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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

NING LIU,

Plaintiff and Respondent,

v.

WILLIAM WONG,

Defendant and Appellant.

A128668

(Alameda County
Super. Ct. No. RG08421861)

INTRODUCTION

Defendant William Wong appeals from a judgment of the Alameda County Superior Court on a jury verdict in favor of plaintiff Ning Liu on her claims arising out of loans Liu made to Wong between 1999 and 2007. Liu alleged Wong induced her to make several unsecured loans to him using both her own funds and the life savings of her family members in China, promising to use the money to purchase foreclosed properties so that Liu's family would have a place to live when they came to the United States and also promising to pay specific above-market interest on the loaned amounts. Liu further asserted Wong never intended to repay Liu or to transfer any of the foreclosed real properties he purchased with the funds to her. The jury unanimously awarded Liu damages of \$311,000 for breach of contract, \$52,000 for fraud, and \$115,000 for intentional infliction of emotional distress. In a second phase of trial, the jury awarded Liu an additional \$410,000 in punitive damages. The total judgment against Wong amounted to \$888,000.

Wong raises numerous claims of error, including: (1) Liu was not a real party in interest and lacked standing to assert claims against Wong; (2) the amount awarded for breach of contract was without foundation; (3) the jury improperly awarded damages for fraud and emotional distress on what was merely a breach of contract case; (4) the finding of liability and the award of damages for intentional infliction of emotional distress were not supported by substantial evidence and the damage award was excessive; (5) the award of damages for fraud was unsupported by substantial evidence and excessive; (6) the award of punitive damages was unsupported by substantial evidence and the amount awarded was excessive; (7) the judgment improperly awarded punitive damages for non-tortious conduct; and (8) the trial court abused its discretion in refusing to grant Wong's new trial motion.

We shall reject Wong's claims of error, except that we shall conclude the jury awarded a double recovery for breach of contract and fraud. Therefore, we shall reduce the damage award attributable to fraud by \$50,000.

FACTS AND PROCEDURAL BACKGROUND

Liu met Wong in 1993 in Guang Zhou, China, where she was a physician. She allowed Wong to stay at her home after they first met, as he did not want to stay in a hotel. He stayed about a week. They had a dating relationship. In 1996 or early 1997, Wong again visited China and invited Liu to the United States. They were still in a romantic relationship at this point, but Wong did not tell her that he was already married. Liu paid Wong \$8,000 to help her obtain a visa. She came to the United States in 1998. Wong assisted Liu when she first came to the United States, helping her rent a basement apartment in East Oakland. She gave him \$350 a month, so that he could pay the rent, as she did not speak or read any English. Wong told Liu that he was in the business of buying foreclosed real estate. He wanted Liu to lend him money. He told her that he would roll her money over and when there was enough, he would buy a foreclosure for her family and the family would have a place to live when they came to the United States.

He agreed he would pay Liu interest at a rate above a bank rate. Liu did not have money at the time.

Liu first loaned Wong money in mid-February of 1999. She had gone back to China to visit her family in 1998 and returned to the United States in February 1999. She loaned Wong \$50,000, while in China. The loan was witnessed by her 18-year-old daughter and other family members. Liu obtained the money to lend Wong from her younger sister and younger brother. At the time Liu loaned him the \$50,000, Wong wrote a promissory note for the money and, later the following year, also wrote a post-dated check for the amount, plus interest. Liu and Wong agreed on an interest rate when she loaned him the money. Interest began at 5 percent per year and became 8 percent later on. Liu did not recall the specific amount of interest on that first loan, but did recall that the interest rate was higher than the bank rate. The promissory note was for one year, due February 1st of the following year. The promissory note was renewed every year and every year Wong would write a new post-dated check due one year later. Every year, Wong would take back the then due promissory note and post-dated check and give Liu the new note and post-dated check for an amount that included the accrued interest. As of February 1, 2007, the original \$50,000 amount, plus interest totaled \$80,050.

On February 1, 2001, Liu loaned Wong \$28,000 cash. He gave her a promissory note and a post-dated check for the principal, plus accrued interest due one year later. By February 2007, the amount owed and reflected on the post-dated check Wong signed on February 1, 2007, had grown to \$40,000. Xue Yi Zhen witnessed the transaction from behind a curtain in Liu's office. Liu had asked witnesses to count the cash she was loaning and then to hide behind the curtain to witness the transaction because she and her family wanted to be extra cautious and because she did not want to embarrass Wong, who had told her not to tell anyone he was borrowing money as it was "very humiliating" to him. Liu did not think to notarize any of the documents because, "[a]ccording to our Chinese custom it is very serious. The process of writing a promissory note is a very serious matter so I did not think to get it notarized. But basically I believed him." Also,

from 1999 to 2003, Wong had borrowed about \$3,000 from Liu's daughter's child support money and he had repaid it.

In February 2004, Liu loaned Wong \$33,000 cash. A witness was present and Wong saw the witness. Liu had brought the cash over from China, and also included some of her own money that she had been saving to pay for her parents' living expenses at the rate of \$150 per month. She did not send the money back to them, but included it in this loan. Wong gave her a promissory note and check post dated for one year later.

In June 2004, Liu loaned Wong \$18,000 in cash she had brought from China. The transaction occurred in her Oakland office and was witnessed by James Gerke, who hid behind the partition. Again defendant wrote a promissory note and a post-dated check and renewed these each year from 2004 to 2007. Gerke supported Liu's testimony about the June 2004 transaction.

