

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

AMJAD SILMI et al.,
Plaintiffs and Respondents,
v.
IZZUDDIN AHMED,
Defendant and Appellant.

A129297

(Alameda County
Super. Ct. No. RG05242170)

Defendant Izzuddin Ahmed appeals a judgment entered following a jury trial awarding damages, including punitive damages, in favor of plaintiff Alex Preiger on his claims for breach of contract and trespass and in favor of plaintiff Amjad Silmi on his claims for theft and fraud. Ahmed contends the court erred in admitting certain evidence at trial, that respondents' counsel committed misconduct during the trial, and that the punitive damage awards are excessive. He also contends the court erred in denying his ex parte motion to stay enforcement of the judgment. None of these arguments has merit and therefore we shall affirm.

BACKGROUND

This appeal arises from a lengthy and complicated dispute between many parties over the lease of retail space in a large building known as The Food King in Oakland. For the purpose of clarity, we limit our presentation of the facts to those that are directly relevant to the disputes at issue on appeal.

When this dispute arose, Preiger owned The Food King. He leased space at The Food King to Ahmed for a grocery store, a meat market, a sundries market, and a check cashing business. Ahmed subleased the check cashing business to Silmi.

In June 2005, Ahmed purported to sell all of his businesses at The Food King to a third party. According to their testimony at trial, neither Preiger nor Silmi was notified of the purported sale until after it was completed. Neither approved the transfer of the leases.

In November 2005, Silmi filed a complaint against Ahmed alleging, among other things, causes of action for breach of written and oral contract and fraud. The complaint alleged that Ahmed had admitted stealing approximately \$59,668 from the check cashing business and had offered to repay the amount only if Silmi signed a document acknowledging that his sublease was null and void.¹

On January 10, 2006, Preiger, individually and on behalf of The Food King, filed a complaint for breach of the commercial lease against Ahmed and Silmi. That complaint alleged that Ahmed was the only tenant specified in the lease and that the terms of the lease prohibited assignment or sublet without the express written consent of the landlord. The complaint alleges that Ahmed breached the terms of the lease by “attempting to sell, transfer and assign his interest in the premises under the grocery lease and addendum to others . . . without plaintiff Preiger’s permission and consent” Preiger’s complaint against Ahmed sought a declaration that both leases were terminated, that Ahmed and Silmi had no right of possession, and that Preiger and The Food King were entitled to immediate possession of the premises.²

¹ In December 2005, Ahmed filed a cross-complaint against Silmi alleging causes of action for interference with contract, interference with prospective business advantage, unfair business practices, and breach of fiduciary duty. The cross-complaint requested a declaration of the parties’ rights with regard to the lease. The cross-complaint also asked for rescission of the lease and \$25,000 in money owed, as well as attorney fees and punitive damages. This cross-complaint is not at issue on appeal.

² The complaint names additional defendants and alleges additional causes of action that are not at issue on appeal. Ahmed filed a cross-complaint against Preiger, The Food

On May 23, 2006, the trial court granted a motion to consolidate the cases. Thereafter, Silmi and Preiger entered into a settlement resolving their claims against each other and the court granted their motion determining the settlement to be in good faith. A substitution of counsel was filed whereby Preiger and Silmi were from that point forward represented by the same attorney.

Prior to trial, Preiger filed a cross-complaint against Ahmed for trespass, assault, and battery arising out of an incident between the two men in August 2006. These new claims and the remaining claims in the consolidated cases were tried before a jury in February 2010.³

The jury found that Ahmed breached his lease with Preiger, stole money from Silmi, and acted fraudulently as to both of them. Following a punitive damages phase, the jury awarded both Silmi and Preiger punitive damages.

Judgment was entered for Silmi against Ahmed for a total of \$113,636.⁴ Judgment was entered for Preiger against Ahmed for \$77,500. The judgment also declared that Ahmed's right to the grocery and meat market leases was forfeited, and that Ahmed had no right of possession of any portion of The Food King. The judgment awarded Preiger and Silmi their attorney fees and costs. Ahmed timely appealed.

