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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

RANDA SAWAN BATHAS,

Plaintiff and Appellant,

v.

DANA SAWAN MCCLUSKEY et al.,

Defendants and Respondents.

G050228

(Super. Ct. No. 30-2012-00590087)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Kirk H. Nakamura, Judge. Affirmed.

Law Office of D. Joshua Staub, D. Joshua Staub and Mark Leonardo for Plaintiff and Appellant.

Buffington Law Firm, Roger J. Buffington, Kaden J. Kennedy, Adam M. Foster; Law Office of Henry B. LaTorraca and Henry B. LaTorraca for Defendants and Respondents.

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Plaintiff and appellant Randa Sawan Bathas appeals from a judgment in favor of her siblings, defendants and respondents Dana Sawan McCluskey (McCluskey), Raymond Sawan (Sawan), and Jackie May Sawan (Jackie May),¹ and Sawan Investment Company (SIC) on her complaint for breach of fiduciary duty, removal of directors, and corporate dissolution. She claims the court made several erroneous factual findings, including that defendants acted in good faith; did not pervasively mismanage SIC despite the failure to strictly comply with all corporate formalities; did not fail to distribute income or make improper distributions; did not commit fraud or grossly abuse their authority; and were properly indemnified for legal expenses. She also argues defendants did not satisfy the requirements of the business judgment rule or prove their entitlement to indemnification. Finally, she challenges denial of her motions for discovery sanctions and judgment on the pleadings.

We conclude there was no error and affirm.

FACTS AND PROCEDURAL HISTORY

SIC was founded by Michel Sawan, the parties' father, who managed the business. He, through the Sawan Family Trust (Trust), controlled 14 percent of the shares; the remaining shares were owned by the parties and their oldest brother, Basim Sawan (Basim). SIC has one asset: a piece of real property leased by Del Taco for a restaurant (Property).

When Michel Sawan died, Basim, successor trustee, took control of SIC. In 2008 the individual defendants filed a petition challenging Basim's actions as the trustee of the Trust (Trust Action). During the pendency of the Trust Action the court issued an interlocutory order that stated the individual defendants owned a majority of the SIC shares and had the right to elect its directors.

¹ McCluskey and Sawan are collectively referred to as the director defendants. McCluskey, Sawan, and Jackie May are collectively referred to as the individual defendants.

The lawyer representing the individual defendants in the Trust Action was Howard Bidna. After the interlocutory order was issued, Bidna advised them as to election of directors and appointment of officers. The director defendants misunderstood Bidna's advice and believed a majority of the shareholders could elect directors by using unanimous consent forms and without holding a shareholders' meeting.

Thereafter, in 2009, by written consent, the individual defendants elected Sawan and McCluskey as directors. The director defendants were also appointed as SIC's officers. Plaintiff was provided notice of these actions. For the next three years the individual defendants elected the same directors and appointed the same officers in the same manner. Defendants also sent certain quarterly reports, financial statements, bank statements, and the like to all of the shareholders in 2011 and 2012.

In 2010 when the lease with Del Taco was about to expire, SIC retained JD Property Management, Inc. (JD) to negotiate a 10-year lease renewal for the Property. McCluskey had been a licensed real estate agent for 20 years and employed by JD for 18 years; she was an officer, director, and minority shareholder of the firm. Jackie May and Sawan were aware of McCluskey's relationship with JD and approved the retention of the firm to undertake the lease negotiations. Sawan as director approved the hiring of JD in writing.

When the lease was renewed, SIC paid JD a commission of \$25,350, which was 2.5 percent of the rents to be paid by Del Taco. McCluskey testified the commission was fair, especially in light of the end result to SIC.

SIC also paid JD \$150 per month to manage the property. This is the "absolute minimum" amount JD charges as a management fee.

None of the transactions with JD were disclosed to plaintiff.

In 2011, while the Trust Action was pending, Basim filed an action (Basim Action) against the shareholder defendants and SIC, making essentially the same allegations as plaintiff makes in this action, i.e., improper payments to JD, stockpiling

cash, and failing to maintain corporate formalities. SIC filed a cross-complaint to recover funds allegedly converted by Basim when he controlled SIC.

