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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

SILVER HORSE EQUITIES, LLC, Plaintiff and Respondent, v. VICTORIA ALI AHMAD et al., Defendants and Appellants.	B270944 c/w B272092 (Los Angeles County Super. Ct. No. LC100473)

APPEALS from a judgment and amended judgment of the Superior Court of Los Angeles County, Huey P. Cotton, Judge. Dismissed in part and affirmed in part.

Richard P. Towne for Defendants and Appellants.

Freeman, Freeman & Smiley and Arash Beral for Plaintiff and Respondent.

Neal Kalin, Jenny Li, and David Radmore for California Association of Realtors as Amicus Curiae on behalf of Plaintiff and Respondent.

Defendants and appellants Victoria Ali-Ahmad and Mazen Ali-Ahmad (Tenants) appeal a judgment in favor of plaintiff and respondent Silver Horse Equities, LLC (formerly known as Tenth Street Venture, LLC) (hereafter, Landlord), insofar as the judgment awarded Landlord its attorney fees in the sum of $95,197.50.

Tenants contend Landlord was not entitled to an award of attorney fees as the prevailing party because it did not attempt to resolve the matter through mediation before filing suit, as required by the lease agreement.

We conclude the record supports the trial court's determination that Landlord duly attempted to resolve the dispute through mediation before commencing litigation and that the failure to mediate was attributable to Tenants. Therefore, the judgment is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

Landlord is the owner of the subject residential real property in Calabasas, California. In August 2010, Landlord and Tenants entered into a one-year lease for the property, at a monthly rent of $9,260. By addenda to the lease, the monthly rent was increased to $10,500 and the expiration date was extended to May 31, 2013.

The lease agreement, which was a California Association of Realtors form agreement, contained an attorney fee provision (paragraph 40), entitling the prevailing party to reasonable attorney fees and costs, "except as provided in paragraph 39.A." Paragraph 39.A provided that "Landlord and Tenant agree to mediate any dispute or claim arising between them out of this Agreement, or any resulting transaction, before resorting to court action. Mediation fees, if any, shall be divided equally among the

parties involved. If, for any dispute or claim to which this paragraph applies, *any party commences an action without first attempting to resolve the matter through mediation, or refuses to mediate after a request has been made*, then that party shall not be entitled to recover attorney fees, even if they would otherwise be available to that party in any such action." (Italics added.)[1]

In January 2013, Tenants vacated the leased property without paying the rent due on the remaining months on the lease. On June 21, 2013, Landlord filed suit against Tenants for purporting to terminate the lease four months early by vacating the premises and refusing to pay any rent on or after February 1, 2013. Landlord alleged Tenants breached the lease by failing to pay rent when due, failing to pay late fees, altering the property without consent, and failing to repair damage to the premises.

With respect to Landlord's entitlement to attorney fees under paragraph 39.A, as will be discussed in greater detail below, the evidence at trial showed that Landlord's counsel repeatedly proposed mediation before commencing litigation, to no avail.

Following a bench trial, on December 2, 2015, the trial court entered judgment in favor of Landlord. The court found, inter alia: Landlord was entitled to damages in the net sum of $27,742.20, including lost rent damages of $42,000, as well as other damages, with Tenants to be credited for their $19,000

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[1] We observe paragraph 39.A is consistent with the " 'public policy of promoting mediation as a preferable alternative to judicial proceedings.' " (*Lange v. Schilling* (2008) 163 Cal.App.4th 1412, 1417 (*Lange*).) The public policy is advanced " 'by requiring the party commencing litigation to seek mediation as a condition precedent to the recovery of attorney fees.' " (*Ibid.*)

security deposit. Tenants were not justified in vacating the premises in January 2013 without paying the remaining rent due on the lease. Landlord made best efforts to mitigate its losses. "The pre-suit efforts of [counsel] on behalf of the their respective clients to agree upon a formal mediation process were not successful, though attempted." Landlord was the prevailing party and was entitled to recover prejudgment interest, costs, and attorney fees, after which the judgment would be amended to reflect the total award to Landlord.

