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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

INDIGO GROUP USA, Plaintiff and Appellant, v. TRUMAN PARK et al., Defendants and Respondents.	B282163 (Los Angeles County Super. Ct. No. BC598575)

APPEAL from a judgment of the Superior Court of Los Angeles County, Elizabeth Feffer, Judge. Affirmed.

Mitchell M. Tsai for Plaintiff and Appellant.

Law Offices of Kim, Au & Associates, John Y. Kim and Jason T. Yoon, for Defendants and Respondents.

Plaintiff Indigo Group USA (plaintiff) sued defendants Truman Park (Park) and Majesty & Royalty, Inc. (Majesty) (collectively, defendants), alleging they purchased approximately 14,000 pairs of jeans and failed to pay the contract price. Defendants contended they took possession of the jeans pursuant to a consignment agreement and owed plaintiff nothing.[1] After hearing evidence at a bench trial, the trial court agreed with defendants' characterization of the transaction but found defendants were unjustly enriched by their continued possession of the jeans. The court ordered defendant to return the unsold jeans to plaintiff, but plaintiff asserts it was entitled to monetary restitution instead. We consider whether such a restitution remedy was required because plaintiff preferred that remedy or because there was evidence the jeans' aggregate value had declined after defendants sold some but not all of the inventory.

I. BACKGROUND

Plaintiff's operative complaint alleged causes of action against defendants for breach of contract, account stated, and unjust enrichment. Three witnesses testified at bench trial held in early 2017: John Kang (Kang), plaintiff's "president and

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[1] "A consignment sale is one in which the merchant takes possession of goods and holds them for sale with the obligation to pay the owner for the goods from the proceeds of a sale by the merchant. If the merchant does not sell the goods the merchant may return the goods to the owner without obligation. [Citation.] In a consignment sale transaction, title to the goods generally remains with the original owner." (*Bank of California v. Thornton-Blue Pacific, Inc.* (1997) 53 Cal.App.4th 841, 847.)

owner"; Veronica Juarez (Juarez), an accounting office manager for plaintiff; and Park, Majesty's president and sole owner.

Kang testified plaintiff is a "high-end denim manufacturing company." Kang met Park in 2015, and the two discussed plaintiff's existing inventory of about 14,000 pairs of jeans. Kang testified that when Park picked up the jeans in July 2015, Kang was "under the impression that he [was] selling these goods to Mr. Park directly as an individual," as opposed to "any sort of consignment or alternative basis." Park, on the other hand, testified the transaction was not a purchase, but rather a consignment to help move plaintiff's "leftover product"—a mix of summer and winter garments "more than ten years old."

In a series of text messages exchanged the day Park picked up the jeans, Park (Majesty's president) asked Kang (plaintiff's president) "how much each pants?" and Kang replied "I'll be happy w[ith] 10." Kang testified he was "telling [Park] like if I got $10 all at once up front, I could take the goods at $10 per piece," a "discount" for up-front payment. Park testified the exchange reflected that "for each jeans that's being sold[,] Mr. Kang's going to get $10." Days later, Kang had Juarez prepare an invoice addressed to Park listing quantities and prices of various jeans, a credit of $3,380, and an amount due of $719,733. This amount reflected prices listed in plaintiff's inventory catalog.

Park testified he had difficulty selling plaintiff's jeans through his "wholesale cash and carry" system because he lacked confidence in the contents of Kang's inventory (he received one pallet of jeans fewer than expected) and did not have faith that

the "packs" of jeans he sold to customers contained an appropriate mix of sizes.[2]

By the end of July, Kang was looking to sell the jeans to "another buyer" and asked Park to stop all sales and provide an inventory of the remaining product. In text messages a little over a week later, however, Kang asked "How's my jeans selling" and told Park: "I need . . . some cash this week." He went on to tell Park: "Don't sell my jeans till u give me payment plan. I want payment plan by end of this week. Otherwise pack all my jeans. I will pick it up next week."

