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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

RAHMI TURKMEN, Plaintiff and Appellant, v. JAMES R. KATZ, et al., Defendants and Respondents.	B234235 (Los Angeles County Super. Ct. No. BC398880)

APPEAL from a judgment of the Superior Court of Los Angeles County, Daniel J. Buckley, Judge. Affirmed in part, reversed in part and remanded.

Alfred R. Keep for Plaintiff and Appellant.

Bonetati & Kincaid, Inc., Mark L. Kincaid and Eugene R. Grace for Defendants and Respondents.

INTRODUCTION

Appellant Rahmi Turkmen appeals from a judgment entered following a jury verdict against respondents James R. Katz and his wife Gail Lynn Katz. The jury awarded Turkmen $120,000 in damages for unpaid work for the Katzes that was within Turkmen's tile contractor license. However, the court ordered that the damages award be offset by $195,425, the amount the Katzes had previously paid Turkmen for construction work, based on the Katzes' cross-claim seeking reimbursement of the $195,425 because Turkmen was not licensed to perform the work. The net result was that Turkmen was ordered to pay the Katzes $75,425.

Turkmen contends that the damages award in his favor should not have been subject to the $195,425 offset because the Katzes failed to prove at trial that the work for which he was paid fell outside his tile license. He also contends that the court cut off his testimony at trial before he could offer proof of his damages, leading to an award that was too low. Finally, he complains that the court responded improperly to several questions posed by the jury during its deliberations.

We find no error in the court's management of the trial and find that Turkmen forfeited any objections to the court's responses to the jury's questions. However, we hold that the trial court erred in concluding that the Katzes were entitled to be reimbursed for the entire $195,425 they paid Turkmen. We thus reverse the judgment ordering the offset, and remand the matter to the trial court for a new trial on the issue of what portion of the $195,425 should be returned to the Katzes because it was payment for work Turkmen was not licensed to perform or was not work that was incidental or supplemental to his tile work.

BACKGROUND

Turkmen is a licensed tile setter; he does not have a general contractor's license. Therefore, under California regulations, he is licensed only to install tile and perform tasks incidental to such tile installation; he is not licensed to do electrical work, build structures, or perform other construction work.[1]

Turkmen was first hired by the Katzes in 2002 to perform wrought iron work at their residence in La Canada, California. Over the next five years, Turkmen did a number of miscellaneous jobs on the Katzes' property, including constructing patios covered in stone tile, tiling part of the kitchen, and constructing a laundry room. In early 2006, Turkmen began building a recording studio on the Katzes' property pursuant to an oral agreement, and he finished working on the project in early 2008. He initially estimated that the project would cost $115,000, but ultimately, because of changes requested by the Katzes, his final bill was for over $300,000.

Over the years, the Katzes had paid Turkmen a total of $195,425 for miscellaneous projects. However, the Katzes failed to pay him for work performed on the studio.

Turkmen filed a complaint alleging causes of action for breach of oral contract, balance due on an open book account, and a common count for work

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[1] "A ceramic and mosaic tile contractor prepares surfaces as necessary and installs glazed wall, ceramic, mosaic, quarry, paver, faience, glass mosaic and stone tiles; thin tile that resembles full brick, natural or simulated stone slabs for bathtubs, showers and horizontal surfaces inside of buildings, or any tile units set in the traditional or innovative tile methods, excluding hollow or structural partition tile." (Cal. Code Regs., tit. 16, § 832.54.) A licensee classified as a specialty contractor, including a tile setter, "shall not act in the capacity of a contractor in any classification other than one in which he/she is classified except on work incidental or supplemental to the performance of a contract in a classification in which any contractor is licensed by the Board." (Cal. Code Regs., tit. 16, § 834, subd. (c).)

labor and materials. He sought damages in the sum of $191,075 and invoked his right to a jury trial.

