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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

PACIFIC INFINITY COMPANY, INC.,

Plaintiff and Appellant,

v.

XI WAN LI et al.,

Defendants and Respondents.

A137278

(Alameda County
Super. Ct. No. RG-12-631395)

I.

INTRODUCTION

Plaintiff Pacific Infinity Company, Inc. (Pacific) appeals from an order denying its motion for a preliminary injunction brought against defendants Xi Wan Li and Xiao Tin Li (the Li's). Pacific contends the trial court abused its discretion in denying its motion, and misconstrued the agreement between the parties in doing so. We conclude there was no abuse of discretion in denying the motion, and no error in construing the parties' agreement. Accordingly, we affirm the contested order.

II.

FACTUAL AND PROCEDURAL BACKGROUNDS

Pacific filed a complaint for a preliminary injunction and for an accounting against the Li's, contending they had breached their lease with Pacific to operate a Chinese herb store at the Pacific East Mall in Richmond, California (the Mall Store). That lease contained a "use restriction" as follows: "4.1. Tenant [the Li's] agrees that it will not, during the term of this Lease, directly or indirectly, operate or own any business similar

to or competing with the business conducted in the Premises within the radius of the shopping center specified in Article 1(m).”¹

A retail lease addendum was later executed between the parties that described the merchandise to be sold in the Mall Store. This merchandise included Chinese herbs and related products, including “over-the-counter Chinese medicine.”

The complaint went on to allege that sometime in late 2011 the Li’s opened another store (the San Pablo Store) approximately one mile away from the Mall Store to sell the same Chinese medicines and herbs sold at the Mall Store, in violation of the lease’s use restriction clause. The Li’s filed an answer admitting that the San Pablo Store had been opened, but denying that the lease with Pacific was breached by its operation.

Pacific filed a motion requesting a preliminary injunction soon after the Li’s answered the complaint. Accompanying the motion was a declaration from Terry Kwong, the principal and majority shareholder of Pacific, and general manager of the Pacific East Mall. Kwong conducted an investigation into the opening of the San Pablo Store and took photographs that were attached to his declaration. Kwong’s photographs show the name of the San Pablo Store as “Wang Fung Chinese Herb and Tea.” Another photograph depicts a sign in the front of the Mall Store, written in Chinese, translating to read: “Our new herb store is already open. We welcome your patronage.”

Kwong observed that the San Pablo Store was about three times the size of the Mall Store, and included a café. The Li’s were believed to be spending most of their time running the San Pablo Store. Advertisements for the San Pablo store stated the store employed a “Chinese California Acupuncture Licensed Medical Doctor.” Kwong opined that the San Pablo Store was “competing” with the Mall Store, and was “similar” to it, in violation of the lease.

The Li’s filed an opposition to the motion which included a declaration from Mr. Li. He described the San Pablo Store as a “full service acupuncture shop” where

¹ The “radius” restriction was set at five miles in Article 1(m) of the lease, and there is no dispute that the San Pablo Store falls within that radius.

clients can come in and see one of the staff acupuncturists who also prescribe herbal remedies. In the same building as the San Pablo Store is a “bubble tea shop” operated by Li’s daughter. The shop was named after the Pacific Mall Store, in part to capitalize on the good will built up by Li between 2006 and 2011. Mr. Li stated that this diversion of good will was necessary because in 2011, Pacific forced him to stop offering acupuncture services at the Mall Store.

Li further claimed that the stores drew two different categories of customers: those coming to the San Pablo Store were seeking the services of an acupuncturist, and those coming to the Mall Store were merely seeking to have prescriptions filled. Also differing was the manner of prescribing herbal remedies; those visiting the San Pablo Store could have herbal prescribed tea or soup prepared at the store, the herbs could be purchased there and taken home, or the customer could take the prescription to another store, such as the Mall Store, and have it filled there. Li stated that business at the Mall Store had actually increased since the opening of the San Pablo Store.

