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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

BERNICE CHENG et al., Plaintiffs and Respondents, v. CAROLINE CHENG et al., Defendants and Appellants.	B294628 (Los Angeles County Super. Ct. No. 16STPB00645)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mary House, Judge. Affirmed.

Einwechter & Hyatt and John P. Einwechter; Law Offices of James A. Bush and James A. Bush for Defendants and Appellants.

Robert D. Feighner for Plaintiff and Respondent Bernice Cheng.

C. B. Jackson Law and C. Bennett Jackson, Jr. for Plaintiff and Respondent Arlene Cheng.

Appellants Caroline Cheng Jones (Caroline)[1] and Diana Cheng (Diana) (collectively, appellants) appeal from the judgment entered in favor respondents Bernice Cheng and Arlene Cheng (collectively, respondents) after respondents successfully petitioned the probate court for an order removing appellants as co-trustees of the Katherine W. Cheng Revocable Family Trust dated 2/15/2006 (the trust), requiring Caroline to return to the trust certain real properties she had transferred to herself, requiring appellants to provide an accounting of the rental income of those properties, and awarding surcharges and double damages against appellants. We affirm the judgment.

BACKGROUND

Sales by trustees Caroline and Diana

Siblings Caroline, Diana, Bernice, and Arlene are beneficiaries of the trust. Each of them has a 25 percent interest in the trust assets. Caroline and Diana became co-trustees of the trust upon the death of the trustor, Katherine W. Cheng, on October 4, 2012.

At the time of Katherine's death, the trust owned Coastal L.B. Associates, LLC (Coastal 1) as its sole member. Caroline became the sole manager of Coastal 1 on October 4, 2012.

The assets of Coastal 1 included an undivided 50 percent interest in a four-unit rental property located at 232 Euclid Avenue in Long Beach (the Euclid property), and an undivided 75 percent interest in a five-unit rental property located at 14 38th Place in Long Beach (38th Place property). The remaining 50 percent interest in the Euclid property and 25 percent interest in the 38th Place property were owned by Coastal LB2 (Coastal 2), a

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[1] Because the parties share the same surname, we refer to them by their first names to avoid confusion.

limited liability company owned by Caroline and her husband, Jeffrey Jones.

In March 2014, Caroline, as manager of Coastal 1, sold Coastal 1's undivided 50 percent interest in the Euclid property and its undivided 75 percent interest in the 38th Place property to Coastal 2. Diana, as co-trustee of the trust, consented to the sales.

The purchase price for the 50 percent interest in the Euclid property was $172,267.68, based upon an October 2012 value for the entire property of $900,000. The $379,242.50 purchase price for the 75 percent interest in the 38th Place property was based upon an October 2012 value of $1,100,000. The purchase prices for both properties were set by Caroline, or by Caroline and Diana jointly, and reflected discounts for partial interests, sales expenses, and brokerage fees, although no sales expenses or brokerage fees were actually incurred. Had the properties been sold in the open market, no discounts would have applied. The sales were structured as unsecured seller-financed transactions that required no down payment.

Respondents were not informed of the property sales before the transactions were completed, and they did not approve or participate in the transactions.

The current action

Arlene filed a petition to remove Caroline and Diana as trustees, for an accounting, surcharge, and other relief on May 23, 2016. Bernice filed a separate but similar petition on November 28, 2016. The matter proceeded to a court trial.

Appellants and respondents testified, as did Jeffrey Jones and Edward Inouye, an attorney who represented Caroline and Diana as trustees. An expert witness, Alex Borden, testified that

the sales transactions were a conflict of interest and that appellants' actions fell below the standard of care. The only appraisals admitted into evidence to show proof of the value of the properties were prepared in October 2012 and showed a value for the Euclid property of $910,000 and a value for the 38th Place property of $1,068,000.

At the conclusion of the trial, the probate court issued a statement of decision in which it found that appellants had breached their fiduciary duties in connection with the sales of the Euclid and 38th Place properties; Caroline, as both the seller and buyer of the properties, had irreconcilable conflicts of interest in violation of Probate Code section 16004, and had acted for her own personal benefit to the detriment of the trust; and Coastal 1, the trust, Arlene, and Bernice did not receive full and adequate consideration as a result of irregularities in the sales transactions and were damaged in that they received reduced distributions as beneficiaries of the trust.

