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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

DERICK PAYNE, Plaintiff and Respondent, v. HOOMAN NISSAN OF LONG BEACH, Defendant and Appellant.	B267147 (Los Angeles County Super. Ct. No. NC059360)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael P. Vicencia, Judge. Reversed and remanded.

Bahar Law Office and Sarvenaz Bahar for Defendant and Appellant.

Derick Payne, in pro. per., for Plaintiff and Respondent.

* * * * * * * *

Defendant Hooman Nissan of Long Beach appeals from the trial court's judgment in favor of plaintiff Derick Payne after a bench trial on his breach of contract claim arising from plaintiff's purchase of a used Lincoln from defendant. Plaintiff claimed defendant breached its promise to register the Lincoln as a commercial vehicle, thereby preventing plaintiff from using the Lincoln in the livery business he had started a few months earlier. Plaintiff sought recovery of $950,000 in lost *gross revenue*.

In response to defendant's motion to exclude any evidence of lost *profits*, plaintiff filed an opposition stating the motion was "moot" because he did not seek lost profits; instead, plaintiff alleged at all times that $950,000 was the *expected income* he could have earned from the Lincoln if it had been properly registered from the time of the purchase. At trial, plaintiff did not offer any evidence of damages related to the Lincoln, but, largely in response to questions from the court, plaintiff testified about another vehicle in his fleet which he had been driving for Uber for about three weeks before trial. The court awarded plaintiff about $26,550 in lost profits.

Defendant appealed. Plaintiff tells us in his respondent's brief that he never sought lost profits or even raised the issue of lost profits. We reverse the judgment and remand for entry of judgment in favor of defendant.

FACTUAL AND PROCEDURAL BACKGROUND

1. Liability Is Not an Issue on Appeal.

Defendant disputed liability at trial, but on appeal, defendant challenges only the court's award of damages and does not recite the trial evidence that defendant presented to contest liability. Hence, we do not discuss the evidence concerning liability.

The operative complaint alleged plaintiff bought a used Lincoln from defendant on November 15, 2013, for use in his livery business. He agreed to finance the purchase price of $23,000 through defendant. As pertinent here, the complaint alleged defendant never transferred title to the Lincoln, or did anything to register it in his name, thereby preventing him from using it in his livery business. The complaint alleged "[t]his popular vehicle is the gold standard of the Livery Business, and in use, it easily garners $50,000.00 per month." The complaint sought recovery of $950,000.

In his opening statement to the court, plaintiff changed his theory of liability, abandoning the claim that defendant never registered the vehicle, and claiming instead that defendant did not register it as a commercial vehicle. Defendant had arranged for plaintiff to finance the purchase of the Lincoln through JP Morgan Chase, which only made loans for the purchase of vehicles for personal use and not for commercial use. Since the lender did not provide financing for the commercial use of the Lincoln, it would not return the pink slip to plaintiff so that he could try to register it commercially.

2. Defendant Consistently Asserted Plaintiff Sought to Recover Damages Which Are Not Compensable as a Matter of Law.

Defendant asserted plaintiff's failure to plead and prove damages in motions in limine filed more than a month before trial, and throughout the one-day court trial held on June 2, 2015. Defendant filed two motions in limine on April 28, 2015, the first seeking to preclude plaintiff from producing any evidence of his alleged lost profits, and the second seeking to preclude plaintiff from introducing into evidence any matters that were not produced in discovery. The basis for the first motion was that the operative complaint sought damages of $950,000 in lost profits, which were speculative and not proximately caused by defendant's alleged breach of contract. The basis for the second motion was that plaintiff never responded to defendant's request for production of documents, form and special interrogatories, or request for admissions, despite defense counsel's efforts to meet and confer; and plaintiff's deposition was suspended because plaintiff admitted he had responsive documents but he did not produce them at the deposition.

After defendant filed the motions in limine, plaintiff's deposition resumed on May 5, 2015. Plaintiff opposed the motions in pertinent part on the ground he was not seeking lost profits, so that issue was moot. The opposition stated plaintiff alleged at all times that $950,000 was the *expected income* he could have earned from the Lincoln if it had been properly registered from the time of the purchase.

