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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

LORI GILL, et al.,

Plaintiffs, Cross-defendants and Respondents,

v.

LORRAINE JANET ZUIDERWEG-ANDREWS,

Defendant, Cross-complainant and Appellant.

2d Civ. No. B269533
(Super. Ct. Nos. CV 130041, PR 130203, 14-PR-0269)
(San Luis Obispo County)

This action pits a mother and daughter against each other in litigation involving the probate estate of the family's matriarch, Edith Lorraine Zuiderweg (Edith).[1] Edith was married to Peter Zuiderweg (Peter), who predeceased her. They had two children, Jack Zuiderweg (Jack) and Lorraine Janet

[1] The parties and their family members are referred to by their first names to avoid confusion. No disrespect is intended.

Zuiderweg-Andrews (Janet), who is the mother in this mother/daughter litigation. Janet has two children, Glen Andrews (Glen) and Lori Gill (Lori), the daughter in this litigation.

In the years leading up to her death, Edith made several changes to her estate plan which favored Lori and disfavored Janet. Multiple legal actions regarding these changes were filed and consolidated for trial. After Janet concluded her case-in-chief on all but one of her claims, Lori and her husband, Craig A. Gill (Craig), moved for judgment under Code of Civil Procedure section 631.8.[2] The trial court granted the motion, finding the evidence did not support Janet's claims (1) that Edith lacked mental capacity to change her estate plan, (2) that Lori and Craig exercised undue influence over Edith, (3) that Lori engaged in self-dealing regarding Edith's irrevocable insurance trusts, (4) that Lori mismanaged trust assets and (5) that Lori and Craig committed elder abuse. In a subsequent trial, the court found that a promissory note between Janet and Lori is valid and enforceable, but that Lori did not breach the note's terms.

On appeal, Janet contends the trial court erred by granting portions of the section 631.8 motion for judgment, by finding that Lori had not breached the promissory note, by awarding Lori her attorney fees and by denying Janet discovery regarding documents possessed by Edith's attorneys. We conclude the trial court erroneously granted judgment under section 631.8 on Janet's petition to surcharge Lori, as trustee, for breach of trust with respect to Edith's irrevocable insurance

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[2] All further statutory references are to the Code of Civil Procedure unless otherwise stated.

trusts. We therefore reverse and remand for further proceedings on the petition. In all other respects, we affirm.

FACTS AND PROCEDURAL BACKGROUND

Peter and Edith executed the Peter J. and Edith L. Zuiderweg Revocable Trust (Trust) on July 28, 1981. Originally, the Trust provided for equal distribution of their substantial assets between their two children, Jack and Janet. Peter and Edith later amended the Trust to provide that if Jack predeceased the last spouse to die, his share of the Trust would be disbursed to Janet. Jack predeceased Edith.

The Trust further stated that upon the death of either Peter or Edith, the Trust would be divided into a revocable "Survivor's Trust," for the benefit of the surviving spouse, and an irrevocable "Residual Trust," containing the decedent's share of the couple's assets. Peter died in 1996. Janet is the sole beneficiary of the Residual Trust, which holds a 100% interest in commercial property at 2300 Broad Street plus a 50% interest in a building at 2800 Broad Street.[3] The remainder of Peter and Edith's real property was allocated to the Survivor's Trust, including 77 Woodbridge, a 50% interest in 2800 Broad Street and a 50% interest in Janet's residence located at 2702/2710 Reservoir Canyon Road.

On September 22, 2003, Edith created an irrevocable life insurance trust for the benefit of Janet and Janet's children, Lori and Glen. This insurance trust held a life insurance policy on Edith with a death benefit of $896,057 and an annual premium of $60,000. The purpose of the trust was to pay the estate taxes due upon Edith's death so that real property assets

[3] All of the properties at issue in this case are located in San Luis Obispo.

would not have to be sold. Any remaining funds were to be distributed equally among the three beneficiaries. Janet was named as trustee. Each year, Edith gave Janet $60,000 to make the annual premium payment. Lori subsequently replaced Janet as trustee.

