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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MAIN STREET-SANTA ANA, LLC,

Plaintiff and Appellant,

v.

DONALD KAPPAUF,

Defendant and Appellant.

G044446

(Super. Ct. No. 30-2008-00116064)

O P I N I O N

Appeals from orders of the Superior Court of Orange County, David R. Chaffee, Judge. Orders affirmed.

Gladych & Associates and John A. Gladych; Law Offices of Roxanne Huddleston and Roxanne Huddleston for Plaintiff and Appellant.

Musick, Peeler & Garrett, Wayne B. Littlefield and Cheryl A. Orr; Worthe, Hanson & Worthe, John R. Hanson and Todd C. Worthe, for Defendant and Appellant.

Plaintiff Main Street-Santa Ana, LLC appeals from an order granting a new trial to defendant Donald Kappauf. The jury had found defendant, an insurance broker, liable for failing to secure insurance for plaintiff's office building before it was damaged by arson. The court granted a new trial on the grounds that (1) defendant was surprised by plaintiff's owner's testimony about the building's value, and (2) the owner's valuation testimony insufficiently supported the verdict.

We need not address the first ground because we affirm on the second. The court did not abuse its discretion by concluding the comparable sales upon which the owner relied did not support his valuation opinion. Thus, defendant is entitled to a new trial on damages.

Defendant appeals from an order denying his motion for judgment notwithstanding the verdict. But plaintiff's evidence sufficiently supported the verdict. Thus, we also affirm this order.

FACTS

The Insurance Claim

Plaintiff buys, manages, and sells commercial real estate. Its managing member and sole stockholder is William Takahashi, who in his 20-year real estate career has bought and renovated more than 30 commercial properties.

Afraid "the bubble was going to collapse here in Southern California," plaintiff began selling its California portfolio in the mid-2000's and buying property in the "countercyclical" market of Midland, Texas. Plaintiff bought the 110,000-plus square foot Hightower Building in Midland in June 2006 for just over \$1.3 million. The office building had been vacant for years and was in "excellent" condition, but dated. It had a fire alarm system — each floor had a lever that could be pulled to trigger a central alarm throughout the building. But it lacked fire sprinklers.

Plaintiff retained an insurance broker, defendant, to obtain insurance for the building. Defendant completed and submitted an application to Landmark American Insurance Company. In the application, defendant incorrectly represented the building had both a central station fire alarm and an operational fire sprinkler system. He did not first verify whether the building had fire sprinklers.

The insurer issued a policy providing up to \$14,750,000 in coverage for damage to the Hightower Building. The policy specified the insurer would “determine the value of the Covered Property in the event of loss or damages as follows: [¶] a. At actual cash value as of the time of loss or damage.” The policy required “[a]s a condition of this insurance,” that the building maintain as “protective safeguards”: (1) An “**Automatic Fire Alarm**, protecting the entire building, that is: [¶] . . . Connected to a central station,” and (2) an “**Automatic Sprinkler System**.”

After an arson fire damaged the building in December 2006, plaintiff tendered a claim to the insurer. The insurer denied coverage. It explained, “There has been no evidence the Protective Safeguards that are a condition of this insurance were present at [the building] at the time of the occurrence.” Rather than repair the building, plaintiff packaged it with adjacent buildings and sold the properties for over \$4 million. Plaintiff sued defendant for breach of contract and negligence.

The Motions in Limine

Defendant filed motions in limine in April 2010 to exclude evidence of plaintiff’s damages. It moved to exclude testimony from plaintiff’s designated expert on the cost of repair, testimony from plaintiff’s property manager on the building’s fire damage, and any evidence on the building’s diminution in value. In opposition, plaintiff contended this evidence was admissible because the policy provided coverage for the building’s “actual cash value,” which was “the repair cost, minus an[y] depreciation” under California law.

After trial was continued and repeatedly trailed until July 2010, defendant moved in limine to exclude testimony from Takahashi on the cost of repair. Defendant asserted plaintiff did not designate Takahashi as an expert witness and plaintiff had denied he knew anything about plaintiff's damages. Defendant further contended Takahashi was not qualified as an expert in repair costs. Plaintiff responded it had made Takahashi available for deposition, but "defense counsel simply elected not to depose [him]." Still, plaintiff offered to "produc[e] Mr. Takahashi for a deposition during trial."

