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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

SHAWN SEDAGHAT, Plaintiff and Appellant, v. ROTH CAPITAL PARTNERS, LLC, Defendant and Appellant.	B226749 (Los Angeles County Super. Ct. No. BC273742)

APPEAL from a judgment of the Superior Court of Los Angeles County. Terry Green, Judge. Affirmed.

Stroock & Stroock & Lavan, Julia B. Strickland, Allan S. Cohen and Seth M. Goldstein, for Defendant Appellant.

The Rosen Law Firm and Laurence M. Rosen, for Plaintiff and Appellant.

Stockbroker Roth Capital Partners, LLC, (Roth) appeals from the judgment following a jury verdict awarding Roth's former client, Shawn Sedaghat, $575,000 in compensatory and punitive damages for Roth's breach of its fiduciary duty to Sedaghat. Sedaghat cross-appeals from the court's denial of his motion for a judgment notwithstanding the verdict. We affirm the judgment and dismiss Sedaghat's cross-appeal as untimely.

FACTS AND PROCEEDINGS[1]

We state the facts in the light most favorable to the judgment. (*Mammoth Lakes Land Acquisition, LLC v. Town of Mammoth Lakes* (2010)191 Cal.App.4th 435, 462-463.) Appellant Roth Capital Partners, LLC, was respondent Shawn Sedaghat's stockbroker. In early 2000, Roth acted on Sedaghat's behalf in Sedaghat's extending a $1 million bridge loan to an internet start-up company, eNucleus, Inc. Roth told Sedaghat that eNucleus was about to issue a private offering of preferred stock for which Roth would be the placement agent. Roth explained to Sedaghat that eNucleus would use the proceeds from the private offering to repay Sedaghat's loan. According to Roth, the stock offering was a "done deal," guaranteeing eNucleus's ability to repay the loan. Roth did not, however, tell Sedaghat that eNucleus's stock offering was conditioned on eNucleus (1) obtaining $2-$3 million in additional financing from a "strategic investor" and (2) merging by March 3, 2000, with SJI Corporation, a provider of network design and integration.[2] Unfortunately, eNucleus did not get the additional strategic investor

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[1] The pagination in the clerk's transcript skips from page 655, which is the last page under tab 42, to page 903, which is the first page under tab 43. Because the parties cite without comment pages that fall within that more than 250-page gap, it appears they have not noticed the interruption in pagination. (See e.g., AOB 33 citing CT 786)

[2] Roth did, however, give Sedaghat a copy of eNucleus's February 2000 private placement memorandum concerning the proposed preferred stock offering, but Sedaghat no more than glanced at it because he was not investing in the stock. He reasoned the memorandum was unimportant because his financial exposure to eNucleus was limited to

financing and did not merge with SJI Corporation. Thus, eNucleus did not issue stock, did not repay Sedaghat's loan other than making $40,000 in interest-only payments and a one-time principal reduction of $10,000, and did not survive, collapsing instead into bankruptcy in May 2001.[3]

In 2002, Sedaghat sued Roth and other defendants. Two defendants defaulted: John Paulsen, who was eNucleus's CEO, and Henry Paulsen, who was a member of its board of directors. In September 2003, the court entered a default judgment against the Paulsens in the amount of $1,000,000 (reduced by $40,000 in payments made) and $310,858 in prejudgment interest. In 2006 before trial, two defendant law firms, Vedder Price Kaufman & Kammholz and Greenberg Traurig LLP, paid Sedaghat $265,983 in settlement.[4] We discuss the default judgment and settlement in greater detail later in this opinion.

The case was tried to a jury in 2010, at the end of which the jury issued a special verdict in favor of Sedaghat on his cause of action against Roth for breach of fiduciary duty in not fully disclosing the bridge loan's risks to him and otherwise mishandling his interests concerning the loan. The jury found (1) Roth "fail[ed] to act as a reasonably careful stockbroker would have acted under the same or similar circumstances"; (2) Sedaghat was "harmed as a result of his purchase of the bridge note issues by eNucleus"; (3) Roth's "conduct [was] a substantial factor in causing [respondent's]

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providing a bridge loan to help eNucleus cover its expenses until the time of the stock offering. If Sedaghat had reviewed the memorandum he would have seen references within the 83-page memorandum to the proposed merger with SJI Corporation, although even those references did not disclose that the merger terminated automatically if not consummated by March 3, 2000.

[3] The one-time $10,000 principal payment occurred in the bankruptcy proceedings.

