Filed 1/25/13 Chabad of California, Inc. v. Arnall CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

CHABAD OF CALIFORNIA, INC., Plaintiff and Appellant, v. DAWN ARNALL, as Special Administrator etc., Defendant and Respondent.	B234059 (Los Angeles County Super. Ct. No. BC423042)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mary Ann Murphy, Judge. Affirmed.

Bingham McCutchen, Marshall B. Grossman, Seth M. Gerber; Greines, Martin, Stein & Richland, Robin Meadow, Barbara W. Ravitz, and Cynthia E. Tobisman for Plaintiff and Appellant.

Reed Smith, Margaret M. Grignon, and Brandon W. Corbridge for Defendant and Respondent.

In this litigation, plaintiff Chabad of California, Inc., seeks to enforce the purported oral pledge of a deceased donor, the late Roland Arnall. Mr. Arnall's widow, defendant Dawn Arnall, denies any knowledge of the purported $18 million pledge, which Chabad failed to acknowledge in writing or record in its books prior to Mr. Arnall's death.

Chabad filed the present action for promissory estoppel against Mrs. Arnall as special administrator and trustee of Mr. Arnall's estate and trust. During the bench trial, Chabad's president, Rabbi Boruch Shlomo Cunin, testified as the sole percipient witness to Mr. Arnall's alleged oral pledge of $18 million for the construction of a new facility. Rabbi Cunin testified that Mr. Arnall's three $180,000 donations to Chabad were installments against the $18 million pledge, although they were not recorded as such by Chabad until after his death.

In its 69-page statement of decision, the trial court found that Chabad had failed to prove the existence of Mr. Arnall's oral promise to pay "$18 million or any amount other than what he actually paid during his lifetime, to fund the development or construction of the Project." In light of Chabad's failure to prove the existence of a promise, which is an essential element of promissory estoppel, the trial court entered judgment for Mrs. Arnall.

In this appeal from the judgment, Chabad argues the trial court erred in refusing to draw any inferences from Mrs. Arnall's alleged withholding of evidence, namely, the Excel spreadsheets on which Mr. Arnall's charitable contributions were recorded by his personal assistant, Lisa Gravelle. Chabad contends that notwithstanding the trial court's doubts concerning Rabbi Cunin's credibility, the evidence when viewed in conjunction with Mrs. Arnall's alleged withholding of the spreadsheets supports the reasonable inference that "Mr. Arnall did, in fact, make the $18 million pledge to Chabad and indeed made payments on it."

We conclude Chabad's reliance upon the withholding of the spreadsheets is misplaced. When Chabad first learned of the spreadsheets during Ms. Gravelle's testimony at trial (Ms. Gravelle's deposition was not taken before trial), Chabad did not demand their production, seek a continuance, or request a finding that the spreadsheets

were wrongfully withheld. Because the spreadsheets were never produced at trial, they are not part of the record on appeal and we may not speculate as to their contents. Assuming the failure to produce the spreadsheets reflects poorly on Mrs. Arnall's credibility, casting doubt on her testimony will not rehabilitate Chabad's witnesses or satisfy its evidentiary burden of proving the existence of an oral pledge. With regard to Chabad's burden of proof, not even the elimination of all the defense evidence would cure its failure to prove the existence of an oral pledge. Based on the record properly before us, we conclude the evidence does not reasonably support Chabad's contentions and thus we affirm.

BACKGROUND

The narrow focus of this appeal does not warrant a full recitation of the evidence. We therefore will focus only on the matters relevant to this appeal.

Chabad contends that Mr. Arnall[1] orally pledged $18 million for the construction of a community center and made three $180,000 installments against that pledge before his death. However, the testimony of Rabbi Cunin, the sole percipient witness to the oral pledge, was not fully credited by the trial court. At the conclusion of trial, the court issued a proposed statement of decision which stated that Chabad had failed to prove the existence of Mr. Arnall's promise to pay "$18 million or any amount other than what he actually paid during his lifetime." In opposition to the proposed statement of decision,

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1 According to the opening brief, Mr. Arnall was appointed Ambassador to the Netherlands in February 2006. The opening brief states that, "Mr. Arnall made his fortune as the owner of Ameriquest Mortgage, a major subprime lender. In 2004-2006, the Attorneys General of 49 states sued Ameriquest for predatory lending practices. Ameriquest settled that litigation in 2006 for $325 million, after which Ameriquest's business substantially declined. Even so, the Arnalls retained other substantial assets, including a $156 million home in Los Angeles and a ranch in Aspen acquired years earlier for $46 million, with no mortgage on either asset. As the primary beneficiary of Mr. Arnall's estate, Mrs. Arnall received some $100 million in addition to real estate (including the home and ranch)." (Internal record references omitted.)

