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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

CHARLINDA L. DUNN et al., Plaintiffs, Cross-defendants and Respondents, v. SILVER LAKES ASSOCIATION, Defendant, Cross-complainant and Appellant.	E031229 (Super.Ct.No. VCV 021864) OPINION

APPEAL from the Superior Court of San Bernardino County. John M. Tomberlin, Judge. Affirmed with directions.

Flore, Racobs & Powers, Peter E. Racobs and Thomas L. Bosworth for Defendant, Cross-complainant and Appellant.

Doss & Page, Dennis H. Doss and Daniel A. Nassie for Plaintiffs, Cross-defendants and Respondents.

Defendant and cross-complainant Silver Lakes Association (the association) appeals judgment entered in favor of plaintiffs and cross-defendants Charlinda Dunn et

al. (plaintiff).

This action arises from a dispute over whether the association can assess plaintiff's undeveloped lot, referred to as lot 288, at a higher rate, as a multiple family residential lot, as opposed to assessing it as a single family residential lot. The trial court granted plaintiff summary adjudication of the declaratory relief cause of action seeking a determination of the dispute. The trial court concluded it was undisputed that the association was required to assess the lot as a single family residential lot.

The association contends triable issues of fact exist as to whether the lot qualified as a multiple family residential lot under the applicable covenants and restrictions (CC&Rs). Although the matter was previously decided by binding arbitration in a prior lawsuit, the association argues that the decision did not have collateral estoppel effect in this action. The association claims the prior agreement to arbitrate and mutual release were superseded and replaced by a subsequent settlement agreement.

We conclude the arbitration decision and dismissal with prejudice of the prior action litigating the same issue raised in this action has collateral estoppel effect. The association is barred from disputing that the lot is a single family residential lot.

The association complains that the trial court abused its discretion in awarding plaintiff $68,831.93 in attorney's fees. We disagree and affirm the judgment.

1. Facts and Procedural Background

Plaintiffs are 17 elderly investors who acquired lot 288 through nonjudicial foreclosure of a loan to the former owner of the property, Evergreen Golf Course Estates,

L.P. (Evergreen). Plaintiff's property, lot 288, consists of 36 acres of undeveloped raw land, located in Silver Lakes, a resort-recreational community near Victorville. The association is a homeowner's association and or residential real estate management association. Plaintiff's property is governed by the association's CC&Rs.

Lot 288 originally was zoned as a multiple family residential lot. In 1989, it was re-zoned for single family residential use. In the early 1990's, the former owner of lot 288, Evergreen, obtained approval of a tentative subdivision map proposing to divide lot 288 into 143 single family residential lots. The association then began assessing the lot as a multiple family residential lot, rather than as a single family residential lot, resulting in the monthly assessment fees increasing from $74.88 to $4,015.

Evergreen objected to the association assessing lot 288 as a multiple family residential lot, at a much higher rate. The association sued Evergreen to collect the unpaid assessments and foreclose on the assessment lien. Evergreen and the association entered into an arbitration agreement and mutual release (arbitration agreement) whereby they agreed to binding arbitration. The parties further agreed to release and forever discharge Evergreen and its successors-in-interest (such as plaintiff) from "any and all claims, damages, demands, liabilities and causes of action, known or unknown, suspected or unsuspected, arising at any time from any of the allegations brought by any party in the Action." The arbitration agreement further stated, "This Agreement shall be binding upon the heirs, successors, assigns, agents, beneficiaries and representatives of all parties to this Agreement."

Following arbitration in 1993, the arbitrator found in Evergreen's favor that the association was required to assess lot 288 as a single family residential lot. In accordance with the arbitration agreement, the association dismissed with prejudice its complaint and plaintiff dismissed its cross-complaint.

Thereafter, Evergreen sued the association for a refund of $73,700.36 in assessment fees which the association had overcharged Evergreen prior to the arbitration decision. In 1994, Evergreen and the association entered into a settlement agreement resolving the matter. The association agreed to refund the overcharged fees (debt) by offsetting each month Evergreen's monthly assessment fees against the debt until the debt was refunded in full. In the event Evergreen's ownership interest transferred to a third party before full refund of the overcharged fees, the association was to pay Evergreen the balance in full and the new owner was to commence paying the assessment fees to the association "consistent with the ASSOCIATION's assessment collection policy."

