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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

WESTSIDE INVESTMENTS, INC., Plaintiff and Respondent, v. RENEE L. DOLBERRY, Defendant and Appellant.	B276462 (Los Angeles County Super. Ct. No. SC121620)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lisa Hart Cole, Judge. Affirmed.

Law Offices of Martin S. Putnam and Martin S. Putnam for Defendant and Appellant.

Bishton Gubernick and Jeffrey S. Gubernick for Plaintiff and Respondent.

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Westside Investments, Inc., doing business as Marina Del Rey Toyota (MDR Toyota), sued Renee L. Dolberry for breach of contract, conversion and fraud after Dolberry leased a 2013 Toyota Highlander and then kept the car for 21 months without making any payments under the lease. Following a three-day bench trial the court found Dolberry had breached the lease and awarded MDR Toyota $14,599.51 in damages. On appeal Dolberry contends the court erred in concluding MDR Toyota had standing to enforce the lease. She also contends MDR Toyota failed to prove its damages, the court used an incorrect formula to calculate damages, and MDR Toyota knowingly submitted false evidence of its damages to the court. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Dolberry's Lease Transaction*

On July 20, 2013 Dolberry signed an agreement with MDR Toyota to lease a 2013 Toyota Highlander. Under the lease terms Dolberry agreed to pay $3,250 at lease signing or delivery ($2,500 in cash plus a $750 manufacturer's rebate credit), a sum that included the first monthly payment of $499.99, and thereafter to make 59 monthly payments of $499.99. The gross capitalized cost (fair market value) of the Highlander at the inception of the lease was $35,297; its residual value at the end of the lease term, $11,898. MDR Toyota credited Dolberry $4,650 as the trade-in value for her 2007 Nissan Quest. Because she still owed $8,500 on the Quest, MDR Toyota incorporated repayment of the $3,850 balance in Dolberry's $499.99 monthly lease payment. Dolberry signed the lease, gave MDR Toyota a deferred down payment in

the form of two postdated checks totaling $2,500[1] and drove off the lot in the new Highlander.

2. *Dolberry's Complaint to MDR Toyota's General Manager and MDR Toyota's Response*

The day after she signed the lease Dolberry and her husband, Timothy Dolberry, telephoned the onsite manager at MDR Toyota to complain about the transaction. After being reminded there was no "cooling off period" for a lease, they were advised to speak to Kevin Ray, MDR Toyota's general manager. Dolberry wrote an email to Ray complaining that MDR Toyota's finance manager, Gamal Habib, had misled her. Dolberry stated she had made clear to Habib she wanted to purchase the Highlander, and she believed she was signing a purchase contract, not a lease agreement. In addition, Habib had led her to believe MDR Toyota would pay the balance of her Quest loan at no cost to her. Dolberry also claimed Habib had sexually harassed her.[2]

In response to Dolberry's written complaint, Ray apologized for Dolberry's experience at MDR Toyota and offered her the choice of negotiating a new purchase of the Highlander, with no

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[1] MDR Toyota agreed to hold the two checks until August 2013 because Dolberry said she did not have the money for the down payment immediately available.

[2] Dolberry alleged Habib made suggestive comments including telling her she looked younger than her age; asking her whether she knew how to say "I love you" in French; and assuring her, at the end of the transaction, she would give him a "big hug."

down payment, or rescinding the entire transaction. Ray also offered an additional $1,000 to compensate her for any inconvenience. Dolberry rejected those offers, explaining to Ray the $1,000 was inadequate compensation for MDR Toyota's conduct. After continued discussions, MDR Toyota offered Dolberry a $4,000 reduction in the capitalized cost of the Highlander or rescission of the lease agreement with a $4,000 cash payment. Dolberry again rejected these offers as inadequate and requested additional compensation. At this point Ray demanded Dolberry return the Highlander before he would consider Dolberry's requests. Dolberry stopped payment on the two checks she had signed on the day of the transaction and refused to return the Highlander. MDR Toyota initiated repossession efforts but was unable to locate the Highlander.

