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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

FREDERICK ADAM DOMINSKI, Jr. et al., Plaintiffs and Appellants, v. STEVE LAZAR et al., Defendants and Appellants.	B268187 (Los Angeles County Super. Ct. No. YC069353)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ramona G. See, Judge. Affirmed and remanded.

Law Office of William F. Clark and William F. Clark, for Plaintiffs and Appellants.

Forry Law Group and Craig B. Forry, for Defendants and Appellants.

Plaintiffs and appellants Frederick Adam Dominski, Jr. and Chris Carole Dominski (the Dominskis) contracted with defendant and respondent Lazar Construction/Design, Inc. (Lazar Construction) to build a custom home on Thirtieth Street in Hermosa Beach (Thirtieth Street or the home). The Dominskis received an "unexpected" invoice several months after the home was completed, which allegedly caused them to question Lazar Construction's billing practices throughout the construction process. Although the Dominskis were pleased with the workmanship of their home, which they admit was free of defects, they claim they were billed for labor at a higher rate than stated in their written contract, and they were billed for labor not performed in the construction of Thirtieth Street.

The Dominskis brought suit over the billing, requesting damages, prejudgment interest, and attorney fees and costs. The Dominskis also sued Steve Lazar (Lazar)—Lazar Construction's President and Chief Executive Officer (CEO)—on an alter ego theory of liability. Near the end of trial, the Dominskis claimed that Design + Build by South Swell, Inc. (South Swell), a corporation formed two months prior to trial—of which Lazar was also President and CEO—was merely a shell created to avoid payment of any judgment against Lazar Construction. The Dominskis did not, however, amend the complaint to add South Swell as a named defendant.

Defendants cross-complained for payment of adjustment increases for changes in the work (change orders) that were provided for under the contract, and declaratory relief. At trial, they argued the Dominskis waived the contract's provisions with respect to the hourly rate, and orally agreed to pay a flat labor rate of $95/hour in exchange for waiver of the 20 percent adjustment increase on all change orders provided for in the contract. They also asserted the Dominskis owed them $4,536.38 for materials, which was billed in the final invoice and remained unpaid.

The trial court ruled in the Dominskis' favor in part as to Lazar Construction, awarding them $39,425 in damages for labor hours billed but unsupported by employee time sheets. It ruled in Lazar's favor as to all causes of action against him. Although it dismissed all Doe defendants from the action and did not address whether South Swell could be added as a defendant, it ruled in favor of South Swell in the statement of decision.[1] The trial court declined to award the Dominskis prejudgment interest on damages, and ordered that the parties bear their own attorney fees and costs. Because defendants stipulated they would not seek damages on the change orders in the event that the trial court ruled in their favor as to the hourly rate at which labor was properly charged—which it did—the court ruled the cross-complaint moot. The trial court did not rule on defendants' claim that the Dominskis owed $4,536.38 for materials.

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[1] The trial court did not include South Swell in the judgment.

The Dominskis appeal the trial court's rulings. Defendants cross-appeal for the $4,536.38 owed for materials, but otherwise accept the trial court's decision.

We affirm the trial court's judgment with respect to the causes of action brought against Lazar Construction and Lazar. We do not reach the question of South Swell's liability as it is not properly before us. We remand the matter to the trial court to decide in the first instance whether the Dominskis are liable for the $4,536.38 charged for materials as alleged in defendants' cross-appeal.

FACTS

Lazar Construction

Lazar Construction builds high-end custom homes. Lazar and his wife, Debbie, are co-officers and shareholders of Lazar Construction. Debbie Lazar handles bookkeeping, billing, and accounts receivable. To ensure high-quality work, Lazar Construction primarily utilizes its own employees and independent contractors rather than subcontractors. All of Lazar Construction's employees and the independent contractors it engages provide "skilled services." Four of Lazar Construction's employees who worked on Thirtieth Street—Carlos Jimenez, Vu Le, Esteban Vizcarra, and John Nabours—are "specialty skilled," and have the ability to make a home look perfect.

