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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

JOSEFINA POSADA,

Plaintiff and Respondent,

v.

STONE STEPS PROPERTIES,  
LLC, et al.,

Defendants and Appellants.

B271664, B277933

(Los Angeles County  
Super. Ct. No. BC543736)

APPEAL from judgment and order of the Superior  
Court of Los Angeles County, Stephanie M. Bowick, Judge.  
Affirmed as modified.

Law Offices of Stephen E. Abraham and Stephen E.  
Abraham, for Defendants and Appellants.

Dijulio Law Group, R. David Dijulio and Tifanny Krog,  
for Plaintiff and Respondent.

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A seller of residential property failed to disclose to the buyer that an unlicensed contractor performed renovations on the property. The buyer moved in and discovered several defects. After a bench trial, the trial court found the use of an unlicensed contractor was a material fact affecting the value or desirability of the property which should have been disclosed prior to completing the sale. The trial court awarded damages against the seller and its principal based on the cost to repair all defects on the property.

On appeal, the seller and principal contend there was no evidence that they knew about any of the defects, and there was no evidence that the failure to disclose the use of an unlicensed contractor caused buyer's damages. The principal contends he is not liable, because he was not a party to the purchase contract. Lastly, they contend the trial court failed to remain impartial at trial, resulting in a violation of due process of law.

We conclude there is substantial evidence to support the trial court's finding that the use of unlicensed contractors was a material fact that affected the value or desirability of the property, which defendants were required to disclose in this case. The measure of damages includes the cost to repair or replace the defective work performed by the unlicensed contractor, but does not extend to the repair or replacement of defects that were not caused by the unlicensed contractor. Seller's principal is personally liable for his own tortious conduct, including the nondisclosure of

material facts. Our review of the record does not reveal any due process violation. We modify the damages awarded in the judgment, and as modified, we affirm.

## **FACTS**

Defendant and appellant Michael Lucas is not a licensed contractor, but he purchased and remodeled a home in 2003 under the owner-builder exemption to the contractor licensing statutes and lived in it for four years. Luis Chacon, who is also not a licensed contractor, helped him remodel the home.<sup>1</sup> In December 2011 or January 2012, Lucas was living with his wife and two young children in San Diego, where his wife had gotten a job, when he formed defendant and appellant Stone Steps Properties, LLC. He capitalized it with \$250,000. Lucas is the managing and sole member of Stone Steps.

Wells Fargo Bank owned a home in Altadena built in 1925 that had an uninhabitable detached garage. Community Economic Development Corporation (CEDC) is a Nevada non-profit corporation that purchases homes from financial institutions in low and moderate income communities with investors to be rehabilitated and sold to

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<sup>1</sup> Chacon's first name is primarily spelled "Luis" in the reporter's transcript and respondent's brief, but it is spelled "Louis" in appellants' briefs and sometimes "Lewis" in the reporter's transcript.

individuals and families in the communities. CEDC agreed with Stone Steps on February 7, 2012, to purchase the Altadena property as tenants in common. Stone Steps contributed \$180,000 to purchase the property. Under the agreement, CEDC received \$5,000 upon closing, disbursed through escrow, and was not entitled to any further monetary consideration at any time. On March 9, 2012, a deed was recorded transferring the property from Wells Fargo to CEDC. On March 14, 2012, CEDC recorded a deed transferring an undivided one percent interest in the property to CEDC and an undivided 99 percent interest in the property to Stone Steps, as tenants in common.

A licensed architect prepared plans to renovate the property. Stone Steps submitted the plans to the Department of Public Works for the County of Los Angeles for approval. On July 17, 2012, Stone Steps applied for five permits: two building permits, an electrical permit, a plumbing permit, and a mechanical permit, which included the heating and air conditioning system. One of the building permits described work to extend the kitchen and bedroom, and to add a new bathroom. The other building permit was to build a new detached garage. The application listed Stone Steps as the contractor.

Each permit required a signed statement that the applicant was a licensed contractor or exempt from the licensing requirements. It noted that any violation subjected the permit applicant to a civil penalty of up to \$500. An owner-builder declaration stated, "I hereby affirm under

penalty of perjury that I am exempt from the Contractors' State License Law for the reason(s) indicated below by the checkmark(s) I have placed next to the applicable item(s)."

There was no check mark by the first paragraph stating that the owner or employees paid solely in wages, would do all the work, and the structure was not intended or offered for sale. There was no check mark by the second paragraph stating that the owner was exclusively contracting with licensed contractors. Lucas checked the third paragraph, which states, "I am exempt from licensure under the Contractor's State License Law for the following reason" with a blank to fill in. He did not fill in the blank. By signing the form, he acknowledged that under the third paragraph, an owner-builder could not legally sell a structure that was not constructed entirely by licensed contractors, except for a personal residence which the owner-builder had lived in for at least one year before completing the improvements covered by the permit. Lucas also signed a certification to comply with all city and county ordinances and state laws related to building construction.

A substantial list of renovations was completed. No licensed contractors were used to construct the improvements. Chacon performed the construction on the project. Lucas never lived at the property. He went to the property two to three days per week. A County inspector visited the property weekly. Lucas was present for the inspections. He had a permit card for the main house and a permit card for the garage which he maintained at the

property. The inspector inspected and signed the permit cards at various stages of construction, including the final stage. On November 29, 2012, certificates of occupancy were issued to Stone Steps for the house and the detached garage.

Plaintiff and appellant Josefina Posada first saw the house in late November or early December 2012. She visited a second time. Lucas was not present, but Chacon was on the property. Posada made an offer in December 2012. She chose to have the listing agent, Tracy Gulugian, represent both parties as a dual agent. She entered into a contract to purchase the property from Stone Steps for \$535,000.

Posada received a buyer's inspection advisory on December 12, 2012, which she glanced through. It stated that the seller was required to disclose known material facts that affected the value or desirability of the property, but that the seller might not be aware of some property defects or conditions, and the seller did not have an obligation to inspect the property for the buyer's benefit. The notice advised the buyer to conduct investigations of the entire property.

Gulugian gave Posada information for a home inspector. Posada hired James Vigil of National Home Inspections to conduct a home inspection. Vigil inspected the property on December 23, 2012, and prepared a report. He noted that the home was vacant. He made a visual inspection of the living room. He wrote that the gas line for the fireplace in the living room was capped. Vigil did not observe any issues with the windows or the drywall ceilings.

In the bathroom, Vigil noted the central heating and cooling appeared to be functioning and in serviceable condition. He noted the windows were double pane and found no issues with the windows in the kitchen area. He noted that the vent in the kitchen was present and functional.

The inspector tested the heating and air conditioning using the thermostat and recommended contacting a licensed service person for a more thorough inspection. Vigil noted that a new furnace heater unit was present and functional. He also noted that the compressor for the air conditioning system, air supply system, and registers appeared functional.

Vigil observed the roof of the garage from the roof on the main house. He noted the use of rolled roofing materials. He saw no major safety or function concerns. He observed all new construction on the garage. He noted clay roofing tiles and rolled roofing material were used on the roof of the house. He observed that the flashings on the roof were sealed with a covering of mastic, which is a roofing product used as a sealant, and he recommended resealing all through the roof vents and projections as part of routine maintenance. No safety or function concerns were noted as to the roof or the chimney. He noted that wire mesh had been installed as a spark arrestor, which was inadequate, and he recommended that a proper spark arrestor and rain cap be installed. He also concluded that the type of screws used for the electrical panel were a hazard and recommended replacement.

