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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

MACK FILM DEVELOPMENT, LLC et
al.,

Plaintiffs and Respondents,

v.

GRANT JOHNSON et al.,

Defendants and Appellants.

B210933

(Los Angeles County Super. Ct.
No. BC335581)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert L. Hess, Judge. Affirmed.

Freund & Brackey, Jonathan D. Freund and Craig A. Huber for Defendants and Appellants.

Quinn Emanuel Urquhart Oliver & Hedges, Quinn Emanuel Urquhart & Sullivan, John M. Pierce and Daniel H. Bromberg for Plaintiffs and Respondents.

Defendants and appellants Grant Johnson and Benevolent Partners, L.P., appeal from a judgment following a jury trial in favor of plaintiffs and respondents Mack Film Development, LLC, Millie Film Development, LLC, and Robert Cort Productions, Inc. (RCP) in this action for breach of contract and fraud. Defendants contend: 1) the trial court's examination of Johnson during the trial deprived them of a fair and impartial trial; 2) the jury awarded duplicative damages and the trial court improperly apportioned the damages to RCP's fraud claim rather than Mack and Millie's claim for breach of contract; and 3) the trial court erred by relieving plaintiffs of their burden to prove Johnson's financial condition and the award of punitive damages was excessive.

We conclude defendants failed to object to the trial court's examination of Johnson during trial, and therefore, the objection is waived. The trial court did not err by apportioning damages for out-of-pocket expenses to RCP's fraud claim, and Johnson waived any objection to the lack of evidence of his financial condition by failing to respond to a court order with meaningful evidence. Therefore, we affirm.

FACTS AND PROCEDURAL BACKGROUND

Robert Cort produces films through RCP and other companies. Cort needed to secure financing of \$5 million for a motion picture development deal with Paramount Pictures. Benevolent is a private equity investment fund owned and managed by Johnson. Johnson wanted an exclusive arrangement to invest in the Paramount deal and promised that he could fund the required amount in full. After investigating Johnson's credentials, Cort agreed. In fact, Benevolent had less than \$1 million immediately available to invest. Although Johnson had invested more than \$3 million of his own liquid net worth in Benevolent, and Benevolent's total capitalization was \$20 million as of January 2007, these funds were committed to specific projects and not available to guarantee funding for the Paramount deal.

In March 2003, Johnson and Cort entered into a written agreement for Benevolent to invest \$5 million in a new limited liability company that would develop theatrical

motion picture projects for RCP. Based on this commitment, RCP formed Mack and Millie. In May 2003, Benevolent, Mack, and Millie executed a term credit agreement under which Benevolent agreed to provide \$4.85 million to the development companies. Cort agreed to invest the balance of \$150,000.

Mack and Millie initiated 39 film development projects, entered into 18 script development contracts with writers, and submitted 48 projects to Paramount for consideration. Benevolent paid the development companies approximately \$1.7 million. On April 28, 2005, Benevolent ceased funding Mack and Millie's projects. In May 2005, Cort and Johnson met for dinner. Johnson told Cort that Benevolent had run out of money and would not make any further payments to the development companies. Mack and Millie owed \$800,000 on commitments to writers. Cort's reputation in the industry was at risk. Cort arranged for RCP to loan \$800,000 to Mack and Millie to meet their obligations.

On June 24, 2005, Mack and Millie filed a complaint against Johnson and Benevolent. Benevolent filed a cross-complaint against Mack, Millie, RCP, and Cort. The operative second amended complaint filed April 5, 2006, added RCP as a plaintiff and alleged causes of action against Johnson and Benevolent for breach of written contract, breach of written guarantee, promissory fraud, fraud in the inducement, negligent misrepresentation, and declaratory relief.

A jury trial commenced on May 20, 2008. On May 29, 2008, plaintiffs served a subpoena on Johnson to produce documents the following day, which would establish his financial condition in the event the jury awarded punitive damages.

