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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

COMERICA BANK,

Plaintiff and Respondent,

v.

FLOYD REID et al.,

Defendants and Appellants.

G042929

(Consol. with G042972)

(Super. Ct. No. 07CC05499)

O P I N I O N

Appeal from a judgment and order of the Superior Court of Orange County,
Linda S. Marks, Judge. Affirmed in part and reversed in part.

Manly & Stewart, Paul J. Sievers and Morgan A. Stewart, for Defendant
and Appellant Floyd Reid.

Ruth A. Fallon, in pro. per., for Defendant and Appellant.

James C. Fallon, in pro. per., for Defendant and Appellant.

Frاندzel Robins Bloom & Csato, Peter Csato, Tricia L. Legittino and Alan
H. Fairley, for Plaintiff and Respondent.

INTRODUCTION

Appellants James and Ruth Fallon and Floyd Reid, Ruth's father, have appealed from a judgment against them in favor of Comerica Bank, a secured creditor of their failed company, Derma Genesis, Inc. Comerica alleged that while Derma Genesis and the Fallons were indebted to Comerica's predecessor, they made two types of fraudulent transfers: They took corporate tax refunds and used them to pay their own expenses, and the Fallons gave Reid a deed of trust on their house. The bank also sued all three for conversion (over the tax refunds) and sought to have them declared alter egos of Derma Genesis. If Comerica succeeded in this latter endeavor, the Fallons and Reid would be personally liable for a multi-million-dollar judgment Comerica had already secured against Derma Genesis.

The trial court found in Comerica's favor and against the Fallons on all causes of action: They had improperly taken the tax refund money; they had put a deed of trust on their house when they should not have; and they were Derma Genesis' alter egos. Reid, however, was not Derma Genesis' alter ego, and he was not liable on the causes of action for fraudulent transfer of the house. He was liable for fraudulent transfer and for conversion based on the tax refunds.

After he prevailed on the cause of action for alter ego, Reid moved for an order awarding attorney fees to him, on the theory that he was the prevailing party on a cause of action based on a contract containing an attorney fee provision. The trial court denied this motion.

We affirm in part and reverse in part. The Fallons and Reid did not appeal the judgment against them for conversion, and this part of the judgment must therefore be affirmed. The judgment in Comerica's favor on the second cause of action for the tax refund money is affirmed, but with modifications as to the Fallons. Comerica, however, did not make its case as to the fraudulent transfer claim based on the deed of trust. And

its effort to hold the Fallons personally liable for the judgment against Derma Genesis is flawed as a matter of law. Judgment must be entered in favor of the Fallons on all causes of action except the second and fourth causes of action for fraudulent transfer and conversion. We also affirm the order denying Reid's motion for attorney fees.

FACTS

James and Ruth Fallon founded Derma Genesis, Inc., in 1995. Ruth was its secretary. James held officer positions – president, chief operating officer, and vice-president – at various points in the corporation's history. Reid was Derma Genesis' treasurer and its president when James was not. Ruth held 60 percent of Derma Genesis' stock. Reid was also a shareholder. Ruth, James, and Reid constituted the board of directors.

In September 1999, Derma Genesis borrowed \$500,000 from Comerica's predecessor, Imperial Bank.¹ Two months later, Derma Genesis obtained a secured line of credit for \$3 million from the bank. The Fallons guaranteed the line of credit for \$500,000 each, for a total of \$1 million. Derma Genesis breached the terms of the line of credit in June 2000, and the bank sued Derma Genesis and the Fallons in July 2000. The parties stipulated to a receiver, and the court appointed Michael Myers to run the business, collect accounts receivable, and sell company assets.

In September 2000, Myers petitioned the court to be allowed to borrow money from the shareholders. Reid thereafter lent the company \$270,000 so that Derma Genesis could remain in business. The Fallons gave him a note and a deed of trust on their house as security for this loan. The note was dated September 2000. The Fallons

¹ In the interest of efficiency, we will refer to the creditor bank throughout this opinion as Comerica. Comerica purchased Imperial in 2001.

then refinanced their home to obtain cash to reimburse Reid for his loan to Derma Genesis.² Reid recorded the deed of trust in December 2000.

