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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

LAYNE LESLIE BRITTON, Plaintiff, Cross-defendant and Appellant, v. CONRAD RIGGS et al., Defendants, Cross-complainants and Appellants.	B272078 (Los Angeles County Super. Ct. No. BC496298)

APPEALS from orders of the Superior Court of Los Angeles County, Frederick C. Shaller, Judge. Reversed in part, and appeals dismissed in part.

Quinn Emanuel Urguhart & Sullivan, Jon Christian Cederberg, Jeffery D. McFarland, Shahin Rezvani, and Aaron Perahia for Plaintiff, Cross-defendant and Appellant Layne Leslie Britton.

Browne George Ross, Eric M. George, and Corbin K. Barthold for Defendants, Cross-complainants and Appellants Conrad Riggs and Cloudbreak Entertainment, Inc.

Plaintiff Layne Leslie Britton filed suit against defendants Conrad Riggs and Cloudbreak Entertainment, Inc. for various claims arising out of an alleged breach of contract, seeking more than $14 million in damages. Riggs and Cloudbreak cross-complained against Britton for legal malpractice and breach of fiduciary duty. After trial on Britton's claims for breach of contract and money had and received, the jury returned a special verdict in favor of Britton on both claims, and awarded him a total of $489,850 in damages. The trial court thereafter granted in part, and denied in part, a motion for a new trial filed by Britton. The parties appeal from various orders entered by the trial court. For the reasons set forth below, we reverse the trial court's order on the motion for a new trial, and dismiss the parties' respective appeals from the remaining challenged orders.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. The Parties

Riggs worked with Mark Burnett to produce the reality television series, *Survivor*, which premiered on CBS in May 2000. Riggs and Burnett originally offered the show to multiple television networks, including UPN. At that time, Britton, who is a licensed attorney, was employed by UPN as the executive Vice President in Charge of Business Operations. Although UPN passed on the project, Britton advised Riggs and Burnett how to approach other networks. CBS ultimately agreed to broadcast *Survivor*, which became an instant success. Burnett thereafter entered into contract negotiations with CBS for additional cycles of *Survivor*. At the request of Riggs and Burnett, Britton attempted to negotiate a new compensation agreement for Burnett directly with the network. When those negotiations

failed, Burnett and CBS proceeded to arbitration. During that time, Britton continued to advise Riggs and Burnett on the negotiations and arbitration with CBS, without charging them for those services.

While Burnett's arbitration with CBS was still pending, Britton and Riggs sought to memorialize their relationship going forward. On October 23, 2000, Britton and Riggs's production company, Cloudbreak, entered into a written agreement entitled "Consulting Agreement." The agreement provided that Britton would render "business advisory and consulting services" to Riggs and Cloudbreak on certain projects that Cloudbreak undertook for Burnett and Burnett's affiliated companies. In exchange for those services, Cloudbreak would pay Britton 35 percent of all gross compensation that Cloudbreak received from Burnett or any other source with respect to the *Survivor* series, and 40 percent of all gross compensation that Cloudbreak received from Burnett or his affiliated companies with respect to other projects covered by the agreement. The agreement also stated that, if Burnett or his affiliated companies failed to pay Cloudbreak for the covered projects, Cloudbreak would not release any claims against them prior to consulting with Britton and obtaining Britton's consent to the release of claims.

Burnett and CBS settled their dispute in January 2001. Britton thereafter provided services to Cloudbreak in accordance with the Consulting Agreement. When Cloudbreak failed to pay Britton for those services despite his repeated requests, Britton retained counsel and threatened to file suit. Cloudbreak then began making interim payments of $200,000 to Britton for the *Survivor* series. Between November 2002 and December 2006, Cloudbreak made payments to Britton totaling $1.877 million. In

late 2006, however, the business relationship between Riggs and Burnett faltered. At that point, Cloudbreak stopped making any payments to Britton under the Consulting Agreement.

In July 2008, Riggs filed suit against Burnett for, among other claims, breach of contract and breach of fiduciary duty. The lawsuit between Riggs and Burnett was pending for several years, but ultimately settled in March 2012. Riggs did not obtain Britton's consent prior to reaching a settlement with Burnett.

