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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

CITY OF LOS ANGELES, et al., Plaintiffs and Respondents, v. TINA MITHAIWALA, Defendant and Appellant; DAVID J. PASTERNAK, Receiver, Real Party in Interest	B268391 (Los Angeles County Super. Ct. No. BC460066)

APPEAL from an order of the Superior Court of Los Angeles County, Elihu Berle, Judge. Affirmed.

Law Offices of Sajan Kashyap, Sajan Kashyap, and Esner, Chang & Boyer, Stuart B. Esner, for Defendant and Appellant.

Burke, Williams & Sorensen, Charles E. Slyngstad for Plaintiffs and Respondents City of Glendale and Housing Authority of the City of Glendale.

Pasternak & Pasternak, David J. Pasternak, and Buchalter, Michael L. Wachtell and William Miller, for Real Party in Interest.

No appearance by City of Los Angeles.

Defendant and Appellant Tina Mithaiwala (Tina) challenges the trial court's order for (1) nonrestitutionary disgorgement of profits from investments she made with $8.25 million wrongfully taken from a corporation formerly controlled by her spouse, his daughter, and the daughter's husband and (2) the sale of her family home (Braewood Court). The court-appointed receiver for the corporation obtained the order to pay approved creditor claims.

Tina contends the $8.25 million was an interest-free loan to her; she was not a "conscious wrongdoer" who may be deprived of profits realized from her successful investment strategies; and the receiver failed to establish the necessity to apply the funds, including equity in Braewood Court, to defray creditor claims. We affirm on the merits as to the first two contentions and find Tina forfeited the third for failing to raise it in the trial court.

FACTUAL AND PROCEDURAL BACKGROUND

This is the second time these two related cases (*City of Los Angeles v. Advanced Development & Investment, Inc., et al.,* BC460066, and *Housing Authority of the City of Glendale et al. v. Karimi et al.,* BC460044) (Cities' actions)) have been before this court. Our previous nonpublished opinion, *Housing Authority of the City of Glendale v. Mithaiwala* (Aug. 26, 2013, B234687)

(*Mithaiwala I*)) included a detailed history of the Cities' actions.[1] In *Mithaiwala I,* this court affirmed the trial court's appointment of the receiver in the Cities' actions and approval for the expansion of the receivership estate to include assets held by four individual defendants: Tina; her spouse, Ajit Mithaiwala (Ajit); Ajit's daughter, Jannki Mithaiwala (Jannki); and Jannki's spouse, Salim Karimi (Salim).[2]

As pertinent to this appeal, we note the following: The Cities' actions have their roots in marital dissolution proceedings between Salim and Jannki. They were the sole shareholders in Advanced Development and Investments, Inc. (ADI) and Pacific Housing Diversified, Inc. (PHD). ADI "was a low income housing developer and the administrative general partner of 57 limited partnerships that owned and operated 55 low income housing projects in California;" PHD "was the general building contractor for [the ADI] projects." Ajit was an executive with both entities. Tina had no role in either corporation.

In early 2010, after Jannki and Salim accused each other of corporate looting and concealing corporate assets, the family law court appointed David Pasternak as the receiver for ADI and PHD. The receiver's preliminary report detailed his discovery of "fraudulent invoices and draw requests, . . . a lack of documentations and internal controls; company funds being

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[1] We take judicial notice of our earlier opinion. Tina filed a notice of appeal in *Mithaiwala I,* but abandoned the effort and her appeal was dismissed. The appeal proceeded as to her spouse, stepdaughter, stepdaughter's spouse, and others.

[2] As has been the custom throughout proceedings in the superior court and here, we refer to the individuals by their first names.

treated as personal assets, including unpaid personal loans to [Salim] and Jannki from the receivership corporations totaling at least $36 million and at least $25 million of the receivership corporations' assets being transferred to India; and interference with his investigation. The report also outlined possible criminal activities, including fraud on lenders and municipalities, failure to report income, and falsification of books and records to conceal fraud." In the meantime, the receiver terminated Ajit from his positions at ADI and PHD and removed Jannki and Salim from the boards of both corporations. (*Ibid.*)

According to the receiver, a Wells Fargo bank/stock trading account in the names of Jannki, Ajit, and Tina provided one example of the principals' treating corporate assets as their own. This account came to the receiver's attention by way of a declaration filed by the certified public accountant (CPA) retained by Jannki's dissolution counsel.

