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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

ALEXANDER SHVARTSMAN, Plaintiff and Appellant, v. GREG KURZULIAN, Defendant and Respondent.	B292426 (Los Angeles County Super. Ct. No. EC052747)

APPEAL from a judgment of the Superior Court of Los Angeles County, William D. Stewart, Judge. Affirmed.

Law Offices of Ashton R. Watkins and Ashton R. Watkins for Plaintiff and Appellant.

Berberian Ain and Farris E. Ain for Defendant and Respondent.

Plaintiff and appellant Alexander Shvartsman entered into a series of joint venture construction projects with defendant and respondent Greg Kurzulian. When one of the projects went wrong, the homeowner, non-party Jeffrey Strauss, successfully sued both Shvartsman and Kurzulian for damages. Shvartsman legally satisfied the Strauss judgment and brought this action against Kurzulian for his 50 percent share of the payoff on the Strauss house. Kurzulian filed a cross-complaint for an accounting of all the amounts outstanding between him and Shvartsman arising out of their joint ventures. The trial court found Shvartsman was owed approximately $800,000 on his complaint for half of the Strauss payment, and that Kurzulian was owed approximately $1.2 million on his accounting cross-complaint, resulting in a net judgment of over $400,000 to Kurzulian.

Shvartsman appeals, challenging the trial court's refusal to award him prejudgment interest on the amount due him for the Strauss payoff. We disagree. Shvartsman also raises numerous other challenges to the trial court's procedure, findings, and judgment, all of which are barred by the inadequate record he provided on appeal and/or the doctrine of waiver. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

What makes this case particularly confusing procedurally is that the trial court initially held a bench trial which resolved only Shvartsman's complaint. At the time, the court believed the accounting issues in Kurzulian's cross-complaint could best be resolved by a reference. However, when the parties later disagreed as to who would advance the costs of the reference, the parties returned to court for a second trial. The first trial – which resolved only Shvartsman's complaint – resulted in a

tentative ruling that Shvartsman was entitled to a declaratory judgment for half of the Strauss payoff (approximately $800,000) plus prejudgment interest. But after the second trial, when it was determined that Shvartsman owed Kurzulian over $1.2 million on the accounting, the court determined that a prejudgment interest award on Shvartsman's complaint was no longer appropriate.[1] The trial court entered a single judgment in favor of Kurzulian in the amount of $412,345.61.

In addition to Shvartsman's challenge to the court's conclusion that he is not entitled to prejudgment interest, Shvartsman also challenges the court's ruling in Kurzulian's favor on the accounting cause of action, specifically claiming: (1) the evidence is insufficient to support Kurzulian's right to an accounting; (2) Kurzulian's accountant was not qualified to testify as an expert; (3) Kurzulian's accountant's opinion was not supported by the record; and (4) Kurzulian's accounting cause of action was time-barred. He also claims the court's statement of decision (5) was not sufficiently specific for an accounting; and (6) was otherwise inadequate. As we will conclude all six of these arguments are barred by the doctrine of waiver and/or Shvartsman's failure to designate a sufficient record on appeal, our discussion of the procedure will pay particular attention to these deficiencies in the record.

1. *The Pleadings*

The record on appeal contains the operative complaint and cross-complaint. It also contains the trial court docket, which

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[1] While Shvartsman argues on appeal that the trial court substantively erred in not awarding him prejudgment interest, he does not suggest that the trial court lacked the authority to change its ruling on this point.

indicates that answers were filed, but the answers themselves are not part of the record on appeal. Thus, whether Shvartsman ever pleaded that Kurzulian's accounting cause of action was barred by the statute of limitations is not shown by the record.[2]

In his complaint, Shvartsman sought recovery of half of the Strauss judgment payoff under multiple theories of relief: breach of a written partnership agreement, implied indemnity, equitable indemnity, contribution, and declaratory relief. Kurzulian successfully demurred to the indemnity and contribution causes of action, and the case proceeded to trial only on breach of written contract and declaratory relief.