The Contract

The Dominskis entered into the contract with Lazar Construction to build Thirtieth Street on June 8, 2011. Per the contract, the Dominskis agreed to pay "[t]he actual time and material costs of the work installed or supplied, including labor, materials, equipment, debris[]removal, rental costs (including equipment rental costs and rental costs for any temporary facilities), and insurance[]costs amounting to 2% of actual Project costs. Contractor will submit to Owner all invoices from its material suppliers, subcontractors and other independent contractors for payment. These invoices may include invoices for deposits, progress payments and final payments. All such payments by Owner shall be made directly to the sub-contractors with [*sic*] 10 days of the submission of the invoice to Owner." They also agreed to pay "[c]osts for any and all changes ordered by the Owner as [] detailed [in the contract]."

Attachment "A" contains an itemized estimated budget, and states, with respect to labor performed by independent contractors and Lazar Construction's employees, "The costs included are based upon discussions between Contractor and Owner of various employees or independent contractors and the quality and price of their work on other projects . . . . Any fluctuation in the pricing between the estimated budget and actual costs for the employees or independent contractors is the complete responsibility of Owner, and Owner agrees to pay to Contractor the actual costs of the

employees or independent contractors regardless of the variance, if any, from the estimated budget attached hereto."

The contract describes how change orders are to be handled: "[A]ny changes to the scope of work covered in Attachment 'A' attached hereto and incorporated by reference shall be subject to an adjustment increase of 20% of the amount of the changed costs to be paid by Owner to Contractor." Such changes are to be incorporated into the contract, with the costs to be "added or subtracted from the contract." The contract describes the manner in which adjustments are permitted to be made and the procedure to be followed when calculating and submitting adjustment cost estimates. The contract requires changes to be requested in writing, but in the event that changes are orally requested and performed, the Dominskis are bound to pay for the changes.

Attachment "B" provides:

"Owner is informed and acknowledges that contractor may use persons on the Project that are considered employees or independent contractors, and who are not subcontractors.

"Owner agrees to pay Contractor for the services of the other persons who perform work on the Project at the following rates as set forth in the invoices submitted by Contractor to Owner:

"a. Skilled services at the rate of $75 per hour;

"b. Specialty services at the rate of $90 per hour; and

"c. Research and design-build services at the rate of $175 per hour." The contract does not further define the various services.

Should a legal dispute arise under the contract or performance of it, the prevailing party is entitled to the costs of litigation or arbitration, including attorney fees and costs.

Three clauses in the contract state that the contract constitutes the entire agreement between the parties. In particular, the contract requires: "No modification, amendment, or supplement of or to this Contract (or any documents expressly incorporated by reference herein) shall be binding unless executed in writing by all the parties. All rights and remedies which the Contractor may have hereunder or by operation of law are cumulative and the pursuit of one right or remedy shall not be deemed an election to waive or renounce any other right or remedy. No waiver of any of the provisions of this Contract shall be deemed, or shall constitute, a waiver of any other provision, whether or not similar, nor shall any waiver constitute continuing waiver. No waiver shall be binding unless executed in writing by the party making the waiver."

The Parties' Interactions During Construction

Construction on Thirtieth Street commenced in August 2011 and was completed in March 2013. During the construction process, the Dominskis lived a block and a half away from Thirtieth Street in a custom home built for them

previously. Frederick Dominski went to the site frequently to check its progress. He was very involved in the details of the project, and e-mailed with Lazar on a regular basis to check on progress, coordinate payments, and verify and modify elements of the design and materials to be used.

The Dominskis arranged financing for the project with US Bank Home Mortgage (US Bank). Payments were made from an escrow account with Dixieline Builders Fund Control, Inc. (Dixieline) in monthly "draws." Dixieline required a US Bank Authorization Form signed by the Dominskis and Lazar Construction, along with invoices, including material receipts and invoices for labor. Each expenditure was categorized under a specific line item for which a budget had been set. The authorization form certified that the Dominskis were satisfied with the progress on Thirtieth Street, and that no notice to file a lien had been filed. Dixieline inspected Thirtieth Street prior to each disbursement to ensure that the work had progressed as stated.

Frederick Dominski worked with Debbie Lazar to adjust the line items on the invoices. He paid for certain expenses out of pocket on several occasions. On one occasion, he questioned the number of labor hours billed. Lazar provided an explanation that satisfied him. Dominski then asked for half of the labor charge for window installation to be moved to an invoice that he would pay personally. On another occasion, Frederick Dominski did not question the number of labor hours, but asked that some

of the charges for labor be moved to an invoice that he would pay.

