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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

JOSEPH POULOSE,

Plaintiff and Appellant,

v.

FORD MOTOR COMPANY,

Defendant and Respondent.

B281693

(Los Angeles County
Super. Ct. No.
BC538679)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gregory Keosian, Judge. Affirmed.

Rosner, Barry & Babbitt, Hallen D. Rosner, Shay Dinata-Hanson and Arlyn L. Escalante; Hutchens & Hutchens, Lawrence J. Hutchens for Plaintiff and Appellant.

Shook Hardy & Bacon, M. Kevin Underhill and Amir M. Nassihi for Defendant and Respondent.

I. INTRODUCTION

Plaintiff Joseph Poulouse appeals from a judgment following a jury trial. Plaintiff sued defendants Ford Motor Company and Vista Ford in Woodland Hills, California (the dealership)¹ for breach of the implied and express warranty under the Song-Beverly Consumer Warranty Act (Civ. Code², § 1790 et seq.) (Song-Beverly). On September 9, 2016, the jury returned a special verdict in favor of plaintiff in the amount of \$5,000 restitution for breach of the implied warranty of merchantability (the implied warranty). Plaintiff contends the jury erred because it applied the wrong remedy for a breach of the implied warranty under Song-Beverly.³ Plaintiff also asserts the trial court erred by failing to answer a jury question during deliberation and not requiring the jury to re-deliberate to correct a purportedly insufficient verdict. We affirm.

¹ Vista Ford was a defendant below, but does not appear in this appeal.

² Further statutory references are to the Civil Code unless otherwise indicated.

³ Plaintiff does not appeal from the verdict against him for breach of the express warranty under Song-Beverly.

II. BACKGROUND

A. *Complaint*

Plaintiff filed his complaint against defendants on March 7, 2014. Plaintiff alleged that on or about June 12, 2013, the dealership sold plaintiff a 2013 Lincoln MKZ (the vehicle). Plaintiff alleged that during the warranty period, Ford Motor Company and the dealership violated Song-Beverly by breaching the implied and express warranties made to plaintiff. Plaintiff sought damages in the amount of the full retail value of the vehicle. Plaintiff also sought rescission of the sale contract and revocation of acceptance.

B. *Pre-trial*

Defendants filed a motion in limine to preclude plaintiff's testimony, asserting that he was not a buyer or retail buyer as defined in Song-Beverly. Defendants asserted plaintiff acquired the vehicle in a raffle in Illinois. Plaintiff's deposition testimony indicated that he had won a raffle, and had a choice between a cash prize and the vehicle. Plaintiff asserted that he chose the new vehicle option, but selected a different upgraded vehicle from the dealership and paid the difference. The car invoice indicated the price of the car was \$46,910, and then added taxes and fees for a total of \$51,812.

The trial court determined that plaintiff was a purchaser of the vehicle in California under Song-Beverly. The trial court also granted plaintiff's motion in limine to preclude evidence that plaintiff had acquired the car in a raffle.

C. Trial

As plaintiff appeals only the jury's verdict on damages, we recite here the testimony that was relevant to damages. Plaintiff testified that he "acquire[d]" and "[took] delivery" of the vehicle at the dealership in Woodland Hills. Plaintiff reviewed exhibit 2-3, a car invoice from the dealership. Plaintiff testified that "the price shown on the invoice at the bottom" was \$51,812.05. Plaintiff stated that he paid the vehicle registration and state sales tax. Exhibit 2-3 listed a "DMV [unintelligible]" as \$18.25, and a "license" cost of \$405. It also listed sales tax as \$4,230.75. Plaintiff did not testify about making any other payments toward the purchase of the car.

4. Jury Instruction CACI No. 3241

The trial court, over defendants' objection, allowed plaintiff's modified version of CACI No. 3241, Restitution From Manufacturer—New Motor Vehicle, to be read to the jury, which provided: "If you decide that Ford Motor Company and Vista Ford or its authorized repair facility failed to repair the defect after a reasonable number of opportunities or if it was not of the same quality as those generally acceptable in the trade or [sic] time of sale it would not pass without objection in the trade or was not fit for the ordinary purposes for which such goods were used, then Joseph Poulse are [sic] entitled to recover the amounts they prove [sic] was paid for the car, including: [¶] 1. The amount paid to date for the vehicle, including finance charges and any amount still owed by Joseph Poulse; [¶] 2. Charges for transportation and manufacturer-installed options;

and [¶] 3. Sales tax, use tax, license fees, registration fees, and other official fees. [¶] In determining the purchase price, do not include any charges for items supplied by someone other than by Ford Motor Company.” Defendants had argued modified CACI No. 3241 was not an accurate instruction for damages for a breach of the implied warranty.

