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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

ANABI OIL CORPORATION, Plaintiff and Respondent, v. FRY'S 57 FREEWAY INVESTMENT LLC, Defendant and Appellant.	B258371 (Los Angeles County Super. Ct. No. KC062364)

APPEAL from a judgment of the Superior Court of Los Angeles County, Brian M. Hoffstadt, Judge. Dismissed as to Frydoun Sheikhpour. Affirmed as to Fry's 57 Freeway Investment LLC.

Steckbauer Weinhart and J. Thomas Cairns, Jr., for Defendant and Appellant.

Cummins & White, James R. Wakefield and Charles P. Murawski for Plaintiff and Respondent.

INTRODUCTION

This is an appeal from a judgment upon a jury's special verdict. Anabi Oil Corporation (Anabi Oil) sued Frydoun Sheikhpour and his company, Fry's 57 Freeway Investment LLC (Fry's 57) for breach of a contract regarding the supply of gasoline. Sheikhpour and Fry's 57 cross-complained for negligent misrepresentation. The jury found in Anabi Oil's favor on the breach of contract cause of action. And although the jury made findings in Sheikhpour's and Fry's 57 favor on negligent misrepresentation, the jury ultimately concluded that reliance on any misrepresentation was not a substantial factor in causing harm. Sheikhpour and Fry's 57 appeal, contending, among other things, that the reasonable reliance finding was inconsistent with the breach of contract verdict. We disagree and affirm the judgment as to the company, Fry's 57. As to the individual appellant, Frydoun Sheikhpour, we dismiss the appeal because it is untimely.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual background.

Sam and Rene Anabi co-owned Sam Brothers. Sam Brothers bought from Shell Oil a gas station at 206 S. Diamond Bar Boulevard. In 2005, Sam Brothers and Shell entered into a retail sales agreement (RSA) obligating Sam Brothers to buy, and Shell to sell, a specified minimum amount of Shell-branded gasoline. Sam Brothers and Shell also entered into a retail facility development incentive program agreement, under which Sam Brothers would get a $500,000 "incentive" after developing or improving the site with, for example, a car wash or convenience store.[1] If no improvements were made, Sam Brothers would not get the incentive.[2]

In or about May 2008, "Sheikhpour and/or Petrol Plus" bought the land and business from Sam Brothers and 206 S. Diamond Bar LLC, under a purchase agreement. The RSA and incentive agreements with Shell Oil were assigned to the buyers. Rene

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[1] They also entered into the retail technology incentive program agreement.

[2] At trial, Anabi Oil contended that the incentive agreement was extended for one year, to February 28, 2009.

Anabi handled all negotiations regarding the sale, and Sam Anabi signed the purchase agreement.

In July 2010, Anabi Oil, formed by Rene and Sam Anabi, bought Shell's rights to distribute gasoline to retail locations, including to the Diamond Bar location. Anabi Oil therefore "stepped into Shell's shoes" under the RSA, becoming the gasoline supplier to the station now owned by Sheikhpour, who was therefore now obligated to buy gasoline from Anabi Oil. Sheikhpour, however, stopped buying gas from Anabi Oil in approximately April 2011.

II. Procedural background.

When Sheikhpour stopped buying gasoline from Anabi Oil, Anabi Oil sued Sheikhpour and Fry's 57 for breach of the RSA. Sheikhpour and Fry's 57 asserted a defense of fraud in the inducement. Sheikhpour also cross-complained against Sam Brothers, Inc.; 206 S. Diamond Bar Blvd.; Anabi Oil; and Sam Anabi for fraud and for negligent misrepresentation, based on allegations that cross-defendants failed to disclose the incentive agreement expired and misrepresented they had the permits and plans necessary to develop the gas station.

The case was tried by a jury. Before the special verdict form was submitted to the jury, the trial court removed, over Sheikhpour's and Fry's 57's objection, Anabi Oil and Sam Anabi as cross-defendants. The jury found for Anabi Oil on its breach of contract cause of action, awarding $581,432.37 in damages. As to the cross-complaint, the jury found, on count 2 for negligent misrepresentation, that cross-defendants made a false representation of material fact; that cross-defendants did not have reasonable grounds for believing the representation was true when made; that they intended Sheikhpour to rely on the representation; and that Sheikhpour reasonably relied on the representation, but that Sheikhpour's reliance on the representation was *not* a substantial factor in causing harm.[3]

[3] On count 1 for fraud, the jury found that cross-defendants Sam Brothers and the 206 S. Diamond Bar LLC, made a false representation of an important fact but that they

Sheikhpour and Fry's 57 moved for a new trial on the ground, among others, that the verdict was inconsistent. (Code Civ. Proc., § 663.) On June 19, 2014, the trial court denied the motion. The court awarded attorney fees to Anabi Oil. This appeal followed.

