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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

CALIENTE DESCANSANDO, LLC.,

Plaintiff and Respondent,

v.

A & A INTERNATIONAL SHIPPING,
INC.,

Defendant and Appellant.

B275568

(Los Angeles County
Super. Ct. No. TC028166)

APPEAL from an order of the Superior Court of Los Angeles County, Brian S. Currey, Judge. Affirmed.

Nsahlai Law Firm and Emmanuel Nsahlai for Defendant and Appellant.

Geraci Law Firm, Paul J. Sievers, Amy E. Martinez and Larissa E. Branes for Plaintiff and Respondent.

Caliente Descansando (Caliente) entered into a lease agreement with A & A International Shipping (A & A), and subsequently filed suit after A & A failed to pay its rent. Caliente first filed a breach of guaranty claim followed by an unlawful detainer suit. The parties ultimately negotiated a global settlement of all pending cases between the two parties, which encompassed Caliente's breach of guaranty and unlawful detainer actions, as well as a first amended cross-complaint A & A had filed against Caliente in the breach of guaranty case. However, due to a scrivener's error, the parties' settlement agreement mistakenly stated that a different cross-complaint—one that the trial court had already dismissed without leave to amend—would be dismissed as part of the settlement. When A & A discovered the error, it refused to comply with the settlement agreement and instead demanded that Caliente pay substantial additional compensation for the dismissal of A & A's first amended cross-complaint. Caliente then filed a motion to reform the settlement agreement to reflect the true and mutual intent of the parties. The trial court granted the motion. We affirm.

BACKGROUND

I. The civil action and unlawful detainer action

On September 28, 2010, Caliente entered into a lease agreement with A & A in which Caliente agreed to lease real property in Gardena (the premises) for a monthly payment of \$20,566. Anton Tombu (Tombu) and Algis Gulbinas (Gulbinas), the principals of A & A, signed a separate "Guaranty of Lease" in which they jointly and severally agreed to guarantee the prompt payment of all rent and sums due under the lease.

After A & A failed to pay rent on the premises from February 2015 through June 2015, Caliente sent a notice of default and demand for payment to A & A, Tombu and Gulbinas. However, neither A & A nor Tombu or Gulbinas cured the default and, as of June 3, 2015, owed Caliente approximately \$111,000. As a result, Caliente filed a complaint for breach of guaranty against Tombu and Gulbinas. The case was assigned number TC028166 (the civil action).

On June 5, 2015, Caliente applied for a writ of attachment over the approximately \$97,000 in net proceeds from the sale of an investment property owned by Tombu. The trial court granted the application.

On July 1, 2015, Caliente filed an unlawful detainer complaint against A & A, in which it sought possession of the premises and approximately \$90,000 in past due rent as well as damages, attorney fees, and forfeiture of the lease agreement.¹ The case was assigned number TC028186 (the unlawful detainer action).

On July 14, 2015, A & A, Tombu and Gulbinas filed a cross-complaint against Caliente in the civil action, alleging twelve causes of action relating to the lease agreement. On August 31 2015, Caliente filed a demurrer to the cross-complaint based, in part, on Tombu and Gulbinas's lack of standing to seek damages

¹ After the service of the three-day notice to pay rent or quit, A & A tendered \$7,000 to Caliente, which was accepted. The balance owed through June 30, 2015, was thus reduced to \$90,057.80.

allegedly incurred by A & A as well as A & A's lack of standing due to its then-pending Chapter 11 bankruptcy proceeding.²

On October 1, 2015, the trial court issued its ruling on Caliente's demurrer to the cross-complaint. With respect to Tombu and Gulbinas, the trial court sustained the demurrer without leave to amend, holding that neither Tombu nor Gulbinas had standing to assert any of the causes of action set forth in their cross-complaint. With respect to A & A, the trial court sustained the demurrer with leave to amend as to some of the causes of action and sustained the demurrer without leave to amend as to the remaining causes of action. Following the trial court's ruling, A & A filed a first amended cross-complaint on October 15, 2015. Caliente then filed a motion to strike portions of A & A's first amended cross-complaint as well as a demurrer.

II. The global settlement

Caliente's unlawful detainer action against A & A proceeded to trial on November 13, 2015. On that day, the trial court heard argument on Caliente's motion for judgment on the pleadings and continued the case to November 16, 2015, to allow A & A to further brief certain issues. On November 16, 2015, the parties engaged in settlement negotiations while the trial court conducted other hearings. During this time, the parties reached

² A & A had filed a Chapter 11 bankruptcy petition on August 14, 2015, which was also the day the unlawful detainer action was initially set for trial. On October 13, 2015, the bankruptcy court found that A & A had filed the Chapter 11 petition "solely as a delay tactic to the unlawful detainer case in the state court" and dismissed the bankruptcy case on November 6, 2015. We take judicial notice of the bankruptcy court's October 13, 2015 minute order pursuant to Evidence Code section 452, subdivision (d) and attach the order to this opinion.

