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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

SHAMUSIDEEN A. ALIU, Plaintiff and Appellant, v. ELAVON INC., Defendant and Respondent.	B265013 (Los Angeles County Super. Ct. No. BC491056)

APPEAL from a judgment of the Superior Court of Los Angeles County, Yvette M. Palazuelos, Judge. Affirmed.

Law Offices of George E. Omoko and George E. Omoko for Plaintiff and Appellant.

Bryan Cave, Jonathan G. Fetterly and Alexandra C. Whitworth for Defendant and Respondent.

Plaintiff and appellant Shamusideen A. Aliu and defendant and respondent Elavon Inc. entered into an agreement. After Elavon terminated the agreement, Aliu sued Elavon for breach of contract and for interference with contractual and prospective economic relationships. After a bench trial, the trial court found for Elavon on all causes of action. Aliu appeals, contending there was insufficient evidence to support the judgment. We disagree and affirm the judgment.

BACKGROUND[1]

Aliu, doing business as Shaga Financial Services, sold income tax preparation software over the internet. Elavon processed credit card transactions for merchants. On November 8, 2007, Aliu and Elavon entered into a credit card processing agreement (the agreement). If an internet customer bought Aliu's software with a credit card, Elavon processed the transaction and deposited the proceeds into Aliu's customer account. According to the agreement's terms of service, Aliu was liable for "chargebacks," which are transactions disputed by the customer or the customer's card-issuing bank.

Although Elavon could terminate the agreement at any time "with or without cause," the agreement identified "excessive" chargebacks as a breach of the agreement and cause for terminating it. "Excessive" was defined as chargebacks exceeding 1 percent of the gross dollar amount of Aliu's sales during a monthly period. Aliu also agreed to comply with "Payment Network Regulations" and acknowledged that if he violated those regulations Elavon was required to report him to the "Terminated Merchant File" known as MATCH. When a

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1 The parties proceed by way of a stipulated settled statement.

merchant is transferred or reported to MATCH, "it means that the card processor has stopped accepting new transactions."

One year after Aliu and Elavon entered into their agreement, Aliu entered into a software distribution agreement, dated November 1, 2008, with New America Software Inc. (New America), according to which Aliu would market and distribute the ShagaTax income tax preparation software. Aliu began to advertise ShagaTax. He had a mailing list of registered tax preparers and obtained a permit for bulk mailing. Forty-one tax preparers signed up to use ShagaTax on a free, trial basis.

In 2009, Aliu's first full year of sales, his transactions totaled $6,187.11. In 2010, his transactions totaled $23,570.33, but $17,070.94 of that resulted in a chargeback. From September through December 2010, Aliu had no sales. The total amount of Aliu's sales during the life of his merchant account with Elavon was $37,256.82, not subtracting chargebacks.

Due to the excessive chargeback activity, Elavon terminated its agreement with Aliu on November 17, 2010.

Aliu then sued Elavon in 2012. Based on allegations that Elavon had wrongfully canceled the agreement, Aliu's first amended complaint alleged causes of action for tortious interference with "economic advantage,"[2] tortious interference

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[2] There is some confusion in the record whether Aliu intended to allege a cause of action for interference with contractual relationships, in addition to a cause of action for interference with prospective economic relationships. Although Aliu argues he alleged both causes of action, he inartfully titled his first cause of action as one for "tortious interference with economic advantage," which has the same elements as his second cause of action for interference with prospective economic advantage. (*Crown Imports, LLC v. Superior Court* (2014) 223 Cal.App.4th 1395, 1404.) The trial court, in any event, addressed both existing and prospective relations. We therefore reject Aliu's

with prospective economic advantage, and breach of contract. After a bench trial in 2014, the trial court found against Aliu on all of his causes of action. In its statement of decision, the court found that Aliu failed to establish his burden of proving all elements of each cause of action. Aliu, for example, had no relationships with third parties having the probability of an economic benefit; Elavon did not know about these third parties; Elavon had the right to terminate the agreement with or without cause and, to the extent cause was needed, Aliu's excessive chargebacks was cause for termination; termination of the agreement did not disrupt Aliu's economic relationships; and Aliu had no damages.

