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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

SORAYA JAVAHERI-LEITER et al.,

Plaintiffs and Respondents,

v.

AZIZOLAH JAVAHERY,

Defendant and Appellant.

B270776

(Los Angeles County
Super. Ct. No. BC389609)

APPEAL from an order of the Superior Court of Los Angeles County, Mark A. Borenstein, Judge. Affirmed.

Michael Poole for Defendant and Appellant.

Simon Resnick Hayes and M. Jonathan Hayes for Plaintiffs and Respondents.

Defendant and appellant Azizolah Javahery (Javahery) appeals a postjudgment order that partially denied his motion to amend a 2012 judgment obtained by plaintiffs and respondents Soraya Javaheri-Leiter (Soraya) and Simin Javahery Khojastegan (Simin) (collectively, Plaintiffs).^{1 2}

For the reasons discussed below, we perceive no error in the trial court's ruling, which effected only a minor change to correct an obvious clerical error. The trial court properly denied Javahery's additional request that the judgment be amended to provide that punitive damages were awarded on the *entire* complaint rather than only on the third and fourth causes of action for fraud. The postjudgment order is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

*1. Facts giving rise to the controversy.*³

Soraya and Simin are Javahery's sisters. When their father died, Javahery, as the eldest son, became the dominant member of their conservative Iranian immigrant family. Javahery became a United States resident in 1975. His sisters

¹ The postjudgment order partially denying Javahery's motion to amend the judgment is appealable as an order after judgment. (Code Civ. Proc., § 904.1, subd. (a)(2); *In re Marriage of Kaufman* (1980) 101 Cal.App.3d 147, 149; *Bowden v Green* (1982) 128 Cal.App.3d 65, 68, fn. 1.)

² For clarity, we refer to the individual Plaintiffs by their first names. No disrespect is intended. (*In re Marriage of Olsen* (1994) 24 Cal.App.4th 1702, 1704, fn. 1.)

³ This summary is largely based on the 2012 statement of decision authored by Judge Hiroshige, who conducted a bench trial in this matter.

entrusted him with assets before they arrived in this country. Simin, who was a dentist in Iran, sent Javahery \$300,000 for safekeeping, and later entrusted him with additional funds. As for Soraya, she entrusted her brother with antiques, silver, and gold jewelry. Over the years, Javahery repeatedly represented to Plaintiffs that he would honor his agreement to hold and invest their funds and to give them their money upon request.

Javahery put his name on every bank account that held Plaintiffs' funds and he was in complete control of their financial affairs. In 2006, Simin learned that her account at Namco Capital Group, Inc. (Namco) was in her brother's name, precluding her from withdrawing her funds.

2. Proceedings.

In April 2008, Plaintiffs filed suit against Javahery for contractual fraud. He filed a cross-complaint against them for breach of contract and conversion.

a. Statement of decision.⁴

Following a bench trial before Judge Hiroshige, the court ruled that Plaintiffs had prevailed on *all* their causes of action, and that Javahery would take nothing on his cross-complaint. On Plaintiffs' claims, the trial court found as follow:

First cause of action: breach of contract. There was clear evidence of indebtedness, and Javahery failed to return Plaintiffs' funds.

Second cause of action: conversion. Javahery received funds from Plaintiffs under the guise and/or for the purposes of safekeeping and investment. Since 2006, he had wrongfully

⁴ We note the statement of decision was filed in June 2012, five months after entry of judgment.

asserted ownership of the funds and refused to return the funds to the rightful owners.

Third cause of action: fraud. Javahery falsely represented to his sisters that he would hold their money for safekeeping and investment and would return the money upon their demand.⁵

Fifth and seventh causes of action: accounting and constructive trust. An accounting was warranted to determine the amount of indebtedness. Because Javahery obtained the property and money in dispute by violating Plaintiffs' trust, he held the property as an involuntary trustee for Plaintiffs' benefit.

Sixth cause of action: breach of fiduciary duty. Javahery and Plaintiffs shared a relationship of trust and confidence, and Javahery knowingly acted against their interests by claiming ownership of money that they provided to him for safekeeping and investment.

Eighth cause of action: interference with contractual relations. Javahery opened an account in Simin's name at Namco, and later surreptitiously transferred the account to his own name, thereby disrupting the contract that Simin had with Namco.

Ninth cause of action: fraudulent transfer. Upon receiving notice of Plaintiffs' lawsuit, Javahery secretly formed Javanian, LLC to which he transferred his funds, with the fraudulent intent to hide the funds from his sisters. In addition, among other things, he fraudulently transferred his sisters' funds at Namco to his own account.