II. The Pleadings

On November 27, 2012, Britton filed this action against Riggs and Cloudbreak. In his second amended complaint, Britton alleged claims for breach of contract, conversion, open book account, money had and received, quantum meruit, fraud, and receipt of stolen property. The gravamen of Britton's complaint was that Cloudbreak breached the Consulting Agreement by failing to pay Britton the full amounts owed under the agreement, and by failing to obtain Britton's consent prior to settling the lawsuit with Burnett. The complaint further alleged that Riggs was the sole owner of Cloudbreak, and that Cloudbreak was a corporate shell designed to insulate Riggs from liability for his wrongful acts. Britton sought compensatory damages from Cloudbreak and Riggs in excess of $14 million.

In response, Riggs and Cloudbreak filed a cross-complaint against Britton. In their first amended cross-complaint, Riggs and Cloudbreak alleged claims for professional negligence, breach of fiduciary duty, declaratory relief, and unjust enrichment. They specifically alleged that Britton had acted as their attorney in various matters, including their agreement with Burnett, and that Britton had breached his professional duties as an attorney by negligently advising them in those matters. They also alleged

that the Consulting Agreement between Britton and Cloudbreak was an attorney-client contingency fee agreement that was void and unenforceable because it failed to comply with various statutes and rules governing attorney-client relationships. In addition to declaratory relief, Riggs and Cloudbreak sought restitution of all amounts paid to Britton that exceeded the reasonable value of the services he had rendered.

On March 19, 2015, the trial court sustained a demurrer filed by Riggs and Cloudbreak to Britton's second amended complaint. The court sustained the demurrer to Britton's causes of action for conversion and receipt of stolen property without leave to amend on the ground that Britton had failed to allege facts sufficient to state a cause of action after having been given leave to do so. The court also granted a motion to strike the cause of action for fraud on the ground that Britton had added that cause of action to his second amended complaint without being granted leave to add a new claim.

III. The Motions for Summary Judgment

On July 17, 2015, the parties filed respective motions for summary adjudication. Britton moved for summary adjudication on the issue of whether he owed any fiduciary duty to Riggs and Cloudbreak by reason of an attorney-client relationship. Britton asserted that he did not have an attorney-client relationship with Riggs or Cloudbreak and did not otherwise owe them a fiduciary duty because he never acted as their attorney. Riggs and Cloudbreak moved for summary adjudication on Britton's cause of action for breach of contract on the ground that the Consulting Agreement was an attorney-client contingency fee agreement that failed to comply with Business and Professions Code 6147, which rendered the agreement voidable at their election. Riggs

and Cloudbreak also moved for summary adjudication on each cause of action in Britton's second amended complaint on the ground that the claims were time-barred by the applicable statute of limitations.

On October 1, 2015, the trial court granted the summary adjudication motion filed by Britton and denied the summary adjudication motion filed by Riggs and Cloudbreak. With respect to Britton's motion, the trial court found that Britton did not owe a fiduciary duty to Riggs or Cloudbreak because the undisputed evidence established that Britton was not their attorney. With respect to Riggs and Cloudbreak's motion, the court found that they were not entitled to summary adjudication on Britton's cause of action for breach of contract because the parties did not have an attorney-client relationship, and thus, the Consulting Agreement was not subject to Business and Professions Code section 6147. The court further found that Riggs and Cloudbreak had failed to demonstrate that the statute of limitations barred each cause of action in Britton's second amended complaint because there were triable issues of fact as to whether Riggs and Cloudbreak were equitably estopped from asserting the statute of limitations as a defense to Britton's claims.

IV. The Jury Trial

In February 2016, the case was tried by a jury on Britton's causes of action for (1) breach of contract against Cloudbreak, and (2) money had and received against Cloudbreak and Riggs. Prior to the start of the jury trial, the trial court indicated that it would reserve two issues for a bench trial following the jury's verdict. Specifically, the court reserved trial on Britton's claim that Riggs and Cloudbreak were equitably estopped from asserting the statute of limitations as a defense to the action.[1] The court also reserved trial on Britton's claim that Riggs was the alter ego of Cloudbreak, and thus, could be held personally liable for Cloudbreak's alleged wrongful acts.

