4th Civ. No.
GO-23206
COURT OF APPEAL

STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION III

JOHN A. METCALF, JR.
and SANDRA L. METCALF,

Plaintiffs/Cross-Defendants
And Appellants,

vs.

JAMES A. POYAR, an individual,
RSI dba BUSINESS PROMOTIONS AKA
RSI/BUSINESS PROMOTIONS

Defendants, Cross-Complainants
and Respondents.

APPEAL FROM
SUPERIOR COURT OF ORANGE COUNTY
RICHARD C. TODD, JUDGE

RESPONDENTS' BRIEF

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I.

STATEMENT OF THE CASE

This appeal provides another method of wasteful delay for plaintiffs/cross-defendants John A. Metcalf and Sandra L. Metcalf (collectively referred to herein as "Metcalf").[1]

A. TRIAL OF THE METCALF COMPLAINT.

Metcalf appeals the trial court's judgment of October 8, 1996 in favor of Defendants/Cross-Complainants James A. Poyar ("Poyar") and Recommendation Systems, Inc. ("RSI") on the Metcalf Complaint and the trial court's judgment of January 5, 1998 pertaining to Poyar's cross-complaint for slander of title.

Metcalf's position at trial and in this appeal is founded upon the same self-serving and unsupported statements. Specifically, Metcalf asserts that the effect of a Grant Deed (Respondent's Appendix, Exhibit "1") transferring full title to 938 Ridgeline in Orange, California (hereinafter "the Property") from Metcalf to Poyar was altered by a prior or contemporaneous oral agreement concerning ownership. (Appellants' Appendix or "A.A.", I pp. 4-6; Opening Brief, p. 2) Metcalf argues that the

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[1] Metcalf does not appeal the judgment rendered in favor of defendant Recommendation Systems, Inc. on the complaint. Neither the Notice of Appeal nor the Appellant's Brief raises any issue of alleged error. Judgment for defendant RSI must stand. Paula Poyar was not named as a defendant in the complaint and she appeared only as a cross-complainant. Metcalf also does not raise any issue on appeal for the judgment in favor of James Poyar on his unlawful detainer complaint. Judgment for possession was entered on October 8, 1996.

trial court erred by excluding offered testimony of Mary Wells, Robert Walker and Miriam Abernathy that would "demonstrate that Poyar had admitted several times that Metcalf was a joint owner of the Property." (Opening Brief, p. 6) Apparently, Metcalf introduced the testimony in an attempt to corroborate his own testimony (which was also stricken) concerning the alleged oral agreement with Poyar. According to Metcalf, "if the parol evidence is believed, then the Metcalfs would be deemed owners of a one-half interest in the property, and could not slander title." (Opening Brief, p. 14)

The problem with Metcalf's position is that the trial court did carefully consider and weigh the extrinsic or parol evidence contradicting the Grant Deed; and found the evidence incredible. In accordance with applicable law, the court then ruled that the parol evidence was inadmissible and struck it from the record. (A.A. I, pp. 173-180; 184, 187; A.A. II, p. 589; Declarations of Walker, Abernathy, Wells, A.A. I, pp. 118-125.) The trial court instead accepted Poyar's testimony that the was never such an oral agreement.

On November 17, 1998, Metcalf opted to file the appeal on the "Appellants' Appendix in lieu of Clerk's Transcript on Appeal" and upon an Opening Brief "excerpted directly from Plaintiff's trial brief and supplemental trial brief." (Opening Brief, p. 8) The manner of appeal was designed for cheap delay, and prevents this court from reviewing the facts

which support the trial court's rulings and judgment. Cf. Sui v. Landi (1985) 163 Cal.App.3d 385, 209 Cal.Rptr. 449.

Appellants fail to propose a standard of review, however, it appears that they want this court to determine *de novo* whether the trial court properly excluded or struck the evidence "parol" or extrinsic to the Grant Deed. (A.A.I, pp. 179; 184; 187 para. "3") Metcalf further argues that the evidence at trial was insufficient to support the judgment in favor of Poyar.

Citing a single sentence of the trial court's Statement of Decision which provided that "parol evidence to the contrary is stricken and is not admissible" Metcalf argues that the court improperly excluded evidence on the issue of ownership of the Property. (Opening Brief, pgs. 16-17) By failing to provide a recorder's transcript and the Grant Deed (Respondents' Appendix or "R.A.," Exhibit "1," pp. 1-3) itself, Metcalf attempts to conceal the trial court's proper treatment of the evidence and exposes appellants purpose of delay and harassment. Metcalf's appeal should be denied on several grounds.

First, Metcalfs' appeal of trial court's October 8, 1996 judgment resolving all claims raised by Metcalfs' complaint (A.A. I, pp. 176, 190-192) should be denied as late.

Second, the record does not support Metcalf's contentions concerning the trial court's handling of evidence extrinsic to the Grant Deed. In other words, the record does not disclose error in this regard.

Finally, the trial court's judgments, the Statement of Decision dated July 26, 1996 as well as the partial record presented, outline the thoughtful weighing of evidence by the trial court and evidentiary rulings which are supported by substantial evidence and the law. In contrast, Appellants' claims that the Grant Deed did not vest title to the Property in Poyar and that a contrary oral promise provides Metcalf ownership in the property by constructive or resulting trust are conclusory, self-serving and unsupported.

B. TRIAL OF THE POYAR CROSS-COMPLAINT FOR SLANDER OF TITLE.

The trial on James and Paula Poyar's slander of title claim commenced immediately after the trial court's judgment on the complaint. The testimony of James Poyar, John Metcalf and Sandra Metcalf, established that John Metcalf and his wife intentionally slandered Poyar's title to the Property by the willful recording of a mechanic's lien to prevent refinancing and sale, and by Metcalf's successive bankruptcies to delay Poyar's clearing the cloud on title. Each bankruptcy prevented and delayed the removal of the wrongfully recorded mechanic's lien. The trial court wrote:

> As pointed out by Metcalf without blushing, he filed bankruptcies for the purpose of avoiding the loss of possession of the subject real property.
>
> ***
>
> In like fashion, Metcalf testified that he recorded the mechanic's lien against the subject property (all the while claming that it was his property as well) to avoid a sale or loss of possession.
> (AA. I, pp.179-180.)

> [I]n this case, Metcalf failed to comply with all aspects of the Mechanic's Lien law all the while disparaging the Poyars' title.
> (A.A. I, p. 183.)

The trial court awarded nominal damages ($2,000) for the disparagement of title claiming there was no lost sale but allowed attorneys fees an as an element of damages under case law and Code of Civil Procedure Section 880.360 with the amount to be determined on a cost bill. The trial court found based on clear and convincing evidence, Poyar was entitled to punitive damages. (A.A., I, p. 185.)

