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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JACK YOMTOUBIAN et al.,

Plaintiffs, Cross-defendants and
Appellants,

v.

CAMELLIA DIAMONDS, LTD.,

Defendant, Cross-complainant and
Respondent.

G045110

(Super. Ct. No. 30-2009-00119619)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Kazuharu Makino, Judge. Affirmed.

Chang Mattern and Stephen H. Mattern for Plaintiffs, Cross-defendants and Appellants.

The Law Office of Joseph P. Scully and Joseph P. Scully for Defendant, Cross-complainant and Respondent.

* * *

Plaintiffs Jack Yomtoubian and DJM Jewelry, Inc. (collectively referred to as plaintiff), appeal from the court's award of prejudgment interest to defendant Camellia Diamonds Ltd., on defendant's common counts in its cross-complaint for money lent and goods sold and delivered. Plaintiff challenges the court's finding that defendant *sold* diamonds to plaintiff on credit, as opposed to placing the diamonds with plaintiff on *consignment*. Plaintiff contends the court erred by admitting parol evidence to show that defendant sold diamonds to plaintiff even though defendant's form memorandum evidencing the transaction contained consignment language. Plaintiff further challenges the court's determination that prejudgment interest under Civil Code section 3287, subdivision (a), began accruing 150 days after the last sale. Finally, plaintiff argues defendant's statements delivered to plaintiff constituted an account stated and did not include interest charges, and therefore the court's award of prejudgment interest was improper. We disagree with plaintiff's contentions and affirm the judgment.

FACTS

David Katz, an owner of defendant Camellia Diamonds Ltd., testified that, from 2001 through mid-2005, defendant sold plaintiff a large volume of diamonds (hundreds of thousands of dollars worth per month). Every three to four weeks during this time period, Katz met with plaintiff to show him diamonds. Plaintiff purchased some diamonds and took others "on an open memo" (i.e., on a consignment basis to try to sell them) for a period of time. In mid-2005, defendant stopped making large volume sales to plaintiff because plaintiff's checks began "bouncing" and plaintiff routinely asked defendant not to deposit the checks.

Plaintiff Yomtoubian testified that, to the contrary, he received diamonds from defendant only on "a memo basis" (i.e., on consignment) and returned unsold diamonds to defendant.

In 2008, defendant filed a notice of default and election to sell property under a deed of trust allegedly securing plaintiff's obligations to defendant. Plaintiff then sued defendant for, inter alia, declaratory relief, contending "that the alleged default of the obligation for which the deed of trust is security has not occurred in that plaintiff has in fact tendered the principal and interest owing on the obligation, and is holding [defendant's] merchandise on consignment and has offered to tender such merchandise to [defendant], which tender defendant . . . has refused."¹ Defendant filed a cross-complaint for, inter alia, judicial foreclosure and money lent,² claiming plaintiff owed defendant \$991,141.30 under a revolving line of credit.

A bench trial ensued. In the court's statement of decision, the court found defendant was entitled to judgment on its cause of action for money lent, because plaintiff purchased diamonds on credit from defendant. The judgment also cited defendant's common count for goods sold and delivered as a basis for the decision. The court found plaintiff owed defendant a principal balance of \$908,455 and that defendant was entitled to prejudgment interest on that principal beginning 150 days after defendant's final diamond sale to plaintiff. The court found defendant's diamond sales to plaintiff were not governed by a line of credit agreement between the parties, nor were plaintiff's obligations secured by an associated deed of trust. Instead, the sales were evidenced by defendant's form memoranda.

The court entered judgment for defendant "on its causes of action for Goods Sold and Delivered and Money Lent in the principle [*sic*] amount of \$908,455 plus prejudgment interest" of \$475,131.01.

¹ The court ultimately found plaintiff's obligations were not secured by the deed of trust.

² Defendant had dismissed the common count for money lent in its cross-complaint at the commencement of trial, but that count was reinstated at the conclusion of trial to conform to proof. Following trial, defendant also successfully moved to amend the cross-complaint to state a common count for goods sold and delivered.

