Filed 1/24/17 Des Metals v. Lee 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

DES METALS, INC., Plaintiff, Cross-defendant and Respondent, v. KYUNG SUP LEE et al., Defendants, Cross-complainants and Appellants.	B264222 (Los Angeles County Super. Ct. No. BC506315)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mel Red Recana, Judge. Affirmed.

Moon & Dorsett, Dana M. Dorsett and Jeremy Cook for Defendants, Cross-Complainants and Appellants.

Garcia Hernandez Sawhney and Norma Nava for Plaintiff, Cross-defendant and Respondent.

This case arises out of the parties' agreements for the purchase and sale of scrap metal. The case proceeded to a bench trial, and the trial court ruled in favor of plaintiff, cross-defendant and respondent DES Metals, Inc. (DES) and against defendants, cross-complainants and appellants Kyung Sup Lee (Lee) and Dong Shim, individuals doing business as KL America, and Glory Auto Parts, Inc. doing business as KL Metals, Inc. (collectively appellants).

Appellants contend the trial court erred in making a "split agency" determination, and by denying their motion for a new trial based on claims of newly discovered evidence and excessive damages. We find no error and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The Players

DES, a California corporation, is a trading company that buys and sells scrap metal. Hugo Rodriguez (Rodriguez) is DES's chief financial officer and lives in Mexico. He testified that he approves all of the company's business; buys and sells the metal; is in charge of making contracts with the shipping lines; approves payments; and negotiates letters of credit with banks. He also testified there is no one else who can bind DES regarding agreements with customers and that he is the only person at DES with authority to make a change in the material terms of an agreement.

Jose Lopez (Lopez) was a broker for DES and other companies, and also lives in Mexico. Rodriguez testified that Lopez was not an employee of DES; there were only three employees of DES, including Rodriguez, and they were also each officers of the company. DES gave

Lopez a DES e-mail address and a cell phone for use in the United States. Lopez printed up business cards identifying himself as a sales manager of DES. Rodriguez told him that the card was "incorrect" because no one at DES used a title on their cards.

Lee has been involved in the scrap metal business through different entities. Lopez introduced Lee and Rodriguez at a meeting in Orange County. In February 2012, Lee purchased, on behalf of appellants, a small amount of scrap metal from DES. The business transaction was successful.

Rodriguez and Lee communicated through e-mail and telephone. Lopez also had many conversations alone with Lee, with Rodriguez's authorization.

The Four Purchase Orders

DES received four more purchase orders from appellants in April, May and June 2012, for approximately $1.5 million worth of scrap metal to be shipped to Pusan, Korea. The material was required to be shipped within 30 days of the purchase order. Once the material was ready to be shipped, appellants received via e-mail the invoices, packing lists, weight tickets, photographs of the loaded shipping containers, and the bill of lading from the shipping line. Payment via wire transfer was due to DES the day after receipt of these documents.

Difficulties Begin

In May 2012, Lee attempted to alter the loading schedule. Rodriguez told Lee that was not possible because Lee could not control when the cargo was shipped and DES could not breach the required 30-

day term for shipping. Lee complained to Lopez, but the schedule remained the same.

Lee told Lopez he wanted to have a meeting in Mexico City with "the owner" of DES, the person "having all of the authority making decision." Lee testified that he had no idea who the owner was. Lee met first with Lopez and complained about DES not allowing him to control the loading schedule. Lopez could not address his concerns. Lopez promised to bring the owner to Lee's hotel the next day, but no one besides Lopez appeared. Lopez could not explain the owner's absence. Lopez apologized and said he would try to convince "the owner" to stop the loading and shipment, which did not happen. Rodriguez was unaware until after the fact that Lee had traveled to Mexico to meet with him. Had Rodriguez known about the planned meeting, he would have attended.

Trouble Paying

By June 2012, appellants were having trouble making payments. Appellants' only customer was not paying appellants on time. Lee testified that in early June 2012, Lopez told him DES would not demand payment, but then "all of a sudden" around June 20, 2012, Lopez told him that DES was demanding payment right away. The next day, Lopez told Lee that DES was selling the shipments to another customer. Lee testified that Lopez told him he wanted DES to continue selling to Lee, but it was not Lopez's decision.

When Lee tried to negotiate the purchase of scrap metal at a lower market price, Rodriguez refused to sell any further product to appellants because appellants already owed money to DES. Lee

screamed at Rodriguez over the telephone and refused to take his calls after that, communicating only with Lopez.

