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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

PONANI SUKUMAR,

Plaintiff and Appellant,

v.

MED-FIT SYSTEMS, INC., et al.,

Defendants and Respondents.

D058855

(Super. Ct. No. GIC852863)

APPEAL from a judgment and orders of the Superior Court of San Diego County, Timothy B. Taylor and Jay M. Bloom, Judges. Affirmed.

Ponani Sukumar appeals from a judgment entered in favor of defendants Med-Fit Systems, Inc. (Med-Fit), and Nautilus Group, Inc. (Nautilus, together defendants), following a jury trial. He claims that the judgment in Med-Fit's favor must be reversed because no evidence supported the jury's ultimate conclusion that Med-Fit was not liable for breach of contract. He also contends that the judgment in favor of Nautilus on his claim against it for inducing Med-Fit to breach its contract with him

should be reversed because the evidence established that Nautilus intentionally prevented Med-Fit from performing its contract with him. Finally, Sukumar claims the trial court erred in: (1) denying his motion to compel discovery; (2) granting Nautilus's nonsuit motion to dismiss the punitive damage component of his claims; and (3) denying his motion to tax costs.

We affirm the judgment in favor of Med-Fit and Nautilus and reject Sukumar's argument that the trial court erred in awarding costs. As we discuss below, Sukumar's remaining claims are moot.

FACTUAL AND PROCEDURAL BACKGROUND

Because this is an unpublished opinion and the parties are familiar with the underlying facts and procedural history of this case, we will dispense with their recitation here. (See *Sukumar v. Med-Fit Systems, Inc., et al.* (Feb. 3, 2009, D051482) [nonpub. opn.], the Prior Opinion.)

Briefly, in the Prior Opinion, we addressed Sukumar's claims against Med-Fit and Nautilus for breach of contract, among other things, pertaining to Sukumar's purchase of three different types of Nautilus equipment: a full line of 2ST Medical equipment consisting of 22 pieces (the 2ST equipment); XP Load equipment (the XP equipment); and a reconditioned set of Next Generation equipment (the Next Generation equipment). The disputes regarding the 2ST and XP equipment were resolved in the Prior Opinion, but we remanded claims involving the Next Generation equipment for a limited retrial, finding there was insufficient evidence to

support the jury's implied finding that Med-Fit performed that part of its contract pertaining to this equipment.

On remand, the jury rendered special verdicts in favor of Med-Fit on Sukumar's claims for breach of contract and negligent misrepresentation and in favor of Nautilus on his claim for inducing breach of contract. Sukumar timely appealed from the judgment and several pre- and posttrial orders.

DISCUSSION

I. *Sufficiency of the Evidence Regarding the Med-Fit Verdict*

In a special verdict, the jury found that Sukumar and Med-Fit entered into a contract for Sukumar to purchase the Next Generation equipment, it concluded that Sukumar failed to do all, or substantially all, of the significant things that the contract required him to do with regard to the Next Generation equipment and that his performance was not excused. Based on these factual findings, the trial court rendered a judgment in favor of Med-Fit on Sukumar's claim for breach of contract. Accordingly, the issue before us is whether there is substantial evidence to support the jury's findings on these issues. We review the sufficiency of the evidence under the substantial evidence test, viewing the whole record in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor. (*Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1100.)

Sukumar contends the judgment in favor of Med-Fit should be reversed because undisputed evidence establishes that he satisfied all of the obligations

imposed on him by the contract. He contends that Med-Fit erroneously argued to the jury that he needed to "reconfirm" his interest in the Next Generation machines because the contract did not contain any conditions precedent to Med-Fit's performance. However, the jury was not instructed on the concept of a condition precedent to contract performance, nor did counsel argue this legal theory during closing argument. Accordingly, Sukumar cannot rely on this theory for the first time on appeal. (*Santantonio v. Westinghouse Broadcasting Co.* (1994) 25 Cal.App.4th 102, 113.)

Rather, the trial court introduced the jury to the issues involved in the case by telling them that: "Sukumar claims that he and Med-Fit entered into a contract for which Med-Fit agreed to sell and Sukumar agreed to purchase 7 refurbished 'Next Generation' exercise machines manufactured by Nautilus. [¶] Sukumar claims that Med-Fit breached this contract by failing to deliver the equipment ordered. [¶] Sukumar also claims that Med-Fit's breach of this contract caused harm to Sukumar for which Med-Fit should pay. [¶] Med-Fit denies these allegations and further claims that Sukumar abandoned the contract and failed to mitigate his damages (if any)." (CACI No. 300.)

