Filed 12/11/18 DePaz v. VPMG 1772 Preuss, LLC

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

GILDA DEPAZ, Plaintiff and Respondent, v. VPMG 1772 PREUSS, LLC, Defendant and Appellant.	B284318 (Los Angeles County Super. Ct. No. BC587438)

APPEAL from a judgment of the Superior Court of Los Angeles County, Margaret L. Oldendorf, Judge. Affirmed.

Cohen & Burge, Darren G. Burge; Hayes, Scott, Bonino, Ellingson, Guslani, Simonson & Clause, Mark G. Bonino and Elizabeth J. Moul for Defendant and Appellant.

Liddy Law Firm, Donald G. Liddy; Shoop and Thomas S. Alch for Plaintiff and Respondent.

Gilda DePaz (DePaz) sued Vivian Aryeh (Aryeh) and VPMG 1772 Preuss, LLC (VPMG) (collectively, defendants) for injuries that she sustained while working at a property that Aryeh rented from VPMG.

Before trial, the parties entered into an agreement that narrowed the scope of their dispute. Aryeh and VPMG "jointly" admitted to "liability for [DePaz's] accident" and to "causation as to [DePaz's] injuries." The defendants stipulated further that, while they did not dispute liability or causation, they reserved their right to contest DePaz's claim for damages. Shortly thereafter, DePaz settled her claims against Aryeh for $300,000.

At trial, DePaz waived her claim for economic damages, limiting her claim against VPMG to noneconomic damages only. The jury awarded DePaz a total of $1.5 million in noneconomic damages. Following the verdict, VPMG argued that it was entitled to a $300,000 offset from the verdict due to DePaz's settlement with Aryeh. The trial court, relying on Proposition 51 (Civ. Code, § 1431 et seq.[1]), rejected VPMG's argument.

On appeal, VPMG argues that the trial court erred because Proposition 51 applies only to cases involving comparative fault, and the parties' stipulation on liability and causation purportedly removed the issue of comparative fault from consideration and rendered both defendants jointly and severally liable for the judgment. We disagree and, accordingly, affirm the judgment.

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[1] All further statutory references are to the Civil Code unless otherwise indicated.

BACKGROUND

I. The Accident

On February 10, 2015, DePaz reported for work at the property Aryeh was renting from VPMG. Before that date, DePaz had never been to that particular property. At the time, DePaz was 66 years old and had worked for Aryeh and/or her mother, Vickie Aryeh (who was the VPMG's managing principal) for 35 years. While at the property, DePaz fell 15 feet through a hole in a closet floor to a concrete basement. As a result of this "high energy fall," DePaz fractured her right shoulder, right elbow, and left wrist. DePaz's injuries required "multiple surgeries," which resulted in "months of disability and recuperation where she couldn't care for herself."

II. The Lawsuit

In July 2015, six months after her fall, DePaz filed suit against defendants, alleging two causes of action: premises liability and negligence. VPMG answered the complaint by denying the allegations and asserting various affirmative defenses, including comparative fault. With regard to its comparative fault defense, VPMG stated as follows: VPMG "will seek from the court appropriate instructions . . . apportioning the negligence or fault, if any, attributable to any other . . . persons, named or un-named, for any damages or loss, if any, suffered by [DePaz] herein."

III. Pretrial Stipulations and Settlement

In January 2017, six weeks before trial was scheduled to begin, the parties entered into a stipulation fixing DePaz's "past

medical costs and/or expenses" at $28,807.53. The stipulation, however, did not preclude the introduction of evidence at trial regarding DePaz's future medical expenses.

In March 2017, the parties entered into a second stipulation, which provided as follows: "[Defendants] . . . Aryeh and VPMG . . . jointly admit liability for [DePaz's] accident and admit causation as to [DePaz's] injuries, including a fractured right shoulder, fractured right elbow, and fractured left wrist, and admit past treatment for said injuries was reasonable and necessary. [Defendants] dispute [DePaz's] claim for future healthcare, and reserve the right to argue fair and reasonable damages for past and future general damages and/or pain and suffering."

