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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 THREE

ROBERT KHODAGULYAN, Cross-complainant and Respondent, v. SAEID STEVE AMINPOUR et al., Cross-defendants and Appellants.	B270330 Los Angeles County Super. Ct. No. BC492587

APPEALS from a judgment and postjudgment order of the Superior Court of Los Angeles County, Mark V. Mooney, Judge. Affirmed in part, reversed in part.

The Mettias Law Firm and Jimmy Philip Mettias for Cross-defendants and Appellants.

Moskovitz Appellate Team, Myron Moskovitz and Paul J. Katz for Cross-complainant and Respondent.

INTRODUCTION

The underlying action began in September 2012 when Shagen Galstanyan and others sued respondent Robert Khodagulyan, appellants Saeid "Steve" Aminpour and Gadi "Kevin" Emein, Freydoon "Freddy" Esmaili (Esmaili), and related entities concerning the alleged fraudulent transfer of a car wash appellants had owned and sold to Esmaili. In April 2013, respondent Khodagulyan filed a cross-complaint against appellants Aminpour and Emein, as well as Esmaili, FAFB, Inc. (FAFB), and Glendale Colorado Investment, Inc. (collectively, cross-defendants) to recover $480,000 Khodagulyan had loaned to appellants. Esmaili and FAFB had assumed that loan, secured by a deed of trust on the car wash they bought from appellants.

The underlying action settled, but Khodagulyan's cross-complaint proceeded to a jury trial. The jury returned a verdict in favor of Khodagulyan on his breach of contract and fraud claims, but awarded damages on the contract claim only. The court also awarded Khodagulyan attorney fees, finding cross-defendants jointly and severally liable for them. Aminpour and Emein appealed. We find substantial evidence supports the jury's verdict and thus affirm the judgment. Because Aminpour and Emein were not parties to the contract containing the attorney fees provision, we reverse the award of attorney fees against them.

FACTS AND PROCEDURAL BACKGROUND[1]

1. *The $480,000 loan*

Appellants Saeid "Steve" Aminpour[2] and Gadi "Kevin" Emein have been in business together for over 20 years. They co-owned several car washes and a pizzeria. In 1996, respondent Robert Khodagulyan began working for appellants in their car wash business. The three were friends and Khodagulyan trusted appellants.

In 2006, appellants formed Glendale Colorado Investment, Inc., which they owned equally, to buy the Glendale Car Wash. They obtained a $6.4 million loan from Woori Bank to finance the $8.4 million purchase. Khodagulyan ran the Glendale Car Wash for appellants from 2006 to 2008. He was unaware of the $6.4 million mortgage on the car wash.

In 2008, Khodagulyan loaned appellants $480,000—his family's life savings—on a "handshake" to buy two car washes, Topanga Car Wash and Ventura West Car Wash. Appellants had agreed to pay him a better interest rate—about 5 percent—than he would have received from a bank. Khodagulyan did not have a written contract with appellants and he did not ask them to

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[1] We state the facts in the light most favorable to the judgment and only include those facts relevant to this appeal.

[2] The complaint and cross-complaint captions identify Aminpour as "Saied 'Steve' Aminpour." Khodagulyan amended his cross-complaint to correct Aminpour's name, as "Saeid Aminpour, also known as Saied Aminpour, also known as Saeid 'Steve' Aminpour, also known as Saied 'Steve[']] Aminpour." We have elected "Saeid" for the spelling of Aminpour's first name based on the amendment and an agreement at issue that also uses that spelling.

secure the loan because they "were friends." Khodagulyan has an Iranian high school education; he describes his English as "not so perfect." Appellants stipulated that they borrowed $480,000 from Khodagulyan.

2. *The sale of the Glendale Car Wash*

At some point, appellants leased the Glendale Car Wash[3] to Esmaili through a corporation he formed, F&H Pit Stop, with an option to buy it. Esmaili operated the car wash through F&H Pit Stop and was responsible for operation costs, including the Woori Bank loan payments. In July 2010, appellants sold the Glendale Car Wash to Esmaili and his company FAFB.[4] At the time, appellants were behind in their property taxes and mortgage payments. Instead of paying appellants cash for the car wash, FAFB assumed the $6.4 million Woori Bank mortgage. It also assumed a $250,000 loan with another entity and paid off two $50,000 loans. When it assumed the Woori Bank mortgage, FAFB had only $2,000 in capital.

