Filed 1/29/16 Endless v. Mason CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

GREGG A. ENDLESS et al., Plaintiffs and Appellants, v. HANNAH E. MASON et al., Defendants and Respondents.	B256290 (Los Angeles County Super. Ct. No. BC389954)

APPEAL from a judgment of the Superior Court of Los Angeles County, Malcolm Mackey, Judge. Reversed.

The Vittal Law Firm and Anthony Vittal for Plaintiffs and Appellants.

No appearance for Defendants and Respondents.

INTRODUCTION

Plaintiffs Gregg Endless and Janet Lee-Endless[1] appeal from default judgment granted in their favor against Defendant Hannah Mason, arguing that the damages awarded by the court were insufficient and contrary to the evidence they provided the trial court, and that the court erred in failing to remove Mason as a corporate director. We agree that the damages awarded are so disproportionate to the evidence produced at the default prove-up so that reversal is required. We also conclude that the court erred in finding no liability for Defendants Fregozo and Palmer, who, as defaulting defendants, admitted Plaintiffs' allegations that they aided and abetted Mason's conversion of corporate assets and fraudulent activity. We also conclude that the court erred in finding that it lacked jurisdiction to consider whether to enter judgment on Plaintiffs' first cause of action, which sought to remove Mason from her position as a director of the corporation.

FACTS AND PROCEDURAL BACKGROUND

Plaintiffs and defendant Mason co-founded PalmerRx, which was incorporated in January 2006. Plaintiffs invested $50,000 in PalmerRx, and became co-directors, officers and 50 percent owners of PalmerRx. Mason was a co-director, the president, and also a 50 percent owner of PalmerRx. Via PalmerRx, Mason and Plaintiffs established Acton Pharmacy. In January 2007, in order to pay certain debts, PalmerRx took a cash advance of $15,404.12 against its American Express account issued jointly to Gregg and PalmerRx on the strength of Gregg's credit. In March 2007, Palmer Rx borrowed $15,000 from Janet, as documented in a promissory note.

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[1] At the outset of our analysis, we note that PalmerRx, Gregg Endless, and Janet Lee-Endless were the three named plaintiffs in the trial court, but only Gregg and Janet appeal. We address the appellate issues directed solely to Gregg and Janet and refer to them collectively as Plaintiffs.

Mason then systematically excluded Plaintiffs from the pharmacy, from business activities, from accessing pharmacy records, and eventually from the board via a phony board meeting. Under Mason's management, PalmerRx never paid back its debts to Plaintiffs. While continuing to use PalmerRx's Pharmacy and DEA licenses, resale permits, and accounts with vendors and service providers, Mason operated Acton Pharmacy under a different corporation's name, Kensington Investment, Inc. Mason also opened up a new bank account for the pharmacy, excluding Plaintiffs from it, and transferred the commercial lease from PalmerRx to Kensington.

Defendants William Palmer and Monet Fregozo aided and abetted Mason's efforts to convert PalmerRx's corporate assets and her fraudulent activity, by in part, holding themselves out to be officers of PalmerRx, following Mason's unauthorized board meeting that removed Plaintiffs from their positions, and by acting as officers and directors of Kensington. In addition, Mason used the PalmerRx's income to pay herself an unauthorized salary and personal expenses.

Plaintiffs and PalmerRx sued Mason, Palmer, Fregozo, Kensington Investment, Inc. and others seeking the removal of Mason as director of PalmerRx, for conversion of the assets of PalmerRx, for unjust enrichment by way of the defendants' retention of PalmerRx assets, for interference with prospective economic advantage, for fraud, for breach of fiduciary duty, for statutory unfair competition, and for breach of implicit covenant of good faith and fair dealing. Defaults were entered against Mason, Palmer, and Fregozo.

