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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

FILED
COURT OF APPEAL FIRST APPELLATE DISTRICT

JUL - 7 2006

PETER LEWIS et al.,

Plaintiffs and Appellants,

v.

MATTHEW KATZ,

Defendant and Appellant.

A111654

BY

DIANA HERBERT, CLERK
DEPUTY CLERK

(San Francisco City & County
Super. Ct. No. 614321)

Alexander "Skip" Spence, James Robert Mosley, Donald J. Stevenson, Peter Lewis, and Jerry A. Miller (collectively, the band or the band members) played music and performed together in the 1960s as the "Moby Grape." Since the 1960s, the band has been involved in protracted litigation with its first manager, Matthew Katz. This particular appeal by Katz and cross-appeal by the band follows a court trial.

Spence, by and through his conservator, the Department of the Public Guardian of Santa Clara County,¹ Mosley, by and through his Guardian Ad Litem, Margaret M. Mosley, and the other band members filed a complaint against Katz for, among other things, declaratory relief and breach of contract. The court considered six principal issues related to title to the recordings, performances, and songs created by the band members. The trial court found in favor of the band on all of the issues and Katz appeals. The trial

¹ Spence died while this litigation was pending. The Estate of Alexander "Skip" Spence, by Omar Spence, its Administrator, replaced Spence.

court denied the band members' request for attorney fees and they filed a cross-appeal challenging the attorney fees ruling. We affirm the judgment.

BACKGROUND

In 1966, Lewis, Spence, Mosley, Stevenson, and Miller formed a band named Moby Grape and they hired Katz as the manager later that year.² Shortly thereafter, the band members attempted to rescind their contracts with Katz, which has resulted in years of litigation. We have set forth many of the facts underlying this case in our earlier opinions. (*Spence v. Katz* (Oct. 30, 1997, A072963) [nonpub. opn.], *Lewis v. Katz* (May 30, 2002, A095819) [nonpub. opn.] (*Katz I*), and *Lewis v. Katz* (Oct. 10, 2003, A100875) [nonpub. opn.] (*Katz II*).)³

In 1966, Spence, Mosley, Stevenson, and Miller decided to form a band; Spence and Mosley devised the name Moby Grape. Later that year, each band member entered into a personal management contract and other agreements with Katz.

On October 10, 1966, Katz and the band members signed an addendum to the personal management agreements, which provided in relevant part: "It is understood and agreed that the name 'MOBY GRAPE' is the property of Matthew Katz. The undersigned has no ownership right, title, or interest in and to the name 'MOBY GRAPE' and he is entitled to utilize the same, only pursuant to the license and consent of Matthew Katz[,] which may be revoked and cancelled at any time. . . ."

On February 7, 1967, CBS Records, the predecessor in interest to Sony Music Entertainment, Inc. (Sony), entered into a recording agreement with the band members.

² We note that the statement of facts and statement of the issue set forth in Katz's opening brief do not comply with the California Rules of Court, rule 14(a)(1), as there are almost no citations to the record. Pursuant to rule 14(e)(2)(C), we disregard all asserted facts or references not supported by a citation to the record.

³ In addition, we issued two other nonpublished opinions related to the 1973 settlements between Katz and the band, which involved the band suing attorney Nicholas Clainos (*Spence v. Clainos* (Jan. 13, 1998, A076647) [nonpub. opn.]) and the band suing the manager it had in 1973, David Robinson (*Spence v. Robinson* (Jan. 13, 1998, A077574) [nonpub. opn.]).

The band members agreed to furnish to CBS Records their recording services as the Moby Grape.

In the late 1960s, CBS Records hired counsel from the law firm of O'Melveny and Meyers to represent the band. In September of 1967, the band members through their counsel notified Katz that they were rescinding their agreements with him because of alleged violations of the Labor Code. On March 27, 1969, the band members filed an action with the Labor Commissioner requesting to set aside their contracts with Katz because of fraud, breach of fiduciary duty, and violations of the Labor Code sections 1700 to 1700.46 (Talent Agencies Act).

On February 25, 1970, after a hearing, the Labor Commissioner issued its determination and award. It determined, Katz, "independently and doing business as MATTHEW KATZ PRODUCTIONS and AFTER YOU PUBLISHING COMPANY, acted in the capacity of an unlicensed artists' manager and, therefore, his contracts with [the band members] are void for failure of said respondent to comply with Sections 1700 to 1700.46 of the Labor Code." Further, the commissioner found that the band members were not liable to Katz for any sums spent in furtherance of their musical careers and that Katz or After You Publishing Company was "not entitled to any commissions resulting from the musical or artistic efforts of [the band members]." The Labor Commissioner set forth the following award: "That the management contracts between [the band members] and respondent MATTHEW KATZ, independently and doing business as MATTHEW KATZ PRODUCTIONS and AFTER YOU PUBLISHING COMPANY, are void for failure of respondent to comply with Sections 1700 to 1700.46 of the Labor Code; that [the band members] are not liable to respondent for any sums spent by respondent in furtherance of [the band members'] musical careers."

In 1973, Clainos, an attorney working for Rubinson, the manager of the Moby Grape at that time, executed stipulated settlements on the claims between Katz and the band members. The band members neither signed the agreements nor attended the settlement conference. The agreements provided Katz with all rights and entitlements to

income associated with the copyrighted Moby Grape publishing interests and gave Katz ownership of the band name Moby Grape.

In 1994, the band members filed in the Superior Court of the City and County of San Francisco a declaratory relief action against Katz to set aside the settlement agreements. The court granted summary judgment against Katz and set aside the 1973 settlement agreements. Katz appealed.⁴

On October 30, 1997, we affirmed the lower court's judgment of setting aside the 1973 settlement agreements. (*Spence v. Katz, supra*, A072963.) Subsequently, the band members demanded that Katz account for and pay any royalties or other monies received by Katz pursuant to the 1973 settlement agreements. The band members assert, without making any citation to the record, that Katz ignored their demands for money; they therefore filed another complaint for, among other things, declaratory relief and breach of contract.⁵ According to the band members, on April 1, 1999, the court consolidated all four cases for all purposes.⁶ Settlement discussions ensued.⁷

On June 12, 2002, the trial court dismissed Katz's challenge to the 1970 Labor Commissioner's award. The band moved to confirm the determination and award of the

⁴ While the appeal was pending, Katz filed a new action on October 7, 1997, in the Los Angeles County Superior Court. The court granted the band members' motion for change of venue and ordered the case transferred to San Francisco.

⁵ The record on appeal *does not contain any* of the complaints.

⁶ The docket statement indicates the case numbers for the consolidated cases, but the record does not establish the actual claims associated with each case.