On December 24, 2015, Tenants filed a notice of intention to move for a new trial. Tenants sought to "eliminate any finding that [Landlord] complied with the mediation obligation of the parties' contract so as to be entitled to any award of attorneys' fees in this action." Tenants argued that Landlord was not entitled to attorney fees because Landlord "did nothing in this regard beyond sending several emails. [Landlord] never forwarded any proposed mediation agreement to [Tenants] and never contacted any mediator."

On or about January 26, 2016, Landlord, as the prevailing party, filed a motion seeking attorney fees in the amount of $166,511.22, as well as costs and prejudgment interest.

On February 11, 2016, the trial court denied Tenants' new trial motion, rejecting Tenants' contention that Landlord failed to attempt mediation before filing suit. The trial court stated: "This court made a specific finding to the contrary. [¶] That finding was based on the following evidence. On February 7, 2013, approximately 4 months before the case was filed, [Landlord] made a request for binding arbitration through [its] attorney in an email to [Tenants]. Further, in an email thread between [the parties' counsel] starting in March 2013 and

concluding in May 2013, it is apparent that [Landlord] reached out to [Tenants'] attorney to suggest a mediator, suggested a name and never got an unequivocal answer from [Tenants'] attorney despite several follow ups. The court found based on this evidence that the obligation to attempt mediation was satisfied. Tenants complain that [Landlord] never actually contacted a mediator but how could they when the last word they heard from [counsel for Tenants] about the matter was that he needed to discuss with his client[s]. [¶] The court denies the [new trial] motion."[2]

On April 29, 2016, after hearing Landlord's post-trial motion, the trial court entered an amended judgment awarding Landlord its attorney fees in the amount of $95,197.50, plus $10,287.59 in costs, and prejudgment interest, for a total judgment of $140,083.03.

On May 4, 2016, Tenants filed a timely notice of appeal from the amended judgment. (No. B272092.) The appeals were consolidated.

CONTENTIONS

On appeal, Tenants challenge only Landlord's entitlement to attorney fees, not the amount of the fees that Landlord was awarded. Tenants contend (1) Landlord is not entitled to an award of attorney fees as the prevailing party because Landlord failed to contact a mediator before filing suit and thus failed to

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[2] On March 11, 2016, Tenants filed an initial notice of appeal, specifying the February 11, 2016 order on the new trial motion. (No. B270944.) However, Tenants are not challenging the damages which were awarded to Landlord, and they have requested dismissal of the appeal with respect to the judgment for damages entered on December 2, 2015. We grant the request.

attempt to resolve the matter through mediation, and (2) substantial evidence did not support the trial court's conclusion that Landlord properly attempted mediation before commencing litigation, as required by paragraph 39.A of the lease agreement.

DISCUSSION

1. *No merit to Tenants' theory that Landlord was obligated to contact a mediator in order to satisfy paragraph 39.A's requirement that a party attempt to resolve the matter through mediation before filing suit.*

As indicated, paragraph 39.A of the lease agreement provides that a prevailing party is precluded from recovering attorney fees if that "party commences an action without first attempting to resolve the matter through mediation."

Tenants contend that Landlord "never contacted any mediator,"[3] and that "[n]o contact with a mediator means no attempt was made to mediate." We do not agree. The language of the lease agreement does not specify that a mediator must actually be contacted, and we reject Tenants' argument that contacting a mediator is an essential element of attempting to resolve the matter through mediation.

Lange, *supra*, 163 Cal.App.4th 1412 is instructive. There, paragraph 17A of a residential property purchase agreement similarly provided that if a party " 'commences an action *without first attempting to resolve the matter through mediation*,' " that party would not be entitled to attorney fees. (*Id.* at p. 1414, italics added.) In *Lange*, the "[p]laintiff filed his complaint first and only later offered mediation." (*Id.* at p. 1417.) *Lange* held

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[3] In support, Tenants cite trial testimony that "[a]fter April 2013," Landlord did not contact any mediators.

that although the plaintiff was the prevailing party, his "failure to meet the condition precedent required by paragraph 17A precludes any award of fees." (*Ibid*.)

