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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

MAZAKODA, INC., Plaintiff and Respondent, v. J&J OIL, INC. et al., Defendants and Appellants.	B289801 (Los Angeles County Super. Ct. No. BC554926)

APPEAL from a judgment of the Superior Court of Los Angeles County, Daniel S. Murphy, Judge. Affirmed.

Duke L. Peters for Defendants and Appellants.

Early Sullivan Wright Gizer & McRae, Scott E. Gizer, Diane M. Luczon and Zachary A. Gidding for Plaintiff and Respondent.

Plaintiff and respondent Mazakoda, Inc. loaned $500,000 to defendants and appellants J&J Oil, Inc., Shawn Sharon Melamed (Sharon), Jenous Tootian, Edmond Melamed (Edmond), and Rozita Safaeipour, in December 2007 pursuant to a contract and promissory note. Defendants ceased making payments on the loan two years later.

Mazakoda filed suit against defendants in August 2014, after the expiration of the statute of limitations on contract actions but within the time to bring actions on promissory notes. After a bench trial at which it excluded evidence defendants failed to timely produce in discovery, the trial court found Mazakoda was entitled to enforce the promissory note despite being unable to locate it. The trial court also expressly found not credible defendants' testimony that they did not sign any loan documents or promissory notes, and rejected defendants' theory that they were induced into entering the transaction as part of a quid pro quo arrangement not to sue a third party for usury. The trial court issued a written statement of decision and entered judgment in favor of Mazakoda.

In this appeal, defendants contend the judgment must be reversed because the trial court made numerous errors throughout the trial, ranging from erroneous evidentiary rulings to a failure to make requested findings in its statement of decision. They also request that we take judicial notice of materials related to a lawsuit Mazakoda filed after they lodged their notice of appeal in this case, and further argue that those materials compel reversal in this case due to the "one-action rule." We deny the request for judicial notice and affirm the judgment of the trial court.

PROCEDURAL HISTORY

Mazakoda filed its initial complaint against defendants in August 2014. It alleged two causes of action: breach of loan agreement and enforcement of promissory note and breach of the covenant of good faith and fair dealing. Mazakoda subsequently amended its complaint twice and added a third cause of action for judicial foreclosure.

In their answer to Mazakoda's second amended complaint, defendants asserted 14 affirmative defenses. As relevant here, they invoked the one-action rule. Defendants also raised the affirmative defense of unclean hands regarding Mazakoda's alleged agent, nonparty Ataollah "John" Aminpour.

Defendants moved for summary judgment or summary adjudication of all Mazakoda's claims. They argued that Mazakoda's first and third causes of action were time-barred because the statute of limitations on contract actions had expired and Mazakoda could not produce a signed promissory note to take advantage of the longer statute of limitations for negotiable instruments. The trial court denied summary judgment on this basis, but granted defendants' motion as to the second cause of action for breach of the covenant of good faith and fair dealing on the ground that it was duplicative of Mazakoda's other causes of action.

Prior to the February 2018 bench trial on the remaining causes of action, the trial court granted Mazakoda's motion to exclude two documents defendants failed to produce until shortly before trial: an unfiled legal complaint and a related letter. Defendants argued they did not have to produce the documents earlier because they were privileged; the trial court rejected this explanation and characterized defendants' untimely production of

the documents as a "willful," "tactical decision" that would lead to "trial by ambush."

The trial proceeded over two days; the trial court issued a tentative statement of decision in Mazakoda's favor shortly thereafter. Defendants objected to the tentative and requested the court address 15 additional "principal controverted issues" in its final statement of decision, including their affirmative defense of unclean hands. The court subsequently issued a final statement of decision in which it found defendants not credible, rejected their theory of the case, and found Aminpour's criminal convictions were irrelevant; it did not expressly mention unclean hands. The trial court entered judgment in favor of Mazakoda in the amount of $908,131.73. It later awarded Mazakoda $192,900 in attorney fees.

Defendants timely appealed. They subsequently filed a motion requesting judicial notice of documents Mazakoda filed in a new action in which Sharon and Tootian are named as defendants.

FACTUAL BACKGROUND

I. Trial Evidence

Defendants Sharon and Edmond are brothers. Sharon is married to defendant Tootian, and Edmond is married to defendant Safaeipour. Sharon created defendant J&J Oil in 2005 for the purposes of purchasing and operating gas stations. J&J Oil purchased a gas station in Vernon in 2005; attorney Klary Pucci assisted with the transaction.

