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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

SCOTT MILANO, Plaintiff and Respondent, v. STEVE EDELSON, Defendant and Appellant.	B237971 (Los Angeles County Super. Ct. No. BC411392)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael C. Solner, Judge. Affirmed in part and reversed in part.

Smith Law Firm and Craig R. Smith for Defendant and Appellant.

Von Behren & Hunter and Andrew R. Hunter for Plaintiff and Respondent.

In this action for specific performance of a stock purchase agreement, defendant and appellant Steve Edelson appeals from the judgment and orders after a court trial awarding specific performance, damages in the amount of $171,567.10, and attorney fees of $252,926.33 in favor of plaintiff and respondent Scott Milano. Edelson contends substantial evidence does not support the order of specific performance and the damages and attorney fees awards were an abuse of discretion. We conclude substantial evidence supports the order of specific performance and the attorney fees award was not an abuse of discretion. We further conclude the damages award was an abuse of discretion. Accordingly, we reverse the damages award and, in all other respects, affirm the judgment and orders.

STATEMENT OF FACTS[1] AND PROCEDURE

In a stock purchase agreement, as amended and reinstated January 30, 2009, Edelson, the seller,[2] and Milano, the buyer, entered into an agreement for Edelson to sell all shares in El Cid Los Angeles, Inc., which owned and operated El Cid restaurant and bar, to Milano ("stock purchase agreement").[3] El Cid restaurant and bar was located on property in Los Angeles (the "property") which was owned by Edelson. The purchase price was $865,000, which included an $87,000 deposit.

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1 In accordance with the rules of appellate procedure, we state the facts in the light most favorable to the judgment. (*Orthopedic Systems, Inc. v. Schlein* (2011) 202 Cal.App.4th 529, 532, fn. 1.)

2 Edelson owned 90 percent of the shares and Tobin Shea owned 10 percent. Shea and Edelson were both sellers. As Shea's shares were transferred to Edelson on March 18, 2009, we will describe the transaction as though Shea's shares were owned by Edelson, except where indicated. Shea was named as a defendant in this lawsuit, but he was dismissed on August 31, 2009.

3 The stock purchase agreement was entered into November 1, 2008, terminated by its own terms on December 31, 2008, and reinstated January 30, 2009.

The stock purchase agreement provided as follows. "The closing date shall be March 2, 2009." Edelson will enter into a separate lease agreement for the property with Milano in Milano's capacity as president of El Cid Los Angeles, Inc. ["lease"], and Milano will guaranty the lease.[4] At the closing, Edelson will deliver, among other things, the stock certificates and executed lease, and Milano will deliver the balance of the purchase price, the executed lease, and Milano's guaranty. All beverages were excluded from the transaction.[5] The parties agreed to make "best efforts" to consummate the transaction. "If buyer fails to complete the purchase of the stock as provided in this agreement by reason of any default of buyer, seller's sole remedy . . . shall be to terminate this agreement and retain the deposit as liquidated damages[[6]] and seller shall be released from its obligation to sell the stock to buyer." The stock purchase agreement expressed the entire agreement between the parties.

The stock purchase agreement did not contain a "time is of the essence" clause, and there was no reason the transaction had to close on March 2. The date was chosen solely because it was 30 days from the date of the reinstated agreement, and the parties believed they should have 30 days to finalize the documents and make the money available. Neither party had a particular need for the closing to occur on that day. In late February, Edelson's attorney stated closing could take place on March 1, 2, or 5, 2009, whichever Milano chose. Milano chose March 2, and he stated, "hopefully" escrow would close that day. After listing items that had to be finished or resolved, Milano

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[4] The lease was for five years, at a monthly rental of $17,456 adjusted annually by the change, if any, in the Consumer Price Index, with an option to extend the term for an additional five years.

[5] Subsequently, the parties agreed that the stock purchase agreement price would be adjusted to credit Edelson with the value of the liquor inventory.

[6] Upon the reinstatement of the stock purchase agreement, $75,000 of Milano's deposit was released to Edelson and became nonrefundable.

concluded, "I'm ready to close and I'm confident we can make this happen by Monday [March 2]."