On August 1, 2006, Liu loaned Wong \$10,000 cash that she had brought from China. The transaction was witnessed by James Burchard, who supported Liu's testimony that he had counted the money beforehand and had hidden behind the curtain in her office when he witnessed the transaction. Again, principal and interest were included in a post-dated check by Wong. Burchard testified to the amount of cash loaned and to the promissory note and to the check dated August 1, 2007, for \$10,800 (8 percent interest for one year). Liu told Burchard that the \$10,000 was for her family to move to the United States and to have a place to live.

On September 21, 2006, Liu loaned Wong \$10,500 cash she had collected from her family in China and brought to the United States. The transaction was witnessed by Dong Guang Feng. Wong gave her a promissory note dated October 5, 2006, for \$11,340 (principal plus 8 percent annual interest), plus a post-dated check.

On February 1, 2007, Liu loaned Wong \$35,000 cash, again at 8 percent interest. The transaction was witnessed by Shuhao Sun from behind the curtain in Liu's office. He saw Wong write a promissory note and two checks that Liu then showed him. One check was for \$35,000 and another for \$80,050 times 1.08 or 8 percent interest. Sun did

not recall the exact total. Liu included \$5,000 of money that she gives to her parents as a sign of respect to be a good daughter from 2004 to 2007.

Liu testified that defendant was very serious about writing the interest rate and the check clearly. Her romantic relationship with Wong came to an end in 2001, around the time Wong evicted Liu's adult daughter from housing he owned. Liu's young adult daughter had accused Wong of coming into the apartment in February 2001 when she was asleep and touching her face while she slept. Liu asked for the money she had loaned him back and Wong said she should not let her imagination run wild, that he was trying to wake up Liu's daughter because he had something important to speak with Liu about. At the time, Liu believed him and thought that he may have been looking for her and trying to awaken the daughter to find out where she was. Liu and her daughter saw the eviction notice, but did not know it was a court document at the time and Wong told them to ignore it. Wong later told Liu that his second wife had wanted to evict them because the rent they were paying was too low. He said his wife forced him to evict them. Liu could not afford the increased rent and so wanted to move. Wong offered to help them move and he did so. They continued to be family friends.

Liu testified that as of January 2010, she had made seven separate cash loans to Wong, for a principal amount in excess of \$184,000, plus the accrued interest. Liu's daughter also testified that the amount Wong owed was "around \$180,000 U.S. dollars" and that the total was "almost \$310,000 U.S. dollars approximate interest." Wong continued to tell her that there was not enough money to fund the purchase of a foreclosed property. On February 7, 2007, Liu told Gerke she had loaned Wong in excess of \$250,000 and Gerke looked into the matter, advising Liu that public records showed that Wong had more than 20 houses. He had bought four in 1999, the cheapest one for slightly more than \$40,000, one over \$50,000, one for over \$80,000 and one in excess of \$150,000. He also took out equity loans from a bank to purchase some of the properties, borrowing a total of more than \$5 million from the bank. Liu testified that since the beginning of the lawsuit, Wong had transferred properties to others, including four of the properties to his mistress, Yang Cao, for more than \$1.2 million.

In 2003, Liu borrowed money from Wong to make a down payment on a condominium. She kept it separate from her family's money and paid him back in full.

At some point after August 1, 2007, Liu attempted to deposit Wong's renewed check in the amount of \$10,800 for the original August 1, 2006, \$10,000 loan. She told Wong she wished to deposit the check approximately one month before she attempted to do so. He told her that there was no problem and she should "just go and get the money." The check bounced.

Liu asked Wong to return the sums owed on the earliest 1999 loan (now having accrued interest for a total of more than \$80,000.) Wong then claimed the post-dated check no 2996, renewed February 1, 2007 for \$80,050 was just \$8,050 and he accused Liu of altering the amount of the renewed check. He grabbed for the check, bruising her wrist and knocking her off balance. When Liu threatened to scream and to call the police, Wong took a step back. He said if she agreed that the \$80,000 was \$8,000, he would pay that money back to her, but she should not say anything stupid, like that he had pushed or grabbed her, or she would not get a penny. Both Liu and Wong called the police. Liu did not tell the police he had pushed and grabbed her wrist, but did tell the police that she wanted to keep the check. Wong told the police Liu had altered the check. She responded that "maybe he wants to defraud on my family's money and I need to keep this check as evidence."

Liu testified she had the original of a "power of attorney" from her family, that they had executed in China in 1996, in which the total amounts owed was stated, including interest. Liu's family considered her father as the head of the household. The promissory notes were written out to Liu's father, Guangming Liu, because he is the representative head of the household and everyone pooled their money together for him to take care of. Liu consulted with her family about filing the lawsuit before doing so. Asked whether her family members ever expressed a desire to also be plaintiffs in the lawsuit, Liu responded: "My father made a power of attorney and I'm representing him. That this would be valid." Liu loaned the money to Wong and she had to repay her family.

During the eight years from her first loan in 1999 to February 7, 2007, Wong had brought Liu to look at foreclosed properties he had purchased, saying that they were worth a lot more than he had paid for them. The stated purpose of taking her to see the houses was that he wanted her to lend him money and to roll the money over so that when there was enough, he would buy a foreclosure for her. Liu wanted his help.

Liu testified that ever since Wong stole the money from her family and did not pay it back, she had been under a lot of emotional stress. Her family thinks she is conspiring with Wong. She cannot sleep and has been suffering.¹ She also testified that in the three year wait for the case to be tried, she has suffered from headache, insomnia, and guilty feelings that she had been tricked. Also testifying to Liu's emotional distress were her daughter, Tiffany Cheung, and her friends, Gerke and Burchard.