Emein testified appellants sold the Glendale Car Wash for $7.2 million—the assumed loans for the underlying real property and an additional $700,000 for the business. The closing statement from the sale, however, lists a $6.45 million purchase price for the car wash and property. Esmaili broke down the sales price in a fax cover sheet emailed to the escrow officer as follows: $3.1 million for the land, $400,000 for improvements,

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[3] The car wash was located on two abutting parcels of land. The sale included this property as well as the car wash itself.

[4] The trial court found FAFB was the alter ego of Esmaili and his brother Hamid Esmaili. We therefore at times refer to FAFB's obligations as Esmaili's and Esmaili/FAFB's.

and $5,000 for equipment, with the remaining $2.945 million relating to the business, including $2 million for good will and $945,000 for a covenant not to compete.[5] The additional $700,000 was not listed.

3. *The agreements to transfer Khodagulyan's loan to Esmaili/FAFB*

Sometime in 2010, Khodagulyan asked appellants to repay his $480,000 loan. At first, appellants suggested Khodagulyan could treat the $480,000 as a down payment to purchase the Glendale Car Wash from them. At some point, Khodagulyan agreed to this arrangement, but then learned Esmaili already had bought the car wash. Appellants told Khodagulyan that Esmaili would be " 'tak[ing] over the payment' " appellants owed Khodagulyan. Khodagulyan told appellants he wanted them to pay him, not Esmaili, but appellants assured him the arrangement was temporary. Esmaili began making interest payments directly to Khodagulyan on the $480,000 loan.

Appellants then suggested Esmaili become responsible for making the loan payments to Khodagulyan because Esmaili owed them $700,000 from the car wash purchase. Appellants told Khodagulyan that they could put the agreement in writing, and Khodagulyan could use the Glendale Car Wash as security for the debt. Khodagulyan wanted his lien to be on the Ventura West Car Wash that appellants owned, but they told him that if

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[5] The fax cover sheet listing the breakdown was dated 2009, but a reasonable juror could conclude the document was misdated, given it was part of the escrow file for the 2010 transaction and the escrow agent had no knowledge of a 2009 escrow for the transaction.

the loan " '[did] not work [out],' " he then could put his lien on the Ventura car wash, or they would pay him.

Appellants told Khodagulyan that Esmaili would be able to pay him back "in a month or two" after Esmaili finished refinancing the mortgage on the car wash, which was "almost done." Appellants repeatedly told Khodagulyan that Esmaili was "good for the money" and owned other assets. On four or five occasions, appellants also promised Khodagulyan that they would pay him if Esmaili did not.

Shortly after Khodagulyan agreed to accept the Glendale Car Wash as security for Esmaili's repayment of his loan, the parties met at an escrow office on March 25, 2011. Khodagulyan was presented with three documents for the first time: a loan assumption agreement (Agreement), dated March 25, 2011, prepared by Emein; a promissory note, dated January 1, 2011, prepared by the escrow officer, Steven Hong; and a deed of trust, dated January 1, 2011, also prepared by Hong.

During that meeting, Khodagulyan wanted to call an attorney, but was told not to hire a lawyer because it would "cost a lot of money." Khodagulyan did not call an attorney because he trusted Emein.[6]

Khodagulyan signed the Agreement at the meeting without doing any independent investigation into the value of the car wash because appellants' "word [was] more valuable than a contract." No one explained the documents to him at the escrow company where he signed them. Khodagulyan did not understand he was releasing appellants from liability when he

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[6] Aminpour was not at the March 25, 2011 meeting. He signed the Agreement later.

signed the Agreement. He believed appellants "still owed [him] the money" and believed appellants when they told him they would pay him if Esmaili did not. Khodagulyan agreed to sign the Agreement because he believed what appellants had told him.

The Agreement states:

> "1. Freydoon Esmaili and FAFB INCORPORATED owe the sum of $700,000 to Gadi Emein and Saeid Aminpour.
>
> "2. Gadi Emein and Saeid Aminpour owe the sum of $480,000 to Robert Khodagulyan[.]
>
> "3. Freydoon Esmaili/FAFB Inc. shall pay directly to Robert Khodagulyan the sum of $480,000 and remaining balance of $220,000 shall be paid to Gadi Emein and Saeid Aminpour.
>
> "4. In lieu of the above, Robert Khodagulyan agree[s] and accepts that Gadi Emein and Saeid Aminpour do[ ] not owe any monies to Robert Khodagulyan."