The "Blumenthal declaration" was dated June 11, 2010. The CPA began with a schedule of "'Jannki-Ajit Identified Company Withdrawals.'" He traced a series of withdrawals from PHD, totaling $8.25 million, to deposits into a single Wells Fargo account in the names of Jannki, Ajit, and Tina. The beginning balance of that joint account was $1,299,262, but the Blumenthal declaration did not trace the source of those funds. $1,107,500 was withdrawn from the Wells Fargo account for the all-cash purchase of Braewood Court. The sellers were Jannki and Salim; the buyers were Tina and Ajit. A total of $2.1 million was transferred to a Charles Schwab account owned by Ajit and

Tina.[3] $2 million was transferred to Ajit and he spent another $250,000 to buy gold to repay a loan associated with the businesses. After these transactions and with an increase in "Equity Values/Interest," $5,931,773 remained in the Wells Fargo account.

In July 2010, the receiver asked Jannki, Ajit, and Tina to return the $8.25 million that was transferred from PHD to the Wells Fargo account. Much of the money was returned; a shortfall was "'satisfied' by Tina and Ajit providing a deed of trust on Braewood Court (Tina and Ajit's home) for the [$1,107,500] withdrawn from the Wells Fargo account."

At the September 1, 2010 hearing to address the receiver's preliminary report, the family law judge accepted the receiver's recommendation and "expanded the receivership to include '[a]ll property and assets held by, for the benefit of, or improperly transferred from [ADI and PHD].'" As part of this ruling, the family law court issued a temporary restraining order against Salim, Jannki, Ajit, and Tina prohibiting them from impairing receivership property.

Armed with this order, the receiver "re-examined transfers from ADI and PHD" to the four individuals. He discovered that shortly before the September 1, 2010 order, $2.1 million in the jointly held Charles Schwab account had been transferred to two HSBC accounts in Tina's name only. The Charles Schwab

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[3] See, *infra*, however. Exhibit D to Tina's 2015 declaration in the Cities' actions included Charles Schwab account summaries. They reflect that in 2010 the Charles Schwab accounts were in the names of Ajit and Tina as joint tenants. But in 2009, the account was in the names of Jannki, Ajit, and Tina as joint tenants.

account had a remaining balance of $509,838, but was then also only in Tina's name. The receiver seized the funds in the Charles Schwab and HSBC accounts on September 7, 2010. (The receiver had already taken the funds remaining in the Wells Fargo account.)

After the seizure, Tina and Ajit applied ex parte in the family law matter to release those portions of the seized funds in the Charles Schwab and HSBC accounts that reflected profits earned from the original PHD deposits into the Wells Fargo account. Their attorney, Nathan J. Hochman, submitted a declaration in support of the application. Without providing details, counsel stated he was seeking approval for the release of "independently-sourced seized funds." The exigency was the need to pay taxes on "gains" in the accounts and to repay a loan in excess of $1 million that an individual made to Ajit for "tax credit housing projects that fell through." The parties' appendices did not include a copy of the court's order denying the motion.

In 2011, Jannki and Salim asked the family law court to dismiss the dissolution action and terminate the receivership. Before the family law judge ruled on terminating the receivership estate, however, the Cities' actions were filed against ADI, PDH, the four individual defendants (it appears from the appellate record that Tina is a named defendant only in the Glendale matter), and others.

