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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

TONY NEMAN,

Plaintiff and Appellant,

v.

FEDERAL DEPOSIT INSURANCE
CORPORATION, as Receiver of
Washington Mutual Bank, Successor-in-
Interest to Commercial Capital Bank,

Defendant and Respondent.

B212246

(Los Angeles County
Super. Ct. No. BC372874)

TONY NEMAN,

Defendant, Cross-Complainant and
Appellant,

v.

SHAHRAM ELYASZADEH,

Plaintiff, Cross-Defendant and
Respondent.

(Los Angeles County
Super. Ct. No. BC328019)

APPEALS from judgments of the Superior Court of Los Angeles County, William F. Fahey, Judge. Affirmed in part; reversed in part; and remanded with directions.

Mink Law Firm and Lyle R. Mink for Defendant, Cross-Complainant and Appellant.

Allen Matkins Leck Gamble Mallory & Natsis, David R. Zaro and Joshua A. del Castillo for Respondent FDIC as Receiver for Washington Mutual Bank.

Russ, August & Kabat, Jules L. Kabat and Michael S. Brophy for Plaintiff, Cross-Defendant and Respondent Shahram Elyaszadeh.

I. INTRODUCTION

This case involves two appeals and a somewhat convoluted procedural history. The first appeal is brought by Tony Neman, on behalf of U.S. Development 26, LLC (“the corporation”), after the trial court sustained a demurrer without leave to amend a derivative action (Los Angeles Superior Court, case No. BC372874) against, defendant, Federal Deposit Insurance Corporation (“FDIC”) as receiver for Washington Mutual Bank, the successor in interest to Commercial Capital Bank, FSB (“the bank”). The derivative action against the bank is based on the bank’s actions in refusing to continue to fund a construction loan after a dispute arose between Mr. Neman and the co-owner of the corporation, Shahram Elyaszadeh. The trial court dismissed the derivative action after sustaining a demurrer without leave to amend when Mr. Neman failed to follow the trial court’s order regarding amendments to an earlier and different complaint. The trial court dismissed the derivative action on the basis of Mr. Neman’s conduct in attempting to circumvent rather than comply with an order regarding Mr. Neman’s derivative claims in light of a bankruptcy proceeding which had been filed on behalf of the corporation. On March 12, 2009, we dismissed without prejudice a prior appeal (case No. B205524) challenging the demurrer ruling. We concluded that the ruling was not appealable but that Mr. Neman could “raise issues relating to the demurrer in any appeal from a final judgment in the consolidated actions. (Code Civ. Proc., § 913.)”

The second appeal is from a September 29, 2008, judgment. The judgment was entered on a third amended complaint and cross-complaint between Messrs. Neman and Elyaszadeh following a court trial of the remaining issues in the consolidated action (case No. BC328019). The judgment awards Mr. Elyaszadeh \$12,982,806 plus \$1,300,000 in punitive damages.

On appeal from the judgment, Mr. Neman re-filed his opening brief from the derivative action appeal in case No. B205524. The bank requests dismissal of the appeal of the derivative action. Insofar as the appeal against the bank is concerned: the bank’s

dismissal motion is denied; the trial court is ordered to amend the judgment nunc pro tunc in favor of the bank; and the judgment in favor of the bank is affirmed. The judgment in favor of Mr. Elyaszadeh is reversed as to \$172,653 in non-project damages, otherwise it is affirmed.

II. BACKGROUND AND PROCEDURAL HISTORY

This case has a number of complaints and cross-actions which all arise out of the problems between the Messrs. Neman and Elyaszadeh, the owners of a limited liability corporation. The corporation was formed to purchase real property in Malibu for the construction of four residences. Construction on the property ultimately ceased after the two owners became embroiled in a dispute and the bank (the construction lender) refused to continue to make disbursements.

The corporation and Mr. Neman filed suit against the bank on March 3, 2005 (*U.S. Development 26, LLC and Tony Neman v. Commercial Capital Bank, FSB, et al.*, case No. BC329745) for contract and other related claims. Thomas J. Weiss represented the corporation and Mr. Neman. Counterclaims were brought by the bank against Mr. Neman and others. On April 13, 2005, the bank answered the complaint and cross-complained against the corporation and Mr. Neman and others. The bank's cross-complaint contained claims for judicial foreclosure, specific performance, appointment of receiver, breach of guarantee and declaratory relief.

On December 1, 2005, an involuntary bankruptcy petition, *In re U.S. Development 26, LLC*, United States Bankruptcy Court, Central District of California, case No. SV05-50099-KT, was filed against the corporation by Mr. Neman. On March 28, 2006, a bankruptcy trustee was appointed. On August 11, 2006, the bank filed a proof of claim in the bankruptcy action regarding its claims to enforce the loan documents and to recover the loan balances in the amount of \$3,099,456.71 as of December 1, 2005. On October

30, 2006, the bankruptcy court approved the trustee's abandonment of the corporation's state court action against the bank, case No. BC329745.

In October 2006, in response to claims of conflict of interest regarding Mr. Weiss's representation of the corporation and Mr. Neman, Mr. Neman filed a substitution of attorney substituting Lyle R. Mink as his counsel in case No. BC329745. On March 12, 2007, Mr. Weiss posted jury fees on behalf of the corporation in case No. BC329745. On April 10, 2007, the trial court granted Mr. Elyaszadeh's motion to disqualify Mr. Weiss as counsel for the corporation in case No. BC329745.

On April 17, 2007, Mr. Neman, through his attorney, Mr. Mink, filed a motion for leave to file an amended complaint in case No. BC329745. The proposed amendment would allow Mr. Neman to proceed as an individual and as a derivative plaintiff on behalf of the corporation. On May 14, 2007, the trial court denied the motion without prejudice. The trial court ordered plaintiff to provide evidence as to whether the bankruptcy trustee had abandoned the corporation's direct and derivative claims. The trial court also ordered Mr. Neman to produce evidence that the bankruptcy court would allow the derivative claims to proceed. In response, Mr. Neman produced an e-mail from the trustee which stated that the trustee had no opinion as to whether Mr. Neman could legally pursue a derivative action. The trial court concluded that the e-mail was not sufficient to comply with the court order. On June 1, 2007, the trial court ordered the dismissal of the corporation's complaint in case No. BC329745. No appeal was taken from this dismissal order or the court's refusal to allow the proposed amendment. The court also ordered Mr. Neman's complaint and the bank's cross-complaint in case No. BC329745 consolidated with the action between Mr. Elyaszadeh and Mr. Neman, case No. BC328019.

