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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

SHAHRAM MARC AZORDEGAN et al., Plaintiffs and Respondents, v. ALBERT AGADJANIAN et al., Defendants and Appellants.	B226978 (Los Angeles County Super. Ct. No. BC365798)

APPEAL from a judgment and orders of the Superior Court of Los Angeles County. Ronald M. Sohigian, Judge. Affirmed.

Law Offices of Perry Roshan-Zamir and Perry Roshan-Zamir for Defendants and Appellants.

Der-Parseghian Law Group and Mary Der-Parseghian for Plaintiffs and Respondents.

* * * * * *

Appellants Albert Agadjanian, and Carloops Inc. (Carloops) appeal from a judgment in favor of respondents Shahram Marc Azordegan and 1 Source Global Tech, Inc. (1 Source). 1 Source purchased a car wash business from Carloops, and Azordegan leased the underlying commercial property from Agadjanian. The jury awarded $950,000 in breach of contract damages for Agadjanian's failure to disclose a material fact related to the sale of the car wash business, and an additional $360,000 for breach of the commercial lease agreement. Appellants appeal from orders denying motions for a new trial, judgment notwithstanding the verdict, and acknowledgement of partial satisfaction of judgment.

We affirm.

FACTS

Underlying Transactions

Agadjanian is the owner of real property located at 322 North Sunset Avenue in the City of La Puente. His wholly owned corporation, Carloops, owned and operated a car wash business which included a lubrication and oil change station on the property. Three tenants leased commercial space on the same property, including a window tint shop, a cellular telephone store, and a coffee shop.

In early 2005, Agadjanian contacted Classic Realty Exchange Group, owned by broker Edik Minassian. Minassian met Agadjanian at the car wash and toured the entire premises. Agadjanian told Minassian that he wanted to sell everything as a "package" and everything was for sale except a Harley Davidson motorcycle which was inside a showroom. Minassian understood this to mean that Agadjanian intended to sell the car wash and the three separate tenancies. Joseph Mkrtchyan, a real estate agent working for Minassian prepared the listing for the car wash business. It was also his understanding that the three tenancies were to be included in the purchase. The listing described the

property as follows: "Carwash and oil changer. 30 year lease $12,000 monthly rent. Cell phone store pays $2,500 rent and coffeeshop pays . . . ."[1]

Sometime in June or July 2005, Azordegan, who was interested in acquiring a business investment, hired Oscar Nasiri, a real estate broker from Sunbelt Business Brokers. Nasiri showed him a number of businesses including the subject car wash. Nasiri contacted Mkrtchyan and received confirmation that the three tenancies were included in the sale of the car wash.

On November 15, 2005, Azordegan made a formal offer of $1.9 million to purchase the car wash business from Agadjanian. The Purchase Agreement for Business Assets (PA) defined the business as Carloops, Inc. The buyer was identified as Shahram Azordegan and the seller was identified as Cra [*sic*] Loops Inc. Paragraph No. 7 listed the following Conditions: "7d. The Seller will lease the Car wash for amount $12,000.00 per month with increase of CPI every 3 years for 30 years." And, "7f. The Buyer is responsibility of tenant lease and collecting rent and making new leases."

The parties exchanged several counteroffers attempting to negotiate the amount of the down payment, the terms of the monthly lease, and who was responsible for paying the property taxes. Nasiri told Azordegan that Agadjanian was not willing to negotiate the overall price of $1.9 million or the monthly lease amount of $12,000. Azordegan was told that $6,000 was a reasonable amount of rent for the car wash because he could collect an additional $6,000 from the other three tenants to make up the $12,000 monthly rent. At that time the cell phone store was paying a monthly rent of $2,500, the coffee shop was paying $2,000, and the window tint shop was paying either $1,500 or $1,600. Agadjanian also insisted that Azordegan pay the property taxes for the entire premises.

