

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

PROGRESSIVE ENVIRONMENTAL
INDUSTRIES, INC.,

Plaintiff and Respondent,
v.

EL CAP RANCH, LLC, et al.,

Defendants and Appellants.

2d Civil No. B221721
(Super. Ct. No. 1266837)
(Santa Barbara County)

Progressive Environmental Industries sued El Cap Ranch, LLC, and Lester Knispel as trustee of the BP Trust, for breach of contract and fraud. A jury returned a general verdict in Progressive's favor in the sum of \$502,949. In a bifurcated proceeding, the same jury awarded Progressive \$1 million in punitive damages. In confirming the award of punitive damages, the trial court strongly condemned El Cap's conduct, characterizing it as "at the very high end of . . . reprehensibility." It also declared that El Cap suborned perjury and took advantage of a "financially vulnerable" company. The court also ordered that contract remedies in the form of prejudgment interest at the rate of 10 percent and a mechanic's lien be included in the award.

El Cap appeals the \$1 million punitive damages award on the grounds that punitive damages cannot be awarded for breach of contract and the amount of the award is grossly excessive. We remand to the trial court with directions to recalculate

prejudgment interest at the rate of 7 percent, and we reverse the order granting the mechanic's lien. In all other respects we affirm the judgment and post trial orders.

Facts and Procedural History

Respondent Progressive Environmental Industries, Inc. (Progressive), through its principal, Arturo Gonzalez, was hired by appellant El Cap Ranch (El Cap) to provide landscaping and landscape maintenance services on the ranch. The parties entered into a written agreement on or about May 2, 2007, setting forth hourly labor rates for various works of improvement and hourly equipment rates. The agreement stated that materials would be supplied at cost, be subject to COD payments, and there would be no discounts.

Progressive did extensive work on the property over several months for which El Cap paid the sum of \$2.5 million. A dispute arose between the parties regarding an additional \$493,949.17 for services and materials and \$9,000 for landscape maintenance services provided by Progressive for which El Cap did not pay. El Cap based its refusal to pay on a purported agreement signed by Gonzalez on December 14, 2007, in which Gonzalez agreed to discount the amount owing by approximately \$400,000. Gonzalez denied having signed the agreement. A major issue at trial was whether Gonzalez's signature on the agreement was forged.

On November 26, 2008, Progressive filed a first amended complaint (FAC) against El Cap alleging breach of contract, open book account, account stated, fraud and deceit (false promise), and to foreclose a mechanic's lien. In addition to compensatory damages, the FAC requested interest at the rate of 10 percent per annum from January 22, 2008, on the breach of contract, open book account, and account stated causes of action. The FAC sought punitive and exemplary damages on the fourth cause of action for fraud and deceit.

El Cap filed a first amended cross-complaint (FACC) against Progressive and Gonzalez, alleging breach of contract, breach of the implied covenant of good faith and fair dealing, breach of the implied warranty of merchantability, intentional and negligent misrepresentation of fact, and declaratory relief. The FACC sought

compensatory damages and interest on the contract causes of action and punitive and exemplary damages on the tort cause of action.

Prior to trial, the court granted El Cap's motion to bifurcate the issue of liability from the issue of punitive damages.

After a five-week trial, the jury, by general verdict, awarded Progressive \$502,949 in compensatory damages and in special findings found that Progressive had proved by clear and convincing evidence that El Cap had engaged in malice, oppression or fraud. The jury also awarded \$60,000 in compensatory damages to El Cap. The jury found that El Cap had not proved by clear and convincing evidence that Progressive or Gonzalez engaged in malice, oppression or fraud. The separate trial on punitive damages resulted in a verdict for Progressive in the amount of \$1 million. The trial court granted Progressive a mechanic's lien in the sum of \$442,949, representing the difference between the compensatory damages awarded to the parties. Judgment was entered accordingly. Subsequently, the court granted Progressive's motion for prejudgment interest on the award at the rate of 10 percent.

El Cap filed motions for judgment notwithstanding the verdict (JNOV) and new trial asserting there was no evidence to support a finding of malice, oppression or fraud, and that the punitive damages award was improper.

Progressive filed a motion for attorney fees in the amount of \$351,599 based on El Cap's failure to admit matters in discovery on issues of substantial importance without reasonable grounds. (Code Civ. Proc., § 2033.420.) At the hearing on the motions, El Cap argued for the first time that, because the verdict form did not specify whether the compensatory damage award to Progressive was based on the contract claims or the fraud claim, the award of punitive damages was improper.

The court awarded Progressive attorney fees in the amount of \$225,000 and denied El Cap's motions for JNOV and a new trial. With respect to the punitive damages award, the tentative ruling states in part: "In the case before the bar the action of the defendants was at the very high end of the degree of reprehensibility They schemed and committed perjury. They conspired, and expanded the participants in the perjured

testimony, as time went along. One perjurer was not enough; it had to be two, then three, then four, and so on. . . . The action evinced an extreme indifference or reckless disregard to the health of Mr. Gonzalez. He was financially vulnerable and the conduct involved repeated actions of the defendants. The harm was the result of deliberate, reprehensible, intentional malice, trickery, and deceit--it was not a mere accident."

