

No. A120324
(Alameda County Super. Ct. No. RG 05-248721)

**IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE**

GLOBAL REACH INVESTMENT CORPORATION,
Plaintiff and Appellant,

v.

BURLINGAME INVESTMENT CORPORATION,
Defendant and Respondent.

Appeal From Post-Judgment Order Of The Superior Court
For The County Of Alameda
(Hon. Winifred Y. Smith, Presiding)

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INTRODUCTION

This case exemplifies why Civil Code Section 1717's prevailing party determination is committed to the sound discretion of the trial court; why it looks to substance rather than form; and why it embodies principles of equity.

A Panamanian corporation brought suit on eight promissory notes against the notes' alleged obligor, claiming that the notes were due and payable. Each note contains an attorney's fee clause. Under Code of Civil Procedure Section 1030, where a prevailing defendant would be entitled to recover its fees and costs, a foreign plaintiff must file an undertaking to secure the full anticipated amount of those fees and costs upon the defendant's showing of a "reasonable possibility" of prevailing. CODE CIV. PROC. §1030(b). If the foreign plaintiff does not do so, the action must be dismissed. The statute's purpose is to ensure that the successful defendant will not get left to shoulder its own attorney's fees and costs, due to the difficulty of chasing down the foreign plaintiff in some distant jurisdiction to collect them.

The defendant, Respondent Burlingame Investment Corporation ("BIC"), secured this protection. It demonstrated a reasonable possibility of defeating the plaintiff's claims, and obtained an order requiring the plaintiff to post a \$1 million bond. But the plaintiff declined to do so. Instead, the plaintiff tried to subvert the order by hastily forming a new, shell domestic subsidiary to which it then assigned the notes and its claims. The trial court declined to permit the subterfuge. After further heavily contested motion practice, it dismissed this case because the plaintiff posted no bond. In the interim, the plaintiff's shell subsidiary brought a second lawsuit on the notes, which is presently stayed. The trial court then determined that BIC had prevailed in this lawsuit and awarded it \$810,000 of its requested \$1.12 million in legal fees.

That ruling should be affirmed.

The plaintiff, Appellant Global Reach Investment Corporation ("Global Reach"), argues that the trial court's determination under

Section 1717 that BIC prevailed is wrong as a matter of law under *Estate of Drummond*, 149 Cal. App. 4th 46 (2007), because it was not a decision on the merits of Global Reach’s contract claims but just a “procedural” interim victory.

This misstates California law. But the Court does not need to consider just how far off the mark Appellant is, because *Drummond*, which upheld the denial of fees to the defense, is distinguishable in important respects. Not the least of which, it did *not* involve a situation in which “the statute of limitations would prevent a losing party from continuing with the litigation.” Appellant’s Opening Brief (“AOB”) 16. BIC showed below that this case does. It therefore exemplifies the very exception that *Drummond* recognizes. This appeal can and should be decided on this narrow ground alone. Global Reach tries to avoid this result by contending that the limitations period has not yet begun to run and, alternatively, by invoking the doctrine of equitable tolling. Both arguments are unavailing—for multiple reasons. *See* Part II, *infra*.

Second, even if a new action would not be time-barred as a matter of law, BIC was still the prevailing party as a matter of law. BIC obtained an unqualified dismissal of this lawsuit. Unlike in *Drummond*, the court issued no directive enabling Global Reach just to transfer its claims to another forum. *See* 149 Cal. App. 4th at 49, 52. It was a simple, unqualified victory that entitled BIC to recover its legal fees under controlling Supreme Court authority and the cases construing it. As those cases show, Section 1717 does not require a victory *on the merits*. *See* Part III, *infra*.

Third, at a minimum, even if the trial court could have concluded for any of the reasons discussed in *Drummond* that BIC was not the prevailing party, that does not mean it *had* to. Global Reach has ignored the standard of review. It is well-established that the trial court’s prevailing party determination under Section 1717 is discretionary. There was ample basis for the trial court to conclude, in the exercise of its broad discretion, that BIC obtained “greater relief” in this lawsuit than Global Reach did. *See* Part IV, *infra*.

STATEMENT OF FACTS

Global Reach is a Panamanian corporation, based in Hong Kong, that claimed to be the assignee of seven promissory notes issued by BIC many years ago to certain of its individual investors, and to be the holder of general powers of attorney as to the notes. *See* 1-Appellant's Appendix ("AA")-42-52.¹ Each note contains a provision entitling the payee to recover its attorney's fees and costs incurred in enforcing the note. *See* 1-AA-54-69.

Claiming that the notes were past due and payable, Global Reach filed this action against BIC on December 29, 2005, seeking a money judgment in excess of \$4 million, plus fees and costs. 1-AA-1-12; *see also* 1-AA-42-52. BIC's defenses included that it was not liable as the primary obligor on the notes; the notes were not due and payable despite their nominal terms; Global Reach had obtained them by fraud; and in any event payment of the notes was subordinated to other obligations. *See* 1-AA-92-97.

Issued over fifteen years ago to eight individual investors in Hong Kong, the notes related to a complicated set of California real estate transactions and business arrangements dating to the late 1980s among a still-larger group of Hong Kong investors. *See* 1-AA-84-90; Respondent's Appendix ("RA")-38-40 ¶¶5-10. These transactions and business arrangements were often only informally documented. Some key witnesses had died or were no longer available, while most of the surviving investors were located in Hong Kong and did not speak English. RA-55-56 ¶8. The relevant records—to the extent they still existed at all—were scattered across half the globe and in many instances were also in Chinese. RA-56 ¶8.

Given the complexity of the case and the long business history relevant to the notes, BIC's counsel spent considerable time familiarizing themselves with the facts, gathering and reviewing

¹Citations to Appellant's Appendix appear as [volume]-AA-[page(s)].

background materials, interviewing witnesses, and identifying and researching a plethora of potential legal defenses and other legal issues. RA-56-57 ¶¶9-10.

On January 10, 2007, BIC moved under Code of Civil Procedure Section 1030 to require Global Reach to file an undertaking in the amount of BIC's incurred and expected attorney's fees and costs. 1-AA-81-98.

Section 1030 requires such an undertaking when a defendant shows that the plaintiff is a foreign corporation, the defendant would be entitled to its attorney's fees and costs in the event it prevailed in the action, and there is a reasonable possibility it will prevail. *See* CODE CIV. PROC. §1030; 1-AA-90. Especially due to the third of these criteria, the work involved in preparing this motion was akin to that involved in a summary judgment motion: preparing detailed factual declarations (*eleven* of them) and thoroughly researching and briefing the legal and factual merits of Global Reach's claims and four of BIC's defenses. RA-60 ¶16; 1-AA-92-97. Global Reach strenuously resisted this motion, leading to extensive further work. *See* RA-60-61 ¶¶19-20; *see also* 1-AA-99-204; RA-67-70 (items 15-56).