Lucas signed a real estate transfer disclosure statement pursuant to Civil Code section 1102.6 on behalf of seller Stone Steps on December 25, 2012. He stated that the seller was not occupying the property. He stated that the roof type was tile/composite, and the approximate age of the roof was new. Lucas marked certain items as being present on the property, including central heating and air conditioning and a detached garage. He did not fill in information about fireplaces. Lucas marked that the items were in operating condition to the best of the seller's knowledge. He indicated that he was not aware of any significant defects in any of listed areas, including roofs and windows. He marked that he was not aware of any alterations or repairs having been made without necessary permits or not in compliance with building codes. He marked that he was not aware of any flooding, drainage or grading problems. Posada received the transfer disclosure statement, but did not pay much attention it.

Lucas also signed a seller's property questionnaire on behalf of Stone Steps on December 25, 2012. The express purpose of the form was to tell the buyer about known material or significant items affecting the value or desirability of the property and eliminate misunderstandings about the condition of the property. Lucas marked that the seller was not aware of any material facts or defects affecting the property that were not otherwise disclosed to the buyer. He marked that the seller was aware of alterations, modifications, remodeling,



replacements or material repairs on the property, but not ongoing or recurring maintenance on the property. The seller was aware of the property being painted within the past 12 months. As further explanation of these answers, he wrote “Full Renovation (See permits).”

Lucas checked yes on the form to indicate that the seller was aware of defects, including past defects that had been repaired in the heating, air conditioning, electrical, plumbing, water, sewer, waste disposal, roof, gutters, chimney, fireplace, foundation, crawl space, attic, soil, grading, draining, retaining walls, interior or exterior doors, windows, walls, ceilings, floors or appliances. As further explanation, Lucas wrote that the garage was “red tagged” and had been replaced with a new garage. Lucas noted that CEDC was also on the title. He indicated that there were existing government requirements affecting the property. He wrote that there was an oak tree on the property and to see the oak tree ordinance. He marked that there were no past or present known material facts or other significant items affecting the value or desirability of the property that were not otherwise disclosed to the buyer.

Posada received the seller’s property questionnaire. No one gave her a copy of the permits, and she did not ask to see the permits. She did not ask the seller any questions about the renovation.

On December 29, 2012, Posada requested that the seller repair 14 items based on the inspection report. Gulugian helped Posada prepare the request. Posada

understood that she would not have a gas fireplace unless she had a fixture installed. Posada asked Stone Steps to tighten a kitchen faucet, adjust the garage door opener, replace screws on the electrical panel box, install a spark arrestor on the chimney, replace screens and a hose bib, grade the lot and remove dirt in certain locations, repair spots on the cabinets, secure a water pipe, and seal the metal flashings on the roof with new mastic around the flashings. Posada did not know what flashing was, but Gulugian had recommended resealing all the roof vents based on the report. Gulugian told her the air conditioning unit in the hallway in the home appeared new. Lucas testified later in his deposition that the interior air conditioning unit was actually refurbished.

Posada signed a verification of the property condition and buyer final inspection on January 2, 2013, without inspecting the property. She did not have time, and Gulugian said the items on the repair list had been fixed. Stone Steps and CEDC transferred the property to Posada by grant deed executed on January 2, 2013. Lucas signed the deed on behalf of Stone Steps and another individual signed the deed on behalf of CEDC.

Posada moved into the property in February 2013 with her boyfriend Efren Bugarin and her child. They noticed the heater was not sufficiently heating the house. They called the warranty company, who sent L&S Air-Conditioning and Heating for a \$60 service call. L&S claimed to have repaired the problem, but Posada had to call again five days later.

The company returned and tried a different repair, which did not work. Bugarin tried to use the fireplace to heat the home and smoke filled the house. A chimney repair company examined the chimney and provided her with an estimate for repairs of \$5,278.

Posada and Bugarin noticed a leak in the garage in February 2013. In March 2013, the garage leaked from two corners of the roof. Bugarin contacted Chacon, who came to the property with another worker. Each of the buildings on the property have flat roofs that slope in a “V” toward the center and water escapes through a drain. Chacon filled a trash bag with leaves from the garage roof and used roofing cement. He said the problem was taken care of, but water continued to leak into the garage.

Posada tried to use the air conditioning in August or September 2013, but found it was unable to cool the house. She made a service call for the air conditioning unit in September 2013.

In October 2013, there was a leak in the master bedroom. Buckets had to be placed under the leak to catch the water. Bugarin went on the roof and found a puddle of standing water in the middle of the roof. He swept it away with a broom and cleaned the gutters. Posada called Gulugian, who suggested making a claim with their insurance company. The insurance company rejected the claim pursuant to the terms of the policy. Bugarin asked Chacon if he knew the roof over the main house leaked and

Chacon said no. Chacon denied it had leaked and referred all further questions to Lucas.

Bugarin called Lucas. At Lucas's request, Bugarin e-mailed an estimate from Superior Roofing for \$3,200 to replace the portion of the roof that was leaking and had roof cement. The inspector from Superior Roofing said the entire roof needed to be repaired and estimated the total cost would be \$9,000. Lucas stated that he did not want to fix anything on the roof or the house, because he did not want to be liable for the roof leaking. Bugarin asked if Lucas had a contractor's license and Lucas stated that he did not need a license because he was an owner-builder.

Heating and air conditioning installer Steve Barrientos visited the property on January 8, 2014. Posada had called the company through her warranty policy to complain that her air conditioner was not working properly. He found the heating and air conditioning had been installed improperly. The system needed to use proper materials and vent through the roof. The flue pipe, which allows gas to escape, had been placed with the arrow facing in the wrong direction. He could see the defective installation by looking at it. The placement of the ducting inside the flat roof, where it cannot be accessed, will eventually crush the ducts. Certain parts were not matched properly. The date stamped on the unit is 2005. Since the flue pipe was installed in the wrong direction, the installer had to cut the pipe on the roof to attach the vent cap and had tied the cap down. A licensed contractor or inspector would have known this is not

permitted, because it vents improperly and creates a fire danger. Posada was charged \$60 for the evaluation and Barrientos estimated it would cost \$15,000 to replace the system.

Roofing contractor Ignacio Garcia of South Coast Valley and Roofing Company visited the property in early 2014. He viewed the roofs on the house and the garage. He found they had been installed improperly. He and Bugarin walked on the roof of the house. Bugarin showed him the side that was leaking and Garcia said it was leaking because the roof was not installed correctly. Layers of roofing material were unrolled and nailed down, including the top layer, which leads to leaks. The installer used roof cement instead of applying heat to seal the layers. The rolled material was simply nailed to the wall and not properly sealed where the material met the roof tiles, instead of going over the wall and having tile placed on top. There was roof cement on the corners, but no other mastic. He told Bugarin that he could not simply repair the portion that leaked. The whole roof needed to be replaced. He estimated that it would cost \$11,000 to replace the roof, which had increased to \$13,500 by the time of trial. Posada paid \$5,000 to South Coast Valley and Roofing Company for a temporary solution to prevent further damage to the house.

After the temporary repairs were completed on the roof, Posada began experiencing leaks from her windows.

## **PROCEDURAL BACKGROUND**

On April 24, 2014, Posada filed a complaint against Stone Steps and Lucas for misrepresentation and failure to disclose defects in violation of the real estate transfer disclosure requirements of Civil Code section 1102, failure to disclose material facts, and fraud. She alleged that the defendants became aware the roof, central air and heating system, and chimney were in a defective condition, or in the alternative, failed to use reasonable care to observe the defective condition. They willfully failed to state on the transfer disclosure statement that these items were in a defective condition. Defendants misrepresented that the roof was new on the form, and falsely represented that the property had undergone a full renovation on the seller's questionnaire. As a result of defendants' breach of the duty of disclosure in connection with the transfer disclosure statement under Civil Code section 1102, Posada purchased the property and has been damaged in an amount required to correct the defective roof, central air and heating system and the chimney.