D. Jury Question and Verdict

On September 9, 2016, during deliberations, the jury sent a question to the court: “How do we figure out restitution for the 2013 Lincoln MKZ on [Q]uestion 3?”⁴ After reconvening the parties, the trial court stated it would answer the question by referring the jurors to CACI No. 3241. However, before the trial court could answer the jury’s question, the jury indicated it had reached a verdict. Plaintiff requested that the jury’s question be answered nonetheless as suggested by the trial court. The trial court declined to do so.

The jury returned the following special verdict. First, for Question No. 1, the jury found plaintiff was a “buyer” or “retail buyer.” In the section for breach of implied warranty, for Question No. 2, the jury found the vehicle was not of the same quality as those generally acceptable in the trade during the first year of ownership. For Question No. 3, the jury awarded \$5,000 restitution to plaintiff. The jury did not find a breach of an express warranty. Plaintiff requested that the court answer the jury’s question and order them back for further deliberation,

⁴ Question No. 3 of the verdict form asked regarding breach of the implied warranty: “What amount is Plaintiff entitled to receive as restitution for the 2013 Lincoln MKZ?”

arguing that the jury did not follow the law by awarding plaintiff only \$5,000. The trial court denied the request.

Plaintiff filed post-trial motions for judgment notwithstanding the verdict, new trial for the express warranty, and partial new trial for damages for the implied warranty breach. As to the motion for partial new trial, plaintiff argued the jury's verdict was against the law and the damages therefore were inadequate. The trial court denied all the motions. As to the motions for judgment notwithstanding the verdict and for partial new trial, the trial court found that based on the instruction given and the admissible evidence, the jury's award was allowable under the law. Judgment was entered January 13, 2017 against defendants for \$5,000.

III. DISCUSSION

A. Appealability and Reviewable Orders

In addition to appealing from the judgment, plaintiff contends the trial court erred by denying his post-trial motions for judgment notwithstanding the verdict and for partial new trial regarding the implied warranty and damages. An order denying a motion for judgment notwithstanding the verdict is directly appealable. (Code Civ. Proc., § 904.1, subd. (a)(4).) Because an order denying a motion for judgment notwithstanding the verdict is separately appealable, it must be specifically designated in the notice of appeal or it is not reviewable. (*Filbin v. Fitzgerald* (2012) 211 Cal.App.4th 154, 173; *Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 212, 239.) Plaintiff indicated in his notice of appeal that he only sought review of the

January 23, 2017 judgment after jury trial. Accordingly, the order denying the motion for judgment notwithstanding the verdict is not reviewable here. (Code Civ. Proc., § 906.)

An order denying a motion for new trial is reviewable on appeal from the underlying judgment. (*Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, 18.) We will thus address plaintiff's arguments pertaining to the partial new trial motion.

B. Verdict Was not Against the Law and Damages Were Adequate

Plaintiff asserts the trial court erred by denying his motion for partial new trial. We review the grant or denial of a motion for new trial for an abuse of discretion; but we must review the entire record to independently determine whether grounds existed for granting the motion. (*Santillan v. Roman Catholic Bishop of Fresno* (2012) 202 Cal.App.4th 708, 733; *ABF Capital Corp. v. Berglass* (2005) 130 Cal.App.4th 825, 832.)

Plaintiff contends that because the jury found a breach of the implied warranty, he was entitled to revocation of acceptance pursuant to section 1794, subdivision (b)(1) and remedies under section 2711 of the Uniform Commercial Code. “[I]n the event of a breach of the implied warranty of merchantability, the buyer is entitled to cancel the contract and recover any amounts paid toward the purchase of the goods.” (*Music Acceptance Corp. v. Lofing* (1995) 32 Cal.App.4th 610, 621; accord, *Mocek v. Alfa Leisure, Inc.* (2003) 114 Cal.App.4th 402, 407; *Brand v. Hyundai Motor America* (2014) 226 Cal.App.4th 1538, 1545 [buyer's remedies include rescission].)

