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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

VALENTINA PAPAZIAN et al., Plaintiffs and Appellants, v. CARNIG SARKISSIAN et al., Defendants and Respondents.	B227048 (Los Angeles County Super. Ct. No. BC368324)

APPEAL from a judgment of the Superior Court of Los Angeles County, Rex Heeseman, Judge. Affirmed in part, reversed in part, and remanded with directions.

Benedon & Serlin, Gerald M. Serlin, and Douglas G. Benedon, for Plaintiffs and Appellants.

Lewis Brisbois Bisgaard & Smith, Raul L. Martinez and Steven E. Meyer, for Defendants and Respondents.

Valentina and Dikran Papazian appeal from a judgment awarding respondent Carnig Sarkissian, doing business as CAS Construction, $348,000 on a theory of quantum meruit. Appellants argue the quantum meruit award cannot stand because the court found the parties had not abandoned their construction contract. This representation of the court's finding is contradicted by the record.

Respondents cross-appeal from the same judgment, arguing the court incorrectly elected the quantum meruit remedy without finding whether a $400,000 promissory note, signed by the Papazians in April 2006, was enforceable. The court made inconsistent findings about the note. We conclude that, to the extent it found the note unenforceable, the court's finding is not supported by substantial evidence. Because of this, we also reject appellants' argument that they prevailed on the note.

We reverse the quantum meruit award and remand the matter to the trial court with directions to enter judgment in favor of respondents on their claim for breach of promissory note. Respondents also are entitled to attorney fees for enforcing the note. In all other respects, the judgment is affirmed.

FACTUAL AND PROCEDURAL SUMMARY

In 2002, appellants contracted Sarkissian to build them a custom home.[1] They obtained a $1,430,000 construction loan from IndyMac Bank. The operative contract with Sarkissian, signed in November 2002, was for $1,499,900. The architectural plans were subsequently changed, and the home was upgraded. Between December 2002 and April 2004, the parties entered into a series of change orders for roughly an additional $500,000. Appellants did not sign the last two change orders.

[1] In their briefs, both sides cite to trial exhibits, but no such exhibits have properly been lodged on appeal. The case was argued and submitted on October 22, 2012. Ten days later, appellants filed a "Joint Notice of Lodging Trial Exhibits." We struck the filing as noncompliant with California Rules of Court, rule 8.224. Our review is limited to the trial testimony and documents included in appellants' appendix.

At some point, Sarkissian began funding the construction. Between September 2003 and October 2004, appellants signed three promissory notes. The last, for $700,000, subsumed the first two and was secured by a deed of trust on the property in favor of Sarkissian as a trustee of his family trust. At meetings with appellants in February and August 2005, Sarkissian estimated the mounting costs of construction first at $2.2 to 2.3 million and then at $2.4 to 2.7 million.

In 2006, appellants applied to Countrywide Bank for a take-out loan that would replace their construction loan with a conventional one. Sarkissian's release of his lien on the property was a prefunding condition of this loan. Sarkissian demanded an additional $300,000, which along with the $700,000 promissory note, was to be paid out of escrow. At the closing, Sarkissian refused to sign the requisite documents, claiming he was owed at least $650,000 more, which he was willing to discount to $250,000.

John Berberian, who had introduced Sarkissian to appellants in 2002, agreed to mediate a settlement. Sarkissian brought copies of all invoices to a meeting in Berberian's office in April 2006. A summary he prepared for the meeting showed the cost of construction amounted to roughly $2.5 million. To that, Sarkissian added a $200,000 flat fee[2] and some "non-related items," such as engineering and surveying costs, for which he sought reimbursement. From a total of about $2.8 million, Sarkissian subtracted the funds he received from Indymac Bank to arrive at the $1,656,000 he claimed he was still owed. He also believed appellants owed him $42,000 in unpaid interest under the $700,000 promissory note and $89,000 in profit for work beyond the scope of the 2002 contract.

As a result of this meeting, appellants signed an agreement acknowledging they still owed Sarkissian and his wife, as trustees of their family trust, $1.4 million for the construction of their home, $1 million of which was to be paid from the escrow of the take-out loan. Appellants signed a promissory note for $400,000 with interest of 10 percent a year that was to be discounted to $250,000 if paid within a year. The note

[2] The parties disagree whether the $200,000 flat fee was owed under a separate oral agreement or was included in the November 2002 contract.

included an attorney fee provision if a lawsuit was brought to collect on it. The take-out loan was funded later that month.

