

The Morrison Law Journal  
September 2009  
Volume IV, Edition 9

Court Of Appeal Narrowly Construes Recovery Of Attorney's Fees On A Contract Where The Trial Of The Matter Only Involved An Assignment Of Claims Related To The Contract And Not The Contract Itself

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In a case with somewhat complex facts, the California Court of Appeal, Second District, concluded that the trial court properly denied an award of attorney's fees to a party which prevailed at trial even through the plaintiff and the defendant were in privity and the contract which they entered into contained an attorney fee clause in favor of the prevailing party in the event of a dispute.

This ruling occurred in the matter entitled The Vons Companies, Inc. v. Lyle Parks, Jr., Inc. (2009) DJDAR 13828 ("The Vons Case"). The facts of The Vons Case are as follows: in July 2002, The Vons Companies, Inc. ("Vons") entered into a construction contract with a contractor, Lyle Parks, Jr., Inc. ("Lyle") for the construction of a shopping center facility. The July 2002 contract contained an attorney fee clause and also required that a warranty be issued. The work was completed by Lyle in 2003 and Lyle issued a warranty on October 14, 2003 which did not include an attorney fee clause. In May 2004, Vons sold the shopping center to Mock Ranch, Inc. ("Mock"). As part of that transaction, Vons did not assign the July 2002 contract with Lyle but did assign the October 14, 2003 warranty. In May 2006, Mock sued Vons for breach of contract and fraud alleging water damage and construction defects. Mock also sued Lyle asserting causes of action for negligence and breach of express warranty (presumably based on the October 14, 2003 warranty).

In August 2007, about a month before trial, Vons filed a Cross-Complaint against Lyle, which was settled in September 2007. Thereafter, Vons settled with Mock and obtained an assignment of Mock's claims against Lyle. The matter then proceeded to trial and a judgment was entered in favor of Vons (as assignee) and against Lyle on the two causes of action which had been assigned by Mock (i.e. negligence and breach of contract).

After the trial, Vons filed a Memorandum of Costs seeking approximately \$33,671 in recoverable costs under Code of Civil Procedure section 1032 and filed a Motion for Attorney's Fees seeking over \$1,500,000 in fees and costs based on the July 2002 contract between Vons and Lyle. Lyle filed a Motion to Tax Costs

as well as an opposition to the Motion for Attorney's Fees, the latter of which was based on the assertion that Vons only prevailed on the breach of warranty claim arising out of the October 14, 2003 warranty, which did not contain an attorney fee clause, and the negligence cause of action. The trial court granted the Motion to Tax Costs and denied the Motion for Attorney's Fees.

Vons appealed on the basis that it had litigated with Lyle and had prevailed (and, by inference, on the basis that the September 2007 settlement did not preclude Vons from seeking attorney's fees). Counsel for Vons pointed out that the Courts have taken a liberal view of what constitutes a suit on a contract citing Dell Merk, Inc. v. Franzia (2005) 132 Cal.App.4th 443 ("Dell Merk Case")- a case where a non-signatory to a security agreement was able to recover attorney's fees from a bank which had intervened in a payment dispute involving a borrower of the bank. The Dell Merk Case has been noted by commentators and is believed to provide authority to broadly construe the ambit of claims which would apply to contract disputes involving prevailing party attorney fee clauses. See, 7 Witkin, California Civil Procedure (4<sup>th</sup> edit. 2000) "Judgment" section 206.

The Court of Appeal affirmed the decision of the trial court.<sup>1</sup> The Court of Appeal acknowledged the holding in the Dell Merk Case but distinguished it on the basis that Vons had only prevailed as an assignee of Mock and Mock did not have a basis to obtain attorney's fees. The Court of Appeal also noted that the October 14, 2003 warranty grew out of the July 2002 contract (which contained an attorney fee clause) but ruled that was not germane to its decision.

The Vons Case appears to have been decided properly. However, counsel need to bear in mind that the ability to recoup attorney fees under contract will be based on what contracts were actually litigated before the court.

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<sup>1</sup> The Court of Appeal over turned the trial court's denial of recoverable costs, but that portion of the ruling which is germane to this article.

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