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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

XTC INVESTMENTS, Plaintiff, v. JONICA STINGL et al., Defendants, Cross-complainants and Respondents; ERROL GAUM, Cross-defendant and Appellant.	B279577 (Los Angeles County Super. Ct. No. BC451733)
JONICA STINGL, et al., Cross-complainants and Respondents v. ERROL GAUM, Cross-defendant and Appellant.	B284250 (Los Angeles County Super. Ct. No. BC451733)

APPEAL from judgments of the Superior Court of Los Angeles County, Suzanne G. Bruguera and Mark A. Young, Judges. Affirmed and remanded with instructions.

Allen Matkins Leck Gamble Mallory & Natsis, Francis Norman Scollan for Cross-defendant and Appellant.

Steven William Kerekes for Cross-complainants and Respondents.

Respondents Jonica Stingl and her solely owned corporation, Zion II, Inc., filed cross-claims for breach of contract, indemnity, and fraud against appellants Errol Gaum (Errol) and his solely owned corporation, Nova Gold, Inc. Stingl and Zion II prevailed on the breach of contract and indemnity claims after a bench trial and were awarded compensatory damages of $1,311,772. The trial court also awarded them $98,330.65 in attorney fees pursuant to Civil Code section 1717. In these consolidated appeals, Gaum and Nova Gold challenge both the substantive rulings and the award of attorney fees. We affirm in full. Zion II is entitled to reasonable attorney fees on appeal. We remand to the trial court for determination of those fees.

BACKGROUND

The trial court's factual findings are not at issue in these appeals. We accordingly draw the following facts largely from the trial court's statement of decision.

Appellant Errol lives in Nova Scotia, Canada, and was at all relevant times the sole shareholder of appellant Nova Gold, Inc., a Delaware corporation. Nova Gold in turn held a controlling stake of Bluenose Trading, Inc. (Bluenose), a corporation headed by Errol's brother, Sanford Gaum (Sanford). Bluenose's sole asset was a shopping center in Pico Rivera. Nova

Gold paid Sanford, who lived in southern California, to manage the shopping center.

In 1995, Errol executed two powers of attorney in favor of Sanford. The first gave Sanford "full authority and power to act on my behalf in the capacity of any official position necessary and on any financial matters regarding Nova Gold Inc. . . . ." The second gave Sanford "full authority and power of attorney . . . to act on my behalf in the capacity of any official position necessary and on any financial matters regarding Bluenose Trading Inc. . . . ." Both powers of attorney were to "remain in full force until reneged in writing" by Errol. Errol testified that he did not revoke the powers of attorney until November 29, 2010, shortly after the third transaction at issue in this case.

In May or June 2010, Sanford approached respondent Jonica Stingl and her solely owned Delaware corporation, respondent Zion II, Inc., about purchasing some of the Bluenose shares held by Nova Gold.

Sanford, Stingl, and their corporations had a history of engaging in financial transactions. In 2005, Zion II loaned $617,000 to another of Sanford's corporations, 8600 SV Inc., to buy a house for Sanford in Glendale. The loan was secured by a deed of trust on the house, into which Stingl also moved in 2006. In 2006, Zion II loaned Bluenose $800,000, which was secured by a deed of trust on the Pico Rivera shopping center. In 2008, Sanford asked Zion II to loan 8600 SV Inc. an additional $505,000. Stingl agreed, and Sanford recorded a second deed of trust on the Glendale house. Stingl eventually became concerned that the value of the house was insufficient to secure both the $617,000 and $505,000 loans, so Sanford, in his capacity as Bluenose CFO, transferred the $505,000 deed of trust to the

shopping center in January 2009. Thus, by the time Sanford approached Stingl about buying Bluenose shares in mid-2010, the "life long friends" had engaged in numerous transactions, and Zion II held a $1,305,000 deed of trust on the shopping center Bluenose owned.

Stingl was interested in having Zion II purchase shares of Bluenose from Nova Gold. Sanford accordingly provided Stingl with the two powers of attorney Errol had signed in 1995, as well as some corporate minutes showing that Errol was the sole shareholder of Nova Gold. Stingl telephoned Errol to confirm that Errol was the sole shareholder of Nova Gold, and that Sanford had the authority to sell Nova Gold's shares of Bluenose. After Errol confirmed both his ownership and Sanford's authority, Sanford dictated and Stingl prepared a purchase agreement containing the negotiated terms of the deal: Zion II would purchase 93.75 shares of Bluenose from Nova Gold for a total price of $535,000, or $5,706.67 per share.

Stingl also included in the purchase agreement the following provision: "Seller is the lawful owner of the Stock, free and clear of all security interest, liens, encumbrances, equities and other charges. EXCEPT the lis pendens (or notice of pending action) of XTC Investments v. Fortuna Investments & Sanford Gaum, April 7, 2006, $628,051.33 judgment in favor of XTC Investments. Mark Cohen of XTC Investments is represented by John Torjeson. Seller agrees to pay for all judgments and/or legal expenses incurred in this matter." Stingl testified that she discussed this provision with both Errol and Sanford, and added it to protect herself against a federal court judgment against Sanford and a lis pendens, both of which she discovered on her own. Stingl did not discover at the time, and neither Errol nor

Sanford disclosed, that a state court judgment in the amount of $769,444.11 had been entered against Sanford and Bluenose and in favor of XTC Investments, LLC on April 30, 2010 (the first state court judgment).

