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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

NEW ENGLAND ELECTRIC WIRE CORPORATION, et al. Plaintiffs and Appellants, v. COONER SALES COMPANY, LLC, Defendant and Respondent; LISBON REGIONAL SCHOOL EDUCATION FOUNDATION, Defendant and Appellant.	B231081 (Los Angeles County Super. Ct. No. BS092832)

APPEAL from a judgment of the Superior Court of Los Angeles County. Soussan G. Bruguera, Judge. Affirmed with directions.

Reed Smith, Margaret M. Grignon, David J. de Jesus for Plaintiffs and Appellants.

Pumilia Patel & Adamec, Jayesh Patel, Justene M. Adamec for Defendant and Appellant.

Pettit Kohn Ingrassia & Lutz, David G. Halm, Valerie Garcia Hong; Burke, Williams & Sorensen, Edwin W. Duncan for Defendant and Respondent.

This is the third appeal in this case. In its first appeal, New England Electric Wire Corporation argued that the parties' contractual arbitration provision *requires an award of attorney fees* incurred in court proceedings to confirm an arbitration award.[1] In this appeal, New England Wire incongruously argues that the same contract provision *does not permit recovery of attorney fees* incurred in court proceedings to confirm an arbitration award. Unsurprisingly, the trial court ruled against appellant. We affirm.

FACTS[2]

For decades, respondent Cooner Sales Company has sold wire and cable products manufactured by New England Electric Wire Corporation.[3] A distribution agreement gave respondent the exclusive right to sell NEWC's products in seven western states. NEWC is not permitted to sell its products to anyone but respondent in the seven states. (B201539.)

In 1996, NEWC and Cooner Enterprises entered a limited liability company operating agreement (the Agreement). They created Cooner Sales Company, LLC, for the purpose of manufacturing and selling cable assemblies, and marketing, selling and distributing electrical wire and devices. Cooner had a 65 percent interest and NEWC had a 35 percent interest in the new company. The Agreement contains an arbitration provision covering any controversy or claim arising out of the Agreement, or any interpretation, breach or enforcement of the Agreement. It states:

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1 New England Wire's second appeal was so poorly conceived that it was summarily dismissed as meritless on its face.

2 Much of our factual summary comes from the two prior appeals in this case, both of which were in Division Three of this district. The prior appeals are *Cooner Sales Company v. New England Electric Wire Corporation* (Feb. 9, 2009, B201539) (nonpub. opn.), hereinafter, B201539, and *New England Electric Wire Corporation v. Cooner Sales Company, LLC* (Apr. 23, 2010, B221380) (dismissal order), hereinafter, B221380.

3 An arbitrator determined that appellant New England Wire Technologies Corporation is the alter ego of New England Electric Wire Corporation. For convenience, we refer to the two appealing alter ego companies as NEWC.

"[T]he arbitrator or arbitrators shall determine how the cost of the arbitration shall be borne. If either party shall prevail or substantially prevail on the issues submitted to arbitration, the arbitrator or arbitrators shall include in the award recovery of such party's reasonable attorneys' fees and similar expenses, which shall be charged to and paid by the other party."

The parties had a falling out in 1999, when NEWC attempted to remove the seven western states from the distribution agreement. The parties' disagreements led to four arbitration proceedings between 1999 and 2007. In the first arbitration, NEWC was found to have breached its fiduciary duty to respondent by purporting to remove the western states from the distribution agreement. A second arbitration addressed NEWC's ability to sell its membership interest and withdraw from Cooner Sales Company LLC. NEWC then offered to sell its 35 percent interest to Cooner Enterprises, which declined the offer. In December 2002, NEWC advised Cooner Enterprises that it had negotiated a sale of its interest to appellant Lisbon Regional School Education Foundation (Lisbon). At the same time, NEWC terminated Cooner's exclusive distribution agreement in the western states. (B201539.)

