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1. Exxess Electronixx v. Heger Realty Corp., 64 Cal. App. 4th 698

Client/matter: FR-007

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Exxess Electronixx v. Heger Realty Corp.

Court of Appeal of California, Second Appellate District, Division One   
 June 8, 1998, Decided

No. B108515.

Reporter: 64 Cal. App. 4th 698; 75 Cal. Rptr. 2d 376; 1998 Cal. App. LEXIS 512; 98 Cal. Daily Op. Service 4396; 98 Daily Journal DAR 5991

lee broker, on grounds that Cal. Civ. Code §   
1717 precluded an award of attorney fees on a

EXXESS ELECTRONIXX et al., Cross-com-  
plainants and Appellants, v. HEGER REALTY CORPORATION et al., Cross-defendants and Respondents.

Prior History: [\*\*\*1] APPEAL from orders of the Superior Court of Los Angeles County. Super. Ct. No. VC020587. Lois Anderson

Smaltz, Judge.

Disposition: The order denying Exxess Elec-  
tronixx’s motion to tax costs and the order awarding attorneys’ fees to Heger Realty Cor-  
poration are reversed. Appellants are entitled to costs on appeal.

Core Terms

lease, attorney’s fees, realty, tort claim,   
prevailing party, indemnity, fee provision,

brochure, cross-complaint, declaratory relief, trial court, contractual, equitable, constructive fraud, terms of the lease, contract claim,

lessee, settlement, breach of fiduciary duty, claim for contribution, bring an action,

fiduciary, hereunder, multiple tortfeasors, contract provision, noncontract, demurrer, italic, lessor, notice

Case Summary

Procedural Posture

Appellant lessee sought review of an order of   
the Superior Court of Los Angeles County (Cali-  
fornia), which awarded attorney fees to appel-

declaratory relief claim which had been previ-  
ously settled and dismissed.

Overview

After entering into a standard commercial   
lease, appellant lessee discovered several de-

fects in the premises that interfered with its use of the property. Appellant filed a lawsuit

against appellee broker for declaratory relief, constructive fraud, breach of fiduciary duty, and equitable relief, alleging that appellee should have disclosed the defects before the lease was executed. The action was settled and dis-

missed. Appellee moved for attorney fees pursu-  
ant to a provision in the lease. The trial court   
awarded the fees and appellant challenged the   
award. The court found that Cal. Civ. Code §   
1717 precluded an award of attorney fees on the   
contract claim for declaratory relief claim.

The court found that because the underlying ac-  
tion was dismissed, there was no prevailing

party and that the attorney fees provision in the lease did not authorize an award of fees on

the tort claims of constructive fraud and breach   
of fiduciary duty, or the claims for equitable re-  
lief. The court held that the trial court erred in   
awarding the attorney fees and in denying ap-  
pellant’s motion for costs. Judgment of the trial   
court was reversed and costs were awarded to   
appellant.

Outcome

The order denying appellant lessee’s motion to tax costs and the order awarding attorney

fees to appellee broker were reversed because

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there was no statutory authorization for fees on the contract claim, and the lease provision

did not authorize fees on the tort claims. Appel-  
lants were entitled to costs on appeal.

LexisNexis® Headnotes

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Timing of Appeals

HN1 A notice of motion to claim attorney fees for services up to and including the rendition of judgment in the trial court shall be served and filed within the time for filing a notice of ap-  
peal. Cal. Ct. R. 870.2(b).

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

HN2 See Cal. Civ. Code § 1717(a).

Civil Procedure > ... > Declaratory Judgments > State Declaratory Judgments > General Overview

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

Legal Ethics > Client Relations > Attorney Fees > Fee Agreements

HN3 If a cause of action is on a contract,″ and the contract provides that the prevailing

party shall recover attorney fees incurred to en-  
force the contract, then attorney fees must be awarded on the contract claim in accordance with Cal. Civ. Code § 1717. Section 1717 gov-  
erns whether attorney fees can be awarded on the claim for declaratory relief.

Civil Procedure > Dismissal > Voluntary Dismiss-  
als > General Overview

HN4 See Cal. Civ. Code § 1717(b)(2).

Civil Procedure > Settlements > Settlement Agree-  
ments > General Overview

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

HN5 An award of attorney fees is not permit-  
ted where an action on a contract has been dis-  
missed as part of a settlement. In those circum-  
stances, Cal. Civ. Code § 1717 cannot be

circumvented by seeking fees under the gen-

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eral cost provisions of Cal. Civ. Proc. Code §   
1032- 1033.5, or under Cal. Civ. Proc. Code §   
1021.

Civil Procedure > Dismissal > Involuntary Dismiss-  
als > General Overview

Civil Procedure > Remedies > Costs & Attorney Fees > Costs

HN6 The general cost provisions define pre-  
vailing party″ to include a defendant in whose favor a dismissal is entered. Cal. Civ. Proc.

Code § 1032(a)(4).

Civil Procedure > Remedies > Costs & Attorney Fees > Costs

HN7 See Cal. Civ. Proc. Code § 1021.

Civil Procedure > ... > Attorney Fees & Ex-  
penses > Basis of Recovery > Statutory Awards

Civil Procedure > Remedies > Costs & Attorney Fees > Costs

Contracts Law > Types of Contracts > Lease Agree-  
ments > General Overview

HN8 The definition of prevailing party″ in   
 Cal. Civ. Code § 1717 is mandatory and can-  
not be altered or avoided by contract. Contrac-  
tual provisions that conflict with the prevail-  
ing party″ definition under § 1717 are void.

Civil Procedure > Remedies > Costs & Attorney Fees > Costs

Legal Ethics > Client Relations > Attorney Fees > Fee Agreements

Torts > ... > Types of Damages > Costs & Attorney Fees > General Overview

Torts > ... > Types of Damages > Costs & Attorney Fees > Statutory Availability

Torts > Procedural Matters > Attorney-Client Relation-  
ships

HN9 Cal. Civ. Code § 1717 does not apply to   
tort claims; it determines which party, if any,   
is entitled to attorney fees on a contract claim   
only. As to tort claims, the question of whether to   
award attorney fees turns on the language of   
the contractual attorneys’ fee provision, i.e.,   
whether the party seeking fees has prevailed″ within the meaning of the provision and

whether the type of claim is within the scope   
of the provision. This distinction between con-

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tract and tort claims flows from the fact that a tort claim is not on a contract″ and is there-  
fore outside the ambit of § 1717.

Civil Procedure > ... > Costs & Attorney Fees > Attor-  
ney Fees & Expenses > General Overview

Civil Procedure > ... > Attorney Fees & Ex-  
penses > Basis of Recovery > Statutory Awards

Civil Procedure > Remedies > Costs & Attorney Fees > Costs

Family Law > Marital Termination & Spousal Sup-  
port > Costs & Attorney Fees

Legal Ethics > Client Relations > Attorney Fees > Fee Agreements

Torts > ... > Types of Damages > Costs & Attorney Fees > General Overview

Torts > Procedural Matters > Attorney-Client Relation-  
ships

HN10 If a contractual attorney fee provision is phrased broadly enough, it may support an

award of attorney fees to the prevailing party   
in an action alleging both contract and tort   
claims. Parties may validly agree that the pre-  
vailing party will be awarded attorney fees in-  
curred in any litigation between themselves,

whether such litigation sounds in tort or in con-  
tract.

Contracts Law > Contract Interpretation > General Overview

Contracts Law > Contract Interpretation > Intent Contracts Law > Defenses > Ambiguities & Mis-  
takes > General Overview

HN11 Under statutory rules of contract interpre-  
tation, the mutual intention of the parties at

the time the contract is formed governs interpre-  
tation. Such intent is to be inferred, if pos-

sible, solely from the written provisions of the contract. The clear and explicit″ meaning of these provisions, interpreted in their ordinary and popular sense,″ unless used by the parties in a technical sense or a special meaning is

given to them by usage, controls judicial inter-  
pretation. Thus, if the meaning a layperson

would ascribe to contract language is not am-  
biguous, the court will apply that meaning.

Civil Procedure > ... > Attorney Fees & Ex-  
penses > Basis of Recovery > Statutory Awards

Civil Procedure > Remedies > Costs & Attorney Fees > Costs

Contracts Law > Contract Interpretation > Fiduciary

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Responsibilities

Contracts Law > Types of Contracts > Lease Agree-  
ments > General Overview

Governments > Fiduciaries

Torts > ... > Fraud & Misrepresentation > Construc-  
tive Fraud > General Overview

Torts > ... > Types of Damages > Costs & Attorney Fees > General Overview

Torts > ... > Types of Damages > Costs & Attorney Fees > Statutory Availability

Torts > Intentional Torts > Breach of Fiduciary Duty > General Overview

HN12 Cal. Civ. Code § 1717(a), makes clear that a tort claim does not enforce″ a contract. That statute expressly refers to, and therefore governs, attorney’s fees which are incurred to enforce the contract. Where a lease autho-

rizes an award of attorney fees in an action to en-  
force any provision of the contract, tort

claims are not covered. The award of attorney fees cannot be sustained on the theory that the tort claims were brought to enforce the

terms″ of the lease.

