Filed 12/5/19 Yang v. Monrovia-Myrtle, LLC CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

MAX YANG, Plaintiff and Appellant, v. MONROVIA-MYRTLE, LLC, Defendant and Respondent.	B291519 (Los Angeles County Super. Ct. No. EC065459)

APPEAL from a judgment of the Superior Court of Los Angeles County, Alan S. Rosenfield, Judge. Affirmed.

The Walker Law Firm, Joseph A. Walker and Stephen M. Lewis for Plaintiff and Appellant.

Wolf, Rifkin, Shapiro, Schulman & Rabkin and Mark J. Rosenbaum for Defendant and Respondent.

Max Yang entered into a lease with Monrovia-Myrtle, LLC (Monrovia). They sued each other based on claims arising out of the lease. After a bench trial, the trial court found against Yang and awarded damages to Monrovia. Yang appeals,[1] contending that Monrovia must file a partial satisfaction of judgment if it rents the premises in the future and that damages were improperly calculated. We reject all contentions.

BACKGROUND

Yang, as tenant, entered into a commercial lease agreement with Monrovia, as landlord. Yang defaulted. Monrovia filed an unlawful detainer action in which Monrovia reobtained possession of the property and was awarded $25,000. However, Yang also sued Monrovia for fraud and breach of contract. Monrovia cross-complained for, among other causes of action, breach of lease. After a bench trial, the trial court found against Yang on his complaint and in Monrovia's favor on its cross-complaint. Monrovia established that its damages totaled $921,832.93. After applying various offsets, the trial court awarded Monrovia less than that, $730,189.10. The offsets included a $150,000 credit Monrovia voluntarily gave, $27,200 attributable to the unlawful detainer action, and $14,443.83 in common area maintenance charges.

DISCUSSION

I. Partial satisfaction of judgment

The judgment against Yang included damages for the balance of the lease term. Yang now invites this court to address whether Monrovia has an affirmative duty to file a satisfaction of judgment

---

[1] Trinity Force International also appealed but its appeal has been withdrawn.

if it enters a new lease that overlaps a portion of the term of the breached lease. We decline the invitation. Generally, it is not our function to decide a moot question or speculative, theoretical or abstract question or proposition, or a purely academic question, or to give an advisory opinion on such a question or proposition. (*In re I.A.* (2011) 201 Cal.App.4th 1484, 1490.) Although there are exceptions to this rule—when there is an issue of broad public interest that is likely to recur; when the controversy may recur between the parties; and when a material question remains for the court's determination—none apply. (See *Epstein v. Superior Court* (2011) 193 Cal.App.4th 1405, 1411.)

Moreover, aside from whatever remedies Yang may have if Monrovia leases the property, the issue was addressed below. Monrovia submitted evidence of its unsuccessful efforts to mitigate damages by finding another tenant. The trial court asked what would happen if, in the year following entry of judgment, Monrovia got a new tenant. Monrovia's counsel represented he would file a partial satisfaction of judgment if that eventuality happened. Yang did not then pursue the issue.

II. Damages

Yang next contends that future lost rent should have been discounted on an annual rather than aggregate basis. However, he never raised this issue below and never offered an alternative calculation to the trial court.[2] "Appellate courts are loath to reverse a judgment on grounds that the opposing party did not have an

---

[2] Without conceding the correctness of Yang's position, Monrovia has calculated what it believes is the amount in dispute based on Yang's theory and has offered to stipulate to reduce the judgment by that amount, $70,000. Yang has refused that offer.

opportunity to argue and the trial court did not have an opportunity to consider. [Citation.] . . . [Citation.] Bait and switch on appeal not only subjects the parties to avoidable expense, but also wreaks havoc on a judicial system too burdened to retry cases on theories that could have been raised earlier." (*JRS Products, Inc. v. Matsushita Electric Corp. of America* (2004) 115 Cal.App.4th 168, 178.) Because an appellant generally may not raise new issues for the first time on appeal, Yang has forfeited the issue.

Notwithstanding the forfeiture problem, Yang styles the issue as a question of law, that calculating damages on an aggregate basis rather than an annual one is wrong as a matter of law. He cites CACI No. 359, which provides that to recover for future harm, the plaintiff must prove the harm is reasonably certain to occur and must prove the amount of those future damages, which must be reduced to present cash value. (See generally CACI No. 3904B.) It is not clear that these jury instructions contradict how damages were calculated. Even if they do, it is also unclear that they apply, as the lease provides for an aggregate calculation. The lease provides: "Landlord's damages include the worth, at the time of [the] award, of the amount by which the unpaid Rent for the balance of the Term after the time of the award exceeds the amount of the rental loss that the Tenant proves could be reasonably avoided. The worth at the time of award shall be determined by *discounting the aggregate of such amounts* for the balance of the Term to present value at one percent (1%) more than the discount rate of the Federal Reserve Bank in San Francisco in effect at the time of the award." (Italics added.)

In any event, Yang has not shown there has been a miscarriage of justice. (See Cal. Const., art. VI, § 13.) In an attempt to avoid any issue regarding the amount of damages,

Monrovia voluntarily gave Yang a $150,000 credit. Were this to go back for a new damages calculation, Yang has not established that any reduction in the judgment based on his theory would be greater than the $150,000 credit he already got.

Further, the reporter's transcript does not include opening statements and the entire testimony of Monrovia's representative, as there was no court reporter then present. As appellant, Yang bears the burden of affirmatively showing prejudicial error, and, to satisfy this burden, he had to provide an adequate record to assess error. (See *Nielsen v. Gibson* (2009) 178 Cal.App.4th 318, 324.) "Where no reporter's transcript [or settled statement] has been provided and no error is apparent on the face of the existing appellate record, the judgment must be *conclusively presumed correct* as to *all evidentiary matters*. To put it another way, it is presumed that the unreported trial testimony would demonstrate the absence of error." (*Estate of Fain* (1999) 75 Cal.App.4th 973, 992; see Cal. Rules of Court, rules 8.130 [reporter's transcript], 8.134 [agreed statement], 8.137 [settled statement].) The presumption applies here.

DISPOSITION

The judgment is affirmed. Monrovia-Myrtle, LLC is awarded its costs on appeal.

NOT TO BE PUBLISHED.

DHANIDINA, J.

We concur:

EDMON, P. J. EGERTON, J.