

Carey Premix, Inc. v. Ortega Rock Quarry, Inc., No. D038623 (Cal.App. Dist.4
03/08/2002)

[1]

COURT OF APPEAL, FOURTH APPELLATE DISTRICT DIVISION ONE STATE OF
CALIFORNIA

[2]

D038623

[3]

2002.CA.0002143

[4]

March 8, 2002

[5]

CAREY PREMIX, INC., PLAINTIFF AND APPELLANT,

v.

ORTEGA ROCK QUARRY, INC. ET AL., DEFENDANTS H & S, OBJECTOR AND
RESPONDENT.

[6]

APPEAL from an order of the Superior Court of Orange, Francisco F. Firmat, Judge.
Affirmed. (Super. Ct. No. 798511)

[7]

The opinion of the court was delivered by: Haller, J.

[8]

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

[9]

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying
on opinions not certified for publication or ordered published, except as specified by rule
977(b). This opinion has not been certified for publication or ordered published for
purposes of rule 977.

[10]

Plaintiff Carey Premix, Inc. (Premix) appeals from an order denying its motion to amend
its judgment against defendant Ortega Rock Quarry (Ortega) to add H & S, a general
partnership, as a judgment debtor. Premix contends the order is not supported by
substantial evidence and should be reversed on equitable principles. We affirm.

[11]

FACTUAL AND PROCEDURAL BACKGROUND

[12]

Because the appellate record provided by Premix is limited to the judgment and
postjudgment filings below, it sheds little light on the precise legal theories and factual
issues raised in the parties' pleadings and litigated at trial. The record indicates Premix
sued Ortega and its owners, Jay P. Hubbs and John R. Schmutz, for breach of contract
and related causes of action and Ortega filed a cross-complaint against Premix. *fn1
Premix entered into a settlement agreement with Hubbs and dismissed him from the
action with prejudice before trial. At trial, the jury awarded Premix contract damages of
\$600,000 against Ortega and awarded Ortega \$15,000 on its cross-complaint against
Premix. About a month after the jury rendered its verdict, Premix's claim that Schmutz

was the alter ego of Ortega was tried to the court. The court ruled against Premix and in favor of Schmutz on the alter ego issue.

[13]

After the court entered judgment, Premix unsuccessfully moved to amend the judgment to add H & S as a judgment debtor on the ground H & S was the alter ego of Ortega. The factual basis of Premix's alter ego claim was that Hubbs and Schmutz each owned 50 percent of both Ortega and H & S, and H & S owned all the equipment used by Ortega in its business. Premix claimed H & S stripped Ortega of all its assets and left it undercapitalized by charging Ortega \$32,000 a month to rent the equipment. *fn2

[14]

DISCUSSION

[15]

Under Code of Civil Procedure section 187, *fn3 a trial court has authority to amend a judgment to add an additional judgment debtor on the ground the new party is the alter ego of an original judgment debtor. (*NEC Electronics Inc. v. Hurt* (1989) 208 Cal.App.3d 772, 778 (NEC).) "This is an equitable procedure based on the theory that the court is not amending the judgment to add a new defendant but is merely inserting the correct name of the real defendant. [Citations.]" (*Ibid.*) To prevail on a motion to add an additional judgment debtor on an alter ego theory, the moving party must show not only that the party to be added was the alter ego of an original judgment debtor but also that the party had control of the litigation and an opportunity to conduct it with diligence corresponding to the risk of personal liability involved - i.e., that the party was "virtually represented" in the action. (*Id.* at pp. 778-779; *Triplett v. Farmers Ins. Exchange* (1994) 24 Cal.App.4th 1415, 1421.) In addition, the moving party must have acted with due diligence in seeking to add the new party as a defendant. (*Alexander v. Abbey of the Chimes* (1980) 104 Cal.App.3d 39, 48.) The moving party has the burden of proving the facts essential to the granting of the motion by a preponderance of the evidence. (*Wollersheim v. Church of Scientology* (1999) 69 Cal.App.4th 1012, 1017.)

