

Hoffman v. Harmony Pictures, Inc., No. B152774 (Cal.App. Dist.2 12/04/2002)

[1]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND  
APPELLATE DISTRICT DIVISION FOUR

[2]

B152774

[3]

2002.CA.0011029

[4]

December 4, 2002

[5]

RON HOFFMAN, PLAINTIFF AND RESPONDENT,

v.

HARMONY PICTURES, INC., ET AL., DEFENDANTS AND APPELLANTS.

[6]

APPEAL from a judgment of the Superior Court of Los Angeles County, J. Stephen  
Czuleger, Judge. Modified and affirmed. (Super. Ct. No. BC176632)

[7]

Silver & Freedman, Barry M. Appell and Linda T. Pierce for Defendants and Appellants.

[8]

Law Offices of Robert S. Scuderi and Robert S. Scuderi for Plaintiff and Respondent.

[9]

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

[10]

NOT TO BE PUBLISHED

[11]

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 This opinion has not been certified for publication or ordered published for  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.

[12]

Appellants Harmony Pictures, Inc., (Pictures) and Harmony Holdings, Inc., (Holdings)  
challenge a judgment in favor of respondent Ron Hoffman on Hoffman's complaint for  
breach of implied contract, breach of contract, and promissory estoppel. We modify the  
judgment in part and otherwise affirm.

[13]

FACTS

[14]

Pictures was engaged in the production of advertising commercials. In November 1986,  
Hoffman and Pictures entered into a one-year employment agreement, effective January  
1, 1987. Under this agreement, Hoffman worked as Pictures's west coast sales  
representative. Hoffman subsequently executed a second one-year employment  
agreement with Pictures, effective January 1, 1989. Hoffman's duties involved finding  
projects for directors of commercials.

[15]

In the early 1990's, Pictures was very successful. Seeking financing, it approached Harvey Bibicoff, who was chairman of the board of Ventura Entertainment Group (VEG). With Bibicoff's participation, Pictures was incorporated in Delaware in 1990. During the same period, Bibicoff and VEG formed Holdings, which bought all of the shares in Pictures when it went public. Aside from Pictures, Holdings acquired several other subsidiaries.

[16]

On January 1, 1993, Hoffman and Pictures entered into a formal, written one-year employment agreement that was to expire on December 31, 1993. Under this agreement, Pictures employed Hoffman as executive vice-president and head of sales. The agreement provided that Hoffman could be terminated for cause on the basis of enumerated grounds, but required Pictures to give Hoffman notice and a 30-day opportunity to cure deficiencies if Pictures sought to terminate him on certain specified grounds. The agreement also contained an integration clause. Hoffman never executed another written employment agreement with Pictures.

[17]

In January 1994, Hoffman orally agreed to continue his employment according to the terms and conditions of the previous written contract. This oral agreement was reported to Bibicoff, who was chairman of Holdings's board of directors.

[18]

In late 1995, Bibicoff acquired a controlling interest in Holdings, and he became chief executive officer (CEO) of Holdings in January 1996. Pictures was then losing money, and Bibicoff became CEO of Pictures in May or June 1996. Thereafter, Pictures promulgated a handbook to its employees, including Hoffman, describing its employment relationship with them as "at will."

[19]

On August 5, 1997, Bibicoff terminated Hoffman's employment. Pictures ceased doing business in November 1998. Holdings remained in existence at the time of trial.

[20]

#### PROCEDURAL BACKGROUND

[21]

On January 8, 1999, Hoffman filed his fourth amended complaint for breach of implied contract, breach of contract, and promissory estoppel against respondents. The complaint alleges that Holdings is the alter ego of Pictures, which employed Hoffman, that Pictures had agreed or promised that Hoffman could be terminated only for good cause, and that he was discharged in violation of this agreement or promise.