Over the next several weeks, Kang repeatedly asked Park to stop selling the jeans and to provide an inventory because he was courting yet another buyer. Park conceded defendants did not immediately stop selling the jeans, but attributed this in part to mixed messages from Kang: "Sometime next day, hey, Mr. Kang wants to sell. He give me the permission. And then later on, he stop me again."

When Park sent a text message indicating the jeans were ready for Kang to pick up, Kang replied, "Dude. Its that easy. U r the most irresponsible biz person with no regards for other

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[2] Park testified his team could not "make it some kind of a packing. So which is no sizes, and we give it to maybe two group, big size and small size. So there's many things to do to sell to those. So it's not a good ratio. It's all broken size. [¶] Even I cannot believe that quantity because we pick up the 14 pallet, but it was 13 pallets. So one pallet short. So I ask him what happened. It was damaged. Then that means I have to redo it, whole inventory, again. Because I'm not bad seller. My customers trust me. If I tell them I don't have a certain size, they charge me because they willing to sell this product because they imagine the selling to their actual one by one customer."

peoples biz I met. To start $10 price was based whole inventory. U told it's easy for u to sell btwn ur 4 stores n ur sales network. 2nd 2x u caused sell of entire inventory. 3rd u ruined my size scales for future sales . . . ." Kang testified "size scales" refer to the distribution of sizes in stock for each style and emphasized it was desirable when selling jeans to have a distribution of sizes clustered around the medium size.[3]

After hearing all the evidence, the trial court ruled "it appears more likely than not that the defense version [of events] was correct, that this was a consignment agreement from the testimony of the plaintiff's representative, Mr. Kang." The court emphasized, among other things, that Kang's inquiries about how the jeans were selling were "consistent with a consignment agreement" because "[i]f the jeans are sold, they're sold. It doesn't matter how they're selling or what sizes are being sold. Further, if there's a contract for sale, why is Mr. Kang on behalf of plaintiff lining up alternate buyers? It's sold." Accordingly, the court ordered "judgment be entered in favor of the defendant

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[3] Specifically, Kang testified "[s]ize scale is like you have a—if you have one style, I mean, in that style you're not selling like one customer just that wears one size. There's, you know, variance from your small to large size. So if a retail store or anybody who wants to sell that style to their customers, you know, you got to have the range of styles. [¶] So I mean like—but at the same time, in that size scale, like most important sizes are like your medium sizes. . . . [¶] . . . But if you just take out like all the good sizes out or the ratio is not like good ratio, it's like—you lose its value."

and against the plaintiff" as to plaintiff's causes of action for breach of contract for sale of goods and account stated.

With respect to unjust enrichment, however, the court found "there's no evidence that the defendant's [still] selling the jeans or has withheld payment for any sold jeans to the plaintiff. So with respect to any monetary damages for unjust enrichment, the plaintiff has failed to provide any evidence that the plaintiff is entitled to damages in that regard. . . . [¶] But the defendant does, however, retain possession of the jeans; and, therefore, the court finds it appropriate to find for the plaintiff on the third cause of action of unjust enrichment. There's no evidence of monetary damages; but as the court was asked for in the prayer of relief for other—such other relief as is appropriate, the court finds for the plaintiff and against the defendant on the third cause of action for unjust enrichment and orders that the defendant return all unsold jeans to the plaintiff."

II. DISCUSSION

Plaintiff contends it was entitled to monetary restitution on an unjust enrichment theory for two reasons. First, it argues it had a right to elect monetary restitution and, upon making such an election, the trial court lacked discretion to order defendants to return the jeans instead. Second, in the alternative, plaintiff argues there was no substantial evidence to support the trial court's determination that returning the jeans was a fully adequate remedy for defendants' unjust enrichment.

