Filed 11/22/19 Ulkarim v. Westfield, LLC CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

MONIRA ULKARIM, Plaintiff, Cross-defendant and Appellant, v. WESTFIELD, LLC, Defendant, Cross-complainant and Respondent.	B287912 Los Angeles County Super. Ct. No. BC487579

APPEAL from judgments of the Superior Court of Los Angeles County, Michael Johnson, Judge. Affirmed.

Law Offices of Stanley H. Kimmel and Stanley H. Kimmel for Plaintiff, Cross-defendant and Appellant.

Ballard Spahr, Brian D. Huben and Nicholas M. Gross for Defendant, Cross-complainant and Respondent.

INTRODUCTION

Monira Ulkarim appeals from two separate judgments: one dismissing her complaint against Westfield, LLC, after the trial court granted Westfield's motion for terminating sanctions; and a second judgment in favor of Westfield following a court trial on its cross-complaint. Finding no error, we affirm both judgments.

FACTS AND PROCEDURAL BACKGROUND

1. *Facts giving rise to the complaint and cross-complaint*

Effective February 2012, Ulkarim, a sole proprietor doing business as iWorld, entered a short-term license agreement (the license) with Westfield to use cart space in its Valencia Town Center shopping center to sell accessories for iPads, iPods, and iPhones. Each month iWorld was to pay base rent plus $100 for common area maintenance (CAM) for its cart space based on the schedule for payment in the license (regular rent). The base rent was significantly higher during the holiday months of November and December.

The license was for a term of one year, subject to Westfield's right to terminate at its sole discretion on seven days' written notice to iWorld. If iWorld did not vacate the center following expiration or termination of the license, it then would be deemed a month-to-month tenant and obligated to pay 150 percent of the monthly base rent plus the $100 CAM charge (holdover rent).

On June 25, 2012, Westfield served iWorld with a seven-day termination notice under paragraph 13d of the license, terminating the license effective July 3, 2012. Westfield had reached an agreement with another retailer selling accessories

and repair service for wireless devices, known as Cellairis, to lease space from Westfield in its shopping centers across the country.

On June 29, 2012, Ulkarim filed her initial complaint against Westfield, in her capacity as an individual doing business as iWorld. iWorld did not leave the center until November 20, 2012.[1] Ulkarim ultimately filed a third amended and supplemental complaint in October 2015. After a hearing on Westfield's demurrer, the only cause of action remaining against it was for breach of contract. Westfield then filed in April 2016 a cross-complaint against Ulkarim for breach of contract.

2. *Discovery and terminating sanctions*

Westfield propounded special interrogatories and requested documents about iWorld's alleged damages. iWorld responded that it suffered a total of $226,000 in damages in lost income and inventory expenses that were supported by "P&L [profit and loss] Statements Schedule of Expenses and Investments: Binders 1-6." Ulkarim signed a verification attesting to the truth of the interrogatory responses. iWorld also produced 10 single-page profit and loss statements. When Westfield deposed Ulkarim's husband Mahmud Ulkarim in January 2017, he testified that additional documents relating to iWorld's damages existed.[2]

---

[1] In the interim, Westfield filed an unlawful detainer action and obtained a judgment for possession in August 2012 after its motion for summary judgment was granted. The appellate division of the superior court reversed that judgment on July 15, 2014.

[2] At trial, Mahmud testified he assisted his wife in the operation of iWorld, including by writing and mailing the rent checks. We refer to him by his first name to avoid confusion.

On March 31, 2017, Ulkarim's counsel emailed the additional documents to Westfield's counsel. The documents included the earlier produced profit and loss statements plus 20 single-page invoices (iWorld invoices) purportedly from iWorld's wholesaler, Valor Communication, Inc. (Valor).

The invoices were suspicious. Although each invoice stated it was from Valor to iWorld, the remittance information was generic, stating, "Make all checks payable to Company Name[.] [¶] If you have any questions concerning this Invoice, contact Name, phone, email[.]" One of Westfield's attorneys found an invoice template with the identical generic remittance information available through Microsoft Word.

Westfield then subpoenaed Valor to produce all invoices relating to iWorld. Valor produced 50 pages of invoices concerning iWorld (Valor invoices). The Valor invoices are completely different from the iWorld invoices. For example, they include detailed entries to describe each item, such as, "Milky/Solid Black Hole Pattern Gummy Cover," the SKU number for each described item, for example, "NewIPADCASKGM5049WP," and an "EAN" number for each item, for example "[illegible]85126005197." Also, they do not include the generic remittance information found on the iWorld invoices. The iWorld invoices in contrast describe the items generally—for example, "iphone3/iphone4 covers"—and have no SKU or other identifying number listed for the item.

Most importantly, the Valor invoices charged iWorld significantly less. For example, a single Valor invoice was issued for July 2012 charging $889.03 for 351 items. In contrast, there are two iWorld invoices for July 2012: the first charged $2,218.85 for 492 items, and the second charged $2,116.75 for 485 items.

Thus, the iWorld invoices reflected $3,446.57 *more* in costs than the Valor invoices for July 2012.

Westfield deposed Valor's person most knowledgeable (PMK), Kenneth Wan, about the invoices in June 2017. Ulkarim's counsel did not attend. Wan testified he did not recognize the iWorld invoices, Valor did not use invoices in that format, and Valor's invoices state each item with a "very distinctive description about what the product is," not a generic " 'iPhone3/iPhone4 covers.' " He testified Valor would never put general remittance information on one of its invoices. Wan testified none of the iWorld invoices had been issued by Valor. He believed they were forged.