The court entered judgment. This appeal followed.[3]

DISCUSSION

I. Standard of review

Aliu's brief on appeal is not a model of clarity. However, his appeal appears to challenge the trial court's finding he did not prove the elements of his causes of action. Where, as here, the court " 'has expressly or implicitly concluded that the party with the burden of proof did not carry the burden and that party

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argument that the trial court misapplied the law because it applied the elements of a cause of action for tortious interference with a prospective economic advantage rather than the elements of one for tortious interference with existing contractual relationships.

[3] The trial court entered judgment on July 13, 2015 and the clerk mailed notice of entry of judgment that day. Aliu had already filed a premature notice of appeal on June 23, 2015. We exercise our discretion to treat the notice of appeal as having been filed immediately after entry of judgment. (Cal. Rules of Court, rule 8.104(d)(2).)

appeals, it is misleading to characterize the failure-of-proof issue as whether substantial evidence supports the judgment.' " (*Sonic Manufacturing Technologies, Inc. v. AAE Systems, Inc.* (2011) 196 Cal.App.4th 456, 465.) Rather, " 'where the issue on appeal turns on a failure of proof at trial, the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law. [Citations.] Specifically, the question becomes whether the appellant's evidence was (1) "uncontradicted and unimpeached" and (2) "of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding." ' " (*Id.* at p. 466.)

However, to the extent the trial court's findings of fact are at issue, they are reviewed under the substantial evidence standard, while the trial court's resolution of a question of law is subject to independent review. (*Brewer v. Murphy* (2008) 161 Cal.App.4th 928, 935-936; *Niko v. Foreman* (2006) 144 Cal.App.4th 344, 364.)

II. Interference causes of action

The trial court found that Aliu failed to satisfy his burden of proving any elements of his causes of action for wrongful interference with "economic advantage" and for interference with prospective economic advantage. We agree.

The tort of wrongful interference with existing contractual relations requires " '(1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage.' " (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998)

19 Cal.4th 26, 55 (*Quelimane*); see also *Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1126.)

A cause of action for interference with a prospective business relationship more broadly "protects against intentional acts designed to harm an economic relationship [that] is *likely* to produce economic benefit." (*Shamblin v. Berge* (1985) 166 Cal.App.3d 118, 123.) Its elements are: " ' "(1) an economic relationship between the plaintiff and some third party, *with the probability of future economic benefit* to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant." ' " (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1153, italics added.) As to the third element, the defendant must engage in an act that is wrongful apart from the interference itself. (*Ibid.*; *Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 393; *Quelimane*, *supra*, 19 Cal.4th at pp. 55-56.) The plaintiff, however, need not prove that "the defendant engaged in wrongful acts *with the specific intent* of interfering with the plaintiff's business expectancy." (*Korea Supply Co.*, at p. 1154.)

A. *Aliu's relationships with third parties*

As to the first element of the two causes of action, Aliu contended he had relationships—existing or prospective—with (1) New America, (2) a roster of 500 tax preparers, and (3) tax preparers using ShagaTax on a trial basis.[4] First, there was no

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[4] His first amended complaint vaguely alleged that in November 2007 he "commenced business relationships with various third parties,

dispute that Aliu had a distribution agreement with New America, and therefore Aliu stated the first element of the cause of action for interference with contractual relations.

Second, as to the 500 tax preparers, Aliu's argument appeared to be he had an existing contract or contracts with them as well. Evidence of this was lacking. According to the settled statement, Aliu merely testified that he "acted for ten years as an OrrTAX service bureau for about 500 tax preparers" using software called IntelliTax. OrrTax went out of business, so those tax preparers needed new software. From this, the trial court, in its statement of decision, extrapolated that Aliu was a "service provider to a roster of 500 tax preparers." The court, however, found that Aliu did not establish a time frame for his alleged relationships with them "and therefore did not prove that those services coincided with his contract with [Elavon]." Stated otherwise, Aliu failed to satisfy his burden of proving he had an existing contract with those preparers.