Civil Procedure > ... > Justiciability > Case & Contro-  
versy Requirements > Actual Controversy

Civil Procedure > Judgments > Declaratory Judg-  
ments > General Overview

HN14 Any person interested under a written in-  
strument, excluding a will or a trust, or under   
a contract, or who desires a declaration of his or   
her rights or duties with respect to another, or   
in respect to, in, over or upon property, may, in   
cases of actual controversy relating to the le-  
gal rights and duties of the respective parties,   
bring an original action or cross-complaint in the   
superior court for a declaration of his or her   
rights and duties in the premises, including a de-  
termination of any question of construction or   
validity arising under the instrument or con-  
tract. Cal. Civ. Proc. Code § 1060.

Civil Procedure > ... > Justiciability > Case & Contro-  
versy Requirements > Actual Controversy

Civil Procedure > Judgments > Declaratory Judg-  
ments > General Overview

Civil Procedure > ... > Declaratory Judgments > State Declaratory Judgments > General Overview

HN13 A complaint for declaratory relief sets   
forth facts showing the existence of an actual   
controversy relating to the legal rights and du-

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ties of the respective parties under a written in-  
strument and requests that these rights and du-  
ties be adjudged by the court. Plainly, a

declaratory relief action that seeks to establish the parties’ rights under a contract is an action sounding in contract.

Contracts Law > Types of Contracts > Lease Agree-  
ments > General Overview

Real Property Law > Torts > General Overview   
Torts > ... > Elements > Duty > General Overview

HN15 While a contract action protects a par-  
ty’s interest in having promises performed, a tort action redresses the breach of the general

duty to society, which the law imposes without regard to the substance of the contractual ob-  
ligation.

Contracts Law > Contract Interpretation > Fiduciary Responsibilities

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > General Overview

Contracts Law > Types of Contracts > Lease Agree-  
ments > General Overview

Governments > Fiduciaries

Real Property Law > Brokers > Fiduciary Responsibili-  
ties

Real Property Law > Purchase & Sale > Rem-  
edies > Duty to Disclose

HN16 An action premised on fraud in the in-  
ducement seeks to avoid the contract rather than to enforce it; the essential claim is ’I would

not have entered into this contract had I known   
the truth.’ The duty not to commit such fraud   
is precontractual; it is not an obligation under-  
taken by the entry into the contractual relation-  
ship.

Civil Procedure > Remedies > Costs & Attorney Fees > Costs

Legal Ethics > Client Relations > Attorney Fees > Fee Agreements

Torts > ... > Types of Damages > Costs & Attorney Fees > General Overview

Torts > ... > Types of Damages > Costs & Attorney Fees > Statutory Availability

Torts > Procedural Matters > Attorney-Client Relation-  
ships

HN17 If an action asserts both contract and   
tort or other noncontract claims, Cal. Civ. Code   
§ 1717 applies only to attorney fees incurred   
to litigate the contract claims. As with tort

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claims, the question of whether to award fees   
on other noncontract claims depends upon the   
scope of the contractual attorneys’ fee provi-  
sion.

Torts > Procedural Matters > Multiple Defen-  
dants > Joint & Several Liability

HN18 In California , as in most other Ameri-  
can jurisdictions, the allocation of damages among multiple tortfeasors has historically

been analyzed in terms of two, ostensibly mutu-  
ally exclusive, doctrines: contribution and in-  
demnification. In traditional terms, the appor-  
tionment of loss between multiple tortfeasors   
has been thought to present a question of con-  
tribution; indemnity, by contrast, has tradition-  
ally been viewed as concerned solely with   
whether a loss should be entirely shifted

from one tortfeasor to another, rather than   
whether the loss should be shared between the   
two. The dichotomy between the two con-  
cepts is more formalistic than substantive, and   
the common goal of both doctrines is the eq-  
uitable distribution of loss among multiple tort-  
feasors.

Contracts Law > Contract Conditions & Provi-  
sions > Indemnity Clauses

Torts > ... > Multiple Defendants > Contribu-  
tion > General Overview

HN19 The right to contribution or indemnity is   
rooted in principles of equity. In the absence   
of a contractual provision for indemnity, the   
right of one party to seek indemnity or contri-  
bution from another has always been consid-  
ered equitable in origin. Indeed, noncontractual   
indemnity and contribution have historically   
been based on equitable considerations of un-  
just enrichment and restitution. As our Su-  
preme Court has explained: Indemnity is a

shifting of responsibility from the shoulders of   
one person to another; and the duty to indem-  
nify will be recognized in cases where commu-  
nity opinion would consider that in justice the   
responsibility should rest upon one rather than   
the other. This may be because of the relation   
of the parties to one another, and the conse-  
quent duty owed; or it may be because of a sig-  
nificant difference in the kind or quality of their

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conduct.

Contracts Law > Types of Contracts > Quasi Con-  
tracts

Torts > ... > Multiple Defendants > Contribu-  
tion > General Overview

HN20 The right of contribution, although nec-  
essarily related to some former transaction or   
obligation, exists as an entirely separate con-  
tract implied by law. The claim for contribu-  
tion thus arises solely from a right imposed by   
operation of law and principles of equity. Al-  
though technically related to the underlying ob-  
ligation, the claim for contribution neither

arises nor is contingent upon the former trans-  
action.

Headnotes/Syllabus

Summary

CALIFORNIA OFFICIAL REPORTS SUM-  
MARY

A commercial lessee brought an action for de-  
claratory relief, constructive fraud, breach of   
fiduciary duty, and equitable relief against its   
real estate broker, alleging nondisclosure of de-  
fects in the commercial property. The action   
was settled and dismissed, and the trial court   
awarded attorney fees to defendant pursuant to   
the lease, which provided for an award of at-  
torney fees to the prevailing party in any ac-  
tion to enforce the terms of″ or declare

rights″ under the lease. (Superior Court of Los Angeles County, No. VC020587, Lois Ander-  
son Smaltz, Judge.)

The Court of Appeal reversed the order award-  
ing attorney fees to defendant, holding that

Civ. Code, § 1717, precluded an award of attor-  
ney fees on the contract claim (declaratory re-  
lief) and that the contractual attorney fees pro-  
vision did not authorize an award of fees on   
the tort claims (constructive fraud and breach of   
fiduciary duty) or the claim for equitable re-  
lief. The court initially held that defendant’s mo-  
tion for attorney fees was filed in a timely man-  
ner, since it was filed within 60 days after

the dismissal was entered (Cal. Rules of Court, rule 870.2). The court further held that, de-

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spite contrary language in the lease, Civ. Code, § 1717, subd. (b)(2), precluded an award of at-  
torney fees on the contract claim (declaratory re-  
lief), since plaintiff dismissed the claim pursu-  
ant to the settlement. The court also held

that the contractual attorney fee provision did not authorize an award of fees on the tort claims (constructive fraud and breach of fiduciary

duty), since those claims were not brought ei-  
ther to enforce the terms of″ or declare rights″ under the lease. And, plaintiff’s tort claims

were premised on a duty to disclose defects in the premises that was not created by the

lease. Finally, the court held that plaintiff’s   
claim for equitable relief (contribution and in-

demnity) were created solely by operation of law   
and principles of equity, not by the lease, and   
thus were not covered by the attorney fee provi-  
sion in the lease. (Opinion by Masterson, J.,   
with Spencer, P. J., and Ortega, J., concurring.)

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Re-  
ports

CA(1) (1)

Costs § 35 > Attorney Fees > Review of Awards.

--An appellate court reviews a trial court’s deci-  
sion regarding a party’s entitlement to attor-  
ney fees de novo when the facts are not in dis-  
pute.

CA(2a) (2a) CA(2b) (2b) CA(2c) (2c)   
CA(2d) (2d) CA(2e) (2e) CA(2f) (2f)   
CA(2g) (2g) CA(2h) (2h) CA(2i) (2i)

Costs § 27 > Attorney Fees > Contract Provi-  
sions > In Lease > Fees Not Allowed > For Claims Aris-  
ing From Failure to Disclose Defects.

