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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

WILLIAM CATES et al.,

Plaintiffs and Respondents,

v.

BENJAMIN JEFFREY FINK,

Defendant and Appellant.

B240085

(Santa Barbara County
Super. Ct. No. 1318743)

APPEAL from the Superior Court of the State of California, County of Santa Barbara, Timothy Staffel, Judge. Affirmed.

Robert Hirschman & Associates, Robert Hirschman; Law Offices of Robert S. Gerstein and Robert S. Gerstein for Defendant and Appellant.

The Law Office of Stan Stern and Stan Stern for Plaintiffs and Respondents.

INTRODUCTION

Defendant and appellant Benjamin Fink (Fink) appeals from a judgment entered against him and in favor of plaintiffs and respondents William Cates (Cates) and Tantara LLC (Tantara). Fink contends that the trial court erred when it found that Cates and Tantara were entitled to \$120,000 as damages for breach of contract based on Fink's taking of an unauthorized salary from Tantara. According to Fink, his salary was authorized by a majority vote of Tantara's members, Cates orally agreed that Fink could take a salary, Cates did not, as the trial court found, object to a portion of Fink's salary, and Cates either waived any objection to the salary or was estopped by his conduct from objecting to it. Fink also claims that the trial court miscalculated prejudgment interest on the salary portion of the damage award.

We hold that Fink forfeited his contentions that his salary was authorized, Cates orally agreed to his salary, and the trial court miscalculated prejudgment interest. We further hold that substantial evidence supported the trial court's finding that Cates objected to a portion of the salary Fink took from Tantara and, as a result, Fink cannot prevail on his waiver and estoppel arguments. We therefore affirm the judgment.

FACTUAL BACKGROUND¹

In July 1998, Cates and Fink entered into an operating agreement "for the purpose of leasing, maintaining and operating a winery . . ." known as Tantara LLC (Tantara). Cates and Fink were the only signatories to the agreement and, at the time, the only members of Tantara. The agreement recited that Cates contributed \$60,000 in investment capital to Tantara, while Fink contributed \$10,000 in investment capital. Paragraph 7.1

¹ Because, as explained below, Fink has forfeited the majority of his contentions at trial and, because the one substantial evidence issue we do address involves a discrete set of facts that we detail in our discussion of that issue, we state here only a summary of the facts in support of the judgment to provide context for the ensuing discussion.

of the operating agreement, provided that “The Members, by a vote of the majority in capital interest, will be responsible for the management of the Company business . . . [, and a]ny one member may bind the Company in transactions involving less than \$2,500, but on all other matters the affirmative approval of a majority of the Members is necessary to bind the Company.”

Fink and Cates jointly operated the winery until September 2004, when Cates underwent cancer surgery. After he recovered from his surgery, Cates worked less at the winery because he had to change his lifestyle. In 2003 and 2004, Cates and Fink sought investors in the winery and eventually sold thirteen units of interest in Tantara.

In December 2006, Fink sent Cates a letter in which he stated, “Also, as I stated earlier in the year, starting January 07, I will be taking a moderate compensation of \$5,000 a month. After working two full time jobs for 10 years and to preserve my sanity and my marriage, it is time.” According to Cates, when Fink started “floating” the idea of taking a salary earlier in 2006, Cates told him it was not “something the winery could afford.” Cates maintained that he never authorized a salary for Fink, and when he received Fink’s December 2006 letter, “[he] told him it was out of the question, that it would violate the Company operating agreement and that it would destroy incentive and that [they] would distribute the profits, and [Fink] said he was having to take home more work because of [Cates] illness, and [Cates] said, ‘if you’re doing the lion share of the work, you’ll get the lion share of the distribution.’”

When Cates realized Fink was taking a salary in 2007, he had a meeting with him during which he told [Fink] that if he took a salary, “he would be destroying the partnership.” According to Fink, Cates told him that if he was going to take a salary, he, Fink, would have to take care of finances, which Fink did. Because Fink was taking a salary, Cates stopped loaning money to the winery and began discussing with Fink terminating their relationship “because [Fink] was taking a salary and continuously [had] been violating the Company operating agreement, and more and more he was trying to treat the winery as his proprietorship, and [they] had had numerous arguments about

that.” Fink said that Cates demanded loan repayments equal to Fink’s salary, which repayments were made.

As discussed in more detail below, in March 2009, Cates sent a letter to the members of Tantara describing the poor financial condition of the winery and suggesting, inter alia, certain cost-cutting measures. It also referred to the compensation and house provided to Fink by the winery. In 2009, Fink sold several units of investment in the winery as a condition to obtaining a bank loan to finance the winery. In June 2009, Cates offered to sell his share in Tantara to Fink for \$1,000,000. Fink responded in December 2009 with a counteroffer of \$166,644.