Third, as to the 41 tax preparers using ShagaTax, there was also no evidence that Aliu had a contract with them. Rather, Aliu merely presented an undated list of 41 individuals or entities who were using ShagaTax on a free, trial basis. Therefore, at best, Aliu had a probability of an economic relationship with those 41 trial users. However, the court found that evidence of a prospective relationship was also absent. There was no evidence of, for example, uncompleted or attempted credit card transactions which would show that these trial users tried to buy ShagaTax but couldn't because Elavon had terminated the agreement. Moreover, the court reasoned that

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which contemplated the purchase of computer servers online from plaintiff's website."

because Aliu entered into the software distribution agreement in November 2008, those trial users would have used the software in 2009 and 2010. "Yet, [Aliu] produced no evidence that a single one of them ever purchased the software." Instead, the evidence was that Aliu made limited sales. In 2009, he had sales transactions only in February, March and June. In 2010, he had sales transactions only in March, April, May, July and August—and the sale in August resulted in a chargeback. Thus, Aliu had no sales in the last quarters of 2009 and 2010, a period during which Aliu's sales should have been at their height. Indeed, Aliu testified that most tax preparers "begin to get ready by about the last quarter of each year for the following tax year. Many make sure their software is ready by the last quarter of the year, and if changes are needed in software, they get in by November/December to prepare for the rush of tax preparation that begins January of the following year." Thus, according to Aliu's own testimony, he had *no* sales during the period when he should have had the majority of sales. The absence of sales in last quarters of 2009 and 2010 and the spotty, limited sales during the other quarters underscores that Aliu had no probability of an economic relationship with those trial tax preparers. That is, the evidence is not of such a character and weight as to undermine the court's finding. (*Sonic Manufacturing Technologies, Inc. v. AAE Systems, Inc.*, *supra*, 196 Cal.App.4th at p. 466.)

B. *Elavon's knowledge of the third party relationships*

Although Aliu established that he at least had an existing contract with New America, he did not establish that Elavon knew about it or about any prospective relationships. Although Aliu testified that he verbally told Elavon about the distribution

agreement, the trial court described Aliu's testimony as "uncorroborated" and lacking "detail as [Aliu] could not state the date or time when the conversations took place, or a name of [Elavon's] personnel with whom he spoke." The court thus clearly found that Aliu failed to establish that Elavon knew about the distribution agreement and, impliedly, did not find Aliu credible on this issue. (See generally *Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 766 [on appeal, we have no power to consider credibility of witnesses]; see *Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42, 48 [under the "doctrine of implied findings, the reviewing court must infer, following a bench trial, that the trial court impliedly made every factual finding necessary to support its decision"].) There was also no evidence that Elavon knew about any tax preparers using the software on a free, trial basis. As the court found, Elavon "would have no knowledge of [Aliu's] customers' existence in the absence of actual sales transactions." Aliu did not establish that any of those preparers bought or tried to buy the software.

C. *Elavon's intentional acts to disrupt the relationships*

Although we could end our discussion there, Aliu also did not satisfy his burden of showing that Elavon acted wrongfully, that is, engaged in acts designed to induce a breach or disruption of Aliu's distribution agreement with New America. The agreement between Aliu and Elavon gave the parties the right to terminate it "with or without cause." Therefore, Elavon did not need a reason to end the agreement. Even so, it had one: Aliu's excessive rate of chargebacks. Excessive chargebacks constituted an express breach and cause to terminate the agreement.

