No.: S206354

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

KANDY-KISS OF CALIFORNIA, INC.,	)	Court of Appeal
	)	No.: B234541
Plaintiff and Appellant,	)	
	)	Los Angeles County
vs.	)	Superior Court
	)	No.: BC442116
TEX-ELLENT, INC.,	)	
	)	
Defendant and Respondent.	)	
	)	

Appeal from a Judgment of Dismissal
Honorable Soussan Bruguera, Judge

ANSWER BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and Rules:

Other Authorities:

ANSWER BRIEF ON THE MERITS

A party to an action on a contract with an attorney-fees clause who obtains an unqualified victory is entitled to a fee award, then and there, despite contemplated or ongoing litigation in another jurisdiction between the parties on the same contract. Nothing in Civil Code section 1717 or this Court's jurisprudence requires the victory to be on the merits of the contract dispute as long as the action was a discrete lawsuit in an independent forum. (Opn.[1] 10.) Viewed this way, the decisions of the courts of appeal in their varying contexts and the Court's decision in *Hsu v. Abbara*[2] are consistent in their holdings and rationale.

Kandy Kiss sued Paramount in superior court on a single cause of action for breach of warranty arising out of contracts by which Paramount sold Kandy Kiss fabric samples bearing a design the copyright to which was held by someone else. (1 CT 1, 10-11.) It sought "reasonable attorney fees in accordance with the terms of the contract." (1 CT 12.) The trial court dismissed the complaint for want of subject-matter jurisdiction because 28 U.S.C. § 1338 vested exclusive jurisdiction in the federal courts due to the copyright-related nature of Kandy Kiss's claim. (2 CT 307.) With the action concluded, the trial court then granted Paramount's motion for attorney fees over Kandy Kiss's assertion

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[1] "Opn." = Slip opinion of the Court of Appeal.

[2] (1995) 9 Cal.4th 863.

that a fee award required a determination on the merits of its contract claims. (3 CT 639.) It had pointed to its new, federal action with additional claims and additional parties, claiming that Paramount had merely shifted the forum. (2 CT 437.)

The Court of Appeal affirmed. "Paramount achieved complete success in defeating Kandy Kiss's state action against it. We conclude that Civil Code section 1717, as construed in *Hsu v. Abbara,* allows the court having jurisdiction of that completed action the authority to award the victor its reasonable attorney fees when that right is expressly conferred by contract." (Opn. 9.)

Kandy Kiss contends that language in the *Hsu* decision compels a different result. And it says that allowing a party to claim attorney fees under circumstances such as these impermissibly melds the "prevailing party" definition under section 1717 with the "prevailing party" definition used in the costs statute, Code of Civil Procedure section 1032.

Kandy Kiss is wrong on both counts. It places more freight on the *Hsu* opinion than it can carry, ignoring the principle that a decision is authority only for points actually decided.[3] *Hsu* did not involve parties with ongoing litigation involving the same contract. The merits of the contract action had been fully decided. And no distinction exists between a section 1717 or a

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[3] *Santisas v. Goodin* (1998) 17 Cal.4th 599, 620.

section 1032 "prevailing party" where the action involves only contract claims with one clear winner.

I. A decision is authority only for points actually decided. *Hsu v. Abbara* is not authority for the proposition that the merits of the contract dispute must be resolved before fees are to be awarded because it never decided that issue.

Kandy Kiss does not point to any language in section 1717 for its contention that the merits of the contract claim must be decided before a party can be said to be the prevailing party. There is none. Rather, Kandy Kiss points to language in *Hsu v. Abbara*. "The prevailing party determination is to be made only upon final resolution of the contract claims." (9 Cal.4th at p. 876.) Properly read, the opinion does not support Kandy Kiss's contention because the language on which it relies was unnecessary to the decision and does not amount to a point actually decided by the Court.

