Not Reported in Cal.Rptr.3d, 2006 WL 711071 (Cal.App. 2 Dist.)
Nonpublished/Noncitable (Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
(Cite as: 2006 WL 711071 (Cal.App. 2 Dist.))

Court of Appeal, Second District, Division 7, California.
Campbell M. ODENING et al., Plaintiffs and Respondents,
v.
Roger EVANS, Defendant and Appellant.

No. B168869.
(Los Angeles County Super. Ct. No. SC065817).
March 22, 2006.

APPEAL from judgments of the Superior Court of the County of Los Angeles, Patricia L. Collins, Judge. Affirmed in part, reversed in part and remanded.
Martin E. Jacobs, Inc. and Martin E. Jacobs for Defendant and Appellant Roger Evans.

Bennett & Erdman, Jeffrey W. Erdman and Julie S. Pearson; Dunn **Koes**, Pamela E. Dunn and Daniel J. **Koes** for Plaintiffs and Respondents Campbell M. Odening and Debra L.K. Odening.

PERLUSS, P.J.

***1** Rogers Evans appeals from an interlocutory judgment for partition of real property entered in favor of Campbell M. Odening and Debra L .K. Odening after a bifurcated court trial and from the final judgment entered after the court granted the motion for summary adjudication filed by the Odenings resolving the legal claims remaining after the partition trial. We affirm in part, reverse in part and remand.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Parties' Agreements Regarding Purchase and Management of the Santa Monica Property*

The Odenings and Evans purchased a four-unit apartment building in the City of Santa Monica in 1992. The Odenings jointly held a 50 percent undivided interest in the property; Evans held the remaining 50 percent undivided interest. Before escrow closed, the Odenings and Evans orally agreed Evans would live in unit D, a two-bedroom apartment; the Odenings would live in units A and B, one-bedroom units the parties intended to convert to a single unit; and units A and B were equal in value to unit D, inclusive of garages. Unit C was to be a rental unit with the rent deposited into a joint checking account to pay for expenses. Because the rent from unit C would not cover the property's full expenses, the Odenings and Evans agreed they would share equally in the additional expenses.

Evans moved into unit D after escrow closed. However, the tenant in unit B refused to leave; and the Odenings were unable to move into units A and B as planned. The Odenings and Evans agreed Evans would contribute to the partnership [FN1] an amount equal to the combined monthly rent collected from the tenants in units A and B and the parties would pay all costs associated with the property from the rent paid by the tenants and Evans. [FN2] They further agreed any net profits or losses after payment of all costs would be shared equally except for any amounts to be retained for future capital expenditures.

FN1. The trial court found the parties' oral agreement created a partnership.

FN2. The rent from units A and B was considered the Odenings' contribution to the partnership.

2. *Evans's Refusal to Cooperate in Efforts to Resolve Recurring Financial Problems*

Beginning in May 1992 the Odenings maintained the checkbook for the property, collected

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rent and paid the bills. Later in 1992 Evans took over the collection and accounting functions. Evans also acted as the on-site manager although Campbell Odening assisted with repairs. For parts of 1996, 1999 and 2000, however, Evans was incapacitated by depression and alcoholism. During those periods the Odenings managed the units and handled all financial matters for the property.

When the Odenings resumed responsibility for the financial affairs of the building in 1996, they learned Evans had separately rented unit A's garage for $115 per month beginning in April 1996 but had failed to inform the Odenings of the additional income. Additionally, although Evans had contributed amounts to the joint checking account roughly equal to the rent from units A and B until January 1996, after that date he began missing payments or making payments substantially less than the amount received for units A and B; Evans refused to communicate with the Odenings to work out a resolution.[FN3]

> FN3. Campbell Odening, who separately owed Evans money in connection with a personal loan, applied a number of his monthly payments toward Evans's rent contribution and share of the mortgage.

