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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

PAUL J. PALMER et al.,

Plaintiffs and Appellants,

v.

JOHN D. SCULL,

Defendant and Appellant.

D057556

(Super. Ct. No. 37-2008-00098697-  
CU-BC-CTL)

APPEALS from a judgment of the Superior Court of San Diego County, Steven R. Denton, Judge. Affirmed.

These appeals arise from an unsuccessful condominium development venture known as the Cosmopolitan Square project in downtown San Diego. Although the factually complex trial involved several phases and multiple claims and parties, only a small portion of the trial record is included in the appellate record and the appeals are limited to several discrete issues and involve only some of the parties.

Specifically, plaintiff Paul Palmer challenges the trial court's refusal to hold defendant John Scull liable for the acts of several corporations under the alter ego

doctrine. Palmer and his trust (collectively Palmer) also challenge the court's order awarding Scull attorney fees under Civil Code section 1717 (section 1717) based on Scull's prevailing on Palmer's breach of contract claim in the second phase of the trial. In a cross-appeal, Scull contends the court erred in refusing to award attorney fees for successfully defending tort claims asserted by Palmer in the first phase of the trial.

We determine each of these contentions is without merit and affirm the judgment. In so concluding, we deny Scull's motion to dismiss the appeal based on Palmer's failure to designate an adequate appellate record. Although we agree the record is insufficient to permit a full review of all of Palmer's appellate contentions, some of Palmer's legal arguments are cognizable on appeal because they involve purely legal issues.

#### FACTUAL AND PROCEDURAL SUMMARY

Because of the limited record designated by Palmer and the narrow focus of the appellate issues raised by the parties, we provide only a brief overview of the proceedings. Additional facts will be set forth in the Discussion section.

Palmer invested in a proposed downtown real estate development project by providing funds to several corporate/partnership entities in exchange for the entities' agreement that they would obtain additional financing and perform development functions. When the entities failed to obtain sufficient financing, Palmer sued these entities and several individuals (including Scull) who were the entities' shareholders, officers, or directors. Palmer sought to recover for his substantial investment losses.

Palmer and the defendants in this first lawsuit reached a settlement agreement, which provided for the execution of notes by several of the entity defendants, including

Simplon Corporation and Simplon Ballpark, LLC (Simplon LLC), and guarantees by Scull and two other individual defendants (Todd Hart and Charles Evans). The settlement agreement contemplated that the three individuals (Scull, Hart, and Evans) would pay Palmer from proceeds of loans that were being negotiated. However, the three individuals were unable to obtain these loans, and the parties thereafter executed a litigation forbearance agreement. This forbearance agreement went into default when the contemplated financing could not be obtained.

Palmer then brought a second lawsuit against numerous defendants including the individual guarantors (Scull, Hart, and Evans) and various entity defendants (including Simplon LLC and Simplon Corporation), reasserting his allegations in the first lawsuit and adding allegations regarding breach of the settlement agreement and the forbearance agreement.

Several defendants defaulted, including Simplon LLC. At a prove-up hearing, the court awarded Palmer \$13,419,397 against Simplon LLC and against several other defaulting defendants, jointly and severally. The court also awarded Palmer this same amount against Simplon Corporation.<sup>1</sup>

With respect to the remaining individual defendants, the court divided the trial into three phases.

First, the court held a jury trial on Palmer's fraud allegations against individuals Scull, Evans, and Hart. After the trial, the jury found that Palmer failed to prove these

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<sup>1</sup> The record before us is not clear as to the basis for the liability finding and damage award against Simplon Corporation.

claims. The jury found Palmer did not meet his burden to show these defendants made a false representation to induce Palmer's investment, intentionally failed to disclose a material fact, or misappropriated any of Palmer's money.

The court then conducted a second jury trial on Palmer's claims that Scull, Evans, and Hart breached contracts relating to the notes and guarantees executed by these individuals. After the trial, the jury returned a verdict finding that Evans and Hart breached their guaranty agreements, and awarded Palmer approximately \$5.3 million against Evans and approximately \$1.3 million against Hart. However, the jury found Palmer did not prove Scull failed to perform the guaranty agreement and thus awarded Palmer no damages against Scull or related defendants.

In the third phase of the trial, the court conducted a bench trial on the alter ego issues. During this phase, Palmer sought to hold Scull (and others) individually liable for judgments entered in Palmer's favor against several corporate entities. Based on the parties' express agreement, the court stated it would base its decision on evidence presented in the first two phases of the trial and on additional evidence presented during the third phase. After the evidence and argument, the court found Palmer did not prove his alter ego claim. In a statement of decision, the court detailed the grounds for this conclusion, including its factual findings that: the corporate formalities were observed, the corporations were not undercapitalized, Palmer was fully aware of the corporate structure of the various defendant entities, Palmer knew and understood that the individuals (including Scull) were not investing their personal funds in the project, and

the application of the alter ego doctrine was unnecessary to avoid fraud or unfairness under the totality of the circumstances.

