NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

STATE CENTER COMMUNITY COLLEGE DISTRICT,

Plaintiff and Respondent,

v.

AMERICAN PROPERTY HOLDINGS, LLC et al.,

Defendants and Appellants.

F072306

(Super. Ct. No. 10CECG03871)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. M. Bruce Smith, Judge.

Wanger Jones Helsley, Timothy Jones, Scott D. Laird and Marisa L. Balch for Defendants and Appellants.

Lozano Smith, Jerome M. Behrens, Mark K. Kitabayashi, Mark W. Waterman and Frances M. Valdez, for Plaintiff and Respondent.

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OVERVIEW

Appellants, American Property Holdings, Inc. (American Property Holdings) and William A. Dyck appeal from the trial court's bifurcated rulings following a bench trial. Respondent, State Center Community College District (district), filed a civil suit against appellants related to the sale of certain real property in Fresno County. Although the transaction was successfully completed, it resulted in a long and expensive litigation with another potential buyer, Golden Bear, Inc. (Golden Bear). This initial litigation proceeded through a trial and appeal, ultimately culminating in a judgment that appellants breached a prior sales agreement with Golden Bear and awarding damages, but not specific performance, to Golden Bear. As a result, the district retained the property it had purchased but incurred substantial attorney fees in the process. To recoup these fees, the district filed the present suit against appellants alleging appellants' negligent misrepresentations, breaches of contract, and failure to indemnify resulted in damages in the form of the attorney fees incurred.

The trial court reviewed the evidence presented at trial and found in favor of the district on all issues. It concluded appellants had breached three express provisions and one implied provision of the parties' sales agreement, that Dyck had made several material misrepresentations in the course of the sale on behalf of American Property Holdings (including by omitting key facts) which satisfied the requirements of a negligent misrepresentation claim, and that the district was entitled to implied indemnity. Further, the trial court found Dyck was personally liable for the damages caused by American Property Holdings' actions, both individually and as the trustee of the William A. Dyck Living Trust, due to his multitude of misrepresentations to both the district and Golden Bear. In addition, the trial court rejected claims that the negligent misrepresentation and personal liability assertions were barred by the statute of limitations. Following these findings, the trial court awarded the district its attorney fees in both the Golden Bear and current litigations.

Appellants have contested all of these rulings, along with some additional evidentiary issues. In resolving this matter, we need not reach each of appellants' arguments. Rather, for the following reasons we conclude that the trial court properly found a breach of contract, that it is proper to categorize attorney fees from the Golden Bear litigation as damages for that breach, and that the trial court could properly apply an alter ego theory to hold Dyck personally liable for the breach. We further find the district is entitled to attorney fees as a matter of contract for those fees incurred in the present litigation. We therefore affirm the trial court's judgment and remand for a determination of the fees incurred in this appeal.

FACTUAL AND PROCEDURAL BACKGROUND

This case continues an extensively litigated dispute. While the parties are well aware of the facts, we summarize the proceedings from the Golden Bear litigation, both phases of the current proceedings, as well as certain additional relevant facts for clarity. The trial court bifurcated liability and damages issues in this litigation, holding a two-day trial on liability and resolving damages issues on briefing and argument. We begin with the factual findings concerning the underlying transactions and history from the phase 1 liability trial.

The Trial Court's Phase 1 Factual Findings

Following phase 1 trial, the court issued a written order, containing a detailed set of factual findings setting forth the history leading to the litigation and the facts relevant to the trial court's rulings.[1]

By way of a 1995 memorandum of understanding (MOU), Velma Dyck[2] granted the district a right of first refusal in four, out of 21, lots she owned near the district's

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1 Appellants have raised objections to the trial court's admission of certain evidence from the Golden Bear litigation. We have excluded that evidence from the following summary for clarity.

2 Some of the individuals are referred to by their first names because they share a last name with others involved. This is done for clarity and convenience. No disrespect is intended.

Clovis campus. The MOU provided that the district would be notified whenever the lots were offered for sale and would have 30 days from the date of notification to exercise its right of first refusal. Velma later transferred her interest in the 21 lots to American Property Holdings, LLC and, through a later sale, to Dyck, who then worked as the manager of American Property Holdings. The other principle owner of American Property Holdings was Alan Fishman.

In the spring of 2003, Dyck began negotiating a sale of all 21 lots to Golden Bear. On or around January 30, 2004, Dyck and Golden Bear had a "meeting of the minds" regarding the proposed sale, settling on a sales figure of $3.8 million. On that same day, Dyck sent the district a letter informing it of its obligation under the MOU to exercise its right of first refusal and attaching a draft release of its rights under the MOU, which the district never executed. After the letter was sent, and in the first half of February 2004, Dyck told a representative for Golden Bear, Brett Fugman, "that he was in the process of obtaining [the district's] waiver [of their right of first refusal] (which he had no basis for representing)."

On February 18, 2004, and prior to the district's right of first refusal expiring, American Property Holdings executed a contract with Golden Bear for the sale of all 21 lots. The agreement included a 90-day due diligence period, but did not contain any contingencies should the district exercise its right of first refusal. Dyck managed the transaction without consulting Fishman.

