

**CERTIFIED FOR PUBLICATION**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

KANDY KISS OF CALIFORNIA, INC.,

Plaintiff and Appellant,

v.

TEX-ELLENT, INC.,

Defendant and Respondent.

B234541

(Los Angeles County  
Super. Ct. No. BC422116)

APPEAL from an order of the Superior Court of Los Angeles County, Soussan G. Bruguera, Judge. Affirmed and remanded with directions.

Ezra Brutzkus Gubner, Mark D. Brutzkus, Todd M. Lander, Nicholas A. Rozansky, and David A. Tashroudian for Plaintiff and Appellant.

Freedman Weisz and Mitchell N. Reinis for Defendant and Respondent.

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Appellant Kandy Kiss of California, Inc. (Kandy Kiss) appeals from the trial court's award of attorney's fees to respondent Tex-Ellent, Inc., dba Paramount Textiles (Paramount), after Paramount successfully moved to dismiss Kandy Kiss's complaint against it for lack of subject matter jurisdiction. We affirm the trial court's award of attorney's fees and remand for a determination of reasonable attorney's fees incurred by Paramount in the litigation of this appeal.

### **BACKGROUND**

Paramount, a fabric wholesaler, provided Kandy Kiss, a clothing manufacturer and wholesaler, with a small fabric sample bearing a paisley print design. The purchase order issued by Kandy Kiss to Paramount for the sample contained various statements regarding attorney's fees in the event of litigation:

“Seller [Paramount] shall indemnify and hold Buyer [Kandy Kiss] harmless from and against any and all claims, demands, lawsuits proceedings, liabilities, losses, damages, costs, and expenses (including attorneys' fees) arising out of any harm, injury, death, damage or loss suffered by any individual or entity or the property or business if any individual or entity in any manner caused or alleged to have been caused in whole or in part by any of the goods and/or services. . . . Seller will defend and save us harmless from any loss or damage, including our attorneys' fees and expenses, arising out any actual or alleged violation thereof. Seller will also defend and save us harmless from loss or damage, including our attorneys' fees and expenses, by reason of actual or alleged infringement of letters patent or copyright. Additionally, Seller will defend and save Buyer harmless from any loss or damage or claims by third parties, including Buyer's attorneys' fees and expenses arising out of any actual or alleged negligence, [or] breach of express or implied warranties[.]”

Similarly, the invoice submitted to Kandy Kiss from Paramount when it shipped the fabric sample also contained a reference to attorney's fees:

“In the event of any dispute regarding this or any related transaction, the prevailing party shall be entitled to reasonable attorney's fees and costs or [*sic*] arbitrating whether or not litigation or arbitration ensues or is conducted. Prevailing party shall include one who substantially obtains or defeats the relief sought whether by settlement, judgment of the claim or defense by the other party.”

Kandy Kiss eventually developed a garment line utilizing the print design which it sold to retailers Target Corporation and Target Brands, Inc. (collectively Target), and Mervyn's. Initially, Kandy Kiss intended to purchase the fabric for the garment line from Paramount, and issued "fabric commits" to Paramount which stated that Kandy Kiss's overseas garment manufacturers would be issuing purchase orders to Paramount for the necessary fabric. Ultimately, however, Kandy Kiss instead purchased the fabric directly from a Chinese textile manufacturer, Pallas Textile Co., Ltd. According to Kandy Kiss, this switch in suppliers was at Paramount's request. Also according to Kandy Kiss, Paramount facilitated the transaction with Pallas and received compensation from Pallas for its participation in the sale.

Unfortunately, neither Paramount nor Pallas owned the paisley design. Another entity, L.A. Printex Industries, Inc., owned the copyright to the paisley print design. After discovering that Kandy Kiss paisley garments were being sold by Target, L.A. Printex sued Kandy Kiss, Paramount, Target, and Hongdou, Inc. (one of Kandy Kiss's overseas garment manufacturers) in federal court for copyright infringement. At trial, the federal jury determined that all four did in fact infringe L.A. Printex's copyright in the design, and awarded damages in the following amounts: \$20,000 against Kandy Kiss, \$175,000 against Target, \$5,000 against Hongdou, and \$36,624 against all defendants jointly and severally.

Shortly thereafter, Kandy Kiss filed the immediate action against Paramount for breach of warranty. In its prayer for damages, Kandy Kiss sought actual and consequential damages in the amount of \$570,000. It also requested recovery of attorney's fees, pursuant to contract, incurred during the pursuit of this litigation.