On June 29, 2007, the trial court ordered the corporation's jury fees transferred to the State Trial Court Trust Fund. Thus, the only jury fees that had been posted in the now consolidated case were on behalf of the corporation whose complaint had been dismissed.

On June 18, 2007, Mr. Neman filed a derivative complaint on behalf of the corporation in Department 13 of the superior court. The matter was subsequently transferred to Department 78, where the consolidated action was being tried. The bank demurred to the derivative action on the grounds: the trustee had not abandoned the derivative claims; the derivative claims violated the bankruptcy stay; Mr. Neman did not satisfy the requirements for a derivative claim; and Mr. Neman could not represent the corporation due to a conflict.

On July 27, 2007, the bankruptcy court approved the trustee's sale of the land to Mr. Elyaszadeh for \$6,625,000 in cash. The bankruptcy court also approved a payment of the principal amount of the bank's loan plus interest from the sales proceeds. In October 2007, the bank and the trustee filed a stipulation which was intended to "fully and finally settle all claims between [the bankrupt estate and the bank] involving the Loans and the Property, including but not limited to, the allowed amount of the claims of [the bank] in connection with the bankruptcy and any other claims that may exist between in any and all other claims that may exist between the Parties." The bank agreed to reduce the disputed claims by \$185,489.74. Paragraph 6 of the Stipulation provided: "Except as otherwise provided herein, the Trustee and [the bank] and their assigns, agents, attorneys and/or representatives, and each of them, here do generally release and forever discharge each other and their assigns, agents, attorney, employee and/or representatives, and each of them, ('the Releasees'), from any and all claims, demands, damages, debts, obligations, losses, causes of action, costs, expenses, attorney's fees, liabilities of any nature whatsoever, known or unknown, whether past, present or future, based on contract, tort, statute or other legal or equitable theory of recovery which, as of the date hereof, they have, had or may cause to have against the Releasees arising out of or in any way related to the Loans, the Loan Documents, the Property, the pledge account or the Bankruptcy, (to the extent not previously abandoned). Unless specifically ordered by the Court, the Trustee agrees to not to take any affirmative steps to support actions, claims or lawsuits against [the bank] in any state or federal court, whether direct or

derivative, arising out of or related to the Loans, the Loan Documents, the pledge account or the Property. Notwithstanding anything in this Stipulation and release, [the bank] retains all of its rights to pursue its claims under the Guaranty Agreement related to the Loans.” The bankruptcy court granted the motion approving the stipulation for allowance of claim on November 21, 2007.

On December 6, 2007, the trial court sustained the bank’s demurrer to the derivative action on the ground that it was similar to the proposed first amended complaint. The trial court noted it had previously ordered Mr. Neman to show that the trustee had abandoned the causes of action and/or that the bankruptcy court authorized the state court to proceed with the derivative action. On December 17, 2007, Mr. Neman filed a first amended complaint. On December 26, 2007, the bank demurred to the first amended complaint on the ground that the amended complaint did not comply with the trial court’s prior orders. The bank further argued that the November 2007 bankruptcy allowance orders had preclusive effects on the derivative complaint. On January 4, 2008, the trial court sustained a demurrer to the first amended complaint in the derivative action without leave to amend on the ground the first amended complaint did not comply with court orders regarding either a statement from the trustee or a bankruptcy court order that any derivative claims had been abandoned.

On March 26, 2008, the trial court entered summary judgment against Mr. Neman on the complaint and cross-complaint in case No. BC328019. The bank was awarded \$185,489.74 plus interest and costs including attorney fees. On July 13, 2009, we affirmed the summary judgment against Mr. Neman. (*Tony Neman v. FDIC, as Receiver for Washington Mutual Bank* (July 29, 2009, B208164) [nonpub. opn.])

The only claims remaining to be tried in the consolidated action were the claims between the two owners in case No. BC328019. Both parties had requested a jury trial in case No. BC328019 in 2005. An initial trial date of May 5, 2008 was set. On April 21, 2008, Mr. Elyaszadeh raised the issue of whether Mr. Neman’s failure to post jury fees by April 11, 2008, which was 25 calendar days before May 5, 2008, resulted in a waiver

of the right to a jury trial. On April 23, 2008, the trial court allowed the parties to submit briefs on the jury waiver issue. Mr. Elyaszadeh argued: no jury trial had ever been requested; Mr. Neman never posted jury fees in case No. BC328019; the only jury fees posted were by the corporation in case No. 329745; and the corporation had been dismissed. Robert E. Satterthwaite, counsel for Mr. Elyaszadeh, declared that as of April 21, 2008 he had spoken with Mr. Mink about the possibility that the failure to post the jury fees had resulted in a waiver. Mr. Satterthwaite sought to meet and confer to work on joint instructions so as to comply with the trial court's scheduling order. Mr. Mink indicated that he had no instructions available as of April 22, 2008. The instructions were due on April 23, 2008. As of April 28, 2008, Mr. Satterthwaite had not received any proposed jury instructions from Mr. Mink. Mr. Neman posted jury fees on April 25, 2008. For the hearing on the issue, Mr. Elyaszadeh's asserted there was prejudice to both him and the court. This was because trial was "only days away." In addition, Mr. Elyaszadeh had been preparing for a court trial. The trial court was also proceeding as if the matter would be tried by the court. The case had been pending in the superior court for a number of years. The court was reminded that it had denied an earlier request for continuance of the trial date.

On April 30, 2008, the trial court concluded that the matter would be tried by the court. The trial court found: the only jury fees posted had been filed in a different case (case No. BC329745); the jury fees were posted by Mr. Weiss on behalf of a corporation that had been dismissed from the action; the corporation is not a party to case No. BC328019 which is the matter to be tried; the fees were due by April 11, 2008; and the belated filing of fees is irrelevant to the waiver issue. The trial court also concluded that Mr. Elyaszadeh had established prejudice in his papers. On May 1, 2008, Mr. Neman filed a petition for writ of mandate or prohibition in which he sought an order directing the trial court to vacate its April 30, 2008 order determining Mr. Neman had waived the right to a jury trial. Mr. Neman also requested an immediate stay of the proceedings pending disposition of the petition. The stay was denied on May 1, 2008.

The petition was denied on May 2, 2008. (*Neman v. Superior Court* (May 2, 2008, B207546).)