Later that same month, DePaz settled her claims against Aryeh for $300,000.[2]

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[2] The settlement agreement is not part of the record. In her declaration supporting Aryeh's application for a determination that the settlement with DePaz was made in good faith, Aryeh's attorney stated that the settlement amount in toto reflected Aryeh's "proportionate share of potential relative liability." However, neither the good faith application nor the supporting declaration indicated what portions of the settlement amount were attributable, respectively, to DePaz's economic and noneconomic damages. Under Proposition 51, "that portion of the settlement attributable to noneconomic damages is not subject to setoff." (*Espinoza v. Machonga* (1992) 9 Cal.App.4th 268, 276.)

Where a settlement agreement does not contain an allocation between economic and noneconomic damages, a posttrial allocation for purposes of Proposition 51 offset may be made in several ways. For example, to preserve joint and several liability for economic damages, a trial court may offset against the settlement fund an amount in proportion to the ratio of

IV. The Trial

On April 12, 2017, counsel for the parties gave their opening statements to the jury. In his opening statement, VPMG's attorney stated that "the defense accepts 100 percent responsibility for . . . DePaz's accident and the injuries she suffered to her right shoulder, her left wrist and her right elbow. The defense in this case is 100 percent at fault."

A. *DePaz's Witnesses*

Consistent with VPMG's declaration of 100 percent responsibility, DePaz did not call any witnesses to testify about either defendant's alleged negligence. Instead, the only witnesses DePaz called were those who could testify about her alleged damages: family members; friends and neighbors; her pastor; her orthopedic surgeon; and one of the firefighters/paramedics who treated her at the scene of the accident.

Although DePaz took the stand during her case-in-chief, she did not offer any testimony about either defendant's responsibility or fault for the accident; in fact, she offered very little testimony about the fall itself, focusing instead on the effects of the accident on her health and life. In addition, DePaz did not testify or call any witnesses to testify about the relationship between the defendants.[3]

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economic versus noneconomic damages found by the jury. (See *Espinoza v. Machonga*, *supra*, 9 Cal.App.4th at pp. 276-277; see also *Hellam v. Crane Co.* (2015) 239 Cal.App.4th 851, 862-865.)

[3] Although DePaz played for the jury excerpts from the videotaped depositions of Aryeh and VPMG's managing principal,

B. *VPMG's Witness*

VPMG did not call any witnesses to support its comparative fault defense. It did not, for example, call Aryeh or a corporate representative familiar with the property. Similarly, VPMG did not call any witnesses who could testify about the relationship between the defendants. In fact, VPMG called only one witness, a medical expert who testified about DePaz's medical treatment and her alleged need for additional treatment in the future.

C. *Jury Instructions Verdict Form and Verdict*

On April 13, 2017, the parties and the trial court finalized the jury instructions, which were then read to the jury. The instructions did not include any instructions regarding the apportionment of responsibility or fault, such as CACI No. 406.[4]

On April 14, 2017, the parties and the trial court finalized the special verdict form. The form contained only one question with two-subparts: "What are Plaintiff Ms. De Paz's damages? [¶] a. Past Harm and Loss . . . . [¶] b. Future Harm and Loss . . . ." The parties, in other words, did not ask the jury to allocate fault among multiple defendants. On that same day,

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Vickie Aryeh, those excerpts did not address the defendants' relationship.

[4] CACI No. 406 is "designed to assist the jury in completing CACI No. VF-402, *Negligence—Fault of Plaintiff and Others at Issue*, which must be given in a multiple-tortfeasor case to determine comparative fault. VF-402 is designed to compare the conduct of all defendants, the conduct of the plaintiff, and the conduct of any nonparty tortfeasors." (Use Note to CACI No. 406 (2018) p. 233.)

after deliberating for less than three hours, the jury returned a verdict awarding DePaz a total of $1.5 million ($1.25 million for past harm and loss [11-1 vote] plus $250,000 for future harm and loss [9-3 vote]).