About two weeks after Wan's deposition, Westfield resumed Mahmud's deposition as PMK for iWorld. Westfield's counsel showed him the iWorld invoices. Mahmud "recognize[d]" them as purchase invoices Valor issued to iWorld. Mahmud testified iWorld received the invoices. He said it could have been him, his brother, his wife—"[a]nybody at the place." After reviewing each invoice, Mahmud stated that to his knowledge there were no other invoices that iWorld received from Valor. He didn't produce them before his last deposition because he "couldn't find them." He had to send someone to search in storage to find them. He testified the iWorld invoices supported iWorld's damages in the case because they showed the money he had to spend to buy inventory, and the inventory iWorld wanted to sell at a profit. He further testified the invoices supported iWorld's profit and loss statements. He agreed with Westfield's counsel's statement that the iWorld invoices "represent monies that you have paid in operating your business that you would like to recover from Westfield." Each invoice represented the amount iWorld was

asking Westfield to pay in terms of the cost of the inventory. Mahmud testified iWorld also was seeking the profit iWorld would have made if it had sold that inventory. He testified that he sells iWorld products at "five times" the price listed in the iWorld invoices.

After Mahmud's deposition, Westfield's counsel called Ulkarim's counsel. He "pointed out the untruthful testimony of iWorld's witness, and urged him to reconsider the continued prosecution of iWorld's complaint." He also sent Ulkarim's attorney an email attaching a Valor invoice and an iWorld invoice. A week later, Westfield's counsel sent a second email to Ulkarim's attorney, "[f]ollowing up on [their] discussion," and asked to hear from him by the next day. The attorney did not respond.

In September 2017, Westfield filed a motion for terminating sanctions or, in the alternative, evidentiary sanctions precluding iWorld from presenting evidence of its damages. Ulkarim filed an opposition but did not include any supporting declarations other than from her counsel about the late filing of the opposition. The trial court heard and granted the motion on October 16, 2017. Judgment in Westfield's favor on Ulkarim's complaint was entered on October 25, 2017.

3. *Court trial of cross-complaint*

The court trial of Westfield's cross-complaint for breach of contract (failure to pay rent) took place on November 13, 2017. Westfield called three witnesses: a former general manager of the center, an expert witness, and its Director of Property Group, who makes damages calculations for litigation. Ulkarim called two witnesses: Mahmud and his brother, who managed the

iWorld cart at the center. On November 21, 2017, the trial court issued its written ruling in favor of Westfield.

Among other things, the court found iWorld was required to vacate the center on July 3, 2012, and its failure to do so and to pay all rent due for the period of iWorld's occupancy breached the license. As a result, iWorld owed regular rent for the period July 1 through July 3, 2012, and holdover rent under paragraph 20 of the license for the period July 4, 2012 through November 20, 2012. The parties stipulated that Ulkarim paid and Westfield received $6,067 in rent during the period. The court rejected Ulkarim's argument that iWorld did not owe the increased amount of holdover rent because Westfield did not give her notice of that obligation. The court found Westfield was not required to provide notice, concluding that under paragraph 3d of the license "the obligation to pay increased rent became operative simply by holding over beyond the termination date." The court also rejected Ulkarim's claim that iWorld had satisfied its rent obligation by tendering all rent due through Mahmud's submission of rent checks on behalf of iWorld to Westfield's banking "lockbox" that Westfield then rejected. The court found Mahmud was "not a credible witness" and rejected his testimony about submitting checks beyond the $6,067 stipulated to by the parties. The court also rejected Westfield's contention that it was entitled to the higher rent it would have received from Cellairis if iWorld had moved out by July 3, 2012.

The court calculated the total rent due for the period July 1, 2012 through November 20, 2012 was $22,345.53. After crediting the $6,067 the parties stipulated iWorld had paid, the court concluded Westfield was entitled to $16,278.53 on its cross-complaint. Judgment on the cross-complaint was entered

on January 8, 2018. Ulkarim filed a timely notice of appeal from both judgments.

DISCUSSION

Ulkarim contends the trial court had neither statutory nor inherent authority to dismiss her complaint as a discovery sanction and thus abused its discretion, because she did not violate a court order, she complied with Westfield's demand for production by producing iWorld's business records, Westfield presented "no evidence of intentional conduct by" Ulkarim personally, and the terminating sanction put Westfield in a better position.

Ulkarim's appeal from the judgment on Westfield's cross-complaint challenges the court's calculation of rent it found Ulkarim owed Westfield. She contends the court erred when it awarded holdover rent to Westfield for the months of July, August, and September when iWorld had deposited rent for those months, and Westfield refunded the amounts but did not demand payment of the holdover rent. Ulkarim also contends the trial court was "prejudiced" against her evidence based on its ruling granting terminating sanctions and "was pre-disposed to give no weight to" Mahmud's testimony about checks he tendered for iWorld's rent.

1. *Terminating sanctions*

a. *Standard of review and applicable law*

We review the trial court's dismissal of Ulkarim's complaint as a discovery sanction for abuse of discretion. (*New Albertsons, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1403, 1422 (*New Albertsons*).) "When the trial court's exercise of its discretion relies on factual determinations," we examine the record for substantial evidence, contradicted or uncontradicted,

that supports the court's determinations. (*Los Defensores, Inc. v. Gomez* (2014) 223 Cal.App.4th 377, 390.) We review the record in the light most favorable to the trial court's ruling, drawing all reasonable inferences in support of it. (*Stephen Slesinger, Inc. v. Walt Disney Co.* (2007) 155 Cal.App.4th 736, 765 (*Slesinger*).) " ' "The power to impose discovery sanctions is a broad discretion subject to reversal only for arbitrary, capricious, or whimsical action." ' " (*Los Defensores*, at p. 390.)

