S223536

SUPREME COURT OF CALIFORNIA

MOUNTAIN AIR ENTERPRISES, LLC, Plaintiff and Respondent, v. SUNDOWNER TOWERS, LLC et al., Defendants and Appellants.	2d Civil No. A138306 (Marin County Super. Ct. No. CIV081957)

OPENING BRIEF ON THE MERITS

After a Decision by the Court of Appeal
First Appellate District, Division Two

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ISSUE FOR REVIEW

Can a party's assertion of an affirmative-defense trigger a clause that awards attorney's fees to the party who prevails in an "action" or "proceeding" to enforce the contract?

INTRODUCTION

The proper construction of the type of attorney's fee clause used by the parties in this case has divided the Court of Appeal. Some courts take a literal view of the language in the clause. As a result, they will award fees to a party who affirmatively files suit, but not to a party who relies on the contract defensively. This asymmetry troubles the courts in the other camp, so they stretch the language of the clause to ensure that either party invoking the contract can obtain fees.

In Mountain Air's view, the courts in the literalist camp have the better argument. The attorney-fee clause in this case applies to an action or proceeding brought to enforce the contract. Affirmative defenses are not actions or proceedings, and they are pleaded — not brought. Therefore, the attorney-fee clause does not apply to affirmative defenses.

This case truly is that straightforward. None of the words in the attorney-fee clause are unclear. The Court of Appeal majority in this case, who adopted the "symmetrical" view, was simply unwilling to credit their natural meaning because it felt that attorney fees *should* be available for affirmative defenses.

This approach to contract interpretation is troubling because it is not animated by what the parties actually agreed to. It is doubtful that the authors of the opinions holding that affirmative defenses can trigger an attorney's fee clause that does not mention them believe that the parties actually had affirmative defenses in mind when they used the term "proceeding." That would have been an inexplicable choice of words, given that affirmative defenses are not referred to as proceedings in any other context. Nor are they ever "brought" — which makes the use of that verb in the fee provision equally problematic.

Neither the majority opinion in this case nor its predecessors offer solutions to these lexical dilemmas. Rather, they suggest that there is no logical reason for a fee provision to treat complaints and affirmative defenses differently. Actually, the distinction may be useful if a party wants to retain the option of raising contract-based affirmative defenses without risking liability for the plaintiff's attorney fees under Civil Code section 1717.

That is not, however, the central problem with the "symmetrical" view adopted in the majority's opinion. The deeper flaw is its determination to improve the contract rather than to simply enforce it as written. Courts are supposed to carry out the mutual intention of the parties, without regard for the prudence of their arrangement.

Perhaps omitting affirmative defenses from an attorney-fee clause is unwise. But even ill-considered contracts must be enforced according to their terms, and there is no justification for ignoring or re-defining the terms that the parties included in their contract.

STATEMENT OF THE CASE

A. Factual Summary

1. The purchase and repurchase agreements are executed

The underlying dispute in this case concerned a piece of commercial real estate in Reno, Nevada. (Typed Majority Opinion ("Maj Opn.") at 2.) The property includes multiple buildings, which were originally designated a single parcel located 450 Arlington Avenue. (*Id.*) On February 17, 2006 the property was subdivided into three separate legal parcels: the north tower, the south tower, and the casino building. (*Id.*)

Before the property was subdivided, it became the subject of a transaction between Steven Scarpa and a Nevada limited liability company named Sundowner Towers. (*Id.* at 2.) On December 12, 2005 Scarpa and

Sundowner entered into two separate written contracts. (*Id.*) In the first contract, Sundowner agreed to sell the south tower to Scarpa for $7 million. (*Id.*) In the second contract, Sundowner promised that it would later repurchase the south tower for the same price, plus a 12% inflation factor. (*Id.*)

Sundowner's members, Bijan Madjlessi and Glenn Larsen, personally guaranteed its obligations under the repurchase agreement. (*Id.*) And Scarpa's rights under both agreements were later assigned to Mountain Air Enterprises, a California limited liability company in which he is the sole member. (*Id.* at 2.)

2. The option agreement is executed

On April 25, 2006 Mountain Air entered into an option agreement with Larsen and Madjlessi, giving them the exclusive right to purchase the south tower during a specified window of time. (*Id.* at 2.) Sundowner was not a party to the contract. (*Id.*)

The option agreement contained the following attorney-fees clause:

> If any legal action or any other proceeding, including arbitration or an action for declaratory relief; is brought for the enforcement of this Agreement or because of an alleged dispute, breach, default, or misrepresentation in connection with any provision of this Agreement, the prevailing party shall be entitled to recover reasonable attorney fees, expert fees and other costs incurred in that action or proceeding, in addition to any other relief to which the prevailing party may be entitled. (*Id.* at 11-12.)

