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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

GEORGE GOMEZ et al.,

Plaintiffs and Respondents,

v.

JUAN CONTRERAS VIVANCO,

Defendant and Appellant.

B281124

(Los Angeles County
Super. Ct. No.VC064512)

APPEAL from a judgment of the Superior Court of Los Angeles County, Patrick T. Meyers, Judge. Affirmed.

Law Office of Oscar Acevedo, Oscar Acevedo for Defendant and Appellant.

Law Offices of Stephan Abraham, Stephen E. Abraham for Plaintiffs and Respondents.

INTRODUCTION

George Gomez and American Development Construction, Inc. (ADC) (plaintiffs) brought an action against Juan Contreras Vivanco, Vanessa Vivanco Penado, and California Realty & Investment Group, Inc. (CRIG) (defendants) for work performed on a construction project. In a court trial, plaintiffs prevailed on their causes of action against Vivanco for breach of oral partnership agreement and breach of fiduciary duty, and defendants prevailed on plaintiffs' cause of action for unjust enrichment.¹ Vivanco appeals, and we affirm.²

BACKGROUND³

In their complaint, plaintiffs alleged ADC held a general contractor's license and Gomez was its principal and responsible managing officer. CRIG also held a general contractor's license. Vivanco and his daughter Penado owned and were officers of CRIG.

¹ At the start of trial, plaintiffs dismissed with prejudice an accounting cause of action against Vivanco and CRIG.

² CRIG erroneously purports to be a party to this appeal. Plaintiffs, however, did not prevail against CRIG on any cause of action, and thus the judgment appealed from was not adverse to CRIG. Penado is not a party to this appeal, as she prevailed in the trial court on the sole cause of action against her.

³ Because our resolution of the issues on appeal largely does not depend on the evidence adduced at trial, we set forth a brief summary of the allegations in plaintiffs' complaint for context and omit a detailed recitation of the trial evidence. As to the one issue on appeal that concerns trial evidence, we set forth that evidence below in our discussion of the issue.

In October 2013, Gomez and Vivanco formed a partnership to remodel an existing building and to build a new building behind it (the project). Gomez and Vivanco would split evenly any profits or losses from the project.

Penado was hired to handle the paperwork and accounting for the project. She was to provide weekly expense reports to plaintiffs. The parties agreed that the property's owner would pay CRIG. Penado would then deduct project expenses from the owner's payments and pay plaintiffs their share of the profits.

The project began in November 2013 and was substantially completed in August 2014. From the project's inception, defendants refused to provide plaintiffs with the required weekly accountings. They also refused to reimburse plaintiffs for expenses they incurred or to provide an accounting for payments received from the property's owner.

Plaintiff's action asserted breach of contract and breach of fiduciary duty causes of action against Vivanco, an unjust enrichment cause of action against all defendants, and a cause of action for an accounting against Vivanco and CRIG. In addition to compensatory damages and other relief, plaintiffs sought punitive damages against Vivanco.

After a court trial,⁴ the trial court found in favor of plaintiffs on their breach of oral partnership agreement and

⁴ The parties did not arrange for the trial to be reported. The record includes the trial court's proposed statement of decision, but not its final statement of decision. The parties prepared a joint settled statement for this appeal.

breach of fiduciary duty causes of action⁵ and in favor of defendants on plaintiffs' unjust enrichment cause of action. The trial court awarded plaintiffs \$115,615.53 in compensatory damages and pre-trial interest on their causes of action for breach of oral partnership agreement and breach of fiduciary duty. Although that sum was awarded as to each cause of action, plaintiffs were to recover it only once. The trial court awarded plaintiffs \$48,000 in punitive damages on their breach of fiduciary duty cause of action.

DISCUSSION

I. Standard of Review

We review a trial court's rulings on evidentiary objections for an abuse of discretion. (*Carnes v. Superior Court* (2005) 126 Cal.App.4th 688, 694.) "Discretion is abused only when in its exercise, the trial court 'exceeds the bounds of reason, all of the circumstances before it being considered.'" (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 281 (*Shaw*).)

II. The "Excluded" Email

Vivanco contends the trial court erred when it excluded evidence of an email the property owner purportedly sent to Gomez and Penado with attached payment waivers and releases to be signed. According to Vivanco, that email would have shown Gomez's knowledge of the waivers and releases, thereby rebutting his testimony that he had never been presented with such documents. Vivanco thus argues that the trial court's

⁵ Plaintiffs also prevailed on defendants' cross-complaint. Vivanco does not challenge the judgment on the cross-complaint in this appeal.

evidentiary ruling was tantamount to a terminating sanction and, as such, “violated the principle of law that the imposition of a terminating sanction by the trial court is excessive where the party’s conduct is not extreme and other options are available to protect the integrity of the litigation process.”⁶

In his opening brief, Vivanco claims “the email which Vivanco sought to offer into evidence was an email sent jointly to Gomez and Penado by the property owner attaching release and waiver for final payment for Gomez to sign. Gomez then emailed the signed release and waiver to Vivanco, Penado, the property owners [*sic*] and his own son.” Vivanco does not, however, cite any part of the record that shows he tried to introduce the described email into evidence, or that the trial court excluded it. Nor does he correct this deficiency in his reply brief, despite plaintiffs’ lengthy discussion in their respondents’ brief of Vivanco’s failure to demonstrate the trial court excluded the email.