The Katzes filed a cross-complaint alleging causes of action for (1) fraud, (2) breach of contract, (3) breach of implied warranty of reasonable workmanship, (4) conversion, (5) negligent design, engineering, construction and planning, and (6) rescission and return of monies paid to an unlicensed contractor (Bus. & Prof. Code, § 7031, subd. (b).).[2] They contended that Turkmen misrepresented that he was a licensed general contractor who was capable of performing all building trade specialties. They alleged that they paid him more than $190,000 for construction work that he was not licensed to perform, and they sought recovery of the full amount. They also alleged that they were damaged because the construction he performed did not meet applicable building codes and otherwise was of poor workmanship.

A four-day jury trial was conducted, in two phases. The first phase concerned solely whether Turkmen acted as a contractor or an employee of the Katzes while performing work on their property. (If the jury found that Turkmen was acting as the Katzes' employee, under California law he would still be entitled to seek compensation for the construction work he performed, whether or not he was a licensed general contractor.) After sending several questions to the court, the jury returned a special verdict concluding that Turkmen was acting as an independent contractor, not an employee.

The second phase of the trial dealt with the parties' liability under the complaint and cross-complaint, subject to the finding that Turkmen was a contractor, not an employee. In its special verdict after that phase, the jury

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[2] All subsequent undesignated statutory references herein are to the Business and Professions Code.

concluded that Turkmen provided tile work to the Katzes reasonably valued at $120,000. Based on a clarifying instruction given by the court in response to a question from the jury during its deliberations, that award of $120,000 pertained solely to work performed on the studio, not to earlier work. The jury further found that none of Turkmen's work damaged the Katzes' property.

The Katzes submitted a proposed judgment under which the $120,000 jury verdict in Turkmen's favor would be offset by $195,425, the total amount the Katzes previously had paid Turkmen for his work. The Katzes thus requested that the court enter judgment in their favor in the amount of $75,425. Turkmen objected to the proposed set-off, arguing that a major part of the work for which he was paid $195,425 was tile work covered by his license, and he could not be required to disgorge payments for such licensed work. He further noted that the $120,000 damages award pertained exclusively to unpaid tile work on the recording studio, and could not be interpreted to encompass a jury finding as to which portion of Turkmen's work prior to the studio was within his tile setter's license. Nonetheless, the court adopted the Katzes' proposed judgment and entered judgment in their favor in the amount of $75,425.

Turkmen moved for a new trial under Civil Procedure Code section 657. The court denied the motion, and Turkmen timely appealed from the decision.

To determine whether Turkmen's motion for a new trial should have been granted, we examine the entire record and make an independent assessment of whether there were grounds for granting the motion. (*ABF Capital Corp. v. Berglass* (2005) 130 Cal.App.4th 825, 832.)

DISCUSSION

I. Unlicensed Construction Work under the CSLL

"To protect the public, the Contractors' State License Law (CSLL; Bus. & Prof. Code, § 7000 et seq.) imposes strict and harsh penalties for a contractor's failure to maintain proper licensure." (*MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc.* (2005) 36 Cal.4th 412, 418, fn. omitted (*MW Erectors*).) Section 7031, subdivision (a) shields parties who utilize the services of an unlicensed contractor[3] from lawsuits by that contractor seeking to collect payment for unlicensed work. (§ 7031, subd. (a); *MW Erectors, supra*, 36 Cal.4th at p. 418.) Further, subdivision (b) of section 7031 provides that parties who hire an unlicensed contractor are entitled to reimbursement for amounts paid to such a contractor even if they knew the contractor was unlicensed.[4] (§ 7031, subd. (b); *Alatriste v. Cesar's Exterior Designs, Inc.* (2010) 183 Cal.App.4th 656, 668.) Under this latter subdivision, "contractors are required to return all compensation received without reductions or offsets for the value of material or services provided." (*White v. Cridlebaugh* (2009) 178 Cal.App.4th 506, 520-521.)

