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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JOHN CRONE et al.,

Plaintiffs, Cross-defendants and  
Appellants,

v.

THOMAS L. BLACK et al.,

Defendants, Cross-complainants and  
Respondents.

STEPHEN M. STEWART,

Defendant, Cross-complainant and  
Appellant.

D057007

(Super. Ct. No. GIC868386)

APPEAL from a judgment of the Superior Court of San Diego County, Frederic L. Link, Judge. Affirmed.

John Crone and his company Baldock Holdings, Inc. (collectively Baldock) brought tort and contract claims against Baldock's secured lender and loan servicer, La Jolla Loans (LJL), and 14 holders of minority fractional interests in the secured loan (the

Investors). Baldock claimed the Investors were vicariously liable for LJJ's misconduct because LJJ served as the Investors' agent. At the conclusion of the evidence, the court ruled that Baldock's claims against the Investors would not be submitted to the jury. The jury then found Crone and Baldock proved their claims against LJJ, and awarded these parties a total of \$1.9 million in compensatory damages and Crone \$1.5 million in punitive damages. The court denied Baldock's postverdict and postjudgment motions requesting the court to impose liability on the Investors as a matter of law and/or to grant a new trial on the issue of the Investors' liability.

On appeal, Baldock challenges only the court's rulings as to the Investors. We reject these contentions and affirm.<sup>1</sup>

#### FACTUAL AND PROCEDURAL SUMMARY

This appeal arises from a residential development project. At trial, there were multiple parties and numerous claims, counterclaims, and cross-claims. The only parties on appeal are Baldock/Crone and the Investors. We thus truncate our factual summary to focus on these parties and on the Investors' liability to Baldock/Crone. Although we have reviewed the entire record, we omit many details in our factual summary that are not directly relevant to the legal issues before us.

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<sup>1</sup> Stephen Stewart, one of the 14 Investors, brought a protective cross-appeal, but he has acknowledged that the cross-appeal no longer serves a purpose in light of the parties' briefs. We thus dismiss the cross-appeal.

### *Background*

In May 2004, Crone (through his wholly-owned entity, Baldock) bought undeveloped property in National City (the T Avenue property). The purchase price was \$534,900; Baldock paid \$280,000 in cash and financed the remainder. Baldock intended to hold the property for a short time until it could be purchased by general contractor Jay Cleveland. Baldock and Cleveland entered into a written contract reflecting this intent. The plan was to build eight homes on the property, and then sell the homes to individual homebuyers.

LJL, a real estate and loan broker, agreed to assist with financing for the T Avenue development. In its business, LJL procured investors to lend funds for real estate development projects and then serviced the loans on behalf of these investors. Keffer Norris was the president of LJL and Brad Wash was the operations manager. LJL personnel were previously acquainted with Cleveland and vouched for his qualifications.

On April 14, 2005, Baldock executed a promissory note reflecting a \$2,585,000 loan from LJL and the Investors; the note was secured by the T Avenue property. Baldock agreed to repay this amount in one year at 12 percent interest, with monthly payments of \$25,850 and a balloon payment of about \$2.6 million. The promissory note identifies LJL as the loan servicing agent, and attaches a list of the lenders, which includes LJL and 14 individual lenders (the Investors), many of whom were trustees of family trusts. This list shows LJL invested \$1,590,000, which is about 61.5 percent of the total loan amount, and the 14 Investors loaned amounts ranging from \$50,000 to

\$140,000, reflecting 1.9 percent to 5.41 percent of the loan. Baldock also executed a deed of trust in favor of the "Lender."

The same day it signed the promissory note, Baldock entered into a written construction loan agreement with LJJ regarding the \$2,585,000 secured loan. In the contract, LJJ agreed to establish a disbursement or fund control account, and Baldock agreed to pay LJJ to monitor the construction progress and disburse the loan proceeds. There is no mention of the Investors in this written agreement, and the agreement does not identify any other party as the "Lender." The agreement sometimes refers to LJJ as the "Lender" (including in the signature line) and sometimes refers to LJJ as the "Lender's Agent."

After the loan closed, LJJ initially deposited only a portion of the borrowed funds into a fund control account—\$995,000 of the Investors' money and \$100,000 of LJJ funds. However, within two months, LJJ placed the remaining \$1,490,000 into the fund control account.

Several months later, in November 2005, LJJ arranged a second secured construction loan of \$950,000 to Baldock. This loan was necessary because the project could not be completed with the initial loan proceeds. The funds for the second loan came from a different group of investors, which included LJJ and LJJ principals. Crone personally guaranteed the loan. Crone/Baldock did not sue this group of investors.

LJJ placed the first and second loan proceeds into a fund control account at U.S. Bank from which it paid construction costs. The record contains overwhelming evidence that LJJ substantially mismanaged this account, including paying sums without a proper

budget or controls and allowing the general contractor (Cleveland's company) to embezzle substantial sums from the fund control account through Cleveland's bank account at Wells Fargo Bank. Between September 2005 and February 2006, Cleveland deposited 28 checks into his Wells Fargo account that did not have his name as payee, and instead were written by LJL to various subcontractors and other workers on the project even though the work had not been completed.