On February 19, 2004, representatives from the district met with Dyck concerning their right of first refusal. The district was interested in leasing the lots after they sold, but "was retaining its right to purchase the lots under the MOU." Dyck told the district "that there was a potential ***buyer*** (not owner) of the property but did not share who that was." (Fn. omitted.) Dyck further stated that, should the district exercise its right of first refusal, that potential buyer "would have to make a decision as to whether to purchase without those specific lots." Through these statements Dyck represented he was honoring and confirming the terms of the MOU at that time. The next day, Dyck sent a fax to Fugman stating that, contrary to what the district said at the meeting, the district did not want to purchase any of the lots in question and provided contact information for the district's representatives so the parties could discuss options short of the district purchasing the lots.

On February 24, 2004, the district and Golden Bear met to discuss those options in advance of a planned presentation to the district's board. Golden Bear offered the district lease terms for one of the lots, but indicated they were not interested in leasing the other three. Golden Bear also explained it intended to enforce certain covenants, which would restrict where district students could park. The district told Golden Bear an upcoming bond measure would be relevant to their decisionmaking process, but that the bond vote would occur after their current right of first refusal period expired. Both the district and Golden Bear agreed it would be beneficial to extend the right of first refusal period, and Golden Bear both agreed to and did request such an extension from Dyck. The district did not tell Golden Bear it would not exercise its right of first refusal, and Golden Bear did not tell the district it had already entered into a contract with Dyck for the subject properties. Immediately after this meeting, Dyck agreed to extend the district's right of first refusal to March 15, 2004, and, eventually, to March 19, 2004. Dyck also sent Golden Bear its due diligence packet, which contained a copy of the MOU containing the district's right of first refusal.

Following the extension, the district decided to purchase three of the four lots. Thus, on March 8 and March 18, 2004, the district sent notices to Dyck exercising its right to purchase the three lots for $600,000. On March 18, Dyck responded to these notices, stating, " 'we are in the process of amending the current escrow with [Golden Bear] to reflect the exclusion of these lots.' " Yet, Dyck did not send the district's notices to Golden Bear. The trial court found "Mr. Dyck falsely represented to [the district] that this real property would be deleted, withdrawn or otherwise removed from the Golden Bear-[American Property Holdings] transaction so that [the district] could complete its purchase.... In reality, at the time he gave such assurances to [the district], and contrary to his representations, he had not started any 'process' nor done anything as of March 18 to amend the Golden Bear escrow and it never was amended to reflect any credit, let alone a $600,000 credit."

On March 19, Dyck notified Fishman that the district had exercised its right on three lots at a higher price than Golden Bear was paying and stated " 'it might not be such a bad thing' " if Golden Bear walked away from their current agreement. That same day, Dyck unilaterally requested the escrow company handling the Golden Bear sale exclude the three relevant lots from escrow. Dyck once again did not notify Golden Bear of the district's decision, despite the fact that any amendment to the terms of escrow had to be mutually agreeable.

On March 26, the district entered into a written sales agreement to purchase the three lots from American Property Holdings. Dyck did not inform the district that entering into the agreement would violate the prior agreement between Golden Bear and American Property Holdings. The agreement with the district contained several provisions relevant to the current dispute. Paragraph 2.01 required American Property Holdings to " 'deliver to [the district] copies of all off-record matters ... of which [American Property Holdings] otherwise has knowledge and which affect tittle to the [properties].' " Paragraph 3.01 a. included a representation and warranty that American Property Holdings " 'has the authority to enter into [the sales agreement], and to sell, convey and transfer [the properties] on the terms set forth in [the sales agreement.]' " Paragraph 3.01 b. represented and warranted that the " 'execution of [the sales agreement] and performance hereunder will not violate any agreement, option, covenant, condition, obligation or undertaking of [American Property Holdings] nor will it violate any law, order, statute, ordinance or regulation.' " Finally, paragraph 5.01 included an attorney fees provision providing that " 'in the event of any action between [the district] and [American Property Holdings] seeking enforcement of any of the terms and conditions of [the sales agreement], or in connection with [the properties], the prevailing party in such action shall be awarded, in addition to damages, injunctive or other relief, its reasonable costs and expenses, including but not limited to taxable costs and reasonable attorney's fees.' "

Golden Bear acknowledged the district's exercise of its right of first refusal on March 31, 2004, and notified American Property Holdings that it expected a $725,000 reduction in the sales price on its pending contract. On April 6, 2004, and after conferring with Fishman, Dyck offered a reduction of $474,230 and informed Golden Bear that American Property Holdings would assume Golden Bear wished to cancel the escrow if they did not respond. The trial court found that Dyck did not intend to offer an offset equal to the $600,000 purchase price when negotiating with Golden Bear.

On April 14, 2004, Dyck unilaterally instructed the escrow company to cancel the pending sale to Golden Bear. Golden Bear responded on April 19, 2004, by informing Dyck he had no right to cancel the agreement, that the contract contained no provisions regarding a sale to a third party, and that American Property Holdings was obligated to deliver title to all of the lots to Golden Bear. Dyck did not tell the district about Golden Bear's demands and, on April 30, 2004, American Property Holdings completed its sale of and transferred title to the three lots to the district.

Following the sale to the district, Golden Bear and American Property Holdings continued to negotiate an appropriate reduction to the sale price for the Golden Bear agreement. However, they could not reach an agreement and, on June 18, 2004, Golden Bear filed a lawsuit in the Superior Court, County of Fresno, against both American Property Holdings, for breach of contract and specific performance, and the district, for specific performance. At the same time, Golden Bear filed a lis pendens on the three lots sold to the district, clouding their title.

