Lien v. Lucky United Properties Investments

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In a complaint filed July 25, 2006, naming as defendants Lucky United Properties Investments, Inc., Chin Teh Shih, in her capacity as Trustee of the Woo Family 2000 Trust, and Salvio Street LLC, plaintiffs Eric W. Lien and Pi-Ching Yen sought a declaration that Lien and Yen owned a 62.5 percent interest in certain property located in San Francisco. The trial court rejected Lien and Yen's complaint on summary judgment, ruling it was barred under principles of res judicata. The court also ruled that Salvio Street had purchased the property free and clear of any interest that Lien and Yen were asserting. Lien and Yen now appeal arguing the court applied the principles of res judicata incorrectly and that Salvio Street purchased the property subject to their ownership claim.

Lucky United, Shih, and Salvio Street also appeal arguing the trial court erred when it refused to award them the attorney fees they spent defending against Lien and Yen's complaint.

We will reject the arguments advanced on both appeals and affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

This court has addressed this dispute many times before. We set forth the facts as described in some of our prior opinions.

In late 1995 and early 1996, Ming Woo, Lien and Yen purchased property located on Joy Street in San Francisco. For the sake of convenience, title was taken by Lucky United, a corporation owned solely by Woo. Under the parties' agreement, Woo would contribute $67,500 for a 37.5 percent share in the property. Woo would loan $67,500 to Lien which Lien would use to acquire his 37.5 percent share. Yen would contribute $45,000, which would entitle her to a 25 percent share. Woo, acting on behalf of Lucky United, signed a promissory note and deed of trust in favor of Yen. The deed of trust was recorded in February 1996.

The parties' agreement gave Lien the right to sell the property for an amount that exceeded a 25 percent annual return on the original purchase price, subject to a right of first refusal granted to

Woo. Between 1998 and mid-1999, the parties received several offers for the property, including three offers from Christopher Cook. The parties could not agree on a sale.

Disputes developed between the parties and in August 1999, Woo and Lucky United sued Lien and Yen for breach of contract and other claims.

In October 1999, Cook again offered to buy the property. Lien and Yen accepted the offer and forwarded it to Woo asking that he accept it or exercise his right of first refusal. On December 13, 1999, Woo sent a letter through his attorney stating that he was exercising his right of first refusal. Lien and Yen did not believe Woo had exercised his right of first refusal validly.

In January 2000, Lien and Yen filed a cross-complaint against Woo and Lucky United in an action Woo had filed seeking declaratory relief as to the parties' interest in the property. Among other things, Lien and Yen's cross-complaint sought a declaration that together they owned a 62.5 percent interest in the property and asked that it be partitioned.

In March 2001, following a bench trial, the court [Judge Chaitin] issued a judgment in favor of Lien and Yen on all the causes of action that Woo had alleged in his complaint, and in favor of Lien and Yen on all the causes of action they had alleged in their cross-complaint. The court also issued an order awarding Lien and Yen their attorney fees. Lien and Yen state they recorded that judgment in April 2001.

Woo separately appealed the judgment and the attorney fee order. On October 2, 2002, we affirmed the judgment in part, reversed in part, and remanded for further proceedings. We affirmed the judgment as to the first five causes of action Woo had alleged. We also affirmed the trial court's determination that prior to Woo's purported exercise of his right of first refusal, Woo owned a 37.5 percent interest in the property, Lien owned a 37.5 percent interest, and Yen owned a 25 percent interest. However, we reversed as to Woo's sixth cause of action for declaratory relief which sought a determination that Woo had effectively exercised his right of first refusal. We ruled the trial court erred when it determined that Woo did not validly exercise his right of first refusal, and remanded the case for a new trial where Lien and Yen could present any evidence they might have that would establish an affirmative defense to Woo's purported exercise. We also reversed the trial court's judgment in favor of Lien and Yen on their cross-complaint noting that the court's ruling and the relief granted, "were predicated on the determination that Woo did not validly exercise his right of first refusal. Because we conclude that that determination was erroneous, we necessarily reverse the trial court's judgment for Lien and Yen and its order that the Property be partitioned." (Oct. 2, 2002, A094960 [nonpub. opn.].)