At the conclusion of the jury trial on Britton's claims for breach of contract and money had and received, the jury returned a special verdict in favor of Britton on both claims. On the breach of contract claim, the jury found that (1) Britton entered into a contract with Cloudbreak; (2) Britton did all of the significant things that the contract required him to do; (3) all of the conditions required for Cloudbreak's performance occurred;

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[1] According to the first amended cross-complaint filed by Riggs and Cloudbreak, the parties entered into a written tolling agreement on June 14, 2012, which tolled all applicable statutes of limitations for a period of 180 days while the parties engaged in mediation. Britton filed suit on November 27, 2012, shortly before the tolling agreement expired. As a result, the four-year statute of limitations on Britton's claim for breach of a written contract barred recovery for damages sustained prior to June 14, 2008 (Code Civ. Proc. § 337, subd. (1)), and the three-year statute of limitations on Britton's common count for money had and received barred recovery for damages sustained prior to June 14, 2009 (Code Civ. Proc. § 338, subd. (d)).

(4) Cloudbreak failed to do something that the contract required it to do; and (5) Britton was harmed by that failure. With respect to Cloudbreak's statute of limitations defense to the contract claim, the jury found that part of Britton's claimed harm occurred before June 14, 2008. The jury also found that, prior to June 14, 2008, Britton knew of facts that would have caused a reasonable person to suspect he had suffered harm caused by Cloudbreak's failure to pay him money due under the contract, and he could have discovered that harm through a reasonable and diligent investigation. With respect to damages, the jury awarded Britton $0 for past economic loss suffered before June 14, 2008, and $489,850 for past economic loss suffered after June 14, 2008.

On the claim for money had and received, the jury found that Cloudbreak or Riggs (1) received money that was intended to be used for the benefit of Britton; (2) failed to use that money for the benefit of Britton; and (3) failed to give that money to Britton. With respect to the statute of limitations defense to the common count, the jury found that part of Britton's claimed harm occurred before June 14, 2009. The jury also found that, prior to June 14, 2009, Britton knew of facts that would have caused a reasonable person to suspect he had suffered harm caused by the defendants' failure to use the money for his benefit, and he could have discovered that harm through a reasonable and diligent investigation. With respect to damages, the jury found that Cloudbreak and Riggs owed Britton $0 on the claim for money had and received.

V. The Post-Trial Proceedings

The jury returned its special verdict on February 26, 2016. Britton filed a notice of intention to move for a new trial on March 1, 2016, and filed his motion for a new trial 10 days later

on March 11, 2016. In his motion, Britton argued that a new trial should be granted on the issue of damages because the amounts awarded by the jury for both causes of action were inadequate. Britton also asserted that the jury's verdict was contrary to law because its finding that part of Britton's claimed harm occurred before June 14, 2008 was inconsistent with its finding that Britton suffered no damages prior to that date. Britton filed his motion for a new trial prior to the court conducting a bench trial on either his equitable estoppel claim or his alter ego claim.[2] Riggs and Cloudbreak opposed the new trial motion.

The trial court entered a judgment on the jury's verdict on March 14, 2016. On April 5, 2016, the trial court held a hearing on Britton's motion for a new trial and took the matter under submission. On April 11, 2016, the court issued an order granting in part, and denying in part, the motion. In ruling on the motion, the court also made a finding that the equitable estoppel doctrine did not bar Riggs and Cloudbreak from asserting a statute of limitations defense to Britton's claims.

The trial court granted a new trial on Britton's claim for money had and received on the ground that the jury's damages award was inadequate and inconsistent with its finding of liability on that claim. The court also concluded that the jury's verdict was ambiguous as to whether its liability finding applied to Cloudbreak only or to both Cloudbreak and Riggs. The court

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[2] The record shows Britton filed bench trial briefs regarding the equitable estoppel and alter ego issues after he filed his motion for a new trial. In particular, Britton filed a trial brief on equitable estoppel on March 16, 2016, and reply briefs on equitable estoppel and alter ego on April 4, 2016.

denied the motion for a new trial on Britton's claim for damages for breach of contract. The court concluded that, while the jury's award of $0 in pre-June 14, 2008 damages was inconsistent with its finding that at least part of Britton's harm occurred prior to that date, the error was harmless because Britton was barred by the statute of limitations from recovering damages for any pre-June 14, 2008 loss. The court decided that Riggs and Cloudbreak were not barred by the equitable estoppel doctrine from asserting the statute of limitations as a defense to the claims because Britton knew as early as March 2002 that Cloudbreak was failing to pay him money owed under the parties' agreement, but did not file suit until November 2012. The court also concluded that Britton had waived any claim based on an inconsistent verdict by failing to raise the issue prior to the discharge of the jury. In addition, the court concluded that the jury's award of $489,850 in post-June 14, 2008 damages was adequate and exceeded the amount that the economic expert for Riggs and Cloudbreak testified was owed to Britton under the Consulting Agreement.