Liu's daughter Cheung also testified that after her mother loaned Wong the money and he did not give it back, "[b]asically every day my mom is blaming herself and regret asking the family to loan him the money. She cannot sleep very well and always cries. She always think about this kind of things. Just for three years I feel like she's just looked 10 years older almost. We asked her to go to the church, she talked to the people about what happened and she always talk about it. Which she's a really good person. She doesn't have to go through this." Liu had been going to psychological counseling and had been taking medication to sleep. She also had missed work because "[s]he cannot work so well because she always thinks about these kind of things. I just ask her to keep her mind off this. She always talks about this. And people see her she always talks about what happened." Liu had paid about \$2000 for psychological counseling. Every time Cheung talked with her grandparents they say they don't want to come to the United States anymore. They just want the money back for their funeral. The money

¹ Liu testified in part: "Ever since Mr. Wong stole that money from my family and did not pay it back, I was under a lot of emotional stress. My family thinks that I am conspiring with Mr. Wong to trick them. That's what my younger sister and my older sister thinks. And so, I can't sleep and I lost a lot of weight and I feel very bad, I have suffered. I feel that I have made this mistake and so, during the day, my emotional state would be like um, half asleep and half awake."

was the lifetime savings of five hardworking families. Burchard testified that Liu's state of mind was "very bad." Liu would cry spontaneously, had sought counseling, and had been "hospitalized for an incident related to this." Also, Liu feels her family has alienated her and they are not talking to her because they feel she is involved in taking the money with Wong. Gerke testified that Liu's emotional state over the last three years had "deteriorated a lot" because of the loss of the family's money.

Wong testified that Liu had not loaned him any money. He had written the promissory notes and post-dated checks (including three or four post-dated checks totaling \$150,000 in December 2004), because Liu had threatened him, saying she wanted a "break-up" fee and that she would tell his wife about their romantic relationship. She also threatened to kill him. Wong testified that he had reviewed the promissory notes, written in Chinese, "that stated that I borrowed the money from her." He testified he first wrote a promissory note to Liu around 2005 for more than \$100,000 and less than \$200,000. It was renewed to the next year and he did not pay it. The promissory note for \$150,000 written in 2005 was renewed twice. Although some of the promissory notes (also identified as receipts for borrowing and promise to pay) stated they were payable to Liu's father, Wong testified that he "actually never borrowed money from her father." At least two promissory notes dated June 5, 2006 and October 5, 2006, designated Liu as the payee and involve net principal payments of \$32,840, plus interest.

Liu filed a complaint against Wong and others on November 24, 2008. Ultimately, other parties were dismissed, leaving only Wong in the action. On March 4, 2010, the jury rendered its unanimous verdict in favor of Liu and against Wong, awarding Liu damages of \$311,000 for breach of contract; \$52,000 for fraud; and \$115,000 for intentional infliction of emotional distress. The jury also found Liu had proved by clear and convincing evidence that Wong had engaged in the conduct with malice, oppression or fraud. At the bifurcated trial on punitive damages, the jury awarded Liu \$410,000 punitive damages. Judgment was entered accordingly on March 12, 2010. The trial court denied Liu's motions for judgment notwithstanding the verdict and for a new trial on May 17, 2010. This timely appeal followed.

DISCUSSION

I. Standing - Real Party in Interest Requirement

Wong contends that Liu has no “standing” to sue him, because the funds she loaned belonged not to her, but to her family, and because the promissory notes were made out to her father.

Plaintiff must be the “real party in interest” with respect to the claim sued upon. Code of Civil Procedure section 367 provides: “Every action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute.” (See e.g., *Dino v. Pelayo* (2006) 145 Cal.App.4th 347, 353 fn. 2; Weil & Brown, California Practice Guide: Civil Procedure Before Trial (The Rutter Group, 2011) ¶ 2:1, p. 2-1. (Weil & Brown, Civil Procedure Before Trial.) “Generally, the real party in interest is the person who has the *right to sue under the substantive law*. It is the person who owns or holds title to the claim or property involved, as opposed to others who may be interested or benefited by the litigation.” (Weil & Brown, Civil Procedure Before Trial at ¶ 2:2, p. 2-2, citing *Jasmine Networks, Inc. v. Superior Court (Marvell Semiconductor, Inc.)* (2009) 180 Cal.App.4th 980, 991 [“ ‘while superficially concerned with procedural rules,’ ” section 367 “ ‘really calls for a consideration of rights and obligations’ ”]; *Gantman v. United Pacific Ins. Co.* (1991) 232 Cal.App.3d 1560, 1566.) “Real party in interest issues are often discussed in terms of plaintiff’s ‘standing to sue.’ [Citations.]” (*Ibid.*) “A party lacks standing if it does not have an actual and substantial interest in, or would not be benefited or harmed by, the ultimate outcome of an action. [Citations.] Standing is a function not just of a party’s stake in a case, but the degree of vigor or intensity with which the party presents its arguments. [Citations.]” (*City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43, 59.)

“Plaintiff’s lack of standing to sue on the claim is treated as a ‘jurisdictional’ defect and is *not waived* by defendant’s failure to raise it by demurrer or answer. [Citations.]” (Weil & Brown, Civil Procedure Before Trial, *supra*, ¶ 2:78 at p. 2-27.) It is not waived by a failure to object and can even be raised for the first time on appeal. (*Ibid.*; e.g., *Cummings v. Stanley* (2009) 177 Cal.App.4th 493, 501.)