Escrow opened on January 24, 2006, and Azordegan continued to conduct due diligence. Azordegan examined ledgers provided by Agadjanian and verified the numbers by personally counting the number of cars that visited the car wash. He spoke

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[1] The original listing appeared on an online commercial real estate listing service called LoopNet. The right side of the copy of the original listing included in the record was cut off and the entirety of the ad could not be read.

with the three tenants to determine how long they intended to stay. Azordegan was concerned when he learned that the coffee shop tenant planned to leave on January 1, 2007, when his lease expired. Agadjanian told Azordegan that he had lived in Los Angeles for a long time and he would help Azordegan find new tenants.

The Commercial Lease Agreement (CLA) which identified Agadjanian as landlord and Azordegan as tenant was signed on January 25, 2006. As had been previously defined in Condition 7d. of the PA, the initial term of the lease was for thirty years "beginning March 13, 2006 and ending March 13, 2036." The rental was "$144,000.00 per year, payable in installments of $12,000.00 per month with an increase of 3% for every 3 years." Azordegan as tenant was required to pay all real estate taxes and special assessments on the leased premises. The lease stated: "Tenant agrees to take over the existing leases, assign sub leases without the landlords consent, and transfer deposits and lasts if there are any to the new tenant through escrow."

On February 24, 2006, Agadjanian completed a Seller's Disclosure Statement (SDS) for the business listed as Carloops Inc. On page two, section B entitled Regulations, item No. 3 asked: "Are you aware of any pending zoning changes, redevelopment or nearby construction that might affect your business?" The box indicating "No" was checked. On page three, section D entitled General, asked: "Are you aware of any other facts or conditions not disclosed above that may adversely affect the operation of the business, a buyer's decision to purchase it or the price he might pay for it?" The box indicating "No" was checked.

Agadjanian insisted that their respective corporations be the parties to the sale of the car wash. Azordegan's corporation 1 Source, paid $500,000 of the purchase price through escrow to Carloops. Azordegan as President of 1 Source signed a Promissory Note and Personal Guarantee in the amount of $1.4 million for a 30-year note. Glen Oaks Escrow issued a buyer's final settlement statement showing that escrow closed on March 8, 2006. Azordegan took possession of the car wash on March 13, 2006.

Azordegan collected rent from the three tenants for the remainder of 2006. After the coffee shop tenant sold their business, Azordegan intended to negotiate a lease with

the new tenant. But Agadjanian executed a lease with the new tenant of the coffee shop and in early 2007 began collecting rent from her.

Respondents filed suit against appellants[2] on February 5, 2007. On April 6, 2007, Azordegan was granted a preliminary injunction prohibiting Agadjanian and Carloops "from collecting any rents due from any and all subtenants of the business located at Carloops including but not limited to Coffee Shop, Window Tint and Cellular Retail Shop until such time as a Trial on its merits in this action." The injunction also prohibited Agadjanian and Carloops from executing any leaseholds.

Sometime in June or July of 2007, Azordegan became aware of a sign posted on Sunset Avenue in front of his car wash that warned of street closures that would occur in November 2007. The Alameda Corridor East Construction Authority (ACE) planned to build a bridge over Sunset Avenue at Valley Boulevard to facilitate railroad traffic.[3] The car wash is located on Sunset Avenue about a half mile north of Valley Boulevard. The street closure began in November 2007 and continued through the date of trial.

On September 17, 2009, the operative sixth amended complaint alleging breach of contract and seeking damages, injunctive relief, and rescission was filed. Azordegan alleged breach of the commercial lease agreement against Agadjanian. 1 Source alleged a breach of the business purchase agreement against Carloops. Attached to the complaint was the CLA, the promissory note and personal guarantee, and the SDS.[4] Respondents' theory of the case was that appellants failure to disclose material facts relative to the street closure and construction project breached the contracts and caused them damages.

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[2] The appellate record does not include the original complaint.

[3] The project was referred to as the Sunset Avenue Grade Separation Project.

[4] Appellants filed a cross-complaint on January 12, 2009, seeking declaratory relief as to the rights of the parties, but the cross-complaint was dismissed prior to trial.