3. Sundowner fails to honor the repurchase agreement, so Mountain Air sues it and its members

On April 27, 2006 Sundowner complied with the purchase agreement by acquiring the south tower from a third party and transferring it to Mountain Air. (*Id.*) But Sundowner never repurchased the south tower, as it had promised to do in the repurchase agreement. (*Id.* at 3.)

Mountain Air attempted to enforce the repurchase agreement by filing this lawsuit against Sundowner, Larsen, and Madjlessi. (*Id.* at 3.)

B. Procedural History

1. The trial court finds that the repurchase agreement cannot be enforced — but denies attorney fees

The defendants prevailed in a 13-day bench trial. (*Id.* at 3.) The trial court ruled in their favor on two affirmative defenses: (1) that the repurchase agreement was illegal and void under the subdivision-map laws of both California and Nevada, and (2) that the option agreement was a novation that extinguished the repurchase agreement. (*Id.* at 3-4.) The trial court's final statement of decision was filed on October 10, 2012 and judgment was entered the same day. (*Id.*)

On December 7, 2012 the defendants moved for an award of attorney fees based on the relevant provisions of the repurchase and option agreements. (*Id.* at 4.) The trial court denied the defendants' motion on March 20, 2013. (Dissent at 5.)

The court determined that fees could not be awarded under the repurchase agreement because that contract was void for illegality. (*Id.* at 5-6.) It ruled that the option agreement's attorney fee provision did not apply because the present action was not brought to enforce that agreement or because of a dispute in connection with that agreement. (*Id.* at 6.) In the

court's view, the relevance of the option agreement to the novation defense was not enough to warrant a fee award. (*Id.*)

On March 29, 2013 the defendants filed a timely notice of appeal from the trial court's order denying attorney fees. (Maj. Opn. at 4.)

2. The Court of Appeal holds that the novation defense warrants attorney fees

In a published 2-1 decision authored by Justice Stewart and joined by Presiding Justice Kline, the Court of Appeal reversed the order denying attorney fees. (Maj. Opn. at 21.) Justice Richman dissented. (Dissenting opn. of Richman, J. at 1-13.)

a. The majority opinion

The majority opinion approved of the trial court's refusal to award attorney fees pursuant to the void repurchase agreement. (Maj. Opn. at 11.) But it held that the defendants were entitled to an award of attorney fees based on the option contract. (*Id.* at 21.)

The majority determined that the novation defense constituted a "legal action" or "proceeding" for purposes of the attorney fee clause. (*Id.* at 13-14.) It acknowledged that a split of authority existed on this point; it endorsed a broad construction and rejected the appellate decisions to the contrary. (*Id.* at 15-18.) In the majority's view, it would be "absurd" for an attorney-fees provision to treat affirmative defenses differently than complaints. (*Id.* at 18.)

The majority held that the novation defense sought to enforce the option contract because it was based on the integration clause in that document. (*Id.* at 19.) Alternatively, the majority believed that the defense had been asserted because of a dispute "in connection with" the option agreement. (*Id.* at 20.) Because the subject matter of the novation defense fell within the scope of the attorney fee clause in the option contract, the

majority concluded that the defendants were entitled to an award of attorney fees. (*Id.* at 21.)

b. Justice Richman's dissent

In his dissenting opinion, Justice Richman disputed whether the novation defense fell within the scope of the attorney-fee clause in the option contract. (Dissenting opn. of Richman, J. at 1.) In his view, the novation defense was not an attempt to enforce the option agreement, nor did it arise from a dispute in connection with that contract. (*Id.* at 10-11.)

STANDARD OF REVIEW

In the Court of Appeal, the majority applied a de novo standard of review because it believed that the availability of attorney fees under the option agreement was purely a question of contract interpretation. (Maj. Opn. at 6 and 20, fn. 12.) Justice Richman disagreed. He argued that review should be deferential because the trial judge was in the best position to know whether the bench trial had been a proceeding to enforce the contract. (Disn. Opn. at 11.)

