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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

DYNAMIC COMMERCIAL PLUMBING,  
INC.,

Plaintiff and Appellant,

v.

PREFERRED BANK,

Defendant and Respondent.

AVOCA USA, INC.,

Plaintiff and Appellant,

v.

PREFERRED BANK,

Defendant and Respondent.

B224728

(Los Angeles County  
Super. Ct. No. YC057945)

(Los Angeles County  
Super. Ct. No. BC393980)

APPEALS from judgments of the Superior Court of Los Angeles County,  
Anthony J. Mohr, Judge. Affirmed.

Edward M. Picozzi for Plaintiffs and Appellants.

Hennelly & Grossfeld and Susan J. Williams for Defendant and Respondent.

## INTRODUCTION

Plaintiff Dynamic Commercial Plumbing, Inc. appeals from a judgment in favor of defendant Preferred Bank in *Dynamic Commercial Plumbing, Inc. v. Avoca USA, Inc. et al.* (Super. Ct. L.A. County, 2010, No. YC057945). Plaintiff Avoca USA, Inc. appeals from a judgment in favor of defendant Preferred Bank in *Avoca USA, Inc. v. Pacific Northstar Reeves, LLC et al.* (Super. Ct. L.A. County, 2010, No. BC393980). We affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

Pacific Northstar Westchester LLC (also referred to as “Owner”) owned property located at 7100 Alvern Street in Westchester (Property). Owner initiated a project to construct an 80-unit apartment complex (Project) on the Property. Plaintiff Avoca USA, Inc. (Avoca) became the general contractor on the Project. Plaintiff Dynamic Commercial Plumbing, Inc. (Dynamic Plumbing) was a subcontractor on the Project. Defendant Preferred Bank was the lender from which Owner obtained a construction loan.

The following facts are from the trial court’s statement of decision issued March 25, 2010. The facts are undisputed.

“Avoca and Dynamic Plumbing filed complaints alleging causes of action arising from their claim that they were not paid for all work that they performed for the construction of an 80-unit apartment building at the Property. Avoca and Dynamic Plumbing sought to foreclose on a mechanics’ lien to recover for their unpaid work.

“Preferred Bank provided financing to build the apartments by making a construction loan to the Property owner, Pacific Northstar Westchester LLC (the ‘Loan’). The Loan was secured by a \$22,250,000 deed of trust encumbering the Property that was recorded on June 6, 2006 (the ‘Deed of Trust’).

“The Court ordered Avoca’s and Dynamic Plumbing’s foreclosure of mechanics’ lien claims to be tried in phases. The first trial phase was to determine the priority as

between Preferred Bank's Deed of Trust and Avoca's and Dynamic Plumbing's mechanics' liens . . . .<sup>[1]</sup> [¶] . . . [¶]

"Evidence at Trial

"Pacific Northstar Westchester LLC had title to the Property during the time that the Property was to be developed with an 80-unit apartment building. Pacific Northstar Property Group was the managing member of Pacific Northstar Westchester LLC. In April 2005, the existing structure on the Property was demolished to make way for the development of an 80-unit apartment building.

"In early 2006, Lorton, a general engineering construction company, submitted a bid proposal to Northstar Construction dated February 3, 2006, to perform site preparation work at the Property<sup>[2]</sup>.

"Before Lorton submitted its bid, its Chief Executive Officer, Dennis Albert Lorton ('Dennis Lorton'), communicated with David Herrlinger (AKA Red Hathaway) ('Herrlinger') of Pacific Northstar Property Group. Herrlinger told Dennis Lorton what needed to be included in the bid. After Dennis Lorton learned that Lorton had not been the low bidder, Lorton submitted a revised bid to Northstar Construction dated April 4, 2006. In response to this bid, Herrlinger called Dennis Lorton to accept Lorton's bid on behalf of the [O]wner<sup>[3]</sup>.

"Shortly after being hired, Lorton was asked to clear weeds and remove trash from the Property. Lorton agreed to do so on the condition that it have a written contract or a letter of intent that confirmed that Lorton would be the grading contractor. On April 28,

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<sup>1</sup> The trial court deviated from the facts at this point and interjected the basis for its analysis: "If work began before the Deed of Trust was recorded, then Avoca's and Dynamic Plumbing's mechanics' liens (to the extent that they are otherwise valid) have priority over the Deed of Trust. Civ. Code § 3134. If work did not begin until after the Deed of Trust was recorded, the Preferred Bank's Deed of Trust has priority."