Lazar testified that he and Frederick Dominski had a "supplemental agreement" that the Dominskis would pay a flat labor rate of $95/hour and, in exchange, would not be billed the 20 percent adjustment increase for change orders. They did not e-mail one another regarding the agreement or otherwise reduce it to writing, as "Fred didn't feel it was necessary." Lazar also did not feel a written modification of the contract was needed. They reached this oral agreement very early in the construction process, just after the previous house on the property had been "demoed." There were numerous change orders during construction. Lazar Construction did not bill the Dominskis the 20 percent adjustment increase for any of them. At trial, Lazar Construction presented evidence that it abstained from charging the Dominskis $84,820 in change order increase adjustments.

Over the course of the construction project, more than 15 invoices were generated, many of which were later the subject of dispute. The majority of these invoices included a labor rate of $95/hour. The first invoice in dispute, dated September 16, 2011, was generated shortly after construction commenced. It was among the invoices that contained the $95/hour rate. When Frederick Dominski began receiving invoices, he noticed that he was being charged a rate of $95/hour. With respect to the September 16, 2011 invoice, he saw the rate, but did not pay particular

attention to the labor charges, as it was a large bill and he was more concerned with other line items. Later, he did not complain about the cost of labor because he assumed that it was the "direct cost" to Lazar Construction.[2] The Dominskis paid all of the invoices and did not question Lazar Construction about the $95/hour labor rate until a few months after Thirtieth Street was completed, when they received the "unexpected invoice" for $15,271, on June 17, 2013.

Proceedings in the Trial Court

On October 10, 2013, the Dominskis sued Lazar Construction for breach of contract, breach of the covenant of good faith and fair dealing, negligent misrepresentation, and accounting. The complaint alleged Lazar Construction had mischarged the Dominskis for labor throughout the construction process, both by charging them for labor at a rate higher than its actual labor costs, and by charging them for labor that was not performed. The Dominskis also sued Lazar on an alter ego theory of liability. Defendants answered, asserting the defenses of waiver, equitable estoppel, and laches, among others. Defendants cross-complained for breach of contract and declaratory relief, claiming damages for the uncharged change order adjustment increases.

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[2] In deposition, Frederick Dominski testified that he did not assume the workers were being paid $95/hour.

The trial court found the Dominskis waived the provision requiring that changes to the construction contract be made in writing and executed by both parties, and were estopped from arguing that the billed labor rate was a breach of the contract. The court awarded the Dominskis $39,425 in damages for billed labor hours that were not supported by employee time sheet records. It did not award the Dominskis prejudgment interest. The trial court found in favor of Lazar Construction with respect to the negligent misrepresentation cause of action, and in favor of Lazar as to all causes of action. Because of the "mixed results," the court ordered the parties to pay their own attorney fees and costs on appeal. The court's statement of decision was filed on August 17, 2015. As relevant here, defendants objected to the statement on the ground that the trial court had not addressed their claim for costs of materials in the amount of $4,536.38. In a supplemental statement of decision, the trial court addressed objections not at issue here, but did not address the claim for materials costs.

The Dominskis timely appealed, and defendants timely cross-appealed. On appeal, the Dominskis contend that the trial court erred in finding that they agreed to a flat labor rate of $95/hour in exchange for a waiver of the 20 percent adjustment increase on change orders, and that they are equitably estopped and estopped under the doctrine of laches from arguing otherwise. They argue that they never orally agreed to modify the written contract in this manner, and that the terms of the written contract should be enforced.

They also argue that there is insufficient evidence to support many of the labor hours that the trial court found were properly billed. The Dominskis challenge the trial court's rulings that Lazar and South Swell were not liable for damages under an alter ego theory of liability, and its denials of their requests for prejudgment interest and attorney fees and costs. Defendants cross-appeal for the $4,536.38 owed for materials but otherwise accept the trial court's ruling.

