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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

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| ROSINA NESBITT, Individually and as Trustee, etc.,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>WARNER EMMANUEL,<br><br>Defendant and Appellant. | B224521<br><br>(Los Angeles County Super. Ct. No. BC401027) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard Fruin, Judge. Affirmed in part; reversed in part.

Raymond I. Moniak for Defendant and Appellant.

Law Offices of Hugh Duff Robertson and Vivian M. Lum for Plaintiff and Respondent.

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## INTRODUCTION

Appellant Warner Emmanuel appeals from a money judgment in favor of respondent Rosina Nesbitt, individually and as trustee for the Rosina Nesbitt Trust. He contends (1) there was insufficient evidence of his finances to support the award of punitive damages; and (2) the Rosina Nesbitt Trust should not have been awarded attorney fees. We conclude the punitive damages award must be stricken on the basis of insufficient evidence, but we will sustain the award of attorney fees.

## FACTUAL AND PROCEDURAL HISTORY

On November 2, 2005, Nesbitt, individually and on behalf of the Rosina Nesbitt Trust, sold her condominium to appellant for $1,200,000. Appellant financed the purchase by making a $120,000 down payment, obtaining a $680,000 bank loan, and persuading respondents to carry back a loan of $400,000. The $400,000 loan was evidenced by a written promissory note dated October 21, 2005, and made payable to the Rosina Nesbitt Trust. It was secured by a deed of trust encumbering the condominium. The note provided that appellant would pay $52,000 in interest over two years, and the principal balance of $400,000 on November 3, 2007.

At the time of the transaction, Nesbitt was in her late 70's and did not understand real estate transactions. In contrast, appellant had been a licensed real estate agent from 1976 to the early 1990's. At the time of trial, he was acting as a trustee of a trust and managing various parcels of real property. His salary was approximately $16,800 per month. He still owned the condominium that formerly belonged to Nesbitt. Within the past three years, he had purchased another condominium and a cabin in California, and a large parcel of land in Utah. He also had sold one of his condominiums in Maui, and had purchased another

condominium in a better area in Maui. He had at least one tenant for his Maui properties.

On March 28, 2006, appellant, along with a notary public, visited Nesbitt. He obtained from her a deed of reconveyance which released the deed of trust securing his payment of the $400,000 promissory note. Appellant had the signed documents recorded with the county recorder's office April 3, 2006. Appellant thereafter encumbered the condominium with a new loan in the amount of $800,000, and received $101,465 in cash as a result of the refinance. He also obtained a $150,000 line of credit secured by the property.

Under the terms of the October 21, 2005 promissory note, appellant was required to repay the $400,000 loan by November 3, 2007. When Nesbitt had not received a payment from appellant by that date, she complained to her friend, Silvana Licciardi, a licensed real estate agent and the successor trustee for the Rosina Nesbitt Trust. Licciardi investigated and learned that Nesbitt had reconveyed her security interest in the condominium. Nesbitt was unaware she had signed a deed of reconveyance and did not understand the legal effect of signing such a document.

On November 13, 2007, Licciardi contacted appellant, who was residing in Hawaii. Appellant told her his lender had "made him do it" -- which Licciardi understood as referring to having Nesbitt sign the reconveyance documents. He also stated he would come to California before Christmas and would then pay off the sum due Nesbitt on the promissory note. Despite these representations, appellant made no further payments to respondent.

Nesbitt was very upset about appellant's actions. Her lawyers wrote a demand letter to appellant on August 11, 2008, but received no response. On

October 31, 2008, she filed a verified complaint against appellant for breach of contract and elder abuse.

After a three-day bench trial, the court issued its written decision in favor of respondent. The court found appellant liable on the October 21, 2005 promissory note, and awarded the Rosina Nesbitt Trust damages and "legal fees, as provided in the note itself." It also found appellant had committed an "egregious violation of the Elder Abuse Act," Welfare and Institutions Code section 15610.30 et seq. In addition, the court found by clear and convincing evidence that appellant's conduct was fraudulent, oppressive and malicious, and that Nesbitt was entitled to punitive damages.

On March 16, 2010, in a judgment after trial by court, it was ordered, adjudged and decreed that "[t]he Rosina Nesbitt Trust and Rosina Nesbitt, individually, shall recover, jointly and severally, from Emmanuel compensatory damages in the sum of $428,000, plus pre-judgment interest at 10% from and after November 3, 2007 until paid, plus attorney's fees as provided in Welfare and Institutions Code § 15667.5(a)." Nesbitt also was awarded punitive damages in the sum of $1,000,000. Appellant appealed from the judgment.

## DISCUSSION

On appeal, appellant contends (1) the trial court erred as a matter of law in awarding punitive damages because there was insufficient evidence of appellant's financial condition; and (2) the court erred as a matter of law in awarding attorney fees to the Rosina Nesbitt Trust. We conclude there was insufficient evidence to support the award of punitive damages, but that the trust was contractually entitled to an award of attorney fees. We address each issue in turn.

