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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THOMAS H. RAVATT, Plaintiff, Cross-defendant and Respondent, v. DENISE JENSEN, Defendant, Cross-complainant and Appellant.	B233241 (Los Angeles County Super. Ct. No. BC 387731)

APPEAL from a judgment of the Superior Court of Los Angeles County, Alan S. Rosenfield, Judge. Affirmed.

Randall A. Spencer for Defendant and Appellant.

Thomas H. Ravatt, in pro. per., for Plaintiff and Respondent.

* * * * * *

Attorney Thomas H. Ravatt, respondent, was awarded $9,000 from appellant Denise Jensen after a bench trial. The appeal is from the judgment; we affirm.

FACTS

The award was based on the trial court's conclusion that appellant had converted that sum or, alternatively, that she had defrauded respondent.

The troubled relationship between respondent and appellant started as a business relationship in that appellant is an accountant or bookkeeper who performs audits. It is uncertain when respondent retained appellant; it was either in December 2006 or January 2007. Respondent hired appellant at the hourly rate of $25, and she was given office space in respondent's law office.

Appellant proceeded with auditing certain accounts, including client and trust accounts. The details of this activity are not important to this appeal; they involved suspicious activity by one of respondent's employees, who left in July 2007.

The relationship between appellant and respondent began to deteriorate in the summer of 2007. According to respondent, appellant was rude and disrespectful to others, committed errors in preparing tax returns, criticized coworkers, brought her dog to the office, which aggravated respondent's allergies, and misstated her education and prior experience. Appellant denied this.

Matters came to a head in December 2007. Respondent notified appellant in a memorandum that he was going to close the office between December 23 and January 2, 2008, and that he wanted to know about the work that appellant was doing. According to appellant, she responded in writing on December 17, 2007, listing the cases on which she was working.

One of the witnesses at trial, Maria Pimental, testified that she operated a landlord service office out of respondent's law office. According to Pimentel, appellant told her on December 17, 2007, that respondent owed her $15,000 and that she was going to quit. The following morning, appellant called Pimentel to tell her that she had quit and asked Pimentel not to let respondent know.

The confrontation that led to this lawsuit took place around 2:30 p.m. on December 20, 2007, when appellant came into respondent's office and demanded that he pay her $25,000. Respondent refused, stating he didn't have the money to pay her. Appellant said she didn't care and that she had "'other means'" of forcing respondent to pay her. She walked out and respondent followed her, asking appellant if she was threatening him. Appellant said she was going to call the Montebello Police Department, which she did.

Respondent kept a handgun and a shotgun in his office. These weapons played some sort of role on the afternoon of December 20. The Montebello police arrived in response to appellant's telephone call and arrested respondent for brandishing a firearm. These charges were eventually dismissed.

The key piece of evidence is check No. 4802, dated December 21, 2007, for $9,000 drawn on respondent's trust account. Even though it is drawn on the trust account, the check is marked as a payroll check. According to appellant, she received this check in the mail on December 21, 2007. According to respondent, the check is forgery.

Appellant testified that on occasion he would sign blank checks. We return to this testimony in greater detail in the Discussion part.

The trial court, noting that no one called a handwriting expert, concluded that respondent had failed to carry the burden of proof that the check was a forgery and that the signature on the check was actually respondent's. In the statement of decision, the court took note of the fact that respondent had testified that on occasion he signed checks that were blank and concluded that the "insertion of a blank one is plausible." The court pointed out that appellant had "a history of controlling access" to the checks as part of her auditing duties. The court drew the inference that appellant had in her possession a blank check signed by respondent that she then filled in on the computer using the Quicken check writing program that she used.

The court rejected as implausible the scenario that after respondent's arrest for brandishing a firearm around 3:00 p.m. on December 20, 2007, respondent made out the check to appellant on December 21, 2007.

We note that both parties testified at length during the trial.

THE PLEADINGS

As it is not unusual when two people lock horns, the pleadings that the foregoing spawned are both extensive and colorful. Respondent's 16-page complaint alleges nine causes of action including, of course, intentional infliction of emotional distress. The cross-complaint is 29 pages long and sets forth 10 causes of action including, somewhat remarkably, one for legal malpractice.

The trial court sustained only two causes of action in respondent's complaint, for conversion and fraud, and ruled against all other causes of action and against the cross-complaint in its entirety. The statement of decision carefully explains the court's rulings dismissing the various causes of action. It is not necessary to discuss these rulings, save to note that for the most part there simply was no evidence to support the array of legal claims paraded in these pleadings.

DISCUSSION

1. The Issue of a Material Variance Was Forfeited

The cause of action for conversion (fourth cause) alleges that appellant "without the permission and consent of [respondent] took the amount of $9,000 for the attorney-client trust account . . . [¶] . . . by signing the name of [respondent] on a financial draft against said account and thereby converting said funds to her personal use."

Appellant contends there is a material variance because the complaint does not allege that respondent signed a blank check that appellant then stole and filled in. Appellant contends that she was prejudiced because she had prepared the case to respond to the theory that the signature on the check was forged and not on the theory the trial court adopted, which she characterizes as "an entirely different set of facts."

As appellant notes, it was really the trial court's questions that elicited the information that sometimes respondent would sign blank checks. Respondent, who tried

the case himself, seems to have stuck, at least for part of the time, with the theory that the signature on the check was a forgery.

"Even if the variance is substantial, the new issue may come as no surprise to the defendant and may not require additional time or effort to meet it; also, the defect can usually be corrected by amendment (supra, §1211). For these reasons a defendant who claims prejudice must make the charge of variance in the trial court, usually by objection to evidence or by motion for nonsuit. If he or she fails to object, and the case is tried on the theory that the new issue is involved, the variance is waived and the point cannot be raised on appeal." (5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 1214, p. 647, citing, inter alia, *Wishart v. Claudio* (1962) 207 Cal.App.2d 151, 154 ["the evidence upon which the court resolved the case went in without objection, the case clearly was tried upon the theory that this was the issue, and appellants therefore cannot raise the claim of variance for the first time on appeal"]; see also *Lujan v. Minagar* (2004) 124 Cal.App.4th 1040, 1048.)