In May 2011, in the Cities' actions, the trial court appointed Pasternak as the receiver, essentially transferring the receivership estate from the Salim/Jannki dissolution matter to these lawsuits: "[T]he Receiver shall continue to undertake immediate, sole and exclusive possession, custody and control of all property and assets held by, for the benefit of, or improperly

transferred from [ADI, PHD, Salim, Jannki, Ajit, Tina] . . . in whatever form or name held and wherever located, and to operate, maintain and conserve the Receivership Estate pending further order of the Court." Pursuant to this order, the receiver kept possession of all assets claimed by the four individuals and was authorized "to commence liquidation of the corporations' assets." In 2013, this court affirmed the order in *Mithaiwala I.*

In 2015, the receiver asked the trial court to release assets held by the receivership estate in the names of Tina, Ajit, Jannki, and Salim in order to pay approved creditor claims against the receivership estate, i.e., ADI and PHD. The motion proceeded only as to Tina, however, as Ajit, Jannki, and Salim were then in settlement negotiations with the receiver.

Tina, not joined on this occasion by Ajit, opposed the motion and submitted a declaration. She reprised and expanded upon the statements her attorney made in the 2010 ex parte application to the family law judge. Specifically, Tina claimed the source for $410,000 deposited into the HSBC account "was my trading profits." She added, "I do not believe it is fair to deprive me of that amount, and request that it be returned to me in full." Braewood Court was also "purchased from my Wells Fargo trading profits for $1,107,500." She requested that the receiver's deed of trust be removed and the home "be reverted to me as my sole and separate property." She explained, "Between 2008 and 2009, I received interest-free company loans from the Receivership Entities totaling $8.25 million, which I invested in stock trading accounts at Wells Fargo and Charles Schwab." She added the loans were repaid and "I do not feel that it is fair to deprive me of the profits I made by investing the loan proceeds." She also acknowledged that "[r]ather than providing for his

family's living expenses through a regular salary, Ajit apparently requested the Receivership Entities [ADI and PHD] or Jannki or Salim . . . pay me directly through company checks. I did not question the method of these payments as I was unaware that such commingled transactions were not the best or correct manner of paying Ajit's salary." She concluded her declaration, "I feel that I am being grouped with Ajit, Jannki and Salim on a 'guilt by association' basis, and not based on any wrongdoing of my own."

The trial court granted the receiver's motion and ordered all assets in the receivership estate in which Tina claimed an interest, including investment and real estate gains, be available to pay ADI and PHD creditors. The court approved the receiver's request to list Braewood Court for sale.[4] At the time of the order, Braewood Court had increased in value and there was $3,676,242.62 in the two HSBC accounts and $509,838 in the Charles Schwab account.[5]

The trial court determined the monies on deposit in the Charles Schwab and HSBC accounts were traceable to the $8.25 million wrongfully taken from PHD and that those funds were taken in the form of a loan to Jannki, not Tina. The proceeds of the Jannki loan were deposited into the Wells Fargo account in

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[4] The trial court also made a ruling concerning a second residential property, Terry Lynn Lane. Counsel confirmed at oral argument that Tina is not appealing from that aspect of the order.

[5] As discussed above, Tina, Ajit, and Jannki had previously relinquished any claim to funds remaining in the Wells Fargo account.

the names of Tina, Ajit, and Jannki; accordingly, funds that were transferred to the Charles Schwab and HSBC accounts "never belonged to Tina individually."

The trial court also discredited Tina's claim that she was entitled to stock trading gains generated from the $8.25 million that Jannki wrongfully took from the corporation: "[T]he funds utilized by Tina . . . to generate her alleged trading profits were taken from advances made on their face to Jannki . . . as an ADI and/or PHD shareholder, and . . . the transfers were inappropriate. Therefore, Tina['s] . . . alleged stock trading profits are subject to disgorgement in order to prevent unjust enrichment."

The trial court applied the same analysis to Braewood Court. That property was purchased in cash taken directly from the Wells Fargo account for the benefit of Tina and Ajit. The trial court ordered that Braewood Court be listed for sale and "the full value" be kept in the receivership estate "to satisfy ADI and/or PHD's obligations."

The trial court denied Tina's motion for reconsideration. (Code Civ. Proc., § 1008.) Tina timely appealed.[6]

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[6] Tina's notice of appeal included a challenge to the denial of the motion for reconsideration. She did not brief that issue in this court, however, and we deem it forfeited.