a global resolution. The parties' attorneys outlined the terms of settlement, including the term that the settlement would resolve all the claims in both the civil action and the unlawful detainer action.³ Indeed, according to Caliente's representatives present during the negotiations, resolution of both the civil action and unlawful detainer action was a material condition of settlement.⁴ The settlement also included mutual releases and waivers pursuant to Civil Code section 1542 as well as a dismissal of the civil action in its entirety.⁵

³ On October 1, 2015, the trial court sustained Caliente's demurrer to Tombu and Gulbinas's cross-complaint in the civil action without leave to amend. Therefore, on November 13, 2015, only three matters were still pending: (1) Caliente's civil action against Tombu and Gulbinas; (2) A & A's first amended cross-complaint in the civil action; and (3) Caliente's unlawful detainer action against A & A.

⁴ Declarations describing the settlement negotiations and the final agreed-upon terms were submitted to the trial court by Brad Kaplan (Kaplan), the sole member of Caliente Descansando, LLC, as well as Jenny Y. Park (Park), Caliente's attorney in the civil action, and Jeffrey M. Winter (Winter), Caliente's attorney in the unlawful detainer action.

⁵ Civil Code section 1542 sets forth the default rule for the scope of a general release of claims, providing that it does not reach "claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor." When parties execute mutual releases and agree to waive section 1542 with respect to future claims, they are agreeing to release all potential claims against each other, both known and unknown. (See *Perez v. Uline, Inc.* (2007) 157 Cal.App.4th 953, 959.)

Based on this settlement, the parties completed an unlawful detainer stipulation and judgment form. Furthermore, based on the parties' agreement that the proposed settlement was a global resolution that would resolve all the claims the parties had against each other, Caliente's attorney also prepared an attachment to the stipulation and judgment form. Pursuant to the stipulation and judgment form and attachment, Caliente and A & A agreed that judgment would be entered in favor of Caliente, and against A & A, in the unlawful detainer action in the amount of \$90,057 for past due rent and \$123,397 for holdover damages. Caliente and A & A also agreed that A & A's rights under the lease would be forfeited, Caliente would be awarded possession of the premises, and Caliente would keep A & A's security deposit. The parties further agreed that the writ of attachment funds held in the civil action would be released to Caliente's attorney and disbursed pursuant to the stipulation. As consideration for A & A timely vacating the premises, Caliente agreed to release a portion of the writ of attachment funds to A & A's agent, Tombu. Additionally, the parties agreed that if A & A vacated the premises on or before January 5, 2016, Caliente would prepare and execute any documents necessary to set aside the unlawful detainer judgment against A & A and dismiss the case with prejudice.

Critically, the last paragraph of the attachment also provided that: "Upon the full satisfaction of all of the above conditions and a mutual general release based upon Civil Code section 15421, Plaintiff shall dismiss case # TC082166 and Anton Tombu and Algis Gulbinas, as individuals, shall dismiss their cross-complaint against Plaintiff in the same action. Each side to bear their own attorney's fees and costs in this case as well as

case # TC082166.” Thus, both the civil action and the cross-complaint filed in the civil action, would be dismissed if the parties complied with the conditions imposed in the unlawful detainer case and signed a section 1542 waiver. The trial court caught and corrected two typos in this last paragraph when the parties went back on the record; namely, the citation to Civil Code section “15421,” which was corrected to section 1542, and the two references to the civil action’s case number as TC082166, which were corrected to case number TC028166. The last paragraph was interlineated to reflect these corrections.

The last paragraph of the attachment still bore one error, however. Tombu and Gulbinas no longer had a cross-complaint in the civil action at this time. The trial court had dismissed their cross-complaint without leave to amend on October 1, 2015. Thus, A & A—and only A & A—had a pending cross-complaint in the civil action.⁶ Neither the parties nor the trial court noticed this particular mistake, however. According to Kaplan, he missed this scrivener’s error because he had been negotiating directly and at length with Tombu and Gulbinas, who were also the principals of A & A. Nevertheless, Kaplan maintained, he never would have agreed to release the writ of attachment funds, conditionally agree to set aside the unlawful detainer judgment against A & A, and dismiss the civil action against Tombu and Gulbinas, if A & A—or any other party for that matter—could still maintain a cross-complaint against Caliente. According to Park, at no point during the settlement negotiations or review of

⁶ Although Caliente had filed a demurrer and motion to strike A & A’s first amended cross-complaint in the civil action, the motion hearing was not scheduled until December 1, 2015, two weeks after the unlawful detainer trial.

the stipulation did any of the opposing parties or their counsel note that the last paragraph of the attachment had mistakenly identified Tombu and Gulbinas as the parties that would be dismissing their nonexistent cross-complaint in the civil action. Park admitted that she also missed the error after a long day of hallway negotiations. The fact that A & A had filed a cross-complaint in the civil action, which named only Tombu and Gulbinas as defendants, added to this confusion. Although Winter had drafted the attachment with Park's assistance, he was unfamiliar with the procedural history of the civil action and also missed the error identifying Tombu and Gulbinas as the parties that would be dismissing the cross-complaint in the civil action.⁷

