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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

JON LOUIS, **Plaintiff and Appellant,** **v.** **DMITRIY TOCHILNIK et al.,** **Defendants and Respondents.**	**A131847** **(San Francisco City & County Super. Ct. No. CGC-09-495617)**

Plaintiff and appellant Jon Louis (Louis) appeals from the verdict following a jury trial in favor of defendants and respondents Dmitriy Tochilnik and Anna Koval (the Tochilniks)[1] and St. Francis Bay – One Hundred One Crescent Way Condominium Owners Association (St. Francis Bay). Louis contends the jury's verdict rejecting his nuisance and negligent infliction of emotional distress (NIED) claims against the Tochilniks and his NIED claim against St. Francis Bay is not supported by substantial evidence. We affirm.

BACKGROUND

St. Francis Bay is a nonprofit corporation charged with management of a condominium complex in San Francisco known as St. Francis Bay – One Hundred One

[1] Although Dmitriy Tochilnik and Anna Koval have different last names, they refer to themselves as the Tochilniks in their brief on appeal and, for the sake of brevity, we do the same.

Crescent Way. In February 2004, Louis purchased (with a co-owner, Marc Parrish) a condominium, unit No. 2206 at 101 Crescent Way in San Francisco. The unit above, No. 2306, is owned by the Tochilniks, who bought the unit in March 2005 and live there with their son.

When the Tochilniks bought their unit, the living room, dining room, and hallways were covered with hardwood laminate flooring, and the three bedrooms were carpeted. Shortly after moving in, the Tochilniks replaced the old carpeting in the bedrooms with new carpeting.

The St. Francis Bay governing documents include its enabling declaration (Declaration) and its rules and regulations (Rules). Article 7.2 of the Declaration is entitled "Nuisances" and states in part, "No noxious, illegal, or seriously offensive activities shall be carried on within Condominium, or in any part of the Project, nor shall anything be done thereon . . . which may be or may become a serious annoyance or a nuisance to or which may in any way interfere with the quiet enjoyment of each of the Owners' Condominiums . . . ." Article 7.20 of the Declaration is entitled "Floor Coverings" and states in part, "No change in the floor covering materials as originally installed in the Units . . . shall be permitted except with the consent of the Architectural Control Committee. To reduce sound transmission between Units, all Units shall have all floor areas except entries, kitchens and bathrooms covered with carpet or other material which provides equivalent insulation against sound transmission. . . ."

Louis's unit was rented to Dr. Eric Brouch, who lived there from May 2004 until May 2007. During the time that Brouch rented the unit, he complained to Louis about noise coming from the unit above. Brouch did not testify at the trial. Parrish lived in the unit on a daily basis from May 2007 through September 2009. There was a problem with noise from the Tochilniks' unit; sometimes it was the sound of adults moving around, but mostly the problem was "extremely loud" sounds made by a child running around. Parrish mostly heard noise from the Tochilniks' unit during the morning and evening hours and usually not after 10:00 p.m. He never heard the Tochilniks throw any parties. He complained to the Tochilniks about the noise three times. Louis began living in the

unit in February 2009. Louis testified that the Tochilniks created "very loud noises on an ongoing basis nearly every day." Louis does not cite to any evidence in the record that the Tochilniks conducted any abnormal noisemaking activities in their unit.[2]

In March 2009, Louis wrote to the St. Francis Bay property manager to complain about the noise coming from the Tochilniks' unit and to allege a violation of the floor covering requirements in the Declaration. In April, the Tochilniks attempted to meet with Louis and Parrish to discuss the noise problem, but Louis said he preferred to go through "formal channels." The Tochilniks placed throw rugs on some of the uncarpeted areas in their unit.

An employee of the property management company, Terri Kinzel, investigated Louis's complaint, including inspecting the Tochilniks' unit. Kinzel attempted to have a sound test done, but, as she informed Louis in a July 2009 e-mail, she was unable to do so because neither Louis nor the Tochilniks had agreed to pay for the test. In August 2009, Louis attended a meeting of the St. Francis Bay Board of Directors (Board) to discuss his noise complaint. In September 2009, on Louis's suggestion, Parrish wrote a letter to the Board about the noise from the Tochilniks' unit.

