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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

INDIAN PALMS COUNTRY CLUB
ASSOCIATION,

Plaintiff and Appellant,

v.

ANCHORBANK, FSB,

Defendant and Respondent.

E062462

(Super.Ct.No. INC1207925)

OPINION

APPEAL from the Superior Court of Riverside County. John G. Evans, Judge.

Affirmed.

Fiore, Racobs & Powers, Peter E. Racobs, Margaret G. Wangler and Jesse W.J.

Male, for Plaintiff and Appellant.

Michael Best & Friedrich and Evan S. Strassberg for Defendant and Respondent.

Plaintiff and appellant Indian Palms Country Club Association (the Association) brought a construction defect lawsuit, alleging (1) breach of the warranty of habitability; (2) breach of the warranty of fitness; (3) strict negligence in tort; (4) negligence; (5) breach of covenant; (6) breach of fiduciary duty; and (7) abatement of nuisance. The Association served defendant and respondent AnchorBank, FSB (the Bank) with a summons in the lawsuit. The Bank moved to quash the service of summons due to California lacking personal jurisdiction over the Bank. The trial court granted the motion to quash the service of summons. The Association contends California has jurisdiction over the Bank via specific or alter ego jurisdiction. We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

A. LAWSUIT AND PARTIES

The Association is the homeowners' association for the Indian Palms Country Club development (the development), in Indio. The development includes approximately 1,100 homes, and common areas that include man-made lakes, water features, retention basins, and drainage facilities. In its complaint, the Association alleged there were a variety of design defects and construction defects in the man-made lakes, water features, retention basins, and storm drainage areas.

The Association sued the development's developers, including (1) Davsha, a California limited liability company; (2) B.P. Westcoast Properties, LLC, a Texas limited liability company; (3) Investment Directions, Inc. (IDI), a Wisconsin corporation; and (4) Does 1 through 100. The Association amended the complaint to

designate the true names of the Does. The Bank was identified as a party, along with (1) David Weimart, (2) eight separate Davsha, LLC entities, such as Davsha II, Davsha III, and Davsha IV; (3) S & D Indian Palms California, Ltd., a Texas Limited Partnership; (4) Gentosi Builders, Inc., a Wyoming Corporation; and (5) Phillip K. Fomotor, doing business as Fomotor Engineering.

Anchor BanCorp, Wisconsin, Inc., a Delaware corporation, was the parent company of IDI and the Bank. IDI was a real estate investment company. The Davsha companies were subsidiaries of IDI. IDI or its subsidiaries owned the property on which the development was located. IDI's subsidiary entities would have contracted with engineers, grading contractors, and other builders to construct the development's common areas.

Weimart was the president of IDI, which made him the primary individual acting on behalf of IDI and its subsidiaries. Weimart was also an employee of the Bank; he was first vice president of secondary and lending administration. IDI reimbursed the Bank for the time Weimart spent working for IDI. Weimart's office was located in the Bank's offices, in Wisconsin. Weimart reported on the development's progress to the Bank's chief executive officer. Weimart served as the Association's president at its inception.

In August 1998, Weimart sent a letter about the development to Baruch Properties regarding an agreement being signed. Weimart used the Bank's letterhead for the letter, and signed it as the Bank's first vice president. In September 1998, Weimart sent another letter about the development to Terra Nova regarding an estimate

for work on the development. Weimart again used the Bank's letterhead and signed the letter as the Bank's first vice president. In December 1998, Weimart used the Bank's fax coversheet when sending a fax about the development to S & D Indian Palms California, LTD.

Some employees in the Bank's accounting department performed accounting work in connection with the development; the accounting work was performed in Wisconsin. There were four people on IDI's board of directors; all four people were employees of the Bank. In November 2009, when Weimart was terminated from his employment at the Bank, he automatically "left all other roles," including his position at IDI because "[t]here wasn't a separate separation process from [the] other entities he was involved in. He was an employee of the [B]ank."