At the time of transfer of ownership of lot 288 to plaintiff in 1999, the association had been assessing lot 288 as a single family residential lot at $100 a month. After plaintiff acquired the property, the association billed plaintiff $100 for the monthly assessment fees. But in April 2000, shortly after discovering plaintiff was attempting to sell the property to a developer, the association notified plaintiff that the assessment fee had increased from $100 to $5,400 per month based on assessing lot 288 as a multiple family residential lot. In May, 2000, the association notified plaintiff that the monthly

assessment had been increased again to $5,724. The potential buyer of the property backed out of the pending sale due to the drastically increased assessment fees.

Plaintiff filed the instant declaratory relief and breach of contract action, requesting a declaration that the proper assessment for lot 288 was $100 per month, as a single family residential lot, rather than $5,400 a month, as a multiple family residential lot. After prevailing on its motion for summary adjudication of the declaratory relief cause of action, plaintiff dismissed its breach of contract claim and filed a motion for attorney's fees. The trial court granted plaintiff $68,831.93 in attorney's fees and costs.

2. Summary Adjudication

The association contends the trial court erred in granting plaintiff's motion for summary adjudication of the first cause of action for declaratory relief. The trial court found that it was undisputed that the association was required to assess lot 288 as a single family residential lot rather than as an unimproved multi-family lot.

A. Standard of Review

"If a cause of action or an affirmative defense similarly lacks any triable issue of material fact, the trial court may grant summary adjudication of issues, if the adjudication completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty. (Code Civ. Proc., § 437c, subd. (f).) An appellate court independently

reviews the questions of law presented and whether the papers raise triable issues of fact."[1]

B. Collateral Estoppel

The key issue in this action is whether the association was required to assess lot 288 as a single family residential lot or could assess the lot at a higher rate as a multiple family residential lot. The association argues there were triable issues of fact that precluded the court from summarily adjudicating the issue. Plaintiff contends that the issue was previously decided by binding arbitration, and the association must abide by that prior decision. We agree the association is bound by the prior binding arbitration award which determined that the association must assess lot 288 as a single family residential lot.

Under the doctrines of res judicata and collateral estoppel a party is precluded from relitigating previously decided claims and issues. "Collateral estoppel is one of two aspects of the doctrine of res judicata. In its narrowest form, res judicata '"precludes parties or their privies from relitigating a *cause of action* [finally resolved in a prior proceeding]."' [Citations.] But res judicata also includes a broader principle, commonly termed collateral estoppel, under which an *issue* '"necessarily decided in [prior] litigation [may be] conclusively determined as [*against*] *the parties* [*thereto*] *or their privies* . . . in a subsequent lawsuit on a *different* cause of action."' [Citation.]

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[1] *R.J. Land & Associates Construction Co. v. Kiewit-Shea* (1999) 69 Cal.App.4th 416, 424, quoting *Rosse v. DeSoto Cab Co.* (1995) 34 Cal.App.4th 1047, 1050.

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"Thus, res judicata does not merely bar relitigation of identical claims or causes of action. Instead, in its collateral estoppel aspect, the doctrine may also preclude a party to prior litigation from redisputing *issues* therein decided against him, even when those issues bear on different claims raised in a later case. Moreover, because the estoppel need not be mutual, it is not necessary that the earlier and later proceedings involve the identical parties or their privies. Only the party *against whom* the doctrine is invoked must be bound by the prior proceeding. [Citations.]"[2]

The doctrine of collateral estoppel or issue preclusion is a secondary form of res judicata.[3] It prevents a party that had a full and fair opportunity to litigate a particular issue in a prior proceeding from relitigating the same issue in any subsequent proceedings.[4] "A prior determination by a tribunal will be given collateral estoppel effect when (1) the issue is identical to that decided in a former proceeding; (2) the issue was actually litigated and (3) necessarily decided; (4) the doctrine is asserted against a

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[2] *Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 828.

