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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

FAMA TRADING CO.,

Plaintiff and Respondent,

v.

FIEL LLC, et al.,

Defendants and Appellants.

B266240

(Los Angeles County  
Super. Ct. No. BC516132)

APPEAL from a judgment of the Superior Court of Los Angeles County, Holly Kendig, Judge. Affirmed.

Mathew & George and Abraham Mathew for Defendants and Appellants.

Law Office of Jason C. Gage and Jason C. Gage for Plaintiff and Respondent.

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## INTRODUCTION

This appeal stems from a contract dispute between plaintiff Fama Trading Co. and defendants Fiel LLC and its owner, Alice Gu. Defendants appeal from the portion of the judgment holding them liable for fraud by concealment and promissory fraud.<sup>1</sup> They contend the evidence was insufficient to support the trial court's finding that Gu knew and intentionally concealed the fact that Fiel had lost the financing source upon which Fama relied when it agreed to ship Fiel over \$75,000 worth of custom-made shoes. We conclude substantial evidence supports the court's finding. We affirm.

## FACTS<sup>2</sup> AND PROCEDURAL BACKGROUND

Fiel designs and sells women's footwear. Gu is Fiel's owner and designer. Fama is a shoe "production house" based in Leon, Mexico. Fama acts as an intermediary between local Leon tanneries and cobblers on the one hand and foreign shoe designers on the other.

In April or May 2011, Fiel entered into an oral agreement with Fama for the production of approximately 2,000 leather shoes. The agreement called for Fiel to pay Fama for the costs of

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<sup>1</sup> Fiel does not appeal from the portion of the judgment holding the company liable for breach of its oral contract and other related common counts. Alice Gu is an aggrieved party insofar as the judgment on the fraud counts served as the basis for holding her jointly and severally liable with Fiel for Fama's damages. (See Code Civ. Proc., § 902.)

<sup>2</sup> Consistent with our standard of review, we state the facts in the light most favorable to the trial court's findings. (See *In re Estate of Young* (2008) 160 Cal.App.4th 62, 75-76 (*Estate of Young*).)

materials as they were incurred and to pay for the completed shoes within 30 days of shipment. The parties contemplated final shipment by July 15, 2011.

Due to a series of problems related to the chosen leather, Fama had not delivered any of the shoes as of August 2011. Some of Fiel's customers began cancelling their orders that month.

On October 11, 2011, Gu traveled to Leon to meet with Luis Rodriguez, Fama's Chairman and President, to discuss the production delays. At the time, Fiel was in arrears to Fama for costs in excess of \$35,000. Gu promised Rodriguez that Fiel would pay for the outstanding production costs and final delivery through her Denver-based factor, Premier Trading Solutions.<sup>3</sup>

On October 21, 2011, Gu sent an email to Fama and Premier, requesting that Premier reimburse Fama for \$37,000 in outstanding costs. A few days later, Gu spoke with her contact at Premier about financing the cost of the entire contract with Fama. According to Gu, Premier agreed to finance the contract price based upon an open purchase order Fiel had with the online retailer Amazon. Premier's agreement was conditioned on the understanding that Fiel would receive the completed shoes within the "next week," before Amazon cancelled the purchase order. Based on that understanding, Premier made the \$37,000 payment to Fama as Gu had requested.

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<sup>3</sup> Factoring is a type of debt financing transaction in which a business sells its accounts receivable to a third party, referred to as a "factor," at a discount, generally in order to meet the business's immediate cash needs.

On October 26, 2011, Premier confirmed, consistent with Gu's promise, that it would wire payment to Fama for the full contract price upon presentation of the airway bill for the final shipment of shoes. Based on Gu's assurances and the receipt of the \$37,000 payment from Premier, Fama moved forward with production of Fiel's order.

On November 15, 2011, Fama still had not shipped the completed shoes to Fiel. Fiel in turn failed to meet its delivery deadline with Amazon, prompting Amazon to cancel its purchase order. According to Gu, when Amazon cancelled its purchase order, Premier "no longer had [the] security" to advance payment for the Fama contract.