The entry of judgment, the determination of attorney's fees and the punitive damage trial were delayed when Metcalf filed a Chapter 7 bankruptcy in August 1996. (R.A., Ex. "9," p. 805.) It was the fifth bankruptcy filing since 1994 and seventh since 1986. In October 1996, Poyar obtained relief from the automatic stay to enforce his right to possession under an unlawful detainer judgment. On October 8, 1996, after Metcalf exhausted all avenues of delay, including ex parte applications, the state trial court issued a judgment for possession, and a judgment for Poyar and RSI on the Metcalf complaint because the bankruptcy stay did not prevent Metcalf as plaintiffs from prosecuting the complaint. (Shorr v. Kind (1991) 1 Cal.App.4th, 2 Cal.Rptr. 192.) The Judgment reserved jurisdiction over the cross-complaint pending the outcome of the Metcalf bankruptcy. (A.A., I, p. 190, 192.)

Poyar obtained a relief from stay order in April 1997 to record an order reconfirming the expungement of the *lis pendens* and an order releasing the mechanic's lien so he could obtain a title policy. (RA, Ex. 10, p. 848-854.) To finalize the award of attorneys fees as compensatory damages and hold the trial on punitive damages, Poyar initiated an adversary proceeding in Metcalf's bankruptcy by filing a complaint objecting to discharge under 11 U.S.C. Section 523. Poyar then obtained another relief from stay order to complete the damages phase of the slander of title complaint so that it could be used as *res judicata* authority by the bankruptcy court. (RA, Ex. 9, p.855.)

At the state court hearing on July 24, 1997, the trial court entered orders clearing title and set a hearing date on Poyar's request for an award of fees as an element of damages for slander of title under Code of Civil Procedure Section 880.360, and the trial on punitive damages. Metcalf appeared at the hearing. (Appellants Appendix did not attach the transcript of the July 24, 1997 hearing.) On July 30, 1997, as ordered by the court, Poyar gave written notice of the setting of hearing dates for the attorney fee and punitive damages hearing. (A.A. I, p. 212.)

On August 8, 1997, Poyar gave notice of the hearing for determination of punitive damages which stated, in part "the court will conduct a hearing on the amount of punitive damages to be awarded." (A.A. I, pp. 216-217.) Poyar served a "Notice of Request for Award of Costs . . . and Attorneys Fees as an Element of Damages" accompanied by

a Memorandum of Costs, Points and Authorities, declaration and billing statements. (A.A. I, pp. 220-279.) Poyar further served Metcalf with a "Notice to Appear at Trial on Punitive Damages and for Production of Documents . . ," which also demanded that Metcalfs appear personally at the hearing. (A.A. I, pp. 280-286.) Metcalf filed an opposition to Poyar's production of records and punitive damages. (A.A. I, p. 293.)

On September 19, 1997, the trial court heard the Poyar motion for attorneys fees as an element of damages. In addition to documentary evidence, the trial court required that Poyar's trial attorney testify and John Metcalf conducted cross-examination. Sandra Metcalf did not appear for any portion of the hearing or trial. The trial court awarded, as an element of damages, $34,000 in attorney's fees and $639 in costs. (A.A. I., p. 307 - Minute Order dated 9-19-97.)

The punitive damage trial proceeded the same day. The trial court heard testimony from James Poyar and John Metcalf and admitted into evidence without objection, documentary evidence of the Metcalfs' financial condition. Among other records, the court considered 1099 forms issued to John and Sandra for 1995 and 1996, canceled checks issued to Metcalf and a signed lease agreement containing a personal financial statement. Metcalf presented no witnesses. Sandra Metcalf did not appear. Metcalf then asked for and was granted a continuance to September 26, 1997 so he could prepare for closing statements. Id. Metcalf's Appendix does not attach a copy of the September 19, 1997 transcript.

On September 26, 1997, Metcalf failed to appear claiming in a telephone conference with the court and Poyar's counsel that his mother in law was in the hospital. The trial court ordered closing statements to proceed but gave Metcalf the opportunity to re-open the case upon evidence of good cause. (A.A. II, p. 309, Minute Order dated 9-26-97)

Metcalf's motion to re-open that portion of the trial was granted on October 31, 1997 and again rather than present evidence or a closing statement, Metcalf asked for a continuance. Again, Sandra Metcalf failed to appear. No witnesses were present and none had been subpoenaed. Metcalf was nevertheless allowed to testify and produce further evidence including declarations and documents; however, Metcalf did not move to have anything admitted. Again, Metcalf provides no transcript of the proceedings on appeal. The trial court's minute order dated November 27, 1997, attached a statement of decision that set forth the evidence and awarded Poyar $75,000 punitive damages against John Metcalf and $15,000 in punitive damages against Sandra Metcalf. (A.A. II, pp. 457-458.) The court stated that:

> it "finds by clear and convincing evidence, that Metcalf's participated in an ongoing common plan, scheme and design to prevent . . . the [Poyar] from reaching the property. [Metcalf] "wrongfully filed and recorded a *lis pendens*, . . in total violation of the Mechanic's Lien Laws, a mechanic's lien was recorded against the property. . . Other acts of interference with cross-complainants' rights are set forth in the record. The cross-defendants' conduct was malicious [sic], oppressive and in disregard of the rights of [Poyar]."

> "[¶] The court finds that the income received . . . by John Metcalf, Jr. in 1995 and 1996, and income received by Sandra Metcalf . . . justifies awards of exemplary damages . . ." (Id.)

C. TRIAL OF THE UNLAWFUL DETAINER ACTION.

This action was originally commenced in 1993 as a separate municipal court lawsuit (Case No. 289977) and stayed in 1994 by Metcalf's four successive and at times overlapping bankruptcies. Ultimately, it was set for trial before Judge Francis A. Firmat when on March 1, 1995, Metcalf stipulated to pay $2,000 a month as condition to remaining in possession pending the trial on the Metcalf complaint. The trial was heard before Judge Todd. Based on the service of a 30-day notice to terminate a month-to-month tenancy, Poyar was awarded judgment for possession and damages for unpaid rent for $14,798.52. (A.A. I., pp. 185, 188.)

D. NEW TRIAL MOTIONS.

Metcalf's motion for a new trial was denied. (A.A. II, pp. 587-591 - Minute Order dated 3-17-98.) The trial court rejected Metcalf's claim of insufficiency of the evidence on the Metcalf complaint, based in part on the failure to produce any transcript or specify claimed error, and the court's weighing of the evidence. The challenge based on excessive damages on the cross-complaint also was rejected, with the trial court reiterating the basis for punitive damages based on the defendants' financial condition. Other claimed errors (allegedly refusing to supplement the Statement of Decision and denying Metcalf further time to present witnesses) were denied because they were without any factual or legal support. (Id.)

II.

