Filed 12/20/16 The Redbean House Corp. V. Colonnade Wilshire Corp. CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE REDBEAN HOUSE CORPORATION, Plaintiff, Cross-defendant and Respondent, v. COLONNADE WILSHIRE CORPORATION, Defendant, Cross-complainant and Appellant.	B265968 (Los Angeles County Super. Ct. No. BC533345)

APPEAL from a judgment of the Superior Court of Los Angeles County. John L. Segal, Judge. Affirmed.

Ryan & Associates and Jeanne Collachia for Defendant, Cross-complainant and Appellant.

Russ, August & Kabat, Jules L. Kabat, Irene Y. Lee, and Robert F. Gookin for Plaintiff, Cross-defendant and Respondent.

Defendant, cross-complainant and appellant Colonnade Wilshire Corporation (Colonnade) appeals from the judgment entered in favor of plaintiff, cross-defendant, and respondent The Redbean House Corporation (Redbean) in this action for rescission of a commercial lease and cross-action for waste. We affirm the judgment.

FACTUAL BACKGROUND

The leased premises

The premises that are the subject of this dispute (the premises) consist of two units in an unreinforced masonry building at 3866-3882 West Sixth Street in Los Angeles (the building). The building was constructed in 1922, and its original certificate of occupancy indicated that it consisted of eight units, totaling 8,929 square feet, and was to be used for retail operations.

In the early 1980's, the City of Los Angeles promulgated a mandatory seismic retrofit ordinance known as Division 88, codified in the Los Angeles Municipal Code. Division 88 required unreinforced masonry buildings constructed before 1933 to be retrofitted.

On October 1, 1986, the Los Angeles Department of Building and Safety (LADBS) issued an order requiring the then owner of the building to comply with the requirements of Division 88. In November 1989, LADBS issued a certificate of compliance approving the building owner's retrofit of the building to comply with Division 88. The certificate of compliance limited the maximum occupant load in the building to 99.

The occupant load of a building is determined by its square footage and its use. Retail space has an occupant load of one person per 30 square feet. Colonnade acquired the building in 1996. At the time of the acquisition, Colonnade did not know that the building was subject to the requirements of Division 88

or that a maximum occupant load had been imposed by the certificate of compliance.

In December 2005, one of the other units in the building filed a change of use from retail to restaurant and received a certificate of occupancy for 49 people.

The lease and Redbean's demolition work

Representatives of Redbean met with Colonnade's leasing agent, Charles Dunn Real Estate Services (Charles Dunn) in April 2013 to discuss Redbean's plans to design, build, and operate a restaurant on the premises. In May 2013, Colonnade and Redbean entered into a lease for the premises (the lease). The parties do not dispute that at the time they entered into the lease, there were five other tenants in the building, excluding Redbean, and the aggregate occupant load of the building, excluding the premises, was 215. Neither party was aware at the time they entered into the lease that the building was subject to Division 88 or a maximum occupant load.

In June 2013, Redbean's contractor, cross-defendant John Kang (Kang),[1] began demolition work at the premises without obtaining the requisite permits. During the course of the demolition, Kang discovered structural, plumbing, and electrical conditions that did not comply with applicable building code requirements. He also found dry rot in the framing and structural studs.

While demolition of the premises continued, Redbean sought to obtain LADBS's approval of its construction plans. The LADBS plan checker, Tarik Saoud, raised an issue as to whether the plans complied with Division 88, and referred Redbean to a supervisor named William Stutsman (Stutsman).

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[1] Kang is not a party to this appeal.

Stutsman met with Redbean's representatives in November 2013. At that meeting, Stutsman informed Redbean that in order to obtain approval of its plans, it would have to show that the occupant load for the building was less than 100. If the occupant load exceeded 100, Redbean would have to undertake a structural analysis of the building and provide plans to seismically retrofit the building in a manner consistent with Appendix A1 of the California Building Code, which had replaced Division 88 in 2010 as the standard for unreinforced masonry buildings.

