Filed 7/29/09

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

ROBERT D. WHITE et al.,

Plaintiffs and Appellants,

v.

TERRY E. HARPER CRIDLEBAUGH et al.,

Defendants and Respondents.

F053843

(Super. Ct. No. CV258815)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Sidney P. Chapin, Judge.

Ana M. Soares for Plaintiffs and Appellants.

No appearance for Defendants and Respondents.

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*Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts I.C., II., III., IV. and V.

Homeowners sued a building contractor, supplier, surety, and individuals involved in the construction of their retirement home for breach of contract, negligence, fraud, and violations of California's licensure requirements. The trial court allowed certain theories against the building contractor to go to the jury but granted nonsuit and directed verdicts on the rest. The jury then found against the homeowners and for the building contractor. After entry of judgment against the homeowners, they appealed.

In the published portion of this opinion, we conclude the corporation that acted as the building contractor on the project violated California's licensure requirements and, based on that violation, the homeowners are entitled under Business and Professions Code section 7031, subdivision (b) (section 7031(b))[1] to recover all compensation paid to the contractor for the unlicensed work. Also, as a matter of statutory construction, we conclude that the recovery authorized by section 7031(b) may not be reduced by an unlicensed contractor's claim of offset for materials and services provided in connection with the unlicensed work. We note that the latter conclusion qualifies for publication because, among other things, some secondary authorities create the impression that an unlicensed contractor may assert offset as a defense to the liability imposed by section 7031(b).

In the unpublished portion of this opinion, we conclude that (1) the homeowners' pleading adequately stated their section 7031(b) reimbursement claim, (2) the homeowners failed to demonstrate the trial court committed reversible error in granting nonsuit on certain claims and directed verdicts on others, (3) the trial court's determinations regarding alter ego are supported by substantial evidence, (4) the trial court's exclusion of certain testimony under Evidence Code section 352 was not an abuse of discretion, (5) the surety was liable on its bond because of the contractor's statutory liability under section 7031(b), and (6) the homeowners, as the prevailing party, are entitled to recover their court costs from the contractor and the surety.

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[1] All further unlabeled statutory references are to the Business and Professions Code.

Accordingly, the judgment will be modified.

FACTS AND PROCEEDINGS

Robert D. White (White) and Carole K. White wanted to build a retirement home on an empty lot in Pine Mountain Club, California. Terry E. Harper Cridlebaugh (Cridlebaugh), Vickie Harper Cridlebaugh, Robert Paul Diani, JC Master Builders, Inc., and Building Technology are individuals and entities involved in the initial phases of building that home. Surety Company of the Pacific provided the contractor's bond for JC Master Builders, Inc.

The Construction Project

The Whites purchased the empty lot in Pine Mountain Club in 2005 for the purpose of building their retirement home. The Whites had been looking at log homes for a number of years, and White obtained estimates on log home packages.

The Whites met the Cridlebaughs at church. In February 2006 or earlier, Carole White attended a women's prayer meeting at their church and Vickie Cridlebaugh told her that they, the Cridlebaughs, desperately needed work. They prayed about it and decided that since the Whites needed to have a house built and the Cridlebaughs needed work, it might be a good fit. The Whites also went and looked at a log home that Cridlebaugh was building.

When they reached the point of entering a contract, White suggested a time and materials contract. Cridlebaugh drafted an initial contract which, after making a few changes, the parties signed on March 14, 2006. Prior to signing the contract, the parties reviewed the plans and specifications for the project. Although the contract listed the owners as the general contractor, White testified that his understanding with Cridlebaugh was that Cridlebaugh would do the actual work on the site and was responsible for reading the plans and doing the work on the drawings. They also discussed the foundation, which "was a slab on grade walkout first floor."

In March 2006, Cridlebaugh began work by clearing brush from the site. The rough grading was complete by April 21st. At about that time, White became concerned

with the amount of excavating that Cridlebaugh was doing and asked him to get a soils engineer to test the site. Cridlebaugh responded that he would know when to get a soil test.

Cridlebaugh excavated to a depth of seven feet or more. He testified that the excavation was necessary because of the top soil, the slope, and Kern County grading regulations. He also testified the excavation was consistent with the elevations indicated on the plans, which showed that the soil at one corner of the house was six and half feet lower than an uphill corner. In contrast, the Whites contend that the pad staking document prepared by Prewitt Land Surveying indicated a cut and fill excavation for the slab-on-grade pad for the first floor and that Cridlebaugh did not follow that document or the other plans. Also, White testified that JC Master Builders, Inc., substantially exceeded the budget that he, White, had established for site preparation.

White's concerns led him to request Cridlebaugh to subcontract the grading work to L & M Construction, which was familiar with the area and had equipment on the hill where the Whites' lot was located. White also asked Cridlebaugh to get a rebar contractor to do the rebar because Cridlebaugh did not have anyone experienced to do the work. White was concerned with paying Cridlebaugh to drive back and forth between the job site and Frazier Park, which is where Cridlebaugh bent the rebar. White believed the rebar should be bent on site.

White also was concerned with the billings he received from JC Master Builders, Inc., which he considered convoluted. For example, Cridlebaugh would convert the time of laborers he hired into time that was billed at his hourly rate. Cridlebaugh said it was easier to do on his computer than having a separate hourly rate for each laborer. With respect to billing for materials, the invoices showed a lump sum instead of indicating how many units of the material were used and the cost per unit. Also, the invoices indicated

the source of the material was Building Technology[2] and did not state where the items had been purchased. White asked Cridlebaugh for the invoices from the suppliers at least five times but they were not provided. White was concerned that unpaid suppliers might place a lien on the lot.

Through mid-May, 2006, White paid the bills of JC Master Builders, Inc., because "I had no reason to believe that they would not perform and keep their agreement to operate the business with … integrity …."

On June 19, 2006, White sent Cridlebaugh a memo confirming his oral instructions to Cridlebaugh to stop all construction activities until he provided the original documents requested by White to verify the billings. On June 22, 2006, White sent Cridlebaugh a letter stating that the relationship was finished. White testified that Cridlebaugh finished returning rebar and then stopped work.

On July 14, 2006, JC Master Builders, Inc., filed a mechanic's lien in the amount of $13,561.62 against the Whites' lot.

Contractor's License

A July 2006 printout from the Web site of the California State Licensing Board indicated that JC Masters Builders, Inc., was a corporation with a class A (general engineering contractor) and class B (general building contractor) license that was issued in October 2002 and would expire in October 2006. The contractor's license was No. 814144. The printout listed the contractor's bond as No. 6059576 issued by Surety Company of the Pacific in the amount of $10,000. The printout identified Robert Paul Diani as the qualifying individual and the responsible managing officer, who had certified that he owned 10 percent or more of the voting stock of the corporation.