--In an action for declaratory relief, construc-  
tive fraud, breach of fiduciary duty, and equi-  
table relief brought by a commercial lessee

against its real estate broker, which was settled   
and dismissed, the trial court erred in award-  
ing attorney fees to defendant pursuant to the   
lease, which provided for an award of attorney

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fees to the prevailing party in any action to en-  
force the terms of″ or declare rights″ under   
the lease. Despite contrary language in the lease,   
 Civ. Code, § 1717, subd. (b)(2), precluded an   
award of attorney fees on the contract claim (de-  
claratory relief), since plaintiff dismissed the   
claim pursuant to the settlement. Furthermore,   
the contractual attorney fee provision did not au-  
thorize an award of fees on the tort claims (con-  
structive fraud and breach of fiduciary duty),   
since those claims were not brought either to   
″enforce the terms of″ or declare rights″ un-  
der the lease. And, plaintiff’s tort claims were   
premised on a duty to disclose defects in the   
premises that was not created by the lease. Fi-  
nally, plaintiff’s claim for equitable relief (con-  
tribution and indemnity) were created solely   
by operation of law and principles of equity, not   
by the lease, and thus were not covered by

the attorney fee provision in the lease.

[See 7 Witkin, Cal. Procedure (4th ed. 1997) Judgment, § 169 et seq.]

CA(3) (3)

Costs § 28 > Attorney Fees > Procedure > Timeliness of Motion.

--In an action for declaratory relief, construc-  
tive fraud, breach of fiduciary duty, and equi-  
table relief brought by a commercial lessee

against its real estate broker, which was settled and dismissed, defendant filed its motion for attorney fees in a timely manner. Although the motion was filed after defendant filed its

cost memorandum, the applicable version of   
Cal. Rules of Court, rule 870.2, which was ad-  
opted in 1994, does not set a deadline based   
on the filing date of the cost memorandum, but   
rather requires that the motion for attorney

fees be filed within the time for filing a notice of appeal (60 days). Because defendant’s mo-  
tion was filed within 60 days after the dis-  
missal was entered, it was timely.

CA(4) (4)

Costs § 25 > Attorney Fees > Contract Provisions.

--If a cause of action is on a contract,″ and   
the contract provides that the prevailing party   
shall recover attorney fees incurred to enforce

376, \*\*376; 1998 Cal. App. LEXIS 512, \*\*\*1

the contract, then attorney fees must be awarded on the contract claim in accordance with Civ. Code, § 1717.

CA(5) (5)

Costs § 31 > Attorney Fees > Procedure > Who Is Pre-  
vailing Party.

--The definition of prevailing party″ in Civ. Code, § 1717, is mandatory and cannot be al-  
tered or avoided by contract. Contractual provi-  
sions that conflict with the prevailing party″ definition under § 1717 are void.

CA(6a) (6a) CA(6b) (6b)

Costs § 25 > Attorney Fees > Contract Provi-  
sions > Applicability to Tort Claims.

-- Civ. Code, § 1717, does not apply to tort   
claims; it determines which party, if any, is en-  
titled to attorney fees on a contract claim   
only. As to tort claims, the question of whether   
to award attorney fees turns on the language   
of the contractual attorney fee provision, i.e.,   
whether the party seeking fees has prevailed″ within the meaning of the provision and   
whether the type of claim is within the scope   
of the provision. This distinction between con-  
tract and tort claims flows from the fact that   
a tort claim is not on a contract″ and is there-  
fore outside the ambit of § 1717. If a contrac-  
tual attorney fee provision is phrased broadly   
enough, it may support an award of attorney   
fees to the prevailing party in an action alleg-  
ing both contract and tort claims: Parties may   
validly agree that the prevailing party will be   
awarded attorney fees incurred in any litigation   
between themselves, whether such litigation   
sounds in tort or in contract.

CA(7) (7)

Contracts § 28 > Construction and Interpreta-  
tion > Intention of Parties.

--Under statutory rules of contract interpreta-  
tion, the mutual intention of the parties at the   
time the contract is formed governs interpreta-  
tion. Such intent is to be inferred, if possible,   
solely from the written provisions of the con-  
tract. The clear and explicit meaning of these   
provisions, interpreted in their ordinary and   
popular sense, unless they are used by the par-

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ties in a technical sense or a special meaning is given to them by usage, controls judicial in-  
terpretation. Thus, if the meaning a layper-

son would ascribe to contract language is not   
ambiguous, a court should apply that mean-  
ing.

CA(8) (8)

Torts § 2 > Distinction Between Tort and Contract Ac-  
tions.

--While a contract action protects a party’s in-  
terest in having promises performed, a tort ac-  
tion redresses the breach of the general duty to society which the law imposes without re-

gard to the substance of the contractual obliga-  
tion.

CA(9) (9)

Brokers § 22 > Duty of Full Disclosure > Commer-  
cial Lease.

--A duty to disclose defects in leased premises   
arises before the lease exists. An action pre-  
mised on fraud in the inducement seeks to avoid   
the contract rather than to enforce it; the essen-  
tial claim is I would not have entered into

this contract had I known the truth.″ The duty   
not to commit such fraud is precontractual; it is   
not an obligation undertaken by the entry into   
the contractual relationship. Similarly, a real es-  
tate broker’s fiduciary duty to disclose mate-  
rial facts about the property arises upon the cre-  
ation of the principal-broker relationship, i.e.,   
before the lease or purchase contract is cre-  
ated.

CA(10) (10)

Costs § 25 > Attorney Fees > Contract Provi-  
sions > Applicability to Contract Claims When As-  
serted With Noncontract Claims.

--If an action asserts both contract and tort or other noncontract claims, Civ. Code, § 1717, ap-  
plies only to attorney fees incurred to litigate the contract claims.

CA(11) (11)

Contribution and Indemnification § 3 > Joint Tortfea-  
sors > Equitable Considerations.

--In traditional terms, the apportionment of   
loss between multiple tortfeasors has been

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thought to present a question of contribution; in-  
demnity, by contrast, has traditionally been

viewed as concerned solely with whether a loss   
should be entirely shifted from one tortfeasor   
to another, rather than whether the loss should be   
shared between the two. The dichotomy be-

tween the two concepts is more formalistic than substantive, and the common goal of both doc-  
trines is the equitable distribution of loss

among multiple tortfeasors. The right to contri-  
bution or indemnity is rooted in principles of   
equity. Indeed, noncontractual indemnity and   
contribution have historically been based on   
equitable considerations of unjust enrichment   
and restitution. Indemnity is a shifting of respon-  
sibility from the shoulders of one person to an-  
other; and the duty to indemnify will be rec-  
ognized in cases where community opinion   
would consider that in justice the responsibility   
should rest upon one rather than the other.

This may be because of the relation of the par-  
ties to one another and the consequent duty

owed; or it may be because of a significant dif-  
ference in the kind or quality of their con-

duct.

[See 11 Witkin, Summary of Cal. Law (9th ed. 1990), Equity §§ 167-169; 5 Witkin, Sum-

mary of Cal. Law (9th ed. 1988), Torts, §§ 82-

91.]

Counsel: Ashouri & Associates, P. Patrick Ash-  
ouri and Michael F. Frank for Cross-

complainants and Appellants.

Greenberg & Creyaufmiller, Lawrence R. Greenberg and Timothy P. Creyaufmiller for Cross-defendants and Respondents.

Judges: Opinion by Masterson, J., with Spen-  
cer, P. J., and Ortega, J., concurring.

Opinion by: MASTERSON

Opinion

[\*702] [\*\*379] MASTERSON, J.

After entering into a standard commercial   
lease, the lessee discovered several defects in   
the premises that interfered with its use of the

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property to conduct business. The lessee sued   
its broker for declaratory relief, constructive   
fraud, breach of fiduciary duty, and equitable   
relief, alleging that the broker should have dis-  
closed the defects before the lease was ex-

ecuted. Eventually, the action was settled and dismissed.

The broker then moved for attorneys’ fees pur-  
suant to a provision in the lease which

provided [\*\*\*2] that [i]f any Party or Broker brings an action or proceeding to enforce the terms hereof or declare rights hereunder, the Pre-  
vailing Party . . . or Broker . . . shall be en-  
titled to reasonable attorney’s fees.″ The trial court awarded fees to the broker. The lessee has appealed the award.

We conclude that Civil Code section 1717 pre-  
cludes an award of attorneys’ fees on the con-  
tract claim (declaratory relief) and that the con-  
tractual attorneys’ fee provision does not

authorize an award of fees on the tort claims   
(constructive fraud and breach of fiduciary duty) or the claims for equitable relief. Accordingly, we reverse.

BACKGROUND 1

Masco Building Products Corporation owns a three-story building in South Gate. In 1994, Exxess Electronixx, a partnership, com-

menced negotiations with Masco to lease a por-  
tion of the building [\*\*\*3] for the purpose of operating a business. Heger Realty Corporation acted as the broker for both parties. In July

1994, Exxess and Masco executed a Standard   
Industrial/Commercial Single-Tenant Lease,″ a form lease prepared by the American Indus-  
trial Real Estate Association. The lease term was   
five years, beginning July 1, 1994. The lease   
acknowledged that Heger Realty was a dual   
agent for the lessor and lessee and required the   
lessor to pay a fee to Heger Realty in accor-  
dance with a separate written agreement. The   
lease did not describe any of Heger Realty’s ob-  
ligations or duties.

