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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CHRISTOPHER POLAND,

Plaintiff and Appellant,

v.

LA BOXING FRANCHISE
CORPORATION et al.,

Defendants and Appellants.

G045158

(Consol. with G045567)

(Super. Ct. No. 30-2009-00121184)

O P I N I O N

Appeal from a judgment and orders of the Superior Court of Orange County, James Di Cesare, Judge. Affirmed.

Ford & Harrison, Lyne A. Richardson, Julianne Pinter and Michelle B. Abidoye for Defendants and Appellants.

Mesisca, Riley & Kreitenberg, Dennis P. Riley and Rena E. Kreitenberg for Plaintiff and Appellant.

INTRODUCTION

After a two-week trial, a jury returned a special verdict partly in favor of plaintiff Christopher Poland and partly in favor of his former employer defendant LA Boxing Franchise Corporation (LA Boxing) and its principal, defendant Anthony Geisler. The jury found LA Boxing had not retaliated against Poland when it fired him, did not owe him any overtime, and owed him \$2,800 in unpaid wages. It also found that LA Boxing had not breached a contract it had with Poland, because he had not performed his part of the bargain. Both LA Boxing and Geisler, however, were liable to Poland for a false promise on which he had relied, and the jury awarded Poland \$75,000 in damages for this reliance. The trial court tacked nearly \$19,000 in prejudgment interest onto this award.

LA Boxing and Geisler have appealed from the award of prejudgment interest only. Poland, in turn, has appealed from various aspects of the judgment unfavorable to him and from the orders denying his posttrial motions for judgment notwithstanding the verdict (JNOV) and for a new trial.

As to Poland's appeal, we affirm both the judgment and the orders denying the posttrial motions. Most of Poland's appeal reflects his dissatisfaction with the jury's verdict. It passed muster with the trial judge. We do not disturb either the jury's verdict or the lower court's evaluation of it after trial unless something went seriously wrong. Nothing of the sort occurred here. On LA Boxing's appeal, we affirm the trial court's award of prejudgment interest.

FACTS¹

LA Boxing had its origins in a scruffy gym in Costa Mesa focusing on boxing instruction and workouts. Geisler joined the gym in 2002 and conceived the idea

¹ Although a number of these facts are disputed, we recite them in the manner most favorable to the judgment. (See, e.g., *SCI California Funeral Services, Inc. v. Five Bridges Foundation* (2012) 203 Cal.App.4th 549, 552.)

of opening a chain of nonscruffy gyms catering to a suburban clientele. Geisler opened his first gym in Aliso Viejo in early 2003, having licensed the name from the original gym's two owners.² Another location in Fullerton opened in late 2003, and still another opened in Anaheim shortly thereafter.

Poland began working at the Aliso Viejo gym in 2003 or 2004 as the sales manager, selling gym memberships. He also created "sales documents," scripts used to sell gym memberships to the public. After the Fullerton location opened, Poland held the same position there, and he may have also worked at the Anaheim location for a short time.

In the early stages, the gyms had only two types of employees – managers and instructors. The managers worked behind the front desk; their primary task was to sell gym memberships, but they also greeted members and guests and were in charge of keeping the gym clean. The instructors conducted classes.

In February 2004, Geisler incorporated LA Boxing and hired a franchising expert to assist in setting up the franchising operation. The Aliso Viejo and Fullerton gyms became franchised stores; another store opened in Albuquerque during that same period.

After Geisler sold the Aliso Viejo gym and it became a franchised store in late 2004, Poland continued to work there as a sales manager until he was terminated in 2005. In 2005 or 2006, he began working as an independent contractor for the franchise operation. He was paid \$500 for each grand opening he attended, at which he would train the general manager, sell memberships, and assist the franchisees. He also developed the corporation's sales training program.

² Geisler incorporated LA Boxing, Aliso Viejo, Inc., and owed 51 percent of the stock, with the two licensors splitting the other 49 percent. When LA Boxing Franchise Corporation was incorporated, its stock was allocated in the same percentages; however, the stock was not issued to the licensors because their low credit scores would have interfered with the company's ability to get credit and sign leases.

Eventually, as the company expanded, Poland became a full-time employee. In mid-2005, Geisler offered Poland a one percent commission on gross franchise receipts, “to keep [him] tied to the gyms forever.”³ Poland interpreted this offer to mean he would receive the commission for the rest of his life, regardless of whether he was working for LA Boxing. Geisler testified that Poland received this commission as national sales director “because [he] was very important to the franchise corporation,” but denied that it was “for life.” Poland began receiving the one percent commission in March 2006. He went on the company payroll as an employee in early 2006, with a base pay of \$1,000 per month, plus his commissions.