Three days later (July 9), defendant filed a trial brief asserting for the first time that controlling Texas law defined "actual cash value" as fair market value. Defendant contended the policy is governed by the law of the state where the insured risk was located; i.e., Texas. And "[u]nder Texas law, [¶] [']Where the contract provides that the measure of damages is the actual cash value of the damaged or destroyed property, it is equivalent to a market value measure of damages. [Citation.] Where the market value is the proper measure of damages, it should be submitted to the jury on the basis of the damaged property's market value immediately before and after the loss.[']"

Defendant explained Texas preferred to determine fair market value through the comparable sales approach. "In Texas, [']Courts have long favored the comparable sales approach when determining the market value of real property. If the goal of an appraisal is to ascertain market value, then logically there can be no better guide than the prices that willing buyers and sellers actually negotiate in the relevant market. Under a comparable sales analysis, the appraiser finds data for sales of similar property, then makes upward or downward adjustments to these sales prices based on differences in the subject property.[']" Defendant asserted the evidence would show the building's market value had "increased from the time of purchase," and was "purchased by a buyer that intended to gut the building, rendering the fire damage irrelevant."

On the first day of trial (July 13), the court began deciding the motions in limine. It denied defendant's motions to exclude plaintiff's cost-of-repair expert,

plaintiff's property manager, and evidence on diminution in value. It invited further briefing on whether Takahashi, as plaintiff's principal, could offer an opinion on the building's value. (See Evid. Code, § 813, subd. (a)(3).)¹

After hearing argument, the court granted defendant's motion to apply Texas law: "welcome to Texas, boys." It found defendant could timely raise the issue "any time up to the start of trial" without waiving it. It told counsel about the sudden change in the choice of law: "Do I think that means that we should continue this trial for some redo? No. We're going forward. The case is what it is. You're stuck with it."

The same day, the court considered whether Takahashi could testify about the building's value. Plaintiff offered to designate Takahashi as an expert and let defendant depose him "right now." Defendant contended plaintiff could not designate a new expert "at this late stage . . . absolutely not. The time for this is gone." The court invited plaintiff to "file a written motion to supplement your expert [designation]." The next morning, plaintiff reported it was "not going to seek to augment the expert witness list," but still intended to call Takahashi as a witness.

After jury selection, the court decided (July 15) the measure of plaintiff's damages. Under Texas law, it stated, actual cash value is "the difference between the value of the property immediately before and immediately after the loss and damage but within the amounts of the policy. And that's what the court is ordering as the measure of damages in this case, nothing more nothing less."

The court also addressed the appropriate "appraisal methodology." It noted, "There are three approaches" (1) "the cost approach, that is market value, which is [the] comparable sales approach," (2) "an income approach," and (3) "a replacement

¹ All further statutory references are to the Evidence Code unless otherwise stated.

value or cost of repair type value approach.” And under Texas law, if there is no actual repair “you have got to apply the other two valuation methods.”

The court also continued considering Takahashi’s proposed testimony. It stated it had “absolutely no problem with Mr. Takahashi taking the stand and saying in my opinion the value of my building the day before the fire was 15 million dollars, or whatever his opinion is.” It cautioned plaintiff: “But not one of us in this room is so naïve as to think that this jury isn’t going to look at Mr. Takahashi and go, hey, he’s the owner of the property. He’s got a major interest in the outcome of this thing, therefore, he’s biased.” Defendant objected plaintiff had not designated Takahashi as an expert. The court stated: “I happen to think under . . . section 813, Mr. Takahashi is entirely entitled to testify with respect to his opinions in value. [Defendant is] entitled to cross-examine the heck out of how he reaches those numbers.” Defendant responded, “You made the obvious point, the jury is not naïve.”

In a brief filed four days later (July 19), defendant made two concessions. First, he conceded “[S]ection 813 permits an owner or a corporate designee to testify to the value of the property.” Second, he conceded section “816 allows for valuation of a property to be determined by comparable sales.” In fact, defendant asserted the income capitalization approach “is not applicable because this property had not generated any income stream in a decade.”

But defendant asked to voir dire Takahashi on “what, if any, specific comparable sales he used to value the property just prior and just after the subject fire.” Defendant stated, “[I]t would be surprising to learn that Mr. Takahashi was aware of any sales of comparable buildings in Midland at that time. . . . it will be interesting to see what, if any, buildings Mr. Takahashi feels can be compared to” the Hightower Building.