⁷ In early December 1999, the parties engaged in settlement discussions, and a settlement was apparently reached. Counsel for the parties as well as Lewis and Katz were present in court. The terms of the settlement were read and counsel, Lewis, and Katz stated that they agreed to the terms. Subsequently, Katz filed a motion to vacate the settlement, and the court ruled it was enforceable only as to Lewis and Katz, since the other band members were not present in court. Katz appealed, and we affirmed (*Katz I, supra*, A095819). In the present case, the statement of decision indicates the settlement agreement was never an issue at trial; the court therefore did not rule on the status of the settlement.

Labor Commissioner, which the trial court granted on September 30, 2002. The court entered judgment and Katz appealed. We affirmed. (*Katz II, supra*, A100875.)

The band apparently made many requests to Katz for an accounting and for payment of any royalties or other monies received by Katz pursuant to the 1973 settlement agreements. Katz paid the band some money for the period between 1995 and 2000, but the band claimed Katz owed it additional money. On March 23, 2005, the band members provided notice to Katz that they were rescinding their publishing agreements with Katz and also terminating any remaining interest that Katz had in their songs to the extent that such agreements had not already been voided by the Labor Commissioner and courts.

The band's tort claims and request for declaratory relief against Katz proceeded to a court trial. Katz appeared in propria persona.

Prior to trial, the court set forth the following "six principal issues as stipulated by this court and agreed upon by each party" to be decided at trial: "1. Who has title to the recordings, performances, and songs created by 'Moby Grape' prior to 1973?; [¶] 2. Who has title to the recordings, performances, and songs created by 'Moby Grape' or by any of its individual members between 1983 (the 'Heart' Album) to 1988 (the 'Mosley Grape' Album)?; [¶] 3. Assuming [Katz] does not have title to the recordings, performances, and songs between 1966 to 1973, what amount of royalties, if any, are owed by [Katz] to the [band]?; [¶] 4. Assuming [Katz] does not have title to the recordings, performances, and songs between 1983 to 1988, what amount of royalties, if any, does [Katz] owe to the [band]?; [¶] 5. Did [Katz] commit the torts of breach of fiduciary duty, elder abuse, breach of contract, conversion, or intentional infliction of emotional distress as to any member of the group?; and [¶] 6. Assuming [Katz] did commit such breaches, what damages, if any, including punitive damages, are owed by [Katz]?"

Following a bench trial, the court ruled that the band has title to the music created between 1966 and 1973. It also found that the band owns the name Moby Grape. It found that Katz has an implied nonexclusive license in the 1983 and 1998 albums entitled

"Heart" and "Mosley Grape," but the band members maintained title to these albums. With regard to royalties owed, the court ruled that Katz had a duty to pay the band members \$24,817.19, which Katz admitted he owed, as well as to provide a full and complete accounting statement. The court found that Katz did not commit any torts against the band members. In addition, the court found that the band members were not entitled to attorney fees and costs under the 1966 management agreements. The court retained jurisdiction over the matter.

Judgment was entered August 15, 2005. Katz filed a timely appeal from the judgment and the band members filed a timely cross-appeal from that portion of the judgment denying them attorney fees.

DISCUSSION

I. KATZ'S APPEAL

A. Ownership of the Name Moby Grape

1. Background and Trial Court's Ruling

Katz contends that the trial court erred when it concluded that the name Moby Grape belongs to the band members. At trial, Katz maintained that, because of his trademark applications, his business practices, and his continuous use of the name Moby Grape, he owned the rights to this name.

It is undisputed that the addendum to the management agreements between the band members and Katz signed on October 10, 1966, provided that the name Moby Grape was the property of Katz. However, the Labor Commissioner ruled that the management agreements between the band members and Katz were void; therefore, the addendum to the voided contracts was also void.⁸ The trial court dismissed Katz's appeal of the commissioner's ruling, and we affirmed (*Katz II, supra*, A100875). Accordingly, Katz

⁸ In addition, the attorney from O'Melveny and Meyers who had represented the band members at the Labor Commission proceedings testified at this trial. He stated that the addendum and the rights to the name Moby Grape were central issues in the Labor Commission proceedings and that the commissioner voided the addendum with the other contracts involving the band and Katz.

cannot now claim any ownership interest in the name Moby Grape based on the 1966 addendum to the management agreements.

It is undisputed that the 1973 stipulated settlements signed by Katz and Clainos, the attorney for the band at that time, gave Katz ownership of the band name Moby Grape. However, because the band members had not signed the settlement agreements and had not attended the settlement conference, the trial court set aside the 1973 settlements and we affirmed this ruling (*Spence v. Katz, supra*, A072963). Consequently, Katz cannot claim any ownership interest in the name Moby Grape based on the 1973 settlements.

The trial court found that Katz failed to establish ownership of the name Moby Grape by any alternative means, that Katz's trademark registration had expired, and that his recent trademark applications did not establish ownership. The court also found Lewis and Mosley's testimony that Mosley and Spence originated the band's name of Moby Grape to be credible. Thus, when the band was formed in 1966, the band members owned the name Moby Grape. The court concluded: "Once [the 1966 Addendum] was declared void *ab initio*, the name 'Moby Grape' was owned either by the original performers or any third party with whom they had an agreement. Since no other valid agreements regarding ownership of the band's name exist, [the band members], as the original performers, own the name 'Moby Grape.' "

On appeal, Katz maintains that he owns the name Moby Grape because the band members were his employees, he was the only one to make continuous use of the name, and the court's findings are inconsistent. We consider each of these arguments.

2. Alleged Employee Relationship

Katz contends the trial court erred as a matter of law in finding that Katz did not own the name Moby Grape because the band members created this name while his employees. He maintains that anything an employee creates within the scope of his employment belongs to the employer. (*Zahler v. Columbia Pictures Corp.* (1960) 180 Cal.App.2d 582, 589.)

First, the question of whether there is an employment relationship is a question of fact. (*Housewright v. Pacific Far East Line, Inc.* (1964) 229 Cal.App.2d 259, 265.) Thus, the standard of review is substantial evidence and not, as Katz asserts, de novo review.

Second, Katz has forfeited raising this issue on appeal. His contention that the band members were Katz's employees and the name was created in the course of the band's employment with Katz appears to be one that was not supported with evidence at trial.⁹ Nowhere in the court's statement of decision does the court address the factual issue of an employment relationship between Katz and the band members. The court set forth Katz's contentions at trial as the following: "that he came up with the name, that it was his business practice to own the names of the bands he managed, and that the members of Moby Grape orally agreed that he would be the owner of the name Moby Grape." With regard to Katz's specific argument that he owned the name Moby Grape, the court explained that Katz contended, "because of his trademark applications, his business practices, and his continuous use of the name 'Moby Grape,' that he owns the rights to this name." Indeed, Katz points to no place in the record where he provided evidence on this issue. Katz's argument, therefore, cannot be considered because it violates two rules of appellate practice: (1) raising a new point on appeal, and (2) changing his theory on appeal. (*North Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, 28-29, disagreed with on other grounds in *San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 315.)

