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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

AMAZING LA TOURS, INC., Plaintiff and Respondent, v. DAVID NICHOLLS, Defendant and Appellant.	B286458 (Los Angeles County Super. Ct. No. SC123206)

APPEAL from a judgment of the Superior Court of Los Angeles County. Lisa Hart Cole, Judge. Affirmed.

David Nicholls, in pro per, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

* * * * * *

A sub-lessee of a commercial lease sued its lessor for fraudulently inducing it to enter into the sublease. Following a three-day bench trial, the trial court awarded damages to the sub-lessee. The lessor appeals. Because none of the lessor's arguments has merit, we affirm.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

At the heart of this case is a 700 square foot office just blocks away from the Pacific Ocean in Santa Monica, California (the property).

At all times pertinent to this lawsuit, the property was owned by Second Street Center Partnership (Second Street). Second Street leased the property to Community Corporation of Santa Monica (Community). In 2004, Community subleased the property to London Travel Center, Inc. (London Travel) (the master lease). David Nicholls (Nicholls) is the sole officer of London Travel and personally guaranteed the sublease. In 2006, London Travel subleased a portion of the property to Amazing LA Tours, Inc. (Amazing Tours), whose majority owner and operator is Sam Hiasat (Hiasat).

The written sublease between London Travel and Amazing Tours was executed in November 2006. Prior to executing the sublease, the parties agreed that Amazing Tours would occupy half of the office space and would correspondingly pay half of the rent that Nicholls—through London Travel—was paying Community under the master lease. Hiasat would not have entered into the sublease had Amazing Tours's share of the rent not been pegged at 50 percent of the rent under the master lease. The terms of the written sublease are unclear because the document signed by Hiasat's brother at Hiasat's direction

(because Hiasat was out of the country tending to an ill parent) was only two or three pages in length, because Nicholls did not simultaneously provide a copy of that document to Hiasat's brother, and because, as discussed below, the four different documents Nicholls subsequently produced purporting to be the "original" sublease or a copy of it were each at least eight pages long and each contained *different* terms. However, none of the documents Nicholls eventually produced included any language expressly linking its rent to the rent charged in the master lease; it merely set forth what the monthly rent would be.

As it turns out, the monthly rent stated in the sublease was substantially more than 50 percent of the amount of rent charged to London Travel in the master lease. At the time the sublease started in 2006, Nicholls charged Amazing Tours 79 percent of the master lease's rent (that is, $1,600 per month out of the master lease's $2,015.71 per month). By 2013, and due chiefly to annual increases in the sublease's monthly rent, Nicholls was charging Amazing Tours 99.8 percent of the master lease's rent (that is, $2,400 per month out of the master lease's $2,406.86 per month).

Hiasat continued with the sub-lessee—and even renewed the sublease in 2009—because Nicholls repeatedly and consistently took steps to keep the terms of the master lease secret. When Hiasat approached Nicholls in early 2007 to ask him why the written sublease set forth a starting monthly rent of $1,600 when the parties had orally agreed that the monthly rent would start at $1,000 to $1,200, Nicholls reaffirmed that the $1,600 amount was half of the rent charged in the master lease and apologized for initially and mistakenly providing Hiasat with an estimate that was too low. Hiasat accepted this seemingly

reasonable explanation. When Hiasat and Nicholls executed a written extension of the sublease in 2009, Nicholls again reaffirmed that the amounts set forth in the extension were half of what Community was charging him in the master lease. And when Hiasat wrote to Nicholls in 2014 to indicate that they were *collectively* paying Community rent that was excessive (because, as far as Hiasat knew, his $2,400 monthly rent meant he and Nicholls were paying a total of $4,800), Nicholls (1) did not tell Hiasat he was wrong to think they were paying $4,800 per month, and (2) explained that he was in any event not at liberty to disclose what he was paying Community in the master lease because that lease contained a confidentiality clause. There was no confidentiality clause in the master lease.

II. Procedural Background

In October 2014, Amazing Tours sued Nicholls, London Travel and two other companies Nicholls used to carry on London Travel's business (namely, Santa Monica Cruise Tour & Travel Center, Inc. and Park City Air Cruise and Travel Corp.) for (1) reformation of the sublease to correctly reflect the parties' agreement that Amazing Tours would pay only half of the rent charged in the master lease, (2) fraud in the inducement, (3) negligent misrepresentation, (4) unfair competition, and (5) declaratory relief that the parties had a month-to-month tenancy.