In court that day, defendant announced its “surprise” that plaintiff had prepared “two binders” of comparable sales about which Takahashi intended to testify. Plaintiff again offered to make Takahashi available for deposition. The court reviewed

the parties' discovery on the damages issue and concluded, "While you guys are both a couple [of] nice guys, couple of pretty good lawyers, you both practice purposely or inadvertently practice the fine art of sandbagging the other side."

The court also agreed with plaintiff on the proper valuation methodology. It stated the "income approach probably would be an improper valuation method for the purpose for which this trial is being held, i.e., to differentiate between the value of the property the day before the fire, the day after the fire." It told plaintiff, "You're right in the sense that it is likely to be a comparable sale approach or alternatively some sort of construction cost."

The court then granted defendant's request to voir dire Takahashi. On direct examination, he testified about his "22, 24 years" of real estate experience, including acquisition of "around 30" commercial office buildings. For each transaction he did "essentially a real estate appraisal in-house." He would consult brokers, "get comps," assess the tenants, and look for "growth potential." He valued each of plaintiff's 13 commercial office buildings in Midland by looking at comparable sales. While others helped gather that information, Takahashi reviewed all the information and made "the final decision."

After discussing 10 sales of commercial buildings in and around Midland, Takahashi concluded the Hightower Building's fair market value before the fire was \$2.5 million. He noted it was "somewhat difficult" to find a sale of a damaged building comparable to the Hightower Building after the fire, but he did find one building "that was water damaged." Takahashi opined the fair market value of the Hightower Building after the fire was \$1 million.

Defendant cross-examined Takahashi. When asked how he knew that "the change in market value was solely the result of the fire and not simply a change in the real estate market," Takahashi answered, "Because the real estate market was great at that time." Defendant asked whether Takahashi or his accountant had allocated the package

deals' sales price among the individual buildings, including the Hightower Building; they had not. Defendant asked Takahashi to describe what repairs the building needed after the fire, which he did at length. Defendant asked whether the water-damaged building was similar to the Hightower Building. Takahashi conceded he "made adjustments." The court ruled Takahashi could testify at trial.

The Trial and Posttrial Motions

Takahashi testified at trial the next day (July 20). He again discussed his real estate background and the fire damage to the Hightower Building. He still concluded its fair market value before the fire was \$2.5 million — \$25 per square foot — and \$1 million after.

Takahashi told the jury about the 10 comparable sales he used to value the 100,000 square foot Hightower Building as of 2006. These were (1) 110 Louisiana, a 78,000-plus square-foot building that was 99 percent occupied, which sold in August 2007 for \$42.08 per square foot, (2) 414 West Texas Avenue, a 38,000-plus square-foot building that was 80 percent occupied, which sold in June 2006 for \$31.32 per square foot, (3) 511 West Ohio, a 64,000-plus square-foot building that was 83 percent occupied, which sold in November 2006 for \$15.46 per square foot, (4) the Cingular Building, a 130,000 square-foot building that was 100 percent occupied by Cingular, which sold in September 2006 for \$115.38 per square foot, (5) the E.O.G. Halliburton Building, a 96,000-plus square-foot building that was 92 percent occupied, which sold in October 2006 for \$36.33 per square foot, (6) the Heritage Center, a 233,500 square-foot building that was unoccupied, which sold in April 2007 for \$29.51 per square foot, (7) Independent Plaza, a 153,000-plus square-foot building that was 97 percent occupied, which sold in June 2007 for \$47.46 per square foot, (8) The TGAAR "A" and "B" complex, a 81,000-plus square-foot building that was 75 percent occupied, which sold in June 2006 for \$24.40 per square foot, (9) TGAAR Tower, a 90,000-plus square-foot

building that was 95 percent occupied, which sold in June 2006 for \$38.29 per square foot, and (10) 3300 North “A” Street, a 144,000-plus square-foot building that was 95 percent occupied, which sold in September 2007 for \$43.54 per square foot.

Takahashi explained why these buildings were comparable to the Hightower Building. He stated most of these buildings were only “blocks away” from each other and the Hightower Building; three others were “probably four miles away.” He “knew all these buildings and the conditions that they had inside,” so he “made allowances for what I knew of the tenancy inside [and] the quality of the leases.”