In 2007, Lori and Craig, who had been living in Northern California, moved back to San Luis Obispo. They moved in with Edith, who was living alone at the family home located at 2778 Reservoir Canyon Road. Although Edith was in her late 80's, she was still driving and taking care of herself without in-home care.

Edith, Janet and Lori decided to purchase a new, handicap-accessible modular home to be located down the hill from the main residence. In 2008, Edith moved into the home, where she lived on her own. Lori and Craig retained a part-time caregiver to assist Edith Mondays through Thursdays. After Edith's doctor recommended that she no longer drive, Lori, Craig and Edith's friends would drive Edith to social events and various appointments.

On May 11, 2010, Craig prepared a handwritten document titled "Survivor's Trust Asset Changes" (Exh. 60). It listed various proposed changes to the Survivor's Trust and was purportedly signed by Edith. Attached to the document is a list of the assets in both the Survivor's Trust and the Residual Trust. The document was provided to Edith's attorney, Keith George, who produced it in response to a subpoena by Janet. Craig testified that he and Lori had discussed the information in the document.

On June 30, 2010, Edith appointed Lori as the sole trustee of the Survivor's Trust and included her as a beneficiary of the trust, along with Janet. Shortly thereafter, Edith amended

the Survivor's Trust to reduce Janet's share to a life estate in 2702/2710 Reservoir Canyon Road.

In August 2010, Janet gifted to Lori the family home at 2778 Reservoir Canyon Road, which Edith had previously gifted to Janet. This gift, which was valued at $600,000, created an estate planning issue, as Janet wanted to treat her children, Lori and Glen, equally. Janet could not gift Glen $600,000 without exceeding the lifetime federal estate tax exemption ceiling of $1 million. Janet's attorney, Stephen Hall, devised a plan for Janet to gift 2778 Reservoir Canyon Road to Lori by valuing the property, for tax purposes, at $500,000 and requiring Lori to execute an unsecured promissory note for $100,000, representing the difference between the property's appraised value and one-half of Janet's tax exemption amount. The promissory note called for interest payments of $2,500 each year starting in August 2011. Hall and Janet told Lori that the interest payments would not be necessary and that Janet would forgive the $100,000 debt by gifting the annual gift tax exclusion amount of $13,000 each year to Lori and $13,000 each year to Craig for four years, thus paying off the note in full.

On November 17, 2010, Edith created a new irrevocable life insurance trust, appointing Lori as the sole trustee and beneficiary. On advice of counsel, Lori transferred Edith's insurance policy from the 2003 insurance trust into the new insurance trust. After Edith's death, Lori received all the proceeds from the 2010 insurance trust. Janet received approximately $20,000 to $25,000 from the 2003 insurance trust.

On August 31, 2011, Edith amended the Survivor's Trust to eliminate Janet's life estate and to confirm Lori's status as sole beneficiary. The following year, Lori, as trustee, transferred three parcels of real property out of the Survivor's

Trust, i.e., the 50% interest in 2800 Broad Street, 50% interest in 2702/2710 Reservoir Canyon Road and 100% interest in 77 Woodbridge. Edith then executed deeds conveying the properties to Lori, who placed them in her own family trust.

Edith passed away on March 10, 2013, at the age of 93.

Before Edith died, Lori and Craig filed a complaint for partition against Janet in Case No. CV13-0041. The complaint concerns 2702/2710 Reservoir Canyon Road, in which Janet and Lori each hold an undivided 50% interest. Janet cross-complained against Lori and Craig for breach of the $100,000 promissory note and financial elder abuse.

