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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

CENTRAL VALLEY GENERAL HOSPITAL,

Plaintiff and Respondent,

v.

BRENTON SMITH, M.D. et al.,

Defendants and Appellants.

F061229

(Super. Ct. No. 02CECG02396)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Adolfo M. Corona, Judge.

Jones Day, George S. Howard, Jr. and Kathleen S. Bolus; Law Offices of William & Romaine and William A. Romaine for Defendants and Appellants.

Latham & Watkins, Susan S. Azad, Wayne S. Flick and Paul C. Fricke for Plaintiff and Respondent.

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This appeal is the second time this lawsuit involving a hospital's unsuccessful attempt to purchase rural health clinics is before this court. In the first appeal, we reversed a judgment entered pursuant to the original referee's second revised statement of decision and directed the superior court to "refer the matter to the referee to (1) apply the correct rules of law concerning repudiation, nullification, and anticipatory breach, and (2) clarify the factual and legal basis, if any, for the ... injunction" (*Central Valley General Hospital v. Smith* (2008) 162 Cal.App.4th 501, 532-533.) Unfortunately, the original referee died during the first appeal and was not available to amend his statement of decision in accordance with our instructions. The parties addressed his unavailability by agreeing to have a second referee conduct the further proceedings required by our opinion.

The second referee resolved the anticipatory breach claim in favor of the hospital based on a finding that the rural health clinics had been double billing for services and, as a result, could not deliver a representation and warranty that their operations complied with applicable laws. The second referee concluded the inability to make this representation and warranty constituted an anticipatory breach of the rural health clinics' contractual obligations that were to be performed at the closing.

With respect to the part of the injunction requiring the hospital to return confidential materials to the health clinics, the second referee concluded the matter was moot because those materials had been destroyed.

The health clinics appealed from the judgment entered in accordance with the second referee's final statement of decision. They contend the original referee's findings of fact were sufficient to resolve the anticipatory breach claim and, alternatively, the second referee improperly decided the case based on a review of the paper record from the first trial.

We conclude that the original referee's findings of fact were insufficient to resolve the hospital's anticipatory breach claim and that the relevant parts of the second referee's

decision did not exceed the scope of our remand instructions or violate the health clinics' due process rights. Furthermore, we conclude that the second referee's determination that the mandatory injunction was moot was appropriate under our instructions to clarify the factual and legal basis, if any, for the injunction.

Therefore, the judgment will be affirmed.

FACTS AND PROCEEDINGS

Brenton Smith, M.D., and the entities he formed to conduct his rural health care business were named as defendants in this litigation. As in our prior opinion, Smith and those entities are referred to as Smith and Affiliates or S&A. (*Central Valley General Hospital v. Smith, supra*, 162 Cal.App.4th at p. 507.)

Plaintiff and cross-defendant Central Valley General Hospital is referred to in this opinion as CVGH or CVG Hospital. CVG Hospital and the other cross-defendants (Adventist Health System/West, Steven Rosenberg and Darwin Rembolt) are referred to in this opinion as Hospital Group.

The parties, the letter of intent that is at the center of this litigation, the due diligence conducted by CVG Hospital in connection with the proposed acquisition of Smith and Affiliates' rural health clinics, and the subsequent disputes and litigation are described at pages 507 through 512 of *Central Valley General Hospital v. Smith, supra*, 162 Cal.App.4th 501. Because the parties, their attorneys and this panel are familiar with those facts and proceedings, those matters will not be repeated in this unpublished opinion. Instead, the narrative here begins with the events that occurred after our April 2008 opinion was filed.

On June 30, 2008, the remittitur in the first appeal was issued. On August 7, 2008, the superior court issued an order referring the matter back to the original referee to reconsider repudiation, nullification and anticipatory breach and to clarify the factual and legal basis for the May 31, 2006, injunction. The terms of the order closely followed the

part of our disposition concerning the remand.¹ Shortly after that order was filed, the parties learned that the original referee had died the previous April.

By June 2009, the parties had agreed to have retired Justice Richard Neal act as the replacement referee. Based on this agreement, the superior court entered an order appointing Neal as the second referee. The order directed the second referee “to, not inconsistent with the Fifth District Court of Appeal’s April 28, 2008 Opinion and this Court’s August 7, 2008 Remittitur Order, (1) apply the correct rules of law concerning repudiation, nullification and anticipatory breach, and (2) clarify the factual and legal basis, if any, for the prohibitory and the mandatory parts of the May 31, 2006 injunction and the conclusion that Smith and Affiliates prevailed on their cross-complaint.”

