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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

MARYAM SEYEDAN, Plaintiff and Respondent, v. NASSIR EBRAHIMI, Defendant and Appellant.	B214791 (Los Angeles County Super. Ct. No. BC364790)

APPEAL from a judgment of the Superior Court of Los Angeles County, Soussan Bruguera, Judge. Affirmed in part and reversed in part.

Horvitz & Levy, Barry R. Levy, Bradley S. Pauley; Seltzer Caplan McMahon Vitek, J. Scott Scheper and Christine M. LaPinta, for Defendant and Appellant.

Greenberg, Glusker, Fields, Claman & Machtinger, Jeffrey Spitz; Greines, Martin, Stein & Richland, Robin Meadow and Barbara W. Ravitz, for Plaintiff and Respondent.

From 1987 to 1997 Maryam Seyedan, who worked as a bookkeeper at one of Nassir Ebrahimi's companies, invested approximately $400,000 in real property acquired by Ebrahimi in Los Angeles and Las Vegas, an arrangement that was memorialized in a written agreement and amended orally over time. In 2006, when Ebrahimi rebuffed Seyedan's demand for her share of the profits from the joint venture, she sued him for breach of the agreement. In July 2008 a jury found Ebrahimi had breached both the joint venture agreement and his fiduciary duty to Seyedan and awarded her economic damages of $7,238,027, representing her share of the joint venture profits, and $966,793 in noneconomic damages. The jury also determined that Ebrahimi had acted with "malice, oppression or fraud." Pursuant to a stipulation between the parties, the trial court awarded Seyedan an additional $1,125,000 in punitive damages.

On appeal Ebrahimi contends the trial court erred in granting Seyedan's motion for nonsuit on his affirmative defense the action was time-barred and wrongly excluded evidence impeaching Seyedan's credibility and suggesting she had stolen money from him. He also contends the jury improperly awarded damages on Seyedan's common count for money had and received, the award of noneconomic damages was not supported by the evidence and the court erred in failing to submit the issue of punitive damages to the jury. With the exception of the award on the common count, which the parties agree was improper, we affirm the judgment in all respects.

FACTUAL AND PROCEDURAL BACKGROUND[1]

In 1983 Ebrahimi, an Iranian immigrant who owned several companies including B.E. American, hired Seyedan, also an Iranian immigrant who had earned degrees in banking and business administration, as a part-time bookkeeper for B.E. American, which operated a retail store in downtown Los Angeles. By 1990 B.E. American had opened five retail stores in various locations throughout Los Angeles. Seyedan's duties included

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[1] As we must, we state the facts in the manner most favorable to the judgment, resolving all conflicts and drawing all reasonable inferences in favor of Seyedan. (*Zanone v. City of Whittier* (2008) 162 Cal.App.4th 174, 178; accord, *Thompson v. Miller* (2003) 112 Cal.App.4th 327, 330; see *Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 925.)

reviewing bank statements and recording all money received and spent by the company. She also assisted Ebrahimi with some aspects of his personal finances. Although she was authorized to sign Ebrahimi's signature on various documents and to endorse checks transmitted to bank accounts, she never signed outgoing checks on his behalf. Through the years Seyedan worked for Ebrahimi, he frequently borrowed money for his business activities, including from Seyedan and other employees. Seyedan never borrowed money from Ebrahimi.

In 1987 Ebrahimi invited Seyedan to become a partner with him in purchasing a commercial property on Vermont Avenue in Los Angeles. They agreed the property would be held in Ebrahimi's name and he would pay all expenses. Seyedan contributed 20 percent of the $540,000 purchase price in exchange for a 20 percent interest in the property. She and Ebrahimi subsequently purchased two more properties in the Palmdale area. On December 29, 1989, at Ebrahimi's suggestion and as dictated by him in Farsi, they executed a joint venture agreement detailing Seyedan's interest in particular properties. According to Seyedan, they contemplated holding the properties for a maximum of 10 to 15 years but no minimum term of investment. A full accounting would be postponed until after the properties were sold.

Although one of the properties mentioned in the joint venture agreement was never purchased, Ebrahimi and Seyedan purchased 14 additional properties in Las Vegas between January and May 1990.[2] In 1994 Ebrahimi sold the Vermont Avenue property purchased in 1987 for a substantial profit. Ebrahimi asked Seyedan if he could invest her share of the profits to expand his business, with accounts to be settled later; she agreed. One of the Las Vegas properties was sold in 1998, again at a substantial profit. In December 1998 Seyedan left her employment with Ebrahimi's company to help in her

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[2] Like the earlier properties, title to the Las Vegas properties was held by Ebrahimi and his wife and not by Seyedan. Three of the Las Vegas properties also reflected an ownership interest held by Iradge "Jim" Pazargad, who had brought the properties to Ebrahimi's attention. In January 1993 Pazargad asked Seyedan and Ebrahimi to buy out his interest in two of the properties, and they agreed to do so because he had failed to make his share of the payments.

family's businesses. Ebrahimi offered her $600,000 for her interest in the joint venture at that time. Seyedan declined, believing the offer was too low.

Over the next few years Ebrahimi gave occasional updates to Seyedan about the status of the joint venture properties. In 2004 he informed her he had sold a property and wanted to know if she was interested in selling her share for $400,000. Seyedan declined, asking him why he thought she would accept $400,000 when she had rejected $600,000 six years earlier. Instead, she said she would rather wait and go over the accounting "when the time comes." Ebrahimi agreed.

In August 2005 Seyedan saw Ebrahimi at a graduation party. Again, he offered to buy her out for $600,000. She responded, "I think this is the time to sit down and go over all the numbers. . . . I'm not going to accept this $600,000 without any supporting documents." Ebrahimi answered, "At this time this is my offer . . . take it or leave it." Soon thereafter, Seyedan retained counsel to request an accounting. Ebrahimi did not respond. Her counsel sent a second and then a third letter asking for the accounting records regarding the properties. Ebrahimi ignored all requests.

On January 16, 2007 Seyedan filed suit. The operative complaint alleged causes of action for breach of contract, breach of fiduciary duty, fraud, conversion and money had and received and sought an accounting, imposition of a constructive trust and declaratory relief. Ebrahimi cross-complained, alleging that the checks reflecting Seyedan's purported contributions to the joint venture were "part of an elaborate scheme" to steal money from his company by creating "an impression that the money was part of an investment rather than repayment of loans or monies taken through her embezzlement."

Trial began on June 30, 2008. Seyedan testified extensively about the joint venture and documented its existence with a copy of the original agreement, checks written by her between 1987 and 1997 to Ebrahimi, B.E. American or the Nevada Tax Collector, as well as ledgers and bank statements reflecting the joint venture's performance. She also testified Ebrahimi's refusal to acknowledge the agreement and his breach of trust had profoundly affected her self-esteem and had caused her emotional distress.