Eventually, Paramount moved to dismiss Kandy Kiss's lawsuit for lack of subject matter jurisdiction. Paramount contended that the case arose under the Federal Copyright Act (17 U.S.C. § 101 et seq.) and that jurisdiction vested exclusively in the federal court. Ultimately, the trial court agreed and dismissed the action. In its order of dismissal, the court awarded Paramount \$3,462.65 in costs.

Thereafter, Paramount moved for attorney's fees pursuant to contract, claiming that it was the prevailing party in the case. The trial court ultimately agreed, and eventually awarded Paramount \$129,492.49 in attorney's fees. It is from this order that Kandy Kiss appeals.

Kandy Kiss did not appeal from the trial court's dismissal for lack of subject matter jurisdiction. Instead, it filed an action against Paramount in the United States District Court for the Central District of California (Los Angeles), again alleging breach of warranty, as well as fraud and negligent misrepresentation. Recently, on June 26, 2012, the district court granted Paramount's motion for summary judgment, and dismissed all of Kandy Kiss's claims against Paramount. More recently, on August 8, 2012, the district court denied Paramount's request for attorney's fees pursuant to contract, finding that the federal suit was not "an action on a contract containing a fee provision."<sup>1</sup>

## **DISCUSSION**

### **A. Legal Principles**

Attorney's fees are recoverable as costs under Code of Civil Procedure section 1032 when authorized by contract. (*Profit Concepts Management, Inc. v. Griffith* (2008) 162 Cal.App.4th 950, 953 (*Profit Concepts*); see also Code Civ. Proc., § 1033.5, subd. (a)(10)(A).) Civil Code section 1717, subdivision (a), governs contractual attorney's fees provisions in actions involving contract claims:

"In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract,

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<sup>1</sup> In two separate requests, Kandy Kiss asks us to take judicial notice of the following: (1) its amended complaint in the federal action; (2) the order and opinion of the district court granting Paramount's motion for summary judgment in the federal action; and (3) the order and opinion of the district court denying Paramount's subsequent request for attorney's fees as the prevailing party in the federal action. We grant the request for judicial notice of these documents. (Evid. Code, §§ 452, subd. (d), 459, subd. (a).) Whether the substance of the two district court opinions can be used under the doctrine of collateral estoppel with respect to material issues raised in this appeal, as Kandy Kiss further argues, is a legal issue separate from that of judicial notice and will be addressed in Part C., *infra*.

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.”

By operation of law, Civil Code section 1717 creates a “mutuality of remedy” with respect to attorney's fees provisions. (*Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 128; accord, *Hsu v. Abbara* (1995) 9 Cal.4th 863, 870.) When a contract allows recovery of attorney's fees by only one party, section 1717 operates to provide that remedy to any prevailing party, whether specified in the contract or not. (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 610-611.)

Civil Code section 1717, subdivision (b)(1), defines prevailing party and the procedure for determining which party has prevailed:

“The court, upon notice and motion by a party, shall determine who is the party prevailing on the contract for purposes of this section, whether or not the suit proceeds to final judgment. Except as provided in paragraph (2), the party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract. The court may also determine that there is no party prevailing on the contract for purposes of this section.”

Paragraph (2), referenced above, provides only that there will be no prevailing party when the action has been voluntarily dismissed or dismissed pursuant to a settlement of the case. (Civ. Code, § 1717, subd. (b)(2).)

In *Hsu v. Abbara*, *supra*, 9 Cal.4th at page 876, the Supreme Court further articulated how the trial court is to determine whether a party has prevailed for purposes of Civil Code section 1717:

“[T]he 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.]”

On appeal, we review the determination of the legal basis for an award of attorney's fees de novo as a question of law. (*Pueblo Radiology Medical Group, Inc. v.*

*Gerlach* (2008) 163 Cal.App.4th 826, 828.) The trial court's actual determination of prevailing party status, however, is often reviewed for an abuse of discretion: "[i]f neither party achieves a complete victory on all the contract claims, it is within the discretion of the trial court to determine which party prevailed or whether, on balance, neither party prevailed sufficiently to justify an award of attorney fees." (*Scott Co. v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1109.) No such discretion exists, though, when one side obtains a simple, unqualified victory by completely prevailing on or defeating all contract claims in the action. In such a situation, the victor is entitled to attorney's fees as a matter of right and the trial court has no discretion to deny an award. (*Hsu v. Abbara, supra*, 9 Cal.4th at p. 876.)