The trial court found that there was indeed a reasonable possibility that BIC would prevail. 1-AA-205. It granted the motion and ordered Global Reach to post a \$1 million undertaking within thirty days or suffer dismissal. 1-AA-205-06.

Rather than comply with this order, Global Reach engaged in a flurry of maneuvers admittedly designed to evade it. In quick succession during the thirty-day grace period, it hastily formed a shell California subsidiary called Global Reach Collection, Inc. ("GRC") and purported to assign the notes and its claims to that entity. 2-AA-224-25 ¶¶4-5; 237-43. Global Reach told the court below that "[t]he formation of GRC and assignment of claims would have been unneeded if the Court had denied defendant's motion to post security" (3-AA-466), and that the assignment was an effort to "escape

the trap” of Section 1030. 3-AA-470.² Consistent with that objective, Global Reach filed a motion for leave to substitute GRC as the named plaintiff and amend the complaint accordingly. It also filed a motion for reconsideration of the order granting the undertaking. *See* RA-61 ¶20; 2-AA-213-21, 259-63. The premise of both motions was that the assignment to GRC made a California corporation the real party in interest and thus mooted the need for an undertaking. *See* 2-AA-219, 262, 351-53.

The transaction was highly dubious and, from all appearances, served no purpose but to transfer the claims from a foreign plaintiff required by law to post a \$1 million bond to a domestic subsidiary that was judgment-proof. GRC’s incorporator was one of Global Reach’s trial counsel in this litigation. 2-AA-240, 364 ¶1. Among other evidence BIC uncovered, GRC was a wholly-owned subsidiary of Global Reach (2-AA-300 ¶9; 321 (item 1))—meaning that Global Reach was GRC’s only shareholder and thus completely controlled it. The sole director and nominal President of GRC, a Bay Area podiatrist named Michael H. Choy, is a close business associate of Global Reach’s principal, Herman Kwai, and had been Global Reach’s local representative in pursuing its claims against BIC. 2-AA-302 ¶13; 321 (items 8, 10); *see* 2-AA-243 (signature blocks). According to Global Reach, GRC was formed for no purpose other than prosecuting the assigned claims against BIC and “helping to manage the collection and enforcement of any claims and interests that Global Reach has directly or indirectly” in certain BIC-related entities. 2-AA-321 (item 2); *but see* 2-AA-301-02 ¶12. GRC had no paid employees and no revenues (2-AA- 321 (items 4 and 5)), no meaningful physical presence in California,³ and its only assets were

²*See also* 3-AA-467 (“[t]he Court order triggered a chain of events leading to the establishment of GRC and the assignment of the claims”); 3-AA-468 (“if the Court had denied defendant’s motion to post security, [Global Reach] would not have had to take the steps to incorporate GRC [and] assign the claims . . .”).

³According to a perfunctory “Rental Agreement” produced by counsel, starting May 1 (*i.e.*, approximately three weeks after the
(continued . . .)

the claims and notes themselves (2-AA-321 (item 3)), for which it had paid nothing.⁴

BIC opposed both motions on the ground (among others) that the assignment was a sham, designed to evade the bond ruling *and* enable Global Reach to continue pursuing its claims through a judgment-proof alter ego subsidiary and thereby insulate itself from fee exposure. 2-AA-283; 3-AA-449, 459-62. Opposing both motions entailed considerable additional work, both factual and legal. *See* RA-61-62 ¶¶20-21; 2-AA-280-345, 423-30; 3-AA-445-63, 573-76. The trial court denied both motions.⁵ 2-AA-434-35; 3-AA-603-04.

Meanwhile, because the thirty-day grace period for posting the required bond had expired, BIC filed a motion to dismiss the action as provided in Section 1030(d). 2-AA-437-42; RA-62-63 ¶¶21-22.

(. . . continued)

April 12 bond ruling (*see* 1-AA-205)) GRC purportedly began paying monthly rent for unspecified “space” in a suite belonging to North Bay Foot and Ankle Medical Group, Inc., at 728 Pacific Avenue, San Francisco. 2-AA-301 ¶11; 324. There was no such entity listed on the directory for that building and no such entity registered with the California Secretary of State. 2-AA-303 ¶¶15-16. However, according to the directory, Mr. Choy’s podiatry office occupied a suite in that building. *Id.* ¶16. The monthly “rent” GRC was to pay under this nominal arrangement was the bargain-basement sum of \$150. 2-AA-324.

⁴The only “value” GRC gave Global Reach for the assignment consisted of 4,210,881 shares of its own common stock. 2-AA-321 (item 9). In other words, the only thing Global Reach got for assigning its claims to GRC was stock in the claims themselves.

Weeks later, in opposing dismissal, Global Reach belatedly sought to introduce evidence of what it characterized as the infusion of \$1.6 million in additional capital beyond the notes themselves (3-AA-502-04, 508-09), but the evidence was struck. 3-AA-641 (sustaining 3-AA-621 (item A.1), 627 (item 1)). BIC also demonstrated that, in any event, the assertion was wrong. *See* 3-AA-613-14; 3-AA-589-92.

⁵It stated no basis for denying the substitution motion. 2-AA-434-35. It denied the reconsideration motion because of Global Reach’s failure to demonstrate new facts or law together with a reasonable explanation for not having presented the new facts or law earlier. 3-AA-604.

This motion, too, was vigorously opposed and necessitated considerable further work. RA-62-63 ¶22; 3-AA-474-572, 581-602, 607-40.

In opposing dismissal, Global Reach did not contend that it was unable to post the required bond. *See* 3-AA-500-06. It maintained only that the need for a bond had been mooted by its tactical maneuverings. *See* 3-AA-501; 2-AA-262.⁶

Two days before the hearing on the dismissal motion, GRC filed a substantively identical, new action in Alameda County Superior Court, attempting to perpetuate these claims on its own. RA-62-63 ¶22; Appellant’s Request For Judicial Notice, filed May 7, 2008 (“Appellant’s RJN”) Ex. A⁷; *see also* 3-AA-641.

On June 13, 2007, the court granted BIC’s motion and dismissed this lawsuit.⁸ 3-AA-641. Thereafter, BIC moved for recovery of its attorney’s fees under Civil Code Section 1717, requesting \$1.12 million in fees. RA-50-51; 4-AA-797. At the hearing, the trial court thoughtfully considered the prevailing party issue (*see* RT (9/1/07) 1-13) and acknowledged the complexity of the matters that led to BIC’s victory. *See id.* at 19-20. It granted the motion, found that BIC “is the prevailing party” under Civil Code Section 1717 and awarded BIC \$810,000 of its requested \$1.12 million in attorney’s fees. 4-AA-850-51.

