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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

TOPAZ FINANCIAL SERVICES, LLC,  
et al.,

Plaintiffs and Respondents,

v.

PLUM ENTERPRISES, LLC, et al.,

Defendants and Appellants.

B269313

Los Angeles County  
Super. Ct. Nos. LC099364,  
LC099519

APPEAL from a judgment of the Superior Court of  
Los Angeles County, Frank J. Johnson, Judge. Affirmed.

Beitchman & Zekian, David P. Beitchman and Shani  
Kochav for Defendants and Appellants.

Law Offices of Joseph A. Pertel and Joseph A. Pertel; Law  
Offices of Schuller & Schuller and Jeffrey S. Schuller; Benedon &  
Serlin, Gerald M. Serlin and Melinda W. Ebelhar for Plaintiffs  
and Respondents.

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A used car dealer and its finance company sued each other during a dispute over money due under various agreements. The parties stipulated to a court order appointing a referee concerning the parties' books and records, with the report to be binding on the parties. The trial court adopted the referee's final report in its entirety, determined no issues remained for trial, and entered judgment in the amount specified in the report. The dealer appeals, and we affirm.

### **BACKGROUND**

Plum Enterprises, LLC (Plum), doing business as Galaxy Automotive, sold used cars, and Topaz Financial Services, LLC (Topaz), provided car loans to Plum's customers. When Plum sold a car, Plum offered the buyer financing through Topaz. Plum received the down payment, and Topaz gave Plum the remaining balance of the purchase price, collecting payments plus interest from the buyer. Topaz withheld a portion of the amount it financed as a reserve in case the buyer defaulted, and held the car's title as security. Once the buyer made the final payment, Topaz provided title to the buyer, and remitted the reserve to Plum.

Plum and Topaz entered into additional agreements. A recourse dealer agreement provided that Plum would repurchase from Topaz any contract that was more than one payment in arrears. A flooring agreement provided that Plum could purchase vehicles at auction or elsewhere with Topaz having the option to advance the funds. Topaz also provided vehicles to Plum to sell, and Plum gave Topaz the sale proceeds.

After Topaz filed suit against Plum in December 2012, Plum filed an action against Topaz and Alon, Mordechai, and

Ronit Yehezkelof (as alter egos of Topaz)<sup>1</sup> on January 17, 2013, alleging breach of contract, fraud, conversion, unjust enrichment, and violation of the Unfair Practices Act (Bus. and Prof. Code, § 17200 et seq.). Plum’s complaint alleged Topaz owed Plum more than \$3 million for breach of contract on three different accounts, Topaz failed to provide an accounting for each account, and Plum “is unable to ascertain the exact amount owed absent the necessary review of Defendants’ books and records.” The complaint alleged the same economic damages on the other causes of action. The fraud cause of action alleged Topaz made false statements, Plum relied on those statements, and Topaz had failed to provide an accurate and complete accounting despite promising to do so.

Topaz filed a first amended complaint on January 30, 2013, seeking an accounting and damages for breach of contract, claim and delivery of automobiles, conversion, and fraud. Topaz’s first amended complaint alleged Plum owed Topaz more than \$938,000, and requested the court order Plum to provide an accounting of the vehicles Topaz provided to Plum to sell on Topaz’s behalf. The two actions were consolidated with Topaz’s action as the lead case.

1. ***The Stipulation to Appoint a Referee***

On April 3, 2014, Topaz and Plum filed a stipulation for a court order appointing a referee under Code of Civil Procedure section 638.<sup>2</sup> The stipulation was signed by the parties’ counsel,

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<sup>1</sup> We refer to Topaz and the Yehezkelofs collectively as Topaz.

<sup>2</sup> All subsequent statutory references are to the Code of Civil Procedure.

and provided that all parties, “by and through their respective attorneys of record,” agreed and stipulated “[t]hat the court enter an order for the appointment of a forensic certified public accountant to act as referee concerning the books, records and documents of the parties with regard to the relationship and dealings by and between the parties.” The parties would provide the referee with information and documentation (with copies to opposing counsel) by May 5, 2014. The referee would produce a written report with his or her decision and findings on or before June 19, 2014, and submit it to the court and to counsel for the parties. “The Court will adopt the referee’s report, including findings and conclusions. As such, such report is binding upon the parties. [¶] The parties agree that Michael Hurley of Farber, Hass Hurley, LLP will be the referee in this matter.” Each party would initially pay half the cost, and the court could reapportion payment in its discretion.

The court entered an order echoing the terms of the stipulation: “A forensic certified public accountant will be appointed to act as referee concerning the books, records and documents of the parties with regard to the relationship and dealings by and between the parties.” The order empowered the referee to hear testimony, and ordered the referee to prepare a written report by June 19, 2014, and to submit the report directly to the court with a copy to the parties. “The Court will adopt the referee’s report, including findings and conclusions. The report shall be binding upon the parties.”