DISCUSSION

The Court Did Not Err by Relying on Parol Evidence to Characterize the Form Memoranda Evidencing the Transactions as Sales Invoices

Plaintiff contends the court erred by awarding prejudgment interest to defendant (on the basis that defendant *sold* diamonds to plaintiff on credit), because (in plaintiff's view) the documents used in all the diamond transactions stated the diamonds were delivered to plaintiff on *consignment*. The court concluded the documents at issue (trial exhibits 201 to 204) reflected sales (not consignments) of diamonds, based on the court's findings that: (1) the parties intended that plaintiff be bound and obligated to pay the amount stated on each form memorandum; (2) plaintiff's "intent to be bound was evidenced by his signature on each [form memorandum, and] by the ongoing course of dealing and course of performance between the parties"; and (3) "by the same evidence and for the same reasons, . . . each transaction was a sale, and not a consignment." The court found plaintiff's testimony that all the transactions were consignments was not credible.

The record shows (and the parties do not dispute) that: (1) defendant used virtually the same form memoranda for all its deliveries of diamonds to plaintiff, and (2) the form memoranda stated the diamonds were delivered to plaintiff "for examination and remain[ed] the property of [defendant]" and that no sale of the diamonds could be "effected" unless and until defendant agreed to the sale and a bill of sale was "rendered therefor."³

³ The form memorandum is entitled "Memorandum" and has rows and columns for the lot number, quantity of pieces, description, carats, and price of various diamonds. Defendant's trial exhibits contain over 200 memoranda it purportedly used for sales invoices from 2002 to 2007 and 77 memoranda it purportedly used for consignments, all on the same form (except for slight revisions made in 2004, described below). Handwritten entries appear in the rows and columns.

The form memoranda defendant used from 2002 through September 1, 2004 (the 2002 form) contains only one paragraph of text, which states the terms of the

Katz testified that when he delivered diamonds “on memo,” this meant he delivered them on consignment. He testified that among diamond merchants, “on memo” means: “That I leave the goods for the other party to give him a chance to sell the goods. If he does sell the goods, he has . . . to pay me. If he doesn’t, he can return them or he can decide to buy them.” This testimony accords with the general definition of a consignment sale: “Case law defines a consignment sale as ‘one in which the merchant takes possession of goods and holds them for sale with the obligation to pay the owner of the goods from the proceeds of a sale by the merchant. If the merchant does not sell the goods the merchant may return the goods to the owner without obligation. [Citation.] In a consignment sale transaction, title to the goods generally remains with the original owner.’” (*Fariba v. Dealer Services Corp.* (2009) 178 Cal.App.4th 156, 164-165.)

transaction as follows: “The goods described and valued above are delivered to you for examination and remain the property of Camellia Diamonds Ltd. subject to their order and shall be returned to Camellia Diamonds Ltd. on demand. Such merchandise, until returned to Camellia Diamonds Ltd. and actually received by them, are at your risk from all hazards. No right or power given to you to sell, pledge, hypothecate or otherwise dispose of this merchandise regardless of prior transactions. A sale of this merchandise can only be effected and title will pass only if, as and when Camellia Diamonds Ltd. shall agree to such sale and a bill of sale rendered therefor.” According to defendant, it used the 2002 form for both: (1) *sales* invoices from February 2002 until September 2004, and (2) all *consignment* invoices.

Defendant revised its form memorandum slightly in September 2004. The lone paragraph was changed to read as follows: “The goods described and valued above are delivered to you for examination and remain the property of Camellia Diamonds Ltd. subject to their order and shall be returned to Camellia Diamonds Ltd. on demand. Such merchandise, until returned to sell, pledge, hypothecate or otherwise dispose of this merchandise rogardiless [*sic*] of prior transactions. A sele [*sic*] of this merchandise can only be effected and title will pass only if, as and when Camellia Diamonds Ltd. shalz [*sic*] agree to such sale and a bill of sale rendered therefor. The undersigned understands and agrees to these terms”