On February 26, 2009, Milano transferred $900,000 to his checking account to pay the balance of the purchase price.

On March 1, 2009, Milano proposed meeting at the restaurant to do a liquor inventory at 12:30 the next day, stating he was "ready to deposit the balance of the purchase price as soon as the required documents are signed and the payables and receivables are added up for the closing statement." Edelson, who was "having second thoughts" about the transaction, told Milano he "should have deposited the money already, you may have messed [up the deal]. I hope you are ready because I have told [Edelson's attorney] if you cannot close on time I will keep it. The inventory and all documents are ready so it's up to you." Prior to that e-mail, Edelson had never notified Milano that, if escrow did not close on March 2, he would declare a default. On March 1, Edelson asked his attorney if he could get out of his obligation to sell the shares if Milano "has not deposited" the purchase money, and the attorney replied Milano would be in default. Edelson changed the March 2 meeting time from 12:30 to 1:30 p.m.

In the morning of March 2, Milano opened a bank account for the new business and transferred the $900,000 to the account. The funds were available on March 2 to wire to escrow. As of March 2, 2009, the assignment of Shea's shares had not been delivered to escrow. The parties met a little after 1:30 p.m. and an agreement was reached concerning the inventory value, the business checking account, and a proration of certain payments under the lease, including property taxes. At one point during the meeting, Edelson told Milano he was having "seller's remorse" and, if Milano did not deposit the balance of the purchase price that day, Edelson would keep the shares. Milano replied he would deposit the money as soon he had a closing statement from the escrow officer. At the conclusion of the meeting, Milano stated he had to leave to go to the escrow company and "do what I have to do to close this." Expecting to take over operation of the business, Milano had one of his employees go to her bank to get money for the cash register.

Inventory agreement in hand, Milano drove to the escrow office, 45 minutes away. Milano had the escrow officer prepare a closing statement that reflected the agreed prorations, adjustments, commission charges, other debits, and escrow charges in addition to the consideration. Milano signed every document the escrow officer handed to him, including the lease, but the escrow officer did not hand him a guaranty to sign. Milano's failure to execute a guaranty was an oversight; he had no objection to signing a guaranty. The escrow officer told Milano it was too late in the day to wire transfer the balance of the purchase price.

Believing seller still had to deliver documents to escrow and that it was too late to transfer his money, Milano left the escrow office at 3:45 p.m. stating he would wire the funds first thing in the morning if it was too late to wire them that day. Edelson, who was sitting in the lobby of the escrow office, congratulated Milano as Milano was leaving. Edelson handed the escrow officer several documents. Milano did not go to his bank, because it was rush hour.

At 5:00 p.m., Edelson declared a default, because the money had not been deposited. He did not know whether Milano's personal guaranty had been delivered to escrow. The escrow officer notified Milano that Edelson declared a default. At 5:25 p.m., Milano's attorney advised the escrow officer that Milano was reviewing the closing statement, was prepared to wire the balance of the purchase price to escrow the next day, expected to close the next day, and asked for a copy of all the documents Edelson had delivered to escrow.

Milano signed and faxed to the escrow officer the buyer's estimated closing costs and then wired the balance due to escrow shortly after 10:00 a.m. on March 3. Edelson was told on March 3 that the balance had been wired to escrow, but he refused to close. The escrow officer stated to Milano's attorney on March 3 that Edelson did not sign the lease and did not provide an assignment of Shea's stock certificate.

Milano left his money in escrow and filed this lawsuit. Based on his many years as a real estate broker, Milano testified an escrow amendment was not required to change the closing date.

In a second amended complaint, Milano alleged causes of action against Edelson for: (1) specific performance; (2) breach of contract; and (3) breach of the implied covenant of good faith and fair dealing. As to each cause of action, the relief Milano sought included specific performance of the stock purchase agreement. For the second and third causes of action, Milano also sought damages. A court trial was held.

