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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

OK SONG CHANG,

Plaintiff,

v.

A-JU TOURS, INC.,

Defendant and Respondent;

HENRY M. LEE LAW CORPORATION,

Intervenor and Appellant.

B263702

(Los Angeles County  
Super. Ct. No. BC401329)

APPEAL from an order of the Superior Court of Los Angeles County,  
Mary Strobel, Judge. Affirmed.

Henry M. Lee Law Corporation, Henry M. Lee and Sabrina Hashmi, for  
Intervenor and Appellant.

Rogari Law Firm and Ralph Rogari for Defendant and Respondent.

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Intervenor and appellant Henry M. Lee Law Corporation (Lee) appeals a postjudgment order directing it to pay restitutionary interest in the amount of \$69,544.22 to defendant and respondent A-Ju Tours, Inc. (A-Ju).

We perceive no abuse of discretion in the trial court's order, which awarded A-Ju interest on \$520,743.20 in funds that Lee had deprived A-Ju of using during a 15-month period while appellate proceedings were pending. The order is affirmed.

### **FACTUAL AND PROCEDURAL BACKGROUND<sup>1</sup>**

1. *Lee obtains \$300,000 fee award in litigation against A-Ju.*

A-Ju is a travel agency operating Korean-language tours in the western United States. Ok Song Chang (Chang) worked as a tour guide for A-Ju at various times beginning in 1995. She accompanied A-Ju's customers on bus and car tours and also worked in A-Ju's offices. Tour customers typically paid her \$10 per tour day per customer. She also received commissions from the sale of optional tour packages, but she received no hourly wages. A-Ju and Chang entered into an agreement entitled Confirmation dated July 29, 2007. The Confirmation agreement stated that Chang was not an employee, but instead was "an independent person," and that her only compensation was "service fees" received from tourists and commissions from tour option sales. It also stated that its terms applied retroactively. Chang stopped working for A-Ju in 2008 after she came to believe that she was unfairly being assigned to less profitable tours.

In November 2008, Chang filed suit against A-Ju and individual defendants, alleging, inter alia, various Labor Code violations as well as unfair competition.

A bifurcated trial commenced in July 2010, beginning with the jury phase. The jury returned a verdict on July 20, 2010, finding that (1) Chang was an employee of A-Ju; (2) A-Ju owed Chang unpaid minimum wages in the amounts of \$21,060 for 2005 and 2006, \$9,093 for 2007 and \$0 for 2008; (3) A-Ju did not owe Chang any unpaid overtime wages and did not deny her

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<sup>1</sup> The factual summary is developed in part from this court's prior opinion in *A-Ju Tours, Inc. v. Ok Song Chang* (Aug. 28, 2013, B230858 c/w B232815) [nonpub. opn.] (*A-Ju I.*) (Cal. Rules of Court, rule 8.1115(b).)

any rest periods or meal breaks; (4) A-Ju willfully failed to pay all wages due as of the end of Chang's employment; (5) A-Ju intentionally and knowingly failed to provide Chang with an accurate accounting of her wages; (6) the \$10 daily payments that Chang received from A-Ju tour customers were tips or gratuities; and (7) Chang was not forced to resign because of sex discrimination. Thereafter, the nonjury phase of the trial on the unfair competition count and alter ego allegations was conducted in July and August 2010.

The trial court filed a judgment in favor of Chang and against A-Ju in November 2010, awarding Chang \$30,150 in damages for unpaid minimum wages; \$1,920 in waiting time penalties under Labor Code section 203; \$4,000 in penalties for failure to provide itemized wage statements under Labor Code section 226; \$15,075 in liquidated damages under Labor Code section 1194.2, subdivision (a); and prejudgment interest on the unpaid wages and liquidated damages. The judgment awarded no relief on the unfair competition count and no relief against the individual defendants.