376, \*\*379; 1998 Cal. App. LEXIS 512, \*\*\*1

Paragraph 31 of the lease provided: If any   
Party or Broker brings an action or proceeding   
to enforce the terms hereof or declare rights   
hereunder, [\*703] the Prevailing Party (as here-  
after defined) or Broker in any such proceed-  
ing, action, or appeal thereon, shall be entitled to   
reasonable attorney’s fees The term ’Pre-

vailing Party’ shall include, without limita-

tion, a Party or Broker who substantially ob-

tains or defeats the relief sought, as the case may

be, whether by compromise, settlement, judg-

ment, or the abandonment by the other Party or

Broker of its claim or defense ″ (Bold-

face [\*\*\*4] in original.)

Exxess and Masco also executed an addendum

to the lease. It provided in part that [e]lectri-

cal service will be separately metered to Les-

see’s Premises, and Lessee shall be respon-

sible for procuring, maintaining, and paying all

charges and taxes in connection therewith.″

Further, Masco agreed that within the first 30

days of the lease, it would [\*\*380] make cer-

tain improvements to the premises (e.g., in-

stall a fire escape door, erect a fence in the yard,

and repair the building’s sprinkler system).

With the exception of those improvements and

Masco’s obligation to remediate any hazard-

ous substances, Exxess acknowledge[d] that

Lessee is leasing the Premises . . . in its pres-

ent ’As Is’ and ’With All Faults’ condition .

. . . Lessee further acknowledges that by its en-

tering into this Lease it has made such legal,

factual, and other inquiries and investigations as

it deems necessary, desirable, or appropriate

with respect to the Premises and the value

thereof and the appurtenances, facilities, and

equipment thereof and that in entering into

this Lease, it will be relying solely thereon.″

(Boldface and capitals in original.)

In 1995, a dispute arose between Exxess

[\*\*\*5] and Masco regarding payment of the

electric bill. In November 1995, Masco filed this

action against Exxess for breach of contract, al-

leging that Exxess had not paid the electric

1 Because the action was dismissed before trial, we rely on the pleadings in stating the facts″ of the case. For purposes of ap-

peal, we will assume that the allegations are true.

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bill as required by the lease. 2 In December 1995, Exxess answered the complaint, denying all allegations. Exxess also filed a cross-

complaint against Masco and Heger Realty. 3 The cross-complaint included claims of negli-  
gent and intentional misrepresentation

against all cross-defendants. It also alleged claims for contribution and equitable indemnity against Heger Realty based on Exxess’s poten-  
tial liability to Masco.

In January 1996, Masco dismissed its com-  
plaint against Exxess. Proceedings continued   
on Exxess’s cross-complaint [\*\*\*6] against

Masco and Heger Realty. Masco filed an an-  
swer to the cross-complaint, denying all alle-  
gations. Heger Realty filed a demurrer to the cross-complaint. By order dated March

[\*704] 22, 1996, the trial court sustained the de-  
murrer in part and overruled it in part. The

trial court sustained the demurrer without leave to amend as to the claims against Heger Re-  
alty for intentional misrepresentation, contribu-  
tion, and equitable indemnity. 4 The demurrer was sustained with leave to amend as to the neg-  
ligent misrepresentation claim.

In April 1996, Exxess filed a first amended cross

-complaint. Exxess alleged a breach of con-  
tract claim and related tort claims against Masco   
for failing to perform various obligations un-  
der the lease. Against Heger Realty, Exxess al-  
leged three [\*\*\*7] causes of action. First, in   
a claim for constructive fraud, Exxess alleged   
that Heger Realty was a fiduciary and had failed   
to disclose certain defects in the premises, in-  
cluding violations of the building code, the un-

376, \*\*380; 1998 Cal. App. LEXIS 512, \*\*\*5

fitness of the premises for occupancy, and the in-  
ability of the premises to qualify for a

business license from the City of South Gate. Heger Realty allegedly withheld information about the defects in order to induce Exxess

to lease the property. Had Exxess known the

truth, it would not have entered into the lease.

5 Second, in a claim for declaratory relief,   
Exxess requested that the court determine the   
rights and duties of the parties under the lease.

6 Finally, in a claim for breach of fiduciary   
duty, Exxess alleged that it had an oral or writ-  
ten representation agreement with Heger Re-  
alty, that Heger Realty was a fiduciary, and that Heger Realty had breached its fiduciary duty by failing to disclose defects in the premises. Exxess sought compensatory and punitive dam-  
ages on the claims for constructive fraud and breach of fiduciary duty. 7

[\*\*381] Heger Realty filed an answer to the   
first amended cross-complaint. The parties en-  
gaged in discovery. On October 21, 1996, ap-  
proximately one month before trial, the case   
settled. Masco agreed to pay Exxess a fixed   
sum within 30 days, and, in return, Exxess   
agreed to pay for certain maintenance costs. As   
to Heger Realty, Exxess agreed to dismiss the   
cross-complaint with prejudice in exchange for   
Heger Realty’s waiver of any claim for mali-  
cious prosecution. Heger Realty was not re-  
quired to pay anything to Exxess. As part of   
the settlement, Heger Realty retained the right   
to move for costs and attorneys’ fees in the ac-  
tion. On October 22, 1996, Exxess dismissed   
the cross-complaint [\*\*\*9] with prejudice.

2 The two general partners of Exxess were also named as defendants. For convenience, we will refer to all three defendants as

″Exxess.″

3

Also named as cross-defendants were two individuals employed by Heger Realty. For convenience, we will refer to these cross

-defendants as Heger Realty.″

4

The trial court concluded that the intentional misrepresentation claim was duplicative of the constructive fraud claim. The

claims for contribution and indemnity were moot because Masco had dismissed its complaint against Exxess.

5

We note that the constructive fraud claim is essentially one for fraud in the inducement. (See 1 Witkin, Summary of Cal. Law

(9th ed. 1987) Contracts, § 392-405, pp. 356-365 [discussing types of fraud].)

6

Exxess alleged that it and Masco were direct parties″ to the lease and that Heger Realty claimed to be a third party benefi-

ciary under the lease.

7

As stated, the trial court sustained Heger Realty’s demurrer with leave to amend as to the negligent misrepresentation claim

in the original cross-complaint. Nevertheless, Exxess did not replead that claim against Heger Realty in the amended cross-  
complaint.

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[\*705] On November 1, 1996, Heger Realty filed a cost memorandum listing $ 31,475.50 in attorneys’ fees and $ 246.25 in other costs.

Exxess responded with a motion to tax costs, challenging Heger Realty’s right to attorneys’ fees. In its opposition to the motion, Heger

Realty argued that it was entitled to fees pursu-  
ant to the attorneys’ fee provision in the

lease. The trial court agreed with Heger Realty and denied Exxess’s motion.

On November 20, 1996, Heger Realty filed a   
motion for attorneys’ fees. Exxess filed papers   
in opposition. By order dated December 23,   
1996, the trial court granted the motion and   
awarded Heger Realty $ 36,421.50 in attor-  
neys’ fees. 8 Exxess timely appealed from

the trial court’s orders denying its motion to tax costs and granting Heger Realty’s motion for attorneys’ fees.

[\*\*\*10] DISCUSSION

CA(1) (1) In determining whether Heger Re-  
alty is entitled to attorneys’ fees, we examine the applicable statutes and provisions of the

lease. Extrinsic evidence has not been offered to interpret the lease, and the facts are not in dis-  
pute. We therefore review the trial court’s de-  
cision de novo. (See Californians for Popula-  
tion Stabilization v. Hewlett-Packard Co .

(1997) 58 Cal. App. 4th 273, 294 [67 Cal.   
Rptr. 2d 621]; Snyder v. Marcus & Millichap

(1996) 46 Cal. App. 4th 1099, 1102 [54 Cal. Rptr. 2d 268]; Hambrecht & Quist Venture Part-  
ners v. American Medical Internat., Inc .

