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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ANICE PLIKAYTIS, Plaintiff and Respondent, v. JAMES ROTH ET AL., Defendants and Appellants.	D056922 (Super. Ct. No. 37-2008-00064809-CU-WT-EC)

APPEAL from a judgment of the Superior Court of San Diego County, Laura W. Halgren, Judge. Affirmed in part, reversed in part and remanded with directions.

A jury found in favor of Anice Plikaytis on some of her claims against her alleged former employers, James Roth, Roth Construction Corporation (RCC), Roth Management Corporation (RMC) and Fairmount, LP dba Talmadge Canyon Park (Talmadge Canyon), and two related entities Talmadge East, LLC (Talmadge East) and Roth Montezuma Partners (RMP; collectively defendants). The jury awarded Plikaytis

punitive damages against Roth and RCC. The trial court denied Talmadge East's request for specific performance.

Defendants appeal some of the jury's findings, contending they are not supported by sufficient evidence. Specifically, they challenge the jury's verdicts for: (1) breach of employment contract against Talmadge Canyon, RCC and RMC; (2) breach of contract against Talmadge East; (3) breach of contract and fiduciary duty against RMP; (4) intentional and negligent infliction of emotional distress against Roth; and (5) punitive damages entered against Roth and RCC. They also challenge the trial court's: (1) order piercing the corporate veil as to RCC and RMC; and (2) finding of joint and several liability between Roth, RCC, RMC and Talmadge Canyon as it applies to the breach of employment contract verdicts. Finally, defendants contend the trial court committed prejudicial error when it denied Talmadge East's request for specific performance.

As discussed below, we conclude that the judgment and damage award in favor of Plikaytis as against Talmadge Canyon on the claim for breach of employment contract must be reversed. We also conclude that the breach of contract damage award against Talmadge East is not supported by the evidence; accordingly, we reverse the judgment on this claim and remand the matter for a new trial on damages. In all other respects, the judgment is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

For the most part, defendants do not challenge the sufficiency of the evidence supporting the jury's findings regarding their liability and the parties are well aware of the facts of this dispute. Accordingly, we merely summarize some of the evidence presented

at trial, in the light most favorable to the judgment, to provide some background for our later discussion.

A. The Roth Entities and Projects

Roth is the sole owner and director of RCC and RMC. Roth is a licensed general contractor and RMC is licensed as a real estate broker in California. RCC makes money in construction and by collecting management fees. Talmadge Canyon is a 110-unit apartment complex located near San Diego State University. In part, Roth formed RCC to do general contracting for the Talmadge Canyon property. RMC is a ten percent owner of, and does property management for, Talmadge Canyon. RMC has a written contract and is paid by Talmadge Canyon on a monthly basis for this work. Additionally, RMC receives 3.5 percent of the gross rents for Talmadge Canyon, or about $2,000,000 to $2,200,000 annually. RCC has a written agreement with Talmadge Canyon to perform monthly maintenance.

In November 2001, Roth formed Talmadge East to build an apartment complex that later evolved into a condominium complex. RCC, RMC and Talmadge East have no employees. In 2002, Roth purchased two pieces of property located on Montezuma Road in San Diego, California (the Montezuma Property). The purchase agreements listed Roth as the buyer and the total purchase price for each piece of property as $500,000. Roth later formed RMP and assigned the purchase agreements to it. The RMP limited partnership agreement listed Roth as the 99 percent limited partner and RCC as the one percent general partner. Roth intended to build a 40-unit apartment complex on the Montezuma Property targeted at students of San Diego State University. RCC, RMC and

RMP operate out of the same office located at Talmadge Canyon, and Roth takes no salary from any of his companies.

B. Defendants' Interactions with Plikaytis

Plikaytis became Roth's employee shortly after he formed RCC in 1985 and she remained an employee until her termination in 2007. Plikaytis worked for a number of years under several written contracts between herself and RCC and RMC. Although there is a written contract signed by Roth with a designated ending date of August 31, 2007, Roth claimed that he did not enter into this contract. Roth asserted that the last written agreement with Plikaytis ended on December 31, 2006. Plikaytis agreed that the contract ending on December 31, 2006, was the last written agreement she had with Roth or any of his entities.

As of at least 1990, Roth had an on and off relationship with Plikaytis. In the late 1990's they became engaged, but Roth broke off the engagement in 2001. Despite the breakup of their personal relationship, Roth made Plikaytis an equal 50 percent partner with him in Talmadge East and their professional relationship continued. In August 2002, Roth started seriously dating his future wife, Debra Roth. In February 2004, Roth married Debra.

In 2005, after Debra lost her employment, she started helping Roth with his businesses, including doing year-end accounting. In December 2006, Debra told Roth that Plikaytis had written some checks to herself. Roth determined that Plikaytis had been dishonest and decided to terminate her employment. Roth removed Plikaytis from RCC, but allowed her to continue working at Talmadge Canyon, the entity that made him

the most money. Plikaytis continued to manage people, write checks and handle the books for Talmadge Canyon until 2007.

At some point, Roth devised a plan to borrow money by deeding to himself and Plikaytis six units each in Talmadge East. RCC issued a corporate resolution enabling Talmadge East to transfer the units with the understanding that all but two of the units would later be transferred back to Talmadge East. The resolution specified that Roth and Plikaytis could each keep one unit. Roth and Plikaytis individually borrowed against the units they now owned, the mortgages were in their names, and all the borrowed money benefited Talmadge East. Plikaytis sold two of the units and the money earned benefited Talmadge East. Of the other four units, three were mortgaged and another unit designated 126 (Unit 126) was unencumbered. Since all the borrowed money benefited Talmadge East, Roth agreed that Talmadge East would pay the mortgages on the units. Roth claimed, however, that Talmadge East agreed to pay the mortgages to the extent it had the money to do so.

In December 2007, Roth demanded that Plikaytis deed back the units to Talmadge East, but Plikaytis refused because she was unhappy with Roth's management of the property. Roth told Plikaytis that if she failed to deed back the units, he would stop paying the mortgages on them because Talmadge East was running out of money. Roth ultimately terminated Plikaytis in December 2007.

