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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

CLEOPATRA RECORDS, INC, et al., Plaintiffs and Respondents, v. FLOYD MUTRUX et al., Defendants and Appellants.	B267390 (Los Angeles County Super. Ct. No. BC488800)

APPEAL from an order of the Superior Court of Los Angeles County, Mark V. Mooney, Judge. Affirmed.

Alan S. Gutman, Evan S. Cohen, and Gutman Law for Plaintiffs and Respondents.

Jeffrey S. Benice and Law Offices of Jeffrey S. Benice for Defendants and Appellants.

INTRODUCTION

Defendants Floyd Mutrux, Northern Lights, Inc., and John Dough, Inc. appeal the trial court's judgment in favor of Plaintiffs Cleopatra Records, Inc., Brian Perera, and Yvonne Perera following a bench trial. Defendants argue the court's findings regarding mistake do not support rescission and that rescission was improper without evidence of fraud. We affirm because the trial court's judgment rescinding the contract was supported by its finding that the parties made a mutual mistake of fact regarding the meaning of material contract terms.

FACTS AND PROCEDURAL BACKGROUND

The following facts and procedural background are based entirely on the trial court's statement of decision. On appeal, this court was not furnished with the entire record. We only received the reporter's transcripts from the bench trial and the appellant's appendix containing the court's statement of decision, Defendants' motion for new trial, and Defendants' notice of appeal. We were not provided copies of the 2004 agreement or the 2008 amendment at issue in this case.

1. The Original 2004 Agreement and 2008 Amendment

Plaintiff Brian Perera is the founder and CEO of co-plaintiff Cleopatra Records, Inc. (Cleopatra). In 2004, Perera was introduced to defendant Floyd Mutrux by Joel Keyser, the long-time accountant for Cleopatra. Mutrux conveyed to Perera his plans to develop a series of musicals, collectively referred to as the American Pop Anthology. On behalf of Cleopatra, Perera agreed to invest $250,000 with Mutrux in exchange for a 20% interest in the musicals.

On October 10, 2004, Mutrux (on behalf of co-defendant John Dough, Inc., a company created by Mutrux) and Cleopatra[1] executed the investment agreement. The agreement memorializes Cleopatra's obligation to pay $250,000 toward the development of musicals. In exchange, Mutrux would give Cleopatra a 20% interest in three musicals. The agreement identified several musicals that Mutrux had intellectual property rights in: "The Shirelles," "Yuppie Like Me," "When the Fat Man Sings," "Lonesome Town," "Heartbreak Hotel," "Million Dollar Quartet," and "The Boy from New York City."

On March 31, 2008, Mutrux and Keyser executed an amendment agreement to further define " 'the profit participation in the Am Pop shows that both parties are invested in.' " The amendment stated that it was a contract between Cleopatra and co-defendant Northern Lights, Inc., another company created by Mutrux.

2. Cleopatra's Payments to Mutrux

After Cleopatra paid the initial $250,000 investment, Keyser began to make additional payments on behalf of Cleopatra to the two Mutrux-controlled entities mentioned in the contracts: Northern Lights, Inc. and John Dough, Inc. Over a period of five years, from 2004 to 2009, Keyser paid these entities over $750,000. Mutrux used much of this money to pay for his personal expenses. Perera asked Keyser on more than one occasion about the status of his investment with Mutrux and

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[1] The contract was actually executed by an entity identified as B-J Music. It appears that B-J Music refers to Cleopatra Records, Inc., and for ease of reading, we do not mention B-J Music further.

Keyser repeatedly reassured him. Mutrux and Perera had no direct communications regarding the investment.

In 2012, Perera became suspicious of the payments being made by Keyser to Mutrux on behalf of Cleopatra. Perera eventually terminated Keyser for embezzlement and later learned that Mutrux had been employing Keyser since at least 2009. Perera also learned the extent to which Keyser had been writing checks from Cleopatra's accounts to Mutrux's entities, Northern Lights, Inc. and John Dough, Inc.

Only one of Mutrux's plays, "Million Dollar Quartet," became financially successful. Mutrux claimed that Cleopatra never had an interest in "Million Dollar Quartet" because it was fully subscribed (fully financed by investors) prior to the 2004 contract.