The borrowed money was not enough to keep the company afloat, and Myers terminated Derma Genesis' business operations in December 2000. By March 2001, the company was completely shut down. Myers moved for an order terminating the receivership in February 2003, which motion was granted in April 2003. The court ordered all remaining Derma Genesis assets turned over to Comerica.

Meanwhile, the collection lawsuit wended its way toward trial, which was held in May 2003. Comerica obtained judgment in June 2003 against the Fallons on their guarantees, for \$500,000 each plus interest, and against Derma Genesis for \$1,684,745 plus interest, late charges, and attorney fees.³ This judgment was not appealed. With postjudgment interest, at the time this case was tried in 2009 the judgments against the Fallons were up to \$974,771 apiece, and the judgment against Derma Genesis totaled over \$2.8 million.

In 2005, Comerica, as judgment creditor, conducted the Fallons' judgment debtor examinations. As a result, it learned of an account at Charles Schwab in Derma Genesis' name containing the proceeds of company tax refunds Reid had obtained.⁴ Reid and Ruth had opened the Schwab account for Derma Genesis in August 2001 and deposited two tax refund checks into it. Reid obtained another tax refund in September 2004 and deposited it as well. Reid wrote nine checks on the account in 2001, 2004, and 2005 totaling \$120,800. The payees were himself, Ruth, James, and Reid's son.

When Comerica found out about the Schwab account, it immediately began a proceeding to obtain what was left. Reid opposed this proceeding by filing a third-party

² The Fallons also lent Derma Genesis \$83,000 and paid other corporate expenses from the refinancing money.

³ Reid was not a party to the 2003 collection action, and he did not participate in it.

⁴ Reid testified that he had applied for the tax refunds at the last minute before they would have been lost, after the receiver had failed to file for them. He used Ruth's home address on the forms as Derma Genesis' address. The refund checks came to her house.

claim to the funds. The court ruled that the money belonged to Comerica, not to Reid. Comerica recovered approximately \$86,000 from the account.

Comerica then sued the Fallons and Reid for alter ego liability, fraudulent transfer of the funds in the Schwab account, conversion of the funds in the Schwab account, and fraudulent transfer of the deed of trust on the Fallon's house. Comerica also sought to have both transfers set aside.

The case was tried to the court over six days in April 2009. Reid was represented by counsel; the Fallons each represented themselves. The court found both Fallons to be alter egos of Derma Genesis and awarded Comerica the principal amount of the 2003 judgment plus nearly \$1 million in interest, for a total of approximately \$2.5 million. It found Reid was not an alter ego of Derma Genesis. The court found in favor of Comerica and against the Fallons and Reid for intentional fraudulent transfer on the causes of action relating to the Schwab account and also for conversion, again relating to the Schwab account. The court awarded judgment in the amount of \$120,799, plus interest of \$61,481. It did not, however, order the transfers set aside.⁵ The court found in favor of Comerica and against the Fallons for constructive fraudulent transfer on the causes of action relating to the deed of trust on the Fallons' home. It found in Reid's favor on these causes of action. The court ordered the deed of trust set aside.

The court issued a statement of decision on August 17, 2009. No one filed objections.⁶ The court entered judgment in September 2009.

In October 2009, Reid moved to have himself declared the prevailing party and to fix the amount of attorney fees. After a hearing, the court denied this motion.

The Fallons and Reid appealed separately. We have consolidated the appeals on our own motion.

⁵ In the statement of decision, the court "set[] aside all transfers made of monies deposited in the [Derma Genesis] Schwab account." This set aside did not make it into the judgment, however.

⁶ Reid moved to vacate the judgment against him on the deed of trust.

DISCUSSION

Ruth identified four issues on appeal. She claimed error in the court's determination that the deed of trust on her house to her father, Reid, was a fraudulent transfer because Comerica had not established the elements of fraudulent transfer. She also claimed setting aside the deed of trust was error. She objected to the finding that she and James were Derma Genesis' alter egos and disputed the court's findings of fraudulent transfer as to the funds in the Schwab account.

James filed a separate opening brief, in which he identified three issues. He asserted error in finding fraudulent transfer as to the deed of trust and as to setting it aside. He also asserted that Comerica's cause of action for fraudulent transfer was barred by res judicata and by the statute of limitations.