2. *The First Trial – Shvartsman's Complaint*

The first trial occurred over seven days. Shvartsman designated transcripts for only five of those days as part of the record on appeal. The record indicates that there were proceedings transcribed on the other two days of trial, but Shvartsman chose not to include them in his appellate record. The docket sheet shows "Full Day of Trial Held" for January 13, 2015 and February 9, 2015, the two omitted dates.[3]

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[2] There is reason to believe Shvartsman might not have pleaded this affirmative defense. At one point during the first trial, Shvartsman's counsel argued that one of the claims in Kurzulian's cross-complaint was barred by collateral estoppel and the statute of limitations. The trial court asked if these arguments were raised in Shvartsman's answer. Shvartsman's counsel responded, "I have a general answer," and proceeded to suggest that he raised the time bar at Kurzulian's deposition.

[3] The trial began on January 12 with Kurzulian called by Shvartsman's counsel as an adverse witness. Shvartsman's counsel finished his examination, and Kurzulian's own counsel began questioning him in response. From context, it appears

Immediately following the first trial, it was not yet clear that the court was resolving only the issues raised in the complaint. Thus, the parties submitted written closing arguments which addressed Kurzulian's accounting cause of action as well. In June 2015, after the briefing was completed, Shvartsman filed a request for a statement of decision. Again, at this point, the parties apparently believed the trial court was resolving the complaint and cross-complaint, so Shvartsman's request for statement of decision included issues pertaining to both pleadings.

The court issued its tentative ruling on August 31, 2015, which addressed only the complaint, and suggested the parties consider a reference for the resolution of the outstanding accounting issues. No judgment was entered at this time.

With respect to the complaint, the court found as follows: (1) there was no partnership, but a series of joint ventures; (2) Shvartsman would prevail on declaratory relief only; and (3) Kurzulian must pay half of the Strauss payoff amount and prejudgment interest.[4] Specifically, the court held Kurzulian must pay $802,668.38, plus interest at $219.91 per day from

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that the omitted testimony on January 13, 2015 consisted of Kurzulian's testimony elicited by his own counsel, defending against Shvartsman's case. The February 9, 2015 testimony omitted from the record encompassed Shvartsman's testimony as an adverse witness when called by Kurzulian's counsel.

[4] The court rejected Shvartsman's purported written partnership agreement, concluding that the document on which he relied was, in fact, an "artifice" created by the parties to minimize their workers' compensation costs.

July 11, 2006, the day Shvartsman satisfied the Strauss judgment.

3. *The Second Trial – Kurzulian's Cross-Complaint for an Accounting*

Several months later, in April 2016, the court concluded that the planned reference was not going to take place and stated that "the parties presented insufficient evidence for an accounting at the trial." The court directed Kurzulian to elect whether to proceed with an accounting or abandon it. Kurzulian elected to proceed. The court said there would be a further trial "and the parties will bring their accountants to testify on the accounting claim."

The second trial was held on November 8, 2016. There was no reporter; so there is no reporter's transcript. Neither party attempted to obtain an agreed or settled statement to substitute for the missing transcript on appeal. (Cal. Rules of Court, rules 8.134, 8.137.) The minute order indicates the only witness who testified was Haig Keledjian, whom the parties agree was Kurzulian's brother-in-law, and an accountant. Some exhibits were admitted – including one Shvartsman describes as "an electronic copy of the documents relied on by Mr. Keledjian." That exhibit is also not part of the record on appeal. The minute order indicates that the court took the matter under submission.

The record does not indicate that either party requested a statement of decision in connection with the second trial. A statement of decision for a trial concluded within one calendar day "must be made prior to the submission of the matter for decision." (Code Civ. Proc., § 632.)[5] The record includes no

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[5] As we have observed, the trial court issued a statement of decision following the first trial. The second trial took place in a

written request; if there was an oral one, we have no record of it due to the absence of a reporter's transcript. Instead, the parties submitted written posttrial briefs.

On January 31, 2017, the court issued its ruling on the submitted matter. The court stated that it did not accept all of Keledjian's data, but reached its conclusions based on all of the evidence in the case. The court determined Kurzulian was entitled to $1,207,556.67. The court had previously decided, in the first trial, that Shvartsman was entitled to $802,668.38 for Kurzulian's share of the Strauss payoff, and prejudgment interest on that amount was now $848,409.48, for a total due Shvartsman of $1,651,077.86. Offsetting the $1,207,556.67 due Kurzulian resulted in a net award for Shvartsman of $443,521.19. Shvartsman was directed to prepare and submit a proposed judgment. The docket sheet does not indicate that he did.