"An appellate decision is not authority for everything said in the court's opinion but only 'for the points actually involved and actually decided.' (Citation.)" (*Santisas v. Goodin, supra,* 17 Cal.4th at p. 620.) "[T]he language of an opinion must be construed with reference to the facts presented by the case; the

positive authority of a decision is coextensive only with such facts." (*PLCM Group v. Drexler* (2000) 22 Cal.4th 1084, 1097.)

When examined under the lens of these principles, *Hsu* provides no authority for the proposition Kandy Kiss asserts. The trial court entered judgment in favor of defendant real-property owners in an action for breach of a real estate sales contract brought by the prospective-purchaser plaintiffs. The court found that plaintiffs' purported acceptance of defendants' counteroffer was in fact a new offer and therefore no contract was formed. But the court denied defendants' section-1717 motion for attorney fees without explanation and the Court of Appeal affirmed finding no abuse of discretion.

Reversing, the Court stated the issue and its holding at the outset of its opinion.

> The issue we address here is whether a trial court may determine that there is no "party prevailing on the contract" when the court renders a simple, unqualified decision in favor of the defendant on the only contract claim in the action. We conclude that in that situation the defendant, who is unquestionably the sole victor, is the party prevailing on the contract as a matter of law and therefore entitled to reasonable attorney fees under section 1717.

(9 Cal.4th at pp. 865-866.)

The Court had no need or occasion to address the issue upon which Kandy Kiss rests its argument. The litigation was over and the contract claims had been adjudicated on their merits but the trial court, inexplicably, had denied the sole victors their fees. The Court saw its task as to harmonize the provisions of section 1717 which provided both that the party prevailing on the contract "shall" recover fees and that the trial court had discretion to find that no party had prevailed. (9 Cal.4th at pp. 871-872.)

The Court traced the legislative history of and examined the cases decided under section 1717.

> "Typically, a determination of no prevailing party results when both parties seek relief, but neither prevails, or when the ostensibly prevailing party receives only a part of the relief sought." (Citation.) By contrast, when the results of the litigation on the contract claims are not mixed-that is, when the decision on the litigated contract claims is purely good news for one party and bad news for the other-the Courts of Appeal have recognized that a trial court has no discretion to deny attorney fees to the successful litigant. Thus, when a defendant defeats recovery by the plaintiff on the only contract claim in the action, the defendant is the party prevailing on the contract under section 1717 as a matter of law. (Citations.)

(9 Cal. 4th at pp. 875-876.)

While the Court did preface the statements on which Kandy Kiss relies with the phrase "we hold," they were unnecessary to the decision. The Abbaras had prevailed as defendants on the merits of the only contract claims and the litigation was over. They were entitled to fees as a matter of law. In conclusion, the Court reiterated, "[w]hen a defendant obtains a simple, unqualified victory by defeating the only contract claim in the action, section 1717 entitles the successful defendant to recover reasonable attorney fees incurred in defense of that claim if the contract contained a provision for attorney fees." (9 Cal.4th at p. 877.)

Paramount obtained a simple, unqualified victory and defeated the only claim - a contract claim - in the action. The action was over. The trial court and the Court of Appeal correctly applied the *Hsu* holding.

II. Kandy Kiss perceives a conflict where none exists. In a case involving only contract claims, applying section 1717's and section 1032's "prevailing party" definitions yields identical results.

Under section 1717, subdivision (b)(1), "the party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract." Under section 1032, "'Prevailing party' includes the party with a net monetary

recovery, a defendant in whose favor a dismissal is entered, a defendant where neither plaintiff nor defendant obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against that defendant." The courts have "recognize[d] that the 'prevailing party' inquiries under Civil Code section 1717 and Code of Civil Procedure section 1032 are distinct. (Citation.)"(*PNEC Corp. v. Meyer* (2010) 190 Cal.App.4th 66, 70 fn. 2.)

Where, as here, there is only one cause of action asserted by the plaintiff and it is a cause of action based on a contract with a fee-shifting clause, a defendant with an unqualified victory is the prevailing party under either definition. It received the "greater relief in the action on the contract" and it is a "defendant in whose favor a dismissal is entered."