After the court informed the parties that there was no right to a jury trial on a claim of rescission, respondents elected not to seek rescission and proceeded to jury trial on the breach of contract claims.

Trial Testimony

During the six-day trial respondents presented evidence that Agadjanian breached the CLA when he executed a lease with a new tenant for the coffee shop and collected rents from her. Both Agadjanian's broker Minassian and agent Mkrtchyan testified that they were told the tenancies were to be included in the sale of the car wash. Azordegan testified that he made every payment of $12,000 per month owed to Agadjanian, and was currently paying $12,350 per month on the lease.

As to breach of the business purchase agreement Azordegan testified that he contacted ACE when he saw the sign regarding the street closure. ACE informed him that on August 15, 2005, "Ms. Galindo called to inquire about the Sunset Avenue Grade Separation Project" "and impacts on her business."[5] Ms. Galindo was the manager of the car wash while it was owned by Agadjanian. Azordegan testified that he was never told by Agadjanian that a street closure would occur in late 2007. Azordegan's broker, Nasiri, testified that Agadjanian never disclosed any information regarding a street closure. Mkrtchyan testified that he never heard Agadjanian mention the street closure or construction project. Mkrtchyan testified that had Agadjanian disclosed the street closure his normal practice would have been to investigate because City Hall was close by and he could have reviewed the appropriate documents. He did not do so in this case because he did not know about the street closure.

Agadjanian testified that he first heard about the street closure and bridge construction even before August 2005, and probably in the middle of 2005. He was told that "they were going to put a bridge. So there wasn't going to be any traffic." He testified that he had several conversations with Azordegan about the bridge construction

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[5] The June 18, 2009 letter from ACE to Azordegan included an August 15, 2005 fax to the car wash with information regarding the street closure and was entered into evidence.

before the close of escrow and that he complied with all disclosure requirements. At trial he produced for the first time what he claimed was the actual SDS that he executed prior to the close of escrow. On page two, section B, item No. 3, in response to the question, "Are you aware of any pending zoning changes, redevelopment or nearby construction that might affect your business?" the box indicating "Yes" was checked and the box indicating "No" was crossed out. The words "Sunset Bridge" were handwritten on the document.

Azordegan testified that he had never seen the SDS that Agadjanian produced at trial. Pursuant to a subpoena for business records, Glen Oaks Escrow produced a file containing 556 pages which contained all the documents that were submitted to them during escrow. The only SDS included in the file showed that the box indicating "No" was checked off in response to item No. 3, in section B, on page two.

Azordegan presented a summary of his yearly income from the car wash and testified that he had lost at least 50 percent of his business due to the street closure and had incurred damages between $800,000 and $1 million. When he took over the car wash in March 2006 there were three tenants in place and he collected approximately $6,000 per month in rent from them until the end of the year. At the time of trial he had only two tenants. A beauty salon was paying rent of $1,400 per month and a smog testing business $1,200. In order to find new tenants he had hired an agent, put up posters in the car wash and advertised in the newspaper. When prospective tenants came to the car wash and saw the road closure they never came back again.

Appellants' expert, Alan Wallace, a licensed attorney and real estate broker with an expertise in disclosures and valuation issues testified as to damages. Based on his 20 years of experience and knowledge of the car wash business, and having visited and observed the subject car wash, he opined that the business "looked like it was dying, if not dead already." He explained that the construction project and street closure cut off street traffic which negatively impacted business. He testified that with the pending street closure, the fair market value of the car wash in March 2006 was $950,000, half the purchase price paid by Azordegan. He based this on his analysis of statistics from the

Los Angeles County Department of Public Works concerning traffic flow, his own observations, and his experience. With respect to the value of the lease of the property, he testified that the fair market rental value of the premises, taking the street closure into consideration, was "at best $6,000 a month," half the amount paid by Azordegan. He reviewed one document that estimated the end of construction and subsequent reopening of the street closure was scheduled to be winter 2010, but found no document that provided an actual completion date.