The jury returned its verdict as to liability and compensatory damages on June 5, 2008. On the cause of action for breach of contract, the jury found that Mack and Millie entered into a contract with Benevolent. Mack and Millie did all, or substantially all, of the things that the contract required them to do and the conditions occurred that were required for Benevolent's performance. Benevolent gave up, through words or conduct, its right to require any unsatisfied conditions to occur. Benevolent failed to perform as required under the contract, and Mack and Millie were harmed as a result. Mack and

Millie's damages for past losses totaled \$3,250,793.20, which consisted of the balance of \$2,350,000 on the contract, out-of-pocket obligations of \$821,573.95, and interest on out-of-pocket obligations of \$79,219.31. In addition, the jury found Johnson was the alter ego of Benevolent.

On the cause of action for intentional misrepresentation, the jury found that Johnson or Benevolent had made a false representation of a material fact to RCP that induced RCP to form Mack and Millie and enter into the term credit agreement with Benevolent. Johnson and/or Benevolent knew that the representation was false, or made it recklessly without regard for its truth, intending RCP to rely on the representation, and failed to disclose an important fact that RCP did not know and could not reasonably have discovered, intending to deceive RCP by concealing the fact. RCP's reliance on the false representation and deception was a substantial factor in causing harm to RCP. The jury found RCP's damages were out-of-pocket obligations of \$821,573.95 and interest on the out-of-pocket obligations of \$79,219.31. The jury also found that Johnson was guilty of malice, oppression, or fraud in his conduct.

Johnson's attorney told the trial court that Johnson's preference was for the jury to return the next day to determine the amount of punitive damages, rather than wait until the following week. Therefore, the court ordered Johnson to produce the financial records requested in the subpoena to plaintiffs by 8:00 a.m. the following morning.

On June 6, 2008, plaintiffs objected that the documents Johnson produced in response to the subpoena were inadequate. They requested a finding that the burden to establish Johnson's financial condition had been waived. The documents produced by Johnson showed that Benevolent had \$700 in a bank account and no income, but had made distributions of \$700,000 to its partners. Johnson testified at trial that Benevolent had assets of \$20 million in 2007, but the documents produced that morning showed de minimis assets. Johnson's personal balance sheet as of May 2008 did not show any ownership interest in Benevolent or any of the similarly named partnerships that plaintiffs had discovered through website searches. It omitted an entire category of assets that had been shown on his balance sheet in 2006. Johnson's balance sheet showed that he owed

his father \$1.3 million and another individual \$1.6 million, and therefore, his net worth was negative \$1.6 million. Plaintiffs argued that it was not a credible financial picture for an individual who had testified that he controlled an investment fund of \$20 million, including several million of Johnson's personal net worth. The trial court found the financial records produced by Johnson were so inadequate on their face as to completely frustrate the purpose of the proceeding and did not even approximate a good faith attempt to comply with the court's order. Although the subpoena was not effective until after the jury rendered its verdict, Johnson and his counsel were on notice to have the information available at the end of the trial and had a duty to gather the documents.

Johnson objected to the timeliness of the subpoena. The trial court overruled the objection because there was no written objection on the grounds of timeliness, despite having been served with the subpoena several days prior. Johnson argued that the documents were not identified in the subpoena with particularity, but the court found the subpoena requested basic financial information, information for 2007 was missing entirely, and the documents that had been produced were not credible. In addition, there were no written objections based on overbreadth. Plaintiffs requested that Johnson be prohibited from testifying as to his financial condition as well, in light of his incomplete disclosure. Plaintiffs noted they had inquired about Johnson's net worth at his deposition, but he had refused to respond based on privacy rights.

The trial court found that plaintiffs were relieved of their burden to show Johnson's financial condition, Johnson was prohibited from introducing additional evidence, and the issue of punitive damages would be decided based on the testimony at trial.

Although plaintiffs suggested in their closing argument that the jury award punitive damages of \$9.75 million, the jury assessed punitive damages of \$1.75 million. On July 16, 2008, the trial court entered its judgment on the jury's special verdicts. Johnson and Benevolent filed a timely notice of appeal.

DISCUSSION

Trial Court's Examination of Johnson

Defendants contend the trial court committed judicial misconduct in questioning Johnson during trial. However, we conclude that defendants failed to object on this ground to any of the court's questions, and therefore, the contention has been forfeited.

