Filed 11/17/11; pub. order 12/16/11 (see end of opn.)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

PARMANAND KUMAR, Plaintiff, Cross-defendant and Appellant, v. ALAN TSUNG YU, Defendant, Cross-complainant and Respondent.	B226335 (Los Angeles County Super. Ct. No. KC050632)

APPEAL from a judgment of the Superior Court of Los Angeles County, R. Bruce Minto, Judge. Affirmed in part and reversed in part.

Burgee & Abramoff and John G. Burgee for Plaintiff, Cross-defendant and Appellant.

Burkhalter Kessler Goodman & George, Daniel J. Kessler and Michael Oberbeck for Defendant, Cross-complainant and Respondent.

INTRODUCTION

Plaintiff Parmanand Kumar appeals from a judgment in favor of defendant Alan Tsung Yu. We affirm in part and reverse in part.

FACTUAL AND PROCEDURAL BACKGROUND

In June 1998, George Chiu (Chiu) and defendant Alan Tsung Yu (collectively, Lessees) entered into a commercial lease (Lease) with plaintiff Parmanand Kumar pursuant to which Lessees leased a store (Premises) in a shopping center at 19251 East Colima Road in Rowland Heights. In June 2001, the parties amended the lease to extend the term, resulting in a total lease term commencing July 15, 1998 and ending July 14, 2006.[1] Pursuant to the amendment, the rent was payable in advance on the first day of the month at the rate of $2,730.00 per month beginning July 1, 2001, and would increase each year thereafter on July 1 in accordance with the Consumer Price Index. As originally specified in the Lease, Lessees were required to pay additional rent consisting of 15 percent of certain common area operating expenses, including property insurance and taxes. As additional rent, Lessees were required to pay the amount of $20.00 per month for water usage and $20.00 per month for parking lot cleaning.

According to plaintiff, beginning with the July 1, 2003 rent payment, Lessees were continuously behind in paying the rent. They never paid the rent due on October 1, 2003 and, hence, were in breach of the Lease in November 2003. Plaintiff initiated an unlawful detainer action against Lessees and as a result, they were evicted. In his

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[1] Pursuant to the Lease, Lessees also agreed "to pay 10% of the unpaid rents including triple net amounts and other charges as additional rent if rent" was not paid by the tenth of each month and to pay $25.00 for each of their checks returned unpaid from the bank. The Lease included a provision for attorney's fees to be awarded to the prevailing party in any action brought to enforce the terms of the Lease.

unlawful detainer action, plaintiff obtained a default judgment against Lessees in the amount of $14,174.86. Defendant obtained an order setting aside the default judgment.

In February 2004, plaintiff entered into a lease for the Premises with Yanthang Li. Li defaulted. In the ensuing unlawful detainer action, plaintiff obtained a judgment in the amount of $22,855.15. Plaintiff filed an acknowledgment of satisfaction of the Li judgment in September 2005.

In September 2005, plaintiff entered into a lease for the Premises with Lian Hua Choi, at a base rent of $4,425.00 per month, beginning in September 2005, plus 15 percent of the common area operating expenses, which totaled $575.00 in September 2005.

In May 2007, plaintiff filed a complaint against Chiu[2] and defendant for breach of the Lease, property damage and rent for the balance of the Lease term. In October 2007, plaintiff filed the first amended complaint, which is the operative compliant herein.

Defendant answered the complaint. In January 2008, defendant filed a cross-complaint against plaintiff to recover sanctions and costs awarded to defendant in a prior case regarding the Lease and to seek damages for property plaintiff had allegedly failed to return to defendant after Lessees were evicted.

The action proceeded in a court trial on February 2 and 5, 2009. After receiving and considering objections from the parties with respect to a proposed statement of decision, the trial court issued a statement of decision on May 31, 2009 and a supplemental statement of decision on November 25, 2009 (collectively, the statement of decision). The statement of decision set forth the trial court's findings, including the rationale and dollar amounts for the elements used to calculate plaintiff's damages. Plaintiff prepared a proposed judgment based upon the two documents. Defendant

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[2] Chiu was a named defendant in the instant action but never appeared. According to plaintiff, Chiu filed a bankruptcy petition that prevented the action from proceeding against him. He is not a party to this appeal.

objected and submitted his proposed judgment. The trial court signed and entered plaintiff's version of the judgment on January 26, 2010.