The instant lawsuit

In a letter dated December 18, 2013, Redbean advised Colonnade and Charles Dunn about the Division 88/Appendix A1 issues and requested a meeting to discuss a possible solution. Colonnade did not respond to the letter, and Redbean commenced this action on January 15, 2014. At the time Redbean commenced this action, it had discontinued its work at the premises, which had been demolished but not rebuilt.

After being served with Redbean's complaint, Colonnade hired a structural engineer to determine whether the building needed to be retrofitted to comply with Appendix A1. The structural engineer advised Colonnade that in order to increase the existing occupant load, the building would have to be structurally retrofitted, and that the estimated cost of doing so was between $250,000 and $300,000.

Colonnade did not undertake a seismic retrofit of the building but instead submitted an application to LADBS for tenant improvement work to restore the premises without retrofitting the building. LADBS issued a permit approving the plans to restore the premises to retail or office use.

PROCEDURAL HISTORY

Redbean commenced the instant action against Colonnade and Charles Dunn[2] on January 15, 2014. As relevant here, the complaint asserted a cause of action for rescission based on mutual mistake.[3] Redbean sought to recover consequential damages in payments it made to Kang and expenses it incurred in anticipation of operating a restaurant on the premises.

The defendants answered and Colonnade filed a cross-complaint against Redbean and Kang for waste and negligence per se.[4]

Before the trial, the parties stipulated to the square footage and usage of the other units in the building. Kang and representatives of Redbean, Colonnade, and Charles Dunn testified at trial, as did Stutsman, an LADBS structural engineer knowledgeable about Division 88.

At the conclusion of a three-day bench trial, the trial court issued a statement of decision in which it found that Redbean was entitled to rescind the lease because the parties were mutually mistaken in May 2013 as to whether the premises could

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[2] Charles Dunn is not a party to this appeal. Redbean also initially sued a managing director of Charles Dunn named Amir Madadi, but subsequently dismissed him from the action.

[3] Redbean also asserted causes of action for intentional misrepresentation, negligent misrepresentation, breach of fiduciary duty, professional negligence, and rescission based on fraud, illegality, and impossibility. Redbean subsequently dismissed all causes of action except its claim for rescission against Colonnade and a claim for negligent misrepresentation against Charles Dunn.

[4] Colonnade also asserted and subsequently dismissed a claim against Redbean for breach of the lease.

lawfully be occupied by Redbean or any tenant. The trial court found that Division 88 precluded Colonnade from leasing the premises to Redbean.

The trial court denied Redbean's claim for consequential damages and instead concluded that Redbean was required to restore Colonnade to the position it was in prior to entering into the lease. To do so, Redbean had to return the premises to their prelease condition.

The trial court determined that Redbean's partially completed demolition work left the premises in a condition worse than it was when Redbean took possession, and that Colonnade was entitled to recover damages for waste. The court found, however, that Colonnade had failed to submit evidence of the cost of repairing the premises to their prelease condition. The trial court parsed through the testimony of Colonnade's cost expert, excluded cost items that appeared to be designed to upgrade the premises to a condition better than they were in May 2013, and concluded that $60,000 was a reasonable award for the cost of repair. From that amount, the court deducted a $5,481 security deposit and a $4,872 payment Redbean had made to Colonnade under the lease, for a net award to Colonnade of $49,647.

Judgment was subsequently entered in favor of Redbean and against Colonnade on Redbean's claim for rescission based on mutual mistake but awarding no damages to either party on that claim; in favor of Redbean and against Colonnade on Colonnade's negligence per se claim; and in favor of Colonnade and against Redbean and Kang, jointly and severally, in the amount of $49,647 on Colonnade's claim for waste.[5] This appeal followed.

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[5] Judgment was also entered in favor of Charles Dunn and against Redbean on Redbean's claim for negligent misrepresentation.

CONTENTIONS ON APPEAL

Colonnade raises the following contentions on appeal:

1. The trial court lacked authority to declare that the lease agreement was rescinded and to enter judgment in Redbean's favor on that basis.

2. The trial court improperly granted rescission based on mutual mistake because under the terms of the lease, Redbean assumed the risk that it could not operate a restaurant on the premises.