In October 2009, the second referee sent counsel a one-page memorandum stating that he had reviewed this court’s opinion and the original referee’s second revised statement of decision. He observed that this court gave no instruction to take new evidence or make new fact findings. He also stated his preliminary view that he was required to “first confirm what material facts [the original referee] found and decided, or, if the court of appeal’s factual recitation differs from [those] findings, which facts I should rely on as a basis for the two legal conclusions I am called on to make.” The second referee posed questions regarding (1) whether this court’s factual recitation was accurate and complete, (2) the binding effect of this court’s factual recitation, (3) whether the parties could reach a stipulation as to the facts material to the referee’s charge, and

¹ Our disposition reversed the judgment and addressed remand by stating: “The matter is remanded for further proceedings not inconsistent with this opinion. In particular, the superior court shall refer the matter to the referee to (1) apply the correct rules of law concerning repudiation, nullification, and anticipatory breach, and (2) clarify the factual and legal basis, if any, for the prohibitory and the mandatory parts of the May 31, 2006, injunction and the conclusion that Smith and Affiliates prevailed on their cross-complaint.” (*Central Valley General Hospital, supra*, 162 Cal.App.4th at pp. 532-533.)

(4) which additional facts might be material and where in the record those material facts appeared. The second referee stated he was inclined to request briefs and inquired about the status of the reporter's transcript.

On December 7, 2009, the parties simultaneously submitted their opening briefs on remand to the second referee. Smith and Affiliates argued that the original referee clearly determined that CVG Hospital destroyed its ability to prove an anticipatory breach by exercising its right to terminate the letter of intent. They also urged the second referee to find that (1) CVG Hospital did not prove any anticipatory breach by Smith and Affiliates and (2) CVG Hospital failed to prove that Smith and Affiliates would have been unable to cure any deficiencies by the time of the interim closing.

CVG Hospital supported its opening brief by filing exhibits which constitute over six volumes of the appellate record. These exhibits included documents from the trial before the original referee, such as trial exhibits, briefs, the second revised statement of decision and two forms of the injunction.

On January 13, 2010, the parties submitted opposition briefs and, about two weeks later, they submitted reply briefs to the second referee.

In March 2010, the second referee served the parties with his tentative statement of decision following appeal and remand. The next month, Smith and Affiliates filed objections to the tentative statement of decision. Smith and Affiliates argued that (1) the second referee's decision exceeded the scope of authority granted under the superior court's referral order and this court's opinion and remittitur, (2) the findings made by the original referee were binding except as expressly disapproved in our April 2008 opinion, (3) the second referee's findings conflicted with those made by the first referee, and (4) it was improper for the second referee to conduct a trial de novo of the anticipatory breach claim without hearing any witness testimony.

On June 3, 2010, the second referee heard oral argument regarding Smith and Affiliates' objections to the tentative statement of decision.

On June 24, 2010, the second referee's final statement of decision was served on the parties. The second referee found that Smith and Affiliates had run its clinics in a manner that did not comply with law (i.e., double billing for services) and, thus, had placed the obligation to deliver truthful warranties beyond its abilities. Thus, the second referee concluded CVG Hospital was entitled to recover the \$250,000 paid to Smith and Affiliates under the terms of the letter of intent.

In addition, the second referee concluded the mandatory injunction requiring the return of documents would be futile because the documents had been destroyed and, therefore, Smith and Affiliates' claim for a mandatory injunction had become moot. Because the claim for an injunction was denied, the second referee also concluded that Smith and Affiliates did not prevail on their cross-complaint.

The second referee addressed Smith and Affiliates' objection that live testimony should have been taken by stating:

“Smith probably had the right to insist on the retaking of evidence, the hearing of additional evidence, even a complete new trial, to assure that the new referee had complete exposure to the evidence and a chance to assess witness credibility. But at no time did Smith request any of this relief. He cooperated in the preparation and transmittal of the trial transcript and exhibits to the new referee, and never once proposed or requested a retrial or additional evidentiary proceedings. Thus, he impliedly waived any objection he otherwise had to the new referee's reliance on the evidentiary record from the prior trial.”