Takahashi conceded it was “difficult” to compare occupied and unoccupied buildings, but it could be done by examining the leases. He also conceded he paid only \$1.3 million for the Hightower Building in 2006, not \$2.5 million, but explained he “got an exceptional deal on it” because the prior owner “really didn’t know what he had” and sold it “for a steal.”

The jury returned a special verdict for plaintiff on both causes of action, finding plaintiff suffered \$1.5 million in damages. But it further found plaintiff’s comparative fault was 30 percent. The court entered judgment for plaintiff on the breach of contract cause of action for \$1.5 million.

Defendant moved for a new trial. He also moved for judgment notwithstanding the verdict, contending insufficient evidence showed the formation of a contract, consideration for a contract, causation, or damages.

After observing “a number of things about this particular trial bothered me greatly,” the court “grant[ed] the motion for new trial for two reasons.”

The first reason was surprise. It stated: “I don’t think that either side in this case . . . engaged in discovery in good faith. And both sides essentially sandbagged each other . . . with respect to how the case was prepared and what the theories were to be presented.” It noted plaintiff “on the first day of trial was completely taken by surprise . . . that Texas law must be applied,” and had “only disclosed as expert witnesses

valuation experts for a theory that under Texas law could not be applied.” And in turn, plaintiff “pull[ed] the proverbial rabbit out of the hat” and called Takahashi to testify about the building’s value as “the owner of the property.” But “[t]he problem with that is that at no time was Mr. Takahashi revealed as a prospective witness,” so “the defense was left flat-footed because it had understood that the only experts applicable were with respect to the repair costs.” “And so because of the failure of discovery,” the court concluded, “both sides were surprised. And that surprise, whether purposeful or accidental, led to a situation where the trial is not fair really to either side.”

The second reason was insufficient evidence. The court found “in some respects Mr. Takahashi’s testimony was not sufficient to support the damage award. . . . The trial testimony provided by Mr. Takahashi as to the comparable buildings, in my view, does not meet the requirements of . . . section 816,” which governs the admissibility of sales prices of comparable properties. It clarified: “I didn’t think he met the requirements, nor did the defense have any opportunity to properly examine him because of the surprise with respect to the nature of the comparables and the fact that the preferable approach to valuation is an income capitalization approach.”

Thus, the court “grant[ed] the motion for new trial only in part, that part being that the only thing to be re-tried are the damages issues.” It found the motion for judgment notwithstanding the verdict was “moot; otherwise denied.” It concluded, “This is really a situation in which the Discovery Act [(Code Civ. Proc., § 2016.010 et seq.)] was intended to eliminate this kind of a surprise, and both sides engaged in a dance around the Discovery Act and both sides suffered for it at the end of the day. And so I think that due process requires both sides to have a full and fair opportunity to address these issues and to address the valuation approaches under the proper law, the Texas law, and both sides then to either have a trial or come to the table and settle up.”

DISCUSSION

The Court Permissibly Granted a New Trial on the Ground of Insufficient Evidence

The court may vacate the verdict and order a new trial when the evidence is insufficient to support the verdict. (Code Civ. Proc., § 657, subd. (6).) “On appeal from an order granting a new trial . . . upon the ground of the insufficiency of the evidence . . . such order shall be reversed as to such ground only if there is no substantial basis in the record for” that reason. (*Id.*, subd. (7).)

“Thus, we have held that an order granting a new trial under [Code of Civil Procedure] section 657 ‘must be sustained on appeal unless the opposing party demonstrates that no reasonable finder of fact could have found for the movant on [the trial court’s] theory.’ [Citation.] Moreover, ‘[a]n abuse of discretion cannot be found in cases in which the evidence is in conflict and a verdict for the moving party could have been reached’ [Citation.] In other words, ‘the presumption of correctness normally accorded on appeal to the jury’s verdict is replaced by a presumption in favor of the [new trial] order.’” (*Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, 412 (*Lane*).

“The reason for this deference ‘is that the trial court, in ruling on [a new trial] motion, sits . . . as an independent trier of fact.’ [Citation.] Therefore, the trial court’s factual determinations, reflected in its decision to grant the new trial, are entitled to the same deference that an appellate court would ordinarily accord a jury’s factual determinations.” (*Lane, supra*, 22 Cal.4th at p. 412.)