"A trial judge may examine witnesses to elicit or clarify testimony [citations]. Indeed, 'it is the right and duty of a judge to conduct a trial in such a manner that the truth will be established in accordance with the rules of evidence.' [Citation.] The trial judge, however, must not become an advocate for either party or under the guide of examining witnesses comment on the evidence or cast aspersions or ridicule on a witness. [Citations.]" (*People v. Rigney* (1961) 55 Cal.2d 236, 241.)

To preserve a judicial misconduct claim for review on appeal, however, a party must object to the trial court's conduct during the trial and provide an opportunity for a curative instruction to the jury. (*People v. McWhorter* (2009) 47 Cal.4th 318, 373 ["because defendant raised no objection below on the grounds asserted in this claim, and did not seek a jury admonition regarding any of the alleged instances of judicial intemperance, he has failed to preserve the issue for appellate review"]; *People v. Fudge* (1994) 7 Cal.4th 1075, 1108.) "It is settled that a judge's examination of a witness may not be assigned as error on appeal where no objection was made when the questioning occurred." (*People v. Corrigan* (1957) 48 Cal.2d 551, 556.) Here, despite his contention that the trial court 'consistently displayed a bias in favor of the prosecution[,] defendant never objected to the trial court's participation in the examination of witnesses. Accordingly, defendant has waived any claim of error." (*People v. Raviart* (2001) 93 Cal.App.4th 258, 269.)

Defendants argue they are excused from the requirement of objecting to judicial misconduct because it would have been futile to do so. (See *People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 648 ["there is a general exception to the waiver rule,

applicable equally to judicial misconduct, where an objection would have been futile”].) However, defendants fail to point to anything in the record on appeal that would demonstrate that objections would have been futile. The trial court gave no indication it would not entertain objections to its questions or consider curative admonitions, as it sustained other objections by defendants during trial. The futility exception has not been shown to be applicable in this case.

Damages for Out-of-Pocket Expenses

Defendants contend the trial court erred by allocating the damages for out-of-pocket expenses to RCP’s fraud claim. We find no error.

“As a general rule, California law does not authorize the award of general or punitive damages for breach of a commercial contract. The measure of damages is limited to those losses which might reasonably be foreseen by the parties. [Citation.]” (*Harris v. Atlantic Richfield Co.* (1993) 14 Cal.App.4th 70, 77.) “The most widely recognized exception is when the defendant’s conduct constitutes a tort as well as a breach of the contract. For example, when one party commits a fraud during the contract formation or performance, the injured party may recover in contract and tort.” (*Id.* at p. 78.)

However, a plaintiff is entitled to recover an item of damages once. (*Tavaglione v. Billings* (1993) 4 Cal.4th 1150, 1159.) “Regardless of the nature or number of legal theories advanced by the plaintiff, he [or she] is not entitled to more than a single recovery for each distinct item of compensable damage supported by the evidence. [Citation.] Double or duplicative recovery for the same items of damage amounts to overcompensation and is therefore prohibited. [Citation.] [¶] Thus, for example, in a case in which the plaintiff’s only item of damage was loss of commissions, two awards of damages identical in amount—one for breach of contract and the other for bad faith denial of the same contract—could not be added together in computing the judgment. Plaintiff was entitled to only one of the awards. [Citations.] [¶] In contrast, where separate items of compensable damage are shown by distinct and independent evidence,

the plaintiff is entitled to recover the entire amount of his [or her] damages, whether that amount is expressed by the jury in a single verdict or multiple verdicts referring to different claims or legal theories. [Citations.]” (*Id.* at pp. 1158-1159, italics omitted.)

In this case, defendants do not contest the jury’s liability findings. The jury found that damages for out-of-pocket expenses were recoverable under both the breach of contract and the fraud theories in this case. The jury’s award of out-of-pocket damages to RCP as a result of defendants’ fraud is supported by substantial evidence. RCP had to lend money to Mack and Millie to pay for outstanding expenses or suffer irreparable harm to its own reputation. RCP paid the expenses, has not been reimbursed by Mack or Millie, and has lost the use of the funds for other purposes. An entity with grounds to pursue breach of contract and fraud claims can elect to recover its damages for fraud. In this case, RCP was not a party to the contract, and therefore, pursued its claim for fraud. Because the same out-of-pocket expenses may be recovered only once, the trial court properly struck the duplicative out-of-pocket damages awarded to Mack and Millie under the breach of contract theory. Mack and Millie did not object to the allocation, and have not appealed from the trial court’s ruling.