A-Ju subsequently moved for a new trial and for judgment notwithstanding the verdict (JNOV). The trial court denied the new trial motion and granted in part the motion for JNOV, reducing the award of damages for unpaid minimum wages by \$4,860 based on the statute of limitations. The trial court also decided that Chang was entitled to recover that same amount as restitution on her unfair competition count. The court entered a revised judgment on January 25, 2011, modifying the monetary awards in accordance with its ruling.

Chang moved for an attorney fee award under Labor Code section 226, subdivision (e), and section 1194, subdivision (a), seeking \$456,712.50 in fees. The trial court awarded Chang \$300,000 in attorney fees in an order filed on April 25, 2011. A-Ju appealed the judgment and the partial denial of its JNOV motion, and also appealed the order awarding attorney fees. On May 31, 2011, Chang and A-Ju agreed to stay execution of the judgment and the fee award pending resolution of A-Ju's appeal.

After Chang terminated Lee as her attorney, Lee filed a motion in the trial court seeking (1) leave to intervene in the action, and (2) an amendment to the order awarding attorney fees, so as to make the fees payable to Lee

rather than Chang. The trial court denied the motion. Lee filed a petition for writ of mandate in this court in August 2011 challenging the denial.

This court granted the petition and concluded, in a published opinion, that attorney fees awarded under Labor Code sections 1194, subdivision (a) and 226, subdivision (e) are payable to the attorney rather than the party, unless an agreement provides for a different disposition of the award. (*Henry M. Lee Law Corp. v. Superior Court* (2012) 204 Cal.App.4th 1375, 1388.) We directed the trial court to conduct further proceedings to determine the terms of the contract between Chang and Lee and to reconsider its ruling on Lee's motion. (*Id.* at p. 1389.)

The trial court conducted a hearing in July 2012 to consider the terms of the attorney-client contract and to reconsider its ruling on Lee's motion. The trial court concluded that the contract did not provide that an attorney fee award would be payable to Chang, and therefore modified the judgment by making the award of \$300,000 in attorney fees payable to Lee rather than Chang.

*2. Lee executes on the fee award; A-Ju recovers the seized funds following reversal of the judgment and attorney fee order.*

Lee maintained that Chang's agreement to stay execution was not binding on it. On July 18, 2012, Lee obtained a writ of execution in the amount of \$345,810.40, and on August 2, 2010, Lee caused the county sheriff to serve the writ on Hanmi Bank and Wilshire State Bank.

On August 2, 2012, Wilshire State Bank froze \$169,837 from A-Ju's bank account, and Hanmi Bank froze \$347,128.20 from A-Ju's customer trust account. Also, on August 3, 2012, the sheriff collected \$3,802 from A-Ju's customers at its business premises.

On August 7, 2012, this court stayed enforcement of the writ of execution pending further order of the court. However, Wilshire State Bank, Hanmi Bank and the sheriff did not release the funds to A-Ju; they demanded that Lee provide a written release of the funds, but Lee refused.

On August 28, 2013, this court, in *A-Ju I*, reversed the judgment and attorney fee award. On October 10, 2013, A-Ju filed an ex parte application requesting that its funds be ordered released. Lee opposed the application, arguing that the funds should not be released until the California Supreme

Court ruled on its petition for review. On November 20, 2013, the petition for review was denied, and on November 25, 2013, this court issued the remittitur. On November 27, 2013, Hanmi Bank released the \$347,128.20 it had seized from A-Ju's customer trust account. On December 6, 2013, A-Ju successfully brought another ex parte application for release of the remaining funds. On December 9, 2013, Wilshire State Bank released the \$169,837 it had seized from A-Ju's account, and on January 6, 2014, the County returned to A-Ju the \$3,802 that had been seized by the sheriff.

