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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

NEWPOINT INTERNATIONAL INC., Plaintiff, Cross-defendant and Appellant, v. L.A. GAB TEX, INC., Defendant, Cross-complainant and Respondent.	B277272 (Los Angeles County Super. Ct. No. BC497319)

APPEAL from a judgment of the Superior Court of Los Angeles County. Deirdre H. Hill, Judge. Affirmed.

Gary Hollingsworth for Plaintiff, Cross-defendant and Appellant.

Levene, Neale, Bender, Yoo & Brill and Irv M. Gross for Nancy Zamora, Trustee of the Bankruptcy Estate of Kouroush Eissakharian.

SUMMARY

Plaintiff Newpoint International Inc. sold fabric manufactured in China to purchasers in the United States, one of which was defendant L.A. Gab Tex, Inc., a company that sells fabric to American garment manufacturers. Disputes arose when the four shipments defendant ordered did not comport with defendant's specifications and defendant made only partial payments for the goods. Plaintiff sued, alleging causes of action for breach of contract, common counts, dishonored checks, and fraud. Defendant cross-complained for breach of contract, breach of warranty and rescission of the contracts.

After a court trial, the court entered judgment for defendant, finding defendant's "obligation to perform and pay on the purchase orders was excused as a result of the receipt of non-conforming goods." The court found plaintiff liable for breach of the contracts and the implied warranty, and awarded defendant $134,000 "for return of the payment it remitted to [plaintiff] in purch[a]se of the four shipments."

Plaintiff appeals, contending the trial court's statement of decision "fails to make the required findings to support the judgment." That is not the case. On the contrary, plaintiff fails to recite the evidence that supports the judgment, and then contends that plaintiff "delivered fabric which was accepted by [defendant] as a matter of law," ignoring the court's express finding, supported by evidence plaintiff ignores, that defendant "rejected the goods within a reasonable time after delivery in each instance."

We affirm the judgment.

FACTS

The transactions in this case hardly present textbook examples of how to preserve one's rights under the Commercial Code, but in the end it is clear that substantial evidence supports the judgment.

1. The Participants in the Transactions

As mentioned above, plaintiff is in the business of selling fabric manufactured in China to American companies. Its original business was the sale of textile goods for home furnishings. Plaintiff expanded its business to sell fabric for the manufacture of garments. In that connection, in 2012 plaintiff hired Fariborz Poursaeed as its fabric salesman, to "market its fabric line for garment goods" to wholesalers.

Mr. Poursaeed was familiar with defendant, a company in the business of selling fabric to garment manufacturers (or to other middlemen buying fabric for garments on a wholesale basis). Mr. Poursaeed knew defendant's owner, Koroush Eissakharian, because of Mr. Poursaeed's previous work in downtown Los Angeles. Mr. Poursaeed "referred [defendant] to [plaintiff]" and told plaintiff that defendant was a reliable company that would abide by credit terms. Thus, "one of the first sale[s] [Mr. Poursaeed] made was to [defendant]."

Before the sales to defendant, there were several meetings between the owner of plaintiff (referred to only as "Mr. Chen") and defendant's owner (Mr. Eissakharian). Mr. Poursaeed arranged and was present at these meetings, as was Jian (Julie) Jiang, plaintiff's purchasing manager. Ms. Jiang had worked for plaintiff since June 2011, and was also in charge of "keeping the books and records of sales by [plaintiff]."

Plaintiff's owner told Mr. Eissakharian he had a "big company" and could "produce anything you want" (but did not tell Mr. Eissakharian that "this is the first time he's [plaintiff's owner] making fabric for America, for the manufacturing"). Both Mr. Poursaeed and Mr. Eissakharian testified that Mr. Eissakharian told plaintiff's owner that he "want[ed] first quality goods." Defendant gave Mr. Poursaeed a sample and requested "this kind of fabric," asking for "first quality because they can sell it better and faster"; "[defendant] said they wanted this fabric for the government, manufacture with the government." Mr. Poursaeed ultimately secured four purchase orders from defendant, "for manufacturing fabric goods to [defendant's] specification."

2. The Four Shipments

There were four written purchase orders for plaintiff's sale of fabric to defendant. The first two were dated February 29, 2012, and the third and fourth were dated April 24, 2012 and May 9, 2012. The first two shipments called for the same fabric (with different colors), the third included some different fabrics, and the fourth an entirely different fabric with spandex. The payment terms were a 10 percent deposit when the order was placed (on the dates just noted); 10 percent on delivery; and 80 percent within 90 days after delivery.

Defendant made a 10 percent deposit on each order when the orders were placed. Plaintiff "contacted its 'sister company' in China to locate a fabric manufacturer to fabricate and ship the fabric [defendant] had ordered directly to [defendant's] warehouse."

