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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

DONALD BIENVENU, Plaintiff and Cross-appellant, v. SHERI C. SUTTER, Defendant and Cross-respondent.	B231108 (Los Angeles County Super. Ct. No. NC043157)

APPEAL from a judgment of the Superior Court of Los Angeles County, Roy L. Paul, Judge. Reversed with directions.

Steven J. Cooper for Plaintiff and Cross-appellant.

Kent M. Bridwell for Defendant and Cross-respondent.

Plaintiff and cross-appellant Donald Bienvenu (Bienvenu) prevailed at trial and obtained a $200,000 verdict against defendant and cross-respondent Sheri C. Sutter (Sutter). Thereafter, the trial court partially granted Sutter's motion for judgment notwithstanding the verdict (JNOV). The trial court found the evidence was insufficient with respect to Bienvenu's causes of action for intentional infliction of emotional distress (IIED) and defamation, and it struck $50,000 from the verdict, the amount which the jury awarded on those claims.[1]

We conclude substantial evidence supports the jury's findings with respect to defamation. Therefore, the judgment is reversed with directions to reinstate the $200,000 verdict in its entirety.

FACTUAL AND PROCEDURAL BACKGROUND

Sutter worked as a bartender and manager at the Office Bar & Grill (Office) in Torrance, owned by Bienvenu.

On July 27, 2009, after the employment relationship was terminated, Bienvenu filed suit against Sutter, setting forth causes of action for breach of contract, fraud, conversion, defamation and IIED. The gravamen of the action was that Sutter embezzled more than $150,000 from her employer. Bienvenu also pled Sutter slandered him by telling customers that Bienvenu was a "crook" who failed to pay his employees their wages, and by complaining to health department officials that he violated health regulations in his capacity as proprietor of the Office.

In October 2010, the matter came on for a jury trial. The evidence showed, inter alia, Bienvenu had conducted an audit of the business. The Office generated about $272,000 in sales during 2008 alone, but only $158,000 was deposited into the Office's bank account for that year.

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[1] Only Bienvenu's cross-appeal is before this court. Sutter voluntarily dismissed her appeal and the remittitur issued May 24, 2012.

With respect to the defamation claim, the evidence showed Sutter told others that Bienvenu conducted his business dishonestly. Megan Ebers was a bartender at the Office. When Ebers began working at the Office, business was great. In February or March of 2009, the business dropped off significantly. A lot of customers ceased coming to the bar. Business declined by about 50 percent. Various customers told Ebers that Sutter had told them Bienvenu was "a crook" and that he had "ripped her off." Sutter told others that Bienvenu "owes her a lot of money and he doesn't pay her. Things to that effect."

Sutter also told Ebers and other employees that they "had to worry about getting paid." However, Ebers always was paid on time.

In the 13 years that Bienvenu owned the Office, up until 2009, there was no problem with rodents. Bienvenu had a pest control contract with Dewey Pest Control, and Dewey would come out every other week. In early 2009, at the time of the conflict with Sutter, Bienvenu received complaints about rats at his place of business. The rats were seen in the parking lot. The Dewey pest control man told Bienvenu these were domestic rats, the type one can buy in a pet store. Bienvenu contended Sutter had planted the rodents in order to injure his business.

After Bienvenu rested, Sutter moved for nonsuit on the defamation and IIED claims. In resisting nonsuit, Bienvenu's counsel cited Ebers's testimony "that patrons heard [Sutter] tell them that [Bienvenu] was a crook and that he ripped them off." As for the rodent infestation, Bienvenu's counsel asserted "[w]e have a circumstantial level of evidence to try and from which the jury could conclude that this was perpetrated by [Sutter]. [¶] Again, the timing is critical. I think that planting rodents, deliberately putting domestic rodents at the business, rises to the level of an outrageous conduct."

The trial court denied the motion for nonsuit, recognizing its role was not to weigh the evidence or determine credibility of witnesses. The trial court stated "though [Bienvenu] may have difficulty establishing the identity of the perpetrator, the question is as this point: Is there evidence presented that could rise to that level? [¶] The court believes that there is if, in fact, the jury believes that someone planted rodents.