"California discovery law authorizes a range of penalties for conduct amounting to 'misuse of the discovery process.' " (*Doppes v. Bentley Motors, Inc.* (2009) 174 Cal.App.4th 967, 991.) Section 2023.010 of the Code of Civil Procedure provides a nonexhaustive, illustrative list of examples of misuse of the discovery process, including failing to respond to discovery, making an evasive response to discovery, and disobeying a court order to provide discovery. Although the production of, and reliance on, fraudulent or forged documents in response to discovery is not specified in section 2023.010, it certainly is the type of conduct that qualifies as a "misuse" of the discovery process. (See *R.S. Creative, Inc. v. Creative Cotton, Ltd.* (1999) 75 Cal.App.4th 486, 489-491, 496-497 (*R.S. Creative*) [terminating sanctions upheld where plaintiff originally offered forged contract as true, destroyed evidence of the forged document, would not sit for her continued deposition, and violated two discovery orders]; *Department of Forestry & Fire Protection v. Howell* (2017) 18 Cal.App.5th 154, 198 (*Howell*) [terminating sanctions upheld where plaintiff presented false discovery responses and deposition testimony, engaged in spoliation of evidence, and failed to comply with discovery orders to produce documents]; *Slesinger, supra*, 155 Cal.App.4th

at pp. 767-768, 770 [holding court had inherent authority to dismiss case for misconduct during discovery that included stealing confidential documents and altering them to delete confidentiality notations to create false impression they were not confidential].)

Under Code of Civil Procedure section 2023.030, a court may impose sanctions—including evidence, issue, and terminating sanctions—"against anyone engaging in conduct that is a misuse of the discovery process" to the extent authorized by the discovery statutes. Trial courts should select sanctions available under the discovery statutes "tailored to the harm caused by the misuse of the discovery process and should not exceed what is required to protect the party harmed by the misuse of the discovery process." (*Howell, supra*, 18 Cal.App.5th at p. 191.) "Discovery sanctions are intended to remedy discovery abuse, not to punish the offending party. Accordingly, sanctions should be tailored to serve that remedial purpose, should not put the moving party in a better position than he would otherwise have been had he obtained the requested discovery, and should be proportionate to the offending party's misconduct." (*Williams v. Russ* (2008) 167 Cal.App.4th 1215, 1223.) Thus, statutory sanctions generally are imposed incrementally, "with terminating sanctions being the last resort." (*Howell,* at p. 191.) Nevertheless, a trial court "may impose terminating sanctions as a first measure in extreme cases, or where the record shows lesser sanctions would be ineffective." (*Id.* at pp. 191-192.)

A trial court also has inherent authority to impose terminating sanctions as a first remedy in certain circumstances. (*Howell, supra*, 18 Cal.App.5th at p. 192; *Slesinger, supra*, 155 Cal.App.4th at p. 763 ["the power to impose sanctions under the

Civil Discovery Act [citation] supplements, but does not supplant, a court's inherent power to deal with litigation abuse"].) "[W]hen the plaintiff has engaged in misconduct during the course of the litigation that is deliberate, that is egregious, and that renders any remedy short of dismissal inadequate to preserve the fairness of the trial, the trial court has the inherent power to dismiss the action." (*Slesinger, supra*, 155 Cal.App.4th at p. 764.)

"The decision whether to exercise the inherent power to dismiss requires consideration of all relevant circumstances, including the nature of the misconduct (which must be deliberate and egregious, but may or may not violate a prior court order), the strong preference for adjudicating claims on the merits, the integrity of the court as an institution of justice, the effect of the misconduct on a fair resolution of the case, and the availability of other sanctions to cure the harm." (*Slesinger, supra*, 155 Cal.App.4th at p. 764.)

b. *The court did not abuse its discretion when it dismissed Ulkarim's complaint*

Ulkarim first argues the court had no discretion to issue a terminating sanction under the discovery statutes because she complied with Westfield's discovery requests and did not violate a court order. As Ulkarim notes, the court's statutory authority to issue a terminating sanction generally is limited by the particular discovery process. The statutes governing requests for production "provide for the imposition of an issue, evidence, or terminating sanction . . . only '[i]f a party fails to obey an order compelling further response' (§ 2031.310, subd. (e)) or '[i]f a party then fails to obey an order compelling inspection' (§ 2031.320, subd. (c))." (*New Albertsons, supra*, 168 Cal.App.4th at pp. 1423-1424.) The court's inherent authority "to dismiss for misconduct

need not be preceded by violation of a court order," however. (*Slesinger, supra*, 155 Cal.App.4th at p. 763.) That Ulkarim did not violate a discovery order, therefore, does not render the court's dismissal of her complaint as a discovery sanction an abuse of the court's discretion.

The rest of Ulkarim's argument essentially is that the court did not have inherent authority to issue the terminating sanction because the conduct here—that did not involve withholding or destroying evidence or proof that Ulkarim personally engaged in intentional misconduct—was not sufficiently egregious to require dismissal to ensure a fair trial. We disagree.

i. Substantial evidence supports the trial court's finding that the production and reliance on the false iWorld invoices was deliberate and sufficiently egregious to justify dismissal

At the hearing on Westfield's motion, the trial court described the iWorld invoices as "phony invoices." It explained, "That's clear from the evidence that the defendant has presented. And they have been offered by the plaintiff as evidence of their damages in the case and the invoices are very much to the favor of the plaintiff. They're what, six, almost seven, times higher than the actual invoices that were issued by Valor. They're phony. They're counterfeit. They're trying to perpetuate a fraud on everybody. That's the way I view the evidence." Based on Westfield's evidence—the discovery requests, verification of interrogatories, depositions of Valor's PMK and Mahmud, and reasonable inferences drawn from that evidence—the court concluded that iWorld "manufactured evidence about [its] damages and that this was done on the plaintiff's behalf."

