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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

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| BLUE FOUNTAIN POOLS AND SPAS, INC. et al.,<br><br>Cross-complainants and Appellants,<br><br>v.<br><br>LUPE ZAUSS,<br><br>Cross-defendant and Respondent. | E077923<br><br>(Super. Ct. No. CIVDS1715712)<br><br>OPINION |

APPEAL from the Superior Court of San Bernardino County. Donald R. Alvarez, Judge. Affirmed.

Law Offices of Robert E. Williams and Robert E. Williams, for Cross-complainants and Appellants.

Briggs Law Corporation, Cory J. Briggs and Nora Pasin, for Cross-defendant and Respondent.

## I.

## INTRODUCTION

Appellants Blue Fountain Pools and Spas, Inc. (BFPS), Sean Lagrave, and Farhad Farhadian appeal the trial court's order awarding Lupe Zauss attorney's fees and costs. We affirm.

## II.

## FACTUAL AND PROCEDURAL BACKGROUND

In August 2017, Daisy Arias sued appellants for workplace sexual harassment. In response, appellants filed a cross-complaint against Zauss and Blue Fountain Pools (BFP) asserting various claims for relief. The thrust of the cross-complaint is that Zauss must indemnify appellants for Arias's claims. Appellants alleged they bought the assets of BFP from Zauss's husband before he died and signed a promissory note BFP's favor. BFP, which was dissolved in 2016, assigned the note to Zauss's husband, who then assigned it to Zauss as his successor after his death. Appellants contend Zauss, as the promissory note's assignee, must indemnify them from Arias's lawsuit and offset whatever they owe her.

Zauss moved for summary judgment on appellants' cross-complaint. Appellants filed a statement of non-opposition to the motion in which they conceded "there is no factual basis for the claims currently set forth in the [c]ross-[c]omplaint." Appellants noted, however, that they had already moved to amend the cross-complaint to add a declaratory judgment claim against Zauss, who threatened to sue appellants "on a related

claim." Zauss demanded payments from appellants she claimed were due directly to her for the note associated with BFPS's purchase of BFP. Appellants sought a declaratory judgment that they are not liable for the payments. Appellants' motion was scheduled to be heard in January 2021.

In December 2020, however, the trial court granted Zauss's motion for summary judgment and dismissed the cross-complaint.[1] In February 2021, the trial court denied appellants' motion to amend the cross-complaint. The trial court then entered judgment for Zauss on the cross-complaint in March 2021.

In April 2021, appellants filed a second motion to amend the cross-complaint. A day later, Zauss filed a separate action in the superior court against appellants and another individual to enforce the promissory note, alleging that they had defaulted on the payments they owed her.

In May 2021, appellants moved to vacate the judgment under Code of Civil Procedure section 473, subdivision (b). Appellants argued the judgment should be vacated because it "was not appropriately entered" given their pending motions and the fact that "there is an ongoing dispute between [] Zauss and [appellants] that arises from the same factual circumstances alleged in the [c]ross-[c]omplaint."

[1] The trial court later vacated its order dismissing the cross-complaint against BFS.

In June 2021, Zauss filed her motion for attorney's fees and costs that is the subject of this appeal. About two months later, the trial court denied appellants' motions for relief from the judgment and to amend the cross-complaint.

The trial court then granted Zauss's motion for attorney's fees and costs. The court ruled, among other things, that (1) the purchase agreement for BFP's assets provided that the prevailing party in "any action . . . arising out of" the agreement is entitled to attorney's fees and costs and (2) Zauss was a prevailing party under the agreement because she obtained a judgment in her favor on the cross-complaint.[2] The court therefore awarded Zauss about $78,500 in attorney's fees and costs associated with litigating the cross-complaint. Appellants timely appealed.

## III.

## DISCUSSION

Appellants argue the trial court erroneously (1) denied their request for judicial notice of Zauss's separate action and (2) found that she was a prevailing party entitled to attorney's fees and costs under the purchase agreement. We find no error.

[2] Although Zauss was not a party the purchase agreement, it provided that it "'shall bind and benefit the parties and their legal successors.'" Zauss assumed the contract as her husband's successor, so appellants do not dispute her ability to enforce the agreement for her benefit.

A. *Judicial Notice*

Appellants contend the trial court erred because it failed to take judicial notice of Zauss's separate action when awarding her attorney's fees and costs. Although appellants discussed the action in their opposition to Zauss's fee motion, they never provided a copy of Zauss's complaint to the trial court. Nor did they ask the trial court to take judicial notice of it. Appellants therefore did not comply with the procedures for requesting judicial notice set forth in Evidence Code section 453 and California Rules of Court, rule 3.1306(c). As a result, the trial court did not abuse its discretion in declining to take judicial notice of the complaint in Zauss's separate action. (See *Ross v. Creel Printing & Publishing Co.* (2002) 100 Cal.App.4th 736, 744; see also *Silver v. Los Angeles County Metropolitan Transportation Authority* (2000) 79 Cal.App.4th 338, 352 [appellants' failure to comply with rule 3.1306(b)'s requirements "disposes of the contention" that the trial court erred].)

B. *Prevailing Party*

Appellants next contend that the trial court erroneously found that Zauss was a prevailing party. We disagree.