***2** In January 1999 Santa Monica initiated rent decontrol. As a result the rent for unit B, which had been vacated at the end of 1998, more than doubled. Despite the increase in unit B's rent, Evans refused to contribute an amount equal to the rent received for units A and B and made only a few small payments to the joint checking account.

In early 2000 Evans stopped contributing any money to the joint checking account. In approximately January 2001 Evans instructed the tenants to pay all rents directly to him and took exclusive control of the financial management of the property, denying the Odenings access to the property's bank accounts and refusing to provide them information about the property or its finances. In response the Odenings made repeated attempts to develop a mutually acceptable plan for the property and revise the partnership agreement, but Evans refused to cooperate.

3. *The Odenings' Complaint and Evans's Cross-complaint*

The Odenings filed an action against Evans in March 2001 for partition of the property, an accounting and constructive trust, breach of contract, breach of fiduciary duty and fraud. The Odenings alleged Evans failed to pay monthly rent for unit D in an amount equal to the rent received for units A and B; failed to deposit all rent received into the common account; failed to account for all income and expenses associated with the property; converted funds received from tenants for his personal use; and failed to fulfill other responsibilities in connection with the property. The Odenings sought partition by sale, requesting their proportionate share of the sale's net proceeds after receiving allowance or contribution based on the accounting sought in the complaint, imposition of a constructive trust, general damages, interest, attorney fees and expenses, costs of suit and punitive damages.

Evans answered the Odenings' complaint and filed a cross-complaint with causes of action that mirrored those in the Odenings' complaint and made similar charges of misconduct.

4. *The Bifurcated Trial on the Causes of Action for Partition and Accounting*

The trial court bifurcated the equitable causes of action for partition and accounting and conducted a bench trial beginning on May 22, 2002. At the conclusion of the bifurcated trial, the court found "multiple instances where [Evans] failed to honor the partnership obligations[.]" The court concluded Evans had failed to pay rent, refused to communicate with the Odenings for long periods of time and failed to respond to the Odenings' repeated efforts to develop a mutually acceptable plan for managing the property. Evans "ultimately shut [the Odenings] out completely from the books, records and management of the Property. Defendant Evans instructed tenants to pay rent only to him, he then denied

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[the Odenings] access to the books and records, denied to [the Odenings] any income and essentially forced [the Odenings] to bring suit."

*3 The court ordered a partition of the property by private sale between the parties, with the first right to purchase the property granted to the Odenings because equity weighed in their favor. The court found, "Evans's occupancy of unit D constitute[d] a valuable benefit to him and a valuable source of income denied the partnership.... To effectuate the original agreement of the parties that both would share equally in the costs and benefits, either 1) Defendant Evans should have continued to pay into the [joint checking account] an amount equivalent to the income generated by units A and B (including the garages), or 2) Defendant Evans should have distributed monthly to [the Odenings] the difference between the rental income from units A and B (including the garages) and the amount he paid into the partnership." The court further found that, since May 1992, units A and B (including garages) had generated rental income of $151,777.25, but Evans had only paid $68,866.22 for his occupancy of unit D, resulting in what was effectively a partnership distribution to Evans of $82,911.03. Taking into consideration a number of other adjustments, including repairs to the property paid personally by Evans and the Odenings, the court found the Odenings' partnership equity was $73,472.36 and Evans's was $7,852.74. Based upon the final accounting the court ordered proceeds from the sale of the property distributed equally to the Odenings and Evans after payment of the balance due on the mortgage, Evans's equity interest if the Odenings purchased the property, the Odenings' equity interest if Evans purchased the property and certain other costs. The interlocutory judgment for partition was entered on August 5, 2002.