STATEMENT OF FACTS

The following "Statement of Facts" is summarized from the facts set forth in the parties' pleadings including trial briefs and exhibits; defendant Poyar's Motion for Judgment and the trial court's Statement of Decision dated July 26, 1996. (A.A. I, 1-66; 70-135; 170-189; 190-194; A.A. II, 587-591; R.A. Exhibits "1" through "11")

A. METCALF'S INVOLVEMENT WITH POYAR AND RSI.

In 1983, John Metcalf met James Poyar when both men were employed by a construction marketing company known as Industry Systems Company ("ISC"). In 1984, Poyar decided to leave ISC and start a similar business through a newly formed California corporation called Recommendation Systems, Inc. (hereinafter "RSI"). Poyar contracted with Metcalf and another former ISC employee, Robert Walker, to perform sales. The three men discussed co-ownership of the business, but Metcalf and Walker declined to become shareholders for primarily three reasons: (1) they lacked the capital to invest; (2) they wanted to avoid the potential liability of an owner (personal guaranties on an office lease); and (3) they wanted to be independent contractors to gain tax advantages and conduct other businesses on the side.

In their capacities as RSI salesmen, Metcalf and Walker received compensation in the form of sales commissions and a year-end bonus based on the corporation's performance. Poyar incorporated RSI and was the

only source of capital; he managed the company, he leased office space and equipment, paid all bills, had sole signature authority on accounts, and made all management decisions. Metcalf and Walker were salesmen only.

In 1987, downturns in the economy and the construction industry forced RSI to consider other forms of marketing business. Poyar decided to implement a marketing and sales concept consisting of selling advertising menus to fast food restaurants known as Business Promotions. Metcalf became the primary sales producer. Walker soon left the company to pursue other work.

Between 1987 and 1992, RSI prospered. Metcalf's sales commissions and bonuses fueled an increasingly lavish lifestyle that could not be sustained when business slowed. Poyar temporarily cured Metcalf's increasing debt by advancing him commissions.

In 1988, Metcalf purchased a residence located at 938 Ridgeline in Orange, California ("Property"). Metcalf after he was paid for his sales commissions paid $140,000 as a down payment on the $540,000 purchase price. Poyar and his family loaned Metcalf $400,000 pending Metcalf's securing permanent financing. Metcalf signed a promissory note secured by a first position trust deed that was to be paid in full by January 1989. (A.A. I, p. 178)

In late 1990, Metcalf developed a back condition that hampered his ability to travel and work in sales. Metcalf's work and financial health was also hurt by his failure to pay income taxes requiring him to constantly

dodge an IRS lien. He also had not disclosed to Poyar or Walker a 1986 bankruptcy filing.

In 1991, Metcalf attempted to resolve his personal financial difficulties by starting two "multi-level marketing" schemes which he named Guaranteed Rollover and Big Brothers and Sisters of the World. Metcalf had failed to pay federal taxes and his earlier bankruptcy had been dismissed. With the IRS lien and unpaid medical bills, in 1991 he filed for a Chapter 13 bankruptcy petition. (R.A., Ex. "3," p. 625) Metcalf did not claim any ownership interest in any real property. (Id., p. 645.)

In 1992, Metcalf informed Poyar in writing that he would no longer contract with RSI and because he thought that he could make more money on his own. John Metcalf had many careers. He had a real estate broker's license and at one time gave seminars for title companies. His wife, Sandra, also had been a real estate agent.

In early 1993, Metcalf began working for a woman named Janice Cadiz in a marketing business known as Creative Promotions, and occasionally worked for RSI via contract with Creative Promotions. Because of an increasingly bad economy and a saturated sales market, RSI's profits dwindled as Metcalf increasingly devoted his attentions to other business pursuits.

In 1993, Metcalf also started a marketing business with his son-in-law, Brian Beloro, known as Regional Promotions. Regional Promotions also sold advertising at fast food locations. Metcalf's business activities

with Regional Promotions led Metcalf's arrest and a second criminal conviction for grand theft in 1994.[2] Poyar and RSI ceased the marketing business in early 1993.

B. THE GRANT DEED.

Following the October 1988 purchase of the Property, Metcalf was unable to obtain bank financing to pay the Poyar $400,000 promissory note. At Metcalf's suggestion Poyar agreed to provide financing. In January 1989, the promissory note was modified to increase the amount due. By April 1989, Metcalf had not made any of the monthly payments on the note. The Metcalf's wished to remain on the Property but could not manage the payments. So it was agreed that Metcalf, in consideration for Poyar canceling the $437,000 promissory note and reconveyance of the trust deed, would transfer title to Poyar. (A.A. I, p. 178-179). John and Sandra Metcalf had been licensed real estate sales agents and were fully cognizant of the effect of a notarized and recorded the Grant Deed. An escrow company handled all of the paperwork. A Grant Deed was recorded on June 15, 1989, (R.A. Ex. "1", p. 1-3.) and Poyar was issued an owner's title policy. James and his wife Paula thereupon became the legal owners of the Property. (Id.; A.A. I, p. 178-179) There was no reservation or limitation set forth in the Grant Deed.

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[2] In 1983, Metcalf was convicted in San Bernardino county for grand theft by selling advertising and then not supplying the product. The second felony conviction in Orange County in 1994 was based upon similar criminal conduct.

Between 1989 and 1993, Metcalf rented the Property for $2,000 a month. Poyar paid all property taxes, insurance, and homeowner's association dues.

In 1993, when Metcalf and Creative Promotions stopped working with RSI and Metcalf had been out on his own since late 1992, Poyar had Metcalf sign a Lease Agreement because Metcalf still wanted to rent the Property. The first rent check was returned NSF, and after several months without any rent, Poyar filed an unlawful detainer action. In response, Metcalf did two things: first, in late 1993, he recorded a mechanic's lien for $600,000 on the Property. Metcalf never gave Poyar notice of the lien. Second, John Metcalf soon filed the first of four Chapter 7 bankruptcy petitions (all filed in 1994) to delay the eviction. Metcalf admitted he filed the bankruptcy actions to delay eviction from the Property. (A.A. I, 179 and R.A. Ex's. "4" through "7.") John Metcalf was sanctioned $3,400 by U.S. Bankruptcy Court for his tactics designed to delay Poyar's possession.[3] (R.A. Ex. "8") To date, these monetary sanctions have not been paid.

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[3] Each time Metcalf filed for bankruptcy, Poyar was required to obtain an order granting relief from the automatic stay. Each time it was granted, John Metcalf would file another case. He followed a procedure employed by debtors seeking delay for delay's sake. He filed a Chapter 7 petition and without giving notice to creditors ask the court to convert it to a Chapter 13 case. Once converted, he would voluntarily dismiss the Chapter 13 case. A chapter 7 case can be dismissed only upon court order. The sanctions award had no effect. Having delayed state court proceedings with three petitions filed in the U.S. Bankruptcy Court in Santa Ana, just before trial, his wife, Sandra whose residence was Orange County, filed a Chapter 7

In each of John Metcalf's 1994 bankruptcies, in each required "Schedule of Assets," he declared under oath that at the time of the filing for bankruptcy he owned no interest in any partnership or other business and most important never included the Property under the Schedule requiring that a debtor list all real property interests. (R.A., Ex. "3" through "5.") [4] Metcalf never listed as an asset of his case the recorded mechanic's lien for $600,000. (Id.)