[22]

On August 13, 1999, respondents filed a motion for summary judgment, or, in the alternative, summary adjudication, contending, inter alia, that Hoffman was an at-will employee. The trial court granted summary judgment, and judgment was filed on October 26, 1999. We reversed in an unpublished opinion. (*Hoffman v. Harmony Pictures, Inc.* (Sept. 8, 2000, B136755).)

[23]

Following a bench trial, the trial court found that (1) in terminating Hoffman, Pictures breached a valid oral employment agreement incorporating the terms of Hoffman's final written contract, and (2) Pictures was Holdings's alter ego. The trial court granted

judgment in favor of Hoffman and awarded him \$309,637 in damages. Judgment was filed on July 30, 2001.

[24]

## DISCUSSION

[25]

Appellants contend that the trial court (1) incorrectly concluded that Pictures was Holdings's alter ego, and (2) erred in determining the amount of damages.

[26]

### A. Alter Ego

[27]

Appellants contend that insufficient evidence supports the trial court's determination that there was an alter ego relationship between Holdings and Pictures. We disagree.

[28]

"To justify piercing the corporate veil on an alter ego theory in order to hold a parent corporation liable for the acts or omissions of its subsidiary, a plaintiff must show that there is such a unity of interest and ownership between the two corporations that their separate personalities no longer exist, and that an inequitable result would follow if the parent were not held liable. [Citation.] To put it in other terms, the plaintiff must show 'specific manipulative conduct' by the parent toward the subsidiary which 'relegate[s] the latter to the status of merely an instrumentality, agency, conduit or adjunct of the former . . . .' [Citation.]" (Laird v. Capital Cities/ABC, Inc. (1998) 68 Cal.App.4th 727, 742, quoting Institute of Veterinary Pathology, Inc. v. California Health Laboratories, Inc. (1981) 116 Cal.App.3d 111, 119-120.)

[29]

"The essence of the alter ego doctrine is that justice be done. . . . Thus the corporate form will be disregarded only in narrowly defined circumstances and only when the ends of justice so require." (Mesler v. Bragg Management Co. (1985) 39 Cal.3d 290, 301.)

However, "[b]ecause it is founded on equitable principles, application of the alter ego 'is not made to depend upon prior decisions involving factual situations which appear to be similar. . . ." "It is the general rule that the conditions under which a corporate entity may be disregarded vary according to the circumstances of each case." [Citations.]" \*fn1 (Las Palmas Associates v. Las Palmas Center Associates (1991) 235 Cal.App.3d 1220, 1248, quoting McLoughlin v. L. Bloom Sons Co., Inc. (1962) 206 Cal.App.2d 848, 853.)

[30]

We review the trial court's determination on this matter for substantial evidence. (Las Palmas Associates v. Las Palmas Center Associates, supra, 235 Cal.App.3d at p. 1248.) Here, Hoffman pointed to evidence supporting the following version of the underlying events: When Pictures was incorporated in 1990, Harvey Bibicoff was Pictures's agent for service of process in California, and the sole member of Pictures's board of directors. In July 1991, a meeting of Pictures's board of directors was held "in the company's offices located at 2921 West Alameda, Burbank . . . ." Bibicoff was identified as chairman of the board, which had five other members, including Hoffman, who was Pictures's vice-president. The principal item of business was to ratify Pictures's pending issuance of common stock.

[31]

Thereafter, no board meetings regarding Pictures were held until June 1996. During the interim, the board of directors for Holdings, which included Bibicoff as a member, held a meeting in July 1993. At this meeting, the Holdings board discussed suggestions that some employees of Pictures, including Hoffman, should be fired. The agenda of a Holdings board meeting in September 1993 identified Holdings's address as 2921 West Alameda, Burbank.

[32]

In January 1994, Hoffman met with Jonathan Miller, President of Pictures, and Gary Horowitz, a principal at Holdings, regarding Hoffman's contract of employment. According to Miller's and Hoffman's testimony at trial, they orally agreed that Hoffman would continue his employment according to the terms and conditions of the previous written contract. Miller then reported the oral agreement to Bibicoff, who was chairman of Holdings's board of directors. Bibicoff did not object to the oral employment agreement with Hoffman when Miller reported it to him.