On November 29, 2011, Fama contacted Gu to advise her it expected to ship 700 pairs of shoes that week. Despite demanding for several months that the shoes ship immediately, Gu requested that Fama delay the shipment until it had completed the entire order.

On January 1, 2012, Fama shipped the entire order as instructed by Gu and delivered its airway bill as requested by Premier. The total outstanding balance on the contract was \$75,386.32. Premier did not remit payment to Fama, nor did Fiel or Gu.

On January 6, 2012, Fama began contacting Gu to pay the outstanding balance on the contract. On January 30, 2012, after several weeks of assuring Fama that payment was forthcoming, Gu advised that she did not expect to have sufficient funds for at least another 30 days. Gu complained that she had been forced to send Fama "numerous emails daily" in the prior months to "get some sort of answers on whether or not my shoes would ever eventually ship," and this had made it "difficult" to "communicate

with my customers on what merchandise they would actually be receiving.” She explained, “Unfortunately, because of all this, I appeared to be dishonest to my Denver based financier, who has subsequently frozen my account due to inaccurate information.” Gu concluded by again assuring Fama, “We have received your invoices and we will pay when we are able to.” Fiel never made the promised payment.

On July 23, 2013, Fama filed a five-count complaint against Fiel and Gu. The complaint asserted four causes of action against Fiel for breach of oral contract, goods sold and delivered at an agreed price, reasonable value of goods delivered, and accounts stated, and one count against Gu and Fiel jointly for fraud by concealment. The fraud cause of action alleged Gu concealed the fact that her factor had frozen her account despite knowing Fama had relied upon the financing arrangement when it agreed to complete the production and make the final shipment.

On March 25, 2015, the trial court commenced a bench trial. After the close of evidence, Fama made a motion to amend its complaint to conform to proof by adding a claim for promissory fraud against Fiel and Gu.

On April 27, 2015, the trial court issued a proposed statement of decision, finding Fiel liable on all counts and Gu jointly and severally liable with Fiel on the fraudulent concealment claim. The court did not rule on Fama’s motion to amend in its proposed statement of decision.

Defendants objected to the proposed findings on the fraudulent concealment claim, arguing there was insufficient evidence to establish when Premier terminated its relationship with Fiel. Specifically, defendants maintained there was no

evidence to support the finding that Premier froze Fiel's account before Fama made the final shipment. Fama filed its own objection to request a ruling on its motion to amend.

On June 19, 2015, the trial court issued its final statement of decision. The court granted Fama's motion to amend, found Fiel liable on all counts, and found Gu jointly and severally liable with Fiel on the fraud causes of action. With respect to the fraudulent concealment claim, the court found that "Gu intentionally concealed the fact that her relationship with her factor was terminated until after the shoes were shipped." On the question of timing raised by defendants' objection, the court reasoned that "if the secured payment factoring relationship hadn't broken down before Fama shipped, the factor would have paid for the shipment." Thus, the court concluded "the factoring relationship necessarily was terminated before Fama shipped the shoes, and Gu intentionally did not disclose that fact, presumably because she wanted the shoes even though she would not be able to pay for them."

On June 23, 2015, the court entered judgment for Fama. The judgment imposes joint and several liability against Fiel and Gu for damages in the total amount of \$75,386.32. Defendants filed a timely notice of appeal.

## **DISCUSSION**

### *1. Standard of Review*

"In general, in reviewing a judgment based upon a statement of decision following a bench trial, 'any conflict in the evidence or reasonable inferences to be drawn from the facts will be resolved in support of the determination of the trial court decision. [Citations.]' [Citation.] In a substantial evidence challenge to a judgment, the appellate court will 'consider all of

the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference, and resolving conflicts in support of the [findings]. [Citations.]’ [Citation.] We may not reweigh the evidence and are bound by the trial court’s credibility determinations. [Citations] Moreover, findings of fact are liberally construed to support the judgment.” (*Estate of Young, supra*, 160 Cal.App.4th at pp. 75-76.)

