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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

BANK OF THE WEST, Plaintiff and Respondent, v. CHAMPION CHRYSLER JEEP DODGE, Defendant and Appellant.	B279822 (Los Angeles County Super. Ct. No. BC499926)

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

Callahan, Thompson, Sherman & Caudill, Lee A. Sherman and Brett E. Bitzer, for Defendant and Appellant.

Law Offices of James T. Reed, Jr., James T. Reed, Jr., for Plaintiff and Respondent.

I. INTRODUCTION

Defendant and appellant Champion Chrysler Jeep Dodge (Dealer) appeals from a judgment following a bench trial. Plaintiff and respondent Bank of the West (Bank) sued Dealer for various causes of action related to an automobile sale contract between Dealer and a third party, which Dealer in turn sold to Bank, pursuant to a Master Sale Agreement between Dealer and Bank. The trial court entered judgment in favor of Bank. Dealer contends that the trial court erred in rendering its verdict because uncontroverted evidence demonstrated that Bank had waived its right to sue Dealer for beach of the Master Sale Agreement, and Bank failed to mitigate its damages. We affirm the judgment.

II. BACKGROUND

A. *Edgardo Contract*

In September 2011, Dealer sold a Dodge Charger (vehicle) to Edgardo Ruiz. Dealer concedes that at the time of sale, it was aware that Edgardo's adult daughter, Wendy Ruiz,[1] would pay for and use the vehicle. Dealer nonetheless obtained Edgardo's signature on a sale contract, in which Edgardo agreed to pay approximately $40,000 to Dealer or its successors (Edgardo Contract). Dealer then sold the Edgardo Contract to Bank, pursuant to a Master Sale Agreement. Dealer did not disclose to

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[1] Because Edgardo and Wendy share the same last name, we refer to them by their first names.

Bank that Wendy, a third party to the contract, would use and possess the vehicle, which rendered the Edgardo Contract a Third-Party Transaction. Had Bank known that Wendy, not Edgardo, would use and possess the vehicle, it would have declined to purchase the Edgardo Contract and so advised Dealer. The Master Sale Agreement included a representation from Dealer that it "does not know of any fact which negatively impacts the collectability of the sale[ ] contract, including but not limited to contemporaneous transactions adding to the debt obligations of the buyer, and arrangements for possession and use of the [vehicle] by third parties other than the buyer." The Master Sale Agreement also provided that Bank could demand that Dealer buy back any sale contract that breached a representation made by Dealer. Bank had a policy whereby, without exception, upon discovering that a dealership had knowingly sold it a loan containing a Third-Party Transaction, it would require the dealership to buy back the loan.

Shortly after purchasing the vehicle, Edgardo received the payment coupon book in the mail. Wendy observed that "everything" in the payment coupon book was wrong: the name, address, and date for the Edgardo Contract. She telephoned Bank and stated, "there must be some mistake." A representative of Bank told Wendy that the representative could not discuss the account with her, and that Wendy needed to contact Dealer.

Wendy contacted Dealer, and told Dealer that it had made a mistake because "everything was wrong [in] the booklet" and "all [of] this information [in the payment coupon book] is wrong." Dealer gave Wendy a check in the amount of $551.12 for the first payment on the Edgardo Contract, and Dealer instructed her to

give the check to Edgardo to deposit into his checking account. Wendy assisted Edgardo in making out his personal check to Bank, for payment under the payment coupon book, and she provided the check to Bank.

Eventually, Edgardo and Wendy failed to make the monthly payments on the vehicle and the Edgardo Contract went into default.

In August 2012, someone from the collections unit of Bank spoke to Edgardo, who stated that his daughter had the vehicle and was making payments on it. He further stated that Bank could pick up the vehicle but he did not know where it was located.

On September 11, 2012, Bank repossessed the vehicle from Wendy's house. After receiving written permission from Edgardo to do so, Bank discussed reinstatement of the Edgardo Contract with Wendy. Wendy provided Bank with proof that she was insured.

On September 13, 2012, Bank reinstated the Edgardo Contract. Thereafter, Edgardo and Wendy again failed to make the monthly payments on the vehicle.

B. *Bank Sues Edgardo and Wendy*

In January 2013, Bank filed an action against Edgardo and Wendy, alleging breach of the Edgardo Contract and other causes of action (Original Action). In October 2013, Edgardo and Wendy filed a cross-complaint against Bank and Dealer for, among other things, fraud in the execution of the Edgardo Contract (Ruiz Cross-Complaint).