In December 2007, Sharon contacted Pucci for assistance in arranging a $500,000 loan for J&J Oil to purchase another gas station. The email chain documenting this contact was admitted

into evidence over defendants' objection.[1] In it, Sharon informed Pucci that J&J Oil wanted to arrange a $500,000 loan that he and Edmond planned to personally guarantee. Sharon also identified four properties against which he wanted the loan to be recorded: the Vernon gas station owned by J&J Oil; a gas station in El Monte of which he was part owner; his and Tootian's personal residence in Encino; and Edmond and Safaeipour's personal residence in Los Angeles. Pucci prepared the requested documents, a loan agreement and a promissory note. The loan agreement and promissory note both identified Mazakoda, Inc. as the lender. Mazakoda's principal, Edwin Benyamini, testified at trial that his uncle, Aminpour, presented Mazakoda with the opportunity to make the loan, and his attorney, Pucci, prepared the documents. Deeds of trust for the four properties to be encumbered were also prepared.

Pucci testified that all four individual defendants came to her office on December 17, 2007 and signed the loan agreement and promissory note in her presence. Pucci "either" kept the original signed documents or gave them to Mazakoda's principal, Edwin Benyamini; she gave copies to "the borrowers." Pucci did not know where the original signed loan agreement or promissory note were at the time of trial. She testified that she looked for the documents but did not "usually keep records that far back."

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[1] Defendants objected that the email chain was not produced in response to their discovery requests or listed as a trial exhibit. Mazakoda responded that the email chain had to have come from defendants, since Mazakoda was not party to the emails it contained. The trial court overruled the objection and admitted the email chain. Defendants suggest this was unfair in their opening brief but do not argue that the email chain should have been excluded.

Benyamini testified that Pucci gave him the original signed documents but that he was unable to locate them at the time of trial. Benyamini further testified that Mazakoda had never transferred or assigned the note, and that no one else had ever claimed to hold it. Benyamini was not present at Pucci's office when the documents were signed and did not witness defendants sign them. Defendants read into the record deposition testimony in which Benyamini said that he typically placed important documents in his filing cabinet, and that he probably had put the documents there but could not find them now. Benyamini also stated at his deposition that he believed Pucci and Aminpour possessed signed copies of the documents. Benayamini did not explain why Aminpour, who had no affiliation with Mazakoda, might have possessed the documents.

Sharon and the other individual defendants all testified that they never signed the loan agreement or the promissory note. They all acknowledged that they went to Pucci's office on December 17, 2007, but stated they did not sign or could not remember signing any paperwork while there.

Defendants admitted they signed deeds of trust for the four properties encumbered by the loan the following day, however. The deeds of trust, which were recorded in June 2008, all stated that they were "for the purpose of securing . . . payment of the indebtedness evidenced by one Promissory Note . . . in the principal sum of $500,000.00." The deeds of trust identified Mazakoda as the trustee and beneficiary.

Mazakoda introduced evidence showing that J&J Oil remitted monthly interest payments directly to Mazakoda from January 2008 through December 2009. Some of the checks introduced into evidence had "interest" written on the memo line.

Documents from Sharon and Tootian's federal bankruptcy petition admitted into evidence also characterized the $500,000 as a loan and identified Mazakoda as a creditor.

According to Sharon, the transaction was not a loan. He testified that he had previous dealings with Aminpour, who had arranged a $1.4 million, high-interest "hard money" loan from an entity called Chapman Oil that Aminpour promised to refinance. After waiting months for Aminpour to refinance the loan, Sharon consulted an attorney, Afaghi, who advised Sharon that he had a claim against Aminpour for usury. Sharon confronted Aminpour, who agreed to give Sharon $500,000 to refrain from filing the usury complaint. Sharon testified that Afaghi advised him not to sign any loan paperwork in connection with his receipt of the $500,000, so he refused to do so when he went to Pucci's office. Sharon (and the other defendants) signed the deeds of trust encumbering the four properties because Aminpour insisted they sign something to formalize their arrangement. According to Sharon, Aminpour told him the deeds of trust would not be recorded. Sharon met with Aminpour and received the $500,000 from him. Sharon was unaware that an entity called Mazakoda was involved; he and the other individual defendants testified that Mazakoda was not written on the deeds of trust until after defendants signed them. Later, in 2009, Sharon consulted a second attorney, Shafron, who prepared a demand letter regarding Aminpour's alleged usury.

II. Statement of Decision

In its statement of decision, the trial court found that Pucci did not currently have the signed loan agreement or promissory note in her possession. The court "found attorney Pucci to be credible" and "did not find defendants to be credible when they

testified that they did not sign the loan agreement (Exhibit 1) or promissory note (Exhibit 4)." The court found "Benyamini credible when he testified that he was in possession of the original loan agreement and promissory note" and was currently unable to locate them. It concluded that Mazakoda met the statutory definition of a "person entitled to enforce" the promissory note even though Mazakoda was unable to locate it.

The court expressly rejected defendants' theory of the case and found that the evidence "clearly establishes that Mazakoda loaned defendants' [*sic*] $500,000." "The court did not find defendants credible when they asserted that the $500,000 was for settlement of a loan and not a debt. There is no paper work evidencing any settlement between defendants and John Aminpour." The court found "unpersuasive" Sharon's retention of attorneys to prepare the usury letter and proposed complaint. The court opined that it was "illogical that defendants would make monthly interest payments to Mazakoda for two years if this was really a settlement and not a loan," and found that Sharon's bankruptcy petition listed Mazakoda as a creditor to whom he owed $500,000.