Here, the form memorandum does *not* meet the foregoing definition of a consignment sale. The form memorandum allows plaintiff to *examine* the diamonds, not to sell them. The form memorandum permits plaintiff to sell the diamonds only if: (1) defendant agrees to the sale, and (2) additional documentation (a bill of sale) is “rendered therefor.” Thus, the language of the form memorandum is inconsistent with either a consignment sale or a purchase sale. As a result, the form memorandum did not memorialize the parties’ complete and final agreement. In other words, the form memorandum was not an integrated contract. “When the parties to a written contract have agreed to it as an ‘integration’ — a complete and final embodiment of the terms of an agreement — parol evidence cannot be used to add to or vary its terms. [Citations.] When only part of the agreement is integrated, the same rule applies to that part, but parol evidence may be used to prove elements of the agreement not reduced to writing.” (*Masterson v. Sine* (1968) 68 Cal.2d 222, 225.)

The court relied on extrinsic evidence of the course of dealing and the course of performance between the parties to find that defendant sold diamonds to plaintiff on credit. Substantial evidence supports this finding. Both parties testified that in the diamond industry, a consignment contract form is generally used to document sales as well as consignments of diamonds. Katz testified that he employed the same form for sales and consignments and that he could not tell, by looking at a form memorandum, whether it reflected a sale or a consignment.⁴ Katz testified that although he used the

⁴ The following colloquy occurred between the court and Katz during Katz’s direct examination at trial:
“The Court: So whenever he purchases the material, no matter what the form says, it’s an invoice?
“The Witness: Yes.
“The Court: So if he doesn’t purchase the material, no matter what the form says, it’s a memo?
“The Witness: Yes. It’s a consignment, consignment and purchase.”

same form memorandum for sales invoices and consignment memos, the types of transactions could sometimes be differentiated by the following indicia on the contracts: (1) sales invoices would always list prices and total prices, while consignment memos often did not; and (2) consignment memos often had individual line entries crossed out to show a consigned diamond had been accounted for as either returned or sold, whereas sales invoices had no crossed out lines. Even plaintiff confirmed that diamond merchants commonly use a consignment form to document a purchase.

But plaintiff contends the court erred by admitting parol evidence that contradicted the express terms of the form memorandum, even though the form memorandum did not memorialize the parties' complete and final agreement.⁵ Plaintiff bases his contention on two arguments: (1) the form memorandum is governed by Uniform Commercial Code section 2202 (applicable to transactions in goods), not by the general parol evidence rule codified in Code of Civil Procedure section 1856; and (2) Uniform Commercial Code section 2202's plain language shows that it prohibits the use of extrinsic evidence to contradict the terms of an agreement, even if the contract is not integrated. As we shall explain, plaintiff's contention is wrong.

Uniform Commercial Code section 2202 provides: "Terms with respect to which the *confirmatory memoranda* of the parties agree or which are otherwise set forth in a *writing intended by the parties as a final expression of their agreement* with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented [¶] (a) By course of dealing, course of performance, or usage of trade

⁵ Defendant argues plaintiff waived this issue by failing to object below to the admission of extrinsic evidence. Plaintiff replies that Commercial Code sections 2202 and 1303 are rules of substantive law which cannot be waived. "The question whether violation of the parol evidence rule may be raised for the first time on appeal has been the subject of conflicting decisions both in California and elsewhere." (2 Witkin, Cal. Evidence (4th ed. 2000) Documentary Evidence, § 64, p. 184.) We address plaintiff's contention on the merits and have determined the issue in defendant's favor.

(Section 1303); and [¶] (b) By evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.” (Italics added.)

