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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

NEXT SEAFOOD COMPANY, INC.,

Defendant and Appellant,

v.

PORT OF SAN FRANCISCO,

Plaintiffs and Respondents.

A137487

**(San Francisco County
Super. Ct. No. CGC-10-506615)**

Next Seafood Company, Inc. (Next) appeals from a judgment entered in favor of the Port of San Francisco (the Port) and from a later order awarding the Port attorney fees. The Port's action sought damages for Next's failure to vacate space it rented from the Port after Next's tenancy was terminated. The trial court awarded the Port what it determined to be the fair market rental value of the premises for the time Next was a holdover tenant. It also ordered Next to pay the Port \$77,881.25 in attorney fees. The trial court denied Next any relief on its cross-complaint.

Next contends the trial court erred in denying its claim for conversion of certain equipment. It also challenges the damages awarded to the Port as unsupported by the evidence. Next further argues the attorney fee award is unsupported by admissible evidence and that it was improperly denied discovery related to the attorney fee motion.

We conclude Next has forfeited its claims by failing to demonstrate they were raised below or by failing to provide an adequate record. Accordingly, we will affirm both the judgment and the order awarding attorney fees.

FACTUAL AND PROCEDURAL BACKGROUND¹

Next is a fish processor and wholesale distributor. It leased shed space from the Port at Pier 45 in San Francisco. Next held three leases in shed D for premises denominated as D3, D4, and D5. The company became delinquent in rent payments, and after unlawful detainer proceedings, the Port recovered judgments for possession of the premises. Despite the Port's success in the unlawful detainer actions, Next did not vacate in a timely manner. The Port accepted no rent from Next during the pendency of the unlawful detainer actions.

The Port later filed an action seeking contract damages from Next. The action sought damages for the rental value of the space during the period in which Next was a holdover tenant.

Next filed its original cross-complaint against the Port in February 2011, as well as its answer to the complaint. After the trial court disposed of the Port's two motions for judgment on the pleadings, Next filed an amended cross-complaint pleading causes of action for the Port's alleged conversion of an ice machine and hoist remaining at shed D4 following Next's eviction.

The matter was tried to the court, and at trial the Port's senior property manager testified regarding the monthly fair market rental value for the sheds during the relevant period. Next did not challenge the amounts the property manager calculated as fair

¹ We have compiled our statement of facts without assistance from the Port. In contravention of California Rules of Court, rule 8.204(a)(1)(C), the introduction and statement of facts in respondent's brief contain not a single citation to the record. (See *Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 97, fn. 2 ["Each and every statement in a brief regarding matters that are in the record on appeal, whether factual or procedural, must be supported by a citation to the record. This rule applies regardless of where the reference occurs in the brief."]) We are ordinarily entitled to disregard arguments unsupported by citations to the record. (*Regents of University of California v. Sheily* (2004) 122 Cal.App.4th 824, 826-827, fn. 1.) We will not do so here, but rather will examine the record on our own and reverse only if we find prejudicial error. (Cf. *Kennedy v. Eldridge* (2011) 201 Cal.App.4th 1197, 1203 [where respondent fails to file brief, court does not treat this as default but independently examines record for prejudicial error].)

market value for sheds D3 and D5. Next did not present any evidence as to the market rate for any shed at any time.

On its claim for conversion of the ice machine and hoist, Next presented the testimony of its officers Kara Chau and Dzunt (Peter) Nguyen. They testified Next purchased the ice machine and hoist from prior Port tenants, paying \$125,000 for the ice machine as reflected in a bill of sale produced at trial. Both Chau and Nguyen further testified that an additional \$150,000 was paid at that time for the ice machine, delivered to the seller in three sacks containing \$50,000 each. The bill of sale reflects that the ice machine was sold to a Hiep Chau, Bruce Chau and Antoinetta Nguyen. Other than testimony that Hiep and Bruce Chau are Kara Chau's brothers, no evidence was offered to establish their relationship to Next. Chau testified that the hoist's purchase was evidenced by the agreement under which Next acquired equipment from a man named John Morgan. At no time did Next Seafood present any testimony or evidence as to the present day value of the ice machine or hoist.

At the conclusion of the trial, the court issued a statement of decision. It found the Port had a right to recover holdover damages in the amount of \$143,172.20. It rejected Next's conversion claim because Next had neither established its ownership of the equipment nor its value. Subsequently, the Port sought and was awarded attorney fees in the amount of \$77,881.25 pursuant to the parties' lease agreements for the various properties. Next then filed this appeal.

DISCUSSION

Next raises three issues on appeal. It first contends the Port converted the ice machine and the hoist, and it was therefore entitled to a writ of possession and nominal damages. Next's second contention is that the evidence supporting the trial court's calculation of fair market rent is legally insufficient. Finally, Next argues the trial court's award of attorney fees was based on what it calls "objectionable evidence." We address these issues in turn.