(1995) 38 Cal. App. 4th 1532, 1539, fn. 4 [46 Cal. Rptr. 2d 33].) CA(2a) (2a) We conclude that the trial court erred in awarding attorneys’

fees to Heger Realty. 9

[\*\*\*11] A. Timeliness of the Motion

CA(3) (3) Exxess contends that the trial court   
erred in awarding attorneys’ fees because Heger

376, \*\*381; 1998 Cal. App. LEXIS 512, \*\*\*9

Realty did not file its motion for attorneys’   
fees in a timely manner. According to Exxess,

the motion had to be filed before or at the same time Heger Realty filed its cost memoran-

dum. Heger Realty missed that alleged dead-  
line, having filed its motion almost three weeks after the cost memorandum was filed. Admit-  
tedly, there is case authority supporting Exxess’s contention. (See Russell v. Trans Pacific

Group (1993) 19 [\*706] Cal. App. 4th 1717, 1723-1725 [24 Cal. Rptr. 2d 274]; Nazemi v. Tseng (1992) 5 Cal. App. 4th 1633, 1637-

1638 [7 Cal. Rptr. 2d 762].) However, those cases were decided under former rule 870.2 of the California Rules of Court, which stated

that [a]ny notice of motion to claim attorney   
fees as an element of costs under Civil Code sec-  
tion 1717 shall be served and filed before or   
at the same time the memorandum of costs is   
served or filed.″ (See Russell v. Trans Pacific   
Group , supra , 19 Cal. App. 4th at p. 1720,

fn. 7; Nazemi v. Tseng , supra , 5 Cal. App. 4th at p. 1641.)

Effective January 1, 1994, a new rule [\*\*\*12] 870.2 was adopted, which provides that

HN1 [a] notice of motion to claim attorney fees for services up to and including the rendi-  
tion of judgment in the trial court shall be

served and filed [\*\*382] within the time for fil-  
ing a notice of appeal under rules 2 and 3.″

(Cal. Rules of Court, rule 870.2(b).) Arguably, because Exxess’s cross-complaint was re-

solved by way of a settlement and dismissal,   
rule 870.2 did not establish any deadline for fil-  
ing the motion for attorneys’ fees; there was   
no appealable order or judgment. (See In re Tomi

C . (1990) 218 Cal. App. 3d 694, 698 [267   
Cal. Rptr. 210].) In any event, assuming that

rule 870.2 provides guidance on the subject, the   
earliest possible deadline for filing the motion   
would have been 60 days after the dismissal was   
entered on October 22, 1996. (See Cal. Rules

8 The fee amount listed on the cost memorandum was lower than the actual award because the memorandum did not include   
the fees subsequently incurred by Heger Realty in opposing Exxess’s motion to tax costs and in bringing the motion for attor-  
neys’ fees.

9

Some Courts of Appeal have reviewed the awarding of attorneys’ fees for an abuse of discretion. (See, e.g., Reveles v. Toyota

by the Bay (1997) 57 Cal. App. 4th 1139, 1153 [67 Cal. Rptr. 2d 543]; Mustachio v. Great Western Bank (1996) 48 Cal. App.

4th 1145, 1150 [56 Cal. Rptr. 2d 33].) In this case, we would come to the same conclusions regardless of the standard of review.

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of Court, rule 2(a); Code Civ. Proc., § 12, 12a.) Because the motion was filed on Novem-  
ber 20, 1996, it was timely.

B. Attorneys’ Fees Awarded Pursuant to Con-  
tract

HN2 Civil Code section 1717, subdivision (a),   
provides: In any action on a contract, where   
the contract specifically provides that attor-  
ney’s fees and costs, which are incurred to en-  
force that contract, shall [\*\*\*13] be awarded ei-  
ther 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.″ (Italics

added.)

1. Contract Claim

CA(4) (4) HN3 If a cause of action is on a con-  
tract,″ and the contract provides that the pre-  
vailing party shall recover attorneys’ fees in-  
curred to enforce the contract, then attorneys’   
fees must be awarded on the contract claim

in accordance with Civil Code section 1717. (   
Santisas v. Goodin (1998) 17 [\*707] Cal. 4th   
 599, 615-617 [71 Cal. Rptr. 2d 830, 951 P.2d   
399].) 10 CA(2b) (2b) In its claim for declara-  
tory relief, Exxess requested that the trial

court determine the parties’ rights and duties un-  
der the lease. Such a claim is on a contract″ for purposes of section 1717. (See City and County of San Francisco v. Union Pacific

R.R. Co . (1996) 50 Cal. App. 4th 987, 999-  
1000 [58 Cal. Rptr. 2d 1]; Las Palmas Associ-  
ates v. Las Palmas Center Associates (1991) 235 Cal. App. 3d 1220, 1259 [1 Cal. Rptr. 2d 301].) Accordingly, section 1717 governs

whether attorneys’ [\*\*\*14] fees can be awarded on the claim for declaratory relief.

376, \*\*382; 1998 Cal. App. LEXIS 512, \*\*\*12

HN4 Civil Code section 1717, subdivision

(b)(2), states that [w]here an action has been   
voluntarily dismissed or dismissed pursuant to a   
settlement of the case, there shall be no prevail-  
ing party for purposes of this section.″ Con-  
sequently, HN5 an award of attorneys’ fees is   
not permitted where an action on a contract″ has been dismissed as part of a settlement.

(See Santisas v. Goodin , supra , 17 Cal. 4th at

p. 617.) Moreover, in those circumstances, Civil Code section 1717 cannot be circumvented by seeking fees under the general cost provisions of the Code of Civil Procedure ( Code Civ.

Proc., § 1032- 1033.5) or under section 1021   
of the Code of Civil Procedure. ( Santisas v.   
Goodin , supra , 17 Cal. 4th at pp. 606-607 &

fn. 4; id . at pp. 623-624 (conc. opn. of Mosk,

11

J.).) Because Exxess dismissed the cross-  
complaint pursuant [\*\*\*15] to a settlement, Heger Realty cannot recover attorneys’ fees on the claim for declaratory relief.

We realize that the lease defined prevailing party″ to include a Party or Broker who sub-  
stantially 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 de-  
fense ″ (Italics added.) Thus, the lease con-

templated an award of attorneys’ fees to a cross

-defendant who is dismissed as a result [\*\*\*16]

of a settlement. CA(5) (5) Nevertheless,

HN8 the definition of prevailing party″ in

Civil Code section 1717 is mandatory [\*\*383]

and cannot be altered or avoided by contract.

( Santisas v. Goodin , supra , 17 Cal. 4th at pp.

615-617.) Contractual provisions that con-

flict with the prevailing party″ definition un-

der section 1717 are void. ( 17 Cal. 4th at p. 617.)

CA(2c) (2c) In [\*708] sum, despite the lan-

guage of the lease, no attorneys’ fees can be

awarded with respect to the claim for declara-

10 There is no dispute that the language of the lease brings it within the reach of Civil Code section 1717.

11 HN6 The general cost provisions define prevailing party″ to include a defendant in whose favor a dismissal is entered.″ (   
 Code Civ. Proc., § 1032, subd. (a)(4).) HN7 Section 1021 of the Code of Civil Procedure provides: Except as attorney’s fees are

specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agree-  
ment, express or implied, of the parties; but parties to actions or proceedings are entitled to their costs, as hereinafter pro-  
vided.″

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64 Cal. App. 4th 698, \*708; 75 Cal. Rptr. 2d tory relief. 12

2. Tort Claims

CA(6a) (6a) HN9 Civil Code section 1717

does not apply to tort claims; it determines   
which party, if any, is entitled to [\*\*\*17] attor-  
neys’ fees on a contract claim only. ( Santi-  
sas v. Goodin , supra , 17 Cal. 4th at pp. 615, 617,   
619; Reynolds Metals Co . v. Alperson (1979)

25 Cal. 3d 124, 129 [158 Cal. Rptr. 1, 599 P.2d 83].) As to tort claims, the question of

whether to award attorneys’ fees turns on the   
language of the contractual attorneys’ fee provi-  
sion, i.e., whether the party seeking fees has   
″prevailed″ within the meaning of the provi-  
sion and whether the type of claim is within the   
scope of the provision. ( Santisas v. Goodin , su-  
pra , 17 Cal. 4th at pp. 602, 608-609, 617,

619.) This distinction between contract and tort claims flows from the fact that a tort claim is not on a contract″ and is therefore outside the ambit of section 1717. ( Stout v. Turney

(1978) 22 Cal. 3d 718, 730 [150 Cal. Rptr.   
637, 586 P.2d 1228]; Childers v. Edwards (1996)

48 Cal. App. 4th 1544, 1548 [56 Cal. Rptr. 2d 328].)

CA(2d) (2d) In this case, Exxess’s claims for   
constructive fraud and breach of fiduciary duty   
sound in tort. (See Tyler v. Children’s Home   
Society (1994) 29 Cal. App. 4th 511, 548-549   
[35 Cal. Rptr. 2d 291] [constructive fraud]; Es-  
tate of Gump (1991) 1 Cal. App. 4th 582,

[\*\*\*18] 601 [2 Cal. Rptr. 2d 269] [construc-  
tive fraud]; Moallem v. Coldwell Banker Com.   
Group, Inc . (1994) 25 Cal. App. 4th 1827 [31   
Cal. Rptr. 2d 253] [fiduciary duty]; Jahn v.   
Brickey (1985) 168 Cal. App. 3d 399, 406

[214 Cal. Rptr. 119] [fiduciary duty].) Conse-  
quently, the question of whether Heger Realty is entitled to attorneys’ fees on those claims is governed by the language of the fee provision in the lease. (See Santisas v. Goodin , supra , 17 Cal. 4th at pp. 602, 608-609, 617, 619.)