V. VPMG's Posttrial Motions

On April 20, 2017, VPMG filed an objection to the proposed judgment, arguing that "[b]ased on the stipulation of joint liability and joint causation, defendant VPMG is entitled to an offset equal to the entire amount of the settlement between . . . DePaz and co-defendant Aryeh." (Underscoring omitted.)

On May 8, 2017, the trial court overruled VPMG's objection, finding as follows: (a) the apportionment of fault "was never raised by VPMG before or during the trial of the action; and the jury instructions and verdict form never contained any facts or information that contemplated any consideration of liability by any [d]efendant other than VPMG"; and (b) the verdict was limited to noneconomic damages only, and, under Proposition 51, " 'liability of each defendant for non-economic damages shall be several only and shall not be joint.' " That same day, the trial court entered judgment in favor of DePaz.

VPMG revisited the lack of an offset in the judgment in a variety of subsequent posttrial proceedings. For example, on May 15, 2017, VPMG moved the court to determine that the DePaz-Aryeh settlement was not in good faith because it did not provide for an offset. Similarly, on May 24, 2017, VPMG moved

to vacate the judgment because it failed to provide an offset for the DePaz-Aryeh settlement.[5]

On June 30, 2017, pursuant to Code of Civil Procedure section 877 et seq., the trial court found that the DePaz-Aryeh settlement was made in good faith. In light of its good faith determination, the trial court denied VPMG's motions to vacate the judgment and to find that the settlement was not made in good faith.[6] VPMG timely appealed.

DISCUSSION

The "sole" issue raised on appeal is whether VPMG was "entitled" to an offset for the $300,000 paid in settlement by Aryeh. VPMG argues that it was entitled to an offset in the full amount of the DePaz-Aryeh settlement because Proposition 51 does not apply where, as here, the parties agreed that defendants' "liability and causation are joint." In effect, VPMG argues that the trial court erred by allowing DePaz to reap a double recovery.

I. Standard of Review

In general, "a ruling granting or denying a [Code of Civil Procedure] section 877 settlement credit" to a nonsettling defendant is reviewed for an abuse of discretion. (*Wade v.*

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[5] In addition, in its motion for a new trial, VPMG argued, inter alia, that the judgment was "erroneous" and "inconsistent with the facts" because it "failed to provide for a setoff equal to the amount of the settlement between [p]laintiff DePaz and [c]o-[d]efendant Aryeh."

[6] On that same day, the trial court also denied VPMG's motion for a new trial.

Schrader (2008) 168 Cal.App.4th 1039, 1044.) "To the extent that we must decide whether the trial court's ruling was consistent with statutory requirements, we apply the independent standard of review." (*Ibid*.)

II. No Abuse of Discretion

VPMG argues that by agreeing to "jointly admit liability," the parties agreed to forego the several liability for noneconomic damages set forth in section 1431.2. As a result, section 1431 applied. Under section 1431, "[a]n obligation imposed upon several persons, or a right created in favor of several persons, is presumed to be joint, and not several, except as provided in Section 1431.2 . . . ." Accordingly, VPMG argues that it was entitled to offset Aryeh's $300,000 settlement against the amount the jury awarded to DePaz for noneconomic damages to prevent a double recovery.

A. *VPMG Misreads the Stipulation*

The underlying premise of VPMG's appeal is based on a misreading of the March 2017 stipulation. VPMG maintains that in that stipulation the defendants admitted that they were jointly liable for DePaz's injuries. But that is not what the stipulation says. The stipulation provides only that the defendants "jointly admit liability." It does not say that defendants "admitted joint liability." Put a little differently, the defendants did not admit in their stipulation that they jointly shared liability in equal degree; they merely admitted that they were each liable in some unspecified degree. Thus, contrary to VPMG's assertion that the stipulation "rendered comparative fault inapplicable," the stipulation—by its wording and by its silence—preserved the

issue of comparative fault for determination at trial. However, as discussed below, VPMG failed to address the issue of comparative fault at trial.