Chabad argued, as it does on appeal, that it was entitled to prevail, as a matter of law, based on Mrs. Arnall's suppression of the Excel spreadsheets.

With regard to the spreadsheets, the trial court stated in its proposed statement of decision: "Ms. Gravelle maintained an Excel spreadsheet on the Ameriquest server that documented all of Mr. Arnall's charitable contributions. She testified that none of the lawyers on the defense team asked her about such a document. Mr. Steven Dorfman [Mr. Arnall's accountant] also had a copy of the Excel spreadsheet documenting Mr. Arnall's charitable contributions. Defendant did not produce the spreadsheet documenting Mr. Arnall's charitable contributions in discovery. Defendant did not produce the spreadsheet documenting Mr. Arnall's charitable contributions at trial." (Internal record references omitted.) "The defense did not produce . . . the Excel spread sheet that would have shed light on disputed facts. Based on the testimony of Mrs. Arnall, Lisa Gravelle and Adam Bass [Mr. Arnall's nephew by marriage who was senior vice president of Ameriquest Mortgage and a partner at the Buchalter law firm], it does not appear that a diligent search and reasonable inquiry was performed."

In objecting that the above language was unduly lenient as to Mrs. Arnall, Chabad argued that the court had overlooked "the most salient portion of Ms. Gravelle's testimony. *She testified that among the entries she made concerning each charitable payment was the 'purpose' of each such payment.* Isn't this enough proof that these three payments were on account of the pledge at issue in this case? Being such, this is proof of the existence of the pledge itself." (Internal record references omitted.) Chabad urged "the Court to find that the purpose of these three $180,000 payments is on the suppressed Excel spreadsheets in the possession of Mrs. Arnall (through her wholly owned Ameriquest and her accountant Mr. Dorfman) and the inference is that the contemporaneously prepared spreadsheet shows the purpose to be payments on account of the claimed pledge. We request a finding one way or the other. More to the point, we ask the Court to find that the last $180,000 check which Mr. Arnall asked Ms. Gravelle to pay to Chabad was for the purpose of payment on what was then a firm $18 million gift. We request a finding one way or the other. We invite the Court to ask: If the stated

purpose of these three payments on the spreadsheet, including the crucial last payment, showed a purpose other than payment on the $18 million pledge or was even inconclusive, is there . . . any question in the Court's mind that the spreadsheets would have been produced in discovery and at trial? Is there any doubt in the Court's mind that after Ms. Gravelle's first day of testimony that the defense didn't access the Ameriquest servers and the files of Mr. Dorfman and review those spreadsheets and would have produced them, even late, if they supported their case? Many people know what those spreadsheets show the purpose of the payments to be. But not Chabad. And not this Court from which this evidence was intentionally withheld. Is there no negative inference to be drawn from this? And isn't it clear what it is — *the purpose of these payments recorded when made states that the payments were made on the pledge sought to be enforced in this case.* Surely that inference alone provides the requisite proof to require judgment in favor of Chabad. Yet there is no finding one way or the other with respect to this contemptuous conduct and Chabad requests such a finding." (Internal record references omitted.)

Mrs. Arnall, on the other hand, expressed her agreement with the court's proposed statement of decision. She argued below that even if her credibility had been damaged by her failure to produce the spreadsheets, neither the rejection of her testimony nor the elimination of her evidence would provide affirmative evidence of an oral promise to pay $18 million. Mrs. Arnall stated: "It is well settled that a plaintiff cannot satisfy its evidentiary burden merely by casting doubt on the credibility of the opposing party's testimony. 'The rejection of a witness's testimony by the trier of fact has only the effect of removing that testimony from the evidentiary mix. Without more, the disregard or disbelief of the testimony of a witness is not affirmative evidence of a contrary conclusion. In other words, the fact that the trier of fact does not credit a witness's testimony does not entitle it to adopt an opposite version of the facts which otherwise lacks evidentiary support.' (*Beck Development Co. v. Southern Pacific Transpiration Co.* (1996) 44 Cal.App.4th 1160, 1205-1206 [citations omitted]; *Bose Corp. v. Consumers Union of U.S., Inc.* (1984) 466 U.S. 485, 512 [disbelief of defense witness' testimony did

not constitute evidence of the opposite fact sufficient to satisfy plaintiff's burden of proving the opposite fact]; *Moore v. Chesapeake & O. Ry. Co.* (1951) 340 U.S. 573, 576 ['[D]isbelief of the engineer's testimony would not supply a want of proof. Nor would the possibility alone that the jury might disbelieve the engineer's version make the case submissible to [the jury].') Accordingly, '[d]isbelief of [a witness's] testimony does not constitute affirmative evidence of the contrary proposition.' (*Viner v. Sweet* (2004) 117 Cal.App.4th 1218, 1229; *Estate of Bould* (1955) 135 Cal.App.2d 260, 265 [the determination that a witness testified falsely 'does not reveal the truth itself or warrant an inference that the truth is the direct converse of the rejected testimony'].)"