The parties signed the Agreement on March 25, 2011.[7] Esmaili signed on behalf of himself and as president of FAFB.

The promissory note, secured by a deed of trust, provides for interest-only installment payments on the principal of $480,000, with any unpaid principal balance due on

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[7] It is unclear when Aminpour signed the Agreement. Reference to his prior testimony (apparently part of the missing transcript, see fn. 10, *post*) indicates he "went later on to the escrow [office] and signed it."

April 1, 2013 (Note). Khodagulyan is the named beneficiary and the Note is signed by Esmaili as president of FAFB. The deed of trust on the Glendale Car Wash property lists FAFB as the trustee and Khodagulyan as the beneficiary. Esmaili signed the deed of trust as president of FAFB on March 25, 2011.

At the time Khodagulyan signed the Agreement, appellants had not told him that his security interest in the car wash would be in fourth position or that the property was in tax default and behind in its mortgage payments. They also did not tell him that they and Esmaili had been parties to lawsuits resulting in $1.9 million and $700,000 judgments against Esmaili and a $110,000 judgment against appellants.

4. *The resulting lawsuit*

FAFB stopped paying interest on the Woori Bank mortgage after March 2011 and was served with a notice of default in August 2011 and a notice of trustee sale in November 2011. FAFB/Esmaili made about five interest payments of $2,000 each to Khodagulyan on the Note and then stopped. None of the cross-defendants has repaid Khodagulyan the $480,000 appellants borrowed.

In September 2012, creditors of cross-defendants sued cross-defendants and Khodagulyan for fraudulent transfer of the Glendale Car Wash in the underlying action.[8] The plaintiffs apparently believed Khodagulyan's deed of trust on the car wash also was created to defraud plaintiffs. In April 2013, respondent Khodagulyan filed his cross-complaint against cross-defendants, alleging causes of action for fraud, money had and received, and

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[8] Plaintiffs settled and dismissed the complaint with prejudice.

money lent against all cross-defendants, and a cause of action for judicial foreclosure against Esmaili. After the close of evidence and at the trial court's suggestion, Khodagulyan amended his complaint to conform to proof to add a cause of action for breach of contract against all cross-defendants, without objection from appellants, and dismissed without prejudice the common counts for money lent and money had and received.

A jury heard Khodagulyan's cross-complaint over four days of trial testimony. By special verdict, the jury found appellants, Esmaili, and FAFB liable for breach of contract and that Khodagulyan had sustained $605,000 in damages. As to the fraud cause of action, the jury found cross-defendants knowingly made false representations to Khodagulyan and intended Khodagulyan to rely on the representations, and Khodagulyan reasonably relied on the false representations to his detriment. The jury awarded "$0" for Khodagulyan's past and future economic and noneconomic losses. The jury also awarded punitive damages against each cross-defendant, $75,000 each against Aminpour and Emein, and $25,000 each against Esmaili and FAFB. The trial court entered judgment on August 24, 2015.

The trial court denied cross-defendants' motion for a new trial, but on its own motion granted judgment notwithstanding the verdict on the punitive damages award. The trial court also granted Khodagulyan's motion for attorney fees, and awarded $178,255 in attorney fees jointly and severally against appellants, Esmaili, and FAFB.

Appellants timely filed notices of appeal.

DISCUSSION

1. *Appellants' contentions*

Appellants contend substantial evidence does not support the existence of any contract that the jury could find appellants breached because appellants were not parties to the Note and the Agreement released them from liability. They also contend substantial evidence does not support the trial court's finding that Khodagulyan was entitled to attorney fees because appellants were not parties to the Note, the only agreement with an attorney fees provision. Finally, appellants contend the jury could not find appellants committed fraud because the jury awarded no damages to Khodagulyan on his fraud cause of action. We find substantial evidence supports the jury's verdict and affirm the judgment. We find the Note's attorney fees provision could not be applied to appellants, however, and reverse the order granting attorney fees against appellants only.