3. *MDR Toyota's Lawsuit*

In November 2013 MDR Toyota sued the Dolberrys for breach of contract, conversion and fraud. The Dolberrys answered the complaint and filed a cross-complaint for breach of contract, fraud and breach of the covenant of good faith and fair dealing. Their cross-complaint was dismissed prior to trial after the court sustained MDR Toyota's demurrer with leave to amend and the Dolberrys failed to file an amended cross-complaint.[3] In an amendment to her answer at trial, Dolberry asserted as an affirmative defense the lease violated the Vehicle Leasing Act (VLA) (Civil Code, § 2985.7 et seq.) because, among other things,

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[3] Timothy Dolberry, who was named as a defendant in MDR Toyota's causes of action for conversion and fraud only, has not appealed. For ease of reference, unless otherwise stated we refer only to Dolberry when discussing her position in the trial court.

it failed to disclose in a single document the deferred nature of the down payment and all the terms of her trade-in agreement.

In April 2015 MDR Toyota filed an application for writ of possession to compel Dolberry to return the Highlander. Following a hearing the trial court granted the writ and issued an interlocutory order awarding MDR Toyota possession of the vehicle. By that time Dolberry had possessed the Highlander for 21 months without making any payments.

4. *The Court Trial*

The Dolberrys, Ray, Habib, and Gary Alwood, MDR Toyota's chief financial officer, testified at the three-day bench trial in May 2015. Following submission of closing briefs and argument, the court issued a 17-page statement of decision on January 7, 2016.

The court found Dolberry, a school administrator with two postgraduate degrees, not credible when she claimed she did not understand she was signing a lease. The court credited Habib's testimony that he had explained to Dolberry that the only way to make her monthly payment less than $500 without requiring a significant down payment, as Dolberry had insisted, was to lease, rather than purchase, the Highlander. Although Dolberry had understood and agreed to lease the Highlander, the court found she suffered a form of "buyer's remorse" after returning home and discussing the transaction with her husband.

The court rejected Dolberry's claim that MDR Toyota had misrepresented her liability for the loan balance on the Quest. The court found the amount of trade-in credit and Dolberry's liability for the remaining loan balance had been disclosed in

paragraphs 2 and 13 of the integrated lease.[4] Although the court also found MDR Toyota had not strictly complied with the VLA—it failed to indicate the deferred nature of Dolberry's down payment on the lease, making the lease voidable at the lessee's request (Civ. Code, § 2988.7)—it concluded Dolberry had refused MDR Toyota's multiple offers of rescission and thus had elected to enforce, rather than rescind, the lease.

The court also rejected Dolberry's argument, based on language in the lease, that MDR Toyota had assigned its interest in the lease to Toyota Lease Trust and thus lacked standing to enforce the lease. The court interpreted the lease as stating a future intent to assign, not a contemporaneous assignment with execution of the lease alone. The court found MDR Toyota's intended assignment had been interrupted when Dolberry complained about the transaction and was never accomplished.

The court ruled MDR Toyota had proved Dolberry breached the parties' contract and was entitled to damages. During trial Alwood had testified he calculated MDR Toyota's contract damages at $29,047.41: 59 monthly lease payments of $499.99, plus the $2,500 down payment and the $750 manufacturer's rebate that would have accrued to MDR Toyota, less $3,702, which Alwood explained was the difference between the value of the vehicle when it was returned in April 2015, $15,600, and its

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[4] Paragraph 2 of the lease stated, "The above Vehicle [Quest] is being traded in today. The Agreed Upon Value of this Vehicle or Property is $4,650. You agree to pay Lessor (Dealer) any deficiency between the payoff used to calculate the amount in 8a or 13j and the actual payoff." Paragraph 13j identified the outstanding balance on the Quest as $3,850.

residual value of $11,898 as set forth in the lease agreement (that is, its value if it had been returned at the end of the lease term).[5] Although Dolberry did not present any evidence to refute Alwood's damage calculation during trial, she argued the VLA limited the amount of damages a lessor could recover following early termination of a lease and urged the court to calculate damages in accordance with the lease's early termination provisions.

The court rejected both parties' positions on damages, finding that Dolberry had, by her default, forfeited any "perceived benefit" she might be entitled to under early termination provisions of the lease. Applying its own damage formula, the court ruled MDR Toyota was entitled to the full benefit it would have received under a five-year lease ($32,749.41) less the fair market value of the Highlander on the wholesale market (not the differential between its value when recovered and its residual value at the end of the lease term, as MDR Toyota had argued). Persuaded by Dolberry's closing trial brief (a document Dolberry has not included in the record on appeal) that the fair market value of the Highlander could only be determined by an actual sale and observing the vehicle had not yet been sold, the court ordered MDR Toyota "to lawfully dispose" of the Highlander "pursuant to the terms of the lease within 30 days of the final Statement of Decision and in accordance with the findings herein. Within 10 days after the sale, [MDR Toyota] is ordered to provide notice and proof to Ms. Dolberry of the sale amount.