"Generally, a trial court's determination that a litigant is a prevailing party, along with its award of fees and costs, is reviewed for abuse of discretion." (*Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1332.) The parties' contract states that the "prevailing party" in any action concerning the contract is entitled to attorney's fees and costs. In a

contractual dispute, "the party who recovered a greater relief in the action" is the prevailing party. (Civ. Code, § 1717, subd. (b)(1).)

In response to her motion for summary judgment on the cross-complaint, appellants filed a notice of non-opposition in which they conceded there was no merit to their cross-claims against Zauss. The trial court therefore granted Zauss's motion for summary judgment, dismissed the cross-complaint against her, and entered judgment in her favor. She therefore recovered a greater relief on appellants' cross-complaint than they did, meaning the trial court did not abuse its discretion in finding her the prevailing party. (See *Hsu v. Abbara* (1995) 9 Cal.4th 863, 876-878; Code Civ. Proc., § 1032, subd. (a)(4) ["'Prevailing party' includes . . . a defendant in whose favor a dismissal is entered . . . ."].)

Appellants argue Zauss cannot be a prevailing party until her separate action is resolved because that case and the cross-complaint arise "from a dispute involving related transactions and occurrences." To support their position, appellants cite (*DisputeSuite.com, LLC v. Scoreinc.com* (2017) 2 Cal.5th 968 (*DisputeSuite*) and *Estate of Drummond* (2007) 149 Cal.App.4th 46. Neither case helps appellants.

In *DisputeSuite*, the trial court properly found that a defendant who successfully enforced a contract's forum-selection clause was not a prevailing party. (*DisputeSuite*, *supra*, 2 Cal.5th at p. 970.) The defendant successfully moved to dismiss a case filed in California on the ground that a forum-selection clause in its contract with the plaintiff required the dispute to be litigated in another state. (*Ibid.*) Our Supreme Court upheld

the trial court's determination that the defendant was not a prevailing party because "the action had already been refiled in the chosen jurisdiction and the parties' substantive disputes remained unresolved." (*Id.* at p. 971.) In other words, there was no decision on the merits of the parties' dispute. (*Ibid.*) *DisputeSuite* is thus distinguishable from this case because appellants' cross-claims against Zauss have been resolved on the merits.

*Estate of Drummond*, *supra*, 149 Cal.App.4th 46 is similarly distinguishable. In that case, appellants hired an attorney to assist them in a probate matter. (*Id.* at p. 48.) After the case settled, the appellants objected to the fee that the attorney took, and claimed he had "duped them into hiring him on a contingency basis." (*Ibid.*) The attorney, on the other hand, argued the appellants owed him more money, and petitioned the probate court for an order adjudicating their fee dispute. (*Id.* at p. 49.) Before he filed that motion, however, the clients filed a separate civil action against him for various claims, including fraud and breach of faith. (*Id.* at p. 49.) The probate court eventually dismissed the attorney's petition because it had to be filed as a compulsory cross-complaint against the appellants in their civil action. (*Ibid.*; see Code Civ. Proc., § 426.30, subd. (a).) The probate court then denied the appellants' motion for attorney's fees. (*Estate of Drummond*, *supra*, at p. 49.)

The Court of Appeal held the appellants were not prevailing parties and thus were not entitled to attorney's fees. (*Estate of Drummond*, *supra*, 149 Cal.App.4th at p. 49.) The court reasoned that the appellants had "obtained only an interim victory" based only on the attorney's "pursu[ing] his claims in the wrong forum." (*Id.* at p. 51.) Litigation on

the attorney's fee petition "ended solely because it should have been brought" elsewhere, and "[n]othing prevented [him] from taking up his claims" in another forum. (*Id.* at p. 53.) The probate court's dismissal of his fee petition thus "did not defeat his contract claims," but "merely deflected or forestalled them." (*Ibid.*) Thus, the appellants had not prevailed on the merits of the parties' fee dispute. (*Ibid.*)

By contrast, Zauss obtained summary judgment and a judgment in her favor after appellants conceded that their cross-claims had no merit. This was not an "interim victory" that left appellants free to pursue their cross-claims against Zauss in another venue. The parties dispute did not end because the cross-complaint should have been brought in another forum. It ended because Zauss defeated appellants' cross-claims on the merits.

Appellants argue Zauss did not prevail under Civil Code section 1717 because her pending separate action concerns the same claims at issue in the cross-complaint, so the parties' dispute on the contract remains unresolved. (See *Hsu v. Abbara*, *supra*, 9 Cal.4th at p. 876 ["The prevailing party determination is to be made only upon final resolution of the contract claims . . . ."].) However, we cannot evaluate this argument because Zauss's complaint in her separate action is not properly before us. As explained, appellants did not present a copy of the complaint in the trial court and did not ask the trial court to take judicial notice of it. Appellants also have not asked us to take judicial notice of the complaint. Instead, appellants included a copy of the complaint in their appellant's appendix. But because a copy of the complaint was never presented to the trial court,

appellants improperly included it in their appendix. (*Termo Co. v. Luther* (2008) 169 Cal.App.4th 394, 404 ["An appellant's appendix may only include copies of documents that are contained in the superior court file."].) We therefore decline to consider it. (See *ibid*.) We in turn reject appellants' argument that Zauss is not a prevailing party because her claims in her separate action are the same as appellants' cross-claims.

IV.

DISPOSITION

The trial court's order awarding Zauss attorney's fees and costs is affirmed. Zauss may recover her costs on appeal.

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CODRINGTON
Acting P. J.

We concur:

SLOUGH
J.

RAPHAEL
J.