⁵ The statement of decision did not address the *fourth* cause of action.

Tenth cause of action: theft/conversion/embezzlement of Plaintiffs' inheritance. Javahery received an \$80,000 inheritance from the sale proceeds of his parents' house in Iran. He deposited the funds into a credit union account and did not disburse any of the funds to his sisters.

Damages. The trial court found that Soraya and Simin had suffered actual damages in the amounts of \$459,959 and \$571,570, respectively. In addition, Javahery had acted with fraud, malice, and oppression. Therefore, each of the Plaintiffs was awarded \$350,000 in punitive damages.

b. *Entry of judgment.*

The judgment, filed January 3, 2012, set forth the trial court's rulings with respect to the various causes of action. With respect to damages, the judgment awarded Plaintiffs as follows:

As to Soraya: \$346,123 (cash damages), plus \$113,836 (damages for antiques and silver), plus \$350,000 in punitive damages.

As to Simin: \$571,570 (cash damages), plus \$350,000 in punitive damages.

No appeal was filed.

c. *Javahery's motion to amend the judgment.*

On December 31, 2015, nearly four years after judgment was entered, Javahery filed the subject motion to amend the judgment on the ground that it contained clerical errors.

By way of background, the judgment stated in relevant part: "3. AS TO PLAINTIFFS[] . . . THIRD AND FOURTH CAUSES OF ACTION FOR FRAUD: [¶] The Court rules that Plaintiffs should prevail on their second cause of action for conversion. [¶] The Court rules that punitive damages are warranted."

Javahery's motion asserted: "[T]he language of the judgment under the heading for the third and fourth causes of action is for conversion which follows with a language [*sic*] that punitive damages are warranted. However, the third and fourth causes of action in the complaint and statement of decision *were* [for fraud,] *not for conversion* and there was no punitive damage award to any specific cause of action. According to the statement of decision, the award of punitive damages was not specific to one cause of action as indicated in the judgment for conversion; but rather to the entire complaint. There is nothing to support or even suggest nor does the Court have to show the punitive damages were awarded to [*sic*] conversion or fraud. This judgment entered on January 3, 2012 does not express the actual judicial intention."

Javahery requested that the judgment be modified to reflect that the court awarded punitive damages on the *entire* complaint rather than awarding punitive damages on any particular causes of action.

d. *Opposition to motion to amend judgment.*

In opposition, Plaintiffs argued, "What [Javahery] complains of is no error at all, and even if it is error, it is judicial error, which cannot be corrected. The Statement of [Decision] does *not* purport to award punitive damages on the entire Complaint, which is why the judgment correctly qualifies the basis for punitive damages. [Javahery], in effect, is asking this Court to insert an error into its judgment, likely in order to pursue a new round of appeals to delay satisfying the judgment against him."

e. *Javahery's reply.*

In his reply papers, Javahery reiterated that the third and fourth causes of action of the complaint were for fraud, not for conversion, but the language of the judgment beneath the heading for the third and fourth causes of action referred to Plaintiffs' second cause of action for conversion. Further, a bankruptcy court judge had "indicated that the judgment contained, essentially, cut and paste error in the language of the judgment. She further indicated that she believes that it is clear that the judgment is on for fraud [*sic*]. See page 2 line 25 and page 3 lines 1-5 in the transcripts of the proceeding attached to declaration of [Attorney] Michael Poole."⁶

f. *Trial court's ruling.*

On February 11, 2016, the matter came on for hearing before a different judge, Judge Borenstein. The trial court ruled as follows: "Motion is granted as to page 2, lines 10 and 10 ½ of the judgment, to strike out the words 'second cause of action for conversion' and to substitute the words 'third and fourth causes of action for fraud.' [¶] As to the balance of the motion, the motion is denied."

On April 14, 2016, the trial court entered an amended judgment in conformity with its minute order.

Javahery filed a timely notice of appeal from the February 11, 2016 order, which partially denied his motion to amend the judgment.

⁶ The Poole declaration and the attached exhibit, which were part of Javahery's reply papers below, were not included in the clerk's transcript.

CONTENTIONS

Javahery contends: the court has inherent and statutory authority to correct clerical errors in its judgment; neither the original judgment nor the amended judgment reflected the actual judicial intention; and the judgment should be amended for the purpose of making the record conform to the truth, and not for the purpose of revising and changing the judgment.