By 2006, Poland was the only corporate representative to attend the grand openings of the franchised locations. He was also involved in “discovery days,” when prospective franchisees would be given a tour of the company headquarters and meet the people involved in the franchise operation. On discovery days, Poland would speak with prospective franchisees as national sales director. He also traveled to troubled franchises to help them increase their sales, sales being the ultimate indicator of a franchise’s success. Poland would be dispatched to these failing franchises to take over the sales department.

In early 2007, Poland’s position was divided; someone else became national sales director, and Poland became national training director. The commission on the franchisee receipts was split as well, with each person getting half of one percent. Poland continued to earn a full commission on the sales he actually made, in addition to his base salary.

By 2007, Poland was flying all over the country to assist the franchisees as national training director. The company charged franchisees \$500 plus expenses per day, provided Poland was able to hit certain sales figures. Of that amount, Poland

³ The parties frequently refer to the commission as an “override.” It is a percentage of the monthly fee paid by the franchisees to LA Boxing, which was six percent of monthly gross revenues.

received \$400 per day as a bonus. Regardless of whether he gained the bonus, however, Poland received his base salary and a commission on his own sales.

Poland testified that in June 2003, Geisler promised him and a colleague each a 10 percent equity stake in LA Boxing. The reason for making this offer was to compensate them for not being able to pay them up front for all the work they would have to do to make the franchise operation successful. Poland testified he wrote training schedules, sample training classes, and sales scripts to prepare for franchise filings, as well as taking over the running of the additional franchise stores. He attended a franchise convention at the Los Angeles Convention Center in 2003 or 2004, at which he “did the same as Mr. Geisler,” which was to sell franchises, because he had “a vested interest in the company.”

After the first few franchised stores opened up and the company offices moved to a new location, Poland continued to work on corporate documents, on getting a franchise up and going, on advertising, and finding building vendors. He also did franchisee training and was one of the three people who created the franchise training manual. Poland spent dozens of hours creating and refining the training manual. He reviewed franchise leases and did site approvals until LA Boxing hired someone for that specific task in November 2006. Poland trained the managers for the new locations and hired a new general manager for the Fullerton store. According to Poland, Geisler was grooming him to take over LA Boxing, once the company was running smoothly.

Poland testified to another conversation with Geisler in May or June 2007, in which Geisler once again promised him 10 percent of the corporation, saying he was close to a deal with the other stockholders to buy some of their stock to give to Poland. Poland testified that Geisler constantly put him off with excuses when he asked when he was going to get his stock. For his part, Geisler testified he had never offered Poland stock in the company.

Geisler testified to numerous problems and complaints regarding Poland's performance in dealings with franchisees and gym customers. One person complained of his tardiness and incompetence at a grand opening in Westminster in May 2007. A franchisee in Atlantic City complained that, while there for training in early 2007, Poland had taken the general manager out on the town, resulting in a two-day absence from work due to a hangover. In May 2007, Geisler received a serious complaint from a member of a Connecticut gym regarding an encounter with Poland, who had reportedly chewed the member out in very strong language for interfering with a sales presentation Poland was making to a potential customer. The member informed Geisler that he had called the police regarding what he perceived to be a threat of violence by Poland. Another member from the same gym complained to the general manager, who forwarded the complaint to Geisler, that Poland had made offensive and harassing remarks to her. Still another potential customer e-mailed LA Boxing after an encounter with Poland to inform the company that she would not join one of the gyms if there was a possibility of running into him. Geisler also received two complaints in July 2007 from a franchise owner in El Paso about Poland's using coarse and vulgar language in front of gym members, which had bad repercussions for the gym. Although Poland was supposed to be in El Paso for a multiple-day training session, the franchisee asked him to leave after one day.

Poland himself reported an altercation on an airplane going to a grand opening in Phoenix resulting in his being detained and questioned by airport security upon landing. Poland was wearing a polo shirt with the LA Boxing logo on it during that encounter.

There were also problems with excessive expenses. In one instance in late 2006, Poland crashed his personal vehicle and charged \$4,500 on the company credit card to rent a replacement. A franchisee in Kentucky complained in July 2007 that Poland had put the cost of a round of golf and of some golf apparel on his hotel room bill, which was charged to the franchisee's credit card.

In early July 2007, Poland went to the Orlando, Florida, store, which was in dire financial straits, to take over operations. The store was on the brink of eviction, and Poland's task was to raise enough money to keep the doors open. Poland's efforts to increase sales having failed, Geisler told him to check the accounts receivable and determine whether any back dues were owing. If so, Poland should make every effort to collect the back dues.

Shortly afterward, Geisler received a report from the company that processed credit card transactions for the Orlando store suspending the account because of a series of unauthorized credit card charges. Poland had charged not only back dues, but also all of the money that the members would owe the gym in the future for the entire term of their memberships. The franchise was not authorized to make these charges, and they all had to be reversed.⁴ As a result, the franchise's merchant account was shut down.

After Poland returned from Orlando in July 2007, he did not get paid as he thought he should have been. On July 30, 2007, Poland sent an e-mail to Geisler demanding payment of wages. Poland sent another e-mail on the same subject on July 31.