“The trial court sits much closer to the evidence than an appellate court. Even the most comprehensive study of a trial court record cannot replace the immediacy of being present at the trial, watching and hearing as the evidence unfolds. The trial court, therefore, is in the best position to assess the reliability of a jury’s verdict and, to this end, the Legislature has granted trial courts broad discretion to order new trials. The only relevant limitation on this discretion is that the trial court must state its reasons for

granting the new trial, and there must be substantial evidence in the record to support those reasons.” (*Lane, supra*, 22 Cal.4th at p. 412.)

The order sets forth two bases for the court’s conclusion plaintiff offered insufficient evidence to support the verdict. First, the court found Takahashi’s valuation opinion did not support the verdict because he used the comparable sales approach, although “the preferable approach to valuation is an income capitalization approach.” Second, the court found Takahashi’s testimony “as to the comparable buildings, in my view, does not meet the requirements of . . . section 816.”²

The record does not support the court’s first basis. There was no evidence that the income capitalization approach to property valuation is “preferable” to the comparable sales approach. No defense witness testified to that. The only witness who offered an opinion on the issue, Takahashi, testified to the contrary. He stated the income capitalization approach “doesn’t apply in this case because the building is vacant.”

And we cannot say as a matter of law the Hightower Building must be valued using the income capitalization approach, not the comparable sales approach. Defendant conceded the income capitalization approach “is not applicable because this

² Defendant also contends a new trial is appropriate because the court should have excluded testimony from Takahashi as an undesignated expert witness. (See Code Civ. Proc., §§ 2034.260, 2034.300.) But he testified as the property owner’s representative, not as an expert witness. The Evidence Code allows both experts and owners to testify about property value; it distinguishes between the two types of witnesses. (§ 813, subds. (a) [experts], (b) [owners], & (c) [owner’s representative].) “[A] designated [corporate] officer . . . who is knowledgeable as to the value of the property may testify to an opinion of its value as an owner. . . . The designee may be knowledgeable as to the value of the property as a result of being instrumental in its acquisition or management or as a result of being knowledgeable as to its character and use; the designee need not qualify as a general valuation expert.” (Cal. Law Revision Com. com. 29B West’s Ann. Evid. Code (2009 ed.) foll. § 813, p. 166.) An owner may be qualified to express and explain an opinion on property value regardless of whether the owner is “technically an ‘expert witness.’” (*Long Beach City H. S. Dist. v. Stewart* (1947) 30 Cal.2d 763, 773.)

property had not generated any income stream in a decade.” As he told the court on separate occasions, Texas law has ““long favored the comparable sales approach when determining the market value of real property”” and California law “allows for valuation of a property to be determined by comparable sales.”³ Defendant was correct on both points. (*City of Harlingen v. Estate of Sharboneau* (Tex. 2001) 48 S.W.3d 177, 182 [Texas]; Evid. Code, § 816 [California].) And even if he were wrong on the law, defendant would have been bound by his repeated endorsement of the comparable sales approach. (Cf. *Fassberg Construction Co. v. Housing Authority of City of Los Angeles* (2007) 152 Cal.App.4th 720, 752 [counsel’s unambiguous concession is a “binding judicial admission”]; *Ferraro v. Camarlinghi* (2008) 161 Cal.App.4th 509, 558 [judicial estoppel; counsel may not “deceive courts [or] argue out of both sides of his mouth . . . behind a smokescreen of self-contradictions and opportunistic flip-flops”].)

But the extraordinarily deferential standard of review compels affirming the new trial order on the second basis. The court found the comparable sales upon which Takahashi relied did “not meet the requirements of . . . section 816.” That statute governs the admissibility of comparable sales. It provides, “When relevant to the determination of the value of property, a witness may take into account as a basis for his opinion the