Reid identified four issues on appeal, three of them dealing with setting aside the deed of trust on the Fallons' home. The fourth issue is the denial of his attorney fees motion.

I. Fraudulent Transfer

Civil Code sections 3439 through 3439.12 constitute California's Uniform Fraudulent Transfer Act. The act distinguishes between intentional fraudulent transfers of assets (§ 3439.04), made "with actual intent to hinder, delay, or defraud any creditor," and constructive fraudulent transfers (§ 3439.05), made without fraudulent intent but instead without receiving reasonably equivalent value in exchange while the debtor was insolvent or became insolvent as a result of the transfer.

The court found the Fallons and Reid liable for intentional fraudulent transfers with respect to the Schwab account. The court ruled there was insufficient evidence of an intent to hinder, delay or defraud Comerica with respect to the note and

deed of trust on their house. Instead it found the Fallons (but not Reid) liable for constructive fraudulent transfer.

A. Constructive Fraudulent Transfer – Deed of Trust

All three appellants have appealed the judgment on the fraudulent transfer causes of action relating to the real estate. Reid’s standing to appeal on this issue must be considered separately, however, because he prevailed on the two causes of action relating to the deed of trust. “Appeals may be brought only by aggrieved parties. (Code Civ. Proc., § 902.) An aggrieved party must (1) be a party of record (2) whose rights or interests are directly and injuriously affected by the judgment.” (*Garrison v. Board of Directors* (1995) 36 Cal.App.4th 1670, 1676.)

Reid fits this description as to the sixth cause of action, which resulted in setting aside his deed of trust. He was a party of record. Although the trial court found in his favor on the fraudulent transfer causes of action regarding the real estate, his interests were directly and injuriously affected by the court’s setting aside the deed of trust as a fraudulent transfer. As a result of this ruling, the Fallons’ debt to Reid on the note went from secured (by their home) to unsecured. This is clearly injurious to Reid’s interests and supports his standing to appeal from the judgment on this cause of action.

One element of fraudulent transfer the plaintiff must establish is injury. “A well-established principle of the law of fraudulent transfers is, ‘A transfer in fraud of creditors may be attacked only by one who is injured thereby. Mere intent to delay or defraud is not sufficient; injury to the creditor must be shown affirmatively. In other words, prejudice to the plaintiff is essential. It cannot be said that a creditor has been injured unless the transfer puts beyond [its] reach property [it] otherwise would be able to subject to the payment of [its] debt.’ [Citations.]” (*Mehrtash v. Mehrtash* (2001) 93 Cal.App.4th 75, 80 [*Mehrtash*].)

In order to prevail on this cause of action, Comerica had to show net equity in the Fallon's property if the trust deed were set aside. That is, it had to show the amount the property was worth after deducting all other encumbrances and senior liens and the homestead exemption. (See *Mehrtash, supra*, 93 Cal.App.4th at p. 81; see also *Fidelity National Title Ins. Co. v. Schroeder* (2009) 179 Cal.App.4th 834, 842-843.) Comerica made no such showing.

Comerica argues it tried to elicit this evidence, but the court refused to admit it. A review of the record reveals this is not the case.

Comerica's counsel did not bring up this issue with James at all. She asked Ruth whether Reid's deed of trust was the second lien on the property. Ruth stated she did not know. Comerica's counsel then asked if the property was mortgaged; Ruth said it was and that Downey Savings held the mortgage. She did not know the amount remaining on the mortgage. Counsel then asked her whether a 1999 financial statement would refresh Ruth's recollection about the current amount owing.

At this point the court intervened to ask where the line of questioning was going. Counsel stated, "I'm trying to establish for the court that there's sufficient equity in the home that if the deed of trust is set aside, there would be something there for – for the bank to receive as a damage." On that explanation, the court refused to allow counsel to show Ruth the 1999 financial statement, which could have had very little relevance, if any, to the value of the property in 2009.

Comerica's counsel then asked Ruth if she had "any idea what the current value is on [her] home today," and Reid's counsel objected on both opinion and relevance grounds.⁷ The court sustained Reid's objection on relevance grounds only. Comerica's counsel did not contest the relevance ruling, only the opinion one. She did not explain to the court that evidence as to the value of the property minus liens,

⁷ Neither of the Fallons objected to this question. Contrary to Comerica's argument, they are not "estopped" from pointing out the failure of evidence now.

encumbrances, and the homestead exemption was a required element of the cause of action.⁸

Comerica implicitly acknowledges the hole in its evidence by speculating that the court could have taken judicial notice of the fact that lenders do not lend the full value of the property. The house must therefore have been worth more than the amount of the loan the Fallons obtained in 2000.