The court then considered the parties' requests for attorney fees. The court awarded Scull \$134,469.36 in attorney fees under section 1717 as the prevailing party on Palmer's contract claim against him (second phase of the trial), but declined to award Scull attorney fees incurred in defending the fraud claim asserted by Palmer in the first phase of the trial.

On appeal, Palmer challenges: (1) the court's refusal to hold Scull liable under the alter ego doctrine; and (2) the court's order requiring Palmer to pay Scull's fees to defend the contract claim. In his cross-appeal, Scull challenges the court's refusal to award him attorney fees incurred in defending Palmer's tort claim.

## DISCUSSION

### I. *Alter Ego Doctrine*

Palmer contends the court erred in concluding he did not meet his burden to show the applicability of the alter ego doctrine to establish Scull's personal liability for the acts of two entities: (1) Simplon LLC (the main developer in the project); and (2) Simplon Corporation (the managing member of Simplon LLC).<sup>2</sup> Palmer recovered a default judgment of approximately \$13 million against Simplon LLC and the same amount

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<sup>2</sup> In his appellate brief, Palmer also mentions that the court erred in not applying the alter ego doctrine to Construction Contract Management, Inc. (CCMI), a construction management firm. However, based on the record before us, it is unclear whether Scull was a shareholder of this corporation. In any event, our alter ego analysis and conclusion with respect to Simplon LLC and Simplon Corporation apply equally to the CCMI entity.

against Simplon Corporation, and was seeking to pierce the corporate veil and hold Scull responsible for this amount based on his status as a shareholder of Simplon LLC through his ownership in Simplon Corporation.

A. *Summary of Applicable Law*

"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." (*Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 538; accord *Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305, 1341 (*Troyk*); *Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1269, 1285.)

Factors relevant to this analysis include: "the disregard of legal formalities and the failure to maintain arm's length relationships among related entities," "the failure to maintain minutes or adequate corporate records," "the confusion of the records of the separate entities," the "failure to segregate funds of the separate entities," "[c]ommingling of funds and other assets," "the total absence of corporate assets, and undercapitalization," the failure "to issue stock," "sole ownership of all of the stock in a corporation by one individual or the members of a family," overlapping officers and directors, "the use of the same office or business location," "the employment of the same employees and/or attorney," "the unauthorized diversion of corporate funds or assets to other than corporate uses," "the use of a corporation as a mere shell, instrumentality or

conduit," and "the diversion of assets from a corporation by or to a stockholder."

(*Associated Vendors, Inc. v. Oakland Meat Co.* (1962) 210 Cal.App.2d 825, 838-840.)

Because the alter ego doctrine is founded on equitable principles, a trial court must consider the totality of the circumstances and has broad latitude in determining whether the factual circumstances support the application of the doctrine. (See *Troyk, supra*, 171 Cal.App.4th at pp. 1341-1342.) "[T]he conditions under which a corporate entity may be disregarded vary according to the circumstances of each case." [Citations.] Whether the evidence has established that the corporate veil should be ignored is primarily a question of fact which should not be disturbed when supported by substantial evidence." (*Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1248.)

On appeal, the trial court's factual findings on the issue of alter ego liability are reviewed under the substantial evidence test. (*NEC Electronics Inc. v. Hurt* (1989) 208 Cal.App.3d 772, 777; *Alexander v. Abbey of the Chimes* (1980) 104 Cal.App.3d 39, 47.) The trial court's ruling is presumed correct, and the appellate court indulges all intendments and presumptions to support the ruling on matters as to which the record is silent. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) The appellant has the burden of overcoming the presumption of correctness by affirmatively showing error on an adequate record. (*Bianco v. California Highway Patrol* (1994) 24 Cal.App.4th 1113, 1125.)

## B. *Summary of Facts and Trial Court's Analysis Relevant to Alter Ego Issue*

### 1. *Limited Record*

Because alter ego claims are equitable in nature, a court, and not a jury, determines whether the moving party met its burden to show the grounds for applying the doctrine. (See *Dow Jones Co. v. Avenel* (1984) 151 Cal.App.3d 144, 147-148.) Thus, in the third phase, the court held a bench trial on Palmer's alter ego claims. Pursuant to the parties' express agreement, the court stated at the outset of this bench trial that it would base its alter ego determination on the evidence presented in each of the three phases of the trial. In its statement of decision, the court reiterated that the parties had stipulated to this procedure and further commented that during the first two phases of the trial it had heard "a significant amount" of "very detailed evidence" pertaining to the "operation of the interrelated individuals and entities" and had reviewed "a multitude of exhibits."

