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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

2503 HASTE STREET OWNER, LLC, Plaintiff and Respondent, v. FANX, INC., Defendant and Appellant.	A170061 (Alameda County Super. Ct. No. 23-CV-034357)

Defendant FanX, Inc. (FanX), a commercial tenant, appeals from the trial court's order denying its motion to vacate the judgment in favor of the landlord, plaintiff and respondent 2503 Haste Street Owner, LLC (Owner). The court entered that judgment after granting summary judgment for the Owner. FanX attempts to appeal from both the court's grant of summary judgment and its subsequent denial of the motion to vacate. But we lack jurisdiction to consider FanX's appeal from the judgment itself because it was untimely. We therefore consider only FanX's appeal from the order denying its motion to vacate the judgment and find that Code of Civil Procedure section 663,[1] which governs motions to vacate a judgment, does not apply to a *summary* judgment. And even if it did apply, we find no merit in FanX's

[1] All further statutory references are to the Code of Civil Procedure unless otherwise specified.

arguments. Accordingly, we affirm.

I. BACKGROUND

A. The Parties' Lease

In January 2021, FanX and Owner's predecessor entered into a commercial lease agreement (lease) for approximately 2,887 square feet of retail space (Premises) within a multi-unit building in Berkeley. FanX agreed to lease the Premises for six months so FanX could assess its longer term suitability as a virtual reality arcade. The lease provided that "Landlord shall not be obligated to provide or pay for any improvement work or services related to the improvement of the Premises," except those identified in an attached "Work Letter Agreement [(WLA)]."

The WLA, in turn, identified various work, referenced as "shell improvements," which included the addition of partition walls, and the installation of electrical outlets and interior lighting, as well as heating and ventilation. The lease also obligated the landlord to deliver the Premises "in compliance with all applicable building codes . . . and all applicable construction-related accessibility standards under California law." The landlord was further responsible "for the cost of any repairs necessary to correct any violations of applicable building codes . . . within the Premises resulting from the completion of Landlord's Work." Any further work "necessary for [FanX] to open for business from the Premises" was to "be completed by [FanX] at [its] sole cost and expense."

Section 3.2 of the lease (Section 3.2) specified that the lease commencement date would be the later of "[10] business days after Tenant is legally permitted to operate its business at the Premises by the City of Berkeley . . . [and 60] days following the date Landlord delivers possession of the Premises to Tenant with Landlord's Work . . . substantially completed as

described in [the WLA]." Section 3.2 further granted either party the right to terminate the lease if the commencement date "has not occurred on or before August 1, 2021" or "Tenant receives written notice from the City of Berkeley . . . that Tenant is legally prevented from operating its business for [90] days or more."

In September 2021, FanX was notified that "Landlord's Work was complete." Later that month, FanX e-mailed Owner's predecessor that the building's front doors were not "fully functional" and that it was the landlord's responsibility to fix it. Owner's predecessor agreed to repair the doors. Ten months later in July 2022, Owner's predecessor e-mailed FanX that the "front door . . . was secured with a better lock and chain." The e-mail referenced an earlier meeting FanX had with a staff member "showing him the issue" and stated that a vendor would "see what adjustments might be needed to the pin for proper security that doesn't need the chain and lock." The e-mail emphasized that "security is an issue in Berkeley." Two days later, Owner's predecessor assigned all rights, interests, and obligations as the lessor to Owner.

In August 2022, Owner and FanX executed a document titled "Notice of Lease Term Dates." The document specified that FanX's lease "shall commence on September 1, 2022 for a term of [6] months ending on February 28, 2023." On September 13, 2022, Owner notified FanX that it was delinquent in its rent payment. FanX made a partial rent payment for September but made no further rent payments after that. Owner subsequently sent FanX multiple notices regarding its failure to pay rent.

In late January 2023, Owner and FanX exchanged more e-mails regarding repairs to the front doors by Owner's vendor, with FanX commenting that "[t]he problem with the front door is the only thing standing

in the way of our opening." On January 30, Owner e-mailed FanX that the "work has been completed regarding the doors" and included a summary of the repairs. Owner concluded the e-mail by noting that "[t]his was completed per your request in good faith but no further alterations are agreed to or called for in the lease."

In February 2023, Owner's attorney sent a letter to FanX, reminding it that its lease was set to expire at the end of the month. The letter referenced and responded to FanX's contentions that the " '[l]ease has not yet commenced' " and that FanX would " 'not be vacating the [P]remises on February 28th.' " On February 28, Owner's attorney sent a second letter to FanX, demanding that it pay $20,176.25 in total past due rent within three days. FanX did not pay any rent and remained in possession of the Premises. In April, Owner's attorney sent another letter to FanX, demanding that it vacate the Premises and pay all past due rent within three days. FanX again did neither.

B. Summary Judgment and Motion to Vacate

In May 2023, Owner filed an unlawful detainer action against FanX. In October, Owner filed a motion for summary judgment, arguing that there was no triable issue of material fact based on FanX's failure to pay rent and failure to vacate the Premises after the term of the lease had expired. FanX opposed, arguing that the lease obligated Owner to repair the front doors before the term of the lease commenced under Section 3.2 and that "[n]o real attempt was made by [Owner]" to repair the front doors until January 2023. The opposition continued that because the lease term never started, "no rents are yet due." The trial court took the motion under submission for several weeks, after hearing oral arguments from the parties.

