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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

BRIAN HUNT,

Plaintiff and Appellant,

v.

GENE STALIANS,

Defendant and Respondent.

E055164

(Super.Ct.No. CIVRS1001175)

OPINION

APPEAL from the Superior Court of San Bernardino County. Barry L. Plotkin, Judge. (Retired judge of the San Bernardino Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Russo & Duckworth and J. Scott Russo for Plaintiff and Appellant.

Mahoney & Soll, Paul M. Mahoney and Richard A. Soll for Defendant and Respondent.

Brian Hunt appeals from a judgment following a court trial on his complaint for restitution of money paid and rescission of a promissory note executed in connection with

the sale of the assets of business entities Hunt had purchased from Gene Stalians by means of installment contracts. The installment contracts and the promissory notes Hunt executed provided for a payment of \$1 million if Hunt either sold 50 percent or more of the assets of the business entities before the maturity date of the contract or if Hunt paid off the notes before maturity for any other reason. Under the latter circumstance, the contracts additionally required payment of the remaining principal and the interest which would have been paid through the terms of the contract.

Hunt did sell the businesses before the maturity date of the notes, and Stalians demanded payment of \$1 million, which he later reduced to \$500,000, in order to release his security interest in the businesses. He now contends that what he terms the prepayment penalty is unenforceable as a matter of law, based upon the facts as found by the trial court in its statement of decision.

We will affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

The following summary of the facts and procedural matters is taken primarily from the trial court's tentative ruling, which it adopted as its statement of decision with minor modifications.¹

¹ Because Hunt does not contend that the evidence is insufficient to support the trial court's findings, we are bound by the factual findings set forth in the statement of decision. Further, we presume that the record contains sufficient evidence to sustain each finding of fact. (*Rael v. Davis* (2008) 166 Cal.App.4th 1608, 1612 & fn. 5.) Hunt does contend that the trial court improperly relied on extrinsic evidence to "rewrite" the parties' agreement. We address that contention elsewhere.

Hunt and Stalians had a business relationship dating back to the early 1990's. Stalians had a paratransit business (i.e., cabs, shuttles and Dial-a-Ride operations), established by his father in the 1950's. In the early 1990's, Hunt, who had just earned a law degree and had extensive experience in paratransit organizations, became a consultant to Stalians. In 1993, Stalians hired Hunt as his general manager. Hunt improved the companies' financial condition and profitability, and Stalians began thinking about selling the business to Hunt and retiring. Stalians had the business appraised in June 1992. The appraiser found that the business was worth between \$4 million and \$6.1 million. Hunt was skeptical of the appraised value because the business had a high debt load, but he believed it had great potential in a market it dominated.

Both men had extensive experience in the paratransit business and both were "capable managers and savvy businessmen." Both were well respected in their field and each had headed a national organization of paratransit businesses. They had a close working relationship characterized by mutual respect and trust.

In 1994, Hunt and Stalians arrived at an oral agreement to sell the business to Hunt for \$3 million payable over 20 years. Hunt began making monthly payments to Stalians which Hunt wrote off as salary to Stalians as a consultant in the business. When the agreement was reduced to writing in 2001, the monthly payments Stalians had received up to that point were credited against the sale price.

In or about August 2001, Hunt and Stalians executed contracts for the purchase and sale of the assets of three business entities owned by Stalians, only two of which—

Diversified Paratransit, Inc. (abbreviated by the parties and the trial court as DPI) and Paul's Yellow Cab Co., Inc. (abbreviated by the parties as PYC)—are at issue.

The parties agreed that Hunt would purchase Diversified Paratransit for \$1,067,910, with interest at 5.57 percent, amortized over 149 monthly payments to Stalians. Hunt executed a promissory note reflecting those terms and gave Stalians a security interest in Diversified Paratransit's assets as collateral. He also executed a personal guarantee.² The purchase price for Paul's Yellow Cab was \$343,174, with interest at 5.57 percent, amortized over 149 monthly payments. Hunt executed a promissory note, gave Stalians a security interest in Paul's Yellow Cab's assets as collateral, and executed a personal guarantee. Both installment agreements matured on December 31, 2013.

