

1
2 UNITED STATES DISTRICT COURT
3 FOR THE NORTHERN DISTRICT OF CALIFORNIA
4 OAKLAND DIVISION
5

6 CLEAR CHANNEL OUTDOOR, INC., a
7 Delaware corporation,

8 Plaintiff,

9 vs.

10 LINDA ERKELENS, an individual,

11 Defendant.

Case No: C 07-6138 SBA

ORDER RE DAMAGES

12
13 This diversity jurisdiction action arises from a lease dispute between Plaintiff Clear
14 Channel Outdoor, Inc. (“Clear Channel”) and Defendant Linda Erkelens (“Erkelens”). In a
15 prior Order, the Court granted Clear Channel’s motion for partial summary judgment on its
16 claims for breach of contract, conversion and declaratory relief, and denied Erkelens’ cross-
17 motion for summary judgment. The parties subsequently waived trial and stipulated to
18 having the Court resolve the issue of damages. Having read and considered the papers filed
19 in connection with this matter and being fully informed, the Court hereby GRANTS in part
20 and DENIES in part Clear Channel’s request for damages. Pursuant to Federal Rule of
21 Civil Procedure 78(b), the Court resolves the parties’ dispute without oral argument.

22 **I. BACKGROUND**

23 **A. FACTUAL SUMMARY**

24 The facts of this case are discussed extensively in the Court’s summary judgment
25 order and will only be briefly summarized here. In 1958, Clear Channel’s predecessor-in-
26 interest obtained a conditional use permit from the San Francisco Department of Public
27 Works to erect a sign on the wall of a building located at 1801 Turk Street, San Francisco,
28 California (“the Property”). In 1984, Erkelens’ predecessor-in-interest and Clear Channel

1 entered into a five-year lease, which included a five-year option to renew, for the purpose
2 of erecting and maintaining advertising signs at the Property. The lease stated that the
3 lessee would remain the owner of all advertising signs, structures, and improvements
4 erected or made by lessee and that lessee would retain the right to remove the signs,
5 structures, and improvements during or after expiration of the lease. On August 17, 2004,
6 Erkelens purchased the Property and acquired the lease with Clear Channel.

7 In 2002, the San Francisco Planning Code was amended to include Section 611.
8 That section, which is intended to reduce the number of billboards, provides that no new
9 advertising signs may be permitted within the city, with certain narrow exceptions. In
10 2006, Section 604(h) of the Planning Code was amended such that a sign voluntarily
11 destroyed or removed by its owner or required by law to be removed may not be
12 reinstated, replaced, or reconstructed at the same location, and the erection, construction,
13 and/or installation of a sign to replace a previously existing sign will be deemed a new sign
14 in violation of Section 611.

15 On February 14, 2008, Erkelens notified Clear Channel that she was not renewing
16 the lease for another five-year term. She then sent a termination notice to Clear Channel,
17 effective July 31, 2007, demanding that Clear Channel make arrangements to remove its
18 billboard. As a result, Clear Channel obtained a removal permit from the San Francisco
19 Department of Building Inspection on July 18, 2007. Meanwhile, Erkelens entered into a
20 lease agreement with Advertising Display Systems (“ADS”) on May 29, 2007, to allow
21 ADS to erect and maintain a new sign at the Property under terms similar to the lease with
22 Clear Channel.

23 Clear Channel sent Erkelens a copy of the permit along with a letter stating that it
24 would remove the sign, but noted Section 604(h) barred her from installing a replacement.
25 Erkelens initially responded that she expected Clear Channel to repair any damage to the
26 building caused by the removal of the sign. However, on July 26, 2007, attorneys
27 representing ADS sent a letter to Clear Channel ordering it not to remove the sign and to
28 stay off the Property because Erkelens intended to appeal the issuance of the removal

1 permit to the San Francisco Board of Appeals (“Board of Appeals”). Clear Channel
2 opposed Erkelens’ efforts to challenge the removal permit. After a series of hearings,
3 however, the Board of Appeals invalidated the removal permit on March 26, 2008.