[33]

Regarding the 1994 oral agreement, Hoffman testified that he had been with Pictures since its inception, and he had no reason to believe that he would be leaving. He stated: "I felt very comfortable with Gary and Jonathan and the company as a whole, and basically I trusted them."

[34]

Jonathan Miller, who was Pictures's president, testified that he was unsure whether Pictures had a board of directors when he negotiated the oral employment agreement with Hoffman in January 1994. Miller stated: "I know there was a [Holdings] board that was active, but I don't recall if there was a board for Pictures." Miller assumed that Bibicoff was a member of the boards of Holdings's subdivisions, but he could not recall anything specific on the matter.

[35]

Miller also testified that Hoffman "was the principal sales rep in terms of both volume and leadership and presence within the company and in the business." According to Miller, Hoffman "was very important." Miller stated: "Mr. Bibicoff would periodically inquire as to how things were going with Ron, and in every one of those conversations would indicate to me his concern that . . . Ron stay with company and be happy."

[36]

In February 1994, a document issued by Holdings indicated that four directors on the six-member Holdings board, including Bibicoff, were also on the six-member Pictures board.

[37]

In January 1996, Bibicoff became CEO of Holdings. On January 30, 1996, Brian Rackohn sent Hoffman a memorandum on Holdings stationery indicating changes in his vacation pay.

[38]

Subsequently, Bibicoff became CEO of Pictures, and the Pictures board held what is described in the minutes as "its first meeting" on June 30, 1996. Only two persons were present: Bibicoff, who is identified in the minutes as "the sole director of the corporation," and Rackohn, who was elected secretary of the meeting. According to the minutes, Bibicoff stated at the meeting that "after filing the Certificate of Incorporation, the corporation did not follow the organizational procedures necessary to complete its

organization, even though the corporation had been engaged in business since that time." During the meeting, Bibicoff and Rackohn adopted corporate bylaws and elected officers. [39]

Appellants disputed that Holdings was the alter ego of Pictures. Judy Fluger, Holdings's general counsel, testified that Holdings and Pictures maintained separate corporate books, accounts, bank accounts, contracts, and employees. She denied that Holdings and Pictures operated out of the same business address in Los Angeles. According to Fluger, Holdings was a publicly traded company that owned and operated Pictures as a subsidiary, and that the Holdings board of directors held regular meetings until Children's Broadcasting Corporation bought a majority interest in Holdings in November 1997. Bibicoff also testified that Pictures was a subsidiary of Holdings, and that Pictures filed separate tax forms, held separate bank accounts, and hired its own employees. [40]

In concluding that there was an alter ego relationship, the trial court found that "the difference between [Pictures] and [Holdings] was minimal at best," citing Pictures's failure to respect corporate formalities after 1990, the overlap between the boards, and the 1996 Holdings memorandum regarding Hoffman's vacation pay. The trial court also stated: "[S]ince [Pictures] and [Holdings] did not recognize the difference in corporate existence, . . . it would visit an unfairness upon Mr. Hoffman if I were to now recognize the parties, the two companies not having done so." [41]

In our view, ample evidence supports these determinations. The record as a whole indicates that when Pictures was profitable, Holdings and its principals ignored Pictures's corporate identity, directly managed its affairs, and undertook liabilities, including the 1994 oral employment agreement with Hoffman. Only after Pictures became unprofitable did Holdings and its principals belatedly try to revive Pictures's separate identity, presumably to shield Holdings. [42]

Appellants disagree, contending that there is insufficient evidence of any fraud or inequity warranting application of the alter ego doctrine. We recognize that "[t]he alter ego doctrine does not guard every unsatisfied creditor of a corporation but instead affords protection where some conduct amounting to bad faith makes it inequitable for the corporate owner to hide behind the corporate form." (*Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 539.) [43]