<sup>2</sup> "Northstar Construction had no relationship to Avoca."

<sup>3</sup> "Avoca was not involved in hiring Lorton."

2006, Pacific Northstar Property Group sent Lorton a letter of intent<sup>[4]</sup> confirming that Lorton would be the grading contractor at the price specified in Lorton's bid. Lorton signed the letter of intent, and in reliance thereon, Lorton removed weeds and trash and leveled piles of dirt at the Property. Lorton did so on May 16 and 17, 2006.

"Lorton identified Northstar Construction, rather than Avoca, as the 'certificate holder' on several insurance related documents with dates in mid-May 2006. A daily progress report dated May 16, 2006, identifies 'North Star Const' as the customer without any reference to Avoca.

"On June 6, 2006, Preferred Bank made the construction loan to [Owner]. The loan was secured by the [D]eed of [T]rust that was recorded on June 6, 2006.

"In August 2006, more than two months after it had cleared the site and four months after Pacific Northstar Property Group had accepted Lorton's bid to perform site preparation work, Lorton entered into a subcontractor agreement with Avoca. Lorton signed the subcontractor agreement on August 2, 2006. The contract had an effective date of June 30, 2006.

"In August 2006, one of Avoca's principals, Michael McKeown ('McKeown'), became responsible for the day-to-day management of Avoca as its President[.] McKeown re-located to the United States from New Zealand. Shortly after he became involved, McKeown learned of Lorton's May 2006 work at the Property. McKeown also learned shortly after his arrival in the United States that Preferred Bank was the construction lender for the [P]roject and that Preferred Bank had a first in priority [D]eed of [T]rust encumbering the Property. McKeown was the primary person at Avoca with responsibility for communicating with Preferred Bank.

"McKeown's knowledge of Preferred Bank's Deed of Trust is confirmed by documents that McKeown received and signed. In January 2008, McKeown signed a Declaration of Establishment of Conditions, Covenants and Restrictions for the Property

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<sup>4</sup> "Avoca is not identified in the letter of intent."

(‘CC&Rs’) that specifically identifies the Deed of Trust in an attached subordination agreement, the Deed of Trust’s recording date of June 6, 2006, and the instrument number. This document was part of the process of converting the Alvern Street apartments to condominiums to be sold to the public. McKeown testified that he understood all along that the apartments being developed would be converted to condominiums. The subordination agreement is specifically identified in the table of contents of the CC&Rs and appears on the page immediately after the page that contains McKeown’s notarized signature.

“McKeown testified that it is his practice to review documents before signing them. If he was telling the truth, he read the subordination agreement . . . . The Court does not find credible McKeown’s testimony that before Avoca filed its complaint [in July 2008] to foreclose its mechanics’ lien, he was ignorant of the information in the CC&Rs concerning the Deed of Trust.

“In February 2008, McKeown received an email with attachments concerning the conversion of the Property from apartments to condominiums. (Ex. 58.) McKeown admitted that he understood that the purpose of the attached documents was for a condominium conversion and that the documents were being circulated for submission to Preferred Bank. The documents identified Preferred Bank’s Deed of Trust, the Deed of Trust’s recording date of June 6, 2006, and the instrument number. McKeown admitted that he received the documents and acknowledged that he realized that some of them had been prepared for his signature at the time he received them in February 2008<sup>[5]</sup>.

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<sup>5</sup> “On the stand, McKeown testified that he did not review Exhibit 58 [the emailed documents]. However, in his deposition, he answered ‘yes’ to the question whether, when he reviewed [the documents], did he notice the document was set up for his signature. Confronted with this prior inconsistent statement, McKeown tried to rescue his credibility by saying that he had reviewed [the emailed documents] at his deposition, but not before. That claim is belied by the videotaped deposition. One does not see him reviewing [the emailed documents], and the elapsed time on the video clock between question and answer is much too brief for him to have been able to review the document. Put simply, this witness’s credibility is wanting.”