The matter of blank checks arose when the court stated that he had not heard anyone ask about such checks, so he would ask it himself. He then addressed respondent directly, asking whether he ever presigned "any checks that [were] blank." Respondent answered yes, explaining that sometimes the staff needed such checks. Respondent continued by stating that "on occasion I've done that," meaning sign blank checks, but that "it's not a habit." He would sign blank checks only for specific cases, when they were needed. It was also the case, according to respondent, that appellant would present him with a number of checks and he would sign them all "and miss one," meaning that he would not look at each one to see if it was filled in. Respondent ended this discussion by stating that "I'm sure one of them could have been blank." He was referring to appellant's practice of presenting him with a number of checks to sign.

There was no objection to any of this by appellant, who represented herself during the trial.

Appellant's motion for a new trial makes no mention of a variance. The motion contends that the court erred in concluding that appellant had obtained a blank check signed by respondent. But the motion does not raise the issue of a material variance.

Although the matter of blank checks arose on the last day of trial, trial was far from over; the transcript of this day of trial ends on page 1011, with the blank check discussion at pages 930-932. There was ample opportunity to raise the issue of variance at trial and, of course, in the motion for a new trial.

We afforded the parties an opportunity to brief the question whether the matter of a variance was forfeited. Appellant contends that the issue was not forfeited because it was the trial court that introduced this issue into the case. We fail to see why this makes any difference, i.e., the point is that appellant wholly failed to object to the variance at any time in the trial court; it is immaterial who generated the issue in the first place. Appellant also claims that in a number of cases dealing with variance there was a warning of some sort that evidence outside the pleadings would be introduced. In fact, the same is true of this case. The trial court's questions served as such a warning, which, as noted, went completely unheeded by appellant.

We conclude that the issue of a material variance was forfeited and cannot be raised for the first time on appeal.

Not only was the issue not raised in the trial court, the matter of blank checks could hardly have surprised appellant. As we discuss more fully below, there is ample evidence to support the court's conclusion that the check in question was signed in blank by respondent. Thus, appellant, who had engineered the transaction, could hardly claim to be surprised by the court's questions about blank checks. It was undoubtedly unpleasant for appellant but that does not translate into surprise, at least in the sense that the existence of blank checks was up to that time unknown to appellant.

Whether appellant required time to respond to this development is another matter. It is noteworthy that appellant, who simply listened to the exchange between respondent and the court about blank checks, went on with the trial and did not ask for a recess, much less request a continuance. Thus, appellant cannot claim to have been deprived of

a chance to construct a defense to this theory. Apparently, at trial she did not think she needed more time to prepare a defense. While this may have been ill advised, appellant is held to the same standard as a lawyer and can claim no special privileges. Moreover she made no mention of having been deprived of a chance to prepare a defense in her motion for a new trial. While her appellate counsel contends skillfully that she was prejudiced, the argument fails because the necessary factual predicates are lacking.

2. The Statement of Decision Is Supported by Substantial Evidence

"Where [the] statement of decision sets forth the factual and legal basis for the decision, any conflict in the evidence or reasonable inferences to be drawn from the facts will be resolved in support of the determination of the trial court decision." (*In re Marriage of Hoffmeister* (1987) 191 Cal.App.3d 351, 358.)

Appellant claims that respondent's testimony about signing blank checks is "highly speculative." We do not agree. Respondent quite firmly, and clearly, admitted that occasionally he would sign blank checks, as they were needed for one purpose or another; in fact, he repeated this testimony twice. He also offered the scenario of being presented with a number of checks at once and not looking to see if all of them were filled in. He did draw the line, however, by saying it was not his habit to sign blank checks. There is nothing speculative about any of this; it describes a common office procedure in clear terms.

The trial court's decision is based on two items of substantial evidence. First, there is no doubt that check No. 4802, dated December 21, 2007, for $9,000 bore respondent's signature and was payable to appellant. Second, the timing of the receipt of the check strongly supports the inference that respondent did not intend to pay $9,000 to appellant on December 21, 2007. Inferences are to be drawn in support of the determination of the trial court. (*In re Marriage of Hoffmeister, supra,* 191 Cal.App.3d at p. 358.) The idea that respondent would hand appellant $9,000 the day after the angry confrontation and arrest is, to use the trial court's word, implausible.

Given the fact of the check and that it is altogether reasonable to infer that respondent would not present appellant with $9,000 on December 21, 2007, appellant's

critique of the trial court's decision comes down to an end-run around the substantial evidence standard. The fact that respondent could not identify precisely when he might have signed such a check is shipwrecked on the hard fact that such a check exists and that respondent did not send it to appellant on December 21, 2007, or on any other day.

The trial court's decision is supported by substantial evidence.

It is unnecessary to address the issue whether appellant's motion for a new trial was timely.

Finally, we agree with appellant that respondent's brief on appeal violates a number of important rules. We add the observation that, in addition to ignoring pertinent rules, the brief is singularly unhelpful. Although the brief is flawed and could have been struck, we chose not to do so in order to save appellant the added expense of having to file another brief to respond to a new brief by respondent. Our forbearance does not mean that we approve of respondent's brief.

DISPOSITION

The judgment is affirmed. In light of respondent's disregard of the California Rules of Court, in the interests of justice each party is to bear his or her own costs. (Cal. Rules of Court, rule 8.278(a)(5).)

FLIER, J.

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.