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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

KENNETH BARTON, Plaintiff and Appellant, v. RPOST INTERNATIONAL LIMITED, et al., Defendants and Respondents.	B266063 (Los Angeles County Super. Ct. No. YC061581)

APPEAL from a judgment of the Superior Court of Los Angeles County, Stuart M. Rice, Judge. Affirmed.

McGarrigle, Kenney & Zampiello, Patrick C. McGarrigle and Michael J. Kenney, for Plaintiff and Appellant.

Ben-Zvi & Associates, Henry Ben-Zvi, for Defendants and Respondents.

Plaintiff and appellant Kenneth Barton appeals from a post-judgment order denying his renewed motion to amend the judgment to add RPost Communications, Ltd. (RComm) and RMail Limited (RMail) as judgment debtors. In the trial court, Barton sought to add RComm and RMail as judgment debtors on the ground that they were the alter egos or successors of defendant and respondent RPost International Limited (RIL).[1] On appeal, Barton contends the trial court required definitive proof, rather than a preponderance of the evidence, and the trial court's findings were not supported by substantial evidence. We conclude Barton has not shown that the trial court applied the wrong standard of proof and the trial court did not abuse its discretion by denying the motion. Therefore, we affirm.

FACTS AND PROCEDURAL BACKGROUND

Company History and Underlying Proceedings

In 1999, Zafar Khan, Terrance Tomkow, and Barton founded RPost, Inc. to develop and market technology that Tomkow had developed for e-mail similar to certified mail. In September 2000, RPost, Inc. was reorganized as Bermuda corporation RIL. Shares of RIL were allotted to the founders. Barton suffered a stroke in September 2003, and resigned in September 2004.

On July 7, 2005, Barton filed an action against RIL, Khan, Tomkow, and another individual, for breach of fiduciary duty and violation of the Labor Code. (*Barton v. RPost International Limited et al.* (Super. Ct. L.A. County, 2005, No. YC051312).) RIL's board of directors took actions to alter the minutes of previous meetings to omit or forfeit the allocation of shares to Barton. On June 8, 2006, Barton filed a new complaint against RIL seeking specific performance and damages for failure to issue stock

[1] RIL has changed its name to Secure Messaging Systems (Bermuda) Limited.

certificates. (*Barton v. RPost International Limited* (Super. Ct. L.A. County, 2006, No. YC053346).)

RIL entered into a confidentiality agreement dated April 11, 2008, with patent holder Authentix. Authentix's attorneys sent a draft patent assignment agreement to RIL's attorney Henry Ben-Zvi in August 2008. The draft had an effective date of September 25, 2008, and included a promissory note.

A decision was made to have a new company purchase the patents instead of RIL. On September 8, 2009, Tomkow executed a promissory note on behalf of RMail agreeing to pay RIL the amount of $550,000, at two percent interest, in five years. The note would be deemed fulfilled and cancelled if the principal was paid, plus accrued interest, or if RIL received in excess of $1 million as a result of enforcement, royalties, licensing, settlement, or court-mandated damages involving the patents owned by RMail and licensed to RIL.

That same day, Tomkow executed an agreement on behalf of RMail granting an exclusive license of the patents to RIL. Under the licensing agreement, RIL was obligated to pay an initial fee of $200,000 and annual royalty of $45,000 to RMail until the expiration or termination of the license.

Authentix's attorney sent a revised patent assignment agreement on September 15, 2008. The revised agreement changed the contracting parties to Authentix and RMail. Ben-Zvi asked Authentix to remove some language identifying RMail as an affiliate of RIL. RMail was incorporated on October 30, 2008.

The patent assignment agreement was executed with an effective date of October 31, 2008, between RMail and Authentix. The agreement required RMail or RIL, "as applicable," to pay cash of $650,000 and RIL preferred stock with a value of $150,000 to Authentix. RMail was to make four payments: $50,000 immediately, $115,000 by December 2, 2008, $160,000 by March 25, 2009, and $325,000 by March 25, 2010. Authentix had the election to receive RIL preferred stock. If Authentix did not elect to receive stock, RMail would pay an amount of cash instead. Tomkow executed a promissory note dated January 21, 2009, on behalf of RMail for $100,000 received from

Khan's father.

RIL provided a report to auditor Kabani & Company, Inc. which showed a number of shares were forfeited after June 30, 2008, and before June 30, 2009. On July 7, 2009, Khan stated in deposition that RIL cancelled Barton's shares and returned them to RIL's treasury. Barton's actions were consolidated.