C. *Bank Demands Buy-Back*

In January 2014, Bank, for the first time, demanded that Dealer buy back the Edgardo Contract pursuant to the terms of the Master Sale Agreement. Bank sent a letter demanding approximately $45,000 in attorney fees that it had incurred in pursuit of its rights under the Edgardo Contract, less certain offsets.

Dealer responded that it would buy back the Edgardo Contract, but was unwilling to pay Bank its attorney fees.

D. *Bank Sues Dealer*

On March 3, 2014, Bank filed a complaint against Dealer alleging causes of action for, among other things, rescission and restitution, and breach of the Master Sale Agreement (Related Action). In its verified answer to Bank's complaint, Dealer denied that it breached express warranties in the sale of the Edgardo Contract.

The Original and Related Actions were ultimately consolidated (Consolidated Action). Thereafter, Bank filed a verified first amended complaint, alleging nine causes of action against Dealer. It alleged, among other things, that Dealer was "aware of arrangements for possession and use of the Subject Vehicle by a third party or parties other than the buyer." In its verified answer to Bank's verified first amended complaint, Dealer again denied that it had breached express warranties in the sale of the Edgardo Contract to Bank. Dealer also asserted waiver and failure to mitigate damages as affirmative defenses.

The parties settled the claims related to the Ruiz Cross-Complaint. Bank and Dealer proceeded to a bench trial on the Consolidated Action.

E. *Trial*

On September 7, 2016, the trial court issued its tentative statement of decision, finding in favor of Bank and against Dealer on all claims, and awarding Bank "the sum of $117,192.52 plus attorneys' fees and costs according to proof." This amount included $71,217.95 for "Net Attorneys' Fees and Costs."

On September 16, 2016, Dealer filed objections to the tentative statement of decision, arguing that the trial court ignored undisputed evidence that established: (1) Bank waived its right to pursue Dealer for claims based on Bank's ratification of the Edgardo Contract; and (2) Bank did not mitigate damages because it failed to demand that Dealer buy back the Edgardo Contract before it incurred any attorney fees. In addition, defendant objected to the court's tentative ruling awarding attorney fees "on the grounds that the Court ruled at the end [of] day 1 of trial that the issue of attorneys' fees, incurred in pursuing both the [Original Action] and the present action, ***would be a post-trial motion for attorneys' fees.***"[2]

On October 3, 2016, the trial court issued its final statement of decision, finding in favor of Bank. The trial court found that Dealer had breached the Master Sale Agreement by failing to repurchase the contract following Bank's written

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[2] During trial, the court had stated that if Bank prevailed at trial, it could seek to recover attorney fees by post-trial motion.

demand on January 17, 2014. The court also concluded that Bank was entitled to rescind its purchase of the Edgardo Contract because Bank's consent to the contract had been induced by mistake and fraud. The trial court denied Dealer's waiver defense. It also rejected Dealer's claim that Bank had failed to mitigate its damages. In so concluding, it found that "[a]s of September 11, 2012, [Bank] had no reason to suspect that [Dealer] had violated any of its warranties with respect to the Contract." Moreover, it concluded that on January 28, 2013, when Bank filed the Original Action against Edgardo and Wendy, it "had no information that [Dealer] had breached the [Master Sales Agreement] or any of its warranties." The trial court further concluded that "Bank became aware of irregularities on the part of [Dealer] after this consolidated litigation was initiated by [Edgardo and Wendy] against [Bank]."[3] The final statement of decision awarded judgment "in the sum of $45,799.78 plus costs and attorneys' fees in the consolidated action to be determined by motion." That amount represented $39,678.07, the remaining balance of the Edgardo Contract, plus late charges, collection expenses, and interest. The final statement of decision thus excluded an award of attorney fees.

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[3] Edgardo and Wendy filed their cross-complaint against Bank and Dealer in October 2013. The trial court also found that "In or about January 2014, [Bank] learned, in the exercise of due diligence, that [Dealer's] representations and warranties to it about the [ ] sale and delivery of the subject vehicle were untrue." Whether Bank reasonably knew that Dealer had breached the Master Sale Agreement in October 2013 or January 2014 is immaterial for purposes of this decision.

On November 1, 2016, plaintiff filed a notice of entry of judgment. On December 29, 2016, Dealer filed its notice of appeal.

F. *Attorney Fees*

Although not part of the record on appeal, according to Dealer, on February 7, 2017, the trial court awarded Bank $72,010 in attorney fees in connection with the Original Action, and $187,995 in attorney fees in connection with the Related Action, for a total award of $260,005 in attorney fees. We have no record of the basis for the attorney fees award.