When reciting the terms of their settlement, Park told the trial court that, with respect to the civil action, the upcoming trial setting conference and hearing on the demurrer and motion to strike A & A's first amended cross-complaint should be continued. "We would like to continue those hearing dates," Park stated, "because once the settlement and release agreement is signed and these conditions have been met, both parties will be dismissing their cases." At no time during this proceeding did any opposing party or their counsel state—or even suggest—that A & A's first amended complaint would not be dismissed. The trial court then set an OSC regarding dismissal of the civil action.

The trial court also issued a minute order in the civil action on November 16, 2015, which noted that the parties had filed an

⁷ Thus, although A & A contends that Caliente offers no evidence to show how the alleged mistake or scrivener's error occurred, the motion to reform and attached declarations and exhibits clearly describe how the error happened.

unlawful detainer stipulation and judgment on this date and that, as part of the stipulation, the parties had agreed to dismiss the civil action once certain terms of that judgment were met. Accordingly, the trial court advanced the upcoming trial setting conference and the hearing on the demurrer and motion to strike A & A's first amended cross-complaint. The trial court also ordered that Caliente's attorney submit a stipulation to release the writ of attachment funds. On November 20, 2015, Caliente, Tombu and Gulbinas filed a stipulation and order in the civil action, acknowledging that they had entered into a global settlement and agreeing that the writ of attachment funds would be released to Caliente's attorney to be held in trust pursuant to the terms of the unlawful detainer stipulation and judgment executed by Caliente and A & A.

III. Performance of the global settlement terms

On November 17, 2015, Kaplan emailed A & A's counsel thanking him for his help in resolving both cases. A & A's counsel replied that their "amicable resolution would not have been possible without [Kaplan's] outstanding input and enthusiasm, as well as willingness to compromise" and said he looked forward to staying in touch.

On December 23, 2015, Caliente's attorney emailed a draft settlement and mutual release agreement to A & A's counsel, which memorialized the terms agreed upon during the unlawful detainer trial, including dismissal of the entire civil action. Pursuant to the settlement, Caliente's attorney obtained and disbursed the writ of attachment funds to Tombu and Gulbinas. On January 27, 2016, the day after Tombu and Gulbinas received the funds, A & A's counsel emailed Caliente's attorney, stating that the written settlement and mutual release agreement was

not acceptable in “form, substance or content.” Despite requests from Caliente’s attorney, A & A’s counsel failed to identify any alleged deficiencies in the settlement and mutual release agreement.

On February 2, 2016, A & A’s counsel informed Caliente’s attorney that, pending approval by Tombu and Gulbinas, he would be preparing and filing an opposition to Caliente’s demurrer and motion to strike A & A’s first amended cross-complaint. On February 8, 2016, A & A’s counsel emailed Caliente’s attorney, again contending that the settlement and mutual release agreement was not acceptable in form, substance or content without pinpointing the objectionable language or suggesting any potential revisions. Instead, A & A’s counsel taunted Caliente’s attorney, stating, “Do you spot your one glaring deficiency or error? Again, I could spell it out for you.”

Later that same day, A & A’s counsel finally revealed the perceived error: “Your proposed settlement for the [civil action] . . . seeks to close out A & A’s cross-complaint. My clients did not agree to that.” Caliente’s attorney responded that Tombu and Gulbinas’s cross-complaint had been dismissed prior to the unlawful detainer trial and, therefore, the settlement agreement could only be referencing A & A’s first amended cross-complaint. Indeed, Caliente’s attorney noted, why would the parties have negotiated for the dismissal of a cross-complaint that no longer existed? Instead, “[i]t is obvious that the parties intended to have the cross-complaint of A & A (the only cross-complaint) dismissed along with the [civil action].” According to Caliente’s attorney, the parties intent was further evidenced by the fact that the trial court vacated the trial setting conference on A & A’s cross-complaint, because it believed the unlawful detainer stipulation

and judgment resolved all their claims. Nevertheless, A & A's counsel refused to comply with the terms of the settlement agreement and demanded that Caliente pay substantial additional compensation for the dismissal of A & A's first amended cross-complaint.

