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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

NEXTGEAR CAPITAL, INC., Plaintiff and Respondent, v. INTERNATIONAL MOTORS EXCHANGE, INC. et al., Defendants and Appellants.	B268580 (Los Angeles County Super. Ct. No. EC063028)

APPEAL from a judgment of the Superior Court of Los Angeles County, Stanley Blumenfeld, Judge. Affirmed.

Prenovost, Normandin, Bergh & Dawe, Tom R. Normandin for Plaintiff and Respondent.

Law Offices of Jilbert Tahmazian, Jilbert Tahmazian for Defendants and Appellants.

I. INTRODUCTION

Defendants International Motors Exchange, Inc. (doing business as IMEX, Inc. and Glendale Auto Gallery), IMEX Trading Corporation (doing business as IMEX Remarketing), and David Ohanjanyan appeal from a judgment. Plaintiff Nextgear Capital, Inc. had a lending agreement with defendants to provide financing for the purchase of vehicles. Defendants received a line of credit under the agreement, secured by 26 vehicles, and subsequently defaulted on their payments. Plaintiff then sued defendants for breach of written agreement and guaranty, common count, wrongful possession of personal property, and conversion. Following trial, the court found in favor of plaintiff as to the cause of action for conversion of the 26 vehicles.

Defendants contend the trial court erred by denying their requests for continuance of the trial. Alternatively, defendants assert plaintiff did not have the necessary lending license as required under the Finance Lenders Law (Fin. Code, § 22000 et seq.) and thus the initial lending agreement was void. Defendants also contend a purported second loan violated the statute of frauds and that there was insufficient evidence for the trial court to find defendants acted willfully and with malice. We affirm the judgment.

II. BACKGROUND

A. *Promissory Note and Individual Guaranty*

Ohanjanyan owns International Motors Exchange, Inc. and IMEX Trading Corporation. Plaintiff is a floorplan lender,

previously doing business in California as Discover DSC or Dealer Services Corporation.[1] A floorplan lender provides commercial lines of credit to licensed automobile dealerships. On February 6, 2009, International Motors Exchange, Inc. executed and delivered to plaintiff a written Demand Promissory Note and Security Agreement (the note) for the financing of its motor vehicle inventory. Under the terms of the note, International Motors Exchange, Inc. granted plaintiff "a continuing security interest in all of [International Motors Exchange, Inc.]'s assets and properties, wherever located, including without limitation, . . . all vehicles, vehicle parts, all Inventory now owned or hereafter acquired, without limitation . . . and proceeds thereof; . . ." Ohanjanyan also executed an Individual Personal Guaranty (the guaranty) of all obligations of International Motors Exchange, Inc. to plaintiff under the note. On May 5, 2010, Ohanjanyan as president of International Motors Exchange, Inc. executed a term sheet amending the terms of the note.[2] It was not until after these events that plaintiff obtained a finance lender license from the Department of Corporations on May 27, 2009.

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[1] Nextgear Capital, Inc. formed after a merger between Discover DSC and Manheim Automotive Financial Services, Inc. on January 31, 2013. We will refer to both Discover DSC and Nextgear Capital, Inc. interchangeably as plaintiff.

[2] Plaintiff had also filed a UCC Financing Statement, and a UCC Financing Statement Amendment dated September 17, 2011, with the Secretary of State, granting plaintiff a security interest in International Motors Exchange, Inc.'s assets.

B. *Complaint*

Sometime between April 30, 2014 and August 14, 2014, defendants received credit line advances for 26 vehicles. Plaintiff alleged defendants defaulted on their obligations on or about September 10, 2014, and filed a complaint on September 23, 2014. It alleged breach of the note, breach of the guaranty, common count for money owed and not paid, possession of personal property (referring to the collateral owed), and conversion. Plaintiff requested as relief the following: $210,997.70 plus attorney fees and costs under the first two causes of action; $203,920 plus interest for the third cause of action; return of the collateral, reasonable attorney fees, and damages for the fourth cause of action; and $203,920, and exemplary and punitive damages for the fifth cause of action.

C. *Requests for Continuance*

Defendants' original attorney was relieved as counsel of record on May 8, 2015. On August 19, 2015, Ohanjanyan applied ex parte for a continuance of the trial date. He asserted no discovery had been conducted and that he planned to retain attorney Marijana Stanojevic. Judge Stewart denied the continuance.