The Golden Bear Lawsuit and the District's Appeal

Golden Bear's lawsuit was tried between August 29 and September 8, 2005. In June 2006, the trial court found that the MOU was unenforceable and, therefore, the district was not a good faith purchaser of the three lots. The court awarded Golden Bear specific performance on its contract with American Property Holdings, enforcing the order against both American Property Holdings and the district.

The district appealed from this ruling. In that appeal, this court reversed the trial court's ruling with respect to the district. This court found that the district's right of first refusal was enforceable against both American Property Holdings and Golden Bear, and that monetary damages were an adequate remedy for Golden Bear in its claims against American Property Holdings. (See *Golden Bear, Inc. v. State Center Community College Dist.* (Aug. 21, 2008, F051219) [nonpub. opn.].) This court remanded the case to the trial court for entry of judgment in the district's favor, which occurred on September 30, 2010. As the trial court in the present lawsuit noted, the district "incurred attorneys' fees and costs defending the action filed by Golden Bear in Superior Court [and in] pursuing the appeal of the decision in that action."

The Tolling Agreement, Present Lawsuit, and Phase 1 Legal Findings

While the Golden Bear appeal was progressing, the district and American Property Holdings entered into a tolling agreement. The agreement, effective September 14, 2007, stated the parties would "toll and not assert any applicable or otherwise assertable statute of limitations or laches defenses in any court action ... so long as such action [was] commenced within two (2) years from the date" the judgment in the Golden Bear action became final. The agreement, however, would "not act to revive claims already barred as of the Effective Date." In addition, the agreement provided that "the members of [American Property Holdings] individually acknowledge and agree to assume the obligations of [American Property Holdings] arising from and/or in connection with this Tolling Agreement, the Contract, the District's purchase of the Property from [American Property Holdings], [American Property Holdings'] sale of the Property to the District, the Lawsuit, the Judgment, and compliance with and/or satisfaction of the Judgment." Dyck and Fishman signed the agreement on behalf of American Property Holdings.

On November 3, 2010, the district filed the present lawsuit against American Property Holdings and Dyck, both individually and as a trustee of the William A. Dyck Living Trust. The complaint contained three causes of action, breach of contract, negligent misrepresentation, and implied indemnity. The trial court bifurcated the damages case from the liability case and held a two-day hearing on liability issues on October 14 and October 15, 2014.

Following the trial, the trial court entered a written order, siding with the district on its claims. Dealing initially with procedural matters, the trial court first found Dyck personally liable for his tortious conduct, due to his "multitude of misrepresentations to both [the district] and Golden Bear" and because the evidence admitted made it "impossible to distinguish between Mr. Dyck acting individually or as an agent for [American Property Holdings]." Next, the trial court found the district's negligent misrepresentation claims were not barred by the statute of limitation because the district's "negligent misrepresentation cause of action *did not* accrue on June 26, 2004, the day Golden Bear filed the complaint in the underlying action." The trial court instead found the district "did not suffer damages due to [American Property Holdings'] negligent misrepresentations until entry of judgment in the Golden Bear trial court." Finally, the trial court overruled American Property Holdings' objections to introducing trial testimony from Fugman and Michael Thomason from the Golden Bear litigation, but noted that "even without the Judicially Noticed evidence, the court would make identical findings."

Turning to the substantive claims, the trial court first found American Property Holdings violated all three contested provisions of the sales agreement as well as the "implicit promise in every contract for the sale of real property that the seller's title is marketable." The trial court next concluded Dyck "engaged in a course of conduct with Golden Bear and [the district] that can be described as misleading, and duplicitous," providing seven bullet point examples before listing additional instances where "Mr. Dyck misrepresented (including through omission) a number of material terms in the Sale Agreement." The trial court found the district reasonably relied on these misrepresentations and suffered damages, in the form of attorney fees, as a result. Finally, the trial court concluded the district had proven its claim for implied indemnity because appellants "by and through the actions of Mr. Dyck, failed to exercise reasonable care and were indeed negligent in performing their obligations under the real estate contract with [the district], thereby causing harm."

Phase 2 Legal Findings

Following additional briefing, the trial court issued its phase 2 ruling on damages. The trial court found the district was entitled to its attorney fees in both the Golden Bear and the present litigations. With respect to the breach of contract claim, the trial court found fees for both litigations were proper under the attorney fees provision of the sales agreement. In addition, the trial court found fees in the Golden Bear litigation were appropriately awarded under what it termed the "third-party litigation exception," which the trial court found permitted an award of fees as damages for breach of contract where "one person's breach of contract compels another person to engage in litigation against a third person." With respect to the negligent misrepresentation claim, the trial court found attorney fees were properly considered a form of damages and found fees incurred during the Golden Bear litigation were proper under such a theory. Finally, with respect to the implied indemnification claim, the trial court found fees in both litigations were proper as damages under that theory.

The total fees awarded were $321,688.68 for the Golden Bear litigation and $259,647.23 for the current litigation.

This appeal timely followed.