The parties argue over whether the standard of review is substantial evidence or de novo review. However, it appears here, as is usually the case, that the question is one of substantial evidence, unless there are no disputed issues of fact. Under either standard, we agree with the trial court's reasoning in rejecting Wong's claims that Liu lacked standing.

In its denial of his post-trial motions for JNOV and new trial, the court found the evidence supported a finding that Liu had standing to sue, even though some of the money at issue belonged to her family and some of the promissory notes were addressed to her father. "Based on the evidence in the record, the contractual and personal interests Wong violated belonged to Liu. First, Wong made the claimed misrepresentations directly to Liu, inducing her to collect money from her family to give to Wong. This was the basis for her . . . misrepresentation claim. Second, the contract Liu claimed Wong breached was the oral agreement they made that he would either repay her the money she gave to him plus interest or transfer a foreclosed property of comparable value. Liu and Wong were the only parties to the oral agreement. The subject of that oral agreement concerned any and all money Liu gave to Wong, which included the money that was also the subject of the promissory notes in Guangming Liu's name. Third, the post-dated checks that Wong executed reflecting the monies Liu gave him as part of this deal were made payable to Liu. Finally, at all times, Wong communicated and transacted with Liu, and not her father or any other member of her family. [¶] The evidence supports a finding that Liu is a proper plaintiff who has suffered an injury as a result of Wong's misrepresentations and breach of contract."

As the court concluded, the evidence showed that the oral loan agreement was between Liu and Wong. Wong also testified that he had *not* received a loan from Liu's father, but had merely written what she told him on the promissory notes/ receipts and promises to pay. Furthermore, post-dated checks were made out to Liu. It is true that Liu testified that the bulk of the money she loaned Wong was collected by her from family members. However, she made the loans, Wong made the misrepresentations to her, and she relied upon them.

Wong appears to argue that the jury could not have found an oral agreement between Liu and Wong, as the complaint did not support it and the instructions—particularly CACI 300—“substantially narrowed the issues in controversy.” This argument is somewhat perplexing as the cause of action for breach of contract against Wong *did* allege an oral agreement between Liu and Wong, the substance of which was that Liu would give funds to Wong, who would buy foreclosed real estate properties for Liu and her family. Liu alleged that pursuant to the agreement, she did give Wong monies from 1999 to 2007, for him to purchase such properties, that he breached the agreement, requesting his bank to stop payment of the checks, and refusing to transfer title to any of the foreclosed properties he had purchased with her funds. Moreover, we see no “narrowing” of the issues through the instructions given the jury. CACI 300 provided the standard breach of contract instruction,² but did not reference whether the contract alleged was written or oral or both. CACI 302 instructed on the essential factual elements of contract formation and CACI 303 instructed on the essential factual elements required for Liu to recover damages for breach of contract. Notably, CACI 304 instructed that “Contracts may be written *or oral*. [¶] Contracts may be partly written and partly oral. [¶] *Oral contracts are just as valid as written contracts.*” (Italics added.) The oral contract theory of the case was presented to the jury and substantial evidence supports the existence of an oral contract. Liu was the “real party in interest” here.

Nor are we persuaded by Wong’s argument that one or more indispensable parties were not joined in the action and that he is “potentially exposed to additional claims by Mr. Liu and [Wong’s] numerous Chinese benefactors” Not only does Wong fail to support his assertion with adequate argument and authority, but here there was ample

² “Ning Liu claims that she and William Wong entered into a contract for William Wong to borrow money from her. [¶] Ning Liu claims that William Wong breached this contract by refusing to pay back the money and canceling checks. [¶] Ning Liu also claims that William Wong’s breach of this contract caused harm to Ning Liu for which William Wong should pay. [¶] William Wong denies all claims. William Wong also claims Ning Liu induced the contract with duress.” (CACI 300)

evidence supporting Liu's right to bring the action not only for herself, but on behalf of her family.

As we recognized in *Novartis Vaccines & Diagnostics, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2006) 143 Cal.App.4th 1284, 1297, a plaintiff generally may assert a claim on behalf of a third party when “(1) the plaintiff has suffered an injury in fact; (2) the plaintiff has a relationship with the third party so that it can, and will, effectively present the third party's rights; and (3) obstacles exist preventing the third party from asserting his own rights. [Citations.]” Although the court sustained an objection to questions relating to visa problems by Liu's family members, it is clear that the family members remain in China, that Liu's parents have stated their intention to remain and not to come to the United States. The evidence supports a determination that the three criteria were met here to allow Liu to assert her own injuries as the real party in interest and also any injuries to her family, as well.³

II. Breach of Contract Damages

Wong contends that the calculation of damages for the breach of contract claim was without foundation. We disagree. Evidence was presented, both in the form of promissory notes, post-dated checks, and testimony, that supported Liu's claim that she had loaned Wong cash of at least \$184,000 from 1999 to 2007, and that the accrued interest on these transactions, which Wong affirmed by his post-dated checks and in the renewed promissory notes, amounted to a total debt of at least \$311,000. Wong contends that the five promissory notes reflect principal amounts of approximately \$248,000 and that no other damages were claimed with regard to the breach of contract. He contends

³ As the record contains ample evidence supporting Liu's standing to sue for Wong's breach of the oral agreement, for his intentional misrepresentations to her, and for his intentional infliction of emotional distress, we need not address his claims that Liu was not a third party beneficiary, that she was merely her family's agent in the loan transactions, and that even a valid “power of attorney” from her family (unlike an assignment) would not have allowed her to sue as a real party in interest on claims held by her family.

the jury should have determined the amount of principal due and the judge should have added the appropriate amount of interest. We disagree.

