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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

NABIL ABDULLA, Plaintiff, Cross-defendant and Respondent, v. TAHER MOSLEH ALDAFARI, Defendant, Cross-complainant and Appellant.	A137599 (Alameda County Super. Ct. No. RG07337346)

Defendant and cross-complainant Taher Mosleh Aldafari appeals from a judgment entered in a civil action involving his former business partner, plaintiff and cross-defendant Nabil Abdulla, following a jury verdict on various civil claims and a court trial on various equitable claims. Aldafari contends: (1) the trial court erred in granting a directed verdict in favor of Abdulla on Aldafari's claim Abdulla breached the parties' contract by failing to pay the full amount of taxes on income generated by the business for a year when Abdulla had exclusive control of the business; (2) certain aspects of Abdulla's equitable accounting claim, which was decided by the court, was subsumed within his breach of contract claim as determined by the jury; and (3) the trial court should have granted Aldafari's motion to amend his second cause of action for fraud after the court granted a directed verdict in favor of Abdulla on that cause of action. We disagree and affirm.

FACTS AND PROCEDURAL HISTORY

Abdulla and Aldafari purchased the Four Star Market in Oakland in 1997. In August 2000, the parties entered into a written partnership agreement providing that each of them had a 50 percent ownership interest in the business and would take turns operating the business for alternating one-year periods. During the year when he had responsibility for the business, the so-called managing partner would "have the responsibilities of running the business adequately including, but not limited to: opening and closing the business on the agreed upon hours, ordering merchandise and pay invoices on time, stock business shelves appropriately, pay taxes and permits fees on time, pay labor wages and workers compensation on time, etc. etc."

In October 2004, Abdulla and Aldafari entered into a new written partnership agreement that superseded the August 2000 agreement. Under the terms of the 2004 agreement, the parties maintained equal ownership interests and would continue to take turns operating the business for alternating one-year periods. Among other things, the agreement provided, "If the Managing Partner who is in charge of management and operation of the business delays in handing over the possession and management of the business to the other Partner, then the Managing Partner shall pay $200 per day as 'Delay Fees' to the other Partner." With respect to the timing of the transfer, "[i]f the time for change of possession is coming up and the other Silent Partner who is supposed to take over the possession and management of the business does not show up or come to take possession for 4 (four) months from the due date of taking possession, then the Managing Partner who is in possession and running the business shall have the option to stay in possession and run the business for one full year from his original completion date." The 2004 agreement also specified the inventory value of the business would be maintained at $180,000, that a professional inventory would be taken when possession was transferred from one partner to the other, that the outgoing managing partner would pay the incoming managing partner the difference if the inventory was valued at less than $180,000, and that the incoming managing partner would pay the outgoing managing partner the difference if the inventory was valued at more than $180,000.

One of Abdulla's "turns" as managing partner was due to begin in November 2006, but he was delayed abroad due to his wife's complications from childbirth and did not return to the country until February 2007.[1] When Abdulla sought to assume his role as managing partner, Aldafari sent him a lengthy letter refusing to relinquish management of the market unless the parties signed a new agreement and Abdulla paid money Aldafari claimed was owed to him.

After the parties failed to resolve their differences, Abdulla filed a civil complaint against Aldafari in July 2007. The first amended complaint, filed in November 2007, included causes of action for breach of the 2004 written partnership agreement based on Aldafari's failure to relinquish management of the market, as well as breach of an oral contract to extend payments Aldafari owed to Abdulla under a promissory note. It also sought an accounting and a dissolution of the partnership as equitable remedies.[2]

Aldafari filed a cross-complaint against Abdulla alleging causes of action for breach of contract, fraud and specific performance of provisions in the 2004 partnership agreement that required one partner to sell his share of the business to the other under certain circumstances. The cause of action for breach of contract was divided into 10 "counts," most of which pertained to alleged acts of mismanagement violating the 2004 partnership agreement, but one of which asserted Abdulla had breached the August 2000 partnership agreement by reporting only half of the store's profits for 2002 in his own personal income taxes and by reporting the other half as income to Aldafari. Aldafari's fraud claim was based on Abdulla's inflation of the value of the store's inventory when he turned the management of the store over to Aldafari in 2005, which allegedly caused Aldafari to pay $25,052.57 more than the inventory was worth.