Defendant brought a motion to vacate the judgment based principally upon defendant's claim that the trial court had miscalculated the amounts deducted as mitigation of damages. The trial court granted the motion, amended its supplemental statement of decision, and recalculated mitigation amounts with the result that the mitigation amounts exceeded plaintiff's damages claim. The court entered a new judgment awarding nothing to plaintiff on his complaint and awarding defendant his attorney's fees and costs.

Defendant filed a motion for attorney's fees. Plaintiff filed a motion to vacate the judgment, contending the mitigation amounts were incorrect and that the judgment failed to address defendant's cross-complaint. On June 3, 2010, after a hearing, the trial court granted both motions in part. As to attorney's fees, the trial court ruled that defendant was the prevailing party on the complaint and plaintiff was the prevailing party on the cross-complaint.

On June 10, 2010, the court entered a new judgment awarding nothing to plaintiff on his complaint and awarding nothing to defendant on his cross-complaint. As to fees and costs, the judgment awarded defendant $55,390.48 and plaintiff $23,029.88.

DISCUSSION

Plaintiff makes three claims. First, the trial court materially miscalculated plaintiff's damages, in that the court treated the excess rents as an offset against unpaid rents and not just a mitigation of plaintiff's damages. Second, the trial court materially miscalculated plaintiff's loss of rent and consequential damages as well as the mitigation amounts. Specifically, the court "double-deducted" maintenance fees, deducted payments made by subsequent tenants beyond rent, and failed to consider late fees and interest. Third, the trial court erroneously found that both plaintiff and defendant are prevailing parties and awarded attorney's fees on that basis.

A. ***Mitigation of Damages, Including Unpaid Rent***

Plaintiff contends that the rent he received from the two subsequent tenants can be applied as mitigation (or an "offset") only against the damages defendant owed *after* he vacated. Plaintiff claims the subsequent tenants' rents (excess rents) cannot be used as an offset for, or in mitigation of, the rent defendant failed to pay before he vacated (the unpaid rent). On that basis, plaintiff claims the trial court should have awarded to him unpaid rent of $8,539.72.

Whether excess rents is a category of amounts properly included in determining the total amount of mitigation proven by a breaching lessor and is, therefore, applicable to reduce the breaching lessee's liability for unpaid rent or, in the alternative, only to the balance of rent due under the lease after the lease is terminated and to consequential damages, is a question of law, subject to de novo review. (Cf. *Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799.)

On this question, the parties have both relied upon *Willis v. Soda Shoppes of California, Inc.* (1982) 134 Cal.App.3d 899 and its interpretation of Civil Code section 1951.2, subdivision (a),[3] concerning the damages which a lessor is entitled to recover if a lessee breaches a lease. Section 1951.2 requires a lessor to mitigate his damages if a lessee abandons the property or the lease is otherwise terminated prior to the

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[3] Civil Code section 1951.2, subdivision (a), provides: "[I]f a lessee of real property breaches the lease and abandons the property before the end of the term or if his right to possession is terminated by the lessor because of a breach of the lease, the lease terminates. Upon such termination, the lessor may recover from lessee: [¶] (1) The worth at the time of award of the unpaid rent which had been earned at the time of termination; [¶] (2) The worth at the time of award of the amount by which the unpaid rent which would have been earned after termination until the time of award exceeds the amount of such rental loss that the lessee proves could have been reasonably avoided; [¶] (3) Subject to subdivision (c), the worth at the time of award of the amount by which the unpaid rent for the balance of the term after the time of award exceeds the amount of such rental loss that the lessee proves could be reasonably avoided; and [¶] (4) Any other amount necessary to compensate the lessor for all the detriment proximately caused by the lessee's failure to perform his obligations under the lease or which in the ordinary course of things would be likely to result therefrom."

end of the lease term. Section 1951.2, subdivision (a)(4), provides that a lessor may recover from a lessee the "amount necessary to compensate the lessor for all the detriment proximately caused by the lessee's failure to perform his obligations under the lease or which in the ordinary course of things would be likely to result therefrom."

