

STEVEN HOLDER, Plaintiff and Appellant,

v.

ROGER HOWE et al., Defendants and Appellants.

No. B260967.

Court of Appeals of California, Second District, Division One.

Filed December 14, 2016.

APPEAL from an order of the Superior Court of Los Angeles County, Super. Ct. No. BC445145, Ruth Ann Kwan. Affirmed in part and reversed in part and remanded with directions.

Davis Law, Thomas P. Davis; George & Shields, Timothy F. Shields; Lane Powell, Paul B. George for Plaintiff and Appellant.

Lewis Brisbois Bisgaard & Smith, Lann G. McIntyre, Brittany H. Bartold; Valensi Rose, Stephen F. Moeller for Defendants and Appellants.

Reliant Pictures, LLC, a movie production company, completed a feature film in 2007 but was unable to find a market for it, and the film sat on a shelf for two years. In 2009, shortly before filing for bankruptcy protection, Reliant Pictures transferred the film to investors who had contributed \$4.2 million to produce it.

Seven Holder purchased Reliant Pictures' "disputed ownership interest" in the film at a bankruptcy auction, then filed this lawsuit against the investors and those company directors who had voted to transfer the film. He sought a declaration that Reliant Pictures owned 100 percent of the film when it was transferred and alleged the transfer defrauded the company's creditors and constituted a breach of fiduciary duty. The investors cross-complained for a declaration that Reliant Pictures owned less than 1 percent of the film.

After a two-phase trial, the trial court declined to make findings as to how much the film was worth or who owned it. Instead, finding Reliant Pictures had fraudulently transferred the film, the court ordered the investors to return it to the company's bankruptcy estate, and thus to Holder, in its 2009 condition.

Both sides appeal. Holder contends the court erred in ordering that the film be returned, and instead should have awarded him a money judgment. The managers and investors contend Delaware law applies to this litigation, under which they cannot be held liable under any theory.

We agree that Holder was entitled to a money judgment and largely reject defendants' arguments. However, we conclude the matter must be remanded for findings on the value of the film and the parties' respective percentage interests in it. Accordingly, we reverse the judgment and remand with directions to the trial court to determine how much the film was worth in 2009 and how much of it Reliant Pictures owned.

BACKGROUND

In July 2006, predecessors of Reliant Pictures formed West Texas New Mexico Films, LLC to produce a film entitled *A West Texas Children's Story*.^[1]

The film cost approximately \$4.3 million to make, almost all of which was provided by outside investors in exchange for equity positions in the film's proceeds, if any. For example, one investor contributed \$100,000 in exchange for a 5 percent share of the "Producer's Gross Pool Profit Participation," which was defined as all revenues received after deducting production costs, financing charges, interest, deferments, and distribution and sales agency fees. Another investor contributed \$205,000. Scott Linton, a Reliant Pictures director, contributed \$300,000. Roger Howe, the biggest single investor, contributed approximately \$1.5 million. Sonora Webb, LLC, an investment group, provided most of the remaining investment funds. An investment in the film was deemed to grant the investor a membership interest in West Texas New Mexico Films, LLC, which wholly owned the film. Thus at the end of the tax year, West Texas New Mexico Films issued K-1 tax schedules to investors reflecting their percentage ownership of the company.

Reliant Pictures itself contributed \$10,000.

The film was completed in time for the Cannes Film Festival in May 2007, but was more than \$400,000 in debt. One vendor held a lien on the footage and another had a lien on the soundtrack, and the two parts could not be permanently combined until the liens were released. West Texas New Mexico Films attempted without significant success to market the film at the festival. Although several small international distributors committed to purchase territorial licenses amounting to \$40,000 to \$60,000 in sales, no large international distributor made a purchase. Domestic efforts to market the film from 2007 to 2009 were similarly unsuccessful, and no purchases were generated despite several screenings, one by the prestigious International Creative Marketing Agency.

The film was never released and never generated any income.

