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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

CARL J. WAHL, JR. et al., **Plaintiffs and Appellants,** **v.** **WILLIAM ESCH,** **Defendant and Respondent.**	**A104246** **(Sonoma County Super. Ct. No. SCV 225058)**

Carl J. Wahl and Margaret M. Wahl appeal the trial court's denial of an award of attorney fees as prevailing parties, based on a contractual fee provision in a home purchase agreement between appellants and respondent William Esch. Appellants further maintain the trial court erred in failing to award certain litigation costs.

We will conclude the trial court was required by the contractual fee provision in the home purchase agreement to award appellants a reasonable attorney fee award, and we will remand for the trial court to set such an award. On remand, we will also direct that the trial court determine litigation costs under Code of Civil Procedure section 998.[1]

I. FACTS AND PROCEDURAL HISTORY

Although this appeal concerns only a claim for attorney fees and costs, some background on the underlying litigation may be helpful.

Appellants Carl Wahl and Margaret Wahl bought a home in Occidental from respondent William Esch and his wife, Cheryl Esch.

The home purchase contract contained an attorney fee provision, allowing the

[1] All further section references are to the Code of Civil Procedure.

"prevailing" party to recover a "reasonable" attorney fee. This provision read: "**ATTORNEY FEES**. In any action or proceeding involving a dispute between Buyer and Seller arising out of the execution of this Agreement or the sale, whether for tort or for breach of contract, and whether or not brought to trial or final judgment, the prevailing party will be entitled to receive from the other party a reasonable attorney fee to be determined by the court or arbitrator(s)."

The home sold to appellants had numerous defects, such as building code violations, which were not disclosed to the appellants when they purchased it. Appellants sued the sellers, respondent William Esch and his wife Cheryl Esch, on both contract and tort theories. The appellants prevailed on their tort claims of liability, and the jury awarded damages as to their tort claims of fraud and negligent misrepresentation. The parties then entered into a settlement, with appellants recovering $95,000 in compensatory damages from both defendants jointly, and $10,000 in punitive damages from William Esch.

Appellants next sought to recover $131,000 in attorney fees under the fee provision of the home sales contract, as well as an award of more than $60,000 in costs.

The trial court declined to award any attorney fees, and awarded only about $13,000 in costs.

The appellants filed this appeal from the trial court's order denying an award of attorney fees and costs as requested. The original respondents, William and Cheryl Esch, did not file respondents' briefs. After our notice of oral argument was mailed, respondent Cheryl Esch filed a notice of bankruptcy case filing, which stayed this appeal as to her, but not as to William Esch. We have entered an order to that effect. (Order dated July 15, 2004)

II. DISCUSSION

A. AN AWARD OF ATTORNEY FEES IS REQUIRED BY THE CONTRACT

The correct application of statutory and case authority regarding an award of attorney fees is a question of law, which the appellate court addresses de novo. (*Silver v. Boatwright Home Inspection, Inc.* (2002) 97 Cal.App.4th 443, 448-449 (*Silver*).)

If a contractual attorney fee clause is sufficiently broad, a party in an action arising out of a contract will be deemed the prevailing party and entitled to attorney fees, even if the recovery in the action is based on noncontract claims. (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 608; *Silver, supra,* at pp. 449, 452; §§ 1032, 1033.5.)

The home purchase contract in issue here contains a broadly worded fee provision allowing a "reasonable" fee award, when the prevailing party has prevailed on contract claims or tort claims. The trial court however did not award any attorney fees. Apparently, the trial court reasoned that because the appellants only collected damages on some of their tort claims, rather than prevailing on all tort and contract claims, a fee award would be unfair or unreasonable. The fee provision in issue here, however, requires a fee award whenever a party prevails, as the appellants unquestionably did. (See *Palmer v. Shawback* (1993) 17 Cal.App.4th 296, 301 [Per Div. One of the First Appellate District] (*Palmer*); *Harvard Investment Co. v. Gap Stores, Inc.* (1984) 156 Cal.App.3d 704, 714-716 [Per Div. Two of the First Appellate District]; *Xuereb v. Marcus & Millichap, Inc*. (1992) 3 Cal.App.4th 1338, 1342 [Per Div. Three of the First Appellate District]; see also *Thompson v. Miller* (2003) 112 Cal.App.4th 327, 337.)

Appellants achieved a net recovery of more than $105,000, including an award of punitive damages. The fact that appellants did not prevail on each of their various contract and tort theories is irrelevant, in light of the broad wording of the attorney fee provision, requiring an award of fees to any "prevailing party" regardless of whether he or she prevailed in contract or in tort. (See *Palmer, supra,* 17 Cal.App.4th at p. 301.) Appellants are entitled to an award of reasonable attorney fees as prevailing parties. (*Ibid.)* This conclusion does not mean that the trial court must award all the fees that the appellants seek, but the court must exercise its discretion to award fees in a reasonable amount, as opposed to denying such fees altogether. (See *Palmer, supra,* at p. 301.) We therefore remand for the trial court to exercise its discretion in making such an award.

B. OTHER REQUESTED LITIGATION COSTS

Appellants similarly contend the trial court erred in denying some of their other requested costs of suit. Appellants sought expert witness costs of $46,000 under section

998.[2] Section 998 allows an award of expert witness fees where a party has refused a settlement offer and subsequently obtains a less favorable result. (See *Santantonio v. Westinghouse Broadcasting Co*. (1994) 25 Cal.App.4th 102, 112; *Wickware v. Tanner* (1997) 53 Cal.App.4th 570, 577-578; cf. *Hilliger v. Golden* (1980) 107 Cal.App.3d 394.) Appellants also sought $2,015 in court reporter fees for the trial, as costs.

The trial court did award appellants more than $13,000 in other costs, but denied their requests for reimbursement of expert witness fees and court reporter fees. No reasons were given for the denial of these particular costs, and thus our review as to these issues is hampered. As we are remanding this matter for the determination of a appropriate attorney fee award, we will also direct the trial court to explicitly address the matter of reimbursement of these litigation costs under section 998, in its discretion, on remand.

III. DISPOSITION

The orders denying an award of attorney fees and costs are reversed, and the matter is remanded to the trial court with instructions to set a reasonable attorney fee award and costs award. Appellants shall also recover their costs on this appeal.

STEVENS, J.

We concur.

JONES, P.J.

GEMELLO, J.

[2] Section 998 provides, in pertinent part: "(d) If an offer made by a plaintiff is not accepted and the defendant fails to obtain a more favorable judgment or award . . . the court . . . in its discretion, may require the defendant to pay a reasonable sum to cover costs of the services of expert witnesses . . . in addition to plaintiff's costs." Appellants had made a section 998 offer to William Esch of $55,000, which was not accepted. The total judgment against William Esch was for more than this sum, i.e., $105,000.