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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

EDWIN L. PYLE,

Cross-complainant, Cross-defendant and  
Appellant,

v.

ERMEL RAY MOLES et al.,

Cross-complainants, Cross-defendants and  
Respondents.

F060873

(Super. Ct. No. 08CECG04145)

**OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Alan M. Simpson and Robert H. Oliver, Judges.\*

Edwin L. Pyle, in pro. per., for Cross-complainant, Cross-defendant and Appellant.

Campagne, Campagne & Lerner, Thomas E. Campagne and Mary F. Lerner for Cross-complainants, Cross-defendants and Respondents.

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\* Judge Simpson ruled on the demurrer on October 6, 2009; Judge Oliver presided over the trial and entered the judgment.

Edwin L. Pyle appeals from a judgment against him and his wife, Adele M. Pyle, on cross-complaints filed in this interpleader action.<sup>1</sup> We conclude that appellant has failed to establish reversible error. Accordingly, we affirm the judgment.

### **FACTS AND PROCEDURAL HISTORY**

Continuing a practice extending back several years, the Pyles leased 118 acres of vineyards to Ben Rastegar for the 2008 growing season. The lease allocated certain expenses between the landlords and the tenant and required the tenant to “farm said land in a farmerlike manner according to best farming methods practiced in this vicinity.” The lease provided that Rastegar would harvest and sell the crop, either as raisins or as wine grapes. The Pyles were to receive as rent “the sum of 22.5% of the proceeds of the sales of the said crop,” together with reimbursement from the crop proceeds for the cost of electricity to run the irrigation pumps on the property.

Sometime in May 2008 appellant determined that Rastegar had stopped farming the property. Appellant did not see Rastegar at the property and became aware that Rastegar had stopped paying the person Rastegar had hired to irrigate the vineyards. Appellant considered the lease to have terminated because of Rastegar’s nonperformance. On July 7, 2008, appellant entered into a contract with E & J Gallo Winery (Gallo) for the grapes growing in the vineyards. He did not tell Rastegar he had done so. On July 16, 2008, Rastegar entered into a contract with Caruthers Packing Company for the raisin crop he was growing under the lease with appellant, although appellant testified he did not learn about the 2008 sale until after he had terminated Rastegar’s lease.

On July 18, 2008, appellant made written demand on Rastegar for payment of \$5,538 for electricity and irrigation water. On or about August 2, 2008, appellant mailed

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<sup>1</sup> Adele M. Pyle did not appeal from the judgment. We will refer to Edwin L. Pyle as appellant and, when referring to both persons, we will refer to them as the Pyles. Both Ernel Ray Moles and Ben Rastegar have appeared as respondents. We will refer to them individually by their surnames and collectively as respondents.

Rastegar a letter stating that the lease had been terminated for “sub-standard farming” practices enumerated in the letter. On or about August 7, 2008, appellant met with Rastegar and received three money orders totaling \$2,500 on this debt. On or about August 26, 2008, appellant told Rastegar not to return to the property and, when Rastegar refused to leave, appellant called the sheriff to remove him.

Moles was a contract buyer for Caruthers Packing Company and provided private financing to growers over the course of the season. He had provided financing to Rastegar during the 2008 season and by the end of the summer Rastegar owed him approximately \$60,000 for expenses on Rastegar’s various vineyards, including those leased from appellant. Rastegar met with Moles and told him about the problems he was having with appellant. He complained that his own attorney seemed incapable of resolving the situation. Moles took Rastegar to see Moles’s attorney. That attorney (one of respondents’ present counsel) prepared and signed a promissory note, security agreement, and UCC financing statement, the latter of which he caused to be filed with the Secretary of State. The attorney also determined that appellant had contracted with Gallo and, on August 28, 2009, he wrote a demand letter to Gallo and to the Pyles advising them of respondents’ claims against the grape crop. Starting at the beginning of September 2008, appellant caused the grapes to be harvested and delivered to Gallo.