Plaintiff generated invoices for the four shipments when they were dispatched to the United States, on or around April 1,

April 15, August 5, and August 17, 2012, in the amounts of $102,090.24; $107,007.33, $76,201.35 and $102,823.40, respectively.

The first two shipments were delivered to defendant's warehouse at the end of April and the beginning of May 2012, respectively. After they were delivered, Ms. Jiang received messages from Mr. Poursaeed "that in fact there are issues with those shipments . . . ." (Ms. Jiang testified these "comments" did not have to do "with the condition of the fabric delivered," but her deposition testimony suggested otherwise. She could not "remember detail," but she "did not think it was serious because if it was serious, they would return the merchandise . . . ." Ms. Jiang admitted that she "saw some" holes in the fabric, but "just a few.")

Ms. Jiang referred to defendant's complaints about the fabric as "comments, not complaint[s]." One of these was about the size of the rolls of fabric, which were small (60 to 70 yards on a roll), while the standard in the industry was 85 to 100 yards. (This is because "it's easier for the garment manufacturer to lay the fabric and cut it," and there's "less wastage," with the larger rolls.)

Mr. Poursaeed testified to defendant's complaints about the shipments. "When [defendant] received the [first] container, they called me and they complain about the small rolls," as well as "a roll [that] has hole on the fabric, and it was short yardage." Mr. Poursaeed went to defendant's warehouse to inspect, and checked several rolls. "It was really, really small rolls, because usually neat fabric is supposed to come in between 80 to 100 yards, but this roll was around 70. It was small rolls. And it was when we open it, it has holes on the whole rolls, and the

yardage was short." There was "exactly the same problem" with the second shipment.

On the third shipment, defendant complained "because the stripe sizes wasn't right. . . . [¶] . . . [¶] . . . The size of the stripe was wrong." The fourth shipment was "supposed to have elastic, but it wasn't elastic enough."

After each complaint, Mr. Poursaeed "went there and inspected," and found the complaints to be accurate. He inspected 10 or 15 rolls. "[W]e saw the complaint that the rolls is small and has holes on the rolls, and . . . short yardage." Each roll was labeled with "how many yards on the roll," and "each roll was short."

Mr. Poursaeed testified that defendant "want[ed] to return [the shipments]" and "request[ed] to return the merchandise." Mr. Poursaeed "report[ed] that to [plaintiff], but [plaintiff] said we gave them discount, they can sell it." Defendant did not return the merchandise "because [plaintiff] told [Mr. Poursaeed], tell [defendant] to keep the merchandise, we give them discount." (Ms. Jiang testified that plaintiff did *not* agree to discount the first or second shipment.)

Mr. Eissakharian likewise testified to the defects in the fabric shipments. On the first shipment, he inspected 10 to 15 rolls "at least," putting them on a machine and showing them to plaintiff (Mr. Poursaeed and Ms. Jiang). All the rolls inspected had holes, were smaller rolls, and had shortages. The second shipment had the same problems.

According to Mr. Eissakharian, he told plaintiff he did not want the merchandise in the first two shipments. Plaintiff begged him for help at "any price you can sell it," and promised the next order would be a good one. But on the next order (the

third shipment) the striping on the fabric was wrong. Plaintiff again asked for help. Mr. Eissakharian agreed to send the fabric to his customer, but the customer sent it back.[1] The fourth shipment was woven fabric for pants requiring "good stretch," but the fabric in the shipment did not have "any stretch[]."

Mr. Eissakharian testified that he offered the merchandise back to plaintiff, "100 percent," but plaintiff did not take the merchandise back; "he wanted money." Mr. Eissakharian told plaintiff to "come in and pick up the merchandise and give me my money back." After the fourth meeting on the last shipment, plaintiff told Mr. Eissakharian, "I wait for you. . . . I wait for you and sell the fabric." Mr. Eissakharian told plaintiff, "I cannot sell this fabric. I send it to customer, it come back. Please take your merchandise." But plaintiff asked Mr. Eissakharian to "help me and sell the merchandise because I cannot send it back to

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[1] Mr. Eissakharian testified: "That time I tell him I don't want it, this merchandise [(the first two shipments)]. . . . Please take it your merchandise. And he say, . . . please, this is first time I business here, and I needed your help. Anything you can, any price you can sell it, . . . help me, please." Plaintiff promised to "give you for next order good one." On the third order, plaintiff's production sample had the wrong striping, and Mr. Eissakharian told plaintiff "I don't want it this time." Plaintiff told him, "please, take it this. I give you sale price is cheap prices, and because this is already [on] the ocean, and it's coming to you." (The parties had discovered from a manufacturer's sample that the striping was wrong before the shipment arrived.) Mr. Eissakharian checked with his customer, who agreed to examine the shipment, so Mr. Eissakharian agreed to help plaintiff and sent the goods to his customer, but his customer rejected the merchandise and sent it back to Mr. Eissakharian.