Barton filed the complaint in the instant case on January 29, 2010. His operative third amended complaint was brought against several defendants, including RIL, RPost, Khan, and Tomkow, alleging causes of action for conversion, breach of fiduciary duty, a derivative claim for breach of fiduciary duty, declaratory relief, fraud, and violation of Business and Professions Code section 17200.

Trial in the consolidated action commenced in April 2010. The trial court granted a motion for directed verdict under Code of Civil Procedure section 831.8 on the cause of action for delivery of stock certificates, finding that none of the contingent events had occurred which would require RIL to deliver stock certificated to the founders. The failure to deliver share documents to Baron was not wrongful.

On February 4, 2011, Kabani provided an auditor's report to RIL's board of directors and shareholders. Kabani had audited RIL's consolidated balance sheet and related financial statements as of June 30, 2010. RIL's cumulative losses and negative cash flow, along with other factors, "raise substantial doubt about the Company's ability to continue as a going concern." In a note, Kabani added, "While the Company's revenue has increased consistently from year to year, the Company is planning to open a new financing round to fund expansion of its sales and marketing efforts in the US and selected countries. The Company expects that investment capital originating from the sale of equity will continue to fund a significant portion of its operations during fiscal year 2011; although there is no assurance that investment capital will be secured."

On February 11, 2011, Khan sent a letter to shareholders soliciting consent to capitalization plans, including a purchase agreement and an exchange of shares. With the shareholders' approval, newly incorporated RComm would purchase certain assets and assume certain liabilities of RIL, in exchange for cash and preferred shares of RComm.

RIL would exchange RComm preferred shares for RIL preferred shares. All preferred shares held by RIL preferred shareholders would be exchanged pro rata for preferred shares of RComm. RComm would assume non-current liabilities of RIL as of December 31, 2010. RComm would assume all of the assets and liabilities of RIL's subsidiaries. RComm would also purchase intellectual property assets.

Under the capitalization plan, RIL would continue to operate as a company with the rights to offer RComm services to companies with a billing address in Bermuda. RIL would manage the exclusive marketing agreement with the Bermuda Postal Service.

Khan stated that the RIL board of directors had approved the plan for several reasons. First, companies like RIL achieve liquidity for investors through acquisition. The acquiring companies scrutinize the financial and legal history of the company to be acquired. For that reason, it is easier to acquire a new company. As a technology company, RIL was an older company. "For the purposes of acquisition, this long history is a burden not an asset. As a new entity, [RComm] will offer itself as a new company starting with a clean slate." Also, as a new entity, RComm would be better positioned to adhere to audit requirements for an initial public offering. RIL signed a partnership agreement with Bermuda Post to market RIL services in Bermuda. An exception allowing RIL to conduct commerce in Bermuda would be more securely preserved if international operations were separated from local ones. Also, a recent experience bringing an action against the Swiss Post Office showed that enforcing patent protections offshore would require an extensive restructuring of the patent licensing agreements. And lastly, their auditors had opined that RIL was unlikely to be able to continue as a going concern.

The RIL board of directors stated the preferred shareholders would give up some revenue from the Bermuda market, but maintain revenue "as the supplier of services in a multi-tier distribution scenario." The increase in total equity ownership would have a current or future value at least equal to the lifetime value of the revenue that preferred shareholders give up from the Bermuda market. The RIL common shareholders would benefit by owning the Bermuda revenue market. Since the auditors opined RIL was

unlikely to be able to continue as a going concern and the preferred shareholders had a liquidation preference, common shareholders were unlikely to receive any proceeds from liquidation. "The proposed new structure of [RIL] would relieve Common shareholders of the current subordination to the preferred shareholders as well as the current subordination to the non-current debt holders. This relief from the subordination would facilitate the Common shareholders realization of near term value of their equity." Eliminating the subordination to preferred shareholders would also make it more likely that common shareholders may receive future dividends.

Among other disclosures and provisions, the document explained four patent infringement actions that RIL was pursuing and Barton's ongoing litigation for fraud and conversion of RIL common stock. RComm would assume financial responsibility for the four patent infringement cases.

Purchaser RComm and sellers RIL and a related Brazilian company entered into a purchase agreement on March 21, 2011. The sellers agreed to sell, transfer and assign to RComm the property and liabilities set forth in attached exhibits. The first exhibit listed specific patents, trademarks, and internet domains. The second exhibit listed assets and liabilities, including several specific liabilities. RComm acquired shares and loans receivable of RIL subsidiaries, including several named corporations. Under current liabilities assumed from RIL was a subheading for obligations to be settled by shares: "Includes legal fees owed to Ben-Zvi & Associates, payable in preferred shares, for services provided between 2006 and 2010, and other shareholders who have provided services to the acquired entities or [RIL] in the past." RComm agreed to pay $26,432 to RIL and provide a number of RComm preferred shares.