Agadjanian testified that when he informed Azordegan of the street closure and bridge construction he knew how much it would impact traffic in the area but "for both of us it was—it was a future. It wasn't—it wasn't a negative thing. It was a positive thing." Agadjanian testified that the car wash business decreased for the following reasons: Azordegan did not have sufficient advertising; Azordegan had issues with the tenants; Azordegan cut the workforce to save payroll; Azordegan changed the brand of oil used at the oil change location; and customer service was bad because Azordegan cut the commissions paid to employees.

Jury Verdict

The parties agreed on the form of the special verdict to be presented to the jury and on June 21, 2010, the jury returned unanimous findings. On the first cause of action for breach of contract for the bulk sale of Carloops, the jury found that 1 Source and Carloops entered into a contract; Carloops breached the contract; and 1 Source's damages were $950,000 in past economic loss. On the second cause of action for breach of the commercial lease agreement, the jury found that Azordegan and Agadjanian entered into a lease agreement; Agadjanian breached the contract; and Azordegan's damages were $360,000 comprised of $306,000 in past economic loss and $54,000 in future economic loss.

Post-Trial Motions

Appellants filed a motion for judgment notwithstanding the verdict (JNOV) on the ground that there was no substantial evidence to support the jury's verdict. Appellants also filed a motion for new trial on the grounds of insufficiency of the evidence and

excessive damages. The motions were heard and denied. Appellants' motion to compel acknowledgement of satisfaction of judgment was also denied. This appeal followed.

DISCUSSION

I. The Motion for Judgment Notwithstanding the Verdict was Properly Denied

A. Standard of Review

"The trial court's power to grant a motion for judgment notwithstanding the verdict is the same as its power to grant a directed verdict. (Code Civ. Proc., § 629.) 'A motion for judgment notwithstanding the verdict may be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence in support.' [Citations.] On appeal from the denial of a motion for judgment notwithstanding the verdict, we determine whether there is any substantial evidence, contradicted or uncontradicted, supporting the jury's verdict. [Citation.] If there is, we must affirm the denial of the motion. [Citation.] If the appeal challenging the denial of the motion for judgment notwithstanding the verdict raises purely legal questions, however, our review is de novo." (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1138.)

B. Substantial Evidence Supported the Jury's Verdict

To prevail on a breach of contract claim, a plaintiff must prove (1) the existence of a contract; (2) plaintiff's performance or excuse for nonperformance; (3) defendant's breach; and (4) resulting damage. (*Armstrong Petroleum Corp. v. Tri-Valley Oil & Gas Co.* (2004) 116 Cal.App.4th 1375, 1391, fn. 6.)

1. The CLA Contained a Duty of Disclosure

Appellants contend that respondents cannot identify any provision in the CLA which imposes a duty of disclosure on appellants. Appellants argue as they did in the trial court for a restrictive interpretation of the documents that constitute the lease agreement. We find the evidence does not support appellant's contention that the sale of the car wash business was a transaction separate from the lease of the premises, and find a duty of disclosure in the CLA.

At the close of respondents' case-in-chief, appellants made an oral motion for non-suit based on the parol evidence rule. Appellants moved to exclude any evidence regarding the lease which preceded execution of the CLA. Appellants' motion specifically sought to exclude the PA which discussed the lease and the SDS. The court ruled that the CLA was not integrated stating: "The real question in this case is what constitutes the contract, and my view is that on this record, the jury would be entitled to find that the contract consisted of all the documents that were placed in escrow. They were placed into escrow deliberately by the litigants. They are referred to in the—in the escrow. The litigants, obviously, made reference to them and repeated reference to them."

California's parol evidence rule is codified in section 1856 of the Code of Civil Procedure. Subdivision (a) of section 1856 provides: "Terms set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement." Under subdivision (d), "[t]he court shall determine whether the writing is intended by the parties as a final expression of their agreement with respect to such terms as are included therein and whether the writing is intended also as a complete and exclusive statement of the terms of the agreement." (Code Civ. Proc., § 1856, subd. (d).)