[16]

On appeal, the trial court's factual findings on the motion are reviewed under the substantial evidence test. (*Wollersheim v. Church of Scientology*, *supra*, 69 Cal.App.4th at p. 1017; *McClellan v. Northridge Park Townhome Owners Assn.* (2001) 89 Cal.App.4th 746, 751-752.) The trial court's ruling is presumed correct, and the appellate court indulges all intendments and presumptions to support the ruling on matters as to which the record is silent. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) The appellant has the burden of overcoming the presumption of correctness by affirmatively showing error on an adequate record. (*In re Kathy P.* (1979) 25 Cal.3d 91, 102; *Bianco v. California Highway Patrol* (1994) 24 Cal.App.4th 1113, 1125.)

[17]

Because the record does not include a transcript of the trial proceedings and is silent as to the basis for the court's denial of Premix's motion to amend the judgment, we indulge three presumptions to support the court's ruling on the motion, any one of which would be sufficient to uphold the ruling. First, we presume the court denied the motion based on the evidence. From the opposition to the motion we glean that the evidence supporting the motion was the same evidence Premix presented in support of its unsuccessful alter ego claim against Schmutz at trial. Hubb's opposition indicates that at trial the court

found the leasing arrangement between H & S and Ortega was a common and legitimate business mechanism for obtaining financing and reducing tax liability and therefore did not support Premix's alter ego claim against Schmutz. Because we lack a reporter's transcript of the trial, we presume the court made that finding and that there was substantial evidence to support it. (*Krueger v. Bank of America* (1983) 145 Cal.App.3d 204, 207; *Denham v. Superior Court*, supra, 2 Cal.3d at pp. 564-565 [where proceedings below were not recorded, facts regarding them were presumed to be as alleged in declarations and points and authorities in opposition to petition for writ of mandate].) Having found the equipment transfer and leaseback arrangement between Ortega and H & S was a proper financing mechanism that would not support an alter ego claim against Hubbs, the court could properly find the arrangement likewise would not support an alter ego claim against H & S.

[18]

Second, we presume the court found Premix failed to act with due diligence in adding H & S as a defendant. As noted, to justify the addition of a new defendant to a judgment the plaintiff must have acted with due diligence. (*Alexander v. Abbey of the Chimes*, supra, 104 Cal.App.3d at p. 48.) "It is blackletter law that an unjust judgment or order by itself is not enough to grant relief under equitable principles. In order to succeed, the aggrieved party in addition must show a satisfactory excuse for not having made his claim or defense in the original action and diligence in seeking relief after discovery of the facts. [Citations.]" (*DeMello v. Souza* (1973) 36 Cal.App.3d 79, 85, italics omitted.)

[19]

"Equitable relief from a judgment may be refused to a party thereto if [¶] (a) before or after the judgment was rendered the complainant or a person representing him failed to use care to protect his interests, or [¶] (b) after ascertaining the facts the complainant failed promptly to seek redress.' [Citation.] . . . 'In determining whether the delay by the complainant in seeking relief has been unreasonable, many circumstances are to be considered. Although length of time in itself, aside from its likelihood of producing hardship, is not a bar, nevertheless the length of time which has elapsed from the time when the complainant knew or should have known of the facts . . . is an important element where no reason is suggested for the delay.'" (*Alexander v. Abbey of the Chimes*, supra, 104 Cal.App.3d at p. 48.)

[20]

The evidence before the court on the motion to amend the judgment showed that in his deposition taken by Premix more than three months before the scheduled trial date, Schmutz disclosed all the material facts regarding Ortega's transfer of its equipment to H & S and leaseback of the equipment. Specifically, Schmutz testified that H & S was a "50/50" partnership between himself and Hubbs and that in 1994 the partnership purchased Ortega's equipment assets, which Ortega held free and clear. The partnership then leased the equipment back to Ortega for \$32,000 per month, using the lease payments to pay off a \$500,000 note held by a third party. The term of the lease was 10 years, but at the time of the Schmutz's deposition Ortega had not made a lease payment for two years due to lack of funds. Although these facts comprise the essential basis for Premix's alter ego claim against H & S, Premix did not seek leave to amend its complaint before trial to add H & S as a defendant.

[21]

In reply papers filed below, Premix asserted that immediately before the alter ego phase of the trial, the court gave its counsel a short time to review certain documents produced by Schmutz and it was during that review that counsel discovered documents relating to H & S's lease of equipment to Ortega. Premix contends it did not put "two and two together" and realize that the equipment used by Ortega in its business was owned by H & S until it questioned Schmutz at trial regarding the equipment. Given Schmutz's clear and unequivocal deposition testimony three months before trial that H & S purchased the equipment in question from Ortega in 1994 and then leased it back to Ortega, the court reasonably rejected Premix's suggested reason for its delay in attempting to bring H & S into the action. Premix clearly knew or should have known H & S owned the equipment used by Ortega when Schmutz expressly stated that fact in his deposition.