In reply, defendant confirmed that plaintiff had testified in deposition "that the only category of damages he is seeking 'is the loss of use of the vehicle over the time

period, the inability to have it out there making money,' and clarified that he was measuring such loss of use in terms of lost gross revenue, not profits." Defendant cited authority establishing that lost revenue is not a proper measure of damages as a matter of law. (*Parlour Enterprises, Inc. v. Kirin Group, Inc.* (2007) 152 Cal.App.4th 281, 287 [" 'Damage awards in injury to business cases are based on net profits.' ' " 'Net profits are the gains made from sales "after deducting the value of the labor, materials, rents, and all expenses, together with the interest of the capital employed." ' " 'A plaintiff must show loss of net pecuniary gain, not just loss of gross revenue.' " (Citations omitted.)].) Defendant contended, "In the simplest possible terms, Plaintiff's lawsuit has a fatal defect, and the Opposition concedes the points that lead to this inescapable conclusion."

The trial court did not rule on the motions in limine since the case was to be tried without a jury, and told the defense to simply make objections.

In defendant's opening statement, counsel repeatedly told the court that plaintiff had not described in his opening statement any item of compensable damage, explaining that the only item of damage plaintiff sought was lost gross business revenue which as a matter of law is not compensable. "Mr. Payne's business was a new business. It was -- had no track record. It only began in 2013. [¶] And in 2014, his business with this other vehicle, his other four vehicles, was break even in nature. The measure of damages is not gross revenue. It is net. It is lost profits because there's obviously costs associated with doing that business. [¶] In discovery, Mr. Payne has given us nothing, though we've asked for it. His claim has always been, as clarified in his deposition, one for gross revenue, the whole enchilada. He's not entitled to that. And he would only be entitled to net profits if his business was established and had a track record on which he could base a calculation; or if it were new and still within the category of speculative adventure if he put forward some kind of expert opinion or industry comps or anything, but he doesn't. All he has -- all he's ever had is his word."

Thus, defendant did not "sandbag" plaintiff. Instead, defendant clearly asserted before trial, and again before plaintiff began his testimony, that it was plaintiff's obligation to plead and prove compensable damages. Defense counsel told the court he

tried to obtain discovery of plaintiff's damages, and the only discovery plaintiff provided was his deposition testimony that he sought lost gross business revenue.

3. Plaintiff Did Not Offer any Evidence of Damages for Loss of Use of the Lincoln.

During plaintiff's opening statement, the court asked plaintiff what his damages were, and plaintiff replied, "So my damages are the loss of income from the time the vehicle was purchased," excluding the two weeks after the purchase date that it takes to get DMV and Public Utilities Commission (PUC) documents. When the court asked plaintiff why he did not sell the Lincoln, since he could not use it in his livery business, plaintiff said he could not sell it because it was worth less than the debt against it. When the court pressed plaintiff, asking him why he did not sell it, take the loss to mitigate his damages, and purchase another Lincoln, plaintiff replied, "Your Honor, that car is a very, very nice car." The court acknowledged it might be a "great" car but pointed out it had to have a commercial registration, the lender would not agree to that, and "that's never going to change; right?" Plaintiff replied, "Well, it will change once -- once I get this matter resolved, of course, I'm sure there will be some changes."

Plaintiff was the only witness in his case. He testified he established DLP Transportation in February 2013 and bought his first vehicle, a GMC Yukon SL, in April 2013. Plaintiff registered it as a commercial vehicle, obtained a permit to pick up passengers at Los Angeles International Airport (LAX), and hired a driver to drop off and pick up passengers at LAX. Plaintiff bought a second vehicle in November 2013, a Chrysler 300S, a four door sedan, that he also registered as a commercial vehicle, and for which he also obtained a permit to pick up passengers at LAX. Plaintiff bought a third vehicle, the Lincoln, from defendant in November 2013. He wanted to use the Lincoln to pick up passengers at LAX, but he could not get a permit to do so because it was not registered as a commercial vehicle.