China. . . . This is too much money." Mr. Eissakharian testified that defendant did its best to sell the fabric, but could not sell it.

3. Defendant's Payments and Financial Problems

As noted earlier, the purchase orders for the fabric called for payments of 10 percent at the time of order, 10 percent on delivery, and 80 percent within 90 days of delivery.

Plaintiff's records show that the 10 percent deposit payment and the 10 percent payment on delivery (or a close approximation) were made for each of the four shipments. In addition, in July 2012 (within the 90-day window), defendant paid an additional $27,890.24 toward the first shipment, and $29,307.33 toward the second shipment. When the shipments were delivered, defendant gave plaintiff postdated checks for the remaining payments called for by the purchase orders. Some of these postdated checks were later replaced with others, and in one case defendant stopped payment on one of the replacement checks. (Mr. Eissakharian testified he stopped payment on the check "[b]ecause the merchandise is not good . . . .") None of the postdated checks (except for the two just mentioned) was negotiated. In November 2012, defendant closed the bank account on which the checks were drawn, apparently because of a fraudulent check drawn on the account. (Plaintiff's summary of payments and balances showed defendant paid a total of $132,589.57, and that a balance remained of $255,532.75; Ms. Jiang testified plaintiff received "in total approximately $134,000" on the four orders.)

At the time (November 2012), in addition to closing its bank account after the fraudulent check problem, defendant was embroiled in a legal dispute with its business partner, which shared a warehouse with defendant. According to

Mr. Eissakharian, the business partner removed all defendant's merchandise from the warehouse. (As the trial court put it, defendant "speculated that its partner may have taken [the merchandise] but presented no first hand information as to what became of it.") This occurred at some time after November 21, 2012. Mr. Eissakharian reported it to plaintiff, showed plaintiff the empty warehouse, and explained that even though plaintiff had agreed to wait for payment until defendant could sell the merchandise, that could no longer happen.

According to Ms. Jiang, she met with Mr. Eissakharian about the unpaid checks several times. The first meeting was October 24, 2012. At that meeting, defendant "explain[ed] to us, they have financial problem. And someone . . . change[d] their check, steal their money, . . . and they lost the money like that. [¶] . . . The second reason is business is no – so they need time to give us payment," but "they promised to give us money." There was a second meeting on November 7, 2012, and Mr. Eissakharian gave the "same story." A third meeting occurred on November 21, 2012. At that meeting, Mr. Eissakharian explained "the problem with [defendant], his partner . . . ." Later ("after November"), Mr. Eissakharian showed Ms. Jiang the empty warehouse. Ms. Jiang said that every time they met, Mr. Eissakharian said he would pay plaintiff, "but cannot guarantee what time [he] can pay us."

4. The Lawsuit

On December 13, 2012, plaintiff sued defendant and Mr. Eissakharian for breach of contract, common counts, dishonored checks and fraud. Plaintiff sought damages of $255,532.75 plus interest, statutory damages of $7,000 for dishonored checks, and punitive damages on its fraud claim.

(Mr. Eissakharian was later dismissed "reportedly after he received a discharge in bankruptcy.")

Defendant cross-complained, alleging causes of action for breach of contract, breach of warranty, fraud-related claims and rescission of the contracts. Defendant sought damages "according to proof," and on its rescission claim sought an order that plaintiff return all consideration with interest and for consequential damages according to proof.

The case was tried to the court in October 2015 on plaintiff's claims and on defendant's cross-claims for breach of contract, breach of warranty and rescission. The evidence included the facts described above. After posttrial briefs, the trial court issued a 10-page intended decision in favor of defendant, both on plaintiff's complaint and on defendant's cross-complaint, adopting defendant's damage calculations (return of defendant's payments of $134,000, and lost profits of $81,739.32).

Plaintiff requested a statement of decision, asking that it cover 52 "disputed issues at trial." The court filed its statement of decision on May 3, 2016, awarding defendant $134,000 for return of the payments it made to plaintiff, but finding lost profits had not been adequately proven.

Plaintiff filed objections to the statement of decision. Plaintiff asserted the statement of decision "fail[ed] to set forth the facts, law and evidence" on 38 points.

5. The Final Statement of Decision

On August 12, 2016, the court issued its final statement of decision, filed concurrently with the judgment. The court stated it had considered "the further arguments and objections" and found "that the following decision reflects all findings necessary to rendering a final decision." Among those findings were these.