In February 2006, LJL discovered Cleveland's embezzlement, and then replaced Cleveland with another contractor. LJL and Baldock thereafter twice agreed to modify the loans with the intent of completing the project and allowing Baldock to pay the outstanding loan amounts. However, after Baldock continued to default on the loan payments, in July 2007, LJL foreclosed on the second deed of trust and bought the property at the foreclosure sale. After the sale, LJL completed the project and sold the homes. The first loan was paid in full and the Investors received a profit on their investments (the interest payments), but LJL recovered nothing on the second loan.

Cleveland was later convicted of federal crimes relating to his theft and embezzlement from the fund control account.

#### *Lawsuits*

Numerous parties involved in the T Avenue project brought lawsuits against one another. These lawsuits were later consolidated for trial. At trial, the two primary plaintiffs were Baldock and LJL.

LJL asserted claims against numerous parties, including Crone, U.S. Bank (the bank where LJL maintained the fund control account), Wells Fargo (the depository bank

which accepted the checks fraudulently presented for deposit), Cleveland, and Sheila Carlson, a former Wells Fargo employee convicted of felony grand theft for her role in Cleveland's fraudulent scheme.

Baldock also brought claims against numerous parties, including LJJ and several of its employees, the Investors, the two banks, and Cleveland. Before trial, Baldock settled with U.S. Bank and Wells Fargo, and the court later dismissed Baldock's claims against LJJ's employees. Additionally, Cleveland, who was in federal prison, defaulted on all claims against him and a default judgment was entered in favor of LJJ.

The trial took about 11 days. During trial, Crone (Baldock's owner) testified that he relied on LJJ in deciding to borrow the funds for the T Avenue development and to work with Cleveland on the project. Crone said LJJ was aware he was to be an absentee owner and that he would rely on LJJ to properly administer the fund control account. A construction loan control expert opined that LJJ failed to meet the standard of care in numerous fundamental aspects, including failing to establish a budget, create a fund draw schedule, monitor cost overruns, review the project, and ensure the contractor was licensed. Crone also testified, and presented evidence, as to numerous misrepresentations made by LJJ personnel.

The Investors were not present at trial and were not called to testify, but were represented by LJJ's counsel. The evidence was unclear as to how or when the Investors were solicited to participate in the Baldock construction loan. The primary evidence on this issue was testimony by Norris (LJJ's president) and Wash (LJJ's operations manager), who said that LJJ prepared a two-page summary sheet to procure investors for

the loan and they believed this summary sheet was sent or presented to the Investors. The sheet contains a summary of terms, the loan purpose ("borrower is using the above money to pay off the existing first of \$280,000 and build 8 single family homes"), a description of the estimated value of the new homes, and additional information about the work and the investment. There was no evidence that any Investor saw this sheet, or relied on it in deciding to invest.

Additionally, there was no evidence regarding any oral or written agreement between the Investors and LJJ. The only evidence of the Investors' identities at trial was the addendum attached to the April 2005 promissory note which identified each Investor and the amount he or she contributed to the loan (consisting of 1.9 percent to 5.41 percent of the loan). There was no showing the Investors knew each other or loaned the money in a collective group.

The two LJJ principals who testified at trial (Norris and Wash) said that LJJ performed its construction fund control functions and other actions related to the Baldock loan solely to benefit and protect the interest of the lenders (including the Investors), and not Baldock's interests. Additionally, when explaining LJJ's business model, Norris testified that LJJ serves as "agent for lenders, for individual investors. We are not the agent for the borrower. We are acting on behalf of the . . . investors and strictly the investors. So we are trying to make sure that their money is . . . returned safely, and that the money is put into the project and it is adding value . . . ." Norris also testified that in preparing the Baldock construction loan documents, he was acting "on behalf of . . . a bunch of individual investors, . . . maybe 10 or 20 investors."

*Court's Ruling on the Investors' Motion Before the Jury Verdict*

At the conclusion of the evidence, the Investors moved for a nonsuit as to Baldock's claims against them. Baldock's counsel responded that the Investors are responsible because LJL "is their agent . . . . In fact, one of my motions is going to be to have the jury instructed that the—or just have it deferred for the court to handle afterwards, there is no question but that they are the principals and [LJL] is acting as their agent and they are responsible. *So I don't see how in the world this needs to go to a jury.* [¶] . . . [¶] *[I]t shouldn't go to the jury. There has been no dispute about it.*" (Italics added.) The court then asked "So what you are saying is if there comes back some type of a verdict for [Baldock] against [LJL], then . . . the investors have some liability?" Baldock's counsel responded: "[The Investors] are liable, as principals. That is the risk you take when you hire an agent like that." The court stated: "Okay. All right. So as far as the jury is concerned, they don't get anything as far as the investors are concerned, they will just—the case will be [Baldock] versus [LJL]."