This deferential standard has already been employed in other cases where attorney fees were available only for actions brought to enforce a specific contract. (*Shadoan v. World Savings & Loan Assn.* (1990) 219 Cal.App.3d 97, 107-108 [whether an action was "on the contract" should be decided by trial court "in its discretion"]; *El Escorial Owners' Ass'n v. DLC Plastering, Inc.* (2007) 154 Cal.App.4th 1337, 1365-1366 [where "provision limits fees to actions to enforce the terms of the subcontract . . . apportionment is within the trial court's discretion"].)

When awarding attorney fees in other contexts, trial courts are afforded the same broad discretion to evaluate the character of the litigation before them. (*Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, 938 [discretion to determine whether litigation involved

enforcement of important right affecting the public interest]; *Sears v. Baccaglio* (1998) 60 Cal.App.4th 1136, 1151-1152 [discretion to choose prevailing party based on "crux" of lawsuit]; *Carver v. Chevron U.S.A., Inc.* (2004) 119 Cal.App.4th 498, 506 [discretion to determine whether lawsuit was predominately an antitrust action]; *Walker v. Countrywide Home Loans, Inc.* (2002) 98 Cal.App.4th 1158, 1181 [discretion to determine whether action had been brought to enjoin unfair business practice].)

The common link between those situations is that they all require the trial court to draw on its superior knowledge of the proceedings before it — which is the underlying basis of the court's broad discretion over attorney fees. (*In re Tobacco Cases I* (2013) 216 Cal.App.4th 570, 588.)

That does not mean that trial courts have unfettered discretion to deny contractual attorney fees. (See, e.g., *Christensen v. Dewor Developments* (1983) 33 Cal.3d 778, 786 [trial court abused discretion by denying contractual attorney fees without valid justification]; *Roybal v. Governing Bd. of Salinas City Elementary School Dist.* (2008) 159 Cal.App.4th 1143, 1148 [reversal required "even giving all possible deference to the superior court's exercise of discretion"].) But to the extent that the trial court relied on its knowledge of the proceedings, its decision should be affirmed so long as it is within the range of reason. (*Satrap v. Pacific Gas & Electric Co.* (1996) 42 Cal.App.4th 72, 80, fn. 1.)

ARGUMENT

A. Overview of the dispute in the Court of Appeal

The division between the majority and the dissent in this appeal reflects a larger dispute in the Court of Appeal about whether a contract-based affirmative defense is an "action" or "proceeding" as those terms are used in attorney-fee clauses.

The Court of Appeal rejected that theory in *Exxess Electronixx v. Heger Realty Corp.* (1998) 64 Cal.App.4th 698, 712, and *Gil v. Mansano* (2004) 121 Cal.App.4th 739, 742. As the *Gil* opinion explained, "the assertion of a contractual defense to a tort action is not an 'action brought to enforce the contract' and, therefore, the prevailing party is not entitled to an attorney fee award." (*Id.*, 121 Cal.App.4th at p. 741.)

The decision in *Salawy v. Ocean Towers Housing Corp.* (2004) 121 Cal.App.4th 664, 672-674, followed the logic of these cases in construing a statute that provided for attorney's fees in an "action . . . to enforce the governing documents" of a common-interest development. (*Id.* at p. 670, quoting Civ. Code § 1354, subd. (f).)

Justice Armstrong dissented in *Gil* and in *Salawy*, faulting the majority for adopting what he viewed as a hyper-technical interpretation of the word "action." (*Gil*, 121 Cal.App.4th at p. 746 (dis. opn. of Armstrong, J.).) The court in *Windsor Pacific LLC v. Samwood Co., Inc.* (2013) 213 Cal.App.4th 263, 268, 276, was persuaded by his view, and held that an affirmative defense qualified as an "action or proceeding" that triggered an entitlement to fees.

The majority opinion in this case followed *Windsor Pacific*, explaining that it "agree[d] with Justice Armstrong" that a defendant who raises an affirmative defense has the same right to attorney fees as a plaintiff who brings an action. (Maj. Opn. at 18.) Mountain Air's research also unearthed

an earlier case taking the same view — *Stockton Theatres v. Palermo* (1954) 124 Cal.App.2d 353, 362 — on the ground that pleading an affirmative defense was the same thing as "commenc[ing]" a "legal proceeding."

B. Attorney fees should be available only if the parties chose to include affirmative defenses in the text of the fee provision

At the outset, it is important to clarify the limited scope of the issue presented in this case. The question is not whether the defendants deserve attorney fees. Nor is it whether attorney-fee clauses *should* be drafted so that they can be triggered by an affirmative defense. Instead, the only thing that matters is the actual text of the attorney-fee provision adopted by the parties in this case.

