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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

LOGIX DEVELOPMENT CORPORATION et al., Plaintiffs and Respondents, v. J. ROGER FAHERTY, Defendant and Appellant.	B213126 (Los Angeles County Super. Ct. No. BC 250732)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ernest Hiroshige, Judge. Vacated and remanded with directions.

Horvitz & Levy, Peter Abrahams, Andrea M. Gauthier; Murchison & Cumming, Edmund G. Farrell, Michael J. Nunez; Monaghan, Monaghan, Lam & Marchisio and Patrick J. Monaghan, Jr., for Defendant and Appellant.

Manning & Marder, Kass, Ellrod, Ramirez, Anthony J. Ellrod, Steven J. Renick, and L. Trevor Grimm for Plaintiffs and Respondents.

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In *Logix Development Corporation v. Faherty* (Nov. 14, 2007, B178872 [nonpub. opn.]) (hereafter *Logix I*), we affirmed in part, reversed in part and remanded a judgment in excess of $22 million, which we reduced to $8,388,385 in favor of Logix Development Corporation, D. Keith and Anne Howington (collectively respondents in *Logix I* and in this appeal), and against appellant J. Roger Faherty. Under our decision in *Logix I*, Logix Development Corporation (Logix) recovered $5,536,102 and the Howingtons' recovery was $2,852,483, totaling $8,388,385. We ordered that a settlement of $8,032,500 received by respondents be credited against the judgment; this reduces the judgment to $356,085. We remanded with directions for a new trial on the issue whether a channel named Spice Hot was an "explicit" channel; only if Spice Hot was explicit respondents could recover $356,085. In other words, if the Spice Hot channel was not explicit, respondents will recover nothing.

Prior to the trial that led to *Logix I*, respondents settled with one of the defendants, Emerald Media, Inc. (EMI), for a stipulated judgment of $40 million. Specifically, Judith Savar, EMI's president, paid respondents $1,000 and agreed to the entry of a judgment of $40 million against EMI; such a judgment was in fact entered against EMI.

Rather than complying with our mandate, on June 18, 2008, respondents filed a motion to add Faherty as an additional defendant and judgment debtor to the stipulated judgment of $40 million, which was originally only against EMI. Ultimately, the trial court granted this motion.

The trial involving the Spice Hot channel never took place; the trial court concluded that such a trial was mooted by the fact that Faherty was now a judgment debtor on the $40 million stipulated judgment.

The trial court granted respondents' motion by a written order filed on October 31, 2008. On February 3, 2009, the trial court entered an "AMENDED JUDGMENT," which provides that Logix is entitled to $32 million and the two Howingtons are each entitled to $4 million from Faherty and EMI, jointly and

severally. Faherty appealed from the October 31, 2008 order, as well as from the amended judgment. We ordered these two appeals to be consolidated for all purposes.

We reverse and vacate the amended judgment and once again remand with directions to proceed with the trial involving the Spice Hot channel for the reasons, and under the terms, of our opinion in *Logix I*.

DISCUSSION

1. The Nature and Significance of the Original Judgment Against Faherty

Initially, respondents' action set forth 10 causes of action and named nine defendants. For various reasons not necessary to detail here, but which are set forth in our opinion in *Logix I*, only one cause of action went to the jury and the sole remaining defendant was Faherty.

The cause of action that went to the jury was for breach of contract. The contract in question was an agreement between Logix and EMI, which we summarize below.

Logix is a software development company that developed technology important to pay-per-view television programming; sports events and adult entertainment depend heavily on pay-per-view programming. Among other channels, Logix operated two explicit adult entertainment channels. Faherty was involved with the business side of adult entertainment and proposed to buy these two channels. In substance, Faherty created EMI to acquire and operate these two channels, in addition to other explicit channels. The Logix-EMI agreement called for payments by EMI to Logix of certain percentages of net revenue derived from explicit programming. It is these payments that are the basis for respondents' recovery.