3. *A-Ju's motion for restitution.*

After recovering the seized funds, A-Ju filed the subject motion, seeking an order directing Lee to pay restitution interest in the sum of \$69,554.22, to compensate A-Ju for Lee's execution on \$520,743.20 for a 15-month period.<sup>2</sup>

In opposition, Lee argued, inter alia, that it would be inequitable to award interest because Lee did not receive any benefit from the \$520,743.20; the funds were never disbursed to Lee and at all times continued to be held by third parties. Lee also contended A-Ju was not entitled to interest at the rate of 10 percent, and instead, if the court were to award any interest, it should be based on the court's rate of interest for funds on deposit.

On January 13, 2015, the trial court granted A-Ju's motion requesting restitutionary interest in the sum of \$69,544.22.

On January 29, 2015, Lee filed a motion for reconsideration of the January 13, 2015 ruling.

On February 2, 2015, the trial court entered a postjudgment order awarding A-Ju \$69,544.22 in restitutionary interest, as requested. The trial court rejected Lee's contention that an award of interest would be inequitable. It reasoned, "On August 7, 2012, the Court of Appeal issued a stay of enforcement of the writ of execution. . . . Lee could have voluntarily released its levy on the funds pursuant to CCP § 699.060(a). Lee declined to do so. . . . Therefore, the fact that the Court of Appeal stayed enforcement of the writ is not dispositive. Lee could have prevented the harm caused to [A-Ju], and thus the equities favor [A-Ju]."

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<sup>2</sup> It is unclear why Lee levied on over \$520,000 from A-Ju's accounts, in view of the fact that Lee's attorney fee award was only \$300,000.

With respect to the amount of interest, the trial court ruled, “Lee contends that the Court should award interest ‘based on the court’s rate of interest for funds on deposit.’ [Citation.] In *Cussler v. Crusader Entertainment* (2012) 212 Cal.App.4th 356 [(*Cussler*)] the Court of Appeal affirmed the lower court’s award of 7 percent restitution interest, instead of the 1.4 percent rate of interest for funds on deposit with the superior court, because the funds were not actually deposited with the court. (*Id.* at 369.) Some of the funds at issue in this case were apparently held by Hanmi Bank, but Lee submits no evidence of the interest rate for funds on deposit with the bank. (See Mot. Exh. 1.) Thus, the instant case is analogous to *Cussler* in that the Court has no factual or legal basis to depart from the interest rates provided by statute and the California Constitution. This claim for restitution relates to postjudgment execution proceedings. The statutory postjudgment interest rate is 10 percent. (See *Cussler* at [p.] 369, citing CCP § 685.010.) Accordingly, 10 percent interest is appropriate.”

On March 23, 2015, A-Ju served notice of entry of the February 2, 2015 postjudgment order. On April 28, 2015, Lee filed a timely notice of appeal from said order.<sup>3</sup>

On July 6, 2015, the trial court took Lee’s motion for reconsideration off calendar as moot, on the ground the matter was pending on appeal, divesting the trial court of jurisdiction to rule on the matter.

### **CONTENTIONS**

Lee contends: the restitution order deprived it of substantial property rights without due process; the trial court violated Lee’s due process rights by imposing the burden on Lee, not on A-Ju, the movant, to prove the actual interest rates on the levied funds; Lee never received any benefit from the levied funds, making it inequitable to compel it to pay interest thereon; the

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<sup>3</sup> We construe the notice of appeal, which referred to an order entered on March 20, 2015, as referring to the February 2, 2015 order. (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 564.) It is clear that Lee was appealing from the order awarding restitutionary interest, and it is evident from A-Ju’s respondent’s brief that A-Ju could not possibly have been misled or prejudiced by the language of the notice of appeal.

10% interest rate imposed on Lee violates due process because the levied funds were not interest bearing; the trial court abused its discretion because A-Ju is not entitled to interest on monies that did not belong to it; the trial court abused its discretion because A-Ju failed to present substantial evidence of the source or details of funds A-Ju used to replace the levied funds; after being surprised with the burden of proof, Lee sought reconsideration to provide evidence that A-Ju's funds were not interest bearing; and A-Ju's failure to post a bond precludes, and postjudgment conduct justifies denial of, any restitution.<sup>4</sup>

## DISCUSSION

### 1. *General principles.*

A person whose property has been taken under a judgment is entitled to restitution if the judgment is reversed or set aside, unless restitution would be inequitable. (*Stockton Theatres, Inc. v. Palermo* (1953) 121 Cal.App.2d 616, 619 (*Stockton Theatres*); *Gunderson v. Wall* (2011) 196 Cal.App.4th 1060, 1064 (*Gunderson*).)

