APPELLATE DIVISION OF THE SUPERIOR COURT

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

MARIJAN DUSEVIC and MATE DUSEVIC, Plaintiffs and Respondents, v. EDELMIRA LOPEZ, Defendant and Appellant.	No. BV 032875 Van Nuys Trial Court No. 18VEUD00572 **OPINION**

Plaintiffs Marijan Dusevic and Mate Dusevic brought an unlawful detainer action against defendant Edelmira Lopez based on alleged unpaid rent. After the conclusion of plaintiffs' presentation of evidence to the jury, the trial court granted defendant's motion for nonsuit. The court found the three-day notice was defective because it demanded excessive rent in that it did not include an offset for defendant's payment of an unauthorized late fee. Defendant sought contractual attorney fees as the prevailing party. The court granted the motion, but it reduced the award by more than 82 percent based, in part, on its disapproval of defendant's litigation strategy. We conclude the court abused its discretion by penalizing defendant for exercising her right to take the case to trial. Accordingly, we reverse the order and remand the case for recalculation of attorney fees.

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BACKGROUND

Plaintiffs filed a complaint in unlawful detainer alleging the following: on or about June 1, 2017, plaintiffs entered into a residential agreement with defendant[1] to lease the subject property; the written agreement obligated defendant to pay rent of $1,150 per month; on February 4, 2018, defendant was served with a three-day notice to pay rent of $1,150 or quit; and as of February 7, 2018, defendant failed to comply with the notice.

Defendant's answer generally denied each allegation in the complaint and set forth several affirmative defenses. Pertinent here, defendant alleged the three-day notice overstated the amount of outstanding rent due to plaintiffs' failure to offset the amount of "illegal late fees previously charged."

Neither party made any pretrial motions. A jury trial commenced on May 30, 2018. After the presentation of plaintiffs' case-in-chief, defendant made an oral motion for nonsuit. Defendant argued she was entitled to an offset for her payment of an "illegal late fee" in the amount of $180, and as a result, the three-day notice overstated the amount of rent due. The trial court agreed, granting the motion for nonsuit and entering judgment in favor of defendant for possession of the premises.

On June 28, 2018, defendant filed a motion seeking $16,812.50 in contractual attorney fees as the prevailing party. Defendant's motion was premised on an attorney fee clause in the lease agreement, along with Civil Code section 1717.[2] The amount of defendant's request was based on the lodestar method, i.e., the number of hours reasonably expended by counsel multiplied by the reasonable hourly rate.

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[1]The complaint also named Pedro Ovalle as a defendant. The record does not reflect that Ovalle was dismissed from the case, and he was not included in the judgment or the notice of appeal. Because Lopez is the only named appellant, we refer to her individually as "defendant."

[2]"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." (Civ. Code, § 1717, subd. (a).)

Defendant was represented by Attorneys Kevin Hermansen and Joezen A. Callos. Hermansen was a ninth-year attorney with significant experience in unlawful detainer matters. His hourly rate was $400. Callos was a third-year attorney with limited trial experience. His hourly rate was $275. According to time logs, a total of 54.5 hours was spent on the case (14.6 hours by Hermansen and 39.9 hours by Callos).

Plaintiffs opposed the motion, arguing defendant's request was excessive. According to plaintiffs, "the expedient approach would have been a demurrer to the . . . complaint, but the deliberate delay and awaiting a subsequent trial date allowed the tenant to reside in the premises for over two more months depriving the landlord of rent, and padding the attorney's bills." Plaintiffs also asserted that the answer—the only document filed by defendant prior to trial—was a duplicate of pleadings filed by defendant's counsel in other cases, and that "[t]his commonality of content argues against any claim of great legal expertise required to research or file this defense, . . ." Plaintiffs requested the court deny attorney fees altogether or, alternatively, reduce the amount sought.

A hearing on the motion convened on August 3, 2018. After hearing argument, the court concluded that defendant was entitled to attorney fees, but it found the amount requested was excessive. The court determined that $2,900 was an appropriate award (an 82 percent reduction), as the number of hours spent on the action was excessive given defendant's use of form pleadings and the simplicity of the determinative issue. The decision was also premised on the court's belief that the factual basis for nonsuit "could have been raised by demurrer, a motion for summary judgment, after opening statement or even by a telephone call to opposing counsel. [¶] The figure in the request for the number of hours spent appears to the Court to be excessive given the use of judicial form pleadings and the fact that the dispositive issue was a simple one, . . ."

