Filed 9/26/19 Hilty v. Moore CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

DAVID HILTY et al.,

Plaintiffs and Respondents,

v.

LONNIE MOORE,

Defendant and Appellant.

B284902

(Los Angeles County Super. Ct. No. BC466696)

APPEAL from a judgment of the Superior Court of Los Angeles County. Malcolm H. Mackey, Judge. Affirmed.

Law Offices of Khachik Akhkashian and Khachik Akhkashian for Defendant and Appellant.

Kempinsky Law, Louis E. Kempinksy and Evan M. Effres; and Hyura Eunyul Choi for Plaintiffs and Respondents.

Lonnie Moore appeals from a default judgment entered against him for over $8 million. He argues substantial evidence does not support several categories of damages awarded. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Moore, along with Michael Robert Malin, managed a number of restaurants, including Geisha House restaurants in Hollywood, Orange County, and Atlanta. They owned a partial interest in each restaurant and sought investors to further fund the restaurants. Moore and Malin were sued by two investors, David R. Hilty and Shereene Arazm, and the entities in which they invested (collectively "Plaintiffs")[1] for using the restaurants as their "personal piggybank."[2]

Plaintiffs also named as defendants Moore and Malin's wholly-owned corporations, LTM Consulting, Inc. (LTM), 2HYPE Productions, Inc. (2HYPE), and Moore & Malin Enterprises, Inc.

---

[1] Hilty and Arazm filed separate actions, which were consolidated by the trial court for all purposes. They alleged derivative claims on behalf of Geisha House, LLC, which owns and operates the Geisha House restaurant in Hollywood (Geisha House), Dolce Group Atlanta LLC, which owns and operates the Geisha House restaurant in Atlanta, Geisha House Santa Ana, LLC, which owns and operates the Geisha House restaurant in Orange County, and OOC Hollywood 1, LLC, which owns and operates Wonderland, a restaurant and club in Hollywood.

[2] Because this is a default judgment and there is no dispute regarding liability—Moore has "confessed" to the misconduct alleged by his default—we do not describe the many ways in which Moore and Malin diverted revenue from the restaurants. (*Steven M. Garber & Associates v. Eskandarian* (2007) 150 Cal.App.4th 813, 823 (*Eskandarian*).)

(MME) (collectively "alter ego corporations"). They alleged these corporations were Moore and Malin's alter egos and that revenue from the restaurants was improperly diverted to the alter ego corporations. We refer to Moore, Malin, and the alter ego corporations as Defendants.

As this matter progressed, Plaintiffs accused Moore and Malin of continuing to divert revenue and business opportunities from the restaurants—Geisha House in particular—for their personal use. They sought to enjoin such misconduct and in 2012, the trial court issued a preliminary injunction prohibiting Moore and Malin from, among other things, incurring debt on behalf of Geisha House, usurping Geisha House business opportunities, and failing to properly account for payments received or expended. A monitor was appointed by the trial court to oversee compliance with the preliminary injunction.

In his monthly reports to the court, the monitor identified multiple violations of the injunction. The monitor noted the general accounting for the restaurant was incomplete or missing entries. He also expressed frustration that he was unable to access the restaurants' financial records. He recounted a May 20, 2013 conversation with Moore during which Moore explained that he and other Geisha House individuals "were intentionally making it difficult [for the monitor] to find information regarding operations."

In addition to thwarting the monitor's efforts to obtain information about the restaurants, Defendants also impeded Plaintiffs' efforts to obtain information through discovery. For example, in response to one document production request, Moore stated he was unable to locate any responsive documents, and suggested Plaintiffs subpoena the monitor's records.

Plaintiffs also presented evidence Moore destroyed relevant evidence. In a declaration filed by Moore in a separate federal action, which was based on the same facts and later dismissed without prejudice, Moore admitted he destroyed a number of documents "as part of a general cleanup of the entire downstairs of [Geisha House] premises [which] . . . is where the firm stores the paperwork for all the restaurants (open and closed) in which [Defendants] have been involved during the last few 11 years." Moore admitted the documents destroyed included financial documents relating to the restaurants such as old credit card receipts and daily sales breakdowns. The documents were destroyed in 2010, after the federal litigation had begun.