The DES Debit Notes

Appellants only paid DES approximately $315,000 out of the agreed $1.5 million on the four purchase orders. DES created four debit notes for the unpaid amounts. Rodriguez asked Lopez to take the notes to Lee in California in July 2012, for Lee's signature. Lee signed the notes because Lopez "begged" him to, but Lee claimed not to understand what they were and testified that he signed them only to acknowledge receipt. Lee admitted that he never communicated with Rodriguez about these debit notes.

The shipped containers sat at the Pusan port in Korea for about a month, while the bills of lading were changed for the containers to be sold to another buyer and for customs to release the containers. There was a daily fine or demurrage fee for each container that was not picked up.

The "Business Plan"

Lee testified that in a single day in July 2012, in Los Angeles, he and Lopez created "a whole business plan," in which appellants would purchase approximately $4.3 million of additional metal from DES over a four-month period, to help cover the amounts already owed. Lee testified that he had "no idea" how much profit DES would receive from the plan. The plan called for appellants to be in charge of all the freight. Only Lee and Lopez signed the plan. The plan was never implemented and Lopez told Lee that Rodriguez was holding it up, but

did not explain further. Rodriguez testified that he did not see any business plan until after litigation commenced.

Appellants' Debit Notes

In September 2012, Lee had Lopez sign two debit notes from KL America to DES, allegedly for appellants' lost profits (the KL America debit notes). Lee admitted that he never communicated with Rodriguez about these notes. Rodriguez saw the notes for the first time after litigation commenced.

Procedural History

DES sued appellants for breach of contract, open book account, account stated, fraud and unfair competition. DES sought $189,627.92 in damages, which included the difference between the original price invoiced to appellants and the price at which the material was ultimately sold, plus interest, as well as demurrage fees.

Appellants filed a cross-complaint alleging that DES breached the original purchase orders, as well as the business plan and the KL America debit notes.

The case proceeded to bench trial. Rodriguez and Lee were the only two witnesses to testify. Following written closing arguments, the trial court ruled in favor of DES on both its complaint[1] and appellants' cross-complaint. The court found Lee "not to be credible as a witness as to key parts of his testimony." The court issued an amended statement of decision prepared by DES's counsel, which included the finding that while Lopez was DES's agent for evidentiary hearsay purposes, he was

---

[1] The trial court, however, did not enter judgment in favor of DES on its fraud and unfair competition claims.

not its agent for purposes of determining liability. Judgment was entered in favor of DES in the amount it sought plus prejudgment interest for a total of $220,591.82.

Appellants moved for a new trial on three grounds: (1) The trial court erred in finding that Lopez was not DES's agent with the authority to bind DES; (2) Lopez was now available to testify; and (3) the damages awarded were excessive. The trial court denied the motion.

This appeal by appellants followed.

DISCUSSION

I. Agency Determination

Appellants contend the trial court erred in making what they call a "split agency" determination, i.e., that Lopez was DES's ostensible agent for hearsay purposes but was not its agent for liability purposes. According to appellants, "[a]n agent is an agent for any purpose." As discussed below, we disagree.

At trial, during Lee's testimony about the DES debit notes, DES's counsel made a hearsay objection. The trial court stated: "I'm making this finding of overruled in the hearsay objection, because I am finding that there's ostensible authority that this Jose Lopez is an ostensible agent of DES. That's how I see it. So whatever statement he makes is basically an admission of the plaintiff." Later, in the amended statement of decision, the court repeatedly found that "the evidence showed that Mr. Lopez was a broker and not an employee or agent of DES Metals." The court therefore concluded that Lopez's signing of any

debit notes or business plan did not constitute legal acceptance of liability by DES.

Extrajudicial statements by an agent against a party are not made inadmissible by the hearsay rule if "[t]he statement was made by a person authorized by the party to make a statement or statements for him *concerning the subject matter of the statement*" and "[t]he evidence is offered either after admission of evidence sufficient to sustain finding of such authority or, in the court's discretion as to the order of proof, subject to the admission of such evidence." (Evid. Code, § 1222, subds. (a) & (b).) (Italics added.)

