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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

REID ITO, Plaintiff, Cross-defendant and Respondent, v. DAVID ITO, Defendant, Cross-complainant and Apellant.	A136513 (Marin County Super. Ct. No. CIV041991)

Reid Ito (Reid), a computer programmer, went into business with his brother, David Ito (David), a real estate investor, dealing in Florida properties. They had a falling out. Reid sued David to wind up their affairs, which proved to be a complicated and lengthy process. The suit was filed in 2004, and judgment was not entered until 2012. David, in propria persona, has appealed. We affirm.

I. BACKGROUND

The case was tried to the court over seven days in 2006. The main issues were how to value the parties' respective interests in the real estate they bought and sold, and how to treat their interests in Preferred Solutions, a corporation they formed to facilitate their business arrangements. The court ruled for Reid on both issues.

Reid testified that when Preferred Solutions was formed in 1999 he was making over $300,000 a year as an independent contractor installing computer software. He said that David had no money at the time, and that he agreed to do business through Preferred

Solutions and give David a 50 percent share in the corporation in order to take advantage of tax losses David had accumulated. David had an employment contract with Preferred Solutions and received a "salary" but, according to Reid, David knew nothing about programming and "never did anything" for the corporation. From 1999 to 2002, David received $362,500 in wages and dividends from Preferred Solutions. He eventually signed an agreement forfeiting his interest in the corporation.

In its "Interim Decision and Order Appointing Referee" (2006 Interim Decision) following the trial, the court called Preferred Solutions "an ill-advised scheme to avoid the payment of income taxes by Reid," and determined that David had no interest in the corporation. In rejecting David's argument that he received no consideration for forfeiting his interest in the corporation, the court observed "there was no consideration for David receiving an interest in Preferred Solutions in the first place, other than the illegal purpose of attempting to divert Reid's income into real estate and avoid the payment of income taxes."

Reid and David jointly purchased approximately 39 properties, and continued to own six, through partnerships or limited liability companies (LLCs), at the time of trial. David claimed a 100 percent interest in the properties. David took the position that the parties' interests were determined by their capital accounts in the properties, and that the value of the accounts would fluctuate based on the amounts each partner contributed to, or withdrew from, the properties. David's counsel argued that Reid's capital accounts for the properties were "zero because . . . whatever money he put in he took back in the forms of payments that he received from Dave which reduced his capital accounts."

Reid testified that when a property was sold, he and David each were credited with the amounts they had invested in the property, and the net profit after those credits was split 50/50. The credits represented amounts paid by each of them to acquire the property and for expenses and renovations. The 2006 Interim Decision characterized these payments as "loan[s] without interest." Reid presented expert testimony that the approach Reid described was the one typically used in real estate partnerships, and said that there were "problems in having an agreement where the profit percentage would

change every time one of the partners went out and spent some money on behalf of the partnership." The expert explained: "If you and I owned a building 50/50, our capital accounts were 50/50, and we were going to sell it tomorrow for a million dollars, the day before the sale I'd find a reason to spend some money on that building and I'd have a much bigger capital percentage and much bigger share of the profit."

The court rejected David's "fluctuating capital accounts" theory because it "ignored the brothers' written agreements contained in partnership agreements and LLC documents, which in essence said that the brothers were 50/50 partners in all of the properties." The court appointed a referee to "determine the balance of the capital account of each brother in the various properties, and the amount of cash advances each brother is entitled to credit for as a loan without interest. The referee shall also make a recommendation in his report as to how the $362,500 paid to David by Preferred Solutions should be characterized."

David's appellant's appendix—which violates various Rules of Court (e.g., Cal. Rules of Court, rules 8.124(d)(1), 8.144(c)(1) [binding], 8.144(b)(1) [indexing], 8.144(a)(1)(C) [chronological ordering], 8.124(b)(1) [contents])—contains a 142-page referee's report dated June 16, 2008. The report stated that the referee received and cataloged over 15,000 documents and records, and considered the parties' detailed comments and objections to a draft of the report. The referee determined that David had paid a total of $288,960.67 more than Reid toward the six properties. The referee traced David's payments from Preferred Solutions through his bank accounts to the properties. Because David's contributions came from Preferred Solutions, the referee treated them as loans from Reid. The report noted that Reid reduced his taxes by $159,000, and increased David's taxes, by having David report income that should have been taxable to Reid, and proposed that "the 159,000 be an offset to Reid's total investment (Loans and Equity) in all the subject properties." The report stated: "If a property is sold the gain or loss from the sale will be allocated 50/50 to the parties Equity accounts. However, before distribution of the parties Equity account can take place, their respective Loan accounts must be repaid (if funds are sufficient to do so)."