All of the Bank's branches were located in Wisconsin. The Bank did not have a physical presence in California. The Bank did not pay income taxes to the State of California. The Bank was not licensed to do business in California. Davsha and B.P. Westcoast had no assets. IDI had limited funds, which were being used to defend against the instant lawsuit. Davsha, B.P. Westcoast, and IDI did not have insurance to defend against the lawsuit.

B. FIRST MOTION TO QUASH

The Bank moved to quash the Association's service of summons. The Bank argued California lacked jurisdiction over the Bank because the work on the project was performed by IDI, with only some accounting work for the development being performed by employees of the Bank. The Bank argued it did not have substantial,

continuous, or systematic contacts with California, and thus, there was not general jurisdiction. In regard to specific jurisdiction, the complaint alleged the Does were the development's "builders, owners, manufacturers, developers and/or mass producers of the planned development project." The Bank asserted there was no evidence reflecting the Bank fell into any of the foregoing categories, and no allegations in the complaint specifically mentioned the Bank. The Bank further argued the Association failed to establish the Bank purposefully availed itself of the forum's benefits.

The Association opposed the motion to quash. The Association asserted the Bank engaged in a substantial amount of activities in California, thus supporting specific jurisdiction over the Bank. The Association argued that Weimart, an employee of the Bank, was the primary individual in charge of coordinating the construction of the development. The Association noted that when Weimart lost his employment with the Bank, he was automatically terminated from IDI as well. The Association pointed to Weimart's correspondence about the development, in which he used his Bank title and the Bank's letterhead. The Association further highlighted that the Bank's accounting personnel handled bills and payments for the development.

Alternatively, the Association argued that the Bank was IDI's alter ego, and therefore, there was alter ego jurisdiction. The Association asserted that in its complaint it alleged, "[D]efendants, and each of them, were the agents, joint venturers, trustees, partners, servants, contractors, employees and/or alter egos of each of the remaining defendants and that the acts and omissions herein alleged were done by them, acting

individually, through such capacity and within the scope of their authority, and that said conduct was thereafter ratified by each of the remaining defendants.”

The Association asserted IDI had limited funds, and Davsha, LLC was a canceled limited liability company with no assets. Further, neither company was insured. The Association argued the Bank created undercapitalized and underinsured “shell” companies to develop the development, and therefore, it was the Bank that was doing business in California.

The trial court issued a tentative ruling granting the Bank’s motion to quash. The trial court found the Association failed to establish minimum contacts existed between the Bank and California. The trial court found the Association’s theory of jurisdiction was based upon Weimart’s role in the development. The trial court found the Association failed to prove “Weimart was not acting for IDI.” The trial court explained, “[The Association] makes much of the fact that Weimart was a [Bank] employee. He was, however, also the president of IDI and the fact that a handful of faxes from more than 15 years ago do not change those facts [*sic*].” The trial court noted that none of the communications or agreements identified the Bank as the development’s developer or reflected the Bank was providing direction for the development. As to the alter ego theory, the trial court wrote, “This argument has no merit. It is based upon speculation that IDI and Davsha were mere shells and that [the Bank] made all the decisions.”

At a hearing on July 1, 2014, the trial court adopted its tentative decision as its ruling, but added that the motion was granted without prejudice. The court explained

that if the Association could provide records establishing the Bank's contact with California, then the court would reconsider the matter.

C. SECOND MOTION TO QUASH

On September 11, 2014, the Association again served the Bank with the complaint in the instant case. The Bank filed a second motion to quash service of process. The Bank argued, "Nothing of consequence has changed—either procedurally or substantively—in the two months since this Court granted [the Bank's] first Motion to Quash." The Bank faulted the Association for not amending its complaint to identify the Bank as something more than a developer or to provide the allegations necessary to support an alter ego theory.