4. *Subsequent Resolution of the Prejudgment Interest Issue in Kurzulian's Favor*

Two weeks later, on February 14, 2017, Kurzulian filed an "Objection to Proposed Statement of Decision and Judgment Thereon." This objection appears to have been directed to the trial court's January 31, 2017 ruling on submitted matter (following the second trial). In it, Kurzulian asked for a further explanation of why Shvartsman was awarded prejudgment interest on the Strauss payoff but Kurzulian received no prejudgment interest on the offsetting partnership accounting

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single day. Because of the procedure adopted by the court and counsel, we conclude the second trial of one day required a pre-submission request for a statement of decision as to the matters adjudicated in the second trial.

debts. Alternatively, Kurzulian argued neither party was entitled to prejudgment interest, as the net amount due was simply unknown until the accounting trial was complete. On the day set for the hearing on Kurzulian's objection, June 2, 2017, Shvartsman filed an opposition, disagreeing, and arguing that the prejudgment interest award to him was appropriate.

Following the hearing the court took the issue of prejudgment interest under submission. The record on appeal does not include a minute order of this date, a reporter's transcript of the hearing, or a settled statement in lieu of reporter's transcript. We only know of the court's action because the court summarized the proceeding in a subsequent minute order.

On August 23, 2017, the court issued its "Ruling on Submitted Matter," concluding that neither party is entitled to prejudgment interest. The court explained, "In the context of these parties' hard-to-categorize (in a legal sense) relationship that the offsetting of the account balances (free from prejudgment interest) as determined by the court (which amounts have not been questioned) is the rule that should apply here." Practically, this meant that rather than Kurzulian owing Shvartsman $443,521.19, Shvartsman owed Kurzulian $404,888.29 ($1,207,556.67 accounting damages minus $802,668.38 share of the Strauss payoff). The court directed Kurzulian to submit a judgment within ten days. It appears that Kurzulian did so.[6]

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[6] There is no proposed judgment in the record on appeal. However, on September 15, 2017, Shvartsman filed objections to the proposed judgment.

5. *Yet Another Round of Briefing and a Belated Request for Statement of Decision*

On September 11, 2017, Shvartsman filed objections to the August 23, 2017 ruling which had resolved the prejudgment interest issue against him.[7] He argued that there was no factual basis to support the court's finding that he was not entitled to prejudgment interest on the Strauss payoff. Shvartsman also raised numerous objections to the court's ruling on the merits of the accounting trial – including that the court should not have allowed Keledjian to testify as an expert, Keledjian's analysis and opinion were fatally flawed, the facts did not support the court's calculation of the amount owed Kurzulian, and the accounting cause of action was time-barred. Shvartsman had raised many of these issues in his November 2016 posttrial briefing immediately after the accounting trial. However, he did not raise them after the court issued its January 30, 2017 minute order setting forth its ruling on the submitted accounting trial, nor did he raise them at the same time as Kurzulian raised his objections (to the prejudgment interest) so that his objections could have been addressed at the June 2, 2017 hearing. Instead, Shvartsman waited until September 11, 2017 – now that the net judgment was against him rather than in his favor – to complain about the

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[7] We are hard-pressed to identify the procedural basis on which Shvartsman believed he had a legal right to reopen this issue, which had already been briefed, argued, and resolved. At best, this appears to be an untimely and legally inadequate request for reconsideration. (Code Civ. Proc., § 1008.)

court's evidentiary and legal rulings first issued more than seven months earlier.

Shvartsman also argued, in the course of his objections, that the court had failed to issue a statement of decision. He stated that he "timely filed and served a request for statement of decision," but did not state when he purportedly filed it. The docket sheet does not indicate that he filed such a request at any time. On appeal, he appears to rely on his June 12, 2015 request for statement of decision with respect to the first trial.

Kurzulian responded to Shvartsman's objections, arguing that, with the exception of the issue of prejudgment interest, all of Shvartsman's objections were waived.

A hearing was held on October 27, 2017, where "the court addressed and ruled upon [Shvartsman's] objections in open court." Again, there is no minute order of this date, reporter's transcript of the hearing, or settled statement in lieu of reporter's transcript as part of the record on appeal. We know what happened on October 27, 2017, because almost one year later, the court summarized what had happened on that date. The court apparently rejected all of Shvartsman's arguments. Shvartsman requested a statement of decision at the hearing.