The Investors' counsel then reasserted the nonsuit motion, stating: "All of the Investors . . . should be dismissed. There is zero evidence as to any possible fiduciary duty relationship . . . between the investors and [Baldock], or agency. You can't have a fiduciary agent, and to say that they are automatically agents for all purposes." The court interrupted saying, "[LJL] is the agent for the Investors. [¶] . . . [¶] . . . They are. They are the agents for the Investors. The money is not [LJL's], it belongs to the Investors. And [the LJL employees] . . . have said in their testimony, that they have been trying to protect [the loaned funds]. . . . [¶] Their liability is going to be based upon whether or

not you recover something against LJJ." After further discussion on other topics, the court returned to the matter of the Investors' liability and said "Look, the Investors at this point are not part of this lawsuit. . . . [T]hey may be considered post-trial, but at this point, as far as this jury is concerned, what is going on, they are not part of that, anything that goes to the jury."

### *Closing Argument*

During closing arguments, Baldock's counsel asserted that LJJ was liable based primarily on its "fraud in the inception" and on its breach of fiduciary duty throughout its relationship with Baldock/Crone. Specifically, Baldock's counsel identified numerous factual grounds for LJJ's liability, including: (1) LJJ failed to disclose that Cleveland was not creditworthy and was not qualified to serve as the contractor for the project; (2) LJJ substantially mismanaged the fund control account, including by allowing "their pal [Cleveland] to use [the funds] wherever he wanted to use it"; (3) LJJ made false representations to the insurer who provided a performance bond for offsite improvements; (4) LJJ misrepresented to U.S. Bank that one of LJJ's employees was an officer of Baldock; (5) LJJ made misrepresentations to Baldock regarding the second loan; and (6) LJJ negligently managed the project after Cleveland's criminal activities were discovered.

### *Jury Verdict*

The jury was provided a lengthy special verdict form pertaining to all claims and parties remaining at the end of trial. Of relevance here, the jury was asked whether

Crone/Baldock proved LJJ's liability for: (1) "breach of fiduciary duty or fraud" with respect to Crone and Baldock; and (2) breach of contract with respect to Baldock.

The jury answered in the affirmative to these questions. With respect to the "breach of fiduciary duty or fraud" finding, the jury awarded Crone \$900,000 and awarded Baldock \$500,000. The jury also found 10 percent of these damages was attributable to the negligence of Baldock and to the negligence of Crone. With respect to the breach of contract finding, the jury found Baldock incurred \$500,000 in damages from the breach. The jury also found by clear and convincing evidence that LJJ's conduct involved "malice, oppression or fraud on the part of an officer, director or managing agent of [LJJ]," and after a second phase awarded Crone \$1.5 million in punitive damages.

The jury found Wells Fargo liable to LJJ for collecting unendorsed checks in the amount of \$222,566.87, but found that LJJ did not prove its claims against U.S. Bank.

#### *Postverdict Motions Regarding the Investors*

Less than one week after the jury returned its verdicts, an ex parte hearing was held regarding the parties' disputes over the form of the final judgment with respect to the Investors' liability. Baldock's attorney said he had understood that the court intended to impose full liability on the Investors for the compensatory damages awarded against LJJ, stating the record showed as a matter of law LJJ had acted on the Investors' behalf and that his "assumption has always been that really there is no question about agency." Baldock's attorney further said he believed he had made a motion for directed verdict at the end of trial, and "I certainly would be making [this motion] now if I didn't make it

then." The Investors' counsel responded that he had moved for a nonsuit because there was "zero evidence" of the Investors' right to control LJJ activities, which is required to impose respondeat superior liability for an agent's acts. The court concluded it would permit the parties to file written briefs on the issues.

At the outset of the first continued hearing, the court said that even though it appeared "obvious" that LJJ was acting on behalf of the Investors, the court did not have the authority to decide as a matter of law that the Investors were vicariously liable on an agency theory, and the issue should have been decided by the jury. The court noted the Investors "had never been dismissed" and therefore they are "[t]echnically . . . still in this lawsuit," but the court was "having a severe problem" with "finding[ ] as a matter of law that they are liable." The court then continued the hearing for additional briefing.

At the next hearing held about one month later, the court reiterated that although there is "no doubt" and it is "beyond question" that LJJ acted as the Investors' agent, the existence of this agency relationship did not necessarily support a respondeat superior finding. The court stated: "I see no case, no law here that gives this court the absolute ability to say agency is here, therefore they are liable. And that being the case, any . . . attempt to make the Investors liable under the decision made by this jury is denied." The court further noted it now believed it had granted a nonsuit motion before the jury was instructed and if Baldock wanted to challenge that ruling, it needed to move for a new trial after the judgment was entered.