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[5] Alwood testified MDR Toyota had three automobile wholesalers inspect the Highlander and make bids on it. He used the highest of the three bids as the vehicle's then-current value.

Plaintiff [(MDR Toyota)] is then to prepare a Judgment in conformance with the court's findings and awarding Plaintiff $32,749.41, less the amount received for the sale of the vehicle."

Noting "Dolberry cannot be liable for both tort and contract damages," the court in its statement of decision explained it would have found her liable for conversion if it had not found her liable for breach of contract: "There is no legal analysis, nor has [Dolberry] provided one, that would permit Ms. Dolberry to keep the Highlander for 21 months without making any payments in the hope that MDR[Toyota] would pay her more money for her fraud and sexual harassment claims. . . . [¶] . . . [¶] MDR[Toyota] has established each element of conversion. MDR[Toyota] was the rightful owner of the vehicle, the Dolberrys acted wrongfully in secreting the vehicle to wrongfully retain possession and MDR[Toyota] was damaged by not being able to sell, lease or otherwise benefit from possession of their car. [¶] . . . [¶] Further, based on the testimony of the witnesses, the court would have found by clear and convincing evidence that both Mr. and Ms. Dolberry acted with both fraud and malice, justifying an award of punitive damages." Despite this analysis, rather than simply deny MDR Toyota a duplicative damage award, the court's statement of decision inexplicably found in favor of the Dolberrys on the conversion and fraud claims. The judgment signed by the court, however, simply omitted any reference to those two causes of action.

The court also found MDR Toyota to be the prevailing party on its contract claim under the lease, which contained an attorney fee provision.

5. *Posttrial Sale of the Highlander; Dolberry's Objections*

On February 8, 2016 MDR Toyota's counsel notified Dolberry's counsel by email the Highlander had been sold to CarCredit AutoGroup on February 5, 2016 for $18,150. The message included a scanned photograph of a check in the amount of $18,150 dated February 5, 2016 and purportedly drawn on CarCredit AutoGroup's account.

On March 31, 2016 MDR Toyota filed a proposed judgment "in the amount of $16,259.41, which represents the amount awarded in the Statement of Decision ($32,749.41) less the amount received by Plaintiff when it disposed of the vehicle ($18,150), plus the unpaid sanctions in the amount of $1,660 awarded by the Court on December 19, 2014." MDR Toyota also moved to recover $10,573.05 in costs of suit and $93,316.50 in reasonable attorney fees as the prevailing party under the lease.

Dolberry timely filed objections to MDR Toyota's proposed judgment and requested a hearing. (Cal. Rules of Court, rule 3.1590(j), (k).) She argued MDR Toyota had violated the court's order to "lawfully dispose" of the Highlander, as well as various provisions of the VLA, by selling the car without proper notice to Dolberry of the sale and her right to obtain an appraisal. Dolberry argued, under the VLA's antideficiency provisions, MDR Toyota's notice violation resulted in a forfeiture of damages it might have otherwise been entitled to under the lease. Dolberry also asserted that records from the Department of Motor Vehicles showed the Highlander was still registered to MDR Toyota on March 2, 2016, after MDR Toyota had purportedly sold it; and the Highlander was actually purchased by Honda of Santa Monica on March 9, 2016, long after the court-ordered 30-day period to sell the car had expired.

In response to Dolberry's objections MDR Toyota argued the notice and appraisal requirements of the VLA were inapplicable. The court had ordered it to sell the car within 30 days; Dolberry had notice of that order and could have had the car appraised; in any event, appraisal was not required because the court had determined the fair market value would be calculated by the amount MDR Toyota actually received for disposing of the car on the wholesale market. MDR Toyota also argued, because the sale was ordered by the court, the antideficiency provisions of the VLA did not apply. MDR Toyota provided a declaration from Nick Posada, its controller, attesting that MDR Toyota had sold the car on February 5, 2016 to CarCredit AutoGroup for $18,150. As for Dolberry's evidence the car was sold to Honda of Santa Monica in March 2016, that evidence, MDR Toyota argued, was immaterial. It was expected that a wholesaler would resell the car to a retailer.

