

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

REXFORD/PICO, LLC et al.,

Plaintiffs and Appellants,

v.

JAMES MORGAN FLAGG,

Defendant and Respondent.

B268363

(Los Angeles County
Super. Ct. No. BC399274)

APPEAL from a judgment of the Superior Court of
Los Angeles County. Victor E. Chavez, Judge. Affirmed.

Bird, Marella, Boxer, Wolpert, Nessim, Drooks, Lincenberg
& Rhaw, Thomas R. Freeman and Ekwan E. Rhaw for Plaintiffs
and Appellants.

Van Etten Sipprelle, David B. Van Etten and Keith A.
Sipprelle for Defendant and Respondent.

Plaintiffs and appellants Rexford/Pico, LLC (Rexford/Pico), and Alex Ghassemieh (Ghassemieh) were members of a limited liability company, Ocean Park Hotels-MMHI, LLC (MMHI), with defendant and respondent James Morgan Flagg (Flagg) and C.E.F. Equities, LLC (CEF Equities). Following the breakdown of the business relationship between Flagg and Ghassemieh, including the loss in foreclosure of the hotel that MMHI owned, plaintiffs filed a lawsuit against Flagg.¹ Part of their theory of damages rested upon the contention that Flagg misused MMHI funds, namely by commingling them with other funds from other hotel entities that Flagg managed. Following a jury trial, judgment was entered in favor of Flagg. Plaintiffs challenge that judgment, arguing that the trial court abused its discretion by excluding certain evidence that Flagg wrongfully commingled funds, namely alleged testimony from (1) Barbara Simonich (Simonich), a certified public accountant with a specialty in financial forensics; (2) Flagg's ex-wife Karen Flagg (Karen); and (3) Flagg's brother Jay Flagg (Jay).²

We find no abuse of discretion and thus affirm the judgment.

¹ Plaintiffs also filed suit against CEF Equities. CEF Equities was dismissed from this appeal on July 22, 2016.

² Because many individuals share the same last name, we refer to some of them by their first names. No disrespect is intended. (*In re Marriage of Smith* (1990) 225 Cal.App.3d 469, 475–476, fn. 1.)

FACTUAL AND PROCEDURAL BACKGROUND

I. *Factual Background*

A. Relevant Parties

1. *Flagg*

Flagg is a California real estate broker and attorney. Beginning in 2000, he began focusing on hotel investments, with an emphasis on “limited service” hotels.

In March 2007, Flagg’s mother passed away and he became the sole trustee of the Claire E. Flagg Trust (the Trust) of which she had previously been the trustee. The Trust indirectly invested in hotel projects that Flagg managed through limited liability companies that the Trust owned, including CEF Equities. CEF Equities was a “Flagg family entity investor.”

2. *Neil Cohen (Cohen)*

Flagg met Cohen in 1998, and Cohen joined Flagg’s hotel management company, Ocean Park Hotels, Inc. (Ocean Park Hotels), in January 2001 as the company’s chief financial officer (CFO).³ Cohen oversaw the finances of the hotel entities that Ocean Park Hotels managed. As part of his duties, he had signatory authority on all bank accounts for these entities.

Flagg trusted and relied on Cohen to handle the finances of these entities.

3. *Ghassemieh and Rexford/Pico*

Ghassemieh is an experienced real estate investor who manages the investments of an investor group consisting primarily of his family members. Rexford/Pico is a limited

³ Ocean Park Hotels managed many hotels that the Trust invested in, including the Valencia Hilton Garden Inn.

liability company owned by Ghassemieh's family. Ghassemieh is the manager of Rexford/Pico.

4. *MMHI*

MMHI is a limited liability company that was formed to purchase and own the Valencia Hilton Garden Inn. MMHI has four members: Flagg, CEF Equities, Ghassemieh, and Rexford/Pico.

B. Relationship Between Flagg and Ghassemieh; Investment in Valencia Hilton Garden Inn

Flagg and Ghassemieh began investing in hotel projects together in 1999. Their fourth hotel investment together was the Valencia Hilton Garden Inn. In October 2004, CEF Equities and Rexford/Pico each contributed approximately \$2.5 million to purchase the Valencia Hilton Garden Inn. The balance of the hotel's \$15 million purchase price was financed with a \$10 million bank loan.

The Valencia Hilton Garden Inn was owned by MMHI. Initially, CEF Equities was the sole member of MMHI. However, in April 2005, the loan on the Valencia Hilton Garden Inn was refinanced and the MMHI operating agreement was amended to provide that MMHI became the sole owner of the hotel with membership interests in MMHI allocated among CEF Equities, Rexford/Pico, Flagg, and Ghassemieh.