Third, even if we presume Katz has preserved the issue of an employment relationship for appeal, Katz could not prevail on this record. For purposes of appeal, a statement of decision provides a record of the trial court's reasoning on particular disputed issues, which the appellate court may review in determining whether the decision

⁹ In the band members' written closing argument, they asserted that Katz stated at trial the band members performed on albums as employees on a "work for hire" basis, but they maintained that Katz never supported this assertion with any evidence.

decision is supported by the evidence and the law. (*In re Marriage of Ditto* (1988) 206 Cal.App.3d 643, 647.) In the present case, the trial court issued a tentative decision on June 22, 2005, and both parties filed corrections and exceptions to the tentative decision. The court considered these corrections prior to issuing its final statement of decision. The statement of decision sets forth the various “particulars” requested by Katz; no mention is made of any concern by either party about the lack of findings regarding an employment relationship.

Code of Civil Procedure section 634 provides: “When a statement of decision does not resolve a controverted issue, or if the statement is ambiguous and the record shows that the omission or ambiguity was brought to the attention of the trial court either prior to entry of judgment or in conjunction with a motion . . . , it shall not be inferred on appeal . . . that the trial court decided in favor of the prevailing party as to those facts or on that issue.” (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133, fn. 5.) When a party fails to bring alleged deficiencies in the trial court’s statement of decision to its attention, the party waives the right to complain of such errors on appeal, with the consequence that the reviewing court will imply findings that are supported in the record in the prevailing party’s favor. (*Id.* at pp. 1133-1134.)

In the present case, ample evidence supports a finding of no employment relationship. “The most important factor of an agency or employee relationship, as distinguished from that of independent contractor, is the *right* to control the manner and means of accomplishing the result desired. Strong evidence of the employer’s control is his right to discharge at will, without cause [citations]. Other factors to be considered are: (a) whether services performed are a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required; (d) who supplies the instrumentalities, tools and the place of work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether the work is a part of the regular business of the principal; and (h)

whether or not the parties believe they are creating the relationship of employer-employee.” (*Housewright v. Pacific Far East Line, Inc.*, *supra*, 229 Cal.App.2d at p. 266.)

In the present case, the band’s musical performances and albums were clearly a distinct occupation and the kind of occupation not done in a particular location or under the supervision of an individual. Indeed, composing and playing music is generally a creative process that is constantly changing as a result of the band members’ processes. Moreover, this “work” requires special skill.

Further, the management contracts between the band members and Katz specified that the band was hiring the services of Katz as an independent contractor. Thus, for example, the agreement between Katz and Lewis dated September 8, 1966, provided the following:¹⁰ “I desire to obtain your advice, counsel and direction in the development and enhancement of my artistic and theatrical career.” It specified in pertinent part that Lewis and Katz had agreed as follows: “I do hereby engage you as my personal manager for a period of 5 years from date. As and when requested by me during and throughout the term hereof you agree to perform for me one or more of the services as follows: advise and counsel in the selection of literary, artistic and musical material; advise and counsel in any and all matters pertaining to publicity, public relationship and advertising; advise and counsel with relation to the adoption of proper format for presentation of my artistic talents and in the determination of proper style, mood, setting, business and characterization in keeping with my talents”

The agreement further provided: “This Agreement shall not be construed to create a partnership between us. It is specifically understood that you are acting hereunder as an independent contractor Your services hereunder are not exclusive and you shall at all times be free to perform the same or similar services for others as well as engage in

¹⁰ This is the only management contract in the record. It appears to be undisputed that the language of the management contracts between Katz and the other band members was identical.

any and all other business activities. You shall only be required to render reasonable services which are called for by this agreement and when reasonably requested by [Lewis]. [¶] In compensation for your services I agree to pay to you, as and when received by me, and during and throughout the term therefore, a sum equal to 20 percent (twenty) percent of any and all gross monies or other considerations”

Thus, this agreement established that the parties did not intend to create a relationship of employer and employee. Moreover, the payment under the contract was not for wages; Lewis was paying for Katz’s services. Katz was not to have any control over the band, but was to provide advice. Katz did not have a right to terminate his relationship, as the agreement specified he would provide services to the band for five years. There is no other written contract establishing that the band members were employees or providing their services as “work for hire.”

Katz’s argument that there was an employment relationship is *extremely* weak. He cites testimony by a witness that Katz put the band together and that Katz had asked this witness to acquire the facility for the band members to showcase their talent. This does not establish that Katz had control over the band members, but merely shows that he was carrying out the services for which he had contracted. Katz also cites Lewis’s testimony that Katz provided an amplifier and microphone as evidence that he supplied the instrumentalities or tools of the work. Again, this evidence does not establish anything other than Katz was performing services under the management contract and there is no evidence that he furnished the band with musical instruments.

Katz also contends that he “paid weekly wages,” but the only support for this argument is Mosley’s testimony that Katz provided him with \$75 a week and a place to live. The court found that Katz, “initially, acted like a father figure to the band members, providing them with shelter, money, and guidance.” This record does not support a finding that Katz paid the band members a salary.

In his reply brief, Katz contends that he is limiting his assertion of an employment relationship to the brief one- or two-week period between the forming and naming of the

group and the signing of the management contracts. Again, he points to the fact that he paid Lewis \$75 during this period as well as to the facts that he paid the band's expenses and hired them to perform at a club that he co-owned. These meager facts do not establish an employer relationship, especially when the management contract evinces no intent by the parties to create such a relationship. Further, it borders on absurd to argue that the parties intended to have an employee and employer relationship for one or two weeks and then replace it with an independent contractor relationship.

Katz presents minimal credible evidence that he was an employer and the band members were employees. Accordingly, the management contract and the specialized skill required to create music established that the band hired the services of Katz as an independent contractor. Further, it can be inferred that this written contract reflected the relationship of the parties during the weeks prior to the signing of the contracts.

3. Continuous Use of the Name

Katz contends that he was the only party to make continuous use of the Moby Grape name and he therefore retains title to the name as a matter of law. In support of his argument that the trial court erred as a matter of law, he cites *Robi v. Reed* (9th Cir. 1999) 173 F.3d 736, 740.