The trial court did not hold a hearing and made no additional findings. On April 22, 2016 the court signed MDR Toyota's proposed judgment as the judgment of the court. On April 29, 2016 MDR Toyota served Dolberry with notice of entry of judgment.

6. *Dolberry's Postjudgment Motions*

On May 13, 2016 Dolberry filed notices of intent to move for new trial and to vacate the judgment. Dolberry asserted the following grounds for a new trial: MDR Toyota's failure to sell the Highlander prior to trial and provide competent evidence at trial of the Highlander's fair market value; the court's failure to calculate damages in accordance with the early termination limitations in the VLA; newly discovered evidence that MDR Toyota had not been truthful when it told the court it had sold

the Highlander on February 5, 2016; and irregularities in proceedings, particularly the court's posttrial order that permitted MDR Toyota to correct its evidentiary deficiency at trial and submit a proposed judgment incorporating posttrial evidence. In her motion to vacate, Dolberry also argued MDR Toyota had submitted false and fraudulent evidence of a sale on February 5, 2016 and, in reply in support of that motion, provided additional DMV records confirming that it was MDR Toyota that sold the Highlander at auction on March 9, 2016, not a third-party wholesaler as MDR Toyota had suggested.

In response, Posada, on behalf of MDR Toyota, filed a supplemental declaration offering a mea culpa for the inaccuracies in his prior declaration. According to Posada, after receiving CarCredit AutoGroups's bid, he instructed MDR Toyota's used car manager to prepare a vehicle/vessel transfer and reassignment form for Dolberry to sign to consummate the transaction. When Dolberry refused to sign it on advice of her counsel, CarCredit's time-limited offer expired. As a result, "unbeknownst to [Posada], MDR[Toyota's] used car manager did not complete the transaction with CarCredit. Rather, the used car manager took it upon himself to sell the car at auction. I was not aware of this fact until MDR[Toyota]'s attorney received R. Dolberry's Reply Brief, which included documentation that indicated the vehicle had been sold at auction rather than to CarCredit" for $20,930. MDR Toyota requested the judgment be reduced by $2,780 to reflect the higher price MDR Toyota obtained for the car at auction.

At a June 17, 2016 hearing on Dolberry's posttrial motions, the court, "deeply troubled" by MDR Toyota's apparent misrepresentation of its compliance with the court's order, denied

the new trial motion without explanation, stayed execution of the judgment, and continued the hearing on Dolberry's motion to vacate to August 18, 2016 for an evidentiary hearing to address the inaccuracies in Posada's initial declaration and determine whether to reduce or eliminate the damage award. Neither Dolberry nor the court apparently recognized the motion to vacate would be denied by operation of law on June 28, 2016, well before August 18, 2016. (See Code Civ. Proc., § 663a, subd. (b) [when notice of entry of judgment is filed and served, "the power of the court to rule on a motion to set aside and vacate a judgment shall expire . . . 60 days after service upon the moving party by any party of written notice of entry of the judgment"].) The court also continued MDR Toyota's motion for costs and attorney fees, which both parties had apparently told the court was now at the heart of their dispute.

On July 14, 2016 Dolberry filed a notice of appeal from the judgment and from the court's June 17, 2016 postjudgment orders. At the August 18, 2016 hearing the court took Dolberry's motion to vacate off calendar, citing its lack of jurisdiction. It also declined to exercise its discretion to consider MDR Toyota's motion for attorney fees, telling the parties it would address that motion following resolution of the appeal.

DISCUSSION

1. *The Trial Court Did Not Err in Finding MDR Toyota Had Standing To Sue Dolberry*

An action may be maintained only by the real party in interest, that is, the person aggrieved by the alleged conduct or otherwise "beneficially interested" in the controversy. (Code Civ. Proc., § 367 ["[e]very action must be prosecuted in the name of the real party in interest except as otherwise provided by

statute"]; see *Carsten v. Psychology Examining Com*. (1980) 27 Cal.3d 793, 796; *Sierra Palms Homeowners Assn. v. Metro Gold Line Foothill Extension Construction Authority* (2018) 19 Cal.App.5th 1127, 1135.) The rule applies to a plaintiff suing under a contract. That is, with rare exceptions, only a party to a contract, its privy or assignee may enforce or be bound by it. (See *EEOC v. Waffle House, Inc.* (2002) 534 U.S. 279, 294 [122 S.Ct. 754, 151 L.Ed.2d 755]; *DMS Services, LLC v. Superior Court* (2012) 205 Cal.App.4th 1346, 1352 ["generally "'one must be a party to an arbitration agreement to be bound by it or invoke it'""].)