In April 2009, Maynard Howe, Scott Linton, and William Lund, Reliant Pictures' directors, voted to approve a resolution by which Reliant Pictures would transfer its interests in the film and West Texas New Mexico Films to Roger Howe and Sonora Webb, the investor group, in exchange for the investors taking over the film's debt. The resolution provided in pertinent part that:

"WHEREAS, Reliant [Pictures] owns all rights, title and interest in and to West Texas New Mexico Films, LLC (the LLC) and that LLC owns certain rights title and interest in and to the film West Texas Children's Story . . . (the Film).

"WHEREAS, a proposal was presented . . . on behalf of an investor group . . . to have said group assume control over the final finishing, marketing and distribution of the Film to satisfy the express requests of those investors. [¶]. . . [¶]

"NOW, THEREFORE, BE IT RESOLVED, . . . that Reliant shall convey and release all rights, including copyrights, in and to the LLC and the film to said investor group. [¶] [S]o long as its monetary rights are reserved, all existing Film and LLC contractual obligations are honored and Reliant is indemnified and released from liability for existing contractual obligations. . . ."

The managing member of Reliant Pictures executed the resolution and transferred the film to Roger Howe and Sonora Webb.

The investors paid off the \$473,853 owed on the film and then set out to modify it because, as Howe told the investors, the film needed additional footage and other modifications because it was "a traveling film where two kids `hoof it' across the country, the problem is that we never see them travel." Howe told the investors the film would end up costing \$5,455,000 to make, but they were "getting a very good film" for the money, in part because one of its stars, Anna Sophia Robb, was "coming off a number one movie, `Race to Witch Mountain', and [was] one of the hottest young actresses around [and] was committed to marketing and promoting the film."

The changes ultimately made to the film were described by plaintiff's expert as making it look "like somebody had taken a camcorder into a theater and made a copy, you know, a pirate copy off the screen. It was really bad."

In July 2009, Reliant Pictures filed for bankruptcy protection. In February 2010, Holder purchased the company's assets at a bankruptcy auction for \$140,000, including the company's "disputed ownership interest" in the film and West Texas New Mexico Films. By June 2010, the bankruptcy trustee became aware of a dispute between Holder and the investors regarding ownership of the film and West Texas New Mexico Films. The trustee then assigned to Holder the estate's litigation rights.

In September 2010, Holder sued the investors, Roger Howe and Sonora Webb, and Reliant Pictures' board members, Maynard Howe, Linton, and Lund. Holder alleged defendants breached fiduciary duties owed to Reliant Pictures by fraudulently transferring (or in the investors' case, receiving) the company's assets, leaving Reliant Pictures with only "debts, obligations, and liabilities." Holder sought a declaration that Reliant Pictures owned "all or substantially all the membership interests (or other indicia of ownership) of West Texas New Mexico Films."

West Texas New Mexico Films cross-complained, alleging Holder owned only 0.58 percent of the company.

Trial was conducted in two phases, first by a jury and then to the court.

The jury's first task was to determine whether any defendant had (1) committed a fraudulent transfer, (2) breached any fiduciary duty owed to Reliant Pictures, or (3) aided and abetted a fraudulent transfer.

The jury found Maynard Howe, Lund and Linton exercised de facto control of Reliant Pictures and breached their fiduciary duty to the company by transferring its assets to the investors for inadequate consideration. The jury found Roger Howe and Sonora Webb received Reliant Pictures' assets in exchange for unreasonably inadequate compensation, both while Reliant Pictures was insolvent and when it had insufficient assets to continue in business, becoming insolvent. The jury found Maynard Howe and Linton aided and abetted the fraudulent transfer, but Lund did not.

The jury's second task was to determine the value of Reliant Pictures' ownership interest in the film, its copyright, and West Texas New Mexico Films.