While the matter was under submission, FanX sent a lengthy letter to

the trial court with various attached documents. The letter stated that following the hearing, FanX served a document subpoena to the vendor hired by Owner to repair the front doors. The letter continued that FanX had received documents that were "case dispositive" and should be considered in connection with the motion for summary judgment. The court declined to consider FanX's untimely and "unfiled communication" and granted Owner's motion. In its order, the court agreed with Owner that although Section 3.2 gives either party the right to terminate the lease under certain conditions, it "does not support [FanX's] argument that it can simply stay and refuse to pay rent because it made its own determination that it would not be feasible to operate the business with allegedly malfunctioning doors."

Judgment was entered in favor of Owner and on December 4, 2023, a notice of entry of judgment was filed and served on FanX. On December 18, FanX moved to set aside or vacate the judgment. Among other arguments, FanX contended that the judgment should be vacated under section 663 because the trial court drew an erroneous legal conclusion regarding Section 3.2 and the lease commencement date. FanX further argued that the judgment should be vacated based on the court's "mistake, inadvertence, surprise, or excusable neglect" under section 473. Owner opposed the motion.

On January 30, 2024, the trial court denied FanX's motion to vacate on the grounds that both sections 473 and 663 were inapplicable.[2] As for section 663, the court held that it did not apply because it "requires the [c]ourt to enter a different [j]udgment after setting aside the [current one]." The court further held that FanX failed to show that the ruling on summary judgment

[2] On appeal, FanX abandons its argument that section 473 provides any basis to vacate the judgment. Indeed, section 473 only authorizes relief due to a *party's* or *attorney's* "mistake, inadvertence, surprise, or excusable neglect." (§ 473, subd. (b).)

was either "legally or factually erroneous." A notice of entry of order was filed and served that same day.

On March 26, 2024, FanX filed a notice of appeal. The notice included a January 30, 2024 date for the appealed judgment or order but specified that the appeal was from a "[j]udgment after an order granting a summary judgment motion," even though notice of entry of the judgment was filed and served on December 4, 2023. We consolidated this appeal with FanX's appeal in case No. A170902 solely for purposes of oral argument.

II. DISCUSSION

As a threshold matter, we find that any appeal by FanX from the judgment and the underlying grant of summary judgment was untimely.[3] The notice of entry of judgment was filed and served on FanX on December 4, 2023. If FanX intended to appeal from that judgment, then it had to file its notice of appeal by February 2, 2024. FanX, however, did not file its notice of appeal until March 26, 2024—over 50 days later. Thus, as conceded by FanX, the appeal is only timely with respect to the January 30, 2024 order denying FanX's motion to vacate. We therefore only consider FanX's challenge to that order under section 663 (cf. *In re Marriage of Eben-King & King* (2000) 80 Cal.App.4th 92, 109 [we have "no jurisdiction to review the merits of the judgment" where the notice of appeal is untimely]), and reject it.

Section 663 provides that a judgment may be set aside or vacated and a new judgment entered if there is an "[i]ncorrect or erroneous legal basis for

[3] We reject FanX's argument that we already decided this issue in its favor by denying Owner's motion to dismiss the appeal. In opposing the motion, FanX *only* argued that its notice of appeal was timely as to the order denying its motion to vacate and that it merely "fail[ed] to check off one box in the form Notice [o]f Appeal." FanX did not otherwise contend that its appeal from the *judgment* itself was timely. Accordingly, the timeliness of that appeal was never before us.

the decision, not consistent with or not supported by the facts." An order denying a motion under section 663 is independently "appealable even [if] the appeal from the judgment was untimely." (*Howard v. Lufkin* (1988) 206 Cal.App.3d 297, 301.) This is so even if the motion "raises issues that could have been litigated via an appeal of the judgment." (*Ryan v. Rosenfeld* (2017) 3 Cal.5th 124, 127 (*Ryan*).) Like other posttrial motions, "the trial court has broad discretion to determine the relief being requested." (*Shapiro v. Prudential Property & Casualty Co.* (1997) 52 Cal.App.4th 722, 727.)