In August 2013, Janet filed a separate probate petition (Case No. PR13-0203), which challenged certain amendments to the Survivor's Trust, based on alleged fraud and undue influence by Lori and Craig. A month later, Janet filed another petition against Lori and Craig (Case No. 14PR-0269), claiming that Lori breached her duties as trustee of the 2003 irrevocable insurance trust, which Edith had created for the benefit of Janet, Lori and Glen. Janet alleged that by transferring the underlying insurance policy to the 2010 insurance trust, Lori had inappropriately usurped the policy's death benefit. The various actions were consolidated.

The trial court held a bench trial on the promissory note cross-complaint, the petition challenging the Survivor Trust's amendments and the insurance trusts petition. At the conclusion of Janet's case-in-chief, Lori and Craig moved for judgment under section 631.8 on all claims but the promissory note claim. In a detailed Statement of Decision, the trial court granted the motion.

Following trial on the promissory note claim, the trial court issued a Statement of Decision finding that the promissory note is valid and enforceable against Lori but that Lori had not breached its terms. The court awarded Lori $9,930.50 in attorney fees as the prevailing party on that claim. Janet appeals from the judgment.[4]

DISCUSSION

Standard of Review

A section 631.8 motion eliminates the need for the defendant to produce evidence when the trial court is persuaded that the plaintiff, having rested, has failed to sustain his or her burden of proof. (*Roth v. Parker* (1997) 57 Cal.App.4th 542, 549.) When a party moves for judgment under this section, "[t]he court as trier of the facts shall weigh the evidence and may render a judgment in favor of the moving party." (§ 631.8, subd. (a).) Because the trial court evaluates the evidence as a trier of fact, it may gauge the credibility of witnesses. (*Jordan v. City of Santa Barbara* (1996) 46 Cal.App.4th 1245, 1255; see *Plaza Home Mortgage, Inc. v. North American Title Co., Inc.* (2010) 184 Cal.App.4th 130, 135.)

We apply the substantial evidence standard of review to a judgment entered under section 631.8, reviewing the record in the light most favorable to the judgment and making all reasonable inferences in favor of the prevailing party. (*San Diego Metropolitan Transit Development Bd. v. Handlery Hotel, Inc.* (1999) 73 Cal.App.4th 517, 528.) We will not reverse the trial court's order granting the motion if its findings are supported by substantial evidence, even if other evidence in the record

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[4] The judgment does not resolve the partition action, which was referred to a referee for further proceedings.

conflicts. (*Roth v. Parker, supra*, 57 Cal.App.4th at pp. 549-550; see *Fink v. Shemtov* (2012) 210 Cal.App.4th 599, 608.)

Insurance Trusts

Janet contests the trial court's ruling that the evidence does not support her claims relating to the irrevocable insurance trusts. She contends that Lori engaged in self-dealing by eliminating Janet and Glen as co-beneficiaries of Edith's life insurance policy when she transferred the policy from the 2003 insurance trust to the 2010 insurance trust. We agree that Janet met her evidentiary burden of showing a breach of trust.

When Edith named Lori as the sole beneficiary of the Survivor's Trust, an issue arose as to how she would pay the estate taxes due upon Edith's death. The 2003 insurance trust was created for that purpose. Once Lori became the only beneficiary, however, Edith and her counsel, Keith George, wished to "[m]odify or decant [the] insurance trust so that proceeds from insurance will be used to pay estate taxes" owed by Lori. George proposed several means of accomplishing this objective, including moving the insurance policy into a new irrevocable insurance trust, which would require the "[n]ew insurance trust [to] pay for [the] policy in an amount equal to the interpolated terminal reserve (i.e. cash value)." George stated, in notes admitted during trial (Exh. 49), that this solution would necessitate the trustee's cooperation. He expressed concern that Janet, who was both the trustee and a beneficiary, would not consent to a modification of the 2003 insurance trust.