Plaintiff testified the Lincoln "would have made much, much more money than all of these vehicles." When the court asked him why that was the case, plaintiff explained there is a much greater demand for a Lincoln to go to and from the airport, because the

Lincoln is larger and has more trunk space. Plaintiff testified he was not sure how many orders he received for the Lincoln in 2014, but he thought it was more than 200 or 300. "When they request a Lincoln Town Car, you can't take a Chrysler." When asked what would have been an average fare, plaintiff said that depended on the market, "from LAX to Ontario, LAX to San Diego." He testified that a fare from LAX to Thousand Oaks would be about $300.

Plaintiff did not have any intention to work with Uber until after he was asked about Uber at his deposition in this case (taken on April 14 and May 5, 2015, shortly before the June 2, 2015 bench trial). He testified that he began to use the Chrysler to drive for Uber in May 2015 (about three weeks before trial), and the Chrysler earned on average $2,400 gross income a week (or month; plaintiff testified first to earning about $2,400 a week, and later, to $2,400 a month). At this point, defense counsel objected that defendant had asked for this information in discovery and plaintiff had produced no documents. The court responded, "Well, let's see what the evidence is."

Plaintiff testified that Uber takes a fee from plaintiff's gross income, netting him "[$]1600 one week, [$]1700 the second week, and the other week was [$]1681." Plaintiff testified he personally drove the Chrysler for Uber, and he did not pay a driver to drive for Uber, but if he had a driver, Uber would have required that he pay the driver 30 percent of his net income, or $480. The court then asked plaintiff what were his monthly payments on the Chrysler, and plaintiff replied, "[$]600. It's [$]595, but I pay [$]600."

The court asked plaintiff if he had shown documents to the defense to support his testimony, and plaintiff replied, "I'm giving him a copy of all of them right now." When the court asked plaintiff why he had not listed the documents as trial exhibits, plaintiff replied, "Well, I just got these, Your Honor. I just printed these . . . yesterday." The defense objected that the documents were not listed on plaintiff's exhibit list. The court replied that if the defense did not want the exhibits to be admitted into evidence, the court would "just take his testimony."

The defense then objected that evidence related to the Chrysler and Uber was irrelevant because plaintiff did not base his damage claim on what he could have earned by driving the Lincoln for Uber. The court responded, "What difference does it make. . . ." and, "Who cares how he makes his money." Defense counsel replied that the money plaintiff was allegedly currently making on the Chrysler was irrelevant to his past lost business claim on the Lincoln. To that, the court replied, "What about his future loss?" The defense reminded the court that plaintiff did not seek future loss in the case but rather $50,000 per month in lost revenue for the previous 19 months. The court overruled the objection.

Plaintiff then testified he had another Chrysler and a driver who drove that Chrysler for Prime Time Shuttle for which plaintiff earned $230,387.38 in gross income in 2014. In response to the court's question, plaintiff testified he paid the driver 25 percent of the gross amount; and in response to the court's next question, plaintiff testified his monthly payments for that car were $619 or $620. Again, the defense objected that plaintiff was referring to a document that he had not produced in discovery although the defense had made a discovery request for such documents. Again, the court stated it would admit plaintiff's testimony regardless of documentary evidence; again, the defense objected the evidence was irrelevant; and again, the court overruled the objection.

On cross-examination, plaintiff recalled his deposition testimony that DLP Transportation had not generated enough income to pay plaintiff anything, and he confirmed, "I personally don't receive any income from the business." When asked what profit he made from the use of the three or four vehicles in his fleet in 2014, plaintiff testified he did not know what his profits were, but that his gross income "for the most part" was "eaten up" by the operational cost of the business. Plaintiff acknowledged he incurred costs to operate his fleet, including insurance, gas, and the like, and that he did not provide the defense any information about his costs because he did not have it.