However, in challenging the court's findings on appeal, Palmer designated only the transcript of Scull's testimony in the first phase (omitting a majority of the eight-day trial proceeding), designated no transcripts from the second phase, and designated witness testimony from the third phase. In designating this limited record, Palmer omitted a substantial portion of the trial. Palmer also failed to designate or lodge any exhibits from the trial. Moreover, in his appellate briefs, Palmer made no effort to provide a comprehensive summary of the relevant evidence (favorable and unfavorable) pertaining to the alter ego issue.

In the absence of an adequate record on appeal, we rely on the court's statement of decision to summarize the evidence relevant to the alter ego issue and assume there is

sufficient evidence to support these factual findings. (See *Estate of Fain* (1999) 75 Cal.App.4th 973, 992; see also *Chapala Management Corp. v. Stanton* (2010) 186 Cal.App.4th 1532, 1535.)

## 2. *Summary of Relevant Facts Contained in Statement of Decision*

Palmer, a "highly educated business person," agreed to invest in the real estate development project after lengthy discussions with Scull, Evans, and Hart. Palmer "had available significant cash for a potential investment" and understood that the individuals would act as developers and would work to seek additional funding. The purpose of the parties' venture was to earn "significant profit[s]" by building a highrise tower and selling condominium units and otherwise developing the property.

In about July 2004, Simplon LLC was formed when Palmer invested \$5.2 million in the project. In exchange for his investment in this entity, Palmer became "a limited member and equity owner" in Simplon LLC. The parties executed an operating agreement, setting forth the parties' various rights and obligations regarding Simplon LLC's operation.

The parties then formed Simplon Corporation to function as the managing member of Simplon LLC. Simplon Corporation was owned and controlled by Scull, Evans, and Hart. Before making his investment, Palmer was aware that Scull, Hart, and Evans "would . . . not be investing personal cash in the project," and instead would be providing the developer services, including generating the various plans for the project construction, obtaining access to the "key real property" necessary for the development,

and processing entitlements. Palmer executed documents confirming he understood the nature of the corporate entities and the risks associated with his investment.

The parties retained a law firm to create the Simplon LLC and Simplon Corporation entities. The two entities were "duly formed by way of formalities with the State of California. Corporate minutes were maintained by a combination of corporate attorneys and . . . Scull at least through 2006."

"Ultimately, the project failed. In the environment of the then occurring real estate collapse, . . . the [parties were] unable to obtain necessary loans to permit the further prosecution of the development project. Bankruptcy of the development entities resulted in a total loss of the investment [f]or all of the members of the [Simplon LLC], as well as a number of creditors and secured lenders above the primary lenders." "The property was foreclosed by one of the lenders, which had . . . provided millions of dollars in financing of the project . . . ."

### *3. Trial Court's Legal Analysis*

In ruling on Palmer's motion to hold Scull (and the others) liable for the acts of Simplon LLC and Simplon Corporation, the court first detailed the legal principles governing its resolution of the parties' claims on the alter ego issue. This discussion constituted an accurate and comprehensive statement of the legal principles guiding a court's analysis on the alter ego issue. For example, the court stated that: "In general, the two requirements for applying the alter ego doctrine is, number one, there is such a unity of interest and ownership between the corporation and individual or organization controlling it so that their separate personalities no longer exist; and two, a failure to

disregard the corporate entity would result in — or sanction a fraud or promote injustice," citing *Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290.

The court also properly identified the factors relevant to its analysis:

"Commingling of funds and other assets, failure to segregate funds of the separate entities, and the unauthorized diversion of corporate funds or assets to other corporate uses. [¶] The treatment by an individual of the assets of the corporation as his own, the failure to obtain authority to issue stock or subscribe to or issue the same, the holding out by an individual that he is personally liable for the debts of the corporation, the failure to maintain minutes or adequate corporate records, and the confusion of the records of the separate entities, the use of the same office or business location, the failure to adequately capitalize a corporation, the total absence of corporate assets and undercapitalization, the use of a corporation as a mere shell, instrumentality or conduit for a single venture or the business of an individual or another corporation, the concealment or misrepresentation of the identity of the responsible ownership, management and financial interest, or the concealment of personal business activities, the failure to maintain . . . arm's length relationships among related entities. [¶] The diversion of assets from a corporation by or to a stockholder or other person or entity, to the detriment of creditors or the manipulation of assets and liabilities between entities so as to concentrate the assets in one and the liabilities in another. And the contracting with another with the intent to avoid performance by use of a corporate entity as a shield against personal liability, or the use of a corporation as a subterfuge for illegal transactions."

The court then applied these legal principles to the factual record. In doing so, the court identified numerous factors supporting its conclusion that Palmer did not meet his burden to show an equitable basis for the application of the alter ego claim.