On September 11, 2009, St. Francis Bay e-mailed the Tochilniks a letter requesting that they install carpet in their unit to comply with the Declaration. On October 24, Dmitriy Tochilnik wrote to the Board, stating that he agreed to comply with the floor covering standards and requesting clarification on some issues. On October 30, the Board passed a motion requiring the Tochilniks to install carpet and padding in their unit.

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[2] The Tochilniks' brief on appeal asserts that they both work full-time outside the home, that their son was born in 2006 and started walking in the fall of 2007, that their son began attending an out-of-home daycare in approximately September 2007, and that, on weekdays, the unit is unoccupied during the daytime. However, those assertions are unsupported by citations to the record. (See Cal. Rules of Court, rule 8.204(a)(1)(B).) It is possible that Anna Koval testified to these matters, but a reporter's transcript for the day of her testimony was not provided to this court. (See Cal. Rules of Court, rule 8.120(b).)

On December 29, 2009, Louis filed a complaint alleging various causes of action against the Tochilniks and St. Francis Bay. Louis alleged causes of action for nuisance (first cause of action), intentional infliction of emotional distress (IIED) (second cause of action), and NIED (third cause of action) against the Tochilniks. Louis alleged causes of action for NIED (fourth cause of action), violation of the Davis-Stirling Common Interest Development Act pursuant to Civil Code section 1350 et. seq. (fifth cause of action), breach of contract (sixth cause of action), unfair business practices pursuant to Business and Professions Code section 17200 (seventh cause of action), and injunctive relief (eighth cause of action) against St. Francis Bay. On April 7, 2010, Louis filed an amended complaint containing the same causes of action. The Tochilniks filed a cross-complaint against Louis for breach of contract, negligence, nuisance, and IIED.

In January 2010, after Louis filed his lawsuit, counsel for the Tochilniks e-mailed Louis's attorney, offering that Louis could participate in selection of the carpet and padding to be installed in the Tochilniks' unit if he would agree to dismiss the lawsuit after installation of the carpet and approval of the carpet by the Board. Louis's attorney declined the offer, although he indicated that Louis would dismiss the lawsuit if there was no more noise problem after the carpet was installed. That same month, the Tochilniks selected carpeting for their unit and paid a deposit. In February, Mr. Tochilnik e-mailed the Board requesting approval to install the carpet; Mr. Tochilnik received positive e-mail responses from two Board members, but the parties do not cite to any official response from the Board in the record. In January 2011, the Tochilniks installed the carpet in their unit. Louis testified that the noise level after installation of the carpet is "well within what is tolerable."

While his lawsuit was pending, from February 2010 to January 2011, Louis kept a log of noise coming from the Tochilniks' unit. He asserts in his brief on appeal that the log notes "over [500] times that [Louis] was disturbed, annoyed, distressed, and vexed by the noise coming from the Tochilniks' [unit]."

In December 2010, a sound study was conducted comparing the sound transmission qualities of the floors in the Tochilniks' unit to those of the floors in Louis's

unit. The study assumed that Louis's carpeting is "original," although Louis cites to no evidence in the record supporting that assumption. The study showed that the bare floors in the Tochilniks' unit transmitted about five times as much sound as the floors in Louis's unit, while the areas covered with rugs transmitted about twice as much sound. The study also showed the flooring in the Tochilniks' unit provided sound insulation above that required by the California Noise Insulation Standards (CNIS), which are less strict than the standards in the Declaration. Based on the CNIS of an impact insulation class of 45 points for field testing, the sound insulation was nine points better in areas without carpet or rugs (almost two times quieter), 24 points better in areas covered by rugs (almost five times quieter), and 26 points better in the newly carpeted bedrooms.

In February 2011, before trial, Louis dismissed with prejudice his second cause of action against the Tochilniks, and his fifth, seventh, and eighth causes of action against St. Francis Bay. The Tochilniks dismissed with prejudice their breach of contract and IIED claims against Louis. Thus, the trial involved only Louis's NIED and nuisance claims against the Tochilniks, Louis's NIED and breach of contract claims against St. Francis Bay, and the Tochilniks' negligence and nuisance claims against Louis. Following the close of Louis's case-in-chief, the trial court granted St. Francis Bay's motion for nonsuit on the breach of contract cause of action. Louis does not contend the court erred in granting the motion for nonsuit as to that cause of action.

