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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

ABDUL M. MOLADINA,

Plaintiff and Respondent,

v.

SOHEIL NAIMI,

Defendant and Appellant.

B261689

(Los Angeles County
Super. Ct. No. BC465789)

APPEAL from judgment of the Superior Court of Los Angeles County, Yvette M. Palazuelos, Judge. Affirmed as modified.

Law Offices of Michael Jay Berger and Michael Jay Berger, for Defendant and Appellants.

Southern California Lawyers Group, Eric Morris, for Plaintiff and Respondent.

Defendant and appellant Soheil Naimi appeals from a judgment in favor of plaintiff and respondent Abdul M. Moladina in this action arising from an investment. On appeal, Naimi contends: (1) the trial court erred by permitting Moladina to contradict deemed admissions; (2) there is no substantial evidence to support findings as to each cause of action, including the finding that Naimi made fraudulent misrepresentations to induce Moladina to invest in the project; and (3) there was no basis for an award of attorney fees. We conclude the finding of fraud is supported by substantial evidence. Naimi has not shown that any of the deemed admissions negated an element of the cause of action for fraud or was contrary to a fact proven at trial. Since Naimi was properly found liable for fraud, we need not consider whether substantial evidence also supported liability for the same damages under other legal theories. There is no basis, however, for an award of attorney fees in this case. We modify the judgment by reversing the award of attorney fees, and affirm the judgment as modified.

FACTS

On October 11, 2005, Naimi incorporated 4220 Fair Avenue Property, LLC (the LLC). Naimi operated the LLC. On December 23, 2005, Naimi signed documents and invested \$75,000 of his own money to purchase real property at 4220 Fair Avenue in Studio City, California, intending to convert the existing apartments into condominiums. Naimi

transferred his interest in the real property to the LLC as his capital contribution. Naimi was the sole member of the LLC and the real property was the main asset.

Naimi represented to investors in the project that the LLC would have capital to protect them in the form of the real property if financing problems arose. Moladina received information about the investment prior to investing. To encourage Moladina to invest in the LLC, Naimi represented that he had invested \$500,000 of his own money to purchase the real property. Naimi said he had used investor funds to begin construction already, which was not true. He had not used funds for their intended purpose. Naimi said he consistently earned double-digit returns for investors, but he had not consistently earned double-digit returns for his investors. Naimi told Moladina that he had never lost money for his investors, but he did not have a perfect track record of always making a profit for investors. Naimi also said Moladina would receive all of the gains from his investment. In fact, Naimi did not intend to provide Moladina any gains from his investments, and he did not intend to return Moladina's funds. Naimi made these representations to obtain Moladina's money for Naimi's personal use or to repay other investors in connections with other properties.

On November 20, 2006, Moladina signed a private placement memorandum agreeing to invest \$50,000 in the project. Naimi signed the document on behalf of the LLC, and received the funds from Moladina. The memorandum

does not contain an attorney fees provision. On December 8, 2006, Naimi wrote a check in the amount of \$150,000 from the LLC's account to himself.

Naimi made similar statements to Moladina over the next year to induce him to continue investing money. The statements were false and Naimi knew they were false when he made them. Moladina invested an additional \$25,000 in the LLC, and signed another private placement memorandum on May 9, 2007. The May 9, 2007 document does not contain an attorney fees provision.

After Moladina invested in the LLC, he participated in LLC meetings. The LLC provided him with financial information and reports regarding the property, and a K-1 form for tax purposes. Naimi took out a \$3.3 million bridge loan from Far East National Bank on May 8, 2007. On the promissory note, Naimi stated that he was the sole member and manager authorized for the LLC.

The operating agreement for the LLC dated November 10, 2008, states that any action to enforce the operating agreement or to resolve disputes among the LLC and/or the members "shall or may be settled" by arbitration by a single arbitrator. The agreement provides: "The parties shall share equally all initial costs of arbitration. The prevailing party shall be entitled to reimbursement of attorney fees, costs and expenses incurred in connection with the arbitration." The operating agreement also states that Naimi is the sole member and manager of the LLC.

