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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

AVI GIL, Plaintiff and Appellant, v. MONET MANSANO, Defendant and Respondent.	B165668 (Los Angeles County Super. Ct. No. LC049187)

APPEAL from a judgment of the Superior Court of Los Angeles County. Richard G. Kolostian, Judge. Affirmed in part and reversed in part.

Law Offices of Gerald Krupp and Gerald Krupp for Plaintiff and Appellant.

Wolf, Rifkin, Shapiro & Schulman and Matthew J. Hafey for Defendant and Respondent.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, only the Introduction, part IV of the Discussion, and the Disposition are certified for publication.

INTRODUCTION

Three individuals engaged in a business venture together. Two of the individuals purchased the third individual's share of the business. All three entered into a written purchase agreement and a separate written release. The release included an attorney fee provision applicable to an action brought to enforce the release. One of the two remaining owners sued the other for fraud, and the defendant asserted the release as an affirmative defense. The defendant prevailed on summary judgment and was awarded attorney fees pursuant to the attorney fee provision in the release. In the published portion of this opinion, we conclude the assertion of a contractual defense to a tort action is not an "action brought to enforce the contract" and, therefore, the prevailing party is not entitled to an attorney fee award. In the unpublished portion of the opinion, we address the remaining contentions. We reverse the attorney fee award and otherwise affirm the judgment.

FACTS AND PROCEDURAL BACKGROUND

Allegations of the Complaint

On June 21, 1999, plaintiff and appellant Avi Gil filed a complaint against defendant and respondent Monet Monsano for fraud arising out of a business venture.[1] The complaint alleged as follows. In late spring 1994, defendant made the following representations to plaintiff and another investor, Baruch Ulner, to induce them to invest in a new corporation. Defendant said he was a well-known and respected make-up artist in the entertainment industry with connections to department and specialty stores, beauty salons, actors and

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1 Plaintiff also named Make-Up by Monet, Inc. as a defendant and alleged a shareholder derivative cause of action. The parties settled this issue and plaintiff dismissed the cause of action against all defendants with prejudice.

actresses, and other make-up artists. Through defendant's efforts, the new corporation could sell an exclusive line of make-up to these potential customers. Defendant had contacted one or more overseas suppliers to produce an exclusive line of make-up that would be so unique, the potential customers could not resist purchasing. If the make-up was offered to these potential customers, who were aware of defendant's notoriety or could be acquainted with his make-up expertise, the resulting sales would be great and the make-up would be in high demand. Therefore, it was necessary to order large initial quantities of the products to satisfy the expected demand. Until the corporation could afford a sales force, defendant would visit all of the potential customers to obtain the initial and subsequent orders. The corporation would open up a store in a carefully selected location to sell the exclusive make-up products to potential customers and the general public. Defendant would supervise the store operations and devote the majority of his time to the corporation's business and the store operations. Defendant told them that there was a large profit margin in make-up and the corporation would realize profits immediately. The corporation's sales would return more than ten times the cost of the initial purchases.

Defendant knew his representations were false. Plaintiff and Ulner believed the representations and would not otherwise have invested in the corporation. In June 1994, Ulner incorporated Make-up by Monet, Inc. (Monet, Inc.). Defendant, plaintiff, and Ulner each owned a one-third interest. Because Ulner had a bankruptcy complication, plaintiff held both his and Ulner's shares in plaintiff's name. In 1998, Ulner's stock was retired. Plaintiff and defendant became equal shareholders. Plaintiff is a director and an officer of Monet, Inc. Defendant is a director and the president of Monet, Inc. Plaintiff has invested approximately $205,000 in Monet, Inc.

Defendant did not devote a majority of his time to Monet, Inc. He did not approach prospective customers and did not sell Monet, Inc.'s products in any large quantity. Defendant did not supervise the store that Monet, Inc. opened for sale of its products. He went into competition with Monet, Inc. by opening his own make-up store, Image Exclusive (Image).

Image sold products under Monet, Inc.'s name as well as defendant's own products in competition with Monet, Inc. Defendant did not account to Monet, Inc.

<u>Motion for Summary Judgment and Supporting Evidence</u>

On October 12, 1999, defendant filed an answer denying the allegations of the complaint and alleging affirmative defenses, including waiver and the statute of limitations.[2] Defendant requested an award of attorney fees. On August 27, 2002, defendant filed a motion for summary judgment on the grounds that the complaint was barred by a mutual release signed by the parties and the three year statute of limitations for fraud. Defendant submitted his declaration, a stock purchase agreement executed by plaintiff and defendant, and the release to establish the following.