Attached to Mr. Li’s declaration was a copy of Mall Store lease, including an option extending that lease from July 2011 to June 2016. Executed on the same day as the lease extension option was another document titled “Retail Lease Addendum,” restricting the merchandise to be sold at the Mall Store to “Chinese Herbs and related products approved by landlord.” The addendum also forbids any acupuncture at the Mall Store.

A tentative ruling on the motion was prepared by the trial court indicating an intention to deny the motion. The grounds for the proposed denial were that Pacific had failed to show a likelihood of prevailing on the merits of its breach of lease claim, including its claim for specific performance. The court also indicated that the “balance of harms” factor favored the Li’s. Specifically, the tentative ruling noted that granting a preliminary injunction would prevent the Li’s from operating their business and potentially require them to lay off employees and to “divest themselves of their business.” The court also was impressed by Mr. Li’s statement that, in fact, the San Pablo Store had actually increased business at the Mall Store.

A hearing on the motion was held on November 20, 2012, after which the court took the matter under submission. An order was filed the next day confirming the tentative decision to deny the motion for a preliminary injunction. The order states the following grounds for the denial: “[Pacific] has not demonstrated that it is likely to prevail on the merits. [Pacific] has not shown that [the Li’s] have violated the lease agreement or that breach of the lease would entitle [Pacific] to specific performance.

“The balance of harms factor also favors [the Li’s]. Granting the requested preliminary injunction would prevent [the Li’s] from operating their business and potentially require [the Li’s] to lay off employees and divest themselves of their business. . . . Moreover, [the Li’s] contend that the opening of their second store has increased business at their first store in Pacific East Mall.”

A notice of appeal was filed by Pacific on December 10, 2012.

III.

DISCUSSION

A. Standard of Review

We must first articulate the applicable standard of review on appeal from the denial of Pacific’s motion for a preliminary injunction. Pacific concedes that, ordinarily, the appellate standard of review would be abuse of discretion. However, because our review turns on the construction of the parties’ contract, and an interpretation of the statute governing preliminary injunctions (Code Civ. Proc., § 526), Pacific claims our review is de novo.

The appellate standard of review applicable to denials of requests for preliminary injunctions has been often stated. “We review an order granting [or denying] a preliminary injunction under an abuse of discretion standard. [Citations.] Review is confined, in other words, to a consideration whether the trial court abused its discretion in ‘evaluat[ing] two interrelated factors when deciding whether or not to issue a preliminary injunction. The first is the likelihood that the plaintiff will prevail on the merits at trial. The second is the interim harm that the plaintiff is likely to sustain if the injunction were denied as compared to the harm the defendant is likely to suffer if the

preliminary injunction were issued.” ’ [Citation.]” (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1109 (*Gallo*).

“Discretion is abused in the legal sense ‘whenever it may be fairly said that in its exercise the court in a given case exceeded the bounds of reason or contravened the uncontradicted evidence.’ [Citations.]” (*Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 527 (*Continental Baking*)). “When a trial court denies an application for a preliminary injunction, it implicitly determines that the plaintiffs have failed to satisfy either or both of the ‘interim harm’ and ‘likelihood of prevailing on the merits’ factors. On appeal, the question becomes whether the trial court abused its discretion in ruling on both factors. Even if the appellate court finds that the trial court abused its discretion as to one of the factors, it nevertheless may affirm the trial court’s order if it finds no abuse of discretion as to the other.” (*Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 286-287, italics omitted.)