Plaintiff confirmed that the $950,000 in damages he alleged in the operative complaint was for lost gross business revenue based on his estimate that the Lincoln

would have generated $50,000 a month in gross income. He authenticated a document he submitted to PUC in April 2013, the month in which he bought the first vehicle in his fleet, about two months after he launched DLP Transportation. In that document, he estimated ***annual*** *revenues for his livery business of $32,000*. We will refrain from summarizing the rest of plaintiff's testimony elicited on cross-examination that impeached his damages claim, except to mention one other thing.

The defense had served plaintiff with a notice to appear and produce the Lincoln at trial. Plaintiff told the court that defense counsel told him he wanted to see the car the day before, and that plaintiff told defense counsel the Lincoln had two flat tires, a dead battery, was very dusty and was in storage. Plaintiff did not understand he was supposed to bring the Lincoln to court on the trial date. The court ordered plaintiff to go to Hawthorne over the lunch break, where plaintiff said the Lincoln was in storage, and take photos of it, including the odometer. The photos showed the Lincoln was clean and had a TCP (Transportation Charter Party) number affixed to the front bumper. Other testimony established a TCP number is evidence of commercial registration. The odometer reading of over 70,000 miles showed plaintiff put over 40,000 miles on the Lincoln in the brief time he owned it.

4. The Court's Award of $26,547.66 in Lost Profits.

In his closing argument, plaintiff did not mention damages until the court asked him, "And how much do you think I should assess in damages?" Plaintiff replied, "I would expect, Your Honor, that I would be receiving somewhere close to $500,000." The court pressed plaintiff to explain how he got that figure, and plaintiff replied, "The loss of use of the vehicle." The court asked plaintiff how much he paid for the Lincoln, and plaintiff said he paid $24,000. The court said, "So you get a car for $24,000. You find out six months later, seven months later, that you can't use it for what you want to use it for. . . . [¶] . . . [¶] . . . And you think you should get a half a million dollars on a $24,000 car? Why not sell the car, even if you just get $10,000 for it. Sell the car. Lick your wounds. Buy a new car. And then sue them for the difference."

The court continued to press plaintiff to explain how he got to $500,000. Plaintiff then capitulated as follows: "I'll allow the court to deem and determine what is equitable as damages." Plaintiff then told the court he had made monthly payments on the Lincoln of $453 from December 2013 through March 2015. (We pause to note here that 16 monthly payments of $453 total $7,248; in other words, plaintiff had paid less than one third of the purchase price, which the complaint alleged was $23,000.)

In defendant's closing, counsel again argued that plaintiff did not plead or prove any compensable damages. The following colloquy ensued:

"[DEFENSE COUNSEL:] And that segways actually into damages because that's, you know, that's what [plaintiff] wants in this case and that's what he's prayed for and he's come to court today asking for monetary relief. And the thing is, Your Honor, is even through his closing, and even in your final questions of him, he still cannot articulate the harm in a monetary quantified -- monetarily quantified sentence that was caused by this incident. And he can't -- he can't even testify, or he couldn't testify, and he couldn't establish the fact that he would have made any money at all in terms of profit. And the extent of it is completely and totally ambiguous and up in the air. It's all over the place. And I mean, I don't -- I don't want to be rude and I don't want to be combative to [plaintiff]. I actually respect him and we've had professional dealings in this case. But he has nothing, even in terms of an explanation as to why he should get $500,000 in damages.

"THE COURT: And no offense, [plaintiff], but $500,000, I think you could have probably guessed this by my questioning, I think is nonsense.

"[PLAINTIFF]: And I agree, Your Honor, with you."

The court then explained the court's own calculation of damages. The court found the average gross income from driving the Chrysler for three weeks for Uber was $1,673.33, out of which plaintiff would have had to pay a driver 30 percent, or $501.99. The court calculated the annual gross income less payments to the driver totaled $60,909.68. The court found plaintiff's additional costs included 12 months of car

payments totaling $5,814.36, and that "it's reasonable to charge $1,500 for gas and maintenance."

