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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

KEYSTONE CONSTRUCTION, INC.,

Plaintiff and Appellant,

v.

JUAN BRISENO CABRERA,

Defendant and Respondent.

B241928

(Los Angeles County  
Super. Ct. No. BC472943)

APPEAL from a judgment of the Superior Court of Los Angeles County.  
Ralph W. Dau, Judge. Affirmed.

C. Jeong & Likens, C. Yong Jeong and Brennan J. Mitch, for Plaintiff and  
Appellant.

Gibson, Dunn & Crutcher, Kahn A. Scolnick, Holly A. Jones and Minae Yu for  
Defendant and Respondent.

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Plaintiff and appellant Keystone Construction, Inc. (Keystone) appeals from the \$1,712.70 default judgment entered in its favor and against defendant and respondent Juan Briseno Cabrera (Cabrera) on Keystone's complaint for breach of contract, conversion, fraud and breach of the implied covenant of good faith and fair dealing. Keystone contends: (1) the undisputed evidence supported a larger damage award; (2) it was entitled to punitive damages; and (3) it was entitled to prejudgment interest. We affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Viewed in accordance with the usual rules of appeal from a default judgment (*Kim v. Westmoore Partners, Inc.* (2011) 201 Cal.App.4th 267, 281 (*Kim*) [defendant's failure to answer has the same effect as an express admission of the material facts alleged in the complaint, but plaintiff must prove entitlement to the damages it claims]), the evidence established that Cabrera was an electrician. In February 2006, Keystone hired Cabrera as a foreman. At that time, Cabrera signed an acknowledgement that he had received a copy of Keystone's "Employee Handbook;" the acknowledgment expressly states that Cabrera is an at-will employee and neither Cabrera nor Keystone "has entered into a contract regarding the duration of my [Cabrera's] employment. I am free to terminate my employment . . . at any time, with or without reason. Likewise, [Keystone] has the right to terminate my employment . . . with or without reason . . . ." In August 2008, Cabrera used the company credit card to purchase \$540.17 worth of tools for himself. On October 2, 2008, Cabrera signed a promissory note agreeing to pay Keystone \$20 per month until he had reimbursed Keystone the full \$540.17 (the promissory note). When Cabrera left work that day, he took with him the tools he had purchased with the company credit card as well as a company owned walkie-talkie/cell phone and some uniforms.

On October 2, 2008, Cabrera provided Keystone with the first of a series of doctor's notes; each note stated a date certain when Cabrera would return to work but on or about each scheduled return date, sometimes a few days after that date, Cabrera would

submit a new doctor's note stating a new return date. The last doctor's note, dated December 17, 2008, stated that Cabrera would be unable to work until January 1, 2009. Cabrera did not return to work on January 2, 2009, and did not provide another doctor's note. During this time, the only communication Cabrera had with Keystone was through these doctor's notes; Cabrera did not respond to messages left for him by representatives of Keystone. By March 2009, five months after Cabrera's last day of work, Keystone had still not formally terminated him.<sup>1</sup> Instead, Keystone hired a series of temporary workers to replace Cabrera, at a higher hourly wage than it was paying Cabrera. On April 20, 2009, a representative of Keystone emailed Cabrera requesting that he return the company property he took with him on October 1, 2008, including the tools he purchased with the company credit card. Cabrera returned the items sometime in 2011, by which time Keystone had already replaced them, making the returned items of little value.

On November 4, 2011, Keystone filed this action against Cabrera. Although the complaint states that Cabrera was an at-will employee, the gravamen of the first cause of action is breach of an "employment contract" arising out of the signed acknowledgement of receipt of the Employee Handbook. The second cause of action is based on Cabrera's breach of the promissory note to reimburse Keystone for his unauthorized use of the company credit card.<sup>2</sup> The third cause of action for conversion is based on Cabrera failing to timely return the company owned property he took with him on his last day of work. The gravamen of the fourth cause of action for fraud is that Cabrera misrepresented that he would abide by the terms of employment set out in the Employee

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<sup>1</sup> A March 17, 2009 email from Cabrera to the president of Keystone states in part, "[I] am sending you this email regarding my employment with Keystone, since I have not heard from you since our meeting at the office. I would like to know if you have already come to a decision with regards to my employment with Keystone. It was my understanding that I was still a Keystone employee while I was on disability. . . ."