On May 3, 2016, the trial court issued an order taking the parties' respective motions for attorney's fees off calendar pending a retrial on the claim for money had and received. The court also ordered that the bench trial on Britton's alter ego claim be reserved pending resolution of the appeal that Riggs and Cloudbreak had indicated they would file in the near future. The court noted that the trial on the alter ego claim had not taken place following the jury's verdict because "almost immediately after the verdict [Britton] filed a notice of intention [to move] for [a] new trial and the court issued a ruling before [it] could hear the additional evidence."

On May 4, 2016, Riggs and Cloudbreak filed a notice of appeal from (1) the April 11, 2016 order on the motion for a new trial, (2) the March 14, 2016 judgment on the jury's verdict, and (3) the October 1, 2015 order on the parties' motions for summary adjudication. On May 9, 2016, Britton filed a notice of cross-appeal from (1) the April 11, 2016 order on the motion for a new trial, (2) the March 14, 2016 judgment on the jury's verdict, and (3) the March 19, 2015 order sustaining the demurrer to Britton's second amended complaint.

DISCUSSION

In their appeal, Riggs and Cloudbreak argue the trial court erred in (1) granting the motion for a new trial on Britton's claim for money had and received, (2) granting Britton's motion for summary adjudication on the issue of whether an attorney-client relationship existed between the parties, and (3) denying Riggs and Cloudbreak's motion for summary adjudication on the issue of whether the Consulting Agreement was void under Business and Professions Code section 6147. In his cross-appeal, Britton asserts the trial court erred in (1) denying the motion for a new trial on Britton's claim for damages for breach of contract, (2) sustaining the demurrer to Britton's claims for conversion and receipt of stolen property without leave to amend, and (3) granting the motion to strike Britton's claim for fraud.

I. Appealability

Following oral argument, we requested supplemental briefing as to whether the March 14, 2016 judgment entered on the jury's verdict is appealable as a final judgment under Code of Civil Procedure section 904.1, subdivision (a)(1), and whether we have jurisdiction to consider any of the issues raised by the

parties in their respective appeals. In their supplemental briefs, the parties agree the March 14, 2016 judgment is not appealable as a final judgment because, at the time it was entered, there were still issues to be decided by the trial court. Both parties assert, however, that the April 11, 2016 order partially granting Britton's motion for a new trial is a separately appealable order, and therefore, subject to review by this Court. We agree.

"The existence of an appealable judgment or order is a jurisdictional prerequisite to an appeal," and "[a] reviewing court must raise the issue on its own initiative whenever a doubt exists as to whether the trial court has entered a final judgment. . . ." (*Jennings v. Marralle* (1994) 8 Cal.4th 121, 126; see also *Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 696 (*Griset*) ["reviewing court has jurisdiction over a direct appeal only when there is (1) an appealable order or (2) an appealable judgment"].) "In general, an adverse ruling in a judicial proceeding is appealable once the trial court renders a final judgment. [Citations.]" (*Dhillon v. John Muir Health* (2017) 2 Cal.5th 1109, 1115 (*Dhillon*); see Code Civ. Proc. § 904.1, subd. (a)(1) [an appeal may be taken "[f]rom a judgment, except an interlocutory judgment"].) "A judgment is the final determination of the rights of the parties. [Citation.]" (*Griset*, *supra*, at p. 697.) "[A] judgment is final, and therefore appealable, ""when it terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined."" [Citations.]" (*Dhillon*, *supra*, at p. 1115.)

Here, the record reflects that, at the time the March 14, 2016 judgment on the jury's verdict was entered, there were two remaining issues to be decided by the trial court: (1) whether Riggs and Cloudbreak were barred from asserting the statute of

limitations as a defense to Britton's claims under the equitable estoppel doctrine, and (2) whether Riggs was personally liable for the alleged acts of Cloudbreak under the alter ego doctrine. The trial court decided the equitable estoppel issue in its subsequent ruling on Britton's motion for a new trial, but reserved trial on the alter ego issue until resolution of the parties' respective appeals. Because the March 14, 2016 judgment was not a final determination of the rights of the parties in this action, it was interlocutory, and thus, not appealable. (See *Griset*, *supra*, 25 Cal.4th at p. 698 ["where anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, the decree is interlocutory"]; *Baker v. Castaldi* (2015) 235 Cal.App.4th 218, 223-224 [filed-document entitled "judgment" that determined liability and compensatory damages but reserved trial on amount of punitive damages was not appealable].)