On July 6, 2010, judgment was entered in favor of CVG Hospital in the amount of \$250,000. In addition, the judgment permanently vacated in full the May 31, 2006, injunction and dismissed Smith and Affiliates' cross-complaint with prejudice.

Smith and Affiliates moved for a new trial, which the superior court denied on September 17, 2010.

In October 2010, Smith and Affiliates filed a notice of appeal.

DISCUSSION

I. Did Original Referee's Findings Resolve Anticipatory Breach Issue?

A. Contentions

Smith and Affiliates challenge the second referee's decision that Smith and Affiliates' anticipatory breach justified the return of CVG Hospital's \$250,000 payment. Smith and Affiliates contend that the original referee's findings of fact, if given proper effect, resolved the anticipatory breach issue in their favor and, therefore, precluded the second referee's contrary findings.

CVG Hospital contends that if Smith and Affiliates' view was correct, then this court would not have remanded for further proceedings or stated that "whether the conduct of Smith and Affiliates was an implied repudiation is a question for the trier of fact." (*Central Valley General Hospital v. Smith, supra*, 162 Cal.App.4th at p. 519, fn. 10.) Thus, CVG Hospital contends that the original referee's findings did not resolve the anticipatory breach claim and the second referee properly found Smith and Affiliates impliedly repudiated its obligations to make certain representations and warranties.

B. Background

In section 12 of the letter of intent, Smith and Affiliates promised to execute and deliver definitive agreements on the interim closing date in the event CVG Hospital exercised the option to purchase the businesses. Section 8 of the letter of intent described the definitive agreements and listed representations and warranties those agreements were to contain. Among other things, Smith and Affiliates were required to represent and warrant that (1) they were in compliance with governing law and (2) their financial statements as well as their books and records were complete, accurate and in conformance with generally accepted accounting principles. Section 8 of the letter of intent also made the accuracy of the representations and warranties a condition of closing the transaction.

CVG Hospital’s anticipatory breach theory concerns the representations and warranties that the letter of intent required Smith and Affiliates to make in the definitive agreements. Paragraph 31.e of CVG Hospital’s complaint alleged Smith and Affiliates breached the letter of intent by “[f]ailing and refusing to deliver and ensure the accuracy of representations and warranties contained in the [letter of intent], including without limitation those described in paragraph 18 above.” In turn, paragraph 18 of the complaint described certain representations and warranties that section 8 of the letter of intent required Smith and Affiliates to make in the definitive agreements, including the representations and warranties that the businesses being sold were in compliance with governing law and their financial statements and books and records were complete, accurate and in conformance with generally accepted accounting principles.

CVG Hospital included the following summary of the anticipatory breach claim in its opening brief in the first appeal:

“CVGH argued from the outset that S&A anticipatorily breached the [letter of intent] because the billing fraud discovered during the diligence review rendered it impossible for S&A to make the requisite representations and warranties prior to closing; namely, that there were no material facts that would diminish the fair market value of the assets being purchased, that S&A was in compliance with applicable laws and regulations, that its books and records were accurate, the good standing of all licenses and permits, and the disclosure of all material facts.”

Smith and Affiliates’ position that the findings of the original referee resolved the anticipatory breach claim is based on a number of different findings from the original referee’s second revised statement of decision. We will examine these findings and explain why they were insufficient or ambiguous and, therefore, did not resolve the anticipatory breach claim.

C. General Finding of No Material Breach

The original referee found that Smith and Affiliates were not in material breach of the letter of intent during the due diligence period.² This finding does not necessarily resolve the anticipatory breach claim. First, the use of the term “breach” in this context is ambiguous. It could have been used broadly to include both breaches by nonperformance³ and breaches of the anticipatory type. Alternatively, the term may have been used narrowly to mean only breach by nonperformance. Thus, the second revised statement of decision was ambiguous for purposes of Code of Civil Procedure section 634. Second, the connection of the term “breach” to a specific time frame—namely, the due diligence period—increases the probability that the original referee did not intend his finding to cover anticipatory breaches of an obligation to deliver representations and warranties after the due diligence had been finished.

Because alternate meanings are possible, we conclude that the original referee’s finding that Smith and Affiliates were not in material breach of the letter of intent during the due diligence period was ambiguous and did not necessarily provide a sufficient factual basis to resolve CVG Hospital’s anticipatory breach claim.