Litigants do not have an innate right to attorney fees. By default, they are not recoverable. (*Tract 19051 Homeowners Ass'n v. Kemp* (2015) 60 Cal.4th 1135, ____, 184 Cal.Rptr.3d 701, 705). This is the so-called "American Rule." (*Id.*) Since there is no statute authorizing non-contractual attorney fees in this case, the defendants are entitled to a fee award only if they can establish that right based on the language of the option agreement.

The majority opinion declares, however, that if the parties had wanted their attorney-fee provision not to apply to affirmative defenses then they "would have gone to greater lengths to document it." (Maj. Opn. at 18.) This flips the burden of proof, allowing the majority to elide the absence of any reference to affirmative defenses in the actual language of the contract.

The majority also attempts to avoid the import of the language used by the parties by arguing that it would produce absurd results to omit affirmative defenses from the attorney-fee provision. (Opn. at 18.) This argument is strategic, since even clear and explicit language can be

disregarded in order to avoid an absurdity. (*Signal Companies, Inc. v. Harbor Ins. Co.* (1980) 27 Cal.3d 359, 375, citing Civ.Code § 1638.) But it fails, since there is nothing absurd about denying a defendant's right to recover attorney fees based on an affirmative defense.

But the American legal system is intentionally designed so that most litigants — whether plaintiffs or defendants — are forced to pay their own legal expenses. So it hardly shocks the conscience that a party could prevail on an affirmative defense without being entitled to attorney fees. On this side of the Atlantic, that outcome is simply par for the course.

If parties wish to allow for a fee award in an action to enforce their contract, they are not compelled to extend that arrangement to affirmative defenses. The majority here insists that raising an affirmative defense is "legally the same" as bringing an action. (Maj. Opn. at 18.) That is simply untrue. They are both vehicles for asserting legal rights, but they arise in completely different procedural contexts.

One may rationally believe that initiating litigation should carry different consequences than simply invoking a contract defensively in an existing lawsuit. That calculus makes particular sense in California, because creating a contractual right to attorney fees also spawns a reciprocal potential for liability to the other side under Civil Code section 1717. (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 870-871.) The parties may prefer to retain the option of raising contract-based affirmative defenses without exposing themselves to that risk. (Cf. *Blue Lagoon Community Assn. v. Mitchell* (1997) 55 Cal.App.4th 472, 477-478 [broadening statutory right to attorney fees would be "shortsighted" given "potential downside" of paying other side's costs].)

The majority points out that a defendant could pursue an attorney-fee award if, instead of raising novation as an affirmative defense, the defendant simply filed a cross-complaint for declaratory relief based on the same facts. (Maj. Opn. at 18.) This is true, but that is a feature of the contract, not a flaw. It means that defendants enjoy two complementary options for asserting their contractual rights. The conservative approach is to only plead a defense, knowing that each side will pay for its own attorney fees. The aggressive approach is to file a cross-complaint, which puts both sides at risk for an award of contractual attorney fees.

But even if there were a loophole in the terms of the contract, it would not be the Court's responsibility to patch it. (See *Safeco Ins. Co. of America v. Robert S.* (2001) 26 Cal.4th 758, 763-764 [invalidating "illegal acts" exclusion as overbroad instead of limiting it to "criminal acts"].) "Courts cannot make for the parties better agreements than they themselves made or rewrite contracts because they operate harshly or inequitably as to one of the parties." (*Hinckley v. Bechtel Corp.* (1974) 41 Cal.App.3d 206, 211.) "To do so would violate the fundamental principle that in interpreting contracts . . . courts are not to insert what has been omitted." (*Safeco,* 26 Cal.4th at p. 764.)

That principle delimits the inquiry before the Court. If the text of the attorney-fee clause includes affirmative defenses, then the defendants are entitled to a fee award. But if that language is absent, then the Court must respect the parties' decision not to make attorney fees available based on an affirmative defense.

C. The plain language of the attorney-fee clause does not include affirmative defenses

1. An affirmative defense is neither an "action" nor a "proceeding"

If the Court agrees to enforce the contract as written, then this appeal is functionally over because there is not a single word in the attorney-fee clause about affirmative defenses. By its terms, it applies to a "legal action or any other proceeding, including arbitration or an action for declaratory relief . . . brought for the enforcement of this Agreement." (Maj. Opn. at 11-12.)