Larry Gerbrandt, an expert witness, testified the value of an independent film could be determined as a percentage of the cost of making it. He opined that in 2009, an independent film could expect to recoup between 35 and 50 percent of its budget internationally and between 10 and 15 percent domestically. He said that the instant film cost \$4.2 million to make. Multiplying \$4.2 million by 65 percent (50 percent internationally plus 15 percent domestically), Gerbrandt concluded the film was worth \$2.73 million. Gerbrandt further testified the film was "uniquely a period piece," set in the early 1960's, with cars and costumes to match, so "whether it was released in 2007 or 2009, . . . aging[] doesn't apply as much to this film."

Defendants' expert testified the film was "worth" \$500,000 in 2006. Thom Mount, Reliant Pictures' managing member, testified he had thought in 2008 that the film would earn between \$4.4 and \$4.7 million. Finally, evidence was introduced that in April 2009, Roger Howe told his investor group that the film would cost approximately \$5,455,000 to make in the end, but was "a very good film" for the money. During closing argument, Holder argued the film was worth \$2.7 million in 2009.

No evidence was presented on the value of West Texas New Mexico Films or the film's copyright.

In a special verdict form, the jury was asked the following question: "What was the value of Reliant Picture[s]' ownership interest, if any, in West Texas New Mexico Films, LLC, the West Texas Children's Story motion picture, and the corresponding copyright as of April 14, 2009?" The jury answered, "\$3,000,000."^[2]

A court trial followed. On the competing declaratory relief causes of action—Holder's request for a declaration that Reliant Pictures owned all or most of West Texas New Mexico

Films, and that company's cross-claim that Reliant Pictures owned only 0.58 percent—the court found the various investments in West Texas New Mexico Films and the film itself created a partnership in which Roger Howe's and Linton's combined interest was 42 percent.

The court found no evidence that Reliant Pictures contributed more than \$10,000 either to the film or to West Texas New Mexico Films.

The court declined to make further findings as to exactly how much interest in West Texas New Mexico Films was owned either by Reliant Pictures or the third party investors (excluding Roger Howe and Linton).

Although acknowledging that the transferees had paid off \$473,853 in debts on the film, the trial court implicitly found the film was transferred for insufficient consideration. It found that Roger and Maynard Howe and Sonora Webb were liable for fraudulent transfer, and that Maynard Howe, Lund and Linton were liable for breach of their fiduciary duties owed to Reliant Pictures in connection with the transfer.

The court deemed the appropriate remedy was to return the film and production company to Holder "in such form and conditions as they existed in" May 2009.

In declining Holder's request for a monetary judgment, the trial court stated in its statement of decision that it deemed the jury verdict to be advisory, to be used only "in the event the Court determined monetary relief was appropriate." But the court found "no evidentiary support" for the jury's \$3 million valuation. The court rejected Gerbrandt's reasoning regarding the film's value, stating it was "illogical" and "defies common sense" to think the value of a film can be calculated based solely on how much was spent on it.

Although the court found Maynard Howe, Lund and Linton liable for breach of fiduciary duty, it ordered no damages against them in light of the remedy it imposed.

Both Holder and the defendants appeal.

DISCUSSION

Holder contends he should have been awarded \$3 million in damages rather than the film, and no reason existed not to order damages against Maynard Howe, Lund and Linton for breach of fiduciary duty. Defendants contend that as a matter of law they cannot be held liable for fraudulent transfer or breach of fiduciary duty under Delaware law, which the trial court erroneously refused to apply.

I. Holder's Appeal

A. Remedy

Under the Uniform Fraudulent Transfer Act (UFTA), Civil Code sections 3439 through 3439.12, a transfer made by a debtor is voidable as to a creditor if the debtor made the transfer with intent to defraud the creditor or without receiving reasonably equivalent value in exchange, in circumstances where the debtor has too few assets to continue in business or has debts that exceed its ability to pay. (Civ. Code, § 3439.04, subd. (a).)^[3]

The UFTA makes a number of remedies available. A successful plaintiff "may obtain" avoidance of the fraudulent transfer "to the extent necessary to satisfy the creditor's claim," an "attachment or other provisional remedy against the asset transferred or other property of the transferee," or any "other relief the circumstances may require." (Civ. Code, § 3439.07, subd. (a).) The successful plaintiff may also obtain a monetary judgment "for an amount equal to the value of the asset at the time of the transfer, subject to adjustment as the equities may require." (Civ. Code, §§ 3439.07, 3439.08, subd. (c).)