From 2008 to 2010, Naimi wrote additional checks on the LLC's account made out to himself in amounts from \$1,000 to \$30,000. Naimi's actions left the LLC insolvent. In 2011, Moladina conducted an audit of the LLC. The property was foreclosed on in 2011.

PROCEDURAL BACKGROUND

Moladina, acting in propria persona, filed a complaint against Naimi on July 19, 2011, for several causes of action, including breach of contract, breach of implied covenant of good faith and fair dealing, fraud in the inducement, fraud, breach of fiduciary duty, and unjust enrichment.

The trial court granted a motion by Naimi, who also appeared in propria persona, to deem certain requests for admission admitted. In addition to relevant facts incorporated above, the following facts were admitted: the LLC offered options to Moladina between 2007 and 2011 to purchase a condominium unit located on the real property and liquidate his investment, which he declined. Moladina filed a chapter 7 bankruptcy petition for the LLC in 2011 that was in violation of the LLC's operating agreement and not authorized by the LLC, in order to disrupt the LLC's settlement negotiations with the mortgage lender which would have resulted in a \$50,000 payment to the LLC. Moladina, or his son acting on his behalf, filed false statements with the bankruptcy court that were signed under penalty of perjury.

Moladina and Naimi each substituted counsel during discovery. A bench trial was held on January 21 and 29, and February 4 and 6, 2014. No court reporter was present for the proceedings. Naimi admitted at trial that he had total control over the LLC, and there was no point in honoring corporate formalities because he was the company. The trial court issued a tentative ruling in favor of Moladina on the causes of action for breach of contract, breach of implied covenant of good faith and fair dealing, fraud in the inducement, fraud, breach of fiduciary duty, and unjust enrichment. The court awarded damages of \$75,000, plus prejudgment interest of 10 percent, attorney fees, and costs as provided by law.

Naimi requested a statement of decision as to the factual and legal basis of 46 issues. The trial court ordered Moladina's counsel to file and serve a proposed statement of decision addressing the material issues and facts. Moladina filed a proposed statement of decision. Naimi objected. Moladina filed an amended statement of decision. Naimi filed objections, including objecting that the amended statement of decision provided no basis for an award of attorney fees, the LLC contract did not contain an attorney fees provision, and there was no statutory basis for an award of attorney fees.

The trial court issued its own statement of decision on December 17, 2014. The statement of decision listed details of checks totaling \$205,250 that Naimi wrote to himself from investor's money. Moladina had relied on Naimi's

representations about the LLC's equity and financial solvency to invest in the company. Naimi admitted that he wrote approximately \$150,000 in checks from the LLC to himself and his four wholly owned shell companies. He characterized them as repayment of a \$500,000 loan to the LLC, but had no loan documents to prove the loan to the LLC, which were required by the statute of frauds for loans on real property. There were no records of a corporate vote to approve the \$500,000 loan. The reimbursement was a preference given to him in an act of self-dealing and conflict of interest to the detriment of the other five investor members. It constituted a breach of fiduciary duty, considering Naimi was the sole managing member of the LLC.

The trial court found sufficient evidence to show Naimi's lack of intent to keep a promise to Moladina. Naimi owed Moladina and the LLC a fiduciary duty, but breached those duties. As to the cause of action for breach of contract, the court found Moladina and Naimi entered into valid, binding, and enforceable contracts dated November 20, 2006, and May 9, 2007, by which Moladina agreed to invest money with Naimi, and Naimi agreed to place the money in an investment pool to be used for real estate. Moladina performed all his material obligations, except those which he was excused or prevented from performing. Naimi materially breached the contract by refusing to refund Moladina's principal, plus any accrued earnings. As a direct

and foreseeable result, Moladina has been damaged in the principal amount.

On the cause of action for breach of the implied covenant of good faith and fair dealing, the trial court stated that the contract contains an implied covenant of good faith and fair dealing. Naimi materially breached the contract by refusing to refund the balance.