The court severed the equitable claims and the case proceeded to a jury trial on the causes of action for breach of contract and fraud. The jury found in favor of Abdulla on his claim for breach of contract based on Aldafari's failure to relinquish management of

[1] Abdulla's wife and children lived in Yemen.

[2] Other causes of action in the first amended complaint were later withdrawn and are not discussed.

the business and awarded him $240,000 in damages. However, it rejected Abdulla's claim for breach of contract based on Aldafari's alleged failure to repay the promissory note. The jury found in favor of Aldafari on his claim for breach of contract (which, as submitted to the jury, was based on Abdulla's failure to pay expenses required under the 2004 partnership agreement), and awarded him $5,000 in damages. The court directed a verdict in favor of Abdulla on Aldafari's claim Abdulla had breached the 2000 agreement by failing to pay the full amount of income taxes owed and by filing a tax form attributing one-half of the partnership's earnings to Aldafari. The court also directed a verdict in favor of Abdulla on Aldafari's fraud claim, based on Aldafari's admission he had not actually paid for the overvalued inventory as alleged in the cross-complaint, and denied Aldafari leave to amend his cross-complaint to state a theory of fraud based on loss of customers due to dissatisfaction over inflated prices.

The court held a separate trial on Abdulla's equitable claims for an accounting and dissolution of the partnership, and for Aldafari's equitable claims for specific performance of provisions in the 2004 partnership agreement requiring one partner to sell the business to the other under certain conditions. The court ordered the partnership dissolved pursuant to Corporations Code section 16801, subdivision (5), and denied Aldafari's request for specific performance. It concluded the evidence presented by Abdulla was "patently incomplete and insufficient for purposes of an accounting in connection with the dissolution and winding up of the business of the partnership" and denied Abdulla any additional relief in connection with the causes of action seeking dissolution of the partnership and an accounting.

DISCUSSION

I. The Trial Court Properly Granted a Directed Verdict on Aldafari's Claim for Breach of the August 2000 Partnership Agreement

The trial court directed a verdict on "count one" of Aldafari's first cause of action for breach of contract, which alleged Abdulla "breached the August 5, 2000, partnership agreement in 2003 when he filed his 2002 federal income tax return and reported only half of the store's profit for the previous year, while he was in possession of the store, and reported to the Internal Revenue Service that the other half of the store's profit was income of [Aldafari]. Prior to 2002 and for each other year, it was the agreement and practice of the partners that all income from the store for the period during which the partner was in possession of the store belonged to the partner in possession." Aldafari argues this claim should have been submitted to the jury because he presented evidence at trial showing Abdulla had agreed to pay the taxes on all of the business's profits for 2002, a period in which Abdulla was the managing partner. We disagree.

In ruling on a defendant or cross-defendant's motion for a directed verdict, the trial court must apply the same standard it would when ruling on a motion for nonsuit and may grant the motion only when, as a matter of law, the evidence is insufficient to permit a jury to find in favor of the plaintiff or cross-complainant. (*Fariba v. Dealer Services Corp.* (2009) 178 Cal.App.4th 156, 174.) " ' " 'In determining whether plaintiff's evidence is sufficient, the court may not weigh the evidence or consider the credibility of witnesses. Instead, the evidence most favorable to plaintiff must be accepted as true and conflicting evidence must be disregarded.' " ' [Citation.]" (*Ibid.*) " 'A directed verdict is . . . subjected to de novo appellate review' and ' " 'is in the nature of a demurrer to the evidence, and is governed by practically the same rules, and concedes as true the evidence on behalf of the adverse party, with all fair and reasonable inferences to be deduced therefrom.' " ' " (*Ibid.*)

The evidence showed that in October 2003, Abdulla filed a partnership income tax return (Form 1065) for tax year 2002 reporting ordinary income of $60,733 for the Four Star Market. He also filed Schedule K-1 tax forms for himself and Aldafari indicating they were each general partners with a 50 percent interest in profit sharing, loss sharing, and ownership of the capital of the Four Star Market, and that $30,367 (one-half the total amount of ordinary income earned by the market) had been distributed to each of them as ordinary income. Aldafari did not pay taxes on the $30,367 and in December 2004, the Internal Revenue Service sent him a notice of tax deficiency in the amount of $10,499.

