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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

GEMINI ALUMINUM CORPORATION,

Defendant and Appellant,

v.

HIHO METAL CO., LTD., et al.,

Plaintiffs and Appellants.

B219193

(Los Angeles County
Super. Ct. No. BC384924)

APPEAL from orders of the Superior Court of Los Angeles County. John Shepard Wiley, Judge. Reversed and remanded.

Roxborough, Pomerance, Nye & Adreani and Drew E. Pomerance; Heller & Edwards, Lawrence E. Heller and Shula Barash, for Defendant and Appellant.

Thomas E. Elenbaas; Christina S. Kim for Plaintiffs and Appellants.

Gemini Aluminum Corp. appeals from the trial court's orders denying its new trial motions in whole, or alternatively, on the issue of punitive damages, in its cross-action for fraud and breach of warranty against Hiho Metal Co., Ltd., HMA, Inc., Dong Chull Ho, and Jay Joo. Hiho Metal and Ho cross-appeal from the punitive damage awards entered against them, as well as from the trial court's costs award to Gemini. As the result of pervasive and pernicious concealment of evidence by HMA's president, we reverse the order denying Gemini's motion for an entirely new trial on the complaint and cross-complaint, and remand for further proceedings. Because we remand the matter for a new trial, we do not reach any of the other issues raised by Gemini's appeal, and none of the issues raised by the HMA/Hiho cross-appeal.

FACTS AND PROCEDURAL HISTORY

Gemini Aluminum Corp. manufactures and sells aluminum products. Gemini buys the aluminum it uses to make its products in unprocessed logs called billets, then heats the billets and extrudes the alloy into a variety of shapes to meet its customers' needs.¹

Before 2007, Gemini was buying its aluminum billets from LG, a Korean corporation. Alan Hardy, who was Gemini's president, dealt with Jay Joo and Dong Chull Ho when he bought from LG. Sometime in 2006, Ho and Joo met with Hardy at Gemini's plant in Pomona. With Joo acting as Ho's interpreter, Ho told Hardy that LG was getting out of the aluminum business and that he was replacing them. Joo was the president of HMA, Inc., a California corporation, and Ho was HMA's sole shareholder. Ho, a Korean national, was also a principal shareholder and CEO of Hiho Metal Co., Ltd., a Korean business entity. HMA was originally named Hiho Metal America, and HMA and Joo are listed in Hiho promotional materials as part of Hiho's network.

Joo, apparently translating for Ho, told Hardy that Ho was a 50 percent owner of the Chinese aluminum foundry that produced the aluminum billets HMA sold. This was

¹ The parties describe extrusion as something akin to squeezing toothpaste out of a tube, or pressing children's modeling clay through various-shaped molds.

important to Hardy because if problems arose with the quality of the aluminum he bought, he could deal with the owner of the foundry instead of a mere middleman broker. There were also discussions about homogenization – a process of super-heating and rapid cooling that leads to even distribution throughout the billet of various trace elements found in aluminum. The better homogenized the billet, the easier it was to extrude it.

Based on his previous favorable dealings with Ho and Joo, Hardy contracted with HMA to buy about 500 tons of the highest Dubai-quality aluminum each month during 2007. Sometime after delivery of the billets began, Hardy discovered that they were not properly homogenized. Although Gemini was able to extrude and sell manufactured products from the HMA billets, the homogenization problems slowed the process down and caused Gemini to incur increased production costs. Hardy complained several times about the inferior quality of the billets. In response, Joo went to Gemini and videotaped a test run of both Dubai-quality billets and those that Gemini received from HMA. After watching that test run, Joo concluded that the HMA billets took as much as 40 percent more time to extrude.

Joo offered to credit back some of the money paid by Gemini, but, for reasons that are disputed, never did. Toward the end of 2007, Gemini decided to withhold approximately \$1.3 million it owed HMA for billets that Gemini used and turned into products that it sold to its customers. As a result, HMA sued Gemini for breach of contract and related theories to recover the amount Gemini owed.

Gemini cross-complained against HMA, Hiho, Joo, and Ho for breach of contract, breach of warranty, and fraud. The breach of warranty causes of action alleged that the cross-defendants failed to supply aluminum billets of the highest Dubai-quality, as promised. The breach of contract cause of action was based on the same allegations, along with claims that HMA and Hiho failed to abide by their agreements to provide Gemini certain credits as offsets. The fraud cause of action alleged that Joo and Ho made a variety of concealments and false promises: that the aluminum would be of Dubai quality; that Ho controlled the foundry where the billets were made and therefore could

assure their quality; and that they were already experiencing problems homogenizing their billets at that time. Gemini sought punitive damages on its fraud claim.