Geisler terminated Poland on August 1, 2007. Before that time, however, Geisler and other LA Boxing department heads had been looking to replace him, because of all the complaints they had been getting about him.

The event precipitating Poland's termination was a report Geisler received from an LA Boxing employee in the corporate office at the end of July of a threat by Poland to shoot up the office, starting with Geisler. Geisler took this threat seriously, called a locksmith to rekey all the offices, and sent a termination letter to Poland.

⁴ In one case, a \$3,000 charge was made to a member's debit card, and the member's checks for rent and car payments bounced.

In mid- to late 2006, Poland informed Geisler that he wanted to purchase a franchise for himself. Poland began looking for financing and scouting possible territories in 2007. He testified he told Geisler in May or June 2007 that he had secured financing. Geisler denied he had ever told Poland he could become a franchisee.

After his termination, Poland wrote to Geisler requesting an LA Boxing franchise. Geisler refused. Poland never filled out a franchise application form, signed a franchise agreement or disclosure statement, or provided the initial \$25,000 payment required of franchisees. After Poland's termination, Geisler continued to receive complaints about Poland's behavior with members of LA Boxing gyms.

Poland filed suit on April 8, 2009, against LA Boxing for wrongful termination, several Labor Code violations, and breach of oral contract. He also sued LA Boxing and Geisler for false promise. In the wrongful termination causes of action, Poland alleged he had been terminated because he demanded his wages. The only Labor Code violations still at issue at trial were the two claims for unpaid wages and overtime. Both the breach of oral contract and the false promise were based on the promise of equity in LA Boxing, the one percent commission, and the franchise purchase. The overtime claim was further refined to apply only to the period between April 9, 2006 and August 1, 2007.

The case was tried to a jury over 16 days. The jury found that LA Boxing had not retaliated against Poland for demanding his wages and that, as an exempt employee, he was not entitled to overtime between April 9, 2006 and August 1, 2007. The jury also found that, although Poland and LA Boxing had entered into an agreement, Poland had not performed his part of the bargain. It found for Poland on unpaid wages and false promise, awarding \$2,800 for unpaid wages and \$75,000 as past economic

damages for false promise.⁵ The jury awarded Poland nothing for future economic loss or for past and future noneconomic loss (including mental pain and suffering). The jury responded to the question “When would a reasonable person have believed that Defendant’s [*sic*] committed a fraud?” with the entry “June 07.”

Over defendants’ objection, the court entered a judgment that included nearly \$19,000 in prejudgment interest on the false promise claim, calculated from the date of Poland’s termination, August 1, 2007. The court denied Poland’s motions for JNOV and for a new trial. LA Boxing and Geisler have appealed from the portion of the judgment awarding prejudgment interest on the false promise claim. Poland has appealed from the judgment and from the denial of his motions.

DISCUSSION

I. LA Boxing’s Appeal

LA Boxing has appealed from the portion of the judgment allowing prejudgment interest on Poland’s false promise claim from the date of his termination, August 1, 2007. The trial court held that a stipulation into which the parties entered just before closing arguments allowed it to determine the amount of prejudgment interest not only for the employment claims but also for the false promise. LA Boxing has protested that the stipulation covered only the employment claims – for wages and overtime – not the false promise claim. It has also asserted that August 1, 2007, is not the date from which the court should have calculated the interest.

⁵ The section of the special verdict for breach of oral contract asked the jury to determine whether the parties entered into an oral contract, agreed to its terms, and agreed to valuable consideration. The verdict form does not specify the subject matter of the oral contract. The jury decided that Poland had not held up his end of the agreement and was not excused from doing so. The false promise section, immediately following, stated, “Did Defendants make a promise to Plaintiff that was important to the transaction?” but without specifying what “the transaction” was. It then proceeded through the elements of fraudulent promise, all of which were decided in Poland’s favor. It is thus not possible to tell from the verdict form what was falsely promised.

Poland testified that he was owed “roughly” \$2,800 for the trip he took to Orlando in July 2007, just before his termination.

A. The Stipulation

We interpret a stipulation, as we would any contract, to determine the parties' objective intent when they entered into it. We look first to the contract language itself. If the language is ambiguous, we resolve the ambiguity "by taking into account all the facts, circumstances and conditions" leading to the stipulation. (*Chacon v. Litke* (2010) 181 Cal.App.4th 1234, 1252.) We are bound by the trial court's interpretation if it turned on the credibility of conflicting extrinsic evidence. (*Rooney v. Vermont Investment Corp.* (1973) 10 Cal.3d 351, 372.) In this case, it did.