The following day, October 3, 2002, we issued a separate opinion reversing the trial court's award of attorney fees to Lien and Yen. We stated, "In our unpublished opinion in Woo I, we reversed in part the trial court's judgment in favor of Lien and Yen.

We held that there was no prevailing party. That reversal requires us to vacate the attorney fees and costs award as well . . . ." (June 12, 2008, A114380 [nonpub. opn.].)

The case returned to the trial court for further proceedings. In November 2004, Lien and Yen recorded a lis pendens on the property. Woo asked the court to expunge the lis pendens. The court [Judge Warren] agreed to do so and an order expunging the lis pendens was filed in October 2005. The order was recorded that same month.

A bench trial [before Judge Mellon] was conducted to determine whether Lien and Yen might have any affirmative defenses to Woo's purported exercise of his right of first refusal. On December 12, 2005, the trial court ruled that Lien and Yen and not proven any affirmative defenses and ruled in favor of Woo on his sixth cause of action finding that he had effectively exercised his right of first refusal in December 1999. Importantly for purposes of the present appeal, the court also ruled against Lien and Yen on their cross-complaint, including their cause of action for declaratory relief in which they sought to establish a 62.5 percent interest in the property, and their cause of action for partition. The court explained its ruling in its statement of decision as follows:

"The plaintiffs are accordingly entitled to the declaration determining, as the Court of Appeal held, that Woo properly exercised his right of first refusal. Given the Court of [Appeal's] determination that the trial court's ruling on the claims asserted in the cross-complaint and the relief the trial court granted on the cross-complaint each had to be reversed because that ruling and relief 'were predicated on the determination that Woo did not validly exercise his right of first refusal,' the resolution now made of the Sixth Cause of Action of plaintiffs' First Amended Complaint precludes any consideration by this court of the merits of any cause of action set forth in the cross-complaint."

The court's judgment included the following similar explanation: "The Court of Appeal has previously affirmed the Judgment of [the] Superior Court in this action made on March 6, 2001 and filed and entered herein as to all causes of action other than the Sixth Cause of Action of Plaintiffs' First Amended Complaint. The Court of Appeal stated as to the Cross-complaint of DEFENDANTS: 'The trial court's rulings on Lien and Yen's claims, and the relief it granted, were predicated on the determination that Woo did not validly exercise his right of first refusal. Because we conclude that that determination was erroneous, we necessarily reverse the trial court's judgment for Lien and Yen and its order that the property be partitioned.' In light of this Court's Judgment with respect to the Sixth Cause of Action of the First Amended Complaint and in accordance with [the] determination of the Court of Appeal affirming the prior Judgment with respect to all causes of action other than the Sixth Cause of Action of the First Amended Complaint and the quoted determination of the Court of Appeal with respect to the Cross-complaint, it is appropriate that this Court enter Judgment determining the disposition of the remainder of the First Amended Complaint and of the entire Cross-complaint. Good cause appearing, it is [¶] FURTHER ORDERED, ADJUDGED AND DECREED THAT PLAINTIFFS and each of the plaintiffs take nothing by reason of the allegations of the First, Second, Third, Fourth and Fifth Causes of Action of their First Amended Complaint;

and that DEFENDANTS and each of the defendants take nothing by reason of anything alleged in their Cross-complaint."

On April 5, 2006, the court [Judge Mellon] issued an order declaring Woo to be the prevailing party for purposes of recovering costs and attorney fees.

Lien and Yen separately appealed both the judgment and the fee order. However, Lien and Yen then voluntarily abandoned their appeal from the judgment. Thus, the trial court's December 12, 2005 judgment is now final.