<sup>2</sup> There is no mention in the second cause of action that Cabrera returned the tools, although that fact is stated elsewhere in the complaint.

Handbook and the terms of the promissory note, Keystone reasonably relied on those promises when it hired and/or retained Cabrera and but for those promises, Keystone would not have hired and/or retained Cabrera. The fifth cause of action for breach of the implied duty of good faith and fair dealing is based on breach of the alleged employment contract and the promissory note. The complaint sought unspecified “compensatory, consequential [and] nominal” damages on each cause of action, as well as punitive damages on the conversion and fraud causes of action.

After Cabrera failed to respond to the complaint, his default was entered on January 18, 2012. Meanwhile, on December 6, 2011, Keystone served Cabrera with a Statement Of Damages. (See Code Civ. Proc., § 425.11, subd. (c), § 580, subd. (a).) Keystone sought \$1.6 million dollars in damages comprised of the following:

\$300,000 in general damages:

\$200,000 for damage to “business reputation”; and

\$100,000 for “wasted time and inconvenience”;

\$700,000 in special damages:

\$200,000 for “loss of earnings”;

\$200,000 for “loss of future earning capacity”;

\$200,000 for “property damage”; and

\$100,000 for “wasted costs and expenses”;

\$600,000 in punitive damages.<sup>3</sup>

In a Request for Entry of Court Judgment filed on April 27, 2012, Keystone requested a \$540,736.68 judgment, comprised of:

\$150,000 in general damages;

\$190,050.99 in special damages;

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<sup>3</sup> “ ‘ ‘ ‘Special damages’ refers to out-of pocket losses that can be documented by bills, receipts, cancelled checks, and business and wage records. . . . ‘General damages’ refers to damages for . . . forms of detriment that are sometimes characterized as ‘subjective’ or not directly quantifiable.” ’ [Citation.]” (*Beeman v. Burling* (1990) 216 Cal.App.3d 1586, 1599.)

\$178.69 in interest;  
\$507 in costs; and  
\$200,000 in punitive damages.

Keystone detailed its damage claims in a document entitled Case Summary In Support of Default Judgment, which it filed along with the request for judgment.

Keystone maintained it was entitled to the following:

\$340,050.99 in general and special damages:

\$1,205.70 in “property expenses”:

\$500.17 (unpaid balance on the \$540.17 promissory note);

\$326.24 (cost of replacing the walkie-talkie/cell phone);

\$234.29 (personal use of the cell phone);

\$145.00 (value of the company owned uniforms);

\$11,995.20 in “additional wage expenses”;

\$175,850 in “lost profits”;

\$100,000 in “loss of business reputation”; and

\$50,000 for “wasted time and inconvenience”;

\$178.69 in prejudgment interest on the unpaid \$500.17 promissory note balance;

\$200,000 in punitive damages on the fraud cause of action; and

\$507 in costs:

\$395 filing fee; and

\$112 process server fees.

Along with the Case Summary, Keystone submitted the declaration of its president, Young B. Park, and various exhibits. Park stated that by the time Cabrera returned “the phone, charger, clip, uniforms, and the tool purchased with the company credit card” sometime in 2011, the company had already replaced those items, including purchasing a new cell phone for \$326.24. Keystone also incurred charges of \$234.29 for Cabrera’s misuse of the company cell phone; phone company invoices were attached as an exhibit. In addition, Park claimed as damages the difference between Cabrera’s

hourly wage and the higher rate Keystone paid to the temporary employees it hired to replace Cabrera during the time he claimed to be disabled. Park also blamed Cabrera's "unprofessional behavior and repeated and continuous absenteeism between October 2008 and March 2009" for missed deadlines that caused Keystone to lose business.