Whether the court could have taken such judicial notice is questionable but moot. Nobody asked the court to take judicial notice of lender practices – although it was asked to take judicial notice of other things. Moreover, what the house was worth when it was refinanced in 2000 has little bearing on its worth in 2009 minus Reid’s deed of trust and minus any other encumbrances and exemptions. There is therefore no evidence of an indispensable element of a cause of action for fraudulent transfer in this record.

There is yet another deficiency in the evidence regarding the deed of trust. The court found the Fallons liable for constructive fraudulent transfer, not a transfer with the intent to hinder, delay or defraud; Comerica therefore had to show either that the note and the deed of trust rendered the Fallons insolvent or that they were already insolvent. (See Civ. Code, § 3439.05.)

Comerica presented no evidence whatsoever as to the Fallons’ financial condition when they executed the note to Reid in September 2000 or when he recorded the deed of trust in December 2000. (See *T W M Homes, Inc. v. Atherwood Realty & Inv. Co.* (1963) 214 Cal.App.2d 826, 842-843 [debtor must appear insolvent at time of transfer or by means of transfer]; see also Civ. Code, § 3439.06, subd. (a) [time of transfer].) Although Comerica hired an expert to testify about Derma Genesis’ insolvency, which he pinpointed as occurring no later than April or May 2000, for some

⁸ Comerica’s trial brief also did not flag this issue for the court, or even mention it.

reason his assignment did not extend to the Fallons' financial condition at the end of 2000.

Comerica argues it provided evidence of insolvency. Reid testified Ruth said she needed money in 2004 and 2005 for household expenses and that is why he wrote checks to her from the Schwab account in 2004 and 2005. As of the time of trial (in 2009), Reid was paying the mortgage on the Fallons' home. The Fallons had not paid anything to Reid on the note (which had a maturity date of September 2001, but which had been extended, and Ruth had not paid Comerica anything on the 2003 judgment.

As the court explained in *Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, reviewing the legal sufficiency of the evidence involves two steps. First, all conflicts in the evidence are resolved in favor of the respondent, and all reasonable inferences in favor of the judgment are presumed. (*Id.* at pp. 1632-1633.) Then the court must determine whether the evidence is substantial. (*Id.* at p. 1633.) “‘Substantial evidence’ is evidence of ponderable legal significance, evidence that is reasonable, credible and of solid value. [Citations.] ‘Substantial evidence . . . is not synonymous with “any” evidence.’ Instead it is “‘substantial’ proof of the essentials which the law requires.” [Citations.] The focus is on the quality, rather than the quantity, of the evidence. ‘Very little solid evidence may be “substantial,” while a lot of extremely weak evidence may be “insubstantial.”’ [Citation.] Inferences may constitute substantial evidence, but they must be the product of logic and reason. Speculation or conjecture alone is not substantial evidence.” (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651.)

In this case, there was no conflict in the evidence Comerica cites as the basis for its claim the Fallons were insolvent. We assume all these facts to be true and draw reasonable inferences from them. This evidence is not, however, “solid” evidence of the Fallons' insolvency, because the note was executed in September 2000 and Reid recorded his deed of trust in December 2000. The earliest fact – the Fallons' failure to

make a payment on the Reid note – happened almost a year after this. All the other events took place even later – in some cases much later.

One could reasonably infer that the Fallons were having financial difficulties in December 2000, but not that they were insolvent. The Uniform Fraudulent Conveyance Act clearly defines insolvency: “A debtor is insolvent if, at fair valuation, the sum of the debtor’s debts is greater than all of the debtor’s assets;” and “A debtor who is generally not paying his or her debts as they become due is presumed to be insolvent.” (Civ. Code, § 3439.02, subs. (a), (c).) Comerica elicited no testimony from either James or Ruth on the relationship between their debts and assets in September or December 2000 or about whether they were paying their bills at that time. It never presented any other evidence, expert or otherwise, on these topics. The sporadic evidence of financial problems after the relevant time period does not fill this gap.