Plaintiff misapprehends both the law and the trial court's ruling. On the law, plaintiff's position is incorrect—the court was not obligated to defer to its preference for monetary restitution. There is also no basis for plaintiff's assertion that returning the

goods was an inadequate remedy because defendants reduced the jeans' value by selling the "most attractive, common sizes." Plaintiff does not challenge the trial court's finding that defendants sold the jeans—and duly paid plaintiff a flat rate for every pair sold—pursuant to a consignment agreement, and there is no substantial evidence to support plaintiff's assertion that the years-old jeans lost value between 2015 (when defendants took possession of them) and 2017 (when the trial court entered judgment for plaintiff) because of changed fashions.

A. Unjust Enrichment Generally

"Unjust enrichment is an equitable principle that underlies 'various legal doctrines and remedies.' [Citation.] It is based on the idea that 'one person should not be permitted unjustly to enrich himself at the expense of another, but should be required to make restitution of or for property or benefits received, retained, or appropriated, where it is just and equitable that such restitution be made, and where such action involves no violation or frustration of law or opposition to public policy, either directly or indirectly.' [Citations.]" (*County of San Bernardino v. Walsh* (2007) 158 Cal.App.4th 533, 542. (*Walsh*).)

"A defendant's unjust enrichment is typically measured by the defendant's profits flowing from the misappropriation. A defendant's profits often represent profits the plaintiff would otherwise have earned. [Citation.]" (*Ajaxo, Inc. v. E*Trade Financial Corp.* (2010) 187 Cal.App.4th 1295, 1305 (*Ajaxo*); accord *Walsh*, *supra*, 158 Cal.App.4th at p. 542 ["Typically, the defendant's benefit and the plaintiff's loss are the same, and restitution requires the defendant to restore the plaintiff to his or her original position. [Citations.] The principle of unjust

enrichment, however, is broader than mere 'restoration' of what the plaintiff lost"].) "Recovery is not prohibited just because the benefit cannot be precisely measured. But as with any other pecuniary remedy, there must be some reasonable basis for the computation." (*Ajaxo*, *supra*, at p. 1305; accord, *Colgan v. Leatherman Tool Group, Inc.* (2006) 135 Cal.App.4th 663, 700 ["Restitution awards made pursuant to a common law equitable unjust enrichment theory must . . . be supported by substantial evidence"].)

B. The Court Had Discretion to Award Other Than Monetary Restitution

Although plaintiff contends the trial court had no discretion to order defendants to return the jeans when plaintiff preferred monetary restitution—despite requesting "[s]uch other and further relief as the Court deems proper" in its operative complaint—the authority he cites provides no support for his contention.

Plaintiff cites *Minsky v. City of Los Angeles* (1974) 11 Cal.3d 113, 121 (*Minsky*) for the proposition that "'[w]here a wrongdoer has converted . . . personal property, the injured owner must elect between his right of ownership and possession (with the remedy of specific recovery) and his right to compensation (with the remedies of damages for conversion or quasi-contract recovery of value on theory of waiver of tort).' [Citation.]" *Minsky* has no relevance to this case or even to restitution generally. As stated in the very first line of the opinion, *Minsky* concerned "whether the claims statutes (Gov. Code, § 900 et seq.) requiring the presentation of certain claims against the government within designated time limits apply to an

action by an arrestee for the return of property taken by local police officers at the time of arrest and wrongfully withheld following the disposition of criminal charges." (*Id.* at pp. 116-117.)

The language from *Minsky* that plaintiff quotes (in isolation) is taken from the opinion's discussion of whether an arrestee's claim for a return of specific property (cash) was a claim for "'money or damages'" for purposes of the claims statutes. (*Id.* at p. 121.) It is drawn from Witkin's discussion of the election of rights doctrine—which requires plaintiffs to elect between inconsistent remedies in certain circumstances—and serves merely to illustrate the principle, inapplicable here, that "[a] claim for the specific recovery of property has never been considered a claim for 'money or damages' as used in [the claims statutes]." (*Ibid.*; 2 Witkin, Cal. Procedure (2d ed. 1970) Actions, § 114.)