The matter proceeded to a three-day bench trial in May 2017. By that time, the trial court had entered a default against London Travel because its corporate status was suspended due to failure to pay its taxes. Also, by that time, Amazing Tours's claims for reformation and declaratory relief had been dismissed.

The trial court issued a 15-page ruling awarding Amazing Tours $75,789.91 in damages on its fraud and negligent

misrepresentation claims. The court reasoned the viability of those claims turned on whether Nicholls had induced Amazing Tours to enter into the sublease by promising Hiasat that the sublease's monthly rent was half of the master lease's monthly rent, which turned on whom to believe—Hiasat (who said Nicholls made that promise) or Nicholls (who denied doing so). The court found that Nicholls was "not" "credible," and detailed its "several reasons" for coming to this conclusion: (1) Nicholls had denied that London Travel had any financial problems, but documentary evidence showed that Community had twice initiated eviction proceedings against London Travel in 2005 and early 2006 for non-payment of rent and that London Travel had been suspended for non-payment of state taxes; (2) Nicholls had gone "to extraordinary lengths to prevent Hiasat from discovering" the monthly rent charged in the master lease, a pointless act "unless Nicholls had something significant to hide"; (3) Nicholls had insisted that he lost the "original" sublease, but subsequently produced three "copies" of that original and miraculously found the "original" during trial—yet all four copies had been "clearly doctored" because they had the same signature block but materially different terms; and (4) Nicholls consistently maintained that the master lease had a confidentiality clause when it did not. The court ruled that Amazing Tours's remaining unfair competition claim was moot because the restitution it sought was duplicative of the "overpayment" damages the court awarded on the first two claims.

The court also held that Nicholls's still extant companies were the alter ego of Nicholls himself because he used them interchangeably and because it would be "inequitable" not to

treat them as a single entity, particularly given that Nicholls himself was the "perpetrator of the tortious conduct."

Following the entry of judgment for the calculated damages as well as prejudgment interest, Nicholls filed this timely appeal.

DISCUSSION

Nicholls argues that the judgment against him suffers from a plethora of defects that, in our view, fall into two broad categories: (1) the trial court's ruling is not supported by substantial evidence, and (2) that ruling is otherwise defective.

I. Substantial Evidence

"We review the trial court's factual findings for substantial evidence by examining the whole record, including conflicting evidence, in the light most favorable to the ruling below to determine whether there is reasonable, credible evidence of solid value to support that ruling." (*Ferguson v. Yaspan* (2014) 233 Cal.App.4th 676, 682.)

To prove fraud in the inducement of a contract, a plaintiff must prove (1) a "misrepresentation ([that is, a] false representation, concealment, or nondisclosure)," (2) "knowledge of falsity (or 'scienter')," (3) "intent to defraud, i.e, to induce reliance," (4) "justifiable reliance," and (5) "resulting damage." (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638 (*Lazar*).) To prove negligent misrepresentation, the plaintiff must prove "each of the [above stated] elements except for knowledge of the falsity of the representation; [an] honest belief in the truth of the statement, without a reasonable ground for that belief, is sufficient." (*R & B Auto Center, Inc. v. Farmers Group, Inc.* (2006) 140 Cal.App.4th 327, 377 (conc. & dis. opn. of Fybel, J.].)

Substantial evidence supports the trial court's findings that Nicholls committed the torts of fraud in the inducement and

negligent misrepresentation. Nicholls falsely represented to Hiasat that the monthly rent in the sublease was half of that in the master lease. Nicholls's "extraordinary" efforts to keep Hiasat from learning the terms of the master lease are powerful evidence that Nicholls knew his representation was untrue. (E.g., *Tenzer v. Superscope* (1985) 39 Cal.3d 18, 30 ["fraudulent intent must often be established by circumstantial evidence"].) At a minimum, Nicholls's possession of the master lease setting forth the rent due under that lease means that Nicholls had no reasonable ground for his representation to Hiasat regarding what constituted half of that rent. Nicholls intended Hiasat to rely on his false representation because Nicholls refused to tell Hiasat the truth, even though Hiasat told him how important the 50/50 term was at the outset and even after Hiasat twice confronted him about the higher-than-expected monthly rent in the sublease. Hiasat justifiably relied on Nicholls's false representation because Nicholls deftly denied Hiasat access to the master lease (which would have revealed Nicholls's deceit), provided seemingly reasonable explanations for the sublease's rent amount, and remained silent in the face of Hiasat's repeated statements that they were sharing the master lease's rental obligations 50/50. And Amazing Tours was damaged by paying for more than it received (*Holder v. Home Sav. & Loan Asso.* (1968) 267 Cal.App.2d 91, 108-109 (*Holder*)), and the parties stipulated that this amount came to $75,789.91.

