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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

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| PHOTOMEDEX, INC.,<br>Plaintiff and Appellant,<br>v.<br>DEAN STEWART IRWIN et al.,<br>Defendants and Respondents. | D044612<br><br>(Super. Ct. No. GIN029408) |

APPEAL from a judgment of the Superior Court of San Diego County, Michael M. Anello, Judge. Affirmed.

Plaintiff PhotoMedex, Inc. (PhotoMedex) appeals a judgment awarding attorney fees and litigation expenses under Civil Code[1] section 1717 to defendant Dean Stewart Irwin (Irwin ) as the prevailing party on PhotoMedex's claim for breach of contract and other causes of action. PhotoMedex contends: (1) Section 1717 provides no basis for an

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1 Statutory references are to the Civil Code.

award of attorney fees against a party who never asserted a contractual right to attorney fees; and (2) the amount of attorney fees awarded to Irwin was excessive and unreasonable. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

From February 1998 to July 2002, Irwin worked for PhotoMedex where he helped design an excimer laser system for the treatment of certain skin conditions. After his employment with PhotoMedex was terminated, Irwin founded RA Medical, Inc. (RA Medical), a company that intended to manufacture and sell a competing excimer laser.

In April 2003 PhotoMedex sued Irwin and RA Medical for breach of contract, misappropriation of trade secrets, intentional interference with contractual relationships, unfair competition and conversion.[2] In its breach of contract cause of action, PhotoMedex alleged Irwin signed two confidentiality agreements and breached those agreements by using PhotoMedex's confidential and proprietary information in his new company. The agreements contained the following attorney fee provision:

> "In the event of any litigation concerning any controversy, claim or dispute between the parties hereto, the prevailing party shall be entitled to recover from the other party reasonable expenses, including attorneys' fees."

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[2] The breach of contract cause of action was alleged against Irwin only.

PhotoMedex claimed that although Irwin's signature on the confidentiality agreements was witnessed, the agreements were missing from his personnel file. In its prayer for relief, PhotoMedex included a request for attorney fees.

Irwin moved for summary judgment, or alternatively, summary adjudication of issues. After hearing, the court granted summary adjudication in favor of Irwin on the breach of contract, conversion and interference with contractual relationships claims. As to breach of contract, the court found Irwin did not recall signing a confidentiality agreement and PhotoMedex could not produce a signed copy of one. Thus, PhotoMedex had failed to raise a triable issue of fact regarding whether Irwin signed a confidentiality agreement for the term of his employment at issue in this matter. The court denied summary judgment and summary adjudication as to the claims for misappropriation of trade secrets and unfair competition. Two days before trial, PhotoMedex voluntarily dismissed these causes of action.

Irwin filed a motion for attorney fees and litigation expenses as prevailing party on the contract claim.[3] He submitted a detailed accounting and explained that effective August 1, 2003, he and his attorneys agreed to modify the fee arrangement by reducing the hourly rate from $250 to $150 in exchange for 100 shares of RA Medical stock, at $1 par value per share, for every hour billed by the attorneys. According to the declaration of Irwin's counsel, the total amount of fees billed was $189,602.38.

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[3] Irwin also sought attorney fees on the ground PhotoMedex filed and maintained the action for misappropriation of trade secrets in bad faith. (§ 3426.4.) However, the court denied attorney fees on this ground.

PhotoMedex opposed the motion, arguing Irwin was not entitled to contractual attorney fees under section 1717 because the court previously found no contract existed. In any event, PhotoMedex argued, the reciprocity provisions of section 1717 did not apply because PhotoMedex did not seek attorney fees in its breach of contract cause of action. PhotoMedex did not object to the amount of fees requested or to the manner in which Irwin calculated those fees.

The court granted Irwin's request for attorney fees, finding Irwin was the prevailing party on the contract cause of action and the reciprocity provisions of section 1717 applied to him as a nonsignatory party. Further, the broad language of the attorney fee clause entitled Irwin to fees on the tort claims, and because all causes of action were inextricably intertwined, apportionment of attorney fees was neither possible nor required. The court awarded Irwin $49,347 in attorney fees and $4,888 in litigation expenses.