Ebrahimi, on the other hand, denied the joint venture had ever existed and disputed Seyedan's version of their conversations. He claimed the checks Seyedan wrote reflected repayments of loans he "always" made to her or her husband, loans that were never documented because of his trust of her. He started to lose that trust in 1993 when he began to believe she was stealing from him, but he nonetheless failed to discipline her or exercise more vigilance over the company's accounts. Ebrahimi attempted to elicit evidence relating to Seyedan's bias against him (Ebrahimi is Jewish and Seyedan is Muslim); however, the court excluded any reference to religion and refused to allow (under Evidence Code section 352) deposition statements by Pazargad indicating Seyedan harbored a bias against Ebrahimi because of his religion, wealth and unwillingness to spend his money.

Each side called a handwriting expert regarding the validity of Ebrahimi's signature on the joint venture agreement. Seyedan's expert testified the signature was "probably" Ebrahimi's and that, even though Seyedan had occasionally signed documents for Ebrahimi, she "probably" did not prepare his signature on the agreement. Ebrahimi's expert testified there were "very strong indications" Ebrahimi did not sign the agreement but there was also a low probability Seyedan had authored the signature.

After the close of evidence the court granted Seyedan's motion for nonsuit on all causes of action contained in Ebrahimi's cross-complaint and on certain of his defenses, including the statute of limitations. On July 17, 2008, after conferring for less than one full day, the jury unanimously found in Seyedan's favor on her claims for breach of contract and breach of fiduciary duty, awarding her $7,238,027 in economic damages and $966,793 in noneconomic damages, for a total of $8,204,820. The jury also awarded Seyedan $7,238,027 in money had and received, rejected Ebrahimi's remaining affirmative defenses and found by clear and convincing evidence he had acted with malice, oppression or fraud.

Having stipulated to bifurcate the trial of the punitive damages claim, the parties agreed to conduct discovery on Ebrahimi's net worth and start the second phase of the trial, before the same jury, on August 13, 2008. Because of Ebrahimi's health, the second

phase of the trial was ultimately continued to November 3, 2008. Ebrahimi filed for bankruptcy on October 27, 2008. As part of a stipulation to relieve the bankruptcy stay, the parties set the amount of the punitive damages award at $1.125 million. Based on the stipulation, the court released the jury on the morning of November 3, 2008. Ebrahimi objected, arguing, although he had agreed to the amount of punitive damages, he was nonetheless entitled to have the jury determine whether any punitive damages at all should be awarded. The court ruled Ebrahimi had waived any right to a jury for the punitive damages phase of the trial and ordered punitive damages fixed at $1.125 million. On December 19, 2008 the court entered judgment in the amount of $9,329,820, plus prejudgment interest and costs, and on February 17, 2009 denied Ebrahimi's motions for new trial and judgment notwithstanding the verdict.

CONTENTIONS

Ebrahimi first contends he is entitled to a new trial because the court erred in granting nonsuit on his statute of limitations defense. He also claims that multiple incorrect evidentiary rulings deprived him of a fair trial; the noneconomic damages award was not supported by the evidence; and he was denied his right to a jury trial on whether punitive damages should have been awarded. Ebrahimi also contends, and Seyedan agrees, the damage award for money had and received was improper.

DISCUSSION

1. *The Trial Court Did Not Err in Granting Nonsuit on Ebrahimi's Statute of Limitations Defense*

    a. *Standard of review for nonsuit motions*

"'The granting of a motion for nonsuit is warranted when, disregarding conflicting evidence, giving [the nonmoving party's] evidence all the value to which it is legally entitled, and indulging in every legitimate inference that may be drawn from the evidence, the trial court determines that there is no evidence of sufficient substantiality to support a verdict in [his or her] favor . . . .'" (*Kidron v. Movie Acquisition Corp.* (1995) 40 Cal.App.4th 1571, 1580; accord, *Lopez v. City of Los Angeles* (2011) 196 Cal.App.4th 675, 684-685.) "'Although a judgment of nonsuit must not be reversed if [the nonmoving

party's] proof raises nothing more than speculation, suspicion, or conjecture, reversal is warranted if there is "some substance to [the nonmoving party's] evidence upon which reasonable minds could differ. . . ."'" (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1124-1125; see *Kidron*, at p. 1580 ["[m]ere conjecture or nonsensical interpretations of evidence are not sufficient to overturn a nonsuit"]; *Ritschel v. City of Fountain Valley* (2006) 137 Cal.App.4th 107, 115.) "The decision about what inferences can permissibly be drawn by the fact finder are questions of law for determination by the court, inasmuch as an inference may not be illogically and unreasonably drawn, nor can an inference be based on mere possibility or flow from suspicion, imagination, speculation, supposition, surmise, conjecture or guesswork." (*Kidron*, at pp. 1580-1581.)

Appellate review of an order granting a motion for nonsuit must be based upon the whole record, not only the excerpts chosen by the appellant. (*Kidron v. Movie Acquisition Corp*., *supra*, 40 Cal.App.4th at p. 1581.) In addition, although resolution of the applicable limitations period generally presents a question of fact for the jury, when the uncontradicted facts are susceptible of only one legitimate inference, a court may determine the issue as a matter of law. (See *Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 487 (*Romano*); *Butcher v. Truck Ins. Exchange* (2000) 77 Cal.App.4th 1442, 1470; see also *Estate of Fincher* (1981) 119 Cal.App.3d 343, 351 [affirming trial court's refusal to submit statute of limitations defense to jury].)

b. *The parties' contentions*

Ebrahimi asserts the trial court's order of nonsuit on his statute of limitations defense usurped the jury's role on the inherently factual question whether Seyedan was put on notice of his alleged breach of fiduciary duty—and her cause of action therefore accrued—when, as she testified, he offered to buy her out in 1998 and 2004 for amounts she believed were grossly inadequate. According to Ebrahimi, causes of action arising from breach of a joint venture agreement accrue "'when the plaintiff discovers or should have discovered all facts essential to [her] cause of action.'" (*April Enterprises, Inc. v. KTTV* (1983) 147 Cal.App.3d 805, 826; see also *Parker v. Walker* (1992) 5 Cal.App.4th

1173, 1190 [statute of limitations began to run when defendant co-venturer "refused to acknowledge" plaintiff's entitlement to assets of joint venture].) If Seyedan had been put on notice of Ebrahimi's alleged breach of duty in 1998 or even in 2004, Ebrahimi argues, the two-year statute of limitations expired in 2006,[3] more than a year before Seyedan filed her lawsuit. At the very least, he claims, the factual issue of accrual should have been resolved by the jury.

