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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DC PARTNERS, INC.,	
Cross-complainant and Appellant,	G052593
v.	(Super. Ct. No. 30-2012-00543779)
AMIR GNESSIN et al.,	O P I N I O N
Cross-defendants and Respondents.	

Appeal from a judgment of the Superior Court of Orange County, Franz E. Miller, Judge.[1] Affirmed.

Law Office of Steven A. Simons and Steven A. Simons for Cross-complainant and Appellant.

Krakowsky Michel, Shinaan S. Krakowsky and Hayes F. Michel; Law Offices of Dean R. Kitano and Dean R. Kitano for Cross-defendants and Respondents.

[1] The matter was tried to Judge Randell L Wilkinson (ret.), who issued the statement of decision. The judgment was signed by Judge Franz E. Miller in Judge Wilkinson's absence.

INTRODUCTION

"'A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.' [Citations.]" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) "A necessary corollary to this rule is that if the record is inadequate for meaningful review, the appellant defaults and the decision of the trial court should be affirmed." (*Mountain Lion Coalition v. Fish & Game Com.* (1989) 214 Cal.App.3d 1043, 1051, fn. 9.)

DC Partners, Inc.'s appeal runs headlong into this general principle and its corollary. The record on appeal is so silent that it all but disappears. Accordingly, we must affirm the judgment of the lower court, which found that cross-defendant and respondent Amir Gnessin had not violated either Labor Code section 2863 or his fiduciary duty to DC Partners as a director or an officer.

FACTS

We take the facts of this case from the statement of decision, since this is the only source of facts included in the record.

Gnessin, Yehoram Uziel, and Raj Bahrathan had worked together for decades in different business entities that manufactured aluminum castings for machinery. In 2005, the three men were working for Uziel's company, Soligen Technology, Inc., which went out of business. Uziel then formed another company, appellant DC Partners, and invited Gnessin and Bahrathan to become co-owners. Both Gnessin and Bahrathan bought stock in the new company and became officers and directors. Uziel, as DC Partners' CEO and CFO, ran the company. Gnessin was vice-president of engineering.

Gnessin was fired from DC Partners in 2011. He resigned from the board of directors, although he continued to own stock.

Gnessin filed a derivative action on behalf of DC Partners against Uziel and Bahathan in 2012, alleging breach of fiduciary duty and conversion of company assets. Uziel and Bahathan cross-complained against Gnessin and his company, Amir Gnessin Engineering (AGE), again on DC Partners' behalf, for breach of fiduciary duty, violation of Labor Code section 2863, and usurpation of corporate opportunity.

Gnessin's complaint alleged that Uziel ran DC partners as if it were a sole proprietorship, without board meetings and without getting approval for the use of corporate money for his personal expenses. Gnessin claimed to have reviewed DC Partners' documents after being terminated and to have discovered payments for Uziel's car and dental bills, among other things. He also alleged that DC Partners had paid expenses attributable to Soligen Technology, the company that closed in 2005.

The cross-complaint against Gnessin and AGE alleged they took business, business opportunities, and revenue away from DC Partners while Gnessin was employed there, in violation of his fiduciary duty to the company and of Labor Code section 2863.[2] He also allegedly devoted time and company assets to AGE instead of to DC Partners.

The case was tried to the court, with testimony commencing on May 8, 2015. The court took the matter under submission on May 13 and issued its statement of decision on May 15.

The court held that Uziel had not improperly used DC Partners' assets for his personal benefit or for that of Soligen Technology. He did not breach his fiduciary duty to DC Partners. The evidence against Bahrathan on these charges was nearly non-existent, so judgment was entered for him on the complaint as well. As for the cross-

[2] Labor Code section 2863 provides, "An employee who has any business to transact on his own account, similar to that intrusted to him by his employer, shall always give the preference to the business of the employer."

complaint against Gnessin and AGE, the court found that Gnessin had permission from Uziel to work on outside projects through AGE and that AGE's business was different from that of DC Partners, so neither Gnessin nor his company competed with DC Partners. Gnessin did not violate his fiduciary duty to DC Partners or Labor Code section 2863. The defense thus prevailed in both the complaint and the cross-complaint. Judgment was entered on July 20, 2015. Only the judgment relating to the cross-complaint against Gnessin and AGE has been appealed.