3. Substantial evidence does not support the trial court's determination that the premises could not be legally occupied by any person.

4. The trial court erred when it determined that the measure of damages to be awarded to Colonnade on its waste claim was the amount sufficient to restore the premises to its prelease condition.

DISCUSSION

I. Rescission

A. Applicable law and standard of review

Before 1961, a party to a contract in California could obtain rescissionary relief in one of two ways: "(1) unilateral rescission, followed by an action to enforce the out-of-court rescission or (2) an action for judicial rescission in which specific judicial relief is granted. [Citation.] In 1961, however, the Legislature abolished the action to obtain judicial rescission and left only an action to obtain relief based on a party effecting rescission. [Citations.] [¶] Consequently, any post-1961 rescission must necessarily be accomplished by a party to the contract. The court does not rescind contracts but only affords relief based on a party's rescission." (*Wong v. Stoler* (2015) 237 Cal.App.4th 1375, 1385.)

The grounds for rescission and the means by which parties may effect a rescission are both governed by statute. As relevant

here, Civil Code section 1689, subdivision (b)(1) allows rescission "[i]f the consent of the party rescinding, or of any party jointly contracting with him, was given by mistake."

The steps to rescind a contract are codified in Civil Code section 1691, which requires the rescinding party, "promptly upon discovering the facts which entitle him to rescind" to "[g]ive notice of rescission to the party as to whom he rescinds; and . . . [r]estore to the other party everything of value which he has received from him under the contract or offer to restore the same upon condition that the other party do likewise, unless the latter is unable or positively refuses to do so." (Civ. Code, § 1691, subd. (a), (b).) The statute further provides that service of a pleading in an action seeking rescission can satisfy both the notice requirement and the offer to restore: "When notice of rescission has not otherwise been given or an offer to restore the benefits received under the contract has not otherwise been made, the service of a pleading in an action or proceeding that seeks relief based on rescission shall be deemed to be such notice or offer or both." (Civ. Code, § 1691, subd. (b).)

The decision "[w]hether to grant relief based on rescission 'generally rests upon the sound discretion of the trial court exercised in accord with the facts and circumstances of the case [citations.]' [Citations.]" (*Wong v. Stoler, supra,* 237 Cal.App.4th at p. 1387.)

B. The trial court acted within its authority

Colonnade concedes that both parties were mistaken as to the applicability of Division 88 and its impact on the premises and that Redbean unilaterally rescinded the lease when it served Colonnade with its complaint. Colonnade argues, however, that the trial court lacked authority to declare the lease rescinded because Redbean did not offer to restore to Colonnade anything of

value it received under the lease but instead sought to recover consequential damages from Colonnade.

Redbean's service of its complaint on Colonnade was deemed to constitute an offer to restore any benefits Redbean received under the lease (Civ. Code, § 1691, subd. (b)), and the trial court ruled that Redbean was not entitled to recover consequential damages. Neither of the purported obstacles cited by Colonnade deprived the trial court of authority to enforce Redbean's rescission of the lease.[6]

Williams v. Puccinelli (1965) 236 Cal.App.2d 512, a case that Colonnade describes as "remarkably similar" to the instant case, supports the trial court's authority to grant rescissionary relief based on the parties' mutual mistake. The tenant in *Puccinelli* leased the entire second floor of a brick building to install and operate a restaurant and bar. (*Id.* at p. 513.) Unknown to both parties, the second floor would not support the weight or "live load" requirements of the building code. Substantial alterations in the entire building, including portions not leased by the tenant, were required by law in order to allow the second floor to be used as a restaurant. (*Ibid.*) The tenant requested that the landlord make the necessary alterations, and the landlord refused, citing the "as is" and "compliance with laws" provisions in the lease and claiming that any such alterations were the tenant's responsibility. (*Id.* at pp. 513-515.) The tenant then sought to rescind the lease.

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6 In its opening appellate brief, Colonnade argues at some length that the parties' mistake regarding the applicability of Division 88 was a mistake of law rather than a mistake of fact. The distinction is of no consequence, because as Colonnade acknowledges, a party may rescind a contract based on a mistake of fact or law. (Civ. Code, § 1576.)