First, the court said it did not find "the assertion of undercapitalization of the subject entities [to be] persuasive . . . . As indicated above, Mr. Palmer was participatory from the commencement of the project and knew how the capitalization of the project was to be undertaken. [Simplon LLC] . . . was in fact capitalized exactly as it was understood by the investment of approximately \$10 million from investors like himself, who would buy into shares of [Simplon LLC], which would in turn be owned half by Simplon Corporation, which would provide no cash from Evans, Scull and Hart. [¶] It was never contemplated by [Palmer] that Simplon Corporation would be the source of recovery from him during the initial investment cycle. *And . . . its capitalization . . . was adequate. . . .* [¶] The fact that ultimately economic events and development circumstances caused [Simplon LLC] to run out of funds and suffer financial extremis, and fall into foreclosure, does not establish undercapitalization in this instance for alter ego purposes." (Italics added.)

The court also found that Simplon Corporation and Simplon LLC maintained "separate bookkeeping records with respect to their operations, which attempted to segregate and state the manner in which funds were received and expensed." In this regard, the court noted there was no evidence that the "accounting and bookkeeping methodology" reflected "theft, fraud, [or] self-dealing . . . ."

The court also stated that "in exercising its power in equity," it was relevant to consider Palmer's conduct, noting that the evidence showed Palmer "generated" the settlement agreement (after the first lawsuit) for the purpose of "caus[ing] third party lenders to lend to the [Simplon LLC and Simplon Corporation] entities that [Palmer] . . . now claims are shams. [¶] This participation and [Palmer's continued actions supporting the] legitimacy of the [two] entities does not support the exercise of the court's equitable powers . . . ." The court also emphasized that Palmer was a potential beneficiary of all of these transactions and was kept fully informed (through his counsel) of these efforts, and never objected to defendants' actions.

The court additionally found it relevant that the individual defendants did not "represent[ ] that [they] were . . . personally financially responsible for the debts" of Simplon Corporation or Simplon LLC, and that when the entities entered into contracts with third parties, "they did so in the proper entity form." The court also noted there was no evidence that any of the individual defendants received any funds from the transactions, and thus "the Court cannot determine that it would be equitable for [these defendants] to be responsible to [Palmer] as an investor in the project." The court also stated that the fact that many of the transactions occurring after the initial failure of the project were "extremely complex and convoluted and involved other properties and entities controlled by the defendants does not mandate the conclusion that they were unfair or fraudulent." The court further observed that: "The context of the Court's rulings in this phase of the proceedings includes consideration that the jury returned verdicts in this matter in favor of the defendants on the allegations of fraud, deceit and

concealment in connection with their activities personally upon the entry of Mr. Palmer into the investments he made."

The court ultimately concluded that Palmer's "proof" did not establish "fraud or unfairness" would result if the corporate structures were respected and it would be inequitable under the circumstances to require the individual defendant to be held liable for the corporate acts, particularly because all parties fully understood and intended that the activities of Simplon LLC and Simplon Corporation were acts by entities with limited liability, rather than acts by the individuals. The court stressed that it had put "a lot of thought" into its alter ego ruling, and understood that "the entire project has been a tremendous financial disaster for [all of] those involved . . . ."

### *C. Palmer's Appellate Contentions*

#### *1. Sufficiency of Evidence*

Palmer challenges the sufficiency of the evidence to support the court's finding that Palmer did not prove the applicability of the alter ego doctrine. However, this argument is waived because Palmer did not provide a sufficient record to examine this contention.

It is a fundamental tenet of appellate law that the lower court's judgment is presumed to be correct. As the party seeking reversal, it is the appellant's burden to provide an adequate record to overcome the presumption of correctness and show prejudicial error. (See *Denham v. Superior Court*, *supra*, 2 Cal.3d at p. 564; *Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 132.) We must make all reasonable inferences favoring the court's order, and must affirm the judgment if any possible

grounds exist for the trial court to have reached its factual conclusions. (See *Gee v. American Realty & Construction, Inc.* (2002) 99 Cal.App.4th 1412, 1416; *Vo v. Las Virgenes Municipal Water Dist.* (2000) 79 Cal.App.4th 440, 447-448.) Any ambiguity in the record is resolved in favor of the judgment. (*Ibid.*)

In this case, it is undisputed that the court relied on evidence presented during the entire trial to reach its conclusions, but Palmer designated only a small portion of that record to be included in the appellate record. Without a complete reporter's transcript of the relevant proceedings and access to the relevant exhibits, we must presume the facts supported the court's findings. An appellant who attacks a judgment, but supplies an inadequate factual record is precluded from asserting that the evidence was insufficient to support the judgment. (*City of Chino v. Jackson* (2002) 97 Cal.App.4th 377, 385.) In the absence of a complete transcript of the proceedings, we cannot evaluate issues requiring a factual analysis and must presume "the trial court acted duly and regularly and received substantial evidence to support its findings." (*Stevens v. Stevens* (1954) 129 Cal.App.2d 19, 20; see *Pringle v. La Chapelle* (1999) 73 Cal.App.4th 1000, 1003; *Hodges v. Mark* (1996) 49 Cal.App.4th 651, 657.)