After delays, on July 17, 2014, the parties filed a revised stipulation to extend the time for the referee to issue the report, stating they had submitted preliminary documentation to the referee and would submit all supplemental information on or

before August 14, 2014. The referee would prepare and provide the written report on or before September 22, 2014. On July 29, 2014, the court filed a stipulation and order continuing the trial from October 15 to December 15, signed by counsel and the court. The stipulation stated that Topaz had retained new counsel and “the Parties’ mutually selected forensic accountant will be unable to provide a preliminary report of this findings prior to August 8, 2014, the date currently reserved for the Mandatory Settlement Conference,” and “the Parties intend to conduct depositions in this case after the preliminary findings provided by the mutually selected forensic accountant.”

## **2. *The referee’s report***

Topaz and Plum provided financial documentation to the referee. On September 3, 2014, the parties met with referee Hurley to discuss the documents. In a letter to the referee dated October 7, 2014, Plum stated, “the substance and purpose of the current exercise is to trace the accounting to determine what funds are owed from one party to the other.” Topaz provided over 7,500 pages of documents, and Plum also provided documents, all of which it had received from Topaz.

Plum filed a motion to compel further responses to a request for production of documents. At a hearing on November 10, 2014, the court ordered the parties to meet and confer, which they did successfully. The court continued the trial date to May 18, 2015, and ordered that the discovery cut-off date remained November 15, 2014 “in accordance with the trial date of December 16, 2014.” Plum did not inform the court it needed additional time for depositions or other discovery.

On December 23, 2014, the referee faxed counsel a one-page “preliminary position” with 18 pages of schedules, stating

“the record keeping was deplorable” and Plum’s “lack of appropriate records is literally unbelievable.” Based on the conflicting documents received, the referee’s preliminary position was that Plum owed Topaz \$48,924.78. On January 6, 2015, Plum responded to the “preliminary findings,” characterizing the case as “primarily one of accounting” and requesting clarification on issues to be discussed in an upcoming conference call.

The referee provided counsel with a four-page draft report and attached schedules on May 8, 2015. The report described the analysis procedures, concluded Plum owed Topaz \$484,206 on four accounts, and attached 13 pages of schedules.

On June 10, 2015, the referee provided counsel with his final report, and sent the final report to the superior court on June 19, 2015.

3. ***Subsequent proceedings***

Plum’s counsel received the final report on June 10, 2015, and that same day, filed a motion to reopen discovery for “crucial” party depositions to “determine the reliability of certain information provided to the court-appointed forensic accountant by the parties and ultimately, whether or not this matter will settle or proceed to a trial on the merits.” Plum asked the court for a new trial date and a new cut-off date for discovery. Topaz’s opposition pointed out that the parties’ stipulation to continue trial, filed July 29, 2014, stated the parties intended to conduct depositions, if necessary, after they received the preliminary findings of the referee, and the court had explicitly ruled that the discovery cut-off date remained November 15, 2014. Plum had done nothing after the preliminary findings until after the referee’s final report, which under the stipulation and the court’s order was binding on the parties. Plum replied that the referee’s

report was not final, but “merely provided a reference point from which the parties may conduct further discovery.”

On July 2, 2015, counsel appeared at a hearing on an order to show cause for failure to appear at an earlier case management conference. The court heard argument, and the minute order states: “Counsel represent that [the] report of the forensic accountants disposes of the matter in its entirety if adopted by the Court. [¶] The court accepts the representations of counsel. Good cause appearing, the Order to Show Cause is discharged. [¶] Pursuant to the stipulation of counsel, and Court order thereon (4/3/14), the findings of the referee are to be adopted by the Court.” The court had received the report from the referee “although there is no accompanying order,” and ordered Topaz’s counsel to submit an order consistent with the referee’s report for the court’s signature.

Topaz moved for entry of judgment on July 13, 2015. Plum’s opposition argued that the stipulation did not state the parties’ intent was that the referee would hear all claims, but to act as a forensic accountant and examine the “books, records and documents” of the parties “in order to determine a fixed sum as a starting point from which the parties would conduct additional discovery.” Topaz replied the stipulation clearly and unambiguously provided for a “voluntary general reference” and therefore subjective intent was irrelevant. Topaz argued that Plum did nothing to conduct discovery after the referee’s preliminary findings, so the final report “provided a defense verdict on all [Plum’s] claims,” and Plum could not now contest the conclusions of the referee.