Trial in the Trust Action resulted in a judgment in favor of defendants, with the court holding Basim had acted in bad faith in his capacity as trustee, including his failure to distribute trust assets and conversion of Trust assets.

Subsequently in 2012 Basim and defendants settled the Basim Action. Among other things, Basim distributed his shares in SIC equally to the parties, including plaintiff, who, as a result, now each own 25 percent of SIC. This was deemed satisfaction of the judgment against Basim in the Trust Action.

During the pendency of the Basim Action, SIC held money in reserve to pay for litigation costs; no funds were distributed to any of the shareholders in 2011 and 2012.

In 2012 plaintiff filed the complaint in this action against defendants for breach of fiduciary duty, to remove the directors, and to have SIC dissolved. She alleged failure to observe corporate formalities, including failure to hold shareholders' and directors' meetings and the method of electing directors and appointing officers; the agreements with JD; stockpiling of cash and failure to pay dividends; improper indemnity; and hostility toward and failure to provide information to her.

Before trial, the court appointed a receiver for SIC. The receiver, represented by SIC's independent counsel, entered into a settlement with the individual defendants of any claims in the complaint that could be considered derivative claims by SIC. The settlement was approved by the court, and included a general release among all the individual defendants and SIC.

After a bench trial, the court ruled in favor of defendants and issued a lengthy statement of decision. As to the agreements with JD, it found the evidence did not support any wrongdoing. The directors acted in good faith and complied with the formalities required by Corporations Code section 310. (All future statutory references

are to this code, unless otherwise stated.) In addition, the transactions were protected by the business judgment rule in section 309. Moreover, the transactions were reasonable and benefited SIC. The court specifically disagreed with certain conclusions of plaintiff's expert witness, including that defendants should have employed a lawyer to handle the lease renewal, and instead found the 2.5 percent commission and the monthly management fee reasonable.

The court did not find "pervasive mismanagement" or "deliberate intent to harm" as to defendants' alleged failure to comply with corporate formalities. There were certain formalities defendants did not observe, including failing to hold annual shareholders' meetings during the time McCluskey and Sawan were directors. Additionally, the written consent documents did not strictly comply with the Corporations Code or SIC's bylaws. But although defendants were not in strict compliance with these requirements, they did not act in bad faith because they did not understand they had a duty to hold annual meetings, and they did not intend to "freeze out" plaintiff. Once defendants learned they were required to hold a shareholders' meeting, they did so; and plaintiff participated and voted.

The court also found defendants fell within the purview of section 309, subdivisions (c) and (b)(2), the safe harbor provision, which exculpates a director who relies on the advice of counsel.

As to the claim defendants intentionally failed to provide accurate records, the court found "some evidence of sloppy record[]keeping," primarily with regard to the minutes. But this also did not prove bad faith or pervasive mismanagement. There was also an incorrect K-1, the other basis for plaintiff's claim. But it resulted from an error by SIC's accountant, on which the director defendants relied, and which was promptly corrected when they learned of it. Section 309, subdivisions (c) and (b)(2), applied to these allegations as well.

Moreover there was no evidence of improper distribution of or failure to distribute corporate income.

The evidence showed all of the individual defendants' alleged wrongful acts were in their capacities as a director, officer, employee, or other agent of SIC. Thus, under section 317, they were entitled to indemnification for their legal fees in defending actions brought against them in that capacity.

The court also found that before this case was filed, the individual defendants obtained a legal opinion they were entitled to indemnification for the Basim Action, which contained virtually identical allegations as those made here. At request of plaintiff, that case was deemed to be related. The individual defendants complied with section 317, subdivision (e)(2). In addition, defendants thought they were, and in fact were, relying on the advice of counsel as set out in section 309, subdivision (b)(2).

Further, the argument defendants were wrongfully indemnified was moot. First, under section 317, subdivision (d), if an agent of a corporation prevails on the merits in defending against the kinds of claims brought by plaintiff, the agent "shall be indemnified against expenses actually and reasonably incurred." (§ 317, subd. (d).) The court ruled defendants prevailed and also that the expenses were "reasonably incurred."

