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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

BAYSHORE DEVELOPMENT
COMPANY LLC et al.,

Cross-complainants and
Respondents,

v.

SUSAN HARVEY et al.,

Cross-defendants and Appellants.

E059457

(Super.Ct.No. INC046806)

O P I N I O N

APPEAL from the Superior Court of Riverside County. Gloria Trask, Judge.

Affirmed.

Law Office of Michael N. Berke, Michael N. Berke; Gregory C. Pyfrom &
Associates, Inc. and Gregory C. Pyfrom for Cross-defendants and Appellants.

Law Offices of Sheldon J. Fleming and Sheldon J. Fleming for Cross-
complainants and Respondents.

I. INTRODUCTION

In this action, appellants Susan Harvey (Harvey) and Desert Pacific Properties, Inc. (DPP) obtained a judgment against respondents Bayshore Development Company LLC (Bayshore) and The Enclave at LaQuinta, LLC (Enclave LaQuinta) for \$362,832.50 in attorney fees and costs, after having prevailed on respondents' cross-complaint against them. By their cross-complaint, respondents sought to recover a \$400,000 real estate sales commission that had been paid to appellants.

Appellants filed a postjudgment motion to add three individuals and alleged alter egos of Bayshore to the judgment as additional judgment debtors: Carl McLarand, Richard Emsiek, and Ernest Vasquez. The trial court denied the motion and appellants' appeal, claiming the trial court abused its discretion in denying the motion. Appellants claim they presented "overwhelming evidence" that McLarand, Emsiek, and Vasquez were alter egos of Bayshore and Enclave LaQuinta—and focus principally on the role of McLarand in controlling the activities of the judgment debtors.

We affirm the postjudgment order denying the motion to amend the judgment. As we explain, substantial evidence supports an implied finding that neither McLarand, Emsiek, nor Vasquez were alter egos of Bayshore or Enclave LaQuinta.

II. BACKGROUND

A. *The Underlying "Nasif" Litigation*

In the present action, Bayshore and Enclave LaQuinta sued appellants, seeking the return of a \$400,000 real estate sales commission paid to DPP in connection with Enclave

LaQuinta's purchase of a 156-acre property in the Coachella Valley. The underlying litigation involved parties who are not parties to this appeal. We briefly describe the litigation in order to shed light on the basis of the cross-complaint against appellants.

In May 2004, John Powell was looking for a buyer for 156 acres of land in the Coachella Valley. Powell called appellant Harvey, a real estate broker working on behalf of DPP. Powell told Harvey he wanted to net \$20 million on the sale, and any commission Harvey earned would have to be in addition to that sales price. Powell and Harvey agreed \$400,000 would be a fair commission, and Harvey secured a buyer, Vincent D'Ambra, who agreed to pay \$20.4 million for the property.

The sellers and D'Ambra signed an option and purchase agreement requiring the sellers to pay DPP a \$400,000 commission. D'Ambra and his copurchaser, William Nasif, later agreed to allow Thomas Noya and Bayshore to purchase the property under the same terms D'Ambra and Nasif had negotiated with the sellers, in exchange for paying D'Ambra and Nasif a \$1.02 million finder's fee. During escrow, Bayshore assigned its rights to purchase the property to Enclave LaQuinta, and Enclave LaQuinta purchased the property. Noya was "an experienced knowledgeable" real estate broker, developer, and investor, and a member of both Bayshore and Enclave LaQuinta.

Bayshore, Enclave LaQuinta, and Noya then refused to pay Nasif and D'Ambra their \$1.02 million finder's fee. The trial court found that Noya, Bayshore, and Enclave LaQuinta breached the finder's fee agreement with Nasif and D'Ambra, and found Noya personally liable for the \$1.02 million finder's fee.

In addition, both of the sellers, including Powell, and the buyers, including Enclave LaQuinta and Noya, denied Harvey was their agent and claimed she was the agent of the other parties, while Harvey claimed she was a dual agent for the buyers and the sellers. The trial court found Harvey was the agent of the sellers and that the sellers had properly paid the \$400,000 commission to Harvey's company, DPP. Thus, the trial court ruled in favor of Harvey and DPP on Bayshore and Enclave LaQuinta's cross-complaint, seeking the return of the \$400,000 sales commission.