“On June 27, 2008, McKeown received an email from Preferred Bank that contained a prior email in which Preferred Bank told McKeown that it would ‘pay[] for security [services] to preserve and protect [the bank’s] collateral.’ McKeown understood at that time that the bank’s collateral was the Property. On June 28, 2008, Avoca recorded an amended and supplemental mechanics’ lien signed by McKeown in the amount of \$1,287,999.14.

“On July 8, 2008, Avoca filed a complaint against Pacific Northstar Westchester LLC and other parties for various claims, including foreclosure of a mechanics’ lien. Avoca failed to name Preferred Bank as a defendant. McKeown testified that he does not know why Preferred Bank was not named as a defendant in Avoca’s complaint. It was not until more than eight months later, on May 7, 2009, that Avoca filed a Doe amendment adding Preferred Bank as a defendant. McKeown testified that he does not know the reason for the 10-month delay before [Avoca] named Preferred Bank as a defendant.”

Dynamic Plumbing signed a subcontract agreement with Avoca on October 5, 2006 to perform services on the Project. On May 29, 2008, Dynamic Plumbing recorded a mechanics’ lien naming Avoca as the company to which Dynamic Plumbing furnished services for the benefit of the Property and its Owner. Dynamic Plumbing filed a complaint on August 20, 2008, alleging various claims, including foreclosure of its mechanics’ lien, against Avoca, Pacific Northstar Westchester LLC and Doe defendants. In January 2009, Dynamic Plumbing filed an amendment to its complaint to add Preferred Bank as a named defendant.

The trial court ruled that Preferred Bank’s Deed of Trust had priority over the mechanics’ liens of Avoca and Dynamic Plumbing. The ruling was based upon the trial court’s finding that Lorton had a separate contract with Owner for site work; Lorton’s work on May 16 constituted the commencement of site improvement by Lorton; and May 16 did not constitute the commencement of the work of improvement by Avoca and Dynamic Plumbing. The court also ruled that Avoca’s mechanics’ lien foreclosure action

was time barred pursuant to Civil Code section 3144. The trial court rendered judgment in favor of Preferred Bank.

## DISCUSSION

Avoca and Dynamic Plumbing both contend that the trial court erred in ruling that their mechanics' liens did not have priority over the Deed of Trust held by Preferred Bank. Avoca also contends that the trial court erred in determining that Avoca's mechanics' lien claim against Preferred Bank was barred by the statute of limitations. We disagree.

### A. *Standard of Review*

The trial court's statement of decision contains both findings of fact and conclusions of law. We review the findings of fact under the substantial evidence standard. (*Westfour Corp. v. California First Bank* (1992) 3 Cal.App.4th 1554, 1558.) The trial court used some of its findings of fact in drawing conclusions of law. We review the trial court's conclusions of law de novo. (*Ibid.*)

We note at the outset that witness credibility was a significant factor in the trial court's factual findings and its related conclusions of law. Specifically, the trial court determined Avoca's key witness, McKeown, was not credible. We must defer to a trial court's evaluation of credibility, assessment of the weight of any evidence or resolution of conflicts in the evidence. Weighing the evidence, determining its credibility, and resolving conflicts in the evidence or reasonable inferences drawn from the evidence are solely within the province of the trial court. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 52-53.)

The primary relevant statutes are in Civil Code section 3082<sup>6</sup> et seq. setting forth definitions and section 3109 et seq. specific to mechanics' liens. Applying statutes to

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<sup>6</sup> All further statutory references are to the Civil Code unless otherwise identified.

facts involves statutory interpretation to determine “the intent of the Legislature in order to effectuate the purpose of the law. [Citation.] We turn first to the words of the statute, and we give effect to the statutes according to the usual, ordinary import of their language. [Citation.] Significance should be given to every word, and construction making some words surplusage is to be avoided. [Citation.] In addition, the various parts of a statutory enactment must be harmonized by considering the particular section in the context of the statutory framework as a whole. [Citation.]” (*Lambert Steel Co. v. Heller Financial, Inc.* (1993) 16 Cal.App.4th 1034, 1040.)