DISCUSSION

Breach of Contract, Covenant of Good Faith and Fair Dealing, and Accounting (First, Second, and Fourth Causes of Action)

"'[T]he elements of a cause of action for breach of contract are (1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff.' (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.) "'The . . . covenant of good faith and fair dealing [is] implied by law in every contract.'" (*Durell v. Sharp Healthcare* (2010) 183 Cal.App.4th 1350, 1369.) The covenant is read into contracts and functions "'as a *supplement* to the express contractual covenants, to prevent a contracting party from engaging in conduct which (while not technically transgressing the express covenants)

frustrates the other party's rights to the benefits of the contract.'" (*Racine & Laramie, Ltd. v. Department of Parks & Recreation* (1992) 11 Cal.App.4th 1026, 1031–1032.)" (*Thrifty Payless, Inc. v. The Americana at Brand, LLC* (2013) 218 Cal.App.4th 1230, 1244.) "If the allegations [of the claim for breach of the covenant of good faith and fair dealing] do not go beyond the statement of a mere contract breach and, relying on the same alleged acts, simply seek the same damages or other relief already claimed in a companion contract cause of action, they may be disregarded as superfluous . . . ." (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1395.)

Because the Dominskis' first two causes of action concern the same breach and damages, we consider them together. Our discussion of the first two causes of action also resolves the Dominskis' fourth cause of action for accounting. The gravamen of the Dominskis' claims is that the contract specifies they are obligated to pay the actual cost of labor, and that Lazar Construction breached the contract by (1) billing them at the higher rate of $95/hour; and (2) charging them for labor that was never performed.

The Contract Terms

The Dominskis first contend that the trial court incorrectly interpreted the contract's terms with respect to the agreed-upon hourly rate for labor. They assert that

under the contract they are only required to pay for the actual cost of labor to Lazar Construction.

"'Contract interpretation presents a question of law which this court determines independently.' (*Ben-Zvi v. Edmar Co.* (1995) 40 Cal.App.4th 468, 472.) ""The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties.' [Citation.] 'Such intent is to be inferred, if possible, solely from the written provisions of the contract.' [Citation.] 'If contractual language is clear and explicit, it governs.' [Citation.]'" (*Powerine Oil Co., Inc. v. Superior Court* (2005) 37 Cal.4th 377, 390.)" (*P&D Consultants, Inc. v. City of Carlsbad* (2010) 190 Cal.App.4th 1332, 1340.)

Here, the contract terms are clear. Attachment "B" plainly states that the Dominskis agree to pay Lazar Construction's employees and independent contractors at hourly rates of $75, $90, or $175, depending on the skill required for the services rendered. Nothing in the contract indicates that the Dominskis are only obligated to pay for the actual cost of the labor to Lazar Construction. The trial court did not err in finding that, absent waiver, estoppel, and laches, Attachment "B" controls.

Waiver

The Dominskis next contend insufficient evidence supports the trial court's finding that they waived the right to pay for labor at the tiered rates specified in the contract in

exchange for release from the provision requiring them to pay a 20 percent adjustment increase on change orders. They cite in particular the fact that the anti-waiver provision in the contract requires all modifications to the agreement to be made in writing and executed by both parties. We conclude the trial court's findings are supported by substantial evidence.

"A definition of 'waiver is set forth in *Roesch v. De Mota* (1944) 24 Cal.2d 563, 572: 'Waiver is the intentional relinquishment of a known right after knowledge of the facts.' *Crest Catering Co. v. Superior Court* (1965) 62 Cal.2d 274 holds at page 278: 'A waiver may occur (1) by an intentional relinquishment or (2) as "the result of an act which, according to its natural import, is so inconsistent with an intent to enforce the right as to induce a reasonable belief that such right has been relinquished."'" (*Freshman, Mulvaney, Marantz, Comsky, Kahan & Deutsch v. Superior Court* (1985) 173 Cal.App.3d 223, 233–234.) The existence of an anti-waiver provision does not always militate against a finding of waiver. (See *Gould v. Corinthian Colleges, Inc.* (2011) 192 Cal.App.4th 1176, 1180 [anti-waiver provision in lease waived].) "Generally, the existence of . . . waiver is a question of fact for the trial court, whose determination is conclusive on appeal unless the opposite conclusion is the only one that we can reasonably draw from the evidence." (*In re Marriage of Turkanis & Price* (2013) 213 Cal.App.4th 332, 353.)