The court found iWorld's conduct was "a very serious violation of discovery and the integrity of the litigation process."

Substantial evidence supports the trial court's finding. The PMK about Valor's invoices testified the iWorld invoices were not Valor invoices. The iWorld invoices look nothing like the invoices produced by Valor and authenticated by the PMK. The false invoices state iWorld paid substantially more for Valor's products than the genuine invoices show, lack any detail describing the products, and include generic template information. Mahmud testified under oath as the PMK for iWorld that the false iWorld invoices were the only invoices iWorld received from Valor. He testified they represented the amounts iWorld paid for the products it sold and supported the damages iWorld sought from Westfield, which included the profit it would have made by selling those products at five times the cost reflected in the invoices. He testified the false invoices supported iWorld's profit and loss statements that Ulkarim had verified under oath were the supporting evidence for iWorld's damages.

Based on this evidence and reasonable inferences drawn from it, the court reasonably could conclude Mahmud—who acted on iWorld's and thus Ulkarim's behalf—deliberately submitted false invoices to inflate iWorld's damages that Ulkarim alleged Westfield caused. As the court found, this conduct not only was a serious violation of the discovery process, but it called into question the integrity of the litigation process that depends on parties to present truthful evidence. We can infer the court also concluded the presentation of the false invoices affected the fair resolution of Ulkarim's complaint. According to Mahmud and Ulkarim, the invoices were the primary evidence supporting a

key element of Ulkarim's breach of contract cause of action—damages. Because iWorld's profit and loss statements were based on the false invoices, all of iWorld's evidence on damages was "call[ed] into question," as the trial court found.

Thus, we conclude the production and use of the false invoices was sufficiently egregious to support the court's dismissal of Ulkarim's complaint under its inherent authority. (*Slesinger, supra*, 155 Cal.App.4th at p. 764 [deliberate egregious misconduct, effect of misconduct on fair resolution of case, and integrity of the court are all relevant to decision to dismiss].)

Ulkarim nevertheless argues, as it did to the trial court, the false invoices do not justify dismissal because Westfield did not prove that Ulkarim personally created the invoices and knew they were false. We are not persuaded.

First, the court in *Slesinger* rejected a similar argument. There, plaintiff's investigator committed most of the misconduct leading to the dismissal of plaintiff's case, including trespassing on private property to obtain defendant's confidential documents from dumpsters and off office desks. (*Slesinger, supra*, 155 Cal.App.4th at pp. 767-768.) The court attributed the investigator's conduct to the plaintiff, finding it was vicariously liable for its investigator's intentional misconduct committed within the course and scope of his employment. The court noted it was " 'immaterial that the employee act[ed] in excess of authority or contrary to instructions.' " (*Id.* at p. 769.)

Similarly, here, Mahmud acted on behalf of Ulkarim. He clearly ran the business with his wife: he signed rent checks, received the invoices for iWorld's products from Valor, and communicated with Westfield about the license. He was the designated PMK for iWorld and produced and authenticated

the false iWorld invoices on Ulkarim's behalf. His actions all were done within the scope of helping his wife manage iWorld's business. As he acted on iWorld's, and thus Ulkarim's (as the sole proprietor of iWorld) behalf, the court could impute his misconduct to Ulkarim. (*Slesinger*, *supra*, 155 Cal.App.4th at p. 769 [even if investigator had acted without plaintiff's authorization, conduct would be imputed to plaintiff because "it occurred in the course and scope of the investigation that [plaintiff] hired him to undertake"].)

Moreover, the court found it unreasonable that Ulkarim "was in the dark about all of this" in such a small organization, emphasizing Mahmud's testimony that he, his brother, or his wife could have received the iWorld invoices. The record supports that conclusion.

Second, as we have said, the court reasonably could infer from the evidence presented that iWorld engaged in deliberate misconduct. The court heard argument from Ulkarim's counsel that the iWorld invoices simply were documents Ulkarim received and were in her records. He argued Mahmud and/or his brother went to the Valor warehouse and paid cash for the product, and the person at the warehouse gave them the invoices. He believed the employee at the warehouse likely created the false invoices "to support the cash he was receiving and then not reporting to the company or reporting at a different level." He argued the evidence only showed that Ulkarim "got some phony documents" not knowing they were not Valor invoices.

But Ulkarim presented no evidence to this effect to the trial court. Neither she nor Mahmud submitted a declaration denying creating the invoices or knowing the invoices were "phony." Neither attempted to reconcile the phony invoices with the true

Valor invoices produced by Valor. They certainly did not present evidence of counsel's theory about the warehouse employee faking the documents to pocket the extra money. Only Ulkarim's counsel submitted a declaration in opposition to Westfield's motion, but it merely explained the late filing of Ulkarim's opposition was due to his need to draft an appellate brief in another case. In short, Ulkarim failed to present any evidence from which the trial court could infer iWorld's conduct was not deliberate.

Indeed, the court particularly was troubled by the lack of explanation in response to Westfield's evidence. The court said it drew adverse inferences from "the things that have been argued by plaintiff's counsel." The court emphasized there had been no response, no declarations, "by the plaintiff, or the other two [Mahmud and his brother] who were involved in the company, to explain this was a mistake. I don't know how this happened. This is what we did. This is how it all played out. We deny this. [¶] There's nothing like that at all. It's just an argument that there are gaps in the evidence for which I should not draw the inferences that I have. And I just don't see it that way. I think that . . . the showing is strong, the inferences that I've drawn are reasonable, and it supports a very serious violation that warrants dismissal."