The present case began when Gallo filed an interpleader action against the Pyles, Rastegar, and Moles. After Gallo was dismissed from the case, the matter was brought for trial to the court sitting without a jury on the second amended cross-complaint of the Pyles (against respondents) and on the second amended cross-complaint of respondents (against the Pyles). Among its 10 causes of action, respondents’ second amended cross-complaint alleged, as relevant here, a cause of action for conversion of the grape crop. The Pyles’s second amended cross-complaint sought to state causes of action for abuse of process and intentional interference with contract. When respondents’ demurrer to this complaint was heard by Judge Simpson, the court denied the demurrer and ruled as

follows: “Although the first cause of action [does not] allege a cause of action for abuse of process ... a valid cause of action for breach of contract ... is alleged.” At trial, Judge Oliver, in reliance on this ruling, instructed appellant that he could not present evidence or argument in support of an abuse of process claim. Neither party requested a statement of decision. (See Code Civ. Proc., § 632.)

After permitting posttrial briefing, the court rendered judgment on July 15, 2010, for respondents for the value of the grapes if they had been made into raisins and sold to Caruthers Packing Company, with an offset to the Pyles for the cost of harvest and for their 22.5 percent rent specified in the lease. The court concluded that the Pyles were entitled to a further offset for diesel fuel and electricity costs for operation of the irrigation system, but the court also concluded that the court could not determine such costs “based on the evidence submitted during the trial.”<sup>2</sup> Accordingly, the court “specifically retains jurisdiction as to amounts paid by Mr. Pyle for utilities and diesel fuel as set forth hereinabove.” In addition, the court determined respondents were the prevailing parties and were entitled to attorney fees under the lease. The judgment states: “The Clerk of the Court is ordered to continue to hold all funds in the interpleader account pending the Court’s ruling on attorneys’ fees, costs, utility and diesel costs and other matters that may be properly before the court.” Appellant filed a notice of appeal on August 2, 2010. The judgment was not, on its face, an appealable final judgment. (See *Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 698.)

The record does not indicate that appellant submitted any further proof concerning the utility and diesel costs. By motion to augment the record on appeal, respondents have

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<sup>2</sup> Appellant’s small claims action against Rastegar for expenses from the 2007 crop year was consolidated into the present case. Although appellant complains that the court did not resolve the small claims case, we infer the court determined that the \$2,500 payment made by Rastegar covered all the applicable expenses sought in the small claims action.

supplied this court with an order and final judgment filed October 1, 2010. Although we denied respondents' motion to augment the clerk's transcript to include this judgment on the basis it was filed after the notice of appeal, we now take judicial notice of this document, in the interest of justice and to permit this appeal to be resolved on the merits. In that final judgment, the court awarded costs and attorney fees and ordered the clerk of the court to release all remaining interpleader funds to respondents. We deem the October 1, 2010, judgment to incorporate and implement the intended rulings announced in the July 15, 2010, judgment and, as such, to constitute the appealable final judgment in this action. Pursuant to California Rules of Court, rule 8.104(d)(2), we treat the August 2, 2010, notice of appeal as "filed immediately after entry of judgment" on October 1, 2010.

### **DISCUSSION**

Although the July 15, 2010, judgment does not expressly rule on any of the causes of action in either of the operative cross-complaints, the court's measure of damages indicates that the court found for respondents on their conversion cause of action and against them on all other causes of action. In addition, the court implicitly found against appellant on both of his causes of action. The parties agree with this interpretation of the July 15 judgment and frame their arguments accordingly.

Appellant contends the court erred in granting judgment on the conversion cause of action because respondents were not in actual or constructive possession of the grape crop when appellant exercised dominion and control of the crop by selling it to Gallo on July 7, 2008, or when he delivered the harvested grapes to Gallo in September 2008. Appellant asserts two bases for his conclusion that respondents had no protectable interest in the crop. First, he contends the testimony and exhibits at trial "provide conclusive evidence that Rastegar had abandoned" his leasehold interest. He contends that such abandonment is tantamount to "consent to [appellant's] dominion" over the crop. Second, appellant contends he had the right to terminate the lease and end

Rastegar's right to come upon the property, without offering a right to cure lease defaults and without legal process to effect an eviction.