Despite repeated admissions that he owned no real property, John Metcalf first claimed an interest in the Property, other than as a tenant, in August 1994. Metcalf claimed in their lawsuit that they had a 1989 oral agreement to own a 50% interest in the Property. The asserted defense to the unlawful detainer case was that they were owners, not tenants. Metcalf along with his complaint filed a *lis pendens* on the Property.

Although he had previously recorded a $600,000 mechanic's lien on the Property, Metcalf was not a contractor (licensed or otherwise). He performed no work of improvement and claimed he recorded the mechanic's lien to prevent any sale of the Property because he thought he

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petition in Los Angeles. She, too, converted to a Chapter 13 case forcing Poyar's attorney's to obtain an order converting the case back to Chapter 7, and granting Poyar relief from the automatic stay to proceed with his unlawful detainer case and cross-complaint. Sandra's bankruptcy case was later dismissed when she again had it converted to a Chapter 13.

[4] (See, R.A., 1991 bankruptcy, real property schedule (p. 627); residential lease at a location other than the Property (p. 634); Ex. 4: 1994 bankruptcy, real property schedules (pp. 675, 690, 694.)

was owed money from RSI. As a result, Poyar could not refinance or sell the Property.

C. METCALFS' CLAIMS ON APPEAL.

Metcalf's complaint alleged that he was a partner with James Poyar in RSI pursuant to an oral agreement. Based on this alleged partnership, Metcalf claimed in 1989 when Metcalf experienced tax and financial difficulties, Metcalf transferred title by the Grant Deed on the explicit oral agreement that "Poyar would transfer back to the Metcalf their one-half interest upon demand, with no further consideration, or if the Property was sold, Metcalf and Poyar would split the proceeds equally." Metcalf agreed to be would be responsible for one-half of the mortgage, taxes and insurance. (App. Brief, p. 6.)

The trial court based on the evidence at trial found "[t]here was no partnership between Metcalf and Poyar." (A.A. I, p. 184.) RSI was in fact a corporation and Metcalf was never a shareholder. He was an independent contractor and received federal 1099 tax forms for his commissions. "During the course of trial, no documentation, was presented to suggest that Metcalf ever owned any type of interest in the corporation." (Id.)

Metcalf's appeal on the Metcalf complaint is purportedly based in whole upon the trial court's decision to strike evidence extrinsic to the Grant Deed ("parol evidence") concerning the alleged oral agreement set forth above including the testimony of John Metcalf, as well as allegedly corroborating testimony in the form of declarations by Mary Wells, Robert

Walker and Miriam Abernathy. Metcalf asserts that the testimony of Wells, Walker and Abernathy, set forth in the declarations, was offered to prove alleged admissions by Poyar that Metcalf was a joint owner in the Property notwithstanding the recorded Grant Deed transferring fee title to Poyar.

The trial court entered a judgment of nonsuit on Metcalf's complaint finding that "the evidence does not support any intentional, constructive or negligent fraud being perpetrated by the Poyars on the Metcalfs" (A.A. I, 184) and that the Grant Deed prohibited the admission of parol and hearsay information on the issue of ownership of the Property. (A.A. I, 184, 187; A.A. II, 589) Most important, on the issue of the alleged oral agreement in the Property, "Poyar denied any such oral agreements and the court accepts that testimony." (A.A., I, p. .) In weighing the credibility of witnesses the court wrote:

> "[t]he court found James Poyar to be a credible witness as to material facts of the case. Whenever there was a challenge to a state of facts or documentary evidence in the possession of Poyar, the documentary evidence bore out Poyar's position."

(A.A.,I, Statement of Decision, p. 186.)

The trial court stated that Metcalf's arguments in equity for constructive or resulting trust could not withstand Metcalf's own admissions that they owned no interest in partnerships, corporations or real property. (A.A. I, 179; A.A. II, 476; R.A., Ex. "3" through "7.")

All issues raised by Metcalf's complaint including ownership of the Property were resolved by the court's judgment dated October 8, 1996. (A.A. I, pp. 176; 190-192). The notice of entry of judgment was served upon Metcalf on October 24, 1996. (A.A. I, pp. 193-194)

III.

ARGUMENT

A. THE RECORD DOES NOT DISCLOSE ERROR.

1. The Court's Judgment Is Presumed Correct.

The most fundamental rule of appellate review is that an appealed judgment order is presumed to be correct. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. Denham v. Superior Court (1970) 2 Cal.3d 557, 564, 86 Cal.Rptr. 65, 69. Any ambiguity in the record is resolved in favor of the appealed judgment or order. Id.

In the present case, Metcalfs support their appeal by citing isolated comments made by the court in its Statement of Decision dated July 26, 1996:

> "The evidence did not disclose, by a preponderance, that the Poyars fraudulently induced the Metcalfs to transfer title of the property to the Poyars. Parol evidence to the contrary is stricken and is not admissible."

(A.A. I, 184)

According to Metcalf, the foregoing statements of Judge Todd prove that the court erroneously failed to "allow" parol evidence suggesting by

inference the court did not consider or weigh evidence extrinsic to the Grant Deed on the issue of ownership of the Property. Metcalf's conclusory statement of error is unsupported by the record. Properly and accurately quoted, the trial court's decision to reject parol evidence is found in the sentence immediately following Metcalf's partial citation. The passage states:

> "Further, Poyar denied any such oral agreements and the court accepts that testimony. Because Poyar did not make oral promises to transfer all or any part of the Property back to the Metcalfs, a statement by Poyar that he did not intend to transfer the property back at the time the Grant Deed was given to him in 1989 is fully consistent with a 100% transfer of interest to him."

(A.A. I, p. 184)

Metcalfs' conclusory and self-serving statements of error unsupported by any record are insufficient to create any material issues on appeal. See FTC v. Publishing Clearing House, Inc. (1996) 104 F.3d 1168.

2. Metcalf Has The Burden Of Overcoming The Presumption of Correctness.

Metcalf can only meet their burden of overcoming the presumption of correctness by providing the Court of Appeals with an adequate record which states what was done by the trial court and demonstrates error. See, Maria P. v. Riles (1987) 43 Cal.3d 1281, 1295, 240 Cal.Rptr. 872.

Metcalf contends that the court improperly excluded "parol evidence," and argues that with the offered parol statements, "the entire judgment against the Metcalfs should fail." (Opening Brief pp. 14-15)

However, the record supplied by Metcalf does not demonstrate error in the trial court's handling of evidence or any insufficiency in evidence supporting the court's rulings. In fact, Metcalf is precluded from challenging the sufficiency of the evidence by appealing on an appendix alone. See, Sui v. Landi (1985) 163 Cal.App.3d 383, 385-386, 209 Cal.Rptr. 449, 450; Nat. Secretarial Service, Inc. v. Froehlich (1989) 210 Cal.App.3d 510, 521-522, 258 Cal.Rptr. 506, 512-513; Bond v. Pulsar Video Productions (1996) 50 Cal.App.4th 918, 924, 57 Cal.Rptr.2d 917, 920.