The Ninth Circuit in *Robi v. Reed, supra*, 173 F.3d 736, considered conflicting claims over the rights to the use of the trademark name "The Platters" by individuals associated with the group. Herb Reed had founded The Platters in 1953; he was also the manager and one of the group's original singers. (*Id.* at p. 738.) In 1954, Paul Robi began performing with The Platters, and he left the group in 1965. (*Ibid.*) Robi died, but he had assigned his rights to The Platters name and goodwill to his wife. (*Ibid.*) Robi's wife sued Reed and others, asserting that she had exclusive rights to The Platters name. (*Ibid.*) Reed counterclaimed, maintaining that he had exclusive rights to the name as the founder and manager of the group. (*Ibid.*) The district court ruled that Robi, as an individual, had no right to use the name The Platters, which was the name of the singing group; therefore, his purported assignment of this right to his wife was invalid. (*Ibid.*)

In affirming the lower court, the Ninth Circuit noted that it has “been held that a person who remains continuously involved with the group and is in a position to control the quality of its services retains the right to use of the mark, even when that person is a manager rather than a performer.” (*Robi v. Reed, supra*, 173 F.3d at p. 740; citing *Rick v. Buchansky* (S.D.N.Y. 1985) 609 F.Supp. 1522.) The Ninth Circuit concluded that Reed was the person who had maintained continuity with the group and had been in a position to control the quality of its services. (*Reed*, at p. 740.) Further, Reed was the only surviving member of the five singers who originally began with the group in 1953. (*Ibid.*) He founded the group, gave the group its name, managed the group, and was the only member who had continuously performed with the group. (*Ibid.*) In contrast, Robi had left the group and his wife had never performed with the group. (*Ibid.*) The Ninth Circuit held that Robi took no rights to The Platters when he left the group and he therefore had nothing to assign to his wife. (*Ibid.*) It concluded, “Reed, who founded the group and is the only person who has remained and performed with it from its inception, retains the right to use of the service mark to the exclusion of Robi.” (*Ibid.*, fn. omitted.)

Robi v. Reed, supra, 173 F.3d 736 reaffirms that the determination of title to a name based on the continuous involvement with the group and the control over the group’s services is a question of fact, not law. (*Id.* at p. 740.) Accordingly, we review the lower court’s finding that the band members retained the legal right to use the name Moby Grape using the substantial evidence test.

“ ‘When a finding of fact is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the finding of fact. [Citations.] [¶] When two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court.’ [Citation.]” (*Scott v. Common Council* (1996) 44 Cal.App.4th 684, 689, quoting *Green Trees Enterprises, Inc. v. Palm Springs Alpine Estates, Inc.* (1967) 66 Cal.2d 782, 784-785.) The testimony of a

single credible witness may constitute substantial evidence. (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614.)

As discussed *ante*, Lewis, Spence, Mosley, Stevenson, and Miller formed the band in 1966. Later that year, after already naming the band Moby Grape, the band members entered into personal management agreements and other agreements with Katz. At trial, both Lewis and Mosley testified that Spence and Mosley created the band's name, Moby Grape. Katz presented two witnesses who said they believed Katz was the person who originated the name, but neither witness indicated he was present when the name was created.

Evidence presented at trial established that in September 1967 the band members notified Katz that they were rescinding their contracts with him. During that same period, the evidence established that Robinson produced the band's second album; he later became the band's manager. Evidence also showed that the name Moby Grape was associated with the band as the album covers featuring the Moby Grape had the names and picture of the band members. Further, the Labor Commissioner voided the contracts with Katz, including the addendum to the management contracts, which had provided Katz with the right to the name Moby Grape. Thus, the evidence supported a finding that Katz did not have continuous use or control of the name Moby Grape after 1967.

The facts of this case do not resemble those in *Robi v. Reed, supra*, 173 F.3d 736. The Ninth Circuit stated that Robi's right to the title of The Platters terminated when he left this music group. Reed, who remained a member of the group and had been an original member of the group, retained the right to the name The Platters. Similarly, here, the band members who had created the name Moby Grape and had performed under that name retained the right to the name Moby Grape. Katz, who was never a member of the band, also never had a legal right to the name; the agreements providing him with title to the name were voided or set aside by the court. Katz may have continued to market and use the name Moby Grape, but that was not done legally. He cannot claim continuous use

based on the illegal use of the name. Moreover, he cannot *retain* title to the name when he never had title to the name.

Katz insists that he formed the band, and two years later the original members stopped performing together. He claims that he continued staging concerts with other musicians performing under the name Moby Grape, and he controlled the quality of the services. He contends that, because the band members did not continue to use the name, they were like Robi in *Robi v. Reed*. We conclude, however, that the facts of this case are not analogous to the facts in *Robi v. Reed*. The band members may have stopped performing together, but Katz presented no evidence that he had a right to stage concerts with other musicians performing under that name. The band members never gave up their title to the name Moby Grape. In contrast, Reed, an original member of The Platters, had a right to the name and therefore could *retain* his right to the name. Thus, even if Katz could have established that the band members abandoned their title to the name Moby Grape, he still cannot establish that he has any right to this name.

As already stressed, Katz may have continued to stage concerts with other musicians using the name Moby Grape, but he had no legal right to the name. His claim to the name has been the subject of dispute before the Labor Commissioners and the courts for over 35 years. Thus, just as Robi's interest in the band was extinguished once he left The Platters, any asserted interest Katz had in the name was extinguished when the band rescinded its management contracts with Katz and the contracts were subsequently ruled void.

Accordingly, we conclude substantial evidence did not support a finding that Katz had title to the name Moby Grape based on continuous use of the name and control of the group.

4. *The Parties' Stipulation and the Ruling*

Prior to trial the parties made the following stipulation: "Absent agreement, express or implied, the performer or the group owns the recordings, performances, or songs as a matter of property law." Katz makes a one-paragraph, somewhat

incomprehensible, argument that the trial court's ruling is inconsistent with this stipulation. He again declares that the court failed to consider the employment relationship of the parties. However, as already discussed, the record does not indicate that Katz presented any employment contract or other agreement establishing an employment relationship.

The only agreements giving Katz title to the name Moby Grape were the contracts rescinded by the band and voided by the Labor Commissioner, and the settlement agreements set aside by the court. Since a contract did not give Katz title to the name Moby Grape, under the terms of the stipulation, the band owned the recording, performances, songs, and title to the name. Accordingly, the court's ruling was consistent with the parties' stipulation.

5. Addendum

Katz argues that "[t]he court below based its determination on the avoidance of the addendum to the management contract by the Labor Commissioner [citation], yet this too is also an erroneous conclusion of law." He maintains that "the addendum was only evidence of ownership, it did not in and of itself constitute title to the name as a deed would constitute title to land."¹¹

Katz's argument appears to be that the addendum was not an agreement, because it was not supported with any consideration. Rather, he claims the addendum was an acknowledgment of an earlier agreement that Katz owned the name Moby Grape. There is nothing in the record to support this argument. In any event, the Labor Commissioner voided the management contracts and any addendum to these voided contracts. Thus,

¹¹ Katz cites *Willard v. First Church of Christ, Scientist* (1972) 7 Cal.3d 473, 476 ("grants are to be interpreted in the same way as other contracts and not according to rigid feudal standards") and *Lillard v. Walsh* (1959) 172 Cal.App.2d 674, 678 (function of the certificate of acknowledgment is to provide prima facie proof that a document has been executed by the person whose signature appears on the document but the certificate is "evidentiary in character and is required so as to entitle the instrument to be recorded or to render it competent evidence without further proof"). These cases have no relevance to the issue here, which is the effect of the addendum.

