DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

MEDIA SERVICES LIMITED, a St. Kitts and Nevis Corporation, Plaintiff/Appellee, v. CORY MICHAEL HARRIS; PURE VERGE, LLC; JUNE AN; KIMBERLY SCOTT fka KIMBERLY AN, Defendants/Appellants.	)	1 CA-CV 09-0454 DEPARTMENT A **MEMORANDUM DECISION** Not for Publication – (Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2004-005095

The Honorable Kristin Hoffman, Judge
The Honorable J. Kenneth Mangum, Judge

AFFIRMED

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June An, Appellant, *In Propria Persona* — San Diego, CA

B A R K E R, Judge

¶1 Defendants Corry Harris, Kimberly An Scott, and Pure Verge, L.L.C. appeal from the superior court's entry of judgment in the amount of $14,191,880 and attorneys fees of $616,670. The court entered the judgment following a jury verdict for fraud and punitive damages and a court finding of alter ego. For the reasons set forth below, we affirm.

Facts and Procedural History

¶2 This case arises out of allegations by Plaintiff, Media Services Limited ("Media"), that Defendants Cory Harris, June An,[1] Kimberly Scott,[2] and Pure Verge, L.L.C. ("Defendants") defrauded Media of millions of dollars via a complex credit card processing scheme. In 2002, Media contracted with a Belize company, ePoint Processing, Ltd. ("ePoint Belize"), for ePoint Belize to process credit card payments for Media. We note ePoint Belize is not a party to this lawsuit. It was wholly owned by Defendant Pure Verge, L.L.C., an Arizona company wholly owned in turn by Defendants June An and Cory Harris.

[1] Defendant June An filed a Notice of Appeal on his own behalf, but failed to file an opening brief. We therefore dismiss this appeal as to June An.

[2] Defendant Kimberly Scott is a defendant by virtue of being married to Defendant June An at the time of the events.

¶3 The contract between Media and ePoint Belize provided that Media would remit credit card payments to ePoint Belize which would in turn exchange the card charges for cash payments from various large "upstream" international banks. Subsequently, ePoint Belize would pay Media the balance of the credit card payments, minus processing fees. The agreement also provided that ePoint Belize would hold 10% of the charges in reserve for "chargebacks."[3] The contract emphasized that ePoint Belize would not remit any funds to Media that it had not in turn received from the upstream banks. Therefore, if an upstream bank declined to pay money on the credit card charges to ePoint Belize, ePoint Belize would not pay Media for those charges.

¶4 In November of 2002, ePoint Belize and Media entered into their contract, and ePoint Belize stopped processing transactions under this agreement in January of 2003 after processing $17,327,635 in payments. Media alleged that ePoint Belize was still withholding $2,522,085 in processing funds. Additionally, ePoint Belize had declined to pay Media any portion of its $1,732,764 in reserves. Defendants alleged that they had not paid this money due to high chargebacks on Media's

[3] Chargebacks occur when a customer disputes a credit card charge and receives a refund of the money the customer paid.

account throughout that period and because the upstream banks had not paid all charges due to ePoint Belize.

¶5 Media sought to prove that instead of being held by upstream banks the money had been transferred by Defendants into their own personal accounts. Media also claimed that its chargeback total had been under $15,000 – far less than the $2.3 million in reserves being retained by ePoint Belize – and that Defendants had appropriated the reserve money.

¶6 At trial, Media called fact witnesses Martin Kenney and Berndt Klose. Martin Kenney was a lawyer for the now-bankrupt ePoint Belize estate's liquidator. Berndt Klose was an attorney hired by Media to investigate the whereabouts of the money owed to Media by ePoint Belize. Both witnesses became involved in the investigation after all the allegedly fraudulent activity had occurred.

¶7 Witness Kenney testified to numerous facts establishing Media's fraud claim. Among other things, he testified that: ePoint Belize owed Media $4.2 million, funds were missing and diverted from the company to Defendants Cory Harris and June An who personally took this money, ePoint Belize had received monies from upstream sources and had not paid Media, and ePoint Belize had incorrectly inflated the amount of "chargeback" money on Media's account by the upstream banks.