5. *The Odenings' Motion for Summary Adjudication*

Although the Odenings had hoped resolution of the partition and accounting causes of action would obviate the need to proceed on the remaining legal claims, Evans's lack of cooperation continued after entry of the interlocutory judgment for partition: He refused to turn over records pertaining to the property's finances following the trial and only finally complied with the demands for accounting information in mid-December 2002. Once the Odenings received and reviewed the records, they learned Evans had failed to contribute any rent for his continued occupancy of unit D.[FN4] To recover damages incurred after the interlocutory judgment was entered, on February 19, 2003 the Odenings filed a motion for summary adjudication on the reciprocal breach of contract and breach of fiduciary duty causes of action in their complaint and Evans's cross-complaint; they also moved for summary adjudication on the fraud claim in Evans's cross-complaint. The trial court granted the Odenings' motion; judgment was entered in the Odenings' favor.[FN5] The form of judgment entered provided, in part, "[U]pon the duly filed motion by the Odenings, they shall recover from Evans the amount of $ _____ as attorneys fees and costs of suit pursuant to Code of Civil Procedure sections 874.010 through 874.050."

FN4. The Odenings also contended in their motion for summary adjudication that Evans refused to cooperate in the sale of the property, requiring court intervention.

FN5. Although the court ruled in the Odenings' favor on the liability portion of their cause of action for breach of fiduciary duty, the court found the Odenings failed to establish their entitlement to an award of punitive damages as a matter of law. To permit the court's ruling on their motion to conclude the case, the Odenings dismissed their demand for punitive damages as well as their fraud claim.

6. *The Postjudgment Motion for Attorney Fees and Costs*

*4 On June 13, 2003 the Odenings filed both a motion for attorney fees and costs and a memorandum of costs seeking a total of $65,188.01, including $53,909.75 in attorney fees; $8,850 in ex-

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pert witness fees; and $2,428.26 in other costs. After full briefing and a hearing on August 6, 2003 the court found that $48,463 of the attorney fees requested by the Odenings had been incurred for the common benefit. The court apportioned those fees according to the Odenings' and Evans's respective 50 percent interests in the property and awarded $24,231.50 to the Odenings. The court also awarded the Odenings 100 percent of the other costs requested because Evans had failed to timely file a motion to tax costs. A notice of ruling on the motion for award of attorney fees and costs was filed on August 8, 2003, and the amount of $35,509.76 was inserted on the judgment previously entered in the case.

7. *Evans's Notice of Appeal*

Evans filed a notice of appeal on July 3, 2003 "from the interlocutory judgment of May 17, 2002, for participation [*sic*] as well as the granting of the Motion of Summary Judgment [*sic*] on the remaining causes of action on May 5, 2003" and "the granting of Summary Judgment [*sic*] as to all remaining Cross Claims on or about May 5, 2003." Evans's notice also stated, "The appeal is based on mistakes of fact and conclusions of law, findings of fact at both the Trial and Motion for Summary Judgment [*sic*] as well as mistakes of law and fact committed after the interlocutory judgment as to the setting and valuation of the property which was the subject of the lawsuit, as well as costs to the [Odenings]." Evans did not file a separate notice of appeal from the postjudgment order awarding attorney fees and costs.

CONTENTIONS

Evans contends the court erred in calculating the amount due the Odenings in connection with the partition of the property; in granting the Odenings' motion for summary adjudication because it was untimely and triable issues of material fact exist; in awarding any attorney fees to the Odenings because the fees were not incurred for the common benefit of the parties and, even if attorney fees were recoverable, in determining the amount of those fees; and in awarding the Odenings the full amount of other fees and costs incurred, including expert witness fees.