STANDARD OF REVIEW

When judgment follows a bench trial, we review issues of law de novo and issues of fact for substantial evidence. (See *Thompson v. Asimos* (2016) 6 Cal.App.5th 970, 981 (*Asimos*); *SFPP v. Burlington Northern & Santa Fe Ry. Co.* (2004) 121 Cal.App.4th 452, 461 (*SFPP*).) Under the substantial evidence test, "findings of fact are liberally construed to support the judgment and we consider the evidence in the light most favorable to the prevailing party, drawing all reasonable inferences in support of the findings." (*Asimos*, at p. 981; see *SFPP*, at p. 462.)

" 'A judgment or order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness.' [Citation.] Specifically, '[u]nder the doctrine of implied findings, the reviewing court must infer, following a bench trial, that the trial court impliedly made every factual finding necessary to support its decision.' " (*Asimos*, *supra*, 6 Cal.App.5th at p. 981.) "Stated otherwise, the doctrine (1) directs the appellate court to presume that the trial court made all factual findings necessary to support the judgment so long as substantial evidence supports those findings and (2) applies unless the omissions and ambiguities in the statement of decision are brought to the attention of the superior court in a timely manner."[3] (*SFPP*, *supra*, 121 Cal.App.4th at p. 462.)

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3 The record does not appear to contain a request for a statement of decision, as suggested under California Code of Civil Procedure section 632. However, both parties treat the trial court's written rulings as statements of decision and no difference in result would arise should we reject this contention. We will therefore treat the trial court's written rulings as formal statements of decision.

DISCUSSION

Although appellants have raised a host of alleged errors, we may affirm the trial court's judgment if fully supported under any of the theories relied upon by the trial court. In our review, we conclude that the full judgment is supportable under a breach of contract analysis. We therefore limit our analysis to that contention and take no position upon the trial court's other conclusions.

American Property Holdings Breached the Sales Agreement

The trial court found four independent breaches of the sales agreement. On appeal, appellants contend the trial court could not find, as a matter of law, that these four breach findings were supported by substantial evidence because it was bound to a contrary factual conclusion by principles of collateral estoppel or law of the case. We do not agree. At a minimum, the trial court could properly find that appellants breached the warranty contained in paragraph 3.01 b. that " 'execution of this Agreement and performance hereunder will not violate any agreement, option, covenant, condition, obligation or undertaking of [American Property Holdings] nor will it violate any law, order, statute, ordinance or regulation.' "

"The elements of a cause of action for breach of contract are (i) the contract, (ii) the plaintiff's performance or excuse for nonperformance, (iii) the defendant's breach, and (iv) damage to the plaintiff." *Bank of America, N.A. v. Roberts* (2013) 217 Cal.App.4th 1386, 1392–1393.)

With respect to the alleged breach of paragraph 3.01 b., appellant first argues our decision on appeal in the Golden Bear litigation precludes finding that American Property Holdings sale to the district breached the Golden Bear agreement. Specifically, mentioning both collateral estoppel and the law of the case doctrine appellants argue that because the "final judgment in the Golden Bear Matter was for specific performance in favor of Golden Bear excluding Lots 18, 19 and 20 which were sold" to the district "as a matter of law, entry into the Sale Agreement with [the district] did **not** violate the Purchase Agreement with Golden Bear."

Even if principles of collateral estoppel or law of the case were applicable here,[4] appellants' position would not logically follow. Our opinion in the Golden Bear litigation considered, among other things, whether the MOU originally signed by Velma was enforceable against Golden Bear. As appellants note, we found the agreement was enforceable against Golden Bear, in part because Golden Bear received notice of the MOU and failed to investigate its scope or object upon the sale to the district. Appellants argue that this notice means that its agreement with Golden Bear could not be violated by the exercise of those rights. We do not see how this is true.

The original sales agreement with Golden Bear covered the sale of 21 lots and contained no express contingencies for amending the scope of the sale should the district exercise its right of first refusal. Indeed, if the district had chosen not to exercise those rights, there is no indication in the record that Golden Bear would receive anything other than the full 21 lots identified in the sales agreement. Thus, when appellants entered into a contract with the district to sell three of the lots already subject to the executed sales contract with Golden Bear, the agreement with the district violated the existing agreement with Golden Bear. That Golden Bear's own failure to investigate or object to the sale forfeited its right to insist upon specific performance in its own litigation does not mean it did not suffer from a breach of its agreement with American Property Holdings. Indeed, as our prior opinion noted, the trial court had awarded specific performance (i.e., delivery of all 21 lots) against both American Property Holdings and

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4 Given the weakness in appellants' argument, we need not reach this issue. However, given that both doctrines require that the issues decided in the prior proceedings are identical with those presented in the action in question, we see no reason why the prior proceedings here, considering the enforceability of one agreement, would bind the district to the factual conclusion that no breach of contract occurred with respect to a different agreement. (See *People v. Cooper* (2007) 149 Cal.App.4th 500, 524; *Kilroy v. State of California* (2004) 119 Cal.App.4th 140, 149.)

the district. Our opinion only reversed the award of specific performance against the district. In doing so, we specifically pointed out evidence showing that Golden Bear had considered monetary damages sufficient to remedy the breach of contract with American Property Holdings and made no indication in our ruling that such a breach had not occurred. Thus, even if we consider our opinion binding on the parties here, it contains no indication, either directly or inferentially, that American Property Holdings' sale to the district did not breach the prior agreement with Golden Bear. At best, our opinion only limits any remedy for that breach to monetary damages.