Plaintiff argues that “an examination of the plain language of [Uniform Commercial Code section] 2202 shows that it was not intended to apply only to fully integrated agreements.” To support this argument, plaintiff ignores the statute’s reference to an integrated contract (“a final expression of their agreement”), and focuses instead on the term, “confirmatory memoranda.” But plaintiff offers no argument or legal support to show that the form memoranda here were “confirmatory memoranda” within the statute’s meaning. This failing generally waives the argument. (*McComber v. Wells* (1999) 72 Cal.App.4th 512, 522-523.) Moreover, the term “confirmatory memoranda” implies some written *confirmation* of a prior understanding. Indeed, Uniform Commercial Code section “2207 recognizes that among the methods whereby a seller and buyer can enter into a contract is an oral agreement followed by *confirmatory memoranda* embodying the terms agreed upon.” (*National Controls, Inc. v. Commodore Bus. Machines, Inc.* (1985) 163 Cal.App.3d 688, 693, italics added.) Here, the parties did not exchange confirmatory memoranda, but rather employed a single form memorandum for each transaction. For these reasons, we reject plaintiff’s assertion that, even though the form memorandum was *not* an integrated agreement, Uniform Commercial Code section 2202 still prohibited the use of parol evidence to contradict the document’s terms.⁶

⁶ Indeed, plaintiff’s contention that Uniform Commercial Code section 2202 establishes a more stringent prohibition on the use of extrinsic evidence than the general parol evidence rule (Code Civ. Proc., § 1856) is contrary to the official comments to Uniform Commercial Code section 2202. Those comments reveal an intention to liberalize the use of extrinsic evidence to aid in interpreting contracts related to goods. The Uniform Commercial Code Comment states: “1. This section definitely rejects: [¶] (a) Any assumption that because a writing has been worked out which is final on some matters, it is to be taken as including all the matters agreed upon; [¶] (b) The premise that

The court did not err by relying on extrinsic evidence to find that the form memoranda served as sales invoices for certain transactions between the parties.

The Court Did Not Err by Holding That Prejudgment Interest Began Accruing 150 Days After the Last Sale of Diamonds

Plaintiff challenges the court's findings that: (1) plaintiff's payment was due 150 days after each respective purchase of diamonds; and (2) prejudgment interest

the language used has the meaning attributable to such language by rules of construction existing in the law rather than the meaning which arises out of the commercial context in which it was used; and ¶ (c) The requirement that a condition precedent to the admissibility of the type of evidence specified in paragraph (a) is an original determination by the court that the language used is ambiguous. ¶ 2. Paragraph (a) makes admissible evidence of course of dealing, usage of trade and course of performance to explain or supplement the terms of any writing stating the agreement of the parties in order that the true understanding of the parties as to the agreement may be reached. Such writings are to be read on the assumption that the course of prior dealings between the parties and the usages of trade were taken for granted when the document was phrased. Unless carefully negated they have become an element of the meaning of the words used. Similarly, the course of actual performance by the parties is considered the best indication of what they intended the writing to mean. ¶ 3. Under paragraph (b) consistent additional terms, not reduced to writing, may be proved unless the court finds that the writing was intended by both parties as a complete and exclusive statement of all the terms. If the additional terms are such that, if agreed upon, they would certainly have been included in the document in the view of the court, then evidence of their alleged making must be kept from the trier of fact.” (Com. on U. Com. Code, 23A West's Ann. Cal. Code (2002 ed.) foll. § 2202, p. 198.) The California Code Comment states: “Under prior California law, whether the parol evidence rule applied depended upon whether or not there was an ‘integration’ or a complete expression of the agreement of the parties.” (Cal. Code com. 23A pt. 1 West's Ann. Cal. U. Com. (2002) foll. § 2201, p. 197.) “In the absence of ambiguity, the hypothesis of California courts was that the writing of the parties was intended to be a complete ‘integration’ of the agreement and therefore parol evidence was inadmissible.” (*Ibid.*) “Under this section the theory of the former California parol evidence rule is altered. See Official Comment 1. Rather than assuming that the parties intended a fully integrated document, section 2202, [subdivision] (b) assumes that a written contract does not express the full agreement of the parties unless the court expressly so finds.” (*Ibid.*) “Paragraph (a) enlarges the permissible use of trade usage and custom to explain or supplement a written memorandum or agreement.” (*Ibid.*)

began accruing 150 days after the last such purchase. Plaintiff challenges these findings on grounds: (1) they are unsupported by substantial evidence; and (2) there was no certain date for performance as required for prejudgment interest under Civil Code section 3287.⁷