Mrs. Arnall further argued: "During this lengthy trial, Chabad produced just one witness—Rabbi Cunin—who claims to have heard Roland Arnall orally pledge $18 million, and failed to produce a single document that confirmed any such pledge. This Court then issued a 69-page Proposed Statement of Decision amply explaining why Chabad failed to meet its burden of proof. Now, Chabad essentially renews its closing argument and asks the Court to reverse itself based primarily on Chabad's claim that the defense lacked credibility. This argument is easily rejected because, by law, Chabad cannot win through any lack of credibility by the defense but must prove its case through affirmative evidence accepted by the Court."

The trial court then inquired of Chabad's counsel, Marshall Grossman: "Let me ask you this. Why didn't you ask me to suspend the trial and order them to produce the Excel spreadsheet?" In response, Mr. Grossman explained that he does not "choose to do discovery during the course of a trial. I don't have the ability to test it, I don't have the full ability to cross-examine on it, I don't have the ability to contact a forensics person in the middle of the trial to do a forensic analysis to determine the integrity of the computers and the servers. These were Ameriquest servicers [and Mrs. Arnall] was still the chairman of Ameriquest during the trial. That's why I thought it would have been futile and, frankly, unnecessary to do so. Overnight they had the opportunity of pulling those documents in from Mr. Dorfman, from Ms. Gravelle, or from Mrs. Arnall. Or from Adam Bass, who was still then the general counsel of Ameriquest." The defense "had the

power, and I believe the duty, to explain why they didn't bring the Excel spreadsheets into Court. It's not my burden in the middle of a trial to engage in forensic testimony, or I should say discovery, and go out and hire a qualified examiner of computer data."

After accepting Mr. Grossman's explanation, the trial court asked Mrs. Arnall's attorney, John Gordon, whether the defense was obligated "to produce the document, to go out and ask [Ms. Gravelle]." Mr. Gordon replied that, on the contrary, Chabad was required to "ask for the spreadsheet no matter what. Then you worry about do I need to have a forensic examiner start looking at the computer; if the document doesn't show any evidence helping me, then am I going to . . . hire someone. They didn't even bother to ask for the spreadsheet to see if it helped their case." "If you believe your case and you think that the document's going to show a pledge of 18 million, you ask for the document."

Mr. Gordon pointed to the lack of any finding that a suppression or concealment of evidence had occurred. The trial court had found only that it "[did] not appear" a diligent search and reasonable inquiry had been made. According to the proposed statement of decision: "The defense did not produce . . . the Excel spread sheet that would have shed light on disputed facts. Based on the testimony of Mrs. Arnall, Lisa Gravelle and Adam Bass, it does not appear that a diligent search and reasonable inquiry was performed."

Mr. Gordon rejected his opponent's argument that a suppression or concealment of evidence had occurred in this case: "Chabad's entire argument that there's been any suppression or concealment or misconduct is completely without foundation, Your Honor. And, it's clear, no matter what we did do, even if you assume the worst, even if you disregard . . . of what I just said, when he did find out about it he never even bothered to ask. Which says a lot. Chabad wants to continue to focus on our spreadsheets and what our spreadsheets say. They continue to ignore, and fail to mention, and do not explain, why there is not one, and I am saying literally one, there is not one written reference contemporaneously made, ever, in all of Chabad's records, saying anything

about any pledge. Any 18 to 40 million, any 18 million pledge. Not one word anywhere."

At the conclusion of the hearing concerning the proposed statement of decision, the trial court adhered to its proposed decision and reiterated that Chabad had failed to prove the existence of an oral pledge: "I'm not acknowledging that [Chabad] put on a prima facie case here." "My statement of decision is that [Chabad] never proved by a preponderance of evidence that Roland Arnall promised 18 million. Never." "You had the burden of proof. Your witnesses were contradicted all over the place — all you have to do is read the proposed statement of decision, contradicted themselves right and left — and you didn't ask Mr. Weisman a word about the corroboration. That was a major problem in the burden of proof on your side."[2]

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[2] We quote from the last five pages of the 69-page statement of decision:

"Subscriptions to a charity are enforceable under the doctrine of promissory estoppel. [Citations.] [¶] Promissory estoppel is a doctrine that employs equitable principles to substitute injurious reliance on a promise for consideration. [Citation.] [¶] . . . [¶] The elements of a promissory estoppel claim are: (1) a promise clear and unambiguous in its terms, (2) reliance by the party to whom the promise is made, (3) the reliance must be both reasonable and foreseeable, (4) the party asserting the estoppel must be injured by the reliance. *Aceves v. U.S. Bank* (2011) 192 Cal.App.4th 218; *Toscano v. Greene Music* (2004) 124 Cal.App.4th 685, 692.