The defense pointed out he had not come to trial prepared to defend a $60,000 case based on driving for Uber, because plaintiff did not allege that, and had made clear at his deposition that he sought to recover $950,000 for lost gross revenue, for which plaintiff provided no information in discovery. "It's a complete and total blind side and ambush." Defense counsel argued if he had two-week's notice of the court's basis for a damages award, he might have brought in a different expert and offered different rebuttal testimony. The defense argued three weeks of driving for Uber was not a sufficient track record on which to base an award of lost profits, and reminded the court that the law requires lost profits be proved with reasonable certainty, whereas plaintiff "simply was making up numbers as he went along" without any effort to quantify his actual damages.

After the defense closing, plaintiff began to discuss the documents he produced, whereupon the court interrupted him, saying, "You know, I'm really not very interested in what people didn't do for each other before we got here." The court summarized the evidentiary basis for its finding of liability and then turned to damages. Apparently addressing plaintiff, the court said, "And you just want the court to snap his finger and give you half a million dollars, or $900,000? First of all, that's not going to happen. You have to have some type of proof, and the best I could do was the Uber notes."

After a brief recess, the court announced that because plaintiff had not mitigated his damages, the court would award only half of the amount the court had calculated based on its "Uber notes," or $26,547.66.

DISCUSSION

1. Standard of Review

Whether lost profits are recoverable in a contract action is a question of law that we review de novo. (*Greenwich S.F., LLC v. Wong* (2010) 190 Cal.App.4th 739, 751.) We also review de novo a trial court's order denying a motion for judgment on the pleadings. (*Lance Camper Manufacturing Corp. v. Republic Indemnity Co.* (1996) 44 Cal.App.4th 194, 198.) The trial court's evidentiary rulings and discovery orders are

reviewed for an abuse of discretion. (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 281; *Biles v. Exxon Mobil Corp*. (2004) 124 Cal.App.4th 1315, 1327.) Challenges to the sufficiency of the evidence are reviewed under the substantial evidence test. (*Asahi Kasei Pharma Corp. v. Actelion Ltd.* (2013) 222 Cal.App.4th 945, 969.)

2. The Basic Legal Principles That Apply to This Appeal.

These legal principles are well established.

First, to recover on a breach of contract cause of action, a plaintiff must *plead and prove* damages. "To prevail on a cause of action for breach of contract, the plaintiff must prove (1) the contract, (2) the plaintiff's performance of the contract or excuse for nonperformance, (3) the defendant's breach, and (4) the resulting damage to the plaintiff." (*Richman v. Hartley* (2014) 224 Cal.App.4th 1182, 1186.) The only damages allegations pled in the operative complaint are that plaintiff "has been injured by an amount of $150,000 at the time of filing, which is derived from the loss of revenue the vehicle could have been earning if [it] was placed in the work force since 11/15/2013." In what appears to be a prayer for relief, plaintiff sought the sum of $950,000, plus costs and interest. Thus, plaintiff plead he was entitled to recover $950,000 in *lost revenue*.

Second, lost *revenue* is not recoverable as a measure of damages for breach of contract. "When loss of anticipated profits is an element of damages, it means net and not gross profits." (*Gerwin v. Southeastern Cal. Assn. of Seventh Day Adventists* (1971) 14 Cal.App.3d 209, 222.) " 'To allow plaintiff to recover a judgment based in part on his gross profits would result in his unjust enrichment. If he is entitled to recover at all, because of his loss of profits, such recovery must be confined to his net profits. Net profits are the gains made from sales "after deducting the value of the labor, materials, rents, and all expenses, together with the interest of the capital employed". [Citation.]' " (*Id.* at pp. 222-223.) Thus, plaintiff did not plead an essential element of his breach of contract cause of action, that is, recoverable damages.

Third, as stated above, it is plaintiff's burden to prove damages as an essential element of a breach of contract cause of action. (*Richman v. Hartley*, *supra*, 224 Cal.App.4th at p. 1186; CACI No. 350 ["To recover damages for any harm, [*name of*

plaintiff] must prove that when the contract was made, both parties knew or could reasonably have foreseen that the harm was likely to occur in the ordinary course of events as result of the breach of the contract. [¶] [*Name of plaintiff*] also must prove the amount of [his/her/its] damages . . . ."].)