Plaintiff also cites two illustrations from the Restatement (Third) of Restitution and Unjust Enrichment to argue it was entitled to the market value of the jeans when defendants took possession.[4] Neither illustration suggests the trial court was

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[4] First: "Husband embezzles $20,000 from Employer and uses this money together with $5000 of his own to buy jewelry worth $25,000 as a present for Wife. Wife is unaware of the source of the funds. By the time the facts come to light, the value of the jewelry at second hand is only $18,000. Wife (as donee) is liable to Employer in restitution, but Wife (as an innocent recipient) may not be subjected to a liability that is prejudicial to her [citation]. Even if Wife's original enrichment at the expense of Employer was $20,000, a judgment in that amount against Wife would subject her to an unfavorable forced exchange. Employer is entitled to an equitable lien on Wife's jewelry to

required to order monetary restitution. Indeed, the Restatement contemplates "[s]pecific restitution of property that may be restored to the claimant eliminates unjust enrichment without the need to measure it." (Rest.3d Restitution & Unjust Enrichment, ch. 7, topic 1, intro. note.) What both illustrations underscore instead is plaintiff's more fundamental objection that the current value of the jeans is less than the unjust enrichment enjoyed by defendants. We turn to this objection now.

C. The Trial Court Did Not Err in Concluding Return of the Jeans Was the Appropriate Unjust Enrichment Remedy

The trial court found there was "no evidence that the defendant's [still] selling the jeans or has withheld payment for

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secure its claim to $20,000; the deficiency of $2,000 may be recoverable from Husband but not from Wife." (Rest.3d Restitution & Unjust Enrichment, § 56, com. g, illus. 20.)

Second: "Without obtaining permission, Orchestra uses a photograph of Artist's sculpture to illustrate one page of a brochure advertising season subscriptions. It is conceded that this use of the image is an infringement of Artist's copyright. Artist is entitled to recover Orchestra's profits attributable to the infringement, but he is unable to produce any evidence of what these might have been (if any). Artist is likewise entitled to recover damages, but he is unable to show that he suffered any. Nevertheless, Orchestra is liable in restitution for the value of what it has obtained in violation of Artist's rights: in this case, the use it made of the photograph in question. The court determines that the reasonable price of a license for such use is $1000. Orchestra is liable to Artist in restitution (whether characterized as 'damages' or 'profits' under the Copyright Act) in the amount of $1000." (Rest.3d Restitution & Unjust Enrichment, § 51, com. d, illus. 9.)

any sold jeans to the plaintiff" and concluded: "So with respect to any monetary damages for unjust enrichment, the plaintiff has failed to provide any evidence that the plaintiff is entitled to damages in that regard." Plaintiff contends there is no substantial evidence supporting the court's conclusion both because defendants' sale of "the most attractive, common sizes" ruined his "size scales" and because the value of jeans "change[s] from season to season." As a result, plaintiff argues, the unsold jeans' value decreased between 2015 and 2017 and their return did not restore plaintiff to its original position.

Plaintiff's theory that it is entitled to restitution based on defendants' "ruining" the size scales is inconsistent with the trial court's unchallenged ruling (supported, in any event, by substantial evidence) that defendants sold plaintiff's jeans pursuant to a consignment agreement. If, as plaintiff argues, certain sizes are more valuable than others—or, more specifically, a particular range of sizes is more valuable at wholesale than another—it could have negotiated a premium for popular sizes in the consignment agreement. Instead, it agreed to a flat rate of ten dollars per garment. Plaintiff does not dispute it received this payment for each garment defendants sold. The trial court found defendants were unjustly enriched by their continued possession of the jeans—it did not find defendants were unjustly enriched by their sales of popular sizes.

Plaintiff's alternative suggestion, that it is entitled to monetary restitution because "jeans are something that change with the fashion from season to season," fares no better on the trial record. As the trial court recognized, the jeans were already several years old when defendants took possession of them in 2015. There was no evidence at trial to establish either that they

were fashionable in 2015 or that they were any less fashionable in 2017.

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

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BAKER, Acting P. J.

We concur:

MOOR, J.

KIN, J.*

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