4 **B. PROCEDURAL SUMMARY**

5 While the Board of Appeals proceedings were pending, Clear Channel filed the
6 instant lawsuit against Erkelens on December 4, 2007, alleging causes of action for breach
7 of contract, conversion, trespass to chattels, promissory estoppel, unjust enrichment and
8 declaratory judgment. On October 7, 2008, the Court granted Clear Channel’s Motion for
9 Partial Summary Judgment [Docket No. 59] on its claims for breach of contract,
10 conversion, and declaratory judgment, and denied Erkelens’ cross-motion for summary
11 judgment. The parties subsequently agreed to waive trial on damages and to submit the
12 matter to the Court through briefs only. Clear Channel also agreed to forego its punitive
13 damages claim.

14 In its Opening Brief Re Compensatory Damages [Docket No. 101], Clear Channel
15 seeks the following damages: (1) \$5,677.34 for the cost of acquiring the removal permit;
16 (2) \$51,712 in attorneys’ fees and expenses incurred in connection with the Board of
17 Appeals and related proceedings; and (3) prejudgment interest. Erkelens has submitted a
18 response brief and Clear Channel has filed a reply.

19 **II. DISCUSSION**

20 **A. CONTRACT DAMAGES**

21 Under California law, the appropriate amount of damages for breach of contract “is
22 the amount which will compensate the party aggrieved for all the detriment proximately
23 caused thereby” Cal. Civ.Code § 3300; Stephens v. City of Vista, 994 F.2d 650, 657
24 (9th Cir. 1993) (“Damages for breach of contract are supposed to compensate for the
25 detriment caused by the breach.”). Stated another way, “the breaching party is only
26 responsible to give the nonbreaching party the benefit of the bargain to the extent the
27 specific breach deprived that party of its bargain.” See Postal Instant Press, Inc. v. Sealy,
28 43 Cal. App. 4th 1704, 1709 (1996).

1 In addition to compensatory damages, an aggrieved party also may seek “special” or
2 “consequential” damages in certain cases. The California Supreme Court has explained the
3 distinction between general or compensatory damages and special damages, as follows:

4 *Unlike general damages, special damages are those losses that*
5 *do not arise directly and inevitably from any similar breach of*
6 *any similar agreement. Instead, they are secondary or*
7 *derivative losses arising from circumstances that are particular*
8 *to the contract or to the parties. Special damages are*
9 *recoverable if the special or particular circumstances from*
10 *which they arise were actually communicated to or known by*
11 *the breaching party (a subjective test) or were matters of which*
12 *the breaching party should have been aware at the time of*
13 *contracting (an objective test). [Citations.] Special damages*
14 *‘will not be presumed from the mere breach’ but represent loss*
15 *that ‘occurred by reason of injuries following from’ the breach.*
16 *[Citation.] Special damages are among the losses that are*
17 *foreseeable and proximately caused by the breach of a contract.*
18 *[Citation.]*

19 Lewis Jorge Const. Mgmt., Inc. v. Pomona Unified School Dist., 34 Cal. 4th 960, 969
20 (2004) (emphasis added). The damages at issue in this case are special damages.

21 **1. Cost to Obtain Removal Permit**

22 Clear Channel seeks to recover the sum of \$5,677.34, which represents the expenses
23 it incurred in connection with obtaining the removal permit, which later was invalidated.
24 Erkelens does not dispute that Clear Channel is entitled to recover the cost of having
25 obtained the removal permit. (Def.’s Mem. at 9.) Rather, Erkelens contends that “Clear
26 Channel would have incurred \$3,985 of the claimed \$5,677.34 even if [she] had never
27 breached the contract.” Id. The \$3,985 figure represents the cost of engineering services
28 retained by Clear Channel in connection with the removal permit process. According to
Erkelens, Clear Channel should not be allowed to recover the cost of such engineering
expenses because Clear Channel will be able to rely on the work performed by the
engineering firm when it obtains a new removal permit. (Id.) However, Erkelens fails to
support her argument either legally or factually. In addition, the record shows that Clear
Channel, in fact, will have to have the engineering services performed again before
removing the sign structure. (See Powers Decl. ¶ 3 [Docket 107].) The Court therefore
concludes that Clear Channel is entitled to recover the requested amount of \$5,677.34.