The Association opposed the motion. The Association provided the declaration of one of its attorneys, Jesse W.J. Male. Male declared he reviewed 40 boxes of records at the offices of the attorneys for Davsha, B.P. Westcoast, and IDI. The records reflected that on at least three occasions, the Bank invoiced IDI for management and accounting services. The accounting services were daily bookkeeping services. Male declared the records showed the Bank was performing day-to-day management and financial operations for the development.

The Association argued the Bank's bills to IDI for management fees reflected the Bank exercised management responsibility over the development. The Association argued that the Bank, through Weimart, was responsible for all aspects of the development. The Association also raised the same points it raised in its opposition to the first motion to quash, e.g., Weimart's use of the Bank's letterhead demonstrated he

was acting on behalf of the Bank. The Association also raised the alter ego theory again. The Association further argued that fairness/equity was a consideration for applying the alter ego doctrine. The Association asserted the Association's members needed a remedy for the defective common areas, i.e., the Bank was the only entity with assets.

The trial court granted the motion to quash. The trial court explained that it was granting the motion “for the reasons set forth in the court’s prior decision. The court finds that [the] moving party [*sic*] has not made a sufficient showing on the issue of alter ego or minimum contacts for California to exercise personal jurisdiction over [the Bank].”

DISCUSSION

A. SPECIFIC JURISDICTION

1. *CONTENTION*

The Association contends the trial court erred by quashing the service of summons because California has specific jurisdiction over the Bank.

2. *STANDARD OF REVIEW*

“When a defendant moves to quash service of process on jurisdictional grounds, the plaintiff has the initial burden of demonstrating facts justifying the exercise of jurisdiction. [Citation.] Once facts showing minimum contacts with the forum state are established, however, it becomes the defendant’s burden to demonstrate that the exercise of jurisdiction would be unreasonable. [Citation.] When there is conflicting evidence, the trial court’s factual determinations are not disturbed on appeal if

supported by substantial evidence. [Citation.] When no conflict in the evidence exists, however, the question of jurisdiction is purely one of law and the reviewing court engages in an independent review of the record.” (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 449.)

The evidence in the instant case is largely undisputed. For example, there is no disagreement that the Bank performed accounting functions for the development during construction or that Weimart was a Bank employee. Accordingly, we apply the independent standard of review.

3. BACKGROUND LAW

If a nonresident defendant does not have substantial and systematic contacts with California that are sufficient to establish general jurisdiction, then the defendant may still be subject to being sued in California via specific jurisdiction. (*Vons Companies, Inc. v. Seabest Foods, Inc.*, *supra*, 14 Cal.4th at p. 446.) There is a three-prong test for determining if specific jurisdiction has been met. “First, the defendant must have *purposefully availed* itself of the state’s benefits. Second, the controversy must be *related to or arise out of* the defendant’s contacts with the state. [Citation.] Third, considering the defendant’s contacts with the state and other factors, California’s exercise of jurisdiction over the defendant must comport with *fair play and substantial justice.*” (*Greenwell v. Auto-Owners Insurance Company* (2015) 233 Cal.App.4th 783, 792.)

4. *PURPOSEFUL AVAILMENT*

We examine the purposeful availment prong. “““The purposeful availment inquiry . . . focuses on the defendant’s intentionality. [Citation.] This prong is only satisfied when the defendant purposefully and voluntarily directs [its] activities toward the forum so that [it] should expect, by virtue of the benefit [it] receives, to be subject to the court’s jurisdiction based on “ [its] contacts with the forum.’ [Citation.] Thus, purposeful availment occurs where a nonresident defendant ““purposefully direct[s]” [its] activities at residents of the forum’ [citation], ““purposefully derive[s] benefit” from’ its activities in the forum [citation], ‘create[s] a “substantial connection” with the forum’ [citation], ““deliberately” has engaged in significant activities within’ the forum [citation], or ‘has created “continuing obligations” between [itself] and residents of the forum’ [citation]. By limiting the scope of a forum’s jurisdiction in this manner, the ““purposeful availment” requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of “random,” “fortuitous,” or “attenuated” contacts’ [Citation.] Instead, the defendant will only be subject to personal jurisdiction if ““it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the state.””” (*Snowney v. Harrah’s Entertainment, Inc.* (2005) 35 Cal.4th 1054, 1062-1063.)