After describing testimony on the subject from Mr. Poursaeed, Mr. Eissakharian and Ms. Jiang, the court found, "in accordance with the verbal understanding[,] that the orders placed were in fact for required 'first quality' goods which were agreed to be in conformity with the samples and specifications discussed free from substantial defect of the roll size and quality standardly used by American garment manufacturers."

The court described in detail the defects in the merchandise in each shipment. "Poursaeed corroborated Eissakharian's testimony that [defendant] notified [plaintiff] upon receipt of each shipment that the fabrics received were non-conforming. The complaints reported various defects with each shipment. Poursaeed acknowledged that he examined each shipment and then advised [plaintiff] of his findings. Again Poursaeed and Eissakharian concur in recounting" that the defects entailed "small rolls rather than standard American size rolls which would result in more wastage, holes in knit fabric and shortages" (shipments one and two); "irregular [striping] on knit fabric not in conformity with demonstrated fabric sample requested upon placement of order" (though an "agreed discount was taken on this roll prior to shipment") (shipment three); and "insufficient stretch not in conformity with sufficiency of stretch specified and a smaller than standard roll of woven stretch fabric" (shipment four). The court found "the shipments fit the above descriptions as evidencing defects which the court categorizes as more than minor, not of first quality, and not of a size and proportion readily salable in the United States marketplace."

The court described Ms. Jiang's testimony that the holes in the fabric were minor and that defendant "still accepted the fabric and never asked to return the fabric." But the court found

"the testimony of Poursaeed to be most compelling with regard to describing non-conformities in the fabric received as well as in Poursaeed's recounting of Eissakharian's objections to the goods upon receipt and request to return the shipments. The court finds that the shipments were non-conforming to the orders placed[,] were not first quality as evidenced by the defects including in particular the holes, shortages and nonstandard roll sizes and that [defendant] rejected the goods within a reasonable time after delivery in each instance. The court finds that [Ms. Jiang] was asked to and did come to [defendant's warehouse] upon [defendant's] request to return the shipment. [Ms. Jiang] examined the shipment but did not take it back."

The court also recounted defendant's financial problems, the postdated checks, the check that bounced and defendant's closure of the bank account, Ms. Jiang's testimony that Mr. Eissakharian repeatedly represented that he would pay if given time, and the later disappearance of the fabric from defendant's warehouse.

The court discussed the third shipment in detail. "The court finds [defendant] did request to return the fabric of the third shipment, however, [plaintiff] insisted [defendant] hold on to it and try to sell it further stating that [plaintiff] would give [defendant] a discount. [Defendant] capitulated to some extent in stating it would check with its customers and try to sell it but in the end none of its customers would agree to buy it; one such customer to whom the fabric was shipped sent the fabric back to [defendant] noting the defects. The court finds that this evidence as well as the testimony given that other wholesale customers were not interested in the material despite resale efforts leads

the court to conclude the fabric was not in conformity with standards and expectations of merchants in the market."

The court continued: "The Court finds that based on the verbal conversation . . . it was understood by both parties that [defendant] had found the shipment to be non-conforming, rejected the shipment within a reasonable time, but then verbally agreed to purchase the fabric if it was able to sell the fabric. [Defendant] having made a go[o]d faith effort to sell and being unable to was not obligated to purchase the non-conforming goods and did not amount to acceptance of the goods under the [California Uniform] Commercial Code as [plaintiff] asserts given the caveat in the verbal agreement that [defendant] would make an effort to sell it with the implicit understanding and assumption that otherwise it would be returned."

The court further found that plaintiff "did not receive back the shipments, however, [plaintiff] effectively rejected the return of at least one shipment and as to the initial shipments [plaintiff] was well aware of the defects and inspected them but did not take back the shipment. Yet as to each shipment the purchase orders were not fulfilled with conforming goods of the required first quality, size, stretchability and condition specified. [Defendant] did advise of the defects within a reasonable time after tender and/or receipt of shipment."

Finding defendant prevailed on plaintiff's claims for breach of contract and common counts, the court concluded: "[Defendant's] obligation to perform and pay on the purchase orders was excused as a result of the receipt of non-conforming goods. [Plaintiff] did not deliver in accordance with specifications and the goods presented were not in conformity with American standards for the 'first quality' goods contracted for. The

uncontroverted testimony is that the small rolls and short yardage alone would result in considerable waste of fabric and thus would not meet merchantability expectations or standards in the US market. In essence [defendant] did not get what it contracted for, was unable to sell such fabrics to its customers or fill its customers' orders as a result. It is true that [defendant] may not have been financially viable at the time of demand for payment, but [defendant] has met its burden ([California Uniform] Commercial Code section 2607) of showing that legally [defendant's] obligation to pay was excused by [plaintiff's] failure to perform."[2]

The court also rejected plaintiff's claims for dishonored checks and fraud.