PROCEDURAL BACKGROUND

In December 2009, Cates and Tantara filed a verified complaint against Fink and others, asserting causes of action for breach of the operating agreement, declaratory relief, breach of fiduciary duty, and injunctive relief. Following the filing of a first amended complaint, Fink filed a demurrer that the trial court sustained with leave to amend. Cates and others filed a second amended complaint to which Fink again demurred. While the hearing on Fink’s second demurrer was pending, Cates and Tantara filed requests for a temporary restraining order and a preliminary injunction. The trial court denied the request for a temporary restraining order and set a hearing on the preliminary injunction request. Prior to the hearing on the preliminary injunction request, the parties stipulated in July 2010 that the hearing on the injunction request would be taken off calendar and that Cates would file a third amended complaint. Thereafter, Cates filed a third amended complaint as the sole plaintiff, i.e., Tantara was no longer named as a plaintiff. In August 2011, on the first day of trial, Cates moved to add Tantara as a party plaintiff, which motion the trial court granted.²

² During posttrial arguments, the trial court indicated that, from the time it granted Tantara leave to join the action as a plaintiff, the parties and the court had treated and

Following a court trial, the trial court issued a written “Court Ruling After Trial.” The trial court thereafter amended its ruling to add certain amounts to an attorney fee award not at issue here and confirmed that its amended ruling was its statement of decision. On the salary issue, the trial court ruled as follows: “FIRST CAUSE OF ACTION: Damages for Breach of Operating Agreement: Plaintiff contends that Defendant, Jeffrey Fink, violated paragraph 7.1 entitled ‘General Policy: Majority Approval’ by not receiving proper authorization to allow Tantara, LLC to pay Defendant a monthly salary amount of \$5,000 per month for the period of January, 2007 to April, 2011, a period of 25 months and therefore the company is entitled to reimbursement of all salary received by Defendant during that period of time. The Court concludes that Exhibit 32, which is a two page document entitled ‘Open Letter from Bill Cates to Tantara Winery Shareholders’ dated March 20, 2009 and is signed by Plaintiff William Cates, is an admission by a party pursuant to Evidence Code, section 1220. This statement serves to either estop Plaintiff William Cates from asserting he had no knowledge that Defendant Jeffrey Fink was receiving \$5,000 per month from January, 2007 to the March 20, 2009 date of the letter and/or as ratification of the policy to commence payment of a monthly stipend/salary to Defendant, Jeffrey Fink. The testimony of witness Maria Acosta, the office manager for Tantara Winery, whose job responsibilities included keeping and maintaining the company’s financial records, established that Plaintiff William Cates had access to the monthly financial statements of the company which clearly documented the compensation being received by Defendant, Jeffrey Fink. [¶] Plaintiff indicates that the holding in *Bardis v. Oates* (2004) 119 Cal.App.4th 1, 11 stands for the proposition that the terms of the operating agreement control over any conduct of the parties that could be construed as the basis for an estoppel and/or ratification argument. However, in *Bardis*, the issue of a waiver of contractual right was presented to the jury which expressly found against waiver. Here, the Court, as trier of fact, concludes that Exhibit 32, the testimony of trial witnesses, especially that of

litigated the matter as a shareholder’s derivative action. Fink raises no challenge on appeal to the trial court’s conclusion in that regard.

Maria Acosta, establishes facts which constitute a knowing waiver of Paragraph 7.1 of the Operating Agreement at least until March 20, 2009 with respect to compensation paid to Defendant, Jeffrey Fink at the rate of \$5,000 per month. [¶] The March 20, 2009 correspondence, Exhibit 32, also acts as a written objection by Plaintiff William Cates to continuing the \$5,000 monthly compensation to Defendant Jeffrey Fink. Therefore Plaintiffs William Cates and Tantara, LLC are entitled to recovery of 24 months (April, 2009 to April, 2011) of \$5,000 per month salary received by Defendant Jeffrey Fink for a total of \$120,000 plus ten percent interest from April 1, 2009.”

Following the issuance of the statement of decision, the trial court entered a judgment that awarded Cates, inter alia, \$120,000 in salary for the period April 2009 through April 2011, plus prejudgment interest of \$33,041.10, for a total award on the salary issue of \$153,041.10. Fink filed a timely notice of appeal from the judgment.³

DISCUSSION

A. Salary Authorization Issue

Fink contends that the undisputed evidence showed that a majority of Tantara’s members voted to approve and ratify his salary in July 2010. He therefore argues that the trial court erred when it concluded that his salary from and after March 2009 was unauthorized. Fink concedes in his opening brief, however, that this contention was never raised in the trial court.

