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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

BLUE WATER SUNSET, LLC, Plaintiff and Appellant, v. PHILIP MARKOWITZ, Defendant and Appellant.	B261752 (Los Angeles County Super. Ct. No. BC316696)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael P. Linfield, Judge. Affirmed.

McMurray Henriks, Yana Gayane Henriks, Randy H. McMurray; Esner, Chang & Boyer and Stuart B. Esner for Plaintiff and Appellant.

Marcus, Watanabe & Enowitz, David M. Marcus, Daniel J. Enowitz; Buley Law and Michael J. Buley for Defendant and Appellant.

As aptly noted by the trial court when it compared the "judicial battlefield" of this action to World War I, this litigation has been ongoing and extensive since the original complaint was filed on June 4, 2004. It has seen numerous judges and has been to the Court of Appeal at least twice. Judgment was finally entered in favor of defendant Philip Markowitz (Markowitz), and plaintiff Blue Water Sunset, LLC (Blue Water), appeals.

The heart of the dispute stems from language in three agreements, raising the question of whether Blue Water was required to make an initial capital contribution of $1,000 to three limited liability companies (the LLC's) in order to be deemed a member of each LLC. The trial court found that the agreements required Blue Water to make an initial capital contribution, in cash or its equivalent, in order to become a member and that it did not do so. Thus, it entered judgment in favor of Markowitz.

On appeal, Blue Water contends that there never should have been a trial in the first place because (1) the trial court erroneously retried issues that were resolved by prior rulings on summary adjudication, (2) Markowitz judicially admitted that Blue Water was a member of the LLC's, (3) Markowitz should have been estopped from claiming that Blue Water was not a member of the LLC's, and (4) the trial court wrongfully set aside a prior jury verdict in Blue Water's favor. Even if the matter had properly proceeded to trial, (1) Blue Water should have been allowed to prove that it made its capital contribution in the form of millions of dollars in property, (2) payment of the $1,000 capital contribution was not a condition precedent to Blue Water becoming a member of each LLC, and (3) the trial court improperly shifted the burden of proof to Blue Water. Moreover, the judgment is improper because it constitutes an unlawful

rescission without restoring Blue Water's contributions. Finally, Blue Water contends that the trial court erred in denying its motion to conform to proof and in issuing a deficient oral statement of decision.

We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In 2001 and 2002, Blue Water entered into a joint venture with Markowitz forming three LLC's. In conjunction with the filing of the documents creating the LLC's, Markowitz and Blue Water executed three operating agreements that controlled the formation and operation of each LLC. The operating agreements identify Markowitz and Blue Water as "'Members.'"

Each operating agreement provides that "[t]he initial capital contribution shall be $1,000 for each member."

According to each operating agreement, removal of a member could only occur by a unanimous vote of members.

An addendum to one of the operating agreements indicates that the members wanted to make additional capital contributions by "unanimous consent." Three amendments to the operating agreements also reflected unanimous consent to those amendments.

On or about January 14, 2004, all claim and interest in Blue Water was transferred to Yana G. Henriks (Henriks). Henriks then attempted to contact Markowitz regarding matters related to the LLC's. When Markowitz allegedly rebuffed her, Blue Water filed an action for judicial dissolution of the LLC's. The operative pleading, the fifth amended complaint, alleges 11 causes of action against Markowitz and the LLC's.

Markowitz responded by filing an answer and a cross-complaint. Defaults were entered against the LLC's.

The case was initially assigned to the Honorable Rex Heeseman. As discussed below, the case was later reassigned multiple times, ultimately ending up before the Honorable Michael P. Linfield. And, as set forth below, the various trial courts saw multiple pretrial dispositive motions, including demurrers and motions for summary adjudication.

Eventually the matter proceed to a bench trial on the single issue of whether Blue Water ever attained membership status in each LLC by paying its $1,000 initial cash contribution into any or all of the LLC's. The trial court found that Blue Water failed to prove that it invested its initial capital contribution in any of the LLC's. Judgment was entered in favor of Markowitz. Blue Water's 50 percent ownership of the various real properties that were co-owned by Blue Water was transferred to the name of each LLC; in other words, title to each property was now in the name of each LLC.

Blue Water filed a motion to set aside and vacate the judgment. The trial court denied that motion.

This timely appeal ensued.