The court also found "no credible evidence that defendants were fraudulently induced by anyone, nor was there any credible evidence [of] any quid pro quo forbearance by defendants." As to Aminpour, the court stated that his criminal conviction and lack of a broker's license had "no impact" on its ruling; the court did not specifically mention unclean hands. The court further found that any post-signatory alterations to the deeds of trust, i.e., the alleged writing-in of Mazakoda, were "immaterial."

DISCUSSION

I. Exclusion of Defendants' Exhibits

A. Background

The parties prepared a joint trial exhibit list shortly before trial. Defendants included on the list Exhibit 28, "Proposed Complaint Against Chapman Oil, et al.," and Exhibit 29, "Proposed Letter to Elyas Babadjouni." The proposed complaint, dated November 6, 2007, did not name Aminpour as a defendant. It alleged that Chapman Oil[2] and its majority shareholder and alleged alter ego, Elyas Babadjouni, extended J&J Oil, Edmond, Sharon, and Tootian a usurious loan—the $1.4 million hard money loan Aminpour allegedly promised to refinance. The letter, dated January 5, 2009, was addressed to Babadjouni and mentioned Aminpour as "the one who made or arranged" the allegedly usurious $1.4 million loan. The letter accused Babadjouni and Chapman Oil of usury and requested a "constructive dialog" to resolve any claims amicably.

Defendants did not produce the proposed complaint or letter in discovery; they gave the documents to Mazakoda on January 31, 2018, after the trial exhibit list was prepared and filed. Mazakoda filed a written motion in limine seeking to exclude the proposed complaint and letter because the documents were not produced in response to certain of its requests for production of documents, including "Any and all DOCUMENTS showing any and all transactions YOU entered into with Ataollah 'John' Aminpour" and "Any and all DOCUMENTS supporting

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[2] Sharon testified at trial that he learned Aminpour was an owner of Chapman Oil in "mid-2007." Sharon did not explain why Aminpour was not named in the proposed complaint or letter.

YOUR contention that PLAINTIFF did not provide you the $500,000 loan that is the subject of the COMPLAINT." Defendants filed an opposition to the motion in limine. They argued that their "withholding of the documents" was "entirely legitimate" because the proposed complaint and letter were subject to the attorney-client privilege, which they asserted in their responses to the production request. Defendants further argued that only "willfully false" discovery omissions may give rise to evidentiary sanctions under the Civil Discovery Act and current case law, and their invocation of attorney-client privilege did not meet that standard. Defendants asserted that Mazakoda would suffer no "unfair surprise" due to the late disclosure because the usury theory was raised in Sharon's deposition and their motion for summary judgment.

At the hearing on the motion in limine, defendants argued the documents were protected from discovery due to attorney-client privilege and contended the trial court "simply does not have the right to issue an evidentiary sanction, unless there's a violation of a discovery order." Mazakoda acknowledged that the documents were listed on defendants' privilege log, but argued that defendants' eleventh-hour attempt to use them at trial amounted to an impermissible attempt to use the privilege log "as both a sword and a shield." The trial court agreed, stating, "You can't use the shield and sword. I have a real problem if you're saying you're not going to turn it over to them and there's a privilege log, and now at the last minute you're waiving the privilege." The court continued, "The whole purpose of discovery is to basically make sure that everybody has the information available to them before trial. California sets forth the discovery procedure so that there is not trial by ambush. This is clearly a

tactical decision. . . . I believe it was willful, and I believe it was deliberate, and I believe it was an attempt to withhold information that they should've been entitled to previously if you were going to use it in trial. You can't do this at the last minute." The trial court granted Mazakoda's motion in limine.

B. Analysis

We review the trial court's ruling for abuse of discretion. (*Britt v. Superior Court* (2006) 145 Cal.App.4th 1112, 1123; *Osborne v. Todd Farm Service* (2016) 247 Cal.App.4th 43, 50-51.) The trial court abuses its discretion only where it exceeds the bounds of reason, all circumstances considered. (*Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 332 (*Saxena*).)

Defendants argue the court abused its discretion by excluding their letter and complaint because "the mere failure to produce something in response to a discovery request is *not* grounds for its exclusion at trial." They rely on *Saxena*, *supra*, 159 Cal.App.4th at pp. 333-334, which states, "While current law continues to treat a failure to respond to discovery as a 'misuse[ ] of the discovery process ([Code Civ. Proc.] §§ 2023.030, 2023.010, subd. (d)), the imposition of an evidence sanction is now conditioned upon the violation of an order compelling the response ([Code Civ. Proc.] §§ 2023.030, 2030.290, subd. (c)). Thus, current law has replaced the former requirement for the imposition of an evidence sanction—that the failure to respond was 'willful'—with the requirement that the responding party violated an order compelling the response." *Saxena* continues: "in the absence of a violation of an order compelling an answer or further answer, the evidence sanction may only be imposed where the answer given is *willfully false*. The simple failure to answer, or the giving of an evasive answer, requires the

propounding party to pursue an order compelling an answer or further answer—otherwise the right to an answer or further answer is waived and an evidence sanction is not available." (*Saxena*, *supra*, 159 Cal.App.4th at p. 334.)