Trial Court's Ruling

On August 8, 2011, the trial court granted specific performance. The court found that Edelson went to the escrow office after the liquor inventory meeting "so that he could declare a default [at 5:00 p.m.] in the event that [Milano] didn't perform and [Edelson] did not receive his proceeds check. The court concludes from the demeanor of [Edelson] at his videotaped deposition, a portion of which was shown at trial, . . . that he did not want to go through with the deal. By the time of the conclusion of the inventory on March [2], [Edelson] knew that it would be virtually impossible for plaintiff to be able to wire the funds into the escrow account after approximately 2 p.m. When there were no wired funds in escrow by 5 p.m. on March [2], [Edelson] declared a default." "[T]he evidence adduced at trial established to the court's satisfaction that [Edelson] does not like [Milano] and probably because of the difficulties encountered in the negotiations, has now experienced seller's remorse."

The trial court found the contract contained no "time is of the essence" clause and there was evidence Edelson indicated the closing could be as late as March 5. "[Edelson] is now hard pressed to urge upon the court that there was some magic to the March [2] date. The fact that the remainder of [Milano's] money was wired into the escrow account on the morning of March [3], the very next day, weighs heavily in [Milano's] favor." "Here . . . what we have is a technical and unintentional default that does not defeat the buyer's right to specific performance. Civil Code section 3392 provides for the denial of specific performance **unless** the defaulting party's failure to perform is only partial and

either immaterial, or capable of being fully compensated [emphasis added]. That is the situation present here."

The trial court awarded interest on the money deposited into escrow, ruling that if interest were not awarded, "[Edelson] would have profited by his own wrongdoing to the detriment of [Milano], which equity abhors."

Judgment

Judgment was filed on October 25, 2011, awarding Milano specific performance of the stock purchase agreement. Escrow was to close and the lease was to commence on January 2, 2012. Milano was ordered to deliver a guaranty of lease, and Edelson was ordered to deliver all the outstanding stock of El Cid Los Angeles, Inc. Milano was awarded $171,567.10 interest on the $926,335.62 deposited in escrow, based on an annual rate of seven percent from March 3, 2009.

On November 16, 2011, Milano was awarded $252,926.33 in reasonable attorney fees and $14,762.03 in costs.

DISCUSSION

Substantial Evidence Supports the Judgment

Edelson contends substantial evidence does not support the order of specific performance, in that Milano failed to prove he timely performed the conditions precedent to Edelson's performance: Milano failed to timely tender the lease guaranty and the balance of the purchase price. We disagree with the contention.

"When considering a claim of insufficient evidence on appeal, we do not reweigh the evidence, but rather determine whether, after resolving all conflicts favorably to the prevailing party, and according the prevailing party the benefit of all reasonable inferences, there is substantial evidence to support the judgment." (*Scott v. Pacific Gas*

& Electric Co. (1995) 11 Cal.4th 454, 465.) "It is an elementary, but often overlooked principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the [trier of fact]. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court." (*Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429.)

Civil Code section 3392 provides, "Specific performance cannot be enforced in favor of a party who has not fully and fairly performed all the conditions precedent on his part to the obligation of the other party, except where his failure to perform is only partial, and either entirely immaterial, or capable of being fully compensated, in which case specific performance may be compelled, upon full compensation being made for the default."

"In equity the general rule is that time is not of the essence unless it is made so by express terms or is necessarily so from the nature of the contract." (*Katemis v. Westerlind* (1956) 142 Cal.App.2d 799, 804.) "We do not think it is necessary, in order to make time of the essence of the obligation, that it should be declared to be so in the words of the statute; but the intent to make it of the essence of the contract must be clearly, unequivocally, and unmistakably shown by an express declaration. Waterman on Specific Performance says that 'the parties themselves may stipulate that time shall be of the essence of the contract. This has been done in almost all of the modern cases in which time has been strictly regarded.' (Sec. 461.) Mr. Pomeroy, in his work on Specific Performance, says that 'the prescribing a day at or before which, or a period within which, an act must be done, even with a stipulation that it shall be done at or before the day named, or within the period mentioned, does not render the time essential with respect to such an act. (Sec. 392. See also sec. 374.) In order to render time thus essential, it must be clearly and expressly stipulated that it shall be so; it is not enough that a time is mentioned during which or before which something shall be done.' (Fry on Specific Performance, sec. 712; *Jones v. Robbins*, 29 Me. 351; 50 Am. Dec. 593;

Barnard v. Lee, 97 Mass. 95.)" (*Miller v. Cox* (1892) 96 Cal. 339, 344-345; see also *Conservatorship of Buchenau* (2011) 196 Cal.App.4th 1031, 1039 ["It is well established that 'if it is not clearly specified that time is of the essence in an escrow transaction, a "reasonable time" is allowed for performance of the escrow conditions.' [Citations.]"].)