In its third demand for arbitration, respondent claimed that Lisbon is not a bona fide purchaser of NEWC's interest, and the sale violated the prior arbitration awards. In 2004, the arbitrator agreed with respondent's claims, and rescinded NEWC's purported termination of the distribution agreement. NEWC filed a petition in superior court to vacate the 2004 arbitration award, claiming that the arbitrator failed to determine all questions submitted to him. Respondent countered with a petition to confirm the 2004 arbitration award. (B201539.)

In February 2005, the trial court granted NEWC's petition to vacate the third arbitration award, and ordered a rehearing before a new arbitrator. In May 2005, the same judge granted respondent's motion to confirm the third arbitration award. Days later, the judge was placed on a forced leave of absence due to cognitive impairment. A different judge granted NEWC's motion to vacate the May minute order, and ordered a new arbitration hearing. (B201539.)

A fourth arbitration hearing was conducted. In 2007, the new arbitrator found that NEWC was allowed to terminate the distribution agreement after selling its membership interest in Cooner Sales Company, LLC, and breached no fiduciary duty to respondent after making the sale. In connection with the fourth arbitration award, NEWC was awarded commissions, attorney fees and costs. The trial court conducted a hearing to determine whether the third arbitration award was valid, or whether the fourth arbitration award was valid. In May 2007, the court vacated the third arbitration award and confirmed the fourth arbitration award. (B201539.)

As the prevailing party in the 2007 court proceedings, NEWC requested an award of attorney fees. NEWC argued that "as the prevailing party in both the underlying arbitration *and these post arbitration judicial proceedings*, [NEWC] is entitled to recover all of its attorney fees as a matter of right in accordance with the contract at issue that entitles the prevailing party to recover its attorneys' fees and costs." (Italics added.) Based on NEWC's argument, the trial court exercised authority under the Agreement and awarded NEWC $252,870 and Lisbon $3,435 for attorney fees and costs incurred in court proceedings after March 2007.[4]

Cooner appealed, claiming that the trial court should have confirmed the third arbitration award and vacated the fourth arbitration award. NEWC also appealed, demanding an additional $600,000 in attorney fees stemming from the court proceedings. Division Three agreed with Cooner, and concluded that the trial court erroneously vacated the third arbitration award, rendered in 2004. It directed the trial court to vacate the order confirming the fourth arbitration award rendered in 2007, as it violated principles of res judicata. (B201539.) NEWC's demand for more attorney fees went down in flames when Division Three reversed the trial court order confirming the 2007 arbitration award.

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[4] The trial court stated that if, through an appeal, it is determined that appellants are entitled to attorney fees incurred before March 2007, the amount that should be awarded to NEWC is $845,417, plus $13,015 for Lisbon.

On remand, the trial court dutifully entered an order (1) confirming the third arbitration award from 2004, and (2) vacating the fourth arbitration award from 2007. The court awarded Cooner reasonable attorney fees. NEWC appealed. Cooner moved to dismiss the appeal. Division Three agreed that the appeal was meritless on its face. The trial court simply followed the appellate court's directions on remand, and the second appeal was an improper attempt to relitigate the validity of the 2007 award. The court dismissed the appeal. (B221380.)

In April 2010, the trial court entered judgment confirming the 2004 award. It awarded respondent "costs of suit and reasonable attorneys' fees and similar expenses in this proceeding and the prior appeal, as determined." Further, respondent "shall be awarded any reasonable attorneys' fees and costs incurred in enforcement of this Judgment." Appellants did not appeal from the judgment. As the prevailing party, Cooner moved for an award of attorney fees and costs incurred in trial court and appellate proceedings related to its efforts to enforce the 2004 arbitration award and to vacate the 2007 award. NEWC opposed respondent's request for attorney fees, though Lisbon did not.