“The usual definitions of substantial evidence apply: it is ‘evidence . . . “of ponderable legal significance, . . . reasonable in nature, credible, and of solid value.” ’ [Citation.] In determining its existence, we look at the entire record on appeal rather than simply considering the evidence cited by a party. [Citation.] “The ultimate determination is whether a *reasonable* trier of fact could have found for the respondent based on the *whole* record. [Citation.] While substantial evidence may consist of inferences, such inferences must be “a product of logic and reason” and “must rest on the evidence” [citation]; inferences that are the result of mere speculation or conjecture cannot support a finding [citations].’ ” (*Estate of Young, supra*, 160 Cal.App.4th at p. 76.)

2. *Substantial Evidence Supports the Finding that Gu Knowingly Concealed the Loss of Financing from Fama*

Defendants contend there are “two fundamental problems” with the trial court’s finding on the fraudulent concealment cause of action: “(1) there was no evidence Gu lost her factor relationship before the shoes shipped, and thus there was no evidence that Gu concealed the loss of that relationship; and (2) there was no evidence that at the time Gu promised to pay for

the shoes, she knew that promise was false and intended to deceive Fama.”<sup>4</sup> Neither contention has merit.

With respect to defendants’ first contention, the evidence supports the trial court’s inference that Premier refused to finance the outstanding contract balance upon Fama’s delivery of the airway bill because Premier had already frozen Fiel’s account. At trial, Gu testified that, on or about October 26, 2011, Premier agreed to advance payment for the total amount of the contract based on a purchase order Fiel had with Amazon that was “still open.” Premier’s agreement to finance the transaction, according to Gu, was premised on the understanding that Fiel would receive the shoes within “the next week,” before Amazon cancelled its purchase order. Thereafter, Premier paid Fama \$37,000 for costs Fama had already incurred under the contract.

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<sup>4</sup> In connection with both points, defendants also argue Gu’s representation about financing was not “material,” since the oral agreement did not stipulate the method of payment and only required Fiel to make payment within 30 days of delivery. The argument ignores testimony by Rodriguez, Fama’s Chairman and President, who the trial court found to be “highly credible.” Rodriguez testified that due to the significant arrears Fiel accumulated with respect to its delinquent cost payments, Fama had considered exercising its right to suspend performance and withhold the final shipment. (See, e.g., Com. Code, § 2609, subds. (1) & (4).) However, after receiving Premier’s payment of \$37,000 for the delinquent costs and Gu’s assurance that final payment would be made through Premier upon delivery of the airway bill, Rodriguez testified Fama decided to proceed with production. Rodriguez’s testimony plainly supports the trial court’s finding that the availability of financing through Premier was material to Fama and that Fama relied on this financing when it declined to exercise its remedial rights under the Commercial Code.



Gu and Premier also assured Fama that Premier would pay the balance upon delivery of the airway bill for the final shipment. However, as of November 15, 2011, Fama still had not completed the remaining shoes. Amazon consequently canceled its purchase order when Fiel failed to deliver the receivables by the cancellation deadline.

According to Gu's testimony, when Amazon cancelled its purchase order, Premier "no longer had [the] security" upon which its agreement to advance payment had been conditioned. This was more than a month before Fama made the final shipment on January 1, 2012. Then, on January 30, 2012, Gu admitted that, due to the delay in shipment, "I appeared to be dishonest to my Denver based financier [Premier], who has subsequently frozen my account due to inaccurate information." Taken together with Premier's refusal to pay upon delivery of the airway bill, the trial court could reasonably infer that Fiel's factoring account was "frozen" with respect to the Fama contract on or around November 15, 2011 when Amazon cancelled the purchase order.

