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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

ALLIED PAVING COMPANY, Plaintiff and Respondent, v. PLATINUM CAPITAL, INC., Defendant and Appellant.	B269324 (Los Angeles County Super. Ct. No. NC059613)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael P. Vicencia, Judge. Affirmed.

Bashir E. Eustache and John W. Hofsaess for Defendant and Appellant.

Devirian & Shinmoto, Donald B. Devirian and Lynn A. Shinmoto for Plaintiff and Respondent.

INTRODUCTION

Defendant Platinum Capital, Inc. (Platinum) appeals from a judgment against it following a bench trial. Platinum hired plaintiff Allied Paving Co. (Allied) to perform paving work on Platinum's parking lot. Once the lot was finished, Platinum refused to pay, claiming that Allied failed to ensure the lot had adequate drainage. Allied sued for breach of contract. The trial court found Platinum liable for the unpaid portion of the paving contract. Platinum contends the trial court erred in finding that Allied had adequately performed under the contract and in rejecting the findings of Platinum's expert. We affirm.

FACTUAL AND PROCEDURAL HISTORY

This appeal arises from a breach of contract action filed by Allied, alleging that Platinum failed to pay Allied for the paving work Allied performed on Platinum's parking lot.[1] The court held a bench trial on July 15 and 16, 2015. The parties presented the following evidence at trial.

A. *Initial bids on parking lot project*

In 2013, Platinum began to convert a building it owned in Long Beach to an office complex for use as company

[1] Neither the complaint, nor any responsive pleadings filed by Platinum, were included in the record on appeal. The focus of the trial, and of the parties' arguments here, was Allied's claim for breach of contract. It does not appear that Platinum filed any cross-claims.

headquarters. The project also included rehabilitation of the existing open air parking lot for the building. Steven Williams, the construction manager for Westland Real Estate Group (Westland), oversaw the project.[2] Williams testified that he is a licensed general contractor who has "been in construction [his] entire life."

According to Williams, the existing parking lot was "significantly worn," "fairly cracked and not maintained very well," with some "ponding," or puddling of water after a rain. Williams testified that he wanted "a new parking lot that was asphalted, striped, wheel stops, and just drained and was maintained properly." He solicited three bids from paving contractors to rehabilitate the parking lot, including one from Allied and one from Mega Paving, Inc., Platinum's preferred vendor.

Williams first met with Allied employees in September 2013. According to Oscar Espinoza, the project manager for Allied on the Platinum job, Williams asked for a bid with a few different options. Allied prepared a bid in September 2013 with two different options for paving—first, to overlay "up to 1.5

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[2] Although Williams was employed by Westland and that entity was listed on the contract with Allied, the parties stipulated at trial that Westland was acting as the agent for all purposes on behalf of Platinum, and that Platinum was the contracting party.

inches new asphalt" over the existing asphalt, or second, to remove and replace the entire lot, at more than twice the cost of the overlay.

According to Espinoza, he could tell the lot was "pretty flat" when he looked at it in 2013, so he included the option to remove and replace the entire lot. Allied recommended the full removal option. Espinoza testified that the full removal option would include grading work to allow drainage of water from the lot, while the overlay option would not include any grading. However, Espinoza did not discuss drainage with Williams at the time of the bid because he "did not know which scope [Williams] was going to go with, he had so many variables of his scope." Instead, his practice was to "give them every option, and depending on which option they go with, that's when we talk about an issue, if there is one or not."

Allied witnesses testified that the minimum industry standard for drainage was a grade of one percent. Upon questioning from the court, Espinoza admitted he could not tell just by looking with a naked eye if a lot was at or under a one percent grade. In order to determine the precise grade of a lot, trained Allied employees would take measurements in a process called "shooting elevations." Allied witnesses all testified that it was not Allied's policy or practice to shoot elevations during the bidding process, due to the expense. It was undisputed that

Allied did not shoot elevations or take other measurements regarding grade during the bidding process.

Brandon Jeter, Allied's general manager, testified that the one percent grading standard for drainage applies to overlay jobs. He noted that Allied has performed other jobs at less than the standard grade, and all of them had ponding or puddling afterward. If the initial salesperson, or estimator, for Allied notices a water drainage problem on a lot, it is Allied's policy to notify the customer of the recommended one percent grade, either through a discussion or by noting it in the contract. In addition, once a bid is accepted, if it comes to their attention that the lot does not have a one percent grade, Allied will shoot the elevations and come up with a design to fix the issue.