In *Lange*, the plaintiff argued that his failure to seek mediation should be excused because he was unable to locate the sellers in order to make such a request. He asserted that once he located the sellers he promptly offered to mediate, and thereby satisfied paragraph 17A of the contract. (*Lange*, *supra*, 163 Cal.App.4th at pp. 1417-1418.) The appellate court rejected the argument, explaining: "[P]laintiff in fact was able to locate sellers. After filing his complaint, plaintiff hired an investigator and, two weeks later, when the investigator discovered the sellers' mailing address, plaintiff mailed them the complaint. *Plaintiff could have readily complied with the requirements of paragraph 17A simply by* hiring the investigator, learning sellers' whereabouts, and *mailing an offer of mediation to them before filing his complaint*." (*Id*. at p. 1418, certain italics added.)

Other decisions are in accord. (*Frei v. Davey* (2004) 124 Cal.App.4th 1506, 1513 ["A demand for mediation certainly meets the Agreement's requirement of a 'request' to mediate"]; *Van Slyke v. Gibson* (2007) 146 Cal.App.4th 1296, 1300 [evidence that attorney telephoned opposing counsel to propose mediation but was rebuffed was sufficient to satisfy contractual requirement of prelitigation attempt to mediate].)

Guided by these authorities, we readily conclude Landlord was not required to contact a mediator in order to satisfy paragraph 39.A's requirement that mediation be attempted prior

to litigation. Rather, it is sufficient if Landlord proposed mediation and was rebuffed.[4]

2. *Substantial evidence supports trial court's finding that Landlord duly attempted mediation before filing suit.*

Having concluded that Landlord was not required to contact a mediator in order to be entitled to prevailing party attorney fees, we next consider whether substantial evidence supports the trial court's finding that Landlord attempted to mediate the dispute before commencing litigation.

a. *Standard of appellate review.*

The question whether Landlord attempted mediation before filing suit was for the trial court, sitting as the trier of fact. In ruling that Landlord was entitled to recover attorney fees as the prevailing party in the litigation, the trial court found "that the obligation to attempt mediation was satisfied." We review that factual finding to determine whether it is supported by substantial evidence. (See, e.g., *Frei v. Davey*, *supra*, 124 Cal.App.4th at p. 1513 [reviewing court found "no substantial evidence supporting the trial court's finding that the [defendants] did not refuse to mediate"].)

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[4] Tenants argue in their appellants' reply brief that this court should disregard Landlord's reliance on post-trial evidence, that Landlord *did* contact a mediator. It is unnecessary to address this argument in light of our conclusion that contacting a mediator is not necessary to satisfy paragraph 39.A's requirement that mediation be attempted.

b. *Substantial evidence supports trial court's finding that Landlord attempted to mediate the dispute before commencing litigation.*

" 'An appellant asserting lack of substantial evidence must fairly state all the evidence, not just the evidence favorable to the appellant. [Citation.] The appellant must "marshall *all* of the record evidence relevant to the point in question and affirmatively demonstrate its insufficiency to sustain the challenged finding." [Citations.] *A failure to state all material evidence may be deemed a waiver of the argument that the evidence was insufficient*. [Citation.]' " (*Hartt v. County of Los Angeles* (2011) 197 Cal.App.4th 1391, 1402, italics added.)

Here, Tenants' opening brief on appeal sets forth only the evidence that tends to support their position. Tenants cite the following:

(1) Mr. Ali-Ahmad's testimony at trial that "I had made it very, very clear at this . . . walk through that I'm wildly open to mediation. But in order to make that mediation efficient and constructive we had to address the issues [regarding the] damages we were accused of causing." He further testified, "I am wide open for any mediation. However, to make that mediation more efficient and more productive we needed to go through that walk through."