APPEALABILITY

Before addressing the merits of the appeal, we address its timeliness.[4] Judgment was entered on April 22, 2014, and notice of entry of judgment was served on April 25, 2014. Sheikhpour and Fry's 57 filed a notice of intent to move for a new trial on May 9, 2014. While that motion was pending, Fry's 57, but not Sheikhpour, filed for bankruptcy on May 30, 2014. The trial court denied the motion for new trial on June 19, 2014 as to Sheikhpour only, and the clerk served notice that same day. The court expressly noted that Fry's 57 had filed for bankruptcy, and therefore the court's ruling applied only to the individual. A notice of appeal was filed on August 15, 2014.

A notice of appeal must be filed on or before the earliest of, for example, 60 days after a party serves a file-stamped copy of the judgment on the person filing the notice of appeal. (Cal. Rules of Court, rule 8.104(a)(1).) That 60 days may be extended 30 days when a new trial motion has been filed. (Cal. Rules of Court, rule 8.108(b)(1).) Because the new trial motion was denied on June 19, 2014 and notice was served that same day, Sheikhpour had until about July 21, 2014 to file his notice of appeal. He did not file it until August 15, 2014. The appeal is untimely as to Sheikhpour.

Fry's 57's appeal, however, is timely. While the motion for new trial was pending, the company filed for bankruptcy, and the court therefore did not rule on the motion as to the company. Although the automatic bankruptcy stay of title 11 United States Code section 362(a)(1), does not toll the time in which a notice of appeal has to be

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did not know the representation was false or did not make it recklessly and without regard for its truth.

[4] At oral argument, we asked for supplemental briefing regarding timeliness of the appeal.

filed, the extension provisions of title 11 United States Code section 108(c)(2)[5] (section 108(c)(2)) extends the time for a trial court to rule on a new trial motion. (*ECC Construction, Inc. v. Oak Park Calabasas Homeowners Assn.* (2004) 118 Cal.App.4th 1031, 1037-1039.) The "purpose of section 108(c)(2) is to extend 'applicable time deadlines . . . for 30 days after notice of the termination of a bankruptcy stay, if such deadline would have fallen on an earlier date.' [Citation.] This allows the continuation of an action which otherwise would have been halted by operation of nonbankruptcy law during the period that the stay was in effect." (*Id.* at p. 1040.) While a bankruptcy stay is in effect, the party to which the stay applies has no way of obtaining a ruling on its motion for a new trial. Under such circumstances, "it appears to us the application of section 108(c)(2) is appropriate to prevent defendant from losing its right to obtain rulings on its motions for new trial, i.e., to continue the action. [¶] Accordingly, we hold that section 108(c)(2) applies to provide a 30-day extension of the time in which a trial court may rule on a motion for new trial, if the automatic stay is in effect while the motion is pending. Inasmuch as defendant obtained a ruling within the 30-day period and filed its notice of appeal within 30 days after notice of ruling, the notice of appeal was timely." (*Ibid.*)

Here, Fry's 57's new trial motion was pending when it filed for bankruptcy. Its bankruptcy case was dismissed on August 18, 2014. Under section 108(c)(2), the trial court had 30 days to rule on the motion for a new trial as to Fry's 57. It does not appear that Fry's 57 requested a ruling. In any event, the court had until about September 15, 2014 to make any such ruling on it. Instead, Fry's 57 filed its notice of appeal

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[5] That section provides: "if applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor, or against an individual with respect to which such individual is protected under section 1201 or 1301 of this title . . . *and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of* [¶] . . . [¶] *(2) 30 days after notice of the termination or expiration of the stay* under section 362 . . . ." (Italics added.)

prematurely, on August 15, 2014. The notice of appeal is premature but timely as to the company. (See Cal. Rules of Court, rule 8.104(d)(2).)

CONTENTIONS

Fry's 57 contends: **I.** the breach of contract verdict was inconsistent with the reasonable reliance finding on negligent misrepresentation; **II.** the trial court abused its discretion by failing to take judicial notice of Anabi Oil's corporate existence; and **III.** the court erred by removing Anabi Oil and Sam Anabi as cross-defendants from the special verdict form.