Code of Civil Procedure section 908 provides that, upon the reversal or modification of a judgment, "the reviewing court may direct that the parties be returned so far as possible to the positions they occupied before the enforcement of or execution on the judgment or order. In doing so, the reviewing court may order restitution on reasonable terms and conditions of all property and rights lost by the erroneous judgment or order, so far as such restitution is consistent with rights of third parties and may direct the entry of a money judgment sufficient to compensate for property or rights not restored. The reviewing court may take evidence and make findings concerning such matters or may, by order, refer such matters to the trial court for determination."

Although this statutory provision refers to "the reviewing court," a trial court whose order or judgment has been reversed on appeal has inherent authority to afford similar relief. (*Gunderson, supra*, 196 Cal.App.4th at

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<sup>4</sup> Additional arguments which Lee raises for the first time in the reply brief are not properly before this court. (*Tisher v. California Horse Racing Bd.* (1991) 231 Cal.App.3d 349, 361.)

p. 1065.) Following reversal, a party may seek restitution from the trial court by a motion in the original action itself, or in a separate action instituted for that purpose. (*Ibid.*) “The fundamental rule guiding the court in [such] proceeding[s] [i]s, so far as possible, to place the parties in as favorable a position as they could have been in had the judgments not been enforced pending appeal.’ [Citation.]” (*Ibid.*)

Whether a party is entitled to restitution following reversal presents a question calling for judicial discretion in determining what equity requires. (*Gunderson, supra*, 196 Cal.App.4th at p. 1065.) The trial court’s ruling will not be disturbed in the absence of a showing of manifest abuse of discretion, with the burden on the appellant to demonstrate that the trial court’s discretion was so abused that it resulted in a manifest miscarriage of justice. (*Ibid.*)

2. *No merit to Lee’s due process arguments.*

Lee contends the restitution order deprived it of due process because it did not have the opportunity to confront and cross-examine witnesses related to the evidence submitted by A-Ju, and was not allowed the opportunity to conduct discovery relating to A-Ju’s claims of damages.

This argument is meritless. In opposing A-Ju’s motion for restitutionary interest, Lee argued, inter alia, that it would be inequitable to award interest, and that the litigation privilege precludes recovery of interest. However, Lee did not assert below that the proceeding deprived him of due process, he did not request the opportunity to cross-examine witnesses at an evidentiary hearing, and he did not seek an opportunity to conduct discovery in the matter. By failing to assert a due process violation below, Lee did not preserve the issue for appeal. (*Hepner v. Franchise Tax Board* (1997) 52 Cal.App.4th 1475, 1486 (*Hepner*) [in civil cases, constitutional questions not raised in the trial court are considered waived].)

Lee also contends the trial court improperly relied upon new evidence submitted in A-Ju’s reply papers below, and on unfounded statements by A-Ju’s counsel at the hearing. This argument is unsupported by the record. Lee did not provide a reporter’s transcript on appeal, and the order Lee cites, at pages 885 and 886 of the Appellant’s Appendix, does not support Lee’s claim with respect to the basis of the trial court’s ruling.

Lee also contends the trial court violated his due process rights by imposing the burden of proof on him, not on A-Ju as the moving party, to prove the actual interest rate on the levied funds. The record reflects that in opposing the motion below, Lee argued that if any interest were to be awarded, it should be based on the rate for funds on deposit with the superior court.<sup>5</sup> In addressing the issue, the trial court stated, inter alia, “[s]ome of the funds at issue in this case were apparently held by Hanmi Bank, but Lee submits no evidence of the interest rate for funds on deposit with the bank.” In so ruling, the trial court did not assign the burden of proof to Lee; rather, the trial court merely was responding to Lee’s argument that any interest should be based on the rate for funds on deposit with the superior court.