Seyedan responds that Ebrahimi is asking the wrong question. The essential inquiry, she asserts, is whether Ebrahimi effectively repudiated the joint venture agreement sufficient to breach the joint venture agreement and trigger the two-year statute of limitations prior to 2005 or whether Seyedan was permitted to ignore his earlier buyout offers and allow the joint venture to run to its conclusion. (See, e.g., *Romano, supra,* 14 Cal.4th at pp. 488-490.)

c. *The accrual of Seyedan's causes of action*

"A cause of action for breach of contract does not accrue before the time of breach." (*Romano, supra,* 14 Cal.4th at p. 488.) "Nonetheless, if a party to a contract expressly or by implication repudiates the contract before the time for his or her performance has arrived, an anticipatory breach is said to have occurred." (*Id*. at p. 489.) "When a promisor repudiates a contract, the injured party faces an election of remedies: he can treat the repudiation as an anticipatory breach and immediately seek damages for breach of contract, thereby terminating the contractual relation between the parties, or he can treat the repudiation as an empty threat, wait until the time for performance arrives and exercise his remedies for actual breach if a breach does in fact occur at such time. [Citation.] However, if the injured party disregards the repudiation and treats the contract as still in force, and the repudiation is retracted prior to the time of performance, then the repudiation is nullified and the injured party is left with his remedies, if any, invocable at the time of performance." (*Taylor v. Johnston* (1975) 15 Cal.3d 130, 137-138; accord,

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[3] The parties agree the two-year limitations period established by Code of Civil Procedure section 339 (breach of an oral contract) governs the breach of contract cause of action in this case.

Romano, at pp. 489-490; *Central Valley General Hosp. v. Smith* (2008) 162 Cal.App.4th 501, 515; *Mammoth Lakes Land Acquisition, LLC v. Town of Mammoth Lakes* (2010) 191 Cal.App.4th 435, 463; *Ferguson v. City of Cathedral City* (2011) 197 Cal.App.4th 1161, 1168-1169.)

Ebrahimi argues two factual issues were improperly withheld from the jury due to the nonsuit order: (1) because the written joint venture agreement was silent on the question of duration, the jury could have found it expired before 2005; and (2) once Ebrahimi repudiated Seyedan's interest in the joint venture with his buyout offer in 1998 (and again in 2004), the statute of limitations accrued and expired before she filed her lawsuit. Both of these arguments lack merit.

To begin with, there is no *disputed* issue of fact related to the duration of the joint venture agreement. Ebrahimi disavowed the existence of the joint venture; according to him the original agreement did not exist and the 1998 and 2004 conversations reported by Seyedan never occurred. The jury, however, rejected his testimony and found Ebrahimi had entered into a joint venture agreement with Seyedan and had then breached the agreement by failing to share with her the profits of the venture. The *only* evidence as to the duration of the agreement was provided by Seyedan. She testified it was their "anticipation . . . to keep these properties between 10 to 15 years." There is no evidence to the contrary.

When a joint venture agreement is silent as to its duration, it will ordinarily remain in effect until its purpose has been accomplished or it has been expressly extinguished. (See *April Enterprises v. KTTV*, *supra,* 147 Cal.App.3d at p. 821; *Leonard v. Rose* (1967) 65 Cal.2d 589, 592 ["[w]here no time is specified for performance, a person who has promised to do an act in the future and who has the ability to perform does not violate his agreement unless and until a demand for performance is made and performance is refused"].) Seyedan's testimony about the duration of the joint venture hardly constitutes express evidence of a definitive termination date. Moreover, not all of the properties purchased under the joint venture had been sold prior to 2005, an event that might have

signaled the formal termination of the joint venture.[4] Thus, the original purpose of the venture—to purchase real property and hold the properties for a period of time as an investment— had not yet been accomplished. At most, assuming, as Seyedan testified, the parties intended the joint venture to terminate between 10 to 15 years after their last joint purchase, the agreement was intended to continue until sometime in 2005, at which point Seyedan was entitled to an accounting and winding up of the relationship.[5] The lawsuit, filed in January 2007, was timely.

Alternatively, Ebrahimi argues Seyedan's breach of contract cause of action accrued when she was put on notice of his repudiation of the contract in 1998, at which time he asked if she was "willing to just terminate this joint venture at this time, and you go on with your life and I go on with my life." This statement, however, is not a clear repudiation that obligated Seyedan to immediately pursue her remedies. (See *Taylor v. Johnston, supra,* 15 Cal.3d at p. 137 [express repudiation must be "clear, positive, unequivocal refusal to perform"; implied repudiation results from conduct by promisor making substantial performance of promise impossible]; see also *Gherman v. Colburn* (1977) 72 Cal.App.3d 544, 566-567 [repudiation found when defendants denied existence of joint venture and plaintiffs' interest in it].)

Ebrahimi's invocation of the delayed discovery rule to establish an early accrual of Seyedan's contract cause of action is simply misconceived. That rule, when applicable, defers or extends the date of accrual, which generally occurs at the time of breach, to avoid a miscarriage of justice. The rule, most often discussed in tort cases, charges plaintiffs with presumptive knowledge of an injury if they have "'"'information of circumstances to put [them] *on inquiry*'"'" or if they have "'"'*the opportunity to obtain knowledge* from sources open to [their] investigation.'"' [Citation.] In other words,

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[4] The parties stipulated before trial the net proceeds from the properties already sold totaled $9,306,758 and the combined value of all properties still held was $16,808,750.

[5] When a joint venture is terminated, either by consent or conduct incompatible with its continuance, the parties remain obligated to divide the assets, usually through an accounting. (See *Griffeth v. Fehsel* (1943) 61 Cal.App.2d 600, 604-605.)

plaintiffs are required to conduct a reasonable investigation after becoming aware of an injury, and are charged with knowledge of the information that would have been revealed by such an investigation." (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 807-808, fn. omitted.)

We applied the discovery rule to a contract claim in *April Enterprises v. KTTV, supra,*147 Cal.App.3d 805 not to bar a plaintiff's cause of action for breach of contract but to preserve it when the plaintiff did not discover the destruction of its property (the erasure of videotapes) until long after its occurrence. As we explained, the injury was "difficult for the plaintiff to detect"; the defendant was in "a far superior position to comprehend the act and the injury"; and the defendant "had reason to believe the plaintiff remained ignorant he had been wronged." (*Id.* at p. 831; see also *Gryczman v. 4550 Pico Partners, Ltd.* (2003) 107 Cal.App.4th 1, 5-6 [explaining "application of the [delayed] discovery rule [in *April Enterprises*] was not governed by the presence of deliberate concealment or a heightened level of duty to the plaintiff but by two overarching principles: '[P]laintiffs should not suffer where circumstances prevent them from knowing they have been harmed' and 'defendants should not be allowed to knowingly profit from their injuree's ignorance.'"].) Although we recognized repudiation of a joint venture agreement can commence the running of the statute of limitations, we noted "the acts of repudiation must be clear and unequivocal." (*April Enterprises*, at p. 824, fn. 10.) We construed the defendant's threat to erase the tapes as mere "bargaining tactics made in the context of contract negotiations." (*Ibid*.)