¶8 Witness Klose testified, among other things, that: nothing substantiated ePoint Belize's claim that it had never received the upstream money due to Media, he was "certain" that the upstream banks did not have the money due to Media, his investigation was based on banking records received from third parties, Defendants owed Media $4.2 million, his investigations showed wire transfers from Media into Defendants' personal accounts, and he had reviewed bank records from ePoint Belize and had been able to determine how much many it had received. Kenney and Klose based their testimony on, and authenticated, numerous documents. These included invoices from upstream banks to ePoint Belize and bank statements from ePoint Belize and Defendants.

¶9 In April of 2005, Media obtained a $4,286,173 judgment against ePoint Belize in the Belize Supreme Court.[4] Media then brought suit in this case against Defendants as the alter ego of ePoint Belize. The superior court rendered judgment against Defendants for $14,191,880 (including punitive damages of $2,600,000) and attorneys' fees of $616,670. Defendants timely appealed. We have jurisdiction under Arizona Revised Statute ("A.R.S.") section 12-2101(B) (2003).

[4] The Supreme Court of Belize is not the final Belizean court. Supreme Court findings are appealable to the Belizean Court of Appeal, and then to the Privy Council.

Discussion

1. Disclosure

¶10 Defendants argue that the trial court committed reversible error by allowing Kenney and Klose to testify because Kenney and Klose were untimely disclosed under Rule 26.1 of the Arizona Rules of Civil Procedure. As described below, Defendants failed to timely raise this objection in the trial court. Therefore, we find no error in the trial court's ruling.

¶11 Defendants initially disclosed their witness list on September 16, 2005, more than thirty months before trial. The disclosure listed seven individuals and nine "entities." The entity witnesses were listed by the name of the entity followed by the designation "person most knowledgeable." Witness number four was designated as "ePoint Belize, person most knowledgeable," and witness number thirteen was "Media Services Limited, person most knowledgeable." From our perspective, such a disclosure is completely inadequate. However, Defendants did not object to this disclosure.

¶12 Two weeks prior to trial, Defendants claimed that they learned for the first time that Media would be calling Kenney, an attorney for ePoint Belize's liquidator, as the "person most knowledgeable" on behalf of ePoint Belize, and Klose, Media's attorney, as "person most knowledgeable" on behalf of Media. It was not until this point that Defendants objected to Media's

proposed testimony on disclosure grounds. The trial court denied Defendants' request to exclude the testimony.

¶13 Arizona's disclosure rules and sanctions were not meant to thwart the goal of maximizing a likelihood of a decision on the merits "by encouraging litigants to lie in wait for their opponents to miss a deadline and then use that momentary transgression to get a case effectively dismissed." *Allstate Ins. Co. v. O'Toole*, 182 Ariz. 284, 287, 896 P.2d 254, 257 (1995). When disclosure rules have been violated, but a party does "nothing to remind [the party] of [its] obligation and ma[kes] no additional requests for the information," a trial court may admit the challenged testimony. *Id.* at 289, 896 P.2d at 258.

¶14 Here, Defendants waited for two and a half years to object to Media's disclosure statements. They then attempted to object to the disclosure two weeks before trial in an effort to exclude Media's key witnesses. Defendants are not permitted to lie in wait for two and a half years before responding to deficient disclosures. We note, too, that the trial court limited the testimony to the subject matter that was disclosed. Accordingly, the trial court did not commit reversible error in admitting Kenney and Klose as witnesses.

2. Foundation for Admitted Documents

¶15 Defendants argue that numerous documents were admitted into evidence erroneously because they were improperly authenticated. Defendants contest admission of document exhibits numbered: 4 and 5 (accounting statements from "upstream" banks to ePoint Belize containing the payout and chargeback amounts on ePoint's accounts); 9, 10, and 11 (banking records of ePoint Belize); 12 (wire transfer records used in Klose's investigation); and 27 (a judgment from a Belizean court against ePoint Belize in favor of Media). Witness Klose provided the foundation for ePoint Belize's banking statements (Exhibits 10 and 11) and the wire transfer records (Exhibit 12). Witness Kenney provided the foundation for the upstream bank accounting statements and some of the banking records (Exhibits 4, 5, and 9).