DISCUSSION

Appeal

I. Trial court properly determined that Blue Water's initial capital contribution had to be in the form of cash

A. Relevant proceedings

On June 4, 2004, Blue Water initiated this action for dissolution of the three LLC's. The case was assigned to Judge Heeseman.

1. *The pleadings*

On April 14, 2009, Blue Water filed its fifth amended complaint, the operative pleading, against Markowitz.

Significantly, at paragraph 9, Blue Water alleges that it "was and is a 50% member of record of [the LLC's]." That allegation is incorporated by reference into each cause of action alleged in the pleading.

On May 18, 2009, Markowitz responded to the fifth amended complaint by filing the fourth amended cross-complaint. His first cause of action is a claim for capital contribution to limited liability company, based upon Blue Water's alleged failure to make its agreed-upon contributions. His second cause of action is a claim for rescission for failure of consideration, based upon Blue Water's alleged failure to contribute the capital required to secure its interests in the LLC's.

Shortly thereafter, on May 27, 2009, Markowitz filed his answer to the fifth amended complaint. At paragraph 1, Markowitz asserted a general denial to each allegation of the pleading. He also asserted numerous affirmative defenses, including the 10th ("the underlying agreements and [Blue Water's] position in the subject entities are invalid and unenforceable due to a lack of consideration"), 11th ("the underlying agreements and [Blue Water's] position in the subject entities are invalid and unenforceable due to a failure of consideration"), and 12th ("the underlying agreements and [Blue Water's] position in the subject entities are invalid and unenforceable due to an inadequacy of consideration").

2. *Order re trial evidence*

On April 12, 2010, Judge Heeseman issued an order re trial evidence about initial capital contribution. After examining and summarizing the pertinent terms of the operating agreements of the three LLC's, Judge Heeseman found: "Each party herein [Blue Water and Markowitz] is required to prove that, as to each

operating agreement, it/he contributed $1,000 in 'money' only or its equivalent as its/his 'initial capital contribution' with respect to each LLC." In reaching this result, Judge Heeseman noted the relevant portions of the Corporations Code that allow LLC members, if they want, to enter into an agreement regarding the nature of a capital contribution to an LLC; however, those statutes do not mandate the form of that contribution. To determine what "form" the parties intended here, Judge Heeseman turned to the plain language of the operating agreements, and those agreements evinced the parties' mutual intent for the initial capital contribution to be in the form of cash.

On July 18, 2014, after the case had been reassigned, Judge Linfield indicated that the trial would proceed in phases, with the first phase addressing the issue of whether there was a $1,000 contribution to each LLC.

B. Analysis

Blue Water challenges the judgment on the grounds that it should have been allowed to prove that it made its capital contribution in a form other than cash.[1]

To resolve this issue, we are called upon to interpret the operating agreements. We do so de novo under settled rules of contract interpretation. (*Ameron Internat. Corp. v. Insurance Co. of State of Pennsylvania* (2010) 50 Cal.4th 1370, 1377.)

"'The fundamental rules of contract interpretation are based on the premise that the interpretation of a contract must

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[1] Blue Water argues that the trial court erred in finding that it is estopped from contesting Judge Heeseman's April 12, 2010, ruling that it had to prove that it made the $1,000 capital contribution in cash. We need not address this argument because we reach the merits of Blue Water's argument on appeal.

give effect to the "mutual intention" of the parties. "Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs interpretation. (Civ. Code, § 1636.) Such intent is to be inferred, if possible, solely from the written provisions of the contract. (*Id.*, § 1639.) The 'clear and explicit' meaning of these provisions, interpreted in their 'ordinary and popular sense,' unless 'used by the parties in a technical sense or a special meaning is given to them by usage' (*id.*, § 1644), controls judicial interpretation. (*Id.*, § 1638.)" [Citations.]'" (*MacKinnon v. Truck Ins. Exchange* (2003) 31 Cal.4th 635, 647–648.)

"When parties dispute the meaning of contractual language, the trial court must provisionally receive extrinsic evidence offered by the parties and determine whether it reveals an ambiguity, i.e., the language is reasonably susceptible to more than one possible meaning. If there is an ambiguity, the extrinsic evidence is admitted to aid the interpretative process. 'When there is no material conflict in the extrinsic evidence, the trial court interprets the contract as a matter of law. [Citations.] . . . If, however, there is a conflict in the extrinsic evidence, the factual conflict is to be resolved by the [factfinder]. [Citations.]' [Citation.]" (*Lonely Maiden Productions, LLC v. GoldenTree Asset Management, LP* (2011) 201 Cal.App.4th 368, 376–377; see also *Supervalu, Inc. v. Wexford Underwriting Managers, Inc.* (2009) 175 Cal.App.4th 64, 72–73.)

