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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

JOHN MICHAEL DELUCA et al.,

Plaintiff, Respondent and
Cross-Appellant,

v.

STATE FISH COMPANY, INC.,

Defendant, Appellant and
Cross-Respondent.

B245049

(Los Angeles County
Super. Ct. Nos. BC353346 &
NC041884)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Ross M. Klein, Judge. Judgment is modified and, as so modified, is affirmed.

Costell & Cornelius Law Corp., Jeffrey Lee Costell, Alexandre I. Cornelius,
Lewis B. Adelson and Jonathon D. Nicol for Plaintiff, Respondent and Cross-Appellant.

Law Offices of Michael Leight and Michael Leight; Tierney | Knipe Law,
John N. Tierney and Nicholas Knipe; Garfield & Tepper and Scott J. Tepper for
Defendant, Appellant and Cross-Respondent.

Plaintiff John DeLuca obtained a judgment in unlawful detainer against defendant State Fish Company, Inc. (State Fish), arising out of DeLuca's termination of State Fish's month-to-month lease of a fish storage, packing, and processing plant. The judgment awarded DeLuca possession of the plant, and damages for its reasonable rental value. DeLuca appeals,¹ arguing the judgment was erroneous in that it: (1) failed to include damages from the date of the verdict to the date of the judgment; and (2) failed to state that the lease was terminated 30 days after service of the notice to quit. Both arguments are meritorious; we therefore modify the judgment and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

As the two errors asserted on appeal relate only to the language of the judgment itself, only a cursory review of the factual and procedural background is necessary. The instant unlawful detainer action is only one of several actions filed between State Fish and DeLuca. State Fish is a family-owned business; DeLuca is a member of the family who left State Fish and began his own, competing, fish business. The unlawful detainer action arose when DeLuca chose to terminate State Fish's long-term tenancy of the plant (under an oral month-to-month lease), so that he could use the plant in his own business.

On May 1, 2006, DeLuca served State Fish with a notice to quit. The notice to quit provided that State Fish's tenancy would end thirty days after the date of service. State Fish did not vacate the plant. On June 2, 2006, DeLuca filed the instant unlawful

¹ Initially, State Fish appealed and DeLuca cross-appealed. State Fish has since dismissed its appeal. The only appeal remaining before this court, therefore, is the DeLuca cross-appeal.

detainer action. In addition to possession of the plant, DeLuca sought, by means of a form unlawful detainer complaint, damages in the amount of the fair rental value of the premises “for each day that defendants remain in possession through entry of judgment.”

The case proceeded to trial although, due to other matters pending between the parties, trial on the unlawful detainer complaint was not held for some *six years*. The matter was tried to a jury, which rendered a special verdict on August 9, 2012. Among other things, the jury found: (1) DeLuca is the owner of the plant; (2) DeLuca rented the plant to State Fish; (3) DeLuca gave “proper 30 days’ written notice that the tenancy was ending”; (4) DeLuca suffered monetary rental damages as the result of State Fish staying in the plant after June 1, 2006; and (5) the reasonable rental value of the plant from June 1, 2006 to “the present”² was \$1,844,166.

DeLuca prepared a proposed judgment. State Fish submitted objections to the proposed judgment, and DeLuca submitted a revised proposed judgment, to which State Fish submitted additional objections, and its own revised proposed judgment. Thereafter, DeLuca submitted a reply to State Fish’s revisions. As to the two issues now before us, the ultimate positions of the parties were as follows: (1) DeLuca’s revised proposed judgment provided for an award to DeLuca of additional daily

² Although the jury’s verdict was dated August 9, 2012, DeLuca represents that the jury calculated damages only to July 31, 2012. State Fish does not challenge this representation.

damages from the date of the verdict to the date of the judgment.³ State Fish did not take issue with this language, and, in fact, included it in its own version of the proposed judgment. (2) Once it had been agreed by the parties that State Fish could remain in possession until November 16, State Fish sought language in the judgment providing that the lease would be terminated “[a]s of November 16, 2012.” DeLuca responded that while State Fish’s *possession* of the plant might terminate at that time, the *lease* had been terminated when the notice to quit expired on May 31, 2006. DeLuca therefore proposed that the judgment contain language to that effect.⁴

On November 2, 2012, the court entered judgment. For reasons which are not entirely clear from the record, the court omitted the language regarding daily damages from the date of the verdict to the date of judgment.⁵ As to the date of termination of

³ As noted above (see fn. 2, *ante*), the verdict covered damages to July 31, 2012, so DeLuca sought additional damages beginning from August 1, 2012. Similarly, although the judgment was ultimately entered on November 2, 2012, DeLuca sought the additional damages only through October 31, 2012. This was because the parties had reached an agreement regarding an amount State Fish would pay DeLuca to remain in possession of the plant from November 1 through November 16, 2012.

