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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

DENNIS M. FETTERS,

Plaintiff and Respondent,

v.

RICHARD TING,

Defendant and Appellant.

E055192

(Super.Ct.No. RIC461157)

OPINION

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

Keller, Weber & Dobrott and Jill Hunt for Defendant and Appellant.

The Law Office of Richard L. Knight and Richard L. Knight for Plaintiff and Respondent.

## I

### INTRODUCTION

Plaintiff Dennis M. Fetters<sup>1</sup> agreed to design and build a prototype of an unmanned helicopter for a Chinese businessman, defendant Richard Ting. When Ting did not pay Fetters, Fetters sued for breach of contract and fraud. After a court trial, Fetters received a judgment of \$208,000.

On appeal, Ting challenges the court's admission of evidence. We hold the trial court did not abuse its discretion and sufficient evidence supports the judgment even if the court had not admitted the subject evidence.

## II

### PROCEDURAL AND FACTUAL BACKGROUND<sup>2</sup>

#### *A. The Complaint*

In November 2006, Fetters filed a verified complaint against Ting for breach of a written contract. Fetters alleged that, after an agreement was formed on August 12, 2002, Ting breached the agreement by not paying Fetters for the development and delivery of a RPV<sup>3</sup> prototype helicopter and by selling the helicopter to a third party. Fetters asserted a related cause of action for fraud, alleging that he was entitled to one-third the sales

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<sup>1</sup> Fetters also uses the name Mohhamed Al Faris.

<sup>2</sup> Ting's opening brief is deficient for its failure to discuss the evidence fully in its brief two-page summary of the facts. (Cal. Rules of Court, rule 8.204(a)(2)(C); *Clark v. Superior Court* (2011) 196 Cal.App.4th 37, 52-53; *Doe v. Roman Catholic Archbishop of Cashel & Emly* (2009) 177 Cal.App.4th 209, 218.)

<sup>3</sup> Remotely piloted vehicle.

price of the prototype, plus \$108,000 in consulting fees. Ting filed a verified general denial.

## *B. The Court Trial*

### *1. Fetters's Evidence*

A one-day court trial was conducted in June 2011. Fetters testified that he has designed and developed helicopters—remote-controlled and manned—for 25 years. Ting was introduced to Fetters as a potential investor. In 2000, Fetters decided to sell the rights to manufacture and sell two types of his helicopters—the Mini 500 and the Voyager 500—in China to Ting for \$200,000. Subsequently, Fetters discovered Ting had sold the worldwide rights for the helicopters to another company. Eventually, Ting paid Fetters another \$250,000 for the worldwide rights or the United States patent rights.

In 2002, Ting contacted Fetters after he had moved to Corona in California. Ting wanted Fetters to design and build an UAV<sup>4</sup> helicopter. Together they drafted and executed the written agreement of August 12, 2002. Fetters was to be paid \$100,000 for development and an additional amount of at least \$100,000 for the sale of the prototype. Ultimately Fetters received only \$100,000. Fetters completed the design but Ting never supplied the remote control system. Without the control system, Fetters could not fulfill the speed and distance requirements. Because funding delays further hindered the completion of the project, Ting and Fetters agreed to waive the original six-months

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<sup>4</sup> Unmanned aerial vehicle.

deadline for completion and to use an off-the-shelf remote control system to complete a demonstration model. Fetters also built a second helicopter with used parts.

After Fetters had delivered the helicopter to Ting in November 2004, he discovered that Ting had already sold the helicopter in July 2002 to Sunward, a Chinese company that needed a UAV helicopter that could be programmed to fly long distances in the Gobi desert. While Ting and Fetters shared a car ride, Ting admitted during a telephone conversation with his secretary that Sunward had paid him in advance.

Sunward contacted Fetters to ask about delivery of the helicopter. Sunward showed Fetters a set of documents indicating that Ting had actually been paid in full by Sunward before executing the contract with Fetters. The documents—exhibits 2, 3, 4, and 9<sup>5</sup>—were in Mandarin Chinese and translated into English. They memorialized the payment of 2 million RMB<sup>6</sup> (about \$250,000) and 1.5 million RMB from Sunward to Ting for development of the UAV prototype. The court overruled Ting’s objections—on the grounds of hearsay, foundation, and authenticity—to the documents and Fetters’s testimony.

