PARTIES/ATTORNEYS

Plaintiff	Dana Brancati	Richard Wideman
Defendant	Cachuma Village, LLC	Rafael Gonzalez, Sean Stratford-Jones Mullen & Henzell L.L.P.

RECOMMENDATION

The parties are instructed to appear at the hearing for oral argument for further discussion of the continued viability of the August 25, 2022 order for fees and costs in favor of defendant against Brancati and Green and the deficiencies in the current record.

On September 7, 2016, plaintiffs Dana Brancati and William Green filed a complaint against defendants Cachuma Village, LLC, and Anne "Nancy" Crawford-Hall, for breach of the warranty of habitability, fraud, constructive eviction, and "personal injuries and property damage," based on mold growth inside the residence. Defendant Cachuma Village, LLC answered on November 28, 2016. It does not appear that Anne "Nancy" Crawford Hall was ever served, or ever appeared. William Green was dismissed as a plaintiff in an order filed on July 26, 2021.

As relevant for our purposes, Judge Staffel granted Cachuma Village's motion in limine, excluding plaintiff's expert from testifying about toxic mold. On May 17, 2022, at plaintiff's request, the court ordered dismissal of the action. Plaintiff appealed. While the appeal was pending, on August 25, 2022, the court awarded attorneys' fees to defendant Cachuma Village LLC in the amount of $181,047.50 and costs in the amount of $41,560.14 for a total judgment of $222 607.64 against plaintiffs Dana Brancati and William Green. (See *Korchemny v. Piterman* (2021) 68 Cal.App.5th 1032, 1052—filing a notice of appeal does not stay any proceedings to determine the matter of costs and does not prevent the trial court from determining a proper award of attorney fees claimed as costs.)

The Court of Appeal ultimately reversed the court's ruling on the motion in limine in a published opinion, concluding the expert Dr. Simon should be allowed to testify. (*Brancati v. Cachuma Village LLC* (2023) 96 Cal.App.5th 499, 502 ["Because the medical expert was qualified and his opinion was based on facts and differential diagnosis, the trial erred in excluding the evidence. We reverse"].) The California

Supreme Court denied review. (*Brancati v. Cachuma Village, LLC*, S28693, petn. for rev. Jan. 31, 2024.) The remittitur was issued on February 7, 2024.

On May 28, 2024, this court granted defendant's motion to dismiss for failure to bring the case to trial within 5 years pursuant to Code of Civil Procedure sections 583.310 and 583.360. Plaintiff filed a Notice of Appeal from this ruling on June 11, 2024.

On June 26, 2024, defendant filed its Memorandum of Costs in the amount of $47,726.26. It is unchallenged. On August 21, 2024, defendant filed its motion for attorney's fees against Dana Brancati in the amount of $181,047.50 (which is the same amount sought in the 2022 motion) on the basis that the rental agreement between the parties permits the recovery of attorney's fees to the prevailing party in any action arising out of the agreement. The motion was served by electronic mail that same date. Opposition was due on September 18, 2024. (Code Civ. Proc., § 1005, subd. (b).) None has been filed. As noted above, the filing a notice of appeal does not stay any proceedings to determine the matter of costs and does not prevent the trial court from determining a proper award of attorney fees claimed as costs. (*Korchemny v. Piterman* (2021) 68 Cal.App.5th 1032, 1052.) The matter is properly before the court.

Continued Viability of Previous Order

The August 25, 2022 order remains of record even though the appellate court undermined a necessary factual predicate—a finding that defendant is the prevailing party—when it reversed the trial court's decision as to Dana Brancati. Defendant does not address this procedural status. Instead, it has caused to be issued an application and order for a debtor's exam to William Green, presumably based on the August 25, 2022 order.

Defendant's counsel should be prepared to address this issue, notably whether it has taken the position that the August 25, 2022 order has been vacated as to Brancati but remains operative as to Green. Further briefing may be required.