D. Findings Related to Representations and Warranties

The original referee’s second revised statement of decision addressed CVG Hospital’s breach of contract claim by tracking the allegations of breach set forth in paragraph 31 of the complaint. In addressing the allegations of breach contained in

² This finding is derived from the original referee’s statement that “if S&A was in material breach of the [letter of intent] during the Diligence Period, which it was not”

³ In the 2008 opinion, we distinguished between breach by nonperformance and breach by repudiation. We used “breach by nonperformance” to mean an unjustified failure to perform a material contractual obligation *when performance is due*. (*Central Valley General Hospital, supra*, 162 Cal.App.4th at p. 514, fn. 3.) In contrast, we used “[b]reach by repudiation” and “anticipatory breach” to mean a promisor’s repudiation of the contract *before the promisor’s performance under the contract is due*. (*Id.* at p. 514.)

paragraph 31.e, the original referee found that CVG Hospital “failed to establish by a preponderance of the evidence that [Smith and Affiliates], or any of them, failed or refused to deliver and insure the accuracy of the representations and warranties contained in the [letter of intent] *when required to do so.*” (Italics added.) Immediately after this finding, the second revised statement of decision provided:

“More specifically, i) that [Smith and Affiliates], or any of them, had any knowledge that would cause the fair market value of the Purchased Assets to be less than the Maximum Aggregate Consideration, ii) that the Definitive Agreements would reflect that [Smith and Affiliates’] Business financial statements and books and records would be complete, accurate and conform to generally accepted accounting principles when the Definitive Agreements became operative, iii) that the Definitive Agreements would reflect that [Smith and Affiliates’] Businesses would be in compliance with governing instruments, contracts and laws when the Definitive Agreements became operative, iv) that the Definitive Agreements would reflect that the required licenses and permits would be in order when the Definitive Agreements became operative, and v) that the Definitive Agreements would reflect that [Smith and Affiliates], and all of them, had made a complete disclosure of material facts when the Definitive Agreements became operative.”⁴

We conclude that these findings are ambiguous for purposes of the anticipatory breach claim. One of the bases for the ambiguity is the qualification “when required to do so.” The original referee might have found that Smith and Affiliates did not fail or refuse to deliver and ensure the accuracy of representations and warranties *when required to do so* based on an underlying determination that the time to deliver the representations and warranties listed in section 8 of the letter of intent never arrived. Thus, the original referee’s finding was not necessarily a determination that Smith and Affiliates could have

⁴ Items i) through v) correspond to the allegations set forth in subparagraphs a through e of paragraph 18 of the complaint. For example, paragraph 18.c alleged that Smith and Affiliates promised to make a representation and warranty at the end of the due diligence period “[t]hat the Businesses were in compliance with governing instruments, contracts and laws. [Letter of intent], ¶ 8(i)(F).”

made those representations and warranties with the requisite accuracy if the interim closing had been held.⁵

E. Smith and Affiliates’ Willingness to Give the Warranties

Smith and Affiliates contend that “the fact a warranty might turn out to be inaccurate does not mean a party has breached its obligation to give it—let alone that it has anticipatorily repudiated its willingness to give the warranty.”

This contention misses the mark because section 8 of the letter of intent required that Smith and Affiliate give certain representations and warranties in definitive agreements delivered at the interim closing *and* conditioned the closing on, among other things, those representations and warranties being accurate. CVG Hospital’s claim of anticipatory breach was based upon Smith and Affiliates’ purported inability to perform its contractual obligation to deliver *accurate* representations and warranties. Thus, Smith and Affiliates’ argument that there could be no implied repudiation so long as it was willing to give the specified warranties fails because it views Smith and Affiliates’ contractual obligations too narrowly.

