

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF VENTURA
VENTURA**

MINUTE ORDER

DATE: 02/13/2015

TIME: 09:19:00 AM

DEPT: 20

JUDICIAL OFFICER PRESIDING: Tari Cody
CLERK: Christine Schaffels
REPORTER/ERM:

CASE NO: **56-2011-00408712-CU-CO-VTA**

CASE TITLE: **North Kern Water Storage District vs City of Bakersfield**

CASE CATEGORY: Civil - Unlimited CASE TYPE: Contract - Other

EVENT TYPE: Ruling on Submitted Matter

APPEARANCES

The Court, having previously taken the Motion for Attorney's Fees and Costs (2/4/15) under submission, now rules as follows:

RULING

North Kern Water Storage District's ("North Kern") motion for attorney's fees and time and expenses of personnel is granted. North Kern is awarded \$1,164,048.99.

North Kern's motion for consulting expert fees is denied.

DISCUSSION

The party prevailing in any litigation is entitled to "costs." In a case where a party "recovers other than monetary relief" the court shall determine the "prevailing party." (Civ. C. §1032(a)(4).) This is such a case.

Costs can include attorneys' fees if the parties' agreement so provides. (CCP §1021; Civ. C. §1717(a).) If the parties' contract provides for attorneys' fees, then if the action is "on a contract" the "prevailing party" is entitled to reasonable fees. "A declaratory relief action that seeks to establish the parties' rights under a contract is an action to enforce the contract." (*Silver Creek, LLC v. BlackRock Realty Advisors, Inc.* (2009) 173 Cal. App. 4th 1533, 1538.)

A party seeking attorneys' fees must file a motion. The court then decides which party is the prevailing party. (Civ. C. §1717 (b)(1).) "[T]he 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 contract ("Agreement") between the parties includes the following clause:

"12.3 Litigation

Except as provided in Article V, Section 5.10[[1]] hereof, in the event of any litigation among the parties hereto in connection with interpretation, performance or enforcement of this Agreement, the prevailing party or parties in such litigation shall be entitled to be reimbursed by the other party thereto for all costs of the litigation, including but not limited to court costs, time and expenses of personnel, attorneys' fees, and the like, provided, however, that the attorneys' to be reimbursed shall not exceed such amount as the court in which the litigation occurs shall determine to be reasonable."

Prevailing Party

North Kern is the prevailing party in this litigation. The City of Bakersfield, ("City"), argued that it had the right to unilaterally terminate the Agreement and that it had done so. North Kern argued the City could not unilaterally terminate the Agreement, and that the Agreement remained in full force and effect. The court agreed with North Kern. "The party prevailing on the contract is the party who recovered "'greater relief in the action on the contract' [citation] and the only way to determine prevailing party status is by evaluating the parties' comparative litigation success." (*Silver Creek, LLC v. BlackRock Realty Advisors, Inc.*, *supra*, 173 Cal. App. 4th at 1540.)

The fact that the judgment in favor of North Kern could be reversed on appeal does not mean that North Kern did not prevail on the contract in the trial court. However, if the judgment is reversed on appeal, then the "identification of the party entitled to a fee award must be determined by the final result of the litigation, *i.e.*, after conclusion of the appeal if an appeal is taken." (*Butler-Rupp v. Lourdeaux* (2007) 154 Cal. App. 4th 918, 928.)

"Thus, for example, if a litigant successfully obtains reversal on appeal of an unfavorable summary judgment on a contract cause of action, he or she cannot collect an award of attorney fees under section 1717 until the case has been remanded, tried on the merits and reviewed on appeal, if an appeal is taken, because the party ultimately prevailing on the cause of action cannot be known with certainty until the case is at an end." (*Ibid.*)

Butler-Rupp does not hold that the court cannot or should not determine who is the prevailing party in the trial court while an appeal is pending. (See, *Bankes v. Lucas* (1992) 9 Cal. App. 4th 365, 368 ["Although a prevailing party at trial may not be the prevailing party after an appeal, it has been held that a motion for attorney fees is not premature despite the filing of a notice of appeal."])

Also, the judgment entered in favor of North Kern is final. It is not interlocutory or interim. No further proceedings are contemplated even though the court retained jurisdiction to enforce the judgment.

In fact, this court would be abusing its discretion if it refused to determine that North Kern was the prevailing party in this case in light of its clear success in obtaining the judgment it sought.