3. Plaintiffs' Lawsuit Against Defendants

Perera, his wife, and Cleopatra (Plaintiffs) thereafter sued Keyser for embezzlement; this claim has since been settled. Plaintiffs also sued Mutrux, Northern Lights, Inc., and John Dough, Inc. (Defendants) for eight causes of action: (1) money had and received, (2) breach of fiduciary duty, (3) fraudulent concealment, (4) constructive fraud, (5) conversion, (6) breach of an implied-in-law contract for unjust enrichment, (7) breach of the 2004 agreement and the 2008 amendment, and (8) rescission.[2] Defendants filed a cross-complaint seeking damages for unfair competition and breach of the 2004 agreement and the 2008 amendment.

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[2] We note that Defendants have not provided this court with a copy of the operative complaint. As a result, we rely on the statement of decision in compiling this list of causes of action.

The bench trial commenced on December 16, 2014. The court heard testimony from Joel Keyser and Floyd Mutrux. Plaintiffs entered many documents into evidence, including the 2004 contract, the 2008 amendment to the contract, and checks showing the exchange of funds and payments.[3] The court requested the parties to simultaneously submit their closing arguments in writing in February 2015.

In July 2015, the trial court found that Plaintiffs' first seven causes of action were not supported by evidence. The court found in favor of Plaintiffs on the cause of action for rescission, stating:

> "The contracts in this matter are by no means models of clarity or draftsmanship. Indeed there are certain material terms in which the parties have completely different interpretations of their meaning. The contract makes reference to seven different projects, including 'Million Dollar Quartet.' Plaintiffs maintain that it was their belief that 'Million Dollar Quartet' was one of the projects in which they were investing. Defendant[s'] position is that 'Million Dollar Quartet' was already fully subscribed at the time of the 2004 agreement and was not part of the 'three other projects' referred to in paragraph 10 of the agreement. Further, defendants contend plaintiffs are obligated to pay the 'running cost' of the productions based upon industry practice, although the agreement is silent on any obligation to pay such production cost."
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> "The court finds that the parties were mutually mistaken as to the legal effect of the contract. Such a

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[3] On appeal, Defendants did not provide us with these exhibits, including the contracts at issue. Their admission into evidence is evident from the reporter's transcripts.

> mutual mistake can form the basis of a claim for rescission pursuant to Civil Code [section] 1689(b)(1). Notice of the claim for rescission was provided by the pleadings in this matter as permitted by Civil Code [section] 1691 [subdivision] (b). The court therefore finds in favor of Plaintiff[s] on its eight[h] cause of action for rescission based upon the mutual mistake of the parties."

The trial court awarded Plaintiffs a total of $830,000 in restitution ($250,000 for the original investment and $580,000 for the money that Keyser subsequently transferred from Cleopatra to defendants John Dough, Inc. and Northern Lights, Inc.). On Plaintiffs' motion, without opposition from Defendants, the court dismissed the cross-complaint's cause of action for unfair competition. As to the cross-complaint's remaining cause of action for breach of contract, the trial court found for Plaintiffs.

Defendants moved for a new trial, which was denied. Defendants appealed.

DISCUSSION

Defendants characterize the ruling excerpted above as the court finding a mistake of law, and contend that the statement of decision references no evidence to support a mistake of law finding. Defendants assert that the "trial court expressly determined that the parties had different subjective understandings of the contract from the inception" and that as "a matter of law, such a determination does not constitute 'mistake' for rescission purposes." Defendants also argue that rescission was legally improper as to the mistake of law finding because Plaintiffs presented no proof of fraud. In sum, Defendants contend that the court's factual findings do not support rescission.

1. Standard of Review

Defendants urge this court to review the judgment de novo because their appeal involves "the legal interpretation of unambiguous and undisputed facts[] and questions of law subject to independent review." Plaintiffs assert that the proper standard of review is substantial evidence even when, as here, Defendants are not challenging the court's factual findings.

In general, when "reviewing a judgment based upon a statement of decision following a bench trial, we review questions of law de novo. [Citation.] We apply a substantial evidence standard of review to the trial court's findings of fact. [Citation.] Under this deferential standard of review, findings of fact are liberally construed to support the judgment and we consider the evidence in the light most favorable to the prevailing party, drawing all reasonable inferences in support of the findings." (*Thompson v. Asimos* (2016) 6 Cal.App.5th 970, 981.)

Here, Defendants raise legal questions regarding the requirements for rescission and whether the court properly awarded rescission. The sufficiency of the evidence supporting the court's findings is not at issue. We review these issues of law de novo.