The Dominskis' statement of facts in their opening brief—which presents the evidence favorable to them as "substantial evidence" in support of their position—misapprehends both the purpose of a statement of facts and the applicable standard of review. "The fact that it is possible to draw some inference other than that drawn by the trier of fact is of no consequence. (*Forte v. Nolfi* (1972) 25 Cal.App.3d 656, 667.) Where findings of fact are challenged on a civil appeal, we are bound by the 'elementary, but often overlooked 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. (*Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429.)" (*Jessup Farms v. Baldwin* (1983) 33 Cal.3d 639, 660.)

The trial court's finding that waiver occurred is supported by substantial evidence. Contrary to the Dominskis' protestations that the contract was "pay as we go" with no change orders contemplated, the contract is replete with provisions relating to change orders, including the Dominskis' agreement to pay a 20 percent adjustment increase on each change order made. Lazar testified that there were many change orders made during the construction process, and defendants submitted evidence of $84,820 in change order adjustment increases that were never charged. E-mails between Frederick Dominski and Lazar show that the Dominskis frequently changed or added

elements of design throughout the project. The monthly invoices that the Dominskis reviewed prior to their submission to Dixieline show no charges for change order adjustment increases. It can be reasonably inferred that the Dominskis, who reviewed each invoice and certified that construction was progressing as indicated, knew that there were no adjustment increases associated with the changes.

The $95/hour labor rate was explicit on 10 of the 13 invoices contested. On another two invoices, the total amount charged for labor was evenly divisible by the $95/hour rate.[3] The $95/hour rate appeared on the very first invoice containing labor charges, dated September 16, 2011. The invoice was tendered after approximately three weeks of work had been performed on Thirtieth Street, which is consistent with Lazar's testimony that he and Frederick Dominski orally agreed to the flat rate very early in the construction process. The Dominskis were billed at the $95/hour rate regularly, and on at least two occasions paid part of the labor costs out-of-pocket, but did not contest the rate until several months after the house was completed. Frederick Dominski testified that he saw the rate as early as the first invoice but was not concerned about it. The

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[3] Only one invoice, dated November 4, 2011, did not contain the rate and was not evenly divisible by $95/hour. It contained labor charges totaling $3,000, the equivalent of 31.58 hours at the $95/hour rate. Defendants presented worker time sheets totaling 31.5 hours of work performed for this time period.

existence of the contract's anti-waiver clause does not preclude a finding of waiver of the clause in light of the Dominskis' actions. There is substantial evidence that the Dominskis were behaving in a manner inconsistent with the intent to enforce the labor rates contained in the contract, and that Lazar Construction reasonably believed the Dominskis had waived their right to pay the labor rate specified in the contract in exchange for being released from the obligation to pay the 20 percent increase adjustment on change orders.

Implied in Fact Contract

"An implied contract is one, the existence and terms of which are manifested by conduct." (Civ. Code, § 1621.) Based on all of the evidence discussed above, it can reasonably be inferred from the Dominskis' conduct that they agreed to a labor rate of $95/hour in exchange for release from the obligation to pay the 20 percent change order adjustment increase. Substantial evidence supports the trial court's ruling.

Estoppel and Laches

"'"[T]he doctrine of equitable estoppel is a rule of fundamental fairness whereby a party is precluded from benefiting from his inconsistent conduct which has induced reliance to the detriment of another [citations]. Under well

settled California law four elements must be present in order to apply the doctrine of equitable estoppel: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury.'" [Citation.]" (*In re Donovan L.* (2016) 244 Cal.App.4th 1075, 1085.)

Laches is "an unreasonable delay in asserting an equitable right, causing prejudice to an adverse party such as to render the granting of relief to the other party inequitable." (*In re Marriage of Plescia* (1997) 59 Cal.App.4th 252, 256.)

The trial court's determinations that the Dominskis were equitably estopped and estopped under the doctrine of laches from contesting the $95/hour charges are supported by substantial evidence. As we have discussed, substantial evidence was presented at trial that the Dominskis knew they had agreed to modify the labor rate specified in the written contract; that they intended for Lazar Construction to forego charging change order adjustment increases in response; that Lazar Construction was unaware that there was any dispute over the amount charged for labor; and that Lazar Construction was damaged because it did not receive payment for the change order adjustment increases.