Further, Palmer waived his substantial evidence challenge by failing to present a summary of all of the evidence presented at the trial. "Failure to set forth [all of] the material evidence on an issue waives a claim of insufficiency of the evidence." (*Brockey v. Moore* (2003) 107 Cal.App.4th 86, 96.) Parties challenging a trial court's decision based upon the claimed absence of substantial supporting evidence "are required to set forth in their brief *all* the material evidence on the point and *not merely their own*

*evidence. Unless this is done the error is deemed waived.' "* (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881; *Myers v. Trendwest Resorts, Inc.* (2009) 178 Cal.App.4th 735, 749.) By discussing only evidence tending to support his position, Palmer waived his right to challenge the sufficiency of the evidence to support the court's conclusions. (See *Myers, supra*, 178 Cal.App.4th at p. 749; *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246; *Brockey v. Moore, supra*, 107 Cal.App.4th at pp. 96-97.)

## 2. Estoppel Defense

Palmer alternatively contends the court erred by allowing Scull to assert an "estoppel defense" because Scull did not plead this theory as an affirmative defense in his answer.

In the proceedings below, Scull argued that Palmer should be estopped *as a matter of law* from asserting an alter ego claim because Palmer was a member of the business entity (Simplon LLC) that Palmer was seeking to disregard and because Palmer specifically entered into contracts recognizing the separate existence of Simplon LLC and Simplon Corporation. However, the trial court *rejected* this estoppel argument, and allowed Palmer to litigate his alter ego claim, despite that he was a part of the entity that he was seeking to avoid. Because Scull did not prevail on the estoppel defense, Palmer's appellate argument that the judgment must be reversed based on deficiencies with this defense is without merit.

To the extent Palmer argues the court erred in considering issues *related to an* estoppel defense, the argument is also unavailing. As summarized above, in its statement of decision, the court discussed the fact that Palmer had full knowledge and

understanding of the business/corporate structure of Simplon LLC and Simplon Corporation, including the extent of each entity's capitalization, and that Palmer had reaffirmed the status of these business entities to third parties while attempting to obtain additional financing after the first lawsuit. The court found this evidence to be a relevant consideration (along with many other factors) in its decision that Palmer did not prove the alter ego doctrine was necessary to avoid a fraud or injustice under the circumstances of this case.

The court's discussion of, and reliance on, these factors was appropriate. To show the applicability of the alter ego doctrine, the moving party must show the failure to disregard the entity "would sanction a fraud or promote injustice." (*Misik v. D'Arco* (2011) 197 Cal.App.4th 1065, 1073.) The fact that a party seeking to apply the alter ego doctrine was a member of the entity and fully understood (and potentially benefited from) the entity's limited liability status, and promoted its corporate existence to third parties, were proper matters to be considered by the court in determining whether Palmer met his burden on this element.

Moreover, contrary to Palmer's assertions, it was unnecessary for Scull to have specifically pled estoppel as an affirmative defense. The court and parties were on notice that Scull intended to raise the issue of Palmer's participation in the entity in defending against the alter ego claim. Further, because alter ego is an equitable doctrine, the facts relating to Palmer's knowledge and consent were part of Palmer's affirmative case. Even without estoppel being pled as an affirmative defense, the court could properly consider

Palmer's expectations and knowledge in determining whether the application of the doctrine would promote equity under the circumstances.

### 3. *Court's Reliance on Jury's Finding of No Fraud*

Palmer alternatively contends we must reverse the judgment on the alter ego issue because the trial court erred by relying "heavily" on the fact that he did not prove Scull had engaged in "actual fraud." The argument is factually unsupported. The record does not show Palmer's failure to prove "actual fraud" was a dispositive factor in the court's analysis. In its statement of decision, the court said it "consider[ed]" the fact that the jury found Palmer did not prove his fraud claim against the individual defendants. But the court made clear it understood it was not necessary for Palmer to prove fraud to show the applicability of the alter ego doctrine. The alter ego doctrine applies if recognizing the entity's existence would "sanction a fraud *or promote injustice*." (*Misik v. D'Arco, supra*, 197 Cal.App.4th at p. 1073, italics added.) Applying this principle, the court found neither fraud *nor* injustice would result if the corporate entities were respected. The fact that an individual defendant engaged in fraudulent conduct is a relevant, but not necessary, factor for applying the alter ego doctrine. (*Id.* at p. 1074.) The court's statement of decision reflects the court understood, and properly applied, this legal principle.