On the record presented, no due process violation has been shown.

3. *No merit to Lee’s argument that it is inequitable to compel it to pay interest.*

Lee contends that because it never received any benefit from the levied funds it is inequitable to compel it to pay interest.

The determination as to whether an award of interest would be equitable is within the purview of the trial court. (*Gunderson, supra*, 196 Cal.App.4th at pp. 1064-1065.) Here, the trial court reasoned that “Lee could have prevented the harm caused to [A-Ju], and thus the equities favor [A-Ju].” Under the circumstances of this case -- namely, Lee levied upon sums greatly in excess of his \$300,000 fee award, and refused to provide a written release of the funds after this court stayed enforcement of the writ of execution -- Lee cannot show that the trial court’s discretion was so abused that it resulted in a miscarriage of justice. (*Ibid.*)

4. *No merit to Lee’s argument that the interest rate awarded to A-Ju violates substantive due process because the levied funds were not interest bearing.*

Lee contends the 10 percent interest rate awarded to A-Ju deprives Lee of “substantive due process” because the levied funds were not interest bearing.

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<sup>5</sup> In this case, the funds were not deposited with the superior court.

A-Ju's moving papers below requested interest at the rate of 10 percent. Lee's opposition papers did not argue that an award of interest at that rate would violate substantive due process. Thus, Lee's belated constitutional argument is not properly before this court. (*Hepner, supra*, 52 Cal.App.4th at p. 1486.)<sup>6</sup>

5. *No merit to Lee's contention that the trial court abused its discretion in awarding interest to A-Ju on monies not belonging to it.*

Lee contends the trial court abused its discretion in awarding interest to A-Ju on \$347,128.20 in funds that belonged to A-Ju's customers, rather than to A-Ju.

Leaving aside the fact that this argument by Lee is not supported by any citation to authority, we perceive no abuse of discretion in an award of interest under these circumstances. Said funds were held by A-Ju in a statutorily required customer trust account (Bus. & Prof. Code, § 17550.15)<sup>7</sup>

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<sup>6</sup> Further, as noted in *Cussler, supra*, 212 Cal.App.4th at page 370, which involved the issue of restitutionary interest, the statutory postjudgment interest rate is 10 percent. (Code Civ. Proc., § 685.010.) In *Cussler*, because the trial court awarded restitutionary interest at the prejudgment interest rate of 7 percent, rather than at the postjudgment interest rate of 10 percent, it was unnecessary for the reviewing court to determine whether the interest award constituted prejudgment or postjudgment interest. (*Cussler, supra*, 212 Cal.App.4th at pp. 369-370.) *Cussler* explained, "We need not decide whether the interest awarded here was prejudgment or postjudgment because the trial court awarded the lower rate, which is to [appellant's] benefit." (*Id.* at p. 370.) In the instant case, in view of the absence of a specific statutory provision governing restitutionary interest following an appellate reversal, Lee has not shown the trial court's decision to award interest at the postjudgment rate was "arbitrary, capricious or patently absurd." (*Id.* at p. 369.)

<sup>7</sup> Business and Professions Code section 17550.15 states in relevant part at subdivision (b): "The seller of travel shall deposit directly into a trust account in a federally insured bank, savings and loan association, or credit union 100 percent of all sums received from any person or entity, including, but not limited to, those payments made in cash, by credit card, or any other method of payment, for air or sea transportation for any person, or for any travel services offered by the seller of travel, and any refunds made by

and were to be used to purchase airline tickets, hotel rooms, or other travel services for A-Ju's customers. By levying on this account, Lee precluded A-Ju from accessing the funds which A-Ju was entitled to withdraw after having provided the required travel services to its clientele.