I. *Standard of Review*

In this case, the trial court issued a statement of decision embodying its findings. “The substantial evidence standard applies to both express and implied findings of fact made by the superior court in its statement of decision rendered after a nonjury trial. [Citation.] The doctrine of implied findings is based on our Supreme Court’s statutory construction of [Code of Civil Procedure] section 634 and provides that a ‘party must state any objection to the statement in order to avoid an implied finding on appeal in favor of the prevailing party. . . . [I]f a party does not bring such deficiencies to the trial court’s attention, that party waives the right to claim on appeal that the statement was deficient . . . and hence the appellate court will imply findings to support the judgment.’ [Citation.] Stated otherwise, the doctrine (1) directs the appellate court to presume that the trial court made all factual findings necessary to support the judgment so long as substantial evidence supports those findings and (2) applies unless the omissions and ambiguities in the statement of decision are brought to the attention of the superior court in a timely manner.” (*SFPP v. Burlington Northern & Santa Fe Ry. Co.* (2004) 121 Cal.App.4th 452, 462.)

The record in this case contains neither a request for statement of decision nor any objections to the proposed statement of decision. Since nothing in the record indicates Next brought any deficiencies in the statement of decision to the trial court’s attention, we must apply the doctrine of implied findings. We will therefore infer the trial court made implied findings favorable to the Port on all issues necessary to support the judgment and will review those implied factual findings under the substantial evidence standard. (*Fladeboe v. American Isuzu Motors, Inc.* (2007) 150 Cal.App.4th 42, 59-60 (*Fladeboe*).

II. *The Theory of Trial Doctrine Bars Next’s Arguments on its Claim for Conversion.*

Next contends the Port converted the ice machine and hoist. The Port argues Next forfeited this argument, because Next seeks reversal of the judgment on the basis of a factual theory it did not raise below. Specifically, the Port contends Next cannot seek reversal on the factual theory that its *possession* of the ice machine and hoist supports a

claim for conversion, when in the trial court Next premised that claim only on its *ownership* of the two items. We agree with the Port.

In its briefs, Next cites us to nothing in the record indicating the factual theory it now raises on appeal was put before the trial court.² Since the record does not contain a request for statement of decision or objections to the proposed statement of decision, we must look to other documents to “illuminate the theory or theories on which this case actually was tried.” (*Brown v. Boren* (1999) 74 Cal.App.4th 1303, 1317.) We look first to Next’s second amended cross-complaint, but we find no allegation that Next’s actual possession of the ice machine and hoist would support an action for conversion. (See *ibid.* [complaint was devoid of allegations regarding contract theory raised on appeal].) Next also filed a trial brief in the court below, but again, that brief makes no mention of this theory. (*Id.* at pp. 1318-1319 [trial brief failed to mention contract theory plaintiff sought to raise on appeal].) The same is true of the closing argument by Next’s counsel; at no point did he seek to ground Next’s cause of action for conversion on the theory that Next’s possession of these items would support the cause of action. His closing argument was focused on his effort to persuade the trial court that Next held title to the ice machine and hoist based upon a bill of sale. (See *Richmond v. Dart Industries, Inc.* (1987) 196 Cal.App.3d 869, 878-879 [absence of factual theory from closing argument to jury demonstrated it had not been raised in trial court].) The theory of trial doctrine prevents Next from changing its position on appeal and arguing it was entitled to damages for conversion based upon possession of, rather than title to, the ice machine and hoist. (*Brown v. Boren, supra*, 74 Cal.App.4th at p. 1316.)

We also will not consider Next’s argument that the trial court failed to address certain provisions of the Civil Code relating to the rights of tenants, the legal duties of

² Although the Port raises this forfeiture argument at the very beginning of its brief, Next’s reply brief makes no effort to refute it. We may deem the matter conceded. (See, e.g., *Campbell v. Ingram* (1918) 37 Cal.App. 728, 732 [“Since appellant has not deigned to reply to the argument of respondent, we have a right to assume that the former deems the argument of the latter unanswerable[.]”].)

landlords with respect to trade fixtures and personal property, and recovery of nominal damages. Next does not cite any part of the record showing these statutory arguments were raised below, and our independent review of the record reveals no indication they were ever mentioned to the trial court. We therefore do not address them. (*Dietz v. Meisenheimer & Herron* (2009) 177 Cal.App.4th 771, 800-801 [reviewing court declined to consider arguments based on statute and rules of professional conduct where appellant failed to demonstrate matters were raised in trial court].)

Similarly, we will not address Next's arguments regarding its alleged cause of action for claim and delivery. Next sought leave to plead such a claim, but in ruling on the Port's second motion for judgment on the pleadings, the trial court granted Next leave to file only a claim for conversion. There is nothing in the court's order permitting Next to add a cause of action for claim and delivery. Although Next now faults the trial court for failing to address that claim, Next's counsel did not mention it in closing argument, and thus this new theory cannot now be raised on appeal. (See *Richmond v. Dart Industries, Inc.*, *supra*, 196 Cal.App.3d at pp. 878-879.)