Plaintiffs then proceeded with their default prove-up, submitting a summary of the case stating the damages attributable to each Plaintiff and a declaration from Greg with exhibits as evidentiary support for the claimed damages. For PalmerRx, Plaintiffs claimed a total of $658,328.24 in damages. This figure was based on the loss of tenant improvements at the pharmacy's rental property ($21,544.98), the loss of a Toshiba notebook computer ($699), the cost of replacing applications software on that computer ($588.86), and "[o]ne-half the value of the Acton Pharmacy business as a going concern" ($635,495.40). Gregg's damages were totaled at $630,510.82. This number was based

on the sum of his initial investment of $25,000 in PalmerRx (to become a 25 percent owner), half of the money wrongfully withdrawn by Mason from the corporation for her use and/or benefit ($248,595.68), one-half of the increased credit costs attributable to Mason's failure to pay off a line of credit jointly extended to the corporation and Gregg Endless by American Express ($25,000), the balance due on the American Express Obligation ($14,167.44), and "[o]ne-quarter of the value of the Acton Pharmacy business as a going concern" ($317,747.70). Lastly, Plaintiffs asserted that Janet's damages were $636,291.95 in total. This total was based on her $25,000 initial investment in the corporation to become a 25 percent owner, half of the money wrongfully withdrawn by Mason from the corporation for her use and/or benefit ($248,595.68), the balance due on the promissory note for money she lent the company ($19,948.57), one-half of increased credit costs attributable to Mason's failure to pay off a line of credit jointly extended to the corporation and Gregg by American Express ($25,000), and "[o]ne-quarter of the value of the Action Pharmacy business as a going concern" ($317,747.70).

Gregg attested to these amounts in his declaration stating: "Once she had absolute control of the corporation and its finances, [Mason] took personal compensation and other funds from [PalmerRx], and remitted funds of [PalmerRx] to others for her personal use and benefit, without any authority to do so, in various ways, including without limitation the following for the period through approximately March 24, 2010 (beyond which my wife and I still have no records, despite court orders requiring [Mason] to provide them). These numbers are taken from the QuickBooks financial records of [PalmerRx] which were prepared by defendant [Julie Welson] (the bookkeeper) in the manner in which [Mason] instructed her to do so, as both [Mason] and [Welson] testified, and are presented here in summary[.]" (Boldface and italics omitted.) Gregg then listed Mason's expenditures in further detail. Although Gregg did not provide accounting documents, he attached the first amended complaint with a copy of Janet's promissory note and a spreadsheet of payments related to the note.

In March 2014, the court entered its default judgment in favor of Plaintiffs, awarding them a total of $46,235.52. The Court issued the following judgment:

> "The Court after analyzing the briefs and documents in the request for default rules as follows, *infra*, on the different items requested by Plaintiff.
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> "The Court does not have authority to hold a special meeting of PALMERRX in Department 55 to conduct an election regarding Mason's removal. Dissolution of corporation must be held in Departments 82, 85, or 86.
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> "Since PALMERRX is a separate corporation, the court does not have authority to render a Judgment in favor of PALMERRX for any amount.
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> "As to the Plaintiffs, Gregg A. Endless and Janet Lee-Endless, the Court awards a Judgment of $46,235.52 jointly and severally. The Court has analyzed damages fully first. There are no accounting documents or statements for the court to rule on for the total extent of damages, as requested by the Plaintiff.
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> "The Court finds that on page 11 of Plaintiffs' First Amended Complaint of damages of $100,064.29 of the amount of Plaintiffs additional damages listed which appear for Hannah Mason aka Hannah Mason Palmer $110,064.24, since the Plaintiffs have a 25% interest in the corporation in PALMERRX. Twenty-five percent of that totals approximately $25,000.
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> "The Court will award that amount totaling $19,484.57 for the Promissory Note and $690.00 for the value of the replacement of the computer, and $588.66 for the MS Software for a total of $46,235.57.
>
> "The Court does not find any liability of Fregozo or Palmer, and the Court issues a Judgment in favor of Fregozo and [Palmer].

Plaintiffs appeal the court's judgment.

DISCUSSION

Plaintiffs raise several issues regarding the adequacy of the court's award resulting from their default prove-up. We consider each argument in turn.

A plaintiff who has requested default judgment may appeal from the judgment. (*Johnson v. Stanhiser* (1999) 72 Cal.App.4th 357, 361 (*Johnson*).) " 'An appellate court may interfere with [a trier of fact's determination of damages] only where the sum awarded is so disproportionate to the evidence as to suggest that the verdict was the result of passion, prejudice or corruption [citations] or where the award is so out of proportion to the evidence that it shocks the conscience of the appellate court. [Citations.]' " (*Ibid*.)