Then on June 12, 2008, this court reversed the April 5, 2006 fee award. We ruled the court had determined those fees incorrectly and "remanded to the trial court with instructions to determine the prevailing party, if any, based on the final results of the litigation and to award attorney fees and costs, based on the litigation as a whole." (June 12, 2008, A114380 [nonpub. opn.].)

Meanwhile Lien and Yen mounted a new line of attack: in July 2006, they filed the complaint that is at issue in the current appeal. It named as defendants Lucky United, Shih, and Salvio Street. Once again, Lien and Yen sought a declaration that together they owned a 62.5 percent interest in the property and asked that it be partitioned.

Lucky United and Shih moved for summary judgment arguing they were entitled to prevail as a matter of law because the December 12, 2005 judgment rejecting Lien and Yen's cross-complaint in which they sought a declaration that they possessed a 62.5 percent interest in the property and partition was res judicata on the same claims that Lien and Yen were asserting in the current complaint. In addition, Salvio Street moved for summary judgment arguing it was entitled to prevail as a matter of law because it took title after the trial court had expunged the lis pendens that Lien and Yen filed, and under Code of Civil Procedure section 405.61, a purchaser for value after an order of expungement takes without notice of any ownership claim of the proponent of the lis pendens.

The trial court agreed with both arguments. The court granted summary judgment for Lucky United and Shih ruling as follows: "Res Judicata bars relitigation of quiet title and partition claims against defendants. In any event, defendants no longer have a claim to any interest in the subject real property so quiet title and partition claims cannot proceed against them."

As to Salvio Street the court ruled as follows: "Defendant acquired the property free and clear of plaintiffs' claims by virtue of CCP 405.61. In any event, res judicata bars relitigation of plaintiffs' quiet title and partition claims already adjudicated in favor of defendant's predecessor."

Subsequently, Lucky United, Shih, and Salvio Street asked the court to award them the attorney fees they had spent litigating the new complaint. They relied on attorney fee clauses contained in the original agreements between Woo, Lien, and Yen. The trial court rejected that request ruling Lucky

United, Shih, and Salvio Street were not entitled to fees.

Lien and Yen then appealed the trial court's decision to dismiss their complaint pursuant to the summary judgment motion.

Lucky United, Shih, and Salvio Street filed a separate appeal from the court's ruling rejecting their request for attorney fees.

This court consolidated both appeals for purposes of argument and decision.

II. DISCUSSION[1]

A. Lien and Yen Appeal

Lien and Yen argue the trial court erred when it granted summary judgment to Lucky United, Shih, and Salvio Street.

The standard we use to evaluate this argument is settled. On appeal, we review the record de novo to determine whether the party moving for summary judgment has met its burden of proving that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law. (Merrill v. Navegar, Inc. (2001) 26 Cal.4th 465, 476.) Where, as here, the defendants are the moving parties, they must show either (1) that the plaintiff cannot establish one or more elements of his cause of action, or (2) that there is a complete defense. If that burden of production is met, the burden shifts to the plaintiff to show the existence of a triable issue of fact with respect to that cause of action or defense. (Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 850.)

With this standard in mind, we turn to the specific arguments advanced.

1. Res Judicata

Lien and Yen argue the trial court erred when it ruled Lucky United and Shih were entitled to prevail under principles of res judicata.

Res judicata, or claim preclusion, prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them. (Mycogen Corp. v. Monsanto Co. (2002) 28 Cal.4th 888, 896.) "A predictable doctrine of res judicata benefits both the parties and the courts because it 'seeks to curtail multiple litigation causing vexation and expense to the parties and wasted effort and expense in judicial administration.' [Citation.]" (Id. at p. 897, original italics.) The prerequisite elements for applying the doctrine of res judicata are: (1) A claim or issue raised in the present action is identical to a claim or issue litigated in a prior proceeding; (2) the prior proceeding resulted in a final judgment on the merits; and (3) the party against whom the doctrine is being

asserted was a party or in privity with a party to the prior proceeding. (Brinton v. Bankers Pension Services, Inc. (1999) 76 Cal.App.4th 550, 556.)