Further, the portion of the court's Statement of Decision cited by Metcalf as disclosing error does not do so. Although there is a general presumption supported by California Rules of Court Rule 52 that an abbreviated record "includes all matters material to a determination of the points on appeal," See Hillman v. Leland E. Burns, Inc. (1989) 209 Cal.App.3d 860, 864, 257 Cal.Rptr. 535 the presumption does not apply where the record omits a reporter's transcript (i.e., appeal taken only on a judgment roll, clerk's transcript or appendix) unless the claimed error appears on the face of the record. Id. Absent error apparent on the face of the record, the judgment is conclusively presumed correct as to all evidentiary matters, i.e., it is presumed that the unreported oral proceedings would have shown an absence of error. See Ehrler v. Ehrler (1981) 126 Cal.App. 147, 153-154, 178 Cal.Rptr. 642, 646.

Judge Todd's Statements of Decision do not demonstrate that he failed to consider and weigh evidence extrinsic to the Grant Deed in forming his judgment. If appellants now believe the Statement of Decision is ambiguous or deficient in this regard, their failure to raise any such alleged ambiguities or deficiencies are waived. See Marriage of Arceneaux (1990) 51 Cal.3d 1130, 1133-1134, 275 Cal.Rptr. 797, 799; Marriage of Hoffmeister (1987) 191 Cal.App.3d 351, 359, 236 Cal.Rptr. 543, 547.

The court's statement that "parol evidence to the contrary is stricken and not admissible" (A.A. I, 184) certainly does not indicate error on its face and in fact unambiguously confirms the proper application of the law to the facts in light of the court's other findings.[5] As a result, the record presented by Metcalf provides no basis for this court to even entertain alleged errors in evidentiary rulings [6] or the trial court's weighing of evidence.

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[5] The court citing an abbreviated summary of the evidence concluded "the evidence did not disclose, by a preponderance, that the Poyars fraudulently induced the Metcalfs to transfer title of the property to the Poyars." (A.A. I, p. 184)

[6] Metcalfs' bare argument that it is "apparent from the Statement of Decision" that the court disallowed offered testimony as set forth in the declarations of Wells, Walker and Abernathy is insufficient. An appellate court will not review "evidence" purportedly contained in trial briefs. See, E.G. Construction Financial LLC v. Perlite Plaster & Company, Inc. (1997) 53 Cal.App.4th 170, 179, 61 Cal.Rptr.2d 574, 579; FTC v. Publishing Clearing House, Inc. supra.

B. EVIDENCE EXTRINSIC TO THE GRANT DEED WAS PROPERLY STRICKEN.

At trial, the court heard testimony over several days and reviewed countless documents on the issue of whether Metcalf acquired an ownership interest in the Property or RSI by virtue of the alleged oral agreement with Poyar. The court carefully considered all proffered evidence on the "ownership" issues even though the Metcalfs repeatedly denied under oath in other legal proceedings they owned any partnership, corporate, or real property interests. (R.A. Ex. "3" through "7;" A.A. I, p. 178.) In effect, the Metcalfs by their testimony at trial were admitting perjury. It is therefore not surprising that the court found Metcalfs' claims in equity to ownership interests in the Property and the alleged partnership unfounded:

> "The Poyars did not hold the subject property in a constructive trust for the Metcalfs."
>
> ***
>
> "The evidence does not support any intentional, constructive or negligent fraud being perpetrated by the Poyars on the Metcalfs. Plaintiffs having failed to establish their claim to a 50% ownership equity in the real property, judgment is to be entered in favor of the defendants and against the plaintiffs on all causes of action claiming plaintiffs' equity interests."
>
> "Metcalf is not entitled to an accounting or damages for alleged unpaid partnership distributions from RSI, a partnership. There was no partnership between Metcalf and Poyar."

(A.A.I, pp. 183-184, Statement of Decision.)

On appeal, Metcalf once again urges a court to ignore the overwhelming evidence that Metcalf did not hold an ownership interest in the Property (the Grant Deed; Metcalf's admissions in the Bankruptcy court) or that there never was an oral agreement. Instead, he asks this court to embrace unreliable witness testimony from Walker, Wells, and Abernathy about an alleged admission of Poyar transmitted to these witnesses years after the real estate transaction was concluded. Metcalf asserts error in the exclusion of this testimony arguing it was sufficient to establish a resulting or constructive trust in favor of Metcalf citing Martin v. Kehl (1983) 145 Cal.App.3d 228, 193 Cal.Rptr. 312. None of Metcalfs' arguments make either legal or factual sense.

The trial court examined the offered parol or extrinsic evidence, weighed it, and thereafter deemed it irrelevant and inadmissible. The court's Statement of Decision provides the factual and legal underpinnings why equity did not favor Metcalf and why the "constructive trust" and/or "resulting trust" remedies applied by the court in Martin under a specific set of facts do not fit here.

1. **Metcalf Was Not Entitled To Either A Constructive Or A Resulting Trust.**

The elements of a constructive trust are that there be a res, the plaintiffs are entitled to it and the defendant acquired the property wrongfully. Mazzera v. Wolf (1947) 30 Cal.2d 531, 183 P.2d 649. The trial court based on the evidence found that Metcalf after executing the

Grant Deed was not entitled to the Property and Poyar lawfully acquired title: Poyar paid $437,000 from Poyar's funds when he cancelled the promissory note. Further, Metcalf did not dispute the validity of the Grant Deed. Upon execution, the Grant Deed passed all legal title. Civil Code section 1105, stating, "A fee simple title is presumed to be intended to pass by a grant of real property, unless it appears from the grant that a lesser estate was intended." See, American Enterprise, Inc. v. Van Winkle (1952) 39 C.2d 210, 246 P.2d 935 (In absence of some exception, limitation or reservation, grant deed is presumed to convey grantor's entire interest); Civil Code Section 1107; Pinsky v. Sloat (1955) 130 Cal.App.2d 579, 279 P.2d 584 (Grantor is estopped to assert that his deed, if its terms were sufficiently comprehensive, did not convey his estate in the land described; and he cannot subsequently claim title thereto). For these reasons, Metcalf also could not have established a resulting trust, which is referred to as an "intent-enforcing trust," where the purchase price is paid by one person and title is taken in the name of another. On the facts of this case, Martin simply does not apply.

In this case, the equitable maxim "he who comes in Equity must come with clean hands" provides insight to the trial court's rulings. See Blain v. Doctor's Co. (1990) 222 Cal.App.3d 1048, 1059, 272 Cal.Rptr. 250. The issue is not that the plaintiff's hands are dirty, but rather "that the manner of dirtying renders inequitable the assertion of such rights against the defendant." Martin v. Kehl supra, at 239-240, n. 1, 193 Cal.Rptr. 312,

318, n.1 (quoting Estate of Blanco (1978) 86 Cal.App.3d 826, 834, 150 Cal.Rptr. 645). In Martin, the court imposed a "resulting trust" in favor of a husband who had, prior to marriage, invested equally in a property purchased with his future wife. 143 Cal.App.3d at 238, 193 Cal.Rptr. at 318. In applying the equitable remedy of a constructive trust, the Martin court admitted evidence of the couple's oral agreement concerning ownership contradicting documented title because of the plaintiff-husband's "clean hands" and, importantly, that the couple had an equal investment in the property. Id.