C. Breakdown of Flagg-Ghassemieh Relationship

In early 2006, the Flagg-Ghassemieh relationship broke down over a dispute about the potential sale of another hotel property. As a result, they did not make any further investments together after 2006 and began unwinding their existing joint hotel investments. By March 2006, their only remaining joint

hotel investment was the Valencia Hilton Garden Inn. That hotel was lost to foreclosure in 2011.

D. Cohen's Improper Transfers/Commingling of MMHI Funds

In late 2007, Flagg began having concerns regarding Cohen's truthfulness regarding financial issues. In the spring of 2008, Flagg learned that Cohen had engaged in some irregularities with respect to his accounting and financial work. He relieved Cohen of his responsibilities as CFO of Ocean Park Hotels on April 15, 2008, and removed him from the bank accounts on which he had signatory authority.

In May 2008, after Cohen admitted to Flagg that funds were missing from MMHI accounts, Flagg directed Ocean Park Hotels's outside accounting firm to investigate potential improprieties by Cohen with respect to MMHI funds. Flagg terminated Cohen's employment in August 2008. Flagg also made a claim on Ocean Park Hotels's insurance policy; the insurance company paid Ocean Park Hotels approximately \$500,000 on its claim relating to Cohen's improper transfers.

After Flagg had been informed by Ocean Park Hotels's accounting firm of the scope of Cohen's improper transfers of MMHI funds, Flagg disclosed the improper transfers to Ghassemieh on September 23, 2008. Flagg advised that he was in the process of arranging for the return of the funds that had been improperly transferred from MMHI.

All improperly transferred MMHI funds were subsequently returned to MMHI.

II. *Procedural Background*

A. The Complaint

On October 2, 2008, plaintiffs filed their lawsuit against Flagg. The fifth amended complaint, the operative pleading, alleges, inter alia, fraud, breach of fiduciary duty, and breach of contract.

B. Ocean Park Hotels Lawsuit Against Cohen

While this lawsuit was pending, in April 2009, Ocean Park Hotels sued Cohen for damages arising out of his improper transfers. Cohen responded by filing a cross-complaint against Ocean Park Hotels and Flagg. That litigation was resolved in 2011 by way of two settlement agreements. As part of the settlement, Cohen signed a declaration in which he corrected prior statements he had made to the effect that Flagg had authorized him to make the improper transfers of MMHI funds. At trial in this litigation, Cohen testified that Flagg had not authorized him to make the improper transfers from the MMHI accounts.

C. Flagg's Motions in Limine

Prior to trial, Flagg filed two motions in limine for orders to preclude plaintiffs from introducing evidence of uncharged misconduct. Motion in limine No. 1 sought to exclude any “evidence of or references to alleged bad acts of [Flagg] in his capacity as trustee of the [Trust].” By this motion, Flagg sought to bar plaintiffs from showing that Flagg had wrongfully commingled any funds except those of MMHI.

Flagg argued that the question of whether he wrongfully commingled from hotel entities wholly-owned by the Trust interests could only be raised by the Trust, which had filed a lawsuit in Northern California, the merits of which were litigated

in a private arbitral forum (the Trust Litigation). Flagg asserted that plaintiffs would improperly attempt to introduce evidence of his “bad acts” towards the Trust in “an effort to sully [him]” and “inject into the trial issues and allegations from the Trust Litigation.” He also asserted that even if these bad acts were relevant and otherwise admissible, any probative value would be outweighed by undue consumption of time, necessitating a “mini-trial” of the Trust Litigation and resulting in juror confusion and prejudice.

Similarly, motion in limine No. 2 sought to exclude evidence or argument that directly or indirectly related to “claims and allegations made in [connection with Flagg’s] divorce proceeding.” The motion sought to bar evidence that Flagg used his management control of Ocean Park Hotels to commingle funds from accounts in a manner that would prejudice the marital community (and therefore his spouse).

Plaintiffs opposed both motions, arguing that Flagg’s wrongful commingling of funds from all accounts under Ocean Park Hotels’s management control (and not just MMHI funds) was evidence of a systemic scheme to commingle the managed accounts for Flagg’s own benefit. Plaintiffs asserted that this evidence was admissible to prove “motive, opportunity, intent, preparation, plan, knowledge, [and] absence of mistake” under Evidence Code section 1101, subdivision (b). Plaintiffs claimed that this evidence was particularly relevant to show Flagg’s modus operandi under Evidence Code section 1101, subdivision (b), because while Flagg did not deny that the transfers out of MMHI occurred, he claimed that they were made by Cohen. Evidence that Flagg made such transfers in either the Trust

Litigation or his divorce was thus highly relevant to show that Flagg made the transfers in this case.