In the present suit, Lien and Yen filed causes of action seeking a declaration that together, they owned a 62.5 percent interest in the Joy Street property and partition. Lien and Yen alleged the same causes of action in their prior cross-complaint. The court's December 12, 2005 judgment rejecting Lien and Yen's causes of action for declaratory relief and partition is both final, (Lien and Yen abandoned their appeal challenging it) and was on the merits. Indeed, prior to rejecting those causes of action, the court conducted not just one, but two trials. Finally, the parties against whom the doctrine is being asserted, Lien and Yen, were the same parties in the prior action. We agree with the trial court and conclude all the requirements for applying the doctrine of res judicata are present.

None of the arguments Lien and Yen advance convince us the trial court erred. First and primarily, Lien and Yen argue the court's prior judgment was not on the merits. They rely on a comment the court made in its statement of decision where the court said it was precluded from considering the merits of any of the causes of action set forth in the cross-complaint. While the court did make that comment, it did so in a specific context.

In the first appeal, this court found the trial court erred when it ruled against Woo on his sixth cause of action alleging that he had properly exercised his right of first refusal. We found Woo had properly exercised that right, but remanded to the trial court so Lien and Yen could present evidence on any affirmative defenses they might have. However, our resolution of the sixth cause of action necessarily implicated the court's ruling in favor of Lien and Yen on the causes of action they had alleged in their cross-complaint. Specifically, we noted that the court's rulings in favor of Lien and Yen "were predicated on the determination that Woo did not validly exercise his right of first refusal. Because we conclude that that determination was erroneous, we necessarily reverse the trial court's judgment for Lien and Yen and its order that the Property be partitioned." (Oct. 2, 2002, A094960 [nonpub. opn.].) On remand, and after conducting another trial, the court ruled Lien and Yen had failed to prove any affirmative defenses and that Woo was entitled to prevail on his sixth cause of action. Then the court went on to reject the cross-complaint Lien and Yen had filed in which they sought a declaration that they possessed a 62.5 percent interest in the property and partition. The precise basis for the court's latter rulings is unclear. It is possible the court reasoned as follows: at the time Woo exercised his right of first refusal, Lucky United already possessed record title; Woo therefore gained whatever rights Lien and Yen possessed to the property through equitable conversion. (Cf. Hastings v. Matlock (1985) 171 Cal.App.3d 826, 837.) It is also possible that the trial court construed our prior opinion as requiring a ruling against Lien and Yen on their cross-complaint if it were to find in favor of Woo on his sixth cause of action. This is suggested by the language the court used: "Given the Court of [Appeal's] determination that the trial court's ruling on the claims asserted in the cross-complaint and the relief the trial court granted on the cross-complaint each had to be reversed because that ruling and relief 'were predicated on the determination that Woo did not validly exercise his right of first refusal,' the resolution now made of the Sixth Cause of Action of plaintiffs'

First Amended Complaint precludes any consideration by this court of the merits of any cause of action set forth in the cross-complaint." However, we need not decide which of these alternatives is correct, because at this point it is irrelevant. If Lien and Yen believed the court committed legal error when it rejected their cross-complaint, or that the court interpreted our remand order incorrectly, they should have appealed that decision. While Lien and Yen did so initially, they then abandoned their appeal. Therefore, the December 12, 2005 ruling is now final. A judgment is res judicata even though it may be harsh, unjust, or based on errors of law. (Beverly Hills Nat. Bank v. Glynn (1971) 16 Cal.App.3d 274, 286.)