"The threshold issue is whether Chabad has proved by a preponderance of evidence that Roland Arnall made a promise or pledge to contribute $18 million to Chabad for the Project.

". . . . . .

"Mr. Arnall knew how to write a check. The Court finds that Mr. Arnall had the financial wherewithal to contribute $18 million or $40 million to Chabad from 2003 until his death on March 17, 2008.

"The determination of whether Mr. Arnall promised to contribute money to the project necessarily involves a determination of credibility.

"Rabbi Cunin may well have discussed the Pico project with Mr. Arnall, delivered plans to his house, sent an e-mail attaching material regarding the Project and probably solicited his pledge on more than one occasion.

"Rabbi Cunin testified that he went for a walk with Mr. Arnall in November 2003 and during their conversation Mr. Arnall stated don't sell [the Pico property], I will be with you or I will help you. No figures were discussed. No one witnessed this

(Fn. continued.)

discussion. Rabbi Cunin testified that after his November 2003 discussion with Mr. Arnall, he spoke with his son Rabbi Tzemach Cunin, Lyle Weisman, David Lacy and Keith Sidley about developing plans for a Project.

"Lyle Weisman testified on September 28, 2010. Mr. Weisman is a Chabad donor and had been a close friend of Rabbi Cunin for more than 30 years. Chabad did not ask Mr. Weisman a single question about Rabbi Cunin's assertion that he spoke with Mr. Weisman about plans for developing a Project after Rabbi Cunin's November 2003 discussion with Mr. Arnall. Mr. Weisman did not corroborate Rabbi Cunin's testimony.

"Rabbi Cunin testified that on November 24, 2004, at the Torah dedication ceremony, Mr. Arnall guaranteed or promised no less than $18 million and perhaps as much as $40 million. No one witnessed this discussion. Rabbi Cunin testified that he told Lyle Weisman and two of his sons about the conversation. Chabad did not ask Mr. Weisman a single question about 'the gift that Mr. Arnall had discussed with you.' Mr. Weisman did not corroborate Rabbi Cunin's testimony.

"With respect to the December 24, 2007 meeting at Schneerson Square, Rabbi Cunin[] testified that Mr. Arnall said: 'I can't make a commitment today to the $40 million. I can get you a check for $180,000 to help you with the costs of the project. And you know it's somewhere between 18 and 40 million.' Rabbi Tzemach Cunin was present during this conversation and did not corroborate this testimony.

"With respect to the April 2007 meeting at the Coffee Bean and Tea Leaf, there is a material discrepancy between Rabbi Cunin and Rabbi Chaim Cunin's account of that meeting. On September 3, [2010], Rabbi Cunin testified that after Daniel Arnall [Mr. Arnall's son] left, he said to Ambassador Arnall: 'the project is going forward rapidly, I really need the funds to pay for the expenses we are — of the monies we're spending.' Rabbi Cunin testified that Ambassador Arnall said: 'I will get you another $180,000 towards these expenses. Please be patient. I'm dealing with my problems.' On September 13, 2010, Rabbi Chaim Cunin testified that Rabbi Cunin said to Ambassador Arnall 'for the project to succeed it requires substantial funds and that would require his making some contributions on his pledge.' Rabbi Chaim Cunin testified that Ambassador Arnall 'assured Rabbi Cunin that the funds would be there shortly. And although he hadn't finalized the amount of his commitment, he would make sure that the project would proceed as necessary.'

"There were long periods of time between each discussion when there appeared to be no communication regarding this major project: November 2003 to November 24, 2004 (one year), a mention at Budget Rent a Car in early 2007 (two years), the April 2007 meeting at Coffee Bean and Tea Leaf, the December 24, 2007 meeting at Schneerson Square (eight months) and the February 27, 2008 airplane conversation (two months). During these discussions, Mr. Arnall never made a single suggestion regarding the project. These interactions appear to be far more removed than one would expect of the interactions between an underwriter and organization planning a block long building.

(Fn. continued.)

The trial court entered a final statement of decision and judgment in favor of Mrs. Arnall. This timely appeal followed.

