IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JARNAIL MAAN, Respondent, v. ANTHONY G. MALELLA, Appellant.	No. 39284-4-II ORDER DENYING MOTION FOR RECONSIDERATION; ORDER AMENDING OPINION

The unpublished opinion in this matter was filed on July 7, 2010. A motion for reconsideration was filed by respondent. After review, it is hereby

ORDERED that the motion for reconsideration is denied. It is further

ORDERED that the filed opinion is amended as follows:

> On page 8, line 5, the appellant's name, Malella, shall be inserted in place of respondent's name, Maan.

IT IS SO ORDERED.

DATED this _____ day of August, 2010.

_____
Armstrong, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JARNAIL MAAN, Respondent, v. ANTHONY G. MALELLA, Appellant.	No. 39284-4-II UNPUBLISHED OPINION

Armstrong, J. — Anthony G. Malella appeals the trial court's denials of his requests for attorney fees and costs, arguing that he was the prevailing party in the contract action filed against him, that the action was frivolous under CR 11 and RCW 4.84.185, and that he prevailed in the resulting arbitration proceeding. We agree and, therefore, reverse and remand for the trial court to award Malella attorney fees and costs.

FACTS

Malella owns commercial real property in Vancouver that formerly contained a gas station, convenience store, and car wash. In July 1986, Daniel Force purchased the convenience store business and leased the building and real property from Malella. The agreement required Force to keep all of the property in good repair, but he failed to do so and the car wash became

inoperable.

Force decided to sell the business to Jarnail Maan in 1996. Force agreed to pay Malella $17,000 at the closing of the sale as "deferred maintenance," thereby fulfilling his obligations under the lease to maintain the property and car wash.

Maan and Malella entered into a five-year lease beginning on August 1, 1996, with the option of two additional five-year terms. The rent was $3,000 per month for the first term and $3,500 per month for the second term. The lease provided that if Maan wanted to renew the lease for a third term, the parties would negotiate the new rent to reflect the current fair market rate. Maan was to provide notice of his intent to renew the lease prior to 180 days before the previous lease term expired. Paragraph 4 of the lease specified that if the parties could not agree on the third rental rate, the issue would be determined by binding arbitration, as provided in Paragraph 33. Paragraph 33 stated:

> Any controversy arising out of this Lease Agreement relating to the amount of basic rental for the [third] five (5) year term of this lease, pursuant to paragraph 4 above, shall be determined by binding arbitration. Lessee shall choose one arbiter and Lessor shall choose one arbiter and the two selected arbiters shall choose a third arbiter who shall act as the sole arbiter, whose determination of the question of basic rental shall be final and binding upon the parties.

Clerk's Papers (CP) at 16. Paragraph 32(b) added that in an action to enforce any of the lease provisions, the prevailing party was entitled to attorney fees.

In 1998, Maan sued Malella, seeking a declaration that Malella had wrongfully withheld approval of a petroleum storage tank upgrade and had failed to use the deferred maintenance compensation from Force to pay for parking lot repairs. The complaint was dismissed for want of prosecution in 2002.

Maan continued leasing the property, with his second term due to expire on July 31, 2006. On February 1, 2006, Maan informed Malella's attorney that he intended to exercise the third five-year option under the lease. The lease required Maan to send such notices directly to Malella. When he learned of Maan's plans, Malella replied that the notice to extend the lease was untimely and that he intended to take possession of the property on August 1, 2006.

On August 1, 2006, Malella wrote to Maan's attorney that Maan was in noncompliance with the lease on several fronts and that he would accept a monthly rental of no less than $4,500 until the matter was settled. Maan continued to pay $3,500 per month and on November 28, 2006, filed a complaint for damages against Malella, again complaining of Malella's failure to use the deferred maintenance funds for parking lot repairs and also alleging that Malella had breached the lease by making unannounced visits to the property, that these visits had impeded Maan's quiet enjoyment of the property, and that Malella had interfered with customer access to the property and customer relations. Malella's amended answer argued that the complaint should be dismissed with prejudice, that he should receive costs and attorney fees, and that the monthly lease payments should be set at $4,500, retroactive to August 1, 2006, as specified in his letter of that date.

Three months later, Malella's attorney wrote to Maan's attorney that she hoped Maan would "be amenable to arbitration (per the instructions of the lease)." CP at 459. She asked him to contact her so that arbitration could be scheduled in the near future. Three days later, Maan filed a Notice to Set for Trial and Statement of Arbitrability stating that the case was not subject to arbitration.

In a second amended answer, Malella alleged that Maan's action was barred by the three-year statute of limitations for oral contracts since its "deferred maintenance" claim depended on parol evidence and did not arise out of the lease. CP at 102-03. He also counterclaimed that Maan had breached the lease by failing to negotiate the rent for a third five-year term and by refusing to arbitrate the issue as the lease required. Malella also argued that he was entitled to attorney fees under Paragraph 32(b) of the lease.