In a related argument Lien and Yen argue that Woo's exercise of his right of first refusal created only "an executory purchase contract", and that that exercise "could not have affected ownership without performance of the executory purchase contract." However, again Lien and Yen are making these arguments at the wrong juncture. The legal consequences of Woo's exercise of his right of first refusal and how that exercise might have affected the parties' ownership interests were issues for the trial court to decide on remand after the first appeal. That was when the court was deciding whether Lien and Yen were entitled to a 62.5 percent interest in the property as they had alleged. However, when the court rejected Lien and Yen's cross-complaint in which they sough to establish a 62.5 percent interest in the property, the court in effect ruled Lien and Yen were not entitled to such an interest. "The invocation of a final judgment as res judicata in a subsequent action is not an invitation to the losing party to attack the judgment for non-jurisdictional error, ironically defrocking the judgment of the very finality upon which the res judicata doctrine depends." (Aerojet-General Corp. v. American Excess Ins. Co. (2002) 97 Cal.App.4th 387, 398.)

Next Lien and Yen rely on the principle that a court being asked to apply principles of res judicata should not resort to speculation or conjecture to decide what was adjudicated in a prior action. (See, e.g., Irwin v. Irwin (1977) 69 Cal.App.3d 317, 322.) We have no quarrel with that principle; however, it is not applicable here. In this case, it is quite clear what the prior court decided. The court unequivocally rejected Lien and Yen's cross-complaint in which they sought to establish a 62.5 percent interest in the property. While the reasoning the court used to reach that conclusion might not be clear, Lien and Yen have not cited any case that holds a prior ruling can be res judicata only when the reasoning upon which it is based is clear.

Lien and Yen next argue that property interests can only be conveyed by a deed, and since they have never executed a deed, they cannot be deemed to have relinquished their 62.5 percent interest in the property. But Lien and Yen concede that property interests can be conveyed by a court decree, and here, when the court rejected Lien and Yen's cross-complaint in which they sought to establish that they possessed a 62.5 percent interest in the property, the court effectively decreed that Lien and Yen did not possess such an interest. The court's ruling on this point was adequate.

Finally, Lien and Yen complain that Woo and Lucky United "have litigated this dispute since 1999 without ever demanding or suing for specific performance of the contract created by Ming Woo's

exercise." They argue that at this late date, a cause of action for specific performance would be "barred by laches, the statute of limitations, [and] . . . waiver or abandonment of the claim." We reject this argument because it is based on a false premise: i.e., that absent an action for specific performance, they still would possess a 62.5 percent interest in the property. As we have stated, that is not correct. When the trial court rejected Lien and Yen's cross-complaint in which they sought to establish that they owned a 62.5 percent interest in the property, it effectively ruled Lien and Yen did not possess such an interest. While Lien and Yen might well be entitled to a share of the price established when Woo exercised his right of first refusal, (a point Lucky United, Shih, and Salvio Street concede on appeal) it is no longer subject to dispute that Lien and Yen do not possess an interest in the property itself.

2. Whether Salvio Street Took Without Notice

As we have stated, this court reversed the trial court's March 2001 judgment in favor of Lien and Yen and remanded the case for further proceedings. In November 2004, Lien and Yen recorded a lis pendens on the property. Shih and Lucky United asked the court to expunge the lis pendens. The court agreed to do so, and an order expunging the lis pendens was filed in October 2005. The order was recorded that same month. Salvio Street then purchased the property from Lucky United via a grant deed that was recorded in March 2006.

After Lien and Yen sued Salvio Street for quiet title, Salvio Street moved for summary judgment arguing it was entitled to prevail as a matter of law, because it took title after the trial court had expunged the lis pendens, and under Code of Civil Procedure section 405.61, a purchaser after an order of expungement takes without notice. The trial court agreed and granted summary to Salvio Street on that ground. Lien and Yen now contend the trial court erred.