"A creditor who successfully attacks a transfer under the UFTA is not automatically entitled to a money judgment against the person for whose benefit the transfer was made." (*Renda v. Nevarez* (2014) 223 Cal.App.4th 1231, 1237.) The statute grants a court discretion to fashion an appropriate remedy. *Filip v. Bucurenciu* (2005) 129 Cal.App.4th 825, 840.)

"Hence, a court may refuse to enter a money judgment against a person for whose benefit a fraudulent transfer was made if an applicable legal or equitable principle bars entry of such a judgment." (*Renda v. Nevarez*, at p. 1237.) The court's choice of remedy will not be set aside absent a showing that the remedy is patently inadequate.

Here, we conclude the trial court abused its discretion by awarding a patently inadequate remedy. The judgment awarded Holder the film "in such form and condition[] as [it] existed in May 2009, at the time of the transfer." This is unworkable and inequitable for several reasons. First, the remedy practically guarantees another trial. It was undisputed the film was modified after May 2009. Although the court found no evidence that post-2009 editing could not be undone, no metric was established by which any party could determine whether efforts to undo the changes were successful. The court in essence ordered defendants to perform a creative service, but established no standard to evaluate when the obligation has been satisfied. This is a recipe for future litigation.

Second, a 2012 (now late 2016) reversion of the film to its 2009 state will almost certainly not grant Holder "the value of the asset transferred," if only because the film's timeliness has faded. The court discounted this time lapse by noting that Gerbrandt, Holder's own expert, testified the film was "uniquely a period piece," set in the early 1960's, with cars and costumes to match, so "whether it was released in 2007 or 2009, . . . aging[] doesn't apply as much to this film." But it was undisputed that part of the film's value was that one of its stars, Anna Sophia Robb, was "coming off a number one movie, 'Race to Witch Mountain' [released in 2009], and [was] one of the hottest young actresses around [and] was committed to marketing and promoting the film." On our own motion (Evid. Code, § 452, subd. (h)), we take judicial notice that in 2009, Ms. Robb was 16 years old. By the time of

trial, she was 20 (and is now 23), and her last starring role in a feature film was in "Soul Surfer," released in 2011. That a film starring a popular teenage actor is a "period piece" does not mean that a lapse of years between production and release will have no impact on its value.

Finally, Holder is an investor, not a movie maker. As the victim of a fraudulent transfer he should not be put to the burden of remediating the film.

The proper remedy is for the trial court to determine first the value of the fraudulently transferred assets and then Reliant Pictures' ownership percentage in those assets, and award damages in that amount to Holder, adjusted by the equities. The trial court expressly declined to follow this course, finding it "would be extremely difficult, if not impossible, to determine each investor's interest," because "Reliant's records are a mess." But the court need not determine each investor's interest, merely Reliant Picture's interest.

Holder argues the jury awarded him \$3 million in damages, and the trial court erred in setting aside this verdict. We disagree.

The jury was asked in a special verdict form: "What was the value of Reliant Picture's ownership interest, if any, in West Texas New Mexico Films, LLC, the West Texas Children's Story motion picture, and the corresponding copyright as of April 14, 2009." It answered, "\$3,000,000."

This question and answer related only to the value of the property Reliant Pictures fraudulently transferred, not to a UFTA damages award. Under the UFTA, valuing the asset transferred is only the first part of a UFTA money judgment equation. The second part, adjustment as the equities may require, is the court's province, not the jury's, as is selection of an appropriate remedy in the first instance.