THE TRIAL COURT'S RULING

In an 11-page ruling on February 4, 2011, the court wrote that it is authorized to award attorney fees as costs in litigation to confirm an arbitration award, if the parties' contract contains a provision giving attorney fees to the prevailing party. Here, the Agreement "necessarily allows for an award of attorneys' fees to the prevailing party in judicial proceedings relating to the arbitration." Respondent is the prevailing party in litigation it pursued to vacate the 2007 award and confirm the 2004 award.

The court found respondent's request for fees and costs of over $800,000 "is reasonable in light of the nature of the case and the skill displayed in litigating the issues." It rejected NEWC's contention that the majority of the fees were incurred unnecessarily. In addition, respondent is entitled to recover attorney fees it incurred to secure the dismissal of appellants' second, meritless appeal. On February 24, 2011, the court signed its final order awarding respondent attorney fees of $804,184 against NEWC

and Lisbon, jointly and severally, plus another $44,615 against NEWC for its meritless appeal.

DISCUSSION

1. Timeliness of This Appeal

In April 2010, the trial court entered judgment confirming the 2004 award, as directed by the Court of Appeal. The judgment awarded respondent its attorney fees, both for the current judicial proceeding and for the prior appeal. Appellants did not appeal from the April 2010 judgment. After judgment, respondent submitted its request for attorney fees and costs, and NEWC challenged respondent's entitlement to fees. In its postjudgment ruling on February 4, 2011, the trial court determined that (1) the operating agreement authorizes the award of fees, (2) respondent is the prevailing party, (3) as the prevailing party, respondent is entitled to recover its attorney fees, and (4) respondent is not judicially estopped from claiming entitlement to attorney fees. The court signed the award on February 24, 2011. This appeal was filed on February 18, 2011.

Cooner argues that the appeal is untimely, because appellants did not appeal from the April 2010 judgment, which awards attorney fees in an unspecified amount. "Notwithstanding the language in the judgment, it is clear that the parties subsequently litigated in a separate postjudgment proceeding not only the reasonableness of the amount of the attorney fees [respondent] was claiming, but also the threshold issue of [respondent's] *entitlement* to such fees." (*Silver v. Pacific American Fish Co., Inc.* (2010) 190 Cal.App.4th 688, 692.) Because NEWC and respondent litigated the issue of respondent's entitlement to attorney fees (and the amount of the fees) in the postjudgment motion, the appeal was properly taken after the trial court entered its final order regarding attorney fees and costs.

2. Respondent's Entitlement to Attorney Fees

Appellants do not challenge the *amount* of attorney fees that the trial court awarded to respondent. Instead, they challenge respondent's *entitlement* to attorney fees. The attorney fees were awarded pursuant to the parties' Agreement. (Civ. Code, § 1717.) A party's entitlement to fees under a contract is reviewed de novo where no extrinsic

evidence was admitted to interpret the contract. (*Kalai v. Gray* (2003) 109 Cal.App.4th 768, 777.) NEWC states, "the plain language of the attorney fee provision does not authorize the award of any fees incurred during judicial proceedings."

There are two problems with appellants' argument.

First, appellants previously claimed entitlement to nearly $1 million in attorney fees incurred in court proceedings, relying on the very same contract clause that supposedly prohibits respondent's recovery of attorney fees. In its 2007 attorney fees motion, NEWC stated that it "seeks to recover all of its attorney fees and costs incurred in these court proceedings." Appellants convinced the trial court to award them attorney fees for postarbitration judicial proceedings in 2007.[5]

We agree with Cooner's assessment that NEWC made "prior judicial admissions . . . that the parties' Operating Agreement provides for an award of attorneys' fees and costs incurred in judicial proceedings related to confirmation and vacatur of arbitration awards." On appeal in B201539, NEWC's entire brief consisted of the argument that the trial court "misappl[ied] established case law in denying [NEWC] most of its attorney fees and costs incurred in the trial court." NEWC insisted that the trial court should have awarded it more attorney fees for participating in judicial proceedings following the arbitration.