At a hearing on July 30, 2015, the trial court stated that when it signed the stipulation, the court had believed the

referee's final report would be binding. The court expressed reluctance to find Plum had forfeited its right to trial without an express waiver by the client, rather than by the attorney. Nevertheless, the court would not have continued the case for months and months if the referee's report had not been intended to settle the case: "[I]t seems like a colossal waste of time and effort." Counsel for Plum represented the report was "absolutely binding as to the accounting," but only as the basis for conducting discovery. Counsel for Topaz argued that "if [the court] doesn't find that the entire case is disposed of by this report, your Honor can, under the authority of CCP 644, take what Mr. Hurley the referee has issued as his findings and adopt those." Because the bench trial was "about the numbers . . . the case [would be] over." The court denied Topaz's request to enter judgment, denied Plum's motion to reopen discovery, and indicated it would think over "what use, if any, this report is going to be put in the trial," setting a court trial for October 13, 2015.

The court later requested supplemental briefing on the validity of the reference signed by the attorneys for the parties.

At a hearing on October 13, 2015, the day set for court trial, the trial court stated that after reading *Estate of Doran* (1956) 138 Cal.App.2d 541, 544, it had concluded counsel had authority to stipulate on the parties' behalf to the referee's jurisdiction. The court now intended "to take Mr. Hurley's report and to accept as proven the factual findings that he made and then we'll see what's left of the case thereafter." The parties and court discussed whether a cause of action for fraud remained. Topaz's counsel argued that the fraud claim concerned the breaches of contract, which was part of the accounting. Topaz indicated it



would not proceed on what remained of its complaint, and agreed Plum could try “whatever they believe is left” of Plum’s case.

The court’s minute order stated: “While this settles the question of the validity of the stipulation, the issue now is the extent and scope of the stipulation vis-à-vis the complaint and cross-complaint.” The court signed and filed an order adopting the referee’s report as “the decision of this Court with respect to ‘the books, records, and documents of the parties,’ ” and ordered briefing on “what remains of this action and how the parties wish to proceed.”

Topaz filed a brief arguing the referee’s report considered and resolved all the overlapping causes of action in Plum’s complaint. The fraud cause of action alleged the identical amount of damages as alleged for breach of contract. The other claims were subsumed in the contract claims, and therefore “there are no additional issues to be tried” in this matter. Plum’s brief agreed the action was “based, in large part, upon accounting,” and argued the referee’s report would prove Plum’s claim at trial, where Plum would claim “the Yehezkelof Parties have engaged in after-the-fact, fraudulent accounting” in order to conceal from discovery the actual amounts owed to Plum. At trial, the report should be admitted into evidence and the referee should be called as a witness to testify to his analysis and his findings, and the report would be the basis for examination of the Yehezkelofs.

#### **4. *Final hearing and entry of judgment***

At a hearing on November 3, 2015, the court noted that Plum’s briefing criticized the process, analysis, and findings of the referee “which is really not the point of today’s hearing,” as the court had already indicated it would adopt the report. Topaz

had unequivocally stated that nothing remained of the case following the referee's report, and the court agreed: "[T]here really is nothing left of either side of this case." The court agreed with Topaz that the transactions that were the subject matter of the fraud claim had been resolved in favor of Topaz.

Plum argued that Topaz created all the documents used in the accounting after Plum filed suit. Plum had wanted "one set of eyes reviewing that accounting, and after that set of eyes reviews the accounting, we'll move forward from there. . . . [W]e don't dispute the numbers that that accounting sets forth. We think that supports our case 100 percent." "[W]e believe that report should be binding as to what the numbers are that the accounting says."

Topaz pointed out that Plum filed suit two years earlier, and could not now claim it had known all along that all the documents submitted to the referee were fraudulent accounting. The fraud claim in Plum's complaint alleged Topaz had not kept accurate books and did not provide Plum with an accounting, with damages the same as the breach of contract claim. Now the accounting was complete, and there was nothing left to try.

Plum agreed "if the court's inclined to adopt the report that's consistent with all parties' intent," but Plum wanted a trial to show "the sum is a result of fraudulent parts," by putting the referee on the stand to discuss "where these numbers came from."

The court stated the fraud claim was the only cause of action Plum continued to argue, and it was no longer viable. The court adopted the referee's report in full and ordered the parties to submit a judgment reflecting the amount specified by the referee.

On November 30, 2015, the court entered judgment for Topaz in the amount of \$484,206. Plum filed a timely notice of appeal from the notice of entry of judgment.

### DISCUSSION

Plum argues the trial court erred in determining that counsel could bind Plum to a “general reference” under section 638. That section states, in pertinent part: “A referee may be appointed upon the agreement of the parties filed with the clerk, or judge . . . : [¶] (a) To hear and determine any or all of the issues in an action or proceeding, whether of fact or of law, and to report a statement of decision. [¶] (b) To ascertain a fact necessary to enable the court to determine an action or proceeding.” (See *Jovine v. FHP, Inc.* (1998) 64 Cal.App.4th 1506, 1521–1522.)