In March 2007, appellants sued respondents Sarkissian and his wife, individually and as trustees of their family trust, and CAS Construction. The complaint alleged a pattern of overcharges, and duplicative, mistaken, or fraudulent billings. It also alleged the April 2006 promissory note lacked consideration and was a product of duress and undue influence. The complaint included 14 causes of action, including breach of written, oral, and implied contract; breach of fiduciary duty; and misrepresentation. Appellants sought an accounting, injunctive relief, rescission and restitution, and money damages. Respondents cross-complained for breach of contract, breach of promissory note, quantum meruit, and fraud.

After a bench trial, the court rejected appellants' argument that Sarkissian had been overpaid, and elected a quantum meruit remedy for him. The court denied recovery on Sarkissian's breach of contract claim, reasoning that the parties had abandoned the November 2002 contract, on which that claim was based. The court advised it "had some issues" with the April 2006 promissory note and declined to "go down that road either." Based on the testimony of Sarkissian's forensic accountant, the court found Sarkissian's total construction costs amounted to $2,726,000. He had been paid $2,378,000,[3] leaving a balance of $348,000, which the court awarded as quantum meruit damages.

At subsequent hearings, appellants announced they intended to seek attorney fees under the April 2006 promissory note. Sarkissian's counsel believed there was no ruling on the promissory note. He argued the court could not elect remedies for his client without ruling on all his causes of action. The court already had rejected Sarkissian's promissory fraud claim, and it agreed it had ruled on the contract claim. As to the promissory note, the court reiterated it had not been persuaded by arguments on either side. Specifically, it did not find appellants' duress argument convincing, but it thought

[3] The reporter's transcript incorrectly reflects this number as $2,318,000, but the court's calculation was based on $2,378,000, the number provided by Sarkissian's trial counsel.

"the circumstances surrounding how the note was put together . . . raised some questions." The court suggested it would find the note was "not viable," and neither side prevailed on it. The July 30, 2010, judgment denied recovery on appellants' complaint, and rejected appellants' and Sarkissian's claims on the promissory note. It granted quantum meruit relief to Sarkissian and denied his remaining causes of action.

Appellants timely appealed, and respondents cross-appealed.

DISCUSSION

The parties agree that the quantum meruit award cannot stand, but they do so for different reasons. It is the burden of the party challenging a particular determination to affirmatively demonstrate error. (*Dieckmeyer v. Redevelopment Agency of Huntington Beach* (2005) 127 Cal.App.4th 248, 260.) We presume the trial court's judgment to be correct, and indulge presumptions to support it on matters as to which the record is silent. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) But "[w]hen the record clearly demonstrates what the trial court did, we will not presume it did something different." (*Border Business Park, Inc. v. City of San Diego*(2006) 142 Cal.App.4th 1538, 1550.) We review the trial court's conclusions of law de novo, and we review its findings of fact under the substantial evidence standard. (*Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 888.)

I

Appellants assume the court rejected Sarkissian's argument that the 2002 contract had been abandoned. Based on this incorrect assumption, they argue Sarkissian is not entitled to recover in quantum meruit.

The abandonment doctrine allows a contractor to recover the reasonable value of its services on a quantum meruit basis if the parties dispense with the contract's written provisions, and the final project is materially different from the one for which they contracted. (*Amelco Electric v. City of Thousand Oaks* (2002) 27 Cal.4th 228, 239.) Here, the court noted that, while the parties initially proceeded through change orders, they soon "went their own way," with Sarkissian funding construction and appellants

signing the occasional promissory note. The court remarked that this was an unusual way to construct a house, "and certainly outside the parameters of the contract situation." The court then asked, "Is this an abandonment of the contract?" It proceeded to cite *Daugherty Co. v. Kimberly-Clark Corp.* (1971) 14 Cal.App.3d 151, 156, where triable issues of fact were found regarding implied abandonment because the parties "consistently ignored the procedures provided by the contract" for extra work. (*Ibid*.) The court concluded that electing a remedy under the contract was "not the way to go." The court's reasoning that the parties' conduct was "certainly outside the parameters of the contract situation" supports the conclusion that it found the 2002 contract abandoned.