Saxena, which concerned the failure to disclose witnesses in response to a form interrogatory, does not address the unusual situation here, in which a party asserted privilege over a document during discovery but then waived the privilege on the eve of trial. (See *Saxena*, *supra*, 159 Cal.App.4th at pp. 330-331.) "The privilege which protects attorney-client communications may not be used as both a sword and a shield." (*Chevron Corp. v. Pennzoil Co.* (9th Cir. 1992) 974 F.2d 1156, 1163; see also *Dietz v. Meisenheimer & Herron* (2009) 177 Cal.App.4th 771, 793.) This general principle of "fundamental fairness" (*Dietz v. Meisenheimer & Herron*, *supra*, 177 Cal.App.4th at p. 793) serves to advance both the general discovery principle of full disclosure of relevant evidence and the protection and enhancement of the special attorney-client relationship. (See *Steiny & Co., Inc. v. California Electric Supply Co.* (2000) 79 Cal.App.4th 285, 291 (*Steiny*).)

Steiny is more analogous. In *Steiny*, the plaintiffs obtained a protective order shielding damages information from the defense. (*Steiny*, *supra*, 79 Cal.App.4th at p. 289.) At trial, the court granted the defendant's motion to exclude the plaintiffs' evidence of damages on the ground "that such exclusion was the appropriate and necessary remedy for [the plaintiffs'] invocation of privilege to prevent disclosure of damages evidence." (*Id.* at pp. 289-290.) The appellate court upheld the trial court's decision. It reasoned, "[w]here privileged information goes to the heart of the claim, fundamental fairness requires that it be

disclosed for the litigation to proceed." (*Id.* at pp. 292.) The court further observed that the plaintiffs' "invocation of the trade secrets privilege, and the blanket protective order they obtained based on the privilege, prevented [the defendant] from examining key evidence needed to test the bona fides" of plaintiffs' claim. (*Ibid.*) It ultimately concluded that the plaintiffs "had the right to stand on the privilege, but not the right to proceed with their claim while at the same time insisting on withholding key evidence from their adversary." (*Ibid.*)

There are some differences between *Steiny* and the instant case—the plaintiffs in *Steiny* entirely refused to disclose their evidence, and the effect of the trial court's order was to preclude their claim, not their defense. Yet the underlying principles are the same. Defendants were entitled to protect privileged documents from discovery, but in accepting the benefits of that protection they were required to bear the cost of not having those documents available for affirmative use at trial. As the trial court observed, defendants' "tactical decision" put Mazakoda at a disadvantage. Its ability to "test the bona fides" of defendants' usury theory was significantly impaired by the belated waiver of the privilege. "'The purposes of the discovery statutes are 'to assist the parties and the trier of fact in ascertaining the truth; to encourage settlement by educating the parties as to the strengths of their claims and defenses; to expedite and facilitate preparation and trial; to prevent delay; and to safeguard against surprise.'" (*Boston v. Penny Lane Centers, Inc.* (2009) 170 Cal.App.4th 936, 950.) Defendants' conduct plainly frustrated those purposes. To the extent the trial court concluded defendants' behavior was a "misuse of the discovery process," it did not abuse its discretion by imposing evidentiary sanctions.

(Code Civ. Proc., §§ 2023.010, 2023.030, subd. (c).)[3]

Even if the trial court erred in excluding the documents, "the error does not require reversal of the judgment unless the error resulted in a miscarriage of justice." (*Saxena*, *supra*, 159 Cal.App.4th at p. 332.) The proponent of the evidence bears the burden of demonstrating it is reasonably probable a more favorable result would have been reached absent the error (*ibid.*), and defendants have not made that showing here. They argue that the effect of the exclusion "cannot be underestimated," because the complaint and letter "demonstrate that two attorneys had concluded that there was indeed a sizeable potential lawsuit for usury" and would have provided "powerful corroborating evidence of [defendants'] claim—that the trial court minimized—that the Mazakoda loan was indeed made as a settlement." The trial court expressly found defendants' usury theory "not credible," found no credible evidence of "any quid pro quo forbearance by defendants," and further found the usury letter and proposed complaint "unpersuasive" The court's findings indicate that it considered and accepted the existence of the excluded documents in reaching its conclusions; it is unclear how the documents themselves would have bolstered defendants' case sufficiently to render a more favorable result reasonably probable.