Civil Code section 3288 provides for prejudgment interest, "in the discretion of the jury," in cases of "an obligation not arising from contract." This section permits an award of interest on unliquidated damages. (*Bullis v. Security Pac. Nat. Bank* (1978) 21 Cal.3d 801, 814 (*Bullis*).) As our Supreme Court has explained, the award compensates a party for the loss of money or property. "The award of such interest represents the accretion of wealth which money or particular property could have produced during a period of loss. Using recognized and established techniques a fact finder can usually compute with fair accuracy the interest on a specific sum of money, or on the property subject to specific valuation. Furthermore, the date of loss of the property is usually ascertainable, thus permitting an accurate interest computation." (*Greater Westchester Homeowners Assn. v. City of Los Angeles* (1979) 26 Cal.3d 86, 102-103.)

Although the statute specifies the jury as the awarder of prejudgment interest, the court may award it as trier of fact in nonjury trials. (*Bullis, supra*, 21 Cal.3d at p. 814, fn. 16.) Without a stipulation, however, the court has no authority to award prejudgment interest in a jury trial.

The stipulation that is the subject of LA Boxing's appeal occurred as the court and counsel were discussing jury instructions. Poland's counsel stated, "We have a stipulation. We decided not to put in the verdict form the ability for the jury to award

prejudgment interest in the light of trying to make this a smaller verdict form. Counsel and I stipulated that Your Honor can decide the prejudgment interest after the fact based on the jury's findings. Plaintiff is entitled to prejudgment interest on the – on some of these claims and plaintiff is not waiving it because counsel stipulated that Your Honor can do it after the fact.” The court then stated, “All right. So stipulated, counsel? That is a simple matter of calculation.” Defense counsel then stipulated.

Poland's counsel prepared a judgment that included nearly \$19,000 in prejudgment interest on the \$75,000 award for false promise as well as prejudgment interest on the \$2,800 wage claim. LA Boxing's objection included a copy of a proposed verdict form exchanged between counsel before trial, which provided lines for prejudgment interest only for the two wage claims; the final verdict form omitted these two lines. The proposed form did not include an entry for prejudgment interest in the false promise portion. Defense counsel asserted that she had not stipulated to the court's determination of prejudgment interest for that claim. Plaintiff's counsel asserted that the stipulation was intended to cover all causes of action for which prejudgment interest could be awarded.

The trial court ruled that “from the evidence presented” the stipulation appeared to be broad enough to include the false promise claim. The court thus based its interpretation on conflicting extrinsic evidence, namely the documents LA Boxing submitted as exhibits to its objection and the declarations of counsel. Because the trial court's decision turns on the credibility of disputed extrinsic evidence, our review is limited. We have no basis upon which to overturn the trial court's resolution of the factual dispute before it and therefore find the stipulation to be valid. (See *Estate of Beebee* (1953) 118 Cal.App.2d 851, 856-857; see also *Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 866, fn. 2 [“when conflicting inferences arise from conflicting evidence . . . the trial court's resolution is binding.”] .)

B. The Date

In addition to holding that the stipulation included the false promise claim, the court held that interest was easily calculated from the amount of the award (\$75,000) and that “it makes sense for the date of loss to be the plaintiff’s termination date of August 1, 2007.” We review the choice of a date from which to calculate prejudgment interest for abuse of discretion. (*Michelson v. Hamada* (1994) 29 Cal.App.4th 1566, 1588.)

LA Boxing argues that the court should not have awarded prejudgment interest at all because Poland’s damages cannot be made certain and because of the large discrepancy between what Poland requested in damages (hundreds of thousands to over a million dollars) and what the jury awarded (\$75,000). Accordingly, LA Boxing reasons, the trial court abused its discretion when it picked August 1, 2007, as the date from which to begin calculating interest.

While LA Boxing’s arguments might have some relevance to an award of prejudgment interest under Civil Code section 3287, the court actually made its award under Civil Code section 3288, which permits an award of prejudgment interest in the discretion of the trier of fact in non-contract actions. It is not necessary, under this code section, that damages be liquidated or capable of being made certain at the time of trial. (*Bullis, supra*, 21 Cal.3d at p. 814.) A discrepancy between the amount requested and the amount awarded is likewise irrelevant under this code section.

LA Boxing supports its arguments against this portion of the judgment exclusively with cases in which the award of interest was based on Civil Code section 3287. This section *entitles* a person who can recover damages capable of being made certain – most commonly contract damages – to prejudgment interest. (See *Greater Westchester Homeowners Assn. v. City of Los Angeles, supra*, 26 Cal.3d at p. 102 [distinguishing between interest awarded under Civil Code section 3287 and interest awarded under Civil Code section 3288].) Both *Polster, Inc., v. Swing* (1985) 164

Cal.App.3d 427, and *James B. Lansing Sound, Inc. v. National Union Fire Ins. Co.* (9th Cir. 1986) 801 F.2d 1560, based their awards of prejudgment interest on Civil Code section 3287. The other authority on which LA Boxing relies, *Smith v. Rickards* (1957) 149 Cal.App.2d 648 (*Smith*), involved an action for rescission, in which court based its award of interest on equitable principles. (*Id.* at p. 654.) *Smith* has no bearing on an interest award made under either Civil Code statute.