David, still represented by counsel, lodged objections to the referee's report, which were considered at a July 2008 hearing. In an "Order re Interlocutory Judgment of Dissolution of Partnership" filed August 19, 2008 (2008 Order), the court overruled the objections and approved the report. The court directed the referee to prepare a supplemental accounting for three additional properties, identified as 459 Bentwood, 465 Bentwood, and 477 Lombard (collectively, the Bentwood Properties). The court ordered "[t]he parties' partnership" dissolved, and directed the referee "to wind up the partnership business by liquidating partnership property and/or proposing a division in kind."

On September 9, 2011, the court filed a "Post-Hearing Order re Receiver/Referee Final Report" (2011 Order). The 2011 Order reflects that the referee had prepared a January 2011 report, and the parties had submitted responses and objections to the report to the referee. Hearings on the disputed issues were held in May and June. The parties and the referee testified at the hearings, and "lengthy" exhibits were admitted. David, now in pro per, and Reid filed pre and post-hearing briefs.

The court found "sufficient evidence that the properties identified as partnership properties were structured to allocate profit or loss on a 50-50 basis between Reid and David, regardless of how title was held to any individual piece of property." With regard to the Bentwood Properties, David testified at the 2006 trial that the properties were sold to the parties' parents, and Reid acknowledged receiving "78,000 and change" from those alleged sales. In the 2011 Order, the court found "insufficient evidence to support finding that the 3 Bentwood properties were sold by David to their parents or to Reid." Rather, David had sold two of the Bentwood properties to third parties in December 2005 for $640,000. The court determined that the Bentwood Properties were owned by the partnership, and each party was to receive one half of the net proceeds from the sale of those properties, with a $78,096 offset against Reid for the amount he said he received from the earlier purported sale.

At the time of the 2011 Order, four properties, valued at a total of $365,000, were held by the parties as partners. Unless the parties could agree otherwise, the court ordered that title to one of the properties be conveyed to Reid, that title to another be

conveyed to David, and that the other two properties be sold and the profits split 50/50. The court confirmed the previously-ordered $159,000 offset against Reid that was attributable to David's increased liability for income taxes.

According to the trial court register of actions,[1] as of December 2011 the referee was holding $596,993 in cash, David was entitled to $303,964 of that amount, and Reid was entitled $293,028.

In April 2012 the court filed an order awarding Reid attorney fees of $308,383.75.

In July 2012, the court filed a final judgment dissolving the parties' LLCs. The court ordered that Reid receive $461,898, and title to three properties, and that David receive title to one property, and $20,072 he was to receive when he delivered grant deeds to two of the properties Reid was receiving. David filed a timely notice of appeal.

II. DISCUSSION

A. Statement of Decision

David argues that the court erroneously denied his request for a statement of decision explaining the basis for the 2006 Interim Decision.[2] This argument fails in the first instance because the record does not establish that David made a timely request. (*Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42, 58 (*Fladeboe*) [judgments are presumed to be correct and the appellant "bears the burden of providing an adequate record affirmatively proving error"].) Where a court trial lasts more than one

[1]We hereby grant, in part, David's unopposed June 16, 2014 "Application to Include Complete Trial Transcripts and Trial Court Register of Actions" in the appellate record. The register of actions is a proper subject for our consideration and should have been included in the appellant's appendix. (Cal. Rules of Court, rules 8.122(b)(1)(F), 8.124(b)(1)(A).) As for the "complete trial transcripts," David appears to have simply copied the reporter's transcript of the 2006 trial. He did not need to apply to include that transcript in the appellate record because it was already included as a settled statement. We have no reason to question its accuracy.