⁴ DeLuca’s proposed judgment erroneously stated the lease terminated as of May 31, 1996.

⁵ While the record is not clear as to exactly how this occurred, there is a possible clue in State Fish’s revised proposed judgment. The document states, on page two, that judgment is to be entered in favor of DeLuca “for damages in the total amount of \$ _____. The Judgment includes the following:” Underneath that provision are three subparagraphs, the first of which is the jury award of \$1,844,166, less previous amounts paid by State Fish of \$1,050,000 “for a remaining total of \$794,166.” The remaining two subparagraphs – providing for additional daily damages through judgment in the amount of \$75,378.36, and costs in an amount to be calculated – are on the following page. On page two, however, someone has interlineated “\$794,166” in the space for the total amount of damages. In other words, although State Fish agreed that the total

the lease, the court used language initially proposed by DeLuca (but subsequently superseded by his later revisions) which simply stated the lease “is hereby terminated.”

Once judgment had been entered, DeLuca attempted, through post-judgment proceedings, to modify the judgment to correct these two errors. While the record does not clearly indicate the bases on which DeLuca’s motions were denied, we note that State Fish filed its notice of appeal on November 6, 2012, the day before the hearing on DeLuca’s initial ex parte application to correct the judgment. This limited the court’s jurisdiction; after an appeal has been taken, the trial court could only correct clerical errors in its judgment, not judicial errors.⁶ (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2013) ¶¶ 7:17-7:18.) DeLuca then timely filed a notice of cross-appeal. As noted above, State Fish has since dismissed its appeal.

DISCUSSION

1. *The Judgment Must Be Modified to Include Post-Verdict, Pre-Judgment Damages*

The damages recoverable in an unlawful detainer action are controlled by Code of Civil Procedure section 1174. (*Castle Park No. 5 v. Katherine* (1979) 91 Cal.App.3d Supp. 6, 9.) The statute is strictly construed and relief not authorized by the statute may not be given. (*Ibid.*) The statute provides that the “jury or the court, if the proceedings be tried without a jury, shall . . . assess the damages” occasioned by the unlawful

damages awarded should include all three subparagraphs, it appears that someone omitted the two subparagraphs on the third page when filling in the blank for the total.

⁶ In his appeal, DeLuca challenges only the judgment itself, not the denial of his post-judgment motions. We therefore need not decide whether the errors complained of were, in fact, clerical.

detainer. (Code Civ. Proc., § 1174, subd. (b).) Damages are calculated as “ ‘the reasonable value of the use of the premises during the time of [the] unlawful detainer.’ ” (*Lehr v. Crosby* (1981) 123 Cal.App.3d Supp. 1, 9.) Damages are allowed up to the date of judgment, but not after that date. (*Hudec v. Robertson* (1989) 210 Cal.App.3d 1156, 1163.) In sum, an unlawful detainer plaintiff is entitled to the reasonable rental value of the property during the time that its right to possession was denied. (*Superior Motels, Inc. v. Rinn Motor Hotels, Inc.* (1987) 195 Cal.App.3d 1032, 1071.) This period runs from the termination of the tenant’s right of possession to judgment. (*Id.* at p. 1066.)

In DeLuca’s complaint, he sought relief up to the date of judgment. During trial, the parties *agreed* that the jury would not specifically be asked to calculate a daily damage amount. Instead, the trial court would calculate the daily fair rental value based on the lump sum awarded and determine post-verdict damages. State Fish’s counsel agreed, stating, “I’m willing to let the Court make that determination.” After trial, DeLuca calculated a daily fair rental value of \$819.33 per day, based on the jury’s verdict,⁷ and used it in the proposed judgment, seeking post-verdict, pre-judgment damages of \$75,378.36. State Fish never challenged the calculation, nor did it challenge DeLuca’s right to collect that amount. Indeed, when DeLuca’s counsel first raised the omission from the judgment with State Fish’s counsel, State Fish’s counsel

⁷ The jury calculated damages from June 1, 2006 through July 31, 2012, a period of 74 months. The total award of \$1,844,166 is thus the equivalent of a monthly reasonable rental value of \$24,921.16, or a daily reasonable rental value of \$819.33.

responded, “There is law that says in an unlawful detainer proceeding, it is proper to award damages up to the date the judgment is entered.”