### *Judgment*

The court then entered the final judgment, which provides in relevant part: (1) Crone shall recover judgment for breach of fiduciary duty or fraud against LJJ for \$900,000; (2) Baldock shall recover judgment for breach of fiduciary duty or fraud against LJJ in the amount of \$500,000; (3) Baldock shall recover judgment for breach of contract against LJJ in the amount of \$500,000; (4) Crone shall recover \$1.5 million in punitive damages against LJJ; and (5) Crone/Baldock shall recover nothing against the Investors because the court "*heard and denied*" Baldock's motion for directed verdict against the Investors and the court "*heard and granted*" the Investors' motion for nonsuit on Crone/Baldock's claims against them. (Italics added.)

### *Motion for New Trial*

Baldock then moved for a new trial, requesting that the court grant a new trial on the limited issue of the Investors' liability for the compensatory damages found by the jury on Baldock/Crone's claims against LJJ.

After considering the briefs and conducting a hearing, the court denied the new trial motion, concluding there was "no evidence" presented showing the Investors were liable based on an agency theory, and therefore the nonsuit was proper. The court stated: "We had a trial. The evidence was presented. There was no evidence as to liability as far as the Investors are concerned. That is what I decided then, that is what I decided previously, and that's what I am going to decide today." The court further stated that many of LJJ's wrongful acts appeared to be outside the scope of its authorized authority.

## DISCUSSION

### I. *Overview*

On appeal, Baldock concedes there is no evidence showing the Investors are liable on a direct liability theory, such as negligent supervision or a breach of a duty owed to Baldock. Instead, Baldock argues the court erred in refusing to impose vicarious liability on the Investors for LJL's wrongful conduct under respondeat superior principles.

Specifically, Baldock contends the court erred in denying its directed verdict motion because the record shows as a matter of law LJL was the Investors' agent and therefore the Investors were vicariously liable for LJL's wrongful actions. Baldock alternatively argues there were disputed facts on the vicarious liability issue, and therefore the court erred in granting the Investors' nonsuit motion, which prevented Baldock from presenting the issue to the jury.

These contentions are without merit. As explained below, the primary flaw in Baldock's arguments is the faulty assumption that LJL's admissions in testimony and documents regarding its agency function in servicing the loan and protecting the Investors' interests in the loan transaction are equivalent to a finding that LJL is an agent for purposes of the respondeat superior doctrine. An essential element for imposing respondeat superior liability based on an agency theory is the party's legal right to control the agent's actions. The record does not contain facts showing any of the individual Investors had a legal right to control LJL's actions. Thus, the court properly declined to impose vicarious liability on the Investors for LJL's wrongful acts.

In reaching these conclusions, we recognize there is some question in the record whether the court actually granted a nonsuit and denied a motion for directed verdict at the time the motions were purportedly made. However, because these rulings are contained in the final judgment and in an effort to reach the merits of the parties' contentions, we assume for purposes of this appeal that the court did make these rulings. Additionally, we conduct a de novo review of the court's challenged rulings and thus we do not focus on the court's comments made at the various hearings.

## II. *Respondeat Superior Doctrine Based on a Claimed Agency Relationship*

Under the respondeat superior doctrine, a principal is vicariously liable for the conduct of its agent acting within the scope of the agency relationship. (*Otis Elevator Co. v. First Nat. Bank of San Francisco* (1912) 163 Cal. 31, 39; see *Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 297, fn. 2; Civ. Code, § 2338; Rest.2d Agency, §§ 219, 243 et seq.; 3 Witkin, Summary of Cal. Law (10th ed. 2005) Agency and Employment, § 165, pp. 208-209.) To prove the existence of an agency relationship, the moving party must show three elements: "(1) An agent or apparent agent holds a power to alter the legal relations between the principal and third persons and between the principal and himself; (2) an agent is a fiduciary with respect to matters within the scope of the agency; and (3) a principal has the right to control the conduct of the agent with respect to matters entrusted to him." (*Garlock Sealing Technologies, LLC v. NAK Sealing Technologies Corp.* (2007) 148 Cal.App.4th 937, 964; *Lewis v. Superior Court* (1994) 30 Cal.App.4th 1850, 1868-1869; see *Vallely Investments v. BancAmerica Commercial Corp.* (2001) 88 Cal.App.4th 816, 826-827.)

Under this analysis, "the primary test" of an agency relationship is the principal's legal right to control the agent's actions. (*Cox v. Kaufman* (1946) 77 Cal.App.2d 449, 452.) "Whether a person performing work for another is an agent . . . depends primarily upon whether the one for whom the work is done has the legal right to control the activities of the alleged agent." (*Malloy v. Fong* (1951) 37 Cal.2d 356, 370; accord, *Korean Air Lines Co., Ltd. v. County of Los Angeles* (2008) 162 Cal.App.4th 552, 562 [" "In the absence of the essential characteristic of the right of control, there is no true agency." ""]; *F. Hoffman-La Roche, Ltd. v. Superior Court* (2005) 130 Cal.App.4th 782, 797 ["the hallmark of agency is the exercise of control over the agent by the principal"]; *Michelson v. Hamada* (1994) 29 Cal.App.4th 1566, 1579 [primary determinative factor is whether the principal "has the legal right to control the activities of the alleged agent" "]; *St. Paul Ins. Co. v. Industrial Underwriters Ins. Co.* (1989) 214 Cal.App.3d 117, 122 [it is "well established" that "control is a decisive factor" in determining agency]; *McCollum v. Friendly Hills Travel Center* (1985) 172 Cal.App.3d 83, 91 [" 'significant test of an agency relationship is the principal's right to control the activities of the agent' "].)