Kandy Kiss's perceived blurring of definitions is correct but only in the sense that applying both definitions yields identical results in the context of this case. The flaw in its analysis lies with its failure to recognize that "action" in these statutes means a discrete lawsuit filed in a California court. Neither section 1717 nor section 1032 defines what an "action" is. But the Legislature did so elsewhere with Code of Civil Procedure section 22, enacted as part of the 1872 Field Code.

> An action is an ordinary proceeding in a court of justice by which one party prosecutes another for the declaration,

> enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense.

In other words, an "action" is a lawsuit. (*People v. Yartz* (2005) 37 Cal.4th 529, 538 [proceedings under the Sexually Violent Predator Act are a "civil suit" within the meaning of Pen. Code, § 1016]; see also *Frog Creek Partners, LLC v. Vance Brown, Inc.* (2012) 206 Cal.App.4th 515, 527 fn. 6 [a discrete lawsuit is an "action" under § 1717 even though future arbitration may be required].) So, when a lawsuit asserting only contract claims is over, and the plaintiff has recovered nothing, the defendant is the prevailing party under either statute's definition.

Other than this appeal, the action is over. And Paramount is the "prevailing party" by having achieved the "greater relief on the contract" and by being a "defendant in whose favor a dismissal is entered." No conflict exists between the statutes in the presented circumstances.

III. The appellate courts consistently have held that a party prevailing in a discrete action on a contract is entitled to fees even though litigation on the merits may not be final.

The issue of whether a party may recover fees when the merits of a contract dispute remain to be decided has been the subject of many appellate opinions. With its judgment, the Court of Appeal joined the ranks of the California appellate courts which have concluded that fees may be awarded under section 1717 to a party who has obtained "an appealable order of judgment in a discrete legal proceeding even though the underlying litigation on the merits [is] not final." (*Otay River Constructors v. San Diego Expressway* (2008) 158 Cal.App.4th 796, 807.) "Thus, the court having jurisdiction of that completed action [has] the authority to award the victor its reasonable attorney fees. . . ." (Opn. 9.) Under section 1717, subdivision (b)(1), the prevailing party is the "one who obtained the greater relief *in the action* on the contract." (Emphasis added.) When a particular action is over, relative success is to be measured and fees awarded accordingly.

a. Where the contract action has been concluded in California, the victor may recover fees.

In *Profit Concepts Management, Inc. v. Griffith* (2008)

162 Cal.App.4th 950, an employee who successfully moved to quash service of employer's breach of contract action for lack of personal jurisdiction was the "prevailing party" entitled to attorney fees under employment contract, even though there was no determination on "merits" of contract claim, and a similar action was still pending in another state.

> We find nothing in the language of the statute [§ 1717] or of *Hsu v. Abbara*, or any other case, that requires resolution in another state on the merits of a contract claim first asserted in California before a prevailing party can be determined here, when the matter has been completely resolved vis-à-vis the California courts.

(162 Cal.App.4th at p.956.)

Similarly, in *PNEC Corp. v. Meyer, supra*, the trial court granted guarantor's motion to dismiss on forum non conveniens grounds, and awarded guarantor attorney fees under a guaranty agreement. The Court of Appeal affirmed, following its earlier decision in *Profit Concepts*. The court noted that nothing in either section 1717 or *Hsu v. Abbara* directed that fees could be awarded only following a decision on the merits. (190 Cal.App.4th at pp. 70-71.) Quoting from its earlier decision, the court concluded, "'The case in California has been finally resolved. What was awarded on Profit Concepts's complaint? Zero. Thus, the contract claim was finally resolved within the meaning of *Hsu v. Abbara.*' (Citation)."(*Id.* at p. 71.)

The Court of Appeal found this reasoning persuasive. (Opn. 9.) Kandy Kiss's action on the contract is over in California.

b. Where the determination of a petition to compel arbitration terminates the entire action on the contract, fees may be awarded.