Thereafter, George informed Janet that she could not serve as trustee of both the 2003 insurance trust and her Uncle Jack's trust. Janet accordingly resigned as trustee of the 2003 insurance trust, making Lori its successor trustee. Lori, at the direction of Edith and George, then transferred the insurance

policy, with the death benefit of $896,057, into the newly created 2010 insurance trust, of which Lori was the sole beneficiary. Lori replaced the policy in the 2003 insurance trust with an investment valued at approximately $60,000. Lori and Craig concede in their brief that Lori "sold" the life insurance policy from the earlier trust to the later one. Lori did not notify Janet or Glen of these actions and neither of them received any of the insurance policy proceeds following Edith's death. Because there were no estate taxes due upon Edith's death, Lori received the entire death benefit of over $700,000.

The trial court found the "evidence does not support Janet's allegation that Lori engaged in 'self-dealing' with regard to the 2010 insurance trust. Rather, the evidence supports [Lori's] claim that she merely acted as a trustee to comply with the wishes and directions of Edith and Edith's estate planning counsel." This finding does not take into account Probate Code section 16002, subdivision (a), which provides that "[t]he trustee has a duty to administer the trust solely in the interest of the beneficiaries." Subdivision (b) of this section states "[i]t is *not* a violation of the duty provided in subdivision (a) for a trustee who administers two trusts to sell, exchange, or participate in the sale or exchange of trust property between the trusts, if both of the following requirements are met: [¶] (1) The sale or exchange is fair and reasonable with respect to the beneficiaries of both trusts. [¶] (2) The trustee gives to the beneficiaries of both trusts notice of all material facts related to the sale or exchange that the trustee knows or should know." (*Id.*, § 16002, subd. (b)(1), (2), italics added.)

Lori served as trustee of both insurance trusts at the time the insurance policy was sold for value to the 2010 insurance trust. Even if we assume that the sale of the insurance

policy between the two insurance trusts was fair and reasonable given the change in Edith's estate plan, it is undisputed that Lori did not give notice of the sale to Janet and Glen as beneficiaries of the 2003 insurance trust. This violation of Probate Code section 16002, subdivision (a) constituted a breach of trust and breach of the duty of loyalty to Janet and Glen. (Prob. Code, § 16002, subd. (b); see Prob. Code § 16400 ["A violation by the trustee of any duty that the trustee owes the beneficiary is a breach of trust"].) Because Janet met her burden of proof on this issue, Lori and Craig were not entitled to judgment at the completion of Janet's case-in-chief. We therefore reverse the grant of the section 631.8 motion with respect to Janet's petition to surcharge Lori for breach of trust.

When the grant of a section 631.8 motion is overturned on appeal, "defendants are entitled to present evidence in support of their defense or in rebuttal." (*Pinsker v. Pacific Coast Soc. of Orthodontists* (1969) 1 Cal.3d 160, 167; *Deutsche Bank National Trust Co. v. McGurk* (2012) 206 Cal.App.4th 201, 217-218.) We remand the matter to permit Lori and Craig the opportunity to adduce evidence of any defenses to Janet's petition regarding the insurance trusts.

Undue Influence

Janet argues the trial court erred by finding that Edith was not subjected to undue influence in connection with the changes to her estate plan. She contends the burden shifted to Lori and Craig to prove the absence of undue influence. We disagree.

The party contesting the testamentary instrument has the burden to prove undue influence unless there is a presumption of undue influence that shifts the burden of proof to the proponent to show the absence of undue influence. (Prob.

Code, § 8252, subd. (a); *Estate of Auen* (1994) 30 Cal.App.4th 300, 308, superseded by statute on other grounds as stated in *Rice v. Clark* (2002) 28 Cal.4th 89, 97.) If the contestant produces substantial evidence that the proponent of the testamentary disposition was in a confidential relationship with the decedent, "actively participate[d] in procuring the execution of the [testamentary instrument]" and received an undue benefit from the instrument, the burden shifts and it is now the proponent who must prove by a preponderance of evidence that the instrument is not a product of undue influence. (*Estate of Mann* (1986) 184 Cal.App.3d 593, 606; Prob. Code, §§ 6104, 8252, subd. (a).) Whether the presumption arose is a question for the trier of fact. The trier of fact's determination of this issue "is upheld in nearly all cases." (14 Witkin, Summary of Cal. Law (10th ed. 2005) Wills and Probate, § 130, p. 193.)