DISCUSSION

Chabad's appeal is based on Evidence Code section 413, which provides: "In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's failure to explain or to deny by his testimony such evidence or facts in the case against him, or his willful suppression of evidence relating thereto, if such be the case." The statute reflects the well-established concept that "[w]hen a party is once found to be fabricating, or suppressing, documents, the natural, indeed the inevitable, conclusion is that he has something to conceal, and is conscious of guilt." (*Warner Barnes & Co. v. Kokosai Kisen Kabushiki Kaisha* (2d Cir. N.Y. 1939) 102 F.2d 450, 453.)

Chabad argues that "[c]onsideration of all of these factors yields only one conclusion here: Mrs. Arnall's suppression of the spreadsheet gives rise to an unavoidable inference that the spreadsheet reflected the three $180,000 payments as installments on the pledge that Mr. Arnall made to Chabad."

"Chabad was paying an architect for planning a five story building before Mr. Arnall allegedly committed to the lower figure, which would not be enough for a five story building.

"The discrepancies and lack of corroboration undercut Chabad's case.

"It is not for the Court to decide whether Mr. Arnall actually promised $18 million to Chabad. It is for the court to determine, based on the testimony of the witnesses and exhibits admitted in evidence, whether Chabad proved by a preponderance of evidence that Mr. Arnall promised Chabad $18 million.

"The Court finds that plaintiff has failed to prove by a preponderance of evidence that Mr. Arnall promised to pay Chabad or Rabbi Cunin $18 million or any amount other than what he actually paid during his lifetime, to fund the development or construction of the Project." (Internal record references omitted.)

We find Chabad's contention unpersuasive for several reasons. As Mrs. Arnall correctly points out in her respondent's brief, the trial court never found that she willfully suppressed or concealed the spreadsheets. By its terms, Evidence Code section 413 requires a finding of willful suppression or concealment as a prerequisite to the adverse inference that is permitted, but is not mandated, by the statute. That requirement has not been met here. At most, the trial court found "it [did] not appear that a diligent search and reasonable inquiry [had been made]." The lack of a diligent search and reasonable inquiry is not the equivalent of an intentional withholding of evidence and there is no basis in this record to conclude otherwise.

More importantly, even if the trial court had made the requisite finding of intentional concealment, Chabad's contention that the court was then required to conclude Chabad had met its burden of proof is flawed. The statute provides that the trier of fact "may consider" a party's willful suppression of evidence. That language makes clear the trial court was not required to consider such evidence, much less conclude that the missing evidence necessarily supported Chabad's claim that the promise had been made.

In addition, the controversy regarding the spreadsheets was addressed at the hearing on Chabad's objections to the proposed statement of decision. At that hearing, the trial court discussed Chabad's assertion that Mrs. Arnall's failure to produce the spreadsheets supported the reasonable, if not mandatory, inference that the spreadsheets would have proven the existence of Mr. Arnall's promise to donate $18 million for a new facility. As it was entitled to do, the trial court found the adverse inference was not warranted in this case. The detailed 69-page statement of decision lays to rest Chabad's contention on appeal that the trial court reached this decision without considering all of the evidence provided by both parties.

The critical issue at the heart of this dispute was the credibility of the witnesses, many of whom were personally interested in the outcome of the case. On issues of credibility, we of course defer to the trier of fact. "The trier of the facts is the exclusive judge of the credibility of the witnesses. [Citation.]" (*Hicks v. Reis* (1943) 21 Cal.2d

654, 659.) In assessing a witness' credibility, the trier of fact may consider the manner in which the witness testifies, the motive or interest of the witness in the outcome of the case, and any contradictory evidence. (*Ibid.*) "Provided the trier of the facts does not act arbitrarily, he may reject *in toto* the testimony of a witness, even though the witness is uncontradicted." (*Id.* at pp. 659-660.) "[W]hen two or more inferences can reasonably be deduced from the facts, the reviewing court is without power to substitute its deductions for those of the jury or trial court." (*Juchert v. California Water Service Co.* (1940) 16 Cal.2d 500, 503.)

After finding that nearly every witness in this case was lacking in credibility to one degree or another, the trial court found that Chabad had failed to prove an essential element of its case, namely, the existence of a promise to donate $18 million for the new facility. In making this finding, the trial court necessarily found that Rabbi Cunin's testimony was not credible on the fundamental question regarding the existence of an oral pledge. Because the adverse credibility determination was based on substantial evidence that Chabad does not dispute on appeal, there are no valid grounds to overturn the trial court's findings.

DISPOSITION

The judgment is affirmed. Mrs. Arnall is awarded her costs on appeal.

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SUZUKAWA, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.