In a subsequent meeting between Fetters, Ting, and Sunward, Sunward explained it had paid for the helicopter and asked Ting where it was. Fetters asked Ting for the money he was owed. Ting refused to acknowledge the Sunward contract and expressed

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<sup>5</sup> Exhibit 9 is a corrected copy of exhibit 3.

<sup>6</sup> RMB is an acronym for renminbi, the official Chinese currency.

outrage. Ting’s trial lawyer objected again and the court deemed it a “standing objection.”

In a letter to Fetters, translated from Chinese and dated May 31, 2007, (exh. 1) Sunward confirmed that it had paid Ting 2 million RMB on August 9, 2002. Sunward never received the helicopter and pursued a Chinese enforcement action against Ting, culminating in a “Pacification Agreement” (exh. 5), dated March 6, 2009. The agreement provided that Ting would pay Sunward 3.5 million RMB in compensation for the 3.5 million RMB Sunward had paid Ting for delivery of the prototype and remote control system it never received.

Although Ting had already been paid by Sunward when he contracted with Fetters, Ting represented to Fetters that he did not have a buyer. In actuality, Fetters should have received \$100,000 from the Sunward sale. Fetters did receive the balance of the \$100,000 for development when the helicopter was delivered in November 2004. In summary, Fetters claimed his damages were \$100,000 from the sale of the prototype and \$108,000 as a monthly salary for six months—a total claim of \$208,000.

## *2. Ting’s Evidence*

On cross-examination, Fetters admitted he was currently an employee of Sunward. Sunward’s attorney had supplied Fetters with the documents identified as exhibits 2, 3, 4, and 5. A Chinese messenger from Sunward offered some explanation of the documents. A corrected copy of exhibit 3—the Sunward-Ting sales agreement dated July 30, 2002—was identified as exhibit 9.

Ting's business associate, Gregg Brown of the Trilogy Group, testified that he received the helicopter from Fetters after Ting had paid the final \$36,000. Exhibit 10 is a sales contract for the helicopter between Trilogy Group and Sunward for \$50,000 dated June 28, 2006. During trial in June 2011, Brown claimed he still had possession of the helicopter. Brown presented a notarized translated Chinese document, explaining Ting could not leave China to testify because of a Chinese legal proceeding.

Ting's final witness, a court-certified Mandarin interpreter read into the record his translation of exhibits 4 and 9—the agreements of February 28, 2004, and July 30, 2002, between Ting and Sunward. His translation, apparently more accurate, was entirely consistent with the previous evidence offered about the meaning of the documents.

### *C. The Statement of Decision*

The trial court prepared an intended statement of decision finding that it was undisputed that Ting had hired Fetters to design and build an unmanned helicopter. Fetters was to be paid \$100,000 for development and \$100,000 upon sale plus \$18,000 a month for six months of consulting. After delays caused by Ting, Fetters finished the prototype and delivered it in November 2004. Fetters was paid \$100,000 but still was not paid the additional \$100,000 and \$108,000. Meanwhile, Sunward had already paid Ting \$250,000. The damages to Fetters were \$208,000.

The court admitted into evidence Exhibits 1, 2, 3, 4, 5, 8, 9, and 10. The court found that Ting signed the two sales agreements with Sunward dated July 30, 2002, and February 28, 2004, exhibits 9 and 4. Because the evidence showed Ting had sold the prototype to Sunward, the court found by a preponderance of the evidence that Ting had

breached the contract with Fetters and by clear and convincing evidence that Ting had committed fraud by concealment of a material fact. The court awarded judgment of \$208,000 and costs to Fetters. The court filed a supplement to its statement of decision, responding to the objections raised by Ting and deeming its tentative and supplemental statements to constitute the final decision.

### III

#### DISCUSSION

On appeal, we presume the evidence supports the findings of fact and the judgment is correct unless the appellant can demonstrate otherwise. (*Boeken v. Philip Morris, Inc.* (2005) 127 Cal.App.4th 1640, 1658.) Additionally, an appellant must show that any error is prejudicial: “We will not reverse a judgment unless ‘after an examination of the entire cause, including the evidence,’ it appears the error caused a ‘miscarriage of justice.’ (Cal. Const., art. VI, § 13.) In the case of civil state law error, this standard is met when ‘there is a reasonable probability that in the absence of the error, a result more favorable to the appealing party would have been reached.’ (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 574.)” (*Elsner v. Uveges* (2004) 34 Cal.4th 915, 939.)