As is relevant, Code of Civil Procedure section 405.61 states, "upon recordation of a certified copy of an order expunging a notice of pendency of action pursuant to this title, no person . . . who thereafter becomes . . . a purchaser . . . of any interest in the real property subject to the action, shall be deemed to have actual knowledge of the action or any of the matters contained, claimed, or alleged therein, or of any of the matters related to the action, irrespective of whether that person possessed actual knowledge of the action or matter and irrespective of when or how the knowledge was obtained. [¶] It is the intent of the Legislature that this section shall provide for the absolute and complete free transferability of real property after the expungement . . . of a notice of pendency of action."

Here, Salvio Street purchased the property after Lucky United and Shih recorded a certified copy of the order expunging the lis pendens. Applying the plain language of Code of Civil Procedure section 405.61, Salvio Street then took the property without "actual knowledge of the action or any of the matters contained, claimed, or alleged therein, or of any of the matters related to the action, irrespective of whether [Lucky United] possessed actual knowledge . . . ." We conclude the trial court correctly ruled Salvio Street took the property free and clear of any interest that Lien and Yen were

asserting.

Lien and Yen advance several arguments in an effort to demonstrate the trial court erred. First they cite the rule that once a lis pendens is expunged, title to the property must be treated as though the lis pendens had never been filed. (Lewis v. Superior Court (1994) 30 Cal.App.4th 1850, 1871.) While that is one consequence of the expungement of a lis pendens, Code of Civil Procedure section 405.61 mandates others, including the fact that no person who thereafter purchases the property "shall be deemed to have actual knowledge of the action or any of the matters contained, claimed, or alleged therein, or of any of the matters related to the action . . . ." It is the latter consequences that are at issue here.

Lien and Yen next note that the trial court ruled in March 2001 that they were entitled to 62.5 percent interest in the property. Lien and Yen contend that ruling was affirmed by this court in October 2002, and they suggest that ruling is now res judicata. We disagree with Lien and Yen's characterization. In our October 2, 2002 opinion, we were careful to state that "prior to" Woo's exercise of his right of first refusal, Lien owned a 37.5 percent interest, and Yen owned a 25 percent interest. We did not state Lien and Yen owned those percentages after Woo had exercised his right and we specifically reversed the portion of the trial court's decision where it ruled Lien and Yen were entitled to an interest in that percentage. Indeed, after the case was remanded, the trial court unequivocally rejected Lien and Yen's argument that they were entitled to a 62.5 percent interest and that ruling is now final. Lien and Yen's argument on this point is based on a false premise.

Next Lien and Yen note that in 1996, Yen recorded a deed of trust that Lucky United had executed in her favor. Lien and Yen also note that they recorded the judgment the court rendered after the first trial. Citing general case law that holds "[a] party to a real estate conveyance is not entitled to ignore any information pertinent to title that comes to him or her" (In re Marriage of Cloney (2001) 91 Cal.App.4th 429, 441) Lien and Yen argue that "[e]xpungement of the lis pendens did not grant Salvio Street the right to completely ignore the deed of trust and the recorded judgment." We disagree because it appears that is precisely what the Legislature intended. The statute is quite clear. Upon the "recordation of a certified copy of an order expunging a notice of pendency of action . . . no person . . . who thereafter becomes . . . a purchaser . . . of any interest in the real property subject to the action, shall be deemed to have actual knowledge of the action or any of the matters contained, claimed, or alleged therein . . . ." (Code Civ. Proc., § 405.61.) The Legislature then emphasized the purpose of the statute: "It is the intent of the Legislature that this section shall provide for the absolute and complete free transferability of real property after the expungement . . . of a notice of pendency of action." (Code Civ. Proc., § 405.61.) We will apply the statute as it is written.

Finally on this point, Lien and Yen argue their position is supported by Federal Deposit Ins. Corp. v. Charlton (1993) 17 Cal.App.4th 1066 (Federal Deposit). The issue in Federal Deposit was whether an abstract of judgment that reflected a prior final judgment was affected by a subsequent order expunging a lis pendens. The Federal Deposit court ruled the expungement order had no effect on

the abstract of judgment because the statutory schemes for lis pendens and abstracts of judgment are different. (Id. at pp. 1069-1070.) Here, Lien and Yen did not record an abstract of judgment that reflected a final judgment. They recorded a prior judgment that was substantially reversed by this court on appeal. Federal Deposit is not controlling under these very different facts.