³ None of defendant’s cases foreclose using the comparable sales approach to value commercial buildings across the board. For example, one case simply applied a statute (§ 822, subd. (a)(1)) that excludes from eminent domain cases any evidence of sales of other properties acquired for public use. (*Emeryville Redevelopment Agency v. Harcros Pigments, Inc.* (2002) 101 Cal.App.4th 1083, 1095.) Another case merely endorsed the appraiser’s use of the income capitalization approach to value a building “that has never been sold and is not currently for sale,” and for which “there is no evidence in the record of any comparable properties in the City, much less any such properties that are for sale.” (*San Franciscans Upholding the Downtown Plan v. City and County of San Francisco* (2002) 102 Cal.App.4th 656, 685.) That case noted the income capitalization approach is “generally” used to value commercial buildings, whereas the comparable sales approach is “not often useful” in valuing those buildings. (*Id.* at pp. 684-685.) But it set no bright-line rule — certainly not one barring use of the comparable sales approach to value a building producing no income, and for which comparable sales may exist.

price and other terms and circumstances of any sale or contract to sell and purchase comparable property if the sale or contract was freely made in good faith within a reasonable time before or after the date of valuation. In order to be considered comparable, the sale or contract must have been made sufficiently near in time to the date of valuation, and the property sold must be located sufficiently near the property being valued, and must be sufficiently alike in respect to character, size, situation, usability, and improvements, to make it clear that the property sold and the property being valued are comparable in value and that the price realized for the property sold may fairly be considered as shedding light on the value of the property being valued.” (§ 816.)

Because we must defer to the court’s factual findings on the new trial motion, our narrow task is to see whether any substantial evidence showed Takahashi’s comparable sales were insufficiently similar to the Hightower Building. (*Lane, supra*, 22 Cal.4th at p. 412.) Such evidence exists. First, the Hightower Building was unoccupied but nine of the 10 sales were of occupied buildings. Only one sale was of an unoccupied building, the Heritage Center. Second, Takahashi testified he bought the Hightower Building for \$1.3 million, an almost 50 percent discount over his fair market value opinion of \$2.5 million. This difference might lead a reasonable fact-finder to conclude the comparable sales were not sufficiently similar. Finally, Takahashi was not just plaintiff’s witness — he is its principal as well. A trier of fact “may disbelieve [witnesses] even though they are uncontradicted if there is any rational ground for doing so, one such reason being the interest of the witnesses in the case.” (*Horn v. Oh* (1983) 147 Cal.App.3d 1094, 1099.)

It is important to remember this is not an appeal from the judgment. If it were, we would review the record for substantial evidence to support the jury verdict. We would look to see whether a reasonable jury could find Takahashi’s comparable sales were sufficiently similar to the Hightower Building, or find the sale of the unoccupied Heritage Center for \$29.51 per square foot sufficiently supported his \$25 per square foot

valuation of the Hightower Building, or credit his explanation for the difference between the Hightower Building's purchase price and fair market value. And we may very well hold the record supports the verdict. As plaintiff notes, "all of the properties Takahashi used as comparable buildings were office buildings [citation], seven were built within two years of the Hightower Building, [citations], at least five were within the 78,000 to 130,000 square foot range of the Hightower Building, [citations], the vast majority were downtown within blocks of the Hightower Building [citations] and the sales or appraisal dates of the comparable buildings were all within a year of December 2006 pre-fire valuation date and almost all [were] within six months of that date."

But we are not reviewing the judgment, we are reviewing the new trial order. We may not substitute our judgment for that of the trial court, which "sits much closer to the evidence" than do we. (*Lane, supra*, 22 Cal.4th at p. 412.) The court was "present at the trial, watching and hearing as the evidence unfolds," and "is in the best position to assess the reliability of a jury's verdict." (*Ibid.*) It found Takahashi's testimony insufficient to support the verdict because his comparable sales were too dissimilar from the Hightower Building. At least some substantial evidence supports that finding; it matters not whether other evidence would sufficiently support the jury's verdict. And so we affirm.

At oral argument, plaintiff asked us to determine the proper valuation method on any retrial of damages.⁴ But we cannot say as a matter of law what approach is best. Texas and California accept the same three traditional methods, and leave it to the trier of fact to find which is most appropriate under the facts. "There are a number of approaches used in the valuation of condemned properties, namely, the market data or comparable sales approach, the cost approach, and the income approach. . . . No matter

⁴ Even if we affirmed the new trial order on the ground of surprise, defendant would be entitled only to a retrial on damages. The surprise of which he complains was Takahashi's testimony on damages.

which method is used, however, it must also be remembered that they are all merely factors to be considered in arriving at the value of the property.” (*Religious of Sacred Heart v. Houston* (Tex. 1992) 836 S.W.2d 606, 615.) “The selection and application of an appropriate appraisal method . . . are factual questions, provided that the method is legally valid and is not arbitrary.” (*County of Los Angeles v. Southern Cal. Edison Co.* (2003) 112 Cal.App.4th 1108, 1121.) While the court should not have rejected the comparable sales approach out of hand, neither is it bound by it on retrial. We leave it to the parties to offer evidence as to which valuation method is most appropriate here, and to the trier of fact to credit or discredit that evidence and base its damages award accordingly.