Ting attacks the judgment on several grounds. His primary contention is there was no competent admissible evidence to prove he had sold the prototype to Sunward and been paid. Ting advances this argument in spite of his introduction of exhibit 10, a sales contract dated June 28, 2006, for sale of a helicopter for \$50,000 by the Trilogy Group, Ting’s agent, to Sunward. Ting also maintains Fetters did not perform fully under the

August 2002 agreement and Fetters was not entitled to be paid an additional \$100,000 for the sale to Sunward or \$108,000 for six months of consulting that never occurred. We conclude the trial court did not err but any purported error in the admission of evidence was certainly harmless because substantial evidence supports the judgment.

*A. Admission of Exhibits 1, 2, 3, 4, 5, 8, 9, and 10*

Ting argues the court abused its discretion in admitting exhibits 1, 2, 3, 4, 5, 8, 9, and 10. (*Panna v. Land Rover North America, Inc.* (2011) 191 Cal.App.4th 1298, 1317.) As an initial matter, we reject Ting's arguments regarding exhibit 10, the \$50,000 sales contract between Sunward and Trilogy Group, acting as Ting's agent, dated June 28, 2006. That document was used by Ting's lawyer during her cross-examination of Fetters. Ting cannot object to the admission of an exhibit which he introduced in court.

As to the other exhibits, on appeal Ting raises challenges on the grounds of hearsay and lack of authentication and foundation. (Evid. Code, §§ 753, subd. (a), 1200, 1201, 1271, 1400, and 1401.) Even if Ting's objections were not waived below, we reject his arguments on appeal on the merits.

Exhibit 1, the letter dated May 31, 2007, is certainly admissible as a business record received by Fetters from the Sunward company: "Evidence Code section 1271(d) requires, as a condition for admissibility of a writing under the business records hearsay exception, that the judge find that (1) the sources of information and (2) the method and time of preparation of the writing "were such as to indicate its trustworthiness." This does not mean that the judge must make an express finding on the court record. A ruling admitting a writing in evidence under this hearsay exception is deemed an implied

finding by the trial judge that these two requirements are present to indicate trustworthiness of the writing. . . . [¶] The business record exception grants the trial judge wide discretion in determining whether a proper foundation has been laid to admit the reports. [Citations.] . . . [¶] In any event, the revision of the business record exception made by the Evidence Code[] strongly supports a more liberal application and broader trial court discretion as to the business records exception. . . . ‘The object of the statute is, of course, to eliminate the necessity of calling each witness. The foundation for admitting the record is properly laid if in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission. This places a broad discretion in the trial court which will not be disturbed on appeal. [Citation.]’” (*Levy-Zentner Co. v. Southern Pac. Transportation Co.* (1977) 74 Cal.App.3d 762, 784-785; *People v. Olguin* (1994) 31 Cal.App.4th 1355.)

Exhibit 2 is a receipt for the 2 million RMB paid on August 1, 2002 by Sunward to Ting’s authorized agent, Eagle and Dragon Trading Company. As such it is admissible both as a business record for Sunward and as an authorized statement by Ting’s agent, and also constitutes an admission by Ting. (Evid. Code, §§ 1222 and 1271; *Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 325.) The receipt is also admissible as impeachment as a prior inconsistent statement of Ting’s denial that he was paid by Sunward for the prototype. (Evid. Code, § 1235; *People v. Hawthorne* (1992) 4 Cal.4th 43, 55; *In re Johnny G.* (1979) 25 Cal.3d 543, 550-556.)

Exhibits 3 and 9 are the same document, the sales agreement between Sunward and Ting dated July 30, 2002. Ting does not actually deny there was an agreement with

Sunward. Moreover, Ting's own witness, the certified interpreter, read a translation of exhibit 9 into the record. Even if the Sunward-Ting sales agreement is hearsay, it is admissible as a business record and an admission by Ting. (Evid. Code, § 1271; *Jazayeri v. Mao, supra*, 174 Cal.App.4th at p. 325.) The sales agreement is also admissible as impeachment of Ting's denials that he was paid. (Evid. Code, § 1235; *People v. Hawthorne, supra*, 4 Cal.4th at p. 55; *In re Johnny G., supra*, 25 Cal.3d at pp. 550-556.)