2. The Court Found Mutual Mistake of Fact

We disagree with Defendants' characterization of the trial court's decision as finding a mistake of law. As Defendants repeatedly admit in their briefing: "the trial court explained that the parties had differing perspectives of the interpretation of the contract. . . . The trial court expressly determined that the parties had different subjective understandings of the contract from the inception." Indeed, the trial court found that the parties had disparate understandings of the contract's material terms, such

as which plays Plaintiffs had invested in and whether Plaintiffs were obligated to pay running costs for the plays (although never mentioned in the contract) in accordance with industry practice. At the outset of its analysis in the statement of decision, the trial court explained that the case involved "a plaintiff who knows nothing about investing in a play, paired with a defendant who knows nothing about producing a play." The trial court did not fault one party more than the other in failing to know of or rectify the factual misunderstandings. Citing Civil Code section 1689, subdivision (b)(1),[4] the trial court found that mutual mistake by the parties warranted rescission.

When reading the statement of decision as a whole, it is clear that the trial court found that each party had made a mistake of fact regarding the material terms of the contract.[5] (See *Guthrie v. Times-Mirror Co.* (1975) 51 Cal.App.3d 879, 884-885 ["Mistake is said to fall generally into two categories: (1) [mistake of law, where a] person may know the specific facts upon which his rights depend but be ignorant of the rules of law the courts will apply to those facts, or (2) [mistake of fact, where] a person may know the applicable legal rules but be mistaken as to the specific facts to which the rules are to be applied."].) Simply because the court wrote in its decision that "the parties were mutually mistaken as to the legal effect of the contract" does not mean that the court specifically found a mistake of law. The trial court specified that mistakes were about the factual aspects of the contract, i.e. the subject of the investment and the

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[4] All subsequent statutory references are to the Civil Code.

[5] We discuss the requirements for a mistake of fact in further detail below.

required payments. These are terms that define the obligations of the parties, and thus different understandings of the terms would alter the legal effect of the contract. The trial court never stated that the parties did not understand the law or were mistaken about it. Therefore, contrary to Defendants' contentions, we conclude that the trial court found there was a mutual mistake of fact regarding the material terms of the contract.

3. Rescission Was Properly Based on Mutual Mistake

" ' "[A] party to a contract cannot rescind at his pleasure, but only for some one or more of the causes enumerated in section 1689 of the Civil Code." ' " (*Nmsbpcsldhb v. County of Fresno* (2007) 152 Cal.App.4th 954, 959.) Section 1689, subdivision (b)(1) authorizes rescission where "the consent of the party rescinding, or of any party jointly contracting with him, was given by mistake." As stated above, this case involves a mistake of fact.

Civil Code section 1577 defines mistake of fact as "a mistake, not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting in: [¶] 1. An unconscious ignorance or forgetfulness of a fact past or present, material to the contract; or, [¶] 2. Belief in the present existence of a thing material to the contract, which does not exist, or in the past existence of such a thing, which has not existed." (Civil Code § 1577.) "The doctrine of mistake customarily involves such errors as the nature of the transaction, the identity of the parties, the identity of the things to which the contract relates, or the occurrence of collateral happenings." (*Odorizzi v. Bloomfield School Dist.* (1966) 246 Cal.App.2d 123, 130.)

" 'Generally[,] a mistake of fact occurs when a person understands the facts to be other than they are.' [Citations.]

When both parties understand the facts other than they are, the mistake necessarily is mutual and thus becomes a basis for rescission." (*Crocker-Anglo National Bank v. Kuchman* (1964) 224 Cal.App.2d 490, 496; *Sharabianlou v. Karp* (2010) 181 Cal.App.4th 1133, 1145 [mutual mistake is basis for rescission].) Rescission is available only where the mutual mistake is *material* to the contract. (*Estate of Barton* (1950) 96 Cal.App.2d 234, 239 ["The general rule is that where an agreement is founded upon a mutual mistake of fact which is material and goes to the essence of the contract, relief will be granted to the one against whom it is sought to be enforced."].)

Here, there was a mistake as to the identity of the investment. The trial court found that the parties were mutually mistaken about which plays were subject to Plaintiffs' investment and Plaintiffs' financial obligations following the initial investment. Specifically, Plaintiffs believed the investment included "Million Dollar Quartet" and Defendants believed it did not. Defendants believed the agreement included Plaintiffs paying for each play's running costs and Plaintiffs did not. The parties had mistaken beliefs regarding material contract terms, not merely collateral matters. The court's mutual mistake of fact finding clearly supports rescission and restoration of the parties to their original positions.

