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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

NARSAI DAVID,

Plaintiff and Respondent,

v.

JAMES LEE et al.,

Defendants and Appellants.

A134731

(San Francisco City & County  
Super. Ct. No. CGC-10-500530)

**I.**

**INTRODUCTION**

Appellants James Lee and Vinexim, LLC appeal from a judgment entered in favor of respondent Narsai David pursuant to a motion for entry of judgment under Code of Civil Procedure section 664.6 (section 664.6). The motion sought to enforce a settlement stipulation entered into by the parties during a mandatory, court-ordered mediation. In opposition to the entry of judgment, appellants contended there were issues of fact as to whether respondent had taken good faith steps to mitigate his damages as required by the stipulation, and that a hearing on that issue was necessary to resolve the question. The trial court disagreed and entered judgment for respondent, indicating it was the court's role under section 664.6 to enforce the agreement the parties made, and that the agreement "does not contemplate my making findings concerning the efficacy of [respondent's] mitigation efforts."

We disagree with the trial court's conclusion, reverse the judgment, and remand the case to the superior court for further proceedings on the contested issue of whether

the mitigation efforts undertaken by respondent were consistent with the obligations imposed by the implied covenant of good faith and fair dealing.

## **II.**

### **FACTUAL AND PROCEDURAL BACKGROUND**

A civil action sounding in contract and breach of warranty was filed by respondent in San Francisco Superior Court on June 8, 2010. After default was entered against appellants and then set aside, an answer to the complaint was filed on October 13, 2010. After a series of continuances, the matter ultimately proceeded to judicial mediation on April 4, 2011,<sup>1</sup> before the Honorable Curtis E.A. Karnow. The case was settled during that session.

The terms of the settlement were reduced to a stipulation and signed on April 4. The settlement related to the sale and purchase of a large quantity of wine respondent had contracted to sell to appellants. The settlement terms included an agreement that judgment would be entered in the amount of \$525,000.00 in favor of respondent, but that judgment would not be entered until on or after October 1.

The stipulation also provided that during the time period from April to October, the parties would make efforts to mitigate respondent's damages by selling the wine, which was the subject of the contract, to third parties. It was further agreed that the proceeds from such sales, or partial sales, would be deducted from the \$525,000.00. In the event that such sales equaled \$525,000.00, then the remaining wines, if any, would be given to appellants. The parties further agreed that they would communicate directly with one another, without counsel, concerning pending sales, and that respondent would furnish to appellants invoices and receipts relating to any sales "as soon as commercially possible."

The parties also agreed that the stipulation would be "subject to enforcement pursuant to [section] 664.6 and/or application to enter judgment in the Court of the Hon.

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<sup>1</sup> All further dates are in the calendar year 2011, unless otherwise indicated.

CURTIS E.A. KARNOW, by ex parte application with 48 hours faxed notice to opposing counsel.”

Thereafter, on November 4, respondent filed an ex parte application for entry of money judgment. Respondent’s counsel filed a supporting declaration indicating that, since the time of signing the stipulation, wine sales totaling \$109,952.00 had been made. As a result, respondent requested that judgment be entered in the amount of \$415,048.00, representing the difference between the agreed upon sum of \$525,000.00 and the amount of the wine sales. The application was also supported by respondent’s declaration stating that he had used his “best efforts to sell the remaining stock of wine,” but had only been able to recover \$109,952.00 from such efforts.

An ex parte hearing was held on November 9, at which time counsel for both sides appeared. The court ordered that by November 16, respondent was to provide the receipts and invoices relating to the sale of the wine to appellants. The court indicated its intention to enter judgment on November 17, after the receipts and invoices had been provided to appellants.

Objections were filed by appellants to respondent’s proposed judgment the next day. The objections were supported by a declaration from appellant Lee. Appellants informed the court that they had received the invoices and receipts relating to the wine sales on November 16, “for the first time.” Based on Lee’s knowledge of the wine market and his review of the invoices and receipts produced by respondent, he opined that the sales price obtained by respondent for the wines fell “unreasonably below the average fair market value for each of the wine[s].” Lee stated further that, had the wines been sold at their respective “average wholesale prices,” the amount received would have totaled \$607,481.33; a sum that is \$401,225.33 more than the amount respondent received for the wine. Given the aging potential of the sold wines, Lee stated that further aging would actually increase the value of the inventoried wines and there was no reason to “dump” them for “pennies,” in a veritable “fire sale.” In all, it was Lee’s opinion that there was no excuse for obtaining such unreasonably low prices for the wines, and therefore, respondent had failed to make reasonable efforts to mitigate his damages as he

was required to do under the stipulation. Lee's declaration was accompanied by more than 50 pages of sales information he had compiled.