DISCUSSION

DC Partners has identified three issues on appeal. It asserts the trial court erred when it found that Gnessin had not breached his fiduciary duty. The trial court also erred when it found that Gnessin had not violated Labor Code section 2863. Finally, the court erred when it denied DC Partners' motion for summary judgment.

The record (appellant's appendix) in this case consists of the statement of decision, the judgment, the notice of appeal, the election to proceed by way of an appendix, and the docket. That is all.

California Rule of Court, rule 8.124(b) requires an appellant's appendix to include all items required by rule 8.122(b)(1) and (b)(3). Rule 8.124(b)(1)(B) requires the appendix to include any document from the superior court file "that is necessary for proper consideration of the issues, including, for an appellant's appendix, any item that the appellant should reasonably assume the respondent will rely on."

Although there was a trial, the appendix includes none of the trial exhibits. More importantly, there is no reporter's transcript, although reporter's fees were paid. We do not even have a copy of the operative pleading, the cross-complaint.

"[B]ecause 'the record does not contain the evidence presented at the trial, it must be presumed conclusively that the findings are supported by the evidence.' [Citations.] [Appellant's] election to proceed without a trial transcript invokes this conclusive presumption not only as to the factual underpinnings for the damages portions

of the judgment, but also as to the trial judge's factual determinations . . . . Because [appellant] chose not to give us the trial evidence, the factual underpinnings of the damages and injunctive portions of the judgment are conclusively presumed." (*Aguilar v. Avis Rent-a-Car Sys.* (1996) 50 Cal.App.4th 28, 35; see *Elena S. v. Kroutik* (2016) 247 Cal.App.4th 570, 576 ["In the absence of a proper record, which would include . . . a reporter's transcript . . ., we must presume the trial court acted properly."].)

I. Breach of Fiduciary Duty

"'The law has long recognized the doctrine of corporate opportunity which prohibits one who occupies a fiduciary relationship to a corporation from acquiring, in opposition to the corporation, property in which the corporation has an interest or tangible expectancy or which is essential to its existence. [¶] . . . [¶] Three tests have been recognized as standards for identifying a corporate opportunity: the "line of business" test, the "interest or expectancy" test, and the "fairness" test. Under any test, a corporate opportunity exists when a proposed activity is reasonably incident to the corporation's present or prospective business and is one in which the corporation has the capacity to engage. *Whether or not a given opportunity meets the requisite relationship is largely a question of fact to be determined from the objective facts and surrounding circumstances existing at the time the opportunity arises. Whether or not an officer has misappropriated a corporate opportunity does not depend on any single factor.'* [Citation.]" (*Kelegian v. Mgrdichian* (1995) 33 Cal.App.4th 982, 988-989.)

With respect to this claim, DC Partners argues that Gnessin engaged in self-dealing transactions. Corporations Code section 310, subdivision (a), governs self-interested transactions in for-profit companies, that is, a "transaction between a corporation and one or more of its directors, or between a corporation and any corporation, firm, or association in which one or more of its directors has a material

financial interest."[3] Nothing in the record establishes that Gnessin or AGE engaged in transactions to which DC Partners was a party.[4] The court stated that "Gnessin's work tended to open up potential business opportunities to [DC Partners]," but nothing shows that this "work" constituted transactions between Gnessin and DC Partners. In the absence of self-interested transactions, Corporations Code 310 does not apply. In addition, DC Partners has not identified any "contract or other transaction" between it and Gnessin that it wanted to avoid.[5]

We must also assume, in the absence of a record, that Gnessin's evidence met the "fairness" test for corporate opportunities and that DC partners did not have an interest or tangible expectancy in any property acquired by Gneissin or AGE. According to the statement of decision, DC Partners and AGE were not in the same line of business, so whatever Gneissin was doing for AGE did not usurp a DC Partners corporate opportunity.

