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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

DI-MOKSH DIAM, INC., et al. Plaintiffs and Respondents, v. VS DIAMONDS, INC., et al., Defendants and Appellants.	B272274 (Los Angeles County Super. Ct. No. BC557925)

APPEAL from a judgment of the Superior Court of Los Angeles County. Allan J. Goodman, Judge. Affirmed.

Park & Lim, S. Young Lim and Shelley A. Sagara for Plaintiffs and Respondents.

Van Antwerp Law Firm and L. Walker Van Antwerp III for Defendants and Appellants.

VS Diamonds, Inc. and Deepak Sagar (collectively "appellants") appeal from a judgment entered following a court trial on Di-Moksh Diam, Inc.'s claims against them for breach of written contract; open book account; account stated; goods sold and delivered; and breach of written guaranty agreement. Appellants have failed to show error below, therefore we affirm the judgment.

FACTUAL BACKGROUND[1]

Alpesh-Sachin Shah (Shah) is the president and owner of respondent Di-Moksh Diam, Inc. (collectively "respondent"). Mukesh Sagar and Deepak Sagar are the principals and owners of appellant VS Diamonds, Inc. Appellants and respondent are wholesale diamond merchants. They started doing business together in 2010, and over time, the frequency of transactions between the businesses increased. Respondent customarily permitted appellants to pay for merchandise on terms of 20 to 60 days.

A form dated November 9, 2012, memorialized an agreement between the parties respecting two items with a total purchase price of $45,973.25. The terms and conditions of the agreement were set forth on the back of the form. The terms stated that the delivery of the specified items was on "consignment," that the appellants received for inspection only the items listed on the front of the form, and that appellants were the bailees of the items and were thus responsible for return of the items in good condition. Appellants were also responsible for loss or damage to the items.

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[1] The facts are taken from the trial court's statement of decision following trial. The trial court noted that these facts were "established by a preponderance of the evidence," and that "there was no significant contrary evidence."

The memorandum is made out to VS Diamonds, Mukesh and Deepak Sagar. The initials on the memorandum are those of Deepak Sagar. According to the document, Deepak Sagar bound both the corporation and himself to the terms of the document.

The prices on the front of the document are wholesale prices. They represent the price that appellants paid for the listed items plus a "minimum markup" to cover respondent's various costs. This pricing method is customary in the industry.

A second form dated November 12, 2012, memorialized a second purchase of two items for a total of $18,217.75. As with the previous form, it is directed to VS Diamonds, Mukesh and Deepak Sagar. It was not initialed or signed by Mukesh Sagar, only by Deepak Sagar. The terms of this agreement were the same as the one signed a few days earlier, described above.

Appellants made $14,000 in payments on the combined balance, as memorialized on the front of the form dated November 9, 2012. As of May 2014, the combined balance due to respondent from VS Diamonds, guaranteed by Deepak Sagar, was $50,191.

On June 18, 2014, a lawyer representing respondent wrote a demand letter to appellants, demanding payment of the balance plus simple interest and attorney fees. The total demanded was $56,671. Appellants received the letter. Approximately one week after the letter was sent, Mukesh Sagar contacted respondent seeking additional time to pay the balance. Eventually the parties agreed that appellants would place a necklace on consignment with respondent. The consignment was memorialized in a memorandum dated August 15, 2014.

The agreement between the parties was that respondent would take custody of the necklace and make efforts to sell it to reduce or eliminate the balance due to respondent from appellants. The transaction was expressly described as a

"consignment." Although the "total" listed on the August 15, 2014 memorandum was $60,000, the memorandum specified that it was "NOT an Invoice or Bill of Sale."

At trial, the parties disagreed over whether the $60,000 amount represented the amount respondent would owe appellants if respondent lost the necklace, or whether it represented the wholesale value of the necklace. Mukesh Sagar, who negotiated the bailment of the necklace, was not present at trial.