F. Findings Regarding Fraud and Smith and Affiliates’ Knowledge

The original referee determined that CVG Hospital failed to prove its causes of action for fraud and negligent misrepresentation. In connection with these determinations, the original referee found that CVG Hospital failed to establish by a preponderance of the evidence that Smith and Affiliates had knowledge, or falsely or negligently asserted having no knowledge, of a material fact that would cause the fair market value of the assets to be purchased to be worth less than the consideration to be

⁵ The interim closing never took place because CVG Hospital’s June 17, 2002, letter terminated the transaction. (*Central Valley General Hospital, supra*, 162 Cal.App.4th at p. 510.) CVG Hospital’s election to terminate the letter of intent was addressed in our earlier opinion under the heading “*Election to Terminate the Letter of Intent.*” (*Id.* at pp. 521-523.)

paid. The original referee also found that CVG Hospital failed to establish by a preponderance of the evidence that Smith and Affiliates induced CVG Hospital to enter into the letter of intent knowing that any of their conduct rendered them unfit to perform the definitive agreements contemplated by the letter of intent.

These findings regarding Smith and Affiliates' lack of knowledge do not resolve the anticipatory breach claim. The fact that Smith and Affiliates did not know about the falsity of assertions required by the representations and warranties does not necessarily mean that Smith and Affiliates could have delivered accurate representations and warranties as required by the letter of intent. Therefore, the original referee's findings regarding fraud and lack of knowledge on the part of Smith and Affiliates does not resolve the anticipatory breach claim.

G. Conclusion

In summary, some of the determinations made by the original referee were tainted by his erroneous view of the law of anticipatory breach and this court was unable to extract clear findings of fact from those determinations to resolve the anticipatory breach claim. Furthermore, those findings not tainted by the original referee's erroneous view of the law were not sufficient to resolve CVG Hospital's claim of anticipatory breach. Consequently, our remand order directing the referee to "apply the correct rules of law concerning repudiation, nullification, and anticipatory breach" required the referee to make findings of fact on matters that either were not addressed by the original referee's second revised statement of decision, were addressed in an ambiguous manner, or were addressed in a manner tainted by an erroneous view of the law.

Therefore, we reject Smith and Affiliates' position that the original referee's findings were sufficient to resolve the anticipatory breach claim. It follows that we reject Smith and Affiliates' position that the second referee refused to give effect to binding

findings by the original referee insofar as that position concerned the anticipatory breach claim.⁶

II. Second Referee's Findings Regarding Anticipatory Breach

A. Contentions

Smith and Affiliates contend that if the original referee's findings did not resolve the anticipatory breach, it was improper for the second referee to make new findings based on his review of the paper record.

CVG Hospital contends that the second referee's resolution of the anticipatory breach claim was consistent with (1) this court's opinion and directions regarding remand, (2) the superior court's order appointing the second referee and (3) the parties' agreement to have the matter decided by the second referee.

We will analyze Smith and Affiliates' contention in two parts. First, we will examine whether the second referee had the authority to make new findings regarding anticipatory breach. Second, if the referee had that authority, we will address whether the new findings could be based on the referee's review of the paper record.

B. Second Referee's Authority Regarding Anticipatory Breach Claim

1. Documents creating that authority

Our April 2008 decision in the first appeal reversed the judgment and included the following directions:

“The matter is remanded for further proceedings not inconsistent with this opinion. In particular, the superior court shall refer the matter to the referee to (1) apply the correct rules of law concerning repudiation, nullification, and anticipatory breach, and (2) clarify the factual and legal basis, if any, for the prohibitory and the mandatory parts of the May 31, 2006, injunction and the conclusion that Smith and Affiliates prevailed on their

⁶ The limitation concerning anticipatory breach is included because, as described in footnote 9, *post*, the second referee made other findings that contradicted findings of the original referee that remained in effect after the first appeal.

cross-complaint.” (*Central Valley General Hospital, supra*, 162 Cal.App.4th at pp. 532-533.)

After remittitur was issued and pursuant to our directions, the superior court referred the matter to the original referee for reconsideration of his findings in accordance with our opinion. The superior court’s order, however, could not be implemented because of the death of the original referee.

Over 10 months later, the superior court entered an order appointing retired Justice Richard Neal as the second referee. The order of appointment stated that the parties had agreed that Justice Neal would serve as the referee in this matter. No other details of the parties’ agreement are contained in the appellate record. Thus, the second referee’s authority and responsibilities are determined by the superior court’s order, the instructions in our April 2008 opinion, and applicable law.