Although LA Boxing argued in favor of applying Civil Code section 3288 in the trial court, it has not addressed this section at all on appeal. It has identified no problem with an award under this code section and given us no reason or authority to reverse this portion of the judgment. Accordingly we affirm the award of prejudgment interest in the judgment.

II. Poland's Cross-Appeal

Poland has appealed from the adverse judgment on his overtime wages and breach of contract claims. He has also appealed from the judgment on his false promise claim, because of the jury's refusal to award him any emotional distress damages and any future economic damages, in addition to the past economic damages award of \$75,000. Finally, Poland has appealed from the two orders denying his motions for JNOV and for a new trial.

Poland has identified four issues that he claims require a reversal of the judgment. These are: (1) an inconsistency between the jury's verdict on the breach of contract claim and the verdict on the false promise claim; (2) the jury's failure to award emotional distress damages and future economic damages on his claim for false promise; (3) insufficient evidence to support an adverse verdict on the breach of contract claim; and (4) an incorrect verdict on his overtime claim. In the body of the brief, however, his arguments focus on obtaining a new trial and on the trial court's error in denying his motion for new trial. This inconsistency in purpose creates difficulties for our review,

because the standards of review are not the same for a judgment and for an order denying a motion for a new trial.

It is well settled that our review of a challenge to a jury verdict for insufficient evidence “‘begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted,’ to support the findings below. [Citation.] We view the evidence most favorably to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor.” (*Oregal v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1100.) We review an order denying a motion for a new trial for abuse of discretion, examining the entire record to assess independently whether the motion should have been granted. (*ABF Capital Corp. v. Berglass* (2005) 130 Cal.App.4th 825, 832.) A trial court may grant a new trial for insufficient evidence or inadequate damages only when, “after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that . . . the jury clearly should have reached a different verdict” (Code Civ. Proc., § 657.) Finally, we review a special verdict de novo to determine whether it is inconsistent. (*Singh v. Southland Stone, U.S.A., Inc.* (2010) 186 Cal.App.4th 338, 358.)

In light of the substantial confusion generated by Poland’s indecision as to whether he wants a reversal of the judgment or a new trial, we will apply both standards to the issues he has identified, where both standards can be applied.

A. Inconsistent verdicts

Poland argues that the findings in his favor on the false promise claim contradict the findings against him on the breach of contract claim and are irreconcilable with each other. Accordingly, he asserts, the judgment must be reversed, and he should have a new trial.

“A special verdict is inconsistent if there is no possibility of reconciling its findings with each other.” (*Singh v. Southland Stone, U.S.A., Inc., supra*, 186 Cal.App.4th at p. 357.) If the verdict is truly inconsistent, then there must be a new trial;

the appellate court cannot choose between two equally probable findings. (*Zagami v. James A. Crone, Inc.* (2008) 160 Cal.App.4th 1083, 1092.) If the verdict is merely ambiguous, however, then the both the trial court and the appellate court can interpret it. (*Woodcock v. Fontana Scaffolding & Equipment Co.* (1968) 69 Cal.2d 452, 456-457.)

A successful claim for breach of contract requires proof of the existence of a contract, plaintiff's performance or an excuse for non-performance, defendant's breach, and proximately caused damages. (*McKell v. Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457, 1489.) A contract requires (1) parties capable of contracting, (2) their consent, (3) a lawful object, and (4) sufficient cause or consideration. (Civ. Code, § 1550.)

A false promise is one made without any intention of performing it. (Civ. Code, § 1710, subd. 4.) The plaintiff must show a promise made without any intent to perform it, an intent to induce plaintiff's action, justifiable reliance, and resulting damages. (*Bondi v. Jewels by Edwar, Ltd.* (1968) 267 Cal.App.2d 672, 677.)

The court instructed the jury on the breach of contract claim as follows: "Mr. Poland claims that he and LA Boxing Franchise Corporation entered into a contract for: [¶] 1. ten percent equity in the company; [¶] 2. one percent override; and [¶] 3. a franchise." The false promise instruction stated, "Mr. Poland claims he was harmed because defendants made a false promise," without specifying the content of the promise. Although the contract instruction referred to "a contract" with three parts, counsel's closing argument suggested to the jury that there were three separate oral contracts.

On the breach of contract claim, the jury found a completed agreement between the parties, but lack of performance by Poland. On the false promise claim, the jury found in Poland's favor on all questions. The verdict form does not specify which promise or promises was or were false. It also does not specify the contract terms the jury believed the parties agreed to. The jury could, of course, have believed some of the

evidence of contract or false promise but not all of it. Neither verdict had to be all or nothing.

Regardless of which promises and which contract terms the jury endorsed, the favorable verdict on the false promise claim does not mandate a favorable verdict on breach of contract, any more than the *unfavorable* verdict on breach of contract would have required the jury to find LA Boxing did *not* make any false promises to Poland. These are separate claims with separate elements; they are not totally interdependent, as Poland would have it.