2. *Standard of review*

We review a challenge to the sufficiency of the evidence under the familiar substantial evidence standard of review. (*Lenk v. Total-Western, Inc.* (2001) 89 Cal.App.4th 959, 968.) Under that standard, " ' " 'the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted,' to support the findings below. [Citation.] We must therefore view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor." ' " (*Ibid.*) "We do not reweigh evidence or reassess the credibility of witnesses. [Citation.] We are 'not a second trier of fact.' " (*Pope v. Babick* (2014) 229 Cal.App.4th 1238, 1246 (*Pope*).) Thus, "[w]e do not review the evidence to see

if there is substantial evidence to support the losing party's version of events, but only to see if substantial evidence exists to support the verdict in favor of the prevailing party." (*Id.* at p. 1245.) Substantial evidence is "evidence which is reasonable, credible, and of solid value." (*Rivard v. Board of Pension Commissioners* (1985) 164 Cal.App.3d 405, 414.)

Finally, " 'the testimony of a witness offered in support of a judgment may not be rejected on appeal unless it is physically impossible or inherently improbable and such inherent improbability plainly appears. [Citation.] Similarly, the testimony of a witness in derogation of the judgment may not be credited on appeal simply because it contradicts the plaintiff's evidence, regardless how "overwhelming" it is claimed to be. [Citation.]' " (*Fuentes v. AutoZone, Inc.* (2011) 200 Cal.App.4th 1221, 1233.)

3. *Substantial evidence supports the jury's finding that appellants breached their contractual obligations to Khodagulyan*

Appellants correctly note the jury verdict does not identify what particular contract each cross-defendant breached. Rather, the special verdict form asked: "Did Robert Khodagulyan enter into a contract for Gadi 'Kevin' Emein, or Saeid Aminpour, also known as Saeid 'Steve' Aminpour, or Freydoon 'Freddy' Esmaili, or FAFB, Incorporated to pay $480,000.00." (Block capitals omitted.) After asking additional questions concerning the elements for a breach of contract, the special verdict asks, "Which one of the Defendants breached the contract?" and then lists each cross-defendant. The jury placed a check mark next to each cross-defendant and found Khodagulyan's damages were $605,000.

Appellants assert the trial court made clear in its findings that the breached contract was the Note. The court's judgment after trial by jury states each cross-defendant owes Khodagulyan "$605,000.00 principal and interest on a promissory note made January 1, 2011." The court's ruling on Khodagulyan's motion for attorney fees states, "The court further finds that as the jury found that this agreement [referring to the Note] was breached by [each cross-defendant], each cross-defendant shall be jointly and severally liable for the attorney fees awarded."

Appellants contend that because they are not signatories to the Note and the Agreement did not modify, supplement, or nullify the Note under section 3117 of the Commercial Code, they cannot be "vicariously incorporate[d]" as parties to the Note. Appellants' argument is without merit. No one has asserted the Agreement is a "defense to the obligation" in the Note under Commercial Code section 3117.

Appellants are correct that the only signatory to the Note is Esmaili, as president of FAFB. But, appellants ignore testimony demonstrating they orally agreed to pay the Note if FAFB did not. Khodagulyan credibly testified appellants told him several times that they would pay back the $480,000 if Esmaili did not. Khodagulyan testified that one reason he agreed to sign the Assignment was appellants' promise to pay him. Khodagulyan further testified that he did not understand that he was releasing appellants. Rather, he understood that they all—Esmaili/FAFB and appellants—owed him the $480,000 he had loaned appellants. Appellants' brief does not mention this evidence. Appellants were required to " 'set forth, discuss, and analyze *all* the evidence on [the challenged] point, *both favorable and unfavorable*.' "

(*Pope, supra*, 229 Cal.App.4th at p. 1246.) By failing to do so, the purported error may be deemed waived. (*Ibid.*)

In any event, Khodagulyan's testimony constitutes substantial evidence of appellants' agreement to guarantee the $480,000 note if Esmaili/FAFB did not pay Khodagulyan as agreed.[9] (*Duchrow v. Forrest* (2013) 215 Cal.App.4th 1359, 1376

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[9] Although appellants did not raise the issues in their opening brief, Khodagulyan argues appellants' oral agreement to guarantee payment of the Note is not barred by the parol evidence rule or statute of frauds. Appellants have forfeited these issues by not raising them in their brief, and by failing to object to the evidence at the time of trial on parol evidence or statute of frauds grounds. (*Phillips v. Campbell* (2016) 2 Cal.App.5th 844, 853 [" 'Points not raised in the trial court will not be considered on appeal.' "]; see also *Howard v. Adams* (1940) 16 Cal.2d 253, 257 [finding appellant waived right to assert affirmative defense of statute of frauds on appeal where she failed to pursue the defense in the trial court and did not object to introduction of parol evidence].)