The arbitration decisions lend support to the decision reached by the Court of Appeal because a petition to compel arbitration, filed independently of an existing lawsuit "commences an independent lawsuit to enforce the agreement to arbitration. (Citations.)" (*Frog Creek Partners LLC v. Vance Brown, Inc., supra,* 206 Cal.App.4th at p. 532.) Where a petition to compel arbitration is *granted*, the court cannot award fees because the court has not determined the merits of the contract dispute and the court retains jurisdiction, for example, to confirm any subsequent award. (*Lachkar v. Lachkar* (1986) 182 Cal.App.3d 641, 649.) But where an independent petition to compel arbitration is *denied* or otherwise terminates the entire "action on the contract" fees should be awarded. (*Otay River Constructors,* 158 Cal.App.4th at p. 807.) "The fact that the parties will probably pursue these claims elsewhere in another action does not lessen [the prevailing party's] victory in this discrete legal proceeding." (*Id.* at p. 808.)

Turner v. Schultz (2009) 175 Cal.App.4th 974 reached the same result. The plaintiff sued the defendants for, among other things, fraud in the inducement to enter into the agreement, which contained an arbitration provision. He also filed a separate declaratory relief action seeking a determination the defendants were barred from arbitrating the action. The trial court entered judgment for the defendants in that action and granted their motion for attorney fees pursuant to the contract. The court of appeal affirmed the fee award, even though the underlying dispute had not been concluded, relying in part on *Otay* and reasoning that "the only issue before the court-whether the arbitration should be allowed to proceed-was resolved in [the] defendants' favor in this discrete legal proceeding. (Citation.)" (175 Cal.App.4th at p. 983.)

This case is the only possible action on the contract that could be filed in California courts. Paramount is the prevailing party under any definition in this discrete legal proceeding and an award of fees is appropriate. That Kandy Kiss pursued its contract (and other, new) claims in federal court does not lessen Paramount's California victory.

c. Other final dispositions that did not reach the full merits of the contract claims have supported fee awards.

Other procedural terminations have generated a prevailing party for purposes of a fee award because the *action* was over. In *Food Safety Net Services v. Eco Safe Systems USA, Inc.* (2012) 209 Cal.App.4th 1118, plaintiff safety-inspection company sued to collect a bill and defendant cross-complained for negligence. The trial court summarily adjudicated the cross-complaint in plaintiff's favor and reclassified its complaint as a limited jurisdiction action. The appellate court, citing *Otay*, held that this resulted in a "judgment amount[ing] to the resolution of a 'discrete legal proceeding' for purposes of Civil Code section 1717." (209 Cal.App.4th at p. 1136.)

Where defendants were alleged to be alter egos of the contracting party, a dismissal in their favor without reaching the merits of the contract dispute supported a fee award. (*Pueblo Radiology Medical Group, Inc. v. Gerlach* (2008) 163 Cal.App.4th 826.) "The trial court's determination that respondents were not the alter egos of the corporation effectively ended the case as to them. They were entitled to recover attorney fees under the contract." (*Id.*, at p. 829 [citing *Profit Concepts*].)

In an action where plaintiff voluntarily dismissed his complaint pending a ruling on defendants' summary judgment motion and then filed a second action, which was dismissed for failure to file a compulsory cross-complaint, the trial court correctly awarded attorney fees to one of the defendants for the

work done after the filing of the second action. (*Carroll v. Import Motors, Inc.* (1995) 33 Cal.App.4th 1429, 1437.) The court and the parties did not even question whether the procedural nature of the dismissal barred the fee award.

Witkin reads the statute the same way. The party who obtains a final disposition of the action on the contract is entitled to fees. (5 Witkin, California Procedure (5th Ed. 2008) Judgment §§ 195, 196, pp. 747-749 [citing cases].) The Rutter Group authors are in accord. "The 'final resolution' of the contract claim need not be on the merits. A defendant dismissed from the action may 'prevail' for Civ.C § 1717 fee award purposes." (Rylaarsdam, et al., Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2012) ¶1:240.6 [citing cases].)