In June 2008, Plikaytis served Roth with this lawsuit and he stopped making the mortgage payments on the units held in Plikaytis's name. Roth, however, kept paying the mortgages on the units held in his name. Roth knew that stopping the mortgage

payments on Plikaytis's units would put a lot of pressure on her because it would impact her credit. Even though Talmadge East discontinued the mortgage payments on Plikaytis's units, it still collected the rents on those units and used them for its benefit. Plikaytis's units went into foreclosure and she short-sold them.

C. This Action

As relevant to this appeal, Plikaytis sued: (1) Roth, RCC, RMC and Talmadge Canyon for breach of employment contract and breach of an implied in fact contract that she would be a lifelong employee that could not be terminated without cause; (2) Talmadge East for breach of its agreement to continue paying the mortgages on her units; (3) Roth for intentional and negligent infliction of emotional distress; and (4) Roth and RCC for breach of fiduciary duties, including duties related to their failure to (a) timely develop Talmadge East, (b) properly manage Talmadge East, (c) pay the mortgages on the units held in her name, and (d) timely develop the Montezuma Property. Plikaytis also sought an award of punitive damages. In turn, Roth and Talmadge East filed a cross-complaint against Plikaytis relating to her failure to reconvey Unit 126 to Talmadge East.

Plikaytis's claims were presented to a jury, and the jury found in her favor on all of them. The trial court later decided against Talmadge East on its claim against Plikaytis regarding Unit 126, and for Plikaytis on her request to pierce the RCC and RMC corporate veils. Defendants filed a new trial motion challenging various portions of the jury's verdicts. The trial court granted a new trial on the issues of emotional distress and punitive damages, subject to the condition that the motion would be denied if Plikaytis accepted a reduction in the damage awards. Plikaytis consented to the remittitur, and the

trial court ultimately entered a judgment in Plikaytis's favor in the total amount of $9,415,397.50.

DISCUSSION

I. *Standard of Review*

Defendants' challenges to the jury's and the trial court's factual findings and conclusions are reviewed under the substantial evidence standard of review. Under this standard we review the entire record to determine whether there is substantial evidence supporting the factual determinations. (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874.) Our review is not limited to appraising "'isolated bits of evidence selected by the respondent.'" (*Id*. at p. 873.) We are required to accept all evidence which supports the successful party, disregard the contrary evidence, and draw all reasonable inferences to uphold the verdict. (*Minelian v. Manzella* (1989) 215 Cal.App.3d 457, 463.) Thus, it is not our role to reweigh the evidence, redetermine the credibility of the witnesses, or resolve conflicts in the testimony, and we will not disturb the judgment if there is evidence to support it. (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 766.) Credibility is an issue of fact for the finder of fact to resolve (*Johnson v. Pratt & Whitney Canada, Inc.* (1994) 28 Cal.App.4th 613, 622) and the testimony of a single witness, even that of a party, is sufficient to provide substantial evidence to support a finding of fact (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614).

II. *Breach of Employment Contract for Unspecified and Specified Terms*

A. Preliminary Analysis

The parties presented the jury with two verdict forms for breach of employment contract. One verdict form addressed a contract for an unspecified term, and the other addressed a contract for a specified term. The jury found for Plikaytis on both claims. Specifically, it found that she had entered into an employment relationship for an unspecified term and an employment contract for a specified term with RCC, RMC and Talmadge Canyon, that she substantially performed her job duties, that her employers discharged her without good cause or before the end of her contract term, and that she was harmed by the discharge in the amount of $280,000 on each claim.

Employment having *no specified term* may be terminated at the will of either party on notice to the other. (Lab. Code § 2922.) This statute establishes a presumption of at-will employment (*Starzynski v. Capital Public Radio, Inc.* (2001) 88 Cal.App.4th 33, 37), which may be rebutted by evidence of a contrary intent (*Gould v. Maryland Sound Industries, Inc.* (1995) 31 Cal.App.4th 1137, 1151 (*Gould*)). The statutory presumption of at-will employment may be rebutted by evidence of an express or implied agreement between the parties that the employment would be terminated only "for cause." (*Eisenberg v. Alameda Newspapers, Inc.* (1999) 74 Cal.App.4th 1359, 1386.) The existence of an implied promise to discharge an employee only for good cause is generally a question of fact for the jury. (*Ibid.*)

In contrast, employment for a *specified term* means employment for a period greater than one month (Lab. Code, § 2922), and may be terminated at any time by the

employer in case of any willful breach of duty by the employee in the course of employment. (Lab. Code, § 2924.) Labor Code section 2924 permits the termination of an employment contract by the employer for cause even when the contract is for a specified term and the term has not expired. (*Koehrer v. Superior Court* (1986) 181 Cal.App.3d 1155, 1167, overruled on other grounds in *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 699 and *Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1093 (*Gantt*) [*Gantt* overruled on other grounds in *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 80, fn. 6].)

Although the jury's positive findings on both verdict forms appear inconsistent, we find some explanation for this result in the record. During closing argument, Plikaytis's counsel told the jury that if they answered the verdict forms addressing breach of contract for specified and unspecified terms positively, they should end up with the same verdict but "[i]t doesn't mean you're giving it to her twice." The judgment entered by the trial court does not list the various claims addressed by the jury; rather, it lists the various defendants against whom Plikaytis was to receive certain damage amounts. Here, although the jury awarded Plikaytis $280,000 as damages on *each* of her two breach of employment contract claims, the judgment simply states that a judgment on special verdict would be entered against Roth, RMC, RCC and Talmadge Canyon jointly and severally in the amount of $280,000. Thus, it appears the trial court treated the breach of employment contract claims for a specified and unspecified term as the same, or as alternative causes of action.

The defendants have appealed some of the jury's findings on these causes of action. First, Talmadge Canyon contends the verdict against it must be reversed because no contract for a specified term existed between it and Plikaytis. It also contends that Plikaytis was an at-will employee that could be discharged at any time with or without cause. Second, RCC, RMC and Talmadge Canyon contend that the evidence does not support the $280,000 damage award against them. We shall address each argument in turn.

B. Contract for a Specified Term

Talmadge Canyon contends the verdict against it for breach of employment contract for a specified term must be reversed because no contract for a specified term existed between it and Plikaytis. We agree.

