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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

SIRY INVESTMENT, L.P., Plaintiff and Appellant, v. SAEED FARKHONDEHPOUR, Individually and as Trustee, et al., Defendants and Appellants.	B223100 (Consolidated with B234665) (Los Angeles County Super. Ct. No. BC372362)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ricardo A. Torres and Susan Bryant-Deason, Judges. Reversed and remanded for further proceedings.

Zakariaie & Zakariaie, Jack M. Zakariaie, Nilou A. Zakariaie; Greines, Martin, Stein & Richland, Robert A. Olson, Sheila A. Wirkus; Law Office of Philip A. Metson, Philip A. Metson for Defendants and Appellants.

Law Office of Philip A. Metson, Philip A. Metson; Law Office of Mohammad A. Fakhreddine, Mohammad A. Fakhreddine; Greines, Martin, Stein & Richland, Robert A. Olson and Sheila A. Wirkus for Defendant and Appellant Saeed Farkhondehpour, individually and as trustee of the 1993 Farkhondehpour Family Trust.

Wilson, Elser, Moskowitz, Edelman & Dicker, Gregory D. Hagen, and Robert Cooper for Plaintiff and Appellant.

This case involves two consolidated appeals: one from a special verdict and judgment entered thereon, and one from the subsequent order approving the final accounting report prepared by the referee. Saeed Farkhondehpour (Farkhondehpour), individually and as trustee of the 1993 Farkhondehpour Family Trust, Morad Neman (Neman), individually and as trustee of both the Neman Family Revocable Trust and the Yedidia Investment Defined Benefit Plan, 416 South Wall Street, Inc., and 241 E. 5th St. Partnership, L.P. (defendants) argue that reversal is compelled because the special verdict and judgment in favor of Siry Investment, L.P. (Siry) are "fatally indefinite in imposing liability." We agree. Siry's arguments notwithstanding, the judgment and special verdict are hopelessly ambiguous because the jury made disjunctive findings—it found Farkhondehpour, *either* individually *or* in his capacity as trustee, liable, and it similarly found Neman, *either* individually *or* in his capacity as trustee, liable. Thus, the judgment is too uncertain to be enforced and must be reversed.

Moreover, because the trial court expressly relied upon the jury's ambiguous findings in approving the referee's final report, the order approving the final report must be reversed as well.

The matter is remanded to the trial court for a new trial.

FACTUAL AND PROCEDURAL BACKGROUND

The Parties

Siry was a limited partner in 241 E. 5th St. Partnership, L.P. According to the partnership agreement, the general partner was 416 South Wall Street, Inc., and the other limited partners were the 1993 Farkhondehpour Family Trust, the Neman Family Irrevocable Trust, and the Yedidia Investment Defined Benefit Plan. Farkhondehpour is the trustee of the 1993 Farkhondehpour Family Trust and Neman is the trustee of the Neman Family Irrevocable Trust and the Yedidia Investment Defined Benefit Plan.

The Second Amended Complaint

In June 2007, Siry filed the instant action against defendants. The second amended complaint, the operative pleading, alleges, inter alia, claims for dissolution and

winding up of limited partnership; accounting, breach of contract; and breach of fiduciary duty.

The Jury Instructions

The case proceeded to a jury trial. Although the second amended complaint alleged alter ego liability, the jury was never instructed on this issue.

The Verdict and Judgment

Siry and the trial court prepared the special verdict form. Defendants objected to the form on the grounds that it improperly "refer[red] to the defendants en masse."

Following deliberation, the jury returned a verdict in favor of Siry. Specifically, the jury answered "Yes" to the following questions: (1) "Did the defendant individually or as trustees of the various trusts, breach any fiduciary duties that they owed to [Siry]?" (2) "Did [Siry] and the Defendants, individually or as trustee of the various trust entities, enter into a contract?" (3) "Did Defendants, individually or as trustees of the various trust entities, fail to do something that the contract required them to do? (4) "Do you find by clear and convincing evidence on the cause of action for breach of fiduciary duty that Defendant Saeed Farkhondehpour, individually or as trustee of the 1993 Farkhondehpour Family Trust, acted with malice, oppression or fraud?" (5) "Do you find by clear and convincing evidence on the cause of action for breach of fiduciary duty that defendant Mourad Neeman [*sic*], individually or as trustee of The Neman Family Irrevocable Trust, and the Yedidia Investments Defined Benefit Plan, acted with malice, oppression or fraud?"