We conclude that Fink has forfeited his contention that his salary was authorized by a vote of the majority of Tantara’s members in July 2010. The Supreme Court in *Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247 (*Keener*) explained the basis for the forfeiture rule as follows: “The forfeiture rule generally applies in all civil and criminal proceedings. [Citations.] The rule is designed to advance efficiency and deter gamesmanship. As we explained in *People v. Simon* (2001) 25 Cal.4th 1082 . . . :

³ In his opening brief, Fink concedes that he is appealing only from that portion of the judgment that awarded damages based on the salary issue.

“““The purpose of the general doctrine of waiver [or forfeiture] is to encourage a defendant to bring errors to the attention of the trial court, so that they may be corrected or avoided and a fair trial had” [Citation.] “No procedural principle is more familiar to this Court than that a *constitutional* right,” or a right of any other sort, “may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.” . . .’ [Citation.] [¶] ‘The rationale for this rule was aptly explained in *Sommer v. Martin* (1921) 55 Cal.App. 603 at page 610 [204 P. 33] . . . : “In the hurry of the trial many things may be, and are, overlooked which would readily have been rectified had attention been called to them. The law casts upon the party the duty of looking after his legal rights and of calling the judge’s attention to any infringement of them. If any other rule were to obtain, the party would in most cases be careful to be silent as to his objections until it would be too late to obviate them, and the result would be that few judgments would stand the test of an appeal.”’ [Citation.]” (Fn. omitted; [citations].)’ [Citation.]” (*Id.* at pp. 264-265.)

Because Fink did not assert his authorization contention in the trial court, neither Cates nor Tantara had an opportunity to consider and address it. As Cates points out, none of the members who allegedly voted to authorize Fink’s salary testified, and Fink himself did not testify that he voted to authorize and ratify his salary. As a result, Cates and Tantara were deprived of any meaningful opportunity to present a factual and legal response to this contention. Fink has therefore forfeited the contention on appeal.

Without citing any authority in his opening brief, Fink argues that because his authorization contention is based on undisputed facts and raises a pure issue of law, an exception to the forfeiture rule applies. Accordingly, Fink urges us to make an exception to the forfeiture rule and consider the issue.

Whether the exception upon which Fink relies is applicable to this case is a discretionary matter that is ordinarily applied to questions of law or issues of public interest or policy. “As a general rule, a claim of error will be deemed to have been forfeited when a party fails to bring the error to the trial court’s attention by timely motion or objection. . . . Nonetheless, it is within this court’s discretion to make an

exception to this rule when the issue on appeal relates to a question of law only, or where the public interest or public policy is involved.” (*Avalos v. Perez* (2011) 196 Cal.App.4th 773, 776-777.) As the Supreme Court explained in *Ward v. Taggart* (1959) 51 Cal.2d 736, “The general rule confining the parties upon appeal to the theory advanced below is based on the rationale that the opposing party should not be required to defend for the first time on appeal against a new theory that ‘contemplates a factual situation the consequences of which are open to controversy and were not put in issue or presented at the trial.’” (*Id.* at p. 742.)

Because the issue concerning the July 2010 vote to authorize Fink’s salary was not put in issue or presented to the trial court, Cates and Tantara were deprived of the opportunity of presenting witnesses, other evidence, and argument to negate that claim. It therefore is not a pure issue of law based on undisputed facts, as claimed by Fink. Instead, it is a new theory based on a factual situation the consequences of which are open to controversy. As Cates explains, the purported facts in support of this contention are in dispute, including whether Fink, whose vote would have been required, ever voted. In addition, this contention raises a disputed legal issue concerning whether a vote by Fink in favor of authorizing his own salary would have been a breach of fiduciary duty. Moreover, the issue concerning the purported authorization of Fink’s salary is based on a private matter in dispute between individual parties to an agreement, which issue does not involve the public interest or public policy. Therefore, under the forfeiture rule discussed above, we decline to consider the issue.

B. Oral Modification of Operating Agreement

Fink next argues that the trial court erred when it failed to find that Fink and Cates had orally agreed in January 2007 that Fink could take a salary if he took over the financing of the winery and Cates’s loans to the winery were repaid. Cates claims that Fink has forfeited this contention by failing to raise it in the trial court.