1. The Court's Damages Award Was Greatly Disproportionate to the Evidence Provided by Plaintiffs and Must be Reversed

Plaintiffs assert that the court disregarded the admitted allegations and their proof of damages and awarded them only a fraction of their claimed damages. We agree that the court erred.

" 'Generally speaking, the party who makes default thereby confesses the material allegations of the complaint. [Citation.] It is also true that where a cause of action is stated in the complaint and evidence is introduced to establish a prima facie case the trial court may not disregard the same, but must hear the evidence offered by the plaintiff and must render judgment in his favor for such sum, not exceeding the amount stated in the complaint, or for such relief, not exceeding that demanded in the complaint, as appears from the evidence to be just. [Citations.]' [Citation.]" (*Johnson, supra*, 72 Cal.App.4th at pp. 361–362, italics omitted.)

A default judgment may be granted by the court at a prove-up hearing upon an evidentiary showing with live testimony or, in the court's discretion, with affidavits or declarations setting forth "with particularity" the facts that are "within the personal knowledge" of the declarant. (Code Civ. Proc., § 585, subd. (d).) The court has discretion to consider hearsay testimony in a default prove-up because "[h]earsay admitted without objection is evidence that may be considered. [Citations.]" (*City Bank of San Diego v. Ramage* (1968) 266 Cal.App.2d 570, 584.) In conducting the prove-up hearing, "[t]he correct standard of proof requires that the plaintiff merely establish a prima facie case." (*Johnson, supra*, 72 Cal.App.4th at p. 361.)

Here, the court's ruling fails to comport with the evidence contained in the record. The court wrote that it "finds that on page 11 of Plaintiffs' First Amended Complaint of damages of $100,064.29 of the amount of Plaintiffs additional damages listed which appear for Hannah Mason aka Hannah Mason Palmer $110,064.24, [sic] since the Plaintiffs have a 25% interest in the corporation in PALMERRX. Twenty-five percent of that totals approximately $25,000." The court's analysis is, however, inaccurate. Plaintiffs established that they collectively owned 50 percent interest in PalmerRx. It is also unclear from where the trial court obtained the two monetary figures ($100,064.29 and $110,064.24), as neither were within the first amended complaint.

Based on our review of the record, the trial court's ultimate decision to award Plaintiffs $46,235.52 in total damages was significantly disproportionate to the evidence of damages before the court. Even if the court only summed the amounts the Plaintiffs invested in PalmerRx ($50,000 to become a shareholder), they loaned to PalmerRx (the $15,000 promissory note) and the debt they are saddled with from the American Express cash advance PalmerRx failed to pay back ($14,167.44), damages were at minimum about twice the amount that was awarded. This damages figure would be even bigger if the court includes recovery for the amounts associated with Mason's wrongful withdrawal of corporate assets for her personal benefit and the value of the business that was lost.

We conclude, therefore, that this matter must be remanded to give the lower court the opportunity to determine the proper amount of damages, plus interest if warranted, from the prove-up evidence already submitted by Plaintiffs.

2. The Court Erred in Finding Fregozo and Palmer Were Not Liable

Plaintiffs argue that court erroneously found that defendants Fregozo and Palmer had no liability. As to this issue, the court stated: "The Court does not find any liability of Fregozo or Palmer, and the Court issues a Judgment in favor of Fregozo and [Palmer]." The trial court did not provide any rationale for its conclusion.

