Case No. S226652

IN THE
SUPREME COURT OF
THE STATE OF CALIFORNIA

Disputesuite.com, LLC.,

Plaintiff and Respondent,

v.

Scoreinc.com et al.,

Defendants and Appellants.

After a Decision of the Court of Appeal
Second Appellate District, Division Two
Case No. B248692
Los Angeles County Superior Court, Case No. BC489083
Honorable James Chalfant

ANSWER BRIEF ON THE MERITS

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ISSUE PRESENTED

Were defendants entitled to an award of attorney fees under Civil Code section 1717 as the prevailing parties in an action on a contract when they obtained the dismissal of the action on procedural grounds pursuant to a Florida forum selection clause?

INTRODUCTION

Plaintiff and Respondent DisputeSuite.com, LLC ("DisputeSuite") brought this litigation in Los Angeles Superior Court seeking temporary and permanent injunctive relief barring its business partner, Defendant and Appellant Scoreinc.com, and Scoreinc.com's principals, Defendants and Appellants Joel S. Pate, and Joshua Carmona's (collectively "Score"), from misappropriating and disseminating DisputeSuite's confidential customer lists and proprietary software. Finding that DisputeSuite was likely to succeed on the merits, the trial court granted DisputeSuite preliminary injunctive relief and then, after concluding that Florida was the more appropriate forum for this litigation, extended that injunctive protection to allow DisputeSuite time to transition the litigation to Florida.

Despite the fact that litigation over the contract claims is ongoing in Florida—such that we do not know who will ultimately on this contract dispute—Score nonetheless immediately sought $84,640 in attorney's fees pursuant to Civil Code section 1717, claiming to be the "party who prevail[ed]" on the contract.

Score's position—that its interim success in litigating the venue of the contract action entitles it recover attorney's fees as the prevailing party—runs contrary to this Court's plain decisional law that "[t]he prevailing party determination under [section 1717] is to be made *only upon final resolution of the contract claims* . . . ." (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 876 [emphasis added].) Score relies on outlier cases that have

been repeatedly rejected by various courts. Consistent with *Hsu*, both the trial court and the Court of Appeal rejected Score's effort, ruling that "an interim procedural victory that results only in a relocation of an active contract dispute from one forum to another" does not constitute a "final resolution of the contract claims . . . ." (*DisputeSuite.com, LLC v. Scoreinc.com* (July 29, 2015) 235 Cal.App.4th 1261, 1268.)

Score complains that this result defeats the "reciprocity" principal of section 1717 because, according to Score, a plaintiff such as DisputeSuite is "without any exposure to contractual attorney's fees." (OBM 1.) Not so. Score may eventually be entitled to recover its attorney's fees if it ultimately prevails on the contract claims in Florida, just as section 1717 contemplates—but not before. Moreover, the trial court could have imposed sanctions if it believed DisputeSuite's decision to file this action in California was frivolous.

Score attempts to convince this Court that a deluge of plaintiff's attorneys will flood California's courts with lawsuits which belong elsewhere if the Court does not loosen the "final resolution" requirement for prevailing party determination in contractual attorney's fees requests. Such a concern does not withstand scrutiny. Contract disputes with an applicable attorney's fees provision are but a fraction of contract litigation (and likely a small fraction), and contract litigation itself is but one subset of civil litigation. Accordingly, the majority of litigation in this state proceeds pursuant to the American Rule that each party bears its own attorney's fees. If Score's prediction had any merit, then (1) we would see the problem manifest itself already in cases where no attorney's fee contractual provision is at issue; and (2) the issue would be better addressed through the creation of (or use of existing) procedural tools available in all cases, rather than revising the final resolution principles of section 1717.

The real harm would derive from following Score's lead. The reality is that both contractual attorney's fees provisions and forum selection clauses are tools which tend to benefit the parties with the greater bargaining power. One need look no further than the size of Score's fee request to sense the danger that interim fee awards would pose. Armed with an $84,640 reward for pushing the litigation from California to Florida, there can be no doubt that Score's next step would have been to use that $84,640 judgment as leverage to force DisputeSuite to settle its still-pending contractual claims—claims which the trial court determined that DisputeSuite was likely to prevail on—out of economic duress rather than substantive merit. Such potential and disproportionate consequences would chill plaintiffs, especially California consumers, from availing themselves of the right to seek redress with the California courts whenever there is even a chance of a jurisdictional or venue dispute.

For these reasons, the denial of Score's fee request should be affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

DisputeSuite is the leading provider of technology training resources, marketing, and business solutions to companies in the credit repair industry. (6 AA 1370.) As a result of its investment of more than one million dollars and five thousand employee hours, DisputeSuite has created and copyrighted computer software, which it markets to credit repair organizations ("CROs") to assist them in better serving their credit repair customers. (*Id.*) This technology is the best available in the credit repair industry. (*Id.*) Score provides outsourcing services to CROs; Score employed DisputeSuite's software product as a platform for its own outsourcing business. (1 AA 23-24.)

DisputeSuite and Score entered into a series of contracts. In May or June of 2010, the parties entered into a Profit Sharing Agreement. (*Id.*)

Pursuant to the agreement, DisputeSuite agreed to refer clients to Score for outsourcing services and to teach to Score DisputeSuite's confidential method for selling its software and other products, in exchange for a share of Score's profits. (*Id.*)

In September 2010, the parties entered into second contract, a Master Re-Seller Agreement. (5 AA 1192.) Pursuant to that agreement, DisputeSuite agreed that Score could re-sell or re-license DisputeSuite's software to certain end-users. (*Id.*) DisputeSuite further provided Score with a license to use its copyrighted software at a discounted price. (6 AA 1371.) As a licensed end-user of DisputeSuite's software and other confidential information, Score agreed to DisputeSuite's "Terms of Use End-User Agreement" ("EUA"). (*Id.*)

Finally, in 2012, the parties entered into a Cross-Marketing Agreement whereby Score agreed to provide outsourcing services only to CROs that utilized DisputeSuite's software, to market DisputeSuite's software exclusively, and to maintain all information, services, software, etc. provided to it by DisputeSuite as "proprietary and confidential information." (*Id.*) Under the Cross-Marketing Agreement, Score further agreed to pay DisputeSuite a commission on a weekly basis. (*Id.*) The EUA contained a California forum selection clause, while the Master Re-Seller and Cross Marketing Agreements contained Florida forum selection clauses. (5 AA 1192-93; 6 AA 1371.)

DisputeSuite met its commitments under these contracts by referring CROs that used its software to Score for outsourcing services. (6 AA 1371.) Score, on the other hand, failed to make the payments it promised. (*Id.*) Frustrated by Score's nonperformance, DisputeSuite notified Score that it was considering development of its own CRO outsourcing business.

In response, Score announced its intention to transfer the 130 CROs referred to it by DisputeSuite to a competing software provider. (6 AA

1372.) DisputeSuite reminded Score that it was contractually prohibited from making such a transfer, and asked Score to reaffirm its contractual obligations. (*Id.*) Score refused, stating that it was no longer bound by any contractual obligations and could do what it wanted with the CRO customers. (*Id.*) Score expressly threatened to transfer Score's services and operations—including the proprietary and confidential information received from DisputeSuite—to one of DisputeSuite's competitors. (*Id.*)

DisputeSuite commenced the underlying action in Los Angeles Superior Court on July 26, 2012, alleging causes of action for, breach of contract, breach of the implied covenant of good faith and fair dealing, fraud, negligent misrepresentation, and misappropriation of trade secrets. (6 AA 1370, 1372.) DisputeSuite's complaint alleged it would suffer "irreparable harm by reason of Score's making good on its threats to transfer DisputeSuite's customers and proprietary confidential information to another software provider" and sought "a prohibitive injunction by which Score is enjoined from making any such transfers." (1 AA 97).

Concurrent with its complaint, DisputeSuite applied *ex parte* for a temporary restraining order ("TRO") and order to show cause ("OSC") re: preliminary injunction, which was denied. (6 AA 1370, 1372.) On August 10, 2012, however, DisputeSuite renewed its *ex parte* application and the trial court issued a TRO restraining Score from (1) transferring CRO clients shared by both businesses to an entity not using DisputeSuite's software; and (2) licensing DisputeSuite's software to any party other than the joint CROs. (*Id.*) The court set an OSC hearing for September 6, 2012. (*Id.*)

On August 28, 2012, Score filed a motion to dismiss DisputeSuite's complaint (styled as a motion to quash service of the summons and complaint) based on the Florida forum selection clause. (2 AA 443.)

On September 21, 2012, the court granted preliminary injunctive relief restraining Score from "[m]aking any effort, directly or indirectly, to

transfer any of the customers that were referred to them by Disputesuite" or selling or "making available to any person" the DisputeSuite software, and further ordered DisputeSuite to post a cash or corporate surety bond in the amount of $10,000.00. (3 AA 595-96.)

At the request of counsel for DisputeSuite, the trial court continued the hearing on the motion to dismiss to October 11, 2012. (*Id.*) On that date, the court granted Score's motion to dismiss pursuant to a forum selection clause, finding that the Florida forum selection clause in the Master Re-Seller and Cross Marketing Agreements controlled over the California forum selection clause in DisputeSuite's EUA. (5 AA 1194.) The court chose, however, to stay the case for 60 days before dismissing, and extended the effective date of its preliminary during that stay, in order to ensure DisputeSuite had adequate time to file in Florida and seek injunctive relief in a Florida court. (6 AA 1372; 5 AA 1195.) On December 11, 2012, the trial court again extended the preliminary injunction to December 18, 2012. (5 AA 1196.) After DisputeSuite re-filed the case in Florida, the California case was dismissed and the preliminary injunction dissolved. (*Id.*)

On December 26, 2012, Score filed a motion to recover attorneys' fees, which DisputeSuite opposed. (5 AA 1197, 6 AA 1283.) The matter was called for hearing on March 14, 2013, wherein the trial court adopted its tentative decision. (6 AA 1369-76.) On April 14, 2015, the Second District affirmed the denial of attorney's fees.

STANDARD OF REVIEW

A trial court's determination of the prevailing party for the purpose of attorneys' fees is reviewed for an abuse of discretion. The statutory language of Civil Code section[1] 1717 "state[s] that the trial court 'may'

[1] Unless otherwise indicated, all statutory references are to the Civil Code.

determine that there is no party prevailing on the contract for purposes of an award of attorney fees [and] vests the trial court with discretion in making the prevailing party determination." (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 871.) Accordingly, "the trial court is given wide discretion in determining which party has prevailed on its cause(s) of action. Such a determination will not be disturbed on appeal absent a clear abuse of discretion." (*Nasser v. Superior Court* (1984) 156 Cal.App.3d 52, 59 [internal quotations omitted]; *Zintel Holdings, LLC v. McLean* (2012) 209 Cal.App.4th 431, 439 [trial court has "broad discretion" in determining who is the prevailing party under section 1717]; *McLarand, Vasquez & Partners, Inc. v. Downey Savings & Loan Assn.* (1991) 231 Cal.App.3d 1450, 1456 ["The trial court's determination that there was no prevailing party on the contract is an exercise of discretion. We will disturb it only if there has been a clear showing of an abuse of that discretion."].)

The party complaining of the trial court's order carries the burden to establish an abuse of discretion. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 331.) "[U]nless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power." (*Id.* [internal quotations and citations omitted].) As the court in *Corbett v. Hayward Dodge, Inc.* (2004) 119 Cal.App.4th 915, explained, "The showing necessary to reverse the trial court is insufficient if it presents facts which merely afford an opportunity for a different opinion." (*Id.* at 927 [internal citations and quotations omitted].) Rather, "it must clearly appear that the injury resulting from such a wrong is sufficiently grave to amount to a manifest miscarriage of justice." (*Id.*)

LEGAL DISCUSSION

I. Where a Party Obtains a Mere Interim, Procedural Dismissal of an Action, But Litigation of the Substantive Contract Claims Continues in a Different Forum, an Award of Contractual Attorney's Fees Pursuant to Civil Code Section 1717 is Premature

A. Score Is Not A Prevailing Party Because There Has Been No Final Resolution of DisputeSuite's Contract Claims

Section 1717 directs that "[t]he court, upon notice and motion by a party, shall determine who is the party prevailing on the contract." (Civ. Code § 1717(b)(1).) "The prevailing party determination is to be made only upon final resolution of the contract claims . . . ." (*Hsu, supra,* 9 Cal.4th, at 876 [emphasis added].)

Because Score's interim procedural victory resulted only in relocation of this active dispute from California to Florida, there has been no final resolution of DisputeSuite's contract claims such that it is premature to identify either party as "prevailing." In *Hsu*, the trial court reached a final resolution of the contract claims before it: the Hsus sued the Abbaras for specific performance of a contract, and the trial court found that no contract had been formed, thus giving the Abbaras a "simple, unqualified win" in the action. (*Id.*) Because of this final resolution of the contract claims in their favor, the Abbaras were the prevailing party for the purpose of awarding attorneys' fees, and it was error for the trial court to conclude that there was no prevailing party. (*Id.* at 877.)