[4] Sedaghat settled with the defendant law firms during pendency of Sedaghat's appeal from the trial court's order sustaining without leave to amend Roth's demurrer to Sedaghat's complaint. In *Apollo Capital Fund v. Roth Capital Partners, LLC* (2007) 158 Cal.App.4th 226, 233, we reversed the trial court and remanded the case for further proceedings, leading to the trial at issue here.

harm."; and (4) Roth "engage[d] in the conduct of malice, oppression or fraud." The jury awarded Sedaghat $500,000 and prejudgment interest in compensatory damages. The jury also awarded Sedaghat $75,000 in punitive damages. Claiming the jury's award did not fully compensate him for his total loss of his loan to eNucleus, Sedaghat moved for judgment notwithstanding the verdict, which the court denied. The court adopted the jury's special verdict and entered judgment for Sedaghat. Roth appealed from the judgment and Sedaghat filed a notice of cross-appeal.

DISCUSSION

A. *Substantial Evidence of Breach of Fiduciary Duty*

The jury found Roth breached its fiduciary duty to Sedaghat as his stockbroker. Among the jury's findings supporting its verdict for Sedaghat, the jury found Roth "fail[ed] to act as a reasonably careful stockbroker would have acted under the same or similar circumstances," and Roth's "conduct [was] a substantial factor in causing [Sedaghat's] harm." Roth contends substantial evidence did not support those findings. We disagree.

1. Lack of Care

Trial evidence supports Sedaghat's assertion that Roth failed to act as a reasonably careful stockbroker. Roth appears to suggest it discharged its duty to Sedaghat by ensuring he was a sophisticated investor who could bear the financial risk of investing in an internet start-up company. The record demonstrates, however, at least three respects in which the jury could have found Roth did not exercise the proper care of a fiduciary:

First, Roth did not tell Sedaghat about the precondition for eNucleus's stock offering that eNucleus receive financing of $2-3 million from a strategic investor. Roth does not discuss on appeal the strategic-investor precondition, an omission that by itself defeats Roth's claim of insufficiency of the evidence. (*Doe v. Roman Catholic Archbishop of Cashel & Emly* (2009) 177 Cal.App.4th 209, 218.)

Second, eNucleus's merger with SJI by March 3, 2000, was a precondition to the stock offering. Roth should have informed Sedaghat about the merger's failure before Roth released Sedaghat's money to eNucleus on or about March 8. Indeed, one expert testified Roth was "reckless" in not monitoring more closely the SJI merger in order to protect Sedaghat's interests. Roth counters that it did not know the merger talks had collapsed before Sedaghat's loan was released to eNucleus, but that is the expert's point: Roth did not adequately monitor eNucleus's activities despite having induced Sedaghat to lend money to eNucleus. The expert testified: "[If Roth] was talking with [eNucleus] every day, [Roth] either knew about S.J.I. and didn't tell about it, or, [Roth] wasn't talking with [eNucleus] every day and was reckless in not keeping up with the due diligence obligation. It's one or the other."

Third, Roth mishandled the release from escrow of Sedaghat's loan to eNucleus. The merger of eNucleus and SJI terminated by its own terms when not completed by March 3, 2000.[5] Despite the merger's failure, Roth permitted the release from escrow of Sedaghat's funds to eNucleus sometime after March 3 even though the failed merger meant the stock offering which was going to repay the loan would not take place.

Roth contends no substantial evidence existed that it concealed or misrepresented material facts about eNucleus or the bridge loan in its dealings with Sedaghat. In support, Roth cites the jury's rejection of Sedaghat's causes of action other than for breach of fiduciary duty. As to Sedaghat's causes of action for intentional and negligent misrepresentation, the jury found Roth did not falsely represent an important fact to Sedaghat. As to Sedaghat's cause of action for concealment, the jury found Roth intended to deceive Sedaghat by intentionally failing to disclose an important fact that Sedaghat did not know and could not reasonably have discovered, but Sedaghat either did not rely on Roth's deception, or Sedaghat's reliance was unreasonable. Roth's contention

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[5] Roth asserts substantial evidence proved that the merger talks did not end until later in March, but the evidence is disputed on that point. Roth also asserts that the parties could have reinstated merger talks after the March 3 termination date. The jury apparently gave no weight to that theoretical possibility.