The superior court’s order appointing the second referee tracked the directions set forth in our disposition of the first appeal and defined the second referee’s role in the further proceedings:

“Because of Judge Goldstein’s death, this matter is referred to Justice Neal to, not inconsistent with the Fifth District Court of Appeal’s April 28, 2008 Opinion and this Court’s August 7, 2008 Remittitur Order, (1) apply the correct rules of law concerning repudiation, nullification and anticipatory breach, and (2) clarify the factual and legal basis, if any, for the prohibitory and the mandatory parts of the May 31, 2006 injunction and the conclusion that Smith and Affiliates prevailed on their cross-complaint. Upon receipt from Justice Neal of clarification as to whether or not there is a legal basis for the injunction, this court will review Justice Neal’s Statement of Decision and make whatever further orders are required and are just.”

2. *Interpretation of our disposition in the first appeal*

Our disposition in the first appeal included the general requirement for “further proceedings not inconsistent with this opinion” followed by a detailed instruction requiring the superior court to “refer the matter to the referee to (1) apply the correct rules

of law concerning repudiation, nullification, and anticipatory breach” (*Central Valley General Hospital, supra*, 162 Cal.App.4th at p. 532.)

In drafting the disposition, this court assumed that retired Judge Goldstein, the original referee, would be available to handle the matter on remand. We believed that the original referee could have corrected his analysis of repudiation, nullification and anticipatory breach without a retrial or a reopening of the evidence because it appeared the parties, particularly CVG Hospital, had been allowed to present the evidence they believed relevant to their theories regarding the anticipatory breach claim.⁷ Nevertheless, our disposition did not expressly require or prohibit a retrial or the reopening of evidence because (1) the parties’ appellate briefing did not address the question and (2) this court, while believing that neither step was necessary to the preparation of a legally sufficient third revised statement of decision, considered it best to allow flexibility on a matter not addressed by the parties while before this court. Based on the assumption that the original referee would be available, our directions required the matter to be referred to him. In the phrase “shall refer the matter to the referee,” we used the definite article “the” to indicate a specific person was to handle the remand—namely, the original referee. (See *Pineda v. Bank of America, N.A.* (2010) 50 Cal.4th 1389, 1396 [use of the definite article “the” refers to a specific person].)

The superior court complied with our instructions by referring the matter to the original referee. Unfortunately, our specific instructions and the superior court’s order

⁷ It appeared the referee could have corrected his decision by taking steps similar to those followed by a referee or superior court that is convinced by objections to a tentative statement of decision that it applied the wrong legal standard. Such a referee or trial court would draft a final statement of decision applying the correct legal standard and usually would not need to take additional evidence. The newly drafted final statement of decision would include findings of fact required by the application of the correct legal standard—findings that might not have been included in the tentative statement of decision.

were impossible to implement because the original referee was unavailable. Consequently, the superior court had to fall back on our general instruction, which required “further proceedings not inconsistent with this opinion.” (*Central Valley General Hospital, supra*, 162 Cal.App.4th at p. 532.)

The superior court’s June 23, 2009, order appointing the second referee and specifying the terms for the further proceedings regarding the anticipatory breach claim complied with that general instruction. In other words, the directions included in that order of appointment were not inconsistent with our opinion in the first appeal.

3. *Authority to make new findings of fact*

The superior court directed the second referee to, not inconsistent with our April 2008 opinion, apply the correct rules of law concerning repudiation, nullification and anticipatory breach.

The superior court’s instruction to “apply the correct rules of law concerning repudiation, nullification and anticipatory breach” is the same language that appears in our April 2008 disposition. The instruction implicitly requires the second referee to make the findings of fact necessary to resolve CVG Hospital’s anticipatory breach claim under the correct rules of law. Because the original referee’s second revised statement of decision did not include findings of fact essential to the resolution of the claim, the second referee necessarily was required to make new findings of fact.⁸

Therefore, Smith and Affiliates’ contention that the second referee improperly made new findings of fact based on his review of the paper record cannot be upheld on the ground that the second referee did not have the authority to make new findings of fact

⁸ We note that the second referee correctly interpreted our opinion in this regard. At page 8 of his final statement of decision, he stated that the “court of appeal intended that additional evidentiary findings be made”

to resolve the anticipatory breach claim.⁹ Consequently, we turn to the question whether it was improper for the second referee to base his findings on a review of the paper record without hearing live testimony.