Fourth, lost profits may not be awarded where a business is new and has no established track record unless the evidence makes reasonably certain their occurrence and extent. (*Parlour Enterprises, Inc. v. Kirin Group, Inc.*, *supra*, 152 Cal.App.4th at p. 288 [lost profits for a new business are generally not recoverable because their occurrence is uncertain, contingent and speculative, and must be proven based on expert testimony, economic and financial data, market surveys and analyses, and/or business records of similar enterprises].)

Fifth, when a defendant properly seeks discovery of the amount and factual basis for a plaintiff's claim of damages, the plaintiff is obligated to disclose the requested information. California's discovery act "was intended to accomplish the following results: (1) to give greater assistance to the parties in ascertaining the truth and in checking and preventing perjury; (2) to provide an effective means of detecting and exposing false, fraudulent and sham claims and defenses; (3) to make available, in a simple, convenient and inexpensive way, facts which otherwise could not be proved except with great difficulty; (4) to educate the parties in advance of trial as to the real value of their claims and defenses, thereby encouraging settlements; (5) to expedite litigation; (6) to safeguard against surprise; (7) to prevent delay; (8) to simplify and narrow the issues; and, (9) to expedite and facilitate both preparation and trial." (*Greyhound Corp. v. Superior Court of Merced County* (1961) 56 Cal.2d 355, 376.) The *Greyhound* court found the Legislature intended to take the "game" element out of trial preparation, do away with surprise at the trial, and make a trial less a game of blindman's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent. (*Ibid.*) Thus, plaintiff here was not entitled to recover damages in any amount or based on any facts that he did not disclose in pretrial discovery.

Last, self-represented plaintiffs have the same burden of proof and pleading as any other plaintiff. "[W]hen a litigant is self-represented, a judge has the discretion to take reasonable steps, appropriate under the circumstances and consistent with the law and the canons, to enable the litigant to be heard." (Cal. Code Jud. Ethics, com. to canon 3B(8).) Self-represented parties are entitled to the same treatment as a represented party, but they are not entitled to special treatment. (*Petrosyan v. Prince Corp.* (2013) 223 Cal.App.4th 587, 594; *Gamet v. Blanchard* (2001) 91 Cal.App.4th 1276, 1284.)

3. The Trial Court Abused Its Discretion.

Plaintiff never had a viable damages theory. On appeal, he confirms that he sought to recover lost revenue and acknowledges there is a clear distinction between lost revenue and lost profits. He tells us that he never sought lost profits or even raised the issue of lost profits. He had made that abundantly clear to the trial court, in his pleadings, his opening statement, his testimony, and his closing argument.

The trial court should not have awarded lost profits, first and foremost, because plaintiff never pled or proved he was entitled to lost profits, but instead asked for lost revenue which is not compensable as a matter of law. The court was presiding over a breach of contract trial and was bound to follow the law recited above.

The court should have entered judgment for defendant because there was no substantial evidence of lost profits, the only legal basis on which a damages award might rest in this case. California law requires expert testimony, economic and financial data, market surveys and analyses, and/or business records of similar enterprises to support an award of lost profits to a new enterprise like plaintiff's livery business. Manifestly, plaintiff's testimony that he had earned an average of $1,673 in the three weeks before trial by personally driving the Chrysler for Uber was irrelevant to determine lost revenue he might have earned by employing a driver for the Lincoln to take passengers to and from LAX; and there was no evidence of what expenses would necessarily be incurred, much less any explanation how lost profits should be calculated for the loss of use of one vehicle in a three- or four-vehicle, newly established livery business.

The trial court also failed to consider defendant's right to discover the basis for plaintiff's damages claim before trial and defendant's good faith efforts to obtain such discovery. The court was not free to disregard defendant's discovery rights.

DISPOSITION

The judgment is reversed and remanded for entry of judgment in favor of defendant. Defendant is to recover its costs of appeal.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.