III. DISCUSSION

A. *Standard of Review*

"The trial court's findings on questions of fact are reviewed under the substantial evidence standard. [Citations.] That standard for review has been described by our Supreme Court as follows: 'Where findings of fact are challenged on a civil appeal, we are bound by the "elementary, but often overlooked principle of law, that . . . the power of an appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted," to support the findings below. [Citation.] We must therefore view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor . . . .' [Citation.]" (*Brewer v. Murphy* (2008) 161 Cal.App.4th 928, 935.)

"[W]here the material facts are undisputed, the legal significance of those facts is a question of law, and an appellate court may draw its own conclusions independent of the trial court's ruling. [Citation.]" (*Oxford v. Foster Wheeler LLC* (2009) 177 Cal.App.4th 700, 707.) "A trial court's conclusions of law are subject to independent review by an appellate court. [Citation.] In other words, an appellate court decides a question of law without deference to how it was answered below. [Citation.]" (*Brewer v. Murphy*, *supra*, 161 Cal.App.4th at p. 936; *Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799 ["[w]hen the decisive facts are undisputed, we are confronted with a question of law and are not bound by the findings of the trial court"].)

B. *No Waiver by Bank*

Dealer contends that the trial court erred in rejecting its affirmative defense of waiver. ""[W]aiver is the intentional relinquishment of a known right after knowledge of the facts." [Citations.] The burden . . . is on the party claiming a waiver of a right to prove it by clear and convincing evidence that does not leave the matter to speculation, and "doubtful cases will be decided against a waiver" [citation].' [Citations.] . . . The waiver may be either express, based on the words of the waiving party, or implied, based on conduct indicating an intent to relinquish the right. [Citation.]" (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 31.)

Dealer contends that by at least September 11, 2012, Bank had actual and constructive knowledge that Dealer had breached the Master Sale Agreement, that is, that it had knowingly sold Bank a Third-Party Transaction. Thus, by permitting Edgardo to

reinstate the Edgardo Contract on September 13, 2012, Bank knowingly waived its rights to sue Dealer for breach of the Master Sale Agreement. We disagree.

Dealer's contention that Bank knew, by September 11, 2012, that Dealer had knowingly sold it a Third-Party Transaction, directly contradicts its answer and amended answer (filed in 2014 and 2016), denying any such breach. Dealer nonetheless cites the following evidence in support of its contention: (1) Wendy telephoned Bank in September 2011 and stated that there was a "mistake" in the coupon book; (2) in August 2012, Edgardo told Bank that Wendy possessed and paid for the vehicle; and (3) on September 11, 2012, Bank discussed the reinstatement with Wendy and accepted proof of insurance from her.

April Curtis, Assistant Vice President of Bank, responsible for collections at Bank, testified that as of September 2012, Bank knew of the existence of the Third-Party Transaction. While this evidence supports Dealer's argument that by September 2012, Dealer knew of the Third-Party Transaction, it does not establish that Bank also knew that *Dealer was aware* of the Third-Party Transaction *at the time it sold the Edgardo Contract to it*.

The trial court expressly found that "[a]s of September 11, 2012, [Bank] had no reason to suspect that [Dealer] had violated any of its warranties with respect to the Contract." This finding was supported by substantial evidence. Curtis testified that in November 2012, Bank did not know that Dealer had been "at fault" in the creation of the Edgardo

Contract.[4] Also, prior to 2013, Bank had not contacted Dealer to determine whether Dealer had knowledge of the Third-Party Transaction. Nor had Bank asked Edgardo or Wendy whether Dealer knew about the Third-Party Transaction. Curtis explained that on those occasions when Bank learned that a third party was in possession of a vehicle, it did not assume that Dealer knew of the Third-Party Transaction at the time that it sold the contract to Bank. She also testified that Bank first learned Dealer may have knowingly sold it a loan containing a Third Party Transaction, on or about October 3, 2013. Finally, Kelly Burfict, a credit supervisor at Bank, testified that when Bank purchased a sale contract from a dealer pursuant to the Master Sale Agreement, it assumed that the dealer had confirmed a third party was not in possession of the vehicle because of the representations and warranties it provided to Bank. Thus, the trial court's conclusion that Bank was not aware of Dealer's breach in September 2012, and did not know of such breach until at least October 2013, is supported by substantial evidence.

