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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

KASCO FAB, INC.,

Plaintiff and Respondent,

v.

JPS INTERNATIONAL, INC., et al.,

Defendants and Appellants.

F068227

(Super. Ct. No. 10CECG01227)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. M. Bruce Smith, Judge.

Rogers, MacLeith & Stolp and Douglas R. MacLeith for Defendants and Appellants.

Parichan, Renberg & Crossman and Michael L. Renberg for Plaintiff and Respondent.

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* Before Levy, Acting P.J., Cornell, J. and Gomes, J.

Three and half years after filing a civil suit, plaintiff Kasco Fab, Inc. (Kasco Fab) and defendants Peter J. Janes (Janes) and his company, JPS International, Inc. (collectively JPS), orally agreed after a mandatory settlement conference to settle Kasco Fab's claims against JPS. The terms of the settlement were recited in open court and memorialized in a reporter's transcript. After the parties could not agree on formal settlement documents, Kasco Fab brought a motion to enforce the settlement under Code of Civil Procedure section 664.6.¹ JPS opposed the motion, arguing Kasco Fab sought to change the terms of the settlement. The trial court granted the motion and entered judgment against JPS, which it stayed as long as JPS made the payments called for under the settlement. JPS appeals.

We agree with JPS's claim that the court erred in granting Kasco Fab's motion to enforce the settlement because the order and resulting judgment are inconsistent with the terms of the parties' memorialized settlement. Accordingly, we reverse the judgment and the order.

FACTUAL AND PROCEDURAL BACKGROUND

Kasco Fab is a steel fabrication company. In May 2009, Kasco Fab purchased a piece of robotic steel fabrication equipment manufactured by RoboPlazma USA, whose primary place of business is in India, for \$475,000. To complete the transaction, the equipment was sold to Saw Service of America, Inc., which resold it to Kasco Fab. The deal was brokered by Janes. After the equipment was installed, Kasco Fab claimed it did not work properly and asked Saw Service to remove the equipment and refund the purchase price. Neither request was honored.

Kasco Fab filed this lawsuit in April 2010 against all of the parties involved in the transaction, including JPS. In the third amended complaint, Kasco Fab alleged against

¹ Undesignated statutory references are to the Code of Civil Procedure.

JPS claims of breach of the sales contract, breach of the implied warranty of fitness, and fraud.

At a mandatory settlement conference held on December 5, 2012, Kasco Fab reached separate settlements with Saw Service and JPS. The settlements were placed on the record orally before the Honorable Bruce Smith. The settlement terms as to JPS, as related by Kasco Fab's counsel are: "There is a stipulated judgment in the amount of [\\$]100,000. \$10,000 is payable in 90 days. \$10,000 is payable in one year. And \$80,000 will be paid from the sale of the subject machine, which is a robotic beam fabrication machine. That beam fabrication machine will be sold as is where is to Mr. Janes with the UCC-1 lien on it. He is to sell it guaranteeing a minimum sale of \$80,000. . . . [I]f he sells it for anything above \$80,000, the excess goes to the plaintiff Kasco Fab. . . . [A]nd then title will be transferred to Mr. Janes with the sale of [the] machine, subject to that UCC-1 lien. Each party to bear their own costs and attorney's fees."

JPS's counsel interjected: "I believe there is one error in there. The second \$10,000 payment is to be paid in two years. And the judgment will not be entered pending the default of any payments. And we agree with Mr. Janes and JPS International aside from what has been agreed to in the settlement." Kasco Fab's counsel responded the "two years is acceptable for the last \$10,000 payment. The \$80,000 due from the sale of the machine, there is one year to sell the machine. And so that \$80,000 is due at the end of the one year, or upon sale, whichever is earlier." The court asked Janes if that was agreeable to him; he responded "Yes." The court also asked Janes if he heard the terms and conditions of the settlement as they relate to him and if he was agreeable to the terms as stated; Janes responded "Yes" to both questions. Kasco Fab's counsel stated he would "prepare paperwork for each one of the settlements of the stipulated judgments by Friday and get it out so this can all be signed and put to bed." The court then asked Kasco Fab's general manager, Thomas Hancock, whether he understood that, by accepting the

settlement, he was barred from seeking any further recovery based on the same facts; Hancock responded “Yes, Your Honor.”

The court then stated it approved the settlement and ordered the parties “to comply with the terms and conditions thereof, including payment of any monies and execution of any releases. This is a – at least until judgment is entered, a judicial supervised settlement and is enforceable pursuant to 664.6 of the Code of Civil Procedure.” The court vacated the trial readiness and trial dates as to JPS and Saw Service, and set a settled case status conference for February 26, 2013. Since Kasco Fab’s counsel agreed to file dismissals if the paperwork was completed, the court stated no appearance was needed if the proper paperwork were filed before the hearing.