## **B. Legal Analysis**

Preliminarily, we note that Kandy Kiss, in its opening brief, and Paramount, in its respondent's brief, implicitly assume that there is a contractual right to recover attorney's fees in this case if there is a prevailing party. Neither side, however, expressly argues which document is the basis of the contractual right to attorney's fees. Paramount's invoice appears to be mutual in its provisions, allowing whoever is the prevailing party the right to attorney's fees. Kandy Kiss's purchase order seems to be unilateral in its provisions, allowing only Kandy Kiss the right to recover attorney's fees. Ultimately, it does not matter which document is relied upon since, as discussed above, Civil Code section 1717 allows both sides the right to recover fees even if the provisions involved are expressly unilateral. Thus, we find that whichever document is relied upon, either side is entitled to attorney's fees if indeed it "prevailed."

Kandy Kiss, in its primary argument, contends that because the dismissal of its state lawsuit was on procedural grounds only, and because it was still allowed to proceed with its claims in a federal forum, there was no prevailing party in the state action. Paramount contends that insofar as the state action is concerned, it completely prevailed on the contract claim by obtaining an unqualified dismissal and therefore it should be allowed the attorney's fees expended to achieve that goal. According to Paramount, it matters not that its victory was based entirely on procedural grounds.

On this issue, there appears to be a split of authority. Kandy Kiss relies on the Sixth District's opinion in *Estate of Drummond* (2007) 149 Cal.App.4th 46 (*Drummond*). In *Drummond*, a probate attorney seeking payment from his former clients filed a lien against their interest in the estate, and eventually obtained an order from the probate court adjudicating the claim in his favor. The Court of Appeal reversed that order on the ground that the attorney did not have standing to bring the motion in probate court. (*Id.* at pp. 48-49.)

The lawyer then filed a petition in the probate court to recover his fees. The probate court ultimately granted the petition but the Court of Appeal reversed that order too. The court found that the petition should have been filed as a compulsory cross-complaint in a separate civil action the clients had since filed against the attorney, and ordered the probate court to dismiss it. (*Drummond, supra*, 149 Cal.App.4th at p. 49.) Ultimately, the lawyer did file his claims as a cross-complaint in the civil action. (*Ibid.*)

On remand in the probate action, the clients sought attorney's fees pursuant to their retainer agreement with the lawyer, claiming they had prevailed by obtaining dismissal of the attorney's petition in probate. (*Drummond, supra*, 149 Cal.App.4th at p. 49.) The probate court denied the request and this time the Court of Appeal upheld the decision, finding no prevailing party for purposes of Civil Code section 1717:

“We can conceive of cases where a party obtaining a dismissal of contract claims on purely procedural grounds might be found to have prevailed on the contract, even though the dismissal was without prejudice, because the plaintiff had no other means to obtain relief under the contract. Thus it might be shown that litigation in the proper forum would entail greater expense, inconvenience, or risk than the plaintiff was willing to hazard, or that a new suit wherever brought would be subject to a bar such as the statute of limitations. Here, however, litigation on the contract in the probate department ended solely because it should have been brought in another department of the same court. Nothing prohibited [the attorney] from taking up his claims in the other department; indeed he did so, and has now recovered a judgment against [his former clients]. The dismissal of his petition in the probate matter did not defeat his contract claims; it merely deflected or forestalled them.” (*Drummond, supra*, 149 Cal.App.4th at p. 53, fn. omitted.)

Paramount relies on two other decisions, both from the Fourth District, which reach the opposite conclusion from *Drummond*. In *Profit Concepts*, a California corporation sued its former employee for breach of contract and misappropriation of trade secrets. (*Profit Concepts, supra*, 162 Cal.App.4th at pp. 952-953.) The employee moved to quash service of summons for lack of personal jurisdiction, which the trial court granted after the company filed a notice of nonopposition. (*Id.* at p. 953.) The employee then sought attorney’s fees pursuant to an attorney’s fees clause in his employment contract. The trial court found him to be the prevailing party and awarded fees. (*Ibid.*)

Division Three of the Fourth District affirmed the trial court’s ruling. After reviewing the Supreme Court’s definition of a “party prevailing on the contract” in *Hsu v. Abbara, supra*, the Court of Appeal stated:

“The only claims before the trial court were contained in Profit Concepts’s complaint, which sought compensatory and punitive damages in an amount to be determined, as well as preliminary and permanent injunctive relief. The case *in California* has been finally resolved. What was awarded on Profit Concepts’s complaint? Zero. Thus, the contract claim was finally resolved within the meaning of *Hsu v. Abbara*, and that case does not use the term ‘merits.’