⁶After-the-fact, in its brief opposing the fee motion, Global Reach stated that it had been “unable” to post the bond within the court-ordered deadline. 4-AA-685, 688. But there is no such evidence; it had never asserted this before the case was dismissed; and the trial court struck this unfounded assertion from its papers. RA-76 ¶2(b); RA-81 (item B.2); 4-AA-866. Moreover, in earlier papers it admitted that it just did not want to “tie up funds it need[ed]” and so, instead, assigned the notes and claims to GRC to try to avoid furnishing a bond. 2-AA-352. In other words, it *had* the money.

⁷BIC does not oppose Appellant’s Request For Judicial Notice, but notes that Exhibits B and C are already in the record. *See* 4-AA-700-53, 755-56.

⁸Global Reach’s appeal of the dismissal was dismissed as untimely. *See* RA-83; *Global Reach Inv. Corp. v. Burlingame Inv. Corp.*, No. A118969, 2008 WL 353217 (Cal. Ct. App. Feb. 11, 2008) (unpublished).

This appeal followed. 4-AA-870.

ARGUMENT

I.

THE TRIAL COURT'S DETERMINATION THAT BIC PREVAILED CANNOT BE OVERTURNED UNLESS IT IS A CLEAR ABUSE OF DISCRETION.

Global Reach misstates the standard of review. It maintains that the trial court's prevailing party determination under Section 1717 should be reviewed independently as a question of law (AOB 8), but the authority it cites did not involve this issue.⁹ Global Reach's position has been rejected. *Jackson v. Homeowners Ass'n Monte Vista Estates-East*, 93 Cal. App. 4th 773, 788-89 (2001).

It is well-established that “[t]he trial court exercises a particularly ‘wide discretion’ in determining who, if anyone, is the prevailing party for purposes of section 1717(a). To overturn that determination on appeal, the objecting party must demonstrate ‘a clear abuse of discretion.’” *Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC*, 162 Cal. App. 4th 858, 894 (2008) (citations omitted); *see, e.g., Christensen v. Dewor Devs.*, 33 Cal. 3d 778, 786 (1983). Numerous cases recognize the trial court's discretion in this area (*see, e.g., Sears v. Baccaglio*, 60 Cal. App. 4th 1136, 1158 (1998); *Nasser v. Superior Court*, 156 Cal. App. 3d 52, 59 (1984); *Smith v. Krueger*, 150 Cal. App. 3d 752, 756-57 (1983))—including *Drummond*. *See Drummond*, 149 Cal. App. 4th 46, 51 (2007).¹⁰

⁹The issue reviewed independently in *Salawy v. Ocean Towers Housing Corp.*, 121 Cal. App. 4th 664 (2004), was whether the lawsuit was an “action . . . to enforce the governing documents” within the meaning of Civil Code Section 1354(f), another fee-shifting statute. *See id.* at 669-74.

¹⁰Although a recent decision says review is *de novo* (*Pueblo Radiology Med. Group, Inc. v. Gerlach*, 163 Cal. App. 4th 826, 828 (2008)), its result is consistent with abuse of discretion review. The case affirmed an award of fees to defendants who obtained an unqualified victory on the only contract claim brought against them. *See id.* at (continued . . .)

II.

BECAUSE ANY NEW ACTION ON THE NOTES WOULD BE TIME-BARRED, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN CONCLUDING THAT BIC PREVAILED WHEN THIS ACTION WAS DISMISSED.

Global Reach contends the fee award must be reversed because “[a] dismissal based on a procedural issue does not entitle a prevailing party to an award of attorney’s fees” under Section 1717. AOB 1; *see also* AOB 12-13 (similar). That is not the law. The trial court’s ruling is consistent with both the statute’s literal language and the cases construing it, as we demonstrate elsewhere. *See* Parts III and IV, *infra*.

But we start with a point on which both parties agree, because it provides a much narrower ground for decision, thus avoiding any need for the Court to consider the issues discussed in Parts III and IV. That is, the very decision that Global Reach cites as ostensibly requiring reversal, *Estate of Drummond*, 149 Cal. App. 4th 46 (2007), recognizes that trial courts have discretion under Section 1717 to award fees to the defendant when a lawsuit is dismissed without prejudice *if a new action on the same claims would be time-barred*. That principle applies here.¹¹

(. . . continued)

827. In that circumstance, the trial court had no discretion to deny fees. *See* pp.18-19, *infra*.

¹¹We encourage the Court to decide the appeal on this narrow ground if it agrees with the arguments that follow. This statute of limitations question is squarely presented by the case law, was raised below (4-AA-791-92), and has been briefed by Appellant. In addition, Global Reach’s pursuit of these claims has consumed considerable judicial resources already and caused BIC to incur enormous legal fees, of which the \$810,000 at issue here is only a part. A ruling by this Court that these claims are time-barred could foreclose the second, duplicative lawsuit that its assignee GRC has filed.

A. Global Reach Concedes That The Trial Court Had The Discretion To Decide BIC Prevailed If A New Action On The Notes Would Be Time-Barred.

Estate of Drummond, 149 Cal. App. 4th 46 (2007), affirmed the denial of fees under Section 1717 to defendants who defeated a contract claim merely on the ground that the claim should be brought against them in another action already pending between the same parties. *Id.* at 54. But *Drummond* also qualified its decision as follows:

We can conceive of cases where a party obtaining a dismissal of contract claims on purely procedural grounds might be found to have prevailed on the contract, even though the dismissal was without prejudice, because the plaintiff has no other means to obtain relief under the contract. Thus it might be shown that litigation in the proper forum would entail greater expense, inconvenience, or risk than the plaintiff was willing to hazard, *or that a new suit wherever brought would be subject to a bar such as the statute of limitations.* (*Id.* at 53 (emphasis added))

Global Reach concedes that under *Drummond*, “a party may be determined to have prevailed on the contract if the statute of limitations would prevent a losing party from continuing with the litigation.” AOB 16. Global Reach asserts this is *dictum*, but does not argue it is an incorrect statement of law. Rather, it argues only that this “possible exception” does not apply because the statute of limitations had not expired by the time its assignee, GRC, initiated a second lawsuit to collect on the notes. *See* AOB 2-3, 6, 16-24. As next explained, Global Reach is wrong: that new action is time-barred. So under *Drummond* itself, this fee award was proper.

B. Global Reach Did Not Challenge BIC’s Showing Below That A New Action Would Be Time-Barred.

As Global Reach acknowledges, BIC “asserted in the lower court that the statute of limitations barred the second action.” AOB 16; *see also* 4-AA-791-92.

Specifically, BIC showed in support of its fee motion that, taking into account the notes’ due date and a four-year tolling

agreement between the parties, the statute of limitations was merely twenty-eight days from expiring by the time Global Reach filed this collection action on December 29, 2005 and that, as a result, any renewed claim on the notes filed after January 26, 2006 would be untimely. *See* 4-AA-791; 1-AA-1.¹² This of course would include the second action, which was not filed until June 11, 2007. 4-AA-755:22-24; *see also* Appellant’s RJN Ex. A.

