

No. S155547
(Court of Appeal Nos. C047837, C048252, C049334
(San Joaquin County Super. Ct. No. CV016537)
(The Hon. Carter P. Holly, Presiding)

**IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA**

BRITTALIA VENTURES,
Plaintiff and Respondent/Cross-Appellant,

v.

STUKE NURSERY CO., INC.,
Defendant and Appellant/Cross-Respondent.

After a Decision By the Court of Appeal,
Third Appellate District

ANSWER TO PETITION FOR REVIEW

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COUNTERSTATEMENT OF ISSUE PRESENTED

Does Civil Code Section 1717 permit an award of contractual attorneys' fees to a plaintiff prevailing on a breach of contract claim who both contended and proved that the contract has no fee clause?

INTRODUCTION

Civil Code Section 1717 ("Section 1717") applies only to an "action on a contract," and only "where the contract specifically provides that attorney's fees and costs, which are incurred to enforce *that* contract, shall be awarded either to one of the parties or to the prevailing party" *Id.* §1717(a) (emphasis added). *If* these conditions are met, then "the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled reasonable attorney's fees in addition to other costs." *Id.*

The trial court awarded the prevailing plaintiff nearly \$750,000 in attorneys' fees under fee provisions contained in documents that the plaintiff never alleged were part of the contract that was breached and, in fact, persuaded the jury were *not* part of the parties' bargain. The trial court did so under Section 1717, on the ground that the defendant had tried to prove in its defense—unsuccessfully—that those other documents containing a fee clause *were* part of the contract. Quite sensibly, the Court of Appeal reversed. It held that Section 1717 does not apply, as this was not an action brought on a contract containing a fee clause. This decision is correct and furnishes no ground for review.

Far from creating any conflict in the law, the Court of Appeal's decision is consistent with both the statute's plain language and also a wide and uniform body of case law construing and applying Section 1717. Under those cases, Section 1717 does not apply when a plaintiff brings suit on a contract with no fee clause. As the Court of Appeal aptly put it, "[i]t's that simple." Opinion ("Op.") 19. The Petition's attempt to create the appearance of a conflict with *North Associates v. Bell*, 184 Cal. App. 3d 860 (1986), ignores a

fundamental distinction that did not escape the Court of Appeal (*see* Op. 22): in *North Associates*, the plaintiff brought suit *on a contract containing an attorneys' fees provision*. *See* 184 Cal. App. 3d at 862. There was thus no question that the case involved an “action on a contract . . . [that] specifically provides that attorney’s fees and costs, which are incurred to enforce that contract, shall be awarded” CIV. CODE §1717(a).

The Court of Appeal broke no new ground and parted ways with not a single California decision. Its decision also presents no pressing legal issue that this Court should review. While Section 1717 is an important statute, the Court of Appeal did no more than apply settled law to somewhat unusual circumstances, and there is no reason to think that the same question has or ever will vex litigants in many other cases.

STATEMENT OF FACTS

This lawsuit arises from the sale of 14,000 walnut trees by Stuke Nursery Co., Inc. (“Stuke”) to Brititalia Ventures (“Brititalia”), some of which turned out not to be the correct variety, and some of which became diseased. Op. 3-7. As a result of these problems, Brititalia brought suit against Stuke for breach of express and implied warranties. Op. 7. Brititalia maintained that the contract of sale consisted only of a typed invoice and a check for full payment, neither of which contained a fee clause. Op. 5-6, 7; 4-AA-864-65.

As affirmative defenses, Stuke argued that the warranty claims were time-barred (1-AA-48-49 ¶2; 2-AA-372) and also barred by binding disclaimers of warranty (1-AA-50 ¶15; 2-AA-379-80). It also argued that, in all events, Brititalia’s consequential damages were limited to the purchase price of the trees. 1-AA-87. These defenses were based upon standard, pre-printed provisions contained in a number of other documents that Stuke contended were part of the agreement of sale. *See* Op. 10. Those other documents also included a fee clause. 4-AA-899-902, 907-914.

Brititalia disputed that it was bound by those other documents (*see* 4-RT-1227, 1229, 1231–36). The jury agreed. Petition 4. By

general verdict, the jury found Stuke liable for breach of both express and implied warranties and awarded Brititalia \$4,497,216 in damages (2-AA-391), implicitly rejecting Stuke's affirmative defenses.