Second, the claim was moot due to the settlement with the receiver, which specifically included the issue of indemnification of the individual defendants for legal fees. The receiver reviewed all actual or potential claims SIC had against the individual defendants. The court found the receiver acted properly, diligently, and independently in entering into the settlement, which was fair to SIC.

In addition, reimbursement of the individual defendants for legal expenses incurred in the Trust Action was proper. Bidna testified the services were performed for the benefit of SIC, including removal of Basim as a director and an officer. Because Basim had control of SIC's finances, SIC could not pay its legal bills and the individual defendants paid them on its behalf. A \$20,000 payment to the individual defendants

shown as reimbursement of legal fees was actually money Basim owed to them for attorney fees as part of their judgment against him in the Trust Action. Furthermore, this claim was covered by the settlement with the receiver.

Although the parties are not on best of terms, the court found there was insufficient hostility to sustain a judgment against defendants.

The court noted that under section 304, the court has discretion to remove a director for fraudulent acts, dishonesty, or “gross abuse of authority.” The court also has inherent discretion to remove an officer or director. A court will not generally remove a director for alleged misconduct during a term of office if the director is reelected, which occurred here. Relying on its finding of facts and consideration of all the evidence, the court determined the officers and directors should not be removed.

The court also found plaintiff had not proved either cause of action for breach of fiduciary duty. This was based on its other findings and rulings as set forth above, including settlement with the receiver as to any derivative claims.

Likewise, plaintiff did not prove SIC should be dissolved. Plaintiff brought the claim pursuant to section 1800, which allows dissolution if those controlling the corporation have engaged in or sanctioned pervasive mismanagement, fraud, or abuse of authority. She relied on the same facts alleged in support of the other causes of action. Under section 1800, subdivision (a)(2), to have standing a shareholder must own at least one-third of the shares, exclusive of those owned by the shareholders participating in the alleged wrongful conduct.

The court reiterated that, as it had already discussed, the individual defendants were not liable for the alleged misconduct. Therefore, not only did plaintiff lack standing because she owned only 25 percent of the shares, there was no wrongdoing that would support dissolution.

Finally, plaintiff also lacked standing to bring derivative claims. The court found the causes of action for breach of fiduciary duty and to remove the officers and

directors could be construed to be derivative claims because they were based on alleged malfeasance or mismanagement of SIC. However section 800 requires a plaintiff to provide the board a copy of the proposed complaint prior to filing it. Plaintiff did not provide such a copy and did not prove it would have been futile to do so. Further, the issue was moot due to the settlement with the receiver.

Additional facts are set out in the discussion.

DISCUSSION

1. Alleged Misconduct

Plaintiff alleges four causes of action: removal of the officers and directors, against the director defendants and SIC; two causes of action for breach of fiduciary duty, one against all defendants and one that does not include Jackie May, and for involuntary dissolution against SIC. Plaintiff generally relies on the same alleged wrongful acts.²

The alleged wrongful acts are payment of the commission and management fees to JD, failure to observe corporate formalities, stockpiling cash, failure to pay

² Plaintiff includes a long list of allegedly improper acts in a section of her brief entitled “Statement of the Case.” (Boldface & capitalization omitted.) She also includes a section entitled “Errors in Statement of Decision” where she sets out portions of the Statement of Decision and summarily challenges them. In addition, she makes several arguments in her “Introduction” that were not included in the argument part of the brief. Finally, she scatters miscellaneous facts throughout her argument.

Whatever acts, errors, or claims plaintiff does not address in the argument portion of her briefs are forfeited and we do not consider them. Further, any argument in the body of the brief not within a discrete section with a heading or supported by reasoned legal argument and authority is also forfeited. (See *Provost v. Regents of University of California* (2011) 201 Cal.App.4th 1289, 1294 [“we do not consider all of the loose and disparate arguments that are not clearly set out in a heading and supported by reasoned legal argument”]; Cal. Rules of Court, rule 8.204(a)(1)(B) [each point must be separately headed and supported by argument and authority if available]; (all further citation to the rules will be to the California Rules of Court.)

dividends, paying “trust expenses,”³ and improperly reimbursing the individual defendants for their legal expenses in the Trust Action and indemnifying them in the Basim Suit and the current action.