Plaintiff contends the verdict was against the law because it failed to comply with CACI No. 3241. Code of Civil Procedure section 657, subdivision 6 provides that the verdict may be vacated and a new trial granted in whole or in part on all or part of the issues if “the verdict or other decision is against law.” A verdict contrary to correct instructions is “against the law.” (*Boam v. Trident Financial Corp.* (1992) 6 Cal.App.4th 738, 743; *Manufacturers’ Finance Corp. v. Pacific Wholesale Radio, Inc.* (1933) 130 Cal.App. 239, 243.) As argued by plaintiff, modified CACI No. 3241 is a correct instruction of restitution for breach of the express and implied warranties under Song-Beverly.⁵

The jury verdict was not against the law. The verdict form provided to the jury required that if the jury found a breach of the implied warranty, it should calculate restitution. Restitution was defined for the jury as “the amount paid” by plaintiff. The amount paid would also include any charges for transportation and manufacturer-installed options, and sales tax, use tax, license fees, registration fees, and other official fees. There were

⁵ Defendant argues that plaintiff was not prejudiced by any error in the jury verdict because, among other things, the trial court delivered an incorrect jury instruction. Specifically, defendant contends that section 1793.2, subdivision (d) does not apply to breaches of implied warranties. We agree that section 1793.2, subdivision (d), which provides for reimbursement to the buyer of the “purchase price paid by the buyer,” only applies to breaches of express warranties. (*Galvador v. DaimlerChrysler Corp.* (2004) 32 Cal.4th 1246, 1262.) But plaintiff was still entitled to damages pursuant to Uniform Commercial Code section 2711, subdivision (1), which provides that a buyer is able to recover “so much of the price as has been paid” In any event, as we find no error, we need not consider defendant’s argument that the trial court erred in delivering this instruction.

no instructions regarding cancellation or rescission of a sale contract.

Plaintiff asserts that the only remedy was restitution of the full amount of the invoice, or \$51,812.05. We disagree. Substantial evidence supports the jury award of restitution. The jury could reasonably infer from plaintiff's testimony that he paid sales tax and registration and his silence regarding any other payments, that plaintiff had *only* paid sales tax and registration. This would make the conclusion that the amount paid was \$5,000 consistent with CACI No. 3241's instruction on restitution. The trial court did not err by denying plaintiff's motion for partial new trial.

D. Sufficiency of Special Verdict and Refusal to Return Jury for Further Deliberations

Plaintiff also contends the trial court erred by not returning the jury for further deliberations. Code of Civil Procedure section 619 provides: "When the verdict is announced, if it is informal or insufficient, in not covering the issue submitted, it may be corrected by the jury under the advice of the Court, or the jury may be again sent out." Code of Civil Procedure section 619 applies to an inconsistent or ambiguous verdict. (*Mendoza v. Club Car, Inc.* (2000) 81 Cal.App.4th 287, 302.) "[W]e review a special verdict de novo to determine whether its findings are inconsistent. [Citation.] . . . "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." [Citation.] 'A special verdict is inconsistent if there is no possibility of reconciling its findings

with each other.” (*Bermudez v. Ciolek* (2015) 237 Cal.App.4th 1311, 1316; accord, *Trejo v. Johnson & Johnson* (2017) 13 Cal.App.5th 110, 124.) We review a trial court’s exercise of discretion under Code of Civil Procedure section 619 for an abuse of discretion. (*Mendoza v. Club Car, Inc., supra*, 81 Cal.App.4th at p. 301.)

As discussed above, we do not find the verdict was insufficient or against the law. Plaintiff asserted CACI No. 3241 as written was a correct instruction of restitution for the breach of implied warranty. The jury was instructed to “follow these instructions,” pursuant to CACI No. 5000. We assume the jury followed the instructions. (*Gray v. Wagner* (1969) 272 Cal.App.2d 671, 672.) Thus, we do not find the trial court abused its discretion by refusing to send the jury to re-deliberate under Code of Civil Procedure section 619.

We also reject plaintiff’s argument that the trial court erred in not answering the juror question after jurors reached a verdict. Even assuming error, plaintiff has the burden of demonstrating prejudice. (See *Bartosh v. Banning* (1967) 251 Cal.App.2d 378, 387-388 [failure to provide additional instructions in response to juror request may constitute reversible error]; *Asplund v. Driskell* (1964) 225 Cal.App.2d 705, 712-713.) A prejudicial error requiring reversal will only be found when there has been a “miscarriage of justice.” (Cal. Const., art. VI, § 13; *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800 (*Cassim*)). To find a “miscarriage of justice,” an appellate court, after examining the entire case, must be of the opinion that “it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.” (*Cassim, supra*, 33 Cal.4th at p. 800.) As indicated, had the trial court answered the

jury question, it would have re-read modified CACI No. 3241. Plaintiff has failed to demonstrate a reasonable probability that a more favorable result would have been reached absent any purported error.

IV. DISPOSITION

The judgment is affirmed. Defendant Ford Motor Company is entitled to recover its costs on appeal from plaintiff Joseph Poulouse.

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KIM, J.*

We concur:

BAKER, Acting P.J.

MOOR, J.

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