Following the entry of judgment, Brititalia requested nearly \$1.5 million in attorneys' fees under the fee clauses contained in these other documents that it had, until then, consistently disavowed. 2-AA-463, 465-66, 476, 483-94. It maintained that it was entitled to an award of fees under Section 1717 because had Stuke prevailed on its affirmative defenses, Stuke would have established that the contract included a fee clause and thus would itself have been entitled to an award of prevailing party legal fees. The trial court agreed. 3-AA-821. The trial court reduced Brititalia's fee request by half, however, and rejected Stuke's argument that the amount should be even further reduced, resulting in an award of \$749,522. 3-AA-821-22.

Stuke appealed from the judgment and the post-judgment award of legal fees, and Brititalia cross-appealed from the post-judgment fee award. Although the Court of Appeal affirmed the judgment, it reversed the fee award. Op. 24. It held that Brititalia is not entitled to an award of legal fees under Section 1717 because "the contract that Brititalia enforced through bringing this action . . . does not contain any attorney fee provision." Op. 18.¹

The Court of Appeal began its analysis with the language of Section 1717, stressing that the statute applies in "any action on a contract, *where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded . . . , then the party who is determined to be the party prevailing on the contract . . .*" shall be entitled to reasonable attorney's

¹Both parties challenged the amount of the fee award on appeal (Appellant Stuke Nursery Co., Inc.'s Opening Brief at 47-52; Respondent's Brief and Cross-Appellant's Opening Brief at 20-23), but the Court of Appeal did not reach those issues. Op. 24 n.3. Brititalia has not raised the amount of the award in its Petition.

fees. Op. 18 (citing CIV. CODE §1717) (emphases in Court of Appeal opinion). Quoting this language, it observed that “[t]he February 19, 1998, purchase proposal and check does not ‘specifically provide[]’ for any award of attorney fees ‘incurred to enforce *that* contract.’” Op. at 18-19 (emphasis in original). It therefore concluded, “[i]t’s that simple: Brititalia is not entitled to an award of attorney fees for enforcing the February 19, 1998, contract.” Op. 19.

The Court of Appeal rejected Brititalia’s argument that the reciprocity principle recognized under Section 1717 in other contexts applies since Stuke defended the action on the basis of documents that included a fee clause. Op. 19-23. It reasoned that Section 1717, and hence its reciprocity principle, does not apply because “[t]he contract on which Brititalia sued does not contain an attorney fee provision.” Op. 20. Principally on this basis, the Court of Appeal distinguished *North Associates v. Bell*, the decision that Brititalia contends is in conflict. Op. 22. It also observed that an award of contractual legal fees would not be consistent with the equitable principles that animate Section 1717. Op. 23.

REASONS FOR DENYING REVIEW

The Court of Appeal’s decision comports with the plain language of Section 1717 and with existing case law construing and applying Section 1717. It broke no new ground and created no conflict.

As the Court of Appeal correctly reasoned, by its terms, Section 1717 applies only in “an[] action on a contract, where *the* contract specifically provides that attorney’s fees and costs, which are incurred to enforce *that* contract, shall be awarded either to one of the parties or to the prevailing party” CIV. CODE §1717(a) (emphases added). In such a case, the statute authorizes an award of fees to “the party prevailing on *the* contract.” *Id.* (emphasis added). The Court of Appeal held that a prevailing plaintiff “cannot obtain attorney fees under Civil Code section 1717 if the contract it

championed did not contain an attorney fee provision, notwithstanding that the losing party defended the matter by championing a different contract that did contain an attorney fee provision.”² Op. 2.

The Petition argues that the decision assertedly “ignores the express terms” of the statute and “imposes additional non-statutory requirements” (Petition 5): namely, a requirement “that the plaintiff must allege the contract contains an attorneys’ fees clause before Civil Code section 1717 applies.” Petition 6. But it does neither. The question here is the meaning of the threshold requirement of an “action on a contract, where the contract specifically provides [for the recovery of] attorney’s fees and costs, which are incurred to enforce that contract” The Court of Appeal concluded that Section 1717 does not apply when the plaintiff neither alleges nor proves there is a fee clause in the contract that was breached. That conclusion is perfectly consistent with the statute’s plain language. Indeed, the statute’s introductory phrase must refer only to a plaintiff’s claims for affirmative relief, and not unsuccessful defense theories, because the statute expressly disallows contractual fee awards when such an “action” has been voluntarily dismissed. CIV. CODE §1717(b)(2). Defense theories cannot be dismissed, and so the interpretation of Section 1717 that Brititalia is endorsing is illogical. It also would frustrate the purpose of Section 1717. “Actions” can be voluntarily dismissed unilaterally only by *plaintiffs*. See CODE CIV. PROC. §581(b)(1). Therefore, under Brititalia’s interpretation of