The trial court instructed the jury that "[a]bandonment of a contract may be implied from the acts of the parties and this may be accomplished by the repudiation of the contract by one of the parties and by the acquiescence of the other party in such repudiation." The court further instructed the jury regarding Med-Fit's contention that it was excused from providing Sukumar with the Next Generation

equipment because Sukumar's actions or inactions prevented it from performing that portion of the contract.

Finally, the court instructed the jury on the legal concept of substantial performance, namely: "Med-Fit [] contends that [] Sukumar did not perform all of the things that he was required to do under the contract, and therefore Med-Fit [] did not have to perform its obligations under the contract. To overcome this contention, [] Sukumar must prove both of the following: [¶] 1. That [] Sukumar made a good faith effort to comply with the contract; and [¶] 2. That Med-Fit [] received essentially what the contract called for because [] Sukumar's failures, if any, were so trivial or unimportant that they could have been easily fixed or paid for." (CACI No. 312.)

The issue whether an obligor has substantially completed a contract presents a question of fact for the jury. (*Murray's Iron Works, Inc. v. Boyce* (2008) 158 Cal.App.4th 1279, 1291.) Similarly, "[a]bandonment of a contract is a matter of intent and is to be ascertained from the facts and circumstances surrounding the transactions out of which the abandonment is claimed to have resulted." (*Busch v. Globe Industries* (1962) 200 Cal.App.2d 315, 320.) Sukumar does not argue that these instructions should not have been given or that they were flawed. Nor does he argue that the special verdict form or special verdict questions were erroneous or misleading.

Med-Fit's theory of the case was that Sukumar abandoned his request for the Next Generation equipment by not confirming the order. The jury presumably

agreed with this contention by finding that Sukumar failed to do what the contract required him to do with regard to the Next Generation equipment and that his performance was not excused. The record before us contains substantial evidence supporting this conclusion.

In early February 2004, Dean Sbragia, President of Med-Fit, sent a letter to Sukumar stating that he located the Next Generation equipment and that it was available on a "first come, first served basis." Sbragia testified that in a pro forma invoice dated February 26, 2004, Med-Fit asked Sukumar to confirm that the Next Generation equipment would include special weights and caddies and that the equipment would not be ordered if the additions could not be procured in a timely fashion. Sbragia understood this language to mean that Sukumar did not want the Next Generation equipment if Med-Fit could not get the additions.

The jury could have reasonably concluded that the purchase of the Next Generation equipment with the additions was time sensitive and that Sukumar would need to confirm his interest in the equipment as time passed. Although Sukumar contends the language in the invoice about procuring the equipment "in a timely fashion" simply meant that the equipment needed to be available, the parties argued this issue to the jury and the jury presumably agreed with Med-Fit's interpretation. Med-Fit also argued to the jury that Sukumar had abandoned his request for the Next Generation equipment and the jury heard evidence supporting this contention.

In an e-mail dated June 9, 2004, Sbragia specified that orders "N336-B" and "N336-C," which pertained to the 2ST and XP equipment, had been cancelled by

Nautilus, but that Med-Fit had obtained replacement orders. The e-mail did not address the Next Generation equipment, which was order "N336-A." Thereafter, on June 16, 2004, Sbragia informed Sukumar that Med-Fit had replacement orders ready for the 2ST and XP equipment. Sbragia informed Sukumar that he needed confirmation within a couple of days or the orders would be cancelled. Sbragia also requested that Sukumar confirm his order and stated that if he did "not have confirmation within a couple of days, I will regrettably have to cancel the orders."

Another e-mail from Sbragia to Sukumar sent the following week stated that Med-Fit cancelled Sukumar's order because he failed to confirm it. Although these e-mails did not specifically mention the Next Generation equipment by name, Sbragia testified that the correspondence included this equipment. After that correspondence, Sukumar never contacted Sbragia to tell Sbragia that he wanted the Next Generation equipment. Additionally, Sbragia never received any written communication or directive from Nautilus indicating that it would not sell the Next Generation equipment to Sukumar and he was "relatively certain" he could have obtained the Next Generation equipment. Thus, even assuming the jury agreed with Sukumar's contention that Nautilus cancelled the order for the Next Generation equipment, it could have reasonably concluded that Med-Fit would have been able to obtain this equipment elsewhere had Sukumar confirmed he still wanted it.

Sbragia explained that in the earlier proceedings, Sukumar's counsel never asked him about the Next Generation equipment, but that as of June 2004, he understood Sukumar had abandoned the order because Sukumar never "indicate[d]

that he had any further interest in those products." This conclusion is supported by correspondence from Sukumar's attorney. In August 2005, Sukumar's counsel sent a letter to Med-Fit entitled "[c]ompletion of delivery to Sukumar" outlining what tasks needed to be completed by the end of the month. Significantly, the letter from Sukumar's counsel did not mention the Next Generation equipment.