Stingl, Sanford, and Errol all signed the purchase agreement on August 30, 2010. Zion II paid Nova Gold for the shares, which were transferred to Zion II. $505,000 of the $535,000 purchase price made it into Errol's personal bank account. Errol testified that because "the whole reason for selling the shares" to Zion II was "Sanford was in desperate need of money," he kept only $100,000 and forwarded $400,000 of the money to Sanford. Errol testified that Sanford told him the lis pendens and federal judgment referred to in the stock purchase agreement had been "taken care of."

In October 2010, Sanford proposed that Zion II purchase more shares of Bluenose from Nova Gold. Sanford and Stingl negotiated a deal pursuant to which Zion II would purchase 62.49 shares of Bluenose for the price of $2,848.46 per share, a total of $178,000. Stingl called Errol to get his approval. He orally approved the deal but did not sign the paperwork because he was sick and could not go into work to use the printer and fax machine he normally used there. Errol also told Stingl she did not need his signature in any event, because of the powers of attorney. Stingl and Sanford signed the second purchase agreement on October 25, 2010. Aside from the number of shares and price per share, it was identical to the first purchase agreement. Stingl transferred $178,000 to Nova Gold in exchange for the shares. A few days later, on November 2, 2010, the Los Angeles Superior Court entered a second judgment in favor of XTC (the second state court judgment). This judgment

found Bluenose and 8600 SV Inc. jointly and severally liable for $586,473.41, plus 10 percent interest. It also imposed a constructive trust and prioritized judicial lien for the full amount of the judgment on the Glendale house.

Sanford, the sole owner of 8600 SV Inc. and partial owner of Bluenose, did not tell Stingl about the second state court judgment. Instead, he immediately began negotiating a third sale of Bluenose stock. Stingl eventually agreed that Zion II would purchase Nova Gold's remaining 31.2 shares of Bluenose, for a total price of $40,000, or $1,282.05 per share. Stingl and Sanford signed a third purchase agreement, identical in all material terms to the first two, on November 26, 2010. They did not complete the transaction until a few days later, however, after Stingl called Errol on November 28, 2010 to obtain his consent to the sale. The $40,000 payment posted to Nova Gold's bank account on November 29, 2010. After the three stock purchases, Zion II replaced Nova Gold as the majority shareholder of Bluenose, with 62.5 percent of all outstanding shares; Stingl was elected or appointed to the position of Bluenose president sometime thereafter.

Approximately one week after the final sale closed, on December 6, 2010, Sanford sent Stingl what she testified was a "kind of odd" text message. Stingl testified that the message read, "'Jonica, are you willing to reconvey your 617,000-dollar note to Bluenose Trading so we can sell the house and pay off the judgment against the plaza? Call me after work." Stingl had no idea what judgment Sanford was talking about.

Stingl's attorney subsequently discovered the existence of the first state court judgment, which was recorded on January 4, 2011. He sent a letter to the attorney representing Errol and

Nova Gold, demanding rescission of the three stock purchase agreements. The demand was rejected. Stingl, in her capacity as Bluenose president, also retained counsel and attempted to challenge the second state court judgment. Her efforts were unsuccessful.

Meanwhile, on December 21, 2010, XTC filed the instant lawsuit against Stingl, alleging fraud; Zion II was later added as a Doe defendant. XTC's claims eventually were settled; neither XTC nor its claims are at issue in these appeals.

In September 2011, Stingl and Zion II filed a cross-complaint that named Nova Gold, Errol, and Sanford as cross-defendants.[1] In that cross-complaint, Zion II asserted a breach of contract claim against Errol and Nova Gold, alleging that Errol and Nova Gold breached the stock purchase agreements by failing to satisfy the federal court judgment. Zion II further alleged that the first and second state court judgments were the proximate result of this breach, and that those judgments reduced the value of Bluenose's asset, the shopping center. Zion II claimed damages equal to Bluenose's 62.5 percent share of the judgment liens placed against the shopping center. It further claimed that it incurred attorney fees challenging the second state court judgment, and was entitled to recover those fees under the terms of the purchase agreements. Zion II also asserted a cause of action for contractual indemnity against Errol and Nova Gold, claiming that the stock purchase agreements

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[1] Bluenose and its minority shareholders also were named as cross-defendants, in causes of action for declaratory relief and equitable indemnity. The trial court dismissed those causes of action as moot after the bench trial and they are not relevant here.

obligated them to reimburse Zion II for attorney fees and other damages it incurred in defending against the state court judgments. In the third cause of action for fraud, Stingl and Zion II alleged that Errol, Sanford, and Nova Gold fraudulently induced them to purchase Nova Gold's shares of Bluenose by representing falsely that the federal court judgment would be paid off and that there were no other judgments or lis pendens against Bluenose property. Stingl and Zion II asserted their reliance on these false representations was reasonable in light of their previous dealings with Sanford, and claimed damages in the amount of $1,355,917.52, the total amount of the first and second state court judgments, plus 10 percent interest from the dates those judgments were entered. In the fourth cause of action, Stingl and Zion II asserted equitable indemnity against Nova Gold, Errol, and Sanford. They alleged that any liability they might have to XTC was "primarily and ultimately" caused by cross-defendants' breach of the contract and fraud, and therefore should be borne by cross-defendants.