²The Petition argues that the Court of Appeal “erroneously held” that Stuke had argued that a “different” contract applied. Petition 4; see also *id.* at 15 (citing Op. 22). However, the Court of Appeal’s characterization of the parties’ arguments is not review-worthy. In any event, the Petition’s focus in isolation on one sentence using the phrase “different contract and different facts” (Op. 22) is just semantics. The Court’s discussion of the underlying merits demonstrates that the Court well understood the issue: namely, that the parties agreed there was a single contract but disagreed about what it consisted of. See Op. 7, 10-14. As Brititalia acknowledges, the decision expressly states that “the underlying issue in this appeal asks: What are the terms of the contract governing Stuke’s sale of goods to Brititalia?” Op. 8; see also Petition 15 (quoting same).

Section 1717, the statute would enable only plaintiffs unilaterally to abandon an ill-founded contract theory without exposure to fee liability but not defendants. CIV. CODE §1717(b)(2). This would not promote mutuality of remedy, but thwart it.³

The Court of Appeal's decision also is consistent with the case law. The cases uniformly hold that Section 1717 applies only when the plaintiff seeks recovery on the basis of a contract that contains a fee clause. If some other document upon which the plaintiff has *not* brought suit contains a fee clause, the statute is inapplicable regardless of which party prevails. *See, e.g., Khajavi v. Feather River Anesthesia Med. Group*, 84 Cal. App. 4th 32, 63 n.16 (2000) (Section 1717 inapplicable to fee claim by prevailing plaintiff who did not prove that fee clause contained in other written agreements was part of oral contract that was breached; Section 1717 "cannot be bootstrapped to provide for attorney fees for breach of a contract that has no attorney fees provision"); *Pilcher v. Wheeler*, 2 Cal. App. 4th 352, 355-56 (1992) (Section 1717 inapplicable to fee claim by prevailing defendant based upon fee clause contained in document found *not* to be part of contract at issue); *Artesia Med. Dev. Co. v. Regency Assocs., Ltd.*, 214 Cal. App. 3d 957, 963 (1989) (Section 1717 inapplicable where plaintiff did not sue defendants "as though they were a party to the [contract]" containing a fee clause);

³Brittalia asks rhetorically why it should make any difference whether Stuke chose to file a cross-complaint for declaratory relief or not. Petition 5. The answer is simple: because the statute's plain language says so.

Moreover, the only case of which Stuke is aware to consider the question has held that a cross-complaint brought in solely a *defensive* posture to limit liability is not an action on a contract within the meaning of Section 1717. *Plemon v. Nelson*, 148 Cal. App. 3d 720, 724-25 (1983). *First Security Bank v. Paquet*, 98 Cal. App. 4th 468 (2002), cited at page five of the Petition, is not to the contrary. That case addresses only the question of whether plaintiffs who brought suit in a derivative capacity but who defeated a cross-complaint of unspecified scope brought against them in their individual capacities were prevailing parties on the cross-complaint under Section 1717. *Id.* at 475.

Wilson's Heating & Air Conditioning v. Wells Fargo Bank, 202 Cal. App. 3d 1326, 1334–35 (1988) (prevailing plaintiff cannot invoke fee clause in defendant's contract with third party because it "was not the contract being actually enforced" against defendant). If a plaintiff does not even *allege* that a contract with a fee clause has been breached, "section 1717 could not apply because the action [is] not on a contract that specifically provides for attorney fees" within the meaning of the statute. *Pilcher*, 2 Cal. App. 4th at 356.