El Cap appeals from the judgment, including the award of attorney fees and the denial of its motions for JNOV and new trial. The sole issue raised on appeal is whether the general verdict supports the punitive damages award.

DISCUSSION

El Cap contends the punitive damages award must be stricken because (1) it is unclear from the jury verdict whether the compensatory damage award was based on Progressive's contract or tort claims, (2) the court awarded a mechanic's lien and prejudgment interest on the entire compensatory damages award at the rate of 10 percent, both of which can be awarded only in contract actions, (3) Progressive did not establish at trial that El Cap never intended to perform under the contract, a necessary element for the tort of promissory fraud or false promise, and (4) the amount of punitive damages awarded was grossly excessive.

El Cap Waived Its Right to Challenge the Punitive Damages Award

Based on the Form of the Verdict

"To preserve for appeal a challenge to separate components of a plaintiff's damage award, a defendant must request a special verdict form that segregates the elements of damages. [Citations.]" (*Greer v. Buzgheia* (2006) 141 Cal.App.4th 1150, 1158.)

There is no evidence in the record on appeal that El Cap ever requested a verdict form segregating contract from tort damages. At the hearing on the post trial motions, the trial court noted: "[C]ounsel for both sides approved the [verdict] form. . . . [T]he form . . . we generated among us was approved by the lawyers for both sides. . . . It was prepared and presented to both sides and the lawyers said yes, that is what they wanted to do, so we went with it. It was a joint effort The form was approved."

El Cap had the opportunity to ensure that damages were segregated on the verdict form prior to it being submitted to the jury. It did not do so; instead, it approved the general verdict form as submitted. Moreover, although El Cap polled the jury after each of the verdicts was reached, it did not seek any correction or clarification of the verdict. Therefore, any ambiguity in the form of the verdict has been waived. (*Behr v. Redmond* (2011) 193 Cal.App.4th 517, 530; *Moore v. Preventive Medicine Medical Group, Inc.* (1986) 178 Cal.App.3d 728, 746; see also *Mendoza v. Club Car, Inc.* (2000) 81 Cal.App.4th 287, 302, quoting *Woodcock v. Fontana Scaffolding & Equip. Co.* (1968) 69 Cal.2d 452, 456 [""If the verdict is ambiguous the party adversely affected should request a more formal and certain verdict . . ." . . ."].)

El Cap correctly asserts that a punitive damages award is authorized only in noncontract actions. (Civ. Code, § 3294; *Middlebrook-Anderson Co. v. Southwest Sav. & Loan Assn.* (1971) 18 Cal.App.3d 1023, 1038.) This is true as far as it goes, but it ignores the fact that the jury returned a general verdict after being instructed on theories of both contract and noncontract actions. The verdict states: "[w]e, the jury in the above-entitled action, find the following verdict on the questions submitted to us on the complaint: . . . for the Plaintiff, Progressive Industries, Inc ("PEI"), and against the Defendant El Cap Ranch, LLC, and award PEI damages in the amount of \$502,949." The verdict contains a finding that "PEI prove[d] by clear and convincing evidence that [El Cap and/or Lester Knispel as Trustee of the BP Trust] engaged in malice, oppression, or fraud."

In such a case, it must be inferred that the jury intended to find that Progressive had been harmed by El Cap's fraud in the same amount that it had been harmed by El Cap's breach of contract. (*Amerigraphics, Inc. v. Mercury Cas. Co.* (2010) 182 Cal.App.4th 1538, 1558; *Fletcher v. Western National Life Ins. Co.* (1970) 10 Cal.App.3d 376, 400; see also *Acadia, California, Ltd. v. Herbert* (1960) 54 Cal.2d 328, 336-337 [if an action is one in tort, punitive damages may be recovered upon a proper showing of malice, fraud or oppression even though the conduct constituting the tort also involves a breach of contract]; *Haigler v. Donnelly* (1941) 18 Cal.2d 674, 680 ["If

. . . the action is one in tort, exemplary damages may be recovered upon a proper showing of malice, fraud or oppression even though the tort incidentally involves a breach of contract"]; *Chelini v. Nieri* (1948) 32 Cal.2d 480, 486-487 [same].)

Myers Building Industries, Ltd. v. Interface Technology, Inc. (1993) 13 Cal.App.4th 949, relied on by El Cap, is not to the contrary. In that case, the court said: "It is clear in this case that the jury was neither requested to nor did it make the necessary factual findings for a fraud or other tort cause of action. Accordingly, an award of punitive damages may not be sustained." (*Id.* at p. 960.) The case is inapt because it involves a special verdict, not a general verdict. (*Id.* at p. 956.) The *Myers* opinion itself notes the difference: "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. . . ." (*Myers*, at pp. 959-960; see also *Oxford v. Foster Wheeler LLC* (2009) 177 Cal.App.4th 700, 707 ["By its nature, a special verdict has 'recognized pitfalls' because it requires the jury to resolve all controverted issues in a case, unlike a general verdict which implies findings on all issues in a party's favor"].)