While the litigation was pending, XTC filed notice that it intended to levy upon the shopping center to satisfy its second state court judgment against Bluenose. A writ of execution was entered on October 19, 2011. The shopping center subsequently was sold to XTC at a Sheriff's sale for $100,000. After the sale, Zion II foreclosed on the $1,305,000 deed of trust it still held against the shopping center. XTC paid off the debt in full.

The trial court entered default against Errol, Sanford, and Nova Gold on October 20, 2011. After a prove-up hearing, the trial court entered default judgment against those cross-defendants on May 24, 2013. The default judgment, for which those cross-defendants were jointly and severally liable, included

$1,215,744 in compensatory damages and $1,215,744 in punitive damages.

Errol subsequently appeared in the case, and the trial court set aside the default judgment as to him. He passed away in 2017. The cross-claims against Errol proceeded to a bench trial, held from November 16 to 20, 2015.

In a lengthy statement of decision, the trial court ruled in favor of Stingl and Zion II on the causes of action for breach of contract, contractual indemnity, and equitable indemnity. With regard to all three of those causes of action, the trial court found that Stingl and Zion II "introduced sufficient evidence of the requirements for alter ego to establish that Errol Gaum and Sanford Gaum are the alter egos of Nova Gold, Inc." The trial court also noted, as an alternative, that Corporations Code section 316, subdivision (a)(1) also rendered Errol personally liable for Nova Gold's breach of contract. The trial court ruled in favor of Errol on the fraud claim, finding that Stingl and Zion II failed to provide sufficient proof that he acted with willful malice.

The trial court entered judgment in favor of Stingl and Zion II and against Errol on October 20, 2016. The court awarded Zion II $717,375 in compensatory damages for breach of contract (the $735,000 Zion II paid for the Bluenose shares, less $35,625 Zion II received in shareholder distributions), plus accrued prejudgment interest of $426,492.26, for a total award of $1,143,867.26 on that cause of action. The court awarded Zion II an additional $162,904.88 on the indemnity causes of action, to compensate it for the fees and expenses it incurred in challenging the state court judgments, plus an additional $5,000 to which the parties stipulated, for a total award of $1,311,772.14. The trial court later awarded Zion II a total of $98,330.65 in attorney fees.

Errol timely appealed both the judgment and the fee award. We consolidated the two appeals for all purposes.

DISCUSSION

I. Personal liability

Errol contends the trial court erred by finding him personally liable for the actions of his corporation, Nova Gold.[2] We disagree.

A. Alter Ego

A corporation generally is regarded as a separate and distinct legal entity from its shareholders, officers, and directors, with separate and distinct liabilities and obligations. (*Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 538.) Under the alter ego doctrine, however, corporate identity may be disregarded—and a shareholder, officer, or director held personally liable for corporate acts—where the corporation "is used to perpetrate a fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose." (*Ibid.*) "'[T]he conditions under which the corporate entity may be disregarded vary according to the circumstances in each case and the matter is particularly within the province of the trial court. [Citations.] This is because the determination of whether a corporation is an alter ego of an individual is ordinarily a question of fact.' [Citation.] There are two requirements for disregarding the corporate entity: first, that there is a sufficient unity of interest and ownership between the corporation and the individual or organization controlling it that the separate personalities of the individual and the corporation no longer exist and, second, that

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[2] Errol does not dispute that he may be held liable for the actions of Sanford, who acted as his agent by virtue of the powers of attorney.

treating the acts as those of the corporation alone will sanction a fraud, promote injustice, or cause an inequitable result." (*Misik v. D'Arco* (2011) 197 Cal.App.4th 1065, 1071-1072.) "'Both of these requirements must be found to exist before the corporate existence will be disregarded, and since this determination is primarily one for the trial court and is not a question of law, the conclusion of the trier of fact will not be disturbed if it is supported by substantial evidence.'" (*Id.* at p. 1072.)