B. *Allied's January 2014 proposal*

Williams did not accept either proposal offered by Allied in 2013. He received a proposal from Mega Paving in January 2014, which included an overlay of an average two-inch thick asphalt over the existing lot. However, when Mega Paving declined the job because it was busy with another project, Williams called Allied. Williams sent Allied the bid from Mega Paving and asked if they could beat the price for the overlay job.

Williams met with Richard Martinez, a project manager from Allied, at the job site in January 2014. They were there about 15 minutes while Martinez inspected the lot. According to

Williams, he told Martinez about his concerns with a "swale," or valley, that was "running down the middle of the existing parking lot that, when it would rain, it would fill up with water. And one of my comments to [Martinez] was, just make sure that swale goes away." Williams wanted to make sure that after the paving, "that we didn't have a big dip in the middle of our parking lot." According to Williams, Martinez responded "not a problem. That's what we do."[3] Other than this conversation regarding the swale, it is undisputed that there was no other discussion between Williams and anyone at Allied regarding drainage prior to acceptance of Allied's proposal.

In the bid submitted in January 2014, Allied proposed to, among other work, place "Petro-Mat fabric" over the existing asphalt,[4] then "machine install up to [two inches] New asphalt hot mix overlay," across the lot. A two-inch overlay consists of putting two inches of asphalt over the existing asphalt. The asphalt is laid down by a paving machine, which is followed by a roller that "fills it for compaction." The proposal did not reference grading.

Williams signed the one-page bid form on March 26, 2014. According to Allied witnesses, Allied sent Williams a two-sided

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[3] Martinez was no longer employed by Allied at the time of trial and did not testify.

[4] Espinoza recommended the use of Petromat, which he testified would help prevent future cracking.

proposal, the back page of which included a disclaimer stating, "Except as specifically set forth to the contrary, Allied . . . shall not be liable for . . . drainage in areas of less than one percent (1%) grade." However, Allied had no record of sending that page to Williams or of receiving a signed version back. Williams testified that when he signed the contract, he thought Allied was going to do an overlay with a grade. He would not have signed the contract if Allied told him the lot was not going to drain properly.

C. *Allied's Proposed Change Order*

Allied started work on the parking lot on March 31, 2014. That day, Allied raised the issue of drainage with Williams. Carlos Juarez, who was running the project for Allied, testified that Williams asked him to make the curbs around the outside of the lot flush with the new asphalt so that water would run from the lot into the nearby planters and water the plants. This request caused Juarez to shoot elevations for the lot to see whether the water would run that way. He then discovered that the lot "was totally flat." Juarez discussed this with Williams, who requested a proposal to get a one percent slope from the center of the parking lot running out to the sides. This request would have required raising the center of the lot about nine inches above the existing paving. Juarez called Espinoza, who

prepared a bid for the additional work, at a cost of approximately $17,000.

Espinoza told Williams that without the proposed change order, there would be "some ponding" or "puddling" in the lot. According to Williams, Juarez came up to him on the first day of work and told him that "the way the lot is right now, it's not going to drain properly." When Allied told Williams about the changes required to get the lot to drain, Williams responded that "it was a little bit like bait and switch." After discussing it with his boss, Williams told Allied that they were not accepting the change order and they wanted "what we agreed to in the proposal." Similarly, Juarez testified that Williams told him "it was too much money, the cost was too much, to just proceed as [per] the first proposal."

Allied completed the Petromat installation and asphalt overlay, as well as the remaining work under the contract, in April 2014. It did not perform any grading work. Juarez testified that he went to the parking lot the day after it was paved and it looked "really nice" and uniform.

D. *Following completion of job*

The parties stipulated that the lot as paved by Allied does not drain properly. Williams testified that "the first time we had a little sprinkle" of rain after the job was completed, he observed "puddles all over my parking lot." He demanded that Allied fix

the problem. Allied performed some patch work, but both parties testified that the patches just moved the water from one spot to another and did not fix the drainage problem.[5]

Apart from the overlay, Platinum was satisfied with the other work performed by Allied under the contract, such as creation of concrete curbs and planters. The total contract price was $74,588. Platinum paid Allied $34,558 on the contract in May 2015 and at the time of the trial had not paid the remainder. Platinum solicited bids for repairing the lot to fix the drainage issue, but had not contracted to have any further repairs done.

E. *Experts*

Thomas Murphy, owner of a civil engineering and design company, testified for Platinum as an expert in paving design and repair. Rather than discussing grading, Murphy's testimony focused on the purported lack of surface uniformity of the paving work done by Allied.[6] Murphy testified that the industry

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[5]Allied claimed it performed the patch work at Williams's request and based on his promise of payment. Williams denied ever requesting patching.