Plikaytis's last written contract was for a term from January 1, 2006 to December 31, 2006 (the 2006 contract). The parties to the 2006 contract were Plikaytis, RCC and RMC. Talmadge Canyon was not a party to the 2006 contract. The 2006 contract provided that part of Plikaytis's compensation would be paid directly by Talmadge Canyon, and that she would do certain work for Talmadge Canyon.

Plikaytis attempts to show that Talmadge Canyon was contractually bound by the 2006 contract because it provided that part of her compensation would come from Talmadge Canyon. Additionally, Roth and Plikaytis later agreed that all of her compensation would "go through Talmadge Canyon Park." Plikaytis, however, cited no authority to support her contention that Talmadge Canyon's act of paying part of her salary made it a party to the 2006 contract. Plikaytis asserts that RMC was Talmadge

Canyon's general partner, and that RMC could bind Talmadge Canyon in an employment contract. While we have no quarrel with this general proposition, Plikaytis cited no evidence showing that RMC bound Talmadge Canyon to the 2006 contract. Talmadge Canyon's act of paying Plikaytis as required by the 2006 contract, and Plikaytis's act of working for Talmadge Canyon, also as required by the 2006 contract, did not make Talmadge Canyon contractually bound to employment contracts signed by other entities. Additionally, the existence of W-2 forms executed by Talmadge Canyon for 2007 and 2008 is irrelevant to this claim. Accordingly, the judgment in favor of Plikaytis as against Talmadge Canyon on the claim for breach of employment contract for a specified term must be reversed.

C. Contract for an Unspecified Term

Defendants assert that the verdict against Talmadge Canyon for breach of an employment contract for an unspecified term must be reversed because Plikaytis was an at-will employee that could be terminated at any time for any reason. As we have explained, the presumption of at-will employment may be rebutted by evidence of a contrary intent. (*Gould*, *supra*, 31 Cal.App.4th at p. 1151.) Plikaytis, however, has not cited any evidence to support her assertion that she had an implied employment contract specifically with Talmadge Canyon that could only be terminated for cause. Without Plikaytis's assistance, we reviewed her trial testimony, but located no testimony supporting an inference that defendants created an implied employment contract specifically between her and Talmadge Canyon whereby she could only be terminated for cause. Rather, Roth reminded Plikaytis a couple of times in 2007 that she was an at-will

employee. Plikaytis also testified about a conversation she had with Roth whereby he told her "that at some point in the future [she] would not be employed by Talmadge Canyon" but would continue to manage Talmadge East. Thus, to the extent Talmadge Canyon was her employer, she was an at-will employee that could be terminated at any time for any reason.

The existence of W-2 forms executed by Talmadge Canyon does not impact her status as an at-will employee. Accordingly, the judgment in favor of Plikaytis as against Talmadge Canyon on the claim for breach of employment contract for an unspecified term must be reversed.

D. Breach of Contract Damages Awarded Against RCC, RMC and Talmadge Canyon

Defendants assert that substantial evidence does not support the damages awarded by the jury for breach of employment contract. Based on our conclusion that substantial evidence did not support the breach of employment contract claims against Talmadge Canyon (*ante*, Part II.B & C), we agree that Talmadge Canyon cannot be jointly and severally liable for the damage award.

Defendants assert that the damage award of $280,000 against RCC and RMC is speculative and not supported by the testimony of Dr. Michael Willoughby, Plikaytis's expert on her lost earnings. They contend the jury improperly considered the closing argument of Plikaytis's counsel as evidence in this case. We disagree.

The measure of damages for breach of contract "is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom." (Civ. Code,

§ 3300.) The purpose of damages is "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." (*Martin v. U–Haul Co. of Fresno* (1988) 204 Cal.App.3d 396, 409.) "[W]hile a plaintiff must show with reasonable certainty that he has suffered damages by reason of the wrongful act of defendant, once the cause and existence of damages have been so established, recovery will not be denied because the damages are difficult of ascertainment." (*Dallman Co. v. Southern Heater Co.* (1968) 262 Cal.App.2d 582, 594.) Damages can be an approximation if some reasonable basis for computation is available. (*Israel v. Campbell* (1958) 163 Cal.App.2d 806, 816.)

Roth fired Plikaytis in December 2007. After her employment with defendants ended, she obtained new employment for about 11 months. At the time of trial in September 2009, she was 57 years old and unemployed. Plikaytis retained Dr. Willoughby to opine regarding any lost earnings that she reasonably suffered as a result of her employment separation. Dr. Willoughby prepared an earnings report summarizing his conclusions. He also testified that Plikaytis's economic losses were between $126,465 and $150,089. The second number was higher because it included an additional 22 weeks of assumed unemployment after completion of trial.

Defendants paid for Plikaytis's leased BMW car, gasoline, insurance and cellular telephone, and she listed these items as lost reimbursement expenses resulting from the termination of her employment. Dr. Willoughby considered lost reimbursement for a leased car, cellular telephone, and a portion of gasoline to be part of the reasonable losses suffered by Plikaytis. However, he questioned the reasonableness of the car lease and

having the employer pay all gasoline expenses. He summarized the numbers given to him by Plikaytis, but did not independently verify them. Plikaytis's lost reimbursement expenses amounted to about $12,000 annually.

During closing argument, Plikaytis's counsel argued that Plikaytis lost $12,000 a year for an eight-year period. In other words, he assumed that once Plikaytis became reemployed any future employer would not reimburse these expenses and that she lost these benefits until she retired at age 66, or in about 8 years. Dr. Willoughby's testimony supported this assumption, except perhaps as to the cellular telephone. As to this expense, the jury could use its common sense to conclude that not all employers pay for employee cellular telephones. Thus, the jury could reasonably conclude that when Plikaytis obtained new employment, any new employer would not reimburse these expenses and Plikaytis would have lost $12,000 annually for eight years or $96,000. When this figure is added to the lost wages of $150,089, only $33,911 in damages are unaccounted for. However, Dr. Willoughby's testimony also supported this figure.