There is also substantial evidence to support the conclusion that the Dominskis unreasonably delayed filing

suit or otherwise alerting Lazar Construction of their concerns. The Dominskis had an opportunity to contest the labor rate with every invoice they certified to US Bank and Dixieline for payment, but never did so. They waited until after construction was completed on their defect-free home and Lazar Construction had foregone payment of all change order adjustment increases to challenge the rate, to Lazar Construction's detriment.

Cedars-Sinai Medical Center v. Shewry (2006) 137 Cal.App.4th 964 (*Cedars*), upon which the Dominskis rely is inapposite. In *Cedars*, a hospital filed a petition for writ of mandate against the Department of Health Services, challenging the state's recoupment of over $35 million in overpayments. The Court of Appeal concluded, in relevant part, that the hospital could not assert the defenses of estoppel and laches because the Department of Health Services mistakenly paid for the services and conducted the audits that revealed the overbilling within two years or less after the end of the fiscal period that it was auditing, which was less than the three-year period for auditing permitted by statute. Here, substantial evidence demonstrates that the Dominskis knew what rate they were paying for labor at the time they paid each and every invoice, yet did not challenge the rate until after their home was complete and built to their satisfaction.

Labor Hours Worked

The Dominskis contend the trial court erred in its calculation of the hours of labor actually performed. They argue, without citation to legal authority or to specific evidence in the record, that they provided "clear evidence of labor charged which was not performed . . . in the amount of $61,655." Having reviewed the invoices and time sheets individually, we confirm there are individual worker time sheets produced within the discovery period accounting for each of the hours of labor the trial court determined had been performed. The Dominskis' argument, improperly made in their statement of facts, that the trial court relied on Lazar Construction's calculations rather than the actual documentation timely provided, is without basis. Their argument that some of the time sheets provided were fraudulent, also made in their statement of facts, is unavailing. It is the role of the trial court to determine the credibility of witnesses and weigh the evidence. We determine only whether there is substantial evidence to support the judgment. There is.

Alter Ego

"Ordinarily, a corporation is regarded as a legal entity, separate and distinct from its stockholders, officers and directors, with separate and distinct liabilities and obligations. [Citations.] A corporate identity may be

disregarded—the 'corporate veil' pierced—where an abuse of the corporate privilege justifies holding the equitable ownership of a corporation liable for the actions of the corporation. [Citation.] Under the alter ego doctrine, then, when the corporate form is used to perpetrate a fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose, the courts will ignore the corporate entity and deem the corporation's acts to be those of the persons or organizations actually controlling the corporation, in most instances the equitable owners. [Citations.] . . . [¶] In California, two conditions must be met before the alter ego doctrine will be invoked. First, there must be such a unity of interest and ownership between the corporation and its equitable owner that the separate personalities of the corporation and the shareholder do not in reality exist. Second, there must be an inequitable result if the acts in question are treated as those of the corporation alone. [Citations.] 'Among the factors to be considered in applying the doctrine are commingling of funds and other assets of the two entities, the holding out by one entity that it is liable for the debts of the other, identical equitable ownership in the two entities, use of the same offices and employees, and use of one as a mere shell or conduit for the affairs of the other.' [Citations.] Other factors which have been described in the case law include inadequate capitalization, disregard of corporate formalities, lack of segregation of corporate records, and identical directors and officers. [Citations.] No one characteristic governs, but the courts must look at all

the circumstances to determine whether the doctrine should be applied. [Citation.] Alter ego is an extreme remedy, sparingly used. [Citation.]" (*Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 538–539 (*Sonora Diamond*).)

"The alter ego doctrine does not guard every unsatisfied creditor of a corporation but instead affords protection where some conduct amounting to bad faith makes it inequitable for the corporate owner to hide behind the corporate form. Difficulty in enforcing a judgment or collecting a debt does not satisfy this standard. [Citations.]" (*Sonora Diamond*, *supra*, 83 Cal.App.4th at p. 539.)

The Dominskis challenge the trial court's determination that neither Lazar nor South Swell is liable under the alter ego doctrine. They again rely on the evidence they produced at trial in support of their claims, ignoring the substantial evidence presented to the contrary.

