Filed 1/30/13 MGM Transformer v. Rosen Electric CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

MGM TRANSFORMER, INC., Plaintiff and Appellant, v. ROSEN ELECTRIC et al., Defendants and Appellants.	B233927 (Los Angeles County Super. Ct. No. BC396934)

APPEAL from a judgment and order of the Superior Court of Los Angeles County. Ralph W. Dau, Judge. Affirmed in part and reversed in part.

Afifi Law Group and Faryan A. Afifi for Plaintiff and Appellant.

Schreiber & Schreiber, Inc., Edwin C. Schreiber and Eric A. Schreiber for Defendant and Respondent.

INTRODUCTION

This appeal and cross-appeal arises from a jury verdict in favor of MGM Transformers, Inc. in its action against Rosen Electric ("RE") and William Rosen for breach of contract, breach of personal guaranty, and fraud based on a false promise. On appeal, RE and Rosen contend that the jury's verdicts of breach of contract and breach of personal guaranty are not supported by substantial evidence. MGM cross-appeals the trial court's entry of judgment notwithstanding the verdict on the fraud claim. We affirm in part and reverse in part.

FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Summary

RE was engaged in the business of buying and selling electrical transformers. For a time, Rosen was a stockholder and president of the corporation. MGM was a manufacturer of transformers; the company was primarily run by Al Googerchian's son, Patrick Gogerchin.[1] The present action involved an alleged promise by Rosen to be personally responsible for RE's debts.

B. MGM's Breach of Guaranty and Fraud Claims against Rosen

i. The oral promise.

According to testimony, Al and Rosen had a personal friendship and their companies often bought goods and services from each other. At about the time of the alleged guaranty, however, RE's payments to MGM had slowed to a point where Patrick no longer wanted to do business with RE. Because of the long-standing relationship between his father and Rosen, Patrick brought his concerns with RE's account to his father. In response, Al advised Patrick to continue doing business with RE and assured

---

1 Because their surnames are spelled similarly, we refer to Al and Patrick by their first names to avoid confusion between the two. We do not intend this informality to reflect a lack of respect.

him that he would speak with Rosen the next time he saw him. The opportunity came at the funeral of Tiffany Sutton, a long-time employee of MGM who unexpectedly died in February, 2005. Al testified that he approached Rosen and asked him, "Bill, what is the problem with Rosen?" Rosen answered, "There is no problem, when you do business with Rosen, you do business with me." Al further testified that Rosen told him, "I guarantee it; you do business with Rosen and you don't get burned." Patrick's testimony was also to the general effect that Rosen had personally agreed to be responsible for RE's debts.

At trial, Rosen denied making any such statements at the funeral. He specifically denied having any discussion with Al regarding RE's unpaid account or Patrick's disinclination to do business with RE.

ii. The check exchange.

The parties do not dispute that after Rosen allegedly guaranteed payment of RE's account, the parties continued to do business together. Donald Tregillis, MGM's controller and chief financial officer, testified that the next problem with RE's account came to his attention over three years later, in the summer of 2008. The evidence shows that in June, 2008, MGM owed RE $31,154.70 for purchases. Rather than have MGM deduct that sum from RE's unpaid balance, the two companies agreed to a mutual exchange of checks for $31,154.70. After the checks were exchanged, however, RE's check was returned with a Stop Payment notice marked on it, while MGM's checks had cleared the bank.[2]

John Jauregui, RE's chief operating officer, testified that he had verified sufficient funds existed in the account to cover the check before he signed it; however, the bank had seized the funds. At that time, the bank held a lien on all of RE's assets and would take funds in the RE account without notice. Jauregui also testified that he spoke to Rosen about the check exchange a week later. In response, Rosen told him to do what he could to take care of MGM.

---

2 MGM wrote three checks totaling $31,154.70.

After Al learned of the stop payment placed on RE's check, he went to see Rosen at RE's shop. While there, Al told Rosen that MGM needed the money; he also confronted Rosen about his guaranty. Rosen stated that his attorney had advised him not to talk to Al. Al further testified that Rosen told him, "Do what you have to do."

At trial, Rosen recalled that Al had come to see him, asking him for money. However, he did not think that Al told him he was responsible for RE's unpaid account.

C. MGM's Breach of Contract Claim against RE

In 2001, Patrick decided to update MGM's terms and conditions. The terms document is a one-page form containing several provisions, including a clause entitled "Special Conditions for Power Transformers." Patrick testified that he had modified a clause within that section to read: "In the event of default by buyer of any obligation buyer agrees to pay costs and expenses including attorney fees, costs of suit and interest at 2% per month."