In deciding the foundational question of integration, cases have disagreed on whether it is a question of law or a question of fact. Several cases have suggested that a substantial evidence standard of review applies to limit the ability of appellate courts to overturn trial court determinations. (See, e.g., *Mobil Oil Corp. v. Handley* (1978) 76 Cal.App.3d 956, 961; *Salyer Grain & Milling Co. v. Henson* (1970) 13 Cal.App.3d 493, 500.) Others have termed the issue a question of law. (See *Esbensen v. Userware Internat., Inc.* (1992) 11 Cal.App.4th 631, 638.)

Still, on the issue, we may look to various factors such as the writing itself, including whether the written agreement appears to be complete on its face and/or contains an integration clause; whether the subject matter at issue might naturally be

made as a separate agreement; and the circumstances surrounding the time of the writing. (*Masterson v. Sine* (1968) 68 Cal.2d 222, 225–226.)

Here, while the CLA did contain an integration clause we find another factor more compelling. The circumstances surrounding the sale and lease showed that the contract for the purchase of the car wash business and the contract for the leaseholds were inextricably connected as appellant insisted the lease accompany the sale. While this was confirmed by the testimony of the brokers and agents, the strongest evidence that the combined sale and lease were inseparable and constituted a "package" as respondent Agadjanian told Minassian, is shown by the language of the PA dated in November 2005 which preceded the CLA dated in January 2006. The PA not only references the lease it specifically states as a condition of sale that "The Seller *will lease the Car wash* for [an] amount [of] $12,000 per month." The relevant language in the later executed lease mirrors this and states "Tenant shall pay to Landlord during the Initial Term rental of $144,000.00 per year, payable in installments of $12,000.00 per month with an increase of 3% for every 3 years."

Another condition of sale contained in the PA contemplated the right to enter new leases and stated that "[t]he Buyer is responsibility of tenant lease and collecting rent and making new leases." Additionally, the amount of the monthly lease was the subject of counteroffers during the sale of the car wash business. Azordegan countered with an offer to pay $11,000 monthly rent for 30 years and increase the down payment for the car wash business.

Whether we review the issue de novo or examine for substantial evidence we agree with the trial court's interpretation that the contracts here were comprised of all of the documents in escrow. The PA with its listed conditions referring to specific terms of the CLA, and the SDS provided by respondent Agadjanian on February 24, 2006, were integral parts of the lease transaction.

2. The Complaint Alleged a Breach of the CLA based on Nondisclosure

Appellants contend that the first cause of action is limited to issues concerning the wrongful collection of rents. This narrow interpretation is erroneous.

The body of the complaint contained allegations that Agadjanian's wrongful collection of rents and negotiation of new leases constituted a breach of the CLA. But, the complaint also alleged at paragraph No. 22 that Agadjanian made representations to respondents in the "Real Estate Seller's Disclosure Statement dated February 24, 2006." In the first cause of action for breach of the CLA, the complaint alleged at paragraph No. 47 that "[Azordegan] relied on the *representations set forth in the disclosure statement* in entering into the agreement and the statement was incorporated into the agreement." In paragraph No. 50 the operative complaint alleged that Agadjanian "breached the agreement by *failing to disclose* material and important information regarding the condition of the business including but not limited to leases held by the three tenants that was within Agadjanian's knowledge . . . ."

3. Evidence of a Breach of the CLA

Appellants' contend that because respondents did not seek reformation of the CLA no evidence was presented of any breach of its terms. We disagree.

Breach based on interference with the tenancies

A condition of the PA stated "The Buyer is responsibility of tenant lease and collecting rent and making new leases." A provision of the CLA stated that "Tenant agrees to take over the existing leases, assign sub leases without the landlords consent . . . ." Both brokers testified that Agadjanian told them that the tenancies were to be included in the sale of the business and Agadjanian's agent testified that the advertisements he prepared for the sale of the business included the tenancies. When a new tenant took over the coffee shop in early 2007, Agadjanian admitted that he negotiated a lease and collected rent from her. He testified that he stopped only because his attorney told him that respondents had obtained a preliminary injunction.