6. *Statement of Decision and Judgment*

On November 1, 2017, Kurzulian filed a proposed statement of decision, which tracked the language from the court's prior three decisions – the August 31, 2015 tentative ruling after the first trial, the January 30, 2017 minute order after the second trial, and the August 23, 2017 minute order in which it refused Shvartsman prejudgment interest.

On November 20, 2017, Shvartsman filed objections to the proposed statement of decision. Among other things, the

objections suggested that the statement of decision failed to acknowledge that the trial court "explained at the October 27, 2017 [hearing] that [Shvartsman] had a right to challenge the court's calculations concerning the accounting cause of action. In other words, [Shvartsman] did not waive [his] right to challenge the court's calculations. The October 27, 2017 hearing was [Shvartsman's] opportunity to challenge the court's calculations." While the absence of a transcript of the October 27, 2017 hearing prevents us from confirming the truth of this representation, the court's minute order in response suggests that the trial court had a somewhat different recollection of the October 27, 2017 hearing.

On July 5, 2018, the court signed the proposed statement of decision and entered judgment. The same day, the court issued a minute order responding to Shvartsman's objections. The order states: "The court has reviewed these prolix documents again and finds a repeat of various arguments made from time to time over this tortuous litigation, save one exception. The party now, months after the hearing on the accounting issues, requests an explanation of how the court arrived at the sum of money owed by [Shvartsman] before the offset. The court can find no record of this request being made at any earlier time, and certainly not at the time it should have been made, i.e., prior to the hearing on the objections set for June 2, 2017.[8] [Shvartsman] was perfectly happy with the accounting, so long as he came out on top; but when the court reversed the determination of the applicability of interest, then [Shvartsman] got interested since he would have to pay instead of [Kurzulian]. He waited too long; the time to object

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8 The minute order quoted in the text was issued on July 5, *2018*, some 13 months after the court found Shvartsman should have made his accounting objection.

to the findings was when [Kurzulian] did so, i.e., in the February time frame when [Kurzulian] filed [his] objections to the interest issue. [¶] The court was in fact prepared to discuss said subject - it had [its] notes on the calculations and could have expounded on them at the hearing on June 2, but no one requested them at that hearing either." The court indicated that even though Shvartsman's request "was untimely made," it checked for its notes, but had apparently made no effort to preserve them, since neither party had timely raised the issue. The court overruled all further objections.

Judgment was entered on July 5, 2018. Shvartsman filed a timely notice of appeal.

7. *Designation of Record on Appeal*

As noted, the reporter's transcript Shvartsman designated on appeal contained five days of the seven-day first trial, and nothing from the one-day second trial. The form for designation of the record includes Item 7, in which the appellant is required to check a box for whether the proceedings the appellant has designated do or do not include all of the testimony. It then states, "If the designated proceedings DO NOT include all of the testimony, state the points that you intend to raise on appeal (*rule 8.130(a)(2) provides that your appeal will be limited to these points unless, on motion, the reviewing court permits otherwise*)." Shvartsman left this item blank, failing to concede that his record did not, in fact, include all of the testimony at trial, and failing in his obligation to identify the points he intended to raise on appeal. Kurzulian filed no counter-designation.

8. *Shvartsman's Opening Brief*

On appeal, Shvartsman's opening brief argued the trial court erred by: (1) concluding Kurzulian had met his burden of

proof for an accounting; (2) allowing Keledjian to testify as an expert at the accounting trial; (3) admitting Keledjian's testimony which was unsupported by the documentary evidence; (4) failing to rule on the "glaring" statute of limitations issue; (5) failing to issue a statement of decision at Shvartsman's request; (6) failing to issue a specific statement of decision on the accounting trial; and (7) improperly denying him prejudgment interest.

9. *Motion to Dismiss Appeal for Inadequate Record*

On May 15, 2019, Kurzulian moved to dismiss the appeal for the inadequacy of the record. Specifically, Kurzulian argued that, in the absence of a reporter's transcript or settled statement of the November 8, 2016 accounting trial, all of Shvartsman's appellate arguments related to that trial cannot be addressed. Kurzulian also noted that, without a transcript of that trial, Shvartsman "cannot prove to the court that a stipulation or binding judicial admission was [not] made on the final day of trial."