The trial court then addressed defendant's cross-complaint, concluding (with analysis corresponding to that delineated above) that plaintiff breached the contracts and the implied warranty of merchantability. The court found defendant's showing insufficient to establish its claims for damages for breach of warranty "[t]o the extent the prayer for damages include chargebacks, refunds, loss of customers, and damage to reputation only . . . ." The court also found the complaint "states a rescission claim only to the extent it is based on mistake," and again found that defendant did not substantiate its claims for "chargebacks, refunds, loss of customers, and damage to reputation."

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[2] Section 2607 governs the effect of acceptance of goods, and among other things provides that the buyer must pay at the contract rate for any goods accepted. (Cal. U. Com. Code, § 2607, subd. (1).)

Finally, the court awarded defendant "$134,000 for return of the payment it remitted to [plaintiff] in purch[a]se of the four shipments," together with interest from the date of filing of the cross-complaint. The court found lost profits had not been adequately proven.

The court entered judgment accordingly, and this appeal followed.[3]

DISCUSSION

1. Standard of Review

The court in *Thompson v. Asimos* (2016) 6 Cal.App.5th 970, 981 (*Thompson*) explained in detail the standards we apply in reviewing a judgment "based upon a statement of decision following a bench trial . . . ." We review questions of law de novo, and apply the substantial evidence rule to the trial court's findings of fact. (*Ibid.*) "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." (*Ibid.*) "A single witness's testimony may constitute substantial evidence to support a finding. [Citation.] It is not our role as a reviewing court to reweigh the evidence or to assess witness credibility. [Citation.] 'A judgment or order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness.' " (*Ibid.*)

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[3] This appeal is defended by Nancy Zamora, the trustee of Mr. Eissakharian's bankruptcy estate. On February 7, 2017, the bankruptcy court entered an order to the effect that any and all legal or equitable interests of L.A. Gab Tex Inc. in any property are now the property of Mr. Essakharian's bankruptcy estate.

Thompson further explains that "the scope of appellate review may be affected" when a proper request for a statement of decision has been made. (*Thompson, supra,* 6 Cal.App.5th at p. 981.) "Under [Code of Civil Procedure] section 632, upon a party's request after trial, the court must issue a statement of decision 'explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial.' And under section 634, if the statement of decision does not resolve a controverted issue or is ambiguous, and the omission or ambiguity was brought to the attention of the trial court, 'it shall not be inferred on appeal . . . that the trial court decided in favor of the prevailing party as to those facts or on that issue.' " (*Ibid*.)

But even when the procedure under Code of Civil Procedure sections 632 and 634 "has been followed punctiliously, '[t]he trial court is not required to respond point by point to the issues posed in a request for statement of decision. The court's statement of decision is sufficient if it fairly discloses the court's determination as to the ultimate facts and material issues in the case.' [Citations.] 'When this rule is applied, the term "ultimate fact" generally refers to a core fact, such as an essential element of a claim.' [Citation.] 'Ultimate facts are distinguished from evidentiary facts and from legal conclusions.' [Citation.] Thus, a court is not expected to make findings with regard to 'detailed evidentiary facts or to make minute findings as to individual items of evidence.' [Citation.] In addition, '[e]ven though a court fails to make a finding on a particular matter, if the judgment is otherwise supported, the omission is harmless error unless the evidence is sufficient to sustain a finding in favor of the complaining party which would have the effect of

countervailing or destroying other findings.' " (*Thompson, supra,* 6 Cal.App.5th at p. 983.)

2. This Case

We begin by observing that plaintiff's recitation of the trial proceedings is entirely devoid of *any* description of the defects the court found to have existed in the fabrics plaintiff delivered to defendant, or to the testimony about those defects – failing to mention, for example, the trial court's finding the defects in the fabric were "more than minor," including "holes, shortages and nonstandard roll sizes," "irregular striping" and "insufficient stretch." Indeed, plaintiff's brief contains 10 pages describing its evidence, and one page purporting to describe defendant's evidence but omitting the pertinent testimony (and asserting incorrectly, for example, that Mr. Eissakharian testified "that he accepted the goods").

We do not view this as an accurate "summary of the significant facts," as is required by the California Rules of Court (rule 8.204(a)(2)(C)). This absence of a fair summary of the facts undermines plaintiff's contention that the trial court's statement of decision "fails to make the required findings to support the judgment." To the contrary, we conclude the trial court's statement of decision " 'fairly discloses the court's determination as to the ultimate facts and material issues in the case' " (*Thompson, supra,* 6 Cal.App.5th at p. 983), and those determinations were supported by substantial evidence.