Estate of Drummond (2007) 149 Cal.App.4th 46, presented a situation where attorney's fees were sought before a final resolution of the contract claims. In *Drummond*, an attorney filed a petition in probate court against his former clients seeking to recover fees. (*Id.* at 49.) The clients,

however, had already filed a suit against the attorney in civil court. (*Id.*) The probate court concluded that the attorney should have brought his claim against the clients as a compulsory cross-claim in the clients' civil case, and dismissed the probate case. (*Id.*) Although the attorney re-filed his claim as a cross-complaint in the civil court action, the clients moved to collect attorneys' fees in the probate case on the grounds that they were the prevailing parties pursuant to section 1717. (*Id.*) The court denied the motion for fees, and the clients appealed. (*Id.* at 50.)

The appellate court held that the court had not abused its discretion in denying fees. (*Id.* at 54.) Relying on *Hsu,* the court stated that because "the prevailing party determination must await the 'final resolution of the contract claims,' [i]t necessarily follows that no fee award can be made before such a 'final resolution.'" (*Id.* at 51 [*quoting Hsu, supra,* 9 Cal.4th, at 876].) The court further explained that "the phrase 'prevailing *on the contract*,' . . . implies a strategic victory at the end of the day, not a tactical victory in a preliminary engagement." (*Id.* at 51.) A party does not prevail when they "have at no time won a victory 'on the contract'" but instead "only succeeded at moving a determination on the merits from one forum to another." (*Id.* at 52-53.)

Similarly, the trial court here correctly determined that there has been no final resolution of the contract claims in this case. (6 AA 1376.) DisputeSuite's complaint against Score asserts various causes of action for breach of contract, fraud, and misrepresentation. (1 AA 77.) The dismissal of the California litigation did not result in a final resolution of *any of the underlying contract claims* as required by *Hsu.* Rather, the trial court found that, like in *Drummond*, the "issues were still being litigated and therefore no party yet had prevailed on the contract." (6 AA 1376.) Those are presently being litigated in Florida. As in *Drummond,* the dismissal of the

California litigation "did not defeat [the] contract claims; it merely deflected or forestalled them." *(Drummond, supra*, 149 Cal.App.4th at 53.)

Score's argument that fee-shifting should trigger "even if the litigation continues in a separate forum" (Opening Brief on the Merits ("OBM") 18), echoes the one rejected by the *Drummond* court. That is, suggesting that "final" means "final for purposes of a particular lawsuit" is "inconsistent with the thrust of the [*Hsu*] decision." (*Drummond, supra,* 149 Cal.App.4th at 51.) But *Drummond* instructs that the determination of the prevailing party is to be "ascertained not by technicalities of pleading and procedure but by a pragmatic assessment of the parties' ultimate positions vis à vis their litigation objectives as reflected in the pleadings, prayers, and arguments." (*Id.* [*citing Hsu*, *supra*, 9 Cal.4th at 877].) Like in *Drummond*, the trial court's finding regarding the "interim nature of appellants' success provided a sound basis for a discretionary finding" that Score did not prevail on the contract. (*Id.* at 54.)

B. Score's Cannot Seek Fees Before Substantive Resolution of The Contract Claims Because Only One Party Can Prevail "On the Contract"

Score's appeal is predicated on its argument that it succeeded on "the only non-fee provision in the contract that could be enforced in California; i.e., the forum-selection clause" and is therefore the prevailing party within the meaning of section 1717. (OBM 11.) But Score's argument sets the stage for "piecemeal attorney fee awards for each resolution of a contract clause." (*DisputeSuite.com, LLC v. Scoreinc.com* (July 29, 2015) 235 Cal.App.4th 1261, 1268.)

Under Score's rationale, the trial court must determine that Score is a prevailing party on the contract because it successfully enforced the forum selection clause. Then, the Florida court, where the merits of the contractual dispute between the parties will be decided, could determine

that DisputeSuite is the prevailing party. There would then potentially be two fee awards to separate parties on the same contract dispute. But case law which makes clear that "under Civil Code section 1717 there can only be one prevailing party on a given contract in a given lawsuit." (*Frog Creek Partners, LLC v. Vance Brown, Inc.* (2012) 206 Cal.App.4th 515, 542-43.)

In *Frog Creek Partners*, plaintiff filed a complaint for breach of contract, and defendant filed a petition to enforce an arbitration clause in the contract. (*Id.* at 520-21.) The question as posed by the appellate court was, "[u]nder Civil Code section 1717, if the plaintiff defeats that petition, is it entitled to recover attorney fees, even if the plaintiff ultimately loses the substantive contractual dispute?" (*Id.* at 520.) In answering that question, the court first analyzed the evolution of the language of section 1717 and its legislative history. It concluded that the clause "the party prevailing on the contract" reflects the Legislature's intent that "in any given lawsuit there can only be one prevailing party on a single contract for the purposes of an entitlement to attorneys fees." (*Id.* at 531.) The court then analyzed cases both within and outside the arbitration context, including *Hsu* and *Drummond.* (*Id.* at 539-43.) Those cases made clear that "action on a contract" within the meaning of section 1717 "refers to the contract claims in the lawsuit as a whole." (*Id.* at 539.) Thus, "[plaintiff's] lawsuit was the action on the contract for purposes of Civil Code section 1717; [defendant's] first petition to compel arbitration was a contract-based claim within the larger action and [plaintiff's] victory was not a basis for a fee award under Civil Code section 1717." (*Id.* at 541.) In sum, the court concluded that "under Civil Code section 1717, there may only be one

prevailing party entitled to attorney fees on a given contract in a given lawsuit."[2] (*Id.*)

Roberts v. Packard, Packard & Johnson (2013) 217 Cal.App.4th 822, is similarly instructive. In *Roberts*, plaintiffs filed an action against their former attorneys for breach of fiduciary duty, conversion, and declaratory relief. (*Id.* at 826.) The attorneys filed a successful petition to compel arbitration based on an arbitration provision in the parties' contingency fee agreement. (*Id.* at 827.) Like Score, the attorneys in *Roberts* argued that they were entitled to attorneys' fees because they had prevailed on a contractual provision—the arbitration clause. (*Id.* at 829.) In other words, the attorneys "asserted that the petition to compel arbitration was an 'action' to enforce the contingency fee agreement, and [the attorneys were] the 'prevailing party' in that action." (*Id.*) The Court of Appeals squarely rejected that argument.

As *Frog Creek Partners* and *Roberts* make clear, Score's petition to dismiss the case on forum grounds was not an "action" within the meaning of section 1717. It was part of the underlying proceeding, which was initiated by DisputeSuite's complaint for breach of contract. The "action" on the contract refers to the entire proceedings between the parties, and thus the prevailing party cannot be determined until the parties' proceedings have reached a final resolution. Indeed, the trial court recognized this when it noted that its decision did not forever cut off Score's rights to attorneys' fees for enforcing the forum selection clause; it simply decided it was premature to determine the prevailing party. (6 AA 1376 ["This does not

[2] *Frog Creek Partners* also illustrates that it is Score's position, not DisputeSuite's, that would undermine the concept of reciprocity under section 1717. In Score's worldview, the only party that could claim fees solely by winning the venue battle is the defendant. The procedural victory by the *Frog Creek Partners* plaintiff would not trigger fee-shifting.

mean, of course, that [Score] may not recover their attorneys' fees incurred in defending the California action should they prevail in the Florida lawsuit."].)

C. The Court of Appeal, Like Many Other Courts, Correctly Declined to Follow *Profit Concepts* and *PNEC* as Contrary to *Hsu* and Section 1717

In an effort to portray its procedural skirmish as a substantive victory, Score relies on two widely disfavored appellate decisions out of the Fourth District, *Profit Concepts Management, Inc. v. Griffith* (2008) 162 Cal.App.4th 950, and *PNEC Corp. v. Meyer* (2010) 190 Cal.App.4th 66. Both the trial court and the Court of Appeal rejected these decisions as outliers to the main body of case law following *Hsu* and *Drummond*. (*See* 6 AA 1376.) The trial court found the reasoning of *Profit Concepts* "unconvincing and superficial." (6 AA 1374.) Further, it found *PNEC* to be "inconsistent with the California Supreme Court's" reasoning in *Hsu*. (6 AA 1376.)

In *Profit Concepts, supra,* 162 Cal.App.4th 950, a company filed suit against its former employee. (*Id.* at 952.) The employee filed a motion to quash service for lack of personal jurisdiction, the company filed a notice of non-opposition, and the motion was granted. (*Id.* at 953.) The former employee then sought, and was granted, attorneys' fees as the prevailing party by the trial court. (*Id.* at 953.) In affirming the trial court's decision, the appellate court relied primarily on two pre-*Hsu* cases from the 1970s. (*Id.* at 954-55.) It concluded the matter had been "completely resolved" vis-à-vis the California courts (even though there was also a matter concurrently pending in Oklahoma) and granted attorneys' fees. (*Id.* at 956.)

As the trial court and other courts listed above noted, the *Profit Concepts* court's conclusion that the matter was "completely resolved"

ignores this Court's decision in *Hsu* and the plain meaning of Section 1717, both of which require a party "prevailing on the contract" and, thus, a final resolution of the contract claims. The trial court noted that in *Profit Concepts*, the employee "prevailed on the case, but not on the contract." (6 AA 1375.) Thus, the contract claims had not yet been resolved. (*Id.*) In rejecting Score's argument that it was the prevailing party based on *Profit Concepts*—a case that multiple other courts have also found to be unpersuasive and contrary to *Hsu*—the trial court acted well within its discretion.

Similarly, like other courts before it, the trial court rejected the reasoning in *PNEC, supra,* 190 Cal.App.4th 66, because it "suffers from the defect that it ignores the language of section 1717 that a party must prevail on a contract to be awarded contractual attorneys' fees." (6 AA 1376.) Further, the trial court found that *PNEC* is "inconsistent with the California Supreme Court's interpretation of section 1717 in Hsu that the prevailing party is determined only upon final resolution of the contract claims." (*Id.* [*citing Hsu, supra*, 9 Cal.4th at 876] (emphasis in original).)

In *PNEC,* PNEC filed a complaint against Meyer and other defendants for breach of contract and other claims. (*PNEC, supra,* 190 Cal.App.4th at 68.) The trial court granted Meyer's motion to dismiss on forum non conveniens grounds, and subsequently granted her motion for attorneys' fees, finding she was "the prevailing party on the contract for purposes of Civil Code section 1717." (*Id.* at 69.) Relying on *Profit Concepts*, the appellate court affirmed, finding that the trial court "did not abuse its discretion in making an award for the work done while the case was under its jurisdiction." (*Id.* at 73.) Yet it appears the parties in that case argued that a final *judgment* was necessary before naming a prevailing party, which the court rejected. (*Id.* at 70-71 ["*Profit Concepts* rejected the notion that a final judgment was required to obtain attorney fees under Civil

Code section 1717; nothing in the current version of the statute (as opposed to the pre–1981 version) indicates a final judgment is necessary."].) No one here is arguing that a final *judgment* is a predicate to a prevailing party determination. But *Hsu* is clear: the prevailing party determination is to be made only upon *final resolution* of the contract claims. (*Hsu, supra*, 9 Cal.4th at 876.) The court in *PNEC* ignored that directive from *Hsu*, as the trial court in this case noted before rejecting the reasoning in *PNEC*. (6 AA 1376.)

Further, *PNEC* is distinguishable from this case in a significant way. The *PNEC* court justified its prevailing party determination partly on the grounds that the claims against Meyer had not yet been filed in another venue. (*PNEC, supra,* 190 Cal.App.4th at 73 ["Whether this action would be filed in another state was speculative."].) The *PNEC* court did not think the attorneys' fees award should depend on speculative future conduct. But here, there is no need to speculate about what the parties may do in the future—the Florida litigation had already been filed even before the court addressed Score's request for attorneys' fees. (6 AA 1376.) Florida is now the forum where there will be a final resolution of DisputeSuite's contract claims against Score.

The trial court and Court of Appeal are in good company in rejecting of *Profit Concepts* and *PNEC*. (*See, e.g., Vistan Corp. v. Fadei, USA, Inc.* (N.D. Cal. 2013) 2013 WL 1345023, *4 ["*Profit Concepts* and *PNEC* appear contrary to *Hsu* and the plain language of Section 1717"]; *HSBC Bank USA v. DJR Properties, Inc.* (E.D. Cal. 2011) 2011 WL 1404899, *2 ["*Profit Concepts* is unpersuasive and this Court declines to follow it. The conclusion in *Profit Concepts* is inconsistent with the plain language of California Civil Code § 1717 and the California Supreme Court's decision in *Hsu.*"]; *Garzon v. Varese* (C.D. Cal. 2011) 2011 WL 103948, *3 [recognizing *Profit Concepts* as in disagreement with the line of cases

following *Hsu*, and agreeing with the latter]; *Advance Financial Resources, Inc. v. Cottage Health System, Inc.* (D. Or. 2009) 2009 WL 2871139, *4 [finding that the conclusion in *Profit Concepts* "appears to be inconsistent with the California Supreme Court's decision in *Hsu,* the California Court of Appeal's decision in *Drummond,* and the plain language of California Civil Code 1717"].); *Russell City Energy Company, LLC v. City of Hayward* (N.D. Cal. Feb. 17, 2015) 2015 WL 983858, at *4 (report and recommendation adopted by 2015 WL 994533) ["There was no determination or 'final resolution' of the contract claim's merits; in fact, the breach of contract claims are now pending in state court."].) Pursuant to California Rules of Court, Rules 8.1115(c) and 8.2014(d), copies of these cited federal decisions are attached hereto as Attachments "1" through "5," respectively.

