

Recovering Atty's Fees: Is A Procedural Victory Enough?

Law360, New York (September 19, 2013, 6:27 PM ET) -- Is a party entitled to recover contractual attorney's fees if it is the "victor" of the action, or must the party demonstrate some entitlement based on the merits of the contract claim? The answer to this question will soon be decided by the California Supreme Court in *Kandy Kiss of California Inc. v. Tex-Ellent Inc.*[1]

The general rule — the "American Rule" — is that litigants should pay their own attorney's fees. If permitted by statute, contract or nonstatutory case law, however, attorney's fees may be awarded as costs. Thus, in California, attorney's fees are recoverable as costs when authorized by contract.

The statute governing contractual attorney's fees provisions in actions involving contract claims is Civil Code Section 1717. Subdivision (a) of Section 1717 provides that in any action on a contract where the contract specifically provides for an award of attorney's fees and costs incurred to enforce the contract, "the party who is determined to be the party prevailing on the contract" is entitled to attorney's fees and costs.

Subdivision (b)(1) of Section 1717 goes on to define "prevailing party" as "the party who recovered a greater relief in the action on the contract." [2] This begs the question: What is "greater relief?" Does any final resolution of a contract claim, or a dismissal for any reason, entitle a party to Section 1717 fees?

The last time the California Supreme Court addressed the issue of interpreting "party prevailing on the contract" was in 1995 with *Hsu v. Abbara*. [3] There, the court held that a 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. The court also noted that the prevailing party determination is to be made only upon final resolution of the contract claims.

Following the decision in *Hsu*, a split in California authority developed on the issue of prevailing party. On the one hand, there is authority holding that attorney's fees are not recoverable in a contract action that technically terminates but can be brought again or in another forum. [4]

On the other, there is authority holding that the determination of which party is the prevailing party must be made without consideration of whether the plaintiff may refile the action. [5] Further muddling the split in authority are federal cases interpreting California law and refusing to award fees where a

party secured the win on technical or procedural grounds.[6]

Kandy Kiss presents the California Supreme Court with the proper opportunity to now clarify this split and provide guidance to litigants, who have remained in a precarious position putting thousands of dollars at stake in terms of whether they will have to pay or lose out on attorney's fees.

The dispositive issue on appeal in Kandy Kiss was whether a dismissal for lack of subject matter jurisdiction over a claim involving copyright issues supported an award of attorney's fees under Section 1717.

The plaintiff, a clothing manufacturer and wholesaler, had issued a purchase order to the defendant, a fabric wholesaler, for a fabric sample. The purchase order contained a provision on attorney's fees in the event of litigation, whereby the defendant agreed to defend and save harmless the plaintiff from and against any and all claims, costs and expenses, including attorney's fees.

Similarly, the defendant's invoice submitted to the plaintiff contained an attorney's fees provision awarding fees and costs to the prevailing party. (The court was spared a "battle of the forms" analysis due to the reciprocity mandated by Section 1717, which permits both sides to recover fees even if a provision is unilateral.)

The plaintiff filed a suit for breach of warranty, alleging that the defendant did not own the design of the fabric sample, which subjected the plaintiff to liability for copyright infringement. The defendant moved to dismiss for lack of subject matter jurisdiction, on the ground that the case arose under the Federal Copyright Act and that jurisdiction vested exclusively with the federal court.

The trial court agreed and dismissed the action. Thereafter, the defendant moved for attorney's fees pursuant to the parties' contract, claiming that it was the prevailing party in the case. The trial court eventually awarded the defendant its attorney's fees (\$129,492.49), and the plaintiff appealed.

On appeal, the plaintiff argued that because the dismissal of the state lawsuit was on procedural grounds only, and because it was still allowed to proceed in federal court, there was no prevailing party in the state action. The defendant, in turn, asserted that it mattered not that its victory was based entirely on procedural grounds, only that there was a victory.

In affirming the trial court's award of attorney's fees, the appeals court canvassed the relevant authority and noted a split between reviewing courts. The plaintiff relied on a case from California's Sixth District Court of Appeal that held that attorney's fees were not warranted where the dismissal was on the procedural ground that the probate court dismissed the action because the plaintiff should have filed the action as a compulsory cross-complaint in an already pending civil suit.[7]

The defendant relied on two cases from the Fourth District, which held that the determination of which party is the prevailing party must be made without consideration of whether the plaintiff can refile.[8] The Kandy Kiss court was convinced that the better rule was the latter, advocated by the defendant.

The court reasoned that the plaintiff chose to sue the defendant initially in state court, the defendant expended resources in defending the suit, and the defendant obtained a complete dismissal of claims against it, with respect to any state litigation. Thus, the court concluded, "[Defendant] achieved complete success in defeating [plaintiff]'s state action against it ... [Defendant] should not be deprived of compensation for the fees it expended in defeating a separate action brought in an independent and

separate forum.”

The California Supreme Court has since granted review of the appeals court decision. California’s high court will tackle the following issue: Is a party that obtains the dismissal of a contract action on procedural grounds entitled to an award of attorney’s fees under Section 1717 of the Civil Code as the “prevailing party”?

Whatever side the decision falls on, Kandy Kiss will hopefully clarify confusion over interpretation of the term “prevailing party” — a clarification that is undoubtedly welcomed by both sides of the bar.

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[1] 209 Cal.App.4th 604 (2012), superseded by grant of review, 291 P.3d 326 (Cal. 2013)

[2] In 1987, the Legislature amended section 1717 to delete the previous definition of “prevailing party” as the party entitled to recover costs, to the current definition, as the party who recovered a greater relief in the action on the contract.

[3] (1995) 9 Cal.4th 863

[4] Estate of Drummond (2007) 149 Cal.App.4th 46.

[5] Profit Concepts Management, Inc. v. Griffith (2008) 162 Cal.App.4th 950; see PNEC Corp. v. Meyer (2010) 190 Cal.App.4th 66.

[6] E.g., Idea Place Corp. v. Fried (N.D. Cal. 2005) 390 F.Supp.2d 903.

[7] Estate of Drummond, *supra*.

[8] Profit Concepts Management, *supra*; PNEC Corp., *supra*.