We further note that plaintiff regularly fails to cite to the record to support its assertions. Plaintiff several times suggests that plaintiff sold the merchandise (or some of it) to its customers and kept the money. For example, plaintiff asserts that "the evidence demonstrated . . . that after receiving the goods,

[defendant] then sold the goods to [defendant's] customers, and kept the proceeds"; and "[f]urther, [defendant] sold the fabric to its customers, and continued marketing the fabric for months"; and defendant "continu[ed] to sell those assertedly defective fabric to its customers." But in no case does plaintiff cite *any* evidence in the record to support the assertions that defendant sold the goods to its customers. This complete absence of references to supporting evidence, like plaintiff's failure to present a fair summary of the evidence, further undermines plaintiff's assertion that the trial court "fail[ed] to make the required findings to support the judgment."

We turn to defendant's specific contentions.

a. Breach of contract

At its core, plaintiff's argument on appeal is that the evidence in this case *required* the conclusion – as a matter of law – that defendant accepted the shipments, and therefore its failure to pay was a breach of the purchase orders. (Thus plaintiff tells us, citing California Uniform Commercial Code section 2606, that "undisputed facts show that [defendant] accepted the goods as a matter of law," and "undisputed facts show that [defendant] did not reject the fabric, by words or conduct, as a matter of law," and "[s]ince it is undisputed that [defendant] had the fabric in its possession" when it was taken from its warehouse, defendant "has performed an act 'inconsistent with the seller's ownership' " and "has accepted the goods as a matter of law.")[4]

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[4] Section 2606 provides in pertinent part that "[a]cceptance of goods occurs when the buyer [¶] (a) After reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their nonconformity; or [¶] (b) Fails to make an effective

As we have seen, the flaw in plaintiff's claim is that the trial court reached contrary conclusions, based on substantial evidence that plaintiff does not mention. On this basis alone, plaintiff has plainly failed to carry its basic burden on appeal. Plaintiff ignores the evidence that the goods were defective, and ignores the court's finding that defendant "rejected the goods within a reasonable time after delivery in each instance." This finding was based on substantial evidence, including Mr. Poursaeed's testimony that defendant "want[ed] to return [the shipments]" and "request[ed] to return the merchandise" and Mr. Eissakharian's testimony that he told plaintiff he did not want the merchandise in the first two shipments, but plaintiff begged him for help at "any price you can sell it." Mr. Eissakharian also testified that he agreed with plaintiff "to extend the checks," and when asked if the purpose of doing so was "to give you time to sell the goods," he replied: "I wanted, you know, really, that time I wanted the 100 percent help each other, if you – I can help him, I help him."

In short, the evidence certainly permitted the court's conclusion that the fabric was defective, that defendant rejected the merchandise, and that defendant retained it only because

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rejection (subdivision (1) of Section 2602) . . . ; or [¶] (c) Does any act inconsistent with the seller's ownership . . . ." (Cal. U. Com. Code, § 2606, subd. (1)(a)-(c).) (Section 2602, subdivision (1) states that "[r]ejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller.")

plaintiff would not take it back and instead wanted defendant to sell it at any price.[5]

Plaintiff points to inconsistencies in the evidence and in the trial court's statement of decision. For example, plaintiff cites the evidence that defendant issued replacement checks (for the postdated checks given at delivery for the remaining 80 percent of the invoice price on the first two shipments) in August 2012.[6] Plaintiff complains the statement of decision "failed to address how the extreme delay between the date when the first two shipments of fabric were allegedly rejected (i.e., the date of delivery [April 27 and May 5] and the dates when [defendant] issued 'replacement checks' on July 30, 2012 . . . did not amount to a failure to timely reject the goods . . . under [California

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[5] Plaintiff also contends there was no evidence on the meaning of the term "first quality," and the court "decided to rule in a vacuum" that the goods were not "first quality." The court's description of the defects in the fabric, fully supported by the testimony, makes it perfectly clear the goods were not "first quality" under any definition. The court did not need "expert testimony . . . to educate the Court" on this topic.

[6] Ms. Jiang testified that defendant gave plaintiff, at the time of delivery, post-dated checks for the remaining amounts due on the shipments. For example, on the first shipment delivered April 27, plaintiff received checks with dates in July and August for the remaining 80 percent of the invoiced amounts. The first check dated July 23, 2012, was paid, and the checks dated August 3 and August 10 were later replaced with checks dated October 5 and October 25. Ms. Jiang testified she received these replacement checks in August. Payment was stopped on the first replacement check in October.