Score also relies on *Turner v. Schultz* (2009) 175 Cal.App.4th 974. In *Turner*, plaintiff filed a complaint seeking declaratory and injunctive relief regarding the arbitration of a contract. (*Id.* at 976.) The only issue the complaint sought to determine—whether arbitration should proceed—was resolved by the trial court, and attorneys' fees were awarded to the prevailing party. (*Id.* at 983-84.) Thus, unlike in this case, there were no further claims to resolve in the underlying complaint before the prevailing party could be determined. (*Id.*) Indeed, the *Turner* court distinguished cases like this one, "as they each involve an interim ruling, where further proceedings *in the same litigation* were contemplated, rather than discrete legal proceedings." (*Id.* at 984.) *Turner* does not support Score's position.

D. Score Fails to Acknowledge the Significance of the Fact that the Parties Continue to Litigate DisputeSuite's Contract Claims in Florida

The Court of Appeal put significant weight on the fact that Score succeeded only as to one contract provision but not as to the contract claims as a whole:

> As stated in *Drummond*, [Score's] argument could be reconciled with *Hsu* only by qualifying 'final' to mean, 'final for purposes of a particular lawsuit.' But this view is inconsistent with the thrust of the *Hsu* decision that courts look at the overall objective of the parties. Defendants did not obtain a simply, unqualified victory on the only contract claim against them, thus ending all litigation on the contract. Rather, plaintiff put its entire complaint before the trial court, including all of its contract claims against defendants. Defendants succeeded only in enforcing one contractual clause, not in disposing of all of plaintiff's contract claims. Thus, defendants obtained merely an interim victory by succeeding in getting the case moved from one forum to another, thereby delaying final resolution of the contract claims.
>
> ...
>
> If it were not the case that there can only be one prevailing party on a contract, then a party could be considered a prevailing party by succeeding on one contract issue or claim while later losing on others. Surely, the Legislature did not intend this result. Nor do we believe the Legislature intended for courts to make piecemeal attorney fee awards for each resolution of a contract clause. Like here, resolution of one contract clause does not always equate to a resolution of all contract claims.

(*DisputeSuite.com, LLC v. Scoreinc.com, supra*, 235 Cal.App.4th, at 1267-68 (internal quotations and citations omitted).)

Score attempts to ignore this reasoning by framing this dispute as merely being about a procedural versus substantive victory, rather than an

interim procedural victory versus a final resolution of the contract claims. But Score's analysis is incomplete and undermined by that failing.

Moreover, Score's position is "'inconsistent with the thrust of the [*Hsu*] decision, . . .' that courts look at the overall objectives of the parties." (*Id.* at 1267-68 [quoting *Drummond*, *supra*, 149 Cal.App.4th at 51].) Score's overall litigation objective is not simply to move the litigation to Florida, but to defeat DisputeSuite's claims. If DisputeSuite prevails in Florida—which the trial court here found to be likely when granting DisputeSuite a preliminary injunction—Score will not say, "We are happy because the judgment against us bears the seal of a Florida circuit court, not Los Angeles Superior Court."

E. DisputeSuite, Not Score, Achieved Its Litigation Objectives In the Trial Court

Section 1717 directs that "the party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract." (Civ. Code § 1717(b)(1).) The trial court is specifically empowered by the statute to "determine that there is no party prevailing on the contract for purposes of this section." (*Id.*) This determination is "governed by equitable principles." (*Hunt v. Fahnestock* (1990) 220 Cal.App.3d 628, 633).

This Court has elucidated this authority by directing that "in deciding whether there is a 'party prevailing on the contract,' the trial court is to compare the relief awarded on the contract claim or claims with the parties' demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources." (*Hsu v. Abbara, supra*, 9 Cal.4th, at 876.) This determination "is to be made . . . only by a comparison of the extent to which each party has succeeded and failed to succeed in its contentions." (*Id.* [internal quotations and alterations omitted]). Furthermore, "a party who is denied direct relief

on a claim may nonetheless be found to be a prevailing party if it is clear that the party has otherwise achieved its main litigation objective." (*Id.*, 9 Cal.4th, at 877.)

Thus, even if this Court accepts Score's position that a prevailing party must be declared regardless of the continuation of the litigation in Florida, Score did not prevail on the contract. DisputeSuite filed this litigation to stop Score from misappropriating its clients and proprietary software. DisputeSuite was granted a preliminary injunction providing precisely that relief. Even when, based on resolution of conflicting forum selection clauses, the trial court dismissed this California litigation, the court extended the preliminary injunctive relief to provide DisputeSuite with adequate time to file suit in Florida and seek injunctive relief from a Florida court barring Score from misappropriating DisputeSuite's clients and proprietary software in violation of its contractual obligations. Score, however, is still a defendant in a breach of contract action, albeit now in Florida state court rather than California. It is DisputeSuite, not Score, that "succeeded . . . in its contentions" on the contract in this litigation and "otherwise achieved its main litigation objective." (*Hsu,* 9 Cal.4th at 876, 877)

II. The "Negative Implications" Score Imagines Do Not Withstand Scrutiny

Score argues that a number of negative implications would befall the legal system were Score forced to await the final resolution of DisputeSuite's contract claims before a prevailing party is determined. None have merit.

First, Score asserts that plaintiffs will "congest California courts by bringing a totally unsuccessful lawsuit for breach of contract in the wrong forum, without any exposure to contractual attorney's fees." (OBM 1.) But Score confuses attorney's fees not being available immediately with

attorney's fees not being available at all. Upon the final resolution of the contract claims, the prevailing party can seek its attorney's fees, including those incurred in the California leg of the litigation.

Further, if Score's concern had any real-world validity, such abuse would appear already in other civil litigation contexts. Only a subset of contract litigation involves contractual attorney's fees provisions, and contract litigation is, likewise, only a subset of civil litigation in general. Therefore, if such abuse was a natural result of the unavailability of immediate attorney's fees, it would already exist in the majority of civil litigation not impacted by Civil Code section 1717. And to the extent the problem does exist, it is better treated by mechanisms that cure the ailment across all of civil litigation, rather than by altering the final resolution principles of section 1717.

Parties and courts already have tools in place to deal with the type of forum abuse Score envisions. First, a challenge to venue can (in fact, must) be made by a defendant at the outset of litigation. Such motion practice is straightforward and need not be expensive.[3] Where a plaintiff files an action in California without legal justification, the trial court has the discretion to impose sanctions (including attorney's fees). (Code of Civ. Proc. § 128.7 [By presenting a pleading to the court, an attorney or unrepresented party certifies, *inter alia*, that "[i]t is not being presented primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."].)

Score next claims that failing to permit it to recover attorney's fees for an interim procedural win will open consumers up to distant forum

[3] Of course, if a party believes it can gain an immediate attorney's fee award (with no reciprocal risk of an immediate fee award against it) such as Score seeks here, it may have a greater incentive to over-litigate the issue of venue.

abuse. But again, because not all consumer contracts contain attorney's fees provisions, the more appropriate remedy is one that would apply more broadly than to just section 1717. Indeed, the case that Score cites in support of its argument does not even involve contractual attorney's fees, but rather fee-shifting provision the anti-SLAPP statute, Code of Civil Procedure section 425.16. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1127.) Score's position thus provides no benefit to the consumers it purports to champion.

In any event, Score ignores that consumers already have a number of tools to combat distant forum abuse. (*See, e.g.*, Civ. Code § 1812.10 (Unruh Act) [actions on consumer contracts must generally be brought where contract signed by buyer or where buyer resides, and plaintiff must attest that the venue selected complies with this requirement]; 15 U.S.C. § 1692i (Fair Debt Collection Practices Act) [actions by debt collector against consumer must generally be brought where consumer signed contract or where consumer resides].) Score's appeal to the concerns of consumers is therefore unavailing.[4]

Finally, Score argues that courts will be bogged down in "satellite litigation" over whether a prevailing party determination is possible following a party's victory in what it terms "procedural motions" such as "demurrer, motion to strike, motion for judgment on the pleadings, and/or motion for summary judgment." (OBM 15.) Score's contention here is absurd. With the possible exception of a motion to strike (which may have both procedural and substantive applications), the types of motions listed by Score provide *final resolution* of litigation *as a whole*. The contract

[4] In fact, as discussed below, Score's position would be detrimental to California consumers by chilling their access to California courts to seek redress against out-of-state businesses where forum may genuinely be in dispute.

claims do not carry on following the grant of any of these motions. By direct contrast, Score succeeded only in moving the litigation from one forum to another—an interim, procedural victory—where further litigation on the substance of the contract claims continues.[5]

III. Score's Position Would Chill Consumer's Access to California Courts and Incentivize Tactical Forum Challenges

At its roots, section 1717 embodies recognition of the "common knowledge that parties with superior bargaining power, especially in 'adhesion' type contracts, customarily include attorney fee clauses for their own benefit." (*Coast Bank v. Holmes* (1971) 19 Cal.App.3d 581, 596-97.) While section 1717 solves a significant aspect of this problem by imposing reciprocity upon such contractual fee provisions, contractual fee shifting still can and does benefit the party with superior bargaining power. It is for this reason that, while parties are free to contract into such fee-shifting

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[5] Score attempts to analogize purported difficulties by courts in applying the distinction between procedural and substantive resolutions in the context of malicious prosecution actions. (OBM 15-16.) This analogy only muddies, not clarifies, the issue because, as the case cited by Score notes, such analysis in malicious prosecution claims is guided by the principle that "the tort of malicious prosecution is disfavored." (*JSJ Ltd. Partnership v. Mehrban* (2012) 205 Cal.App.4th 1512, 1525 (internal quotations omitted).) Malicious prosecution actions and contractual fee awards are distinct and different creatures, as evidenced by the fact that a voluntary dismissal of underlying litigation can support a malicious prosecution action but not a contractual fee award. (*Id.* at 1524 (regarding malicious prosecution) ["A voluntary dismissal may be an implicit concession that the dismissing party cannot maintain the action and may constitute a decision on the merits."] (internal quotations omitted); *cf.* Civ. Code § 1717(b)(2) (regarding contractual attorney's fees awards) ["Where 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."].)

provisions, absent such agreement the default rule is that each party bears its own attorney's fees.

The same can be said for forum selection clauses. There is no question that forum selection clauses are, generally speaking, enforceable. (*Smith, Valentino & Smith v. Superior Court* (1976) 17 Cal.3d 491, 495.96 ["No satisfying reason of public policy has been suggested why enforcement should be denied a forum selection clause appearing in a contract entered into freely and voluntarily by parties who have negotiated at arm's length."].) But even judicial acceptance of forum selection clauses comes with the caveat that courts must keep watch for abuse by parties with superior bargaining position. (*See Carnival Cruise Lines, Inc. v. Shute* (1991) 499 U.S. 585, 595 [noting that "forum selection clauses contained in form passage contracts are subject to judicial scrutiny for fundamental fairness . . . ."].)

Score's position would place California plaintiffs, especially consumers, seeking redress for claims involving a contract that has both an attorney's fee provision and a questionable forum selection clause in the untenable position of choosing the best of three bad options: (1) bring the action in California knowing that an adverse result over a preliminary procedural issue (venue) could force you to unfavorably settle your substantive claims to resolve the potentially ruinous fee award; (2) abandon your preferred venue and good-faith basis for challenging the enforceability of the forum selection clause by simply filing in the other forum; and/or (3) never pursue your substantive contract claims at all because you can afford neither litigation in the other forum nor the risk of an adverse fee award for losing the venue battle in California.

Section 1717 attorney's fees should compensate parties, whether plaintiff or defendant, for the expense of vindicating their substantive

contractual rights in court. Score's position, by contrast, would turn preliminary procedural disputes into bet-the-litigation stakes.

IV. In the Alternative, the Court Could Establish a Rebuttable Presumption That a Procedural Dismissal is Final, But Allow the Party Opposing a Fee Motion to Overcome the Same by Demonstrating that the Litigation Continues in Another Forum

There is no denying that the substantive contract dispute between the parties continued in Florida following the dismissal of the California action—a transition which the trial court went to great lengths to facilitate by extending the preliminary injunction entered against Score to allow DisputeSuite time to file the Florida action prior to dismissal of the California action. Nevertheless, Score implores the Court to adopt a "bright-line rule that minimizes unnecessary disputes regarding the timing of contractual fee motions . . . ." (OBM 17.) In this way, Score invites the Court to elevate form over substance.

The hollow substance of Score's position is most evident when considering Score's proposal that "notwithstanding future litigation between the parties," contractual fee awards should be available based solely on "the assignment of a new case number by a neutral third party clerk . . . ." (OBM 20.) Score's entire line of reasoning runs directly counter to the equitable principles underlying section 1717. In *Sears v. Baccaglio*, after thoroughly reviewing the statute's legislative history, the court of appeal noted, "the continuing theme of the Legislature's discussion of section 1717 has been the avoidance of narrowly defined procedures, which have been seen as favoring the dominant party, in favor of an equitable consideration of who should fairly be regarded as the winner." (*Sears v. Baccaglio* (1998) 60 Cal.App.4th 1136, 1147-48.)

To the extent the Court is concerned about any uncertainty as to whether litigation persists following a procedural dismissal that may or may

not be interim (depending on whether the plaintiff pursues the matter further), the Court could adopt a flexible alternative superior to Score's line-drawing: Upon involuntary dismissal of an action without prejudice, a rebuttable presumption exists that the dismissal is a final resolution of the action on the contract, but this presumption can be overcome by demonstrating the continuation of the litigation of the plaintiff's contract claims in another forum.