Counsel for Abdulla moved for a directed verdict on the claim the 50-50 allocation of income for tax year 2002 was a breach of the August 2000 partnership agreement. Aldafari's trial counsel acknowledged the August 2000 partnership agreement contained no express provision concerning the division of profits and income tax liability. However, Aldafari testified that in 2001, he and Abdulla orally agreed the managing partner would take 100 percent of the profits and pay 100 percent of the income taxes for the time he was running the store. This arrangement lasted until August 2003, when the parties verbally agreed to split the taxes evenly, an arrangement that lasted until 2006.[3] The trial court granted Abdulla's motion for directed verdict, concluding there was no substantial evidence the filing of the 2002 tax forms violated the August 2000 partnership agreement.

We assume, as Aldafari argues, the evidence at trial supported a determination that as of 2002, the parties' practice had been for the managing partner to file a partnership tax return allocating the full amount of the profits as income for the managing partner. The problem is, Aldafari's cause of action was for the breach of the written August 2000 partnership agreement. As the trial court correctly concluded, that agreement contained no provisions regarding the allocation of income and income tax liability between the partners. A party to a contract cannot breach a term that is not included within the contract. (See *Thrifty Payless, Inc. v. The Americana at Brand, LLC* (2013) 218 Cal.App.4th 1230, 1240 [terms of contract are "exclusive evidence of the parties' agreement"].)

The evidence would have supported a finding Abdulla and Aldafari orally agreed in 2001 that the managing partner would bear the full responsibility to pay income taxes earned by the market during his tenure. But Aldafari's cross-complaint did not allege a breach of this oral agreement. Moreover, Aldafari was notified of his tax liability for 2002 in December of 2004, marking the outside limit for the accrual of any cause of action based on this tax liability. (See *April Enterprises, Inc. v. KTTV* (1983) 147

[3] Abdulla testified that under their verbal agreement, each partner would be responsible for his own share of income tax.

Cal.App.3d 805, 832 ["discovery rule" may apply to breach of contract claim].) This action was not filed until July 2007, meaning the two-year limitations period for breach of an oral contract (Code Civ. Proc., § 339, subd. (1)) had already expired.

II. Abdulla's Equitable Claims Were Not Subsumed Into the Jury's Verdict

Aldafari contends the trial court erred in allowing Abdulla to present evidence of debts owed by Aldafari during the court trial on Abdulla's cause of action for an accounting, arguing Abdulla waived his right to present such evidence by failing to do so during the jury trial. We disagree.

The trial court severed the equitable claims from the legal claims, and determined the equitable claims following a court trial. In support of his equitable cause of action seeking an accounting, Abdulla presented evidence of various debts allegedly owed to him by Aldafari in connection with the business: (1) $490 for a 2003 license payment to the Department of Alcoholic Beverage Control; (2) $481 for a 2003 Alameda County Department of Environmental Health annual permit fee; (3) $468.40 for a 2004 State Board of Equalization sales tax determination; (4) $1,180.25 for a 2007 Wells Fargo Bank credit card debt; (5) $3,641 for a 2004 debt to the State Board of Equalization; and (6) $3,500 for another debt to the State Board of Equalization. Evidence of these same debts was not introduced during the jury trial to support Abdulla's claim of damages for breach of contract or to offset Aldafari's damages on his cause of action for breach of contract.

At the court trial, Aldafari filed a motion to strike these items of evidence, arguing they should have been presented during the jury trial as offsets to Aldafari's cause of action for breach of contract. Aldafari relied on Code of Civil Procedure section 426.30, subdivision (a): "Except as otherwise provided by statute, if a party against whom a complaint has been filed and served fails to allege in a cross-complaint any related cause of action which (at the time of serving his answer to the complaint) he has against the plaintiff, such party may not thereafter in any other action assert against the plaintiff the related cause of action not pleaded." The trial court denied the motion, noting that under

Code of Civil Procedure section 426.40, subdivision (c), related causes of action need not be brought if "[a]t the time the action was commenced, the cause of action not pleaded was the subject of another pending action," and further noting the items objected to were part of the equitable claims to be tried in the court trial.

The trial court correctly found Abdulla did not waive his right to present evidence of the challenged items during the court trial. These items did not amount to a separate "cause of action" that should have been tried to the jury along with Aldafari's breach of contract claim, but were components of the accounting sought by Abdulla as an equitable matter. The court trial on the equitable claims was not a separate proceeding in which related claims were improperly asserted, but a continuation of the same case. Abdulla was not required to file a cross-complaint to present the challenged items as part of his accounting claim.