The debt owed was the amount of principal plus interest on the loans to the date of trial. Liu's daughter also testified that the amount Wong owed was "around \$180,000 U.S. dollars" and that the total was "almost \$310,000 U.S. dollars approximate interest." The closing arguments that likely contained counsel's interest calculations were not transcribed and are not before us. However, the parties appear to agree on appeal that the debts evidenced by the promissory notes and the post-dated checks totaled \$248,454 as of June 2007. Wong also agreed to pay Liu interest at a rate of 8 percent per year. Therefore, by the end of trial in March 2010, Liu calculates the total amount of damages Wong owed was \$317,153. The evidence presented as to the principal amounts Liu loaned to Wong, the interest rates, and Wong's reaffirmation of those debts evidenced by the post-dated checks and promissory notes, support the jury verdict here. Wong has failed to demonstrate that it was erroneous for the jury to include the calculation of interest to the dates of trial as part of the amounts owing under the contract. Nor has Wong demonstrated any prejudice to himself from any error.

III. Tort Damages

A. *Liability for breach of contract and fraud.* Wong contends that the jury improperly awarded damages for fraud and emotional distress on what was merely a breach of contract claim. We disagree. As Witkin explains, "The distinction between tort and contract 'is well grounded in common law, and divergent objectives underlie the remedies created in the two areas. Whereas contract actions are created to enforce the intentions of the parties to the agreement, tort law is primarily designed to vindicate "social policy".' (*Foley v. Interactive Data Corp.* (1988) 47 C[al].3d 654, 683; [citations].) However, the same act may be both a breach of contract and a tort. Even where there is a contractual relationship between parties, a cause of action in tort may sometimes arise out of the negligent manner in which the contractual duty is performed, a failure to perform the duty, or an intentional act causing injury to an interest created by

the contract. [Citations.].” (5 Witkin, Summary of Cal. Law (10th ed. 2005) § 2, pp. 44-45.)

Wong asserts that the damages suffered by Liu must be independent of the contractual breach. Relying upon *Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979 (*Robinson Helicopter*), Wong argues that to be actionable, the fraud must expose Liu to a loss *beyond* the amount she suffered by his breach of their contract to repay the loans. In *Robinson Helicopter*, the court addressed the question “whether the economic loss rule, which in some circumstances bars a tort action in the absence of personal injury or physical damage to other property, applies to claims for intentional misrepresentation or fraud in the performance of a contract.” (*Id.* at p. 984.) The court held that because the fraud at issue was an independent action based in tort, the economic loss rule did not bar recovery. (*Ibid.*) First, we note that Liu did sustain personal injuries with respect to the emotional distress she suffered, resulting in both physical and emotional injuries. Moreover, we reject Wong’s analysis, even if the only damages Liu suffered consisted of the failure of Wong to repay his debt or to purchase the foreclosed property as he had promised.

“In *Robinson Helicopter* [, *supra*,] 34 Cal.4th 979, 990 . . . , the Supreme Court synthesized the relevant test for allowing a contract based claim to be pursued as a tort cause of action: ‘ “Generally, outside the insurance context, ‘a tortious breach of contract . . . may be found when (1) the breach is accompanied by a traditional common law tort, such as fraud or conversion; (2) the means used to breach the contract are tortious, involving deceit or undue coercion; or (3) one party intentionally breaches the contract intending or knowing that such a breach will cause severe, unmitigable harm in the form of mental anguish, personal hardship, or substantial consequential damages.’ [Citation.] Focusing on intentional conduct gives substance to the proposition that a breach of contract is tortious only when some independent duty arising from tort law is violated. [Citation.] If every negligent breach of a contract gives rise to tort damages the limitation would be meaningless, as would the statutory distinction between tort and contract remedies.” [Citation.]’ ” (*Benavides v. State Farm General Ins. Co.* (2006)

136 Cal.App.4th 1241, 1251.) “ ‘[C]onduct amounting to a breach of contract becomes tortious when it also violates a duty independent of the contract arising from principles of tort law. [Citation.]’ [Citation.]” (*Robinson Helicopter*, 34 Cal.4th at p. 998.) “ ‘Tort damages have been permitted in contract cases where a breach of duty directly causes physical injury [citation]; for breach of the covenant of good faith and fair dealing in insurance contracts [citation]; for wrongful discharge in violation of fundamental public policy [citation]; or where the contract was fraudulently induced. [Citation.]’ [Citation.] ‘[I]n each of these cases, the duty that gives rise to tort liability is either *completely independent of the contract or arises from conduct which is both intentional and intended to harm*. [Citation.] ([*Erlich v. Menezes* (1999) 21 Cal.4th 543,] 552; see also *Harris v. Atlantic Richfield Co.* (1993) 14 Cal.App.4th 70, 78[‘when one party commits a fraud during the contract formation or performance, the injured party may recover in contract and tort.’].)” (*Robinson Helicopter* at pp. 989-990, italics added; accord, *Benavides v. State Farm General Ins. Co.* (2006) 136 Cal.App.4th at pp. 1251-1252.)