A Doe amendment was filed to add CEDC as Doe 1. A default was entered as to CEDC. The trial court granted the defendants' request to take judicial notice of weather records.

A four-day bench trial was held beginning on November 22, 2015. Posada testified that she believed the

roof on the main house was not new because it was leaking, and the insurance company denied her claim on the ground that it showed wear and tear. She did not believe the garage could have been newly constructed because it leaked. The defendants painted the chimney, so they must have known something was wrong with it. She did not know if they ever tested the chimney. The estimate to repair the chimney related to the top of the chimney and was not related to the work done to paint the chimney or cap the gas.<sup>2</sup>

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<sup>2</sup> On cross-examination, defendants' attorney asked Posada if she was claiming that there had not been a full remodel of the house. She answered, "Correct." He asked her about several improvements to the house, such as new flooring, painting, and recessed lighting. He asked if one of the bathrooms was a new addition to the house and she said it was, with new fixtures and new flooring. The kitchen had a new open layout with new cabinetry, a new ceiling, and recessed lighting. The trial court interrupted and stated that Posada had not alleged any defects with the areas mentioned. Defendants' attorney explained that the complaint broadly alleged the statement "there was a full remodel" was false. The trial court stated, "I thought that the plaintiff had narrowed, for purposes of this case, the areas that she believed had not been fully renovated including the roof, central air and heating and chimney. That's what I felt were the issues involved in this case, that she's not claiming that the bathroom was [not] renovated or not claiming some of the other things you're going into, but just failed to disclose the roof, central air and heating system and chimney were defective. I take that to mean she's not

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claiming there weren't other areas in the home that had been renovated." Defendants' attorney read the allegation from the complaint about the property not having undergone a full renovation. The trial court asked, "Let me clarify from [Posada's attorney.] I was still under the impression they're making that statement because the roof, central air, heating and chimney were defective." Posada's attorney answered, "Your Honor, you're entirely correct in your reading of it." The court added, "And that because there was a statement there was full renovation, your client is alleging that was false . . . , correct?" Posada's attorney said the court was correct. The court continued, "[Defendants' attorney,] you're welcome to go through the entire house and have her describe it. To let you know, again, this is a court trial and you might want to focus on other areas for purposes of your time. I didn't take it from the complaint that she was alleging anything else had been falsely alleged to have been redone." Defendants' attorney stated, "In fact, if I may, Your Honor, this is the first time since the complaint was filed that that was the interpretation." The court stated, "Counsel, there's such a thing as other motions pretrial to clarify if you feel it's unclear and there aren't sufficient allegations for you to respond. That's what some of the pretrial motions are designed to do; right? You know, I'm going to be quiet and let you keep going, because if you want to spend time going through the entire house and doing a checklist, that's fine. I just wanted to make [sure] this court understood the allegations. And [Posada's attorney] has clarified that. So I'm not going to have any more discussions about it because [Posada's attorney], when he does his closing argument will focus the court in terms of that clarification we made. [¶] If you want to go through and



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talk about the entire house, [Defendants' attorney], I'll let you do that. At least I'm now clear as to what is alleged to have been not done. Thank you."

Defendants' attorney responded, "Thank you, Your Honor. May I approach the witness with respect to the document that I will have her examine?" Posada's attorney asked to see it first. Defendants' attorney said he had just given it to him, referring to the complaint. The court stated, "Counsel, wait a minute[.] I didn't bring up that issue for you to now cross-examine the client about the complaint filed against her [*sic*]. That wasn't my purpose of that. [¶] [Posada's attorney,] I don't know how you feel about that, but that was the purpose of what I brought it up for. I was trying to get clarification as to the issues that I think is really more appropriate to address with counsel and not necessarily asking a layperson."

Defendants' attorney responded, "Your Honor, if I may, the court has questioned my examination of the witness regarding --" The trial court interrupted, "[Defendants' attorney,] look, you know, just for the record, you've been argumentative about this case every time you appear here in court. One issue becomes a huge issue. A small issue becomes the biggest issue ever. All I was doing is trying to get clarification. But because you disagreed with me and disagreed with [Posada's attorney], I told you, I don't want to waste any more time about it. You feel free to examine this witness about anything you want. You can ask her to go through the entire house; every light switch, every faucet, every toilet. I'm not stopping you. That's why I said, you know what, because you wanted to argue with me about the allegations of the complaint and you're claiming you didn't

Bugarin testified about photos that he took of the ceiling in the master bedroom which showed water damage from the leak. When the ceiling was wet, a square of sheet rock was visible, which he thought looked like a patch. He admitted that he was not an expert, and he did not know the normal size of sheet rock. Bugarin was present during an inspection of the roof after the leak in the house, although he did not say who was conducting the inspection. A picture was taken with a portion of the roofing material pulled back, exposing the wood below. Bugarin said the picture showed roof cement had been used in the area that leaked.

Expert witness Gidon Vardi visited the property on July 6, 2015. He testified about the obvious defects in the installation methods for the roof over the garage. He noted that there was a new roof covering the house by the time he viewed the property. He stated that he would have made the same findings for the roof on the house as he did for the garage if it had been constructed in the same manner as the

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know anything before now, I'm telling you to go ahead and [Posada's attorney] is not objecting."

The court continued, "So I don't want to argue about it anymore, but I don't want you now, because of what the court needed clarification on, for you to now put the complaint down in front of a layperson's nose and tell her to interpret what it says. That's not appropriate either. [¶] We're going to take a break and I'm going to have you think about what you're going to do." The trial court repeated these points and a break was taken.

roof over the garage. In his report, however, he stated the roof over the house was not new and had not been replaced. His opinion was based on photographs taken before the roof was repaired and the fact that it leaked. One of the photographs that he relied on was the photograph Bugarin had testified about, but he had seen others as well. When he referred to the roof, he was referring to the roofing materials covering the plywood and not the plywood underneath, which did not need to be replaced. He added that the portion of the roof over the addition to the home must have been new. Interior photos showed the ceiling in the bedroom had been patched at some point from the inside. He estimated the cost of repairing both roofs was \$11,000, plus 20 percent for general conditions, overhead, fee and a 10 percent contingency.

Vardi visually inspected the chimney and saw significant issues with the old masonry construction. The fire box appeared cracked. The cost of repair is \$5,367, plus 30 percent. There was no evidence that any work had been performed on the interior of the fireplace in recent years, or that defendants did any work on the interior of the fireplace.

Vardi found significant problems with the heating and air conditioning system. There was a mismatch between the condenser on the outside of the house and the coil connecting it. The newly extended size of the kitchen can no longer be served by the small vent. The ceiling of the closet where the air handler is located is open, which is a fire hazard. The unit is operating at 30 percent efficiency. There are pinched

ducts in the attic, cutting off the volume of air being delivered. The estimate to repair the heating and air conditioning system is \$15,599, plus 30 percent.

He explained problems with the window renovation. The window glass was replaced with energy efficient windows, but the framing was not replaced. If the old window frames did not leak, it was fine to install retrofit windows because the old frame was secure against water intrusion. If the old window frames leaked and the remodel used retrofit windows, nothing would have been done to cure the leak because the old frame was still there. Vardi observed water intrusion in the entry and the living room. In his opinion, the windows and plaster need to be removed, the original problem repaired, and new windows installed. His estimate for window repair was \$9,414, plus 30 percent.