In March 1996, Image, a beauty supply store, was available for purchase. Monet, Inc. had not yet found a suitable location and its inventory was sitting in a warehouse. Defendant suggested Monet, Inc. purchase the store. Plaintiff and Ulner told defendant they were not interested, but that he could purchase the store for himself. Defendant purchased Image in April 1996. Both plaintiff and Ulner were aware of defendant's purchase. Image purchased products from Monet, Inc.

In approximately September 1996, Monet, Inc. opened a store. The store closed one year later. At the end of 1997, Ulner wanted to withdraw from Monet, Inc. The shareholder records showed that plaintiff owned 200 shares and defendant owned 100 shares of Monet, Inc. Defendant and plaintiff agreed to buy Ulner's shares and become equal shareholders. On January 15, 1998, plaintiff and defendant entered into a stock sale agreement. Defendant agreed to pay $5,000 to plaintiff to purchase 50 shares from plaintiff, resulting in defendant

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2 Defendant filed a cross-complaint against plaintiff and Monet, Inc. for involuntary dissolution of Monet, Inc., breach of fiduciary duties, breach of the implied covenant of good faith and fair dealing, and fraud. However, on October 4, 2002, defendant voluntarily dismissed his cross-complaint.

and plaintiff each owning 150 shares. The agreement stated: "As a condition precedent to this Agreement the Parties herein and BARUCH ULNER shall sign a Mutual Release Agreement, a copy of the draft of said Agreement is attached hereto as Exhibit 'A'." In addition, the agreement stated: "This Agreement contains the sole and only agreement of the Parties hereto relating to this transaction and correctly sets forth the rights, duties and obligations of each party as of its date. Any prior agreements, promises, negotiations or representation not expressly set forth in this Agreement are of no force and effect." The agreement further stated: "In the event of any Arbitration or Litigation between the Parties over this Agreement, the prevailing Party shall be entitled to reasonable attorney fees and costs." Defendant and plaintiff signed the agreement. In addition to paying $5,000 to plaintiff, defendant paid $35,000 to Ulner.

Also on January 15, 1998, a mutual release was entered into "by and between MONY MANSANO, AVI GIL AND MAKE UP BY MONET INC[.], A CALIFORNIA CORPORATION[,] hereinafter[] collectively sometimes referred to as 'The Corporation[,]' and BARUCH ULNER[,] hereinafter referred to as 'Ulner.'" The release recited the following circumstances as the basis for the release: Ulner and plaintiff had contemplated, but not executed, an option agreement; Ulner might have claims against the Corporation and/or its assets; plaintiff and defendant had entered into a stock sale agreement; and a mutual release by the parties was a condition precedent to the stock sale agreement.

The release provided: "Each of the parties jointly and severally . . . hereby fully and forever releases and discharges each other party . . . from all expenses, compensations, cost demands, rights, claims, liabilities, accounts and causes of action which each party . . . now [has] or may have after the signing of this Agreement against any other party . . . in connection with Make Up By Monet, Inc[.], its business or assets." The release also contained a provision that "[i]n the event action is brought to enforce the terms of this Agreement, the prevailing party shall be paid his reasonable attorney[] fees and costs incurred therein." The release was signed by Ulner, defendant, and plaintiff individually, and by defendant and plaintiff on behalf of Monet, Inc.

Defendant also submitted plaintiff's deposition testimony. Plaintiff formed the belief that defendant did not intend to perform his earlier promises when defendant told plaintiff and Ulner in late 1995 or early 1996 that he wanted to purchase Image. Plaintiff and Ulner accused defendant of lying to them. They told defendant that if he had told them from the beginning he planned to purchase Image, they would not have invested in Monet, Inc. Once defendant began operating the Image store in April 1996, plaintiff believed defendant had been lying at the time he made the promises that induced plaintiff to invest in Monet, Inc. and had never intended to perform them. As soon as defendant began operating Image, he ceased his efforts on behalf of Monet, Inc. After defendant made the initial promises to induce the investment as set forth in the complaint, defendant did not make any additional promises to plaintiff that he did not keep. Attorney Moshe Young prepared the stock sale agreement and the release at the request of plaintiff, Ulner, and defendant. Attorney Young explained the documents to plaintiff in general, but did not explain the release specifically. Plaintiff relied on Attorney Young's legal advice in signing the documents.