We review the trial court's implied conclusion that Rastegar did not abandon the lease pursuant to the familiar substantial evidence rule. To paraphrase the Supreme Court in *Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429, in reviewing the evidence on appeal all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the judgment if possible. Our power "begins and ends" (*ibid.*) with a determination whether "substantial evidence, contradicted or uncontradicted," (*ibid.*) supports the trial court's implied findings. Substantial evidence includes circumstantial evidence and the reasonable inferences flowing therefrom. (*In re James D.* (1981) 116 Cal.App.3d 810, 813.) Further, where no statement of decision has been requested, the doctrine of implied findings requires that we infer that the trial court made all findings and determinations of credibility that would be necessary to support the judgment, when such findings and determinations are supported by substantial evidence. (*County of Orange v. Barratt American, Inc.* (2007) 150 Cal.App.4th 420, 438-439.)

Appellant has requested in separate motions filed June 30, 2011, and November 4, 2011, that, instead of applying the substantial evidence standard of review, we make findings of fact pursuant to Code of Civil Procedure section 909 (section 909).<sup>3</sup> The

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<sup>3</sup> Section 909 provides: "In all cases where trial by jury is not a matter of right or where trial by jury has been waived, the reviewing court may make factual determinations contrary to or in addition to those made by the trial court. The factual determinations may be based on the evidence adduced before the trial court either with or without the taking of evidence by the reviewing court. The reviewing court may for the purpose of making the factual determinations or for any other purpose in the interests of justice, take additional evidence of or concerning facts occurring at any time prior to the decision of the appeal, and may give or direct the entry of any judgment or order and may make any further or other order as the case may require. This section shall be liberally construed to the end among others that, where feasible, causes may be finally disposed of by a single appeal and without further proceedings in the trial court except where in the interests of justice a new trial is required on some or all of the issues."

well-established rule governing the application of section 909 is that findings will be made by the appellate court only in order to fill a gap in the trial court's findings in order to affirm a judgment or, in rare instances, where the evidence supporting reversal establishes facts as a matter of law. (See 9 Witkin, Cal. Procedure (5th ed. 2008) *Appeal* §§ 309-313, pp. 359-363.) In general, the time and place for resolution of evidentiary conflicts is at trial in the lower court. Section 909 was not intended to, and does not, reorder the functions of the trial and appellate courts. (*Tupman v. Haberkern* (1929) 208 Cal. 256, 269-270 [discussing prior statute permitting appellate fact finding].) We decline appellant's invitation to retry the case in this court. By previous orders of July 21, 2011, and November 14, 2011, this court deferred ruling on appellant's motions pending determination of the merits of the appeal. We now deny those motions for the reasons stated above.<sup>4</sup>

We conclude substantial evidence supports the trial court's implied finding that Rastegar did not abandon his tenancy; Rastegar therefore had a sufficient possessory interest in the grape crop, and Moles had a security interest in the crop, sufficient to support a cause of action for conversion. The evidence showed that Rastegar hired someone to irrigate the vineyards and, although he stopped paying his worker at some point, he did not instruct the worker to stop performing the assigned irrigation tasks. Rastegar proceeded in accordance with his practice of prior years to sell his prospective crop to a raisin packer. When appellant demanded payment for utility bills, Rastegar made partial payments. When appellant complained that Rastegar was not adequately

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<sup>4</sup> In addition, we deny appellant's June 30, 2011, request for judicial notice, consideration of which was previously deferred by order of this court, together with his August 10, 2011, filing which sought to supplement the request for judicial notice. The requested items consist of portions of the record on appeal in the present case and the content of a published decision of the Court of Appeal cited by the trial court. Further judicial notice of these items is unnecessary.

controlling the weeds growing on the property, Rastegar came to the property to attempt a remedy, even though appellant prevented him from doing so. All such actions objectively indicate an intent by Rastegar to continue his tenancy. (See, e.g., *Kassan v. Stout* (1973) 9 Cal.3d 39, 43.) While there was conflicting evidence from which a trier of fact might have concluded Rastegar abandoned the property, that evidence fell far short of establishing abandonment as a matter of law. In the absence of surrender or abandonment of the lease property, appellant was not entitled to retake possession of the property. In the absence of abandonment, as a matter of law Rastegar was still in possession of the grape crop when appellant seized the crop and delivered it to Gallo. (See *id.* at p. 44 [“A landlord is permitted to reenter without satisfying the requirements of section 1161 of the Code of Civil Procedure only when the tenant has abandoned the premises and thereby lost his right to possession.”].)<sup>5</sup> The court did not err in awarding judgment to respondents on the conversion cause of action in their second amended cross-complaint.