Substantial evidence here showed that Wong committed promissory fraud in inducing Liu to enter the contract when he intentionally misrepresented to Liu that he would purchase foreclosed property with the funds and that the loaned funds would accrue a high rate of interest in the meantime. (See *Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1239 [applying substantial evidence review to case of fraudulent inducement of a contract].) Wong further induced her to continue making loans by taking Liu to see foreclosed properties he owned and by signing both promissory notes and renewed post-dated checks to evidence the loans and his intention to repay them. Knowing that much of the money she lent him had been collected from Liu’s family, he likely also knew that his fraud would cause her great emotional distress.

“An action for promissory fraud may lie where a defendant fraudulently induces the plaintiff to enter into a contract. [Citations.] In such cases, the plaintiff’s claim does not depend upon whether the defendant’s promise is ultimately enforceable as a contract. ‘If it is enforceable, the [plaintiff] . . . has a cause of action in tort as an alternative at

least, and perhaps in some instances in addition to his cause of action on the contract.’ [Citations.] Recovery, however, may be limited by the rule against double recovery of tort and contract compensatory damages.” (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638-639.) “[F]raudulent inducement of contract—as the very phrase suggests—is not a context where the ‘traditional separation of tort and contract law’ [citations] obtains. To the contrary, this area of the law traditionally has involved both contract and tort principles and procedures. For example, it has long been the rule that where a contract is secured by fraudulent representations, the injured party may elect to affirm the contract and sue for the fraud. [Citations.]” (*Id.* at p. 645.)

Substantial evidence supports the jury verdict holding Wong liable for both breach of contract and intentional misrepresentation.

B. Double recovery of damages for breach of contract and fraud. Wong also argues that the jury awarded double recovery by awarding, in addition to contract damages, \$52,000 for fraud. “The general theory of compensatory damages bars double recovery for the same wrong.” (6 Witkin, Summary of Cal. Law, Torts, (10th ed. 2005) § 1550, p. 1023; *Tavaglione v. Billings* (1993) 4 Cal.4th 1150, 1159; Hersh and Smith, Cal. Civil Practice Torts (2011) § 5:20.) As recognized by our Supreme Court, the rule against double recovery of tort and contract compensatory damages may limit recovery of damages where an action may proceed both for breach of contract and for tort. (*Lazar v. Superior Court, supra*, 12 Cal.4th at p. 638; *Tavaglione v. Billings* at p. 1159.) “In contrast, where separate items of compensable damage are shown by distinct and independent evidence, the plaintiff is entitled to recover the entire amount of his damages, whether that amount is expressed by the jury in a single verdict or multiple verdicts referring to different claims or legal theories. [Citations.]” (*Tavaglione v. Billings* at p. 1159.)⁴

⁴ “Regardless of the nature or number of legal theories advanced by the plaintiff, he is not entitled to more than a single recovery for each distinct item of compensable damage supported by the evidence. (*Shell v. Schmidt* (1954) 126 Cal.App.2d 279, 291.)

Liu does not address the question of double recovery of tort and contract damages here, except in noting that she suffered intentional infliction of emotional distress, began taking medication in order to sleep, missed work as a result of Wong's actions and incurred at least \$2,000 in medical expenses related to psychological counseling. The \$2,000 in medical expenses were recoverable under either the fraud or intentional infliction of emotional distress theories and we shall assume, consistent with the standard of review, that they were awarded for the former. The remaining \$50,000 fraud damages described by Liu relating to her emotional distress were, presumably, covered in the award of \$115,000 damages for intentional infliction of emotional distress. Apart from the \$2,000 medical expenses, Liu points to no *additional* damages suffered from the fraud apart from her emotional distress damages and the damages awarded on the breach of contract theory. Although the jury could have awarded damages on Liu's fraud theory rather than the breach of contract theory, or could have awarded damages on both, up to the total damages shown, the record shows that \$50,000 of the damages award violated the rule against double recovery. Therefore, we shall reverse that amount of the fraud damages award.

IV. Intentional Infliction of Emotional Distress

Emotional distress damages may be recovered in intentional fraud cases such as this. (See *Schroeder v. Auto Driveaway Co.* (1974) 11 Cal.3d 908, 921; *Croskey et al.*,

Double or duplicative recovery for the same items of damage amounts to overcompensation and is therefore prohibited. (*Ibid.*)

“Thus, for example, in a case in which the plaintiff's only item of damage was loss of commissions, two awards of damages identical in amount—one for breach of contract and the other for bad faith denial of the same contract—could not be added together in computing the judgment. Plaintiff was entitled to only *one* of the awards. [Citations.]

“In contrast, where separate items of compensable damage are shown by distinct and independent evidence, the plaintiff is entitled to recover the entire amount of his damages, whether that amount is expressed by the jury in a single verdict or multiple verdicts referring to different claims or legal theories. [Citations.]” (*Tavaglione v. Billings, supra*, 4 Cal.4th 1150, pp. 1158-1159.)

Cal. Practice Guide: Insurance Litigation (Rutter Group 2011) ¶¶ 13:70.1 13:85, pp. 13-16 – 13-24.2.) (Croskey et al., Insurance Litigation.)