Janet asserts there is overwhelming evidence of the three elements which give rise to a presumption of undue influence. The presence of a confidential relationship between Edith, on the one hand, and Lori and Craig, on the other, is not reasonably subject to dispute and there is no question that Lori and Craig benefitted from the testamentary changes. The dispute focuses on the second factor, i.e., whether Lori and Craig actively participated in procuring the execution of the challenged testamentary instruments.

Janet is correct that the requisite active participation "may be established by inference, that is, circumstantial evidence." (*Estate of Jamison* (1953) 41 Cal.2d 1, 8, superseded by statute on other grounds as stated in *Beavers v. Allstate Ins. Co.* (1990) 225 Cal.App.3d 310, 324-325.) Control over the testamentary acts "may be established by a variety of circumstances, such as the dependency of the testator upon the

beneficiary for care and attention." (*Estate of Calway* (1961) 196 Cal.App.2d 268, 276.) Nonetheless, "[s]ome incidental activity in the execution, rather than the preparation of the will [or trust]," is not enough to [show active participation]." (*Estate of Bould* (1955) 135 Cal.App.2d 260, 275.) "[T]he mere fact of the beneficiary procuring an attorney to prepare the will is not sufficient 'activity' to bring the presumption into play [citations]; or selection of attorney and accompanying testator to his office [citations]; . . . or presence at the execution of the will [citations]; or presence during the giving of instructions for the will and at its execution [citations]." (*Id.* at pp. 275-276.)

Here, the trial court found that the credible evidence failed to establish active participation. It concluded: "At most, the evidence established that Lori and/or Craig drove Edith to her multiple appointments, including appointments with her attorney. That is, however, as far as the evidence goes. There was no credible evidence that Lori or Craig suggested terms to be inserted in the estate planning documents, hired or paid for Edith's counsel who prepared the estate planning documents, or furnished any language for those estate planning documents."

Substantial evidence supports these findings. The evidence established that "Edith was a 'strong willed' individual who zealously safeguarded her funds and assets" and who, according to her personal physician, was "capable of handling her own affairs mere months before her death." It is undisputed that Lori and Craig were very close to Edith, and that they assisted her in many ways during her final years. A reasonable inference from the testimony and documentary evidence, however, is that the relationship between Edith and Janet had become strained over the years and, as a result, Edith had changed her mind about gifting portions of her estate to Janet. Another reasonable

inference is that, as Janet and Lori's relationship also deteriorated, "Edith wanted to preserve or protect Lori's inheritance against a reduction by Janet in Janet's estate plan."

Janet argues the record does not support the finding that there was no credible evidence that Lori or Craig suggested terms to be inserted in the estate planning documents. On May 11, 2010, Craig prepared a handwritten document titled "Survivor's Trust Asset Changes" (Exh. 60). The document, which was purportedly signed by Edith, stated, among other things, that "2760 Reservoir Cyn & 2774 Reservoir Cyn Rd and the 6+ acres they are on to go to Lori's Trust being created by Steve Hall." It further stated that "777 Woodbridge & 50% of 2800 Broad to Lori's Trust. If Possible." The document, which Craig authenticated and discussed with Lori, was provided to Edith's attorney.

The document is not mentioned in the trial court's Statement of Decision, but we presume that the court did not find it to be credible evidence of Lori and Craig's active participation in procuring the execution of Edith's estate planning documents. Although it could be inferred from the document that Craig and Lori suggested terms to be inserted in Edith's trust amendments, it also could be inferred that Edith, who purportedly signed the document, dictated the terms outlined in the document. There is no evidence suggesting Craig and Lori proposed the terms themselves, and it is not our function to reweigh the evidence. (*Hubbell v. City of Los Angeles* (1956) 142 Cal.App.2d 1, 6.)