We conclude the trial court correctly ruled Salvio Street took without notice.

3. Whether Triable Issues Exist

Lien and Yen argue the trial court should not have granted summary judgment because triable issues of fact exist. Specifically, Lien and Yen argue there is a triable issue over whether Salvio Street was a bona fide purchaser because it failed to investigate the nature of the claims Lien and Yen were asserting. This argument is foreclosed by the portion of Code of Civil Procedure section 405.61 that states a purchaser after an expungement order takes without notice even if that person had actual knowledge. The extent of Salvio Street's investigation and knowledge was not relevant and could not create a triable issue of material fact that would preclude summary judgment. (Cf. Romero v. American President Lines, Ltd. (1995) 38 Cal.App.4th 1199, 1203.)

Lien and Yen also argue a triable issue of act exists because it is not clear who owns the property. That is not true. Based on the record before us, Salvio Street owns the property free and clear of any interest Lien and Yen have asserted. Lien and Yen have no interest pursuant to the trial court's now final December 12, 2005 judgment rejecting Lien and Yen's cross-complaint. We find no material triable issues of fact exist.

B. Lucky United, Shih, and Salvio Street Appeal

After the trial court entered its ruling dismissing the new complaint that Lien and Yen filed, Lucky United, Shih, and Salvio Street filed a motion in which they asked the trial court to award them attorney fees. They relied on attorney fee clauses that are contained in the original agreements between Woo, Lien, and Yen. The trial court denied the motion ruling Lucky United, Shih, and Salvio Street "cannot obtain fees based on the contract because [Lien and Yen were] not suing on the contract. The Court finds that Defendants may not recover under Code of Civil Procedure section 685.040 because Defendants were not enforcing a judgment."

Lucky United, Shih, and Salvio Street now appeal contending they were entitled to fees under Civil Code section 1717[2] and Code of Civil Procedure section 685.040.[3]

Turning to the former argument, Civil Code section 1717 does not create a right to attorney fees. Its sole purpose is to transform a contractually unilateral right to fees into a reciprocal right to fees. (Chelios v. Kaye (1990) 219 Cal.App.3d 75, 79.) Furthermore, and importantly for purposes of this appeal, where a lawsuit on a contractual claim has been reduced to a final judgment, all prior

contractual rights are merged into and extinguished by the judgment. (Id. at p. 80.) One consequence of that merger is that all further contractual rights, including the contractual right to attorney fees, are extinguished. (Ibid.)

Here whatever right to fees Lucky United, Shih, and Salvio Street may have possessed based on the original agreements that were signed by Woo, Lien, and Yen were merged into the now final December 12, 2005 judgment. That judgment "extinguish[ed] all further contractual rights, including the contractual attorney fees clause." (Berti v. Santa Barbara Beach Properties (2006) 145 Cal.App.4th 70, 77.) Since there was no longer a valid contractual provision upon which a fee award under Civil Code section 1717 could be based, the court properly denied the request for fees.

Lucky United, Shih, and Salvio Street contend Lien and Yen should be precluded from arguing that the prior judgment extinguished the attorney fee clause because Lien and Yen have consistently argued in this litigation that the prior judgment was not a final adjudication of the rights they were asserting. While that is true, it is also true that a party may advance inconsistent, even contradictory legal theories. (See, e.g., Manti v. Gunari (1970) 5 Cal.App.3d 442, 449; see also 4 Witkin, Cal. Procedure (4th ed. 1997) Pleading §§ 363-365, pp. 466-469.) It is entirely proper for Lien and Yen to advance an alternative and inconsistent legal argument to address those issues that might arise if this court were to reject the initial argument they advanced.