At trial, an HMA metallurgy expert testified that he tested samples of both the HMA-supplied material and of Dubai quality billets and found only insignificant differences between the two. According to the expert, Gemini's extrusion problems were caused by its outdated equipment. Gemini's metallurgy expert testified that there was nothing wrong with Gemini's production equipment and that, based on tests he ran on various samples, the billets HMA supplied had not been homogenized at all.

Hardy, Gemini's owner, testified that based upon a 20 percent production delay figure applicable to almost all of the HMA aluminum, Gemini's damages were \$1.5 million. A certified public accountant who represented metal manufacturing companies was called as a witness by HMA and testified that he relied on a production delay figure of 9.15 percent that came from one of Hardy's pretrial declarations, and calculated Gemini's production-delay damages at a range of \$125,000 to \$185,000.

On cross-examination, Joo admitted that: he had lied when he told Gemini that Hiho had an ownership interest in the aluminum foundry; he had tried to delete e-mails from HMA's computers that showed HMA knew the billets were not properly homogenized and that other customers were complaining about the problem; and that he added the names of fictional lawyers and HMA staff members as recipients of copies of letters between him and Gemini concerning their dispute in order to show Gemini that HMA had "internal staff sharing this issue," and that HMA had retained legal counsel.

Most significant to our decision was evidence concerning whether other HMA customers were experiencing homogenization problems with the Hiho billets. Joo was briefly cross-examined during the liability phase of the trial about one e-mail he tried to conceal that mentioned how all of the foundry's American customers were having problems with the homogenization of the billets. He was also briefly cross-examined during the punitive damage phase of the trial with another concealed e-mail referring to homogenization complaints by another aluminum extruder. Representatives of two Gemini competitors who also bought aluminum from HMA at about the same time

testified for cross-appellants that they had no problems with the aluminum they purchased. Another competitor called by cross-appellants testified that he bought and was able to use aluminum that Gemini had rejected. Cross-appellants referred to these witnesses during their closing argument as proof that there was no problem with their aluminum because only Gemini had complained about it.

By way of special verdicts, the jury found that Gemini breached its contract with HMA by failing to pay for the aluminum billets Gemini had received, and awarded HMA damages of \$1,347,998.60, plus interest at a monthly rate of 1.25 percent through February 14, 2008. The jury found that HMA “and/or” Hiho breached the contract with Gemini, and awarded damages of \$96,224, next to a handwritten notation concerning certain credits that Gemini had already withheld. As for the fraud claim, the jury found that Joo made false promises, representations, and concealments from Gemini, and that at the time he did so, he was an officer of HMA acting in the course and scope of his employment, and that he and HMA were the agents of Hiho. The jury found that Ho also made false representations, promises, and concealments to Gemini. As to Hiho, the jury found that when Ho either committed his frauds or ratified those of Joo, he was the sole shareholder, or an officer or managing agent of HMA, “and/or” an owner and managing agent of Hiho. The jury found that Ho, Joo, HMA, and Hiho, were all liable for Gemini’s fraud claim in the sum of \$185,000. Finally, the jury found that each was guilty of oppression, malice, or fraud, for purposes of awarding punitive damages.

The issue of whether to assess punitive damages was tried separately. In response to the question, “[s]hall punitive damages be assessed against the cross-defendants?” the jury answered yes as to HMA, Hiho, and Ho, but no as to Joo. The jury assessed punitive damages as follows: as to both HMA and Joo, a zero with a diagonal slash through it. As to Hiho and Ho, asterisks linked to a handwritten notation that read: “\$1,347,998.60 + 1.25[percent] monthly interest rate for OCT & NOV 07 unpaid invoices through 2/14/08 [¶] 10[percent] to be paid by Hiho Metal Co., Ltd [¶] 90[percent] to be paid by Dong Chull Ho.” In short, the jury awarded Gemini punitive damages in the exact amount of the breach of contract damages Gemini was ordered to pay HMA.

The parties brought competing posttrial motions that are the primary subject of the appeal and cross-appeal before us. Gemini brought motions contending that flagrant discovery abuses by Joo and HMA caused the late discovery of three critical documents, justifying either a complete new trial or terminating and monetary sanctions. Gemini also contended that a new trial was warranted as a result of the trial court's time constraints on Gemini's presentation of its case, particularly in regard to Hardy's testimony. Gemini also moved in the alternative for a new trial on the punitive damages claim, contending that the jury's award of zero such damages against HMA was fatally inconsistent with its determination that punitive damages should have been assessed against HMA. Finally, Gemini brought a motion to amend the judgment (Code Civ. Proc., § 187) to add HMA to the punitive damage award because HMA was the alter ego of both Hiho and Ho. The trial court awarded the full amount of monetary sanctions sought by Gemini for HMA's discovery violations – \$108,859.60 – but denied the other motions. On appeal, Gemini contends that the trial court erred by denying those motions.