"'[C]ourts may not resort to equitable considerations in defiance of section 7031.' [Citation.] That is because the statute '"'represents a legislative determination that the importance of deterring unlicensed persons from engaging

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[3] Section 7026 defines "contractor" to include "any person who undertakes to or offers to undertake to, or purports to have the capacity to undertake to, or submits a bid to, or does himself or herself or by or through others, construct, alter, repair, add to, subtract from, improve, move, wreck or demolish any building [or part of a building] . . . ."

[4] Section 7031, subdivision (b) provides in full: "Except as provided in subdivision (e), a person who utilizes the services of an unlicensed contractor may bring an action in any court of competent jurisdiction in this state to recover all compensation paid to the unlicensed contractor for performance of any act or contract."

in the contracting business *outweighs any harshness between the parties . . . .*'" [Citation.]' [Citation.]" (*WSS Industrial Construction, Inc. v. Great West Contractors, Inc.* (2008) 162 Cal.App.4th 581, 587.)

However, the CSLL includes exceptions to the requirement that contracting work be performed only by licensed contractors. (§§ 7040-7054.5; see *California Groundwater Assn. v. Semitropic Water Storage Dist.* (2009) 178 Cal.App.4th 1460, 1464.) For instance, section 7053 provides that the licensing requirement "does not apply to any person who engages in the activities herein regulated as an employee who receives wages as his or her sole compensation, does not customarily engage in an independently established business, and does not have the right to control or discretion as to the manner of performance so as to determine the final results of the work performed." (§ 7053; see *Pickens v. American Mortgage Exchange* (1969) 269 Cal.App.2d 299, 305.) Similarly, the CLSS exempts from the licensing requirements "[a]n owner of property, building or improving structures thereon, or appurtenances thereto, who does the work himself or herself or through his or her own employees with wages of their sole compensation . . . ." (Former § 7044, subd. (a).)

At trial, Turkmen contended that his work for the Katzes fell under the above exceptions because he was an employee of the Katzes; thus, he argued that he was entitled to wages for all his construction work, whether or not he was licensed to perform it. The first phase of the trial dealt with this threshold issue, and the jury concluded that he acted as a contractor. Based on the jury's finding on this issue, Turkmen was entitled to recover only for work he performed that was within his tile setter's license, and the Katzes were entitled to be reimbursed for amounts they had already paid him for work that he was not licensed to perform. (§ 7031, subds. (a), (b).)

II. The Katzes' Reimbursement Claim

Before trial, the parties orally stipulated that the Katzes had paid Turkmen a total of $195,425 for construction work at their home. Testimony at trial suggested that the work for which Turkmen was paid this total sum included both jobs that were within his license (such as laying stone tiles) and tasks for which he was not licensed (such as building a retaining wall and performing electrical work). Nonetheless, the trial court concluded that Turkmen should reimburse the entire $195,425 to the Katzes pursuant to their cross-claim under section 7031, subdivision (b), because Turkmen was not a licensed general contractor. Turkmen contends that the jury's special verdicts do not support the judgment, and that the trial court implicitly made a factual finding that all the work done prior to the studio fell outside the tile setter's license. We agree with Turkmen that there is a disconnect between the evidence at trial, the jury's special verdicts, and the judgment entered by the court with respect to the Katzes' cross-claim for reimbursement. As best we can, below we attempt to piece together the circumstances leading to this lack of congruity.

Before the second phase of the trial, the Katzes' counsel raised the issue of the effect of the parties' earlier stipulation that Turkmen was paid $195,425:

"[KATZES' COUNSEL]: There is one question that needs to be done before we start this afternoon. It is simple. Since he stipulated $195,425 as the amount that Dr. Katz paid him and the jury held it [*sic*] is a contractor, he gets all that back, we don't have to put that on as part of the case because it is a matter of law and it isn't a question of fact. $195,425 is the exact figure and since that is not a question of fact at all with the amount not in question that was paid to him and under 4701 he is entitled to all of it back, but there is an offset which would be part of the jury verdict how much would he be entitled to for his qualified value work as a C-54 contractor and it would be deducted from that particular figure. Then we

have the second part, our cross-complaint, for the damages to restore the property. So what I'm trying to get at is –

"THE COURT: I mean, I thought your question is simply on the verdict form –

"[KATZES' COUNSEL]: It doesn't cover the $195,000.

