IN THE UTAH COURT OF APPEALS

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Michael T. Bilanzich, Plaintiff and Appellant, v. John Lonetti, an individual; Eunes I. Lonetti, an individual; and JD Holding, L.L.C.; et al., Defendants and Appellees.	MEMORANDUM DECISION (Not For Official Publication) Case No. 20040640-CA F I L E D (December 8, 2005) 2005 UT App 522

Fifth District, St. George Department, 010500411
The Honorable James L. Shumate

Attorneys: Richard D. Burbidge and Jefferson W. Gross, Salt Lake City, for Appellant
Terry L. Wade and Bryan J. Pattison, St. George, for Appellees

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Before Judges Davis, Greenwood, and Thorne.

GREENWOOD, Judge:

Plaintiff Michael T. Bilanzich appeals the trial court's ruling that he was not entitled to recover attorney fees from Defendants,[1] in consolidated actions regarding the guaranty (the Guaranty) executed by Plaintiff. The trial court denied Plaintiff attorney fees on the basis that the court had previously held that the Guaranty was unenforceable because a condition precedent to Plaintiff's liability had not occurred. We affirm.

"Attorney fees are generally recoverable in Utah only when authorized by statute or contract." Prince v. Bear River Mut.

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[1]The Defendants are John Lonetti, Eunes I. Lonetti, and JD Holding, L.L.C. For the sake of clarity, we refer to them collectively as Defendants.

Ins. Co., 2002 UT 68,¶52, 56 P.3d 524.[2] "Whether attorney fees are recoverable in an action is a question of law, which we review for correctness." Warner v. DMG Color, Inc., 2000 UT 102,¶21, 20 P.3d 868 (quotations and citations omitted).

The trial court granted summary judgment in favor of Defendants, determining that they were not liable on the Guaranty because a condition precedent to enforcement of the Guaranty had not occurred. Plaintiff maintains that this outcome does not render unenforceable the attorney fee provision upon which he relied. In support of this claim, Plaintiff attempts to distinguish his case from the controlling authority in this jurisdiction, BLT Investment Co. v. Snow, 586 P.2d 456 (Utah 1978).

In Snow, the supreme court concluded that parties "'may not avoid the contract and, at the same time, claim the benefit of the provision for attorney fees.'" Id. at 458 (quoting Bodenhamer v. Patterson, 563 P.2d 1212, 1218 (Or. 1977). Plaintiff argues, however, that because Snow was decided before the enactment of Utah's reciprocal attorney fee statute, see Utah Code Ann. § 78-27-56.5 (2002), the continued vitality of that ruling is uncertain. We do not agree.

Following the enactment of the reciprocal attorney fee statute, in Chase v. Scott, 2001 UT App 404, 38 P.3d 1001, we addressed the circumstances under which a party can rely upon contractual provisions for attorney fees. See Id. at ¶13. We concluded that a party mounting a successful defense to rescission would be entitled to attorney fees under a contract because the contract would remain in effect. See id. at ¶¶16-17. Referring to Snow, we reasoned that, where a contract has been declared a nullity, because "the contract no longer existed, . . . [the prevailing party] could no longer rely upon any of its terms." Id. at ¶14.

We also explained in Scott that the holding in Snow did survive the enactment of the reciprocal attorney fee provision. See id. at ¶16 (concluding that this court's holding in Scott was consistent with both Snow and Utah's reciprocal attorney fee provision).

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[2]Other circumstances may allow recovery of attorney fees. See, e.g., Utah Code Ann. § 78-27-56 (2002); Utah R. App. P. 33; Stewart v. Public Serv. Comm'n, 885 P.2d 759, 782 (Utah 1994) (explaining that "a court has inherent equitable power to award reasonable attorney fees when it deems it appropriate in the interest of justice and equity.").