Irwin requested oral argument to address whether the court considered the actual $250 per hour expense to Irwin to defend the case, an amount comprising $150 per hour plus 100 shares of RA Medical stock for every hour billed. The court stated it did not award fees of $250 per hour for those hours billed at the reduced rate of $150 per hour. Counsel for Irwin explained each share of stock was worth $1 (its par value), and the total amount paid in stock was $63,000. The court questioned whether "par value" of stock is an arbitrarily assigned number which may not necessarily represent a stock's true value. Counsel for PhotoMedex conceded she had presented no opposition on this issue, and would defer to the court's discretion.

After taking the matter under submission, the court modified its ruling by recalculating the fee amount according to the actual fees charged, which included 100 shares of stock, at $1 per share, for every hour billed by the attorneys. The court increased the award of attorney fees and litigation expenses by $28,894, for a total award of $83,129.[4]

## DISCUSSION

### I

### *Section 1717 Provides a Basis For an Award of Attorney Fees*

PhotoMedex contends the reciprocity provisions of section 1717 are not triggered unless a party suing on a contract affirmatively seeks attorney fees. Specifically, PhotoMedex asserts its complaint did not allege a right to contractual attorney fees and thus, Irwin failed to establish PhotoMedex would have been entitled to attorney fees had it prevailed on the contract claim. Because PhotoMedex challenges the legal basis for the award of attorney fees, we review the court's decision de novo. (*Sessions Payroll Management, Inc. v. Noble Construction Company, Inc.* (2000) 84 Cal.App.4th 671, 677 (*Sessions*); *Ramos v. Countrywide Home Loans, Inc*. (2000) 82 Cal.App.4th 615, 621.)

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4 This figure represents $78,241 in attorney fees and $4,888 in litigation expenses.

A

*The Validity or Existence of a Contract is Not a Prerequisite to a Fee Award*

Section 1717, subdivision (a) provides in part: "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to attorney's fees in addition to other costs." The primary purpose of section 1717 is to ensure mutuality of remedy and to prevent oppressive use of one-sided attorney fee provisions. (*Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 128; *Santisas v. Goodin* (1998) 17 Cal.4th 599, 610.) In this regard, section 1717 has been interpreted to provide a reciprocal remedy for a nonsignatory defendant sued on a contract as if the defendant were a party to it, when a plaintiff would be entitled to attorney fees should the plaintiff prevail in enforcing the contract against the defendant. (*Reynolds Metals Co.*, at pp. 128-129.)

Further, "a party is entitled to attorney fees under section 1717 'even when the party prevails on grounds the contract is inapplicable, invalid, unenforceable or nonexistent, if the other party would have been entitled to attorney's fees had it prevailed.'" (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 870; *Santisas v. Goodin, supra,* 17 Cal.4th at p. 611.) Section 1717 would fall short of its "goal of full mutuality of remedy if its benefits were denied to parties who defeat contract claims by proving that they were not parties to the alleged contract or that it was never formed. To achieve its goal, the statute generally must apply in favor of the party prevailing on a contract claim whenever

that party would have been liable under the contract for attorney fees had the other party prevailed." (*Hsu*, at pp. 870-871.)

Here, PhotoMedex sued Irwin "on a contract" that provided for an award of attorney fees to the prevailing party "[i]n the event of any litigation concerning any controversy, claim or dispute between the parties . . . ." Although PhotoMedex was unable to produce a copy of the agreements it claimed were signed by Irwin, PhotoMedex alleged their existence, referred to one of the agreements in its request for a temporary restraining order, questioned Irwin about it at his deposition, and produced 22 copies of confidentiality agreements, all containing an identical attorney fee clause, signed by other employees. Irwin successfully defended on the ground there was no enforceable contract. By successfully defending against PhotoMedex's claim for breach of contract and its related claims for conversion and interference with contractual relationships,[5] Irwin was the prevailing party within the meaning of section 1717. Had PhotoMedex been successful in proving the existence of a contract and its breach by Irwin, it would have been entitled to attorney fees in accordance with the clear language of the reciprocal attorney fee provision. Thus, section 1717's "full mutuality of remedy" entitled Irwin to his attorney fees even in the absence of an enforceable contract between the parties.