Thereafter, Sbragia believed that Med-Fit had fulfilled all aspects of the order that Sukumar required, that the orders were "complete to [Sukumar's] satisfaction" and that Sukumar had abandoned the Next Generation equipment order.

Accordingly, the jury had before it evidence from which it could conclude that Sukumar repudiated the portion of the contract regarding the Next Generation equipment and that Med-Fit acquiesced in the repudiation. (*Griffin v. Beresa, Inc.* (1956) 143 Cal.App.2d 299, 301 ["An abandonment of a contract may be implied from the acts of the parties, and this may be accomplished by the repudiation of the contract by one of the parties and the acquiescence of the other party in such repudiation and words of the parties to the effect that they are mutually rescinding the contract are not necessary."].)

We reject Sukumar's argument that the judgment cannot be affirmed on the theory that he abandoned the Next Generation equipment because this theory was not presented in the verdict form. Although Sukumar is correct that the special verdict form did not include a specific question asking jurors to decide whether he had abandoned the Next Generation equipment, the jurors were instructed on this theory and on the theories of substantial performance and excuse of performance.

The verdict form asked the jury whether Sukumar and Med-Fit had entered into a contract regarding the Next Generation equipment, whether Sukumar had substantially performed the contract, and whether Sukumar's performance was excused. To answer these questions, the jury necessarily had to decide the terms of the contract, including the meaning of the language in the invoice regarding procuring the equipment "in a timely fashion."

As we previously discussed, the jury could have reasonably concluded this language meant that the purchase of the Next Generation equipment with the additions was time sensitive and that Sukumar needed to confirm his interest in the equipment as time passed. The jury could have also concluded from the evidence that, rather than confirming his desire for the Next Generation equipment, Sukumar abandoned this portion of the contract. These conclusions were impliedly subsumed within the jury's finding that Sukumar had not substantially performed what the contract required him to do regarding the Next Generation equipment.

The evidence amply supported the jury's findings. Moreover, as the trial court noted in its denial of Sukumar's motion for a new trial, the evidence was hotly disputed and the case turned on witness credibility. The trial court specifically stated that it "did not believe much of Sukumar's testimony" and concluded that "it is highly likely that this credibility determination was shared by the 10 jurors who answered 'no' to the crucial questions 2 and 3" regarding whether Sukumar substantially performed and whether his performance was excused. It is axiomatic that questions

of credibility are not determined on appeal. (*Escamilla v. Department of Corrections & Rehabilitation* (2006) 141 Cal.App.4th 498, 514-515.)

II. *Remaining Issues on Appeal*

A. Nautilus

The jury found that Nautilus knew of the contract between Med-Fit and Sukumar regarding the Next Generation equipment, but that Nautilus did not intend to cause Med-Fit to breach its contract regarding the Next Generation equipment. A necessary element of Sukumar's claim against Nautilus required proof that "Nautilus' conduct caused Med-Fit to breach the contract." (CACI No. 2200.) Because we affirmed the jury's ultimate conclusion that Med-Fit is not liable for breaching its contract with Sukumar, Sukumar's claim against Nautilus for inducing breach of that contract necessarily fails. Accordingly, the judgment in favor of Nautilus is affirmed.

B. Punitive Damages

At the close of Sukumar's case, the trial court granted Nautilus's nonsuit motion to dismiss the punitive damage component of Sukumar's claims. This claim of error is moot as we have affirmed the judgment in Nautilus's favor.

C. Motion to Compel Discovery

Following remand, Sukumar asked Nautilus to disclose its e-mails and all other electronically stored information concerning the Med-Fit order. After Nautilus responded that it had already disclosed all relevant documents, Sukumar filed a motion to compel. The trial court denied the motion, concluding that Nautilus's

response was sufficient and Sukumar "has offered only speculation that additional documents exist." On appeal, Sukumar asserts that the trial court's order denying his motion to compel should be reversed.

As a threshold matter, Sukumar argues that the requested discovery was relevant to prove his cause of action against Nautilus for inducing a breach of Med-Fit's contract with him; namely, that Nautilus was aware of the contract and intended to induce its breach. Sukumar does not argue that the requested discovery was relevant to any other matter before the jury on remand. We affirmed the jury's ultimate conclusion that Med-Fit did not breach its contract with Sukumar, and this conclusion rendered moot Sukumar's claim against Nautilus for inducing breach of that contract. (*Ante*, Parts I and II.A.) Accordingly, even assuming the trial court erred in denying the motion, Sukumar cannot show the assumed error prejudiced him.