In contrast to Martin, Metcalfs by their conduct alone rendered relief in equity implausible. Some of the more salient facts include:

(1) Metcalf's borrowed $400,000 from Poyar to buy the Property.
(2) Metcalf's initial down-payment of $140,000 on the Property equaled unpaid obligations owed to Poyar when title was transferred by Grant Deed.
(3) Metcalf despite having no monetary investment in the property continued to live there during litigation essentially rent free.
(4) When Poyar attempted to evict Metcalf for failure to pay rent, Metcalf recorded a bogus mechanic's lien against the property to avoid a sale or loss of the Property.
(5) Metcalf filed multiple bankruptcies for the sole purpose of avoiding eviction and slowing Poyars' unlawful detainer suit.
(6) Metcalf admitted under oath in each of these bankruptcy filings that he owned no real property or interest in a partnership.
(7) Metcalf filed the instant lawsuit claiming that he owned the Property and an interest in an alleged partnership with Poyar.

(A.A.I, pp. 170-189; A.A. II, pp. 587-591)

The intent of the trial court's rulings in light of its findings of fact is clear. It would have been unfair to grant Metcalfs the equitable relief they sought in light of the overwhelming evidence of misconduct on their part. (A.A.I, p. 187, para. "2"). Cf. Mattco Forge, Inc. v. Arthur Young & Co. (1997) 52 Cal.App.4th 845, 60 Cal.Rptr.2d 780; Martin v. Kehl, supra, 145 Cal. App.3d at pp. 239-240, fn. 1. Further, there was ample evidence (including Poyar's financing of the Property) that the parties intended to pass full title by provision of the Grant Deed in 1984. Based upon such evidence, the trial court properly protected a fully integrated document (i.e. – the Grant Deed) transferring full title in the Property from attack by extrinsic evidence to the contrary. (A.A.I, pp. 184 and 187)

2. The Grant Deed Could Not Be Contradicted By Parol Evidence.

Introduction of extrinsic evidence to vary or contradict the terms of an integrated written instrument is prohibited. See Code of Civil Procedure § 1856; Civil Code § 1624. Whether the parol evidence rule applies in a given set of circumstances is a question of law, which an appellate court can consider *de novo* to the extent that no evidentiary conflict exists. See Banco Do Brazil, S.A. v. Latian, Inc. (1991) 234 Cal.App.3d 973, 285 Cal.Rptr. 870; Wagner v. Glendale Adventist Medical Center (1989) 216 Ca.App.3d 1379, 265 Cal.Rptr. 412; EPA Real Estate Partnership v. Kang (1992) 12 Cal.App. 171, 15 Cal.Rptr.2d 209. Generally, the resolution of

this issue involves a two-part analysis: (1) was the writing intended to be an integration; and, (2) is the agreement reasonably susceptible of the meaning urged by the party offering the evidence. Id. If a written agreement is integrated, extrinsic evidence is admissible only to supplement or explain the terms of the agreement - and even then, only where such evidence is consistent with the terms of the integrated document, and only where the writing is not also intended as an exclusive statement regarding its subject matter. Id. See also Alling v. Universal Manufacturing Corp. (1992) 5 Cal.App.4th 1412, 7 Cal.Rptr.2d 718.

In the present case, the court determined that the Grant Deed was integrated and passed full ownership in the Property from Metcalf to Poyar. (A.A. I, pp. 183, 187; A.A. II, 589) The Deed itself provided no terms or implication to the contrary; a fact which is undisputed. Metcalf, however, claims that the parties intended by a prior or contemporaneous agreement that Metcalf would retain a one-half interest in the Property. Metcalf's testimony at trial in this regard was met by defense objections that such oral testimony was inadmissible pursuant Code of Civil Procedure Section 1856; Civil Code Section 1624 and supporting case law. (A.A. I, pp. 84-90; 126-135) The court agreed and properly so.

The trial court, after weighing all of the evidence, determined that the Grant Deed was a writing intended by the parties as a final expression of their agreement concerning ownership and could not be contradicted by any evidence of a prior or contemporaneous agreement such as the one

advanced by Metcalf. (A.A. I, 187 para. "3") Since the extrinsic evidence which Metcalf desires to be admitted contradicted the parties' written agreement, it was stricken because it cannot serve to prove what the agreement was, this being determined as a matter of law by the writing itself. See Citizens for Covenant Compliance v. Anderson (1995) 12 Cal.4th 345, 47 Cal.Rptr.2d 898; Riley v. Bear Creek Planning Committee (1976) 17 Cal.3d 500, 131 Cal.Rptr. 381; Werner v. Graham (1919) 181 Cal. 174, 183 P. 945. The case law explains that the doctrine excluding such parol evidence is a function in part of the parol evidence rule and in part from the policies underlying and implemented by the Statute of Frauds. Id.

Importantly, the court also determined that there was no evidentiary basis for Metcalfs' claim of Poyars' unjust enrichment by the manner the Property was transferred. Metcalf had no financial stake or beneficial interest in the Property at the time of the transfer. Further, Metcalf held no interest in RSI. In sum, there was no equitable reason to allow parol evidence which contradicted the Grant Deed or Poyars' good title to the Property.

3. The Offered Testimony of Walker, Abernathy and Wells Was Irrelevant And Inadmissible To The Issue Of Ownership.

Finally, Metcalf argues that the offered testimony of Walker, Wells and Abernathy should have been admitted for the purposes of impeachment

as a party admission or as a prior inconsistent statement of James Poyar. However, the admissibility of evidence for these purposes requires that the evidence is both relevant and otherwise admissible. (Evidence Code §§ 1220; 1235, 350 and 351) Further, a court has the discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time. (Evidence Code § 352.)

In the present case, Metcalf offered the hearsay testimony of Walker, Abernathy and Wells in the form of declarations which alleged admissions by Poyar that Metcalf was a joint owner of the Property. (A.A. I, 120-125) Since the court had already heard testimony by John Metcalf and Robert Walker, and had an opportunity to read the declarations of Wells, Walker, and Abernathy, there was no need to take further oral testimony from these proposed witnesses. The offered parol and hearsay evidence was deemed irrelevant on the issue of ownership and inadmissible under Code of Civil Procedure Section 1856 and Civil Code Section 1624. (A.A. I, 187; A.A. II, 589-590) On these grounds, the court determined that live testimony by Abernathy, Wells and Walker concerning the alleged admissions of Poyar held no probative value and would only be a waste of time. Thus, even if there is a compelling argument to support the introduction of such testimony, it is harmless error given the overwhelming evidence supporting the court's decision.