376, \*\*383; 1998 Cal. App. LEXIS 512, \*\*\*16

CA(6b) (6b) HN10 If a contractual attorney   
fee provision is phrased broadly enough, . . . it   
may support an award of attorney fees to the   
prevailing party in an action alleging both con-  
tract and tort claims: ’[P]arties may validly

agree that the prevailing party will be awarded attorney fees incurred in any litigation be-

tween themselves, whether such litigation   
sounds in tort or in contract.’  ( Santisas v. Goo-  
din , supra , 17 Cal. 4th at p. 608.) Here, the   
lease provided for an award of attorneys’ fees   
to the prevailing party [i]f any Party or Bro-  
ker brings an action or proceeding to enforce   
the terms [\*709] hereof or declare rights here-  
under.″ CA(2e) (2e) Accordingly, we must   
decide [\*\*\*19] whether the claims for construc-  
tive fraud and breach of fiduciary duty were   
brought by Exxess either to enforce the terms″ of the lease or to declare rights []under″ the   
lease.

CA(7) (7) To answer this question, we apply the ordinary rules of contract interpretation. HN11 ’Under statutory rules of contract inter-  
pretation, the mutual intention of the parties at the time the contract is formed governs inter-  
pretation Such intent is to be inferred, if pos-

sible, solely from the written provisions of

the contract The clear and explicit″ mean-

ing of these provisions, interpreted in their or-

dinary and popular sense,″ unless used by

the parties in a technical sense or a special mean-

ing is given to them by usage″ . . ., controls ju-

dicial interpretation Thus, if the mean-

ing a layperson would ascribe to contract

language is not ambiguous, we apply that mean-

ing ’ ″ ( Santisas v. Goodin , supra , 17

Cal. 4th at p. 608, citations omitted.)

[\*\*384] a. Action to Enforce the Terms of the

Lease

CA(2f) (2f) We conclude that Exxess’s claims

for constructive fraud and breach of fiduciary

duty were not brought to enforce the terms″

12 Section 1161.1, subdivision (a) of the Code of Civil Procedure addresses the determination of the prevailing party″ in an un-  
lawful detainer action where the tenant has defaulted in the payment of rent under a commercial lease. Because the parties do   
not contend that this statute is applicable, we do not discuss its effect, if any, on the prevailing party″ definition in the lease be-  
fore us.

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of the lease. HN12 Civil Code section 1717,   
subdivision (a), [\*\*\*20] makes clear that a tort   
claim does not enforce″ a contract. That stat-  
ute expressly refers to, and therefore governs,   
″attorney’s fees . . . which are incurred to en-  
force th[e] contract.″ Because section 1717 does   
not encompass tort claims ( Santisas v. Goo-  
din , supra , 17 Cal. 4th at pp. 615, 617, 619;   
 Reynolds Metals Co . v. Alperson , supra , 25 Cal.   
3d at p. 129), it follows that tort claims do

not enforce″ a contract.

As our Supreme Court has indicated, where a lease authorizes an award of attorneys’ fees in an action to  ’ enforce any . . . provision . . .

of this [contract],″ ’  tort claims are not cov-  
ered. ( Santisas v. Goodin , supra , 17 Cal. 4th at

p. 622, fn. 9.) Other decisions are in accord.   
(See, e.g., McKenzie v. Kaiser-Aetna (1976) 55   
Cal. App. 3d 84, 89 [127 Cal. Rptr. 275] [″. .   
. an action for negligent misrepresentation is not   
an action to enforce the provisions of a con-  
tract″]; DeMirjian v. Ideal Heating Corp . (1949)

91 Cal. App. 2d 905, 909-910 [206 P.2d 20]

[lease authorizing award of attorneys’ fees in an   
action  ’to enforce Lessor’s rights hereunder’   
″ does not include tort claims]; Xuereb v. Mar-  
cus & Millichap, [\*\*\*21] Inc. (1992) 3 Cal.   
 App. 4th 1338, 1342-1343 [5 Cal. Rptr. 2d 154]

[attorneys’ fees not permitted on tort claims un-  
der contractual provision authorizing fees in   
an action to interpret or enforce the contract].)

In short, the award of attorneys’ fees cannot   
be sustained on the theory that the tort claims   
were brought to enforce the terms″ of the lease.

[\*710] b. Action to Declare Rights Under the Lease

Although Exxess’s tort claims did not enforce the terms″ of the lease, our inquiry is not at

an end. The lease also authorizes attorneys’ fees in an action to declare rights hereunder.″ For several reasons, we conclude that the tort claims do not fall within this second category.

376, \*\*384; 1998 Cal. App. LEXIS 512, \*\*\*19

First, we observe that the few reported deci-  
sions applying the attorneys’ fee provision in a   
standard industrial/commercial lease have all   
involved contract claims. In Roth v. Morton’s   
Chefs Services, Inc . (1985) 173 Cal. App. 3d 380   
[218 Cal. Rptr. 684], the lessor prevailed in

an unlawful detainer action where the lessee had   
breached the lease by entering into a sublease   
without the lessor’s consent. ( Id . at pp. 385, 387,   
389; see Fragomeno v. Insurance Co. of the

West [\*\*\*22] (1989) 207 Cal. App. 3d 822, 828

-831 [255 Cal. Rptr. 111] [unlawful detainer ac-  
tion based on breach of lease sounds in con-  
tract].) Similarly, in Chapman and Cole v. Itel Container Intern. B.V . (S.D. Tex. 1987) 665 F. Supp. 1283, affirmed (5th Cir. 1989) 865

F.2d 676, the lessee was found liable under the lease for failing to pay rent and not maintain-  
ing the premises. ( 665 F. Supp. at pp. 1287, 1290, 1291, 1295.) In Dorman v. DWLC

Corp . (1995) 35 Cal. App. 4th 1808 [42 Cal.   
Rptr. 2d 459], the court assumed that attor-  
neys’ fees could be awarded to the lessor where   
the lessee had damaged the premises. ( Id . at   
pp. 1811-1813 & fn. 4.) Although these cases do   
not hold that the attorneys’ fee provision in a   
standard industrial/commercial lease excludes   
tort claims, neither do they suggest that

claims of constructive fraud and breach of fidu-  
ciary duty fall within the scope of the provi-  
sion.

Second, the contractual phrase declare rights hereunder″ is substantially similar to the lan-  
guage used in the declaratory relief statute,

which permits a person to obtain a judicial dec-  
laration of his rights under a contract. 13

″HN13 A complaint for declaratory [\*\*385] re-  
lief . . . sets forth [\*\*\*23] facts showing the ex-  
istence of an actual controversy relating to

the legal rights and duties of the respective par-  
ties under a written instrument and requests

that these rights and duties be adjudged by the court.″ ( Maguire v. Hibernia S. & L. Soc .

(1944) 23 Cal. 2d 719, 728 [146 P.2d 673, 151

13 The declaratory relief statute provides: HN14 Any person interested under a written instrument, excluding a will or a trust,   
or under a contract, or who desires a declaration of his or her rights or duties with respect to another, or in respect to, in, over or upon   
property, . . . may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an origi-  
nal action or cross-complaint in the superior court . . . for a declaration of his or her rights and duties in the premises, including   
a determination of any question of construction or validity arising under the instrument or contract ″ ( Code Civ. Proc., § 1060.)

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A.L.R. 1062]; accord, Rubin v. Toberman   
 (1964) 226 Cal. App. 2d 319, 325 [38 Cal.   
Rptr. 32].) Plainly, a declaratory [\*711] relief   
action that seeks to establish the parties’   
rights under a contract is an action sounding in   
contract. (See City and County of San Fran-  
cisco v. Union Pacific R.R. Co., supra, 50 Cal.   
App. 4th at pp. 999-1000; Las Palmas Associ-  
ates v. Las Palmas Center Associates, supra, 235   
Cal. App. 3d at p. 1259.) Consequently, the   
similarity between the attorneys’ fee provision   
and the declaratory relief statute suggests   
that the lease does not authorize fees on a tort   
claim.

[\*\*\*24] Third, Exxess’s tort claims are pre-  
mised on a duty--specifically, a duty to dis-  
close defects in the premises--that was not cre-  
ated by the lease. As stated, the lease did not set   
forth any obligations or duties of Heger Re-  
alty. CA(8) (8) It is well settled that HN15 while   
a contract action protects a party’s interest in   
having promises performed, [a] tort action . . .   
redresses the breach of the general duty to so-  
ciety which the law imposes without regard to   
the substance of the contractual obligation.″ (   
 Careau & Co. v. Security Pacific Business   
Credit, Inc . (1990) 222 Cal. App. 3d 1371,

1393 [272 Cal. Rptr. 387].)