2. *Payments to JD*

Plaintiff argues the director defendants breached their fiduciary duty by retaining JD to negotiate the lease renewal and to manage the Property. The court found the transactions were reasonable and beneficial to SIC. Further, the director defendants acted in good faith and complied with the requirements of section 310. Finally, the transactions were protected by the business judgment rule set out in section 309. The court’s factual findings are supported by substantial evidence and thus we agree there was no breach of fiduciary duty.

When we are faced with a substantial evidence argument, we start with the presumption the judgment is correct. (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 957.) On review of a judgment ““based upon a statement of decision following a bench trial, ‘any conflict in the evidence or reasonable inferences to be drawn from the facts will be resolved in support of the determination of the trial court decision. [Citations.]’ [Citation.]”” (*Axis Surplus Ins. Co. v. Reinoso* (2012) 208 Cal.App.4th 181, 189.) We liberally construe the court’s findings of facts, whether express or implied. (*Ibid.*) We may not reweigh or resolve conflicts in the evidence or redetermine the credibility of witnesses. (*Citizens Business Bank v. Gevorgian* (2013) 218 Cal.App.4th 602, 613.)

³ Plaintiff did not direct us to anything in the record to explain the nature of the expenses encompassed in the term “Trust Expenses.” The only record reference is to certain exhibits. But she did not request any exhibits be transmitted to us and we cannot rely on them in deciding the appeal. Arguments based on exhibits not transmitted are deemed abandoned. (*Brown v. Copp* (1951) 105 Cal.App.2d 1, 9.)

Plaintiff relies heavily on her limited version of the facts in arguing the director defendants improperly retained JD. As to the commission, she argues JD made only “minimal efforts” in negotiating the renewal: there were three or four phone calls, a few e-mails, and a one-page lease extension to show for its efforts. The result was only an additional \$200 per month rent and a minimum three percent increase for the option period.

What plaintiff neglected to include in her statement of facts⁴ was the following: Del Taco had a five-year option to renew the existing lease. It had advised SIC it was uncertain whether it would exercise that option or “upgrade” at another location. Defendants believed it was in their best interest to have JD act on its behalf to negotiate with Del Taco, a large company with a stable of professionals handling their property matters. McCluskey testified it is the industry norm to have a broker/agent negotiate on behalf of the owner rather than a lawyer, as plaintiff argued.

In the course of the negotiations, Del Taco asked SIC to contribute \$150,000 to \$200,000 to make capital improvements. Ultimately Del Taco agreed to a 10-year lease with increased rent, another increase after five years, and an option to renew with a minimum of a three percent increase even if the fair rental value decreased. Rent over the 10-year term was to equal more than \$1 million. Defendants did not have to expend any funds to make tenant improvements.

Plaintiff argues because McCluskey was a longtime broker she had the expertise to negotiate the extension herself without charge to SIC. But McCluskey testified it would have been improper for her to do so. She works for JD and cannot act outside its auspices.

⁴ Rule 8.204(a)(2)(C) requires plaintiff to “[p]rovide a summary of the significant facts” rather than merely evidence favorable to her position. We could consider her arguments forfeited. (*Clark v. Superior Court* (2011) 196 Cal.App.4th 37, 53.)

Likewise, plaintiff challenges payment of the minimal management fee, claiming that before he died, Michel Sawan managed the property and he was not a professional manager. Further, the only work required is to collect monthly rent. She claims this does not benefit SIC but only JD and McCluskey.

But McCluskey testified JD performs other services, including preparing quarterly financial reports, cutting checks to the shareholders, and paying property taxes.

Plaintiff's conclusory statements defendants did not show good faith, the transactions did not benefit her or SIC, and the actions constituted mismanagement are, at best, an argument we should reweigh the evidence, which, of course, is not within our province.