FanX contends that the trial court erred in denying its motion to vacate the judgment pursuant to section 663. But we can reject this contention without reaching the merits of FanX's arguments. This is because a section 663 motion "does *not* lie to vacate a summary judgment and remit an action for trial." (*Forman v. Knapp Press* (1985) 173 Cal.App.3d 200, 203 (*Forman*), italics added.) Rather, "[t]he procedure appertains after rendition of a judgment 'based upon a decision by the court, or the special verdict of a jury' " and "is designed to enable speedy rectification of a judgment rendered upon erroneous application of the law to facts which have been found by the court or jury or which are otherwise uncontroverted." (*Ibid.*)

Indeed, section 663 is inapplicable because it requires the court to enter a *different* judgment after setting aside the current one. (See § 663 ["A judgment . . . may, upon motion of the party aggrieved, be set aside and vacated by the same court, *and another and different judgment entered*," italics added]; *Forman*, *supra*, 173 Cal.App.3d at p. 203 ["Plaintiffs' instant motion to vacate was not within the category established by section 663, inasmuch as it essentially sought to have the summary judgment vacated and the action restored to the trial calendar"].) As the trial court pointed out in its order, vacating the judgment and reversing the summary judgment

order, as requested by FanX, could not and would not result in the entry of a different judgment. Instead, it would presumably result in the matter proceeding to trial. Section 663 therefore does not apply.[4]

In any event, even if section 663 did apply here, FanX has not shown that the trial court abused its discretion in denying the motion to vacate.[5] At the hearing on the motion, FanX argued that the court misinterpreted Section 3.2 in granting summary judgment. The court, however, responded that FanX's argument was "predicated on [a] misunderstanding of what [the court's] ruling was" because the provision giving either party the right to terminate the lease under Section 3.2 "was not the justification for [that] ruling," but just "an example." We find no error in this analysis. Neither party exercised its right to terminate the lease under Section 3.2, and after Owner became the landlord, the parties confirmed in writing that the lease term commenced on September 1, 2022.

Once the parties agreed that the lease term had commenced, FanX was obligated to pay rent. If FanX believed that Owner had breached the lease by failing to repair the front door, it could sue Owner for damages. But FanX could not retain possession of the Premises and withhold rent. (*Schulman v.*

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[4] Contrary to FanX's assertion, *Ryan* expressly declined to address whether a motion to vacate under section 663 "was improper because the motion did not seek entry of a judgment different from the one that was entered." (*Ryan*, *supra*, 3 Cal.5th at p. 128, fn. 2.)

[5] In its reply brief, FanX accuses the trial judge of being "completely uninformed," "disregard[ing] . . . California law," and "abdicat[ing] . . . her duties as a judge" in denying the motion to vacate. It is a long-standing rule that an appellate brief "containing matter manifestly disrespectful toward the trial judge is to be deemed contempt of the appellate court." (*First Nat. Bank v. Superior Court* (1909) 12 Cal.App. 335, 348.) We advise counsel for FanX to consider his language more carefully in the future when challenging a ruling of the trial court.

Vera (1980) 108 Cal.App.3d 552, 558 [for commercial leases, "a lessee's claim for damages allegedly resulting from a breach of the lessor's covenant to repair could not be asserted as a defense and litigated in an unlawful detainer action by the lessor based on the lessee's non-payment of rent"]; see also *Frittelli, Inc. v. 350 North Canon Drive, LP* (2011) 202 Cal.App.4th 35, 46 ["Absent special lease provisions, when a [commercial] lessor impairs the use of leased premises without seizing a physical portion of the premises, the lessee may seek damages while retaining possession [citation], but the lessee's obligation to pay rent *continues*," italics added].) Thus, the trial court did not abuse its discretion by denying FanX's motion to vacate the unlawful detainer judgment.

Citing *Gruzen v. Henry* (1978) 84 Cal.App.3d 515 and *Espinoza v. Calva* (2008) 169 Cal.App.4th 1393, FanX counters that "[a] landlord is not entitled to collect or request rent from the tenant in an unpermitted unit." But those cases involve residential leases and do not apply to *commercial* leases like one at issue here. Likewise, FanX's reliance on *Brown v. Green* (1994) 8 Cal.4th 812 and *Hadian v. Schwartz* (1994) 8 Cal.4th 836 is misplaced because those cases concern the apportionment of abatement and repair costs between a lessor and lessee. Neither case suggests, much less establishes, that a commercial tenant may maintain possession of the premises without paying rent solely because there is an ongoing dispute regarding repairs. And even if a commercial tenant could do so, section 19.5 of the lease—which provides that "Tenant shall have *no right* to offset or abate rent in the event of any default by Landlord under this Lease, except to the extent offset rights are specifically provided to Tenant in this Lease"—prohibited FanX from doing so. (Italics added.)

Lastly, FanX contends that the trial court abused its discretion in

declining to consider "highly relevant evidence" that FanX submitted after the court had taken the motion for summary judgment under submission. The court, however, acted within its discretion when it disregarded FanX's unfiled and untimely letter and documents. (*Bozzi v. Nordstrom, Inc.* (2010) 186 Cal.App.4th 755, 765 ["A trial court has broad discretion . . . to consider papers served and filed beyond the deadline without a prior court order finding good cause for late submission" in connection with motions for summary judgment].) In any event, whether repairs made to the front doors were considered " 'major repair[s]' " as claimed in the letter has no bearing on whether Owner was entitled to summary judgment in its unlawful detainer action based on FanX's failure to pay rent and vacate the Premises when the lease term expired. (Cf. *Shulman*, *supra*, 108 Cal.App.3d at p. 558.)

III. DISPOSITION

The order denying FanX's motion to vacate the judgment is affirmed.

CHOU, J.

We concur.

SIMONS, Acting P. J.
BURNS, J.

A170061/ *Haste v. FanX*