Also, during the pendency of this appeal, the trial court approved the receiver's acceptance of an offer to purchase Braewood Court. Tina has appealed from that order (B275909). By order dated August 17, 2016, we denied the parties' request to consolidate the two appeals.

DISCUSSION

I. Standard of Review

The parties agree we apply the deferential abuse of discretion standard to review the trial court's order: "The order authorizing the receiver to [act] rests upon the court's 'sound discretion exercised in view of all the surrounding facts and circumstances and in the interest of fairness, justice and the rights of the respective parties. [Citation.] The proper exercise of discretion requires the court to consider all material facts and evidence and to apply legal principles essential to an informed, intelligent, and just decision. [Citation.] Our view of the facts must be in the light most favorable to the order and we must refrain from exercising our judgment retrospectively.' [Citations.] . . . [T]he court has wide direction in approving the receiver's proposed actions." (*City of Santa Monica v. Gonzalez* (2008) 43 Cal.4th 905, 931.)

II. Legal Principles

Receivership courts have broad discretion to determine which assets belong in the receivership estate (*Steinberg v. Goldstein* (1954) 129 Cal.App.2d 682, 686) and whether particular profits generated from receivership assets should be disgorged. (*Uzyel v. Kadisha* (2010) 188 Cal.App.4th 866, 894.)

"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.) Nonrestitutionary disgorgement is based on sound public policy to prevent a person from benefitting from his/her own wrong at the expense of another "'if the

circumstances are such that . . . it is *unjust* for the person to retain it.'" (*Ibid.*)

In resolving disgorgement issues, California courts apply principles found in the Restatement Third of Restitution and Unjust Enrichment (Restatement). (*American Master Lease LLC v. Idanta Partners, Ltd.* (2014) 225 Cal.App.4th 1451, 1486, fn. 23.) One such principle, described as "'one of the cornerstones of the law of restitution and unjust enrichment,' [is] '[t]he profit for which the wrongdoer is liable . . . is the net increase in the assets of the wrongdoer, to the extent that this increase is attributable to the underlying wrong.'" (*Id.* at p. 1486.) As the Restatement explains, "The principal focus of [disgorgement] is . . . unjust enrichment . . . measured by the defendant's profits, where the object of restitution is to strip the defendant of a wrongful gain [citation]. This profit-based measure of unjust enrichment determines recoveries against conscious wrongdoers and defaulting fiduciaries." (Rest.3d Restitution and Unjust Enrichment, § 51, com. a, p. 204.)

III. Characterization of the $8.25 Million and Nonrestitutionary Disgorgement

As Tina stated in her reply brief, all parties agree the $8.25 million "was improperly taken from PHD and deposited into a Wells Fargo account jointly in the names of Tina, Ajit and [Jannki]." The trial court rejected Tina's claim that the sum represented a loan to her. Overwhelming evidence supports that conclusion, and Tina does not directly challenge it on appeal.

Instead, Tina asserts that as an innocent bystander/ outsider to the Ajit, Jannki and Salim dealings, she was entitled to use whatever funds they diverted from the corporations as

seed money for her own gain. She contends she was not a "conscious wrongdoer," so profits from her efforts could not be disgorged to benefit corporate creditors. The argument fails.

First, the $8.25 million in seed money never belonged to Tina. The trial court's finding on this point is unassailable. The money was deposited into the Wells Fargo account she shared with two individuals, Ajit and Jannki, who the trial court could conclude on the record before it were "conscious wrongdoers." Exhibit D to Tina's declaration established the profits and gains from Tina's stock trading remained in the joint Ajit/Jannki/Tina Wells Fargo account or were transferred to a Charles Schwab account that was initially held in joint tenancy with Ajit and Jannki and later in joint tenancy only with Ajit.