The judgment against the Fallons must be reversed on the cause of action for fraudulent transfer relating to the deed of trust. The judgment setting aside the deed of trust must also be reversed.⁹

B. Fraudulent Transfer – Schwab Account

The court found the Fallons and Reid transferred the tax refund checks to the Schwab account in 2001 and 2004 with the actual intent to hinder, delay, or defraud Comerica, the debtor of both the Fallons and of Derma Genesis. As of 2001, the Fallons and Derma Genesis were all Comerica’s debtors, even though Comerica did not obtain its judgment until May 2003. “A transfer made . . . by a debtor is fraudulent as to a creditor, whether the creditor’s claim arose before or after the transfer was made . . . if the debtor made the transfer . . . as follows: (1) With actual intent to hinder, delay, or defraud any creditor of the debtor.” (Civ. Code, § 3439.04, subd. (a)(1.)

⁹ Because we reverse the judgment relating to the fraudulent transfer of the deed of trust for lack of evidence, we do not deal with James’ issues of res judicata or statute of limitations or the remaining issues Reid identified.

The key here is who was transferring what to whom. The money in Derma Genesis' Schwab account belonged to the company; it came from corporate tax refunds. Derma Genesis was the debtor. As senior secured creditor (in 2001) and later as judgment creditor (in 2003), Comerica was ultimately entitled to that money.¹⁰

Derma Genesis, through Reid, transferred money from its Schwab account to Reid, James, Ruth, and Reid's son by writing checks to these people. This is the fraudulent "transfer," which the code defines as "every mode . . . of disposing of or parting with an asset" (Civ. Code, § 3439.01, subd. (i).) Putting the tax refunds into the Schwab account was not a transfer, because Derma Genesis did not "dispose of" or "part with" the money when that happened.

Reid wrote all the checks on the Derma Genesis account, in his capacity as company treasurer. The parties stipulated to this fact. The debtor doing the transferring was Derma Genesis, not the individuals. Comerica was therefore entitled to judgment against *Derma Genesis* for fraudulent transfer, for dispersing money from the Schwab account to the individuals.

Even though the Fallons cannot be liable for the fraudulent transfer of Derma Genesis' funds out of the Schwab account, they can be liable for *accepting* the funds as first transferees, under Civil Code section 3439.08, subdivision (b)(1). This subdivision, however, limits the creditor's recovery to "the value of the asset transferred . . . or the amount necessary to satisfy the creditor's claim, whichever is less." The joint and several judgment entered by the court on this cause of action was therefore in error. But because the parties stipulated to the amount of the checks, the judgment can be easily modified. James received \$12,796.31 from the Schwab account. Ruth received a total of

¹⁰ Before Myers' discharge, the receivership estate was immediately entitled to the tax refunds. Comerica was also the Fallons' creditor, by virtue their guarantees and its 2003 judgment against them personally. But the Fallons' individual money is not at issue in this cause of action.

\$98,296. The judgment in favor of Comerica and against the Fallons on the second cause of action is modified accordingly.

In its complaint, Comerica also asked for the transfers to be set aside, pursuant to the common-law trust fund theory, which prohibits insiders of an insolvent corporation from making preferential payments of corporate assets to themselves to the detriment of outside creditors. (See *Berg & Berg Enterprises, LLC v. Boyle* (2009) 178 Cal.App.4th 1020, 1040-1041.) The court did not order the transfers set aside as part of the judgment; instead, it awarded the same judgment on all of the Schwab account causes of action. If this was an oversight, it was harmless, because Comerica obtained judgment on its conversion cause of action, to which we now turn.