As to the payment due date of 150 days after a purchase, the court expressly found: (1) the parties did not specify when plaintiff's payment to defendant was due; (2) therefore, plaintiff's payment to defendant was due after a commercially reasonable time; (3) 150 days after delivery of the diamonds was a commercially reasonable time period; and (4) the parties' course of dealing "was that payment was due 120 days after delivery of the diamonds, and that [plaintiff] generally made his payments 120 to 160 days after he received the diamonds." By making these findings, the court essentially found that an implied contract existed between the parties manifested by conduct (Civ. Code, § 1621), and that the parties' conduct showed they agreed to a payment due date of 150 days after a purchase (*Kashmiri v. Regents of University of California* (2007) 156 Cal.App.4th 809, 829 (*Kashmiri*) ["obligations imposed pursuant to implied contractual terms . . . 'center around what is reasonable'"]; *Arcade County Water Dist. v. Arcade Fire Dist.* (1970) 6 Cal.App.3d 232, 238 [parties' past dealings indicated implied agreement to pay "a reasonable price"]).⁸ Under Uniform Commercial

⁷ Plaintiff additionally argues the diamond transactions were consignments, not sales, an assertion we addressed and rejected in the preceding section of this discussion.

⁸ The court expressly based its findings on Civil Code section 1657, which provides: "If no time is specified for the performance of an act required to be performed, a reasonable time is allowed. If the act is in its nature capable of being done instantly — as, for example, if it consists in the payment of money only — it must be performed immediately upon the thing to be done being exactly ascertained." Because plaintiff was obligated solely to pay money, the payment was due immediately upon exact ascertainment of the obligation. Nonetheless, a court's decision, "itself correct in law, will not be disturbed on appeal merely because given for a wrong reason." (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 19.) Moreover, plaintiff was not

Code section 1303, subdivision (d), a “course of performance or course of dealing between the parties . . . may give particular meaning to specific terms of the agreement, and may supplement or qualify the terms of the agreement.”

Whether the parties’ conduct created an implied agreement is a question of fact. (*Kashmiri, supra*, 156 Cal.App.4th at p. 829.) With respect to Uniform Commercial Code section 1303, subdivision (d), an “inference of the parties’ common knowledge or understanding that is based upon a prior course of dealing is a question of fact.” [Citation.] We review findings of fact under a substantial evidence standard of review.” (*C9 Ventures v. SVC-West, L.P.* (2012) 202 Cal.App.4th 1483, 1499.)

Substantial evidence supports the court’s finding the parties had an implied contract, based on their conduct, that plaintiff’s payment was due 150 days after a purchase. Katz testified the parties agreed the payment due date was 120 days after purchase, but that plaintiff usually paid late. Katz testified that even though plaintiff sometimes paid late, this did not change the parties’ agreement that payment was due within 120 days. Katz testified that one particular form memoranda required plaintiff to make installment payments 60, 90, 120, and 150 days after the purchase. With respect to two particular form memoranda, plaintiff’s average dates of payment were 197 and 218 days after each purchase, respectively. Plaintiff, on the other hand, offered no evidence at trial as to the payment due date, having taken the position that all transactions were consignments.

prejudiced by the finding payment was due later than delivery of the diamonds — the date the exact amount of the purchase was stated on the memoranda.

As to prejudgment interest, the court found, under Civil Code section 3287, subdivision (a), that interest began accruing 150 days after the date of the last sales invoice. Civil Code section 3287, subdivision (a) provides in relevant part: “Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day”

In its statement of decision, the court explained at length the basis for its finding defendant’s claim was certain, i.e., liquidated. On appeal, however, plaintiff does not challenge the certainty of the amount owed.