DC Partners' argument that "every work that Gnessin performed as AGE could have been performed by Gnessin as [DC Partners] VP of engineering" also lacks any support in the record. Nothing establishes what Gnessin was doing for DC Partners or for AGE, other than the generic term "engineering." We must therefore assume that Gnessin fulfilled his duties as DC Partners' vice-president of engineering while also doing whatever he was doing for AGE, particularly since he had Uziel's permission to do projects for AGE while working for DC Partners. We must also assume that Gnessin's engineering work for DC Partners was not the same as his work for AGE.

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[3] DC Partners' opening brief repeatedly cites to Corporations Code sections 5231 and 5233, part of the Nonprofit Corporations Law. (Corp. Code, §§ 5000 et seq.) Nothing in the record suggests that DC Partners is a nonprofit corporation.

[4] Although it is not entirely clear, DC Partners appears to argue at one point that the payment of money to Gnessin by DC Partners for the work he did for DC Partners (i.e., his salary) was a self-dealing transaction.

[5] DC Partners also argues that the trial court erred by not accepting its forensic accountant's evidence of damages. We review a trial court's rulings on evidence for abuse of discretion. (*People v. Bui* (2001) 86 Cal.App.4th 1187, 1196.) With no record whatsoever regarding the accountant's evidence, we must assume the court did not abuse its discretion in disregarding it.

II. Labor Code Section 2863

The trial court found that Gnessin had not violated Labor Code section 2863, because AGE's business was not "similar to that intrusted to [Gnessin] by his employer." The court held that "[Gnessin's] work for AGE was in a different line of business" and "the type of engineering work Gnessin was doing for AGE customers was different than the type of work DC Partners did in manufacturing."

Since we do not know what business DC Partners was in or, for that matter, what business AGE was in, we have no way of telling whether AGE's business was similar to DC Partners'. We can infer from officer titles (vice-president of *manufacturing*) and company names (Amir Gnessin *Engineering*) and from the court's holding above that DC Partners was manufacturing something and AGE was an engineering company. Further than that, however, we have no clue.[6]

Without any clues, we fall back on the standard appellate principle that the trial court's judgment is presumed correct. DC Partners has the burden of showing error, and it has included nothing in the record to refute the trial court's conclusion that AGE's business was not similar enough to DC Partners' business to trigger Labor Code section 2863.

III. Motion for Summary Judgment

DC Partners purportedly filed a motion for summary judgment, although one would never know this by looking at the appendix. It contains not a single document from this motion, yet DC Partners asks us to reverse the order denying it, because there was no triable issue of fact. The order is not included.

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[6] The trial court's observation that "Gnessin's work tended to open up potential business opportunities to [DC Partners], which, without Gnessin's engineering work for AGE, would never have been possible" shows that there was some connection between what DC Partners did and what AGE did. But it does not follow that AGE's business and DC Partners' business were similar.

How we are supposed to determine whether a triable issue of fact existed without the moving and opposition papers and the evidence presented to the trial court is a complete mystery. An issue presented without an adequate record is deemed abandoned. (See *In re Valerie A.* (2007) 152 Cal.App.4th 987, 1002.) The record for this issue is non-existent.

IV. Respondents' Motion for Sanctions

Gnessin and AGE have moved for sanctions for a frivolous appeal. "[A]n appeal should be held to be frivolous only when it is prosecuted for an improper motive – to harass the respondent or delay the effect of an adverse judgment – or when it indisputably has no merit – when any reasonable attorney would agree that the appeal is totally and completely without merit." (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650 (*Flaherty*).) The lack-of-merit basis for determining frivolousness rests on an objective standard. It looks at the appeal from a reasonable person's perspective; an attorney's subjective, "honest," belief in its merits is irrelevant. (*Id*. at p. 649.)