The exclusive patent licensing agreement between RMail and RIL was terminated on March 23, 2011. That same day, RMail granted an exclusive patent license to RComm.

Barton filed a new action against RIL, RMail, and RComm for fraudulent transfer of assets. (*Barton v. RPost International Limited* (Super. Ct. L.A. County, 2011, No. YC065259).) The parties settled the consolidated cases in 2012. Trial commenced in the

instant conversion action on March 1, 2012. The trial court issued a statement of decision on August 3, 2012, finding Barton's stock was converted on June 30, 2009, or July 7, 2009, when the shares were transferred back to the RIL treasury. The court declared that Barton owned 6,016,500 common shares of RIL and prohibited RIL from taking any action to encumber, forfeit, or cancel Barton's shares. The court ordered RIL to restore the shares of common stock to Barton and awarded damages for emotional distress.

Further trial proceedings were held on the issue of punitive damages. In Khan's testimony at trial on November 21, 2012, he stated RComm was proposed to shareholders to provide an opportunity to go forward in a way that would not have been possible if they had continued with no ability to fund the current operations. The court asked if Khan had entered into the RComm plan in order to continue the business on the same course under a new name. Khan disagreed. He stated that it was different, because they developed a different capital structure and broader based employee ownership, adjusted their business plan to focus on product integration, and separated out existing common shares and left the common shares with a viable market. The court asked, "Basically everything that that [RIL] had going with exception of the Bermuda contract became part of RComm's operations?" Khan responded, "Substantially all the assets. There were some other operations that [weren't part of RIL.]" Ben-Zvi questioned Khan about the unfavorable auditor's report. Khan stated that RIL could have continued to service a few customers for small operations, but would not have been able to raise investment funds they needed to keep the product updated and grow sales.

The financial information presented including the following evidence. RIL had $1.26 million in its bank account in March 2011. As of June 30, 2012, RIL had assets of $328,000 and liabilities of $100,000. $850,000 was transferred from RIL to other RPost entities to enable the other entities to take advantage of business opportunities. In the initial offering of preferred shares of RComm in 2011, the price was $5 per share. Later that year, the price was raised to $5.25 per share for preferred shares. In 2012, the price was raised to $5.75 per share. At RComm's October 2012 shareholder meeting, Khan

advised shareholders $5 million had been raised. RComm intended to raise $18.2 million over two years to expand its business. RPost entities were pursuing patent infringement actions against several defendants, including Amazon and PayPal. Khan and Tomkow owned shares of RIL, RComm, and RMail.

On April 14, 2013, the eve of the final hearing on the issue of punitive damages, Khan and Tomkow each filed a chapter 13 bankruptcy petition. The bankruptcy court approved stipulated stay relief that allowed the state court action to proceed.

On June 18, 2013, the trial court issued a ruling on punitive damages and revised the statement of decision. The evidence presented in the second phase of trial had revealed that the assets and character of RIL had changed dramatically. Restoring Barton's shares would not provide the intended remedy. The court found Barton's shares had a total monetary value of $3,850,560. The court modified the original statement of decision and determined Barton was entitled to a monetary judgment for the value of his converted shares against Tomkow, Khan, and RIL. The total amount awarded to Barton for the value of his converted shares, after deducting an equalizing payment, was $3,840,060. The court also awarded punitive damages of $250,000 against Khan and punitive damages of $150,000 against Tomkow.

On August 8, 2013, Barton filed a motion to amend the complaint to conform to proof or, alternatively, to amend the judgment to name RComm and RMail as additional defendants and judgment debtors jointly and severally liable for obligations of RIL as RIL's alter egos. Barton argued that a unity of interests existed between the companies, such that they formed a single enterprise, based on the evidence at trial, including that: Khan and Tomkow are owners of RIL, RComm, and RMail, and control all three companies; RIL's assets and corporate opportunities were transferred to the other companies; all three companies are represented by the same counsel; information in Khan and Tomkow's bankruptcy filings; and the depletion of RIL's bank account. He argued inequity would result if RIL were treated as one corporation alone. RIL responded that the businesses were created for legitimate reasons, there was no commingling of assets, and no showing that the corporate form was disregarded or formalities were not complied

with.