Instead, plaintiff focuses on the requirement under Civil Code section 3287, subdivision (a), that the right to recover must be “vested in [the claimant] upon a particular day.” Plaintiff argues the payment due date which the court found to be commercially reasonable does *not* equate to a specific date that was ascertainable prior to the trial. To support this argument that there was no “showing of a particular date upon which the right to recover payment [became] vested,” plaintiff reiterates the assertion the “consignment memoranda” did not constitute “sales contracts,” an assertion we rejected above. Plaintiff also relies on *Budget Finance Plan v. Sav-On Food Club* (1955) 44 Cal.2d 565, which stated in a footnote: “Plaintiff has not asked for interest on the amounts due and makes no showing of the time when they became due and payable. Where there is no express contract covering the matter, the law awards interest on money from the time it becomes due and payable if such time is certain or can be made certain by calculation [citation]. In the absence of a showing as to such time, and in the absence of a demand for interest, there is no occasion to award it.” (*Id.* at p. 572, fn. 6.) But “*Budget* has no application here, as the plaintiff in that case failed to request interest and made no showing of when the obligations became due.” (*Cheng v. California Pacific Bank* (1999) 76 Cal.App.4th 274, 278.) Furthermore, the quoted language from *Budget* is dictum and appears to conflate Civil Code section 3287’s requirement of “damages

certain, or capable of being made certain by calculation,” with the statute’s reference to vesting of the right to recover on a particular day.

Here, the court found plaintiff owed payment 150 days after each purchase pursuant to an implied contract based on conduct, a finding supported by substantial evidence. Plaintiff does not complain about the commencement date for the accrual of prejudgment interest beginning only after the *final* sales invoice, nor was plaintiff prejudiced by this aspect of the court’s ruling since it lowered the amount of prejudgment interest owed.

In sum, the court did not err by awarding prejudgment interest accruing from the date 150 days after the last sales invoice.

It is Immaterial that Defendant’s Accounting Statements Did Not Include Interest Charges

Plaintiff contends defendant issued “periodic statements listing all of the memoranda and the outstanding balance” owed and that plaintiff made payments to defendant in reliance on these statements. Plaintiff concludes these statements constituted an account stated and did not include interest. Essentially, plaintiff is arguing that defendant waived any interest by failing to provide for it in an account stated contract. But the court awarded prejudgment interest pursuant to Civil Code section 3287, subdivision (a), not under any contract.

To constitute an account stated, “[i]t must appear” “that at the time of the accounting certain claims existed, of and concerning which an account was stated; that a balance was then struck and agreed upon, and that the defendant expressly admitted that a certain sum was then due from him as a debt.” “An account stated is a document — a writing — which exhibits the state of account between parties and the balance owing from one to the other, and when assented to, either expressly or impliedly, it becomes a new contract. An action on it is not founded upon the original items, but upon the

balance agreed to by the parties. And the general rule is that when the stated account is admitted, it can be avoided only by averments and proof of fraud, mistake, etc.’ The action upon an account stated is not upon the original dealings and transactions of the parties. Inquiry may not be had into those matters at all. It is upon the new contract by and under which the parties have adjusted their differences and reached an agreement.” (*Gardner v. Watson* (1915) 170 Cal. 570, 574.) Thus, the existence of an account stated requires a finding of fact that the parties, by their words or conduct, agreed upon the balance to be struck. Not surprisingly, the court did not make that finding, for neither party requested it. Their contest concerned the nature of the “original dealings and transactions” — sale or consignment — not whether the parties had agreed upon a new contract which “adjusted their differences.”

“As a general rule, a party may not change the theory of his case on appeal when the issue was not properly raised in the trial court.” (*Adelson v. Hertz Rent-A-Car* (1982) 133 Cal.App.3d 221, 225.) “[I]f the new theory contemplates a factual situation the consequences of which are open to controversy and were not put in issue or presented at the trial the opposing party should not be required to defend against it on appeal.” (*Id.* at pp. 225-226.) “To permit a change of theory on appeal is to allow one party to deal himself a hole card to be disclosed only if he loses. Even if that device does no more than give him a second chance, it has unbalanced the inherent risk of the litigation and put the other party at a disadvantage.” (*Id.* at p. 226.) Raising the potential of an account stated for the first time on appeal manifestly “contemplates a factual situation the consequences of which are open to controversy and were not put in issue or presented at the trial” (*Ibid.*) Accordingly, we do not consider the issue here.

DISPOSITION

The judgment is affirmed. Defendant is entitled to its costs on appeal.

IKOLA, J.

WE CONCUR:

ARONSON, ACTING P. J.

FYBEL, J.