Exhibit G to Tina's declaration included photocopies of an HSBC receipt indicating a $2.51 million deposit on July 29, 2010; a May 27, 2010 "Schwab Bank" cashier's check in the amount of $2.1 million; and a July 28, 2010 check from a Citibank account in Tina's name in the amount of $410.00 She provided no documentation for the remainder of the opening deposit, but in her declaration appeared to refer to the $410.00 check as a $410,000 deposit representing her "trading profits."[7]

Next, the trial court did not abuse its discretion in concluding the profits from Tina's stock trading also never belonged to her. The evidence was uncontradicted that the stock trading gains initially remained in accounts that included Ajit and/or Jannki as signatories. There was no evidence of an effort

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[7] Another photocopy of the Citibank check is also in the Appellant's Appendix at page 262. It is not of the same quality as the photocopy attached to Tina's declaration, but nonetheless appears somewhat altered.

to segregate funds Tina claimed in her name alone until shortly before the receiver obtained the order from the family law court to seize assets in the names of any of the four individuals. At that point, Jannki and Salim's mutual allegations of wrongdoing already had been partially corroborated by Jannki's own CPA and the receiver's preliminary report.

Tina produced no documentation or declarations—other than her own—suggesting, much less establishing, that she had an ownership interest in gains realized from stock or real estate purchases. Nor would we expect that she could. The $8.25 million in seed money was neither Jannki's nor Ajit's to loan or gift to her. By the time she attempted to assert an individual ownership interest in stock trading profits, the "the risk of liability," i.e., that Ajit and Jannki had not dealt fairly with corporate assets, was known. At that point, under Restatement precepts, Tina was fairly labeled as a conscious wrongdoer, independent of any conscious wrongdoing or breach of fiduciary duty by Ajit and Jannki: "Status as a conscious wrongdoer is established in most cases by showing 'knowledge of the underlying wrong to the claimant,' but there are contexts in which—although the risk of liability is known—the legal conclusion that a wrong has been committed may not be reached until after the fact. [Citation.] Subsection (3)(b) makes clear that one who chooses to act in such circumstances bears the risk of liability by a disgorgement measure." (Rest.3d Restitution and Unjust Enrichment, § 51, com. a, p. 205.) Tina's belated attempt to assert an individual ownership interest in stock trading gains was one of those circumstances that justified the equitable remedy of nonrestitutionary disgorgement.

The trial court was required to balance the equities to obtain a just result between Tina and the receivership corporations. Whether Tina was taken advantage of, or misled, by her spouse and stepdaughter did not contribute to the analysis. We are bound by the trial court's findings and reverse only if they constituted an abuse of discretion. On this record, they did not.

IV. Necessity to Sell Assets

In the trial court, Tina did not argue the receiver failed to demonstrate the need to sell Braewood Court and apply the proceeds, as well as the cash on hand in the various accounts, to satisfy approved creditor claims against ADI and PHD. At a minimum, Tina forfeited the issue by not addressing it in the trial court. The Supreme Court in *Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247 explained, "The forfeiture rule . . . is designed to advance efficiency and deter gamesmanship[, i.e.,] . . . to encourage a defendant to bring errors to the attention of the trial court, so that they may be corrected or avoided." (*Id.* at pp. 264-265, internal quotation marks omitted.)

We decline Tina's request to exercise our discretion to consider the issue in this appeal. Even if Tina did not forfeit the contention, we cannot ignore *Mithaiwala I.* Tina abandoned her appeal in *Mithaiwala I,* allowing the trial court's order to become final as to her. That order included the trial court's finding that "based on the number of outstanding claims and lawsuits against the receivership corporations and the lack of adequate books and records, it was not unreasonable or arbitrary for the trial court to conclude that the receiver's recommendation to commence

liquidation of the corporations' assets was well taken." (*Mithaiwala I, supra,* at *10.)

A vivid and unbroken line traced the wrongful taking of $8.25 million in corporate assets to deposits into the Wells Fargo account in the names of Jannki, Ajit, and Tina and then to Ajit and Tina's purchase of Braewood Court from sellers Jannki and Salim. To the extent a necessity finding was required, the trial court made it in 2011, and this court affirmed it in 2013.

DISPOSITION

The order is affirmed. Respondents are entitled to their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

DUNNING, J.*

We concur:

KRIEGLER, Acting P. J.

BAKER, 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.