The court admitted evidence of the actual discussion between Shah and Mukesh Sagar to interpret the terms of the memorandum memorializing the consignment. Respondent's representative testified without contradiction that the necklace was consigned to respondent for respondent to seek a buyer so that the proceeds could be used to reduce or eliminate appellants' debt to respondent. There was never an agreement for the sale of the necklace to anyone, whether a third party or respondent. There was also uncontradicted testimony at trial that the amount of $60,000 stated on the memorandum was a gross exaggeration of the wholesale price of the item. The highest price that respondent was offered for the necklace was in the $20,000 to $25,000 range.

Vasken Krikor-Khodanian, owner and president of Gemological Laboratory Services, qualified as an expert in the price of gems and jewelry. Appellants did not object to his testimony. Krikor-Khodanian testified that the wholesale price of the necklace would be approximately $20,000.

On September 2, 2014, respondent received from appellants a sales invoice in the amount of $60,000 for the necklace. Respondent then spoke with an intermediary, who informed appellants that respondent considered the invoice to be fraudulent both as to the stated price and because the parties

had agreed that no sale was intended. Almost immediately upon receipt of the invoice, respondent contacted a lawyer and filed the complaint in this action.

PROCEDURAL HISTORY

Respondent filed its complaint against appellants on September 17, 2014. Respondent stated causes of action for breach of written contract; open book account; account stated; goods sold and delivered; and breach of written guaranty agreement. Respondent sought damages of $50,191, plus interest and attorney fees.

On January 20, 2015, appellants filed a cross-complaint against respondent for breach of contract; open book account; account stated; and goods sold and delivered. Appellants alleged that respondent was indebted to them for $60,000 due to the transfer of the necklace.

Trial was held on February 3, 2016. Shah and Deepak Sagar were present at trial. Mukesh Sagar had proper notice of the trial but failed to appear, electing to celebrate a holiday in India. However, Mukesh Sagar was represented by counsel at trial.

On February 4, 2016, the trial court issued a statement of decision. The court found that respondent was entitled to prevail at trial, and issued a judgment in favor of respondent for $47,681. However, $20,000 of the debt was discharged by the transfer of title of the necklace. Respondent was also awarded its fees and costs, to be determined by posttrial motion. Judgment was entered against VS Diamonds, Inc. and the sole guarantor, Deepak Sagar.

Final judgment was entered on March 15, 2016. On May 13, 2016, appellants filed their notice of appeal from the judgment.

DISCUSSION

Appellants make two arguments on appeal. First, appellants argue that the August 2014 contract was for a sale or return of the necklace, and respondent did not sell or return the necklace. Second, appellants argue that the trial court erred in admitting extrinsic evidence to interpret the terms of the written agreement regarding the necklace. Appellants contend that the price of the necklace was unambiguous.

I. Standards of review

The trial court's resolution of factual issues must be affirmed if supported by substantial evidence. (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632.) Under the substantial evidence test, we look at the record as a whole to determine whether substantial evidence supported the judgment. (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 872-873.) The reviewing court has no power to substitute its own deductions for those of the trial court. (*Id.* at p. 874.) Where substantial evidence supports the judgment, it is of no consequence that the trial court might have reached a contrary conclusion. (*Ibid.*)

We review the trial court's interpretation of a contract de novo. (*ASP Properties Group, L.P. v. Fard, Inc.* (2005) 133 Cal.App.4th 1257, 1266-1267 (*ASP Properties*).) Where there is ambiguity in a contract, "'extrinsic evidence may be considered to ascertain a meaning to which the instrument's language is reasonably susceptible.'" (*Id.* at p. 1266.) "'We review the agreement and the extrinsic evidence de novo, even if the evidence is susceptible to multiple interpretations, unless the interpretation depends upon credibility. [Citation.]'" (*Id.* at p. 1266-1267.) Where the extrinsic evidence depends upon credibility, "'we must accept any reasonable interpretation

adopted by the trial court. [Citation.]' [Citation.]" (*Id.* at p. 1267.)