Defendants were sanctioned multiple times by the trial court for failure to properly respond to discovery requests. Requests for admission made to LTM and 2HYPE were deemed admitted as a discovery sanction and the trial court ordered them to provide responses to other discovery requests. As a result of the discovery sanctions, the alter ego corporations became subject to default.

Ultimately, the trial court struck Moore's answer as a terminating sanction for abuse of the discovery process. Moore's default was deemed entered as of January 14, 2015. Moore declared bankruptcy soon after, which stayed the litigation against him. The stay was lifted in November 2016 pursuant to section 362(c)(2)(C) of title 11 of the United States Code.

While the matter was subject to the bankruptcy stay as to Moore and Malin,[3] Plaintiffs pursued default judgments against

---

[3] Malin filed bankruptcy in January 2015 and this matter was also stayed as to him. It is unclear whether the stay has been lifted. The record, however, indicates Plaintiffs have

the alter ego corporations. The defaults of the three alter ego corporations were entered by the clerk on February 10, 2015. In lieu of a prove-up hearing, Plaintiffs submitted their counsel's declaration explaining the claims alleged in the operative complaints and the 15 categories of damages sought. Plaintiffs' counsel described the difficulty in obtaining financial information, but stated he was able to obtain documents from the previous federal matter, the monitor,[4] and other sources. Plaintiffs' counsel attached over 1,000 pages of exhibits to his declaration, including the monitor's reports, deposition transcripts, and accounting records. He also set forth his qualifications in economics, accounting, and book keeping to establish a foundation for his analysis of the financial records. Based on the accounting records obtained in the previous federal action, Plaintiffs' counsel generated profit and loss schedules, transaction statements, and payroll expense reports for the restaurants. On May 3, 2016, a default judgment was entered against the alter ego corporations. No appeal was filed from this judgment.

After the bankruptcy stay was lifted, Plaintiffs pursued a default judgment against Moore, based on substantially the same declaration and supporting documents as those submitted for the default judgment against the alter ego corporations. The trial court entered a default judgment against Moore in the amount of $8,394,662.87, excluding interest. The default judgment imposed

---

reached a tentative settlement with Malin. He is not a party to this appeal.

[4] The trial court ordered the monitor to transfer to Plaintiffs all the documents, files, computers, property, and other items in his custody, control, or possession.

joint and several liability against Moore and the alter ego corporations. Moore timely appealed.

DISCUSSION

Plaintiffs set forth 15 categories of damages; Moore challenges seven of them. We find substantial evidence supports the challenged damage awards.

As an initial matter, we note that throughout his opening brief, Moore impermissibly attempts to contest his liability for damages. Moore is barred from doing so because " '[t]he judgment by default is said to "confess" the material facts alleged by the plaintiff, i.e., the defendant's failure to answer has the same effect as an express admission of the matters well pleaded in the complaint. The judgment is, in consequence, res judicata on the issue of the right to the relief awarded.' " (*Eskandarian, supra,* 150 Cal.App.4th at p. 823, italics omitted.) Moore does not contend the operative complaints fail to adequately allege his liability. Indeed, he cannot, because the complaints properly plead Plaintiffs' right to the relief awarded. For example, Moore argues there is no evidence to support a finding that the payroll expenses were fraudulent or overinflated. By his default, however, Moore has admitted to the allegation that he "diverted substantial monies from Dolce Group Entities, including Geisha [House and OOC], through excessive and inflated payments for 'payroll' or 'common' expenses." We thus decline to further address Moore's attempts to challenge his liability in the sections below.