On the causes of action for fraud and fraud in the inducement, the court stated that Moladina agreed to invest his money with Naimi. Naimi falsely told Moladina that he used investor funds for construction, he consistently earned double digit returns for investors, he had never lost money for his investors, and Moladina would receive all gains from his investment. Naimi made similar statements to Moladina over the next year to induce him to continue investing his money with Naimi. The statements were false and Naimi knew they were false when he made them. Naimi did not use the funds for their stated purpose, did not consistently earn double-digit returns for his investors, and did not have a perfect track record of always making a profit for investors. In fact, Naimi did not intend to provide Moladina any gains from his investments, and he did not intend to return Moladina's funds. Rather, Naimi made these false representations to obtain Moladina's money for Naimi's personal use or to repay other investors in connection with other properties.

When Moladina demanded the return of his entire investment, Naimi refused. Moladina justifiably relied on

Naimi's misrepresentations when he entered into the contract with Naimi. He believed the representations to be true. Had he known the representations were false, he would not have invested his money with Naimi. As a direct and foreseeable result, Moladina has been damaged.

On the cause of action for breach of fiduciary duty, the court found Naimi managed an investment pool on behalf of the investors. He held a position of confidence and trust. He owed a fiduciary duty, which he breached, proximately causing damages to Moladina.

As to the cause of action for unjust enrichment, Naimi unjustly enriched himself by acquiring \$75,000 from Moladina by wrongful means and without providing Moladina the agreed-upon consideration. Naimi unjustly retained the whole amount without providing any benefit to Moladina. He should not be permitted to retain this benefit from his wrongful actions.

Based on the trial court's findings, the court intended to enter judgment on the relevant causes of action in the amount of \$75,000, with prejudgment interest at a rate of 10 percent, attorney fees and costs as provided by law. The statement of decision did not provide a specific basis for the award of attorney fees. The court issued a proposed judgment. Naimi filed objections and amended objections to the proposed judgment, including his objection that no basis was provided for the award of attorney fees, the LLC contract did not contain an attorney fees provision, and no statute authorized attorney fees.

On January 13, 2015, the trial court entered judgment in favor of Moladina on the causes of action for breach of contract, breach of the covenant of good faith and fair dealing, fraud, fraud in the inducement, breach of fiduciary duty, and unjust enrichment. The court awarded damages to Moladina as against Naimi in the amount of \$75,000, with prejudgment interest of 10 percent, plus attorney fees and costs. Naimi filed a timely notice of appeal on January 29, 2015.

On February 9, 2015, Naimi filed a motion to permit him to prepare a settled statement in place of a reporter's transcript on appeal, because no court reporter was present during trial. A hearing was held and the motion was denied. Naimi filed a motion for reconsideration. A hearing was held and the trial court ordered Moladina's counsel to file a declaration in opposition to the motion for reconsideration. Moladina's counsel complied and declared that it was not possible to write a settled statement that would suffice as a record in place of Naimi's failure to obtain an adequate record during or after trial. Moladina's counsel did not have an adequate record or notes of the trial from which to form a sufficient settled statement for appeal. Moladina's counsel would be placed at a disadvantage if forced to collaborate with Naimi's counsel, because he would not be able to oppose any assertions of Naimi's counsel with specific facts. The request for a settled statement was a last ditch effort to save a case with multiple instances of negligence. Moladina's counsel asked the trial court to deny the motion for

reconsideration because he did not have any notes from trial to draft a settled statement, and to be forced to draft one with Naimi's counsel would present a prejudicial burden on Moladina.

After a hearing, the trial court granted the motion for reconsideration and ordered Naimi to file a proposed a settled statement within 30 days. The court noted that Moladina's counsel had no ability to remember the details of the trial and no notes to assist him in creating an accurate settled statement. The court found it was a significant burden to require Moladina's counsel to settle a statement without notes or adequate memory, since the trial was a year earlier. The trial court also had no notes or substantial memory of the trial. The extent of the court's recollection was contained in the statement of decision, so it would be a significant burden to the court to attempt to create a settled statement without notes or memory. The court stated that it was highly likely that the court would have no choice except to adopt its own statement of decision as the final settled statement.