In support, plaintiffs submitted a declaration from Simonich, which attached her expert report describing Flagg's wrongful commingling among the Trust's hotel entities. Simonich, a certified public accountant with a specialty in financial forensics, who had previously been designated as an expert witness by CEF Equities and served as the Trust's expert witness in the Trust Litigation, conducted an extensive review of the Trust's and Ocean Park Hotels's record.

Simonich prepared a detailed report, finding that Flagg had commingled funds among the hotel entities to enrich himself at the expense of the hotel entities whose interests he was supposed to protect. She described his commingling as widespread, emphasizing that it became his common practice. Although Flagg blamed Cohen for the wrongful commingling, Simonich asserted that the wrongful commingling continued after Flagg fired Cohen.

In their opening brief, plaintiffs claim that they would have called "Simonich to rebut [Flagg's] expected trial testimony denying that he used [Ocean Park Hotels] to systematically manipulate and ransack the managed accounts for his own benefit. She would have confirmed that [Flagg] was embezzling the Trust's hotel funds through his control of [Ocean Park Hotels] at the same time and in the same manner as MMHI's funds were embezzled. [Citation.] She would have described the precise manner of [Flagg's] misconduct and shown that what happened to MMHI happened to all the managed accounts—they were manipulated and depleted to serve [Flagg's] interests."

Karen testified by declaration in the divorce proceedings that Flagg did to her just what plaintiffs alleged that he did to them—he commingled funds among the hotel entities for personal gain. Again, on appeal plaintiffs assert that they wanted to call Karen to testify regarding Flagg’s alleged uncharged misconduct to show his “unique methods for commingling, his intent to commit financial fraud, and his scheme to manipulate[] [Ocean Park Hotels’s] funds for his own benefit.”

After entertaining oral argument, the trial court granted both motions in limine. It did state that plaintiffs could “have [an Evidence Code section 402] hearing” during trial, where the trial court would “consider whether or not [they could] make those inquiries at that time.”

D. Trial; Judgment; Appeal

On February 9, 2015, this action proceeded to trial. Plaintiffs asserted that Flagg, as the managing member of MMHI, breached the MMHI operating agreement, as well as his fiduciary duties to plaintiffs in several respects, including by Cohen’s improper transfer of funds out of MMHI. Plaintiffs also claimed that they were induced to invest approximately \$2.5 million in the Valencia Hilton Garden Inn by various oral promises purportedly made by Flagg to Ghassemieh in March or April 2005, including a supposed promise that MMHI funds would not be commingled with or used for Flagg’s other hotel projects.

Through their two experts, plaintiffs claimed four categories of damages: (1) improper transfers of MMHI funds; (2) improper management fees paid to Ocean Park Hotels; (3) penalties incurred due to the delinquent payment of property

taxes; and (4) losses due to mismanagement of the Valencia Hilton Garden Inn and Flagg's failure to sell that hotel. Flagg countered with testimony from two different experts, who opined that plaintiffs had not suffered any damages.

Notably, with respect to Cohen's improper transfer of MMHI funds, all of the experts agreed that all of the improperly transferred funds had been returned to MMHI.

During trial, the issue of Flagg's alleged authorization of improper commingling again was raised. Flagg testified that commingling of funds among properties that the family owned was allowed. But CEF Equities had represented that Jay would contradict Flagg's testimony that the Trust or the family had approved of commingling. Relying on that representation, plaintiffs argued that they were entitled to test the truth of Flagg's testimony by questioning Jay. CEF Equities countered by stating that Jay lacked personal knowledge of Flagg's alleged commingling.

Ultimately, the trial court denied plaintiffs' request to call Jay as a witness.

Following the presentation of evidence, the jury returned its special verdict on March 5, 2015, finding in favor of Flagg on all three of plaintiffs' claims. With respect to the breach of fiduciary duty cause of action, the jury found that Flagg had breached a fiduciary duty to plaintiffs, but that that breach had not harmed plaintiffs. With respect to the breach of contract claim, the jury found that Flagg had breached the MMHI operating agreement, but that plaintiffs had not been harmed by that breach. Finally, with respect to the fraud claim, the jury found that Flagg had not misrepresented a past or existing material fact; nor had he made any false promise to plaintiffs.

that was material to their decision to invest in MMHI. While the jury did find that he had failed to disclose a material fact to plaintiffs, it found that Flagg did not intend that plaintiffs rely on any false representation, concealed fact, or false promise. The jury therefore never reached the issue of whether plaintiffs had been harmed by any false representation, concealed fact, or false promise.

Judgment was entered on September 1, 2015.

Plaintiffs' motion for a new trial was denied, and this timely appeal followed.