Similarly, Ebrahimi's buyout offers did not constitute express repudiations of the joint venture; to the contrary, they were reasonably perceived by Seyedan as nothing more than bargaining tactics. She decided, as was her right, to wait for the date of performance before pursuing her available remedies. (See *Romano, supra,* 14 Cal.4th at pp. 489-490.)

In sum, because there were no facts that would have permitted the jury to reasonably conclude Seyedan's lawsuit was untimely, the trial court did not err in granting Seyedan's motion for nonsuit on Ebrahimi's statute of limitations defense.

2. *Evidentiary Rulings*

Trial court rulings on the admissibility of evidence, whether in limine or during trial, are generally reviewed for abuse of discretion. (*People v. Williams* (1997) 16 Cal.4th 153, 196-197 ["In determining the admissibility of evidence, the trial court has broad discretion. . . . On appeal, a trial court's decision to admit or not admit evidence, whether made in limine or following a hearing pursuant to Evidence Code section 402, is reviewed only for abuse of discretion."]; *People v. Alvarez* (1996) 14 Cal.4th 155, 201, ["appellate court reviews any ruling by a trial court as to the admissibility of evidence for abuse of discretion"]; *Zhou v. Unisource Worldwide, Inc.* (2007) 157 Cal.App.4th 1471, 1476.) "The trial court's error in excluding evidence is grounds for reversing a judgment only if the party appealing demonstrates a 'miscarriage of justice'—that is, that a different result would have been probable if the error had not occurred." (*Zhou,* at p. 1480; accord, *Pannu v. Land Rover North America, Inc.* (2011) 191 Cal.App.4th 1298, 1317 (*Pannu*); see Evid. Code, § 354; Code Civ. Proc., § 475.)

a. *The Pazargad deposition excerpts*

Iradge Pazargad, Ebrahimi's contact in Las Vegas who had assisted in locating certain property and who had originally held an interest in several of the Las Vegas properties, was unavailable for trial. Based on Pazargad's unavailability, Ebrahimi sought to read portions of his deposition into the record. The court allowed Ebrahimi to play a 23-minute excerpt from Pazergad's deposition after the parties negotiated—line by line—multiple objections to his testimony.

i. The disparaging religious comments

Certain of Pazargad's statements were excluded because the court had previously granted Seyedan's motion in limine to exclude evidence about the parties' religion—she is Muslim; Ebrahimi is Jewish. Ebrahimi opposed the motion, in part because he intended to introduce evidence that, in a conversation with Pazargad about Ebrahimi's refusal to give her a raise, Seyedan had made a comment about "Jewish people making a lot of money, but they . . . don't want to spend their money." She also made "a statement along the lines

of 'let's take some of our money back from these Jews."[6] Pressed about the statements at his deposition, Pazargad continued, "[Y]ou know, she was unhappy. She was frustrated because she would see Mr. Ebrahimi having a good life. He's making money . . . . He's building a home. . . . And . . . she was living in an apartment with two kids and a husband who is not working." Pazargad stated he had informed Ebrahimi about this conversation. The court granted the motion in limine, explaining that "as despicable, vulgar, gross and unacceptable" as the comments were, it did not want religion to become an issue in the case. As the court stated, "It appears as though these two people from different religions were close friends until they basically had a divorce, and I don't think there is any need to go into that under [Evidence Code section] 352."

Ebrahimi contends on appeal the court's rulings prevented him from showing Seyedan's bias against Ebrahimi and her dishonesty. While we agree the reported comments were odious, we cannot say the decision to exclude them, in light of the circumstances in which they were made and the risk of injecting tangential vitriol into the trial, was an abuse of discretion.

ii. The "in-my-hand" comment

Pazargad also purportedly testified at his deposition he had heard Seyedan say, "I have Ebrahimi in my hand. I can handle him very well." The statement is included in the reporter's transcript of a hearing during which the court considered which excerpts from Pazargad's deposition could be played for the jury. The original deposition transcript, however, with the statement attributed to Seyedan in context, has not been provided in the record on appeal. Without a more complete record, we cannot conclude the trial court abused its discretion in excluding this comment. "It is axiomatic it is the appellant's

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[6] There is some question whether this remark indicated Seyedan's demand for a kickback from Pazargad on a real estate commission. The court excluded as hearsay Pazargad's statement he told Ebrahimi his secretary was "demanding money from me," but allowed Pazergad to testify he had given Seyedan "a share of his commission," which he described as "very little . . . not that much." The court declined to allow further unspecified conversations on the grounds of "relevance and time and hearsay." Ebrahimi has failed to show the trial court abused its discretion in making these rulings.

responsibility to provide an adequate record on appeal." (*Lincoln Fountain Villas Homeowners Assn. v. State Farm Fire & Cas. Ins. Co.* (2006) 136 Cal.App.4th 999, 1003, fn. 1.) "[F]ailure to do so 'precludes adequate review and results in affirmance of the trial court's determination.'" (*Ibid.*)

b. *The unauthorized blanket discovery exclusion*

"The Civil Discovery Act . . . warns . . . that the failure to respond to discovery, or the making of evasive responses to discovery, is not condoned. The '[f]ail[ure] to respond . . . to an authorized method of discovery' ([Code Civ. Proc.,] § 2023.010, subd. (d)), and '[m]aking an evasive response to discovery' (§ 2023.010, subd. (f)) are defined as '[m]isuses of the discovery process.' (§ 2023.010.) But the *sanctions* for misuse of the discovery process are limited '[t]o the extent authorized by the chapter governing any particular discovery method or any other provision of [the Civil Discovery Act].' (§ 2023.030.)" (*Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 333) "Thus, in the absence of a violation of an order compelling an answer or further answer, the evidence sanction may only be imposed where the answer given is *willfully false.* The simple failure to answer, or the giving of an evasive answer, requires the propounding party to pursue an order compelling an answer or further answer—otherwise the right to an answer or further answer is waived and an evidence sanction is not available. '[T]he burden is on the propounding party to enforce discovery. Otherwise, no penalty attaches either for the responding party's failure to respond or responding inadequately.'" (*Id.* at p. 334.)