Appellants have the burden to demonstrate there is no substantial evidence to support a finding the contract was abandoned. (*Jhaveri v. Teitelbaum* (2009) 176Cal.App.4th 740, 749.) Since they assume the court made the opposite finding, appellants do not address this issue, and we may consider it forfeited. (*Dieckmeyer v. Redevelopment Agency of Huntington Beach*, *supra*, 127 Cal.App.4th at p. 260.) Appellants point out that in responses to questions by the court during their trial counsel's closing argument, Sarkissian's counsel conceded that some changes to the project were subsumed in the change orders. But Sarkissian's counsel argued that not all project modifications were subsumed in the change orders, pointing to the fact that some change orders were unsigned and additional modifications to the driveway and retaining walls were made after the last change order. Even appellants' expert on the custom and practice in the construction industry found it unusual that the parties stopped using change orders early on in the project and did not use them to reconcile allowances or to extend the construction schedule.

We conclude the court found the 2002 contract abandoned, and the finding is supported by substantial evidence.

II

Respondents argue the court elected not to enforce the April 2006 promissory note without finding it was unenforceable, and there is no substantial evidence to support such a finding. Appellants in turn contend the court found the note unenforceable, and its

finding is supported by substantial evidence. Alternatively, they argue respondents forfeited the claim that the court prematurely elected a remedy because Sarkissian's trial counsel acquiesced in the error.

The court acknowledged that it initially attempted to elect remedies for Sarkissian without making definitive findings on the note. At a subsequent hearing, Sarkissian's counsel brought the error to the court's attention, and the court indicated in more definite terms that it would not enforce the note.[4] Thus, the issue before us is not whether the court prematurely elected remedies for Sarkissian, but whether finding the note unenforceable is supported by substantial evidence.

Appellants' only arguments at trial were that the note was unenforceable because it was a product of economic duress and it lacked consideration. Thus, to refuse enforcement of the note, the court needed to find either duress[5] or lack of consideration. The court consistently declined to find duress. In light of the court's clear position on this issue, we will not presume a contrary finding. (See *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.*, *supra*, 39 Cal.App.4th at p. 1384.)

The doctrine of economic duress requires "a wrongful act which is sufficiently coercive to cause a reasonably prudent person faced with no reasonable alternative to succumb to the perpetrator's pressure. [Citations.] The assertion of a claim known to be false or a bad faith threat to breach a contract or to withhold a payment may constitute a wrongful act for purposes of the economic duress doctrine. [Citations.] Further, a reasonably prudent person subject to such an act may have no reasonable alternative but

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[4] The judgment is inconsistent since the court denied appellants' complaint as a whole, including the request for rescission of the note. (See, e.g., Civ. Code, § 1689, subd. (b) [a party whose consent has been obtained by duress may rescind contract].) The court could not refuse to enforce the note without sustaining appellants' complaint in part.

[5] Appellants did not argue at trial that the note was obtained through undue influence, and their undue influence argument on appeal is along the lines of their duress argument.

to succumb when the only other alternative is bankruptcy or financial ruin. [Citations.]" (*Rich & Whillock, Inc. v. Ashton Development, Inc.* (1984) 157 Cal.App.3d 1154, 1158–1159.)

Substantial evidence supports a finding that the note was not procured through economic duress. There was no evidence appellants were faced with a wrongful foreclosure, bankruptcy, or financial ruin, or that Sarkissian's lien on the property had been recorded in bad faith. (Cf. *Leeper v. Beltrami* (1959) 53 Cal.2d 195, 203–205 [duress found where defendants knowingly attempted to foreclose on already satisfied mortgage].) The only evidence was that appellants might incur penalty fees for delaying the conversion of the construction loan, and they were concerned they might lose their house if they did not obtain the take-out loan. But neither Sarkissian nor any bank threatened foreclosure, and the court was justifiably baffled why appellants signed the note without talking to the bank.

Since the court did not make a duress finding, its refusal to enforce the note appears to rest solely on an implied finding that the note lacked consideration. We have found one place in the record where the court expressed its preliminary view on this issue. Appellants' trial counsel argued that Sarkissian was not owed anything and his demand for additional payments in 2006 was "without support." The court corrected counsel, pointing to respondents' exhibits that supported Sarkissian's demand, "at least from his perspective." The court questioned whether this support was valid since some numbers were later determined to be inaccurate, and advised Sarkissian's counsel that appellants' lack of consideration argument was persuasive. But in declining to enforce the note, the court did not explicitly find that it lacked consideration. Rather, it flagged its concern that the note did not result from the same "extensive handwriting, notes, change orders" that were present in the beginning of the construction project. That concern alone cannot support finding a lack of consideration.