Naimi filed a proposed settled statement setting forth witnesses and testimony. The trial court rejected Naimi's proposed settled statement because it did not comport with the court's recollection of the trial proceedings. The trial court filed its own settled statement of the trial proceedings based on the statement of decision, which it adopted as the final ruling of the court on July 29, 2015. In connection with the causes of action for breach of contract and breach of the

implied covenant of good faith and fair dealing, it simply stated that the parties entered into a valid, binding, and enforceable contract dated November 20, 2006, and May 9, 2007. There is no other information in the settled statement pertinent to the award of attorney fees.

DISCUSSION

Effect of Statement of Decision and Settled Statement on Standard of Review

“A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.’ [Citations.]” (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.).)

A party may request that the trial court issue a statement of decision under Code of Civil Procedure section 632, explaining the basis for its decision on specified issues. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) “A statement of decision gives the trial court ‘an opportunity to place upon [the] record, in definite written form, its view of the facts and the law of the case, and *to make the case easily reviewable on appeal by exhibiting the exact grounds upon which judgment rests.*’ [Citation] ‘If a statement of decision is given, it provides us with the trial court’s reasoning on disputed issues and “is our touchstone to

determine whether or not the trial court's decision is supported by the facts and the law." [Citation.]' [Citation.]" (A.G. v. C.S. (2016) 246 Cal.App.4th 1269, 1282.)

"[I]f the trial court issues a statement of decision, a party claiming omissions or ambiguities in the factual findings must bring the omissions or ambiguities to the trial court's attention. [Citation.]" (*Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42, 59.) If a party brings omissions or ambiguities to the attention of the trial court under Code of Civil Procedure section 634, an appellate court will not imply findings favorable to the judgment. (*In re Marriage of Arceneaux, supra*, 51 Cal.3d at p. 1133.)

California law allows litigants to provide a settled statement on appeal as an alternative to a reporter's transcript under certain circumstances, including where the proceedings "were not reported or cannot be transcribed." (Cal. Rules of Court, rule 8.137(a)(2)(B);¹ *Randall v. Mousseau* (2016) 2 Cal.App.5th 929, 933 (*Randall*)). The appellant files a motion in the trial court to use a settled statement, as well as a "condensed narrative of the oral proceedings that the appellant believes necessary for the appeal." (Rule 8.137(b)(1).) The respondent may file proposed amendments to the settled statement. (Rule 8.137(b)(4).) At a noticed hearing, the judge "must settle the statement." (Rule 8.137(c)(2).)

¹ All further references to rules are to the California Rules of Court.

If the appellant fails to persuade the trial judge that the proposed settled statement accurately reflects the proceedings that took place, “the action of the trial judge, who heard and tried the case, must be regarded as final. [The trial judge’s] familiarity with the trial and knowledge of what took place there make him uniquely qualified to determine what the evidence was and whether it has been correctly stated.” (*Burns v. Brown* (1946) 27 Cal.2d 631, 636; accord, *Marks v. Superior Court* (2002) 27 Cal.4th 176, 196, quoting *Burns v. Brown*.)

“When the trial court denies a party’s motion for a settled statement, the rule requires appellant to ‘file a new notice designating the record on appeal under rule 8.121 within 10 days after the superior court clerk sends, or a party serves, the order of denial.’ (Rule 8.137(a)(3).) To preserve the issue of the denial for appeal, the appellant may seek writ review at the time of the denial, or raise the denial in the opening brief on appeal. (See *Western States Const. Co. [v. Municipal Ct.* (1951)] 38 Cal.2d 146; *Keller [v. Superior Court* (1950)] 100 Cal.App.2d 231.)” (*Randall, supra*, 2 Cal.App.5th at pp. 935–936.)