[6] Platinum appeared to focus mainly on the grading issue early in the trial, but then shifted its focus to argue that, even without a grade, Allied's paving was not consistent with the industry standard for surface uniformity, or smoothness. At various points during trial and on appeal, Platinum has alternately claimed that the ponding in the parking lot was caused by the absence of a grade or by the lack of surface uniformity.

standard for pavement surface uniformity is no more than one-eighth of an inch deviation from a straight grade, as measured over a 10-foot length. In other words, if a 10 foot beam were laid on the lot, there would be no dips below the line of the beam greater than one-eighth of an inch. Murphy cited two industry sources for the standard—the Asphalt Handbook, published by a trade organization in the industry, and the Green Book, which sets forth standard specifications for public works construction. According to Murphy, this surface uniformity standard applies to overlay jobs.

Murphy took measurements of Platinum's lot after Allied had completed work and concluded it was "well out of the standard for uniformity," as there were multiple areas with deviation greater than the standard. He also took measurements and photographs of the "large major ponding areas" in the lot. He opined that the lack of surface uniformity "is contributing" to the lack of drainage in the lot, especially because the lot is flat. Based on the state of the original lot, he did not believe installation of Petromat and overlay was an appropriate way to repair the lot. Instead, he suggested "total removal of the asphalt and replacement with new asphalt" should have been performed to avoid premature cracking, among other isues.

Allied called John Smith as a rebuttal expert. Smith was employed by Kelterite Corporation, an asphalt supplier which

worked with Allied, and also had experience as a paving contractor. He inspected the lot in December 2014, after it had rained. Smith opined the parking lot was a "quality job that appeared to be flat and didn't drain." Smith was "impressed at how well it was paved." He observed some ponding, or "birdbaths," in the lot, and opined that the drainage issues were caused by improper design of the lot, as it did not have the one percent slope "that is a requirement for asphalt to drain." Smith inspected the lot again in April 2015 and stated that the quality had not changed.

Smith testified that he did not notice any surfacing irregularities in the lot, other than some minor cracking, which he described as typical for the age of the lot. He discussed the "Caltrans specifications" regarding surface uniformity, which also require less than one-eighth inch variance. According to Smith, that variance specification would only apply if it was referenced in the contract.[7]

[7] Jeter, Allied's general manager, also testified that there was no industry standard for minimum surface uniformity in parking lot overlay jobs. He stated that it would be impossible to meet that level of uniformity, since with an overlay, "you're just putting two inches on the existing, up and down. Your overlay is going to be up and down."

F. *Argument and Ruling*

During closing argument, the court asked the parties to first focus on "contract formation." Counsel for Allied contended that the parties agreed upon a contract for concrete work and an asphalt overlay, without a grade. On the other hand, Platinum's counsel argued that when the bid form was signed, "there wasn't an agreement and meeting of the minds, based on the way the testimony came in."

The court then asked whether, by telling Allied to proceed after rejecting its proposed change order, Williams was "waiving any right to insist that there was grading." Platinum's counsel responded that it was "a fair point and a reasonable way to analyze it. . . . [I]f we had gotten a lot which had some birdbathing on it, that we wouldn't be here talking about this." Later, the court reiterated to counsel for Platinum, "So really, your argument is not there was supposed to be a grade. Your argument was, they were supposed to give us a flat surface. They didn't meet standards." Platinum's counsel agreed.

The court first found that the issue of what the parties agreed to at the time the contract was signed "doesn't really matter, because by the time or before the work started, everyone agreed as to what work was going to be performed, and that was a flat parking lot without a grade." The court then turned to whether the work done for a flat lot without a grade "was below

standard in the industry. . . . I have on the one hand Mr. Murphy's testimony that it did, in fact, fall below the standard of care[,] citing two publications about concrete and asphalt. I have on the other hand Mr. Smith's testimony that it was a beautiful job, and that those standards don't apply to parking lots, so to speak, on an otherwise flat surface." The court "found Mr. Smith more genuine" although "less polished," while Murphy's testimony was "a little disingenuous." Accordingly, "in judging the credibility of the two witnesses, I find that the work done by Allied was not below the standard in the industry." The court entered judgment on behalf of Allied, awarding $40,000 plus interest.

Platinum timely appealed.