The jury rejected all of Louis's claims and all of the Tochilniks' cross-claims. The special verdict forms completed by the jury reflect that it found that neither Louis nor the Tochilniks created a nuisance, and that none of the parties were negligent. The trial court entered judgment in accordance with the verdict and, subsequently, denied Louis's motion for judgment notwithstanding the verdict (JNOV) or new trial. The court also granted costs and attorney fees to St. Francis Bay in the amount of $174,042.50 and to the Tochilniks in the amount of $26,335. This appeal followed.

DISCUSSION

Because Louis challenges the sufficiency of the evidence supporting the jury's verdict on his claims against the Tochilniks and St. Francis Bay, we apply the substantial

evidence standard of review. (*Holmes v. Lerner* (1999) 74 Cal.App.4th 442, 445.) He also contends the trial court erred in denying his motion for JNOV, which we also review "for substantial evidence to support the verdict." (*Sanchez v. Brooke* (2012) 204 Cal.App.4th 126, 134.) "Substantial evidence means evidence which is of ponderable legal significance—evidence which is reasonable in nature, credible and of solid value. [Citation.]" (*Horn v. Oh* (1983) 147 Cal.App.3d 1094, 1099.) We start with " 'the presumption that the record contains evidence to sustain every finding of fact.' [Citation.] We review the evidence in the light most favorable to the respondent, resolve all evidentiary conflicts in favor of the prevailing party and indulge all reasonable inferences possible to uphold the . . . verdict. [Citation.]" (*US Ecology, Inc. v. State of California* (2005) 129 Cal.App.4th 887, 908.) " 'It is not our task to weigh conflicts and disputes in the evidence; that is the province of the trier of fact.' [Citation.] . . . [W]e do not evaluate the credibility of the witnesses or otherwise reweigh the evidence. [Citation.] Rather, 'we defer to the trier of fact on issues of credibility. [Citation.]' [Citation.]" (*Escamilla v. Department of Corrections & Rehabilitation* (2006) 141 Cal.App.4th 498, 514-515.) The testimony of a single witness may be sufficient to constitute substantial evidence. (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614.)

It is important to note that Louis, as the plaintiff in this action, bears the burden of proof. (See Evid. Code, § 500; *Tusher v. Gabrielsen* (1998) 68 Cal.App.4th 131, 144-145.) Where, as here, the judgment is against the party who has the burden of proof, it is enormously difficult for the party to prevail on appeal by arguing the evidence compels a judgment in its favor "as a matter of law." (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1528.) It is not enough for the party to point to uncontradicted evidence that is sufficient to support the elements of its claims; the jury is not required to believe even uncontradicted evidence. (*Sprague v. Equifax, Inc.* (1985) 166 Cal.App.3d 1012, 1028.)

I. *Louis's Nuisance Claim Against the Tochilniks*

Louis contends there is no substantial evidence supporting the jury's rejection of his nuisance cause of action against the Tochilniks. Section 3479 of the Civil Code defines a nuisance as "Anything which is injurious to health, including, but not limited to,

the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property . . . ." The special verdict form reflects that the jury found that the Tochilniks did not "create a condition that was harmful to health; or was offensive to the senses; or was an obstruction to the free use of property."

In order to state a cause of action for nuisance, a plaintiff must demonstrate that the defendant created a condition that "caused the plaintiff to suffer 'substantial actual damage.' " (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 938 (*San Diego*).) "The degree of harm is to be judged by an objective standard, i.e., what effect would the invasion have on persons of normal health and sensibilities living in the same community? [Citation.] 'If normal persons in that locality would not be substantially annoyed or disturbed by the situation, then the invasion is not a significant one, even though the idiosyncrasies of the particular plaintiff may make it unendurable to him.' [Citation.] This is, of course, a question of fact that turns on the circumstances of each case." (*Ibid.*) Moreover, in order to be actionable, the interference due to the condition created by the defendant must have been " '*unreasonable*' [citation], i.e., it must be 'of such a nature, duration or amount as to constitute unreasonable interference with the use and enjoyment of the land.' [Citations.] . . . Again the standard is objective: the question is not whether the particular plaintiff found the invasion unreasonable, but 'whether reasonable persons generally, looking at the whole situation impartially and objectively, would consider it unreasonable.' [Citation.] And again this is a question of fact: 'Fundamentally, the unreasonableness of intentional invasions is a problem of relative values to be determined by the trier of fact in each case in the light of all the circumstances of that case.' [Citations.]" (*Id.* at pp. 938-939.)