Katz presented no evidence of any contract, which provided him with legal title to the name Moby Grape.

As already stressed, the testimony established that Mosley and Spence created the name Moby Grape. In fact, Mosley and Lewis testified that Katz did not like the name Moby Grape and suggested other names. Accordingly, the trial court committed no error when it concluded that the addendum did not provide Katz with title to the name Moby Grape.

6. *The Labor Commissioner's Ruling and the Ownership of the Name*

Katz protests that the Labor Commissioner stated that it did not have the "power to determine the ownership of the name MOBY GRAPE" Katz claims that the trial court therefore erred in relying on the Labor Commissioner's decision when issuing its ruling regarding ownership of the name.

Katz's claim, which is supported by no analysis, is baseless. There is no question that the Labor Commissioner determined the validity of the contracts between the band and Katz. The commissioner clearly had jurisdiction to conclude Katz's violation of the law voided these contracts, which included the addendum to the management contract.¹² Katz therefore had to establish that some other contract or agreement supported his claim to title of the name. He failed to do so and the trial court properly ruled that he did not have title to the name Moby Grape.

7. *Prior Court of Appeal Opinions*

Katz maintains that the lower court improperly relied on our earlier opinions when rendering its ruling. He claims that this court did not rule on any substantive issues. This argument is clearly incorrect. In *Spence v. Katz, supra*, A072963, we affirmed the lower

¹² The band presents other evidence, including the testimony of the attorney from O'Melveny and Meyers who represented the band at the Labor Commission proceedings in 1970. We need not consider this evidence because we have already held in our nonpublished decision, *Katz II, supra*, A100875, that the Labor Commissioner voided all of the contracts between Katz and the band. Katz, at that time, made no argument that the addendum to the management contract was excluded from the commissioner's ruling.

court's setting aside the settlement agreements between Katz and the band members. In *Katz II*, *supra*, A100875, we affirmed the lower court's dismissal of Katz's untimely appeal of the Labor Commissioner decision. Thus, these holdings had res judicata effect on this lawsuit and the trial court would have erred had it retried these issues.

In his reply brief, Katz claims the trial court improperly used our prior holdings to determine the present issue of who owned the name Moby Grape. The record does not support this contention by Katz. The trial court considered the evidence and determined that Katz had failed to establish that he had ownership of the name. As discussed *ante*, we conclude that substantial evidence supports this finding.

B. The Labor Commissioner's Ruling and the Publishing Contracts

The trial court found that the 1966 publishing agreements between the band members and Katz were void. The court found that the Labor Commissioner had the authority to void the publishing contracts. Further, it explained that the Labor Commissioner voided all contracts between the band and Katz as well as between the band and Katz's publishing company, After You Publishing Company. The court explained that specifying company "helps to demonstrate that the Publishing Agreements were at issue in the Labor Commissioner's Determination."¹³ Katz protests that the publishing agreements were not a part of the proceedings before the Labor Commissioner.

When interpreting a prior judgment, "[t]he meaning and effect of a judgment is determined according to the rules governing the interpretation of writings generally. [Citations.] ' "[T]he entire document is to be taken by its four corners and construed as a whole to effectuate the obvious intention." ' [Citations.] ' "No particular part or clause in the judgment is to be seized upon and given the power to destroy the remainder if such

¹³ The court also provided an independent reason for finding the publishing agreements void. The court found "that regardless of the Labor Commissioner's determination, the 1966 Publishing agreements are void due to [Katz's] declination to account for and pay royalties to [the band] after 1999. This action created an implied rescission of the publishing contracts."

effect can be avoided.”’ [Citations.] [¶] Where an ambiguity exists, the court may examine the entire record to determine the judgment’s scope and effect. [Citations.] The court may also ‘ “refer to the circumstances surrounding the making of the order or judgment, [and] to the condition of the cause in which it was entered.” ’ ” (*People v. Landon White Bail Bonds* (1991) 234 Cal.App.3d 66, 76.) The interpretation of a contract or a judgment is a question of law that is subject to the independent review of the appellate court. (*County of Contra Costa v. Kaiser Foundation Health Plan, Inc.* (1996) 47 Cal.App.4th 237, 241.)

Katz maintains there is no ambiguity in the Labor Commissioner’s award but, even if there is, the only other document related to this proceeding was the band’s petition, which did not mention the publishing contracts. He asserts that the publishing agreements were neither pleaded nor attached to the petition. Katz also declares that the attorney representing the band members at these proceedings stated that he “had no specific recollection of the publishing contracts.” He claims that taking the “generic” term of contracts to include publishing contracts is “taking one term and interpreting it to defeat the intention stated in the remainder of the document.” He asserts that the award refers to contracts in the plural because each band member signed a separate management contract.

When making its determination and award, the Labor Commissioner stated that it had determined that the “contracts” between the band members and Katz, independently, and doing business as Matthew Katz Productions and After You Publishing Company were void. Subsequently, when setting forth the award the Labor Commissioner referred to the “management contracts.”¹⁴ Accordingly, we conclude there is an ambiguity and therefore parol evidence should be considered to interpret this judgment.

¹⁴ The band members insist that the use of the words “management contracts” includes publishing contracts because the commissioner did not specify one management contract, but used the plural word “contracts.” However, each individual band member signed a separate management contract with Katz; only the addendum was signed by all

In this case, as the trial court pointed out, the antecedent phrase to the use of the word "contracts" specified that the commissioner was voiding all contracts between Katz, "independently and doing business as MATTHEW KATZ PRODUCTIONS and AFTER YOU PUBLISHING COMPANY." If the commissioner did not intend to include publishing contracts, there would have been no reason to include Katz's publishing company. Moreover, the commissioner could have limited the ruling to the management contracts throughout its decision.

Further, the Labor Commissioner specifies that Katz, independently, or doing business as Matthew Katz Productions or After You Publishing Company "is not entitled to any commissions resulting from the musical or artistic efforts of [the band members]." Thus, it appears that the commissioner's intent was to prevent Katz or his publishing company from earning any money from the band's work or effort. This would presumably include the publishing contracts.