Unless a party has the legal right to control another person's actions, the party cannot be held vicariously liable for the other person's acts on an agency theory. (*Edwards v. Freeman* (1949) 34 Cal.2d 589, 592 ["In the absence of the essential characteristic of the right of control, there is no true agency and, therefore, no 'imputation' of the [wrongdoer's] negligence"]; *Kaplan v. Coldwell Banker Residential Affiliates, Inc.* (1997) 59 Cal.App.4th 741, 746 ["Absent a showing that Coldwell Banker controlled or had the right to control the day-to-day operations of Marsh's office, it was not liable for

Marsh's acts or omissions as a real estate broker on a true agency-respondeat superior theory."].)

The party seeking to impose vicarious liability generally has the burden to prove the agency and that the wrongful actions fell within the scope of the agency. (See *Inglewood Teachers Assn. v. Public Employment Relations Bd.* (1991) 227 Cal.App.3d 767, 780; *California Viking Sprinkler Co. v. Pacific Indemnity Co.* (1963) 213 Cal.App.2d 844, 850.) "[T]he existence of agency is a factual question within the province of the trier of fact whose determination may not be disturbed on appeal if supported by substantial evidence." (*Wickham v. Southland Corp.* (1985) 168 Cal.App.3d 49, 55; see *Inglewood Teachers, supra*, at p. 780.) Although an agency may be inferred from circumstantial evidence, "[t]he formation of an agency relationship is a bilateral matter. Words or conduct by both principal and agent are necessary to create the relationship . . . ." (*van't Rood v. County of Santa Clara* (2003) 113 Cal.App.4th 549, 571.) "Only when the essential facts are not in conflict will an agency determination be made as a matter of law." (*Wickham, supra*, 168 Cal.App.3d at p. 55.)

Applying these legal principles, we examine whether the court erred by denying Baldock's directed verdict and new trial motions, or by granting the Investors' nonsuit motion.

### III. *Directed Verdict*

#### A. *Review Standard*

A motion for directed verdict is in the nature of a demurrer to the evidence. (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 629.) In ruling on the motion,

"the trial court has no power to weigh the evidence, and may not consider the credibility of witnesses. It may not grant a directed verdict where there is *any* substantial conflict in the evidence. [Citation.] A directed verdict may be granted only when, disregarding conflicting evidence, giving the evidence of the party against whom the motion is directed all the value to which it is legally entitled, and indulging every legitimate inference from such evidence in favor of that party, the court nonetheless determines there is no evidence of sufficient substantiality to support the claim or defense of the party opposing the motion, or a verdict in favor of that party." (*Id.* at pp. 629-630.)

" 'Unless it can be said as a matter of law . . . no other reasonable conclusion is legally deductible from the evidence . . . the trial court is not justified in [granting a directed verdict].' . . . [Citations.]" (*Hilliard v. A. H. Robins Co.* (1983) 148 Cal.App.3d 374, 395, italics omitted.)

#### B. *Analysis*

Baldock contends the court erred in denying its directed verdict motion because "the evidence was susceptible of but one interpretation. LJL was the [Investors'] agent; and, it was acting as such during every phase of the transactions which are the subject of his litigation." In support, Baldock relies primarily on the testimony of the two LJL principals (Norris and Wash) that LJL was acting to protect the Investors' interests in servicing Baldock's construction loan. Baldock also relies on Norris's testimony describing LJL's business model, wherein he stated that LJL generally serves *as an agent for the lenders*, and not the borrowers, in performing financing and loan servicing functions.

This evidence does not support the imposition of vicarious liability on the Investors because neither Norris nor Wash addressed the control issue in their testimony. The party seeking to prove the agency must present *evidence* showing the principal's legal control over the agency. Control " 'may not be inferred merely from the fact that one person's act benefits another' " or from the fact that the parties had a " 'preexisting relationship.' " (*van't Rood v. County of Santa Clara, supra*, 113 Cal.App.4th at p. 572.) Further, calling a person an "agent" is generally insufficient in and of itself to create a legal agency relationship supporting respondeat superior liability. (See *Pistone v. Superior Court* (1991) 228 Cal.App.3d 672; *Anderson v. Badger* (1948) 84 Cal.App.2d 736, 741-742.) The testimony by LJL principals that they were acting on the Investors' behalf and that they generally served as agents for the lenders is insufficient to show the Investors had any control over LJL's conduct. Although it is undisputed that the Investors relied on LJL to execute the loan documents and service the loan, absent evidence of control these facts are legally insufficient to impose liability on the Investors for LJL's wrongful acts. (See *Malloy v. Fong, supra*, 37 Cal.2d at p. 370; *Edwards v. Freeman, supra*, 34 Cal.2d at p. 592; *Korean Air Lines Co., Ltd. v. County of Los Angeles, supra*, 162 Cal.App.4th at p. 562.)