¶16 The authentication requirement "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Ariz. R. Evid. 901(a). We defer heavily to the trial court's determination of foundational adequacy. *See State v. Thompson*, 166 Ariz. 526, 527, 803 P.2d 937, 938 (App. 1990) ("The sufficiency of the foundation for the authentication of a document is within the trial court's discretion."). If the trial court's finding on foundation is based on an incorrect ruling, we will affirm the

determination if the finding could have properly been based on other grounds. *Id.*

¶17 Rule 901(a) calls for "evidence sufficient to support a finding." Ariz. R. Evid. 901(a). This suggests that evidence of authenticity must be non-hearsay and otherwise admissible. 1 Arizona Practice Series, Law of Evidence § 901:3 (2009). But when the subject of authentication is real evidence, such as a document, the court may look to the face of the item in question for information bearing on its authentication determination. 31 Charles Alan Wright & Victor James Gold, Federal Practice and Procedure § 7104 (2010) (analyzing the Federal counterpart to 901(a)); *see Thompson*, 166 Ariz. at 527, 803 P.2d at 938 (holding that sufficient authentication evidence to admit prison "pen pack" existed when the defendant's "name was on all the separate items in the exhibit; the fingerprints, physical description, and birth date matched appellant, as did the date of the prior offense"); *see also United States v. One 56-Foot Yacht Named Tahuna*, 702 F.2d 1276, 1284-85 (9th Cir. 1983) (holding that a diary was properly authenticated based on examination of the diary itself). This method of authentication is supported by Rule 901(b)(4) stating that a document may be authenticated by "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." Ariz. R. Evid. 901(b)(4); *see*

31 Charles Alan Wright & Victor James Gold, Federal Practice and Procedure § 7104 n.10 (2010).

¶18 Assuming, for the sake of argument, that Kenney's testimony alone was insufficient to authenticate the documents, the trial court could still admit the documents because they appeared to be what they purported to be. *See id.* Defendants have given no reason as to how the trial court would have abused its discretion in determining that exhibits 4, 5, 9-12, and 27 appeared to be accounting statements, bank statements, wire transfer records, and a Belizean judgment.

¶19 Defendants also assert that the documents were admitted in violation of hearsay rules. But the only authority that Defendants cite in their opening brief for the hearsay argument pertains to authentication challenges. Defendants make no assertion in their opening brief that the business records exception, Rule 803(6), is at issue. Defendants first assert this rule in their reply brief. Therefore, insofar as it pertains to the business records exception, the hearsay argument is insufficiently supported for appellate review and is waived. *See State v. Lopez*, 223 Ariz. 238, 240, ¶ 6, 221 P.3d 1052, 1054 (App. 2009) ("'The rule that issues not clearly raised in the opening brief are waived' serves 'to avoid surprising the parties by deciding their case on an issue they did not present' and to prevent the court from 'deciding cases with no research

assistance or analytical input from [both] parties.'") (quoting *Meiners v. Indus. Comm'n,* 213 Ariz. 536, 538 n.2, 145 P.3d 633, 635 n.2 (App. 2006)); Ariz. R. Civ. App. P. 13(a)(6) (mandating that the opening brief "contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on"). Thus, based on the issues as framed in this appeal, we cannot say that the trial court committed reversible error by admitting the documents.

3. Testimony of Kenney and Klose

¶20 Defendants also argue that we should reverse the trial court's decision because the testimony of Kenney and Klose was hearsay and not based on personal knowledge. We disagree. Much of Kenney's and Klose's testimony was merely recitations and basic interpretations of financial exhibits, the admission of which we have already upheld. Moreover, the court permitted Kenney and Klose to testify as fact witnesses only and not as experts. Indeed, upon Defendant's request, the court expressly announced to the jury that Kenney was testifying as a fact witness.

(At the Bench)

The Court: Go ahead.