This means that the clause does not reach affirmative defenses because a defense is not an action or proceeding. (*Exxess Electronixx v. Heger Realty Corp.* (1998) 64 Cal.App.4th 698, 712 ("Under any reasonable interpretation of the attorneys' fee provision, we cannot equate raising a 'defense' with bringing an 'action' or 'proceeding'."]; accord *Gil v. Mansano* (2004) 121 Cal.App.4th 739, 744 ["the assertion of a defense does not constitute the bringing of an action to accomplish that goal"].)

These are the standard terms used in many attorney-fee clauses, precisely because their meaning is so clear.

"An 'action' is 'a lawsuit brought in a court; a formal complaint within the jurisdiction of a court of law; an ordinary proceeding in a court of justice by which one party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense.'" (*Gil v. Mansano*, 121 Cal.App.4th at p. 744, ellipses and brackets omitted, quoting Black's Law Dict. (6th ed.1990) p. 28, col. 1; accord Code Civ. Proc., §§ 20–22.)

"The word 'proceeding' may be used synonymously with 'action' or 'suit' to describe the entire course of an action at law or suit in equity from

the filing of the complaint until the entry of final judgment." (*Exxess Electronixx*, 64 Cal.App.4th at p. 712, ellipses and brackets omitted, quoting Black's Law Dict., p. 1204, col. 1.) It is broader than 'action,' because it may encompass the resolution of a dispute before quasi-judicial officers and boards. (*Id.*)

By definition, a defense is neither an action nor a proceeding. It is "that which is offered and alleged *by the party proceeded against in an action* or suit, as a reason in law or fact why the plaintiff should not recover or establish what he seeks; it is a *response to the claims of the other party*, setting forth reasons why the claims should not be granted." (*Gil*, 121 Cal.App.4th at p. 744, brackets and ellipses omitted, italics modified, quoting Black's Law Dict., p. 419, col. 2.)

The parties would have chosen different words if they wanted to make attorney fees available for an affirmative defense. Many attorney-fee provisions directly refer to defenses arising from the contract. (*See, e.g., Share v. Casiano Bel-Air Homeowners Assn.* (1989) 215 Cal.App.3d 515, 521 [mandating fees if "any party to this Agreement . . . is required to defend any action the defense to which is any provision of this Agreement"].) Others are drafted broadly enough that they apply whenever the contract becomes the subject of litigation. (*Thompson v. Miller* (2003) 112 Cal.App.4th 327, 336-337 [clause awarding fees for "any dispute under the agreement" encompassed affirmative defense]; *Salawy,* 121 Cal.App.4th at p. 674 [fees could be awarded for any action "in which" the document is enforced].)

It would have been easy for the parties here to employ similarly broad language in their contract. (See *Safeco,* 26 Cal.4th at pp. 763-764 ["Had Safeco wanted to exclude criminal acts from coverage, it could have

easily done so" like other insurers].) Instead, they adopted a narrower fee provision. The courts should respect that choice.

2. Affirmative defenses are not "brought"

It is already clear from the definitions of the words "action" and "proceeding" that the fee provision does not apply to affirmative defenses. But the text of the contract clarifies this point by pairing those nouns with the verb "brought" — i.e., fees are available in an action or proceeding "*brought* for the enforcement of this Agreement." (Maj. Opn. at 11-12, emphasis added.)

The use of this verb confirms that the drafters did not have affirmative defenses in mind. (*See Windsor Pacific LLC v. Samwood Co., Inc.*, 213 Cal.App.4th at p. 276 [explaining that earlier cases "seemed to regard the word 'brings' or 'brought' as narrowing the scope of the attorney fee clause"].)[1] In normal legal parlance, defenses are "pleaded" or "raised" or "asserted" — but they are not "brought."

The majority admits that is technically true, but it argues that *raising* a defense is like *bringing* an action. (Maj. Opn. at 18.) In its view, the idea that the drafters would rely on such an inconsequential word to narrow the scope of the attorney-fee provision "elevates form over substance and fiction over reality." (Maj. Opn. at 18.)

But it would be just as easy to turn that accusation on the majority for interpreting the clause as if the word "brought" had not been included in it. That verb cannot be deleted simply because it defies the majority's preferences for what the contract should mean. Nor is it unusual for courts to allow seemingly minor linguistic nuances to have major interpretative

[1] The attorney-fee clause at issue in *Windsor Pacific* did not include the word "brought" or any equivalent term. (*Id.*, 213 Cal.App.4th at p. 276.)

ramifications. For example, in an insurance policy, the scope of exclusion for liability resulting from the intentional acts of "an" insured is much broader than one for the intentional acts of "the" insured. (*See, e.g., Minkler v. Safeco Ins. Co. of America* (2010) 49 Cal.4th 315, 322-323 [explaining distinction].)

