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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

LAZBEN INVESTMENTS CO., Plaintiff and Respondent, v. GOLDEN GLOBE INVESTMENTS, LLC et al., Defendants and Appellants.	B277009 (Los Angeles County Super. Ct. No. BC52542)

APPEAL from a judgment of the Superior Court of the County of Los Angeles, Samantha P. Jessner, Judge. Affirmed.

Hill, Farrer, & Burrill, Michael K. Collins, for Defendants and Appellants.

Ervin Cohen & Jessup, Allan B. Cooper, for Plaintiff and Respondent.

Defendant tenant Kim Bang Ly[1] entered into two commercial leases with plaintiff landlord Lazben Investment Co. After performing under the leases for 20 and 15 years, respectively, a dispute arose over calculation of the annual cost-of-living (COLA) rent increases.

Lazben sued and Ly cross-complained. After a bench trial, the court found the parties' consistent, 20-year course of conduct vis-à-vis the COLA provisions constituted implied modifications to the written leases and entered judgment in favor of Lazben. Ly timely appealed, raising a variety of issues. Substantial evidence supports the trial court's factual finding of implied modifications. That issue is dispositive of this appeal, and we do not analyze Ly's remaining contentions.

FACTUAL BACKGROUND

On October 6, 1989, Ly[2] entered into a lease with Lazben for commercial space in a shopping center in Rowland Heights (first lease). Before executing the first lease, Ly engaged in negotiations with a Lazben representative. The parties negotiated the lease term and COLA increases. They discussed how the annual percentage increases would be added to the current rent. They agreed COLA increases would be based on the

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1 The appellants are Ly and his company, Golden Globe Investments, LLC. They will be referred to collectively as Ly.

2 Ly came to the United States in 1977 and began operating supermarkets. The supermarket involved in the first Lazben/Ly lease was the fourth one he opened.

consumer price index (CPI), with a minimum three percent and maximum eight percent annual increase.

Following discussions with the Lazben representative, Ly engaged an attorney, John Chang, to finalize the written lease and ensure Ly understood its terms. By the time Chang became involved in the negotiations, the draft lease already contained the three percent/eight percent COLA provision. Other than discussing the annual percentage increase, Chang did not discuss with anyone from Lazben the formula for calculating the annual COLA increases.

Ly's understanding of the written terms of the lease was based exclusively on his discussions with Chang. When Ly signed the lease he was "comfortable" he understood its terms.[3] He knew he would be responsible for yearly COLA rent increases once the lease space was built out.

Ly acknowledged receiving yearly notices that not only advised him of the new rent, but also how the increase was calculated. Notwithstanding section 3.02's language providing an

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[3] Section 3.02 of the first least provided in pertinent part: "Cost of Living Increases. The Base Rent shall be increased at the times specified in Paragraph 1.13(a) above, in proportion to the increase in the [CPI] Index which has occurred between the first month of the Lease Term and the month in which the rent is to be increased. Landlord may notify Tenant of each increase by delivering a written statement setting forth the [PI] Index for the first month of the Lease Term, the [CPI] Index for the month in which the Base Tent is to be increased, the percentage increase between those two Indices, and the new amount of the Base Rent. . . . [¶] Anything to the contrary notwithstanding, the increase in the [CPI] Index utilized in calculating all increases to the Base Rent shall not be less than three percent (3%) per annum or greater than eight percent (8%) per annum."

annual percentage rent increase based on the CPI for "*the first month of the Lease Term*," Lazben calculated the annual increase under the first lease based on the CPI for the first month *of the year immediately prior to the effective date of the rent increase.*

Ly gave the notices to his accounting personnel to ensure the rent increases had been calculated correctly, but never provided them with copies of the lease to verify "what they were supposed to be calculating." From the first rent increase in November 1990 through 2012, none of Ly's employees told him the rent increases under the lease were erroneously calculated. Ly also personally reviewed those rent increases and believed they conformed to the lease terms.

In 1996, Ly negotiated and entered into a second lease with Lazben for additional space in the same shopping center (second lease).[4] During these negotiations, Ly did not question, or complain about, how the COLA rent increases were calculated under the first lease, but he wanted a cap lower than eight percent. He understood the COLA rent increases under the second lease would be calculated "precisely the way it was done in the first lease." The only difference between the COLA provisions in the first and second leases was that the latter limited the maximum annual increase to five percent.[5]

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[4] Chang did not represent Ly in these negotiations.