The HMA parties brought motions for new trial and judgment notwithstanding the verdict, contending that the punitive damage award of \$1.3 million was unconstitutional because it was grossly disproportionate to the jury's compensatory damage award of \$185,000. In their cross-appeal, Ho and Hiho raise the same contentions.² They also contend that the punitive damage award must fall because there was insufficient evidence of their net worth, and because there was insufficient evidence that they actually engaged in fraudulent or malicious conduct or ratified any such conduct by Joo. Finally, they contend the trial court erred by awarding Gemini costs of \$21,764.24 for the preparation and presentation of various trial exhibits.

² Joo and HMA were originally parties to the cross-appeal, but have abandoned their cross-appeal. We will sometimes refer to Ho and Hiho collectively as cross-appellants.

DISCUSSION

1. *The New Trial Motion For HMA/Joo's Discovery Abuse*

During 2008, Joo and HMA and cross-appellants repeatedly answered discovery requests by stating that Gemini had been the only customer to complain about homogenization problems. However, after subpoenaing documents from other HMA customers, Gemini learned that they too had complained about the homogenization issues. In late 2008, Gemini sought discovery of HMA's computer files and on Friday, January 23, 2009, right on the eve of trial, the trial court ordered HMA to grant Gemini's computer experts access to those computers two days later. After examining those computers, Gemini's experts determined that numerous files had been deleted within the previous few days.³

Gemini brought motions for terminating and evidentiary sanctions. Those were put off until after the trial, but the court did continue the trial date for a few weeks, allowing Gemini's experts time to recover many, but not all, of the missing documents right before trial began. One that Gemini was able to use during the liability phase of the trial was a March 2007 e-mail from HMA's metal broker to the Chinese foundry that produced the aluminum billets, which was copied to Joo, pointing out that as of December 2006, HMA was getting complaints about the homogenization process, stating that "[a]ll of our customer [*sic*] point out that was the 'main problem.' " Gemini's experts kept working on the matter throughout the trial, and according to Gemini, right after the jury reached its liability verdict, were able to retrieve a May 2007 e-mail from HMA customer Tower Metals to HMA stating that Joo had agreed to a delayed payment because the billets Tower received were unusable and had to be rehomogenized. Joo was cross-examined about this document during the punitive damage phase of the trial. The third document, that Gemini says it did not retrieve until after the entire trial concluded, was a March 2007 e-mail from Lena Shim of HMA, which was copied to Joo, that

³ These were the deletions that Joo admitted to making, as mentioned above.

discussed Gemini's claims about the homogenization problems, and compared Gemini's problems to those experienced by Tower.

Relying on *Sherman v. Kinetic Concepts, Inc.* (1998) 67 Cal.App.4th 1152 (*Sherman*), Gemini asked for a new trial on the grounds of newly discovered evidence (Code Civ. Proc., § 657, subd. (4)) and irregularity in the proceedings (Code Civ. Proc., § 657, subd. (1)). The trial court denied the motion because: (1) Unlike the *Sherman* decision, the jury heard about the discovery abuse; (2) the jury resolved the conflict between Hardy's and Suderman's damage calculations in favor of Suderman, in part because Hardy lacked credibility; and (3) the jury reached a just result, accepting Gemini's claim that the aluminum was inferior, but awarding less in damages than Gemini sought. We next evaluate the trial court's ruling in light of *Sherman*.

2. The *Sherman* Decision

The plaintiff in *Sherman* was injured when he inhaled silicon glass beads that were expelled into the air when his therapeutic bed sprung a leak. He sued the bed's manufacturer, who maintained through discovery and trial that there had been only three reported leaks in the past. The jury quickly returned a defense verdict. A few weeks later, a Texas lawyer representing another bed purchaser in a similar action contacted the plaintiff's lawyer and provided information concerning two dozen such incidents.

The trial court in *Sherman* denied the plaintiff's new trial motion based on this new evidence. The *Sherman* court reversed, holding that the evidence was material and not cumulative because it was relevant to several elements of plaintiff's product liability claim, including that: the malfunction was commonplace, not rare; the product did not perform as safely as a reasonable consumer would ordinarily expect when used in a foreseeable manner; the product carried a substantial risk of danger about which the manufacturer failed to warn; and the manufacturer knew of the continuing defect but negligently failed to take steps to protect consumers. (*Sherman, supra*, 67 Cal.App.4th at p. 1161.) Based on this, the *Sherman* court concluded that the plaintiff was cheated out of the ability to tell his whole story to the jury. (*Id.* at p. 1162.)