"THE COURT: You have a stipulation.

"[KATZES' COUNSEL]: I know. With that stipulation it doesn't even have to be brought up. You can do that from the bench.

"THE COURT: Okay. Then I misunderstood.

"[KATZES' COUNSEL]: So we don't even have to talk about that in the second half. That cuts down the time considerably by not having to establish all of these checks that were written because –

"THE COURT: Do we have a stipulation that the amount paid was $195,425?

"[TURKMEN'S COUNSEL]: Yes, Your Honor."

At the conclusion of phase two of the trial, the jury received a special verdict form asking, in part: "1. Do you find Mr. Turkmen provided any tile work within his C-54 tile setter's license that was a value to the property of James and Gail Katz? . . . [¶] 2. What is a reasonable dollar value of the licensed tile work by Mr. Turkmen?"

During its deliberations, the jury sent the following question to the court: "Is the damages and/or money owed in reference to only the studio work or all work completed by Mr. Turkmen?" The parties stipulated to the following response, which was provided to the jury: "If your question relates to Question # 2

on the Special Verdict, the damages or money owed relates to the studio."[5] Thus, as clarified by the court, Question 2 on the special verdict asked the jury to specify a reasonable dollar value of the licensed tile work by Turkmen on the recording studio only. Because of this clarification, the jury was not asked to determine the extent to which Turkmen's *earlier* work for the Katzes, for which he had already been paid $195,425, fell outside his license. Neither the court nor the parties appear to have recognized that the clarification to which they all agreed would result in no finding by the jury on this issue of fact that was salient to the Katzes' cross-claim for reimbursement of the $195,425.

In the absence of such a finding, the Katzes suggest on appeal that the court correctly concluded that the entire $195,425 should be reimbursed because Turkmen had acquiesced to the argument that he should return all the money paid to him. They rely on the stipulation that the Katzes had paid Turkmen a total of $195,425.

"A stipulation is an agreement between counsel respecting business before the court [citation], and like any other agreement or contract, it is essential that the parties or their counsel agree to its terms. [Citations.]" (*Palmer v. City of Long Beach* (1948) 33 Cal.2d 134, 142.) "Unless it is clear from the record that both parties assented, there is no stipulation." (*Id.* at p. 143.) "[W]hile no particular form of stipulation is required when made orally in open court, except that it be noted in the minutes, its terms must be definite and certain to render the proper basis for a judicial decision." (*Harris v. Spinali Auto Sales, Inc.* (1966) 240 Cal.App.2d 447, 452.)

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5 The court further stated, "If your question relates to Question # 3 on the Special Verdict, the damages or money owed relates to all work." Question 3 on the special verdict asked, "Did Mr. Turkmen, in performing work at the Katz property, cause damage to the home and grounds [*sic*] Katz property?" The jury ultimately responded "no" to Question 3.

In this case, while the parties stipulated in open court that Turkmen was paid $195,425, the record does not reflect any stipulation by Turkmen or his counsel that the $195,425 was payment solely for work not covered by Turkmen's license and thus subject to reimbursement in full. The exchange on the record shows that the Katzes' counsel suggested this approach to the court, arguing that his clients should get back the entire $195,425 payment, but he also acknowledged a moment later that "there is an offset which would be part of the jury verdict how much would [Turkmen] be entitled to for his qualified value work as a C-54 contractor." Thus, even the Katzes' counsel presumed that Turkmen would be permitted to keep any portion of the $195,425 that was for tile work under Turkmen's license. Thus, there was no agreement that the Katzes would be credited with $195,425 in full, without regard to whether or not Turkmen was licensed to perform some of the work for which he was paid.