The matter proceeded to a court trial on the third amended complaint and cross-complaint in case No. BC328019. On June 30, 2008, Mr. Neman submitted a post-trial brief. Mr. Neman requested punitive damages on his cross-complaint “in the event the court finds sufficient justification for them.” On July 3, 2008, the trial court heard closing arguments on the trial. During argument, Mr. Elyaszadeh indicated that he was requesting punitive damages. The trial court stated that it did not recall bifurcating the trial for a punitive damages phase. The trial court issued a tentative decision on July 30, 2008. In the tentative decision, the trial court noted that it was inclined to award punitive damages against Mr. Neman. On August 11, 2008, Mr. Neman filed a request for a statement of decision in which he asked whether the trial court had the authority to order bifurcation of punitive damages after trial of the entire action. On September 15, 2008, the trial court conducted the punitive damages phase of the trial. Mr. Neman did not call any witnesses or introduce any evidence during the punitive damages phase of the trial. Mr. Neman also did not respond to a subpoena to appear at the punitive damages trial. Mr. Elyaszadeh introduced evidence of Mr. Neman’s financial condition.

On September 17, 2008, the trial court issued its final statement of decision. In the final statement of decision, the trial court concluded that it had no authority to wind up or dissolve the corporation which was under the jurisdiction of the United States Bankruptcy Court. This relief had been requested by Mr. Elyaszadeh in the third amended complaint and Mr. Neman in the cross-complaint. The trial court noted Mr. Elyaszadeh had agreed that two of his causes of action had been rendered moot. Mr. Elyaszadeh also agreed to withdraw one cause of action. The trial court then rendered conclusions on the remaining causes of action in Mr. Elyaszadeh’s third amended complaint for: contract breach (third); fiduciary breach (fourth) and constructive fraud (seventh). Mr. Neman’s cross-complaint consisted of causes of action for: contract breach (first); fiduciary breach (second); and intentional interference with prospective economic advantage (third). The

trial court concluded that Mr. Elyaszadeh had met his burden of proof on each remaining cause of action and that Mr. Neman had failed to meet his burden of proof on any cause of action in the cross-complaint. In rendering its decision, the trial court stated: “The key issue at trial was whether Exhibit 19, the so-called ‘first’ operating agreement (dated May 14, 2003), was false because it contained the forged signature of Mr. Elyaszadeh.” The trial court found credible: Mr. Elyaszadeh’s testimony that he did not sign exhibit 19; and the testimony of James Blanco Mr. Elyaszadeh’s handwriting expert that it was highly probable Mr. Elyaszadeh did not sign exhibit 19.

The court also noted that attorney Steven Sokol testified that he had assisted the parties in drafting exhibit 64 or the “second operating” agreement. Mr. Sokol finalized the agreement over a several month period of time. The parties executed the second operating agreement on May 19, 2004. No one told Mr. Sokol that there was any other operating agreement. Mr. Sokol attended a meeting on February 20, 2005 with his client Mr. Elyaszadeh, Mr. Elyaszadeh’s father, and Mr. Neman and his attorney Mr. Weiss. Mr. Sokol testified that Mr. Neman stated he (Mr. Neman) had signed Mr. Elyaszadeh’s name on the first operating agreement. This is “because ‘Mr. Elyaszadeh would not have signed it.’” Thereafter, Mr. Sokol sent a letter to the bank asking that disbursements be made only when authorized by Mr. Elyaszadeh and Mr. Neman. Mr. Sokol learned that the bank had only been given a copy of the first operating agreement (exhibit 19).

The decision summarizes the evidence from the trial as follows.
“[Mr. Elyaszadeh] is a licensed mortgage broker and a licensed real estate broker. He testified that in or about 2002, Mr. Neman came to his office looking for financing on a real estate project. Mr. Neman continued to call him in order to establish a ‘business relationship’ and eventually Mr. Elyaszadeh came to trust him. [¶] In 2003, Mr. Neman took Mr. Elyaszadeh to a site in Malibu and talked about a project to build four single family homes. Mr. Elyaszadeh agreed to contribute the financing for the project, in part because he would be able to purchase one of the homes being developed on the site. Mr. Neman was to contribute no financing to the project, but instead was to be ‘in

charge' of the project by, *inter alia*, working with the architect, the structural and civil engineers and to oversee the construction. On or about March 10, 2003, Mr. Neman and Mr. Elyaszadeh signed [exhibit] 17, a 'deal memorandum,' setting forth the basic terms of their agreement. [¶] During the time period of July 2003 through May 2004, Mr. Elyaszadeh invested \$3.67 million in the project These funds were to be used for the acquisition of the land and for the plans and permits, among other things. However, according to Mr. Elyaszadeh, much of these funds instead were diverted to Mr. Neman's personal use for such items as car registration fees, car payments, pharmacy bills, food, payments to Mr. Neman's [Certified Public Accountant], salary to a secretary for Mr. Neman's personal use, excessive cash draws and for use on Mr. Neman's other projects. [¶] Mr. Elyaszadeh testified that the only operating agreement he signed for [the corporation] was [exhibit] 64 which like [exhibit] 17, provided that profits would be split between himself and Mr. Neman '50-50.' [Exhibit] 64, page 33, reflects that Mr. Elyaszadeh contributed \$3.675 million to the project and Mr. Neman initialed that page. Paragraph 5.1 and 5.2 of [exhibit] 64 provided for the 'joint' approval of both managers . . . on all significant decisions to be made by the [corporation]. This agreement was signed in the escrow office on May 19, 2004, one week before the 'transaction [the real estate purchase] closed.' [¶] Mr. Elyaszadeh denied signing his name on page 27 of [exhibit] 19. Mr. Elyaszadeh also testified that [exhibit] 19 falsely shows that Mr. Neman had contributed \$600,000 to the project, which was supposedly '90% of the fair market value' of the project. According to Mr. Elyaszadeh, he was first shown [e]xhibit 19 by [bank employees] in early 2005 after the dispute between Mr. Neman and himself arose. [¶] Among the disputes between the parties in 2005 were: (1) Mr. Elyaszadeh's attempts to get an accounting for all of the funds he had contributed to the project; (2) a return to Mr. Elyaszadeh by the bank of \$200,000 he had contributed at closing; and (3) Mr. Elyaszadeh's demands to get a deed of trust on the property to secure his investments. [Mr. Neman had the \$200,000 released to himself and not to Mr. Elyaszadeh. In addition, Mr. Elyaszadeh never recovered any of the \$3.67 million he