DISCUSSION

Ahmed contends that the trial court erred in admitting certain evidence, that opposing counsel engaged in improper conduct, that the punitive damages award was excessive, and that the trial court erred in denying his *ex parte* motion to stay enforcement of the judgment. "An appealed judgment is presumed to be correct. We will

King, and Silmi for interference with contract, interference with prospective business advantage, unfair business practices, and breach of contract. Silmi filed a cross-complaint against Ahmed for indemnification and apportionment of fault. None of the cross-complaints are at issue on appeal.

³ The jury ultimately rejected the assault and battery claim and that verdict is not challenged on appeal. Accordingly, we need not recite the facts relating to this incident.

⁴ Ahmed's liability for \$37,136 of this amount is joint and several with another defendant, whose liability is not at issue on appeal.

indulge all intendments and presumptions to support the judgment on matters as to which the record is silent and prejudicial error must be affirmatively shown.” (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 267.)

1. *Evidentiary Objections*

In December 2008, the third party to whom Ahmed purported to sell his business obtained a restraining order against Ahmed. During the course of that proceeding, the trial court commented that “there is a pattern that is reflected where [Ahmed] tries to instigate violence even on himself by acting with intimidation and violently towards other people short of actually hitting them. Knowing that if he does that, he’s got a problem. But if they hit him, he’s got a better case. And that’s what he was trying to do on that day.” This statement was admitted at trial in the present action after Ahmed testified that he was not trying to provoke Preiger into hitting him during the August 2006 incident that formed the basis of Preiger’s assault and battery claim. Ahmed’s attorney did not object to the admission of this statement.

Ahmed challenges the admission of this testimony on the ground it was tantamount to allowing the judge who heard the restraining order to testify at trial in violation of Evidence Code section 703.⁵ “Where inadmissible evidence is offered, the party who desires to raise the point of erroneous admission on appeal must object at the trial, specifically stating the grounds of the objection, and directing the objection to the particular evidence that the party seeks to exclude. Obviously, failure to object at all

⁵ Evidence Code section 703 provides: “(a) Before the judge presiding at the trial of an action may be called to testify in that trial as a witness, he shall, in proceedings held out of the presence and hearing of the jury, inform the parties of the information he has concerning any fact or matter about which he will be called to testify. [¶] (b) Against the objection of a party, the judge presiding at the trial of an action may not testify in that trial as a witness. Upon such objection, the judge shall declare a mistrial and order the action assigned for trial before another judge. [¶] (c) The calling of the judge presiding at a trial to testify in that trial as a witness shall be deemed a consent to the granting of a motion for mistrial, and an objection to such calling of a judge shall be deemed a motion for mistrial. [¶] (d) In the absence of objection by a party, the judge presiding at the trial of an action may testify in that trial as a witness.”

waives the defect.”⁶ (3 Witkin, Cal. Evidence (4th ed. 2000) Presentation at Trial, § 371, pp. 459-460; see also Evid. Code, § 353, subd. (a).) Moreover, since this testimony was relevant only to the assault claim on which Ahmed prevailed, any error in this respect was harmless.

2. *Conduct of Counsel*

Ahmed argues that the attorney for Silmi and Preiger engaged in inappropriate conduct by asking numerous questions that were designed to create bias against him. “ ‘Generally a claim of misconduct is entitled to no consideration on appeal unless the record shows a timely and proper objection and a request that the jury be admonished. [Citations.]’ [Citation.] In evaluating claims of misconduct, ‘[e]ach case must ultimately rest upon a court’s view of the overall record, taking into account such factors, inter alia, as the nature and seriousness of the remarks and misconduct, the general atmosphere, including the judge’s control, of the trial, the likelihood of prejudicing the jury, and the efficacy of objection or admonition under all the circumstances.’ ” (*Du Jardin v. City of Oxnard* (1995) 38 Cal.App.4th 174, 178.)