DISCUSSION

I. Inconsistent verdicts.

Fry's 57 contends that the jury's findings on the negligent misrepresentation cause of action were inconsistent with its breach of contract verdict. We disagree.

Inconsistent verdicts are against the law and are grounds for a new trial. (*Shaw v. Hughes Aircraft Co.* (2000) 83 Cal.App.4th 1336, 1344.) A special verdict is inconsistent if there is no possibility of reconciling its findings with each other. (*Zagami, Inc. v. James A. Crone, Inc.* (2008) 160 Cal.App.4th 1083, 1092; *City of San Diego v. D.R. Horton San Diego Holding Co., Inc.* (2005) 126 Cal.App.4th 668, 682 [" ' "Where the findings are contradictory on material issues, and the correct determination of such issues is necessary to sustain the judgment, the inconsistency is reversible error." ' [Citations.]".) If no party requests clarification or an inconsistency remains after the jury returns, the trial court must interpret the verdict in light of the jury instructions and the evidence and attempt to resolve any inconsistency. (*Hasson v. Ford Motor Co.* (1977) 19 Cal.3d 530, 540-541, overruled on another ground in *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580; *Zagami*, at pp. 1091-1092.) Our review is de novo. (*Zagami*, at p. 1092.)

To understand Fry's 57's argument, we begin with the breach of contract cause of action. Anabi Oil claimed that Fry's 57 and Sheikhpour breached the RSA by failing to buy gasoline and by using non-Shell brand gasoline. Fry's 57's and Sheikhpour's fraud

affirmative defense was based on alleged misrepresentations about the incentive agreement and construction permits, which induced it to enter into the purchase and related agreements. As to that affirmative defense, the trial court instructed the jury with CACI No. 335, requiring it to prove it "would not have entered into the contract if he had known that the representation was not true." (CACI No. 335.) By finding in Anabi Oil's favor on the breach of contract, the jury necessarily rejected the affirmative defense—namely, any fraud did not vitiate consent (Civ. Code, § 1567). Then, in connection with the negligent misrepresentation cause of action in the cross-complaint, the jury found that cross-defendants made a false representation of an important fact on which Sheikhpour reasonably relied, but that this reliance was *not* a "substantial factor in causing" harm. Hence, on both the affirmative defense and negligent misrepresentation cause of action, the jury found causation lacking. On its face, the special verdict is consistent.

CACI Nos. 1907 and 1908 do not create any inconsistency. CACI No. 1907 instructed the jury on "reliance" as follows: "Sheikhpour, relied on cross-defendants, Sam's Brothers and 206 S. Diamond Bar Boulevard, LLC's false representations [*sic*] were negligent misrepresentations, if: [¶] One, the false representations or negligent misrepresentations substantially influenced him to purchase the gas station business at issue in this case; and second, he probably would not have purchased the gas station business at issue in this case, without the false representations or negligent misrepresentations. [¶] It is not necessary for the false representation or negligent misrepresentation to be the only reason for [Sheikhpour's] contract." CACI No. 1908 instructed the jury on reasonable reliance; namely, whether "Sheikhpour's reliance on the false misrepresentations or negligent misrepresentations was reasonable, you must first prove that the matter was material. [¶] A matter is material if a reasonable person would find it important in determining his or her choice of action."

In answering, question 4 of the special verdict ("Did [Sheikhpour] *reasonably rely* on the representation?", italics added), the jury thus would have looked to CACI No. 1908, defining reasonable reliance. In answering question 5 ("Was [Sheikhpour's]

reliance on each Cross-Defendant's representation a substantial factor in causing harm to [Sheikhpour]?"), the jury would have looked to CACI No. 1907. By answering "yes" to question 4, the jury could have believed that the misrepresentations were material but, by answering "no" to question 5, the jury clearly believed that any misrepresentation did not harm Sheikhpour. Again, the findings are consistent.