Simon v. San Paolo U.S. Holding Co., Inc. (2005) 35 Cal.4th 1159 (*Simon*) closely parallels this case. In *Simon*, plaintiff and defendant negotiated for the sale of defendant's office building and signed a letter of intent, but did not finalize a contract. The defendant falsely promised to proceed to escrow and to seek approval of the sale from its head office, leading the plaintiff, Simon, to hire and pay for a real estate attorney to complete the transaction, which then fell through. (*Id.* at p. 1168.)

Simon sued for breach of contract and fraud; the jury found against him on the contract claim and for him on the fraudulent promise claim. (*Simon, supra*, 35 Cal.4th at p. 1170.) Simon relied on the defendant's false promise only to the extent that he hired a lawyer to complete the transaction; his damages consisted of the amount he paid the lawyer. He could not recover for breach of the contract to sell him the building, because the jury found there was no contract. These were two separate claims.

Similarly, in this case the jury could have found that LA Boxing falsely promised Poland a franchise, a promise on which he relied by working extra hard for low pay or by lining up financing and looking for suitable locations. Or the jury might have believed Poland when he said Geisler promised him stock in LA Boxing, another false promise Poland relied on by working extra hard for lower pay than he would otherwise

have received.⁶ Poland did not identify any other category of reliance damages, such as investing his money in the corporation, or paying a franchise fee, or turning down more lucrative employment offers elsewhere. He was entitled, however, to the value of whatever he did in reliance on the promise or promises, and that is presumably what the jury gave him. But the jury found against Poland on his breach of contract claim, as the jury did in *Simon*. Poland was therefore not entitled to recover what he would have gained had the contract been fulfilled, because LA Boxing did not breach a contract.

Breach of contract and false promise are separate causes of action, with separate requirements and separate damages. A favorable verdict on one is not inconsistent with an unfavorable verdict on the other. The new trial was not necessary on account of an inconsistent verdict.

B. Future economic damages and emotional distress damages

The jury correctly found that Poland was not entitled to future damages for false promise. Future damages are based on the losses estimated to occur because of the false promise from the commencement of the action into the future. (See Civ. Code, § 3283.)

As discussed above, Poland was harmed because he relied on a false promise to make him a franchisee, to give him stock, or to give him a commission for life, or perhaps on some combination of these promises. He relied by “working for free” or providing “sweat equity.” By the time of trial, he was no longer relying on these promises. He was not working for LA Boxing at all, let alone working for substandard pay.

Once again, *Simon, supra*, provides a close parallel with this case. The plaintiff in *Simon* recovered his reliance damages, the amount he paid the lawyer because of the false promise. His damages did *not* include his lost profits, i.e., the difference

⁶ Poland testified that in 2005 he was “working for the equity” and not getting paid.

between the amount he agreed to pay for the office building and its value as of the date the deal was supposed to close (\$400,000). Lost profits would have been his damages for breach of contract, but the jury found no contract. The defendants' false promise did not deprive Simon of the ownership of the building; he never secured that right. (*Simon, supra*, 35 Cal.4th at pp. 1175-1176.)

Poland likewise did not have an enforceable contract with LA Boxing. He was therefore not entitled to future damages for not getting a franchise or not getting stock in LA Boxing. (See also *Kenly v. Ukegawa* (1993) 16 Cal.App.4th 49, 53 [plaintiff not entitled to damages for profits he would have made if promise kept].) He was no longer relying on any promises. He had no economic damages from trial into the future. The jury got it exactly right.

On the issue of emotional distress damages, Poland argues that, having found past economic damages, the jury was *required* to award him emotional distress damages after both he and his wife testified about his distress. Poland is mistaken. The case he cites, *Wilson v. R. D. Werner Co.* (1980) 108 Cal.App.3d 878, is a personal injury case. Some courts have held that failure to compensate a personal injury plaintiff for noneconomic damages when liability for physical injury has been established is error as a matter of law.⁷ (See, e.g., *Capelouto v. Kaiser Foundation Hospitals* (1972) 7 Cal.3d 889, 893 and cases cited therein; *Dodson v. J. Pacific, Inc.* (2007) 154 Cal.App.4th 931, 937-938.) Poland, however, did not sue for personal injuries. He sought damages on a fraud claim. Poland has not cited to any authority compelling an award of mental distress damages as a matter of law in a fraud case. There is no basis for granting a new trial on this verdict as being "against law." (Code Civ. Proc., § 657 subd. (6).)

As for the evidence of mental distress, the jury members were free to disbelieve the testimony of Poland and his wife on this subject. (See *Tan Jay Internat.*,

⁷ And some have held that it is not. (See, e.g., *Randles v. Lowry* (1970) 4 Cal.App.3d 68, 73-74; *Miller v. San Diego Gas & Electric Co.* (1963) 212 Cal.App.2d 555, 557-560 and cases cited.)