4. Authority to review only the paper record

The superior court's order appointing the second referee, like our opinion, did not expressly require or prohibit a retrial or the reopening of evidence. Again, the second referee correctly interpreted our opinion when he stated that this court "left open the possibility of the taking of new evidence." Immediately after identifying this possibility, the second referee stated:

"The parties concluded that the existing evidentiary record is adequate, and did not seek leave to present additional evidence. So, the new referee's mandate is to 'redetermine the issues based on the evidence previously before' Judge Goldstein."¹⁰

On appeal, Smith and Affiliates contend that it was improper for the second referee to base his decision on evidence he did not hear. In support of this contention, Smith and Affiliates cite *People v. Paramount Citrus Assn.* (1960) 177 Cal.App.2d 505

⁹ Smith and Affiliates have correctly interpreted our opinion and the superior court's order in arguing that the second referee was not authorized to find Smith and Affiliates breached the due diligence requirements of the letter of intent, which findings contradict those of the original referee. We conclude that the second referee's findings and determinations on this theory of actual breach (which he made "for completeness's sake, and to avoid any possible further remand") are void and without legal effect. The inclusion of these findings and determinations, however, do not constitute reversible error as the second referee determined CVG Hospital was entitled to return of the \$250,000 based on the alternate ground of anticipatory breach.

¹⁰ The language quoted by the second referee comes from Eisenberg, et al., California Practice Guide: Civil Appeals and Writs (The Rutter Group 2011) paragraph 11:73.1, page 11-28, which states: "When the existing evidentiary record is adequate to permit the trial court to redetermine the issues on remand without a new trial, the appellate court may reverse with directions to the trial court to *redetermine the issues based on the evidence previously before it.*" (Italics added.)

for the “well-settled principle that in the absence of consent or waiver, one judge cannot make findings or enter a judgment upon evidence taken before another judge.” (*Id.* at p. 512.)

We believe this principle extends to referees and, therefore, conclude that the second referee could not make findings based upon evidence taken before the original referee without the parties’ waiver or consent. Therefore, our determination concerning the second referee’s authority will depend upon whether Smith and Affiliates consented to the second referee making findings based on a review of only the paper record.

Smith and Affiliates contend that they did not waive their right to insist that the second referee not reweigh the evidence after reviewing the paper record. Smith and Affiliates support this position by referring to the opposition brief they submitted to the second referee in January 2010. In that brief, Smith and Affiliates argued that the original referee “made extensive factual findings within his Second Revised Statement of Decision which resolved all of the significant issues addressed in CVGH’s Opening Brief.” Smith and Affiliates’ opposition brief also asserted:

“CVGH is asking a new Referee to substitute his judgment for that of the [original referee], by cherry picking and selectively quoting testimony and briefing, without acknowledging that substantial evidence was presented for the contrary proposition on each point. CVGH also asks the current Referee to address alleged breaches of contract that were not anticipatory. Nothing in the Court of Appeal Opinion or the Superior Court’s Order on Remand dated August 7, 2008, authorized a new trial of this matter, and especially not based on written submissions from each party. [¶] ... [¶]

“The Referee should reject the effort to expand the Court of Appeal’s remand order and to engage in a retrial by written submissions. Instead, the extensive factual findings of [the original referee] remain binding and, given proper effect, require that CVGH’s arguments on both the contract and injunction issues be rejected.” (Fn. omitted.)

In the reply brief Smith and Affiliates submitted to the second referee, they argued that the “Court of Appeal did not, as CVGH contends, authorize a new trial, by briefs and selective snippets of testimony from an 18 day hearing, of the entire case.”¹¹

Analyzing Smith and Affiliates’ actions concerning the proceedings at their most basic level, we conclude that Smith and Affiliates clearly agreed to the second referee conducting further proceedings and also agreed that those proceedings did not require the reopening of the evidence. The latter agreement is demonstrated by, among other things, the fact Smith and Affiliates did not request leave to present additional evidence. Furthermore, Smith and Affiliates realized that the further proceedings would involve the second referee making additional findings to resolve the issues remanded and necessarily consented to the second referee making those findings. For instance, the opening brief that Smith and Affiliates submitted to the second referee enumerated approximately 30 findings that Smith and Affiliates urged the second referee to make. If Smith and Affiliates’ position was accepted, it would mean that they would have been given a free shot at obtaining a favorable decision and, if it went against them, then they could protest and obtain a new trial with the opportunity to present testimony from live witnesses.