Exhibit 4 is a written modification, dated February 28, 2004, of the Sunward-Ting sales agreement, dated July 30, 2002. Exhibit 5 is the Pacification Agreement between Sunward and Ting, dated March 6, 2009. Both documents are admissible as business records, admissions, and for impeachment purposes.

In addition, there were no problems with the foundation or authenticity of exhibits 1, 2, 3, 4, 5, and 9. Exhibit 1 is a letter to Fetters which he certainly may testify he received. Exhibits 2, 3, 4, 5, and 9 were given to Fetters by Sunward's lawyer, which is sufficient foundation and authentication. (Evid. Code, § 1400; *Landale-Cameron Court, Inc. v. Ahonen* (2007) 155 Cal.App.4th 1401, 1409; *The Luckman Partnership, Inc. v. Superior Court* (2010) 184 Cal.App.4th 30, 34.) Exhibits 4 and 9 were helpfully translated by Ting's witness, curing the problem of any inaccuracy.

Exhibit 8 is a set of photographs of Sunward's Chinese lawyer, holding the relevant documents while in the company of the Sunward courier who brought them to the United States. Ting did not expressly object to the introduction of the photographs and forfeited the issue on appeal. (*Platzer v. Mammoth Mountain Ski Area* (2002) 104

Cal.App.4th 1253, 1261.) In any event, the photographs had little evidentiary value and their admission was too innocuous to constitute prejudicial error.

*B. Sufficiency of Evidence for Breach of Contract*

As framed by Ting, “[t]he critical issue in this case was whether or not Richard Ting ever sold the [RPV] Helicopter, triggering the payment to Fetters.” Ting argues Fetters could not meet his burden of proof without relying on inadmissible evidence. We conclude that, even without admitting the subject exhibits, there was sufficient evidence for Fetter’s claims.

As we have discussed, all the significant evidence was admissible. Exhibits 2, 4, and 9—the Sunward-Ting sales agreement, the receipt for 2 million RMB, and the modified agreement—all tend to prove that Sunward bought and paid for the prototype. Furthermore, Fetters was entitled to testify that Ting had admitted selling the prototype to Sunward. (*People v. Richards* (1976) 17 Cal.3d 614, 617-618, disapproved on other grounds in *People v. Carbajal* (1995) 10 Cal.4th 1114, 1126; *Legg v. United Ben. Life Ins. Co.* (1951) 103 Cal.App.2d 228, 229.)

The standard elements of breach of contract are a contract, performance or excusable nonperformance, breach, and damage. (*Wall Street Network, Ltd. v. New York Times Co.* (2008) 164 Cal.App.4th 1171, 1178.) The written contract between Ting and Fetters provided that Ting would pay \$100,000 for development of the prototype and at least \$100,000 when it was sold to a third party. Because Ting caused the delays in development, he cannot claim Fetters’s failure to perform within six months as a defense; “prevention by one party will excuse want of performance or delay on the part of the

other.” (*Taylor v. Sapritch* (1940) 38 Cal.App.2d 478, 481, citing Civ. Code, § 1511; *Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 868-869; *Mad River Lumber Sales, Inc. v. Willburn* (1962) 205 Cal.App.2d 321, 324.)<sup>7</sup> Once it was established that Ting presold the prototype, Fetters was entitled to receive a minimum of \$100,000 from the sale.

The issue involving the \$18,000 monthly compensation is different. Additionally, Fetters agreed he would be available to perform postsale consulting services for \$18,000 monthly compensation: “Dennis Fetters agrees to be available to travel to the buyer of the project, and train them [in] the methods necessary to reproduce the mechanical parts of the helicopter. This will be for a period of time where he or the buyer feels it is adequate, or until Dennis Fetters feels that he is wasting his time. Dennis Fetters is to be paid a monthly salary of \$18,000. . . .” Fetters testified the consulting period was intended to be six months for a total fee of \$108,000. Ting invites this court to conduct a de novo review of the contract to find that Fetters should not be paid \$108,000 for consulting fees.