Dr. Willoughby stated that Plikaytis's 25-year employment with one employer could be considered negative, however, he did not take this factor into account. Nor did he consider Plikaytis's age or gender. He testified that based on national averages, "the statistics say she ought to be employed today." Plikaytis, however, testified that although she had been "extremely diligently" looking for a job, she had nothing lined up. Based on this testimony, the jury could have determined that Plikaytis would have more difficulty finding a job based on her unique circumstances and awarded her the additional $33,911 to cover roughly another six months of unemployment. Although Plikaytis's

counsel suggested damages totaling $450,000 or that the jury multiply their total damages number by 1.5 or 2, the damages awarded by the jury indicate they disregarded these suggestions.

III. *Purported Verdicts Entered Against RMP*

As a threshold matter, defendants argue that substantial evidence does not support the verdict against RMP. The verdict forms, however, contain no findings as to RMP and a judgment was never entered against RMP. Accordingly, we interpret defendants' argument as challenging the jury's finding that: (1) Roth breached a contract with Plikaytis to form a partnership on a 75 percent (Roth) and 25 percent (Plikaytis) basis for the development of the Montezuma Property; and (2) Roth breached his fiduciary duty to Plikaytis by failing to timely develop the Montezuma Property. We separately address defendants' claims that: (1) no partnership agreement existed; and (2) assuming such an agreement existed, the evidence did not support (a) the breach of contract damage award, or (b) the jury's finding that Roth breached a fiduciary duty to timely develop the Montezuma Property.

A. Existence of a Partnership Contract

A partnership is the association of two or more persons to carry on a business. Subjective intent to form a partnership is not a necessary element. (Corp. Code, § 16202, subd. (a).) Joint ownership does not, by itself, establish a partnership, even if profits are shared. (Corp. Code, § 16202, subd. (c)(1) & (2).) The existence of a partnership is a question of fact determined from the parties' agreement, their conduct, and the surrounding circumstances. (*Holmes v. Lerner* (1999) 74 Cal.App.4th 442, 454.)

Accordingly, our review is limited to determining whether substantial evidence supports the findings and conclusions made by the trier of fact. (*Cochran v. Board of Supervisors* (1978) 85 Cal.App.3d 75, 81, overruled on another point in *Weiner v. Fleischman* (1991) 54 Cal.3d 476, 482-483.)

"An executed oral agreement will serve as a modification of a written agreement without regard to the presence or absence of a consideration." (*Eluschuk v. Chemical Engineers Termite Control, Inc.* (1966) 246 Cal.App.2d 463, 469 (*Eluschuk*); Civ. Code, § 1698.) Whether a writing has been modified by an executed oral agreement is a question of fact. (*Eluschuk*, *supra*, at p. 469.) "[T]he effect [of an executed modification] is to alter only those portions of the written contract directly affected by the oral agreement leaving the remaining portions intact. [Citation.]" (*Ibid*.)

Here, the jury found that Plikaytis and Roth entered into a contract to form a partnership on a 75 percent and 25 percent basis for the development of the Montezuma Property. Defendants contend that the evidence does not support the jury's conclusion that Roth and Plikaytis entered into a partnership agreement whereby Plikaytis would receive a 25 percent interest in RMP. As we shall discuss, the evidence supported the jury's findings.

Before offering to purchase the Montezuma Property, Roth discussed the property with Plikaytis as a potential development opportunity. In May 2002, Roth needed to place $15,000 into escrow. Plikaytis loaned him $13,000 to put into the project and the parties executed a promissory note to memorialize the transaction. Roth put about a

$330,000 down payment on the Montezuma Property by borrowing on the equity of his home and obtaining a loan to pay the balance of the purchase price.

In late 2001 or early 2002, Roth and Plikaytis discussed her participation in the Montezuma project. Plikaytis testified that she discussed retirement plans with Roth and that they sometimes referred to the Montezuma project as a retirement plan. She claimed that Roth agreed to give her a 25 percent interest in the project, and that she would put in money if needed, but at the time they were unsure how the deal would be finalized. Plikaytis stated that she was not purchasing 25 percent, and that Roth would not be "giving it" to her because she claimed that she would be doing more than 25 percent of the work. She reviewed the RMP limited partnership agreement, including the provisions that Roth was a 99 percent owner and RCC a one percent owner, and "had no problem" with it because they needed an agreement to close escrow. Roth explained to her that things would be divided once they obtained an investor, but that she would get 25 percent of the "developer" total.

A number of documents supported Plikaytis's contention that she and Roth formed a partnership for the development of the Montezuma Property. First, is a handwritten note entitled "SDSU" (the SDSU note) stating that the "[m]inimum to [Plikaytis]" is "25% of developer." Second, financial statements prepared by Roth in 2003, 2004 and 2006 listed his interest in RMP as 75 percent. Third, a 2004 letter signed by Roth and addressed to a commercial realty consultant for the purpose of obtaining funding for the Montezuma project listed RCC as the general partner and stated that the "limited partnership interests will be broken down as follows" Roth and his wife as the 75 percent

partner, and Plikaytis as the 25 percent partner. Attached to the letter is a printed document entitled "Investment Opportunity" stating that RMP closed escrow on the property, that it proposed to build student housing, and that the project was "the third project by the principals of this partnership" addressing student housing. Roth admitted that the reference to "principals" in this statement included Plikaytis.

Roth admitted that he had discussions with Plikaytis regarding the project, but claimed that making Plikaytis a 25 percent partner was only one possible scenario. Roth asserted that anyone "buy[ing] into the deal" would be a 25 percent partner, but that any person would need to "buy in" as he was not "giving it" away. Roth testified that he never agreed to make Plikaytis a 25 percent partner in the development. He also denied telling Plikaytis that they would develop the property together, or having any conversations with Plikaytis about her future and her retirement. Roth admitted that the SDSU note contained his signature, but he denied signing the document and claimed that the writing above the signature was Plikaytis's. During his deposition, Roth testified that he had "no recollection" of signing the SDSU note. Plikaytis denied forging Roth's signature and claimed that Roth signed the SDSU note as he leaned over her desk.