DISCUSSION

1. *Trial court's authority to correct clerical error in the judgment; distinction between clerical error and judicial error.*

It is “elementary that ‘[a] court can always correct a clerical [error], as distinguished from a judicial error which appears on the face of a decree by a *nunc pro tunc* order. [Citation.] It cannot, however, change an order which has become final even though made in error, if in fact the order made was that intended to be made.’ (*Estate of Eckstrom* (1960) 54 Cal.2d 540, 544.) In *Tokio Marine & Fire Ins. Corp. v. Western Pacific Roofing Corp.* (1999) 75 Cal.App.4th 110, 117, the court elaborated on this point: ‘The test which distinguishes clerical error from possible judicial error is simply whether the challenged portion of the judgment was entered inadvertently (which is clerical error) versus advertently (which might be judicial error, but is not clerical error). [Citation.] Unless the challenged portion of the judgment was entered inadvertently, it cannot be changed post judgment under the guise of correction of clerical error.’ ” (*Bell v. Farmers Ins. Exchange* (2006) 135 Cal.App.4th 1138, 1144 (*Bell*).)

2. *Trial court properly amended the judgment to correct a clerical error with respect to the ruling on the third and fourth causes of action.*

The trial court (Judge Hiroshige) found that “Plaintiffs should prevail on all their causes of action.” However, the original judgment contained a clerical error in its specification of the resolution of the third and fourth causes of action.

As indicated, the original judgment stated in relevant part: “3. AS TO PLAINTIFFS[] . . . THIRD AND FOURTH CAUSES OF ACTION FOR FRAUD: [¶] The Court rules that Plaintiffs should prevail on their *second cause of action for conversion*. [¶] The Court rules that punitive damages are warranted.” (Italics added.)

This paragraph contained an obvious internal inconsistency. The paragraph’s heading referred to the third and fourth causes of action for fraud, but the sentence beneath the heading referred to the second cause of action for conversion. Accordingly, the trial court (Judge Borenstein) properly amended this paragraph of the judgment to replace the words “second cause of action for conversion” with the words “third and fourth causes of action for fraud.”

3. *Trial court properly refused Javahery’s request that the judgment be amended to provide that punitive damages were awarded on the entire complaint rather than on the third and fourth cause of actions for fraud.*

By way of background, paragraph three of the original judgment, captioned “THIRD AND FOURTH CAUSES OF ACTION FOR FRAUD,” concludes with the following sentence: “The Court rules that punitive damages are warranted.”

Javahery requested that the judgment be amended to provide that punitive damages were awarded on the *entire* complaint because the punitive damages “award was not specific to conversion or third and fourth causes of action as incorrectly indicated in the judgment.”

As indicated, the test that distinguishes clerical error from possible judicial error is simply whether the challenged portion of the judgment was entered inadvertently (which is clerical error) or advertently (which might be judicial error, but is not clerical error). (*Bell, supra*, 135 Cal.App.4th at p. 1144.) Javahery has not shown that the phrase “punitive damages are warranted” was inadvertently inserted in paragraph three of the judgment, rather than elsewhere. Nor has Javahery demonstrated that Judge Hiroshige’s actual intention was to award punitive damages on the entire complaint, rather than on any particular causes of action.

Further, it is rudimentary that punitive damages may not be awarded for breach of contract. “[P]unitive or exemplary damages, which are designed to punish and deter statutorily defined types of wrongful conduct, are available only in actions ‘for breach of an obligation *not* arising from contract.’ (Civ. Code, § 3294, subd. (a), italics added.)” (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 516.) Plaintiffs’ complaint included, inter alia, a cause of action for breach of contract. If the judgment were amended to provide for punitive damages on the entire complaint, including the contractual claim, the judgment would become patently erroneous. We do not presume that Judge Hiroshige intended to render an incorrect judgment that would have indiscriminately awarded damages on the entire complaint.

Accordingly, Judge Borenstein properly declined Javahery's request, in the guise of correction of clerical error, that the judgment be amended to award damages on the entire complaint.⁷

⁷ Javahery's opening brief asserts that if the judgment awarded punitive damages on the entire complaint, the judgment would be *void on its face* and could be set aside on motion without any time limitation. It thus appears that Javahery's purpose in moving to amend the judgment to provide for punitive damages on the *entire* complaint is to lay the groundwork for a challenge to the validity of the judgment, if the judgment were amended in that fashion.

DISPOSITION

The February 11, 2016 order partially denying Javahery's motion to amend the judgment is affirmed. Respondents shall recover their costs on appeal.

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EDMON, P. J.

We concur:

LAVIN, J.

JOHNSON (MICHAEL), J.*

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