[2]This argument appears in a "Motion to Vacate Based on Trial Court's Failure to Provide a Statement of Decision on its Interim Decision," which was filed simultaneously with David's opening brief. We ordered that the motion be considered with the merits of the appeal, and invited Reid to respond to the motion in his respondent's brief. The statement of decision argument is thus properly before us.

day, Code of Civil Procedure section 632 requires that a request for statement of decision be filed within 10 days after the court announces its tentative decision. The 2006 Interim Decision was filed on June 28, 2006. The appellant's appendix includes a request for statement of decision from David that is dated July 5, 2006, within 10 days of the 2006 Interim Decision, but there is no indication that this document was ever filed with the court. The appendix also includes an "amended" request for a statement of decision, which posed the same questions as the request dated July 5, 2006, but the "amended" request was not filed until August 2008, after the court filed its 2008 Order. Thus, the record does not establish that David filed a timely request for a statement of decision on the 2006 Interim Decision.

Even if David timely requested a statement of decision, the court could have permissibly denied the request. The purposes of a statement of decision are to explain the factual and legal basis for the court's rulings, and to facilitate appellate review of the decision. (*In re Marriage of Williamson* (2014) 226 Cal.App.4th 1303, 1318; *People v. Landlord's Professional Services, Inc.* (1986) 178 Cal.App.3d 68, 70.) The 2006 Interim Decision fulfilled those objectives. The court set forth its rulings that David had no interest in Preferred Solutions, and that the parties were 50/50 owners of the properties. The court explained the basis for its rulings. David had no interest in Preferred Solutions because he was not involved in the corporation's activities, and the agreement purporting to give him an interest was a sham done for tax avoidance. The parties were equal owners of the properties because that was what their partnership and LLC agreements provided.

David's request for a statement of decision asked the court to answer 25 questions. "The trial court was not required to provide specific answers so long as the findings in the statement of decision fairly disclose the court's determination of all material issues." (*People v. Casa Blanca Convalescent Homes, Inc.* (1984) 159 Cal.App.3d 509, 525, disapproved on another point in *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 184–185.) A statement of decision need only state " 'ultimate rather than evidentiary facts because findings of ultimate facts necessarily

include findings on all intermediate evidentiary facts necessary to sustain them.' " (*Muzquiz v. City of Emeryville* (2000) 79 Cal.App.4th 1106, 1125.) A detailed evidentiary analysis is not required. (*Olen Commercial Realty Corp. v. County of Orange* (2005) 126 Cal.App.4th 1441, 1452.)

Most of David's questions related to Preferred Solutions. He asked, for example, whether he received 50 percent of the Preferred Solutions stock, and whether the parties agreed that he was to receive 50 percent of the corporation's profits. The answers to these and other questions about the corporation were subsumed in the court's determination that David had no interest in Preferred Solutions. Most of the other questions asked whether particular properties were owned by the parties' specified partnerships and LLCs. The answers were again subsumed in the court's finding that "the brothers' written agreements . . . in essence said that the brothers were 50/50 partners in all of the properties." The equal ownership finding and the court's rejection of David's "fluctuating capital" theory obviated other questions, such as whether the parties agreed "that any moneys spent on their properties would be treated as a capital contribution," and "that each brother's percentage ownership interest in a property would be determined by the extent of his capital contributions." The request for statement of decision identified no material deficiencies in the 2006 interim decision.

B. Property Interests

(1) *Introduction*

David contends that the trial court "abused its discretion" in a number of respects when it determed the parties' interests in Preferred Solutions and the real estate they acquired. These arguments all involve factual determinations that are reviewed for substantial evidence, not abuse of discretion. (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2013) ¶ 8:43, p. 8-22 (rev. #1, 2013) [substantial evidence review applies to "the trial court's resolution of *any* disputed fact question"].)

"Where findings of fact are challenged on a civil appeal, we are bound by the '. . . principle of law, that . . . the power of an appellate court begins and ends with a

determination as to whether there is any substantial evidence, contradicted or uncontradicted,' to support the findings below. [Citation.] We must therefore view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor . . . ." (*Jessup Farms v. Baldwin* (1983) 33 Cal.3d 639, 660 (*Jessup*).) " '[W]e do not reassess the credibility of witnesses or reweigh the evidence.' " (*Kelly v. CB & I Contstructors, Inc.* (2009) 179 Cal.App.4th 442, 452 (*Kelly*).)