Among the decisions that reflect this principle are those that have held Section 1717 inapplicable in cases in which a contract containing a fee clause was raised only defensively in litigation in an effort by the defendant to avoid or limit its liability to the plaintiff—whether by way of affirmative defense *or* cross-complaint (contrary to Brititalia's mistaken assumption (Petition 11)). *See Gil v. Mansano*, 121 Cal. App. 4th 739, 745 (2004) (affirmative defense that tort claim was released, based upon release agreement containing a fee clause); *Plemon v. Nelson*, 148 Cal. App. 3d 720, 724–25 (1983) (cross-complaint asserting contractual limitation of liability in defense to plaintiff's tort claim). Although these decisions involved tort claims, their rationale applies equally here: "[r]aising a [contractual] defense may not be equated with bringing an action" on the contract. *Gil*, 121 Cal. App. 4th at 744; *accord, Plemon*, 148 Cal. App. 3d at 725 (defensive cross-complaint "was not an attempt to make [plaintiff] liable under the contract"); *cf. Exxess Electronixx v. Heger Realty Corp.*, 64 Cal. App. 4th 698, 711–12 (1998) (fee clause that applied to "an action or proceeding to enforce the terms hereof" not triggered by successful defense under contract).

Contrary to these cases and supported by none, Brititalia maintains that the term "action" is not limited to the plaintiff's claims but also includes the assertion of affirmative defenses. Petition 7-8. Even if Brititalia were arguing on a blank slate, it would be wrong.⁴

⁴An "action" is defined as "an ordinary proceeding . . . by which *one party prosecutes another* for the declaration, enforcement, or protection of a right [or] the redress or prevention of a wrong" (CODE CIV. (continued . . .))

In any event, it is irrelevant. Whatever the precise contours of the term “action,” the question here is the meaning of the phrase, “action on a contract, where the contract specifically provides [for the recovery of] attorney’s fees and costs, which are incurred to enforce that contract” CIV. CODE §1717(a). Even Brititalia concedes that the term “action” encompasses a lawsuit’s ultimate adjudication (*see* Petition 7)—which, in this case, is that the contract has no fee clause.

The Court of Appeal’s decision is consistent with the entire body of law discussed above. Brititalia did not prove nor even allege that its contract with Stuke contained a fee clause. It alleged and proved just the opposite. Brititalia maintains that this “makes no difference” (Petition 10), but that is contrary to law: because the fee provision was contained in documents that were alleged and proved *not* to be part of the contract at issue, Section 1717 was inapplicable. *Khajavi*, 84 Cal. App. 4th at 63 n.16; *Pilcher*, 2 Cal. App. 4th at 355-56. As a matter of both law *and* logic, the affirmative defenses that Stuke raised could not transform Brititalia’s claims into an “action on a contract” that “specifically provides [for the recovery of] attorney’s fees which are incurred to enforce that contract.” CIV. CODE §1717; *see Plemon*, 148 Cal. App. 3d at 724–25; *Gil*, 121 Cal. App. 4th at 745. Indeed, the Petition concedes that the decision is consistent with this line of authority. Petition 6 (the decision “implicitly agree[s]” with *Gil v. Mansano*).

The Petition maintains that the decision conflicts with *North Associates v. Bell*, 184 Cal. App. 3d 860 (1986), but that is incorrect. In *North Associates*, a landlord brought an unlawful detainer action

(. . . continued)

PROC. §22 (emphasis added))—*i.e.*, a proceeding in which one party seeks affirmative relief against another. *See also id.* §30 (“A civil action is prosecuted *by one party against another* for the declaration, enforcement or protection of a right, or the redress or prevention of a wrong”) (emphasis added)). By contrast, an answer may state affirmative defenses but it may *not* seek “[a]ffirmative relief.” *Id.* §431.30(b), (c).

under a lease *that contained a fee clause* (*id.* at 865) and requested its prevailing party legal fees. *Id.* at 863. The tenant defended on the ground that it had been granted extensions under the lease. *See id.* at 865. The trial court ruled in the landlord’s favor, but on the ground that the lease had expired and a new lease temporarily formed, which also then expired. *Id.* at 863. The Court of Appeal upheld an award of legal fees to the landlord under the new lease which also had a fee clause (*id.* at 866-67) and, in an *alternative* holding, under the original lease that had expired (*id.* at 865-66). With regard to the latter, it reasoned that had the tenant been successful in its defense, the tenant would have been entitled to recover its legal fees under the lease. *Id.* The *North Associates* court’s reliance on the reciprocity principle is of no help to *Brittalia* here, however. There was no threshold issue in that case—as there is here—as to whether the litigation involved an action on a contract with a fee clause, because it did. *See id.* at 865 (plaintiff “brought suit on a written lease agreement containing an attorneys’ fees provision”). Even the defendant opposing the fee award did not bother to argue otherwise. The Court of Appeal in this case had no trouble seeing this dispositive distinction. Op. 22. *North Associates* does not address the question whether Section 1717 applies when the plaintiff alleges and proves the breach of a contract *without* a fee clause. In fact, it has been read as standing for the unremarkable proposition that a fee clause in an expired lease is enforceable. *See City & County of San Francisco v. Union Pac. R.R. Co.*, 50 Cal. App. 4th 987, 1000 (1996) (citing *North Associates*).