Roth testified that the 2004 letter did not list Plikaytis as a 25 percent owner. He claimed that the document listed "a proposed deal structure at that particular point in time." He claimed that if Plikaytis put up 25 percent, that she would then become a 25 percent owner, but that Plikaytis never put up the money. Roth denied telling Plikaytis that she would be a 25 percent limited partner in RMP, but admitted that he had no other investors who purchased a 25 percent share in the properties.

This evidence, viewed in the light most favorable to the judgment, supported the jury's finding that Plikaytis and Roth entered into a contract to form a partnership on a 75 percent and 25 percent basis for the development of the Montezuma Property. The evidence also supported the jury's finding that Roth breached the agreement. Specifically, in late 2005 or early 2006, Plikaytis requested that Roth draw up documents showing her interest in the Montezuma project. Roth stated, "'Okay. That's not a priority right now. We'll get to that.'" Roth told her the same thing about one or two months later. However, when Roth terminated Plikaytis's employment in 2007, he told her that she was not on the documents and that he had changed his mind regarding including her in the Montezuma project. This evidence established a breach of the contract. Thus, we turn to whether the evidence supported the damages award against Roth.

B. Breach of Contract Damages

The jury awarded Plikaytis $2.8 million for Roth's failure to develop the Montezuma Property. Defendants claim that the verdict is not supported by the evidence. They argue, that Plikaytis's appraisal expert, Mark Berger, testified that the vacant real property, RMP's only asset, would be worth $4.93 million. Based on a $3 million loan on the property, they assert that the total value of the partnership is $1.93 million. Thus, they contend that Plikaytis's purported 25 percent of the partnership is $482,500, not the $2.8 million awarded by the jury.

Plikaytis does not address defendants' argument that the jury's damage amount is not supported by the evidence. Nor has she referred us to any evidence in the record to support the $2.8 million in damages awarded by the jury. Nonetheless, we reviewed the

testimony of Plikaytis's other retained expert, Alan Nevin, an economic consultant on real estate matters. Nevin investigated the Montezuma and Talmadge East projects; specifically, whether these projects were handled in an appropriate manner in terms of process and development, the standard of care in how the businesses were operated, and the balance of responsibility and finances as they related to Plikaytis.

Nevin testified that if Roth had acted as a reasonable developer, the Montezuma project should have been finished and available for rent by August 2005. Nevin determined that Plikaytis's 25 percent interest in the Montezuma Property would have been worth $1.865 million. He also determined that Plikaytis would have obtained annual cash flow of $39,000, which would increase over time.

During closing argument, Plikaytis's counsel argued that Plikaytis could expect annual income of about $40,000 and "I multiply that 25 years, assuming Ms. Plikaytis doesn't leave this earth for another 25 years. That's where I get a million dollars; 25 times $40,000 is getting you to $1 million."

The reasoning of Plikaytis's counsel is sound; however, we reviewed the instructions and note that the trial court did not instruct the jury with CACI No. 3932 regarding Plikaytis's life expectancy. Nor was there any evidence presented at trial regarding Plikaytis's life expectancy. Although there is no evidence supporting the 25 years of annual income suggested by Plikaytis's counsel, we reviewed the Life Expectancy Table for a woman contained in the June 2009 edition of CACI. The table states that the average life expectancy of a 57 to 58 year old woman is 26.5 years. Thus, even though there was no evidence presented regarding Plikaytis's life expectancy, we

consider the error to be harmless as the number the jury should have been instructed with was greater than the number used by Plikaytis's counsel.

Moreover, life expectancy is a question of fact for the jury. (*Allen v. Toledo* (1980) 109 Cal.App.3d 415, 424.) Absent mortality tables, the trier of fact may still approximate the life expectancy of an individual who appeared in court. (*Francis v. Sauve* (1963) 222 Cal.App.2d 102, 121.) Here, the jury had an ample opportunity to observe Plikaytis during trial and evaluate her life expectancy. The damage award suggests the jury agreed that Plikaytis could expect another 25 years of life. Thus, we reject defendants' claim that the verdict was not supported by the evidence.

C. Breach of Fiduciary Duty

The jury concluded that Roth breached his fiduciary duty to Plikaytis by failing to timely develop the Montezuma Property. Roth claims the judgment against him on this claim must be reversed because the evidence shows that Plikaytis's actions prevented him from timely developing the Montezuma Property. Specifically, in May 2008, he had obtained about $12 million in loan commitments from a lender to build the Montezuma project, but the commitments died because Plikaytis filed this action in June 2008 and placed a lis pendens on the property.

Nevin testified, however, that Roth did nothing from 2002 to the present on the project and opined that Roth did not handle the project in a diligent businesslike manner. Had Roth acted as a reasonably diligent developer regarding the Montezuma Property, Nevin opined that the project should have been completed by May 2005 and completely rented by August 2005 because there was a shortage of student housing at San Diego

State University. Thus, the jury could have reasonably concluded that Plikaytis's actions in 2008 did not impact Roth's earlier breach of fiduciary duty. Accordingly, we affirm the judgment against Roth for breach of fiduciary duty.

IV. *Intentional or Negligent Infliction of Emotional Distress Damages*

In connection with her four claims for breach of fiduciary duty, the jury awarded Plikaytis a total of $160,000 in noneconomic damages for emotional distress. The jury also found Roth liable for intentional and negligent interference with prospective economic relations and awarded Plikaytis a total of $40,000 in noneconomic damages for emotional suffering. Thus, in connection with all of these claims the jury awarded emotional distress damages totaling $200,000. On the separate claims for intentional and negligent infliction of emotional distress the jury awarded $300,000 in damages.

Defendants moved for a new trial arguing that Plikaytis did not offer substantial evidence of emotional distress to support the verdicts on her claims for intentional and negligent infliction of emotional distress. The trial court agreed, stating although the evidence supported the total $200,000 damages award for the tort causes of action, when the conduct supporting the tort causes of action is eliminated, the evidence was insufficient to support an additional $300,000 in emotional distress damages. The court noted that Plikaytis's distress related primarily to the consequences of the conduct addressed by her tort claims, or by the breach of contract claims for which emotional distress damages were not available. It noted that Plikaytis did not incur any counseling or medical costs, and that while her distress was "real and significant," it did not support an overall award of $500,000. The trial court stated that "[a]lthough [Plikaytis's] concern

for her financial future is understandable and her distress over the loss of credit, retirement security, loss of investment and betrayal [was] deserving of compensation," it found that the total additional amount of emotional distress damages supported by the evidence on the intentional and negligent infliction of emotional distress claims was $50,000, for a total of $250,000 in emotional distress damages. Plikaytis accepted the reduction.