This approach is wholly consistent with the spirit and text of section 1717, which expressly reserves the trial court's power to "determine that there is no party prevailing on the contract for purposes of this section." Moreover, this approach avoids the incongruous situation of partitioning one contract dispute into multiple, inconsistent attorney's fee awards.

Under this framework, DisputeSuite easily overcomes the presumption because the litigation continues in Florida. Accordingly, the trial court's denial of attorney's fees was proper.

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CONCLUSION

DisputeSuite obtained the injunctive relief it sought by demonstrating a likelihood of prevailing on the merits on its contract claims. Score obtained a change of venue. The remaining chapters of this contract dispute are still being written.

Therefore, the denial of Score's motion for attorneys' fees must be affirmed.

Respectfully Submitted,

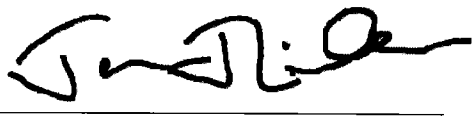
J.J. LITTLE & ASSOCIATES, P.C.

Dated: January 29, 2016 By: _____

James J. Little
Attorneys for Plaintiff and
Respondent DisputeSuite.com,
LLC

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, Rule 8.204, subdivision (c)(1), I certify that the attached brief is proportionately spaced, has a typeface of 13 points and contains 7,488 words (as counted by the computer program used to prepare this brief).

Dated: January 29, 2016 By: 

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Attorneys for Plaintiff and
Respondent DisputeSuite.com, LLC

Attachment "1"

2013 WL 1345023
Only the Westlaw citation is currently available.
United States District Court,
N.D. California.

VISTAN CORPORATION, Plaintiff,
v.
FADEI, USA, INC., et al., Defendants.

No. C–10–04862 JCS. | April 2, 2013.

Attorneys and Law Firms

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Michael John Thomas, Janlynn Robinson Fleener, Andrew L. Collier, Downey Brand LLP, Sacramento, CA, for Defendants.

Opinion

ORDER DENYING DEFENDANTS' MOTION FOR ATTORNEY'S FEES

JOSEPH C. SPERO, United States Magistrate Judge.

I. INTRODUCTION

*1 Following summary judgment of non-infringement in favor of Defendants, Defendants now move for an award of attorney's fees, asserting that Plaintiff's pursuit of this litigation was objectively baseless and conducted in bad faith. Dkt. No. 146 (Defendants' Motion for Attorney's Fees ("Motion")). Defendants also argue that they are entitled to attorney's fees pursuant to California state law for defending against Plaintiff's breach of contract claim. *Id.* The Court finds that the Motion is suitable for determination without oral argument, pursuant to Civil Local Rule 7–1(b). The April 5, 2013 hearing is accordingly VACATED. For the reasons stated below, the Motion is DENIED.

II. BACKGROUND

On October 27, 2010, Plaintiff filed a complaint alleging infringement by Defendants of U.S. Patent No. 5, 870,949. Dkt. No. 1. Plaintiff also alleged a separate claim for breach of contract against Defendant Mariani.*Id.* On January 10, 2013, this Court granted summary judgment of noninfringement in favor of Defendants. Dkt. No. 143.Because no federal claim remained following summary judgment, the Court declined to exercise pendant jurisdiction and dismissed without prejudice Plaintiff's contract claim for want of federal jurisdiction. *Id.* at 2.

III. ANALYSIS

A. Whether Plaintiff Acted in Bad Faith or Asserted an Objectively Baseless Position

Under 35 U.S.C. § 285, a "court in exceptional cases may award reasonable attorney[s'] fees to the prevailing party." The Federal Circuit has stated that

> Section 285 must be interpreted against the background of the Supreme Court's decision in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 113 S.Ct. 1920, 123 L.Ed.2d 611 (1993). There, the Court recognized that the right to bring and defend litigation implicated First Amendment rights and that bringing allegedly frivolous litigation could only be sanctioned if the lawsuit was "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits."*Id.* at 60."Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation."*Id.*

iLOR, LLC v. Google, Inc., 631 F.3d 1372, 1376 (Fed.Cir.2011). Some examples of actions warranting attorney's fees are "when there has been some material inappropriate conduct related to the matter in litigation, such as willful infringement, fraud or inequitable conduct in procuring the patent, misconduct during litigation, vexatious or unjustified litigation, conduct that violates Fed.R.Civ.P. 11, or like infractions."*Id.* Further, "absent misconduct during patent prosecution or litigation, sanctions may be imposed against a patent plaintiff only if both (1) the litigation is brought in subjective bad faith, and (2) the litigation is objectively baseless."*Id.* at 1377 (internal quotation marks omitted)."Under this exacting standard, the plaintiff's case must have no objective foundation, and the plaintiff must actually know this. Both the objective and subjective prongs of [the test] must be established by clear and convincing evidence."*Id.* (internal quotation marks omitted).

*2 Although Defendants spend a wealth of time seeking to rehash their claim construction and summary judgment

arguments, the Court finds the discussion unhelpful for purposes of deciding the present Motion. In short, Defendants have not met their high burden to show by clear and convincing evidence that this suit was brought frivolously or that Plaintiff's position following claim construction was objectively baseless. Defendants' argument for fees centers around their view that the Court's Claim Construction Order "was susceptible to only one reasonable interpretation."Dkt. No. 146 at 4. While Plaintiff's interpretation of the Order was ultimately unsuccessful, Defendants have not shown by clear and convincing evidence that Plaintiff's interpretation "was so unreasonable that no reasonable litigant could believe it would succeed."*Id.* at 1378.In addition, the Court finds no bad faith by Plaintiff at any point in this litigation.

Defendants' Motion pursuant to Section 285 is accordingly denied. [1]

B. Contract Claim

The parties dispute whether Defendants should be awarded attorney's fees for work done pursuant to Plaintiff's contract claim, which this Court dismissed without prejudice for lack of federal jurisdiction. The Court finds that attorney's fees are not warranted and therefore denies Defendants' Motion.

Federal courts apply state law in determining whether to award attorney's fees in an action on a contract. *Ford v. Baroff,* 105 F.3d 439, 442 (9th Cir.1997).California Civil Code Section 1717 provides, in relevant part:

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

Cal. Civ.Code § 1717(a) (emphasis added). The statute further provides that "the party prevailing on the contract shall be the party who recovered greater relief in the action on the contract."*Id.* § 1717(b)(1)."The court may also determine that there is no party prevailing on the contract for purposes of this section."*Id.* The California Supreme Court has provided the following guidance in applying Section 1717:

> [I]n deciding whether there is a party prevailing on the contract, the trial court is to compare the relief awarded on the contract claim or claims with the parties' demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, and similar sources. The prevailing party determination is to be made *only upon final resolution of the contract claims* and only by a comparison of the extent to which each party ha[s] succeeded and failed to succeed in its contentions.

***3** *Hsu v. Abbara,* 9 Cal.4th 863, 876, 39 Cal.Rptr.2d 824, 891 P.2d 804 (1995) (emphasis added)."*[I]n determining litigation success,* courts should respect substance rather than form, and to this extent should be guided by 'equitable considerations.' " *Id.* at 877, 39 Cal.Rptr.2d 824, 891 P.2d 804 (emphasis original).

Federal district courts appear uniform in denying fees under Section 1717 where a non-merits decision results in dismissal of the contract claim. *See Laurel Village Bakery, LLC v. Global Payments Direct, Inc.,* 2007 WL 4410396, at *4 (N.D.Cal. Dec.14, 2007) (Jenkins, J.) (denying attorney's fees following dismissal for improper venue and reasoning under *Hsu* that "[d]efendants do not constitute a 'prevailing party' entitled to fees because no decision has been reached on the merits of Plaintiff's contract claims"); *Idea Place Corp. v. Fried,* 390 F.Supp.2d 903, 905 (N.D.Cal.2005) (Armstrong, J.) ("[T]his Court's dismissal for lack of subject matter jurisdiction in federal court did not foreclose the possibility that Plaintiff could pursue its contract claims in state court. Thus, it remains to be seen which entity is the 'prevailing party' on Plaintiff's contract action."); *N.R. v. San Ramon Valley Unified Sch. Dist.,* 2006 WL 1867682, at *7 (N.D.Cal. July 6, 2006) (Illston, J.) (finding that while the defendant prevailed in the "action" by successfully arguing that the court lacked jurisdiction, it did not prevail "on the contract claim" and therefore fees were not appropriate under Section 1717); *Advance Fin. Res., Inc. v. Cottage Health Sys., Inc.,* 2009 WL 2871139, at *2 (D.Or. Sep.1, 2009) (holding that defendant was not a prevailing party under Section 1717 because the "contract claim was dismissed on jurisdictional grounds and there [had] been no final resolution of the underlying contract

claim"); *Garzon v. Varese*, 2011 WL 103948, at *3 (C.D.Cal. Jan.11, 2011) (stating that because "Defendant secured a dismissal on technical grounds, rather than a judgment on the merits of the contract claim, he is not the prevailing party within the meaning of section 1717 and is, therefore, not entitled to attorney's fees").

While the California state courts appear to diverge on the issue, the cases nonetheless support denying Defendants' Motion. In *Estate of Drummond*, 149 Cal.App.4th 46, 56 Cal.Rptr.3d 691 (2007), a party's contract claim against will contestants was dismissed from probate court as having been brought in the wrong forum; the contract claim, the court ruled, must instead be brought in an already pending civil action. *Id.* at 49, 56 Cal.Rptr.3d 691. Following dismissal, the will contestants moved for attorney's fees under California Civil Code 1717(a), arguing that they were the prevailing parties on the contract action in the probate court. *Id.* The court denied an award of attorney's fees under Section 1717(a), reasoning that the will contestants must await the final resolution of the contract claims in the civil action.*Id.* at 51, 56 Cal.Rptr.3d 691. The court rejected the will contestants' argument that the phrase "final resolution" simply meant "final for the purposes of a particular lawsuit."*Id.* The court noted that this argument was inconsistent with the plain meaning of the "phrase 'prevailing on the contract,' which implies a strategic victory at the end of the day, not a tactical victory in a preliminary engagement."*Id.* The will contestants had "obtained only an interim victory, based on [the attorney] having attempted to pursue his claims in the wrong forum."*Id.* The court also found that the dismissal of the probate action was not the kind of final resolution contemplated by *Hsu*; it "determined nothing except that Desmarais had to pursue his claims against [the will contestants] in the civil case."*Id.* at 52, 56 Cal.Rptr.3d 691. Finally, the court found significant the California Legislature's decision to amend Section 1717, and replace the term "prevailing party" with "party prevailing on the contract." *Id.* This change "shifted the emphasis from victory at a particular stage of the proceedings to victory 'on the contract.' " *Id.* The will contestants had "at no time won a victory 'on the contract.' They ha[d] only succeeded at moving a determination on the merits from one forum to another." *Id.* at 52–53, 56 Cal.Rptr.3d 691.

***4** Here, not only was there no determination of the contract claim's merits, the parties did not even seriously litigate the issue. As in *Drummond*, Defendants have "only succeeded at moving a determination on the merits from one forum to another."*Id.* at 52–53, 56 Cal.Rptr.3d 691. Further, taking into account "equitable considerations" and substance over form, *Hsu*, 9 Cal.4th at 877, 39 Cal.Rptr.2d 824, 891 P.2d 804, the Court finds it would be inappropriate to award attorney's fees in this case where the contract claim was never seriously litigated. As Defendants' own motion for summary judgment states in arguing that the Court should decline to grant supplemental jurisdiction over the contract claim: "only minimal discovery concerning Plaintiff's breach of contract claim against Mariani has been conducted, and this claim has not been the subject of any hearings or Court orders."Dkt. No. 71 at 4. In other words, the work on the contract claim in this case was *de minimis*.

The cases cited by Defendants do not compel a different result. In *Profit Concepts Management, Inc. v. Griffith*, 162 Cal.App.4th 950, 956, 76 Cal.Rptr.3d 396 (2008), the court found that an award of attorney's fees was appropriate where the court had dismissed a contract claim for lack of personal jurisdiction, reasoning that "[t]he case *in California* has been finally resolved."(emphasis original). The court rejected the argument that attorney's fees should not be awarded because plaintiff had refilled the contract claim in Oklahoma: "We find nothing in the language of the statute or of *Hsu v. Abbara*, or any other case, that requires resolution in another state on the merits of a contract claim first asserted in California before a prevailing party can be determined here, when the matter has been completely resolved vis-à-vis the California courts."*Id.* Similarly, in *PNEC Corp. v. Meyer*, 190 Cal.App.4th 66, 118 Cal.Rptr.3d 730 (2010), the court granted attorney's fees following dismissal of a contract claim for *forum non conveniens*.The court appeared to distinguish *Drummond*, asserting that "it clearly appeared that the party seeking an award of fees [in *Drummond*] faced no obstacles in pursuing an award in a different department of the same court," whereas the party in *PNEC* could pursue the contract claim and any future award only in Washington. *PNEC*, 190 Cal.App.4th at 72–73, 118 Cal.Rptr.3d 730. Unlike in *Profit Concepts* and *PNEC*, the matter here has *not*"been completely resolved vis-àvis the California courts."In fact, California state court is likely the only forum in which Plaintiff will, and can, pursue its contract claim if it wishes to do so.