These decisions and commentators confirm the basic premise underlying the Court of Appeal's judgment. Under section 1717, the prevailing party is the one who "obtained the greater relief *in the action* on the contract." The case, insofar as the California judicial system is concerned, is over and Paramount has achieved a simple, unqualified victory. An award of fees is mandatory.

IV. *Estate of Drummond* applied the wrong test to determine the party entitled to fees.

Of all the California appellate decisions to consider this issue only *In re Estate of Drummond* (2007) 149 Cal.App.4th 46 can be said to support Kandy Kiss's view of the law. A lawyer sought to recover fees from his clients in a pending probate proceeding. His two efforts were rebuffed by the appellate court and he ultimately re-filed his claim as a cross-complaint in a civil case the clients had against him. When, on remand in the probate matter, the clients sought fees for their successful outcome, the appellate court found that the lack of a determination on the merits of the contract claim in the probate department precluded an award. "The dismissal of [the lawyer's] claims in the probate matter did not defeat his contract claims; it merely forestalled them." (149 Cal.App.4th at p. 53.)

As far as the opinion reveals, the court did not consider the fact that the probate proceedings were part of an action separate from the civil proceedings. The opinion seems to conflate the language in subdivision (b)(1)- "party prevailing in the action on the contract" with the language in subdivision (a)(1) "party prevailing on the contract." (149 Cal.App.4th at p. 50 [respondents were not"part[ies] prevailing on the contract."].)

The language in subdivision (a)(1) reflects the legislative

intent that "determination of prevailing party for purposes of contractual attorney fees was to be made without reference to the success or failure of noncontract claims." (*Hsu v. Abbara, supra,* 9 Cal.4th at p. 874.) Subdivision (b)(1), on the other hand, contains the legislative direction as to the nature of the result required to support a fee award. The prevailing party is the "party who obtained the greater relief *in the action* on the contract." By conflating the two subdivisions, the *Drummond* court failed to consider and to evaluate properly the fact that the appellants had obtained the greater relief in the discrete probate proceedings that constituted the action on the contract.

The *PNEC* court rejected or, at least, distinguished *Drummond*, concluding its trial court "did not abuse its discretion in making an award for the work done while the case was under its jurisdiction." (190 Cal.App.4th at p. 73.) What might happen in another jurisdiction was speculative. (*Id.*) Likewise, the Court of Appeal below declined to follow *Drummond*, finding *Profit Concepts* and *PNEC "*to be the better reasoned opinions" and fully in harmony with *Hsu v. Abbara.* (Opn. at p. 9.)

A qualitative difference exists between a case being re-filed in a different department of the superior court and it being re-filed in a federal or sister-state court. *Drummond* is analogous to the arbitration cases where the petition to compel arbitration is

filed within an existing lawsuit or where the petition is granted. By statute, the court retains jurisdiction to confirm any subsequent award. This case, *Profit Concepts* and *PNEC* are analogous to the discrete petitions to compel arbitration that are denied and the rationale of those cases is more compelling in this context because the jurisdiction of the California state courts has been exhausted.

V. The federal cases lack authoritative value.

The short answer to the federal cases that have reached a different conclusion about the effect of a "procedural" dismissal is that they are not authoritative in California state courts. Federal cases interpreting California law are not binding. (*Estate of D'India* (1976) 63 Cal.App.3d 942, 948.) The federal "posture," as Kandy Kiss puts it, is not relevant.[4] (OBM 17.) A federal court must follow the state law, not the other way around. (*Erie R. Co. v. Tompkins* (1938) 304 U.S. 64, 78-79.) "In an action involving state law claims, we apply the law of the forum state to determine whether a party is entitled to attorneys' fees, unless it conflicts with a valid federal statute or procedural rule." (*MRO Communications, Inc. v. American Tel. & Tel. Co.* (9th Cir.1999) 197 F.3d 1276, 1282.) *PNEC* and the court below found the federal cases cited by Kandy Kiss "unpersuasive." (190

[4] Most of Kandy Kiss's federal cases are unpublished. It has not attached copies of these electronically-available-only opinions to its brief as the Rules of Court, rule 8.1115, subd. (c) requires.