Plaintiff argues that the excess rents cannot be used as a setoff against unpaid rents. Plaintiff quotes the *Willis* court's statement that "the allowance for such excess [rents] is not . . . a setoff." (*Willis v. Soda Shoppes of California, Inc.*, *supra*, 134 Cal.App.3d at p. 905.) Plaintiff is correct, but omits the remainder of the sentence. The *Willis* court's complete explanation is that "the allowance for such excess is not . . . a setoff, but is simply a method of determining the actual damages sustained by the lessor as a result of the breach." (*Ibid.*)

As defendant points out, the *Willis* court noted that "the measure of damages for such breach [of a lease] is subject to the well established rule that a party damaged by a simple breach of contract may not recover more on the breach than the party would have received by performance. Civil Code section 3358 provides: 'Except as expressly provided by statute, no person can recover a greater amount in damages for the breach of an obligation, than he could have gained by the full performance thereof on both sides.'" (*Willis v. Soda Shoppes of California, Inc.*, *supra*, 134 Cal.App.3d at p. 905.) The court held: "Unless the total detriment suffered, whether by loss of rentals or consequential damages, exceeds the amount to be received under the new lease there is in fact no detriment, and hence no damages." (*Ibid.*) On this basis, we conclude that the trial court properly used the excess rents in calculating the amount of plaintiff's damages for breach of the Lease.

In the alternative, plaintiff claims that the reasoning applicable to his cause of action for breach of the Lease does not apply to his cause of action for common counts for rent owed. Plaintiff contends that, under his common counts cause of action, he is entitled not only to the unpaid rent, but also the cost of repairing damage defendant caused to the premises, and the only offset should be defendant's security deposit. On that basis, plaintiff claims the trial court should have awarded him $11,579.57, with

interest from November 2003. The trial court rejected the claim, saying that "it doesn't make sense to not calculate [damages] the same under either cause of action." We agree with the trial court.

B. ***Other Claimed Errors in the Trial Court's Calculations***

Plaintiff claims the trial court erred in calculating his damages based upon maintenance fees, so-called CAM fees, and calculations of interest payments or late fees to account for the difference in the value of dollars owed in 2004 and dollars received in 2006. However, plaintiff provides no citations to the record identifying the specific fee amounts and calculations which are at issue. It is an appellant's duty to provide citations to the record to identify those portion of the record on which his arguments are based. (Cal. Rules of Court, rule 8.204(a)(1)(C).) "When an appellant's brief makes no reference to the pages of the record where a point can be found, an appellate court need not search through the record in an effort to discover the point purportedly made." (*In re S.C.* (2006) 138 Cal.App.4th 396, 406.) That there may be related record citations in the appellant's statement of the facts is insufficient to meet the requirement for pertinent record citations in the argument. (*City of Lincoln v. Barringer* (2002) 102 Cal.App.4th 1211, 1239, fn. 16.) In the absence of such record citations, we may treat the issues raised in the arguments as forfeited. (*In re S.C.*, *supra*, at p. 407; *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246.) While defendant addresses some of the issues in his brief and plaintiff revisits them in his reply brief, none of the discussions includes citations to the record identifying the specific fees or calculations at issue.[4] We, therefore, treat the issues as forfeited. (*Nwosu*, *supra*, at p. 1246.)

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[4] For example, plaintiff contends that the trial court improperly "double deducted" *maintenance* fees, but defendant's argument in opposition does not mention *maintenance* fees. Defendant's argument refers to *management* fees. Neither plaintiff nor defendant cites to the record to identify the fees to which each refers.

C. ***Attorney's Fees***

Plaintiff contends that the trial court erred in ruling that defendant was the prevailing party and entitled to attorney's fees on the complaint and, surprisingly, also that plaintiff was the prevailing party and entitled to attorney's fees on the cross-complaint.[5] Plaintiff claims there was no prevailing party, in that neither party was awarded compensation. We disagree.

The determination of the prevailing party and the award of attorney's fees authorized by contract are within the discretion of the trial court. (*Deane Gardenhome Assn. v. Denktas* (1993) 13 Cal.App.4th 1394, 1397.) "'We will disturb it only if there has been a clear showing of an abuse of that discretion.' [Citation.]" (*Ibid.*) Civil Code section 1717 mandates the award of reasonable attorney's fees to the prevailing party in an action to enforce a contract if the contract so provides.[6] "To achieve its goal [of mutuality of remedy], 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 v. Abbara* (1995) 9 Cal.4th 863, 870-871.)