In the present case, substantial evidence supports the jury's finding that the Tochilniks did not create a nuisance, i.e., a condition that substantially and/or unreasonably interfered with Louis's enjoyment of his unit. Despite the testimony that there was a lot of noise coming from the Tochilniks' unit, there is no evidence that they engaged in any unusual or unreasonable noisemaking activities in their unit. The

co-owner of Louis's unit, Parrish, confirmed that the noise was primarily confined to normal daytime and evening hours (not past 10:00 p.m.), and that the noise was mostly due to the Tochilniks' child running on the floor.

Louis's claim that the Tochilniks created a condition that substantially and unreasonably interfered with his enjoyment of his unit rests primarily on his own testimony as supported by his complaint e-mails and his log, all of which were more dramatic than Parrish's testimony. However, we are obligated to presume that the jury did not find his testimony to be wholly credible. Indeed, the log is inherently suspect, as it was created during and for the purposes of the litigation, and there are entries alleging noise on dates where the Tochilniks presented evidence they were traveling and not in their unit.

Louis also relies on a sound study that he characterizes as finding that the sound transmission from the Tochilniks' unit was more than five times greater than that permitted in the Declaration. However, as pointed out by the Tochilniks, the study only compared the sound transmission properties of the floors in the Tochilniks' unit to those of the floors in Louis's unit. Louis cites to no evidence that his floor coverings are equivalent to the original coverings in the Tochilniks' unit or that the sound transmission properties of his floor coverings are otherwise equivalent to the maximum permitted under the Declaration.[3] Moreover, the sound insulation of the floors in the Tochilniks' unit was substantially greater than required by the CNIS. Even though there was evidence the floor covering requirements in the Declaration are more stringent than the CNIS, that the Tochilniks complied with the CNIS provides additional support for the jury's finding that the Tochilniks did not *create a nuisance*. In any event, the results of

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[3] We uncovered in our own review of the record testimony from Louis that, "to [his] knowledge," the flooring in his unit is "the original carpet that was installed." However, the jury was not required to accept that testimony, which lacked any explanation of the basis for his knowledge, as adequate to establish that his flooring was equivalent to the original flooring installed in the Tolchiniks' unit.

the sound study did not *compel* the jury to conclude that the noise emanating from the Tochilniks' unit was so excessive as to constitute an actionable nuisance.

Ultimately, even assuming Louis sincerely found the amount of noise coming from the Tochilniks' unit to be unbearable, our inquiry is objective, and the evidence was not so overwhelming as to compel the jury to find that the Tochilniks created an actionable nuisance. In this regard, the following language from *San Diego* is apropos: " 'Life in organized society and especially in populous communities involves an unavoidable clash of individual interests. Practically all human activities unless carried on in a wilderness interfere to some extent with others or involve some risk of interference, and these interferences range from mere trifling annoyances to serious harms. It is an obvious truth that each individual in a community must put up with a certain amount of annoyance, inconvenience and interference and must take a certain amount of risk in order that all may get on together. The very existence of organized society depends upon the principle of "give and take, live and let live," and therefore the law of torts does not attempt to impose liability or shift the loss in every case in which one person's conduct has some detrimental effect on another. Liability for damages is imposed in those cases in which the harm or risk to one is greater than he ought to be required to bear under the circumstances, at least without compensation.' " (*San Diego*, *supra*, 13 Cal.4th at pp. 937-938.)

The jury's verdict on Louis's nuisance cause of action is supported by substantial evidence.

II. *Louis's NIED Claim Against the Tochilniks*

Louis contends that, even if substantial evidence supports the jury's finding that the Tochilniks did not create an actionable nuisance, substantial evidence does not support their rejection of his cause of action for NIED. "A claim of negligent infliction of emotional distress is not an independent tort but the tort of negligence to which the traditional elements of duty, breach of duty, causation, and damages apply. [Citations.]" (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1377 (*Wong*).) The special verdict form reflects that the jury found that the Tochilniks were not negligent. The jury was

instructed that "Negligence is the failure to use reasonable care to prevent harm to oneself or to others. A person can be negligent by acting or by failing to act. A person is negligent if he or she does something that a reasonably careful person would not do in the same situation or fails to do something that a reasonably careful person would do in the same situation."