Defendants appeal, contending that even as reduced by the trial court, the evidence did not support the $50,000 award because Plikaytis presented no evidence supporting a severe emotional distress claim.

Where, as here, the trial court provided a statement of reasons as required by Code of Civil Procedure section 657, we defer to the trial court's resolution of conflicts in the evidence and inquire whether the court's decision was an abuse of discretion. (*Oakland Raiders v. National Football League* (2007) 41 Cal.4th 624, 636.) We will not disturb an order granting a new trial "unless a manifest and unmistakable abuse of discretion clearly appears." (*Jiminez v. Sears, Roebuck & Co.* (1971) 4 Cal.3d 379, 387.) "So long as a reasonable or even fairly debatable justification under the law is shown for the order granting the new trial, the order will not be set aside." (*Ibid*.)

Defendants have not framed their argument using the correct standard of review. Instead, they argue that Plikaytis presented virtually no evidence to support her claim of severe emotional distress, as if the award were being attacked for insufficiency of the evidence. It is the cardinal rule of appellate review that a judgment or order of the trial court is presumed correct and prejudicial error must be affirmatively shown. (*Denham v.*

Superior Court (1970) 2 Cal.3d 557, 564.) A "reviewing court is not required to make an independent, unassisted study of the record in search of error or grounds to support the judgment." (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 701, p. 769.) By not discussing how, or even whether, the trial court abused its discretion by granting a new trial on the intentional and negligent infliction of emotional distress claims and reducing the damages for these claims to $50,000, defendants have waived their contention on appeal. (See *In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 830 ["We are not bound to develop appellants' arguments for them. [Citation.] The absence of cogent legal argument or citation to authority allows this court to treat the contentions as waived."].) Even if we considered the argument on its merits, the $50,000 award does not amount to an abuse of discretion.

V. *Breach of Contract Damages Against Talmadge East*

The jury found that Plikaytis had entered into an agreement with Talmadge East regarding the payment of mortgages and homeowner's association fees on units in her name, that she had substantially performed all the things the agreement required her to do, that Talmadge East breached the agreement and that Plikaytis was harmed by the breach in the amount of $3,086,805.

Defendants assert that the verdict is not supported by the evidence because Plikaytis's expert witness, James Wrider, opined that the damage Plikaytis suffered as a result of Talmadge East's failure to pay her mortgages was $53,260. They request that we reduce the breach of contract verdict against Talmadge East to $53,260 because Plikaytis presented no evidence to support a multimillion dollar verdict for this cause of

action. We agree that the verdict is not supported by the evidence, reverse the judgment on this cause of action and remand for a new trial on damages.

Plikaytis's counsel asserted during closing argument that $53,260 was the appropriate damage amount for this cause of action. He argued that this was the minimum the jury should award, suggesting that it should also award "up to" $100,000 because her damaged credit would continue to hurt her in intangible ways. After the jury returned its verdict, Plikaytis's counsel suggested to the trial court that the jury may have "flip flopped" its damage amounts on this cause of action and the breach of fiduciary duty cause of action relating to Talmadge East because he argued for a $3 million verdict against Roth and RCC for its breach of fiduciary duty to Plikaytis relating to their failure to timely develop Talmadge East, but the jury instead awarded $8,000.

After some discussion with counsel outside the presence of the jury, the trial court sent the jury back to the deliberation room with a note asking them to review their answers to these causes of action and "verify that the damage amounts entered for each of these causes of action are correct." The jury wrote back that the verdicts were correct. Thereafter, defendants moved for a new trial on this cause of action, arguing that the damages were excessive and not supported by the evidence; however, they did not seek a remittitur.

Plikaytis essentially concedes that the evidence does not support the damage award. She states that "the jury may have put th[e] $3 million [ ] in the wrong box" and we should "view the award against Talmadge East, as being against James Roth and RCC for misdeeds committed as manager and managing member" of Talmadge East.

Plikaytis, however, did not raise this issue in any post-trial motion, nor did she file a protective cross-appeal. Under these circumstances we must reverse the judgment and remand for a new trial on damages.

VI. *Order Piercing the Corporate Veil*

Plikaytis moved for an order that RCC and RMC be considered the alter ego of Roth. After considering the parties' briefs, the trial court tentatively ruled that the corporate veil should be pierced based on a combination of factors, including: Plikaytis's employment relationship with RCC and RMC; the assets of various defendants being used to obtain financing for other defendants; Roth's 100 percent ownership of RCC and RMC; comingling of monies; preferential treatment to Roth's corporations to Plikaytis's detriment; paying Plikaytis's salary as an owner's draw; use of the same business location and employees for multiple entities; diverting income from the entities to Roth; lack of capitalization as to RMC and RCC; and an inequitable result if the veil is not pierced. Defendants submitted on the tentative ruling and the trial court entered a judgment finding that Roth, RCC and RMC were the alter ego of one another and ordering that the corporate veils of RCC and RMC be pierced.

Defendants argue that this portion of the judgment should be reversed because Plikaytis offered no proof that RCC and RMC were undercapitalized or that these entities comingled funds. Although Plikaytis's respondent's brief is devoid of any citations to the record to support the trial court's findings, the record contains sufficient evidence to support the judgment.

A corporation is ordinarily regarded as a legal entity, separate and distinct from its shareholders, officers, and directors. (*Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 538 (*Sonora*).) Nonetheless, a corporate identity may be disregarded "where an abuse of the corporate privilege justifies holding the equitable ownership of a corporation liable for the actions of the corporation." (*Ibid*.) Alter ego liability affords relief when "some conduct amounting to bad faith makes it inequitable for the corporate owner to hide behind the corporate form." (*Id*. at p. 539.) Two conditions must be met to find alter ego liability. First, there must be a unity of interest and ownership between the corporation and the individual. (*Automotriz etc. De California v. Resnick* (1957) 47 Cal.2d 792, 796.) Second, the judgment creditor must show "'that an adherence to the fiction of the separate existence of the corporation would, under the particular circumstances, sanction a fraud or promote injustice.'" (*Thomson v. L. C. Roney & Co.* (1952) 112 Cal.App.2d 420, 428.)