The morning of trial, defendants' new counsel, Stanojevic, made an oral request for a brief continuance. She explained that she had just been retained by defendants the Friday before trial and plaintiff's counsel just handed her 50 documents. In response to an inquiry by the trial judge regarding her experience, she stated that she had previously done collection-

type cases; worked for the Kaufman Law Group, where she handled several civil cases involving money owed, conversion, and fraud; and had practiced law since 2002.

Plaintiff's counsel indicated the documents provided to Stanojevic were business records possessed by both plaintiff and defendants and were given to her an hour earlier. He also advised the court that: (1) Ohanjanyan's ex parte request for a continuance had been denied; (2) Stanojevic had requested a continuance the morning of trial before Judge Stewart, who also denied it; and (3) a representative from plaintiff had flown into California from out of state and would be inconvenienced by a continuance. Stanojevic conceded that she did request a continuance before Judge Stewart and had told him only that she had been retained the previous Friday. She also indicated she had received and reviewed all the documents given to her by Ohanjanyan and had prepared all weekend. Significantly, she did not claim that she had not seen any of the documents. The trial court granted defendants' counsel an additional two hours to review documents, and ordered the parties back in the afternoon to begin trial.

D. *Trial and Judgment*

Ohanjanyan's trial testimony that is most relevant to the issue before this court can be summarized as follows: He borrowed money from plaintiff for purposes of purchasing vehicles wholesale and would then sell those vehicles for a profit to retail customers. Plaintiff's collateral on the loan included receipt of title for the vehicles. Once he sells a vehicle to a customer, he provides plaintiff with money in order to receive the title to the vehicle. Title is then transferred to the customer. He

paid substantial amounts of money owed to plaintiff, but in response to questions by the trial judge, he could not produce documentation to back up that claim. He admitted that the money that he received from the sale of the 26 vehicles was used to pay private investors, which included family members, that had loaned him money for his business operations.

During cross-examination by plaintiff's counsel, the following exchange took place:

"Q. [Counsel] Since Dealer Services [Corporation] had the original titles to these 26 vehicles, how were you able to sell these vehicles to a third party consumer?

"A. [Defendant] Initially the vehicles came from IMEX Remarketing. IMEX Remarketing the company that purchased those vehicles, reconditioned those vehicles, restored those vehicles, and since Nextgear Capital hasn't been recorded, doesn't prove any way his right to be recorded as a legal owner on those titles, . . . only physical holding titles. . . . [¶] So IMEX Remarketing would . . . put a lien on those vehicles and request a new title from DSC [*sic*] based on the fact that IMEX Remarketing actually purchased, reconditioned restored those vehicles, and those titles were obtained and we transferred to the customer.

" Q. [Counsel] You told the Department of Motor Vehicles that you, IMEX Remarketing, had the right to sell this vehicle to a consumer. That's what you told the Department of Motor Vehicles?"

The court sustained its own objection to this question and recessed the proceedings to give Stanojevic an opportunity to discuss the implications of this testimony with her client. After the recess, she reported that her client would assert his Fifth

Amendment privilege regarding any title issues. A brief discussion then took place between the parties and Ohanjanyan and the court ruled that it would allow Ohanjanyan to assert his right against self incrimination with respect to any questions regarding title or registration or any information directly or indirectly provided to the Department of Motor Vehicles with respect to the 26 vehicles. Shortly thereafter, Ohanjanyan got off the witness stand.

On August 25, 2015, the court issued its judgment in favor of plaintiff and against defendants. On the conversion cause of action it found against IMEX Trading Corporation and Ohanjanyan and awarded damages in the amount of $218,040.[3] The court found defendants' conversion of the 26 vehicles was willful and malicious and intended to cause harm to plaintiff. It imposed a lien on the vehicles in favor of plaintiff and ordered defendants to immediately turn over to plaintiff the 26 vehicles. Finally, defendants were ordered to provide plaintiff an inventory of the vehicles by August 28, 2015.

Defendants moved for new trial based on the denial of a continuance and other issues concerning the legality of the contract and lack of evidence regarding conversion and malice. That motion was denied on October 22, 2015, and this appeal followed.