Errol contends the trial court undertook an erroneous "legal interpretation" by finding the alter ego doctrine applicable even though "Stingl and Zion II were aware of Nova Gold's alleged alter ego circumstances yet elected to contract only with Nova Gold." The evidence he cites in support of this awareness was Stingl's testimony that she was not "aware of" and could not remember any other assets held by Bluenose; her use of the words "me," "him," and "Sanford" when testifying about transactions that formally involved their businesses; and an assertion she made in 2009 that Sanford had "multiple shell companies to protect himself from his creditors." Relying on *Lynch v. McDonald* (1909) 155 Cal. 704, 705-706 (*Lynch*), *T W M Homes, Inc. v. Atherwood Realty & Investment Co.* (1963) 214 Cal.App.2d 826, 853 (*Atherwood*), and *Potts v. First City Bank* (1970) 7 Cal.App.3d 341, 345-346 (*Potts*), Errol asserts that "parties with knowledge of alter ego factors who nonetheless choose to contract only with the subject corporation (or only the individual) are bound by that election and are precluded from invoking alter ego after the fact." He further argues that the trial court engaged in a "cramped reading" of the cases cited above such that it "precluded proper consideration of the compelling evidence . . . as to Respondents' clear knowledge." In his view,

the trial court erroneously concluded that Stingl and Zion had to have "absolute knowledge of every financial aspect of the contracting corporation alleged to be an alter ego" before it would find the alter ego doctrine inapplicable. We reject these contentions.

As discussed above, the applicability of the alter ego doctrine is a question of fact, not a matter of "legal interpretation." Indeed, all three cases Errol cites emphasize the factual nature of the inquiry rather than support his contention that the court should have found the alter ego doctrine inapplicable as a matter of law.

In *Lynch*, *supra*, 155 Cal. 704, the plaintiff entered into a contract to provide services to a mining company. The contract was signed by the president of the corporation "only in his capacity as president of the corporation." (*Lynch*, *supra*, 155 Cal. at p. 705.) The plaintiff nevertheless sought to impose personal liability on the president under the alter ego doctrine, because the president held nearly all the stock of the company and deceived the plaintiff about the net earnings of the mine. (*Id.* at p. 706.) The Supreme Court affirmed the lower courts' rejection of this effort, reasoning, "[t]here was sufficient evidence to justify the court in the conclusion . . . that McDonald wished to show that he did not intend to be bound personally," and noting "there are other facts in evidence which would justify the lower court's decision." (*Ibid.*) Those facts included the plaintiff's training as an attorney, as well as his "thorough[ ]" familiarity "with all the facts concerning the president's relation to the corporation." (*Ibid.*) The Court observed that the plaintiff nevertheless "was content to act under a contract which respondent refused to sign except as an officer of the company," and accordingly "cannot

complain that McDonald, who was not a party signatory to the instrument, is not bound." (*Ibid.*)

In *Atherwood*, the trial court found "untrue" the plaintiff's allegations that Atherwood, a residential real estate and construction company with which it contracted, was the alter ego of its principals. (*Atherwood*, *supra*, 214 Cal.App.2d at p. 851.) On appeal, the plaintiff argued that "the failure to validly issue stock and to provide for the adequate capitalization of Atherwood 'when considered with all the other evidence regarding the individual respondents' handling of the affairs of the respondent corporation' *require* findings and judgment disregarding the corporate entity." (*Ibid.*) The court of appeal rejected this premise, holding that "it was within the province of the trial court to determine whether there was such unity of interest and ownership as to preclude separate existing personalities of Atherwood on one hand and the four individual respondents on the other." (*Id.* at p. 852.) It further rejected plaintiff's reliance on Atherwood's undercapitalization, explaining, "this factor and the evidence bearing upon it were merely circumstances to be considered by the trial court. We cannot hold that such evidence constituted undercapitalization as a matter of law or that such factor, if it did exist, requires as a matter of law that the corporate entity be disregarded." (*Id.* at p. 853.)

Even *Potts*, which expressly addressed "ordinary agency principles" rather than the alter ego doctrine and therefore is not on point here, emphasized "the facts surrounding the transaction" rather than a rule of law. (*Potts*, *supra*, 7 Cal.App.3d at pp. 344, 345.) There, defendant bank rejected the individual plaintiffs' request to loan money to their corporation and instead loaned money directly to the plaintiffs in their

personal capacities. The plaintiffs in turn loaned the money to their corporation, depositing it into their corporation's account at the same bank. (*Id.* at p. 343.) The bank "offset the bank account" of the corporation for the amount the plaintiffs owed on the loan, which prompted plaintiffs to sue to recover the money as well as consequential damages associated with the corporation's subsequent bankruptcy. (*Id.* at p. 343.) The bank asserted alter ego as a defense, claiming its offset was justified because the corporation was the plaintiffs' alter ego. The trial court accepted the defense and found in the bank's favor, but the court of appeal reversed. (*Id.* at p. 344.) Notably, the court of appeal found the alter ego doctrine entirely inapplicable, because the case was one "in which the corporation is being charged with a debt allegedly contracted on its account by its agent and the case can, and must, be determined on ordinary agency principles." (*Ibid.*) Nonetheless, the court examined the facts and concluded it could find "only a definite intention by the bank *not* to treat the corporation as being, in any way, a party to the loan. It looked only to the [plaintiffs] and to their personal credit; it cannot now look further." (*Ibid.* at p. 345.)