Breach based on nondisclosure

Condition 7a. of the PA specified that appellants had an obligation to submit a disclosure statement for respondents' inspection and satisfaction. Agadjanian testified that he was aware of the street closure and construction project as early as August 2005 and possibly earlier. The SDS contained in the escrow file produced at trial showed that Agadjanian stated that he was not aware of any pending zoning changes, redevelopment or nearby construction that might affect their business. He also disavowed knowledge of any other facts or conditions that could adversely affect the operation of the business, a buyer's decision to purchase it or the price. The jury rejected Agadjanian's production of an alternate version showing a handwritten reference to "Sunset Bridge" as well as his testimony that he informed Azordegan of the street closure.

The importance of a seller's disclosure statement was presented through testimony from respondents' expert witness Wallace, and from Minassian and Nasiri, the brokers involved in the transaction. Nasiri testified that it was important the buyer know "if there's going to be any circumstances that is going to happen" that would affect the potential income of the business. Minassian testified that awareness of zoning ordinances or street closures are facts that affect the property or business and have to be disclosed. Wallace testified that "the law requires and the custom, practices, and standard of care is that all the materials—all the key information has to be presented to the buyer so he can decide if it's the right business for him." Wallace opined that in this particular case involving a car wash, location and easy access are important because the value of the business and the value of the lease is based on how much business the car wash can generate.

Knowledge of the street closure and construction project was a material fact concerning the viability of the business that would impact a decision to purchase and lease the premises, and failure to make that disclosure in the SDS provided by Agadjanian on February 24, 2006 constituted a breach of the CLA.

Appellants' reliance on *Malcolm v. Farmers New World Life Ins. Co.* (1992) 4 Cal.App.4th 296 (*Malcolm*) is misplaced. In *Malcolm*, the insurer issued life insurance

policies which excluded the risk of suicide during the first two policy years, the insured committed suicide within two years, and the insurer declined the claims. (*Id.* at p. 299.) Summary judgment in favor of Farmers was affirmed because the court found that "[t]he suicide provision clearly and conspicuously conveyed its message in understandable language." (*Id.* at p. 302.) The holding that an insurer has no duty to point out and explain an unambiguous and conspicuous provision of a policy has no relevance to the instant case.

4. Substantial Evidence Supported the Award of Damages

Appellants contend that there is no evidence in the record to support the jury's award of damages and that 1 Source presented no evidence of damages and will actually benefit from the street closure and construction project. They argue that because Wallace did not differentiate between the individual respondent and the corporate respondent in determining the damages award his opinion amounts to speculation and conjecture.

Damages for breach of the PA

On the breach of contract claim for the bulk sale of Carloops, testimony was presented by both Azordegan and his expert, Wallace. Azordegan testified that business at his car wash was down by at least 50 percent. Wallace testified that the fair market value of the car wash in March 2006 was $950,000, half the purchase price of $1.9 million paid by Azordegan. The jury award of damages of $950,000 for past economic loss on this cause of action was supported by substantial evidence. Wallace had expertise in the valuation of car wash businesses and described how he analyzed various factors such as street access and traffic flow to calculate the diminution in value of the car wash business and the lease.

Damages for breach of the CLA

On the cause of action for breach of the commercial lease agreement Wallace testified that the rental value of the premises while the closure was in effect was "at best $6,000 a month," half the monthly rent paid by Azordegan. Azordegan testified that he paid Agadjanian the full amount due under the lease and at the time of trial in June 2010 had made a total of 51 payments. A document from the Department of Public Works

stated that the construction project was scheduled to end in "Winter 2010" which was approximately nine months from the date of trial. On this cause of action, the jury awarded $306,000 in past economic loss which equated to $6,000 for each of the prior 51 months, and $54,000 in future economic loss calculated at $6,000 for each subsequent month until March 2011, for a total award of $360,000. This award was also supported by substantial evidence.