Cal.App.4th at p. 73; Opn. at p. 10 fn. 2.) This Court should do so also.

VI. Equitable considerations compel a fee award under these circumstances.

"Under [section 1717's] provisions, equitable considerations must prevail over both the bargaining power of the parties and the technical rules of contractual construction. (Citation.)"(*PLCM Group v. Drexler*, 22 Cal.4th at p. 1091.) This case, *Profit Concepts*, *PNEC* and the discrete actions to compel arbitration where the defendant prevails share a common ground-the plaintiff chose the forum and the defendant had to expend resources to defeat the plaintiff's contract claims achieving a victory. (Opn. at p. 9.)

Plaintiffs are in a different position from defendants and the result Kandy Kiss urges discriminates unfairly against defendants. Plaintiffs are not obligated to file lawsuits. Subject to statute-of-limitations considerations, plaintiffs have unlimited time to consider whether and where to sue or not to sue at all. Defendants, on the other hand, must defend a case no matter its merit or risk default. They have no choice. The duty to choose the proper forum and the associated risk of selecting the improper one should be on the plaintiffs. Any other rule defeats the contractual expectations of the parties and defeats the

Legislature's purpose with section 1717's enactment. "The history of the statute 'consistently adheres to the theme of equity in the award of fees. . . .'(Citation)." (*PLCM Group,* 22 Cal.4th at p. 1091.)

Successful plaintiffs always get fees if there is a fee-shifting contract provision, even if they win on a procedural basis such as by default or by a discovery coup such as evidentiary, issue or terminating sanctions. Put another way, there is no procedural victory for plaintiffs; it is always on the "merits." Kandy Kiss's interpretation undermines the mutuality principles of section 1717.

Section 1717 provides for fees to the party who obtained "the greater relief *in the action* on the contract." Kandy Kiss's and *Drummond's* interpretation ignores the phrase "in the action." Kandy Kiss would have the Court conclude that it merely moved its claims from one forum to another so that Paramount was not the prevailing party until it won in federal court. (See 2 CT 437-438.) Such a conclusion would ignore the Legislature's directions in subdivision (b)(1).[5]

[5] It bears some emphasis that Kandy Kiss's federal action was not merely a recapitulation of its state action. The state action contained but a single cause of action under Comm. Code, § 2302. (1 CT 1.) The federal action added tort claims and a new defendant, Paramount's principal. (2 CT 413.)

VII. The parties' contract does not require a determination of the merits of the contract claims for a fee award.

The parties agreed that the language of the Paramount invoice provided the operative fee language. "The invoice states that '[p]revailing party shall include one who substantially obtains or defeats the relief sought whether by settlement, judgment of the claim [,] or *defense by the other party.* (Opn. at p. 10 [court italics amended].) The plain meaning of this contract language is that resolution of the dispute need not be on the merits. Paramount "defeated the relief sought . . . by defense" – lack of subject matter jurisdiction.

The parties' right to enter into agreements for the award of attorney fees in litigation derives from Code of Civil Procedure section 1021. "Because of its more limited scope, Civil Code section 1717 cannot be said to supersede or limit the broad right of parties pursuant to Code of Civil Procedure section 1021 to make attorney fees agreements." (*Xuereb v. Marcus & Millichap, Inc.* (1992) 3 Cal.App.4th 1338, 1342.) Thus, parties may agree that the loser will pay the winner's fees in any dispute, tort or contract. (*Id.*)

In *Santisas v. Goodin,* the Court did find that the express language of section 1717, subdivision (b)(2) could defeat the parties' contrary contractual provisions.