Diani testified that (1) he was the registered owner of JC Master Builders, Inc., (2) he had been an absentee officer of the corporation, and (3) he had turned over any

[2]Cridlebaugh informed White that he owned Building Technology jointly with his wife Vickie.

dealings and daily work of JC Master Builders, Inc., to Cridlebaugh. Diani went to Peru in 2004 to act as an independent missionary. In the two and half years before his deposition, Diani had returned to the United States twice.

The last time Diani had taken active control of JC Master Builders, Inc., was prior to leaving in August 2004 and after that he had left all management and supervision decisions to Cridlebaugh. For example, Diani had not discussed the contract between the Whites and JC Master Builders, Inc., with Cridlebaugh until after the lawsuit was filed. Also, Diani had not been aware that Cridlebaugh had used JC Master Builders, Inc., to sue the Whites and place a mechanic's lien on their property.

Cridlebaugh has never held a California contractor's license.

Ownership and Control of JC Master Builders, Inc.

Diani testified that (1) he did not own any stock in JC Master Builders, Inc., (2) "Terry should own the stock," (3) he gave the stock to Cridlebaugh, and (4) he did not have any documents showing such a transfer of stock.

Cridlebaugh testified that he did not own any voting stock in JC Master Builders, Inc., and that Diani owned all of the voting stock. Cridlebaugh testified that JC Master Builders, Inc., held board of directors meetings and that Diani and he attended those meetings. Diani testified that board meetings had not been held in the last couple of years.

Cridlebaugh identified his roles with JC Master Builders, Inc., as chief financial officer, secretary, and employee.

Diani also testified that he did not receive any compensation or profits from JC Master Builders, Inc., and stated that he hoped Cridlebaugh was making an income from JC Master Builders, Inc., because that was why he let Cridlebaugh use the license.

PROCEEDINGS

In early August 2006, the Whites filed a complaint. Their operative pleading in this case is a second amended complaint that alleged 10 causes of action and named the Cridlebaughs, Diani, JC Master Builders, Inc., Building Technology, and Surety

Company of the Pacific as defendants. The causes of action were labeled (1) breach of contract, (2) negligence, (3) breach of express and implied warranties, (4) strict liability, (5) fraud, fraudulent transfer and concealment, (6) intentional and negligent misrepresentation, (7) construction and trade practice, state license law and action against surety, (8) punitive damages, (9) attorney fees and costs, and (10) alter ego theory.

In October 2006, JC Master Builders, Inc., filed a complaint against the Whites for breach of contract, quantum meruit, and foreclosure of the mechanic's lien for $13,561.62 it recorded against the Whites' parcel in mid-July 2006 (the mechanic's lien action).

The Whites filed a demurrer to JC Master Builders, Inc.'s complaint in the mechanic's lien action, contending the claims should have been asserted as a cross-complaint in their lawsuit. In January 2007, the trial court ordered the two actions consolidated, with the Whites' action being the lead case.

The jury trial began on July 2, 2007. The next day, the trial court held an Evidence Code section 402 hearing on defendants' motion in limine to exclude the testimony of Robert Rosen. Rosen also had entered into a contract with JC Master Builders, Inc., had become embroiled in a dispute with the company and Cridlebaugh, and had had a mechanic's lien recorded against his property. Counsel for the Whites argued that Rosen's experience shared 11 points in common with the Whites', and Rosen's testimony demonstrated a common plan or design, which qualified it for an exception to the general exclusion of character evidence contained in Evidence Code section 1101.[3] At the end of the hearing, the trial court granted the motion and excluded the testimony of Rosen.

[3]Rosen's project also involved construction of a log home and was located in nearby Lebec, California. The Whites contend Cridlebaugh employed the same tactics on Rosen, which included using Building Technology to double-charge Rosen, violating the contractor's license requirements on that project, and filing a mechanic's lien on Rosen's house after completion.

The Whites rested their case on July 9, 2007. Defendants began their case with Cridlebaugh's testimony, but the testimony was interrupted when the trial court considered two motions. First, the trial court denied as premature the Whites' motion for a directed verdict. Second, the trial court heard arguments on defendants' written motion for judgment of nonsuit. The court granted the motion for nonsuit on the fraudulent transfer and breach of express warranty claims and denied it as to all other claims.

On July 10, 2007, the testimony of Cridlebaugh was completed and the defense rested its case. The trial court admonished the jurors, told them to report at 1:00 p.m. the next day, and then discussed evidentiary issues with counsel. The court also severed the alter ego claim from the claims to be presented to the jury.

The next morning, counsel for the Whites filed a motion under Code of Civil Procedure section 630 for relief under Business and Professions Code section 7031. After hearing arguments on the motion and taking a recess to review the authorities cited, the trial court granted the Whites' motion for a directed verdict in the mechanic's lien action. The trial court orally explained its ruling as follows:

> "[I]t's not a matter of equity, it's not a matter of balance, it's a matter of policy behind the licensing laws and the results are harsh. They have become harsher since 200[1] with the amendment to that section because the Court's motion for directed verdict will include not only a judgement [*sic*] for dismissal of the affirmative claims of JC Master Builders, an order to dissolve the mechanic's lien, but an order for disgorgement of all amounts received under the contract by JC Master Builders; that being the $84,000 and change as provided in [section 7031(b)]. The sub paragraph speaking to recovery by the owner of the property."

The trial court discussed the potential harshness of this result, recognizing that the jury could conclude from the evidence and arguments that JC Master Builders, Inc., had done a good job and an appropriate job with the Whites getting a better place than originally contemplated.

In the afternoon, the trial court instructed the jury, and counsel for the parties presented their closing arguments. Out of the presence of the jury, the trial court heard

argument on the issues relating to the alter ego claims and took that matter under submission.

The jury returned its verdict during the afternoon of July 12, 2007. The verdict forms set forth the jury's findings with respect to specific questions regarding (1) breach of contract, (2) negligence, (3) intentional misrepresentation, (4) concealment, and (5) negligent misrepresentation.

The jury found JC Master Builders, Inc., did not conceal an important fact from the Whites or make a false representation of an important fact to the Whites. The jury also found for JC Master Builders, Inc., on the breach of contract claim, specifically finding (1) the Whites did not do substantially all of the things the contract required and (2) they were not excused from doing those things.