There is more than sufficient evidence supporting the court's findings that hiring JD not only was reasonable and benefitted SIC, it was also done in good faith.

Furthermore, the evidence supports the finding the director defendants complied with the requirements of section 310. That statute pertains to transactions in which a director has a "material financial interest." (§ 310, subd. (a).) It provides that such a transaction is not void or voidable so long as the material facts about the transaction and the director's interest are either: (1) known to the disinterested shareholders, who approve the transaction in good faith (§ 310, subd. (a)(1)); or (2) a sufficient number of independent directors who authorize the transaction, which must be just and reasonable (§ 310, subd. (a)(2)). Here, as the court found, all of these factors were met.

Because we may affirm the decision as to the JD transactions on these grounds, we need not discuss or rely on the business judgment rule.

3. Reimbursement of Legal Expenses and Indemnification

a. Reimbursement of Fees for Trust Action

SIC reimbursed the individual defendants for attorney fees they paid to Bidna in the Trust Action. Plaintiff claims this was error because the reimbursement did not benefit SIC.

Bidna testified the services he performed were for SIC's direct benefit, including removal of Basim who had wrongfully taken control of SIC, and collecting back rents in the sum of approximately \$94,000 from Del Taco. At that time the only way SIC could pay for legal services was for the individual defendants to advance the fees. The bills for services were introduced and the court found they substantiated Bidna's testimony.

In her brief, plaintiff points to no evidence and makes no reasoned legal argument to support her claim reimbursement for these fees was improper. She merely cites two cases and claims payments to defendants was theft. Plaintiff has not met her burden to show reimbursement was improper.

b. Indemnification for Legal Expenses in Basim Action and Current Action

Defendants also paid Sawan's legal expenses incurred in defending the Basim Action, and paid the attorney fees for all of the individual defendants in the current action.

Plaintiff challenges these payments on several bases: Defendants did not satisfy the requirements of section 317 which allows for indemnification, including that defendants had not yet prevailed in the current action, a majority of the nonparty directors or nonparty shareholders did not vote to approve indemnity, defendants did not obtain a written opinion from independent legal counsel that indemnification was permissible, there was no court order approving indemnification, and defendants did not provide a bond. Further, she asserts section 317 allows only agents to be indemnified and Jackie May was never an agent.

However, as the statement of decision provides, this issue is moot. It was included in the settlement between defendants and the receiver. We reject plaintiff's argument the settlement did "not retroactively alter the fact that [defendants] violated [s]ection 317." Of course a settlement cannot retroactively alter a fact, but it can resolve a claim of wrongdoing, which it did here.

4. Stockpiling Cash and Failing to Make Distributions

Plaintiff protests SIC's failure to pay her pro rata share of income from the Del Taco rent for certain periods from 2010 through 2013. She claims, SIC "stockpiled" more cash than necessary because, based on its triple net lease, Del Taco paid all expenses for the Property. She also contends defendants deprived her of income when they paid their own legal expenses and the broker's fees to JD. These arguments fail.

First, as discussed above, reimbursement of legal expenses and payments of fees to JD were proper. Moreover, any complaint about indemnification is moot.

Second, plaintiff's claim all of SIC's income should be distributed is based on faulty logic. In fact, the opposite is true. SIC has reasonable or potential expenses beyond those included in Del Taco's triple net lease. There are at least tax liabilities in addition to JD's monthly management fee. Further, it is prudent to retain some cash for other potential expenses.

For all these reasons the court found there was no evidence defendants had wrongfully failed to distribute income or that any distributions were improper. We agree.

5. Failure to Observe Corporate Formalities

Plaintiff points to defendants' failure to hold shareholders meetings from 2009 through 2012, in violation of the bylaws. She also challenges four written shareholders' consents that designated themselves as "unanimous," because she signed none of them; they were signed only by the individual defendants.

The court found defendants failed to observe some of the corporate formalities such as holding annual shareholders' meetings. But it also concluded this

failure was not done in bad faith or with the intent to “freeze out” plaintiff. McCluskey testified she did not know an annual meeting was required. However, once defendants learned of the requirement, plaintiff was given notice of meetings and participated in them.