IV. Caliente's motion to reform

Based on A & A's refusal to dismiss its first amended cross-complaint, Caliente filed a motion to reform the unlawful detainer stipulation and judgment and enforce the terms of the global settlement agreement. The motion sought to correct the error in the attachment to the unlawful detainer stipulation and judgment form, which mistakenly stated that Tombu and Gulbinas would be dismissing their cross-complaint, rather than A & A. To that end, the motion sought to strike "Anton Tombu and Algis Gulbinas, as individuals" from the attachment and superimpose "A & A International Shipping, Inc." over the stricken portion of the attachment. Caliente also requested that the trial court enforce the terms of the settlement by ordering a mutual release under section 1542 between Caliente, A & A, and Tombu and Gulbinas regarding the tenancy at the premises, the civil action, and the claims in A & A's first amended complaint. Caliente further requested that the trial court dismiss the civil action and A & A's first amended complaint with prejudice and set aside the unlawful detainer judgment against A & A. In short, Caliente argued, the clear intent of the parties was to reach a global resolution of the unlawful detainer and civil actions, which included a section 1542 waiver and a dismissal of both actions, including A & A's first amended cross-complaint, and that the inclusion of a nonexistent cross-complaint by Tombu and Gulbinas instead was simply a scrivener's error.

V. The trial court's order

On April 7, 2016, the trial court granted Caliente's motion to reform. The court reformed the unlawful detainer stipulation and judgment by: (1) striking "Anton Tombu and Algis Gulbinas, as individuals" and superimposing "A & A International Shipping, Inc." over the stricken portion; (2) ordering a mutual release under section 1542 between Caliente, A & A, and Tombu and Gulbinas regarding the tenancy at the premises and the claims set forth in the unlawful detainer action and civil action, including A & A's first amended cross-complaint; (3) vacating the judgment entered against A & A in the unlawful detainer action; (4) dismissing the unlawful detainer action with prejudice; and (5) dismissing the civil action, including A & A's first amended cross-complaint, with prejudice.

In so holding, the trial court found that Caliente's position regarding the intent of the parties when they entered into the unlawful detainer stipulation and judgment was the correct one. First, the trial court found it significant that A & A's counsel failed to object to or correct the record on November 16, 2015, when the parties and the trial court agreed to continue the trial setting conference and hearing on the demurrer to the first amended cross-complaint because it was agreed both parties would be dismissing their cases. A & A counsel's failure to clarify the record at that time was critical, the court stated, because it demonstrated that counsel did in fact agree with the representation that this was a global settlement. "Indeed, [the trial court] would not have continued the trial setting conference and hearing on the demurrer to the first amended complaint if it was the parties' intention all along to allow the first amended cross-complaint to proceed," the court noted. "At the very least,"

the court continued, “[A & A] counsel’s silence operates as an estoppel.”

The trial court also found counsel’s postjudgment conduct to be telling in this regard. A & A’s counsel did not provide any indication that A & A intended to proceed with the first amended cross-complaint until February 8, 2016. Rather, counsel sent several emails to Caliente’s attorney about the “one glaring deficiency or error” in the stipulation and judgment that Caliente’s attorney seemingly missed, suggesting that A & A’s counsel “discovered the error . . . at some point, recognized that it was an error, but refused to disclose or correct the error.” Moreover, the statement in the stipulation and judgment that Anton Tombu and Algis Gulbinas, as individuals, shall dismiss their cross-complaint against Caliente could only be explained as a scrivener’s error given that Tombu and Gulbinas no longer had an active cross-complaint against Caliente at the time of the stipulation and judgment. According to the trial court, “[t]he only reasonable explanation is that the parties intended to state that A & A’s Cross-Complaint would be dismissed.” Indeed, A & A’s counsel failed to cite “any specific evidence in support of his contention that there was no scrivener’s error; rather, [A & A’s] counsel simply claims that [Caliente] would have spotted the ‘error’ if there was one during the extensive settlement negotiations on 11/16/15. [Citation.] However, it is clear the error was overlooked by the parties during the settlement negotiations.”

Under the totality of the circumstances, the trial court found that the parties and the court believed that the entire civil action as well as the unlawful detainer action would be settled through the stipulation and judgment. Accordingly, the trial

court set aside and reformed the judgment pursuant to Code of Civil Procedure section 128, subdivision(a)(8), and section 473, subdivisions (b) and (d), as well as Civil Code section 3399, to reflect that A & A's first amended cross-complaint should have been dismissed as well.⁸

Pursuant to the trial court's order, Caliente's complaint in the civil action was dismissed with prejudice as to Tombu and Gulbinas. Furthermore, A & A's first amended cross-complaint against Caliente was also dismissed with prejudice. As such, case number TC028166 (the civil action) was dismissed in its entirety with prejudice. The trial court ordered that each party bear its own attorney fees and costs.

⁸ Under Code of Civil Procedure section 128, subdivision (a)(8), every court has the power to "amend and control its process and orders so as to make them conform to law and justice." Under Code of Civil Procedure section 473, subdivisions (b) and (d), the court "may, upon any terms as may be just, relieve a party . . . from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect" and "may, upon motion of the injured party, or its own motion, correct clerical mistakes in its judgment or orders as entered, so as to conform to the judgment or order directed" Under Civil Code section 3399, "[w]hen, through fraud or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value."