II. Return of the necklace was not required

Appellants argue that respondent did not do what it was legally required to do under the contract in order to effectuate a rejection of the price term of $60,000. Appellants argue:

> "The record is clear that Respondents did not wish to pay $60,000 for the necklace, and wished to reject the invoice for that amount sent to them. The record is equally clear, however, that Respondents did not do what they were legally required to do in order to effectuate their rejection of the price term: *they did not return the necklace.*"

The trial court found that "filing and service of the complaint in this action constitute a timely rejection of the attempt by [appellants] to create a sale of the necklace at the price of $60,000, and at any price." Substantial evidence supports this factual determination. Respondent received the sales invoice from appellants on September 2, 2014. Shortly thereafter, respondent spoke with an intermediary, who informed appellants of respondent's position that the invoice was fraudulent and no sale had been intended. Respondent contacted a lawyer and filed the complaint in this action on September 17, 2014, just over two weeks after receipt of the alleged invoice.

The evidence in the record supports the trial court's conclusion that respondent timely rejected appellants' attempt to create a sale. Appellants cite no legal authority that respondent's actions were insufficient.[2]

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[2] Further, as the trial court noted, the cross-complaint did not contain a cause of action for return of the necklace. Thus, any such claim has been forfeited. (*In re Marriage of Eben-King*

III. The trial court did not err in interpreting the contract

Appellants' second claim is that the trial court erroneously substituted its judgment in place of the agreed-upon $60,000 price for the necklace. Appellants suggest that the language of the contract was unambiguous as to the value of the necklace and the court should not have admitted extrinsic evidence to interpret it.

The trial court found that "[e]vidence of the actual discussion that resulted in the preparation of [the memorandum regarding the necklace] was necessary to a proper understanding of its terms." On its face, the document is contradictory. As the trial court explained:

> "While the final paragraph of text, immediately above the signature line, contains a promise to pay the amount stated, the body of text above that area in which the description of the item is set out contains words of bailment and consignment and not of sale. Further, this section of this document states: 'A sale of all or any portion of the merchandise shall occur only if and when we agree and you shall have received from us a separate invoice.'"

This contradictory language rendered the document ambiguous. Thus, the trial court properly admitted extrinsic evidence to help interpret it. (*ASP Properties, supra*, 133 Cal.App.4th at pp. 1266-1267.)

One of the ambiguous terms of the contract was the significance of the $60,000 "total." The trial court heard evidence that the number was not intended to be the value of the necklace, but instead signified the amount that respondent would owe appellants if respondent lost the necklace. As set forth in the

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& King (2000) 80 Cal.App.4th 92, 110-111 [parties not permitted to raise new theories on appeal].)

statement of decision, the trial court heard uncontradicted testimony from both respondent's representative and an unchallenged expert witness regarding the value of the necklace. The evidence provided by these witnesses supported the trial court's determination that the value of the necklace was $20,000. Appellants point to no contrary evidence in the record. Thus, we find that substantial evidence supports the trial court's determination that the value of the necklace was $20,000.

Nelkin v. Marvin Hime & Co. (1964) 228 Cal.App.2d 744 (*Nelkin*), cited by appellants, does not suggest that a different outcome is appropriate in this case. The *Nelkin* court agreed that contractual terms are "not subject to extrinsic explanation or variation unless ambiguous." (*Id.* at p. 746.) In *Nelkin*, the contract contained unambiguous language suggesting an "agreed value" of the item in question. Extrinsic evidence did "not affect the expressed obligation . . . to pay to plaintiffs the 'agreed value' as stated in the memorandum." (*Id.* at p. 748.) Here, in contrast, it was unclear what the significance of the $60,000 number was, especially given the conflicting language in the document regarding the document's purpose. Because the intent of the parties and the meaning of the dollar amount were ambiguous, extrinsic explanation was appropriate.

DISPOSITION

The judgment is affirmed. Respondents are awarded their costs of appeal.

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_____, J.
CHAVEZ

We concur:

_____, P. J.
LUI

_____, J.
ASHMANN-GERST