DISCUSSION

Defendant challenges the validity of the attorney fee award, arguing (1) the trial court erred by not employing the lodestar adjustment method, (2) the court abused its discretion by reducing the amount of the award without any mathematical explanation, and (3) the factual

findings underlying the award are not supported by substantial evidence. On the latter point, defendant further contends the court erred by speculating that the case could have been resolved by demurrer, a motion for summary judgment, after opening statement or by telephone call. As explained *post*, we agree with defendant's latter argument.

Code of Civil Procedure section 1032 mandates that, except as otherwise provided by statute, the prevailing party is entitled to recover costs in any action. (Code Civ. Proc., § 1032, subd. (b).) Attorney fees are included as costs when authorized by contract. (Code Civ. Proc., § 1033.5, subd. (a)(10)(A).) The prevailing party may recover reasonable attorney fees, when the contract being enforced specifically provides for such an award, even if the contract limits attorney fees to only one party. (Civ. Code, § 1717, subd. (a).) The reciprocal fee provision applies to this case because section 11 of the lease agreement provides "[t]hat the violation of any of the conditions of this agreement shall be sufficient cause of eviction from said premises, [and] tenant agrees to pay all costs of such action, including such reasonable attorneys fee as may be [*sic*] by court."

Ordinarily, the trial court's determination of an appropriate amount of attorney fees begins with the lodestar method. (*Roe v. Halbig* (2018) 29 Cal.App.5th 286, 310.) Under this method, the court multiplies the time spent by a reasonable hourly compensation of each attorney involved in the case, which may be adjusted upward or downward based on various factors. (*Ibid.*) These factors include (1) the difficulty of the questions involved, (2) the skill displayed in presenting them, (3) the extent to which the litigation precluded other employment by the attorneys, and (4) the contingent nature of the award. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132.) Other factors include the nature of the litigation, the amount in controversy, and the attorney's success or failure. (*Hoffman v. Superior Ready Mix Concrete, L.P.* (2018) 30 Cal.App.5th 474, 488-489.)

Our review of the amount of attorney fees awarded is deferential, as the trial court is the best judge of the value of professional services rendered before it. (*Hoffman v. Superior Ready Mix Concrete, L.P.*, *supra*, 30 Cal.App.5th at p. 488.) This judgment will not be disturbed unless the appellate court is convinced that it is clearly wrong. (*Ibid.*) Notwithstanding this

deference, an attorney fee award will be reversed for an abuse of discretion when the court employed the wrong legal standard in making its determination. (*569 East County Boulevard LLC v. Backcountry Against the Dump, Inc.* (2016) 6 Cal.App.5th 426, 434.) That is what occurred in this case.

It is well settled that an award of attorney fees is governed by equitable principles. (*EnPalm, LLC v. Teitler Family Trust* (2008) 162 Cal.App.4th 770, 774 (*EnPalm*).) This equitable discretion allows the court to reduce attorney fees based on the prevailing party's frivolous procedural maneuvers, with an eye towards encouraging efficient litigation. (*Frog Creek Partners, LLC v. Vance Brown, Inc.* (2012) 206 Cal.App.4th 515, 547.) Consistent with equitable principles, when a party has engaged in litigation conduct that has caused the prevailing party to spend more time on a case than was otherwise reasonably necessary, the trial court may use equitable considerations to reduce the lodestar amount. (*EnPalm*, *supra*, at pp. 777-778.)

Nevertheless, a reduction to contractual attorney fees may not hinge on purely subjective reasons, such as the court's disapproval of counsel's litigation strategy. (*EnPalm*, *supra*, 162 Cal.App.4th at p. 775, fn. 5; see *Ketchum v. Moses*, *supra*, 24 Cal.4th at p. 1142 [court's disapproval of a party's litigation strategy may not be used to punish the prevailing party]; see also *Hill v. Affirmed Housing Group* (2014) 226 Cal.App.4th 1192, 1198-1199.)[3]

In *EnPalm*, the defendants sought an award exceeding $116,000 for contractual attorney fees. (*EnPalm*, *supra*, 162 Cal.App.4th at p. 773.) Applying the lodestar method, the trial court calculated a reasonable attorney fee of $50,000, but it ultimately reduced the award by 90 percent (to $5,000) based on equitable principles. (*Ibid.*) The court cited various forms of