Accordingly, we reject appellants' first assertion of error. In our independent review, substantial evidence supports the trial court's conclusion that American Property Holdings breached its sales agreement with the district by entering into an agreement that violated its preexisting agreement with Golden Bear.

Secondarily, appellants argue that even if a breach occurred, that breach was not material. According to appellants, because they transferred title to the district, and the district knew of a potential agreement with Golden Bear, appellants substantially performed under the contract. As an initial matter, appellants' argument misses the mark. "Any breach, total or partial, that causes a measurable injury, gives the injured party a right to *damages as compensation therefor*." (See 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 852, p. 938.) Damages arising from a breach provide " 'as nearly as possible the equivalent of the benefits of performance.' " (See *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 515.) The materiality of a breach thus becomes relevant where the inured party seeks the right to terminate the contract. (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 852, pp. 938–939; see *Karz v. Department of P. & V. Standards.* (1936) 11 Cal.App.2d 554, 557 ["The [nonbreaching party] was bound to perform his part of the contract, and his only remedy for breach was compensation in damages, because failure to perform a subsidiary act under a contract will not ordinarily justify a rescission unless it is of such character as to evince an intent on the part of the person in default to abandon the contract or to be no longer bound by its terms"].) Although appellants performed some portion of their agreement (i.e., the transfer of the land) this does not necessarily mean they did not breach the agreement in other ways causing injury.

Even if the argument were on point, however, appellants would not prevail. Whether a partial a breach is material depends upon whether the injured party gets substantial performance and is a question of fact. (*Brown v. Grimes* (2011) 192 Cal.App.4th 265, 278.) The evidence in this case clearly supports a material breach finding with respect to a partial breach. Dyck engaged in a course of conduct that left two parties believing they were entitled to the same property. He then made a promise to the district that signing the sales agreement would not breach any other existing agreements, despite having already entered into a sales agreement with Golden Bear that purported to sell the same property. The breach of this promise left the district with property clouded by competing claims of ownership and immediately resulted in litigation. The trial court thus possessed substantial evidence to conclude that simply receiving the property was not substantial performance.

Attorney Fees for Both Cases Are Properly Awarded for the Breach

The trial court predicated its award of attorney fees on multiple grounds with respect to the district's breach of contract theory. As a matter of contract, the trial court awarded attorney fees for both the Golden Bear and present actions under the express terms of the sales agreement. As a matter of direct damages for the breach, the trial court awarded attorney fees in the Golden Bear litigation under the theory that "when one person's breach of contract compels another person to engage in litigation against a third person, the breaching party is liable for the attorney fees incurred in that litigation."

Appellants do note that, should the district prevail on its contract claims it would be proper to award attorney fees for the current litigation under the sales agreement. However, were appellants' arguments persuasive, they would ultimately preclude any award of fees in this matter. This is so because appellants argue the district was unable to prove it suffered damages resulting from appellants' conduct.[5] According to appellants, attorney fees incurred in the Golden Bear litigation do not qualify as damages in a contract case and the district "abandoned its diminution in value claim." Appellants argue the trial court wrongly extended the "tort of another" doctrine to contract cases and therefore could not find attorney fees incurred in that matter were damages.

Accordingly, we begin by considering whether incurring attorney fees due to third-party litigation constitutes damages in a breach of contract action. We conclude that it does.

Attorney Fees Incurred to Defend Third-party Litigation Are Contract Damages

When awarding fees as a form of damages arising from the Golden Bear litigation, the trial court relied on a tort theory expressed in *Prentice v. North Amer. Title Guar. Corp.* (1963) 59 Cal.2d 618, 620 (*Prentice*), which was later extended to contract cases in *De La Hoya v. Slim's Gun Shop* (1978) 80 Cal.App.3d Supp. 6 (*De La Hoya*). In the tort context, the theory provides that one who "through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover compensation for the reasonably necessary loss of time, attorney's fees, and other expenditures thereby suffered or incurred." (*Prentice*, at p. 620.) In such a scenario, the normal premise that attorney fees not awarded by stature are generally left to the agreement of the parties gives way to the recognition that the fees awarded are not the typical measure and mode of compensation of attorneys but instead "damages wrongfully caused by defendant's improper actions." (*Id.* at pp. 620–621.)

In *De La Hoya*, the appellate department of the Los Angeles County Superior Court considered whether the tort theory applied in breach of contract cases. In that case, the plaintiff bought a gun, which turned out to be stolen. He was arrested and incurred

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[5] Appellants also do not challenge the calculation of the fees awarded.

attorney fees defending himself. He later brought a civil suit alleging breach of contract, specifically breach of the warranty of title, and seeking damages in the form of the fees incurred defending himself. (*De La Hoya*, *supra*, 80 Cal.App.3d at pp. Supp. 7–8.) Finding no California cases awarding attorney fees as damages in breach of contract actions, the appellate division surveyed basic principles of California law and the decisions of several jurisdictions that had previously considered whether attorney fees could be awarded as damages in breach of contract cases. (*Id.* at pp. Supp. 8–10.) The court then concluded that the general rule allowed "attorney fees incurred in litigation with third parties may be recoverable as damages in an action for breach of contract" and, seeing "no reason why the general rule applied elsewhere should not also be adopted in this state," found that attorney fees were a form of damages in that case. (*Id.* at p. Supp. 10.)