The probate court further found that appellants breached their duty of loyalty as trustees and engaged in self-dealing. The court rejected appellants' argument that provisions of the trust absolved them from liability: "The Trust provision, Article 5.14, that permits self-dealing absolves a trustee only if they act in good faith and for adequate consideration. It does not apply here because there was no adequate consideration and the failure to advise the beneficiaries of the intended sale is substantial evidence of bad faith." The court found Diana jointly liable with Caroline because by acquiescing to Caroline's actions, Diana breached her duties as a trustee. The probate court found that a surcharge against appellants was appropriate and that "any ultimate determination of damages," following an accounting,

should be doubled as to both Diana and Caroline because "without the imposition of a surcharge, these breaches would be rewarded." Finally, the court found that appellants, through their pleadings, had "admitted that the [trust] was the member and sole member of [Coastal 1], and that admission is a binding judicial admission."

The probate court ordered appellants removed as trustees and the Euclid property and the 38th Place property restored to the trust. The court imposed a surcharge against appellants in the amount of $914,000 for the 38th Place property and $920,000 for the Euclid property, based on the lost appreciation of the properties during the period from 2012 to 2018.[2] The probate court further found appellants liable for double damages under

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[2] The surcharges appear to be based on the probate court's adoption of proposed additional findings Bernice submitted in response to the court's proposed statement of decision. In her proposed additional findings, Bernice requested damages based on the premise that the "value of the property recovered" under Probate Code section 859 should be the lost appreciation of the Euclid and 38th Place properties during the period from 2012 to 2018.

For the Euclid property, the value of the property recovered was calculated as $460,000 (its 2018 value of $1,370,000 minus the 2012 value of $910,000). This figure was then doubled to arrive at the $920,000 surcharge awarded by the probate court for that property.

For the 38th Place property, the value of the property recovered was $457,000 (2018 value of $1,525,000 minus the 2012 value of $1,068,000). This amount was then doubled to $914,000, the surcharge imposed by the probate court for the 38th Place property.

Probate Code section 859,[3] in an amount to be determined after an accounting of the rental income for both properties during the period from March 31, 2014, through the date of termination of appellants' position as trustees.

Judgment was entered on September 25, 2018. The probate court denied appellants' motion for a new trial, and this appeal followed.

CONTENTIONS ON APPEAL

Appellants raise the following contentions on appeal:

1. The probate court misapplied the doctrine of judicial admissions in finding that the trust was the sole owner of Coastal 1.

2. The damages award is not authorized under section 859 because the statutory remedy is limited to either (1) return of the property to the trust, plus its monetary value, or alternatively, (2) twice the value of the property recovered. The award is also improper because it does not account for the trust's partial interest in Coastal 1 and existing mortgages encumbering the properties.

3. The probate court erred in finding that appellants had acted in bad faith because there was no evidence of intentional misconduct, fraud, or deception, and appellants' reliance on advice of counsel shields them from liability.

DISCUSSION

I. Judicial admissions

"The admission of fact in a pleading is a 'judicial admission.'" (*Valerio v. Andrew Youngquist Construction* (2002) 103 Cal.App.4th 1264, 1271 (*Valerio*).) Such an admission "'is

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[3] All further statutory references are to the Probate Code unless stated otherwise.

fundamentally different from evidence: It is *a waiver of proof* of a fact by conceding its truth, and it has the effect of removing the matter from the issues. Under the doctrine of "conclusiveness of pleadings," a pleader is bound by well pleaded material allegations or by failure to deny well pleaded material allegations. [Citations.]"' (*Ibid.,* citing 4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 413, pp. 510-511.) "Because an admission in the pleadings forbids the consideration of contrary evidence, any discussion of such evidence is irrelevant and immaterial. [Citation.] "'When a trial is had by the Court without a jury, a fact admitted by the pleadings should be treated as 'found.' . . . If the court does find adversely to the admission, such finding should be disregarded in determining the question whether the proper conclusion of law was drawn from the facts found and admitted by the pleadings. . . . In such case the facts alleged must be assumed to exist. Any finding adverse to the admitted facts drops from the record, and any legal conclusion which is not upheld by the admitted facts is erroneous." [Citations.]' [Citation.]" (*Valerio, supra*, 103 Cal.App.4th at p. 1271.)

We review for abuse of discretion the probate court's finding that appellants' admission in their pleadings that the trust was the sole member of Coastal 1 was a binding judicial admission. (*Kurinij v. Hanna & Morton* (1997) 55 Cal.App.4th 853, 871.)

