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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

PRIVATE BANK OF CALIFORNIA,

Plaintiff and Respondent,

v.

METRO MANAGEMENT SYSTEMS,
INC.,

Defendant and Appellant.

B237641

(Los Angeles County Super. Ct.
No. BC444561)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kenneth Freeman, Judge. Affirmed.

Chris Campbell for Defendant and Appellant.

Epport, Richman & Robbins, Steven N. Richman and Nami Kang for Plaintiff and Respondent.

Defendant and appellant Metro Management Systems, Inc. (MMS), appeals from a judgment following an order granting summary judgment in favor of plaintiff and appellant Private Bank of California (the Bank) in this action arising out of a commercial lease agreement. MMS contends: 1) triable issues of fact exist as to whether it had an enforceable lease, either because there was never a lease or because MMS's obligations were extinguished by the Bank's foreclosure on the property; 2) triable issues of fact exist as to whether the Bank is barred by the doctrine of unclean hands for making a loan that could not be paid; 3) triable issues of fact exist as to the proper calculation of the Bank's damages; and 4) the trial court erred by failing to discount the amount of the damages to present value. We agree with the Bank that MMS failed to raise any of these issues in the trial court and therefore has forfeited the contentions. Therefore, we affirm.

FACTS

In December 1996, MMS President Ella Avery-Smothers signed an agreement to lease the premises of 105 South La Brea from an entity known as 101 South La Brea (101) for a term of 15 years. At her deposition in this case, Avery-Smothers stated that there were many changes made as they discussed the lease agreement, but 101 never gave her a copy of the lease that contained all of the provisions in one document. In her view, the lease that she signed was not the agreement that they intended. She does not believe that the lease presented for her signature constituted the entire agreement between MMS and 101. She was led to believe when she signed the agreement that there was a bank operating on the property which would provide a steady stream of customers, when the bank actually vacated shortly after construction began. She does not believe there is a written lease agreement between MMS and 101, because she never agreed with it.

On April 1, 1997, MMS and 101 executed an amendment that altered several provisions of the original lease. For example, the basic monthly rent changed to \$5,928. The basic monthly rent from months 61 to 120 would be \$6,817.20, and from months 121 through 180 would be \$7,839.78. The amendment also contained provisions to calculate

MMS's proportionate share of operating expenses. Avery-Smothers signed the document and initialed each page. At her deposition, she stated that the amended lease did not clear up the parties' agreement.

MMS opened a Burger King franchise on the property in June 1997. The restaurant was never profitable and it closed in December 2006, but MMS continued to pay monthly rent.

On May 21, 2008, 101 borrowed \$1,985,000 from the Bank, which was to be repaid by May 21, 2010. The loan was secured by a deed of trust on the property. An estoppel certificate was prepared in connection with the loan. The certificate stated that MMS entered into a lease, as amended, which was in full force and had been duly executed. It stated that the current monthly rent was \$8,557.09. "Directing Manager" Ronson Smothers executed the certificate on behalf of MMS.

MMS ceased paying rent in October 2008. 101 defaulted on the loan and the Bank foreclosed on the property. The Bank purchased the property at the auction. The Bank's evidence showed that the amount of rent due from October 1, 2008, through the end of the lease term in June 2012, with interest and late charges, totaled \$475,308.26. MMS's forensic economist, David Weiner, calculated the Bank's damages to be \$381,805, but his calculations did not include late fees for several months or interest.

PROCEDURAL BACKGROUND

On August 27, 2010, the Bank filed a complaint against MMS for breach of the lease agreement, common counts and breach of a settlement agreement. MMS filed an answer asserting several affirmative defenses, including unclean hands. The Bank filed a motion for summary judgment, or in the alternative, summary adjudication of the first cause of action for breach of the lease agreement. The Bank argued that MMS had admitted the authenticity and terms of the lease, as well as its default, and no viable affirmative defenses had been alleged.

MMS opposed the motion for summary judgment on the grounds that 101 breached the lease agreement and its duty to mitigate damages by unreasonably withholding approval of two subtenants. In addition, MMS argued that the estoppel certificate was invalid and not binding, because it was not executed by a corporate officer.