Substantial evidence supports the finding Milano's failure to fully perform his obligations was "only partial, and either entirely immaterial, or capable of being fully compensated[.]" (Civ. Code, § 3392.)

The evidence Milano signed and delivered the lease and other documents required by escrow, but not the balance of the purchase price and personal guaranty, is evidence his failure to fully perform was only partial. The evidence the parties had no particular reason for setting March 2 as the closing date, the stock purchase agreement did not state time was of the essence, and Edelson offered to reschedule the closing to a date three days after March 2 supports a finding that time was not of the essence. Because time was not of the evidence and Milano paid the balance of the purchase price within 24 hours of the contractual closing date, Milano's failure to perform his obligation to pay the purchase price on March 2 was immaterial. There was evidence Milano's failure to deliver a signed personal guaranty of the lease was inadvertent and he would have signed it on March 2 at the escrow office if the escrow officer had given it to him to sign. The judgment requiring Milano to deliver a signed guaranty as part of the order of specific performance demonstrates that this failure of full performance was capable of being rectified. Accordingly, the order of specific performance is supported by substantial evidence.

Interest

Edelson contends the award of interest was an abuse of discretion and not supported by substantial evidence. We agree with the contention.

"A ruling that constitutes an abuse of discretion has been described as one that is 'so irrational or arbitrary that no reasonable person could agree with it.' [Citation.] But

the court's discretion is not unlimited . . . . Rather, it must be exercised within the confines of the applicable legal principles. [¶] 'The discretion of a trial judge is not a whimsical, uncontrolled power, but a legal discretion, which is subject to the limitations of legal principles governing the subject of its action, and to reversal on appeal where no reasonable basis for the action is shown.' [Citations.] 'The scope of discretion always resides in the particular law being applied, i.e., in the "legal principles governing the subject of [the] action . . . ." Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an "abuse" of discretion. [Citation.] . . . [¶] The legal principles that govern the subject of discretionary action vary greatly with context. [Citation.] They are derived from the common law or statutes under which discretion is conferred.' [Citation.] To determine if a court abused its discretion, we must thus consider 'the legal principles and policies that should have guided the court's actions.' [Citation.]" (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773.)

Damages incident to an order for specific performance are losses that occurred by virtue of the fact that performance did not take place on the date it was supposed to have taken place: "'In California the compensation which may be awarded incident to a decree of specific performance is not for breach of contract and is not legal damages. The complainant affirms the contract and asks that it be performed. Since the time for performance has passed, the court relates that performance back to that date, by treating the parties as if the change in ownership had taken place at that time. Thus the buyer is entitled to the rents and profits from the time the contract should have been performed, and the seller is entitled to an offset for the interest on the purchase money which he would have received had the contract been performed. The process is more like an accounting between the parties than an assessment of damages. (*Ellis v. Mihelis* (1963) 60 Cal.2d 206, 219-220 . . . .)' [Citation.]" (*Bravo v. Buelow* (1985) 168 Cal.App.3d 208, 213.)

Milano's expert testified that, based on "the rate of return, interest rates, and interest that would be earned on the amount of money that was put into escrow[,]" the

amount in escrow ($926,325.65) would have earned $66,447.47 in interest. He did not know whether El Cid restaurant and bar made or lost money during the period between March 3, 2009, and the date trial began.

While the record contains evidence concerning the interest Edelson would have received on the purchase price had the contract been performed, it contains no evidence concerning the business's profits or losses after the time the contract should have been performed. The award of seven percent interest on the amount in escrow is not based on the applicable law governing damages incident to an award of specific performance, because it is not a measure of the position the parties would have been in had the contract been performed. As the damage award in this case "transgresses the confines of the applicable principles of law," it is an abuse of discretion. (See *Sargon Enterprises, Inc. v. University of Southern California*, *supra*, 55 Cal.4th at p. 773.)