Ebrahimi alleges the trial court imposed an unauthorized evidentiary sanction when it granted Seyedan's motion in limine to exclude all evidence not produced in discovery and improperly relied on that order to exclude evidence proffered by Ebrahimi at trial. Ebrahimi cites two examples of evidence excluded by the court, which we address separately.

i. The Pazargad document

In June 2007 Seyedan propounded numerous requests for production of documents including "[a]ny and all written agreements between YOU and any third parties RELATING TO properties YOU own" and "[a]ny and all DOCUMENTS which reflect

the terms" of such agreements (RFP Nos. 49 and 50). (See Code Civ. Proc., § 2031.010.) In response, Ebrahimi sought a protective order relieving him of any obligation to produce documents until after his deposition had been taken. The motion was summarily rejected by the trial court on October 25, 2007. Ebrahimi made an initial production of documents on October 31, 2007, but provided no substantive responses to RFP Nos. 49 and 50. He later refused to supplement his responses.

At his deposition in January 2008, Ebrahimi denied having any written agreements with Pazargad.[7] Shortly after the deposition Seyedan moved to compel further responses to written discovery, including RFP Nos. 49 and 50. Pending a hearing on the motion, Ebrahimi repeated his objections to those requests but agreed to produce any responsive documents in his possession, custody or control.[8] A copy of the Pazargad agreement was produced by Ebrahimi in conjunction with other documents in February 2008, after the discovery cutoff. Neither party realized the Pazargad agreement had been produced.

On March 26, 2008, in anticipation of an April 16, 2008 trial date, Seyedan moved in limine to exclude any witnesses or evidence not disclosed in Ebrahimi's discovery responses. The trial, meanwhile, was trailed until June 23, 2008. Sometime in April Ebrahimi's counsel again provided the Pazargad agreement to Seyedan. At the pretrial hearing on June 23, 2008, the court granted Seyedan's in limine motion.

At trial, over Seyedan's objections, Ebrahimi testified he had entered into attorney-prepared written agreements with various partners in real estate ventures and proffered the Pazargad document. In a sidebar following Seyedan's objection that the document had not been produced during discovery, Ebrahimi's counsel advised the court he had obtained the document from Pazargad in March and produced it to Seyedan in April. The court excluded the document on the ground it had not been timely produced. As the court

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[7] At his deposition Pazargad also denied having any such documents.

[8] At an intervening hearing on discovery issues, the trial court had expressed its displeasure with Ebrahimi's counsel and stated, "There's games being played, my time is being wasted and I'm going to order a meet and confer . . . . And that means you've got to turn over what you've got."

explained, "This is such an important document if it's dealing with the actual property that's alleged to be part of the joint venture. It's just not fair to have it admitted now."

In reviewing this order for an abuse of discretion, we consider only those facts the parties made known to the court. Accordingly, the apparent production of the document in February 2008 is irrelevant to the court's ruling because Ebrahimi's counsel failed to properly advise the court of its production.

More fundamentally, Ebrahimi's failure to produce the Pazargad agreement before the discovery cutoff in response to Seyedan's repeated document demands and his deposition testimony denying the existence of the document, which he directly contradicted at trial six months later, remove the court's order from the restrictions imposed by the Civil Discovery Act. (*Saxena v. Goffney*, *supra*, 159 Cal.App.4th at pp. 333-334.)[9] As the *Saxena* court recognized, an evidentiary sanction may be imposed when an answer given in discovery is "*willfully false*." (*Id.* at p. 332; see *New Albertsons, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1403, 1424-1426 [discussing cases approving nonmonetary sanctions for misuse of discovery process even if such sanctions not expressly authorized by statute].) "The general rule that we glean from these opinions is that if it is sufficiently egregious, misconduct committed in connection with the failure to produce evidence in discovery may justify the imposition of nonmonetary sanctions even absent a prior order compelling discovery, or its equivalent. Furthermore, a prior order may not be necessary where it is reasonably clear that obtaining such an order would be futile." (*New Albertsons*, at p. 1426.) It is clear from the record the trial court concluded Ebrahimi's conduct justified the evidentiary sanction imposed. There was no abuse of discretion.

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[9] The *Saxena* court explained "misuse of the discovery process" includes failing to respond to an authorized method of discovery (Code Civ. Proc., § 2023.010, subd. (d)) and making an evasive response to discovery (Code Civ. Proc., § 2023.010, subd. (e)), but not giving a willfully false answer, which is "a circumstance not specifically dealt with in the Civil Discovery Act." (*Saxena v. Goffney*, *supra*, 159 Cal.App.4th at pp. 333-334.)

ii. The Gharakhani testimony

Ebrahimi also contends the court abused its discretion by excluding the testimony of Abdolamir Gharakhani, a former store manager for B. E. American, who supposedly would have testified he did not trust Seyedan, who had disliked Ebrahimi intensely and had ample opportunity to steal money from him. Ebrahimi failed to disclose Gharakhani as a witness in written discovery, and Seyedan objected when Ebrahimi called Gharakhani to testify at trial. Asked for an offer of proof by the court, Ebrahimi's counsel stated Gharakhani would testify he worked for Ebrahimi in the 1980's and had "interactions" with Seyedan about "cash collections from the safe" and "reconciliation of those receipts to her accounting records." Ebrahimi's counsel provided the court with a declaration signed by Gharakhani addressing his proposed testimony. After reviewing the declaration, the court concluded the statements contained in the declaration were inadmissible.[10]

We agree. Having reviewed the declaration describing Gharakhani's anticipated testimony, there is nothing in the declaration that was not properly excluded under multiple provisions of the Evidence Code, including sections 352 (court's discretion to exclude evidence when probative value outweighed by its danger of undue prejudice or jury confusion), 787 (specific instances of conduct inadmissible to attack credibility of witness) and 1101, subdivision (a) (evidence of character inadmissible to prove conduct on specific occasions).

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[10] The declaration stated Gharakhani had been employed by Ebrahimi at B.E. American from approximately 1985-1987; Seyedan was in charge of the accounting and ran the office; Ebrahimi trusted her a great deal, "but I believe that he trusted Ms. Seyedan too much"; when there was a discussion about money being short on one occasion, she told him not to worry about it because Ebrahimi had a lot of money; she was often in the store alone; her husband's business was not good and she was struggling to make money; Ebrahimi was a "good, helpful and generous person"; Seyedan gave Gharakhani cash advances when he needed them; and she never told him she had a partnership with Ebrahimi. Counsel advised the court Gharakhani would actually testify Seyedan had said, "This motherfucker has plenty of money."

c. *The NCR check duplicates*

Seyedan moved in limine to exclude two original NCR (carbon-style) impressions of two 1993 checks purportedly drawn on bank accounts Seyedan managed for Ebrahimi. The carbon-copy duplicates reflect checks for $100,000 made out to Seyedan and purportedly signed by Ebrahimi. According to Ebrahimi, these duplicates evidenced Seyedan's "serious and intentional malfeasance" in the oversight of Ebrahimi's finances. Ebrahimi was unable to produce any other evidence the checks reflected in the duplicates had ever existed, let alone that they had been negotiated by his bank.