Next, Janet argues that Lori and Craig's active participation in obtaining the trust amendments may be inferred by evidence of Edith's declining mental capacity. Janet contends Edith's freedom of will was overcome by her mental and physical conditions. (See *Estate of Lingenfelter* (1952) 38 Cal.2d 571, 585.)

Janet produced a number of witnesses who testified that Edith was not as sharp as she used to be, that she frequently repeated herself and that she seemed "out of it" at times. The trial court did not, however, find the testimony persuasive. It found that "the vague and conclusory statements were generally made by lay persons who made no attempt to assess [Edith's] ability to understand documents. The testimony indicated that she always knew who she was, where she was, and the identities of her immediate family members. She knew what assets she owned, and who she wanted to give them to."

The trial court found that the most credible testimony regarding Edith's mental capacity was that of her physician, Dr. Mark Lane Stilphen, who treated her between September 7, 2012, and the date of her death. When Dr. Stilphen first saw Edith, he signed a letter (Exh. 211) advising that "this patient is capable of caring for her own affairs." His notes from that date state: "I asked about social history, and I got that she was independent, occasionally needed a housekeeper. Her granddaughter helped with meals. She was upset about her son dying. And she perseverated, which meant she was ruminating on her loss, but eats, sleeps okay, emotions under control. She takes little walks for an hour three or four times a week. And from the history I got, as recorded here, she was capable of caring for her own affairs and she was not confused."

Conflicts in the evidence are for the trial court, not this court, to decide. (*Escamilla v. Department of Corrections & Rehabilitation* (2006) 141 Cal.App.4th 498, 514-515; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874.) Because Dr. Stilphen's testimony was not "'incredible or inherently improbable'" (*Harry Carian Sales v. Agricultural Labor Relations Bd.* (1985) 39 Cal.3d 209, 220), we conclude it alone constituted

substantial evidence to support the trial court's findings regarding Edith's mental capacity and ability to care for her own affairs. (*Greenwich S.F., LLC v. Wong* (2010) 190 Cal.App.4th 739, 767-768 ["The testimony of one witness may provide substantial evidence"].)

A trust cannot be set aside based on the mere speculation that undue influence may have been exerted to procure it. (*Estate of Mann*, *supra*, 184 Cal.App.3d at pp. 608-609.) In the absence of credible evidence of Lori and Craig's active participation in the procurement of the trust amendments, the trial court properly found that the presumption of undue influence did not arise. It did not err by granting judgment on that claim.

Promissory Note

The trial court determined that the $100,000 promissory note is valid and enforceable against Lori. Janet contends, however, that the court erred by finding that Lori did not breach the note's terms. We are not persuaded.

As previously discussed, Lori signed the promissory note when Janet gifted her the home at 2778 Reservoir Canyon Road. As part of her estate plan, Janet wished to gift each of her two children property worth $500,000. Because the 2778 Reservoir Canyon Road property was worth $600,000 -- $100,000 more than the intended gift -- Janet's attorney, Hall, devised a plan whereby the property would be valued at $500,000 for tax purposes and Lori would execute a $100,000 unsecured promissory note representing the difference between the $500,000 gift and the property's value. Although the promissory note required interest payments of $2,500 each year starting in August 2011, Hall and Janet told Lori that she would not be responsible for the interest payments and that Janet would

forgive the $100,000 debt by making annual gifts to Lori and Craig over the next four years.

Based on Hall and Janet's representations that the promissory note was for estate planning purposes only, Lori did not make any interest payments on the note in August 2011 or August 2012. Neither Janet nor Hall notified her of any default until December 2012, when Lori informed Janet of her desire to purchase Janet's half of the 2702/2710 Reservoir Canyon Road property. Janet responded by demanding payment of the entire $100,000 plus interest. Lori forwarded a $5,000 check to Hall for payment of the past due interest. The check was never cashed.