The trial court accordingly awarded judgment in favor of appellants on respondents' third amended cross-complaint for intentional and negligent misrepresentation, concealment, conversion, money had and received, and statutory violations. Appellants filed a postjudgment motion for attorney fees and costs. In April 2010, the court awarded appellants \$362,832.50 in attorney fees and costs against both Bayshore and Enclave LaQuinta.

B. The "Harvey II" Litigation

In June 2011, in an attempt to collect the judgment, appellants sued Bayshore, McLarand, Enclave at Sunrise, LLC (Enclave Sunrise), and others in *Harvey v. McLarand*, Riverside County Superior Court case No. INC1105284, assigned to the Indio branch (*Harvey II*). Among other claims, appellants alleged that McLarand and the other defendants violated the Uniform Fraudulent Transfer Act (Civ. Code, § 3439 et seq.) by transferring over \$3 million in equity, in the form of a deed of trust, from Enclave Sunrise

(not to be confused with Enclave LaQuinta) in order to avoid paying the \$362,832.50 judgment.

In October 2012, following a series of adverse rulings in *Harvey II*, appellants moved to transfer *Harvey II* from Indio to Riverside and consolidate it with the present action. In November 2012, the trial court denied the motion on the ground the operative pleadings in the present action were no longer pending. (See Code Civ. Proc., § 1048.)

C. Appellants' Motion to Add McLarand, Emsiek, and Vasquez as Additional Judgment Debtors

Then, in March 2013, appellants filed the motion in the present action to add McLarand, Vasquez, and Emsiek as additional judgment debtors to the \$362,832.50 judgment against Bayshore and Enclave LaQuinta, on the ground the three individuals were alter egos of Bayshore and Enclave LaQuinta and controlled the litigation against appellants that resulted in the \$362,832.50 judgment. Appellants alleged Bayshore and Enclave LaQuinta were judgment proof; thus, appellants were seeking “other potential sources of payment” for the judgment.

In their motion, appellants claimed the deposition testimony of McLarand in *Harvey II* and a third party judgment debtor examination of Noya “revealed [that] Carl McLarand, the CEO, President and the true managing member of Bayshore was the driving force behind the Nasif litigation, and that he manipulated the flow of money and assets between the various limited liability companies . . . draining Bayshore of all value and cash for his own selfish benefit all the while hiding behind Thomas Noya.”

Appellants claimed: “McLarand testified everything he did was approved by his partners, Richard Emsiek and Ernest Vasquez, who equally shared in the decision making process of Bayshore and the Nasif litigation, and received the same monetary benefits from looting Bayshore.” Appellants alleged that during “the Nasif litigation,” McLarand transferred the only asset Bayshore had, a 75 percent ownership interest in Enclave Sunrise, to another entity, “rendering Bayshore assetless, surviving on management fees from [Enclave LaQuinta]” and other “developments managed in some fashion by Bayshore.” By the fall of 2008, Bayshore “ceased to receive any fees and thus had no assets left,” and, according to Noya, “any funds remaining” in Enclave LaQuinta “were consumed prosecuting the case against Harvey.” Thus, appellants claimed that unbeknownst to them, Bayshore and Enclave LaQuinta were judgment proof even before appellants were awarded \$362,832.50 in attorney fees and costs in April 2010.

D. McLarand’s Deposition Testimony in Harvey II

In his deposition testimony in *Harvey II*, taken in August and December 2012, McLarand confirmed that he, Vasquez, Emsiek, and Noya were members of Bayshore. Noya was the “manager” of Bayshore and McLarand was its president and chief executive officer. McLarand explained that Bayshore was a “facilitator” and “development manager” for real estate projects, meaning Bayshore would hire architectural firms, civil engineers, contractors, and other consultants for a development project and would be compensated for its services with development fees paid from the project’s revenues or profits.