There are two main activities that form the basis of the Association’s purposeful availment argument: (1) the Bank performed accounting work in connection with the

development's construction; and (2) the Bank provided management services to the California-based Davsha companies during the development's construction.

The Bank is headquartered in Wisconsin. IDI is a Wisconsin corporation. There are invoices from the Bank to IDI charging for management fees and accounting fees, and there are checks from IDI to the Bank paying the invoices. Additionally, the record includes e-mails and letters to and from James Hoemke, a Bank employee, discussing accounting issues relating to the development. Some of the e-mails involve an accounting firm based in California.

This evidence reflects the Bank provided services to IDI, another Wisconsin-based business. All of the Bank's accounting work was performed in Wisconsin. Thus, the evidence reflects two Wisconsin-based companies were doing business in Wisconsin.

In regard to the Davsha businesses, they are California-based subsidiaries of the Wisconsin-based IDI. The Bank billed IDI for the Bank's management and accounting services. Thus, again, the Bank was interacting with IDI, a Wisconsin-based business. The Bank was not directing its activities at Davsha, a California company. For example, a letter from First Pacifica is addressed as follows:

Jim Hoemke
Investment Directions, Inc.
c/o Anchor Bank, FSB
25 West Main Street, Ste. 600
Madison, WI 53703

The letter reflects Davsha should pay approximately \$5,000 to Valley Sanitary and the City of Indio. The fact that the letter is addressed to Jim Hoemke, a bank employee, at IDI, shows the Bank was interacting with IDI—bills for Davsha were running through IDI, so the Bank, in performing management and accounting services, was interacting with IDI, not Davsha. Again, it was two Wisconsin companies working together, and the work was performed in Wisconsin.

The evidence reflects the Bank did not (1) purposefully direct its activities at California residents; (2) purposefully derive a benefit from an activity in California; (3) create a substantial connection with California; (4) deliberately engage in significant activities in California; or (5) create a continuing obligation between itself and California residents. Accordingly, we conclude the purposeful availment prong has not been satisfied. As a result, the trial court did not err in concluding specific jurisdiction has not been established.

B. ALTER EGO JURISDICTION

1. *CONTENTION*

In the alternative, the Association asserts California has jurisdiction over the Bank via alter ego jurisdiction. The Association asserts IDI's actions and presence in California must be attributed to the Bank, so that in legal effect, the Bank had a presence in California.

2. *BACKGROUND LAW AND STANDARD OF REVIEW*

“The alter ego doctrine arises when a plaintiff comes into court claiming that an opposing party is using the corporate form unjustly and in derogation of the plaintiff's

interests In certain circumstances the court will disregard the corporate entity and will hold the individual shareholders [or an affiliated corporation] liable for the actions of the corporation: “As the separate personality of the corporation is a statutory privilege, it must be used for legitimate business purposes and must not be perverted. When it is abused it will be disregarded.” (*Greenspan v. LADT, LLC* (2010) 191 Cal.App.4th 486, 510 (*Greenspan*).

“There is no litmus test to determine when the corporate veil will be pierced; rather the result will depend on the circumstances of each particular case. There are, nevertheless, two general requirements: “(1) that there be such unity of interest and ownership that the separate personalities of the corporation and the individual [or affiliated corporation] no longer exist and (2) that, if the acts are treated as those of the [initial] corporation alone, an inequitable result will follow.”” (*Greenspan, supra*, 191 Cal.App.4th at p. 511.) “The essence of the alter ego doctrine is that justice be done. “. . . [L]iability is imposed to reach an equitable result.” . . . Thus the corporate form will be disregarded only in narrowly defined circumstances and only when the ends of justice so require.” (*Id.* at p. 511.)