It is true that the parties probably did not insert the word "brought" with the express purpose of limiting the scope of the attorney-fee provision. They accomplished that with the terms "action" and "proceeding." But the meaning of those nouns can be inferred by examining the verb that accompanies them. (Civ. Code, § 1641; see also, *Sampson v. Century Indem. Co.* (1937) 8 Cal.2d 476, 480 ["No term of a contract is either uncertain or ambiguous if its meaning can be ascertained by fair inference from other terms thereof"].)

Perhaps, in the abstract, there is some broad sense in which those nouns could encompass a defense. But "in construing a contract the court's function is not merely to import all of the possible definitions or even the broadest definition, but to glean the meaning of the words *from the context and usage of the words in the contract itself.*" (*Mirpad, LLC v. California Ins. Guarantee Assn.* (2005) 132 Cal.App.4th 1058, 1069, original italics.) Here, that exercise confirms that the words "action," "proceeding," and "brought" do not refer to affirmative defenses.

D. The two rationales for awarding fees are both deeply flawed

1. When awarding fees, it would be unreasonable to brand every event in a lawsuit as a "proceeding"

The majority opinion in this case held that an affirmative defense is a "proceeding" on the ground that each discrete step in a lawsuit deserves that title. It explains that, "Anything done from the commencement to the

termination is a proceeding." (Maj. Opn. at 14, quoting *Zellerino v. Brown* (1991) 235 Cal.App.3d 1097, 1105.)

There are contexts in which that expansive definition is appropriate, but this is not one of them. "'Proceeding' has different meanings in different contexts" — as explained by the case that the majority relies on. (*Zellerino*, 235 Cal.App.3d at p. 1105.) "Narrowly, it means an action or remedy before a court. . . Broadly, it means 'All the steps or measures adopted in the prosecution or defense of an action.'" (*Id.*, internal citations omitted.)

Zellerino "construed the term 'proceeding' in [Code of Civil Procedure] section 473 broadly," because that is clearly the sense in which the word appears within that statute. (*Id.*) Section 473 describes when a party may "amend any pleading or proceeding" or receive relief from a "judgment, dismissal, order, or other proceeding." (Code Civ. Proc., § 473.) The other words listed in Section 473 are each individual steps within a lawsuit, so "proceeding" is clearly used in the same sense.

This is a straightforward result of the rule that "a court will adopt a restrictive meaning of a listed item if acceptance of a more expansive meaning would make other items in the list unnecessary or redundant, or would otherwise make the item markedly dissimilar to the other items in the list." (*Moore v. California State Bd. of Accountancy* (1992) 2 Cal.4th 999, 1012.) The name of this rule is "noscitur a sociis: that a word takes its meaning from the company it keeps." (*Blue Shield of California Life & Health Ins. Co. v. Superior Court* (2011) 192 Cal.App.4th 727, 740.)

When applied to the contract in this case instead of section 473, the rule produces the opposite conclusion. The contract's attorney-fee provision applies to "any legal action or any other proceeding, including

arbitration or an action for declaratory relief." (Maj. Opn. at 11.) Each of those terms refers to the entirety of a suit, so it is clear that "proceeding" is used in the same sense.

That conclusion is bolstered by the fact that the provision authorizes recovery of "attorney fees, expert fees and other costs incurred *in* that action or proceeding..." (Maj. Opn. at 11, italics added.) A party incurs costs *in* a lawsuit, whereas it would be very odd to say that a party incurred costs *in* an affirmative defense. The preposition is only appropriate if "proceeding" is used in the narrow sense that is roughly comparable to "action."

The majority rejected this interpretation, suggesting that it would render the word "proceeding" superfluous within the attorney-fee clause. (Maj. Opn. at 14, citing *Deutsch v. Phillips Petroleum Co.* (1976) 56 Cal.App.3d 586, 590 [contract "must be construed so as to give force and effect to *every* word contained within it"].) It was mistaken. The clause lists a "legal action" as an *example* of a proceeding.