Finally, Ulkarim relies heavily on *New Albertsons* to support her contention the circumstances here do not justify the dismissal of the complaint. There, on a petition for writ of mandate, this Court found the trial court abused its discretion by granting issue and evidence sanctions. (*New Albertsons, supra*, 168 Cal.App.4th at p. 1434.) There, a man and his wife sued defendant after he was injured in a fall while shopping at

defendant's supermarket. (*Id.* at p. 1408.) A key issue was whether a bag of ice was left on the floor in the aisle where the man fell or whether an employee left the ice on the floor next to the man after he fell. (*Id.* at pp. 1409-1410.) Plaintiffs' attorney demanded defendant preserve all video recordings of the incident for potential use in litigation. (*Id.* at pp. 1410-1411.) Through discovery, plaintiffs demanded the production of video recordings " 'showing the condition of any aisle' " at the supermarket on the day of the incident. (*Id.* at p. 1411.) Defendant objected to the request as overbroad but agreed to produce photographs of the aisle taken after the incident; it also produced a CD showing portions of the premises in response to another discovery request. (*Id.* at pp. 1411-1412.) During the litigation, the store's video footage from the day of the incident was recorded over. At his deposition, the store's on-site director testified none of the store's video cameras covered the aisle where plaintiff fell. He testified the store's video recordings are recorded over after the memory is full, about every four to six months. (*Id.* at p. 1413.)

Plaintiffs moved for discovery sanctions arguing defendant had willfully destroyed the video recordings after they had demanded their production. (*New Albertsons, supra*, 168 Cal.App.4th at p. 1413.) The trial court granted the motion in part. It precluded defendant from entering any part of its video recordings into evidence and said it would instruct the jury that defendant had destroyed the video recordings after receiving notice to preserve them and that it may infer the destroyed recordings were unfavorable to defendant. (*Id.* at pp. 1415-1416.)

We found these sanctions were unauthorized by the discovery statutes because defendant had not violated a court order to compel a further discovery response. (*New Albertsons,*

supra, 168 Cal.App.4th at pp. 1423-1424.) We explained, "[t]he general rule that we glean from these opinions [allowing nonmonetary sanctions absent violation of a court order] is that if it is sufficiently egregious, misconduct committed in connection with the failure to produce evidence in discovery may justify the imposition of nonmonetary sanctions even absent a prior order compelling discovery, or its equivalent. Furthermore, a prior order may not be necessary where it is reasonably clear that obtaining such an order would be futile." (*Id.* at p. 1426.)

We found those circumstances did not exist. (*New Albertsons, supra*, 168 Cal.App.4th at pp. 1424, 1426-1427.) We noted defendant never agreed to produce the video recordings "of any aisle," but had objected to plaintiffs' request. We concluded defendant "had no obligation" to produce further responsive documents, including the recordings, because plaintiffs never moved to compel them. (*Id.* at pp. 1427-1428.) Thus, unlike in other cases, defendant had never agreed to produce the recordings, had not failed to comply with an agreement or court order to do so, and had not willfully destroyed the recordings.

We also concluded the court's inherent authority did not authorize the sanctions, "because the destruction of the recordings in these circumstances was not egregious misconduct and the sanctions are not necessary to ensure a fair trial." (*New Albertsons, supra*, 168 Cal.App.4th at p. 1434.) The trial court never expressly found whether a bag of ice was on the floor before the incident, and the video recordings would not "have shown definitively whether a bag of ice was or was not on the floor before the incident" because the cameras were not directed at the aisle. (*Id.* at pp. 1431-1434.)

Ulkarim seems to contend the circumstances here are similar, focusing again on the lack of evidence that Ulkarim created the false invoices, that Ulkarim did not violate a discovery order, and that Westfield never moved to compel further responses from Ulkarim. We are not persuaded. The circumstances in *New Albertsons* are nothing like those here. As we have said, the record supports the court's conclusion that iWorld deliberately produced the false invoices to inflate its damages substantially—a key issue in the case. In contrast, the defendant in *New Albertsons* never agreed to produce the video recordings and the recordings—mistakenly overwritten in the normal course of business—would not have provided the evidence the plaintiffs sought—that there had been ice on the floor before the husband fell.

ii. A lesser sanction would not have ensured a fair trial

Ulkarim also contends dismissal of her complaint was not necessary to ensure a fair trial and it put Westfield in a better position than if it had to prove at trial Ulkarim forged the invoices. Ulkarim misses the point.

The trial court considered whether it should issue a lesser sanction, such as limiting the evidence Ulkarim could present at trial, but concluded a lesser sanction was not "appropriate, particularly in light of the absence of some explanation by the plaintiff as to what was going on here." As we said, in reaching this conclusion, the court explicitly found all the evidence on iWorld's damages had been called into question by the false invoices. The court continued, "it's certainly, again, a very serious violation that goes to the integrity of the litigation process. And I just cannot—I do not believe that a lesser

sanction is appropriate." Based on the record, we can infer the court implicitly found no other remedy short of dismissal would "preserve the fairness of the trial." (*Slesinger, supra*, 155 Cal.App.4th at p. 764.)