CA(9) (9) Moreover, the duty to disclose de-  
fects in the premises arose before the lease even   
existed. HN16 An action premised on fraud   
in the inducement seeks to avoid the contract   
rather than to enforce it; the essential claim is ’I   
would not have entered into this contract had   
I known the truth.’ The duty not to commit such   
fraud is precontractual[;] it is not an obliga-  
tion undertaken by the entry into the contrac-  
tual relationship.″ ( Perry v. Robertson (1988)   
201 Cal. App. 3d 333, 343 [247 Cal. Rptr.

74], italics added.) Similarly, a real estate bro-  
ker’s fiduciary duty to [\*\*\*25] disclose ma-  
terial facts about the property arises upon the   
creation of the principal-broker relationship, i.e.,   
before the lease or purchase contract is cre-

376, \*\*385; 1998 Cal. App. LEXIS 512, \*\*\*23

ated. (See Padgett v. Phariss (1997) 54 Cal. App. 4th 1270, 1279-1286 [63 Cal. Rptr. 2d 373]; Salahutdin v. Valley of California, Inc . (1994) 24 Cal. App. 4th 555, 561-563 [29

Cal. Rptr. 2d 463].) CA(2g) (2g) Simply put, Exxess’s tort claims were premised on a duty that arose without regard to the terms of the lease and before the lease existed. It follows that

Exxess’s pursuit of the tort claims did not seek to declare rights []under″ the lease. 14

[\*\*\*26] Finally, Heger Realty argues that it   
is entitled to fees because its defense to the cross

-complaint was based on a provision of the   
lease, in particular, the as is″ clause. Accord-

ing to Heger Realty, all of Exxess’s claims were

[\*712] meritless because Exxess had ex-  
pressly agreed in the lease to take the property   
″as is″ and with all faults″ and had further   
agreed to rely solely on its own investigation   
of the property. The as is″ clause, so the argu-  
ment goes, negated any duty on Heger Real-  
ty’s part to disclose defects in the property. (See   
 Shapiro v. Hu (1986) 188 Cal. App. 3d 324, 332

-334 [233 Cal. Rptr. 470] [discussing effect   
of as is″ clause on sellers’ liability to purchas-  
ers for failing to disclose defect in premises].)

Leaving aside the merits of the as is″ defense,   
the question remains whether it comes within   
the attorneys’ fee provision of the lease. Assum-  
ing that Heger Realty is the prevailing party   
in the case, the lease authorizes attorneys’ fees   
″[i]f any Party or Broker brings an action or   
proceeding to enforce the terms hereof or de-  
clare rights hereunder.″ (Italics added.) While   
the as is″ defense may have had the effect

of enforc[ing] [\*\*\*27] the terms″ of the lease or declar[ing] rights [there]under,″ Heger Re-  
alty did not bring[] an action or proceed-

ing″ to [\*\*386] accomplish those goals. Un-  
der any reasonable interpretation of the

attorneys’ fee provision, we cannot equate rais-  
ing a defense″ with bringing an action″ or

14 We express no opinion on the ability of a broker to recover attorneys’ fees under a contract between it and its client (e.g.,

listing agreement, brokerage agreement). Here, the pertinent contract is a lease between Masco, as lessor, and Exxess, as lessee. Although the attorneys’ fee provision includes the broker, Heger Realty was not a signatory to the lease, and the lease did not describe any rights″ of Masco or Exxess as against Heger Realty.

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″proceeding.″ 15 By asserting a defense to the cross-complaint, Heger Realty did not bring an action or proceeding to enforce the lease or

to declare rights under it.

[\*\*\*28] Although we sympathize with Heger Realty’s position, 16 we cannot rewrite the at-  
torneys’ fee provision in the lease. We note, however, that the provision before us appears to be quite narrow. In that regard, courts have in-  
terpreted broader provisions to permit an

award of attorneys’ fees on a tort claim. (See, e.g., Santisas v. Goodin , supra , 17 Cal. 4th at p. 607 [provision authorizing fees  ’[i]n the

event legal action is instituted by the Bro-  
ker(s), [\*713] or any party to this agreement,   
or arising out of the execution of this agree-  
ment or the sale [of the property], or to collect   
commissions’ ]; Allstate Ins. Co. v. Loo   
 (1996) 46 Cal. App. 4th 1794, 1799 [54 Cal.   
Rptr. 2d 541] [provision authorizing fees  ’[i]n   
any legal action brought by either party to en-  
force the terms hereof or relating to the de-  
mised premises’ ]; Moallem v. Coldwell   
Banker Com. Group, Inc ., supra , 25 Cal. App.   
4th at p. 1831 [provision authorizing fees in   
″any ’legal action . . . relating to’ the con-  
tract″]; Xuereb v. Marcus & Millichap, Inc ., su-

376, \*\*386; 1998 Cal. App. LEXIS 512, \*\*\*27

pra , 3 Cal. App. 4th at p. 1342 [provision autho-  
rizing fees in any ’lawsuit or other legal

proceeding’ to which [\*\*\*29] ’this Agreement   
gives rise’ ]; see also Share v. Casiano Bel-  
Air Homeowners Assn . (1989) 215 Cal. App. 3d   
515, 521 [263 Cal. Rptr. 753] [provision autho-  
rizing fees  ’[i]n the event any party to this   
Agreement brings suit to enforce any provision   
of this Agreement, or is required to defend

any action the defense of which is any provi-  
sion of this Agreement’ ].) 17

[\*\*\*30] In sum, because Exxess’s tort claims   
did not enforce the terms of the lease or de-  
clare rights under the lease, Heger Realty can-

not recover attorneys’ fees on those claims.

18

3. Other Noncontract Claims

CA(10) (10) HN17 If an action asserts both   
contract and tort or other noncontract claims,   
[Civil [\*\*387] Code] section 1717 applies only   
to attorney fees incurred to litigate the con-

tract claims.″ ( Santisas v. Goodin , supra , 17 Cal. 4th at p. 615, italics added.) As with tort claims, the question of whether to award fees on other noncontract [\*\*\*31] claims depends

15 An action″ is a lawsuit brought in a court; a formal complaint within the jurisdiction of a court of law[;] . . . [a]n ordinary pro-  
ceeding in a court of justice by which one party prosecutes another for the enforcement or protection of a right, the redress or pre-  
vention of a wrong, or the punishment of a public offense.″ (Black’s Law Dict. (6th ed. 1990) p. 28, col. 1; accord, Code Civ.   
Proc., § 20- 22.) A ’proceeding’ includes action and special proceedings before judicial tribunals as well as proceedings pending be-  
fore quasi-judicial officers and boards.″ (Black’s Law Dict., supra, p. 1204, col. 1.) The word [’proceeding’] may be used syn-  
onymously with ’action’ or ’suit’ to describe the entire course of an action at law or suit in equity from the . . . filing of the com-  
plaint until the entry of final judgment ″ (Ibid.; see also Code Civ. Proc., § 20- 23.) In contrast, a defense″ is [t]hat

which is offered and alleged by the party proceeded against in an action or suit, as a reason in law or fact why the plaintiff

should not recover or establish what he seeks[; . . . [P] it is a] response to the claims of the other party, setting forth reasons why the claims should not be granted.″ (Black’s Law Dict., supra, p. 419, col. 2, italics added.)

16

During the litigation, Heger Realty repeatedly informed Exxess that the cross-complaint was frivolous. Moreover, the terms

of the settlement were very favorable to Heger Realty: The cross-complaint was dismissed with prejudice in exchange for Heger Re-  
alty’s waiver of any malicious prosecution claim; no money was paid; and Heger Realty reserved the right to seek attorneys’   
fees.

17

Among secondary authorities, one recommends that contracting parties use an attorneys’ fee clause virtually identical to the pro-

vision in this case. (See Greenwald & Asimow., Cal. Practice Guide: Real Property Transactions 1 (The Rutter Group 1998)

form 4:H, Purchase and Sale Agreement and Joint Escrow Instructions p. 4-193 (rev. # 1, 1998) [suggesting provision in pur-

chase and sale agreement awarding fees [i]f either party named herein brings an action or proceeding to enforce the terms hereof or declare rights hereunder″].) Another authority recommends a broader clause. (See Commercial Real Property Lease Form   
(Cont. Ed. Bar Supp. 1990) § 3.160, p. 104 [suggesting provision in commercial lease awarding fees [i]f either party commences an action against the other party arising out of or in connection with this lease″].)