Without doubt, the policy of promoting mutuality of remedy embodied by Section 1717 is an important one (Petition 15-16), but that policy applies only in cases the Legislature has specified. Just as a prevailing plaintiff cannot benefit from Section 1717 to make a unilateral fee clause reciprocal if it prevailed only on a tort claim (*Moallem v. Coldwell Banker Commercial Group, Inc.*, 25 Cal. App. 4th 1827 (1994)), neither does Section 1717 apply if the contract upon which a plaintiff brings suit has no fee clause. “The public

policy underlying section 1717 may be clear. But a court is not free to advance the public policy that underlies a statute by extending the statute beyond its plain terms and established reach.” *Id.* at 1833.

Brittalia cites no case authorizing an award of contractual attorney’s fees to a plaintiff who brings suit on a contract that it claims and proves has no fee clause. Its position defies the plain language of Section 1717 *and* common sense. While it maintains that a different rule is more desirable in the circumstances of this case, that is concern not for this Court but for the Legislature.

Not only is there no conflict in the law and not only is the decision correct, but this case is *not* a vehicle to decide whether it is permissible to apply the reciprocity principle of Section 1717 when the plaintiff alleges and proves the breach of a contract with no fee clause. That is because, although not mentioned in the decision, Stuke would not have been entitled to its legal fees had it prevailed. The fee clause applies only “[i]n the event that it shall be necessary to *institute* legal proceedings or arbitration to collect any portion of the amount due under this contract or to enforce the provisions of this Agreement” 4-AA-900 (emphasis added). Stuke merely defended itself in this case; it did not “institute” any legal proceedings. The fee clause therefore would not have applied had it won. *See, e.g., Exxess Electronixx*, 64 Cal. App. 4th at 711–12 (construing fee clause that applied if any party “brings an action or proceeding to enforce the terms hereof”). Notably absent from the Petition is any demonstration to the contrary. Thus, on this record, the policy arguments advanced by Brittalia could not be reached.

Finally, and contrary to the Petition’s assertion that the decision presents an issue of statewide importance (Petition 15), there is no reason to think that the problem encountered here is common or likely to recur with any frequency. Here, the non-prevailing defendant maintained that the contract contained additional dispositive terms and, as it happened, those terms were evidenced by documents that also included a fee clause. Brittalia has not demonstrated that this scenario has arisen in numerous other cases. If, in the future,

other cases do arise that present the same question, time will tell if the issue is a significant one. However, even that is extremely unlikely: the decision in this case is consistent with both the statute's plain language and the case law, and so it is unlikely that other appellate courts would disagree with it. Review of the question is unnecessary and, in all likelihood, will never be necessary.

CONCLUSION

The Petition For Review should be denied.

DATED: September 5, 2007.

Respectfully,

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**CERTIFICATE OF COMPLIANCE
PURSUANT TO CAL. R. CT. 8.504(d)(1)**

Pursuant to California Rules of Court 8.504(d)(1), and in reliance upon the word count feature of the software used to prepare this document, I certify that the foregoing Answer To Petition For Review contains 3,666 words, excluding those materials not required to be counted under Rule 8.504(d)(3).

DATED: September 5, 2007.

By _____
AMY E. MARGOLIN

PROOF OF SERVICE

I, Elizabeth Carmichael, declare:

I am a resident of the State of California and over the age of eighteen years and not a party to the within-entitled action; my business address is Three Embarcadero Center, Seventh Floor, San Francisco, California 94111-4024. On September 5, 2007, I served the following document(s) described as:

ANSWER TO PETITION FOR REVIEW

- by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.
- by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California addressed as set forth below.
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- by placing the document(s) listed above in a sealed Federal Express envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a Federal Express agent for delivery.
- by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

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I am readily familiar with the firm's practice of collection and processing documents for delivery by Federal Express. Under that practice it would be deposited with a Federal Express facility on that same day with fees arranged to be paid in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at San Francisco, California on September 5, 2007.

Elizabeth Carmichael