In addition, the jury's \$3 million figure was unsupported by substantial evidence. Gerbrandt was the only witness who attempted to place a value on the film as of 2009, when Reliant Pictures transferred it to investors. He testified that in that year, independent films typically recouped 65 percent of their production costs. He reasoned from this fact that this film was worth 65 percent of its \$4.3 million cost, or \$2.73 million. The trial court found this to be too speculative an approach, and we agree. "There are three basic methods for calculating fair market value: (1) the comparative sales or market data method; (2) the reproduction or replacement cost method; and (3) the income method." (*Dreyer's Grand Ice Cream, Inc. v. County of Kern* (2013) 218 Cal.App.4th 828, 836.) Gerbrandt's attempt to assess the film's future income as a factor of its production costs was pure speculation that directly contradicted the inescapable fact that the film generated no income in the two years since its completion, despite extensive marketing.

Gerbrandt offered no support for his opinion that market data across all independent films can reliably predict the value of any particular film. To determine the fair market value of an item by the comparative sales method requires that the items compared actually be similar. For example, to determine the value of a home, a realtor inquires how similar homes in the

neighborhood recently sold. A market-wide average of the sales prices of homes as a percentage of their average construction costs would be useless in predicting the value of any particular home.

A feature film, as art, is particularly unsuitable to the market data method. Although the price of art can be averaged, and the cost to create it also averaged, the ratio of the first result to the second offers no information on the value of the art.

Nor was there any other evidence of the film's value in 2009. Roger Howe stated to investors that they were getting a "very good" film that cost \$5.5 million to make. But "very good" is too vague a term to use in assessing value. The only other witnesses to testify as to the film's value were defendants' expert, who thought it was worth \$500,000 in 2006, and Thom Mount, who confirmed that in 2008 he thought the film would *earn* \$4.4 million. None of this evidence establishes the film's value in 2009.

Even if the film was worth \$3 million, when the jury rendered its advisory verdict the court had yet to try either side's declaratory relief claim. Holder claimed Reliant Pictures was the sole member of West Texas New Mexico Films and held 100 percent of its equity interest. West Texas New Mexico Films contended Reliant Pictures owned only 0.58 percent. In the end, the court determined Reliant Pictures had contributed only \$10,000 to a \$4.2 million enterprise and owned only up to 58 percent of West Texas New Mexico Films and the film. The jury therefore could not award Holder, who stood in Reliant Pictures' stead, the entire value of the company and film.

B. Breach of Fiduciary Duty

Holder argues the trial court should have awarded him damages on his claim for breach of fiduciary duty. We disagree. "The elements of a cause of action for breach of fiduciary duty are the existence of a fiduciary relationship, breach of fiduciary duty, and damages." (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820.) The court made no finding that Reliant Pictures suffered any damages by transferring the debt-laden film to the investors, and Holder identifies no damages that cannot be compensated as outlined above. The court was therefore within its discretion to award no damages on this cause of action.

II. Defendants' Appeal

A. Direct Liability for Fraudulent Transfer

Defendants argue Roger Howe and Sonora Webb cannot be held directly liable for fraudulent transfer because under the LLC agreement, they had no authority to transfer any of Reliant Pictures' assets, that authority residing only in Thom Mount, the managing member, whom Holder did not sue.

The point is irrelevant because Roger Howe and Sonora Webb were proper defendants as transferees, not transferors. (Civ. Code, § 3439.07, subd. (a)(2) [creditor may obtain attachment against the asset transferred or other property of the transferee].)

B. Breach of Fiduciary Duty

Defendants contend they cannot be held liable for breach of fiduciary duty under Delaware law because the LLC agreement limited their power to manage Reliant Pictures and expressly imposed fiduciary duties on Thom Mount.

The point is moot, as the trial court imposed no remedy as to Holder's cause of action for breach of fiduciary duty. An appellate court's jurisdiction extends only to actual controversies for which it can grant relief. (*In re Christina A.* (2001) 91 Cal.App.4th 1153, 1158.)