According to Fink, he raised the alleged oral agreement in the trial court. In support of this assertion, he points to certain arguments contained in his closing trial

brief. Fink did not, however, plead the oral agreement as an affirmative defense or otherwise move to amend his answer to conform to proof at the close of evidence. In addition, following oral argument, the trial court directed the parties to focus their written arguments on certain discrete issues, including the estoppel issue, but did not mention the alleged oral agreement. Thus, Fink's inclusion of the argument concerning the oral agreement in his closing trial brief was submitted without leave of court and was otherwise insufficient to raise the issue with the trial court and opposing counsel. Again, neither Cates nor Tantara had the opportunity to present facts or argue this issue. Based on the authorities discussed above concerning the forfeiture rule, we conclude that Fink forfeited his contention based on an alleged oral agreement. (*Keener, supra*, 46 Cal.4th at pp. 264-265.)

C. March 2009 Objection to Salary

Fink contends that the trial court erred when it found that Cates objected to Fink's salary in March 2009. According to Fink, when Cates March 20, 2009, letter is reviewed de novo, it cannot reasonably be construed as an objection to Fink taking salary from Tantara from that point forward.

1. Standard of Review

Fink's contention concerning the interpretation of Cates's March 20, 2009, letter raises a threshold issue as to the appropriate standard of review. Relying on the standard that governs the interpretation of contracts, Fink asserts that a de novo standard should govern the review of the trial court's conclusion that the March 20, 2009, letter was an objection to Fink taking any further salary from Tantara. Respondents counter that the trial court's conclusion that the letter constituted an objection is a factual finding that must be reviewed under the substantial evidence standard. We agree with respondents.

First, Cates's March 20, 2009, letter to Tantara's members was not a contract to be interpreted pursuant to the canons of contract interpretation and, without parol evidence,

reviewed de novo. The letter was an item of evidence introduced to support Cates's contention that Fink's salary was unauthorized.

Second, the trial court made its finding that the letter was an objection as part of its analysis and determination of the waiver and estoppel issues, i.e., whether Cates waived his right to object to the salary or was estopped from arguing that the salary was unauthorized under the Tantara operating agreement. The issues of whether a waiver or an estoppel exist and, if they do, the period during which they apply, are factual ones based on an evaluation of the conduct of the party against whom the waiver or estoppel is asserted. (See *Adolph v. Coastal Auto Sales, Inc.* (2010) 184 Cal.App.4th 1443, 1449-1450 [waiver of right to arbitrate is a factual issue to be determined by the trial court and upheld if supported by substantial evidence]; *In Re Marriage of Iberti* (1997) 55 Cal.App.4th 1434, 1442-1443 ["Rulings concerning the existence of an estoppel are factual issues and are normally reserved for resolution by the trial court and will be upheld if supported by substantial evidence"]; and *Syufy Enterprises v. City of Oakland* (2002) 104 Cal.App.4th 869, 889-890 ["Normally, '[t]he presence of estoppel is a question of fact to be pleaded and proved'"].)

We conclude that the trial court's finding that Cates objected to Fink's salary as of March 20, 2009, must be reviewed under the substantial evidence standard of review. "Because [a party] challenges the sufficiency of the evidence supporting the trial court's decision, we apply the substantial evidence standard of review. (*Holmes v. Lerner* (1999) 74 Cal.App.4th 442, 445 [88 Cal.Rptr.2d 130].) 'Substantial evidence means evidence which is of ponderable legal significance—evidence which is reasonable in nature, credible and of solid value. [Citation.]" (*Horn v. Oh* (1983) 147 Cal.App.3d 1094, 1099 [195 Cal.Rptr. 720].) 'In general, in reviewing a judgment based upon a statement of decision following a bench trial, "any conflict in the evidence or reasonable inferences to be drawn from the facts will be resolved in support of the determination of the trial court decision. [Citations.]" [Citation.]" (*Estate of Young* (2008) 160 Cal.App.4th 62, 75-76 [72 Cal.Rptr.3d 520].) 'We may not reweigh the evidence and are bound by the trial court's credibility determinations. [Citations.] Moreover, findings of fact are liberally

construed to support the judgment. [Citation.]’ (*Id.* at p. 76.) The testimony of a single witness may be sufficient to constitute substantial evidence. (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614 [122 Cal.Rptr. 79, 536 P.2d 479].)” (*Lui v. City and County of San Francisco* (2012) 211 Cal.App.4th 962, 969.)