We also conclude that failing to mention the publishing contracts or attach them to the petition before the Labor Commission does not preclude the band from arguing that the validity of these agreements was considered in this proceeding. Clearly, not all of the contracts at issue were attached to the petition, as only the management contract between Katz and Lewis and the addendum were attached; none of the contracts between the other band members and Katz was attached. However, the commissioner's decision referred to all of the management contracts between Katz and each band member, not just to the one involving Lewis. In addition, the caption to the petition and the text of the petition referred to After You Publishing Company as a respondent. Although the record does not contain the publishing contracts, the parties appear to agree that the publishing contracts were between the band members and After You Publishing Company. Finally, the petition requests that the band members be granted "all other, further and proper relief to

the band members. Therefore, the use of the language "management contracts" could refer to all of the individual management contracts between each band member and Katz.

which they may be justly entitled.” Thus, if presented with evidence regarding the publishing agreements, the commissioner could properly rule on their validity.

Katz complains that the mere inclusion of After You Publishing Company in the petition and award provides no support for finding that the publishing contracts were considered by the Labor Commissioner. He maintains that the “doctrine of *descriptio personae*” applies. (See, e.g., *Hobson v. Hassett* (1888) 76 Cal. 203.) Although Katz’s argument is somewhat obscure, he appears to be arguing that the use of the fictitious business name of After You Publishing Company was merely descriptive and had no significance. Consequently, the trial court should not have given the use of this fictitious business name in the petition and in the commissioner’s award any particular significance. We disagree. The numerous cases cited by Katz that applied the principles of *descriptio personae* usually involve the situation where an individual signs a promissory note or a personal guarantee and then adds a title such as “president” after the signature; courts hold that inserting this title does not permit the person to escape personal liability for the debt. “[T]he addition of such words as ‘president’ and the like will be considered as mere *descriptio personae*. . . .” (*Sebastian International, Inc. v. Peck* (1987) 195 Cal.App.3d 803, 808, italics added.) After You Publishing Company is not merely descriptive or surplusage; this fictitious business name is functional and indicates the type of work Katz was performing. Further, the parties appear to agree that the publishing agreements were between the band members and After You Publishing Company, not with Katz, individually. We therefore conclude that the principles of *descriptio personae* have no application to the present case.

Katz also contends that the attorney representing the band members at these proceedings stated that he “had no specific recollection of the publishing contracts.” Katz concludes that this testimony supported a finding that these contracts were excluded from the commissioner’s award. Katz’s depiction of the attorney’s testimony indicates that the attorney did not believe the publishing contracts were considered at the proceedings before the Labor Commissioner, but that is not exactly what the attorney stated. The

attorney was asked: "And my last question is do you have an understanding as to whether or not the February 25th, 1970, Labor Commission determination award also terminated the Katz After You Publishing contracts with the plaintiffs?" Counsel responded: "I really have no recollection of the publishing contract as a separate item. I have not yet had an opportunity to review the file of the actual labor proceedings, so I simply have no understanding as to that without further review[.]" Thus, the attorney appears to be saying that he believed the publishing contracts were included when considering the question of the legality of the contracts between Katz and the band members, but he did not have any specific recollection regarding the publishing contracts. In any event, since he had no recollection about this issue, the trial court properly did not base its decision on this testimony.

Finally, this court is hampered in its analysis because neither party has cited to any portion of the record that contains the 1966 publishing contracts and our review of the record indicates they are not included in it.¹⁵ At trial, the parties appeared to agree that publishing agreements were executed between Katz and his publishing company while Katz was still the band's manager. At trial, Katz presented no evidence that established the publishing contracts should be excluded from the commissioner's award and determination. Rather, the following evidence supports a finding that the publishing contracts were included in the commissioner's decision: the commissioner's decision refers to voiding "contracts" and does not specify management contracts in the determination section; the commissioner specified that the decision applied to After You Publishing Company and Katz signed the management contracts in his own name but he used the name After You Publishing Company when signing the publishing contracts; and

¹⁵ An appellant has the burden of affirmatively demonstrating error by providing the reviewing court with an adequate record. (Cal. Rules of Court, rule 5(a); *Scala v. Jerry Witt & Sons, Inc.* (1970) 3 Cal.3d 359, 367, fn. 4.) "[T]he reviewing court presumes the judgment of the trial court is correct and indulges all presumptions to support a judgment on matters as to which the record is silent." (*Baker v. Children's Hospital Medical Center* (1989) 209 Cal.App.3d 1057, 1060.)

the award specifies that Katz, independently, or doing business as After You Publishing Company, "is not entitled to any commissions resulting from the musical or artistic efforts of [the band members]."

We therefore conclude this evidence establishes that the commissioner's intent was to void all agreements made prior to 1970 between the band members and Katz, independently, or doing business as Matthew Katz Productions or After You Publishing Company that involved Katz or his fictitious businesses making commissions from the band's "musical or artistic efforts." Since we are affirming on this basis, we need not consider Katz's challenge to the trial court's independent reasons for finding these contracts void.¹⁶

C. Katz's Settlement with CBS Records

On February 21, 1979, Katz entered into a stipulated settlement with CBS Records, the predecessor in interest to Sony, in a case involving their respective interest in a different music group, "It's a Beautiful Day." Although the band was not a party to this lawsuit, Katz and CBS Records agreed that Katz could sell the recordings the band had made for CBS Records under its February 7, 1967 recording contract. Since the band members were never a party to the settlement between CBS Records and Katz (CBS settlement) and CBS Records is not involved in this action, Katz contends that the trial court cannot reform the CBS settlement.

The trial court ruled that all agreements between Katz and the band members are void "and therefore the original performers, [the band members], have the ownership rights related to their recordings, performances, and songs created prior to 1973. This ruling does not affect either party's contracts with Sony or any other individuals not a party to this suit."

¹⁶ The court also found these contracts void on the grounds that the band had rescinded these contracts and Katz's failure to pay the band royalties constituted an implied rescission.

Since the trial court specified that its ruling had no effect on other settlements, including the 1973 CBS settlement, we reject Katz's contention that the ruling improperly reforms the CBS settlement. Much of Katz's argument appears to address other irrelevant issues and facts, but he does seem to be asserting that the award of damages in this lawsuit will affect the licenses he received in the CBS settlement. The trial court ordered Katz to complete an accounting and therefore any alleged effect the damage award may have on other settlements is currently hypothetical.

Further, the lower court is retaining jurisdiction over this matter, and it therefore can address any issues that may arise as a result of the accounting. The trial court explained: "As a court of equity, this court will maintain jurisdiction over ownership issues regarding the music made between 1966 to 1973. This court maintains jurisdiction to at a later date, depending on the nature and complexity of the arrangements Mr. Katz has made with record companies regarding this music, to declare Matthew Katz a constructive trustee of these albums and songs. [Katz] would be able to continue with his arrangements to sell the [band members'] music from these years, as long as these arrangements are fair to the [band]. The [band members] would maintain title in these songs and albums, while [Katz] would act as a constructive trustee who could continue to manage the sales of their music. This court maintains jurisdiction to rule on this, pursuant to the accounting statement that will be provided by [Katz]."