In any event, evidence of appellants' oral agreement was not barred by the parol evidence rule or by the statute of frauds. The trial court reasonably could conclude the Assignment was not fully integrated, and, as Khodagulyan argues, appellants' oral promise to repay Khodagulyan if Esmaili/FAFB failed to pay the Note does not conflict with the Agreement's release of appellants from primary liability to pay the debt. (*Esbensen v. Userware Internat., Inc.* (1992) 11 Cal.App.4th 631, 637 [evidence of "oral understandings" admissible to prove additional contract terms "not inconsistent with the express language of the writing"].) The oral promise also falls under Civil Code section 2794, subdivision (1), which does not require a writing for "[a] promise to answer for the obligation of another . . . [¶] [w]here the promise is made . . . by one who has received a discharge from an obligation in

["testimony of a single witness may constitute substantial evidence"].) Although Emein denied telling Khodagulyan he and Aminpour would pay the $480,000 if Esmaili did not, the jury was free to believe Khodagulyan over Emein. On the record before us,[10] we cannot say Khodagulyan's testimony was "inherently improbable." Thus, appellants' promise to pay the $480,000 is consistent with the trial court's judgment that cross-defendants, including appellants, owe Khodagulyan "$605,000.00

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whole or in part, in consideration of such promise." Here, testimony demonstrated Khodagulyan discharged appellants from primary liability for the loan based in part on their oral promise to guarantee the debt.

[10] As Khodagulyan has called to our attention, although appellants designated it, the reporter's transcript is missing one day of trial testimony, March 26, 2015. Khodagulyan's counsel concluded his direct examination of Emein at the end of the proceedings on March 25. We reasonably can infer appellants' counsel then questioned Emein the next day on March 26, as the reporter's transcript otherwise contains no questioning of Emein by his counsel. We also reasonably can infer that Aminpour testified on March 26 based on counsel's reference on March 27 to Aminpour's testimony. Also, Aminpour's testimony is not part of the other transcripts. Without the missing transcript, we cannot tell what else Emein or what Aminpour may have said on this subject. We must assume their missing testimony supports the judgment. (*Bennett v. McCall* (1993) 19 Cal.App.4th 122, 127 ["The appellant must affirmatively demonstrate error by an adequate record. In the absence of a contrary showing in the record, all presumptions in favor of the trial court's action will be made by the appellate court."].) Even if Aminpour also denied making the oral guaranty, however, we would resolve that conflict in Khodagulyan's favor.

principal and interest on a promissory note made January 1, 2011," contrary to appellants' argument, as appellants' promise to pay related to the amount in the Note. (See *Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956 [judgment will be affirmed on appeal if correct on any theory, "regardless of the trial court's reasoning"].)

Accordingly, we conclude appellants have not met their burden on appeal to demonstrate a lack of substantial evidence supporting the jury's verdict that appellants breached a contract to pay Khodagulyan $480,000.

4. *The Note's attorney fees provision cannot be enforced against appellants*

The trial court found Khodagulyan was the prevailing party on his cross-complaint and that he had incurred attorney fees to collect on the Note. The court concluded, "as the jury found that [the Note] was breached by [each cross-defendant], each cross-defendant shall be jointly and severally liable for the attorney fees awarded." Appellants contend the trial court erred in finding the attorney fees provision in the Note applied to them on the sole ground that they were not parties to it. In response, Khodagulyan argues appellants' promise to guarantee the Note supports the trial court's conclusion they were bound by all terms in the Note, including the attorney fees provision.

We review "a determination of the legal basis for an award of attorney fees de novo as a question of law." (*Sessions Payroll Management, Inc. v. Noble Construction Co.* (2000) 84 Cal.App.4th 671, 677 (*Sessions*).) Attorney fees generally are not recoverable as costs unless authorized by statute or contract. (Code Civ. Proc., § 1021; *Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 127 (*Reynolds*).) Section 1717 of the Civil Code

provides in part: "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs." (Civ. Code, § 1717, subd. (a).)

The attorney fees provision in the Note states: "Should suit be commenced to collect this note or any portion thereof, such sum as the Court may deem reasonable shall be added hereto as attorney's fees." Thus, the provision is not limited specifically to the parties to the Note. (Compare *Sessions, supra*, 84 Cal.App.4th at p. 681 [provision providing for recovery of attorney fees " '[i]n the event it becomes necessary for *either party* to enforce the . . . Agreement' " reflected intent to limit scope of attorney fees clause to signatories].) Nevertheless, we conclude the attorney fees provision does not apply to appellants.