Defendants contend the foregoing evidence was insufficient to support the trial court's finding because "Fama's counsel conceded at closing argument that *Fama did not know the date Fiel lost its factor.*" The supposed admission is irrelevant. In determining whether substantial evidence exists, "we look at the entire record on appeal *rather than simply considering the evidence cited by a party.*" (*Estate of Young, supra*, 160 Cal.App.4th at p. 76, italics added.) Thus, contrary to defendants' contention, we will not reverse a judgment when our review of the record reveals it is supported by substantial

evidence, regardless of any admission the respondent's counsel might have made about the evidence in the trial court.

Defendants also argue Gu's testimony regarding the Amazon cancellation was irrelevant because Gu further testified that Premier factored a smaller purchase order in late November 2011. Alternatively, defendants contend Gu's testimony was insufficient because it did not establish "when Premier first learned about the Amazon cancellation." Again, both contentions ignore the rules of substantial evidence.

Under the substantial evidence standard of review, we "consider all of the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference, and resolving conflicts in support of the [findings]." (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 630; *Estate of Young, supra*, 160 Cal.App.4th at p. 76.) Substantial evidence includes inferences that are the "product of logic and reason," "so long as those inferences are based on the evidence. (*Estate of Young*, at p. 76.)

Here, even if we credit Gu's testimony about the smaller purchase order, it is still reasonable to infer that Premier froze Fiel's account with respect to the \$75,386.32 that Fiel still owed on the Fama contract when Amazon cancelled the larger purchase order. That inference logically follows from Gu's testimony that Premier premised its agreement to finance the transaction entirely on the understanding that Fiel would receive the shoes within "the next week," in time to collect payment from Amazon on the larger purchase order.<sup>5</sup>

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<sup>5</sup> Gu also testified with respect to the smaller purchase order that the proceeds were used to pay "outstanding debts to Premier for the money that they had advanced for production on behalf of

It was likewise reasonable to infer Premier knew Amazon cancelled the purchase order soon after the cancellation occurred. Again, this inference logically follows from Gu's testimony that Premier only agreed to finance the Fama transaction "on the condition that the shoes would be received the next week," while "the Amazon P.O. was still open."<sup>6</sup> Moreover, Gu testified that Premier, like all factors, would "keep a very watchful eye on cancel dates" to ensure it was not over-exposed to the risk of a borrower's default. Gu also testified that she dutifully reported "status updates" to Premier about the anticipated final shipment when she received them from Fama. In view of this evidence, it is reasonable to infer that (1) Premier knew Fiel had not received the finished shoes in time to meet the Amazon purchase order's cancellation deadline; (2) Premier knew that Amazon cancelled the purchase order as a result; and (3) Premier froze Fiel's account with respect to the Fama contract because the condition for agreeing to finance the transaction had failed.

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Fiel." A logical inference to draw from this testimony is that, without the larger Amazon purchase order, Premier did not have the security it required to advance payment for the Fama transaction, given the debts Fiel already owed to Premier. This inference is entirely consistent with Gu's testimony that Premier "no longer had [the] security" when Amazon cancelled its purchase order.

<sup>6</sup> Gu's testimony was consistent with an October 21, 2011 email she sent to Premier, in which she stated that "[t]he shoes are well under way and should all be delivered next week, so we will make the Amazon deadline."

The evidence also supports the inference that Gu knew Premier froze Fiel's account before Fama made the final shipment, and that Gu intended to deceive Fama by concealing this fact until after she received the shoes. On November 29, 2011, Fama emailed Gu to advise her that it expected to ship 700 pairs of shoes that week. Despite knowing the Amazon purchase order had been cancelled, Gu nevertheless asked Fama to hold off on the partial shipment and to deliver the entire order once all shoes were completed. The logical inferences to draw from this chain of events are that (1) Gu knew Premier would not pay for the partial shipment, and (2) she intentionally concealed this fact from Fama to ensure it would complete and ship the entire order at a later date, to buy herself time to find some other means of paying the bill.

Taken together with the undisputed fact that Premier did not pay Fama upon receipt of the final shipment airway bill, there was sufficient evidence to support the trial court's finding that Gu concealed a material fact from Fama with the intention of deceiving Fama into completing and shipping the entire order of custom-made shoes.