McLarand explained that Bayshore was “not a development company similar to, say, Standard Pacific or Irvine Company . . . in which those companies have their own capital . . . [and] provide[] the capital required to purchase and develop the particular project. [¶] . . . Bayshore was sort of an intermediary. Bayshore would seek, acquire, and become the development manager, but others were required to put in equity to actually purchase and develop the property. As a consequence, TES and other entities like that were developed subsequent to the initial acquisition of the property to reflect the actual equity ownership of various capital partners.” Bayshore located the property that was later developed as single-family residences through Enclave Sunrise, an entity owned and controlled by McLarand, Emsiek, and Vasquez.

Enclave Sunrise was Bayshore’s first development project. Initially, Bayshore received a 75 percent ownership interest in Enclave Sunrise, but transferred its interest to “TES Fund, LLC,” another entity owned and controlled by McLarand, Emsiek, and Vasquez. Bayshore was paid development fees for serving as the development manager for Enclave Sunrise.

Over several years, McLarand, Vasquez, and Emsiek contributed “well over \$5 million” to Enclave Sunrise, more than enough to purchase the development property. In order to fully develop the property and pay the project’s “ongoing expenses,” including taxes and insurance, Enclave Sunrise obtained a \$16 million loan from California Bank and Trust (CB&T). The loan was partially repaid with proceeds from home sales, leaving a \$3.2 million balance, which was paid in full in December 2008 by CFM Management,

LLC (CFM), another entity owned and controlled by McLarand, Emsiek, and Vasquez. CFM was paid around \$800,000 against its \$3.1 replacement loan and deed of trust against the property owned by Enclave Sunrise, leaving a balance of around \$2.4 million in December 2008. By August 2012, the \$2.4 million balance had not been repaid, and neither McLarand, Emsiek, nor Vasquez had received any portion of their \$5 million in capital contributions back from Enclave Sunrise. Instead, they continued paying the project's ongoing maintenance expenses through TES Fund, LLC. Between August and December 2012, Enclave Sunrise sold one more home. As of December 2012, Enclave Sunrise had an "inventory" of homes to sell.

By the fall of 2008, Bayshore had no operational income from any of the projects it had started, and "[t]he development market was terrible. There was no future in sight. And Bayshore's capital had been pretty much extinguished."

Enclave LaQuinta was Bayshore's second development project, and it failed by the fall of 2008. Its members, McLarand, Emsiek, and Vasquez, contributed over \$10 million to it, and all of that money was spent early on to purchase the property, to get the property entitled, on civil engineers, and on operational expenses.

When asked whether he participated in the "Nasif litigation" on behalf of Bayshore, McLarand responded that he was removed from the courtroom on the first day of trial at the request of appellants' counsel. McLarand approved Bayshore's decision to file the cross-complaint against appellants to recoup the \$400,000 sales commission paid to DPP on behalf of Harvey, because in his view there was a "very sketchy basis" for the

commission. McLarand, Emsiek, and Vasquez contributed money to pay Bayshore's attorney fees in prosecuting the cross-complaint against appellants.

E. Noya's Third Party Judgment Debtor Examination Testimony

McLarand authorized Noya to act on behalf of Bayshore. Noya did not believe he was a member of Bayshore. Bayshore was funded by McLarand, Emsiek, and Vasquez. Bayshore received development/management fees from Enclave Sunrise, Enclave LaQuinta, and two other projects. Enclave LaQuinta paid Bayshore a total of around \$900,000 in fees, in monthly increments of \$20,000. Bayshore paid Noya a monthly fee of \$15,000 for managing Bayshore. Bayshore also had operational expenses, including a \$4,000 monthly rental obligation for office space.

The Enclave LaQuinta project was "a complete loss" and generated no profits. After the fall of 2008, Bayshore's only business was overseeing the Enclave Sunrise project. Noya left Bayshore in April 2009 and was paid in full for his management services. After he was paid, there was little to no money left in Bayshore's bank accounts.

In December 2008, a promissory note owed by Enclave Sunrise to CB&T was refinanced by CFM. The original loan had been renewed several times, and its balance "rose and fell" based on construction costs and home sales. In the fall of 2008, McLarand decided that CB&T's terms for renewing the loan were unacceptable, and refinanced the loan through CFM in order to avoid incurring additional costs.