Opposition to Motion for Summary Judgment and Supporting Evidence

Plaintiff filed an opposition to the motion for summary judgment on the grounds that: (1) the statute of limitations did not begin to run until early 1999 when plaintiff discovered defendant had been ordering make-up without plaintiff's knowledge, because plaintiff had believed subsequent assurances by defendant that he would fulfill his promises; and (2) plaintiff did not understand the release he had signed, because he cannot read English and Attorney Young told him only that he was releasing claims against Ulner.

Plaintiff submitted his declaration in support of his opposition. In 1996, defendant told plaintiff and Ulner that he would be purchasing the Image store regardless of whether they chose to invest in it, because he needed to make a living. Plaintiff and Ulner were angry. A week later, defendant told plaintiff that although he would be purchasing the Image store, it would not interfere with the plan to purchase an exclusive store for Monet, Inc. Defendant

said that he would not need to spend much time at the Image store and would devote the majority of his efforts and time to Monet, Inc. Defendant said he would renew his efforts to introduce and sell the make-up, bring actors and make-up artists to Monet, Inc.'s exclusive store, teach employees to apply and sell Monet, Inc.'s make-up, and market Monet, Inc.'s make-up line to department stores. Defendant promised plaintiff that he would not be disappointed by defendant's efforts and Monet, Inc. could still be a big success. Although plaintiff discovered defendant had purchased an interest in the Image store, plaintiff believed defendant's representation that he would devote himself primarily to Monet, Inc.

Defendant took Ulner and plaintiff to look at potential locations for Monet, Inc.'s store. Defendant found a location on Santa Monica Boulevard in the summer of 1996. Defendant contributed money to remodel the store. Defendant told plaintiff and Ulner that he would come to the store on a regular basis to teach the employees, greet actors and make-up artists, and obtain endorsements from make-up artists. The store opened in September 1996. It did not succeed and closed after a year and a half. Although plaintiff was not pleased with defendant's efforts, he continued to hope that Monet, Inc. could be turned around, defendant would fulfill his promises, and plaintiff would recoup a portion or all of his $180,000 investment. Ulner was disgusted and wanted to be bought out. Defendant told plaintiff that more could be accomplished with only two partners and promised to redouble his efforts to make Monet, Inc. a success. Plaintiff wanted to believe defendant. Plaintiff paid $32,500 to purchase Ulner's interest in Monet, Inc. in January 1998.

Plaintiff was born in Israel in 1949 and moved to the United States in 1982. Hebrew is his primary language. He needed the assistance of an interpreter for his deposition. Attorney Young spoke to plaintiff, defendant, and Ulner in Hebrew. Attorney Young told them that the first document would memorialize plaintiff and defendant's purchase of Ulner's interest in Monet, Inc. He told them that the second document was to release plaintiff and defendant's claims against Ulner and Ulner's claims against plaintiff and defendant. Plaintiff did not intend to release any claims against defendant and would not have signed the release had he known it would release defendant. Attorney Young did not translate either document from

English to Hebrew. Attorney Young was aware that plaintiff could not read the release document.

Plaintiff had little contact with defendant in 1998. In early 1999, plaintiff was curious about the inventory in the warehouse. He looked at a customs document stating that a make-up shipment had arrived for Monet, Inc. Plaintiff contacted the customs agent and learned that during 1997, 1998 and 1999, defendant had ordered make-up under the name of Monet, Inc. and sold it without plaintiff's knowledge. Plaintiff realized defendant had deceived him and used Monet, Inc. to his own advantage. Plaintiff sought legal assistance and filed his complaint shortly thereafter.

On September 19, 2002, plaintiff filed a supplemental opposition on the ground that defendant had not alleged the affirmative defense of the release in his answer.

Reply

Defendant filed a reply on the grounds that: (1) plaintiff could not raise a new theory of liability and new allegations of promises made after April 1996, in contradiction of plaintiff's deposition testimony; (2) plaintiff could not reasonably have relied on the additional promises; and (3) the release was valid, because it was not obtained through fraud or misrepresentation by defendant.

Subsequent Trial Court Proceedings

A hearing was held on September 24, 2002. In the event the trial court found the affirmative defense of release was not encompassed by the affirmative defense of waiver defendant had pled in the answer, defendant requested leave to amend his answer. The trial court granted the motion for summary judgment. The trial court found no question of fact concerning the release. In addition, the trial court found plaintiff was bound by his deposition

testimony that he had discovered the alleged fraud cause of action prior to 1996, and therefore, the statute of limitations barred the fraud action.