DISCUSSION

1. *Evans's Appeal of the Interlocutory Judgment for Partition Is Untimely*

An interlocutory judgment for partition of property is an exception to the general rule that interlocutory orders are not appealable. (Code Civ. Proc., § 904.1, subds. (a)(1), (a)(9) [appeal may be taken "[f]rom an interlocutory judgment in an action for partition determining the rights and interests of the respective parties and directing partition to be made"].) [FN6] Evans had at most 180 days from the date of entry of the interlocutory judgment for partition to file a notice of appeal. (Cal. Rules of Court, rule 2(a)(3); § 906; *Norman I. Krug Real Estate Investments, Inc. v. Praszker* (1990) 220 Cal.App.3d 35, 46 [" 'If a judgment or order is appealable, an aggrieved party *must* file a *timely* appeal or forever *lose* the opportunity to obtain appellate review.' "]; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2005) ¶ 2:13, pp. 2-10 to 2-11 ["This ... is a *jurisdictional* principle: Appellate courts have *no discretion* to entertain appellate *or writ* review of appealable judgments or orders from which a timely appeal was not taken."].) Because the interlocutory judgment was entered on August 5, 2002 and Evans did not file his notice of appeal until July 5, 2003, his appeal of the interlocutory judgment for partition is not timely and must be dismissed.

> FN6. Statutory references are to the Code of Civil Procedure unless otherwise indicated.

***5** Evans contends his appeal is not untimely because the interlocutory judgment expressly provided for possible further judicial action, including the potential appointment by the court of an appraiser and referee, and thus did not determine all of the rights and interests of the parties.[FN7] Provision for further judicial action of this kind, however, is contemplated by the statutory scheme

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governing partition and is in part what makes a judgment for partition "interlocutory." (See, e.g., §§ 872.720, subd. (a) ["If the court finds that the plaintiff is entitled to partition, it shall make an interlocutory judgment that determines the interests of the parties in the property and orders the partition of the property and, unless it is to be later determined, the manner of partition."], 873.010, subd. (a) ["The court shall appoint a referee to divide or sell the property as ordered by the court."], 873.510 [providing for sale by court-appointed referee], 873.940 [When partition is by appraisal, "[t]he court shall appoint one referee or, if provided in the agreement, three referees to appraise the property and the interests involved."]; see also *Williams v. Wells Fargo Bank* (1941) 17 Cal.2d 104, 106 [interlocutory decree of partition is appealable whether it orders partition in kind or by sale of the property and division of the proceeds; "provisions concerning the sale and confirmation merely state the action required to be taken in execution of [the decree's] terms, and the order of confirmation to be later made will be one following final judgment"]; *Pista v. Resetar* (1928) 205 Cal. 197, 199 ["An interlocutory decree in an action for the partition of real property, although preliminary to the final judgment of conformation, is conclusive as to the matters determined therein [citations]; that is, it is final upon the questions adjudicated in it and is to all intents and purposes a final judgment from which an appeal may be taken [citation], although it is not the last judgment entered in the action."].)

> FN7. The judgment provided the court would select an appraiser if the parties could not mutually agree upon one and a referee to oversee the sale of the property if neither the Odenings nor Evans elected to purchase it.

Evans's reliance on *Swarthout v. Gentry* (1946) 73 Cal.App.2d 847 for the proposition interlocutory judgments of partition providing for possible future judicial action are not appealable is misplaced. To be sure, in *Swarthout* the court held a judgment appointing three referees to partition property, but reserving to the court final decisionmaking authority, was a nonappealable interlocutory judgment because "much remains of a judicial nature to be finally settled by the trial court." (*Id.* at p. 851.) At issue in *Swarthout,* however, was not an interlocutory judgment for partition but an interlocutory judgment in an action for dissolution of partnership subject to the general rule that interlocutory judgments are not appealable: Although the action as originally filed sought both dissolution of partnership and partition of real property, ultimately "the plaintiff abandoned his original contention that the real property was owned by himself and defendant as tenants in common and agreed ... the real and personal property involved was owned by the partnership.... Therefore the action must now be regarded as one for dissolution of the partnership...." (*Id.* at pp. 849-850.) Accordingly, the statutory scheme governing partition actions did not apply to the case notwithstanding the trial court's use of partition as a mechanism to divide the partnership's real property. (*Id.* at pp. 848-850; see also *Shirley v. Cook* (1953) 119 Cal.App.2d 220, 222-223 [rejecting contention interlocutory judgment determining real property was partnership asset was appealable because it essentially effected partition of property].)

