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)

REPLY BRIEF ON THE MERITS

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

The defendants' brief conflates two distinct definitions of the words "proceeding."

In the attorney-fee clause, this word refers to a lawsuit as a whole, as Mountain Air has always contended. This definition precludes a fee award because the present lawsuit was not brought to enforce the option agreement in which the attorney-fee provision appears. Surprisingly though, this is the definition of "proceeding" that the defendants advocate in the majority of their brief.

They seem to assume that if an affirmative defense is *part of* a proceeding then they prevail. Not so. The attorney-fee provision does not merely require the contract to have been brought up in the proceeding; it mandates that the proceeding have been brought *for the purpose of* enforcing the contract or adjudicating its meaning. Thus, the defendants can only recover fees if "proceeding" refers, not to the entire lawsuit, but to each individual procedural event within the suit — including affirmative defenses.

This is not a viable construction of the attorney-fee clause. It lists three examples of "proceedings" — a legal action, an action for declaratory relief, and an arbitration — all of which refer to entire legal disputes, not discrete procedural events within those disputes. And the clause employs the words "in" and "brought" in ways that would not make sense if applied to affirmative defenses.

Worse, there is no way to include affirmative defenses in the definition of "proceeding" without it resulting in the attorney's fee clause applying to every other discrete step in a lawsuit, from demurrers to motions in limine. Under the construction of the attorney-fee clause advocated by the defendants, the prevailing party in each of these

"proceedings" would be entitled to a fee award. The defendants agree that this would be absurd, but it would be an inevitable consequence of expanding "proceeding" in the manner they advocate.

Every normal rule of construction demonstrates that an affirmative defense is *not* an "action" or "proceeding" within the meaning of the attorney-fee clause within the option agreement. It is not the Court's role to decide that the clause *should* apply to a defense. The parties could have selected broader language, but they opted for a narrower clause, which does not support a fee award in this case.

ARGUMENT

A. In the attorney-fee clause, "action" and "proceeding" refer to an entire lawsuit — not discrete procedural events within the lawsuit, such as affirmative defenses

1. Both sides agree that "action" and "proceeding" encompass the entire lawsuit

In its opening brief, Mountain Air argued that the words "action" and "proceeding" refer to the entirety of a lawsuit. (OBOM at 13-14.) It specifically said that this included "the entire course of an action at law or suit in equity from the filing of the complaint until the entry of final judgement." (*Id.*, quoting *Exxess Electronixx v. Heger Realty Corp.* (1998) 64 Cal.App.4th 698, 712.)

Unfortunately, the defendants have misstated Mountain Air's position. (See ABOM at 2 ["According to Mountain Air, only the *filing* of a suit is an 'action' or 'proceeding'"].) Their brief is written as if Mountain Air wanted to restrict the terms "action" and "proceeding" to the filing of a complaint. Once again, that is false: Mountain Air believes that the terms "action" and "proceeding" encompass an entire suit.

The defendants seem to agree with this definition. They admit that "action" means "a lawsuit" — i.e., "a proceeding brought before a court

to obtain relief." (ABOM at 17, quoting American Heritage Dictionary (5th ed. 2011) p. 17.) This definition makes the meaning of the attorney-fee clause clear: It applies to "a lawsuit" that is brought for enforcement of the contract. An affirmative defense is not a lawsuit, so it cannot support an award of fees.

2. The individual procedural events within a lawsuit are *not* each a separate "action" or "proceeding"

In their brief, the defendants reason that because the words "action" and "proceeding" encompass affirmative defenses, affirmative defenses are therefore "actions" and "proceedings." Not so.

The defendants have fallen prey to what logicians call "the fallacy of division." "It is committed when one argues that what is true of a whole must also be true of its parts." (*Rosen v. Unilever U.S., Inc.* (N.D. Cal., 2010) 2010 WL 4807100 at *6.)[1]

This is an invalid form of reasoning, because individual parts often lack the properties of the things they compose when aggregated. A grain of sand is part of the shore, but it is not a beach. A violinist is part of the orchestra, but she is not a symphony. And an affirmative defense is part of a proceeding, but it is not a legal action.