[3] *People v. Sims* (1982) 32 Cal.3d 468, 477, footnote 6.

[4] See 7 Witkin, California Procedure (4th ed. 1997) Judgment, section 339, page 894.

party to the former action or one who was in privity with such a party; and (5) the former decision is final and was made on the merits."[5]

In this case, all the elements of collateral estoppel are present. The same issue was raised in the association's prior arbitrated action; the issue was litigated and decided; the doctrine is asserted against the association, who was a party to the former action; and the arbitration award and dismissal with prejudice of the association's action constituted a final decision on the merits.

The association argues that the arbitration award and dismissal do not qualify as a final decision on the merits because the arbitration award was not confirmed by the trial court and plaintiff was not a party to the arbitration. In *Torrey Pines Bank v. Superior Court*,[6] the court held that voluntary dismissal of an action constituted a judgment on the merits with res judicata effect. In *Torrey*, the bank sued White, a guarantor of a defaulted loan. Meanwhile, White sued the bank in a separate action for breach of fiduciary duty, breach of the good faith covenant, negligent misrepresentation, and negligence. White dismissed with prejudice his lawsuit against the bank. The bank moved for summary judgment in its lawsuit on the ground White's voluntary dismissal of his lawsuit constituted a judgment on the merits and thus collaterally estopped him from raising the same issues and claims as affirmative defenses in the bank's lawsuit. The trial court

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[5] *Kelly v. Vons Companies, Inc.* (1998) 67 Cal.App.4th 1329, 1339; *People v. Taylor* (1974) 12 Cal.3d 686, 691.

[6] *Torrey Pines Bank v. Superior Court* (1989) 216 Cal.App.3d 813, 819-820.

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denied summary judgment. The *Torrey* court reversed, concluding that White's affirmative defenses were barred under res judicata since they were based on the same nucleus of operative facts and raised the same legal issues as those alleged in White's complaint.[7]

The *Torrey* court explained that White's voluntary dismissal with prejudice of his lawsuit "constituted a retraxit and determination on the merits invoking the principles of res judicata barring relitigation of those issues as affirmative defenses . . . . [¶] '"A retraxit has always been deemed a judgment on the merits against the plaintiff, estopping him from subsequently maintaining an action for the cause renounced." [Citation.]' [Citation.]" [¶] . . . Dismissal with prejudice is determinative of the issues in the action and *precludes the dismissing party from litigating those issues again*."[8] The *Torrey* court further noted that "Res judicata bars 'not only the reopening of the original controversy, but also subsequent litigation of all issues which were or could have been raised in the original suit. [Citations.]' [Citation.]"[9]

Here, the association's action raised the same issues raised in the instant lawsuit. The parties agreed to binding arbitration and, following an arbitration award in

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[7] *Torrey Pines Bank v. Superior Court, supra,* 216 Cal.App.3d at page 819.

[8] *Torrey Pines Bank v. Superior Court, supra,* 216 Cal.App.3d at pages 819-820, italics added.

[9] *Torrey Pines Bank v. Superior Court, supra,* 216 Cal.App.3d at page 821.

[footnote continued on next page]

Evergreen's favor, the association dismissed its lawsuit with prejudice. The same issues were again raised in the instant action for declaratory relief and the association's cross-complaint. The parties in the instant case are the same or in privity with the parties in the previous action. Plaintiff, as the subsequent owner of lot 288, is in privity with Evergreen.

The association claims the arbitration award does not have collateral estoppel effect because there was no final judgment since the arbitration award was never confirmed.