Here, based upon the language in the operating agreements, the trial court found that the $1,000 contribution had to be in the form of cash or its equivalent, such as a viable check. The language of the documents supports this

interpretation and Blue Water offers no basis to disturb that ruling.

C. Payment of the initial capital contributions was a condition precedent to membership in the LLC's

Blue Water argues that the initial contribution of $1,000 was not a condition precedent to Blue Water becoming a member of each LLC. Rather, it contends that it became a member of the LLC's at the time of execution because the operating agreements refer to it as a member. This argument is circular and, as pointed out by Judge Linfield, makes no sense. As Judge Linfield indicated in his order denying Blue Water's motion to set aside and vacate the judgment: Blue Water's "argument is essentially that it did not have the burden of proving that it was a member of the LLC because it was a member of the LLC. This argument is wholly illogical and not well taken."

For the same reason, we reject Blue Water's claim that it had to have been a member of the LLC's because it could only be removed as a member of the LLC's by unanimous consent.

While there may be no rule of law that LLC membership must be contingent upon payment of a capital contribution, that is not the issue here. The critical question is what did the parties intend when they executed the operating agreements. The plain language of the operating agreements here reflect the parties' mutual intent to make an initial $1,000 capital contribution for membership in the LLC. Nothing in the Corporations Code or case authority cited by Blue Water indicates that such a condition is unlawful.

It follows that the trial court did not improperly shift the burden of proof to Blue Water. As stated above, Blue Water had to prove that it made the $1,000 initial capital contribution in

cash and substantial evidence supports the trial court's finding that it did not do so.

Blue Water further asserts that the judgment constitutes an unlawful rescission of the LLC's. But, as the trial court noted when it denied Blue Water's motion to set aside and vacate the judgment, the trial court "did not rescind the operating agreements; instead, the Court found that [Blue Water] failed to fully perform thereunder by failing to make the required capital contribution." There was no rescission.

II. The trial court properly set aside the November 2010 jury verdict

A. Relevant proceedings

Following the bench trial on the question of the initial capital contribution, Judge Heeseman determined that the jury would decide whether Blue Water failed to make that requisite $1,000 capital contribution.

On October 22, 2010, two procedural events occurred. First, it appears that the jury trial was scheduled to commence. Second, Blue Water filed a verified statement objecting to trial before Judge Heeseman, pursuant to California Code of Civil Procedure section 170.3, subdivision (c)(1).

While Blue Water's objection was pending without a ruling from Judge Heeseman, the matter proceeded to a jury trial. On November 4, 2010, 13 days after Blue Water filed its objection, the jury found that Blue Water made its initial $1,000 capital contribution to each of the three LLC's.

On November 15, 2010, Judge Heeseman issued the following minute order: "I was unaware that a verified statement of disqualification had been filed on October 22, 2010, and did not timely respond to it. It was included in many other papers filed

on or about that same date. However, it appears that a failure to timely answer or strike even a legally deficient, repetitive or untimely statement of disqualification for cause may result in my automatic disqualification. . . . [¶] Accordingly, I will transfer this case to the Supervising Judge of the Civil Departments for appropriate action."

On December 6, 2010, the trial court (Hon. Elihu M. Berle) held a hearing on an order to show cause re assignment of case. Judge Berle found: "As a result of [Blue Water] filing a Statement of Disqualification pursuant to Code of Civil Procedure Section 170.3(c)(1) on October 22, 2010, and Judge Rex Heeseman having failed to timely respond to the statement within 10 days (Code of Civil Procedure Section 170.3(c)(3)(A)[)], Judge Heeseman was disqualified in this case no later than November 2, 2010. [¶] Since Judge Heeseman was disqualified from hearing the case no later than November 2, 2010, the jury verdict in this matter rendered on November 4, 2010 is null and void, and ordered vacated." The case was reassigned to the Honorable Ramona G. See for all further proceedings.

Blue Water objected to Judge Berle's order vacating the November 4, 2010, jury verdict, and on December 17, 2010, Judge Berle held a hearing on that objection. The trial court sustained Blue Water's objection "on procedural grounds," finding that "there was no notice to [the] parties that the issue of whether or not the jury verdict should be declared void would be discussed at the hearing." The ruling was expressly made without prejudice to Markowitz "filing a motion to have the jury verdict declared null and void before the new trial judge."