The trial court found that Janet was estopped from declaring a default and exercising her option to accelerate payments due under the promissory note. "'The elements of a promissory estoppel claim are "(1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) [the] reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance." [Citation.]'" (*Jones v. Wachovia Bank* (2014) 230 Cal.App.4th 935, 945.) Each of these elements is present here.

The trial court determined that Janet's failure to declare a default after the August 2011 and August 2012 payments were not made "corroborates Lori's testimony that she was informed that these payments did not have to be made." The court further found that because Janet had refused to accept Lori's payment of the past due interest, any future tenders of annual interest payments also would have been refused. (See *Sutherland v. Barclays American/Mortgage Corp.* (1997) 53 Cal.App.4th 299, 313 ["The law did not require [the plaintiff] to engage in futile or useless acts"].) Substantial evidence

supports these findings. (See *Ash v. North American Title Co.* (2014) 223 Cal.App.4th 1258, 1268.)

In addition, Lori's reliance was reasonable and foreseeable given Janet and Hall's assurances that the promissory note was merely an estate planning tool, and Lori was injured when Janet attempted to accelerate payment of the note. (See *Jones v. Wachovia Bank*, *supra*, 230 Cal.App.4th at p. 945.) We conclude the trial court did not err by finding that no breach had occurred.

Attorney Fees

The $100,000 promissory note contains an attorney fees provision. Janet argues the trial court erred by awarding Lori her attorney fees under Civil Code section 1717 with respect to Janet's cross-complaint for breach of the note. She contends that Lori was not the prevailing party on the contract claim and, as a result, was not entitled to fees. We disagree.

"When a party obtains a simple, unqualified victory by completely prevailing on or defeating all contract claims in the action and the contract contains a provision for attorney fees, [Civil Code] section 1717 entitles the successful party to recover reasonable attorney fees incurred in prosecution or defense of those claims. [Citation.] If neither party achieves a complete victory on all the contract claims, it is within the discretion of the trial court to determine which party prevailed on the contract or whether, on balance, neither party prevailed sufficiently to justify an award of attorney fees." (*Scott Co. v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1109.)

"[I]n deciding whether there is a 'party prevailing on the contract,' the trial court is to compare the relief awarded on the contract claim or claims with the parties' demands on those same claims and their litigation objectives as disclosed by the

pleadings, trial briefs, opening statements, and similar sources. The prevailing party determination is to be made only upon final resolution of the contract claims and only by 'a comparison of the extent to which each party ha[s] succeeded and failed to succeed in its contentions.'" (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 876.) "[I]n determining litigation success, courts should respect substance rather than form, and to this extent should be guided by 'equitable considerations.' For example, a party who is denied direct relief on a claim may nonetheless be found to be a prevailing party if it is clear that the party has otherwise achieved its main litigation objective." (*Id.* at p. 877, italics omitted.)

In her cross-complaint, Janet alleged that "[a]s a result of Lori Gill's breach of the Promissory Note, [Janet] has been damaged in the amount of one hundred thousand dollars ($100,000), plus interest, costs and attorney's fees," and sought damages in that amount. Although the trial court rejected Lori's contention that the note is invalid and unenforceable, it ruled in her favor on Janet's breach of contract claim. It found that Lori had not breached the note and that she was entitled to cure any arrearages in the interest payments.

The trial court necessarily found that Lori had achieved her main litigation objective, which was to defend the breach of contract action. Lori successfully established that she had not defaulted on the promissory note and that she was not required to immediately pay the $100,000 principal balance. In contrast, Janet did not meet her main litigation objective of establishing a default and acceleration of the note. We cannot conclude on this record that the trial court abused its discretion by declaring Lori the prevailing party and awarding her $9,930.50 in attorney fees.