II. Promissory Note Findings and Rulings

A. Background

Mazakoda filed this action after the expiration of the four-year statute of limitations for contract actions (§ 337, subd. (a)), but within the six-year statute of limitations for negotiable

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

instruments (Cal. U. Com. Code, § 3118, subd. (a)). Defendants consistently have contended, from their answer to their summary judgment motion to their briefing here, that the action was barred by the four-year contract statute of limitations. They argue that the six-year statute of limitations for negotiable instruments cannot apply because the promissory note was not signed or otherwise enforceable by Mazakoda, which could not produce it.

At trial, Pucci and Benyamini both testified about the promissory note. Pucci testified that she witnessed Sharon and Edmond sign it, and Pucci and Benyamini both stated that they were unable to locate a signed copy. Benyamini also testified that Mazakoda never transferred or assigned the note to anyone. Defendants read portions of Benyamini's deposition transcript into the record, including his statements that his practice was to store important documents in his filing cabinet. Defendants testified that they never signed the promissory note.

The court "found attorney Pucci to be credible," found "Benyamini credible when he testified that he was in possession of the original loan agreement and promissory note," and "did not find defendants to be credible when they testified that they did not sign the loan agreement . . . or promissory note." The court also found that Mazakoda was a person entitled to enforce the note within the meaning of Commercial Code sections 3301 and 3309, because "Mazakoda through its agents, Benyamnini [*sic*] and Klary Pucci, had possession of the note. The note was never transferred. Mazakoda is unable to determine the current whereabouts of the Note."

At the conclusion of its statement of decision, the court stated: "Mazakoda performed it[s] terms of the loan agreement by having the $495,000 delivered to defendants. Defendants breached the terms of the loan agreement by making no

payments on the loan after December 2009. As a result of defendants' breach, Mazakoda has been damaged. As of February 15, 2018, Mazakoda has incurred damages from defendants' breach in the amount of $908,131.78. This includes interest and principal accrued to this date."

B. Proof of Signature

Defendants contend the trial court "abused its discretion by allowing the fact of the signature on the note to be proven by oral testimony without evidence of a diligent search." Relying on *Dart Industries, Inc. v. Commercial Union Insurance Co.* (2002) 28 Cal.4th 1059 (*Dart*) and an older case cited therein, *Kenniff v. Caulfield* (1903) 140 Cal. 34, they argue that the court failed to make an adequate inquiry into Mazakoda's efforts to locate the promissory note because "suspicion hangs over the instrument." We are not persuaded.

In *Dart*, the issue before the Supreme Court was "what an insured must prove in order to establish its rights under a lost or destroyed insurance policy." (*Dart*, *supra*, 28 Cal.4th at p. 1064.) The Supreme Court began its analysis with Evidence Code sections 1521 and 1523, which it described as "codifications of the venerable common law rule that lost documents may be proved by secondary evidence."[4] (*Id.* at p. 1068.) Quoting language in a

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[4]Evidence Code section 1521, subdivision (a) provides that the content of a writing may be proved by admissible secondary evidence. Evidence Code section 1523 sets forth the circumstances under which oral testimony may be admissible to prove the contents of a writing, including where "the proponent does not have possession or control of a copy of the writing and the original is lost or has been destroyed without fraudulent intent on the part of the proponent of the evidence," and where the proponent lacks possession or control of the original or a copy

case from 1856, the Court observed that the rule "'for the admission of secondary evidence of a lost paper, requires "that a *bona fide* and diligent search has been unsuccessfully made for it in the place where it was most likely to be found;" and further, "the party is expected to show that he has in good faith exhausted in a reasonable degree all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him.[']"' (*Dart*, *supra*, 28 Cal.4th at p. 1068.)

The Supreme Court also quoted the following language from *Kenniff v. Caulfield*, *supra*: '"'If any suspicion hangs over the instrument, or that it is designedly withheld, a rigid inquiry should be made into the reasons for its non-production. But where there is no such suspicion, all that ought to be required is reasonable diligence to obtain the original-in-fact, courts in such cases are extremely liberal.'" [Citation.] Questions whether the search was sufficient in scope and was conducted in good faith are addressed to the discretion of the trial court and will not be disturbed on appeal absent abuse of discretion." (*Dart*, *supra*, 28 Cal.4th at p. 1069.) The parties agree these standards are applicable here. (Cf. *id.* at p. 1069 [citing case law addressing lost promissory notes].)