Factors to be considered in determining whether to apply the alter ego doctrine include the commingling of funds or other assets of the corporation and the individual, the individual's treatment of corporate assets as his or her own, the individual's representation of personal liability for corporate debts, failure to maintain adequate corporate minutes or records, sole ownership of the corporation's stock, domination and control of the corporation, use of the same address for the individual and the corporation, undercapitalization of the corporation, disregard of formalities and the individual's failure to maintain arm's length transactions with the corporation. (*Mid-Century Ins. Co. v. Gardner* (1992) 9 Cal.App.4th 1205, 1213, fn. 3.) No factor or factors should be

considered in isolation; rather, the totality of the circumstances should be examined in making the determination. (*Id*. at pp. 1213, 1215; accord, *Sonora*, *supra*, 83 Cal.App.4th at p. 538.)

Here, Roth is the sole owner and director of RCC and RMC. Financial statements prepared by Roth in 2004 and 2007 valued his interest in RCC and RMC at $1000 each. RCC, RMC and Talmadge East have no employees. RCC, RMC and RMP operated out of the same office located at Talmadge Canyon. Roth took no salary from any of his companies; rather, Plikaytis testified that: "[M]oney was moved at will from one account to another as [Roth] needed it."

Plikaytis testified that RMC borrowed money, but Roth had the money deposited into the RCC checking account and all jobs were paid out of that account. Eventually, the other entities obtained checking accounts which made it easier for Plikaytis to keep track of the money. Plikaytis reviewed financial statements from 2001 to 2004 or 2005 listing every expense that Roth ran through RCC. She testified that RMC borrowed from Talmadge Canyon, that money went from RMC to RCC, and then to Talmadge East. Roth testified that even though RCC and RMC were Plikaytis's designated employers, that Talmadge Canyon paid RCC and RMC, thus 100 percent of Plikaytis's salary came from Talmadge Canyon. Plikaytis testified that RCC and RMC paid some of Roth's personal expenses. Although Roth did not engage in business travel, Plikaytis observed travel reimbursements listed on the books. Additionally, Debra's daughter lived at Talmadge East, but paid no rent in 2007 and Roth ignored Plikaytis when she told him that they needed that rent payment.

The determination of alter ego is primarily the province of the trial court. (*Jack Farenbaugh & Son v. Belmont Construction, Inc.* (1987) 194 Cal.App.3d 1023, 1032.) Here, there were multiple factors, which, when taken in combination, were sufficient to permit the court to have concluded there was substantial evidence of alter ego liability and that unless the corporate entities of RCC and RMC are bypassed, Plikaytis would suffer unfairly because of the corporate owner's conduct.

VII. *Punitive Damage Award*

The jury awarded Plikaytis $1,000 and $ 2.5 million in punitive damages against RCC and Roth, respectively. The trial court later reduced the award against Roth to $500,000.

Roth appeals, contending the award was disproportionate to the evidence of his net worth and that the award should be reduced to 5 percent of his net worth, or $38,582.80. In his reply brief, Roth argues for the first time that the $500,000 punitive damage award should be reduced because it exceeded constitutional limits. We will not consider points raised for the first time in a reply brief in the absence of good cause because opposing counsel has not been given the opportunity to address those points. (*In re Marriage of Ackerman* (2006) 146 Cal.App.4th 191, 214.) Here, no good cause was shown. Accordingly, we limit our review to whether the award was disproportionate to the evidence of his net worth.

A plaintiff may recover punitive damages "for the sake of example and by way of punishing the defendant." (Civ. Code, § 3294, subd. (a).) In determining whether a punitive damages award is excessive under California law, a court must consider: (1) the

reprehensibility of the defendant's conduct; (2) the amount of compensatory damages or actual harm suffered by the plaintiff; and (3) the defendant's financial condition. (*Adams v. Murakami* (1991) 54 Cal.3d 105, 110 (*Adams*); *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928.) Here, only the third prong is at issue.

It is the plaintiff's burden to establish the defendant's financial condition. (*Adams*, *supra*, 54 Cal.3d at p. 123; *Kelly v. Haag* (2006) 145 Cal.App.4th 910, 916 (*Kelly*).) "[T]here should be some evidence of the defendant's actual wealth. Normally, evidence of liabilities should accompany evidence of assets, and evidence of expenses should accompany evidence of income." (*Baxter v. Peterson* (2007) 150 Cal.App.4th 673, 680.) We review an award of punitive damages for substantial evidence. (*Id*. at p. 679; *Kelly*, *supra*, at p. 916.)

Exhibits presented at trial established that Roth's net worth in 2003, 2006 and 2007 was about $4.3 million, $10.5 million and $14.8 million, respectively. In response to Plikaytis's request for 2008 financial statements, Roth produced an August 2008 financial statement showing assets of $9.75 million and a net worth of $8.04 million.

Roth also prepared an October 2009 financial statement for this lawsuit listing his net worth at about $500,000. Roth claimed that his assets depreciated in value to about $5 million, and that his liabilities went from $2.073 million in 2007 to $4.469 million in 2009. He asserted that much of his net worth was associated with the rise and fall of real estate and at the time of trial, real estate values were down significantly. Roth claimed that his ten percent interest in Talmadge Canyon went from almost $1.7 million in 2008 to $996,000 in 2009. Roth owns a home on Ocean Front Walk and two condominiums

referred to as Zanzibar. In 2008, he valued his beach residence at $2.65 million and the two Zanzibar units at $950,000. In 2009, Roth claimed that the values went down to $2.565 million on the home and $783,000 for the condominium units. Roth, however, did not present any real estate appraisals or expert testimony about land value to substantiate the drop in real estate values from 2008 to 2009. Roth admitted that he did not have a current appraisal of the Ocean Front property and conceded it could still be worth $2.8 million.