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[5] Where, as here, a contractual attorney fee provision is phrased broadly, it may support an award of attorney fees to the prevailing party in an action alleging both contract and tort claims. (*Santisas v. Goodin, supra,* 17 Cal.4th at p. 608; *Xuereb v. Marcus & Millichap, Inc*. (1992) 3 Cal.App.4th 1338, 1341.)

B

*Claims for Contractual Attorney Fees Need Not Be Pleaded and Proved in the Underlying Action*

PhotoMedex asserts it would not have been entitled to attorney fees had it prevailed because: (1) its complaint did not allege the right to contractual attorney fees; (2) the complaint did not describe any contractual provision for attorney fees or include the contract as an attachment; and (3) the right to attorney fees was not pleaded or proved during the litigation of this case. Because it never claimed a right to attorney fees under any contract provision, PhotoMedex asserts, section 1717's purpose to ensure "mutuality of remedy" is not implicated here.

A party seeking to recover contractual attorney fees need not plead entitlement to them as an item of damages. (*Allstate Ins. Co. v. Loo* (1996) 46 Cal.App.4th 1794, 1797-1798.) Attorney fees awarded under section 1717 are not an element of damages, but an item of costs. (§ 1717, subd. (a) ["Reasonable attorney's fees shall be fixed by the court, and shall be an element of the costs of suit"]; see also Code Civ. Proc. § 1033.5, subd. (a)(10)(A) [attorney fees authorized by contract are allowable as costs].) Thus, "claims for contractual attorney fees need not be pleaded and proved in the main action, but are includable in the post trial cost bill along with other elements of costs." (*Pecsok v. Black* (1992) 7 Cal.App.4th 456, 460, disapproved on another ground in *Bank of San Pedro v. Superior Court* (1992) 3 Cal.4th 797, 803, fn. 4.)[6] Section 1717's "mutuality of remedy"

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6 Conversely, "[t]he mere allegation in a complaint that the plaintiff is entitled to receive attorney fees does not provide a sufficient basis for awarding them to the

did not require PhotoMedex to specifically allege the right to contractual attorney fees, attach the contracts to the complaint[7] or otherwise plead and prove this entitlement.

Citing *M. Perez Company, Inc. v. Base Camp Condominiums Assn. No. One* (2003) 111 Cal.App.4th 456 (*M. Perez*), PhotoMedex claims it should not have to pay Irwin's attorney fees because it did not assert a right to attorney fees under the contract. However, PhotoMedex misstates the holding in that case. In *M. Perez*, the contract on which the plaintiff sued did not contain an attorney fee provision. (*Id*. at p. 463.) The court reiterated the principle that "a prevailing party is entitled to attorney fees only if it can prove it would have been liable for attorney fees had the opponent prevailed." (*Id*. at p. 467.) Applying that principle to the facts before it, the court held "where the contract does not contain an attorney fee provision, even though the plaintiff seeks attorney fees, success by the plaintiff on the breach of contract claim does not entail a finding of a valid attorney fee provision. The prevailing party would not be entitled to attorney fees. Thus, the distinction is between success on the underlying claim of breach and success in proving there is an applicable attorney fee provision." (*Id*. at pp. 467-468.)

Here, in contrast, Irwin succeeded on both the underlying claim and in proving the existence of an applicable attorney fee provision. Notwithstanding PhotoMedex's claims

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opposing party if the plaintiff does not prevail." (*Sessions, supra*, 84 Cal.App.4th at p. 682.)