[3]In *Hill v. Affirmed Housing Group*, *supra*, 226 Cal.App.4th 1192, the appellant argued that the prevailing party should have mitigated their attorney fees by moving for summary judgment. (*Id.* at p. 1198.) The appellate court noted that the appellants failed to cite a single case permitting a reduction to an award for failure to mitigate. (*Ibid.*) Additionally, the appellants' argument "would not carry the day," as their unsuccessful motion for nonsuit suggests that a summary judgment motion may have been denied, and the court's conclusion that the prevailing party's trial-related fees were reasonably necessary was not clearly wrong. (*Id.* at pp. 1198-1199.) In contrast to *Hill*, the trial court's legal conclusion in this case—that defendant was obligated to seek relief prior to trial—was clearly inappropriate pursuant to the principles discussed in *EnPalm*, *supra*, 162 Cal.App.4th at page 775, footnote 5.

misconduct and false statements by one of the defendants, finding "'this action may well have resolved in its early stages, formally or informally, had [defendant] been more forthcoming as to the true facts, i.e., the vast majority of the time incurred by . . . counsel was not reasonably incurred.'" (*Ibid.*)

On appeal, the defendants argued that the trial court erred by reducing the attorney fee award as punishment for their purported litigation misconduct. (*EnPalm*, *supra*, 162 Cal.App.4th at p. 775.) The majority affirmed, rejecting the view that the reduction to the award served as "punishment." (*Ibid.*) Instead, the majority concluded that the reduction to the lodestar figure was within the court's discretion because most of the attorney fees were unnecessary and were caused by defendant's misconduct. (*Ibid.*)

The dissent in *EnPalm* expressed concern that "[t]he majority position, if correct, would allow a trial judge to reduce fees to a nominal amount in any case where he felt that the prevailing party behaved badly or could have avoided the litigation entirely," and that "this authority would be quite a boon to judges and could drastically reduce future litigation in California because the scenario (one side is lying and could avoid the litigation) is likely to be true in a significant percentage of litigation filed in the California courts." (*EnPalm*, *supra*, 162 Cal.App.4th at p. 786, dis. opn. of Cooper, J.) In response, the majority "agree[d] with the dissent's rejection of a rule that would allow a trial court to reduce a prevailing party's contractual attorney fees for purely subjective reasons, such as . . . counsel's litigation strategy. (*Id.* at p. 775, fn. 5.) The court rejected the notion that an award may be reduced to punish a party for counsel's litigation conduct, reiterating that "our holding is based solely on the undisputed finding that, given how the case unfolded at trial, the bulk of appellants' fees was unnecessary." (*Ibid.*)

EnPalm is instructive insofar as the court rejected a rule that would allow the trial court to reduce an award based on its disapproval of counsel's litigation strategy. But unlike *EnPalm*, defendant in this case did not commit clear wrongdoing resulting in an unnecessary delay of the litigation. The opposite is true, as defendant did not file any pretrial motions, and the trial convened a mere 107 days after the complaint was filed. These factors bely a finding

that defendant unduly prolonged the litigation. Further, we are aware of no authority supporting the proposition that a prevailing party can be penalized for exercising their constitutional right to proceed to trial (Cal. Const., art. I, § 16), and for prevailing based on a successful defense.

Indeed, "it is impossible for an attorney to determine before starting work on a potentially meritorious legal theory whether it will or will not be accepted by a court years later following litigation. It must be remembered that an award of attorneys' fees is not a gift. It is just compensation for expenses actually incurred . . . ." (*Sundance v. Municipal Court* (1987) 192 Cal.App.3d 268, 273 [time spent on legal theories in which plaintiff did not prevail should not be excluded from prevailing party fee award].)

Plaintiffs claim that defense counsel willfully prolonged the case by waiting until trial to bring the motion for nonsuit, "[r]ather than courteously bringing up the matter of late fees with Plaintiff, or sensibly disposing of the case in a prompt manner by motion, . . ." A party's purported discourtesy is not a downward adjustment factor in a lodestar calculation.

Moreover, plaintiffs do not specify what motion would have been the more prudent approach. For good reason. The trial court found that defendant could have attempted to resolve the case by demurrer, a motion for summary judgment, after opening statement or by a telephone call to opposing counsel. We address each individually.

First, a demurrer is appropriate only when a defect exists on the face of the complaint (*Staniforth v. Judges' Retirement System* (2014) 226 Cal.App.4th 978, 992), and the complaint in this case does not reveal any defect in the amount of past-due rent demanded by plaintiffs. This conclusion is evinced by defendant's answer, which relied upon the defective notice as an affirmative defense rather than a specific denial.