However, the record discloses evidence upon which the trial court could have inferred the existence of fraud or inequity. In May 1996, Bibicoff ensured that the Pictures employee manual was issued to Hoffman, and thereafter he decided with principals at Pictures to terminate Hoffman as an at-will employee under the manual's provisions. Notwithstanding Bibicoff's denial that he was unaware of the 1994 oral employment agreement, the trial court could have concluded from the evidence in the record that Bibicoff knew about this agreement since 1994, and that the attempt to treat Hoffman as an at-will employee was an act of bad faith by Holdings. [44]

Appellants also contend that Hoffman is estopped from asserting an alter ego relationship because he was vice-president of Pictures. Again, we recognize that a person who has

acted as a director, principal, or agent of an association purporting to be corporation may be estopped to deny its existence. (Wynn v. Treasure Co. (1956) 146 Cal.App.2d 69, 76.) However, this rule is inapplicable when "considerations of equity and fair dealing" bar estoppel (Hiehle v. Torrance Millworks, Inc. (1954) 126 Cal.App.2d 624, 629-630), and thus the trial court may properly decline to find an estoppel when there is "no element of reliance by defendants upon any conduct of plaintiff which could give rise to that equitable conclusion" (Engineering etc. Corp. v. Longridge Inv. Co. (1957) 153 Cal.App.2d 404, 417).

[45]

Here, appellants never raised the question of estoppel before the trial court, and it did not determine whether Hoffman's conduct may have rendered his claims against appellants inequitable. In view of the conflicts in the record, appellants have therefore waived the contention of estoppel. (People v. Casa Blanca Convalescent Homes, Inc. (1984) 159 Cal.App.3d 509, 531, abrogated on other grounds in Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, 184-185.)

[46]

In sum, the trial court correctly determined that there was an alter ego relationship between Holdings and Pictures.

[47]

#### B. Damages

[48]

Appellants also contend that the trial court committed several errors in determining the amount of damages.

[49]

Generally, "[d]amages are awarded in an action for breach of contract to give the injured party the benefit of his bargain and insofar as possible to place him in the same position he would have been in had the promisor performed the contract. [Citations.] Damages must be reasonable, however, and the promisor is not required to compensate the injured party for injuries that he had no reason to foresee as the probable result of his breach when he made the contract. [Citations.]" (Coughlin v. Blair (1953) 41 Cal.2d 587, 603.)

[50]

Here, the final written contract guaranteed Hoffman a minimum annual income of \$180,000, plus the opportunity to earn additional income in the form of commissions. Hoffman submitted evidence that his gross wages up to the date of termination in 1997 were between \$181,492 and \$192,123.91, and he estimated that had he not been terminated, his total earnings in 1997 would have been between \$311,000 and \$329,000. Hoffman also testified that after he was terminated, he was unable to find employment in 1997. In 1998, he started his own firm and went into business for himself. During 1998, he earned \$123,000. On the basis of this evidence, the trial court awarded Hoffman \$129,678 in damages for 1997, and \$180,000 in damages for 1998.

[51]

Regarding these determinations, appellants contend that the trial court (1) did not apply the correct measure of damages, (2) failed to reduce the award by the income that Hoffman earned in 1998, and (3) improperly awarded damages for November and December 1998, after Pictures ceased doing business.

[52]

## 1. Measure Of Damages

[53]

Appellants contend that Hoffman is entitled solely to an award of lost income for the 30-day notice period found in the "for cause" termination clause of the final written agreement. Appellants are mistaken on this matter.

[54]

Appellants rely primarily upon *Pecarovich v. Becker* (1952) 113 Cal.App.2d 309 and *Martin v. U-Haul Co. of Fresno* (1988) 204 Cal.App.3d 396. In *Pecarovich*, a professional football coach's employment agreement provided that he could be terminated upon 90 days' notice. (*Pecarovich v. Becker*, supra, at p. 317.) When the coach was fired without notice, the court in *Pecarovich* held that his damages were limited to the income he would have earned during the 90-day period, had he been terminated with notice. (Id. at pp. 317-318.)