II. Conversion – Schwab Account

The court awarded judgment to Comerica on its fourth cause of action for conversion against the Fallons and Reid in the amount of the checks written on the Schwab account, plus interest. The conversion cause of action is based on the same facts as the fraudulent transfer cause of action relating to the Schwab account. Neither the Fallons nor Reid has raised this issue in their opening briefs; it is therefore abandoned. (See *Padilla v. Rodas* (2008) 160 Cal.App.4th 742, 753, fn. 2.) The judgment against the Fallons and Reid for conversion must stand.¹¹

III. Alter Ego

When there is no conflict in the evidence, we exercise our independent judgment to determine a question of law. (*Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 535 (*Sonora Diamond*)). In this case, there is no conflict in the evidence on which the court based its finding the Fallons were Derma Genesis' alter

¹¹ We emphasize that Comerica can collect the amounts improperly dispersed from the Schwab account only once. The different judgments affect the person(s) from whom Comerica may collect the funds and how much may be collected from each one.

egos. It is undisputed that Ruth and Reid opened the Schwab account and that Reid deposited corporate tax refunds into and wrote checks on the account.¹²

The law regards a corporation as an entity separate from its shareholders. (*Communist Party v. 522 Valencia, Inc.* (1995) 35 Cal.App.4th 980, 993.) Under ordinary circumstances, shareholders do not incur personal liability for the corporation's actions during its existence.¹³ They are not personally liable for the corporation's debts or its torts. (*Bing Crosby Minute Maid Corp. v. Eaton* (1956) 46 Cal.2d 484, 487 [debts]; *Wyatt v. Union Mortgage Co.* (1979) 24 Cal.3d 773, 785 [torts].) If the corporation fails, the shareholders lose only the amount of their investment, not the entire amount the corporation owes its creditors. (*Bing Crosby Minute Maid Corp. v. Eaton, supra*, 46 Cal. 2d at p. 487.)

The alter ego doctrine developed as a remedy for misusing the legal distinction between shareholder and corporation. Shareholders cannot behave as though the corporation did not exist – helping themselves to corporate money whenever the spirit moves them, for example – and then, when the creditors come calling, disclaim any personal responsibility for the corporation's debts. Under those circumstances, a court will disregard the corporation's existence and hold the individual shareholders liable. (See *Sonora Diamond, supra*, 83 Cal.App.4th at p. 538; *Communist Party v. 522 Valencia, Inc., supra*, 35 Cal.App.4th at p. 994; *Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 300.)

The activities upon which the court based its alter ego determination in this case occurred after the receiver had been installed to operate the company (in July 2000)

¹² Appellants dispute the impropriety of these actions, but not that they occurred.

¹³ Things change when a corporation is wound up. An unpaid creditor can sue a shareholder individually for his or her distribution. (See Corp. Code, § 2009, subd. (b).)

Although the receiver terminated Derma Genesis' business operations and sold all its assets, the corporation was never dissolved. It was suspended and could not defend itself at the trial. It is not quite true, however, that the corporation "ceased to exist" in 2000, as the court stated in its statement of decision. It may have been comatose, but it was not quite dead.

and after he had terminated company operations (in December 2000). These activities were opening the Schwab account in August 2001, depositing three Derma Genesis tax refund checks in the account, and writing nine checks on the account between 2001 and 2005, all without telling either the receiver or the bank. Both Ruth and Reid opened the account. Reid deposited the tax refund checks, with Ruth's knowledge. Reid wrote all the checks.

Alter ego must be supported by *both* "unity of interest and ownership" and an "inequitable result." (*Associated Vendors, Inc. v. Oakland Meat Co.* (1962) 210 Cal.App.2d 825, 837; see also *Sonora Diamond, supra*, 83 Cal.App.4th at p. 538.) Putting the corporate tax refunds into an account concealed from the receiver and the bank and paying out that money to family members were both actions that would satisfy the first prong of the test. Appropriating corporate funds for personal use definitely qualifies as "commingling of funds" and "disregard of corporate formalities." (*Sonora Diamond, supra*, 83 Cal.App.4th at pp. 538, 539.)

But there is no inequity of result here. There was no need to resort to the alter ego doctrine in order to hold any of the defendants liable for misappropriating the tax refund money. Comerica sued them all individually for fraudulent transfer and conversion and obtained a judgment against them all. (Cf. *Filet Menu, Inc. v. C.C.L. & G., Inc.* (2000) 79 Cal.App.4th 852, 865-866 [alter ego finding unnecessary in light of finding of individual liability].) As far as the tax refund money is concerned, the judgment makes Comerica whole.