## **B. Priority**

Section 3134 gives priority to a mechanics’ lien which attaches to a work of improvement prior to a subsequent lien, deed of trust, or other encumbrance upon the work of improvement and the site and to an encumbrance of which the lien “claimant had no notice and which was unrecorded at the time of commencement of the work of improvement.”<sup>7</sup> Pursuant to section 3106,<sup>8</sup> a “work of improvement” includes, inter alia, construction of a building and/or grading of a tract of land. Avoca and Dynamic Plumbing assert that the work of improvement commenced when Lorton began its brush

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<sup>7</sup> Section 3134 states: “The liens provided for in this chapter (other than with respect to site improvements) are, subject to [an exception inapplicable here], preferred to any lien, mortgage, deed of trust, or other encumbrance upon the work of improvement and the site, which attaches subsequent to the commencement of the work of improvement, and also to any lien, mortgage, deed of trust, or other encumbrance of which the claimant had no notice and which was unrecorded at the time of commencement of the work of improvement.”

<sup>8</sup> Section 3106 provides: “‘Work of improvement’ includes but is not restricted to the construction, alteration, addition to, or repair, in whole or in part, of any building, wharf, bridge, ditch, flume, aqueduct, well, tunnel, fence, machinery, railroad, or road, the seeding, sodding, or planting of any lot or tract of land for landscaping purposes, the filling, leveling, or grading of any lot or tract of land, the demolition of buildings, and the removal of buildings. Except as otherwise provided in this title, ‘work of improvement’ means the entire structure or scheme of improvement as a whole.”



clearing and grading on May 16, 2006 and, consequently, their mechanics' liens relate back to that date and have priority over Preferred Bank's Deed of Trust which was recorded June 6, 2006. Their position is that Lorton performed the work pursuant to a contract with Avoca as general contractor for the Project.

The trial court determined that May 16, 2006 was not the date that the work of improvement commenced with respect to Avoca and Dynamic Plumbing. According to the court, Lorton had a separate contract with Northstar Construction for site work (§ 3102) and, pursuant to section 3135, the date that the site work commenced did not qualify as the date the work of improvement (§ 3106) for which Avoca contracted as general contractor and Dynamic Plumbing contracted as a subcontractor. We agree with the trial court's conclusions.

Section 3135 provides that site improvement as defined in section 3102<sup>9</sup> performed under a separate contract from any contract for erection of residential units, such as apartments, is a "work of improvement" that is separate from the "work of improvement" for erection of the residential units.<sup>10</sup> As a result, according to section 3135, the commencement of the site improvement does not constitute the commencement of the erection of the residential units. (See *Lambert Steel Co. v. Heller Financial, Inc.*, *supra*, 16 Cal.App.4th at pp. 1038-1039.) In section 3135, "the Legislature is differentiating two types of contracts, one for site improvement and the

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<sup>9</sup> Section 3102 states: "'Site improvement' means the demolishing or removing of improvements, trees, or other vegetation located thereon, or drilling test holes or the grading, filling, or otherwise improving of any lot or tract of land or the street, highway, or sidewalk in front of or adjoining any lot or tract of land, or constructing or installing sewers or other public utilities therein, or constructing any areas, vaults, cellars, or rooms under said sidewalks or making any improvements thereon."

<sup>10</sup> Section 3135 provides: "If any site improvement is provided for in a separate contract from any contract with respect to the erection of residential units or other structures, then the site improvement shall be considered a separate work of improvement and the commencement thereof shall not constitute a commencement of the work of improvement consisting of the erection of any residential unit or other structure."

other for the erection of the structure. When those two contracts exist in a given construction project, . . . section 3135 applies.” (*Id.* at p. 1040.)

By definition, removing vegetation and grading a tract of land or sidewalk adjoining the tract constitute a “site improvement” under section 3102. It is undisputed that this is the type of work Lorton performed on the Property on May 16 and 17, 2006, and the work constituted site improvement. Thus, the determinative issue is whether Lorton had a contract with Avoca to do the work or, in the alternative, a separate contract with another entity.

