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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

FRANK S. CAMMARATA, d/b/a
CAMMARATA ASSOCIATES,

Plaintiff,

v.

KELLY CAPITAL, LLC; KELLY
ESCROW FUND V, LLC; and
MICHAEL R. KELLY,

Defendants.

Case No.: 3:17-cv-00346-BEN-AGS

**ORDER GRANTING IN PART
DEFENDANTS’ MOTION FOR
ATTORNEY’S FEES**

[Doc. No. 99]

Before the Court is Defendants’ Motion for Attorney’s Fees. For the reasons set forth below, the motion is **granted in part**.

I. BACKGROUND

Plaintiff Frank S. Cammarata first brought suit against Defendants Kelly Capital, LLC and Michael R. Kelly (collectively, “Kelly”) in the United States District Court for the District of New Jersey, alleging Kelly failed to pay him for commissions due on the sale of a financial asset that purportedly occurred on July 16, 2020. Mot., ECF No. 99, 6. Kelly successfully argued for the case to be dismissed based on lack of personal jurisdiction. Id. Thereafter, Kelly moved for attorney’s fees in the District of New Jersey

1 for defending the action through the motion to dismiss. *Id.* at 6-7. While Kelly's motion
2 for attorney's fees was pending, Cammarata filed another lawsuit against Kelly in this
3 Court. Compl., ECF No. 1. This suit, brought on tort and contract theories, also alleged
4 failure to pay a commission due following the sale of the financial asset on July 16, 2020.
5 *Id.* at ¶ 29.

6 Thereafter, the New Jersey court denied Kelly's motion for attorney's fees,
7 reasoning that because it lacked personal jurisdiction over Kelly it also lacked the ability
8 to award Kelly attorney's fees. Mot., ECF No. 99. The New Jersey court also cited
9 choice-of-law concerns and the fact that Cammarata had already filed this lawsuit, which
10 had not yet been adjudicated on the merits, as reasons for its denial of Kelly's motion.
11 Kelly Decl., ECF No. 99-2, Ex. B.

12 Cammarata's case against Kelly in this Court pressed forward. Following an
13 extension of the time for discovery, this Court granted Kelly's motion for summary
14 judgment on each of Cammarata's claims on September 10, 2018. Order, ECF No. 78.
15 Kelly then filed a timely motion for attorney's fees, which was denied without prejudice
16 as Cammarata had appealed this Court's grant of summary judgment. Mot., ECF No. 80;
17 Order, ECF No. 96. The Court's order allowed Kelly to refile its motion after the appeal
18 was concluded. Order, ECF No. 96.

19 The appeal is now completed. The Ninth Circuit affirmed summary judgement on
20 March 12, 2020. The Mandate was issued on April 28, 2020. Mandate, ECF No. 98.
21 Kelly filed the instant Motion for Attorney's Fees on May 12, 2020. Mot., ECF No. 99.
22 Kelly's motion seeks attorney's fees arising from both the New Jersey action and the
23 instant lawsuit based on an applicable provision in the Parties' First Amended
24 Commission Agreement. *Id.* Cammarata opposed the motion, and Kelly replied. The
25 Court submitted the motion on the briefs and now issues its order.

26 **II. LEGAL STANDARD**

27 As discussed in this Court's Order granting summary judgment, California law
28 applies to this case. Order, ECF No. 78, 5-6 (citing *Homedics, Inc. v. Valley Forge Ins.*

1 Co., 315 F.3d 1135, 1138 (9th Cir. 2003). Where California law provides the rule of
2 decision, it also controls both the award and the reasonableness of attorney’s fees. See
3 Alaska Rent-A-Car, Inc. v. Avis Budget Group, Inc., 738 F.3d 960, 973 (9th Cir. 2013).

4 “California courts have consistently held that a computation of time spent on a case
5 and the reasonable value of that time is fundamental to a determination of an appropriate
6 attorney’s fee award.” *PLCM Group, Inc. v. Drexler*, 22 Cal. 4th 1084, 1095 (Cal. 2000)
7 (quoting *Margolin v. Regional Planning Comm.*, 134 Cal. App. 3d 999, 1004-05 (Cal.
8 App. 1982) (internal quotations omitted). This figure is called the “lodestar,” which
9 “may then be adjusted, based on consideration of factors specific to the case, in order to
10 fix the fee at the fair market value for the legal services provided.” *Id.* at 1095 (citing
11 *Serrano v. Priest*, 20 Cal. 3d 25, 49 (Cal. 1977). “The party opposing the fee application
12 has a burden of rebuttal that requires submission of evidence to the district court
13 challenging the accuracy and reasonableness of the hours charged or the facts asserted by
14 the prevailing party in its submitted affidavits.” *Gates v. Deukmejian*, 987 F.2d 1392,
15 1397-98 (9th Cir. 1992) (citing *Blum v. Stenson*, 465 U.S. 886, 892 n.5 (1984)).

