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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

JB SQUARED LTD., Plaintiff and Respondent, v. WILLIAM NAIM, Defendant and Appellant.	B293971 (Los Angeles County Super. Ct. No. BC650957)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark V. Mooney, Judge. Affirmed.

Beitchman & Zekian, David P. Beitchman and Andre Boniadi for Defendant and Appellant.

Fernald Law Group and Brandon Claus Fernald for Plaintiff and Respondent.

Defendant William Naim appeals from a judgment entered in favor of plaintiff JB Squared Ltd. (JB Squared) following a court trial. The court found Naim liable for breach of a personal guarantee and awarded JB Squared damages in the amount of $94,447.92 plus interest. As the record before us does not demonstrate any error, we affirm.

BACKGROUND

As we discuss more fully below, although there was a trial in this case, including witness testimony, Naim has not provided us with a reporter's transcript of the proceedings. Accordingly, our discussion of the factual and procedural background is taken from the statement of decision and judgment.

A. Factual Background

Naim is the founder, and a major shareholder, of Globatrac LLC (Globatrac).[1] Globatrac makes the Trakdot, a battery-operated device that can be placed in luggage to enable a traveler to keep track of his or her bags using a smartphone or other electronic device.

In 2012, JB Squared entered into a distribution agreement with Globatrac to become the exclusive distributor of the Trakdot in the United Kingdom and the European Union. JB Squared also contracted with sub-distributors to distribute the Trakdot in Russia and Germany.

In October 2014, JB Squared placed two purchase orders for Trakdots, paying $94,447.92 in advance of delivery. Production of the Trakdots was delayed, causing JB Squared problems with its sub-distributors when they did not arrive as originally promised. JB Squared then entered into a "Personal

[1] Globatrac is not a party to this appeal.

Deed of Guarantee" (Guarantee) with Naim, whereby he personally guaranteed that if Globatrac failed to make the Trakdots available for shipping by December 10, 2014, JB Squared "may cancel the order and the Guarantor [Naim] hereby guarantees to pay [JB Squared] the sum of $94,447.92." The Guarantee further provided that Naim "agrees that any sums due under this [Guarantee] shall be paid without set off, condition or counterclaim whatsoever." JB Squared and Naim later modified the Guarantee to provide that the Trakdots would be available for shipping by January 10, 2015, and payment would be received by January 14, 2015.

Globatrac failed to deliver the Trakdots by January 10, 2015. On January 15, 2015, JB Squared requested a refund of its money. Globatrac refused, asserting that the purchase orders did not provide for cancellation, and JB Squared could not cancel the orders without agreeing to terminate the distribution agreement. JB Squared made several demands on Naim for payment under his Guarantee, which Naim steadfastly refused.

JB Squared's Russian sub-distributor threatened litigation based on JB Squared's failure to timely deliver Trakdots. JB Squared was finally able to take delivery of the Trakdots on February 24, 2015. JB Squared and its Russian sub-distributor were able to resolve their dispute, but the business relationship was damaged; the sub-distributor placed no more orders with JB Squared.

B. The Trial Court Proceedings

JB Squared sued Naim for breach of contract, demanding payment of the $94,447.92 set forth in the Guarantee based on Globatrac's failure to timely deliver the Trakdots. Naim took the position the Guarantee provided for payment of $94,447.92 only if

JB Squared formally cancelled the order with Globatrac, and that while JB Squared expressed a desire to cancel, it never formally did so.

Following a two-day bench trial, the court issued a written statement of decision finding in favor of JB Squared. The court found Naim agreed to pay JB Squared $94,447.92 if the Trakdots were not made available by January 10, 2015. The Trakdots were not available for shipping by that date, and Naim failed to pay the $94,447.92 as required by the Guarantee. The court concluded Naim therefore breached the Guarantee, and ordered Naim to pay damages of $94,447.92.

Following entry of judgment, Naim timely appealed.

DISCUSSION

Naim asserts there is no substantial evidence to support the trial court's finding that he breached the Guarantee. Specifically, Naim contends there is no substantial evidence to support the judgment because (1) JB Squared failed to properly exercise its right to cancel the order, and (2) even if JB Squared did attempt to cancel the order, it waived its right to return of the purchase price by accepting the untimely delivery from Globatrac and selling the goods. Putting aside that our role is not to reweigh the evidence in the way Naim suggests, in the absence of a reporter's transcript we cannot evaluate, much less agree, with Naim's claims.

A. Standard of Review

As our Supreme Court has observed, "the absence of a court reporter at trial court proceedings and the resulting lack of a verbatim record of such proceedings will frequently be fatal to a litigant's ability to have his or her claims of trial court error resolved on the merits by an appellate court. This is so because it

is a fundamental principle of appellate procedure that a trial court judgment is ordinarily presumed to be correct and the burden is on an appellant to demonstrate, on the basis of the record presented to the appellate court, that the trial court committed an error that justifies reversal of the judgment. [Citations.] . . . 'Consequently, [the appellant] has the burden of providing an adequate record. [Citation.] Failure to provide an adequate record on an issue requires that the issue be resolved against [the appellant].' [Citation.]" (*Jameson v. Desta* (2018) 5 Cal.5th 594, 608-609, fn. omitted.)