Ltd. v. Canadian Indemnity Co. (1988) 198 Cal.App.3d 695, 708 [existence of emotional distress left to jury].) They evidently did, as they did not simply leave that portion of the verdict blank but entered a zero in the appropriate spot. The jury could reject even uncontradicted testimony, having had the opportunity to observe the demeanor of both witnesses. (See *Goehring v. Chapman University* (2004) 121 Cal.App.4th 353, 368.) Nothing requires us to overturn this portion of the verdict. (See *Choate v. County of Orange* (2000) 86 Cal.App.4th 312, 321-322 [appellate court not able to second-guess factual determinations on damages].)

C. Evidence to support breach of contract verdict

Poland also argues that the breach of contract verdict is not supported by substantial evidence. The jury believed there was a contract, but Poland did not perform his part of it, and he was not excused from performing. Poland argues that there is no evidence of his failure to perform the agreement, and therefore he should have a new trial on this issue. A court may not grant a new trial on grounds of insufficient evidence “unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that . . . the jury clearly should have reached a different verdict . . . “ (Code Civ. Proc., § 657.)

The jury was instructed to consider “a contract” with the following terms: 10 percent equity in LA Boxing, a one percent commission (or “override”), and a franchise. Poland’s counsel later argued to the jury that these were actually three individual contracts. He also told the jury that the consideration from Poland for the three agreements was his “sweat equity.” The special verdict form did not specify the terms of any contract or contracts, so we do not know which one or ones the jury believed was or were formed.⁸

⁸ The jury found only that the parties had entered into an oral contract and had agreed to its (unspecified) terms.

Substantial evidence supports the jury’s determination that Poland did not “do all, or substantially all, of the significant things that the contract required him to do,” regardless of which contract(s) the jury endorsed. The jury could have believed that LA Boxing agreed to make Poland a franchisee, but Poland never filled out an application, paid the initial fee, signed a disclosure statement, or took some other necessary step to complete the process. The jury could have believed the parties agreed that Poland could have a 10 percent stake in the company, but then Poland behaved so badly – tangling with franchisees and gym members, driving away potential customers, embarrassing the company, threatening to shoot up the offices – that he was not entitled to become an owner. The jury could also have felt this course of conduct disqualified him from being a franchisee.

The special verdict form allowed the jury to consider whether Poland had fulfilled his part of the agreement – whatever it was – and the jury decided he had not. Substantial evidence supports this decision. The trial court correctly denied Poland’s motion for new trial for insufficient evidence on this issue.

D. Overtime verdict

Poland makes two arguments for overturning this portion of the jury’s verdict. First, he maintains he is not an exempt employee because he was not paid enough money to qualify as exempt.⁹ Second, he contends the evidence that he met the criteria for an exempt employee was insufficient.

To qualify as exempt, an employee must be paid at least twice the amount that he or she would earn if paid at minimum wage. (Cal. Code Regs., tit. 8, § 11020, subd. (1)(A)(2)(g).) In 2006, the minimum wage was \$6.75 per hour. In 2007, it was \$7.50 per hour. LA Boxing paid Poland \$34,498 in 2006 and \$54,164 in 2007.

⁹ Actually, Poland argues that the finding he was “non-exempt” is contrary to law.

Poland's first argument fails because he did not raise it timely in the trial court. Nothing in this record even hints at an objection to a jury instruction or a verdict on this basis, although he claims – without citation to the record – that he objected to the special verdict on this ground. Our independent review of the record has unearthed no such objection. Poland also did not raise the issue in either the motion for new trial or the motion for JNOV. It surfaced for the first time in the reply briefs for the two motions.

In fact, the issue was doubly waived – if such a thing is possible. Poland cannot wait to see what the jury decides and then, if he does not like it, appeal the decision. (See *Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, 847; *Richmond v. Dart Industries, Inc.* (1987) 196 Cal.App.3d 869, 879 [plaintiffs “ought not have two trials where they could have had but one.”].) And he cannot bring an issue up for the first time in a reply brief without some explanation for the tardiness of his brainstorm. (Cf. *San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 316 [right to due process violated by consideration of evidence filed after opposition to motion]; *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 616.) Moreover, if a jury instruction is too general or is incomplete, a party must request additional instructions in the trial court to obtain review on appeal. (*Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121, 1131.) Nothing in the record suggests that Poland asked for a clarifying or more specific jury instruction on the salary test for exempt employees.¹⁰

The second argument also fails. We do not reweigh evidence. The record amply supports the jury's conclusion that between April 9, 2006 and August 1, 2007,

¹⁰ Although we do not decide this point, because no one raised it, it does not appear to us that the salary test issue was one for the jury in any event. It appears to require the application of law (the legal definition of “salary” for exemption status) to undisputed facts (the amount Poland earned in a year and the components of that amount), which would be the province of the trial court. (See, e.g., *Morgan v. United Retail Inc.* (2010) 186 Cal.App.4th 1136, 1142.) The parties acknowledged that the correct hourly rate for Poland's alleged overtime was a matter of law for the trial court to determine, and it did so. While they were about it, they could also have asked the court to determine, again as a matter of law, whether Poland met the salary test for an exempt employee. If he did not, a lot of time would have been saved.