Defendant filed a motion for an attorney fee award and a memorandum of costs, including attorney fees, totaling $79,468. Plaintiff filed an opposition. A hearing was held on November 12, 2002, that was not recorded. The same day, the trial court entered judgment in favor of defendant and awarded defendant $50,000 in attorney fees, with no additional sum for costs. Plaintiff filed a timely notice of appeal from the judgment.

DISCUSSION

On appeal, plaintiff contends: (1) the complaint is not barred by the statute of limitations, because defendant reaffirmed fraudulent promises within the statute of limitations period; (2) defendant did not properly plead the affirmative defense of release in his answer; (3) plaintiff did not intend to release his claims against defendant; (4) the attorney fee provision of the release does not apply to this action; and (5) the amount of attorney fees awarded to defendant was unreasonable.

I. Standard of Review

"'A defendant is entitled to summary judgment if the record establishes as a matter of law that none of the plaintiff's asserted causes of action can prevail.' (*Molko* v. *Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1107, citations omitted.) The pleadings define the issues to be considered on a motion for summary judgment. (*Sadlier* v. *Superior Court* (1986) 184 Cal.App.3d 1050, 1055.) As to each claim as framed by the complaint, the defendant must present facts to negate an essential element or to establish a defense. Only then will the burden shift to the plaintiff to demonstrate the existence of a triable, material issue of fact. (*AARTS Productions, Inc.* v. *Crocker National Bank* (1986) 179 Cal.App.3d 1061, 1064-1065.)" (*Ferrari v. Grand Canyon Dories* (1995) 32 Cal.App.4th 248, 252.) In opposing the motion,

the plaintiff may not simply rely upon allegations or denials of the pleadings; the plaintiff must set forth specific facts showing that a triable issue of material fact exists. (*Ibid.*; *Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 580-581, 593.) A declaration which simply contradicts a prior discovery admission is not normally sufficient to raise a triable issue of fact. (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 21-22.)

"There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) Although "the court may not weigh the plaintiff's evidence or inference against the defendants' as though it were sitting as the trier of fact, it must nevertheless determine what any evidence or inference *could show or imply to a reasonable trier of fact.*" (*Id.* at p. 856.) We review orders granting or denying a summary judgment motion de novo. (*FSR Brokerage, Inc. v. Superior Court* (1995) 35 Cal.App.4th 69, 72; *Union Bank v. Superior Court, supra,* 31 Cal.App.4th at p. 579.) We exercise "an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law." (*Iverson v. Muroc Unified School Dist.* (1995) 32 Cal.App.4th 218, 222.)

II. Sufficiency of the Answer

Plaintiff contends defendant did not properly allege the release as an affirmative defense in his answer, and therefore, the trial court could not grant summary judgment on the basis of the release. We disagree.

Waiver is an affirmative defense that must be specially pleaded in the answer. (5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 1049, pp. 499-500.) Often, an allegation of waiver actually constitutes a contractual release. (*Ibid.*) Plaintiff did not demur to the answer.

In this case, defendant alleged the affirmative defense of waiver in his answer, which could include the defense of a contractual release. Even if the allegations of the answer were deficient, defendant requested leave to amend the answer to include the specific facts concerning the release. The trial court did not grant this request because it deemed the allegations sufficient. In any event, plaintiff did not request a continuance or otherwise indicate that any prejudice would result by allowing defendant to amend the answer to more specifically raise the release issue.

III. Release

Plaintiff contends the 1998 release is ambiguous and extrinsic evidence shows that he did not intend to release his claims against defendant. We disagree.

The interpretation of a written instrument, even though it involves what might properly be called questions of fact, is essentially a judicial function to be exercised according to the generally accepted canons of interpretation so that the purposes of the instrument may be given effect. (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865.) This court interprets the parties' agreement de novo, unless the interpretation depends upon conflicting extrinsic evidence. (*Home Federal Savings & Loan Assn. v. Ramos* (1991) 229 Cal.App.3d 1609, 1613; *Broffman v. Newman* (1989) 213 Cal.App.3d 252, 257.)

"When the contract is unambiguous, an appellate court is not bound by the trial court's interpretation of the contract. [Citations.] However, when the meaning of a contract is uncertain, and contradictory evidence is introduced to aid in the interpretation, the question of meaning is one of fact properly assigned to the [finder of fact] and its findings should not be disturbed by the appellate tribunal. [Citation.] [¶] . . . [¶] Under the parol evidence rule, extrinsic evidence is not admissible to contradict express terms in a written contract or to explain what the agreement was. [Citation.] The agreement is the writing itself. [Citation.] Parol evidence may be admitted to explain the meaning of a writing when the meaning urged is one to which the written contract term is reasonably susceptible or when the contract is

ambiguous. [Citations.] Parol evidence cannot, however, be admitted to show intention independent of an unambiguous written instrument." (*Sunniland Fruit, Inc. v. Verni* (1991) 233 Cal.App.3d 892, 898.)