DISCUSSION

A. *Standard of Review*

When a party contends insufficient evidence supports a judgment following a bench trial, we apply the substantial evidence standard of review. "[T]he power of an appellate court begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the determination . . . ." *(Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873–874.) We view the evidence in the light most favorable to the prevailing party and draw all reasonable inferences and resolve all conflicts

in its favor. (*Hub City Solid Waste Services, Inc. v. City of Compton* (2010) 186 Cal.App.4th 1114, 1129.) "A judgment of the lower court is presumed correct, and all intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. [Citation.] Where no statement of decision is requested, it must be presumed that the trial court found facts necessary to support the judgment." (*Roffinella v. Sherinian* (1986) 179 Cal.App.3d 230, 236.)

Platinum urges us to apply de novo review to two issues: first, whether the trial court erroneously found a waiver of the parties' agreement to include grading with the overlay work; and second, whether the trial court failed to consider whether Allied's work breached its implied duty of workmanship. Platinum contends that these issues present "predominantly legal" questions and that the "central facts are undisputed." We disagree. Independent review is appropriate only when the undisputed facts permit just one reasonable inference. (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1196.) Here, whether the parties' contract included an agreement to ensure drainage and whether Allied performed its work in compliance with the contract were central areas of dispute at trial, and both parties presented conflicting evidence on those points. Under these circumstances, de novo review is

inappropriate. (See, e.g., *In re Marriage of Fonstein* (1976) 17 Cal.3d 738, 746 [applying substantial evidence review "where extrinsic evidence has been properly admitted as an aid to the interpretation of a contract and the evidence conflicts"]; *Bower v. Inter-Con Security Systems, Inc*. (2014) 232 Cal.App.4th 1035, 1043 ["The question of waiver is generally a question of fact, and the trial court's finding of waiver is binding on us if it is supported by substantial evidence."].)

B. *Waiver*

Platinum contends that the trial court erred in finding that Platinum "waived" its "right to proper drainage" by refusing the change order proposed by Allied. This argument is premised on two assumptions regarding the trial court's ruling: first, that the court found the original paving contract included an agreement to provide a one-percent grade, and second, that it found Platinum's subsequent rejection of the change order waived that agreement. Platinum provides no support for these underlying assumptions, however, and we find none in our review of the record.

Specifically, the trial court made no reference to waiver in announcing its ruling, nor did it expressly find that the parties had reached an agreement regarding grading at the time Williams signed the bid form. It appears that Platinum is basing its assumption on questions raised by the court during closing argument, which included several questions directed to

Platinum's counsel related to waiver.[8] However, the court also broached other theories during the trial, questioning both counsel about whether there was a "meeting of the minds" as to grading when Williams signed the bid form and urging them to focus their arguments on "contract formation." Indeed, Platinum's counsel argued that "there wasn't an agreement and meeting of the minds, based on the way the testimony came in." Platinum has provided no evidence to suggest that the court concluded otherwise. In fact, the court found that at the time work began, "everyone agreed as to what work was going to be performed, and that was a flat parking lot without a grade." That finding was supported by substantial evidence that: (1) as of the first day of work by Allied, both parties knew that without the change order, Allied would provide an asphalt overlay without any grading; (2) Williams rejected the change order and told Allied to proceed under the contract; and (3) Allied did exactly that.

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[8] Platinum contends the court raised the waiver issue sua sponte and then improperly relied on it without allowing the parties an opportunity to provide briefing. While we conclude Platinum has failed to demonstrate the court's reliance on this theory, we also note that Platinum's counsel did not object or request further briefing on the waiver issue during trial. Instead, Platinum's counsel agreed several times with the court that his ultimate argument was not whether the contract required grading (or whether Platinum waived that term), but whether Allied failed to provide a lot with an adequate degree of surface uniformity.

C. *Implied Duty of Workmanship*

While conceding that the written contract did not contain any terms requiring Allied to ensure proper drainage, Platinum nevertheless argues that the "unprecedented ponding" in the finished lot violated Allied's implied duty of care, and therefore excused Platinum's nonpayment. Platinum contends that the trial court erred in failing to find accordingly. We find no error.