Although the *Sherman* court reversed the order denying a new trial on the ground of newly discovered evidence, it noted that the plaintiff had also sought a new trial on the ground of irregularity in the proceedings, and that it was clear the plaintiff also deserved a new trial on that ground as well. (*Sherman, supra*, 67 Cal.App.4th at p. 1162, fn. 5.)

3. A New Trial Was Warranted Due to Irregularity of the Proceedings

A new trial may be granted for irregularity in the proceedings committed by the court, counsel, or an adverse party, that prevented a party from having a fair trial. (Code Civ. Proc., § 657, subd. (1); *Los Angeles v. Decker* (1977) 18 Cal.3d 860, 870.) The motion is proper as to only those things that could not have been fully presented at trial by way of objection, and which must therefore appear by affidavits. (*Gibbons v. Los Angeles Biltmore Hotel Co.* (1963) 217 Cal.App.2d 782, 791-792.) A new trial for misconduct is warranted only if the aggrieved party shows that it is reasonably probable it would have obtained a more favorable verdict without the alleged misconduct. (*Bell v. Bayerische Motoren Werke Aktiengesellschaft* (2010) 181 Cal.App.4th 1108, 1122.) We review the trial court's order under the abuse of discretion standard. (*Ibid.*)

In light of these principles of appellate review, cross-appellants contend a new trial was unwarranted and that the decision in *Sherman, supra*, 67 Cal.App.4th 1152 is inapplicable, because: (1) Gemini used one of the three concealed e-mails during the liability phase of the trial to impeach Joo with the existence of other customer complaints; (2) Gemini used another of the e-mails, apparently discovered after the jury reached its liability-phase verdict, to impeach Joo on the same subject during the punitive damage trial; and (3) unlike *Sherman*, the issue of other customer complaints had no bearing on calculating Gemini's damages, which came down to a credibility contest between Hardy and Suderman.

We acknowledge these distinctions, and do not lightly dismiss them. Neither can we lightly dismiss the gravity of the misconduct in this case, however. Despite their knowledge that all the foundry's U.S. customers were complaining about poor homogenization of the billets HMA/Hiho were selling, HMA/Hiho lied about that

throughout discovery up until the eve of trial. When finally compelled by court order to let Gemini inspect HMA's computers for the information, Joo tried to delete it all, along with the video he shot of the test run showing that the billets delivered to Gemini took far longer to process than those of the quality Gemini was promised. Gemini's last-minute exhumation of two sketchy e-mails did not, in our view, allow Gemini to fully present objections on that issue.

Moreover, Gemini and this court are left with the nagging doubt that even more damning evidence remains concealed or undiscovered. Unlike the plaintiff in *Sherman*, *supra*, 67 Cal.App.4th 1152, who at least learned all that had been concealed, we cannot say the same for Gemini. Had cross-appellants acted honestly, who is to say that Gemini would not have been able to show that the problems with cross-appellants' aluminum were widespread? And, if so, who is to say what effect that might have had on the jury's evaluation of Hardy's credibility, which was discredited at least in part based on evidence that he was the only customer to complain, and that implied he had at least exaggerated the existence of such problems in the past? Finally, if the jury had seen a fuller picture of the extent of the fraud that cross-appellants were perpetrating on aluminum extruders generally, who is to say that its punitive damage award might not have been higher? Because these uncertainties were caused by cross-appellants, we conclude that the risk in this case is theirs, not Gemini's.

In short, we confront an irregularity of proceedings that calls into question whether a fair trial took place at all. In the face of such misconduct, cross-appellants ask us to effectively hold our noses and speculate that their discovery abuse had no effect on the outcome. Gemini deserves better, and our system of justice demands better. We therefore decline to do so.⁴

⁴ It is important to note that Gemini does not contend, and the record does not show, that cross-appellants' trial counsel were in any way responsible for the discovery abuse.

DISPOSITION

The order denying Gemini's motion for a new trial is reversed and the matter is remanded for further proceedings. As a result cross-appellants' cross-appeal is moot. Gemini shall recover its costs on appeal.⁵

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.

⁵ We leave undisturbed the trial court's order awarding Gemini \$108,859.60 in discovery sanctions, as that order was separate from the underlying judgment and cross-appellants do not contend that the sanctions order should be reversed.