Global Reach did not contest this below. The trial court did not address the statute of limitations in its written ruling, but is presumed to have ruled in BIC’s favor. *See Denham v. Superior Court*, 2 Cal. 3d 557, 564 (1970); *Drummond*, 149 Cal. App. 4th at 54.

Having acquiesced below on this point, Global Reach now raises two new arguments in an effort to avoid the statute of limitations. As explained in the next sections, neither one succeeds.

C. The Fact That, In Moving For A Bond, BIC Asserted As An Alternate Defense That The Notes Were Not Yet Due Does Not Avoid The Time Bar.

Global Reach argues that “[t]his Court should not entertain a statute of limitations claim” because BIC argued that the notes were not yet due when it moved for an order requiring Global Reach to post a bond. AOB 16 (citing 1-AA-93-95). Therefore, Global Reach argues, “since the Notes were not yet due,” the statute of limitations “has not yet begun to run.” AOB 16. Global Reach is wrong, for several reasons.

First, this issue is not cognizable. It has been doubly waived: first, because it was not raised below (*see Premier Med. Mgmt. Sys., Inc. v. California Ins. Guarantee Ass’n*, 163 Cal. App. 4th 550, 564 (2008)), and, second, because the assertion is just conclusory. Global Reach cites no legal authority and provides no reasoned

¹²On further reflection, even that assessment was conservative. The four-year tolling agreement applies only if claims are filed by December 31, 2005. *See* 1-AA-38-41. Thus, its benefits are lost if claims are filed on or after January 1, 2006.

argument as to *why* BIC's position on the bond motion would allow Global Reach to re-file its collection action at this late date. That is a waiver. *See People ex rel. 20th Century Ins. Co. v. Bldg. Permit Consultants, Inc.*, 86 Cal. App. 4th 280, 284 (2000) (discussion that is "conclusory and fails to cite any authority to support the claim . . . amounts to an abandonment of the issue"); *Perlin v. Fountain View Mgmt., Inc.*, 163 Cal. App. 4th 657, 667 n.11 (2008); *Aviel v. Ng*, 161 Cal. App. 4th 809, 821 (2008); *accord, Horowitz v. Noble*, 79 Cal. App. 3d 120, 138-39 (1978). When opposing BIC's fee motion, Global Reach also told the trial court that the notes "were due and owing" when this case was filed in December 2005. 4-AA-683; *see also* 4-AA-684 (asserting that "the Promissory Notes are due and owed"). So any error by the trial court in concluding otherwise would be invited. *See Geffcken v. D'Andrea*, 137 Cal. App. 4th 1298, 1312 (2006); *see Howard S. Wright Constr. Co. v. BBIC Investors, LLC*, 136 Cal. App. 4th 228, 239-40 (2006).

Second, and more fundamentally, Global Reach's argument begs the question. Global Reach brought this collection action alleging that the notes *are* past due.¹³ *Those* contract claims were dismissed (3-AA-641) and, as demonstrated above, they are now time-barred. Global Reach thus "has no other means to obtain relief" on those contract claims. *Drummond*, 149 Cal. App. 4th at 53. So BIC has definitively prevailed on them. The only significance of the fact that the notes might not yet be due is that it would mean that the notes' owners might *later* have a basis to bring a collection action *if* the notes are not timely paid in the future when they come due. But those would be different contract claims, based on a different theory, different facts and a different breach. It would not

¹³*See* 1-AA-45 ¶7 ("the time for payment of each note [was extended] to December 31, 1997"); 1-AA-47 ¶12 ("To date, BIC has failed to make any payment of principal or interest with respect to each of the promissory notes despite demand therefor"); 1-AA-47-51 ¶¶15, 18, 21, 24, 27, 30, 33, 36 (specifying amounts "currently due from BIC to Global Reach" on each of the notes); 1-AA-52 (damages prayer).

detract from the fact that the only contract claims *asserted in this case* have been dismissed and cannot be revived.

Finally, and in all events, nothing litigated in connection with the bond motion determined anything of substantive consequence. In requesting a bond, BIC did argue that there was a reasonable possibility that the notes were not yet due. 1-AA-93-95. But this was just one of *four* reasons BIC argued it had a “reasonable possibility” of prevailing in this lawsuit (*see* 1-AA-92-97), which is all that was required to obtain a bond. CODE CIV. PROC. §1030(b). Global Reach *disputed* this argument. *See* 1-AA-105. In ordering a bond, the trial court did not say whether it agreed that there was some chance the notes were not presently due—much less that, in fact, they were not. *See* 1-AA-206. Global Reach conceded this later when it opposed the fee motion, acknowledging that “at no point in the litigation, or as part of the Court’s ruling on any of the motions involving the [Section] 1030 undertaking, did the Court make factual findings in favor of [this] defense[.]” 4-AA-689. But even if the trial court had made such findings on the bond motion, that would not mean the notes were *in fact* not yet due. Code of Civil Procedure Section 1030 states that “[t]he determinations of the court under this section have no effect on the determination of any issues on the merits of the action” CODE CIV. PROC. §1030(f).

Even Global Reach acknowledged below that BIC’s argument in the bond motion was no obstacle to a statute of limitations defense. It told the court that, “inconsistent pleading is permitted to let Defendant raise the [statute of limitations] defense if GRC files a separate lawsuit.” 3-AA-472. It was right. *See generally* 1 A.T. SCHWING, CALIFORNIA AFFIRMATIVE DEFENSES §1:3 (2007). This statute of limitations bar was the very reason Global Reach urged the trial court to reconsider the order requiring a bond and not dismiss the case. *See* 3-AA-472, 505.

D. The Doctrine Of Equitable Tolling Is Inapplicable As A Matter Of Law But, If Not, Has Been Waived.

Next, Global Reach argues that any statute of limitations defense to the second action would be barred by the doctrine of equitable tolling. AOB 17-24. Here too it is incorrect.

Equitable tolling applies only in “carefully considered situations to prevent the unjust technical forfeiture of causes of action, where the defendant would suffer no prejudice.” *Lantzy v. Centex Homes*, 31 Cal. 4th 363, 370 (2003); accord, *Addison v. State*, 21 Cal. 3d 313, 316 (1978) (equitable tolling applies “occasionally and in special situations”). Most often, as in the cases Global Reach cites, it applies when the plaintiff has multiple potential remedies in different forums and, within the limitations period, diligently pursues one in good faith that turns out to be unfruitful. See *Addison*, 21 Cal. 3d at 317-21 (claim pursued in federal court but dismissed for lack of jurisdiction); *Elkins v. Derby*, 12 Cal. 3d 410, 414-20 (1974) (worker’s compensation claim); *Marcario v. County of Orange*, 155 Cal. App. 4th 397, 407-09 (2007) (internal grievance procedure); *Collier v. City of Pasadena*, 142 Cal. App. 3d 917, 923-34 (1983) (worker’s compensation claim); see also, e.g., *Prudential-LMI Commercial Ins. v. Superior Court*, 51 Cal. 3d 674, 687-93 (1990) (insurance claims reporting process). Among other things, the doctrine “avoids the hardship upon plaintiffs of being compelled to pursue simultaneously several duplicative actions on the same set of facts.” *Collier*, 142 Cal. App. 3d at 926.