Wong asserts that the finding of liability for emotional distress damages and the amount of such damages awarded by the jury were unsupported by substantial evidence. Wong focuses on portions of Liu’s testimony describing her emotional distress during the three years after she first sued Wong and argues that the normal process of litigation is stressful and does not meet the criteria for extreme and outrageous behavior supporting an award of emotional distress. Wong minimizes the ample testimony by Liu and others, describing Liu’s substantial emotional distress from the time Wong “stole” the money and did not pay it back. Further, other behavior by Wong provides additional support the jury’s findings that his conduct was “outrageous” and that he either intended to cause her emotional distress or acted with reckless disregard of the probability that she would suffer emotional distress. This includes his behavior in accusing her of changing the amount of the \$80,050 check; his accusing her of fraud relating to that check when they both called the police after he had grabbed her wrist and knocked her off balance in struggling over the check; his purposely writing “0.08 percent” interest on some of the post-dated checks instead of “8” percent interest, which the jury could have believed was an attempt to invalidate the post-dated checks or pay less interest than agreed without Liu being aware of it.

Substantial evidence supported the jury’s finding Wong liable for intentionally causing Liu severe emotional distress.

Nor do we believe the award of \$115,000 damages for intentional infliction of emotional distress was “excessive” in the circumstances. “The amount of a monetary award of damages for emotional distress is a matter left to the discretion of the trier of fact. [Citations.]” (DiMugno and Glad, Cal. Insurance Law Handbook (April 2011 update) § 11:7.2, p. 251; see *Fletcher v. Western National Life Ins. Co.* (1970) 10 Cal.App.3d 376, 408-409 (*Fletcher*).) “There is no fixed standard by which to compute the monetary value of emotional distress. The question must necessarily be left

to the jury: ‘The question of what may be reasonable compensation in cases of this kind is a matter on which there legitimately may be a wide difference of opinion.’ [Citation.]” (Croskey et al., Insurance Litigation, *supra*, ¶ 13:110, pp. 13-30 – 13-31, quoting *Fletcher* at p. 409; accord, *Merlo v. Standard Life & Acc. Ins. Co.* (1976) 59 Cal.App.3d 5, 17, 23 (*Merlo*).) The amount fixed as damages for emotional distress will be disturbed on appeal “ ‘only when the sum awarded is so large that the verdict shocks the moral sense and raises a presumption that it must have resulted from passion or prejudice.’ ” (*Fletcher* at p. 709; Croskey et al., Insurance Litigation, ¶ 13:111, p. 13-31.)

An award of emotional distress damages may be based on the testimony of plaintiff alone and does “not require proof of bankruptcy, physical illness or injury, nor courtroom demonstrations of the destruction of personal peace of mind or well-being.” (*Tan Jay Internat., Ltd. v. Canadian Indemnity Co.* (1988) 198 Cal.App.3d 695, 708.) Such damages are “extra contractual damages—damages above and beyond the contract measure” (Croskey et al., Insurance Litigation, ¶ 13:68, p. 13-16.)

There is some question whether the amount of emotional distress damages must be tied to economic damages or simply proportionate to the distress suffered by the plaintiff. (Croskey et al., Insurance Litigation, *supra*, ¶¶ 13:111.1, 13:111.3, p. 13-31; see *Major v. Western Home Ins. Co.* (2009) 169 Cal.App.4th 1197, 1216.) We needn’t trouble with that question here as the amount of emotional distress damages awarded here were reasonably proportionate to the \$313,000 compensatory economic damages award.

V. Punitive Damages Award

Wong attacks the \$410,000 punitive damages award as unsupported by substantial evidence. He asserts that the record at trial is “seriously deficient of any substantial evidence demonstrating that [he] committed wrongful acts of such a despicable nature to justify a punitive damages award.” Once again, we disagree.

At the outset, we recognize the well-established rule that “an award of both compensatory and punitive damages for intentional infliction of emotional distress is not subject to challenge as double recovery.” (6 Witkin, *supra*, Torts, § 1550 at p. 1024.)

Emotional distress is a form of actual damage. (*McNairy v. C.K. Realty* (2007) 150 Cal.App.4th 1500, 1506; *Balmoral Hotel Tenants Assn. v. Lee* (1990) 226 Cal.App.3d 686, 689; *Merlo, supra*, 59 Cal.App.3d at p. 16.) In *Merlo*, the court explained: “Compensatory damages and punitive damages are two different things with two different purposes. Compensatory damages are awarded to compensate an injured party for his injury; punitive damages are awarded to punish a wrongdoer and make an example of him. When both compensatory and punitive damages are awarded, there is no double punishment. There may be double recovery, but, unless and until the Legislature sees fit to alter Civil Code section 3294, it is a permissible double recovery.” (*Merlo*, at p. 20; see 6 Witkin, Torts, § 1550 at p. 1024.)

We have concluded that substantial evidence supports the jury’s award of emotional distress damages. So, too, substantial evidence supports the jury’s finding that Liu had proven by clear and convincing evidence that Wong engaged in conduct with malice, oppression or fraud. Our review of that determination remains one of substantial evidence, that is whether there was substantial evidence to support the jury’s determination by that clear and convincing evidence standard. (*Mike Davidov Co. v. Issod* (2000) 78 Cal.App.4th 597, 605-606.)

The evidence supported an inference that Wong never intended to pay Liu any money or to purchase foreclosed property with the loaned money when he entered into the agreement with her and throughout the course of their financial relationship when he wrote the promissory notes and post-dated checks. The jury could believe that Wong knew that Liu was not only lending him some of her own money, but the life savings of her family members. It could determine that he acted with malice and that his conduct was reprehensible as he showed her properties as an inducement for the loans, and then told her he still did not have enough moneys from her to make such a purchase, when he was in fact purchasing numerous foreclosures, some for less than she had loaned him, and then taking money out of them. His denial that he had borrowed the money from Liu and

his claim that she had essentially blackmailed him, further supports the jury's imposition of punitive damages.