“[I]ssues of fact are subject to review under the substantial evidence standard; issues of pure law are subject to independent review. [Citation.]” (*Gallo, supra*, 14 Cal.4th at pp. 1136-1137, fn. omitted, dis. opn. of Mosk, J.) “The classic rule that if any substantial evidence supports the finding of the trial court as to an issue of fact a reviewing court may not substitute its own evaluation of the evidence, applies to an appeal from a preliminary injunction. A reviewing court may reverse only if an abuse of discretion is shown; and it follows that if substantial evidence supports the order there is no abuse of discretion. (*Union Interchange, Inc. v. Savage* [(1959)] 52 Cal.2d 601, 606)” (*San Diego Gas & Elec. Co. v. San Diego Congress of Racial Equality* (1966) 241 Cal.App.2d 405, 407.) Accordingly, “[w]here the evidence before the trial court was in conflict, we do not reweigh it or determine the credibility of witnesses on appeal. ‘[T]he trial court is the judge of the credibility of the affidavits filed in support of the application for preliminary injunction and it is that court’s province to resolve conflicts.’ [Citation.] Our task is to ensure that the trial court’s factual determinations, whether express or implied, are supported by substantial evidence. [Citation.] Thus, we interpret the facts in the light most favorable to the prevailing party and indulge in all reasonable

inferences in support of the trial court's order. [Citations.]” (*Shoemaker v. County of Los Angeles* (1995) 37 Cal.App.4th 618, 625.)

As mentioned, here the trial court's role in deciding Pacific's motion for a preliminary injunction was to determine two issues: (1) The likelihood that Pacific would prevail on the merits at trial, and (2) a balancing of any interim harm that Pacific was likely to sustain if the injunction were denied as compared to the harm the Li's were likely to suffer if the preliminary injunction were issued. (*Gallo, supra*, 14 Cal.4th at p. 1109.) In resolving these issues the court was not required to construe any statute that would necessarily invoke our de novo review. Furthermore, while the parties' contract was central to the court's consideration of the merits argument (first issue), that interpretation is subject to de novo review only if the contract language is unambiguous and all extrinsic evidence is undisputed, otherwise, the substantial evidence standard of review applies. (*DVD Copy Control Assn., Inc. v. Kaleidescape, Inc.* (2009) 176 Cal.App.4th 697, 713; *ASP Properties Group, L.P. v. Fard, Inc.* (2005) 133 Cal.App.4th 1257, 1266-1267.) Here, the contract, including the “use restriction” was ambiguous, and the extrinsic evidence concerning whether the lease was breached was disputed. Therefore, de novo review is inapplicable.²

B. The Court Correctly Determined that Pacific Had Failed to Show a Likelihood of Prevailing on the Merits of its Claim

Pacific's complaint sought a preliminary injunction for what it alleged was “a clear and unmistakable breach of the lease” It alleged that the injunction was necessary to stop the Li's from siphoning off customers and thus revenue from the Mall Store because damages “would not be a complete or adequate remedy.” Alternatively, Pacific sought an accounting to determine what merchandise had been sold at the San Pablo Store that was duplicative of what was available for sale at the Mall Store, claiming entitlement to damages based on that accounting.

² We note, however, that even if we applied de novo review, we would affirm the trial court.

Of course, Pacific's entitlement to any relief primarily hinged on its ability to show that the Li's breached their lease agreement by operating a "similar" or "competing" business to that being operated under the agreement. While Mr. Kwong, on behalf of Pacific, characterized the San Pablo Store as competing with, or similar to, the Mall Store, the factual basis for this conclusion was controverted.³ The Mall Store was limited to selling "Chinese herbs and related products," including "over-the-counter Chinese medicine." Mr. Li pointed out that the San Pablo Store, a "full service acupuncture shop," was opened once Pacific forced the Li's to cease offering acupuncture services at the Mall Store, a proposition supported by the documents relating to the 2011 lease extension. Also, Li stated, without contradiction in the evidence, that rather than competing with the Mall Store, the San Pablo Store was actually increasing revenue at the Mall Store, thereby refuting Kwong's assertions that the two store were "competing," and that revenue was being siphoned off from the Mall Store by the San Pablo Store.⁴

Moreover, in addition to the acupuncture services, Li claimed that there were two different categories of customers coming into the two stores: those coming to the San Pablo Store were seeking the services of an acupuncturist, while those at the Mall Store were merely seeking to have prescriptions filled. Also differing was the manner of prescribing herbal remedies. Those visiting the San Pablo Store could have herbal

³ While Pacific cites to its moving papers and the November 20, 2012 hearing transcript as evidentiary support for its positions, the only documents in the record of evidentiary value were the declarations of Mr. Kwong and Mr. Li, and the lease attached to their respective declarations.