We recognize that using the alter-ego doctrine to hold the Fallons liable for the tax refund money was not Comerica's purpose. What Comerica really wanted was to make the Fallons (and Reid) individually liable for the 2003 Derma Genesis judgment, a judgment Comerica had obtained because Derma Genesis did not pay back its 1999 loan. And we cannot see the equity in holding the Fallons liable for a corporate debt incurred years earlier, at a time when they were operating the company and observing all

corporate formalities, simply because they dipped into corporate funds after the corporation had shut down. The bank introduced no evidence that the money it lent to Derma Genesis in 1999 was somehow lost because the Fallons were disregarding the corporate form. Without such evidence it would be highly inequitable to make them individually liable for the 2003 Derma Genesis judgment in addition to their personal liability on their guarantees.

IV. Reid's Motion for Attorney Fees

We review de novo, as a question of law, the legal basis for awarding attorney fees. (*Pueblo Radiology Medical Group, Inc. v. Gerlach* (2008) 163 Cal.App.4th 826, 828 (*Pueblo Radiology*.) The terms of the attorney fees clauses and the facts pertaining to Reid's claim for fees are undisputed.

Reid argues that he is entitled to attorney fees pursuant to Civil Code section 1717, as a prevailing party under a contract providing for fees, because he prevailed on Comerica's alter ego cause of action. Comerica sought to have him declared an alter ego of Derma Genesis, and Comerica had prevailed against Derma Genesis in the 2003 collection action. The loan documents on which Comerica sued Derma Genesis included attorney fees clauses, and Comerica got its fees as part of the 2003 judgment.¹⁴ Because Comerica unsuccessfully sought to make Reid responsible for the 2003 judgment, Reid contends he should get his fees in this matter.

Civil Code section 1717, subdivision (a), provides in pertinent part: "In any action on a contract, where the contract specifically provides that attorney's fees and

¹⁴ Comerica sued Derma Genesis on both a note and a credit agreement. The note stated, "Lender may hire or pay someone else to help collect this Note if Borrower does not pay. Borrower will also pay Lender that amount. This includes, subject to any limits under applicable law, Lender's attorneys' fees and Lender's legal expenses whether or not there is a lawsuit, including attorneys' fees and legal expenses for bankruptcy proceedings (including efforts to modify or vacate any automatic stay or injunction), appeals, and any anticipated post-judgment collection services. Borrower will also pay any court costs, in addition to all other sums provided by law." The credit agreement provided, "If suit is brought to enforce any provision of this Agreement, the prevailing party shall be entitled to recover reasonable attorneys' fees and court costs in addition to any other remedy or recovery awarded by the court."

costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs." The purpose of this section "is to transform a unilateral contract right to attorney's fees 'into a reciprocal provision giving the right to recover fees to whichever party prevails [in the contract action].' [Citations.]" (*Associated Convalescent Enterprises v. Carl Marks & Co., Inc.* (1973) 33 Cal.App.3d 116, 120.)

If Comerica had tried to hold Reid liable for Derma Genesis' debt as its alter ego in the 2003 collection action, he could unquestionably have made a claim for attorney fees if he had prevailed. The California Supreme Court decided this question in *Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, a collection case in which a creditor sued two individual shareholders of a bankrupt corporation as its alter egos. The shareholders prevailed, and the court found they were entitled to fees pursuant to attorney fee provisions in the notes. "Had plaintiff prevailed on its cause of action claiming defendants were in fact the alter egos of the corporation . . . , defendants would have been liable on the notes. Since they would have been liable for attorney's fees pursuant to the fee provision had plaintiff prevailed, they may recover attorney's fees pursuant to [Civil Code] section 1717 now that they have prevailed." (*Id.* at p. 129.)

The question before us is different. Comerica did not sue Reid along with Derma Genesis in 2003. Instead, it sued him several years later, in a separate action, after discovering his involvement with the tax refunds. It had already received a judgment against Derma Genesis. The suit it brought in 2007 was not one either to collect on the note or to enforce the credit agreement.

The court in *Hambrose Reserve, Ltd. v. Faitz* (1992) 9 Cal.App.4th 129, dealt with a similar situation. The plaintiff obtained an out-of-state judgment on a note containing an attorney fee provision. It sought unsuccessfully to enforce the judgment in

California. The defendant then moved under Civil Code section 1717 for the attorney fees he had spent resisting enforcement of the judgment, asserting that he was the prevailing party on the note. (*Id.* at pp. 130, 131.)