In addition to compensatory damages, the jury awarded punitive damages against "Farkhondehpour, individually or as trustee of the 1993 Farkhondehpour Family Trust" and against "Neman, individually or as trustee of The Neman Family Irrevocable Trust and the Yedidia Investments Defined Benefit Plan."

Judgment was entered in favor of Siry and against defendants. Notably, the proposed preprinted judgment form identified defendants as "SAEED FARKHONDEHPOUR, an individual and Trustee of the 1993 Farkhondehpour Family Trust; MORAD NEMAN, an individual, and Trustee of The Neman Family Irrevocable

Trust, and the Yedidia Investments Defined Benefit Plan." However, the trial court crossed out the conjunctions "and" and replaced them with "or," leaving the judgment against defendants as follows: Siry "is entitled to judgment against Defendants SAEED FARKHONDEHPOUR, an individual OR Trustee of the 1993 Farkhondehpour Family Trust; MORAD NEMAN, an individual, OR Trustee of The Neman Family Irrevocable Trust, OR the Yedidia Investments Defined Benefit Plan."

Siry was awarded compensatory damages from "Defendants SAEED FARKHONDEHPOUR, as an individual or as Trustee of the 1993 Farkhondehpour Family Trust; MORAD NEMAN, as an individual, or as Trustee of The Neman Family Irrevocable Trust, or as Trustee the Yedidia Investments Defined Benefit Plan." Siry was also awarded punitive damages from "Defendant SAEED FARKHONDEHPOUR, as an individual or as Trustee of the 1993 Farkhondehpour Family Trust" and from "Defendant MORAD NEMAN, as an individual, or as Trustee of The Neman Family Irrevocable Trust, or as Trustee of the Yedidia Investments Defined Benefit Plan."

Costs too were awarded in favor of Siry and against "Defendants SAEED FARKHONDEHPOUR, as an individual or as trustee of the 1993 Farkhondehpour Family Trust and MORAD NEMAN, as an individual or as trustee of the Neman Family Irrevocable Trust or as Trustee the Yedidia Investments Defined Benefit Plan."

The trial court further ordered that the partnership be dissolved. And, as to the second cause of action for an accounting, the trial court found in favor of Siry and ordered a reference pursuant to Code of Civil Procedure section 639, subdivision (a).

Posttrial Motions

Defendants then filed a notice of motion for judgment notwithstanding the verdict (JNOV) and to vacate the judgment. Contemporaneously, defendants filed notice of intent to move for new trial. In support of the two posttrial motions, defendants filed a combined points and authorities. As is relevant to the issues raised in this appeal, defendants argued that the special verdict and judgment were fatally uncertain because they did not indicate whether Farkhondehpour and Neman were liable to Siry

individually or as trustees. Consequently, according to defendants, "[a] new trial [was] required."

Both motions were denied, although the punitive damage awards against "Farkhondehpour, as an individual, or as Trustee of 1993 Farkhondehpour Family Trust" and "Neman, as an individual, or as Trustee of The Neman Family Irrevocable Trust, or as Trustee of the Yedidia Investments Defined Benefit Plan" were reduced.

Defendants' Appeal and Siry's Cross-Appeal

Defendants' appeal from the judgment ensued. Siry timely filed a notice of cross-appeal.

Accounting

While the appeal was pending, in accordance with the trial court's judgment, the matter was sent to a referee, David Frankel (certified public accountant) for an accounting. The referee then submitted his final report to the trial court. On May 26, 2011, the trial court approved and adopted the referee's March 17, 2011, final report. In rejecting Farkhondehpour's challenge to the referee's report, the trial court noted that "[t]he jury ha[d] spoken" with respect to the question of whether Farkhondehpour had misappropriated partnership funds.

Next, the trial court summarized the accountant's findings. In particular, the trial court indicated that certain cash receipts were "understated in 2007-2009 by a total of $42,612 due to misappropriation by Farkhondehpour," prompting the referee to recommend a decrease of Farkhondehpour's capital account. Concerning commercial spaces, the trial court noted that the referee believed that the discrepancy may have been because tenants did not pay rent "or may be due to amounts misappropriated by Farkhondehpour and/or his employees." Capital accounts were adjusted accordingly.

The trial court then addressed defendants' objections to the referee's report. Regarding documents that were belatedly submitted to the referee, the trial court noted: "The jury already found that Defendants misappropriated funds from Siry after hearing the evidence at trial. It is not a stretch to the imagination based on the history of the parties and the findings of the jury in this case to believe that defendants[] could have

used the extra time in providing the late documents to further 'cook the books' to look legitimate."