Platinum relies heavily on *Kuitems v. Covell* (1951) 104 Cal.App.2d 482, 485 (*Kuitems*) in support of the proposition that "[a]ccompanying every contract is a common-law duty to perform with care, skill, reasonable expedience, and faithfulness the thing agreed to be done." According to Platinum, this duty included an obligation for Allied to provide a parking lot with adequate drainage through grading, surface uniformity, or both. Platinum's reliance on *Kuitems* is misplaced. There, the controversy involved the faulty installation of a roof covering by appellant contractors. (*Id.* at p. 483.) The trial court found that the contractors "installed roofing material . . . insufficient and not of proper type" for the roof, resulting in extensive water damage to the building interior after it rained. (*Id.* at p. 484.) On appeal, the contractors argued that they were not required to provide a roof that would keep the water out of the house because "the contract contained no written warranty" as to that issue. (*Ibid.*) The court disagreed, concluding that "the statement in the

written contract that it contains the entire agreement of the parties cannot furnish the appellants an avenue of escape from the entirely reasonable obligation implied in all contracts to the effect that the work performed 'shall be fit and proper for its said intended use.'" (*Id.* at p. 485.)

Platinum's attempt to equate a roof that does not drain properly, thereby allowing water to come into the building, with a parking lot that does not drain properly, resulting in several areas of significant ponding, is unavailing. Here, there was substantial evidence to support the conclusion that the parking lot remained fit for its intended use. Indeed, despite its complaints regarding the standing water, Platinum continued to use the lot through the trial, over a year after Allied had completed the paving. Platinum contends that the industry standards regarding grading and surface uniformity should be included within Allied's implied duty. But it cites no authority for this proposition, apart from *Kuitems*, and it ignores the disputed evidence at trial as to whether such industry standards applied to the job at issue.[9] Further, apart from the drainage

[9] As discussed above, the parties agreed at trial that the industry standards called for a minimum one percent grade and a maximum surface uniformity variance of one-eighth of an inch. They disputed, however, whether Allied was contractually required to provide a parking lot in conformance with these standards.

issue, there was no evidence that the work performed by Allied failed to meet its duty of workmanship.

D. *Expert Testimony Regarding Surface Uniformity*

Finally, Platinum challenges the trial court's reliance on Allied's expert, Smith, in resolving Platinum's claim that Allied failed to pave the lot with the required degree of surface uniformity. Platinum contends that Smith lacked credibility and provided only speculative testimony regarding the surface uniformity standard and the quality of Allied's paving work.

We conclude that the evidence is sufficient to support the trial court's findings. The trial court expressly found Smith more credible, albeit "less polished," than Platinum's expert. Platinum's arguments about the relative qualifications and biases of the experts in essence asks us to reweigh those factors, which we will not do. (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 479 ["When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court."]; *Ellena v. State of California* (1977) 69 Cal.App.3d 245, 256 ["resolution of conflicts in the evidence, assessment of the credibility of the witnesses and the weight to be given the opinions of the experts [are] all matters within the exclusive province of the trier of fact"].)

Moreover, we disagree with Platinum that Smith's testimony lacked evidentiary support. While Smith did not take measurements of the ponding in the parking lot, he did personally inspect the lot on two occasions, at least one of which was after a rainfall. He testified as to his observations, including the quality of the paving work, the presence of some ponding, which he attributed to the lack of grading, and the presence of some minimal cracking. The court was entitled to find this testimony more credible than conflicting opinion provided by Platinum's expert, Murphy, and to draw its own conclusions from the evidence. (See, e.g., *In re Marriage of Ackerman* (2006) 146 Cal.App.4th 191, 204; *Kennemur v. State of California* (1982) 133 Cal.App.3d 907, 923.)

The court was similarly entitled to rely on Smith's opinion regarding the applicability of the surface uniformity standard. During his testimony, Smith discussed the Caltrans standard for surface uniformity and opined that such a standard would not apply to an overlay unless specifically referenced in the contract. Platinum points out that the two experts cited different authorities regarding this standard. However, all three of the authorities referenced the same standard—that, where applicable, the paved surface should contain no variances greater than one-eighth of an inch over a ten foot area. Although Platinum's expert testified that this standard would apply to an

overlay job, several Allied witnesses testified to the contrary, and explained why it would be impossible to do so, as the overlay process simply places the specified amount of new asphalt over the existing surface. Moreover, although Platinum attempted to establish during the latter part of trial that the ponding in the parking lot was due to the lack of surface uniformity (rather than the lack of a grade, as it initially contended), this conclusion was disputed. Smith opined that the standing water was a result of the flatness of the lot. In addition, Allied employees testified that providing a more uniform surface, such as by patching, on a flat lot would merely move the water from one section of the lot to another, without improving drainage.

As such, the trial court's conclusion that Allied adequately performed its contractual obligation to provide an asphalt overlay was amply supported by the evidence.

DISPOSITION

Judgment is affirmed. Allied is awarded its costs on appeal.

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COLLINS, J.

We concur:

WILLHITE, Acting P. J. MANELLA, J.