The jury was instructed to consider the claims of the individual respondent and the corporate respondent separately.[6] The law presumes that jurors understand and follow their instructions. (*Francis v. Franklin* (1985) 471 U.S. 307, 324, fn. 9.) The special verdict form agreed to by the parties, provided that if damages were awarded, the jurors could allocate damages to individual respondent Azordegan for past and future economic loss, and to corporate respondent 1 Source for past and future economic loss. The jury's award of damages indicates the jury followed the given instructions.

We view the evidence and resolve all factual conflicts in the light most favorable to the verdict, and we may not reweigh the evidence as appellants request or judge the credibility of witnesses unless their testimony is "inherently improbable or clearly false." (*Crabtree v. Western Pac. R. Co.* (1939) 33 Cal.App.2d 35, 41.) It is the exclusive province of the jury to determine the weight and sufficiency of the evidence. We find no basis for overturning the verdict here. The trial court did not err in denying the motion for JNOV.

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6 The jury received instruction No. 5005 as follows: "There are two Plaintiffs and two Defendants in this trial. You should decide the case of each Plaintiff and Defendant separately as if it were a separate lawsuit. Each Plaintiff and Defendant is entitled to separate considerations of its claim(s). Unless, I tell you otherwise, all instructions apply to each Plaintiff."

II. The Trial Court Did Not Abuse Its Discretion in Denying the New Trial Motion

Appellants contend that their motion for new trial should have been granted because the jury's award of damages was excessive when it failed to take into account the rental income Azordegan received.

Code of Civil Procedure section 657 provides in relevant part: "A new trial shall not be granted upon the ground of insufficiency of the evidence to justify the verdict or other decision, nor upon the ground of excessive or inadequate damages, unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury clearly should have reached a different verdict or decision." Thus, the trial judge "'sits . . . as an independent trier of fact.'" (*Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, 412.) We will reverse only if the "'opposing party demonstrates that no reasonable finder of fact could have found for the movant on [the trial court's] theory.'" (*Ibid.*) We review the trial court's denial of a motion for new trial under the abuse of discretion standard. (*Wall Street Network, Ltd. v. New York Times Co.* (2008) 164 Cal.App.4th 1171, 1176.) "[T]he motion for new trial can only be granted on a ground specified in the notice of intention to move for a new trial." (*Wagner v. Singleton* (1982) 133 Cal.App.3d 69, 72.)

Appellants' memorandum supporting the motion for new trial addressed only sufficiency of the evidence and excessive damages. In denying the motion the trial court stated that "there was testimony regarding each element of the cause of action and justifying the jury's award of damages, the jury, quite obviously, found and is supported by abundant evidence that there had been breaches and that the damages were in the amount awarded."

There was nothing arbitrary, capricious or patently absurd in the trial court's ruling. We find no abuse of discretion.

III. Motion to Compel Acknowledgement of Satisfaction of Judgment was Properly Denied

Appellants contend that respondent Azordegan received a double recovery and appellants should be allowed a set off. Appellants contend that because the jury awarded Azordegan $360,000 in damages for breach of the CLA, there should be a set off in the amount of $283,626.97[7] for the rent collected by Azordegan. Appellants contend that "the preliminary injunction was wrongful as a matter of law, and all rents that AZORDEGAN collected pursuant to it must be restored immediately."

On appeal, we will uphold the factual findings supporting the trial court's decision on a motion for satisfaction of judgment if the findings are supported by substantial evidence. (*George S. Nolte Consulting Civil Engineers, Inc. v. Magliocco* (1979) 93 Cal.App.3d 190, 193–194.) We will presume the existence of every fact the finder of fact could reasonably deduce from the evidence in support of the judgment or order. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) Moreover, the constitutional doctrine of reversible error requires that "'[a] judgment or order of the lower court [be] presumed correct.'" (*Nelson v. United Technologies* (1999) 74 Cal.App.4th 597, 605.) Therefore, all intendments and presumptions must be indulged to support the judgment or order on matters as to which the record is silent, and error must be affirmatively shown. (*Ibid*.) The appellant has the burden to demonstrate there is no substantial evidence to support the findings under attack. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.)