16 Cammarata argues against awarding the requested attorney’s fees for six reasons.
17 The Court addresses each of these grounds in turn.

18 **III. ANALYSIS**

19 **A. Kelly has prevailed on Cammarata’s claims**

20 Cammarata’s first argument against awarding attorney’s fees is that Kelly has not
21 prevailed on the case. *Opp’n.*, ECF No. 100, 2-3. Thus, Cammarata argues, Kelly is not
22 the “prevailing party” and cannot recover attorney’s fees.

23 Kelly argues it is entitled to attorney’s fees based on a provision of the Parties’
24 First Amended Commission Agreement, which states in relevant part:

25 “In any litigation, arbitration or other legal proceeding which
26 may arise between the parties hereto, the prevailing party shall
27 be entitled to recover its costs, including costs of arbitration,
28

1 and reasonable attorney's fees in addition to any other relief to
2 which such party may be entitled."

3 Compl. ECF No 1, Ex. 2, ¶ 8. As Kelly correctly points out, this is a broad attorney's fee
4 provision. It covers "any litigation...between the parties hereto" and contains no
5 limitation that it applies only to disputes on or arising out of the parties' agreement. *Id.*
6 (emphasis added).

7 The California Code of Civil Procedure allows attorney's fees to be awarded when
8 the litigants are parties to a contract containing an attorney's fees provision. See Cal.
9 Code Civ. P. § 1033.5. Those fees may be awarded to a "prevailing party," which is
10 defined therein as "a defendant in whose favor a dismissal is entered" or a defendant
11 against whom the plaintiff does not recover any relief. Cal. Code Civ. P. § 1032(a)(4).
12 California courts have also recognized that attorney's fees may be awarded where
13 authorized by a contract even if the underlying dispute arises in tort. See *Miske v.*
14 *Coxeter*, 204 Cal. App. 4th 1249, 1259 (Cal. App. 2012) (quoting *Thompson v. Miller*,
15 112 Cal. App. 4th 1338, 1341 (Cal. App. 2003)) (internal quotations omitted).

16 Cammarata brought ten claims against Kelly sounding in tort and contract alleging
17 the financial asset at issue was sold on July 16, 2010, and that thereafter Kelly failed to
18 pay him the commission due. Compl., ECF No. 1. The Court granted summary
19 judgment to Kelly on each claim, precluding Cammarata from recovering anything
20 against Kelly. Order, ECF No. 78. The Court of Appeals has affirmed this Court's
21 decision. Mandate, ECF No. 98. Because Kelly prevented Cammarata from recovering
22 any relief, it follows that Kelly is the "prevailing party" on these claims within the
23 meaning of California Code of Civil Procedure § 1033.5(a)(10)(A) and § 1032.¹

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26 ¹ Cammarata extensively argues that this case is an "interim" or "qualified" victory for
27 Kelly. As discussed by the Ninth Circuit, this case is not a bar to Cammarata recovering
28 a commission for the sale of this financial asset if the asset has not been sold. Mandate,
ECF No. 98, fn. 1. However, this case did determine the claims Cammarata advanced
here, namely that he was entitled to a commission for a sale that purportedly occurred on

1 **B. Kelly is entitled to recover attorney’s fees for all claims**

2 Cammarata next argues that any attorney’s fees awarded should only be awarded
3 for those claims arising under contract law. The Court notes the attorney’s fee provision
4 of the First Amended Commission Agreement covers both contract and tort claims. The
5 plain language of the agreement states that attorney’s fees shall be awarded “[i]n any
6 litigation...which may arise between the parties hereto.” Compl. ECF No 1, Ex. 2, ¶ 8.
7 There is no limitation that the provision applies only to “contract claims” or to “claims
8 arising under the contract” at issue. Instead, the Court finds it is sufficiently broad to
9 encompass attorney’s fees for all the tort and contract claims Cammarata brought here.
10 See Miske, 204 Cal. App. 4th at 1259.

11 **C. Kelly is not seeking to re-tax costs**

12 Cammarata further argues Kelly seeks to “re-tax costs” in requesting attorney’s
13 fees here. Opp’n., ECF No. 100, 18-21. Specifically, Cammarata argues that once Kelly
14 “chose to move for the \$352,467.55 [requested in attorney’s fees] as costs under the Bill
15 of Costs, which was denied effective January 30, 2019, [Kelly] could not request the
16 same costs by motion filed before the Order Taxing Costs.” Id. at 19 (emphasis in
17 original).