"The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed." (Civ. Code, § 1644.) "We interpret the intent and scope of the agreement by focusing on the usual and ordinary meaning of the language used and the circumstances under which the agreement was made." (*Lloyd's Underwriters v. Craig & Rush, Inc.* (1994) 26 Cal.App.4th 1194, 1197-1198.)

"A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties." (Civ. Code, § 1643.) "Moreover, where one construction would make a contract unusual and extraordinary and another construction, equally consistent with the language employed, would make it reasonable, fair, and just, the latter construction must prevail." (*Sayble v. Feinman* (1978) 76 Cal.App.3d 509, 513.) "The court must avoid an interpretation which will make a contract extraordinary, harsh, unjust, or inequitable." (*Strong v. Theis* (1986) 187 Cal.App.3d 913, 920.)

The release in this case is unambiguous. The plain language of the document states that each party "jointly and severally" released each of the other parties from all claims against any other party in connection with Monet, Inc, its business or assets. Defendant, plaintiff, and Ulner each signed the release as individuals. Separately, defendant and plaintiff signed the release on behalf of Monet, Inc. The basis for executing the release was the stock sale agreement between defendant and plaintiff. The stock sale agreement and the release were part of one transaction to buy out Ulner's interest and release all potential claims against all parties. The two documents were signed by the parties on the same day. The release clearly discharged any claims plaintiff had in connection with Monet, Inc., its business or assets, against any other party, including defendant.

It is true that the release referred to defendant, plaintiff, and Monet, Inc. "collectively sometimes" as "the Corporation." However, in the provision at issue, the release clearly stated that the parties "jointly and severally" relinquished all claims against "any other party." This provision did not refer to "the Corporation" or otherwise use language to suggest that defendant, plaintiff, and Monet, Inc. were relinquishing claims only against Ulner. Had the parties intended to release only claims by or against Ulner, the release would have referred to relinquishing the Corporation's claims against Ulner and Ulner's claims against the Corporation, or similar language. Instead, the release clearly relinquished the claims of each party, jointly and severally, as against any other party. Therefore, plaintiff's claims against defendant based on promises in connection with Monet, Inc. were released.

Plaintiff cannot avoid the release based on the fact that he signed it without being able to read it. (*Hoffman v. Sports Car Club of America* (1986) 180 Cal.App.3d 119, 126.) "'It is well established, in the absence of fraud, overreaching or excusable neglect, that one who signs an instrument may not avoid the impact of its terms on the ground that he failed to read the instrument before signing it.' [Citations.]" (*Randas v. YMCA of Metropolitan Los Angeles* (1993) 17 Cal.App.4th 158, 163.) "'Ordinarily, one who accepts or signs an instrument, which on its face is a contract, is deemed to assent to all its terms, and cannot escape liability on the ground that he has not read it. If he cannot read, he should have it read or explained to him.' [Citation.] This is not only the California but the general rule. (3 Corbin, Contracts (1960) § 607, pp. 668-669, fn. omitted ['One who signs an instrument when for some reason, such as illiteracy or blindness, he can not read it, will be bound by its terms in case the other party acts in good faith without trick or misrepresentation. The signer should have had the instrument read to him.']" (*Ibid*.) Although plaintiff could not read the release and the attorney who prepared the release may not have adequately explained its provisions, defendant did not misrepresent the terms of the release to plaintiff or otherwise obtain plaintiff's signature through fraud. Defendant relied on plaintiff's execution of the release and bears no fault for plaintiff's misunderstanding. Therefore, plaintiff cannot avoid the release as a defense to his claims against defendant.

IV. Attorney Fee Award

The parties in this case signed a release that included the following attorney fee provision: "In the event action is brought to enforce the terms of this [Release], the prevailing party shall be paid his reasonable attorney[] fees and costs incurred therein." Plaintiff sued defendant for fraud, a tort. Defendant asserted the release as an affirmative defense. The trial court entered summary judgment in favor of defendant based on the release and awarded defendant attorney fees pursuant to the attorney fee provision of the release. We have affirmed the summary judgment in favor of defendant. Thus, defendant is the prevailing party for purposes of attorney fees and costs. We must, therefore, determine whether the attorney fee provision in the release entitles defendant to attorney fees in this case. We conclude it does not.