***6** Equally without merit is Evans's contention, based on language from the opinion in *Schwartz v. Shapiro* (1964) 229 Cal.App.2d 238, 246, that his appeal is not untimely because the issues remaining in his cross-complaint after the interlocutory judgment of partition were directly related to the partition claims. In *Schwartz,* which concerned a premature notice of appeal, not a late notice, the defendants sought to appeal from an interlocutory decree of partition that was silent on issues tendered by defendants' cross-complaint. It was apparent from the defendants' briefs, however, that they intended to appeal from both the decree of partition itself and an unfavorable adjudication of issues in their cross-complaint. (*Id.* at pp. 245-246.) The court concluded that, although there was no final judgment

and the notice of appeal was therefore premature, it was clear from the findings of fact and conclusions of law the trial court had intended to deny defendants any relief on their cross-complaint. (*Id.* at p. 246.) Consequently, the court exercised its discretion to "obviate the harsh result attendant premature appeals by ordering judgment, where the intention of the trial court is clear, rather than sending the case back to the lower court for the performance of that act.... Accordingly, the notice of appeal prematurely filed [was] declared to be a notice of appeal from the judgment as thus amended." (*Id.* at pp. 246-247.)

In the case at bar the interlocutory judgment for partition was entered following a bifurcated trial on the partition and accounting claims. The interlocutory judgment for partition was an appealable order. (§ 904.1, subd. (a)(9).) It is simply irrelevant to Evans's obligation to timely appeal from that interlocutory partition judgment whether the legal claims remaining in his cross-complaint (or in the Odenings' complaint, for that matter) may have involved the same nucleus of facts as the equitable claims resolved at the partition trial.

2. *The Motion for Summary Adjudication Was Properly Granted*

a. *The undisputed facts warrant judgment in favor of the Odenings*

Without citation to the record or legal argument other than recitation of the general principles governing summary judgment, Evans contends the Odenings failed to demonstrate there was no merit to Evans's causes of action and they were replete with triable issues of fact. Evans also contends that, by considering the testimony given at the first trial as determinative on the issues in Evans's cross-complaint, the court improperly gave every benefit and intendment to the Odenings, rather than to Evans.

Evans's deficient briefing on the merits of the trial court's order granting summary adjudication violates California Rule of Court, rule 14(a)(1)(B) and (C) and is adequate ground to find those issues forfeited on appeal. (See *People v. Stanley* (1995) 10 Cal.4th 764, 793 [" '[E]very [appellate] brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration. [Citations.]' "]; *Del Real v. City of Riverside* (2002) 95 Cal.App.4th 761, 768 ["it is counsel's duty to point out portions of the record that support the position taken on appeal"; "[t]he appellate court is not required to search the record on its own seeking error"]; *Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545-546 [it is not the proper function of Court of Appeal to search the record on behalf of appellants or to serve as "backup appellate counsel"].)

*7 Even if we were to exercise our discretion and reach the merits of Evans's argument, however, the record here clearly supports summary adjudication in favor of the Odenings.[FN8] The Odenings separate statement in support of their motion sets forth undisputed facts establishing each element of their breach of contract and fiduciary duty claims and negating elements of Evans's reciprocal cross-claims. A significant number of those undisputed facts had been found by the court in the trial on the partition and accounting causes of action. Those findings, which were not challenged on appeal, were properly given collateral estoppel effect by the trial court when it considered the Odenings' motion for summary adjudication. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1244 ["Just as the parties are bound by collateral estoppel where issues are litigated in a prior action, so, too, do issues decided by the court in the equitable phase of the trial become 'conclusive on issues actually litigated between the parties.' "].)

FN8. We review a grant of summary adjudication de novo and decide independently whether the facts not subject to triable dispute warrant judgment for the moving

party as a matter of law. (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348; 437c, subd. (c).)