The record discloses no abuse of discretion. Arlene's petition alleged, in paragraph 17, that "[o]n October 4, 2012, the date of Mrs. Cheng's death, the Trust was the sole Member of Coastal [1], by prior assignment of Mrs. Cheng's membership interest in Coastal to the Trust." In their response to Arlene's

petition, appellants stated: "Responding to Paragraph 17, Respondents admit the allegations contained therein." That admission is clear and unequivocal. We disregard appellants' argument that contradictory evidence concerning the trust's ownership interest in Coastal 1 was presented at trial. An admission in the pleadings precludes consideration of contrary evidence, and "any discussion of such evidence is irrelevant and immaterial. [Citation.]" (*Valerio, supra*, 103 Cal.App.4th at p. 1271.)

The probate court rejected, in its statement of decision and in the order denying appellants' motion for a new trial, appellants' argument that the parties' subsequently filed joint stipulation of facts nullified appellants' previous admission concerning the trust's ownership of Coastal 1.[4] The record shows that the probate court considered the conflicting facts in both pleadings, as well as briefing by the parties on the issue, and concluded that the facts admitted in appellants' response to Arlene's petition were binding judicial admissions. The record discloses no abuse of discretion.

II. Damages

The plain language of the applicable statutes contradicts appellants' assertion that the remedy under section 859 is limited to either (1) "twice the value of the property recovered" or, alternatively, (2) return of the property plus its monetary value as a penalty (for total damages equal to twice the value of the property). Return of the property is authorized by section 856. That statute authorizes a court to order the return of property to

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[4] A joint stipulation of facts filed by the parties on March 8, 2018, states that the trust owned a 51 percent membership interest in Coastal 1.

a petitioner who establishes the right to such property: "[I]f the court is satisfied that a conveyance, transfer, or other order should be made, the court shall make an order authorizing and directing the personal representative or other fiduciary, or the person having title to or possession of the property, to execute a conveyance or transfer to the person entitled thereto, or granting other appropriate relief." (§ 856.) An order granting relief under section 856 confers "the right to the possession of the property, and the right to hold the property, according to the terms of the order as if the property had been conveyed or transferred in accordance with the terms of the order." (§ 857, subd. (b).)

The statute also authorizes the court to grant "other appropriate relief." (§ 856.) "'Section 856 clearly and unambiguously grants the probate court the power not only to order a conveyance or transfer to the person entitled to the property in question, but also to *grant other appropriate relief*.'" (*Estate of Kraus* (2010) 184 Cal.App.4th 103, 113-114 (*Kraus*).) A petitioner may therefore recover property under section 856 and seek additional relief under section 859. (*Estate of Ashlock* (2020) 45 Cal.App.5th 1066, 1073 (*Ashlock*); *Estate of Young* (2008) 160 Cal.App.4th 62, 89.)

Section 859, which authorizes damages of "twice the value of the property recovered," likewise expressly states that "[t]he remedies provided in this section shall be in addition to any other remedies available in law to a person authorized to bring an action pursuant to this part." The plain language of sections 856 and 859 authorizes return of property and double damages as concurrent, not alternative remedies.

Case authority confirms that double damages, in addition to return of the property, is authorized under the statutory

scheme. In *Ashlock*, the court explained how section 859 may apply to real property transfers: "Suppose a petitioner seeks to recover title to residential real estate valued at $100,000. If he prevails, the trial court will order the necessary reconveyance of title. If the opposing party acted in bad faith when transferring title to herself, she will be liable for $200,000." (*Ashlock, supra*, 45 Cal.App.5th at p. 1074.) Here, although the probate court's calculation of the surcharge was based on the lost appreciation of the properties rather than appraised values, nothing in the statutory language or case law precludes such a calculation.

Appellants cite *Conservatorship of Ribal* (2019) 31 Cal.App.5th 519 (*Ribal*) as support for their position the statutory scheme limits a wrongdoer's monetary responsibility. The petitioner in *Ribal* obtained a judgment against the respondent that included a net recovery of $79,991 under section 856. (*Ribal*, at pp. 521-522, 522-524.) The respondent was also found liable under section 859 for twice the value of the property recovered, in the amount of $159,982. On appeal, the respondent argued that the double damages award subsumed the compensatory damages. (*Id.* at p. 523.) The appellate court in *Ribal* agreed that the obligation to return the $79,991 merged with the respondent's liability for double damages: "If the Legislature had intended damages to be tripled, it would have written something akin to 'the person shall be liable for [*three times*] the value of the property recovered by an action under this part.' (Prob. Code, § 859.) In our experience, the Legislature knows how to distinguish between double damages and treble damages and has provided for each in numerous contexts." (*Ribal*, at p. 525, original brackets.)