A hearing was held on August 30, 2013. The trial court denied the motion to add RComm and RMail as additional judgment debtors under the alter ego doctrine, finding that there were different investors in the companies and there may have been legitimate business purposes for creating RComm and RMail as separate business entities from RIL. Although the entities were interrelated, they were not a single enterprise with commonality of ownership. RComm and RMail cannot be said to have controlled the litigation, because they were not even significantly mentioned at trial until the punitive damages phase. The court expressly stated that Barton's burden of proof on the motion to amend was a preponderance of the evidence standard. The court denied the motion without prejudice, however, in the event new evidence came to light during the judgment debtor examinations or the fraudulent transfer action.

The trial court reduced the damages award to account for a settlement by another defendant and awarded prejudgment interest. The court entered judgment that same day. RIL, Khan, Tomkow, and Barton all appealed from the judgment. Barton did not raise any issues on appeal about the denial of his motion to add RComm and RMail as defendants and judgment debtors.

Barton moved to convert the bankruptcy cases to chapter 7. Khan and Tomkow commenced proceedings in the bankruptcy cases to disallow Barton's claims. The bankruptcy court found Khan and Tomkow had filed their chapter 13 cases in bad faith, and therefore, cause for conversion to chapter 7 existed. The timing of the chapter 13 filings showed an intent to defeat the state court action, and Khan and Tomkow refused to provide sufficiently complete and accurate financial information relating to settlements and transactions involving their companies. The bankruptcy court converted the cases and overruled the objections to Barton's claims.

In December 2014, this appellate court modified the judgment to deduct the emotional distress damages, which were not supported by substantial evidence, and as modified, we affirmed the judgment.

Renewed Motion to Amend Judgment and Supporting Evidence

On June 24, 2015, Barton filed a motion to amend the judgment to name RComm and RMail as additional defendants and judgment debtors, or in the alternative, for reconsideration of his prior motion to amend the judgment heard on August 30, 2013. Barton argued that RComm was liable as a successor of RIL and/or an alter ego, and RMail was liable as an alter ego of RIL. Barton submitted approximately 100 exhibits in support of the motion. Barton did not clarify which exhibits contained new evidence, but approximately 40 of the exhibits were obtained after the judgment was entered.

Among the new evidence was a letter Khan wrote to his father dated January 21, 2009, stating the following. The RIL board of directors had recommended setting up a separate corporation for the acquisition of the Authentix patent portfolio to provide greater flexibility in funding. In September 2008, the financial crisis made RIL's investment commitments uncollectible. Since RIL could not make the payments to purchase the patent from Authentix, Khan formed RMail with his own money, provided $50,000 of his own money, finalized the patent acquisition agreements to be made between Authentix and RMail, and borrowed $50,000 on his credit card for the first payment. Acquiring the patents removed the threat that Authentix would file another patent infringement lawsuit. He tried for several weeks to raise financing with RIL investors to fund the second payment due on the patents. Khan stated that RIL was in no better financial situation and could cover its own decreased operating expenses on a month-to-month basis. He asked his father to invest directly in RMail in order that RMail could make the second payment due for the patents. He explained that RMail is an independent corporation for which he personally provided the capital. RMail equity would be split pro-rata among the people funding the first $750,000 required to cover fees, taxes, and the patent purchase. The current plan, based on his father's commitment, would be to have Khan and Tomkow personally fund $650,000. With his father's commitment to fund $100,000, the share equity would be split proportionately among

Khan, Tomkow, and Khan's father. Khan asked his father to wire $100,000 to the RMail attorney client account that week.

Barton provided the RMail shareholder registry, dated September 14, 2012, listing three shareholders: Khan, Tomkow, and Juan Rojas. Khan and Tomkow each hold 250 shares, while Rojas holds 4,500 shares.

Barton also provided the RComm shareholder registry from February 2015. Fifteen million shares are held by Alexander Management Ltd., which has an address in Bermuda. Khan and Tomkow hold 750,000 shares each. Thirteen other individuals hold a number of shares ranging from 5,000 to 675,000. Barton provided Khan's deposition testimony from June 12, 2014, that Alexander held the shares for employee incentives, to be granted by the RComm board of directors. RComm's board of directors at the time was Khan, Tomkow, Carole Krechman, Richard Pryor, and Mark Readinger. Khan stated that the question of who had the right to vote the 15 million shares held by Alexander had never come up, but Khan assumed the board of directors had the right to vote the shares. Barton also provided the February 22, 2015 declaration of James Watlington, who is a Bermuda attorney employed by Alexander and serves as the corporate secretary for RIL, RComm, and RPost. Watlington declared that Alexander holds the 15 million shares of RComm in trust on behalf of RComm and will transfer shares as directed by the RComm board of directors to employees of RComm or its subsidiaries.