On or about April 22, 2011, Markowitz filed a motion for a new trial on the grounds that Judge Heeseman's disqualification

required a new trial. That motion apparently was denied by operation of law.

On December 2, 2011, Judge See found "that the actions of Judge Heeseman between October 22 and November 2 exceeded the limited powers retained by a disqualified judge under [Code of Civil Procedure] Section 170.4(a)." Therefore, the November 4, 2010, jury verdict was null and void; the trial court ordered that those issues be "retried."

On February 17, 2012, Blue Water filed a motion to set aside the trial court's order vacating the November 4, 2010, jury verdict. Judge See denied that motion.

According to Blue Water's opening brief, on October 16, 2013, the case was reassigned (again) to Judge Linfield.

On July 18, 2014, the trial court held a final status conference in this matter. The parties waived jury trial, and the matter was scheduled for a court trial. Blue Water reiterated its position that the previous jury trial finding that there was a $1,000 contribution to the three LLC's should stand. The trial court then stated that a court trial would proceed in phases, with the first phase addressing the issue of whether there was a contribution to the LLC's.

B. Analysis

Blue Water claims that the trial court erred when it set aside the November 2010 jury verdict without notice or a hearing.

We agree with the trial court that the November 4, 2010, jury verdict had to be set aside once Blue Water filed its statement of disqualification and Judge Heeseman failed to rule on it within the timeframe set forth in the statute. By not responding within 10 days of Blue Water filing its statement of disqualification, Judge Heeseman was deemed to have consented

to his disqualification. (Code Civ. Proc., § 170.3, subds. (c)(3) & (4).) As a disqualified judge, he no longer could preside over the trial of the matter. (Code Civ. Proc., § 170.4, subd. (a).) Thus, the jury verdict was void, and the trial court had the power, at any time, to sua sponte set aside the void judgment. (*Dakota Payphone LLC v. Alcaraz* (2011) 192 Cal.App.4th 493, 498.)

Blue Water contends that the jury verdict was voidable, not void; therefore, Markowitz could only ask that the jury verdict be set aside in a timely, proper fashion, i.e., via a motion for a new trial, which he did. But that motion was denied by operation of law, and, according to Blue Water, the trial court could not revisit the issue. Blue Water is mistaken. Code of Civil Procedure section 170.4, subdivision (c)(1), expressly provides that "all orders and rulings of the judge found to be disqualified made after the filing of the statement shall be vacated." Judge See, like Judge Berle before her, correctly applied the statute in vacating the jury verdict. And there was no good cause requirement for the trial court to do so.

Finally, Blue Water argues that there was no determination as to the merits of the disqualification statement. In other words, after it received a favorable jury verdict, Blue Water wants the courts (including numerous trial court judges and the Court of Appeal) to find that the statement of disqualification that it filed on the grounds that Judge Heeseman's bias against it was "as bad as it gets" was not true. Setting aside Blue Water's "chutzpah," the argument readily fails. "When no answer is filed in response to a statement of disqualification, the facts set out in the statement are taken as true." (*Urias v. Harris Farms, Inc.* (1991) 234 Cal.App.3d 415, 424.)

III. The trial court properly held a trial on the issue of whether Blue Water made its initial capital contribution

A. Relevant procedural background

1. *First motion for summary adjudication*

On or about February 10, 2012, Blue Water filed a motion for summary adjudication of the first and second causes of action pled in the fourth amended cross-complaint.

On September 25, 2012, the trial court granted Blue Water's motion as to the first and second causes of action, finding the claims time-barred. In so ruling, the trial court noted that the second cause of action should have been brought derivatively.

2. *Second motion for summary adjudication*

On July 3, 2012, Blue Water filed another motion for summary adjudication, arguing, inter alia, that Markowitz's 10th, 11th, and 12th affirmative defenses had no merit because Markowitz lacked standing to assert them in that the consideration belongs to the LLC's. According to Blue Water, "[t]hese allegations are along the lines of Markowitz's former 1st and 2nd causes of action, which alleged that Blue Water had failed to make its initial contributions to the LLCs. . . . This Court granted summary adjudication as to those two causes of action, and these affirmative defenses must similarly be disposed of. [¶] The Court is aware of the law of the case that a claim alleging inadequacy of consideration in terms of capital contributions in this matter is one that belongs to the LLCs, as per this Court's recent ruling and the previous ruling by Judge Fields. . . . Therefore, Markowitz does not have standing to assert these 10th, 11th, and 12th affirmative defenses because *he [has] no interest at all in the LLCs properties*." (Bolding omitted.)