In *Niederer v. Ferreira* (1987) 189 Cal.App.3d 1485, 1492 (*Niederer*), relied on by Khodagulyan, plaintiff obtained judgment against defendant for amounts due on a promissory note based on the guaranty he signed; the guaranty was included within the promissory note. The Court of Appeal upheld an award of attorney fees to plaintiff based on an attorney fees provision found in the note. (*Id.* at p. 1506.) Although the guaranty itself did not include an attorney fees provision, because the guaranty essentially provided defendant would "make payment on the note in accordance with its terms in the event of default," the court concluded that defendant also had agreed to pay attorney fees as provided in the note. (*Ibid.*) The court reasoned that while a

"guarantor's obligation rests on the contract guaranty, not the note itself . . . the guaranty and the note 'must be construed to be but one instrument, constituting a single contract, upon which the liability of the guarantor, to the extent of its obligation, [is] commensurate with that of the maker of the note.' " (*Id.* at p. 1505.) The court construed the guaranty and note together to conclude the parties intended the "the guarantor to be bound by the express terms of the note and his liability be commensurate with that of the maker." (*Id.* at p. 1506.)

The difference here, of course, is that the oral guaranty does not have any express terms from which we can infer the parties intended appellants to be bound by the express terms of the Note, including the attorney fees provision. (*Niederer, supra*, 189 Cal.App.3d at p. 1505 [" 'where one guarantees payment of a note according to its terms, and the note provides for attorneys' fees, the judgment, in an action on the note and guaranty, may include attorneys' fees' "].) Although substantial evidence supports a finding that appellants breached their oral agreement to guarantee payment of the Note, substantial evidence does not support a finding that appellants agreed to pay the amount due under the Note according to the terms of the Note, as the defendant in *Niederer* did. The guaranty in *Niederer* stated defendant would pay " 'each and every installment of the within note, when due, waiving any defenses that the maker could not maintain as maker.' " (*Id.* at p. 1499.) The court concluded this language "in essence" provided defendant would " 'perform' the underlying contract," i.e., the terms of the note. (*Id.* at p. 1506.)

No evidence of such an agreement exists here. The record demonstrates appellants agreed to pay Khodagulyan if Esmaili/FAFB did not. Nothing in the record could lead to the

conclusion that appellants agreed to pay Khodagulyan according to the terms of the Note, including the attorney fees provision.[11] Indeed, Khodagulyan's original loan of the $480,000 to appellants was based on an oral agreement, and no attorney fees provision was part of that agreement.

Respondent also argues appellants were third party beneficiaries to the Note, and thus subject to the attorney fees provision. Appellants' reliance on *Cargill, Inc. v. Souza* (2011) 201 Cal.App.4th 962 (*Cargill*), however, is misplaced. There, the Court of Appeal concluded a nonsignatory plaintiff, an unsecured creditor, was a third party beneficiary to secured creditors' written agreement with the debtor to accept transfer of the debtor's property and pay the debtor's outstanding obligations. (*Id.* at pp. 967, 969-970.) Because the attorney fees clause in that agreement was not limited to litigation between signatories, the plaintiff would have been entitled to recover attorney fees against defendants, the secured creditors, if he had prevailed in his complaint against them. (*Id.* at p. 970.) As a result, defendants were entitled to reasonable attorney fees incurred in defending the plaintiff's action even though he was not a signatory to the contract. (*Ibid.*)

Although appellants benefitted from Esmaili/FAFB's assumption of Khodagulyan's $480,000 loan in the Agreement, the Note itself contains no expression of intent to benefit appellants. The agreement in *Cargill* expressed an intent to

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[11] We decline to presume that the missing day of testimony from the reporter's transcript somehow contains admissions by appellants that they agreed to be bound by the attorney fees provision in the Note.

benefit other creditors of the debtor, such as the plaintiff, by obligating defendants there to pay the debtor's outstanding obligations. Here, however, appellants could not sue to enforce the terms of the Note. They may have been able to sue Esmaili/FAFB under the Agreement to enforce its terms, but nothing indicates appellants are "member[s] of the class for whose benefit [the Note] was made," enabling appellants to enforce the Note as a third party beneficiary. (*Cargill, supra*, 201 Cal.App.4th at p. 967; see also *Sessions, supra*, 84 Cal.App.4th at p. 680 ["party not named in the contract may qualify as a beneficiary under it where the contracting parties must have intended to benefit the unnamed party *and the agreement reflects that intent*" (italics added)].)