Dealer next argues that Bank, by allowing Edgardo to reinstate the Edgardo Contract, knowingly relinquished its rights under the Master Sale Agreement. According to Dealer, Bank was not required, under the Automobile Sales Finance Act, to allow Edgardo to reinstate the Edgardo Contract and the trial court therefore erred when it concluded that Bank was so obliged. This argument misses the point. The issue for the trial court was not whether the Automobile Sales Finance Act required Bank to

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[4] This court previously concluded that Dealer engaged in fraud in procuring the Edgardo Contract. (*Bank of the West v. Ruiz* (April 13, 2015, B253980 [nonpub. opn.] at p. 9).)

permit Edgardo to reinstate the Edgardo Contract, but whether by permitting such reinstatement, Bank intentionally relinquished its rights against Dealer. Under the Automobile Sales Finance Act, "a defaulting buyer whose car has been repossessed by . . . a creditor must be given the opportunity to reinstate the contract, absent proof of certain statutory circumstances, including that the buyer (1) 'intentionally provided false or misleading information of material importance on his or her credit application'. . . ." (*Ramirez v. Balboa Thrift & Loan* (2013) 215 Cal.App.4th 765, 780-781 [citing Civ. Code, § 2983.3.]) The creditor must "reasonably and in good faith determine[ ]" that one of the statutory circumstances apply. (Civ. Code, § 2983.3, subd. (b).) The creditor must determine whether a buyer is entitled to reinstatement within 60 days of repossession. (*Ramirez v. Balboa Thrift & Loan, supra,* 215 Cal.App.4th at p. 781 [citing Civ. Code, §§ 2983.2, subd. (a)(2) and 2983.3, subd. (b)].) We need not decide whether Bank would have prevailed under the Automobile Sales Finance Act had it decided to deny Edgardo reinstatement. Rather, we must determine whether substantial evidence supports the trial court's conclusion that Bank did not waive its rights under the Master Sale Agreement by allowing such reinstatement. Curtis testified that at the time of the reinstatement, she did not believe there were any conditions that allowed Bank to deny reinstatement. She further testified that she did not believe Edgardo had provided any misleading information on his credit application. The trial court reasoned that under these circumstances, "[t]he Bank, like any seller or holder of a sales contract, faces significant liability and damages if it wrongfully refuses to allow

reinstatement and violates the statute."[5] Thus, the trial court's finding that Bank did not waive its rights is supported by substantial evidence.

C. *Failure to Mitigate Attorney Fees*

Dealer next contends Bank failed to mitigate its damages, specifically, attorney fees, because it did not demand, prior to January 2013, that Dealer repurchase the Edgardo Contract. "A plaintiff who suffers damage as a result of either a breach of contract or a tort has a duty to take reasonable steps to mitigate those damages and will not be able to recover for any losses which could have been thus avoided." (*Shaffer v. Debbas* (1993) 17 Cal.App.4th 33, 41.)

Bank did not begin incurring attorney fees until January 23, 2013. Dealer faults Bank for failing to demand that it repurchase the Edgardo Contract before that date. Specifically,

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[5] For these same reasons, we reject Dealer's related argument that Bank, by allowing Edgardo to reinstate the Edgardo Contract, did not thereby ratify Dealer's refusal to buy back the contract. "If after discovering the untruth of the representations, [a party] conducts himself with reference to the transaction as though it were still subsisting and binding, he thereby waives all benefits of and relief from the misrepresentations." (*Oppenheimer v. Clunie* (1904) 142 Cal. 313, 320, overruled on other grounds in *Liodas v. Sahadi* (1977) 19 Cal.3d 278, 287-288 and fn. 4.) As set forth above, we conclude substantial evidence supports the trial court's conclusion that Bank did not know of Dealer's breach of the Master Sale Agreement in September 2012, and thus decline to deem Bank's reinstatement of the Edgardo Contract a ratification of the breach.

Dealer contends that Bank was obligated to follow its own policy of demanding that a dealer repurchase a sale contract as soon as it discovered that the dealer had knowingly sold it a Third Party Transaction.

Dealer's argument fails for at least two reasons. First, appealed judgments and orders are presumed correct and appellant has the burden of overcoming this presumption by affirmatively showing error on an adequate record. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140-1141.) Here, Dealer challenges the attorney fees award yet the record does not include a motion for attorney fees, an opposition to such motion, an order awarding attorney fees, a transcript of the proceedings, or a suitable substitute. Upon Dealer's request, the trial court reserved ruling on attorney fees until the filing of post-judgment motions and Dealer has failed to include any of the post-judgment motions as part of this appeal. Dealer therefore has waived its argument on appeal.

Second, even if not waived, Dealer's argument regarding Bank's failure to mitigate damages would fail for the same reason that its waiver argument fails, namely, because the trial court's conclusion that Bank was unaware of Dealer's breach prior to January 2013 is supported by substantial evidence. Thus, Bank had no obligation to mitigate damages prior to January 2013.

IV. DISPOSITION

The judgment is affirmed. Bank is awarded its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KIM, J.

We concur:

MOOR, Acting P. J.

JASKOL, 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.