### 4. *Evasion of Contractual Obligations*

Palmer additionally contends the court "erred when it ignored evasion of contractual obligations as a basis for imposing alter ego liability." (Emphasis omitted.) In support, Palmer cites decisions in which the court applied the alter ego doctrine based

on evidence that an individual was using the corporate form to avoid contractual obligations. (See *Moore v. Phillips* (1959) 176 Cal.App.2d 702; *Kohn v. Kohn* (1950) 95 Cal.App.2d 708.) However, the court's statement of decision shows the court was fully aware of this legal principle, but found it factually inapplicable to the case. In setting forth the law, the trial court noted the alter ego doctrine may be applied where a party contracts with another "with the intent to avoid performance by use of a corporate entity as a shield against personal liability. . . ." But the court found that the evidence did not support that the individual defendants (including Scull) used the corporate entities to avoid contractual obligations owed to Palmer. As discussed, we are bound by this factual finding on the record before us.

## II. *Palmer's Challenge to Attorney Fees Award*

Palmer next contends the court erred by finding Scull was a prevailing party on Palmer's breach of contract claim and awarding Scull attorney fees. Palmer has forfeited this contention by failing to cite to any relevant portion of the appellate record. Palmer provides no citation to the trial record regarding Scull's motion or evidence supporting his attorney fees request, Palmer's objections to the requested attorney fees, the court's rulings on the motion, or the court's order awarding the attorney fees.

An appellant bears the burden of showing error on appeal and this burden includes supporting its arguments with precise citations to the appellate record. (See *State Farm Fire & Casualty Co. v. Jioras* (1994) 24 Cal.App.4th 1619, 1625, fn. 4; *McComber v. Wells* (1999) 72 Cal.App.4th 512, 522-523.) In the absence of these citations, a court

may treat the argument as waived. (*City of Lincoln v. Barringer* (2002) 102 Cal.App.4th 1211, 1239; *Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856.)

In any event, we find Palmer's arguments are unsupported on the merits.

From our independent review of the record, we have determined that Scull initially requested approximately \$353,047.50 in attorney fees under section 1717 as a prevailing party on Palmer's tort and contract causes of action. Over Palmer's objections, the court ultimately ordered Palmer to pay \$134,469.36 in attorney fees to Scull. In awarding this amount, the court stated it was relying on an attorney fees provision in the litigation forbearance agreement (signed by Palmer and Scull), and that this provision applies only to contract-based claims. The court thus awarded Scull only those fees incurred in defense of Palmer's contract claims. The court also rejected Palmer's argument that Scull did not prevail because he was a controlling officer of a nonprevailing corporation.

On appeal, Palmer does not challenge the evidence supporting the amount of the fees incurred by Scull in defending the contract claim, but argues the court erred in finding Scull was a prevailing party.

In an action on a contract, section 1717 permits an award of attorney fees to the prevailing party based on an attorney fees contractual provision. "[T]he party prevailing on the contract shall be the party who recovered *a greater relief in the action on the contract.*" (§ 1717, subd. (b)(2), italics added.) Although a court may determine there is no prevailing party, the California Supreme Court has held that when a party obtains a " 'simple, unqualified win' " by completely prevailing on, or defeating, the contract claims in the action, and the contract contains a provision for attorney fees, the successful party

is entitled to attorney fees as a matter of right, eliminating the trial court's discretion to deny fees under section 1717. (*Hsu v. Abbata* (1995) 9 Cal.4th 863, 875-877 (*Hsu*.)

In this case, the record shows Scull obtained an "unqualified win" on Palmer's contract claims asserted against him. In the second phase, the jury found Palmer did not prove his breach of contract claim asserted against Scull, and in the third phase, the court found that Palmer did not prove Scull's alter ego liability for the judgments against Simplon LLC and Simplon Corporation. Thus, the court properly awarded Scull attorney fees under the attorney fees provision in the litigation forbearance agreement.

Palmer argues the court erred in finding that Scull was the prevailing party because "Scull presented a joint defense with Simplon Corporation" and Scull was a principal in various entities that were found liable in the action. He argues that the court abused its discretion in awarding Scull fees because "the Palmers . . . achieved their goal of obtaining multi-million dollar judgments against a majority of defendants, including . . . Evans, Hart, Simplon [LLC] and Simplon Corporation."

The argument is unpersuasive. The fact that Palmer was successful against other defendants does not show the court erred in finding Scull was a prevailing party on Palmer's contract claims asserted against him. To the extent Palmer was the prevailing party against other parties on claims governed by a contractual provision, he was entitled to seek attorney fees on those claims. But there is no authority permitting him to bootstrap this success to his claims against Scull.