Since the *De La Hoya* decision, no California court has expressly upheld the extension of the *Prentice* theory to contract law in a published decision, although a handful of federal and sister-state courts have referred to *De La Hoya* as exemplifying California law. (See *Hynix Semiconductor Inc. v. Rambus, Inc.* (N.D. Cal. 2007) 527 F.Supp.2d 1084, 1102 [distinguishing case because relevant litigation was not with a third party]; *Platte Anchor Bolt, Inc. v. IHI, Inc.* (N.D. Cal. 2004) 352 F.Supp.2d 1048, 1057–1058 [permitting claim alleging attorney fees as damages because, in California, "a party may recover attorney fees not only on a statutory/contractual fee-shifting basis, but also as consequential damages in breach of contract actions when those fees are foreseeable and proximately caused by the breach"]; *Jelen & Son, Inc. v. Bandimere* (Colo. 1990) 801 P.2d 1182, 1185, fn. 3 [finding attorney fees were not incidental damages under appellant's state law theory, but noting it need not reach whether attorney fees incurred in defending a criminal action may be recovered if they are a natural and foreseeable consequence of a breach of contract].) The only California state court to reference the issue uncritically adopted it as law because the parties had conceded the issue on summary judgment. (See *Pacific Sunwear of California, Inc. v. Olaes Enterprises, Inc.* (2008) 167 Cal.App.4th 466, 483–484.) In light of this history, appellants argue *De La Hoya* was wrongly decided and request we decline to follow its precedent. We reject this request.

Under California law generally, the measure of damages for a breach of contract "is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom." (Civ. Code, § 3300.) Where the breach is of an agreement to convey an estate in real property, damages include all "consequential damages according to proof," among other specifically enumerated items. (Civ. Code, § 3306.) With respect to attorney fees generally, California, like all jurisdictions, follows the American rule, which provides that each party shall be responsible for their own fees. (*Trope v. Katz* (1995) 11 Cal.4th 274, 278.) As *Prentice* explains, however, in the context of tortious conduct the American rule does not preclude awarding attorney fees for third-party litigation expenses. The statutory authority imposing this rule "prohibits the allowance of attorney fees against a defendant in an ordinary two-party lawsuit" but "is not applicable to cases where a defendant has wrongfully made it necessary for a plaintiff to sue a third person." (*Prentice*, *supra*, 59 Cal.2d at pp. 620–621.)[6]

In light of these guiding principles, we see no reason why the American rule would preclude third-party litigation attorney fees as a measure of damages in contract cases where the third-party litigation is proximately caused by or likely to result from the alleged breach. Recovery of such fees are surely necessary to compensate the party sued for all damages caused by the breach and there is nothing in the American rule or related

6 Under tort principles, damages are meant to "compensate for all the detriment proximately caused [by the tort], whether it could have been anticipated or not." (Civ. Code, § 3333.) This principle is broader than that employed for contract damages. However, this appears not to be a distinction requiring further analysis with respect to the award of attorney fees for foreseeable litigation.

statutory authority which would preclude an award of attorney fees as damages when foreseeable litigation is instituted by a third party. While there are undoubtedly potential limits to such a damages theory—for example, were the aggrieved party to initiate litigation against a third party and the seller to quiet title, additional foreseeability and proximate cause considerations would arise—such scenarios are sufficiently different from the factual case before us that we need not consider them at this time.

Moreover, in our own review of recent case law, it is apparent that the concept of awarding attorney fees for foreseeable third-party litigation arising from a breach of contract has withstood the test of time. Multitudes of cases espouse and rely upon the theory to award damages in a variety of breach scenarios, and additional jurisdictions have adopted the rule since 1978. (See *Montara Owners Ass'n. v. La Noue Dev., LLC* (Or. 2015) 353 P.3d 563, 578, fn. 15 ["The third-party litigation exception to the American rule has been adopted by almost every jurisdiction in the United States"]; *Masonic Temple Ass'n. of Crawfordsville v. Ind. Farmers Mut. Ins. Co.* (Ind. 2005) 837 N.E.2d 1032, 1037–1039 [adopting third-party litigation exception in Indiana and identifying multiple jurisdictions already following the rule].)

It is therefore apparent from our review that attorney fees incurred due to third-party litigation arising from a breach of contract are properly categorized as consequential damages if those fees were foreseeable or, in other words, proximately caused by the breach. (Cf. *Hardison v. Bushnell* (1993) 18 Cal.App.4th 22, 26 [outlining basic proximate cause principles in tort cases].) We therefore turn to whether the litigation fees incurred in this case were foreseeable.

The Third-party Litigation Was Foreseeable in This Matter

Whether damages arising out of a contract breach are foreseeable is a question of fact, governed by the substantial evidence test. (*Ash v. North American Title Co.* (2014) 223 Cal.App.4th 1258, 1268.) The question in this case is, thus, whether substantial evidence supports the conclusion that appellants' breach of contract would foreseeably result in Golden Bear filing a lawsuit against the district.