Before deciding the motion, the trial court conducted an admissibility hearing under Evidence Code section 402, at which Seyedan was questioned. Seyedan acknowledged she had had access to Ebrahimi's checkbooks and had prepared most of the other checks in the book. She also acknowledged the date on one of the duplicates was in her handwriting. The remainder of the writing on the duplicates was not in her handwriting; nor did she recognize the handwriting. She testified she was convinced, based on other episodes, Ebrahimi had forged the duplicates. The trial court excluded the check duplicates on several grounds, including lack of authentication and Evidence Code section 352.

Ebrahimi argues the court erred in concluding the duplicates could not be properly authenticated under Evidence Code section 1400.[11] According to Ebrahimi, the duplicates themselves are original documents maintained by his business, and the inability to identify authorship is not determinative of authenticity: "[A]uthentication, correctly understood, may involve a preliminary showing that the writing is a forgery or is a writing found in particular files regardless of its authorship. [Citation.] When the requisite preliminary showing has been made, the judge admits the writing into evidence for consideration by

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[11] Evidence Code section 1400 provides: "Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law." Evidence Code section 1401 provides: "(a) Authentication of a writing is required before it may be received in evidence. [¶] (b) Authentication of a writing is required before secondary evidence of its content may be received in evidence."

the trier of fact." (Cal. Law Revision Com. com., 29B pt. 4 West's Ann. Evid. Code (1995 ed.) foll. § 1400, p. 440.) Ebrahimi insists the trial court abused its discretion and effectively resolved his cross-complaint by excluding the duplicates.

The authenticity of the duplicates, however, is not the determinative issue here; relevance is. (See Evid. Code, §§ 210, 350.) The proffered evidence is probative of nothing; all one can reasonably deduce from the impressions shown on the duplicates is that someone, at some time, purported to write checks for two very large amounts of money.[12] From the duplicates alone, the jury could not determine whether an actual check was written, by whom it was written, whether it was forged, whether it was negotiated or whether it was destroyed. Under these circumstances the court did not abuse its discretion by excluding them under Evidence Code section 352.

d. *Nassirbegli's rebuttal testimony*

Ebrahimi challenges the admission of a portion of the testimony of Seyedan's sister-in-law, Mojgan Nassirbegli, who was called by Seyedan as a rebuttal witness, as inadmissible hearsay. Nassirbegli, who stated she had long known about Seyedan's investment of her family's finances with Ebrahimi, testified she had accompanied Seyedan to the 2005 graduation party attended by Ebrahimi. According to Nassirbegli, Ebrahimi came to the table where she and Seyedan were sitting. He complimented Seyedan, who introduced him to Nassirbegli and her husband, and engaged in pleasant conversation with those at the party. After dinner, while Nassirbegli was dancing with her husband, she saw Ebrahimi again approach Seyedan at the family's table. By the time Nassirbegli returned to the table, Ebrahimi had left. Seyedan was "visibly upset" and told Nassirbegli Ebrahimi had offered her $600,000 for her investments. The entire family left the party immediately after this encounter.

Seyedan's comment to Nassirbegli after her encounter with Ebrahimi was certainly hearsay, a statement offered to prove a joint venture existed and a buyout offer had been

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[12] The court noted after reviewing several of the checkbooks produced by Ebrahimi that virtually all of the duplicates, other than those at issue here, reflected checks drawn for amounts under $5,000.

made. (See Evid. Code, § 1200, subds. (a) & (b) [hearsay is "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated"].) Seyedan acknowledges as much, but argues it was admissible under the hearsay exception for spontaneous utterances. (See Evid. Code, § 1240.)[13]

Under the spontaneous utterance exception, "[a] statement may be admitted, though hearsay, if it describes an act witnessed by the declarant and was 'made spontaneously while the declarant was under the stress of excitement caused by' witnessing the event. [Citation.] '"To render [statements] admissible [under the spontaneous declaration exception] it is required that (1) there must be some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it."'" (*Melkonians v. Los Angeles Civil Service Com.* (2009) 174 Cal.App.4th 1159, 1169 (*Melkonians*).)

Spontaneous statements are deemed sufficiently trustworthy to be admitted into evidence because "'"'in the stress of nervous excitement the reflective faculties may be stilled and the utterance may become the unreflecting and sincere expression of one's actual impressions and belief.'"'" (*People v. Gutierrez* (2009) 45 Cal.4th 789, 809-810.) "The crucial element in determining whether a statement is admissible as a spontaneous statement is the mental state of the speaker. [Citation.] 'The nature of the utterance—how long it was made after the startling incident and whether the speaker blurted it out,

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[13] Evidence Code section 1240 provides: "Evidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception."

for example—may be important, but solely as an indicator of the mental state of the declarant.'" (*Melkonians, supra*, 174 Cal.App.4th at p. 1169.)

The record does not reveal the basis for the trial court's ruling. Nonetheless, we cannot say it was an abuse of discretion to allow Nassirbegli to repeat the statement. The most significant aspect of Nassibegli's testimony was her corroboration that Seyedan was separately approached by Ebrahimi and became visibly upset by the conversation, facts disputed by Ebrahimi, his wife and a third party guest who testified she never saw Seyedan and Ebrahimi alone together. That aspect of her testimony was not hearsay. The lone statement reflecting Ebrahimi's $600,000 buyout offer was made to Nassirbegli immediately after the confrontation, which apparently upset Seyedan enough to cause her to leave the party with her family. Whether she was sufficiently distressed by Ebrahimi's offer to make her own statement admissible under the spontaneous utterance exception is exactly the kind of question committed to the discretion of the trial court. On the record presented, we find no abuse of that discretion.

3. *There Is Adequate Evidence To Support the Jury's Award of Noneconomic Damages*

"Appellate review of a factfinder's award of damages is limited." (*Pannu v. Land Rover North America, Inc., supra*, 191 Cal.App.4th at p. 1321.) The amount of damages is a question of fact, committed to the discretion of the fact finder, in this case the jury. (*Seffert v. Los Angeles Transit Lines* (1961) 56 Cal.2d 498, 506-507.) "In examining the sufficiency of the evidence to support an award of damages, it is not required that we be able to precisely recreate the jury's reasoning." (*Pellegrini v. Weiss* (2008) 165 Cal.App.4th 515, 532.) As long as an award is within the range of possibilities supported by the testimony (*id.* at p. 532), we "'can interfere . . . only on the ground that the verdict is so large that, at first blush, it shocks the conscience and suggests passion, prejudice or corruption on the part of the jury.' [Citations.] [¶] In assessing a claim that the jury's award of damages is excessive, we do not reassess the credibility of witnesses or reweigh the evidence. To the contrary, we consider the evidence in the light most favorable to the judgment, accepting every reasonable inference and resolving all conflicts in its favor."