NEWC presently concedes that "as part of an earlier attorney motion and related appeal, [NEWC] sought fees for judicial confirmation proceedings based on the attorney fee provision at issue here." Despite this concession, NEWC argues that "judicial estoppel does not apply." NEWC's inconsistent positions over the course of this litigation make a compelling case for the application of judicial estoppel.

Judicial estoppel is an equitable doctrine aimed at maintaining the integrity of the judicial system and preventing unfair strategies. (*People v. Castillo* (2010) 49 Cal.4th

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[5] Though Cooner argued against an award of attorney fees for litigation, this argument was unsuccessful: the trial court adopted appellants' interpretation of the Agreement, and rejected Cooner's interpretation.

145, 155.) It precludes a party from gaining an advantage by taking one position during litigation, then seeking a second advantage by taking an incompatible position. It applies when (1) the same party has taken two positions in judicial proceedings; (2) the party was successful in asserting the first position, convincing the court to adopt or accept the position; (3) the two positions "are totally inconsistent"; and (4) the first position was not the result of ignorance, fraud, or mistake. (*Id.* at pp. 155-156.) In short, judicial estoppel "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." (*Pegram v. Herdrich* (2000) 530 U.S. 211, 227, fn. 8; *New Hampshire v. Maine* (2001) 532 U.S. 742, 749.)

Appellants argued in 2007 (trial court) and 2008 (Court of Appeal) that the Agreement's arbitration clause entitles them to nearly $1 million in attorney fees for their efforts to enforce the arbitration award that was (at that time) in their favor. In a declaration, NEWC Attorney Donald Kula recited "the three phases of this litigation" relating to the enforcement of the arbitration awards. Citing the arbitration clause quoted on page three of this opinion, Kula states that this provision entitles the prevailing party to its attorney fees in court proceedings. NEWC induced the trial court to award it substantial attorney fees, based on its interpretation of the Agreement's arbitration clause. On appeal, NEWC argued that it was "*the obvious intent of the parties* that the prevailing party recover all of its reasonable attorney fees" in court proceedings stemming from the arbitration. (Italics added.)

Appellants now abandon their former interpretation of the Agreement, and adopt a polar reading. When appellants were the prevailing parties, they were positive that the Agreement entitles them to attorney fees for court proceedings because that was the parties' "obvious intent." Now that appellants are the losing party, they claim they never intended to allow attorney fees for court proceedings. Contractual intent exists at the time the contract is formed: it does not change from year to year. (Civ. Code, § 1636; *AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 821.) Once appellants announced

their contractual intent in the first appeal, they were not free to invent an entirely inconsistent contractual intent in a later appeal.

NEWC observes that the doctrine of judicial estoppel should be applied with caution and limited to egregious circumstances. (*Jogani v. Jogani* (2006) 141 Cal.App.4th 158, 170.) These are egregious circumstances, particularly when considered in light of appellant's meritless second appeal in B221380, which was an improper attempt to relitigate the very issue that was resolved in the first appeal, B201539. It is egregious that appellants barely acknowledge their prior inconsistent interpretation of the Agreement (by way of a footnote), instead waiting for Cooner to bring appellants' contrariness to our attention. Appellants are trying to "'play fast and loose' with the judicial system.'" (*Uhrich v. State Farm Fire & Casualty Co.* (2003) 109 Cal.App.4th 598, 613) Their arguments "smack of inconsistencies seemingly designed to game the system." (*Rapture Shipping, Ltd. v. Allround Fuel Trading B.V.* (S.D.N.Y. 2004) 350 F.Supp.2d 369, 373 [defendant took the position in one court that an implied contract was created, but took the inconsistent position in subsequent litigation that no contract existed].) Appellants are wasting judicial resources. In B221380 they sought to relitigate a matter that was res judicata; now they want us to ignore their judicial admissions in B201539.