At McLarand's direction, Noya instructed the attorney for Bayshore and Enclave LaQuinta to sue appellants for the return of the \$400,000 real estate commission on the Enclave LaQuinta project. To Noya's knowledge, Enclave LaQuinta paid all of the attorney fees to prosecute the lawsuit; Bayshore did not. In the spring of 2009, Enclave LaQuinta ran out of money and stopped paying the attorney fees. Enclave Sunrise paid Noya to perform "in essence, a custodial role" for Enclave Sunrise from April 2009 to around June 2010.

F. The Trial Court's Ruling on the Motion

At the hearing on appellants' motion to amend the judgment, the trial court asked appellants' counsel to point to specific evidence showing that McLarand, Emsiek, and Vasquez were alter egos of Bayshore or Enclave LaQuinta. Respondents' counsel argued there was no evidence of alter ego liability, appellants were misquoting testimony, and drawing unsupported conclusions of alter ego liability. The trial court took the matter under submission, saying it would again review the papers for evidence of alter ego liability. In a subsequent order, the court summarily denied the motion.

III. DISCUSSION

A. Applicable Legal Principles

Code of Civil Procedure section 187¹ authorizes the court to amend a judgment to add alter egos of the original judgment debtor as additional judgment debtors. (*Hall*,

¹ Code of Civil Procedure section 187 provides: "When jurisdiction is, by the Constitution or this Code, or by any other other statute, conferred on a Court or judicial officer, all the means necessary to carry it into effect are also given"

Goodhue, Haisley & Barker, Inc. v. Marconi Conf. Center Bd. (1996) 41 Cal.App.4th 1551, 1554-1555.) “Amendment of a judgment to add an alter ego ‘is an equitable procedure based on the theory that the court is not amending the judgment to add a new defendant but is merely inserting the correct name of the real defendant. [Citations.]’” (*Carr v. Barnabey’s Hotel Corp.* (1994) 23 Cal.App.4th 14, 21-22.)

Amending a judgment to add new defendants as judgment debtors “requires both (1) that the new party be the alter ego of the old party and (2) that the new party had controlled the litigation, thereby having had the opportunity to litigate, in order to satisfy due process concerns.’ [Citation.]” (*Toho-Towa Co., Ltd. v. Morgan Creek Productions, Inc.* (2013) 217 Cal.App.4th 1096, 1106.)

We begin with the alter ego doctrine. The alter ego doctrine may not be invoked against a new defendant unless two conditions are present: “First, there must be ‘such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist.’ [Citation.]^[2] Second, it must be demonstrated that ‘if the acts are treated as those of the corporation alone, an inequitable result will follow.’

² In determining whether there is a unity of interest and ownership, the trial court must consider a number of factors, including “the commingling of funds and assets of the two entities, identical equitable ownership in the two entities, use of the same offices and employees, disregard of corporate formalities, identical directors and officers, and use of one as a mere shell or conduit for the affairs of the other. [Citation.] ‘No one characteristic governs, but the courts must look at all the circumstances to determine whether the [alter ego] doctrine should be applied. [Citation.]’ [Citation.]” (*Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305, 1342; see also *Zoran Corp. v. Chen* (2010) 185 Cal.App.4th 799, 811-812 [identifying “long list” factors courts may consider in determining unity of interest and ownership “‘[a]mong’ others”].)

[Citation.]” (*NEC Electronics Inc. v. Hurt* (1989) 208 Cal.App.3d 772, 777; *Misik v. D’Arco* (2011) 197 Cal.App.4th 1065, 1073.) “Alter ego is a limited doctrine, invoked only where recognition of the corporate form [or other limited liability entity] would work an injustice to a third person. [Citation.]” (*Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1269, 1285.)