Pucci testified she witnessed defendants sign the promissory note, a copy of which she at one time possessed. Benyamini also testified he saw—and possessed a copy of—the

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of the writing and either the writing was not "reasonably procurable by the proponent by use of the court's process or by other available means," or "[t]he writing is not closely related to the controlling issues and it would be inexpedient to require its production." (Evid. Code, § 1523, subds. (b) and (c).)

signed promissory note. The trial court found this testimony credible, and rejected defendants' contrary assertions they did not sign the note. The trial court also implicitly credited Pucci's testimony about her records retention policy and typical practice of providing the original promissory note to the lender, as well as Benyamini's testimony that he was unable to locate the note after searching his filing cabinet. Defendants contend that Pucci's and Benyamini's testimony "strain[ed] credulity,"[5] and suggest that their own testimony about not signing the note casts "suspicion . . . over the instrument," such that the court should have conducted a more "rigid inquiry" into the reasons for its absence. These contentions essentially amount to disagreement with the trial court's credibility determinations, which we do not revisit or disturb. Nothing about Pucci's or Benyamini's testimony was facially suspect, and the trial court reasonably concluded that both had been sufficiently diligent in their efforts to locate the document some seven or more years after its creation. Defendants also suggest the trial court should have required Benyamini to explain when and how he lost the note, or Mazakoda to disprove that "someone," presumably external to the case, "put their hands on the note . . . at or shortly after it went into default." The trial court was not required to do any more

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[5]Defendants assert that Pucci's "explanation as to why she did not have a signed version"—that the transaction occurred beyond the bounds of her records retention policy—was "plainly evasive," because "the default in payments occurred less than two years" after the note was prepared. It is unclear why or how Pucci, whose involvement in the transaction appears to have extended only to the preparation of the initial paperwork, would have been aware of defendants' default approximately five years before the instant lawsuit was filed.

than it did under the principles set forth in *Dart* and the circumstances of this case.

C. Mazakoda's Entitlement to Enforce the Note

Defendants challenge the trial court's finding that Mazakoda was a person entitled to enforce the note within the meaning of the Commercial Code as unsupported by substantial evidence. They further assert that "out-of-state caselaw [*sic*] (in jurisdictions such as Florida, where judicial foreclosures are the norm, unlike California) has established that one seeking to enforce a 'lost note' under [California] Commercial Code § 3309 must do something more than simply claim 'I can't find it.'"

Under California law, which is the only law relevant to this California case, a "person entitled to enforce" a negotiable instrument can be "(a) the holder of the instrument, (b) a nonholder in possession of the instrument who has the rights of a holder, or (c) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to Section 3309 or subdivision (d) of Section 3418." (Cal. U. Com. Code, § 3301.) As relevant here, Commercial Code section 3309—"Enforcement by person not in possession of instrument"—provides in subdivision (a) that "A person not in possession of an instrument is entitled to enforce the instrument if (1) the person was in possession of the instrument and entitled to enforce it when loss of possession occurred, (2) the loss of possession was not the result of a transfer by the person or a lawful seizure, and (3) the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process." (Cal. U. Com. Code, § 3309, subd. (a).)

The trial court's conclusion that Mazakoda satisfied the requirements of Commercial Code section 3309 was supported by substantial evidence. As defendants acknowledge, Benyamini, the sole principal of Mazakoda, testified "on direct that he was given the original of the note by Klary Pucci." The trial court was permitted to credit this in-court testimony over Benyamini's earlier deposition testimony that he could not remember whether he had received the original note or a photocopy. The court likewise was entitled to credit Pucci's trial testimony that she either would have kept the note or given it to Benyamini over her deposition testimony that Sharon "may" have taken the original after signing it in her office. "[A] trier of fact is permitted to credit some portions of a witness's testimony, and not credit others." (*People v. Williams* (1992) 4 Cal.4th 354, 364.) And "the testimony of a single witness, even that of a party, is sufficient to provide substantial evidence to support a finding of fact." (*Doe v. Regents of University of California* (2016) 5 Cal.App.5th 1055, 1074.) Thus, subdivision (a)(1) of Commercial Code section 3309 was sufficiently supported.

The same is true of subdivisions (a)(2) and (a)(3). Benyamini testified that Mazakoda never transferred or assigned the note to anyone, providing support for the trial court's finding that the loss of possession was not the result of a transfer of the note.[6] And, as addressed above, the court credited both Benyamini's and Pucci's testimony that the whereabouts of the note could not be determined. The court's finding that Mazakoda was a person entitled to enforce the note is adequately supported under California law.

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[6] Defendants do not suggest that the note was lawfully seized.

D. Basis of Damages

Defendants' final claim of error regarding the promissory note is that the court improperly awarded damages for breach of the loan agreement instead of the promissory note. They point to the following language from the 13-page statement of decision: "Mazakoda performed it[s] terms of the loan agreement by having the $495,000 delivered to defendants. Defendants breached the terms of the loan agreement by making no payments on the loan after December 2009. As a result of defendants' breach, Mazakoda has been damaged. As of February 15, 2018, Mazakoda has incurred damages from defendants' breach in the amount of $908,131.78. This includes interest and principal accrued to this date." Defendants argue that this language makes "apparent that the breach for which the court awarded damages to [Mazakoda] was of the Loan Agreement," which violates the four-year statute of limitations on such actions.