[5] Section 3.02 of the second lease contained the COLA provision that provided in pertinent part: "Cost of Living Increases. The Base Rent shall be increased annually, at the times specified in Section 1.13(a) above, in proportion to the increase in the [CPI] Index which has occurred between the first month of the Lease Term and the month in which the rent is to be increased. In any event, the percentage of the increase shall

Ly then received annual COLA notices for both leases, each calculated using the CPI for the first month of the year immediately preceding the rent increase, instead of the first month of the lease term, as specified under section 3.02 of each lease. As with the first lease, Ly gave the notices to his accounting personnel for verification. None of his employees ever told him the annual rent increases under the second lease were incorrectly calculated. He also personally confirmed the rent increases for the second lease were being calculated correctly. Chang received at least some of the annual COLA notices for both leases, but did not review them for accuracy or complain to Lazben that the calculations were not in accordance with the written lease terms.

In sum, it was undisputed that, between 1990, when the first rent increase was imposed, and 2012, Ly never challenged the method for calculating the rent increases.

All that changed in 2012, when Ly sent Chang tenant estoppel certificates[6] to review. At that time, Chang also

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not be less than three percent (3%), nor more than five percent (5%). Landlord shall notify Tenant of each increase by delivering a written statement setting forth the [CPI] Index for the first month of the Lease Term, the [CPI] Index for the month in which the Base Rent is to be increased, the percentage increase between those two Indices, and the new amount of the Base Rent."

[6] "Black's Law Dictionary defines 'estoppel certificate' as '[a] signed statement by a party, such as a tenant or a mortgagee, certifying for the benefit of another party that a certain statement of facts is correct as of the date of the statement, such as that a lease exists, that there are no defaults and that rent is paid to a certain date. Delivery of the statement by the tenant prevents (estops) the tenant from later claiming a different state

reviewed the leases and concluded Lazben was using an incorrect formula. Chang recalculated the increases according to his interpretation of the lease provisions and returned the estoppel certificates to Lazben with handwritten revisions. Chang used the CPI existing as of the first month of the lease term in 1989, per section 3.02 of each lease, but also used the initial 1989 rent as the continuing "base rent" to which all the percentage increases would be added. At that point, Ly refused to pay the full amount of the billed monthly rent and fell behind in his payments.

PROCEDURAL BACKGROUND

In October 2013, Lazben sued Ly to recover the amount of rent Ly had been withholding. The operative pleadings were the third amended complaint, filed in August 2015, and the first amended cross-complaint, filed in June 2014. Both sides asserted the lease terms had been breached, and Lazben's complaint sought reformation of the two leases.[7]

The case proceeded to a bench trial. The trial court excluded testimony from Ly's proposed expert on the custom and practice in the industry regarding application of COLA provisions like the ones in these leases. The trial court allowed Lazben's expert to testify, but limited him to mathematical calculations,

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of facts.'" (*Plaza Freeway v. First Mt. Bank* (2000) 81 Cal.App.4th 616, 626; see also *Robert T. Miner, M.D. Inc. v. Tustin Ave. Investors* (2004) 116 Cal.App.4th 264, 273.)

7 Ly also cross-complained to recover alleged overcharges of common area maintenance fees. Ly did not prevail on this claim, either, but he did not challenge that aspect of the trial court's decision on appeal.

not opinions concerning the proper interpretation of the COLA provision.

At the end of trial, Ly submitted a closing brief with exhibits that calculated the annual rent increases according to Chang's interpretation of the COLA provisions. Because those exhibits had not been admitted into evidence, Lazben objected; and the trial court refused to consider them.

Ly's closing brief explained his interpretation of the COLA provision as follows: "[Section] 3.02's language *necessarily* requires that, for each annual COLA, the increase in the [CPI] be from the first month of the Lease Term and that such increases be applied to the Base Rent for the *first month of the lease term* as well." (Italics in original.)

Lazben's closing brief asserted the COLA provisions should be interpreted in a manner consistent with the calculations for the past 20 years, i.e., using the CPI for *the first month of the year immediately preceding the rent increase* and adding the percentage increase in the CPI that occurred during that year to the *current amount of the rent.* In the alternative, Lazben argued the COLA provisions should be interpreted as its expert proposed, i.e., using the CPI for the first month of the lease year and adding the percentage increase to the current rent.