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[3] International Motors Exchange, Inc. was apparently in bankruptcy.

III. DISCUSSION

A. *Denial of Continuances*

Defendants contend Judge Stewart and Judge Blumenfeld erred by denying the applications for continuance. We generally review a trial court's grant or denial of a continuance for abuse of discretion. (*Dailey v. Sears, Roebuck & Co.* (2013) 214 Cal.App.4th 974, 1004; *Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal.App.4th 1112, 1126.) California Rules of Court, rule 3.1332(c), governing grounds for a trial continuance provides: "Although continuances of trials are disfavored, each request for a continuance must be considered on its own merits. The court may grant a continuance only on an affirmative showing of good cause requiring the continuance. Circumstances that may indicate good cause include: [¶] . . . [¶] (4) The substitution of trial counsel, but only where there is an affirmative showing that the substitution is required in the interests of justice; . . . ."

We find no abuse of discretion. As to Judge Stewart's denial, Ohanjanyan indicated he was without counsel since May 8, 2015. However, trial was set for August 24, 2015. That gave defendants more than one hundred days from the date of trial to find new counsel. Apparently, defendants did not procure new counsel until a few days prior to trial. A trial court could reasonably find defendants were not diligent in seeking new counsel. As to Judge Blumenfeld's ruling, though defendants categorize it as essentially a denial, defendants actually received a continuance of two hours. Defendants have failed to demonstrate an abuse of discretion. Defendants' trial counsel

was well qualified to conduct the very brief trial and she had the opportunity to prepare for it over the weekend. She was given adequate time to review the relevant documents and discuss them with her client. In addition, the court had before it evidence that plaintiff's representative had flown in from out of state for purposes of the trial and the 50 documents exchanged were business records in possession of both plaintiff and defendants. Judge Blumenfeld nonetheless granted defendants an additional two hours to prepare. Given these circumstances, we find no error.

Even if we were to find error, we may not reverse a judgment and grant a new trial unless we are convinced that a miscarriage of justice occurred, meaning that there is a reasonable probability that a result more favorable to the appellant would have been reached absent the error. (Cal. Const., art. VI, § 13; *People v. Watson* (1956) 46 Cal.2d 818, 836.) We cannot reach that conclusion in this case because defendants have not shown what prejudice they suffered due to the denial of the continuance.

B. *Enforceability of the February 6, 2009 Promissory Note*

Defendants contend the February 6, 2009 promissory note is illegal because plaintiff was not a licensed finance lender under the Finance Lenders Law (Fin. Code, § 22000 et seq.) at the time it was executed. Financial Code section 22009 provides: "'Finance lender' includes any person who is engaged in the business of making consumer loans or making commercial loans." Financial Code section 22100, subdivision (a) provides: "No person shall engage in the business of a finance lender or broker

without obtaining a license from the commissioner." Defendants contend that because plaintiff obtained its finance lender license after the signing of the February 6, 2009 promissory note, the note was void. We review questions of statutory interpretation de novo. (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432; *Cuiellette v. City of Los Angeles* (2011) 194 Cal.App.4th 757, 765.)

It is undisputed the promissory note at issue is a commercial loan within the meaning of Financial Code section 22502.[4] The Finance Lenders Law provides a penalty for willful violations concerning commercial loans, namely a fine and possible imprisonment. (Fin. Code, § 22780.) However, the loan is not rendered void under the Finance Lenders Law. This is in contrast to consumer loans, in which a willful violation of the Finance Lenders Law does result in the loan being void. (See Fin. Code, § 22750.) Thus, even if we were to find plaintiff had violated the Finance Lenders Law, the commercial loan at issue here is not void. (See Fin. Code, § 22001, subd. (c) [commercial loans not subject to article 2 of chapter 4 of the Financial Code, in which section 22750 appears].) Because we find the promissory note is not void under the Finance Lenders Law, we need not decide the parties' remaining arguments on this topic.

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[4] Financial Code section 22502, defines "commercial loan" as follows: "'Commercial loan' means a loan of a principal amount of five thousand dollars ($5,000) or more, or any loan under an open-end credit program, whether secured by either real or personal property, or both, or unsecured, the proceeds of which are intended by the borrower for use primarily for other than personal, family, or household purposes."