STANDARD OF REVIEW

The trial court's exercise of power under Code of Civil Procedure section 128, subdivision(a)(8), and section 473, subdivisions (b) and (d) is reviewed for abuse of discretion. (See *In re Joshua G.* (2005) 129 Cal.App.4th 189, 199; *Conservatorship of Tobias* (1989) 208 Cal.App.3d 1031, 1035.) Under the abuse of discretion standard, "a reviewing court should not disturb the exercise of a trial court's discretion unless it appears that there has been a miscarriage of justice." (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.) "The burden is on the party complaining to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power.'" (*Ibid.*)

With respect to the trial court's exercise of power under Civil Code section 3399, "the intention of the parties is a factual matter to be determined by the trial court, and our review of the judgment is limited to the question whether it is supported by substantial evidence." (*Campbell v. Republic Indemnity Co.* (1957) 149 Cal.App.2d 476, 480.) Accordingly, we view the entire record in the light most favorable to the prevailing party to determine whether there is substantial evidence to support the trial court's findings. (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873–874.) Under the substantial evidence standard, "[w]e look at the evidence in support of the successful party, disregarding any contrary showing, and we resolve all conflicts in favor of the respondent, indulging in all legitimate and reasonable inferences to uphold the verdict if possible. [Citation.] When two or more inferences can reasonably be deduced from the

facts, we do not substitute our deductions for those of the finder of fact.” (*Canister v. Emergency Ambulance Service, Inc.* (2008) 160 Cal.App.4th 388, 394.) In sum, we must resolve all conflicts in the evidence and draw all reasonable inferences in favor of the trial court’s findings. (See *Watson v. Department of Rehabilitation* (1989) 212 Cal.App.3d 1271, 1289.)

DISCUSSION

I. The trial court’s order

In its opening brief, A & A contends that the trial court erred because “[i]t is well established that once you have signed a settlement, you are stuck with the terms of that settlement, unless you prove fraud, mutual mistake of fact, duress or undue influence.” A & A neglects to add, however, that if there is fraud, or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, then a written contract may be revised in order to express the true intent of the parties. (Civ. Code, § 3399.) In this case, substantial evidence supports the trial court’s determination that the parties intended to resolve the civil action in its entirety—including A & A’s first amended cross-complaint—when they entered into a global settlement on November 16, 2015.

At the outset, we note that courts must interpret a contract in a manner that is reasonable and does not lead to an absurd result. (*ASP Properties Group, L.P. v. Fard, Inc.* (2005) 133 Cal.App.4th 1257, 1269.) This principle is codified in Civil Code section 1638, which provides: “The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity.” (Civ. Code, § 1638.) Here, the last paragraph of the parties’ unlawful detainer stipulation and judgment was not clear and explicit, given that it referred to a

nonexistent cross-complaint and would thus lead to an absurd result. Consequently, interpreting the contract in the manner encouraged by A & A would not be reasonable.

Furthermore, “[t]he goal of contractual interpretation is to determine and give effect to the mutual intention of the parties.” (*Safeco Ins. Co. v. Robert S.* (2001) 26 Cal.4th 758, 763.) Thus, a “court’s paramount consideration in construing [a] stipulation is the parties’ objective intent when they entered into it.” (*Sy First Family Ltd. Partnership v. Cheung* (1999) 70 Cal.App.4th 1334, 1341.) Despite A & A’s argument to the contrary, the record is replete with objective indicators of the parties’ mutual intent. At no time during the November 16, 2015, hearing did anyone in the courtroom indicate that A & A’s first amended cross-complaint would not be dismissed. Nor did A & A’s counsel correct the express representation made by Caliente’s attorney that both the civil action and unlawful detainer action would be dismissed. Furthermore, in the unlawful detainer stipulation and judgment, A & A agreed to a general release of all claims and a waiver under Civil Code section 1542 without carving out an exception for A & A’s first amended cross-complaint. This would have been a nonsensical concession had A & A truly intended to maintain its only claim. The parties also agreed to bear their own attorney fees in each action, a premature and illogical arrangement if the parties intended to proceed with A & A’s first amended cross-complaint.

Indeed, it defies logic and common sense that Caliente would dismiss its claim against A & A in the unlawful detainer action and its claim against Tombu and Gulbinas in the civil action but permit A & A’s first amended cross-complaint to proceed against it. It also defies belief that Caliente would agree

to release a portion of the writ of attachment funds, set aside the unlawful detainer judgment against A & A, and dismiss the case with prejudice, yet permit the A & A's first amended cross-complaint to continue. The trial court also understood the parties' intent as stated on the record once negotiations were complete. Indeed, as the court later noted, if the parties did not intend to settle both the civil action and unlawful detainer action, it would not have continued the hearing on the demurrer and motion to strike A & A's first amended cross-complaint—and set an OSC regarding dismissal—because the settlement would not have affected the disposition of the first amended cross-complaint.