had invested in the corporation.] [¶] As further evidence of the fraud he is alleging, Mr. Elyaszadeh testified that someone signed his name without his authorization to [exhibit] 18 a ‘Limited Liability Company Articles of Incorporation,’ filed with the California Secretary of State on May 12, 2003. The bank first showed him a copy of this document in 2005. Mr. Elyaszadeh also testified that he never approved the filing (on April 29, 2004) with the Secretary of State of [exhibit] 45, a ‘Limited Liability Company Certificate of Amendment,’ which improperly showed that Mr. Neman was the sole ‘managing member’ of the [corporation]. [¶] In or about June 2004, some preliminary construction activities began on the Malibu site. Mr. Elyaszadeh visited the site about once a week, but Mr. Neman had become far less communicative with him. [¶] Mr. Neman and his attorney, Mr. Weiss, put the [corporation] into bankruptcy without Mr. Elyaszadeh’s authorization. Mr. Weiss purported to represent the [corporation] without Mr. Elyaszadeh’s approval. [¶] After four years the project is not completed. Only two foundations have been constructed at the site and they are defective. Mr. Elyaszadeh has since purchased the Malibu property for himself for \$6.625 million through the bankruptcy court and he also has a creditor’s claim in the [corporation] bankruptcy case [¶] Mr. Neman was called as a witness pursuant to Evidence Code [section] 776. He admitted that he is not a licensed real estate broker or general contractor and is not currently employed. He first met Mr. Elyaszadeh in 2002. In 2003, they agreed to work together with Mr. Elyaszadeh providing the investment capital and Mr. Neman acting as the project manager. He signed [exhibit] 17 which reflected the amount of money Mr. Elyaszadeh would invest in the project. The profits were to be split ‘50-50.’ He admitted signing [exhibit] 19 and also admitted that he had not in fact contributed \$600,000 to [the] project. Mr. Neman’s later attempts to explain that he had made some capital contribution to the project were very confusing and unpersuasive. [¶] Mr. Neman admitted that he signed [exhibit] 45 dated April 29, 2004. This admission was especially damning because [exhibit] 64, the ‘second operating agreement’ has an effective date of January 30, 2004 and the evidence was that the terms of the agreement

were being negotiated for several months in the early part of 2004. And, [e]xhibit 64 clearly shows that [Mr.] Elyaszadeh was one of the *two* managers of the [corporation]. In his deposition, Mr. Neman admitted that [exhibit] 64 ‘controls the relationship with Elyaszadeh in connection with the [corporation].’ [¶] Mr. Neman also admitted that he did not have ‘too many communications’ with Mr. Elyaszadeh once construction on the project had begun. However, Mr. Neman controlled the disbursement of funds from the [corporation’s] account. The [corporation] was funded with a \$3.675 million investment by Mr. Elyaszadeh. Mr. Neman, on the other hand, admitted he invested nothing in the [corporation]. [¶] Mr. Neman testified that he signed the [corporation] checks ‘99.9% of the time.’ Mr. Neman also testified [exhibit] 5 consisted of checks ‘for expenses related to [the corporation.]’ But it is apparent that a number of those checks were used to pay for Mr. Neman’s personal expenses or for business expenses on his other projects, such as car payments, payments for a pool and deck, payments to his attorney, payments of taxes and for Mr. Neman’s personal business office. The Court did not find Mr. Neman credible when he attempted at trial to explain how it was proper for the [corporation] to be paying for these expenses. [¶] It was also significant to the Court that Mr. Neman authorized a number of checks made payable to himself for amounts less than \$10,000. [Exhibit] 64 required the approval of both managers for all checks over \$10,000, so it is reasonable to infer that Mr. Neman was seeking to conceal from Mr. Elyaszadeh multiple cash payments from the [corporate] account.”

Mr. Elyaszadeh’s contracting and real estate development expert concluded that there were \$368,931 in ““hard construction costs”” before the project was shut down. Mr. Neman’s fee according to exhibit 64 should have been 15% of the hard construction costs or \$55,339. But, Mr. Neman was paid approximately \$400,635.

James Gordon was Mr. Elyaszadeh’s expert real estate appraiser. Mr. Gordon testified that had the project been completed on schedule, the house on lot 1 would have sold for \$5.5 million in April 2006. The land value of each of the four lots was in excess of \$2.2 million in April 2006.

Bank employees testified that the bank had in its possession exhibit 19, the first operating agreement. The bank did not have exhibit 64 in its files. The bank did not obtain a copy of exhibit 64 until 2005. Mr. Sokol (Mr. Elyaszadeh's attorney) gave the bank a copy of exhibit 64 which was in conflict with exhibit 19. The bank was concerned about the conflicting instruments and decided to freeze funding on the Malibu project until Mr. Neman and Mr. Elyaszadeh resolved the dispute.

The trial court concluded that Mr. Elyaszadeh had met his burden of proof as to each of his outstanding causes of action. Mr. Neman had failed to carry his burden of proof on any claim in the cross-complaint. Mr. Neman or someone acting on his behalf forged Mr. Elyaszadeh's signature on exhibit 19 by using the signature from exhibit 17. Exhibit 17 shows that the deal was to be 50/50 and no persuasive reason was advanced as to why Mr. Elyaszadeh would invest almost \$4 million in the project and then agree to only a 10% interest two months later. Mr. Neman also offered no evidence to support the statement in exhibit 19 that he had contributed \$600,000 to the project. His testimony that he had was contradictory, not supported by any evidence, and completely unbelievable. Although Mr. Neman promised to produce an attorney named Mr. Zar who purportedly prepared exhibit 19, Mr. Neman did not call the mysterious man as a witness.

The trial court further concluded that Mr. Neman forged or caused to be forged Mr. Elyaszadeh's signature on exhibit 19 with the intent to have easier access to the funds contributed by Mr. Elyaszadeh or through the bank loans. The court stated that Mr. Neman may have hoped to complete the project but he had a very expensive lifestyle which caused him to "loot" the corporation's account. The court stated: "The evidence strongly suggests that Mr. Neman is a 'promoter' who moves from one real estate project to the next and uses the money from bank loans and investors to support himself and his life style." Mr. Neman's "deception and greed" was established by a series of five checks he wrote to himself or one of his companies on December 28, 2004 in amounts less than \$10,000 to avoid having to obtain approval from Mr. Elyaszadeh. Further,

Mr. Elyaszadeh did not authorize the payments of more than \$400,000 of the corporation's funds to Mr. Neman.