The defendants claim that the Court of Appeal reached a different conclusion in *Palmer v. Agree* (1978) 87 Cal.App.3d 377, 387, which they cite for the proposition that a "defense *constituted* an 'action." (ABOM at 19, emphasis added.) That is incorrect. In reality, *Palmer* adopted Mountain Air's position, explaining, "The defenses raised in the answer to the complaint are a real *part of* any action." (*Palmer*, 87 Cal.App.3d at p. 387.)

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[1] This fallacy was also recognized in *U.S. v. Standefer* (3d Cir. 1979) 610 F.2d 1076, 1106 ["one risks committing the fallacy of division, erroneously reasoning that what holds true of a composite whole necessarily is true for each component part considered separately"].

3. The defendants' interpretation is inconsistent with the rest of the words in the attorney-fee clause

As Mountain Air explained in its opening brief, the meaning of the word "proceeding" depends on the context in which it is used. (OBOM at 17.) Although it normally refers to an entire suit, there are some circumstances in which it may refer to the suit's individual components. But the attorney-fee clause uses the term in the stricter sense. Three aspects of the provision make this clear.

First, every example of a "proceeding" in the clause refers to the entire course of a legal dispute. (See OBOM at 17.) It lists three proceedings: a "legal action," an "arbitration," and an "action for declaratory relief." None of those are discrete pleadings, so it would be anomalous to include an "affirmative defense" in the same category.

It might make sense to treat an affirmative defense as a "proceeding" if the other examples of proceedings were individual procedural steps within lawsuits. For example, Civil Code section 437 refers to "a judgment, dismissal, [or] order" as a "proceeding," so the Court of Appeal has correctly applied the looser definition of that term. (See *Zellerino v. Brown* (1991) 235 Cal.App.3d 1097, 1105.) But here, since the examples listed in the attorney-fee clause do not refer to individual components within a lawsuit, the definition that refers to a lawsuit as a whole should be employed.

Second, the attorney-fee clause uses the word "brought." (OBOM at 15.) In normal English, lawsuits are "brought" — but one cannot "bring" a defense. That simply is not the appropriate verb.

The defendants illustrate this point in their brief, which says that the "defense was brought for enforcement of the Option Agreement . . . ."

(ABOM at 31, emphasis altered.) Under normal circumstances, no editor would allow that verb to remain in place, because it is objectively incorrect.

In fact, the defendants have not offered a single example of a court pairing the verb "brought" with the noun "defense." They cite *Curtis v. County of Los Angeles* (1985) 172 Cal.App.3d 1243, 1249, which "held that the word 'brought' encompasses not only the filing of an action, but also its continued maintenance." (ABOM at 27.) But that definition does not advance their cause, because one cannot file or maintain an action by pleading an affirmative defense.

The defendants argue that there is no intrinsic logical reason that the terms "brought" and "defense" could not be used together. (ABOM at 26.) Perhaps that is true, but Civil Code section 1644 says the words of a contract should be understood "in their ordinary and popular sense." And it is neither ordinary nor popular to "bring a defense."

Third, the attorney-fee clause uses the preposition "in." (OBOM at 18.) It is normal to speak of the costs incurred *in* a lawsuit, but not *in* a defense. The defendants accurately describe the purpose of the preposition — i.e., it ensures that the only fees that can be recovered are those incurred for enforcement of the contract. (ABOM at 23, fn. 6.) But even they do not argue that it would be normal to speak about incurring costs "in a defense."

Their brief also fails to offer any textual grounding for their claim that each procedural event in a lawsuit is a "proceeding."

They argue that the attorney-fee clause uses "broad" language, because it refers to "any" proceeding, including arbitration and actions for declaratory relief. (ABOM at 33-34.) It is true that this language "confirmed that the recovery of attorney fees would not be limited to fees incurred in proceedings before a judicial tribunal or in lawsuits seeking monetary

relief." (ABOM at 34.) But that has nothing to do with whether it applies to affirmative defenses.