Even if, as Fry's 57 suggests, CACI No. 1907 informed the jury's response to question 4 as well to 5, the findings are not irreconcilable. Reliance and causation are intertwined concepts. "Actual reliance occurs when a misrepresentation is ' "an immediate cause of [a plaintiff's] conduct, which alters his legal relations," ' and when, absent such representation, ' "he would not, in all reasonable probability, have entered into the contract or other transaction." ' " (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 976; see also *Hall v. Time, Inc.* (2008) 158 Cal.App.4th 847, 855 & fn. 2.) Reliance thus might be "thought of as the mechanism of causation in an action for deceit." (*Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1092.) In answering, "no," to question 5, the jury clearly believed that any misrepresentation did *not* substantially influence Sheikhpour and that Sheikhpour and Fry's 57 probably would have entered into the purchase and related agreements, notwithstanding any misrepresentation. The jury's rejection of the fraud affirmative defense indicates a consistent belief on the part of the jury that causation was lacking. The verdicts are not, therefore, hopelessly irreconcilable. (*Hasson v. Ford Motor Co.*, *supra*, 19 Cal.3d at pp. 540-541 ["The general and special verdicts must be beyond possibility of reconciliation under any possible application of the evidence and instructions. If any conclusions could be drawn thereunder which would explain the apparent conflict, the jury will be deemed to have drawn them."].)

Because we reject Fry's 57's basic premise the verdict was inconsistent, we reject the suggestion that the trial court's failure to instruct the jury on out-of-pocket damages was a "source of the jury's confusion." It is unclear how instruction on an issue—damages—that the jury never reached could have been prejudicial. Also, to the extent the court refused the instruction because evidence did not support it, Fry 57's's failure to

address the evidence forfeits the issue. (*Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699-700 [we may deem an issue abandoned when appellant cites only general principles but fails to apply those principles to the circumstances before the court]; *Dills v. Redwoods Associates, Ltd.* (1994) 28 Cal.App.4th 888, 890, fn. 1 [we do not develop appellants' arguments for them]; *In re Marriage of Schroeder* (1987) 192 Cal.App.3d 1154, 1164.)

II. Judicial notice.

After the parties rested, Fry's 57 asked the trial court, based on the Secretary of State's website, to judicially notice that Anabi Oil existed at the time misrepresentations were made in 2008. This evidence, the company argued, contradicted Rene Anabi's testimony Anabi Oil did not exist before July 2010. The trial court denied the request, which ruling we review for abuse of discretion. (*Evans v. California Trailer Court, Inc.* (1994) 28 Cal.App.4th 540, 549.)

Although the trial court cited *Jolley v. Chase Home Finance, LLC* (2013) 213 Cal.App.4th 872, in concluding it could not take judicial notice of "postings on a website," that was not the basis of the court's ruling. Rather, the court reasoned that the alleged misrepresentations were made in 2008, when Sam's Brothers and 206 S. Diamond Bar LLC sold the business. Even assuming, which the court did, that Anabi Oil existed in 2008, Anabi Oil did not sell the business: Sam's Brothers and 206 S. Diamond Bar LLC did. Absent a showing Anabi Oil was the sellers' alter ego—a point on which no evidence was presented and no jury instructions were requested—Anabi Oil was not liable for any misrepresentation.[6] Fry's 57 makes no argument why this reasoning was incorrect.

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[6] The court agreed, however, that Sheikhpour could, post-verdict, "go after Anabi Oil, if you can establish alter-ego, but I don't think, based on the contracts that are signed, the fact that they have the same princi[pals] means that every corporation that they happen to own is equally liable in this case."

Instead, the company argues that the evidence was crucial to undermining Rene Anabi's credibility, that it had a "strong bearing" on her "astonishing false testimony." The trial court rejected this argument: "while that is impeachment evidence, I think it is sufficiently collateral to the issues in this case, that I am not going to allow it in," under Evidence Code section 352. Again, we see no abuse of discretion. (*People v. Fuiava* (2012) 53 Cal.4th 622, 667-668 [rulings on admission or exclusion of evidence under Evid. Code, § 352 are reviewed for abuse of discretion].) The court was well within its discretion to consider the matter a collateral one, especially where, as here, the issue appears to have been raised after the parties had rested. In any event, the record doesn't support the hyperbolic charge that this evidence was critical to attacking Rene Anabi's credibility. Even in the absence of the proposed evidence, the jury found that cross-defendants made misrepresentations. No miscarriage of justice occurred based on the exclusion of this evidence. (*Huffman v. Interstate Brands Corp.* (2004) 121 Cal.App.4th 679, 692.)

III. Anabi Oil and Sam Anabi.

Fry's 57 next argues that the removal of Anabi Oil and Sam Anabi as cross-defendants on the negligent misrepresentation cause of action was "a probable source of the jury's confusion, leading to the rendering of inconsistent special verdicts and, in any event were prejudicial error." We disagree.