Merits

Civil Code section 1717 provides that in an action to enforce a contract authorizing an award of fees and costs to one party, the party "prevailing on the contract" is entitled to reasonable fees. (Civ. Code, § 1717.) Such fee awards are allowable as court costs under Code of Civil Procedure section 1032. (Code Civ. Proc. § 1033.5(a)(10)(A) & last para.) The prevailing party includes a defendant who is dismissed from the action. (Code Civ. Proc., § 1032, subd. (a)(4).) A defendant dismissed from the action is the "prevailing party" regardless whether the dismissal is voluntary or involuntary. (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 606—

defendant entitled to costs as a matter of right after plaintiff voluntarily dismissed proceeding; *Crib Retaining Walls, Inc. v. NBS/Lowry, Inc.* (1996) 47 Cal.App.4th 886, 890—involuntary dismissal pursuant to CCP § 877.6 order approving good faith settlement.) A defendant against whom no relief is recovered is the prevailing party as a matter of law, and the court has no discretion to deny fees. (*Childers v. Edwards* (1996) 48 Cal.App.4th 1544, 1549-1551.)

Here, the rental agreement authorizes the recovery of fees: "In any action or proceeding arising out of this Agreement, the prevailing party between landlord and Tenant shall be entitled to reasonable attorney fees and costs." (Gonzalez Decl., , Exhibit A, ¶ 36.) As there was no relief recovered from defendant, it is the prevailing party.

Defendant requests recovery of attorney's fees in the amount of $181,047.50. Contractual attorney fees in California are ordinarily calculated using the lodestar method. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095.) "Under the lodestar method, attorney fees are calculated by first multiplying the number of hours *reasonably* expended on the litigation by a *reasonable* hourly rate of compensation." (*Chacon v. Litke* (2010) 181 Cal.App.4th 1234, 1259, italics added.) California courts do not require detailed time records for purposes of calculative the lodestar method, and a trial court have discretion to award fees based on declarations of counsel describing the work they have done and the court's own view of the number of hours reasonable spent. (See, e.g., *Syers Properties III, Inc. v. Rankin* (2014) 226 Cal.App.4th 691, 698.) An attorney fees award should include compensation for the work of legal assistants when the "prevailing practice ... is to bill separately for paralegal service time at a reasonable market value rate"—in other words, when the cost of paralegal work is not included as overhead in the rates charged for attorney work. (*Guinn v. Dotson* (1994) 23 Cal.App.4th 262, 269.)

Here, the court has insufficient information to make a determination of reasonableness. Attorney Gonzalez submits his declaration in support of the motion describing the motions, hearings, discovery practice, and other key events for which his client incurred attorney's fees. (Gonzalez Decl. ¶ 4.) The declaration, however, fails to detail how much time was spent performing each activity. While time records are not necessarily required,[1] the court needs more what was presented to determine whether the hours spent are reasonable.

Moreover, there is no <u>*evidence*</u> of the hourly rates charged. The memorandum of points and authorities identify each associate and hourly rate (along with a generic description of paralegals and legal assistants). "Matters set forth in points

[1] The court nevertheless notes: "[C]ontemporaneous time records are the best evidence of lawyers' hourly work. They are not indispensable, but they eclipse other proofs. Lawyers know this better than anyone. They might heed what they know." (*Taylor v. County of Los Angeles* (2020) 50 Cal.App.5th 205, 207.)

and authorities are not evidence." (*Alki Partners, LP v. DB Fund Services*, LLC (2016) 4 Cal.App.5th 574, 590; see *Brehm Cmtys. v. Superior Court* (2001) 88 Cal.App.4th 730, 735; *Smith, Smith & Kring v. Superior Court* (1997) 60 Cal.App.4th 573, 578 ["The only evidence the trial court should [consider] and which we may consider ... is that contained in the declarations filed in support of ... the motion. The matters set forth in ... memoranda of points and authorities are not evidence and cannot provide the basis for the granting of [a] motion."].) Once an evidentiary basis has been provided for the hourly rates, the court can determine if they are reasonable.

The parties are instructed to appear at the hearing for oral argument for further discussion. Appearance by Zoom Videoconference is optional and does not require the filing of Judicial Council form RA-010, Notice of Remote Appearance. (See Remote Appearance (Zoom) Information | Superior Court of California | County of Santa Barbara.)