The contracts included the following provisions, which are at issue here. The contract for the sale of Diversified Paratransit's assets to Diverse Transit provided:

"Section 10. Certain Negative Covenants of Buyer

"Buyer covenants and agrees that Buyer will not:

10.1 Merger, Consolidation or Sale of Assets, Etc. So long as any amounts are owing with respect to the Note, Buyer shall not become a party to any merger or consolidation, or take any action looking to the dissolution or liquidation of the Business, (or except) [*sic*] in the ordinary course of business sell, lease or otherwise dispose of any assets of

² The actual purchaser was Diverse Transit, Inc., of which Hunt was president, and he executed the promissory note in that capacity. Hunt gave Stalians a personal guarantee. Because of the personal guarantee, Hunt alleged that he was a party to the purchase agreements.

the Business. In the event the Buyer sells more than 50% of the assets of **Diverse Transit, Inc.** during the term of the promissory note, an extra payment shall be made to the Seller of \$1,000,000 (one million dollars) as consideration and to induce the seller to allow the sale. However, this amount shall not be due if the buyer has already paid a one million dollar extra payment required by Section 11 of the agreement between Diversified Paratransit, Inc. and Paul's Yellow Cab Co., Inc.

“Section 11. Events of Default Acceleration

“If any of the following events (‘Event of Default’) shall occur, then and in any such event Seller may, by written notice to the Buyer, declare an Event of Default and exercise any or all rights set forth in Section 12, or may declare all amounts owing with respect to the Note for Purchase and Sale of Assets to be immediately due and payable, whereupon the same shall forthwith mature and become immediately due and payable together with interest thereon and all other amounts then owing under this Agreement.

“In the event of early pay-off of the note for any reason, unless otherwise agreed to in writing by the seller, a payment shall be paid Seller of one million dollars. However, this amount shall not be due if buyer has already paid a one million dollar extra payment required by Section 10 of this or by the agreement between Diversified Paratransit, Inc. and Paul's Yellow Cab Co., Inc. In the event of early payoff of the promissory note, the entire principal amount and remaining interest that would have been earned over the period of the note is due and payable.”

The contract for the sale of Paul's Yellow Cab contains substantially the same provisions.

Hunt made the first 59 payments due under each note. Under the Diversified Paratransit note, Hunt paid principal in the amount of \$337,648 and interest in the amount of \$249,107; the remaining principal was \$730,262 and the remaining interest was \$164,793. Under the Paul's Yellow Cab note, the principal and interest paid were \$108,504 and \$85,051, respectively; the remaining principal was \$234,670 and the remaining interest was \$52,955.

On May 9, 2006, Hunt entered into an agreement to sell the assets of Diversified Paratransit and Paul's Yellow Cab to Diversified Transportation, LLC, for \$4.6 million. When he notified Stalians of the sale, Stalians required payment of the unpaid principal and interest through the term of each note, the value of medical insurance and an auto allowance Hunt had agreed to pay him under a consulting agreement, and the \$1 million "premium payment." When Hunt informed Stalians that the sale proceeds were insufficient to meet Stalians' demand, Stalians agreed to reduce the premium payment to \$500,000 and to release his security interests upon condition that Hunt pay him \$2,081,254, consisting of \$1.7 million in cash through escrow and a "penalty balance note" for \$381,254, and pay an agreed upon CPI³ interest payment. It was during the parties' negotiations concerning the sale to Diversified Transportation, LLC, that Hunt first told Stalians that he did not think the premium payment was reasonable because he had by then paid almost half of the notes.

³ "CPI" refers to the Consumer Price Index.

Hunt did not make any payment on the penalty balance note. In February 2010, he filed suit. In response to a demurrer, he filed a first amended complaint alleging causes of action for unjust enrichment, unjust enrichment and imposition of constructive trust, and declaratory relief. He sought cancellation of the penalty balance note and restitution of \$118,746, which Stalians had received through escrow, which Hunt contended constituted partial payment of the \$500,000 premium payment. Stalians cross-complained.

After a court trial, the court found in favor of Stalians on Hunt's complaint. (We discuss the court's ruling below.) On Stalians' first cross-complaint, the court found Hunt liable for \$381,254, the amount of the penalty balance note. The court found in favor of Hunt on Stalians' second cross-complaint. Judgment was entered on September 23, 2011 on the complaint and cross-complaints, and judgment for attorney fees and costs was entered on November 1, 2011. On November 17, 2011, Hunt filed a notice of appeal from the judgment on his complaint only. Stalians did not appeal.