Lazar

Substantial evidence supports the trial court's finding of no alter ego as to Lazar. Defendants produced Lazar Construction's Articles of Incorporation, resolutions adopted by the board of directors, a stock certificate, corporate minutes, and Statements of Information with the California Secretary of State. With respect to comingling of corporate and individual funds, the only possible personal expense for which no explanation was given is payment for lice

treatments. As the trial court explained, it was not inappropriate for Lazar Construction to make charitable donations or to make draws for gas and maintenance of corporate vehicles. No evidence was presented that Lazar Construction was undercapitalized or that assets were transferred to Lazar.

Nor is there evidence of bad faith on Lazar Construction's part. Although Lazar Construction's recordkeeping was disorganized and incomplete, in ruling against the Dominskis on their fraudulent misrepresentation cause of action, the trial court found that it did not materially misrepresent any fact. It noted that, "At best, . . . Defendants failed to document all of the hours because they failed to present all of the timesheets within the discovery cut-off period or lost some of the timesheets." The Dominskis do not challenge that ruling and have not otherwise demonstrated that Lazar Construction acted in bad faith or perpetrated any fraud. Their desire to collect on the judgment is not a basis for piercing the corporate veil.

South Swell

Although the trial court analyzed the alter ego cause of action with respect to South Swell, the claim is not properly before us. "A person or entity may become a party defendant only in two ways: by being named as a defendant, or by being properly named and served as a fictitiously named defendant pursuant to section 474." (*Kerr-McGee Chemical*

Corp. v. Superior Court (1984) 160 Cal.App.3d 594, 597.) South Swell was never a named defendant to the action below. The trial court dismissed all Doe defendants from the action in its statement of decision and did not include South Swell in the judgment. The Dominskis did not challenge the Doe defendants' dismissal generally, or South Swell's dismissal in particular. They did not amend the complaint to include South Swell. South Swell is not included in the Dominskis' notice of appeal to this court. Even if their claim against South Swell was properly before us, however, it would fail for the same reasons that its alter ego claim against Lazar fails.

Prejudgment Interest

The Dominskis contend they are entitled to recover prejudgment interest under Civil Code section 3287 for the hours of labor Lazar Construction billed but never performed. They additionally request that this court award them prejudgment interest on "damages sustained but not awarded by the [t]rial court."

"'"The test for recovery of prejudgment interest under [Civil Code] section 3287, subdivision (a) is whether *defendant* actually know[s] the amount owed or from reasonably available information could the defendant have computed that amount. [Citation.]" [Citations.] "The statute . . . does not authorize prejudgment interest where the amount of damage, as opposed to the determination of

liability, 'depends upon a judicial determination based upon conflicting evidence and it is not ascertainable from truthful data supplied by the claimant to his debtor.' [Citations.]" [Citation.] Thus, where the amount of damages cannot be resolved except by verdict or judgment, prejudgment interest is not appropriate. [Citation.]' [Citation.]" (*Children's Hospital & Medical Center v. Bonta* (2002) 97 Cal.App.4th 740, 774.) "'On appeal, we independently determine whether damages were ascertainable for purposes of the statute, absent a factual dispute as to what information was known or available to the defendant at the time.' (*Collins v. City of Los Angeles* (2012) 205 Cal.App.4th 140, 151.)" (*Watson Bowman Acme Corp. v. RGW Construction, Inc.* (2016) 2 Cal.App.5th 279, 296.)

Here, prejudgment interest was not appropriate because the amount of damages required judicial determination. Although defendants had the information necessary to calculate the number of hours worked, the parties disagreed as to the rate at which those hours were to be billed. A judicial determination of the terms of their agreement was required to enable defendants to properly determine the amount owed. "Further, as the court said in *Polster, Inc. v. Swing* (1985) 164 Cal.App.3d 427, 435: '[T]he cases indicate that where there is a large discrepancy between the amount of damages demanded in the complaint and the size of the eventual award, that fact militates against a finding of the certainty mandated by [Civil Code section 3287].' . . . The greater the disparity between the

complaint and the damages, . . . the less likely prejudgment interest is appropriate." (*Wisper Corp. v. California Commerce Bank* (1996) 49 Cal.App.4th 948, 961.) The Dominskis demanded $62,000 or an amount to be proven at the time of trial in their complaint. At trial, they sought damages in the amount of $260,000 or greater. They recovered only $39,425. The large disparity in the damages sought versus the damages awarded also indicates that an award of prejudgment interest is inappropriate.