"Under the doctrine of implied findings, the reviewing court must infer, following a bench trial, that the trial court impliedly made every factual finding necessary to support its decision." (*Fladeboe v. American Isuzu Motors, Inc.* (2007) 150 Cal.App.4th 42, 48.) To avoid an implied finding, a party must follow the two-step process provided by sections 632 and 634 (see *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133-1134): "[F]irst, a party must request a statement of decision as to specific issues to obtain an explanation of the trial court's tentative decision [citation]; second, if the court issues such a statement, a party claiming deficiencies therein must bring such defects to the trial court's attention to avoid implied findings on appeal favorable to the judgment [citation]." (*Id.* at p. 1134.) "[i]f a party fails to bring omissions or ambiguities in the statement of decision's factual findings to the trial court's attention, . . . the appellate

court will infer the trial court made implied factual findings to support the judgment." (*Fladeboe*, *supra,* 150 Cal.App.4th at p. 59; see also *id*. at p. 48.)

Here, the trial court issued a tentative decision that included identical language to that which defendants challenge here. Defendants subsequently requested a statement of decision and objected to the tentative on the grounds that 15 issues "were not addressed therein." Defendants did not object to or request clarification of the language they now dispute. We agree with Mazakoda that this omission precludes defendants from now raising this factual claim of error; the statute of limitations in this case turns on a clearly disputed issue of fact, namely, whether Mazakoda was entitled to enforce the promissory note.

Moreover, the entirety of the statement of decision makes clear that the court based its award on the promissory note.[7] The language defendants quote is under the heading "Mazakoda Is Entitled to Recover Damages for Defendants' Failure to Pay Back the a [*sic*] Person Entitled to Enforce the Note Pursuant to the California Commercial Code." The court spent the entire page preceding the challenged language making findings related to the promissory note and explaining why Mazakoda was entitled to enforce it. It also found, shortly before the contested language, that "the evidence establishes that defendants signed the promissory note and deed," and that "Defendants made payment on the loan for two years is evidence of this agreement." We are

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[7]As Mazakoda accurately points out, defendants interpreted the statement of decision this way in their opposition to Mazakoda's request for attorney fees. There, defendants asserted, "the court, in its Statement of Decision, grounded plaintiff's recovery upon the note, not the Loan Agreement."

satisfied that the damage award was proper.

III. Unclean Hands

A. Background

In their answer to Mazakoda's second amended complaint, defendants asserted the affirmative defense of unclean hands. They also contended during closing argument that Mazakoda "cannot escape the consequence of Mr. Aminpour's fraud and unclean hands. It's imputed to Mazakoda, the fraud in the inducement for the supposed entering into of the promissory notes and loan agreements, the fraud in the inducement of the signing of the deeds of trust, the false representation that Mr. Aminpour was a licensed real estate broker and that the loan would've been exempt from usury limitations. And so, Mazakoda cannot enforce the note or the deeds of trust for that reason as well, there's fraud and unclean hands which is imputed to it by Mr. Aminpour."

The trial court's tentative statement of decision did not use the term unclean hands. It stated, "The fact that John Aminpour has been convicted of a crime and is not a real estate broker has no impact on this court's ruling." In their objections to the tentative and request for a statement of decision, defendants requested the court address (1) "Whether the conduct of plaintiff and/or persons acting on its behalf with respect to the transaction amounts to unclean hands," (2) "Whether, assuming the conduct of plaintiff and/or persons acting on its behalf with respect to the transaction amounts to unclean hands, plaintiff ought to be barred from any relief," and (3) "Whether, assuming the conduct of plaintiff and/or persons acting on its behalf with respect to the transaction amounts to unclean hands, plaintiff ought to be barred from equitable relief."

In the final statement of decision, the court added the following relevant finding to the previously quoted finding

regarding Aminpour: "There was no credible evidence that defendants were fraudulently induced by anyone, nor was there any credible evidence [of] any quid pro quo forbearance by defendants." The trial court also reiterated its tentative decision that Mazakoda was entitled to relief. It did not use the phrase "unclean hands."

B. Analysis

Defendants argue that the judgment must be reversed "on account of the failure of the trial court to make a finding on the issue of unclean hands." They acknowledge the trial court's finding that they were not fraudulently induced by Aminpour, but contend that the unclean hands defense "extends beyond fraudulent inducements" and point to the evidence they introduced concerning Aminpour's alleged machinations with the Chapman Oil loan. Defendants also contend that the trial court's finding regarding quid pro quo forbearance was inadequate because the court did not have the benefit of the usury complaint and letter it excluded from evidence.