We do not construe the trial court's ruling on the hearsay objection as a ruling that Lopez was DES's agent for all purposes. The ruling was made in the context of questioning on the DES debit notes, and the evidence showed that Lopez had authority to speak on behalf of DES with regard to these notes. Rodriguez specifically asked Lopez to take the notes to California for Lee's signature. No other interpretation of the court's ruling makes sense in light of its subsequent findings in the amended statement of decision that Lopez was not DES's agent for purposes of binding DES to the business plan or to the KL America debit notes.

Contrary to appellants' argument, an agent is not an agent for any purpose. "Agents are not fungible. A person who is authorized to perform one function on behalf of a principal may have no authority at all regarding a different function." (*Dill v. Berquist Construction Co.* (1994) 24 Cal.App.4th 1426, 1438 ["the fact that a person is authorized to receive mail on behalf of a corporation and to sign receipts

acknowledging the delivery of that mail does not mean that the same person is authorized by the corporation to accept service of process"].) Indeed, appellants cite no authority to support their position.

"An agent has such authority as the principal, actually or ostensibly, confers upon him." (Civ. Code, § 2315.) "Actual authority is such as a principal intentionally confers upon the agent, or intentionally, or by want of ordinary care, allows the agent to believe himself to possess." (Civ. Code, § 2316.) "Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess." (Civ. Code, § 2317.)

The trial court's findings that Lopez did not have actual or ostensible authority to bind DES to the business plan or to the KL America debit notes is supported by substantial evidence. "The question whether an agent acted within his authority is a question of fact for the trier of fact, and on appeal the finding of the trial court will not be disturbed where it is supported by substantial evidence." (*Ripani v. Liberty Loan Corp.* (1979) 95 Cal.App.3d 603, 611.)

With respect to the theory of actual authority, the evidence showed that Lopez was not an employee of DES, but merely a broker. Rodriguez, as chief financial officer of DES, testified that he alone approved all of the company's business, he alone was the person at DES who could bind the company to agreements, and he alone had the authority to make a change to the material terms of an agreement. Appellants produced no evidence that Rodriguez, or anyone else at DES,

allowed Lopez to believe that he had authority to sign the KL America debit notes or to bind DES to the business plan.

With respect to the theory of ostensible authority, it is true that DES gave Lopez a company e-mail address and a cell phone to use in the United States and also allowed him to communicate alone with Lee. But these facts do not establish that DES allowed or caused appellants to believe that Lopez had authority to bind DES to a $4.3 million business plan or to sign debit notes on its behalf. This is so because the remaining evidence demonstrated that Lee did not believe Lopez had the authority to bind DES. When Lee wanted to change the loading schedule in the purchase orders, he attempted to negotiate with Rodriguez, not Lopez, and Rodriguez refused to change the schedule. Lee complained to Lopez, but Lopez did nothing to change the schedule. When Lee wanted to purchase scrap metal at a lower price from DES, he attempted to negotiate with Rodriguez, not Lopez, and again Rodriguez rejected this request. Lee admitted that Lopez told him that Lopez wanted to continue to sell metal to Lee, but that it was not Lopez's decision. When Lee became frustrated, he asked Lopez to arrange a meeting with the "owner" of DES. Lee testified that he believed the owner was the person with all the decisionmaking authority. When the "owner" failed to appear, Lopez had no explanation. Clearly, Lee would not have made such a request if he believed that Lopez had the authority to bind DES.

Finally, contrary to appellants' argument, DES did not ratify Lopez's acts by failing to repudiate them. "An agency may be created, and an authority may be conferred, by a precedent authorization or a

subsequent ratification." (Civ. Code, § 2307.) A principal is not responsible for acts committed by his agent "unless he has authorized or ratified them, even though they are committed while the agent is engaged in his service." (Civ. Code, § 2339.) The evidence showed that Rodriguez, the only person at DES with authority to approve of the $4.3 million business plan or the KL America debit notes, was unaware of their existence until after litigation commenced. Hence, DES could not have ratified or repudiated acts taken by Lopez of which it was unaware.

Accordingly, the trial court's finding that DES was not bound through Lopez's acts to the business plan or to the KL America debit notes is supported by substantial evidence.

II. Newly Discovered Evidence

Appellants contend the trial court abused its discretion in denying their motion for a new trial based on the "newly discovered evidence" that Lopez was now available and willing to testify. We review the denial of a new trial motion based on new evidence for abuse of discretion. (*Shiffer v. CBS Corp*. (2015) 240 Cal.App.4th 246, 255.)