Attorney Fees and Costs

The Dominskis contend the trial court abused its discretion by failing to award them attorney fees and costs. They argue the contract provides for an award of costs and fees to the prevailing party, and that as the party who received a net monetary gain they prevailed in this action under the definition of prevailing party set forth in Code of Civil Procedure section 1032 (section 1032). We disagree.

"[A] trial court's determination that a litigant is a prevailing party, along with its award of fees and costs, is reviewed for abuse of discretion." (*Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1332 (*Goodman*).) The definition of "prevailing party" for purposes of attorney fees differs from the definition of "prevailing party" in the context of costs. (*David S. Karton, A Law Corp. v. Dougherty* (2014) 231 Cal.App.4th 600, 607 (*Karton*).) We therefore set forth the legal bases for attorney fees and costs separately.

Attorney Fees

Where, as here, a contract provides for attorneys fees and costs to a party, Civil Code, section 1717, subdivision (a) (section 1717), governs attorney fees awards:

"In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs."

The court determines which party has prevailed: "The court, upon notice and motion by a party, shall determine who is the party prevailing on the contract for purposes of this section . . . . [T]he party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract. The court may also determine that there is no party prevailing on the contract for purposes of this section." (§ 1717, subd. (b)(1).)

Costs

"[Code of Civil Procedure] [s]ection 1032 provides that the prevailing party is entitled as a matter of right to recover costs in any action or proceeding. (§ 1032, subd. (b).) 'Prevailing party' is defined as including 'the party with a

net monetary recovery, a defendant in whose favor a dismissal is entered, a defendant where neither plaintiff nor defendant obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against that defendant.' (§ 1032, subd. (a)(4).)" (*Dell'Oca v. Bank of New York Trust Co., N.A.* (2008) 159 Cal.App.4th 531, 559.) "[A] party that receives a net monetary recovery is entitled to its costs even if the party did not prevail on all causes of action asserted." (*Ibid.*)

"Thus, 'section 1032 . . . declares that costs are available as "a matter of right" when the prevailing party is within one of the four categories designated by statute. . . . In other situations or when a party recovers other than *monetary* relief, the prevailing party is determined by the court, and the award of costs is within the court's discretion.' (*Michell v. Olick* (1996) 49 Cal.App.4th 1194, 1197–1198, citation omitted; see *Goodman*[, *supra*,] 47 Cal.4th [at pp.] 1333, 1338, fn. 4[]; *Cussler v. Crusader Entertainment, LLC* (2012) 212 Cal.App.4th 356, 371–372.)" (*Karton*, *supra*, 231 Cal.App.4th 600, 611.)

Discussion

In this case, the court determined there was no prevailing party, stating that the results were "mixed." The Dominskis were awarded a net monetary gain against Lazar Construction, but they did not prevail on any of their causes of action against Lazar. Thus, the trial court did not abuse

its discretion in finding they neither "recovered greater relief" under section 1717, nor fell neatly into the one of categories of "prevailing party" as designated in section 1032.

With respect to the allocation of attorney fees and costs, we note that defendants shared counsel throughout this action. The four causes of action against Lazar Construction were identical to those against Lazar, who additionally had to defend against the Dominskis' alter ego claim. The Dominskis do not argue that apportionment is appropriate, or offer any evidence that Lazar Construction's attorney fees and costs can be disentangled from the attorney fees and costs attributable to Lazar. Given the extent to which the defendants' attorney fees and costs necessarily overlap and the lack of evidence that apportionment is either appropriate or possible, we cannot say that the trial court abused its discretion in ordering that the parties bear their own attorney fees and costs. (See *Goodman*, *supra*, 47 Cal.4th at p. 1332.)

Cross-Appeal for Material Costs

We agree with Defendants that the trial court did not address the argument that they were due reimbursement for materials in the amount of $4,536.38 in their cross-complaint. We remand the matter to the trial court to make findings on this issue.

DISPOSITION

The cause is remanded to the trial court for determination of the sole issue of whether defendants are due reimbursement for materials in the amount of $4,536.38 under their cross-complaint. In all other respects the judgment is affirmed. The Dominskis are to bear costs on appeal.

KRIEGLER, Acting P.J.

We concur:

BAKER, J.

KIN, 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.