“Generally, alter ego liability is reserved for the parent-subsidary relationship. However, under the single-enterprise rule, liability can be found between sister companies. The theory has been described as follows: “In effect what happens is that the court, for sufficient reason, has determined that though there are two or more personalities, there is but one enterprise; and that this enterprise has been so handled that it should respond, as a whole, for the debts of certain component elements of it.

The court thus has constructed for purposes of imposing liability [on] an entity unknown to any secretary of state comprising assets and liabilities of two or more legal personalities; endowed that entity with the assets of both, and charged it with the liabilities of one or both.”””” (Greenspan, *supra*, 191 Cal.App.4th at p. 512.)

“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.” (Toho-Towa Co., Ltd. v. Morgan Creek Productions, Inc. (2013) 217 Cal.App.4th 1096, 1108; see also *H.A.S. Loan Service v. McColgan* (1943) 21 Cal.2d 518, 524 [applying the substantial evidence standard]; see also *Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1248 [substantial evidence standard applies]; see also *Kazutoff v. Wahlstrom* (1961) 196 Cal.App.2d 65, 69 [substantial evidence standard applies].)

The Association asserts the trial court did not make factual findings, rather, it made legal findings based upon largely undisputed evidence, and therefore the de novo standard of review should be applied. Although the evidence in this case may have been mostly undisputed, the issue of whether the Association established alter ego liability is primarily a factual question “for the trial court and is not a question of law.” (*Jack Frenbaugh & Son v. Belmont Construction, Inc.* (1987) 194 Cal.App.3d 1023, 1032.) Alter ego liability is an equitable principle which depends upon the factual circumstances of the case (*Las Palmas Associates v. Las Palmas Center Associates, supra*, 235 Cal.App.3d at p. 1248), and thus, applying the de novo standard would be inappropriate. Given the factual and equitable nature of the issue, the substantial

evidence standard must be applied. (*Arrowhead Mut. Service Co. v. Faust* (1968) 260 Cal.App.2d 567, 576 [“Its findings of fact, if based on any substantial evidence, are final, and his conclusions, sitting as a chancellor in equity, are entitled to great weight”] [Fourth Dist., Div. Two]; *Hoopes v. Dolan* (2008) 168 Cal.App.4th 146, 156-157 [factual equitable findings are binding on the court of appeal unless not supported by substantial evidence].)

3. UNITY OF INTEREST

As to the first element—unity of interest—there are a host of factors to consider. The factors include, ““commingling of funds and other assets of the two entities, the holding out by one entity that it is liable for the debts of the other, identical equitable ownership in the two entities, use of the same offices and employees, and use of one as a mere shell or conduit for the affairs of the other[,]’ . . . inadequate capitalization, disregard of corporate formalities, lack of segregation of corporate records, and identical directors and officers. [Citations.] No one characteristic governs, but the courts must look at all the circumstances to determine whether the doctrine should be applied.” (*Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 538-539 (*Sonora*)). The factors are used to determine if a corporation misused the corporate laws “by the device of a sham corporate entity formed for the purpose of committing fraud or other misdeeds.” (*Id.* at p. 538.)

The evidence reflects the Bank and IDI shared employees and office space. However, IDI reimbursed the Bank for the time Weimart spent working for IDI, which supports a finding that the businesses were separate because IDI could not simply use a

Bank employee as its own—it had to pay for the privilege. In regard to commingling funds, the Bank handled IDI's accounting; however, the evidence reflects payments were made from accounts separate from the Bank's accounts. For example, there are two bills that Davsha was required to pay, which were sent to Jim Hoemke at IDI, care of the Bank. This evidence reflects that, even with the shared employees and shared office space, there were separate bills and accounts. Additionally, IDI still has assets, which indicates it is not merely a shell or sham corporation.