Moreover, to the extent the Odenings' motion was supported by additional evidence (declarations of Campbell Odening and his attorney and supporting exhibits), Evans failed to raise any meaningful challenge to this new evidence. Evans did not submit competent evidence in opposition; rather, he advanced technical grounds for the court to disregard the Odenings' proof (for example, Evans argued certain facts were not material to the issues framed by the pleadings and beyond the scope of the pleadings as limited by the statute of limitations). Evans's legal arguments, however, were insufficient to demonstrate a triable issue of material fact. (See 437c, subds. (b)(3) ["Each material fact contended by the opposing party to be disputed shall be followed by a reference to the supporting evidence."] (p)(1) [once a plaintiff has met his or her burden, defendant must "set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or defense"]; see also *Leo F. Piazza Paving Co. v. Foundation Constructors, Inc.* (1981) 128 Cal.App.3d 583, 589 ["When no affidavits are filed in opposition to a motion for summary judgment, the court is entitled to accept as true the facts alleged in the movant's affidavits, provided they are within the personal knowledge of the affiant and are facts to which he could competently testify."].)

b. *The motion for summary adjudication was timely*

A motion for summary adjudication "shall be heard no later than 30 days before the date of trial, unless the court for good cause orders otherwise." (§ 437c, subd. (a).) The Odenings' motion for summary adjudication was heard on May 5, 2003, 30 days before the scheduled trial date of June 4, 2003 on the causes of action at issue in the motion.

Without citation to any authority to support his position, Evans asserts the Odenings' motion was untimely because it was not heard 30 days before the commencement of the *initial* trial on the partition and accounting causes of action.[FN9] Evans's argument fails to acknowledge both the significance of a bifurcation order and the usefulness of a second-phase summary judgment/summary adjudication motion to resolve issues and avoid unnecessary trials in bifurcated cases.

FN9. The trial court found the motion was timely because it was heard 30 days before the trial date on the bifurcated claims.

***8** When a case has been bifurcated, there are two (or more) separate trials. (§ 1048, subd. (b) ["The court, ... when separate trials will be conducive to expedition and economy, may order a separate trial of any cause of action, including a cause of action asserted in a cross-complaint ... preserving the right of trial by jury...."].) Section 437c, subdivision (a), requires the motion be filed before the date of trial. That statutory requirement is fully satisfied if the motion is filed 30 days before the date of trial involving the causes of action at issue in the motion. (Cf. *Green v. Bristol Myers Co.* (1988) 206 Cal.App.3d 604, 609 ["the 30-day time limit on summary judgment hearings should be calculated based on the trial date in existence when the motion is noticed regardless of whether that date is the original trial date or not"] .) Indeed, to require a motion for summary adjudication on the legal causes of action in a case before a bifurcated trial on the equitable ones, as Evans's interpretation of section 437c would mandate, would frustrate the goal of judicial economy. (See *Nwosu v. Uba, supra,* 122 Cal.App.4th at p. 1238 ["Numerous cases having a mixture of legal and equitable claims have identified this same principle-that trial of equitable issues first may promote judicial economy."]; § 1048, subd. (b)].)

c. *The statement of decision was adequate*

A trial court granting a motion for summary adjudication "shall, by a written or oral order, specify the reasons for its determination. The order shall specifically refer to the evidence proffered in support of, and if applicable in opposition to, the motion which indicates that no triable issue exists." (§ 437c, subd .(g).) "A statement of reasons is suffi-

cient if it allows for meaningful appellate review." (*Santa Barbara Pistachio Ranch v. Chowchilla Water Dist.* (2001) 88 Cal.App.4th 439, 448.)

The trial court's statement of decision complies with this requirement. Although the statement of decision itself is short, it refers to the court's exhaustive 15-page statement of decision after the partition and accounting trial on enumerated points as support for its decision to grant summary adjudication in favor of the Odenings. The two statements of decision, read together, provide sufficient detail for meaningful appellate review.