Nicholls levels what boils down to six challenges to this analysis.

First, he argues that Amazing Tours is categorically barred from recovering any damages because (1) it willingly paid the rent due under the written terms of the sublease for nearly a

decade, (2) the alleged promise that the sublease's rent accounted for only half of the master lease's rent was not reduced to writing in the sublease (such that the oral representation violates the parol evidence rule), and (3) Hiasat is at fault for not reading the sublease before signing it. These arguments might have some purchase if Amazing Tours had sued Nicholls for breach of contract. But it did not. Instead, Amazing Tours sued Nicholls for fraud in the inducement—that is, on the theory that it "understood the contract it was signing," but that "its consent to th[at] contract was induced by fraud." (*Brown v. Wells Fargo Bank, N.A.* (2008) 168 Cal.App.4th 938, 958; *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 415.) When suing under this theory, it does not matter "whether the defendant's promise is ultimately enforceable as a contract" (*Lazar*, *supra,* 12 Cal.4th at p. 638) or whether the defrauded party read the terms of the contract (because doing so "would not necessarily have" "alerted" him to the "false representations") (*Orozco v. WPV San Jose, LLC* (2019) 36 Cal.App.5th 375, 392; *Chapman v. Skype, Inc.* (2013) 220 Cal.App.4th 217, 232-233; see also *Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Assn.* (2013) 55 Cal.4th 1169, 1183, fn. 11 [leaving issue open]).

Second, Nicholls contends that the trial court erred in finding him not to be a credible witness—which is why the trial court believed he had made a false representation—because (1) Hiasat's contrary testimony was "ridiculous" and "preposterous," and (2) the court's credibility finding as to Nicholls was defective because (a) the master lease should not have been admitted into evidence and (b) without that lease, the court could not have relied upon the contradiction between the absence of a

confidentiality clause in the master lease and Nicholls's testimony to the contrary as a basis for disbelieving Nicholls. As a threshold matter, Nicholls is asking us to second guess the trial court's credibility finding. This is something we are not equipped—and hence not permitted—to do. (*People v. Prunty* (2015) 62 Cal.4th 59, 89 [""We do not reweigh evidence or reevaluate a witness's credibility"""].)

We are also unpersuaded. Hiasat's testimony that he and Nicholls had agreed to evenly split the master lease's rent is consistent with their oral agreement to evenly split the property's square footage. To be sure, the four versions of the sublease Nicholls eventually produced all stated that Amazing Tours would occupy "two thirds" of the property. But there was ample reason to suspect that this written term—like the subleases Nicholls produced—was an after-the-fact fabrication, particularly in light of testimony from both Hiasat and one of Amazing Tours's employees that Amazing Tours occupied only half of the property's square footage. However, even if we were to second guess the trial court's weighing of the evidence and credit Nicholls's testimony (and the subleases' language) that the sublease allowed Amazing Tours to occupy two-thirds of the square footage, that still does not explain why Amazing Tours was paying between three-quarters and nearly all of the rent.

The trial court also properly admitted the master lease into evidence. Nicholls urges that Amazing Tours's counsel engaged in misconduct by issuing a subpoena to Community for a copy of the lease and that the court should have granted Nicholls's motion to quash the subpoena on the ground that the court in a prior unlawful detainer action between the parties had declared the master lease to be confidential. We reject this assertion for