The jury determined JC Master Builders, Inc., was negligent, but the negligence was not a substantial factor in causing harm to the Whites. The verdict form for negligent misrepresentation shows the jury found that JC Master Builders, Inc., falsely represented an important fact to the Whites without a reasonable ground for believing the representation was true. The jury, by a ten-to-two vote, found JC Master Builders, Inc., did not intend the Whites to rely on the misrepresentation. As a result, the jury did not address whether the Whites reasonably relied on the misrepresentation or whether the misrepresentation was a substantial factor in causing harm to the Whites.

On July 16, 2007, the trial court filed a judgment on verdict, directed verdicts, and court's judgment on alter ego. The document (1) stated judgment was granted for the Whites in the mechanic's lien action based on the order granting their motion for directed verdict against JC Master Builders, Inc.; (2) ordered the mechanic's lien dissolved; and (3) pursuant to section 7031(b), stated JC Master Builders, Inc., was to reimburse the Whites $84,621.45, plus interest from and after July 1, 2006.

The document granted judgment in the Whites' action as follows. JC Master Builders, Inc., was granted judgment in its favor on all of the Whites' claims submitted to the jury. The Cridlebaughs, Diani, and Building Technology received judgment in their

favor and against the Whites on all causes of action, except the seventh and tenth, based on the orders granting motions for nonsuit and directed verdict. On the tenth cause of action (alter ego), the defendants received judgment in their favor based on the trial court's determination that the Whites did not carry their burden of proof. Surety Company of the Pacific was granted judgment in its favor and against the Whites on the seventh cause of action.

The parties subsequently filed memoranda of costs. The Whites requested costs totaling $7,764.10 and the defendants requested costs totaling $10,688.79. Each side also filed a motion to tax the costs requested by the other side. Ultimately, the trial court determined that the parties would bear their own costs.

In August 2007, each side filed a motion for new trial. Defendants also filed a motion for judgment notwithstanding the verdict. The trial court heard argument on these motions in late August, took them under submission, and issued its ruling on September 10, 2007.

The ruling is set forth in the register of action/docket that is part of the appellate record. The trial court denied both motions for a new trial and partially denied defendants' motion for judgment notwithstanding the verdict. The partial grant of JC Master Builders, Inc.'s motion for judgment notwithstanding the verdict vacated the prior judgment granting the Whites reimbursement of the money paid to JC Master Builders, Inc., which reimbursement was the only recovery the Whites had achieved in the litigation.

Also on September 10, 2007, the trial court filed an amended judgment on verdict, directed verdicts, and court's judgment on alter ego that reflected its rulings on the posttrial motions.

The Whites filed a notice of appeal and an amended notice of appeal later that month. The Whites filed an opening brief in September 2008. Defendants did not file a brief.[4]

DISCUSSION

I. Reimbursement under Section 7031(b)

A. Contentions and Issues Raised on Appeal

The Whites contend that the trial court erroneously granted JC Master Builders, Inc.'s motion for judgment notwithstanding the verdict on their claim for reimbursement under section 7031(b). They argue that the trial court correctly granted their motion for a directed verdict on that claim and request this court to reinstate the reimbursement award.

The trial court's reason for vacating the portion of the judgment that granted the Whites reimbursement is set forth in the register of actions:

> "Section 7031(b) specifically requires an affirmative claim be brought in court for such relief, i.e., reimbursement or disgorgement of compensation. The Whites never plead for that affirmative relief nor sought, timely or otherwise, to amend to seek such relief. J.C. Master Builders has been prejudiced by the lack of opportunity to litigate, at the very least, issues of offset and indemnity/contribution. [Citations.]"[5] (Some capitalization omitted.)

Based on the trial court's reasoning, the contentions raised by the Whites, and the lack of a respondents' brief, we conclude the issues presented to this court are (1) whether the Whites properly brought a claim for reimbursement under section 7031(b)

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[4]In late December 2008, the clerk of this court sent counsel for defendants the notice required by California Rules of Court, rule 8.220(a)(2), which stated that the appeal might be submitted for decision on the record and opening brief if a respondent's brief was not filed within 15 days. In mid-January and again in mid-February, this court granted defendants 30-day extensions to file their brief, the last of which stated no further extensions would be granted absent exceptional circumstances.

[5]The two cases cited by the trial court were *Ranchwood Communities Limited Partnership v. Jim Beat Construction Co.* (1996) 49 Cal.App.4th 1397 and *Marshall v. Von Zumwalt* (1953) 120 Cal.App.2d 807, both of which predate the 2001 amendment that added current section 7031(b) to the Contractors' State License Law (§ 7000 et seq.). (See fn. 9 & accompanying text, *post*.)

and (2) whether JC Master Builders, Inc., suffered prejudice, including the lack of opportunity to litigate issues of offset, indemnity and contribution. The first issue can be divided into two subissues: (1) Were the Whites, seeking reimbursement or disgorgement, required to plead specifically for such relief and (2) did the Whites' pleadings adequately allege the right to recover under section 7031(b).

B. Background on License Requirements for Contractors

1. Licensure requirement

The Contractors' State License Law (CSLL), section 7000 et seq., is a comprehensive legislative scheme governing the construction business in California. The CSLL provides that contractors[6] performing construction work must be licensed unless exempt. (§ 7026 et seq. & 7040 et seq.) "The licensing requirements provide minimal assurance that all persons offering such services in California have the requisite skill and character, understand applicable local laws and codes, and know the rudiments of administering a contracting business. [Citations.]" (*Hydrotech Systems, Ltd. v. Oasis Waterpark* (1991) 52 Cal.3d 988, 995.) The licensing requirement and the penalties for violating that requirement are designed to protect the public from incompetent or dishonest providers of building and construction services. (*Ibid*.)

When a corporation, such as JC Master Builders, Inc., applies for a contractor's license, it must qualify through either a "responsible managing officer" (RMO) or "responsible managing employee" (RME), who is, him or herself, eligible for the same license qualification. (§ 7068, subd. (b)(3).) The "qualifier" RMO or RME must be a bona fide officer or employee of the corporation and actively engaged in work encompassed by the license. (§ 7068, subd. (c).)

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[6]Section 7026 defines "contractor" to include "any person who … does himself or herself or by or through others, construct … any building …." The term "person" is defined broadly to include "an individual, a firm, copartnership, corporation, association or other organization, or any combination of any thereof." (§ 7025.)

Under section 7068.2, if the qualifier is disassociated from the licensed entity, the entity has 90 days to replace the qualifier. If the qualifier is not replaced, the contractor's license issued to the entity is automatically suspended. (*Ibid.*; *Wright v. Issak* (2007) 149 Cal.App.4th 1116, 1123.)