I. The Law Regarding Proof of Damages After a Default

" 'Plaintiffs in a default judgment proceeding must prove they are entitled to the damages claimed.' " (*Kim v. Westmoore*

Partners, Inc. (2011) 201 Cal.App.4th 267, 288, quoting *Barragan v. Banco BCH* (1986) 188 Cal.App.3d 283, 302; Code Civ. Proc., § 585.) A plaintiff need only establish a prima facie case. (*Harbour Vista, LLC v. HSBC Mortgage Services, Inc.* (2011) 201 Cal.App.4th 1496, 1503, fn. 6; *Johnson v. Stanhiser* (1999) 72 Cal.App.4th 357, 361.) However, damages may not exceed the amount stated in the complaint. (Code Civ. Proc., § 585, subd. (b).)

The plaintiff may prove his damages by personal testimony or, at the court's discretion, by using affidavits. (Code Civ. Proc., § 585, subd. (d).) "The facts stated in the affidavit or affidavits [must] be within the personal knowledge of the affiant . . . , and each affidavit [must] show affirmatively that the affiant, if sworn as a witness, can testify competently thereto." (*Ibid.*) In Los Angeles County, the submission of declarations pursuant to Code of Civil Procedure section 585, subdivision (d), is the preferred procedure to obtain a default judgment. (Super. Ct. L.A. County, Local Rules, rule 3.201(a).)

In evaluating the trial court's damages award, our review "is severely circumscribed." (*Uva v. Evans* (1978) 83 Cal.App.3d 356, 363.) We "may interfere with the [trial court's] determination 'only where the sum awarded is so disproportionate to the evidence as to suggest that the verdict was the result of passion, prejudice or corruption . . . or where the award is so out of proportion to the evidence that it shocks the conscience of the appellate court.' [Citation.]" (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 361, p. 417; *Uva v. Evans, supra,* 83 Cal.App.3d at pp. 363–364.) "Damages for which there is no substantial evidence . . . satisfy this standard." (*Ostling v. Loring* (1994) 27 Cal.App.4th 1731, 1746.)

II. Substantial Evidence Supports the Challenged Damage Awards

A. Credit Card Revenues

Moore first contends the trial court improperly awarded $418,928 for three months of diverted credit card receipts. He asserts this award was not supported by admissible evidence because Plaintiffs' counsel lacked personal knowledge of the missing deposits. We find no error.

The award for diverted credit card monies was based on the monitor's report, which had previously been filed in the trial court and was attached to Plaintiffs' counsel's declaration. In his sixth report to the trial court, the monitor noted that there were no credit card deposits to Geisha House bank accounts for the months of February, March, and May of 2013, despite records indicating credit card sales were made. The monitor inquired about this discrepancy, but "management [did] not explain[] where the funds from such credit cards were deposited." The monitor concluded that the diversion of funds violated the preliminary injunction. Based on the monitor's estimate that credit card deposits total approximately $139,641 per month, Plaintiffs sought an award of $418,923 ($139,641 x 3) in diverted funds for those three months.

There is no dispute as to the authenticity of the monitor's report or the monitor's personal knowledge of the facts stated in his report. Moreover, Moore does not challenge the admissibility of the monitor's report on hearsay[5] or any other ground. In any case, Plaintiffs' counsel properly authenticated the report and

---

[5] Moore instead concedes that the trial court "is allowed to entertain hearsay evidence in a default prove-up hearing."

laid the foundation for it. (Evid. Code, §§ 1401, 1521.) Substantial evidence supports this category of damages.

B. Revenues from Exclusive Product Agreements

Moore next argues that the evidence supports a damages award of only $29,080 for revenues from exclusive product agreements, rather than the $94,320 awarded. Moore claims the amount awarded over $29,080 was impermissibly speculative because Plaintiffs provided only an estimate of those damages. In short, Moore argues Plaintiffs should have supported each dollar awarded with receipts or other evidence.