Markowitz opposed Blue Water's motion, contending, among other things, that "Blue Water's standing as an LLC member is still being litigated. It is premature to allow it to seek adjudication on defenses related to this issue when the judgment will affect the LLCs."

On October 26, 2012, the trial court granted Blue Water's motion as to the 10th, 11th, and 12th affirmative defenses, finding "that it is undisputed that any claim for inadequate consideration in terms of capital contributions belongs to the LLC entities and not to Markowitz individually." In support, the trial court cited *PacLink Communications Internat., Inc. v. Superior Court* (2001) 90 Cal.App.4th 958, 964.

B. Analysis

Blue Water argues that the trial court erred when it retried issues that had been removed from the case by the prior summary adjudication orders.

Blue Water is mistaken. The issue of Blue Water's standing as a member of the LLC's was not resolved in either summary adjudication motion. The first summary adjudication motion was decided on the grounds of the statute of limitations. And, in granting Blue Water's second motion for summary adjudication, all the trial court decided was that Markowitz could not assert the 10th, 11th, and 12th affirmative defenses. But that finding did not relieve Blue Water of its burden to prove every element of its causes of action alleged against Markowitz, including the allegation that it was a 50 percent member of the LLC's. (*Chaffee v. Sorensen* (1951) 107 Cal.App.2d 284, 291 [burden of proof is on the plaintiff to prove every element of its case].) In other words, it is not that Markowitz (or whoever) had to properly assert lack of consideration as an affirmative defense

to Blue Water's claim; rather, as the plaintiff, Blue Water had the burden to prove every element of its causes of action.

Nor could the trial court have resolved this issue on Blue Water's request for summary adjudication. California Code of Civil Procedure section 437c, subdivision (f)(1), only allows for "summary adjudication as to one or more causes of action within an action, one or more affirmative defenses, one or more claims for damages, or one or more issues of duty." It does not allow for summary adjudication of only part of a cause of action. (*McCaskey v. California State Automobile Assn.* (2010) 189 Cal.App.4th 947, 975 ["there can be no summary adjudication of less than an entire cause of action. . . . If a cause of action is not shown to be barred in its entirety, no order for summary judgment—or adjudication—can be entered"].) It follows that when the trial court granted Blue Water's prior motions for summary adjudication, it did not adjudicate the issue of whether Blue Water had standing under the terms of the operating agreements to pursue its claims for dissolution.

In urging us to reverse, Blue Water relies heavily upon *Torrey Pines Bank v. Superior Court* (1989) 216 Cal.App.3d 813, 821 for the proposition that "[t]he bar raised by a dismissal with prejudice is equal under the doctrine of res judicata, to the bar raised by a judgment on the merits." According to Blue Water, this principle "should have barred Markowitz from asserting any defenses to dissolution that were identical to issues that were or could have been asserted under his Fourth Amended Cross-Complaint." We disagree.

Res judicata prohibits the relitigation of claims and issues in an earlier proceeding. The doctrine has two components. In its primary aspect, res judicata (claim preclusion) operates to bar

"relitigation of the same cause of action in a *second suit* between the same parties or parties in privity with them." (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896, italics added.) The secondary aspect of collateral estoppel (issue preclusion) does not operate to bar a second action; rather, it "'precludes relitigation of issues argued and decided in *prior proceedings*.' [Citation.]" (*Ibid.*, italics added.) Whereas res judicata bars a claim that could have been raised in earlier litigation, whether or not the claim was actually raised (*id.* at pp. 896–897; *Torrey Pines Bank v. Superior Court*, *supra*, 216 Cal.App.3d at p. 821), collateral estoppel bars only those issues actually and necessary decided in *prior litigation*. (*People v. Garcia* (2006) 39 Cal.4th 1070, 1076–1077.)

