

Chinn v KMR Property Management

8/22

CCP section 998; Prevailing party; Recovery of attorney fees

Plaintiff Chinn had an altercation with the property manager at her apartment. In December 2004, she sued for assault, battery, and negligence against the manager, Grimes, and the management company, KMR and the property owner, CPLP. She alleged KMR and CPLP owed a **duty to provide for tenant safety**. In March 2006, plaintiff served KMR and CPLP with offers to enter judgment in her behalf for \$10,000 each and an offer to Grimes for \$17,000, all pursuant to CCP section 998. The offers all expired.

In June 2006, KMR and CPLP served plaintiff with a section 998 offer containing two separate proposals. She could (1) **dismiss with prejudice as to all defendants**, accept \$23,000 from the defendants, and they would waive costs. **Alternatively**, she could (2) **allow judgment to be taken in favor of defendants and against plaintiff** and they would pay her \$23,000 and waive costs. If she declined and failed to obtain a more favorable judgment she could not recover costs and would pay defendants' costs from the time of the offer.

Chinn agreed to the first offer, and **dismissed her action with prejudice**, and filed a notice of settlement. In September of 2006, plaintiff Chinn filed a **memorandum of costs** for \$30,279.42, including **expert witness fees** of \$15,840 and **investigation costs** of \$9,880. She also requested **attorney fees**. Defendants **moved to strike the cost bill** because Chinn **did not obtain a judgment in her favor**. Defendants also **moved to tax costs**.

Plaintiff then brought a **motion for attorney fees and costs** as a **prevailing party** under CCP 1021 based on a provision in her lease. The lease stated: *"If any legal action or proceeding be brought by either party to this agreement, the prevailing party shall be reimbursed for all reasonable attorney's fees and costs in addition to other damages awarded."* The defendants opposed the motion because there was no prayer for attorney fees, the claim was unrelated to the lease, and because plaintiff did not prevail.

The trial court **struck** the cost bill as to manager Grimes. It **taxed** the expert fees and investigative costs, and **denied** the motion for attorney fees as to

the management defendant and the property owner defendant. Plaintiff filed a [motion for reconsideration](#), and plaintiff was awarded costs of \$4,036 against KMR and CPLP because she was the **prevailing party** based on her net monetary recovery. Plaintiff then appealed.

Attorney Fees:

The Second District Court of Appeal addressed several issues in its opinion. First, on the **question** of plaintiff's [entitlement to attorney fees](#), the Justices noted the test is not whether the cause of action sounds in tort or contract. Instead, [the sole question is the intent of the parties: did they intend to authorize the prevailing party to recover its attorney fees for a tort cause of action.](#) (*Allstate Ins. Co. v Loo* (1996) 46 Cal.App.4th 1794)

Here, the fee provision in the lease was exceptionally broad. It did not require the action to arise out of the lease. Also, the negligence claim was clearly related to plaintiff's tenancy. (*Castaneda v Olsher* (2007) 41 Cal.4th 1205) Thus, the fee provision in the lease allowed an award of attorney fees in this case.

Recovery of attorney fees under CCP Section 998:

Next, the Second DCA noted the statutes regarding costs and section 998 allow parties to allocate costs and fees in their compromise agreement. [A judgment entered pursuant to the acceptance of a section 998 offer is a "stipulated or consent judgment" that is regarded as a contract between the parties. It permits the parties to determine the nature of the judgment to be entered and to resolve collateral matters, including costs.](#) (*Rappenecker v Sea-Land Service, Inc.* (1979) 93 Cal.App.3d 256)

[A section 998 offer that is silent on the issue of attorneys fees and costs cannot reasonably be interpreted to exclude recovery of fees and costs by the prevailing party.](#) (*Ritzenhaler v Fireside Thrift Co.* (2001) 93

Cal.App.4th 986) A party intending an offer to compromise under section 998 to encompass attorney fees and costs can easily provide in the offer that **each side is to bear its own attorney fees and costs.**

Here the defendants could have provided that they were the prevailing parties for purposes of an award of costs, a right that they waived, or that the parties would bear their own costs. They caused any uncertainty which exists, and therefore, the agreement must be interpreted against them. (Civil Code section 1654)

Defining "prevailing party:"

Regarding the award of costs, each side contended it is the prevailing party. Section 1032 describes **both** the **party with a net monetary recovery** and a **defendant in whose favor a dismissal is entered** as the **prevailing party**. The Justices noted the Legislature did not intend to include settlement proceeds received by the plaintiff in exchange for a **dismissal in favor of the defendant** as a **net monetary recovery**. Nothing in the background materials of the 1986 amendment to the cost statutes mentioned settlement proceeds or suggested a change of law to allow costs to a plaintiff following a dismissal. Thus, defendants KMR and CPLP are the **prevailing parties** and plaintiff is not entitled to costs for investigation or service of process.

Prevailing party for attorney fee award:

Civil Code section 1717 provides for the reciprocal **right to attorney fees** in contracts. The statute now indicates "the party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract." (CC 1717 (b)(1)) Thus, **the determination of "prevailing party" for costs purposes is not the same as determining the party prevailing for an award of attorney fees.** (*Santisas v Gooden* (1998) 17 Cal.4th 599)

In *Santisas*, the California Supreme Court stated there should not be an inflexible rule denying attorney fees in all voluntary pretrial dismissal cases. Instead, the court should determine if there is a **prevailing party** by examining the terms of the contract and considering a pragmatic definition of the extent to which each party has **realized its litigation objectives** whether by judgment, settlement, or otherwise. (*Santisas*, at pp. 621-622)

Therefore, the issue is remanded to the trial court to determine whether there is a prevailing party for the purpose of an award of attorney fees, pragmatically assessing whether and to what extent plaintiff or defendants realized their objectives through settlement.

Attorney fees are an element of costs:

Plaintiff also contended she was **not required to include a prayer in her complaint for attorney fees**. The Second DCA agreed, noting under CCP 1033.5(a)(10) that **attorney fees are recoverable as an element of costs**, rather than as an element of damages. A motion is the proper method to seek recovery of any such fees. Thus plaintiff's motion for fees

satisfied due process.

Settlement as Judgment:

For the last item in this mixed bag, plaintiff claims that by settling, she exceeded her own CCP 998 offers and should have been awarded her costs, including expert fees. [A voluntary dismissal with prejudice is a judgment for purposes of section 998. A "judgment" is defined in CCP 577 as "the final determination of the rights of the parties in an action or proceeding." \(*Goodstein v Bank of San Pedro* \(1994\) 27 Cal.App.4th 899\)](#) Thus a [judgment includes an offer of compromise that results in the final disposition of the underlying lawsuit if accepted.](#)

Here the trial court did not abuse its discretion by declining to award plaintiff costs under CCP 998. The payment of \$23,500 to plaintiff resulting in the dismissal of the action as to all defendants was arguably a [more favorable judgment](#) to KMR and CPLP than plaintiff's earlier offers to the three defendants totaling \$37,000.

The case is remanded for hearing on the attorney's fees motion. In all other respects it is affirmed. Each side to bear its own costs on appeal.

////

This case is provided in the hope it may prove useful in your practice or in the handling of litigated cases. If you receive a forwarded copy of this message and would like to be added to the mailing list, let me know.

Mediation and Binding Arbitration are economical, private, and final. Alternative dispute resolution will allow you to dispose of cases without the undue time consumption, costs, and risks of the courtroom. Your inquiries regarding an alternative means to resolve your case are welcome.