Moore's argument overlooks the fact that his abuse of the discovery process resulted in terminating sanctions. Thus, any paucity in the evidence, which necessitated proof by reasonable estimation, was attributable to Moore's own misconduct. We find no error.

Evidence Code section 413 allows the trial court to draw adverse inferences from any willful suppression of evidence. " 'The rule of [present Evidence Code section 413] . . . is predicated on common sense, and public policy. The purpose of a trial is to arrive at the true facts. A trial is not a game where one counsel safely may sit back and refuse to produce evidence where in the nature of things his client is the only source from which that evidence may be secured. *A defendant is not under a duty to produce testimony adverse to himself, but if he fails to produce evidence that would naturally have been produced he must take the risk that the trier of fact will infer, and properly so, that the evidence, had it been produced, would have been adverse*.' [Citation.]" (*Williamson v. Superior Court* (1978) 21 Cal.3d 829, 835–836, fn. 2, original italics (*Williamson*).)

Further, "[w]here the *fact* of damages is certain, the amount of damages need not be calculated with absolute certainty. [Citations.] The law requires only that some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an approximation. [Citation.] This is especially true where, as here, it is the wrongful acts of the defendant that have created the difficulty in proving the amount of loss of profits [citation] or where it is the wrongful acts of the defendant that have caused the other party to not realize a profit to which that party is entitled. [Citations.]" (*GHK Associates v. Mayer Group, Inc.* (1990) 224 Cal.App.3d 856, 873–874 (*GHK*).)

Applying these principles, we reject Moore's argument that the evidence supports a damages award of only $29,080, the total amount of the checks and emails submitted by Plaintiffs, rather than the $94,320 awarded. Plaintiffs set forth a reasonable basis for computation of damages and the trial court did not err in accepting their damages figure, even if it was approximate.

To calculate this category of damages, Plaintiffs assumed vendors made quarterly payments to Moore and Malin for their products to be promoted or sold exclusively at Geisha House and the other restaurants during the time period between approximately 2006 and 2011. Plaintiffs presented emails and checks showing payments by Redbull, Fiji Water, and Snow Queen Vodka. Moore and Malin's assistant testified payments by Fiji Water were "a pretty regular occurrence . . ." but equivocated about their frequency, stating, "I don't know. Maybe it was a quarterly thing."

Moore argues his assistant's testimony was not a sufficient basis for the court to assume that Red Bull and Snow Queen Vodka also made quarterly payments. However, as in *GHK,* the fact of damages is certain, so there need only be some reasonable basis of computation of damages. There is no dispute there were similar exclusivity agreements in place with Red bull and Snow Queen Vodka. Also, Plaintiffs submitted evidence that Red bull made multiple payments in the same year to Moore. The trial court could reasonably infer from this evidence that the payments from both Red bull and Snow Queen Vodka were also made quarterly. (*Williamson, supra,* 21 Cal.3d at pp. 835–836, fn. 2.)

Our conclusion is bolstered by Moore's documented suppression of evidence. As we have noted, Moore refused to produce answers or documents in response to Plaintiffs' discovery requests. He instead suggested Plaintiffs obtain the information from the monitor, whose efforts to acquire the same information were thwarted by him and others. Moore also admitted that he destroyed relevant evidence. Thus, we are willing to accept that $65,240 ($94,320 - $29,080) out of an approximate $8.4 million award may not be calculated with absolute certainty. (*GHK, supra,* 224 Cal.App.3d at p. 873.)

We are not convinced by *Scognamillo v. Herrick* (2003) 106 Cal.App.4th 1139, that this category of damages, while approximate, falls to the level of speculation. In *Scognamillo*, the trial court, in a default judgment, awarded the plaintiff damages for a second back surgery that possibly would be unnecessary, depending on the result of a first surgery. (*Id.* at p. 1151.) Here, we need not speculate as to what will occur in the future. The fact of damages is certain. Plaintiffs were only required to provide a reasonable basis to calculate damages and they did so. (*GHK, supra*, 224 Cal.App.3d at pp. 873–874.)