At trial, it was undisputed that the parties' usual course of conduct was that RE would provide MGM with a purchase order containing the specifications and price of the goods; the purchase order included no contractual term for attorney fees. MGM would respond with an order acknowledgment which included the terms document containing the attorney fee provision. Patrick testified, however, that upon RE's receipt of the product, MGM also issued an invoice with the same standard form attached.

Jauregui denied that MGM's invoices included a copy of the terms document. He testified that as chief operating officer, a position that he held at RE from 2005 onward, it was his standard practice to receive and review invoices. He specifically testified that prior to trial, he had never before seen MGM's terms and conditions. He stated, "Anything that came in with the invoices was supposed to be left intact."

D. Procedural History

On August 22, 2008, MGM filed a complaint alleging breach of contract, book account, account stated, fraud, and breach of personal guaranty against RE and Rosen. On March 11, 2011, a jury rendered a special verdict in MGM's favor, finding that (1)

Rosen breached a contract to be personally responsible for RE's debts; (2) RE breached a contract to pay costs and expenses including attorney fees in the event of a default by RE;[3] and (3) Rosen committed fraud based on a false promise. The jury assessed punitive damages against Rosen in the amount of $500,000. Based on the jury verdict, the trial court entered judgment against RE and Rosen setting damages of $127,134, plus $77,826.91 in prejudgment interest, and against Rosen for punitive damages of $500,000.

On March 21, 2011, RE and Rosen filed a motion for judgment notwithstanding the verdict and for new trial, on the grounds that there was no substantial evidence to support the jury's verdict. After a hearing, the court denied the motion for new trial, but partially granted the motion for judgment notwithstanding the verdict on the issue of fraud, striking the punitive damages award against Rosen. The trial court granted MGM's motion for attorney fees, awarding fees in the amount of $210,000 against both RE and Rosen.

RE and Rosen timely appealed from the judgment and order awarding attorney fees. MGM filed a timely notice of cross-appeal with respect to the judgment on the fraud claim.

DISCUSSION

RE and Rosen contend that (1) there was no substantial evidence that the oral promise fell within an exception to the Statute of Frauds; and (2) there was no substantial evidence that the parties' contract included MGM's terms and conditions. In its cross-appeal, MGM asserts that the trial court erred in entering judgment on the fraud claim, on the grounds that there was substantial evidence of Rosen's intent to deceive MGM.

I. Standard of Review

In resolving challenges to a verdict based on sufficiency of the evidence, we review the record as a whole, resolving all conflicts and indulging all legitimate and reasonable inferences in favor of the prevailing party, to determine whether substantial

---

3 At trial, the parties stipulated that the amount due for goods sold to RE was $127,134; RE did not contest its liability for that amount.

evidence supports the verdict. (*Western State Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 571.) If there is substantial evidence, contradicted or uncontradicted, that supports the jury's finding, it must be upheld regardless of whether the evidence is subject to more than one interpretation. (*Ibid*.) Substantial evidence, however, is not synonymous with "any" evidence. (*Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 51.) To be substantial, the evidence supporting the judgment must be "of ponderable legal significance, . . . reasonable, credible and of solid value." (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651.) Moreover, while the determination of the trier of fact is entitled to great weight (*Fortman v. Hemco, Inc.* (1989) 211 Cal.App.3d 241, 259), substantial evidence "is . . . not merely an appellate incantation designed to conjure up an affirmance. To the contrary, it is essential to the integrity of the judicial process that a judgment be supported by evidence that is at least substantial." (*Roddenberry, supra,* 44 Cal.App.4th at p. 652.)

A trial court must render judgment notwithstanding the verdict whenever a motion for a directed verdict for the aggrieved party should have been granted. (Code Civ. Proc., § 629.) "A motion for judgment notwithstanding the verdict may be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence in support [of the verdict]." (*Sweatman v. Department of Veterans Affairs* (2001) 25 Cal.4th 62, 68.) "Where appropriate a *partial* JNOV may be granted." (*Hansen v. Sunnyside Products, Inc.* (1997) 55 Cal.App.4th 1497, 1510.)

"In passing upon the propriety of a judgment notwithstanding the verdict, appellate courts view the evidence in the light most favorable to the party who obtained the verdict and against the party to whom the judgment notwithstanding the verdict was awarded. [Citations.] In other words, we apply the substantial evidence test to the jury verdict, ignoring the judgment." (*Hassan v. Ford Motor Co.* (1977) 19 Cal.3d 530, 546, overruled in part on other grounds by *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580.)

