

Applying Contractual Attorney's Fees Clauses after *Marina Glencoe*

WHEN LITIGATING CASES INVOLVING contracts with attorney's fee clauses, the possibility of recovering attorney's fees, or being held responsible for the other side's fees, can profoundly affect the decision of whether to proceed, dismiss, or seek a settlement with mutual releases. Given this reality, it is critical to understand just when a voluntary dismissal can be effective as a means of avoiding exposure to a claim for the attorney's fees of the opposing party.

A recent Second District Court of Appeal opinion in the case *Marina Glencoe v. Neue Sentimental Film AG* provides some lessons on the litigation strategy of voluntary dismissals in the context of a potential attorney's fees claim. However, although it does not expressly say so, *Marina Glencoe* may be significantly limited in its application based upon the narrow nature of the particular claims that were being litigated. Analyzing the impact of a voluntary dismissal upon the recovery of attorney's fees requires an understanding of the procedural posture of the case at the time of dismissal, the wording of the attorney's fees clause, and whether the claims being litigated are contract claims, noncontract claims, or some combination thereof.

In *Marina Glencoe*, a plaintiff commercial landlord sued its tenant and two of the tenant's related entities alleged to be its alter egos. The lease contained a fairly typical attorney's fee clause:¹

[I]f any action for breach of or to enforce the provisions of this Lease is commenced, the court in such action shall award to the party in whose favor judgment is entered, a reasonable sum as attorneys' fees and costs. The losing party in such action shall pay such attorneys' fees and costs."²

Before trial, the tenant filed for bankruptcy, and trial proceeded only against one of the alleged alter ego defendants. At the request of the plaintiff, trial was bifurcated to adjudicate first the issue of liability based on alter ego, and then if necessary to determine damages if such liability were found.

When the plaintiff landlord rested upon completing its evidence in the alter ego liability phase of the trial, the defendant moved for judgment in its favor under Code of Civil Procedure Section 631.8. The trial court took the motion under submission overnight, but before it could rule, the plaintiff landlord voluntarily dismissed its suit with prejudice the next morning. Upon the defendant's subsequent motion for its attorney's fees under the contractual attorney's fee clause, the trial court ruled that the defendant was not entitled to the fees under Civil Code Section 1717.³

On appeal by the defendant, the court of appeal held that the trial court's refusal to award attorney's fees was correct under the express language of Civil Code Section 1717(b)(2), which provides: "When an action has been voluntarily dismissed or dismissed pursuant to a settlement of the case, there shall be no prevailing party for purposes of this section." The *Marina Glencoe* opinion notes that Section 1717(b)(2) contains no temporal limitation—for example, whether trial has already commenced—and "bars recovery of Section 1717 attorney fees regardless of when the dismissal was filed."⁴

The tenant asserted on appeal that a dismissal with prejudice

while a motion for judgment is already pending should not be deemed a voluntary dismissal within the meaning of Section 1717(b)(2), and so supposedly should not fall within its proscription denying any award of attorney's fees to the dismissed party. The court of appeal rejected this contention, finding that it is not the stage of proceedings that distinguishes a voluntary dismissal from an involuntary one but rather the plaintiff's role in bringing the dismissal about.⁵

The *Marina Glencoe* court also was not persuaded that it should allow an award of attorney's fees by analogy to other situations in which a voluntary dismissal short of a full trial—even a dismissal without prejudice—has been held not to relieve the dismissing party from having to pay the prevailing party's attorney's fees. For example, attorney's fees are recoverable by a prevailing party defendant notwithstanding the plaintiff's voluntary dismissal without prejudice if the dismissal occurs either after a general demurrer has been granted without leave to amend or a general demurrer has been granted with leave to amend but no amendment is timely made, and thus all issues have been deemed admitted in the defendant's favor.⁶ Similarly, when a defendant's right to obtain summary judgment has ripened to the point of inevitability because the plaintiff's opposition papers, which are inadequate to defeat the motion, have all been filed, the plaintiff does not avoid having to pay the prevailing party defendant's attorney's fees by filing a voluntary dismissal without prejudice before the trial court actually rules on the motion.⁷

The *Marina Glencoe* opinion distinguishes the dismissal in its case, which was with prejudice, from these other situations. The dismissal in *Marina Glencoe* was made with the intent to end the litigation rather than to avoid its end. This would appear to be a distinction created judicially on policy grounds, since neither Civil Code Section 1717 nor Code of Civil Procedure Sections 1032 and 1033.5 contain language that distinguishes prevailing party defendants according to whether the judgment of dismissal is voluntary or involuntary, or whether it is with or without prejudice.

It may be argued that as a result of this line of reasoning that *Marina Glencoe* contains an unstated limitation that significantly limits its scope and applicability. Unlike the language and court interpretations of Civil Code Section 1717(b)(2), different rules apply when attorney's fees are sought under Code of Civil Procedure Sections 1032 and 1033.5 for claims that are not purely contractual. *Marina Glencoe* specifically states that the dismissed defendant's motion for attorney's fees was denied because the trial court concluded that the dismissed defendant "was not entitled to attorney fees under either Civil Code Section 1717 or Code of Civil Procedure Section 998." Although the opinion does not expressly explain its reasoning for a distinction, it appears that the motion for attorney's fees in the trial court was made only under Civil Code Section 1717 and Code of Civil Procedure Section 998 and not under Code of Civil Procedure Sections 1032 and 1033.5.

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