A trial court may grant a new trial based on "[n]ewly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial." (Code Civ. Proc., § 657, subd. (4).) "'The essential elements which must be established are (1) . . . the evidence is newly discovered; (2) . . . reasonable diligence has been exercised in its discovery and production; and (3) . . . the evidence is material to the movant's case.'

[Citation.]" (*Sherman v. Kinetic Concepts, Inc.* (1998) 67 Cal.App.4th 1152, 1161. Appellants did not establish the first two elements.

In their new trial motion, appellants asserted that Lopez was "unavailable" at trial, which took place in October 2014, and that he "was beyond the court's subpoena power" because he was a Mexican resident, but that he was now available to testify. Appellants attached to their motion a declaration from Lopez, dated February 16, 2015, in which he stated that he did not appear for trial because he had received threats of harm to his family; he moved his family to another town; and, after talking to Rodriguez in or around September 2014 and the other two officers of DES in October and November 2014, he no longer received threats or believed that the threats had to do with DES.

The trial court rightly found that "Lopez or his testimony is NOT newly discovered evidence." Appellants have known throughout this case about Lopez's involvement with the business plan and the KL America debit notes and that his testimony would be relevant to their claims and defenses. In their reply brief, appellants point out that while they knew about Lopez and that his testimony would "likely" be relevant, "the newly discovered evidence was the information contained in Lopez's declaration, including the details of Lopez's meetings with Rodriguez, which were not previously known to Appellants." But this begs the question of why this information was not known before trial, and plays into the second element of whether appellants showed they exercised reasonable diligence in trying to secure Lopez's testimony prior to trial. The answer is no.

"It is true that where a party knows of an important witness and the materiality of his testimony but is unable to produce him at the time of trial, due diligence normally requires the party to move for a continuance; failure to seek a continuance justifies denial of a subsequent new trial based on the discovery of new evidence." (*Andersen v. Howland* (1970) 3 Cal.App.3d 380, 383.) Appellants did not seek a continuance of trial. They also did not explain what actions, if any, they took to secure Lopez's testimony or deposition. DES filed its complaint in April 2013, appellants filed their cross-complaint in June 2013, and trial did not commence until more than a year later in October 2014. Yet, appellants offered no evidence that they even attempted to contact Lopez during this year. A party must show that it exercised reasonable diligence by providing a """"satisfactory explanation for the failure to produce that evidence at an earlier time."""" (*Shiffer v. CBS Corp.*, *supra*, 240 Cal.App.4th at p. 255.)

"The question of due diligence is peculiarly one for the trial judge (Code Civ. Proc., § 657, subd. 4). He can better appraise the events and atmosphere of the trial for that purpose than can we." (*Andersen v. Howland*, *supra*, 3 Cal.App.3d at p. 384.) We find no abuse of discretion in the trial court's denial of appellants' motion for a new trial on their claim of newly discovered evidence.

III. Excessive Damages

Appellants also contend the trial court erred in denying their motion for a new trial based on their claim that the awarded damages of $189,627.92, plus prejudgment interest, were excessive. (Code Civ. Proc., § 657, subd. (5).)

In their new trial motion, appellants argued the damages awarded were excessive for three reasons: (1) Lopez, as an agent of DES, signed the KL America debit notes, which should have been offset against the amount awarded; (2) the trial court did not take into account the business plan and a new trial should be ordered so that Lopez could provide further details regarding the business plan; and (3) DES did not properly mitigate its damages because the newly discovered evidence in Lopez's declaration showed that DES could have sold the material to another buyer at a higher price than actually sold. In denying the motion, the trial court found that "[t]he damages awarded were supported by the evidence" and that appellants "failed to articulate any admitted evidence that contradicted the awarded damages."

There is no merit to appellants' three arguments. We have concluded the trial court did not err in finding both that Lopez had no authority to bind DES to the KL America debit notes or to the business plan, and that Lopez's proffered testimony was not newly discovered evidence. Appellants make additional arguments on appeal as to why the awarded damages were excessive, but they did not raise these arguments before the trial court. We therefore decline to address them. (*In re Marriage of Eben-King & King* (2000) 80 Cal.App.4th 92, 117.)

DISPOSITION

The judgment is affirmed. DES is entitled to recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
HOFFSTADT

_____, J.*
GOODMAN

---

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