Emphasizing a provision at the bottom of the first page of the lease stating, "The lessor hereby accepts this Lease and assigns to Toyota Lease Trust all rights, title and interest in the Lease and in the Vehicle," Dolberry argues, as a matter of law, MDR Toyota assigned its interest in the lease and the Highlander to Toyota Lease Trust as soon as Habib signed the lease on MDR Toyota's behalf. Consequently, MDR Toyota lacked standing to pursue this action. (See generally *Essex Ins. Co. v. Five Star Dye House, Inc.* (2006) 38 Cal.4th 1252, 1264 [following assignment of chose in action, the assignee becomes the real party in interest, standing in the "'shoes of his assignor [and] taking his rights and remedies"']; *Searles Valley Minerals Operations Inc. v. Ralph M. Parsons Service Co.* (2011) 191 Cal.App.4th 1394, 1402 ["once the transfer has been made, the assignor lacks standing to sue on the claim"].) Any evidence to the contrary, Dolberry argues, including testimony by Ray and Alwood that assignment required additional acts and approval by MDR Toyota and Toyota Lease Trust that were interrupted when Dolberry complained about the transaction, was inadmissible

parol evidence. (See Code of Civ. Proc., § 1856, subds. (a), (b) [terms in a writing intended by the parties as a final integrated agreement may not be contradicted by evidence of a prior or contemporaneous agreement].)

The fundamental goal of contract interpretation is to give effect to the mutual intention of the parties as it existed at the time they entered into the contract. (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264; *Parsons v. Bristol Development Co*. (1965) 62 Cal.2d 861, 865; see also Civ. Code, § 1636.) That intent is interpreted according to objective, rather than subjective, criteria. (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1126 (*Wolf*).) When the contract is clear and explicit, the parties' intent is determined solely by reference to the language of the agreement. (See Civ. Code, §§ 1638 ["language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity"]; 1639 ["[w]hen a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible"].) The words are to be understood "in their ordinary and popular sense" (Civ. Code, § 1644), and the "whole of [the] contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." (Civ. Code, § 1641.)

Although parol evidence is inadmissible to vary or contradict the clear and unambiguous terms of a written, integrated contract (Code Civ. Proc., § 1856, subd. (a); *Wolf, supra*, 162 Cal.App.4th at p. 1126), extrinsic evidence is admissible to interpret the agreement when a material term is ambiguous. (*City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 395 (*City of Hope*).) Whether an

ambiguity exists is a question of law, subject to independent review on appeal. (*Wolf v. Superior Court* (2004) 114 Cal.App.4th 1343, 1351; *Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165.)

Here, the parties' intent as reflected in the language of the agreement is not as clear as Dolberry suggests. Paragraph 38 of the lease, specifically governing assignments, provides, "**Assignment.** We can assign our interest in this Lease and in the Vehicle without your consent. After you sign this Lease we will assign it to TLT [(Toyota Lease Trust)] and you agree to make all payments to TLT." In contrast to the language Dolberry cites, this provision indicates assignment to Toyota Lease Trust remained an identified, but future, objective of MDR Toyota at lease signing, not an occurrence contemporaneous with Dolberry's and MDR Toyota's execution of the lease. At the very least, when the whole of the lease is taken into account, the agreement concerning assignment is ambiguous, and testimony directed to its intended meaning, properly considered. To that end, Alwood and Ray testified that MDR Toyota required approval from authorized personnel at MDR Toyota and from Toyota Lease Trust for the assignment to be effective; and that approval was never obtained because Dolberry's complaint interrupted the process.

The trial court's interpretation of the lease as representing a future intent to assign, rather than a contemporaneous assignment, is reinforced by the parties' postcontracting conduct. (See *City of Hope*, *supra*, 43 Cal.4th at pp. 343-349 [predispute, postcontracting conduct is admissible and relevant to determining parties' intent and resolving ambiguities in contract language]; *Crestview Cemetery Assn. v. Dieden* (1960) 54 Cal.2d 744, 753-754 [same].) Rather than referring Dolberry's complaint

about the lease transaction to Toyota Lease Trust, MDR Toyota directly engaged with her in negotiations for a new purchase of the car or rescission of the agreement, an act consistent with its role as title holder and inconsistent with a contemporaneous assignment. For her part, Dolberry made her down payment checks, which she postdated to August 6, 2013 and August 20, 2013, payable to MDR Toyota, not Toyota Lease Trust. Moreover, Dolberry testified Toyota Lease Trust had declined to address her inquiries concerning the lease, reporting it had no record of the Highlander or her lease transaction. In addition, MDR Toyota, not Toyota Lease Trust, was registered with the DMV as the legal owner of the Highlander.