While we make no judgment about motives, this appeal is totally and completely without merit – if only because of the lack of an adequate record. A reasonable person with a basic knowledge of appellate law and procedure could not possibly have expected to succeed. (See *Kunza v. Gaskell* (1979) 91 Cal.App.3d 201, 211 [appellant "could not conceivably have anticipated a successful appeal"].)

To take but one example, DC Partners raised the adverse ruling on its Labor Code violation claim as an issue on appeal. The Labor Code section requires an employee to give preference to his employer in any business he does that is similar to his employer's business. (Lab. Code, § 2863.) So a basic and obvious question is whether the employer's business and the employee's business are similar.

In this case, the trial court held they were not similar. DC Partners challenged that holding. But nothing in the record told us even what the two businesses

did, let alone whether they were similar. No reasonable person could have expected such an appeal on this issue to succeed.

Likewise, DC Partners raised the denial of its summary judgment motion as an issue on appeal. Presumably, it wanted us to agree with it that the motion should not have been denied. But it did not include a single document relating to the motion in the record. How could an appeal on this issue get off the ground without any documents? Were we supposed to take DC Partners' word for it that the motion was improperly denied? No reasonable person could expect to succeed on an appeal of an issue for which it supplied no record whatsoever.

As for DC Partners' main issue, Gnessin's alleged breach of his fiduciary duty as a director or an officer by working for AGE, the appeal of this issue suffered not only from the lack of an adequate record, but also from DC Partners' repeated resort to the Corporations Code statutes relating to non-profit corporations. The standards for a non-profit corporation and a for-profit corporation, like DC Partners, are different. A reasonable person would have closely analyzed which part of the Corporations Code he or she was relying on before basing an entire argument on it.

The court in *Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181 (*Foust*), confronted a similar appeal taken on a grossly inadequate record.[7] Although the case had gone to trial in the lower court, the appellant proceeded on appeal without a reporter's transcript and with only a few documents from the clerk's transcript. (*Id.* at pp. 188-189.) The court concluded this record "failed to present a colorable claim that the trial court erred." (*Id.* at p. 188.)] The court further concluded that this lack of objective merit was evidence of an improper purpose – harassment of the respondent. "[T]he fact that an appeal is objectively without any merit is often an

[7] The record in *Foust* was not quite as parsimonious as the record in this case. The *Foust* court got the complaint, the amended complaint, and two trial exhibits in addition to the bare minimum. (*Foust, supra,* 198 Cal.App.4th at p. 186.)

indication that the appellant filed it for an improper purpose." (*Id.* at p. 189.) The court imposed significant sanctions on the appellant. (*Id.* at pp. 189-190.)

In this case, as in *Foust*, there is ample evidence of lack of objective merit, leading to the implication of harassment, but we need not draw that conclusion. We determine here only that the appeal was totally without merit. Accordingly we impose sanctions in the amount of $2,000 on DC Partners and its counsel jointly, payable to respondents.

DISPOSITION

The judgment is affirmed. We find this appeal to be frivolous and assess sanctions against DC Partners, Inc., and its attorney, Steven A. Simons, State Bar number 131410, jointly and severally in the amount of $2,000, payable to respondents within 30 days of the issuance of the remittitur in this matter. Respondents are awarded their costs on appeal.

This opinion constitutes a written statement of our reasons for imposing sanctions, as required by *Flaherty, supra,* 31 Cal.3d at p. 654.

Pursuant to Business and Professions Code section 6086.7, subdivision (a)(3), the clerk of this court is ordered to forward a copy of this opinion to the State Bar of California upon return of the remittitur and to notify attorney Steven A. Simons that the matter has been referred to the State Bar.

BEDSWORTH, ACTING P. J.

WE CONCUR:

ARONSON, J.

FYBEL, J.