Industrial Indem. Co. v. Golden State Co. (1957) 49 Cal.2d 255, 271-272 cited by Milano, for the proposition that the trial court had discretion to award interest, is inapposite. The discussion there concerning interest on the damages award was not based on a remedy of specific performance, although the action was equitable. Our discussion here is not that damages could not be awarded, but rather that the court's method of calculating damages does not comport with the applicable law.

Al-Husry v. Nilsen Farms Mini-Market, Inc. (1994) 25 Cal.App.4th 641, 648 ("*Al-Husry*"), cited in Milano's brief, held that when a seller "fails or refuses to convey, a buyer who has made advance payments toward the purchase price may recover interest on those payments as damages for breach of contract." The case is inapposite. Contract damages were awarded in *Al-Husry*, not specific performance. We conclude the award of damages in this case was an abuse of discretion.

Attorney Fees

Edelson contends it was an abuse of discretion to award attorney fees for work on the contract causes of action or contract damages, because Milano dismissed the contract

claims before trial and sought only specific performance at trial. Edelson contends fees should have been awarded only for work on the claim for specific performance. We disagree with the premise of the contentions.

Prior to trial, without dismissing the contract causes of action, Milano elected to pursue the specific performance remedy only after the trial court advised the parties at the final status conference that it would be difficult to schedule a jury trial in the matter because of the court's congested calendar. Faced with the prospect of a long delay in obtaining a jury trial on his complaint, Milano elected to pursue only the equitable remedy of specific performance sought in each cause of action, which the court stated would allow it to proceed as a court trial.

Milano's attorney was clear, however, that he was electing the remedy of specific performance and waiving damages for breach of contract, rather than dismissing the contract causes of action. "[Milano's attorney]: . . . I don't want to have a dismissal of [the contract] claims and then entangle myself later on [in a dispute concerning whether a cause of action for specific performance is actually a cause of action]. I want to make clear that we're electing to proceed solely on the specific performance remedy or remedies and on the complaint. [¶] [Edelson's attorney]: And I'm not trying to put the plaintiff or [his attorney] in the position where they're not alleging a cause of action. I know what they're doing. I just want to have a certain framework within the complaint to work with. And so we're going forward on the equitable remedy of specific performance as its alleged in the first cause of action and the other two causes of action are not going forward. [¶] [Milano's attorney]: The claims for damages are not going forward. [¶] [The Court]: Right. So I think everybody is clear on it. I hope everybody is clear. I'm clear. We're going to deal with it as a court trial on - - seeking the equitable relief of specific performance[.]" As Milano did not dismiss the contract causes of action, we reject Edelson's contention that Milano cannot be the prevailing party on the dismissed contract causes of action.

It was not necessary for the contract claims to be dismissed for the equitable claim to be tried by the court. (*Raedeke v. Gibraltar Sav. & Loan Assn.* (1974) 10 Cal.3d 665,

671 ["It is well established that, in a case involving both legal and equitable issues, the trial court may proceed to try the equitable issues first, without a jury . . . , and that if the court's determination of those issues is also dispositive of the legal issues, nothing further remains to be tried by a jury"].) We therefore turn to the propriety of the award of attorney fees in this action.

The amount of attorney fees awarded is a matter within the sound discretion of the trial court. (*Wilkerson v. Sullivan* (2002) 99 Cal.App.4th 443, 448.) The trial court is in the best position to assess the value of professional services rendered in its court, and while its judgment is subject to our review, we will not disturb that determination unless we are convinced that it is clearly wrong. (*Serrano v. Priest* (1977) 20 Cal.3d 25, 49.) The only proper basis of reversal of the amount of an attorney fees award is if the amount awarded is so large or small that it shocks the conscience and suggests that passion and prejudice influenced the determination. (*Reveles v. Toyota by the Bay* (1997) 57 Cal.App.4th 1139, 1153.)