Dolberry's alternative argument that Alwood's testimony relating to whether an assignment had occurred violated Evidence Code section 1523, prohibiting, except in specified circumstances, use of oral testimony to prove the content of an agreement, lacks merit and is, in any event, unhelpful to her position on standing. In response to a question at trial whether it was MDR Toyota's practice to operate in accordance with a dealer agreement governing assignment of leases, Alwood testified, over objection, "yes." Asked "[w]ho are the individuals [who] are authorized to assign leases," Alwood named, without objection, the four individuals at MDR Toyota authorized to approve assignments to Toyota Lease Trust. Habib, who signed the lease on MDR Toyota's behalf, was not among them.

Alwood did not testify to the content of the dealer agreement but to his personal knowledge about the practices and procedures of MDR Toyota. Moreover, both Alwood and Ray testified, without objection, that additional action, including approval from Toyota Lease Trust, was required to complete the

assignment. Habib also testified, without objection, that he was not authorized to, and did not participate in, assignment decisions. Thus, even if this small portion of Alwood's testimony was improperly admitted, it was cumulative; any error, if one occurred at all, does not compel reversal. (See Evid. Code, § 353, subd. (b) [erroneous admission of evidence requires reversal only when error resulted in a miscarriage of justice].)

In sum, considering the language of the agreement and the testimony concerning the meaning and intention of the parties, the court did not err in interpreting the agreement to identify a future, not contemporaneous, intent to assign the lease to Toyota Lease Trust. Its finding the assignment never occurred was supported by substantial evidence. (See generally *City of Hope, supra,* 43 Cal.4th at p. 395 [the trial court's legal interpretation of agreement is reviewed de novo; the court's factual findings, for substantial evidence]; *In re Marriage of Assemi* (1994) 7 Cal.4th 896. 911 [same].)

2. *MDR Toyota Presented Substantial Evidence Supporting the Court's Damage Award*

a. *Damage calculations under the VLA and the parties' lease agreement*

The VLA is intended to protect consumers by, among other things, standardizing leasing contracts to require certain disclosures on the face of the lease. (*LaChapelle v. Toyota Motor Credit Corp.* (2002) 102 Cal.App.4th 977, 986.) Among its consumer protection provisions, the VLA does not permit a lessor following default to recover the full contract expectancy as if the lease had been completed to term. Rather, a lessor's recovery of damages following early termination is calculated by a specific formula that takes the sum of (1) all accrued and unpaid amounts

under the lease agreement except excess wear and mileage charges, (2) expenses incurred in connection with repossession and storage of the vehicle, and (3) the adjusted capitalized cost of the vehicle as set forth in the lease agreement less the sum of all depreciation and other amortized amounts accrued through the date of early termination and the "realized" or fair market value of the vehicle at the time it is returned.[6] The VLA also requires

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[6] Civil Code section 2987, subdivision (b), provides, "The lessee's liability shall not exceed the sum of the following: [¶] (1) All unpaid periodic lease payments that have accrued up to the date of termination. [¶] (2) All other amounts due and unpaid by the lessee under the lease contract, other than excess wear and mileage charges and unpaid periodic lease payments. [¶] (3) Any charges, however denominated, that the lessor or holder of the lease contract may assess in connection with termination not to exceed in the aggregate the amount of a reasonable disposition fee, if any, disclosed in the lease contract and assessed upon termination of the lease contract. [¶] (4) In the event of the lessee's default, reasonable fees paid by the lessor or holder for reconditioning of the leased vehicle and reasonable and necessary fees paid by the lessor or holder, if any, in connection with the repossession and storage of the leased vehicle. [¶] (5) The difference, if any, between the adjusted capitalized cost disclosed in the lease contract and the sum of (A) all depreciation and other amortized amounts accrued through the date of early termination, calculated in accordance with the constant yield or other generally accepted actuarial method, and (B) the realized value of the vehicle as provided in subdivision (c)."