Further, due process requires that the proposed additional judgment debtors, in their capacity as alter egos of an original judgment debtor, had “control of the previous litigation, and thus were virtually represented in the lawsuit.” [Citation.]” (*NEC Electronics Inc. v. Hurt, supra*, 208 Cal.App.3d at pp. 778-779.) The proposed new defendants must have had “occasion to conduct” the litigation “with a diligence corresponding to the risk of personal liability that was involved.” [Citation.]” (*Ibid.*)

Courts have emphasized that “[t]he greatest liberality is to be encouraged” (*Wells Fargo Bank, N.A. v. Weinberg* (2014) 227 Cal.App.4th 1, 7 [Fourth Dist., Div. Two]) in allowing an amendment to add additional judgment debtors to a judgment, “in order to see that justice is done” (*Greenspan v. LADT LLC* (2010) 191 Cal.App.4th 486, 508). Still, the decision to grant or deny the motion lies within the sound discretion of the trial court. (*Relentless Air Racing, LLC v. Airborne Turbine Ltd. Partnership* (2013) 222 Cal.App.4th 811, 815.) A reviewing court will not substitute its opinion for the trial court’s when the decision lies within the trial court’s discretion, there is a legal basis for the decision, and substantial evidence supports it. (*People v. ex rel. Harris v. Sarpas* (2014) 225 Cal.App.4th 1539, 1552; see also *Wollersheim v. Church of*

Scientology (1999) 69 Cal.App.4th 1012, 1013-1014 [trial court applies preponderance of evidence standard in determining whether to grant motion to add an alleged alter ego defendant to a judgment as additional judgment debtor].)

B. *The Doctrine of Implied Findings Applies*

As noted, following the hearing on the motion the court took the matter under submission and later issued an order summarily denying the motion. The court did not issue a statement of decision explaining its reasons for denying the motion, though the court would have been required to issue a statement of decision if any of the parties to the motion had timely requested one. (*Gruendl v. Oewel Partnership, Inc.* (1997) 55 Cal.App.4th 654, 659-661 [error to refuse to issue statement of decision explaining reasons for amending judgment to add additional judgment debtor on alter ego theory]; Code Civ. Proc., § 632.)³

³ A superior court is required to issue a statement of decision “upon the trial of a question of fact by the court . . . explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial,” upon the timely request of any party appearing at the trial. (Code Civ. Proc., § 632.) As a general rule, courts have refused to require trial courts to issue a statement of decision for an order denying a motion, even if the order is appealable. (*Gruendl v. Oewel Partnership, Inc.*, *supra*, 55 Cal.App.4th at p. 660; *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1294; but see Code Civ. Proc., § 1291 [statement of decision required if requested pursuant to Code Civ. Proc., § 632 “whenever an order or judgment, except a special order after final judgment, is made that is appealable”].)

Still, courts have created exceptions to this general rule and generally require a statement of decision to be issued when the motion involves important issues of fact, significant rights are affected, and a statement of decision would aid appellate review. (See *Gruendl v. Oewel Partnership, Inc.*, *supra*, 55 Cal.App.4th at pp. 660-661; cf. *City of San Diego v. Rancho Penasquitos Partnership* (2003) 105 Cal.App.4th 1013, 1044-1045.) Thus, in *Gruendl*, the court concluded the trial court should have issued a statement of decision on its order after granting a motion to amend the judgment to add

[footnote continued on next page]

A party's failure to request a statement of decision when one is available has two consequences: (1) the party waives any objection to the trial court's failure to make all findings necessary to support its decision, and (2) the appellate court applies the doctrine of implied findings and presumes the trial court made all necessary findings to the extent such implied findings are supported by substantial evidence. (*Acquire II, Ltd. v. Colton Real Estate Group* (2013) 213 Cal.App.4th 959, 970.) Here, substantial evidence supports an implied finding that neither McLarand, Emsiek, nor Vasquez were alter egos of Bayshore or Enclave LaQuinta. Thus, substantial evidence supports the order denying the motion and shows the court did not abuse its discretion in denying the motion.

C. Substantial Evidence Supports the Order Denying the Motion

Appellants claim they presented "substantial, even overwhelming" evidence that McLarand controlled the "Nasif litigation" in which Bayshore and Enclave LaQuinta sued appellants for the return of the \$400,000 commission that Harvey and DPP earned for brokering the sale of the 156-acre property to its ultimate buyer, Enclave LaQuinta. Appellants also argue they presented overwhelming evidence that McLarand (and by extension Emsiek and Vasquez), failed to treat Bayshore as a separate entity and drained Bayshore of all of its value and cash "for his own selfish benefit." In sum, appellants argue the trial court abused its discretion in denying their motion.