On May 16, 2012, the trial court entered default judgment against Cabrera in the amount of \$1,712.70, comprised of special damages of \$1,205.70 (the amount Keystone claimed as "property expense") and \$507 in costs. In a four page written order, the trial court did not specify upon which cause of action or causes of action its special damage award was based, but stated that Keystone failed to meet its burden to establish that it was entitled to the additional special and general damages it sought. Regarding Keystone's request for punitive damages, the trial court found Keystone failed to prove malice, oppression or fraud, and failed to prove Cabrera's financial condition. Without explanation, the trial court found Keystone had failed to establish that it was entitled to prejudgment interest. Keystone timely appealed.

## **DISCUSSION**

At the outset we observe that the essence of Keystone's complaint – aside from the conversion of specific property for which the judgment compensated Keystone – is that Cabrera breached his at-will employment contract by leaving his job. Remarkably, in Keystone's five pages of its opening brief on the breach of contract claims, Keystone cites no authority for the proposition that an employer can sue an at-will employee for deciding no longer to work for the employer. Generally, unlike an independent contractor who may be liable in breach of contract for breaching his agreement, "an employee may quit his work." (*Greenaway v. Workers' Comp. Appeals Board* (1969) 269 Cal.App.2d 49, 55; see *Baugh v. Rogers* (1944) 24 Cal.2d 200, 207.) This fatal flaw infects in some manner all of the arguments that Keystone has offered in its appellate briefs. Nevertheless, we address the points in the manner in which Keystone has presented them.

A. *General And Special Damages*

Keystone contends the damage award was not adequate. As we understand its argument, it is that substantial evidence established that Cabrera's absences from work caused Keystone the hundreds of thousands of general and special damages it claims. The contention is without merit.<sup>4</sup>

To establish entitlement to damages, a plaintiff must prove a causal connection between the damages it seeks and the defendant's wrongful conduct, and that the detriment it suffered was a natural and probable consequence of the defendant's conduct. (*Chaparkas v. Webb* (1960) 178 Cal.App.2d 257, 260.) For example, to establish a claim for lost profits, the plaintiff must show a reasonable probability that profits would have been earned but for the defendant's conduct. (*S. C. Anderson, Inc. v. Bank of America* (1994) 24 Cal.App.4th 529, 536.) And to be entitled to special damages for breach of contract, the plaintiff must prove that those damages were actually foreseen or were reasonably foreseeable when the contract was formed. (*Lewis Jorge Construction Management, Inc. v. Pomona Unified School Dist.* (2004) 34 Cal.4th 960, 970) Likewise, fraud damages must follow "the act complained of as a legal certainty" and may not be based on mere speculation. (*Ferguson v. Lieff, Cabraser, Heimann & Bernstein* (2003) 30 Cal.4th 1037, 1048.) The plaintiff at a default prove-up hearing has the burden of proving he is entitled to the damages claimed. (*Kim, supra*, 201 Cal.App.4th at p. 288.) As such, the plaintiff has the burden of proving that the defendant's wrongful conduct

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<sup>4</sup> In his Respondent's Brief, Cabrera contends the judgment should be affirmed because the complaint failed to state a cause of action for fraud, breach of contract or breach of the implied covenant of good faith and fair dealing. Keystone counters that, as a defaulting defendant, Cabrera does not have standing to challenge the merits of the case. Keystone is incorrect. Notwithstanding the defendant's default, a plaintiff is not entitled to relief where the allegations of the complaint do not state a cause of action. (*Kim, supra*, 201 Cal.App.4th at p. 282 [objection that complaint failed to state a cause of action may be considered on appeal].) Cabrera does not challenge the conversion claim, or the sufficiency of the evidence to support the damage award based on that cause of action.

caused its claimed damages and that those damages were reasonably foreseeable to the defendant.

In both breach of contract and tort cases, a plaintiff “ ‘has a duty to take reasonable steps to mitigate those damages and will not be able to recover for any losses which could have been thus avoided.’ ” (*Valle de Oro Bank v. Gamboa* (1994) 26 Cal.App.4th 1686, 1691.) The burden of proving facts in mitigation of damages rests upon the defendant. (*Jackson v. Yarbray* (2009) 179 Cal.App.4th 75, 97; *Carnation Co. v. Olivet Egg Ranch* (1986) 189 Cal.App.3d 809, 817-818, and cases cited therein.)