In this case, JC Master Builders, Inc., was not qualified for a contractor's license because (1) Diani was not actively engaged in its construction business after August 2004, (2) Cridlebaugh did not have a contractor's license, and (3) no replacement was ever qualified in Diani's place. Therefore, JC Master Builders, Inc.'s contractor's license was suspended by operation of law. (§ 7068.2.)

2. Penalties applied to unlicensed contractors

The CSLL encourages licensure by subjecting unlicensed contractors to criminal and civil penalties. The criminal provisions state it is a misdemeanor for a person without a license or an exemption to act in the capacity of a contractor. (§ 7028, subd. (a).) The civil penalties affect the unlicensed contractor's right to receive or retain compensation for unlicensed work.

a. The shield—collection actions prohibited

The CSLL shields persons who utilize the services of an unlicensed contractor from lawsuits by that contractor to collect payment for unlicensed work. Specifically, subdivision (a) of section 7031 provides:

> "Except as provided in subdivision (e), no person engaged in the business or acting in the capacity of a contractor, may bring or maintain any action, or recover in law or equity in any action, in any court of this state for the collection of compensation for the performance of any act or contract where a license is required by this chapter without alleging that he or she was a duly licensed contractor at all times during the performance of that act or contract, regardless of the merits of the cause of action brought by the person, except that this prohibition shall not apply to contractors who are each individually licensed under this chapter but who fail to comply with Section 7029."[7]

[7]The exception in subdivision (e) of section 7031 concerns situations where the contractor has substantially complied with the licensure requirement. The exception is narrowly

The California Supreme Court has given a broad, literal interpretation to the shield provision in section 7031: "Where applicable, section 7031(a) bars a person from suing to recover compensation for *any* work he or she did under an agreement for services requiring a contractor's license unless proper licensure was in place *at all times* during such contractual performance." (*MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc*. (2005) 36 Cal.4th 412, 419.) The Legislature's use of the phrase "in law or equity" and the unqualified terms "any" and "all" mean that section 7031, subdivision (a) applies "[r]egardless of the equities." (*Hydrotech Systems, Ltd. v. Oasis Waterpark, supra*, 52 Cal.3d at p. 997.) The statutory language demonstrates the Legislature's "intent to impose a stiff all-or-nothing penalty for unlicensed work …." (*MW Erectors, Inc.*, *supra*, at p. 426.) The statute's harsh results are justified by the importance of deterring violations of the licensing requirements. (*WSS Industrial Construction, Inc. v. Great West Contractors, Inc.*, *supra*, 162 Cal.App.4th at p. 596.)

b. The sword—disgorgement of pay for unlicensed work

In 2001, the Legislature complemented the shield created by subdivision (a) of section 7031 by adding a sword that allows persons who utilize unlicensed contractors to recover compensation paid to the contractor for performing unlicensed work. (Stats. 2001, ch. 226, § 1 (Assem. Bill No. 678).) Section 7031(b) provides that "a person who utilizes the services of an unlicensed contractor may bring an action in any court of competent jurisdiction in this state to recover *all* compensation paid to the unlicensed contractor for performance of any act or contract" unless the substantial compliance doctrine applies. (Italics added.) This provision was explained in part by an April 2001 Assembly Committee analysis of the bill, which stated:

> "According to the sponsor, this measure is intended to address the recent case of *Cooper v. Westbrook Torrey Hills, LP* (2000) 81 Cal.App.4th 1294, in which the court, in an unpublished portion of the opinion, referred

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drawn and has been described as rigid. (*WSS Industrial Construction, Inc. v. Great West Contractors, Inc.* (2008) 162 Cal.App.4th 581, 594, fn. 8.) It is not relevant in this litigation.

> to Section 7031(a) prohibiting an unlicensed contractor from recovering fees, but not requiring any refund of compensation already paid to the contractor. *Cooper* relied on *Culbertson v. Cizek* (1964) 225 Cal.App.2d 451, 473, in which the court permitted the unlicensed contractor to offset 'as a defense against sums due the plaintiffs any amounts that would otherwise be due Cizek under his contract.' This measure is intended to clearly state that those using the services of unlicensed contractors are entitled to bring an action for recovery of compensation paid. [¶]… [¶]
>
> "AB No. 678 constitutes an additional and consistent legislative determination that such deterrence can best be realized by compelling violators to return all compensation received from providing their unlicensed services. That rationale is reflected in the judicial decisions involving rejected attempts by unlicensed contractors to obtain payment based on knowledge of their unlicensed status by persons sued for non-payment of services rendered. That policy is furthered in AB No. 678 by specifically recognizing the capacity of an owner to recover money already paid an unlicensed contractor, even if the person knew the contractor was unlicensed. (Emphasis in original.)" (Assem. Com. on Judiciary, Analysis of Assem. Bill No. 678 (2001-2002 Reg. Sess.), as introduced Feb. 22, 2001, pp. 2-3, <http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab_0651-0700/ab_678_cfa_20010423_102730_asm_comm.html> [as of July 28, 2009].)

It appears section 7031(b) was designed to treat persons who have utilized unlicensed contractors consistently, regardless of whether they have paid the contractor for the unlicensed work. In short, those who have not paid are protected from being sued for payment and those who have paid may recover all compensation delivered. Thus, unlicensed contractors are not able to avoid the full measure of the CSLL's civil penalties by (1) requiring prepayment before undertaking the next increment of unlicensed work or (2) retaining progress payments relating to completed phases of the construction.

C. Pleading Requirements When Seeking Reimbursement[*]

1. Contents of second amended complaint

The Whites' pleadings did not affirmatively request the "reimbursement" or "disgorgement" of money paid to JC Master Builders, Inc., and did not specifically allege

[*]See footnote, *ante*, page 1.

a violation of section 7031(b). Instead, the prayer for relief in the Whites' second amended complaint requested "direct and consequential monetary damages and … such other relief as the court may deem just …."

The generality of the prayer for relief is countered in part by the specificity of allegations made elsewhere in the second amended complaint. In particular, paragraph No. 49 of the second amended complaint mentioned the funds the Whites paid to JC Master Builders, Inc. It alleged that the Whites paid defendants in excess of $84,000 on the contract prior to termination, and the "sums were misspent or misappropriated" by defendants.

2. Adequacy of the request for relief

The statutory language of section 7031(b) does not set forth any pleading requirements. It simply states that a person "may bring an action" to recover all compensation paid to an unlicensed contractor. (*Ibid*.) Consequently, the statutory language does not support the proposition that a plaintiff must specially plead "reimbursement" or "disgorgement" as a prerequisite to obtaining such relief.