Mr. Elyaszadeh acted properly in: contacting the bank, giving the bank exhibit 64, which is the true operating agreement and requesting the bank to halt the disbursement of funds to Mr. Neman. The bank acted properly in ceasing funding on the project until the dispute could be sorted out between the two men. Mr. Neman and his counsel filed the bankruptcy action and Los Angeles Superior Court cases to delay resolution of the dispute and in furtherance of the fraud perpetrated by Mr. Neman. The trial court concluded: "But the trial in this matter has shown by clear and convincing evidence that Mr. Neman's scheme to defraud Mr. Elyaszadeh has been discovered."

The trial court stated that the punitive damages phase of the trial was bifurcated. The trial court ruled that Mr. Neman's objection to this portion of the trial rang "hollow" because he had requested a court determination of punitive damages in his June 30, 2008 post-trial brief. The trial court further noted that Mr. Elyaszadeh had called witnesses and produced evidence during the punitive damages trial phase. Mr. Neman did not call witnesses nor did he introduce any evidence. In rendering a punitive damage award in Mr. Elyaszadeh's favor, the trial court found that Mr. Neman waived any objection to the award by failing to comply with proper demands to appear at the punitive phase of the trial or to produce relevant documents pertaining to his wealth. The trial court concluded: "Mr. Neman clearly engaged in extensive fraudulent conduct, and Mr. Elyaszadeh's request is reasonable given the amount of actual damages incurred and the need to deter Mr. Neman and others from similar conduct in the future. The evidence introduced during both phases of the trial shows that Mr. Neman's net worth in the relevant time period was at least \$9 million. Thus, it is clear to this Court that Mr. Neman has sufficient net worth to justify this award."

The trial court awarded Mr. Elyaszadeh \$12,982,806 in damages plus \$1.3 million in punitive damages. The trial court entered judgment on September 29, 2008 in favor of

Mr. Elyaszadeh. Mr. Neman filed a timely appeal from the judgment in favor of Mr. Elyaszadeh.

III. THE APPEAL AGAINST THE BANK

A. The Bank's Dismissal Motion

The bank has moved to dismiss the appeal from the derivative action on the grounds: Mr. Neman failed to provide an adequate record; Mr. Neman's opening brief against the bank is procedurally defective in that it attempts to revive a dismissed appeal through consolidation; and Mr. Neman's opening brief against Mr. Elyaszadeh concedes that the bank was not at fault for any damages. With respect to the adequacy of the record, the bank has supplied this court with pertinent documents so the record is sufficient for review.

The question remains, however, whether Mr. Neman has utilized a proper method to obtain appellate review of the trial court's demurrer ruling. As previously noted, we dismissed without prejudice as premature Mr. Neman's appeal from the trial court's ruling. The dismissal order states: Mr. Neman could "raise issues relating to the demurrer in any appeal from a final judgment in the consolidated actions. (Code Civ. Proc., § 913.)" The derivative action was consolidated in the lower court with an action that is currently being appealed after entry of a final judgment. For that reason, the bank's reliance on cases where consolidation was deemed inappropriate due to lack of similarity is misplaced. Mr. Neman's appeal complies with this court's instructions for obtaining review of the dismissal order after entry of a judgment on a consolidated matter. An appeal from a nonappealable order sustaining a demurrer may be treated as filed immediately after entry of judgment. (Cal. Rules of Court, rule 8.104(e)(2); *Greenfield v. Insurance Inc.* (1971) 19 Cal.App.3d 803, 814 [motion to dismiss for lack of jurisdiction denied where appeal taken after trial court sustained demurrer to complaint

without leave to amend and judgment was subsequently entered]; see also *In re Social Services Payment Cases* (2008) 166 Cal.App.4th 1249, 1262, fn. 4.) Thus, the premature appeal may be treated as a timely appeal from the judgment. However, it must be noted that the judgment on the Neman/Elyaszadeh action references the derivative action but the judgment was not entered in favor of the bank. Nevertheless, dismissal is not the appropriate remedy where in the interest of justice, an order can be issued to the trial court to amend the judgment nunc pro tunc to add the bank to the judgment against Mr. Neman. (See *So. Pacific Land Co. v. Westlake Farms, Inc.* (1987) 188 Cal.App.3d 807, 812, fn. 1; *Barnett v. Lewis* (1985) 170 Cal.App.3d 1079, 1084, fn. 6; *Evola v. Wendt Construction Co.* (1958) 158 Cal.App.2d 658, 660; *Zellers v. State* (1955) 132 Cal.App.2d 56, 57.) Moreover, to the extent that Mr. Neman's opening brief in the companion appeal makes a concession, it has no bearing on the sufficiency of the trial court's demurrer ruling. The bank has not established any grounds for dismissing the appeal.

B. The Order Sustaining the Demurrer Without Leave to Amend

On the merits of the appeal, we conclude the trial court properly sustained the demurrer to the derivative action without leave to amend. Mr. Neman's derivative action was clearly an attempt to evade the trial court's ruling refusing to allow an amendment to his original defective complaint. The trial court unequivocally ruled that Mr. Neman would not be allowed to pursue the derivative claims unless he showed either that the bankruptcy trustee had abandoned any such claims or that the bankruptcy court would allow the derivative action. Mr. Neman chose not to comply with the court's express instructions. The trial court ultimately gave the instructions no less than three times. Instead of complying with the court's instructions, Mr. Neman chose to engage in a course of conduct specifically designed to make an end run around the court's orders. This included filing the derivative action in a different department of the superior court. No doubt, this was because Mr. Neman's counsel disagreed with the trial court's

interpretation of the law as to Mr. Neman's ability to proceed with the derivative claims in light of the bankruptcy proceedings. However, it was incumbent upon Mr. Neman to conform to the court's instructions in granting leave to amend the original complaint not to attempt to evade a prior ruling by filing a second action in a different superior court department. (Code Civ. Proc., § 436; *Lyons v. Wickhorst* (1986) 42 Cal.3d 911, 915; *Ricard v. Grobstein, Goldman, Stevenson, Siegel, LeVine & Mangel* (1992) 6 Cal.App.4th 157, 162.) Evidently, Mr. Neman had stated his strongest case and elected not to further amend the original complaint to cure the defects created by the existence of the bankruptcy proceeding. (See *Davis v. Stroud* (1942) 52 Cal.App.2d 308, 319-320 [no abuse of discretion established where counsel ignored court's instructions on numerous opportunities to amend complaint to cure defects identified by the court because counsel disagreed with court's interpretation of the law]; see also *Titus v. Canyon Lake Property Owners Assn.* (2004) 118 Cal.App.4th 906, 917-918 [leave to amend further is properly denied if the facts and nature of defects and previous unsuccessful attempts show that plaintiff could not state a cause of action]; *Brenner v. City of El Cajon* (2003) 113 Cal.App.4th 434, 444 [failure to identify proposed amendment that would cure defect is sufficient reason to sustain demurrer without leave to amend].) That being the case, the trial court acted well within its discretion to sustain the demurrer without leave to amend. (*Reynolds v. Bement* (2005) 36 Cal.4th 1075, 1091 [leave to further amend is properly denied when plaintiff fails to amend to correct defects where demurrer has been sustained on a previous complaint]; *Campbell v. Regents of the University of Cal.* (2005) 35 Cal.4th 311, 320 [discretionary standard applies to demurrers sustained without leave to amend].) We need not address other contentions about the merits of the appeal against the bank.¹

