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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

LOUIS LIBERTY & ASSOCIATES et al.,
Cross-complainants and Respondents,
v.
SYED ALI HUSAIN,
Cross-defendant and Appellant.

A141048

(San Mateo County
Super. Ct. No. CIV479070)

Cross-defendant Syed Ali Husain appeals from a judgment entered following a bench trial holding him liable for the conversion of telephone equipment that had been leased by cross-complainant Louis Liberty & Associates, a Professional Law Corporation (Liberty), the obligations under the lease having been personally guaranteed by Louis A. Liberty (Louis). Because the record contains substantial evidence supporting the court's findings, despite Husain's contrary testimony that the court disbelieved, we shall affirm the judgment awarding Liberty¹ and Louis damages of \$78,000 plus interest.

¹ Husain has filed a request that we take judicial notice of the certificate of status issued by the Secretary of State indicating that on August 1, 2014, Liberty's powers, rights and privileges were suspended and that, as of February 20, 2015, they remained suspended. We grant the unopposed request, but shall not strike the respondents' appellate brief as Husain requests in its reply brief. The judgment in this matter was entered by the trial court on December 19, 2013, well before the corporation's powers were suspended. Assuming that the subsequent suspension precludes the corporation's participation in the appeal, the judgment also runs in favor of Louis personally, and respondents' brief, submitted in propria persona, has also been submitted on his personal behalf. There being no difference between the interests and contentions of Louis and Liberty, affirmance of

Background

We set forth the relevant facts as they were succinctly summarized in the trial court's statement of decision. "LIBERTY^[2] leased an Avaya telephone system from plaintiff CIT [CIT Communications Finance Corporation, doing business as Avaya Financial Services] in 2005. In March of 2008, LIBERTY closed its business and put the office building up for sale. In March of 2008 HUSAIN purchased various office equipment from LIBERTY and specifically requested to purchase the Avaya telephone system (the SYSTEM). LIBERTY refused to sell the SYSTEM. In the summer 2008 HUSAIN offered to store the SYSTEM for LIBERTY as LIBERTY was selling his home and the office furnishings. LIBERTY agreed. In the summer of 2008, HUSAIN sent his son Syed to retrieve the SYSTEM for storage in his warehouse on Rollins Road in Burlingame, CA. In November 2008, CIT made a demand of LIBERTY to return the SYSTEM. In November 2008, LIBERTY made a demand of HUSAIN to return the SYSTEM. HUSAIN responded he had sent the SYSTEM to India and could not return it. On December 8, 2008 plaintiff CIT filed its complaint. On February 20, 2009 LIBERTY filed a cross complaint . . . [and] [o]n October 23, 2009 LIBERTY amended its cross-complaint to add HUSAIN."

The trial court found as follows: "LIBERTY was a lessee of the SYSTEM. HUSAIN has business interests in India. HUSAIN has real property interests in India pursuant to trial testimony in . . . [an unrelated action] wherein HUSAIN testified he owned two parcels of real property in India. HUSAIN received the SYSTEM in the summer of 2008. LIBERTY demanded return of the SYSTEM in November 2008. HUSAIN refused to return the SYSTEM to LIBERTY in November 2008. HUSAIN converted the SYSTEM to his own use in November 2008. The SYSTEM is valued at \$56,000.00. The seat licenses are valued at \$22,000.00."

the judgment as to Louis indicates that the judgment was also properly entered as to Liberty.

² The trial court referred to Liberty and Louis collectively as "LIBERTY." The court expressed each statement as a separate paragraph.

The court entered its proposed tentative statement of decision on March 19, 2012. On November 21, 2012, Husain filed a motion to reopen the case and be permitted to introduce additional evidence. The motion stated: "Sometime after the Court rendered the tentative decision, HUSAIN located two boxes of equipment in his warehouse. It was noted that there was old equipment on the top of the boxes, but underneath there was some newer equipment. HUSAIN is requesting the Court to reopen this case and allow him to bring the boxes which contain the telephone equipment located in his warehouse. HUSAIN would like to have the Court order that both LIBERTY and a representative of CIT/Avaya be present at this hearing . . . to authenticate the equipment to see if this is the equipment that was allegedly converted." The record on appeal does not contain the order denying this motion, but in support of Husain's motion for reconsideration of the order denying the motion, Husain indicates that the motion was denied based on his failure to submit declarations supporting the asserted new facts. In support of his motion for reconsideration, Husain submitted his own declaration confirming that after entry of the proposed tentative statement of decision he had located the telephone equipment in his warehouse, and an expert declaration that the value of the equipment was \$1,845. The court denied the motion on two grounds: (1) the motion for reconsideration failed satisfy the requirements of Code of Civil Procedure section 1008 in that Husain failed to explain why he did not offer the expert testimony in support of the original motion, and (2) even if the motion were reconsidered it would be denied because Husain did not exercise reasonable diligence in presenting at trial the new evidence, the telephone equipment that was then in his warehouse.

The motion for reconsideration was denied on June 3, 2013, and the final statement of decision was filed the next day. On December 19, 2013, the court entered judgment against Husain for \$78,000 plus interest.