Uniform] Commercial Code section 2607."[7] Similarly, plaintiff cites the evidence defendant honored two of the checks postdated for July (the first installment of the remaining 80 percent of the invoiced amount for the first two shipments), and complains the statement of decision does not explain why this "did not amount to an acceptance despite the alleged non-conformity."

But inconsistencies in the evidence do not satisfy plaintiff's burden to establish reversible error. The trial court acknowledged the evidence plaintiff cites, but apparently gave it no weight, instead accepting the evidence that the goods were nonconforming and that plaintiff rejected them. (As the court noted, "as to all Purchase orders the quality of the goods received was substandard, and not in conformity with specifications and not of a quality generally acceptable in the 'American' trade market for goods of its type . . . .") Where evidence is contradictory or inconsistent, that was the trial court's call to make.

Certainly the trial court was not *required* to conclude, from evidence that partial payments were made or that defendant acknowledged a debt to plaintiff, that defendant therefore had accepted the shipments. On the contrary, the court appeared to recognize the evidentiary contradictions when it discussed defendant's financial problems and apparent acknowledgment of

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[7] As noted above, section 2607 governs the effect of acceptance of goods, and provides that the buyer must pay at the contract rate for any goods accepted. (Cal. U. Com. Code, § 2607, subd. (1).) The only reference to "rejection" in section 2607 appears in the clause stating that "[a]cceptance of goods by the buyer precludes rejection of the goods accepted and, if made with knowledge of a nonconformity, cannot be revoked because of it . . . ." (*Id.*, subd. (2).)

monies owed to plaintiff.[8] Nonetheless, the court concluded: "Yet as to each shipment the purchase orders were not fulfilled with conforming goods of the required first quality, size, stretchability and condition specified," and defendant "did advise of the defects within a reasonable time after tender and/or receipt of shipment." And: "However, with regard to the core subject in dispute, the purchase orders, the court finds that as to all Purchase orders the quality of the goods received was substandard, and not in conformity with specifications . . . ." And: "[Defendant has [met] its burden ([California Uniform] Commercial Code section 2607) of showing that legally [defendant's] obligation to pay was excused by [plaintiff's] failure to perform."

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[8] For example, the court refers to defense exhibit 111. This was a one-page document purporting to be defendant's description of "the delay of the check payments," the fraud causing "a problem with our bank account," and problems in its business partnership with Lavitex, Inc. which "greatly impacts the clearing of the checks that we have issued." In the document, defendant "promises to pay the total amount of money we owe after the settlement with our partner in court." The document is not signed by defendant. It does contain the signatures of two of plaintiff's employees (Ms. Jiang and Mr. Poursaeed). The document was marked for identification but never admitted into evidence. Defendant argued that it showed plaintiff's agreement "to forego collection" so that defendant had no obligation to pay when plaintiff filed its complaint. The trial court rejected that claim, stating that the document was "nothing more than a 'letter of explanation' " of the "circumstances surrounding the delay in check payments" and an "acknowledgement of the debt owed and a representation of [defendant's] intention to honor the debt once its litigation disputes with its partner Lavitex resolved . . . ."

In the end, while the parties' conduct does not align perfectly with the California Uniform Commercial Code, there is no gainsaying the trial court's ultimate conclusion that plaintiff failed to perform under the contract when it shipped defective goods, excusing defendant's obligation to pay. Plaintiff's argument to the contrary is rooted in mistakenly equating the fact the goods remained in defendant's possession with proof that defendant accepted the goods. That is simply not the law in a case where plaintiff refused to take back the goods. (Cf. Cal. U. Com. Code, § 2604 ["if the seller gives no instructions within a reasonable time after notification of rejection the buyer may store the rejected goods for the seller's account" and "[s]uch action is not acceptance"].)

We note several other points.

Plaintiff cites cases where courts have found that a buyer's action in continuing to order and sell known defective goods constitutes an acceptance of those goods. (See, e.g., *Lorenzo Banfi di Banfi Renzo & Co. v. Davis Congress Shops, Inc.* (N.D. Ill. 1983) 568 F.Supp. 432, 433 [buyer's action in placing shoe shipments in its inventory, offering them for sale, and selling almost half of them was inconsistent with rejection and was an exercise of ownership which "even after rejection, was wrongful as to [the seller] and constituted acceptance of the goods when 'ratified' by" the seller].) That principle has no application to the facts found to exist in this case – including that defendant retained the fabric only because plaintiff would not take it back and instead wanted defendant to sell it at any price.

b. Plaintiff's other contentions

Plaintiff contends defendant did not notify plaintiff "within a reasonable time that the product did not have the expected

quality," and therefore did not establish its cause of action for breach of warranty. This claim is specious because the trial court plainly found otherwise, and that finding was supported by the substantial evidence already described.[9]

Plaintiff also contends the statement of decision failed to address whether defendant's failure to return the fabric that "disappeared while in the possession of [defendant]" precludes the remedy of rescission. This claim has no merit either.