(2) An email exchange (exhibit 640) on April 26, 2013, in which Landlord's attorney stated: "Please let us know whether you[r] client agrees to participate in a mediation," and Tenants' counsel responded, "Yes, we are."

(3) An email (exhibit 641) from Tenants' attorney to Landlord's attorney, dated May 8, 2013, that stated: "I'm still under the obligation in the other litigation with Stacey Blank to

seek access to the home for a limited inspection. Why don't we arrange that asap in connection with our mediation?"

Tenants have omitted any discussion of unfavorable evidence, recited below, and therefore may be deemed to have waived their argument that the evidence in this regard was insufficient. (*Hartt v. County of Los Angeles*, *supra*, 197 Cal.App.4th at p. 1402.) Nonetheless, we dispose of the contention on the merits.

In doing so, we review the entire record to determine whether the trial court's factual determination has evidentiary support. It is settled that "[w]hen a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether*, on the entire record*, there is substantial evidence, contradicted or uncontradicted, which will support the determination, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court." (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874; accord, *Moran v. Foster Wheeler Energy Corporation* (2016) 246 Cal.App.4th 500, 517.)

Trial exhibit 143, which was not mentioned in the appellants' opening brief, contains the following email thread between the parties' respective attorneys:

On April 8, 2013, Bradley D. Ross, counsel for Landlord, sent the following message to Richard Towne, who represented Tenants: "Rick: [¶] As we have been unable to informally resolve the issues pertaining to the lease between our clients, we hereby offer to participate in a mediation. Please contact me this

week if your client agrees to participate, so we may select a mediator."

On April 26, 2013, Dawn B. Everly, for Landlord, wrote to Towne: "I am following up on this email in Brad's absence. Please let us know whether your client agrees to participate in a mediation."

Later that day, Towne responded: "Yes, we are."

On May 6, 2013, Ross wrote to Towne: "We suggest using Michael Marcus to mediate this dispute. He has experience in this area and he has availability in June. Please let us know your thoughts."

Later that day, Towne responded: "I've worked with Michael before and he's very good. Let me consult with [my clients]."

On May 14, 2013, Ross wrote to Towne: "We need to come to a resolution on this. What is the status of setting up the mediation?"

In the final email in this thread, dated May 21, 2013, Ross wrote to Towne: "Saying that your client is willing to mediate, and actually mediating are two different things. Your client's only intent appears to be to stall the resolution of this dispute. We suggested a mediator. Weeks later, we have not received any response from your client, no alternative suggestions, nothing. [¶] If your client wants to mediate, a complete agreement needs to be entered this week. Otherwise we will proceed to litigation, with any possibility of mediating having been frustrated by your client."

With no follow up, one month later, Landlord filed this lawsuit.

The above email colloquy constitutes substantial evidence to support the trial court's determination that Landlord attempted to resolve the dispute through mediation before filing suit, in accordance with paragraph 39.A of the lease agreement. We reiterate the trial court's ruling at the time it denied the motion for new trial: "[I]n an email thread between Mr. Ross and Mr. Towne starting in March 2013 and concluding in May 2013, it is apparent that [Landlord] reached out to [Tenants'] attorney to suggest a mediator, suggested a name and never got an unequivocal answer from [Tenants'] attorney despite several follow ups. The court found based on this evidence that the obligation to attempt mediation was satisfied. [Tenants] complain that [Landlord] never actually contacted a mediator but how could they when the last word they heard from Mr. Town[e] about the matter was that he needed to discuss with his client[s]."

In sum, on the record presented, we conclude the trial court properly found that Landlord attempted to pursue mediation before filing suit.

DISPOSITION

Pursuant to Tenants' request, the first appeal (notice of appeal filed March 11, 2016) is dismissed. With respect to the second appeal (notice of appeal filed May 4, 2016), the amended judgment entered on April 29, 2016 is affirmed. Landlord shall recover its costs on appeal.

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EDMON, P. J.

We concur:

LAVIN, J.

CURREY, 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.