Accordingly, the trial court stated that its ruling has no effect on the CBS settlement. Any future issues that may arise as a result of Katz's accounting will be settled by the trial court as it has retained continuing jurisdiction.

D. "Mosley Grape" Album

Katz contends that Mosley, individually, signed a contract with Katz, which governed the recording and release of the album "Mosley Grape." He claims the trial court erred in finding there was no such agreement.

The trial court found “there was no valid written agreement that transferred ownership of the ‘Mosley Grape’ album to [Katz]. The court cannot consider the contract between Mr. Katz and Bob Mosley since it was not properly submitted into evidence. Furthermore, the legality of the contract between Katz and Mosley is questionable, and Katz has not produced evidence to establish the validity of the contract. It follows then that Mr. Katz does not have title to this album.” The court did find there was an implied nonexclusive license in the “Mosley Grape” album granted to Katz, which was created by the conduct of both parties.

Katz complains that the trial court abused its discretion in excluding evidence of this contract between Katz and Mosley. Katz, however, never presented this document during the trial and never requested that it be received in evidence. Instead, Katz offered the contract to the court for the first time when he attached it to his written closing argument. He asserts that the band did not object to the admission of this contract, but merely stated that the contract had not been submitted at trial. In addition, Katz insists that evidence presented at trial supported a finding that a contract existed because Mosley admitted at trial that the contract existed.

We review the trial court’s refusal to consider the written agreement submitted with the closing argument under the abuse of discretion standard. (See, e.g., *People v. Rowland* (1992) 4 Cal.4th 238, 264.) We consider whether there was substantial evidence in the record to support the court’s finding of no written contract. “[W]e may affirm a trial court judgment on any [correct] basis presented by the record whether or not relied upon by the trial court. [Citation.]’ [Citation.] ‘No rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion.’ ” (*ASP Properties Group, L.P. v. Fard, Inc.* (2005) 133 Cal.App.4th 1257, 1268.)

Even if we presume that the trial court abused its discretion in not considering the contract submitted with the written closing argument or that Mosley's testimony at trial was sufficient to establish a contract between Katz and him regarding the album "Mosley Grape," we conclude that the evidence supported a finding that this agreement was not enforceable. The handwritten contract is dated February 24, 1988. However, the record contains ample evidence that Mosley could rescind the agreement based on his mental incapacity.

Civil Code section 39, subdivision (a) provides: "A conveyance or other contract of a person of unsound mind, but not entirely without understanding, made before the incapacity of the person has been judicially determined, is subject to rescission" As a general rule, the presumption is that a person is competent, placing the burden upon the party claiming incompetence to overcome the presumption. (*Estate of Mann* (1986) 184 Cal.App.3d 593, 602.) The test of a party's ability to rescind under Civil Code section 39 is "whether or not the party was mentally competent to deal with the subject before him with a full understanding of his rights." (*Stratton v. Grant* (1956) 139 Cal.App.2d 814, 817.) "[T]he test . . . in each instance [is] whether he understood the nature, purpose and effect of what he did." (*Smalley v. Baker* (1968) 262 Cal.App.2d 824, 832, overruled on other grounds by *Weiner v. Fleischman* (1991) 54 Cal.3d 476.)

In the present case, the record contains sufficient evidence to meet the burden of establishing that Mosley was not mentally competent to deal with the issue of publishing rights in 1988.¹⁷ The band submitted into evidence a report dated October 6, 1966,

¹⁷ In our nonpublished decision, *Spence v. Clainos*, *supra*, A076647, we concluded that the pleading by Spence and Mosley for claims arising out of the 1973 settlements with Katz alleged sufficient facts that they were "insane" pursuant to the Code of Civil Procedure section 352, subdivision (a), to defeat a demurrer by Clainos based on the statute of limitations defense. Similarly, in our nonpublished decision, *Spence v. Robinson*, *supra*, A077574, we held there was a triable issue of fact whether Spence and Mosley were "insane" under section 352, subdivision (a), which would toll the statute of limitations for their claims against Robinson regarding the 1973 settlements with Katz.

written by Dr. John S. Smolowe to the Department of Veterans Affairs Regional Office. In this report, Smolowe wrote that, in 1970, Mosley was found unfit for duty in the United States Marine Corps because of a diagnosis of schizophrenic reaction. His diagnosis was “[s]chizophrenic reaction, Paranoid Type, acute, severe, manifested by hallucinations, delusions, loose associations, withdrawn behavior and inappropriate actions. . . .” Mosley had been prescribed antipsychotic medications such as Haldol, Stelazine and Moban, but Smolowe reported that Mosley told him that he “stopped his medication in the 80s ‘because [he] felt [he] was being manipulated.’ ” Smolowe diagnosed Mosley with Schizophrenia, chronic paranoid type. He concluded: “[Mosley’s] partial improvement on medication in the early 1970s was temporary. He has now for two decades been psychotic, unable to find his own housing, and unable to work. He is by mental status and by history totally disabled”

The band met its burden of overcoming the presumption that Mosley was competent to enter into an agreement regarding publishing rights to the album “Mosley Grape”; Katz presented no evidence countering Smolowe’s report. Accordingly, we conclude that the evidence supported the finding that the contract regarding the “Mosley Grape” album was void when Mosley rescinded it.¹⁸

E. Incomplete Relief

The trial court, according to Katz, improperly failed to address the issues of a settlement between Lewis and Katz in 2000. Katz claims the terms of that settlement conflict with the rulings in the present case. Katz also complains that the court declined to rule on the ownership of the art work for the albums “Heart” and “Mosley Grape.”

¹⁸ We need not address the band members’ additional arguments that the evidence established Katz breached this agreement by not paying Mosley for his songs and that Mosley’s guardian ad litem rescinded all of his agreements with Katz in 2005 because of Katz’s refusal to pay royalties.

1. 2000 Settlement

In early December 1999, the parties engaged in settlement discussions, and a settlement was apparently reached. Counsel for the parties as well as Lewis and Katz were present in court. The terms of the settlement were read and counsel, Lewis, and Katz stated that they agreed to the terms. Subsequently, Katz filed a motion to vacate the settlement, and the court ruled it was enforceable only as to Lewis and Katz, since the other band members were not present in court. Katz appealed, and we affirmed. (*Katz I*, *supra*, A095819.)

In the present case, the court explained in its statement of decision that “[t]he 2000 settlement agreement between Mr. Katz and Peter Lewis was . . . never an issue in this trial, and this court is in no position to rule on the status of this settlement.”