The contracting parties to the Logix-EMI agreement were only Logix and EMI. Faherty was not a contracting party. Thus, only Logix or EMI could breach the contract; the jury concluded that EMI had breached the agreement.

This is when the jury's finding that Faherty was an alter ego of EMI becomes both relevant and critical. The alter ego finding shifted the liability for this breach to Faherty.

"The issue is not so much whether, for all purposes, the corporation is the 'alter ego' of its stockholders or officers, nor whether the very purpose of the organization of the corporation was to defraud the individual who is now in court complaining, as it is an issue of whether *in the particular case presented and for the purposes of such case* justice and equity can best be accomplished and fraud and unfairness defeated by a disregard of the distinct entity of the corporate form." (*Kohn v. Kohn* (1950) 95 Cal.App.2d 708, 718, italics added.)

Once liability was imposed on Faherty for EMI's breach of contract, the alter ego doctrine had served its purpose. That is, Faherty was prevented from using the corporate form of EMI to protect himself from liability vis-à-vis respondents' cause of action for breach of contract.

2. It Was Error to Add Faherty As an Additional Defendant to the Stipulated Judgment

As we have already noted, the issue under the alter ego doctrine is whether in the instance of a *specific instance* justice and equity, and the prevention of fraud and unfairness, require that the distinct entity of the corporate form is to be disregarded. (*Kohn v. Kohn, supra*, 95 Cal.App.2d at p. 718; see generally 9 Witkin Summary of Cal. Law (10th ed. 2005) Corporations, § 9(2), p. 786.) There is no point to a general finding that Mr. X is the alter ego of corporation Y if Mr. X is not using the corporate form of Y to commit fraud and perpetrate an injustice. That is, Faherty is not EMI's alter ego as an abstract, general proposition but only on the cause of action for breach of the Logix-EMI agreement.

Respondents contend that there is substantial evidence that Faherty was and continues to be the alter ego of EMI. While we agree that there was substantial evidence that required the invocation of the alter ego doctrine when it came to the

cause of action for breach of the Logix-EMI agreement, that is the full extent of the role of the alter ego doctrine in this case. We develop this point further below.

The flaw in the trial court's order adding Faherty as a defendant to the stipulated judgment is that it does not appear that justice and equity, and the prevention of fraud and unfairness, requires this result.

In the first place, there is nothing to indicate that Faherty used the stipulated judgment to perpetrate a fraud or injustice. Faherty had no connection with the stipulated judgment. The contrast with the cause of action for breach of the Logix-EMI contract is clear. In the instance of the breach of contract, Faherty sought to shield himself from liability by effectively hiding behind EMI's corporate veil. Nothing of the sort was happening in the instance of the stipulated judgment. For one, it is a judgment and not a claim and it is respondents and the trial court that added Faherty to the stipulated judgment. In short, Faherty is not using the stipulated judgment to perpetrate fraud and injustice.[1]

The trial court's order also overlooked the fact that the stipulated judgment was not the result of a trial but rather came about because the parties to that settlement agreed to its terms. That is, the stipulated judgment is fundamentally a consensual document between respondents and Savar. There was simply no way for Faherty to abuse this judgment. Importantly, it certainly did not shield him from the adverse judgment on the breach of contract cause of action.

The consensual nature of the stipulated judgment is underlined by the principle that someone who is not a party to a settlement agreement is not bound by that agreement nor bound by the stipulated judgment based on that agreement. (*Cortez v. Kenneally* (1996) 44 Cal.App.4th 523, 529-530.) We think it is questionable, in the first place, whether an entity who was not a party to the settlement agreement nor to

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[1] It is of marginal interest that the record contains a declaration under penalty of perjury by one of Faherty's lawyers, Patrick J. Monoghan, Jr., that he advised an attorney acting for Savar that the stipulated judgment was a bad idea.

the resulting stipulated judgment can be added to that judgment against his will. But this is only a theoretical concern because there is simply nothing to show that the stipulated judgment was used to perpetrate an injustice.