The Bank filed a reply arguing that MMS had failed to show that it met the requirements under the lease for approval of a sublessee, including a signed written offer from the proposed sublessee and financial information. In addition, the Bank argued that Smothers had ostensible authority to sign the estoppel certificate, because MMS represented to the Bank that he had the authority to do so.

A hearing was held on July 25, 2011. MMS sought leave to amend its answer, which the trial court denied. The trial court noted several undisputed facts. MMS admitted signing the lease agreement and the amendment. The meaning of a contract is a question of law for the court to determine, unless interpretation turns on the credibility of extrinsic evidence. MMS leased and occupied the premises. MMS stopped paying rent prior to the expiration of the lease and the Bank has the right to collect past due rents based on the loan to 101. MMS argued that the estoppel certificate was relevant and presented a triable issue of fact, and that the Bank failed to mitigate its damages. In the minute order, the trial court denied the motion for summary judgment, but granted the motion for summary adjudication of the breach of contract cause of action in favor of the Bank. The Bank dismissed the remaining causes of action. The trial court entered judgment in favor of the Bank in the amount of \$475,308.26 on October 24, 2011. The trial court subsequently entered a written order granting the motion for summary adjudication on November 9, 2011, and a similar, if not identical, order on November 22, 2011. MMS filed a timely notice of appeal from the judgment.

DISCUSSION

Standard of Review

“A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. [Citation.] We review the trial court’s decision de novo, considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports. [Citation.]’ (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.)” (*Zalkind v. Ceradyne, Inc.* (2011) 194 Cal.App.4th 1010, 1021.)

Contentions Raised for the First Time

On appeal, MMS contends triable issues of fact exist as to whether there was a lease agreement between MMS and 101, whether the Bank is barred from recovery under the doctrine of unclean hands for making a speculative loan secured by partially vacant commercial property, and whether MMS’s obligations were extinguished by the Bank’s foreclosure. In addition, MMS contends that the amount of the Bank’s damages is in dispute and the trial court erred by failing to discount the damages to present value. However, none of these contentions were raised by MMS in the trial court, and they cannot be considered for the first time on appeal.

“Though this court is bound to determine whether defendants met their threshold summary judgment burden independently from the moving and opposing papers, we are not obliged to consider arguments or theories, including assertions as to deficiencies in defendants’ evidence, that were not advanced by plaintiffs in the trial court. ‘Generally, the rules relating to the scope of appellate review apply to appellate review of summary judgments. [Citation.] An argument or theory will . . . not be considered if it is raised for the first time on appeal. [Citation.] Specifically, in reviewing a summary judgment, the

appellate court must consider only those facts before the trial court, disregarding any new allegations on appeal. [Citation.] Thus, possible theories that were not fully developed or factually presented to the trial court cannot create a “triable issue” on appeal.’

[Citation.] ‘A party is not permitted to change his position and adopt a new and different theory on appeal. To permit him to do so would not only be unfair to the trial court, but manifestly unjust to the opposing litigant.’ [Citation.]” (*DiCola v. White Brothers Performance Products, Inc.* (2008) 158 Cal.App.4th 666, 676.)

MMS did not argue in the trial court that there was no enforceable lease agreement or the Bank made an unconscionable loan. MMS’s sole argument in the trial court with respect to damages was that the Bank failed to mitigate by refusing to accept two subleases, an argument which MMS has not renewed in its briefs on appeal. Instead, for the first time on appeal, MMS argues that a triable issue of fact exists as to the proper calculation of the Bank’s damages. “We agree principals of forfeiture and ‘theory of the trial’ prevent plaintiffs from making these arguments for the first time on appeal. [Citations.]” (*DiCola v. White Brothers Performance Products, Inc.*, *supra*, 158 Cal.App.4th at p. 677.) Were we to consider the issues raised for the first time on appeal, we would conclude summary adjudication was properly granted, as the undisputed evidence establishes that MMS entered into a valid lease under an agreement with 101, which preexisted the Bank’s loan to 101, and failed to pay rent under the lease. Although MMS’s expert calculated the Bank’s damages differently, there is no evidence or argument to explain why interest and late fees should not be assessed.

DISPOSITION

The judgment is affirmed. Respondent Private Bank of California is awarded its costs on appeal.

KRIEGLER, J.

We concur:

TURNER, P. J.

MOSK, J.