DISCUSSION

Introduction and Standard of Review

Hunt asserts that the prepayment provision contained in Section 11 of the contracts is an illegal penalty and void as a matter of law.⁴ He contends that even when reduced to \$500,000, the provision is unlawful because it is disproportionate to the actual damage suffered by Stalians as a result of the sale of the businesses and the early payment of the promissory notes and because the parties made no effort to create a liquidated damages clause based on damages which were reasonably foreseeable when they entered into the contracts.

We first address the standard of review. Hunt contends that our review is *de novo* because we are addressing purely legal issues based on uncontested evidence. Stalians contends that we review the trial court's ruling solely to determine whether it is supported by substantial evidence. Neither is correct.

The standard of review is crucial to our analysis: ““Arguments should be tailored according to the applicable standard of appellate review.” [Citation.] Failure to acknowledge the proper scope of review is a concession of a lack of merit.” (*Sonic Manufacturing Technologies, Inc. v. AAE Systems, Inc.* (2011) 196 Cal.App.4th 456, 465.) In order to determine the applicable standard, we must first determine precisely

⁴ Although Section 10 of the agreements, which provided for a penalty if Hunt sold 50 percent or more of the assets of the businesses before the maturity date of the note, was a factor addressed at trial and considered in the trial court's decision, on appeal Hunt limits his contentions to the validity of Section 11, the prepayment clause. Accordingly, we need not address the validity of Section 10, even though the sale of the business assets was the event which brought Section 11 into play.

what it is that we are reviewing. The parties appear to be of the opinion that the trial court ruled that the prepayment penalty provision is not unenforceable. However, a careful reading of the statement of decision reveals that the trial court concluded that Hunt failed to meet his burden to prove that the penalty provision was unenforceable. The court stated that although “at first blush, the extra payment provision appears to be a penalty, the evidence suggests otherwise.” It found that the evidence supported two possible inferences, one of which would render the provision unenforceable and one of which would render it enforceable. The court ultimately concluded that the evidence did not preponderate in Hunt’s favor and that he did not meet “his burden of proof to establish the unreasonableness of the extra payment provision at the time it was agreed to or that the payment provision [was] a prohibited penalty.”

Where the issue on appeal turns on a failure of proof at trial by the appealing party, “the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law. [Citation.]” (*Sonic Manufacturing Technologies, Inc. v. AAE Systems, Inc.*, *supra*, 196 Cal.App.4th at p. 466.) In deciding that question, “[W]e keep in mind that where a statement of decision sets forth the factual and legal basis for the decision, any conflict in the evidence or reasonable inferences to be drawn from the facts will be resolved in support of the trial court’s determination. [Citation.] We also keep in mind the well-settled principle that “[a] judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown [by the appellant]. . . .” [Citations.]’ [Citation.]” (*City of Merced v. American*

Motorists Ins. Co. (2005) 126 Cal.App.4th 1316, 1322-1323.) We conclude that Hunt has failed to demonstrate that the facts found by the trial court support only the conclusion that the prepayment provision is an unenforceable penalty.

The Facts Found by the Trial Court Do Not Mandate the Conclusion That the Prepayment Provision Is an Unlawful Penalty

A contract provision requiring payment of a set amount in the event of breach of the contract, such as a liquidated damages clause, must bear a reasonable relationship to the damages the nonbreaching party would suffer in the event of a breach. Such a provision is unenforceable as an unlawful penalty if it does not bear a reasonable relationship to the amount of damages the parties could reasonably anticipate, at the time they entered into the agreement, in the event of a breach. (*Ridgley v. Topa Thrift & Loan Assn.* (1998) 17 Cal.4th 970, 976-978.) A prepayment clause, however, is not required to bear a reasonable relationship to potential damages because “[p]ayment before maturity is not a breach of the contract, but simply an alternative mode of performance on the borrower’s part; the prepayment charge is *not a penalty imposed for default*, but an agreed form of compensation to the lender for interest lost through prepayment, additional tax liability or other disadvantage.” (*Id.* at p. 978, italics added.) The nomenclature used by the parties is not dispositive; we do not elevate form over substance. (*Garrett v. Coast & Southern Fed. Sav. & Loan Assn.* (1973) 9 Cal.3d 731, 737, superseded by statute on another point as stated in *Weber, Lipshie & Co. v. Christian* (1997) 52 Cal.App.4th 645, 654.) Accordingly, even though Section 11 refers to paying off the notes before the maturity date of the installment contracts as a default, it

is not. Rather, it is an alternative means of performance, and it is not subject to the requirements which apply to a liquidated damages provision. (*Ridgley v. Topa Thrift & Loan Assn.*, at pp. 978-979.)⁵