Second, because the determination as to whether the notice to pay rent or quit stated precisely the rent due is a "question of fact which must be put to trial[,]" it is not appropriately resolved by motion for summary judgment. (*Ernst Enterprises, Inc. v. Sun Valley Gasoline, Inc.* (1983) 139 Cal.App.3d 355, 359.)

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Third, "[a] defendant is entitled to nonsuit after the plaintiff's opening statement only if the trial court determines that, as a matter of law, the evidence to be presented is insufficient to permit a jury to find in the plaintiff's favor. [Citations.]" (*Ewing v. Northridge Hospital Medical Center* (2004) 120 Cal.App.4th 1289, 1296.) The granting of nonsuit after opening statement is a disfavored practice. (*Uccello v. Laudenslayer* (1975) 44 Cal.App.3d 504, 509.) The record does not include a record of the arguments asserted in plaintiffs' opening statement. Without an adequate record, we cannot speculate whether plaintiffs' opening statement warranted nonsuit. Importantly, even if we credited this argument, it would simply authorize the trial court to reduce the award for any attorney fees expended after opening statement; it would not support the 82 percent reduction ordered by the trial court.[4]

Fourth, we agree with defendant that she cannot be punished for her counsel's failure to reveal her trial strategy to opposing counsel by phone call, and that doing so may have exposed counsel to liability for malpractice.

In addition to our conclusion that the trial court employed the wrong legal standard in making its determination, and after applying all presumptions in favor of the trial court's determination in this case, we cannot deduce any mathematical or logical explanation for how it arrived at the award of $2,900. If Callos's hourly rate is used, the award would cover 10.54 hours. If Hermansen's rate is used, the award would cover 7.25 hours. Neither hourly figure is supported by the evidence. Instead, it appears the decision was simply based on the court's determination that defendants should have attempted to resolve the case by motion rather than allowing it to go to trial.

"It is the essence of arbitrariness to make an award of attorney fees that cannot be justified by the plaintiffs' request, the supporting bills, or the defendant's opposition." (*Gorman v. Tassajara Development Corp.* (2009) 178 Cal.App.4th 44, 101; accord, *Roe v. Halbig, supra*, 29 Cal.App.5th at p. 312 [award with no reasonable basis is an arbitrary determination]; see also *Mountjoy v. Bank of America, N.A.* (2016) 245 Cal.App.4th 266, 281

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[4]According to their declarations, Hermansen expended four hours of billable hours after the motion for nonsuit, while Callos expended 1.8 hours following the nonsuit.

[trial court abused its discretion when it "determined that because well over 70 percent of the billing entries suffered from one or more flaws, it was appropriate to simply reduce the total hours claimed by 70 percent"]; see also *Northwest Energetic Services, LLC v. California Franchise Tax Bd.* (2008) 159 Cal.App.4th 841, 882 [rejecting award that bears no "reasonable relationship" to the lodestar figure].)

For these reasons, the award must be reversed and remanded for further consideration.[5]

DISPOSITION

The order of attorney fees is reversed. The matter is remanded to the trial court for a determination of defendant's reasonable attorney fees in a manner that is consistent with this opinion. Defendant is entitled to costs on appeal.

P. McKay, P. J.

We concur:

Ricciardulli, J.

Richardson, J.

[5]We do not intend to suggest that the amount of the award was necessarily inappropriate; rather, we conclude (1) the trial court's decision relied on the wrong legal standard, and (2) the award is not supported by substantial evidence. (See *Gorman v. Tassajara Development Corp.*, *supra*, 178 Cal.App.4th at p. 101, fn. 36.)

In light of the disposition, we do not address defendant's remaining claims of error.

On May 3, 2019, defendant filed a motion to strike portions of plaintiffs' brief based on various perceived deficiencies. The motion is denied.

C E R T I F I C A T E O F T R A N S M I T T A L

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A copy of the following:

( ) Order of this Date	(✓) Opinion
( ) Memorandum Judgment	( ) Order Denying Rehearing/Certification
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( ) Notice Fixing Brief Dates	( ) Notice Setting Cause for Hearing

has been transmitted to above named parties (✓) and trial court ~~appeal clerk~~ Judge.

Dated: AUG 20 2019 By C. Esquivel, Deputy