Ample evidence supports the trial court’s conclusion that Lorton’s contract for site improvement was not with Avoca. For the work Lorton performed, Lorton submitted its original bid and its revised bid to Northstar Construction. Owner, through its managing member, Pacific Northstar Property Group, communicated with Dennis Lorton about the bidding process, and informed Lorton that Owner accepted Lorton’s revised bid submitted April 4, 2006. Lorton requested written confirmation that Owner had orally accepted Lorton’s bid amount for the site work and that an agreement existed between Owner and Lorton. In response, Owner submitted the letter of intent to Lorton, and Lorton signed the letter of intent. Although the letter of intent included a disclaimer that it was not a contract, that did not foreclose or negate any prior oral contract between Lorton and Owner. The letter of intent supported an inference that the oral contract existed. (See § 1550 [contract elements are competent parties, mutual consent, lawful objective, consideration], § 3088 [“‘[c]ontract’ means an agreement between an owner and any original contractor . . . for the work of improvement”].) The trial court’s inference that Lorton had an oral agreement with Owner is supported by the foregoing evidence. (See *Bailey v. Breetwor* (1962) 206 Cal.App.2d 287, 291.)

Lorton performed the site work on May 16 and May 17. During the entire contracting process prior to Lorton’s performance under the contract, Avoca was never mentioned. In fact, Avoca entered into a written contract with Lorton months later in August 2006. The Avoca contract specified June 30, 2006 as the effective date, which was more than a month after Lorton performed the site work in May. Avoca represented

in its first amended complaint that it entered into an agreement with Owner to erect the apartments on October 20, 2006, which is several weeks after Avoca entered into the agreement with Lorton.

Avoca and Dynamic Plumbing are mistaken in relying on *Westfour Corp. v. California First Bank*, *supra*, 3 Cal.App.4th 1554 as support for their contention that no separate contract existed with respect to Lorton's work. The facts in the instant case are similar to those in *Lambert Steel Co. v. Heller Financial, Inc.*, *supra*, 16 Cal.App.4th 1034. The *Lambert* court recited undisputed facts similar to those we recounted above to affirm the existence of a separate contract and that section 3135 applied in deciding the priority issue presented. (*Id.* at pp. 1039, 1042.) The evidence showed that the construction lender recorded its deed of trust prior to the commencement of the work of improvement on which Lambert Steel was a subcontractor. Accordingly, the *Lambert* court held that the lender's deed of trust had priority over Lambert Steel's mechanics' lien. (*Id.* at p. 1039.)

The *Lambert* court addressed a contention based upon *Westfour Corp. v. California First Bank*, *supra*, 3 Cal.App.4th 1554 that section 3135 did not apply. *Lambert* distinguished *Westfour* as follows: "Although there were two contractors and presumably two separate contracts between the contractors and the owner, the trial court in *Westfour* found the later contractor's work was part of the same work of improvement begun by the earlier contractor pursuant to section 3106. [Citation.] The appellate court upheld the factual finding as it was supported by substantial evidence, and it reached the same legal conclusion. [Citation.] Section 3135, which explicitly distinguishes 'site improvement' from 'work of improvement' where the property owner enters into separate contracts for site improvement, was not at issue in *Westfour*. As might be expected, the opinion does not discuss the implications of separate contracts for site improvements." (*Lambert Steel Co. v. Heller Financial, Inc.*, *supra*, 16 Cal.App.4th at p. 1039, fn. omitted.) *Westfour* was distinguishable in *Lambert*; it is distinguishable on essentially the same basis from the instant case.

Given that Lorton's work in May 2006 was site improvement work under a separate contract to which section 3135 applied, it is undisputed that the work of improvement for which Avoca and Dynamic Plumbing contracted commenced after the date Preferred Bank recorded its Deed of Trust. Therefore, under section 3134, Preferred Bank's Deed of Trust had priority over the mechanics' liens of Avoca and Dynamic Plumbing.

### ***C. Statute of Limitations Effect on Avoca's Lien***

Avoca contends that the trial court erred in ruling that, "[r]egardless of whether Avoca's mechanics' lien has priority over Preferred Bank's Deed of Trust, Avoca's foreclosure of mechanics' lien claim [against Preferred Bank] fails because it is time-barred" under section 3144.<sup>11</sup> Pursuant to section 3144, a contractor or other claimant has 90 days after recording its mechanics' lien claim to bring a lien foreclosure action against a defendant; the claimant will be barred from bringing such an action against any defendant not designated as a defendant in the action. The claimant may use the procedure in Code of Civil Procedure section 474<sup>12</sup> to toll the statute as to an unknown defendant by naming Doe defendants in its complaint and then amending the complaint to replace a Doe defendant with the newly-identified named defendant (Doe amendment). (*Grinnell Fire Protection Systems Co. v. American Sav. & Loan Assn.* (1986) 183 Cal.App.3d 352, 358-359.)

