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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

KEMERY DAY et al.,

Plaintiffs and Respondents,

v.

TONJA DEMOFF,

Defendant and Appellant.

G049293

(Super. Ct. No. 30-2008-00103768)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Craig L. Griffin, Judge. Affirmed.

Law Office of P. Sterling Kerr, and P. Sterling Kerr for Defendant and Appellant.

The Hellenkamp Law Firm, Terry J. Hellenkamp and Timothy V. Mahar, Jr., for Plaintiffs and Respondents.

Tonja Demoff appeals from a judgment following a court trial in favor of Kemery Day and her corporations, Four Days Investment, Inc., and JAB 1962 NV, LLC (hereafter referred to collectively and in the singular as “Day”), in this action arising out of failed business relationships. Demoff contends the trial court erred by finding she was the alter ego of several business entities she controlled and with whom she was found to be jointly and severally liable. We conclude Demoff has failed to demonstrate she was prejudiced by the alter ego finding because she has not challenged the findings she is personally liable on each cause of action, including those causes of action alleged against her alone. Accordingly, we affirm the judgment.

#### FACTS & PROCEDURE<sup>1</sup>

In our prior opinion *Day v. Demoff* (May 25, 2011, G043227) [nonpub. opn.], we reversed a \$1.2 million default judgment Day obtained against Demoff, Demoff’s partner Toby Maloney, and seven business entities owned and controlled by them.<sup>2</sup> Day sued Demoff for breach of fiduciary duty, fraud, breach of

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<sup>1</sup> Demoff provided us a reporter’s transcript from the trial proceedings and a clerk’s transcript that contained only the register of actions, the judgment, the notice of appeal, and the designation of the record on appeal. On our own motion we have augmented the record to include the complaint and the trial court’s statement of decision. (Cal. Rules of Court, rule 8.155(a)(1)(A).)

Additionally, although the trial court’s statement of decision and the reporter’s transcript indicate almost 90 exhibits were admitted into evidence, Demoff has not filed a notice under California Rules of Court, rule 8.224 designating any trial exhibits to be considered by this court, nor have any of the exhibits been transmitted to this court. “Where exhibits are missing we will not presume they would undermine the judgment. [Citation.]” (*Western Aggregates, Inc. v. County of Yuba* (2002) 101 Cal.App.4th 278, 291; see also *Heyman v. Franchise Mortgage Acceptance Corp.* (2003) 107 Cal.App.4th 921, 925, fn. 1.)

<sup>2</sup> The business entities are TDCO, LLC, a California limited liability company; TDCO Realty, LLC, a Nevada limited liability company; TDCO Realty, Inc., a California corporation; Financial Freedom Seminar Systems, LLC, a California limited liability company; TDCO, LLC, a Nevada limited liability company; Financial Freedom

contract, and negligence, among other causes of action. Our prior opinion explains the gist of the dispute: “In short, Day alleged Demoff promoted herself as a ‘wealth coach’ who through public speaking, seminars, books, and infomercials, advised people on how to become financially ‘free’ through investing in real estate. On alleged promises she was to be Demoff’s partner in various Demoff-run ventures, and would receive 25 percent of commissions earned on certain real estate transactions[,] Day gave Demoff \$249,000 (her life savings), as loans. The loans were not repaid and the commissions were not paid.” (*Day v. Demoff, supra*, G043227, typed opn. pp 2-3.)

On remand, a bench trial was conducted following which the trial court issued an exhaustive statement of decision containing findings of fact and conclusions of law. Demoff does not challenge the sufficiency of the evidence to support the court’s factual findings or conclusions of law, which we summarize here, other than as to the alter ego finding.

#### *Day’s Work for and Loans to the TDCO Companies*

Day met Demoff in the summer of 2005 when Day sold her house to Demoff and one of Demoff’s business partners. Demoff repeatedly told Day that someday they would work together as business partners and/or joint venturers.

Demoff contacted Day in January 2006 and suggested they get together to discuss possible employment and/or business opportunities. During this conversation, Demoff outlined the various investments and businesses Demoff was creating for wealth coaching, speaking seminars, and real estate investments. She gave Day the impression she was creating an empire of wealth helping people become financially free by educating them on how to invest in real estate, an impression reinforced by books, CD’s, and other products Demoff sold promoting herself as a real estate and investment guru.