Barton submitted the June 2, 2014 deposition testimony of Mark Readinger, who is on RComm's board of directors. Referring to the purchase agreement, Barton's attorney asked, "Are you aware, Mr. Readinger, that RPost Communications assumed RIL/RPost International Limited's liability for legal fees and costs incurred in the defense of the Barton fraud/fiduciary duty/conversion lawsuit?" Readinger responded that he was aware. He thought he saw it in the documents. Barton's attorney asked what RComm's role was after assuming liability for defense costs, from a blank check for legal fees to oversight of the defense. RIL's attorney Ben-Zvi objected to the question on the grounds that it assumed facts not in evidence and misstated the evidence. Readinger answered, "I

assumed when I read this that RPost Communications was taking on the assets and the liabilities of RPost International, certain assets and certain liabilities, the result of which was relatively equivalent in value. [¶] I think there was a small amount of cash that went back to RPost [I]nternational . . . and that going forward that RPost Communications would manage and pay for the different lawsuits that were either pending or that they would enter into based on the intellectual property issues."

Barton's attorney asked, "So if RComm was assuming the responsibility to pay Mr. Ben-Zvi's legal fees in cash or in shares associated with his defense of the fraud/conversion/fiduciary duty lawsuit, RComm would - - since it's writing a check or issuing shares would oversee those services, correct?" RIL's attorney objected that the question assumed facts not in evidence. He instructed Readinger that the question was a hypothetical and he could answer if he had information to answer. Readinger answered, "I would assume RPost Communications would in fact oversee it and manage the process." Barton's attorney asked, "Isn't that in fact what occurred - - that's occurring to this date, that RPost Communications is handling the - - or paying for the legal fees associated with Mr. Ben-Zvi's services in the underlying fraud/conversion case which is now up on appeal?" Ben-Zvi told Barton's attorney that he was confusing the witness, because he had gotten him to adopt a false statement. The attorneys argued. Readinger answered, "I understand that that's true."

Barton also submitted a notice RIL sent out on August 30, 2013, entitled RIL "Notice of Annual General Meetings." The annual general meetings for fiscal years ending 2011, 2012 and 2013 were to be held at the company's office in Bermuda on September 13, 2013. The items on the agenda were to approve the minutes of the annual general meeting in 2010, review company reports, elect directors and review and approve corporate and capitalization matters.

Opposition to Renewed Motion and Supporting Evidence

RIL, RComm, and RMail opposed the motion to amend the judgment. They

submitted additional testimony from Readinger's deposition. Attorney Ben-Zvi had called a five minute break in the testimony. When Barton's attorney asked if Readinger was ready to proceed, Readinger responded, "Yes. Just one clarification quickly. The more I thought about the question you asked about compensation relative to I think it was Exhibit 7 and then follow-on questions about Mr. Ben-Zvi, I was [under] the understanding from that that he was going to be compensated for services between those two time periods, I believe it was '05 and 2010, and that his compensation for other services continues on a basis of whatever agreement he and the company have come to, but I don't have any knowledge as to whether he's being compensated for the conversion case." The attorneys argued about whether Barton's attorney had confused the witness or Ben-Zvi had coached the witness on his testimony during the break. Barton's attorney asked if RComm was paying the legal fees Ben-Zvi charged for the underlying defense of RIL, Khan, and Tomkow in the fraud and conversion case. Readinger said he was not aware and did not know if it was for that purpose or not. He stated that he had not made any inquires to determine whether RComm is paying legal fees and costs associated with Khan, Tomkow, and RIL's defense in the conversion case. It had not been discussed at RComm's board meetings. He insisted that he did not have any information as to the specific compensation related to the conversion case.

RIL submitted the minutes of a meeting held on October 28, 2008, by Watlington and another individual acting as the provisional directors of RMail. They resolved to open a stock book and allot 4,500 common shares to Alexander, as nominee for Rojas, 250 common shares to Khan, and 250 common shares to Tomkow. Watlington, Khan, and Tomkow, voting as shareholders, elected Khan and Tomkow as RMail's directors.