The court did not abuse its discretion in so finding. As all the evidence of iWorld's damages was based in some way on the false invoices,[3] the only "lesser" sanction that would ensure a fair trial would be to preclude Ulkarim from presenting any evidence of iWorld's damages. That sanction would have had the same effect as dismissal. Without evidence of damages, iWorld would have been unable to prove an element of its contract cause of action—the only remaining cause of action in its complaint. Thus, even if the court should have imposed a lesser sanction by excluding evidence of iWorld's damages, any such error would have had no prejudicial effect.

We also reject Ulkarim's argument that the false invoices raised a conflict in the evidence for the trier of fact to determine —here, the court—"after a full explanation by live testimony." The time for Ulkarim to have presented evidence to explain the false invoices was in her opposition to Westfield's motion. The court was not required to wait for trial to hear Ulkarim's explanation when she failed to provide even an explanatory

---

[3] Ulkarim argues there was other evidence of her damages. But her interrogatory response stated iWorld's damages were based on its profit and loss statements. While other documents may also provide evidence of iWorld's sales, the record shows the profit and loss statements were based on the false invoices.

declaration in opposition to the motion.[4] This is particularly true here where the trial was to be heard by the court, not a jury.[5]

We conclude the court did not abuse its discretion when it dismissed Ulkarim's complaint.

2. *The judgment on Westfield's cross-complaint*

a. *Standard of Review*

Because Ulkarim appeals from the trial court's factual determinations supporting its judgment in favor of Westfield on Westfield's cross-complaint, we review Ulkarim's second and third issues on appeal—whether the trial court erred in calculating Westfield's damages and in disregarding Mahmud's

---

[4] Ulkarim seems to challenge the court's ruling in part on the ground it did not hold an evidentiary hearing, as was done in *Slesinger* and *R.S. Creative*. No evidentiary hearing was needed, however, as iWorld presented no evidence in opposition to the motion. Nor does the record reflect that iWorld asked the trial court to conduct an evidentiary hearing. The court denied counsel's request, made after the court ruled, for the opportunity to submit an explanatory response to the inferences the court drew from the evidence. But, as the court noted, counsel had months to provide an explanation from the time Westfield's counsel alerted him to the conflicting invoices and plenty of time from the filing of the motion to submit declarations. Moreover, the court held a hearing and gave both sides an opportunity to argue. It considered the parties' written and oral arguments and the evidence Westfield presented. Having failed to present evidence to the trial court in the first place, any contention that the court was required to hold an evidentiary hearing before granting the motion to dismiss the complaint is meritless.

[5] Accordingly, Ulkarim's implication that a limiting jury instruction would be an appropriate lesser sanction is, as Westfield notes, "nonsensical."

testimony on the issues of checks tendered for rent—for substantial evidence. (*Piedra v. Dugan* (2004) 123 Cal.App.4th 1483, 1489 [substantial evidence applies to jury and court trials].) "When a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether, *on the entire record*, there is substantial evidence, contradicted or uncontradicted, which will support the determination, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court. *If such substantial evidence be found, it is of no consequence that the trial court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion.*" (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874.)

b. *The court did not err in calculating the amount of rent iWorld owed Westfield*

Ulkarim does not challenge the trial court's underlying finding that Westfield properly terminated the license and that Ulkarim breached the license[6] leading to the judgment in

---

[6] In her brief, Ulkarim states the appellate division's reversal of Westfield's summary judgment against her in the separate unlawful detainer case is the law of the case "as to Westfield's wrongful termination." The appellate division found Westfield was required to give a 24-hour termination notice once iWorld became a holdover tenant before it could proceed with the unlawful detainer. As the trial court noted, this decision "merely deals with the issue of whether Westfield was entitled to the remedy of unlawful detainer." It has nothing to do with the issues before us on appeal. As we have said, Ulkarim has

Westfield's favor on its cross-complaint for breach of contract. Ulkarim also concedes in her brief that the court correctly found she owed holdover rent for the month of October 2012 and holdover rent at the holiday rate for November 1 through November 20, 2012.[7] Accordingly, she has abandoned her argument made at trial—through Mahmud's testimony—that Mahmud mailed checks covering regular rent for September 11 to September 30, 2012, October 2012, and November 2012. (*Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 216, fn. 4 [issues not raised in appellant's brief may be deemed forfeited]; *Brown v. Deutsche Bank National Trust Co.* (2016) 247 Cal.App.4th 275, 279 [appellate review "is limited to issues that have been adequately raised and supported in the appellate briefs"].)

Rather, Ulkarim focuses her appeal on the amount of rent the court found she owed for the months of July, August, and September 2012. She argues that because iWorld deposited checks in Westfield's bank account—in the amount of regular rent for the months of July, August, and part of September—and Westfield did not "make a subsequent demand for payment" after

---

presented no argument on appeal that the court erred in finding iWorld breached the license.

[7] Ulkarim agrees the holdover rent due for October was $3,850. Under the license, the holiday rent for November was $7,000 plus $100 for CAM charges, increased to $10,500 plus $100 as holdover rent. At $353.33 per day (calculated at $10,600/30 days), the court found Ulkarim owed $7,066.60 in holdover rent for November 1 through 20. In her brief, Ulkarim calculated her prorated rent due for November based on $10,500, forgetting to include the $100 monthly CAM expense.

rejecting those payments, she satisfied her rent obligation for those months. She thus contends the court's damages calculation should be reduced to $10,845.53.[8]

Mahmud, on behalf of iWorld, mailed checks to Westfield's bank lockbox from an account held by Megna Enterprises in the amount of $2,600 for July 2012 rent and $2,600 for August 2012 rent. Those checks inadvertently were processed through Westfield's bank lockbox. Westfield's counsel notified Ulkarim's counsel of this fact by letter for the July payment and again for the August payment. The letter added, "[p]rocessing by the bank does not constitute Westfield's acceptance of rent or a waiver by Westfield of any of its rights under the License." Westfield refunded the two $2,600 payments by checks payable to iWorld sent to Ulkarim's counsel, "[s]ubject to a full reservation of all of its rights." The reasons provided for the refund were "(among other things) Megna Enterprises is not the licensee under the License, and in any event, the License was terminated effective July 3, 2012."