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the appellant as an additional judgment debtor based on the appellant's alter ego status. (*Gruendl v. Oewel Partnership, Inc., supra*, 55 Cal.App.4th at pp. 656, 659-662.) But unlike appellants here, the appellant in *Gruendl* timely requested a statement of decision. (*Id.* at p. 658; Code Civ. Proc., §§ 632, 1291.)

We find no abuse of discretion in the order denying the motion. Based on all of the evidence presented on the motion, the trial court could have reasonably concluded—and implicitly found—that appellants failed to show by a preponderance of the evidence that McLarand, Emsiek, or Vasquez were alter egos of either one of the original judgment debtors, Bayshore or Enclave LaQuinta. Specifically, the record supports an implied finding that McLarand, Emsiek, and Vasquez *did not* fail to treat Bayshore or Enclave LaQuinta as entities separate from themselves, and *did not* drain either entity of value or cash for their own benefit. (*NEC Electronics, Inc. v. Hurt, supra*, 208 Cal.App.3d at p. 777 [alter ego liability requires showing of “such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist.”].) It is therefore unnecessary to address the due process requirement—whether the record supports an implied finding that neither McLarand, Emsiek, nor Vasquez controlled the litigation of the cross-complaint by Bayshore and Enclave LaQuinta against appellants.

The record supports an implied finding that Bayshore and Enclave LaQuinta ran legitimate businesses—Bayshore as a manager of real estate development projects and Enclave LaQuinta as a vehicle for funding a specific real estate development project. By the end of 2008, the Enclave LaQuinta project was “a complete loss” for McLarand, Emsiek, and Vasquez. After the end of 2008, Bayshore’s only business, other than pursuing the cross-complaint for the return of the \$400,000 commission from appellants, was its continued oversight, through Noya, of the Enclave Sunrise project. By early 2010, when appellants were awarded \$362,832.50 in attorney fees and costs, neither

Bayshore nor Enclave LaQuinta had sufficient funds to pay the judgment. Though, from the time they filed their cross-complaint, Enclave LaQuinta and Bayshore should have foreseen that they would be required to pay appellants' attorney fees and costs if appellants prevailed on the cross-complaint, Enclave LaQuinta and Bayshore apparently paid their other creditors and ran out of money by the time appellants were awarded fees and costs in early 2010.⁴

Appellants' focus on McLarand's refinancing of Enclave Sunrise's \$3.1 million loan balance to CB&T, in late 2008 through CFM, an entity solely owned and controlled by McLarand, is a red herring. Appellants call the loan replacement "a manipulation" and suggest it shows McLarand simply treated Enclave Sunrise, CFM, and the other entities as mere extensions of himself. The record shows otherwise, however. The Enclave Sunrise project had nothing to do with the litigation against appellants, or Harvey's \$400,000 real estate commission. Its purpose was to develop a different real estate project—completely separate from the Enclave LaQuinta project and Bayshore's management services. That McLarand personally refinanced the \$3.1 million construction loan balance that Enclave Sunrise owed to CB&T, through his wholly-owned entity CFM, in 2008, is utterly insufficient to prove he was the alter ego of Enclave LaQuinta or Bayshore.

⁴ Appellants' award of attorney fees and costs was based on a provision in the purchase and sale agreement for the 156-acre property, purchased by Enclave LaQuinta.

To be sure, McLarand authorized the filing of the cross-complaint against appellants and made key decisions on behalf of Bayshore and Enclave LaQuinta, with the express or implied consent of Emsiek and Vasquez. But “alter ego is an extreme remedy, sparingly used. [Citation.] [¶] . . . [¶] . . . The alter ego doctrine does not guard every unsatisfied creditor of a corporation [or limited liability company] but instead affords protection where some conduct amounting to bad faith makes it inequitable for the corporate owner to hide behind the corporate form. Difficulty in enforcing a judgment or collecting a debt does not satisfy this standard.” (*Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 539.)

IV. DISPOSITION

The postjudgment order denying appellants’ motion to amend the judgment is affirmed. Respondents shall recover their costs on appeal. (Cal. Rules of Court, rule 8.278.)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

KING
J.

We concur:

RAMIREZ
P. J.

McKINSTER
J.