that these findings preclude a verdict in Sedaghat's favor is unavailing, however, because concealment and reliance are not essential elements of breach of a fiduciary duty. (*Mosier v. Southern Cal. Physicians Ins. Exchange* (1998) 63 Cal.App.4th 1022, 1044-1046.) A fiduciary owes the highest duty of loyalty and care and can fall short of those obligations without misrepresenting or concealing facts. (*Assilzadeh v. California Federal Bank* (2000) 82 Cal.App.4th 399, 414 [applying such duties to real estate broker]; *Twomey v. Mitchum, Jones & Templeton, Inc.* (1968) 262 Cal.App.2d 690, 711-712 [client may reasonably assume the "trust and confidence in the integrity and fidelity" of a fiduciary].) Moreover, the supposed inconsistency that Roth perceives between the jury's finding of breach of fiduciary duty while rejecting causes of action for misrepresentation and concealment does not run throughout the jury's entire verdict. Roth overlooks that the jury found under Sedaghat's causes of action for violations of the Corporations Code covering stock fraud that eNucleus got its loan from Sedaghat with Roth's "material assist[ance]" as to which Roth knew, or had reason to know, consisted of "a written or oral communication that included an untrue statement of material fact or that omitted a material fact that made other statements misleading."[6]

2. Substantial Factor in Causing Harm

Roth contends that Sedaghat's loss arose from the collapse of the internet stock bubble which started deflating in April 2000 after Sadeghat extended the bridge loan to eNucleus in March 2000. Roth's contention is unavailing, however, because it at best creates a conflict in the evidence which the jury resolved against Roth. Sedaghat offered evidence at trial that Roth's release from escrow of the loan to eNucleus without satisfying two preconditions for the stock offering – a strategic investor and merger with SJI – substantially contributed to Sedaghat's loss on the loan. The jury heard testimony that Sedaghat had the option under the loan agreement while his funds were in escrow to

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[6] The jury ultimately found for Roth on the Corporations Code cause of action based on Roth's statute of limitations defense (Corp. Code, § 25504) and Roth's not *intending* to defraud Sedaghat (Corp. Code, § 25504.1).

back out of his investment in eNucleus and retrieve his money. And the jury heard expert testimony rejecting Roth's assertion that market forces caused Sedaghat's loss. The expert testified that "When the investors closed and made the investment, if they had had the proper information, the material information that was either misrepresented or omitted, they would not have made that investment . . . . [¶] So it's not the market that caused it. It's the lack of information that caused it, because if they had known the risks were significantly higher in this bridge loan than represented, they would not have made the investment."

B. *Punitive Damages*

Roth contends no substantial evidence supported imposing a punitive damages award against it because the jury's findings on Sedaghat's unsuccessful causes of action vindicated Roth. We disagree. Punitive damages require clear and convincing evidence that Roth acted with malice or oppression. (Civ. Code, § 3294, subd. (a); *Flyer's Body Shop Profit Sharing Plan v. Ticor Title Ins. Co.* (1986) 185 Cal.App.3d 1149, 1154.)[7] " '[M]alice' means conduct intended to injure or conduct carried on with a 'conscious disregard' of another's rights. [Citations.] Evidence establishing 'conscious disregard' is evidence indicating that the defendant was aware of the probable consequences of his or her acts and willfully and deliberately failed to avoid those consequences. [Citation.]" (*Travelers Ins. Co. v. Lesher* (1986) 187 Cal.App.3d 169, 200 overruled on other grounds in *Buss v. Superior Court* (1997) 16 Cal.4th 35, 52 fn. 14.) Oppression means "despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." (§ 3294, subd. (c)(2).) It is not enough that Roth may have been careless, grossly negligent, or even reckless. (*G. D. Searle & Co. v. Superior Court* (1975) 49 Cal.App.3d 22, 31-32.) Here, however, the jury found Roth intentionally failed to disclose an important fact regarding the loan with the intent to deceive Sedaghat, presumably finding that Roth's own financial interests were in line

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[7] All further section references are to the Civil Code.

with the deal going forward. Given the highest duty of loyalty that the law imposes on a fiduciary, we conclude that a fiduciary's attempt to mislead a client, whether or not successful, supports finding malice or oppression, and thus a punitive damages award. (*Collins v. eMachines, Inc.* (2011) 202 Cal.App.4th 249, 255.)

Roth contends it could not have intended to harm Sedaghat because a number of Roth's employees personally invested in eNucleus. Such investments, Roth argues, belie Sedaghat's assertion that Roth knew Nucleus was a bad investment that would inflict financial loss on Sedaghat. This contention creates a conflict in the record, however, which the jury resolved against Roth.