[55]

Similarly, in *Martin*, a rental equipment dealer worked under a contract that provided that his services could be terminated "on thirty days written notice or without previous notice upon violation . . . of any promise or condition heretofore mentioned." (*Martin v. U-Haul Co. of Fresno*, supra, 204 Cal.App.3d at p. 405, italics added.) After the dealer was terminated without notice, he prevailed at trial on a breach of contract claim, and was awarded \$29,000 in damages. (Id. at p. 400.) Thereafter, the trial court ordered a new trial unless the dealer accepted a reduction of the damages to \$725, the sum that the dealer would have earned during the 30-day notice period. (Id. at p. 406.)

[56]

The court in *Martin* affirmed. (*Martin v. U-Haul Co. of Fresno*, supra, 204 Cal.App.3d at p. 411.) It reasoned that because the jury had found that the dealer had not breached the contract, the operative provision for the determination of damages was the term that permitted termination upon 30 days' notice. (Id. at p. 407.) Citing *Pecarovich* and the principle that only foreseeable damages are recoverable for breach of contract, the *Martin* court concluded that the dealer was entitled only to \$725.

[57]

In our view, the case before us falls outside the scope of *Pecarovich* and *Martin*. Unlike the pertinent notice provisions in those cases, which permitted termination of the contract without cause after notice, the "for cause" termination provision here permitted termination of the contract upon notice only upon specified grounds. \*fn2 These grounds involved "intentional or negligent dereliction" of duties and responsibilities, failure to carry out specified directives, and "willful breach of duty . . . ."

[58]

Because the notice provision in question hinges on the presence of specified grounds for termination, we conclude that it provides the measure of damages only if the record unequivocally establishes that appellants properly terminated Hoffman for one of the specified reasons. (Cf. *SHA-I Corp. v. City and County of San Francisco* (9th Cir. 1980) 612 F.2d 1215, 1218 [*Pecarovich* measure of damages is inapplicable when termination-upon-notice provision in contract does not permit termination at will].) Here, Bibicoff testified that Hoffman was disrupting relationships with directors. Accordingly to Bibicoff, before he terminated Hoffman, he spoke to Hoffman "[o]n dozens of occasions" about this matter, and he offered to subsidize an independent business by Hoffman if

Hoffman left the firm voluntarily. By contrast, Hoffman testified that he generally got along with most of the directors, that Bibicoff never spoke to him about an inability to deal with directors, and that Bibicoff never offered to finance Hoffman's own firm. Hoffman also stated that he was terminated without notice.

[59]

In finding that appellants had breached the contract and awarding Hoffman damages exceeding the income that he would have earned in the 90-day notice period, the trial court impliedly determined that Hoffman had not been properly terminated on any of the grounds triggering the notice provision. Because this determination is supported by substantial evidence, we conclude that the trial court did not err in these matters.

[60]

## 2. Damages For November And December 1998

[61]

Appellants contend that the trial court erred in awarding Hoffman damages for November and December 1998, when the record unequivocally indicates that Pictures ceased doing business in November 1998. However, the employment agreement at issue indicates that Hoffman was to receive \$180,000 as "the minimum annual guaranteed compensation," and that the annual term expired on December 31 of each year. (*Italics added.*)

Furthermore, as we have explained (see pt. A., ante), the trial court properly found that Holdings was Pictures's alter ego, and thus liable under the agreement. (*Engineering etc. Corp. v. Longridge Inv. Co.*, supra, 153 Cal.App.2d at pp. 416-417.) Because Holdings remained in existence throughout 1998, the trial court could properly award Hoffman \$180,000 for the entirety of 1998.