Westfield's general manager at the time, Raj Chandani, testified that Westfield had no control over whether rent payments sent to its bank lockbox were processed. He said

---

[8] The court calculated Ulkarim's rent for July 2012 at $251.61 for July 1 through July 3 (calculated at the regular base rent rate of $2,500 plus $100 for CAM charges) and $3,477.32 for July 4 through July 31 (calculated at the holdover base rent rate of $3,750 plus the $100 CAM charges). It found Ulkarim owed holdover rent of $3,850 for August and for September. Thus, for July through September, 2012, Ulkarim was obligated to pay $11,428.93 minus the $6,067 credit the court applied for the amount the parties stipulated had been paid and received.

checks from tenants sent to the lockbox are "automatically cashed" by the bank, which controls the lockbox. Chandani confirmed the July and August 2012 checks iWorld sent were processed through the bank lockbox, but Westfield did not accept them and refunded the payments after it realized the bank had processed them. No rent was processed through the lockbox for iWorld after August 2012.

Ultimately, as part of the unlawful detainer action, Mahmud endorsed the two $2,600 refund checks to Westfield's counsel for deposit in its client trust account. He also wrote a check to Westfield's counsel for rent for September 1 through 10, 2012, in the amount of $867 that was deposited in the client trust account. Westfield's counsel then wrote a check to Westfield totaling $6,067 ($2600 x 2 + $867). Westfield accepted those payments without prejudice to Westfield's "rights relating to whether there was a premium rent which should have been paid or not." The court received the stipulation to these facts. Westfield offset its damages calculations by the $6,067, and the court applied that amount to its damages determination.

Westfield did not send a separate notice or demand to iWorld demanding rent at the 150 percent holdover rate. Ulkarim thus contends iWorld's payments to Westfield fully satisfied its rent obligations under the license because Westfield did not demand payment after it rejected iWorld's deposits or after it accepted the payments in connection with the unlawful detainer action. Relying on *Kruger v. Reyes* (2014) 232 Cal.App.4th Supp. 10 (*Kruger*), Ulkarim argues that "once rent

is tendered [under Civil Code section] 1500,[9] even if it is refunded, the rent obligation is satisfied and the refunding landlord must give notice demanding repayment of the refunded rent in order to oblige [the] tenant to make a second payment after completed tender."

In *Kruger*, the appellate division of the superior court reversed an unlawful detainer judgment finding the tenants "had timely paid *all* rent due through the period covered by the three-day notice by deposit directly into" the landlord's bank account. (*Kruger, supra*, 232 Cal.App.4th Supp. at p. 12.) The landlord had filed an unlawful detainer action to remove the tenants for engaging in alleged illegal activities, but the tenants continued to pay rent in advance for the months of April through September by direct deposits into the landlord's bank account. (*Id.* at p. 13.) The landlord periodically returned those funds to tenants, but had no receipts. (*Id.* at p.17.) Eventually, the landlord "considered the lease terminated, acknowledged that rent was no longer due, and confirmed she would no longer accept it." (*Id.* at p. 13.)

The landlord dismissed the pending unlawful detainer action in September and served a three-day notice to pay rent or quit, demanding back rent from April through September. (*Kruger, supra*, 232 Cal.App.4th Supp. at p. 13.) At that point, the landlord considered rent to be due again, but neither

---

9 Section 1500 of the Civil Code provides, "An obligation for the payment of money is extinguished by a due offer of payment, if the amount is immediately deposited in the name of the creditor, with some bank or savings and loan association within this state, of good repute, and notice thereof is given to the creditor."

informed the tenants that back rent again was " 'due' " or that she would accept it if paid again. (*Id.* at p. 17.) The landlord filed a second unlawful detainer action against the tenants and judgment was entered in her favor. (*Id.* at p. 14.)

The appellate division held that the tenants had satisfied their obligation to pay rent by depositing their rent directly into the landlord's bank account under Civil Code section 1500. (*Kruger, supra*, 232 Cal.App.4th Supp. at pp. 17-18.) The court concluded that "[t]o the extent rent was then 'unpaid,' it was due solely to [the landlord] having returned the funds that had already been timely deposited into her bank account, extinguishing [the tenants'] obligation to pay rent . . . under Civil Code section 1500." (*Id.* at p. 18.) The court held the landlord "was required to provide notice and demand payment of rent due, i.e., that previously paid by deposit but returned, once she reinstated the lease and became open to accepting rent payments." (*Id.* at p. 19.)

At first blush, the situation here may appear similar to that in *Kruger*—Westfield rejected and refunded iWorld's rent payments, in part because it considered the license terminated, and later accepted payment of the amounts it had rejected. The circumstances here are quite different from those in *Kruger*, however. First, the tenants in *Kruger* deposited *all rent due* into the landlord's bank account. Here, iWorld deposited only *part* of the rent due, not the 150 percent holdover rent due under paragraph 20 of the license. iWorld maintained it was entitled to remain at the center as a holdover tenant under that provision; it thus knew it owed the higher holdover rent. The tenants in *Kruger*, in contrast, could not have known they owed rent when

the landlord earlier had acknowledged no rent was due and that she would not accept it.