Based upon the foregoing evidence, there is substantial support for the finding that the sister companies, IDI and the Bank, shared resources such as employees and office space, but that IDI was not a sham corporation. There are different bills and different accounts for the different businesses, such that it does not appear the two entities merged together financially or legally. Because the evidence supports a finding that the two businesses kept separate accounts and separate records, e.g. billing one another for services, we conclude there is substantial evidence supporting a finding that a unity of interest is lacking between the Bank and IDI.

The Association points to 12 pages of e-mails to support its assertion. The pages contain e-mails sent from 2002 through 2006. The Association asserts these e-mails show all the various entities, such as that the Davsha entities were operating out of the Bank's office with the Bank's employees. The Association also cites deposition testimony; a 1998 letter wherein Weimart discusses California building issues on the Bank's letterhead; a 1998 Bank fax coversheet Weimart used when sending a fax related to the California construction; a 2004 letter on Bank letterhead related to

accounting issues (tax credits) for IDI; a 2005 fax concerning accounting issues (deferred gains) for the California construction; an undated accounting memo from Hoemke giving a synopsis about the sale of 61 lots from S&D Indian Palms to Paragon Indian Palms Associates and what the accounting entries should be for those sales; and a 2004 interoffice memo on Bank's letterhead from Weimart to Hoemke regarding paying legal bills.

The evidence relied upon by the Association reflects sparse e-mail communication over a four-year period, some possible administrative misuse of Bank stationary, and that Bank was providing accounting work. This evidence, at most, contradicts the trial court's findings, but under the substantial evidence standard, contradictory evidence is not sufficient for a reversal.¹ (*Eidsmore v. RBB, Inc.* (1994) 25 Cal.App.4th 189, 195 [appellate court decides if there is substantial evidence, it does not decide conflicts in the evidence].)

4. *INEQUITABLE RESULT*

Next, we address the second element—the potential for an inequitable result. An injustice is not established by claims of potential difficulty in collecting a debt. (*Sonora, supra*, 83 Cal.App.4th at p. 539.) As explained in *Sonora*, “The alter ego doctrine does not guard every unsatisfied creditor of a corporation but instead affords

¹ Notably, to the extent the Association is relying on contradictory evidence or inferences, there is more reason to apply the substantial evidence standard of review, rather than the de novo standard. (See *Wickham v. Southland Corp.* (1985) 168 Cal.App.3d 49, 55 [where parties rely on conflicting inferences the substantial evidence standard applies] [Fourth Dist., Div. Two].)

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.” (*Ibid.*)

IDI still has assets, but, according to the Association’s attorney, IDI’s funds are limited and are being used to defend against the instant lawsuit. The fact that the Association may have difficulty collecting against IDI does not warrant application of the alter ego doctrine in this case. (*Sonora, supra*, 83 Cal.App.4th at p. 539.)

The Association asserts the Bank’s participation is necessary in order to conduct proper discovery because the Bank is the “repository of the files and documents,” presumably for the canceled corporations. An injustice is not created by the Association needing to conduct discovery with an out-of-state nonparty—discovery can be conducted with out-of-state nonparties. (See e.g., Code Civ. Proc., §§ 2026.010, subd (c) [depositions of out-of-state nonparties], 2020.410 [production of business records]; see also *Monarch Healthcare v. Superior Court* (2000) 78 Cal.App.4th 1282, 1287 [“The procedure to obtain documents from a nonparty is through a ‘records only’ or ‘records and testimony’ deposition subpoena”].) In sum, the trial court properly concluded an inequitable result would not occur by treating IDI and the Bank as separate entities.

5. CONCLUSION

The trial court did not err in ruling that the alter ego doctrine is inapplicable.

DISPOSITION

The judgment is affirmed. Respondent, AnchorBank, FSB, is awarded its costs on appeal.

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MILLER
J.

We concur:

McKINSTER
Acting P. J.

KING
J.