

Runez v. Cedar Village, Inc., No. A095450 (Cal.App. Dist.1 09/09/2002)

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

[2]

A095450

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2002.CA.0008253

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September 9, 2002

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FILDRES RUNEZ, PLAINTIFF, CROSS-DEFENDANT, AND APPELLANT,
v.

CEDAR VILLAGE, INC. ET AL., DEFENDANTS, CROSS-DEFENDANTS,
AND RESPONDENTS;

GUY R. SEATON III, PLAINTIFF AND APPELLANT,

v.

FILDRES RUNEZ, DEFENDANT AND RESPONDENT.

[6]

(San Francisco County Super. Ct. No. 981600) (San Francisco County Super. Ct. No.
987546)

[7]

The opinion of the court was delivered by: Sepulveda, 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NOT TO BE PUBLISHED IN OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 977.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]

These cross-appeals mark the second appearance of this cause before this court. In the prior appeal-Runez v. Seaton (August 31, 2000, A087232 [nonpub. opn.])-we affirmed the ruling of Judge Robertson of the San Francisco County Superior Court entering judgment enforcing a settlement agreement between plaintiff Runez and some of the individual defendants and remitting the case to Judge Douglass for trial of the remaining claims. Runez's suit arose out of her lease of two residential health care facilities to defendant Cedar Village, Inc., subsequent financial reverses, and the eventual bankruptcy of the corporate lessee and operator and, in time, Runez's loss of both of her properties through foreclosure proceedings.

[11]

In the ensuing fallout, Runez filed a breach of contract suit for damages in San Francisco Superior Court against Cedar Village, Seaton Enterprises, and an entity known as Subacute Medical Services. Guy and Jacqueline Seaton, husband and wife and the sole shareholders of the corporate defendants, were joined as defendants on alter ego grounds; Orrin Grover, formerly the attorney for both Runez and Cedar Village in connection with

the lease transactions, was also named as a defendant in a count for legal malpractice. Cedar Village cross-complained against Runez for fraud and misrepresentation. In the meantime, Guy Seaton filed an independent suit against Runez in Alameda County on a promissory note given by Runez in exchange for a loan from Seaton to pay taxes on one of the properties. That proceeding was later transferred to the San Francisco County Superior Court and consolidated with the cross-actions pending there.

[12]

Runez's present appeal presents for resolution a single question. Did Judge Douglass err when he concluded the alter ego doctrine, as embodied in California case law, requires as a condition essential to its application a finding that the corporation whose existence is to be disregarded was governed by the particular person (or entity) the plaintiff seeks to hold liable as an alter ego? It was on that ground that the trial court denied plaintiff's attempt to fasten liability on Jacqueline Seaton for the damages occasioned by the corporation's breach of the lease agreement. Defendants' cross-appeal presents an array of issues arising out of the final judgment entered by Judge Douglass at the close of the bench trial of the Seatons' claims against Runez and her claims against them remaining after entry of Judge Robertson's earlier judgment enforcing the settlement agreement. The judgment entered by the trial court found in favor of Jacqueline Seaton on both plaintiff's alter ego and breach of contract claims and awarded Mrs. Seaton her costs. In addition, it found in favor of Guy Seaton on his suit to enforce the \$113,079.39 promissory note given by plaintiff, including an award of prejudgment interest, but without an award of costs.

[13]

The final judgment entered by Judge Douglass also applied the four-year limitations statute to exclude Runez's claim for back rent accruing before October 3, 1992, and went on to find Cedar Village liable to Runez for unpaid rent in the sum of \$371,348.52, interest of \$285,187.21, and supplemental rent and interest of \$49,815. Last, the trial court's final judgment disallowed Cedar Village's setoff claims against plaintiff and found for Runez on its cross-complaint for fraud, awarding her costs and attorneys fees against both Cedar Village and Guy Seaton. A modified judgment was filed on June 11, 2001, reducing the award for unpaid rent from \$371,348.52 to \$335,940.07 and the prejudgment interest award from \$285,187.21 to \$256,860.45, denying Guy Seaton's motion for costs, and awarding Runez \$284,427 in attorneys fees against Cedar Village and Mr. Seaton. These cross-appeals are timely and, as will appear, we affirm the judgment entered below in its entirety.