Other appellate courts have declined to follow the approach in *Ribal*. In *Kraus*, the court affirmed a judgment ordering the appellant Kraus to return to his sister's estate $197,402 wrongfully withdrawn from his dying sister's bank account, and in addition to pay the estate's beneficiaries $394,804, twice the value of the property recovered in the action. (*Kraus, supra*, 184 Cal.App.4th at pp. 106-107.) In doing so, the court noted that the probate court's finding of bad faith made Kraus separately liable under section 859 for a "statutory penalty" of twice the value of the property wrongfully taken. (*Id.* at p. 118.) The court reasoned that the purpose of the statutory scheme "is to effect a conveyance or transfer of property belonging to a decedent or a trust or another person under specified circumstances, to grant any appropriate relief to carry out the decedent's intent, and to prevent looting of decedent's estates. [Citations.]" (*Id.* at pp. 117-118.)

In *Ashlock*, the court adopted the holding in *Kraus* and rejected that in *Ribal*. The court in *Ashlock* reasoned that section 859 "is designed to punish and deter specific misconduct" and that "[t]here is nothing punitive about requiring a thief to return stolen property to its rightful owner," which undermines the argument "that a penalty imposed under section 859 subsumes the wrongdoer's obligation under section 856 to return the misappropriated property. [Citations.]" (*Ashlock, supra*, 45 Cal.App.5th at pp. 1076-1077.) The court further noted that "the statutory language treats the duty to return the property as a separate and antecedent obligation: "'the person shall be liable for twice the value of the property *recovered* by an action under this part.'. . . If the Legislature had intended to merge the

restorative obligation with the punitive penalty, inclusion of the word 'recovered' would serve no purpose." (*Id.* at p. 1077.)

We agree with the reasoning in *Ashlock* and *Kraus* and apply it here. The probate court did not err by ordering appellants to return the wrongfully transferred properties to the trust, and surcharging appellants in an amount equal to two times the lost appreciation value of the properties. Because the surcharges were based on lost appreciation value of the properties rather than appraised values, the surcharges need not be reduced to reflect any existing liens or mortgages.

As discussed, appellants judicially admitted that Coastal 1 was wholly owned by the trust. We therefore do not address their argument that the surcharges awarded against them should be reduced to reflect the trust's partial interest in Coastal 1. We reject appellants' argument that the order to restore the properties to the trust was an order rescinding the sales, entitling them to return of the purchase price Coastal 2 paid for the properties.

We do not address respondents' argument that they, rather than the trust, are entitled to the surcharges imposed against appellants, as respondents did not cross-appeal from the judgment. (*Kardly v. State Farm Mut. Auto Ins. Co.* (1995) 31 Cal.App.4th 1746, 1749, fn. 1 ["A respondent who fails to file a cross-appeal cannot urge error on appeal"].)

III. Bad faith

A. Applicable law and standard of review

Section 859 permits a court to award a penalty of double the amount of actual damages when it finds a "person has in bad faith wrongfully taken, concealed, or disposed of property

belonging to a . . . trust." (§ 859.)[5] The statute does not define "bad faith." Case authority, however, provides some guidance.

In *Hill v. Superior Court* (2016) 244 Cal.App.4th 1281, the court distinguished between double damages under section 859 and punitive damages. The court rejected the argument that a finding of bad faith under section 859 requires evidence of malice: "[T]o the extent the alternative bases of recovery under section 859 require proof of any such misconduct, the section requires only a showing of 'bad faith,' which is not the equivalent of malice required under Civil Code section 3294." (*Hill*, at p. 1287.) Bad faith under section 859 accordingly does not require a separate showing of oppression, fraud, or malice. (*Hill*, at p. 1288.)

The probate court here expressly found that appellants' wrongful taking of trust property was in bad faith. "'[I]n reviewing 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.]' [Citation.] 'We may not reweigh the evidence and are bound by the trial court's credibility determinations. [Citations.]

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[5] Section 859 provides in relevant part: "If a court finds that a person has in bad faith wrongfully taken, concealed, or disposed of property belonging to a . . . trust, . . . the person shall be liable for twice the value of the property recovered by an action under this part. In addition, except as otherwise required by law, including Section 15657.5 of the Welfare and Institutions Code, the person may, in the court's discretion, be liable for reasonable attorney's fees and costs. The remedies provided in this section shall be in addition to any other remedies available in law to a person authorized to bring an action pursuant to this part."

Moreover, findings of fact are liberally construed to support the judgment. [Citation.]' [Citation.] The testimony of a single witness may be sufficient to constitute substantial evidence. [Citation.]" (*Lui v. City and County of San Francisco* (2012) 211 Cal.App.4th 962, 969.)