The appellate court in *Puccinelli* affirmed the trial court's decision to grant rescission of the lease based on the parties' mutual mistake that the second floor could be used as a restaurant without making structural changes to the undemised portions of the building. (*Puccinelli, supra,* 236 Cal.App.2d at p. 520.) Here, as in *Puccinelli* the premises could not legally be occupied unless the entire building was structurally upgraded. The trial court acted within its authority to grant relief on Redbean's claim for rescission based on mutual mistake.

C. Redbean did not assume the risk

Colonnade next argues that Redbean was not entitled to rescind the lease because under paragraph 5.1.6 of the lease, Redbean assumed the risk that it might not be able to use the premises for its intended use as a restaurant and was required to sublet the premises if it was unable to do so.

Paragraph 5.1.6 of the lease provides in relevant part:

> "Permit Contingency. Notwithstanding anything to the contrary set forth in this Lease, in the event that despite Tenant's diligent efforts, Tenant does not by the Rent Commencement Date obtain all permits, licenses, approvals and entitlements required from any governmental authorities necessary for the operation of the Premises for the Permitted Use and for the construction of the improvements . . . Tenant shall have the right upon . . . written notice to Landlord (i) [to] apply to change its use of the Premises to such other use legally permitted by applicable law for the Premises (the 'New Permitted Use'), in which event, subject to the Landlord's reasonable approval, the term 'Permitted Use' shall thereafter be deemed to include the 'New Permitted Use'; and (ii) if so elected by Tenant, to assign or sublet this Lease to a reasonable transferee to operate the New Permitted Use, subject to Landlord's reasonable approval."

"Permitted Use" is defined in the lease as "for the purpose of preparing and selling baked goods and other items consistent with those described on the menu attached" as an exhibit to the lease.

Paragraph 5.1.6 did not preclude Redbean's rescission. Redbean did not rescind the lease because it was unable to use the premises for a restaurant operation. Rather, it rescinded the lease because it was unable to legally occupy or use the premises for any purpose. The trial court granted relief on that basis, as it made clear in the statement of decision: "Redbean has proved by a preponderance of the evidence that both it and Colonnade were factually mistaken in May 2013 about whether, because of the Division 88 occupancy limits, the premises could be leased and occupied by Redbean (or, for that matter, any tenant). Unknown to both parties, Division 88 precluded Colonnade Wilshire from renting Units 1 and 2 to Redbean or anyone else."

Colonnade urges us to apply the standard set forth in *Donovan v. RRL Corp.* (2001) 26 Cal.4th 261 (*Donovan*), and conclude that Redbean was not entitled to rescind the lease. That case, however, is not only inapposite; it undermines rather than supports Colonnade's position. The court in *Donovan* set forth the requirements for rescission of a contract based on the rescinding party's unilateral mistake of fact. (*Id.* at pp. 280-281.) Colonnade concedes that the mistake here regarding the applicability and effect of Division 88 was mutual.

The court in *Donovan* considered whether an automobile dealer that advertised the sale of an automobile in a newspaper at a price significantly lower than the intended sale price should bear the risk of its unilateral mistake, and in so doing, considered the following factors: (a) whether the risk was allocated to that party by agreement of the parties; (b) whether the mistaken party was aware, at the time of contracting that he had only

limited knowledge with respect to the facts relating to the mistake but treated this limited knowledge as sufficient; and (c) whether the risk should be allocated to that party by the court because it is reasonable under the circumstances to do so. (*Donovan, supra*, 26 Cal.4th at p. 283.) The court found the first two factors inapplicable. *Donovan* accordingly did not involve a contractual allocation of risk between the parties.

Significantly, the court in *Donovan* granted rescissionary relief to the automobile dealer based on the finding that the dealer's error in the advertisement was a "'good faith' mistake" that did not involve a breach of its duty of good faith and fair dealing and should not preclude equitable relief for mistake. (*Donovan, supra,* 26 Cal.4th at pp. 289-290.) Colonnade does not contend that Redbean breached any duty of good faith and fair dealing, nor is there any evidence in the record of such breach. *Donovan* thus supports Redbean's rescission based on a good faith mistake regarding its ability to occupy the premises.