Further, *Profit Concepts* and *PNEC* appear contrary to *Hsu* and the plain language of Section 1717, which require that the prevailing party determination "be made only upon final resolution of the contract claims."*Hsu*, 9 Cal.4th at 876, 39 Cal.Rptr.2d 824, 891 P.2d 804;*see Advance Fin.*, 2009 WL 2871139, at *4 (finding *Profit Concepts* inconsistent

with *Hsu, Drummond,* and Section 1717).[2] Neither *Profit Concepts* nor *PNEC,* nor Defendants for that matter, explain the departure from the clear language in *Hsu* and Section 1717.

***5** Even if the Court were to find that attorney's fees could be awarded in this case under Section 1717, Defendants have not presented sufficient evidence supporting its contention that any significant work was done on the contract claim in this action. As already noted, Defendants have stated that only "minimal" discovery concerning the contract claim has been conducted. In addition, Defendants state that "[t]he work done on the defense of the contract claim was often times intertwined with the work involved in the defense of the patent infringement claims."Dkt. No. 147, Thomas Declaration ¶ 31. Nonetheless, Defendants assert that they estimate that ten percent of their hours were billed on the contract claim and, "out of an abundance of caution," seek between $34,250 (five percent of total fees) and $68,500 (ten percent of total fees).*Id.* Defendants provide no basis for this estimation. Rather, Defendants generally state that these fees were incurred "on interrogatories, requests for production, responses to requests for production, document review, deposition preparation, deposition questions and answers, as well as research, analysis, and modest briefing."*Id.* Defendants, however, do not point to a single discrete task that they billed on the contract claim. Given Defendants' earlier concession that only "minimal" discovery concerning the contract claim was conducted, Defendants' statement that the work on the contract claim was "often times" intertwined, and Defendants' failure to show any actual work done on the claim, the Court declines to award attorney's fees, even assuming such fees are awardable in this case.

IV. CONCLUSION

For the reasons stated, Defendants' Motion is DENIED.

IT IS SO ORDERED.

Footnotes

1 Plaintiff's Opposition to the Motion purports to move for sanctions against Defendants, arguing that the Motion is frivolous. Dkt. No. 150 at 22.Plaintiff's request, however, is procedurally improper and will not be considered. Civil Local Rule 7–8 requires that motions for sanctions be separately filed and formally noticed. Further, "[u]nless otherwise ordered by the Court, no motion for sanctions may be served and filed more than 14 days after entry of judgment by the District Court."Civ. L. Rule 7–8(d). Plaintiff's request for sanctions was not separately filed, formally noticed, or brought within 14 days of judgment absent a Court order allowing otherwise. Plaintiff's request accordingly fails to conform to the Local Rules.

2 Defendants also cite to *Kandy Kiss of Cal., Inc. v. Tex Ellent, Inc.*, 209 Cal.App.4th 604, 146 Cal.Rptr.3d 899 (2012), *superseded by grant of review,* 151 Cal.Rptr.3d 105, 291 P.3d 326 (Cal. Jan 16, 2013), which adopted the holdings in *Profit Concepts* and *PNEC* in holding that a party was a prevailing party under Section 1717 where the contract claim was dismissed from state court because jurisdiction rested exclusively in federal court under the Federal Copyright Act. *Kandy Kiss,* however, has been vacated pending review by the California Supreme Court. Moreover, the Court does not find the reasoning in that case persuasive; the court simply summarizes *Drummond, Profit Concepts,* and *PNEC,* and holds that the latter two cases are more persuasive.

Attachment "2"

2011 WL 1404899
Only the Westlaw citation is currently available.
United States District Court,
E.D. California.

HSBC BANK USA, Plaintiff,
v.
DJR PROPERTIES, INC. dba Super 8 Mariposa, et al., Defendants.

No. 1:09–CV–01239 AWI SKO. | April 13, 2011.

Attorneys and Law Firms

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Kawaljit Singh, Livermore, CA, pro se.

Harinder Kaur, Livermore, CA, pro se.

Opinion

ORDER DENYING MPUD'S MOTION FOR AWARD OF ATTORNEY'S FEES AND COSTS

ANTHONY W. ISHII, Chief Judge.

BACKGROUND

*1 On November 16, 2010, Plaintiff HSBC Bank USA ("HSBC") filed a Motion for Partial Summary Judgment against Defendant Mariposa Public Utility District ("MPUD"). In the motion, HSBC asked the Court to judicially declare that HSBC's lien on the subject property was superior to MPUD's interest. On January 20, 2011, the Court dismissed MPUD from this action based on mootness because MPUD's lien against the subject property had been extinguished. Subsequently, MPUD filed a Motion for Award of Attorney's Fees and Costs on February 17, 2011. For the reasons that follow, the motion will be denied.

DISCUSSION

A. Motion for Costs

MPUD has requested costs in the amount of $739.01. (Doc. 154 at 1.) Rule 54(d)(1) of the Federal Rules of Civil Procedure provides that "costs-other than attorney's fees-should be allowed to the prevailing party." "Rule 54(d)(1) creates a presumption in favor of awarding costs to a prevailing party, but the district court may refuse to award costs within its discretion." *Champion Produce, Inc. v. Ruby Robinson Co., Inc.*, 342 F.3d 1016, 1022 (9th Cir.2003) (citations omitted). However, "costs under Rule 54(d) may not be awarded where an underlying claim is dismissed for lack of subject matter jurisdiction, for in that case the dismissed party is not a 'prevailing party' within the meaning of Rule 54(d)." *Miles v. State of California*, 320 F.3d 986, 988 (9th Cir.2003).

In this case, MPUD was dismissed from the action based on mootness. Mootness deprives a federal court of subject matter jurisdiction to hear a case. *North Carolina v. Rice*, 404 U.S. 244, 246, 92 S.Ct. 402, 30 L.Ed.2d 413 (1971). Therefore, since MPUD was dismissed for lack of subject matter jurisdiction, costs are not recoverable under Rule 54(d). Accordingly, MPUD's Motion for Costs is DENIED.

B. Motion for Attorney's Fees

"In an action involving state law claims, [federal courts] apply the law of the forum state to determine whether a party is entitled to attorneys' fees, unless it conflicts with a valid federal statute or procedural rule." *MRO Commc'ns v. Am. Tel. & Tel. Co.*, 197 F.3d 1276, 1282 (9th Cir.1999). Here, MPUD requests attorney's fees under California Civil Code § 1717 and California Public Utilities Code § 16647.

1. California Civil Code § 1717

California Civil Code § 1717 provides in relevant part:

> (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, shall be entitled to reasonable attorney's fees in addition to other costs.

...

(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. The court may also determine that there is no party prevailing on the contract for purposes of this section.

***2** The California Supreme Court has explained:

> in deciding whether there is a 'party prevailing on the contract,' the trial court is to compare the relief awarded on the contract claim or claims with the parties' demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources. The prevailing party determination is to be made *only upon final resolution of the contract claims* and only by a 'comparison of the extent to which each party has succeeded and failed to succeed in its contentions.'

Hsu v. Abbara, 9 Cal.4th 863, 876, 39 Cal.Rptr.2d 824, 891 P.2d 804 (1995) (citation omitted and emphasis added).

For example, in *Idea Place Corp. v. Fried*, 390 F.Supp.2d 903, 904 (N.D.Cal.2005), the Northern District of California ("Northern District") dismissed plaintiff's complaint due to lack of subject matter jurisdiction. Subsequently, the defendants filed a motion for attorney's fees, contending that they were entitled to fees under California Civil Code § 1717 because they were the prevailing party on plaintiff's contract claim. *Id.* The Northern District denied the motion for attorney's fees, stating that defendants "were quite obviously not the prevailing party *on the contract*." *Id.* at 905.The Northern District explained that "the Court's conclusion that subject matter jurisdiction was lacking expressly precluded the Court from making any findings with respect to the merits of the underlying action, including plaintiff's breach of contract claim." [1] *Id.*

Similarly, in this case, MPUD was dismissed for lack of subject matter jurisdiction. Therefore, MPUD was not a prevailing party on the contract because the Court made no determination whatsoever as to the merits of HSBC's underlying declaratory relief claim against MPUD.

Furthermore, the Court is not persuaded that *Profit Concepts Management, Inc. v. Griffith*, 162 Cal.App.4th 950, 76 Cal.Rptr.3d 396 (2008) and its progeny requires a different result. In *Profit Concepts*, the California Court of Appeal affirmed the trial court's grant of attorney's fees to the defendant, who had been dismissed for lack of personal jurisdiction. *Id.* at 952, 76 Cal.Rptr.3d 396. The court held that defendant was the prevailing party under California Civil Code § 1717 because nothing was awarded on plaintiff's complaint. *Id.* at 956, 76 Cal.Rptr.3d 396. The court emphasized that a determination on the merits of the contract claim was not required for a court to award attorney's fees under California Civil Code § 1717. Therefore, the court concluded that the "contract claim was finally resolved within the meaning of *Hsu v. Abarra* [.]" *Id.*

Profit Concepts is unpersuasive and this Court declines to follow it. The conclusion in *Profit Concepts* is inconsistent with the plain language of California Civil Code § 1717 and the California Supreme Court's decision in *Hsu*.California Civil Code § 1717 explicitly states that attorney's fees are available for the party prevailing *on the contract*.In addition, *Hsu* made clear that the "prevailing party determination is to be made only upon *final resolution of the contract claims*." *Hsu*, 9 Cal.4th at 876, 39 Cal.Rptr.2d 824, 891 P.2d 804. As discussed above, this Court made no determination on the contract because of a lack of subject matter jurisdiction. Therefore, MPUD cannot be a prevailing party on the contract under California Civil Code § 1717. Accordingly, MPUD's Motion for Attorney's Fees under California Civil Code § 1717 is DENIED.

2. California Public Utilities Code § 16647

***3** California Public Utilities Code § 16647 provides:

> The board may provide for the collection of delinquent taxes, penalties, interest, and costs by actions or legal proceedings brought, prosecuted, and maintained in the name of the district against the several owners of property from whom taxes are due and delinquent.

This provision does not authorize an award of attorney's fees against HSBC. MPUD did not bring, prosecute and maintain an action or legal proceeding against HSBC. On the contrary, MPUD was named as a Defendant in this proceeding by HSBC. Further, HSBC is not an owner of the subject property.

HSBC is a lender and holds only a lien against the subject property. Accordingly, MPUD's Motion for Attorney's Fees under California Public Utilities Code § 16647 is DENIED.

IT IS HEREBY ORDERED that MPUD's Motion for Award of Attorney's Fees and Costs is DENIED.

IT IS SO ORDERED.

CONCLUSION

Footnotes

1 *See also N.R. v. San Ramon Valley Unified Sch. Dist.*, No. C 05–0441 SI, 2006 WL 1867682, at *2 (N.D.Cal. Jul.6, 2006) (concluding that defendant was not a prevailing party because the court "dismissed plaintiffs' breach of contract claim for lack of jurisdiction, and made no determination whatsoever as to the merits of that claim"); *Advance Fin. Res., Inc. v. Cottage Health Sys., Inc.*, No. CV 08–1084–KI, 2009 WL 2871139, at *2 (D.Or. Sep.1, 2009) (holding that defendant was not a prevailing party under California Civil Code § 1717 because the "contract claim was dismissed on jurisdictional grounds and there [had] been no final resolution of the underlying contract claim"); *Estate of Drummond*, 149 Cal.App.4th 46, 51, 56 Cal.Rptr.3d 691 (2007) (denying attorney's fees because "appellants obtained only an interim victory, based on [the attorney] having attempted to pursue his claims in the wrong forum"); *Garzon v. Varese*, No. CV 09–9010 PSG, 2011 WL 103948, at *3 (C.D.Cal. Jan.11, 2011) (stating that because "Defendant secured a dismissal on technical grounds, rather than a judgment on the merits of the contract claim, he is not the prevailing party withing the meaning of section 1717 and is, therefore, not entitled to attorney's fees").

Attachment "3"

2011 WL 103948
Only the Westlaw citation is currently available.
United States District Court,
C.D. California.

Miguel Urbina GARZON
v.
Francesco Andrea VARESE, et al.

No. CV 09-9010 PSG (PLAx). | Jan. 11, 2011.

Attorneys and Law Firms

Jose Mariano Castillo, Steve E. Hollatz-Castillo, Jose M. Castillo Law Offices, Los Angeles, CA, for Miguel Urbina Garzon.

Allison S. Hart, Martin D. Singer, Lavely and Singer APC, Los Angeles, CA, for Francesco Andrea Varese.

Opinion

Proceedings: (In Chambers) Order Denying Defendant's Motion for Attorney's Fees

The Honorable PHILIP S. GUTIERREZ, District Judge.

*1 Wendy K. Hernandez, Deputy Clerk.

I. *Background*

Plaintiff Miguel Urbina Garzon ("Plaintiff") filed a Complaint against Defendant Francesco Andrea Varese ("Defendant") alleging that Defendant breached the terms of a promissory note entered into on or about May 21, 2006 (the "Note"). The alleged agreement contained a choice of law provision identifying that California law would govern any dispute. Defendant successfully removed the contract dispute to this Court and filed an answer denying the validity of the Note.

On November 15, 2010, the eve of trial, the Court heard oral arguments on Plaintiff's Motion to Continue the Trial. As no good cause was shown, the Court denied Plaintiff's request and dismissed the case without prejudice for failure to prosecute pursuant to Federal Rule 41(b).

