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5 UNITED STATES DISTRICT COURT  
6 EASTERN DISTRICT OF CALIFORNIA

7  
8 DAVIS MORENO CONSTRUCTION,  
9 INC.,

10 Plaintiff,

11 v.

12 FRONTIER STEEL BUILDINGS  
13 CORP.,

14 Defendant.

1:08-cv-00854-OWW-SMS

MEMORANDUM DECISION AND ORDER  
DENYING PLAINTIFF'S MOTION FOR  
ATTORNEY'S FEES

15 I. INTRODUCTION.

16 Plaintiff Davis Moreno Construction, Inc., ("Plaintiff")  
17 proceeds with an action for damages against Defendant Frontier  
18 Steel Buildings Corp. ("Defendant").

19 On November 18, 2010, the court entered an order granting  
20 Plaintiff's motion for partial summary judgment, holding that  
21 Defendant was a "contractor" as defined by California's  
22 Contractors' State License Law for the purposes of the parties'  
23 agreement. (Doc. 120).<sup>1</sup>

24 On December 1, 2010, Plaintiff filed a motion for attorneys'  
25 fees. (Doc. 124). Defendant did not file timely opposition to  
26 Plaintiff's motion. See E.D. Cal. R. 230(c) (opposition due not  
27

28 <sup>1</sup> CAL. BUS. & PROF. CODE § 7000 et seq.

1 less than fourteen days preceding noticed hearing date).

2 **II. FACTUAL BACKGROUND.**

3 This action concerns a contract between Plaintiff and  
4 Defendant related to a public works project for the Kern Unified  
5 School District for the construction of its Records Retention  
6 Facility (the "Project") in Kern County, California. As the prime  
7 contractor on the Project, Plaintiff engaged subcontractors and  
8 suppliers, including Defendant.

9 Pursuant to the parties' contract, Defendant agreed to  
10 generate "anchor bolt and structural drawings," "shop drawings and  
11 engineering calculations," "fabrication drawings," and to deliver  
12 the fabricated materials to the Project site within certain  
13 specified time periods. The materials Defendant agreed to provide  
14 included primary and secondary steel, roof panels, steel framing,  
15 and other materials. Defendant also retained broad authority to  
16 perform or direct the performance of corrections to the structural  
17 framing it provided. Defendant performed various obligations under  
18 the contract, and Plaintiff made several payments to Defendant. In  
19 total, Plaintiff paid Defendant \$168,025.90.

20 On June 18, 2008, Plaintiff filed a law suit against Defendant  
21 for breach of contract based on Defendant's alleged failure to meet  
22 certain deadlines set forth in the parties' agreement. Plaintiff  
23 filed an amended complaint on February 17, 2009 ("FAC"). (Doc.  
24 24). *Inter alia*, the FAC added a claim pursuant to California's  
25 Contractor State License Law ("CSLL"). The CSLL requires  
26 contractors performing construction work to be licensed at all  
27 times during the performance of such work, *see, e.g., MW Erectors,*  
28 *Inc. v. Niederhauser Ornamental & Metal Works Co.*, 36 Cal. 4th 412,

1 425 (Cal. 2005), and bars an entity from recovering or retaining  
2 compensation for any work performed in connection with an agreement  
3 for services requiring a contractor's license unless proper  
4 licensure was in place at all times during such contractual  
5 performance, *White v. Cridlebaugh*, 178 Cal. App. 4th 506, 518 (Cal.  
6 Ct. App. 2009) (citation omitted).

7 On November 18, 2010, the court issued a memorandum decision  
8 granting: (1) Plaintiff's motion for summary judgment on its  
9 statutory claim for disgorgement under the section 7031(b), which  
10 allows recovery of all compensation paid to a contractor for  
11 performing unlicensed work; and (2) Plaintiff's motion for summary  
12 judgment on Defendant's counterclaim for breach of contract  
13 pursuant to section 7031(a), which shields a person who utilizes  
14 the services of an unlicensed contractor from lawsuits by that  
15 contractor to collect payment for unlicensed work. (Doc. 118).

### 16 **III. LEGAL STANDARD.**

17 A federal court sitting in diversity applies the law of the  
18 forum state regarding the award of attorneys' fees. *E.g.*, *Kona*  
19 *Enters. v. Estate of Bishop*, 229 F.3d 877, 883 (9th Cir.  
20 2000) (citations omitted). As a general matter, California follows  
21 the "American rule," which provides that each party to a lawsuit  
22 ordinarily pays their own attorneys' fees. *E.g.*, *Lockton v.*  
23 *O'Rourke*, 184 Cal. App. 4th 1051, 1070 (Cal. Ct. App. 2010).  
24 California's Legislature codified the American rule in 1872 when it  
25 enacted California Code of Civil Procedure section 1021. *Trope v.*  
26 *Katz*, 11 Cal. 4th 274, 278 (1995). Section 1021 provides:

27 Except as attorney's fees are specifically provided for  
28 by statute, the measure and mode of compensation of  
attorneys and counselors at law is left to the agreement,

1 express or implied, of the parties; but parties to  
2 actions or proceedings are entitled to their costs, as  
hereinafter provided.