They are also incorrect when they claim that Mountain Air's interpretation would make the word "proceeding" superfluous. (ABOM at 22.) As the opening brief explained, the clause uses "legal action" as its first *example* of a proceeding. (OBOM at 18.) That is the purpose of the word "other" in the phrase "legal action or *other* proceeding," which indicates that one example of a proceeding has already been mentioned.

It is actually the defendants' interpretation that would make the clause ungrammatical. If "proceeding" means a discrete step within a lawsuit, then a legal action is not a proceeding. And if a legal action is not a proceeding, then the phrase "legal action or *other* proceeding" would not make any sense.

4. Mountain Air's interpretation avoids the absurd results inherent in the defendants' position

Mountain Air's interpretation circumvents the potential to produce absurd results, unlike the defendants' definition of "proceeding." If each procedural event in a lawsuit is a "proceeding," then attorney fees could be awarded any time a judge made a ruling.

The defendants argue that would not occur because the attorney-fee clause only allows an award in favor of "the prevailing party." (ABOM at 23-24.) That begs the question of what "action" or "proceeding" the party must prevail in to recover fees.

If "proceeding" means the entire lawsuit, then there will only be one fee award at the conclusion of the litigation. But if every procedural event is a "proceeding," then fees could be awarded for anything. The Court of Appeal has specifically condemned this practice because of the absurd results it could produce — e.g. fee awards for prevailing on a change of

venue or for defeating a demurrer. (See *Frog Creek Partners, LLC v. Vance Brown, Inc.* (2012) 206 Cal.App.4th 515, 545-546; *Salawy v. Ocean Towers Housing Corp.* (2004) 121 Cal.App.4th 664, 673-674.)

The defendants argue that Mountain Air's interpretation would produce different problems, but their claims cannot withstand scrutiny.

First, they argue that it would be absurd to treat an affirmative defense and a cross-complaint differently, because "raising an affirmative defense is legally the same as bringing an action." (ABOM at 27, ellipses omitted, quoting Maj. Opn. at 18.) The majority opinion in this case makes that claim, but it is objectively false.

A cross-complaint goes beyond merely defending against the plaintiff's attack because it seeks some form of affirmative relief. (*Idell v. Goodman* (1990) 224 Cal.App.3d 262, 272.) Thus, "[w]here a cross-complaint is filed there are two simultaneous actions pending between the parties wherein each is at the same time both a plaintiff and a defendant." (*K.R.L. Partnership v. Superior Court* (2004) 120 Cal.App.4th 490, 503.)

There are material consequences to this distinction between an affirmative defense and a cross-complaint, despite the fact that both may require a defendant to prove the same facts. (*Cussler v. Crusader Entertainment* (2012) 212 Cal.App.4th 356, 368 fn. 5.) Unlike an affirmative defense, a cross-complaint terminates the plaintiff's ability to end the litigation. (*Paragon Real Estate Group of San Francisco, Inc. v. Hansen* (2009) 178 Cal.App.4th 177, 187-188 [approving cross-complaint for equitable indemnity, because affirmative defense would not prevent a "day of trial" dismissal].) And a defendant who pleads an affirmative defense cannot be held liable for malicious prosecution, no matter how baseless its position. (*Triplett v. Farmers Ins. Exchange* (1994) 24 Cal.App.4th 1415, 1422.) Yet if

the defendant seeks affirmative relief by filing a cross-complaint, it faces the same risk of malicious prosecution as a plaintiff. (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 50-53.) The law treats affirmative defenses and cross-complaints differently, so it was not absurd for the parties to do likewise.

Second, the defendants attack the rationale for this approach advanced in the opening brief. Mountain Air argued that the clause allowed defendants to decide whether to simply plead an affirmative defense or to go further and file a cross-complaint, thereby exposing both sides to the risk of an attorney-fee award. (OBOM at 12.) The defendants claim this is absurd, because a "party would only [forego filing a cross-complaint] if it determined that there was a greater possibility that it would lose, rather than prevail, on its argument." (ABOM at 38.)