1 **2. Attorneys' Fees**

2 Clear Channel next seeks to recover the sum of \$51,712 57, which represents the
3 amount of attorneys' fees it incurred in connection with the Board of Appeals proceedings
4 involving Erkelens.¹ "California follows what is commonly referred to as the American
5 rule, which provides that each party to a lawsuit must ordinarily pay his own attorney fees."
6 Trope v. Katz, 11 Cal. 4th 274, 278 (1995). There are, however, limited exceptions to this
7 rule. In Prentice v. North Amer. Title Guar. Corp., 59 Cal. 2d 618 (1963), the court held
8 that "[a] person who through the *tort of another* has been required to act in the protection of
9 his interests by bringing or defending an action against *a third person* is entitled to recover
10 compensation for the reasonably necessary loss of time, attorney's fees, and other
11 expenditures thereby suffered or incurred." Id. at 620 (emphasis added). Subsequently, in
12 De La Hoya v. Slim's Gun Shop, 80 Cal. App. 3d Supp. 6 (1978), the court of appeal
13 applied the Prentice rule to claims based on breach of contract. Id. at 11-12 (purchaser of
14 gun that was, in fact, stolen was entitled to recover legal fees he paid to defend himself
15 against criminal charges of receiving stolen property).

16 Citing De La Hoya, Clear Channel argues that it was compelled to defend its
17 removal permit in the Board of Appeals proceedings as a result of Erkelens' failure to
18 comply with the terms of the lease, and therefore, it should be reimbursed for fees resulting
19 from that matter. (Pl.'s Mem. at 6-9.) The Court disagrees. Like the tort of another
20 doctrine, the holding in De la Hoya is limited to situations involving *third party litigation*.
21 De La Hoya, 80 Cal. App. 3d Supp. at 9 ("a party who becomes embroiled in litigation with
22 third persons as a result of the defendant's breach of contract may recover, as an item of
23 damages, attorney fees incurred in prosecuting or defending the *third party litigation....*").
24 Id. at 9 (emphasis added). In this case, there was no third party action. The proceedings
25 before the Board of Appeals involved only Clear Channel and Erkelens, who was the real

26 _____
27 ¹ Though Clear Channel contends it may recover its legal fees as consequential
28 damages resulting from Erkelens' breach of contract, or alternatively, as damages for
conversion, the legal theory underlying both arguments is based on the rule first articulated
in Prentice.

1 party in interest. While the Board of Appeals proceedings may have been a separate action,
2 the dispute remained between Clear Channel and Erkelens. As a result, Clear Channel may
3 not recover its legal expenses incurred in that matter. See Golden West Baseball Co. v.
4 Talley, 232 Cal. App. 3d 1294, 1302 (1991) (holding that plaintiff could not recover fees
5 incurred in prosecuting a separate action as damages resulting from defendant’s breach of
6 contract where the separate action involved the same parties); Schneider v. Friedman,
7 Collard, Poswall & Virga, 232 Cal. App. 3d 1276, 1281-82 (1991) (allowing recovery of
8 attorneys’ fees outside the third party context would undermine the American Rule); Hynix
9 Semiconductor Inc. v. Rambus, Inc., 527 F. Supp. 2d 1084, 1102 (N.D. Cal. 2007) (ruling
10 that De La Hoya was inapposite where the fees were in a third party action).

