

THE HIDDEN LESSON OF DRYBREAD V. CHIPAIN CHIROPRACTIC CORPORATION

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Did you ever think that agreeing to a reciprocal attorneys' fee provision was a no-brainer because any court would make a unilateral fee clause reciprocal under Civil Code § 1717? Why not look like the good guy and concede a clause that you cannot enforce anyway? Read *Drybread v. Chipain* (June 6, 2007) 07 C.D.O.S. 6507 and you might think twice before conceding this point so quickly.

Drybread actually does not deal directly with the enforceability of a unilateral contractual fee provision. The Court in that case, however, confirms that section §1717, which imposes the reciprocity in attorney's fees clauses, may not apply in all cases dealing with contractual fee provisions. Rather, that section (and its rule of reciprocity) applies only to claims that "sound in contract" and not those that "sound in tort."

In *Drybread*, plaintiff filed an unlawful detainer action against defendant based on defendant's refusal to surrender possession of the premises following expiration of the term of the lease. Ultimately, plaintiff voluntarily dismissed the action after he no longer wanted possession of the premises for his own use. Then the defendant moved for attorneys' fees under a reciprocal attorneys' fee provision in the lease. The trial court ruled that: "Given the legal issues presented by the parties, the unlawful detainer action in this case sounds more in contract than not. That being the case, Civil Code section 1717(b)(2) bars defendant from recovering attorneys fees." The appellate division of the superior court affirmed the trial court's order without explanation and defendant petitioned the Court of Appeal for review.

Defendant argued that Civil Code § 1717 applies only to contract actions, and that the trial court improperly applied that status to this unlawful detainer action. Defendant argued that all unlawful detainer actions sound in tort and even if they do not necessarily sound in tort, *this* unlawful detainer action sounded in tort. The Court of Appeals agreed and held that *this* unlawful detainer action sounded in tort; the trial court's denial of defendant's motion for attorney's fees was therefore improper.

Civil Code § 1717 provides:

"(a) In any action on a contract, where the contract

specifically provides that the 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."

"(b)(2) Where an action has been voluntarily dismissed or dismissed pursuant to a settlement of the case, there shall be no prevailing party for the purposes of this section."

In holding that the limitations of § 1717 did not apply, the Court in *Drybread* relied on *Sintisas v. Goodin* (1998) 17 Cal.4th 599, in which the Supreme Court explained that the limitation of Civil Code § 1717(b)(2) – precluding attorney's fees when a complaint is voluntarily dismissed – applies only to contract claims. *Id.* at 622. Contractual attorney's fees provisions are generally enforceable in voluntary pre-trial dismissal cases except as barred by Civil Code § 1717. *Id.* Section 1717 does not bar recovery of attorney's fees for noncontract claims voluntarily dismissed by the plaintiff, *as long as the attorney's fees clause is broad enough to encompass noncontract claims.* Thus, defendant would be entitled to attorney's fees unless such fees are barred by § 1717.

(Continued on page 16.)

(*Drybread*, continued from page 9.)

So the question is whether the unlawful detainer action is “an action on contract” (to which § 1717 applies) or a noncontract claim. To answer that question, the Court in *Drybread* relied on *Fragomeno v. Insurance Co. of the West* (1989) 207 Cal.App.3d 822, in which the Court said “In order to determine whether this summary and statutory procedure [unlawful detainer] sounds in contract or in tort, the gravamen of the facts giving right to recovery must be examined. If the right to recover realty emanates from the breach of a lease provision occurring during an unexpired term of a lease, then the right to recover has its inception in a contractual arrangement between the parties. If the right to recover is based upon a civil wrong such as possession of property by a trespasser *ab initio*, or by a holdover tenant as a resulting trespasser, or by an encroacher then the right to recover possession of the property by way of the summary and statutory procedure of unlawful detainer has its inception in tortious conduct.” *Id.* at 830-831.

In *Drybread*, the plaintiff’s claim was that defendant was holding over after expiration of the lease – a noncontract claim. Thus, the trial court erred in determining that the case sounded more in contract than in tort. Therefore, Civil Code § 1717 (which bars attorney’s fees where contract claims are voluntarily dismissed) did not apply. Rather, defendant was the prevailing party pursuant to Code of Civil Procedure § 1032 (which provides that a prevailing party is entitled as a matter of right to recover costs, and “prevailing party” includes “a defendant in whose favor a dismissal is entered”) and was entitled to attorney’s fees pursuant to the provisions of the lease.

So back to the original question posed by this case note: Should you think twice about automatically making an attorney’s fee provision reciprocal? Based on the reasoning in *Drybread*, a one-sided attorney’s fees clause puts a landlord in a much better position than a landlord with a reciprocal attorney’s fees clause now found in most leases. If the clause is one-sided, in favor of the landlord, then the only way the tenant could make it reciprocal would be by saying it was governed by § 1717. But if it was governed by § 1717, there is no right to fees after voluntary dismissal. Thus, a one-sided attorney’s fees clause favoring the landlord would be enforceable in a claim sounding in tort, entitling the prevailing landlord, but not a prevailing tenant, to fees on a tort claim, while allowing the landlord to avoid paying fees on a claim sounding in contract, when it voluntarily dismisses before trial.