Vardi opined that the condition of the house was consistent with a “full renovation” of the house. He did not think it was adequately renovated. Knowing work was performed by an unlicensed contractor has a negative impact on the valuation. A general contractor has responsibility for work performed under his supervision and coordination. The general contractor cannot avoid liability by saying he did not know what his subcontractors were doing. An owner/builder has the same duty as a general contractor to build a safe house that does not leak and is in conformance with building codes and regulations. An owner/builder can construct his or her own residence without a contractor’s license. If the owner/builder does not comply with the

provisions of the board regulations, the owner/builder is looked upon as a general contractor and the board can handle those issues through the Attorney General's office for any violations of the law. The consequences are that the Attorney General may take some enforcement action, but the house is not torn down as a result of the owner/builder's failure to adhere to the regulations. Vardi's repair estimates were based solely on the estimates provided by other companies.

The trial court excluded any questioning by defendants' attorney as to what Vardi believed a building professional should have observed and what the defendants knew of the defects. The court stated, "[Vardi] is not saying [the defendants] should have known something, he's only testifying about what he observed and what he believed the condition of the property was at the time he testified. [¶] I haven't heard him saying anything about [what] Mr. Lucas should have known. He hasn't gone there. He is only telling the court the defects he observed and the repair items he believes are needed and the costs. No one has made any statement about anything more than that." After further argument, Posada's attorney stipulated that Vardi had not provided, and would not be providing, any testimony about misrepresentations or fraud by the defendants. He stated that Vardi's testimony concerned damages and the condition of the building. Defendants' attorney agreed to limit questioning of Vardi based on the trial court's statements and the representation by Posada's attorney.

Lucas testified that he and Chacon agreed if Lucas moved into the house, he would buy out the work that Chacon had done. If Stone Steps sold the house, it would give 40 percent of the sale to Chacon. His wife's job continued longer than expected and their children started school in San Diego, so in October 2012, they decided not to move to the Altadena property. Stone Steps paid between \$125,000 and \$150,000 for the costs of the materials for the project and the workers who worked for Chacon.

The heating system was working on December 25, 2012, when he signed the documents. He used it during the open houses. He was present when the county inspector visited, turned on the heating and air conditioning system, and checked the air flow. The inspector looked at the venting of the ducting, and ensured that it produced hot and cool air flow. The heat was on while the items on the repair list were fixed. He went into each room in the house and it appeared warm air was circulating. He had no reason to believe the heater was not functioning.

When he wrote "new roof" on the disclosure statement, he meant all new tile, roofing material, and plywood. The inspector views the rolls of roofing material before it is affixed. Lucas watched them apply heat. Nothing he has heard has led him to believe that any part of the roof on the main house was not new. He has no reason to believe there is anything wrong with his statement that the roof was new. When he prepared the statements, he had no information that would lead him to believe it was incorrect. He was

present in the house and the garage after it had rained in December and he did not see any leak inside the house or garage, he did not see any evidence of an attempt to paint over a leak, and no one told him they suspected any leaks. He was present on other dates when it was raining and he never saw any evidence of leaks.

In deposition, Lucas testified that he believed some of the plywood was replaced, but not all of it. At trial, he clarified that he spoke with Chacon after the deposition and he had been mistaken when he testified that only a portion of the existing plywood had been replaced. When he saw two-thirds of the existing roof removed, the project was not finished. After the roof was inspected, Lucas had no reason to believe there were any problems with the plywood on the roof.

The only work done to the chimney was to paint it and to put a spark arrester on top. Stone Steps did not work on the interior of the chimney and did not alter the internal masonry. No one ever told him there were any defects in the fireplace. He never saw any evidence of defects with the windows.

Photographs of the property taken during the remodeling were introduced as exhibits at trial. The photographs showed that the old garage was demolished, windows inside the house did not show evidence of leaking, and new tile was installed on the roof.

On December 3, 2015, the trial court found in favor of Posada on all three causes of action. As to the statutory

cause of action under Civil Code section 1102 for failure to make disclosures on the transfer disclosure statement, the trial court found that the roof was not entirely new and the defendants failed to disclose that the roof was not entirely new. The finding was based on testimony that the roof leaked and photographs showing the roof leakage and patches in the roof, and evidence from witnesses regarding the roofer and the expert. Based on the way it was written in the transfer disclosure statement, a buyer would expect the entire roof was new, rather than patched or partially repaired. The fact that Lucas did not occupy the home did not excuse him from disclosing the conditions he knew or should have known about when he sold the property.

Lucas checked off items on the transfer disclosure statement and signed a statement saying that to the best of his knowledge all of those items were in operating condition, including the roof, fireplace, and central air conditioning and heating. On the second page he indicated that he was not aware of any significant defects in various aspects of the house, including the roof and windows. Lucas listed no other concerns or defects, and signed the document.

Relevant to the common law cause of action for failure to disclose material facts, the trial court found Stone Steps and Lucas failed to disclose material facts on the seller's property questionnaire. They indicated that the house was a full renovation and referred to permits. The court found with respect to that disclosure, Lucas should have disclosed that he used unlicensed contractors. Lucas did not comply



with the requirements for the owner-builder exemption and did not disclose to Posada that he failed to comply with the permit process or use licensed contractors. The disclosure that he had permits was misleading, because he did not fully comply with the permit process. The court found the statement that there was a “full renovation” was a misleading statement. The evidence showed that everything was not fully renovated. The court found the use of unlicensed contractors affects the desirability and value of the property and should have been disclosed to Posada to take into consideration in terms of the value of the property as well as whether she wanted to consider that fact and purchase it. Failure to disclose the use of unlicensed contractors applies to all the items complained of by Posada with respect to the property, so the court applied its findings equally to the permits pulled for the heating system, roof, central air, and windows.

Defendants knew the use of unlicensed contractors was not disclosed and permits were not properly obtained. They knew Posada could not reasonably have discovered this information. The information significantly affected the value or desirability of the property. Posada was harmed, and the failure to disclose the information was a substantial factor in causing her harm.

The use of unlicensed contractors was shown to have caused the damages suffered by Posada. Specifically, work was not done properly, and there are now problems with the systems that were not installed properly, are leaking, and

need repair or replacement to make them operational and safe.

The court expressed concern that there were permits in evidence, but no testimony by a County inspector to explain what work was requested and inspected. The court was not sure if there was a permit for the entire roof to be replaced and what exactly the inspector inspected when the permit was signed. No expert had refuted Vardi or Posada's roofer. There were no invoices for the purchase of materials with respect to the full renovation.

It was not disclosed that the entire roof was not new. There was not sufficient evidence to show that the entire roof was replaced by Lucas or Stone Steps. Lucas did not really deny the roof was not patched in some form. Even if part of the materials of the roof were new, there was no disclosure of a roof patch or problems with the roof that would have required a patch, and the court found that there was sufficient evidence of patching, and that there was no question about that.

Defendants failed to disclose problems with the heating system and chimney. On the disclosure form, there was an area to address issues with the chimney. Lucas essentially said everything was in operating condition, including the fireplace, which the court assumed related to the chimney. Vardi had discussed that the windows were not replaced properly because the framing was not replaced. The court found Lucas knew or should have known the windows were leaking and needed to be entirely replaced, and the old

framing not left in place. The court did not find credible that there was no leaking prior to the installation of the new glass, and that Lucas did not know there was leaking prior to the sale to Posada.