II. There is No Substantial Evidence in Support of the Cause of Action for Breach of Guaranty

Civil Code section 1624 provides that a contract must be in writing if it is: "(2) A special promise to answer for the debt, default, or miscarriage of another, except in the cases provided for in Section 2794." (Civ. Code, § 1624, subd. (a).) The parties do not dispute that the oral promise was to answer for the debt of another, and that there was no memorandum sufficient to satisfy the Statute of Frauds. However, "[a] recognized exception to the statute occurs . . . when the oral promise is made for a consideration beneficial to the promisor, so that it appears that he gave the promise merely for his own pecuniary or business advantage. In such case, it is deemed an original obligation of the promisor and need not be in writing. (Civ. Code, § 2794, subd. (4).) Thus, the test of exclusion from the statute of the new promise depends upon the 'main purpose' or 'leading object' of the promisor." (*Michael Distributing Co. v. Tobin* (1964) 225 Cal.App.2d 655, 664-665, fns. omitted.)

The "main purpose" rule was specifically approved by the Supreme Court in *Schumm by Whyner v. Berg* (1951) 37 Cal.2d 174, 187: "'Whenever a promise to answer an antecedent obligation of another is made upon a fresh consideration beneficial to the promisor, no matter from what source it may move, the promise is an original one and valid though oral; or, as was said in an early case, whenever the leading and main object of the promisor is not to become surety or guarantor of another, but to subserve some purpose or interest of his own, his promise is not within the statute, although the effect of the promise may be to pay the debt or discharge the obligation of another.' [Citations.]" Specifically, "two elements are required by the code provision, one, that the promise be to pay for the antecedent obligation, and two, that the consideration for the promise be for the benefit of the promisor." (*Fuller v. Towne* (1920) 184 Cal. 89, 96.)

The evidence presented at trial demonstrated that the alleged promise was supported by consideration consisting of MGM's future and continued business with RE. The only issue remaining on appeal, therefore, is whether Rosen obtained, as part of that consideration, a benefit accruing directly to him personally. After a thorough review of

the record, however, we find that MGM produced no evidence of any consideration to Rosen in return for Rosen's guaranty. There was no promise of forbearance, and MGM was free to institute legal proceedings against RE whenever it wished. The only consideration for the guaranty was the continued sale of products to RE on credit, a consideration that primarily inured to the benefit of RE; there was no direct benefit of any kind that accrued to Rosen personally. The only benefit Rosen received from the continued sales to MGM on credit was as one of the stockholders of RE. Here, however, the evidence does not show that Rosen owned all or even substantially all of the stock of the corporation. (Cf. *Michael Distributing, supra*, 225 Cal.App.2d at p. 666 [a stockholder's promise to pay for lumber delivered to a building corporation was not within the Statute of Frauds where the stockholder held 51 percent of the corporation's stock and was benefited personally by the contract].) Accordingly, this benefit, which was shared with the other stockholders of the company, is too remote and indirect to render the promise enforceable as an original undertaking.

Even the testimony of benefit to RE as a company was limited. The only record evidence that MGM points to in support of this element is the following excerpt of Jauregui's deposition testimony, which was quoted during his direct:

> "Q: What did you just mean when you said you need these guys?
>
> "A: Transformers. I was afraid they were going to cut us off. I mean, if I can't sell transformers, I mean, that's like putting a guy out of business.
>
> "Q: You mean, if you couldn't sell transformers, you'd go out of business?
>
> "A: I could, yea. It was bad for me or the Rosens, everybody's bad. If you're a car salesman, you can't sell cars, you can't sell cars."

The record indicates, however, that MGM's attorney then asked Jauregui, "Rosen's Electric needed to be able to sell transformers and do business with MGM Transformer . . . otherwise it would go out of business?" Jauregui answered, "Yes. In the generality. But referring to MGM, but we have other means to purchase transformers from." Documentary evidence established that RE had, indeed, purchased products from other transformer companies. Accordingly, when viewed as a whole, the evidence does

not support MGM's contention that RE's success as a company depended on MGM's agreement to continue selling transformers to RE, much less that there was personal benefit to Rosen in making the promise.

III. There is No Substantial Evidence in Support of the Cause of Action for Promissory Fraud

"The well-established common law elements of fraud which give rise to the tort action of deceit are: (1) misrepresentation of a material fact (consisting of false representation, concealment or nondisclosure); (2) knowledge of falsity (scienter); (3) intent to deceive and induce reliance; (4) justifiable reliance on the misrepresentation; and (5) resulting damage." (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 481.) "*All* of these elements must be present if actionable fraud is to be found; one element absent is fatal to recovery." (*Okun v. Morton* (1988) 203 Cal.App.3d 805, 828, italics in original.)