B. *Settlement Credits and Proposition 51*

In 1986, the voters enacted Proposition 51, the Fair Responsibility Act of 1986, which abolished joint and several liability for noneconomic damages in personal injury cases.[7] Proposition 51, which amended section 1431 and added sections 1431.1 through 1431.5, "retains the joint liability of all tortfeasors, regardless of their respective shares of fault, with respect to all objectively provable expenses and monetary losses. On the other hand, the more intangible and subjective categories of damage were limited by [section 1431.2[8]] to a rule of strict

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[7] "Non-economic" damages are such "subjective, non-monetary losses [as] pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation." (§ 1431.2, subd. (b)(2).) In contrast, "economic" damages encompass all "objectively verifiable monetary losses including medical expenses, loss of earnings, burial costs, loss of use of property, costs of repair or replacement, costs of obtaining substitute domestic services, loss of employment and loss of business or employment opportunities." (*Id.*, subd. (b)(1).)

[8] Section 1431.2, subdivision (a) provides as follows: "In any action for personal injury, . . . based upon principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate

proportionate liability." (*DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 600.) In other words, with respect to economic damages, codefendants are jointly and severally liable, but, with respect to noneconomic damages, liability is several but not joint: "each defendant is liable for only that portion of the plaintiff's noneconomic damages which is commensurate with that defendant's degree of fault for the injury." (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1198, fn. omitted.)

A personal injury defendant seeking a Proposition 51 offset must not only plead comparative fault as an affirmative defense, but he or she also must prove the comparative fault of others, and request that an allocation be made. (See Evid. Code, § 500 ["a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting"]; *Wilson v. Ritto* (2003) 105 Cal.App.4th 361, 366-369 [apportionment of noneconomic damages requires evidence of fault for both named parties and nonparties]; *Kitzig v. Nordquist* (2000) 81 Cal.App.4th 1384, 1398 ["A defendant seeking a [§ 1431.2] offset for noneconomic damages attributable to another person's fault must propose a special verdict requesting this allocation"]; *Conrad v. Ball Corp.* (1994) 24 Cal.App.4th 439, 444-445 [nonsettling personal injury defendant waived any right to offset by failing to propose special verdict differentiating between economic and noneconomic portions of the judgment].)

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judgment shall be rendered against that defendant for that amount."

C. *VPMG Was Not Entitled to an Off-set*

VPMG was not entitled to an offset for two related reasons. First, the verdict was not for economic damages. At trial, DePaz expressly and explicitly waived her claim for economic damages against VPMG, limiting her claim to noneconomic damages. As a result, the jury did not decide an issue upon which joint and several liability could be found. As noted earlier, VPMG's efforts to construe the stipulation to avoid several liability for DePaz's noneconomic damages under Proposition 51 reflects a misreading of that stipulation.

Second, although VPMG pleaded comparative fault in its answer to DePaz's complaint, at trial it did not prove—or even attempt to prove—that Aryeh was also at fault for DePaz's injuries. VPMG did not call Aryeh or any other witness who could testify as to Aryeh's responsibility for the accident and DePaz's injuries. In fact, VPMG called only one witness and his testimony was limited to DePaz's medical treatment and prognosis. VPMG's failure in this regard was magnified by DePaz's witnesses, none of whom testified about Aryeh and her alleged role in the accident.

Moreover, VPMG's failure to present any comparative fault evidence appears not to have been an oversight. Throughout the course of the litigation,[9] VPMG had any number of opportunities

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[9] Due to a number of questions that arose as a result of the relatively limited record submitted by the parties, we requested and reviewed the entire file from the superior court. In addition, we invited the parties to submit supplemental briefing addressing both factual and legal questions. Both parties submitted letter briefs and VPMG submitted a selection of documents from the superior court file.

to litigate its comparative fault defense, but, at each step, it chose not to do so. For example, when VPMG answered DePaz's complaint, it could have filed a cross-complaint against Aryeh for equitable indemnification, but it did not do so. In fact, prior to trial, VPMG actually took steps that would have made it practically impossible for it to establish its comparative fault defense. In its motion in limine No. 9 and in its joint trial brief with Aryeh, VPMG urged the trial court to exclude any "[e]vidence related to the *manner* in which the accident occurred, including *photographs* of the scene, *testimony* related to site conditions and dangers posed thereby, accident witness testimony, evidence of changes to the basement access area, effectiveness of the locking system on the door, failure to provide warnings, graphic depictions of the site of the incident, *expert testimony regarding building code violations* and other construction issues . . . ." [10]