To demonstrate an entitlement to relief under the alter ego doctrine, Stingl and Zion II had to show that failure to pierce the corporate veil would sanction a fraud or promote injustice. The extent of their knowledge of Nova Gold's lack of corporate formalities, Bluenose's limited assets, or Sanford's alleged use of "multiple shell companies," was certainly relevant to this inquiry. Such evidence did not compel the conclusion that the alter ego doctrine was inapplicable, however. Instead, it presented a factual question for the trial court: did Zion II demonstrate it would suffer an injustice if Errol was not held personally liable

for the actions of Nova Gold, or did its familiarity with Sanford indicate that no injustice would result if Errol was not held personally liable? The trial court was entitled to, and apparently did, weigh the evidence Errol mentions against substantial evidence that Stingl and Zion II were unaware of the two state court judgments at the time of the stock sales and had transacted business successfully with Sanford and his other corporate entities in the past. We do not disturb the court's factual conclusion, which is supported by substantial evidence.

Nor do we agree with Errol that the trial court held that the alter ego doctrine was applicable merely because Zion II did not know the "entire financial situation of the company" or otherwise possess "absolute knowledge of every financial aspect of the contracting corporation alleged to be an alter ego." Although Errol is correct that the statement of decision notes there was no evidence that Stingl and Zion II "had full knowledge of Nova Gold, Inc.'s financial affairs or how it conducted business," he ignores the remainder of that sentence, which continues, "similar to the evidence which was introduced in the cases cited by Cross-defendants." In other words, the trial court was distinguishing Errol's cases on their facts, not stating an erroneous conclusion of law.

B. Corporations Code section 316

In a single paragraph of its statement of decision, under the heading "Additional Ground for Personal Liability of Errol Gaum: Corporations Code Section 316(a)," the trial court concluded that Corporations Code section 316, subdivision (a)(1) afforded an "alternative ground" on which to find Errol personally liable on the contract claim. Errol argues this was legal error because Nova Gold, a Delaware corporation, was

subject to Delaware law, not Corporations Code section 316.

We need not and do not address the merits of this contention. The trial court invoked Corporations Code section 316, subdivision (a)(1) merely as an alternative basis for its decision to hold Errol personally liable for the acts of Nova Gold. "'No rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion.'" (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 19, quoting *Davey v. Southern Pacific Co.* (1897) 116 Cal. 325, 329.) The trial court's application of the alter ego doctrine was supported by substantial evidence and therefore was correct in law. (See *Atherwood*, *supra*, 214 Cal.App.2d at p. 852.) Any error in its brief allusion to Corporations Code section 316 accordingly would not change the outcome here.

II. Breach of Contract

A. Breach

To prove a breach of contract claim, a plaintiff (or, in this case, cross-complainant) must show, by a preponderance of the evidence, the existence of a contract, performance or excused non-performance by the plaintiff, breach by the defendant, and damages. (*First Commercial Mortgage Co. v. Reece* (2001) 89 Cal.App.4th 731, 745 [elements]; *People v. Burnick* (1975) 14 Cal.3d 306, 310 [standard of proof].) Errol challenges the sufficiency of Zion II's proof as to the breach element. He contends Zion II "did not establish at trial that the Federal

Judgment was not paid." Instead, he asserts, Zion II benefitted from the trial court's misapplication of Evidence Code section 635, which states that "An obligation possessed by the creditor is presumed not to have been paid." Errol further argues that the trial court's alternative finding—that Nova Gold breached the contracts by failing to disclose the state court judgments against Bluenose—was not supported by the language of the contract. We reject both arguments.

The trial court made two alternative findings on the breach element of Zion II's contract claim. Both findings concerned Nova Gold's failure to comply with paragraph 3(b)(ii) of the purchase agreements, which provided "Seller is the lawful owner of the Stock, free and clear of all security interest, liens, encumbrances, equities and other charges. EXCEPT the lis pendens (or notice of pending action) of XTC Investments v. Fortuna Investments & Sanford Gaum, April 7, 2006 $628,051.33 judgment in favor of XTC Investments. Mark Cohen of XTC Investments is represented by John Torjeson. Seller agrees to pay for all judgments and/or legal expenses in this matter." The trial court first concluded that Nova Gold breached this provision by failing to satisfy the federal judgment. The trial court indeed mentioned Evidence Code section 635 here, finding that the presumption applied because Zion II proved the existence of the federal judgment. The court's "additional basis for breach of contract against Nova Gold" was "[t]he failure to disclose the existence of at least the first of the state court judgments," which the court found to be "an 'equity or other charge' which Nova Gold had a duty to disclose."

There was never any dispute below regarding the existence of the federal judgment. No direct evidence showed it had not

been satisfied, however. The trial court thus relied on Evidence Code section 635. We agree with Errol that this reliance was misplaced. Evidence Code section 635 is concerned with promissory notes, not judgments. "Normally, a promissory note is given to a lender contemporaneously with the borrower's receipt of the face amount of the note. When a promissory note is paid, the note is normally cancelled. Thus when the lender holds an uncancelled promissory note, truth favors the conclusion that the borrower received the money and did not repay the note. The law thus creates a presumption in favor of this conclusion. The burden then shifts to the borrower to rebut the presumption either by proving payment, or by proving that the face amount of the note was never advanced." (*Remington Investments, Inc. v. Hamedani* (1997) 55 Cal.App.4th 1033, 1041.) Judgments do not function in the same manner and accordingly are not properly subject to the presumption.