None of this conduct was sufficient to prove “pervasive mismanagement” or any intent to hurt plaintiff. Plaintiff’s challenge on appeal essentially asks us to reweigh the evidence, which, as set out above, is not our role.

Finally, plaintiff did not show these lack of corporate formalities caused her any legally compensable harm. As discussed above, none of the decisions made were damaging and there is no evidence the results would have been any different had plaintiff participated in the missed meetings.

Because we decide plaintiff’s corporate formalities complaints on this basis, again there is no need to discuss or rely on the business judgment rule under section 309.

6. Removal of Directors

Under section 304, a court has discretion to remove a director for dishonesty, fraud, or “gross abuse of authority.” The court also has inherent discretion to remove a director or officer. (*Brown v. North Ventura Road Development Co.* (1963) 216 Cal.App.2d 227, 232.) The court noted that, under *Remillard Brick Co. v. Remillard-Dandini Co.* (1952) 109 Cal.App.2d 405, 424, the general rule is that directors reelected subsequent to the alleged misconduct will not be removed. Further, based on all the evidence and its findings of fact, the court ruled there was no basis to remove the officers and directors.

Plaintiff argues *Remillard* is distinguishable and does not apply for several reasons. But the *Remillard* rule is only one of the grounds on which the court relied. As discussed above, there is more than sufficient evidence that the director defendants did not commit any wrongdoing that would justify removal.

7. *Dissolution of Corporation*

Plaintiff sued for dissolution of SIC under section 1800, which supports such a claim where “[t]hose in control of the corporation have been guilty of or have knowingly countenanced persistent and pervasive fraud, mismanagement or abuse of authority or persistent unfairness toward any shareholders or its property is being misapplied or wasted by its directors or officers.” (§ 1800, subd. (b)(4).) To have standing a plaintiff must own at least a third of the shares, excluding shares owned by shareholders engaging in the alleged misconduct. (§ 1800, subd. (a)(2).)

The trial court found defendants did not engage in any wrongful conduct. Thus, not only did plaintiff lack standing, she could not prevail on the substantive claim either. Again, we agree. As we have discussed, the evidence supports the court’s findings defendants did not commit actionable misconduct.

As an alternate ground plaintiff relies on section 1800, subdivision (b)(5), which authorizes dissolution where necessary to protect a shareholder’s rights and interests in a close corporation with 35 or fewer shareholders. She cites *Stumpf v. C.E. Stumpf & Sons, Inc.* (1975) 47 Cal.App.3d 230, where the court affirmed involuntary dissolution on this basis, stating: “The hostility between the two brothers had grown so extreme that respondent severed contact with his family and was allowed no say in the operation of the business. After respondent’s withdrawal from the business, he received no salary, dividends, or other revenue from his investment in the corporation.” (*Id.* at p. 235.)

Plaintiff claims *Stumpf* is “eerily familiar” to the instant case, pointing to McCluskey’s testimony McCluskey once “bit [plaintiff’s] head off.” Other testimony on which she relies is purportedly contained in the exhibits that are not before us and which we cannot consider.

Nonetheless, these remarks are not comparable to the hostile acts in *Stumpf*. And here, the court found that once defendants realized they needed to conduct meetings,

they did so, with plaintiff participating. Plaintiff's attack on this finding again is a substantial evidence challenge that fails.

While it may be, as plaintiff contends, failure to make distributions to shareholders is a factor that might support corporate dissolution to protect a minority shareholder (*Bauer v. Bauer* (1996) 46 Cal.App.4th 1106, 1115), here when distributions were made at all, plaintiff received her pro rata share.

The court also found there was insufficient hostility to support dissolution. Finally, none of the alleged misconduct on which she relies regarding her other causes of action supports this claim.