RIL also filed Khan's declaration that RMail has three shareholders: Rojas owned 90 percent of the shares, while Khan and Tomkow each owned five percent. All of the RIL shareholders who voted on the purchase and sale agreement executed with RComm were in favor of it. The valuations placed on RIL's assets and liabilities were determined using methods consistent with the Kabani audit. None of the corporations has ever paid for any debt or obligation of any of the other corporations, and none has ever received

funds or assets that belonged to any of the other corporations. Each of the corporations maintains its own financial accounts, separate from the others. The funds and assets have never been commingled. None of the corporations have ever treated the assets of any of the other corporations as its own. Each corporation has its own board of directors who meet separately, and each corporation maintains its own books of minutes of board meetings. The business of each corporation is distinct and continuing to the present. Each corporation is capitalized sufficiently to operate. RComm and RMail have never asserted control over the instant lawsuit, and neither has ever paid any legal fees or expenses associated with the lawsuit. When RIL sold assets to RComm, Ben-Zvi was owed preferred shares of RIL, which would have been exchangeable for RComm preferred shares if they had been issued. RComm assumed the obligation to issue preferred shares.

RIL submitted the declaration of Rojas as well. Rojas declared that he is a citizen of Costa Rica. In October 2008, he executed a subscription for 4,500 shares of RMail stock. He paid $4,500 when he executed the subscription.

Barton filed a reply. A hearing was held on July 17, 2015. The trial court acknowledged that considerable discovery had taken place since the judgment was entered. The court found Barton had presented new evidence and the motion was properly brought. The court did not think Barton had overstated the Readinger testimony, although the court did not find it to be the admission that Barton sought, due to Readinger's subsequent modification of his statement, whether or not the modification was coached. Other evidence and case law was thoroughly discussed, and the court took the matter under submission.

On July 24, 2015, the trial court issued its ruling on the renewed motion to amend the judgment. With respect to the alter ego claim, the trial court concluded Readinger's testimony was the only new evidence presented on the issue of whether RComm or RMail controlled the litigation. Readinger had modified his initial response to a leading question. The trial court found "the citation to Readinger's deposition testimony, for purposes of this motion does not definitively establish that RComm or RMail controlled

the Barton/RIL's litigation. Further, as to proceedings prior to 2011, RComm could not have controlled the litigation because it had not yet been formed."

The trial court considered the issue of successor liability. The court found Barton failed to establish that RComm expressly or impliedly agreed to assume RIL's obligation to Barton. The solicitation and the purchase agreement stated that RComm assumed certain liabilities, but did not expressly list Barton's litigation. The court found the contract language was susceptible to numerous inferences, not all of which gave rise to an implied assumption of liability for Barton's litigation. Also, Barton had not provided any evidence that there was a de facto merger of the companies.

The court found RComm was not a mere continuation of RIL, because RIL continued to exist. Proper corporate formalities were observed to form RComm and RMail, so they could not be disregarded on that basis. Also, RComm and RMail did not have the same shareholders and directors as RIL. RIL had provided a declaration from Juan Rojas, as the majority shareholder of RMail, who had no stake in RIL. The court stated that Barton's assertion Rojas was a sham shareholder could be explored in the fraudulent transfer trial. Although the shareholders and directors were intertwined, they were not practically the same for the purpose of imposing liability without a trial. There is no dispute that RIL is an existing entity that has not been dissolved. Barton's arguments that RIL received token payment for assets and RIL's remaining assets are insignificant may prove to be relevant to Barton's separate fraudulent transfer action, but the actions are open to different interpretations. RComm and RMail could not be considered a mere continuation of RIL, because RIL legally exists and has assets.

"Fourth, plaintiff has not definitively established, for purposes of this motion only, that there was actual intent to hinder, delay, or defraud any creditor. The fact that there has already been a determination that Khan and Tomkow were liable for conversion does not compel the conclusion that RMail and RComm were formed for the purpose of escaping liability." The trial court denied the renewed motion to amend the judgment.

Barton filed a timely notice of appeal from the post-judgment order denying his motion to amend the judgment.

DISCUSSION

Standard of Review

Code of Civil Procedure section 187 authorizes a trial court to amend a judgment to add additional judgment debtors.[2] (*Highland Springs Conference & Training Center v. City of Banning* (2016) 244 Cal.App.4th 267, 280 (*Highland Springs*).) "[T]he procedural mechanism of section 187 enables the court to consider disregarding the corporate entity on any of several theories in order to add an additional judgment debtor." (*McClellan v. Northridge Park Townhome Owners Ass'n* (2001) 89 Cal.App.4th 746, 754 (*McClellan*).) "In addition, even if all the formal elements necessary to establish [a theory of liability] are not present, an unnamed party may be included as a judgment debtor if 'the equities overwhelmingly favor' the amendment and it is necessary to prevent an injustice. (*Carr v. Barnabey's Hotel Corp.* (1994) 23 Cal.App.4th 14, 20-23 (*Carr*).)" (*Carolina Casualty Ins. Co. v. L.M. Ross Law Group, LLP* (2012) 212 Cal.App.4th 1181, 1188-89, footnote omitted (*Carolina Casualty*).)