The court in *Thibodeau v. Crum*,[10] held that, under the particular circumstances of the *Thibodeau* case, an unconfirmed arbitration award had res judicata effect and barred the plaintiffs' subsequent case. In *Thibodeau*, the homeowner plaintiffs and their general contractor arbitrated a construction defect dispute regarding the plaintiffs' driveway. Following issuance of an arbitration award, cracks in the driveway increased. The plaintiffs sued the cement subcontractor. The subcontractor filed a motion for judgment on the pleadings on the ground the arbitration award had res judicata effect and barred the plaintiffs' lawsuit. The trial court denied the motion, and the *Thibodeau* court reversed,

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[10] *Thibodeau v. Crum* (1992) 4 Cal.App.4th 749, 761.

holding that even though the arbitration award was never confirmed by the trial court, the arbitration award nevertheless had res judicata effect.[11]

In reaching its decision, the *Thibodeau* court explained that “The doctrine of res judicata applies not only to judicial proceedings but also to arbitration proceedings.”[12] The court added that “the courts have viewed an unconfirmed arbitration award as the equivalent of a final judgment,” with res judicata effect.[13]

The *Thibodeau* court acknowledged that the court in *Kahn v. Pelissetti*,[14] held that an unconfirmed arbitration award did not have res judicata effect. But the *Thibodeau* court concluded *Kahn* was distinguishable and that “the *Kahn* court did not hold that an unconfirmed arbitration award can never have a res judicata effect but only that it would not have such an effect under the particular circumstances of that case.”[15]

In *Kahn*, the plaintiff brought an uninsured motorist claim against her insurer. The insurer disputed the uninsured motorist’s liability and prevailed at arbitration. The plaintiff then sued the uninsured motorist. The trial court ruled that the unconfirmed

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[11] *Thibodeau v. Crum, supra,* 4 Cal.App.4th at page 761.

[12] *Thibodeau v. Crum, supra,* 4 Cal.App.4th at page 755.

[13] *Thibodeau v. Crum, supra,* 4 Cal.App.4th at page 759; *Trollope v. Jeffries* (1976) 55 Cal.App.3d 816, 822-823; *Ulene v. Murray Millman of California* (1959) 175 Cal.App.2d 655, 663; *Lehto v. Underground Constr. Co.* (1977) 69 Cal.App.3d 933, 939.

[14] *Kahn v. Pelissetti* (1968) 260 Cal.App.2d 832.

[15] *Thibodeau v. Crum, supra,* 4 Cal.App.4th at page 761.

arbitration award had res judicata effect on issues regarding the uninsured motorist's liability. The *Kahn* court disagreed. The court explained that, "The Code of Civil Procedure provides that an unconfirmed or unvacated award 'has the same force and effect as a contract in writing between the parties to the arbitration' (Code Civ. Proc., § 1287.6) i.e., a contract between appellant and insurer. Respondent was not a party to that contract; the question remains whether he can take advantage of it as a third party beneficiary."[16] The court concluded, "The resulting arbitration award did not purport to affect respondent's interests in any way. Therefore, viewing the unconfirmed award as a contract as we must under the statute, respondent is at most an incidental beneficiary thereof and cannot enforce its implied covenant that he is not liable to appellant. [Citations.]"[17]

The *Thibodeau* court concluded *Kahn* was distinguishable because in *Thibodeau* the construction contract between the homeowner and general contractor was intended to provide for resolution of disputes concerning subcontractors' work whereas in *Kahn* the insurance contract between the insured and insurer was not intended to resolve disputes between the insured and uninsured motorist or benefit the uninsured motorist in any way.[18]

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[16] *Kahn v. Pelissetti, supra,* 260 Cal.App.2d at page 834.

[17] *Kahn v. Pelissetti, supra,* 260 Cal.App.2d at page 835.

[18] *Thibodeau v. Crum, supra,* 4 Cal.App.4th at page 761.

The instant case is analogous to *Thibodeau*. Here, the association's prior lawsuit and the instant action involve the same issue of whether, for purposes of calculating association assessment fees, lot 288 is a multiple family residential lot or single family residential lot. The mutual release and agreement to arbitrate the first lawsuit expressly stated that determination of the disputed issues and claims would be binding on the parties and their successors-in-interest and assigns. The arbitration agreement states that the association and Evergreen's successors and assigns shall be released and forever discharged "from any and all claims, damages, demands, liabilities and causes of action, known or unknown, suspected or unsuspected, arising at any time from any of the allegations brought by any party in the Action" to be arbitrated. We thus conclude from such language that the association intended that the arbitration award be binding not only on the association and Evergreen but also on each other's successors and assigns, including plaintiff.