8. *Motion for Sanctions*

Plaintiff propounded requests for admissions to McCluskey and Sawan regarding SIC's payment of the legal fees for the individual defendants. Specifically, she asked them to admit SIC did not comply with section 317 before it paid Sawan's and Jackie May's⁵ fees, and that Jackie May had no right to such payment. In addition, plaintiff asked them to admit none of the three individual defendants had received an opinion from independent legal counsel they were entitled to indemnity from SIC. Sawan and McCluskey objected to the form of the requests regarding their alleged failure to comply with section 317 and then denied them. They unqualifiedly denied the other four requests.

In the follow-up interrogatories, in explaining their responses to all of these requests, Sawan and McCluskey stated that SIC complied with section 317, subdivisions (b) and (e)(2) and (3). The Bidna Law Firm had provided an opinion that indemnification was proper. Moreover, Sawan, McCluskey, and Jackie May each individually concluded the other two of them were entitled to indemnity in the Basim Action, which made essentially the same claims as those made by plaintiff. Their conclusion was based on

⁵ One request also dealt with payment of fees for McCluskey but it was not the subject of the motion for sanctions.

determinations by counsel and the shareholders that plaintiff's action had no merit, was brought solely out of spite, and would be resolved by summary judgment. Defendants also stated they had searched and found no documents to support their responses and believed Bidna might have a document.

Plaintiff moved for evidentiary and monetary sanctions against Sawan and McCluskey and their counsel. She sought to preclude defendants from introducing evidence at trial that they had obtained a written opinion from independent legal counsel they were entitled to indemnity for legal expenses in the Basim Action or the instant action. Plaintiff argued defendants' responses to the discovery had been false. As part of the motion plaintiff included excerpts from the deposition of Bidna where he stated he had not seen pleadings in the Basim Action and had last spoken with defendants prior to the time the Basim Action or the current action was filed.

The court denied the motion on several grounds including, among other reasons, that plaintiff failed to file a separate statement as is required for a request for evidentiary sanctions under rule 3.1345(a)(7). It also ruled that, based on Bidna's testimony, there were good faith issues regarding some of the responses.

Plaintiff argues the court erred because no separate statement is required for a sanctions motion. Not so. Rule 3.1345(a)(7) specifically requires a separate statement in a motion for "issue or evidentiary sanctions."

Plaintiff's reliance on *Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007) 148 Cal.App.4th 390, 411 is equally misplaced. Its statement that a motion for sanctions need only include points and authorities and a declaration supporting the amount of sanctions requested had to do with the 45-day time limit for certain sanctions motions, not whether a separate statement was required. And plaintiff's conclusory statement that rule 3.1345(a)(7) conflicts with Code of Civil Procedure section 2023.040 is not persuasive. (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852 [failure to make reasoned legal argument forfeits claim].)

The purpose of a separate statement, as set out in rule 3.1345(a) and (c), is to eliminate the need for the court considering the motion to engage in flipping back and forth among a multitude of documents, as we were required to do in reviewing plaintiff's argument on this issue. Contrary to her claim, plaintiff's notice of motion for sanctions did not satisfy rule 3.1345's requirements or purposes. The court did not err in denying the motion on that basis.

Plaintiff also points to an e-mail from the Buffington Law Firm, defendants' counsel in this action, which apparently validated defendants' right to indemnification in the Basim Action. She complains the court allowed defendants to "hide" its existence until trial.

Plaintiff did not direct us to a copy of the e-mail in the record, but only to a trial exhibit not before us and on which we may not rely, as discussed above. (*Western Aggregates, Inc. v. County of Yuba* (2002) 101 Cal.App.4th 278, 291 ["Where exhibits are missing we will not presume they would undermine the judgment"].) Moreover, there is no evidence the court knew of this e-mail at the time it denied the motion for sanctions, so it is irrelevant to our review of the court's ruling.

Most importantly, when McCluskey was questioned about the e-mail at trial, plaintiff raised no objection except that the question was vague, and she did not object to its admission into evidence. Failure to object at trial forfeits this issue on appeal. (*In re Clara B.* (1993) 20 Cal.App.4th 988, 1000; Evid. Code, § 353, subd. (a).)