Furthermore, general principles of pleading do not require such specificity. For instance, in a legal malpractice action where a plaintiff sought disgorgement of fees paid, the appellate court stated the plaintiff was not required to use the term "disgorgement" in her complaint. (*Slovensky v. Friedman* (2006) 142 Cal.App.4th 1518, 1536.) "Plaintiff's general prayer for 'such other and further relief as the Court may deem proper' was sufficient to plead entitlement to disgorgement as a remedy. [Citation.] The trial court erred by ruling that plaintiff had to specially plead disgorgement." (*Ibid*.)

Based on the foregoing authority, we conclude that the Whites' prayer for monetary damages and such other relief as the court may deem just, along with the specific allegation that the funds paid had been "misappropriated," were sufficient to request the recovery authorized by section 7031(b). Consequently, we conclude that the order granting JC Master Builders, Inc.'s motion for judgment notwithstanding the

verdict cannot be upheld on the ground that the Whites did not affirmatively request "reimbursement" or "disgorgement" of compensation paid.

3. Adequacy of the theories pled

The trial court may have based its ruling on the ground that the legal theories of recovery disclosed by the Whites' second amended complaint did not include the theory that the Whites were entitled to relief under section 7031(b) because JC Master Builders, Inc., violated the licensure requirement.

On appeal, the Whites contend their pleadings adequately alleged a cause of action under section 7031(b) and defendants were not surprised by the issue regarding licensure.

The second amended complaint did not specially plead that JC Master Builders, Inc., was not duly licensed or that the Whites were entitled to recover under section 7031(b). The seventh cause of action, however, alleged the Whites "have proof that the Defendants (not including the Surety) have violated sections of the Contractor's License Law, including but not limited to: Sections 7071.5, 7107, 7109, 7110 and 7113."

The Whites refer to documents other than the second amended complaint to support their assertion that defendants were not surprised by the theory that JC Master Builders, Inc., could not rely on Diani's license in connection with the work done on their residence.

For instance, the Whites' November 14, 2006, demurrer and motion to strike JC Master Builders, Inc.'s complaint in the mechanic's lien foreclosure action stated that JC Master Builders, Inc., had wrongly taken $84,620.34 from the Whites.

Also, counsel for the Whites prepared an answer to JC Master Builders, Inc.'s claims for breach of contract, quantum meruit, and foreclosure of the mechanic's lien. The answer stated the Whites "admit that they paid [JC Master Builders, Inc.] $84,621.95, which amount they are claiming should be refunded back to them." The Whites' affirmative defenses included the allegations that "Cridlebaugh was unlicensed and that … Diani had nothing to do with the corporation or the construction of the [Whites'] residence." Counsel served the answer on counsel for defendants by depositing

a copy in the United States mail in May 2007, more than a year before trial. The Whites' attorney also attempted to file the answer with the clerk of the superior court. Although the clerk returned the answer without filing it, it provided notice to defendants that the Whites (1) were seeking a refund of the compensation paid to JC Master Builders, Inc., and (2) contested JC Master Builders, Inc.'s reliance on Diani's contractor's license.

When courts construe a pleading to determine its effect, "its allegations must be liberally construed, with a view to substantial justice between the parties." (Code Civ. Proc., § 452; see 4 Witkin, Cal. Procedure (5th ed. 2008) Pleading, §§ 412-413, pp. 550-552 ["theory of the pleading" doctrine repudiated].)

Liberally construing the allegations of the second amended complaint, which includes allegations that the CSLL was violated and the $84,620 paid under the contract had been misappropriated, we conclude that they are sufficient to state a claim for violation of the CSLL's licensure requirement and recovery under section 7031(b). We further conclude that this interpretation of the complaint is consistent with achieving substantial justice between the parties because (1) defendants were notified that the Whites disputed JC Master Builders, Inc.'s reliance on Diani's contractor's license and (2) defendants were required to plead and prove licensure as part of their claims against the Whites. Thus, defendants were not surprised that licensure was an issue.

Furthermore, because defendants have not filed a respondents' brief, we have been presented with no other arguments regarding the "substantial justice" element of Code of Civil Procedure section 452. Accordingly, we conclude the Whites' pleading adequately stated a claim for recovery under section 7031(b).

D. Prejudice and Opportunity to Litigate Offset

Can judgment for JC Master Builders, Inc., on the Whites' section 7031(b) claim be upheld on the ground that JC Master Builders, Inc., was prejudiced by the lack of opportunity to litigate the issues of offset, indemnity, or contribution? This question raises the following specific question of statutory interpretation: May the recovery of

compensation authorized by section 7031(b) be reduced by offsets for materials and services provided or by claims for indemnity and contribution?[8] We conclude it cannot.

1. Standard of review

Issues of statutory construction are pure questions of law subject to independent review by appellate courts. (*Neilson v. City of California City* (2007) 146 Cal.App.4th 633, 642.)

2. Statutory construction

We conclude the authorization of recovery of "*all* compensation paid to the unlicensed contractor for performance of any act or contract" (§ 7031(b), italics added) means that unlicensed contractors are required to return all compensation received without reductions or offsets for the value of material or services provided. (*Goldstein v. Barak Construction* (2008) 164 Cal.App.4th 845, 856 [dicta states beneficiary of services of unlicensed contractor may invoke CSLL against offset by the contractor].)

Our interpretation, and that of the *Goldstein* court, is consistent with the usual meaning of the word "all," which signifies the whole number and does not admit of an exception or exclusion not specified. (*Stewart Title Co. v. Herbert* (1970) 6 Cal.App.3d 957, 962.) In short, "all compensation paid" does not mean all compensation less reductions for offsets, equitable indemnity, and contribution.

Our use of the plain and usual meaning of the word "all" is consistent with the reference to offsets in the legislative materials quoted in part I.B.2.b, *ante*, as well as the statement that "deterrence can best be realized by compelling violators to return all compensation received from providing their unlicensed services." (Assem. Com. on Judiciary, Analysis of Assem. Bill No. 678 (2001-2002 Reg. Sess.), as introduced

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[8]This issue concerning the relationship between section 7031(b), which was added to the CSLL in 2001, and the defensive use of offset is noted in California Forms of Jury Instruction (2009) Construction Contract, section 300I:59, comment 3e, page 3I.132: "It is unclear whether the amended statute supersedes earlier decisions holding that an unlicensed contractor can assert his or her claim as an offset [citation]."