The trial court issued a detailed tentative statement of decision to which the parties responded in writing. In May 2016, the trial court issued its final statement of decision. After setting forth the parties' respective and conflicting interpretations of the COLA provisions, the trial court rejected the interpretations proffered by both sides: "While the parties . . . presented two methods of calculations and interpretations of the lease language that conflict with each

other, the court cannot find the applicable language in the leases is reasonably susceptible to the interpretation urged by either party. [¶] . . . [¶] In summary, the extrinsic evidence admitted . . . during the court trial did not reveal that the language in the leases is reasonably susceptible to the interpretations that both parties urge the court to adopt . . . . The plain language of the leases is unambiguous—the percent change for purposes of calculating the COLA adjustments and rent increases was to be measured from the first month term, then added to the then-existing rent, never to be less than a 3% change or more than an 8% or 5% change. The fact that the parties, for decades, acted in a way that was not consistent with this language, does not render the clear language of the leases ambiguous or reasonably susceptible to a different meaning. As a result, the court need not consider the extrinsic evidence admitted at trial in order to interpret the clear language of [section] 3.02 and related sections."

Notwithstanding its interpretation of the unambiguous COLA provisions as a matter of law, the trial court concluded as a matter of fact that the parties impliedly modified the leases based on a 20-year course of conduct: "[Lazben] asserts that the parties' mutual course of conduct for decades operated to amend the leases. When one party has, through oral representations and conduct or custom, subsequently behaved in a manner antithetical to one or more terms of an express written contract, he or she has induced the other party to rely on the representations and conduct or custom. In that circumstance, it would be equally inequitable to deny the relying party the benefit of the other party's apparent modification of the written contract. (*Wagner v. Glendale Adventist Medical Center* (1989) 216

Cal.App.3d 1379 [(*Wagner*)].) [¶] Based on the evidence presented to the court and the fact that the court found the testimony of [Lazben's] witnesses regarding their intentions at the time of the lease negotiations more credible than [Ly's] sole witness . . . , Mr. Ly, the court agrees with [Lazben] in this regard . . . . It is undisputed that [Lazben] calculated the rent increases consistent with its understanding of [section] 3.02, sent the required notices to [Ly] explaining the method of calculation and setting forth the amount of the increase, and [Ly] paid consistent with [Lazben's] calculations from 1989/1996 to March 2012 without objection.[fn.] As a result, it makes sense and it is fair to amend [section] 3.02 of the leases to reflect the *mutual* understanding and intent of the parties at the time of contracting and for decades thereafter. The lease language is, therefore, ordered amended consistent with [Lazben's] interpretation and the parties' conduct for decades. More specifically, the period for measuring the percentage change in the Index is from the last time the rent was increased to the time of the current rent increase, to be added to the existing Base Rent which will become the new Base Rent. The same floor and ceiling will apply (3% floor and 8% or 5% ceiling)."

The trial court entered judgment against Ly in the amount of $607,022 for unpaid rent, late charges, and interest. Ly timely appealed.

DISCUSSION

A. Implied Amendment by Conduct

1. Standard of Review

The trial court's factual finding of implied modifications to the COLA provisions was based on testimony and documents

extrinsic to the leases themselves. We review this factual finding and any implied findings under the substantial evidence standard. (*Fink v. Shemtov* (2012) 210 Cal.App.4th 599, 608.)

The application of the substantial evidence standard of review has been summarized as follows: "'Where findings of fact are challenged on a civil appeal, we are bound by the "elementary, but often overlooked principle of law, that . . . the power of an appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted," to support the findings below . . . . An appellate court presumes in favor of the judgment or order all reasonable inferences. [Citation.] If there is substantial evidence to support a finding, an appellate court must uphold that finding even if it would have made a different finding had it presided over the trial. [Citations.] An appellate court does not reweigh the evidence or evaluate the credibility of witnesses, but rather defers to the trier of fact." (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 957-958.)

2. Legal Principles

The law concerning implied-in-fact amendments or modifications to written agreements is venerable and well settled. As early as 1944, our Supreme Court recognized a written contract may be impliedly modified when the parties engage in conduct that is "inconsistent with the written contract so as to warrant the [factual] conclusion that the parties intended to modify the written contract." (*Garrison v. Edward Brown & Sons* (1944) 25 Cal.2d 473, 479 (*Garrison*).) More recently, the Court of Appeal cited *Garrison* and observed, "In short, the parties to the contract not only abandoned or ignored the

provisions [at issue in the litigation], but, postagreement, substituted a course of conduct wholly incompatible with those provisions. This is a textbook case of modification by conduct. As our Supreme Court . . . held [in *Garrison*], where the subsequent conduct of parties is inconsistent with and clearly contrary to provisions of the written agreement, the parties' modification setting aside the written provisions will be implied." (*Diamond Woodworks, Inc. v. Argonaut Ins. Co.* (2003) 109 Cal.App.4th 1020, 1038 (disagreed with on another ground in *Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1182.)