Plaintiffs accused Fregozo and Palmer of conspiring with and assisting Mason in converting PalmerRx's assets, unjustly enriching themselves with those assets, interfering with PalmerRx's prospective economic advantage, aiding and abetting Mason's breach of fiduciary duties, breaching fiduciary duties as ostensible corporate officers of PalmerRx, committing fraud against PalmerRx, and unfairly competing with PalmerRx. By defaulting, Fregozo and Palmer admitted the truth of these allegations. (*Fitzgerald v. Herzer* (1947) 78 Cal.App.2d 127, 131 ["By permitting his default to be entered he confessed the truth of all the material allegations in the complaint."].) "The default of the defendant in an ordinary action . . . admits . . . the absolute verity of all the allegations of the complaint. No amount of evidence could establish the facts more effectually for the purpose of rendering the judgment, as against such defendant." (*Los Angeles v. Los Angeles F. & M. Co.* (1907) 150 Cal. 647, 649.) "The trial court may not require plaintiff to tender evidentiary facts supporting the complaint's allegations of liability." (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2015) § 5.215, p. 5-54; *Carlsen v. Koivumaki* (2014) 227 Cal.App.4th 879, 899-900 ["The only evidentiary facts that have a place at a prove-up hearing are those concerning the damages alleged in the complaint."].)

As there is no evident ground for ignoring these admissions or concluding that Fregozo and Palmer nonetheless incurred no liability, we must conclude that the trial court erred in finding that they were not liable. We reverse the judgment on this ground as well.

3. The Court Erred in Determining It Lacked Authority to Rule on Claims for Equitable Relief

Plaintiffs argue that the trial court erred when the court denied Plaintiffs' request for an order removing Mason as director and setting a special shareholder meeting so that the shareholders could conduct an election to fill the director vacancy. In response to this request, the court reasoned: "The Court does not have authority to hold a special meeting of PALMERRX in Department 55 to conduct an election regarding Mason's removal. Dissolution of corporation must be held in Departments 82, 85, or 86."

In making this statement, it appears that the trial court relied on Chapter Two of the Local Rules of the Los Angeles County Superior Court regarding the distribution of court business. Section 2.7 of the Local Rules states that certain special proceedings, which include petitions to wind up corporations, fix share values, appoint a provisional director when there is a deadlocked board, and determine the validity of a corporate election, are to be assigned for all purposes to the writs and receivers departments (departments 82, 85, and 86). A review of those provisions, however, fails to support the trial court's conclusion that a proceeding to remove a director from office must be heard in a writs and receivers department. The court misconstrued Plaintiffs' request for relief as a petition to wind up the corporation. Nothing within the local rules bars the trial court, as it sat in department 55, from adjudicating the appellant's first cause of action.

The superior court has powers pursuant to both statute and equity to remove a director from a corporate board, as requested in part here. (*Brown v. North Ventura Road Dev. Co.* (1963) 216 Cal.App.2d 227, 232 ["Since directors hold a position of trust, judicial power to remove them exists independent of statute."]; Corp. Code, § 304.) The Supreme Court has explained that the jurisdiction of a multi-judge, multi-department superior court is vested in the court as a whole and if one department exercises authority in a matter which might properly be heard in another such action, although "irregula[r]," it does not amount to a defect of jurisdiction.[2] (*Williams v. Superior Court* (1939) 14 Cal.2d 656, 662-663; *Shane v. Superior Court* (1984) 160 Cal.App.3d 1237, 1249.) Accordingly, the court's conclusion that it lacked jurisdiction or authority to hear and decide this matter was erroneous.

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[2] It is well established that the division of the court into departments is merely for the convenient dispatch of business, and that jurisdiction is vested by the Constitution in the court, not in a particular judge or department. (*People v. Stuyvesant Ins. Co.* (1968) 261 Cal.App.2d 773, 785.) The first department "to assume and exercise jurisdiction over a matter acquires exclusive jurisdiction." (*Silverman v. Superior Court* (1988) 203 Cal.App.3d 145, 151.)

We therefore conclude the appellants have established that the matter of whether an order should issue removing Mason as a director of PalmerRx should have been heard and decided in Department 55.[3] The court erred in determining it did not have authority to address issues regarding equitable relief.

DISPOSITION

The judgment is reversed. As there is no appearance by Defendants, Plaintiffs Gregg A. Endless and Janet Lee-Endless shall bear their own costs on appeal.

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JONES, J. *

I concur:

ALDRICH, Acting P. J.

LAVIN, J.

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[3] PalmerRx was not a party to the appeal. At oral argument, appellant's counsel acknowledged that the corporation was suspended. It is unclear what equitable relief can be afforded upon remand to alter the composition of the board of a suspended corporation. That issue, however, remains to be adjudicated upon remand.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.