"[W]hen the results of the litigation on the contract claims are *not* mixed-that is, when the decision on the litigated contract claims is purely good news for one party and bad news for the other-the Courts of Appeal have recognized that a trial court has no discretion to deny attorney fees to the successful litigant... [A] plaintiff who obtains all relief requested on the only contract claim in the action must be regarded as the party prevailing on the contract for purposes of attorney fees under [Civil Code] section 1717." (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 875-76; see also, *Nazemi v. Tseng* (1992) 5 Cal. App. 4th 1633, 1641 [trial court abused its limited discretion by considering the motion for attorney's fees for trial long after the maximum time allowed by the Rules of Court – now Rule 3.1720(b)(2)].).

Non-Statutory Costs

North Kern's motion seeks to recover "time and expenses of personnel" ("personnel expenses") and fees paid to a third-party engineering consultant/expert ("expert fees"). The City challenges North Kern's attempt to recover these non-statutory costs i.e., costs not specifically enumerated in CCP §1033.5(a).

The City makes several arguments why North Kern cannot recover these non-statutory costs. First, the City argues that despite what the parties might have agreed to, as a matter of law only costs specifically enumerated under CCP 1033.5 are recoverable. Second, even if parties can agree to a broader category of litigation costs than are allowed under the statute, North Kern was required to prove these costs at trial. Third, if North Kern was not required to prove these expenses at trial, it was at least required to include these costs in its memorandum of costs.

Contracts Authorizing Recovery of More Than Statutory Costs

Appellate courts appear to be in some conflict as to whether parties can agree to expand recoverable costs beyond those specified in CCP 1033.5(a). For example, *Fairchild v. Park* (2001) 90 Cal. App. 4th 919, 929, holds that despite what the parties may have intended "costs" under Civ. C. §1717 cannot be contractually redefined to include costs not otherwise recoverable under CCP §1033.5.

Other cases say that parties can agree to expand the definition of costs. (See e.g., *Arntz Contracting Co. v. St. Paul Fire & Marine Ins. Co.* (1996) 47 Cal. App. 4th 464, 49; *Ripley v. Pappadopoulos* (1994) 23 Cal.App.4th 1616, 1621–1627.)

In attempting to recover personnel expenses and expert fees, North Kern is not relying upon Civil Code §1717, so *Fairchild* is not directly on point. The cases allowing parties to contractually expand the recoverable costs beyond those specified in CCP §1033.5 are the more persuasive.

Establishing a Right to and Proving Non-Statutory Costs at Trial

The City contends North Kern should have presented evidence at trial regarding its right to recover personnel expenses and expert fees.

Courts are also somewhat in conflict on this issue. (See, Cal. Prac. Guide Civ. Trials & Ev. Ch. 17-E §17:164.1.) In *Carwash of America—PO LLC v. Windswept Ventures No. 1, LLC* (2002) 97 Cal. App. 4th 540, the contract stated entitled the prevailing party to "be reimbursed for all reasonable costs incurred in connection with such litigation, including, without limitation, reasonable attorneys' fees." (*Id.* at 542.) Summary judgment was entered for the defendant, but defendant was denied expert witness fees it sought in a post-judgment motion. The court of appeal affirmed, finding "while the parties may agree to allow recovery of expert witness fees by the prevailing party, this is a matter that must be pleaded and proven at trial rather than submitted in a cost bill." (*Id.* at 544.)

In a more recent case, *Thrifty Payless, Inc. v. Mariners Mile Gateway, LLC* (2010) 185 Cal.App.4th 1050, the contract stated the prevailing party is entitled to "reasonable expenses," including attorney fees, "court costs, witness and expert fees." (*Id.* at 1056.) The prevailing party included expert witness fees in its cost memo. The opposing party filed a motion to tax costs arguing although the contract provided for them, they were not pleaded and proven at trial. The trial court awarded the expert fees. (*Id.* at 1059-1060.) The appellate court affirmed finding: "While the Legislature has not adopted a specific provision addressing the recovery of expert witness fees, such fees are, indeed, a cost, and when 'expressly authorized by law[,] they are 'allowable as costs' under Code of Civil Procedure section 1033.5, subdivision (b)(1). We therefore see no reason why they should not be recoverable as costs

when the parties specifically agree to such a provision in a freely negotiated contract." (*Id.* at 1066.)

Here, the Agreement explicitly provided for recovery of personnel expenses. "Personnel" is reasonably interpreted to mean employees. The judgment awards North Kern personnel expenses. Thus, under *Thrifty Payless, Inc.*, North Kern can recover its personnel expenses in a post-judgment motion.