"Except as attorney[] fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties . . . ." (Code Civ. Proc., § 1021.) "In any action on a contract, where the contract specifically provides that attorney[] 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 reasonable attorney[] fees in addition to other costs." (Civ. Code, § 1717, subd. (a).) "Where a contract provides for attorney[] fees . . . that provision shall be construed as applying to the entire contract . . . ." (*Ibid*.)

"If a cause of action is 'on a contract,' and the contract provides that the prevailing party shall recover attorney[] fees incurred to enforce the contract, then attorney[] fees must be awarded on the contract claim in accordance with Civil Code section 1717." (*Exxess Electronixx v. Heger Realty Corp.* (1998) 64 Cal.App.4th 698, 706.) "Civil Code section 1717 does not apply to tort claims; it determines which party, if any, is entitled to attorney[] fees on a contract claim only. [Citations.] As to tort claims, the question of whether to award

attorney[] fees turns on the language of the contractual attorney[] fee provision, i.e., whether the party seeking fees has 'prevailed' within the meaning of the provision and whether the type of claim is within the scope of the provision. [Citation.] This distinction between contract and tort claims flows from the fact that a tort claim is not 'on a contract' and is therefore outside the ambit of section 1717." (*Id*. at p. 708.) Nevertheless, a broadly phrased contractual attorney fee provision may support an award to the prevailing party in a tort action. "'"[P]arties may validly agree that the prevailing party will be awarded attorney fees incurred in any litigation between themselves, whether such litigation sounds in tort or in contract."'" (*Ibid*.)

The court must determine whether the contract provides for attorney fees in a tort action under the procedural posture of the particular case. "'To answer this question, we apply the ordinary rules of contract interpretation. "Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs interpretation. . . . Such intent is to be inferred, if possible, solely from the written provisions of the contract. . . . The 'clear and explicit' meaning of these provisions, interpreted in their 'ordinary and popular sense,' unless 'used by the parties in a technical sense or a special meaning is given to them by usage' . . . , controls judicial interpretation. . . . Thus, if the meaning a layperson would ascribe to contract language is not ambiguous, we apply that meaning. . . ."' [Citation.]" (*Exxess Electronixx v. Heger Realty Corp., supra,* 64 Cal.App.4th at p. 709.) If the parties do not present extrinsic evidence to interpret the attorney fee provision of a contract, the appellate court determines de novo whether the contractual attorney fee provision entitles the prevailing party to attorney fees. (*Siligo v. Castellucci* (1994) 21 Cal.App.4th 873, 880; *Thompson v. Miller* (2003) 112 Cal.App.4th 327, 334-335.)

A tort claim does not enforce a contract. (*Exxess Electronixx v. Heger Realty Corp., supra*, 64 Cal.App.4th at p. 709.) Where a contract authorizes an award of attorney fees in an action to enforce any provision of the contract, tort claims are not covered. (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 622 & fn. 9; *Exxess Electronixx v. Heger Realty Corp., supra*, 64 Cal.App.4th at p. 709.) A defense to a tort action may be based on a provision of a

contract. Where a contract authorizes an award of attorney fees in an action to enforce any provision of the contract, a defense to a tort action based on a provision of the contract may have the effect of enforcing the provisions of the contract. (*Exxess Electronixx v. Heger Realty Corp., supra*, 64 Cal.App.4th at p. 712.) However, the assertion of a defense does not constitute the bringing of an action to accomplish that goal. (*Ibid*.; *Plemon v. Nelson* (1983) 148 Cal.App.3d 720, 724-725.)[3] Raising a defense may not be equated with bringing an action. (*Exxess Electronixx v. Heger Realty Corp., supra*, 64 Cal.App.4th at p. 712.) The language "brings an action to enforce the contract" is quite narrow. (See, e.g., *ibid*.)

"An 'action' is 'a lawsuit brought in a court; a formal complaint within the jurisdiction of a court of law[;] . . . [a]n ordinary proceeding in a court of justice by which one party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense.' (Black's Law Dict. (6th ed. 1990) p. 28, col. 1; accord, Code Civ. Proc., §§ 20-22.)" (*Exxess Electronixx v. Heger Realty Corp., supra,* 64 Cal.App.4th at p. 712, fn. 15.) "In contrast, a 'defense' is '[t]hat which is offered and alleged by the party proceeded against in an action or suit, as a reason in law or fact why the plaintiff should not recover or establish what he seeks[; . . . [] it is a] *response to the claims* of the other party, setting forth reasons why the claims should not be granted.' (Black's Law Dict., *supra*, p. 419, col. 2, italics added.)" (*Ibid*.)