Ultimately, the trial court concluded that the referee presented a proper balance sheet, again relying upon the jury's finding that "Farkhondehpour breached his fiduciary duty by misappropriating" monies from Siry. It made findings regarding the proper distribution of the parties' capital accounts, and ordered the receiver to make appropriate distributions in accordance with its findings.

Appeal and Consolidation

Defendants timely filed a notice of appeal from the trial court's May 26, 2011, order.

Defendants' original appeal (case No. B223100) was consolidated with defendants' second appeal (case No. B234665).

DISCUSSION

I. *Appealability*

According to appellants' opening brief, "[t]his case presents an appealability conundrum." After all, at the time defendants filed their original notice of appeal, damages had been awarded and dissolution and an accounting had been ordered, but no final accounting had been entered. While the appeal was pending, the final accounting was entered. In fact, defendants filed a separate notice of appeal from the trial court's May 26, 2011, order approving the final accounting prepared by the referee.[1] In light of the fact that all issues have been resolved and are now pending in this consolidated appeal, and given no objection from Siry,[2] we conclude that the judgment and all issues raised are appealable and properly before us for determination.

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1 The second appeal was consolidated into the already pending appeal.

2 Siry did not address the appealability issue in its respondent's brief.

II. *Jury Verdict and Judgment*

A. Standard of Review

We review the judgment and special verdict de novo. (*Zagami, Inc. v. James A. Crone, Inc.* (2008) 160 Cal.App.4th 1083, 1092 (*Zagami*); *City of San Diego v. D.R. Horton San Diego Holding Co., Inc.* (2005) 126 Cal.App.4th 668, 678 (*City of San Diego*) ["'[A] special verdict's correctness must be analyzed as a matter of law'"].)

"'Unlike a general verdict (which merely *implies* findings on all issues in favor of the plaintiff or defendant), a special verdict presents to the jury each ultimate fact in the case. The jury must resolve all of the ultimate facts presented to it in the special verdict, so that "nothing shall remain to the court but to draw from them conclusions of law." (Code Civ. Proc., § 624.) [¶] The requirement that the jury must resolve every controverted issue is one of the recognized pitfalls of special verdicts. "[T]he possibility of a defective or incomplete special verdict, or possibly no verdict at all, is much greater than with a general verdict that is tested by special findings . . . ." [Citation.]' [Citation.]" (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 959–960 (*Myers*).)

B. The Judgment Must be Reversed and Remanded for a New Trial

"It is the general rule that a judgment must be sufficiently certain to permit enforcement." (*Imperial Casualty & Indemnity Co. v. Sogomonian* (1988) 198 Cal.App.3d 169, 185.) In that regard, a judgment must designate the party against whom it is rendered. (*Shriver v. Superior Court* (1920) 48 Cal.App. 576, 585.)

The judgment here is not sufficiently certain to permit enforcement. The words of the special verdict and judgment are clear (either Farkhondehpour individually *or* as trustee is liable and either Neman individually *or* as trustee is liable), but which one is actually liable to Siry? All we know is that the jury narrowed it down, so to speak, to two possible choices. And, as pointed out by appellants and unrefuted by Siry, who is liable is key. If Farkhondehpour and Neman are liable individually, then the assets they hold as trustees are not subject to execution; and a trustee cannot be held personally liable for an obligation arising from his ownership or control of trust property unless there is proof

that the trustee intentionally or negligently acted or failed to act in a manner that establishes personal fault. (Prob. Code, §§ 18000-18004; *Townsend v. Greeley* (1866) 72 U.S. 326, 337; *Haskett v. Villas at Desert Falls* (2001) 90 Cal.App.4th 864, 877–878.)

Relying upon cases that concern statutory interpretation, Siry contends that the judgment and special verdict are not ambiguous. While we may be permitted to correct a drafting error in a statute (*Friedman v. City of Beverly Hills* (1996) 47 Cal.App.4th 436, 444 ["When it appears . . . that to effectuate the purpose or intent of a statute the use of the word 'or' rather than the word 'and' is required, our Supreme Court tells us that we may rectify the apparent error by judicial construction"]), Siry offers no legal authority that allows us to cure a similar defect in a judgment. (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852.)

Siry further argues that the judgment and special verdict are not defective because the jury found in favor of Siry on each element of each cause of action. We disagree. As noted above, the judgment and special verdict are defective because they do not identify whether the jury found against Neman and Farkhondehpour individually or as trustees (or both, as Siry claims). (*Zagami, supra*, 160 Cal.App.4th at p. 1092.) Because of the disjunctive language in both the special verdict and the judgment, we cannot "track back through the special findings in order to appreciate what exactly the jury" found. (*All-West Design, Inc. v. Boozer* (1986) 183 Cal.App.3d 1212, 1221; *Myers, supra*, 13 Cal.App.4th at p. 961.)