> When a plaintiff files a complaint containing causes of action within the scope of section 1717 (that is, causes of action sounding in contract and based on a contract containing an attorney fee provision), and the plaintiff thereafter voluntarily dismisses the action, section 1717 bars the defendant from recovering attorney fees incurred in defending those causes of action, *even though the contract on its own terms authorizes recovery of those fees*.

(17 Cal.4th at p. 616 [court emphasis].)

"[W]e construe subdivision (b)(2) . . . as overriding or nullifying conflicting contractual provisions." (*Id*., 17 Cal.4th at p. 617.) On the other hand, nothing in the statutory language precludes the parties, by contract, from providing for a fee award to a party who prevails by a defense that does not consider the merits of the underlying dispute.

In *Acosta v. Kerrigan* (2007) 150 Cal.App.4th 1124, 1132, "the contractual provision at issue state[d] a party who is forced to file a petition to compel arbitration of a dispute arising under the Occupancy Agreement may recover his attorney fees incurred in making the successful petition." So even though subsequent arbitration proceedings were contemplated, the plaintiff could recover, based on the "independent provision of the contract, fees to which he is entitled even if he loses the case on the merits in the arbitration." (*Id*.)

Acosta did not consider section 1021. And its reasoning has been criticized as being at odds with the principle that there can be only a prevailing party as defined in section 1717 per contract. (*Frog Creek Partners,* 206 Cal.App.4th at p. 544.) But even though *Frog Creek Partners* relied on *Santisas,* it did not heed the Court's direction that a decision is authority only on points actually decided. (17 Cal.4th at p. 620.)

The *Santisas* majority did not limit contracting parties in situations where there was no express legislative direction as there is in the case of pre-trial dismissals under subdivision (b)(2). Justices Baxter, Werdegar and Brown, in dissent, saw section 1021's broad grant of authority to make fee-shifting agreements as prevailing over the limiting language of the subdivision. (17 Cal.4th at pp. 624-627 [Baxter, J., dissenting].) No basis exists to give *Santisas* an interpretation broader than its holding.

In other words, Section 1021 authorizes, and section 1717 does not bar, an agreement that fees may be awarded where the winner prevails by defense as opposed to on the merits. Even if the Court were to conclude that, in general, section 1717's operation required a decision on the merits of the contract claims, Paramount should recover its fees under the terms of the parties' agreement.

VIII. Paramount is entitled to fees on appeal.

The Court of Appeal directed that Paramount recover its fees on appeal. (Opn.,at p.12.) This Court should do so also. "Where a section 1717 fee award is made at the trial level, the prevailing party may, at the appropriate time, request fees attributable to a subsequent appeal. (Citations.)" (*Butler-Rupp v. Lourdeaux* (2007)154 Cal.App.4th 918, 923.)

CONCLUSION

Paramount obtained a simple, unqualified victory. It obtained the "greater relief in the action on the contract." *Hsu v. Abbara* cannot be read as imposing an additional obligation on a defendant seeking fees that the merits of the contract dispute be reached in light of this statutory language and *Hsu's* factual setting. The judgment of the Court of Appeal must be affirmed with directions that Paramount be awarded its attorney fees on appeal.

Dated: April 18, 2013

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WORD COUNT CERTIFICATE

I certify that the foregoing Answer Brief on the Merits contains 5,222 words as returned by Word Perfect X5.

_____
Alan Charles Dell'Ario

PROOF OF SERVICE BY MAIL

I declare that:

I am employed in the County of Napa, California. I am over the age of eighteen years and not a party to the within cause; my business address is 5 Saint Francis Circle, Napa, California 94558. On April 19, 2013, I served the within Answer Brief on the Merits on the below named parties in said cause, by placing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States mail at Napa, California addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on April 19, 2013 at Napa, California.

_____

Alan Charles Dell'Ario