C. THERE WAS NO ERROR ON THE SLANDER OF TITLE CLAIM OR PUNITIVE DAMAGES AWARD.

1. The Trial Court's Finding That Metcalf Intentionally Slandered Title Was Based On Overwhelming Evidence.

Metcalf's argument, unsupported by any legal authority or the record, is that "If the parol evidence is to be believed, then the Metcalfs would be deemed owners of a one-half interest in the property, and could not slander title." (Opening Brief, p. 14.) As disclosed by the record, it would take an incredible leap of faith to find Metcalf had any interest in Property following their voluntary delivery of the Grant Deed in consideration for the cancellation of the $437,000 promissory note, and the multiple admissions affirming the absence of any ownership interest. Indeed, Metcalfs' affirmation of having no claim to the Property continues during this appeal. In their pending bankruptcy case (R.A., Ex. "9," p.811, 812), neither the Property nor the complaint upon which this appeal is based are listed as asset of the debtors.

As a matter of law, the trial court's finding Metcalf intentionally slandered title does not depend on their status as an alleged co-owner. Case law provides no such exception from liability to a defendant who makes an unprivileged, false statement with the intent to wrongfully cloud title. Certainly, Metcalf cannot be claiming that an owner has a privilege to slander a co-owner's title. Assuming for the purposes of argument Metcalf had even a partial ownership interest in the Property, they are liable

nonetheless if the elements of the claim are established. This is no doubt why the appellants cite no legal authority.

Slander of title occurs when there is an unprivileged publication of a false statement which disparages title to property and causes pecuniary loss. Gudger v. Manton (1943) 21 Cal.2d 537, 541-546, 134 P.2d 217; Seeley v. Seymour (1987) 190 Cal.App.3d 844, 858, 237 Cal.Rptr. 282. California has adopted the definition the tort set forth in section 624 of the Restatement of Torts, which provides:

> "One who, without a privilege to do so, publishes matter which is untrue and disparaging to another's property in land . . . under such circumstances as would lead a reasonable man to foresee that the conduct of a third person as purchaser or lessee thereof might be determined thereby is liable for pecuniary loss resulting to the other from the impairment of vendibility thus caused."

Seeley v. Seymour, supra, at 858. The Court continued, adding that:

> "Nowhere does a California decision require that the published matter create a legal 'cloud' upon plaintiff's title to constitute a disparagement. Indeed, the tort may be committed through the use of oral statements . . . or signs . . . neither of which involve any recordation whatsoever. [¶] '[Protection] from injury to the salability of property is the thrust of the tort.' . . . Therefore, the key to whether the defendant's conduct is actionable is not whether he has succeeded in casting a legal cloud on the plaintiff's title, but whether he could reasonably foresee that 'the conduct of a third person as purchaser or lessee [of the property] might be determined thereby. . . ' (Rest., Torts, §624, italics added.), n.4"

190 Cal. App. 3d at 858. Thus, filing or recording a document which appears to claim an interest or to cast doubt upon the title may furnish the basis for an action. Metcalf certainly intended such a result.

The elements of a slander of title claim are (1) a publication, (2) the absence of justification, (3) falsity and (4) pecuniary loss. See, Seeley, supra. Each of these elements was established from the uncontradicted evidence before the trier of fact.

2. The Award Of Attorney's Fees For Slander Of Title Was Proper And Is Not Excessive.

Attorney's fees and litigation costs are an element of the damages for slander of title. In Seeley v. Seymour, supra, the court held:

> "In an action for wrongful disparagement of title, [fn11] a plaintiff may recover (1) **the expense of legal proceedings necessary to remove the doubt cast by the disparagement,** (2) financial loss resulting from the impairment of vendibility of the property, and (3) general damages for the time and inconvenience suffered by plaintiff in removing the doubt cast upon his property."

Id. at 865 (emphasis added.)

Although the Seeley court disagreed with the amount of fees awarded by the jury, the appellate court held that attorney fees and litigation expenses reasonably necessary to remove a cloud from the record were recoverable as an element of damages. Appel v. Burman (1984) 159 Cal.App.3d 1209, 206 Cal.Rptr. 259, upheld damages in a slander of title case and stated the trial court's statement of decision correctly relied on Glass v. Gulf Oil Corp. (1970) 12 Cal.App.3d 412, 437:

> "[f]or the proposition that attorneys fees "even those incurred in the same action, in removing the doubt cast by the disparagement of title are a proper element of damages to be

> awarded to the plaintiffs in this slander of title action." Appellants concede and we agree that since damages were properly awarded in this case, attorney's fees are also a proper element of the damages."

(Id. at 1216.) The recoverable damages for slander of title were codified in Code of Civil Procedure Section 880.360:

> A person shall not record a notice of intent to preserve an interest in real property for the purpose of slandering title to the real property. If the court in an action or proceeding to establish or quiet title determines that a person recorded a notice of intent to preserve an interest for the purpose of slandering title, the court shall award against the person the cost of the action or proceeding, including a reasonable attorney's fee, and the damages caused by the recording.

See, Law Revision Commission, Comment 880.360, which provides that "[S]ection 880.360 does not affect the elements of the cause of action for slander of title and codifies the measure of recovery for slander of title, with the addition of attorney's fees."

Poyar also did not have to show "actual" damages to recovery for Metcalf's slander of title. As set forth above in Seeley v. Seymour, supra, it is clear that the damages are not restricted to what can be shown to be an "out-of-pocket" loss. The loss in value and the time and inconvenience as standard elements, clearly show that an award may be made for such damages as may be proximately caused by a defendant's conduct. It is not necessary to show that a particular pending deal involving the property was hampered or prevented. See, Gudger v. Manton, (1943) 21 Cal.2d 537, 541, 134 P.2d 217. Even if the damages that are shown may be

nominal or not "bottomline" like because they are difficult to quantify, the damage to the owner is sustained. See, Appel v. Burman supra at 1215 ("Although the extant cases deal mainly with the loss incurred as the result of losing a purchaser, it is clear in California that a slander of title can result where no purchaser is present."). Thus, general damages may be awarded even if they are not shown to be "actual" or are not subject to exact quantification. In Wright v. Rogers (1959) 172 Cal.App.2d 349, 342 P.2d 447, the court stated:

> "It has been held that in an action for disparagement of title, damages may be awarded for the inconvenience and time suffered by the plaintiff in the removal of a recorded cloud on his title. . . . There is no express testimony of the amount of damage as a result of these matters, but their character is such that the trial judge could call on his general knowledge of their amount. . . . The record fully supports the finding as to compensatory damages."

(172 Cal.App.3d at 366-367.) Here, the trial court heard testimony from James Poyar about his inability to refinance the Property and inability to sell it. Although there was no testimony of a failed sale, the trial court correctly concluded that damage had been sustained by the Metcalf's wrongful disparagement of title. Of course, Metcalf again has not provided this Court with the trial transcript to support his claim.