[22]

On appeal Premix contends there was no time to attempt to bring H & S into the action before trial because it did not receive the transcript of Schmutz's deposition until shortly before the "30-day and 15-day quiet time rules prior to the initial [t]rial date" Premix speculates that the court would likely have denied any motion related to H & S brought so close to trial. Premix does not explain and we are at a loss to understand why it needed the deposition transcript to be put on notice of facts that Schmutz expressly stated during the deposition. Premix was on notice that H & S rather than Ortega owned the equipment in question when Schmutz testified to that fact during his deposition. Due diligence required that Premix attempt to add H & S as a defendant promptly upon learning the facts forming the basis of its claim against H & S. Premix's failure to make the attempt is not excused by the possibility it might have been unsuccessful. Based on the uncontroverted evidence that Schmutz disclosed all the facts underlying Premix's alter ego claim against H & S more than three months before trial, the court could reasonably deny Premix's bid for equitable relief on the ground Premix failed to act with due diligence in seeking to add H & S as a defendant.

[23]

Finally, we presume the court found that amending the judgment to add H & S as a judgment debtor would infringe H & S's due process right because H & S did not control the litigation and thus was not "virtually represented" at trial. In *NEC*, the Court of Appeal reversed an order amending the judgment to add an individual (Hurt) as a judgment debtor despite sufficient evidence that Hurt was the alter ego of the defendant corporation. (*NEC*, supra, 208 Cal.App.3d at p. 778.) The Court of Appeal concluded the corporation's interests and Hurt's interests in the litigation were not the same because the corporation planned to file a bankruptcy petition and thus lacked incentive to defend. (*Id.* at p. 780.) Because of those differing interests, the Court of Appeal could not "say that Hurt had occasion to conduct the litigation with a diligence corresponding to the risk of personal liability that was involved or that Hurt was virtually represented in the lawsuit." (*Id.* at p. 781.)

[24]

In the present case, Premix acknowledges that H & S is an entity distinct from its partners (Corp. Code, § 16201); that property acquired by a partnership is property of the partnership and not of the individual partners (Corp. Code, § 16203); and that a partner is not a co-owner of partnership property (Corp. Code, § 16501). Accordingly, Schmutz's

and Hubb's personal interests in the litigation were not necessarily identical to H & S's interests in the litigation. Even assuming they were, we could not say H & S was virtually represented at trial through Hubbs and Schmutz because Hubbs settled out of the action before trial and the record indicates Schmutz's personal involvement in the trial was limited to defending against the alter ego claim Premix asserted against him personally.
[25]

Nor can we say H & S was virtually represented in the litigation through Ortega. We cannot determine whether H & S's interests in the litigation were the same as Ortega's because the record does not reveal the nature of Premix's contract claim against Ortega, the nature of Ortega's cross-claim against Premix, or whether Ortega had the same incentive to defend that H & S would have had it been named as a defendant before trial. The record being silent regarding H & S's and Ortega's respective interests in the litigation, we presume the court properly found their interests were not the same and, accordingly, that H & S did not have an opportunity to conduct the defense with a diligence corresponding to the risk of personal liability involved.
[26]

Premix has not met its burden of showing the court erred in denying its motion to amend the judgment to add H & S as a judgment debtor.
[27]

DISPOSITION

[28]

The order denying Premix's motion to amend the judgment is affirmed.

[29]

WE CONCUR:

[30]

HUFFMAN, Acting P. J.

[31]

McCONNELL, J.

Opinion Footnotes

[32]

*fn1 The nature of Ortega's claim(s) against Premix is unclear.

[33]

*fn2 In its reply to opposition to the motion and in supplemental papers filed after the reply, Premix contended Ortega transferred the equipment to H & S in 1994 and then leased it back, and that Ortega's books did not show H & S ever paid anything for the equipment.

[34]

*fn3 Section 187 provides: "When jurisdiction is, by the constitution or this code, or by any other statute, conferred on a court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this code or the statute, any suitable process

or mode of proceeding may be adopted which may appear most conformable to the spirit of this code." All further statutory references are to the Code of Civil Procedure unless otherwise specified.