[7] We note PhotoMedex failed to attach the contracts to the complaint not because it was not seeking attorney fees, but because it could not locate those documents.

to the contrary, Irwin clearly would have been liable for attorney fees had PhotoMedex prevailed on its breach of contract claim. Further, nowhere in *M. Perez* does the court state a defendant, sued as if he were a party to the contract, can only recover attorney fees if the plaintiff expressly seeks attorney fees in its complaint. Indeed, a plaintiff who signs a reciprocal attorney fee provision cannot force a defendant to incur attorney fees to defend a breach of contract claim and then, after losing on the merits, avoid paying attorney fees through artful pleading. Moreover, it would violate section 1717's equitable principles to deny a party who successfully defends an action on a contract containing an attorney fee provision the right to recover its attorney fees simply because the party initiating the case has not specifically pleaded attorney fees in its complaint. (See *Jones v. Drain* (1983) 149 Cal.App.3d 484, 489-490.) Irwin was entitled to contractual attorney fees under section 1717.

II

*The Court Did Not Abuse its Discretion in Determining the Amount of Attorney Fees*

PhotoMedex challenges the amount of attorney fees awarded, contending the court erroneously compensated Irwin $100 for each hour his counsel worked based on the par value of shares of RA Medical stock. PhotoMedex asserts: (1) par value has no significance as a measure of value and thus there was no evidence from which the court could make a reasoned assessment of the value of the stock issued to counsel; and (2) there is no justification for awarding attorney fees to Irwin as credit for shares of stock issued by RA Medical.

A

*Standard of Review*

Under section 1717, subdivision (a), "[r]easonable attorney's fees shall be fixed by the court . . . ." Because an award of attorney fees under section 1717 is governed by equitable principles, "the trial court has broad authority to determine the amount of a reasonable fee." (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095.) The experienced trial court is the best judge of the value of professional services rendered in its court, and although subject to review, the court's decision will not be disturbed on appeal unless it is clearly wrong. (*Ibid*.; *Serrano v. Priest* (1977) 20 Cal.3d 25, 49.) Thus, we review the court's determination of reasonable attorney fees for abuse of discretion. (*Childrens Hospital and Medical Center v. Belshe* (2002) 97 Cal.App.4th 740, 777.)

B

*PhotoMedex Waived the Issue on Appeal*

PhotoMedex's opposition to Irwin's request for attorney fees challenged Irwin's *entitlement* to fees under section 1717, but not the *amount* of fees requested or the calculation used with respect to the issuance of 100 shares of stock for each billed hour.[8]

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[8] In a footnote in its opposition to Irwin's request for attorney fees, PhotoMedex stated: "In the unlikely event that the Court awards attorneys' fees based on Section 1717, the amount of fees awarded should be recalculated to reflect that the breach of contract claim was brought only against Irwin, it was no longer at issue subsequent to the Court's summary judgment order, and the amount of fees attributable to the defense of the breach of contract claim should be minimal. Section 1717 provides no basis for the

When Irwin asked the court to recalculate the amount of fees awarded by considering the payment of 100 shares of stock for every hour billed, counsel for PhotoMedex conceded she had presented no opposition on this issue, and would defer to the court's discretion. Having failed to object to the court's consideration of stock at par value in its computation of an attorney fee award, PhotoMedex is foreclosed from challenging this ruling on appeal. (*In re Marriage of Hinman* (1997) 55 Cal.App.4th 988, 1002; *Conservatorship of Rand* (1996) 49 Cal.App.4th 835, 841, fn. 7 citing *People v. Whisenand* (1995) 37 Cal.App.4th 1383, 1395 [failing to object in the trial court on the grounds now urged constitutes a waiver of the right to make the argument on appeal].)

C

*The Attorney Fee Award Was Reasonable*

Even if the issue is not waived, the amount of attorney fees awarded was reasonable. As we previously discussed, the trial court has wide discretion to fix a reasonable amount of attorney fees. (*PLCM Group, Inc. v. Drexler, supra,* 22 Cal.4th at p. 1096.) In making this determination, the court ordinarily considers "the number of hours expended by counsel multiplied by the prevailing market rate for comparable legal services . . . where counsel is located." (*Ibid*.) The court also considers factors such as "the nature of the litigation, its difficulty, the amount involved, the skill required in its handling, the skill employed, the attention given, the success or failure, and other

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recovery of the costs sought by the Defendants." However, PhotoMedex now improperly attempts to raise a new theory on appeal.