18 In other words, Cammarata argues that because Kelly did not file a motion to re-
19 tax costs within seven days, Civil Local Rule 54(1)(g) precludes Kelly from bringing a
20 motion for fees now. Cammarata cites no case law adopting this view. In response,
21 Kelly states it moved for these attorney’s fees as costs only because California Code of
22 Civil Procedure § 1033.5(a)(10) classifies attorney’s fees awarded pursuant to contract as
23 “costs.” Reply, ECF No. 101, 8-9. After the Clerk of Court properly removed attorney’s
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27 July 16, 2010, are barred by the applicable statutes of limitations. In defeating those
28 claims, Kelly achieved its primary litigation objectives and is the reasonable “prevailing
party.”

1 fees from the Bill of Costs, and Kelly properly filed a motion for attorney’s fees pursuant
2 to Federal Rule of Civil Procedure 54(d)(2)(A).

3 This is a simple matter of different terminology used by the federal and state courts
4 that has no substantive effect here. Accordingly, the Court finds this is not a motion to
5 re-tax costs and analyzes Kelly’s claimed “attorney’s fees and related nontaxable
6 expenses” pursuant to Rule 54(d)(2)(A).

7 **D. Kelly cannot recover attorney’s fees for the New Jersey action**

8 Kelly argues it is entitled to \$146,624.00 in attorney’s fees arising out of the New
9 Jersey action. Mot., ECF No. 99, 10. Cammarata argues he should not have to pay
10 Kelly’s attorney’s fees arising out of the New Jersey action because Kelly was not the
11 “prevailing party” in that action. Opp’n., ECF No. 100, 5. Specifically, Cammarata
12 argues that because the New Jersey action was dismissed for lack of personal jurisdiction
13 over Kelly, there was no prevailing party in that case. Id. at 5-6.

14 Kelly’s request for these attorney’s fees is based on Federal Rule of Civil
15 Procedure 41. Rule 41 provides that “[i]f a plaintiff who previously dismissed an action
16 in any court files an action based on or including the same claim against the same
17 defendant, the court: (1) may order the plaintiff to pay all or part of the costs of that
18 previous action; and (2) may stay the proceedings until the plaintiff has complied.” Fed.
19 R. Civ. P. 41(d). There is no dispute that the New Jersey action terminated when the
20 court dismissed Cammarata’s claim against Kelly for lack of personal jurisdiction, or that
21 this case is “based on or including the same claim against the same defendant.” Fed. R.
22 Civ. P. 41(d). The Court has also concluded in this Order that Kelly is now the prevailing
23 party. The remaining issue is whether Rule 41(d) applies to an involuntary dismissal for
24 lack of personal jurisdiction.

25 Kelly cites to other courts in this circuit that have awarded attorney’s fees pursuant
26 to Rule 41(d) where cases were involuntarily dismissed. See e.g., *Holt v. Kormann*, 11-
27 CV-1047-MLGx, 2012 U.S. Dist. LEXIS 164339, at *9 (C.D. Cal. Nov. 15, 2012)
28 (awarding attorney’s fees where previous case was involuntarily dismissed for the

1 plaintiff's failure to respond to an order to show cause but limiting its holding to the facts
2 of the case). Despite the use of the word "costs" and not "attorney's fees" in Rule 41,
3 courts in this circuit have also applied Rule 41(d) to award attorney's fees where a
4 plaintiff voluntarily dismissed an action only after filing a new lawsuit in another district
5 court. See e.g., *Esquivel v. Arau*, 913 F. Supp. 1382, 1392 (C.D. Cal. 1996) (noting the
6 Sixth and Seventh Circuits have reached different conclusions on whether attorney's fees
7 can be included as "costs" for purposes of Rule 41); *Whole E Nature, LLC v. Wonderful*
8 *Company, LLC*, 17-CV-010-LAB-KSC, 2017 WL 4227150, at *4-5 (Sep. 22, 2017)
9 (awarding attorney's fees as costs under Rule 41). Moreover, Kelly argues that awarding
10 attorney's fees here would discourage vexatious litigation and forum shopping.

11 However, an unpublished Ninth Circuit opinion held that Rule 41(d) applies only
12 to voluntary dismissals. *Platinum Logistics, Inc. v. Platinum Cargo Logistics, Inc.*, 711
13 F. App'x 376, 377 (9th Cir. 2018). While the unpublished opinion is not binding, the
14 Court's finds its reasoning rooted in the "plain language of the rule" to be persuasive and
15 adopts it here. Rule 41(d) discusses "a plaintiff who previously dismissed an action," not
16 an action dismissed by the court. Given Rule 41's application to voluntary dismissals
17 only, the Court declines to award attorney's fees to Kelly arising out of the New Jersey
18 action.

