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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

BANYAN LIMITED PARTNERSHIP et  
al.,

Plaintiffs and Respondents,

v.

DAN W. BAER,

Defendant and Appellant.

G045797

(Super. Ct. No. 764271)

O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County,  
Thierry P. Colaw, Judge. Motion to dismiss denied; order reversed.

Enterprise Counsel Group, Benjamin P. Pugh, Teddy Davis, and David A.  
Robinson; Schadrack & Chapman and C. Michael Chapman for Defendant and  
Appellant.

Law Offices of Dennis Hartmann and Dennis Hartmann; The Dressler Law  
Group and Thomas W. Dressler; Snell & Wilmer, Richard A. Derevan and Todd E.  
Lundell for Plaintiffs and Respondents.

Dan W. Baer appeals from a postjudgment order in favor of Banyan Limited Partnership (Banyan), Pear Tree Limited Partnership (Pear Tree), and Orange Blossom Limited Partnership (Orange Blossom) (hereafter referred to collectively as the Grammer Limited Partnerships). In a court trial, the Grammer Limited Partnerships obtained a judgment totaling about \$1.1 million against two corporations owned by Baer—IBT International, Inc. (“IBT”) and Southern California Sunbelt Developers, Inc. (“SCSD”)<sup>1</sup>—for loans they made to the corporations that had not been repaid. Although the Grammer Limited Partnerships’ complaint alleged Baer was an alter ego of his corporations, no evidence concerning the alter ego relationship was presented at trial and in its statement of decision, the court found the Grammer Limited Partnerships had affirmatively abandoned the alter ego claim. The trial court subsequently granted the Grammer Limited Partnerships’ motion for new trial and amended its statement of decision to delete the abandonment finding. The Grammer Limited Partnerships filed a motion to dismiss Baer’s appeal, contending the order is not separately appealable. We reject their contentions and deny the motion to dismiss. Baer contends the order must be reversed because the time for ruling on a new trial motion had expired. We agree and reverse the order.

#### FACTS AND PROCEDURE

This is the second of three appeals that followed the final judgment in this litigation. In our concurrently filed opinion in *Banyan et al. v. Baer et al.* (Aug. 12, 2013, G045584) [nonpub. opn.] (*Banyan 1*), we affirm the final judgment against IBT and SCSD awarding the Grammer Limited Partnerships about \$1.1 million on certain contract

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<sup>1</sup> Baer, IBT, and SCSD are hereafter sometimes referred to collectively as Defendants.

claims, but which was against the Grammer Limited Partnerships and four other plaintiffs (the non-Grammer plaintiffs)<sup>2</sup> in favor of Baer, IBT, and SCSD on all other claims.<sup>3</sup>

We adopt and incorporate by reference the facts and analysis from our opinion in *Banyan I, supra*, G045584. To recap, attorney David A. Tedder and non-attorney Baer formed a business arrangement (ultimately found by the court to be a partnership) in 1986 to market and mass-produce estate plans through Tedder's law firm, split the law firm profits, and use them to invest in real estate in which the two men were to be partners. Tedder eventually began providing asset protection services for some very wealthy clients, which entailed his creating a myriad of limited partnerships for each client, of which Tedder was general partner, through which client funds would be moved and invested. When the law firm failed to produce profits, Tedder began arranging for loans from the limited partnerships, including the Grammer Limited Partnerships, for real estate acquisition. Three pieces of real estate were acquired and title held by the two corporations owned by Baer—IBT and SCSD. When Tedder and Baer's partnership fell apart, Tedder sued Defendants on behalf of his client limited partnerships to recover on the loans.

The original complaint filed in 1996 alleged the Grammer Limited Partnerships made loans to Defendants based on oral agreements, pursuant to which Baer agreed the proceeds from the real estate investments would be used first to pay off the loans. An attachment to the complaint identified seven loans made by the Grammer Limited Partnerships to IBT totaling \$1,210,500, and one loan to SCSD for \$70,000. It alleged Baer, individually and on behalf of IBT and SCSD had repudiated the

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<sup>2</sup> The Grammer Limited Partnerships and the non-Grammer plaintiffs are hereafter sometimes referred to collectively as Plaintiffs.