Second, appellants' newly minted re-interpretation of the Agreement is wrong, because the Agreement entitles Cooner to recover attorney fees it incurred in securing judicial confirmation of the third arbitration award. This Court has acknowledged that a petition to confirm an arbitration award "is in a sense an action to compel a party to perform his promise to accept the arbitrator's decision." (*San Luis Obispo Bay Properties, Inc. v. Pacific Gas & Elec. Co.* (1972) 28 Cal.App.3d 556, 573.) "[A] contract provision that permits the recovery of fees in arbitration is broad enough to include fees in related judicial proceedings, including an appeal from the judgment confirming the award." (*Ajida Technologies, Inc. v Roos Instruments, Inc.* (2001) 87 Cal.App.4th 534, 552.) Although the contract stated that the arbitrators will determine fees, the arbitrators no longer have jurisdiction over this dispute: instead, the trial court

has jurisdiction and is empowered to award attorney fees and costs based on its valuation of the nature of the services and the time involved. (*Id.* at p. 552, fn. 11. Accord: *Acosta v. Kerrigan* (2007) 150 Cal.App.4th 1124, 1130-1131.)[6]

When courts interpret contracts, they must "give meaning to the parties' intentions in agreeing to an attorney fees clause." (*Villinger/Nicholls Development Co. v. Meleyco* (1995) 31 Cal.App.4th 321, 328.) Appellants assert that "[t]he attorney fee provision may not encompass fees for judicial proceedings because the parties wanted to discourage either side from seeking judicial review of the arbitration award." Respondent did not seek "review" of the award: it sought to confirm the award and hold appellants to their contractual promise to abide by the arbitrator's decision. "This dispute was to enforce the terms of the contract; the arbitration award was to enforce the terms of the contract; and this action to confirm the award is also to enforce the terms of the contract," giving the prevailing party the right to recoup its attorney fees in judicial proceedings. (*Stermer v. Modiano Constr. Co.* (1975) 44 Cal.App.3d 264, 272-273; *Benjamin, Weill & Mazer v. Kors* (2011) 195 Cal.App.4th 40, 73-79. See Civ. Code, § 1717, subd. (a) [an attorney fees clause "shall be construed as applying to the entire contract"].) Our inclination is to hold appellants to the intent they cogently expressed on appeal in B201539; i.e., their intent that the Agreement cover attorney fees for all judicial proceedings connected with arbitration between the parties.

3. <u>Forfeiture by Lisbon</u>

Cooner argues that Lisbon forfeited its right to challenge the award of attorney fees by failing to oppose Cooner's motion in the trial court. NEWC concedes that it is the indemnitor of Lisbon, and is responsible for any adverse attorney fee award in this litigation. Because appellants are, in fact, jointly and severally obligated to pay the

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6 In their prior appeal, appellants described *Ajida* as "dispositive" in requiring an award of attorney fees for judicial proceedings, and they relied heavily on the *Acosta* case, referring to these opinions as "well established case law." Displaying a lack of integrity, appellants now mischaracterize *Ajida,* and *Acosta* is not mentioned in their briefs. The authorities appellants currently cite are factually and legally irrelevant.

attorney fees awarded by the trial court, appellants can resolve the responsibility issue among themselves, and there is no need to reach the forfeiture issue.

4. Attorney Fees on Appeal

Pursuant to the parties' Agreement, respondent is entitled to recover the attorney fees it incurred in this appeal. "Although this court has the power to fix attorney fees on appeal, the better practice is to have the trial court determine such fees when it determines costs on appeal." (*Security Pacific National Bank v. Adamo* (1983) 142 Cal.App.3d 492, 498.)

DISPOSITION

The judgment is affirmed with directions to the trial court to determine the amount of attorney fees and costs to be awarded to Cooner Sales for legal services rendered on this appeal.

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BOREN, P.J.

We concur:

DOI TODD, J.

CHAVEZ, J.