DeLuca’s right to an award of damages up to the time of judgment, in the amount calculated in its proposed judgment, cannot be disputed. On appeal, State Fish’s sole argument against DeLuca’s position is that the trial court lacked jurisdiction to augment the jury’s award. In other words, State Fish argues that, since the case was tried to a jury, only the jury “shall . . . assess” the damages, pursuant to Code of Civil Procedure section 1174. Even if this were a correct interpretation of the statutory language, however, State Fish has waived this argument by specifically agreeing, at trial, that the trial court could make this determination.⁸ The judgment will therefore be modified to include damages from the date of the verdict to the date of judgment, in the uncontested amount.

2. *The Judgment Must be Modified to Include the Proper Date of Termination of the Lease*

When there is a month-to-month lease, “either of the parties may terminate the same by giving at least 30 days’ written notice thereof at any time” (Civ. Code, § 1946.) DeLuca served a 30-day notice to quit on May 1, 2006. That notice provided that the lease would terminate 30 days after the notice was served. Thus, if the notice to quit was properly served, State Fish’s tenancy terminated on May 31, 2006, and its

⁸ Indeed, DeLuca’s counsel had specifically stated, “I don’t want to hear an objection after the fact that we’re capped at [the jury’s award of a lump sum] and that we can’t seek daily damages from the day the verdict has been read” State Fish’s counsel agreed to let the trial court make the calculation and determine post-verdict damages.

unlawful detainer of the premises commenced on June 1, 2006. (See *Highland Plastics, Inc. v. Enders* (1980) 109 Cal.App.3d Supp. 1, 7 [stating that the tenancy is terminated “on expiration of the notice period” and that no cause of action arises “until after the tenancy has been terminated”].)

The jury was asked to find whether the notice to quit was properly served; it concluded the notice to quit *was* properly served. Thus, the lease terminated on May 31, 2006. DeLuca is entitled to a judgment stating that the lease terminated on this date, rather than at the time of entry of judgment.⁹

On appeal, State Fish argues that DeLuca is not entitled to judgment on this point because DeLuca could have sought, but did not seek, a specific jury finding on the issue of the date of termination of the lease. State Fish notes that the jury was asked if DeLuca “gave ‘proper 30 days’ written notice that the tenancy was ending’ [but] was not asked when [the notice to quit] was served, and service was . . . contested.” Even if State Fish were correct that the date of service was contested, the issue was, in fact, presented to the jury. The jury had been specifically instructed that, in order to find that DeLuca gave proper notice, DeLuca must have established three elements: (1) that the notice informed State Fish in writing that the tenancy would end on a date at least 30 days after notice was given; (2) that notice was given at least 30 days before the

⁹ DeLuca represented to the court that, in another case between the parties, State Fish was pursuing a dispositive motion based on the purported fact that the lease was “in effect” until the November 2, 2012 judgment in the instant case, and thus it had a legal right to remain in possession of the premises until that date. This is clearly a meritless argument. DeLuca would not have received *any* damages for State Fish’s unlawful detainer of the premises if State Fish had lawfully been in possession up to the time of judgment.

tenancy was to end; and (3) “That the notice was given to State Fish . . . at least 30 days before June 1, 2006.” The jury found that DeLuca gave proper notice; therefore, the jury necessarily found that the notice was given at least 30 days before June 1, 2006. DeLuca is therefore entitled to a judgment providing that the lease terminated on May 31, 2006.¹⁰

¹⁰ It could be argued that, because of the language in the jury instruction, the jury found a lease termination date of *no later than* June 1, 2006, and that DeLuca is therefore entitled to a judgment stating June 1, 2006 as the termination date. However, such a provision would be problematic. If the lease terminated on June 1, 2006, the jury’s award of damages calculated “from June 1, 2006” would be inconsistent. In any event, State Fish takes no issue with a termination date of May 31, 2006 as opposed to June 1, 2006; State Fish seeks a lease termination date some six years later, at the time of judgment.

DISPOSITION

The judgment is modified as follows: (1) Item 3 of the judgment, which states “Judgment is now entered in favor of John Michael DeLuca and against State Fish Company Inc. and for damages in the total amount of \$794,166.00” is modified to provide for total damages in the amount of \$869,544.36, including post-verdict, pre-judgment damages of \$75,378.36; and (2) the second sentence of item 2 of the judgment, which states, “The subject Lease is hereby terminated,” is stricken, and replaced with “The subject lease was terminated on May 31, 2006.” In all other respects, the judgment is affirmed. DeLuca is to recover his costs on appeal.

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CROSKEY, J.

WE CONCUR:

KLEIN, P. J.

ALDRICH, J.