After Aryeh reached a settlement with DePaz in March 2017, VPMG faced a choice: it could either put on an "empty chair" defense and ask the jury to apportion defendants' liability for the accident or it could accept complete responsibility for the accident. VPMG opted for the latter course. In its opening statement, VPMG expressly told the jury that no one else was to blame, that it was "*100 percent* at fault." (Italics added.)

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[10] Ultimately, the trial court denied VPMG's request. As a result, if VPMG had changed its mind and wanted to put on evidence showing that Aryeh was the more culpable party, it could have done so. As discussed above, it choose not to do so, limiting its defense to a challenge to the amount of DePaz's noneconomic damages.

VPMG's decision not to point the finger at its codefendant can be seen in how it approached the issue of jury instructions. In February 2017, approximately *a month before* the Aryeh settlement, VPMG elected not to include any proposed instructions, such as CACI No. 406, on comparative fault. Following the settlement, VPMG had the opportunity to submit new proposed instructions, but, once again, it elected not to include any instructions on comparative fault. Similarly, both before and after the settlement, VPMG endorsed special verdict forms that did not ask the jury to allocate fault between itself and any other party or nonparty.

As explained by the court in *Wilson v. Ritto*, *supra*, 105 Cal.App.4th at p. 369, "A defendant bears the burden of proving affirmative defenses and indemnity cross-claims. Apportionment of noneconomic damages is a form of equitable indemnity in which a defendant may reduce his or her damages by establishing others are also at fault for the plaintiff's injuries. Placing the burden on [the] defendant to prove fault as to [other] tortfeasors is not unjustified or unduly onerous." Here, VPMG is not entitled to an offset, because it did not meet its burden—that is, it did not take the steps necessary to qualify for an offset: it neither put on evidence of someone else's comparative fault nor requested that the jury allocate fault between itself and anyone else. Under such circumstances, the trial court did not abuse its discretion in denying VPMG's request for an offset.

D. *VPMG's Arguments About the Inapplicability of Proposition 51*

VPMG attempts to escape from the consequences of its actions by offering an array of arguments about the purported

inapplicability of Proposition 51 due, among other things, to the following: the doctrine of strict products liability; the existence of a joint venture; and the doctrine of respondeat superior.

1. Strict Products Liability

VPMG argues that Proposition 51 does not apply to strict products liability cases. However, on the record before us, this is not a case where the strict products liability doctrine applies.

California's strict products liability doctrine "provides generally that manufacturers, retailers, and others in the marketing chain of a product are strictly liable in tort for personal injuries caused by a defective product." (*Peterson v. Superior Court* (1995) 10 Cal.4th 1185, 1188.) However, strict liability is not imposed on parties that are "not a part of the manufacturing or marketing enterprise of the allegedly defective product that caused the injury in question." (*Ibid.*) Accordingly, as our Supreme Court made clear in *Peterson*, landlords are not strictly liable for defects in their premises that they neither created nor marketed. (*Id.* at pp. 1188-1189, 1204-1206 [landlord (hotel) not subject to strict liability for injuries to tenant (hotel guest)]; *Muro v. Superior Court* (1986) 184 Cal.App.3d 1089, 1098 [landlord not subject to strict liability for injury to employee who fell from allegedly defective stairs].)

Here, there is nothing in the record before us that would put VPMG outside the scope of this general rule regarding landlords. For example, VPMG did not introduce any evidence at trial that it created or marketed the opening in the closet that provided access to the basement. (See *Peterson v. Superior Court*, *supra*, 10 Cal.4th at pp. 1199, 1202, 1209.) As a result, we are unpersuaded by VPMG's argument.