Given this fundamental principle of appellate procedure, an appellant in Naim's situation cannot challenge the sufficiency of the evidence to support a trial court's judgment in the absence of a reporter's transcript of the trial. (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 132; *Estate of Fain* (1999) 75 Cal.App.4th 973, 992.) We therefore treat this matter as an appeal on the judgment roll, and "[o]ur review is limited to determining whether any error 'appears on the face of the record.' [Citations.]" (*Nielsen v. Gibson* (2009) 178 Cal.App.4th 318, 324-325.) Our review of the trial court's findings reflected in the statement of decision is simply to determine whether they support the judgment. (See *Estate of Fain*, *supra*, at p. 994; see also *Taylor v. Nu Digital Marketing, Inc.* (2016) 245 Cal.App.4th 283, 288 [in judgment roll appeal, " 'the evidence is conclusively presumed to support the findings, and the only questions presented are the sufficiency of the pleadings and whether the findings support the judgment' "].)

B. There Is No Error in the Judgment

1. *The Purported Cancellation Requirement*

Naim asserts express contractual language contradicts the trial court's finding that the Guarantee "does not require that the purchase order be cancelled before Naim is required to perform under the terms of the contract." As noted above, the contractual language provides that "[i]f Globatrac LLC fails to make available for shipping the [Trakdots], by December 10th, 2014 . . . the Purchaser *may* cancel the order *and* the Guarantor hereby guarantees to pay to the Purchaser the sum of, $94,447.92 . . . ." (Italics added.)

Naim acknowledges this language is ambiguous. One can plausibly read the language as Naim does—that the remedies are tied together, and that only upon cancellation must the Guarantor pay. One, however, can also plausibly read this language as the trial court did—that if Globatrac fails to make the product available for shipping by the promised date, the Purchaser has the option to cancel the order, *and* regardless of whether the order is cancelled, the Guarantor agrees to pay $94,447.92. The use of the term "may" in connection with cancellation of the order indicates cancellation of the order is optional (see *Los Altos Golf & Country Club v. County of Santa Clara* (2008) 165 Cal.App.4th 198, 206), but there is no such qualifying language after the "and" conditioning Naim's payment obligation on cancellation of the order.

When a trial court admits parol evidence to resolve a contractual ambiguity, "the trial court's resolution of that conflict is a question of fact and must be upheld if supported by substantial evidence." (*Wolf v. Superior Court* (2004) 114 Cal.App.4th 1343, 1351.) Based on the evidence adduced at trial,

the court found "cancellation of the order was not a mandatory condition precedent for N[ai]m's performance" and the only condition that triggered N[ai]m's payment obligation was that "[t]he stock was not timely made available for shipping." As " 'the evidence is conclusively presumed to support the findings' " in a judgment roll appeal (*Taylor v. Nu Digital Marketing, Inc.*, *supra*, 245 Cal.App.4th at p. 288), those findings alone were sufficient to support the judgment.

But the trial court did not stop there, and further explained the evidence supporting its interpretation. The court noted the Guarantee was executed after "deliveries of the device from Glob[a]trac were delayed causing [JB Squared] problems with its sub-distributors." In light of that history, the court found it was "clear that the intent of the guarantee was to protect [JB Squared] in the event of another delay in delivery of stock." The trial court further held that even if cancellation of the order was a condition precedent to payment, "that condition would be excused. [JB Squared] did in fact attempt to cancel the order. Glob[a]trac (a non-party to the guarantee) imposed an additional requirement that [JB Squared] must terminate its distribution agreement before it could cancel the order. The refusal of Glob[a]trac to cancel the order upon [JB Squared']s request would excuse any requirement that the order be cancelled before N[ai]m was required to perform."

We reject Naim's efforts to rely on selective exhibits to suggest these findings lacked substantial evidentiary support. In the absence of a reporter's transcript, we must "presume[] that the unreported trial testimony would demonstrate the absence of error." (*Estate of Fain*, *supra*, 75 Cal.App.4th at p. 992.)

2. *Alleged Waiver by Acceptance of Shipment*

Naim also asserts that JB Squared waived any right to demand payment under the Guarantee by accepting the Trakdots, and later selling the goods. The trial court addressed this claim in its statement of decision, finding that JB Squared "suffered damage to its relationship with its customers when [it] was unable to deliver the device according to the expectations of [its] customers. The fact that [JB Squared] was later able to take delivery of a shipment from Glob[a]trac is a transaction separate and apart from the guarantee contract between N[ai]m and JB Square[d]. Indeed, the contract specifically states that the: 'Guarantor agrees that any sums due under this deed shall be paid without set off, condition or counterclaim whatsoever.' "

Globatrac and Naim were two separate parties, and the purchase contract and the Guarantee were two separate contracts. The trial court's findings as to both those agreements were sufficient to support its rejection of Naim's waiver argument, and we will not presume otherwise in the absence of a reporter's transcript. In sum, we find no error on the face of the statement of decision and judgment. Naim has failed to meet his burden of demonstrating error on appeal. (*Jameson v. Desta*, *supra*, 5 Cal.5th at pp. 608-609.)

DISPOSITION

The judgment is affirmed. JB Squared is to recover its costs on appeal.

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WEINGART, J.*

We concur:

ROTHSCHILD, P. J.

BENDIX, J.

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