I can't weigh the fact whether they are outside or inside. That is weighing evidence and giving credibility. [¶] So I am going to deny the non-suit for the intentional infliction of emotional distress as well."

Following the presentation of the defense case, the jury returned a special verdict finding in favor of Bienvenu on all causes of action: breach of contract, fraud, defamation and IIED. The jury awarded Bienvenu $150,000 for "monies lost," as well as $50,000 for "loss of business, humiliation, suffering or damage to reputation."

Sutter filed motions for new trial and for JNOV. The trial court denied the motion for new trial, but partially granted Sutter's motion for JNOV. Even though the trial court previously had denied Sutter's motion for nonsuit, the trial court now ruled "the evidence presented was insufficient to support the findings and verdicts of Intentional Infliction of Emotional Distress, and Defamation." Based thereon, the trial court reduced the judgment by the amount of $50,000.

This appeal followed.

CONTENTIONS

Bienvenu contends the trial court erred in finding the evidence insufficient to support the jury's findings in favor of Bienvenu on his causes of action for defamation and IIED, and in partially granting Sutter's motion for JNOV by striking $50,000 from the damages awarded to Bienvenu.

Bienvenu also challenges a pretrial ruling by the trial court refusing to award certain sanctions which Bienvenu had requested.

DISCUSSION

1. *Appealability.*

Before addressing Bienvenu's contentions on appeal, we address the issue of appealability.

On December 6, 2010, the trial court entered judgment on the verdict, in the sum of $200,000. Sutter moved for JNOV.

On January 28, 2011, the trial court partially granted the motion for JNOV, reducing the judgment by the sum of $50,000.

On April 15, 2011, Bienvenu filed notice of appeal, purporting to appeal from the January 28, 2011 order partially granting Sutter's motion for JNOV.

An appeal does not lie from an order *granting* JNOV. (Compare Code Civ. Proc., § 904.1, subd. (a)(4) [appeal may be taken from order *denying* JNOV].)[2] " 'An order granting judgment notwithstanding the verdict is not a final judgment and is not an appealable order.' [Citation.] It is not listed as an appealable order in Code of Civil Procedure section 904.1. [Citation.]" (*Walton v. Magno* (1994) 25 Cal.App.4th 1237, 1240.) The appeal "is *from the judgment entered after the grant of JNOV*, not the order itself. [Citation.]" (*Trujillo v. North County Transit Dist*. (1998) 63 Cal.App.4th 280, 285, fn. 2, italics added.) Here, the trial court failed to enter a new judgment following the partial grant of Sutter's motion for JNOV.

Therefore, during the pendency of the appeal, we directed Bienvenu to perfect his appeal by obtaining a final judgment following the grant of partial JNOV. Bienvenu complied and submitted a signed judgment dated December 20, 2012. We construe the notice of appeal filed April 15, 2011 to be a premature and therefore timely notice of appeal from said judgment. (Cal. Rules of Court, rule 8.104(d).)

We now turn to the merits of the appeal.

2. *Trial court erred in granting JNOV with respect to the defamation claim.*

a. *Standard of appellate review*.

A motion for JNOV may properly 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 to support the verdict. If there is any substantial evidence, or reasonable inferences to be drawn therefrom, in support of the verdict, the motion should be denied. (*Chicago Title Ins. Co. v. AMZ Ins. Services, Inc*. (2010) 188 Cal.App.4th 401, 418.) "We resolve all conflicts in the evidence and draw all reasonable inferences in

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[2] All further statutory references are to the Code of Civil Procedure, unless otherwise specified.

favor of the verdict, and do not weigh the evidence or judge the credibility of witnesses." (*Ibid*.)

b. *Defamation.*

In this regard, the evidence showed Sutter told others that Bienvenu conducted his business dishonestly. When bartender Ebers began working at the Office, business was great. In February or March of 2009, business dropped off significantly. A lot of customers ceased coming to the bar. Business declined by about 50 percent. Various customers told Ebers that Sutter had told them Bienvenu was "a crook" and that he had "ripped her off." Sutter told others that Bienvenu "owes her a lot of money and he doesn't pay her. Things to that effect."