“In California ‘the intention of the parties as expressed in the contract is the source of contractual rights and duties. A court must ascertain and give effect to this intention by determining what the parties meant by the words they used.’ (*Pacific Gas & Elec. Co. v. G. W. Thomas Drayage etc. Co.*, 69 Cal.2d 33, 38.)” (*Lee v. Springer Laundries, Inc.* (1970) 8 Cal.App.3d 1003, 1006.) “““The test of admissibility of extrinsic evidence to

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<sup>7</sup> For the same reason, we dismiss Ting’s other contentions about Fetters’s failure to perform.

explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible.” ([*Diamond v. Insurance Co. of North America* (1968) 267 Cal.App.2d 415,] 419.) It was further held in *Pacific Gas & Elec. Co.* that ‘rational interpretation requires at least a preliminary consideration of all credible evidence offered to prove the intention of the parties.’ (*Supra*, 69 Cal.2d at pp. 39-40.)” (*Id.* at 1007.) In *Parsons v. Bristol Dev. Co.*, *supra*, 62 Cal.2d at page 866, the court commented that “even in the absence of extrinsic evidence, the trial court’s interpretation of a written instrument must be accepted “if such interpretation is reasonable, or if [it] is one of two or more reasonable constructions of the instrument” [citation].” (*Lee*, at p. 1008.)

In this case, the duration of Fetters’s employment was left unstated. The omission “did not render the agreement fatally uncertain and indefinite. [Citations.] However, such omission does require that the duration of the contract be judicially determined in accordance with established rules of construction. [Citations.] [¶] In construing contracts which call for continuing performance or forbearance but which contain no *express* term of duration, it is first necessary to determine whether the intention of the parties as to duration can be *implied* from the nature of the contract and the circumstances surrounding it. [Citations.] Thus, in some cases the court by referring to the nature of the contract and the totality of circumstances is able to determine that the obligations of the contract were impliedly conditioned as to duration upon the occurrence or non-

occurrence of some event or situation.” (*Consolidated Theatres, Inc. v. Theatrical Stage Employees Union* (1968) 69 Cal.2d 713, 724-725.)

Here the trial court could consider the nature and circumstances of the contract between Fetters and Ting and reasonably conclude that, because it was expected that Fetters would design and build the prototype in six months, it would require an additional six months to train the buyer. Fetters testified that was his expectation. Therefore, as part of Fetters’s damages for breach of contract, he could recover \$108,000 for six months of consulting fees. Sufficient evidence supported Fetters’s claim for breach of contract, entitling him to damages of \$208,000.<sup>8</sup>

### C. Bias

For the first time on appeal, Ting claims the court’s evidentiary rulings showed bias based on “preconceived stereotypes.” (*Develop-Amatic Engineering v. Republic Mortgage Co.* (1970) 12 Cal.App.3d 143, 150; *Catchpole v. Brannon* (1995) 36 Cal.App.4th 237, 245, disapproved of by *People v. Freeman* (2010) 47 Cal.4th 993.) Even if the trial court’s evidentiary rulings were erroneous—which they were not—it would not establish judicial bias. (*People v. Avila* (2009) 46 Cal.4th 680, 696.) The brief testimony about whether Ting had dual citizenship was “innocent and appropriate when viewed in context.” (*Moulton Niguel Water Dist. v. Colombo* (2003) 111

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<sup>8</sup> Ting focuses on the breach of contract claim and does not offer any appellate arguments about the claim for fraud. Nevertheless, we agree with Fetters that the evidence supported the trial court’s finding of fraud by concealment of the sale of the prototype. (*SCC Acquisitions, Inc. v. Central Pacific Bank* (2012) 207 Cal.App.4th 859, 864.)

Cal.App.4th 1210, 1218.) Similarly, the judge’s comments regarding whether there are written similarities or differences between written Cantonese and Mandarin did not indicate bias and are not relevant. Ultimately, of course, Ting’s witness, the certified Mandarin interpreter submitted a translation of the documents which were written in Mandarin.

#### IV

#### DISPOSITION

The trial court did not abuse its discretion in its evidentiary rulings and did not exhibit bias. Even without the subject exhibits, sufficient evidence of breach of contract and fraud supports the judgment. We affirm the judgment and award Fetters his costs on appeal.

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CODRINGTON  
J.

We concur:

McKINSTER  
Acting P. J.

MILLER  
J.