On the third cause of action for fraud, the court expressed concern that the project was intended for low income individuals. The court found that Lucas's testimony about the structure of the transaction and his understanding of the owner-builder requirements was not credible. The court found Lucas had no intention to live in the home and simply intended to turn a quick profit. When he wrote the roof was new, he knew it was not a new roof and there was not a full renovation of the property. He had the intent to patch and paint, and quickly sell without fully disclosing to an innocent buyer what some of the true defects were. Lucas intentionally misrepresented facts that he knew were not true when he made them, intending Posada to rely on the misrepresentations in the sale documents, the seller questionnaire and the disclosure documents, and Posada reasonably relied on them. Posada's reliance was a substantial factor in causing her harm.

The court viewed with concern the home inspection report that was produced by an inspector who was referred by an agent representing both buyer and seller, in light of the agent's inherent interest in closing the sale. The court acknowledged that Lucas had not lived on the property but found sufficient evidence of the defects that he knew or should have known of these conditions. Although it was not

a construction defect case, the failure to use licensed contractors and the lack of proper installation and equipment was sufficient evidence to show a substantial cause of harm to Posada. The court awarded damages of \$49,520.90 for all of the items that were not properly disclosed with respect to the roof, the full renovation, central heating and air conditioning system, repair of the chimney and windows.

The trial court entered judgment in favor of Posada on March 1, 2016, and awarded damages of \$49,520.90 as against Lucas, Stone Steps and CEDC. The court also awarded attorney fees and costs to Posada upon noticed motion. Stone Steps and Lucas filed a timely notice of appeal from the judgment.

## **DISCUSSION**

### **Standard of Review**

“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.] Under this deferential standard of review, findings of fact are liberally construed to support the judgment and we consider the evidence in the light most favorable to the prevailing party, drawing all reasonable inferences in support of the findings. [Citation.]”

(*Thompson v. Asimos* (2016) 6 Cal.App.5th 970, 981 (*Thompson*).)

“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. [Citation.] ‘A judgment or order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness.’ [Citation.] Specifically, ‘[u]nder the doctrine of implied findings, the reviewing court must infer, following a bench trial, that the trial court impliedly made every factual finding necessary to support its decision.’ [Citation.]” (*Thompson, supra*, 6 Cal.App.5th at p. 981.)

### **General Statutory Scheme Governing Contractor Licensing**

The Contractors’ State License Law (CSLL) (Bus. & Prof. Code, § 7000 et seq.) provides a comprehensive legislative scheme governing the construction business in California.<sup>3</sup> “The CSLL manifests a strong public policy favoring protection of the public against unscrupulous and incompetent contractors.” (*Goldstein v. Barak Construction* (2008) 164 Cal.App.4th 845, 853–854.) “The purpose of the licensing law is to protect the public from incompetence and

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<sup>3</sup> All further statutory references are to the Business and Professions Code unless otherwise stated.

dishonesty in those who provide building and construction services. [Citation.] The licensing requirements provide minimal assurance that all persons offering such services in California have the requisite skill and character, understand applicable local laws and codes, and know the rudiments of administering a contracting business.” (*Hydrotech Systems, Ltd. v. Oasis Waterpark* (1991) 52 Cal.3d 988, 995, (*Hydrotech*) superseded by statute on another point as stated in *Montgomery Sansome LP v. Rezai* (2012) 204 Cal.App.4th 786, 794 (*Montgomery*).)

A “contractor” under the CSLL is “synonymous with ‘builder’” and includes any person who undertakes himself or herself or through others to construct, alter, or repair any building, structure or improvement. (§ 7026.)

Contractors must be licensed to perform construction work unless an exemption applies. (§ 7040 et seq.) The CSLL “imposes strict and harsh penalties for a contractor’s failure to maintain proper licensure” to protect the public. (*MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc.* (2005) 36 Cal.4th 412, 418 (*MW Erectors*).)

It is a misdemeanor to engage in the business of a contractor without a license, unless exempted. (§ 7028.) Upon a proper showing by the registrar of contractors, a licensed contractor, a consumer, a district attorney, or the Attorney General, an injunction will issue to restrain a person who does not hold a state contractor’s license and is engaging in a practice which violates the CSLL to prohibit the person from acting in the capacity of a contractor

without a license. (§§ 7028.3, 7028.4.) The registrar may also issue citations with an order of abatement and an assessment of civil penalties. (§ 7028.7.)

Unlicensed contractors cannot use the courts to recover compensation for the performance of any act or contract where a contractor's license is required. (§ 7031, subd. (a).)<sup>4</sup> With limited exception, a person who utilizes the services of an unlicensed contractor may recover all compensation paid to the unlicensed contractor to perform any act or contract. (§ 7031, subd.(b).) “Although the language of the two provisions is somewhat different, they are interpreted ‘in a consistent manner, resulting in the same remedy regardless

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<sup>4</sup> Section 7031 provides in pertinent part: “(a) Except as provided in subdivision (e), no person engaged in the business or acting in the capacity of a contractor, may bring or maintain any action, or recover in law or equity in any action, in any court of this state for the collection of compensation for the performance of any act or contract where a license is required by this chapter without alleging that he or she was a duly licensed contractor at all times during the performance of that act or contract regardless of the merits of the cause of action brought by the person, except that this prohibition shall not apply to contractors who are each individually licensed under this chapter but who fail to comply with Section 7029. [¶] (b) Except as provided in subdivision (e), a person who utilizes the services of an unlicensed contractor may bring an action in any court of competent jurisdiction in this state to recover all compensation paid to the unlicensed contractor for performance of any act or contract.”

of whether the unlicensed contractor is the plaintiff or the defendant.’ [Citation.]” (*Judicial Council of California v. Jacobs Facilities, Inc.* (2015) 239 Cal.App.4th 882, 895 (*Judicial Council*)). No offsets are made for payments to third parties, so an unlicensed contractor forfeits all money paid to others for materials and labor. (*Id.* at p. 896.) Section 7031 applies even when the other party knew the contractor was unlicensed. (*MW Erectors, supra*, 36 Cal.4th at p. 424.) The contractor cannot assert the other party’s false promise to pay or unjust enrichment as a defense. (*Ibid.*)

“The obvious statutory intent is to discourage persons who have failed to comply with the licensing law from offering or providing their unlicensed services for pay. [¶] Because of the strength and clarity of this policy, it is well settled that section 7031 applies despite injustice to the unlicensed contractor. ‘Section 7031 represents a legislative determination that the importance of deterring unlicensed persons from engaging in the contracting business outweighs any harshness between the parties, and that such deterrence can best be realized by denying violators the right to maintain any action for compensation in the courts of this state. [Citation.] . . .’ [Citations.]” (*Hydrotech, supra*, 52 Cal.3d at p. 995, italics omitted.)

Courts have refused to apply section 7031 in other contexts, such as to bar unlicensed contractors from maintaining an action for indemnity, stating “[t]he courts will not impose penalties on a contractor for noncompliance



with the licensing requirements other than that provided by the statute.’ [Citation.]” (*UDC-Universal Development v. CH2M Hill* (2010) 181 Cal.App.4th 10, 26.)

The use of unlicensed contractors is permitted under exemptions to the CSLL. Owner-builders are exempt from the requirements of the CSLL under three circumstances. (§ 7044.)<sup>5</sup> First, the CSLL does not apply to an owner who

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<sup>5</sup> Section 7044 provides: “(a) This chapter does not apply to any of the following:

“(1) An owner who builds or improves a structure on his or her property, provided that both of the following conditions are met:

“(A) None of the improvements are intended or offered for sale.

“(B) The property owner personally performs all of the work or any work not performed by the owner is performed by the owner’s employees with wages as their sole compensation.

“(2) An owner who builds or improves a structure on his or her property, provided that both of the following conditions are met:

“(A) The owner directly contracts with licensees who are duly licensed to contract for the work of the respective trades involved in completing the project.