Roth testified that he got annual profit distributions from Talmadge Canyon of about $60,000, but claimed that the distributions stopped in 2009 because the property had 44 empty units and could not afford to maintain the distribution. Roth asserted that the property had a 35 percent vacancy rate, the same as other apartment complexes that currently rent to students at San Diego State University, even though school was in session. Roth, however, did not present any documentation to support his assertions.

The jury clearly rejected Roth's 2009 self-appraisal of his real estate holdings when it awarded Plikaytis $2.5 million in punitive damages. Use of the 2008 value of Roth's assets to evaluate his new worth in 2009, even when considered with the liabilities he listed in 2009, showed a net worth of about $5.2 million. Thus, the evidence amply supported the trial court's remitted punitive award of $500,000.

VIII. *Denial of Talmadge East's Request for Specific Performance*

Roth and Talmadge East filed a cross-complaint against Plikaytis pertaining to Unit 126 in the Talmadge East development. Roth claimed that he and Plikaytis decided to deed to themselves certain condominium units owned by Talmadge East for the

purpose of obtaining financing and that they agreed to reconvey the condominiums to Talmadge East after they obtained the necessary financing. Roth claimed that Plikaytis took possession of the units, received financing against three of them, and turned that financing over to Talmadge East to use for its debts, but that she failed to reconvey Unit 126 as previously agreed.

After the jury rendered its special verdicts, the parties filed briefs addressing Talmadge East's request for specific performance of Plikaytis's agreement to reconvey Unit 126. After considering the arguments and evidence, the trial court noted that the jury found Plikaytis did not breach her agreement with Talmadge East, and to the extent she had a duty to reconvey Unit 126, defendants' actions relieved her of that duty. The trial court concluded that the request for specific performance should be denied because: (1) there was no breach by Plikaytis; (2) had damages been pursued, there was no showing that damages would have been inadequate; and (3) it would be inequitable to order specific performance in light of the jury's findings.

After hearing the ruling, the parties addressed the matter to the court. Defendants argued that Unit 126 was unique because it was the only unit that was unencumbered, that the unit belonged to Talmadge East and should go back to it. Plikaytis argued that Roth managed Talmadge East, that Roth made all decisions for Talmadge East, that Roth breached his fiduciary duty to her, and that Talmadge East, through Roth, breached the contract with her. Accordingly, there was no way to give Talmadge East the remedy of specific performance without "completely contradicting" the jury's findings.

Thereafter, the trial court confirmed its ruling. In doing so, it noted that although Unit 126 was not the unit originally intended to be transferred to Plikaytis, there was an agreement that each party would have its own unit "[a]nd although this is a different number, I don't think there is a distinction, really, between the one she was originally to have and this one; so it leaves her in the position of what the parties originally had intended."

On appeal, defendants argue that the trial court committed prejudicial error in not ordering specific performance because Plikaytis admitted that she entered into a contract with Talmadge East which required her to transfer Unit 126 back to it, but that she refused to do so. They assert that these facts entitle it to specific performance, and that Unit 126 was different in character than the unit Talmadge East got because Unit 126 was unencumbered. We disagree.

Specific performance and damages are separate, alternative remedies for breach of contract. (*Rogers v. Davis* (1994) 28 Cal.App.4th 1215, 1220.) To obtain specific performance for a breach of contract, a plaintiff must show the consideration was adequate, the contract just and reasonable, and that the plaintiff has no other remedy at law. (*Tamarind Lithography Workshop, Inc. v. Sanders* (1983) 143 Cal.App.3d 571, 575.) There is a rebuttable presumption that monetary damages are not an adequate remedy for breach of a commercial real property contract. (Civ. Code, § 3387; *Real Estate Analytics, LLC v. Vallas* (2008) 160 Cal.App.4th 463, 473-474.) Because it is a rebuttable presumption, the "Legislature necessarily contemplated that there may be circumstances when the presumption that damages are inadequate can be overcome." (*Id.*

at p. 474.) The rebuttable presumption shifts the burden to the breaching party to prove the adequacy of damages. (*Ibid*.) A grant or denial of specific performance is reviewed under an abuse of discretion standard. (*Petersen v. Hartell* (1985) 40 Cal.3d 102, 110.)

Among other things, the evidence shows that Plikaytis had initially agreed to transfer Unit 126 back to Talmadge East, but that she later refused to do so because Roth had changed many things that he initially agreed to. Plikaytis testified that after she refused to reconvey Unit 126, Roth stopped paying on her mortgages and that the mortgages went into default. After hearing all the evidence, the jury concluded that Talmadge East breached its agreement with Plikaytis to pay the mortgages on units in her name, and that Plikaytis had substantially performed all the things the agreement required her to do. The jury also rejected defendants' claim that Plikaytis had breached a fiduciary duty owed to Roth to transfer Unit 126 to Talmadge East. Apparently, the parties never submitted Roth's claim that Plikaytis breached a contract to reconvey Unit 126 to the jury. On this record, we cannot conclude that the trial court erred when it found that it could not order specific performance because "there [was] no breach by Plikaytis."

Even assuming the record did not support this finding, defendants have not shown that Talmadge East's legal remedy was inadequate. The trial court found that the unit Talmadge East received from Plikaytis was essentially the same as Unit 126, and that the parties got what they intended. Defendants do not challenge this conclusion, except to point out that Unit 126 was different because it was "unencumbered." This purported distinction, however, went to the value of the unit that Talmadge East received instead of

Unit 126, and thus could have been addressed by damages. Talmadge East, however, did not seek damages.

Accordingly, the trial court did not err when it denied Talmadge East's request for specific performance.

DISPOSITION

The judgment in favor of Plikaytis as against Talmadge Canyon on her claims for breach of employment contract for an unspecified term and specified term are reversed. The judgment holding Talmadge Canyon jointly and severally liable for breach of employment contract damages is reversed. The judgment in favor of Plikaytis as against Talmadge East for breach of contract is reversed and the matter is remanded for a new trial on damages. In all other respects, the judgment is affirmed. Each party is to bear their own costs on appeal.

MCINTYRE, J.

WE CONCUR:

HALLER, Acting P. J.

MCDONALD, J.