Moreover, under paragraph 3d of the license, iWorld was required to pay rent and any other payments due under the license "without notice, demand, abatement, deduction or offset." As a holdover tenant under paragraph 20 of the license, iWorld was subject to the same terms and conditions of the license, except that it was required to pay the holdover rather than regular rent. Thus, iWorld was required to pay that increased rent amount without notice or demand from Westfield.

The court recognized that iWorld was attempting to have its cake and eat it too. At trial, the court noted that if iWorld wanted the court to follow paragraph 20 and find iWorld was entitled to remain on the property as a holdover tenant, then logically, the court should follow "all aspects" of that provision, including the requirement that iWorld pay 150 percent rent. The court explained, "If you want to take advantage of paragraph 20, you should also pay the price."

iWorld's counsel nevertheless argued that iWorld's tender of what Westfield considered short payment satisfied the rent obligation. But the checks iWorld sent for July and August rent were inadvertently processed by Westfield's bank, and Westfield informed iWorld of that fact. More importantly, when Westfield returned the funds to iWorld, it reserved all of its rights under the license, which would include its entitlement to holdover rent without notice or demand. There was no evidence in *Kruger* that the landlord similarly reserved its rights. The parties also stipulated that Westfield's ultimate acceptance of the $6,067 paid toward rent for July, August, and part of September was without prejudice to whether Ulkarim still owed holdover rent.

Accordingly, we disagree with Ulkarim's position that Westfield was required to notify Ulkarim that holdover rent was due under Civil Code section 1500 after Mahmud deposited the regular rent for July and August and prorated regular rent for September. That Westfield considered the license terminated does not change Ulkarim's obligations under the license. iWorld remained on the property and thus owed holdover rent. Had iWorld deposited the full amount of holdover rent due and Westfield nonetheless rejected it without making another demand for payment, the situation would look more like that in *Kruger*. But that is not what happened. We thus conclude the court did not err when it applied the unambiguous terms of the license to determine iWorld owed holdover rent for the months of July, August, and September, and properly calculated the amount Ulkarim owed Westfield in rent, reduced by the $6,067 iWorld already paid.

c. *The court did not punish Ulkarim by rejecting Mahmud's testimony*

Curiously, Ulkarim argues the court was "pre-disposed" to disbelieve Mahmud's testimony. Ulkarim's contention is without merit. First, even if the court were biased, Ulkarim was not prejudiced. The testimony the court rejected related to Mahmud's testimony that he submitted "additional rental payments to Westfield's banking lock box, which were rejected by Westfield." The questionable payments related to amounts allegedly paid beyond the $6,067 that Westfield ultimately accepted without waiving its rights to holdover rent. Mahmud testified that in addition to the checks sent for rent in July, August, and the first part of September, he also sent checks to

cover rent from September 11 through September 30,[10] October, and November 1 through November 20. Yet, Ulkarim does not challenge the court's calculation of the rent iWorld owed Westfield for October and November. Thus, the court's alleged prejudicial view of evidence concerning rent Mahmud paid for those months is irrelevant to this appeal and does not affect the portion of the judgment Ulkarim challenges.

Second, " ' "[[i]]t is the exclusive province of the [trier of fact] to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends." ' " (*Oldham v. Kizer* (1991) 235 Cal.App.3d 1046, 1065.) We may not credit on appeal " 'testimony of a witness in derogation of the judgment . . . simply because it contradicts the plaintiff's evidence, regardless how "overwhelming" it is claimed to be. [Citation.]' " (*Fuentes v. AutoZone, Inc.* (2011) 200 Cal.App.4th 1221, 1233.) Moreover, "the trial court is not bound by uncontradicted evidence." (*Adoption of Arthur M.* (2007) 149 Cal.App.4th 704, 717.) Where the trial court has rejected uncontradicted testimony, "it 'cannot be credited on appeal unless, in view of the whole record, it is clear, positive, and of such a nature that it cannot rationally be disbelieved.' " (*Ibid.*)

We defer to the trial court's credibility determinations about Mahmud's testimony. His testimony was contradicted by Westfield's witnesses and certainly was not of a nature that it could not rationally be disbelieved. Mahmud produced the checks he wrote at trial, but did not have copies of the canceled checks, despite the capability to retrieve them from his bank online, to show that they had been deposited in Westfield's bank account.

---

[10] As we discussed, Ulkarim contends the $6,067 included her rent obligation for the month of September.

Westfield also presented evidence that Mahmud pleaded guilty to a charge of embezzlement, but Mahmud testified he pleaded no contest.

Finally, we do not find the court's acknowledgment that it "imposed sanctions for falsified documents in which Mahmud had a role" demonstrates the court was punishing or biased against Ulkarim based on its earlier ruling. Rather, the court's statement supported its conclusion that it had "no confidence in any aspect of Mahmud Ulkarim's testimony." The court reasonably could conclude it could not trust Mahmud's account given the court earlier found Mahmud testified untruthfully at his deposition about the invoices. In any event, even if the court had not considered Mahmud's participation in the production and authentication of the false invoices, the court reasonably could find Mahmud's testimony about the checks for September through November not credible based on the suspicious nature of the checks themselves, his felony conviction, and his testimony that he pleaded no contest to the conviction when in fact he pleaded guilty.

We find no prejudicial error in the court's rejection of Mahmud's testimony.

DISPOSITION

The judgment dismissing Monira Ulkarim's complaint and the judgment entered in favor of Westfield on its cross-complaint are affirmed. Westfield is to recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EGERTON, J.

We concur:

EDMON, P.J.

DHANIDINA, J.