C. *Judgment Credits*

The jury awarded Sedaghat $500,000 and prejudgment interest in compensatory damages. The jury award was not Sedaghat's only recovery in this litigation. First, Sedaghat recovered $290,907 through his lien against the Paulsen defendants' 2006 legal malpractice action against their lawyer for permitting their default to Sedaghat's complaint. Second, Sedaghat received $265,983 in settlement from defendants Vedder Price Kaufman & Kammholz and Greenberg Traurig LLP (the Vedder/Greenberg settlement).

Following the jury's verdict, Roth moved to credit Sedaghat's recoveries from the Paulsens and the Vedder/Greenberg settlement toward Sedaghat's judgment against Roth. The court granted Roth's motion in part and denied it in part. The court denied credit to Roth for the $290,907 recovered from the Paulsens because their payment did not satisfy the outstanding postjudgment interest, let alone any portion of the $960,000 in principal, that they owed Sedaghat. On the other hand, the court granted credit for the $265,983 Sedaghat received from the Vedder/Greenberg settlement, but credited it solely against the Paulsens' $960,000 default judgment, and not against the $500,000 compensatory award which Roth owed Sedaghat. We review the court's allocation of judgment credits for abuse of discretion. (*County of San Bernardino v. Walsh* (2007) 158 Cal.App.4th 533, 534; *Erreca's v. Superior Court* (1993) 19 Cal.App.4th 1475, 1504-1505.)

Roth contends the Vedder/Greenberg settlement should be credited to Sedaghat's judgment against Roth to reduce the amount Roth owes. In support, Roth cites section 877, subdivision (b). It states "Where a release, [or] dismissal with or without prejudice . . . is given in good faith before verdict or judgment to one or more of a number of tortfeasors claimed to be liable for the same tort, . . . it shall have the following effect: [¶] . . . it shall reduce the claims against the others in the amount stipulated by the release [or] the dismissal . . . ." Roth contends the court erred by applying the Vedder/Greenberg settlement to reduce the amount the Paulsens owed under their default judgment, but not also to reduce the amount Roth owed. (See *Abbott Ford, Inc. v. Superior Court* (1987) 43 Cal.3d 858, 873 [a good faith settlement reduces nonsettling defendants' "ultimate liability to the plaintiff"]; *American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578, 604 ["we conclude that a plaintiff's recovery from nonsettling tortfeasors should be diminished only by the amount that the plaintiff has actually recovered in a good faith settlement"].) According to Roth, only by crediting Roth with the Vedder/Greenberg settlement can one satisfy section 877's objective of equitable sharing of costs among multiple tortfeasors. We are unpersuaded. One purpose of section 877 is to prevent a plaintiff's double recovery from multiple defendants. (*County of San Bernardino v. Walsh*, *supra*, 158 Cal.App.4th at p. 544.) A plaintiff is entitled to only one complete satisfaction of a judgment. (*McCall v. Four Star Music Co.* (1996) 51 Cal.App.4th 1394, 1399; *Carr v. Cove* (1973) 33 Cal.App.3d 851, 854.) If a plaintiff receives partial satisfaction from one defendant, then the plaintiff must credit other defendants with the partial satisfaction and reduce the amount they owe under the judgment. (*Dell'Oca v. Bank of New York Trust Co., N.A.* (2008) 159 Cal.App.4th 531, 560.) As to the Vedder/Greenberg settlement, no double recovery is taking place. Indeed, in ruling on Roth's motion for judgment credits, the court noted Sedaghat was unlikely to ever be made whole given the amount of unpaid postjudgment interest that had accumulated, let alone principal and prejudgment interest.

Roth also contends the court erred by not crediting against Roth's judgment Sedaghat's recovery from the Paulsen malpractice action. Because Sedaghat's right to

recover from the Paulsens rested on a default judgment, not a settlement, Roth does not rely on section 877, which applies to settlements, not judgments. (§ 877 [applies to release, dismissal, or covenant not to sue or enforce judgment, rendered before jury's verdict or judgment]; *Southern Cal. White Trucks v. Teresinski* (1987) 190 Cal.App.3d 1393, 1405 ["section 877 applies only to settlements reached before liability is established by jury verdict or by judgment"].) Instead, Roth relies on the general notion that Sedaghat may not receive a double recovery. Roth's reliance on that notion is unavailing, however, because as the court noted, Sedaghat has not received a double recovery and is unlikely to ever do so. To the contrary, the Paulsen payment does not even fully compensate Sedaghat for postjudgment interest. As the court noted, "The motion for judgment credits for the amounts recovered from the Paulsens is denied because the amounts recovered were less than the outstanding postjudgment interest then owed by the Paulsens pursuant to the default judgment, and therefore the amount [Sedaghat] received from the Paulsens merely reduced the amount of postjudgment interest owed to [Sedaghat] by the Paulsens but did not reduce the outstanding principal or prejudgment interest owed pursuant to Sedaghat's default judgment against the Paulsens and does not reduce the outstanding principal or prejudgment interest owed pursuant to the award of damages in this action."