Section 283 states: “An attorney and counselor shall have authority . . . [t]o bind his client in any of the steps of an action or proceeding by his agreement filed with the Clerk . . . .” In *Estate of Doran, supra*, 138 Cal.App.2d 541, two of the heirs of a decedent’s predeceased husband were represented by John Doran, who was also a party. Cocounsel with Doran and his attorney of record represented to the court that by verbal stipulation all had agreed to a reference to determine heirship, and that Doran, who was not present, did not object or agree. The trial court ordered the case to trial before a referee, who determined that Doran was not an heir, as none of the estate was either community property or separate property of the predeceased husband. Doran and other heirs challenged the reference as outside the court’s jurisdiction, as they did not consent in writing or in open court to the referee’s appointment, as required by section 638. (*Doran*, at pp. 543–545.) The court

compared the language of sections 638 and 283, and concluded that an “agreement for reference . . . entered into by attorneys of record for all parties” withstood an appellate challenge by parties whose attorneys signed such an agreement on their behalf. In addition, “where a reference has been ordered without consent, it is waived by a failure to take objection thereto,” and in the trial court the appellants had not objected that they had not consented to the reference. (*Doran*, at pp. 546–547.)

Under *Estate of Doran*, the reference signed by Plum’s attorney of record on its behalf binds Plum. The stipulation is a contract whose terms “are determined by objective rather than by subjective criteria,” and while the court interprets the contract to give effect to the parties’ mutual intent, undisclosed intent or understanding is irrelevant. (*Cedars-Sinai Medical Center v. Shewry* (2006) 137 Cal.App.4th 964, 980; *Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632.) Plum participated in the reference without objecting that it did not consent, which “established [its] prior consent to the court’s reference, or at least a waiver of any objections thereto.” (*Estate of Johnston* (1970) 12 Cal.App.3d 855, 859.) Plum even agreed in open court that it was consistent with the parties’ intent that the court adopt the report of the referee.

*Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, does not help Plum. When the client learned that her attorney stipulated to binding arbitration against her desire to retain the right to trial de novo, she immediately objected, fired the attorney, and with new counsel moved to invalidate the stipulation on the grounds that she had never given her consent. (*Id.* at p. 401.) The Supreme Court held that the attorney, as the client’s agent, lacked the authority to stipulate to arbitration without informing

his client and obtaining her consent. (*Id.* at pp. 407–408.) Here, Plum was informed and consented to the reference.

Plum argues that the trial court was wrong in “determining that the subject stipulation constituted a general reference concerning *all* of the issues in this action.” The trial court did not rule that the stipulation referred all issues to the referee, or that it was a general reference. Instead, the trial court ordered the referee to do what the stipulation provided—act as a referee *as to Plum’s and Topaz’s books and records*—with a final report binding on the parties as to that accounting only.

Nor did the trial court determine that Plum waived its right to trial. After Plum received the final report, Plum asked for more discovery even though the discovery cut-off date was long past. The court denied the motion to reopen discovery and also denied Topaz’s motion for entry of judgment and set a date for court trial. After concluding counsel had authority to sign the stipulation on behalf of the parties, the court accepted as proven the referee’s factual findings, and ordered the parties to brief what remained for trial. After briefing and a hearing, the court agreed that the accounting performed by the referee did resolve all the issues in Plum’s complaint, including the fraud claim, and nothing remained for trial. The trial court did not rule that Plum had waived its right to trial when it entered into the stipulation. After the final report, additional briefing, and argument, the court concluded that no issues remained for trial.

We reject Plum’s argument that the trial court should have independently reviewed the referee’s findings. Plum did not promptly object to those findings or move to set them aside. (*Martino v. Denevi* (1986) 182 Cal.App.3d 553, 557; § 645.)

Instead, Plum argued the numbers in the report should be binding.

We also reject Plum's argument that the trial court abused its discretion when it denied Plum's motion to reopen discovery to show that Topaz submitted fraudulent information to the referee. The discovery cut-off date of November 15, 2014 was long past when Plum made the motion. Plum had received copies of all the information and documents Topaz submitted to the referee, and had ample opportunity to challenge the authenticity of the information before the referee issued its report. Plum and Topaz agreed they would conduct depositions after the preliminary findings of the referee. Plum did not attempt to do so after the referee's preliminary analysis in December 2014 or after the referee's May 8, 2015 report. Plum moved to reopen discovery only after the referee made his report final a month later on June 10, 2015, and the trial court did not exceed the bounds of reason in denying the motion. (*Hernandez v. Superior Court* (2004) 115 Cal.App.4th 1242, 1246.)

### **DISPOSITION**

The judgment is affirmed. Topaz Financial Services, LLC, Alon Yehezkelof, Mordechai Yehezkelof, and Ronit Yehezkelof are awarded costs on appeal.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

EGERTON, J.

We concur:

EDMON, P. J.

KALRA, J.\*

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