Plaintiff also contends defendants committed a fraud on the court by relying on the "nonexistent Bidna opinion" to defeat her request for an injunction and sanctions motion. But there is a big difference between fraud and misremembering. McCluskey testified she thought Bidna had provided an opinion but actually it was Roger Buffington. She believed the individual defendants had received a written opinion from Bidna but it must have been oral. Just because information is incorrect does not mean it is fraudulent or perjured.

Even according to *Stephen Slesinger, Inc. v. Walt Disney Co.* (2007) 155 Cal.App.4th 736 on which plaintiff relies, she has not satisfied the elements. At best she showed defendants made a mistake. There is no evidence of “deliberate conduct” in furtherance of an “unconscionable scheme calculated to interfere with the judicial system’s ability to impartially adjudicate a matter” or of willful deception. (*Id.* at p. 764, fn. 20.)

We reject plaintiff’s claim she is entitled to monetary sanctions for costs incurred in filing the motion because she did not prevail.

Plaintiff has not shown the court abused its discretion in denying the motions for sanctions. (*Los Defensores, Inc. v. Gomez* (2014) 223 Cal.App.4th 377, 390.)

9. *Motion for Judgment on the Pleadings*

Plaintiff moved for judgment on the pleadings based on an alleged admission of an allegation in the Basim Action. In their answer to the complaint in the Basim Action, the director defendants admitted an allegation they “stockpiled cash for the sole purpose of harming shareholders, engaged in self-dealing by authorizing and paying unearned commissions and fees to themselves, failed to maintain corporate formalities and have failed to keep accurate and complete records.”

In the motion, plaintiff argued that admission in the Basim Action was an admission of the same conduct alleged in her complaint. She asserted defendants’ denial of similar allegations in the instant case should be disregarded as a sham or perjurious.

The court denied the motion, ruling there was an issue as to whether the admission in the Basim Action was inadvertent or mistaken. It noted that defendants had denied “overlapping allegations” in the complaint in that action. The court did not err in denying the motion.

A plaintiff may move for judgment on the pleadings on the grounds the complaint sufficiently states a cause of action and “the answer does not state facts

sufficient to constitute a defense to the complaint.” (Code Civ. Proc., § 438, subd. (c).) Grounds for the motion must appear on the face of the pleading or be based on facts the court may judicially notice. (*Id.*, subd. (d).) All of the allegations in the pleading must be accepted as true, read as a whole and liberally construed. (*Ibid.*; *Lance Camper Manufacturing Corp. v. Republic Indemnity Co.* (1996) 44 Cal.App.4th 194, 198.) We review denial of a motion for judgment on the pleadings de novo. (*Wedemeyer v. Safeco Ins. Co. of America* (2008) 160 Cal.App.4th 1297, 1302.)

Plaintiff asserts defendants failed to present any evidence in opposition to the motion, or explain the admission. But extrinsic evidence may not be considered in a motion for judgment on the pleadings. (*Taylor v. Lockheed Martin Corp.* (2000) 78 Cal.App.4th 472, 479.)

In their opposition to the motion, defendants pointed to their answers in both the Basim Action, where they denied the “overlapping allegations,” and the instant action, where they denied numerous similar allegations. In addition, they highlighted their extensive and lengthy affirmative defenses alleged in opposition to the complaint here. In defendants’ 161-page answer, of which 153 pages comprised affirmative defenses, defendants laid out multiple pages of facts and arguments. This was more than enough to show defendants had defenses to the complaint and sufficient to defeat the motion for judgment on the pleadings.

Plaintiff took exception to defendants’ explanation at trial of the challenged admission, describing it as “speculation and regret” or no explanation at all when McCluskey characterized it as a “typo.” But defendants’ trial testimony had no bearing on the motion for judgment on the pleadings. And in any event, this goes to credibility, which, as discussed above, the trier of fact and not the appellate court evaluates. (*Citizens Business Bank v. Gevorgian* (2013) 218 Cal.App.4th 602, 613.)

DISPOSITION

The judgment is affirmed. Defendants are entitled to costs on appeal.

THOMPSON, J.

WE CONCUR:

ARONSON, ACTING P. J.

IKOLA, J.