We likewise reject Palmer's argument that the fact he was a prevailing party against corporations owned or controlled by Scull creates a basis for finding Scull

personally liable for the attorney fees. A main purpose of the corporate form or a limited partnership is to limit the liability of the individuals who manage the entity. Absent a basis for alter ego liability, this statutory form must be respected and cannot be used as a springboard for imposing individual liability. (See *Hollywood Cleaning & Pressing Co. v. Hollywood Laundry Service, Inc.* (1932) 217 Cal. 124, 127-131 (*Hollywood Cleaning*)). This well-settled principle applies to preclude individual liability for an entity's attorney fees. Absent an alter ego finding, it is the nonprevailing corporation, and not an individual shareholder, that is liable to a prevailing party for section 1717 attorney fees.

In arguing for a contrary conclusion, Palmer cites *Hilltop Investment Associates v. Leon* (1994) 28 Cal.App.4th 462. In *Hilltop*, several corporate/partnership entities were found liable to respondents, but the court refused to hold an individual shareholder liable under the alter ego doctrine for the acts of these entities. (*Id.* at pp. 464-465.) When the individual sought attorney fees for prevailing on the claim against him, the trial court found " '[f]airness dictates that [the individual] should not be declared the prevailing party' " because the evidence shows the individual " 'was responsible for the diversion of funds [to] which [the respondents] were rightfully entitled.' " (*Id.* at p. 465.) The appellate court affirmed the trial court's exercise of discretion, concluding that although "[t]echnically speaking, appellant was 'a prevailing party'. . . respondents were also prevailing parties in relation to the partnership over which appellant exerted control" and thus the trial court could conclude the "result was a draw . . . ." (*Id.* at p. 468.)

*Hilltop* is unhelpful on the issues before us. First, as this court has noted, *Hilltop* was decided before the California Supreme Court's *Hsu* decision, and therefore there is a substantial question as to whether it is still viable. (*Silver Creek, LLC v. BlackRock Realty Advisors, Inc.* (2009) 173 Cal.App.4th 1533, 1540-1541; see *Hsu, supra*, 9 Cal.4th at pp. 875-876.) *Hsu* concluded that where, as here, one party obtains an unqualified successful result, that party is entitled to attorney fees under section 1717 and the trial court has no discretion to determine there is no prevailing party. (*Hsu, supra*, 9 Cal.4th at pp. 875-876.) Moreover, even assuming *Hilltop* survives *Hsu*, *Hilltop* does not stand for the broad proposition that a managing director/officer of a corporation who is sued individually and prevails on this claim cannot be found to be a prevailing party if the corporation is found liable. This holding would undermine the fundamental principle that a corporation is a legal entity that has an existence separate from its shareholders and officers/directors. (See *Hollywood Cleaning, supra*, 217 Cal. at pp. 127-131.)

At most *Hilltop* supports a conclusion that a trial court retains discretion to find no prevailing party under certain circumstances where the prevailing party was in fact a cause of the opposing party's losses. However, on the record before us, there is no showing that Scull was in a position similar to the individual in *Hilltop*. The trial court did not find Scull was responsible for Palmer's losses for which the corporate entities were found liable. Thus, even assuming the court here had the discretion to find there was no prevailing party, the court did not abuse its discretion by finding that Scull — who prevailed on each and every claim asserted against him by Palmer and was found not

to have engaged in fraud or unfair conduct — was entitled to attorney fees as a prevailing party under section 1717.

### III. *Cross-Appeal: Scull's Challenge to Attorney Fees Award*

In his cross-appeal, Scull contends the court erred in refusing to award him attorney fees incurred *in defending Palmer's tort action* based on a provision in the subscription agreement signed by Palmer.

#### A. *Relevant Background Facts*

Scull was not a party to the subscription agreement; it was between Simplon LLC and Palmer. The subscription agreement set forth the terms under which Palmer agreed to invest funds in the project by purchasing "Units" or "Securities" from Simplon LLC. In the agreement, Palmer stated he had reviewed the operating agreement, understood the risks, was provided full information, and was not relying on any representations made by Simplon LLC or its "directors, officers, agents, or employees."

Palmer later sued Scull, alleging that he made false representations to induce Palmer's investment, intentionally failed to disclose a material fact, and misappropriated Palmer's money. The jury found Palmer did not prove those claims. Scull then sought to recover attorney fees based on his prevailing on these tort claims under an indemnity provision in the subscription agreement stating:

"(n) The undersigned [Palmer] understands the meaning and legal consequences of the representations, warranties, covenants, and other agreements contained in this Subscription Agreement, and the undersigned understands that the Company has relied upon such representations, warranties, covenants, and agreements, including those with respect to compliance with applicable securities laws, rules, and regulations, and the undersigned hereby agrees to

indemnify, defend and hold harmless the Company, the Managing Member, and their respective officers, agents, attorneys, and employees, from and against any and all loss, damage, or liability, together with all costs and expenses (including attorneys' fees and disbursements), which any of them may incur by reason of (i) any breach of any of the representations, warranties, covenants, or agreements of the undersigned contained in this Subscription Agreement, or (ii) any false, misleading, incomplete, or inaccurate information contained in this Subscription Agreement. All representations, warranties, and covenants contained in this Subscription Agreement, and the indemnification contained in this Section, shall survive the acceptance of this Subscription Agreement."