Thus, there was substantial evidence at trial that Sutter defamed Bienvenu, and that Bienvenu was damaged thereby. The evidence was sufficient to support the jury's determination that Sutter was liable for defamation, and that Bienvenu was entitled to damages of $50,000 for the resulting damage to his business. On this record, the trial court erred in finding the evidence was insufficient to support the finding and verdict of defamation.

c. *IIED.*

Because substantial evidence supports the jury's award of $50,000 on the defamation claim, it is unnecessary to address the IIED claim.

3. *Trial court properly refused to award Bienvenu sanctions.*

Lastly, we address Bienvenu's contention with respect to a pretrial ruling by the trial court.

a. *Proceedings.*

By way of background, a civil subpoena (duces tecum) was issued in the matter and served on the Department of Public Health and Safety of the County of Los Angeles for the production of documents, including any complaint purportedly made by Sutter to the department, and field documentation relating to the Office bar.

On November 13, 2009, Sutter filed a motion to quash the subpoena, contending the records being subpoenaed were absolutely privileged pursuant to Civil Code section 47, subdivision (b).

Bienvenu opposed the motion to quash, contending the litigation privilege was inapplicable because it has "nothing to do with disclosure of communication, but rather, with insulation of liability for publications that might otherwise be defamatory."

Bienvenu's opposing papers also requested sanctions on the ground Sutter's counsel had failed to meet and confer with Bienvenu's counsel before filing the motion to quash. Had "defense counsel contacted plaintiff's counsel[, Sutter] would have had an opportunity to learn of [Bienvenu's] position on the merits of the motion, and of [Bienvenu's] valid authority," and Bienvenu would not have had to incur unnecessary attorney fees in responding to Sutter's motion to quash. Bienvenu requested sanctions in the sum of $1,925 based on 5.5 hours of attorney time.

The trial court denied Sutter's motion to quash the subpoena, and also denied Bienvenu's request for sanctions.

b. *Bienvenu had no entitlement to sanctions based on Sutter's failure to meet and confer; the sanctions provisions of the Civil Discovery Act are inapplicable to Sutter's motion to quash.*

Bienvenu relies on section 2023.020, within the Civil Discovery Act (§ 2016.010 et seq.) Section 2023.020 provides: "Notwithstanding the outcome of the particular discovery motion, the court shall impose a monetary sanction ordering that any party or attorney *who fails to confer as required* pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct." (Italics added.)

However, section 2023.020 cannot be viewed in isolation. Section 2023.010, pertaining to discovery sanctions, states that misuse of discovery includes: "(i) *Failing to confer* in person, by telephone, or by letter with an opposing party or attorney in a reasonable and good faith attempt to resolve informally any dispute concerning discovery, *if the section governing a particular discovery motion requires the filing of a*

declaration stating facts showing that an attempt at informal resolution has been made." (Italics added.)

For example, section 2025.450 provides a motion to compel following a failure to comply with a *deposition* notice "shall be accompanied by a meet and confer declaration under Section 2016.040, ..." (§ 2025.450, subd. (b)(2).) Similarly, section 2030.300 specifies that a motion for an order compelling further responses to *interrogatories* shall be accompanied by a meet and confer declaration under section 2016.040. (§ 2030.300, subd. (b).) Likewise, section 2031.310 states a motion for an order compelling further response to a *demand for inspection of documents* must be accompanied by a meet and confer declaration under section 2016.040. (§ 2031.310, subd. (b)(2).)

Here, the discovery method in issue was a subpoena duces tecum, pursuant to section 1985 et seq. Said statutory scheme is separate and distinct from the Civil Discovery Act, found at section 2016.010 et seq. Therefore, the Civil Discovery Act's sanctions provision for a failure to meet and confer (§ 2023.020) is inapplicable.

Accordingly, the trial court properly refused to award sanctions to Bienvenu based on Sutter's failure to meet and confer before she moved to quash Bienvenu's subpoena duces tecum.

DISPOSITION

The December 20, 2012 judgment is reversed with directions to reinstate the jury's $200,000 verdict. Bienvenu shall recover costs on appeal.

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KLEIN, P. J.

We concur:

KITCHING, J. ALDRICH, J.