Only Kasco Fab’s counsel appeared at the February 26, 2013 status conference. The court set an order to show cause hearing (OSC) regarding sanctions for May 7, 2013.

JPS made the \$10,000 payment due 90 days after the settlement conference, but failed to return an executed settlement agreement. On May 6, 2013, Kasco Fab filed an ex parte application for order entering judgment pursuant to section 664.6, by which it sought the entry of judgment against JPS in the amount of \$90,000. The application was based on JPS’s failure to execute a settlement agreement and their counsel’s failure to respond to numerous requests for a signed settlement agreement.

Kasco Fab’s counsel stated in his declaration that while he had not obtained a transcript of the settlement conference hearing, the settlement terms agreed to on the record were: (1) “Judgment in the amount of \$100,000 against Defendant[s] JPS and Janes, which was stayed if Defendant[s] made agreed payments”; (2) JPS would pay \$10,000 within 90 days of the settlement conference, the greater of the sales price of the machine or \$80,000 within one year of the settlement conference, and \$10,000 within 24 months of the settlement conference; (3) Kasco Fab would permit JPS to “broker/sale” the machine on an as is basis from Kasco Fab’s facility; and (4) “all claims between the parties related to the transaction would be released.”

Kasco Fab's counsel further declared that he prepared a settlement agreement that set forth these terms, which he provided to JPS's counsel on December 27, 2012, who requested a few changes; the changes were made and a revised settlement agreement sent to JPS's counsel on January 25, 2013; and when JPS did not return an executed agreement, reminders were sent to JPS's counsel, who failed to appear at the February 26, 2013 status conference. At that hearing, Kasco Fab's counsel asked the court to set an OSC that required JPS to explain why it had not provided an executed settlement agreement, which it set for May 7, 2013. Thereafter, JPS requested a few additional grammatical changes to the agreement, to which Kasco Fab agreed; a final agreement was sent to JPS's counsel on March 11, 2013. On March 22, 2013, JPS's counsel asked Kasco Fab to send an executed settlement agreement because it needed one to market the machine; Kasco Fab did so, but JPS still had not executed the agreement. Kasco Fab's counsel made other attempts to get the agreement signed, but JPS's counsel never responded.

Kasco Fab asserted the requirements for an enforceable judgment pursuant to section 664.6 were satisfied at the December 5, 2012 court hearing, thereafter counsel for the parties prepared a settlement agreement that reflected the settlement's terms, and JPS's counsel has not offered any explanation as to why JPS has refused to sign the final agreement. It appeared to Kasco Fab the only way to proceed was to enter judgment in the amount of \$90,000, as JPS was in breach of the requirement that they execute a settlement agreement, thereby making the entire amount agreed upon due immediately.

At the May 7, 2013 hearing, attended by counsel for both parties, the court denied Kasco Fab's ex parte application and set a hearing on the motion for entry of judgment for June 20, 2013.

On June 13, 2013, JPS filed an opposition to the motion for entry of judgment in which it argued Kasco Fab was not entitled to judgment due to JPS's failure to sign a written settlement agreement. JPS argued that, pursuant to the terms of the parties'

settlement agreement, judgment could only be entered if JPS failed to pay according to the agreement's actual terms, which the trial court was bound to enforce, and by the motion, Kasco Fab was asking for something that was not in the settlement agreement, namely an executed agreement that was not required under the settlement's terms. JPS explained the problem with the settlement agreement arose from Kasco Fab's conduct, as when JPS set about to sell the machine, it discovered that Kasco Fab had completely dismantled the machine, which was not contemplated in the settlement. JPS refused to sign the agreement because it might preclude JPS from asserting that issue.² JPS stated it was sending the signed agreement to Kasco Fab with appropriate corrections, and argued the motion must be denied because there had been no showing of a violation of the settlement agreement's terms.