In this case, the trial court made the express factual finding that the parties' conduct for 20 years amounted to implied modifications of the written terms of the COLA provisions, i.e., implied-in-fact contracts of their own. (See Civ. Code, § 1621 ["An implied contract is one, the existence and terms of which are manifested by conduct"].) In an implied-in-fact contract, "the intent of the parties is not expressed but is inferred from the facts and circumstances surrounding the transaction."[8] (*County of Santa Clara v. Robbiano* (1960) 180 Cal.App.2d 845, 848.)

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[8] In addition to the factual finding that for 20 years the parties engaged in a course of conduct at odds with the written COLA provisions, the trial court quoted a passage from *Wagner, supra,* 216 Cal.App.3d at page 1388 and suggested inducing reliance and enforcing equities were additional elements for implied-in-fact contracts. They are not.

The *Wagner* passage quoted by the trial court was dictum included in that opinion as part of a discussion concerning oral representations made "contemporaneously with or prior to the execution of the written contract." (*Wagner, supra,* 216 Cal.App.3d at p. 1388.) The complete discussion provides context for the *Wagner* dictum: "In [the cases just discussed], the oral

3. Substantial Evidence of Implied Modification

The trial court concluded the plain and unambiguous language of the COLA provisions required the annual percentage increase in the CPI to be calculated using the CPI for "the first month of the Lease Term," i.e., November 1989, for the first lease and October 1996, for the second lease. The language also required the percentage increase under that calculation to be added to the *current* base rent and the increased amount would become the *new* base rent for purposes of calculating the next annual increase. That language was included in the initial draft of the first lease Chang reviewed and never changed.

Notwithstanding the written COLA provisions, for 20 years Lazben calculated the percentage increase using the CPI for the first month of the immediately preceding year. The parties agree Lazben notified Ly every year of the new rent as well as how the increase was calculated. Ly admitted he and his accounting employees reviewed each such notice, believed the increases were

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representations alleged to create an implied contract were made contemporaneously with or prior to the execution of the written contract. The inequity in enforcing the implied contract in that situation is apparent. However, that is not to say the parties may not in that manner thereafter modify their agreement. [¶] When one party has, through oral representations and conduct or custom, subsequently behaved in a manner antithetical to one or more terms of an express written contract, he or she has induced the other party to rely on the representations and conduct or custom. In that circumstance, it would be equally inequitable to deny the relying party the benefit of the other party's apparent modification of the written contract." (*Ibid.*) Here, of course, the conduct occurred for a period of 20 years after the parties signed the first lease.

correctly calculated, and never complained to Lazben they were not.

The undisputed evidence of the parties' performance under the leases clearly demonstrated Lazben's calculation of the rent increase was inconsistent with, and contrary to, the plain language of the COLA provisions that required use of the CPI for the first month of the 20-year lease term. The parties' mutual acceptance of Lazben's inconsistent and contrary methodology for 20 years supports a reasonable inference the parties intended to amend or modify the leases to conform to their conduct and understanding and provides substantial evidence for the trial court's judgment.

B. Evidentiary and Contract Interpretation Issues

Ly additionally asserts the trial court erred by excluding the testimony of his expert, John Pagliasotti; by refusing to consider the attachments to his closing brief showing calculations of Ly's damages using Chang's interpretation of the COLA provision; and by allowing Lazben's expert, John Luna, to testify as to the proper interpretation of the COLA provision, despite a ruling that he could not so testify. Ly finally contends the trial court's interpretation of the COLA provisions was erroneous as a matter of law.

Ultimately, none of these issues is relevant to the judgment and need not be addressed. For example, although we agree with the trial court that the COLA provisions were not ambiguous and would conclude its interpretation of those terms was correct as a matter of law, the judgment was based on implied modifications of the leases, not enforcement of the written terms. And the trial

judge noted in the statement of decision that she "need not consider the extrinsic evidence admitted at trial in order to interpret the clear language of [the leases]." Any testimony by Ly's expert and damage calculations based on lease interpretations would have met the same fate.

DISPOSITION

The judgment is affirmed. Lazben is awarded costs on appeal.

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DUNNING, J.*

We concur:

KRIEGLER, Acting P. J.

BAKER, J.

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* Judge of the Orange Superior Court appointed by the Chief Justice pursuant to article VI, section 6, of the California Constitution.