The trial court denied the motion, and the appellate court affirmed. “Once there is a judgment, contractual rights are merged into and extinguished by the terms of the judgment. At that point there is no subsisting contractual attorney fees provision on which [Civil Code] section 1717 may operate.” (*Hambrose Reserve, Ltd. v. Faitz, supra*, 9 Cal.App. 4th at p. 132.)

The same principle applies in this case. Once Comerica obtained a judgment, there was no more note, no more credit agreement, and no more attorney fee provision. This works both ways; Comerica could not have recovered its fees from Reid under either contract had it prevailed in this action, just as he cannot recover fees from Comerica. In addition, Civil Code section 1717 applies only to actions “on a contract” and to fees “incurred to enforce that contract.” (Civ. Code, § 1717, subd. (a).) The suit Comerica filed against Reid was not an action on a contract and the fees incurred were not incurred to enforce that contract.

Pueblo Radiology, supra, does not assist Reid. In that case, the defendant corporation and the individual defendants were sued for breach of contract in the same lawsuit, with the individuals named as alter egos. The trial court bifurcated the trial and tried the alter ego issue first. The court found for defendants and awarded them their fees. (*Pueblo Radiology, supra*, 163 Cal.App.4th at p. 828.) The plaintiff protested that the case was not over yet, and the court could not award attorney fees until after the trial. (*Ibid.*) The appellate court disagreed. The individual defendants had prevailed on the alter ego theory; for them, the case was over. The award was therefore proper and timely. (*Id.* at p. 829.) The court in *Pueblo Radiology* did not deal with a contract that had merged into a judgment and is not authority for the proposition that a later filed alter ego cause of action can revive an extinguished contract.

Reid also argues that incorporating the prior lawsuit into the present one somehow performs this resuscitation. It cannot. The 2003 collection lawsuit was a done deal. Comerica did not and could not bring it back to life by incorporating it into the present action. A party may bring a motion to amend the judgment to add a nonparty judgment debtor as an alter ego, or it may bring a separate action to accomplish the same end. (*Leek v. Cooper* (2011) 194 Cal.App.4th 399, 419.) In neither case, however, does a judgment that has become final become “un-final,” so that the contractual claims can be revisited. (See *Chelios v. Kaye* (1990) 219 Cal.App.3d 75, 80 [“When . . . a lawsuit on a contractual claim has been reduced to a final, nonappealable judgment, all of the prior contractual rights are merged into and extinguished by the monetary judgment, and thereafter the prevailing party has *only* those rights as are set forth in the judgment itself.”].)¹⁵

DISPOSITION

The judgment against the Fallons on the first cause of action for alter ego is reversed. Judgment on the second cause of action against the Fallons, as first transferees of the fraudulent transfers of the amounts in the Schwab account, is affirmed as modified: judgment against James Fallon in the principal amount of \$12,796.31; judgment against Ruth Fallon in the principal amount of \$98,296. Judgment on the third cause of action against the Fallons is reversed. The judgment against the Fallons on the fourth cause of action for conversion is affirmed. Judgment on the fifth and sixth causes of action for fraudulent transfer of deed of trust and to set aside deed of trust against the Fallons is

¹⁵ Code of Civil Procedure section 685.040 does not apply to this case, as Reid argues. The code section deals with attorney fees incurred to enforce a judgment and allows them to be added to a judgment if it included an award of contractual (or statutory) attorney fees. The code section does not provide for reciprocal fees, as does Civil Code section 1717, even if Comerica’s 2007 lawsuit could be considered an enforcement of the 2003 judgment, a doubtful proposition. It certainly does not revive a contract claim that has merged with a judgment. (See *Chinese Yellow Pages Co. v. Chinese Overseas Marketing Service Corporation* (2008) 170 Cal.App.4th 868, 879-882.)

reversed.

The judgment against Reid on the second, third, and fourth causes of action relating to the monies in the Schwab account is affirmed. The judgment on the sixth cause of action is reversed.

The judgment is affirmed in all other respects. The postjudgment order denying Reid's motion for attorney fees is affirmed. Respondent is to bear the costs on appeal.

BEDSWORTH, ACTING P. J.

WE CONCUR:

ARONSON, J.

FYBEL, J.