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Seminar Systems, LLC, a Nevada limited liability company; and 04 Ocean, LLC (hereafter collectively called the TDCO Companies). The TDCO Companies and Maloney do not appeal from the judgment.

In March 2006, Demoff and Day formed a joint venture agreeing to combine efforts and resources to make a profit in a variety of real estate ventures. Day began working with Demoff in the TDCO Companies offices assisting Demoff with real estate transactions and marketing Demoff's wealth seminars. Day received no pay for her work; Demoff promised Day she would be compensated by lucrative investments she could make in the TDCO Companies and she would make a minimum of \$250,000 annually—but more likely would earn upwards of \$750,000. Demoff told Day she would act as Day's wealth coach and ensure her financial success, and she induced Day to disclose all her personal assets and financial condition.

By April 2006, Day was spending all her time working for the TDCO Companies and/or Demoff and could not work on her own personal real estate transactions. Demoff told Day about her plan to make Day and other investors rich and successful by investing money in real estate through the TDCO Companies. Demoff also had plans to grow her speaking, seminar, book, and infomercial career. Day worked tirelessly on both Demoff's real estate investments and wealth coaching business. Demoff provided Day with forecasts showing the TDCO Companies would have a net cash flow of \$4.6 million dollars in 2006 and \$11.4 million dollars by 2008.

In June 2006, Day orally agreed to pay \$50,000 to the TDCO Companies in return for a partnership interest in them and in Demoff's ventures. The \$50,000 was later characterized as a \$1,000 payment for the partnership interest and a \$49,000 loan to the TDCO Companies. Demoff promised the loan would be repaid within two years. Demoff consistently told Day the TDCO Companies were on the brink of greatness and they were guaranteed to make millions within a few years. Many of the projects centered around buying and selling real estate between different TDCO Companies at increased prices making a higher demand in the market and increasing the property's value.

In October 2006, Day and Demoff discussed Day's request for compensation for her work for Demoff and the TDCO Companies. In lieu of a salary,

Demoff promised Day a 25 percent share of all commissions on real estate transactions for certain investors. The promise was memorialized in a written contract. Demoff told Day she would be closing escrow on dozens of properties and Day would receive a share of commissions on all those properties. Demoff only made this promise to keep Day working for free and she never intended to pay Day the commissions.

In December 2006, Demoff convinced Day to loan the TDCO Companies another \$200,000, which she orally agreed would be paid back with 8 percent annual interest within three years. Demoff promised Day she would have a larger percentage interest in the TDCO Companies and continued to assure Day the business was going to be highly profitable and she would be making a fortune. Demoff used the \$200,000 to pay a bonus to another employee so he could invest in the Clinton Properties (discussed below).

Later, when Day demanded Demoff put the \$49,000 and \$200,000 loans into writing, Demoff provided her with signed promissory notes on completely different terms than they had orally agreed upon—the notes would be at 6.5 percent annual interest, no monthly payments, and were not due until 2031.

#### *The LHP Properties*

Around this same time, Demoff proposed to Day that she invest in three rental properties in the Long Beach area known as the Lindale, Hersholt, and Platt properties (the LHP Properties). The plan was for Day to purchase the properties and transfer ownership to LHP06, LLC. LPH06, LLC in turn was owned by three entities—one owned by Demoff and her partner Maloney (defendant 04 Ocean, LLC), one owned by Day and another person, and one owned by friends of Demoff's. Demoff promised she would equally contribute to the LHP Properties expenses including mortgage, taxes, and maintenance.

Day purchased the LHP Properties from one of Demoff's other clients, and Demoff acted as a dual real estate agent for both the seller and purchaser. Demoff did not

disclose to Day that another company owned by Demoff, BB TNT, had an ownership interest in the property. Apparently through BB TNT, Demoff had earlier purchased the notes on the LHP Properties at discounted rates. Demoff was then able to have those notes paid off in full through Day's purchase of the properties. Demoff had set the purchase price for the properties so her notes on the property would be paid in full. Additionally, the LHP Properties were covered under the commission agreement, but Demoff refused to provide Day with her share of the commission. By 2008, Demoff ceased contributing towards the mortgage and taxes, and Day eventually lost the LHP Properties through foreclosure.