Malella subsequently moved for summary judgment on all issues as well as the fees and costs incurred while defending against Maan's complaint. Malella asked the court to order Maan to arbitrate the rental rate for the third term, to order Maan to pay back rent due, and to appoint retired Judge John Skimas as arbiter.

Maan then voluntarily dismissed his complaint, contending that this rendered most of Malella's summary judgment motion moot. Maan also argued that he had never refused to participate in arbitration, that Malella had failed to comply with the prerequisites of transferring the matter to arbitration as set forth in the lease, and that the lease did not allow the court to appoint an arbiter and order Maan to pay retroactive rent.

Malella then moved to dismiss all his counterclaims, except the one seeking arbitration. The trial court granted the partial voluntary dismissal, adding that

> the parties have agreed to arbitrate paragraph 4 of the lease pursuant to paragraph 33 of the lease. The parties shall each choose an arbitrator pursuant to paragraph 33 of the lease within 30 days of July 11, 2008. If Plaintiff fails to submit a name for an arbitrator within the stated 30 day period, retired Judge John Skimas shall be the sole arbitrator of paragraph 4 of the lease. Defendant will stipulate to Judge Skimas as the sole arbitrator.

CP at 344.

At subsequent hearings, Malella argued that he was entitled to attorney fees because he was the prevailing party in Maan's contract action and because Maan's action was frivolous under CR 11 and RCW 4.84.185. The trial court disagreed that the action was frivolous and denied Malella's request for attorney fees. The court did not resolve the prevailing party question.

Arbitration followed, with the only issue being the fair rental value of the property after August 1, 2006. After noting that Malella's experts had opined that the rent should be between $5,000 and $5,833 per month, and that Maan's expert's had opined the rent should be $3,750 per month, the arbitrator set rent at $4,000 per month. He ordered Maan to pay $15,500 in back rent and continuing rent of $4,000 per month as long as he occupied the premises. The arbitrator did not award either party fees or costs.

When Maan failed to comply with the award, Malella moved for judgment on the arbitration award and for attorney fees and costs incurred in obtaining the award. Maan objected, arguing that the fee provision did not apply because he had never disputed that the matter was subject to arbitration. Maan also argued that Malella was not the prevailing party after arbitration because the final rental amount was closer to his proposal than Malella's. The trial court found no refusal to arbitrate that would trigger the lease's fee provision. It awarded judgment on the arbitration award but denied an award of costs and fees.

Malella appeals the trial court's denials of his requests for attorney fees.

ANALYSIS

I. Attorney Fees for the Contract Action

A prevailing party is entitled to attorney fees only if authorized by statute, agreement of the parties, or a recognized equitable ground. *Hutson v. Costco Wholesale Corp.*, 119 Wn. App. 332, 334, 80 P.3d 615 (2003). Malella contends that he is entitled to fees under the lease because Maan voluntarily dismissed his contract action under CR 41(a)(1)(B) and because he prevailed on his counterclaim. Although the determination of whether a party is a prevailing party has been described as a mixed question of law and fact, we review the trial court's decision for legal error. *Magnussen v. Tawney*, 109 Wn. App. 272, 275, 34 P.3d 899 (2001).

CR 41(a)(1)(B) does not contemplate the award of costs or attorney fees following a voluntary dismissal. *Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 488, 200 P.3d 683 (2009). In a civil action arising out of a lease with a unilateral attorney fees provision, RCW 4.84.330 governs the award of fees. *Wachovia SBA Lending, Inc.*, 165 Wn.2d at 489. RCW 4.84.330 makes unilateral fee provisions bilateral, and authorizes an award of fees to the party in whose favor final judgment is rendered. *Wachovia SBA Lending, Inc.*, 165 Wn.2d at 489. A voluntary dismissal is not a final judgment, so if RCW 4.84.330 controls, the defendant does not qualify as a prevailing party entitled to fees. *Wachovia SBA Lending, Inc.*, 165 Wn.2d at 492. Where a lease contains a bilateral attorney fees provision that does not require a final judgment, however, a voluntary dismissal may result in an award of attorney fees. *See Hawk v. Branjes*, 97 Wn. App. 776, 780, 986 P.2d 841 (1999) (where agreement already contains a bilateral attorney fees provision, RCW 4.84.330 is inapplicable and a voluntary dismissal may warrant an award of

fees); *Walji v. Candyco, Inc.*, 57 Wn. App. 284, 288, 787 P.2d 946 (1990) (statutory provision requiring final judgment does not control in interpreting lease provision following voluntary nonsuit and fees may be awarded).