In April 2006, Sarkissian claimed appellants still owed him over 1.7 million. Appellants agreed to pay $1 million out of escrow, but disputed the additional amount. By signing the note, they settled the disputed portion of the claim for $400,000. The note

was an executory accord, "'an agreement to accept, in extinction of an obligation, something different from or less than that to which the person agreeing to accept is entitled.' [Citation.]" (*Gardiner v. Gaither* (1958) 162 Cal.App.2d 607, 620.) While "[a]cceptance of such performance by the creditor is the satisfaction of the accord" (*ibid*.), here appellants did not perform under the note, and the accord was never satisfied.

It is a basic principle of contract law that, to support a settlement, a disputed claim need not be legally valid and enforceable. (See *Stub v. Belmont* (1942) 20 Cal.2d 208, 217; *Bennett v. Bennett* (1933) 219 Cal. 153, 159.) "[T]he compromise of a doubtful claim asserted and maintained in good faith constitutes a sufficient consideration for a new promise, even though it may ultimately be found that the claimant could not have prevailed." (*Union Collection Co. v. Buckman* (1907) 150 Cal. 159, 163.) "[U]nless a claim is advanced in bad faith, or is without foundation, the actual validity of the claim is immaterial in determining whether forbearance from proceeding thereon is sufficient consideration." (*Goldstone-Tobias Agency, Inc. v. Barbroo Enterprises Productions, Inc.* (1965) 237 Cal.App.2d 720, 722.)

Appellants cite the principle that '"[t]he sufficiency of a purported consideration for a contract must be determined from the facts of the transaction as they existed when the contract was made rather than by subsequent developments.' [Citation.]" (*Estate of Boyd* (1979) 98 Cal.App.3d 125, 135.) They then posit that, after the escrow payments in 2006, Sarkissian would not have been owed anything under the 2002 contract, and therefore the note lacked consideration. They insist that the only consideration for the note was Sarkissian's release of his lien on the property, suggesting that Sarkissian's claim was advanced in bad faith or was without foundation.

Whether or not Sarkissian's release of his preexisting $700,000 lien on the property was sufficient consideration for the additional payments he sought, it is undisputed that he discounted the amount he claimed he was still owed. His agreement to receive less than what he believed he was due was sufficient consideration. That appellants believed Sarkissian was owed nothing under the contract only means that, in their view, his claim for additional payment was doubtful, not that it was false or

unfounded. That he may not have been able to prove or recover his claimed additional costs and lost profit under the 2002 contract goes to the enforceability of his claim. But there is no evidence that Sarkissian demanded additional payment without a good faith belief he was entitled to it.

The court made no finding that Sarkissian's demand for additional payment was advanced in bad faith or without foundation, and its other findings militate against implying such a finding. The court rejected appellants' position that Sarkissian was overpaid and instead accepted his expert forensic accountant's testimony that he was in fact owed additional money. The $348,000 award was based on Sarkissian's actual costs as determined by the forensic accountant, despite evidence of some double billing, questionable billing, and missing documentation. Appellants have not shown that any of these costs was incurred after April 2006. The quantum meruit award did not include Sarkissian's lost profit. But this does not mean Sarkissian's belief, both in 2006 and at trial, that he was owed at least $200,000 in profit was advanced in bad faith, whether or not he could actually recover on it.

We conclude that the court could not refuse to enforce the note without finding that Sarkissian's claim for additional payment, which the note settled, was advanced in bad faith or without foundation. The evidence does not support a finding by implication of bad faith or lack of foundation. Under the terms of the note, respondents are entitled to $400,000 with interest of 10 percent a year since April 2007, plus attorney fees for the portion of this case that represents their effort to collect the note. Because we conclude the note is enforceable, we necessarily reject appellants' argument they prevailed on it.

DISPOSITION

The quantum meruit award and the denial of respondents' claim under the April 2006 promissory note are reversed. The matter is remanded to the trial court with directions to enter a judgment in favor of respondents on their claim for breach of promissory note in the amount of $400,000 with interest of 10 percent a year since April 2007. On proper motion, the court may award respondents their reasonable attorney fees

attributed to their efforts to enforce the note in this case. In all other respects, the judgment is affirmed. Respondents are entitled to their costs on appeal.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.