Based on the foregoing, we conclude that Smith and Affiliates consented to the second referee making the factual determinations necessary to resolve the anticipatory breach claim based on the evidence presented to the original referee. The fact that Smith and Affiliates may have been mistaken about the exact nature of the findings to be made or the legal effect of the original referee’s findings does not relieve them from the consequences of agreeing to the procedures for resolving the remaining issues. By submitting to those procedures, Smith and Affiliates accepted the risk inherent in their

¹¹ This statement is true because of its breadth. Neither this court nor the superior court authorized “a new trial ... *of the entire case.*” (Italics added.) Both courts limited the further proceedings to matters concerning the anticipatory breach claim and the injunction.

position concerning how the original referee’s decision should be interpreted and applied on remand.

III. The Injunction

A. Background

The May 31, 2006, injunction had two parts. The prohibitory part prevented Hospital Group from using the patient records, trade secrets or proprietary information obtained from Smith and Affiliates pursuant to the letter of intent. (*Central Valley General Hospital, supra*, 162 Cal.App.4th at p. 512.) The mandatory part of the injunction gave Hospital Group 30 days to return documents and information reflecting patient records, trade secrets or proprietary information belonging to Smith and Affiliates. (*Ibid.*)

Smith and Affiliates has explicitly “elected not to appeal the portion of the judgment that concerns the prohibitory injunction.” Therefore, our discussion here concerns only the second referee’s decision regarding the mandatory part of the injunction.

The relevant portions of our April 2008 opinion, which are repeated in the superior court’s order appointing the second referee, required the referee to “clarify the factual and legal basis,[¹²] if any, for ... the mandatory parts of the May 31, 2006, injunction and the conclusion that Smith and Affiliates prevailed on their cross-complaint.” (*Central Valley General Hospital, supra*, 162 Cal.App.4th at pp. 532-533.)

B. The Second Referee’s Mootness Determination

The second referee’s decision addressed the mandatory part of the injunction as follows:

¹² The phrase “the factual and legal basis” contained in our disposition was taken from the second sentence of Code of Civil Procedure section 632, which provides: “The court shall issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial”

“As to the mandatory portion of the injunction, requiring return to Smith of documents obtained by Hospital during due diligence, Smith does not dispute Hospital’s evidence that all the documents were *destroyed*. While this may have violated the terms of the injunction, it accomplished its essential purpose—removing Smith’s materials from Hospital’s custody. Smith makes no showing that it sought relief for any violation of the injunction. Destruction of the document accomplished the purpose of the injunction if it did not comply with the letter of it. And, the court of appeal subsequently vacated the injunction. The court of appeal surely would have simultaneously vacated any order punishing violation of the injunction, had one been issued.

“The mandatory injunction is now moot. Any order requiring Hospital to return the documents would be futile, as they have been destroyed. For the same reason[,] there is no need for a mandatory injunction.”

Smith and Affiliates contend the second referee’s mootness determination was inappropriate because it “did not answer the question remanded by this Court: to clarify the basis, if any, for the mandatory injunction.” In view of this challenge, the threshold issue presented is whether our instructions for the clarification of the factual and legal basis for the injunction were met when the second referee determined the question was moot.

Our interpretation of the second referee’s mootness determination is that there is no longer a factual or legal basis for the mandatory injunction. We conclude this determination amounts to a clarification of “the factual and legal basis, if any, for ... the mandatory parts of the May 31, 2006, injunction ...” (*Central Valley General Hospital, supra*, 162 Cal.App.4th at pp. 532-533.) In short, there no longer is a basis for the mandatory injunction. Furthermore, the second referee was not restricted to considering only facts as they existed at the time of the original referee’s decision. In an unpublished portion of the April 2008 opinion, we anticipated the possibility that the circumstances

relevant to the injunction might have changed by the time further proceedings on remand were conducted¹³ and we did not intend to prevent the consideration of these changes.

Because we have concluded that the mootness determination complies with our directions on remand, we need not address other issues concerning the mandatory injunction, many of which were the subject of a supplemental briefing request.

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

Kane, J.

WE CONCUR:

Hill, P.J.

Gomes, J.

¹³ The possibility of changed circumstances was mentioned in the text accompanying footnote 16 of the opinion, which is located in an unpublished part of the opinion.