Subdivision (c) of section 2987, in turn, defines the "realized value" to be used to calculate the lessee's liability as "the higher of (A) the price paid for the vehicle upon disposition, *Footnote continued.*

the lessor to act "in good faith and in a commercially reasonable manner in connection with the disposition of the vehicle" following early termination of a lease (Civ. Code, § 2987, subd. (d)(1)) and mandates that the lessor's disposition of the vehicle after return be preceded by sufficient notice of the sale to the lessee and disclosure to the lessee of his or her right prior to disposition to obtain an appraisal of the vehicle at the lessee's expense. (See Civ. Code, § 2987, subd. (d)(2)(A), (B); *Flannery v. VW Credit, Inc.* (2014) 232 Cal.App.4th 606, 615 [substantial compliance with notice provisions of VLA is insufficient; the statute requires strict compliance].)

The lease between MDR Toyota and Dolberry provided a somewhat different method for calculating damages upon the lessee's breach. Paragraph 29 of the lease provides, "If you are in default we may do any of the following after giving any legally required notices, and after expiration of any legally required cure or reinstatement periods: [¶] (i) terminate this Lease . . . ; [¶] (ii) take possession of the Vehicle . . . ; [¶] (iii) require you to pay the amount set forth in Section 33; [¶] (iv) pursue any other remedy allowed by law; and [¶] (v) require you to pay all of our expenses for taking these actions, including, but not limited to, expenses for repossession, transportation, storage, collection and legal costs, including reasonable attorneys fees . . . ."

Paragraph 33, which by its terms only applies when the lessee is "not in default," approximates the damage formula under the VLA. It requires return of the vehicle and payment of all amounts due as of the time of termination as well as certain

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or (B) any other amount established by the lessor or the lease contract."

out-of-pocket costs. It also provides for an early termination charge equal to the remaining (future) lease payments plus the residual value of the vehicle as specified in the lease agreement less the unearned portion of the rent charge (that is, the portion of the remaining lease payments other than the unaccrued depreciation and other amortized amounts) less the fair market value of the vehicle at the time it is returned.[7]

b. *MDR properly proved total (gross) and mitigated (net) damages for breach of contract*

Dolberry contends the judgment must be reversed because MDR Toyota failed to prove the fair market value of the Highlander in April 2015, an essential element of its "net" damages. She argues under paragraph 33 of the lease fair market value at the time of return could only be determined by a

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[7] Paragraph 33 defined the "early termination charge" as "the difference, if any, between the 'Adjusted Lease Balance' and the 'Fair Market Value' (as defined below). . . . [¶] . . . [¶] The 'Adjusted Lease Balance' is calculated by adding the remaining Base Monthly payments not yet due and the Residual Value, then subtracting the unearned portion of the Rent Charge. The unearned portion of the Rent Charge is calculated according to the 'constant yield' method. [¶] The 'Fair Market Value' is equal to the price we receive when we dispose of the Vehicle at wholesale. The Fair Market Value may also be determined by an appraisal of the wholesale value of the Vehicle, which you may obtain, at your own expense, from a professional independent appraiser agreed to by us. If you obtain such an appraisal, the appraised value will be used as the Fair Market Value. The appraisal must be obtained by you within 10 days after the Vehicle is returned to us."

sale of the Highlander on the wholesale market and MDR Toyota failed to sell the car prior to the close of evidence. The court, either because of, or in spite of, that evidentiary deficiency, compounded the error by permitting MDR Toyota to sell the Highlander after trial and submit a proposed judgment effectively incorporating new evidence.

At the threshold, even if it were MDR Toyota's burden to prove "net damages" and not Dolberry's to establish MDR Toyota's failure to mitigate as an affirmative defense, Dolberry's absence-of-proof argument is misplaced. Contrary to Dolberry's contention, neither the lease nor the VLA requires the vehicle to be sold for a lessor to establish its fair market value upon the lessee's default and early termination of the lease. Paragraph 29 of the lease authorizes MDR Toyota in the event of default to pursue "any remedy" allowed by law. Similarly, under the VLA, absent a total loss of the vehicle from theft or damage, or retention of the vehicle for use to lease to a subsequent lessee, realized value following an early termination is determined by the higher of "(A) the price paid for the vehicle upon disposition, or (B) any other amount established by the lessor or the lease contract." (Civ. Code, § 2987, subd. (c).)

