

**EXXON CORPORATION, Plaintiff-Appellee, -vs- MOHAMMAD FALLAHI,
Defendant-Appellant.**

No. 95-15881

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

1996 U.S. App. LEXIS 26852

October 9, 1996 *, Submitted, San Francisco, California

*** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a) and Ninth Circuit Rule 34-4.**

October 11, 1996, FILED

NOTICE:

[*1] RULES OF THE NINTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

SUBSEQUENT HISTORY:

Reported in Table Case Format at: *98 F.3d 1345; 1996 U.S. App. LEXIS 38544.*

PRIOR HISTORY:

Appeal from the United States District Court for the Eastern District of California. D.C. No. CV-94-01290-EJG(GGH). Edward J. Garcia, District Judge, Presiding.

DISPOSITION:

AFFIRMED.

COUNSEL:

For EXXON CORPORATION, Plaintiff - Appellee:
Robert M. Harrison, EXXON LAW DEPARTMENT,
Houston, TX. Kurt Osenbaugh, Esq., McCLINTOCK,
WESTON, BENSHOOF, ROCHEFORT,
RUBALCAVA, MacCUISH LLP, Los Angeles, CA.

For MOHAMMAD FALLAHI, Defendant - Appellant:
Allen Ruby, Esq., MORGAN, RUBY, TETER,
SCHOFIELD, FRANICH & FREDKIN, San Jose, CA.
John L. Fitzgerald, COTCHETT, ILLSTON & PITRE,
Burlingame, CA.

JUDGES:

Before: GOODWIN, WALLACE, and RYMER, Circuit Judges.

OPINION:

MEMORANDUM

Fallahi appeals from an award of attorney's fees entered pursuant to section 1717 of the California Civil Code (section 1717). The district court had jurisdiction under *28 U.S.C. § § 1331* and *1367*. We have jurisdiction over this timely appeal pursuant to *28 U.S.C. § 1291*. We affirm.

Fallahi raises two issues in this appeal. First, he contends that the Petroleum Marketing [*2] Practice Act preempts section 1717. Fallahi concedes that he raises this argument for the first time on appeal, and we will not consider its merits. *Broad v. Sealaska Corp.*, *85 F.3d 422, 430 (9th Cir. 1996)*.

Fallahi next argues that the district court erroneously awarded attorney's fees to Exxon pursuant to section 1717, which permits attorney's fees to the "party prevailing on the contract." Cal. Civ. Code § 1717(a) (West 1985 & Supp. 1996). We review an award of attorney's fees for an abuse of discretion. *Haworth v. Nevada*, *56 F.3d 1048, 1051 (9th Cir. 1995)*. The district court abuses its discretion "when it bases the award on clearly erroneous legal or factual findings." *Henry v. Gill Indus.*, *983 F.2d 943, 946 (9th Cir. 1993)* (citations omitted).

Fallahi contends that Exxon did not prevail "on the contract," because Exxon dismissed its breach of contract claim. California courts have interpreted "on the contract" liberally. See *Milman v. Shukhat*, 22 Cal. App. 4th 538, 545 (1994) (holding that "section 1717 does apply, even though the relief sought by respondents was of a declaratory nature"); *Leaf v. Phil Rauch, Inc.*, 47 Cal. App. 3d 371, 378-79, 120 Cal. Rptr. 749 [*3] (1975) (upholding an action that "involved" a contract, even though the plaintiff had earlier rescinded the contract). Since Exxon's relief in this case both "involved" a contract and arose from a declaratory judgment, the district court did not abuse its discretion in finding that Exxon prevailed "on the contract."

Fallahi also argues that Exxon was not the prevailing party. Since Exxon only "prevailed" on its claim for declaratory judgment, Fallahi argues it cannot have prevailed "on the contract" as section 1717 requires.

Both the text of section 1717 and California case law refute Fallahi's argument. Subdivision (b)(1) of section 1717, which Fallahi omitted from his briefs,

states: "The party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract." Cal. Civ. Code § 1717(b)(1) (West 1985 & Supp. 1996). The California Supreme Court in *Hsu v. Abbata*, 9 Cal. 4th 863, 891 P.2d 804 (1995), stated: "The prevailing party determination is to be made by 'a comparison of the extent to which each party has succeeded and failed to succeed in its contentions.'" *Id.* at 876 (citations omitted).

Not only did Exxon prevail [*4] on the declaratory judgment claim, but the district court implicitly found for Exxon on the eviction and unlawful detainer claims. Fallahi did not succeed on any claim. Comparing the success of Exxon to the success of Fallahi under Hsu, it is clear that the district court did not abuse its discretion in finding Exxon to be the prevailing party.

AFFIRMED.

Note: This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.