(*Westphal v. Wal-Mart Stores, Inc.* (1998) 68 Cal.App.4th 1071, 1078; see also *Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 64 [damages are excessive "'"where recovery is so grossly disproportionate as to raise a presumption that it is the result of passion or prejudice"'"]; *Hilliard v. A.H. Robins Co.* (1983) 148 Cal.App.3d 374, 414 [trial court's determination on motion for new trial on the issue of excessive damages is usually upheld].)

A plaintiff who suffers a substantial financial injury may recover damages for mental or emotional distress resulting from that injury if the plaintiff can demonstrate the injury was caused by the defendant's intentional or reckless conduct. (*Branch v. Homefed Bank* (1992) 6 Cal.App.4th 793, 800.) However, application of this rule is limited to circumstances in which physical injury results and to certain cases involving the breach of fiduciary duties. (*Id.* at p. 800; see also *Sutherland v. Barclays American/Mortgage Corp.* (1997) 53 Cal.App.4th 299, 316 [emotional distress damages are not available in a standard breach of contract action].) When the parties have a preexisting fiduciary relationship, such as the joint venture relationship here, the emotional distress that might result from the breach of the fiduciary's duty is considered reasonably foreseeable. (*Cooper v. Superior Court* (1984) 153 Cal.App.3d 1008, 1012-1013.)

Even in those cases where recovery of damages for emotional distress is potentially available, however, a plaintiff may be awarded damages only for emotional distress that is objectively serious: "Serious emotional distress is such that '"a reasonable [person], normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case."'" (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 989, fn. 12; see *Commercial Cotton Co. v. United California Bank* (1985) 163 Cal.App.3d 511, 517 ["injuries suffered must be severe, i.e., substantial or enduring as distinguished from trivial or transitory"], disapproved on another ground in *Copesky v. Superior Court* (1991) 229 Cal.App.3d 678.) "[T]he essential question is one of proof . . . ." (*Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916, 929-930.) "'In cases other than where proof of mental distress is of a medically significant nature,

[citations] the general standard of proof required to support a claim of mental distress is some guarantee of genuineness in the circumstances of the case.'" (*Id.* at p. 930.)

Ebrahimi claims there was insufficient evidence to support Seyedan's claim of noneconomic damages in this case. He argues the jury's award of $966,793—the exact amount of interest sought by Seyedan—is suggestive of an improper and irrational verdict on those damages.[14]

Without question Seyedan's testimony in support of the emotional distress caused by Ebrahimi's conduct is sparse.[15] We cannot, however, doubt the sincerity of Seyedan's testimony at this juncture. The trial court had ample opportunity to do so and declined to modify the award, even in its role as the 13th juror considering Ebrahimi's motion for a new trial. (See *Seffert v. Los Angeles Transit Lines, supra*, 56 Cal.2d at p. 506.) Nor does it appear to us to be unreasonable for Seyedan to have been seriously emotionally distressed when Ebrahimi rejected her request for an accounting and it became apparent he had no intention of returning her investment. As the jury no doubt inferred from her testimony, as the person in charge of her family's finances, she was ashamed, humiliated, embarrassed and angry, as well as worried about the weakened financial position of her family. (See, e.g, *Young v. Bank of America* (1983) 141 Cal.App.3d 108, 114 [emotional

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[14] Ebrahimi also correctly observes Seyedan is not entitled to recover damages for emotional distress that is caused by the litigation itself. (See Civ. Code, § 47, subd. (b); *Silberg v. Anderson* (1990) 50 Cal.3d 205, 210-211.)

[15] Her entire testimony on the topic is contained on two pages of the reporter's transcript: "The past few years it has been the hardest of my life. I have sacrificed a lot of time being with my family by traveling lengthy hours in the hope of providing a better life for my family and my children. Mr. Ebrahimi, he lied to me and he has lied to me and deceived me, and he has taken opportunities away from me. I think that I have been used and I have been abused. As I'm sitting here, I'm thinking about this matter from the time that I wake up, up to the time that I go to bed. I am not the same person. I have lost trust in others, which is far different from the person that I was—that I once was. I had control of my parents' financ[es]. I had control of my own family's financ[es], and now when it comes to a financial decision, they have second thoughts. His deceit has caused me emotional distress, financial agony, financial hardship and physical agony and pain and frustration, so I think—I mean, I have had the worst past three years of my life. It has had a lot of impact on my self-esteem and a lot of problem—impact on my health and sanity."

injury "may include 'all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry and nausea'"].)

As for Ebrahimi's challenge to the correlation between the award for emotional distress and the interest sought by Seyedan, he has failed to establish the jury engaged in misconduct in setting the award. The absence of evidence on this issue, as well as the trial court's denial of Ebrahimi's motion for a new trial, lead us to conclude the award was within the "range of possibilities" supported by the evidence and not the result of passion or prejudice.

4. *The Court Did Not Err in Awarding Punitive Damages Pursuant to the Parties' Stipulation and Denying a Further Jury Trial*

a. *The provisions governing bifurcation of punitive damages*

Civil Code section 3294, subdivision (a), permits the recovery of punitive damages in an action for the breach of a noncontractual obligation when clear and convincing evidence establishes the defendant "has been guilty of oppression, fraud, or malice." To ensure a punitive damages award has a "'deterrent effect—without being excessive,'" a plaintiff has the burden to establish the defendant's financial condition at trial. (*Kelly v. Haag* (2006) 145 Cal.App.4th 910, 915.) "[A]ctual *evidence* of the defendant's financial condition is essential." (*Ibid.*)

To protect defendants from the premature disclosure of their financial position (see *Medo v. Superior Court* (1988) 205 Cal.App.3d 64, 67; *City of El Monte v. Superior Court* (1994) 29 Cal.App.4th 272, 276), Civil Code section 3295, subdivision (d), provides that "[t]he court shall, on application of any defendant, preclude the admission of evidence of that defendant's profits or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud in accordance with Section 3294. Evidence of profit and financial condition shall be admissible only as to the defendant or defendants found to be liable to the plaintiff and to be guilty of malice, oppression, or fraud. Evidence of profit and

financial condition shall be presented to the same trier of fact that found for the plaintiff and found one or more defendants guilty of malice, oppression, or fraud."