The doctrine does *not* apply when the plaintiff’s only potential remedy is to bring suit in Superior Court, as in this case. See *Wood v. Elling Corp.*, 20 Cal. 3d 353, 360 n.4 (1977); *Martell v. Antelope Valley Hosp. Med. Ctr.*, 67 Cal. App. 4th 978, 985 (1998). “[A] party cannot deduct from the period of the statute of limitations . . . the time consumed by the pendency of an action in which he sought to have the matter adjudicated, but which was dismissed without prejudice to him.” *Wood*, 20 Cal. 3d at 359 (citation omitted). The only narrow exception—inapplicable here—is if an initial, timely filed action in Superior Court is *erroneously* terminated due to

judicial error *and* the defendant engaged in dilatory tactics during that first lawsuit. This was the situation in *Bollinger v. National Fire Insurance Co.*, 25 Cal. 2d 399 (1944) (discussed AOB 20-21), and the Supreme Court has since made clear that *Bollinger* is limited to its facts. *See Wood*, 20 Cal. 3d at 361-62; *Lantzy*, 31 Cal. 4th at 379 (in *Bollinger*, first action “was dismissed, after the limitations period had expired, on a false technicality urged by the insurer”).

Moreover, even if equitable tolling could apply to successively filed suits in the same forum, it is not a “get-out-of-jail-free” card for tactical choices, neglect or miscalculation. It only “suspend[s] or extend[s] a statute of limitations as necessary to ensure fundamental practicality and fairness.” *Lantzy*, 31 Cal. 4th at 370 (citation omitted). When a lawsuit is timely filed in Superior Court but then dismissed and re-filed outside the limitations period, there is no tolling if dismissal of the first suit could have been avoided. In that situation, the plaintiff flunks the requirements of both diligence *and* good faith. *See, e.g., Wood*, 20 Cal. 3d at 357, 361-62 (equitable tolling inapplicable following dismissal for failure timely to serve summons); *Tannhauser v. Adams*, 31 Cal. 2d 169, 177-78 (1947) (dismissal for want of prosecution); *Thomas v. Gilliland*, 95 Cal. App. 4th 427, 434-35 (2002) (voluntary dismissal); *Hu v. Silgan Containers Corp.*, 70 Cal. App. 4th 1261, 1269-70 (1999) (complaint voided because plaintiff failed timely to pay filing fees); *Martell*, 67 Cal. App. 4th at 985 (voluntary dismissal). “[T]he fact that the plaintiff is left without a judicial forum for resolution of the claim must be attributable to forces *outside* [its] control” *Hull v. Cent. Pathology Serv. Med. Clinic*, 28 Cal. App. 4th 1328, 1336 (1994) (emphasis added; citation omitted); *accord, Gordon v. Law Offices of Aguirre & Meyer*, 70 Cal. App. 4th 972, 980 n.8 (1999); *California Standardbred Sires Stakes Comm., Inc. v. California Horse Racing Bd.*, 231 Cal. App. 3d 751, 759 (1991).

In this case, all Global Reach had to do to avoid dismissal—and thus the limitations bar—was post the required bond. Yet it declined to do so. Far from it being equitable to relieve Global

Reach (and its assignee, GRC) of the statute of limitations, it would be the height of inequity. Its “predicament at being unable to file another complaint is of [its] own making” *Martell*, 67 Cal. App. 4th at 985-86.

The alternative Global Reach chose to pursue is all the more reason equitable tolling does not apply. Rather than post the security to which BIC was statutorily entitled, Global Reach instead tried to deprive BIC of this protection. It admittedly tried to “escape” Section 1030 by assigning the notes and claims to its newly formed subsidiary, GRC (3-AA-470), claiming this mooted the need for a bond. 2-AA-262. Fully aware that GRC would face a “potential statute of limitations” problem if it filed suit anew, Global Reach tried to persuade the trial court to reconsider the bond ruling. 3-AA-472. That failed. 3-AA-604. Following these maneuvers, GRC commenced a second lawsuit outside the limitations period. 4-AA-755. That is procedural gamesmanship, not good faith conduct. *See Mitchell v. Frank R. Howard Mem’l Hosp.*, 6 Cal. App. 4th 1396, 1407-08 (1992) (equitable tolling “is certainly not available to a plaintiff who engages in the procedural tactic of moving the case from one forum to another in the hopes of obtaining more favorable rulings”); *accord, Hernandez v. City of El Monte*, 138 F.3d 393, 401-02 (9th Cir. 1998) (judge shopping); *see also Thomas*, 95 Cal. App. 4th at 434-35 (no tolling where action was voluntarily dismissed to avoid trial scheduling conflict and re-filed same day); *Estate of Blue v. County of Los Angeles*, 120 F.3d 982, 984-85 (9th Cir. 1997) (no tolling where plaintiff “created this problem by its procedural maneuvering”). The fact that Global Reach sought to substitute an apparently *judgment-proof* plaintiff for itself (*see pp.4-6, supra*) is only further proof of Global Reach’s bad faith.

On top of all this, the only reason Global Reach did not *timely* commence suit through the attempted vehicle of a domestic subsidiary is because its lawyers “did not have the foresight to think of this alternative” sooner. 3-AA-468; *see also 2-AA-352* (asserting that “GR could have assigned the promissory notes to GRC, had it been

in existence when the action was filed”); 2-AA-224 ¶4 (advice of counsel). Regardless whether that stratagem might otherwise have succeeded (a question not at issue here), that is not a reasonable excuse for delay. *See Bonifield v. County of Nevada*, 94 Cal. App. 4th 298, 306 (2001) (“attorney neglect does not satisfy the standard of reasonableness and special circumstances required by California’s equitable tolling doctrine”); *cf. Gutierrez v. Mofid*, 39 Cal. 3d 892, 902 (1985) (limitations period is not “delayed, suspended or tolled” when plaintiff delays filing suit due to poor legal advice).