In the absence of a final, appealable judgment, this Court does not have jurisdiction to consider Riggs and Cloudbreak's challenge to the trial court's October 1, 2015 order on the parties' respective summary adjudication motions. (*Angelica Textile Services, Inc. v. Park* (2013) 220 Cal.App.4th 495, 503 ["[g]enerally, orders granting summary adjudication are interlocutory orders and, as such, are not appealable"]; *Federal Deposit Ins. Corp. v. Dintino* (2008) 167 Cal.App.4th 333, 343 ["[a]n order denying a motion for summary judgment or summary adjudication is not an appealable order"].) We also lack jurisdiction to consider Britton's challenge to the trial court's March 19, 2015 order on Riggs and Cloudbreak's demurrer and motion to strike. (*Arce v. Kaiser Foundation Health Plan, Inc.* (2010) 181 Cal.App.4th 471, 485, fn. 9 ["an order sustaining a

demurrer without leave to amend is ordinarily not appealable since the order is not a final judgment"]; *Walnut Producers of California v. Diamond Foods, Inc.* (2010) 187 Cal.App.4th 634, 641 ["[g]enerally, an order granting a motion to strike is not an appealable order"].) Instead, each of these interlocutory orders may only be reviewed on appeal from a final judgment entered in the case. (*Jennings v. Marralle*, *supra*, 8 Cal.4th at p. 128.)

In contrast, the trial court's April 11, 2016 order partially granting Britton's motion for a new trial is an appealable order. Code of Civil Procedure section 904.1 specifically provides that an appeal may be taken "[f]rom an order granting a new trial." (Code Civ. Proc., § 904.1, subd. (a)(4).) California courts likewise have held that an order granting a motion for a new trial as to some issues while denying it as to other issues is appealable. (*Liodas v. Sahadi* (1977) 19 Cal.3d 278, 285 [where trial court granted defendant's motion for new trial but limited new trial to issue of damages, both parties properly appealed from new trial order]; see also *Spencer v. Nelson* (1947) 30 Cal.2d 162, 164; *Ferraro v. Pacific Fin. Corp.* (1970) 8 Cal.App.3d 339, 355.) We therefore have jurisdiction to consider the parties' respective appeals from the April 11, 2016 new trial order.

II. The Trial Court's Order on Britton's Motion for a New Trial Is Void and Without Legal Effect

In its order on Britton's motion for a new trial, the trial court granted the motion as to Britton's claim for money had and received and denied the motion as to Britton's claim for breach of contract. Both parties challenge portions of the order on appeal. Riggs and Cloudbreak contend the order partially granting the new trial motion is void as a matter of law because Britton filed the motion prematurely before all issues in the case had been

decided. Britton, on the other hand, claims the order partially denying the new trial motion was erroneous because the court misapplied the law in deciding that Britton was not entitled to a new trial on his claim for damages for breach of contract. We conclude the trial court's order partially granting and partially denying the motion for a new trial is void because the notice of intention to move for a new trial was filed prematurely, thereby depriving the court of jurisdiction to rule upon the motion.

A. Governing Legal Principles

Code of Civil Procedure section 657 provides, in relevant part, that a "verdict may be vacated and any other decision may be modified or vacated, in whole or in part" upon the application for a new trial made by any "party aggrieved." (Code Civ. Proc., § 657.) A new trial is defined as "a re–examination of an issue of fact in the same court after a trial and decision by a jury, court or referee." (Code Civ. Proc., § 656.) A party moving for a new trial must file and serve a notice of his or her intention to move for a new trial "either: [¶] (1) After the decision is rendered and before the entry of judgment. [or] [¶] (2) Within 15 days of the date of mailing notice of entry of judgment by the clerk of the court . . ., or service upon him or her by any party of written notice of entry of judgment, or within 180 days after the entry of judgment, whichever is earliest. . . ." (Code Civ. Proc. § 659, subd. (a).) A notice of intention to move for a new trial "shall be deemed to be a motion for a new trial on all the grounds stated in the notice." (Code Civ. Proc. § 659, subd. (b).)