The inapplicabilty of the presumption does not mean there was a failure of proof, however. We review factual findings for substantial evidence, and "[s]ubstantial evidence includes circumstantial evidence and any reasonable inferences drawn from that evidence." (*In re Michael D.* (2002) 100 Cal.App.4th 115, 126.) The record here contained sufficient circumstantial evidence from which the trial court could infer the federal judgment was unpaid. The trial court had before it evidence that creditor XTC had filed not one but two state court lawsuits alleging fraudulent transfers aimed at evading the federal judgment. The only reasonable inference from these lawsuits is that the federal judgment had not been paid; otherwise, XTC would have had no cause to file and pursue litigation concerning it. Errol did not come forward with any evidence to rebut this

inference.

He likewise did not dispute that the first state court judgment was entered prior to the three stock sales. He challenges, however, the court's conclusion that Nova Gold's failure to disclose that fact to Stingl and Zion II breached the contract. He contends that the language in paragraph 3(b)(ii) of the contract referred only to "security interest, liens, encumbrances, equities and other charges" on the Bluenose stocks themselves, not on the asset underlying those stocks, the shopping center. If that were true, proof that the federal judgment remained unpaid would likewise not establish a breach, which Errol has not argued. In any event, we are not persuaded that Errol's interpretation of the contract is correct, particularly given the lack of authority he has presented in support of his position.

We interpret contracts to give effect to the mutual intention of the parties when they entered the agreement. (Civil Code, § 1636.) "Parol evidence is admitted where uncertainty exists as to the meaning of a contract to show what the parties meant by what they said, but it is not admitted to show that they meant something other than what they said." (*Rilovich v. Raymond* (1937) 20 Cal.App.2d 630, 639-640.) Here, the trial court admitted parol evidence regarding what the parties intended by paragraph 3(b)(ii) without objection, thereby implicitly finding that the requisite uncertainty existed. Where parol evidence was introduced to aid the court in interpreting a contract, the meaning of a contract is a question of fact. (*Horseman's Benevolent & Protective Assn. v. Valley Racing Assn.* (1992) 4 Cal.App.4th 1538, 1559.) These principles lead us to conclude the court interpreted the contract as the parties intended.

Stingl testified that she inserted paragraph 3(b)(ii) because she did not want to close the deal "if there was any legal issue against the property." She testified that she spoke to both Sanford and Errol about her concerns, they understood her concerns, and Errol further assured her the lis pendens would have no bearing on the property or the shares of stock. The court was entitled to credit this testimony.

B. Damages

Errol also disputes the validity of the damages the trial court attributed to the breach of contract. In his view, "Even if one accepts the theory that the alleged failure to disclose the Second State Court Judgment is a breach of contract, only the third purchase agreement is implicated." He argues that the shopping center was sold under a writ of execution issued pursuant to the second state court judgment, which did not exist until after the first two purchase agreements were signed. Therefore, he continues, Zion II's purchase price damages should be limited to those incurred in the third transaction, $40,000. He does not cite any legal authority in support of this argument.

This argument misapprehends the nature of the breach the court found and the damages it awarded, the fundamental premises of which Errol does not challenge here. The breach lay in Nova Gold's failure to disclose the first and second state court judgments to Zion II, while simultaneously representing that no such encumbrances existed. Zion II was injured at the time of each transaction, when it purchased stock that Nova Gold knew would not maintain any value.

III. "Value Retained"

Errol contends the trial court erroneously failed to consider "value retained by Zion II when assessing damages." The "value"

in question arose from Zion II's foreclosure of its deed of trust on the shopping center, which included the $505,000 deed that originally had been secured by the Glendale house. Errol argues that "Zion II was thus able to capture $505,000 in equity in the Bluenose Property *for itself* without ever having paid Bluenose the funds." Therefore, Errol contends, "This $505,000 of value, retained by Zion II, must be offset against Zion's claims for the purchase price." He cites no legal authority in support of this contention,

There is no dispute that Zion II made a $505,000 loan to Sanford's corporation, 8600 SV, Inc., or that the loan was secured by a deed of trust on the shopping center. This transaction was completely separate from the three stock purchase agreements, and predated them by more than a year. Bluenose shareholder Robert Jaffe testified that he and the other minority shareholders were compensated with additional equity in Bluenose when the deed of trust was transferred to the shopping center in early 2009. Errol has given us no basis, aside from assertions of unfairness, to conclude that the $505,000 Zion II received to satisfy the deed of trust in connection with this independent transaction should be offset against the damages it received in connection with Nova Gold's breach of the stock purchase agreements. We accordingly do not adjust the damages award.