The record on appeal contains a notice to Katz dated March 18, 2005, stating that Lewis was rescinding the settlement agreement because Katz had failed to perform his duties under the agreement. Other than this one document in the record, Katz provides no citation to the record that indicates the 2000 settlement was an issue in this trial. The pleadings and the trial record do not indicate that either Lewis or the other band members requested the trial court to enforce this settlement. Katz did not file a cross-complaint to enforce the settlement; nor does he cite to any time during the trial where he raised this issue. Since neither the enforcement of this settlement nor the terms of this settlement was ever before the trial court, it properly did not make any findings with regard to this settlement.

2. Ownership of the Artwork

With regard to the ownership of the artwork on the albums “Heart” and “Mosley Grape,” the court explained that it could not “decide this issue on the grounds that it was never properly raised in the proceedings. This was neither raised in [Katz’s] briefs nor was it raised at trial.”

Again, Katz has failed to point to any place in the trial where he raised this issue. Accordingly, ownership of the artwork was never an issue at trial and the court therefore properly did not rule on this issue.

II. *The Band's Cross-Appeal*

The management contracts between Katz and individual band members provided: "In the event of litigation or arbitration the prevailing party will be entitled to recover any and all reasonable attorney's fees and other costs incurred in the enforcement of the terms of this agreement." The court ruled that the band could not "recover attorney's fees or costs in this case because [the management agreements are] void *ab initio*. In general, parties cannot recover under clauses that are present in voided contracts."

The band contests this ruling and asserts the court erred as a matter of law (see *Hsu v. Abbata* (1995) 9 Cal.4th 863, 875-876 (*Hsu*)). The trial court, according to the band, erred in ruling that all illegal contracts prevent a party from claiming attorney fees under Civil Code section 1717. The band contends that, since the object of the contract was not illegal, the exception to the general rule of denying fees when the contract is illegal applies.

"On appeal this court reviews a determination of the legal basis for an award of attorney fees de novo as a question of law." (*Sessions Payroll Management, Inc. v. Noble Construction Co.* (2000) 84 Cal.App.4th 671, 677.) The general rule is that each party to a lawsuit is responsible for his or her own attorney fees unless a statute or contract provides otherwise. (Code Civ. Proc., § 1021.) Where there is a contractual attorney fees provision, Civil Code section 1717, subdivision (a) provides, "[i]n 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."

In the present action, the management contracts contained an attorney fees provision, and the band members requested attorney fees pursuant to this provision. However, the Labor Commissioner determined the management contracts were illegal and therefore void. The band members acknowledge that courts generally will not enforce a contract when its objective is illegal, because courts want to deter illegal conduct and do not want to “ ‘lend assistance to a party who seeks to benefit from an illegal act.’ ” (*Yuba Cypress Housing Partners, Ltd. v. Area Developers* (2002) 98 Cal.App.4th 1077, 1082 (*Yuba Cypress*)). However, the band members point out that courts have found that in some cases “ ‘effective deterrence is best realized’ by enforcing the plaintiff’s claim or allowing some other remedy because ‘the forfeiture resulting from unenforceability [of the contract] is disproportionately harsh considering the nature of the illegality.’ ” (*Ibid.*)

In *Yuba Cypress*, the plaintiff sued to rescind a real estate contract, which contained an attorney fees provision. (*Yuba Cypress, supra*, 98 Cal.App.4th at p. 1082.) The plaintiff prevailed on his claim for rescission on the basis that the seller had violated the Subdivided Lands Act, but the court still held he could recover attorney fees pursuant to the contract because the Subdivided Lands Act was to protect the plaintiff. (*Yuba Cypress*, at p. 1082.) Thus, when the plaintiff purchased land under a contract that did not comply with the Act, the contract was voidable, not void; it did not have an illegal object and therefore the attorney fees clause was enforceable. (*Id.* at pp. 1082-1083.)

The band asserts that the validity or existence of the contract is not a prerequisite to an award of attorney fees under Civil Code section 1717. The band maintains that under this statute “a party is entitled to attorney fees under section 1717 ‘even when the party prevails on grounds the contract is inapplicable, invalid, unenforceable or nonexistent, if the other party would have been entitled to attorney’s fees had it prevailed.’ ” (*Hsu, supra*, 9 Cal.4th at p. 870; see also *Dell Merk, Inc. v. Franzia* (2005) 132 Cal.App.4th 443, 451.) “The statute would fall short of this goal of full mutuality of remedy if its benefits were denied to parties who defeat contract claims by proving that they were not

they were not parties to the alleged contract or that it was never formed. To achieve its goal, the statute generally must apply in favor of the party prevailing on a contract claim whenever that party would have been liable under the contract for attorney fees had the other party prevailed.” (*Hsu, supra*, at pp. 870-871.)

The band maintains that Katz could have recovered attorney fees had he prevailed in this lawsuit. We disagree. Unlike the situation in *Yuba Cypress*, where the action involved rescission, this action did not involve the enforceability of the management contracts. Similarly, the present declaratory action is not similar to those declaratory actions that involve the determination of the parties’ rights under the contract containing the attorney fees provision. (See *Milman v. Shukhat* (1994) 22 Cal.App.4th 538, 545.)

Prior to this lawsuit, we had affirmed the lower court’s determination that the management contracts were void pursuant to the Labor Commissioner’s ruling. Thus, although Katz’s complaint regarding the Labor Commissioner’s ruling was consolidated with the other complaints, the *trial* did not involve the enforceability of this illegal contract; nor did it involve the rights of the parties under the management contracts. Rather, the *trial* concerned claims of title to the recordings, performances, and songs that arose independent of the management contracts. This lawsuit may have been connected to the management contracts, but the trial did not concern a party’s attempt to enforce or rescind the management contracts; nor did the parties litigate any alleged breach of the contracts. The actual trial was not concerned with any determination of the parties’ rights under the management contracts.

The fact that the management contracts were connected to the issues of the present case, does not mean that Katz could have received attorney fees under Civil Code section 1717 had he prevailed in establishing title to the recordings, performances, or songs of the Moby Grape. Thus, even if Katz had prevailed in establishing that he had title to Moby Grape, *he could not have recovered attorney fees* in this lawsuit pursuant to the void management contracts. Any recovery that Katz could have made would have arisen from *a right or contract independent of the management contracts*.

Under the mutuality of remedy purpose of Civil Code section 1717, Katz could not have recovered attorney fees pursuant to the attorney fees provision in the void management contracts had he prevailed; neither can the band members recover pursuant to this provision. Accordingly, the band members cannot recover attorney fees pursuant to a fee provision in a void contract when enforcing the contract and the rights under this contract were not at issue in the trial. We therefore affirm the trial court's denial of attorney fees.

DISPOSITION

The judgment is affirmed and the band is awarded the costs of appeal.

Lambden, J.

We concur:

Kline, P.J.

Richman, J.

Lewis et al. v. Katz (A111654)