Here there has only been one suit—there has been no "prior proceedings" or "first" and "second" action. Thus, the doctrine of res judicata, including the related principle of collateral estoppel, does not apply.[2]

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[2] Other than a passing allusion in its opening brief, in its reply brief, Blue Water argues for the first time that the doctrine of law of the case precludes Markowitz from relitigating the issue of standing. Aside from the fact that we do not consider issues first raised in a reply brief (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764), the doctrine does not apply here. In our prior opinion, we upheld a trial court order sustaining a demurrer without leave to amend on the grounds that Blue Water could not assert claims for fraud and fraudulent conveyance individually; those claims are derivative in nature. (*Blue Water Sunset, LLC v. First View, LLC* (Dec. 9, 2008, B204012) [nonpub. opn.], p. 7.) As stated above, Markowitz is not pursuing a claim; rather, Blue Water is the plaintiff asserting its claims against Markowitz and, as the plaintiff, it has the burden

Blue Water further argues that Markowitz's allegations in his fourth amended cross-complaint and representations in his motion for judgment on the pleadings constitute binding judicial admissions that Blue Water was a member of the LLC's but that its membership should be rescinded or forfeited. We reject Blue Water's broad and sweeping definition of the term "judicial admission."

"'Judicial admissions may be made in a pleading, by stipulation during trial, or by response to request for admission. [Citations.] Facts established by pleadings as judicial admissions '"are conclusive concessions of the truth of those matters, are effectively removed as issues from the litigation, and may not be contradicted, by the party whose pleadings are used against him or her.' [Citations.] . . . [Citation.]"' [Citations.]

"It follows from the foregoing definition of a judicial admission that not every factual allegation in a complaint automatically constitutes a judicial admission. Otherwise, a plaintiff would conclusively establish the facts of the case by merely alleging them, and there would never be any disputed facts to be tried.

"Rather, a judicial admission is ordinarily *a factual allegation by one party that is admitted by the opposing party*. The factual allegation is removed from the issues in the litigation because the parties *agree* as to its truth. Thus, facts to which adverse parties stipulate are judicially admitted. [Citation.] Similarly, in discovery when a party propounds requests for admission, any facts admitted by the responding party constitute judicial admissions. [Citations.] And when an answer admits

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of proving all elements of its claims, including its status as a member of the LLC's.

certain factual allegations contained in a complaint or cross-complaint, those facts are likewise judicially admitted. [Citation.]" (*Barsegian v. Kessler & Kessler* (2013) 215 Cal.App.4th 446, 451–452, fn. omitted.)

Applying the foregoing principles, Markowitz never judicially admitted that Blue Water was a member of the LLC's. He filed a general denial in response to Blue Water's fifth amended complaint. Markowitz also alleged in his fourth amended cross-complaint that Blue Water never made the agreed upon capital contributions.

Finally, Blue Water contends that Markowitz should have been judicially estopped from claiming that it was not a member of the LLC's. In light of our finding that Markowitz never asserted that Blue Water was a member of the LLC's, we cannot find that he has taken two inconsistent positions in this lengthy litigation. (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 183 [elements of judicial estoppel include the same party having taken two "totally inconsistent" positions].) Moreover, Blue Water has not shown how Markowitz was successful in asserting that alleged first position. (*Ibid.*)

IV. Motion to amend the pleading to conform to proof

Blue Water argues that the trial court abused its discretion in denying Blue Water's motion to conform to proof.

A. Relevant proceedings

The bench trial before Judge Linfield commenced on September 18, 2014. On or about September 21, 2014, Blue Water filed its trial brief, which included a motion for leave to amend the fifth amended complaint to conform to proof at trial. In particular, Blue Water sought to allege the existence of a

partnership between itself and Markowitz. The trial court denied that motion.

B. Applicable law

"The cases on amending pleadings during trial suggest trial courts should be guided by two general principles: (1) whether facts or legal theories are being changed and (2) whether the opposing party will be prejudiced by the proposed amendment. Frequently, each principle represents a different side of the same coin: If new facts are being alleged, prejudice may easily result because of the inability of the other party to investigate the validity of the factual allegations while engaged in trial or to call rebuttal witnesses. If the same set of facts supports merely a different theory—for example, an easement as opposed to a fee—no prejudice can result." (*City of Stanton v. Cox* (1989) 207 Cal.App.3d 1557, 1563.) "The basic rule applicable to amendments to conform to proof is that the amended pleading must be based upon the same general set of facts as those upon which the cause of action or defense as originally pleaded was grounded." (*Union Bank v. Wendland* (1976) 54 Cal.App.3d 393, 400–401.)