IV. Prejudgment Interest

The trial court awarded Zion II prejudgment interest on the contract claim, in the amount of $426,492.26. The court started the clock on the interest on the respective dates on which Nova Gold and Zion II entered into the three stock purchase agreements, pursuant to Civil Code section 3287, subdivision (a). Errol contends this is error under Civil Code section 3287,

subdivision (b), which he argues restricted the court to starting the prejudgment interest clock on September 13, 2011, the date the cross-complaint was filed, or September 12, 2012, the date the shopping center was sold at the Sheriff's sale. Whether the trial court misinterpreted or misapplied the statute is a question of law we review de novo. (*Union Pacific Railroad Company v. Santa Fe Pacific Pipelines, Inc.* (2014) 231 Cal.App.4th 134, 204.)

Civil Code section 3287 governs the time from which prejudgment interest may run. Subdivision (a) provides, "A person 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. This section is applicable to recovery of damages and interest from any debtor, ..." (Civ. Code, § 3287, subd. (a).) "The test for recovery of prejudgment interest under section 3287, subdivision (a) is whether '*defendant* actually know[s] the amount owed or from reasonably available information could the defendant have computed that amount.' [Citation.]" (*Cassinos v. Union Oil Co.* (1993) 14 Cal.App.4th 1770, 1789.)

Subdivision (b), on the other hand, governs in contract actions in which a judicial determination is required to assess damages. (*George v. Double-D Foods, Inc.* (1984) 155 Cal.App.3d 36, 46.) It provides, "Every person who is entitled under any judgment to receive damages based upon a cause of action in contract where the claim was unliquidated, may also recover interest thereon from a date prior to the entry of judgment as the court may, in its discretion, fix, but in no event earlier than the date the action was filed." (Civ. Code, § 3287, subd. (b).) Errol

argues the court should have used Civil Code section 3287, subdivision (b) to calculate the prejudgment interest, but we disagree.

Here, the trial court determined that Zion II was damaged in the amount of its purchase price when it completed its performance of the three stock purchase agreements. While inconsistent with the theory of damages initially advanced in Zion II's cross-complaint, Zion II's counsel advanced this theory at trial with no objection or contrary theory put forth by Errol's counsel. Under this theory of damages, which the court accepted and Errol does not contest, the damages were at all times readily ascertainable by Errol. The court accordingly did not err in applying Civil Code section 3287, subdivision (a) and awarding prejudgment interest from the dates of the transactions.

V. Attorney Fees

After trial, Stingl and Zion II moved for attorney fees pursuant to Civil Code section 1717. They cited as a basis for their motion paragraph 5(c) of the purchase agreements, which provided in relevant part, "In the event that litigation results from or arises out of this Agreement or performance thereof, the parties agree to reimburse the prevailing party's reasonable attorney's fees, court costs, and all other expenses, whether or not taxable by the court as costs, in addition to any other relief to which the prevailing party may be entitled." They submitted a declaration and attorney invoices in support of their request for fees totaling $105,960.85.

Errol opposed the motion. He argued that Stingl was not entitled to fees because she was not a party to the purchase agreements underlying the breach of contract cause of action and did not prevail on her fraud claim. He contended that the fee

award should be reduced by 50% "or such amount as the Court may deem appropriate, to reflect that Stingl has no basis for claiming her fees." He further argued that the fees request should be reduced because Stingl and Zion II lost on their fraud claim. Errol characterized the fraud claim as "key" to their case because it could have led to punitive damages "and would tend to insulate a judgment from bankruptcy relief." He pointed out that half of the approximately $2.4 million default judgment originally entered against him had consisted of punitive damages, and asserted that "losing this at trial was a major loss to Cross-Complainants." Errol urged the court to reduce the fee award by a "minimum appropriate amount" of 1/3, because "the case was comprised of work on three topics: (1) contract (indemnity and the purchase agreements), (2) alter ego and (3) fraud." He relied exclusively on a citation to *Sokolow v. County of San Mateo* (1989) 213 Cal.App.3d 231, 249 (*Sokolow*). Errol finally contended that the fee request included a few duplicate bills.

The trial court that heard the motion was not the trial judge. It found Zion II to be the prevailing party on the contract under Civil Code section 1717 and granted Zion II's motion for fees "in the reduced amount of $98,330.65." The court agreed with Errol that Stingl was not a party to the stock purchase agreements and did not prevail on any claim; it denied her motion for fees, but declined to reduce the award by 50%. The court also agreed (and Zion II conceded) that the request had included duplicate invoices in the amount of $1,604.25. The court further accepted Errol's contention that the award should be reduced by $6,025.95 to reflect fees Zion II already received in connection with a discovery sanction.

The trial court rejected Errol's argument that the fees should be reduced to reflect the losing fraud claim. It stated: "In opposition, Cross-Defendants [sic] argue any award of attorneys' fees must be reduced to account for the failed fraud claim. However, Cross-Defendants' [*sic*] argument is not supported by *on-point* case law or authority. (Opposition, pg. 3). Moreover, as discussed above, Zion prevailed on the contract-related claims. Zion represents it 'obtained 96.75% of the compensatory damages it sought in the Cross-complaint.' (Reply, pg. 4). [¶] The Court finds Zion is entitled to an award of attorneys' fees in the reduced amount of $98,330.65 ($105,960.85 - $1,604.25 - $6,025.95). The court's award of attorneys' fees reflects a reasonable amount for incurred [*sic*] by Zion *in prosecuting its claims for breach of contract and indemnity, including the alter ego theory of liability*." (Emphases added.)

