, J. Concurred.

OPINION BY: FYBEL

OPINION

INTRODUCTION

Mark Romeo purchased hardwood flooring for his house from Katzir's Floor and Home Design, Inc., doing business as National Hardwood Flooring and Moulding (National). National recommended a contractor to install the flooring. When parts of the flooring buckled, Romeo sued National and its president Omer Katzir (collectively defendants) under the Consumer Legal Remedies Act (CLRA) (*Civ. Code, § 1750 et seq.*), and for violation of the unfair competition law (*Bus. & Prof. Code, § 17200* [*2]).

Shortly before trial, Romeo requested a dismissal without prejudice of all claims against defendants; the trial court dismissed Romeo's case without prejudice.

Defendants filed a motion for statutory and contractual attorney fees, stating: "This motion is brought pursuant to the attorney's fee provision in the invoice[] signed by the Plaintiff, *Civil Code § 1780*[], subdivision](d), Plaintiff's request for attorney's fees in his complaint, and the fact that the moving party prevailed in the underlying litigation." (Italics omitted.) The trial court denied the motion and defendants appealed.

We affirm because: (1) the trial court did not abuse its discretion in declining to find Romeo's prosecution of the case was not in good faith under the CLRA (*Civ. Code, § 1780, subd. (d)*); (2) statutory attorney fees were not recoverable for the unfair competition law claim (*Bus. & Prof. Code, § 17203; Korea Supply Co. v. Lockheed Martin Corp. (2003) 29 Cal.4th 1134, 1148*); and (3) Romeo's voluntary dismissal of the complaint before trial meant defendants were not prevailing parties for purposes [*3] of recovering contractual attorney fees (*Civ. Code, § 1717, subd. (b)(2); Santisas v. Goodin (1998) 17 Cal.4th 599, 602*).

STATEMENT OF FACTS

Romeo bought hardwood flooring for his house from National. National recommended Hugo Rodriguez to install the flooring. National invoiced Rodriguez for the flooring and claimed Romeo signed the invoice.

Two months after Rodriguez installed the hardwood floors, they buckled in several places. Rodriguez blamed the problem on moisture on or under the concrete slab. An inspector from Romeo's insurance company concluded the buckling was due to faulty installation. Romeo contacted Katzir, who visited Romeo's home with a video camera. Romeo claimed Katzir made material statements regarding Katzir's referral relationship with Rodriguez, and Rodriguez's violation of "fundamental principals [*sic*] of hardwood flooring installation," all of which were recorded by the video camera.

Rodriguez later offered to repair the buckled portions of the hardwood flooring. Romeo refused the offer, and sued National and Katzir for violations of the CLRA (*Civ. Code, § 1750 et seq.*) and the [*4] unfair competition law (*Bus. & Prof. Code, § 17200*). (Romeo

also sued Rodriguez, who defaulted.)

The case against National and Katzir was heavily litigated, with extensive discovery and motions filed by both sides. One year after Romeo filed the complaint, Katzir declared his car had been stolen, and the videotape had been inside the car at the time. Two months later, Romeo filed a motion for terminating, evidentiary and/or issue preclusion sanctions because of the loss of the videotape; the court denied the motion. Two weeks before trial, Romeo filed a request for dismissal without prejudice of his complaint. The clerk of the court rejected the request for dismissal, apparently because of a typographical error. Romeo did not appear on the day set for trial, and the trial court dismissed Romeo's complaint against defendants without prejudice.

Defendants moved for attorney fees, contending: (1) Romeo did not bring his CLRA claim in good faith, therefore making attorney fees recoverable under *Civil Code section 1780, subdivision (d)*; and (2) National entered into a contract with Romeo, which provided for recovery of attorney fees. [*5] The court's order denying the motion reads as follows: "IT IS HEREBY ORDERED that the Defendants' Motion for Attorney's Fees, made after entry of dismissal of plaintiff's complaint, is hereby denied." Defendants appealed.¹

¹ Defendants' notice of appeal was premature. At the hearing on the motion for attorney fees on December 11, 2003, the court announced the motion would be denied. Defendants filed a notice of appeal on January 16, 2004. The order denying the motion, however, was not filed until January 29, 2004. We use our discretion to treat the notice as filed immediately after entry of the order. (*Cal. Rules of Court, rule 2(d)(2)*; *Village Nurseries v. Greenbaum* (2002) 101 Cal.App.4th 26, 36.)

THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANTS' MOTION FOR ATTORNEY FEES.

Attorney fees are recoverable only when authorized by contract, statute or law. (*Code Civ. Proc., § 1033.5, subd. (a)(10)*.) Here, defendants claimed a right to [*6] recover attorney fees incurred defending the CLRA claim pursuant to statute (*Civ. Code, § 1780, subd. (d)*) and a right to recover fees incurred defending the unfair competition law claim pursuant to contract (the invoice from National to Rodriguez for the flooring materials).

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANTS' MOTION FOR ATTORNEY FEES UNDER CIVIL CODE SECTION 1780, SUBDIVISION (D).

Defendants moved for statutory attorney fees on the CLRA claim under *Civil Code section 1780, subdivision*

(*d*), which provides, "reasonable attorney's fees *may* be awarded to a prevailing defendant upon a finding by the court that the plaintiff's prosecution of the action was not in good faith." (Italics added.)

"On appeal from a denial of a request for attorney fees [under *Civil Code section 1780, subdivision (d)*], we presume the order of the trial court is correct, and the standard of review is abuse of discretion." (*Corbett v. Hayward Dodge* (2004) 119 Cal.App.4th 915, 927.) Discretion is abused when, in its exercise, the trial court "exceeds the [*7] bounds of reason, all of the circumstances before it being considered." (*Loomis v. Loomis* (1960) 181 Cal. App. 2d 345, 348-349, 5 Cal. Rptr. 550.) When challenging a discretionary trial court ruling, the appellant bears the burden of establishing an abuse of discretion. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 331, 216 Cal. Rptr. 718.)

Defendants argue Romeo's prosecution of the action was not in good faith because: (1) Romeo knew he had contractually prevented himself from seeking relief for the causes of action he alleged; (2) Romeo knew or should have known he could not sue under the CLRA because Rodriguez offered Romeo an adequate remedy; and (3) Romeo could not prove his claim for violation of the unfair competition law. In considering the denial of a motion for attorney fees under *Civil Code section 1780, subdivision (d)*, it is not our role as an appellate court to weigh the evidence or determine the merit of either party's case. (*Corbett v. Hayward Dodge, supra*, 119 Cal.App.4th at p. 929.)

Civil Code section 1780, subdivision (d) provides the trial court with broad discretion in [*8] awarding attorney fees. The court first must conclude a plaintiff's prosecution of the action was not in good faith and, if it does so, it *may* then award attorney fees. Here, the trial court was in a better position to determine whether Romeo pursued his case in good faith. The court saw the case progress, ruled on motions, and granted the request for dismissal without prejudice. In a declaration in opposition to the motion for attorney fees, Romeo explained the videotape was a "fundamental piece of evidence," without which his case would be more difficult to win. Romeo also expressed concerns regarding alleged threats made by Katzir to Romeo regarding his family, and alleged untrue assertions of fact made by Katzir to Romeo's employer, both of which Romeo claimed affected his willingness to pursue the lawsuit. The trial court could have relied upon Romeo's statements in denying the motion for attorney fees. (*Whyte v. Schlage Lock Co.* (2002) 101 Cal.App.4th 1443, 1458 ["the trial court judges the credibility of the declarations"].)

In *Corbett v. Hayward Dodge, supra*, 119 Cal.App.4th at page 929, the appellate court affirmed the trial court's [*9] denial of a motion for attorney fees

under *Civil Code section 1780, subdivision (d)*, stating: "The trial court found that the evidence did not support [the plaintiff's] claims when it granted [the defendant's] summary judgment motion. However, the court found that the pleadings did have merit and were supported by weak evidence. It therefore concluded that there was no bad faith tactics in pursuing this action. From the record before us, we see no clear evidence of an improper motive and [the defendant] 'points to no evidence which conclusively demonstrates [the plaintiff] pursued [the] action . . . in bad faith.' [Citation.] Accordingly, we must affirm the trial court." Here, too, there was no evidence conclusively demonstrating Romeo did not pursue the case in good faith. Therefore, we cannot conclude the trial court abused its discretion in denying the motion for attorney fees under *Civil Code section 1780, subdivision (d)*.