The association cites *Vandenberg v. Superior Court*,[19] for the proposition that the unconfirmed arbitration award and dismissal of the association's action does not have res judicata or collateral estoppel effect. In *Vandenberg*, the California Supreme Court clarified when a private arbitration award has res judicata effect. The *Vandenberg* court held that, regardless of whether a private arbitration award has been confirmed by the

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[19] *Vandenberg v. Superior Court* (1999) 21 Cal.4th 815.

court, the award does not have res judicata effect unless the parties have indicated in their contract to arbitrate that the award shall have such effect.[20]

In the instant case, Evergreen and the association agreed in the mutual release and arbitration agreement that the arbitration award would be binding on them and their successors and assigns, and the issues arbitrated could not be raised again. In accordance with the agreement, following issuance of the arbitration award, the association dismissed its lawsuit with prejudice. The association was collaterally estopped from raising the same arguments rejected in the prior arbitration decision, even though the arbitration award was not confirmed by the court.

The association further argues that the arbitration award is not binding because it was superseded and replaced by the 1994 settlement agreement, which required any subsequent owners of lot 288, such as plaintiff, to pay all assessments due pursuant to the association's assessment collection policy. The settlement agreement arose from Evergreen suing the association for failing to comply with the arbitration decision and reimburse Evergreen for overpaid assessment fees.

The association acknowledged in the settlement agreement that it owed Evergreen a refund of $73,700.36 in assessment fees. The association also agreed to a specified method of repayment.

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[20] *Vandenberg v. Superior Court, supra,* 21 Cal.4th at pages 833-836.

The settlement agreement states that Evergreen's transferee(s) of the property (plaintiff) "shall pay any and all assessments due thereon on a cash basis consistent with the ASSOCIATION'S assessment collection policy, and there shall be no further reduction in the Debt due to assessments accruing against the interest transferred to such third parties after the date of transfer. . . ." "Upon exhaustion of the ASSOCIATION's Debt . . . EVERGREEN . . . shall forthwith resume payment of the ASSOCIATION's then prevailing assessment collection policy. . . . In the event the entirety of the Subject Property . . . are transferred to third parties prior to the satisfaction of the entire Debt, the then remaining unpaid balance of the Debt shall be paid to EVERGREEN in cash within ten (10) days . . . ."

Nothing in the settlement agreement states that lot 288's designation as a single family residential lot for assessment purposes would change upon transfer of Evergreen's property to a third party. Viewing the settlement agreement as a whole, we conclude the settlement agreement did not supersede or negate the terms of the arbitration agreement and award. The settlement agreement addressed a new dispute over reimbursing Evergreen for overpaid assessment fees. The settlement agreement terms were not in any way inconsistent with those in the arbitration agreement and award.

Furthermore, the language referring to "payment of the association's then prevailing assessment collection policy," cannot reasonably be construed as providing that the previous determination that lot 288 was a single family residential lot for assessment purposes would change to a multiple family residential lot upon transfer of

property ownership to a third party. Read as a whole, the 1994 settlement agreement does not supersede or abrogate the arbitration agreement and award. It does nothing more than set forth the terms upon which the association shall refund to Evergreen overpaid assessment fees and clarifies that, once the debt is fully offset or if Evergreen transfers its ownership interest, the monthly assessment fees shall be paid directly to the association.

In summary, we conclude the assessment issue was decided by binding arbitration. The association agreed the determination would be binding and bar the association from asserting the same claims against Evergreen's successors and assigns. We affirm the trial court's summary adjudication ruling on the ground the association is collaterally estopped from claiming the property can be assessed as a multiple family residential lot. The issue was decided to the contrary in binding arbitration and the issue cannot be relitigated.

3. Attorneys Fees

The association contends the trial court abused its discretion in awarding plaintiff $68,831.93 in attorney's fees.