D. *No Jurisdiction to Hear Cross-Appeal*

After the jury awarded him $500,000 in compensatory damages, Sedaghat moved for judgment notwithstanding the verdict in the amount of the full $1 million loan (minus $40,000 in interest payments received and a $10,000 reduction in principal through eNucleus's bankruptcy.) The court denied Sedaghat's motion and notice of the court's denial was served on June 25, 2010. Three days later on June 28, 2010, the court entered its final judgment. Less than 60 days later on August 19, Roth filed its notice of appeal from the judgment and the clerk mailed the notice of appeal to the parties the next day. On September 8 – 72 days after the court entered judgment and 75 days after the court

served notice of its denial of Sedaghat's motion for JNOV – Sedaghat filed his notice of cross-appeal from the court's denial of his motion for JNOV.[8]

The court's order denying Sedaghat's motion was an appealable order. (Code Civ. Proc., § 904.1, subd. (a)(4); *Sweatman v. Department of Veterans Affairs* (2001) 25 Cal.4th 62, 68.) "The long standing rule is that where an order is appealable, it is not also reviewable on appeal from the final judgment: Any other conclusion would allow two appeals raising the same question." (*Machado v. Superior Court* (2007) 148 Cal.App.4th 875, 884) Accordingly, Sedaghat was obligated to file a notice of appeal no later than within 60 days of the court's service of denial of his motion for JNOV on June 25, or else lose the right to appeal from the order. (*Ibid.* ["If a judgment or order is appealable, an aggrieved party *must* file a *timely* appeal or forever *lose* the opportunity to obtain appellate review." (Italics added.)]; *Maughan v. Google Technology, Inc.* (2006) 143 Cal.App.4th 1242, 1247; 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 17 ["Of course, an *appealable* order from which no appeal was taken cannot be reviewed on an appeal from the final judgment." (Italics added.)].) Because Sedaghat did not file his notice of cross-appeal within 60 days of the court's order denying his motion for JNOV, we lack jurisdiction to hear his cross-appeal.

Sedaghat contends his notice of cross-appeal was timely because he filed it within 20 days of Roth's notice of appeal. (Cal. Rules of Court, rule 8.108, subd. (g)(1) [must file notice of cross-appeal within 20 days of clerk's service of notice of appeal from same judgment].) But the provision for filing a notice of cross-appeal applies only to the order or judgment covered by the initial notice of appeal. The rules states: "If an appellant timely appeals from a judgment or appealable order, the time for any other party to appeal from the *same judgment or order* is extended until 20 days after the superior court clerk serves notification of the first appeal." (Rule 8.108, subd. (g)(1), italics added.)

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8 Sedaghat also moved for a new trial or additur in which he sought only to retry the amount of damages, which the court denied. He does not discuss those motions in his cross-appeal, thus abandoning them as potential grounds for appeal.

Roth appealed from the judgment; Roth did not appeal from denial of the motion for JNOV, and thus Sedaghat's cross-appeal did not involve the "same judgment or order."

Sedaghat's reliance on the principles articulated in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644 is misplaced because *Lakin* dealt with timely appeal of *post*judgment orders. Sedaghat cites *Lakin* to argue that the court's order denying the motion for JNOV was not an appealable order under *Lakin's* criteria for distinguishing between appealable and nonappealable orders. Sedaghat's argument misses the mark, however, because the court's order here was a prejudgment order, and, in any case, Code of Civil Procedure section 904.1 expressly makes an order from denial of a motion for JNOV an appealable order. (*Lakin* at p. 651; *Bates v. Rubio's Restaurants, Inc.* (2009) 179 Cal.App.4th 1125, 1131 [*Lakin* deals with postjudgment orders].)

DISPOSITION

The judgment is affirmed. Each side to bear its own costs on appeal.

RUBIN, Acting P. J.

WE CONCUR:

FLIER, J.

GRIMES, J.