“(B) For projects involving single-family residential structures, no more than four of these structures are intended or offered for sale in a calendar year. This subparagraph shall not apply if the owner contracts with a general contractor for the construction.

builds or improves a structure on the owner's property if the improvements are not intended or offered for sale, and the owner performs the work personally or through employees paid solely in wages. (§ 7044, subd.(a)(1).) Second, the CSLL does not apply to an owner-builder who contracts directly with licensed contractors in their respective trades,

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“(3) A homeowner improving his or her principal place of residence or appurtenances thereto, provided that all of the following conditions exist:

“(A) The work is performed prior to sale.

“(B) The homeowner has actually resided in the residence for the 12 months prior to completion of the work.

“(C) The homeowner has not availed himself or herself of the exemption in this paragraph on more than two structures more than once during any three-year period.

“(4) A nonprofit corporation providing assistance to an owner-builder, as defined in subdivision (a) of Section 50692 of the Health and Safety Code, who is participating in a mutual self-help housing program, as defined in Section 50078 of the Health and Safety Code.

“(b) In all actions brought under this chapter, both of the following shall apply:

“(1) Except as provided in paragraph (2), proof of the sale or offering for sale of a structure by or for the owner-builder within one year after completion of the structure constitutes a rebuttable presumption affecting the burden of proof that the structure was undertaken for purposes of sale.

“(2) Proof of the sale or offering for sale of five or more structures by the owner-builder within one year after completion constitutes a conclusive presumption that the structures were undertaken for purposes of sale.”

other than a general contractor, and no more than four single-family residences are intended or offered for sale in a calendar year. (§ 7044, subd.(a)(2).) Last, the CSLL does not apply to a homeowner improving his or her principal place of residence if the work is performed prior to sale, the homeowner resided in the home for at least 12 months before the work was completed, and the homeowner has not used this exemption for more than two structures more than once during any three-year period. (§ 7044, subd.(a)(3).)

It is undisputed that Stone Steps did not meet the conditions necessary for exemption from the requirements of the CSLL. It is also undisputed that no provision of the CSLL is at issue in this case.

### **Common Law Duty of Disclosure**

Lucas and Stone Steps contend there is no substantial evidence to support the trial court's finding that they knew a material fact affecting the value or desirability of the property that they failed to disclose to Posada, which was a substantial factor in causing her damage. We disagree.

“Generally, where one party to a transaction has sole knowledge or access to material facts and knows that such facts are not known or reasonably discoverable by the other party, then a duty to disclose exists. [Citation.] In the context of a real estate transaction, ‘[i]t is now settled in California that where the seller knows of facts materially affecting the value or desirability of the property . . . and

also knows that such facts are not known to, or within the reach of the diligent attention and observation of the buyer, the seller is under a duty to disclose them to the buyer. [Citations.]’ [Citations.] Undisclosed facts are material if they would have a significant and measurable effect on market value. [Citation.] A breach of this duty of disclosure will give rise to a cause of action for both rescission and damages. [Citation.]” (*Shapiro v. Sutherland* (1998) 64 Cal.App.4th 1534, 1544 (*Shapiro*).)

“The seller or his or her agent must have actual knowledge in order to be liable for failing to disclose a material fact.” (*Assilzadeh v. California Federal Bank* (2000) 82 Cal.App.4th 399, 410 (*Assilzadeh*).) Whether an undisclosed fact was sufficiently material to have affected the value or desirability of the property is a question of fact. (*Shapiro, supra*, 64 Cal.App.4th at p.1544; contra *Reed v. King* (1983) 145 Cal.App.3d 261, 265 [materiality is a question of law].)

In this case, there was substantial evidence to support the trial court’s finding that the use of unlicensed contractors for the construction of improvements on the property was a material fact affecting the value or desirability of the property which should have been disclosed to the buyer. California’s laws strongly favor protecting the public from unscrupulous and incompetent contractors, and work by unlicensed contractors provides less assurance for the buyer that the requisite skill and understanding of building codes has been exercised. The home was vacant

and unoccupied during the project. Substantial construction work was completed right before the property was listed for sale. Because the owner never lived on the property, he lacked the ability to determine whether the work performed by unlicensed contractors was without defect. The use of unlicensed contractors under these circumstances clearly affected the desirability of the property. Lucas represented to the County that he intended to live on the property, but never did so before the property was sold six months later. Although the use of unlicensed contractors by an owner-builder is lawful under the CSLL when certain conditions are met, none of those conditions were met in this case. The seller's disregard of the lawful use of the permit process was another circumstance in this case that required disclosure of the use of unlicensed contractors. It was not obvious that contractors who performed the work were unlicensed. The use of unlicensed contractors to perform substantial renovations affected the value and desirability of the property. That the work was permitted, inspected, and approved by a County inspector did not eliminate the duty to disclose that the work was performed by unlicensed contractors.

### **Measure of Damages**

Lucas and Stone Steps contend there is no substantial evidence to support finding they caused Posada's damages. We conclude their failure to disclose the use of unlicensed

contractors proximately caused damages in the amount of the repair costs for defects in the work performed by the unlicensed contractors. The damages do not include repair costs for defects on the property that are not attributable to work performed by the unlicensed contractors.

“To recover damages for fraud, a plaintiff must have sustained damages proximately caused by the misrepresentation. (*State Farm Mut. Auto. Ins. Co. v. Allstate Ins. Co.* (1970) 9 Cal.App.3d 508, 528; [Civ. Code,] §§ 3333, 3343, subd. (a)(4)(iii).) A damage award for fraud will be reversed where the injury is not related to the misrepresentation. (*Gray v. Don Miller & Associates, Inc.* [(1984)] 35 Cal.3d 498, 504.) [¶] For fraud arising out of the purchase, sale, or exchange of property, [Civil Code] section 3343 provides that a plaintiff is entitled to his ‘out-of-pocket’ damages. The formula for determining ‘out-of-pocket’ losses under the statute is the difference between the actual value of what the defrauded person parted with and the actual value of what he received in return. The statute also allows a plaintiff under certain conditions to recover his lost profits as a form of consequential damages. ([Civ. Code,] § 3343, subd. (a)(4).)” (*Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1252 (*Las Palmas*).)

In this case, there was substantial evidence that the leaking roofs over the house and the garage were improperly installed by the unlicensed contractor hired by Stone Steps. Licensed roofing contractor Garcia viewed both roofs, including the portion of the roof over the house that was

leaking. He explained that the roofing materials had been installed improperly and needed to be replaced entirely at a cost of \$13,500. The defects in the roof were obvious to a licensed roofing contractor. Posada believed she was paying for new roofs constructed by licensed contractors, or at minimum in proper compliance with the permit process, and received roofs with defects constructed by unlicensed contractors that did not properly comply with the permit process.

Similarly, there was substantial evidence that the heating and air conditioning system was improperly installed by the unlicensed contractor. The unlicensed contractor performed work on the heating and air conditioning system under the mechanical permit that Lucas obtained from the County. Heating and air conditioning installer Barrientos testified about numerous serious defects in the installation of the heating and air conditioning system which a licensed contractor would have known were not permitted. Barrientos estimated it would cost \$15,000 to replace the system. Had Stone Steps alerted the buyer that the renovations were performed by unlicensed contractors, Posada would have been alerted to perform the additional inspection of the heating and air conditioning system by a licensed service professional rather than simply the minimal home inspection performed by Vigil. The cost to replace the heating and air conditioning system represents the difference between the system that she paid for and actual value of the system that she got.