Because Plaintiff fails to establish how he can "avoid the contract and, at the same time, claim the benefit of the provision for attorney fees[,]" Snow, 586 P.2d at 458, his argument that he is entitled to attorney fees under the Guaranty fails.[3]

Accordingly, we affirm.[4]

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Pamela T. Greenwood, Judge

I CONCUR:

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James Z. Davis, Judge

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[3]Plaintiff cites several cases from sister jurisdictions in support of his argument. These include Yuba Cypress Hous. Partners, Ltd. v. Area Developers, 120 Cal. Rptr. 2d 273, 277-78 (Cal. Ct. App. 2002) (allowing attorney fees in successful action to rescind contract on basis of unenforceability, but not where contract is illegal and void); Bovard v. American Horse Enters., Inc., 247 Cal. Rptr. 340, 346 (Cal. Ct. App. 1988) (denying attorney fees based on an attorney fee provision in a contract where the contract was illegal and void but allowing fees where a party "prevails on grounds the contract is inapplicable, invalid, unenforceable or nonexistent"); Carey v. Wallner, 725 P.2d 557, 560-62 (Mont. 1986) (granting attorney fees to purchasers under Montana statute where mutual mistake was involved and purchasers successfully rescinded the purchase contract); and Hackney v. Sunset Beach Invs., 644 P.2d 138, 142 (Wash. Ct. App. 1982) (reversing a trial court's refusal to grant attorney fees where a party successfully rescinded a contract). However, these cases are inapposite to the extent they conflict with Utah's controlling authority on this issue, BLT Investment Co. v. Snow, 586 P.2d 456 (Utah 1978).

[4]Because we conclude that BLT Investment Co. v. Snow, 586 P.2d 456 (Utah 1978), precludes Plaintiff's recovery of attorney fees, we need not determine if he would otherwise be entitled to fees under the Guaranty or the note to which the Guaranty applied.

THORNE, Judge (concurring):

I concur in both the reasoning and the result of the majority opinion. I write separately, however, because I believe that an additional ground for affirming the trial court's decision is apparent on the face of the Guaranty.

The Guaranty was absolute, obligating Plaintiff to pay Defendants "all principal, interests, costs, expenses, and attorney fees incurred in collection of the [n]ote and realization of the security." (Emphasis added.) The Guaranty was a form of security on the note, and Plaintiff's declaratory judgment and rescission action was an attempt to avoid his responsibilities under the Guaranty. Conversely, Defendants' defense of the action and attempt to collect on the Guaranty were undertaken in "realization of the security" on the note. Thus, in my view, had the Guaranty been upheld, Plaintiff would have been liable for Defendants' attorney fees resulting from the litigation as a portion of the corpus of the Guaranty. Cf. Connecticut Nat'l Bank v. Foley, 560 A.2d 475, 478 (Conn. App. Ct. 1989) (holding that attorney fees incurred in enforcing a guaranty were within the guarantor's obligations under the guaranty).

Ordinarily, a provision allowing one party to a document to recover attorney fees allows the other party to recover them as well, and on the same terms. See Utah Code Ann. § 78-27-56.5 (2002); Anglin v. Contracting Fabrication Machining, Inc., 2001 UT App 341,¶11, 37 P.3d 267 ("Section 78-27-56.5 . . . provid[es] reciprocal rights to attorney fees, thereby creating a level playing field for all parties to a [writing]."). However, a guaranty is not supposed to be a "level playing field," id., but rather is a one-sided document protecting the obligee at the expense of the guarantor. There is no reciprocity in the guaranty context--Plaintiff agreed to pay, and Defendants agreed to nothing. Allowing Plaintiff to recover attorney fees based solely on his own guaranty of payment would be incompatible with the unilateral nature of a guaranty, and I do not believe that such a result is mandated by section 78-27-56.5.

For these reasons, I would hold that an absolute guaranty that includes attorney fees as part of the corpus of the guaranty does not constitute an attorney fees provision subject to reciprocity under section 78-27-56.5. I see no circumstances under which Plaintiff could recover attorney fees from Defendants under the terms of the Guaranty if it had been deemed valid, and would affirm the trial court on that basis.

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William A. Thorne Jr., Judge