<sup>3</sup> In our concurrently filed opinion in *Banyan et al. v. Baer et al.* (Aug. 12, 2013, G046428) [nonpub. opn.], we affirm the postjudgment order denying both sides' motions for attorney fees.

loan agreements, was using the cash flow from the properties for his own benefit, and was not repaying the loans as agreed. The original complaint contained causes of action against Defendants for money lent, seeking to recover all amounts loaned; for fraud and deceit and for unjust enrichment, alleging Baer was improperly diverting cash flow and equity in the properties (through new loans and encumbrances) for his own use; and for judicial foreclosure, seeking imposition of an equitable lien on the properties. The first amended complaint and subsequent complaints contained the same basic allegations as the original complaint about loans from the Grammer Limited Partnerships to Defendants for real estate acquisition, adding the oral loan agreements were later memorialized by written promissory notes. The amended complaints added alter ego allegations, i.e., that each corporate defendant (IBT and SCSD) were “sham” corporations acting as alter egos of the individual defendant (Baer). The amended complaints also added a breach of fiduciary duty cause of action.

The action was tried in four phases over seven years before different judges. The phase 2 trial took place in the summer of 2004 before Judge C. Robert Jameson. The trial status order stated the second phase would cover the claims of the Grammer Limited Partnerships “except alter ego and punitive damages.” Later phases would consider the claims of the non-Grammer plaintiffs, issues relating to the relationship of Tedder and Baer and dissolving their joint venture, any remaining claims and cross-claims of the parties, followed by alter ego claims, punitive damages claims, and any remaining matters.

In the phase 2 trial, Judge Jameson determined the Grammer Limited Partnerships were entitled to a judgment against IBT on four unpaid promissory notes signed by Baer on IBT’s behalf totaling \$1 million (less credit for certain amounts IBT had already paid on those debts), and against SCSD on one unpaid promissory note signed by Baer on SCSD’s behalf for \$70,000. (Baer’s motion for judgment on the breach of contract cause of action was subsequently granted.) After the phase 2 trial, but

before the statement of decision was entered, Judge Jameson retired. He returned on assignment for the following hearings/events scheduled for March 9, 2005, “statement of decision; [p]roposal of plaintiff to revise Court’s ruling . . . until completion and disposition of all causes and matters heard pursuant to this assignment.” He was again assigned to sit on April 6, 2005, “and until completion and disposition of all causes and matters heard pursuant to this assignment.”

Judge Thierry Colaw presided over the final two phases of the trial, including phase 4 in the summer of 2010. In their statement of issues for the 2010 phase 4 trial before Judge Colaw, which was to be the final phase of trial, the Grammer Limited Partnerships stated their contract claims had been resolved in phase 2 and there were “[n]o remaining issues for trial: This claim was fully tried in prior phases. Plaintiffs prevailed on some loan claims, Defendants prevailed on others.” The only remaining issues were as to their remaining tenth cause of action for breach of fiduciary duty against Baer. The statement made no mention of alter ego issues remaining to be tried.

The trial court’s phase 4 tentative ruling was issued on October 18, 2010, stating phase 4 was the “final” phase of trial. It ruled in Baer’s favor, declared Baer the prevailing party, and directed Baer’s attorneys to prepare the formal statement of decision. Although the court’s tentative ruling made no specific mention of the alter ego allegations, the proposed statement of decision stated that because the Grammer Limited Partnerships introduced no evidence during trial on any other causes of action of claims, including alter ego, they had “affirmatively abandoned” any remaining claims. Over the Grammer Limited Partnerships’ timely objections, the trial court signed and entered the proposed statement of decision.