“The determination of which party is the prevailing party must be made without consideration of whether the plaintiff may refile the action after a motion to quash service is granted. The issue of final resolution should not depend on the plaintiff’s possible *future* conduct. Prevailing party attorney fees should be awarded based on the contract language, the statutory language, and the fact of dismissal of the case, not on speculation.” (*Profit Concepts, supra*, 162 Cal.App.4th at p. 956.)

The court reached this decision fully cognizant that the employer had refiled its action in the employee’s state of residence and was awaiting a trial date: “[w]e find nothing in the language of the statute or of *Hsu v. Abbara*, or any other case, that requires resolution in another state on the merits of a contract claim first asserted in California before a prevailing party can be determined here, when the matter has been completely resolved vis-à-vis the California courts.” (*Profit Concepts, supra*, 162 Cal.App.4th at p. 956.)

In *PNEC Corp. v. Meyer* (2010) 190 Cal.App.4th 66 (*PNEC*), a different panel from Division Three of the Fourth District reached a similar result. In *PNEC*, the trial



court dismissed a contract action against one defendant based upon forum non conveniens. That defendant then sought an award of attorney's fees pursuant to the contract, which the trial court granted. (*Id.* at pp. 68-69.)

Relying on its decision in *Profit Concepts*, Division Three affirmed the trial court's award of attorney's fees. In doing so, it claimed to distinguish *Drummond*, but in reality effectively rejected it:

“[In *Drummond*,] it clearly appeared that the party seeking an award of fees faced no obstacles in pursuing an award in a different department of the same court. But here, as in *Profit Concepts*, the ‘issue of final resolution should not depend on the plaintiff’s possible *future* conduct.’ [Citation.] Whether this action would be filed in another state was speculative. The court thus did not abuse its discretion in making an award for the work done while the case was under its jurisdiction.” (*PNEC, supra*, 190 Cal.App.4th at pp. 72-73.)

We find *Profit Concepts* and *PNEC* to be the better reasoned opinions and also to be fully consistent with the Supreme Court's definition of “party prevailing on the contract” as articulated in *Hsu v. Abbata*. Kandy Kiss chose to sue Paramount initially in state court. Paramount expended resources defending that suit, and was able to obtain a complete and final dismissal of the claims against it insofar as any state litigation was concerned. Thus, Paramount achieved complete success in defeating Kandy Kiss's state action against it. We conclude that Civil Code section 1717, as construed in *Hsu v. Abbata*, allows the court having jurisdiction of that completed action the authority to award the victor its reasonable attorney's fees when that right is expressly conferred by contract.

That Kandy Kiss could and ultimately did refile its action in another forum does not deprive the trial court of authority to act in the action finally disposed of before it. Though it did not, had Kandy Kiss prevailed on the merits of its claim in federal court, it could have sought an award from the district court to compensate it for the fees it expended litigating its claims there. But even had that scenario occurred, it would not change the decision we reach today: under Civil Code section 1717 and the terms of the

contract, Paramount should not be deprived of compensation for the fees it expended in defeating a separate action brought in an independent and separate forum.<sup>2</sup>

In addition to its assertion that *Drummond* is dispositive of this case, Kandy Kiss makes another argument in its opening brief: it contends that the definition of “prevailing party” in the Paramount invoice prohibits fees in this case. The invoice states that “[p]revailing party *shall include* one who *substantially* obtains or defeats the relief sought whether by settlement, judgment of the claim[,] or defense by the other party.” (Italics added.) Kandy Kiss argues that the use of “substantially” means that to prevail, a party must win on the substantive merits.

We reject this contention for two reasons. First, Kandy Kiss never raised this argument in the court below. It is therefore waived. (*In re Aaron B.* (1996) 46 Cal.App.4th 843, 846.) Second, on the merits, we find this argument wholly unpersuasive. The definition of “prevailing party” as contained in the invoice is *inclusive* not *exclusive*, and thus the plain terms of the invoice would allow any definition of “prevailing party” additionally provided for under state law. Also, Kandy Kiss’s contention that the adverb “substantially” in this context means a “substantive” victory on the merits attempts to load that word with more freight than it can bear: “substantially,” in this context, means only “largely.”