"[I]n practice bifurcation under this section means that all evidence relating to the *amount* of punitive damages is to be offered in the second phase, while the determination whether the plaintiff is *entitled* to punitive damages (i.e., whether the defendant is guilty of malice, fraud or oppression) is decided in the first phase along with compensatory damages." (*Holdgrafer v. Unocal Corp.* (2008) 160 Cal.App.4th 907, 919-920.)

b. *The facts relevant to the court's ruling*

In keeping with the statutory procedure, the parties stipulated to bifurcate the issue of punitive damages pursuant to Civil Code section 3295, subdivision (d). Instructing the jury at the first-phase trial, the court stated, "If you decide that Ebrahimi's breach of fiduciary duty or fraud caused Seyedan harm, you must decide whether that conduct justifies an award of punitive damages, and that's only if you decide whether there was a breach of fiduciary duty. At this time you must decide whether Seyedan has proved by clear and convincing evidence that Ebrahimi engaged in that conduct with malice, oppression or fraud. *The amount of punitive damages, if any, will be decided later*."[16] [Italics added.] The court then continued to read the standard definitions of malice, oppression and fraud. In closing argument, with no objection from the defense, Seyedan's counsel explained that "[p]unitive damages are awarded to punish someone for bad conduct and to deter them from acting like that in the future. . . . What we must have convinced you about is that there was despicable conduct. Conduct that is vile. Conduct that reasonable people would look down upon that was . . . in conscious, meaning knowing, and willful disregard for the rights of somebody else. . . . When you think about what Mr. Ebrahimi has done her by denying this contract and stonewalling Ms. Seyedan . . . he has acted in a manner that is both despicable and in conscious and willful disregard of her legal rights. And I would ask you to return a verdict that *she is entitled to punitive*

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[16] In an aside, the court stated, "I wonder if I should read this later? Oh, this is first phase. Okay."

damages on that issue." (Italics added.) Ebrahimi's counsel did not address the question of punitive damages.

In a section entitled "Punitive damages," the special verdict form provided to the jurors read, "As to Seyedan's claims for Breach of Fiduciary Duty or Fraud, do you find by clear and convincing evidence, as that term has been explained to you, that Ebrahimi acted with malice, oppression or fraud[?]" The jury answered "Yes" to this question.

After the reading of the verdict, the court instructed the jurors they had not yet been released and ordered them to return four weeks later, on August 13, 2008, to hear testimony regarding Ebrahimi's net worth in order to decide "punitive damages." On the late afternoon of August 12, 2008, Ebrahimi's counsel informed the court Ebrahimi had been hospitalized for heart problems and would not appear the next day for the punitive damages phase of the trial. The trial was continued to October 6, 2008. On October 3, 2008 the court indicated it was inclined not to resume trial based on a letter received from Ebrahimi's treating physician documenting the extent of Ebrahimi's health problems and requesting special medical accommodations in the courtroom. Ebrahimi's counsel also advised the court his client was considering bankruptcy and was not willing to waive the punitive damages phase of the trial.[17] On October 6, 2008, after conferring with Ebrahimi's physician, the court continued the trial until November 3, 2008.

On October 27, 2008 Ebrahimi filed a petition for federal bankruptcy protection. The same day Seyedan filed a motion for relief from the automatic stay to permit her to proceed with the punitive damages phase of the trial and to permit entry of judgment in the state court action. Over the next week the parties negotiated a resolution of that motion, which resulted in relief from the stay "for all purposes by all of the Parties (including, without limitation, all trial and posttrial proceedings and appeals), except that Seyedan may not enforce the judgment in the non-Bankruptcy action outside of this

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[17] Discussing these issues, defense counsel stated, "[I]n a punitive damages phase, what have we got to decide? We've got to decide the defendant's financial condition, the defendant's net worth and third, what is the importance of deterren[ce] . . . in terms of assessing punitive damages."

[Bankruptcy] Court, unless and until this Court orders otherwise or this bankruptcy case is dismissed." Seyedan and Ebrahimi also stipulated to the amount of punitive damages, "the last item left to deal with the jury."

The stipulation recites that the jury had determined Ebrahimi "had acted with fraud, oppression or malice and that Seyedan was therefore entitled to punitive damages," and provides, "In lieu of having the jury determine the amount of punitive damages," in the [action], the parties agree that the amount of punitive damages will be set in the sum of [$1,125,000]. . . . The Parties may not challenge the amount of (as opposed to Seyedan's entitlement to) punitive damages as agreed to herein. However, [Ebrahimi] preserves any rights he may have to challenge Seyedan's entitlement to the award of any punitive damages, including by way on nonsuit or directed verdict, if available. This paragraph is not intended to enlarge or contract the rights of the Parties to challenge or defend Seyedan's entitlement to punitive damages. To the extent that Seyedan's entitlement to punitive damages in the [action] is voided, reversed or overturned, then the Parties' Stipulation herein as to the amount of punitive damages shall have no further force or effect."

The parties promptly provided the court with a copy of the stipulation. Based on the stipulation, shortly before the scheduled November 3, 2008 hearing, the court directed the clerk to contract the jurors and release them because the issue of amount of punitive damages had been resolved. When the parties appeared at the hearing, Ebrahimi's counsel objected, claiming he had the right to place the issue before the jury, which retained the discretion to award no punitive damages. The court ruled the issue had been waived and set the punitive damages award at $1.125 million.

c. *The court did not err in finding Ebrahimi had waived his challenge to the amount of punitive damages*

The language of the stipulation is clear: The jury determined Seyedan was entitled to an award of punitive damages; the amount of punitive damages is set at $1.125 million; and Ebrahimi preserves the right to challenge Seyedan's entitlement to those damages, but

not the amount, in post-trial and appellate proceedings. The trial court's construction of the stipulation was correct, as was its finding of waiver.[18]

To be sure, although the jury had already concluded Ebrahimi's conduct warranted an award of punitive damages, it is conceivable he could have painted a financial portrait at the second-phase trial that might have convinced the jurors to award nothing on the claim. But it was his decision to remove the issue from the jury by stipulating to $1.125 million. The circumstances make it evident Ebrahimi's team of experienced trial and bankruptcy counsel understood the risks at hand when they negotiated the stipulation. By limiting the award to $1.125 million, Ebrahimi avoided incurring a potentially higher award from the same jurors who had rejected every claim he made during the first phase of the trial.

DISPOSITION

The award of $7,238,027 for money had and received is vacated. In all other respects the judgment is affirmed. Seyedan is to recover her costs on appeal.

PERLUSS, P. J.

We concur:

ZELON, J. JACKSON, J.

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[18] The fundamental goal of contract interpretation is to give effect to the mutual intention of the parties as it existed at the time they entered into the contract. (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264; accord, *Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865; see also Civ. Code, § 1636.) That intent is interpreted according to objective, rather than subjective, criteria. (*Wolf v. Walt Disney Pictures & Television, supra,* 162 Cal.App.4th at p. 1126.) When the contract is clear and explicit, the parties' intent is determined solely by reference to the language of the agreement. (Civ. Code, §§ 1638 ["language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity"]; 1639 ["[w]hen a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible"].) The words are to be understood "in their ordinary and popular sense" (Civ. Code, § 1644), and the "whole of [the] contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." (Civ. Code, § 1641.)