For similar reasons, we find unavailing Baldock's reliance on various documents (including the construction loan agreement and loan forbearance documents) characterizing LJL as the "Lender's Agent" and/or the "authorized agent." These documents do not show the Investors had any legal control over LJL's activities, and thus

do not establish a basis for vicarious liability. Moreover, these documents were not signed by the Investors, and there was no evidence the Investors ever saw the documents.

Baldock argues there was no need to produce evidence on the control issue because during opening statements the Investors' counsel referred to the fact that LJJ acted as the Investors' agent in the loan transaction. We agree that a counsel's concession at trial eliminates the need to prove the fact or issue admitted and is binding on the client. (See *Horn v. Atchison T. & S. F. Ry. Co.* (1964) 61 Cal.2d 602, 605; *Fassberg Construction Co. v. Housing Authority of City of Los Angeles* (2007) 152 Cal.App.4th 720, 752.) However, for a disputed issue to be resolved by a judicial admission, the party must show the admission was a concession on the matter at issue. The issue here is whether the Investors can be held vicariously liable for LJJ's wrongful actions. The Investors' counsel did not make any statements at trial conceding this issue. Viewed in context, counsel's comments during opening statements reflected his understanding that LJJ was acting on behalf of the Investors with respect to the secured loan, a fact that was undisputed at trial. However, as discussed above, without evidence of the control element, the fact that an individual is retained to act on another's behalf and works to benefit the principal does not create an agency relationship for purposes of imposing respondeat superior liability.

In its reply brief, Baldock cites unpublished federal district court and bankruptcy court decisions to support its agency arguments. (See, e.g., *Griley v. National City Mortgage* (E.D.Cal. 2011) 2011 U.S. Dist. LEXIS 5061 (*Griley*); *In re Savvon* (Bankr.

N.D. Cal. 2009) 2009 Bankr. LEXIS 2490 (*Savvon*.) These decisions do not advance Baldock's position under the factual circumstances here.

In *Griley*, the borrower brought an action against several parties, including a lender and a loan servicer. (*Griley, supra*, 2011 U.S. Dist. LEXIS at pp. \*1-\*4.) As here, the borrower's claims against the lender were based on the wrongful conduct of the loan servicer. (*Id.* at pp. \*14-\*16.) In ruling on a motion to dismiss the complaint, the court held the pleadings, which alleged "a lender-servicer relationship[,] are sufficient *at the pleading stage*" to withstand the dismissal motion. (*Id.* at p. \*15, italics added.) But the court indicated the issue whether there was *sufficient evidence* to support an agency theory was a different issue, quoting another district court opinion in which the court "explain[ed] that '[w]hether [the lender] had some degree of control over the conduct and activities of [the alleged servicer] is a question to be answered in discovery.'" (*Id.* at p. \*16; quoting *Warden v. PHH Mortg. Corp.* (N.D.W.Va. 2010) 2010 U.S. Dist. LEXIS 98545 at \*13; accord *Arias v. Capital One, N.A.* (N.D.Cal. 2011) 2011 U.S. Dist. LEXIS 21936 [current lender is not liable on an agency theory as a matter of law because there is no evidence the lender exercised legal control over mortgage company alleged to be lender's agent].)

*Savvon* is similarly unhelpful. In *Savvon*, the bankruptcy court recognized that a mortgage broker owes a fiduciary duty to both the lender and the borrower. (*Savvon, supra*, 2009 Bankr. LEXIS 2490.) However, the existence of these duties does not resolve the issue before us. The issue on appeal concerns whether the lender can be held

liable for the agent's misconduct that was not known or authorized by the lender and over which the lender had no right to control. This issue was not addressed in *Savvon*.

On the record before us, the court did not err in denying Baldock's motion for directed verdict.

#### IV. *Nonsuit*

Baldock alternatively contends the court erred in granting a nonsuit in the Investors' favor because there was *some evidence* from which a jury could find that an agency relationship sufficient to impose respondeat superior liability existed between the Investors and LJJ.

##### A. *Review Standard*

"A defendant is entitled to a nonsuit if the trial court determines that, as a matter of law, the evidence presented by plaintiff is insufficient to permit a jury to find in his favor. [Citation.] 'In determining whether plaintiff's evidence is sufficient, the court may not weigh the evidence or consider the credibility of witnesses. Instead, the evidence most favorable to plaintiff must be accepted as true and conflicting evidence must be disregarded. The court must give "to the plaintiff[s] evidence all the value to which it is legally entitled, . . . indulging every legitimate inference which may be drawn from the evidence in plaintiff[s] favor." ' [Citation.] A mere 'scintilla of evidence' does not create a conflict for the jury's resolution; 'there must be *substantial evidence* to create the necessary conflict.' [Citation.]" (*Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 291; see *Sandoval v. Los Angeles County Dept. of Public Social Services* (2008) 169 Cal.App.4th 1167, 1178, fn. 11.)