¹ The bank has requested judicial notice of three items. The first is the final decision from the court trial in the owner dispute. Judicial notice of the final decision as it relates to the derivative action is denied as it is unnecessary to the disposition of the appeal against the bank. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 87, fn. 5; *Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063, overruled on a different point by *In re Tobacco Cases II* (2007) 41 Cal.4th 1257, 1272.) Judicial notice of items two and

IV. THE JUDGMENT IN FAVOR OF MR. ELYASZADEH

A. The Jury Trial Fees

Mr. Neman asserts that he was denied the right to a jury trial in case No. BC328019. He asserts both sides made a timely demand for a jury trial and the trial court erroneously ordered timely posted jury fees transferred to the State Trial Court Trust Fund. The issue arose in the following context. On March 12, 2007, Mr. Weiss as counsel for the corporation posted jury fees in case No. BC329745. Trial was set for April 9, 2007. Mr. Weiss was subsequently disqualified as counsel for the corporation. On June 1, 2007, the trial court ordered case No. BC329745 consolidated with case No. BC328019. On June 1, 2007, the trial court dismissed the corporation's complaint in case No. BC329475. On June 29, 2007, the trial court ordered the jury fees that had been posted by the corporation in case No. BC329475 be transferred to the State Trial Court Trust Fund. On January 4, 2008, the trial court sustained without leave to amend a demurrer to the derivative claims brought on behalf of the corporation. The only remaining aspect of the consolidated case proceeded to trial in May 2008. It bears emphasis that, by the time of the May 5, 2008 trial: only case No. BC328109 remained; the corporation was not a party at the trial of case No. BC328019; and the corporation's jury fees (posted for trial of case No. BC329745) had been transferred to the state. Mr. Neman did not post jury fees for the trial of case No. BC328019 until April 25, 2008.

Code of Civil Procedure section 631, subdivision (b) specifies that jury fees must be deposited "at least 25 calendar days before the date initially set for trial" by "[e]ach party demanding a jury trial" The trial date for case No. BC328019 was May 5, 2008. Fees should have been deposited by April 11, 2008. Mr. Neman did not make a deposit of jury fees until April 25, 2008. The failure to deposit jury fees at least 25

three is granted because the documents illustrate the history of this case and are pertinent to the issues raised in the appeal in the derivative action.

calendar days before the date initially set for trial constitutes a waiver of the right to a jury trial. (Code Civ. Proc., § 631, subds (b) & (d)(5); *Grafton Partners v. Superior Court* (2005) 36 Cal.4th 944, 956.) However, even though there may have been a waiver, the trial court had discretion to allow a trial by jury. (Code Civ. Proc., § 631, subd. (e); *Gann v. Williams Brothers Realty, Inc.* (1991) 231 Cal.App.3d 1698, 1703-1705.) The trial court is not required to grant relief from the waiver. The trial court may grant relief from an inadvertent waiver by failure to deposit the fees when there has been no prejudice to the other party or to the court. (*Johnson-Stovall v. Superior Court* (1993) 17 Cal.App.4th 808, 810; *Wharton v. Superior Court* (1991) 231 Cal.App.3d 100, 104; *Winston v. Superior Court* (1987) 196 Cal.App.3d 600, 602; *Byram v. Superior Court* (1977) 74 Cal.App.3d 648, 654.)

As stated above, Mr. Neman's failure to deposit the fees in a timely manner resulted in waiver of the jury trial right. (Code Civ. Proc., § 631, subds. (b) and (d)(5); *Grafton Partners v. Superior Court, supra*, 36 Cal.4th at p. 956.) The question then is whether the trial court abused its discretion in refusing to grant relief from the waiver. "A trial court abuses its discretion only if its ruling falls outside the bounds of reason." (*People v. Burney* (2009) 47 Cal.4th 203, 241; *People v. Manriquez* (2005) 37 Cal.4th 547, 574; *In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319; *In re Marriage of Loyd* (2003) 106 Cal.App.4th 754, 759.) "As with all actions by a trial court within the exercise of its discretion, as long as there exists 'a reasonable or even fairly debatable justification, under the law, for [denial of a request for relief of jury waiver, such denial], will not be here set aside, even if . . . we might feel inclined to take a different view from that of the court below as to the propriety of its action.' [Citation.]" (*Gonzales v. Nork* (1978) 20 Cal.3d 500, 506-507.) "In exercising its discretion, a court is entitled to consider many factors, including the possibility of delay in rescheduling the trial for a jury, lack of funds, timeliness of request and prejudice to all the litigants." (*March v. Pettis* (1977) 66 Cal.App.3d 473, 480; accord *Gann v. Williams Brothers Realty, Inc., supra*, 231 Cal.App.3d at pp. 1703-1704; *McIntosh v. Bowman* (1984) 151 Cal.App.3d

357, 363.) Moreover, no abuse of discretion occurs simply because the reviewing court may take a different view of any reasonable factors supporting the denial of relief. (*Gann v. Williams Brothers Realty, Inc.*, *supra*, 231 Cal.App.3d at p. 1704; *Simmons v. Prudential Ins. Co.* (1981) 123 Cal.App.3d 833, 839.)

Mr. Neman claims an abuse of discretion occurred when the trial court denied relief on the ground that Mr. Elyaszadeh had been prejudiced. The ruling is not outside the bounds of reason. The matter was set for trial on May 5, 2008. The jury fees were due on April 11, 2008. The fees were not deposited until April 25, 2008, which was two weeks after they were due. It was also ten days before the scheduled trial date. Furthermore, Mr. Neman had failed to comply with the trial court's order to submit joint jury instructions by April 23, 2008. But, as of April 28, 2008, Mr. Elyaszadeh's counsel had not received a copy of Mr. Neman's instructions. By the time the trial court ruled on the waiver issue on April 30, 2008, only five days remained before trial. At that point, Mr. Elyaszadeh was proceeding as if the matter would be tried by the court. Thus, he was not prepared for a jury trial. No abuse of discretion occurred in the finding of prejudice under the circumstances of this case. Thus, the trial court did not abuse its discretion.