B. DEFENDANTS WERE NOT PREVAILING PARTIES FOR PURPOSES OF RECOVERING CONTRACTUAL ATTORNEY FEES.

Unlike the CLRA, the unfair competition law does not provide for recovery of attorney fees. (*Bus. & Prof. Code, § 17203 [*10]* ; *Korea Supply Co. v. Lockheed Martin Corp., supra, 29 Cal.4th at p. 1148.*)² Defendants therefore moved for contractual attorney fees based on provisions of the invoice for the flooring. Both in the trial court and on appeal, defendants argued the unfair competition act claim was "an action on the contract" because they had to defend themselves to retain the money they received for the flooring.

2 Defendants did not argue in the trial court they were entitled to recover attorney fees under a statutory provision in the unfair competition act. Instead, they argued they were entitled to recover attorney fees incurred defending against the unfair competition law claim because a contractual provision permitted recovery of attorney fees. As discussed in the text of this opinion, that contention lacks merit under *Civil Code section 1717, subdivision (b)(2)* and *Santisas v. Goodin, supra, 17 Cal.4th 599, 602*.

Because Romeo voluntarily dismissed his claims without [*11] prejudice before trial, any request for attorney fees incurred defending a contract claim was barred by operation of law. *Civil Code section 1717* governs claims for contractual attorney fees. When a plaintiff dismisses a contract-based claim without prejudice, there is no prevailing party: "Where an action [on a contract] has been voluntarily dismissed . . . , there shall be no prevailing party for purposes of this section." (*Civ. Code, § 1717, subd. (b)(2).*) This is exactly what happened here. Assuming for purposes of this analysis that Romeo's claim for violation of the unfair competition law was an action on the contract, the

voluntary dismissal of the complaint without prejudice before trial precluded defendants from being declared the prevailing parties, and therefore prevented them from recovering attorney fees as prevailing parties under the terms of the invoice.

Even if we disagreed with defendants' description of Romeo's claims as "an action on the contract," we would still conclude the trial court did not err in denying the motion for attorney fees. The leading case in this area is *Santisas v. Goodin, supra, 17 Cal.4th 599, 603, [*12]* in which the plaintiffs asserted claims for breach of contract and for fraud, arising out of a residential purchase agreement. That agreement contained a broadly worded attorney fees provision, entitling the prevailing party in any legal action "arising out of the execution of this agreement or the sale, or to collect commissions" to recover reasonable attorney fees. (*Ibid.*) The plaintiffs dismissed the complaint with prejudice before trial, and the defendants moved for recovery of attorney fees pursuant to the residential purchase agreement. (*Id. at pp. 603-604.*)

The California Supreme Court ultimately concluded the defendants could not recover their attorney fees incurred defending the claim for breach of contract, citing *Civil Code section 1717, subdivision (b)(2)*. (*Santisas v. Goodin, supra, 17 Cal.4th at p. 615.*) The Supreme Court concluded, however, the defendants' request for attorney fees incurred defending the tort or other noncontract claims was not barred under that statute. "This bar, however, applies *only* to causes of action that are based on the contract and are therefore within the scope of *section [*13] 1717*. If 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." (*Id. at p. 617.*)

Here, even if the invoice permitted recovery of attorney fees by defendants and Romeo's claims were noncontract claims, defendants would not automatically be entitled to attorney fees by virtue of the dismissal in their favor. In *Santisas v. Goodin, supra, 17 Cal.4th at page 622*, the Supreme Court expressly gave trial courts in cases such as the present one the discretion to determine whether there is a prevailing party when the complaint is voluntarily dismissed, stating: "[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 [*14] 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. [Citation.]" The invoice under which defendants sought recovery of attorney fees from Romeo did not mention, much less define, "prevailing party," and did not authorize or bar recovery of attorney fees in the event of a voluntary dismissal of a legal action. We conclude the trial court did not err in denying the motion for attorney fees.

DISPOSITION

The postjudgment order denying the motion for attorney fees is affirmed. Respondent to recover costs on appeal.

FYBEL, J.

WE CONCUR:

SILLS, P. J.

MOORE, J.