On November 29, 2010, Defendant filed a motion for an award of attorney's fees. Plaintiff opposed Defendant's motion by arguing that Defendant could not recover attorney's fees under the Note because Defendant consistently maintained that it was unenforceable. For the reasons that follow, the Court DENIES Defendant's request for attorney's fees.

II. *Legal Standard*

Under the "American Rule," each party to a lawsuit is generally responsible for its own attorneys' fees. *Hensley v. Eckerhart*, 461 U.S. 424, 429, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). However, an award of attorneys' fees may be proper where a valid contract or statute shifts fees to a losing party. *See, e.g., United States v. Standard Oil Co. of Cal.*, 603 F.2d 100, 103 (9th Cir.1979). In order to award attorneys' fees to a party in litigation, a court must be satisfied that both (1) the party is entitled to the fees and (2) that the fee award is reasonable. Reasonableness is generally determined using the "lodestar" method, where a court considers the work completed by the attorneys and multiplies "the number of hours reasonably expended on the litigation by the reasonable hourly rate."*Gracie v. Gracie*, 217 F.3d 1060, 1070 (9th Cir.2000) (citing *Intel Corp. v. Terabyte Int'l, Inc.*, 6 F.3d 614 (9th Cir.1993)). If it is state law that allows for a fee award, federal courts must look to that law to determine the propriety of such an award. *Michael-Regan Co. ., Inc. v. Lindell*, 527 F.2d 653, 656 (9th Cir.1975).

III. *Discussion*

Defendant seeks attorney's fees pursuant to Cal. Civ.Code § 1717(a) and under the Note. Plaintiff objects to Defendant's motion for attorney's fees on grounds that a party who disputes the existence of a promissory note cannot benefit from the note's fee provision.

California Civil Code section 1717 governs the recovery of attorney's fees in connection with contract-related disputes. In relevant part, it provides:

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

*2 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. The court may also determine that there is no prevailing party on the contract for purposes of this section.

Cal. Civ.Code § 1717(a), (b)(1) (emphasis added). In *Hsu v. Abbara*, 9 Cal.4th 863, 39 Cal.Rptr.2d 824, 891 P.2d 804 (1995), the California Supreme Court explained:

> In deciding whether there is a "party prevailing on the contract," the trial court is to compare the relief awarded *on the contract claim or claims* with the parties' demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources. The prevailing party determination is to be made only upon *final resolution of the contract claims* and only by a comparison of the extent to which each party has succeeded and failed to succeed in its contentions.

Id. at 876, 39 Cal.Rptr.2d 824, 891 P.2d 804 (emphasis added) (quotations and citations omitted).

Courts disagree over whether a party who secures a dismissal in its favor on technical grounds is a prevailing party within the meaning of section 1717. For the most part, though, district courts that have addressed this question have answered it in the negative. For instance, in *CK DFW Partners Ltd. v. City Kitchens, Inc.*, 541 F.Supp.2d 839 (N.D.Tex.2008), the defendants successfully moved to dismiss under Federal Rule of Civil Procedure 12(b)(3), for improper venue. *Id.* at 840.The court, however, denied their motion for attorney's fees, reasoning that it had yet to be determined whether plaintiffs would ultimately succeed or fail on the merits of their contract claims. [1] *Id.* at 843.The court in *Laurel Village Bakery, LLC v. Global Payments Direct, Inc.*, No. CV 06–1332 MJJ, 2007 U.S. Dist. LEXIS 95238, 2007 WL 4410396 (N.D.Cal. Dec. 14, 2007), reached a similar conclusion. Like the defendants in *CK DFW Partners*, the defendants in *Laurel Village Bakery* successfully secured a dismissal in their favor for improper venue.*Id.* at * 1–2.And like the defendants in *CK DFW Partners*, their attempt to recover attorney's fees was rejected by the district court, which reasoned that "[d]efendants do not constitute a 'prevailing party' entitled to fees because no decision has been reached on the merits of Plaintiff's contract claims."*Id.* at * 10 (citing *Hsu*, 9 Cal.4th at 876, 39 Cal.Rptr.2d 824, 891 P.2d 804);*see also Mail Boxes, Etc., Inc. v. Sanford Indus., Inc.*, No. CV 06–6027 AA, 2006 U.S. Dist. LEXIS 25715, 2006 WL 814950 (D.Or.2006) (holding defendants not entitled to fees under section 1717 because court dismissed breach of contract case for lack of venue).

District courts have also rebuked defendants' efforts to recover attorney's fees under section 1717 when the technical ground for dismissal was lack of jurisdiction. For example, in *Idea Place Corp. v. Fried*, 390 F.Supp.2d 903 (N.D.Cal.2005), the court dismissed the plaintiff's breach of contract case for lack of subject matter jurisdiction. *Id.* at 904.Subsequently, the court denied the defendants' motion for attorney's fees, reasoning that because the plaintiff could pursue its contract claims in state court, "it remain[ed] to be seen which entity is the 'prevailing party' on Plaintiff's contract action."*Id.* at 905.Similarly, in *N.R. v. San Ramon Valley Unified Sch. Dist.*, No. CV 05–441 SI, 2006 U.S. Dist. LEXIS 47287, 2006 WL 1867682 (N.D.Cal.2006), the court found that while the defendant prevailed in the "action" by successfully arguing that the court lacked jurisdiction, it did not prevail "on the contract claim." *Id.* at *7.

***3** While the district courts appear to be in agreement on the immediate issue, at least one California court has reached a different conclusion. In *Profit Concepts Mgm't, Inc. v. Griffith*, 162 Cal.App.4th 950, 76 Cal.Rptr.3d 396 (2008), the California Court of Appeal affirmed the superior court's grant of attorney's fees to the defendant, who had previously successfully moved to quash service of summons for lack of personal jurisdiction. The court explained that since the case had been "completely resolved vis-à-vis the California courts," there was a "final resolution of the contract claims."*Id.* at 956, 76 Cal.Rptr.3d 396.

This Court agrees with the district courts cited above. A party who prevails in an action does not necessarily prevail on the contract claim in that action. Section 1717 defines a prevailing party as the one who prevails "on the contract." Cal. Civ.Code § 1717(a), (b)(1). Under California law, one prevails "on the contract" only if there has been "final resolution of the contract claim[.]"*Hsu*, 9 Cal.4th at 876, 39 Cal.Rptr.2d 824, 891 P.2d 804;*see also Lachkar v. Lachkar*, 182 Cal.App.3d 641, 648, 227 Cal.Rptr. 501 (1986) ("[Section 1717] still requires that there be some

final disposition of the rights of the parties."). Here, the Court dismissed this case without prejudice pursuant to Federal Rule 41(b) meaning the plaintiff is allowed to bring a new suit on the same claim. In this case there has been no determination whatsoever of the merits of the contract claims.[2] Accordingly, Defendant has not prevailed "on the contract" within the meaning of section 1717.

In summary, there is a distinction between a prevailing party in an action and a prevailing party on a contract claim. *See N.R.*, 2006 U.S. Dist. LEXIS 47287, at *7, 2006 WL 1867682.This distinction is a decisive one. Because Defendant secured a dismissal on technical grounds, rather than a judgment on the merits of the contract claim, he is not the prevailing party within the meaning of section 1717 and is, therefore, not entitled to attorney's fees.

IV. *Conclusion*

Based on the foregoing, the Court DENIES Defendant's Motion for an Award of Attorney's Fees.

IT IS SO ORDERED.

Footnotes

1 The court applied California law because the parties had included express choice-of-law provisions in their agreements. *Id.* at 840.

2 Generally, a dismissal for failure to prosecute under Rule 41(b) operates "with prejudice," or "on the merits." *See* Fed.R.Civ.P. 41(b). However, that is not the case if the Court indicates that the dismissal is "without prejudice." *See id.*("*Unless the dismissal order states otherwise*, a dismissal under [41(b)] ... operates as an adjudication on the merits."(emphasis added)). In this case, the Court specifically dismissed the case "without prejudice," *see* Dkt. # 38, thus making the dismissal similar to those for "lack of jurisdiction, improper venue, or failure to join a party under Rule 19."*See id.*As a result, the Court examines the award of attorney's fees in cases dismissed for those "without prejudice" reasons listed, and applies the same reasoning here.

End of Document

Attachment "4"

2009 WL 2871139
Only the Westlaw citation is currently available.
United States District Court,
D. Oregon.

ADVANCE FINANCIAL RESOURCES, INC., Plaintiff,
v.
COTTAGE HEALTH SYSTEM, INC., Defendant.

No. CV 08–1084–KI. | Sept. 1, 2009.

Attorneys and Law Firms

Sonia A. Montalbano, William A. Drew, Elliott Ostrander Preston, PC, Portland, OR, for Plaintiff.

Frank J. Weiss, Tonkon Torp LLP, Portland, OR, for Defendant.

Opinion

OPINION AND ORDER

KING, Judge:

***1** Before the court is a motion for attorney fees (doc. 20) filed by Defendant Cottage Health System, Inc. ("Cottage Health"). For the reasons below, I DENY the motion.

Background

On September 17, 2008, Advance filed this action for breach of contract, invoking this court's diversity jurisdiction under 28 U.S.C. § 1332. After conducting limited discovery, Cottage Health filed a motion to dismiss for lack of personal jurisdiction. In the alternative, Cottage Health sought an order transferring this action to the proper venue in the Central District of California. While Cottage Health's motion was pending, Advance filed a parallel action in the United States District Court for the Central District of California. On April 21, 2009, I issued an Opinion and Order granting Cottage Health's motion to dismiss for lack of personal jurisdiction. In so doing, I relied on the fact that Advance had filed a parallel and identical Complaint in the Central District of California. I also noted that "California appears to be the most efficient forum to resolve the dispute because the parties' rights and obligations under the contract are to be 'determined under, governed by and construed in accordance with the internal laws of the State of California.' " Opinion and Order, at 12. Cottage Health has since filed its Answer and Counterclaims in the California case, in which it seeks the attorney's fees incurred in the present case. On April 22, 2009, I issued an Order of Judgment dismissing Advance's case with prejudice.

On May 7, 2009, Cottage Health filed the present motion for attorney fees under Federal Rule of Civil Procedure 54(d), California Civil Code 1717(a), and the terms of the parties' agreement. The contract in this case contains a provision requiring Cottage Heath "to pay, any and all out-of-pocket expenses and charges incurred by [Advance] in connection with the ... enforcement of this Agreement (including reasonable attorneys' fees and disbursements of [Advance's] counsel)." Dec. of Sheila Souther in Supp. of Mot. to Dismiss, Ex. A, at 7 (doc. 6). California law governs the construction and interpretation of the contract. *Id.* at 6. Where, as here, a contract contains a provision granting either party the right to recover attorney's fees in the event of litigation on the contract, California Civil Code 1717(a) gives the "party prevailing on the contract" a right to recover attorney's, regardless of whether that party is specified in the contract. Cottage Health contends that having obtained a dismissal of Advance's Complaint based on lack of jurisdiction, it is entitled to attorney's fees under California Civil Code 1717(a), as the "party prevailing on the contract." I disagree.

Discussion

Federal courts apply state law in determining whether to award attorney's fees in an action on a contract. *Ford v. Baroff*, 105 F.3d 439, 442 (9th Cir.1997).California Civil Code 1717 provides, in relevant part:

> ***2** 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, shall be entitled to reasonable attorney's fees in addition to other costs.

Cal. Civ.Code § 1717(a) (emphasis added). The statute further provides that "the party prevailing on the contract shall be the party who recovered greater relief in the action on the contract."*Id.* § 1717(b)(1)."The court may also determine that there is no party prevailing on the contract for purposes of this section."*Id.*"[I]n deciding whether there is a party prevailing on the contract, the trial court is to compare the relief awarded on the contract claim or claims with the parties' demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, and similar sources. The prevailing party determination is to be made *only upon final resolution of the contract claims* and only by a comparison of the extent to which each party ha[s] succeeded and failed to succeed in its contentions."*Hsu v. Abbara*, 891 P.2d 804, 813 (Cal.1995) (emphasis added). Substance rather than form should be respected, and to this extent the trial court should be guided by equitable considerations. *Id.* In other words, "status as the 'party prevailing on the contract' is ascertained not by technicalities of pleading and procedure but by a pragmatic assessment of the parties' ultimate positions vis-à-vis their litigation objectives as reflected in pleadings, prayers and arguments."*Estate of Drummond*, 149 Cal.App. 4th 46, 51 (Cal.Ct.App.2007).

Although Cottage Health is correct that it prevailed *in this action*, it has not prevailed *on the contract* and is therefore, not entitled to attorney's fees under the plain language of California Civil Code § 1717(a). As noted, the "prevailing party" determination under Section 1717(a) "is to be made *only upon final resolution of the contract claims*." *Hsu*, 891 P.2d at 813 (emphasis added). Here, I dismissed Advance's Complaint for lack of personal jurisdiction, and made no determination whatsoever as to the merits of Advance's underlying contract claim. In dismissing that claim, I expressly relied on the fact that Advance had filed a parallel and identical action in the Central District of California. That contract claim is still pending. It necessarily follows that there has been no "final resolution" of Advance's contract claim. Because "no fee award can be made before such a 'final resolution,' " Cottage Health is not entitled to an award of attorney's fees under Section 1717(a) as the "party prevailing on the contract." *See Drummond*, 149 Cal.App. 4th at 51 (holding that an award of attorney's fees under Section 1717(a) cannot be made before the final resolution of the contract claims); *see also Idea Place Corp. v. Fried*, 390 F.Supp.2d 903, 905 (N.D.Cal.2005) (defendants were "not the prevailing party on the contract" and therefore, not entitled to attorney's fees under Section 1717 because the court's dismissal for lack jurisdiction "precluded the Court from making any findings with respect to the merits of the underlying ... breach of contract claim"); *N.R. v. San Ramon Valley Unified School Dist.*, 2006 WL 1867682, at *2 (N.D.Cal.2006) (holding that defendant was not the prevailing party on the contract where court dismissed plaintiffs' breach of contract claim for lack of jurisdiction).