True. But defendants routinely plead affirmative defenses that they know are unlikely to succeed. And even a defendant who is confident in an affirmative defense may not be in a financial position to take on the risk of a fee award under Civil Code section 1717. The attorney-fee provision allows them to retain the option of foregoing their opportunity to recover fees in exchange for limiting their potential liability.

B. The present lawsuit was not brought *because of* the contract or *for* its enforcement, so the attorney-fee clause does not apply

When "action" and "proceeding" are properly construed as references to the entire lawsuit, the attorney-fee clause requires the lawsuit to have been brought *for* the enforcement of the agreement or brought *because of* a dispute about the agreement. The current suit does not satisfy either of those criteria.

Mountain Air devoted an entire section of its opening brief to this issue. It explained that the words "for" and "because" specify the *purpose*

of the lawsuit. (OBOM at 20-22.) Yet the defendants have failed to respond. Their brief seems to assume that, once the novation defense became part of the lawsuit, the purpose of the proceeding became enforcement of the contract.

This is another example of the fallacy of division. Numerous decisions have rejected the idea that one side's invocation of a contract transforms the purpose of a lawsuit. (See OBOM at 22, citing *Cytodyn, Inc. v. Amerimmune Pharmaceuticals, Inc.* (2008) 160 Cal.App.4th 288, 301; *Vons Companies, Inc. v. Lyle Parks, Jr., Inc.* (2009) 177 Cal.App.4th 823, 835; *Perry v. Robertson* (1988) 201 Cal.App.3d 333, 343.) And this Court has held that a plaintiff's claim for benefits was not an "action to enforce ERISA," merely because the judge had to review ERISA to determine whether it prevented an award of benefits. (*In re Marriage of Oddino* (1997) 16 Cal.4th 67, 79.)

Here, the lawsuit was filed and maintained in order to enforce the repurchase agreement. Because that was the only relief that was ever sought, it remained the only purpose of the litigation. (See OBOM at 21, citing *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 571.) If the defendants had filed a cross-complaint to enforce the contract, that would have triggered the attorney-fee clause, because then they would have been seeking affirmative relief. (*Idell v. Goodman*, 224 Cal.App.3d at p. 272.) The purpose of the litigation would necessarily have been altered, which is why "[d]ismissal of the complaint . . . does not affect the independent existence of the cross-complaint or counterclaim." (*Bertero v. National General Corp.*, 13 Cal.3d at p. 52.)

An affirmative defense does not have the same effect. Its "only goal is to preserve, or to return to, the status quo as it existed before judicial

proceedings had commenced." (*Idell v. Goodman*, 224 Cal.App.3d at p. 273.) For instance, if Mountain Air had given up on enforcing the repurchase agreement and dismissed its complaint, the litigation would have ceased. The court never would have reached the option agreement, because the enforcement or interpretation of that contract was *not* the purpose of the lawsuit.

This "purpose" requirement is not arbitrary; it is a specific feature of the language that the parties chose to use in the option agreement. Attorney-fee clauses are often drafted more broadly, using language that embraces affirmative defenses. (See OBOM at 22, citing, *Share v. Casiano Bel-Air Homeowners Assn.* (1989) 215 Cal.App.3d 515, 521.) But the parties in this case chose a narrower clause, and their choice should be respected.

CONCLUSION

The novation defense was part of this lawsuit, but it did not change the lawsuit's purpose. The suit was filed and maintained to enforce the repurchase agreement, so fees are not available under the option agreement.

Dated: August 5, 2015.

Respectfully submitted,

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Certificate of Word Count

(Cal. Rules of Court, Rule 8.520(c)(1))

The text of this brief consists of 2,853 words, according to the word count generated by the Microsoft Word word-processing program used to prepare the brief.

Dated: August 5, 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 **August 5, 2015**, I served the foregoing documents described as **REPLY BRIEF ON THE MERITS** on the interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

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Executed on **August 5, 2015,** at Claremont, California.

Isabel Cisneros-Drake, Paralegal

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