Hunt contends that even if a prepayment penalty need not be reasonably related to the damages which could be anticipated by the parties as a result of prepayment, it may nevertheless be deemed unenforceable if it is so onerous as to be unconscionable. None of the cases he cites for that proposition actually so holds,⁶ but even if we assume that

⁵ Hunt refers to Section 11 as a prepayment penalty in his opening brief, but he also asserts that it is an invalid penalty because it does not pass muster as a liquidated damages clause. He emphasizes that in *Garrett v. Coast & Southern Fed. Sav. & Loan Assn.*, *supra*, 9 Cal.3d 731, the court stated that a provision may be deemed a penalty, regardless of what the parties call it. However, it is equally true that because a prepayment provision is not a remedy for a breach, it does not become an unlawful penalty merely because the parties have so named it. (*Ridgley v. Topa Thrift & Loan Assn.*, *supra*, 17 Cal.4th at pp. 978-979.)

⁶ Hunt quotes *Lazzareschi Inv. Co. v. San Francisco Fed. Sav. & Loan Assn.* (1971) 22 Cal.App.3d 303, as holding that “[P]alpably exorbitant charges would be subject to defeat by judicial decision.” In reality, the court said, “For the purpose of this appeal, *we shall assume that* palpably exorbitant charges would be subject to defeat by judicial decision.” (*Id.* at p. 308, italics added.) The court went on to hold only that the prepayment penalty before it was not exorbitant. (*Id.* at p. 310.)

Hunt also represents that the court in *Williams v. Fassler* (1980) 110 Cal.App.3d 7 held that courts may strike down exceptionally high prepayment penalties as unconscionable if they are “so exorbitant as to shock the judicial conscience and entirely incompatible with customs of the trade.” [Citing *Williams* at pp. 11-12]” However, in the passage cited by Hunt, the court was discussing dictum in *Hellbaum v. Lytton Sav. & Loan Assn.* (1969) 274 Cal.App.2d 456 and in *Lazzareschi Inv. Co. v. San Francisco Fed. Sav. & Loan Assn.*, *supra*, 22 Cal.App.3d 303, and the specific language quoted above is from a student note in a law review discussing *Hellbaum*. (*Williams v. Fassler*, at pp. 11-12.) *Williams* itself does not hold that courts may invalidate shockingly exorbitant prepayment penalties, and, as in *Lazzareschi*, merely goes on to hold that the prepayment penalty before it was not, in any event, exorbitant. (*Williams*, at pp. 12-13.)

under some circumstances a prepayment penalty may be deemed unconscionable and therefore unenforceable, this is not such a case.

Here, the trial court found that one purpose of the prepayment provision was to allow Stalians to “recapture the lost value of the company” that he relinquished when he agreed to sell the businesses to Hunt in 1994. “The parties agreed that Stalians wished to include the [prepayment provision] as an option because of his strongly held belief that should Hunt not retain the businesses for the duration of the note, Hunt would likely receive a windfall from a profitable sale, which both parties reasonably expected, and Stalians would be deprived of the fruits of his almost forty years of labor positioning the businesses to be profitable.” Further, “Hunt was in agreement acknowledging that the \$3 million sale in 1994 was below the appraised value [of the businesses], the interest rate was low, and Hunt was bringing ‘nothing to the table,’ contributing nothing to the acquisition of Stalians’ companies, other than his promise to continue to operate the businesses profitably. Hunt lacked the funds to make a down payment. Hunt agreed that the businesses were capable of becoming more profitable and generating a future sales price that would generate a large profit for him.” Based on these facts, the prepayment provision is in no way unconscionable, particularly when reduced to \$500,000.

Moreover, the court found that during the drafting of the agreements, Hunt accepted Stalians’ desire to include the prepayment provision and sought to couch it in terms which would avoid the possibility that a court would find that it was an unlawful penalty.