In addition, Kurzulian raised Shvartsman's failure to comply with California Rules of Court, rule 8.130(a)(2)'s requirement that he identify in the Notice of Appeal the points he intended to raise on appeal, given his partial designation of the record. Kurzulian argued that Shvartsman "should have informed the court that he was designating less than all the testimony, and state the points to be raised solely on the days where there was a record of the testimony."

In opposition, Shvartsman argued that he could not have designated a transcript for the accounting trial on November 8, 2016, because no reporter was present. He took the position that no transcript was required "where there is sufficient record of the testimony from the parties" in the form of the parties' trial briefs

"summarizing and referencing the testimony of the witness." He noted that Kurzulian could have counter-designated missing transcripts, and speculated that Kurzulian "failed to designate any such records because the transcripts do not exist or the transcript[s] are unrelated to the issues presented in this appeal." He also argued that he made no binding admissions on November 8, 2016, and that, if he had, it would have been recorded in the court's minute orders or statement of decision.

On June 18, 2019, we denied the motion to dismiss, without prejudice to raising the issues again in respondent's brief.[9] In his respondent's brief, Kurzulian again argues the record is inadequate to enable appellate review.

DISCUSSION

We first reject several of Shvartsman's contentions because of an inadequate record. Next, we reject Shvartsman's contentions pertaining to the statement of decision based on waiver. Finally, we address Shvartsman's challenge to the denial of prejudgment interest, and reject it on the merits.

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[9] Kurzulian had filed a request for judicial notice concurrent with his motion to dismiss. We granted the request with respect to six documents, but deferred to panel the remainder of the request. The remaining documents of which Kurzulian sought judicial notice were simply cases, court rules, and a local rule he felt relevant to his motion to dismiss. We deny this portion of the request. While the law of this state and rules of court are appropriate subjects for judicial notice (Evid. Code, § 451, subds. (a), (c)), the court takes judicial notice of applicable law even in the absence of a request. (*County of Los Angeles v. Hill* (2011) 192 Cal.App.4th 861, 866, fn. 3.)

1. *Contentions Arising From the Accounting Trial are Unsupported by the Record*

We begin our discussion with some familiar principles.

"Appellants challenge orders made after a lengthy hearing at which no court reporter was present. The record on appeal does not include a settled statement or agreed statement as authorized by California Rules of Court, rules 8.134 and 8.137. [¶] '[I]t is appellant's burden to provide a reporter's transcript if "an appellant intends to raise any issue that requires consideration of the oral proceedings in the superior court . . . ." (Cal. Rules of Court, rule 8.120(b)), and it is the appellant who in the first instance may elect to proceed without a reporter's transcript (Cal. Rules of Court, rule 8.130(a)(4)) . . . .' [Citation.] A reporter's transcript may not be necessary if the appeal involves legal issues requiring de novo review. [Citation.] In many cases involving the substantial evidence or abuse of discretion standard of review, however, a reporter's transcript or an agreed or settled statement of the proceedings will be indispensable. [Citations.]" (*Southern California Gas Co. v. Flannery* (2016) 5 Cal.App.5th 476, 483.) "Generally, appellants in ordinary civil appeals must provide a reporter's transcript at their own expense. [Citation.] In lieu of a reporter's transcript, an appellant may submit an agreed or settled statement. [Citation.]" (*Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181, 186.)

Four of Shvartsman's contentions on appeal are clearly barred by the absence of an adequate record. He argues that: (1) Kurzulian has not met his burden of proof; (2) Keledjian should not have been permitted to testify as an expert; (3) Keledjian's testimony was unsupported by the documentary

evidence; and (4) the accounting cause of action was barred by the statute of limitations.

Whether Kurzulian met his burden of proof requires a review of the evidence at both trials; we have only an incomplete transcript of the first trial and no transcript of the second.

Whether Keledjian was properly allowed to testify as an expert depends on the testimony he gave on the issue of his qualifications; we lack a transcript of this testimony.

Whether Keledjian's testimony was supported by the documentary evidence requires a review of both his testimony and the documentary evidence on which he relied; we lack a transcript of his testimony and copies of his exhibits.