The majority overlooked the presence of the word "other," which is "used to refer to all the members of a group except the person or thing that has already been mentioned."[2] In the fee provision, the only phrase mentioned before "other proceeding" is "legal action." Thus, a legal action is the first type of proceeding mentioned in the clause. Then two other proceedings are listed: "arbitration" and "an action for declaratory relief." The drafter's inclusion of the latter examples was clearly intended to convey that the fee provision can be triggered — not only by a prototypical lawsuit seeking a monetary award before a court — but also

[2] Merriam-Webster Online, 2015. "Other." <http://www.merriam-webster.com/dictionary/other>.

actions brought in quasi-judicial forums, as well as actions that do not seek pecuniary damages.[3]

If "proceeding" referred to every step of an action, then the clause would become incomprehensible. Listing a "legal action" as the first example of a "proceeding" would not make sense, because a "legal action" is not a discrete event within a lawsuit. (*Salawy,* 121 Cal.App.4th at pp. 672-673 ["An 'action to enforce' does not refer to specific pleadings or steps within the action or a defense."]; accord *Windsor Pacific,* 213 Cal.App.4th at p. 274 ["the words 'action or proceeding'. . . encompass the entire action or proceeding"].)

Worse, this definition would produce absurd results in the context of the attorney-fee clause. If every procedural event were an "action" or "proceeding," then every ruling in the trial court could give rise to a separate fee award. It "would seem to justify awarding fees to a party who prevails on a contract-based motion to change venue." (*Frog Creek Partners, LLC v. Vance Brown, Inc.* (2012) 206 Cal.App.4th 515, 545-546; accord *Salawy,* 121 Cal.App.4th at pp. 673-674 ["logical conclusion" would be fee award just because "demurrers had been overruled"].) Indeed, "party who succeeded on *any* dispute related to a contract's enforcement could claim fees, even if that party was not the prevailing party at trial." (*Frog Creek,* 206 Cal.App.4th at pp. 545-546.) Obviously, this is not what advocates of the approach intend — but it is a logical consequence of their definition.

[3] This is immediately evident when the items are listed in a different order, e.g., "any proceeding, including any legal action, arbitration, or action for declaratory relief." The actual clause means exactly the same thing.

2. The purpose of a given lawsuit cannot be altered by an affirmative defense

A different justification for awarding attorney-fees was adopted in *Windsor Pacific,* based on Justice Armstrong's dissent in *Gil.*

The court argued that, because an answer is part of an action or proceeding, pleading a contract-based affirmative defense should trigger attorney fees. In its view, once a contract-based affirmative defense is pleaded, then the "action does *involve* the interpretation of the [contract]" and it also qualifies as "an action *in which* a party seeks to enforce or interpret [the contract]." (*Windsor Pacific*, 213 Cal.App.4th at pp. 274-275, emphasis added.)

Those are both reasonable descriptions of such an action. And they are roughly equivalent to the standards that appear in broadly worded attorney-fee clauses. The theory would make sense for a clause triggered by "any dispute *under* the agreement," since an affirmative defense can certainly place a contract in dispute. (*Thompson v. Miller,* 112 Cal.App.4th at pp. 335-337, emphasis added.) It would also be appropriate for clauses that award fees in any action *related* to the contract. (See, e.g., *Moallem v. Coldwell Banker Com. Group, Inc.* (1994) 25 Cal.App.4th 1827, 1831 ["'relating to' the contract"]; *Allstate Ins. Co. v. Loo* (1996) 46 Cal.App.4th 1794, 1799 ["relating to the demised premises"].)

Provisions worded in this way are, by their clear terms, "not limited to an action brought to enforce the agreement." (*Gil*, 121 Cal.App.4th at p. 745.) That limitation did not appear in the clause from *Windsor Pacific.* It does, however, appear in the contract in this case.

The fee provision here applies only if an action or proceeding "is *brought for* the enforcement of this Agreement or *because of* an alleged dispute, breach, default, or misrepresentation in connection with any

provision of this Agreement . . ." (Maj. Opn. at 14, emphasis added.) The prepositions "for" and "because of" each refer back to "brought" — which "refers to the initiation of legal proceedings in a suit." (*Curtis v. County of Los Angeles* (1985) 172 Cal.App.3d 1243, 1249, quoting Black's Law Dictionary (Rev'd. 4th Ed. 1957) 242); see also, *Employers Reinsurance Corp. v. Phoenix Ins. Co.* (1986) 186 Cal.App.3d 545, 555 ["the term 'suit brought' denotes the filing of a lawsuit"].)