[14]

ANALYSIS

[15]

I. Plaintiff's appeal

[16]

A. Trial Court Did Not Err in Rejecting Runez's Claim for Alter Ego Liability Against Jacqueline Seaton.

[17]

In his memorandum opinion filed on September 18, 2000, Judge Douglass denied Runez's attempt to fasten liability on Mrs. Seaton under an alter ego theory. At the outset of its analysis, the court observed that "many of the circumstances which can contribute

to a finding of alter ego liability exist" in this case. Itemizing these features, it noted the Seatons were the sole shareholders of their several corporations, that Guy Seaton "treated these sibling corporations . . . as if they were personal bank accounts, conveniently shifting funds from one corporation to another as the need arose to meet both the obligations of the corporations and the personal obligations of Guy and Jacqueline, including income taxes Guy and Jacqueline each was a 50% owner of Cedar Village as well as an officer and director of Cedar Village during the entire time plaintiff and Cedar Village were involved in the transactions which give rise to this lawsuit." The court's memorandum opinion went on to note that Cedar Village had never issued shares of stock, that neither of the Seatons had paid for their ownership interests, and that the corporation was inadequately capitalized, with its debts frequently exceeding its assets.

[18]

Notwithstanding these findings favoring application of the alter ego doctrine to impose personal liability on Mrs. Seaton for the money judgment rendered against the bankrupt Cedar Village, the trial court declined to apply the doctrine on the particularized ground that " `before the acts and obligations of a corporation can be legally recognized as those of a particular person" it must be shown that " `the corporation is . . . influenced and governed by that person" (Mem. opn., at p. 5, quoting *Minifie v. Rowley* (1921) 187 Cal. 481, 487). The trial court, in short, rejected plaintiff's argument for application of the alter ego doctrine to Mrs. Seaton on the ground that she "took no part in the governance" of Cedar Village. "Guy made all the business decisions. Shareholders' and directors' meetings were pro forma. Although the minutes of those meetings indicated substantive discussions took place, Guy and Jacqueline agree that what really happened was that Guy just told Jacqueline that things were going fine and left it at that." (Id. at p. 6.)

[19]

The trial court rejected Runez's argument that Guy acted as Jacqueline's agent in conducting Cedar Village's affairs and that in declining to grant alter ego relief, it had embraced an anomalous result by holding that a director could escape personal liability for her corporation's debts by disregarding her directorial duties. As Judge Douglass reasoned, the rule of *Minifie v. Rowley*, supra, 187 Cal. 481, had been, at the time his decision was rendered, the law of California for almost eighty years, its language repeatedly invoked by our Supreme Court, the Court of Appeal, and the Ninth Circuit. (See id. at p. 6, collecting the cases from *Temple v. Bodega Bay Fisheries, Inc.* (1960) 180 Cal.App.2d 279, 283 to *Wood v. Elling Corp.* (1977) 20 Cal.3d 353, 365, fn. 9, and *Firstmark Capital Corp. v. Hempel Financial Corp.* (9th Cir. 1988) 859 F.2d 92, 94, applying California law.) We agree with the trial court's result for two related reasons.

[20]

First, its legal reasoning-the notion that a sine qua non of the alter ego doctrine is a finding of actual governance by the individual shareholder-is plainly correct. As Witkin has it, summarizing the California alter ego doctrine, in order for the principle to apply, it "must be shown that the corporation is dominated or controlled by the individual" sought to be charged with the entity's liability. (9 Witkin, Summary of Cal. Law (9th ed. 1989) Corporations, § 13, p. 526, italics in original, collecting the cases.) Second and relatedly, as Justice Wakefield Taylor of this court wrote in *Arnold v. Browne* (1972) 27 Cal.App.3d 386, " `[t]he conditions under which the corporate entity may be disregarded .