B. The Statement of Decision

Mr. Neman contends that the trial court's statement of decision is defective because the statement does not identify the elements of either a contract or fraud claim. Code of Civil Procedure section 632 provides in part: "In superior courts, upon the trial of a question of fact by the court, written findings of fact and conclusions of law shall not be required. The court shall issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial upon the request of any party appearing at the trial." We respectfully disagree that the statement of decision is inadequate to satisfy the trial court's duty under Code of Civil Procedure

section 632. As *Hellman v. La Cumbre Golf & Country Club* (1992) 6 Cal.App.4th 1224, 1230 explained: “In rendering a statement of decision under Code of Civil Procedure section 632, a trial court is required only to state ultimate rather than evidentiary facts; only when it fails to make findings on a material issue which would fairly disclose the trial court’s determination would reversible error result. [Citations.] Even then, if the judgment is otherwise supported, the omission to make such findings is harmless error unless the evidence is sufficient to sustain a finding in the complaining party’s favor which would have the effect of countervailing or destroying other findings. [Citation.] A failure to find on an immaterial issue is not error. [Citations.] The trial court need not discuss each question listed in a party’s request; all that is required is an explanation of the factual and legal basis for the court’s decision regarding the principal controverted issues at trial as are listed in the request. [Citation.]” (See also *Peak-Las Positas Partners v. Bollag* (2009) 172 Cal.App.4th 101, 112; *In re Marriage of Balcof* (2006) 141 Cal.App.4th 1509, 1530-1531; *Muzquiz v. City of Emeryville* (2000) 79 Cal.App.4th 1106, 1124-1125.)

With respect to the contract claim, Mr. Neman argues the statement does not identify: a contract that was breached; an act which constituted a breach; nor damages from the breach. Similarly, Mr. Neman claims the statement does not identify any element of fraud including reliance or causation of damages. Mr. Neman also asserts that Mr. Elyaszadeh failed to produce any evidence that Mr. Neman did not intend to keep his promises or that Mr. Neman conceived of the deceptive agreement in December 2002. The trial court concluded based on the evidence, including Mr. Neman’s own admissions, that the only operating agreement between the parties was exhibit 64. The trial court’s statement of decision clearly and unequivocally documents Mr. Neman’s fraudulent conduct in connection with two operating agreements, exhibits 19 and 64. The trial court meticulously described Mr. Neman’s conduct which constituted a breach of contract or fraud in connection with exhibit 64. This included: fraudulently presenting exhibit 19 to the bank as the operating agreement; making disbursements of cash for his own personal

use; paying fees to himself of \$368,931 when the maximum amount he was contractually allowed was \$55,339; presenting fraudulent or forged documents to the bank and the Secretary of State; authorizing checks to himself for amounts less than \$10,000 so as to conceal the cash payments from Mr. Elyaszadeh; and placing the corporation in bankruptcy in order to avoid detection. In the face of such overwhelming evidence it is disingenuous of Mr. Neman to claim that he cannot articulate a basis for his liability under any theory of the third amended complaint. Moreover, we disagree with Mr. Neman that Mr. Elyaszadeh caused the damages because he presented exhibit 64 to the bank. The trial court determined that the damages were caused by Mr. Neman's conduct in breaching the true operating agreement and his fiduciary duties (looting the corporation funded by Mr. Elyaszadeh's investment for Mr. Neman's own personal benefit) and engaging in fraudulent activity (including the presentation of exhibit 19 a forged document to the bank) against his business partner. As shown above at length, the trial court thoroughly and meticulously set forth ultimate facts and conclusions as to the remaining causes of action.²

² Mr. Neman raises specific issues that he claims the statement of decision does not address. None of the claims have merit and the trial court's decision is sufficient as to the ultimate issues raised. In issues 9 and 10, Mr. Neman mentioned whether exhibits 19 and 64 both give the partners equal management. The statement of decision clearly addresses these issues at pages 9 through 10. Issues 13 through 17 were whether Mr. Elyaszadeh's letter to the bank actually caused the bank to cease funding the loan, which ultimately caused the losses in this case. The trial court's statement clearly and unequivocally identified that the losses in this case were caused by Mr. Neman's conduct in presenting a forged agreement to the bank in order to loot the corporation. Mr. Neman also placed the corporation in bankruptcy to delay discovery of his fraudulent conduct. The trial court concluded that Mr. Elyaszadeh had acted properly in notifying the bank about the forged documents. The trial court also addressed and rejected Mr. Neman's claims regarding the bifurcated trial (issues 34 and 35). To the extent, the trial court did not address issues 19 and 20 as to whether Mr. Elyaszadeh still had the property or ever had the intention to complete the project, the findings are not material to the issue raised in the complaint. The trial court concluded that Mr. Neman's fraudulent conduct had created the losses in this case. In the face of this evidence, Mr. Elyaszadeh's purchase of the property from the bankruptcy court or his intentions in performing the contract was immaterial. Issue 27 raised the question of computation of profit if there had been timely completion of the

C. The Project Damages

Mr. Neman also asserts that the damages award must be set aside because the trial court incorrectly calculated the damages. He claims the trial court ignored the fact that Mr. Elyaszadeh purchased the property in the bankruptcy proceeding for \$6.6 million. Mr. Elyaszadeh also has a claim for return of his original equity investment in the corporation. The trial court awarded damages for a total project loss of \$12,637,500. The trial court's statement provides that the amount is calculated by considering "uncontested evidence" that the project would have realized \$21.4 million had Mr. Neman not acted wrongfully. Mr. Elyaszadeh would have been able to recoup his initial investment of \$3.675 million plus a bank deposit of \$200,000 or \$3.875 million. The remainder of \$17,525,000 would be divided equally between the men with each receiving \$8,762,500. The trial court noted that Mr. Neman had made sworn statements that he had incurred project losses in excess of \$10 million. Mr. Neman had also sought damage of more than \$7.3 million in a post-trial brief.