A judgment was filed by the court on November 28, awarding respondent \$396,173.30.<sup>2</sup> The judgment was accompanied by a memorandum regarding judgment. In it, the trial court recounted the procedural history of the case and events surrounding the settlement. As to the objections lodged by appellants complaining that the wine was sold for less than it was worth resulting in an unfair increase in the judgment, the court stated:

"It is my role under [section ] 664.6 to enforce the agreement the parties made, and that agreement does not contemplate my making findings concerning the efficacy of [respondent's] mitigation efforts. As the Stipulation and the parties agreed on November 9, 2011, [respondent] was contractually obliged to provide the receipt and invoices. That prerequisite accomplished, it is my obligation to enter judgment. I have therefore signed the proposed judgment this date."

Appellant filed this timely appeal.

### **III. DISCUSSION**

"Section 664.6 was enacted to provide a summary procedure for specifically enforcing a settlement contract without the need for a new lawsuit. [Citations.]" (*Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 809 (*Weddington*)). Section 664.6 provides: "If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement."

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<sup>2</sup> The invoices presented to the court showed sales totaling \$128,826.70. This sum was deducted from the judgment amount of \$525,000.00, leaving an amount of \$396,173.30, which the court entered as the judgment.

“The trial court’s factual findings on a motion to enforce a settlement under Code of Civil Procedure section 664.6 ‘are subject to limited appellate review and will not be disturbed if supported by substantial evidence.’ [Citation.] In instances involving questions of law . . . the trial court’s decision is not entitled to deference and will be subject to independent review. [Citations.]’ [Citation.]” (*Chan v. Lund* (2010) 188 Cal.App.4th 1159, 1166.) Here, the ruling challenged on appeal involves no factual findings (the very absence of which is the principal contested issue on appeal). Therefore, we will review the ruling de novo.

As noted, the stipulation specially provided that the trial court retained jurisdiction to enforce the agreement pursuant to section 664.6: “13. The terms of this agreement are subject to enforcement pursuant to [section] 664.6 and/or application to enter judgment in the Court of the Hon. CURTIS E.A. KARNOW, by ex parte application with 48 hours faxed notice to opposing counsel.”

Under section 664.6, the judge has the power to receive evidence, to determine disputed facts, and enter the terms of the settlement agreement as a judgment. (*Weddington, supra*, 60 Cal.App.4th at p. 810.) However, while the trial court retains jurisdiction to determine what terms have been agreed to and whether the parties have performed their respective duties under such terms, “ ‘ “nothing in section 664.6 authorizes a judge to create the material terms of a settlement, as opposed to deciding what terms the parties themselves have previously agreed upon.” [Citation.]’ [Citation.]” (*Steller v. Sears, Roebuck & Co.* (2010) 189 Cal.App.4th 175, 180, italics omitted; accord, *Weddington*, at p. 810.)

Appellants contend that the trial court erred in the manner in which it interpreted the parties’ stipulation. They point out that an express term of the settlement was that the amount to be awarded to respondent would be reduced by the amounts received through mitigation, i.e., the sale of the wine to others.<sup>3</sup> Appellants claim that the express promise

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<sup>3</sup> Paragraph 8 of the stipulation provides: “Each party will continue to attempt to mitigate the damages by the sale of the wine that was the subject of this contract.”

to mitigate damages carried with it the implied obligation of good faith and fair dealings in making such mitigation efforts. Appellants' objections to the motion for entry of judgment under section 664.6 included evidence that respondent did not act in good faith in attempting to sell the wine.<sup>4</sup> They claim this evidence could lead a reasonable trier of fact to conclude respondent breached his implied-in-law promise not to do anything to undermine appellants' right to receive the benefit of the parties' settlement agreement, particularly the mitigation provision. They contend the trial court's entry of judgment for respondent after summarily refusing to consider this issue was error. We agree.