. . necessarily vary according to the circumstances in each case inasmuch as the doctrine is essentially an equitable one and for that reason is particularly within the province of the trial court.' " (Id. at p. 393, italics added.) Reviewing courts, in other words, are inclined to "avoid formulas and tests and treat the [alter ego] question as one of fact." (9 Witkin, supra, at p. 527; see also Stark v. Coker (1942) 20 Cal.2d 839, 846; Shafford v. Otto Sales Co., Inc. (1953) 149 Cal.App.2d 428, 433; Associated Vendors, Inc. v. Oakland Meat Co. (1962) 210 Cal.App.2d 837; Arnold v. Browne, supra, 27 Cal.App.3d 386, 393.) Stated differently, we defer to the findings made by the trial judge in reaching a determination whether the requisites for disregarding the corporate form with respect to Mrs. Seaton's acts justified application of the alter ego doctrine. Applying that standard to the record before us here, we find no error with respect to the trial court's ruling on this issue.

[21]

II. The Cross-Appeal

[22]

A. Trial Court Did Not Err in Declining to Award Jacqueline Her Attorneys Fees and Costs.

[23]

In their cross-appeal from the final judgment entered by the trial court, the Seatons and Cedar Village present a one-paragraph argument that Judge Douglass erred when he declined to award Mrs. Seaton her attorneys fees and costs. Because she prevailed on both the breach of contract and alter ego claims of Runez, the argument runs, she qualified as the prevailing party within the meaning of Civil Code section 1717. Jacqueline filed a costs memorandum with the court, which included a flat \$50,000 in attorneys fees and \$4,803.48 in costs. However, the summary memorandum of costs provides no breakout or other details whatever with respect to the attorneys fees claimed; no worksheet providing the necessary details was filed with the summary memorandum.

[24]

It was in light of this incomplete summary that Runez moved for an order striking defendants' costs memorandum and, presumably for like reasons, that the trial court granted that motion. Worse for defendants, the trial court invited them, including Jacqueline-not once, but twice-to file an appropriate motion for an award of attorneys fees for section 1717 purposes. Evidently, defendants never filed such a motion. Plaintiff's motion to strike the memorandum of costs being uncontested by defendants and the memorandum itself being insufficient to justify an award, the trial court did not err in not awarding Jacqueline her attorneys fees and costs. (See Code Civ. Proc., § 1033.5(c)(5) [fees applicant bears burden of proof].)

[25]

B. Trial Court's Award of Prejudgment Interest Did Not Offend Rule in Cassinos and like decisions.

[26]

Defendants next contend the trial court erred when it awarded Runez prejudgment interest on her breach of contract claim. Relying on Cassinos v. Union Oil Co. (1993) 14 Cal.App.4th 1770 (Cassinos), and similar precedents, defendants recite the familiar rule that prejudgment interest is proper only where the damages do not depend upon conflicting evidence and can be ascertained from data furnished from the debtor. (See

also *Fireman's Fund Ins. Co. v. Allstate Ins. Co.* (1991) 234 Cal.App.3d 1154.) Because the facts of this case, defendants argue, do not give rise to a liquidated claim, the trial court's award of prejudgment interest offended the rule in *Cassinos* and like decisions. We disagree.

[27]

The chief business transaction at issue between the parties involved the lease of real property at a fixed monthly rental. This is obviously the sort of transaction that is amenable to deriving a liquidated sum certain. As the *Cassinos* court put it, an award of prejudgment interest is proper in circumstances where a " `defendant actually know[s] the amount owed or from reasonably available information could . . . comput[e] that amount.' " (Id. at p. 1789, quoting *Chesapeake Industries, Inc. v. Togova Enterprises, Inc.* (1983) 149 Cal.App.3d 901, 907, 911, italics omitted.) Those criteria were met here. Plaintiff put on a forensic accountant, Marc Lumer, whose calculations showed Cedar Village rent to have been \$28,534.02 per month before the March 1993 rent reduction. As the trial court noted in its memorandum opinion, Cedar Village's records showed the same figure- \$28,534.02.