Whether the accounting cause of action is barred by the statute of limitations depends on a review of the evidence regarding discovery of the cause of action, termination of the parties' relationship, and tolling. With only a partial transcript of the first trial and no transcript of the second, we cannot conduct this review.[10]

We reject Shvartsman's suggestion that the statements in the parties' trial briefs and the court's minute orders discussing the testimony are a sufficient replacement for a reporter's transcript. The rules of court set forth the procedure for obtaining a settled statement as a way to obtain the parties' (and

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[10] Moreover, the record provided on appeal does not demonstrate that Shvartsman pleaded the statute of limitations as a defense to the accounting cause of action, and his brief – which states the court failed to rule on a "glaring" statute of limitations issue – never asserts that it was pleaded.

trial court's) agreement on the missing testimony.[11] (Cal. Rules of Court, rule 8.137.) These procedures cannot simply be bypassed by relying on the argumentative briefs the parties filed in the trial court.

2. *Contentions Pertaining to the Statement of Decision are Waived*

Shvartsman makes two arguments that the court's statement of decision is deficient – he argues that it is inadequate in general and that it is insufficiently detailed for disposition of an accounting cause of action. We reject these contentions as waived because Shvartsman never timely requested a statement of decision of the accounting trial.

Code of Civil Procedure section 632 provides, "In superior courts, upon the trial of a question of fact by the court, written findings of fact and conclusions of law shall not be required. The court shall issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial upon the request of any party appearing at the trial. The request must be made within 10 days after the court announces a tentative decision unless the trial is concluded within one calendar day or in less than eight hours over more than one day in which event the request must be made prior to the submission of the matter for decision. The request for a statement of decision shall specify those controverted issues as to which the party is requesting a statement of decision. After a party has requested the statement, any party may make proposals as to the content of the statement of decision. [¶] The

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[11] Alternatively, the rules provide for an agreed statement when the parties agree on the relevant facts. (Cal. Rules of Court, rule 8.134.)

statement of decision shall be in writing, unless the parties appearing at trial agree otherwise; however, when the trial is concluded within one calendar day or 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."

We review the timeline of Shvartsman's requests for a statement of decision. In June 2015, after the first trial, Shvartsman requested a statement of decision. The second trial was held in one day on November 8, 2016. The record does not indicate Shvartsman requested a statement of decision before the matter was submitted. On October 27, 2017, the court rejected Shvartsman's objections in open court, and Shvartsman *then* requested a statement of decision.

Shvartsman's arguments on appeal regarding the validity of, and level of detail in, the court's ultimate statement of decision relate to the accounting trial. But Shvartsman never timely requested a statement of decision as to that trial. His first request, in June 2015, was nearly a year and a half before the second trial took place, and was premature. At the time, the parties were considering a reference for the accounting. His second request, in October 2017, was nearly a year after the second trial took place, and was too late. Having not timely requested a statement of decision for the second trial, Shvartsman cannot be heard to complain.[12] (*University of San*

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[12] Shvartsman takes issue with our view of the proceedings as two separate trials, preferring to consider them as one single proceeding, albeit with a 21-month continuance in the middle. With this perspective, Shvartsman believes his June 2015 request for statement of decision was timely as it occurred before the trial would ultimately end, in November 2016. But a request for statement of decision "must be made within 10 days *after* the

Francisco Faculty Assn. v. University of San Francisco (1983) 142 Cal.App.3d 942, 946 [failing to request statement of decision waives any right to one].)

3. *Prejudgment Interest was Appropriately Denied*

Civil Code section 3287, subdivision (a) provides, in pertinent part, "A person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in the person upon a particular day, is entitled also to recover interest thereon from that day, except when the debtor is prevented by law, or by the act of the creditor from paying the debt."

Shvartsman argues that the Strauss payoff amount, and Kurzulian's half of it, were fixed as of the day Shvartsman satisfied the Strauss judgment, entitling Shvartsman to prejudgment interest. This argument is correct as far as it goes, which is why the trial court indicated its intent to grant prejudgment interest after the first trial.