The Court Correctly Denied the Motion for Judgment Notwithstanding the Verdict

The court denied defendant’s motion for judgment notwithstanding the verdict, both on the merits and as moot given its grant of a new trial. Even though we affirm the new trial order and remand for retrial on damages, the appeal from the order denying the motion for judgment notwithstanding the verdict is not moot. Damages cannot be retried if defendant was not liable in the first place.

“‘A motion for judgment notwithstanding the verdict of a jury may properly be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence to support the verdict.’ [Citation.] ‘The trial judge cannot weigh the evidence . . . or judge the credibility of witnesses. [Citation.] If the evidence is conflicting or if several reasonable inferences may be drawn, the motion for judgment notwithstanding the verdict should be denied.’ [Citation.] On appeal, we review the motion de novo. ‘[W]e determine whether substantial evidence supported the verdict, viewing the evidence in the light most favorable to the party who obtained the verdict. [Citation.] We resolve all conflicts in the evidence and draw all reasonable inferences in favor of the verdict, and do not weigh

the evidence or judge the credibility of witnesses.” (*Linear Technology Corp. v. Tokyo Electron Ltd.* (2011) 200 Cal.App.4th 1527, 1532.)

Defendant asserts four reasons why the court should have granted judgment notwithstanding the verdict. As to the breach of contract cause of action, he contends (1) insufficient evidence showed any contract between plaintiff and defendant; rather, defendant merely passed along an offer from the insurer, and (2) insufficient evidence showed any consideration from plaintiff to defendant; rather, defendant received his commission from the insurer. As to both causes of action, defendant contends (3) insufficient evidence showed causation; rather, the insurer would have denied coverage anyway because Takahashi disconnected the required central station fire alarm, and (4) insufficient evidence showed damages; rather, plaintiff sold the damaged building for a profit to a buyer who was going to gut it.

But plaintiff offered substantial evidence on each point. On both contract formation and consideration, plaintiff offered defendant’s responses to its requests for admission.⁵ Defendant unqualifiedly admitted “[p]laintiff retained [his] services to obtain insurance coverage for the PROPERTY for damages caused by fire,” “[he] secured the POLICY for the PROPERTY on behalf of the Plaintiff,” and “Plaintiff paid money to [him] so that the PROPERTY would be covered for damage caused by fire under the POLICY.” In addition, one of plaintiff’s managers testified he entered into “an oral contract” with defendant on plaintiff’s behalf, for which plaintiff paid defendant “a broker’s fee.” Next, on causation, plaintiff offered defendant’s admission that “[the insurer] would have covered the damages and losses caused by fire if the PROPERTY

⁵ “Any matter admitted in response to a request for admission is conclusively established against the party making the admission in the pending action” (Code Civ. Proc., § 2033.410, subd. (a).) “[A] party may be precluded from introducing evidence contrary to its response in a request for admission” because the request “is aimed primarily ‘at setting at rest a triable issue so that it will not have to be tried.’” (*Mardirossian & Associates, Inc. v. Ersoff* (2007) 153 Cal.App.4th 257, 271.)

had an operational sprinkler system.” Moreover, Takahashi and plaintiff’s property manager testified Takahashi discontinued the security company monitoring of the burglar alarm — *not* the fire alarm — to avoid false alarms. Finally, on damages, we have already observed the record was sufficient to support the verdict for plaintiff. Despite defendant’s urging, we will not reweigh plaintiff’s evidence against whatever contrary evidence defendant may have mustered at trial. (*Linear Technology Corp. v. Tokyo Electron Ltd.*, *supra*, 200 Cal.App.4th at p. 1532.)

DISPOSITION

The order granting a new trial on damages is affirmed. The order denying judgment notwithstanding the verdict is affirmed. In the interests of justice, the parties shall bear their own costs on appeal.

IKOLA, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

ARONSON, J.