Defending the judgment, Siry claims that the judgment is joint and several, and that we should construe the word "or" to mean "and." We cannot do so. The "'"ordinary and popular"' meaning of the word 'or' is well settled. [Citation.] It has a disjunctive meaning: 'In its ordinary sense, the function of the word 'or' is to mark an alternative such as 'either this or that."'" (*In re Jesusa V.* (2004) 32 Cal.4th 588, 622.)

Siry further argues that we may affirm the judgment on the grounds that there is substantial evidence to support a judgment against either Farkhondehpour in his individual capacity or as a trustee and Neman, again either in his individual capacity or in his capacity as trustee of both the Neman Family Irrevocable Trust and the Yedidia

Investments Defined Benefit Plan. The problem for Siry is that we are reviewing a special verdict, and a special verdict affords no presumption or implied findings in favor of one party or the other. (*City of San Diego*, *supra*, 126 Cal.App.4th at p 678; *Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 285; *Zagami*, *supra*, 160 Cal.App.4th at p. 1092.) Thus, we cannot look at the evidence and decide whether it supports a judgment against any one of the defendants.

Siry also asserts that the judgment may be saved because there is substantial evidence of alter ego liability. This argument fails on at least two levels. First, as set forth above, we cannot affirm a judgment based upon a special verdict on the grounds that substantial evidence supports the judgment. (*City of San Diego*, *supra*, 126 Cal.App.4th at p. 678.) Second, even if we could, the jury was not asked to make any findings on the issue of alter ego. And, while the jury was instructed on agency liability, there were no jury instructions given on alter ego liability.

Finally, Siry's reliance upon case law that interprets the phrase "and/or" is misplaced for one simple reason—the special verdict form and judgment here do not use the phrase "and/or."

Having determined that the judgment and special verdict are hopelessly and fatally ambiguous, we must reverse the entire judgment in favor of Siry. (See, e.g., *Burt v. Board of Trustees of Edgefield City, Sch. D.* (4th Cir. 1975) 521 F.2d 1201, 1204–1205.) The next question is whether we reverse with directions to enter judgment in favor of defendants or reverse and remand the matter for a new trial. Equating the uncertain special verdict here with unenforceable inconsistent special verdicts, and in light of our public policy favoring trial on the merits, we opt to remand the matter for a new trial. (See *Stillwell v. The Salvation Army* (2008) 167 Cal.App.4th 360, 375–376 [holding that the remedy for inconsistent verdicts is not to grant judgment but to order a new trial]; *City of San Diego*, *supra*, 126 Cal.App.4th at p. 678; *Zagami*, *supra*, 160 Cal.App.4th at pp. 1091–1092.)

Defendants' contention that the defective special verdict requires reversal with directions to enter judgment for defendants is not well-taken. Preliminarily, we point out

that this argument has been forfeited on appeal. As set forth above, defendants argued in their posttrial motions that the special verdict and judgment were fatally uncertain. But, they asked for a new trial, not for judgment, and they did not rely upon the same case authority offered on appeal. For this reason alone, the argument fails. (*California State Auto. Assn. Inter-Ins. Bureau v. Antonelli* (1979) 94 Cal.App.3d 113, 122 ["It is a general rule of appellate review that arguments waived at the trial level will not be considered on appeal. This rule is founded on considerations of practical necessity in the orderly administration of the law and of fairness to the court and the opposite party [citation]"].)

Setting this procedural obstacle aside, the legal authority offered by defendants in support of their request for judgment is distinguishable. In *Myers*, *supra*, 13 Cal.App.4th 949, Interface Technology, Inc. (Interface) entered into a contract with Myers Building Industries, Ltd. (Myers), a general contractor, pursuant to which Myers agreed to construct an office building for Interface. (*Id*. at p. 955.) Following completion of the building, a dispute arose, prompting a lawsuit that was initiated by various subcontractors. (*Ibid*.) Myers filed a cross-complaint against Interface, alleging breach of contract and various torts. (*Ibid*.) The matter proceeded to trial, and the jury returned a special verdict in favor of Myers, finding that Interface had breached its contract with Myers and awarding Myers compensatory damages. (*Ibid*.) But, the special verdict did not ask the jury to find whether Interface had committed any tort. (*Id*. at p. 957.) Nevertheless, the jury found "that Interface had acted with 'oppression, fraud or malice' towards Myers." (*Id*. at p. 958.) The jury then returned a punitive damage verdict against Interface. (*Ibid*.) Interface's posttrial motions for new trial and JNOV were denied, and Interface appealed. (*Ibid*.)