Feb. 22, 2001, p. 3.) If reductions for offset, indemnity, and contribution were allowed, deterrence of unlicensed work would be diminished.

We recognize the court in *Holland v. Morse Diesel Internat., Inc.* (2001) 86 Cal.App.4th 1443 stated that "in many cases unlicensed contractors have been permitted to raise sums due to them as an offset in defense of an action against them. [Citations.]" (*Id.* at p. 1453.) *Holland* and the cases it cites, however, were decided before the current subdivision (b) was added to section 7031 in 2001. Consequently, those cases have no bearing on the meaning of section 7031(b) and, thus, create no direct conflict with the interpretation adopted in *Goldstein* and here.

Our interpretation of section 7031(b) means that certain principles of law set forth in cases decided before the enactment of Assembly Bill No. 678 (2001-2002 Reg. Sess.) have been abrogated, at least to the extent they suggest claims for offset can be asserted defensively to reduce or defeat a claim for reimbursement of compensation paid. (2 Schwing, Cal. Affirmative Defenses (2009 ed.) § 39:18, pp. 900-901, fns. 13, 14 & accompanying text.) For example, it would be inaccurate to state that the CSLL allows an unlicensed contractor to respond to a claim for reimbursement by "setting up as a defense any sums which may be equitably due him from the plaintiff upon [the] illegal contract [for building services]." (*Marshall v. Von Zumwalt, supra,* 120 Cal.App.2d at p. 810.) Similarly, "'cases permitting an unlicensed contractor to assert a setoff based on a contract for building services, notwithstanding that the contract is otherwise unenforceable due to the absence of a license[,]'" (*Ranchwood Communities Limited Partnership v. Jim Beat Construction Co.*, *supra*, 49 Cal.App.4th at p. 1411) should not be extended to reimbursement claims under section 7031(b).[9]

[9]Some secondary authorities mention the principles concerning offset stated in the older cases without describing the impact of the 2001 amendment to section 7031. (E.g., 10 Miller & Starr, Cal. Real Estate (3d ed. 2001) Mechanics' Liens, § 28:19, p. 72, fn. 1 & accompanying text; 1 Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2009) ¶ 2:133.5, p. 2-39; 11 Cal.Jur.3d (2006) Building and Construction Contracts, § 214, pp. 228-229, fn. 5 & accompanying text; see 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 442, pp. 483-484, citing *Culbertson v. Cizek*, *supra,* 225 Cal.App.2d 451.)

We conclude section 7031(b)'s reference to the recovery of all compensation paid an unlicensed contractor means the unlicensed contractor cannot reduce the recovery authorized by asserting claims of offset, indemnity, or contribution arising out of the unlicensed work.

E. Conclusion

The trial court correctly granted the Whites' motion for a directed verdict against JC Master Builders, Inc., on their section 7031(b) claim for reimbursement of the $84,621.45 in compensation paid. Consequently, we will modify the judgment to include that award of reimbursement.

II. Nonsuit and Directed Verdicts*

A. Standards of Review

A nonsuit motion tests the sufficiency of the plaintiff's evidence before the defense is presented. (*Carson v. Facilities Development Co.* (1984) 36 Cal.3d 830, 838.) A trial court may grant a motion for nonsuit only when, disregarding conflicting evidence, giving the plaintiff's evidence all the value to which it is legally entitled, and indulging in every legitimate inference that may be drawn from the evidence, there is no sufficiently substantial evidence to support a verdict in the plaintiff's favor. (*Kidron v. Movie Acquisition Corp.* (1995) 40 Cal.App.4th 1571, 1580.)

When a judgment is based on a grant of nonsuit, appellate courts will reverse "'unless interpreting the evidence most favorably to plaintiff's case and most strongly against the defendant and resolving all presumptions, inferences and doubts in favor of the plaintiff a judgment for the defendant is required as a matter of law.'" (*Carson v. Facilities Development Co.*, *supra*, 36 Cal.3d at p. 839.)

Appellate courts apply the same standard of review to the grant of a motion for a directed verdict. (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 629.)

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*See footnote, *ante*, page 1.

Therefore, to demonstrate reversible error, a plaintiff must show the record contains substantial evidence that tends to prove each element of a cause of action eliminated by the grant of nonsuit or a directed verdict. (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1119; see *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 [appellant bears burden of affirmatively showing error on the record].)

B. Method by Which the Appellant Demonstrates Reversible Error

Generally, an appellant attempting to show that the trial court erroneously granted nonsuit or directed a verdict on a particular cause of action would complete the following steps in the opening appellant's brief.

First, the appellant should identify each cause of action and the corresponding elements that must be proven to establish liability under that theory. Second, the appellant should address separately each essential element and cite the evidence in the record that tends to prove that element. Third, where circumstances require, the appellant should explain why an erroneous dismissal was prejudicial. For example, where (1) a cause of action was eliminated only as to some defendants and allowed to go to the jury as to other defendants and (2) the jury found the cause of action was not proven, the appellant should address the question of prejudice by explaining how the theory against the defendants who obtained the dismissal differs from the theory presented to and rejected by the jury. (See *Deaile v. General Telephone Co. of California* (1974) 40 Cal.App.3d 841, 849 [erroneous dismissal of second and third causes of action was not prejudicial in view of jury's disposition of first cause of action in favor of defendant].)

C. The Whites' Contentions

The Whites contend the "jury could have found that … Cridlebaugh and … Diani were negligent, made intentional and negligent misrepresentations, violated construction, trade practices and state license laws." The Whites also appear to contend that the express and implied warranty cause of action against Cridlebaugh and Diani should have been presented to the jury.

D. Analysis

1. Claims presented to the jury

The jury found against the Whites on their claims against JC Master Builders, Inc., for (1) negligence, (2) negligent misrepresentation, (3) intentional misrepresentation, and (4) concealment.

The Whites have not explained how the failure to present these same claims to the jury against Cridlebaugh and Diani, the officers who controlled JC Master Builders, Inc., resulted in prejudice. In other words, they have not shown how it would have been possible for the jury to absolve the corporate defendant of liability and still find the individual defendants liable on these particular causes of action.

Accordingly, we conclude the Whites have not carried their burden of demonstrating prejudice resulting from the error, if any, of not allowing the jury to decide these claims as to the individual defendants.

2. Express and implied warranty

Express warranties basically are contractual in nature. (*Atkinson v. Elk Corporation of Texas* (2006) 142 Cal.App.4th 212, 229.) In addition, implied warranties typically are inserted into a contract by operation of law. (*Ibid*.) As a general rule of California law, privity of contract is required for an action for breach of either express or implied warranty. (*All West Electronics, Inc. v. M-B-W, Inc.* (1998) 64 Cal.App.4th 717, 723, 726-727 [appellate court upheld trial court's grant of directed verdict on warranty claims based on the lack of privity].)