In reviewing a grant of nonsuit, we apply a de novo review and are guided by the same rules requiring us to evaluate the evidence in the light most favorable to the plaintiff. (*Nally v. Grace Community Church, supra*, 47 Cal.3d at p. 291; *Thrifty Payless, Inc. v. Mariners Mile Gateway, LLC* (2010) 185 Cal.App.4th 1050, 1060.)

#### B. *Analysis*

Preliminarily, we note that the court's granting of the nonsuit was invited error and thus any challenge to the court's ruling is waived. As summarized above, in response to the Investors' nonsuit motion on the Investors' liability to Baldock, Baldock's counsel essentially conceded that the matter should not be resolved by the jury, and instead stated that he was relying on the various admissions by LJL principals and the Investors' counsel to request the court to impose vicarious liability as a matter of law *after the jury verdict*. At a later postverdict hearing, Baldock's counsel reiterated that Baldock could prevail on the vicarious liability issue only if the court found that as a matter of law the evidence established LJL was the Investors' agent for purposes of the respondeat superior doctrine. Because Baldock's counsel did not seek a jury determination on the respondeat superior issue in the proceedings below, Baldock cannot now prevail on an argument that the court should have allowed the jury to resolve the issue.

But even assuming Baldock properly preserved the issue, the court did not err in granting the nonsuit motion. To show evidence of the agency relationship (including the control element), Baldock relies primarily on Exhibit 702, which is a large packet of documents apparently filed by LJL with the California Department of Corporations on October 21, 2005 (several months after the Investors loaned the funds to Baldock)

seeking a renewal of its permit to sell fractional interests in unspecified secured promissory notes.<sup>2</sup>

Although Baldock did not rely on this document in responding to the Investors' nonsuit motion at trial, Baldock now argues that Exhibit 702 "is irrefutable evidence" that LJL acted as the Investors' agent and that a "true agency relationship" existed between the parties. In support, Baldock directs us to an "Offering Circular" included within Exhibit 702, which states: (1) LJL is a "licensed real estate broker engaged in business as a mortgage loan broker and loan servicer" and (2) a "majority-in-interest" of the lenders (not necessarily referring to the loan at issue in this case) have various powers pertaining to a secured loan, including to approve amendments to the loan agreements, approve delays in filing notice of defaults, waive defaults, and terminate LJL as loan servicer.

Baldock's reliance on Exhibit 702 is misplaced.

First, there is no evidence in the record that this document reflected an agreement between LJL and the Investors, or that the Investors saw or knew about the offering circular. Baldock argues that an offering circular is generally "required by law to be included with any offers to investors of a fractional interest investment opportunity." However, there was no evidence that LJL actually complied with this law and that the Investors saw this document and agreed with its terms.

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<sup>2</sup> We say apparently because Baldock has not cited to anything in the lengthy record showing these documents were properly authenticated during trial. Baldock's counsel stated at trial that he did not intend to seek the admission of these documents, but the entire package was later admitted into evidence as Exhibit 702.

Equally important, the information contained in Exhibit 702 does not show the Investors had legal control over LJJ's actions sufficient to support the imposition of respondeat superior liability. As noted above, the statement that LJJ is a "licensed real estate broker engaged in business as a mortgage loan broker and loan servicer" does not establish that the Investors in this case had the requisite control over LJJ's activities.

Similarly, the Offering Circular's provisions that a "*majority-in-interest*" of unspecified lenders have certain rights to control LJJ's activities does not establish a basis for imposing vicarious liability in this case. (Italics added.) Significantly, there was no showing that the Investors, singly or collectively, held a "majority-in-interest" in the Baldock construction loan. The undisputed evidence shows that *LJJ* held a majority interest in the note (61.5 percent), and no other investor held more than 5.41 percent of the loan. Baldock argues the Investors held a majority interest because LJJ initially funded only \$1,095,000 of the loan, and of that amount only \$100,000 was from LJJ. However, the undisputed record shows that within 60 days, essentially all of the remaining funds were deposited into the fund control account.<sup>3</sup> Moreover, there was no showing the Investors loaned the money as a collective group; instead each Investor loaned a small fraction of the total loaned amount (ranging from \$50,000 to \$140,000). Each of the Investors is listed separately, and nothing in the records suggests that the Investors acted collectively or even knew one another. Thus, even if only a portion of the

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<sup>3</sup> In its reply brief, Baldock cites to two trial exhibits (Exhibits 122 and 567) in an attempt to refute this fact, but our review of the exhibits show they do not support Baldock's contention.

loan proceeds was placed into the fund control account, there was no single Investor who held a "majority-in-interest" in this initially-funded portion of the loan.<sup>4</sup>

Baldock alternatively contends that once it elicited testimony and produced documents designating LJL as the lender's agent, it created a prima facie case of agency and the burden shifted to the Investors to prove that LJL was an independent contractor. This argument is waived because it was not asserted at trial or in Baldock's opening brief and the argument was raised for the first time in Baldock's reply brief. (See *Karlsson v. Ford Motor Co.* (2006) 140 Cal.App.4th 1202, 1216-1217.)