Where RCW 4.84.330 does not control, a voluntary dismissal is not intended to preclude attorney fees to a defendant who has "prevailed" at that point. *Walji*, 57 Wn. App. at 289; *see also Andersen v. Gold Seal Vineyards, Inc*., 81 Wn.2d 863, 868, 505 P.2d 790 (1973) (allowing fees following voluntary nonsuit because a defendant who prevails is ordinarily one against whom no affirmative judgment is entered). The *Walji* court explained that since a voluntarily dismissed case may never be renewed, a lease's attorney fees provision must be applied at the time of the dismissal to fulfill the parties' intent. *Walji*, 57 Wn. App. at 288-89. "This interpretation will inhibit frivolous or badly prepared lawsuits and will protect parties from the expense of defending claims which do not result in liability." *Walji*, 57 Wn. App. at 289. While a voluntary dismissal under CR 41(a)(1) generally divests a court of jurisdiction to decide a case on the merits, an award of attorney fees pursuant to a contractual agreement is collateral to the underlying proceeding, and the court retains jurisdiction for the purpose of considering a defendant's motion for fees. *Hawk*, 97 Wn. App. at 782-83; *see also Escude v. King County Pub. Hosp. Dist. No. 2*, 117 Wn. App. 183, 192, 69 P.3d 895 (2003).

Paragraph 32(b) of the lease is a bilateral attorney fees provision that authorizes an award of fees to a party who prevails in an action "commenced to enforce any of the provisions of this lease." CP at 14. Under *Hawk* and *Walji*, Malella is arguably entitled to attorney fees solely on the basis of Maan's voluntary dismissal. Maan contends, however, that both parties prevailed

because Malella voluntarily dismissed most of his counterclaims. *See Smith v. Okanagan County*, 100 Wn. App. 7, 24, 994 P.2d 857 (2000) (if both parties prevail on major issues, there may be no prevailing party entitled to attorney fees). But Malella did not dismiss his counterclaim seeking arbitration of the monthly rent, and Malella argues that he prevailed on this issue when the trial court ordered Maan to enter into arbitration. Although Maan asserts that the parties eventually agreed to arbitrate the third-term rental amount, there was no such agreement until Maan filed his counterclaim.

On balance, we conclude that Malella qualifies as the prevailing party. Maan voluntarily dismissed his contract action. Even though Malella voluntarily dismissed all but one of his counterclaims, the remaining counterclaim succeeded when he obtained arbitration of the new rent and an award for back rent due. Because Malella is entitled to fees under the lease, we need not consider whether he is also entitled to fees under RCW 4.84.185 and CR 11.

IV. Attorney Fees for the Arbitration Proceeding

Malella argues here that he prevailed at arbitration and thus was entitled to attorney fees under Paragraphs 4, 33, and 32(b) of the lease. As stated, Paragraph 4 required the parties to determine a rental amount for any third lease term by negotiation or binding arbitration. Paragraph 33 set forth the procedure for selecting an arbitrator, and Paragraph 32(b) authorized an award of fees to any party who prevailed in an action to enforce the lease. Malella contends that he prevailed by obtaining a court order that required Maan to arbitrate as well as a judgment in his favor following arbitration.

Maan responds that he never refused to submit to arbitration. He maintains that his notice

to set for trial, which stated that his contract action was not subject to arbitration, was accurate because Malella had not yet brought his counterclaim putting the rental amount at issue. But, three months earlier, Malella's answer to Maan's complaint had requested that the rental amount be set at $4,500 retroactive to August 1, 2006. Moreover, Malella's attorney had written to Maan's attorney requesting arbitration, and the only written response was Maan's notice stating that the matter was not subject to arbitration.[1] Malella had to file a counterclaim to enforce the provision requiring the parties to either negotiate or arbitrate the rental rate for any third term. Although the order partly dismissing Malella's counterclaims was drafted to require the parties to arbitrate, the parties agreed to arbitrate before the order was filed, and handwritten changes to the order reflect that agreement. Maan uses that language to argue that he never refused to engage in arbitration. The fact remains, however, that Malella had to resort to legal action to obtain such an agreement.

Malella also argues that he is entitled to fees because he prevailed at the arbitration proceeding. The arbitrator set the rental amount at $4000 and awarded Malella $15,500 for back rent due. Maan responds that he prevailed because the rental amount was closer to the amount he proposed than the amount Malella sought. But the fact remains that Malella received a judgment in his favor. *See* 15A Karl B. Tegland and Douglas J. Ende, Handbook on Civil Procedure § 71.2, at 574 (2009-2010) (plaintiff who obtains favorable money judgment is prevailing party even though judgment is less than amount plaintiff originally sought). Accordingly, we hold that Malella, as the prevailing party at the arbitration, is entitled to attorney fees related to that

[1] Maan did inform Malella's attorney, in a letter written three days after Malella inquired about arbitration, that he was unwilling to engage in mediation but would entertain settlement offers.

proceeding.

III. Attorney Fees on Appeal

Malella also asks for attorney fees on appeal pursuant to Paragraph 32(b) of the lease and RAP 18.1. Because we have held that Malella was entitled to attorney fees below, he is entitled to fees on appeal. *See Malted Mousse, Inc. v. Steinmetz*, 150 Wn.2d 518, 535, 79 P.3d 1154 (2003) (party may recover reasonable attorney fees on appeal if allowed by statute, rule, or contract and the party makes a request under RAP 18.1(a)).

Reversed and remanded for trial court to award Malella attorney fees and costs.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Van Deren, J.

Penoyar, C.J.