We reject appellants' argument that de novo review applies to the probate court's finding of bad faith because that "finding rests solely on the faulty legal premise that Appellants had a duty to give advance[] notice before authorizing Coastal 1 to sell the properties." The statement of decision plainly states that the lack of adequate consideration for the property sales, as well as appellants' failure to advise respondents of the intended sales, constituted "substantial evidence of bad faith." Viewed in context, the statement of decision also makes clear that the bad faith determination is based on findings that appellants engaged in self-dealing and breached fiduciary duties and duties of loyalty owed to respondents, in addition to the absence of adequate consideration for the property sales and the failure to provide notice.

A "'court's statement of decision is sufficient if it fairly discloses the court's determination as to the ultimate facts and material issues in the case.' [Citations.] 'When this rule is applied, the term "ultimate fact" generally refers to a core fact, such as an essential element of a claim.' [Citation.] 'Ultimate facts are distinguished from evidentiary facts and from legal conclusions.' [Citation.] Thus, a court is not expected to make findings with regard to 'detailed evidentiary facts or to make minute findings as to individual items of evidence.' [Citation.] In addition, '[e]ven though a court fails to make a finding on a particular matter, if the judgment is otherwise supported, the

omission is harmless error unless the evidence is sufficient to sustain a finding in favor of the complaining party which would have the effect of countervailing or destroying other findings.' [Citations.]" (*Thompson v. Asimos* (2016) 6 Cal.App.5th 970, 983.)

The statement of decision sufficiently discloses the probate court's determination of the ultimate facts supporting its finding that appellants acted in bad faith. That finding is supported by substantial evidence as well.

B. Substantial evidence of bad faith

Substantial evidence supports the probate court's finding that appellants wrongfully disposed of trust property in bad faith. The evidence showed that there were no negotiations for the property sales, that Caroline engaged in self-dealing by selling the properties to an entity owned by her and her husband, that appellants set purchase prices that included discounts for fees and expenses that were never incurred, that appellants did not inform respondents of the intended sales, and that respondents never approved or participated in the sales transactions.

That the trust terms do not expressly require appellants, as trustees, to give respondents advance notice of the sales did not relieve them of the obligation to do so under the circumstances. Section 16060 imposes on trustees "a duty to keep the beneficiaries of the trust reasonably informed of the trust and its administration," including disclosure of all material facts.[6] (§ 16060; *Van de Kamp v. Bank of America* (1988) 204 Cal.App.3d 819, 835.) Appellants' belated, post-closing disclosure of the sales

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[6] Section 16060 states: "The trustee has a duty to keep the beneficiaries of the trust reasonably informed of the trust and its administration."

transactions did not relieve them of their statutory obligation to inform respondents of the intended sales to an interested party at substantial discounts, and did not nullify the conflicts of interest, self-dealing, and lack of adequate consideration that were the bases for the bad faith finding.

Appellants' reliance on advice of counsel does not shield them from liability. Advice of counsel is a defense typically reserved for malicious prosecution and insurance bad faith actions. In these contexts, a party may avoid liability by demonstrating "[g]ood faith reliance on the advice of counsel, after truthful disclosure of all the relevant facts." (*Bisno v. Douglas Emmett Realty Fund 1988* (2009) 174 Cal.App.4th 1534, 1544.) "However, if the initiator acts in bad faith or withholds from counsel facts he knew or should have known would defeat a cause of action otherwise appearing from the information supplied, that defense fails. [Citations.]" (*Bertero v. National General Corp*. (1974) 13 Cal.3d 43, 53-54.) Advice of counsel, moreover, does not automatically confer immunity from a claim of bad faith. Advice of counsel is only one factor in determining bad faith. (See *Masterson v. Pig'n Whistle Corp.* (1958) 161 Cal.App.2d 323, 339 [noting that reliance must have been "in good faith" and "based upon a full and fair statement of the facts by the client" and only "may afford" a "complete defense to an action for malicious prosecution"]; see Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2019) ¶ 12:1249, p. 12D-26 ["Good faith reliance on advice of counsel is a factor in determining whether the insurer acted in 'bad faith'"].) Advice of counsel does not prove the absence of bad faith. (*Ibid.* at ¶ 12:1251, p. 12D-26.) Given the substantial evidence of appellants' self-dealing, concealment, breaches of fiduciary duty

and duty of loyalty, the advice of counsel defense does not shield them from the consequences of their actions.

DISPOSITION

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

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
HOFFSTADT