Mr. Neman asserts that the trial court erred because the gross amount should have been reduced by the cost of the land and the construction loans. He claims that on his formulation Mr. Elyaszadeh's profits would have been half of \$4,650,000 not half of \$17,525,000. The problem with this argument is Mr. Neman has not cited to any evidentiary basis for the deduction nor is there any indication that he requested the trial court to consider the deduction in the calculation. Furthermore, as previously noted, Mr. Neman claimed and swore that his project losses were in excess of \$10 million.

project. Mr. Neman has not cited to any place in the record where he raised a cost and expense analysis as a defense to the uncontested expert opinion that the losses were at least \$21.4 million. In any event, the trial court's statement is based on uncontested evidence that was consistent with Mr. Neman's own evidence. As the court stated at footnote 13, Mr. Neman advocated his project losses were in excess of \$10 million.

D. The Non-Project Damages

Mr. Neman further claims that the trial court should not have awarded \$345,306 “non project damages” to Mr. Elyaszadeh for unauthorized payments that Mr. Neman made to himself. Mr. Neman argues that Mr. Elyaszadeh would have recovered the inappropriate payments by the return of his capital investment. But, if the payments were not covered by the return of the investment, Mr. Neman would only have to return half of the total amount he improperly paid to himself because he was an owner of the corporation. During argument after the trial, the court considered this aspect of the damages award. The trial court noted evidence had been introduced that Mr. Neman’s \$1.07 million may have been spent on inappropriate expenditures. Mr. Elyaszadeh’s counsel, Jules Kabat, responded that the claim was not made that all the expenditures were inappropriate because some of them might have been tied to the project. However, according to Mr. Kabat, the evidence on the issue was too confusing so that the focus should be on whether Mr. Neman had overpaid the 15% fee for hard construction costs by as much as \$371,206.33. The trial court inquired why the fees were not duplicative if Mr. Elyaszadeh received as damages the entire amount for the project loss. Mr. Kabat responded that Mr. Elyaszadeh had been damaged by what the project had not realized and what Mr. Neman had stolen, which was not duplicative. The trial court indicated it would consider the issue. When counsel for Mr. Neman was given the opportunity during argument to the trial court on July 3, 2008, counsel did not argue that the fees were duplicative. Mr. Neman apparently did not argue that the damages were duplicative at any time during the trial or in the post-trial briefs. Because the issues were never properly raised in the trial court, it is difficult to determine whether the trial court awarded duplicative damages. Furthermore, it is unclear from the record where this money originated. There is some evidence that Mr. Neman may have taken some of the money from Mr. Elyaszadeh’s initial investment of \$3.675 million. But, the trial court awarded Mr. Elyaszadeh his entire initial investment as damages. If the money was taken

from the initial investment, it appears that the entire \$345,306 damages award would be duplicative. But, the trial court stated that the money was taken from the corporation as draws through the bank. In the face of the confusion and the trial court's statement that the money was taken from the corporation, the better argument is that the damages should have been limited to half of the \$345,306 because the fees were paid not by Mr. Elyaszadeh personally but from the corporation's assets. Thus, the damages award should be reduced by \$172,653.

E. The Punitive Damage Award

Mr. Neman also claims that the trial court erred in bifurcating the punitive damages phase of the trial in violation of Civil Code section 3295, subdivision (d) which provides: "The court shall, on application of any defendant, preclude the admission of evidence of that defendant's profits or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud in accordance with Section 3294. Evidence of profit and financial condition shall be admissible only as to the defendant or defendants found to be liable to the plaintiff and to be guilty of malice, oppression, or fraud. Evidence of profit and financial condition shall be presented to the same trier of fact that found for the plaintiff and found one or more defendants guilty of malice, oppression, or fraud." According to Mr. Neman, he never made an application for a bifurcated trial but the trial court permitted a bifurcated phase at the close of trial. Mr. Neman contends that the punitive damages phase of the trial under these circumstances was error. However, nothing in the language of Civil Code section 3295, subdivision (d) precludes a court from bifurcating the punitive damages phase of the trial under the circumstances of this case. Rather, the statute protects a defendant from premature disclosure of the defendant's financial condition when punitive damages are sought. (*Torres v. Automobile Club of So. California* (1997) 15 Cal.4th 771, 778; *Medo v. Superior Court*

(1988) 205 Cal.App.3d 64, 67; *Cobb v. Superior Court* (1979) 99 Cal.App.3d 543, 550.) It has been noted that “in practice bifurcation under this section means that all evidence relating to the *amount* of punitive damages is to be offered in the second phase, while the determination whether the plaintiff is *entitled* to punitive damages (i.e., whether the defendant is guilty of malice, fraud or oppression) is decided in the first phase along with compensatory damages.” (*Holdgrafer v. Unocal Corp.* (2008) 160 Cal.App.4th 907, 919; *Barmas, Inc. v. Superior Court* (2001) 92 Cal.App.4th 372, 374.) This is exactly what occurred in this case. Here, the parties pursued the claims and counter-claims against each other on the theories they were entitled to punitive damages. In its tentative decision, the trial court stated its findings that punitive damages should be awarded against Mr. Neman. The trial court, which had heard all the evidence, was the same trier of fact which rendered the punitive damages award. In post-trial matters, both parties raised the issue of whether the trial court should render punitive damages against the opposing side based on the trial evidence. In Mr. Neman’s case, the request was made in his June 30, 2008 post-trial brief on his cross-complaint prior to the trial court’s issuance of a tentative decision. At the hearing on July 3, 2008, Mr. Elyaszadeh indicated that he too wanted punitive damages in the bifurcated trial. Mr. Neman raised no objection to having the trial court render a punitive damages award under the circumstances. Rather, he waited until the trial court issued the tentative decision against him to claim the trial court lacked the authority to render the punitive damages in a bifurcated trial. Thus, we agree with the trial court that the late objection “rings hollow” given Mr. Neman’s request in his post-trial brief and his failure to object to the bifurcation until it became unfavorable to him. (See *Medo v. Superior Court, supra*, 205 Cal.App.3d at 67.) There is no basis for setting aside the punitive damages award in this case.

V. DISPOSITION

The trial court on remittitur issuance is directed to amend the judgment nunc pro tunc in favor of defendant, Federal Deposit Insurance Corporation as receiver for Washington Mutual Bank, the successor in interest to Commercial Capital Bank, FSB. As amended, the judgment is affirmed. The Federal Deposit Insurance Corporation is awarded its costs on appeal from plaintiff, Tony Neman.

The judgment in favor of plaintiff, Shahram Elyaszadeh, on the third amended cross-complaint is reversed as to non-project damages in the amount of \$172,653. In all other respects, the judgment in favor of Shahram Elyaszadeh is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WEISMAN, J.*

We concur:

ARMSTRONG, ACTING P. J.

KRIEGLER, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.