18

Our analysis of Exxess’s claims for constructive fraud and breach of fiduciary duty would also apply to its claims for negli-

gent and intentional misrepresentation, which appeared in the original cross-complaint and were dismissed as a result of Heger Realty’s demurrer. (See Bily v. Arthur Young & Co . (1992) 3 Cal. 4th 370, 407, 414-415 [11 Cal. Rptr. 2d 51, 834 P.2d 745, 48 A.L.R.5th 835] [negligent and intentional misrepresentation claims sound in tort].)

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upon the scope of the contractual attorneys’ fee provision. ( Id . at p. 602.)

CA(2h) (2h) The trial court sustained Heger Re-  
alty’s demurrer without leave to amend as to   
Exxess’s claims for contribution and equitable   
indemnity. [\*714] Assuming that Heger Re-  
alty is the prevailing party in the case, we

must determine whether those claims are cov-  
ered by the attorneys’ fee provision in the lease. We begin by examining the nature of contribu-  
tion and equitable indemnity in general. 19

[\*\*\*32] CA(11) (11) HN18 In California, as in most other American jurisdictions, the allo-  
cation of damages among multiple tortfeasors has historically been analyzed in terms of

two, ostensibly mutually exclusive, doctrines:   
contribution and indemnification. In traditional   
terms, the apportionment of loss between mul-  
tiple tortfeasors has been thought to present a   
question of contribution; indemnity, by con-  
trast, has traditionally been viewed as con-

cerned solely with whether a loss should be en-  
tirely shifted from one tortfeasor to another,

rather than whether the loss should be shared be-  
tween the two [T]he dichotomy between

the two concepts is more formalistic than sub-

stantive, and the common goal of both doc-

trines[is] the equitable distribution of loss among

multiple tortfeasors ″ ( American Motor-

cycle Assn . v. Superior Court (1978) 20 Cal. 3d

578, 591 [146 Cal. Rptr. 182, 578 P.2d 899], ci-

tations and fn. omitted; accord, Coca-Cola

376, \*\*387; 1998 Cal. App. LEXIS 512, \*\*\*31

Bottling Co. v. Lucky Stores, Inc. (1992) 11 Cal. App. 4th 1372, 1378 [14 Cal. Rptr. 2d 673].) 20

[\*\*\*33] HN19

The right to contribution or indemnity is   
rooted in principles of equity. In the absence   
of a contractual provision for indemnity, the   
right of one party to seek indemnity or contri-  
bution from another has always been consid-  
ered [\*715] equitable in origin Indeed,

noncontractual indemnity and contribution have

historically been ’based on equitable consider-

ations of unjust enrichment and restitution.’

″ ( Miller v. American Honda Motor Co . (1986)

184 Cal. App. 3d 1014, 1019 [229 Cal. Rptr.

523], citations omitted.) As our Supreme Court

has explained:  ’Indemnity is a shifting of re-

sponsibility from the shoulders of one person to

another; and the duty to indemnify will be rec-

ognized in cases where community opinion

would consider that in justice the responsibility

should rest upon one rather than the other.

This may be because of the relation of the par-

ties to one another, and the consequent duty

owed; or it may be because of a significant dif-

ference in the kind or quality of their con-

duct.’  [\*\*388] ( American Motorcycle Assn .

v. Superior Court , supra , 20 Cal. 3d at p.

595, fn. 4; accord, County of Lassen v. State of

California (1992) 4 Cal. App. 4th 1151,

[\*\*\*34] 1154 [6 Cal. Rptr. 2d 359].)

19 Because Exxess brought a claim for equitable indemnity, we do not discuss express indemnity. (See Smoketree-Lake Murray,   
Ltd. v. Mills Concrete Construction Co . (1991) 234 Cal. App. 3d 1724, 1735-1737 [286 Cal. Rptr. 435] [addressing distinction be-  
tween express and equitable indemnity].) Nor is it necessary in this case to distinguish between implied contractual indemnity″ (see   
 West v. Superior Court (1994) 27 Cal. App. 4th 1625, 1632-1633 [34 Cal. Rptr. 2d 409]) and implied noncontractual indem-  
nity″ (see Taggart v. State of California (1975) 45 Cal. App. 3d 768, 770-771 [119 Cal. Rptr. 696]), since both doctrines are suffi-  
ciently similar for our purposes (see Bay Development, Ltd. v. Superior Court (1990) 50 Cal. 3d 1012, 1029 & fn. 10 [ 269 Cal.   
Rptr. 720, 791 P.2d 290]). Also, we rely on contract and tort cases to the extent that contribution and indemnity are based on the   
same principles in both types of cases. (See 11 Witkin, Summary of Cal. Law (9th ed. 1990) Equity, § 167-169, pp. 847-850; 5 Wit-  
kin, Summary of Cal. Law (9th ed. 1988) Torts, § 82-91, pp. 157-165; Smoketree-Lake Murray, Ltd. v. Mills Concrete Construc-  
tion Co ., supra , 234 Cal. App. 3d at pp. 1736-1737.)

20

In California, a right of contribution among joint tortfeasors did not exist at common law but was conferred by statute in

1957. (See Western Steamship Lines, Inc. v. San Pedro Peninsula Hospital (1994) 8 Cal. 4th 100, 108, fn. 6 [32 Cal. Rptr. 2d 263,   
876 P.2d 1062]; Coca-Cola Bottling Co. v. Lucky Stores, Inc., supra, 11 Cal. App. 4th at p. 1378, fn. 6; Stats. 1957, ch. 1700, §   
1, pp. 3076-3077, codified as Code Civ. Proc., § 875- 877, 878- 880.) In contrast, as early as 1872, joint judgment debtors on a con-  
tract claim had a statutory right of contribution. (See Deering’s Ann. Code Civ. Proc. (1959 ed.) § 709, p. 557; Stats. 1982, ch.   
1364, § 1, p. 5070, repealing Code Civ. Proc., § 709; Stats. 1982, ch. 497, § 63, pp. 2164-2165, adding Code Civ. Proc., § 881- 883;   
see also Cal. Law Revision Com. coms., Deering’s Ann. Code Civ. Proc. (1996 ed.) § 882-883, pp. 381-382.)

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By way of example, where one judgment   
debtor seeks contribution from another in an ac-  
tion involving the breach of a promissory   
note, HN20 [t]he right of contribution, al-  
though necessarily related to some former trans-  
action or obligation, exists as an entirely sepa-  
rate contract implied by law [P] . . .

[The] claim for contribution thus arises solely

from [a] right imposed by operation of law and

principles of equity. Although technically re-

lated to the underlying obligation, [the] claim for

contribution neither arises nor is contingent

upon the promissory note ″ ( Borba Farms,

Inc. v. Acheson (1988) 197 Cal. App. 3d 597,

602 [242 Cal. Rptr. 880].)

CA(2i) (2i) Consistent with the foregoing analy-

sis, we conclude that Exxess’s claims for con-

tribution and indemnity do not fall within

the scope of the attorneys’ fee provision in the

lease. Exxess’s rights to contribution and in-

demnity, if any, were created solely by opera-

tion of law and principles of equity, not by the

parties’ underlying obligation (i.e., the lease).

(See Borba Farms , Inc . v. Acheson , supra , 197

376, \*\*388; 1998 Cal. App. LEXIS 512, \*\*\*34

Cal. App. 3d at p. 602.) Those rights exist[ed] as an entirely [\*\*\*35] separate contract im-  
plied by law″ (ibid.); they did not arise from, nor were they contingent upon, the lease (see

ibid.). It follows that Exxess’s claims for contri-  
bution and indemnity did not enforce the

terms″ of the lease or declare rights []under″ the lease. 21

[\*\*\*36] In conclusion, Civil Code section   
1717 precludes an award of attorneys’ fees on

Exxess’s declaratory relief claim, and the attor-  
neys’ fee provision in [\*716] the lease does not encompass any of the other claims. The trial court therefore erred in granting Heger Real-  
ty’s motion for attorneys’ fees.

DISPOSITION

The order denying Exxess Electronixx’s mo-  
tion to tax costs and the order awarding attor-  
neys’ fees to Heger Realty Corporation are re-  
versed. Appellants are entitled to costs on

appeal.

Spencer, P. J., and Ortega, J., concurred.

21 Heger Realty argues that it is entitled to attorneys’ fees merely because Exxess requested them in its cross-complaint. We reject this argument for two reasons. First, an examination of each cause of action in the amended cross-complaint indicates that Exxess did not seek fees against Heger Realty. Instead, it sought them against Masco for allegedly breaching the lease. Second, the court in Sweat v. Hollister (1995) 37 Cal. App. 4th 603 [43 Cal. Rptr. 2d 399], disapproved on other grounds in Santisas v. Goodin , supra , 17 Cal. 4th at page 609, footnote 5, thoroughly reviewed the case law on this point and concluded, as have the   
more recent cases, that [t]he mere fact that a plaintiff alleges an entitlement to attorney fees does not create an entitlement to same by a prevailing defendant ″ ( 37 Cal. App. 4th at p. 616.)