The postjudgment conduct of A & A's counsel is also instructive. Although the unlawful detainer stipulation and judgment was entered on November 16, 2015, A & A's counsel made no effort to proceed with A & A's first amended cross-complaint or oppose Caliente's demurrer and motion to strike until February 2016. It was only after a portion of the writ of attachment funds had been released that A & A's counsel made any indication he intended to proceed with A & A's first amended cross-complaint. If this had been the intent all along, however, there would have been no need to taunt Caliente's attorney about the "one glaring deficiency or error"—A & A's counsel would have just stated the error. Nor would A & A's counsel have needed to ask his clients for approval to oppose the demurrer and motion to strike A & A's first amended cross-complaint.

"A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." (Civ. Code, § 1636). When, through a mistake, "a written

contract does not truly express the intention of the parties, it may be revised . . . to express that intention.” (Civ. Code, § 3399.) A mistake includes error on the scrivener’s part: “In the classic reformation case a contract is formed, but a provision of the writing that is executed, through mistake such as a scrivener’s error, contradicts the terms to which the parties agreed. In such a case, upon evidence of the actual agreement a court is empowered to correct the error by striking the mistaken language in the instrument and inserting appropriate language.” (*Pacific Gas & Electric Co. v. Superior Court* (1993) 15 Cal.App.4th 576, 593, abrogated on other grounds by *Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 376–377.) Based on the objective signs of the parties’ mutual intent discussed above, it is clear that this is a classic reformation case.⁹ Therefore, the trial court was empowered to correct the error at issue here by striking the mistaken language and inserting appropriate language. (See *Pacific Gas*, at p. 593.) The trial court’s decision

⁹ A & A contends that the parol evidence rule precludes Caliente from relying on extrinsic evidence to contradict the stipulation and judgment’s written terms. Not so. “The parol evidence rule protects the integrity of written contracts by making their terms the exclusive evidence of the parties’ agreement.” (*Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Assn.* (2013) 55 Cal.4th 1169, 1171–1172.) However, “[w]here a mistake or imperfection of the writing is put in issue by the pleadings, [the parol evidence rule] does not exclude evidence relevant to that issue.” (Code Civ. Proc., § 1856, subd. (e).) Given that Caliente’s motion to reform put in issue the mutual mistake within the stipulation and judgment, the trial court properly replied on extrinsic evidence, such as counsel’s declarations in support of and in opposition to the motion.

to do so was supported by substantial evidence and did not constitute an abuse of discretion.¹⁰

DISPOSITION

The order granting the motion to reform is affirmed. A & A International Shipping, Inc. shall pay Caliente Descansando, LLC's fees and costs on appeal.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

BENDIX, J.

¹⁰ Contrary to A & A's argument on appeal, the trial court did not make a new contract for the parties or add a party who was not a party to the original agreement. Nor did the trial court err in deciding the cases as consolidated when no motion to consolidate had been filed. The motion to reform was filed in the unlawful detainer action and its caption page states: "Case No. TC028186 (and TC028166)." A & A's argument that the cases were decided as a consolidated case appears to be based on this caption page. Given that the trial court issued rulings and orders in each action based on the global settlement of *both* actions, A & A's argument is meritless.

ATTACHMENT

**United States Bankruptcy Court Central District of
California Los Angeles
Judge Ernest Robles,
Presiding Courtroom 1568
Calendar**

Tuesday, October 13, 2015

Hearing Room 1568

11:00 AM

**2:15- A & A International Shipping Inc.
22774**

Chapter 11

#113.10 Hearing
RE: [7] Notice of motion and motion for relief from the automatic stay with supporting declarations UNLAWFUL DETAINER RE: 15914 S. AVALON BLVD. COMPTON, CA 90220 Notice of Motion and Motion for Relief from the Automatic Stay. With Exhibits A through C..

FR. 9-14-15

Docket 7

Matter Notes:

10/13/2015

The tentative ruling will be the order.

POST PDF OF TENTATIVE RULING TO CIAO

Tentative Ruling:

10/8/2015: For the reasons set forth below, GRANT Motion.

N.B. The notice issue raised in a previous tentative ruling for this motion has been corrected.

Pleadings Filed and Reviewed

1. Notice of Motion and Motion for Relief from the Automatic Stay or for order Confirming That the Automatic Stay Does Not Apply Under 11 U.S.C. § 362 (l) ("Motion") [Doc. No. 7]
2. Response to Motion Regarding the Automatic Stay ("Response") [Doc. No. 18]
3. Declaration of Algis Gulbinas In Support of Opposition to Motion for Relief of Automatic Stay ("Gulbinas Declaration") [Doc. No. 17]
4. Order to Continue Hearing on Motion [Doc. No. 21]

**United States Bankruptcy Court Central District of
California Los Angeles
Judge Ernest Robles,
Presiding Courtroom 1568
Calendar**

Tuesday, October 13, 2015

Hearing Room 1568

11:00 AM

CONT...

A & A International Shipping Inc.