Following a prove-up hearing, the trial court must render judgment in the plaintiff’s favor “as appears by the evidence to be just.” (Code Civ. Proc., § 585, subd. (b); see also Civ. Code, § 3359 [no more than reasonable damages can be recovered].) Because the plaintiff in a default case has no motive to be conservative in its demands, and there is no “opposing party to point out the excesses, it is the duty of the court to act as gatekeeper, ensuring that only the appropriate claims get through. [Citation.]” (*Electronic Funds Solutions, LLC v. Murphy* (2005) 134 Cal.App.4th 1161, 1179.)

Here, even assuming the complaint states causes of action for breach of contract and fraud, Keystone has failed to prove damages greater than those awarded by the court. First, Keystone did not show that its business losses were caused by Cabrera’s wrongful conduct – i.e., his persistent absenteeism – much less that those damages were reasonably foreseeable. It simply defies logic to believe the success or failure of Keystone’s business rested on the absence of one at-will employee who Keystone claims was demonstrably unreliable. Thus, Keystone failed to prove Cabrera’s conduct was the cause of its losses, or that those losses were the natural and probable consequence of Cabrera’s conduct.

Second, Keystone’s failure to mitigate its damages appears on the face of the complaint and Park’s declaration submitted for the prove-up hearing. The complaint alleges that Cabrera was an at-will employee. In his declaration, Park characterizes the Employee Handbook signed acknowledgement as an “agreement to conform to



[Keystone’s] company policy in exchange for at-will employment . . . .” As an at-will employee, Cabrera had no duty to continue working for Keystone and Keystone had no duty to continue employing him. Keystone has not shown why it could not have terminated Cabrera for his failure to comply with company policy and hired a permanent replacement. Not doing so for approximately six months constitutes a failure to mitigate its damages.

## B. *Punitive Damages*

Keystone contends the trial court erred in denying its claim for punitive damages. It argues that (1) evidence Keystone paid Cabrera \$51.38 per hour, from which it could be inferred that Cabrera had earned over \$1 million in the past decade, was sufficient to establish Cabrera’s financial condition; and (2) the finding that Cabrera converted Keystone’s property was sufficient to support a finding of fraud. Keystone is incorrect.

“ ‘In a civil case not arising from the breach of a contractual obligation, the jury may award punitive damages “where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice.” (Civ. Code, § 3294, subd. (a).)’ [Citation.] ‘Under California law, a punitive damages award must be based on three factors: (1) the reprehensibility of the defendant’s conduct; (2) the amount of compensatory damages awarded to or actual harm suffered by the plaintiff; and (3) the defendant’s financial condition.’ [Citations.]” (*Behr v. Redmond* (2011) 193 Cal.App.4th 517, 535 (*Behr*)). “ ‘Something more than the mere commission of a tort is always required for punitive damages. There must be circumstances of aggravation or outrage, such as spite or “malice,” or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that his conduct may be called willful or wanton.’ [Citation.]” (*Taylor v. Superior Court of Los Angeles* (1979) 24 Cal.3d 890, 894–895, italics omitted.)

A punitive damage award “must bear some reasonable relationship to the net worth of the defendant . . . .” (*Dumas v. Stocker* (1989) 213 Cal.App.3d 1262, 1267.) It is the plaintiff’s burden to produce evidence of the defendant’s net worth and failure to

do so is reason enough to deny punitive damages. (*Id.* at p. 1268.) We review a punitive damage award for substantial evidence, viewing the record in the light most favorable to the judgment. (*Behr, supra*, 193 Cal.App.4th at p. 535.)

Here, the trial court's finding that Keystone failed to introduce sufficient evidence of Cabrera's net worth and also failed to establish that Cabrera's conduct was so reprehensible as to satisfy the "malice, oppression, or fraud" element is supported by the record. The misconduct alleged in the complaint simply did not rise to the level of reprehensibility necessary to support an award of punitive damages.