Whether a party has been awarded compensation is not determinative as to whether the party is the prevailing party in the litigation. "[A] party who is denied direct

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[5] Section 31, Attorneys' Fees, of the Lease provides: "If any Party . . . brings an action or proceeding to enforce the terms hereof or declare rights hereunder, the Prevailing Party (as hereafter defined) in any such proceeding, action, or appeal thereon, shall be entitled to reasonable attorneys' fees. . . . The term 'Prevailing Party' shall include, without limitation, a Party . . . who substantially obtains or defeats the relief sought, . . . whether by compromise, settlement, judgment, or the abandonment by the other Party . . . of its claim or defense."

[6] Civil Code section 1717, subdivision (a), provides: "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 reasonable attorney's fees in addition to other costs."

relief on a claim may nonetheless be found to be a prevailing party if it is clear that the party has otherwise achieved its main litigation objective." (*Hsu v. Abbara*, *supra*, 9 Cal.4th at p. 877.) As the California Supreme Court has held, "in deciding whether there is a 'party prevailing on the contract,' the 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 as disclosed by the pleadings, trial briefs, opening statements, and similar sources. The prevailing party determination is to be made only upon final resolution of the contract claims and only by 'a comparison of the extent to which each party ha[s] succeeded and failed to succeed in its contentions.' [Citation.]" (*Id.* at p. 876.)

In the instant case, defendant successfully defended against plaintiff's claims; plaintiff failed to succeed in his contentions that defendant owed some amount as damages for breach of the Lease. The result here does not qualify for a finding that there is no prevailing party on the basis that the judgment on the Lease claims is "'good news and bad news to each of the parties.'" (*Hsu v. Abbara*, *supra*, 9 Cal.4th at p. 874.) Here the judgment on the Lease claims is "good news" for defendant and "bad news" for plaintiff. Where, as here, the judgment is "a 'simple, unqualified win' . . . for the [defendant] on the only contract claim[s] between" the parties, the trial court has no discretion to deny the defendant his attorney's fees and costs under Civil Code section 1717. (*Id.* at p. 876, citation omitted.) Therefore, the trial court did not abuse its discretion in ruling that defendant was the prevailing party and entitled to attorney's fees on the complaint. (*Id.* at p. 877.)

Defendant contends that, if the trial court erred at all, it was in ruling that plaintiff was the prevailing party on the cross-complaint. We agree.

In his second amended cross-complaint, the operative pleading here, defendant alleges plaintiff violated Civil Code sections 1983 and 1988, in that plaintiff never gave notice, as required by the statutes, of defendant's personal property which was left on the premises after plaintiff took possession of the premises as the result of succeeding in the unlawful detainer action against Chiu and defendant. According to defendant, because of

the lack of notice, he lost the opportunity to recover videotapes he owned, allegedly worth $500,000, from the premises.

Defendant's cross-complaint was not based upon an alleged breach of the Lease by plaintiff, but rather was based upon statutory violations not related to performance or interpretation of the Lease. The cross-complaint, therefore, was not an "action on a contract" as required for the award of attorney's fees pursuant to Civil Code section 1717. (See *Santisas v. Goodin* (1998) 17 Cal.4th 599, 619 [section 1717 applies only to contract claims and not to tort claims]; *Hsu v. Abbara, supra,* 9 Cal.4th at pp. 868-869, fn. 3 ["the cross-complaint was not a contract action for breach of the . . . agreement . . . and thus section 1717 did not apply"]; see, e.g., *Super 7 Motel Associates v. Wang* (1993) 16 Cal.App.4th 541, 549 ["an action for fraud seeking damages sounds in tort, and is not 'on a contract' for purposes of an attorney fee award, even though the underlying transaction . . . involved a contract containing an attorney fee clause"].) By its terms, Civil Code section 1717 mandates reasonable attorney's fees and costs only to "the party who is determined to be the party prevailing *on the contract*" (*id.*, subd. (a), italics added) "upon final resolution of the *contract claims*" (*Hsu, supra,* at p. 876).