Moreover, in ruling on a motion to amend a complaint to conform to proof, the trial court also considers whether there is a reasonable excuse for the delay. Even a good amendment may be denied for an unwarranted delay in presenting itself. (*Duchrow v. Forrest* (2013) 215 Cal.App.4th 1359, 1380.)

We shall only reverse an order denying a motion for leave to amend if the trial court abused its discretion. (*Record v. Reason* (1999) 73 Cal.App.4th 472, 486.)

C. Analysis

Here, the trial court did not abuse its discretion in denying Blue Water's motion for leave to amend to conform to proof. This case was 10 years old when Blue Water requested leave to amend. And Blue Water failed to offer any explanation for this lengthy delay.

Moreover, Blue Water's proposed amendment—alleging an oral partnership as opposed to being members of the three LLC's via three written operating agreements—amounts to an entirely new theory of the case. The trial court did not err in not allowing Blue Water to switch theories at this late stage of the proceedings.

V. Statement of decision

Blue Water argues that the trial court's oral statement of decision was procedurally improper.

A. Relevant proceedings

On September 19, 2014, Blue Water requested a statement of decision from the trial court. The trial court responded that it would give an oral statement of decision.

Following the close of evidence, the trial court gave its oral statement of decision, pursuant to Code of Civil Procedure sections 631.8 and 632. It noted that Blue Water had the burden to show that it made the initial contribution of $1,000 to each of the LLC's. After summarizing the testimony from various witnesses, the trial court "found no substantial evidence presented that Blue Water paid its initial contribution." Thus, the trial court granted Markowitz's motion for judgment pursuant to Code of Civil Procedure section 631.8.

On September 24, 2014, Blue Water filed a renewed request for statement of decision. It argued that the oral

statement of decision was deficient because the trial court failed to set forth the "legal [basis] for any of its findings." The trial court denied that motion, noting that an oral statement of decision was proper because (1) Blue Water never requested a written statement of decision; it only requested a statement of decision; and (2) trial had lasted slightly less than four hours. The trial court also pointed out that it "spent close to 30 minutes giving an oral statement of decision indicating the [basis] for the Court's decision. Such an oral statement of decision is sufficient."

On October 7, 2014, Blue Water filed an objection to the trial court's oral statement of decision.

B. Analysis

Code of Civil Procedure section 631.8, subdivision (a), provides, in relevant part: "After a party has completed his presentation of evidence in a trial by the court, the other party . . . may move for a judgment. The court as trier of the facts shall weigh the evidence and may render a judgment in favor of the moving party, in which case the court shall make a statement of decision as provided in Sections 632 and 634." Code of Civil Procedure section 632 mandates that a statement of decision explain "the factual and legal basis for its decision as to each of the principal controverted issues at trial." Moreover, the statement of decision must "be in writing . . . ; however, when the trial is concluded . . . in less than 8 hours over more than one day, the statement of decision may be made orally on the record in the presence of the parties." (*Ibid*.)

Here, Blue Water rested its case after slightly less than four hours of testimony. Thus, an oral statement of decision was permissible. (Code Civ. Proc., § 632.) And, the statement of decision adequately explained the factual and legal basis for the

trial court's decision as to the principal controverted issue at trial, namely whether Blue Water had made its requisite initial $1,000 capital contribution to each LLC. The trial court went systematically through Blue Water's witnesses' testimonies, noting that no one presented evidence that the initial contributions were paid. For example, the trial court examined Blue Water's expert's testimony and found that he was unable to testify that the initial contributions were paid. It also synthesized the testimony of Henriks, Blue Water's custodian of records, noting that she had no personal knowledge regarding initial contributions. In conclusion, the trial court "sum[ed] up all of the testimony that was presented to the court [and] found no substantial evidence presented that Blue Water paid its initial contribution." This oral statement of decision satisfies Code of Civil Procedure section 632.

To the extent Blue Water is claiming that the trial court erred in denying its renewed request for statement of decision, we note that Blue Water has offered no legal authority in support of such a request. (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852 [appellant has the burden of supporting each point with reasoned argument and citations to authority].)

Cross-appeal

"[O]ut of an abundance of caution," Markowitz filed a cross-appeal challenging the trial court's December 5, 2013, order granting Blue Water's motion for summary adjudication. In light of our conclusion that the judgment should be affirmed, the cross-appeal is moot.

DISPOSITION

The judgment is affirmed. Markowitz is entitled to costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J.
HOFFSTADT