Ahmed contends that opposing counsel committed misconduct by improperly questioning him regarding the fact that he had killed someone years prior. Before trial, Ahmed made a motion in limine to exclude evidence that he had killed a person in 1996.

⁶ In his reply brief and at oral argument, counsel for Ahmed argued that objecting to this evidence, as well as to the allegedly improper questions discussed below, would have been futile and that he and Ahmed had been threatened with sanctions if they “refuse[d] to cooperate with the question and answer process.” His argument is not supported by the record. Outside the presence of the jury, the court observed that “[t]he record is deteriorating because the witnesses are not answering questions directly. And it’s taking a lot more time.” Counsel was advised to “talk to your client [Ahmed] and make sure he answers the questions.” Shortly thereafter, when Ahmed continued to be uncooperative, the court warned, “if he is not going to cooperate, everything that he has said from the beginning of this trial until now will be stricken.” Nothing in this exchange suggests that counsel’s objections to inadmissible evidence or improper questions would have been futile, excusing his failure to object. Nor is there any basis to assume that the court would have denied requests for admonitions to disregard suggestions implicit in questions to which the court sustained objections.

The trial court denied the motion, explaining, “if . . . there are allegations of threats, and I understand that there were, and if there is the fact that at least one of the parties at some point shot someone, which apparently they did, I think that that could possibly be relevant so I can’t exclude it.” During trial, counsel for Preiger and Silmi asked Ahmed a series of questions about his conflict with Silmi. When Ahmed denied that he was vengeful or aggressive towards Silmi, counsel asked, “In the past, in 1996, you killed someone, didn’t you?” Ahmed’s counsel objected and the court sustained the objection. On redirect, when Ahmed’s attorney attempted to elicit Ahmed’s explanation of the circumstances surrounding the 1996 killing, opposing counsel objected and the trial court sustained the objection. The court explained, “I stopped the inquiry. . . . [¶] . . . [¶] I thought that when we had our side bar, we discussed that we weren’t going to be discussing it because it wasn’t relevant.” Ahmed did not ask for an admonition and there were no further references to the killing. In the context of a lengthy trial in which there was ample testimony concerning Ahmed’s threats and improper behavior, opposing counsel’s question hardly rises to the level of misconduct.⁷

Ahmed identified a number of additional questions asked by opposing counsel that he argues demonstrates misconduct. First, counsel asked if Ahmed used an associate of his as “muscle,” “[m]eaning, you know, you’re a small guy. He’s a large guy. You take him with you to intimidate people.” Ahmed answered, “Not correct.” There was no objection. Later, counsel asked the associate if he promised a potential witness “\$10,000 if his wife testifies against Mr. Silmi.” Again, Ahmed did not object. By failing to object, Ahmed has forfeited the right to argue on appeal that these questions were improper. (See 3 Witkin, Cal. Evidence, *supra*, § 371, pp. 459-460.)

Ahmed also argues that opposing counsel committed misconduct when he showed Ahmed a letter from the Department of Agriculture and asked, “this is not a forgery, it’s

⁷ Ahmed seems to suggest that the prejudice that flowed from this was that the jury did not believe certain evidence presented by him which he alleges established that Silmi lied about when he obtained his business license. He does not explain why this might have flowed from the reference to killing someone and we can see no connection.

an accurate document, correct?” In the trial court, Ahmed objected that the question lacked foundation and the trial court sustained the objection. On appeal, Ahmed suggests that asking this question was an attempt “to insinuate that any document provided by defendant should be considered as being a potential forgery.” Insofar as the question was asked in an attempt to establish the authenticity of the document, there was no misconduct. Ahmed did not cite the reference to forgery as misconduct nor did he request that the jury be admonished to disregard the reference. The reference therefore provides no basis for relief on appeal.

