



## David Valdovino v. Mason McDuffie Real Estate

2011 | Cited 0 times | California Court of Appeal | February 2, 2011

Valdovino v. Mason McDuffie Real Estate CA3

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

In an action that arose out of a commercial real estate deal gone bad, the seller, David R. Valdovino, prevailed against the buyers on their claims for breach of contract and specific performance by establishing that no purchase contract was ever formed. Valdovino also prevailed against Mason McDuffie Real Estate, Inc., dba Prudential California Realty (Mason McDuffie) -- the brokerage firm that employed the real estate agent involved in the deal -- on Valdovino's cross-complaint against Mason McDuffie for breach of fiduciary duty and professional negligence (based on the actions of the agent, Roger Edwards) and on Mason McDuffie's cross-complaint against Valdovino for indemnity.

Postjudgment, the trial court ordered the buyers to pay some of Valdovino's attorney fees under the fee clause in the proposed purchase agreement. The court also ordered Mason McDuffie to pay most of Valdovino's remaining attorney fees in the action pursuant to the fee clause in the proposed purchase agreement "because he prevailed on his breach of fiduciary cause of action."

On appeal, Mason McDuffie contends the trial court erred in ordering it to pay attorney fees to Valdovino because Mason McDuffie "was not a party to any contract with an applicable fee provision." Valdovino contends Mason McDuffie forfeited this argument by failing to raise it in the trial court. We agree with Valdovino. In opposing Valdovino's fee motion, Mason McDuffie did not challenge Valdovino's right to fees; instead, Mason McDuffie challenged only the amount of fees Valdovino sought. Although we have discretion to consider Mason McDuffie's argument, raised for the first time on appeal, that the award of any fees was improper, Mason McDuffie offers us no reason why we should exercise that discretion in its favor and accordingly we decline to do so. Thus, we will affirm the attorney fee award.

### FACTUAL AND PROCEDURAL BACKGROUND

In March 2005, Valdovino, who owned an automotive repair business that included a parcel of real estate, entered into a listing agreement with Edwards, an agent employed by Mason McDuffie, to sell



## David Valdovino v. Mason McDuffie Real Estate

2011 | Cited 0 times | California Court of Appeal | February 2, 2011

the business. The listing agreement included an attorney fees clause, but the scope of that clause was limited to litigation "regarding the obligation to pay compensation under th[e] listing agreement."<sup>1</sup>

In June 2005, Zhi Zheng and Kevin Lee (the buyers) signed a "Standard Offer, Agreement and Escrow Instructions for Purchase of Real Estate (Non-Residential)" form, offering to purchase the business. The form includes an attorney fees clause, which provides in relevant part as follows: "If any Party or Broker brings an action or proceeding . . . involving the Property whether founded in tort, contract or equity, or to declare rights hereunder, the Prevailing Party (as hereafter defined) in any such proceeding, action, or appeal thereon, shall be entitled to reasonable attorneys' fees. . . . The term 'Prevailing Party' shall include, without limitation, a Party or Broker who substantially obtains or defeats the relief sought, as the case may be, whether by compromise, settlement, judgment, or the abandonment by the other Party or Broker of its claim or defense."

Valdovino signed the purchase agreement but added an addendum with additional terms. The buyers signed the addendum but also added one of their own. Valdovino never signed the second addendum.

After Valdovino refused to go through with the deal, the buyers sued him, eventually filing an amended complaint in December 2005, alleging causes of action for specific performance and breach of contract against him and a cause of action for professional negligence against Mason McDuffie. The buyers asserted that Mason McDuffie had altered terms in the first addendum without permission and that this alteration led Valdovino to claim there was no contract.

Valdovino filed a cross-complaint against Mason McDuffie and Edwards for breach of fiduciary duty and indemnity, claiming there was no meeting of the minds with the buyers because Edwards altered the addendum without permission.

Mason McDuffie filed a cross-complaint against Valdovino for indemnity, asserting that if Mason McDuffie was liable to the buyers, Valdovino was obligated to indemnify Mason McDuffie.

By agreement, the issue of contract formation was tried to the court in October and November 2007. The court concluded "no contract was formed between [the buyers] and Valdovino."

The remainder of the case was tried to the court in March 2009.<sup>2</sup> The court found in favor of Valdovino on the buyers' claims against him but found in favor of the buyers on their claims against Mason McDuffie, awarding the buyers just over \$45,000 in damages. On Valdovino's cross-complaint against Mason McDuffie, the court found in favor of Valdovino and awarded him \$25,000 in damages. On Mason McDuffie's cross-complaint for indemnity against Valdovino, the court found in favor of Valdovino. The court entered judgment in the action in April 2009.

Shortly thereafter, the buyers sought an award of attorney fees from Mason McDuffie under the fee clause in the purchase agreement on the ground they were the prevailing parties on the contract



## David Valdovino v. Mason McDuffie Real Estate

2011 | Cited 0 times | California Court of Appeal | February 2, 2011

against Mason McDuffie. In opposing that motion, Mason McDuffie argued the buyers were not entitled to any fees because Mason McDuffie was not a party to the purchase agreement. In the alternative, Mason McDuffie argued that the amount of fees the buyers sought was excessive. In June 2009, the court granted the buyers' fee motion and ordered Mason McDuffie to pay the buyers over \$107,000 in attorney fees. That fee award is not before us.<sup>3</sup>

Meanwhile, in May 2009, Valdovino moved for over \$119,000 in attorney fees from the buyers, Mason McDuffie, and Edwards, asserting his entitlement to fees "as the prevailing part[y] under the reciprocal provisions of the purchase agreement." In opposing that motion, Mason McDuffie did not argue (as it had in opposing the buyers' fee motion) that the court should deny Valdovino a fee award because Mason McDuffie was not a party to the purchase agreement. Instead, Mason McDuffie argued only that the amount of fees Valdovino was requesting was unreasonable and excessive.