Defendants liken this case to *Hedging Concepts, Inc. v. First Alliance Mortgage Co.* (1996) 41 Cal.App.4th 1410, 1420-1421 (*Hedging Concepts*), and argue that the court's findings do not support a "mistake" finding for rescission purposes. In *Hedging Concepts*, the trial court awarded rescission on the basis of mistake. (*Id*. at p. 1420.) The appellate court reversed because the mistake was unilateral: the plaintiff misinterpreted the

contract and the defendant correctly interpreted the contract. (*Id*. at p. 1421.) Furthermore, there was no finding that the defendant knew of and failed to rectify the plaintiff's mistake at the time of contract, as would justify rescission in the event of a unilateral mistake. (*Ibid*.) The holding in *Hedging Concepts* was that under those facts, a unilateral mistake did not support rescission. (*Ibid*.)

Hedging Concepts is inapt because the present case involves a *mutual mistake* regarding the material terms of the contract.[6] Here, the trial court made a factual finding, unchallenged by Defendants on appeal, that there was a mutual mistake of fact that the parties made when entering into the contract. Plaintiffs had one understanding of the terms, and Mutrux had a different understanding. The court's ruling indicated that the words of the written agreement failed to clarify which party had the correct interpretation of the disputed terms.

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[6] Defendants make much of the *Hedging Concepts* court's characterization of the defendant's confusion as "at most a mistake of law." (*Hedging Concepts, supra,* 41 Cal.App.4th at p. 1421.) Defendants assert the *Hedging Concepts* mistake is similar to the mistake in the case at bar. As we explain, the critical point in *Hedging Concepts* was that the mistake was unilateral, unlike the mutual mistake in the present case. Moreover, even if we were to characterize the mistake in this case as one of law, mutual mistake of law is also a valid basis for rescission. (*Merced County Mutual Fire Insurance Co. v. State of California* (1991) 233 Cal.App.3d 765, 771 ["When contracting parties have entered into a contract under a material mistake of law or fact, the parties are entitled to be relieved by reason of their mutual mistake."].)

The court found mistake on *both* sides, unlike the unilateral mistake in *Hedging Concepts*.[7]

All of Defendants' arguments (including that fraud was necessary to award rescission) rely entirely on the presumption that the court found a mistake of law and not a mutual mistake of fact. In their respondents' brief, Plaintiffs argued that this case involved a mutual mistake of fact and that such a mistake was an appropriate basis for rescission. Despite having the opportunity to file a reply brief to respond to these arguments, Defendants never did. As explained above, the mutual mistake in this case supported rescission. We do not address Defendants'

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[7] We note that the trial court expressly found that the parties had entered into a contract, despite the mutual mistake of fact. In a footnote in its statement of decision, the trial court found it curious that Defendants argued in their closing brief to the trial court that there was no meeting of the minds between the parties and therefore no contract ever existed between the parties. This was expressly contrary to Defendants previous assertions of the existence of a contract made in their cross-complaint, where they sought damages for breach of contract. The trial court stated that if it were to accept this argument (although it did not), "it would follow that [P]laintiff would be entitled to restitution for unjust enrichment." Defendants' argument that there was no meeting of the minds further bolsters the trial court's mutual mistake finding.

arguments based on their mischaracterization of the court's statement of decision any further.[8]

DISPOSITION

We affirm the judgment. Plaintiffs Cleopatra Records, Inc., Brian Perera, and Yvonne Perera are awarded costs on appeal.

SORTINO, J.*

WE CONCUR:

FLIER, ACTING P. J.

GRIMES, J.

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[8] At oral argument before this Court, Defendants' counsel argued for the first time that the trial court's damages award was not supported by evidence and that in the interest of equity, we must reverse the damages award. Counsel provided no justification for this untimely argument. "Absent a sufficient showing of justification for the failure to raise an issue in a timely fashion, we need not consider any issue which, although raised at oral argument, was not adequately raised in the briefs." (*Sunset Drive Corp. v. City of Redlands* (1999) 73 Cal.App.4th 215, 226.) Furthermore, counsel also failed to provide this Court with citation to authority in support of his argument as well as a complete record for this Court to evaluate this sufficiency of the evidence challenge. We therefore deem this argument forfeited. (See *People v. Stanley* (1995) 10 Cal.4th 764, 793 [arguments not supported by legal authority are forfeited]; *Nielsen v. Gibson* (2009) 178 Cal.App.4th 318, 324 [failure to provide adequate record forfeits argument].)

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