“While the underlying facts supporting a punitive damages award are for the jury to decide, the amount of punitive damages must be independently reviewed on appeal. [Citation.]” (*Romo v. Ford Motor Co.* (2003) 113 Cal.App.4th 738, 754.) Recently, the Court of Appeal in *Bullock v. Philip Morris USA, Inc.* (2011) 198 Cal.App.4th 543, 558-559 summarized the principles guiding appellate review of a claim that a punitive damages award was excessive: “ ‘A court determining whether a punitive damages award is excessive under the due process clause must consider three guideposts: “(1) the degree of reprehensibility of the defendant’s misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. [Citation.]’ (*State Farm [Mut. Automobile Ins. Co. v. Campbell]* (2003) 538 U.S. [408,] 418.) The defendant’s financial condition also is an essential consideration for a court reviewing a punitive damages award under California law, and is a permissible consideration under the due process clause in determining the amount of punitive damages necessary to further the state’s legitimate interests in punishment and deterrence. [Citation.] [¶] On appeal, we defer to findings of historical fact if they are supported by substantial evidence, and we independently assess each of the three guideposts and determine de novo whether the punitive damages award is excessive under the due process clause. [Citations.] As the California Supreme Court stated in *Simon [v. San Paolo U.S. Holding Co., Inc.]* (2005) 35 Cal.4th 1159,] 1188, ‘While we must . . . assess independently the wrongfulness of a defendant’s conduct, our determination of a maximum award should allow some leeway for the possibility of reasonable differences in the weighing of culpability. In enforcing federal due process limits, an appellate court does not sit as a replacement for the jury but only as a check on arbitrary awards. [Citation.]’ ”

We are aware of no civil penalties authorized or imposed in comparable cases. The jury determined, and we agree, that the evidence showed that defendant’s

misconduct, as described above, was both fraudulent and highly reprehensible. Wong's misrepresentations continued over the nine year course of the lending relationship. They were made with the intent to defraud Liu and at least with intentional indifference and conscious disregard to the likely injury to Liu and her family. There is no great disparity between the harm suffered by Liu as measured by the compensatory damages of \$115,000 for the intentional infliction of emotional distress damages and the \$410,000 punitive damages award. Numerous cases considering the question have indicated that a ratio of approximately four to one satisfies due process. (See *Simon v. San Paolo U.S. Holding Co., Inc.*, *supra*, 35 Cal.4th 1159, 1182 [indicating approval of decisions involving ratios of three or four to one]; *Amerigraphics, Inc. v. Mercury Casualty Co.* (2010) 182 Cal.App.4th 1538 1561 [reducing punitive damages to a 3.8 to one ratio]; *Bullock v. Philip Morris USA, Inc.*, *supra*, 198 Cal.App.4th at p. 567 [observing that in an unexceptional fraud case where the conduct was not exceptionally extreme, the constitutional limit *may* approach a ratio of four to one]; *Boeken v. Philip Morris, Inc.* (2005) 127 Cal.App.4th 1640, 1695-1696, 1701[same].) The punitive damages award was not excessive in the circumstances.⁵

Finally, evidence as to Wong's wealth was conflicting. Wong testified that Liu had threatened him in 2004 or 2005, when she saw he had \$5 million in equity in his properties. Wong testified that his net worth was more than *negative* \$1 million at the time of trial. However, he admitted that in the year preceding trial, he had taken more than \$1.4 million in equity from the houses he had purchased. He also admitted that after

⁵ The punitive damages award is proportionally reasonable in relation to the compensatory damages awarded for intentional infliction of emotional distress. However, we note that while punitive damages are not recoverable for breach of contract, the fraud finding certainly warrants them. We have determined that the jury awarded an impermissible double recovery of fraud and breach of contract damages and shall reduced the fraud damages accordingly. Nevertheless, the jury could as easily have awarded \$311,000 damages for the intentional misrepresentation, instead of the breach of contract, resulting in a punitive damages award of less than the total compensatory damages for fraud and intentional infliction of emotional distress. Our approval of the punitive awarded here does not rest on this observation.

the start of the litigation, he had transferred several properties to Cao, a loan agent whom Liu identified as Wong's girlfriend. Immediately following the transfers, Cao had refinanced and taken substantial equity out of those properties. This evidence was more than sufficient to allow the jury to determine that the award of punitive damages was reasonable in proportion to Wong's actual wealth. (See *Zaxis Wireless Communications, Inc. v. Motor Sound Corp.* (2001) 89 Cal.App.4th 577, 582-583 [looks beyond net worth to determine ability to pay].)

Viewing the entire record most favorably to the judgment, we conclude that the punitive damages award was not the result of passion and prejudice (*Bardis v. Oates* (2004) 119 Cal.App.4th 1, 25), and that the amount awarded was not excessive. (*Bullock v. Philip Morris USA, Inc.*, *supra*, 198 Cal.App.4th at pp. 558-559.)

As we have rejected Wong's claims that the evidence was insufficient to support the jury's verdicts, except for the double recovery of \$50,000 in damages, which we shall order stricken, we need not address Wong's final claim that the trial court abused its discretion in denying his motion for a new trial.

DISPOSITION

The judgment is modified to strike \$50,000 from the damages awarded, so as to reduce the award for fraud to \$2,000. In all other respects, the judgment is affirmed. The parties are to bear their own costs on this appeal.

Kline, P.J.

We concur:

Lambden, J.

Richman, J.