several reasons: Nicholls voluntarily withdrew his motion to quash, thereby forfeiting the issue on appeal; Nicholls also forfeited the issue on appeal by never objecting to the admission of the master lease at trial; and the unlawful detainer court had *denied* Nicholls's motion to quash production of the master lease in that case and merely allowed him to redact any "confidential or proprietary information," but we now know the master lease did not by its own terms declare any of its contents to be confidential or proprietary. At bottom, the gist of Nicholls's argument is that the court erred in not granting Nicholls a right to conceal information (under, Nicholls suggests, the Fourth Amendment or the right to privacy) that would have revealed his deceitful behavior, but we are aware of no right to suppress unprivileged information in order to continue the perpetration of a fraud. Not surprisingly, we decline to create such a right. We likewise reject Nicholls's related contention that, because he and Hiasat were not in a joint venture, Nicholls had no duty to disclose the master lease's rent amount to Hiasat and thus could not be held liable for fraud based on that nondisclosure. Where, as here, a party affirmatively misrepresents a fact (here, that Amazing Tours was only paying half of the rent), that misrepresentation constitutes a fraud even in the absence of an independent duty to disclose. (See *Charpentier v. Los Angeles Rams Football Co., Inc.* (1999) 75 Cal.App.4th 301, 312, fn. 9 [duty is not an element of a claim based on affirmative misrepresentation]; see also *Los Angeles Memorial Coliseum Com. v. Insomnia, Inc.* (2015) 233 Cal.App.4th 803, 831 [comparing elements of fraud based on affirmative misrepresentation and elements of fraud based on concealment].)

Third, Nicholls asserts that Amazing Tours suffered no damages because it got what it paid for (namely, the right to occupy the property) and because its damages were "speculative." Where, as here, a plaintiff establishes fraud in the inducement, the typical measure of damages is the plaintiff's "out-of-pocket" losses—that is, "the difference in actual value at the time of the transaction between what the plaintiff gave and what [it] received." (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1240; *Kenly v. Ukegawa* (1993) 16 Cal.App.4th 49, 54; *Holder*, *supra*, 267 Cal.App.2d at pp. 108-109.) As applied here, Amazing Tours would be entitled to the difference between what it paid Nicholls (that is, the inflated payments under the sublease) and what it received (that is, the value of the property). In calculating what Amazing Tours received, the court implicitly looked to the monthly rent set forth in the master lease as the fair market value of the property, and calculated the value to Amazing Tours as half that amount. This was a "reasonable basis of comput[ing the] damages." (*GHK Assocs. v. Mayer Group* (1990) 224 Cal.App.3d 856, 873.) And the precise calculation of those damages was not "speculative" and cannot otherwise be attacked on appeal because Nicholls stipulated to that calculation. (Accord, *In re Marriage of Freeman* (1996) 45 Cal.App.4th 1437, 1451-1452 (*Freeman*) [stipulation to issue waives it on appeal].)

Fourth, Nicholls argues that the trial court erred in not giving dispositive weight to his affirmative defenses of (1) the statute of limitations, (2) laches, and (3) waiver (on the ground that Hiasat waived any right to object by not insisting that the link to the master lease be included in the sublease and by paying the sublease's specified rent).

In its ruling, the court refused to consider the statute of limitations defense because Nicholls did not plead it as one of the 19 affirmative defenses asserted in his answer and his amended answer. This is undeniably correct. (*Hall v. Chamberlain* (1948) 31 Cal.2d 673, 679 ["The general rule is firmly established that if a statute of limitations is not pleaded it is waived."].) Nicholls claims he did not have time to plead the statute of limitations defense, but nothing in the record indicates he was unable to plead a 20th affirmative defense of statute of limitations in either of the answers he filed. Nicholls purports to cite contrary authority empowering him to object to the statute of limitations at any time, but that authority all deals with criminal cases where the limitations period is *jurisdictional*. (See *People v. Williams* (1999) 21 Cal.4th 335, 341; *Cowan v. Superior Court* (1996) 14 Cal.4th 367, 374.) The same is not true in civil cases.

The trial court considered the affirmative defenses of laches and waiver, but declined to apply them because they are equitable defenses that, in its view, were unavailable to a party like Nicholls who had acted inequitably by engaging in fraudulent behavior. This is also undeniably correct: The defenses of laches and waiver are equitable defenses (*Estate of Kampen* (2011) 201 Cal.App.4th 971, 998 [laches]; *Watkins v. Warren* (1932) 122 Cal.App. 617, 625 [waiver]); "'one who seeks equity must be willing to do equity'" (*Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 180); and Nicholls's conduct in making false representations to Hiasat to induce him to enter into a contract is deceitful—and hence, inequitable—behavior (e.g., *Pedro v. Soares* (1937) 18 Cal.App.2d 600, 610 ["fraudulent conduct" disentitles defendant to assert equitable defenses]). The trial court's rejection of Nicholls's waiver defense

is correct for one additional reason—namely, by making Amazing Tours's payment of rent under the lease a disqualifying act, Nicholls is effectively arguing that a plaintiff must first breach a contract in order to sue for fraud in its inducement. This argument is absurd.