C. *Willful and Malicious Finding*

Defendants dispute the trial court's finding that their conversion of the 26 vehicles was willful and malicious with the intent to harm plaintiff.[5] We review a trial court's resolution of disputed facts for substantial evidence. (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874.)

Though it appears the trial court awarded no punitive damages, we infer the trial court's malice finding to be derived from the definition under Civil Code section 3294, subdivision (c)(1): "'Malice' means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." (See *Patrick v. Maryland Casualty Co.* (1990) 217 Cal.App.3d 1566, 1576 [award of punitive damages reviewed for substantial evidence].) Substantial evidence supports the trial court's findings. Ohanjanyan testified that he received loans from plaintiff which he then used to purchase vehicles. Title to the purchased vehicles was used as collateral by plaintiff. In order to receive title, defendants would have to pay plaintiff money as specified in

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[5] "A cause of action for conversion requires allegations of plaintiff's ownership or right to possession of property; defendant's wrongful act toward or disposition of the property, interfering with plaintiff's possession; and damage to plaintiff. [Citation.] Money cannot be the subject of a cause of action for conversion unless there is a specific, identifiable sum involved, such as where an agent accepts a sum of money to be paid to another and fails to make the payment. [Citation.]" (*McKell v. Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457, 1491.)

the promissory note. Nonetheless, the vehicles were sold and title transferred without evidence that the money owed was paid to plaintiff. It is unclear whether Ohanjanyan meant that he obtained title from "DSC" or from the Department of Motor Vehicles, as argued by plaintiff. However, the doctrine of implied findings requires this court to infer the trial court made all factual findings necessary to support the judgment. (*Oceguera v. Cohen* (2009) 172 Cal.App.4th 783, 794; *Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42, 58.) "A judgment or order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness. [Citations.]" (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133; *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) Given the context of his testimony, the trial court implicitly did not find Ohanjanyan meant that he somehow obtained title to the 26 vehicles from plaintiff. Thus, based on Ohanjanyan's testimony, defendants intentionally transferred title of the 26 vehicles to other customers without paying plaintiff the money owed under the promissory note. Such evidence supports the trial court's finding that defendants maliciously and willfully converted the 26 vehicles with intent to harm plaintiff.

D. *Purported Second Loan*

Defendants assert that around April 2014, plaintiff contacted Ohanjanyan to inform him that his accounts with plaintiff were reopened. Defendants contend this violates the statute of frauds because there was no written contract for this loan. Defendants cite to nothing in the record in support of this proposition.

Appealed judgments and orders are presumed correct, and the appellant has the burden of overcoming this presumption by affirmatively showing error on an adequate record. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140-1141; *Stasz v. Eisenberg* (2010) 190 Cal.App.4th 1032, 1039.) All intendments and presumptions are made to support the judgment or final order on matters as to which the record is silent. (*Denham v. Superior Court, supra*, 2 Cal.3d at p.564; *Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956.) "'A necessary corollary to this rule [is] that a record is inadequate . . . if the appellant predicates error only on the part of the record he provides the trial court, but ignores or does not present to the appellate court portions of the proceedings below which may provide grounds upon which the decision of the trial court could be affirmed.' [Citation.]" (*Osgood v. Landon* (2005) 127 Cal.App.4th 425, 435; accord, *Jade Fashion & Co., Inc. v. Harkham Industries, Inc.* (2014) 229 Cal.App.4th 635, 644.) "'The absence of a record concerning what actually occurred at the trial precludes a determination that the trial court [erred].' [Citation.]" (*Oliveira v. Kiesler* (2012) 206 Cal.App.4th 1349, 1362; *Osgood v. Landon*, *supra*, 127 Cal.App.4th at p. 435.) Because defendants presented an inadequate record concerning this purported second loan, we need not consider it. The judgment is presumed correct.

IV. DISPOSITION

The judgment is affirmed. Plaintiff, Nextgear Capital, Inc., may recover its costs on appeal from defendants, International Motors Exchange, Inc. (doing business as IMEX, Inc. and

Glendale Auto Gallery), IMEX Trading Corporation (doing business as IMEX Remarketing), and David Ohanjanyan.

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LANDIN, J.*

We concur:

KRIEGLER, Acting P.J.

BAKER, J.

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