3 Cal. Civ Code § 1021 (2011). Pursuant to section 1021, parties  
4 "contract out" of the American rule "when there is an 'agreement,  
5 express or implied, of the parties' that allocates attorney fees.'" *Locton*, 184 Cal. App. 4th at 1070 (citing *Trope*, 11 Cal. 4th at  
6 279). In order to determine whether an award of attorney fees is  
7 warranted under a contractual attorney fees provision, the  
8 reviewing court must examine applicable statutes and the provisions  
9 of the contract. *Id.* at 1076 (citations omitted).

10  
11 Attorneys' fees provisions concerning actions "on a contract"  
12 are governed by California Civil Code section 1717. Section 1717  
13 provides, in pertinent part:

14  
15 a) In any action on a contract, where the contract  
16 specifically provides that attorney's fees and costs,  
17 which are incurred to enforce that contract, shall be  
18 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.

19 Where a contract provides for attorney's fees, as set  
20 forth above, that provision shall be construed as  
21 applying to the entire contract, unless each party was  
22 represented by counsel in the negotiation and execution  
of the contract, and the fact of that representation is  
specified in the contract.

23 Reasonable attorney's fees shall be fixed by the court,  
and shall be an element of the costs of suit.

24 Attorney's fees provided for by this section shall not be  
25 subject to waiver by the parties to any contract which is  
26 entered into after the effective date of this section.  
Any provision in any such contract which provides for a  
waiver of attorney's fees is void.

27 (b)

28 (1) The court, upon notice and motion by a party, shall

1 determine who is the party prevailing on the contract for  
2 purposes of this section, whether or not the suit  
3 proceeds to final judgment. Except as provided in  
4 paragraph (2), the party prevailing on the contract shall  
5 be the party who recovered a greater relief in the action  
6 on the contract. The court may also determine that there  
7 is no party prevailing on the contract for purposes of  
8 this section.

9 Cal. Code Civ. P. § 1717.

10 Section 1717 only applies to a party that prevails "on the  
11 contract." "Where a cause of action based on the contract  
12 providing for attorney's fees is joined with other causes of action  
13 beyond the contract, the prevailing party may recover attorney's  
14 fees under [] section 1717 only as they relate to the contract  
15 action." *Abdallah v. United Savings Bank*, 43 Cal. App. 4th 1101,  
16 1111 (Cal. Ct. App. 1996) (citation omitted). Apportionment of a  
17 fee award between fees incurred on a contract cause of action and  
18 those incurred on other causes of action is within the trial  
19 court's discretion, however, fees need not be apportioned when  
20 incurred for representation on issues common to contract and non-  
21 contractual claims. *Id.* Where contract and non-contract claims  
22 are "inextricably intertwined," making it "impracticable, if not  
23 impossible, to separate the multitude of conjoined activities into  
24 compensable or noncompensable time units," apportionment is not  
25 necessary. *Id.*

#### 26 **IV. DISCUSSION.**

27 Plaintiff seeks to recover attorneys' fees pursuant to a  
28 provision contained in the parties' contract that provides:

if either party hires an attorney to enforce any  
provision of the Purchase Order, or files a law suit  
against the other for damages sustained by a breach, the  
prevailing party in such action shall be entitled to  
receive attorney's fees and costs as awarded by the

1 Court.

2 (Doc. 124, Cook Decl., Ex. A).<sup>2</sup> Plaintiff invokes California Civil  
3 Code section 1717, contending that the order granting partial  
4 summary judgment renders Plaintiff the "prevailing party" in this  
5 action within the meaning of California Civil Code section  
6 1717(b)(1). Plaintiff's motion is premature. "The prevailing  
7 party determination [under section 1717] is to be made *only* upon  
8 final resolution of the contract claims and *only* by a comparison of  
9 the extent to which each party has succeeded and failed to succeed  
10 in its contentions," even if that law does not require entry of  
11 final of judgment. *Hsu v. Abbara*, 9 Cal. 4th 863, 876 (Cal. 1995)  
12 (emphasis added, citations and quotations omitted).

13 Section 1717(b)(1) defines "prevailing party" as the party  
14 "who recovered a greater relief in the action *on the contract*."  
15 Cal. Code Civ. P. § 1717(b)(1) (emphasis added). "When a party  
16 "obtains a simple, unqualified victory by completely prevailing on  
17 or defeating all contract claims in the action and the contract  
18 contains a provision for attorney fees, section 1717 entitles the  
19 successful party to recover reasonable attorney fees incurred in  
20 prosecution or defense of those claims." *Scott Co. v. Blount,*  
21 *Inc.*, 20 Cal. 4th 1103, 1109 (Cal. 1999). On the other hand, when  
22 neither party obtains complete victory on all the contract claims  
23 raised in an action:

24 it is within the discretion of the trial court to  
25 \_\_\_\_\_

26 <sup>2</sup> Plaintiff does not contend that this provision is broad enough to permit  
27 recovery for attorneys' fees incurred litigating non-contract claims. See  
28 *Moshonov v. Walsh*, 22 Cal. 4th 771, 775 (Cal. 2000) (distinguishing between fees  
provisions containing broad language covering claims "arising out of the  
agreement" from fees provisions which specifically limit fee recovery to  
proceedings "brought to enforce the terms of this contract").

