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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

CRAIG IMBACH et al.,

Plaintiffs and Appellants,

v.

FOUR SEASONS AUTO GROUP, INC. et
al.,

Defendants and Respondents.

E059228

(Super.Ct.No. CIVRS912897)

OPINION

APPEAL from the Superior Court of San Bernardino County. Donald R. Alvarez,
Judge. Affirmed.

Richard V. McMillan for Plaintiffs and Appellants.

Orrock Popka Fortino Tucker & Dolen and Micheal A. Fortino for Defendants and
Respondents.

I

INTRODUCTION

In 2008, Darryn Kamae, a New Mexico used car dealer, agreed to sell a 2006
Yukon SUV to his sister and her husband, plaintiffs and appellants Jerrina and Craig

Imbach (Imbachs). The vehicle was repossessed in California by defendant Four Seasons Auto Group, Inc. (Four Seasons) in March 2009. The Imbachs sued Four Seasons and its owner, defendant and respondent Oscar Amezcua. During a jury trial, the court granted Amezcua's motion for a nonsuit. The Imbachs obtained a judgment awarding damages of \$38,805.92 against defendant Four Seasons only.

On appeal, the Imbachs argue the trial court should not have granted Amezcua's motion for nonsuit, which was based on the absence of evidence of his alter ego liability. The Imbachs contend the trial court should not have excluded Amezcua's own declarations and evidence obtained from the New Mexico State website showing his alter ego liability. Additionally, the Imbachs claim the court erred in awarding to Amezcua all of his statutory costs as a prevailing party without making an apportionment of the amount of costs between him and Four Seasons, which was not a prevailing party.

An initial difficulty with the appeal is the Imbachs did not designate as part of the appellate record the complete clerk and reporter's transcripts and omitted their own trial testimony as witnesses. Because of that omission we cannot review the whole record to determine whether precluding the proffered evidence was prejudicial to them.

Additionally, after reviewing the substance of the proffered evidence, we conclude it would not have served to establish that Amezcua was the alter ego of Four Seasons. On the issue of apportionment, we conclude there was no evidence of a unity of interest between Amezcua and Four Seasons, requiring an apportionment of costs between them

as prevailing and nonprevailing party defendants. We affirm the judgment.¹

II

PROCEDURAL AND FACTUAL BACKGROUND

Because of the inadequate appellate record, we derive most of the factual statement from the allegations of the second amended complaint (SAC), although we recognize the allegations are not actual evidence.

Jerrina Imbach's brother, Darryn Kamae, owned Four Seasons, the New Mexico used car dealership that he had purchased from Amezcua in December 2007. In 2008, Kamae agreed to sell the Imbachs a 2006 GMC Yukon for \$21,500, including a \$5,000 deposit. On August 1, 2008, the Imbachs sent the balance of \$16,500 by wire transfer to Animas Credit Union.

On September 25, 2008, Amezcua's lawyer wrote the Imbachs in California demanding \$18,000 in full payment for the Yukon. On October 1, 2008, Amezcua and Four Seasons obtained a default judgment in New Mexico against Kamae, awarding them the Four Seasons business and assets, including the sales agreement with the Imbachs. On October 27, 2008, Amezcua wrote the Imbachs a letter, explaining that the credit union had applied the \$16,500 wire transfer to cover insufficient funds and that the Imbachs needed to pay \$18,000 to obtain title to the Yukon vehicle. In February 2009, Amezcua and Four Seasons obtained a final judgment in New Mexico against Kamae for

¹ We do not review the question of standing raised by Amezcua in his respondent's brief. He has not filed a cross-appeal on this issue. Because we affirm the judgment, we also do not discuss the issue plaintiffs raise regarding jury instruction upon retrial.

more than \$1.3 million and for repossession of the Yukon. Amezcua and Four Seasons hired U.S. Recovery to repossess the Yukon on March 13, 2009, in Chino, California, pursuant to the New Mexico judgment.

In April 2011, the Imbachs filed the SAC for possession of personal property and conversion, in which they alleged that Amezcua was the alter ego of Four Seasons.

Amezcua and Four Seasons separately filed general denials to the complaint.