Given that the cross-complaint was not an action on the contract, the attorney's fees provision in the Lease is inapplicable and Civil Code section 1717 does not mandate the award of attorney's fees and costs to plaintiff. If an action asserts contract and non-contract claims, Civil Code section 1717 applies only to the fees and costs incurred in litigating the contract claims. (*Santisas v. Goodin, supra,* 17 Cal.4th at p. 615.)

Under Code of Civil Procedure sections 1032 and 1033.5, however, a "prevailing party," as defined by section 1032, is entitled to recover costs other than attorney's fees, if attorney's fees are not authorized by statute or contract. Plaintiff submitted a memorandum of costs showing a total of $1,788 in non-attorney's fees costs and the trial court awarded the costs to plaintiff. (Code Civ. Proc., §§ 1032, 1033.5; Cal. Rules of Court, rule 3.1700.) Although plaintiff does not qualify as a prevailing party on the contract claims (Civ. Code, § 1717), plaintiff does come within the definition of a "prevailing party" set forth in Code of Civil Procedure section 1032, subdivision (a)(4).

"Prevailing party" includes "a defendant where neither plaintiff nor defendant obtains any relief." (Code Civ. Proc., § 1032, subd. (a)(4).) Plaintiff was the cross-defendant on the cross-complaint and neither the cross-defendant or the cross-complainant obtained any relief on the cross-complaint. Therefore, Code of Civil Procedure section 1032, subdivisions (a)(4) and (b), mandate the award to plaintiff of his non-attorney's fees costs on the cross-complaint. (See *City of Long Beach v. Stevedoring Services of America* (2007) 157 Cal.App.4th 672, 678-680 [cross-defendant is "prevailing party" under section 1032 where a cross-complaint is dismissed as result of settlement or because of mootness].)

Accordingly, the trial court erred in awarding attorney's fees on the cross-complaint to plaintiff.[7] However, the trial court properly determined plaintiff was the "prevailing party" under Code of Civil Procedure section 1032 and properly awarded plaintiff his non-attorney's fees costs under Code of Civil Procedure section 1033.5.

For the foregoing reasons, the trial court's award of attorney's fees to plaintiff must be reversed. We are satisfied from our examination of the record that the judgment may be modified to reflect the reversal of the award by deleting the provisions for award of attorney's fees to plaintiff on defendant's cross-complaint. We also note that such a modification would be consistent with plaintiff's contention on appeal that the trial court erred in awarding attorney's fees to plaintiff (as well as to defendant) and that we should therefore vacate the attorney's fees awards to plaintiff (and to defendant as well).

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[7] Even if defendant's cross-complaint could be characterized as "an action on the contract," as defendant claims, the cross-complaint appears purely defensive in furtherance of defendant's main litigation objective of not being required to pay plaintiff anything on his Lease-related allegations in his complaint. (See *Hsu v. Abbara*, *supra*, 9 Cal.4th at p. 877.) Where a defendant's cross-action against a plaintiff is essentially defensive in nature, a court "may properly find the defendant to be the party prevailing on the contract." (*Id.* at p. 875, fn. 10.) Thus, the conclusion would remain that defendant is the prevailing party in the contract action and is, therefore, the party to whom the trial court was required to award attorney's fees pursuant to Civil Code section 1717; plaintiff did not prevail on its main litigation objective and, therefore, was not entitled to attorney's fees on the cross-complaint or any other claim.

DISPOSITION

The judgment is reversed as to the award of attorney's fees to plaintiff on the cross-complaint. In all other respects, the judgment is affirmed. Defendant shall recover his costs on appeal.

JACKSON, J.

We concur:

PERLUSS, P. J.

ZELON, J.

Filed 12/16/11

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

PARMANAND KUMAR, Plaintiff, Cross-defendant and Appellant, v. ALAN TSUNG YU, Defendant, Cross-complainant and Respondent.	B226335 (Los Angeles County Super. Ct. No. KC050632) ORDER CERTIFYING FOR PUBLICATION

The opinion in the above-entitled matter filed on November 17, 2011, was not certified for publication in the Official Reports. For good cause it now appears that the opinion should be published in the Official Reports and it is so ordered.

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PERLUSS, P. J.	ZELON, J.	JACKSON, J.