Broad language in a contractual attorney fee provision may support a broader interpretation. (*Exxess Electronixx v. Heger Realty Corp., supra,* 64 Cal.App.4th at p. 712.) Thus, for example, an attorney fee provision applicable to "any dispute under the agreement" is sufficiently broad to include the assertion of a contractual defense to fraud and breach of fiduciary duty causes of action. (*Thompson v. Miller, supra*, 112 Cal.App.4th at pp. 335-337.) Such an attorney fee provision is not limited to an action brought to enforce the agreement.

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[3] These cases are to be distinguished from cases in which there is an action on the contract, and the issue is one of apportionment of fees between the action on the contract and related tort actions. (*Siligo v. Castellucci, supra,* 21 Cal.App.4th at p. 879; *IMO Development Corp. v. Dow Corning Corp.* (1982) 135 Cal.App.3d 451, 463; *Wagner v. Benson* (1980) 101 Cal.App.3d 27, 37.)

Other broad language has also been interpreted broadly to include tort actions. (*Santisas v. Goodin, supra*, 17 Cal.4th at p. 607 ["arising out of the execution of the agreement"]; *Allstate Ins. Co. v. Loo* (1996) 46 Cal.App.4th 1794, 1799 ["'relating to the demised premises'"]; *Moallem v. Coldwell Banker Com. Group, Inc.* (1994) 25 Cal.App.4th 1827, 1831 ["'relating to' the contract"]; *Xuereb v. Marcus & Millichap, Inc*. (1992) 3 Cal.App.4th 1338, 1342 ["to which 'this Agreement gives rise'"].)

A similar analysis applies to the construction of statutes authorizing an award of attorney fees. Broad statutory language authorizes attorney fee awards where the statute is used defensively. (*Palmer v. Agee* (1978) 87 Cal.App.3d 377, 386-387 ["In any action arising out of Sections 789.5 to 789.11, inclusive, the prevailing party shall be entitled to reasonable attorney[] fees and costs . . . ."] [(Civ. Code, § 789.12.)].) Narrow statutory language limited to "actions to enforce" does not authorize attorney fee awards where the statute is used defensively. (Civ. Code, § 1354, subd. (f) ["In any action . . . to enforce the governing documents [of a common interest development], the prevailing party shall be awarded reasonable attorney[] fees and costs"]; cf. *Blue Lagoon Community Assn. v. Mitchell* (1997) 55 Cal.App.4th 472, 476-477.)

In this case, the attorney fee provision in the release is very narrowly drawn. It requires action brought to enforce the terms of the release. Plaintiff did not bring an action on the release; he sued in tort for fraud. Thus, the mutuality and reciprocity provisions of Civil Code section 1717 are inapplicable. The fraud action is certainly not an action to enforce the release. Neither is the assertion of the affirmative defense of release an action brought to enforce the release. Accordingly, no action was brought by either party to enforce the terms of the release and defendant may not recover attorney fees as the prevailing party in the fraud action.

We sympathize with defendant's position, but we are not permitted to rewrite the narrowly drawn attorney fee provision in the release. Had the attorney fee provision in the release been intended to apply to defensive use of the release, it could have so provided. For example, the attorney fee provision may have read: "'In the event any party to this Agreement brings suit to enforce any provision of this Agreement, or is required to defend any action the

defense to which is any provision of this Agreement, the unsuccessful party agrees to pay the successful party such court costs and attorney[] fees as the court deems just.'" (*Share v. Casiano Bel-Air Homeowners Assn*. (1989) 215 Cal.App.3d 515, 521.) The provision could have been made applicable to any action (1) in which the release was raised, (2) in which a party asserted his or her rights under the release, or (3) involving the release. Instead, the attorney fee provision was made applicable only where action was brought to enforce the release. No such action was brought in this case.[4]

The attorney fee award must be reversed.

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[4] Defendant argues that the absence of the article "an" before "action" requires a different result. He argues that any action taken to enforce the provisions of the release, including assertion of the release as an affirmative defense in a fraud action, falls within the ambit of the provision. We are not persuaded by this argument. It takes the word "action" out of context. The attorney fee provision applies to "action brought to enforce the terms" of the release. This language contemplates the bringing of a court action.

DISPOSITION

The judgment award of attorney fees in the amount of $50,000 to defendant is reversed. In all other respects, the judgment is affirmed. The parties are to bear their own costs on appeal.