"'Promissory fraud' is a subspecies of the action for fraud and deceit. A promise to do something necessarily implies the intention to perform; hence, where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud." (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.) Further, "'something more than nonperformance is required to prove the defendant's intent not to perform his promise.' [Citations.]" (*Tenzer v. Superscope, Inc.* (1985) 39 Cal.3d 18, 30.)

The trial court, in granting the JNOV on the fraud claim, found "there is no substantial record evidence that William Rosen intended, when he made the promise to be responsible for the debts of RE (if he made such a promise), not to perform that promise." The trial court noted that the only evidence MGM provided on that issue was Rosen's testimony that he never intended to be personally responsible for the debts of RE to MGM, and continued "[a]s noted above, in the same breath, Mr. Rosen said he did not recall making such a promise. This evidence does not support element 3 of CACI 1902, and the only record evidence plaintiff can point to for that element is that Mr. Rosen did not pay off RE's debt when asked to do so by Al Googerchian in 2008. This is not

substantial evidence of intent not to keep a promise when made." Accordingly, even fully crediting the testimony that the promise was made, the issue on appeal is whether there was substantial evidence of Rosen's intent not to perform that promise.

The evidence shows that the alleged guaranty took place in 2005, when Al and Rosen were graveside at a funeral. According to testimony, Al approached Rosen and expressed Patrick's disinclination to do business with RE due to its unpaid account. In response, Rosen allegedly stated, "[W]hen you do business with Rosen, you do business with me," and further assured him that he would not get burned. At trial, Rosen denied making any such statements. The evidence is undisputed that following the funeral, the parties continued to do business with each other. Three years later, in 2008, when Al learned of the stop payment placed on RE's check, he went to see Rosen and allegedly confronted him about his guaranty. According to Rosen's version of events, he recalled that Al had asked him for money, but denied being told that he was responsible. The evidence is uncontroverted that Rosen ultimately did not pay RE's debts.

The record does not contain any evidence of Rosen's intent to defraud MGM. "To be sure, fraudulent intent must often be established by circumstantial evidence," and may be "inferred from such circumstances as defendant's insolvency, his hasty repudiation of the promise, his failure even to attempt performance, or his continued assurances after it was clear he would not perform." (See *Tenzer*, *supra*, 39 Cal. 3d at p. 30.) Here, however, there is no additional evidence from which an inference of the requisite intent can be drawn. Rather, the facts only demonstrate that the companies continued to do business for three years, apparently without incident or demand for payment on the guaranty after the promise was made, but that the new request in 2008 was not honored; this is not enough to establish fraudulent intent. (See *id.* at pp. 30-31 [noting that in order to prevent every breach of contract from automatically giving rise to a fraud recovery, the courts have concluded that proof of nonperformance of the promise is, without more, insufficient to prove the defendant had no intent to perform the promise at the time it was made].) MGM contends that Rosen's failure to repay RE's debts at Al's request in 2008 constitutes substantial circumstantial evidence of his "unwillingness even to attempt

performance." There is, however, no other evidence in the record, and MGM points to none, showing Rosen's knowledge of the falsity of his promise made three years earlier, or of any intent to deceive or defraud when the promise was made. As such, the circumstantial evidence is too tenuous to support the inference urged by MGM.[4]

IV. The Attorney Fee Provision in MGM's Acknowledgment Form Did Not Become a Contract Term

Where a commercial buyer and seller exchange purchase order and acknowledgment forms containing inconsistent provisions, California Uniform Commercial Code section 2207 governs the existence of a contract and its terms.[5] (See *Transwestern Pipeline Co. v. Monsanto Co.* (1996) 46 Cal.App.4th 502, 515-516; *Diamond Fruit Growers, Inc. v. Krack Corp.* (1986) 794 F.2d 1440, 1442-1443.)

Section 2207 provides: "(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms. (2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless: (a) The offer expressly limits acceptance to the terms of the offer; (b) They materially alter it; or (c) Notification or objection to them has already been given or is given within a reasonable time after notice of them is received. (3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act."

---

4 Because the trial court properly entered judgment notwithstanding the verdict on the fraud cause of action, we need not reach the issue of punitive damages.