We repeat the relevant factual background: in 2005, Sam Brothers bought the Diamond Bar gas station from Shell Oil. At the same time, Sam Brothers entered into the RSA with Shell, obligating Sam Brothers to buy Shell gasoline from Shell. In 2008, Sam Brothers and 206 S. Diamond Bar LLC sold the gas station to Fry's 57 and Sheikhpour. Fry's 57 and Sheikhpour assumed obligations under the RSA and therefore had to buy Shell-branded gasoline from Shell. But, in 2010, Shell sold/assigned its rights under the RSA to Anabi Oil. Anabi Oil therefore "stepped into Shell's shoes," and, as assignee of the RSA, Anabi Oil became Fry 57's and Sheikhpour's gasoline supplier.

Fry's 57, however, argues that Anabi Oil, as assignee, was subject to the "same defenses, including fraud in the inducement, that applied to its assignors." (See generally *Johnson v. County of Fresno* (2003) 111 Cal.App.4th 1087, 1096.) Anabi Oil's "assignor," however, was Shell Oil not Sam Brothers.[7] Absent an evidentiary showing that Anabi Oil was *Sam Brother's* alter ego, Anabi Oil had nothing to do with the 2008 purchase agreement between Sam Brothers and Fry's 57 and Sheikhpour. No such evidence or argument was introduced below. Any fraud in the inducement of that agreement and related contracts, therefore, was committed by Sam Brothers and/or the 206 S. Diamond Bar LLC, who were named as cross-defendants in the special verdict form.

To the extent Fry's 57's argument is that Sam Brothers and/or 206 S. Diamond Bar LLC therefore should have been named with Anabi Oil in the fraud affirmative defense to the breach of contract cause of action, the deletion of Anabi Oil and Sam Anabi from the negligent misrepresentation cause of action is irrelevant to that argument. Moreover, appellant fails to cite where in the record a modification to CACI No. 335 was requested. Instead, the record shows that the parties agreed to CACI No. 335 as given. Any such argument is therefore forfeited on appeal. (See *Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121, 1131 [" 'Where, as here, "the court gives an instruction correct in law, but the party complains that it is too general, lacks clarity, or is incomplete, he must request *the additional or qualifying instruction in order to have the error reviewed*." [Citations.]' [Citation.] [A party's] failure to request any different instructions means he may not argue on appeal the trial court should have instructed

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[7] The trial court, after instructing on the fraud affirmative defense to Anabi Oil's breach of contract cause of action, instructed on the assignment: "Anabi Oil Corporation and Fry's 57 Freeway Investment, LLC, were not parties to the original contract; however, Anabi Oil Corporation may bring a claim for breach of contract, because Shell transferred its rights, under the original contract, to Anabi Oil Corporation. [¶] Anabi Oil Corporation may sue Fry's 57 Freeway Investment, LLC, because Sam's Brothers transferred its rights, under the original contract, to Petrol Plus, Incorporated, and then to Fry's 57 Freeway Investment, LLC. These transfers are referred to as 'assignments.' "

differently."]; *Agarwal v. Johnson* (1979) 25 Cal.3d 932, 950-951 [" 'In a civil case, each of the parties must propose complete and comprehensive instructions in accordance with his theory of the litigation; if the parties do not do so, the court has no duty to instruct on its own motion.' "], overruled on another ground by *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 574, fn. 4; see also Code Civ. Proc., § 607a.)

We also fail to see how removal of Sam Anabi as a cross-defendant on the negligent misrepresentation cause of action, even if error, led to any inconsistency in the verdict.[8] The jury expressly found that misrepresentations were made, but that they did not cause Sheikhpour to enter into any contract. It is unclear how any misrepresentations personally made by Sam Anabi would have affected the causation finding. Indeed, the evidence was that Sam Anabi signed the purchase agreement but otherwise had no involvement in the transaction. Rene Anabi handled all negotiations regarding purchase of the gas station. Sam Anabi never spoke to Sheikhpour before the contract was signed. Sam Anabi was not present at the February 2008 meeting where the agreement was prepared and signed. Sheikhpour testified he negotiated with Rene and with Sam Anabi's sister, and Sam Anabi was not present at the February 2008 meeting.

[8] After the close of evidence, plaintiffs moved for nonsuit as to Sam Anabi.

DISPOSITION

The appeal is dismissed as to Frydoun Sheikhpour. The judgment is affirmed as to Fry's 57.[9] Respondent is to recover its costs on appeal.

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ALDRICH, J.

We concur:

EDMON, P. J.

LAVIN, J.

[9] Because we affirm the judgment, we do not address the appeal of any postjudgment order granting attorney fees to plaintiffs.