There is no evidence, however, that the use of unlicensed contractors caused Posada's damages with respect to the chimney defect. Lucas stated that no work was performed on the chimney except to paint it and put the spark arrester on top at Posada's request. Vardi also testified there was no evidence that any work had been performed on the interior of the fireplace in recent years, or that defendants did any work on the interior of the fireplace. The use of unlicensed contractors cannot be said to have caused the crack in the fire box. Although we have found the use of unlicensed contractors affects the value and desirability of the property, especially considering California's strong public policy to protect the public from unscrupulous and incompetent contractors, the failure to disclose the use of unlicensed contractors does not result in strict liability for any defect of the property, in the absence of evidence showing that the defect is related to the unlicensed contractor's work.

There is no evidence to support awarding damages for failing to disclose the chimney defect or misrepresenting the operability of the chimney under another theory. There was no evidence that Stone Steps was aware of any defect with the chimney or made any representations about the chimney. The gas was capped. Vardi said it did not look like any work had been done on it in recent years. On the transfer disclosure form, Lucas did not write anything about fireplaces or make any representation about chimney operations. There was no evidence that he knew whether it



was operational. He had a spark arrester placed on the top of the chimney when Posada requested it. Stone Steps was required to disclose material facts that it had actual knowledge of, but it was not required to inspect the property for the buyer. No expert testified that the seller or contractor would have seen signs of a defect or that any inference can be drawn from the fact that Stone Steps painted the chimney in the course of painting the house for sale. Posada did not present evidence that would even lead to an inference that Stone Steps knew the chimney was defective.

Since we conclude that Posada cannot recover damages of \$5,278 based on the cost to repair the chimney, we need not address defendants' contention that the cost estimate for chimney repairs relied on by expert Vardi was inadmissible hearsay testimony from the chimney company.

There is no evidence that the use of unlicensed contractors caused Posada's damages of \$9,414, plus 30 percent, to replace leaking window frames. The unlicensed contractor replaced the glass within the window frames to increase energy efficiency. It is clear from Vardi's explanation that exchanging the glass did not cause the frames to leak. The court made clear that Vardi was not expressing an opinion on causation. There is no evidence that the unlicensed contractor replaced the window frames. The use of unlicensed contractors did not cause Posada's damages with respect to this item. We also observe, as set forth in footnote two, *ante*, the court understood, and

Posada's counsel agreed, that the nondisclosure claim was related to the roof, chimney, and heating and air conditioning, but the windows were not mentioned in that colloquy.

There is no substantial evidence to support awarding damages for failing to disclose that the window frames leaked under any other theory. There is no evidence Stone Steps or its contractor knew the window frames would leak. Photographs that show windows inside the home before the remodeling do not show water damage. The windows did not leak when the roof over the garage leaked in February and March of 2013, or when the roof over the house leaked in October 2013. There were no leaks around the windows until after the temporary roofing work was completed in January 2014. No expert testified that Stone Steps or its contractor must have had knowledge of leaks. There is no evidence that the windows leaked when the house was sold and no evidence that Stone Steps or its contractor knew that the window frames would leak. The fact that Stone Steps painted the interior of the house in the course of preparing it for sale does not alone support a finding that defendants knew the window frames leaked. The amount of damages awarded by the judgment must be reduced by \$17,516.20 to reflect the deduction of the chimney and window framing repair costs.

### **Liability of Individual Member of Limited Liability Company**

Lucas contends he is not personally liable for nondisclosure, because he was not the seller of the property and not a party to the contract. Posada asserts that Lucas is liable for his own tortious conduct, which is correct.

Stone Steps 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, operative January 1, 2014, but which continues to be applicable to any right which accrued before January 1, 2014.

“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*).)

“[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 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.)

Lucas, acting as an agent on behalf of Stone Steps, was required to disclose to Posada that the construction on the property was performed by unlicensed contractors. His failure to disclose a material fact resulted in harm to Posada. He can be held personally liable, therefore, for the tortious nondisclosure.

### **Trial Court Bias**

Lucas and Stone Steps contend they did not receive a fair trial before an impartial trier of fact, because the trial court acted as an advocate on Posada's behalf. Based on our review of the record, we find no violation of due process.

“Absent a financial interest, adjudicators are presumed impartial. [Citations.] To show nonfinancial bias sufficient to violate due process, a party must demonstrate actual bias or circumstances “in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.” [Citation.] The test is an objective one. [Citations.] While the ‘degree or kind of interest . . . sufficient to disqualify a judge from sitting “cannot be defined with precision” [citation], due process violations generally are confined to ‘the exceptional case presenting extreme facts’ [Citation.]” (*Today's Fresh Start, Inc. v. Los Angeles County Office of Education* (2013) 57 Cal.4th 197, 219.)

“The power of a trial judge to question witnesses applies to cases tried to the court as well as to a jury.

(*People v. Murray* (1970) 11 Cal.App.3d 880, 885; see also *Martin v. Martin* (1947) 79 Cal.App.2d 409, 410.)” (*People v. Carlucci* (1979) 23 Cal.3d 249, 255–256; *People v. Raviart* (2001) 93 Cal.App.4th 258, 270.) The trial court “shall exercise reasonable control over the mode of interrogation of a witness so as to make interrogation as rapid, as distinct, and as effective for the ascertainment of the truth, as may be.” (Evid. Code, § 765.)

We have reviewed the entire record. No doubt the trial court and defendants’ attorney had difficulty communicating at times during the trial. While defendants complain of rulings regarding exclusion of cross-examination based on judicially noticed records of the national weather service and other topics, and the court’s consideration of theories and damage claims at trial that were not alleged in the complaint, these matters, in our view, do not approach what is required to demonstrate a violation of due process.

### **Attorney Fees**

In a separate appeal, Stone Steps and Lucas appeal from a postjudgment order awarding attorney fees to Posada. On appeal, Lucas contends there was no basis to award attorney fees against him based on alter ego liability, and they dispute the amount of fees awarded. We agree that there is no substantial evidence to support an award of attorney fees against Lucas. We find no abuse of discretion as to the amount of attorney fees awarded as against Stone

Steps. We modify the postjudgment order, and as modified, we affirm.

### **A. Facts and Procedural History**

On March 11, 2016, Posada filed a motion seeking an award of attorney fees of \$94,932.50 and costs of \$1,683.72 against Stone Steps, Lucas and CEDC. Stone Steps and Lucas opposed the motion on the grounds that Lucas was not a party to the contract and was not liable for attorney fees. In addition, they argued the amount of fees was unreasonable and described detailed entries that should be disallowed.

Posada argued in her reply that a nonsignatory to a contract who is sued as if a party, as an alter ego for example, is able to recover fees as a prevailing party, because the nonsignatory would have been liable for fees had it lost. (*Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 128-129). Therefore, Posada reasoned, since the nonsignatory would have been entitled to attorney fees if he prevailed, fees are recoverable against him as well. Posada's reply did not expressly justify any individual charge, but did state that the time records provided a basis for a reasonable lodestar amount.

A hearing was held on June 22, 2016. The trial court noted that there were no allegations of alter ego in the complaint and no finding of alter ego had been made at trial. Posada argued that attorney fees were recoverable under the

contract against Lucas as an individual for his acts of fraud that arose out of the contract. The court asked defendants' attorney why Lucas should not be tied to the contract, since he was the one giving the information and making the misrepresentations in connection with the contract. Defendants' attorney responded that the argument would eliminate the distinction between the company and the individual acting solely on behalf of the company, thereby erasing the corporate fiction. The trial court noted that Lucas's fraud was connected to the contract in question. Defendants' attorney added, if the contract had been expressly written that Stone Steps was liable for attorney fees and Lucas was not, Posada could not argue that the limitation should be ignored because all the underlying facts were the same.