A. Civil Code Section 1354

The association complains that, when determining attorney's fees, the trial court erred in not taking into consideration plaintiff's failure to comply with Civil Code section 1354, subdivision (b). This provision provides in relevant part: ". . . prior to the filing of a civil action by . . . an owner . . . solely for declaratory relief or injunctive relief, or for

declaratory relief or injunctive relief in conjunction with a claim for monetary damages, *other than association assessments, not in excess of five thousand dollars ($5,000)*, related to the enforcement of the governing documents, the parties shall endeavor, as provided in this subdivision, to submit their dispute to a form of alternative dispute resolution such as mediation or arbitration."[21]

Civil Code section 1354, subdivision (b) also provides that before filing a civil action, the plaintiff must file a certificate stating that alternative dispute resolution has been completed. Failure to do so shall be grounds for a demurrer or motion to strike, unless certain specified circumstances exist.

Subdivision (f) provides that "the prevailing party shall be awarded reasonable attorney's fees and costs. Upon motion by any party for attorney's fees and costs to be awarded to the prevailing party in these actions, the court, in determining the amount of the award, may consider a party's refusal to participate in alternative dispute resolution prior to the filing of the action." The association claims that the trial court should have considered plaintiff's violation of section 1354 into consideration when awarding plaintiff attorney's fees.

In the instant case, plaintiff did not serve a request for alternative dispute resolution but plaintiff was not required to do so. Plaintiff's action was not subject to the alternative dispute resolution requirement since the second cause of action was for breach

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[21] Italics added.

of contract and sought damages in excess of $5,000. Plaintiff alleged in the second cause of action that the association violated the CC&Rs by erroneously billing plaintiff for assessment fees at the high density rate rather than the single-family rate, and this resulted in a prospective buyer of lot 288 backing out of the sale of lot 288, resulting in at least $900,000 in damages.

Furthermore, Civil Code section 1354, subdivision (b) provides that "the *parties* shall endeavor . . . to submit their dispute to a form of alternative dispute resolution such as mediation or arbitration. . . . *Any party* to such a dispute may initiate this process by serving on another party to the dispute a Request for Resolution."[22] Under this provision, the association, as well as plaintiff, was required to make an attempt to resolve the dispute by alternative dispute resolution. The association thus is equally at fault for not making any effort to resolve the dispute out of court. For instance, after being served with plaintiff's lawsuit, rather than requesting alternative dispute resolution, the association responded by filing a cross-complaint. The association also did not demur or move to strike the complaint under Civil Code section 1354. We therefore deem the association's attorney's fees challenge based on noncompliance with Civil Code section 1354 meritless.

[22] Italics added.

B. Failure to Give Notice of Attorney's Fees Request

The association contends plaintiff is not entitled to attorney's fees because plaintiff failed to request them in the complaint prayer as to the declaratory relief cause of action. Attorney's fees were only requested in the prayer as to the second cause of action for breach of contract, which plaintiff dismissed.

Attorney's fees need not be pled in the complaint prayer if the contract claim is based on a contract containing an attorney's fee provision allowing the prevailing party to recover attorney's fees.[23] As stated in *Allstate Ins. Co. v. Loo*[24] stated: "The trial court concluded that a party seeking to recover attorney fees pursuant to a contractual provision must plead entitlement to attorney fees as an item of damages in order to recover them in California. That is no longer correct. [¶] Under Code of Civil Procedure section 1033.5, subdivision (a)(10), attorney fees, when authorized by contract, statute, or law, are recoverable as an element of costs. The Legislature has further detailed the procedure by which attorney fees as costs may be fixed: upon a noticed motion. (Code Civ. Proc., § 1033.5, subd. (c)(5); Cal. Rules of Court, rule 870.2.)"

Here, plaintiff alleged in the first cause of action for declaratory relief that plaintiff had incurred attorney's fees and costs. Plaintiff did not request attorney's fees in the

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[23] *Allstate Ins. Co. v. Loo* (1996) 46 Cal.App.4th 1794, 1797.