Moreover, Aldafari cannot establish he was prejudiced in any way. No issue of double recovery is presented, because the trial court specifically indicated it would not allow Abdulla to present evidence of debts in support of his accounting claim that had already been presented to the jury. After hearing the new items of evidence, the court found the evidence insufficient to order an accounting in connection with the dissolution of the partnership, and denied any further relief to Abdulla on his accounting claim. Aldafari does not explain how the evidence of the challenged debts during the court trial affected his substantial rights, such that it is reasonably probable he would have obtained a more favorable result if the court had excluded the evidence. (See Code Civ. Proc., § 475 [harmless error standard].)

III. The Court Properly Granted a Directed Verdict on Aldafari's Fraud Cause of Action and Did Not Abuse Its Discretion in Denying Aldafari Leave to Amend His Cross-Complaint

Aldafari argues the trial court erred when it granted Abdulla's motion for a directed verdict on Aldafari's fraud cause of action without permitting Aldafari to amend his cross-complaint to conform to proof at trial. We disagree.

The second cause of action in Aldafari's cross-complaint alleged Abdulla had committed fraud by inflating the value of the market's inventory when Aldafari assumed his position as managing partner in November 2005, causing Aldafari to pay Abdulla $25,052.57 more than the inventory was actually worth. At trial, Aldafari testified he did not actually pay Abdulla for the inventory.

A cause of action for fraud requires proof of (1) a knowingly false representation by the defendant (or cross-defendant), (2) an intent to deceive, (3) justifiable reliance by the plaintiff (or cross-complainant), and (4) resulting damages. (*Hasso v. Hapke* (2014) 227 Cal.App.4th 107, 127.) Abdulla made a motion for a directed verdict on Aldafari's fraud claim based on the lack of proof on the elements of reliance and damages. The trial court granted the motion.

Aldafari does not argue the court erred in granting a directed verdict on the fraud count based on his (nonexistent) overpayment for the inventory, but argues the court should have granted his request to amend his cross-complaint to allege fraud based on his testimony that when he assumed management of the store in November 2005, Abdulla had marked up the prices of several items, angering customers and causing the market to lose business. The court concluded Abdulla had not been provided with sufficient notice of a fraud claim based on the markup of various prices and expressed doubt that such action would, in any event, amount to a representation necessary for a fraud claim.

A motion for leave to amend a complaint or cross-complaint is entrusted to the sound discretion of the trial court and is reviewed for abuse of discretion. (*Garcia v. Roberts* (2009) 173 Cal.App.4th 900, 909.) Code of Civil Procedure section 473 gives trial courts the discretion to allow the amendment of a pleading "in furtherance of justice," while Code of Civil Procedure section 469 provides, "No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits." When a party seeks to amend a pleading during trial, the court should inquire " '(1) whether facts or legal theories are being changed and (2) whether the opposing party will be prejudiced by the proposed amendment.' " (*Garcia*, at p. 910.) " 'If new facts are being alleged, prejudice may easily result because of the inability of the other party to investigate the validity of the factual allegations while engaged in trial or to call rebuttal witnesses. If the same set of facts supports merely a different theory—for example, an easement as opposed to a fee—no prejudice can result.' " (*Ibid*.)

The trial court in this case acted well within its discretion in denying Aldafari's motion to amend his cause of action for fraud. The cross-complaint asserted Aldafari was defrauded because Abdulla inflated the value of the store's inventory, causing Aldafari to pay him more money than he should have. The proposed amendment would have predicated the fraud claim on the higher prices charged to customers and the effect on the store's business. While this alternative theory was also based on an inflation of the prices of various items carried by the store, the method of calculating damages (which would have been predicated on the loss of business and would likely have required expert testimony regarding the reasonableness of the prices and the effect on the market's sales) would have been completely different. We also agree with the trial court that the markup of various items, even if unwarranted, did not amount to a representation by Abdulla to Aldafari, as would be necessary to prove fraud.

DISPOSITION

The judgment is affirmed. Ordinary costs on appeal are awarded to Abdulla.

NEEDHAM, J.

We concur.

JONES, P. J.

BRUINIERS, J.