Here, the Whites have presented no argument or authority that demonstrates their claims for breach of warranty against the individual defendants come within a recognized exception to the general rule requiring privity. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785 [appellate court may treat a point as forfeited when appellant fails to raise the point or does not support it with reasoned argument and citations to authority]; *Atchley v. City of Fresno* (1984) 151 Cal.App.3d 635, 647 [where point is

merely asserted by appellant without argument or authority, it is deemed to be without foundation and requires no discussion by reviewing court].)

Accordingly, the Whites have not demonstrated that the trial court erred by not allowing the jury to decide the breach of warranty claims against the individual defendants.

3. Surety's liability on the bond

Surety Company of the Pacific issued contractor's license bond No. 6059576 in the amount of $10,000 for JC Master Builders, Inc. The Whites made a claim under the bond and included Surety Company of the Pacific as a defendant in their lawsuit, alleging it failed to pay on the bond.

The Whites' bond claim and the correspondence with Surety Company of the Pacific regarding that claim were admitted into evidence as plaintiffs' exhibits 30, 31, and 33.

A letter from Surety Company of the Pacific to counsel for the Whites stated that the "conditions for your recovery of damages from a contractor's license bond are set forth in Section 7071.5(a) of the [CSLL], as follows: [¶] 'Any homeowner contracting for home improvement upon the homeowner's personal family residence damaged as a result of a violation of this chapter by the licensee.'"

On appeal, the Whites note that Surety Company of the Pacific never presented any evidence in its defense, even after their claim against the bond was admitted into evidence. In addition, the Whites assert that the trial court correctly stated that Surety Company of the Pacific would be obligated to pay on the bond if there was a determination that there was an act that violated the CSLL. Based on this assertion, the Whites contend Surety Company of the Pacific is liable under the bond because they have demonstrated that JC Master Builders, Inc., violated the licensing requirements of the CSLL and is statutorily liable for $84,621.45 as a result of that violation.

The lack of a respondent's brief in this appeal means we have been presented with no arguments or authorities that contradict the theory of liability under the bond that the

Whites have presented on appeal. Based on our conclusion regarding JC Master Builders, Inc.'s violation of and liability under the CSLL, we conclude the Whites have established the conditions that entitle them to payment under the bond. (§ 7071.5.)

Accordingly, the judgment will be modified to reflect Surety Company of the Pacific's liability for the full amount of the bond.

III. Alter Ego*

A. Principles of Law

In *Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, this court set forth the basic principles that define California's alter ego doctrine:

> "Ordinarily, a corporation is regarded as a legal entity, separate and distinct from its stockholders, officers and directors, with separate and distinct liabilities and obligations. [Citations.] A corporate identity may be disregarded—the 'corporate veil' pierced—where an abuse of the corporate privilege justifies holding the equitable ownership of a corporation liable for the actions of the corporation. [Citation.] Under the alter ego doctrine, then, when the corporate form is used to perpetrate a fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose, the courts will ignore the corporate entity and deem the corporation's acts to be those of the persons or organizations actually controlling the corporation, in most instances the equitable owners. [Citations.] The alter ego doctrine prevents individuals or other corporations from misusing the corporate laws by the device of a sham corporate entity formed for the purpose of committing fraud or other misdeeds. [Citation.]
>
> "In California, two conditions must be met before the alter ego doctrine will be invoked. First, there must be such a unity of interest and ownership between the corporation and its equitable owner that the separate personalities of the corporation and the shareholder do not in reality exist. Second, there must be an inequitable result if the acts in question are treated as those of the corporation alone. [Citations.] 'Among the factors to be considered in applying the doctrine are commingling of funds and other assets of the two entities, the holding out by one entity that it is liable for the debts of the other, identical equitable ownership in the two entities, use of the same offices and employees, and use of one as a mere shell or conduit for the affairs of the other.' [Citations.] Other factors which have been described in the case law include inadequate capitalization, disregard

*See footnote, *ante*, page 1.

> of corporate formalities, lack of segregation of corporate records, and identical directors and officers. [Citations.] No one characteristic governs, but the courts must look at all the circumstances to determine whether the doctrine should be applied. [Citation.] Alter ego is an extreme remedy, sparingly used. [Citation.]" (*Sonora Diamond Corp. v. Superior Court*, *supra*, 83 Cal.App.4th at pp. 538-539.)

An example of the use of a corporation as a mere shell or conduit for the affairs of others occurs when the individuals controlling the corporation use it as a subterfuge to further an illegal transaction. (*Associated Vendors, Inc. v. Oakland Meat Co.* (1962) 210 Cal.App.2d 825, 840; *Wheeler v. Superior Mortgage Co.* (1961) 196 Cal.App.2d 822, 827-828 [two corporations used in usurious loan transaction].)

The trial court determines whether the requirements for a finding of alter ego have been established by the evidence, and its determination will be upheld on appeal if supported by substantial evidence. (*Jack Farenbaugh & Son v. Belmont Construction, Inc.* (1987) 194 Cal.App.3d 1023, 1032-1033.)

B. Contentions on Appeal

The Whites contend that a finding of alter ego was warranted and, therefore, the trial court erred in determining they did not carry their burden of proof on their alter ego claims. Therefore, on appeal the Whites must demonstrate that they proved their theory of recovery as a matter of law. (*Horn v. Oh* (1983) 147 Cal.App.3d 1094, 1099.) In other words, the Whites must establish that the only reasonable hypothesis is that one or more of the individual defendants were alter egos of JC Master Builders, Inc. (*Ibid*.)

C. Inequitable Result Element of Alter Ego Doctrine

The Whites suggest, without explicitly asserting the position, that the inequitable result element was met by a showing that JC Master Builders, Inc., is a shell corporation that will be unable to pay the judgment obtained against it for violating the licensure requirement. This contention is implied by the Whites' express factual assertions that JC Master Builders, Inc., "was undercapitalized, lacked working capital, has no assets, [and]

no equipment …." The Whites also assert that JC Master Builders, Inc., had no discernible income.

Both Diani and Cridlebaugh admitted in their depositions that JC Master Builders, Inc., did not own any construction equipment. Consequently, we will accept that fact as established as a matter of law.