Moreover, " 'a reviewing court starts with the presumption that the record contains evidence to sustain every finding of fact.' " (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881 (*Foreman*).) Appellants who contend that " 'some particular issue of fact is not sustained . . . are required to set forth in their brief *all* the material evidence on the point, and *not merely their own evidence*.' " (*Ibid.*) " 'A party who challenges the sufficiency of the evidence to support a particular finding must *summarize the evidence* on that point, *favorable and unfavorable*, and *show how and why it is insufficient*.' " (*Schmidlin v. City of Palo Alto* (2007) 157 Cal.App.4th 728, 738 (*Schmidlin*).) " 'Unless this is done the error is deemed to be waived.' " (*Foreman, supra,* 3 Cal.3d at p. 881.)

(2) *Preferred Solutions—2006 Interim Decision*

David contends that he was shortchanged in the amounts he received from Preferred Solutions because he and Reid agreed that he would receive 50 percent of the corporation's profits, and Reid illegally "diverted" money from the corporation by "allocat[ing]" "additional salaries" to himself and paying himself retirement benefits.

But the court found that David had no interest in Preferred Solutions, and this finding was supported by substantial evidence. (*Jessup, supra,* 33 Cal.3d at p. 660.) Reid testified that he lent David the money to fund his capital contribution to the corporation because David had no money when the corporation was formed. Reid further testified that David performed no services for the corporation, and that the corporation was merely a tax-avoidance scheme. Since David had no valid interest in Preferred Solutions, he had no right to the money he received from it, and no basis to argue that it owed him any additional sums.

(2) *Bentwood Properties—2011 Order*

David challenges the court's finding that the Bentwood Properties were never effectively conveyed to the parties' parents as he claimed. The reasons for that finding were detailed in the 2011 Order.

The order stated that David testified at the 2011 hearings that the properties were sold to the parents "pursuant to a December 2002 written contract, and that the properties were then gifted back to David in January 2005 (pursuant to a January 1, 2005 handwritten note from one parent)." Although David testified at the March 2006 trial that he owned the Bentwood Properties, he had actually sold two of them in December 2005, and continued to hold title to the third. "Undisputed evidence was provided that grant deeds were not received by [the parties'] parents and title to the parents to the three Bentwood properties . . . was never conveyed or recorded." "Sufficient evidence at the hearing show[ed] that since 2002, each property was in David's name," but the properties "were treated as partnership properties, regardless of . . . title."

The order concluded: "While the court heard conflicting evidence, the prior court ruling [the 2006 Interim Decision] and current evidence supports the Court's finding that at the time David sold the two Lombard properties, the partnership was the owner of all three Bentwood Properties. [¶] Each brother is entitled to one-half of the net proceeds generated by the sales of the two Bentwood properties."

David has included his objections to the 2011 Order in his appendix, but not the 2011 testimony or briefing presented to the court. In support of his challenge to the court's findings, he refers to documents we presume he introduced into evidence at the hearings, but none of the conflicting evidence that supported the court's decision. He points to Reid's testimony at the 2006 trial that their parents owned the Bentwood properties, but ignores Reid's 2011 testimony, cited in the 2011 Order, that a sale to the parents was "never completed." Since he has failed to present or acknowledge all of the relevant evidence, David has forfeited his challenge to the Bentwood Properties findings. (*Foreman, supra,* 3 Cal.3d at p. 881; *Schmidlin, supra,* 157 Cal.App.4th at p. 738.)

The evidence David cites does not, in any event, establish as a matter of law that the properties were conveyed to the parents and gifted back to him. According to the 2011 order, it was undisputed that the parents did not receive grant deeds to the properties, and David identifies no such documentation.

(3) *Accountings*

(a) 2008 Order

David contests parts of the referee's accounting that the court approved in the 2008 Order.

He argues that the referee erred in crediting Reid with a 50 percent interest in the proceeds from the sale of the real estate identified as Westchase Properties. In the 2006 Interim Decision the court determined that the parties were "50/50 partners" in the properties, but the referee reexamined the parties' interests in the properties in connection with the 2008 accounting. At the July 2008 hearing on the accounting, the referee advised the court that because of "comments and objections received from both counsel in December of 2007, we poked our nose into the Westchase properties to look at that issue, and determined that indeed David had deposited all the escrow deposits into those purchases; Reid had not. However, accounting records they kept contemporaneously with those transactions, credited Reid for 50% of those deposits by virtue of payments he made on Dave's and Reid's behalf related to other properties, and indeed refunded the difference to Reid for five thousand and some odd dollars . . . I think sometime in 2000. . . . I looked at it enough to determine that I agreed with the way you ruled, and that's how we did the accounting." The credit to Reid was thus supported by substantial evidence. (*Jessup, supra*, 33 Cal.3d at p. 660.)