On that point, the trial court had more than enough evidence to satisfy the substantial evidence test. As discussed above, appellants warranted that their agreement with the district would not violate any existing agreement. Yet, at the time they made that promise, they had already signed an agreement to sell the same properties to another party and had failed to include within that agreement any language which would exclude the subject property should the district exercise its right of first refusal. As the trial court found, "as a result of Mr. Dyck's misrepresentations, omissions, and efforts to sell the same property to two parties, [American Property Holdings] breached the terms of the agreement and [the district] was forced to incur fees and costs by defending against a lawsuit." It is no stretch to find it foreseeable that the breach of a warranty that the current agreement will not violate any existing agreements will result in litigation attempting to enforce the prior agreement.[7]

Related to this issue, appellants argue the district could not establish any form of causation to support a damages claim because it failed to present evidence establishing why Golden Bear filed suit. According to appellants, the district's own conduct, allegedly working to buy the lots out from under Golden Bear, was an equally plausible reason for Golden Bear's lawsuit. We do not agree for two reasons. First, appellant's argument improperly asks us to review the evidence and place more weight upon facts supporting Golden Bear's position than facts supporting the trial court's ruling. (*Asimos*, *supra*, 6 Cal.App.5th at p. 981.) Second, the evidence was more than sufficient for the

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7 The foreseeability of litigation fees in this case is more directly associated with the breach than that in *De La Hoya* itself, where the breach would result in litigation fees only if an independent government agency, the prosecution, chose to charge the purchaser for possessing a stolen handgun. (See *De La Hoya*, *supra*, 80 Cal.App.3d at p. Supp. 11 [focusing on foreseeability of arrest].) We take no position on the foreseeability conclusion in *De La Hoya*, other than noting this case easily satisfies the general foreseeability requirement identified therein.

trial court to conclude appellants' conduct, and not the district's, was the proximate cause of the Golden Bear litigation. The court detailed an extensive set of misstatements made by Dyck to both Golden Bear and the district that misrepresented both the validity and security of their various agreements. Given this history, the trial court could reasonably conclude that Golden Bear brought suit because, as it alleged, its agreement had been breached by the sale to the district and, therefore, that the lawsuit was a foreseeable result of breaching appellants' promise that a sale to the district would not violate any other agreement.

<u>The Trial Court Properly Held Dyck Personally Liable</u>

In addition to awarding damages against American Property Holdings, the trial court also awarded damages against Dyck personally for his tortious conduct. The trial court noted, as examples, that Dyck had made false statements regarding amending the escrow documents with Golden Bear, frequently acted without seeking approval from the other member of American Property Holdings, and acted as both the only representative of American Property Holdings and the only contact with the district. Based on this evidence, the trial court concluded it was impossible to distinguish between Dyck acting individually or as an agent for American Property Holdings.

American Property Holdings is a limited liability company, or LLC for short, and Dyck was a manager of that LLC, benefiting from owning a portion through the William A. Dyck Living Trust. Under California law, a member of an LLC may be found personally liable for the obligations or liabilities of the LLC "whether that liability or obligation arises in contract, tort, or otherwise" under the same rules as shareholders of a corporation. (Corp. Code, § 17703.04, subd. (b).) " 'A claim against a defendant, based on the alter ego theory, is not itself a claim for substantive relief, e.g., breach of contract or to set aside a fraudulent conveyance, but rather, procedural, i.e., to disregard the corporate entity as a distinct defendant and to hold the alter ego individuals liable on the obligations of the corporation where the corporate form is being used by the individuals to escape personal liability, sanction a fraud, or promote injustice. [Citations.]' [Citation.] In applying the alter ego doctrine, the issue is not whether the corporation is the alter ego of its shareholders for all purposes, or whether the corporation was organized for the purpose of defrauding the plaintiff, but rather, whether justice and equity are best accomplished in a particular case, and fraud defeated, by disregarding the separate nature of the corporate form as to the claims in that case." (*Shaoxing County Huayue Import & Export v. Bhaumik* (2011) 191 Cal.App.4th 1189, 1198 (*Shaoxing*).)

"A corporate identity may be disregarded—the 'corporate veil' pierced—where an abuse of the corporate privilege justifies holding the equitable ownership of a corporation liable for the actions of the corporation. [Citation.] Under the alter ego doctrine, then, when the corporate form is used to perpetrate a fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose, the courts will ignore the corporate entity and deem the corporation's acts to be those of the persons or organizations actually controlling the corporation, in most instances the equitable owners. [Citations.] The alter ego doctrine prevents individuals or other corporations from misusing the corporate laws by the device of a sham corporate entity formed for the purpose of committing fraud or other misdeeds." (*Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 538 (*Sonora Diamond*).)

To establish alter ego liability, two conditions must be met. "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*, *supra*, 83 Cal.App.4th at p. 538.) Factors courts may consider include the commingling of funds, holding out that one entity is liable for the other's debts, identical equitable ownership between the entities, using the same officers and employees, using an entity as a mere shell or conduit for the affairs of another, inadequate capitalization, disregarding corporate formalities, and inadequate corporate records. (*Id.* at pp. 538–539.) "No one characteristic governs, but the courts must look at all the circumstances to determine whether the doctrine should be applied. [Citation.] Alter ego is an extreme remedy, sparingly used." (*Id.* at p. 539.)

" '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.' " (*Greenspan v. LADT, LLC* (2010) 191 Cal.App.4th 486, 512 (*Greenspan*).)

The evidence is extremely strong with respect to the second condition. As the trial court extensively detailed, and as noted above, Dyck engaged in an extended deception regarding the sale of the three contested lots, in an apparent attempt to extract as much money from the deals as possible. Substantial evidence supported the trial court's implicit conclusion that failing to hold Dyck responsible for this pattern of deception because he utilized a corporate shell to engage in the fraudulent behavior would, indeed, be inequitable and unjust.