DISCUSSION

I. Standard of review

As the parties agree, we review the trial court's order for abuse of discretion. "A motion *in limine* is made to exclude evidence before the evidence is offered at trial, on grounds that would be sufficient to object to or move to strike the evidence. The purpose of a motion *in limine* is "to avoid the obviously futile attempt to 'unring the bell' in the event a motion to strike is granted in the proceedings before the jury." [Citation.] Generally, a trial court's ruling on an *in limine* motion is reviewed for abuse of discretion. [Citation.]" (*Condon-Johnson & Associates, Inc. v. Sacramento Municipal Utility Dist.* (2007) 149 Cal.App.4th 1384, 1392.)

An appellant faces a "daunting task" in seeking reversal of a trial court's discretionary ruling. (*Dreamweaver Andalusians, LLC v. Prudential Ins. Co. of America* (2015) 234 Cal.App.4th 1168, 1171.) "To succeed, the appellant must demonstrate that the ruling was arbitrary, capricious, whimsical, or exceeded the bounds of reason." (*Ibid.*)

II. The trial court did not abuse its discretion

We conclude that the trial court did not abuse its discretion in denying plaintiffs' efforts to have Simonich, Karen, and Jay testify.⁴

Any testimony by Simonich or Karen would have been of minimal probative value and constituted improper character evidence.⁵ They had no knowledge of any alleged commingling involving MMHI; rather, plaintiffs wanted to elicit testimony from them regarding Flagg's alleged mishandling of funds of other hotel properties managed by Ocean Park Hotels. Such evidence had nothing to do with the issues in this case. In fact, it appears that plaintiffs wanted this evidence to taint Flagg in front of the jury by presenting evidence of his purported misconduct in unrelated issues. It is well-established that such character evidence is prohibited by Evidence Code section 1101, subdivision (a). (*Bowen v. Ryan* (2008) 163 Cal.App.4th 916, 923.)

⁴ Plaintiffs do not clearly set forth the issue that they would like us to resolve. It seems at times that they are challenging the trial court's order granting the two motions in limine. At other times, plaintiffs appear to be challenging the trial court's specific prohibition against Simonich, Karen, and Jay's testimonies. And in their reply brief, plaintiffs claim that they are contesting the trial court's decision to prevent the introduction of evidence *from any source* that Flagg planned to commingle and embezzle from any and all Ocean Park Hotels accounts.

⁵ We reach the merits of this argument without addressing Flagg's claim that plaintiffs waived this argument by failing to make a proper offer of proof below.

Under these circumstances, the trial court acted well within its discretion in refusing to allow these witnesses to testify.

Plaintiffs contend that the testimony of Simonich and Karen should have been admitted to prove Flagg's "common plan or design, intent, or identity." After all, evidence of uncharged bad conduct is admissible to establish a "common design or plan." (*Hub City Solid Waste Services, Inc. v. City of Compton* (2010) 186 Cal.App.4th 1114, 1132.)

"The relevance of uncharged misconduct to show intent or the existence of a common design or plan is determined by the nature and degree of the similarity between such misconduct and the charged conduct. [Citation.] The least degree of similarity is required to prove intent, and a greater degree is required to prove the existence of a common design or plan. [Citation.] In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to evidence in the present case to support the inference that the defendant would have harbored the same intent in each incident. [Citation.] To establish a common design or plan, evidence of uncharged misconduct must demonstrate a concurrence of common features indicating the existence of a plan rather than a series of similar spontaneous acts. [Citation.]" (*Hub City Solid Waste Services, Inc. v. City of Compton, supra*, 186 Cal.App.4th at p. 1132, fn. omitted.)

The problem with plaintiffs' theory is simple: As Flagg testified, commingling/transfers of funds among hotel investments that were wholly-owned by the Trust and/or Flagg family interests was proper and authorized, but the commingling of funds among hotel investments in which there was a third party investor (such as MMHI) was not proper or authorized.

The declarations of Simonich and Karen filed in opposition to Flagg's motions in limine do not distinguish between these two types of hotel investments. As such, they do not shed any light on whether Flagg authorized or directed Cohen to engage in improper commingling of funds among hotel investments in which a third party investor, like MMHI, was involved.

Similarly, the trial court did not abuse its discretion in refusing to compel Jay to testify. Jay became the manager of CEF Equities and the trustee of the Trust in 2009, well after Cohen's improper transfers of MMHI funds had occurred. He had no first-hand knowledge regarding any commingling prior to 2009.

Plaintiffs claim that Jay could have testified regarding alleged family approval to commingle funds. But Flagg never testified that Jay had given him authority to commingle funds between Trust/family-owned hotel properties.

Because a judgment or order of the lower court is presumed correct, error must be affirmatively shown.⁶ (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) Plaintiffs failed to meet their burden. Accordingly, the judgment is affirmed.

⁶ Because we find no trial court error, we need not address whether the alleged error was prejudicial.

DISPOSITION

The judgment is affirmed. Flagg is entitled to costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
HOFFSTADT

_____, J.*
GOODMAN

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