The trial court found this provision did not support an attorney fees award because the provision applies to fees incurred in defense of claims brought by third parties resulting from Palmer's breach of the subscription agreement, and in this case Scull was seeking fees incurred in defending claims brought against him by Palmer. We agree with the court's interpretation of the subscription contract.

#### B. *Analysis*

"[S]ection 1717 does not apply to tort claims; it determines which party, if any, is entitled to attorneys' fees on a *contract claim only*. [Citations.] As to tort claims, the question of whether to award attorneys' fees turns on the language of the contractual attorneys' fee provision, i.e., whether the party seeking fees has 'prevailed' within the meaning of the provision and whether the type of claim is within the scope of the provision." (*Excess Electronix v. Heger Realty Corp.* (1998) 64 Cal.App.4th 698, 708.)

In this case, the provision relied upon by Scull as a basis for recovering his attorney fees incurred in defense of the tort claim is an indemnity provision in which Palmer agreed to "indemnify, defend, and hold harmless" Simplon LLC and its officers,

employees, and agents for losses and damages incurred (including attorney fees) because of *Palmer's* breach of the subscription agreement. "Indemnity agreements are construed under the same rules which govern the interpretation of other contracts . . . . [T]he contract must be interpreted so as to give effect to the mutual intention of the parties . . . [which is] ascertained from the 'clear and explicit' language of the contract."

(*Continental Heller Corp. v. Amtech Mechanical Services, Inc.* (1997) 53 Cal.App.4th 500, 504 (*Continental Heller*)). Moreover, because the purposes of an indemnification agreement (to unilaterally benefit the indemnitee under the specified circumstances) differ from the purpose of a prevailing party attorney fees provision (to benefit the prevailing party), the courts have held that section 1717 does not apply to the interpretation of indemnification clauses. (*Carr Business Enterprises, Inc. v. City of Chowchilla* (2008) 166 Cal.App.4th 14, 20; *Baldwin Builders v. Coast Plastering Corp.* (2005) 125 Cal.App.4th 1339, 1344; *Campbell v. Scripps Bank* (2000) 78 Cal.App.4th 1328, 1337.)

Under the plain language of the indemnity provision at issue here, Palmer agreed to indemnify the specified parties (including officers/directors/agents of Simplon LLC) for damages resulting from third party claims against them. This agreement cannot be reasonably interpreted to mean that Palmer agreed to pay attorney fees to the prevailing party in a tort action that did not involve Scull's right to indemnity under the agreement.

Scull did not bring an indemnity claim against Palmer, and thus he is not entitled to recover attorney fees as an element of his damages under the subscription agreement's indemnification clause. Moreover, there was no showing on the record before us that

Scull suffered any damages resulting from a third party claim. There is no language in the indemnity provision or any other provision of the subscription agreement showing the parties intended Scull to recover attorney fees as a prevailing party in a tort action, where Scull did not seek indemnification arising from a third party claim.

In this regard, Scull's reliance on *Continental Heller, supra*, 53 Cal.App.4th 500 is misplaced. In *Continental Heller*, the general contractor brought an action against its subcontractor for breach of express indemnity provisions contained in a contract between the parties, and the contract contained a provision providing for attorney fees to the prevailing party in a case involving a breach of the indemnity agreement. (*Id.* at pp. 508-509.) The case here is unlike *Continental Heller* because neither party sought to enforce an indemnity provision against the other. Scull never brought an action alleging that Palmer breached the indemnity provision and there is nothing in the subscription agreement providing for attorney fees to the prevailing party in a tort action that did not arise from an indemnification claim.

In reaching our conclusion on the merits of Scull's cross-appeal, we reject Palmer's arguments that we should dismiss Scull's cross-appeal because he did not abide by California Rules of Court, rule 8.208, which requires parties to serve and file a certificate identifying entities or persons with specified financial interests or other interests in the outcome of the proceedings. Scull did file this certificate, and there is nothing in the record showing the information in the certificate was incomplete or improper. Moreover, Palmer's attempt to use the certification requirement to establish trial court error with

respect to his own appellate arguments is unavailing. We deny Palmer's request for judicial notice of documents that pertain to this contention.<sup>3</sup>

DISPOSITION

Judgment affirmed. The parties to bear their own costs on appeal.

HALLER, J.

WE CONCUR:

HUFFMAN, Acting P. J.

McDONALD, J.

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<sup>3</sup> Palmer mailed a letter to this court one day before oral argument notifying the court of two recent California Court of Appeal decisions. Because the letter was not received until after the case was submitted, the letter was untimely. In any event, the authorities cited are consistent with our conclusions in the case.