Assuming for argument’s sake that equitable tolling could apply, Global Reach also is wrong that BIC “cannot assert any prejudice” if GRC were permitted to pursue a time-barred claim. AOB 22. When filed, this case had at most twenty-eight days remaining before the limitations period expired (as already contractually tolled). *See* pp.10-11, *supra*. Then, by mutual agreement, there was only limited discovery while the case was pending.¹⁴ The claims date back to notes issued to a group of Hong Kong investors more than fifteen years ago, in the early 1990s. 1-AA-43-45 ¶6. By the time this lawsuit was served slightly over two years ago, some key witnesses already had died¹⁵ or were no longer available, and the relevant records—to the extent they still existed at all—were scattered across half the globe. *See* RA-56 ¶8. At least four of the surviving noteholders are now in their sixties. *See* RA-3 ¶1; 9 ¶1; 13 ¶1; 30 ¶1. Self-evidently, the memories of surviving percipient witnesses are stale, and fading by the day. Meanwhile, any paper trail is an even poorer substitute than in the ordinary case, because the

¹⁴By agreement, discovery was largely stayed for many months, initially to facilitate settlement discussions and then because of the bond motion. *See* 2-AA-303-04 ¶¶17-18, 340-45. Although some limited written discovery was exchanged, and Global Reach commenced the deposition of BIC’s president, *BIC deposed nobody*. 2-AA-223-24 ¶3 & n.1.

¹⁵This includes one of the two lead Hong Kong investors, Chan Dang, and another of the original noteholders, Ng Ting Chung. RA-38-39 ¶¶3-5; 48 ¶40.

transactions to which the notes relate often were only informally-documented. RA-55-56 ¶8. This situation doesn't remotely compare to the facts of cases such as *Addison*, *Elkins* and *Collier* that Global Reach cites.

But regardless of prejudice, equitable tolling is inapplicable under the foregoing authorities as a matter of law. The Court therefore can reach this issue and should do so, for the reasons previously discussed. If the Court is unable to decide this question as a matter of law, however, then it should not be deferred as Global Reach suggests (AOB 24) but, rather, it would be waived because Global Reach did not raise it below. *See Thompson v. California Fair Plan Ass'n*, 221 Cal. App. 3d 760, 766 (1990); *Dowell v. County of Contra Costa*, 173 Cal. App. 3d 896, 902-03 (1985); *Sierra Club, Inc. v. California Coastal Comm'n*, 95 Cal. App. 3d 495, 503 (1979).

III.

THE TRIAL COURT HAD NO DISCRETION TO DETERMINE THAT BIC WAS NOT THE PREVAILING PARTY.

Even if the Court could not affirm the fee award under *Drummond* itself on the ground that any new action was time-barred, the award still must be affirmed. Far from being compelled as a matter of law to deny BIC's fee request, the trial court was compelled as a matter of law to grant it.

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." *Hsu v. Abbara*, 9 Cal. 4th 863, 876 (1995); *see also Christensen v. Dewor Devs.*, 33 Cal. 3d 778, 786 (1983). Only when the litigation results are "mixed"—that is, when the results are not "purely good news for one party and bad news for the other"—does the trial court have discretion to decide who prevailed. *Hsu*, 9 Cal. 4th at 875-76 (citations omitted). Here, BIC obtained an unqualified dismissal of this lawsuit. As a matter of law, it prevailed:

The most . . . any . . . civil defendant . . . ordinarily can hope to achieve is to have the plaintiff's claim thrown out completely. This is exactly what happened here. . . . In any practical sense of the word, the defendant "prevailed." (*Elms v. Builders Disbursements, Inc.*, 232 Cal. App. 3d 671, 674-75 (1991) (citation omitted))

Global Reach's position, that Section 1717 requires a determination on the merits of a contractual dispute and that "procedural" dismissals cannot suffice (AOB 1, 12-13), is not the law.

First, it is inconsistent with the statute's plain language. Section 1717 authorizes an award of fees to "the party who is determined to be the party prevailing on the contract." CIV. CODE §1717(a). With limited exceptions, Section 1717 defines the phrase "party prevailing on the contract," as "the party who *recovered a greater relief in the action* on the contract" and directs the trial court to "determine who is the party prevailing on the contract . . . *whether or not the suit proceeds to final judgment.*" CIV. CODE 1717(b)(1) (emphases added). So to qualify as a prevailing party, a defendant need only "recover[] a greater relief in the action," not obtain a "final judgment." CIV. CODE §1717(b)(1).¹⁶ A dismissal without prejudice is indeed a form of "relief." Moreover, by negative implication, Section 1717 applies to all involuntary dismissals: the only exceptions to the definition of "prevailing party" it enumerates are voluntary dismissals and dismissals pursuant to a settlement. *See* CIV. CODE §1717(b)(2); *Sierra Club v. State Bd. of Forestry*, 7 Cal. 4th 1215, 1230 (1994) (maxim of *expressio unius est exclusio alterius*). In addition, by disclaiming the need for a "final judgment," the Legislature intended to allow defendants to recover their fees without an adjudication on the merits. *See Hsu*, 9 Cal. 4th at 873.¹⁷

¹⁶Ignoring the statute's definition of the phrase "party prevailing on the contract," Global Reach stresses the phrase itself in isolation. AOB 10. But the phrase itself is meant only to "emphasize that the determination of prevailing party . . . was to be made without reference to the success or failure of noncontract claims." *Hsu*, 9 Cal. 4th at 873-74.

¹⁷Global Reach points to *Hsu*'s statement that "[t]he prevailing
(continued . . .)

Global Reach also ignores a wide body of case law interpreting and applying Section 1717. For example, in *Elms*, the case had been dismissed for failure to prosecute. 232 Cal. App. 3d at 672-73. *Elms* held that the defendant had prevailed as a matter of law under Section 1717 despite there having been no merits determination. *Id.* at 674-75; *see also, e.g., Wong v. Thrifty Corp.*, 97 Cal. App. 4th 261, 265 (2002). As in this case, the dismissal was without prejudice. *See Franklin Capital Corp. v. Wilson*, 148 Cal. App. 4th 187, 214-15 (2007); CODE CIV. PROC. §581(b)(4). In *Hsu v. Abbara*, the Supreme Court cited *Elms* as an example of the situation in which a “defendant is the party prevailing on the contract under section 1717 as a matter of law.” *Hsu*, 9 Cal. 4th at 876. It is impossible to square the Court’s endorsement of *Elms* with the position that a defendant *cannot* prevail under Section 1717 if it has achieved only a procedural dismissal and not a victory on the merits. BIC pointed this out below (4-AA-789); it is surprising that Global Reach ignores it.¹⁸

Elms is no outlier. There are many cases—all of them ignored by Global Reach—in which “courts have awarded attorney fees to a

(. . . continued)

party determination is to be made only upon final resolution of the contract claims . . .” (AOB 11; *Hsu*, 9 Cal. 4th at 876), but it is evident the Court meant only that the immediate lawsuit itself must be finally over. It cited *Bank of Idaho v. Pine Avenue Associates*, 137 Cal. App. 3d 5, 15 (1982), which held that a plaintiff did not prevail under Section 1717 merely by succeeding on appeal in overturning the dismissal of its lawsuit and getting the action reinstated. *Bank of Idaho* reasoned that “until *the litigation* is finally disposed of” it was premature to decide which side had won. *Id.* at 15 (emphasis added); *see also id.* at 16 (the parties’ net success “cannot be ascertained until the final termination of *the suit*”) (emphasis added).