Appellant next contends he adequately pled a cause of action for abuse of process, and that the evidence at trial established his entitlement to recovery on that cause of action. His claims are based in various ways upon the preparation, filing, and delivery to Gallo of documentation establishing (falsely, in appellant’s view) Moles’s security interest in Rastegar’s grape crop. As the superior court impliedly concluded, based upon its citation to *Woodcourt II Limited v. McDonald Co.* (1981) 119 Cal.App.3d 245, 252, the tort of abuse of process requires that the defendant use court-issued process. Just as

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<sup>5</sup> Appellant cites to numerous provisions of the Commercial Code for the proposition that he was entitled to terminate the lease without notice to the lessee. The provisions he cites are, however, applicable only to leases of goods, not to leases of real property. (See U. Com. Code, §§ 10102, 10103, subd. (a)(10) [defining lease as a transfer of the right to possession and use of *goods*].) While the purpose of the lease in this case was to permit Rastegar to grow and harvest grapes, Rastegar was not leasing the grapes.

the filing of a *lis pendens* in *Woodcourt* did not involve court-issued process, even though the document was filed with the county and created a lien on the property of the debtor, in the present case the security agreement and financing statement created by respondents did not involve court-issued process, even though the financing statement was filed with the Secretary of State and was delivered to Gallo. As stated in one of the cases cited by appellant, *Brown v. Kennard* (2001) 94 Cal.App.4th 40, 44, the tort requires an act done in the name of the court and under the authority of the court. That element is entirely missing in the present case and, as a matter of law, appellant has failed to plead or prove a right to recovery for abuse of process. Accordingly, appellant's arguments concerning the fraudulent nature of the security agreement and financing statement are not relevant to establishing reversible error in the lower court's rejection of appellant's abuse of process cause of action.

Appellant also contends he established the right to recover on his cause of action for intentional interference with contractual relationship. This argument is premised, however, on the existence of a valid contract between himself and Gallo—in other words, on the premise that appellant had the right to sell the grapes. For the reasons set forth in our discussion of the conversion cause of action, this premise is false. As a result, appellant has failed to establish that the court erred in impliedly ruling against him on this cause of action.

Finally, appellant makes a rather broad argument that respondents and their lawyers treated appellant unfairly in an “attempt [to] get Appellant to [the] settlement table.” He contends, quoting *Kendall-Jackson Winery, Ltd. v. Superior Court* (1999) 76 Cal.App.4th 970, 978, that a party “must come into court with clean hands, and keep them clean, or he will be denied relief, regardless of the merits of his claim.” Unclean hands is, in the circumstances of this case, an affirmative defense (*id.* at p. 974) and appellant would have been required to raise the defense in his answer to respondents' second amended cross-complaint. He did not do so. Further, to the extent appellant

presented evidence of the instances of unclean hands upon which he relies in his brief, the court impliedly resolved the factual questions against appellant or the contentions (such as allegations of fraud in the security agreement) were irrelevant to the issues before the court. Even when the defense is properly asserted, the “determination of the unclean hands defense cannot be distorted into a proceeding to try the general morals of the parties.” (*Id.* at p. 979.) Appellant has failed to establish that the trial court committed any error concerning appellant’s claims that respondents acted with unclean hands.

**DISPOSITION**

The judgment is affirmed. Appellant’s motions of June 30, 2011, and November 4, 2011, are denied. Appellant’s motion for judicial notice filed June 30, 2011, is denied. Respondents are awarded costs on appeal.

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DETJEN, J.

WE CONCUR:

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LEVY, Acting P.J.

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GOMES, J.