III. *Next Forfeited Any Objection to the Port's Evidence of Fair Market Value for Sheds D3 and D5.*

Next contends the evidence supporting fair market value for rental of sheds D3 and D5 was legally insufficient. Next argues the Port presented only evidence of what it would accept as rent for the space, rather than evidence of what a willing lessee would have agreed to pay during the period at issue. Next contends the Port's evidence is inadequate because the "Port presented no real estate brokers; no appraisals; no evidence of comparable rents; and no evidence of what the successor tenant was paying for the premises at issue."³ The Port argues Next forfeited any objection to the adequacy of the evidence of fair market value by failing to challenge that evidence. We agree.

³ As to shed D4, Next argued below that the measure of the Port's damages was the lease rate of \$1 per month. (But see *Superior Motels, Inc. v. Rinn Motor Hotels, Inc.* (1987) 195 Cal.App.3d 1032, 1069 [damages for an unlawful detainer may be greater or less than the rent provided for in the lease].) Its opening brief makes no argument regarding shed D4, and we therefore treat this argument as abandoned.

At trial, the Port's senior property manager testified that he had calculated the rental value of the space using "\$0.85 a foot, which is a shed rate, and it's comparable to what [the Port is] leasing space for today." Using that rate, he calculated the amount Next owed for each of the sheds, and he arrived at an aggregate figure of \$166,932 for all three sheds. Next's counsel made no objection to this testimony. The property manager also explained that the rent for shed D4 had been \$1 per month, but that amount was increased to fair market value after the lease was terminated.

During closing argument, the trial court asked Next's counsel whether there was a basis to dispute the rental value for sheds D3 and D5, and counsel conceded there was not. Although he contended the \$166,932 figure was not accurate, he would not tell the court what he thought the correct amount was. Counsel said he did not know and could not properly commit to an amount.

At the outset, Next's failure to object at trial to the method used to calculate fair market value for rental of the sheds forfeits any challenge to the methodology used. (*SCI California Funeral Services, Inc. v. Five Bridges Foundation* (2012) 203 Cal.App.4th 549, 564-565.) In addition, by refusing to state what it considered the proper amount of rent, Next has failed to meet its burden of showing the trial court committed prejudicial error. (See *Sharabianlou v. Karp* (2010) 181 Cal.App.4th 1133, 1150 [where appellants did not tell appellate court what amount of damages should have been awarded, they failed to demonstrate error].) Finally, since neither the request for statement of decision nor any objections to the statement are in the record on appeal, there is nothing to indicate Next brought this alleged error to the trial court's attention. (See *Fladeboe, supra*, 150 Cal.App.4th at p. 58.)

Next has also failed to provide us with a record adequate to demonstrate error. In determining whether the record contains substantial evidence of damages, "[w]e presume the evidence supports every finding of fact unless appellant demonstrates otherwise, and we must draw all reasonable inferences from the record to support the judgment." (*El Escorial Owners' Assn. v. DLC Plastering, Inc.* (2007) 154 Cal.App.4th 1337, 1357.) The parties introduced a number of exhibits at trial that are not part of the record. At

least some of these appear to have been relevant to the issue of fair market value.⁴ Since the record does not contain all the documents submitted in connection with this issue, we decline to find error and will infer that substantial evidence of damages was before the trial court. (See *Haywood v. Superior Court* (2000) 77 Cal.App.4th 949, 955.)

IV. *Next Provides No Reporter's Transcript of the Attorney Fee Hearing, and It Therefore Fails to Demonstrate Error.*

Next claims the trial court's award of attorney fees was based on objectionable evidence. It contends the award was supported by a hearsay declaration of the Port's counsel, and this is inadequate to sustain the award. It also contends it was improperly denied discovery on the fee motion. It faults the trial court for ignoring its evidentiary objections and its discovery attempts.

We cannot reach Next's arguments because the record is inadequate to permit informed appellate review. The trial court held a hearing on the Port's motion for attorney fees. Next did not include a reporter's transcript of that hearing in the record on appeal. We therefore do not know whether the trial court addressed Next's objections and arguments at that hearing, nor do we know what, if any, evidence or reasoning the trial court relied upon in making its order. As a consequence, we must resolve all claims regarding the attorney fee award in favor of the Port and against Next. (See *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296 [where party challenging attorney fee award failed to include reporter's transcript of attorney fee hearing, it failed to provide adequate record and order was affirmed].)

⁴ We granted Next's motion to augment the record on appeal with a number of documents filed in the trial court, including certain exhibits. The exhibits to which we refer here were never designated for inclusion in the record, and they were not part of Next's motion to augment.

DISPOSITION

The judgment and order awarding attorney fees are affirmed. The Port shall recover its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1), (2).)

Jones, P.J.

We concur:

Simons, J.

Needham, J.