However, the right to prejudgment interest on liquidated damages is not absolute when there is a cross-complaint for an unliquidated offset. The proper procedure is for the court to

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court announces a tentative decision . . . ." (Code Civ. Proc., § 632, emphasis added.) Although Shvartsman's request came after the court had announced a *partial* tentative decision, on the issues resolved at the first phase of the supposed unitary trial, the court did not announce any decision on the remaining issues until January 30, 2017. If there was indeed one trial, Shvartsman's right to request a statement of decision did not commence until that date. It is against both the letter and the spirit of Code of Civil Procedure section 632 to allow a party to request a statement of decision effectively more than a year before the end of the trial.

determine the amount of the unliquidated offset, subtract that from the liquidated damages due, and award prejudgment interest only on the remaining liquidated amount, if any. (*Great Western Drywall, Inc. v. Roel Construction Co., Inc.* (2008) 166 Cal.App.4th 761, 768 (*Great Western*).)

In *Burgermeister Brewing Corp. v. Bowman* (1964) 227 Cal.App.2d 274, the plaintiff sued defendant for liquidated damages arising from a contract, and the defendant cross-complained for unliquidated damages arising from the plaintiff's breach of the same contract. The court explained, "It is settled that when a plaintiff sues for a liquidated sum and the defendant establishes an offsetting claim based upon defective workmanship or defective performance of the same contract by the plaintiff, the amount of the former is to be offset against the latter as of the due date of the original debt and only the balance bears interest. [Citation.]" (*Id.* at p. 285, emphasis omitted.)

Shvartsman focuses on the "of the same contract" language in *Burgermeister* and attempts to distinguish it based on that language. Specifically, Shvartsman argues that his liquidated claim against Kurzulian does not arise out of the same contract as Kurzulian's unliquidated claim against him – because the trial court concluded that the parties did not, in fact, have a single partnership agreement, but had instead entered into a series of joint ventures. As Kurzulian owed Shvartsman on the Strauss joint venture, but Shvartsman owed Kurzulian on any number of joint ventures (possibly including the Strauss one), the offset rule of *Burgermeister* is not appropriate.

The same argument was made, and rejected, in *Great Western Drywall*. There, the plaintiff subcontractor sued defendant contractor for liquidated damages on their contract,

while the contractor cross-complained in both breach of contract and tort for damages the subcontractor caused to the work of other subcontractors. It was unclear if the trial court's award of unliquidated damages to the contractor had been based on contract or tort. (*Great Western Drywall, supra,* 166 Cal.App.4th at p. 765.) The court awarded the subcontractor prejudgment interest and the contractor appealed, arguing its damage award offset the entire damage award for the subcontractor, eliminating the justification for prejudgment interest. The subcontractor relied on *Burgermeister* to argue that this rationale applied only when the damages awarded the defendant arose from the same contract, not when they were tort damages. (*Id*. at pp. 767, 769.) The *Great Western Drywall* court concluded that *Burgermeister* was no bar; the *Burgermeister* court had not addressed whether unliquidated tort damages could be offset against liquidated contract damages to defeat prejudgment interest, and cases are not authority for issues they do not address. (*Id*. at p. 769.) Considering the issue before it, the *Great Western Drywall* court concluded that the contractor's damages should be offset, defeating prejudgment interest, even if the damages had been awarded in tort. (*Id*. at p. 770.)

The court explained, "It is undisputed that [the contractor's] damages arose entirely from [the subcontractor's] deficient performance of the contract, and [the contractor's] mere inclusion of an alternative count for negligence in its cross-complaint, and any arbitrary reliance by the trial court on one theory over another, should not adversely affect [the contractor's] setoff rights.[Fn.] Both parties had claims against each other under the subcontract, thus setoff serves the interests of justice and the purposes of the prejudgment interest statute. Another

ruling would elevate form over substance. [Citations.]" (*Great Western Drywall, supra,* 166 Cal.App.4th at p. 770, fn. omitted.)

The rationale of *Great Western Drywall* applies here. Shvartsman sued Kurzulian for breach of what he alleged to be a partnership agreement; Kurzulian cross-complained for an accounting of that very same partnership. While the trial court ultimately found there was no partnership, but a series of joint ventures, it is apparent that the complaint and cross-complaint arose from the same relationship. Setoff serves the interests of justice and the purposes of the prejudgment interest statute. To do otherwise would be to elevate form over substance.

DISPOSITION

The judgment is affirmed. Shvartsman is to pay Kurzulian's costs on appeal.

RUBIN, P. J.

WE CONCUR:

MOOR, J.

KIM, J.