Fifth, Nicholls contends that the trial court lacked any basis to reform the sublease. However, the court did no such thing. Amazing Tours's reformation claim had already been dismissed, and the court awarded the proper measure of damages.

Lastly, Nicholls asserts that the trial court's analysis was defective because (1) the court's written ruling focused on the question of the parties' credibility rather than ticking through the elements of the various claims, and (2) the court erred in not asking the parties' witnesses certain questions that now, on appeal, Nicholls insists should have been asked. The court's focus on credibility was entirely appropriate because, as noted above, that was the chief issue to be decided—who was telling the truth about the negotiations leading up to the sublease? And the inquiry on substantial evidence review is not what questions should have been asked, but whether the answers to the questions that *were* asked add up to substantial evidence supporting the judgment. For the reasons we have explained, they do.

II. Remaining Arguments

A. *Severance order*

Nicholls argues that the trial court erred in denying his motion to bifurcate the trial into two phases: (1) a bench trial on Nicholls's affirmative defenses (statute of limitations, laches, and waiver) and Amazing Tours's equitable claims (reformation,

unfair competition, and declaratory relief); and (2) a jury trial on Amazing Tours's legal claims (fraud and negligent misrepresentation). This argument ignores Nicholls's own behavior in subsequently stipulating with Amazing Tours to try *all* issues and claims to the court in a bench trial and in correspondingly taking his bifurcation motion off calendar. He cannot now complain on appeal about the failure to bifurcate. (*Freeman*, *supra*, 45 Cal.App.4th at p. 1451.)

B. *Subjecting Nicholls to duress*

Nicholls contends that the trial court erred in requesting to speak with counsel in chambers to discuss the court's "concerns" with the original sublease that Nicholls produced for the first time mid-trial. This chambers conference was not reported. Nicholls asserts, without any citation to the record, that the court had counseled his attorney that (1) the "original" produced mid-trial was doctored, and (2) Nicholls ran the risk of committing perjury if he resumed the stand to authenticate the document. As a result, Nicholls continues, his attorney did not recall him to take the stand. This sequence of events, Nicholls concludes, prejudged his credibility and violated his constitutional rights "to a fair trial, due process, to give testimony freely, to present relevant evidence at the hearing, and the right to have an impartial trier of fact."

Nicholls is wrong. To begin, this contention is based on nothing but speculation, and not anything in the record. More to the point, Nicholls's contention is without merit. A trial court acting as the trier of fact may permissibly comment that a witness whose credibility is at issue has testified falsely (*People v. Venegas* (1970) 10 Cal.App.3d 814, 825), and may go a step further and advise a witness on the dangers of testifying when it

might incriminate him (*People v. Warren* (1984) 161 Cal.App.3d 961, 972). What a court may *not* do—at least in a criminal case where the defendant has a Sixth Amendment right to compulsory process—is threaten a defense witness with a perjury prosecution before the witness takes the stand. (*Webb v. Texas* (1972) 409 U.S. 95, 97-98.) Even if we assume that a civil litigant such as Nicholls is entitled to similar protection, he has not pointed to anything in the record indicating that he was subjected to such coercive pressure.

Nicholls has also not proven that his failure to re-take the stand after this chambers conference would have had any effect on the outcome of the trial. (See *People ex rel. City of Santa Monica v. Gabriel* (2010) 186 Cal.App.4th 882, 887 ["'the burden is on the appealing party to demonstrate'" "prejudice"].) The trial court cited four reasons for its conclusion that Nicholls was not credible, and Nicholls's surprise, mid-trial production of the "original" sublease was only one of those reasons. What is more, it is highly unlikely that anything Nicholls could have said would have negated the objective facts that the newly discovered "original" sublease was (1) different from the other "copies" Nicholls had produced, and (2) different in a way that explicitly favored Nicholls by containing a for-the-first-time-ever paragraph reciting that the master lease's provisions were confidential.

DISPOSITION

The judgment is affirmed. Amazing Tours is entitled to its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
HOFFSTADT

We concur:

_____, P.J.
LUI

_____, J.
ASHMANN-GERST