3. *The Judgment Does Not Improperly Hold Gu Liable for Concealing Defendant's Intention to Breach the Contract*

In the alternative, defendants contend the trial court "improperly collapsed a straightforward breach of contract claim into a fraud claim" by holding Gu liable for concealing merely her "intent not to comply with the contract." "[S]uch 'intent' " defendants argue, "does not give rise to a fraud claim" as a matter of law. They rely principally upon *Bank of America Corp.*

*v. Superior Court* (2011) 198 Cal.App.4th 862 (*Bank of America*). The case is inapposite.

The plaintiffs in *Bank of America* sued their mortgage lender for damages stemming from declining real estate values allegedly caused by the lender's fraudulent scheme to securitize high risk mortgage pools. The appeal concerned the plaintiff's fraudulent concealment claim, which alleged the lender knew "the risks it was undertaking," but concealed " 'these risks from the borrowers, potential borrowers and investors' " in order to advance its fraudulent scheme to " 'bilk investors, trade on inside information and otherwise pump [up] the value of [its] stock.' " (*Bank of America, supra*, 198 Cal.App.4th at p. 866.) After the trial court overruled its demurrer, the lender petitioned for a writ of mandate, arguing it could not be held liable for fraudulent concealment because it "did not owe a duty to disclose to plaintiffs/borrowers its alleged intent to defraud third party investors by selling mortgages to those investors at fraudulently inflated prices." (*Id.* at p. 870.) The appellate court agreed, explaining, " 'We are aware of no authority supporting the imposition of additional liability on an intentional tortfeasor for failing to disclose his or her tortious intent before committing a tort.' " (*Id.* at p. 873, italics omitted.) While the lender had "a duty to refrain from committing fraud," the court concluded it could not be held liable for fraudulent concealment because "it had no *independent duty* to disclose to its borrowers its alleged intent to defraud its investors by selling them mortgage pools at inflated values." (*Id.* at pp. 872-873, italics added.)

The principle invoked by the *Bank of America* court is not applicable to this case. Unlike the lender in *Bank of America*, Gu did not merely conceal Fiel's intention to breach the contract with

Fama. Rather, in response to Fama's legitimate concern that Fiel would be unable to pay for the full order, Gu made an affirmative representation that she had secured financing in order to assure Fama that Fiel would meet its obligations. Having made that representation, which caused Fama to forego remedial rights it had under the Commercial Code (see fn. 4, *ante*), Gu assumed a duty, *independent of Fiel's obligations under the contract*, to alert Fama if the financing arrangement fell through. Indeed, Fama's president testified that had the company known the concealed fact, it could have avoided "substantial cost[s]" that resulted from manufacturing and delivering custom shoes without receiving immediate payment.

In view of the independent duty Gu assumed by affirmatively assuring Fama of Fiel's ability to finance the purchase, the principle articulated in *Bank of America* does not shield Gu from liability for the resulting harm. Gu has failed to establish reversible error.<sup>7</sup>

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<sup>7</sup> Because affirmance of the judgment on the fraudulent concealment cause of action is sufficient to sustain the imposition of joint and several liability against Gu, we need not consider whether the trial court properly granted Fama's motion to amend to conform to proof with respect to the promissory fraud claim. (See fn. 1, *ante*.) We also need not address defendants' contention that the trial court erroneously failed to apportion damages between Fama's fraud and breach of contract claims. Because defendants failed to request an allocation or raise the issue in their objections to the court's proposed statement of decision, they forfeited this argument for appeal. (See *White v. Inbound Aviation* (1999) 69 Cal.App.4th 910, 930–931 ["a defendant who chooses not to request allocation of damages may not challenge the judgment on the ground that he should only be held liable for a portion of the damages"].)

### **DISPOSITION**

The judgment is affirmed. Fama is entitled to its costs on appeal.

### **NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

JOHNSON (MICHAEL), J.\*

We concur:

EDMON, P. J.

LAVIN, J.

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