⁴ Similarly, we reject Pacific's claim that because both stores sell some of the same Chinese herb products, presumably in the same form, it is conclusively proven that the stores are competing or "similar." There are any number of hypotheticals that refute such a presumption. For example, if the same owners operate a sandwich shop in a mall, and offer some of the same food and beverages as a nearby gas station, it is certainly arguable that the two establishments are not "competing" or even similar. The point here is that the trial court's finding that the Li's operation of the San Pablo Store does not violate the lease because it was not similar to the Mall Store is supported by substantial evidence, even if there is evidence or inferences that suggest the contrary.

prescribed tea or soup prepared at the store, the herbs could be purchased there and taken home, or the customer could have the prescription taken to another store, such as the Mall Store, and have it filled there. Contradicting the declarations and conclusions of Kwong, Li's declaration pointed out that the impetus for the San Pablo store was not to compete, but to fill a gap for a Chinese medical practice occasioned by Pacific's insistence that the Mall Store stop offering acupuncture services, which featured prominently in the palette of health care options available at the San Pablo Store.

Thus, the court's determination that the lease was not breached, based on the implicit finding that the San Pablo Store was not "competing" with or "similar" to the Mall Store, was supported by substantial evidence. In considering the parties' evidentiary showing, we are mindful that a trial court "will consider the probability of the plaintiff's ultimately prevailing in the case and, it has been said, will deny a preliminary injunction unless there is a reasonable probability that plaintiff will be successful in the assertion of his rights. [Citations.]" (*Continental Baking, supra*, 68 Cal.2d at p. 528.) Applying this legal standard to the record, we conclude that the trial court could properly conclude that Pacific failed to make a showing of probability it would succeed at trial.

C. Pacific Failed to Demonstrate That Any Remedy at Law Was Inadequate

Even if Pacific had shown that it was likely to prevail at trial on its breach of contract claim, as we noted earlier, it was also obligated to make an additional showing that its remedy at law was inadequate, and that the potential irreparable harm to Pacific without a preliminary injunction outweighed the potential irreparable harm to the Li's if the preliminary injunction issued.

While Pacific, through Kwong, concluded summarily that the San Pablo Store was siphoning off revenue from the Mall Store, there was no such evidence presented, nor of *any* damage sustained by Pacific as a result of the opening of the San Pablo Store. To the contrary, the *only* evidence came from Li who stated that the San Pablo Store had led to an *increase* in revenue and "foot traffic" for the Mall Store. This point was emphasized by the trial court in making its determination to deny the motion.

Pacific argues in its briefs on appeal that it is entitled to an injunction, in part, because damages are inadequate under the facts of this case, and are difficult if not impossible to prove. Except for the argument of appellate counsel, there is nothing in the record to support this factually. Certainly, neither Kwong nor anyone else at Pacific provides the foundation for this assertion.⁵ On the other hand, the trial court also was rightfully concerned for the impact an injunction would have on the Li's and their employees. Consideration of the prospect they would have to "divest" themselves of the San Pablo Store, and concomitantly lay off employees was proper.

In an apparent attempt to lessen the impact of this evidence, Pacific contends on appeal that: "Landlord's petition for a preliminary injunction does not seek to shut down the acupuncture clinic or café at the [San Pablo Store]" To the contrary, the very first page of Pacific's notice of motion requesting a preliminary injunction states that it was seeking "an Order issuing a preliminary injunction requiring [the Li's] to cease operation of the business known as the Wang Fung Chinese Herb and Tea store [the San Pablo Store]." Pacific later attempted to retreat from this broad statement by restating Pacific's goal as being simply to stop the sale of herbs at the San Pablo Store. It suggested that any injury to the Li's can be mitigated by shifting their inventory to the Mall Store, or even by leasing the non-café portion of the San Pablo Store to "a different business." Despite this effort to characterize the scope of the requested injunctive relief, the trial court's conclusion that issuing an injunction "would prevent [the Li's] from operating their business and potentially require [the Li's] to lay off employees and divest themselves of their business" is fully supported by the record below.