[28]

Defendants argue, however, that other factors in the case militate against an award of prejudgment interest, citing the great discrepancy between the sum claimed by plaintiff in her complaint (\$3,500,000), the amount ultimately awarded (approximately \$385,000), plaintiff's rejected duress claim with respect to the lease modification, and the effect of the four-year limitations statute. None of these features of the case, however, is sufficient to defeat the fixed and liquidated nature of plaintiff's damages. If damages "may be determined by reference to reasonably ascertainable market values, they are `capable of being made certain by calculation' within the meaning of [Civil Code] section 3287," the applicable statute. (*Howe v. City Title Ins. Co.* (1967) 255 Cal.App.2d 85, 88[.]) As plaintiff remarks, the fact that Judge Douglass rejected plaintiff's claims for consequential damages, applied the limitations statute to reduce her claim for back rent, and denied Cedar Village's offsets hardly makes the amount of unpaid back rent unknowable. (Cf. *Hansen v. Covell* (1933) 218 Cal. 622 [existence of unliquidated offsets does not deprive plaintiff of prejudgment interest].) There was no error in the trial court's award of prejudgment interest.

[29]

C. Trial Court Did Not Err in Calculating Damages for Supplemental Rent.

[30]

The trial court's judgment awarded Runez \$49,815 in supplemental rent and associated prejudgment interest. Defendants argue the award was inconsistent with the testimony of plaintiff's expert, Lumer. His testimony, according to defendants, was to the effect that for the years 1991 to 1993, the supplemental rent due under the lease totaled \$59,131. Applying the four-year limitations period to this sum yields a revised supplemental rent total of \$14,418, defendants tell us.

[31]

Defendants' briefing does not direct us to Mr. Lumer's trial testimony, contenting itself with providing the annual supplemental dollar figures only. From these data alone, however, it is evident that Judge Douglass may have derived the figure stated in the judgment for supplemental rent by totaling the 1992 and 1993 dollar values from Mr.

Lumer's testimony (\$39,888), and adding interest. *fn1 We cannot know the precise method of calculation used by the trial court to reach the figure chosen. But given its presumptive correctness and absent argument and record reference more compelling than those summarily offered by defendants, we find no error on this score.

[32]

D. Trial Court Did Not Err in Denying Cedar Village's Asserted Setoffs.

[33]

Under this point, defendants argue it was error for the trial court to reject Cedar Village's setoff claims against Runez's claim for back rent. The argument relies on the statutory codification of the equitable setoff doctrine in Code of Civil Procedure section 431.70 and the argument that, although no writing substantiated the alleged setoffs, they effectively modified the lease agreement because they were fully performed. We agree with plaintiff that this contention fails for two related reasons. The record does not disclose that the setoff claim was ever presented to the trial court for decision and defendants' brief fails to enlighten us as to any aspect of this claim, including the nature, source, and amount of the asserted setoffs and the manner in which they were performed. Absent some evidence supporting the point, it is waived. (*Sherwood v. Superior Court* (1979) 24 Cal.3d 183, 186-187.)

[34]

E. Trial Court Did Not Err in Declining to Award Attorneys Fees to Guy Seaton as Prevailing Party in Alameda Action.

[35]

Defendants next contend the trial court erred in not awarding Guy Seaton his attorneys fees incurred in the prosecution of the Alameda proceeding on the promissory note. Because he prevailed on that claim, the argument runs, he was entitled to an award of counsel fees under Civil Code section 1717. In both his original statement of decision filed on September 18, 2000, and in the final judgment filed on March 14, 2001, Judge Douglass expressly invited counsel to file noticed motions raising the question of entitlement to attorneys fees as an element of costs under Civil Code section 1717 and Code of Civil Procedure section 1033.5, subdivision (c)(5). We have found no such motion filed on behalf of Mr. Seaton on this point and defendants' brief does not direct us to one. Presuming none was filed, the point is waived. (See, e.g., *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1138.)