The evidence supporting the first condition is less robust. The parties point to no evidence in the record showing commingling of funds, improper statements Dyck would be liable for American Property Holdings' debts,[8] inadequate capitalization or corporate records, or any disregarding of corporate formalities. The record also reflects that Dyck, through his trust, was not the sole member of American Property Holdings and, in fact, appears to have been a minority member. Instead, the trial court's ruling focused exclusively on evidence demonstrating Dyck was using American Property Holdings as a mere shell or conduit for his own affairs and the affairs of his trust. As established above, the evidence supporting the trial court's conclusion on that point is extensive and

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8 The record does show that Dyck, as trustee for the William A. Dyck Living Trust, personally guaranteed any liabilities American Property Holdings may have incurred due to the alleged breach of contract in this case as part of the tolling agreement. We need not consider the effect of this agreement, as the trial court's ruling is sustainable without it.

includes evidence of Dyck's extensive role in the negotiations, his failure in several instances to coordinate with his partner, his intentional deception toward all parties, and his desire to increase the value of assets benefiting him personally through that deception.

While it is true that no one factor in the alter ego analysis is dispositive, it is equally true that alter ego cases are equitable decisions that are not designed " 'to depend upon prior decisions involving factual situations which appear to be similar.' " (*Greenspan*, *supra*, 191 Cal.App.4th at p. 512.) Thus, the trial court would be within its authority to apply the alter ego theory of liability where evidence of one factor was so overwhelming as to require piercing the corporate veil to provide equitable relief. (See *Toho-Towa Co., Ltd. v. Morgan Creek Productions, Inc.* (2013) 217 Cal.App.4th 1096, 1108–1109.) In this case, the evidence of Dyck's conduct during negotiations constituted substantial evidence supporting the trial court's conclusion that Dyck and American Property Holdings were one in the same. Given that both factors are supported by substantial evidence, we find no error in the trial court's ruling.

Appellants contend both that Dyck cannot be held liable as the trustee for the William A. Dyck Living Trust and that he cannot be held liable personally because it was American Property Holdings that held title to the disputed lots and because Dyck never signed any documents in his personal capacity—limiting his actions to signing as a trustee at most. In addition, Dyck argues he is not personally liable for any breach of conduct claims because those actions do not sound in tort. In addition, although not clearly presented, it appears Dyck is arguing a statute of limitations defense to any personal claims, contending that because he did not sign the tolling agreement the claims against him in his personal capacity and as a trustee cannot proceed.

Each of these lines of attack relies on a fundamentally unsound understanding of the alter ego doctrine. With regard to the manner in which Dyck signed documents, his argument is essentially that only the entities signing are bound. But the purpose of the alter ego doctrine is to set aside corporate formalities where the equities demand, in order to deal with the transaction as if the corporate agency did not exist. (*Greenspan*, *supra*, 191 Cal.App.4th at p. 510.) Thus, upon upholding the finding that Dyck and his trust were merely the alter ego of Dyck himself, the entity under which Dyck signed documents is immaterial. Nor is it true that holding one accountable for their tortious conduct requires a claim based in tort law. While the corporate code and the many cases cited herein effectively disprove this argument, it is worth also noting that the alter ego doctrine does not require proof of fraud or other tortious conduct. Rather, evidence of inequity or injustice will suffice. (*Misik v. D'Arco* (2011) 197 Cal.App.4th 1065, 1074.) The trial court's determination to pierce the corporate veil due to Dyck's tortious conduct did not depend upon a successful claim sounding in tort but rather upon facts showing tortious conduct and/or inequitable or unjust results if the corporate veil were not pierced. Finally, Dyck's implication that the statute of limitations bars individual claims also falls on well-settled principles. As noted above, the alter ego doctrine is not a separate cause of action but rather a procedural tool for enforcing judgments. (*Shaoxing*, *supra*, 191 Cal.App.4th at p. 1198.) Thus, liability need not arise based on substantive claims brought against Dyck personally. Rather, the claims, including the breach of contract claim discussed herein, could be and were brought against American Property Holdings. If such claims succeeded, Dyck could properly face personal liability if the evidence was sufficient to set aside the corporate entity involved. Accordingly, we find the trial court did not err in finding Dyck liable personally and as the trustee for the William A. Dyck Living Trust.

Request for Attorney Fees on Appeal

The district requests attorney fees with respect to this appeal. As noted, *infra*, the award of fees for the current litigation are not contested outside of assertions that there is no liability upon which they could be sustained. Moreover, appellants have not argued against awarding fees for these appellate proceedings should the district prevail. Having determined the district properly prevailed on its breach of contract claim, the district is entitled to its fees pursuant to the sales agreement. We therefore remand this matter to the trial court to determine the appropriate measure of those fees. (See *Akins v. Enterprise Rent-A-Car Co.* (2000) 79 Cal.App.4th 1127, 1134 ["Although we have the power to appraise and fix attorney fees on appeal, we deem it the better practice to remand the cause to the trial court to determine the appropriate amount of such fees"].)

DISPOSITION

The matter is remanded to the trial court for a determination of attorney fees incurred on appeal. The judgment is affirmed in all other respects.

HILL, P.J.

WE CONCUR:

LEVY, J.

GOMES, J.