#### *The Clinton Properties*

Demoff also persuaded Day and others to invest in a condominium conversion project in Fresno—the Clinton Properties. The plan was for Day, and Demoff's other partners, to each purchase four units. Demoff urged Day to invest in the Clinton Properties saying it would be the start of great wealth for her. The price of a two-bedroom unit was \$200,000 and a one-bedroom unit was \$180,000. Demoff promised Day \$135,000 in cash at the close of escrow as a bonus, which she never paid. Demoff also promised Day \$80,000 in commission on the property, but she only paid Day \$40,000. Demoff told Day she was also purchasing four of the units at the same price all the others were paying, when in fact she was purchased her four units for only \$17,500 each. Demoff earned over \$2,000,000 in commissions from the Clinton Properties. Day lost the Clinton Properties in foreclosure.

#### *The Complaint*

Day's complaint alleged the following causes of action: breach of fiduciary duty (first cause of action) against Demoff only alleging Demoff breached fiduciary duties as her real estate agent, wealth coach, joint venture/business partner, and managing member of the companies in which Day held a membership interest with regards to all their business dealings; fraud and negligent misrepresentation (second and third causes of

action) against Demoff and the TDCO Companies with regard to the \$249,000 in loans Day made; breach of written contract (fourth cause of action) against Demoff only pertaining to the written agreement to pay Day 25 percent commission on certain real estate transactions; anticipatory breach of written contract (fifth and sixth causes of action) against Demoff and the TDCO Companies relating to the \$249,000 in loans made by Day; negligence (seventh cause of action) against Demoff and the TDCO Companies relating to all the business transactions; fraudulent conveyance (eighth cause of action) against Demoff and the TDCO Companies relating to the use of the proceeds of \$249,000 and the mismanagement of the LHP Properties; common count (ninth cause of action) against Demoff and the TDCO Companies relating to the \$249,000 in loans; and breach of contract (tenth cause of action) against Demoff, Maloney, and 04 Ocean, LLC relating to the LHP Properties investment. The complaint also alleged the TDCO Companies were shell entities and alter ego entity business through which Demoff conducted her business.

### *Ruling & Judgment*

The trial court ruled in Day's favor on all her causes of action. We detail first its ruling on the causes of action that were alleged against Demoff only—breach of fiduciary duty (first cause of action) and breach of written commission agreement (fourth cause of action). The court found Demoff owed Day a fiduciary duty as Day's real estate agent during the purchase of the LHP Properties and the Clinton Properties, which she breached by not disclosing material details of the transactions, misleading Day as to the commissions she would be paid, and failing to disclose she only paid \$17,500 for each unit while telling Day she was paying \$200,000 per unit. The court also determined Demoff owed Day a fiduciary duty as Day's wealth coach/investment professional, which she breached by inducing Day to invest in her companies and to work tirelessly without pay under the promise of profitability, to loan money to Demoff, and to invest in LHP Properties and the Clinton Properties, by which Demoff profited at Day's

expense. The court found Demoff owed Day a fiduciary duty as a joint venture/business partner, which she breached by failing to act with candor towards Day and which resulted in the losses suffered by Day in all the transactions. The court found Demoff owed a fiduciary duty to Day as managing member in the TDCO Companies in which Day had a membership interest, which she breached by failing to do the following: use the utmost care and concern in conducting the joint business undertakings, protect Day's investments, disclose profits to Day, properly manage and operate the TDCO Companies, and act honestly towards Day. The court found Demoff liable for breach of written agreement pertaining to payment of 25 percent commissions.

The court also held Demoff and the TDCO Companies liable for fraud because Demoff intended to take all profits for herself, to not repay the \$249,000 in loans, to unfairly profit from Day's time, energy, and efforts without compensation, and to misuse Day's investments for her own gain. The court found Demoff liable for negligent misrepresentation because Demoff stepped out of her proper role as employer, partner, and business venturer and the negligent misrepresentations were not risks or incidental to their agreements. And the court concluded Demoff and the TDCO Companies were liable for anticipatory breach of contract and common count relating to the \$249,000 in loans. The court further found the TDCO Companies were the alter egos of Demoff, and Demoff was jointly and severally liable with these business entities.