Aliu, however, argues that Elavon breached the implied covenant of good faith and fair dealing by terminating the

contract while investigating the chargebacks.[5] On November 10, 2010, Elavon advised Aliu of the $6,677.20 chargeback and asked for a response by December 28, 2010. On November 19, 2010, Elavon advised Aliu of the $10,143.74 chargeback and asked for a response by December 16, 2010. Elavon terminated its agreement with Aliu on November 17, 2010, before the response dates. We fail to see how this breached the implied covenant, when excessive chargebacks constituted an express ground to terminate the agreement and when the agreement could be terminated with or without cause. Elavon could terminate the agreement and continue to investigate the chargebacks and to pursue collection even after the agreement's termination. An implied covenant cannot contradict the contract's express terms. (*Storek & Storek, Inc. v. Citicorp Real Estate, Inc.* (2002) 100 Cal.App.4th 44, 55.)

Aliu also argues that Elavon acted in bad faith because it failed to withdraw funds to cover the chargebacks from Aliu's account. Certainly, the agreement gave Elavon the right to withdraw funds from Aliu's account to satisfy the chargebacks. However, Elavon had no obligation to do so. Instead, Aliu had the obligation to satisfy the chargebacks, but, "by his own testimony, he never did." The right to terminate the agreement was not contingent on whether and how chargebacks were repaid.

Given these failures of proof on the first through third elements of the causes of action, the trial court properly found

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[5] Aliu suggests that Elavon admitted in discovery that it had breached the implied covenant of good faith and fair dealing. There was no such admission. Elavon merely admitted that the agreement had an implied covenant of good faith and fair dealing. That is not tantamount to an admission it *breached* the covenant.

against Aliu on them. We therefore need not address the remaining elements, including damages.

III. Breach of contract

Our discussion regarding Aliu's failure to prove his interference causes of action informs our discussion regarding his breach of contract cause of action. The elements of this cause of action are: (1) a contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) damage to plaintiff. (*Abdelhamid v. Fire Ins. Exchange* (2010) 182 Cal.App.4th 990, 999.) Aliu failed to perform his obligations under the agreement: he had excessive chargebacks and did not pay them back. In August 2010, his sales amounted to $17,070.94. One hundred percent of that resulted in a chargeback. The agreement, however, defined an excessive chargeback as one exceeding *1* percent the gross dollar amount of sales in a monthly period. Such an excessive chargeback was an express ground to terminate the agreement which, in any event, was terminable with or without cause.

IV. Waiver and limitation of liability defenses

Aliu complains that Elavon failed to disclose its waiver and limitation of liability defenses during discovery. Even if true, we fail to see how that changes the outcome. In reaching its decision, the trial court did not rely on Elavon's defenses. The court instead found that Aliu failed to meet his burden of proof. Stated otherwise, the court never reached Elavon's defenses.

Although this renders moot Aliu's argument that there was insufficient evidence of his "waiver," we note that this vague argument appears to be based on a misapprehension of a statement the trial court made. In its statement of decision, the

court noted that the agreement obligated Elavon to report a terminated merchant (Aliu) to MATCH and Aliu "waived his right to all claims as a result of [Elavon's] report." The court was referencing paragraph 17 of the agreement's terms of service requiring Aliu to "[a]cknowledge that Member and/or Servicer is required to report Merchant's business name and the name of Merchant's principals to the MATCH listing maintained by MasterCard and accessed and updated by Visa and American Express pursuant to the requirements of the Payment Network Regulations." Aliu then argues that because the Payment Network Regulations were never introduced into evidence, there was insufficient evidence of waiver. Aliu misses the point: the court was merely pointing out that Aliu acknowledged that Elavon had to report him to MATCH if, for example, Aliu had excessive chargebacks. The court did not need the Payment Network Regulations to come to that conclusion.

DISPOSITION

The judgment is affirmed. Defendant and respondent Elavon is to recover its costs on appeal.

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DHANIDINA, J.*

WE CONCUR:

EDMON, P. J.

LAVIN, J.

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