As part of their opposition to defendants' motion for judgment on the pleadings, the Imbachs asked the court to take judicial notice of the website for the New Mexico Secretary of State. The screen capture—dated February 7, 2013—lists the date of incorporation for Four Seasons as October 21, 2005, and its status as “Cancellation.” Oscar Amezcua is the agent, director, president, and secretary, and Cynthia Amezcua is the vice-president. The court denied the request for notice, stating “[t]he court should not take judicial notice of documents, including facts from an internet site that contain unauthenticated statements with no indication of the author, custodian, date, creation, purpose, reliability or veracity” and citing *Hartwell Corp. v. Superior Court* (2002) 27 Cal.4th 256, 279, footnote 12. The court denied the motion for judgment on the pleadings.

Subsequently, during the jury trial in March 2013, the Imbachs asked the court to take judicial notice of two declarations filed by Amezcua in earlier summary judgment proceedings. The declarations included the information that Amezcua was the sole owner of Four Seasons, and Four Seasons owned the Yukon vehicle, which defendants had caused to be repossessed from the Imbachs. The declarations also included copies of

documents showing that Four Seasons owned the Yukon and had pursued its repossession in March 2009. The court denied the Imbachs' request for judicial notice.

After the Imbachs concluded their trial presentation (which is not part of the appellate record), Amezcua made a motion for nonsuit on the grounds no evidence had been presented of his alter ego liability. (Code Civ. Proc., § 581c.) The court granted the motion.

The jury found in favor of the Imbachs and the final award of damages was \$38,805.92 against Four Seasons but not against Amezcua as an individual. Amezcua was awarded his costs of \$3,043.08.

III

DISCUSSION

The Imbachs argue on appeal that the trial court erred by not taking judicial notice of an official record for New Mexico, which listed Oscar Amezcua as holding several offices with Four Seasons in 2013. Furthermore, the Imbachs claim Amezcua's declarations identifying him as the sole owner of Four Seasons were sufficient to demonstrate that Amezcua was an alter ego of the corporation. Additionally, the Imbachs suggest that Amezcua misrepresented the Yukon's title to the New Mexico court. Evidence of these claims was not presented at trial, or in the record designated for appeal, and is not found in the proffered evidence.

A. Standard of Review

The Imbachs have the burden of affirmatively demonstrating error by providing the reviewing court with an adequate record. (*Bianco v. California Highway Patrol*

(1994) 24 Cal.App.4th 1113, 1125.) An inadequate record requires that the issue be resolved against the appellant. (*Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502.) “In reviewing a judgment of nonsuit, this court will review the evidence in the light most favorable to the party appealing the nonsuit. [Citations.] However, appellant’s omission of the reporter’s transcript precludes appellant from raising any evidentiary issues on appeal. [Citation.]” (*Hodges v. Mark* (1996) 49 Cal.App.4th 651, 657.) Because the reversal of a nonsuit requires the review of the evidence presented to the trial court, and the Imbachs did not provide complete reporter and clerk’s transcripts, including their own testimony, as well as any evidence of alter ego liability, we cannot fully address the Imbachs’ claim.

B. Alter Ego Liability

Code of Civil Procedure section 581c authorizes granting a motion for nonsuit after the plaintiff completes presenting his or her evidence in a jury trial. (*Castaneda v. Olsner* (2007) 41 Cal.4th 1205, 1212.) In ruling on the motion, the trial court must indulge in every legitimate inference that may be drawn in plaintiff’s favor, disregarding any conflicting evidence and accepting the evidence most favorable to the plaintiff as true. A nonsuit is proper if the evidence viewed in this light would not be sufficient to support a jury verdict in plaintiff’s favor. (*Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 291.) Although the court may infer facts from the evidence, those inferences must be logical and reasonable and cannot be based on mere possibility, suspicion, imagination, speculation, supposition, surmise, conjecture or guess work. (*Kidron v. Movie Acquisition Corp.* (1995) 40 Cal.App.4th 1571, 1580-1581.)

In this case, no evidence in this appellate record supported a finding by the jury that Amezcua was the alter ego of Four Seasons. The two requirements for alter ego liability “are that there be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist and that adherence to the fiction of separate existence would, under the circumstances, promote fraud or injustice.” (*Watson v. Commonwealth Ins. Co.* (1936) 8 Cal.2d 61, 68.)