“In reviewing a judgment based upon a statement of decision following a bench trial, we review questions of law de novo. [Citation.] We apply a substantial evidence standard of review to the trial court’s findings of fact. [Citation.]” (*Thompson v. Asimos* (2016) 6 Cal.App.5th 970, 981 (*Thompson*).)

“Under the substantial evidence standard of review, our review begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the trial court’s factual determinations. [Citations.] Substantial evidence is evidence of ponderable legal significance, reasonable in nature, credible, and of solid value. [Citation.] The substantial evidence standard of review applies to both express and implied findings of fact made by the court in its statement of decision. [Citation.]” (*Ermoian v. Desert Hospital* (2007) 152 Cal.App.4th 475, 501.)

“A single witness’s testimony may constitute substantial evidence to support a finding. [Citation.] It is not our role as a reviewing court to reweigh the evidence or to assess witness credibility.” (*Thompson, supra*, 6 Cal.App.5th at p. 981.)

“Evidence to support the findings of fact and conclusions of law and the judgment must appear in the settled statement (*Kovacik v. Reed* [(1957)] 49 Cal.2d 166); we are bound to assume that enough appears in the settled statement to enable us to decide whether reversible error was committed; and we must make our ruling upon what is affirmatively shown by the record (*Estate of Pierce* [(1948)] 32 Cal.2d 265, 274; *Sloan v. Stearns* [(1955)] 137 Cal.App.2d 289, 293.)” (*People ex rel. Dept. Pub. Works v. Bond* (1964) 231 Cal.App.2d 435, 437.) “The settled statement cannot be impeached by charges contained in a brief.” (*People v. Keligian* (1960) 182 Cal.App.2d 771, 774.)

Liability for Fraud

Naimi makes several contentions on appeal concerning the trial court's finding of liability for fraud, but none have merit.

“““The elements of fraud, which give rise to the tort action for deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or ‘scienter’); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage.” (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638 (*Lazar*).)” (*Tenet Healthsystem Desert, Inc. v. Blue Cross of California* (2016) 245 Cal.App.4th 821, 837.)

“While generally *members* of a limited liability company are not personally liable for judgments, debts, obligations, or liabilities of the company ‘solely by reason of being a member’ (Corp. Code, § 17101, subd. (a)), they are subject to liability under the same circumstances and to the same extent as corporate shareholders under common law principles governing alter ego liability and are *personally* liable under the same circumstances and extent as corporate shareholders. ([Corp. Code,] § 17101, subd. (b); 9 Witkin, Summary of Cal. Law [(2004 supp.)] Partnership, § 140, pp. 328–329.) Also, the Act ‘do[es] not relieve a member from liability arising from (1) the member’s tortious conduct, or (2) the terms of a member’s written guarantee or contractual obligation.’ (9 Witkin, *supra*, Partnership, § 140, p. 329, citing [Corp. Code,] § 17101, subd. (c).)” (*People v.*

Pacific Landmark, LLC (2005) 129 Cal.App.4th 1203, 1212 (*Pacific Landmark*).)²

“[W]hereas managers of limited liability companies may not be held liable for the wrongful conduct of the companies *merely* because of the managers’ status, they may nonetheless be held accountable under Corporations Code section 17158, subdivision (a) for their personal participation in tortious or criminal conduct, even when performing their duties as manager.” (*Pacific Landmark, supra*, 129 Cal.App.4th at p. 1213.)

As explained in *Estate of Countryman v. Farmers Coop. Ass’n* (Iowa 2004) 679 N.W.2d 598, with regard to similar provisions for limited liability companies under Iowa law, “Agency law generally, and Iowa law in particular, has long recognized that if a person commits a tort while acting for another person, the tortfeasor is personally liable for the tort, even if the person for whom he is acting is also vicariously liable for the same wrong. In other words, a person’s status as an agent confers no immunity with respect to the person’s own tort liability. Thus, if a member of a limited liability company injures another person while

² The LLC was formed under the provisions of the Beverly-Killea Limited Liability Company Act (former Corp. Code, § 17000 et seq.), which the Legislature repealed and replaced with the California Revised Uniform Limited Liability Company Act (Corp. Code, § 17701.01 et seq.), operative January 1, 2014, but which continues to be applicable to any right which accrued before January 1, 2014.

working in the course of the firm's business, the member is personally liable for that harm along with the company, just as the member would be if he worked for a firm organized as a corporation, a partnership, or any other business form.' [Citation.]" (*Id.* at pp. 603–604.)