El Cap's argument that the award of interest at the rate of 10 percent applicable to contract damages and the award of a mechanic's lien is inconsistent with a punitive damages award has merit. The award of compensatory damages could support an award for either tort or contract. Having awarded \$1 million in punitive damages, we must presume the jury based its compensatory damage award on the fraud cause of action.

There is no legislative act specifying the rate of prejudgment interest in a fraud claim; therefore the constitutional rate of 7 percent applies. (*Michelson v. Hamada* (1994) 29 Cal.App.4th 1566, 1585.) Whether the proper interest rate is applied is a question of law (*ibid.*); therefore, we will reverse the judgment as to the mechanic's lien

claim and remand to the trial court for recalculation of prejudgment interest at the rate of 7 percent.

El Cap Waived Its Right to Make a Substantial Evidence Challenge

El Cap's argument that punitive damages should be stricken because Progressive did not prove its tort claim has also been waived because it has not provided the court with a reporter's transcript of the trial. (See, e.g., *Hodges v. Mark* (1996) 49 Cal.App.4th 651, 657 [appellant's omission of reporter's transcript precludes appellant from raising any evidentiary issues on appeal]; see also *Consenza v. Kramer* (1984) 152 Cal.App.3d 1100, 1102 [reporter's transcript required for appellate review of alleged failure of proof].)

El Cap attempts to avoid waiver by arguing that the undisputed fact that El Cap paid \$2.5 million under the contract defeats as a matter of law the fraud claim because a necessary element of the tort of false promise is that the promisor have no intent to perform at the time the contract was made. (See, e.g., *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638 ["'Promissory fraud' is a subspecies of the action for fraud and deceit. A promise to do something necessarily implies the intention to perform; hence, where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud"].)

The flaw in this argument is that El Cap's payment and claim of partial performance was based on the initial May 2, 2007, contract. It was the separate and fraudulent December 14, 2007, agreement, not the initial contract, which was the basis of the fraud claim and the resulting compensatory and punitive damages award.

The Punitive Damages Award Was Not Grossly Excessive

El Cap concedes that the trial court weighed the factors necessary for upholding a punitive damages award. (*Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 712-713.) Nonetheless, El Cap asserts the punitive damages award is grossly excessive because the verdict does not disclose the amount of compensatory damages awarded for the tort claim. Therefore, El Cap argues, the amount awarded by the jury for the tort

claim could have been \$1, thus making the \$1 million punitive damages award grossly disproportionate to the amount of compensatory damages awarded.

As we have stated, the argument fails because (1) the contention is waived as El Cap did not request a verdict that segregated separate elements of damages (*Greer v. Buzgheia, supra*, 141 Cal.App.4th at p. 1158), (2) the general verdict implies findings on all issues in a party's favor (*Oxford v. Foster Wheeler LLC, supra*, 177 Cal.App.4th at p. 707), and (3) an award of punitive damages on a general verdict reflects an implied finding of an underlying tort plus fraud, malice or oppression (*Palmer v. Ted Stevens Honda, Inc.* (1987) 193 Cal.App.3d 530, 536).

As stated by our Supreme Court in *Tavaglione v. Billings* (1993) 4 Cal.4th 1150, "[B]y reason of the 'general verdict rule,' it is unnecessary to determine whether every count or theory of recovery is legally valid and supports the general verdict, but only whether any *one* such theory is valid and supports that verdict. . . . 'In other words, we must affirm the judgment if we determine there is any theory of recovery which supports the judgment. This principle pertains even though the measure of damages, and thus the amount of the general damage verdict, might differ under the various theories of recovery pleaded in the complaint. [Citations.]" (*Id.* at pp. 1155-1156, fn. omitted.)

The trial court characterized this lawsuit as a "scheme . . . formulated at the outset and pursued relentlessly; [Mr. Peters] personally orchestrated the fraud perpetrated on the plaintiffs and then pursued it vigorously throughout discovery and trial--right through closing argument." The amount of punitive damages awarded is not excessive.

The judgment on the mechanic's lien claim is reversed and the matter is remanded to the trial court with directions to recalculate prejudgment interest at the rate

of 7 percent. In all other respects the judgment and post trial orders are affirmed.
Respondent shall recover costs on appeal.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

Thomas P. Anderle, Judge
Superior Court County of Santa Barbara

Stroock & Stroock & Lavan LLP, John M. Gatti, John J. Lucas and Crystal
Y. Jonelis for Appellants.

Frank P. Cuykendall for Respondent.