A notice of intention to move for a new trial filed before the time permitted by statute is premature and void. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 459-460 (*Auto Equity Sales*); *Fong Chuck v. Chin Po Foon* (1947) 29 Cal.2d 552,

553-554 (*Fong Chuck*); *Tabor v. Superior Court* (1946) 28 Cal.2d 505, 507-508 (*Tabor*).) Where the notice is filed prematurely, the court lacks jurisdiction to entertain the new trial motion, and all orders and proceedings based on the motion are likewise void and without legal effect. (*Fong Chuck*, *supra*, at p. 553 ["trial court did not have jurisdiction to grant a new trial" or "to enter a new and different judgment" where notice of intention to move for new trial was premature]; *Tabor*, *supra*, at p. 508 ["premature notice of intention to move for a new trial was 'a nullity and ineffectual for any purpose' and [trial] court was without power to entertain the motion"].) As the California Supreme Court has explained, "[t]he concept of prematurity as applied to new trial proceedings is based on two major concepts—one is that to vest the trial court with the jurisdiction to pass on a motion for a new trial a timely notice must be made [citation]. The other is that the motion cannot be made until there is a decision in the case. The statutory scheme on new trials makes it quite evident that a new trial is not proper until the action has been prosecuted to a point where it can be said to be complete. [Citations.] . . . Until there has been a decision there is no aggrieved party. [Citations.]" (*Auto Equity Sales*, *supra*, at pp. 458-459.)

"A notice of intention to move for a new trial is 'premature' and void if filed before there has been a 'trial and decision.' (Code Civ. Proc., § 656.) . . . 'That "decision" is the rendition of judgment by the verdict of the jury or the signed and filed findings of the court.' [Citation.] For purposes of [Code of Civil Procedure] section 659 a 'trial' is complete when all the issues have been determined [citations] as to the 'party aggrieved' in question [citation]." (*Auto Equity Sales*, *supra*, 57 Cal.2d at p. 460.) Accordingly, in a case tried by the court, "the decision is rendered

only when the court signs and files its findings of fact and conclusions of law." (*Id.* at p. 459.) In a case tried by a jury, "the trial is not complete until the jury renders a verdict . . . disposing of all the issues in the case." (*Id.* at p. 460.)

"When issues are tried separately, there is no 'trial and decision' [citation] until all issues have been decided. [Citations.]" (*Ochoa v. Dorado* (2014) 228 Cal.App.4th 120, 133; see Cal. Rules of Court, rule 3.1591(c) ["[a]ny motion for a new trial following a bifurcated trial must be made after all the issues are tried"].) Thus, "[w]here the action embraces several issues, some of which are tried by the court and some by a jury, a notice of intention to move for a new trial, served and filed after the verdict on the issues submitted to the jury, but before the decision on the issues tried by the court, is premature and gives 'to the court no power to act upon the motion which should thereafter be made under the notice.' [Citations.]" (*Barnes v. Foley* (1922) 189 Cal. 226, 227; see *Ochoa v. Dorado*, *supra*, at p. 133 [in personal injury action, notice of intention to move for new trial filed after jury trial on damages, but before bench trial on reserved issue regarding insurance, "was premature and of no effect and . . . void for all purposes"]; *Ruiz v. Ruiz* (1980) 104 Cal.App.3d 374, 379 [where defendants filed notice of intention to move for new trial after jury made advisory findings in equity case, but before court made its own findings, notice was premature and "court was without jurisdiction to make its order granting defendants' motion"]; *Mays v. Disneyland, Inc.* (1963) 213 Cal.App.2d 297, 298 [in bifurcated trial, court erred in granting new trial where notice of intention to move for new trial was filed after verdict on liability, but before trial on damages,

because "the trial was not completed until there had been a determination of both issues"].)

B. Britton's Notice of Intention to Move for a New Trial Was Premature and Void for All Purposes

As discussed, there were two issues to be decided by the trial court after the case was tried by the jury on Britton's causes of action for breach of contract and money had and received. Those issues were Britton's claim that Riggs and Cloudbreak were barred from asserting the statute of limitations as a defense under the equitable estoppel doctrine, and Britton's claim that Riggs was personally liable for Cloudbreak's alleged wrongful acts under the alter ego doctrine. The record reflects that the jury returned its verdict on Britton's causes of action on February 26, 2016, and that Britton filed his notice of intention to move for a new trial on March 1, 2016. Britton filed his notice of intention to move for a new trial before the court made any determination on either the equitable estoppel issue or the alter ego issue.