Accordingly, no abuse of discretion is shown in an award of interest on the funds levied on A-Ju's customer trust account.

6. *No merit to Lee's contention that the trial court abused its discretion because A-Ju failed to establish the source of funds it used to replace the levied funds.*

Lee contends the trial court abused its discretion in awarding interest to A-Ju because A-Ju failed to present substantial evidence of the source of funds or details of funds that A-Ju used to replace the levied funds.

Lee does not supply any authority for its theory that following an appellate reversal, a defendant seeking restitutionary interest is required to demonstrate the source of funds that it used to replace the funds levied on by the plaintiff. Therefore, this argument requires no discussion.

7. *No merit to Lee's contention with respect to its motion for reconsideration.*

Lee asserts that "after being surprised with the burden of proof, [Lee] filed a motion for reconsideration providing evidence that A-Ju's funds were non interest bearing." This contention is in narrative form; it is not accompanied by a legal argument, supported by citation to authorities, as to why reconsideration should have been granted. Therefore, no discussion is warranted. (*In re Marriage of Schroeder* (1987) 192 Cal.App.3d 1154, 1164 [it is not appellate court's role to develop an appellant's legal arguments].)<sup>8</sup>

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carriers or providers of travel services." Subdivision (c) of the statute specifies the conditions under which a seller of travel may withdraw funds from the trust account. Further, subdivision (d) states: "Subdivision (c) shall not prevent payment of the interest earned on the trust account to the seller of travel."

<sup>8</sup> We note, however, that after Lee filed notice of appeal, the trial court took the motion for reconsideration off calendar on the ground the matter was already pending on appeal.

8. *No merit to Lee's contention that A-Ju's failure to post a bond justifies denial of interest.*

Lee contends that A-Ju's failure to post a bond to stay enforcement of the judgment makes an award of restitutionary interest inequitable, because any harm that A-Ju suffered was "wholly and entirely a consequence of its own failure to post a proper undertaking." In support, Lee cites *Gunderson, supra*, 196 Cal.App.4th 1060, which Lee contends "is on all fours."

Our reading of *Gunderson* leads us to conclude that it is clearly distinguishable. At the outset, *Gunderson* noted that the "'vast majority'" of cases have awarded interest following a reversal, because a plaintiff who collects the judgment pending appeal assumes the risk that it may have to repay the award, along with interest, if the defendant were to prevail on appeal. (*Gunderson, supra*, 196 Cal.App.4th at pp. 1066-1067, citing *PSM Holding Corp. v. National Farm Financial Corp.* (2010) 743 F.Supp.2d 1136, 1155.) Nonetheless, *Gunderson* upheld the lower court's denial of interest to the defendant because, "[r]ather than simply paying the judgment after [plaintiff] sought to execute on his award, [defendants] chose to engage in extensive and prolonged evasive misconduct. These actions forced [plaintiff] to unnecessarily expend over \$100,000 to secure his judgment. By permitting [plaintiff] to retain whatever interest had accrued on the reversed portion of his award, the trial court was, in effect, attempting to return him to the position he held prior to the execution of the judgment. (See *Stockton Theatres, supra*, 121 Cal.App.2d at p. 632 [in assessing request for restitution, goal of trial court is 'so far as possible, to place the parties in as favorable a position as they could have been in had the judgments not been enforced pending appeal'].)" (*Gunderson, supra*, 196 Cal.App.4th at p. 1067, fns. omitted.)

Lee's reliance on *Gunderson* is misplaced because Lee has not shown that defendant A-Ju engaged in extensive misconduct which would warrant a denial of restitutionary interest. The mere fact that A-Ju did not post a bond to stay enforcement of the judgment does not bring this fact situation within *Gunderson*.

**DISPOSITION**

The postjudgment order awarding \$69,544.22 in restitutionary interest to A-Ju is affirmed. A-Ju shall recover its costs on appeal.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

EDMON, P. J.

We concur:

ALDRICH, J.

STRATTON, J.\*

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.