C. Filming Fees

Moore also challenges as speculative Plaintiffs' estimate of the filming fees diverted from the restaurants. Plaintiffs alleged these fees were misappropriated by Defendants. We rely on the same legal authorities discussed above to reject Moore's argument.

Here, Moore admits he testified the filming fees earned by Geisha House totaled at least $105,000 over seven years, but contends there is no support for an award of $200,000 in diverted revenue for filming at Geisha House. He makes similar contentions as to fees earned from filming at Wonderland.

Again, Plaintiffs were unable to obtain complete documentation as to the fees earned by Geisha House and Wonderland for filming at these locations. To calculate these damages, then, Plaintiffs presented a list of what had been filmed at Geisha House. They then relied on Moore's testimony regarding the average filming fee that would typically be charged for big budget movies, television shows, and music videos to estimate how much revenue would have been earned for filming at Geisha House. A similar computation was provided for Wonderland. This evidence provides a reasonable basis from which total damages may be calculated. (*GHK, supra,* 224 Cal.App.3d at pp. 873–874.)

D. Private Event Fees

Moore likewise complains the evidence did not support a $530,000 damages award for diverted private event fees. By Moore's calculation, Plaintiffs' exhibits, consisting of checks and other evidence that customers paid Moore or his cohorts for private events instead of the restaurants, only totaled $336,255.73. Thus, Moore argues $193,744.27 ($530,000 – $336,255.73) of the damages awarded was entirely speculative.

We again reject Moore's argument based on the authorities discussed above. Here, Plaintiffs set forth the historical average revenue earned from a private event and multiplied it with the average number of events held by the restaurants. This is a reasonable basis from which total damages may be calculated. (*GHK, supra*, 224 Cal.App.3d at pp. 873–874.) Given the size of the total damages and Moore's documented suppression of evidence, we are willing to accept that $193,744.27 of the damages awarded may not be calculated with absolute certainty. (*Ibid.*)

E. Lost Revenues from the Failure to Properly Account for Cash Sales and Discount Certificates

Moore next contends there is insufficient evidence to support an award of $396,000 in damages for lost revenues from Defendants' failure to properly account for cash sales and discount certificates at the restaurants. Moore complains there is no evidence that this practice began in 2011, when the Arazm complaint was filed. We disagree.

Arazm's complaint alleged Moore and his coconspirators diverted "monies from the sale of restaurant gift cards, discount coupons, and other restaurant merchandise." It also alleged Moore instructed staff not to ring up certain sales on the restaurants' point of sale systems. The complaint alleged the "looting" of the restaurants occurred "from the beginning" and "[s]ince the time of, or shortly following the time of, the formation of The Dolce Group in 2003 . . . ." As he has "confessed" these material facts by defaulting, Moore is barred from challenging these allegations. (*Eskandarian, supra,* 150 Cal.App.4th at p. 823.)

F. Inflated or Fraudulent Payroll Expenses

Moore also challenges the trial court's award of $2,569,138.97 in damages for inflated or fraudulent payroll expenses. He contends Plaintiffs used the wrong multiplier to calculate damages. We are not persuaded.

Here, Plaintiffs' asserted damages for inflated payroll expenses could be calculated by subtracting the amount paid for 2006 to 2011 payroll expenses from 25 percent of the gross income of each restaurant during that time period. The Dolce Group's controller[6] testified labor costs, including independent contractor and management fees, should be within 25 to 30 percent of gross sales. Moore does not challenge her testimony or the formula used, but contends Plaintiffs should have used the 30 percent multiplier. However, Moore presents no legal or factual support for using the 30 percent multiplier, except to assert it results in a lower damages award.