On April 11, 2016, the trial court issued its order granting in part, and denying in part, Britton's motion for a new trial. At that time, the court also decided the issue of equitable estoppel, finding that Britton failed to establish that Riggs and Cloudbreak should be estopped from asserting the statute of limitations as a defense to his claims. The court did not, however, decide the issue of alter ego liability, and instead reserved trial on that issue until the resolution of the parties' respective appeals. Because Britton filed his notice of intention to move for a new trial before all issues had been decided, the notice was premature and void for all purposes. The trial court therefore had no jurisdiction to rule on the motion for a new trial, and its order partially granting and partially denying the motion is void and without legal effect.

On appeal, Britton does not contend that his notice of intention to move for a new trial was timely filed. Rather, he claims that Riggs and Cloudbreak forfeited any objection that the notice was premature by failing to raise the issue in the trial court. This argument lacks merit. First, Riggs and Cloudbreak did raise the issue of prematurity in opposing the new trial motion. Specifically, Britton had argued in his motion that a new trial on pre-June 14, 2008 damages was "necessary before the [c]ourt passes on [his] equitable estoppel claim." In their opposition, Riggs and Cloudbreak responded that a separate trial on equitable estoppel was no longer necessary given the jury's finding that Britton unreasonably delayed in discovering the facts giving rise to his claims, and that "if Britton really thinks himself entitled to another phase of trial, his motion for [a] new trial is premature." The opposition also quoted a leading treatise that "'[w]hen issues are bifurcated and tried separately . . ., a new trial motion is premature if made before all issues have been tried.' Cal. Prac. Guide Civ. Trials & Ev. Ch. 18-B, ¶ 18:209.1." Britton's claim that Riggs and Cloudbreak failed to raise the prematurity of the new trial motion before the trial court is not supported by the record.

Second, even if Riggs and Cloudbreak had failed to object to the new trial motion on the ground it was premature, it is well-established that "'[p]roceedings for a new trial taken prematurely are a nullity and ineffectual for any purpose' [citation], and it is not within the power of the litigants to invest the court with jurisdiction to hear and determine the motion for a new trial by consent, waiver, agreement or acquiescence. [Citations.]" (*Tabor*, *supra*, 28 Cal.2d at p. 507.) As the Supreme Court long ago explained, "a court may have jurisdiction to grant a new trial

after motion based upon proper statutory grounds, but has no jurisdiction to make the order unless the moving party has given his notice of intention within the prescribed statutory time. [Citation.]' [¶] . . . The parties' oral presentation and argument of the motion, though at a time when . . . a written notice might have been seasonably filed had objection been raised [citations], did not satisfy the jurisdictional requirement. . . ." (*Id*. at p. 508; accord, *Fong Chock*, *supra*, 29 Cal.2d at p. 554 [plaintiff was not estopped from objecting to premature notice of intention to move for new trial because "the objection has been held to be one going to the jurisdiction of the trial court, [and] we do not believe that jurisdiction may be conferred by estoppel"]; *Ehrler v. Ehrler* (1981) 126 Cal.App.3d 147, 152 [where notice of intention to move for new trial is filed prematurely, "[t]he mere act by the trial court in hearing the motion does not operate to give the court jurisdiction over the matter" and "[t]he parties cannot invest the court with jurisdiction through participation in the hearing"]; *Frye v. Pacific Freight Lines* (1938) 27 Cal.App.2d 748, 750 [trial court lacked jurisdiction to rule upon motion for new trial where notice was premature, and appellants did not waive defect by failing to object because "'litigants are entitled to a strict and certain interpretation of the statute governing . . . new trials"].)

Because the trial court was without jurisdiction to entertain Britton's motion for a new trial, its order adjudicating the motion is "'void and of no force or effect . . . as completely as if never entered.'" (*Tabor*, *supra*, 28 Cal.2d at p. 509.) The order accordingly must be reversed. (*Ochoa v. Dorado*, *supra*, 228 Cal.App.4th at p. 133, fn. 8 [order ruling on motion for new trial is appealable even if the order is void and the proper procedure is

to reverse the void order rather than dismiss the appeal from it]; *Ruiz v. Ruiz*, *supra*, 104 Cal.App.3d at p. 379, fn. 5 [same].)

DISPOSITION

The April 11, 2016 order granting in part, and denying in part, Britton's motion for a new trial is reversed. The parties' respective appeals are otherwise dismissed. The parties shall bear their own costs on appeal.

ZELON, J.

We concur:

PERLUSS, P. J.

FEUER, J.