5 All further statutory references are to the Commercial Code unless otherwise noted.

Section 2207 replaces the common law "mirror image" rule which required an acceptance to "mirror" the offer, i.e., to reiterate all terms and conditions exactly. (See, e.g., *Apablasa v. Merritt & Co.* (1959) 176 Cal.App.2d 719, 726.) A purported acceptance at variance with the offer was treated under the common law as a counteroffer which was deemed accepted if the offer or proceeded to perform. (*Diamond Fruit Growers, supra*, 794 F.2d at 1443.) "In place of the 'mirror image' rule, section 2207 inquires as to whether the parties intended to complete an agreement: 'Under this Article a proposed deal which in commercial understanding has in fact been closed is recognized as a contract.' (§ 2207, Cal. U. Com. Code, com. 2.) If the parties intend to contract, but the terms of their offer and acceptance differ, section 2207 authorizes a court to determine which terms are part of the contract, either by reference to the parties' own dealings (see § 2207, subds. (1), (2)), or by reference to other provisions of the code. (See § 2207, subd. (3).)" *Steiner v. Mobil Oil Corp.*, (1997) 20 Cal.3d. 90, 99-100.)

The record demonstrates and the parties do not dispute that the parties were merchants, as MGM was a manufacturer of transformers, and RE was engaged in the business of selling transformers. The purchase order and acknowledgment forms exchanged by the parties contained inconsistent provisions. According to the testimony, every purchase order issued by RE provided the specifications and price of the transformer purchased; none included a contractual term for attorney fees. All of MGM's acknowledgment forms, however, included a clause stating: "In the event of default by buyer of any obligation buyer agrees to pay costs and expenses including attorney fees, costs of suit and interest at 2% per month." Accordingly, the issue here is whether the additional provisions contained in MGM's acceptance materially altered the contract.

A variation is material "if it would 'result in surprise or hardship if incorporated without express awareness by the other party.'" (*Steiner, supra*, 20 Cal.3d 90, 102, quoting § 2207, Cal. U. Com. Code, com. 4.) Given the specific factual context of this case, an attempt by MGM to enforce the new provision would certainly have resulted in surprise to RE. RE's order only provided the specifications and price of the goods purchased; it contained no attorney fee and interest clause. There is no evidence that RE

expressly consented to the provision; nor does the evidence indicate that RE read the clause or was aware of it. There is also no evidence demonstrating that the provision was ever negotiated or discussed between the parties. The clause, therefore, was a material alteration in the parties' contract and, as such, is unenforceable against RE.

MGM contends that the fact the parties had exchanged the same forms on prior occasions gives rise to an inference that RE was aware of the clause. MGM's reliance on the prior course of dealings between the parties is, in this case, misplaced.

A course of dealing requires "a sequence of conduct concerning previous transactions between the parties to a particular transaction that is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." (§ 1303, subd. (b); see also *C9 Ventures v. SVC-West, L.P.* (2012) 202 Cal.App.4th 1483, 1507, quoting *Union Carbide Corp. v. Oscar Mayer Foods Corp.* (7th Cir. 1991) 947 F.2d 1333, 1336 [A party's consent to an additional term, even if it modifies the agreement, can nonetheless be inferred "'from silence, in the face of a course of dealings that makes it reasonable for the other party to infer consent from a failure to object'"].) Here, RE and MGM engaged in a series of purchases by RE from MGM. From 2001 onward, MGM provided RE an acknowledgment form containing the disputed provision, without express objection from RE.

Those facts are insufficient to establish that the additional clause became a contract term. (See, e.g., *Transwestern, supra*, 46 Cal.App.4th at p. 513-519 [concluding that liability limiting language was not part of the parties' contract though included in invoices for 12 years and stated to expressly condition acceptance of purchase orders on assent to the additional limitation of liability terms].) Adopting the reasoning of the Third Circuit Court of Appeals in *Step-Saver Data Systems, Inc. v. Wyse Technology* (3d Cir. 1991) 939 F.2d 91, the *Transwestern* court ruled: "Common sense tells us the mere exchange of forms containing inconsistent terms, for however long a period, cannot establish a common understanding between the parties as to which set of conflicting terms is part of their contract. . . . Each party is equally entitled to claim its terms and conditions constituted the parties 'course of dealing.' [Citation.] . . . The longer such a

battle continues, the more obvious it is the parties have not reached agreement over the terms in dispute." (*Id.* at p. 516.) Aside from MGM's repeated sending of a standard form with the same term, the record contains no other evidence to support a reasonable conclusion that the parties had reached mutual agreement as to the disputed term. Accordingly, while a prior course of dealing is relevant here, there is nothing about the prior dealings of the parties herein that negated the effects of section 2207(2)(a).

DISPOSITION

The judgment against Rosen is reversed. The judgment against RE is affirmed as to damages, but reversed as to the award of attorney's fees and interest, and the matter remanded to the court to determine the amount of interest awardable as a matter of law.

The judgment against MGM and in favor of RE and Rosen as to the fraud claim is affirmed.

RE and Rosen are awarded their costs on appeal against MGM.

ZELON, J.

We concur:

WOODS, Acting P. J.

JACKSON, J.