In sum, it is not possible to construe the jury's special verdicts or the parties' stipulation to support the judgment ordering Turkmen to return all the money the Katzes had paid him. We agree with Turkmen that the trial court implicitly, and improperly, made a factual finding that all the work done prior to the studio fell outside the tile setter's license. We therefore order that the judgment be reversed with respect to the damages on the Katzes' cross-claim for reimbursement for payments for unlicensed work under section 7031, subdivision (b), and we remand the matter for a new trial on the question of which portion, if any, of the $195,425 paid to Turkmen was for work outside his tile setter's license and therefore should be returned to the Katzes.

III. Alleged Errors During Trial on Turkmen's Claims

Turkmen alleges several errors by the court which he contends deprived him of a fair trial on his own claims. We find no error.

A. *Limits on Turkmen's Testimony*

Turkmen contends that the court improperly cut off his testimony in the second phase of trial and did not permit him to testify regarding his damages, resulting in an award of only $120,000 that did not fully compensate him for his work on the recording studio. However, trial courts have significant leeway to control the conduct of a trial. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1108 ["[W]e defer to the trial court's decisions to control the proceedings over which it presides absent clear evidence of bias or other misconduct."]) As discussed further below, the court here reasonably exercised its discretion to limit the time for Turkmen's testimony.

At the outset of trial, Turkmen's counsel told the court that Turkmen would be the primary witness during phase two of the trial on the value of the tile work he performed. He estimated that Turkmen's direct examination would take 45 minutes. He further indicated that he had an expert who would testify for half an hour on the subject, if necessary.

Ultimately, the trial court permitted Turkmen to testify for much longer than 45 minutes, over two days. On the first day of his testimony, he was called to the stand after the afternoon break and testified on direct examination until the end of that day's proceedings. After the jury was discharged for the day, the court advised his counsel that he could have 30 more minutes for Turkmen's continued direct and redirect examinations when the trial resumed. Turkmen's counsel responded, "I can do it in that."

On the next day of trial, the court stated at the outset that Turkmen's counsel could have 45 more minutes with Turkmen, and his counsel did not state that he needed any more time than that. When Turkmen resumed his testimony, his counsel focused his questions on rebutting the testimony of the Katzes' expert

concerning damage that Turkmen allegedly caused to the property. The court periodically warned Turkmen's counsel of the time limit and ultimately said, "No more questions." Turkmen's counsel protested that he had yet to cover Turkmen's costs associated with the tile work, but the court reiterated, "No more questions." Turkmen's counsel made no further objection. Moreover, he declined to call his expert witness.

The record demonstrates that the trial court allowed substantially more time for Turkmen's examination than his counsel ever estimated that he needed. Further, the court invited him to call Turkmen's designated damages expert, but he decided not to do so. Given these circumstances, we agree with the Katzes that any failure of proof on the issue of Turkmen's damages was due to his counsel's failure to manage the time allotted to him and to which he had agreed, not to any abuse of the court's authority. (*Hernandez v. Kieferle* (2011) 200 Cal.App.4th 419, 439 (*Hernandez*) [court did not abuse its authority to control the proceedings by denying counsel's request for more time to conduct examination at trial, because counsel had been afforded ample time and had made inefficient use of it].)

The cases cited by Turkmen in support of his position, *In re Marriage of Carlsson* (2008) 163 Cal.App.4th 281 (*Carlsson*) and *Elkins v. Superior Court* (2007) 41 Cal.4th 1337 (*Elkins*), are inapposite. In *Carlsson*, the appellate court found a due process violation where "the trial judge literally walked out of the courtroom in midtrial" in the middle of counsel's questioning of a witness, without any warning. (*Carlsson, supra*, 163 Cal.App.4th at p. 293.) By contrast, the trial judge in this case gave Turkmen's counsel repeated warnings about the impending time limit for his testimony. Further, unlike Turkmen's testimony, the testimony cut off by the court in *Carlsson* was taking no longer than the parties had estimated. (*Id.* at pp. 285-286; see *Hernandez, supra*, 200 Cal.App.4th at p. 438 [distinguishing *Carlsson* and concluding that where the court acted "only to

enforce the parties' time estimates and agreements regarding evidence" and even permitted counsel additional time in which to examine a witness, the court did not improperly limit witness testimony].)