D. Substantial evidence supports the trial court's findings

Substantial evidence supports the trial court's determination that at the time Redbean and Colonnade entered into the lease, neither Redbean nor any other tenant could lawfully occupy the premises. LADBS engineer Stutsman testified that the building is subject to the requirements of Division 88, and that under Division 88, the maximum occupant load in the building is 99.

Stutsman explained that the occupant load for a building is calculated based on its use and square footage, and that the permitted occupancy load for a retail space is one person per 30 square feet. Stutsman testified that the occupant load for the coffee shop operated in the building is a maximum of 49 people.

In May 2013, the aggregate occupant load in the building, excluding the premises, was 215, exceeding the maximum occupant load allowed under Division 88.[7] The evidence thus showed that at the time Redbean and Colonnade entered into the lease, the premises could not legally be occupied or used for any purpose.

Colonnade claims that it proved the premises could be legally occupied as a retail establishment because it obtained a permit from LADBS in December 2014 to restore the premises for use as a retail establishment. The issuance of the permit, Colonnade argues, gives rise to a mandatory presumption that the premises could legally be occupied upon completion of the restoration work.

There was no evidence that issuance of the December 2014 permit allowed the premises to be occupied for retail or office use in compliance with Division 88. Rather there was evidence to the contrary. Stutsman testified that the permit obtained by Colonnade in December 2014 approved renovation of the premises but did not obviate compliance with Division 88; that the premises could not legally be occupied upon completion of the renovation; and that if the premises were to be occupied, LADBS could issue an order to vacate.

Colonnade argues that Stutsman's testimony regarding noncompliance with Division 88/Appendix A1 was without evidentiary foundation, that "Stutsman is the only person at LADBS who insists the building is out of compliance with

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[7] The parties stipulated that the City of Los Angeles issued to one of the tenants in the building a certificate of occupancy providing maximum occupancy of 49 persons and that 4,992 square feet was occupied by the other remaining tenants in the building. (4,992 ÷ 30 square feet/person = 166; 166 + 49 = 215, which exceeds the maximum allowable occupant load of 99.)

Division 88," and that application of Division 88 to prohibit occupancy of the premises is speculative.

Colonnade raised no evidentiary objection to Stutsman's testimony based on lack of foundation in the trial court below and therefore forfeited any claim on appeal that such evidence was improper. (Evid. Code, § 353; *Estate of Odian* (2006) 145 Cal.App.4th 152, 168.) Stutsman's testimony is substantial evidence that the premises could not legally be occupied by Redbean or by any other tenant. Under the applicable standard, "the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted," to support the trial court's findings. (*Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429.) The testimony of a single witness can constitute substantial evidence. (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614.) In addition, we must view the evidence in the light most favorable to the prevailing party, accord it the benefit of any reasonable inference and resolve all conflicts in its favor. (*Jessup Farms v. Baldwin* (1983) 33 Cal.3d 639, 660.) Stutsman testified unequivocally that the premises could not legally be occupied by anyone, even after the tenant improvement work restoring them to retail/office use has been completed.

Substantial evidence supports the trial court's finding that the premises could not be legally occupied by Redbean or any other tenant. Colonnade fails to establish any abuse of discretion by the trial court in granting relief on Redbean's claim for rescission based on mutual mistake.

II. Damages

Once a trial court has determined that a contract was rescinded under Civil Code section 1692, it must then award the aggrieved party "complete relief, including restitution of benefits, if any, conferred by him as a result of the transaction and any

consequential damages to which he is entitled." (*Sharabianlou v. Karp* (2010) 181 Cal.App.4th 1133, 1144-1145.) Civil Code section 1692 ""restates the equity jurisprudence applicable in the rescission context." [Citation.] The fundamental principle underlying that jurisprudence "is that 'in such actions the court should do complete equity between the parties' and to that end 'may grant any monetary relief necessary' to do so. [Citation.]". . . .' [Citation.]" (*Wong v. Stoler, supra,* 237 Cal.App.4th at p. 1386.)