Turning next to Code of Civil Procedure section 685.040, that section states that a judgment creditor may recover "[a]ttorney's fees incurred in enforcing a judgment" but only if the "the underlying judgment includes an award of attorney's fees to the judgment creditor . . . ." Here, on April 5, 2006, the trial court awarded Woo and Lucky United the fees they had spent to obtain the December 12, 2005 judgment. This court reversed that order on June 12, 2008. Thus, at the present time there is no fee award upon which an award of fees under Code of Civil Procedure section 685.404 might be based. [4] The court did not err when it declined to award fees on that basis.[5] (Cf. Imperial Bank v. Pim Electric, Inc. (1995) 33 Cal.App.4th 540, 558, "The absence of any fee award in the underlying judgment precludes the recovery of fees as costs in the trial court for enforcing the money judgment . . . .")

III. DISPOSITION

The judgment and order declining to award fees are affirmed.

We concur: Simons, J., Dondero, J.[6]

1. While this case was being briefed, Lucky United, Shih, and Salvio Street filed four requests for judicial notice. The court deferred ruling on the requests until the merits of the appeal. Having now considered the requests, the court rules as follows: The request filed on January 30, 2008 in A118698 is granted in part and denied in part. The court will take notice of the lis pendens recorded in the underlying case on November 16, 2004. Both parties rely on that document in

their briefs. The request to take judicial notice of an answer filed by a non-party in a different case is denied. An appellate court can but is not required to take judicial notice of material that was not presented to the trial court in the first instance. (Brosterhous v. State Bar (1995) 12 Cal.4th 315, 325.) The court declines to take notice of the document Lucky United, Shih, and Salvio Street have identified. The request filed on July 31, 2008 in A118698 to take judicial notice of a judgment rendered in a different case is denied. Again, the court declines to take judicial notice of a document that was not presented to the trial court in the first instance. (Brosterhous v. State Bar, supra, 12 Cal.4th at p. 325.) The request filed on March 28, 2008 in A120068 to take judicial notice of the legislative history of Code of Civil Procedure section 685.040 is granted. The request filed on August 7, 2008 in A120068 is granted. The court will take judicial notice of the documents attached to the request: i.e., (1) this court's June 12, 2008 opinion in A114380, (2) the opening brief that Lien and Yen filed in this appeal, and (3) the reply brief that Lien and Yen filed in this appeal.

2. Civil Code section 1717, subdivision (a) states in part, "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."

3. Code of Civil Procedure section 685.040 states, "The judgment creditor is entitled to the reasonable and necessary costs of enforcing a judgment. Attorney's fees incurred in enforcing a judgment are not included in costs collectible under this title unless otherwise provided by law. Attorney's fees incurred in enforcing a judgment are included as costs collectible under this title if the underlying judgment includes an award of attorney's fees to the judgment creditor pursuant to subparagraph (A) of paragraph (10) of subdivision (a) of Section 1033.5."

4. Having reached this conclusion, we need not discuss Globalist Internet Technologies, Inc. v. Reda (2008) 167 Cal.App.4th 1267 (Globalist), where the court ruled that fees incurred in the defense of a related action were recoverable under Code of Civil Procedure section 685.040 because they were incurred when "enforcing the judgment." In Globalist, unlike the present case, the underlying judgment included a valid award of fees.

5. We state no opinion on the issue of whether Lucky United, Shih, and Salvio Street might be entitled to fees if the court should ultimately find Lucky United and Shih to be the prevailing parties pursuant to this court's June 12, 2008 opinion in the prior attorney fee appeal. (Cf. Ersa Grae Corp. v. Fluor Corp. (1991) 1 Cal.App.4th 613, 628 [the court declines to state its opinion on an issue that might not arise on remand].)

6. Judge of the Superior Court of the City and County of San Francisco, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.