Finally, Ahmed cites testimony by numerous witnesses that he argues was improper and prejudicial. While Ahmed objected to some of the cited testimony and some of his objections were sustained, at no point did he assert a claim of misconduct and request an admonition. As noted above, his failure to do so forfeits his claim on appeal. Moreover, to the extent his argument focuses on the admissibility of the witnesses’ answers and not on opposing counsel’s questions, he has not met his burden of demonstrating attorney misconduct.⁸ The content or admissibility of the answers does not establish improper behavior on the part of trial counsel.

Punitive damages

“[O]ur review of punitive damage awards rendered at the trial level is guided by the ‘historically honored standard of reversing as excessive only those judgments which the entire record, when viewed most favorably to the judgment, indicates were rendered as the result of passion and prejudice. . . .’ [Citation.] Stating the matter somewhat differently . . . an appellate court may reverse such an award ‘only “ ‘[when] the award as a matter of law appears excessive, or where the recovery is so grossly disproportionate as

⁸ For example, in his reply brief, Ahmed argues, “In the guise of asking a police officer her understanding of ‘the situation,’ [opposing counsel] presented testimony of a police officer’s opinion who essentially ‘parroted’ respondents theory of the case. Though the opinion lacked foundation, and the objection by Ahmed’s counsel was sustained, the addition of [the] police officer’s testimony unfairly created additional bias.”

to raise a presumption that it is the result of passion or prejudice.’ ” ’ ” (Neal v. Farmers Ins. Exchange (1978) 21 Cal.3d 910, 927-928.)

“A court determining whether a punitive damages award is excessive under the due process clause must consider three guideposts: ‘(1) the degree of reprehensibility of the defendant’s misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. [Citation.]’ [Citation.] The defendant’s financial condition also is an essential consideration for a court reviewing a punitive damages award under California law” (Bullock v. Philip Morris USA, Inc. (2011) 198 Cal.App.4th 543, 558.)

The jury awarded Preiger \$70,000 in punitive damages and Silmi \$67,000 in punitive damages. Ahmed argues that “the imposition of punitive damages against him can only be described as being the result of bias and prejudice” because evidence during the punitive damages phase reflected that he had a negative net worth. Ahmed testified that he had a negative net worth of approximately \$1.9 million, and submitted a supporting personal financial statement. However, Silmi and Preiger introduced evidence that Ahmed had substantial assets in the form of real estate and four check cashing businesses, and that he had rental income from various properties and income from a laundromat, from a janitorial service that he owned, and from partial ownership of a grocery store. Silmi and Preiger argued that Ahmed consistently undervalued the worth of his various assets and that their evidence showed Ahmed’s net worth to be “at least one to \$2 million even in this current market, maybe even more.”

“On appeal, we defer to findings of historical fact if they are supported by substantial evidence” (Bullock v. Philip Morris USA, Inc., supra, 198 Cal.App.4th at p. 558.) Although Ahmed may disagree with the jury’s evaluation of the evidence, based on the countervailing evidence presented by Silmi and Preiger, the jury was entitled to find that Ahmed had a net worth that supported the punitive damages award.

Application to stay enforcement of judgment

On April 15, 2010, after the jury returned its verdict but before judgment was entered, Ahmed filed a motion entitled, “Ex Parte Application Re: Notice of former tenant’s rights; Request for order (1) staying time for enforcement of CCP 1993, (2) reserving jurisdiction to issue orders, or (3) allowing Izzuddin Ahmed access to property to recover personal property pursuant to CCP 1993 et seq.” The record reflects that this motion was dropped from the calendar at the agreement of the parties. “A party who expressly agrees to an action taken by the trial court or in the trial proceedings cannot challenge that action on appeal.” (Eisenberg et al., Civil Appeals and Writs (2011) § 8:250, p. 8-165, citing *Nevada County Office of Education v. Riles* (1983) 149 Cal.App.3d 767, 779.)⁹

DISPOSITION

The judgment is affirmed.

Pollak, J.

We concur:

McGuinness, P. J.

Siggins, J.

⁹ Tellingly, Ahmed states in his opening brief that “The application was denied,” but there is no citation to the record following the statement.