The amount of the damages (attorney's fees) is not excessive. An appellate court must uphold an award of damages whenever possible and "can interfere on the ground that the judgment is excessive only on the ground that the verdict is so large that, at first blush, it shocks the conscience and suggests passion, prejudice or corruption on the part of the

jury." Seffert v. Los Angeles Transit Lines (1961) 56 Cal.2d 498, 15 Cal.Rptr. 161. Here, the award based on the trial testimony was more than justified. Further Metcalf offered no witness (expert or lay) to testify that the attorney's fees incurred were excessive.

Regarding Metcalf's argument that Poyar had a simple remedy by filing a motion under Civil Code Section 3154, the trial court said it best: it was speculation. "Mr. Metcalf would have the Court assume that [he] would not have challenged such an attempt. . ." (AA. II, p. 589.) The trial court was referring to the record of Metcalf's evasive and dilatory actions by successive bankruptcy filings and misuse of lien laws to thwart any sale, not to protect an interest in property but to delay eviction and use the lien as leverage to obtain money from Poyar and RSI. In Seeley, supra, in response to the defendant's claim the recording of a "memorandum" had no legal effect of the property, the court noted "[S]eymour was able to thwart a prospective sale without first proving his claim in court. It was precisely at this form of insidious disparagement that the tort of slander of title was aimed." 190 Cal. App. 3d at 859, n. 5. Similarly, Metcalf was able to thwart Poyar by his actions.

The damage award should be upheld for another reason: "One whose wrongful conduct has rendered difficult the ascertainment of the damages cannot escape liability because the damages could not be measured with exactness. " Wright v. Rogers, supra, at 349.

3. The Award Of Punitive Damages Is Based On Clear And Convincing Evidence And Justified By The Metcalfs' Financial Condition.

Appellants do not find fault in the trial court's decision to grant punitive damages; nor do they challenge the finding that the defendants acted with malice, oppression and with a conscious disregard of the Poyar's rights. (Civil Code Section 3294; AA, II, Minute Order, p. 458.)

Appellants cannot claim Poyar failed to establish the defendants' financial condition as required under Adams v. Murakami (1991) 54 Cal.3d 105, 284 Cal.Rptr. 318. Here, Poyar introduced subpoenaed copies of Metcalf's 1099 forms showing their gross income for the two years preceding the trial and copies of canceled checks. (AA, II, p. 307.) The defendants' income and the earning potential were corroborated by John Metcalf's testimony that he signed and used a Lease Application that contained his and Sandra's detailed statements of current past income and assets.[7] (RA, Ex. "11," p. 860.) Metcalf conveniently omits any mention of this written admission, and he does not attach any of the trial transcripts.

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[7] The evidence proving income was based on the Metcalf's income before their August 9, 1996 bankruptcy filing. The trial court had a copy of the Metcalf's 1996 petition and schedules (R.A., Ex. "9.") signed under penalty of perjury on August 9, 1996. John Metcalf testified the bankruptcy schedules were accurate statements of income for 1995 and 1996, where they listed income as zero. (Id., p. 824, Statement of Financial Affairs). A lease application, dated July 21, 1996, signed under penalty of perjury by both John and Sandra [Ex. BBB as identified in the Court's minute order, A.A., II, p. 307.] disclosed the Metcalf in fact earned significant income for

An appellate court's standard of review of the damages is to find whether substantial evidence supported a determination by the trier of fact of clear and convincing evidence. Tomaselli v. Transamerica Ins. Co. (1994) 25 Cal.App.4th 1269, 31 Cal.Rptr.2d 433 (standard of review is substantial evidence). Here, the trial court's minute order (A.A., II, pp. 307, 506) establishes there was meaningful evidence of the defendants' financial condition and justifies a punitive damage award of $75,000 against John Metcalf and $15,000 against Sandra.

4. The Punitive Damages Award Is Not Excessive.

Although case law requires a reasonable relationship between compensatory and actual damages, there is no fixed ratio by which to determine the proportion between the two. See, Adams v. Murakami, supra. Given evidence the financial condition (gross income was at least $200,000) (AA, II, Minute Order, p. 307, Minute Order, p. 586-591), compensatory damages of $36,000 and the need to punish and deter the Metcalf (AA, II, p. 589), an award of $15,000 and $75,000 is not unreasonable. It cannot be argued it is so large that it was rendered by passion or prejudice. See, Downey Savings & Loan v. Ohio Casualty Ins. Co. (1987) 189 Cal.App.3d 1072, 1099, 234 Cal.Rptr. 835. As noted above, the award is not excessive in light of the defendants' financial condition. Adams v. Murakami, supra. There is nothing in the record that

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these two years and this fact was corroborated by the subpoenaed 1099 forms, cancelled checks and testimony.

warrants the appellate court substituting its own judgment for the trial court's when it is based on substantial evidence as disclosed in the record on appeal. See, Gruner v. Barber (1962) 207 Cal.App.2d 54, 24 Cal.Rptr. 292.

5. There Was No Procedural Irregularity During The Punitive Damages Trial or Determination of Attorney's Fees As Damages.

Metcalf claims the trial court "failed to define the procedural scope of the hearings, causing surprise . . ." (Opening Brief, p. 16.) That claim is simply not supported by the record. Indeed, the record is remarkable for the innumerable chances the Metcalf were given to present evidence, cross-examine witnesses and argue their case. Continuances were repeatedly granted. Matters that were closed were re-opened. Again, although transcripts of the proceedings for September 19 and October 31, 1997 were available, Metcalf did not include them in the record of appeal. It is clear Metcalf received multiple notices about the punitive damages trial and knew of the exact procedure to be followed. He had enough knowledge to demand a Statement of Decision to delay the entry of judgment, and he knew enough procedure to file opposition papers to the Notice to Appear in Lieu of Subpoena compelling an appearance at trial and for production of records. Metcalf cannot in good faith claim "surprise." Sandra Metcalf, for one, willfully failed to show up at any hearing or the trial. As the trial court noted after it had reopened the punitive damages case for Metcalf, when the

time came for Metcalf to present evidence, he did not have any witnesses present in the court and when it suited him he claimed "surprise." (AA, II, p. 590.)

Metcalf argument also ignores the court's reserving of jurisdiction over the cross-complaint to later award attorney's fees and try punitive damages based on the Metcalf's bankruptcy. (AA, I, October 8, 1996 Judgment.) Further, Poyar's relief from stay order (RA, Ex. "10," p. 855.) specifically put Metcalf on notice that Poyar would prosecute his claim for punitive damages and attorney's fees.

The reliance on City of El Monte v. Superior Court (1994) 29 Cal. App.4th 272, 34 Cal.Rptr.2d 490, is entirely misplaced. That case involved a plaintiff who obtained a verdict entitling him to punitive damages and allowed the jury to be discharged without presenting evidence relevant to the amount of punitive damages and the trial court could not "reconvene another jury" to consider that evidence. (Id. at 274.) Here, the same trier of fact who determined that punitive damages should be awarded heard the trial on the amount of punitive damages.

IV.

CONCLUSION

Respondents respectfully request this Court to affirm the trial court's judgments in all respects.

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Respectfully submitted,

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