In November 2009, after further briefing on certain questions not relevant here, the trial court -- relying on the fee clause in the proposed purchase agreement -- ordered the buyers to pay Valdovino nearly \$20,000 in attorney fees for defending his interests in the first phase of the trial (on contract formation). The court ordered Mason McDuffie to pay most of the rest of Valdovino's attorney fees in the action -- \$94,761.50 -- also pursuant to the fee clause in the proposed purchase agreement, "because he prevailed on his breach of fiduciary cause of action."

Mason McDuffie timely appealed from the November 2009 postjudgment order for attorney fees.

### DISCUSSION

On appeal, Mason McDuffie does not challenge the amount of fee award against it in favor of Valdovino as unreasonable or excessive. Instead, Mason McDuffie argues there was no basis for the trial court to award Valdovino any fees because (1) Mason McDuffie was not a party to the purchase agreement; (2) the purchase agreement never became a contract; (3) the claims against Mason McDuffie did not fall within the plain language of the fee clause; and (4) Mason McDuffie could not have recovered fees against Valdovino under the purchase agreement.

Valdovino contends Mason McDuffie forfeited these arguments because Mason McDuffie did not make them in the trial court and therefore we should disregard them. We agree.

Mason McDuffie asserts that it "clearly and repeatedly staked out the position that [it was] not [a] part[y] to the purchase agreement and that there was no contractual basis for a fee award against [it]." As we have noted, however, Mason McDuffie made such an argument only in opposition to the buyers' fee motion, which is not before us. In opposition to Valdovino's fee motion, Mason McDuffie specifically omitted any such argument and instead argued only that the amount of fees Valdovino was seeking to recover was unreasonable and excessive.



## David Valdovino v. Mason McDuffie Real Estate

2011 | Cited 0 times | California Court of Appeal | February 2, 2011

"[A]ppellate courts will not ordinarily consider matters raised for the first time on appeal." (Bayside Timber Co. v. Board of Supervisors (1971) 20 Cal.App.3d 1, 5, italics omitted.) Whether to do so "is largely a question of the appellate court's discretion." (Ibid.) Thus, for example, "we have 'discretion to consider a new issue on appeal where it involves a pure question of the application of law to undisputed facts.'" (Henderson v. Pacific Gas and Electric Co. (2010) 187 Cal.App.4th 215, 225.) "Appellate courts are more inclined to consider such tardily raised legal issues where the public interest or public policy is involved." (Bayside, at p. 5.)

It is true the "determination of the legal basis for an award of attorney fees [is] a question of law" (Sessions Payroll Management, Inc. v. Noble Construction Co. (2000) 84 Cal.App.4th 671, 677), and the material facts here appear to be undisputed. Nevertheless, we decline to exercise our discretion to consider for the first time on appeal Mason McDuffie's new arguments regarding Valdovino's right to recover attorney fees under the proposed purchase agreement. Mason McDuffie has not argued, let alone established, that the legal issues it belatedly seeks to raise are of any public interest or importance. Indeed, Mason McDuffie has offered us no reason why we should exercise our discretion to consider its belated arguments. Instead, Mason McDuffie simply notes (in a footnote in its reply brief) that we have that discretion, which merely begs the question of whether we should exercise it in Mason McDuffie's favor.

Absent a compelling reason to address for the first time, at this late stage in the proceeding, the question of whether Valdovino was entitled to recover attorney fees from Mason McDuffie under the fee clause in the proposed purchase agreement, we decline to do so. Because Mason McDuffie does not challenge -- as it did in the trial court -- the amount of the fee award as either unreasonable or excessive, we are left with nothing to do but affirm the fee award.

### DISPOSITION

The "Ruling on Post-Trial Motions for Attorney's Fees and Costs" is affirmed. Valdovino shall recover his costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

We concur:

NICHOLSON , Acting P. J.

BUTZ , J.

1. There is nothing in the record explaining why the scope of this attorney fee clause (which turned out to be inapplicable) was so narrow.
2. In advance of the second phase, the buyers filed a second amended complaint adding a cause of action for breach of fiduciary duty against Mason McDuffie.



## David Valdovino v. Mason McDuffie Real Estate

2011 | Cited 0 times | California Court of Appeal | February 2, 2011

3. Although Mason McDuffie (and Edwards) appealed from the judgment entered in April 2009, Mason McDuffie did not appeal from the attorney fee order in June 2009 or the amended judgment entered the same day as that order. Mason McDuffie later voluntarily dismissed its appeal from the judgment just before it filed its opening brief, which accordingly addressed only the issue of attorney fees. While Mason McDuffie's opening brief addressed the fee awards in favor of both Valdovino and the buyers, and the buyers filed a respondents' brief, Mason McDuffie and the buyers settled before Mason McDuffie filed its reply brief, and we subsequently granted Mason McDuffie's request to dismiss its appeal as to the buyers. That leaves only Mason McDuffie's appeal of the postjudgment attorney fee award in favor of Valdovino for us to address in this opinion.