[62]

Citing *Richardson v. Restaurant Marketing Associates, Inc.* (N.D.Cal. 1981) 527 F.Supp. 690, 698, appellants contend that the cut-off date for the determination of Hoffman's damages is the date upon which Pictures ceased operations. However, *Richardson* concerns a claim for back wages by an employee improperly terminated due to racial discrimination, and it does not involve an alter ego. (*Id.* at pp. 691- 694, 698.) It is therefore factually distinguishable from the case before us.

[63]

## 3. Mitigation of Damages

[64]

Finally, appellants contend that the trial court erroneously failed to reduce his damages for 1998 by the sums that Hoffman earned through his own business in 1998. We agree.

[65]

"The general rule is that the measure of recovery by a wrongfully discharged employee is the amount of salary agreed upon for the period of service, less the amount which the employer affirmatively proves the employee has earned or with reasonable effort might have earned from other employment. [Citations.]" (*Smith v. Brown-Forman Distillers Corp.* (1987) 196 Cal.App.3d 503, 518.) Here, Hoffman testified that according to his 1998 tax return, he earned \$123,000 through his own business, although he was unsure that this figure was for gross or taxable wages. He also indicated that this income was earned for providing services to directors akin to the services that he rendered while employed by appellants.

[66]

Following the presentation of evidence, the trial court concluded that given the financial difficulties facing Pictures in 1998, "it would be speculation to award [Hoffman] anything more than the contract minimum of [\$]180,000," but it did not discount this sum to reflect Hoffman's actual income in 1998. In view of the unequivocal evidence in the record that Hoffman earned at least \$123,000 in 1998, the trial court erred in this regard. We therefore conclude that his damages must be reduced by \$123,000.

[67]

#### DISPOSITION

[68]

The award of damages is reduced by \$123,000 to \$186,637, and the judgment is otherwise affirmed in all respects. The parties are to bear their own costs.

[69]

#### NOT TO BE PUBLISHED

[70]

We concur:

[71]

VOGEL (C.S.), P.J.

[72]

EPSTEIN, J.

#### Opinion Footnotes

[73]

\*fn1 Factors relevant to the existence of an alter ego relationship include the commingling of funds and other assets, the failure to separate the assets of separate entities, the treatment of the corporation's assets as those of an individual or other corporation, holding out that the individual or other corporation is personally liable for the first corporation's debts, the failure to maintain separate records or the commingling of the records of the entities, identical equitable ownership in the two entities, the equitable owners' domination and control of the entities, the use of the same business location, the employment of the same employees, the use of the corporation as a mere shell or instrumentality for the conduct of the affairs of another entity, and the failure to maintain arm's length transaction between entities and the diversion of assets.

(Associated Vendors, Inc. v. Oakland Meat Co. (1962) 210 Cal.App.2d 825, 838- 840; see Roman Catholic Archbishop v. Superior Court (1971) 15 Cal.App.3d 405, 411.)

[74]

\*fn2 The termination clause provides: "Cause. Company may terminate Employee's employment hereunder at any time for cause, which shall mean (i) fraud or embezzlement or indictment of Employee of any felony or crime involving moral turpitude or larceny; (ii) the commission by Employee of an act of dishonesty constituting a crime; (iii) intentional or negligent dereliction in the performance of Employee's duties or responsibilities; (iv) the failure to carry out the reasonable directives of the President of Company or its Board of Directors relating to the conduct of Company's business; (v)

willful breach of duty by Employee within the course of Employee's employment hereunder; (vi) engaging in any business for profit in violation of paragraph 1 of the Standard Terms and Conditions of this Agreement; or (vii) knowingly imparting confidential information relating to the business of Company or its personnel. In the case of an event described in clauses (iii), (iv), or (v) above, Company may terminate Employee's employment hereunder only by giving Employee thirty (30) days prior written notice, during which period Employee shall have the opportunity to cure any breach in which case such notice shall be deemed rescinded."