The following day, Kasco Fab's counsel filed his declaration in support of the motion. He stated JPS's counsel had not contacted him since the May 7, 2013 hearing, that he ordered a transcript of the settlement conference, which was attached, and, as stated in the transcript, there is "a stipulated judgment of \$100,000, a first payment of \$10,000 due in 90 days, a second payment of a minimum of \$80,000 from the sale of the equipment in one year, and a third payment of \$10,000 in two years. The machine was being sold to defendant 'as is where is' and defendant was to [sell] the equipment guaranteeing a minimum price of \$80,000. As indicated on page 6, lines 4-7, Mr. Janes specifically agreed to the terms of the settlement. In addition, paper work for the settlement and stipulated judgment was to be circulated and signed by the parties." He

² In its opening brief, JPS states that Kasco's concealment of the state of the machine partially voided the agreement and discharged its duty to sell the machine or cover any shortfall in the sales price, and it has filed suit seeking relief through rescission, damages for fraud and declaratory relief. There is nothing in the record, however, to support these assertions. Moreover, as Kasco Fab points out, JPS never sought to void the settlement.

further stated that JPS refused to sign the settlement agreement and stipulated judgment, and he was requesting the court enter judgment in the amount of \$90,000.

Both counsel appeared at the June 20, 2013 hearing before Judge Smith and argued the matter. The court, however, continued the hearing on the motion to July 9, 2013 and ordered the parties to meet and confer a minimum of three times for at least 20 minutes each time. At the July 9, 2013 hearing before Judge Smith, at which both counsel appeared, the court granted the motion.

On July 22, 2013, the court filed a written order which stated that after reviewing the motion for entry of judgment, JPS's opposition, the transcript of the December 5, 2012 mandatory settlement conference, and allowing the parties to be heard, it was entering the following order: (1) the motion for entry of judgment under section 664.6 against JPS is granted, as "[t]he court finds the parties entered a valid and enforceable settlement at the hearing on December 5, 2012, that Defendants were at the hearing in court when the terms of the agreement were recited, and Defendants agreed to the terms of the settlement"; (2) Kasco Fab is to prepare and submit a judgment to the court against JPS International and Janes, jointly and severally, in the amount of \$90,000 plus interest at the legal rate of 10% commencing from December 5, 2012; and (3) "[p]ursuant to the terms of the settlement placed on the record, enforcement of the judgment against Defendants is stayed until December 6, 2013. If Defendants pay Plaintiff the sum of \$80,000 or the amount received from the sale of the robotic fabrication equipment referred to in the transcript of the mandatory settlement conference, whichever is greater, by December 5, 2013, then the stay of enforcement of judgment is extended to December 6, 2014."

A judgment was signed by the court and filed on July 22, 2013, which stated that pursuant to the court order granting Kasco Fab's motion for entry of judgment based on section 664.6, the court enters the following judgment: (1) that Kasco Fab recover from JPS International and Janes a "joint and several judgment" in Kasco Fab's favor and

against JPS International and Janes in the amount of \$90,000 based upon a judgment of \$100,000, less a \$10,000 credit for payment received by Kasco Fab; and (2) that Kasco Fab recover interest on the judgment amount of \$100,000 at the legal rate from December 5, 2012 until paid.

DISCUSSION

Section 664.6 provides: “If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement.” This section grants authority to a trial court to enforce settlement agreements without the need to file a new lawsuit. (*Timney v. Lin* (2003) 106 Cal.App.4th 1121, 1125; *Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 809 (*Weddington Productions*)).) The personal consent to the terms of the settlement by each of the parties is a statutory prerequisite to a settlement agreement that is enforceable under section 664.6. (*Critzer v. Enos* (2010) 187 Cal.App.4th 1242, 1257–1258.)

JPS frames the issue it raises on appeal as whether the trial court erred “when it ordered and entered judgment, even though there had been no default in payment, and the settlement agreement specifically requires a default in payment before entry of judgment.” JPS asserts that in granting the motion, the trial court changed a material term of the agreement, namely that “the judgment will not be entered pending the default of any payments.”

The court in *Skulnick v. Roberts Express, Inc.* (1992) 2 Cal.App.4th 884 (*Skulnick*) explained the standard of review when a motion is made to enforce a settlement agreement under section 664.6: “A trial court, when ruling on a section 664.6 motion, acts as a trier of fact. [Citation.] Section 664.6’s ‘express authorization for trial courts to

determine whether a settlement has occurred is an implicit authorization for the trial court to interpret the terms and conditions to settlement.’ [Citation.] The proper standard of review, therefore, is whether the trial court’s ruling [construing] the settlement . . . is supported by substantial evidence.” (*Skulnick*, at p. 889.)

“A settlement agreement is a contract, and the legal principles which apply to contracts generally apply to settlement contracts. [Citation.] An essential element of any contract is ‘consent.’ [Citations.] The ‘consent’ must be ‘mutual.’” (*Weddington Productions, supra*, 60 Cal.App.4th at pp. 810–811.) “‘The existence of mutual consent is determined by objective rather than subjective criteria, the test being what the outward manifestations of consent would lead a reasonable person to believe.’ [Citation.] . . . The parties’ outward manifestations must show that the parties all agreed ‘upon the same thing in the same sense.’” (*Id.* at p. 811.)