Expert fees are different. The judgment does not explicitly mention expert fees. It is a matter of interpretation to determine whether "personnel expenses ... and the like" was intended to include expert fees. There is no statutory procedure, like the post-judgment motion for attorneys' fees, for the court to determine whether a party is contractually entitled to expert fees. The parties did not agree to a special procedure for determining whether expert fees were recoverable. (See, *Arntz Contracting Co. v. St. Paul Fire & Marine Ins. Co.*, *supra*, 47 Cal. App. 4th 492 [parties stipulated to a special procedure].)

Even cases which conclude that parties can agree to expand recoverable costs beyond those in CCP §1033.5 have stated that a party seeking those costs is required to plead and prove them at trial and not in a post-judgment motion. (See e.g., *Ripley v. Pappadopoulos*, *supra*, 23 Cal.App.4th 1616, 1621–1627; *Arntz Contracting Co. v. St. Paul Fire & Marine Ins. Co.* (1996) 47 Cal. App. 4th 464, 49; *Carwash of Am.-PO LLC v. Windswept Ventures No. 1*, *supra*, 97 Cal. App. 4th 540, 545; *Nationwide Bank v. Mountain Cascade, Inc.* (2000) 77 Cal.App.4th 871, 878–879; *Hsu v. Semiconductor Systems, Inc.* (2005) 126 Cal.App.4th 1330, 1341.)

Although North Kern pleaded its entitlement to litigation costs in its complaint quoting verbatim from section 12.3 of the Agreement, it did not attempt to prove or even argue at trial that that language was intended to include expert fees, nor did it attempt to prove the amount of those fees. Accordingly, North Kern's request for expert fees is denied.

Memorandum of Costs

The City contends North Kern should have listed the personnel expenses on its memorandum of costs. CCP §1034 subdivision (a) states that costs "allowable under this chapter [Ch. 6] shall be claimed and contested in accordance with rules adopted by the Judicial Council." North Kern's personnel expenses are not a cost allowed under Chapter 6 (CCP §1021-1038.) The Judicial Council memorandum of costs form (MC-010) does not include any place to list non-statutory costs. North Kern was not required to list its personnel expenses on the memo of costs.[2]

Amount of Personnel Expenses

North Kern seeks to recover \$72,844.49 in personnel expenses. North Kern created a segregated billing account to record time spent as a result of the litigation. These expenses were incurred over a three-year period and have been documented by North Kern in a report attached to the declaration of Richard Diamond and Patrick Mize. There is nothing on the face of the report that appears unreasonable. The report documents the name of the employee, the amount of time spent, and the rate of the expense which is based upon the employee's actual salary and benefits paid.

The City objects to some of these expenses, in particular work done on the extension price under the Agreement, saying it was not relevant to the litigation. The court disagrees. There was evidence presented during the trial concerning the calculation of the extension price and the court referenced that evidence in its ruling. North Kern also objects to time spent by personnel performing a review of North Kern's own water operations but does not explain why that review was not relevant to the litigation.

Both North Kern and the City presented complex and detailed evidence concerning the issues each

deemed relevant to interpreting the Agreement. It is difficult for parties to know in advance what evidence the trier of fact might find persuasive and it is not unusual, especially in a case as important as this one appears to have been to both sides, to present all potentially relevant evidence to the court. The fact that some evidence ultimately was not as significant to the court as other evidence does not mean that it was unreasonable to spend time preparing that evidence for trial.

North Kern's explanation for personnel time spent on this litigation is reasonable, the amount requested is reasonable, and North Kern is entitled to be reimbursed for those expenses in the amount of \$72,844.49.

Amount of Attorneys' Fees

North Kern seeks \$1,091,204.10 in attorneys' fees. The City objects that the amount reflects unnecessary and duplicative time. While the total figure is large, this was a complex case. North Kern has provided a lucid and reasonable explanation why these fees were necessary and not duplicative. Although not mentioned by either party, in this court's experience the hourly rates are very reasonable, even for public agency attorneys.

North Kern, therefore, is entitled to be reimbursed its reasonable attorneys' fees incurred in prosecuting this action, which are \$1,091,204.10.

Fees and Costs Incurred for this Motion

North Kern may file and serve declarations evidencing a request for fees and costs incurred in bringing this motion by March 2, 2015. The City may file a response to that request by March 16, 2015. North Kern's reply, if any, shall be filed and served by March 23, 2015. The court will thereafter issue a ruling on any such request.

The Clerk is directed to give notice.

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[1] Article V, Section 5.10 is a different attorneys' fees clause not applicable to the issues in this case.

[2] A recent case found that even contractual attorneys' fees, which are among the recoverable costs listed in CCP §1033.5, do not need to be included in the memorandum of costs. (*Kaufman v. Diskeeper Corp.* (2014) 229 Cal. App. 4th 1, 4.)