3. *The Award of Attorney Fees and Costs*

a. *Evans did not need to file a separate notice of appeal from the postjudgment order awarding attorney fees and costs*

When a final judgment includes an award of attorney fees and costs but leaves the amount of the award for later determination, as did the judgment in the case at bar, a separate appeal from the postjudgment award is unnecessary; " *requiring* a separate appeal from such an order when the judgment expressly makes an award of costs and/or fees serves no apparent purpose.... [¶][S]ince the judgment expressly provides for an award of fees and costs, the issue is not a collateral matter unrelated to the judgment's validity and finality." (*Grant v. List & Lathrop* (1992) 2 Cal.App.4th 993, 997 (*Grant*).)

***9** Relying on *Fish v. Guevara* (1993) 12 Cal.App.4th 142, 147-148, the Odenings assert Evans was required to file a separate notice of appeal from the postjudgment award of attorney fees. In *Fish* the court held a discretionary award of expert witness fees after judgment pursuant to section 998 must be separately appealed. (*Id.* at p. 147.) Unlike the appeal from the award of attorney fees in *Grant, supra,* 2 Cal.App.4th 993, in which the prevailing party's rights to costs and fees was determined by the judgment itself, the award of expert fees pursuant to section 998 is not merely incidental to the judgment, but is a postjudgment discretionary decision that must be separately litigated. (*Fish,* at p. 148.) "Prevailing parties do not recover their expert witness fees as a matter of right. When the opposing party has rejected a settlement offer and fails to obtain a more favorable judgment, the trial court may, in its discretion, make an award of expert witness fees. (§ 998.) Thus, even a losing defendant may recover its expert witness fees if the plaintiff obtains a judgment which is less favorable than defendant's rejected offer to compromise. [Citations.] Because expert witness fees are not incidental to the judgment, the propriety of a postjudgment award of expert witness fees cannot be reviewed on an appeal from the judgment." (*Fish,* at p. 148.)

Unlike the expert witness fees in *Fish v. Guevara, supra,* 12 Cal.App.4th 142 the award of attorney fees incurred for the common benefit was a matter of right necessarily determined by the judgment; only the amount was left for later determination. Section 874.040 provides, "Except as otherwise provided in this article, the court shall apportion the costs of partition among the parties in proportion to their interests or make such other apportionment as may be equitable." The costs of partition include "[r]easonable attorney fees incurred or paid by a party for the common benefit." (§ 874.010, subd. (a).) Although the court must make a factual determination whether and in what amount attorney's fees were incurred or paid for the common benefit (and, in fact, Evans contends no attorney fees were expended for the common benefit), recovery of those fees under section 874.040 is mandatory. (Cf. *Gouskos v. Aptos Village Garage, Inc.* (2001) 94 Cal.App.4th 754, 764-765 ["The 'may be awarded' language and 'good faith' requirement unquestionably make an award of attorney fees under [the Rosenthal Fair Debt Collection Practices] Act a discretionary award.... [¶] ... [¶] The 'shall be awarded' language unquestionably makes an award under [section 3068, subdivision (d),] one as a matter of right."].) Evans was not required to file a separate notice of appeal from the

postjudgment award of attorney fees.

b. *The court did not abuse its discretion in apportioning 50 percent of the Odenings' attorney fees to Evans without an offset for Evans's attorney fees*

***10** We review an award of attorney fees in a partition action for abuse of discretion. (*Finney v. Gomez* (2003) 111 Cal.App.4th 527, 545.) Reversal is warranted only "when there is no substantial evidence to support the trial court's findings or when there has been a miscarriage of justice." (*Ibid.*)

Substantial evidence supports the trial court's apportionment of $24,231.50 of the Odenings' attorney fees to Evans. The trial court found $48,463.00 was expended for the common benefit. In arriving at the figure the court deducted fees relating to, among other things, disputes between the Odenings and the property's lender, objections to the court's tentative decision, the filing of the memorandum of costs, client communications regarding status only and unsuccessful ex parte appearances.[FN10] The court then apportioned the attorney fees expended for the common benefit to the Odenings and Evans based upon their respective 50 percent interests in the property.