In any event, defendants do not dispute the trial court's finding that they exercised de facto control of Reliant Pictures. By voting to give away the company's purportedly main asset, defendants took on the duty to act in good faith. "Breach of fiduciary duty is an equitable claim, and it is a maxim of equity that 'equity regards substance rather than form.'" [Citations.] Courts applying equitable principles therefore [have] little trouble extending liability for breach of fiduciary duty beyond the natural persons who served as directors to outsiders like majority stockholders who effectively controlled the corporation." (*Feeley v. NHAOCG, LLC* (Del. Ch. 2012) 62 A.3d 649, 668.) It is irrelevant that the LLC agreement failed to authorize the control over Reliant Pictures' activities that defendants admit they exercised. Further, that the LLC agreement imposed fiduciary duties only on certain other individuals expressly is also irrelevant. Nothing in the agreement limited fiduciary duties only to those named.

C. Aidor and Abettor Liability for Fraudulent Transfer

Maynard Howe and Linton argue Delaware law applies to this dispute but recognizes no cause of action for aiding and abetting a fraudulent transfer. Holder counters that California law applies, and both it and Delaware law recognize a cause of action for aiding and abetting a fraudulent transfer. We conclude the choice of law on this point is irrelevant because neither jurisdiction recognizes a cause of action for aiding and abetting fraudulent transfer.

Aiding and abetting liability may "be imposed on one who aids and abets the commission of an intentional tort if the person (a) knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act or (b) gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person." (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1325-1326.)

The UFTA gives no remedy against a non-transferor or non-transferee. Therefore, the conduct of a non-transferor or non-transferee, separately considered, cannot constitute a breach of duty to the injured creditor, and thus cannot support a cause of action for aiding and abetting a fraudulent transfer.

Holder relies on *Qwest Communications Corp. v. Weisz* (S.D.Cal. 2003) 278 F.Supp.2d 1188, 1192, *Filip v. Bucurenciu, supra*, 129 Cal.App.4th at pages 837-838, and *In re Acequia, Inc.* (9th Cir. 1994) 34 F.3d 800, for the proposition that California recognizes aiding and abetting liability for fraudulent transfer. But those cases address claims for civil conspiracy, not aiding and abetting. (E.g., *Filip v. Bucurenciu, supra*, 129 Cal.App.4th at p. 838.) The claims are distinct. (See *Neilson v. Union Bank of California, N.A.* (C.D.Cal. 2003) 290 F.Supp.2d 1101, 1134 [unlike conspirator, aider and abettor does not adopt tort of the primary violator as his own].) "There simply is no language in [the UFTA] that suggests the creation of a distinct cause of action for aiding-abetting claims against non-transferees." (*Freeman v. First Union Nat'l Bank* (Fla. 2004) 865 So.2d 1272, 1276-1277.)

Accordingly, the judgment as to Maynard Howe and Linton for aiding and abetting fraudulent transfer must be reversed.

DISPOSITION

The judgment is reversed as to Maynard Howe and Linton as to their liability for aiding and abetting a fraudulent transfer. The judgment is reversed as to the UFTA award, and the matter is remanded for the trial court to (1) determine the value of Reliant Pictures' interest in the fraudulently transferred assets, (2) enter judgment in Holder's favor in that amount, adjusted as the equities may require, and (3) reexamine the issue of costs. In all other respects the judgment is affirmed. Each side is to bear its own costs on appeal.

JOHNSON, J. and LUI, J., concurs.

[1] By Reliant Pictures'"predecessors" we mean five corporate entities the names and relationships of which are irrelevant for our purposes. For simplicity, we gather all these entities under the moniker "Reliant Pictures."

[2] It is not clear why the jury was asked this question, as the court had deferred until phase two of the trial a determination of what percentage of West Texas New Mexico Films and the film Reliant Pictures owned. It is also unclear where the \$3 million figure originated, as no witness stated the film was worth more than \$2.73 million, and Holder himself sought only \$2.7 million.

[3] Civil Code section 3439.04 provides in pertinent part: "A transfer made or obligation incurred by a debtor is voidable as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation as follows: [¶] (1) With actual intent to hinder, delay, or defraud any creditor of the debtor. [¶] (2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor either: [¶] (A) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction. [¶] (B) Intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due."