It may be said that the stipulated judgment reflects the disposition of some or all of respondents' claims against EMI and that Faherty should therefore become liable on the stipulated judgment. But this is metaphysics and not reality. The stipulated judgment rests on an agreement between Savar and respondents to the terms of the settlement; the sum of the judgment itself, a round $40 million, is without any basis in the facts and figures of this case.

It is also true that if the stipulated judgment reflects claims against EMI, there is no reason to shift liability to Faherty for those claims unless, *as to those specific claims*, the predicates of the alter ego doctrine have been met. (It should be kept in mind that the alter ego finding as to the breach of contract claim rested on a complex matrix of historical facts.) Because no one can tell which claims are somehow reflected in the stipulated judgment, there is no way to determine whether the alter ego doctrine should be applied.

Finally, the toothless nature of the stipulated judgment, given the covenant not to execute on the judgment, renders it completely harmless, even if Faherty had something to do with it -- which he did not. As the stipulated judgment is effectively meaningless, it cannot be employed to perpetrate fraud and injustice, which renders it unnecessary to invoke the alter ego doctrine.

While there is precedent for adding parties to a judgment upon an alter ego showing (*Mirabito v. San Francisco Dairy Co.* (1935) 8 Cal.App.2d 54, 56, 60), this case did not involve a stipulated judgment but rather a judgment based on a jury verdict. We have pointed out that the addition of an unwilling party to a stipulated judgment is questionable but it is not a question that we need to address.

3. The Trial Court Was Required to Follow the Law of the Case

We have addressed the alter ego issue because respondents claim that the trial court's amendment of the stipulated judgment rendered the doctrine of the law of the case inapplicable; we return to this argument below. As we have shown, it was error to amend the stipulated judgment. This brings us to the doctrine of the law of the case and our directive in *Logix I* to resolve the matter of the Spice Hot channel.

"When an appellate court's reversal is accompanied by directions requiring specific proceedings on remand, those directions are binding on the trial court and *must* be followed. Any material variance from the directions is unauthorized and void." (*Butler v. Superior Court* (2002) 104 Cal.App.4th 979, 982.) This has been the rule for some time (e.g., *Keller v. Lewis* (1880) 56 Cal. 466, 469; *Hampton v. Superior Court* (1952) 38 Cal.2d 652, 655-656), up to and including the present (*In re N.M.* (2008) 161 Cal.App.4th 253, 264). Failure to follow the directives of the reviewing court is so fundamental that, in addition to raising the matter in a direct appeal, this error can also be raised by an extraordinary writ. (See generally Eisenberg, et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2009) ¶ 14:150, p. 14-51 (rev. #1, 2008).)

The question is whether the variance in the execution of the directions set forth in *Logix I* was material. (*English v. Olympic Auditorium, Inc.* (1935) 10 Cal.App.2d 196, 202 ["any material variance from the explicit directions of the reviewing court is unauthorized and void"]; *In re Candace P.* (1994) 24 Cal.App.4th 1128, 1131.) It cannot be doubted that it was *at least* material. The trial of the issue whether the programming on Spice Hot was explicit did not take place at all.

We understand the trial court believed that, in light of respondent's earlier settlement with EMI, our decision in *Logix I* may have provided support for an order adding Faherty as a judgment debtor to the $40 million EMI judgment. Nevertheless, that action was not authorized by our remand. For that reason, the trial court order is void, is not subject to a harmless error analysis, and is set aside. (*In re Candace P.*,

supra, 24 Cal.App.4th at p. 1131.) That respondents might have asserted the additional judgment debtor argument in this court does not give the trial court the authority to take action beyond the clear directions of our remand order.

DISPOSITION

The amended judgment entered on February 3, 2009, is vacated and set aside. The case is remanded with directions to follow our directives in *Logix Development Corporation v. Faherty, supra*, B178872.

FLIER, J.

We concur:

RUBIN, Acting P. J.

LICHTMAN, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.