1 determine which party prevailed on the contract or  
2 whether, on balance, neither party prevailed sufficiently  
3 to justify an award of attorney fees. In deciding whether  
4 there is a "party prevailing on the contract," the trial  
5 court is to compare the relief awarded on the contract  
6 claim or claims with the parties' demands on those same  
7 claims and their litigation objectives as disclosed by  
8 the pleadings, trial briefs, opening statements, and  
9 similar sources.

10 *Id.* (citations and quotations omitted). The language of section  
11 1717 emphasizes that the determination of who is the "prevailing  
12 party" for purposes of contractual attorney fees is to be made  
13 without reference to the success or failure of non-contract claims.  
14 *Hsu*, 9 Cal. 4th at 873-74.

15 The order granting Plaintiff partial summary judgment did not  
16 resolve all of the contract claims at issue in this action.  
17 Although Plaintiff has prevailed on its statutory claim under  
18 California's CSLL, Plaintiff has yet to prevail on its own breach  
19 of contract claim, which is subject to trial, especially as to the  
20 amount of damages, if any. Summary judgment on Defendant's  
21 counterclaim for breach of contract was based solely on the fact  
22 that California Business and Professions Code section 7031(a)  
23 precludes Defendant from recovering damages on its breach of  
24 contract claim. It did not adjudicate the claims on completion of  
25 the work and competing damage claims. Although a party is entitled  
26 to attorneys' fees under section 1717 "even when the party prevails  
27 on grounds the contract is inapplicable, invalid, unenforceable or  
28 nonexistent," see *Hsu*, 9 Cal. 4th at 870, it is possible that  
29 Defendant will prevail on the substantive merits of Plaintiff's  
30 breach claim at trial, in which case the court may find that no  
31 party is the prevailing party regarding claims "on the contract,"  
32 *Deane Gardenhome Assn. v. Denktas*, 13 Cal. App. 4th 1394, 1398

1 (Cal. Ct. App. 1993) ("a determination of no prevailing party  
2 results when both parties seek relief, but neither prevails"). In  
3 fact, depending on the outcome of trial, Defendant could establish  
4 that *it* is the prevailing party "on the contract," notwithstanding  
5 Defendant's inability to recover damages for Plaintiff's purported  
6 breach:

7       When there are cross-actions on a contract containing an  
8       attorney fees provision, and no relief is awarded in  
9       either action, a trial court is not obligated to find  
10       that there is no party prevailing on the contract for  
11       purposes of section 1717. If the court concludes that the  
12       defendant's cross-action against the plaintiff was  
13       essentially defensive in nature, it may properly find the  
14       defendant to be the party prevailing on the contract.

15 *Hsu*, 9 Cal. 4th at 875 n. 10.

16       Plaintiff's reliance on *Pac. Custom Pools v. Turner Constr.*  
17       *Co.*, 79 Cal. App. 4th 1254 (2000) is misplaced. In *Pac. Custom*  
18       *Pools*, an order granting summary judgment on the basis of  
19       California's CSLL resolved **all** contract claims between the relevant  
20       parties. Here, by contrast, the order granting partial summary  
21       judgment only resolved Defendant's counterclaim for breach;  
22       Plaintiff's claim for breach of contract is subject to trial.

23       Plaintiff's motion for attorneys' fees pursuant to section  
24       1717 is DENIED. The matter of the propriety of this motion is  
25       raised *sua sponte*. Not only is this motion indisputably premature,  
26       it cries out for an inquiry under Federal Rule of Civil Procedure  
27       11 and 28 U.S.C. § 1927, whether appropriate remedies should not be  
28       imposed on Plaintiff and Plaintiff's counsel. Plaintiff shall have  
29       thirty (30) days to show cause why all time and any costs of this  
30       motion should not be disallowed, and why further appropriate  
31       sanctions against Plaintiff and Plaintiff's counsel should not be



1 imposed to deter vexatious conduct that unnecessarily multiplies  
2 the litigation.

3 **ORDER**

4 For the reasons stated, IT IS ORDERED:

5 1) Plaintiff's motion for attorneys' fees is DENIED;

6 2) Plaintiff is ordered to show cause why all time and any  
7 costs of this motion should not be disallowed, and why further  
8 sanctions should not be imposed on Plaintiff and Plaintiff's  
9 counsel pursuant to Federal Rule of Civil Procedure 11 and 28  
10 U.S.C. § 1927, within thirty (30) days of electronic service  
11 of this decision; and

12 3) The hearing on this motion currently set for April 26, 2011  
13 is VACATED.

14 IT IS SO ORDERED.

15 Dated: March 3, 2011

/s/ Oliver W. Wanger  
UNITED STATES DISTRICT JUDGE