[36]

F. Trial Court Did Not Err in Ruling Guy Seaton Liable for Plaintiff's Fees and Costs in San Francisco Action.

[37]

Defendants next contend the trial court erred in imposing liability on Guy Seaton (as well as the other defendants) for plaintiff's attorneys fees. In their settlement of part of the litigation in open court on October 16, 1998, all agreed that "[a]ll parties to bear their own costs and fees," to quote plaintiff's counsel. That being the agreement, defendants contend it was error to impose liability on Guy Seaton for a share of plaintiff's attorneys fees. While the argument is not without a facial plausibility, we are unable to find any trace in the record that the point was initially raised before the trial court. Defendants, including Mr. Seaton, did file objections to the trial court's statement of decision, in which the trial court made the ruling challenged under this heading, but those objections

did not include any complaint with respect to the award of attorneys fees to plaintiff. Because the trial court was never provided with an opportunity to consider the merits of this claim in the first instance, we will not examine it now. (See *In re Marriage of Arceneaux*, supra, 51 Cal.3d at p. 1138 ["It is clearly unproductive to deprive a trial court of the opportunity to correct . . . a purported defect by allowing a litigant to raise the claimed error for the first time on appeal"].)

[38]

G. Trial Court Did Not Err in Awarding plaintiff \$284,427 in Attorneys Fees.

[39]

Last, defendants contend the trial court erred in awarding plaintiff \$248,427 in attorneys fees, pursuant to her Civil Code section 1717 motion. The argument supporting reversal of that outcome is that the evidence substantiating the claim did not consist of contemporaneous records, but was a reconstruction. Defendants contend the accuracy and reliability of the reconstruction could not be verified independently, counsel's activities being lumped together in blocks of monthly time summaries. Because the case involved multiple causes of action against multiple defendants, it is argued, plaintiff's claim for attorneys fees should have been apportioned by the trial court. Instead, defendants tell us, their request for an evidentiary hearing on this issue was denied.

[40]

We are not persuaded there was any error in the trial court's award of attorneys fees to plaintiff. Both sides rely on *Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, the widely cited Supreme Court opinion on apportionment of attorneys fees awards, a case that happened to deal with alter ego issues. We think Justice Clark's comments for a unanimous court provide the answer to defendants' contention under this point. He wrote: "plaintiff's joinder of causes of action should not dilute its right to attorney's fees. Attorney's fees need not be apportioned when incurred for representation on an issue common to both a cause of action in which fees are proper and one in which they are not allowed. All expenses incurred with respect to the alter ego issue-common to both the note and the . . . consignment agreement-qualify for award." (Id. at pp. 129-130.)

[41]

That rule applies here, where plaintiff sought an award of attorneys fees in the sum of \$334,620. The trial court slashed that figure by some \$85,000. And while it is true that the documentation supporting the fees claimed "lumped" together time spent on more than a single cause of action-alter ego work and malpractice work appear under a single heading, for example-counsel's submissions were otherwise quite detailed regarding the kind and duration of the activities recorded. As for combining attorney time expended on different issues, we think those items qualify under Reynolds's "common expenses" rule. The depositions of Mr. Grover, for example, were necessary because he acted as counsel to both plaintiff and defendants simultaneously, drawing up the lease agreement for both sides. For like reasons, plaintiff's discovery efforts and inquiries into financial transactions between Cedar Village and its sister companies appear to have been compelled by the cross-complaint Cedar Village filed against Runez, alleging she caused the loss of the corporations' investments and seeking \$5 million in damages. In these circumstances, we agree with the trial court's implicit ruling that no apportionment was required. *fn2

[42]

CONCLUSION

[43]

Finding no error, the judgment of the superior court is affirmed in all respects.

[44]

We concur:

[45]

Kay, P.J.

[46]

Reardon, J.

Opinion Footnotes

[47]

*fn1 This calculation would have been based on the view that the parties to the lease could not know, as of July 1 of a given year, what the tenant's annual revenues for the year would be, making the obligation payable in the following year, thus avoiding the limitations bar for that period.

[48]

*fn2 We likewise reject defendants' contention that a post- event reconstruction of the time expended by counsel is fatal to plaintiff's claim for fees. (See, e.g., *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1096, fn. 4 [affirming fee award, notwithstanding counsel's failure to keep contemporaneous records and reliance on a detailed reconstruction instead].)