On March 29, 2011, the Grammer Limited Partnerships filed a motion for new trial under Code of Civil Procedure section 657 on the alter ego issue asking the court to strike the finding in its statement of decision they had affirmatively abandoned their alter ego claim and allow alter ego be litigated. In their motion, the Grammer

Limited Partnerships' attorney, Dennis Hartmann, asserted it had always been his understanding that claims for attorney fees and alter ego claims relating to the phase 2 breach of contract claims on which the Grammer Limited Partnerships prevailed would be decided postjudgment by retired Judge Jameson. He understood Judge Jameson's postretirement assignment to sit on post phase 2 trial matters, which was to last "until completion and disposition of all causes and matters heard pursuant to [these] assignment[s,]" encompassed these matters. Hartmann declared he had recently learned Judge Jameson now had a conflict that prevented him from hearing the postjudgment motions.

The trial court entered final judgment on May 31, 2011, awarding the Grammer Limited Partnerships approximately \$1.1 million in damages, plus pre- and postjudgment interest, against IBT and SCSD on their breach of contract and common counts causes of action in accordance with Judge Jameson's August 30, 2005, statement of decision. The court entered judgment in Defendants' favor on all remaining causes of action as to the Grammer Limited Partnerships and on all causes of action as to the non-Grammer plaintiffs.

On July 19, 2011, the trial court ruled on the Grammer Limited Partnerships' new trial motion. It granted the motion "as to [the Grammer Limited Partnerships'] request to strike from the statement of decision the finding that [they] had abandoned their alter ego remedy against Baer. [¶] A review of the complicated procedural posture of this case, particularly the status of Judge Jameson begin given, post-retirement, the power to resolve issues in [phase 2] of these proceedings mandate" granting the Grammer Limited Partnerships' new trial motion as to the alter ego issue only. "The evidence was insufficient to show waiver of further proceedings on this issue, and this [alter ego] matter, procedurally, was still an issue for Judge Jameson to decide since he still had sole jurisdiction to decide such an issue in the [phase 2] portion of the trial."

On August 3, 2011, the Grammer Limited Partnerships (and the non-Grammer plaintiffs) filed their notice of appeal from the final judgment. (*Banyan I, supra*, G045584.) On August 24, 2011, Defendants filed a notice of appeal from the final judgment, but they later dismissed their cross-appeal.

On September 16, 2011, Baer filed a separate notice of appeal from the trial court's July 19, 2011, order granting the Grammer Limited Partnerships' new trial motion, which is the appeal before us. The Grammer Limited Partnerships filed a motion in this court to dismiss the appeal on the grounds the order is not separately appealable. We ordered the motion to dismiss decided in conjunction with the appeal.

## DISCUSSION

### *1. Motion to Dismiss*

The Grammer Limited Partnerships contend the appeal should be dismissed because the order is not appealable. A new trial order, including an order for a partial new trial, is an appealable order. (Code Civ. Proc., § 904.1, subd. (a)(4); *Beavers v. Allstate Ins. Co.* (1990) 225 Cal.App.3d 310, 330.) Although the Grammer Limited Partnerships moved for new trial under Code of Civil Procedure section 657, and the trial court granted the new trial motion as to the alter ego issue, the Grammer Limited Partnerships argue the order was in reality one simply modifying the statement of decision to delete the abandonment finding so they could file a postjudgment motion under Code of Civil Procedure section 187 to add Baer as a judgment debtor. Therefore, they argue the order is in effect one denying new trial and granting alternative relief

under Code of Civil Procedure section 662<sup>4</sup> and such an order is not separately appealable. (See *Concerned Citizens Coalition of Stockton v. City of Stockton* (2005) 128 Cal.App.4th 70, 77-78 [where true nature of order was denying new trial and granting alternative relief under Code of Civil Procedure section 662, order not directly appealable].)