The trial court found Naimi falsely represented that he had invested \$500,000 of his own money to purchase the real property, had begun construction on the property, consistently earned double-digit returns, and never lost money for his investors. Naimi contends the court's findings that he made these representations to induce Moladina to invest in the LLC are not supported by substantial evidence, but Naimi relies on evidence and assertions of fact which are not contained in the statement of decision or the settled statement. He did not object to the trial court's settled statement in the lower court or on appeal. Statements in the briefs about evidence outside the record cannot impeach the settled statement. He also asks this court to reweigh evidence presented at trial, which is not our province on appeal. The trial court's finding of fraud is supported by substantial evidence contained in the settled statement.

Naimi also contends a finding of fraud was precluded by Moladina's admission that he had an opportunity to review investment materials and consult with financial and legal advisors before investing money in the LLC. This is incorrect. Moladina relied on Naimi's statements about his equity in the project and the progress that had been made. Naimi has not shown that Moladina or any advisor should

have known that Naimi's statements were false. None of Moladina's deemed admissions precluded finding liability for fraud.

Naimi is personally liable for his fraudulent representations, even though he was acting on behalf of the LLC. The trial court's ruling in favor of Moladina on the fraud cause of action fully supported the award of damages, with the exception of the award of attorney fees as discussed further below. We need not address whether damages were additionally supported by substantial evidence of alter ego and the other causes of action.

Attorney Fees

Naimi contends there is no basis for an award of attorney fees in this case. We agree.

Attorney fees are generally not recoverable as costs unless they are authorized by statute or agreement. (*Carver v. Chevron U.S.A., Inc.* (2002) 97 Cal.App.4th 132, 143–144 (*Carver*).) We generally review an award of attorney fees for an abuse of discretion. (*Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1175.) However, we conduct a de novo review of the basis for an award of attorney fees on undisputed facts. (*Carver, supra*, 97 Cal.App.4th 132, 142.)

“‘The words of a contract are to be understood in their ordinary and popular sense.’ [Citations.]” (*Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2003) 109 Cal.App.4th 944, 955.)

Civil Code section 1638 states, “[t]he language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity.”

The trial court awarded attorney fees to Moladina, but did not state the basis for the attorney fee award in the statement of decision. Naimi objected to both the statement of decision and the judgment on the ground that there was no basis for an award of contractual or statutory attorney fees. Because Naimi requested a statement of decision and objected to the court’s failure to state the basis for the award of attorney fees, we do not imply any findings in favor of the judgment on this issue. The settled statement, which is our only record of the proceedings at trial, lacks any discussion pertinent to the attorney fee award. The contract that the trial court found to exist between Naimi and Moladina does not contain an attorney fee provision.

Moladina contends that article X of the LLC’s operating agreement provided a contractual basis for recovery of prevailing party attorney fees. It is true that the LLC’s operating agreement contains an attorney fee provision, but it is expressly limited to “reimbursement of attorney fees, costs and expenses incurred in connection with the arbitration.” The plain language of the provision applies to attorney fees incurred in connection with an arbitration, and there was no arbitration in this case. It cannot be said that the attorney fees incurred at the trial in this case were incurred in connection with arbitration, when there never

was an arbitration. The portion of the judgment awarding attorney fees must be reversed.

DISPOSITION

The judgment is modified to delete the award of attorney fees, and as modified, the judgment is affirmed. The parties are to bear their own costs on appeal.

KRIEGLER, Acting P.J.

We concur:

BAKER, J.

DUNNING, J.*

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