[24] *Allstate Ins. Co. v. Loo, supra,* 46 Cal.App.4th at page 1797.

prayer as to the declaratory relief cause of action but did request costs of suit. The CC&R's provide that, if an owner does not pay assessment fees when due, the association is entitled to reasonable attorney's fees incurred in collecting the unpaid assessment fees. As the prevailing party, under the CC&Rs, plaintiff thus had a reciprocal contractual right to attorney's fees under Code of Civil Procedure sections 1021 and 1717.

Civil Code section 1717, subdivision (a) provides: "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 either to one of the parties or to the prevailing party, 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 to reasonable attorney's fees in addition to other costs. [¶] . . . [¶] Reasonable attorney's fees shall be fixed by the court, and shall be an element of the costs of suit."

Under Civil Code section 1717, subdivision (b), the party seeking attorney's fees must file a noticed motion requesting attorney's fees and must establish it is the prevailing party and the action is on the contract. Plaintiff complied with both these requirements. Plaintiff brought a motion requesting attorney's fees as costs. Plaintiff also established that this action is premised on the CC&Rs provisions pertaining to assessments. Plaintiff is thus entitled to recover attorney's fees as costs despite not requesting them in the complaint prayer as to damages in connection with the first cause of action.

The association's reliance on *Wiley v. Rhodes*[25] is misplaced. *Wiley* involved a default judgment in which the plaintiff failed to mention anywhere in the complaint that it was seeking attorney's fees. The instant case does not involve a default judgment; plaintiff indicated in its declaratory relief cause of action that it had incurred considerable costs and legal fees as a result of the assessment dispute; plaintiff gave the association notice of plaintiff's attorney's fee claim by properly filing a noticed motion for attorney's fees; and the association was given an opportunity to refute plaintiff's attorney's fees claim at the hearing on plaintiff's motion.

Plaintiff is entitled to recover attorney's fees as costs under Code of Civil Procedure section 1035, subdivision (a)(10) and Civil Code section 1717. Plaintiff's failure to request them as damages in the first cause of action prayer does not preclude the court from awarding fees as costs.

C. Statement of Decision Regarding Attorney's Fees

The association contends the trial court abused its discretion in awarding plaintiff $68,831.93 in attorney's fees based in part on the association's statement of itemized objections to plaintiff's attorney's bills. The association complains that the court told the association that its objections to plaintiff's attorney's fees request was too general and that the court needed an itemized, "line-by-line item-by-item" objection statement. The association provided the court with such a statement and then the court found plaintiff's

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[25] *Wiley v. Rhodes* (1990) 223 Cal.App.3d 1470.

fees were reasonable based on plaintiff's "over-all aggressive litigation of this case - as exemplified by 38 pages of objections and responses to the fee request." The association further notes that plaintiff's, not the association's brief was 38 pages and the association's was 16 pages.

The attorney's fee award will be disturbed on appeal only where there has been a manifest abuse of discretion.[26]

The association has not established that the trial court abused its discretion in awarding attorney's fees or that the award was excessive. Although we recognize the court requested the association to provide a more detailed itemized statement, the association has not established that the numerous objections in the statement were well taken and that the association, in general, did not aggressively litigate the case. The association has failed to establish that the trial court abused its discretion in concluding plaintiff's legal fees were necessary and reasonable.

4. Disposition

The judgment is affirmed. Plaintiff is awarded its costs and attorney's fees on appeal as the prevailing party. As to the amount of attorney's fees incurred on appeal, we defer to the trial court determination of the appropriate amount of fees recoverable. Although this court possesses the power to appraise and fix attorney's fees incurred in an

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[26] *Walters v. Marler* (1978) 83 Cal.App.3d 1, 36.

appeal, the better practice is to allow the trial court to make that determination.[27] There is no reason for us to insert ourselves into a fact-finding function that is customarily delegated to the trial court.

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s/Gaut
J.

We concur:

s/McKinster
Acting P. J.

s/Richli
J.

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[27] *Smith v. Krueger* (1983) 150 Cal.App.3d 752, 758.