Punitive Damages

Johnson contends the subpoena seeking his financial information was defective, punitive damages cannot be awarded without evidence of his financial condition, and in any event, the award was excessive. We hold that the failure to comply with the subpoena and a subsequent court order to produce records justified the imposition of punitive damages, and the amount awarded was not excessive as a matter of law.

In order for a reviewing court to make an informed decision as to whether an award of punitive damages is excessive, the record must contain evidence of the defendant’s financial condition. (*Adams v. Murakami* (1991) 54 Cal.3d 105, 110-112.) However, when the defendant disobeys an order to produce information showing his financial condition, he cannot object to a punitive damage award for lack of such

evidence. (*Mike Davidov Co. v. Issod* (2000) 78 Cal.App.4th 597, 608-609 (*Davidov*); see also *Caira v. Offner* (2005) 126 Cal.App.4th 12, 41.) The failure to make a full, good faith disclosure regarding financial condition despite a proper order to do so may constitute a waiver of any right to complain of insufficiency of the evidence to support a punitive damage award. (See *Davidov, supra*, 78 Cal.App.4th at pp. 608-609.)

“Civil Code section 3295, subdivision (c), allows the trial court, ‘*at any time*,’ to enter an order permitting the discovery of a defendant's profits and/or financial condition, if the plaintiff has established that there is a substantial probability that he or she can prevail on a claim upon which an award of punitive damages can be based. While it is true that subdivision (c) states that such an order may be made ‘[u]pon motion by the plaintiff supported by appropriate affidavits and after a hearing,’ that subdivision clearly presupposes that such motion procedure is required *where the plaintiff has not actually prevailed on his or her claim at trial*. However, once there has been a determination of liability by the trier of fact based on an actual weighing of the credibility of witnesses, this kind of affidavit-and-hearing procedure is patently superfluous. So long as the trial court allows the defendant sufficient time, following a determination of liability, to collect his or her financial records for presentation on the issue of the amount of such damages to be awarded, there is nothing prejudicial or unfair about using such a process to try the issue of the amount of punitive damages. If anything, this method serves the purpose behind section 3295, to wit, to protect against premature disclosure of the defendant’s financial condition. [Citation.]” (*Davidov, supra*, 78 Cal.App.4th at p. 609.)

In *Davidov*, the trial court found the defendant liable for fraud and ordered defendant to produce to the plaintiff all records regarding his net worth by 9:00 a.m. the following day. The defendant failed to comply and the trial court awarded punitive damages. (*Davidov, supra*, 78 Cal.App.4th at pp. 603-604.) On appeal, the defendant argued punitive damages could not be awarded in the absence of any evidence of net worth. The appellate court held that “by failing to bring in any records which would reflect his financial condition, despite being ordered to do so . . . defendant has waived any right to complain of the lack of such evidence.” (*Id.* at pp. 608-609.)

“‘The standard of review for a discovery order is abuse of discretion, because management of discovery lies within the sound discretion of the trial court. [Citation.] Thus, where there is a basis for the trial court's ruling and it is supported by the evidence, a reviewing court will not substitute its opinion for that of the trial court.’ [Citations.]” (*Lee v. Superior Court* (2009) 177 Cal.App.4th 1108, 1124-1125.)

In this case, Johnson waived any objection to the lack of evidence on his financial condition when he failed to respond to the trial court’s order to bring financial records the following day with a good faith effort to produce meaningful evidence of his financial condition. Johnson was on notice to gather his financial information as a result of the subpoena served by plaintiffs eight days prior to the court’s order. Johnson did not file any written objections to the subpoena. Moreover, as shown in *Davidov*, the court’s order was proper regardless of the subpoena’s validity. Johnson was not entitled to escape punitive damages by the simple expedient of refusing to produce financial information needed to fix such an award, as doing so would have allowed him to flout a court order with impunity and undermine the legal process. In view of Johnson’s failure to produce evidence of his financial condition, he may not complain the amount of punitive damages is excessive.

DISPOSITION

The judgment is affirmed. Mack Film Development, LLC, Millie Film Development, LLC, and Robert Cort Productions, Inc., are awarded their costs on appeal.

KRIEGLER, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.