***3** In determining whether Cottage Health is the "prevailing party on the contract," *Estate of Drummond*, 149 Cal.App. 4th 46 (Cal.Ct.App.2007), is instructive. In that case, an attorney representing the contestants of a will filed a claim against the contestants in probate court, arguing that they owed him additional fees under the legal services contract. The will contestants subsequently filed a separate civil action on the contract. In the meantime, however, the probate court ruled in favor of the attorney on the contract claims and awarded him fees. The California Court of Appeal reversed, and directed the probate court to dismiss the attorney's contract claims for violation of the compulsory cross-complaint rule. The will contestants then moved for attorney's fees under California Civil Code 1717(a), arguing that they were the prevailing parties on the contract action in the probate court.*Id.* at 49.

The trial court denied the will contestant's motion for attorney's fees, and Court of Appeal affirmed. The Court of Appeal held that an award of attorney's fees under Section 1717(a) must await the final resolution of the contract claims. *Id.* at 51.In so doing, the court rejected the will contestant's argument that the phrase "final resolution" simply meant "final for the purposes of a particular lawsuit."*Id.* The court noted that this argument was inconsistent with the plain meaning of the "phrase 'prevailing on the contract,' which implies a strategic victory at the end of the day, not a tactical victory in a preliminary engagement."*Id.* The will contestants had "obtained only an interim victory, based on [the attorney] having attempted to pursue his claims in the wrong forum."

The will contestant's argument was also inconsistent with *Hsu*, which required the court to make the prevailing party determination by a "pragmatic assessment of the parties' ultimate position vis à vis their litigation objectives as reflected in pleadings, prayers, and arguments."The court observed that in dismissing the probate petition, it "explicitly recogniz[ed] and expect[ed] that the controversy could proceed to a judgment on the merits in the civil suit."*Id.* at 52.As such, the dismissal of the probate action was not the kind of final resolution contemplated by *Hsu*; it "determined nothing except that [the attorney] had to pursue his claims against [the will contestants] in the civil case."*Id.* at 52.

The Court of Appeal also analyzed the California legislature's decision to amend Section 1717, and replace the term "prevailing party" with "party prevailing on the contract." *Id.* This change "shifted the emphasis from victory at a particular stage of the proceedings to victory 'on the contract.' " *Id.* at 52–53.The will contestants had "at no time won a victory 'on the contract.' They ha[d] only succeeded at moving a determination on the merits from one forum to another." *Id.* The litigation on the contract in the probate court ended solely because it should have been brought in another court.

***4** Like the will contestants in *Drummond,* Cottage Health has succeeded only in moving the resolution of the underlying contract dispute in this case from one forum to another. Advance's contract claim was dismissed on jurisdictional grounds and there has been no final resolution of the underlying contract claim. Much like the procedural victory in *Drummond,* this was an interim, preliminary victory, rather than a strategic victory at the end of the day. Cottage Health has at no time obtained a victory "on the contract," and Advance's underlying contract claims are still pending. The dismissal of Advance's Complaint "did not defeat [the] contract claims; it merely deflected or forestalled them. By achieving that result, [Cottage Health] ha[s] no more 'prevailed' than does a fleeing army that outruns a pursuing one."*Id.* at 53.

A comparison of the "relief awarded on the contract" with ultimate "litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources,"*Hsu,* 891 P.2d at 813, confirms that neither has prevailed on the contract. Those materials make clear that the parties anticipated continued litigation on the merits of Advance's contract claim. Indeed, Cottage Health acknowledged that jurisdiction would be proper in the Central District of California and explicitly argued that this court should transfer jurisdiction to that forum. While Cottage Health's motion to dismiss was pending, Advance filed a parallel and identical complaint in the Central District of California. Like the Court of Appeal in *Drummond,* I dismissed Advance's Complaint "while recognizing and expecting that the controversy [w]ould proceed to a judgment on the merits" in the Central District of California. *Id.* at 52.Had Advance not filed the California action, I would have granted Cottage Health's request for a change of venue. In other words, the parties' arguments and the procedural posture of this case make clear that in obtaining a dismissal of the present action, Cottage Health obtained only an interim, preliminary victory based on Advance's attempt to pursue its claims in the wrong forum. Advance's contract claim is still pending in the Central District of California and it cannot be said that Cottage Health has obtained any relief "on the contract."

I am not persuaded that *Profit Concepts Management, Inc. v. Griffith,* 162 Cal.App. 4th 950 (Cal.Ct.App.2008), mandates a different result. Although the *Profit Concepts* court found that a determination on the merits was not necessary for the court to award attorney's fees to a defendant that obtained a dismissal for lack of jurisdiction, *Id.* at 956, that conclusion appears to be inconsistent with the California Supreme Court's decision in *Hsu,* the California Court of Appeal's decision in *Drummond,* and the plain language of California Civil Code 1717. As noted, the California Court of Appeal in *Drummond* held that "no fee award can be made before the final resolution of the contract claims."*Drummond,* 149 Cal.App. 4th at 51. In so holding, the Court of Appeal relied on the California Supreme Court's admonition that the prevailing party determination "is to be made only upon final resolution of the contract claims...."*Hsu,* 891 P.2d at 813. The *Drummond* court also rejected the argument advanced by Cottage Health that final simply means final for the purposes of this particular lawsuit. *Profit Concepts* appears to be contrary to both *Drummond* and the plain meaning of the Section 1717, which states that the "party prevailing on the contract" is entitled to attorney's fees. Accordingly, I find *Profit Concepts* unpersuasive and decline to follow it.

***5** Here, Cottage Health has not obtained any relief on merits of Advance's contract claims. It has succeeded only in moving the resolution of the underlying contract dispute from one forum to another. It remains to be seen which party will be the "party prevailing on the contract." Until the final resolution of Advance's contract claim, however, there can be no prevailing party for the purposes of Section 1717, and Cottage Health's motion for an award of attorney's fees is premature.

III. Conclusion

For the reasons set forth above, Cottage Health's Motion for Attorney's Fees (doc. 20) is DENIED.

IT IS SO ORDERED.

End of Document

Attachment "5"

2015 WL 983858
Only the Westlaw citation is currently available.
United States District Court,
N.D. California.

Russell City Energy Company, LLC, Plaintiff,
v.
City of Hayward, Defendant.

No. C-14-03102 JSW (DMR)
|
Signed February 17, 2015

Attorneys and Law Firms

Robb Christopher Adkins, Charles John Moll, III, Krista M. Enns, Winston and Strawn LLP, San Francisco, CA, for Plaintiff.

REPORT AND RECOMMENDATION RE DEFENDANT'S MOTION FOR ATTORNEYS' FEES [DOCKET NO. 40]

DONNA M. RYU, United States Magistrate Judge

***1** This matter has been referred to the undersigned for a Report and Recommendation on Defendant City of Hayward's motion for attorneys' fees. [Docket No. 40.] The court finds that this matter is appropriate for resolution without oral argument. N.D. Cal. Civ. L.R. 7–1(b). For the following reasons, the court issues this Report and Recommendation, with a recommendation that the motion be dismissed, or in the alternative, denied.

I. Factual & Procedural Background

The factual allegations in the complaint are summarized in the district judge's order granting Defendant's motion to dismiss. Plaintiff Russell City Energy Company, LLC ("RCEC") and City of Hayward ("the City") are parties to a 2005 agreement and a 2006 amendment thereto (together, "the Agreement") in which RCEC agreed to build the Russell City Energy Center ("the Energy Center"), a "natural gas fired combined cycle power plant," in Hayward, California. (Compl. Ex. A (Agreement).) In July 2014, RCEC filed this lawsuit against the City alleging five state law claims and one federal claim arising out of the City's alleged breach of the Agreement. RCEC's claims were based upon the City's 2011 notification that its Utility Users Tax Ordinance ("UUT") applied to the Energy Center's operations. Specifically, RCEC alleged that the City's determination that the tax applied to the Energy Center, as well as the City's subsequent tax assessments on the Energy Center, violated a provision of the Agreement that stated "the City shall not impose any other levies, fees, taxes, contributions, or charges on [RCEC] ... other than such levies, fees, taxes, contributions, or charges generally applicable to similarly situated owners of real property located in the City." (*See* Compl. ¶¶ 3, 6, 44, 45, Agreement § 6.)

RCEC filed an amended complaint in August 2014, asserting claims for 1) breach of contract; 2) promissory estoppel; 3) anticipatory repudiation; 4) violations of the contracts clauses of the United States and California constitutions, pursuant to 42 U.S.C. § 1983; and 5) declaratory relief. [Docket No. 19.] The City moved to dismiss the amended complaint, and on November 13, 2014, the Honorable Jeffrey S. White granted the City's motion and entered judgment. [Docket Nos. 36 (Dismissal Order), 37.] The court held that the Tax Injunction Act ("TIA"), 28 U.S.C. § 1341, and principles of comity precluded the court from exercising jurisdiction over RCEC's claims. The TIA provides that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." The TIA applies to municipal taxes like the City's UUT. 28 U.S.C. § 1341; *Hibbs v. Winn*, 542 U.S. 88, 100 n.1 (2004) ("State taxation, for § 1341 purposes, includes local taxation."). The court concluded that the "crux of each of RCEC's claims for relief is that the UUT does not apply to it, and the City breached its agreement by assessing the tax against it"; accordingly, since "RCEC [sought] orders that would enable it to avoid paying state taxes," the court lacked subject matter jurisdiction over the action. (Dismissal Order 5–6.)

***2** The City now seeks attorneys' fees incurred in defending this action under section 21 of the Agreement, which provides:

> If an arbitration, mediation, court or other proceeding is brought to enforce or interpret any of the terms of this Agreement, the Party not prevailing shall pay the prevailing Party's attorney fees, costs and disbursements, and such other sums as the arbitrator, mediator or court may determine to be

> reasonable for the prevailing Party in the case.

(Agreement § 21.) RCEC opposes the motion.

II. Legal Standard

California law governs the method of calculating attorneys' fees awarded under state law. *Mangold v. Cal. Pub. Util. Comm'n*, 67 F.3d 1470, 1478 (9th Cir.1995). " 'Unless authorized by either statute or agreement, attorney's fees ordinarily are not recoverable' in California." *Sunnyside Dev. Co., LLC v. Opsys Ltd.*, No. 05–cv–0553 MHP, 2007 WL 2462141, at *1 (N.D.Cal. Aug. 29, 2007) (quoting *Reynolds Metals Co. v. Alperson*, 25 Cal.3d 124, 127 (1979)). California Civil Code section 1717 governs contractual fee provisions, and provides in relevant part:

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

Cal. Civ.Code § 1717(a).

The starting point for determining reasonable attorneys' fees is the "lodestar," which is calculated by multiplying the number of hours reasonably expended on litigation by a reasonable hourly rate. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). In determining a reasonable amount of hours, the court must review time records to decide whether the hours claimed by the applicant are adequately documented and whether any of the hours were unnecessary, duplicative or excessive. *Chambers v. City of L.A.*, 796 F.2d 1205, 1210 (9th Cir.1986), *reh'g denied, amended on other grounds*, 808 F.2d 1373 (9th Cir.1987). To determine reasonable hourly rates, the court must look to the prevailing rate in the community for similar work performed by attorneys of comparable skill, experience, and reputation. *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 979 (9th Cir.2008).

III. Analysis

A. Jurisdiction to Consider this Motion

As a preliminary matter, the court must determine whether it has jurisdiction to determine this motion given that the action has been dismissed for lack of subject matter jurisdiction. According to RCEC, because the court determined that it lacked jurisdiction to adjudicate its claims on the merits, the court lacks jurisdiction to award attorneys' fees to the City.

Under Ninth Circuit precedent, a court that has dismissed a case for lack of subject matter jurisdiction generally has no jurisdiction to award attorneys' fees. *Latch v. United States*, 842 F.2d 1031, 1033 (9th Cir.1988) (in tax abatement case, holding that "since the district court lacked jurisdiction to entertain the tax claim, it had no authority to award attorney's fees"); *Smith v. Brady*, 972 F.2d 1095, 1097 (9th Cir.1992) ("if the district court lacked jurisdiction over the underlying suit, 'it had no authority to award attorney's fees' " (citing *Latch*, 842 F.2d at 1033)); *Branson v. Nott*, 62 F.3d 287, 292–93 (9th Cir.1995) ("because the district court lacked subject matter jurisdiction over [plaintiff's] purported civil rights claim in the first instance, it also lacked the power to award attorney's fees under the civil rights attorney fee statute [42 U.S.C. § 1988] ... 'fee shifting provisions cannot themselves confer subject matter jurisdiction' "); *Skaff v. Meridien N. Am. Beverly Hills, LLC*, 506 F.3d 832, 837 (9th Cir.2007) ("[a] court that lacks jurisdiction at the outset of a case lacks the authority to award attorneys' fees."). "An exception to this rule exists where the statute under which a party seeks attorney's fees contains an independent grant of jurisdiction," *Latch*, 842 F.2d at 1033, or where a district court imposes Rule 11 sanctions for filing a frivolous complaint. *See Branson*, 62 F.3d at 293 (citing *Willy v. Coastal Corp.*, 503 U.S. 131, 138 (1992)). For example, 28 U.S.C. § 1919, which authorizes a court to order "the payment of just costs" whenever a suit is dismissed, and 28 U.S.C. § 1447(c), which authorizes an order requiring "payment of just costs ... including attorney fees" incurred as a result of wrongful removal, each allow a district court to award fees even though it lacks jurisdiction over substantive claims. *Branson*, 62 F.3d at 293 n.10; *see also Cal. Ass'n of Physically Handicapped, Inc. v. FCC*, 721 F.2d 667, 671 (9th Cir.1983) (§ 505(b) of the Rehabilitation Act contains independent grant of jurisdiction allowing district court to award fees even where it lacked jurisdiction over action).