Moreover, the argument is without merit. In support of the argument, Baldock relies on *Robinson v. George* (1940) 16 Cal.2d 238 (*Robinson*), in which the plaintiff sought to hold a newspaper publisher vicariously liable for its newspaper carrier's negligent driving. (*Id.* at p. 240.) In defense, the newspaper argued the carrier was an independent contractor and thus the newspaper could not be held liable for the carrier's negligence under respondeat superior principles. (*Id.* at pp. 240-241.) Applying a presumption developed in the workers compensation context, the court held a presumption of employee status applied under the circumstances, and the defendant newspaper had the burden to show independent contractor status. (*Id.* at pp. 242-244.)

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<sup>4</sup> We also reject Baldock's argument that Investor Stephen Stewart "was clearly in a position to control LJL" because Stewart "served as a consultant for LJL." This argument is waived because it was not asserted at trial and was raised for the first time in Baldock's reply brief.

Although the *Robinson* burden-shifting rule has been applied in cases when the primary issue is whether a person is an employee or an independent contractor (see *Bemis v. People* (1952) 109 Cal.App.2d 253, 263-264), the rule is not applicable in every case raising an agency issue. (See *Fillmore v. Irvine* (1983) 146 Cal.App.3d 649, 659-661.) Generally, the party asserting an agency relationship has the burden of proving the relationship (see *Inglewood Teachers Assn. v. Public Employment Relations Bd.*, *supra*, 227 Cal.App.3d at p. 780), and courts have refused to extend the *Robinson* burden-shifting rule to situations where the reason for the exception is inapplicable. (See *Fillmore v. Irvine*, *supra*, 146 Cal.App.3d at pp. 659-661.) As the *Fillmore* court noted, the *Robinson* rule was developed under the particular facts of the case where the newspaper employer (and not the injured party) had ready access to available information reflecting the worker's status as to whether the worker was an independent contractor or an employee. (*Fillmore*, *supra*, 146 Cal.App.3d at p. 661.) However, in this case, information about LJJ's role in the transaction was not necessarily available to the Investors, who were each solicited by LJJ to provide a very small fractional portion of funds in a secured loan transaction. Under the circumstances, there is no reasoned basis to shift the burden of proof. (See Evid. Code, § 500; *Fillmore*, *supra*, 146 Cal.App.3d at p. 661.) Further, even if the burden shifted in the case, the undisputed evidence showed the Investors had no control over LJJ's actions, and thus a burden-shifting rule would not have supported a denial of the nonsuit motion.

Citing to various isolated comments made by the trial court, Baldock also contends the judgment must be reversed because the court erroneously believed a

principal could not be held liable for the intentional misconduct of an agent. The argument is unavailing because we are governed by a de novo review standard. To the extent the court's comments did not accurately reflect the applicable law, these comments have no effect on our legal conclusions in this case.

Finally, Baldock argues that we should reverse the judgment because the court's rulings led to an unfair result. Baldock contends: "[The Investors] received payment in full on their investments, only because of LJJ's fraud and breaches of fiduciary duty . . . . It is offensive to any notion of fairness that [Crone and Baldock], whom the jury found to be the victims of LJJ's bad act[s], should have their money wrongfully taken by [the Investors'] agents and delivered over to [the Investors]."

However, in deciding whether respondeat superior liability may be imposed, we apply legal principles and not rules based solely on one party's sense of equity and fairness. Moreover, the concept that an owner of a 1.9 percent or a 5.41 percent interest in a secured promissory note would be held fully responsible for a loan broker's misconduct when the owner had no legal control over the broker's activities is not necessarily consistent with notions of fairness and equity. As between Crone/Baldock and the Investors, it is arguable that Crone/Baldock had the better opportunity and ability to structure the deal to ensure they were protected in the event of LJJ's wrongful conduct.

#### *V. New Trial Motion*

To the extent Baldock challenges the court's denial of its new trial motion, we reject this contention. The rationale underlying our conclusion that the court did not err

in denying Baldock's motion for directed verdict and in granting the Investors' nonsuit motion applies equally to the court's ruling on the new trial motion.

DISPOSITION

Judgment affirmed. Appellants John Crone and Baldock Holdings, Inc. to pay respondents' costs on appeal. Stephen Stewart's appeal is dismissed.

HALLER, J.

WE CONCUR:

McCONNELL, P. J.

NARES, J.