Hunt contends that we must disregard the parol evidence as to the parties’ intent and determine the parties’ intent solely from the language of the contracts. He is

incorrect. Extrinsic evidence is admissible to “prove a meaning to which the language of the instrument is reasonably susceptible,” even if the language is not ambiguous on its face. (*Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 391.) Parol evidence may not be used to contradict the express terms of an integrated agreement, but it is admissible to enable the court to ascertain the meaning of the provision in question. (*City of Manhattan Beach v. Superior Court* (1996) 13 Cal.4th 232, 238.) “For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the Judge be placed in the position of those whose language he is to interpret.” (Code Civ. Proc., § 1860.) In *Garrett v. Coast & Southern Fed. Sav. & Loan Assn.*, *supra*, 9 Cal.3d 731, the court held that “[w]hether late charges represent a reasonable endeavor to estimate fair compensation depends upon the motivation and purpose in imposing such charges and their effect.” (*Id.* at p. 740.) Resort to parol evidence will almost always be necessary in order to determine the parties’ motivation and intent, and to determine whether they designed the contractual provision to estimate fair compensation upon default. (See *ibid.*) Here, because Hunt asserted that the prepayment provision was an unlawful penalty, the court properly admitted parol evidence to address that contention and to determine the parties’ “motivation and purpose” (*ibid.*) with respect to the prepayment provision.

Hunt also contends that the trial court improperly relied on the parol evidence to “rewrite” the parties’ agreement. The trial court, however, rejected that contention, finding as a matter of fact that Hunt failed to show how the trial court’s interpretation of

Section 11 “alter[ed] ‘the obligations of the parties and create[d] new and/or different rights and duties’” pursuant to the contracts. As we have noted elsewhere, in an appeal following a court trial where a statement of decision sets forth the factual and legal basis for the decision, we are bound by the trial court’s factual findings, and reasonable inferences to be drawn from the facts will be resolved in support of the trial court’s determination. (*Rael v. Davis, supra*, 166 Cal.App.4th at p. 1612; *City of Merced v. American Motorists Ins. Co., supra*, 126 Cal.App.4th at pp. 1322-1323.) The court properly considered the parties’ testimony about the circumstances which existed when the agreements were made in order to determine whether the prepayment clause had a legitimate purpose, based on those circumstances, and drew a reasonable conclusion from the evidence. Hunt has not met his burden of showing that facts found by the trial court mandate a different conclusion. (*Sonic Manufacturing Technologies, Inc. v. AAE Systems, Inc., supra*, 196 Cal.App.4th at p. 466.)

Finally, Hunt contends that because Stalians accelerated the principal and interest which remained due on the contracts, he could not also assess a prepayment penalty. Hunt implies that *Tan v. California Fed. Sav. & Loan Assn.* (1983) 140 Cal.App.3d 800 (Fourth Dist., Div. Two) holds that under all circumstances, acceleration of a debt precludes assessment of a prepayment penalty. That is not what *Tan* says. Rather, *Tan* holds that the specific language of the promissory note in that case permitted imposition of a prepayment penalty only when the debtor chose to make prepayments in excess of a certain amount. The court held that when the note holder exercised a due-on-sale clause, the prepayment penalty did not apply, by the express terms of the prepayment clause.

(*Id.* at pp. 802 & fn. 1, at pp. 809-810.) Other cases have analyzed contractual provisions and concluded that acceleration did not preclude imposition of a prepayment penalty. (See, e.g., *Biancalana v. Fleming* (1996) 45 Cal.App.4th 698, 703-704; see also *Ridgley v. Topa Thrift & Loan Assn.*, *supra*, 17 Cal.4th at p. 979, fns. 3, 4.) Hunt does not elaborate beyond merely citing *Tan*. He provides no argument or analysis as to why the contracts in this case preclude both acceleration and imposition of a prepayment penalty. It is the appellant's burden to demonstrate error. (*State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 610.) To meet that burden, the appellant must provide reasoned legal analysis, supported by citations to relevant authority. (*Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6.) A perfunctory argument which does not provide any analysis of pertinent authority does not merit consideration on appeal. (*People v. Weaver* (2001) 26 Cal.4th 876, 987.) Accordingly, we deem the argument waived. (*Ibid.*)

Stalians' Affirmative Defenses

Stalians asserted multiple affirmative defenses in the trial court. He devotes a large portion of his brief on appeal to those defenses as well. The trial court deferred any ruling on those defenses, finding that its determination that Hunt had failed to show that Section 10 and Section 11 were unlawful penalties was dispositive. For the same reason, we need not address them.

DISPOSITION

The judgment is affirmed. Respondent Gene Stalians is awarded costs on appeal.

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McKINSTER
J.

We concur:

HOLLENHORST
Acting P. J.

RICHLI
J.