CERTIFIED FOR PARTIAL PUBLICATION.

GRIGNON, Acting P. J.

I concur: MOSK, J.

ARMSTRONG, J.

I respectfully dissent.

As the majority notes, the laws of contract interpretation direct us to base an interpretation on the ordinary use of words (*Lloyd's Underwriters v. Craig & Rush, Inc.* (1994) 26 Cal.App.4th 1194, 1197-1198) and to avoid an interpretation which makes the contract unusual or extraordinary. (*Sayble v. Feinman* (1978) 76 Cal.App.3d 509, 513.) I believe that by taking a magnifying glass to the word "action" and ascribing a technical meaning to that word, the majority has violated the rules it cites.

The majority impliedly finds that the parties intended that "action" bear a technical meaning and that they knowingly agreed to only a "narrowly drawn" fee provision. I see no basis for that implied finding. The fee provision in the release seems to be an ordinary one, in which the parties add teeth to their commitment to release all claims by providing that if there is litigation on those claims in violation of the release, the loser pays the winner's fees. In this case, there was litigation in violation of the release, which means, in my view, that fees should have been awarded. The majority has defeated, not enforced, the overall meaning of the release.

It may be that, as the majority writes, "action" has a technical meaning which includes a filing but not an answer, but that is not the only meaning which the law ascribes to the term. "[U]se of the term 'action' does not in all contexts refer to the technical meaning of the term as defined in the Code of Civil Procedure." (*Best v. California Apprenticeship Council* (1987) 193 Cal.App.3d 1448, 1460 [term "action" in Code Civ. Proc., § 1021.5 encompassed administrative proceedings which preceded filing of a writ].) Another court has observed that "An action is not limited to the complaint but refers to the entire judicial proceeding at least through judgment and is generally considered synonymous with 'suit.' (*Palmer v. Agee* (1978) 87 Cal.App.3d 377, 387.) Action is not the same as cause of action." (*Nassif v. Municipal Court* (1989) 214 Cal.App.3d 1294,1298 ["action" for purposes of Code Civ. Proc.,

§ 583.310].) "'Generally an action is defined as a proceeding wherein one asserts a right or seeks redress for a wrong. ([Code Civ. Proc.,] § 22.) An action is usually deemed to commence upon the filing of a complaint ([Code Civ. Proc.] §§ 350 & 411.10) and remains pending until the judgment is final. ([Code Civ. Proc.,] § 1049.)' [Citation.]" (*Sunkyong Trading (H.K.) Ltd. v. Superior Court* (1992) 9 Cal.App.4th 282, 288-289 ["action" under Code Civ. Proc., § 170.6].) These cases teach us that, like many words, "action" is not limited and precise, but general and inclusive. "How the party achieves the goal of enforcing the right in question is not determinative of the right to an award of attorney fees . . . . The impact of the litigation is." (*In re Head* (1986) 42 Cal.3d 223, 228-229 [Code Civ. Proc., § 1021.5 fees available to prevailing party in habeas corpus proceedings].)

In an everyday sense, "action" includes both an answer and an affirmative defense, for the simple reason that the two are in many ways alike. The defendant has the burden of proof on the affirmative defense just as the plaintiff does on a complaint. The rules which relate to pleading a cause of action in a complaint also apply to pleading an affirmative defense in an answer. Because there is no replication in California, affording a plaintiff a chance to deny the allegations of affirmative defense, they are deemed controverted. If the defendant prevails on the release defense, it will only be because the court has "enforced" the release. (5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, §§ 1008–1010, pp. 461-465.) Thus, an equitable right of action may properly be asserted as an equitable defense "in an action involving the same subject-matter brought . . . by the plaintiff. The party relying upon such equitable defense must, however, plead it with the same fullness and particularity as is required in cases involving like subjects of inquiry in suits in equity. . . . *He then becomes an actor with respect to the matters alleged by him* . . . . [Citations.]" (*Swasey v. Adair* (1891) 88 Cal. 179, 181-182 [emphasis added].) Raising a release as an affirmative defense is legally the same as bringing an "action" to enforce it. The defendant becomes an actor.

Neither party asserts that the language of the release is ambiguous, and we thus do not have the benefit (or burden) of extrinsic evidence. However, I believe I may confidently state that it is not within the imagination of mortal lawyers to draft an attorney fee clause which

provides for fees if the winner filed, but not if the winner defended, and that if lawyers ever managed to agree on such an unusual arrangement, they would document that agreement with elaborate care.

ARMSTRONG, J.