Substantial evidence, on the other hand, supports the trial court's use of the 25 percent multiplier. Plaintiffs explained that the 25 percent multiplier represents the mid-point between 20 percent of gross sales, which is the historical cost of labor at the restaurants, and 30 percent, which is the maximum of the range testified to by the controller. The trial court reasonably accepted the 25 percent multiplier, particularly since the controller

---

6 Moore and Malin provided management services through the Dolce Group, an umbrella entity they formed in 2003, which was exclusively owned and controlled by them. Thus, the Dolce Group's controller had knowledge of the finances and operations of the restaurants that Moore and Malin managed.

testified the restaurants failed to maintain any payroll records from 2006 on to substantiate their payroll expenses. Indeed, the controller testified that payroll files were destroyed as part of the "general cleanup" of Geisha House in 2010.

G. Management Fees and Distributions

Moore also challenges the order to disgorge $2,261,173.13 in management fees and distributions he received from 2005 to 2013. Moore contends there is no evidence to support disgorgement of all management fees and distributions because there is no evidence of mismanagement beginning in 2005, when the restaurants were profitable. We disagree.

"There are two types of disgorgement: restitutionary disgorgement, which focuses on the plaintiff's loss, and nonrestitutionary disgorgement, which focuses on the defendant's unjust enrichment." (*Meister v. Mensinger* (2014) 230 Cal.App.4th 381, 398 (*Meister*).) Nonrestitutionary disgorgement is based on sound public policy to prevent a person from benefitting from his own wrong at the expense of another " 'if the circumstances are such that . . . it is *unjust* for the person to retain it.' " (*Ibid.*) " 'The emphasis is on the wrongdoer's enrichment, not the victim's loss. In particular, a person acting in conscious disregard of the rights of another should be required to disgorge all profit because disgorgement both benefits the injured parties and deters the perpetrator from committing the same unlawful actions again. [Citations.] Disgorgement may include a restitutionary element, but it " 'may compel a defendant to surrender all money obtained through an unfair business practice . . . regardless of whether those profits represent money taken directly from persons who were victims of the unfair practice.' " [Citation.] Without this result, there would be an insufficient deterrent to improper conduct that is more profitable than lawful conduct.' [Citation.]" (*Meister, supra*, 230 Cal.App.4th at pp. 398–399.)

"Disgorgement of profits is particularly applicable in cases dealing with breach of a fiduciary duty, and is a logical extension of the principle that . . . fiduciaries cannot profit by a breach of their duty. Where a person profits from transactions conducted by him as a fiduciary, the proper measure of damages is full disgorgement of any secret profit made by the fiduciary regardless of whether the principal suffers any damage." (*County of San Bernardino v. Walsh* (2007) 158 Cal.App.4th 533, 543 (*Walsh*).)

The principles of nonrestitutionary disgorgement are appropriately applied here, as Moore may not be unjustly enriched from his wrongdoing. (*Meister, supra*, 230 Cal.App.4th at pp. 398–399.) There is no dispute Moore breached his fiduciary duty to Plaintiffs. Plaintiffs presented evidence that revenues were misappropriated since 2005. Moore's own testimony revealed that revenues from private events and filming fees were diverted while Geisha House reported a profit. Further, Plaintiffs alleged the "looting" of the restaurants occurred "from the beginning" and "[s]ince the time of, or shortly following the time of, the formation of The Dolce Group in 2003 . . ." Moore admits these facts by his default. (*Eskandarian, supra,* 150 Cal.App.4th at p. 823.)

Contrary to Moore's assertion, we need not consider that Plaintiffs received a return on their investment when the restaurants were profitable and that they would have had to pay management fees to someone else. We also need not limit damages to the amount of distributions Moore took and Plaintiffs did not receive. Full disgorgement of Moore's secret profit, without consideration of Plaintiffs' losses, is a proper measure of damages under *Walsh, supra,* 158 Cal.App.4th at page 543 and *Meister, supra*, 230 Cal.App.4th at pages 398–399.

DISPOSITION

The judgment is affirmed. Plaintiffs to recover their costs on appeal.

BIGELOW, P. J.

We concur:

GRIMES, J.

STRATTON, J.