As we explain in *Banyan I, supra*, G045584, the Grammer Limited Partnerships' argument is based on the faulty premise that being fully aware of its alter ego claim against Baer, and having alleged those claims in its complaint and identifying it as a trial issue in the pretrial scheduling order, it nonetheless had the "option" of not presenting those claims for trial and pursuing them via a postjudgment motion to amend the judgment under Code of Civil Procedure section 187. Code of Civil Procedure section 187 provides the trial court an equitable procedure to add a nonparty to a judgment for collection purposes, when the judgment creditor has been unsuccessful in its efforts at collecting on the judgment against the named judgment debtor. (See e.g., *Leek v. Cooper* (2011) 194 Cal.App.4th 399, 419 ["[u]nder some circumstances a judgment against a corporation may be amended to add a *nonparty alter ego* as a judgment debtor" (italics added)].) Here, whether named defendant Baer was an alter ego of named defendants IBT and SCSD was front and center in the Grammer Limited Partnerships' pleadings and was an issue that should have been proven at trial. (See *Jines v. Abarbanel* (1978) 77 Cal.App.3d 702, 717 [improper to amend judgment

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<sup>4</sup> Code of Civil Procedure section 662 provides that in ruling on a new trial motion following a court trial, "the court may, on such terms as may be just, change or add to the statement of decision, modify the judgment, in whole or in part, vacate the judgment, in whole or in part, and grant a new trial on all or part of the issues, or, in lieu of granting a new trial, may vacate and set aside the statement of decision and judgment and reopen the case for further proceedings and the introduction of additional evidence with the same effect as if the case had been reopened after the submission thereof and before a decision had been filed or judgment rendered. Any judgment thereafter entered shall be subject to the provisions of [Code of Civil Procedure] sections 657 and 659."

where plaintiff was aware alleged alter ego's existence before trial].) Accordingly, the trial court's original finding Baer did not present evidence at trial to prove alter ego and thus abandoned that claim was appropriate and any relief was properly to be addressed via a new trial motion. The trial court's order is properly viewed as one granting a new trial because it envisions "a re-examination of an issue of fact in the same court after a trial and decision by a jury, court or referee" (Code Civ. Proc., § 656), and as such the postjudgment order is appealable (Code Civ. Proc., § 904.1, subd. (a)(4)). Accordingly, we deny the Grammer Limited Partnerships' motion to dismiss and turn to the merits of Baer's appeal.

## 2. *New Trial Order*

Baer contends the order granting the Grammer Limited Partnerships a new trial on the alter ego issue is void because the court lost jurisdiction to rule on the motion. We agree.

"The power of a trial court to rule on a motion for a new trial expires 60 days after (1) the clerk mails the notice of entry of judgment, or (2) a party serves written notice of entry of judgment on the party moving for a new trial, whichever is earlier, or if no such notice is given, then 60 days after filing of the first notice of intent to move for a new trial. ([Code Civ. Proc.,] § 660.) If the motion for a new trial is not ruled upon within the 60-day time period, then 'the effect shall be a denial of the motion without further order of the court.' ([Code Civ. Proc.,] § 660.) The 60-day time limit provided in [Code of Civil Procedure] section 660 is jurisdictional. Consequently, an order granting a motion for a new trial beyond the relevant 60-day time period is void for lack of jurisdiction. (*Fischer v. First Internat. Bank* (2003) 109 Cal.App.4th 1433,

1450-1451.)” (*Dakota Payphone, LLC v. Alcaresz* (2011) 192 Cal.App.4th 493, 500 (*Dakota Payphone*); see also *Collins v. Sutter Memorial Hospital* (2011) 196 Cal.App.4th 1, 14.)<sup>5</sup>

Here, the Grammer Limited Partnerships filed their new trial motion on March 29, 2011, but the court did not rule on the motion until July 19—112 days after the motion was filed. Accordingly, the trial court lost jurisdiction to rule on the new trial motion.