The trial court found, at least implicitly, that the disappearance of the goods did not preclude the rescission remedy. Plaintiff has not shown that was error. Plaintiff simply observes that the trial court cited Civil Code section 1691, which states that to effect a rescission a party must "[r]estore to the other party everything of value" received from that party under the contract "or offer to restore the same . . . ." (§ 1691, subd. (b).) The court repeatedly found that defendant "request[ed] to return the shipment"; that plaintiff "did not retrieve or receive back the shipments," that defendant "did request to return the fabric of the third shipment" but plaintiff "insisted [defendant] hold on to

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[9] Plaintiff also recites evidence it contends supports its causes of action for dishonored checks and fraud. As to the dishonored checks, plaintiff fails to address the trial court's conclusion that plaintiff failed to comply with the procedural requirements of Civil Code section 1719. Indeed, plaintiff fails in its opening brief even to identify the statute under which it seeks a penalty for dishonored checks. As to the fraud claim, plaintiff cites no evidence to support its claim that defendant "never intended to honor the checks it issued," and relies on the evidence supporting its other causes of actions, which we have found to be without merit.

it and try to sell it"; and that plaintiff "was well aware of the defects and inspected them but did not take back the shipment[s]." And there was testimony plaintiff asked Mr. Eissakharian to help him sell the merchandise because it was too costly to send it back to China. The fabric did not disappear from defendant's warehouse until "after November," more than three months after delivery of the last shipment.

Under these circumstances, we see no error in the trial court's award of the monies defendant paid for the rejected goods. (Cf. Cal. U. Com. Code, § 2602, subd. (2)(b) & (c) [buyer who has "before rejection taken physical possession of goods . . . is under a duty after rejection to hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them; but [¶] . . . [t]he buyer has no further obligations with regard to goods rightfully rejected"].)[10]

Finally, plaintiff contends defendant's cross-claims were barred because Mr. Eissakharian "did not list or disclose such claims in his bankruptcy proceeding," and "a debtor who fails to disclose a legal claim on his bankruptcy schedules is judicially estopped from asserting the claim in a subsequent proceeding." This claim is without merit for multiple reasons.

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10 Plaintiff cites *Lepper v. Ratterree* (1929) 98 Cal.App. 245 for the proposition that the trial court "cannot order a rescission of the sales contract, unless [defendant] is capable of restoring the fabric to [plaintiff]." The case does not stand for that proposition; the court found the plaintiff-buyers of real property failed to prove claims of mistake in their contracts and instead the evidence showed "an absolute want of diligence, care and attention" by the plaintiffs. (*Id.* at p. 256.)

First, the cases plaintiff cites involve debtors who failed to list claims as assets in their bankruptcy proceedings, and later sued on the same claim, thus taking clearly inconsistent positions in the two proceedings. (E.g., *Hamilton v. State Farm Fire & Cas. Co.* (9th Cir. 2001) 270 F.3d 778, 784.) Here, the debtor (Mr. Eissakharian) is *not* the party that asserted the cross-claims (defendant L.A. Gab Tex did), so we fail to see the relevance of plaintiff's contention. Second, plaintiff did not object to the statement of decision on this ground, and so has waived any claim on the point. (See *Thompson, supra,* 6 Cal.App.5th at p. 983 ["where a party . . . fails to object under [Code of Civil Procedure] section 634 . . . , objections to the adequacy of a statement of decision may be deemed waived on appeal"].) Third, there was in any event no evidence on the point at trial and thus no reason for the trial court to address the issue.[11]

In sum, the trial court fairly disclosed its findings on all the elements of plaintiff's breach of contract and other claims, as well as on defendant's cross-claims. Substantial evidence supports the court's conclusions, including that the fabric was defective, defendant rejected it, and defendant retained the merchandise only at the instance of plaintiff, who would not take the merchandise back and insisted defendant try to sell it at any price. These circumstances did not constitute an acceptance of the goods by defendant.

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[11] At trial, defense counsel questioned Mr. Eissakharian about whether he listed his company's claim against plaintiff as an asset, and he replied, "I don't remember exactly." Then defense counsel objected to that line of questioning, and the court sustained the objection.

DISPOSITION

The judgment is affirmed. Defendant shall recover its costs on appeal.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.