19 **E. Kelly's fee motion is timely**

20 Cammarata finally argues Kelly's motion is untimely. Cammarata argues that
21 when the Court denied without prejudice Kelly's motion for attorney's fees before the
22 appeal was completed, it only allowed Kelly to refile that same motion. Cammarata
23 argues that Kelly's instant motion is different, and therefore it should be denied as
24 untimely. In support, Cammarata cites to an inapposite case from the Second Circuit that
25 dealt with a motion for attorney's fees filed after the fourteen-day deadline imposed by
26 Rule 54. See *Tancredi v. Metro Life Ins. Co.*, 378 F.3d 220 (2nd Cir. 2004). Here, Kelly
27 filed its motion for attorney's fees within the fourteen-day timeframe required by Rule
28 54(d). Moreover, nothing in the Court's previous order precluded the parties from

1 including different arguments in their renewed motions or responses. See Order, ECF
2 No. 96. To do so would have rendered superfluous the Court's decision to defer a
3 determination on attorney's fees until the appeal was completed.

4 Accordingly, the Court finds that Kelly's instant motion for attorney's fees is
5 timely.

6 **F. Attorney's fees awarded**

7 Kelly claims \$360,160.05 in attorney's fees in this motion. Mot., ECF No. 99, 10.
8 As discussed above, \$146,624.00 of that amount relates to the New Jersey action, which
9 the Court determined it cannot award here. *Id.* The remaining amount is \$213,536.05.
10 Cammarata argues for deductions as discussed below. See *Gates*, 987 F.2d at 1397-98.

11 First, he argues for the reduction of several expenses listed as costs. See e.g.,
12 *Opp'n.*, ECF No. 100, 19. Kelly outlines but does not seek "costs" in this motion, only
13 attorney's fees. To the extent Cammarata argues for reduction of specific "costs" those
14 requests are denied as moot.

15 Next, Cammarata argues attorney's fees should be reduced by \$7,692.50, which
16 represents the increase in attorney's fees sought by Kelly between its first motion for
17 attorney's fees and the one presently before the Court. *Opp'n.*, ECF No. 100, 3.
18 Cammarata does not argue that the later-incurred fees were unreasonable, but rather that
19 Kelly had simply already filed a motion for attorney's fees that was denied without
20 prejudice. Cammarata ignores the fact that his appeal, which was unsuccessful, is the
21 reason the Court denied the initial motion without prejudice. See *Camacho v. Schaefer*,
22 193 Cal. App. 3d 718, 724 (Cal. Ct. App. 1987) (stating that while a party has the right to
23 contest litigation, it cannot then complain when its "litigation posture generated
24 additional legal expenses [for the opposing party]"). The Court denies this request for a
25 reduction.

26 Cammarata further argues that Duane Morris, a law firm retained by Kelly,
27 engaged in block-billing. *Opp'n.*, ECF No. 100, 21. He specifically points to two time
28 entries he believes were improperly block-billed totaling 2.6 hours. The Court has

1 reviewed these specific entries and the other entries submitted by Kelly’s counsel. The
2 Court may reduce attorney’s fees documented where block-billing occurs because the
3 practice “makes it more difficult to determine how much time was spent on particular
4 activities.” *Welch v. Metropolitan Life Ins. Co.*, 480 F.3d 942, 948 (9th Cir. 2007).
5 Nonetheless, the reasonableness determination remains within the discretion of the Court.
6 Reviewing the entries submitted by Kelly’s counsel, the Court concludes they were
7 reasonable. Where multiple tasks are described in a particular time entry, counsel most
8 often sub-allocated time to specific tasks within each entry. Where counsel did not, the
9 Court finds that those entries reasonably document tasks that took the stated amount of
10 time. Accordingly, the Court declines to reduce the number of hours claimed by Kelly’s
11 counsel on the instant case.

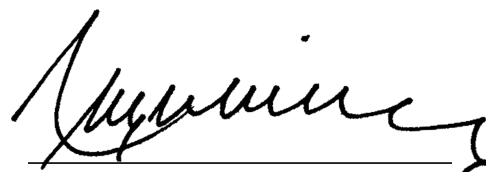
12 Finally, Cammarata argues that the hourly rates sought by Kelly’s counsel are
13 unreasonable and that Kelly fails to show comparable rates within the local community.
14 *Opp’n.*, ECF No. 100, 21-22. Kelly’s counsel have submitted declarations establishing
15 their qualifications and asserting that their rates are commensurate with prevailing rates
16 in the local community. *Mot.*, ECF No. 99, Exs. 3, 4. The Court has reviewed these
17 declarations and concludes the hourly fees are reasonable, especially considering the
18 complexity of this case. Accordingly, the Court declines to reduce the hourly fees
19 requested by Kelly’s counsel.

20 **IV. CONCLUSION**

21 For the foregoing reasons, the Motion for Attorney’s Fees (ECF No. 99) is
22 **GRANTED in part.** The Court awards Kelly \$213,536.05 in attorney’s fees incurred
23 during this action.

24 **IT IS SO ORDERED.**

25
26 Dated: August 18, 2020



27 Hon. Roger T. Benitez
28 United States District Judge