The Grammer Limited Partnerships argue Baer waived his right to object to the trial court’s jurisdiction to rule on the Code of Civil Procedure section 657 new trial motion because he did not alert the court to the jurisdictional issue. But it was not Baer’s responsibility to make sure the motion was ruled on in a timely manner. (See *Dakota Payphone, supra*, 192 Cal.App.4th at p. 500 [“It is the duty of the [moving] party to be present and see that his motion for a new trial is set for hearing within the statutory [time] period”].) And the claim ignores the record. At a hearing on May 20, 2011, Baer’s counsel specifically alerted the trial court the 60-day period for ruling on the Grammer Limited Partnerships’ new trial motion was about to expire. The Grammer Limited Partnerships’ counsel advised the court the 60-day period did not start until judgment was entered. The trial court agreed the 60 days did not start until either judgment was entered or notice of entry of judgment was given. But in *Green v. Laibco, LLC* (2011) 192 Cal.App.4th 441, on procedurally similar facts (i.e., motion for new trial was filed after verdict rendered but before judgment was entered), the court concluded that based on “the unanimity of the appellate authorities” when no judgment has been entered, the 60-day period begins to run from the date of filing of the notice of intention to move for

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<sup>5</sup> The same time constraint applies to a motion made under Code of Civil Procedure section 662 (i.e., amending the statement of decision and denying new trial). (*Tuck v. Tuck* (1966) 245 Cal.App.2d 260, 263 [“By failing to act within the 60-day time limitation, a court loses jurisdiction to take any further action and any purported action by the trial court thereafter is void”].)

new trial. (*Id.* at pp. 447-448.) Baer was not responsible for the Grammer Limited Partnerships' misunderstanding of the law. A new trial order rendered more than 60 days after the motion was filed is void. (*Dakota Payphone, supra*, 192 Cal.App.4th at p. 500.)

The Grammer Limited Partnerships also argue we should construe their new trial motion as a motion to set aside a judgment under Code of Civil Procedure section 663 so as to avoid jurisdictional bar and render the order effective. Code of Civil Procedure section 663 allows the trial court, in the case of a court trial, upon noticed motion to set aside and vacate the judgment and enter a different judgment when there was an “[i]ncorrect or erroneous legal basis for the decision, not consistent with or not supported by the facts; and in such case when the judgment is set aside, the statement of decision shall be amended and corrected.” (See *Payne v. Rader* (2008) 167 Cal.App.4th 1569, 1574 [““A motion to vacate under [Code of Civil Procedure] section 663 is a remedy to be used when a trial court draws *incorrect conclusions of law* or renders an erroneous judgment on the basis of *uncontroverted evidence*””].) Although the current version of Code of Civil Procedure section 663a imposes the same 60-day requirement for ruling on the motion imposed upon new trial motions (Code Civ. Proc., § 663a, subd. (b)), the version of the statute in effect when the Grammer Limited Partnerships' motion was ruled upon imposed no time limit. In the alternative, the Grammer Limited Partnerships argue we should construe the motion as one brought under Code of Civil Procedure section 473, subdivision (d), to set aside any void judgment or order. Generally, absent a showing of “extremely good cause,” an appellate court will construe a motion as it is labeled. (*20th Century Ins. Co. v. Superior Court* (2001) 90 Cal.App.4th 1247, 1261 (*20th Century*)); *APRI Ins. Co. v. Superior Court* (1999) 76 Cal.App.4th 176, 181-184; *Passavanti v. Williams* (1990) 225 Cal.App.3d 1602, 1610.) Although there can be exceptional cases in which appellate courts have disregarded the label assigned to the motion by the moving party and looked instead to the substance of the relief sought and obtained from trial court (*20th Century*,

supra, 90 Cal.App.4th at p. 1261), the Grammer Limited Partnerships have not demonstrated this to be such a case.

DISPOSITION

The motion to dismiss the appeal is denied. The postjudgment order is reversed. In the interests of justice, each side shall bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

O'LEARY, P. J.

WE CONCUR:

RYLAARSDAM, J.

BEDSWORTH, J.