In reviewing the verdict, we are "guided by the rule that the trier of fact determines whether a defendant's conduct satisfies the applicable standard of care. [Citations.] When reasonable minds may differ as to the reasonableness of defendant's conduct, neither the trial court nor an appellate court may substitute its own judgment and override the determination of the jury as the trier of fact. [Citations.]" (*Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1061.)

"[T]here is no duty to avoid negligently causing emotional distress to another." (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 984 (*Potter*); accord, *Gu v. BMW of North America, LLC* (2005) 132 Cal.App.4th 195, 204.) Instead, the duty element of a negligence action "may be imposed by law, be assumed by the defendant, or exist by virtue of a special relationship. [Citation.]" (*Potter*, at p. 985.) As explained above, the Tochilniks did not create an actionable nuisance, but Louis contends the "governing documents and rules create a duty upon each homeowner not to create any annoyance or nuisance that interferes with another homeowner's use and enjoyment of their property." Louis argues that the Tochilniks breached that duty by "refusing to install floor covering that complied with" the governing documents.

Assuming that the Declaration and Rules gave rise to a duty not to cause Louis emotional distress by excessive noise, substantial evidence supports the jury's finding that the Tochilniks did not breach that duty. Although it was not necessary for the jury to reach the issue of whether Louis suffered serious emotional distress, a prior issue was whether the Tochilniks created excessive noise—specifically, noise that would cause serious emotional distress in a reasonable person. (See *Molien v. Kaiser Foundation*

Hospitals (1980) 27 Cal.3d 916, 928 (*Molien*),[4] quoting *Rodrigues v. State* (1970) 52 Haw. 156, 283 [472 P.2d 509, 520] [" 'serious mental distress may be found where a reasonable [person], normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case' "]; accord, *Potter*, *supra*, 6 Cal.4th at p. 989, fn. 12; *Wong*, *supra*, 189 Cal.App.4th at pp. 1377-1378.)[5] That was part of the determination of whether the Tochilniks were negligent, because if the Tochilniks did not create such circumstances then they did not commit an actionable breach of their alleged duty not to create excessive noise. For the reasons stated above with regard to Louis's nuisance claim, substantial evidence supports the jury's finding that the Tochilniks were not negligent, because the state of the evidence did not *compel* the jury to conclude that the noise the Tochilniks created would cause serious emotional distress to a reasonable person. That precludes Louis's NIED claim even if the evidence compelled the jury to find that the Tochilniks acted unreasonably in regard to compliance with the floor covering requirements—an issue we need not and do not reach—because the Tochilniks are not liable if they did not also create the type of excessive noise that can support a NIED claim.

III. *Louis's NIED Claim Against St. Francis Bay*

Louis contends the jury's finding that St. Francis Bay was not negligent, as relevant to his cause of action for NIED against St. Francis Bay, is not supported by substantial evidence. On that issue, the parties dispute whether St. Francis Bay owed Louis a duty to enforce the flooring requirements in the governing documents and whether it acted reasonably in regard to such enforcement, in order to prevent Louis from

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[4] Disapproved on other grounds in *Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1074 (*Burgess*).

[5] The requirement that a defendant's conduct be sufficiently distressing to overwhelm a reasonable person guards against fraudulent claims in the same way that, in the context of IIED claims, "it is the outrageous conduct that serves to [e]nsure that the plaintiff experienced serious mental suffering and convinces the courts of the validity of the claim." (*Molien*, *supra*, 27 Cal.3d at p. 927; see also *id.* at pp. 927-928; *Burgess*, *supra*, 2 Cal.4th at p. 1073, fn. 6.)

suffering emotional distress due to excessive noise. We need not address that issue because, even if St. Francis Bay was negligent in failing to enforce the governing documents, the jury's finding that the Tochilniks did not create the type of condition that can support a NIED claim also precludes the NIED claim against St. Francis Bay.[6]

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to respondents.

SIMONS, J.

We concur.

JONES, P.J.

BRUINIERS, J.

[6] Because substantial evidence supports the jury's verdict, the trial court did not err in denying Louis's JNOV motion. (*Mason v. Lake Dolores Group* (2004) 117 Cal.App.4th 822, 829 [in determining the propriety of granting a JNOV motion, the reviewing court "independently determine[s] whether the record, viewed in the light most favorable to the verdict, contains any substantial evidence to support the verdict"].)