2. Joint Venture

VPMG also argues that Proposition 51 does not apply to joint ventures and the "joint admission of liability by both [d]efendants . . . created a de jure joint venture such that both [d]efendants admitted responsibilities for the liabilities of the other [d]efendant." (Underscoring omitted.) We disagree.

First, as noted above, the language of the parties' stipulation does not state that VPMG and Aryeh accepted responsibility for each other's liabilities. Instead, the stipulation provided only that the defendants "jointly admit liability," not that they jointly shared liability or that they admitted joint liability. In other words, the stipulation is silent with respect to the nature of the relationship between the defendants and their respective shares of responsibility for DePaz's injuries.

Second, the stipulation's silence with regard to joint liability is magnified by the absence of any evidence at trial about the relationship between VPMG and Aryeh. Neither party presented any evidence demonstrating or even suggesting that VPMG and Aryeh were involved in either a de jure or a de facto joint venture. In fact, the jury was presented with almost no evidence about Aryeh and none about her relationship with VPMG's management.[11] For example, DePaz testified about a

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[11] Pretrial discovery revealed that the managing principal of VPMG, Vickie Aryeh, and Aryeh were not merely related, but mother and daughter. Discovery also revealed that the Aryehs were also the joint owners of a company that sells embellishments to the garment industry. However, neither VPMG nor DePaz presented evidence of this familial and business relationship to the jury. Moreover, VPMG made no mention of the Aryehs' relationship in its posttrial briefing to vacate the judgment. Instead, when VPMG raised its joint

"Vickie Aryeh," but said nothing about Vivian Aryeh, the defendant who rented the property where she was injured and who agreed to pay her the $300,000 settlement.

Finally, the cases upon which VPMG relies—*Axis Surplus Ins. Co. v. Reinoso* (2012) 208 Cal.App.4th 181 and *Myrick v. Mastagni* (2010) 185 Cal.App.4th 1082—instead of strengthening VPMG's argument only serve to illustrate its factual deficiencies. In *Axis Surplus*, the defendants were a husband and wife who owned and managed 15 rental properties in Palmdale and 64 other rental properties in Southern California; in addition, the wife admitted that she should be jointly and severally liable for any tort committed by her husband. (*Axis Surplus*, at pp. 184, 195.) Here, in contrast, there was no evidence that VPMG and Aryeh were involved in the management and/or ownership of the property where the accident occurred and no concession by either defendant that they should be jointly and severally liable for each other's torts.

In *Myrick v. Mastagni*, *supra*, 185 Cal.App.4th 1082, the defendants jointly owned and managed a commercial building, which they transferred to a living trust in which they were both trustees. (*Id.* at p. 1086.) After the husband died, the wife formed a limited liability company to manage the building. The

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venture argument below, it premised its argument solely on the parties' stipulation in which the defendants jointly admitted liability. On appeal, only DePaz mentioned that the Aryehs were mother and daughter. For its part, VPMG remained silent on the issue. In neither its opening brief nor in its reply brief did VPMG mention that the Aryehs were related and in business together. As it did below, VPMG based its joint venture argument on the parties' stipulation alone.

jury found that the wife "was acting as the agent for the living trust, the survivor's trust, the children's trust and the LLC in the operation and management of the [building]. The jury also found that [the wife], [the husband], the living trust, the survivor's trust, the children's trust and the LLC were involved in a joint venture for the ownership, management, operation or maintenance of the [building]." (*Id*. at pp. 1086, 1087.) In contrast, the parties in the instant case did not present to the jury any facts about the relationship between the defendants and did not ask the jury to determine if the defendants were involved in a joint venture.

3. Respondeat Superior

VPMG contends that the trial court erred because Proposition 51 does not apply to cases of vicarious liability where the doctrine of respondeat superior is at issue.

This argument is unavailing for the same reason that we found the strict product liability and joint venture arguments lacking—there are no facts to support it. As noted above, VPMG did not introduce any evidence about the relationship between VPMG and Aryeh, let alone establish that they were in an employer-employee relationship.

DISPOSITION

The judgment is affirmed. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

BENDIX, J.