As for *Elkins*, that decision deals with the unrelated subject of the propriety of local court rules that required certain trial testimony to be submitted in the form of a declaration. The California Supreme Court invalidated the local rules in part based on its conclusion that the public interest in affording parties the right to offer relevant and competent evidence on a material issue outweighed the interest in expeditious resolution of the case. (*Elkins, supra,* 41 Cal.4th at pp. 1351-1369.) However, *Elkins* did not address the trial courts' authority to enforce time limits on live testimony, and the reasoning of the opinion does not compel us to find an abuse of authority by the trial court in this case in imposing such a limit.

In sum, we find that the trial court did not abuse its authority by enforcing a time limit on Turkmen's testimony.

B. *Trial Court's Clarifying Instructions to the Jury*

Turkmen also asserts that the trial court committed error in instructing the jury in response to two questions from the jury during its deliberations. The first alleged error pertained to the trial court's instruction to the jury during phase one of the trial, when the jury was asked to decide whether Turkmen was acting as an employee or a contractor while he performed construction work for the Katzes. The jury asked, "At what period of time (projects) are we to look at as him being a Employee/Contractor? All projects or just the studio?" The court responded in writing, "It is the time period covering all projects testified about." The record does not reflect any objection from the parties to this response.

The jury then sent a revised question that it termed a "clarification": "Are we, as the jury, to look and judge the relationship between the Katzes and Mr.

Turkmen for all work (02/2004 to present) or just the ~ 24 months of work on the studio?" The court sent a response, "All work mentioned during testimony." Again, the record shows no objection from either party.

On appeal, Turkmen contends that the court's responses to the jury's questions were inadequate, because they failed to inform the jury that it could find a different relationship between the parties with respect to different projects on the Katzes' property. In particular, Turkmen claims that the court's responses prevented the jury from returning a special verdict finding that he acted as an employee when he built the studio, even if he served as a contractor before that time. Had the jury been permitted to make such a distinction, Turkmen claims, his damages would have been doubled.

Turkmen has forfeited this argument. First, Turkmen did not object at trial to the further instructions given by the court in response to the jury's questions during deliberations. Further, he did not raise the issue in his motion for new trial. "It is well established that issues or theories not properly raised or presented in the trial court may not be asserted on appeal, and will not be considered by an appellate tribunal. A party who fails to raise an issue in the trial court has therefore [forfeited] the right to do so on appeal." (*In re Marriage of Eben-King & King* (2000) 80 Cal.App.4th 92, 117.)

Turkmen also asserts that the trial court erred in the clarifying instructions it gave during the jury's deliberations after phase two of the trial. As discussed in section II, *ante*, the jury sent the following question to the court during its deliberations: "Is the damages and/or money owed in reference to only the studio work or all work completed by Mr. Turkmen?" The court provided the following response to the jury: "If your question relates to Question # 2 on the Special Verdict, the damages or money owed relates to the studio. If your question relates

to Question # 3 on the Special Verdict, the damages or money owed relates to all work."

Because Turkmen's counsel stipulated to this response, he waived any objection on his client's behalf. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293, fn. 2 ["a waiver is the '"intentional relinquishment or abandonment of a known right."' [Citations.]".) He also failed to raise the issue in his motion for a new trial. As such, we decline to consider his argument on appeal that the response to the jury's question was erroneous.

DISPOSITION

The judgment is reversed in part and remanded for a new trial on the issue of damages on the Katzes' cross-claim for reimbursement under section 7031, subdivision (b). In all other respects, the judgment is affirmed. Each party shall bear its own costs on appeal.

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WILLHITE, J.

We concur:

EPSTEIN, P. J. SUZUKAWA, J.