Mr. Jensen: Your Honor, they're qualifying him as a fraud expert, which is

> exactly what he is, which is the concern that we had all along.
>
> The Court: He is not going to be qualified as a fraud expert. He is not testifying as an expert. His testimony will not be that of an expert. If you want me to explain that to the jury, I will.
>
> Mr. Jensen: I would ask that.
>
> The Court: Thank you.
>
> (Whereupon, the following proceedings took place in open court:)
>
> The Court: All right. The record will reflect that this witness is not an expert witness. He's a fact witness.

Thus, the testimony was intended to be directly linked to documents in evidence. The court enforced this limitation on both Kenney and Klose by actively excluding testimony that crossed the line into expert testimony.

¶21 To the extent that the scope of Kenney's and Klose's testimony exceeded that permitted by a fact witness, the error was not reversible because Defendants were not prejudiced. We will not reverse based on improper testimony unless the error is prejudicial. *Brown v. U.S. Fid. & Guar. Co.*, 194 Ariz. 85, 88, 977 P.2d 807, 810 (App. 1998). Here, any improper testimony was duplicated by Plaintiff's expert forensic accountant, Eric Lane. Lane testified that ePoint overcharged Media for the amount of chargebacks, that the upstream banks were not holding funds due to Media, and that funds due to Media were transmitted to the

personal accounts of June An and Cory Harris. Given the overlap between Lane's testimony and the testimony of Kenney and Klose, we cannot say that absent potentially improper portions of Kenney's and Klose's testimony the jury would have reached a different verdict. Therefore, to the extent that there was error in the scope of Kenney's and Klose's testimony, the error was not reversible.

4. Alter Ego

¶22 Defendants claim that the trial court erred when it made a finding of alter ego and liability after the jury found breach of contract between ePoint Belize and Media. Essentially, Defendants claim that the jury should have been required to make the alter ego finding before it found Defendants personally liable for ePoint's breach of contract. The only legal authority Defendants cite states that the existence of a contract must be proven by offer, acceptance, definiteness of terms, and consideration, and that the trier of fact must determine whether a contract exists. They cite to *Firchau v. Barringer Crate Co.*, 86 Ariz. 215, 222, 344 P.2d 486, 490-91 (1959), and *K-Line Builders, Inc. v. First Federal Savings & Loan Ass'n*, 139 Ariz. 209, 212, 677 P.2d 1317, 1320 (App. 1983). Neither authority supports the contention that a court must make alter ego findings before it finds primary liability. *See Firchau*, 86 Ariz. at 222, 344 P.2d at 490-91; *K-*

Line Builders, 139 Ariz. at 212, 677 P.2d at 1320. On the record before us there was more than sufficient evidence to support the alter ego determination.

5. Punitive Damages

¶23 Finally, Defendants argue that we should reverse the trial court's entry of punitive damages. We disagree. The jury found that Defendants were guilty of fraud, conversion, negligence, negligent misrepresentation, and breach of contract. The jury, however, did not find actual damages for any claim except the breach of contract claim; it entered the damages for the remaining claims as "$0." Defendants argue that punitive damages are rarely available for breach of contract and that breach of contract was the only claim under which damages were awarded.

¶24 Although punitive damages are generally unavailable in a contract claim, they are available in cases where the breach was brought about by fraud. *Rhue v. Dawson*, 173 Ariz. 220, 232, 841 P.2d 215, 227 (App. 1992) ("[B]oth fraud and deliberate, overt, dishonest dealings will suffice to sustain punitive damages."). Here, the jury found that Defendants had committed deliberate fraud. The documents and testimony discussed above adequately support this finding. Therefore, the award of punitive damages is affirmed.

Conclusion

¶25 For the foregoing reasons, the decision of the trial court is affirmed. Pursuant to A.R.S. § 12-341.01(A), Media is also awarded reasonable attorneys' fees for this appeal in an amount to be determined in compliance with Arizona Rule of Civil Appellate Procedure 21.

/s/
_____
DANIEL A. BARKER, Judge

CONCURRING:

/s/
_____
DONN KESSLER, Presiding Judge

/s/
_____
JON W. THOMPSON, Judge