Poland acted with the initiative, independence, and authority characteristic of exempt employees.¹¹ He created the company's cancellation policy. When he was not traveling, he attended the weekly Monday morning meetings of department heads. As national training director and the only member of "the allstar team," charged with rescuing troubled franchisees, he traveled all over the country as the company's sole on-the-spot representative. All the national directors reported to him, and he in turn reported weekly to Geisler. He ran weekly conference calls with general managers, using his own outlines. He took it upon himself to contact the franchisees' credit card processing company to obtain financial reports tailored to his specifications, which he then reviewed.

¹¹ The jury was instructed on discretion and independent judgment. "A. To qualify for the administrative exemption, an employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance. In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct in acting or making a decision after the various possibilities have been considered. The term 'matters of significance' refer[s] to the level of importance or consequence of the work performed.

"B. The phrase discretion and independent judgment must be applied in light of all the facts involved in the particular employment situation in which the question arises. [¶] Factors to consider when determining whether an employee exercises discretion and independent judgment with respect to matters of significance include, but are not limited to: [¶] whether an employee has authority to formulate, effect, interpret or implement manager policies or operating practices; [¶] whether the employee carries out major assignments in conducting the operation of the business; [¶] whether the employee performs work that affects business operations to a substantial degree or if the employee's assignments are related to the operations of a particular segment of the business; [¶] whether the employee has the authority to commit the employer in matters that have significant financial impact; [¶] whether the employee has the authority to waive or deviate from established policies and procedures without prior approval; [¶] whether the employee has authority to negotiate and bind the company on significant matters; [¶] whether the employee provides consultation or expert advice to management; [¶] whether the employee is involved in planning long- or short-term business objectives; [¶] whether the employee investigates and resolves matters of significance on behalf of management; [¶] and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.

"C. The exercise of discretion and independent judgment implies that the employee has authority to make an independent choice free from immediate direction or supervision; however, employees can exercise discretion and independent judgment even if their decisions or recommendations are reviewed at a higher level. [¶] Thus, the term discretion and independent judgment does not require that the decisions made by employee have a finality that goes with unlimited authority and a complete absence of review. [¶] The decisions made as the result of exercise of discretion and independent judgment may consist of recommendations or [sic; of?] action rather than actual taking of action. [¶] The fact that an employee's decision may be subject to review and that upon occasion the decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment. [¶] An employer's line of business may make it necessary to employ a number of employees to perform same or similar work. The fact that many employees perform identical work or work of the same relative importance does not mean that the work of each employee does not involve the exercise of discretion and independent judgment with respect to matters of significance. [¶] An employee does not exercise discretion and independent judgment with matters of significance merely because the employer will experience financial losses if the employee fails to perform the job properly." This instruction is adapted from 29 Code of Federal Regulations, part 541.202.

Until early 2007, he was in charge of vetting and recruiting general managers for all the franchisees.

Poland's efforts to portray himself on appeal as a lowly worker bee, humbly following orders, are at odds with the portrait he painted of himself a trial: a linchpin of LA Boxing's successful franchise operation, Geisler's heir apparent, and an "owner" with an "investment" in the corporation. Substantial evidence supports the jury's determination that he qualifies as exempt.

E. Appeal from the Order Denying Motion for JNOV

The jury found that between April 9, 2006 and August 1, 2007, Poland was an exempt employee and therefore not entitled to overtime pay. The sole issue Poland raised and argued in his motion for JNOV was whether substantial evidence supported the jury's determination that Poland acted with discretion and independent judgment. On appeal, however, Poland identifies this issue in terms of reversal of the judgment and of the denial of his motion for new trial. He then *argues* the issue solely in terms of reversing the judgment.

It does not appear that Poland challenges the denial of his motion for JNOV on appeal. He presented no argument or authority on this issue. Accordingly, we deem it abandoned. (See *Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699.) "One cannot simply say the court erred, and leave it up to the appellate court to figure out why." (*Niko v. Foreman* (2006) 144 Cal.App.4th 344, 368.)

DISPOSITION

On the appeal from the judgment by LA Boxing and Geisler, we affirm the portion of the judgment awarding prejudgment interest to Poland. On the appeal from the judgment by Poland, we affirm the judgment. On the appeal by Poland from the orders denying his motions for new trial and for JNOV, we affirm the orders. The parties will bear their own costs on appeal.

BEDSWORTH, ACTING P. J.

WE CONCUR:

MOORE, J.

IKOLA, J.