First, appellants' argument rests on the faulty premise that Azordegan's award of damages for breach of the CLA was a substitute for the rents due to him under the contractual terms of the CLA. At the hearing on this motion appellants' counsel argued that respondents are "not entitled to collect the rents at this point" "because the jury already gave them damages for it." The trial court responded, "No. The jury gave them damages for the diminution in value of the lease." The evidence at trial showed that

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[7] At various points in appellants' brief this amount is stated to be $280,000, $283,000, $283,626.97, and "*nearly* $306,000."

Azordegan paid $12,000 per month while the actual value of the lease as determined by respondents' expert Wallace, was $6,000.

Second, appellants do not show how any decision made by respondents entitles them to a satisfaction of judgment based on the amounts paid as rent by the subtenants. Respondents obtained a preliminary injunction to preserve their contractual rights pursuant to the CLA to continue to receive the rents owed to them from the subtenants. The injunction was a provisional remedy to preserve the status quo until a final judgment on the merits was awarded. (*Southern Christian Leadership Conference v. Al Malaikah Auditorium Co.* (1991) 230 Cal.App.3d 207, 223.)

A plaintiff cannot recover a judgment based on both rescission and damages, but may seek recovery based on rescission or damages in the alternative, and generally need not elect between the remedies until the case has proceeded through trial and all the evidence is presented. (*Paularena v. Superior Court* (1965) 231 Cal.App.2d 906, 915.) Here respondents elected to seek damages. Appellants' contention that the election of remedies is an acknowledgement that respondents abandoned their claim that they were entitled to rents under the terms of the CLA is not supported by the law.

The case on which appellant relies, *Asevado v. Orr* (1893) 100 Cal. 293 is inapposite. Appellant Orr sued Asevado to prevent him from depositing sand or gravel in a ditch and from diverting the water of a creek from the ditch. (*Id*. at p. 296.) He obtained an injunction restraining Asevado, pending the litigation, from doing those acts. Orr dismissed the action and Asevado brought an action to recover damages sustained by reason of the injunction from Orr and the sureties. (*Ibid.*) Judgment was entered in the amount of $750 against Orr, and $500 against the sureties. On appeal, the California Supreme Court held that the complaint against Orr did "not aver either malice or want of probable cause" and the judgment against Orr was reversed. (*Id.* at p. 298.) The Court stated "[t]he contention on the part of the respondents that the voluntary dismissal of the action was an admission by the plaintiff that he had no probable cause for commencing it is not tenable." (*Ibid.*)

Third, although irrelevant to our decision here we note inaccuracies and mischaracterization of the evidence. Appellants erroneously cite a page of the reporter's transcript asserting that respondent Azordegan testified that he had been "collecting the rents for whatever tenants are there" from March 2006 until the time of trial, and two pages of the reporter's transcript of the hearing on this motion and then assert that the Court recognized from the cited material that Azordegan "had collected $280,000 in rents to which he never proved himself entitled." Our review of the record reveals that Azordegan testified that there were only two tenants at the time of trial and he was receiving a total of $2,600 in rent. No further testimony was elicited as to how much Azordegan received in rent from the subtenants.

We find no support in the cited material or indeed anywhere in the record for appellants' claim that respondents collected $283,626.97 in rent.

Substantial evidence supports the trial court's finding that respondent Azordegan did not receive a double recovery and thus there is no amount to set off against the award of damages. The motion was properly denied.

DISPOSITION

The trial court's judgment and orders are affirmed. Respondents are to recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
DOI TODD

We concur:

_____, P. J.
BOREN

_____, J.
CHAVEZ