The court awarded Day \$1,123,197.62 total damages on all her causes of action against Demoff and the TDCO Companies broken down as follows: \$58,539.61 (principal and prejudgment interest) for the \$50,000 loan; \$306,667.31 (principal and prejudgment interest) for the \$200,000 loan; \$174,971.92 (principal and prejudgment interest) for the lost down payment on the LHP Properties; \$423,599.54 (principal and prejudgment interest) for the lost down payment on the Clinton Properties, plus another \$60,676.43 (principal and prejudgment interest) in unpaid commissions relating to the

Clinton Properties; and \$98,782.81 (principal and prejudgment interest) for other unpaid commissions.

## DISCUSSION

The sole issue Demoff raises on appeal pertains to the trial court's alter ego findings. She contends there is insufficient evidence to support a finding there was any "unity of interest" between Demoff and the TDCO Companies.<sup>3</sup> Demoff has not shown any prejudicial error.

We agree with Day that we may affirm the judgment without considering Demoff's alter ego argument for the simple reason that even if erroneous, Demoff has shown no prejudice from the trial court's alter ego finding. An appellant has the burden to show not only that the trial court erred but also that the error is prejudicial.

(Cal. Const., art. VI, § 13; Code Civ. Proc., § 475; *Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1069.) "No form of civil trial error justifies reversal and retrial, with its attendant expense and possible loss of witnesses, where in light of the entire record, there was no actual prejudice to the appealing party." [Citation.] (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 801.) An error is not prejudicial if independent grounds unaffected by the error support the judgment. (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 19; *Estate of Beard* (1999) 71 Cal.App.4th 753, 776-777.)

Demoff's appeal is premised on the mistaken assumption the sole basis for her personal liability for the judgment is through application of the alter ego doctrine, i.e., that she is being held responsible only for the wrongs of her companies, not for her own conduct. She is wrong. Demoff was found liable for *her* actions and *her* tortious

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<sup>3</sup> "In California, two conditions must be met before the alter ego doctrine will be invoked. 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 Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 538.)

conduct. (See e.g., *PMC, Inc. v. Kadisha* (2000) 78 Cal.App.4th 1368, 1379 [“Corporate . . . officer status” does not “immunize[ ] a person from personal liability for tortious conduct”].)

Significantly, two of the complaint’s causes of action were alleged against Demoff *only*—breach of fiduciary duty and breach of written commission agreement. The trial court found in Day’s favor on those causes of action. Demoff does not discuss or in any way challenge the sufficiency of the evidence to support the trial court’s findings of fact or conclusions of law on those causes of action—or any others—and thus she has waived any such argument. (*Roehl v. Ritchie* (2007) 147 Cal.App.4th 338, 352 [appellant’s failure to raise issue in opening brief waives that challenge].)

The trial court’s judgment did not award different damages for different causes of action. Because it is clear *all* the damages awarded against Demoff are encompassed by the breach of fiduciary duty and breach of written commission agreement causes of action, we need look no further to affirm this judgment. The court concluded Demoff breached the fiduciary duty she owed Day as her real estate agent in the purchase of the LHP Properties and the Clinton Properties by not disclosing material details of the transactions and misleading Day as to the commissions she would be paid, which encompasses the damages awarded relating to those transactions. It found Demoff breached the fiduciary duty she owed as Day’s wealth coach/investment adviser by inducing Day to invest in the TDCO Companies, to work for them without pay under the promise of profitability, to loan money to Demoff’s companies, and to invest in the LHP Properties and the Clinton Properties (from which Demoff was profiting), which encompasses the damages relating to the LHP Properties and the Clinton Properties transactions and to the loans Day made to the TDCO Companies. The court found Demoff breached the fiduciary duty she owed as a joint venturer/business partner with Day, which encompasses all the losses suffered by Day in all the transactions. The court found Demoff breached the fiduciary duty she owed Day as managing member in the

TDCO Companies in which Day had a membership interest, which encompasses the damages relating to the loans Day made to the companies. And, finally, the court found Demoff breached the written agreement between Demoff and Day concerning payment of real estate commissions, which encompasses the damages for unpaid commissions. Because liability is supported by the causes of action alleged against Demoff only, and that are unrelated to her alter ego liability, she has shown no prejudice from the alter ego finding.

#### DISPOSITION

The judgment is affirmed. Respondents are awarded their costs on appeal.

O'LEARY, P. J.

WE CONCUR:

RYLAARSDAM, J.

BEDSWORTH, J.