“A settlement agreement is a contract, and the legal principles which apply to contracts generally apply to settlement contracts. [Citation.]” (*Weddington, supra*, 60 Cal.App.4th at p. 810.) In California, every contract has an implied covenant to perform contractual obligations, like respondent's obligation to sell the wine in mitigation of his damages, in “good faith.” (*Cates Construction, Inc. v. Talbot Partners* (1999) 21 Cal.4th 28, 43; *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 683 (*Foley*); see *Cal. Lettuce Growers v. Union Sugar Co.* (1955) 45 Cal.2d 474, 484 [“where a contract confers on one party a discretionary power affecting the rights of the other, a duty is imposed to exercise that discretion in good faith and in accordance with fair dealing]; *Hicks v. E.T. Legg & Associates* (2001) 89 Cal.App.4th 496, 508 (*Hicks*) [“ ‘ ‘such power must be exercised in good faith’ ” ].) In describing this duty, California courts have used the terms “good faith” and “best efforts” interchangeably. (See *Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1120; *Third Story Music, Inc. v. Waits* (1995) 41 Cal.App.4th 798, 805 (*Third Story*) [“Although the contract does not promise in so many words that the licensee will use its best efforts, ‘ ‘such a promise is fairly to be implied’ ” ].)

Respondent places undue emphasis on the fact that there is no good faith requirement to be found in the parties' stipulation, arguing that if “[a]ppellants wanted

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<sup>4</sup> Respondent did not file any rebuttal to Lee's declaration and the documents he attached, nor did respondent raise any specific objections to Lee's assertions.

more facts adduced” on the legitimacy of respondent’s mitigation effort “they should have made provision for that in the Stipulation.” This argument reflects a fundamental misunderstanding of a cause of action for breach of the implied covenant of good faith and fair dealing. As the court explained in *Koehrer v. Superior Court* (1986) 181 Cal.App.3d 1155 (*Koehrer*), disapproved on other grounds in *Foley, supra*, 47 Cal.3d at pages 698-699), “[T]he obligations imposed by the implied covenant of good faith and fair dealing are not those set out in the terms of the contract itself, but rather are obligations imposed by law governing the manner in which the contractual obligations must be discharged—fairly and in good faith. [Citation.] While the specific nature of the obligations imposed by the implied covenant of good faith and fair dealing are dependent upon the nature and purpose of the underlying contract and the legitimate expectations of the parties arising from the contract [citations], those obligations are not the obligations that were consensually undertaken in the contractual provisions . . . .” (*Koehrer*, at p. 1169.)

“ [T]he covenant is not susceptible to firm definition but must be examined on a case-by-case basis. . . . ‘It is universally recognized the scope of conduct prohibited by the covenant of good faith is circumscribed by the purposes and express terms of the contract. . . .’ The issue of whether the implied covenant of good faith and fair dealing has been breached is ordinarily ‘a question of fact unless only one inference [can] be drawn from the evidence.’ [Citation.]” (*Hicks, supra*, 89 Cal.App.4th at pp. 508-509.)

Applying these principles here, appellants’ evidence supported the inference that respondent may have breached his implied obligation to use “good faith” or “best efforts” in setting the price of the wine in order to generate an offset for appellants’ damages. (*Third Story, supra*, 41 Cal.App.4th at p. 805.) Consequently, it was incumbent upon the trial court to allow the parties to present evidence, to consider the mitigation issue raised by appellants, and to make a determination of whether respondent negotiated a fair price for the sale of the wine before judgment could be entered. (*In re Marriage of Assemi* (1994) 7 Cal.4th 896, 905 [in ruling on § 664.6 motion, trial court is empowered to resolve disputed issues]; *Hines v. Lukes* (2008) 167 Cal.App.4th 1174, 1183 [obligation

to consider arguments in opposition to motion for entry of judgment pursuant to settlement].) The failure to do so was error.<sup>5</sup>

**IV.**

**DISPOSITION**

The judgment is reversed. This matter is remanded to the trial court with directions to conduct further proceedings pursuant to section 664.6, consistent with this opinion. In the interests of justice, both parties are to bear their own costs on appeal.

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RUVOLO, P. J.

We concur:

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RIVERA, J.

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HUMES, J.

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<sup>5</sup> We note, however, that there is no right to a jury trial on issues arising from a section 664.6 enforcement motion. (See, e.g., *Osumi v. Sutton* (2007) 151 Cal.App.4th 1355, 1360; *Malouf Bros. v. Dixon* (1991) 230 Cal.App.3d 280, 283.)