Chapter 11

5. Amended Proof of Service [Doc. No. 22]

Facts and Summary of Pleadings

A & A International Shipping, Inc. ("Debtor") filed a voluntary chapter 11 petition on August 14, 2015. Doc. No. 1.

1. Motion

On August 21, 2015, Caliente Descansando, LLC, a California limited liability company ("Movant"), filed a motion for relief from the automatic stay under 11 U.S.C. § 362(d)(1) and (d)(2). Doc. No. 7. The Debtor remains at 15914 S. Avalon Blvd., Compton, California 90220 ("Property") pursuant to a lease that is in default. Debtor failed to pay the monthly rent of \$20,566.26 through June 30, 2015. Motion, at 7. Movant caused a notice to quit to be served on Debtor on June 5, 2015. *Id.*, Ex. A. An unlawful detainer proceeding was commenced on June 16, 2015. *Id.* at 3. A trial was held on August 14, 2015, and it was continued to October 2, 2015. *Id.* at 8.

Movant asserts that cause exists such that relief from the automatic stay is proper under 11 U.S.C. § 362(d)(1) and (d)(2). Movant contends that Debtor's right to possession should terminate under § 362(d)(1) because Debtor has failed to pay rent since filing of the bankruptcy. Motion, at 4. Alternatively, the Movant argues that relief should be granted under § 362(d)(2) since the Debtor has no equity in the Property and Property is not necessary to an effective reorganization. *Id.*

Movant requests that the Court retroactively annuls the automatic stay. Motion, at 4. Movant took postpetition actions against the Debtor because these actions were taken before Movant knew the bankruptcy petition was filed, and Movant would have been entitled to relief from stay to proceed with these actions. *Id.* at 4; Declaration of Laurence Bradley Kaplan ("Kaplan Decl."), ¶ 12. In addition, Movant requests that the 14-day stay prescribed by FRBP 4001(a)(3) is waived. Motion, at 5.

2. Opposition

As a preliminary matter, the Court notes that the Debtor, a corporate entity,

filed an opposition to the Motion without legal representation, in violation of Local

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Bankruptcy Rule 9011-2(a). A hearing on the United States Trustee's Motion to Dismiss or Convert or Appoint a Chapter 11 Trustee and the Order to Show Cause re: Dismissal or Conversion addressing the same issue, *inter alia*, is being heard today as well. *See* Doc. No. 10, 14.

Debtor filed an opposition and attached the declaration of Algis Gulbinas, the Principal of the Debtor ("Gulbinas Decl."), in support thereof ("Opposition"). Doc. No. 18. In the Opposition, the Debtor contends that the Property is necessary for an effective reorganization and that Debtor intends to file a plan of reorganization that requires use of the Property. Opposition, at 2. However, this is not supported by the Gulbinas Declaration. In his declaration, Gulbinas states that the Debtor "file[d] this Chapter 11 bankruptcy because its landlord's unlawful detainer lawsuit threatened its existence and operations." Gulbinas Decl., ¶ 7.

Debtor also asserts that the Movant has an equity cushion of \$97,500.00 based on the fact that the Movant has secured a writ of attachment from one of the guarantors of the Property. Gulbinas Decl., ¶ 13. Additionally, the Movant currently holds approximately \$20,000.00 from the Debtor in security deposit. *Id.*, ¶ 14.

**Findings of Fact and Conclusions of
Law**

For the reasons set forth below, the Motion is GRANTED pursuant to 11 U.S.C. § 362(d)(1) and (d)(2) to permit Movant to enforce its remedies to foreclose upon and obtain possession of the Property in accordance with applicable law.

I. Section 362(d)(1)

Movant has established a *prima facie* case that cause exists, and Debtor has not responded with evidence establishing that Debtor intends to file a plan of reorganization that requires use of the Property. Additionally, the Court finds that this bankruptcy case was filed solely as a delay tactic to the unlawful detainer case in the state court. Stay-relief would not be appropriate if it is possible for Debtor to assume and assign the release as part of Debtor's reorganization efforts. However, if

there is no possibility of Debtor assuming the lease, Movant should not be prejudiced. Therefore, the Court will determine whether there is any possibility that Debtor may successfully assume the lease. To begin with, even if the lease terminated pre-

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petition, Debtor still may be able to assume the lease by reversing the termination under California anti-forfeiture law.

Section 365 permits the Debtor to "assume . . . any . . . unexpired lease." "Assumability of a lease . . . in bankruptcy, in the context of a lease termination claim, involves a two-part test. The first part of the test is to determine whether the lease terminated before the petition in bankruptcy was filed The second part of the test requires the court to 'determine *whether the termination could have been reversed under a state anti-forfeiture provision or other applicable state law.*' This second step in the analysis 'permits the [debtor-in-possession] the same opportunities to avoid forfeiture of a lease ... that it would have received under state law absent the bankruptcy proceedings.'" *In re Windmill Farms, Inc.*, 841 F.2d 1467, 1472 (9th Cir. 1988) (internal citations omitted).