¹⁸Below, Global Reach argued that the dismissal in *Elms* was a “final determination” because the “deadline to bring suit could not be extended by the Court except as provided by statute,” citing Section 583.360(b) of the Code of Civil Procedure. 4-AA-690. If it makes the same argument in its reply brief, it would be mistaken. A dismissal for failing to bring a case to trial within five years is without prejudice (*see* CODE CIV. PROC. §581(b)(4)) and thus does not preclude the plaintiff from *re-filing*.

party obtaining an appealable order or judgment in a discrete legal proceeding” despite the possibility of continued litigation on the merits. *Otay River Constructors v. San Diego Expressway*, 158 Cal. App. 4th 796, 807 (2008). For example, in *Christensen v. Dewor Devs.*, 33 Cal. 3d 778 (1983), the plaintiff filed suit but later dismissed without prejudice and instead filed a petition to have its contract claims arbitrated. *Id.* at 780-81. The petition to compel arbitration was denied, thus concluding that proceeding. *Id.* at 781. Even though the underlying contractual dispute was still outstanding, the Supreme Court held that the defendant was entitled to its legal fees under Section 1717 as a matter of law. *See id.* at 786; *accord*, *Otay River Constructors*, 158 Cal. App. 4th at 808 (defendant who defeated petition to compel arbitration held prevailing party; “[t]he fact that the parties will probably pursue these claims in another action does not lessen [defendant’s] victory in this discrete legal proceeding”). Cases involving dismissals or similar dispositions on procedural grounds are to the same effect. *See Profit Concepts Mgmt., Inc. v. Griffith*, 162 Cal. App. 4th 950, 956 (2008) (defendant who successfully moved to quash service of summons for lack of personal jurisdiction is prevailing party, notwithstanding plaintiff’s commencement of another action against defendant in another state); *Carroll v. Import Motors, Inc.*, 33 Cal. App. 4th 1429, 1437 (1995) (defendants held prevailing parties where complaint was dismissed because it should have been filed as a compulsory cross-complaint in other pending action, and “[plaintiff’s] recourse lies in moving to file a compulsory cross-complaint in the [other] action”); *Cole v. BT & G, Inc.*, 141 Cal. App. 3d 995, 997-99 (1983) (defendant who succeeded in vacating a confession of judgment entitled to fees despite fact that separate action was pending on the agreement and note).¹⁹

¹⁹*Cole* was construed narrowly in *Estate of Drummond*. *See Drummond*, 149 Cal. App. 4th at 53 (“Given the narrowness of its analysis, it is perhaps not surprising that the *Cole* decision has never been followed by a California court”). But it has continuing vitality outside of its facts. Cases decided after *Drummond* continue to rely on
(continued . . .)

As these cases show, the defendant *is* the prevailing party when an action or other proceeding is dismissed or otherwise concluded in its favor on procedural grounds, despite the possibility (or fact) of continued litigation on the merits. The trial court has no discretion to *deny* fees in this circumstance. *See, e.g., Christensen*, 33 Cal. 3d at 786 (reversing denial of fees); *Otay River Constructors*, 158 Cal. App. 4th at 808 (same); *Elms*, 232 Cal. App. 3d at 675-76 (same); *Cole*, 141 Cal. App. 3d at 999-1000 (same).

Estate of Drummond, 149 Cal. App. 4th 46 (2007), is not to the contrary. *Drummond* upheld the denial of fees under Section 1717 to defendants who secured the dismissal of a petition filed against them in probate court that should have been brought against them as a compulsory cross-complaint in a civil action that was already pending between the same parties. Although *Drummond* technically involved a dismissal, as a practical matter the plaintiff was merely directed to change venue: when the Court of Appeal ordered the dismissal of the plaintiff's petition, it "explicitly recogniz[ed] and expect[ed] that the controversy could proceed to a judgment on the merits in the civil suit" (*id.* at 52) and the controversy did so. *Id.* at 49; *see also Otay River Constructors*, 158 Cal. App. 4th at 807 (dismissal in *Drummond* "simply moved [the] action to another forum"). The Court of Appeal likened the disposition to "the sustaining of a plea in abatement on grounds that an action on the same subject matter was already pending in another forum." 149 Cal. App. 4th at 52. A plea in abatement "is essentially a request—not that an action be terminated—but that it be *continued* until such time as there has been a disposition of the first action." *Shuffer v. Bd. of Trustees*, 67 Cal. App. 3d 208, 217 (1977) (emphasis added); *see also* CODE CIV. PROC. §597. Because of this peculiar procedural posture, the parties in *Drummond* "could each legitimately claim some success in the litigation," and so the court had discretion to conclude that neither

(. . . continued)

it. *See Otay River Constructors*, 158 Cal. App. 4th at 807; *Zagami, Inc. v. James A. Crone, Inc.*, 160 Cal. App. 4th 1083, 1097 (2008).

party prevailed. *Hsu*, 9 Cal. 4th at 875. Thus, despite some broad language (*see* AOB 14), *Drummond*'s holding is quite narrow: it recognizes the trial court's discretion to find no prevailing party when a contract claim is merely transferred to another forum where another action is already pending between the same parties. *Drummond* does not even hold that the trial court *must* so find.²⁰ It did not involve an unqualified involuntary dismissal, as this case did. *See Hsu*, 9 Cal. 4th at 877. It does not compel reversal. *See Covenant Care, Inc. v. Superior Court*, 32 Cal. 4th 771, 790 n.11 (2004) ("It is axiomatic that an unnecessarily broad holding is 'informed and limited by the fact[s]' of the case in which it is articulated") (citation omitted).