Because Vivanco has not shown that the trial court excluded the purported email, he has not met his burden to demonstrate the trial court committed any error with respect to such purported email. (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573 (*Sanghera*) [“Perhaps the most fundamental rule of appellate law is that the judgment challenged on appeal is presumed correct, and it is the appellant’s burden to affirmatively demonstrate error”].)

⁶ Code of Civil Procedure section 2023.030, subdivision (d) provides for the imposition of various terminating sanctions (*e.g.*, striking pleadings in whole or in part, dismissing the action, or entering a default judgment) when a party has violated its discovery obligations.

III. The \$30,000 Check

Vivanco argues the trial court erred when it excluded a copy of a \$30,000 check from CRIG to ADC, dated July 26, 2014, because it directly contradicted Gomez's testimony that he had not been paid since June 6, 2014. The trial court's error was prejudicial, he contends, because "this is a case of the credibility of one side versus the other."

A. Background

According to the parties' Joint Settled Statement, defense counsel asked Gomez on cross examination "if he recalled having received any payment through Vivanco after July 25, 2014." Gomez responded that "he did not recall." Gomez was then shown a \$5,000 check from CRIG to ADC "drawn July 26, 2014," after which Gomez acknowledged he received that \$5,000 payment after July 25, 2014. Gomez further testified that "[t]o the best of his knowledge," the \$5,000 payment was the last payment he received for the project.

Also during cross examination, defense counsel showed Gomez a copy of a July 26, 2014, check for \$30,000, from CRIG to ADC, which had been marked as Exhibit 13. Plaintiffs' attorney then objected, "citing that this check had not been turned over during discovery." In response, "[d]efense counsel argued that it should be allowed as it directly impeached Gomez's testimony that he had not received this or any sum from Vivanco after July 25, 2014." The trial court sustained the objection and excluded the check.

Later, during cross-examination, Gomez testified that other than the July 26, 2014, check for \$5,000 "he had not been paid by Vivanco since June 6, 2014." The record contains no indication

defense counsel attempted to introduce the July 26, 2014, check for \$30,000 to rebut that subsequent testimony.

B. Forfeiture

At trial, defendant only attempted to introduce the \$30,000 check to rebut Gomez's testimony that he had not received any money from Vivanco after July 25, 2014. On appeal, defendant makes a different argument for admissibility of the check, namely, to rebut Gomez's subsequent testimony that Vivanco had not paid him any amount after June 6, 2014, other than the July 26, 2014, check for \$5,000. Because Vivanco did not seek to introduce the \$30,000 check to rebut that subsequent testimony, he has forfeited any claim the trial court somehow erred by purportedly excluding evidence he did not seek to admit at the time. (*Shaw, supra*, 170 Cal.App.4th at p. 282 ["Where, as here, a proponent of evidence does not assert a particular ground of admissibility below, he or she is precluded from arguing on appeal that the evidence was admissible under a particular theory"]; Evid. Code, § 354.)

IV. Impeachment

Vivanco argues that, even if the purported email addressed in his first argument and the \$30,000 check addressed in his second argument were not admissible, he "should have been entitled to, at a minimum, use the exhibits for impeachment."

As we held above, the record contains no indication Vivanco attempted to use the email at trial or that the trial court prohibited Vivanco from using that email for impeachment purposes or otherwise. Accordingly, we can assign no error to the trial court with respect to this claim.

As for the \$30,000 check, we find the trial court did not err, because the check did not impeach the testimony that defendant sought to impeach at trial. When attempting to introduce the \$30,000 check, defense counsel argued to the trial court that it impeached Gomez's testimony that he had not received any money from Vivanco after July 25, 2014.⁷ But Gomez did not so testify. Instead, Gomez testified that he did not "recall" receiving a payment after July 25, 2014. When shown the \$5,000 check, Gomez acknowledged receiving that check after July 25, 2014, and then testified that "[t]o the best of his knowledge" that was the last payment he had received for the project. It was not an abuse of discretion for the trial court to prohibit Vivanco from using the \$30,000 check in light of its limited impeachment value, if any. Moreover, even if the \$30,000 check were deemed appropriate impeachment, the trial court sustained plaintiffs' objection to the check on the basis that it had not been produced in discovery. Vivanco has raised no argument and made no showing in the record to affirmatively demonstrate the trial court erred by sustaining the objection on that basis. (*Sanghera*, *supra*, 139 Cal.App.4th at 1573.)

V. Cumulative Error

Vivanco contends the cumulative prejudicial effect of the trial court's errors combined to deprive him of a fair trial. "Having found no errors and certainly no prejudicial ones, we

⁷ While the \$30,000 check may have impeached Gomez's subsequent testimony that he did not receive any money after June 6, 2014, other than the \$5,000 check, as discussed above, Vivanco has forfeited any such claim of error because he never attempted to impeach that testimony with the \$30,000 check.

reject this claim as well.” (*People v. Hovarter* (2008) 44 Cal.4th 983, 1030.)

DISPOSITION

The judgment is affirmed. Plaintiffs are awarded their costs on appeal.

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KIN, J.*

We concur:

BAKER, Acting P. J.

MOOR, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.