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<sup>11</sup> Section 3144 provides: "(a) No lien provided for in this chapter binds any property for a longer period of time than 90 days after the recording of the claim of lien . . . . [¶] (b) If the claimant fails to commence an action to foreclose the lien within the time limitation provided in this section, the lien automatically shall be null and void and of no further force and effect."

<sup>12</sup> Code of Civil Procedure section 474 states: "When the plaintiff is ignorant of the name of a defendant, he must state that fact in the complaint, . . . and such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered, the pleading or proceeding must be amended accordingly . . . ."

To toll the statute, the claimant cannot have actual knowledge of the unknown defendant's interest in the property. "Where the plaintiff does not have actual knowledge of another party's interest in the subject property, . . . he can satisfy the requirements of section 3144 by naming that party as a Doe defendant until he gains *actual knowledge* of its interest in the property." (*Westfour Corp. v. California First Bank, supra*, 3 Cal.App.4th at p. 1558, italics added.) "Actual knowledge" does not mean that the claimant "must be aware of each and every detail concerning" the party. (*Dover v. Sadowinski* (1983) 147 Cal.App.3d 113, 117-118.)

As set forth, *ante*, in the factual background, Avoca filed its complaint to foreclose its mechanics' lien on July 8, 2008. Avoca did not name Preferred Bank as a defendant, but did include Doe defendants. About 10 months later, on May 7, 2009, Avoca completed a Doe amendment to add Preferred Bank as a named defendant. Preferred Bank answered and asserted that Avoca's action was barred under the 90-day statute in section 3144. The president of Avoca, McKeown, admitted that he knew from the beginning of his involvement in August 2006 that Preferred Bank was the construction lender for the Project. He claimed he believed Preferred Bank had a first in priority deed of trust encumbering the Property.

Avoca claims that the trial court erred in finding that Avoca, through McKeown, had actual knowledge of Preferred Bank's interest in the Property and, therefore, Avoca's lien foreclosure action against Preferred Bank was barred by section 3144. Avoca asserts that it did not have the requisite actual knowledge, in that McKeown did not know the Deed of Trust's recording date was June 6, 2006. In our view, lack of knowledge of the actual recording date was a detail not required to meet the actual knowledge standard. (*Dover v. Sadowinski, supra*, 147 Cal.App.3d at pp. 117-118.)

In any event, a reasonable inference from the trial court's discussion is that the trial court found that McKeown had actual knowledge of the recording date. The trial court pointed to the evidence that McKeown testified that he had received and signed documents that identified Preferred Bank's Deed of Trust, including the recording date and instrument number, in January and February 2008. The documents were part of the

significant event of finalizing the CC&Rs necessary to accomplish the condominium conversion. McKeown also testified that it was his practice to review documents before signing them. McKeown's document review occurred months before Avoca filed its complaint in July 2008, well past the 90-day limit in section 3144. The trial court determined that McKeown's testimony was not credible about his lack of actual knowledge of Preferred Bank's interest in the Property.<sup>13</sup>

We conclude substantial evidence supports the trial court's findings that Avoca had knowledge that Preferred Bank was the construction lender, it had a recorded deed of trust against the Property, and the deed was recorded in June 2006. The trial court thus properly found that Avoca's action against Preferred Bank was time-barred.

### **DISPOSITION**

The judgments are affirmed. Defendant shall recover its costs on appeal.

JACKSON, J.

We concur:

PERLUSS, P. J.

WOODS, J.

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<sup>13</sup> The trial court cited instances in which McKeown's testimony about his knowledge was contradicted by his deposition testimony. The court also mentioned its negative impression based upon observation of McKeown's demeanor while he was testifying. We defer to the trial court's credibility determination. (*In re Casey D.*, *supra*, 70 Cal.App.4th at pp. 52-53.)