11 The principal case cited by Clear Channel, E. & J. Gallo Winery v. Andina Licores
12 S.A., 2007 WL 333386 (E.D. Cal. 2007), is inapposite. In that case, Andina Licores S.A.
13 (“Andina”) brought an action against E. & J. Gallo (“Gallo”) Winery in an Ecuador civil
14 court. In turn, Gallo filed suit in federal district court alleging that Andina breached the
15 forum selection clause contained in the agreement at issue, which required that all disputes
16 were to be litigated in Stanislaus County, California. With little discussion or analysis, the
17 court ruled that Andina breached the parties’ agreement by filing suit in Ecuador, and
18 therefore, Gallo was entitled to recover attorneys’ fees expended in the course of defending
19 the foreign action. Id. at *3.

20 The Court finds E. & J. Gallo Winery unpersuasive. The district court’s unpublished
21 disposition does not cite, let alone discuss, either Prentice or De La Hoya. Rather, the only
22 authority cited by the court is Hangarter v. Paul Revere Life Ins. Co., 236 F. Supp. 2d 1069,
23 1101 (N.D. Cal. 2002), rev’d in part, 373 F.3d 998 (9th Cir. 2004). Hangarter, in turn, is
24 based on the rule articulated in Brandt v. Superior Court, 37 Cal. 3d 813 (1985), where the
25 California Supreme Court held that an insured may recover its attorneys’ fees where the
26 insurer’s “tortious conduct reasonably compels the insured to retain an attorney to obtain
27 benefits due under a policy.” Id. at 817. However, Brandt does not stand for the
28 proposition that fees may be awarded as compensatory damages in satellite litigation

1 involving the same two parties involved in the contract action. Rather, Brandt is a “limited
2 exception” to the American Rule applicable only insurance bad faith cases. See CNA
3 Casualty of Cal. v. Seaboard Surety Co., 176 Cal. App. 3d 598, 621 n.12 (1986) (“[Brandt]
4 is not applicable here, where tortious conduct by the insurers or bad faith was never
5 alleged, argued, proven, or determined.”). Given the limited exception created by Brandt,
6 the cursory analysis and conclusion of E. & J. Gallo Winery unconvincing.² Accordingly,
7 the Court finds that Clear Channel is not entitled to recover damages based on the amount
8 of legal fees it incurred in connection with the Board of Appeals proceedings.

9 B. PREJUDGMENT INTEREST

10 Erkelens does not dispute Clear Channel’s right to recover prejudgment interest,
11 which is permitted under California law. Cal.Civ.Code § 3287(a). However, she contends
12 that prejudgment interest may not be awarded with respect to Clear Channel’s request to
13 recover its attorneys’ fees on the ground that such damages are not sufficiently certain.
14 (Def.’s Opp’n at 10.) Given the Court’s determination that Clear Channel is not entitled to
15 recover its legal expenses resulting from the Board of Appeals matter, Erkelens’ point is
16 moot. Clear Channel’s right to recover prejudgment interest is thus limited to the damages
17 based on the cost of obtaining the removal permit.

18 III. CONCLUSION

19 For the reasons stated above,

20 IT IS HEREBY ORDERED THAT final judgment shall be entered in favor of
21 Plaintiff Clear Channel Outdoor, Inc., in accordance with the terms of the Court’s ruling on
22 the parties’ motions for summary judgment [Docket 85]. Clear Channel is entitled recover
23 \$5,677.34 plus prejudgment interest at the allowable rate under California law. Within five
24 (5) court days of the date this Order is filed, Plaintiff shall submit a proposed form of
25 judgment to the Court.

26 _____
27 ² In any event, E. & J. Gallo Winery is distinguishable on its facts. There, the
28 damages were a *direct* result of Andina’s breach of the forum selection clause. In this case,
however, the lease does not contain a forum selection clause nor were any of Clear
Channel’s claimed damages the result of Erkelens having filed suit in the wrong forum.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IT IS SO ORDERED.

Dated: September 2, 2009



SAUNDRA BROWN ARMSTRONG
United States District Judge