A. *Punitive Damages*

As an initial matter, we note appellant did not move for a new trial based on the allegedly excessive punitive damages pursuant to Code of Civil Procedure section 657, subdivision 5. We asked for supplemental briefing on whether appellant forfeited its challenge to the award of punitive damages by failing to move for a new trial. After reviewing the supplemental briefing, we conclude there has been no forfeiture. We find dispositive the footnote in *Adams v. Murakami* (1991) 54 Cal.3d 105 (*Adams*) that an appellate court should review whether an award of punitive damages is excessive despite "a defendant's oversight or trial tactics." (*Id*. at p. 115, fn. 5; see also *Tomaselli v. Transamerica Ins. Co*. (1994) 25 Cal.App.4th 1269, 1282 [evidence of a defendant's financial condition "is a requirement imposed as a matter of public policy and hence not subject to waiver by the failure of an inattentive defendant to object or otherwise call attention to the inadequacy of plaintiff's proof"].) We turn to the merits of the challenge to the award of punitive damages.

"[T]he purpose of punitive damages is not served by financially destroying a defendant. The purpose is to deter, not to destroy." (*Adams*, *supra*, 54 Cal.3d at p. 112.) "[A] punitive damages award is excessive if it is disproportionate to the defendant's ability to pay." (*Ibid*. [citing cases finding award of punitive damages excessive where award exceeded more than two-and-a-half-months of defendant's annual net income, or more than 30 percent of defendant's net worth].) The plaintiff bears the burden of proof to show defendant's ability to pay. (*Id*. at p. 119.) Accordingly, "[a] reviewing court cannot make a fully informed determination of whether an award of punitive damages is excessive unless the record contains evidence of the defendant's financial condition." (*Id.* at p. 110.)

We review the trial court's award of punitive damages for substantial evidence. (*Kelly v. Haag* (2006) 145 Cal.App.4th 910, 916 (*Kelly*).)

Here, the record showed that appellant was employed as a trustee earning approximately $16,800 per month, or $201,600 annually. He also had at least one tenant, but there was no evidence as to the amount of his rental income. Appellant had been a licensed real estate agent, but there was no evidence regarding whether he could operate a profitable real estate practice in the near future. The record further showed that appellant still owned the condominium that formerly belonged to Nesbitt, but there was no evidence of how much equity remained in the property. In addition, the record showed appellant had recently purchased several properties in California and Hawaii as well as a parcel of land in Utah. However, there was no evidence that appellant still owned the properties or whether any of them was encumbered. Finally, there was no evidence regarding appellant's liabilities. In short, there was insufficient evidence from which the court below -- or this court on appeal -- could determine whether appellant would be able to pay the award of $1,000,000 in punitive damages. (See, e.g., *Baxter v. Peterson* (2007) 150 Cal.App.4th 673, 681 ["In sum, although the record shows that [defendant] owns substantial assets, it is silent with respect to her liabilities. The record is thus insufficient for a reviewing court to evaluate [defendant's] ability to pay $75,000 in punitive damages."]; *Kelly*, *supra*, 145 Cal.App.4th at p. 917 ["[W]ithout any evidence [defendant] still held the assets, or of the amounts of his liabilities, the $75,000 award is unsupported by substantial evidence and excessive."].) Although appellant's conduct was unquestionably reprehensible and Nesbitt would otherwise be entitled to punitive damages, the award of punitive damages must be stricken because there was insufficient evidence of appellant's financial condition. (*Kelly*, *supra*, 145 Cal.App.4th at p. 919.)

B. *Attorney Fees Award*

In the judgment, the trial court awarded Nesbitt and the trust "jointly and severally . . . attorney's fees as provided in Welfare and Institutions Code § 15667.5(a)." Appellant contends the trust was not entitled to attorney fees under section 15667.5 because that provision applies only to an elder or dependent adult, and not to an entity such as a trust.[1] However, as the trial court correctly stated in its written decision, the trust was entitled to legal fees based upon the October 21, 2005 promissory note. The note provided that "[i]f action [is] instituted on this note, I/We promise to pay such sum as the Court may fix as attorney's fees." Thus, even if the trust was not statutorily entitled to attorney fees, the fee award was proper under the terms of the promissory note. (*Hiott v. Superior Court* (1993) 16 Cal.App.4th 712, 717 [order of superior court may be sustained on any adequate ground that exists in the record].) Accordingly, the trust was entitled to the award of attorney fees.

[1] Appellant does not contest that Nesbitt was individually entitled to attorney fees under the statute.

## DISPOSITION

The judgment is reversed insofar as it awarded punitive damages. In all other aspects, the judgment is affirmed. The parties are to bear their own costs on appeal.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.