A. Did the Lease Terminate Pre-Petition?

To determine whether the lease terminated pre-petition, the Court looks to California law. California Code of Civil Procedure ("CCP") § 1161(2) provides that a lease terminates upon the delivery of a proper three-day notice to pay rent or quit if the tenant fails to pay the rent within the three-day period. Here, there is no dispute that Debtor failed to pay the rent after receiving a three day notice.

B. Could the Lease Termination be Reversed Under Anti-Forfeiture Law?

The second part of the test requires the Court to determine whether the lease termination could be reversed under California anti-forfeiture law.

CCP § 1179 permits the Court to "relieve a tenant against a forfeiture of a lease or rental agreement, whether written or oral, and whether or not the tenancy has terminated, and restore him or her to his or her former estate of tenancy, in case of hardship, as provided in section 1174." In determining whether to relieve a tenant against forfeiture, "the court in balancing the equities should take into consideration the circumstances of the case, the hardship, if any, to the lessee from the forfeiture, the hardship, if any, to the lessor from relieving the lessee from the forfeiture, the willful or other character of the breach, and then use its best discretion in determining

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whether relief will be granted. Its action will not be upset unless there is a clear showing of abuse of discretion." *Thrifty Oil Co. v. Batarse*, 174 Cal. App. 3d 770, 777, 220 Cal. Rptr. 285 (Cal. Ct. App. 1985) (internal citations omitted).

CCP § 3275 contains a similar anti-forfeiture provision: "Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, ..., he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty."

Debtor occupies the Property pursuant to a lease that is in default. As of the commencement of unlawful detainer proceedings in the state court, the balance owed by Debtor is \$90,057.80. The Court finds that Debtor is highly unlikely to assume the lease and does not relieve Debtor against its forfeiture. Debtor failed to file or fails to express any intention to file a plan of reorganization that requires use of the Property. Debtor has yet to obtain counsel pursuant to Local Bankruptcy Rule 9011-2(a)—despite a motion filed by UST and an Order to Show Cause issued by the Court—suggesting that Debtor has no intention of creating or submitting a reorganization plan. As Movant correctly notes, and Debtor has not disputed, the Property is nonresidential and no reorganization is reasonably in prospect.

The Court finds that Movant's interest in the collateral is not adequately protected there is cause to terminate the stay under 11 U.S.C. § 362(d)(1) for lack of equity. Stay-relief is appropriate under § 362(d)(1).

II. Section 362(d)(2)

Alternatively, the Movant contends that relief under § 362(d)(2) is proper. Under § 362(d)(2), the Court shall grant relief if the debtor lacks equity and the property is not essential to reorganization that is in prospect. The U.S. Supreme Court explained:

Once the movant under § 362(d)(2) establishes that he is an undersecured creditor, it is the burden of the debtor to establish that the collateral at issue is "necessary to an effective reorganization." See § 362(g). What this requires is not merely a showing that if there is conceivably to be an effective

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reorganization, this property will be needed for it; but that the property is essential for an effective reorganization that *is in prospect*. This means, as many lower courts, including the en banc court in this case, have properly said, that there must be "a reasonable possibility of a successful reorganization within a reasonable time."

United Sav. Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 375–76 (1988) (emphasis in original). As discussed above, the Debtor lacks equity in the Property.

The Court is unpersuaded that the Property is necessary to an effective reorganization. The Debtor's sole argument in support of such contention is that the stay-relief will force Debtor out of business. While such contention exemplifies that the Property is important to Debtor's business, it does not make the Property necessary for an *effective reorganization*. As stated above, the Debtor filed this bankruptcy case without counsel in violation of the Local Bankruptcy Rule and still has not employed one as the date of this tentative ruling. Therefore, the Court finds that Property is not necessary to an effective reorganization, and grants relief from the automatic stay under § 362(d)(2).

In light of the foregoing, the Court finds cause to waive the fourteen-day stay. The stay is also annulled retroactively to the bankruptcy petition date. All other requested relief is denied.

Based on the foregoing, the Court GRANTS the Motion under 11 U.S.C. §§ 362(d)(1) and (d)(2). Movant shall lodge a conforming order within 7 days of the hearing.

No appearance is required if submitting on the court's tentative ruling. If you intend to submit on the tentative ruling, please contact James Yu or Daniel Koontz

at 213-894-1522. **If you intend to contest the tentative ruling and appear, please first contact opposing counsel to inform them of your intention to do**

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so. Should an opposing party file a late opposition or appear at the hearing, the court will determine whether further hearing is required. If you wish to make a

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telephonic appearance, contact Court Call at 888-882-6878, no later than one hour before the hearing.

Party Information

A & A International Shipping Inc.

Pro Se

Movant(s):

Caliente descansado. LLC. A. CA

Represented By Denice Gaucin