Discovery Issues

Janet asserts that she was denied "critical" discovery sought from George-Cyr, LLP, the attorneys who drafted the documents changing Edith's estate plan. She contends the discovery should have been permitted under the crime-fraud and advice of counsel exceptions to the attorney-client privilege. We reject both contentions.

Evidence Code section 956 codifies the common law rule that the privilege protecting confidential attorney-client communications is lost if the client abuses the relationship by seeking legal assistance to perpetrate a crime or fraud. The crime-fraud exception is "a very limited exception" and "the proponent of the exception bears the burden of proof of the existence of crime or fraud." (*Geilim v. Superior Court* (1991) 234 Cal.App.3d 166, 174, italics omitted.) A mere accusation of crime or fraud is not sufficient to overcome the attorney-client privilege. (*BP Alaska Exploration, Inc. v. Superior Court* (1988) 199 Cal.App.3d 1240, 1262 ["mere assertion of fraud is insufficient; there must be a showing the fraud has some foundation in fact"].)

In opposing Lori and Craig's motion to quash Janet's subpoena requesting the documents from Edith's attorneys, Janet did nothing more than accuse Lori and Craig of *possibly* engaging in some type of fraud. Counsel stated: "What if Ms. Gill, and I'm not suggesting this was done, but maybe it was. What if Ms. Gill or Mr. Gill went to the attorneys there and said, you know, we'd like to do something that was wrong, a breach of trust, like it's alleged in this action, and we want to know how to do that to best make it -- you know, to put our best foot forward, and make it as defensible as possible. In a case like that, there's an exception to

[the] attorney-client privilege, where there's an allegation that would aid in a completion of a wrongful act."

The trial court correctly determined that the mere allegation or suggestion that the crime-fraud exception to the attorney-client privilege applied was insufficient and that Janet had failed to establish a prima facie case that a fraud had occurred. (*BP Alaska Exploration, Inc. v. Superior Court*, *supra*, 199 Cal.App.3d at p. 1262.) We conclude the trial court did not abuse its discretion by granting the motion to quash Janet's subpoena on that basis. (See *Manela v. Superior Court* (2009) 177 Cal.App.4th 1139, 1145 [standard of review for discovery orders is abuse of discretion].)

As a general rule, raising a defense of advice of counsel waives the attorney-client privilege as to communications and documents relating to the advice. (*Wellpoint Health Networks, Inc. v. Superior Court* (1997) 59 Cal.App.4th 110, 127-128.) Because Lori and Craig had raised advice of counsel as an affirmative defense to Janet's claims relating to the irrevocable insurance trusts, they conceded the attorney-client privilege had been waived as to those claims. Accordingly, when the trial court granted the motion to quash, it modified Janet's subpoena to exclude all attorney-client communications regarding trust administration except those concerning the insurance trusts. Janet accepted that ruling without identifying any other claims in which Lori and Craig were asserting advice of counsel as a defense. Consequently, the court did not have an opportunity to consider whether Lori and Craig had waived the privilege as to other claims, and we will not consider the issue for the first time on appeal. (See *Giraldo v. Department of Corrections & Rehabilitation* (2008) 168 Cal.App.4th 231, 251 ["new issues not

presented below . . . generally cannot be raised for the first time on appeal"].)

DISPOSITION

The trial court erroneously determined that Janet failed to meet her burden of proof with respect to her petition to surcharge Lori, as trustee, for breach of trust regarding the irrevocable insurance trusts. We therefore reverse the judgment on that petition and remand the matter for further proceedings, including but not limited to allowing Lori and Craig to introduce evidence of any defenses to the petition. The judgment is affirmed in all other respects. Janet shall recover her costs on appeal.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Martin J. Tangeman, Judge
Superior Court County of San Luis Obispo

Andre, Morris & Buttery and Gordon E. Bosserman, for Defendant, Cross-complainant and Appellant.

Ogden & Fricks, Roy E. Ogden and Sue N. Carrasco, for Plaintiffs, Cross-defendants and Respondents.