In November 2009, CIT's complaint against Liberty and Louis was resolved by a stipulation under which Liberty and Louis stipulated to the entry of a judgment against them in favor of CIT if they failed to make payments in specified amounts pursuant to an agreed schedule. On August 14, 2012, the court granted CIT's motion and entered

judgment in favor of CIT and against Liberty and Louis for \$98,685.41 plus interest and for possession of the telephone equipment.

Husain has timely appealed from the judgment against him on the cross-complaint.

Discussion

Husain contends there is no substantial evidence to support the finding that he converted the phone system. However, Louis testified that when he demanded the return of the phone equipment, Husain refused and told him that the equipment had been shipped to India. Although Husain denied making these statements and testified that the equipment was in his warehouse and could be retrieved at any time, he did not produce the equipment at trial and the trial court expressly disbelieved his testimony. According to the statement of decision: “This matter turned on the credibility of the witnesses. The court finds that Cross-Defendant HUSAIN was not believable. In this Court’s opinion, it appeared that Mr. HUSAIN made major misrepresentations to the Court. He appeared to be evasive and disingenuous and, apparently, did not care to tell the truth about what happened to the telephone system. Clearly, he wanted the telephone system, and was prepared to do anything possible to retain the system. He remarked on more than one occasion that he desired the system, and offered to purchase the system from Cross-Complainant LIBERTY. Despite the advice by LIBERTY that the system was a leased system, and that it was not for sale, Mr. Husain kept and converted the system once Cross-Complainant LIBERTY asked to have it stored in Cross-Defendant Husain’s warehouse.” It is not for this court to reweigh the credibility of the testimony. Louis’s testimony was clearly sufficient to support the trial court’s finding. (Evid. Code, § 411.)

Moreover, even if consideration were to be given to the additional evidence that Husain unsuccessfully attempted to present after the close of evidence, the result would be no different. While the additional evidence may have shown that the telephone equipment had not been sent to India, as the trial court apparently believed, that does not necessarily change the fact found by the court that “Husain refused to return the System to Liberty in November 2008.” Whether or not Husain’s explanation to Louis for not returning the telephone system was truthful, the court was entitled to find, based on

Louis's testimony, that Husain refused to return, and thereby converted, the equipment. Conversion is simply "the wrongful exercise of dominion over personal property." (5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 699, p. 1023; *Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 119 .)

Similarly, there is no merit to Husain's contention that the amount of damages awarded by the court is unsupported by the evidence. Despite Husain's evidence that the depreciated value of the equipment at the time of conversion was considerably less, the damage amount was supported by the testimony of Cos Ortiz and the invoices that were received in evidence. Indeed, the \$78,000 in damages for which the court held Husain liable is less than the \$98,000 for which Liberty and Louis have been held liable to CIT as a result in part of Liberty's inability to return the equipment to CIT.

Husain's additional arguments likewise lack merit. Although Liberty was the lessee rather than the owner of the telephone equipment, and CIT was demanding its return, Liberty's possession of the equipment at the time of delivery to Husain is sufficient to support the conversion claim. (5 Witkin, Summary of Cal. Law, *supra*, Torts, § 706, pp. 1029-1030 ["It is not necessary that the plaintiff have legal title in order to sue; *possession alone* is sufficient. The possessor may be liable to the true owner, and consequently is entitled to recover from the converter."].) While only Liberty was the lessee of the equipment, Louis guaranteed performance of Liberty's obligations and thus was directly harmed by the conversion that precluded Liberty's performance and rendered him liable on the guaranty. Husain's references to the limited duties of a gratuitous depository (Civ. Code, §§ 1844, 1847) are beside the point; the limitations do not sanction the unauthorized retention or excuse the conversion of the deposited property.

Husain contends the trial court abused its discretion in failing to apply his affirmative defense of unclean hands. But while the trial court felt that the defense was a subsidiary issue that was unnecessary to address, the court at the same time made clear that it rejected the defense. Husain contended that because Liberty had initially refused to return the equipment to CIT while negotiating the amount that was owed to CIT, Liberty

had unclean hands precluding recovery against him. The court found that “the evidence clearly establishes that Liberty did not act in bad faith by agreeing to leave the equipment with Husain from the summer of 2008 to November 2008.” Liberty’s dealings with CIT the court considered a subsidiary issue; “[t]he major issue in this case is whether or not Cross-defendant Husain converted the telephone system.” The court did not abuse its discretion in refusing to find that Liberty’s claim was barred by the doctrine of unclean hands. (See, e.g., *Brown v. Grimes* (2011) 192 Cal.App.4th 265, 282-283 [“ ‘If he [the wrongdoer] is not guilty of inequitable conduct toward the defendant in that transaction, his hands are as clean as the court can require.’ ”].)

Finally, the trial court did not abuse its discretion in refusing to reopen the case. Husain’s motion to reopen and his motion for reconsideration of the initial denial were properly denied for the reasons stated by the trial court. Moreover, the denials were also justified by the fact that the additional evidence Husain sought to present would not have affected the outcome. As indicated above, the additional evidence might have established that the telephone equipment had not been sent to India, but it would not have negated the fact, established by Louis’s testimony, that Husain had refused to return the equipment when demanded. The posttrial motions were properly denied.

Disposition

The judgment is affirmed.

Pollak, Acting P.J.

We concur:

Siggins, J.

Jenkins, J.