There was a discussion of the attorney fee billing. The trial court stated an intent to review the billing closely. The court noted that the preliminary review did not show anything that appeared to be highly unreasonable, but intended to take the concerns to heart and review the billing again. The court took the matter under submission.

On August 8, 2016, the trial court issued a minute order awarding attorney fees of \$90,310.50 and costs of \$1,612.54. The court's ruling stated, "While the claim for attorney fees is under contract, and Lucas signed on behalf of Stone Steps, the Court finds [Civil Code] section 1717 broad enough to extend to Lucas. (*Reynolds Metals Co. v. Alperson*, 25 Cal.3d 124, 128-129 (1979) [*sic*]; *Santisas v.*



*Goodin*, 17 Cal.4<sup>th</sup> 599, 626-628 (1998) [*sic*].) Further, that to circumvent fraud and to accomplish justice, the Court is disregarding any distinction between Stone Steps and Lucas. In this particular case, it would be unfair to do otherwise in light of the Court's findings at trial that Lucas was in charge of the transaction and property remodeling, and that Lucas and Stone Steps failed to disclose material facts to plaintiff regarding the condition of the property in violation of Civil Code section 1102, et seq. The Court further found that both of these Defendants had essentially engaged in fraudulent conduct with respect to the purchase and sale agreement, and related documents. A specific finding of alter ego liability is not required. (*Kohn v. Kohn*, 95 Cal. App. 2d 708, 718 (1950) [*sic*].)"

The trial court deducted billing related to CEDC and reduced bills for administrative tasks that were charged at attorney billing rates. The court disagreed that the fee was padded or vague. The court reduced the amount of costs by deducting the service fee for CEDC. Stone Steps and Lucas filed a timely notice of appeal from the postjudgment order awarding costs and attorney fees.

## **B. Applicable Standards of Review**

"Whether the evidence has established that the corporate veil should be ignored is primarily a question of fact which should not be disturbed when supported by

substantial evidence. [Citation.]” (*Las Palmas, supra*, 235 Cal.App.3d at p. 1248.)

We review the reasonableness of the amount of attorney fees awarded by the trial court under the abuse of discretion standard. (*Calvo Fisher & Jacob LLP v. Lujan* (2015) 234 Cal.App.4th 608, 619 (*Calvo*).) “““The “experienced trial judge is the best judge of the value of professional services rendered in his court, and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong”—meaning that it abused its discretion.” (*PLCM Group v. Drexler* [(2000)] 22 Cal.4th 1084, 1095, quoting *Serrano v. Priest* [(1977)] 20 Cal.3d 25, 49 . . . and citing *Fed-Mart Corp. v. Pell Enterprises, Inc.* (1980) 111 Cal.App.3d 215, 228 [an appellate court will interfere with a determination of reasonable attorney fees “only where there has been a manifest abuse of discretion”].)’ Indeed, our colleagues in Division Four have observed that the ‘only proper basis of reversal of the amount of an attorney fees award is if the amount awarded is so large or small that it shocks the conscience and suggests that passion and prejudice influenced the determination.’ (*Akins v. Enterprise Rent-A-Car Co.* (2000) 79 Cal.App.4th 1127, 1134.)” (*Calvo, supra*, 234 Cal.App.4th at p. 620.) An award of costs is also reviewed on appeal for an abuse of discretion. (*El Dorado Meat Co. v. Yosemite Meat & Locker Service, Inc.* (2007) 150 Cal.App.4th 612, 617.)

### C. Lucas's Liability for Attorney Fees

Lucas contends there is no evidence to disregard the corporate form and extend liability for attorney fees under the purchase agreement for the property. We agree.

“Because society recognizes the benefits of allowing persons and organizations to limit their business risks through incorporation, sound public policy dictates that imposition of alter ego liability be approached with caution. [Citation.]” (*Las Palmas, supra*, 235 Cal.App.3d at p. 1249.) “Ordinarily, a corporation is regarded as a legal entity separate and distinct from its stockholders, officers and directors. Under the alter ego doctrine, however, where a corporation is used by an individual or individuals, or by another corporation, to perpetrate fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose, a court may disregard the corporate entity and treat the corporation's acts as if they were done by the persons actually controlling the corporation. (*Shapoff v. Scull* (1990) 222 Cal.App.3d 1457, 1469, overruled on other grounds in *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 521; *NEC Electronics Inc. v. Hurt* (1989) 208 Cal.App.3d 772, 777; 9 Witkin, Summary of Cal. Law (9th ed. 1989) Corporations, § 12, p. 524.)” (*Communist Party v. 522 Valencia, Inc.* (1995) 35 Cal.App.4th 980, 993 (*Communist Party*).)

“In general, the two requirements for applying the alter ego doctrine are that (1) there is such a unity of interest and ownership between the corporation and the individual or organization controlling it that their separate personalities no longer exist, and (2) failure to disregard the corporate entity would sanction a fraud or promote injustice. (*Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 300; *Automotriz etc. De California v. Resnick* (1957) 47 Cal.2d 792, 796; *Minifie v. Rowley* (1921) 187 Cal. 481, 487; *Shapoff v. Scull, supra*, 222 Cal.App.3d at pp. 1469–1470.) The doctrine is applicable where some innocent party attacks the corporate form as an injury to that party’s interests. The issue is not so much whether the corporate entity should be disregarded for all purposes or whether its very purpose was to defraud the innocent party, as it is whether in the particular case presented, justice and equity can best be accomplished and fraud and unfairness defeated by disregarding the distinct entity of the corporate form. (*Shapoff v. Scull, supra*, 222 Cal.App.3d at p. 1469; *Kohn v. Kohn* (1950) 95 Cal.App.2d 708, 718; 9 Witkin, Summary of Cal. Law, *supra*, Corporations, § 12, p. 525.)” (*Communist Party, supra*, 35 Cal.App.4th at p. 993.) “Alter ego is a limited doctrine, invoked only where recognition of the corporate form would work an injustice to a third person. [Citation.]’ (*Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1269, 1285.)” (*Communist Party, supra*, 35 Cal.App.4th at p. 995.)

In this case, the evidence does not support disregard of the corporate form. Lucas did not use the corporate form to defraud Posada. His use of the corporate form was not related to the fraudulent conduct. All of the documents in the case were clearly signed by Lucas on behalf of Stone Steps. There was no evidence that he did not maintain the separate identities of the individual and organization. The corporate form does not need to be disregarded in this case to circumvent fraud, because Lucas has been held directly liable for fraud. He was not a signatory to the contract, so he was never personally liable for attorney fees in an action arising out of the contract. No unfairness to Posada has been shown. The postjudgment order awarding attorney fees as against Lucas must be reversed.

#### **D. Amount of Attorney Fees and Costs**

Stone Steps and Lucas contend the trial court abused its discretion by awarding improper fees and costs. We conclude that there was no abuse of discretion. The trial court carefully reviewed the attorney billing records and reduced the requested amounts for attorney fees and costs to reflect items that were not appropriate to include. The resulting amounts were well within the trial court's discretion to determine the value of professional services rendered in the courtroom. No abuse of discretion has been shown as to the amounts awarded.

## DISPOSITION

The judgment is modified to reduce the award of compensatory damages to \$32,004.70, and as modified, the judgment is affirmed. The postjudgment order awarding attorney fees is modified to award attorney fees to plaintiff Josefina Posada solely against defendant Stone Steps, LLC, and as modified, the postjudgment order is affirmed. In the interests of justice, the parties are ordered to bear their own costs on appeal.

KRIEGLER, Acting P.J.

We concur:

BAKER, J.

DUNNING, J.\*

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