"[Code of Civil Procedure s]ection 1032 is the fundamental authority for awarding costs in civil actions. It establishes the general rule that 'except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding.' [Citation.] . . . [¶] Section 1033.5 of the Code of Civil Procedure . . . specifies the 'items . . . allowable as costs under Section 1032.' It lists as one category of costs '[a]ttorney fees, when authorized by . . . [¶] (A) Contract.' [Citation.]" (*Scott Co. v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1108.) "When any party recovers other than monetary relief[,] the 'prevailing party' shall be as determined by the court, and under those circumstances, the court, in its discretion, may allow costs or not . . . ." (Code Civ. Proc., § 1032, subd. (a)(4).)

Civil Code section 1717 provides, in pertinent part: "(a) 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 . . . to the prevailing party, then the party who is determined to be the party prevailing on the contract . . . shall be entitled to reasonable attorney's fees in addition to other costs. [¶] . . . [¶] Reasonable attorney's

fees shall be fixed by the court, and shall be an element of the costs of suit. [¶] . . . [¶] (b)(1) The court . . . shall determine who is the party prevailing on the contract for purposes of this section, whether or not the suit proceeds to final judgment. Except as provided in paragraph (2), the party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract. The court may also determine that there is no party prevailing on the contract for purposes of this section. [¶] (2) Where an action has been voluntarily dismissed or dismissed pursuant to a settlement of the case, there shall be no prevailing party for purposes of this section."

The stock purchase agreement provided: "In any action or proceeding arising out of this Agreement, the prevailing party shall be entitled to reasonable attorneys' fees and costs . . . ." This language is broad enough to support an award of fees incurred in pursuing all causes of action in the complaint, because it provides for recovery of reasonable attorney fees in any action arising out of the stock purchase agreement. (See *Santisas v. Goodin* (1998) 17 Cal.4th 599, 608 [a broadly worded contractual attorney fee provision permits prevailing party to recover attorney fees incurred in connection with both contract and tort claims].)

At the conclusion of the hearing on attorney fees, the trial court stated: "[T]he plaintiff, really, was seeking specific performance but it was all based on the contract. And you can have specific performance and damages as separate remedies for breach of contract. So I think that [plaintiff's attorney] is entitled to most of the fees. I took a look at it. I think they need to be adjusted downward by about ten percent. Other than that, I think they are totally appropriate." [¶] . . . [¶] . . . [L]ooking at what actually this case ended up being all about, I think he's entitled . . . to reasonable attorney's fees. And I think that what he's asking for is a little much, but I think that looking at the case and what went on in the case but not only in trial. But from what I know about what happened before, I think that the plaintiff here is entitled to $252,926.33 in fees . . . ."

To the extent Edelson contends that fees incurred to prove contract damages should have been excluded from the award because the issue of contract damages was unrelated to any specific performance issue, we disagree with the contention. Contract

damages and damages incident to an award of specific performance are not unrelated, because the lost profits that can be recovered as damages for breach of contract can include elements of the profits that the breaching seller must account for to the buyer incident to an order for specific performance. (See *Lewis Jorge Construction Management, Inc. v. Pomona Unified School Dist.* (2004) 34 Cal.4th 960, 971; *Bravo v. Buelow*, *supra*, 168 Cal.App.3d at p. 213.)

In his reply brief, Edelson argues for the first time on appeal that the trial court erred in awarding attorney fees to Milano out of the funds in escrow, citing *Behniwal v. Mix* (2007) 147 Cal.App.4th 621. Reversal is not required on this issue, because the argument based on *Behniwal* was made for the first time in the reply brief and is therefore forfeited. (*Garcia v. McCutchen* (1997) 16 Cal.4th 469, 482, fn. 10; *People v. JTH Tax, Inc.* (2013) 212 Cal.App.4th 1219, 1232; *Holmes v. Petrovich Development Co., LLC* (2011) 191 Cal.App.4th 1047, 1064, fn. 2; *Keyes v. Bowen* (2010) 189 Cal.App.4th 647, 660.)

We conclude the award of attorney fees was not an abuse of discretion.

DISPOSITION

The damages award is reversed. In all other respects, the judgment and orders are affirmed. No costs on appeal are awarded.

KRIEGLER, J.

We concur: MOSK, Acting, P. J.

O'NEILL, J.*

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* Judge of the Ventura County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.