Errol now pursues only his argument regarding the fraud claim. He contends "[t]he trial court erred as a matter of law to the extent that it determined that it could not consider a reduction for Respondents' lack of success" on the fraud claim, and further "abused its discretion in failing to consider Respondents' loss on a major claim, including losing the sole basis for punitive damages, and reducing the fee award accordingly." In his reply brief, he further asserts that the court "[i]ncorrectly believ[ed] that Appellant had not provided authority for considering the impact of the failed claim for fraud and punitive damages," and therefore erroneously "considered only the outcome of the contract claims." These contentions are not persuasive.

The trial court awarded fees pursuant to Civil Code section 1717 (section 1717). Section 1717, subdivision (a) provides in

relevant part that "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs. . . . ." (§ 1717, subd. (a).) Subdivision (b)(1) provides that, subject to exceptions not relevant here, "the party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract." (§ 1717, subd. (b)(1).) Subdivision (c) addresses situations in which a party "seeks relief in addition to that based on a contract": "if the party prevailing on the contract has damages awarded against it on causes of action not on the contract, the amounts awarded to the party prevailing on the contract under this section shall be deducted from any damages awarded in favor of the party who did not prevail on the contract. If the amount awarded under this section exceeds the amount of damages awarded the party not prevailing on the contract, the net amount shall be awarded the party prevailing on the contract and judgment may be entered in favor of the party prevailing on the contract for that net amount." (§ 1717, subd. (c).) A party who obtains an "unqualified victory on a contract dispute" is entitled as a matter of law to be considered the prevailing party for purposes of section 1717. (*DisputeSuite.com, LLC v. Scoreinc.com* (2017) 2 Cal.5th 968, 973.) The trial court has "broad discretion to determine the amount of reasonable attorney fees under section 1717, and the award of fees is governed by equitable principles." (*Burkhalter Kessler Clement & George LLP v. Hamilton* (2018) 19 Cal.App.5th 38, 43.)

Errol does not dispute that Zion II was the prevailing party on the contract actions. He essentially contends, however, that because *he* was the prevailing party on the fraud claim, the trial court abused its discretion by not reducing Zion II's award. Because Errol did not receive damages on the fraud claim to offset Zion II's recovery on the contract claims, section 1717, subdivision (c) does not entitle him to an offset. Errol does not rely on section 1717, subdivision (c) in any event.

He instead looks again to *Sokolow*, *supra*, 213 Cal.App.3d 249-250, and other cases involving statutory rather than contractual fee awards, including *Bingham v. Obledo* (1983) 147 Cal.App.3d 401, 407 and *Meister v. Regents of Univ. of Cal.* (1998) 67 Cal.App.4th 437, 454. He argues, accurately, that these cases stand for the proposition that a party's "degree of success" is one factor a trial court may consider when determining the amount of reasonable attorney fees. We agree with the trial court, however, that these authorities are not on point. These cases address fees awarded under 42 U.S.C. section 1988 (*Sokolow*) or state statutory fee provisions (Code Civ. Proc., § 1021.5 [*Bingham*]; Civ. Code, § 1798.45 [*Meister*]). These cases do not discuss contractual fees awarded pursuant to section 1717 or a trial court's exercise of discretion thereunder. Accordingly, they do not stand for the proposition that the trial court abused its broad discretion by not explicitly considering Zion II's loss on the fraud claim when assessing the fees to which it was equitably entitled. Furthermore, the court has broad discretion in setting attorney fees, and is not required to expressly consider all factors in every case to properly exercise its discretion. The trial court acknowledged and rejected Errol's argument, which sufficiently demonstrates that it appropriately exercised its discretion.

Moreover, the trial court determined that the fees billed—which were amply supported by invoices largely unchallenged by Errol—were reasonably incurred "in prosecuting [the] claims for breach of contract and indemnity, including the alter ego theory of liability." It gave no indication that it awarded any fees based on the fraud claims, and Errol has not pointed to any invoices suggesting that the work counsel performed reasonably was allocable by claim. Errol likewise has not furnished a basis for his assertion that the award should be reduced by at least one-third. We find no failure to exercise its discretion or abuse of discretion by the trial court.

Both sides have requested attorney fees on appeal. "Statutory authorization for the recovery of attorney fees incurred at trial necessarily includes attorney fees incurred on appeal unless the statute specifically provides otherwise." (*Akins v. Enterprise Rent-A-Car Co.* (2000) 79 Cal.App.4th 1127, 1134.) Because section 1717 does not provide otherwise, Zion II is entitled to its attorney fees and costs incurred on appeal, and we accordingly grant its motion for those fees. "Although we have the power to appraise and fix attorney fees on appeal, we deem it the better practice to remand the cause to the trial court to determine the appropriate amount of such fees." (*Ibid.*)

DISPOSITION

The judgments of the trial court are affirmed. The matter is remanded to the trial court for the limited purpose of setting a reasonable appellate attorney fee award for Zion II. Respondents are to recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.