Furthermore, the trial court concluded that Pacific had failed to show entitlement to specific performance—a finding that Pacific challenges on appeal. As Pacific points out in its opening brief on appeal, one element that must be proved in order to obtain

⁵ Again, while not citing to any part of the appellate record, appellant concedes in its opening brief that the Li's have continued to make rent payments to Pacific after opening the San Pablo Store—a proposition that undermines even further its equitable position as to the need and justification for a preliminary injunction.

specific performance is that damages cannot be determined without great difficulty. (*Entin v. Superior Court* (2012) 208 Cal.App.4th 770, 785.) As we have pointed out, here there was no evidence that Pacific was damaged at all as a result of the San Pablo Store’s existence, let alone evidence that determining damages was difficult or impossible. For that reason alone, Pacific was not entitled to an injunction specifically enforcing the lease (assuming there was a breach of the lease by the Li’s).

Lastly, we reject Pacific’s alternative argument that it is entitled to specific performance in the context of this lease dispute even without a showing of damages because it involves the “transfer” of an interest in land. None of the cases it cites apply here.

The case of *Tamarind Lithography Workshop, Inc. v. Sanders* (1983) 143 Cal.App.3d 571 had nothing to do with an alleged breach of a lease for real property: “The essence of this appeal concerns the question of whether an award of damages is an adequate remedy at law in lieu of specific performance for the breach of an agreement to give screen credits.” (*Id.* at p. 572.) *Henderson v. Fisher* (1965) 236 Cal.App.2d 468 is cited by Pacific for the proposition, unremarkable to every first year law student, that a transfer of property can be set aside by the remedy of specific performance because of the uniqueness of real estate. (*Id.* at pp. 473-474.)

In *Kaufman v. Goldman* (2011) 195 Cal.App.4th 734, another case cited by Pacific, the landlord sued for specific performance of a settlement agreement earlier reached with the tenant which required the tenant to vacate the premises. (*Id.* at p. 737.) Because the case involved the transfer of an interest in real property, the court granted the relief when the tenant failed to rebut the presumption that damages were an inadequate remedy. (*Id.* at p. 743.) Of course, in this case there is no transfer of property involved, and in any event, the Li’s demonstrated that Pacific suffered no damages as a result of the alleged breach of lease—a fact essentially conceded by Pacific by its acknowledgement that the Li’s have continued to pay all rents for the Mall Store.

Finally, in *Remmers v. Ciciliot* (1943) 59 Cal.App.2d 113, specific performance was allowed in the dispute concerning a promised exchange of real properties without a

showing of inadequacy of damages as a remedy; a small business property in Monrovia, for the defendant’s five-room residence in Pomona. (*Id.* at p. 114.) This case is plainly distinguishable.

As is apparent, none of these cases absolve Pacific from the requisite showing that it had suffered any damages for the alleged breach of the lease by the Li’s, and that damages were an inadequate legal remedy because they were difficult or impossible to quantify.

As noted earlier, Pacific was not entitled to a preliminary injunction without showing both a probability that it would prevail at trial and that the “ ‘interim harm that the plaintiff is likely to sustain if the injunction were denied [favored the plaintiff] as compared to the harm the defendant is likely to suffer if the preliminary injunction were issued.’ ” [Citation.]” (*Gallo, supra*, 14 Cal.4th at p. 1109.) In applying the appropriate standard of review to this second determination, we conclude the trial court acted well within its discretion in finding that the balance of hardships favored the Li’s.

IV.
DISPOSITION

The trial court’s order denying Pacific’s motion for a preliminary injunction is affirmed. Costs on appeal are awarded to the Li’s.

RUVOLO, P. J.

We concur:

REARDON, J.

HUMES, J.