David contends that the referee erroneously disallowed $161,090.61 of the $332,434.91 in expenses he claimed to have paid on the properties. At the July 2008 hearing, the referee explained "[t]he procedures we went through to identify payments made by both brothers with specific properties and legitimate expenses . . . . We went through an exhaustive analysis. Many times we're missing direct evidence, such as invoices relating to properties. And we associated them with properties as best we could

by proximity, knowledge of the scope of the work that was going on with those properties, based on interviews with Reid and Dave . . . . [W]e cast a pretty wide net when we were trying to capture the expenses that made sense, and we thought that had adequate support . . . . And I say that the ones I rejected, there's just not adequate support." The court had determined in the 2006 Interim Decision that David was responsible for record keeping for the properties, and that "what records he kept were chaotic and disorganized." The court reiterated at the July 2008 hearing that David's record keeping "wasn't convincing," and accepted the referee's "judgment" on which expenses he claimed were "credible." Disallowance of some of the claimed expenses was thus supported by substantial evidence. (*Kelly, supra,* 179 Cal.App.4th at p. 452.)

David also reiterates objections he raised at the hearing to the accounting for the properties at 2737-2749 Vernon Terrace and 2969 Herschel Street. Again, however, the court could credit the explanations the referee provided.

(b) October 2011 Report

David contends that the court erred in approving parts of the referee's October 2011 accounting. We reject these arguments because the record does not include this accounting or the order approving it. (*Fladeboe, supra,* 150 Cal.App.4th at p. 58.)

C. Referee Fees

David contends that the court abused its discretion in approving the referee's fees, which he states in his opening brief totaled approximately $500,000. In support of his argument, he cites his trial court pleading dated January 31, 2008, and his objection to a December 7, 2011 order authorizing payment of $16,000 in fees to the referee. In the January 2008 pleading, David stated that referee's fees totaled $115,000, and requested that the referee be ordered to complete his accounting without further payment from the parties. The appendix does not show that the January 2008 pleading was filed with the court. The December 2011 objection stated that the referee's fees were approaching $500,000, and requested "that the Court order the Referee to repay without delay to the Parties, the funds charged for the Referee/Receiver's work."

David cites none of the responses to his referee fee arguments, and no rulings as to those fees other than the December 2011 order for payment of $16,000. The record and the briefing are inadequate to establish any abuse of discretion with respect to the referee fees.

D. Attorney Fees

David contends that the court abused its discretion in awarding attorney fees to Reid pursuant to the attorney fee provisions of the parties' two LLC agreements. He reasons that because the LLC agreement for RD Real Estate provided for mandatory arbitration of disputes, and because Reid pursued a lawsuit rather than arbitration to resolve their differences, he, and not Reid, is entitled to attorney fees. However, the arbitration clause in this LLC agreement has no bearing on Reid's entitlement to attorney fees because David never sought to compel arbitration and thereby waived his right to arbitration. (*Bodine v. United Aircraft Corp.* (1975) 52 Cal.App.3d 940, 945.) David argues that he should have been deemed to be the prevailing party because he was determined to have the greater interest in the only property he asserts was held by Ito Properties, LLC. However, the prevailing party entitled to contractual attorney fees is the one who "recovered a greater relief in the action on the contract." (Civ. Code, § 1717, subd. (b)(1).) That David may have obtained greater relief as to one property in the case does not establish that he obtained the greater relief in the action as a whole. Accordingly, we find no grounds to overturn the attorney fee award.

E. Bias

David contends that the court and the referee were biased against him, but offers no support for that assertion other than determinations they made that were adverse to him. David has not demonstrated that any of those determinations were reversible error, much less that they were motivated by some improper animus against him. No bias has been shown.

III. DISPOSITION

The judgment is affirmed.

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Siggins, J.

We concur:

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Pollak, Acting P.J.

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Jenkins, J.