Finally, Global Reach's position is at odds with the purpose of Section 1717 and it is illogical. Had Global Reach prevailed in this lawsuit, it would have been entitled to recover its legal fees. Denying BIC its legal fees after having secured dismissal in its favor would make the notes' fee clauses unfairly one-sided. It would give only the *plaintiff* the unconditional right to recover its fees in the event of victory in this action. This would disserve the mutuality principle of Section 1717. *See Reynolds Metals Co. v. Alperson*, 25 Cal. 3d 124, 129 (1979). Moreover, if the Legislature meant to preclude an award of fees for a "procedural victory" that does not definitively foreclose the plaintiff from pursuing its claims in another forum, it would give plaintiffs a free pass on the defendant's dime by making it virtually impossible for a defendant to recover its fees should the plaintiff, rather than re-file, just pack up and go

²⁰A portion of the opinion, cited extensively in the Opening Brief, addresses what the Court called a "straw man" argument by the appellant: that the trial court had considered itself "powerless" to award fees under the circumstances. *Drummond*, 149 Cal. App. 4th at 51-53. The Court said it was "far from convinced" that the appellant's criticisms of that imputed ruling were sound. *Id.* at 51. It then said "even accepting appellants' premise that the court below had the power to award fees . . . [w]e think the interim nature of appellants' success provided a sound basis for a *discretionary* finding that neither party prevailed on the contract," and affirmed on that basis. *Id.* at 54 (emphasis added).

home. Any plaintiff could force a defendant to spend a king's ransom in litigation, only to suffer a dismissal without prejudice (or an order quashing service of summons, or any similar disposition), and then avoid a fee award merely by taking the position that it was still considering its options and might yet pursue the defendant. That would be absurd.

IV.

EVEN IF NOT COMPELLED AS A MATTER OF LAW, THE TRIAL COURT'S DETERMINATION THAT BIC WAS THE PREVAILING PARTY WAS WITHIN ITS BROAD DISCRETION.

In all events, even if BIC was not the prevailing party as a matter of law, the trial court's determination that BIC prevailed was not an abuse of discretion.

In deciding whether any party prevailed, "the trial court is to compare the relief awarded on the contract claim or claims with the parties' demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements and similar sources." *Hsu*, 9 Cal. 4th at 876. In exercising this discretion, the trial court "should respect substance rather than form" and to that extent, be "guided by 'equitable considerations.'" *Id.* at 877; *see also Sears v. Baccaglio*, 60 Cal. App. 4th 1136, 1150-51 (1998).

There was ample basis for the court to conclude that BIC recovered "greater relief in the action" than Global Reach. CIV. CODE §1717(b)(1). Even though the dismissal of this action technically did not preclude Global Reach from bringing suit against BIC again, "there is more to section 1717 than a merely mechanical determination of the form of a particular judgment." *Sears*, 60 Cal. App. 4th at 1154. Not only did BIC get the case dismissed—a victory by any reasonable measure—but it secured a definitive ruling that Global Reach cannot pursue these claims unless it comes forward with a sizable bond. 1-AA-205-06. That is a powerful deterrent to suit. It was one of BIC's primary "litigation objectives"

(*Hsu*, 9 Cal. 4th at 876), and it was achieved. The defendants obtained no comparable relief in *Drummond*.

Indeed, the proof is in the pudding. *Global Reach has assigned away the notes and its claims*. So it now “has no other means to obtain relief” on the notes. *Drummond*, 149 Cal. App. 4th at 53. *Drummond* itself recognizes the trial court’s discretion to decide in these circumstances that BIC obtained “greater relief” in this action. Global Reach no longer even owns the claims.

Nor is this conclusion altered by the fact that Global Reach’s putative subsidiary is now attempting to pursue these claims against BIC as Global Reach’s assignee. Section 1717 fee liability follows *parties*, not contractual disputes. *Cf. Pueblo Radiology Med. Group, Inc. v. Gerlach*, 163 Cal. App. 4th 826, 828-29 (2008) (not premature to determine that individual defendants prevailed by establishing they were not alter egos of corporate co-defendant, despite no decision yet whether contract was breached); *First Sec. Bank of California v. Paquet*, 98 Cal. App. 4th 468, 475-76 (2002) (not premature to determine that cross-defendants sued in individual capacity prevailed, despite unresolved claims brought by them in representative capacity); *Neptune Soc’y Corp. v. Longanecker*, 194 Cal. App. 3d 1233, 1243, 1250 (1987) (affirming fee award against plaintiff who failed to prove it was lawful assignee of promissory notes and thus lacked standing to sue for contract breach). At any rate, the court’s “particularly ‘wide discretion’” (*Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC*, 162 Cal. App. 4th 858, 894 (2008) (citation omitted)), surely encompasses the discretion to discount the fact that BIC’s liability to *another* plaintiff on the same notes has yet to be resolved, particularly since dismissal of this lawsuit has made it materially more difficult—if not impossible—for that second action to survive a statute of limitations challenge. *See pp.10-18, supra*.

Finally, equity cannot ignore that this lawsuit was dismissed to effectuate the purpose of Section 1030, which is “to afford security for an award of costs which the defendant might otherwise have

difficulty enforcing against a nonresident plaintiff.” CODE CIV. PROC. §1030 Law Revision Comm’n cmt.—1980 amendment. By obtaining dismissal of this lawsuit when Global Reach refused to post the court-ordered bond, BIC was spared the risk of proceeding to trial in this case, prevailing at the end of the day (as the trial court found it reasonably might do (1-AA-206)), and then obtaining a fee award—magnitudes larger than this one—that it could not collect. The dismissal thus conferred very valuable “relief” to BIC, and it was by far “greater relief” than Global Reach obtained—which was *less* than nothing (having divested itself of its claims). CIV. CODE §1717(b)(1).

None of these factors were present in *Drummond*. The trial court did not abuse its discretion in concluding that BIC prevailed in this action when it achieved this protection.

V.

BIC SHOULD BE AWARDED ITS ATTORNEY’S FEES FOR THIS APPEAL.

If the Court affirms the trial court’s determination that BIC was entitled to its legal fees, then BIC also should be awarded its attorneys’ fees in this appeal. The amount may be decided by the trial court. *See Otay River Constructors*, 158 Cal. App. 4th at 808-09; *Pueblo Radiology Med. Group, Inc.*, 163 Cal. App. 4th at 830; *Vella v. Hudgins*, 151 Cal. App. 3d 515, 525 (1984).

CONCLUSION

The fee award should be affirmed and the trial court should be directed to calculate and award BIC its attorney's fees for this appeal.

DATED: August 15, 2008.

Respectfully,

DIRK M. SCHENKAN
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**CERTIFICATE OF COMPLIANCE
PURSUANT TO CAL. R. CT. 8.204(c)**

Pursuant to California Rule of Court 8.204(c), and in reliance on the word count feature of the software used to prepare this document, I certify that the foregoing Respondent's Brief contains 9,017 words, exclusive of those materials not required to be counted under Rule 8.204(c)(3).

DATED: August 15, 2008.

AMY E. MARGOLIN

PROOF OF SERVICE

I, Jay Gresham, 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 August 15, 2008, I served the following document(s) described as:

RESPONDENT'S BRIEF;

RESPONDENT'S APPENDIX

- 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 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 practice for collection and processing of documents for delivery by U.S. mail of Howard Rice Nemerovski Canady Falk & Rabkin, A Professional Corporation, and that practice is that the document(s) are deposited with a U.S. Postal facility in an envelope with postage affixed 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 August 15, 2008.

JAY GRESHAM

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