“The question on appeal thus resolves into whether the record contains substantial evidence which could lead a reasonable person to construe the agreement [as the trial court did].” (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632.) The trial court’s power under section 664.6 is extremely limited: “‘Although a judge hearing a section 664.6 motion may receive evidence, determine disputed facts, and enter the terms of a settlement agreement as a judgment [citations], nothing in section 664.6 authorizes a judge to *create* the material terms of a settlement, as opposed to deciding what terms *the parties themselves* have previously agreed upon.’ [Citation.] . . . ¶] A settlement agreement is simply a contract. [Citation.] The retention of the trial court’s jurisdiction to enforce the settlement agreement is no different than allowing a person with a contract with the school district to sue it for breach. The court is powerless to impose on the parties more restrictive or less restrictive or different terms than those contained in their settlement agreement.” (*Hernandez v. Board of Educ. of Stockton Unified School Dist.* (2004) 126 Cal.App.4th 1161, 1176; see also *Terry v. Conlan* (2005)

131 Cal.App.4th 1445, 1460 [court erred in granting section 664.6 motion where record demonstrated no meeting of minds concerning material terms of settlement].)

Here, the parties' oral agreement specifically provided that the stipulated judgment would not be entered "pending the default of any payments." The trial court, however, found that judgment could be entered, despite the fact that no default in payment had occurred, and that, "[p]ursuant to the terms of the settlement placed on the record, enforcement of the judgment against Defendants is stayed until December 6, 2013."

These findings are contrary to the terms of the oral settlement agreement placed on the record. Kasco Fab asserts the order staying enforcement "is precisely the terms of the agreed upon settlement," but the oral agreement does not state that judgment may be entered and then stayed; it states that judgment may not be entered unless there is a default in payments. While Kasco Fab complains that JPS has not identified how the judgment's terms differ from the settlement terms, the issue here is not whether the terms contained in the judgment differ from the settlement terms, but whether the oral settlement prohibited entry of the judgment itself when there had not been any default in payments, even if the judgment were stayed.

Kasco Fab argues JPS is merely raising the issue of the timing of the entry of judgment "which is a separate issue from whether the judgment entered properly reflects the terms of the settlement," and submits the entry of judgment and stay of enforcement were appropriate because they enforce the agreement placed on the record. The issue JPS raises, however, does not involve the timing of entry of judgment since, according to the settlement terms, judgment would not be entered at all if JPS made all of the scheduled payments. Since the oral agreement prohibited entry of judgment unless there was a default in payments and no such default had occurred at the time the motion was decided, the entry of judgment violated the agreement's terms. Rather than effectuating the parties' agreement, the court imposed an entirely new term that had not been agreed upon at the mandatory settlement conference. The terms were reflected in the recitation of the

agreement made by both counsel, and the parties consented to those terms on the record. The recitation makes no mention of entry of judgment apart from the limitation that it not be entered pending the default of any payments, or that any judgment entered would be stayed.

As noted, “nothing in section 664.6 authorizes a judge to *create* the material terms of a settlement, as opposed to deciding what terms the *parties themselves* have previously agreed upon.” (*Weddington Productions, supra*, 60 Cal.App.4th at p. 810.) By entering judgment when default had not occurred, the court created a material term to which the parties had not agreed. There was thus no substantial evidence supporting the court’s finding that the settlement to which the parties agreed included a provision that judgment in Kasco Fab’s favor and against JPS would be entered and stayed if JPS was current on its payment obligations. (See *Terry v. Conlan, supra*, 131 Cal.App.4th at p. 1460.)

Kasco Fab asserts that even if the trial court erred by granting the motion, JPS is not entitled to reversal because it cannot show prejudice, as required by section 475 and California Constitution Article VI, section 13, since the judgment was stayed for the period agreed upon in the oral settlement agreement and JPS is not prohibited from performing its obligations under the settlement. But the “concept of harmless error plays no role in an analysis of the sufficiency of evidence to support a ruling. If the ruling was unsupported by substantial evidence, it is necessarily reversible. (*In re Catherine S.* (1991) 230 Cal.App.3d 1253, 1258.) Here, the trial court’s decision that the parties’ settlement agreement allowed for entry of judgment, which was then stayed, when no default in payments had occurred, was not supported by the evidence. Accordingly, prejudice need not be shown.

DISPOSITION

The judgment entered pursuant to section 664.6 and the order granting Kasco Fab’s motion for entry of judgment are reversed. Costs on appeal are awarded to appellants.