### **C. Collateral Estoppel**

Kandy Kiss contends, for the first time in its reply brief, that the district court’s opinions granting Paramount’s motion for summary judgment and denying its request for attorney’s fees may be used, under the doctrine of collateral estoppel, to defeat Paramount’s request for attorney’s fees in this case. With respect to the summary judgment opinion, Kandy Kiss argues that because the district court found no contract between it and Paramount, there is no contractual provision upon which Paramount may base a demand for attorney’s fees. With respect to the attorney’s fees opinion, Kandy

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<sup>2</sup> In its briefs, Kandy Kiss cites a series of federal cases which are contrary to *Profit Concepts* and *PNEC* and consistent with *Drummond*. Federal cases which construe state law, though they may be persuasive, are not binding. (*Estate of D’India* (1976) 63 Cal.App.3d 942, 948.) We find the federal cases cited by Kandy Kiss unpersuasive.

Kiss argues that because the district court found Kandy Kiss's claims did not include an "action on a contract" as required by Civil Code section 1717, there is no basis for awarding attorney's fees pursuant to section 1717. Kandy Kiss also argues that it may raise collateral estoppel for the first time on appeal, citing *First N.B.S. Corp. v. Gabrielsen* (1986) 179 Cal.App.3d 1189.

We first observe that absent good cause, an appellant may not raise new issues for the first time in a reply brief because it deprives the respondent of an opportunity to counter the argument or requires the delay of an additional brief by permission. (*Campos v. Anderson* (1997) 57 Cal.App.4th 784, 794, fn. 3; see also *Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747, 761, fn. 4.) Given the timing of the district court opinions, Kandy Kiss might have good cause to now raise these issues. Nevertheless, Kandy Kiss simply included the new arguments in its request for judicial notice and in its reply brief; it did not seek permission to submit supplemental briefing, which would have at least given Paramount the chance to respond to the new arguments.

In any event, we find Kandy Kiss's arguments unpersuasive. Kandy Kiss never raised the issues decided by the district court in the state trial court. In the court below, Kandy Kiss, for obvious reasons, did not argue that a contract never existed between it and Paramount or that its breach of warranty claim was not an action on a contract. Instead, Kandy Kiss opposed Paramount's motion by claiming that neither side was the prevailing party in the state action because of the procedural nature of Paramount's dismissal. Below, Kandy Kiss implicitly conceded that (1) a contract existed and (2) its breach of warranty claim was an action on a contract. By doing so, Kandy Kiss preserved its right to continue its litigation in federal court and then obtain attorney's fees there as the prevailing party. Since it tactically conceded these issues in the court below, Kandy Kiss cannot now, when its goals have changed, reverse field and claim the opposite.<sup>3</sup> Kandy Kiss has effectively waived its right to challenge these issues on appeal. (*In re Aaron B.*, *supra*, 46 Cal.App.4th at p. 846.)

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<sup>3</sup> We also note that the absence of a contract between the parties does not necessarily prevent the prevailing party from obtaining attorney's fees. (See *Santisas v.*

**D. Paramount's Request for Attorney's Fees on Appeal**

Finally, Paramount contends that it is entitled to attorney's fees on appeal. In light of our decision above, we agree. The case is remanded to the trial court for a determination of the attorney's fees reasonably incurred by Paramount in litigating this appeal. (*Silver Creek, LLC v. BlackRock Realty Advisors, Inc.* (2009) 173 Cal.App.4th 1533, 1541; see also *Butler-Rupp v. Lourdeaux* (2007) 154 Cal.App.4th 918, 923.)

**DISPOSITION**

The trial court's order awarding attorney's fees is affirmed. Paramount's request for attorney's fees on appeal is granted. The case is remanded to the trial court to determine the reasonable fees incurred by Paramount in the litigation of this appeal. Paramount is also otherwise awarded its costs on appeal.

SORTINO, J.\*

We concur:

FLIER, Acting P. J.

GRIMES, J.

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*Goodin, supra*, 17 Cal.4th at p. 611 [where a litigant successfully defends against a contract action by arguing that the contract is inapplicable, unenforceable, or nonexistent, Civil Code section 1717 still allows recovery of attorney's fees if the opposing party would have been entitled to attorney's fees had it prevailed; to hold otherwise would defeat the "mutuality of remedy" created by section 1717].)

\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.