2. *Substantial Evidence*

In his March 20, 2009, letter, Cates informed Tantara’s members of the winery’s “precarious” financial situation, including that accounts payable were \$720,822 and there were outstanding loans of \$275,000, \$365,750, and \$125,091. But accounts receivable as of March 2009 were only \$88,688. In addition, the winery still owed wine growers a substantial sum, which debt Cates would not pay personally as he had in the past through loans to the winery. Cates reminded Tantara’s members that he had never taken salary or other benefits from the winery, except health insurance. Cates then contrasted his situation with Fink’s, stating, “[Fink] takes a salary of \$5,000 a month and the winery pays his winery-related expenses, including [the rental payment] for the house in Santa Maria.” Cates concluded his letter by suggesting several cost-cutting measures, such as cutting back on grape and barrel purchases, eliminating production of slow selling wines, terminating a lease on an office the winery was renting, using the Santa Maria house that the winery rented for Fink as an office and storage space, and terminating the winery’s work on improvements to the winery.

In addition to considering the March 20, 2009, letter, the trial court heard testimony from Cates concerning the letter and the salary issue. According to Cates, he never authorized Fink’s salary and there was never an amendment to the operating agreement, much less a specific amendment to paragraph 7.1 authorizing a member to bind the winery to transactions in excess of \$2,500 without approval by a majority of the members. When asked if he ever told Tantara’s members that he did not want Fink to take a salary, Cates responded in the affirmative and explained that he did so in the March 20, 2009, letter. “I mentioned in one letter that we were having such a hard time at making ends meet and [Fink] was taking a salary, and this was creating additional

problems for the winery.” Cates further explained that he did not want Fink to take a salary because the winery could not afford it. Cates also said that he objected to Fink taking a salary.

Cates’s March 20, 2009, letter, when read in the context of the winery’s dire financial condition and his testimony concerning that letter, which the trial court found credible, supported a reasonable inference that Cates was objecting to Fink taking any further salary as of March 20, 2009, due to the financial condition of the winery. The trial court, sitting as the trier of fact, was able to observe Cates’s demeanor and make determinations about his credibility, determinations by which we are bound on appeal. Therefore, when the foregoing evidence is reviewed under the substantial evidence standard discussed above, it is sufficient to support the trial court’s finding that Cates’s March 20, 2009, letter to Tantara’s members constituted an objection to Fink’s salary from and after that point in time. Because, as Cates’s testimony confirmed, the operating agreement had never been amended to allow the parties thereto to incur expenditures in excess of \$2,500 without the authorization of a majority of the members of Tantara, Cates’s objection was sufficient to show that from and after March 20, 2009, Fink and the other members of Tantara were on notice that Cates was opposed to, and was no longer acquiescing in, Fink’s salary.

D. Waiver and Estoppel

Fink contends that the trial court erred when it failed to find that Cates waived any objection he may have had to Fink’s salary or was otherwise estopped by his conduct from objecting to that salary. According to Fink, because the evidence satisfied all the elements of a waiver and an equitable estoppel, he was entitled to a judgment in his favor on the salary issue.

Fink’s waiver and estoppel contentions ignore the trial court’s findings on those issues, which included a finding in Fink’s favor that Cates had waived the right to object to salary taken prior to March 20, 2009, or was estopped from objecting to salary taken prior to March 20, 2009. Fink also ignores the trial court’s finding, discussed above, that

Cates objected to Fink's salary in his March 20, 2009, letter, which objection was notice to Fink that any further salary under the operating agreement was not authorized. Because we have concluded that the trial court's findings in that regard were supported by substantial evidence, we reject Fink's arguments concerning a complete waiver or a continuing estoppel beyond March 2009.

E. Prejudgment Interest

Fink's final contention on appeal is that the trial court miscalculated prejudgment interest. According to Fink, the trial court awarded interest on the \$120,000 salary component of the damage award from April 1, 2009, but Fink did not receive the entire \$120,000 on that date. Instead, he received a salary at a rate of \$5,000 per month. Therefore, Fink argues, prejudgment interest should be recalculated.

As with certain of his other contentions on appeal, Fink failed to raise the claimed miscalculation of interest in the trial court. He therefore forfeited the issue on appeal. (*Keener, supra*, 46 Cal.4th at pp. 264-265; see *Jones v. Wagner* (2001) 90 Cal.App.4th 466, 481-482 [because parties "did not object to the award of prejudgment interest in the trial court, they may not do so now"].)

DISPOSITION

The judgment is affirmed. Respondents are awarded costs on appeal.

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MOSK, J.

We concur:

TURNER, P. J.

GOODMAN, J.*

* Judge of the Superior Court of Los Angeles County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.