circumstances in the case." (*Melnyk v. Robledo* (1976) 64 Cal.App.3d 618, 623-624.) The court is not limited to awarding the amount actually paid by the prevailing party. (*Gilbert v. Master Washer & Stamping Co*. (2001) 87 Cal.App.4th 212, 220-221.) Indeed, a party who receives free legal services from a pro bono attorney, and thus incurs no attorney fees at all, is nonetheless entitled to recover attorney fees under section 1717. (*PLCM*, at p. 1096, citing *Beverly Hills Properties v. Marcolino* (1990) 221 Cal.App.3d Supp. 7, 12.)

Here, the court properly based the attorney fee award on the number of hours expended by Irwin's counsel multiplied by the prevailing market rate for comparable legal services in San Diego. According to the declaration of Irwin's counsel, the fee request was based on the number of hours expended times the standard billing rate of $250 per hour or a blended rate of $150 per hour plus 100 shares of RA Medical stock. The uncontested evidence before the court showed the stock consideration given to counsel cost Irwin $1 per share and represented $63,000. The court was entitled to use the par value of the stock given to counsel as an aid in determining a reasonable hourly rate.

Although the par value of stock does not necessarily reflect its actual or market value (*Castle v. Acme Ice Cream Co.* (1929) 101 Cal.App. 94, 101), PhotoMedex did not dispute the value of RA Medical stock in its opposition or at oral argument in the trial court. Had PhotoMedex done so, the court and the parties would have had the opportunity to address any difference between the stock's par value and its market value. Therefore, we express no opinion on whether RA Medical stock given to counsel was

actually worth the par of the shares. (See *Virginia v. West Virginia* (1915) 238 U.S. 202, 220.) The only evidence before the court was that Irwin paid his attorney the equivalent of $250 per hour. In this regard, the court's attorney fee award was not arbitrary or unreasonable. (*Winick Corp. v. Safeco Insurance Co*. (1986) 187 Cal.App.3d 1502, 1509 [where opposing party failed to challenge individual items in reasonably detailed bill of costs, trial court was entitled to rely on it in assessing appropriate attorney fee award].)

Irwin made an adequate showing of the cost of legal services he incurred. PhotoMedex challenged neither the number of hours expended by counsel or the prevailing market rate for comparable services in San Diego. Under these circumstances, whether Irwin paid for legal services in cash or shares of stock has no bearing on the court's award of reasonable attorney fees.

D

*Irwin Was Entitled to the Value of Fees He Incurred*

PhotoMedex asserts the court was not justified in awarding fees to Irwin as credit for shares of stock "paid" by his codefendant RA Medical. PhotoMedex argues the court improperly compensated RA Medical, who was not the prevailing party on the contract, for the purported value of stock it paid to its attorneys.

As we previously discussed, PhotoMedex did not object in the trial court to a computation of attorney fees that included RA Medical stock. Nor did PhotoMedex claim Irwin could not be reimbursed for those fees he did not personally pay. By not objecting on this ground in the trial court, PhotoMedex has waived the right to make this argument on appeal. (*Conservatorship of Rand, supra,* 49 Cal.App.4th at p. 841, fn. 7.)

In any event, Irwin was liable for attorney fees for services rendered by his counsel in defending PhotoMedex's lawsuit even if he was not the source of payment counsel looked to first. Irwin "incurred" fees within the meaning of section 1717 and thus was entitled to an award of fees. (*International Billing Services, Inc. v. Emigh* (2000) 84 Cal.App.4th 1175, 1193 [prevailing litigants were entitled to attorney fees even though fees had been paid by employer].) PhotoMedex cannot avoid its contractual obligation to pay reasonable attorney fees based on the fortuitous circumstance it sued a defendant whose employer issued stock as partial payment of those fees. (See *Staples v. Hoefke* (1987) 189 Cal.App.3d 1397, 1410 [prevailing party entitled to award of contractual attorney fees paid by insurer].)

DISPOSITION

The judgment is affirmed.

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IRION, J.

WE CONCUR:

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NARES, Acting P. J.

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HALLER, J.