***3** In this case, the City seeks fees solely pursuant to California Civil Code section 1717. The City provides no authority to support construing section 1717 as conferring an independent grant of jurisdiction to the court. Accordingly, this exception is inapplicable here. *See Archer v. Silver State Helicopters, LLC*, No. 06CV1229 JAH(RBB), 2007 WL 4258237, at *2 (S.D.Cal. Dec. 3, 2007) (concluding "there is no basis for construing [state law fee provisions, including Cal. Civil code § 1717] as containing an independent grant of jurisdiction to this Court"); *see also In re Knight*, 207 F.3d 1115, 1117 (9th Cir.2000) (holding that court that lacks subject matter jurisdiction over action lacks authority to award fees and costs under ERISA section 502(g)(1); noting "the logic of *Branson* is broadly controlling").

In response, the City cites *Kona Enterprises, Inc. v. Estate of Bishop*, 229 F.3d 877 (9th Cir.2000), in support of its position that this court may exercise jurisdiction to determine this motion. In *Kona*, the Ninth Circuit held that "a district court sitting in diversity may award attorneys' fees to the prevailing party under applicable state law, despite a dismissal of the action for lack of subject matter jurisdiction." *Id.* at 887–88 (affirming award of attorneys' fees and costs to defendants deemed "prevailing party" under Hawaii statute after plaintiffs' claims dismissed with prejudice for lack of subject matter jurisdiction). However, *Kona*, which was decided after *Latch*, *Smith*, and *Branson*, did not mention or distinguish those cases, and a number of district courts have declined to consider *Kona* 's holding on this point to be binding authority for that reason. *See, e.g., Archer*, 2007 WL 4258237, at *2–3 ("[a]bsent an intervening Supreme Court decision, a Ninth Circuit panel must follow Ninth Circuit precedent unless such precedent is distinguished; precedent may only be overruled by the Ninth Circuit sitting *en banc* .... [b]ecause one panel cannot overrule another, and because *Kona Enterprises* failed to distinguish what appears to be controlling authority, this Court concludes it would be inappropriate to follow *Kona Enterprises*."); *Skaaning v. Sorenson*, 679 F.Supp.2d 1220, 1224–25 (D.Haw.2010) ("[t]he *Kona Enterprises* panel, which was not sitting *en banc*, did not, and indeed could not, overrule [*Latch*, *Smith*, and *Branson*] ... to the extent that the *Kona Enterprises* panel's statement on this narrow issue is contrary to prior established precedent as well as subsequent Ninth Circuit case law, *Kona Enterprises* does not control this Court's determination."); *see also Doan v. Singh*, No. 1:13–cv–00531–LJO–SMS, 2013 WL 5718720, at *3–4 (E.D.Cal. Oct. 18, 2013) (concluding that it lacked jurisdiction to evaluate request for attorneys' fees pursuant to California Civil Code section 1717 where it dismissed underlying claims for lack of subject matter jurisdiction, citing *Skaff*; concluding that *Kona* "should be limited to its facts ... if not disregarded entirely."). [1]

This court finds the reasoning of *Archer*, *Skaaning*, and *Doan* persuasive and declines to follow *Kona* here. Additionally, the court agrees with the *Archer* court's determination that "the statement of law in [*Latch*, *Smith*, *Branson*, *Skaff*, and *Knight*]–that a district court has no authority to award attorney's fees where it lacks jurisdiction over the underlying suit–is sufficiently broad to preclude an award of fees" in this case, where RCEC is free to pursue its claims in state court. [2] *See Skaaning*, 679 F.Supp.2d at 1225 (noting that the court in *Kona* emphasized that the plaintiff's action was dismissed with prejudice and distinguishing *Kona* on that ground; *Skaaning* plaintiff's claims were not dismissed with prejudice and could be pursued in state court).

***4** The court concludes that it lacks jurisdiction to consider the City's motion for attorneys' fees. Accordingly, it recommends that the motion be dismissed on that basis. *See Skaff*, 506 F.3d at 837 n.2 ("[o]rdinarily, the appropriate disposition of a motion for attorneys' fees when the court lacked jurisdiction from the outset of an action is not denial of the motion ... but dismissal of the motion for lack of jurisdiction" (citations omitted)).

B. The City's Entitlement to Fees

Alternatively, even assuming the court has jurisdiction over the City's fee motion, the court recommends the motion be denied because the City is not entitled to fees under California Civil Code section 1717(a) as the "party prevailing on the contract."

Section 1717, which the parties agree governs this dispute, provides in relevant part:

> 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 shall be entitled to reasonable attorney's fees in addition to other costs....
>
> 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. The court may also determine that there is no prevailing party on the contract for purposes of this section.

Cal. Civ.Code § 1717(a), (b)(1).[3] The California Supreme Court provided the following guidance in applying section 1717 in *Hsu v. Abbara*, 9 Cal.4th 863 (1995):

> [I]n deciding whether there is a "party prevailing on the contract," the trial court is to compare the relief awarded on the contract claim or claims with the parties' demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources. The prevailing party determination is to be made *only upon final resolution of the contract claims* and only by a comparison of the extent to which each party ha[s] succeeded and failed to succeed in its contentions.

Id. at 876 (quotations and citations omitted, emphasis added). "*[I]n determining litigation success,* courts should respect substance rather than form, and to this extent should be guided by 'equitable considerations.' " *Id.* at 877.

In this case, while the City prevailed in this action, the court dismissed RCEC's claims for lack of subject matter jurisdiction. There was no determination or "final resolution" of the contract claim's merits; in fact, the breach of contract claims are now pending in state court. *See Idea Place Corp. v. Fried*, 390 F.Supp.2d 903, 905 (N.D.Cal.2005) (holding defendant not entitled to fees under section 1717 because court dismissed claims for lack of subject matter jurisdiction, noting "this Court's dismissal for lack of subject matter jurisdiction in *federal court* did not foreclose the possibility that Plaintiff could pursue its contract claims in *state court*. Thus, it remains to be seen which entity is the 'prevailing party' on Plaintiff's contract action."); *N.R. v. San Ramon Valley Unified Sch. Dist.*, No. C 05–0441 SI, 2006 WL 1867682, at *7 (N.D.Cal. July 5, 2006) (denying award of fees pursuant to section 1717 where court dismissed breach of contract claim for lack of subject matter jurisdiction; "Plaintiffs remain free, after this Court's decision, to pursue their breach of contract claims in state court.").

***5** The City urges the court to reach a different result, citing *Profit Concepts Management, Inc. v. Griffith*, 162 Cal.App. 4th 950 (2008). In *Profit Concepts*, the court affirmed the trial court's award of attorneys' fees to the defendant where it had dismissed a contract claim for lack of personal jurisdiction, reasoning that "[t]he case in California has been finally resolved" and nothing had been awarded on the plaintiff's complaint. *Id.* at 956. The court rejected the argument that fees should not be awarded because the plaintiff had re-filed the claim in another state, concluding "[w]e find nothing in the language of the statute or of *Hsu v. Abbara*, or any other case, that requires resolution in another state on the merits of a contract claim first asserted in California before a prevailing party can be determined here, when the matter has been completely resolved vis-a-vis the California courts." *Id.*; *see also PNEC Corp. v. Meyer*, 190 Cal.App. 4th 66, 72–73 (2010) (granting attorneys' fees following dismissal of contract claim for forum non conveniens where the plaintiff could re-file in Washington, following *Profit Concepts*). These cases do not compel a different result here, because unlike *Profit Concepts* and *PNEC*, RCEC's contract claims have not been "completely resolved vis-à-vis the California courts."

Moreover, *Profit Concept* 's holding is inconsistent with the plain language of section 1717, which provides that fees shall be awarded to "the party prevailing on the contract," and the California Supreme Court's guidance that "[t]he prevailing party determination is to be made only upon final resolution of the contract claims." *Hsu*, 9 Cal.4th at 876; *see also Estate of Drummond*, 149 Cal.App. 4th 46, 56 (2007) ("the phrase 'prevailing *on the contract*,'... implies a strategic victory at the end of the day, not a tactical victory in a preliminary engagement.").

Accordingly, the court declines to follow *Profit Concepts*. *See HSBC Bank USA v. DJR Properties, Inc.*, No. 1:09–CV–01239 AWI SKO, 2011 WL 1404899, at *2 (E.D. Cal. April 13, 2011) (holding party dismissed for lack of subject matter jurisdiction cannot be prevailing party on contract under section 1717; noting "*Profit Concepts* is unpersuasive and this Court declines to follow it"); *Garzon v. Varese*, No. CV 09–9010 PSG (PLAx), 2011 WL 103948, at *3 (C.D.Cal. Jan. 11, 2011) ("[b]ecause Defendant secured a dismissal on technical grounds, rather than a judgment on the merits of the contract claim, he is not the prevailing party within the meaning of section 1717 and is, therefore, not entitled to attorney's fees."); *Vistan Corp. v. Fadei USA, Inc.*, No.

C–10–04862 JCS, 2013 WL 1345023, at *3–4 (N.D. Cal. April 2, 2013) (distinguishing *Profit Concepts* and *PNEC* and denying fee motion in part because contract claim, dismissed for lack of subject matter jurisdiction, was not completely resolved); *see also Advance Fin. Res., Inc. v. Cottage Health Sys., Inc.*, No. CV 08–1084–KI, 2009 WL 2871139, at *4 (D.Or. Sept. 1, 2009) ("I find *Profit Concepts* unpersuasive and decline to follow it."). As the City has not prevailed "on the contract" within the meaning of section 1717, the court recommends that its motion for attorneys' fees be denied.

IV. Conclusion

For the foregoing reasons, the court recommends that the City's motion for attorneys' fees be dismissed, or in the alternative, denied.

Any party may file objections to this report and recommendation with the District Judge within 14 days after being served with a copy. *See* 28 U.S.C. § 636(b)(1); Fed.R.Civ.P. 72(a); N.D. Cal. Civ. L.R. 72–2.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.3d, 2015 WL 983858

Footnotes

1 Notably, *Skaff* was decided in 2007, after *Kona*. The court in *Skaff* relied upon *Latch, Smith,* and *Branson* in holding that "[a] court that lacks jurisdiction at the outset of a case lacks the authority to award attorneys' fees." *Skaff,* 506 F.3d at 837. It did not cite or discuss *Kona* .

2 In fact, RCEC represents in its opposition that the breach of contract claims are now pending in state court. (*See* Pl.'s Opp'n 6.)

3 Section 1717(b)(2) applies to voluntary dismissals or dismissals upon settlement.

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2015 WL 994533
Only the Westlaw citation is currently available.
United States District Court,
N.D. California.

Russell City Energy Company, LLC, Plaintiff,
v.
City of Hayward, Defendant.

No. C 14–03102 JSW
|
Signed 03/04/2015

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ORDER ADOPTING REPORT AND RECOMMENDATION REGARDING MOTION FOR ATTORNEYS' FEES

JEFFREY S. WHITE, District Judge

***1** Now before the Court for consideration is the Report and Recommendation (the "Report") regarding Defendant's motion for attorney's fees, prepared by Magistrate Judge Donna M. Ryu. The time for filing objections has passed, and neither party has submitted objections. The Court has considered the Report and it finds it through and well reasoned. Accordingly, the Court adopts its findings that the Court lacks jurisdiction over the motion and, in the alternative, that if it had jurisdiction, the motion should be denied for the reasons set forth in the Report.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.3d, 2015 WL 994533

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Proof of Service

I am over the age of 18 years and I am not a party to the within action. I am employed at 13763 Fiji Way, Suite EU-4, Marina del Rey, California 90292.

On January 29, 2016, I caused the following document entitled: **ANSWER BRIEF ON THE MERITS** to be served on the interested parties in this action, addressed as follows:

Marvin Gelfand Brendan J. Begley WEINTRUAB TOBIN CHEDIAK COLEMAN GRODIN 9665 Wilshire Boulevard, Ninth Floor Beverly Hills, California 90212	Robert Cooper WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER, LLP 555 South Flower Street, 29th Floor Los Angeles, California 90071

[X] **BY OVERNIGHT DELIVERY:** I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses noted above. I placed the envelope or package for collection and overnight delivery.

I declare, under penalty of perjury, under the laws of the State of California, that the above is true and correct.

Executed on January 29, 2016, at Marina del Rey, California.

Priscilla Tesillo