"'The decision to grant an amendment in such circumstances lies in the sound discretion of the trial court. "The greatest liberality is to be encouraged in the allowance of such amendments in order to see that justice is done."' [Citation.]" (*Greenspan v. LADT LLC* (2010) 191 Cal.App.4th 486, 508.) "The trial court's decision to amend a judgment to add a judgment debtor is reviewed for an abuse of discretion. [Citations.]

[2] Code of Civil Procedure section 187 provides: "When jurisdiction is, by the Constitution or this Code, or by any other statute, conferred on a Court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this Code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code." All further statutory references are to the Code of Civil Procedure unless otherwise stated.

Factual findings necessary to the court's decision are reviewed to determine whether they are supported by substantial evidence. [Citations.]" (*Carolina Casualty, supra,* 212 Cal.App.4th at p. 1189, footnote omitted.)

Standard of Proof Applied by the Trial Court

Barton contends the trial court required him to definitively establish each element, rather than proving his claims by a preponderance of the evidence. We disagree.

Under Evidence Code section 664, we begin with the presumption that the court has properly performed its judicial duty. (Evid. Code, § 664; *People v. Coddington* (2000) 23 Cal.4th 529, 644, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) We presume that the trial court "[knew] and [applied] the correct statutory and case law [citation] . . . ." (*People v. Coddington, supra,* at p. 644.) In addition, we presume that the trial court applied the proper burden of proof in resolving a case tried to the court. (*Ross v. Superior Court* (1977) 19 Cal.3d 899, 913-914.)

Barton has not met his burden on appeal to show that the trial court applied a burden of proof other than a preponderance of the evidence. The trial court was aware of the applicable burden of proof, because at the hearing on the first motion to amend the judgment on August 30, 2013, the trial court clearly stated that the preponderance of the evidence standard applied. None of the court's oral or written statements in connection with the renewed motion to amend the judgment stated that the court was applying a different burden of proof. The trial court's statements that particular evidence did not "definitively establish" a fact, in context, meant the evidence could be interpreted in different ways and the court was not persuaded by Barton's inferences for purposes of this hearing. Barton has not shown that the trial court required "definitive evidence."

Alter Ego

Barton contends there is no substantial evidence to support the trial court's finding that RComm and RMail were not RIL's alter egos for the purpose of adding them as judgment debtors in this case. Barton has not clearly set forth which evidence was presented for the first time in the renewed motion, nor has he stated the evidence in the light most favorable to the judgment in his briefs on appeal. We conclude Barton has failed to show an abuse of discretion.

Judgments are typically amended under section 187 "'to add additional judgment debtors on the grounds that a person or entity is the alter ego of the original judgment debtor. [Citations.] This is an equitable procedure based on the theory that the court is not amending the judgment to add a new defendant but is merely inserting the correct name of the real defendant. [Citations.] "Such a procedure is an appropriate and complete method by which to bind new individual defendants where it can be demonstrated that in their capacity as alter ego of the corporation they in fact had control of the previous litigation, and thus were virtually represented in the lawsuit." (1A Ballantine & Sterling, Cal. Corporation Laws (4th ed.) § 299.04, p. 14-45.)' [Citations.]" (*McClellan, supra*, 89 Cal.App.4th at p. 752.)

"It is well settled that when a corporation 'is used by an individual or individuals, or by another corporation, to perpetrate a fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose, a court may *disregard the corporate entity* and treat the acts as if they were done by the individuals themselves or by the controlling corporation . . . [.]' (9 Witkin, Summary of Cal. Law (9th ed.1989) Corporations, § 12, p. 524.)" (*McClellan, supra*, 89 Cal.App.4th at pp. 752-753.)

"To prevail on the motion, the judgment creditor must show, by a preponderance of the evidence, that '(1) the parties to be added as judgment debtors had control of the underlying litigation and were virtually represented in that proceeding; (2) there is such a unity of interest and ownership that the separate personalities of the entity and the owners no longer exist; and (3) an inequitable result will follow if the acts are treated as those of the entity alone.' (*Relentless Air Racing, LLC v. Airborne Turbine Ltd. Partnership* (2013) 222 Cal.App.4th 811, 815-816.)" (*Highland Springs, supra*, 244 Cal.App.4th at

p. 280.)