The Court of Appeal reversed the judgment in part, striking the award for punitive damages on the grounds that "the jury was neither requested to nor did it make the necessary factual findings for a fraud or other tort cause of action." (*Myers*, *supra*, 13 Cal.App.4th at p. 960.) Because an award of punitive damages is not supported by a verdict based solely on breach of contract, the punitive damage award could not stand. (*Ibid*.)

In urging the court to affirm the judgment, Myers contended, inter alia, that the jury's finding of malice, fraud, or oppression constituted an implied finding that Interface committed fraud against Myers. (*Myers*, *supra*, 13 Cal.App.4th at p. 961.) The Court of Appeal rejected that argument, finding that the special verdict "failed entirely to elicit findings concerning a fraud cause of action." (*Myers*, *supra*, 13 Cal.App.4th at p. 962.)

Making matters worse, Interface's counsel "attempted repeatedly to bring this problem to [Myers's counsel's attention] and the trial court," but Myers's counsel "vigorously opposed" Interface's position, maintaining that any correction was unnecessary. (*Myers*, *supra*, 13 Cal.App.4th at p. 962.)

In contrast, in the instant case, the jury did not utterly fail to make findings regarding the causes of action pled in the second amended complaint and then tried. Rather, unfortunately, the jury was provided with an uncertain special verdict form, which did not differentiate between the capacities in which Farkhondehpour and Neman were being sued. Thus, it is now impossible for us to know how to enforce the jury's findings.

Moreover, unlike Interface, which attempted to bring the problem to the trial court's attention numerous times so that the special verdict finding could have been remedied prior to discharge of the jury (*Myers*, *supra*, 13 Cal.App.4th at p. 962), defendants here only once objected to the special verdict form on the grounds that it referred to defendants "en masse." While that objection, bolstered by the argument raised in defendants' posttrial motion, is sufficient to preserve the issue for appellate review, there is no indication that defendants—over Siry's vigorous opposition—attempted to have the issue resolved by the trial court. In light of these differences, *Myers* does not compel reversal with judgment in favor of defendants.

Likewise, in *Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 329, the Court of Appeal reversed a judgment in favor of a plaintiff on a medical malpractice/battery claim on the grounds that the jury did not make a finding, and was never asked to make a finding, on battery. Under these circumstances, the Court of Appeal concluded that the trial court should have granted the defendant's motion for JNOV. (*Ibid*.) Here, the jury was asked to make all requisite findings; the special verdict form, however, was ambiguous. And, unlike the defendant in *Saxena*, defendants here did not ask for JNOV.

Given our conclusion that the uncertain and ambiguous special verdict and judgment require reversal and a new trial, all remaining issues raised by defendants in their opening brief are moot. Needless to say, the issues raised in Siry's cross-appeal are moot as well.

III. *Accounting Order*

In the second appeal, Farkhondehpour, individually and as trustee of the 1993 Farkhondehpour Family Trust, challenges the trial court's May 26, 2011, order approving the final accounting.[3] In light of our conclusion that the special verdict is hopelessly ambiguous and compels reversal and a new trial, we must reverse the trial court's order approving the referee's final accounting as well.

As Siry points out in its respondent's brief, the issues adjudicated by the jury are binding in later phases of trial. (See, e.g., *Hoopes v. Dolan* (2008) 168 Cal.App.4th 146, 155–156 [In a bifurcated trial, a judge is bound by the jury's prior factual determinations on common issues of fact].) In fact, that is exactly what the trial court did here. In its May 26, 2011, order, the trial court relied upon and incorporated findings that it assumed had been made by the jury. But, as set forth above, because of the special verdict's disjunctive findings, both the special verdict and judgment are uncertain; in other words, because the jury did not specify whether it found Farkhondehpour liable individually or

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[3] While all defendants filed notices of appeal, only Farkhondehpour, both individually and as trustee, briefed this issue.

in his capacity as trustee, the referee and the trial court's reliance upon an assumed finding cannot be affirmed.

DISPOSITION

The judgment is reversed. The matter is remanded to the trial court for a new trial. Defendants are entitled to costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, Acting P. J.
DOI TODD

_____, J.
CHAVEZ