As comprehensively identified in *Associated Vendors, Inc. v. Oakland Meat Co.* (1962) 210 Cal.App.2d 825, 838-840, the pertinent factors for alter ego liability include: “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 than corporate uses [citations]; the treatment by an individual of the assets of the corporation as his own [citations]; the failure to obtain authority to issue stock or to subscribe to or issue the same [citations]; the holding out by an individual that he is personally liable for the debts of the corporation [citations]; the failure to maintain minutes or adequate corporate records, and the confusion of the records of the separate entities [citations]; the identical equitable ownership in the two entities; the identification of the equitable owners thereof with the domination and control of the two entities; identification of the directors and officers of the two entities in the responsible supervision and management; sole ownership of all of the stock in a corporation by one individual or the members of a family [citations]; the use of the same office or business location; the employment of the same employees and/or attorney [citations]; the failure to adequately capitalize a corporation; the total absence of corporate assets, and undercapitalization [citations]; 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 [citations]; the concealment and misrepresentation of the identity of the responsible ownership, management and financial interest, or concealment of personal business activities [citations]; the disregard of legal formalities and the failure to maintain arm's length relationships among related entities [citations]; the use of the corporate entity to procure labor, services or merchandise for another person or entity [citations]; 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 [citations]; the contracting with another with 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 of illegal transactions [citations]; and the formation and use of a corporation to transfer to it the existing liability of another person or entity [citations]. A perusal of these cases reveals that in all instances several of the factors mentioned were present.”

Here all that the Imbachs could demonstrate is that Amezcua was the sole owner of Four Seasons and both were represented by the same lawyer. The New Mexico public document was identified, although not authenticated, as a “New Mexico Corporation Division Efile” from the Public Regulation Commission of the Corporations Division. Significantly, it was dated February 7, 2013, almost four years after the Yukon was repossessed. It certainly offered no evidence that Amezcua was an alter ego of Four Seasons on the relevant dates in 2008 and 2009. Additionally, Amezcua’s declarations

stating that he owned Four Seasons, the legal owner of the Yukon, were also insufficient to pierce the corporate veil. The Imbachs presented no evidence of comingling of funds or any other pertinent factor that would indicate a unity of interest between Amezcua and Four Seasons.

A. Unity of Interest

The Imbachs argue that the standard definition of prevailing defendant in Code of Civil Procedure section 1032, subdivision (a)(4), does not apply, and Amezcua, a prevailing party, is not entitled to costs as a matter of right because Amezcua and Four Seasons were united in interest and had joined in making the same defense: “‘Instead the allowance or disallowance of costs to the prevailing defendant lies within the sound discretion of the court, as does the apportionment of those costs, if allowed.’ . . . Put another way, ‘where one of multiple, jointly represented defendants presenting a unified defense prevails in an action, the trial court has discretion to award or deny costs to that party.’” (*Wakefield v. Bohlin* (2006) 145 Cal.App.4th 963, 984.)

Here the two defendants employed separate and distinct defenses. Four Seasons defended the action on the grounds that it had a lawful order issued by the New Mexico court giving it the right to repossess the Yukon. The sole claim against Amezcua was that Four Seasons was his alter ego. There was no evidence that Amezcua repossessed the Yukon as an individual rather than acting as a corporate officer. No unity of interest permitted the court to exercise discretion in the award of costs or to make an allocation as requested by the Imbachs.

In *Smith v. Circle P Ranch Co.* (1978) 87 Cal.App.3d 267, 272, the court set forth

the basic elements of unity of interest, making it discretionary for the court to grant costs to a prevailing defendant: “Section 1032, subdivision (b), establishes two requirements which must be met to determine which defendants are entitled to mandatory recovery of an award of costs in those cases where there are several defendants and plaintiff fails to recover judgment against all. Those requirements are: (1) Defendants must not be united in interest; *and* (2) defendants must make separate defenses by separate answers. . . .” In this case, separate answers were filed by Four Seasons and Amezcua, and they asserted separate defenses. As a matter of law, there was no unity of interest permitting the trial court, in its discretion, to deny mandatory recoverable costs to Amezcua as the prevailing party or to allocate the costs between Amezcua and Four Seasons. (*Textron Financial Corp. v. National Union Fire Ins. Co.* (2004) 118 Cal.App.4th 1061, 1075; *Webber v. Inland Empire Investments, Inc.* (1999) 74 Cal.App.4th 884, 920.)

IV

DISPOSITION

Based on this record, we affirm the judgment in all aspects. In the interests of justice, we order the parties to bear their own costs on appeal.

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CODRINGTON

J.

We concur:

HOLLENHORST

Acting P. J.

MILLER

J.