The factual assertion that JC Master Builders, Inc., had no discernible income is based on Cridlebaugh's testimony that he did not prepare a profit and loss statement or an annual income statement for the corporation and he could not estimate its income for 2006. Because other inferences are possible, we must conclude that this testimony about the lack of particular documents and inability to provide an estimate of income does not establish as a matter of law that JC Master Builders, Inc., had no discernible income.

As to the factual assertion that JC Master Builders, Inc., had no assets, the Whites' citation to the record leads to the deposition of Diani and his testimony that he did not know what, if any, assets are held by JC Master Builders, Inc. Diani's testimony does not conclusively establish that the corporation had no assets because, among other things, Diani had not been active in the corporation during the two years prior to his testimony, and his ignorance of assets does not establish, as a matter of law, that none existed.

The Whites' citations to the record in pages 42 and 43 of their opening brief have been reviewed by this court and those citations do not reference evidence that necessarily requires a trier of fact to conclude that JC Master Builders, Inc., was (1) undercapitalized or (2) lacked working capital.

Based on the foregoing review of the evidence, we cannot conclude that the trial court erred in determining that the Whites had failed to prove an inequity would result from recognizing JC Master Builders, Inc., as a separate legal entity. Accordingly, we will uphold the trial court's ruling on the Whites' alter ego cause of action.

IV. Exclusion of Rosen's Testimony*

A. Trial Court's Ruling

On July 3, 2007, the trial court held an Evidence Code section 402 hearing to determine whether Rosen would be allowed to testify.

After reviewing the papers submitted by the parties and listening to the arguments of counsel, the court decided to exclude Rosen's testimony. The court stated that the testimony ran afoul of Evidence Code section 1101, subdivision (a) and did not meet the requirements for the common design or plan exception set forth in Evidence Code section 1101, subdivision (b). The court also stated the testimony ran afoul of Evidence Code section 1104 "in terms of character or trait for negligence." Lastly, under Evidence Code section 352, the court stated Rosen's testimony "would consume an undue amount of time and be confusing to the jurors." Among other things, the trial court was concerned that (1) the dispute between Rosen and JC Master Builders, Inc., would have to be fully litigated to enable the jurors to decide how much weight to give Rosen's testimony and (2) fully litigating that dispute would consume an undue amount of time.

B. Contentions

The Whites assert Rosen hired JC Master Builders, Inc., to do contracting work on a log home and he had an experience similar to the Whites. The Whites contend Rosen's testimony was admissible to establish a common design or plan under Evidence Code section 1101, subdivision (b).

C. Applicable Rules of Law

Evidence Code section 352 vests the trial court with discretion to "exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." The weighing process under this section depends on the trial court's consideration of the unique facts

*See footnote, *ante*, page 1.

and issues of the case rather than hard and fast rules. (*Aguayo v. Crompton & Knowles Corp.* (1986) 183 Cal.App.3d 1032, 1038.)

Appellate courts review rulings under Evidence Code section 352 for an abuse of discretion and reverse only if there is a clear showing of abuse. (*People ex rel. Lockyer v. Sun Pacific Farming Co.* (2000) 77 Cal.App.4th 619, 639.)

D. Analysis

The Whites argue that Evidence Code section 352 should not have prevented the introduction of Rosen's testimony because (1) the events involving Rosen and those involving the Whites were independent and (2) they were willing to agree to a limiting instruction. These arguments do not address the trial court's determination that admitting the Rosen testimony would result in an undue consumption of time and, thus, do not demonstrate why that determination was beyond the bounds of reason. (*Piscitelli v. Salesian Society* (2008) 166 Cal.App.4th 1, 11 [Evid. Code, § 352 ruling reversed for an abuse of discretion only if it is beyond the bounds of reason].) For example, the Whites have not stated how long it would have taken to present Rosen's testimony or addressed the trial court's concern that Rosen's dispute would have to be fully litigated for the jury to judge the merits of Rosen's accusations against JC Master Builders, Inc., and Cridlebaugh.

Accordingly, we conclude that the Whites have not demonstrated that the trial court abused its discretion by excluding the testimony of Rosen.

V. Costs for the Prevailing Party[*]

After trial, each side filed a memorandum of costs as well as motions to tax or strike costs requested by the other side. The trial court heard arguments from counsel, took the matter under submission, and subsequently ruled that all parties would bear their own costs of suit.

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[*]See footnote, *ante*, page 1.

Code of Civil Procedure section 1032, subdivision (b) provides that "a prevailing party is entitled as a matter of right to recover costs in any action or proceeding" unless a statutory exception applies. Subdivision (a)(4) of that section defines "prevailing party" to include "the party with a net monetary recovery."

The Whites argue that they are the prevailing party and, thus, are entitled to an award of costs both below and on appeal. Based on the reinstatement of the judgment imposing liability on JC Master Builders, Inc., under section 7031(b) and the modification of judgment imposing liability under the bond on Surety Company of the Pacific, we conclude that the Whites are the prevailing party for purposes of an award of costs both in the trial court and on appeal.

Accordingly, the amended judgment filed on September 10, 2007, shall be modified to reflect that the Whites are entitled to recover their court costs against JC Master Builders, Inc., and Surety Company of the Pacific. We note that Surety Company of the Pacific's statutory liability for costs is separate from and not limited by the amount of the bond. (*Harris v. Northwestern National Ins. Co.* (1992) 6 Cal.App.4th 1061.) The amount of court costs awarded shall be determined by the trial court, which already has considered the Whites' memorandum of costs and defendants' motion to tax costs.

DISPOSITION

The judgment filed September 10, 2007, is modified by deleting the second to last paragraph, which references the seventh cause of action, and replacing it with the following: "On the seventh cause of action, judgment is granted (1) in favor of plaintiffs and against defendant JC Master Builders, Inc., in the amount of $74,621.45, plus interest from and after July 1, 2006, and (2) in favor of plaintiffs and against defendants Surety Company of the Pacific and JC Master Builders, Inc., jointly and severally, in the amount of $10,000, plus interest from and after July 1, 2006. Thus, the judgment against defendant JC Master Builders, Inc., totals $84,621.45, plus interest. Defendants Surety Company of the Pacific and JC Master Builders, Inc., are jointly and severally liable for plaintiffs' court costs." As modified, the judgment is affirmed.

The superior court is directed to vacate its order granting in part and denying in part JC Master Builders, Inc.'s motion for judgment notwithstanding the verdict and enter a new order denying that motion.

JC Master Builders, Inc., and Surety Company of the Pacific shall be jointly and severally liable for the Whites' costs on appeal.

_____
DAWSON, J.

WE CONCUR:

_____
LEVY, Acting P.J.

_____
CORNELL, J.