Even if this were not the case, Keystone failed to establish Cabrera's net worth. The only evidence probative of Cabrera's net worth was Keystone's claim that it paid Cabrera \$51.38 per hour, from which Keystone extrapolates that Cabrera must have earned in excess of \$1 million dollars over the past 10 years. Keystone's calculation is speculative, to say the least. Further, a calculation based on gross earnings has very little to do with actual net worth at the time of the prove-up hearing. Keystone's calculations do not account for Cabrera's expenses over the years, including but not limited to the cost of food and housing, taxes, medical expenses or expenses associated with supporting a family. Thus, Keystone failed to meet its burden of proving Cabrera's net worth.

### C. *Prejudgment Interest*

Keystone contends the trial court erred in denying its request for prejudgment interest of \$178.20 on the \$500.17 unpaid balance of the promissory note, to which it argues it was entitled as a matter of law pursuant to Civil Code section 3287, subdivision (a). We disagree.

Prejudgment interest may be recovered in a conversion action. (*Moreno v. Greenwood Auto Center* (2001) 91 Cal.App.4th 201, 203.) Civil Code section 3287, subdivision (a) provides: "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon . . . ." Where the amount of damages cannot be ascertained except by verdict or judgment, prejudgment

interest is not appropriate. (*Wisper Corp. v. California Commerce Bank* (1996) 49 Cal.App.4th 948, 960.) A claim is not certain just because it is possible to determine a single element in the mathematical calculations. (*Id.* at pp. 960-961, citing *Chesapeake Industries, Inc. v. Togova Enterprises, Inc.* (1983) 149 Cal.App.3d 901, 914; but see *Gourley v. State Farm Mut. Auto. Ins. Co.* (1991) 53 Cal.3d 121, 384 [“When a case involves multiple types of damages, a plaintiff who recovers judgment should be permitted to recover prejudgment interest as to each type if warranted under the statutory provisions.”].) But, “[a] large discrepancy between the amount demanded and the amount awarded indicates that damages were not ascertainable if the discrepancy results from the resolution of factual disputes arising from conflicting evidence or the lack of factual information needed to readily calculate damages. [Citations.]” (*Uzyel v. Kadisha* (2010) 188 Cal.App.4th 866, 920.)

Here, each cause of action alleged that Cabrera took company owned property with him when he left work on October 1, 2008; Park’s declaration makes clear that this includes the tools Cabrera bought with the company credit card.<sup>5</sup> One element of Keystone’s requested \$190,050.99 in special damages was \$500.17, which was alleged to be the unpaid balance on the promissory note Cabrera executed to reimburse Keystone for the \$540.17 unauthorized credit card purchase. But the complaint also alleged that Cabrera returned the tools to Keystone, albeit three years after he took them. Because it

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<sup>5</sup> The first cause of action for breach of contract alleged that Cabrera used the company credit card to buy tools for his personal use and did not return those tools until three years later. The second cause of action for breach of the promissory note alleged that Cabrera improperly used the company credit card to buy tools for his personal use, executed the promissory note and failed to pay any of the amount owed, but it did not state that Cabrera had eventually returned the tools. The conversion cause of action stated that Cabrera returned the “items in 2011 after making [Keystone] replace the converted property, and making the converted items have no value . . . .” The fourth cause of action for fraud alleged that Cabrera “convert[ed] [Keystone’s] properties for his personal use for more than three years, in direct violation of his representations.” The fifth cause of action alleged that Cabrera breached the covenant of good faith and fair dealing by “converting [Keystone’s] properties for his personal use for more than three years . . . .”

was undisputed that Cabrera returned the tools, Keystone's damages were not necessarily the unpaid balance on the promissory note, but could arguably have been the difference between the \$540.17 unauthorized credit card charge to purchase the tools and the value of the returned tools – an amount that required calculation. Even assuming the \$500.17 was calculable, we conclude that the large discrepancy between the \$190,050.99 Keystone demanded as special damages and the actual award, was a sufficient reason to deny Keystone prejudgment interest.

### **DISPOSITION**

The judgment is affirmed. Cabrera shall recover his costs on appeal.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.