Sections 632 and 634 concern the adequacy of a statement of decision. Section 632 requires a statement of decision to explain "the factual and legal basis for [the trial court's] decision as to each of the principal controverted issues at trial." (§ 632.) Section 634 provides that a statement of decision that does not resolve a controverted issue cannot be the basis of an inference on appeal "that the trial court decided in favor of the prevailing party as to those facts or on that issue." (§ 634.) Together, these provisions "have been interpreted to mean that a statement of decision is adequate if it fairly discloses the determinations as to the ultimate facts and material issues in the case." (*Central Valley General Hospital v. Smith* (2008) 162 Cal.App.4th 501, 513.) "When this rule is applied, the term 'ultimate fact' generally refers to a core fact, such as an element of a claim.

[Citation.] Ultimate facts are distinguished from evidentiary facts and from legal conclusions." (*Ibid.*)

Unclean hands is an equitable doctrine that applies "when a plaintiff has acted unconscionably, in bad faith, or inequitably in the matter in which the plaintiff seeks relief." (*Salas v. Sierra Chemical Co.* (2014) 59 Cal.4th 407, 432.) Any conduct that violates conscience, good faith, or other equitable standards of conduct may give rise to unclean hands; it need not be a tort or crime. (*Kendall-Jackson Winery, Ltd. v. Superior Court* (1999) 76 Cal.App.4th 970, 978.) However, the misconduct alleged must relate directly to the transaction(s) involved in the litigation, and must affect the equitable relations between the litigants. (*Salas*, *supra*, 59 Cal.4th at p. 432.) "Past improper conduct or prior misconduct that only indirectly affects the problem before the court does not suffice." (*Kendall-Jackson*, *supra*, 76 Cal.App.4th at p. 979.) Whether the doctrine of unclean hands applies is a question of fact. (*Id.* at p. 978.)

Here, the court in its statement of decision found that Aminpour's criminal record and real estate broker status—implicated by defendants in connection with the Chapman Oil loan—were not relevant to the loan transaction at issue. It further found not credible defendants' evidence that Aminpour or anyone else fraudulently induced them into the transaction or that the transaction was really a quid pro quo forbearance of their usury claim. In other words, the court expressly rejected all of the ultimate facts necessary to support an unclean hands defense: it found that the alleged misconduct either was not proven or was not connected to the transaction at hand. The statement of decision "fairly" and quite explicitly "discloses the determinations as to the ultimate facts and material issues in the case." The court's omission of the phrase "unclean hands" is of no consequence, as its conclusion the defense was inapplicable was

clear.

Defendants essentially dispute the trial court's factual findings and credibility determinations. We do not revisit those rulings under the guise of assessing the adequacy of the statement of decision. The statement of decision properly informed the parties of the basis for the court's judgment.

IV. Judicial Notice and the One-Action Rule

In their answer, defendants raised the "one-action rule" as an affirmative defense. The one-action rule, set forth in section 726, states: "There can be but one form of action for recovery of any debt or the enforcement of any right secured by mortgage upon real property or an estate for years therein, which action shall be in accordance with the provisions of this chapter." (§ 726.) The rule "compels a secured creditor to exhaust its security in a single judicial action before obtaining a monetary deficiency judgment against the debtor." (*C.J.A. Corp. v. Trans-Action Financial Corp.* (2001) 86 Cal.App.4th 664, 668.) Its purpose "is to prevent a secured creditor from enforcing its rights by seeking recourse to more than one remedy, such as by obtaining both a money judgment on the mortgage debt and by foreclosing on the mortgage." (*Id.* at p. 669.) Neither the parties nor the court addressed the one-action rule at trial.

While defendants' appeal was pending, defendants filed a motion requesting judicial notice of documents Mazakoda filed in a new action in which Sharon and Tootian are named as defendants. Defendants argue the documents tend to show that Mazakoda "violated the 'one-action rule' in the prosecution of the case currently under appeal by failing to vindicate and judicially foreclose upon its lien on property [in] Encino, while enforcing its purported promissory note by judicially foreclosing upon another lien it held on property [in] Los Angeles." Mazakoda opposed the motion. We deferred ruling on the motion pending full briefing of

the case. In their briefing, defendants, on "the assumption the Court ultimately agrees to take judicial notice," argue that Mazakoda's violation of the one-action rule requires reversal of the instant judgment.

We deny the motion for judicial notice and accordingly do not reach the merits of defendants' one-action rule arguments. Although we are permitted to take judicial notice of court records (Evid. Code, §§ 452, subd. (c), 459, subd. (a)), "[i]t has long been the general rule and understanding that 'an appeal reviews the correctness of a judgment as of the time of its rendition, upon a record of matters which were before the trial court for its consideration.'" (*In re Zeth S.* (2003) 31 Cal.4th 396, 405.) We adhere to that general rule here, where the one-action rule was not invoked at trial and may be raised as an affirmative defense or sanction in the later action. (See *Kirkpatrick v. Westamerica Bank* (1998) 65 Cal.App.4th 982, 986-987.)

DISPOSITION

The request for judicial notice is denied and the judgment of the trial court is affirmed. Mazakoda is awarded its costs of appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

WILLHITE, ACTING P.J.

CURREY, J.