Nor is *Reynolds, supra,* 25 Cal.3d 124, also relied on by Khodagulyan, applicable to the facts here. In *Reynolds*, plaintiff, the beneficiary of promissory notes, sued nonsignatory shareholders and directors of bankrupt corporations, claiming defendants were the *alter egos* of the signatory corporations and personally liable for the corporations' debts under the notes. (*Id.* at p. 127.) The trial court rejected plaintiff's alter ego theory and awarded defendants attorney fees under the attorney fees clause in the notes. Our Supreme Court concluded the nonsignatory defendants could recover their attorney fees under Civil Code section 1717, because had plaintiff prevailed on her alter ego theory, they would have been liable under the notes, and thus liable for attorney fees. (*Reynolds*, at p. 129.) No such similar claim exists here where appellants could be deemed *parties* to the Note, as with plaintiff's alter ego theory in *Reynolds*. Khodagulyan's breach of contract claim against appellants is founded on their agreement to guarantee payment

of the Note. As we have said, substantial evidence does not support a finding that the guaranty encompassed all of the terms in the Note.

5. *The judgment does not impose liability on appellants for fraud*

Appellants ask this court to order the trial court to grant a judgment notwithstanding the verdict and find appellants did not commit the tort of intentional misrepresentation. Appellants argue the jury's award of "$0" damages to Khodagulyan on his fraud cause of action precludes a finding that appellants committed fraud because damages are an element of the tort. True, damages are an element of fraud. No liability will attach if damages caused by a misrepresentation would have occurred in the absence of the fraud or if due to a cause unrelated to the fraud. (*Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039, 1064.)

Here, however, the jury found each element of fraud satisfied by special verdict; and that each cross-defendant made the misrepresentations. The jury specifically found Khodagulyan's reasonable reliance on cross-defendants' misrepresentations was "a substantial factor in causing harm" to him. When asked, however, "What are ROBERT KHODAGULYAN'S damages?" the jury wrote in "$0" next to the spaces for past and present economic and noneconomic damages. The jury could have decided to award Khodagulyan zero dollars in damages for any number of reasons. It could have determined Khodagulyan failed to quantify his damages with sufficient specificity to make an award, for example. We need not speculate on the jury's reasoning, however. The judgment imposes no

liability on cross-defendants on the fraud cause of action.[12] Thus, there is no error in the judgment to correct.

And, although a heading in appellants' brief asserts substantial evidence did not exist to find appellants committed intentional misrepresentation, the body of appellants' brief argues only that judgment notwithstanding the verdict must be granted on the fraud cause of action because the jury did not award actual damages for it. Appellants bear the burden to "affirmatively demonstrate error." (*Bennett v. McCall, supra,* 19 Cal.App.4th at p. 127.) As appellants have failed to cite to the record to support their contention that substantial evidence does not support the jury's findings, we presume the jury's findings are correct. (See *Bernard v. Hartford Fire Ins. Co.* (1991) 226 Cal.App.3d 1203, 1205 [party has duty to support its arguments "by appropriate reference to the record" to identify which facts support their position].)

In any event, substantial evidence exists to support the jury's findings in its verdict. A reasonable juror could conclude appellants falsely promised to guarantee the Note, falsely represented Esmaili's/FAFB's financial solvency, and concealed material facts from Khodagulyan concerning the value of the car wash with the intent to induce him into signing the Agreement. The record also demonstrates Khodagulyan relied on those misrepresentations to his detriment.

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[12] The trial court denied cross-defendants' motion for a new trial, finding no inconsistency in the verdict. On its own motion, however, the court granted judgment notwithstanding the verdict striking the punitive damages awarded against each cross-defendant.

The jury reasonably could conclude Khodagulyan was harmed by releasing appellants from their primary liability to repay him the $480,000 and would not have done so if appellants had not made those false representations to him. A jury also could conclude that if Khodagulyan had not been fraudulently induced to enter into the Agreement by appellants' misrepresentations, he would not have been named as a defendant in the underlying action as having an alleged fraudulent deed of trust on the car wash.

DISPOSITION

The judgment is affirmed. The order awarding Khodagulyan attorney fees is reversed to the extent it makes Aminpour and Emein liable for those fees.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EGERTON, J.

We concur:

EDMON, P. J.

DHANIDINA, J.