> FN10. Evans contends a review of the moving and opposing papers on the Odenings' motion for attorney fees clearly shows attorney fees were awarded by the court with respect to issues related to causes of action other than for partition. Inasmuch as Evans fails to cite to the record in support of his contention, he has forfeited this argument. (*Del Real v. City of Riverside, supra,* 95 Cal.App.4th at p. 768.)

Evans contends the attorney fees were not expended for the common benefit because the parties had hotly contested and diametrically opposed views regarding the proper distribution of the proceeds after partition. This same argument has been rejected by the California Supreme Court. (*Capuccio v. Caire* (1932) 215 Cal. 518, 528-529 ["counsel fees may be allowed ... for services rendered for the common benefit even in contested partition suits"]; see also *Regaldo v. Regaldo* (1961) 198 Cal.App.2d 549, 551 [" 'The presence and litigation of controversial issues between all the parties does not preclude the allowance of attorney's fees for services connected with such issues where such services are found to be for the common benefit of the parties.' "]; *Stewart v. Abernathy* (1944) 62 Cal.App.2d 429, 431-432 ["The purpose of [former section 796] was to place the burden of the expense for services of counsel upon those parties sharing in the benefits realized from such services, and that burden is specifically placed upon the parties 'entitled to share in the lands divided,' that is, the owners."].)

Evans also contends he is entitled to a credit for at least some portion of his own attorney fees, which were set forth in a declaration submitted by Evans's attorney in opposition to the Odenings' motion. Putting aside Evans's failure to file a motion for attorney fees (Cal. Rules of Court, rule 870.2), the declaration by Evans's counsel provided only monthly totals for amounts billed to Evans without any description of the services rendered. [FN11] It was therefore impossible for the trial court to determine whether any of those services related to the partition action or were otherwise for the parties' common benefit. Substantial evidence thus supports the trial court's implied finding none of Evans's attorney fees was expended for the common benefit. (See *Finney v. Gomez, supra,* 111 Cal.App.4th at p. 545 ["If the trial court has made no findings, the reviewing court will infer all findings necessary to support the judgment and then examine the record to see if the findings are based on substantial evidence."].)

> FN11. The declaration states that the monthly charges were for services "related to this case" or "attorney services for this litigation."

c. *The court abused its discretion by apportioning*

100 percent of the expert witness fees to Evans

***11** The court awarded the Odenings 100 percent of their costs other than for attorney fees, which included $8,850 for expert witness fees, because Evans failed to file a motion to tax costs. Evans contends the court erred in awarding the Odenings any expert witness fees because they were not incurred for the common benefit. Evans also contends the court erred in failing to allocate the expenses between the partition and other causes of action.

For the reasons previously discussed, we reject Evans's contention costs expended to resolve contested issues cannot be for the common benefit. [FN12] However, the court abused its discretion in failing to apportion the expert witness fees and other costs based upon the parties' ownership interest of 50 percent each or some other equitable apportionment supported by the evidence as required by section 874.040. (See *Finney v. Gomez, supra,* 111 Cal.App.4th at p. 548 [trial court abused its discretion when it deviated from apportionment of attorney fees and costs based upon ownership interest when there was no substantial basis for doing so] .)

> FN12. Costs of partition include "[o]ther disbursements or expenses determined by the court to have been incurred or paid for the common benefit." (§ 874.010, subd. (e) .)

DISPOSITION

The judgment is reversed to the extent it fails to apportion expert witness fees and other costs, and the cause is remanded for further proceedings not inconsistent with this opinion. In all other respects the judgment is affirmed. Each party is to bear his or her own costs on appeal.

We concur: WOODS and ZELON, JJ.

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