After granting Redbean relief on its claim for rescission, the trial court determined that the most equitable way to restore Colonnade to the status quo *ante* was to require Redbean to pay to Colonnade an appropriate amount to restore the premises to their prelease condition. The trial court further determined that the best way to balance the equities as to all of the parties was to award the cost of repair damages to Colonnade on its claim for waste, thereby entitling Colonnade to recover damages not only from Redbean, but also from Kang, who undertook the demolition of the premises without obtaining the requisite permits.

In determining the amount necessary to restore the premises to their prelease condition, the trial court found that Colonnade had failed to present any evidence of the cost of restoring the premises to their prelease condition. The trial court noted that Colonnade's construction expert had testified that it would cost approximately $230,000 to restore the premises consistent with plans prepared by DSR Design, a company hired by Colonnade to bring the premises to an "as built" "ready to lease" condition. Colonnade's expert admitted, however, that the DSR plans and the resulting cost estimate were not intended to restore the premises to their prelease condition. When the trial court pointed out this evidentiary deficiency, Colonnade suggested during closing argument that a 30 percent discount be

applied to its $230,000 cost estimate. The trial court disregarded Colonnade's 30 percent discounted estimate as a figure that "appears to have been selected out of thin air."

The trial court then noted that Kang had testified that it would cost approximately $30,000 to restore the premises to its prelease condition and that the actual cost of repair was "somewhere in between" that number and Colonnade's discounted estimate. The trial court then reviewed in detail the testimony of Colonnade's cost expert, and excluded cost items that appeared to be designed to upgrade the premises to a condition better than they were in May 2013. The court also excluded items such as contingencies and permit costs that Colonnade would have had to incur in any event. The resulting award for the reasonable cost of repair was $60,000 From that amount, the trial court deducted a $5,481 security deposit and a $4,872 payment Redbean paid to Colonnade pursuant to the lease, for a total net award to Colonnade of $49,647.

The record discloses no abuse of discretion. (*Wong v. Stoler, supra,* 237 Cal.App.4th at p. 1387 [trial court's grant of relief based on rescission is within the sound discretion of the trial court].) Rather, it shows that the trial court carefully considered and weighed the evidence, and balanced the equities in granting restitutionary relief to Colonnade.

Colonnade contends the trial court erred by not including in the award the cost of restoring the premises to a leasable condition, including bringing the premises into compliance with current building codes, as well as lost rent. The trial court found that Colonnade was not entitled to recover either lost rent or the cost of upgrading the premises to a condition better than they were at the lease commencement date. The court credited Kang's testimony that the premises were not in a leaseable condition when Redbean took possession, as the result of numerous

structural, lighting, and plumbing deficiencies that did not comply with applicable code requirements. Substantial evidence supports that finding.

Colonnade next argues that it is entitled to recover as damages the diminished market value of the premises caused by a reduction in the square footage after the premises are restored pursuant to the DSR plans. That the premises cannot be restored to their exact prelease condition does not entitle Colonnade to the economic damages it seeks. Rescission is intended to restore the parties as nearly as possible to their former positions and ""to bring about substantial justice by adjusting the equities between the parties' despite the fact that 'the status quo cannot be exactly reproduced.'" [Citations.]' [Citation.]" (*Wong v. Stoler, supra*, 237 Cal.App.4th at p. 1386.)

Colonnade claims it is entitled to recover the diminished market value of the premises because such damages are properly awarded on a cause of action for waste. (*Patel v. Athow* (1973) 34 Cal.App.3d 727, 735.) An equally acceptable alternative measure of damages for waste is the cost of restoring the property to its condition prior to the injury. (*Smith v. Cap Concrete, Inc.* (1982) 133 Cal.App.3d 769, 779, fn. 9.) The trial court adopted that alternative formula as the one most appropriate to compensate Colonnade for the loss it sustained.

DISPOSITION

The judgment is affirmed. Redbean is awarded its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
CHAVEZ

We concur:

_____, J.*
GOODMAN

_____, J.
HOFFSTADT

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