The use of that verb comports with the "common understanding" that an action is a "proceeding initiated by the filing of a claim," which "is generally considered synonymous with suit." (*Salawy*, 121 Cal.App.4th at p. 672.) Thus, the specifications in the clause are conditions on the reason that the lawsuit was filed. The suit must have been either (1) filed *for* enforcement of the contract or (2) field *because of* a dispute about the contract.

In the phrase "for enforcement," the word "for" is "used as a function word to indicate purpose."[4] The first option therefore requires the lawsuit to have been filed for the purpose of enforcing the contract. "A lawsuit's ultimate purpose is to achieve actual relief from an opponent" — i.e., "some action (or cessation of action) by the defendant." (*Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 571, citation omitted.) If the relief the suit seeks it not enforcement of the contract, it is irrelevant what affirmative defenses the answer pleads. An answer can never alter the suit's purpose because a defensive pleading's "only goal is to preserve, or to return to, the status quo as it existed before judicial proceedings had commenced." (*Idell v. Goodman* (1990) 224 Cal.App.3d 262, 273.)

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[4] Merriam-Webster Online, 2015. "For." <http://www.merriam-webster.com/dictionary/for>.

The fact that a pleading injects the agreement into the lawsuit does not transform the proceeding into an action to enforce that agreement. (See *Cytodyn, Inc. v. Amerimmune Pharmaceuticals, Inc.* (2008) 160 Cal.App.4th 288, 301 ["The mere mention of an agreement in a complaint does not mean, as defendants seem to believe, that the lawsuit has been brought to enforce those agreements."]; *Vons Companies, Inc. v. Lyle Parks, Jr., Inc.* (2009) 177 Cal.App.4th 823, 835 [rejecting "the proposition that *any* contract in *any* way involved in an action renders the suit an action 'on the contract'"]; *Perry v. Robertson* (1988) 201 Cal.App.3d 333, 343 ["a cause of action does not warrant a recovery . . . *merely* because a contract with an attorney's fees provision is part of the backdrop of the case"].)

This Court has held that a "claim for benefits . . . is not an action to enforce ERISA" merely because a judge must examine ERISA provisions to determine whether they prevent benefits from being awarded. (*In re Marriage of Oddino* (1997) 16 Cal.4th 67, 79.) Similarly, a suit for relief under one contract does not become a proceeding to enforce another merely because a defendant invokes the second contract to avoid liability.

That leaves the second prong of the attorney-fee provision in this case, which requires the lawsuit to have been filed "because of" a controversy over the contract. The phrase "because of" means "by reason of: on account of."[5] That criterion can only be satisfied if a conflict about the contract *caused* the filing of the suit. An answer can never accomplish that because it is only filed once the lawsuit has already commenced.

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[5]Merriam-Webster Online, 2015. "Because." <http://www.merriam-webster.com/dictionary/because>.

CONCLUSION

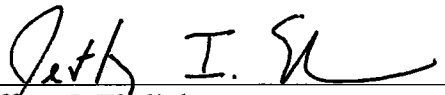
Some attorney-fee provisions do not allow fees to be recovered based on an affirmative defense, because the parties may wish to invoke the contract defensively without risking liability for the other side's fees. When the parties agree to this arrangement — as they clearly did in this case — their bargain should be enforced.

Dated: May 18, 2015.

Respectfully submitted,

LAW OFFICE OF ERIK A. HUMBER

THE EHRLICH LAW FIRM

By 

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Certificate of Word Count

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Dated: May 18, 2015.

Jeffrey I. Ehrlich

Mountain Air Enterprises, LLC v. Sundowner Towers, LLC, et al.
Supreme Court No. S223536
Court of Appeal No. A138306
Superior Court Case No. CIV081957

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 237 West Fourth Street, Second Floor, Claremont, California 91711.

On **May 18, 2015,** I served the foregoing documents described as **OPENING BRIEF ON THE MERITS** on the interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

PLEASE SEE ATTACHED SERVICE LIST

[XX] BY MAIL I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Claremont, California, in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one (1) day after date of deposit for mailing in affidavit.

[XX] ELECTRONIC A copy was submitted electronically as indicated on the service list.

[] BY OVERNIGHT MAIL/COURIER To expedite service, copies were sent via FEDERAL EXPRESS.

[] BY PERSONAL SERVICE I caused to be delivered such envelope by hand to the individual(s) indicated on the service list.

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

Executed on **May 18, 2015,** at Claremont, California.

Isabel Cisneros-Drake, Paralegal

Mountain Air Enterprises, LLC v. Sundowner Towers, LLC, et al.
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