D. Costs Award

In a posttrial motion, defendants sought costs totaling \$32,347.42. Part of the request included \$7,028.79 in "prejudgment" interest, which represents interest at the rate of ten percent per annum on the initial cost award to defendants from the date of the initial judgment. The parties erroneously termed this interest as "prejudgment;" however, interest accruing since entry of a judgment is necessarily postjudgment interest. We analyze the issue as such and substitute the word "postjudgment" for the word "prejudgment" where it appears in the record.

Sukumar moved to tax the award of postjudgment interest because part of the first judgment in defendants' favor was reversed on appeal. The trial court denied Sukumar's request to tax the award of postjudgment interest, specifically noting that it agreed with defendants' argument that it had discretion to award these costs as "[a]ny other item that is required to be awarded to the prevailing party pursuant to statute as an incident to prevailing in the action at trial or on appeal." (Code Civ. Proc., § 1033.5, subd. (a)(14).)

Sukumar contends the trial court erred in awarding postjudgment interest on the trial court's earlier cost award to defendants because interest is not a "cost" of litigation; thus, the trial court had no discretion to award interest. We disagree.

"Costs are added to and become a part of the judgment" (Code Civ. Proc., § 685.090, subd. (a)) and the "[p]rincipal amount of the judgment' means the total amount of the judgment as entered or as last renewed, together with the costs thereafter added to the judgment pursuant to Section 685.090 . . ." (Code Civ. Proc., § 680.300). Additionally, by operation of law, "interest commences to accrue on a money judgment on the date of entry of the judgment" (Code Civ. Proc., § 685.020, subd. (a)), and "accrues at the rate of 10 percent per annum on the principal amount of a money judgment remaining unsatisfied" (Code Civ. Proc., § 685.010, subd. (a)). Thus, a court can award postjudgment interest on an award of costs.

"[A] judgment bears interest from the date of its entry even though it is subject to direct attack." (*Bellflower City School Dist. v. Skaggs* (1959) 52 Cal.2d 278, 280.) The question here is how our reversal of the judgment and remand for a limited new

trial in the Prior Opinion impacts the award of postjudgment interest on the earlier cost award to defendants. On this issue, we are not writing on a blank slate.

Where a judgment is reversed on appeal, postjudgment interest runs only from the date of entry of the new judgment after the appellate court remittitur. (*Stockton Theatres, Inc. v. Palermo* (1961) 55 Cal.2d 439, 443.) However, a money judgment modified on appeal bears interest from the date of entry of the original judgment, not from the date of the new judgment. (*Munoz v. City of Union City* (2009) 173 Cal.App.4th 199, 203 (*Munoz*); *Ehret v. Congoleum Corp.* (2001) 87 Cal.App.4th 202, 208-210.) Whether the judgment is reversed or merely modified depends on the substance of the order, not the label, of the appellate court's disposition. (*Munoz*, at pp. 203-204.) Accordingly, a "reversal" that practically and legally is a modification of the judgment should be treated for purposes of the accrual of interest as a modification. (*Id.* at p. 204.)

In the Prior Opinion, we concluded that the record did not contain substantial evidence to support the jury's finding that Med-Fit performed all parts of its contract with Sukumar, specifically that portion of the contract pertaining to the Next Generation equipment; however, we rejected Sukumar's remaining breach of contract claims. (Prior Opinion at pp. 2, 8-13.) Thus, we reversed the jury's verdict on the breach of contract claim as to Med-Fit and remanded for a limited retrial. (*Id.* at pp. 2, 13, 27-28.) Because the jury's verdicts on Sukumar's negligent misrepresentation claim against Med-Fit and inducing breach of contract claim against Nautilus were

dependent on the finding of a breach of contract, these claims were also remanded for a new trial. (*Id.* at pp. 2, 13-14, 27-28.)

The original judgment determined that defendants were not at fault. Although we reversed the original judgment and ordered a limited retrial, the only question was whether the earlier finding of no liability would change. It did not. Thus, although we termed the disposition in the Prior Opinion as a "reversal," in effect it amounted to a modification of the original judgment pending the limited new trial.

Accordingly, postjudgment interest ran from the date of entry of the original judgment, not from the date of the judgment following the remittitur, and the trial court did not abuse its discretion in awarding postjudgment interest.

DISPOSITION

The judgment is affirmed. Respondents are entitled to their costs on appeal.

MCINTYRE, J.

WE CONCUR:

HUFFMAN, Acting P. J.

AARON, J.