"In determining whether there is a sufficient unity of interest and ownership, the court considers many factors, including 'the commingling of funds and assets of the two entities, identical equitable ownership in the two entities, use of the same offices and employees, disregard of corporate formalities, identical directors and officers, and use of one as a mere shell or conduit for the affairs of the other. [Citation.]' [Citation.] Inadequate capitalization of the original judgment debtor is another factor. [Citation.] No single factor governs; courts must consider all of the circumstances of the case in determining whether it would be equitable to impose alter ego liability. [Citation.]" (*Highland Springs*, *supra*, 244 Cal.App.4th at pp. 280-281.)

The trial court concluded that the only new evidence offered on the issue of whether RComm or RMail exercised control of the litigation in the underlying case was Readinger's testimony. It is clear from the testimony that Readinger was giving his interpretation of language in the purchase agreement. The language of the agreement speaks for itself. In the agreement, RComm agreed to honor RIL's liability for preferred shares that had been incurred, but not yet issued. RComm did not agree to assume liability for the ongoing expenses of the Barton's lawsuits. The trial court could properly conclude that Readinger's statements about control of the conversion action based solely on reading the purchase documents did not constitute admissions and were not of much weight. Khan declared that RIL's ongoing legal expenses were not being funded by RComm. The trial court properly found Barton's new evidence did not establish RComm or RMail's control of the litigation. The trial court did not abuse its discretion by declining to add RComm or RMail as judgment debtors based on the theory that they were alter egos of RIL.

Successor Liability

Barton contends the trial court's finding that RComm is not the successor of RIL for the purposes of adding RComm as a judgment debtor is not supported by substantial

evidence. We conclude that Barton has shown no abuse of discretion.

A judgment may also be amended to add a judgment debtor under section 187 on the theory that the entity is a successor corporation. (*McClellan, supra,* 89 Cal.App.4th at p. 753.) Successor liability "is consistent with the principle that 'if a corporation organizes another corporation with practically the same shareholders and directors, transfers all the assets but does not pay all the first corporation's debts, and continues to carry on the same business, the separate entities may be disregarded and the new corporation held liable for the obligations of the old. [Citations.]' (9 Witkin, Summary of Cal. Law, *supra,* Corporations, § 19, p. 532.)" (*McClellan, supra,* at p. 753.)

"The general rule is 'where one corporation sells or transfers all of its assets to another corporation, the latter is not liable for the debts and liabilities of the former unless (1) the purchaser expressly or impliedly agrees to such assumption, (2) the transaction amounts to a consolidation or merger of the two corporations, (3) *the purchasing corporation is merely a continuation of the selling corporation*, or (4) the transaction is entered into fraudulently to escape liability for debts. [Citations.]' [Citations.]" (*McClellan, supra,* 89 Cal.App.4th at pp. 753-754.)

"[C]orporations cannot escape liability by a mere change of name or a shift of assets when and where it is shown that the new corporation is, in reality, but a continuation of the old. Especially is this well settled when actual fraud or the rights of creditors are involved, under which circumstances the courts uniformly hold the new corporation liable for the debts of the former corporation. [Citations.]" (*Blank v. Olcovich Shoe Corp.* (1937) 20 Cal.App.2d 456, 461.)

"California decisions holding that a corporation acquiring the assets of another corporation is the latter's mere continuation and therefore liable for its debts have imposed such liability only upon a showing of one or both of the following factual elements: (1) no adequate consideration was given for the predecessor corporation's assets and made available for meeting the claims of its unsecured creditors; (2) one or more persons were officers, directors, or stockholders of both corporations. [Citations.]" (*Ray v. Alad Corp.* (1977) 19 Cal.3d 22, 29.)

In this case, the trial court declined to amend the judgment to add RComm as a judgment debtor on the theory that RComm was the successor of RIL. The trial court's findings are supported by substantial evidence. RIL is a continuing concern. The purchase agreement did not include assuming liability for any potential judgment in Barton's litigation. The trial court limited the finding to the context of amending the judgment to add judgment debtors. The trial court's reasoning was careful, not capricious. We find no abuse of discretion in the trial court's ruling.

DISPOSITION

The order is affirmed. Respondent RPost International Limited is awarded its costs on appeal.

KRIEGLER, J.

We concur:

TURNER, P.J.

BAKER, J.