Here, Alwood testified the wholesale value of the car at termination was $15,600. Although handwritten purchase offers Alwood received supporting that calculation were later excluded as hearsay, Alwood's testimony, introduced without objection, remained part of the record. That the court, despite this competent evidence, ordered the car sold (apparently because Dolberry successfully, albeit incorrectly, persuaded it that a sale was the only authorized means to determine realized value at the time of termination) was unfortunate. The court's error,

however, does not mean MDR Toyota failed to prove its damages. Dolberry's argument in this regard is without merit.

c. *Any error in concluding Dolberry's default forfeited the consumer protection provisions of the VLA was harmless*

Dolberry's contention the court erred in concluding she had forfeited the protections provided by the VLA by her default on the lease, while technically correct, likewise does not compel reversal. Contrary to the court's finding, MDR Toyota's right under paragraph 29 of the lease to "pursue any other remedy allowed by law" is subject to the damage limitations of the VLA. But Civil Code section 2987, subdivision (b), does not mandate a precise formula for calculating damages; it specifies that "[t]he lessee's liability shall not exceed the sum" of the factors identified in that provision. Although the trial court constructed its own formula for calculating MDR Toyota's contract recovery, using slightly different figures to come to its total, Dolberry has not shown the damages awarded exceeded the sum authorized by the VLA. It is Dolberry's burden to demonstrate prejudice. (See *Scheenstra v. California Dairies, Inc.* (2013) 213 Cal.App.4th 370, 403 ["a fundamental rule of appellate review is that the appellant must affirmatively show *prejudicial* error"].) She has not done so.[8]

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[8] Under the VLA damages would be unpaid accrued amounts ($13,249.80) plus the vehicle's adjusted capitalized cost ($33,078.64) less 35 percent of total depreciation and other amortized amounts ($7,413.23) less the vehicle's April 2014 fair market value, or $38,915.21 less the vehicle's value. The court's formula awarded MDR Toyota $32,749.41 less the vehicle's April *Footnote continued.*

d. *Any issue of posttrial misconduct may be addressed at the delayed hearing on MDR Toyota's motion for attorney fees*

As discussed, MDR Toyota presented substantial evidence of its contract damages during the three-day bench trial, including evidence of the wholesale value of the Highlander when it was retaken in April 2015. Apparently misled by Dolberry's advocacy, the court erroneously concluded MDR Toyota was required by provisions in the VLA or the parties' lease to sell the vehicle on the wholesale market, rather than to establish its value by other means. The court ordered the Highlander sold; as a result, rather than the $15,600 value to which Alwood testified at trial, MDR Toyota submitted a proposed judgment indicating it had sold the vehicle for $18,150 pursuant to the court's directive and computing its damages using that sum. After judgment was entered, it was discovered the Highlander had not been sold as represented, but had been purchased at auction sometime later for $20,930.

Dolberry moved to vacate the judgment based on MDR Toyota's alleged fraud on the court. MDR Toyota submitted declarations explaining how its mistake had been made and urged the court to amend the judgment to reduce the damage award by $2,780 or to credit Dolberry with that amount in partial satisfaction of the judgment. Although the court was troubled by these events and intended to hear additional evidence before deciding how to proceed, it failed to set its hearing within the 60-day period for deciding a motion to vacate the judgment. (Code

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2015 fair market value, more than $6,000 less than the limit set by the VLA.

Civ. Proc., § 663a, subd. (b).) Accordingly, Dolberry's motion was denied by operation of law. (*Ibid.*)

Notwithstanding the absence of any findings by the trial court on this issue, Dolberry urges us to vacate the judgment on the ground of MDR Toyota's fraudulent representations to the court and to direct the court on remand to enter judgment for her (and to award her sanctions against MDR Toyota, as well). MDR Toyota repeats its suggestion of providing Dolberry with a $2,780 credit against the judgment.

Resolving the parties' factual dispute as to how the erroneous information about the Highlander's sale came to be presented to the court, which necessarily would involve determining questions of credibility, is simply not the function of the appellate courts. Without findings from the trial court, we have no basis to reverse the denial of the motion to vacate the judgment. Any issue of MDR Toyota's purported misconduct in connection with responding to the court's order to sell the Highlander can be addressed in connection with the remaining motion for an award of attorney fees and costs.

DISPOSITION

The judgment is affirmed. Upon issuance of the remittitur the superior court is to enter a partial satisfaction of judgment in the sum of $2,780. MDR Toyota is to recover its costs on appeal.

PERLUSS, P. J.

We concur:

ZELON, J.

FEUER, J.*

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